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"No Handicapped People Allowed": The Need for Objective Accessibiity Standards under the Fair Housing Act

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"NO HANDICAPPED PEOPLE ALLOWED": THE NEED FOR OBJECTIVE ACCESSIBILITY STANDARDS UNDER THE FAIR HOUSING ACT

By Michael J. Jeter

Abstract: The Fair Housing Act (FHA or the Act) sets forth accessibility requirements that housing developers must meet, but the Act does not contain objective performance standards for satisfying those requirements. This omission creates substantial barriers in housing opportunities for persons with disabilities. For example, the FHA mandates that doors must be wide enough to allow passage of wheelchair users, but it does not provide measurements for door width. The United States Department of Housing and Urban Development (HUD) has attempted to use ten model building codes or "safe harbors" from its regulations as minimal objective standards for accessibility. HUD and the Department of Justice (DOJ) contend that developers must either adopt a safe harbor or show that they followed some comparable objective building standard. However, housing developers continue to build inaccessible housing, arguing that the FHA contains no performance standards and that HUD does not have the authority to proscribe such standards. Some jurisdictions have agreed with HUD's position, holding that a developer's failure to adopt a safe harbor establishes a prima facie case for disability discrimination that may be overcome if the developer shows that it followed some comparable objective standard. Other jurisdictions have sided with developers, holding that the FHA does not require developers to build by any objective standard but, rather, gives developers the freedom to argue that their design and construction conform with the FHA's general accessibility requirements. In turn, developers often hire experts who—without reference to any objective standard—conclude that the units are accessible under the FHA. As a result, accessibility becomes a matter of opinion. When courts do not recognize minimal standards for accessibility in housing, persons with disabilities, developers, and the government all pay a price. Developers will continue to build housing that is inaccessible to persons with disabilities, re-litigating the same question about accessibility, which is costly to both the government and developers. This Comment argues that objective standards would safeguard the rights of persons with disabilities under the FHA, put developers on notice that they must build by an objective standard, and preserve the government's litigation resources. Courts should recognize that HUD's regulations establish minimal accessibility standards, deserve judicial deference under established administrative law principles, and effectuate Congress's intent to eliminate barriers to equal housing opportunities for persons with disabilities.

"A person using a wheelchair is just as effectively excluded from the opportunity to live in a particular dwelling by the lack of access into a unit and by too narrow doorways as by a posted sign saying 'No Handicapped People Allowed.'"[1]

1. H.R. REP. NO. 100-711, at 18 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 2173, 2+173.

INTRODUCTION

Under the Fair Housing Act (FHA or the Act),[2] one form of prohibited disability discrimination is the failure to "design and construct" certain multifamily dwellings in a manner that is accessible to persons with disabilities.[3] The FHA sets forth accessibility requirements that developers must meet[4] (e.g., doors must be wide enough to allow passage for wheelchair users) but the Act does not contain objective performance standards (e.g., measurements for door width) for meeting those requirements. Congress gave the United States Department of Housing and Urban Development (HUD) regulatory authority over the Act.[5] HUD recognizes ten model building codes as "safe harbors"—compliance with the safe harbors constitutes compliance with the Act.[6] HUD has attempted to establish these safe harbors as a minimum objective standards for accessibility in design and construction claims.[7] An increasing number of developers, however, are not adopting any safe harbor, nor are they following any comparable standard, and are building inaccessible multifamily dwellings.[8] Developers argue that the FHA contains no objective standards and that HUD does not have the regulatory authority to prescribe any mandatory performance standards.[9] Under this argument, the standard becomes whatever the developers' experts claim it is.[10] Accessibility, in turn, becomes a matter of opinion.[11]

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2. 42 U.S.C. §§ 3601–3619 (2012).

3. *Id.* § 3604(f)(3)(C).

4. *Id.*

5. *Id.* §§ 3601 note, 3614A; Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 13(b), 102 Stat. 1619, 1636 (codified at 42 U.S.C. § 3601); Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., __ U.S. __, 135 S. Ct. 2507, 2537 (2015).

6. Design and Construction Requirements, 24 C.F.R. § 100.205(e) (2015).

7. Compliance with ANSI A117.1 Standards, 73 Fed. Reg. 63,610, 63,614 (Oct. 24, 2008) (to be codified at 24 C.F.R. § 100).

8. OFFICE OF POLICY DEV. & RES., U.S. DEP'T OF HOUS. & URBAN DEV., MULTIFAMILY BUILDING CONFORMANCE WITH THE FAIR HOUSING ACCESSIBILITY GUIDELINES, at v (2003) [hereinafter HUD CONFORMANCE STUDY], http://www.huduser.org/portal/publications/fairhsg/multifamily.html [https://perma.cc/E8R8-459N].

9. United States v. JPI Constr., L.P., No. 3:09-cv-0412-B, 2011 WL 6963160 (N.D. Tex. Nov. 10, 2011), *report and recommendation adopted*, 2012 WL 43507 (N.D. Tex. Jan. 9, 2012).

10. *See id.* at *4 ("countering" the government's claim "with reports from experts who inspected the same properties and found them to be generally accessible and usable by handicapped persons").

11. *Id.* (noting an expert's conclusion that the subject properties were in compliance with the FHA by conducting a "roll-thru" survey which involved putting an able-bodied person in a wheelchair and having them navigate the property).

Persons with disabilities, especially wheelchair users, can face substantial architectural barriers in housing. For example, units can be completely inaccessible to wheelchair users if there are steps leading to the building's entrance or if the access ramp or slope from the parking lot is at too steep of a grade. Other examples of inaccessible features include thermostats that are out of reach, hallways and doors that are too narrow to allow a wheelchair to pass through, bathroom walls too weak to support grab-bars, and cabinets and kitchen appliances that create insufficient maneuvering space.[12] The FHA prohibits such inaccessible features, but it does not specify exactly how wide a door must be or how much maneuvering space is sufficient.[13] Much of design and construction litigation focuses on what exactly are the parameters of accessibility under the FHA.[14]

This Comment argues that under the FHA, accessibility should be determined by objective standards. The rising trend of design and construction litigation will continue unless housing developers are put on notice that the FHA's accessibility requirements mandate minimal performance standards.[15] Without reference to any set of objective standards, developers will continue to argue that their subjective standards comply with the FHA's accessibility requirements.[16] Subjective standards lead to an increase in inaccessible housing, which in turn generates design and construction litigation.[17] Moreover, the statute of limitations for individual design and construction claims is two years after the alleged discriminatory housing practice occurs,[18] which makes quickly curtailing noncompliance especially important because it may take more than two years for a prospective tenant with disabilities to encounter an inaccessible feature, let alone file a complaint.[19]

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12. 42 U.S.C. § 3604(f)(3)(C)(iii)(I)–(IV) (2012).

13. *Id.* §§ 3601, 3604(f)(3)(C).

14. *See infra* Section I.D.

15. Press Release, Shantae Goodloe, U.S. Dep't of Hous. & Urban Dev., HUD, DOJ Release New Guidance on "Design and Construction" Requirements Under the Fair Housing Act (Apr. 30, 2013) [hereinafter HUD Joint Statement Press Release], http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2013/HUDNo.13-055 [https://perma.cc/GS4U-9WTX]; HUD CONFORMANCE STUDY, *supra* note 8.

16. *JPI Constr., L.P.*, 2011 WL 6963160, at *4.

17. Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" Cases Under the Fair Housing Act*, 40 U. RICH. L. REV. 753, 771–75 (2006).

18. 42 U.S.C. § 3613(a)(1)(A) ("An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice . . . .").

19. The time-barring of design and construction claims has been sharply criticized for impeding enforcement of the FHA. *See, e.g.*, Schwemm, *supra* note 17, at 754–55; Laura Katherine Boren,

Section I.A of this Comment provides background on the FHA's accessibility requirements and the evolution of design and construction claims. Section I.B examines the FHA's legislative history and Congress's intent behind the amendment that set forth the accessibility requirements. Section I.C outlines HUD's regulatory actions after Congress passed the amendment. Finally, Section I.D discusses design and construction litigation, the courts' treatment of the accessibility requirements, and HUD's regulations.

Part II of this Comment argues that HUD's regulations establish minimal standards for compliance with the Act's accessibility requirements. The ten recognized safe harbors should set a floor for accessibility: minimal objective standards that developers must meet or exceed to be in compliance. Minimal standards should not be misconstrued as mandatory standards. HUD's Fair Housing Accessibility Guidelines (Guidelines) and 2008 regulation codifying the ten safe harbors do not mandate that developers adopt a particular safe harbor.[20] Instead, developers are free to adopt any safe harbor or alternatively, any comparable *objective* standard that is at least as good as the safe harbors.[21]

Part III of this Comment argues that HUD's interpretations of the FHA's accessibility requirements deserve judicial deference. First, HUD is the agency that Congress delegated authority to interpret and administer the FHA.[22] Because HUD's Guidelines and codification of the safe harbors should be construed as reasonable interpretations of the FHA, they should be given deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[23] Second, courts should defer

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Note, *Recalling What Congress Forgot: Ledbetter's Continuing Applicability in FHA Design-and-Construction Cases and the Need for a Consistent Legislative Response*, 43 IND. L. REV. 467, 468 (2010); Matthew R. Farley, Note, *Boarding Up the Fair Housing Act: Time Barring Design and Construction Claims for Handicapped Individuals*, 13 SCHOLAR 29, 32 (2010); Stephen M. Frinsko, Note, *Fair Housing Act Design and Construction Claims in the Ninth Circuit Post-*Garcia v. Brockway*: Erecting New Barriers to Individuals with Disabilities*, 46 IDAHO L. REV. 257, 258 (2009).

20. Design and Construction Requirements, 24 C.F.R. § 100.205(e) (2015); Compliance with ANSI A117.1 Standards, 73 Fed. Reg. 63,610, 63,614 (Oct. 24, 2008).

21. 24 C.F.R. § 100.205(e).

22. 42 U.S.C. §§ 3601 note, 3614A; Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 13(b), 102 Stat. 1619, 1636 (codified at 42 U.S.C. § 3601).

