IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NAACP, CITY OF COMMERCE BRANCH,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	CA 3-88-0154-R
	§	
HOUSING AUTHORITY OF THE CITY OF COMMERCE, and THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,	§	
	§	
Defendants,	§	

vs.

THE CITY OF COMMERCE,

Third-Party Defendant.

MEMORANDUM OPINION AND ORDER

This case involves racial discrimination in low-income public housing projects in the City of Commerce.[1] The parties are the City of Commerce Branch of the NAACP ("the NAACP"), the Housing Authority of the City of Commerce ("CHA"), the United States Department of Housing and Urban Development ("HUD"), and the City of Commerce ("the City"). This Court concludes that CHA and HUD are liable for the racial discrimination existing in 191 public housing units in the City (pp. 57-71).

In finding CHA and HUD liable, this opinion holds specifically that:

(1) the NAACP has standing on behalf of its members to bring this case against CHA and HUD (pp. 17-19);

(2) the NAACP has a private right of action against CHA under Title VI

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[1]/ The City of Commerce, which has a population of 6,825 (1990 census), is about 70 miles northeast of Dallas.

of the Civil Rights Act of 1964 (pp. 19-29) and Title VIII of the Civil Rights Act of 1968 (pp. 29-34);

(3) the NAACP does not have a private right of action against HUD under Title VI (pp. 19-29) or Title VIII (pp. 29-34);

(4) the NAACP does have the right to use 42 U.S.C. section 1983 against CHA and HUD to enforce Title VI and Title VIII (pp. 34-40, 67-70);

(5) sovereign immunity does not bar the NAACP from seeking nonmonetary relief against HUD under the Administrative Procedure Act ("the APA") (pp. 40-44);

(6) the APA does not require the NAACP to exhaust the administrative procedures of Title VI and Title VIII before seeking judicial review of HUD's conduct (pp. 44-46); and

(7) HUD's administrative decisions under Title VI and Title VIII are not committed to agency discretion (pp. 46-53) and are subject to de novo review under the APA (pp. 54-57).

I. THE PROCEDURAL HISTORY

In January 1988, the NAACP brought this action against CHA, HUD, and the City,[2] contending: (i) that HUD developed, and CHA used, tenant selection and assignment plans that promoted and perpetuated racial segregation in CHA's four public housing projects; (ii) that, although aware of CHA's discriminatory housing practices, HUD continued to fund CHA; (iii) that CHA did not provide its predominantly black housing project with the same

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[2]/ When the NAACP filed this suit on January 22, 1988, it named the City as a defendant. CHA and HUD filed third-party complaints against the City on June 14, 1988, after the NAACP voluntarily dismissed the City from the suit on May 6, 1988.

maintenance services as its predominantly white projects; and (iv) that CHA operated its Section 8 Existing Housing Program (Section 8 Program) in a discriminatory manner. The NAACP alleges that this conduct violates the Fifth and Fourteenth Amendments, Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, and 42 U.S.C. sections 1981, 1982, and 1983.

The NAACP filed its First Amended Complaint on June 14, 1988, and its Motion for Partial Summary Judgment on December 21, 1988. In February 1992, this Court granted the parties leave to file supplemental briefs to address changes in the law that had occurred since the filing of the original complaint. The parties completed their supplemental briefing in July 1992.

II. THE FACTUAL BACKGROUND[3]

A. The Public Housing Projects in Commerce

In 1952, CHA built, with federal financial assistance, its first two public housing projects, Sunrise Homes ("Sunrise") and Durham Homes ("Durham I"). CHA constructed these public housing projects under a system of *de jure* racial segregation. Sunrise consisted of twenty-five housing units built for black families in an area away from the center of the City. Durham I consisted of fifty housing units built for members of the white community. In 1965, CHA constructed, with federal financial assistance, twenty units of public housing adjacent to the white family public housing units of Durham I. CHA intended to house the elderly in these new Durham Homes ("Durham II"). After submitting an application to HUD for the development of low-rent public housing for elderly tenants, CHA built Tarter Homes ("Tarter") in 1974,

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[3]/ These undisputed facts are based upon the affidavits, reports, records, and other evidentiary materials submitted by the NAACP, CHA, and HUD.

containing ninety-six housing units for the elderly. In addition to the public housing projects, CHA also has administered, since December 1987, the Section 8 Program.[4]

HUD and its predecessor, the Public Housing Administration ("the PHA"), granted CHA over $2.5 billion in Annual Contribution Contract payments from 1959 to 1988. HUD granted CHA over $175,000 in operating subsidy payments from 1972 to 1988. From 1978 to 1992, HUD granted CHA over $1.6 million in modernization funding.[5]

The racial composition of CHA's four public housing projects as of June 30, 1992, is set out below:

Project	Families	Elderly	Vacant	Total Units
Sunrise	10 Black 4 White	7 Black 0 White	4	25
Durham I	9 Black 23 White	4 Black 13 White	1	50
Durham II		1 Black 19 White	0	20
Tarter		2 Black 93 White[6]	1	96

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[4]/ Under the Section 8 Program, HUD provides a subsidized rental payment to a qualified individual who obtains approved private housing. HUD pays the tenant the difference between the fair market rent and the amount the tenant can afford to pay. *See* 42 U.S.C. § 1437f.

[5]/ *See* NAACP Ex. 2; Wilson Aff. at 1-2 (Jul. 20, 1992) (CHA Ex. 21).

[6]/ Wilson Aff. at 3-4 (Jul. 20, 1992) (CHA Ex. 21). The 1980 census reported that 54,486 people lived in Hunt County, Texas, where the City of Commerce is located. Approximately 87% (47,164) of these people were white and 13% (7,026) were black. The City of Commerce had 8,136 inhabitants. Approximately 79% (6,448) were white and 17% (1,388) were black. Of the 1,121 persons over the age of 65, approximately 92% (1,034) were white and 7% (80) were black. The 1990 census reported some changes in the racial composition of Hunt County. Approximately 87% (55,705) of the county's 64,343 inhabitants were white and 11% (6,802) were black. In the City of Commerce, approximately 77% (5,279) of the city's 6,825 inhabitants were white and 18% (1,224) were

B. **The Development of the Tenant Selection and Assignment Policy**

After the passage of Title VI of the Civil Rights Act of 1964, the federal government required public housing authorities receiving federal funds to adopt some form of a tenant selection and assignment policy to ensure a funding recipient's compliance with Title VI. The government intended the policy to end discrimination and remedy the effects of prior discrimination resulting from *de jure* segregated public housing systems.[7] In December 1964, HUD's predecessor, the PHA, endorsed a freedom-of-choice tenant selection and assignment policy. The freedom-of-choice plan offered the public housing applicant an opportunity to state a project preference on the application. The local authority would then assign the applicant, if possible, to the public housing project of his choice.

Although many local public housing authorities adopted the freedom-of-choice plan, it did not result in substantial changes in the racial composition of public housing projects. Local authorities often administered the plan in a manner that rendered it ineffective. The plan could not counteract long-established social inhibitions which discouraged individuals from exercising their freedom to choose, and it could not eradicate the effects of prior discrimination. By 1967, the newly-created Department of Housing and Urban Development required federal funding recipients to replace the freedom-of-choice plan with the "first-come, first-served" plan. Under the "first-come, first-served" plan, the local authority assigns each applicant a place on a waiting list based on the date of the application, the

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black. None of the parties submitted 1990 census figures for the racial composition of persons over the age of 65 living in the City of Commerce.

[7]/ *See* HUD, **Subsidized Housing and Race** 31 (1985) (NAACP Ex. 10); Appendix 2 of **Subsidized Housing** at 6-11 (NAACP Ex. 11).

size of the housing unit requested, and any other factors besides race, color, or national origin affecting the applicant's position on the list. When a vacancy arises, the local authority offers the unit to the first eligible applicant on the waiting list. If the applicant rejects the vacancy offered, one of the following scenarios results: (1) the applicant retains her place at the top of the waiting list; (2) the applicant drops to last place on the list; or (3) the applicant remains at the top of the list but if she rejects a set number of suitable vacancies, she eventually drops to the bottom of the waiting list.

By 1970, the "first-come, first-served" tenant selection and assignment plan had proven unsuccessful in reducing discriminatory public housing practices.[8] Critics charged that the plan's unenforceability, adverse side effects, and lack of flexibility had made it unworkable.[9] Furthermore,

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[8]/ HUD, **Tenant Selection in the Public Housing System** 9 (1971) (NAACP Ex. 12). After noting that HUD's "first-come, first-served" tenant selection and assignment plan had not led to any significant changes in the racial composition of public housing projects, HUD's **Tenant Selection** report stated that as long as HUD operates under this plan it "is not doing all that it can and should be doing to assure compliance with Title VI of the Civil Rights Act of 1964." *Id.* at 7. *See* Memorandum from Laurence D. Pearl, HUD Program Compliance, to Joseph Vera, Dir. Off. of Regional Fair Hous. & Equal Opportunity (1980) (NAACP Ex. 16) (stating that "[t]he current policy has not served to desegregate low-rent housing projects or provide an affirmative race conscious approach for integration").

[9]/ **Tenant Selection** at 7-9 (NAACP Ex. 12). HUD's **Tenant Selection** report noted the problems with the "first-come, first-served" plan. First, the plan had not lessened racial discrimination in public housing because of the complicated administrative enforcement procedures of Title VI. Consequently, HUD tended to rely on informal methods of persuading a local housing authority's compliance. Second, the rigidity of the plan caused undesirable side effects. For example, if the projects with vacancies were 100% black-occupied, white applicants who refused these offers would eventually drop to the bottom of the waiting list and have to seek suitable housing elsewhere. Similarly, many blacks who refused vacancies in undesirable projects would also have to find other housing arrangements. As a result, minority families without the economic means of securing more suitable housing would eventually comprise the entire waiting list. *Id.*

because the plan was a "vacancy-conscious policy, not a race conscious policy," it could not achieve the HUD objective of redressing the effects of past discrimination in public housing.[10] A proposed alternative to the "first-come, first-served" plan suggested that local housing authorities found in noncompliance with Title VI take race affirmatively into account by assigning black applicants to vacancies in white units and white applicants to vacancies in black units.[11] Several variations of this proposed plan were submitted,[12] but HUD never adopted any of them.[13] Consequently, the "first-

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[10]/ Off. of Assist. Sec. for Fair Hous. & Equal Opportunity, Assessment Report by Off. of HUD Program Compliance, **A Management Control Assessment of the HUD Tenant Selection and Assignment Policy** 8 (1981) (NAACP Ex. 17). Requiring local housing authorities using HUD's "first-come, first-served" plan to offer applicants a unit in the project with the greatest number of vacancies did not result in the desegregation of black projects because the black projects often had more vacancies than the white projects. *Id.* at 7. In developing the plan, HUD assumed that:

> in many cities the local housing authorities had black projects with long waiting lists and white projects with no waiting lists at all. It was assumed that offers of units in white projects would overcome the reluctance of blacks to move into such projects, resulting in the desegregation of previously white projects. The policy was not designed to desegregate black projects.

Id.

[11]/ Appendix 2 of **Subsidized Housing** at 29 (NAACP Ex. 11) (quoting Letter from Jerris Leonard, Assist. Attorney General, Civil Rights Div., to Richard C. Van Dusen, Undersec. (Feb. 6, 1969)). Commenting upon the need to make race an affirmative consideration in tenant assignments, Jerris Leonard said that:

> Our experience has shown, in this conjunction, that to assign one or two Negroes to a white project, or one or two whites to a black one, is likely to be a hardship on those involved, whereas if a greater degree of integration is accomplished, the results are less unsatisfactory to all concerned."

Id.

[12]/ One of the variations HUD proposed as an alternative to the "first-come, first-served" plan contemplated requiring local housing authorities' projects to reflect the minority tenant population in the community. The

come, first-served" plan is still in effect today.[14]

In 1977, the Civil Rights Division of the United States Department of Justice ("DOJ") completed a report of HUD's Title VI enforcement activities.[15] DOJ concluded that HUD had not adequately performed its duties to prevent and remedy racial discrimination in public housing. The report found that HUD had failed to develop an effective Title VI compliance review program, had failed to resolve civil rights violations in a timely manner, had failed to allocate sufficient resources to its Title VI enforcement effort,

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minority population in the housing projects operated by a local authority had to fall within a range whose boundaries were the percentage of minority persons within the community and the percentage of minority persons eligible for public housing within the community. HUD believed that this proposal would more affirmatively promote the desegregation of public housing projects. Appendix 2 of **Subsidized Housing** at 30 (NAACP Ex. 11).

[13]/ *Id.* at 33-35.

[14]/ *See* 24 C.F.R. § 1.4(b)(2)(ii) and (iii) (1992). HUD codified the "first-come, first-served" plan in § 1.4. The pertinent part of § 1.4(b)(2) states that:

> (ii) A recipient, in operating low-rent housing with Federal financial assistance. . .shall assign eligible applicants to dwelling units in accordance with a plan, duly adopted by the recipient and approved by the responsible Department official, providing for assignment on a community-wide basis in sequence based upon the date and time the application is received, the size or type of unit suitable, and factors affecting the preference or priority established by the recipient's regulations, which are not inconsistent with the objectives of title VI of the Civil Rights Act of 1964. . . .The plan may allow an applicant to refuse a tendered vacancy for good cause without losing his standing on the list but shall limit the number of refusals without cause as prescribed by the responsible Department official.
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> (iii) The responsible Department official is authorized to prescribe and promulgate plans, exceptions, procedures, and requirements for the assignment and reassignment of eligible applicants and tenants[.]

Id.

[15]/ DOJ, **Interagency Survey Report: Evaluation of Title VI Enforcement at HUD** (NAACP Ex. 14).

and had failed to implement a new tenant selection and assignment policy even though HUD was aware that the "first-come, first-served" plan did not remedy segregation. Although HUD agreed to develop an effective tenant selection and assignment policy as a result of the DOJ report,[16] HUD still has not replaced its "first-come, first-served" plan. Today, HUD's principal means of attempting to ensure that local housing authorities do not violate Title VI is through the use of informal means of compliance, short of funding termination.[17]

C. **The Conduct of CHA and HUD**

CHA adopted HUD's "first-come, first-served" tenant selection and assignment plan in 1967.[18] On August 3, 1976, HUD informed CHA that because 100 percent of the tenants at Sunrise were black and 100 percent of the tenants at both Durham I and Tarter were white, CHA was in apparent noncompliance with the requirements of Title VI.[19] HUD gave CHA sixty days to comply voluntarily or adopt and implement a plan to ensure Title VI compliance, or HUD would begin administrative enforcement procedures seeking the termination of CHA's federal funding. On August 26, 1976, CHA stated that it would "do everything possible" to comply voluntarily with Title VI.[20] CHA

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[16]/ Memorandum of Understanding Between HUD and the Civil Rights Div., DOJ, Regarding the Enforcement of Title VI of the Civil Rights Act of 1964, 7-8 (1979) (NAACP Ex. 15).

