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Re: Equitable Access to Low-Income Housing ("EQUAL") Ordinance

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prospective tenants with the ability to pay are considered for housing regardless of whether they receive a housing subsidy or housing assistance of any kind.

The Oakland Housing Authority ("OHA") has cited voucher underutilization as "the most significant challenge the agency is facing" and has reported that nearly 1,000 vouchers were unused as of the beginning of the year. (Oakland Housing Authority: OHA: *MTW Annual Plan 2017*, 11). . (OHA: *MTW Annual Plan 2020*, 20).² The OHA has reported that HCV holders have faced "much longer search times" and required "multiple voucher extensions" while searching for housing (MTW Annual Plan 2020, 34).

OHA attributes Oakland's declining voucher utilization rate to "high demand and low inventory ... driving up prices and causing owners to abandon the Section 8 program and seek unassisted families for their vacant units" (*Id.* at 14). As more technology companies and their workers move to Oakland, HCV holders increasingly find themselves "applying for homes that ... have a dozen or more applications to choose from[,] the majority being without the burdensome process, regulations, and stigma associated with the Section 8 program" (OHA: *MTW Annual Plan 2018*, 14). In 2016, OHA reported that it had lost "824 units from the HCV program ... [in the previous year due to owners exercising] options to exit the program ranging from ... not abat[ing] inspection fails ... [to] rent[ing] to private market tenants when units become vacant" (*MTW Annual Plan 2017*, 11, 16). As more landlords refuse to accept Housing Choice Vouchers, "more voucher holders need to look for rental housing outside of Oakland." (Oakland Dept. of Housing and Community Development: *Analysis of Impediments to Fair Housing Choice*, 81).

In recent years, OHA has explored a number of potential interventions to encourage landlord participation in the HCV program, including but not limited to initiatives to streamline unit inspections and subsidize related abatement activities, automate rent increases for HCVs, cover vacancy losses when landlords re-rent units to HCV holders, and provide new landlord-participants with a one-time incentive payment ((Oakland Housing Authority: *MTW Annual Plan 2019*, 27-30). While these programs may help address some landlords' qualms regarding the procedural hurdles associated with renting to tenants who receive housing assistance, their effectiveness will be improved by legislation *requiring* landlords to give due consideration to all prospective tenants

² This number is calculated from the OHA's reporting of its voucher utilization rate. Significantly, this number does not account for voucher turnover when a HCV holder is unable to find housing (i.e. when more than one family uses a voucher unsuccessfully in the same year). Housing authorities can more accurately describe the share of families who have been unable to use a new HCV to rent a home by using a metric called the "success rate." HCV success rates are usually lower than utilization rates, which count the number of HCV leased units as a proportion of vouchers HUD has authorized the housing authority to issue. For example, advocates reported in 2015 that San Mateo County had a utilization rate of 92 percent but a success rate of 45 percent. See <http://nhlp.org/files/01%20Voucher%20Utilization%20Presentation.pdf>, p. 12.

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with the ability to pay for housing *regardless* of any administrative burdens associated with their form of payment.

Over the past year, the City of Oakland (“the City”) has received numerous reports of landlords openly refusing to rent to HCV holders. Many of these landlords include phrases like “NO Section 8” in online advertisements for their units; others wait until after families submit an application or schedule an appointment to view the unit to communicate that they will not accept HCVs as a method of payment. On February 23, 2018, city staff conducted a Craigslist search for one-bedroom units renting for \$2,000 per month or less in downtown Oakland. 28 of the first 100 unique advertisements indicated that recipients of housing assistance would not be considered. Blanket policies of this nature are demoralizing to families who rely on housing assistance to pay rent and perpetuate the very disparities in access to safe and affordable housing that the HCV Program was designed to remedy.

Oakland’s housing crisis disproportionately impacts populations at high-risk for homelessness, including low-income households, minorities, senior citizens, and persons with disabilities (See, e.g., OHA: *Moving to Work Annual Report FY 2016*, 2). Since these populations are also more likely to qualify for HCVs, the HCV Program’s effectiveness as an affordable housing intervention depends upon landlords providing individualized consideration to each prospective tenant, regardless of whether they receive housing assistance.

