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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

Petition to Amend Rule 31.3(e),
Rules of the Supreme Court of
Arizona

Arizona Supreme Court No. R-24-0029

**Comment to Petition to Amend Rule 31.3(e),
Rules of the Supreme Court of Arizona**

Pursuant to Rule 28(e) of the Rules of the Supreme Court of Arizona, Disability Rights Arizona (DRAZ), formerly known as the Arizona Center for Disability Law, respectfully submits this comment in support of Petition R-24-0029 (the Petition), filed by Petitioner the Civil Rights Division of the Arizona Attorney General’s Office (the Division). The Petition appropriately urges adoption of an amendment to Rule 31.3(e) of the Rules of the Supreme Court of Arizona, governing the limited practice of non-lawyer advocates in administrative proceedings. The proposed rule change would allow non-attorney employees of certain fair housing organizations funded by the United States Department of Housing and Urban Development (HUD) to provide no-cost assistance to housing discrimination complainants during the Division’s efforts to investigate and

informally resolve housing discrimination complaints.

DRAZ is a non-profit law firm that provides free assistance and representation to individuals with disabilities throughout Arizona. DRAZ is also the designated Protection and Advocacy agency for Arizona. DRAZ is one of the very few law firms that regularly represents complainants alleging discrimination in housing before the Division. DRAZ is deeply familiar with the devastating impacts of disability discrimination in housing in Arizona, as well as the significant barriers faced by complainants who presently navigate the Division's administrative processes without representation.

The proposed rule change is overdue and should be adopted. As explained in detail below, the proposed rule change is limited to employees of organizations funded and monitored by HUD's Fair Housing Initiatives Program (FHIP), a program designed to further the goal of eradicating housing discrimination through partnerships with non-profit organizations. FHIP employees, who receive training from HUD and have expertise in housing discrimination, are already authorized to file administrative housing discrimination complaints with HUD and to assist unrepresented complainants throughout HUD's administrative investigative and dispute resolution proceedings. FHIP representatives do not charge for this assistance.

However, under current practices, HUD refers most fair housing complaints filed in Arizona to the Division for investigation. When this happens, FHIP employees are prohibited under current rules from continuing to provide ongoing assistance to complainants. By allowing FHIP employees to assist complainants before the Division,

the proposed rule change would harmonize Arizona's administrative process for investigating and resolving housing discrimination with the federal administrative process already employed by HUD. Moreover, adoption of the proposed rule change would also protect the rights of Arizonans with disabilities who face barriers navigating the administrative complaint process and would bolster Arizona's status as a nationwide leader in addressing access to justice for Arizonans.

I. Adoption of the Proposed Rule Change Is Necessary to Harmonize Federal and State Fair Housing Administrative Complaint Processing.

To further the Fair Housing Act's (FHA's) purpose of eliminating housing discrimination, Congress authorized HUD to create two complementary programs to partner with local agencies: the FHIP program and the Fair Housing Assistance Program (FHAP), of which the Division is a participant. HUD funds FHIP partners, typically non-profit organizations, to investigate violations of the FHA, assist individuals who allege housing discrimination in filing and pursuing complaints, and promote public understanding of the requirements of the FHA. *See* 42 U.S.C. § 3616a; 24 C.F.R. § 125.103 *et seq.*

HUD also partners with FHAP organizations, including the Division, which are state and local agencies responsible for enforcing a state or local anti-discrimination law that provides protections substantially equivalent to the FHA. *See* 42 U.S.C. §§ 3610(f), 3616. FHIPs and FHAPs are therefore two sides of the same coin: HUD-funded partnership programs designed to further the FHA's core purpose of eliminating housing discrimination. FHIPs provide advocacy and assistance to complainants while FHAPs

provide neutral investigative and dispute resolution mechanisms. However, under current practice in Arizona, this framework is undermined by the inability of FHIP employees to continue assisting a complainant whose complaint is referred by HUD to the Division for investigation.

