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## America's Continued Fair Housing Crisis and the Ignored Solution: The Affirmatively Furthering Fair Housing Rule

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## AMERICA'S CONTINUED FAIR HOUSING CRISIS AND THE IGNORED SOLUTION: THE AFFIRMATIVELY FURTHERING FAIR HOUSING RULE

### INTRODUCTION

When the United States Department of Housing and Urban Development (“HUD”) seized control of the public housing authority in Wellston, Missouri in 1996, it was one of Missouri’s poorest cities.<sup>1</sup> The authority was mismanaged and financially unstable, and dilapidated buildings lined the streets of the City.<sup>2</sup> HUD’s primary goal was to stabilize the authority and the area then hand it back over to the City.<sup>3</sup> Rather than stabilize, federal control led to a shutdown of the authority on January 1, 2019.<sup>4</sup> One fifth of the City’s residents living in public housing will lose their homes over the next year.<sup>5</sup> The residents will be compensated for their loss with a voucher for subsidized rent for use in the private market.<sup>6</sup> However, Wellston and other nearby St. Louis cities offer very limited affordable housing options for these displaced residents.<sup>7</sup> Furthermore, with the rise of rental costs,<sup>8</sup> and the average family spending more than fifty

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1. Molly Parker, *HUD Took Over a Town’s Housing Authority 22 Years Ago Now the Authority’s Broke and Residents Are Being Pushed Out*, PROPUBLICA (Dec. 14, 2018, 5:00 AM), <https://www.propublica.org/article/residents-are-being-pushed-out-of-wellston-missouri-housing-authority> [<https://perma.cc/Z2QQ-RRDL>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*; Jacob Barker, *HUD Happy to Help Residents Move Out of Wellston But Won’t Commit to Preserving Units*, ST. LOUIS POST-DISPATCH (Nov. 26, 2019), [https://www.stltoday.com/news/local/govt-and-politics/hud-happy-to-help-residents-move-out-of-wellston-but/article\\_75c8029f-fa64-5e69-bf63-0f641d8ab3d3.html](https://www.stltoday.com/news/local/govt-and-politics/hud-happy-to-help-residents-move-out-of-wellston-but/article_75c8029f-fa64-5e69-bf63-0f641d8ab3d3.html) [<https://perma.cc/CTK5-PFTT>].

6. Parker, *supra* note 1.

7. *Id.*

8. *America’s Rental Housing*, JOINT CTR. HOUS. STUD. HARVARD U. 3 (2017), [https://www.jchs.harvard.edu/sites/default/files/harvard\\_jchs\\_americas\\_rental\\_housing\\_2017\\_0.pdf](https://www.jchs.harvard.edu/sites/default/files/harvard_jchs_americas_rental_housing_2017_0.pdf) [<https://perma.cc/CL4J-R853>].

percent of its income on rent,<sup>9</sup> these low-income, minority families are often left in desperate situations.<sup>10</sup>

Public housing advocates and even some HUD representatives cite Wellston's downfall as emblematic of HUD's shift away from supporting public housing efforts and a continuous trend in cutting funds to public housing programs.<sup>11</sup> Diane Yentel, president and chief executive officer of the National Low Income Housing Coalition, says that the Trump administration's policies on housing are to blame, noting a retreat away from HUD's core mission of supporting public housing.<sup>12</sup> This policy shift is evidenced in a HUD letter to housing authorities across the nation calling for authorities to look towards the private sector to fund repairs, demolish or sell old buildings, and issue residents Section 8 vouchers.<sup>13</sup> The problem with calling on authorities to turn to the private sector is that the private sector is generally unwilling to entertain investment in struggling minority, low-income areas, like Wellston.<sup>14</sup>

Today, Wellston is the poorest city in St. Louis County.<sup>15</sup> It has a population of 1818, down from 1949 the year before.<sup>16</sup> The median household income is \$20,423 and the median property value sits at \$42,800.<sup>17</sup> The population of Wellston is made of up 96.4% Black residents.<sup>18</sup> The 2017 poverty rate was 51.9%.<sup>19</sup> Wellston's history is reflective of other St. Louis cities that have struggled with supporting minority, low-income populations, which results in starkly segregated housing populations.<sup>20</sup> Like Wellston, St. Louis is home to a host of poor, majority-African American communities that sit north of Delmar Boulevard, which have become the topic of conversation in debates on fair housing across this nation.<sup>21</sup>

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9. Mitchell Hartman, *Home Prices Rise Much Faster than Wages and Consumer Prices*, MARKETPLACE, (Nov. 28, 2017, 6:55 AM), <https://www.marketplace.org/2017/11/28/home-prices-rise-much-faster-wages-and-consumer-prices/> [<https://perma.cc/RM5B-TJFJ>]; JOINT CENTER FOR HOUSING STUDIES AT HARVARD UNIVERSITY, *AMERICA'S RENTAL HOUSING 2020* 6 (2020).