Local governments currently have authority to protect voucher holders. (*City and County of San Francisco v. Post* (2018) 22 Cal.App.5th 121 [upholding San Francisco’s ordinance against preemption challenge].) At least eight other cities and counties in California—including Berkeley, Corte Madera, East Palo Alto, Los Angeles, Marin, San Francisco, Santa Clara, and Santa Monica—have enacted similar laws prohibiting landlords from refusing to rent to HCV holders (Poverty & Race Research Action Council: *Expanding Choice: Practical Strategies for Building a Successful Housing Mobility Program*, Appendix B). One study prepared for the Department of Housing and Urban Development found that these laws increase HCV utilization rates by 4-11% (Lance Freeman, *The Impact of Source of Income Laws on Voucher Utilization and Locational Outcomes*, 11). By providing low-income households with access to low-poverty neighborhoods and improving their residential stability, they may also lead to better educational and health outcomes for children of families that receive HCVs (See, e.g., Urban Institute: *Housing as a Platform for Improving Education Outcomes Among Low-Income Children*, 6-9). In Oakland, this law has the potential to make a meaningful difference in the lives of hundreds of local families.

However, the California Legislature is currently considering Senate Bill 329 (“SB 329”), which would extend the housing protections of California’s Fair Employment Housing Act (“FEHA”) to tenants receiving Housing Assistance. If Senate Bill 329 were to

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become law, it would preempt the City's enforcement of this Ordinance. Previous legislative attempts to extend FEHA's protections to tenants receiving Housing Assistance have failed and it is uncertain whether SB 329 will become law. The City's passage of this Ordinance would ensure that whether or not SB 329 passes, Oakland's residents will be protected immediately.

PURPOSE & METHOD

This ordinance will help redress Oakland's housing crisis by ensuring that all persons with the ability to pay for housing are considered for housing, regardless of whether they receive a housing subsidy or housing assistance of any kind. At present, Oakland offers no special protection for tenants seeking to pay rent with some form of government assistance (e.g., HCVs). As a result, prospective residential tenants who rely on rental or housing assistance are often denied equal consideration for access to housing.

The ordinance's purpose is furthered by a set of prohibitions on owner behaviors motivated—in whole or in part—by a household's receipt of housing assistance. Many of these restrictions pertain exclusively to selection of potential tenants. Several, however, extend beyond these initial processes to regulate the substance of agreements and ensure that owners do not present families with less favorable terms and conditions because of their reliance on housing assistance. The ordinance prohibits doing any of the following based on a tenant's participation in a Housing Assistance program:

- Refusing to rent a unit, requiring different rental terms, or misrepresenting the availability of a unit;
- Including additional terms or conditions of a rental agreement aside from what is required to receive the relevant form of housing assistance;
- Refusing or restricting facilities, services, repairs, or improvements;
- Terminating a tenancy;
- Causing statements to be made or disseminated that relate to a rental transaction that indicate preference, limitation, or prejudice based on receipt of housing assistance; and
- Using a financial standard that privileges income or payments made directly by prospective tenants or prejudices reliance on housing assistance.

The ordinance's deterrent effect on these behaviors is accomplished in three ways. First, aggrieved current or prospective tenants and nonprofits can bring civil actions to enforce the ordinance. Through these actions, tenants and nonprofits may seek equitable relief (including restitution) as well as monetary recovery in the amount of three times the greater of either actual damages, one month's rent for the unit, or the HUD Small Area Fair Market Rent for the unit. In addition to increasing the cost of

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violating the ordinance, minimum and treble damages in this context serve to incentivize enforcement by tenants and nonprofits in situations where actual damages are very low or difficult to quantify. Owners may also be liable for litigation costs, reasonable attorney’s fees, and—under certain circumstances—punitive damages.

Second, the City Attorney is authorized to bring civil actions to punish violations of the ordinance. In civil actions enforcing the ordinance, the City Attorney may seek equitable relief (including restitution), litigation and investigation costs, and reasonable attorney’s fees.