Housing discrimination complainants may file complaints with HUD's Office of Fair Housing and Equal Opportunity (FHEO), which is charged with investigating complaints of housing discrimination and determining whether there is reasonable cause to believe that discrimination occurred. 42 U.S.C. § 3610(a), (g). Where a complaint is found to be meritorious, HUD must attempt to obtain voluntary compliance with the FHA through a conciliation agreement or may bring a civil judicial action to obtain compliance. 42 U.S.C. § 3610(b), (e).

During HUD's investigation of an administrative complaint of discrimination, the complainant has the right to be represented by either an attorney or by a non-attorney representative.¹ Non-attorney FHIP employees may play the role of authorized representative during HUD's investigative proceedings and thereby assist complainants—free of cost—with collecting and organizing evidence, identifying possible witnesses to provide the Division, explaining to the complainant what to expect at their interview before the Division, attending the complainant's interview with them, meeting deadlines, maintaining communication with the assigned HUD investigator, and

¹ See HUD FHEO Handbook 8024.01, Ch. 7, *Planning and Conducting the Investigation*, at 7-20(A), available at <https://www.hud.gov/sites/documents/80241C7FHEH.PDF> (last accessed April 19, 2024) (explaining that when a non-attorney authorized representative represents a complainant, both the complainant and the representative shall sign the letter of representation).

conveying informal dispute resolution offers during HUD’s conciliation process.² FHIP representatives can also help complainants put their experience into a coherent narrative. At times, individuals have reported that they were not able to file a complaint with the Division because the matter was determined to be outside of the Division’s jurisdiction. Many times, those complainants lacked assistance before filing and so focused on landlord/tenant issues rather than fair housing issues, even though they may also have had a meritorious discrimination complaint.

However, under current practice, HUD refers most housing discrimination complaints filed in Arizona to the Division, its FHAP partner, for investigative and informal dispute resolution efforts. This partnership is authorized by statute, which allows for HUD to refer housing discrimination complaints to a State or local public agency responsible for enforcing a state or local anti-discrimination law that provides protections “substantially equivalent” to the FHA. 42 U.S.C. §§ 3610(f), 3616. The Arizona Fair Housing Act (AFHA), A.R.S. § 41-1491 *et seq.*, was enacted to create “substantial equivalency” between Arizona law and the federal government’s housing discrimination enforcement efforts. 1991 Ariz. Sess. Laws, ch. 181, § 1. AFHA is enforced by the Division through an administrative investigation and resolution process that mirrors HUD’s processes. *See* A.R.S. § 41-1491.22. HUD has therefore certified the Division as an agency that may receive referrals of housing discrimination complaints filed with

² HUD Handbook 8024.01, Ch. 11, *Conciliation*, at 11-3(B), available at <https://www.hud.gov/sites/documents/80241C11FHEH.PDF> (last accessed April 19, 2024) (describing requirement that HUD convey conciliation offers to the authorized representative rather than directly to the complainant)

HUD. *See* 73 FR 15535 (March 24, 2008). Pursuant to a Memorandum of Understanding between HUD and the Division, the Division therefore investigates and pursues resolution of claims of housing discrimination referred to the Division by HUD. *See* 24 C.F.R. §§ 103.100, 115.205.

Under current rules, the referral of a complaint of housing discrimination from HUD to the Division precludes FHIP employees from serving as a complainant's authorized representative, even when the FHIP has investigated the underlying facts and initiated the HUD complaint. The rule change proposed by the Division would eliminate this inconsistency and further the purpose of the FHA and AFHA of eliminating housing discrimination by allowing FHIP employees to also assist complainants before the Division. As explained below, the current inability of FHIP employees to provide critical assistance to housing discrimination complainants before the Division has devastating consequences for complainants, the vast majority of whom are unrepresented by counsel.