10. Matthew Desmond, *Unaffordable America: Poverty, Housing, and Eviction*, 22-2015 INS. FOR RES. ON POVERTY 1 (2015).

11. Parker, *supra* note 1.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Wellston, MO*, DATA USA, <https://datausa.io/profile/geo/wellston-mo/> [<https://perma.cc/46FP-AAGX>].

17. *Id.*

18. *Id.*

19. *Wellston, Missouri*, CITY-DATA, [www.city-data.com/city/Wellston-Missouri.html](http://www.city-data.com/city/Wellston-Missouri.html) [<https://perma.cc/77KR-T6KC>].

20. Parker, *supra*, note 1.

21. *Id.*

Under the Fair Housing Act (“FHA”), local governments receiving federal funding are required to actively take steps to undo and prevent discrimination in housing.<sup>22</sup> This requirement, known as the Affirmatively Further Fair Housing (“AFFH”) provision, mandates that communities take actions to effectively undo historic patterns of segregation and discrimination, and afford access to opportunity.<sup>23</sup> There have been numerous attempts to enforce this provision through additional legislation in the past: The Housing and Community Development Act of 1974,<sup>24</sup> the Cranston-Gonzalez National Affordable Housing Act,<sup>25</sup> the Quality Housing and Work Responsibility Act of 1998,<sup>26</sup> and the Analysis of Impediments method.<sup>27</sup> However, these attempts did the bare minimum, only stating that a condition of receiving funds is to affirmatively further fair housing.<sup>28</sup>

The AFFH has become a drafting tool; a simple agreement to “affirmatively further fair housing” is all that has been required of fund recipients. An attempt by the Obama administration in 2015 sought to change that with enforcement of the AFFH via enhanced HUD requirements and oversight of fund recipients’ fair housing plans.<sup>29</sup> The Affirmatively Furthering Fair Housing Rule (“AFFH Rule”) sought to enforce the ignored provision of the FHA by requiring that any community receiving block-grant funding from HUD complete a comprehensive Assessment of Fair Housing (“Assessment”) to target and eliminate discriminatory housing practices and policies.<sup>30</sup>

The Trump administration halted enforcement of the AFFH Rule by pushing back the timeline by which communities must submit their Assessments.<sup>31</sup> Originally, the Assessments were submitted on a rolling basis dependent on the locality’s progress in local planning cycles.<sup>32</sup> Program participants now have

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22. 42 U.S.C. § 3608 (1968).

23. *Id.* (“All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.”).

24. Housing and Community Development Act of 1974, Pub. L. No. 93-383 (1974).

25. 42 U.S.C. § 12741 (1990).

26. Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276 (1998).

27. Dept. Of Hous. and Urban Dev., Affirmatively Further Fair Housing, Vol. 80, No. 136 (July 16, 2015) (to be codified as 24 C.F.R. pt. 5, 91, 92, 570, 574, 576, and 903).

28. *Id.*

29. *Id.*

30. *Id.*

31. HUD *Indefinitely Suspends AFFH Rule, Withdraws Assessment Tool*, NAT’L LOW-INCOME HOUS. COALITION (May 21, 2018), <https://nlihc.org/article/hud-indefinitely-suspends-affh-rule-withdraws-assessment-tool> [<https://perma.cc/6YYZ-W75R>].

32. Kriston Capps, *The Trump Administration Just Derailed a Key Obama Rule on Housing Segregation*, CITYLAB (Jan. 4, 2018), <https://www.citylab.com/equity/2018/01/the-trump-administration-derailed-a-key-obama-rule-on-housing-segregation/549746/> [<https://perma.cc/6YYZ-W75R>].

until October 2020 to complete the Assessment.<sup>33</sup> While a date pushback doesn't sound like much of a setback, it disincentivizes localities to proactively take steps to abide by the AFFH. There is also a possibility that a date pushback becomes indefinite, as there have been bills introduced in Congress (two in 2017 alone) to dismantle the AFFH Rule or its mapping tool used to aid localities in identifying patterns of segregation.<sup>34</sup>

States that have taken steps towards dismantling discriminatory practices in housing have seen success in creating affordable and fair housing.<sup>35</sup> This author argues that implementation of the AFFH Rule will simultaneously achieve both affordable and fair housing by eliminating segregation tools like ordinances with discriminatory economic effects. Cities and states that have taken steps in this direction have had modest success, even when not acting under the requirements of the AFFH Rule.<sup>36</sup>

This Note will analyze the ability of the AFFH Rule to simultaneously accomplish the goals of fair housing and affordable housing. Specifically, this Note will assess how implementation of the AFFH Rule could cure the disparate impact of explicit and implicit discriminatory housing practices and policies on low-income, minority residents by requiring localities to recognize such issues and actively dismantle these practices. The specific housing practices that are addressed include: nuisance, zoning, crime-free housing, exclusionary, and economic building ordinances.