Third, the ordinance authorizes the District Attorney to impose a criminal infraction for an owner’s first violation of the Ordinance. The District Attorney may impose a misdemeanor for multiple violations of the Ordinance by the same Owner.

The ordinance contains exemptions for rental units in hospitals and nursing or health facilities; transient occupancy hotels and motels; and rental units in specified nonprofit facilities. Rental units that are occupied by or share a bathroom or kitchen with an owner or their family member are also exempt.

This ordinance does not restrict owners’ ability to evaluate housing applicants based on criteria unrelated to receipt of housing assistance that are otherwise permitted under federal, state, and local law. Additionally, as defined in the ordinance, housing assistance does not include benefits or subsidies that are paid directly to the tenant. Administrative burdens associated with acceptance of housing assistance as a form of payment, however, are not a defense to violations of this ordinance.

ANALYSIS

The ordinance will improve low-income families’ access to housing by prohibiting owners from refusing to enter into rental agreements with applicants based on their receipt of housing assistance. It will also help reduce bargaining power disparities between owners and recipients of housing assistance, who might otherwise be willing to accept unusually restrictive terms and conditions based on their method of rental payment, at the contract negotiation stage. Finally, tenants who pay rent with HCVs may be more likely to assert their rights and report health and safety issues in their units in light of the protections afforded by the ordinance.

The primary downside of this ordinance is that violations may be difficult to identify and enforce. HCV holders who are barred from consideration for housing may not report violations of the ordinance or lack the resources to bring litigation to assert their rights. By allowing nonprofits to sue on behalf of aggrieved individuals and providing for minimum and treble damages, the ordinance offers incentives for HCV holders to come forward with their experiences and bring civil enforcement actions against landlords who

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violate the law. To ensure the ordinance's effectiveness, however, City Council should consider providing funding for legal assistance to families who are denied consideration for housing based on their receipt of housing assistance.

SOCIAL IMPACT

This ordinance is intended to ensure that families who use housing assistance to pay rent receive equal consideration when applying for housing. It does not curtail owners' ability to select tenants based on legitimate, lawful criteria unrelated to a prospective tenant's receipt of housing assistance. The City acknowledges that this law requires owners to bear any administrative burdens associated with accepting housing assistance as a form of payment and has determined that any potential difficulties imposed on owners are outweighed by the importance of ensuring equal access to housing for families who rely on housing assistance.

FISCAL IMPACT

The new private right of action created by "EQUAL" would have little direct fiscal impact on City government. Adequately responding to the public's inquiries regarding this ordinance may result in small increases in staffing in the Department of Housing and Community Development and the Office of the City Attorney. Many of the costs to the City Attorney's office will be recoverable in the form of attorney's fees recovered in successful actions brought by the City Attorney. Moreover, if the legislature passes SB329 and the Governor signs it into law, SB329 will preempt the City from enforcing this Ordinance. In such a case, the Ordinance would have no fiscal impact.

SUSTAINABLE OPPORTUNITIES

Economic: Without equal access to safe and habitable rental units, families that rely on housing assistance are more likely to become homeless. Homelessness limits individuals' ability to improve their economic situation and strains City resources through service provision.

Environmental: Tenants who pay rent with housing assistance may not voice concerns about habitability issues in their units for fear of reprisal. To the extent that this law encourages tenants to assert their rights to safe and habitable housing, it may help ensure that existing health and safety standards are complied with and enforced.

Social Equity: Low-income households that are eligible for housing assistance are at high-risk of homelessness and are among Oakland's most vulnerable residents. By prohibiting owners from rejecting prospective tenants on the basis of their receipt of housing assistance, this law may enable these families to find stable housing and, in turn, improve their children's educational and health outcomes.

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ACTION REQUESTED OF CITY COUNCIL

The Council is requested to enact the Equitable Access to Low-Income Housing ("EQUAL") Ordinance.

For questions regarding this report, please contact Ubaldo Fernandez at 238-7040.

Very truly yours,

BARBARA J. PARKER
City Attorney

2782031v2

FILED
OFFICE OF THE CITY CLERK
OAKLAND

APPROVED AS TO FORM AND LEGALITY

INTRODUCED BY CITY ATTORNEY PARKER, COUNCILMEMBER KALB,
AND COUNCILMEMBER FORTUNATO BAS

19 JUN 20 PM 1:20


CITY ATTORNEY'S OFFICE

OAKLAND CITY COUNCIL

ORDINANCE NO. _____ C.M.S.