[17]/ *See* 24 C.F.R. §§ 1.6(a), 1.7(d) (1992).

[18]/ Minutes from Regular Meeting of the Hous. Auth. Comm'n, 2-3 (Sept. 6, 1967) (NAACP Ex. 22A).

[19]/ Letter from Leonard Chaires, HUD's Assist. Regional Adm'r for Fair Hous. & Equal Opportunity, to W.N. Wright, Exec. Dir. of CHA (Aug. 3, 1976) (NAACP Ex. 28).

[20]/ Letter from W.N. Wright, Exec. Dir. of CHA, to Leonard Chaires, Assist. Regional Adm'r for Fair Hous. & Equal Opportunity (Aug. 26, 1976)

claimed to have offered Sunrise units to white individuals, but none had accepted. Furthermore, an elderly black man had moved into Durham I. CHA claimed that other elderly tenants at Sunrise had refused offers to move into Tarter.

On January 25, 1977, HUD received CHA's proposed voluntary compliance agreement. CHA had submitted HUD's standard form compliance agreement. The central feature of the proposed agreement was that CHA would take affirmative action to eradicate the effects of past discrimination.[21] CHA would disestablish its segregated projects by offering new applicants the first available and appropriate unit in a housing project where the applicant's race did not predominate. If the applicant refused, without good cause, the applicant would drop to the bottom of the waiting list. In addition, CHA offered to transfer any present tenant who resided in a project where the applicant's race did predominate.

In response to CHA's request for modernization funding to upgrade the conditions of its projects, HUD conducted a four-day review of CHA's operations in March 1977.[22] HUD found that all the projects needed repairs, especially Sunrise and Durham I. On June 21, 1977, HUD invited CHA to apply for modernization funding for Sunrise and Durham I although HUD had earlier considered conducting another compliance review of CHA.[23] In his letter

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(NAACP Ex. 29).

[21]/ Compliance Agreement between HUD and CHA, 2-3 (Jan. 25, 1977) (NAACP Ex. 31).

[22]/ Letter from Edgar M. Bice, Deputy Dir. Hous. Management Div., to Dr. A.C. Hughes, Chairman of CHA (Jun. 21, 1977) (NAACP Ex. 32).

[23]/ Letter from Leonard Chaires, Assist. Regional Adm'r for Fair Hous. & Equal Opportunity, to B.C. Tarter, Exec. Dir. of CHA (Mar. 29, 1977) (NAACP Ex. 34).

notifying CHA of the possibility of a compliance review, HUD's regional director noted that, even after a recipient spends its federal funds, HUD has a continuing responsibility to determine whether the recipient is using the money in a manner consistent with the requirements of Title VI.[24]

On September 5, 1977, CHA, in order to receive the modernization funding it had requested from HUD, certified that HUD had made no outstanding findings of noncompliance.[25] HUD approved $154,040 of modernization funds for Sunrise and $293,470 for Durham I in 1977.[26]

HUD finally approved CHA's proposed tenant selection and assignment plan on July 10, 1978.[27] HUD's regional director understood CHA's proposed plan to mean that CHA would ensure assignment of tenants in a nondiscriminatory manner and secure the integration of its housing projects. HUD's regional director also stated that:

> Since it appears that the implementation of this plan should eliminate the racial identification (segregation) of housing units operated by [CHA], [CHA] will be in compliance with the requirements of

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[24]/ *Id.* In his letter to the executive director of CHA, Leonard Chaires, a HUD official, noted that:

> Regional responsibility for programs administered by HUD does not stop when the funds are obligated and spent. The Regional HUD Office is charged to determine whether the programs are achieving the intent of the statute and furthering National Policy. HUD is charged with the responsibility of examining recipients of Federal Funds to determine whether the HUD money that is spent is having a beneficial effect on the citizens and environment of the community.

Id.

[25]/ Regular Meeting of the Hous. Auth. Comm'n (Sept. 5, 1977) (NAACP Ex. 35).

[26]/ Wilson Aff. at 5 (May 30, 1989) (CHA Ex. 4).

[27]/ Letter from Leonard Chaires, Dir. of Off. of Regional Fair Hous. & Equal Opportunity, to W.N. Wright, Exec. Dir. of CHA (July 10, 1978) (NAACP Ex. 40).

> Title VI of the Civil Rights Act of 1964 so long as it carries out the plan, thereby remaining eligible to receive financial assistance from this Department.[28]

After a HUD inspection of CHA's housing projects in 1980 and 1981, CHA received a letter from HUD on March 5, 1981, ordering CHA to develop a plan "to deconcentrate the units according to race, ethnic group and/or income groups."[29] The letter found that Sunrise's twenty-five units were "all Black," Durham I's fifty units were "46 White, 4 Black," Durham II's twenty units were "all White," and Tarter's ninety-six units were "all White."[30] CHA responded to this letter on April 7, 1981, stating that it would continue to make all efforts to integrate Sunrise, but that both white and black applicants had refused to accept offers of vacant units in projects where their race did not predominate.[31]

On July 11, 1984, HUD conducted a management and occupancy review of CHA's housing projects.[32] HUD concluded that ten of the twenty-five families in Sunrise were housed in units larger than permitted under HUD standards. Twenty-eight of the fifty families in Durham I were similarly over-housed.[33]

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[28]/ *Id.*

[29]/ Letter from P.T. Hinojosa, Dir. of Fair Hous. & Equal Opportunity Div., to W.N. Wright, Exec. Dir. of CHA (Mar. 5, 1981) (NAACP Ex. 47).

[30]/ *Id.*

[31]/ Letter from W.N. Wright, Exec. Dir. of CHA, to P.T. Hinojosa, Fair Hous. & Equal Opportunity (Apr. 7, 1981) (NAACP Ex. 49).

[32]/ Letter from Robert T. Creech, Dir. of Management Hous. Div., to Charles J. Muller, Chairman of CHA (Aug. 28, 1984) (NAACP Ex. 50).

[33]/ "Segregation often leads to 'over housing.'" *Young v. Pierce*, 628 F. Supp. 1037, 1052 n.7 (E.D. Tex. 1985) (quoting affidavit of John Knapp, HUD's General Counsel), *vacated on other grounds*, 822 F.2d 1368 (5th Cir. 1987). Patterns of over-housing may indicate that a local public housing authority is attempting to maintain racially segregated projects. Typically, the local public housing authority places a white family in a unit with more

The number of minorities in all the housing projects had barely changed since HUD's first finding of apparent noncompliance eight years earlier. HUD stated that CHA's failure to respond within thirty days would adversely affect CHA's receiving any federal funding in the future.

CHA promptly responded to HUD's findings and submitted a transfer plan intended to correct the over-housing situation and disestablish the segregation existing at CHA's four housing projects.[34] CHA's proposed tenant transfer plan first called for over-housed tenants to transfer, on a voluntary basis, to an appropriately-sized unit. CHA would then use mandatory transfers if the tenant refused to transfer voluntarily. In either case, CHA would begin eviction proceedings against any tenant who refused to transfer.

In April 1985, CHA revised its former tenant selection and assignment policy at HUD's suggestion and adopted the "one-offer, one-refusal" plan where the applicant is allowed only one refusal of an offered unit before dropping to the bottom of the waiting list.[35] In addition, the policy required CHA to give a preference to applicants willing to accept a unit in a project where their race did not predominate.

On May 15, 1986, HUD monitored CHA's public housing program.[36] HUD

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bedrooms than the family is eligible for under HUD guidelines, because the only eligible family on the waiting list is black. *See id.*; Appendix 3 of **Subsidized Housing** at 7 (1985) (NAACP Ex. 11A).

[34]/ Letter from W.N. Wright, Exec. Dir. of CHA, to John E. Wright, Dir. of Regional Off. of Fair Hous. & Equal Opportunity (Aug. 13, 1984) (NAACP Ex. 52).

[35]/ Statement of Policies Governing Admission to, and Continued Occupancy of, HUD-Aided Lower-Income Public Housing Projects Owned and Operated by CHA (Apr. 8, 1985) (NAACP Ex. 54).

[36]/ Letter from Earnie F. Wilkinson, Dir. of Program Operations Div., to L.G. Dickson, Chairperson of CHA (Dec. 12, 1986) (NAACP Ex. 57).

found that: "[CHA] is operating racially identifiable sites. Sunrise is 100 percent minority and Tarter is 98 percent White."[37] HUD stated that a finding of racially identifiable sites indicated that CHA's low-rent public housing program was in violation of Title VI.

In October 1986, HUD invited CHA to apply for $68,795 in modernization funding.[38] HUD approved the application and CHA received the funding in 1987 and 1988.

In October 1987, HUD notified CHA that CHA was administering an unapproved tenant selection and assignment plan that used race as a factor in assigning units.[39] HUD ordered CHA to adopt either Plan A or Plan B of the "first-come, first-served" tenant selection and assignment plan. Plan A required an applicant to drop to the bottom of the waiting list after refusing one offered unit. Plan B did not require an applicant to move to the bottom of the list until the applicant rejected three suitable vacancies. HUD also gave CHA the option of adopting an alternative plan consistent with the requirements of Title VI. HUD ordered CHA to reply within sixty days or face the initiation of enforcement proceedings leading to the termination of federal funding.

In November 1987, HUD's regional office explained its October letter.[40]

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[37]/ *Id.* CHA's Durham I was 6% black and Durham II was 10% black. NAACP Ex. 58. The term "racially identifiable" means that a "racial group within a project exceeds its representation within all projects supported by a given public housing agency by more than twenty percentage points." **Tenant Selection** at 12 (NAACP Ex. 17).

[38]/ Letter from Roman R. Palomares, Dir., Public Hous. Management Div., to Dennis Wilson, Exec. Dir. of CHA (Oct. 6, 1986) (NAACP Ex. 59).

[39]/ Letter from Sam R. Moseley, Regional Adm'r, Regional Hous. Comm'n, to Exec. Dir. of CHA (Oct. 23, 1987) (NAACP Ex. 19).

[40]/ Letter from Sam R. Moseley, Regional Adm'r, Regional Hous. Comm'n,

HUD realized that CHA had based its current tenant selection and assignment plan on the model that HUD had provided CHA. HUD stated that the purpose of its October letter was merely to ensure that CHA use a race neutral selection policy, even though HUD's model plan contained language permitting a local public housing authority to take race into account. HUD stated that it did not mean to imply that CHA's public housing program violated Title VI. Until HUD developed an updated tenant selection and assignment policy, HUD requested that CHA continue to use the "one-offer, one-refusal" plan and refrain from considering any racial criteria in the assignment of vacant units.

On March 29, 1988, CHA removed from its tenant selection and assignment plan the language that gave a preference to applicants willing to accept an offer in a unit where their race did not predominate.[41] CHA also stated that it would use its Section 8 Program to assist in the transfer of over-housed tenants from its public housing projects into appropriately-sized units.

CHA's occupancy reports from 1986 through 1988 reveal that:

(1) CHA made fifty-five offers of units in predominantly white projects to thirty-eight elderly white applicants. CHA made one offer of a unit in Sunrise, the black project, to these applicants, and this was CHA's only first offer of a unit in a project where the applicant's race did not predominate.

(2) CHA made two offers of units in Sunrise and one offer of a unit in a predominantly white project to two elderly black applicants. CHA made no first offers of units in a project where the applicant's race did not

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to Dennis L. Wilson, Exec. Dir. of CHA (November 25, 1987) (NAACP Ex. 20).

[41]/ Letter from Dennis L. Wilson, Exec. Dir. of CHA, to Sam R. Moseley, Regional Adm'r, Regional Hous. Comm'n (Apr. 4, 1988) (NAACP Ex. 63).

predominate.

(3) CHA made thirty offers of units in predominantly white projects to twenty-eight white families. CHA made eight offers of units in Sunrise to these applicants. These were the only first offers CHA made of units in a project where the applicant's race did not predominate.

(4) CHA made nine offers of units in Sunrise and five offers of units in predominantly white projects to twelve black families. CHA made four first offers of units in a project where the applicant's race did not predominate.[42]

III. THE APPLICABLE LAW

Rule 56(c) of the Federal Rules of Civil Procedure allows summary judgment only where there is no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law.[43] All reasonable doubts and inferences must be decided in the light most favorable to the party opposing the motion.[44] Indeed, as long as there appears to be some evidentiary support for the disputed allegations, the court must deny the motion.[45] Finally, a summary judgment motion may be "opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves[.]"[46]

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[42]/ *See* NAACP Ex. 65.

[43]/ Fed. R. Civ. P. 56(e).

[44]/ *Thornbrough v. Columbus & Greenville R.R.*, 760 F.2d 633, 640 (5th Cir. 1985).

[45]/ *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 595 (5th Cir. 1981) (en banc).

[46]/ *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

A. Standing

CHA argues that the NAACP does not have standing to bring this suit on behalf of its members. HUD has not challenged the NAACP's standing. This Court finds that the NAACP has standing to sue both CHA and HUD.

An association has standing to sue whenever it can allege injury to itself or injury to its members.[47] The NAACP is alleging injury to its members. An association has standing to bring suit on behalf of its members when: (1) the association's members would have standing to sue on their own; (2) it is unnecessary for individual members to participate in the lawsuit; and (3) the interests at stake are germane to the association's purpose.[48]

Taking the facts as alleged in the NAACP's complaint as true for purposes of standing,[49] this Court finds that the NAACP meets the requirements of associational standing. The NAACP's members would have standing to sue on their own because they can allege actual injury traceable to the Defendants' conduct and redressable by a favorable federal court decision.[50] The NAACP alleges that both HUD and CHA adopted policies that resulted in racially segregated public housing projects. The NAACP alleges that three of its members are residents of CHA's black public housing projects. These members who were denied equal housing on account of race have sustained an actual injury traceable to the Defendants' conduct. The nature of the relief the NAACP seeks from this Court--an injunction requiring the

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[47]/ *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

[48]/ *Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333, 343 (1977).

[49]/ *Warth*, 422 U.S. at 501.

[50]/ *Allen v. Wright*, 468 U.S. 737, 751 (1984). *See* Chemerinsky, **Federal Jurisdiction** § 2.3.1 (1989).

Defendants to end the racial segregation and to adopt a plan to rectify the effects of the segregation--would redress the injury suffered by the NAACP's members. In addition, the injunctive relief requested does not demand the kind of individualized proof that would require the participation of the NAACP's members.[51] Finally, the NAACP's attempt to protect its members is germane to its organizational purpose of ending racial segregation and inequality.

In challenging agency action and thereby seeking to proceed under the Administrative Procedure Act ("the APA"), the NAACP must satisfy not only the constitutional dimensions of standing but also a prudential one--the zone of interests test.[52] The zone of interests test requires the complaining party to show that it is arguably within the zone of interests that Congress designed the statute at issue to protect.[53] Congress enacted Title VI and Title VIII to protect black persons from racial discrimination.[54] This Court finds that the NAACP is within the zone of interests that Title VI and Title

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[51]/ *See Hunt*, 432 U.S. at 343-44.