23. *See* Meyer v. Holley, 537 U.S. 280, 287–88 (2003) (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984)); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (stating that HUD is "the federal agency primarily charged with the implementation and administration of the [FHA]" and that "we ordinarily defer to an administering agency's reasonable interpretation of a statute").

to HUD's interpretations of its own regulations under *Auer v. Robbins*.[24] HUD's burden-shifting scheme for establishing a prima facie case for a design and construction claim was not explicitly incorporated into the Guidelines or the 2008 Amendment but is found in the Federal Register, HUD's joint statement with the Department of Justice (DOJ), and in its briefs.[25] Violation of the Guidelines, i.e., failure to adopt a safe harbor, is not a per se violation of the FHA, but rather it creates a presumption of a violation that developers are free to rebut by demonstrating that they adopted an objective comparable standard to the safe harbors.[26] HUD's burden-shifting scheme is not a clearly erroneous reading of the Guidelines or the 2008 Amendment and should, therefore, be given *Auer* deference. Finally, HUD's promulgation of the Guidelines and recognition of the ten safe harbors should be given *Skidmore*[27] deference because they represent a considerable body of technical expertise and are the product of over two decades of rulemaking subject to public notice and comment.[28]

Part IV of this Comment argues that HUD's interpretation of the FHA's accessibility requirements effectuates Congress's intent to "eliminate many of the barriers which discriminate against persons with disabilities in their attempts to obtain equal housing opportunities."[29] Recognition of minimal objective standards for compliance with the

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24. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997) (establishing the well-settled proposition that an agency's interpretation of its own regulations is entitled to judicial deference unless it is plainly erroneous or inconsistent with the regulation).

25. Design and Construction Requirements; Compliance with ANSI A117.1 Standards, 72 Fed. Reg. 39,540, 39,540–41 (July 18, 2007); OFFICE OF FAIR HOUS. & EQUAL OPPORTUNITY, U.S. DEP'T OF HOUS. & URBAN DEV., JOINT STATEMENT OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND THE DEPARTMENT OF JUSTICE, ACCESSIBILITY (DESIGN AND CONSTRUCTION) REQUIREMENTS FOR COVERED MULTIFAMILY DWELLINGS UNDER THE FAIR HOUSING ACT (2013) [hereinafter HUD & DOJ JOINT STATEMENT], http://portal.hud.gov/hudportal/documents/huddoc?id=JOINTSTATEMENT.PDF [https://perma.cc/S56L-E52X]; Brief for Respondent, Nelson v. Sec'y, U.S. Dep't of Hous. & Urban Dev., 320 F. App'x 635 (9th Cir. 2009) (Nos. 07-72803 & 07-73230), 2006 WL 5517606.

26. Design and Construction Requirements, Compliance with ANSI A117.1 Standards, 72 Fed. Reg. at 39,542.

27. *See Skidmore*, 323 U.S. at 140 ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

28. Fair Housing Accessibility Guidelines, 56 Fed. Reg. 9472 (Mar. 6, 1991); Design and Construction Requirements, Compliance with ANSI A117.1 Standards, 72 Fed. Reg. 39,540.

29. H.R. REP. NO. 100-711, at 27–28 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 2173, 2188–89.

FHA's accessibility requirements is consistent with Congress's policy goal of preventing the exclusion of persons with disabilities from the American mainstream.[30] The best approach for realizing Congress's intent and ensuring that there is more accessible housing is for courts to recognize HUD's authority to create minimal standards for compliance.

I. BACKGROUND ON THE FHA'S ACCESSIBILITY REQUIREMENTS, HUD'S REGULATORY ACTIONS, AND DESIGN AND CONSTRUCTION LITIGATION

A. The Creation of the Fair Housing Act's Accessibility Requirements and the Basis for Design and Construction Claims

Congress enacted the FHA to prohibit discriminatory housing practices in multifamily dwellings that contain at least four units.[31] In the Fair Housing Amendments Act of 1988 (FHAA), the FHA was amended to include disability in its list of protected classes.[32] As part of this amendment, the FHA now includes several provisions requiring that covered multifamily dwellings be designed and constructed in accordance with specific accessibility requirements.[33] The FHA sets forth accessibility requirements that developers must meet, but the Act does not contain objective performance standards for meeting those requirements.[34] By contrast, in contexts other than housing, accessibility is determined by objective standards under the Americans with Disabilities Act (ADA).[35] This incongruity produces an odd outcome where claims of inaccessible rental or leasing offices are analyzed under the ADA, which includes objective standards for accessible design; whereas claims regarding the rental units themselves may be subject to

30. *Id.* at 18, 1988 U.S.C.C.A.N. at 2179 ("The Fair Housing Amendments Act, like Section 504 of the Rehabilitation Act of 1973, as amended, is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.").

31. 42 U.S.C. §§ 3601, 3604(f)(7)(A)–(B) (2012).

32. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 13(b), 102 Stat. 1619, 1636 (codified at 42 U.S.C. § 3601 note).

33. 42 U.S.C. § 3604(f)(3)(C)(i)–(iii).

34. *Id.*

35. U.S. DEP'T OF JUSTICE, 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN (2010), http://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards.pdf [https://perma.cc/5UP2-DBYM].

the FHA which contains no such corollary standard.[36] In other words, a rental office may be accessible whereas the rental units themselves may not be.

Design and construction claims brought under the FHA allege that developers built covered multifamily dwellings in a way that is inaccessible to persons with disabilities.[37] The amount of design and construction litigation has increased greatly over the past decade, and HUD has found high amounts of noncompliance with the accessibility requirements.[38] Much of the design and construction litigation has centered on what standards developers must follow in order to comply with the Act's accessibility requirements.[39] The text of the FHA provides that:

> (C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that—
>
> (i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;
>
> (ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and
>
> (iii) all premises within such dwellings contain the following features of adaptive design:
>
> (I) an accessible route into and through the dwelling;
>
> (II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
>
> (III) reinforcements in bathroom walls to allow later installation of grab bars; and
>
> (IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.[40]

In the subsections immediately following the accessibility requirements, the FHA states that compliance with the American

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36. *See e.g.*, United States v. Taigen & Sons, Inc., 303 F. Supp. 2d 1129, 1148–51 (D. Idaho 2003) (analyzing plaintiff's claim regarding the leasing office under the ADA and the rental units under the FHA).

37. 42 U.S.C. § 3604(f)(3)(C)(i)–(iii).

38. HUD Joint Statement Press Release, *supra* note 15; HUD CONFORMANCE STUDY, *supra* note 8, at v.

39. *See, e.g.*, United States v. Tanski, No. 1:04-CV-714, 2007 WL 1017020 (N.D.N.Y. Mar. 30, 2007); United States v. Quality Built Constr., 309 F. Supp. 2d 756 (E.D.N.C. 2003).

40. 42 U.S.C. § 3604(f)(3)(C)(i)–(iii).

National Standard Institute's (ANSI) standards suffices to satisfy the accessibility requirements.[41] However, compliance with the ANSI standards is not mandatory. The FHA further granted HUD explicit regulatory authority to provide technical assistance for the implementation of the Act's accessibility requirements.[42] HUD's regulatory authority over the FHA and its rules promulgated subsequent to the 1988 Amendment will be discussed in greater detail in Section I.C.

B. Legislative History: Congress's Intent Behind the Accessibility Requirements

The House report in support of FHAA stated that the new provisions were intended to be a "clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream."[43] The House Judiciary Committee further explained that discrimination against persons with disabilities can take on forms that are less direct and blatant than intentional discrimination but can nonetheless have devastating effects.[44] "A person using a wheelchair is just as effectively excluded from the opportunity to live in a particular dwelling by the lack of access into a unit and by too narrow doorways as by a posted sign saying 'No Handicapped People Allowed.'"[45] In support of this rationale, the Committee cited to a United States Supreme Court case in which Justice Marshall argued that disability discrimination may not arise from just animus but also out of "thoughtlessness and indifference" and that "architectural barriers" could have discriminatory effects.[46]

Congress explicitly included the ANSI standards as a model for compliance, stating that while ANSI is not the exclusive standard, developers may find "other creative methods of 'meeting these standards.'"[47] The Committee Report explained the rationale behind the requirements as follows:

> The Committee believes that these provisions carefully facilitate the ability of tenants with handicaps to enjoy full use of their

41. *Id.* § 3604(f)(4).

42. *Id.* § 3604(f)(5)(C).

43. H.R. REP. NO. 100-711, at 18 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 2173, 2179.

44. *Id.* at 25, 1988 U.S.C.C.A.N. at 2186.

45. *Id.*

46. *Id.* (citing Alexander v. Choate, 469 U.S. 287, 295–96 (1985)).

47. *Id.* at 27, 1988 U.S.C.C.A.N. at 2188.

> homes without imposing unreasonable requirements on homebuilders, landlords and non-handicapped tenants. The Committee believes that these basic features of adaptability are essential for equal access and to avoid future de facto exclusion of persons with handicaps, as well as being easy to incorporate in housing design and construction. *Compliance with these minimal standards* will eliminate many of the barriers which discriminate against persons with disabilities in their attempts to obtain equal housing opportunities.[48]

Congress adopted the provision stating that compliance with ANSI standards would suffice to satisfy the FHA's accessibility requirements, emphasizing its intent to set minimal standards while giving developers room for flexibility to exceed those standards.[49] When Congress proposed the amendment to include the ANSI standards, it had the support of both the National Association for Homebuilders and the American Institute of Architects.[50] Further, Senator Harkin stated that the amendment was the product of "lengthy negotiations between the disability community and architects, builders, and managers to achieve a reasonable balance between meeting the intent of the bill, to assure equal opportunity in housing for individuals with handicaps, while minimizing both construction costs and potential issues of marketability."[51]

C. HUD Promulgates Guidelines that Create Minimal Standards for Meeting the FHA's Accessibility Requirements

Congress delegated to the Secretary of HUD the authority to issue regulations for the implementation of the FHA.[52] The FHAA mandated that HUD "shall provide technical assistance to States and units of local government and other persons to implement the [Act's accessibility

48. *Id.* at 27–28, 1988 U.S.C.C.A.N. at 2188–89 (emphasis added).

49. 42 U.S.C. § 3604(f)(4) (2012) ("Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as 'ANSI A117.1') suffices to satisfy the requirements of paragraph (3)(C)(iii).").

50. 134 CONG. REC. S10455 (daily ed. Aug. 1, 1988) (statement of Sen. Kennedy).

51. *Id.* at S10464 (statement of Sen. Harkin).

