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## STANDING ON SHAKY GROUND: STANDING UNDER THE FAIR HOUSING ACT

by

Dash T. Douglas\*

### I. INTRODUCTION

Standing jurisprudence has undergone a substantial evolution in recent decades.<sup>1</sup> The Supreme Court was particularly active during the 1970s in addressing standing issues in housing discrimination cases.<sup>2</sup> In 1982, the Supreme Court revisited standing,<sup>3</sup> but has been deathly silent ever since.<sup>4</sup> This void has left the development of standing jurisprudence to the lower courts, which has resulted in a schizophrenic body of law.

Although many commentators have expressed their discontent with standing law in housing discrimination cases,<sup>5</sup> few have examined the threshold issue; that is, who has standing

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<sup>1</sup> See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224-25 (1988). In the 1930s, the Supreme Court began to develop the doctrine of standing. See *id.* at 225. Professor Fletcher states that the creation of standing law can be attributed to the “growth of the administrative state and an increase in litigation to articulate and enforce public, primarily constitutional, values.” *Id.* Before 1970, the Supreme Court required the plaintiff to demonstrate a “legal right” or “protected interest.” Eric J. Kuhn, *Standing: Stood Up at the Courthouse Door*, 63 GEO. WASH. L. REV. 886, 887 (1995). By the 1970s, the Court replaced the “legal interest” test with a substantially more lenient inquiry. *Id.* The Court established a new liberalized test that required plaintiffs to demonstrate “an injury-in-fact that . . . fell within the zone of interests protected by the statutory or constitutional provision in question.” *Id.* This test had the effect of opening the courthouse doors “to litigants who did not suffer a direct economic harm . . . .” See *id.* It was not until the Burger Court that the reins began to be pulled in on the standing doctrine. See *id.* at 888. The standing bar has continued to be raised in the current Court. See *id.*

<sup>2</sup> See Robert G. Schwemm, *Standing to Sue in Fair Housing Cases*, 41 OHIO ST. L.J. 1, 3 (1980).

<sup>3</sup> See *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

<sup>4</sup> See Michael E. Rosman, *Standing Alone: Standing Under the Fair Housing Act*, 60 MO. L. REV. 547 (1995).

<sup>5</sup> See, e.g., Steven M. Kahaner, *Standing: Separation of Powers and the Standing Doctrine: The*

to sue under the Fair Housing Act (hereinafter “FHA” or “Act”)?<sup>6</sup> This question appears to be causing some confusion in the fair housing world because the federal circuit courts have interpreted the standards established by the Supreme Court in vastly different ways. Thus, the purpose of this Article is not to critique standing law, but rather to analyze the current state of standing jurisprudence in an attempt to provide some clarity.

Part II of this Article reviews the general principles of standing and its development under the FHA. Part III explores the two forms of standing successfully employed by testers – direct injury and neighborhood standing. Additionally, Part III focuses on the Supreme Court’s conclusion in *Havens Realty v. Coleman* that the “any person” language in § 3604(d) of the FHA provides standing to testers,<sup>7</sup> and discusses how this holding has been interpreted by circuit courts in terms of its applicability to other provisions of the FHA. Finally, Part IV examines the requirements for organizations to achieve standing. Part IV also discusses the division at the circuit court level regarding the injury-in-fact standard pronounced in *Havens*, and it outlines the various circuit court positions.

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*Unwarranted Use of Judicial Restraint*, 56 GEO. WASH. L. REV. 1074, 1075 (1988) (“Much of the controversy surrounding the issue [of standing] may be traced to the Supreme Court’s inability to articulate clear standards for the standing inquiry . . . . This approach has left the doctrine in a state of ‘intellectual confusion’ leading to what many have found to be unprincipled decisionmaking . . . .”); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 68-70 (1984) (“In perhaps no other area of constitutional law has scholarly commentary been so uniformly critical . . . . The Court has so severely manipulated the injury standard that the foundation of standing law is essentially incomprehensible.”); Paul A. LeBel, *Standing After Havens Realty: A Critique and an Alternative Framework for Analysis*, 1982 DUKE L.J. 1013, 1013 (stating that the injury in fact requirement of standing “has been shown to be a mutable and poorly defined standard”); 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 24:35, at 342 (2d ed. 1983) (describing standing law as “permeated with sophistry”).

<sup>6</sup> See, e.g., Rosman, *supra* note 4; Ronald L. Phillips, *Challenging Discrimination in Real Estate Advertising: Do “Mere” Readers Have Standing?*, 3 TEX. F. ON C.L. & C.R. 113 (1997) (focusing on the issue of reader standing in discriminatory housing advertisement cases).

<sup>7</sup> See *Havens*, 455 U.S. at 373-74.

## II. STANDING UNDER THE FAIR HOUSING ACT

Standing is a basic jurisdictional question, finding its roots in Article III of the Constitution.<sup>8</sup> Article III requires that all litigated federal matters involve a case or controversy.<sup>9</sup> To satisfy this requirement, a plaintiff must establish standing to sue.<sup>10</sup> Generally, a standing inquiry involves a two-tiered examination: (1) the constitutional limits on federal court jurisdiction; and (2) the prudential limits<sup>11</sup> that the court exercises “to avoid deciding questions of broad social import where no individual rights would be vindicated . . . .”<sup>12</sup>

The Supreme Court has held that Congress intended to confer standing in suits brought pursuant to §§ 3610 and 3612 of the FHA to the fullest extent permitted by Article III, thereby eliminating the prudential barriers to standing.<sup>13</sup> However, Congress may not abrogate the

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<sup>8</sup> See *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

<sup>9</sup> See *id.*

<sup>10</sup> See *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); *Fair Hous. Council v. Montgomery Newspapers*, 141 F.3d 71, 74 (3d Cir. 1998).

<sup>11</sup> Prudential limits are judicially self-imposed rules devised “to limit access to the federal courts to those litigants best suited to assert a particular claim.” *Gladstone*, 441 U.S. at 100. Three prudential rules frequently mentioned are: (1) litigants should not assert the rights of third parties; (2) litigants should not assert generalized grievances; and (3) the injury claimed should be in the “zone of interests” of the statute or provision in question. *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982)).

<sup>12</sup> *Gladstone*, 441 U.S. at 99-100.

<sup>13</sup> See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) (finding that Congress eliminated the prudential barriers to standing in interpreting § 810(a) (later recodified at § 3610(a)). See also *Gladstone*, 441 U.S. at 91. In *Gladstone*, the Supreme Court addressed whether the somewhat differently worded § 812 (later recodified at § 3612) likewise eliminated prudential barriers. See *id.* at 101. The Court found that it did, stating that §§ 810 and 812 (later recodified at §§ 3610, 3612) were designed to provide alternative remedies

Article III minima, which requires that the plaintiff suffer “a distinct and palpable injury to himself” that is likely to be redressed if the requested relief is granted.<sup>14</sup>

Although standing jurisprudence has been widely criticized for its lack of clarity, the requirements to establish standing are clear.<sup>15</sup> The constitutional limits on federal court jurisdiction embodied in the case or controversy provision of Article III require a plaintiff to demonstrate: (1) an “injury in fact” – an invasion of a judicially cognizable interest which is (a) “concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical”; (2) “a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant”; and (3) the likelihood, as opposed to mere speculation, that the injury will be “redressed by a favorable decision.”<sup>16</sup>

### III. TESTER STANDING

#### A. Direct Injury to Testers

Fair housing organizations often employ the use of testers as a means of uncovering unlawful housing practices. Testers are essentially investigators who pose as renters to collect evidence necessary to file a complaint; therefore, they play a major role in ferreting out housing

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to the same class of plaintiffs. *See id.* at 102. *See also* *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 364 (1982) (stating that because “Congress intended standing under § 812 [later recodified at § 3612] of the [Fair Housing] Act to extend to the full limits of Article III . . . courts accordingly lack authority to create prudential barriers to standing in suits brought under that section.”).