[52]/ *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987).

[53]/ *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

[54]/ *See* 42 U.S. C. §§ 2000d, 3601. Section 601 of Title VI of the Civil Rights Act of 1964 provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

Section 801 of Title VIII of the Civil Rights Act of 1968 states that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601.

VIII were designed to protect.[55] This Court also finds that the NAACP is within the zone of interests that sections 1981 and 1982 were designed to protect.[56] Congress enacted sections 1981 and 1982, in part, to enforce the Thirteenth Amendment's prohibition of slavery.[57] Finally, this Court finds that the NAACP is within the zone of interests that the equal protection component of the Due Process Clause of the Fifth Amendment was designed to protect.[58]

B. Title VI of the Civil Rights Act of 1964

HUD contends that Title VI creates no private right of action against a federal funding agency like itself. Section 601 of Title VI of the Civil Rights Act of 1964 provides:

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[55]/ *See, e.g., Munoz-Mendoza v. Pierce*, 711 F.2d 421, 425 (1st Cir. 1983); *Young v. Pierce*, 544 F. Supp. 1010, 1022 (E.D. Tex. 1982).

[56]/ *See, e.g., id.* at 1022-23. Section 1981(a) states that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981.

Section 1982 states that:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982.

[57]/ *See General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

[58]/ *See, e.g., Young v. Pierce*, 544 F. Supp. at 1023.

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[59]

Title VI also contains an administrative mechanism that authorizes federal funding agencies to implement the provisions of section 601 by terminating funding assistance to a federal program recipient found in violation of the nondiscrimination policy of Title VI. Concerns over the potential for abuse of the federal agency's funding termination power led Congress to include several procedural protections for the recipient in sections 602 and 603 of Title VI.[60] Under section 602, the federal agency may not cut-off funding unless the recipient has had notice and an opportunity for a hearing.[61]

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[59]/ 42 U.S.C. § 2000d.

[60]/ *See NAACP v. Medical Ctr., Inc.*, 599 F.2d 1247, 1253-54 (3d Cir. 1979).

[61]/ 42 U.S.C. § 2000d-1. Section 2000d-1 provides:

> Each federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such a program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of

Section 603 of Title VI allows the funding recipient to seek judicial review of agency action taken pursuant to section 602.[62]

Under Title VI, victims of discrimination have an implied right of

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> any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Id. (emphasis in original).

Pursuant to this section, HUD promulgated regulations to provide complaint and investigative procedures for possible Title VI violations. *See* 24 C.F.R. §§ 1.1-1.12. The regulations permit any victim of discrimination to submit a written complaint to HUD within 180 days of the alleged discrimination. 24 C.F.R. § 1.7(b). HUD must then conduct a prompt investigation of the complaint and attempt to resolve any violations of Title VI through informal means. 24 C.F.R. § 1.7(c). If the informal means cannot remedy the noncompliance, then HUD may threaten the termination of federal funding. 24 C.F.R. § 1.8(a). Before a funding termination can become effective: (1) HUD must notify the applicant or recipient of federal funds of its failure to comply and have determined that voluntary compliance is not feasible; (2) there must have been an express finding, on the record and after opportunity for hearing, that the applicant or recipient has failed to comply; (3) HUD must approve the request seeking funding termination; and (4) 30 days must have elapsed after HUD has filed a written report to Congress stating the reasons for the funding termination. 24 C.F.R. § 1.8(c).

[62]/ 42 U.S.C. § 2000d-2. Section 2000d-2 states:

> Any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that chapter.

Id.

action against the recipients of federal funding who do not comply with the Title VI principle of racial equality.[63] Accordingly, the NAACP has a private right of action against CHA. However, HUD argues that Title VI does not create a private right of action against the federal funding agency. HUD contends that the NAACP can maintain an action against HUD only under the APA.

In recent decisions, the United States Supreme Court has shown some reluctance to create new private rights of action.[64] *Cort v. Ash* demonstrated that courts may not necessarily imply a private right of action simply because a federal statute has been violated, causing injury to some person.[65] In *Touche Ross & Co. v. Redington*, the Supreme Court replaced the

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[63]/ *See Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 696 & 696 nn.20, 21, 703, 706 n.40 (1979); *Bossier Parish Sch. Bd. v. Lemon*, 370 F.2d 847, 852 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967). *See also Guardians Ass'n v. Civil Service Comm'n.*, 463 U.S. 582 (1983).

[64]/ *See e.g., Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) (refusing to create private right of action under § 206 of Investments Advisors Act); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) (refusing to create private right of action under Securities Investor Protection Act). *See generally* Chemerinsky, **Federal Jurisdiction** § 6.3.3 (1989) (noting recent trend of United States Supreme Court decisions refusing to find implied private rights of action).

[65]/ *See Cannon*, 441 U.S. at 688; *Cort v. Ash*, 422 U.S. 66 (1975). In *Cort v. Ash*, the Supreme Court held that a court must determine the existence of an implied private right of action using the following factors:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (emphasis in original) (citations omitted).

four-factor test of *Cort v. Ash* with a narrower inquiry,[66] so that now a court's only task is to determine whether Congress intended to create, either explicitly or by implication, a private right of action.[67] The *Touche Ross* Court said that: "The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law."[68]

A great deal of controversy exists among federal courts over whether Title VI creates an implied right of action against a federal funding agency. Although the United States Supreme Court found affirmative evidence that Congress intended section 601 of Title VI to create a private right of action against the recipients of federal funds,[69] it did not address the question of whether Congress also intended to create a private right of action against the federal agency providing the funds. This Court, however, will address the question, applying the *Touche Ross* restrictive approach to determine whether an implied private right of action exists.

Although the Fifth Circuit has not decided whether Title VI creates a private right of action against a federal funding agency, this Court is aware of the decisions in other circuits that have permitted such a cause of action.[70] Many of these decisions simply assumed that a private right of

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[66]/ *Touche Ross*, 442 U.S. at 574.

[67]/ *Id.* at 568, 575.

[68]/ *Id.* at 578.

[69]/ *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696 & 696 nn.20, 21, 703, 706 n.40 (1979). *See Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983).

[70]/ *See, e.g., Garrett v. City of Hamtramck*, 503 F.2d 1236 (6th Cir. 1974); *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971); *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970); *Little Earth of United Tribes v. HUD*, 584 F. Supp.

action existed because of the presence of compelling evidence indicating that a federal agency had abandoned its duty to eliminate discrimination.[71] However, since *Cort v. Ash*, courts may no longer assume the existence of a private right of action merely because a federal statute has been violated. The ambiguity that characterized many pre-*Cort* decisions is no longer acceptable. Consequently, the presence or absence of compelling circumstances is not the dispositive factor in determining whether an implied cause of action exists. As the Supreme Court has pointed out, the only question for courts to examine is whether Congress intended to create an express or implied cause of action.[72] None of the decisions finding a private right of action against a federal funding agency under Title VI analyzed this specific question of congressional intent. The better-reasoned decisions are from those courts that have made the proper inquiry into legislative intent and refused to find an implied cause of action against a federal funding agency.[73]

The Supreme Court noted in *Cannon v. University of Chicago* that Congress wanted to accomplish two separate but related objectives with its passage of

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1292 (D. Minn. 1983); *Young v. Pierce*, 544 F. Supp. 1010 (E.D. Tex. 1982); *Munoz-Mendoza v. Pierce*, 520 F. Supp. 180 (D. Mass. 1981); *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. La. 1969). *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 696 n.21 (1979) (listing cases).

[71]/ See, e.g., *Young v. Pierce*, 544 F. Supp. at 1015. *See Grimes v. Cavazos*, 786 F. Supp. 1184, 1191 (S.D.N.Y. 1992) (noting existence of extraordinary circumstances that lead to several courts' finding an implied private right of action against a federal agency).

[72]/ *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979).

[73]/ *See, e.g., NAACP v. Medical Ctr., Inc.*, 599 F.2d 1247, 1252-58 (3d Cir. 1979); *Givens v. Chaires*, No. 3-83-0131-H, slip op. at 3-4 (N.D. Tex. Jan. 23, 1984).

Title IX, patterned after Title VI.[74] First, Congress wanted to prevent the use of any federal funds by discriminatory recipients. Title VI attempts to achieve this objective through the enforcement procedures set out in section 602 that could ultimately result in a funding cut-off. Second, because victims of discrimination cannot compel the federal agency to terminate funds, Congress wanted to provide the victims with a means of protecting themselves against discriminatory practices.[75] Title VI furthers this objective through the use of a private cause of action against the funding recipient. These two means of accomplishing the objectives of Title VI are not incompatible. A federal agency's ordering a funding termination for an isolated discriminatory incident is a severe remedy and might be inappropriate relief for a victim of discrimination who merely wishes to obtain a benefit that a recipient has improperly denied him. In such a situation, an individually-tailored court order requiring the recipient to cease the discriminatory practice and grant

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[74]/ 441 U.S. 677, 704-08 (1979). The *Cannon* Court noted that Congress used Title VI as a basis for its design of Title IX. *Id.* at 694. Consequently, other courts have consistently held that the language of *Cannon* is applicable to discussions of Title VI. *See e.g., NAACP v. Medical Ctr., Inc.*, 599 F.2d 1247 (3d Cir. 1979); *Grimes v. Cavazos*, 786 F. Supp. 1184 (S.D.N.Y. 1992); *Community Brotherhood of Lynn, Inc. v. Lynn Redevelopment Auth.*, 523 F. Supp. 779 (D. Mass. 1981).

[75]/ *See Community Brotherhood*, 523 F. Supp. at 781 (citing *Cannon*, 441 U.S. at 706 n.41). The district court in *Community Brotherhood* said that the Supreme Court found the implication of a private right of action against a funding recipient necessary because a victim of discrimination could not compel funding termination or injunctive relief against the funding agency. *Community Brotherhood*, 523 F. Supp. at 781.

See also Cannon, 441 U.S. at 706 n.41. Examining the agency regulations adopted pursuant to Title IX, similar to the regulations HUD adopted pursuant to section 602 of Title VI, the *Cannon* Court said that "the complaint procedure adopted by HEW does not allow the complainant to participate in the investigation or subsequent enforcement proceedings. Moreover, even if those proceedings result in a finding of a violation, a resulting voluntary compliance agreement need not include relief for the complainant." *Id.* (citations omitted).

the victim the benefit sought is often a more efficient and appropriate form of relief. In addition, the private right of action against the recipient enables the federal agency to accomplish more effectively the purposes of Title VI because the agency may not have adequate resources to administer the enforcement procedures of section 602 in every case.[76] Finally, because a private right of action against a recipient requesting a declaratory judgment or injunction against future discrimination does not involve a funding termination decision or disrupt administrative enforcement procedures, it would not implicate the concerns that led to the section 602 limitations on a federal agency's funding termination power.[77]

The reasons that led to the dual enforcement procedures in Title VI also led the Third Circuit to refuse to find a private cause of action against the federal funding agency. A private action against the federal agency necessarily would implicate the section 602 enforcement procedures of Title VI.[78] Because such an action would essentially enable a victim of discrimination to participate in funding termination decisions[79] and

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[76]/ A 1977 DOJ evaluation of HUD's Title VI enforcement efforts found that HUD had failed (1) to develop a compliance program that could review a substantial number of its federal funding recipients; (2) to resolve, in a timely manner, possible civil rights violations, along with individual complaints from alleged victims of discrimination; and (3) to allocate sufficient resources to its Title VI enforcement efforts. DOJ, **Interagency Survey Report: Evaluation of Title VI Enforcement at the U.S. Department of Housing and Urban Development**, 27-32 (Sept. 1977) (NAACP Ex. 14). *See Cannon*, 441 U.S. at 706-08 nn.41 & 42 (1979).

[77]/ *NAACP v. Medical Ctr., Inc.*, 599 F.2d 1247, 1255 n.30 (3d Cir. 1979).

[78]/ *Id.* at 1254 n.27.

[79]/ *But see Young v. Pierce*, 544 F. Supp. 1010, 1013-17 (E.D. Tex. 1982) (finding that *NAACP v. Medical Center* was poorly-reasoned). In *Young*, the district court concluded that a private right of action against the federal funding agency would not necessarily entangle a victim of discrimination in

ultimately lead to the circumvention and disruption of the section 602 administrative procedures, the Third Circuit refused to find an implied cause of action against the federal funding agency.[80] Any other outcome would have enabled a victim to compel the federal agency to terminate financial assistance without providing the funding recipient with the procedural protections set out in sections 602 and 603 of Title VI.[81] A private right of action against the funding recipient still enables a victim to procure adequate relief without the federal agency as a party. In addition, the APA permits a victim of discrimination to obtain judicial review of the federal

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the administrative decision to terminate funding. *Id.* at 1014 n. 3. Given the proven success of funding terminations in ending discrimination, *National Black Police Ass'n, v. Velde*, 712 F.2d 569, 582 n.74 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 963 (1984), and the paucity of other means of HUD's effectuating Title VI compliance, it is unclear in *Young* how such a private right of action would work and what form of declaratory or injunctive relief a victim of discrimination could request that would not ultimately invoke the funding termination procedures of section 602.

[80]/ *Medical Ctr.*, 599 F.2d at 1254 n.27. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 715 (1979). In *Cannon*, the Supreme Court held that Title IX of the Education Amendments of 1972 provided a private cause of action against the recipient of federal funds. *Id.* at 688-89. Although the question of whether Title IX permitted a private right of action against the federal funding agency was not directly before it, the Court noted that the final version of Title VI, upon which Congress based Title IX, was "a compromise aimed at protecting individual rights without subjecting the Government to suits." *Id.* at 715. Examining the legislative history of Title VI, the Court suggested a reason for this compromise:

> In its final form, § 601 was far more conducive to implication of a private remedy against a discriminatory recipient than was the original language, but at the same time was arguably *less* conducive to implication of a private remedy against the Government (as well as the recipient) to compel the cutoff of funds. Although willing to extend private rights against the discriminatory recipients, the Government may not have been anxious to encourage suits against itself.

Id. at 716 n.51 (emphasis in original).

[81]/ *Medical Ctr.*, 599 F.2d at 1254 n.27. *See Grimes v. Cavazos*, 786 F. Supp. 1184, 1190 (S.D.N.Y. 1992).

agency's decision.[82] In fact, the availability of judicial review under the APA has led the First Circuit to note that this form of relief precludes the implication of a private right of action against the federal agency.[83] Accordingly, this Court agrees with HUD's contention that Title VI does not imply a private right of action against a federal funding agency.

Before the NAACP may proceed with its private cause of action against CHA, this Court must address the question of whether a plaintiff has to exhaust the agency funding termination procedures contained in sections 602 and 603 of Title VI. In *Cannon v. University of Chicago*, the Supreme Court noted in dictum that Title IX, like Title VI, did not require the plaintiff to exhaust administrative remedies before proceeding with a private cause of action.[84] The Court observed that exhaustion of administrative procedures before filing suit was inappropriate. Because the federal agency may not have the enforcement resources to investigate adequately every complaint of discriminatory conduct it receives, the *Cannon* Court said that "individual complainants cannot assure themselves that the administrative process will reach a decision on their complaints within a reasonable time."[85]

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[82]/ This Court will address later the NAACP's right to proceed under the APA.