Part I discusses the history of housing laws and highlights key advances and regressive measures that have contributed to either preserving or dismantling the noted ordinances. Part II addresses fair housing. Specifically, Part II addresses attempts at implementing the AFFH, the disparate impacts of segregated housing practices, and how the AFFH Rule seeks to dismantle such housing practices. Part III addresses affordable housing, particularly, the practice of exclusionary and economic zoning, and the effect and success of mixed-income neighborhoods. Ultimately, Part III argues that eliminating housing practices that exclude low-income, minority residents leads to mixed-income and mixed-race communities that flourish, giving way to fair *and* affordable housing. As evidence shows, such communities have prosperous track records.<sup>37</sup>

## I. HISTORY OF FAIR HOUSING

Fair housing has been a slow-moving fight in the United States. Through the years, housing policy concerns have found their way into courts with variable outcomes, sometimes depending on the political climate of our nation. In 1926,

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33. *Id.*

34. H.R.482, 115th Cong. Local Zoning Decisions Protection Act (2017).

35. See *infra* notes 94–129 and 184–218 and accompanying text.

36. *Id.*

37. *Id.*

the Supreme Court upheld economic and land zoning by local governments, concluding that excluding industrial uses in a residential neighborhood was clearly justified and not a violation of the Fourteenth Amendment.<sup>38</sup> The local ordinance at issue in *Ambler Realty Co.* restricted the community's land parcels to single or two-family residences.<sup>39</sup> The Court pejoratively included apartments in its definition of industrial use, reasoning that apartments may also be excluded on the basis that they are a "parasite constructed in order to take advantage of the open spaces and attractive surroundings."<sup>40</sup> Fifty years later, the Supreme Court upheld an economic zoning regulation that had the effect of excluding low-income and racial minorities, even though there was evidence of racial bias among community members in enforcing the ordinance.<sup>41</sup> In 1977, the Court held in *Arlington Heights v. Metropolitan Housing Corporation* that the Equal Protection Clause of the Fourteenth Amendment only provided relief in cases of housing discrimination if the plaintiff alleging discrimination could demonstrate that the defendant intended to discriminate, thereby eliminating suits brought on the basis of disparate impact alone.<sup>42</sup>

The *Arlington Heights* decision came after two major strides in fair housing. First, in what is generally regarded as the biggest fair housing win coming from the Court in our nation's history, the Supreme Court unanimously held in *Shelley v. Kraemer* that racially restrictive covenants were a violation of the United States Constitution.<sup>43</sup> Next, in 1968, during the height of the civil rights movement—and just a week after the assassination of Martin Luther King Jr.—President Lyndon B. Johnson signed the Fair Housing Act,<sup>44</sup> which sits in the canon of civil rights laws as one of the most prolific steps towards desegregation, and which has also proven to be the most difficult to enforce. The FHA made it unlawful "to refuse to sell or rent after the making of a bona fide offer, or refuse to negotiate for the sale or rental of, or otherwise make available or deny, a dwelling to any person because of race, color, religion, sex, familial status or natural origin" and to "discriminate against any person in the terms, conditions,

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38. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926).

39. *Id.* at 379–80.

40. *Id.* at 394.

41. *Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 253 (1977).

42. *Id.* ("Proof of a racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause of the Fourteenth Amendment, and respondents failed to carry their burden of proving that such an intent or purpose was a motivating factor in the Village's rezoning decision.").

43. *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

44. DeNeen L. Brown, *The Fair Housing Act was Languishing in Congress. Then Martin Luther King Jr. Was Killed*, WASH. POST, (Apr. 11, 2018, 11:28AM), <https://www.washingtonpost.com/news/retropolis/wp/2018/04/11/the-fair-housing-act-was-languishing-in-congress-then-martin-luther-king-jr-was-killed/> [https://perma.cc/45NT-GUEB]; 42 U.S.C. § 3604 (1968).

or privileges of sale or rental of a dwelling, or in the provision of services or facilities in the connection therewith.”<sup>45</sup>

The language of the FHA which gives teeth to the provisions above comes in the form of a call on all recipients of HUD funds to act in conformity with the Civil Rights Act of 1964 and the Fair Housing Act by *affirmatively furthering fair housing*.<sup>46</sup>

Affirmatively furthering fair housing means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant’s activities and programs relating to housing and urban development.<sup>47</sup>