<sup>14</sup> *Gladstone*, 441 U.S. at 100 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)). *See also Havens*, 455 U.S. at 364 (“[T]he sole requirement for standing to sue under § 812 [§ 3612] is the Article III minima of injury in fact.”); *Allen*, 468 U.S. at 751 (noting that the injury must be fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief).

<sup>15</sup> *See Kuhn*, *supra* note 1, at 891.

<sup>16</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted).

discrimination. However, on its face, the standing of testers is questionable.<sup>17</sup> They have no intent to rent or purchase a home or apartment when they encounter the discrimination.<sup>18</sup> Consequently, they suffer no apparent harm other than that which they invite.<sup>19</sup> Nevertheless, the Supreme Court in *Havens* held that testers have standing under the FHA.<sup>20</sup>

In *Havens*, Housing Opportunities Made Equal (HOME) and two testers (one black and one white) brought an action under § 3604(d)<sup>21</sup> of the FHA against Havens Realty Corporation, the owner of an apartment complex.<sup>22</sup> The black tester was informed by Havens Realty that there were no vacancies, while the white tester was provided accurate information.<sup>23</sup> The Court held that even though the black tester approached the real estate agent fully expecting to receive false information and without any intent to rent an apartment, he suffered an injury in fact and, therefore, had standing to maintain a damages claim under the FHA.<sup>24</sup>

The Court posited that the “injury required by Article III may exist solely by virtue of statut[orily] creat[ed] legal rights, the invasion of which creates standing.”<sup>25</sup> The Court

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<sup>17</sup> See *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990).

<sup>18</sup> See *Havens*, 455 U.S. at 373.

<sup>19</sup> See *Dwivedi*, 895 F.2d at 1526; *Havens*, 455 U.S. at 373.

<sup>20</sup> See *Havens*, 455 U.S. at 363-64 (syllabus).

<sup>21</sup> Section 3604(d) states “it shall be unlawful . . . [t]o represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.” 42 U.S.C. § 3604(d) (1994).

<sup>22</sup> See *Havens*, 455 U.S. at 363 (syllabus).

<sup>23</sup> See *id.*

<sup>24</sup> See *id.* at 374.

<sup>25</sup> *Id.* at 373 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

determined that such a right was created by § 3604(d), which entitles *any person* to truthful information concerning the availability of housing.<sup>26</sup> Therefore, the Court concluded that a tester who has received false information has suffered the precise injury that the statute was intended to prevent.<sup>27</sup>

Continuing with its analysis, the Court held that the white tester did not have standing.<sup>28</sup> The Court stated that the white tester's situation was different because he did not receive false information from Havens Realty; rather, he was correctly informed of the availability of apartments.<sup>29</sup> Thus, the Court concluded that the white tester suffered no injury to his statutory right to accurate information.<sup>30</sup>

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<sup>26</sup> See *id.* at 373-74. Cf. *Biggus v. Southmark Management Corp.*, No. 83C4024, 1985 WL 1751 (June 13, 1985 N.D. Ill.). In *Biggus*, the Northern District of Illinois restricted "any person" to those persons who are directly affected by the discriminatory conduct. See *id.* at \*2. Eight black individuals had inquired about housing availability and were provided false information in violation of § 3604(d). *Id.* at \*1. The defendant challenged the standing of the three "witness" plaintiffs who were merely present when the misrepresentations were made to the other testers. *Id.*

The Court stated that the fact that these plaintiffs "were not testers at the time they first approached the real estate agent does not negate their right to truthful information . . ." *Id.* at \*2. The Court continued that it was the defendant's provision of misinformation which is important in a § 3604(d) action and not the plaintiffs' intent in seeking the information. *Id.* However, the Court, in remanding for further fact finding, held that for the plaintiffs to have standing the misrepresentations must have been communicated to them directly. See *id.* See also *Montana Fair Hous. Inc. v. American Capital Dev., Inc.*, 81 F. Supp. 2d 1057, 1064 (D. Mt. 1999) (holding that a plaintiff who had alleged that the defendant ignored accessibility standards, but who had never actually attempted to gain access to the building, did not have standing because he was not directly affected by the discriminatory housing design).

<sup>27</sup> *Havens*, 455 U. S. at 373-74.

<sup>28</sup> *Id.* at 375.

<sup>29</sup> See *id.* at 374-75.

<sup>30</sup> See *id.* at 375. See also *Nur v. Blake Dev. Corp.*, 655 F. Supp. 158, 162 (N.D. Ind. 1987) (holding that white testers did not allege any facts that amounted to an injury under § 3604 of the Act).

The Supreme Court’s analysis of the “any person” language in § 3604(d) has caused much angst in the fair housing world.<sup>31</sup> Based on the Court’s reasoning, it is unclear whether the Court’s holding – that testers have standing under § 3604(d) – is applicable to other provisions of the Act that do not explicitly provide protection to “any person.” This lack of clarity has given birth to conflicting decisions in the lower courts.

The Second Circuit has held that any person who is confronted by a discriminatory advertisement, regardless of whether the person was in the market for housing, has standing under § 3604(c).<sup>32</sup> In *Ragin v. Harry Macklowe Real Estate Co.*, the defendant, a leasing and managing agent for two luxury apartments, placed allegedly discriminatory advertisements in *The New York Times*.<sup>33</sup> The advertisements utilized models, most of whom were white.<sup>34</sup> The plaintiffs, who read the advertisements but who were not searching for an apartment, argued that the advertisements indicated a race preference in violation of § 3604(c).<sup>35</sup>

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<sup>31</sup> See, e.g., Rosman, *supra* note 4, at 547. Rosman states that: “Judge Posner and several commentators have noted that the idea that [the black tester in *Havens*] suffered a factual injury is difficult to swallow.” *Id.* at 576 (citing *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990))s. See also Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1483 (1988) (arguing that neither the white nor the black tester in *Havens* suffered an injury in fact); Fletcher, *supra* note 1, at 253; Christopher J. Sprigman, Comment, *Standing on Firmer Ground: Separation of Powers and Deference to Congressional Findings in the Standing Analysis*, 59 U. CHI. L. REV. 1645, 1649-50 (1992).

<sup>32</sup> See *Ragin*, 6 F.3d at 904. See also *Saunders v. General Servs. Corp.*, 659 F. Supp. 1042, 1053 (E.D. Va. 1987) (stating that the statutory rights approach established in *Havens* is applicable to § 3604(c)).