[83]/ *See Munoz-Mendoza v. Pierce*, 711 F.2d 421 (1st Cir. 1983). In *Munoz-Mendoza*, minority residents of Boston claimed that HUD's multi-million dollar urban development action grant was not preceded by adequate planning and would have a discriminatory impact on low-income residents of Boston. Although the district court found that the plaintiffs possessed a private right of action under Title VI against HUD, the First Circuit, in remanding the case for further proceedings, mentioned that "there is no need to locate a separate private right of action [against HUD] given the judicial review provisions of the APA." *Id.* at 429.

[84]/ 441 U.S. 677, 706 n.41 (1979). *See, e.g., Medical Ctr.*, 599 F.2d at 1249 n.6, 1250 n.10.

[85]/ *Cannon*, 441 U.S. at 706 n. 41. One HUD official said to a member of

Furthermore, the Court noted that the administrative enforcement mechanism of funding termination available under Title VI may not give a victim of discrimination the kind of individualized relief she is seeking.[86] Accordingly, this Court finds that a plaintiff is not required to exhaust the administrative processes before bringing a private cause of action directly against a funding recipient.

C. Title VIII of the Civil Rights Act of 1968

Section 801 of Title VIII of the Civil Rights Act of 1968 states that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[87] Sections 804-806 prohibit discrimination related to the sale, rental, financing, or brokerage of housing.[88] Section 808(e)(5) states that the Secretary of HUD shall "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [fair housing]."[89] HUD contends that the NAACP has no private right of action against it for failure to carry out the mandate of section 808(e)(5).[90]

Although the Fifth Circuit has not decided whether Title VIII contains a private cause of action against HUD, some courts in other circuits have

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DOJ conducting a review of HUD's Title VI enforcement activities: "We don't get as many complaints as we would if people had the faith they'd get a timely response." **Interagency Report** 30 (NAACP Ex. 14).

[86]/ *Cannon*, 441 U.S. at 706 n.41.

[87]/ 42 U.S.C. § 3601.

[88]/ 42 U.S.C. §§ 3604, 3605, 3606 (Supp. 1992).

[89]/ 42 U.S.C. § 3608(e)(5) (Supp. 1992).

[90]/ The NAACP may bring an action directly against CHA because § 813 permits a victim of discrimination to pursue a private right of action against a federal funding recipient. *See* 42 U.S.C. § 3613(a)(1)(A) (Supp. 1992).

concluded that Title VIII does permit such an action.[91] However, these courts failed to address the ultimate question of congressional intent, as the United States Supreme Court required in *Touche Ross & Co. v. Redington*, in determining whether to imply a private right of action.[92] In *Young v. Pierce*, the district court held that a private cause of action existed against HUD to ensure HUD's compliance with its express and affirmative duties under section 808(e)(5) of Title VIII.[93]

The "affirmative duty" language of section 808(e)(5) is insufficient evidence of congressional intent to create a private right of action against HUD.[94] This Court is of the opinion that the decisions from those courts that have properly analyzed the question of congressional intent and refused to imply a private right of action against HUD are better-reasoned.[95] These decisions have emphasized that the elaborate and comprehensive enforcement procedures expressly set out in Title VIII[96] indicate that Congress did not

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[91]/ *See, e.g., Client's Council v. Pierce*, 711 F.2d 1406 (8th Cir. 1983). *See also Young v. Pierce*, 544 F. Supp. 1010 (E.D. Tex. 1982).

[92]/ 442 U.S. 560, 578 (1979).

[93]/ 544 F. Supp. 1010, 1017-19 (E.D. Tex. 1982). *See also Client's Council v. Pierce*, 711 F.2d 1406, 1425 (8th Cir. 1983) (holding, as alternative finding of liability, that HUD had failed to carry out its affirmative duty to implement fair housing and eliminate discrimination).

[94]/ *See Touche Ross*, 442 U.S. at 578.

[95]/ See *NAACP v. Sec. of HUD*, 817 F.2d 149 (1st Cir. 1987); *Latinos Unidos de Chelsea en Accion v. Sec. of HUD*, 799 F.2d 774 (1st Cir. 1986); *Givens v. Chaires*, No. 3-83-0131-H (N.D. Tex. Jan. 23, 1984).

[96]/ *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified as amended in 42 U.S.C. §§ 3601-3614). In 1988, Congress added to the already elaborate enforcement mechanism of Title VIII. Section 810 permits a victim of housing discrimination to file a complaint with the Secretary of HUD. 42 U.S.C. § 3610(a)(1)(A)(i). The Secretary must serve notice upon the funding recipient and permit the recipient to file an answer to the complaint. 42 U.S.C. § 3610(a)(1)(B)(i)-(iii). The Secretary

intend to create a private right of action against HUD.[97] In view of these express procedures for enforcing the fair housing policy of Title VIII, it is doubtful that "Congress absentmindedly forgot to mention an intended private action" against HUD.[98]

Another factor one circuit emphasized in refusing to imply a private right of action against HUD was the availability of relief under the APA.[99] The First Circuit criticized the decisions of other courts that found a private right of action against HUD but that failed to consider the role of judicial review of agency action under the APA.[100] Because a federal

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must then initiate an investigation, 42 U.S.C. § 3610(a)(1)(B)(iv), and attempt conciliation. 42 U.S.C. § 3610(b). The Secretary can refer the complaint to the Attorney General with a recommendation to file a civil action pursuant to § 814. 42 U.S.C. § 3610(c). Section 812 permits a complainant to elect to bring the claims in a civil action, commenced by the Attorney General. 42 U.S.C. §§ 3612(a), 3612(o). Any aggrieved person may intervene as of right in the civil action. 42 U.S.C. § 3612(o). The Secretary, in the alternative, must provide an administrative law judge to conduct a hearing relating to the claim on the record. 42 U.S.C. § 3612(b). The Secretary may review any findings, conclusion, or order that an administrative law judge issues after conducting a hearing. 42 U.S.C. § 3612(h). Any party aggrieved by a final order issued after a hearing may obtain judicial review. 42 U.S.C. § 3612(i). Section 813 permits an aggrieved person to commence a civil action not later than two years after the occurrence of an alleged discriminatory housing practice. 42 U.S.C. § 3613(a)(1)(A). The court may appoint an attorney and waive costs if the person alleging the discriminatory housing practice cannot afford them. 42 U.S.C. § 3613(b). A court may grant actual and punitive damages, as well as injunctive relief, to the victim of discrimination. 42 U.S.C. § 3613(c). The Attorney General may intervene in a civil action brought by a victim of discrimination if the Attorney General certifies that the case is of general public importance. 42 U.S.C. § 3613(e). Section 814 authorizes the Attorney General to bring a civil action against anyone who is engaging in a pattern or practice of housing discrimination. 42 U.S.C. § 3614(a). Any aggrieved person may intervene in a civil action brought by the Attorney General. 42 U.S.C. § 3614(e).

[97]/ *See Latinos Unidos*, 799 F.2d at 792-93; *Givens*, No. 3-83-0131-H, slip op. at 5.

[98]/ *Latinos Unidos*, 799 F.2d at 793 (citations omitted).

[99]/ *NAACP v. Sec. of HUD*, 817 F.2d at 152-54.

[100]/ *Id.* at 153. In *NAACP v. Sec. of HUD*, the First Circuit

agency's conduct is usually reviewable under the APA for conformity with statutory duties, the First Circuit found it difficult to understand why Congress would ever create a private right of action against a federal agency.[101]

In addition to finding that the original Title VIII legislation did not create a private cause of action against HUD, this Court also concludes that Congress did not intend the 1988 amendments to Title VIII, specifically the amendment to section 813, to create a private cause of action against HUD. The report of the House Judiciary Committee, in the legislative history accompanying the 1988 amendments, states that the amendment to section 813 merely continues the private right of action against the funding recipient already existing under the original language of Title VIII,[102] but

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specifically criticized the decision of *Young v. Pierce*, 544 F. Supp. 1010 (E.D. Tex. 1982), for its failure to consider the role of the APA before finding a private right of action against HUD under Title VIII. *NAACP v. Sec. of HUD*, 817 F.2d at 153.

[101]/ *Id.* at 152. In *NAACP v. Sec. of HUD*, the First Circuit explained the reasons for its refusal to find a private right of action against HUD under Title VIII when review of the agency action is available under the APA:

> Given [the principles of administrative law], as set forth in the APA, it is not surprising that cases discussing a "private right of action" implied from a federal statute do not involve a right of action against the federal government. Rather, they typically involve statutes that impose obligations upon a *nonfederal person* (a private entity or a nonfederal agency of government). The statute typically provides that the federal government will enforce the obligations against the nonfederal person. The "private right of action" issue is whether Congress meant to give an injured person a right himself to enforce the federal statute directly against the nonfederal person or whether the injured person can do no more than ask the federal government to enforce the statute.

Id. (citations omitted) (emphasis in original).

[102]/ *See* Civil Rights Act of 1968, Pub. L. No. 90-284, Title VIII, § 812, 82 Stat. 88 (1968) (codified at 42 U.S.C. §§ 3601-3614) (amended 1988). The original language of § 812 of Title VIII provided for private enforcement,

eliminates some of the restrictions on the exercise of that right.[103] The report also states that the amendments are intended to overcome the primary weakness in the existing law--its limited and ineffective means of enforcement.[104] The report makes no mention of intending to create a new private cause of action against HUD. Accordingly, this Court finds that Title VIII does not permit a private right of action against HUD.

Before the NAACP may proceed in its private right of action against CHA, this Court must address the question of whether a plaintiff needs to exhaust the administrative procedures provided under Title VIII. In *Gladstone, Realtors v. Village of Bellwood*, the United States Supreme Court noted that the legislative history to Title VIII suggested that immediate judicial review was available to all complainants who sought it, with the administrative procedures providing an alternative source of relief.[105] Furthermore, the legislative history surrounding the passage of section 813 of the Fair Housing Amendments Act of 1988 notes that "an aggrieved person is not required to exhaust the administrative process before filing a civil action."[106] This

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through a civil action, of any housing discrimination relating to rental, sale, financing, or brokerage. 42 U.S.C. § 3612 (1968). However, Congress excluded from private civil enforcement under § 812 the provisions of § 808, which listed HUD's affirmative duties under Title VIII. *See* 42 U.S.C. §§ 3608, 3612. The exclusion of § 808 from private civil enforcement is further evidence that Congress did not intend to create a private right of action against HUD even under the original language of Title VIII.

[103]/ H.R. No. 711, 100th Cong., 2d Sess. 39 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 2173, 2200.

[104]/ *Id.* at 13, 15, 16, *reprinted in* 1988 U.S. Code Cong. & Admin. News at 2174, 2176, 2177.

[105]/ 441 U.S. 91, 105-08 (1979).

[106]/ H.R. No. 711, 100th Cong., 2d Sess. 39 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 2173, 2200. Noting that a plaintiff need not exhaust administrative remedies, the House Judiciary Committee Report went on to state

Court agrees that the exhaustion of the administrative procedures of Title VIII is not a prerequisite to the filing of a private cause of action directly against a funding recipient.

D. Section 1983

The NAACP seeks to use section 1983 to enforce its Fourteenth Amendment, Title VI, and Title VIII claims against CHA. Before the NAACP may bring suit under section 1983, this Court must determine whether CHA acted under color of state law in allegedly depriving the NAACP of its federal constitutional and statutory rights. CHA is a federally-subsidized, locally administered corporate and political body created under Texas law.[107] The mayor of the City of Commerce appoints a five-member board of commissioners to operate CHA.[108] CHA then has the authority to exercise "public and essential governmental functions and has the powers necessary or convenient to accomplish the purposes [of public housing]."[109] In *Billington v. Underwood*, the Fifth Circuit recognized that public housing authorities are state actors for purposes of the Fourteenth Amendment.[110] Because the Supreme Court has held that the state action requirement of the Fourteenth Amendment is identical to the statutory requirement of action taken "under

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that "[t]he Committee intends for the administrative proceeding to be a primary, but not exclusive, method for persons aggrieved by discriminatory housing practices to seek redress." H.R. No. 711 at 39, 1988 U.S. Code Cong. & Admin. News at 2200.

[107]/ Tex. Local Gov. Code 392.011(a).

[108]/ Tex. Local Gov. Code 392.031.

[109]/ Tex. Local Gov. Code 392.051.

[110]/ 613 F.2d 91, 92 n.1 (5th Cir. 1980).

color of state law,"[111] the NAACP may properly bring a section 1983 suit against CHA.

The next question this Court must address is whether the NAACP may use section 1983 to enforce Title VI and Title VIII. The Supreme Court, in a series of recent decisions, has held that not every federal law is enforceable under section 1983.[112] In *Pennhurst State School & Hospital v. Halderman*,[113] the Supreme Court recognized an exception to its expansive holding in *Maine v. Thiboutot*[114] that made section 1983 suits available to redress state officials' violations of any federally-created rights.[115] The *Pennhurst* Court concluded that a plaintiff may use section 1983 to enforce federal statutes only when (1) Congress has not foreclosed private enforcement of the federal statute; and (2) the statute creates enforceable rights.[116]

On only two occasions has the Court found sufficient evidence of congressional intent within a federal statutory scheme to foreclose section 1983 enforcement.[117] First, in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, the Court noted that the presence of a

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[111]/ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982).

[112]/ *See generally* Chemerinsky, **Federal Jurisdiction** § 8.8 (1989).

[113]/ 451 U.S. 1 (1981).

[114]/ 448 U.S. 1 (1980).

[115]/ *Id.* at 4.

[116]/ *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981).

[117]/ *See Suter v. Artist M.*, __ U.S. __, 112 S.Ct. 1360, 1368-69 n.11 (1992); *id.* at 1376-77 (Blackmun, J., dissenting) (noting *Smith v. Robinson*, 468 U.S. 992 (1984), and *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), as the only instances where the Court concluded that the federal statutes at issue provided a comprehensive enforcement mechanism manifesting Congress's intent to foreclose remedies under § 1983).

comprehensive enforcement mechanism within a federal statute constitutes evidence of congressional intent to displace the remedy provided in section 1983.[118] Although the statutes at issue in *Middlesex* provided for judicial review of administrative decisions and contained a limited "citizen-suit" provision permitting "private attorneys general" to bring suit, the Court concluded that these provisions were evidence of Congress's intent to foreclose an implied private right of action and supplant any remedies available under section 1983.[119] The Court said that permitting a plaintiff to bring suit directly under section 1983 would allow the plaintiff to circumvent the elaborate enforcement procedures and express remedies of the statutes.[120] Second, in *Smith v. Robinson*, the Court again found that comprehensive enforcement mechanisms were evidence of congressional intent to make the Education of the Handicapped Act the exclusive means of protecting the constitutional right of a handicapped child to a public education.[121]

However, in *Wright v. City of Roanoke Redevelopment & Housing Authority*, the Court permitted a plaintiff to use section 1983 to enforce the Brooke Amendment because the statute's remedial mechanisms were not sufficiently comprehensive or effective.[122] Simply because HUD had the power to cut-off the funding of a local housing authority found in violation of the Brooke

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[118]/ 453 U.S. 1, 20-21 (1981).