It is this unheeded call to action that led to the creation of the AFFH Rule by the Obama Administration.<sup>48</sup> The July 2015 published Rule cites as its purpose the establishment of “basic parameters to help guide public sector housing and community development planning and investment decisions in being better informed about fair housing concerns and consequently help program participants to be better positioned to fulfill their obligation to affirmatively further fair housing.”<sup>49</sup> The Rule came after HUD recognized the ineffectiveness of another previously implemented method known as AI, or “analysis of impediments.”<sup>50</sup> The AI approach directed participants in certain HUD programs to “identify impediments to fair housing choices within their jurisdiction, plan, and take appropriate actions to overcome the effects of any impediments, and maintain records of such efforts” without submitting such work to HUD or obtaining HUD review.<sup>51</sup> The approach, with minimal guidance, was determined by program participants, civil rights advocates, the U.S. Government Accountability Office, and others as ineffective.<sup>52</sup>

Most notable to this argument, the Rule explicitly cites the goals to accomplish fair *and* affordable housing:

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45. 42 U.S.C. § 3604 (1968).

46. 42 U.S.C. § 3608 (1968).

47. Dept. of Hous. and Urban Dev., *supra* note 27.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Dept. of Hous. and Urban Dev., *supra* note 27.

This new approach is designed to empower program participants and to *foster the diversity* and strength of communities *by overcoming historic patterns of segregation*, reducing racial or ethnic concentrations of poverty, and responding to identified disproportionate housing needs consistent with the policies and protections of the Fair Housing Act. The rule also seeks to assist program participants in *reducing disparities in housing choice and access to housing* and opportunity based on race, color, religion, sex, familial status, national origin, or disability, *thereby expanding economic opportunity* and enhancing the quality of life.<sup>53</sup>

This Note asserts that it is the emphasis on fair and affordable housing that makes the AFFH Rule the most viable option to accomplish the goals of fair housing policy across the nation.

In 2015, the Supreme Court in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project* interpreted the AFFH to mean that housing policies that inadvertently hurt minorities were just as bad as those that explicitly discriminated, i.e., disparate impact can be considered racial discrimination.<sup>54</sup> The 5–4 decision affirmed a Fifth Circuit ruling against the Department of Housing and Community Affairs of Texas for allocation of a majority of the state's federal tax credits for lower-income housing in primarily low-income, minority neighborhoods, effectively concentrating low-income housing.<sup>55</sup> Justice Kennedy's majority opinion honed in on the portion of the FHA that makes it illegal to "refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to a person because of race," noting that "the results-oriented phrase 'otherwise make unavailable' refers to the consequences of an action rather than the actor's intent."<sup>56</sup> Kennedy likened the phrase to the "otherwise adversely affect" language used in Title VII and the Age Discrimination in Employment Act, noting the phrase is "equivalent in function and purpose."<sup>57</sup>

Following this impactful fair housing decision, the Obama Administration rolled out the AFFH Rule, which addressed any community receiving federal block-grant funding (including Community Development Block Grant ("CDBG"), HOME Investment Partnerships ("HOME"), Emergency Solutions Grants ("ESG"), and Housing Opportunities for Persons with AIDS ("HOPWA")).<sup>58</sup> Any community receiving federal funding would be required to conduct an Assessment of four fair housing issues: (1) Patterns of integration and segregation; (2) Racially or ethnically concentrated areas of poverty; (3)

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53. *Id.* (emphasis added).

54. *Texas Dept. of Hous. and Cmty. v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2511 (2015).

55. *Id.* at 2510.

56. *Id.* at 2511 (emphasis added).

57. *Id.*

58. *Dept. of Hous. and Urban Dev.*, *supra* note 27.

Disparities in access to opportunity; and (4) Disproportionate housing needs.<sup>59</sup> The Assessment, outlined in the below table, helps community participants identify these issues and requires them to set goals to combat such issues *and* related contributing factors.<sup>60</sup> Goals and decisions made in the Assessment further act as the basis of community investment and other decisions in future local planning processes.<sup>61</sup>

Part	Description
<b>Part One: Provision of Data and AFH Assessment Tool</b>	HUD provides each program participant with data and an AFH assessment tool to use in assessing fair housing issues in its community. In addition, HUD will provide technical assistance to aid program participants in submitting its AFH.
<b>Part Two: Analysis</b>	Using the HUD data, local data and local knowledge, the required community participation process, and the assessment tool, each program participant prepares and submits a complete AFH to HUD, including fair housing goals.
<b>Part Three: Review and Response</b>	HUD has 60 days after receipt of the AFH to determine whether the program participant has met the requirements for providing its analysis, assessment, and goal setting. The AFH is deemed accepted after 60 days unless HUD provides the program participant written notification of why the AFH was not accepted and guidance on how the AFH should be revised in order to be accepted. HUD will not accept an AFH if HUD finds that an AFH or a portion of the AFH is inconsistent with fair housing or civil rights requirements or is substantially incomplete.
<b>Part Four: Incorporation into Subsequent Planning Processes and Action</b>	The goals identified in the AFH must inform the strategies and actions of the Consolidated Plan, the Annual Action Plan, the PHA Plan, and the Capital Fund Plan.