<sup>33</sup> See *Ragin*, 6 F.3d at 902.

<sup>34</sup> See *id.*

<sup>35</sup> See *id.* at 901-03. Section 3604(c) states that:

[I]t shall be unlawful . . . [t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

42 U.S.C. § 3604(c) (1994).



The Court compared the factual situation before it to the testers' receipt of misinformation in *Havens* and found that the plaintiffs had standing.<sup>36</sup> The Court stated that “[t]here is no significant difference between the statutorily recognized injury suffered by the testers in *Havens* and the injury suffered” by the plaintiffs in *Ragin*.<sup>37</sup>

The Tenth Circuit has taken a far more restrictive approach to standing under § 3604(c).<sup>38</sup> In *Wilson v. Glenwood Intermountain Properties, Inc.*, the Court explicitly rejected the analysis in *Ragin*<sup>39</sup> and *Saunders* and found that the reading of a discriminatory advertisement by one who is not in the market for housing is insufficient to confer standing.<sup>40</sup> The Court found the “any person” analysis of *Havens* inapplicable because, unlike § 3604(d), § 3604(c) does not provide protection to “any person.”<sup>41</sup> To support its position, the Court cited *Spann v. Colonial Village*, in which Judge Ginsberg expressed doubt as to whether the mere receipt of a discriminatory advertisement was sufficient to establish standing.<sup>42</sup> The Court

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<sup>36</sup> See *Ragin*, 6 F.3d at 904.

<sup>37</sup> *Id.* See also *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990). In *Dwivedi*, the Seventh Circuit found that testers have standing to sue under § 3604(a) “even though they [did not make a ‘bona fide offer’ and] sustained no harm beyond the discrimination itself . . . .” *Id.* at 1527. The court reasoned that the logic of *Havens* embraces § 3604(a) of the FHA. See *id.*

<sup>38</sup> See *Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590 (10th Cir. 1996).

<sup>39</sup> Some commentators have taken issue with the Second Circuit’s analysis in *Ragin*. See, e.g., Rosman, *supra* note 4, at 587 (noting that the Court “obscure[d] the underlying goal of a statutory standing inquiry, viz., whom did Congress want to enforce the provision in question?”). See also Phillips, *supra* note 6, at 120-21.

<sup>40</sup> See *Wilson*, 98 F.3d at 595.

<sup>41</sup> See *id.* at 596.

<sup>42</sup> See *id.* at 595. In *Spann v. Colonial Village Inc.*, Judge Ginsberg stated: “we question whether Congress intended 804(c) [42 U.S.C. § 3604(c)] to confer a legal right on all individuals to be free from indignation and distress.” *Spann v. Colonial Village Inc.*, 899 F.2d 24, 29 n.2 (D.C. Cir. 1990).

averred that holding otherwise would confer standing on anyone who receives a discriminatory housing advertisement.<sup>43</sup> The Court concluded that the courts in *Ragin* and *Saunders* “take *Havens* too far.”<sup>44</sup>

Similarly, the Ninth Circuit limits the “any person” discussion in *Havens* to provisions of the Act where that language is explicitly stated.<sup>45</sup> In *Ricks v. Beta Development Co.*, the plaintiff challenged the district court’s dismissal of his § 3604(f) action for lack of standing.<sup>46</sup> The Court of Appeals upheld the district court’s dismissal, stating that “unlike section 3604(d), which uses the language ‘any person’, . . . section 3604(f)(1) employs the terms ‘renter or buyer’ suggesting that . . . Ricks must allege that he is a prospective buyer to achieve standing.”<sup>47</sup> Therefore, the Court elaborated that Ricks was required to make some allegation of interest in the condominium.<sup>48</sup>

Did the Supreme Court in *Havens* hold that Congress created statutory rights for *any person* in all provisions of the Act enforced by § 3612? Practitioners and litigants have been left with an array of contrary circuit court decisions. Although they are at odds, the Second,

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<sup>43</sup> See *Wilson*, 98 F.3d at 595.

<sup>44</sup> *Id.*

<sup>45</sup> See *Ricks v. Beta Dev. Co.*, No. 95-15334, 1996 WL 436548, at \*1 (9th Cir. Aug. 1, 1996).

<sup>46</sup> See *id.* The plaintiff, Jeff Ricks, was a paraplegic who alleged that the defendant’s condominium contained architectural barriers for people with disabilities. *Id.*

<sup>47</sup> *Id.* See also *United States v. Rock Springs Vista Dev. Corp.*, No. CV-S-97-1825JBR(RLH), 1999 WL 1491621, at \*3 (D. Nev. July 2, 1999) (holding that because § 3604(f)(1) contains the phrase “buyer or renter” and not “any person,” the plaintiff must demonstrate some interest in the property to satisfy the injury-in-fact requirement). The case was appealed and the Ninth Circuit heard oral argument on February 14, 2001.

<sup>48</sup> See *Ricks*, 1996 WL 436548, at \*1.

Seventh, Ninth, and Tenth Circuits have made their stance clear as to their interpretation of the “any person” analysis in *Havens*. This is helpful to litigants in those jurisdictions, but what about potential litigants in the remaining jurisdictions? This raises important questions, not the least of which is whether fair housing organizations that test for various illegal actions – such as discriminatory refusal to rent or sell under § 3604(a) and § 3604(f) or discriminatory advertising under § 3604(c) – have standing to bring an action based on their findings. A better question may be whether fair housing organizations should even bother to use precious resources to test for discrimination under these sections in such an uncertain legal environment.

#### *B. Indirect Injury to Testers*

A second strategy to achieve standing is referred to as “neighborhood” or “third party” standing.<sup>49</sup> This standing concept is most often employed by white testers in racial steering cases.<sup>50</sup> Neighborhood standing differs from “tester” standing because the injury asserted is indirect; that is, the injury adversely impacts the neighborhood in which the plaintiff resides as a result of racial steering.<sup>51</sup> As the argument goes, the illegal racial steering deprives the inhabitants of the neighborhood of the benefits derived from interracial associations.<sup>52</sup>

In *Havens*, the Court, after determining that the white tester did not have standing by virtue of the misinformation provided to the black tester, examined whether the white tester had

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<sup>49</sup> See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375 (1982).

<sup>50</sup> See, e.g., *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 93-95 (1979); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 206-08 (1972); *Havens*, 455 U.S. at 374-75.

<sup>51</sup> See *Havens*, 455 U.S. at 374-75.

<sup>52</sup> See, e.g., *Gladstone*, 441 U.S. at 111-12; *Trafficante*, 409 U.S. at 209-10.

standing regardless of his status as a tester.<sup>53</sup> The Court began its analysis with *Gladstone, Realtors v. Village of Bellwood*.<sup>54</sup> In *Gladstone*, six testers attempted to determine whether certain real estate companies were engaging in racial steering.<sup>55</sup> Four of the plaintiffs were homeowners in the community to which the defendants allegedly steered African-Americans.<sup>56</sup> The plaintiffs claimed that the defendants' discriminatory steering practices denied them the right to live in an interracial society.<sup>57</sup> Specifically, they alleged that they were deprived of the "important social, professional, business and economic, political and aesthetic benefits of an integrated community . . . ."<sup>58</sup>

The Court, construing the plaintiffs' claim as referring to a 12-by-13 block area, found that the four testers who owned homes in the targeted area had standing.<sup>59</sup> The Court rejected the defendants' contention that there is a distinction between the apartment complex found in *Trafficante*<sup>60</sup> – a sufficiently confined area that the fact finder could infer a personal injury –

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<sup>53</sup> See *Havens*, 455 U.S. at 374-75.