52. 42 U.S.C. § 3601; Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 13(b), 102 Stat. 1619, 1636 (codified at 42 U.S.C. § 3601) ("In consultation with other appropriate Federal agencies, the Secretary shall, not later the 180th day after the date of the enactment of this Act [Sept. 13, 1988], issue rules to implement title VIII [this subchapter] as amended by this Act."); *see also* 42 U.S.C. § 3614A ("The Secretary may make rules (including rules for the collection, maintenance, and analysis of appropriate data) to carry out this subchapter. The Secretary shall give public notice and opportunity for comment with respect to all rules made under this section.").

requirements]."[53] In response, HUD initially promulgated several regulations describing the conduct prohibited by the FHAA.[54] Pursuant to HUD's mandate to provide technical assistance, it published the Fair Housing Accessibility Guidelines in 1991, at the same time that the accessibility requirements became effective.[55] From the outset, HUD made it clear that the Guidelines "are intended to provide technical guidance only, and are not mandatory."[56] The Guidelines, like the ANSI standards, were meant to provide a safe harbor. In other words, they both refer to a set of technical standards that developers could adopt—as one way but not the exclusive way—to achieve compliance with the Act.[57] In response to public concern that the Guidelines would have the force of law to bind developers, HUD stated that it had not recognized the Guidelines "as either performance standards or minimum requirements. The minimum accessibility requirements are contained in the Act."[58] Further, HUD stated that "[t]he purpose of the Guidelines is to describe minimum standards of compliance with the specific accessibility requirements of the Act."[59]

In HUD's view, the Guidelines effectuated congressional intent to prevent disability discrimination in the design and construction of homes and provided a simple form of compliance with the accessibility requirements in a way that was affordable and not burdensome to developers.[60] Developers were concerned that the Guidelines could impose mandatory standards in addition to state and local building codes, or worse, form a federal building code.[61] HUD was careful not to imply that the new Guidelines could take the form of a federal building code stating, "there is no statutory authority to establish one nationally uniform set of accessibility standards."[62]

In 1996, five years after the accessibility requirements and the Guidelines went into effect, HUD published the Fair Housing and

53. 42 U.S.C. § 3604(f)(5)(C).

54. Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232 (Jan. 23, 1989) (codified at 24 C.F.R. § 100.201 (2015)).

55. Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. 9472 (Mar. 6, 1991) (to be codified at 24 C.F.R. Ch. I, Subch. A, App. II).

56. *Id.* at 9472.

57. *Id.* at 9479.

58. *Id.* at 9478.

59. *Id.* at 9476.

60. *Id.* at 9472.

61. Design and Construction Requirements, 24 C.F.R. § 100.205(e) (2015), Compliance with ANSI A117.1 Standards, 73 Fed. Reg. 63,610, 63,612 (Oct. 24, 2014).

62. Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. at 9478.

Design Manual (Design Manual) as an additional safe harbor.[63] HUD updated the Design Manual in 1998, and by 2005, HUD recognized seven different safe harbors.[64] In 2008, HUD formally codified the ten safe harbors as an amendment to the Guidelines.[65] In HUD's proposal for the 2008 Amendment, it recognized that the ANSI standards cited in the FHA only provided technical standards for measurement but did not address developers' other building concerns.[66] Before codifying the ten safe harbors, HUD responded to developers' concern over the prospect of being subject to additional requirements by stating that the safe harbors did not engender substantive changes, but merely provided technical compliance with the Act's accessibility requirements.[67] The purpose of providing ten safe harbors in the Guidelines was to give developers greater flexibility to meet the Act's accessibility requirements.[68]

HUD also articulated a new position in the 2008 Amendment, stating that the Guidelines provide minimal standards for compliance with the Act's accessibility requirements.[69] This position seemed to conflict with HUD's statements in 1991, when it first promulgated the Guidelines as the second safe harbor.[70] In 1991, HUD emphasized that the Guidelines neither created mandatory requirements nor set minimal standards for compliance with the FHA's requirements.[71] In the 2008 Amendment to the Guidelines, HUD's position evolved to reflect its recognition of ten safe harbors: "In enforcing the design and construction requirements of

63. OFFICE OF FAIR HOUS. & EQUAL OPPORTUNITY, U.S. DEP'T OF HOUS. & URBAN DEV., FAIR HOUSING ACT DESIGN MANUAL (1998) [hereinafter FAIR HOUSING ACT DESIGN MANUAL], http://www.huduser.org/publications/PDF/FAIRHOUSING/fairfull.pdf [https://perma.cc/7SAE-S47F].

64. Schwemm, *supra* note 17, at 760 n.39.

65. Design and Construction Requirements, 24 C.F.R. § 100.205(e) (2008); HUD & DOJ JOINT STATEMENT, *supra* note 25.

66. Design and Construction Requirements, Compliance with ANSI A117.1 Standards, 72 Fed. Reg. 39,540, 39,541 (July 18, 2007).

67. Design and Construction Requirements, Compliance with ANSI A117.1 Standards, 73 Fed. Reg. 63,610, 63,610 (Oct. 24, 2008) ("This change is technical and not substantive."); *id.* ("This final rule makes no substantive changes to the proposed rule, but adds a new section on incorporation by reference and makes other technical revisions consistent with recent guidelines on incorporation by reference."); *id.* ("This rule does not change either the scoping requirements or the substance of the existing accessible design and construction requirements contained in the regulations, nor does the rule state that compliance with the 1986 ANSI standard is no longer appropriate.").

68. *Id.* at 63,612.

69. *Id.* at 63,613–14; *see also* 24 C.F.R. § 100.205(e).

70. Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. 9472, 9478 (Mar. 6, 1991).

71. *Id.*

the Fair Housing Act, a prima facie case may be established by proving a violation of HUD's Fair Housing Accessibility Guidelines. This prima facie case may be rebutted by demonstrating compliance with a recognized, comparable, objective measure of accessibility."[72] In essence, HUD's new position was that a developer's choice not to adopt any of the ten safe harbors could create a prima facie case of disability discrimination if that developer failed to show that it followed a comparable objective standard. However, this new burden-shifting scheme did not create any mandatory requirements in addition to the FHA's seven broad accessibility requirements, nor did it mandate minimum performance standards for meeting those seven requirements.

HUD did not promulgate mandatory objective standards, nor did it require developers to adopt a safe harbor.[73] While developers are not required to adopt any of the safe harbors, non-adherence to any creates a rebuttable presumption of disability discrimination.[74] This burden-shifting scheme easily lends itself to mischaracterization as establishing minimum standards. However, the scheme does not set minimal standards; rather, it requires that developers show that they followed at least some comparable objective standard that satisfies the Act's accessibility requirements.[75]

The DOJ, which shares enforcement responsibility with HUD,[76] recently articulated in a joint statement with HUD that: "determining whether a standard, guideline or code qualifies as a safe harbor, HUD compares it with the Act, HUD's regulations implementing the Act, the ANSI A117.1-1986 standard . . . and the Guidelines to determine if, taken as a whole, it provides at least the same level of accessibility."[77] Drawing from the language of the Guidelines, HUD further stated, "[t]he purpose of the Fair Housing Act Guidelines is 'to describe the minimum standards of compliance with the specific accessibility requirements of the Act.'"[78] It is significant to note that when developers choose to adopt

72. Design and Construction Requirements, Compliance with ANSI A117.1 Standards, 72 Fed. Reg. 39,540, 39,541 (July 18, 2007).

73. Design and Construction Requirements, Compliance with ANSI A117.1 Standards, 73 Fed. Reg. at 63,614.

74. *Id.*

75. *Id.* at 63,613–14.

76. 42 U.S.C. §§ 3612–3614 (2012) (providing that the Attorney General may either bring pattern or practice cases and may bring cases referred to it by the Secretary of HUD).

77. HUD & DOJ JOINT STATEMENT, *supra* note 25.

78. *Id.* (citing Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. 9472, 9476 (Mar. 6, 1991) ("The purpose of the Guidelines is to describe the minimum standards of compliance with the specific accessibility requirements of the Act.")).

a standard outside of the safe harbors, the developers "bear the burden of showing that their standard provides an equivalent or a higher degree of accessibility than every provision of one of the recognized safe harbors."[79] In other words, if a safe harbor is not adopted, the alternative standard needs to provide equal or greater accessibility with respect to the Act's accessibility requirements. In this way, the safe harbors collectively form a minimal standard. The safe harbors share similar technical specifications that developers can adopt in compliance or deviate from at their own risk.[80]

D. Design and Construction Litigation, Courts' Interpretations of the FHA's Accessibility Requirements, and HUD's Regulatory Actions

After the Act's accessibility requirements went into effect in 1991, design and construction litigation was slow to follow.[81] Despite the FHAA's accessibility requirements and HUD's regulatory actions, noncompliance persisted nationally.[82] Professor Schwemm noted that "[v]irtually every § 3604(f)(3)(C) testing program has found that the vast majority of multi-family complexes contacted do not comply with the FHAA's accessibility requirements, and other evidence, including studies commissioned by [HUD] . . . also confirms the high degree of noncompliance."[83] In practical terms, this means that since the FHAA's implementation in 1991, millions of rental units within covered multifamily dwellings likely have been built in a way that is inaccessible to tens of millions of persons with disabilities.[84]

Disability discrimination complaints are the single largest category of FHA complaints HUD and Fair Housing Assistance Program (FHAP) agencies receive.[85] In fiscal year (FY) 2010, HUD and FHAP received 4839 disability complaints, 48% of the overall total; 4498 in 2011, 48% of the total; 4379 in 2012, 50% of the overall total; and 4429 in 2013,

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79. FAIR HOUSING ACT DESIGN MANUAL, *supra* note 63, at 21; Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. at 9476; HUD & DOJ JOINT STATEMENT, *supra* note 25 (citing Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. at 9476).

80. *See, e.g.*, FAIR HOUSING ACT DESIGN MANUAL, *supra* note 63.

81. Schwemm, *supra* note 17, at 753.

82. *Id.* at 753–54.

83. *Id.* at 754 n.8.

84. *See* HUD CONFORMANCE STUDY, *supra* note 8, at 27–28 (describing that the majority of tested homes were not compliant with at least some of the Guideline's requirements); Schwemm, *supra* note 17, at 770 (discussing widespread noncompliance with the Act's requirements).

85. U.S. DEP'T OF HOUS. & URBAN DEV., ANNUAL REPORT ON FAIR HOUSING FY 2012–2013, at 19 (2014).

53% of the overall total.[86] Of all complaints, noncompliance with design and construction requirements comprised approximately 1–2% of the overall total each year: 2% in 2010 with 169 complaints; 1% in 2011 with 90 complaints; 1% in 2012 with 106 complaints; and 1% in 2013 with 114 complaints.[87] While design and construction claims comprised approximately 1–2% of all claims brought, such claims were present in 2–4% of all HUD complaints alleging multiple claims: 4% in 2010 with 69 complaints; 4% in 2011 with 69 complaints; 3% in 2012 with 52 complaints; and 2% in 2013 with 43 complaints.[88] Disability claims for failure to make reasonable modifications to units that are not in compliance with the Act's accessibility requirements are not included in this category.[89]

Between FY 2001 and 2007, nearly half of the FHA cases that the DOJ Housing and Civil Enforcement Section (HCE) filed were brought on behalf of persons with disabilities.[90] DOJ HCE "asserted more claims on behalf of persons with disabilities (115 of 250) than any other protected class."[91] While the report does not specifically account for design and construction claims, nine of the twenty cases where the DOJ sent testers to subject properties involved allegations of disability discrimination in "new construction, rentals, or both."[92]

In 2004, HUD conducted a study using ninety-nine paired testers (one without a disability and one who used a wheelchair).[93] The testers made in-person visits to advertised rentals in Chicago.[94] While the study did not determine how many of the properties were subject to the FHA's accessibility requirements, it used "criteria consistent with the design and construction requirements" of the FHA in determining whether the buildings were accessible.[95] The study found that 36% of the properties

86. *Id.*

87. *Id.* at 22.