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The Obama Administration created a regional training program to be held in nine major cities to aid program participants in preparing an Assessment on their own or collaborating with other program participants to prepare a joint or regional Assessment submission.<sup>63</sup> This training has all been postponed to an undetermined date.<sup>64</sup>

## II. FAIR HOUSING

The four fair housing issues local governments are asked to address in the Assessment act as a roadmap to identify practices that stem from and allow for continued segregation. Nuisance and Crime-Free Housing ordinances are two practices that are both rooted in segregation and perpetuate the problem by

59. U.S. DEPT. OF HOUS. AND URBAN DEV., THE ASSESSMENT OF FAIR HOUSING (2016).

60. U.S. DEPT. OF HOUS. AND URBAN DEV., AFFIRMATIVELY FURTHERING FAIR HOUSING (2016).

61. *Id.*

62. U.S. DEPT. OF HOUS. AND URBAN DEV., *supra* note 59.

63. U.S. DEPT. OF HOUS. AND URBAN DEV., AFFH REGIONAL TRAININGS (2016).

64. *Id.*

disparately impacting minorities, domestic violence victims, and low-income residents. In the following sections, this author argues that these practices also violate the FHA and Supreme Court precedent that operate to uphold the purpose of the AFFH.

A. *Nuisance and Crime-Free Housing Ordinances*

On their face, Nuisance and Crime-Free Housing ordinances may seem to serve a salutary purpose. These ordinances are often cited as tools to keep violence and drugs out of neighborhoods.<sup>65</sup> Maplewood, Missouri landlord Steve Terelmes noted that his city's nuisance ordinance—which was repealed and revised in 2018—was one he enforced to maintain living standards in the city.<sup>66</sup> The ordinances are often structured as a “three strikes, you’re out” system where residences and their residents can be deemed a nuisance after a certain amount of calls to police are made from or about a property.<sup>67</sup> The remedy written into such ordinances is usually eviction of the “problem” tenant and even a prohibition on that tenant renting in the city for a certain period of time.<sup>68</sup> The alternative to exercising an abatement measure is for a landlord to lose his or her rental license.<sup>69</sup>

In September of 2016, HUD issued fair housing guidance regarding local nuisance ordinances, specifically noting that such ordinances should be an area of consideration for localities when conducting their Assessment under the AFFH Rule.<sup>70</sup> HUD recognized the impact that such ordinances have on domestic violence victims, victims of other crimes, and those in need of emergency services who “may be subjected to discrimination prohibited by the Act due to the operation” of such ordinances.<sup>71</sup> In line with the 2015 decision in *Inclusive Communities Project, Inc.*, the guidance set out a standard for determining when such an ordinance violates the FHA: such ordinances “violate the Fair Housing Act when they have an unjustified discriminatory effect, even

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65. Jenny Simeone-Casa, *From Complaint to Eviction, Here's How the Maplewood Nuisance Ordinance Works*, ST. LOUIS PUBLIC RADIO (June 15, 2017), <https://news.stlpublicradio.org/post/complaint-eviction-heres-how-maplewood-nuisance-ordinance-works#stream/0> [<https://perma.cc/7F6P-M6N7>].

66. *Id.*

67. MAPLEWOOD, MO., Code §§ 34-240 et seq.

68. *Id.*

69. *Id.*

70. HUD Issues Fair Housing Guidance Regarding Local Nuisance Ordinances, NAT'L LOW INCOME HOUS. COALITION (Sept. 19, 2016), <https://nlihc.org/article/hud-issues-fair-housing-guidance-regarding-local-nuisance-ordinances> [<https://perma.cc/QKR3-DTLD>].

71. U.S. DEPT. OF HOUS. AND URBAN DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING STANDARDS TO THE ENFORCEMENT OF LOCAL NUISANCE AND CRIME-FREE HOUSING ORDINANCES OF DOMESTIC VIOLENCE, OTHER CRIME VICTIMS, AND OTHERS WHO REQUIRE EMERGENCY SERVICES (2016).

when the local government had no intent to discriminate.”<sup>72</sup> Thus, “a facially-neutral policy or practice that has a discriminatory effect violates the [FHA] if it is not supported by a legally sufficient justification.”<sup>73</sup>

Thus, where a policy or practice that restricts the availability of housing on the basis of nuisance conduct has a disparate impact on individuals of a particular protected class, the policy or practice is unlawful under the Fair Housing Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the local government . . . .<sup>74</sup>