[119]/ *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 21 (1981).

[120]/ *Id.* at 20 & 20 n.30. *See Smith v. Robinson*, 468 U.S. 992, 1012-13 (1984).

[121]/ 468 U.S. 992, 1013 (1984).

[122]/ *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 425 (1987).

Amendment did not indicate that Congress intended to foreclose the use of section 1983, the Court said.[123] An important factor in the Court's finding was the absence of a provision within the Brooke Amendment permitting judicial review of violations of the statute.[124] The Court noted that in both *Middlesex* and *Smith*, the federal statutes at issue provided means for judicial review of administrative decisions, demonstrating congressional intent to foreclose the section 1983 remedy.[125] Furthermore, the Court implied that, because the burden is on the state actor to prove that Congress intended to foreclose private enforcement of the federal statute at issue, a presumption exists in favor of permitting the use of section 1983 to enforce federally-created rights.[126]

Based on this Court's earlier analysis of the administrative schemes of Title VI and Title VIII, the NAACP may use section 1983 to enforce the federal rights contained within those statutes. Title VI has administrative and judicial review procedures that provide safeguards for a recipient threatened with the termination of federal financial assistance. However, the complaint procedure adopted by HUD pursuant to Title VI does not allow a victim of discrimination to compel an agency to terminate funding or participate in the investigation and enforcement proceedings. Like *Wright*, HUD's power to terminate funding is insufficient evidence of congressional intent to supplant section 1983 remedies. In addition, the relief available under Title VI and

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[123]/ *Id.* at 428 (citing for comparison *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704-07 (1979)). *See also Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 522 (1990).

[124]/ *Wright*, 479 U.S. at 427-29.

[125]/ *Id.* at 427.

[126]/ *Id.* at 423-24.

HUD regulations is often inappropriate for the victim of discrimination who seeks an individually-tailored remedy. Finally, HUD lacks the resources to investigate timely every complaint. These factors provide compelling proof of the insufficiency of the administrative procedures of Title VI for the victim of discrimination.

Besides the insufficiency of the administrative procedures of Title VI and HUD regulations, the Supreme Court's recognition of an implied private right of action under Title VI against a funding recipient provides additional evidence that Congress did not intend to foreclose section 1983 remedies.[127] This implied private right of action demonstrates that Congress did not intend the administrative enforcement procedures of Title VI to be the exclusive remedy for victims of discrimination. In *Cannon v. University of Chicago*, the Court was unconcerned with the possibility that a private right of action would permit a plaintiff to circumvent the administrative procedures of Title VI.[128] Because complainants cannot assure themselves that the administrative process will reach a decision on their complaints within a reasonable time, the Court said that it made little sense to require exhaustion before bringing a private cause of action.[129] Similarly, this Court finds that it makes little sense to foreclose section 1983 actions that would also circumvent the administrative procedures of Title VI.

Although the statutory scheme of Title VIII is as comprehensive as the statutes at issue in *Sea Clammers* and *Smith*, Title VIII contains evidence of congressional intent not to foreclose section 1983 remedies. Title VIII has

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[127]/ *See Virginia Hosp. Ass'n*, 496 U.S. at 522 n.19.

[128]/ 441 U.S. 677, 706 n.41 (1979).

[129]/ *Id.*

an elaborate enforcement mechanism that includes a provision permitting a victim of discrimination to seek judicial review of HUD's administrative decisions.[130] However, Title VIII also has an express provision that allows a victim of discrimination to bring a private right of action against the federal funding recipient for alleged violations of Title VIII.[131] Furthermore, the legislative history surrounding the Fair Housing Amendments Act of 1988 states that Congress did not intend the administrative enforcement procedures of Title VIII to be the exclusive remedy for victims of discriminatory housing practices.[132] Therefore, like Title VI, the private right of action available under Title VIII permits a victim of discrimination to circumvent the administrative enforcement procedures of Title VIII. Accordingly, this Court finds that Congress did not intend the comprehensive administrative procedures of Title VIII to foreclose the use of section 1983 to enforce Title VIII.

This Court also finds that both Title VI and Title VIII create substantive rights, enforceable under section 1983. In deciding whether a federal statute creates an enforceable right, a court first must determine whether Congress intended the statute to benefit the plaintiff.[133] If the plaintiff is the intended beneficiary, the statute creates enforceable rights unless the statute merely reflects a congressional preference for a certain kind of conduct or the interest the plaintiff asserts is so vague that it is

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[130]/ 42 U.S.C. § 3612(i) (Supp. 1992).

[131]/ 42 U.S.C. § 3613(a)(1)(A) (Supp. 1992).

[132]/ H.R. No. 711, 100th Cong., 2d Sess. 39 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 2173, 2200.

[133]/ *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990).

beyond the competence of the judiciary to enforce.[134]

The benefits Congress intended to confer on plaintiffs like the NAACP are sufficiently specific and definite to qualify as rights within the competence of the judiciary to enforce. The existence of an implied private cause of action in Title VI and an express cause of action in Title VIII provides the most compelling evidence that Congress intended these statutes to create substantive rights and obligations that a victim of discrimination could enforce under section 1983.[135] In addition, the language and legislative history surrounding the enactment of Title VI and Title VIII do more than merely "express a congressional preference for certain kinds of treatment."[136] Title VI and Title VIII codify the fundamental right of all persons to be treated equally without regard to race, color, or national origin.

E. Sovereign Immunity

HUD initially claimed that sovereign immunity barred actions for injunctive relief against a federal agency. However, in its supplementary response to the NAACP's Motion for Partial Summary Judgment, HUD abandoned that defense and now claims that sovereign immunity bars only claims for money damages against a federal agency. HUD's citations on this point are irrelevant because the NAACP seeks injunctive relief against HUD.[137] HUD

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[134]/ *Id.*; *see also Suter v. Artist M.*, __ U.S. __, 112 S.Ct. 1360, 1367, 1370 (1992) (finding that the proper inquiry for determining when a federal statute creates a substantive right is whether the statute unambiguously confers an enforceable right upon the statute's intended beneficiaries).

[135]/ *See, e.g., Virginia Hosp. Ass'n*, 496 U.S. at 516-19; *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 27-28 & 28 n.21 (1981).

[136]/ *Id.* at 19.

[137]/ HUD implicitly argues that the injunctive relief the NAACP seeks--

correctly concedes that the judicial review provisions of the APA permit a plaintiff to obtain declaratory and injunctive relief against a federal agency.

The Fifth Circuit held that, with the amendment of 5 U.S.C. section 702 of the APA in 1976, Congress waived sovereign immunity for nonstatutory review of a federal agency or officer acting in an official capacity in cases seeking nonmonetary relief brought under 28 U.S.C. section 1331, the general federal question jurisdictional statute.[138] Because the NAACP's claims involving

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the cessation of racial segregation and the disestablishment of the effects of the segregation--will involve the payment of money from the federal treasury and is therefore barred by a sovereign immunity defense. HUD cites *Colorado Dept. of Highways v. U.S. Dept. of Transport.*, 840 U.S. F.2d 753, 755 (10th Cir. 1988), for the proposition that courts will look behind the label of the relief requested and decide whether a claim for declarative or injunctive relief actually involves the payment of money damages from the government. However, the United States Supreme Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), holds that the term "money damages" in 5 U.S.C. § 702 of the APA means compensatory relief for an injury suffered. The *Bowen* Court noted that an equitable action for specific relief could include an injunction either directing or restraining an official's conduct. *Id.* at 893. The Supreme Court said that "[t]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" *Id.* This Court finds that the NAACP's request for injunctive relief does not involve the payment of money damages as compensation for losses or injuries that the NAACP sustained.

[138]/ *Sheehan v. Army & Air Force Exchange Serv.*, 619 F.2d 1132, 1139 (5th Cir. 1980), *rev'd in part on other grounds*, 456 U.S. 728 (1982). *See also Warin v. Director, Department of Treasury*, 672 F.2d 590, 592 (6th Cir. 1982); *Carpet Linoleum & Resilient Tile Layers v. Brown*, 656 F.2d 564, 567 (10th Cir. 1981); *Jaffee v. United States*, 592 F.2d 712, 718-19 (3d Cir. 1979); H.R. No. 1656, 94th Cong., 2d Sess. 1-13 (1976), *reprinted in* 1976 U.S.Code Cong. & Admin. News 6121, 6121-33.

The amended language of section 702 of the APA states that:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that

the Fifth Amendment, Title VI, Title VIII, and 42 U.S.C. sections 1981 and 1982 arise under the Constitution or laws of the United States, section 1331 gives this Court general federal question jurisdiction.[139] The combination of section 1331 with section 702 of the APA acts as a waiver of sovereign immunity to all of the NAACP's causes of action against HUD.[140] Accordingly, this Court finds that sovereign immunity does not bar the NAACP

> it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702.

[139]/ The Due Process Clause of the Fifth Amendment restricts the federal government in areas where the Equal Protection Clause of the Fourteenth Amendment restricts state actors. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). Accordingly, the Fifth Amendment applies to the NAACP's equal protection claim against HUD, while the Fourteenth Amendment applies to the NAACP's equal protection claim against CHA. Furthermore, sections 1981 and 1982 are applicable to both state and federal defendants. *See Penn v. Schlesinger*, 490 F.2d 700, 702-03 (5th Cir. 1973), *rev'd on other grounds*, 497 F.2d 970 (5th Cir. 1974) (en banc). Congress enacted section 1983 to implement the principles of the Fourteenth Amendment and, consequently, section 1983 prohibits persons acting under color of state law from discriminating. *See District of Columbia v. Carter*, 409 U.S. 418, 423 (1973). On the other hand, because sections 1981 and 1982 have roots in the Thirteenth Amendment, the reach of these statutes is not limited to state action. *See General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 390 n.17 (1982). Sections 1981 and 1982 bar all racial discrimination from any source. *See General Bldg. Contractors, 458 U.S. at 387 (citing Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968)). Accordingly, the NAACP may bring a private cause of action against CHA and HUD under sections 1981 and 1982.

[140]/ Because section 702 of the APA requires the NAACP to name the proper federal officer before it may take advantage of the provision's waiver of sovereign immunity, this Court will treat the NAACP's complaint as properly amended. Fed. R. Civ. P. 15.

from seeking judicial review of HUD's conduct under the APA.

The NAACP, besides seeking review of federal agency action under the APA, also may bring direct causes of action against HUD under the Fifth Amendment and sections 1981 and 1982. HUD claims that sovereign immunity bars the NAACP from seeking relief directly under these statutes. The Supreme Court has recognized an exception to the doctrine of sovereign immunity: Sovereign immunity does not bar suits for specific relief against government officials who allegedly are acting beyond their legal authority or pursuant to an unconstitutional statute.[141] A plaintiff may seek an injunction restraining the illegal conduct of an individual officer responsible for implementing the federal government or agency policies.[142] However, the relief available under this exception is limited to the court's simply ordering the cessation of the unlawful conduct.[143] Sovereign immunity will bar the suit if the relief sought requires the sovereign to act affirmatively[144] or places an intolerable burden upon governmental functions.[145] The difficulty courts faced in trying to discern whether an injunction would operate directly against the federal government or agency rather than the named federal official led Congress to amend the APA in 1976 and permit plaintiffs to bring suits for injunctive relief directly against the federal government, its agencies, officers, or employees.[146]

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[141]/ *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-90 (1949).

[142]/ *Id.* at 690.

[143]/ *Id.* at 691 n.11.

[144]/ *Id.*

[145]/ *See Dugan v. Rank*, 372 U.S. 609, 620 (1963).

[146]/ *See* H.R. No. 1656, 94th Cong., 2d Sess. 5-6 (1976), *reprinted in*

Accordingly, this Court need not address the issue of sovereign immunity presented by any of the NAACP's direct causes of action against HUD and will address the NAACP's Fifth Amendment and sections 1981 and 1982 claims against HUD under the APA only.

F. Administrative Procedure Act

1. Exhaustion of Administrative Remedies

The NAACP seeks judicial review under the APA of HUD's administrative actions. However, the NAACP has done nothing to exhaust the administrative remedies available under Title VI and Title VIII. This Court must determine whether the NAACP is required to exhaust the administrative procedures available under Title VI and Title VIII before permitting judicial review under the APA.

Usually, a plaintiff must exhaust administrative procedures before seeking judicial review under the APA. The doctrine of exhaustion promotes administrative and judicial efficiency.[147] Exhaustion enhances efficiency by avoiding unwarranted judicial interference with the administrative process before an agency has had the opportunity to exercise its expertise and develop a factual record to aid review.[148] However, when the purposes of the doctrine are not served, exhaustion is inappropriate.[149] Consequently, the United States Supreme Court has recognized that a plaintiff does not have to

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1976 U.S. Code Cong. & Admin. News 6121, 6125-26; Chemerinsky, **Federal Jurisdiction** § 9.2.2 (1989).

[147]/ *See Atlantic Richfield Co. v. United States Dept. of Energy*, 769 F.2d 771, 781 (D.C. Cir. 1984).

[148]/ *See McKart v. United States*, 395 U.S. 185, 193-94 (1969); *Atlantic Richfield*, 769 F.2d at 781.

[149]/ *McKart*, 395 U.S. at 193.

exhaust inadequate administrative remedies.[150] Exhaustion will not further administrative efficiency if an agency's remedies are inadequate, and judicial review will not unnecessarily interfere with an agency's administrative procedures. This Court finds that because the administrative remedies of Title VI and Title VIII cannot provide adequate relief against HUD in this case, requiring the NAACP to exhaust administrative procedures would not serve the purposes of the exhaustion doctrine.

Title VI and Title VIII provide administrative remedies against a funding recipient. However, Title VI and Title VIII do not provide any administrative remedies against a federal funding agency. Neither statute contains procedures requiring HUD to investigate allegations of its own discriminatory conduct.[151] Congress designed the administrative enforcement procedures of Title VI, and HUD fashioned regulations pursuant to Title VI, to provide relief for specific acts of a federal funding recipient's discriminatory conduct. Title VI provides no remedial procedures that address an agency's decision to continue funding a recipient allegedly engaged in discriminatory practices. Similarly, the comprehensive administrative procedures of Title VIII provide redress against a local authority's discriminatory housing practices, but do not apply to the enforcement of HUD's affirmative duties under section 808 of Title VIII. Accordingly, this Court finds that the NAACP's failure to exhaust the administrative procedures of

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[150]/ *See Coit Independence Joint Venture v. Federal Savings & Loan Ins. Corp.*, 489 U.S. 561, 587 (1989); *see also Hessbrook v. Lennon*, 777 F.2d 999, 1003 (5th Cir. 1985).