<sup>54</sup> See *id.* at 376.

<sup>55</sup> See *Gladstone*, 441 U.S. at 94. It should be noted that the testers did not attempt to press the claim that they had standing in their capacity as testers. See *id.*

<sup>56</sup> See *id.* at 93-95.

<sup>57</sup> See *id.* at 111.

<sup>58</sup> *Havens*, 455 U.S. at 363.

<sup>59</sup> See *Gladstone*, 441 U.S. at 95, 114.

<sup>60</sup> *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). In *Trafficante*, two tenants of an apartment complex (one black and one white) alleged that their landlord discriminated against non-whites. *Id.* at 206-07. They claimed, and the Court agreed, that they suffered an injury in fact by being deprived of the social and professional benefits of living in an integrated community. See *id.* at 208-10.

and a 12-by-13 block residential neighborhood.<sup>61</sup> The Court disagreed, stating that there is no categorical distinction between an injury suffered by occupants of a large apartment complex and that exacted upon residents of a relatively compact neighborhood.<sup>62</sup> The Court continued: “[t]he constitutional limits of standing to protest the intentional segregation of their community do not vary simply because that community is defined in terms of city blocks rather than apartment buildings. Rather, they are determined by the presence or absence of a distinct and palpable injury.”<sup>63</sup>

The Court’s decision effectively broadened the geographic scope of neighborhood standing from an apartment complex to a 12-by-13 block neighborhood. The Court in *Havens*, however, was reluctant to extend its holding in *Gladstone* to an area consisting of 37 square miles and a population of 220,000 people.<sup>64</sup> The Court stated that it was implausible that the defendants’ acts of discrimination could have palpable effects throughout such a vast area.<sup>65</sup> The Court added that it has upheld standing based on discriminatory effects, but only

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<sup>61</sup> See *Gladstone*, 441 U.S. at 113.

<sup>62</sup> *Id.* at 114.

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

<sup>64</sup> See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377 (1982). The defendants in *Havens* did not dispute that the loss of social, professional, and economic benefits resulting from steering practices constituted a palpable injury. See *id.* Instead, the defendants argued that the plaintiffs failed to demonstrate how the steering practices affected their particular neighborhood. See *id.*

<sup>65</sup> See *Havens*, 455 U.S. at 377. See also *South Suburban Hous. Ctr. v. Santefort Real Estate, Inc.*, 658 F. Supp. 1450, 1452, 1454, 1456 (N.D. Ill. 1987) (holding that eight plaintiffs, who were not seeking to purchase a home but lived in the targeted area, which spanned 220 miles and had a population of 700,000, lacked standing). Cf. *Sherman Park Community Assoc. v. Wauwatosa Realty Co.*, 486 F. Supp. 838, 842 (E.D. Wis. 1980) (holding neighborhood standing extended to an area consisting of approximately twenty-five by twelve blocks). See also *Nur v. Blake Dev. Corp.*, 655 F. Supp. 158 (N.D. Ind. 1987). In *Nur*, plaintiffs requested the court to expand neighborhood standing not on a geographic basis, but on the basis of the type of injury suffered. *Id.* at 163. The plaintiffs (white testers) argued for the court to extend neighborhood standing to include injuries suffered – emotional distress, embarrassment, humiliation – as a result of

within a “relatively compact neighborhood.”<sup>66</sup> Nevertheless, the Court did not find, as a matter of law, that an injury could not be proven.<sup>67</sup> This leaves open the question of how broad an area must be to constitute a “relatively compact neighborhood.”<sup>68</sup>

### C. Summary of Tester Standing

Testers have argued two separate theories of standing: one involving a direct injury and the other involving an indirect injury suffered resulting from conduct adversely impacting their neighborhood.<sup>69</sup> With regard to the former, even though they fully expect to receive false information and have no intention of renting or purchasing a home, testers have standing for violations of § 3604(d) of the FHA.<sup>70</sup> The Supreme Court in *Havens* found that Congress created a statutory right to truthful information for “any person” regarding the availability of

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“members of their own race engaging in prohibited discriminatory conduct.” *Id.* The Court declined to do so, stating that “stigmatic, non-economic injuries . . . accord a basis for standing only to ‘those persons who are personally denied equal treatment’ by the challenged discriminatory conduct.” *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)). To accept the plaintiffs’ argument, the Court posited, would require conferring standing on all white persons, regardless of where they reside. *Id.* This “would transform the federal courts into ‘no more than a vehicle for the vindication of the value interests of concerned bystanders.’ ” *Id.* at 164 (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)).

<sup>66</sup> *Havens*, 455 U.S. at 377 (quoting *Gladstone*, 441 U.S. at 114).

<sup>67</sup> The Court ordered further pleading, providing the plaintiffs an opportunity to establish that the defendants’ discrimination had a palpable effect on the area in question. *Id.*

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

<sup>69</sup> *See, e.g.*, *Village of Bellwood v. Gorey & Assocs.*, 664 F. Supp. 320 (N.D. Ill. 1987). In *Gorey*, the defendants confused the two forms of tester standing. *See id.* at 325. The defendants argued that the testers, who were provided misinformation, did not have standing because they did not live in the targeted area. *Id.* The Court, finding that the testers were victimized by a discriminatory misrepresentation, and therefore suffered a direct injury, explained that the fact that these plaintiffs resided outside of the targeted area was irrelevant to proving such an injury. *Id.* at 325-26.

<sup>70</sup> *See Havens*, 455 U.S. at 363.

housing under § 3604(d).<sup>71</sup> Therefore, the violation of this right, in and of itself, confers standing upon the tester.<sup>72</sup> This decision has resulted in inconsistent rulings at the circuit court level regarding whether testers have standing when other provisions of the FHA are violated.

#### IV. ORGANIZATIONAL STANDING

An organization can achieve standing either on its own behalf (first-party standing) or as a representative of its members who have suffered an injury.<sup>73</sup> Although it is fraught with confused and contrary circuit court decisions, the former ground is most commonly employed by fair housing organizations. For this reason, and because this area of standing jurisprudence is particularly problematic, this section will focus on the issues surrounding first-party standing.

##### A. *First-party Standing*

In *Havens*, the Supreme Court set out the standard for first-party standing.<sup>74</sup> The Court determined that first-party standing for organizations involves the same inquiry as for

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<sup>71</sup> See *id.* at 373-74.

<sup>72</sup> See *id.*

<sup>73</sup> The Supreme Court has recognized that an organization may achieve standing based on the representation of its members. See *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). In order to establish standing on this basis, the organization must show: (1) the conduct challenged is injurious to its members – “its members would otherwise have standing to sue in their own right”; (2) “the interests it seeks to protect are germane to the organization’s purpose”; and (3) the nature of the claim or the relief sought does not necessitate the participation of an injured member for proper resolution of the suit. *Id.*; see also *HOPE, Inc. v. DuPage County*, Ill. 738 F.2d 797, 813 (7th Cir. 1984); *Association for Retarded Citizens v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994).