88. *Id.* at 24.

89. *Id.*

90. GOV'T ACCOUNTABILITY OFFICE, U.S. DEP'T OF JUSTICE, INFORMATION ON EMPLOYMENT LITIGATION, HOUSING AND CIVIL ENFORCEMENT, VOTING AND SPECIAL LITIGATION SECTION'S ENFORCEMENT FROM FISCAL YEARS 2001 THROUGH 2007, at 19 (2009), http://www.gao.gov/assets/300/297337.pdf [https://perma.cc/K7D5-Q3XZ].

91. *Id.* at 52.

92. *Id.* at 55.

93. U.S. DEP'T OF HOUS. & URBAN DEV., DISCRIMINATION AGAINST PERSONS WITH DISABILITIES: BARRIERS AT EVERY STEP 42 (2005), http://www.gao.gov/assets/300/297337.pdf [https://perma.cc/QX6P-DQ42].

94. *Id.*

95. *Id.* at 12 n.21.

tested were "inaccessible for people in wheelchairs to even visit."[96] Further, the study concluded that wheelchair users were precluded from two-thirds of the rental market in Chicago because they could not enter the unit or building.[97]

It is worth noting that HUD conducted a study in 2003 that produced seemingly contradictory conclusions to the reports discussed above.[98] In this study, HUD assigned a number value to each of the FHA's seven general accessibility requirements and scored developers based on their degree of compliance with each requirement.[99] However, as Professor Schwemm recognized, partial compliance with the FHA's requirements still constitutes a violation, and "it is quite possible for a development to be found in violation of *each* FHA requirement even though it complies with over eighty percent of the subsidiary elements surveyed in the HUD study."[100] Professor Schwemm further concluded the value of the Conformance Study, from an "enforcement perspective" was "hard to fathom."[101]

The number of total design and construction claims may appear to be deceptively small when compared to the overall number of claims brought by the government; however, a single design and construction case could involve multiple properties including hundreds, if not thousands, of individual units that fail to meet the FHA's accessibility requirements. For example, the DOJ recently filed a colossal lawsuit in Alabama against owners and developers of seventy-one multifamily complexes across Alabama, Georgia, North Carolina, and Tennessee.[102] The seventy-one complexes contain more than 4000 units, 2700 of which are covered by the FHA's accessibility requirements.[103] The DOJ alleged that the developers created significant barriers for persons with disabilities, including: "steps leading to building entrances, non-existent or excessively sloped pedestrian routes from apartment units to site

96. *Id.* at 42.

97. *Id.*

98. HUD CONFORMANCE STUDY, *supra* note 8, at v–vi.

99. *Id.* at 15–16.

100. *See* Schwemm, *supra* note 17, at 770 (emphasis added).

101. *Id.*

102. Press Release, U.S. Dep't of Justice, Justice Department Files Lawsuit Alleging Disability-Based Discrimination by Developers of 71 Apartment Complexes in Alabama, Georgia, North Carolina and Tennessee (Sept. 30, 2015) [hereinafter DOJ Rappuhn Press Release], http://www.justice.gov/opa/pr/justice-department-files-lawsuit-alleging-disability-based-discrimination-developers-71 [https://perma.cc/GS4U-9WTX].

103. Complaint at 3, United States v. Rappuhn, No. 2:15-CV-01725-TMP (N.D. Ala. Sept. 30, 2015), 2015 WL 5731922.

amenities (e.g., picnic areas, dumpsters, clubhouse/leasing offices), insufficient maneuvering space in bathrooms and kitchens and inaccessible parking."[104]

For further illustration, in *United States v. Biafora's Inc.*,[105] the DOJ recently settled a large design and construction case.[106] In that case, the subject properties included twenty-three apartment complexes in West Virginia and Pennsylvania with hundreds of units covered by the FHA.[107] The parties' consent decree included broad remedial action:

> These corrective actions include replacing excessively sloped portions of sidewalks, installing properly sloped curb walkways to allow persons with disabilities to access units from sidewalks and parking areas, replacing cabinets in bathrooms and kitchens to provide sufficient room for wheelchair users, widening doorways and reducing door threshold heights. The settlement also requires the defendants to construct a new apartment complex in Morgantown, West Virginia, with 100 accessible units.[108]

Despite the Act's accessibility requirements and Guidelines' safe harbors, developers have built multifamily dwellings that are inaccessible for people with disabilities. Some developers argue that the FHA contains no objective standards and that HUD has neither the regulatory authority to proscribe any mandatory performance standards nor the ability to establish a burden-shifting scheme.[109] Courts have split over how to interpret HUD's Guidelines.[110] The general trend has been to rule against developers, granting HUD's interpretation of the FHAA's accessibility requirements varying degrees of deference.[111] Courts have

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104. *See* DOJ Rappuhn Press Release, *supra* note 102.

105. Consent Order, United States v. Biafora's Inc., No. 14-cv-00165-IMK (N.D. W. Va. July 23, 2015), https://www.justice.gov/opa/file/639696/download [https://perma.cc/2YQQ-WRTV].

106. Press Release, U.S. Dep't of Justice, Justice Department Settles Disability-Based Housing Discrimination Lawsuit with West Virginia Developer (July 23, 2015), http://www.justice.gov/opa/pr/justice-department-settles-disability-based-housing-discrimination-lawsuit-west-virginia [https://perma.cc/5X9N-ETE5].

107. *Id.*

108. *Id.*; *see also* Consent Order, *supra* note 105 (detailing how the developer will comply with the FHA).

109. United States v. JPI Constr., L.P., No. 3:09-cv-0412-B, 2011 WL 6963160 (N.D. Tex. Nov. 10, 2011), *report and recommendation adopted*, 2012 WL 43507 (Jan. 9, 2012).

110. *Compare* United States v. Taigen & Sons, Inc., 303 F. Supp. 2d 1129, 1151 (D. Idaho 2003) (finding a violation where developers did not adopt a safe harbor or any comparable standard), *with* Barker v. Niles Bolton Assocs., 316 F. App'x 933, 941–42 (11th Cir. 2009) (holding that HUD's Guidelines set neither mandatory nor minimum standards).

111. United States v. Edward Rose & Sons, 384 F.3d 258, 263 n.4 (6th Cir. 2004); United States

not, however, provided a definitive answer as to whether HUD's interpretation of the Act and Guidelines form minimal standards, leaving the door open for design and construction litigation to determine what accessibility in housing requires.[112]

In some design and construction cases, courts have held that the Guidelines and safe harbors have no binding effect upon developers. For example, the Eleventh Circuit has held that "[t]he guidelines are not mandatory, however, nor do they establish performance standards or minimum requirements . . . . Rather, the guidelines constitute only one of several safe harbors for compliance with the FHA."[113] In *Fair Housing Council, Inc. v. Village of Olde St. Andrews, Inc.*,[114] a frequently cited Sixth Circuit design and construction case, the court posed an alternative framing of the issue and held that:

> [T]he Guidelines, though relevant and highly significant, are not decisive. The real question is whether the units . . . are reasonably accessible and useable for most handicapped persons." Although the district court did note that "Defendants undoubtedly face a heavy burden of demonstrating accessibility" in instances where a construction feature does not comply with the HUD guidelines, the touchstone of the district courts [sic] compliance analysis was clearly the Act itself. Accordingly, we find that Defendant WKB had ample opportunity to demonstrate compliance with the Fair Housing Act by means other than those set forth by the applicable HUD guideline and simply failed to do so.[115]

Decisions that follow *Olde St. Andrews* stand for the proposition that while HUD's Guidelines are not binding, developers must still provide proof of compliance with the Act's accessibility requirements.[116] *Olde St. Andrews* also makes clear, however, that HUD's Guidelines and interpretations are not to be perfunctorily discarded and that "the Supreme Court has held that HUD's interpretation of the FHA is entitled

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v. Shanrie Co., 669 F. Supp. 2d 932 (S.D. Ill. 2009); Memphis Ctr. for Indep. Living v. Richard & Milton Grant Co., No. 01-2069, 2004 WL 6340158, at *3 (W.D. Tenn. June 29, 2004); United States v. Edward Rose & Sons, 246 F. Supp. 2d 744, 751–53 (E.D. Mich. 2003), *aff'd*, 384 F.3d 258 (6th Cir. 2004); *Taigen & Sons*, 303 F. Supp. 2d 1129.

112. *Edward Rose & Sons*, 384 F.3d at 263 n.4; *see also Shanrie*, 669 F. Supp. 2d 932; *Memphis Ctr. for Indep. Living*, 2004 WL 6340158; *Taigen & Sons*, 303 F. Supp. 2d 1129.

113. *Barker*, 316 F. App'x at 941–42.

114. Fair Hous. Council, Inc. v. Vill. of Olde St. Andrews, Inc., 210 F. App'x 469 (6th Cir. 2006).

115. *Id.* at 482 (citations omitted).

116. *Id.*

to deference."[117] While *Olde St. Andrews* did not discuss what deference HUD's regulatory actions were due in any detail beyond that single sentence,[118] deference becomes a central feature in holdings that find that the Guidelines and the ANSI standards form minimal standards.[119] It is also worth noting that some states have passed their own versions of the FHA that include mandatory performance standards. For example, an Illinois district court held that the FHA's safe harbors were not mandatory but ultimately ruled against the developer under state law, which explicitly set out mandatory minimum standards.[120]

Courts that do not recognize objective accessibility standards leave determinations of what constitutes accessibility under the FHA up to laypersons and competing experts.[121] Without objective standards, parties are forced to re-litigate the same questions with respect to the FHA's design and construction requirements. These decisions are at odds with HUD's interpretation of the Act's accessibility requirements as expressed in the 2008 Amendment.[122] Once the Guidelines and safe harbors are discarded, so too is HUD's burden-shifting scheme and the requirement that developers produce evidence that they adopted a comparable objective standard to prove compliance.[123] What is left is an individual determination—unattached to any objective standard—of what accessibility means, usually supported by the developer's expert testimony.[124] At that point in a case, accessibility under the FHA is not determined by any standard but rests solely on the FHA's broad

117. *Id.*

118. *Id.*

119. United States v. Shanrie Co., 669 F. Supp. 2d 932 (S.D. Ill. 2009); Memphis Ctr. for Indep. Living v. Richard & Milton Grant Co., No. 01-2069, 2004 WL 6340158 (W.D. Tenn. June 29, 2004); United States v. Taigen & Sons, Inc., 303 F. Supp. 2d 1129 (D. Idaho 2003).