[151]/ *See Shannon v. HUD*, 436 F.2d 809, 820 (3d Cir. 1970) (holding that the complaint and enforcement procedures available under Title VI and Title VIII did not permit victims of discrimination to challenge the adequacy of HUD's procedures or affirmative duties).

Title VI and Title VIII does not result in the forfeiture of its right to judicial review of HUD's actions under the APA.

2. Reviewability of Agency Action

This Court must next address the question of whether HUD's administrative decisions are reviewable. The United States Supreme Court has held that under the APA a strong presumption exists in favor of the reviewability of agency action.[152] However, not all agency action is reviewable under the APA. Section 701 of the APA states that a court may not review agency action when (1) a statute precludes judicial review; or (2) the law commits agency action to agency discretion.[153]

The first exception to the general presumption of reviewability is not applicable to HUD's conduct under Title VI or Title VIII. The second exception presents a more difficult question. The NAACP seeks review of two separate categories of conduct: (1) HUD's continued funding of CHA, or conversely, its refusal to initiate the funding termination procedure against CHA; and (2) HUD's failure to further the policies of Title VIII in an affirmative manner. Regarding the first category of conduct, section 603 of Title VI expressly permits an aggrieved person to seek judicial review of agency action that results in "terminating or refusing to grant or to continue financial assistance" of a funding recipient found in noncompliance with Title VI.[154] Section 603 also states that the decision of the agency in these instances "shall not be deemed committed to unreviewable agency

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[152]/ *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967).

[153]/ 5 U.S.C. § 701.

[154]/ 42 U.S.C. § 2000d-2.

discretion."[155] However, section 603 says nothing about the reviewability of a federal agency's decision to *continue funding* a recipient engaged in discriminatory conduct. Similarly, Title VIII contains no procedures that call for judicial review of HUD's alleged failure to further affirmatively the policies of fair housing.

Accordingly, HUD contends that its actions were merely agency decisions refusing to enforce the dictates of Title VI and Title VIII against CHA. HUD cites *Heckler* v. *Chaney*[156] as support for the proposition that an agency's nonenforcement decision is presumed to be committed to agency discretion and is therefore immune from judicial review under section 701(a)(2) of the APA. *In Chaney*, prison inmates sentenced to death by the injection of lethal drugs petitioned the Food and Drug Administration ("FDA"), claiming that it had not approved the drugs for such use. The inmates claimed that the FDA had to approve the drugs as safe and effective for capital punishment before manufacturers could ship the drugs through interstate commerce. The inmates requested the FDA to take various investigative and enforcement actions in order to prevent any violation of the Food, Drug, and Cosmetic Act ("FDCA"). The FDA refused to take any enforcement action.

The United States Supreme Court held that an agency's decision not to take enforcement action is presumptively unreviewable under the APA because nonenforcement decisions are generally committed to an agency's absolute discretion.[157] Unfortunately, the Court gave little guidance in defining a "nonenforcement decision" and instead, noted the administrative concern behind

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[155]/ *Id.*

[156]/ 470 U.S. 821 (1985).

[157]/ *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

its decision: Because an agency usually cannot take enforcement action against every violation of a statute, the agency, and not the court, is in a better position to assess the value of expending limited resources in pursuing an administrative enforcement action. The Court emphasized that nonenforcement decisions are only presumptively unreviewable. A plaintiff may rebut the presumption if the legislative command of the statutory scheme has provided the agency with meaningful standards defining the limits of its discretion in exercising its enforcement authority. The Court also noted, in dictum, that if an agency "consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty," then the substantive statute might reveal that such a decision is not committed to agency discretion.[158] Finally, the Court distinguished *Chaney* from the case where the plaintiffs claim that the agency's refusal to take administrative action rises to the level of a constitutional violation.[159]

Some courts have held that *Chaney* commits to unreviewable agency discretion decisions to refuse to initiate enforcement proceedings or continue to fund a recipient.[160] However, *Chaney* is distinguishable from the case

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[158]/ *Id.* at 833 n.4 (citing *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)). *See also Chaney*, 470 U.S. at 839 (Brennan, J., concurring). Brennan's concurrence in *Chaney* noted that the Court did not decide that nonenforcement decisions are unreviewable in cases where "an agency engages in a pattern of nonenforcement of clear statutory language." *Id.* (citing *Adams*).

[159]/ *Id.* at 838. *See also Chaney*, 470 U.S. at 839 (Brennan, J., concurring).

[160]/ *See, e.g., Arnow v. United States Nuclear Regulatory Comm'n*, 868 F.2d 223, 226-36 (7th Cir.) (holding that 5 U.S.C. § 702(a)(2) of the APA commits to unreviewable discretion agency's refusal to take enforcement action), *cert. denied*, 493 U.S. 813 (1989); *International Union v. Brock*, 783 F.2d 237, 244-45 (D.C. Cir. 1986) (same); *Eastern Paralyzed Veterans Assoc. of Penn. v. Southeastern Penn. Transport. Auth.*, No. 85-446, slip op. at 10 (E.D. Penn. Oct. 2, 1986) (characterizing Department of Transportation's continued

before this Court. *Chaney* involved an agency's decision not to take investigative and enforcement action in one particular instance of an alleged statutory violation. The instant case, however, involves HUD's decisions over a period of time demonstrating a preference for a particular method of enforcement--informal compliance agreements--that proved ineffective. Furthermore, Title VI, HUD's accompanying regulations, and Title VIII--unlike the FDCA--contain meaningful standards for HUD to use as guidelines in exercising its enforcement powers and for this Court to use in determining the legality of HUD's actions.

In *Chaney*, the Court noted that the enforcement provision in the FDCA stated only that the FDA was authorized to conduct examinations and investigations. Other provisions of the statute gave no indication of the circumstances under which the FDA should seek an injunction or seize any offending food, drug, or cosmetic article.[161] However, Title VI and the regulations HUD promulgated pursuant to section 602 of Title VI,[162] provide HUD with more explicit guidance as to when it should use its funding

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funding of an allegedly discriminatory transportation authority as a nonenforcement decision presumptively committed to unreviewable agency discretion).

[161]/ *Chaney*, 470 U.S. at 835.

[162]/ Section 602 of Title VI states that "[e]ach Federal department and agency which is empowered to extend Federal financial assistance. . .is authorized and directed to effectuate the provisions of section 2000d of this title by issuing rules, regulations, or orders[.]" 42 U.S.C. § 2000d-1. This Court is aware that *Chaney* did not directly address the question of whether an agency's rules and regulations can provide courts with adequate standards for judicial review of nonenforcement decisions. *See Chaney*, 470 U.S. at 836. However, the Supreme Court has implied that agency rules, regulations, and announcement of policies could, under some circumstances, supply sufficient guidelines for judicial review. *See, e.g., Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985) (per curiam) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 40-44 (1983)).

termination enforcement power. HUD enacted regulations in accordance with Title VI to ensure that:

> no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Housing and Urban Development.[163]

The regulations list seven forms of discriminatory actions specifically prohibited, along with a general prohibition of discrimination.[164] The enforcement provisions of the regulations state that HUD "shall make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with [the nondiscrimination policy of Title VI and the regulations]."[165] Title VI and the regulations provide that HUD should first attempt to secure a recipient's compliance through voluntary means.[166] If HUD cannot correct a recipient's noncompliance through informal means, then HUD may use its funding termination power, or any other means authorized by law, to effectuate compliance.[167]

As the *Chaney* Court pointed out, a federal agency is in a much better position to decide how to allocate its limited enforcement resources and assess the chances that a particular method of enforcement will succeed.[168] The courts have little expertise in evaluating these kinds of agency decisions. Appropriately, many of these determinations are left to the

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[163]/ 24 C.F.R. § 1.1 (1992).

[164]/ 24 C.F.R. § 1.4 (1992).

[165]/ 24 C.F.R. § 1.7(c) (1992).

[166]/ 42 U.S.C. § 2000d-1; 24 C.F.R. § 1.7(d) (1992).

[167]/ 42 U.S.C. § 2000d-1; 24 C.F.R. § 1.8(a) (1992).

[168]/ *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

agency's unreviewable discretion. In the instant case, however, the NAACP is not asking this Court to determine whether, after a single instance of discriminatory conduct, it was an abuse of HUD's enforcement discretion to continue funding CHA and use a voluntary method of ensuring compliance, rather than a termination of CHA's federal financial assistance. Instead, the NAACP is asking this Court to determine whether HUD's continued use of ineffective compliance agreements, after it became aware of CHA's discriminatory practices, was an abuse of HUD's enforcement discretion. Courts are not without adequate standards in supervising this kind of agency decision.

Both section 602 of Title VI and HUD regulations contemplate informal, voluntary means as the first step toward effectuating a recipient's compliance. However, if the federal funding recipient does not take responsive action within a reasonable period of time, the statute and the regulations do not relieve HUD of its responsibility to enforce Title VI through a funding termination or any other means authorized by law.[169] HUD's decisions to achieve CHA's compliance through means less severe than a funding termination suggest that HUD's actions were inconsistent with its statutory and regulatory policy against discrimination in federally-assisted housing.[170] This Court finds that HUD "consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty."[171]

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[169]/ *Adams* v. *Richardson*, 480 F.2d 1159, 1162-63 (D.C. Cir. 1973) (en banc).

[170]/ *See Shannon* v. *HUD*, 436 F.2d 809, 819 (3d Cir. 1970) (holding that HUD's broad enforcement discretion "must be exercised within the framework of the national policy against discrimination in federally assisted housing").

[171]/ *Adams* v. *Richardson*, 480 F.2d at 1162. *See* Chaney, 470 U.S. at 833 n.4 (citing *Adams* v. *Richardson*); Chaney, 470 U.S. at 839 (Brennan, J., concurring). *See also Robbins* v. *Reagan*, 780 F.2d 37, 46 (D.C. Cir. 1985) (noting that "[c]ourts often have invalidated agency action because it simply

Accordingly, HUD's continued failure to take sufficient enforcement steps as contemplated by Title VI and the regulations is subject to judicial review under the APA.

Like Title VI, Title VIII also contains adequate standards for a court to review HUD's administrative enforcement decisions. The NAACP alleges that HUD failed to carry out its duties under section 808(e)(5) of Title VIII. Section 808(e)(5) states that HUD "shall. . .administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [fair housing]."[172] Admittedly, HUD does have broad discretion in choosing methods to achieve fair housing.[173] However, simply because a statute grants broad discretion to an agency does not necessarily foreclose judicial review of the agency's decisions. Congress may limit an agency's exercise of enforcement discretion by setting "substantive priorities" or by defining the kind of cases or issues the agency will pursue.[174] In the absence of clear statutory guidelines, courts can find limits on enforcement discretion within the statutory scheme by examining congressional intent to achieve a specific goal.[175] Accordingly, HUD must exercise its broad discretion in achieving the objective of Title VIII within

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did not comport with standards of rational decisionmaking given the agency's uncontested goal").

[172]/ 42 U.S.C. § 3608(e)(5) (Supp. 1992).

[173]/ *See Client's Council v. Pierce*, 711 F.2d 1406, 1425 (8th Cir. 1983) (citing *Shannon v. HUD*, 436 F.2d 809, 819 (3d Cir. 1970)).

[174]/ *Chaney*, 470 U.S. at 833.

[175]/ *See Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985); *Suffolk Hous. Servs. v. Town of Islip*, No. CV-82-2882, slip op. at 3-4 (E.D.N.Y. Jul. 14, 1987).

the framework of the federal policy in favor of fair housing.[176] It is important to note again that the NAACP is not asking this Court to decide whether one decision involving a single instance of CHA's discriminatory conduct was an abuse of HUD's enforcement discretion. Instead, the NAACP is asking this Court to determine whether a series of decisions over time demonstrates HUD's failure to further in an affirmative manner the goal of fair housing. This Court is not left without adequate standards of judicial review in a case where HUD's long-term conduct reveals that it explicitly adopted a policy amounting to an abdication of its statutory responsibilities.[177] Accordingly, this Court finds that Congress did not intend to commit to unreviewable agency discretion HUD's continued failure to further its Title VIII statutory duties.[178]

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[176]/ *See Shannon v. HUD*, 436 F.2d 809, 819 (3d Cir. 1970).

[177]/ *See, e.g., NAACP v. Secretary of HUD*, 817 F.2d 149, 158-59 (1st Cir. 1987); *Suffolk Hous. Servs. v. Town of Islip*, No. CV-82-2882, slip op. at 3-4 (E.D.N.Y. Jul. 14, 1987). In *NAACP v. HUD*, the First Circuit held that Title VIII did not commit to unreviewable agency discretion HUD's duty to further the policies of fair housing in an affirmative manner. *NAACP*, 817 F.2d at 157-60. The First Circuit came to this conclusion for several reasons. First, HUD's assistance in achieving fair housing was a significant right. *Id.* at 157-58. Second, adequate standards for assessing HUD's conduct were available, especially when HUD's pattern of behavior revealed an abdication of its statutory duties. *Id.* at 158-59. Third, judicial review for alleged violations of HUD's duty would not unduly interfere with HUD's ability to satisfy its statutory obligations. *Id.* at 159. Fourth, a court could develop an appropriate remedy. *Id.* at 159-60.

[178]/ In addition to finding that Title VI and Title VIII contain meaningful standards against which this Court may judge the lawfulness of HUD's failure to take effective enforcement action, this Court also notes that HUD's decisions rise to the level of constitutional violations. As this Court's findings on the issue of liability will reveal, HUD's continued funding of CHA, its refusal to compel CHA to follow the policies of fair housing, and its promulgation of a tenant selection and assignment policy that did nothing to eradicate racial discrimination in public housing violated the equal protection principle contained in the Due Process Clause of the Fifth Amendment. Congress never intended to commit an agency's alleged constitutional violations to unreviewable agency discretion. *See Chaney*, 470

3. Scope of Review

Before reviewing HUD's conduct, this Court must determine whether it may conduct de novo review or whether it must rely only on the administrative record. HUD claims that this Court's review is limited to the administrative record. The NAACP claims that this Court may conduct de novo review. This Court finds that section 706 of the APA permits it to conduct a trial de novo of the facts of this case.

Section 706 authorizes trial de novo of the facts only in limited situations.[179] In *Citizens to Preserve Overton Park v. Volpe*, the United

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U.S. at 838; *Chaney*, 470 U.S. at 839 (Brennan, J., concurring). Judicial deference to agency expertise in fact-finding and decision-making has no place when constitutional violations are involved because the courts have the greater expertise in these matters. *Porter v. Califano*, 592 F.2d 770, 780 & 780 n.15 (5th Cir. 1979).