<sup>74</sup> *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

individual standing;<sup>75</sup> that is, the plaintiff must demonstrate an injury in fact, causation,<sup>76</sup> and redressability.<sup>77</sup>

In *Havens*, HOME and two of its employed testers brought an action against Havens Realty as the owner of an apartment complex.<sup>78</sup> The plaintiffs alleged that Havens Realty

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<sup>75</sup> See *id.* at 378.

<sup>76</sup> The causation prong of the Article III test requires the plaintiff to demonstrate a causal connection between the injury and the defendant's actions. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Arkansas ACORN Fair Hous., Inc. v. Greystone Dev., Ltd.*, 160 F.3d 433, 434-35 (8th Cir. 1998) (requiring organization to present facts which quantify the resources it used to counteract, monitor or investigate defendant's actions); *Fair Hous. Council v. Montgomery Newspapers*, 141 F.3d 71, 76-78 (3d Cir. 1998) ("[S]pecific facts that [the organization] was 'directly' affected" by the alleged discrimination is required to establish standing); *HOPE*, 738 F.2d at 815 (holding that organization that failed to show that even a single developer was deterred by the defendant's actions from proposing low and moderate income housing did not have standing).

<sup>77</sup> See *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). The third element of Article III standing asks whether a favorable decision will redress the alleged injury. See *Lujan*, 504 U.S. at 561. The Supreme Court has been less than consistent in its approach to this requirement. See *Kuhn*, *supra* note 1, at 893. *Kuhn* opines that: "the Supreme Court has wavered as to the precise degree of specificity needed to fulfill the redressability requirement." *Id.* In some instances, the Court has required that the injury "likely" be redressed by a favorable decision. *Id.* (citing *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 262 (1977)). In other cases, the Court has required a plaintiff to demonstrate a "substantial likelihood" that the injury would be removed by a favorable decision. *Id.* (citing *Duke Power Co. v. Carolina Entvl. Study Group, Inc.*, 438 U.S. 59, 74 (1978)). In still other cases, the Court has applied a strict standard, requiring that the injury be "in fact" redressable by the Court. See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976).

The Court's ostensibly mercurial approach to "redressability" has prompted one commentator to state: "[t]he redressability requirement, so easily described in judicial opinions, has been applied with such a determined inconsistency that it can likely be explained only by the Court's view of the merits of the cases." *Nichol*, *supra* note 5, at 72 (citing *Duke Power Co.*, 438 U.S. at 75 n.20; *Village of Arlington Heights*, 429 U.S. at 262; *Simon*, 426 U.S. at 45). Even so, the "Court has consistently refused to speculate on whether a plaintiff's injury would be cured through a favorable decision," making this requirement a non-issue. See *Kuhn*, *supra* note 1, at 893 (citing *Simon*, 426 U.S. at 44 (noting "unadorned speculation will not suffice to invoke the federal judicial power")); *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973)("[D]enying standing because the prospect that favorable judicial relief would solve plaintiff's injury was 'only speculative.'").

<sup>78</sup> See *Havens*, 455 U.S. at 363 (syllabus).



practiced racial steering in violation of § 3604(d) of the FHA.<sup>79</sup> The Court addressed the issue of whether HOME alleged an injury sufficient to confer standing upon the organization.<sup>80</sup>

The Court found that there was no question that HOME suffered the requisite injury.<sup>81</sup> HOME devoted significant resources to identifying and counteracting Havens Realty's discriminatory steering practices, which frustrated the organization's counseling and referral services.<sup>82</sup> The Court concluded that "[s]uch a concrete and demonstrable injury to the organization's activities – with the consequent drain on the organization's resources – constitutes far more than simply a setback to the organization's abstract social interests . . . ."<sup>83</sup>

The injury in fact standard expressed in *Havens* is not exactly a model of clarity, as the various interpretations of the case demonstrate.<sup>84</sup> The only thing that is clear about the decision is the division that has resulted among the circuit courts.<sup>85</sup> The language regarding the drain on an organization's resources has been particularly conflicting. Three circuit courts have interpreted this clause broadly, while an equal number have construed it with a more restrictive eye.<sup>86</sup>

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<sup>79</sup> *See id.*

<sup>80</sup> *See id.* at 376.

<sup>81</sup> *See id.* at 379.

<sup>82</sup> *See id.*

<sup>83</sup> *Id.* at 379 (citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)).

<sup>84</sup> *See Rosman, supra* note 4, at 591-92 (discussing four possible interpretations of *Havens*).

<sup>85</sup> *See Fair Hous. Council v. Montgomery Newspapers*, 141 F.3d 71, 79 n.6 (pointing out the different views of *Havens* adopted by sister courts). *See also Rosman, supra* note 4, at 593-94.

<sup>86</sup> Although the Fourth and Ninth Circuits have not rendered an opinion on this matter, the district courts in these circuits have. While the district courts in the Ninth Circuit have followed the strict interpretation

## 1. Liberal Interpretations of *Havens*

The Second, Sixth, and Seventh Circuits have found that, for an organization to demonstrate an injury in fact, it need only show a *deflection of resources from its daily activities to the pursuit of legal efforts against the discrimination*.<sup>87</sup> “Legal efforts” has been held to include such activities as investigating the alleged discrimination and the filing of the lawsuit.<sup>88</sup>

The Seventh Circuit, in *Dwivedi*, stated that “*Havens* makes clear . . . that the only injury which need be shown to confer standing on a fair-housing agency is deflection of the agency’s time and money from counseling to legal efforts directed against discrimination.”<sup>89</sup> Using this as its guide, the Court found that using testers to investigate discriminatory practices was an injury sufficient to confer standing.<sup>90</sup> Three years later, the Second Circuit followed suit.<sup>91</sup>

In *Ragin*, the Open Housing Center (OHC) devoted substantial blocks of time to

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approach, the district courts in the Fourth Circuit have reached mixed conclusions. No courts in the First, Eighth, Tenth, and Eleventh Circuits have directly addressed what constitutes a sufficient deflection of an organization’s resources.

<sup>87</sup> See, e.g., *Ragin v. MacKlowe Real Estate Co.*, 6 F.3d 898 (2d Cir. 1993); *Hooker v. Weathers*, 990 F.2d 913 (6th Cir. 1993); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990).

<sup>88</sup> See *Ragin*, 6 F.3d at 905; *Dwivedi*, 895 F.2d at 1526; *Hooker*, 990 F.2d at 915.

<sup>89</sup> *Dwivedi*, 895 F.2d at 1526. The Sixth Circuit has reached the same conclusion. See *Hooker*, 990 F.2d at 915 (holding that fair housing organization which devoted resources to investigating the defendants’ practices had standing).

<sup>90</sup> See *Dwivedi*, 895 F.2d at 1525-26.