II. Complainants Face Numerous Challenges Navigating the Division's Administrative Proceedings Without Assistance.

Although the Division makes significant efforts to provide an administrative process that is fair, efficient, and accessible, barriers to effective participation by complainants remain. The Division's investigative process may take a full year or longer.³ To pursue their complaint, a complainant must submit an inquiry to HUD or the Division, review and notarize a formal charge of discrimination, submit to a formal recorded

³ *See* A.R.S. § 41-149.24 (allowing investigations to continue past one year so long as written notice is provided to complaining and responding party).

interview under penalty of perjury, respond to legal and factual arguments submitted by a respondent housing provider who is typically represented by counsel, and participate in informal dispute resolution mechanisms, all while maintaining communication with the Division throughout a lengthy process.

Complainants face numerous barriers in accessing this process, including unfamiliarity with the substantive legal standards and procedures, lack of access to technology, a sense of overwhelm by the formality of the recorded interview taken under oath, and lack of access to stable housing. Indeed, actionable housing discrimination itself renders many complainants homeless or precariously housed.⁴ Because many housing discrimination complainants therefore lack a permanent address, it is particularly difficult for such complainants to remain in communication with the Division throughout the entirety of an investigative process.

For many complainants with meritorious claims of discrimination, the traumatic experience of discrimination itself presents an emotional barrier to effective participation in the administrative process. An individual who has experienced not only the stigmatic and dignitary harm of unlawful discrimination but material consequences of such discrimination, including homelessness, may have difficulty mustering the objectivity and composure necessary to articulate their claim of discrimination, rebut sophisticated arguments furnished by attorneys for responding housing providers, and otherwise

⁴ See A.R.S. §§ 41-149.19, 1491.22 (prohibiting housing providers from refusing to sell, rent, or “otherwise make unavailable or deny” a dwelling based on membership in protected classes).

advocate for themselves in an effective manner throughout the Division's investigation.

Complaints alleging disability discrimination make up the majority of housing discrimination complaints investigated by the Division. *See* Petition at 2. Barriers to successfully navigating the Division's proceedings are particularly high for some individuals with disabilities. Unlike other types of discrimination that arise from discriminatory animus, disability discrimination in housing may also take the form of failure by housing providers to provide reasonable accommodations or reasonable modifications necessary to provide individuals with disabilities an equal opportunity to use and enjoy housing.⁵ Many complainants with meritorious complaints for a housing provider's failure to provide reasonable accommodations and reasonable modifications may not fully understand this unique form of discrimination and may have difficulty articulating the precise nature of their complaint to the Division.

Moreover, individuals with disabilities may face barriers to effective participation in the Division's administrative proceedings because of the very disabilities that led them to experience discrimination. Individuals with various disabilities, including mental health disabilities, intellectual/developmental disabilities, and traumatic brain injuries may have disability-related difficulties meeting deadlines, keeping track of paperwork, remembering to attend appointments, communicating effectively, managing the stress of an adversarial process, and otherwise performing tasks that are required of complainants

⁵ *See* 42 U.S.C. 3604(f)(3) (FHA); A.R.S. § 41-1491.19(E) (AFHA) (defining as discrimination the failure to permit "reasonable modifications of existing premises" and the failure to "make reasonable accommodations in rules, practices or services").

alleging housing discrimination before the Division.

The complexity and importance of the Division’s complaint investigation and resolution procedures require additional assistance for complainants. FHIP employees, as individuals with expertise in housing discrimination and administrative complaint mechanisms, are well positioned to provide no-cost non-attorney assistance and authorized representation to such complainants. As the Arizona Department of Housing’s 2020 Analysis of Impediments to Fair Housing Choice noted, the low number of findings of cause that discrimination occurred during HUD administrative complaints may reflect the need for additional assistance from FHIP employees who can help complainants “navigate the complaint filing process and communicate the nature of their complaint with investigators.”⁶

III. Adoption of the Proposed Rule Change Would Bolster Arizona’s Status as a Nationwide Leader in Securing Access to Justice