[179]/ 5 U.S.C. § 706(2)(A). Section 706 of the APA states that:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret unconstitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action. The reviewing court shall--
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> (1) compel agency action unlawfully withheld or unreasonably delayed; and
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
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> (D) without observance of procedure required by law;
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> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
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> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
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> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

States Supreme Court defined the narrow instances which called for de novo review.[180] The Court permitted de novo review in only two circumstances: (1) "when the action is adjudicatory in nature and the agency factfinding procedures are inadequate;" and (2) "when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action."[181]

The first circumstance for allowing de novo review is applicable here. First, HUD's refusal to cut-off federal funding and its pursuit of CHA's cessation of discriminatory housing practices through a series of compliance agreements were informal agency actions that were adjudicatory in nature.[182] Second, HUD's administrative fact-finding procedures were inadequate. The NAACP claims that HUD itself acted in a discriminatory manner, yet, as this Court held earlier, neither Title VI nor Title VIII provide administrative procedures which require HUD to investigate its own discrimination.[183]

Id.

[180]/ 401 U.S. 402, 415 (1971).

[181]/ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

[182]/ *See* 5 U.S.C. §§ 551(7), 551(13). Section 551(13) includes "failure to act" within the definition of the term "agency action." 5 U.S.C. § 551(13). The APA has given the term "adjudication" a broad definition. See 5 U.S.C. § 551(7). An adjudication is "an agency determination (other than rulemaking) of particular rather than general applicability that affects private rights or interests." Stein, Mitchell & Mezines, **Administrative Law** § 33.01[1] (1988). HUD's decisions refusing to take effective administrative action against CHA were not "designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). Instead, HUD had to decide a specific factual question affecting the rights of a particular federal funding recipient. *See* 5 U.S.C. § 551(6); Stein, Mitchell & Mezines, § 33.01[1] n.1.

[183]/ *See Shannon v. HUD*, 436 F.2d 809, 820 (3d Cir. 1970) (holding that the complaint and enforcement procedures available under Title VI and Title VIII do not permit a victim of discrimination to challenge the adequacy of

Congress enacted the enforcement procedures of Title VI and Title VIII to ensure that recipients of federal funding did not engage in discriminatory practices. Accordingly, this Court's review is not limited to the administrative record, and it may consider de novo the issue of HUD's alleged discriminatory conduct.[184] Examination of the NAACP's evidentiary materials submitted in support of its Motion for Partial Summary Judgment is therefore appropriate.[185]

Finally, HUD contends that section 704 of the APA precludes the NAACP from bringing an action directly against HUD because the NAACP already has an

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HUD's procedures or its affirmative duties).

[184]/ *See, e.g., Montgomery Improvement Assoc. v. HUD*, 543 F. Supp. 603, 605-07 (M.D. Ala. 1982) (permitting de novo review of HUD's alleged discriminatory conduct under Title VIII).

[185]/ The APA also authorizes trial de novo of a plaintiff's constitutional claims when administrative procedures are inadequate. The NAACP contends that HUD's alleged discriminatory conduct violates the equal protection principle contained within the Due Process Clause of the Fifth Amendment. Under section 706(2)(B) of the APA, Congress intended the courts to make an independent assessment of an agency's alleged constitutional violations. *See* 5 U.S.C. § 706(2)(B); *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979). In *Porter v. Califano*, the Fifth Circuit held that alleged constitutional violations are too important for a reviewing court to leave to an agency's administrative fact-finding and decision-making procedures. *Id.* at 780 & 780 n.15. The courts, not agencies, possess the expertise in determining whether a violation of the Constitution has occurred. As a result, the APA gives the reviewing court the authority to make an independent assessment of the agency's conduct. Trial de novo of constitutional claims is appropriate when agency procedures do not adequately protect an individual's constitutional rights. The inadequacy of agency procedures to provide for some means of assessing HUD's discriminatory practices furnishes this Court with the authority to conduct trial de novo of the constitutional claims. *See Porter v. Califano*, 592 F.2d 770, 781 n.16. The inadequacy of agency procedures also lends support to this Court's finding that the NAACP was not required to exhaust administrative procedures. *See Porter*, 592 F.2d at 781 n.16. However, trial de novo is not always appropriate for constitutional claims. If the administrative procedure is both fair and adequate for presentation of material facts, a court may be required to review the claims based only on the administrative record. See *Quaker Action Group*, 460 F.2d 854, 861 (D.C. Cir. 1971). This is not the case here.

adequate remedy against CHA. Section 704 limits judicial review to "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court[.]"[186] However, the Supreme Court noted in *Bowen v. Massachusetts* that the primary purpose of section 704 was to codify the exhaustion requirement.[187] The Court quoted with approval the statement of an administrative law scholar who said that the "adequate remedy" provision of section 704 merely restated the proposition that a plaintiff is not required to exhaust administrative procedures that cannot provide adequate relief.[188] The Court also said that Congress did not intend the grant of review provided by the first part of section 704 to duplicate previously existing special statutory procedures for review of agency action or "defeat the central purpose of providing a broad spectrum of judicial review of agency action."[189] Accordingly, HUD is in error in its contention that section 704 prohibits the NAACP from seeking relief against HUD simply because the NAACP may have an adequate remedy against CHA in court.

VI. LIABILITY

A. Equal Protection

The United States Supreme Court has held that, under the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment, a plaintiff must prove an intent to discriminate in situations where the government adopts a

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[186]/ 5 U.S.C. § 704.

[187]/ 487 U.S. 879, 903 (1988).

[188]/ *Bowen v. Massachusetts*, 487 U.S. 879, 902 (1988) (quoting K. Davis, **Administrative Law** § 26:11 (2d ed. 1983)).

[189]/ *Bowen v. Massachusetts*, *487 U.S. at* 903.

neutral policy that has a racially disproportionate impact.[190] In *Washington v. Davis*, the Court said that a plaintiff's showing of disparate impact through statistics alone do not always rise to an inference of discriminatory purpose.[191] A plaintiff must then set out any circumstantial or direct evidence that may assist a court in determining whether an invidious discriminatory purpose was a motivating factor in the government's decision to adopt the statute or policy at issue.[192] In *Village of Arlington Heights v. Metropolitan Housing Corporation*, the Supreme Court listed some of the kinds of evidence that might produce a strong inference of discriminatory intent. The *Arlington Heights* Court mentioned, as important evidentiary sources: (1) the extent of the discriminatory impact; (2) the historical background of the decision; (3) any procedural or substantive departures from the normal decision-making sequence; and (4) the legislative or administrative history of the decision-making body.[193] If the plaintiff carries the burden of proving that discriminatory purpose was a motivating factor in the government's

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[190]/ *See Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 242 (1976). Discriminatory purpose means more than volition or awareness of consequences. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979). Instead, discriminatory purpose implies that the decisionmaker "selected or affirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.*

[191]/ *Washington v. Davis*, 426 U.S. at 242. Sometimes, disparate impact is enough to infer discriminatory purpose. The Supreme Court noted in *Washington v. Davis* that, in situations where the statute or government policy has a seriously disproportionate impact upon an identifiable group, the impact alone can demonstrate discriminatory purpose because the government cannot plausibly offer a neutral explanation for the impact of the statute or policy. *Id. See also Personnel Adm'r v. Feeney*, 442 U.S. at 275; *Arlington Heights*, 429 U.S. at 266.

[192]/ *Arlington Heights*, 429 U.S. at 266.

[193]/ *Id.* at 266-68.

decision, then the burden shifts to the government to establish that it would have made the same decision even had it not considered the discriminatory purpose. The detailed chronology of the conduct of CHA and HUD supports this Court's conclusion that both CHA and HUD violated the equal protection principle of the Constitution.

1. CHA

This Court must examine the impact of CHA's facially neutral decisions to determine whether CHA acted with discriminatory purpose and violated the Equal Protection Clause of the Fourteenth Amendment. This Court concludes that the evidence demonstrates that CHA administered its tenant selection and assignment policies with discriminatory purpose, resulting in racially segregated projects.

The factual record is filled with instances of CHA's administrative decisions having an adverse discriminatory impact on CHA's black applicants and tenants. Since 1976, HUD has consistently found CHA in noncompliance with the Title VI mandate of racial equality. At that time, all of the tenants in Sunrise were black. Despite HUD's threats of funding cut-offs and additional findings of noncompliance, CHA had made no progress in integrating Sunrise for thirteen years. Sunrise's first white residents did not move into the project until some time after May 30, 1989.[194] Even with CHA's recent improvements to integrate the projects since the NAACP's institution of this lawsuit, Sunrise is still racially identifiable.

CHA's pattern of offering units to its applicants while operating under the "first-come, first-served" plan provides additional evidence of the discriminatory impact of CHA's decisions on blacks. During the period from

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[194]/ Wilson Aff. at 4 (CHA's Ex. 4).

July 1986 to March 1988, CHA's occupancy reports reveal that CHA offered 111 public housing units to applicants. Fifty-seven (86%) of CHA's first offers to sixty-six white applicants were for units in the predominantly white projects. Ten (71%) of CHA's first offers to fourteen black applicants were for units in Sunrise, the all-black project. CHA claims that it exercises no independent judgment over whom it will offer a unit because prospective tenants apply voluntarily and choose the kind of housing they want.[195] However, CHA's pattern of offers during this two-year period indicates more than a random system of offering an applicant the first available unit in the project with the most vacancies. Instead, the pattern of offers betrays a more invidious system at work: a system that bears more heavily on black applicants, a system that perpetuates existing patterns of racial stratification, a system that departs from any substantive or procedural standards for making offers.

CHA claims that it made significant efforts to end racial segregation in its projects. CHA developed a voluntary plan like the one HUD used to eradicate the discrimination existing in the projects of many East Texas housing authorities.[196] In 1984, CHA adopted a plan calling for the

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[195]/ CHA notes that because only 14 (10%) of its public housing tenants are elderly black individuals and no elderly black individuals were on the waiting list, it has difficulty altering significantly the racial composition of its projects. However, this Court notes that 7 (50%) of these elderly persons live in Sunrise, while only 3 (2.6%) live in Durham II and Tarter, the projects CHA built specifically to house the elderly.

[196]/ Wright Aff. at 3 (CHA's Ex. 1). HUD had achieved some success in desegregating public housing projects when it required 37 local public housing authorities in East Texas to adopt race conscious remedial tenanting procedures. Appendix 3 of **Subsidized Housing** at 2 (NAACP's Ex. 11A). The procedures required local authorities to offer applicants units only in projects where their race did not predominate and to transfer over-housed and under-housed families to projects where their race did not predominate. HUD found that over-housed families presented local authorities with a significant

transfer of over-housed tenants to units in projects where their race did not predominate and giving a preference to applicants who were willing to accept units in projects where their race did not predominate. CHA amended the plan at HUD's suggestion and adopted a "one-offer, one-refusal" policy to replace the "three-offers, three-refusals" policy before an applicant would drop to the bottom of the waiting list. CHA presented no evidence that the plan resulted in any changes in the racial composition of its projects during the period it operated under the plan before being ordered by HUD to remove race conscious language from its plan.[197]

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opportunity to remedy discrimination because over-housing is one of the few, and perhaps exclusive, circumstances in which local authorities have the power to transfer a tenant to an appropriately-sized unit or evict the tenant if the offered unit is rejected. *Id.* at 7-8. In addition, transferring several over-housed families at the same time to a housing project where their race does not predominate eliminates the sense of isolation that might otherwise occur when local authorities transfer only a single family or individual to an all-white or all-black project. *Id.*

CHA claims that many of the over-housed tenants presented acceptable medical excuses, preventing CHA from transferring them to appropriately-sized units. However, this lack of success in transferring over-housed tenants does not explain the overwhelming disparity that existed in the housing project offers CHA made to black applicants.

[197]/ This episode typifies the nature of the relationship between CHA and HUD that is revealed throughout the record. In this instance, CHA submitted an alternative tenant selection and assignment plan in 1984. It is unclear what kind of plan CHA used while awaiting HUD's approval. Regardless, the racial composition of CHA's projects did not change significantly. When HUD finally approved CHA's use of an amended version of the plan in 1985, CHA failed to implement that plan. CHA's occupancy reports from 1986 to 1988 indicate that CHA still appeared to be operating under a "three-offers, three-refusals" plan despite HUD's ordering CHA to adopt a "one-offer, one-refusal" plan. A three-refusal plan in a public housing system with many vacancies often allows applicants to accept a unit in a project where their race predominates, further perpetuating racial segregation. Memorandum from Wanda Helms, Hous. Management Specialist, to John E. Eubanks, Dir. of Desegregation Coordinating Off. (Jun. 11, 1985) (CHA's Ex. 9). In spite of CHA's delinquency during this period, it continued to receive its Annual Contribution Contract payments, and HUD approved its request for modernization funding. HUD later had to remind CHA to use the "one-offer, one-refusal" plan.

This Court recognizes that the racial composition of CHA's public housing projects has improved since 1989. These recent improvements do not, however, excuse CHA's earlier unconstitutional conduct. The record indicates that, prior to the commencement of the NAACP's suit, CHA continually responded to HUD's findings of noncompliance through ineffective or non-existent efforts to eradicate racial discrimination in its projects. The only reasonable inference this Court can draw is that CHA's actions were motivated by a discriminatory purpose. CHA's failure for so long to make any significant attempts to change the racial stratification existing in its projects can only lead this Court to conclude that CHA believed that segregation and discrimination were acceptable. CHA could not provide any nonracial explanation for its actions that would overcome the strong inference of discriminatory purpose that the evidence of disproportionate impact demonstrates.[198] The NAACP has carried its burden and proven that CHA acted with discriminatory purpose in administering its tenant selection and assignment policies. CHA has not submitted any evidence tending to indicate that it would have made the same decisions without considering any invidious purpose. This Court finds CHA liable under the Equal Protection Clause of the Fourteenth Amendment.

2. HUD

HUD contends that the NAACP needs to prove intentional discrimination before it may prevail on its Fifth Amendment equal protection claim. The

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[198]/ This case may present one of the rare instances where, because of the decisionmaker's inability to explain plausibly its actions on a neutral ground, "impact itself would signal that the real classification made by the law was in fact not neutral." *Personnel Administrator v. Feeney*, 442 U.S. 256, 275 (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

NAACP asserts that proof of intentional discrimination is required only in cases involving facially neutral government practices allegedly having a disparate impact. The NAACP argues that HUD's practices are not facially neutral. However, the NAACP claims that it can prove intentional discrimination even if this Court does find that HUD's actions were facially neutral. This Court finds that the evidence presented in this case establishes HUD's liability under the Fifth Amendment in two different instances. First, HUD intentionally continued to recommend a tenant selection and assignment plan that promoted racially segregated housing projects. Second, HUD continued to fund CHA even after HUD knew that CHA was engaged in racially discriminatory housing practices.

This Court must first use the facially neutral analysis of *Washington v. Davis* and determine whether a discriminatory purpose motivated HUD's development and promotion of the "first-come, first-served" tenant selection and assignment policy. Although HUD developed this policy as a means of changing the racial stratification existing in public housing projects, the policy itself is facially neutral because it does not use the applicant's race as a factor in the local authority's decision to assign the applicant to a particular housing project. The policy allowed the applicant to choose the unit most suitable from several vacancies offered.