ORDINANCE ADDING A NEW ARTICLE TO O.M.C. CHAPTER 8.22 TO INCREASE ACCESS TO HOUSING FOR LOW-INCOME TENANTS DEPENDENT ON HOUSING ASSISTANCE AND TO PROVIDE REMEDIES FOR VIOLATIONS

WHEREAS, increased demand for rental housing in Oakland has caused rents to skyrocket, destabilizing Oakland's rental housing market and triggering an affordable housing crisis; and

WHEREAS, Oakland's prolonged affordable housing crisis harms neighborhood stability and cohesion and disproportionately impacts populations at high-risk for homelessness, including low-income households, senior citizens, people of color, and people with disabilities; and

WHEREAS, many of the tenants most affected by Oakland's affordable housing crisis rely on housing assistance, such as Section 8 vouchers (also known as Housing Choice Vouchers), to pay rent;

WHEREAS, Oakland's low-vacancy, high-demand rental housing market incentivizes landlords to rent units to private market tenants and, in 2015 alone, the Oakland Housing Authority ("OHA") reported losing 824 units from the Housing Choice Voucher ("HCV") Program because property owners decided to leave the Program;

WHEREAS, OHA has cited HCV voucher underutilization as "the most significant challenge the agency is facing" and has attributed its declining utilization rate to decreased owner participation in the HCV Program;

WHEREAS, many landlords in Oakland openly refuse to rent to recipients of housing assistance, and blanket policies of this nature are both demoralizing to families who rely on housing assistance to pay rent and perpetuate the very disparities in access to safe and affordable housing that the HCV Program was designed to remedy; and

WHEREAS, as more landlords refuse to accept Section 8 vouchers, more voucher holders are displaced from their neighborhoods and forced to seek rental housing outside of Oakland;

WHEREAS, because Oakland presently offers no special legal protection for tenants seeking to pay rent with housing assistance, renters who rely on housing assistance may be denied equal consideration for access to housing; and

WHEREAS, the lack of protections for HCV recipients exacerbates Oakland's housing emergency, and the HCV Program's effectiveness as an affordable housing intervention depends upon landlords providing individualized consideration to each prospective tenant, regardless of whether they receive housing assistance; and

WHEREAS, at least eight other cities and counties in California—including Berkeley, Corte Madera, East Palo Alto, Los Angeles, Marin, San Francisco, Santa Clara, and Santa Monica—have enacted similar ordinances; and

WHEREAS, a study prepared for the Department of Housing and Urban Development found that laws preventing landlords from refusing to rent to Section 8 recipients increase voucher utilization rates by 4-11%; and

WHEREAS, providing low-income households with access to low-poverty neighborhoods and improving their residential stability may also lead to better educational and health outcomes for children and families that receive HCVs;

WHEREAS, protecting tenants from being denied housing because they receive housing assistance is consistent with the Housing Element of the Master Plan of the City of Oakland, which states that all residents have the right to decent housing in pleasant neighborhoods at prices they can afford; and

WHEREAS, the City Council is committed to maintaining the ability of people in all income categories to live in our city. Increased housing pressures for low-income residents warrant improved rent stabilization, tenant protection, and housing access policies. The City Council, further, finds that reasonable regulation of aspects of the landlord-tenant relationship is necessary to maintain an adequate supply of a variety of rental housing options, and to protect the health, safety, and general welfare of the public; and

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:

SECTION 1. Addition of Article IX to Chapter 8.22 of the Oakland Municipal Code. That the City Council hereby adopts the addition of Section 8.22.900 et. seq. as Article IX of Chapter 8.22 of the Oakland Municipal Code, as follows.

Article IX – Equitable Access to Low-income (“EQUAL”) Housing Ordinance

8.22.900 – Title.

This Ordinance shall be known as the Equitable Access to Low-income (“EQUAL”) Housing Ordinance.

8.22.910 – Purpose.