120. Jafri v. Chandler LLC, 970 F. Supp. 2d 852, 861 (N.D. Ill. 2013) (holding that compliance with Illinois Environmental Barriers Act was "mandatory rather than merely a safe harbor" and that the Illinois Accessibility Code and related regulations set minimum design and construction requirements).

121. United States v. Pac. Nw. Elec. Inc., No. 01-019, 2003 WL 24573548, at *12–14 (D. Idaho Mar. 21, 2003) (granting summary judgment to the housing developer on the grounds that the Guidelines were not binding and some wheelchair users found the properties generally accessible); *see also* Equal Rights Ctr. v. Post Properties, Inc., 522 F. Supp. 2d 1, 5–6 (D.D.C. 2007) (denying the government's request for injunctive relief, in part, because the Guidelines and safe harbors were not mandatory and the developers had "presented competing reports and declarations regarding the design specifications and other details" of the various properties).

122. Design and Construction Requirements, 24 C.F.R. § 100.205(e) (2008) (codifying the ten safe harbors as paths to compliance with the Act's requirements).

123. Barker v. Niles Bolton Assocs., 316 F. App'x 933, 941–49 (11th Cir. 2009); *Post Properties*, 522 F. Supp. at 5–6.

124. *Pac. Nw. Elec. Inc.*, 2003 WL 24573548, at *12.

accessibility requirements.[125] Accessibility becomes whatever competing experts are able to convince a jury it is. This type of case-by-case re-litigation of the parameters of accessibility is detrimental to persons with disabilities, developers, and the government. Given that the overwhelming majority of design and construction cases are resolved either by consent decree or settlement in district courts,[126] the litigation does not create binding precedent that would inform future litigation. Subjective standards fail to put developers on notice about what the FHA's accessibility requirements demand, perpetuate noncompliance with the FHA which in turn creates inaccessible housing, and forces the government to re-litigate the parameters of the FHA's requirements without reference to minimal standards.

Several design and construction cases have found that HUD's Guidelines and the FHAA present minimal standards for accessibility and maintained HUD's burden-shifting framework.[127] Some of these cases state in a conclusory manner that the Guidelines set minimum standards for accessibility while other make more nuanced arguments based on deference to agency interpretations.[128] For example, in *United States v. Shanrie*,[129] an Illinois district court concluded that Congress gave HUD regulatory authority over the FHA and that its regulations were binding.[130] In determining whether the developer was in compliance, the court in *Shanrie* compared the defendant developer's technical specifications with those found in the ANSI standards and the Guidelines.[131] In practical terms, that meant ANSI standards and the Guidelines set a range for compliance, within which developers must fall. In *Shanrie*, for example, ANSI standards and the Guidelines provide that developers place thermostats between forty-eight to fifty-four inches

125. 42 U.S.C. § 3604(f)(3)(C)(i)–(iii) (2012).

126. *Recent Accomplishments of the Housing and Civil Enforcement Section*, U.S. DEP'T JUST. (Jan. 5, 2016), http://www.justice.gov/crt/recent-accomplishments-housing-and-civil-enforcement-section [https://perma.cc/Q73D-8QSE] (listing design and construction cases, nearly all of which were disposed of by consent decree).

127. United States v. Shanrie Co., 669 F. Supp. 2d 932 (S.D. Ill. 2009); United States v. Tanski, No. 1:04-CV-714, 2007 WL 1017020 (N.D.N.Y. Mar. 30, 2007); Memphis Ctr. for Indep. Living v. Richard & Milton Grant Co., No. 01-2069, 2004 WL 6340158, at *3, *7 (W.D. Tenn. June 29, 2004); United States v. Taigen & Sons, Inc., 303 F. Supp. 2d 1129 (D. Idaho 2003); United States v. Quality Built Constr., Inc., 309 F. Supp. 2d 756 (E.D.N.C. 2003).

128. *Shanrie*, 669 F. Supp. 2d at 932; *Tanski*, 2007 WL 1017020, at *10–14; *Memphis Ctr. for Indep. Living*, 2004 WL 6340158, at *7; *Taigen & Sons*, 303 F. Supp. 2d at 1129; *Quality Built Constr.*, 309 F. Supp. 2d at 756.

129. 669 F. Supp. 2d 932 (S.D. Ill. 2009).

130. *Id.* at 936.

131. *Id.* at 939 n.11.

from the floor but the developer had placed theirs at sixty-four inches.[132] The *Shanrie* court gave HUD's rulemaking power wide latitude:

> Congress granted the Secretary of HUD the authority to promulgate regulations to implement the FHA and provide technical assistance to help achieve the Act's accessibility requirements . . . . HUD issued implementing regulations in 1989, which discussed the FHA's design and construction requirements. Guidelines setting minimum standards for compliance with the design and construction requirements were issued two years later.[133]

While *Shanrie* represents a highly favorable view of HUD's Guidelines, other courts have similarly granted HUD's interpretation of the Act's accessibility requirements considerable deference.[134] In *United States v. Tanski*,[135] a New York district court granted the government summary judgment when the developer failed to comply with the ANSI standards or HUD's Guidelines.[136] "Courts have held that summary judgment on the issue of design-and-construction discrimination is appropriate where plaintiff demonstrates that a covered dwelling does not comply with the ANSI standards or the HUD Guidelines, and defendants fail to submit evidence that the property complies with any other accessibility standard."[137] In the Guidelines' 2008 Amendment, HUD stated that a prima facie case is established when a developer fails to comply with either ANSI standards or the Guidelines.[138] But the developer could overcome the presumption of noncompliance by

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132. *Id.* ("The Guidelines require that controls, including light switches, electrical outlets, and thermostats, can be no higher than 48 inches above the floor in unobstructed locations, while the ANSI standards permit an increased height of 54 inches . . . . Thermostats at Hartman Lane are more than 56 inches above the floor and a kitchen outlet on the stove wall is obstructed by the stove, while at Rockwood Court, in one of the two-bedroom apartments, the thermostat was 64 inches above the floor." (internal citations omitted)).

133. *Id.* at 936 (internal citations omitted).

134. United States v. Tanski, No. 1:04-CV-714, 2007 WL 1017020, at *11 (N.D.N.Y. Mar. 30, 2007); United States v. Quality Built Constr., Inc., 309 F. Supp. 2d 756 (E.D.N.C. 2003); United States v. Taigen & Sons, Inc., 303 F. Supp. 2d 1129 (D. Idaho 2003).

135. No. 1:04-CV-714, 2007 WL 1017020 (N.D.N.Y. Mar. 30, 2007).

136. *Id.* at *11.

137. *Id.* (citing *Taigen & Sons*, 303 F. Supp. 2d at 1154; *Quality Built Constr.*, 309 F. Supp. 2d at 763).

138. Design and Construction Requirements, Compliance with ANSI A117.1 Standards; Final Rule, 73 Fed. Reg. 63,610, 63,614 (Oct. 24, 2008) ("In enforcing design and construction requirements of the Fair Housing Act, a prima facie case may be established by proving a violation of HUD's Fair Housing Accessibility Guidelines. This prima facie case may be rebutted by demonstrating compliance with a recognized, comparable, objective measure of accessibility.").

proving that it complied with a comparable objective standard.[139] In *Tanski*, the court expanded this burden-shifting scheme to state that if the developer failed to provide a comparable objective standard (i.e., a model building code), the prima facie case is sufficient for a finding of disability discrimination and warrants granting summary judgment against the developer.[140] Other courts have also held that failing to follow the ANSI standards or the Guidelines, or failing to proffer an alternative standard, is sufficient to grant summary judgment to the plaintiffs.[141]

Ultimately, a court's decision to treat HUD's regulatory actions as having set minimal standards for accessibility is predicated upon varying degrees of judicial deference to HUD's interpretations. There is substantial disagreement among courts on how to adjudicate design and construction claims applying HUD's Guidelines. Whether HUD's interpretation should be granted deference, and if so, to what extent, will be discussed in Part III.

II. HUD'S GUIDELINES AND SAFE HARBORS ESTABLISH MINIMAL STANDARDS FOR COMPLIANCE WITH THE FHA'S ACCESSIBILITY REQUIREMENTS

When HUD first issued the Guidelines, it stated that they were not mandatory but "provide a safe harbor for compliance with the accessibility requirements of the [FHA],"[142] and the "purpose of the Guidelines is to *describe minimum standards* of compliance with the specific accessibility requirements of the Act."[143] Much of the confusion over HUD's position comes from its seemingly contradictory statements contained within the Guidelines. HUD explicitly stated that the Guidelines were not meant to prescribe "mandatory standards,"[144] nor were they meant to impose "minimal requirements";[145] rather they were intended to describe "minimum standards of compliance"[146] with the accessibility requirements of the FHA.[147] This proposition requires some

139. *Id.*

140. *Tanski*, 2007 WL 1017020, at *11.

141. *Quality Built Constr.*, 309 F. Supp. 2d at 763, 767.

142. Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. 9472, 9473 (Mar. 6, 1991).

143. *Id.* at 9476 (emphasis added).

144. *Id.* at 9472.

145. *Id.* at 9478.

146. *Id.* at 9476.

147. *Id.*

unpacking. HUD stated that the Guidelines did not impose "mandatory" standards on developers, which means that developers were not required to adopt the Guidelines in order to comply with the FHA.[148] When the Guidelines were promulgated in 1991, the only other safe harbor at that time was the ANSI standards contained within the FHA itself.[149] Further, the Guidelines do not create "minimum requirements"[150] because the FHA itself imposes the only seven accessibility features that developers are bound to follow. To "describe minimum standards of compliance" means to provide a baseline for standards by which developers can comply with the FHA's seven accessibility requirements.[151] The following excerpt from the discussion of general comments on the Guidelines captures HUD's stance in response to conflicting public input over the issue of performance standards versus requirements:

> Comment. A number of commenters requested that the Department categorize the final Guidelines as minimum requirements, and not as performance standards, because "recommended" guidelines are less effective in achieving the objectives of the Act. Another commenter noted that a safe harbor provision becomes a *de facto* minimum requirement, and that it should therefore be referred to as a minimum requirement.
>
> Response. The Department has not categorized the final Guidelines as either performance standards or minimum requirements. The minimum accessibility requirements are contained in the Act. The Guidelines adopted by the Department provide one way in which a builder or developer may achieve compliance with the Act's accessibility requirements. There are other ways to achieve compliance with the Act's accessibility requirements, as for example, full compliance with ANSI A117.1. Given this fact, it would be inappropriate on the part of the Department to constrain designers by presenting the Fair Housing Accessibility Guidelines as minimum requirements.