The memorandum offers a three-step fact intensive inquiry to determine liability for a discriminatory effect.<sup>75</sup> Central to this analysis is step one: “Evaluating Whether the Challenged Nuisance Ordinance or Crime-Free Housing Ordinance Policy or Practice Has a Discriminatory Effect.”<sup>76</sup> The burden is on the plaintiff to show that the ordinance has or could have a disparate impact on a protected class.<sup>77</sup> The burden can be met by offering statistics, demographic data, city and police records, court records, etc.<sup>78</sup>

#### B. *Disparate Impact*

The burden established by the Rule is not a weighty one. Such nuisances usually have a proven discriminatory effect.<sup>79</sup> In practice, these ordinances disproportionately affect women, people with disabilities, and people of color.<sup>80</sup> The U.S. Bureau of Justice Statistics found that sixty-five to sixty-nine percent of victims of serious violent crime/domestic violence and simple assault/domestic violence are women.<sup>81</sup> A HUD memorandum addressed to the Office of Fair Housing and Equal Opportunity noted that these domestic violence victims also fall into other protected classes at an alarming number.<sup>82</sup> Black women experience intimate partner violence at a rate thirty-five percent higher than that of White females, and about two and a half times the rate of women of other races.<sup>83</sup> Native American women are victims of violent crime, including rape and sexual assault, at more than double the rate of other racial

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72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. U.S. DEPT. OF HOUS. AND URBAN DEV., *supra* note 71.

77. *Id.*

78. *Id.*

79. *Id.*

80. Simeone-Casa, *supra* note 65.

81. U.S. DEPT. OF JUSTICE, NJC 244697, NONFATAL DOMESTIC VIOLENCE 2003–2012 (2014).

82. U.S. DEPT. OF HOUS. AND URBAN DEV., *supra* note 71.

83. U.S. DEPT. OF JUSTICE, NJC 244697, NONFATAL DOMESTIC VIOLENCE 2003–2012 (2014).

groups.<sup>84</sup> Women of certain national origins and immigrant women also experience domestic violence at disproportionate rates.<sup>85</sup>

A Milwaukee-based study spanning one year detailed the nuisance activity reported in the city and found that that the local nuisance ordinance was overwhelmingly enforced against minorities and particularly female domestic assault survivors.<sup>86</sup> Of 503 properties deemed a nuisance, 319 were in Black neighborhoods, contrasted with the eighteen in White neighborhoods.<sup>87</sup> Approximately sixteen percent of all nuisances were related to domestic violence.<sup>88</sup> Citations for these nuisances were concentrated in almost exclusively Black neighborhoods, with 179 (thirty-six percent of the total) distributed to properties in neighborhoods with a ninety percent Black resident population.<sup>89</sup> Of the 157 citations generated by domestic violence, 109 were addressed to properties in Black neighborhoods, compared to six in White areas, three in Hispanic areas, and thirty-nine in mixed neighborhoods.<sup>90</sup> In a majority of these cases, landowners responded with formal eviction, and relied on eviction upon next nuisance and informal eviction as other abatement strategies.<sup>91</sup>

As discussed *infra*, exceptions to this portion of the Rule—the legally sufficient justification—can be accomplished by non-discriminatory means. Alternatives to nuisance and crime-free housing ordinances that reduce or eliminate disparate impact are discussed in the next section.

### C. Why the AFFH Guarantees Fair Housing

While *Inclusive Communities Project, Inc.* gave a remedy to individuals disparately impacted by discriminatory housing practices such as nuisance and crime-free housing ordinances, it assumes that an individual who is subjected to discriminatory housing practices will sue or that an organization like Inclusive Communities Project will sue on behalf of such individual. However, individuals adversely affected by such ordinances are usually living in low-income, minority areas, and, as noted in the 2016 HUD memo, are likely victims of domestic violence and other crimes.<sup>92</sup> Forty-five percent of domestic violence victims do not report their abuse to police,<sup>93</sup> let alone the court system. Additionally, courts interpreting and applying *Inclusive Communities Project*,

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84. BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME 4 (1999).

85. U.S. DEPT. OF HOUS. AND URBAN DEV., *supra* note 71.

86. Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78(1) AM. SOC. REV. 117, 118 (2013).

87. *Id.* at 125.

88. *Id.* at 131.

89. *Id.* at 125.

90. *Id.* at 132.