<sup>91</sup> See *Ragin*, 6 F.3d 898.

investigating and attempting to remedy the defendants' discriminatory advertisements.<sup>92</sup> OHC also took steps to file an administrative complaint that required it to identify the building developers, the marketing agent, and the advertising agent.<sup>93</sup> The Court, utilizing a similarly broad definition of resource diversion employed in *Dwivedi*, found OHC's expenditure of resources sufficient to confer standing on the fair housing organization.<sup>94</sup>

## 2. Strict Interpretations of *Havens*

The District of Columbia, Third, and Fifth Circuits reject this broad interpretation of *Havens*,<sup>95</sup> and hold that, in order for an organization to demonstrate the requisite injury, it must show an expenditure of resources on organizational activities *independent of the lawsuit*.<sup>96</sup> The District of Columbia Circuit, in *Fair Employment Council of Greater Washington v. BMC Marketing Corp.*, stated that the Seventh Circuit's decision in *Dwivedi* would effectively

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<sup>92</sup> See *id.* at 905.

<sup>93</sup> See *id.*

<sup>94</sup> See *id.* (citing *Dwivedi*, 895 F.2d at 1526).

<sup>95</sup> See, e.g., *Fair Employment Council v. BMC Mktg. Corp.*, 28 F.3d 1268 (D.C. Cir. 1994); *Spann v. Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990); *Association for Retarded Citizens v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241 (5th Cir. 1994); *Fair Hous. Council v. Montgomery Newspapers*, 141 F.3d 71, 79 (3d Cir. 1998) (adopting the position of the D.C. Circuit in *BMC* and *Spann*).

<sup>96</sup> See, e.g., *Spann*, 899 F.2d at 27; *Association for Retarded Citizens*, 19 F.3d at 244; *Fair Hous. Council*, 141 F.3d at 79. The Ninth Circuit Court of Appeals has not yet decided this issue. However, there are district courts in the Ninth Circuit that have rendered decisions on this issue. See *United States v. Rock Springs Vista Dev. Corp.*, No. CV-S-97-1825JBR(RLH), 1999 WL 1491621, at \*4 (D. Nev. July 2, 1999) (holding that an organization only suffers the requisite injury in fact if it alleges that the discriminatory conduct required it to increase the resources it devotes to non-litigious and non-enforcement activities); *Project Sentinel v. Evergreen Ridge Apartments*, 40 F. Supp. 2d 1136, 1139 (N.D. Cal. 1999) (holding that the costs incurred in identifying and litigating instances of unlawful conduct alone does not constitute injury in fact).

eliminate the injury in fact requirement altogether.<sup>97</sup> The Court explained that this overly broad reading of *Havens* would permit an organization to manufacture the injury necessary to maintain a suit by spending time and money on that very suit.<sup>98</sup> In essence, the litigant could create the requisite injury by bringing a case, thus making Article III not a real limitation.<sup>99</sup> The Court explained that the diversion of resources to testing is a self-inflicted harm resulting not from any actions taken by the defendant, but rather from the organization's own budgetary choices.<sup>100</sup> The Court concluded that *Havens* does not "support such a purely self-referential injury."<sup>101</sup>

Likewise, the Fifth Circuit has held that an organization cannot have standing merely because it redirected some of its resources to litigation in response to actions of the defendant.<sup>102</sup> In *Association for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Center Board of Trustees, Advocacy, Inc.*, the plaintiff contended that it suffered an injury in fact because it expended resources to challenge the wrongful actions of the defendants.<sup>103</sup> The Court found this argument untenable and explained

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<sup>97</sup> See *BMC*, 28 F.3d at 1277.

<sup>98</sup> See *id.* See also *Spann*, 899 F.2d at 27 (citing *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 799 n.2 (D.C. Cir. 1987)).

<sup>99</sup> See *Spann*, 899 F.2d at 27 (citing *Haitian Refugee Ctr.*, 809 F.2d at 799 n.2).

<sup>100</sup> See *BMC*, 28 F.3d at 1276.

<sup>101</sup> *Id.* at 1277.

<sup>102</sup> See *Association for Retarded Citizens v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994).

<sup>103</sup> See *id.* *Advocacy, Inc.* also argued that it had standing by virtue of being a federally funded program established to protect and advocate the rights of disabled individuals. See *id.* The Court stated that being a federally funded program designed to provide disabled persons with legal representation does not enhance the assertion of organizational standing. See *id.*

that this position would permit “any sincere plaintiff [to] bootstrap standing by expending its resources in response to the actions of another.”<sup>104</sup>

### 3. Middle Ground Interpretations of *Havens*

The district courts in the Fourth Circuit have provided a novel interpretation of *Havens*.<sup>105</sup> It appears that the District of Maryland in *Williams v. Poretsky Management, Inc.*, took a middle ground approach.<sup>106</sup> In *Williams*, the Fair Housing Council of Greater Washington (FHC) brought an action against apartment owners for discrimination on the basis of sex.<sup>107</sup> FHC alleged that it devoted significant resources to counseling the victim of sexual harassment and investigating her complaint.<sup>108</sup> The Court determined that this deflection of resources was a perceptible impairment to the organization’s efforts against discrimination, and thus satisfied the injury in fact requirement.<sup>109</sup>

The Court, following an opinion of the Eastern District of Virginia, stated that *Saunders v. General Services Corp.* “refined” the standard for what constitutes a deflection of resources,

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<sup>104</sup> *Id.* It should be noted that in a recent decision, the Fifth Circuit indicated that an organization may satisfy the injury in fact requirement if it stopped everything and devoted *all* of its attention to the litigation and diverted resources to counteracting the defendant’s actions. *See Louisiana ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2000) (citing *Alexander v. Riga*, 208 F.3d 419, 427 n.4 (3d Cir. 2000)). This focus on the diversion of *all* of an organization’s activities to litigation adds another twist to this issue in the Fifth Circuit. The Fifth Circuit, to that point, had only described what would *not* suffice to confer standing; that is, the diversion of *some* of the organization’s resources to litigious activities. *See Association for Retarded Citizens*, 19 F.3d at 244.

<sup>105</sup> *See Williams v. Poretsky Management, Inc.*, 955 F. Supp. 490 (D. Md. 1996); *Saunders v. General Servs. Corp.*, 659 F. Supp. 1042, 1052 (E.D. Va. 1987).

<sup>106</sup> *See Williams*, 955 F. Supp. at 493.

<sup>107</sup> *See id.* at 491.

<sup>108</sup> *See id.* at 493.

<sup>109</sup> *See id.*

as set forth in *Spann*.<sup>110</sup> In *Saunders*, the Court stated that standing should not be negated merely because some resources are spent on activities necessary to the suit.<sup>111</sup> The Court concluded that the *testers' activities, while providing evidence to form the basis of the action, are still relevant in a standing analysis*.<sup>112</sup> Thus, breaking from both the liberal and strict approaches, these courts hold that while resources expended on legal efforts do not, in and of themselves, result in the requisite injury, they should, be considered in the standing analysis.

### B. Agency Non-acquiescence

Inconsistency at the circuit court level presents a problem for agencies such as HUD, which administers a national program. Agencies favor administrative uniformity to promote

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<sup>110</sup> *Id.* at 493-94 (citing *Saunders*, 659 F. Supp. at 1052). In *Spann*, the District of Columbia Circuit stated that to acquire standing, an organization must allege a devotion of resources to activities *other than those challenging the lawsuit*. *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)).