148. *Id.* at 9473 ("The Guidelines are not mandatory. Additionally, the Guidelines do not prescribe specific requirements which must be met, and which, if not met, would constitute unlawful discrimination under the Fair Housing Amendments Act. Builders and developers may choose to depart from the Guidelines, and seek alternate ways to demonstrate that they have met the requirements of the Fair Housing Act.").

149. 42 U.S.C. § 3604(f)(4) (1991) ("Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1") suffices to satisfy the requirements of paragraph (3)(C)(iii).").

150. Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. at 9478.

151. *Id.* at 9476.

> Builders and developers should be free to use any reasonable design that obtains a result consistent with the Act's requirements. Accordingly, the design specifications presented in the final Guidelines are appropriately referred to as "recommended guidelines."[152]

What HUD was attempting to make clear was that the Guidelines provide performance standards for achieving compliance with the FHA's seven specific accessibility requirements.[153] For example, one of the FHA's requirements mandates that "all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs."[154] The Guidelines provide the specific provision of the ANSI standards that would satisfy this requirement, as well as its own equivalent standard:

> Within individual dwelling units, doors intended for user passage through the unit which have a clear opening of at least 32 inches nominal width when the door is open 90 degrees, measured between the face of the door and the stop, would meet this requirement. Openings more than 24 inches in depth are not considered doorways.[155]

Other than the Guidelines, HUD has recognized nine other building codes as safe harbors.[156] Unlike the Guidelines, which only address the

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152. *Id.* at 9478.

153. *See id.* at 9479 ("The Fair Housing Accessibility Guidelines are—as the name indicates—only guidelines, not regulations or minimum requirements. The Guidelines consist of recommended design specifications for compliance with the specific accessibility requirements of the Fair Housing Act. The final Guidelines provide builders with a safe harbor that, short of specifying all of the provisions of the ANSI Standard, illustrate acceptable methods of compliance with the Act. To the extent that the preamble to the Guidelines provides clarification on certain provisions of the Guidelines, or illustrates additional acceptable methods of compliance with the Act's requirements, the preamble may be relied upon as additional guidance.").

154. 42 U.S.C. § 3604(f)(3)(C)(ii) (2012).

155. Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. at 9506 (internal citation omitted).

156. Design and Construction Requirements, 24 C.F.R. § 100.205(e) (2008). The rule provides:

> ((e)(1) Compliance with the appropriate requirements of ICC/ANSI A117.1–2003 (incorporated by reference at § 100.201a), ICC/ANSI A117.1–1998 (incorporated by reference at § 100.201a), CABO/ANSI A117.1–1992 (incorporated by reference at § 100.201a), or ANSI A117.1–1986 (incorporated by reference at § 100.201a) suffices to satisfy the requirements of paragraph (c)(3) of this section.
>
> (2) The following also qualify as HUD–recognized safe harbors for compliance with the Fair Housing Act design and construction requirements:
>
> (i) Fair Housing Accessibility Guidelines, March 6, 1991, in conjunction with the Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines, June 28, 1994;
>
> (ii) Fair Housing Act Design Manual, published by HUD in 1996, updated in 1998;

FHA's seven specific accessibility requirements, the other codes cover a wider range of building specifications.[157] To reflect this view, HUD has adopted a burden-shifting scheme to establish a prima facie case for a violation as opposed to treating a violation of the Guidelines as a violation of the FHA.[158] After HUD investigators have taken the relevant measurements of the building, a prima facie case for a violation of the FHA may be established by showing that the measurements fall below all of the safe harbors.[159] Once a prima facie case is established, it "may be rebutted by demonstrating compliance with a recognized, comparable, objective measure of accessibility."[160] Finally, "[i]n making a determination as to whether the design and construction requirements of the Fair Housing Act have been violated, HUD uses the Fair Housing Act, the regulations, and the Guidelines, all of which reference the technical standards found in ANSI A117.1-1986."[161] HUD argued that the standard developers adopt must:

> meet or exceed all of the design and construction requirements specified in the Act and HUD's Regulations, and the builders

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(iii) 2000 ICC Code Requirements for Housing Accessibility (CRHA), published by the International Code Council (ICC), October 2000 (with corrections contained in ICC–issued errata sheet), if adopted without modification and without waiver of any of the provisions;

(iv) 2000 International Building Code (IBC), as amended by the 2001 Supplement to the International Building Code (2001 IBC Supplement), if adopted without modification and without waiver of any of the provisions intended to address the Fair Housing Act's design and construction requirements;

(v) 2003 International Building Code (IBC), if adopted without modification and without waiver of any of the provisions intended to address the Fair Housing Act's design and construction requirements, and conditioned upon the ICC publishing and distributing a statement to jurisdictions and past and future purchasers of the 2003 IBC stating, 'ICC interprets Section 1104.1, and specifically, the Exception to Section 1104.1, to be read together with Section 1107.4, and that the Code requires an accessible pedestrian route from site arrival points to accessible building entrances, unless site impracticality applies. Exception 1 to Section 1107.4 is not applicable to site arrival points for any Type B dwelling units because site impracticality is addressed under Section 1107.7;

(vi) 2006 International Building Code; published by ICC, January 2006, with the January 31, 2007, erratum to correct the text missing from Section 1107.7.5, if adopted without modification and without waiver of any of the provisions intended to address the Fair Housing Act's design and construction requirements, and interpreted in accordance with the relevant 2006 IBC Commentary).

Id.

157. *Id.*

158. *See* Design and Construction Requirements, Compliance with ANSI A117.1 Standards, 73 Fed. Reg. 63,610, 63,614 (Oct. 24, 2014) (to be codified at 24 C.F.R. pt. 100).

159. *Id.*

160. *Id.*

161. *Id.*

> and developers bear the burden of showing that their standard provides an equivalent or a higher degree of accessibility than every provision of one of the recognized safe harbors.[162]

In sum, the Guidelines and safe harbors do not impose mandatory requirements on developers, because developers are only bound to adhere to the FHA's seven accessibility requirements.[163] Further, the safe harbors are not minimum requirements because developers are free to adopt generally accepted and comparable objective standards.[164] Finally, safe harbors do provide minimal standards for compliance with the FHA's accessibility requirements.[165] Developers are free to adopt either a safe harbor or a comparable objective standard, but that standard may not fall below the safe harbors' standards.

This subtle distinction is critical because in design and construction cases, both developers and courts have disregarded the safe harbors as minimal standards because HUD did not intend for them to create mandatory requirements.[166] This reading was reinforced by HUD's insistence when it first issued the Guidelines that they "are not mandatory," nor do they "prescribe specific requirements which must be met, and which, if not met, would constitute unlawful discrimination under the Fair Housing Amendments Act."[167] Rather, "[t]he purpose of the Guidelines is to describe minimum standards of compliance with the specific accessibility requirements of the Act."[168] By creating a burden-shifting scheme based off of the safe harbors, HUD has attempted to set a base level of compliance with the FHA's accessibility requirements, leaving developers free to adopt any objective standard that does not fall below the safe harbors' threshold.

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162. HUD & DOJ JOINT STATEMENT, *supra* note 25.

163. 42 U.S.C. § 3604(f)(5)(C) (2012); Design and Construction Requirements, 24 C.F.R. § 100.205(e) (2008).

164. Design and Construction Requirements, Compliance with ANSI A117.1 Standards, 73 Fed. Reg. at 63,614.

165. Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. 9472, 9476 (Mar. 6, 1991) ("The purpose of the Guidelines is to describe minimum standards of compliance with the specific accessibility requirements of the Act.").

166. *See* Barker v. Niles Bolton Assocs., 316 F. App'x 933, 942 (11th Cir. 2009); Equal Rights Ctr. v. Post Properties, Inc., 522 F. Supp. 2d 1, 10 n.1 (D.C. Cir. 2007).

167. Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. at 9473, 9476.

168. *Id.*

III. COURTS SHOULD RECOGNIZE MINIMAL OBJECTIVE STANDARDS FOR ACCESSIBILITY IN HOUSING AND DEFER TO HUD'S INTERPRETATION OF THE FHA

HUD's interpretation of the FHA's accessibility requirements, its interpretations of its own regulations, and its technical guidance should all be given judicial deference and more courts should adopt the burden-shifting scheme based on the safe harbors. Developers are unlikely to ignore judicially recognized objective standards if courts defer to HUD's authority to create minimal standards for compliance. As previously discussed in Section I.D of this Comment, courts are split over the question of whether to defer to HUD's interpretations on this matter.[169]

There are three well-settled legal doctrines for determining whether to give deference to an agency's actions.[170] First, *Chevron* deference is granted to an agency's interpretation of a statute when: Congress delegated it authority to administer the statute, the agency has acted within that authority, Congress has not directly spoken on the issue, and the interpretation is reasonable.[171] This Comment argues that *Chevron* deference would apply to HUD's interpretations of the FHA's accessibility requirements found in the Guidelines and the codification of the safe harbors. Second, *Auer* deference is granted to an agency's interpretation of its own regulations unless the interpretation is clearly erroneous.[172] This Comment further argues that *Auer* deference would apply to HUD's interpretations of the Guidelines and the 2008 regulation as expressed in its publications, its joint statement with the DOJ and its stance in litigation. Finally, *Skidmore* deference is given to an agency's action, regardless if it is interpreting a statute or its own regulation, to the extent that its action is persuasive and rests on an informed body of experience.[173] Under *Skidmore*, courts give agency interpretation judicial respect to the extent of its persuasiveness.[174] In other words, the agency's interpretations are not controlling by virtue of the agency's

169. *See supra* Section I.D.

170. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997) (establishing that an agency's interpretation of its own regulations is entitled to judicial deference unless it is plainly erroneous or inconsistent with the regulation); Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984) (establishing the test for an agency's interpretations of the statute it was delegated authority to administer); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (granting judicial respect to the extent of an agency's persuasiveness).

171. *Chevron*, 467 U.S. at 842–45.

172. *Auer*, 519 U.S. at 461.

173. *Skidmore*, 323 U.S. at 140.

174. *Id.*

authority, but if they constitute "a body of experience and informed judgment" then courts may find the interpretation persuasive.[175] This Comment also argues that *Skidmore* deference can apply to all of HUD's regulatory action and is especially important for considering the technical expertise and rulemaking processes that went into the creation of the Guidelines and recognition of the safe harbors.[176]

A. Courts Should Give Chevron Deference to HUD's Interpretations of the FHA

Congress granted the Secretary of HUD broad rulemaking authority over the FHA.[177] The Supreme Court has held that such broad grants of authority permit courts to apply the *Chevron* framework to an agency's interpretation of its statute.[178] Further, the Supreme Court has recognized that HUD's interpretations of the FHA deserve *Chevron* deference.[179] Because Congress delegated power to HUD to administer the FHA and HUD acted within that authority, *Chevron* deference is applicable to the Guidelines and HUD's codified safe harbors.[180] To determine whether HUD's interpretations found in the Guidelines and the 2008 regulation deserve *Chevron* deference, courts must determine whether "Congress

175. *Id.*

176. *See* Design and Construction Requirements, 24 C.F.R. § 100.205(e) (2008) (codifying HUD's formal recognition of ten safe harbors including the ANSI standards, widely recognized building codes, HUD's own Guidelines, and HUD's Design Manual).