HUD's predecessor, the PHA, initially recommended that local housing authorities adopt a freedom-of-choice tenant selection and assignment plan. This facially neutral plan permitted the applicant to put down a preference as to where he wished to live within the public housing system operated by the local authority. The PHA abandoned the freedom-of-choice plan after realizing that the plan was not producing any substantial changes in the racial

composition of public housing.

Consequently, HUD adopted the "first-come, first-served" tenant selection and assignment plan in 1967. By 1970, HUD knew that the plan was not working. A DOJ report in 1977 concluded that HUD was not adequately performing its duties to prevent and remedy racial discrimination in public housing. DOJ based part of its conclusion on HUD's failure to implement an effective tenant selection and assignment plan to replace the "first-come, first-served" policy. HUD agreed to develop a new, effective policy as a result of the DOJ report. Despite significant evidence indicating the futility of the "first-come, first-served" policy in eradicating racial discrimination in public housing, HUD ordered CHA to continue using the policy. In fact, HUD directed CHA to discontinue using a race conscious policy that gave a preference to applicants willing to live in a housing project where their race did not predominate and ordered CHA to return to the "first-come, first-served" plan.[199] HUD still uses this plan today.

Using the evidentiary sources listed in *Arlington Heights*, this Court concludes that a discriminatory purpose motivated HUD to continue using the

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[199]/ HUD had achieved some success in desegregating public housing projects when it required 37 local public housing authorities in East Texas to adopt race conscious remedial tenanting procedures. Appendix 3 of **Subsidized Housing** at 2 (NAACP's Ex. 11A). HUD's failure to implement the East Texas race conscious procedures in CHA's public housing projects does not necessarily imply that HUD is guilty of intentional discrimination. HUD must individually assess the conditions existing at each local public housing authority it finds in non-compliance with the requirements of Title VI. This Court cannot assume that compliance measures that proved successful in one authority will be as effective elsewhere. Most of the East Texas authorities shared (1) a history of segregation of the races in public housing attributable mainly to official purpose; (2) a fairly balanced demand for public housing according to race and household classification (elderly and family); (3) waiting lists that were not so lengthy as to predetermine occupancy for years; and (4) geographic concentration of the local authority so that the authority could feasibly assign applicants to any project within the system. *Id.* at 27.

"first-come, first-served" tenant selection and assignment plan despite compelling evidence that the plan had not resulted in any substantial changes in the racial composition of CHA's housing projects. First, the evidence reveals that the discriminatory impact of the plan bears heavily upon CHA's black applicants and tenants because it does not redress the effects of past discrimination.[200] The plan merely perpetuates existing patterns of segregation. The evidence shows that no significant change in the racial composition of the housing projects has occurred since CHA adopted the "first-come, first-served" plan in 1967.[201] Second, HUD departed from its normal substantive standards when it refused to replace its "first-come, first-served" plan. HUD's predecessor abandoned the freedom-of-choice plan when it concluded that the plan was not remedying racial discrimination. Accordingly, HUD's realization that its "first-come, first-served" plan was not effective at eradicating racial discrimination should have strongly influenced a decision to abandon the plan. However, HUD reached the opposite conclusion and continued to use the plan. HUD's failure to account for this substantive departure provides this Court with additional circumstantial evidence that

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[200]/ The Supreme Court stated in *Arlington Heights* that only in rare cases would the presence of a clear pattern of significant racially disproportionate impact alone suffice to prove discriminatory purpose. *Arlington Heights*, 429 U.S. at 266. The case before this Court may present such an instance. HUD's continued use of the "first-come, first-served" tenant selection and assignment plan, despite substantial evidence of its ineffectiveness in remedying racial discrimination, defies any neutral explanation. This Court's inquiry could then end here, without further examination into the other evidentiary sources of discriminatory purpose listed in *Arlington Heights*. *Id.* *See also Personnel Adm'r v. Feeney*, 442 U.S. 256, 275 (1979); *Washington v. Davis*, 426 U.S. 229, 242 (1976).

[201]/ Sunrise was still all black at least until May 30, 1989. Wilson Aff. at 4 (CHA's Ex. 4). However, some of the recent changes in the racial composition of Sunrise and CHA's other housing projects may be attributable to the bringing of this lawsuit in January 1988, rather than any particular success of HUD's "first-come, first-served" plan.

leads to an inference of discriminatory purpose.

This Court concludes that, at least in part, a discriminatory purpose motivated HUD's conduct regarding the development and implementation of the "first-come, first-served" tenant selection and assignment plan. The only reasonable conclusion that this Court can advance to explain HUD's lengthy attraction to the "first-come, first-served" plan is that HUD officials must have believed that racial segregation and discrimination were acceptable.[202] The NAACP has carried its burden in establishing that a discriminatory purpose motivated HUD. HUD has not offered any neutral explanations that can overcome the strong inference of discriminatory purpose or presented any evidence that can demonstrate that it would have continued using the plan even if it had not considered the discriminatory purpose.

HUD also violated the equal protection principle of the Constitution by its continuing financial support of CHA. However, the *Washington v. Davis* analysis of a facially neutral policy is not applicable to this situation because the evidence indicates that HUD knew about CHA's discriminatory practices.[203] The United States Supreme Court held, in *Washington v. Seattle School District*, that a court does not need to conduct a particularized inquiry into the decisionmaker's motivation in every equal protection case.[204] The Court said that legislation based upon a racial classification is presumptively invalid, regardless of the decisionmaker's intent, and a court may uphold the legislation only if a compelling government

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[202]/ *See Client's Council v. Pierce*, 711 F.2d 1406, 1423 (8th Cir. 1983).

[203]/ *See, e.g., Young v. Pierce*, 628 F. Supp. 1037, 1053 (E.D. Tex 1985).

[204]/ 458 U.S. 457, 485 (1982).

interest can overcome strict judicial scrutiny.[205]

HUD's administrative decisions to continue funding CHA were not facially neutral. The evidence indicates that HUD knew CHA was intentionally discriminating. HUD consistently found CHA in noncompliance with Title VI, yet "HUD consistently responded to its findings of noncompliance in ways that allowed [CHA] to continue discriminating."[206] HUD never pursued its numerous threats to cut-off federal financial assistance and instead followed a course of conduct that perpetuated the segregated nature of CHA's public housing projects. Given the proven effectiveness of funding terminations in achieving compliance with Title VI, HUD's decision to rely primarily upon voluntary compliance agreements provides further evidence that HUD consciously and expressly abdicated its statutory and regulatory duties. HUD cannot provide any justification that would enable its administrative decisions to withstand a strict scrutiny analysis. The Fifth Amendment prohibits HUD from providing any tangible assistance that has a significant tendency to support discrimination.[207] Accordingly, this Court finds HUD liable under the APA for its violation of the equal protection component of the Due Process Clause of the Fifth Amendment.

3. **Conspiracy between CHA and HUD**

The NAACP alleges that CHA and HUD acted jointly to deprive the NAACP of its constitutional rights. The NAACP contends that it may bring suit against

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[205]/ *Washington* v. *Seattle Sch. Dist.*, 458 U.S. 457, 485 & 485 n.28 (1982).

[206]/ *Client's Council*, 711 F.2d at 1423.

[207]/ *Norwood* v. *Harrison*, 413 U.S. 455, 466 (1973). *See, e.g., Garrett* v. *City of Hamtramck*, 503 F.2d 1236, 1247 (6th Cir. 1974); *Gautreaux* v. *Romney*, 448 F.2d 731, 740 (7th Cir. 1971).

HUD under section 1983, even though section 1983 applies only to the discriminatory activities of persons acting "under color of state law."[208] A court may, however, find federal officials liable if the alleged constitutional violation is the result of a conspiracy between state and federal officials.[209] The reasoning behind allowing section 1983 suits against federal defendants who act in concert with state officials is that "the state officials provide the requisite state action to make the entire conspiracy actionable under section 1983."[210] In some situations, however, the federal involvement is so pervasive that a court deems the state officials as having acted under color of federal law instead of state law.[211] The test is whether the state actors played a significant role in the deprivation of the plaintiff's constitutional rights.[212]

The case before this Court is similar to the Fifth Circuit case of *Knights of the Ku Klux Klan Realm v. East Baton Rouge Parish School Board*.[213] In *Ku Klux Klan*, the Fifth Circuit addressed the question of whether the Ku Klux Klan could bring suit under section 1983 against the local school board and the United States Department of Health, Education and Welfare

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[208]/ *See Wheeldin v. Wheeler*, 373 U.S. 647, 650 & 650 n.2 (1963); *District of Columbia v. Carter*, 409 U.S. 418, 424 (1973).

[209]/ *See Knights of Ku Klux Klan Realm v. East Baton Rouge Parish Sch. Bd., 735 F.2d 895, 900 (5th Cir. 1984); Hampton v. Hanrahan*, 600 F.2d 600, 623 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980); *Kletschka v. Driver*, 411 F.2d 436, 448-49 (2d Cir. 1969).

[210]/ *Knights of Ku Klux Klan*, 735 F.2d at 900 (quoting *Hampton v. Hanrahan*, 600 F.2d at 623).

[211]/ *Askew v. Bloemker*, 548 F.2d 673, 677-78 (7th Cir. 1976).

[212]/ *Kletschka v. Driver*, 411 F.2d 436, 449 (2d Cir. 1969).

[213]/ 735 F.2d 895 (5th Cir. 1984).

("HEW"). The Klan claimed that the school board and HEW violated the Klan's constitutional rights because of the board's decision preventing the Klan from using a public highschool for a meeting. The board initially granted the Klan's request to use the highschool. However, HEW stated that it would terminate all federal financial assistance to the school district because the board's decision permitting the Klan to use the highschool would violate Title VI. The school board then withdrew its permission to let the Klan use the highschool. The Fifth Circuit held that the Klan could bring a cause of action against HEW using section 1983. The Court said that even though HEW influenced the board's decision, the board made its decision not to risk the loss of federal financial assistance under color of state, not federal, law.[214] In addition, the Court found that the Klan had presented sufficient evidence to establish that HEW and the school board "implicitly agreed" to prevent the Klan from using the highschool.[215]

The Fifth Circuit's reasoning in *Ku Klux Klan* applies to the case before this Court. The undisputed evidence indicates that HUD provided CHA with federal funding and had the power, under Title VI, to terminate that federal funding if CHA engaged in discriminatory conduct. Although HUD exerted considerable influence over CHA, HUD's influence does not change the nature of CHA's conduct. CHA made its decisions regarding tenant assignment policies and took the risk, under color of state law, that HUD would terminate CHA's federal financial assistance. CHA played a crucial role in the deprivation of the NAACP's constitutional rights.

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[214]/ *Id.* at 900.

[215]/ *Id.*

Askew v. Bloemker[216] is distinguishable from the case before this Court. In *Askew*, the Seventh Circuit held that the plaintiffs could not bootstrap a section 1983 claim against federal drug enforcement agents merely because of the presence of several state law enforcement officials serving only in a back-up capacity to the federal agents who organized and executed a raid on a suspected criminal's home.[217] Like *Ku Klux Klan*, the case before this Court contains sufficient evidence to establish an implicit agreement between HUD and CHA to adopt and implement policies which resulted in racially identifiable public housing projects.

B. The Remaining Claims

Sections 1981 and 1982 require the NAACP to prove intentional discrimination before this Court may find HUD and CHA liable.[218] Title VI does not require a showing of discriminatory intent unless the plaintiff is seeking compensatory relief.[219] Section 804 of Title VIII, prohibiting discrimination in the sale or rental of housing, requires only that the plaintiff prove significant discriminatory effect instead of intentional discrimination.[220] Some courts have held that section 808(e)(5) of Title VIII, commanding HUD to administer its programs in a manner to further affirmatively the policies of fair housing, imposes similar obligations upon

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[216]/ 548 F.2d 673 (7th Cir. 1976).

[217]/ *Askew v. Bloemker*, 548 F.2d at 677-78.

[218]/ *See General Bldg. Contractors Ass'n, v. Pennsylvania*, 458 U.S. 375, 391 (1982) (holding that § 1981, like the Equal Protection Clause, requires proof of intentional discrimination); *Memphis v. Greene*, 451 U.S. 100, 131, 135 (1981) (White, J., concurring) (noting that a violation of § 1982 requires some showing of an intent to discriminate on the basis of race).

[219]/ *See Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983).

[220]/ *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986).

HUD as the Fifth Amendment. These courts require the plaintiff to prove either that HUD acted in an intentionally discriminatory manner or that HUD knew of a federal funding recipient's discriminatory practices and yet made no effort to effectuate compliance with Title VIII.[221] Accordingly, this Court's finding that HUD and CHA violated the equal protection principle of the Constitution also resolves the liability issue under the NAACP's remaining claims. This Court's review of HUD's conduct under the APA establishes that HUD violated both Title VI and section 808(e)(5) of Title VIII, along with sections 1981 and 1982. This Court finds CHA liable under Title VI and section 804 of Title VIII, and under sections 1981 and 1982 for its discriminatory conduct in the administration of its low-rent public housing projects.

C. **Factual Disputes**

This Court finds that a genuine issue of material fact exists over (i) whether the units at the predominately white projects were better maintained than the units at Sunrise, its predominantly black project, and (ii) whether the Section 8 Program was administered with discriminatory intent. Accordingly, resolution of these issues through summary judgment is inappropriate.

CONCLUSION

Based upon the summary judgment record, this Court finds that: (1) the NAACP is **GRANTED** summary judgment on CHA's liability under the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, section 804 of

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[221]/ *See, e.g., NAACP v. Sec. of HUD*, 817 F.2d 149, 154-57 (1st Cir. 1987); *Anderson v. City of Alpharetta*, 737 F.2d 1530, 1537 (11th Cir. 1984).

Title VIII of the Civil Rights Act of 1968, and 42 U.S.C. sections 1981 and 1982;

(2) the NAACP is **GRANTED** summary judgment on HUD's liability under the Fifth Amendment, Title VI of the Civil Rights Act of 1964, section 808(e)(5) of Title VIII of the Civil Rights Act of 1968, and 42 U.S.C. sections 1981 and 1982;

(3) the NAACP is **DENIED** summary judgment on the liability of CHA and HUD resulting from alleged disparities in the provision and quality of maintenance services at the public housing projects; and

(4) the NAACP is **DENIED** summary judgment on the liability of CHA and HUD resulting from the alleged discriminatory administration of the Section 8 Program.

Accordingly, the only issues remaining before this Court are (i) the form of relief; (ii) CHA's claims against the City of Commerce as third-party defendant; and (iii) the NAACP's claims against CHA and HUD involving maintenance services at the public housing projects and the administration of the Section 8 Program.

SIGNED THIS 27 DAY OF AUGUST, 1993.

Jerry Buchmeyer

UNITED STATES DISTRICT JUDGE
JERRY BUCHMEYER