The purpose of this Ordinance is to redress the severe housing crisis in Oakland by ensuring that all persons with the ability to pay for housing are considered for housing, regardless of whether they receive a housing subsidy or housing assistance of any kind.

8.22.920 – Definitions.

“Housing Assistance” means any benefit or subsidy from any federal, state, local, or nonprofit-administered program, including, but not limited to, housing and rental assistance programs, homeless assistance programs, security deposit assistance programs, housing subsidy programs, and any requirement of any such programs. “Housing Assistance” does not include any benefit or subsidy that is paid directly to the Tenant.

"Owner" means an owner, real estate broker, trustee, receiver, or any person having any legal or equitable right of ownership or the right to rent or lease Rental Units, or an agent, representative, or successor of any of the foregoing.

"Rent" has the same meaning as in O.M.C. 8.22.340.

"Rental Agreement" has the same meaning as in O.M.C. 8.22.340.

"Rental Unit" means any unit in any real property, regardless of zoning status, including the land appurtenant thereto, that is rented or available for rent for residential use or occupancy (regardless of whether the unit is also used for other purposes), together with all housing services connected with use or occupancy of such property, such as common areas and recreational facilities held out for use by the tenant.

"Tenant" has the same meaning as in O.M.C. 8.22.340.

8.22.930 – Applicability.

- A. This Ordinance shall apply to all Rental Units, except any Rental Unit as described in O.M.C. 8.22.630(B)(2)-(4) and accommodations in motels, hotels, inns, tourist houses, rooming houses, and boarding houses, provided that such accommodations are not occupied by the same tenant for thirty (30) or more continuous days.

- B. Nothing in this Ordinance shall be construed to apply to the renting or leasing of any Rental Unit that meets the following criteria:
 - 1. the Owner, or any member of his or her family, occupies the Rental Unit, and
 - 2. The Owner, or any member of his or her family, shares a bathroom or kitchen facility in common with the Tenant.

8.22.940 – Prohibited Activity.

It is unlawful for any Owner to do or attempt to do any of the following that is wholly or partially based on receipt of Housing Assistance:

- A. To refuse to rent; to require different terms for renting;
- B. To misrepresent that a Rental Unit is unavailable for rent;
- C. To include in the terms or conditions of a Rental Agreement any clause, condition, or restriction, unless those clauses, conditions, or restrictions are required from the source of Housing Assistance to receive such assistance;
- D. To refuse or restrict facilities, services, repairs, or improvements for any current or prospective Tenant;
- E. To serve a notice of termination of tenancy; commence an unlawful detainer action; or otherwise deny or withhold the use of a Rental Unit;
- F. To make, print, publish, advertise, or disseminate in any way, or cause to be made printed or published, advertised or disseminated in any way, any notice, statement, or advertisement with respect to a rental, that unlawfully indicates preference, limitation, or prejudice based on receipt of Housing Assistance;
- G. To use a financial or income standard for rental housing that gives preferential treatment to income earned, or rental payments made, directly by a prospective Tenant over Housing Assistance, or that discounts or discriminates against Housing Assistance.

8.22.950 – [Reserved].

8.22.960 – Civil Remedies.

- A. Enforcement of Civil Remedies. A civil action to enforce the provisions of this Ordinance may be filed by:
 - 1. Any aggrieved current or prospective Tenant;
 - 2. The City Attorney; or

3. Any organization that:
 - i. Has tax exempt status under 26 United States Code Section 501(c)(3) or 501(c)(4);
 - ii. Has a mission of protecting the rights of Tenants in Oakland or Alameda County; and
 - iii. Will fairly and adequately represent the interests of the aggrieved current or prospective Tenant or a protected class.

- B. Equitable Relief. Any Owner who commits, proposes to commit, or aids another in committing an act that violates this Ordinance may be enjoined therefrom by any court of competent jurisdiction. The court may also award any further relief it deems proper, including but not limited to restitution.