<sup>111</sup> *Saunders*, 659 F. Supp. at 1052.

<sup>112</sup> *See id.* (citing *Havens*, 455 U.S. 363). In a more recent decision of the District of Maryland, the Court appears to interpret *Havens* somewhat differently. *See Baltimore Neighborhoods, Inc. v. Continental Landmark, Inc., Fair Housing - Fair Lending (P-H)* ¶ 16,236, 16236.2 (D. Md. Oct. 20, 1997). In *Continental Landmark*, Baltimore Neighborhoods, Inc. (BNI) claimed that it invested time and resources investigating a complaint and preparing materials for use in a suit against the defendants. *See id.* The Court, finding that BNI could not acquire standing by merely alleging that it expended resources on litigation, explained that the utilization of resources and funds to investigate and gather information was not a “concrete and demonstrable injury.” *Id.* at ¶ 16,236.2-16,236.3. The Court found, however, that the expenditure of resources dedicated to “*detecting whether discrimination . . . [was] occurring . . . and educating the public*” was sufficient to confer standing. *Id.* (emphasis added). The Court did not specify which BNI activities it determined to be dedicated to *detecting whether discrimination was occurring*. This language could be read to include the utilization of testers, although the court stated that the use of resources to investigate was itself insufficient to confer standing. *See id.* Cf. *Pumphrey v. Stephen Homes, Inc., No. Civ. A. HAR 93-1329, 1994 WL 150947, at \*5* (D. Md. Feb. 24, 1994) (concluding that sending out testers alone was a sufficient deflection of resources to establish standing). This court that decided this case also decided *Continental Landmark*.

horizontal equity in their treatment of similarly situated persons and organizations.<sup>113</sup> Applying their regulations uniformly simplifies the administration of the agencies' programs, which makes the operation more efficient and less expensive.<sup>114</sup> This raises the question of whether an agency can ignore the precedent established in a particular jurisdiction – or “non-acquiesce” – in an effort to administer a uniform national program.<sup>115</sup> Although this issue is not neatly tied to the purpose of this Article, its implications for organizational standing are sufficient to warrant some attention.

Whether federal agencies are currently bound by the decisions of the circuit courts of appeals is a hotly debated question.<sup>116</sup> Understandably, federal courts and the Association of

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<sup>113</sup> See Joshua I. Schwartz, *Nonacquiescence*, *Crowell v. Benson*, and *Administrative Adjudication*, 77 GEO. L.J. 1815, 1819 (1989).

<sup>114</sup> See *id.* See also Carolyn A. Kubitschek, *Social Security Administration Nonacquiescence: The Need for Legislative Curbs on Agency Discretion*, 29 SOC. SEC. REP. SERVICE 627, 658 (1990).

<sup>115</sup> Government agencies offer many justifications for non-acquiescing, but the one most strongly and widely argued is that non-acquiescence is necessary for an agency to administer its statutory responsibilities in a uniform manner on a nationwide basis. See Kubitschek, *supra* note 114, at 655; Schwartz, *supra* note 113, at 1818-19. However, the uniformity justification offered by agencies has been met with skepticism. See, e.g., *Johnson v. U.S. R.R. Retirement Bd.*, 969 F.2d 1082 (D.C. Cir. 1992). In *Johnson*, the District of Columbia Circuit rejected the Railroad Board's argument that its non-acquiescence policy was in the interest of the uniformity of its programs. See *id.* at 1092. The Court, questioning the Railroad Board's sincerity, stated that although the agency claimed that the circuit court misinterpreted the law, it failed to petition the Supreme Court for certiorari. See *id.* Therefore, it appears, the Court averred, that the Railroad Board is “less interested in national uniformity than in denying benefits one way or another.” *Id.* See also Kubitschek, *supra* note 114, at 631 (rejecting the uniformity justification, stating that adverse decisions are rarely brought before the Supreme Court to avoid setting unfavorable precedent which the agency would be obliged to follow nationally).

<sup>116</sup> See, e.g., Schwartz, *supra* note 113. In his article, Professor Schwartz argues that Article III forbids an agency from maintaining a practice of nonacquiescence. See *id.* at 1860. Professor Schwartz notes that his view differs from that of Professors Estreicher and Revesz. See *id.* at 1861 (citing Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989)). While Professors Estreicher and Revesz espouse a balancing test where the agency's policy justifications are weighed against the costs imposed on the private litigants, Professor Schwartz would simply limit non-acquiescence to “situations in which the conduct is consistent with the maintenance of the judicial power of the Article III courts.” Schwartz, *supra* note 113, at 1863. Professor Schwartz clarifies, however, that he agrees that, in certain situations, non-acquiescence should be permissible, but argues that it should be the exception and not the norm. *Id.* at 1865. See also Kubitschek, *supra* note 114, at 627-29 (disagreeing with

Administrative Law Judges strongly oppose agency non-acquiescence.<sup>117</sup> Although most courts<sup>118</sup> have routinely criticized this practice and have found it to be unlawful,<sup>119</sup> some agencies have held firm in their stance that they are not bound by circuit court decisions.<sup>120</sup>

This issue has not gone unnoticed by Congress.<sup>121</sup> There is a bill (H.R. 1924), the Federal Agency Compliance Act, currently in the U.S. House of Representatives that, if passed,

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Professors Estreicher and Revesz's analysis of agency non-acquiescence); *Federal Agency Compliance with Judicial Septem, 1999: Hearing on H.R. 1924 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of William B. Schultz, Deputy Assistant Attorney General), available at 1999 WL 27596379 (stating that the Department of Justice has consistently held the position that agency non-acquiescence is constitutional and, therefore, should be permissible).

<sup>117</sup> See Kubitschek, *supra* note 114, at 631-32; *Federal Agency Compliance with Judicial Septem, 1999: Hearing on H.R. 1924 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Ronald G. Bernoski on behalf of the Association of Administrative Law Judges), available at 1999 WL 27596382.

<sup>118</sup> The Supreme Court has not yet ruled on the agency non-acquiescence question. In the only case before the Court that directly challenged agency non-acquiescence, the Court did not address the issue. See *Heckler v. Lopez*, 469 U.S. 1082 (1984).