91. Matthew Desmond & Nicol Valdez, *Supra* note 86, at 133.

92. U.S. DEPT. OF HOUS. AND URBAN DEV., *supra* note 71.

93. U.S. DEPT. OF JUSTICE, *supra* note 81.

*Inc.* have honed in on the “robust causality requirement” and are dismissing cases that do not or cannot identify a causal link between a practice and a negative impact against a protected class.<sup>94</sup> Without further regulatory guidance, this strict pleading standard has posed a major hurdle for plaintiffs in meeting their prima facie burden.<sup>95</sup> Implementation of the AFFH Rule would remove such hurdles and render these ordinances illegal, where they are intentionally discriminatory or where they create a disparate impact, by requiring localities to assess such practices and repeal ordinances that deny housing, encourage evictions, or penalize individuals experiencing violence or crime.<sup>96</sup>

There exists a vast set of alternatives available to local governments to protect neighborhoods without discriminating via such ordinances. First, they can simply choose not to implement crime-free housing and nuisance ordinances. Avoiding implementation of an ordinance that may open the locality up to liability can rid it of the problem that comes with implementation at the outset. Recognizing that localities may have a legitimate interest in enforcing such ordinances for other reasons, drafting the ordinance in accord with the Rule can eliminate the disparate impact of such ordinances.

The Maplewood nuisance ordinance is an example of an ordinance that was redrafted to achieve its intended effect of crime reduction without enforcement against victims of domestic violence.<sup>97</sup> The original language permitting eviction and rental prohibition for making more than two calls to the police for domestic violence within a 180-day period was removed for language that provides for protection of individuals calling for police or emergency services from abatement.<sup>98</sup> The revised ordinance reads:

No enforcement action or abatement will be ordered against an individual who was a victim in whole or in part of the incidents that formed the basis of the nuisance enforcement action. No occupancy permit revocation or other abatement measure against an individual will be predicated upon the fact that such individual called for police or emergency services.<sup>99</sup>

The revised ordinance still maintains the effect of abating actual nuisances; provisions in the revision specifically address and remedy public concerns for nuisances such as harassment, intimidation, littering, unkempt lawns, loud

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94. *Texas Dept. of Hous. and Cmty. v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2512 (“A disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity. A robust causality requirement is important in ensuring that defendants do not resort to the use of racial quotas. Courts must therefore examine with care whether a plaintiff has made out a prima facie showing of disparate impact . . .”).

95. *Id.*

96. U.S. DEPT. OF HOUS. AND URBAN DEV., *supra* note 71.

97. MAPLEWOOD, MO. Code § 34-240.

98. MAPLEWOOD, MO. Code § 34-240 (17).

99. MAPLEWOOD, MO. Code § 34-240 (18).

noises, indecent conduct, etc.<sup>100</sup> However, by waiving abatement measures against those faced with domestic assault,<sup>101</sup> the City relieves itself of liability for a discriminatory practice.

In the ACLU's Guide for Local Leaders on Domestic Violence and Fair Housing,<sup>102</sup> the ACLU offers numerous quick fixes in ordinances that can reduce the discriminatory effect of a crime-free housing or nuisance ordinance that may have a disparate impact.<sup>103</sup> Such fixes include: (1) prohibiting discrimination against domestic violence survivors who are tenants or applicants for housing,<sup>104</sup> (2) prohibiting lease agreements that require tenants to waive their right to call for emergency assistance,<sup>105</sup> (3) permitting early lease termination so a battered tenant can flee violence,<sup>106</sup> (4) allowing courts to exclude an abuser from the home,<sup>107</sup> (5) bifurcation of leases in order to early terminate or exclude a perpetrator from the lease,<sup>108</sup> (6) allowing for affirmative defenses whenever the basis of an eviction relates to being a victim of an incident of domestic violence in eviction proceedings,<sup>109</sup> and (7) granting survivors the right to install new locks.<sup>110</sup> Additional measures include exercising discretion when using background checks to screen residents.<sup>111</sup> As discussed in the next section, these checks often take into consideration a swath of activity outside of convictions, which can be detrimental to domestic assault victims.<sup>112</sup> Inquiring about circumstances that may contribute to negative reporting and giving applicants the opportunity to explain whether past criminal history is related to domestic

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100. MAPLEWOOD, MO. CODE §§ 34-240 (15), (17)(e)(h)(i)(j): ("In addition to any other act declared to be a nuisance by this Code or other ordinances of the city, nuisances are hereby defined and declared to be as follows . . . Indecent conduct . . . harassing or intimidating behavior . . . failure by the property owner to remove any litter . . . loud noise emitted from electronic equipment of any type including radios and televisions on the premises or any parked vehicles . . .").

101. MAPLEWOOD, MO. Code §§ 34-240 (18) ("No occupancy permit revocation or other abatement measure against an individual will be predicated upon the fact that such individual called for police or emergency services.").

102. *Safe Homes, Safe Communities: A Guide for Local Leaders on Domestic Violence and Fair Housing*, ACLU (April 2015), <https://www.fairhousingnc.org/wp-content/uploads/2015/05/ACLU-Safe-Homes-Safe-Communities-Guide-for-Local-Leaders.pdf> [<https://perma.cc/3LW3-PJX8>] (hereafter *Safe Homes, Safe Communities*).