- C. Civil Liability. Any Owner who violates, or any person who aids another to violate, any provision of this Ordinance shall be liable for the following monetary damages:
 1. In any action brought by any aggrieved current or prospective Tenant or any organization defined under O.M.C. 8.22.960(A)(3) or pursuant to this Ordinance, the Owner shall be liable for (a) three times the greater of either (1) actual damages, (2) one month's Rent that the Owner charges for the Rental Unit in question, or (3) the HUD Small Area Fair Market Rent of such Rental Unit, and (b) litigation costs and reasonable attorney's fees. All damages shall be awarded to the current or prospective Tenant whose rights were violated. The court may award punitive damages in a proper case as set out in Civil Code Section 3294 and pursuant to the standards set forth in that Code Section or any successor thereto, pursuant to standards for punitive damages set by state law.
 2. The City Attorney may file an action against an Owner that the City Attorney believes has violated provisions of this Ordinance. Such an action may include requests for equitable relief (e.g., injunctions and restitution), and recovery of costs and reasonable attorney's fees. The City Attorney has sole discretion to determine whether to bring such an action.

- D. Criminal Penalties.
 1. Infraction. Any Owner who violates, or any person who aids another to violate, any provision of this Ordinance shall be guilty of an infraction for the first offense.
 2. Misdemeanor. Any Owner who violates, or any person who aids another to violate, any provision of this ordinance multiple times shall be guilty of a misdemeanor.

- E. General Remedies. The remedies available in this Ordinance are not exclusive and may be used cumulatively with any other remedies in this Ordinance or at law.

8.22.970 – Miscellaneous.

- A. Non-waivability. The provisions of this Ordinance may not be waived. Any term of any Rental Agreement, lease, contract, application for rental of a unit, or other agreement which purports to waive or limit a current or prospective Tenant's substantive or procedural rights under this Ordinance is contrary to public policy, unenforceable, and void.
- B. Retaliation Prohibited. Retaliation against a prospective Tenant because of the Tenant's exercise of rights under this Ordinance is prohibited and constitutes a violation of this Ordinance. Retaliation claims may only be brought in court and may not be addressed administratively.
- C. Administrative Burden. While landlords may face some administrative burdens to receive Housing Assistance, new or greater administrative burden associated with receiving Housing Assistance is not a defense to any violation of this Ordinance.
- D. Rules and Regulations. The City Administrator is authorized to create and amend rules and regulations, and forms consistent with this Ordinance.

SECTION 3. Severability. If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the Chapter. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, clause or phrase thereof irrespective of the fact that one or more other sections, subsections, clauses or phrases may be declared invalid or unconstitutional.

SECTION 4. No Conflict with State or Federal Law. Nothing in this Ordinance shall be interpreted or applied so as to create any requirement, power, or duty in conflict with any federal or State law.

SECTION 5. Effective Date. This Ordinance shall become effective immediately on final adoption if it receives six or more affirmative votes; otherwise, it shall become effective upon the seventh day after final adoption.

SECTION 6. CEQA Exemption. This action is exempt from the requirements of the California Environmental Quality Act ("CEQA") pursuant to, but not limited to, the following CEQA guidelines: § 15378 (regulatory actions), § 15061(b)(3) (no significant environmental impact), and §15183 (actions consistent with the general plan and zoning).

IN COUNCIL, OAKLAND, CALIFORNIA,

PASSED BY THE FOLLOWING VOTE:

AYES - FORTUNATO BAS, GALLO, GIBSON MCELHANEY, KALB, REID, TAYLOR, THAO AND PRESIDENT KAPLAN

NOES -

ABSENT -

ABSTENTION -

ATTEST: _____

LATONDA SIMMONS
City Clerk and Clerk of the Council
of the City of Oakland, California

Date of Attestation: _____

NOTICE AND DIGEST

ORDINANCE ADDING A NEW ARTICLE TO O.M.C. CHAPTER 8.22 TO INCREASE ACCESS TO HOUSING FOR LOW-INCOME TENANTS DEPENDENT ON HOUSING ASSISTANCE AND TO PROVIDE REMEDIES FOR VIOLATIONS

This Ordinance adds a new Article to O.M.C. Chapter 8.22 to increase access to housing for low-income tenants dependent on housing assistance such as Section 8 Housing Choice Vouchers and to provide remedies for violations.