<sup>119</sup> See *Rogers v. Chater*, 118 F.3d 600, 602 (8th Cir. 1997) (“[T]he policy of non-acquiescence is flagrantly unlawful.”); *Hillhouse v. Harris*, 715 F.2d 428, 430 (8th Cir. 1983) (citations omitted) (“It is, emphatically, the province and duty of the judicial department, to say what the law is . . . and the Secretary [of HHS] will ignore that principle at his peril.”); *Stieberger v. Heckler*, 615 F. Supp. 1315, 1357 (S.D.N.Y. 1985) (“[T]he judiciary’s duty and authority . . . ‘to say what the law is’ would be rendered a virtual nullity if coordinate branches of government could effectively and unilaterally strip its pronouncements of any precedential force . . . .”), *vacated sub nom.*, *Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986); *Lopez v. Heckler*, 572 F. Supp. 26, 30 (D.C. Cal. 1983) (holding that secretary violated the Separation of Powers doctrine in announcing her non-acquiescence in federal appeals court decisions), *aff’d in part, rev’d in part*, 725 F.2d 1489 (9th Cir. 1984), *vacated*, *Heckler v. Lopez*, 469 U.S. 1082 (1984). See also *NLRB v. Eastern Smelting and Ref. Corp.*, 598 F.2d 666, 671 (1st Cir. 1979), *overruled by* *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981); *ITT World Communications Inc. v. FCC*, 635 F.2d 32, 43 (2d Cir. 1980); *Hyatt v. Heckler*, 807 F.2d 376 (4th Cir. 1986); *Stieberger v. Bowen*, 801 F.2d 29, 36-37 (2d Cir. 1986); *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984); *Lopez v. Heckler*, 725 F.2d 1489 (9th Cir. 1984), *vacated*, 469 U.S. 1082 (1984); *Childress v. Secretary of Health & Human Servs.*, 679 F.2d 623, 630 (6th Cir. 1982); *Jones & Laughlin Steel Corp. v. Marshall*, 636 F.2d 32, 33 (3d Cir. 1980); *PPG Indus., Inc. v. NLRB*, 671 F.2d 817, 823 n.9 (4th Cir. 1982); *Beverly Enter. v. NLRB*, 727 F.2d 591, 593 (6th Cir. 1984).

<sup>120</sup> The Social Security Administration, Internal Revenue Service, and the National Labor Relations Board have gone as far as adopting policies of non-acquiescence. See *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325, 1331 n.4 (D.C. Cir. 1989). See also Kubitschek, *supra* note 114, at 684 n.1 (citing many government agencies that have practiced various forms of non-acquiescence, including the National Labor Relations Board, Internal Revenue Service, Occupational Safety and Health Administration, United States Postal Service, Federal Communications Commission, Railroad Retirement Board, and the Social Security Administration).



would eliminate agency non-acquiescence.<sup>122</sup> The bill requires federal agencies to adhere to precedents set by the circuit court for the circuit in which the agency is located when it administers its programs or enforces its regulations.<sup>123</sup> Because of its wide base of bi-partisan support,<sup>124</sup> the bill appears to be primed to become law.<sup>125</sup>

### C. Summary of Organizational Standing

*Havens*, the leading decision for first party standing, has given birth to various interpretations of the injury in fact requirement of Article III standing. The Second, Sixth, and Seventh Circuits employ an expansive approach, requiring only a deflection of resources from an organization's daily activities to the pursuit of legal efforts directed against the defendant. In contrast, the District of Columbia, Third, and Fifth Circuits, and the district courts in the Ninth Circuit require an organization to demonstrate an expenditure of resources independent of the

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<sup>121</sup> During the 98th Congress, the U.S. House of Representatives passed a bill (H.R. 3755) that severely criticized the Social Security Administration's non-acquiescence policy. Kubitschek, *supra* note 114, at 677. The Senate, however, passed a different bill, which permitted non-acquiescence. *See id.* at 678. As a result of this clear Congressional divide, the matter was referred to the Conference Committee. *See id.* The Committee was unable to reconcile the bills however, and Congress subsequently enacted the Social Security Disability Benefits Reform Act of 1984, which was bereft of a non-acquiescence provision. *See id.* (citing Pub. L. No. 98-460, 98 Stat. 1794 (codified as amended in scattered sections of 42 U.S.C.)). The Committee did, however, condemn the practice of non-acquiescence, stating that the result of agency non-acquiescence is "undesirable." *See id.* at 678 (quoting H.R. CONF. REP. NO. 98-1039, at 38, *reprinted in* 1984 U.S.C.C.A.N. 3080).

<sup>122</sup> Similar legislation (H.R. 1544) was adopted by the House during the 105th Congress, but the Senate Bill (S. 1166) was pending on the Senate floor when the session of Congress ended. The current bill includes some changes recommended by the Senate during the last Congress.

<sup>123</sup> *See* Michael Posner, *House Panel Tells Agencies to Obey Courts*, NAT'L J. NEWS SERVICE, (June 21, 2000) <<http://www.govexec.com/dailyfed/0600/062100t3.htm>>.

<sup>124</sup> *See Federal Agency Compliance with Judicial Septem, 1999: Hearing on H.R. 1924 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Ronald G. Bernoski on behalf of the Association of Administrative Law Judges), available at 1999 WL 27596382.

<sup>125</sup> As of the writing of this Article, the latest action on the bill was on June 21, 2000, when the House

lawsuit. To further complicate matters, two district courts in the Fourth Circuit have staked a middle ground, holding that while diversion of resources to litigation-related activities alone is insufficient to confer standing, it should still be considered in the standing analysis.<sup>126</sup>

Clearly the inconsistency among the circuit courts is problematic for fair housing organizations. Additionally, this inconsistency affects HUD because HUD relies upon these fair housing organizations to bring housing discrimination actions in furtherance of its mission. Varying precedents from jurisdiction to jurisdiction make the administration of a national program arduous. To circumvent similar situations, some agencies have non-acquiesced in those circuit court decisions they have found to be contrary to their policy. This practice has stirred up the judicial and legislative hornet's nests, placing the viability of agency non-acquiescence in doubt.

## V. CONCLUSION

Although the various circuits are clearly at odds, the Supreme Court has not seen fit to unify the direction of standing under the Fair Housing Act. When will the Court again descend

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Judiciary approved the bill and cleared it for full committee action. *See* Posner, *supra* note 123.

<sup>126</sup> The Administrative Law Judges appear to favor the more expansive view of *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). In *HUD v. Jancik*, the only HUD Administrative Law Judges' decision specifically addressing this issue, the Leadership Council (Council) brought an action alleging that the defendant violated the FHA. *HUD v. Jancik*, 1993 WL 388608, at \*1 (H.U.D. A.L.J.). The Council employed two testers to investigate whether the defendant was discriminating on the basis of familial status. *Id.* at \*1, \*3. The Council's investigation manager spent an hour designing a test that involved the construction of fictitious identities for the testers and selecting the appropriate people to perform the test. *Id.* at \*3.

The Court, relying on the standard established in the Seventh Circuit, found that the Council had standing. *Id.* at \*5 (citing *City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1095 (7th Cir. 1992) (holding that an organization which, during the course of investigating the defendant's activities, had deflected its time and money from counseling to legal efforts directed against discrimination, satisfied the standard established in *Dwivedi*)). The Court reasoned that, at a minimum, the Council expended resources investigating and prosecuting the action. *Id.* at \*5. In so finding, the Court provided no indication whether its holding was the position of the Administrative Law Judges or whether it was merely following the law of the circuit in which the case arose. *See id.*

from its lofty mount and provide guidance to the swooning fair housing masses? Until that day, practitioners and litigants will have to continue to weave their way through this veritable standing maze that is beset with unclear, inelaborate, and oftentimes contrary decisions of the lower courts. For now, it appears that the Supreme Court is content to allow confusion to reign, and thus to leave fair housing advocates standing on shaky ground.<sup>127</sup>

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<sup>127</sup> The views expressed in this article do not necessarily represent those of the U.S. Department of Housing and Urban Development or of the United States.