177. *See* 42 U.S.C. § 3608(a) (2012) ("The authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development."); *id.* § 3614A ("The Secretary may make rules (including rules for the collection, maintenance, and analysis of appropriate data) to carry out this subchapter. The Secretary shall give public notice and opportunity for comment with respect to all rules made under this section."); *id.* § 3601; Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 13(b), 102 Stat. 1619, 1636 (codified at 42 U.S.C. § 3601) (providing initial rulemaking grant with notice and comment requirement over the FHA); Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., __ U.S. __, 135 S. Ct. 2507, 2537 (2015) (stating that Congress gave HUD rulemaking authority in the FHA); *see also* 42 U.S.C. § 3535(d) (granting the Secretary of HUD general rulemaking authority to "make such rules and regulations as may be necessary to carry out his functions, powers, and duties").

178. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980–81 (2005).

179. Meyer v. Holley, 537 U.S. 280, 287–88 (2003) (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–845 (1984) (stating that HUD is "the federal agency primarily charged with the implementation and administration of the [FHA]" and that "we ordinarily defer to an administering agency's reasonable interpretation of a statute").

180. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (holding that "administrative implementation of a particular statutory provision qualify for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law and that the agency interpretation was promulgated in exercise of that authority"); Christensen v. Harris Cty., 529 U.S. 576, 587 (2000).

has directly spoken to the precise question at issue" and if not, then "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[181] The question at issue is whether Congress has directly spoken about the performance standards that developers must adopt to comply with the FHA's seven broad accessibility requirements.

While Congress delegated rulemaking authority to HUD over the FHA when Congress first passed the FHA and provided the accessibility requirements, it also mandated that HUD "shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C)."[182] Some developers have argued that Congress's mandate to provide "technical assistance" restricted HUD's regulatory authority by foreclosing on its ability to promulgate standards.[183] There is very little case law that discusses Congress's mandate to provide technical assistance and some courts have merely interpreted it as a requirement imposed upon HUD in addition to its rulemaking authority.[184] What is known is that Congress has not spoken on the matter of what technical standards satisfy the FHA's requirements and that it delegated such rulemaking authority to HUD.[185] The FHA sets forth accessibility requirements that have the force of law[186] and HUD interpreted those requirements by promulgating the Guidelines and safe harbors to ensure compliance.[187] Courts must defer to HUD's interpretation of the FHA if it is a permissible construction of the statute.[188] In *Chevron* the Supreme Court held that:

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181. *Chevron*, 467 U.S. at 842–43.

182. 42 U.S.C. § 3604(f)(5)(C).

183. *See* Defense Motion for Summary Judgment at 10, United States v. JPI Constr., L.P., No. 3-09-CV-0412-B-BD, 2011 WL 6963160 (N.D. Tex. Nov. 10, 2011); Reply Memorandum in Support of Defendant's Motion for Partial Summary Judgment at 2–6, United States v. Post Properties, Inc., No. 1:10-CV-01866-RJL (D.D.C Mar. 7, 2014).

184. *See* United States v. Shanrie Co., Inc., 669 F. Supp. 2d 932, 936 (S.D. Ill. 2009) ("Congress granted the Secretary of HUD the authority to promulgate regulations to implement the FHA and provide technical assistance to help achieve the Act's accessibility requirements. HUD issued implementing regulations in 1989, which discussed the FHA's design and construction requirements. Guidelines setting minimum standards for compliance with the design and construction requirements were issued two years later." (internal citations omitted)).

185. *See* 42 U.S.C. § 3601 note; Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 13(b), 102 Stat. 1619, 1636 (codified at 42 U.S.C. § 3601); 42 U.S.C. § 3614a ("The Secretary may make rules . . . to carry out this subchapter.").

186. 42 U.S.C. § 3604(f)(5)(C).

187. Fair Housing Accessibility Guidelines, 56 Fed. Reg. 9472, 9473, 9476 (Mar. 6, 1991); Design and Construction, Requirements, 24 C.F.R. § 100.205(e) (2008).

188. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[189]

Courts have read this to mean that HUD has the authority to provide objective standards for satisfying the FHA's accessibility requirements.[190] In *Tanski*, a district court case out of New York, the court held that "a plain reading of section 3604(f)(3)(C) demonstrates that [the FHA] requires compliance with an objective accessibility standard broadly applicable to handicapped people."[191] Further, as previously discussed in Section I.D, courts have deferred to HUD's Guidelines in design and construction cases.[192]

B. Courts Should Give Auer *Deference to HUD's Interpretations of Its Own Regulations on the FHA's Accessibility Requirements*

From the outset, it is important to note that the future of the *Auer* doctrine is uncertain given the mounting concerns voiced by Supreme Court justices and scholars.[193] *Auer* deference has been criticized because it affords agencies great latitude in establishing legal rights and obligations and encourages agencies to promulgate vague regulations

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189. *Id.*

190. *See* Nelson v. HUD, 320 F. App'x 635, 637–38 (9th Cir. 2009); United States v. Shanrie Co., 669 F. Supp. 2d 932, 936 (S.D. Ill. 2009); United States v. Tanski, No. 1:04-CV-714, 2007 WL 1017020, at *11 (N.D.N.Y. Mar. 30, 2007); United States v. Taigen & Sons, Inc., 303 F. Supp. 2d 1129, 1154 (D. Idaho 2003); United States v. Edward Rose & Sons, 246 F. Supp. 2d 744, 751–53 (E.D. Mich. 2003), *aff'd*, 384 F.3d 258 (6th Cir. 2004).

191. *Tanski*, 2007 WL 1017020, at *14.

192. *See supra* Section I.D.

193. Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) ("The defects of *Auer* deference, and the alternatives to it, are fully explored in Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612 (1996). We have not been asked to reconsider *Auer* in the present case. When we are, I will be receptive to doing so."); *see also* Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 EMORY L.J. 47 (2015) (arguing that the doctrine has deviated from its history and purpose and should be reexamined and possibly abandoned).

that they can later interpret under a highly deferential standard.[194] As of this writing, however, the *Auer* doctrine is still good law.

Some courts have deferred to HUD's interpretations of its Guidelines establishing minimal standards for accessibility.[195] HUD's reading of its own regulations are expressed in the Federal Register discussing the Guidelines and the codification of the safe harbors as well as in its joint statement with the DOJ on enforcing the FHA's accessibility requirements.[196] Courts may grant *Auer* deference to an agency's interpretation of its own regulations unless that interpretation is clearly erroneous or inconsistent with the regulations.[197] *Auer* deference is usually granted to an agency's interpretation of its own regulation.[198] Deference may not be granted where the interpretation "does not reflect the agency's fair and considered judgment on the matter in question"[199] and where the interpretation appears to be merely a "convenient litigation position" or a "post hoc rationalization" advanced to defend prior agency action.[200]

HUD's position that the safe harbors set minimal standards, and its creation of a burden-shifting scheme for establishing a prima facie case are reasonable, consistent interpretations of the Guidelines and the 2008 Amendment and should therefore be given *Auer* deference. When HUD first issued the Guidelines in 1991, it announced that their purpose was to "describe minimum standards of compliance with the specific accessibility requirements of the Act."[201] HUD first used the burden-shifting scheme in 2006, prior to the codification of the safe harbors.[202] In *HUD v. Nelson*[203] an administrative law judge announced, and the

194. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 614–17 (1996).

195. *See, e.g.*, *Shanrie*, 669 F. Supp. 2d at 936 (stating that the Guidelines set minimum standards for compliance with design and construction requirements); United States v. Hallmark Homes, Inc., No. CV01-432-N-ELJ, 2003 WL 23219807, at *6–7 (D. Idaho 2003) (holding that the Guidelines set minimum standards for compliance and set clear principles to inform developers of design and construction requirements).

196. Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. 9472, 9473, 9476 (Mar. 6, 1991); Compliance With ANSI A117.1 Standards, 73 Fed. Reg. 63,610, 63,614 (Oct. 24, 2014); HUD & DOJ JOINT STATEMENT, *supra* note 25.

197. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997).

198. Christopher v. SmithKline Beecham Corp., __ U.S. __, 132 S. Ct. 2156, 2166 (2012).

199. *Auer*, 519 U.S. at 462.

200. *SmithKline Beecham Corp*., 132 S. Ct. at 2166.

201. Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. at 9476.

202. Sec., U.S. Dep't of Hous. & Urban Dev. v. Nelson, HUDALJ No. 05-069FH, 2006 WL 4573902, at *5–6 (Sept. 21, 2006).

203. *Id.*

Ninth Circuit later affirmed, that developers bear the burden of showing that they followed some comparable objective standard if they did not adopt a safe harbor.[204]

> The Charging Party may establish a *prima facie* case by proving a violation of the Guidelines. A respondent can then rebut the presumption established by the violation of the Guidelines by demonstrating compliance with a recognized, comparable, objective measure of accessibility. Giving the Guidelines the status of a rebuttable presumption, contrary to the ALJ, is not inconsistent with the concept that the Guidelines are not mandatory; because even if a respondent violates the Guidelines, the respondent can demonstrate that the property satisfies another comparable and objective standard of accessibility and thus avoid a liability finding.[205]

Courts have applied HUD's burden-shifting scheme, and recognized that it represents a reasonable construction of the Guidelines.[206] An agency's interpretation of its own regulations is reviewed under a clearly erroneous standard, and interpretations that represent a mere "convenient litigation position" or a "post hoc rationalization" are not given *Auer* deference.[207] HUD has interpreted the Guidelines to be minimal standards for compliance with the FHA's requirements[208] and the establishment of the burden-shifting scheme is in line with that interpretation.[209] The Guidelines and the safe harbors are not mandatory standards nor are they minimum requirements for compliance.[210] Given that HUD's burden-shifting scheme is consistent with the Guidelines and safe harbors, it is unlikely that they represent the kind of "convenient litigation position" or "post hoc rationalization" for HUD's prior actions.[211] Because these interpretations are not clearly erroneous, they

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204. *Id.*

205. *Nelson*, 2006 WL 4573902, at *5 (footnote omitted) (citing United States v. Quality Built Constr., Inc., 309 F. Supp. 2d 756, 764 (E.D.N.C. 2003); United States v. Taigen & Sons, Inc., 303 F. Supp. 2d 1129, 1151 (D. Idaho 2003)).