The proposed rule change would also further Arizona’s leadership in addressing the justice gap in which most civil legal needs of low-income and moderate-income individuals remain unmet. As the Report and Recommendations of the Arizona Supreme Court’s Task Force on the Delivery of Legal Services (the Task Force) recounted, the costs of hiring lawyers has increased significantly since the 1970s, putting private representation out of reach for most Arizonans.⁷ At the same time, resources and funding

⁶ Arizona Department of Housing (ADOH), *State of Arizona Analysis of Impediments to Fair Housing Choice*, 2020, available at https://housing.az.gov/sites/default/files/documents/files/AZ-2020-Analysis-of-Impediments-to-Fair-Housing-Choice_0.pdf (last accessed April 19, 2024) at 65.

⁷ Arizona Supreme Court Task Force on the Delivery of Legal Services, *Report and Recommendations*, October 4, 2019, available at

for nonprofit legal services providers are insufficient to meet the significant demand for critical civil legal services.⁸ In response to these challenges, the Task Force proposed numerous reforms, including the development of a tier of nonlawyer legal services providers.⁹ In November of 2021, Arizona became one of a few states “leading the charge to address access to justice issues” by granting licenses to the first ten legal paraprofessionals in the state.¹⁰

The Division’s administrative proceedings present the same access to the justice obstacles as civil courts. Most complainants alleging housing discrimination are low-income, in part because people of means may be able to avoid ongoing housing discrimination by simply moving, whereas individuals with low income are subjected to continuing discrimination because of their lack of resources. Even for those complainants who may have financial resources, the cost of hiring an attorney may exceed the value of their claim of discrimination, and very few private sector attorneys represent complainants alleging housing discrimination before the Division. In fact, DRAZ has only been able to identify four private sector attorneys in Arizona who represent complainants in fair housing matters.

Discrimination in housing is not only an ongoing problem in Arizona; it is in fact

<https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRED10042019.pdf> (last accessed April 19, 2024) at 7-8.

⁸ *Id.* at 6.

⁹ *Id.* at 3.

¹⁰ Arizona State Law Journal, *Closing the “Justice Gap”: The First Ten Legal Paraprofessionals Receive Licensure in Arizona*, Feb. 3, 2022, available at <https://arizonastatelawjournal.org/2022/02/03/closing-the-justice-gap-the-first-ten-legal-paraprofessionals-receive-licensure-in-arizona/> (last accessed April 19, 2024).

a growing problem that significantly contributes to Arizona’s housing and homelessness crisis. As the ADOH’s Analysis of Impediments found, Arizona’s aging housing stock and aging population should be expected to lead to a continued increase in complaints relating to disability accessibility and reasonable accommodations over the coming years.¹¹ DRAZ has made enormous efforts to meet this challenge, including adding housing discrimination as an organizational area of focus, developing staff capacity, partnering with other organizations to pursue systemic reform, and increasing the number of individuals DRAZ is able to serve through virtual civil rights consultations and virtual presentations on reasonable accommodations and modifications in housing. Nonetheless, DRAZ is a nonprofit that provides free legal services to our clients, and the demand for our services greatly exceeds our staff and resources.

Adoption of the proposed rule change would address the lack of attorney assistance currently available to complainants by empowering FHIP employees—individuals with demonstrated expertise and experience with housing discrimination—to provide free assistance to complainants before the Division.

IV. Conclusion

As the Petition demonstrates, the proposed rule change is firmly in line with the already-existing exceptions to Rule 31.2 contained in Rule 31.3(e). And as explained above, the proposed rule change also accords with HUD’s pre-existing rules and with this Court’s recent efforts to secure access to justice to Arizonans. DRAZ respectfully urges

¹¹ ADOH *Analysis of Impediments*, *supra* at note 6, at page 40.

this Court to adopt the proposed rule change.

RESPECTFULLY SUBMITTED this 30th day of April, 2024.

/s/ Joseph Falcon-Freeman

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