206. *Id.* at *5–6; United States v. Richard & Milton Grant Co., No. 01-2069 D, 2004 WL 6340158, at *8 (W.D. Tenn. Apr. 27, 2004); *Taigen & Sons, Inc*., 303 F. Supp. 2d at 1154; United States v. Edward Rose & Sons, 246 F. Supp. 2d 744, 751–53 (E.D. Mich. 2003), *aff'd*, 384 F.3d 258 (6th Cir. 2004); *Quality Built Constr., Inc.*, 309 F. Supp. 2d at 764.

207. Christopher v. SmithKline Beecham Corp., __ U.S. __, 132 S. Ct. 2156, 2166 (2012).

208. Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. 9472, 9473, 9476 (Mar. 6, 1991).

209. Compliance With ANSI A117.1 Standards, 73 Fed. Reg. 63,610, 63,614 (Oct. 24, 2014).

210. Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. at 9472.

211. *SmithKline Beecham Corp.*, 132 S. Ct. at 2166.

should be given *Auer* deference.[212]

C. *HUD's Recognition of the Safe Harbors and Publication of Technical Materials Should Be Given* Skidmore *Deference*

At a minimum, Courts should give HUD's technical publications and regulations *Skidmore* deference because they are the product of the agency's technical expertise and made with considerable public input.[213] *Skidmore* deference recognizes that agency interpretations, while not controlling, do "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[214] Agency interpretations are given weight depending on several factors including: the thoroughness of their consideration, the validity of the agency's reasoning, the consistency of the agency's other pronouncements, and "all those factors which give it power to persuade."[215]

HUD's regulatory interpretations of the FHA's accessibility requirements present a considerable body of technical expertise that courts should defer to and treat as authoritative interpretations of the FHA in design and construction cases.[216] Congress explicitly recognized HUD's technical expertise over the FHA's accessibility requirements when it mandated that HUD "provide technical assistance" to achieve compliance.[217] HUD also stated that "[t]o assist those involved in design or construction to comply with the Act's requirements, HUD provides

212. Auer v. Robbins, 519 U.S. 452, 461 (1997).

213. Design and Construction Requirements, Compliance With ANSI A117.1 Standards, 73 Fed. Reg. 63,610, 63,611 (Oct. 24, 2014) ("A total of eight comments were received from the following: An individual building owner; a consultant who monitors compliance with the Fair Housing Act; a nonprofit organization that addresses design issues for persons with disabilities and older persons; a nonprofit organization representing paralyzed veterans; an organization representing building safety and fire prevention professionals; a coalition representing both the multifamily rental housing industry and an international federation representing owners and managers of commercial properties; a national, nonprofit organization of diverse communities within the disability community; and an organization representing wheelchair users."); Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. at 9475 ("The Department received 562 timely comments. In addition, a substantial number of comments were received by the Department after the September 13, 1990 deadline. Although those comments were not timely filed, they were reviewed to assure that any major issues raised had been adequately addressed in comments that were received by the deadline. Each of the timely comments was read, and a list of all significant issues raised by those comments was compiled. All these issues were considered in the development of the final Guidelines.").

214. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

215. *Id.*

216. *See* Design and Construction Requirements, 24 C.F.R. § 100.205(e) (2008).

217. 42 U.S.C. § 3604(f)(5)(C) (2012).

rulemaking, training and technical assistance on the Act, the Regulations, and the Guidelines."[218] The ten safe harbors were the product of broad consensus and public notice and comment:

> While there are some differences among the ten designated safe harbors, there is broad consensus about what is required for accessibility based on the ANSI standards and the safe harbors. These standards result from a process that includes input from a variety of stakeholders including builders, designers, managers, and disability-rights advocates.[219]

The Guidelines and safe harbors are exactly the type of technical documents "to which courts and litigants may properly resort for guidance."[220] Courts have recognized that while HUD's interpretation may not be controlling, courts should give the interpretation deference: "Given the broad remedial purpose of the Fair Housing Act, the Court is persuaded that HUD's interpretation of the FHAA concerning multifamily dwellings is reasonable and entitled to deference."[221] Because the Guidelines and the safe harbors present a body of informed technical experience, courts should defer to these documents as authoritative interpretations of the FHA's accessibility requirements.[222]

IV. MINIMAL OBJECTIVE STANDARDS FOR ACCESSIBILITY IN HOUSING BEST EFFECTUATES CONGRESS'S INTENT AND ARE THE MOST PRACTICAL METHOD FOR ENSURING ACCESSIBILITY

Judicial recognition of objective minimal standards for compliance with the FHA's accessibility requirements is in line with Congress's policy goal of removing architectural barriers for persons with disabilities and is the best method to ensure that developers design and construct housing in an accessible manner.[223] As previously discussed in Section I.B,[224] Congress's purpose in amending the FHA to include persons with disabilities was to give a "clear pronouncement of a

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218. HUD & DOJ JOINT STATEMENT, *supra* note 25.

219. *Id.* at 21.

220. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

221. Fair Hous. Council, Inc. v. Vill. of Olde St. Andrews, Inc., 250 F. Supp. 2d 706, 717 n.9 (W.D. Ky. 2003) (citing Meyer v. Holley, 537 U.S. 280, 287–88 (2003); Trafficante v. Metro. Life Ins., 409 U.S. 205, 210 (1972)).

222. *See* Design and Construction Requirements, 24 C.F.R. § 100.205(e) (2008).

223. *See* H.R. REP. NO. 100-711, at 25, *as reprinted in* 1988 U.S.C.C.A.N. 2173, 2186 (citing Alexander v. Choate, 469 U.S. 287, 295–96 (1985)).

224. *See supra* Section I.B.

national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream."[225] Congress stated that the purpose of the FHAA was, in part, to "extend[] the principle of equal housing opportunity to handicapped persons."[226] Congress created the accessibility requirements in recognition of the fact that discrimination against persons with disabilities "is not limited to blatant, intentional acts of discrimination. Acts that have the effect of causing discrimination can be just as devastating as intentional discrimination."[227] Congress further recognized that lack of access to a person using a wheelchair excludes a person in the same way that a posted sign saying "No Handicapped People Allowed" would.[228]

Most importantly, Congress believed that "[c]ompliance with these minimal standards will eliminate many of the barriers which discriminate against persons with disabilities in their attempts to obtain equal housing opportunities."[229] Courts have recognized Congress's intent to make housing accessible when giving deference to HUD's interpretations establishing minimal standards for compliance.[230] Minimal standards for accessibility ensure that when developers fall below the ten safe harbors that are widely recognized building codes, they run the risk of violating the FHA if they cannot prove that they followed some comparable objective standard.[231] If courts do not recognize the ten safe harbors as having established minimal standards, individual developers are free to argue that their units are accessible without reference to any recognized standard.[232] The alternative subjective standard for accessibility, which some courts have

225. H.R. REP. NO. 100-711, at 18, *as reprinted in* 1988 U.S.C.C.A.N. 2173, 2179.

226. *Id.* at 13, 1988 U.S.C.C.A.N. at 2174.

227. *Id.* at 25, 1988 U.S.C.C.A.N. at 2186.

228. *Id.*

229. *Id.* at 27–28, 1988 U.S.C.C.A.N. at 2188–89.

230. Nelson v. HUD, 320 F. App'x 635 (9th Cir. 2009); United States v. Shanrie Co., Inc., 669 F. Supp. 2d 932, 936 (S.D. Ill. 2009); United States v. Tanski, No. 1:04-CV-714, 2007 WL 1017020, at *22 (N.D.N.Y. Mar. 30, 2007); United States v. Quality Built Const., Inc., 309 F. Supp. 2d 756, 761 (E.D.N.C. 2003) (citing Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc., 3 F. Supp. 2d 661, 665 (D. Md. 1998)).

231. Design and Construction Requirements; Compliance with ANSI A117.1 Standards, 72 Fed. Reg. 39,540, 39,541 (July 18, 2007).

232. *See* United States v. JPI Constr., L.P., No. 3-09-CV-0412-B-BD, 2011 WL 6963160, at *4 (N.D. Tex. Nov. 10, 2011), *report and recommendation adopted*, 2012 WL 43507 (Jan. 9, 2012) (holding that HUD's regulations form neither mandatory standards nor minimum requirements and denying the government's motion for summary judgment where the developer's properties fell below the safe harbors on the grounds that the developer's experts argued that the units were accessible without adopting any objective comparable standard).

recognized,[233] will contribute to the growing trend of design and construction litigation,[234] increase the amount of inaccessible housing,[235] expose developers to potential liability under the FHA,[236] and will have the functional effect of preventing many persons with disabilities from attaining accessible housing.[237]

CONCLUSION

In 1988, Congress amended the FHA to tear down barriers in housing which discriminate against persons with disabilities. The accessibility requirements were meant to make housing accessible nationwide, and bring persons with disabilities into the American mainstream. Initially, HUD provided technical guidance to developers, giving them flexibility to meet the requirements. Developers have flouted HUD's guidance and the degree of noncompliance with the Act's accessibility requirements is rampant and widespread. After consulting with the industry, HUD recognized several widely accepted model building codes and gave developers many avenues for compliance. Housing developers have shirked the safe harbors as well, some going as far as to argue that they do not have to meet any set of standards. If developers are not held accountable to meet minimal objective standards, noncompliance will continue to pervade housing nationwide, persons with disabilities will be prevented from attaining accessible housing, and litigation over what accessibility means under the FHA will only grow as a result. In sum, courts must recognize HUD's regulations as having set minimal objective standards for accessibility. If courts defer to HUD's interpretations, developers will be put on notice of the objective standards they have to meet. As a result, housing will more likely be built with accessible features, and Congress's purpose in amending the FHA to provide persons with disabilities accessible homes will be realized.

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233. *See* Barker v. Niles Bolton Assocs., Inc., 316 F. App'x 933, 941–42 (11th Cir. 2009); *JPI Constr.*, 2011 WL 6963160, at *5.

234. U.S. DEP'T OF HOUS. & URBAN DEV., ANNUAL REPORT ON FAIR HOUSING FY 2012–2013 (2014), http://portal.hud.gov/hudportal/documents/huddoc?id=2012-13annreport.pdf [https://perma.cc/7CNY-HSMK].

235. Schwemm, *supra* note 17, at 754 n.9.

236. Design and Construction Requirements, Compliance with ANSI A117.1 Standards, 72 Fed. Reg. at 39,540.

237. H.R. REP. NO. 100-711, at 25, *as reprinted in* 1988 U.S.C.C.A.N. 2173, 2186.