103. *Id.* at 14.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Safe Homes, Safe Communities*, *supra* note 102, at 14.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 11.

112. *See infra* notes 113–15 and accompanying text.

violence will protect innocent tenants and victims while relieving housing providers of housing discrimination liability.<sup>113</sup>

The AFFH Rule would require a city or municipality to introspectively assess the effect of an ordinance as currently drafted and implemented via the Assessment, and work to achieve a better ordinance by following AFFH guidelines.<sup>114</sup> The ACLU offers points of assessment for ordinance drafters to consider when coming into compliance with the AFFH.<sup>115</sup> They include: (1) whether a domestic violence victim receives an eviction notice, which cites violations of such an ordinance,<sup>116</sup> (2) whether a landlord engages in informal eviction or refuses to renew a tenant's lease, telling him or her that he or she is no longer welcome due to use of police services or the violence committed against him or her,<sup>117</sup> (3) whether a victim of domestic violence or other crime refuses to call 911 for fear of losing housing,<sup>118</sup> and (4) whether a landlord instructs a tenant that he or she must stop calling the police or he or she may face eviction.<sup>119</sup>

Characteristics of laws that threaten domestic assault survivors are also outlined in the ACLU guidance.<sup>120</sup> Problematic characteristics of laws include defining a nuisance as any situation where an "occupant, guest, or business invitee commits criminal activities," or "engages in disorderly conduct" on the premises, regardless of whether the tenant endured or sanctioned that conduct.<sup>121</sup> This allows for the nuisance to be imputed on an otherwise uninvolved or innocent tenant or victim.<sup>122</sup> Additionally, defining nuisances based on specific crimes that are commonly associated with domestic violence, such as assault and sexual misconduct, can prove problematic as this practice explicitly brings domestic violence into the purview of punishable activity.<sup>123</sup> Creating a point system, three-strike rule, or any other mechanism by which tenants will be evicted after multiple instances of "criminal activity" or calls to the police also threatens domestic assault survivors because it discourages victims from calling the police when they are victims of an assault.<sup>124</sup> With no evidence that penalizing people for calling the police controls crime, a point system, in effect,

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113. *Safe Homes, Safe Communities*, *supra* note 102, at 11.

114. U.S. DEPT. OF HOUS. AND URBAN DEV. *supra* note 71.

115. *Chronic Nuisance and Crime-Free Ordinances: Endangering the Right of Domestic Violence Survivors to Seek Police Assistance*, ACLU, <https://www.aclu.org/other/nuisance-ordinances-fact-sheet> [<https://perma.cc/R8HD-64MS>] (last visited Jan. 23, 2020).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Safe Homes, Safe Communities*, *supra* note 102, at 11.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

undermines public safety and allows for crime to escalate.<sup>125</sup> Specifically with domestic violence, abuse generally begins as assault and battery and can turn into homicide.<sup>126</sup> Furthermore, characterizing “criminal activity” based on arrests and/or police investigations, rather than convictions, is problematic because it may allow landlords or government subsidized housing providers to take into consideration criminal activity with no conviction, and any criminal conduct a housing provider may deem to be a threat to the health, safety, and peaceful enjoyment of other residents.<sup>127</sup> Again, this allows for an uninvolved tenant or victim in the activity to be punished.<sup>128</sup> Furthermore, it directly hurts domestic violence survivors as survivors who fight back against their abusers often face arrest and/or criminal conduct even when their actions are defensive.<sup>129</sup>

Taking these factors into consideration are not merely suggestions by the AFFH Rule, but requirements that would push localities to draft effective ordinances that do not explicitly or implicitly discriminate, thereby reducing the disparate impact nuisance and crime-free housing ordinances have on tenants.<sup>130</sup> Furthermore, the independent Assessment required by the locality itself will allow for general progression in housing policy. In the past month, the ACLU of Missouri and the St. Louis Equal Housing and Opportunity Council (“EHOC”) called on six cities in St. Louis County to abandon their nuisance ordinances.<sup>131</sup> This move came shortly after the successful settlement in Maplewood and revision of the City’s nuisance ordinance. While the ACLU and organizations like EHOC have been successful in bringing about revision or repeal of such ordinances, implementation of the Rule would create a standard across the nation to eliminate discriminatory housing practices.<sup>132</sup>

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125. *Safe Homes, Safe Communities*, *supra* note 102, at 12.

126. JACQUELYN C. CAMPBELL ET AL., ASSESSING RISK FACTORS FOR INTIMATE PARTNER HOMICIDE, 250 NAT’L INST. OF JUST. J., 14, 18 (2003) (“Intimate partner homicides make up 40 to 50 percent of all murders of women in the United States,” and “in 70 to 80 percent of intimate partner homicides, the man physically abused the woman prior to her murder.”).

127. *Safe Homes, Safe Communities*, *supra* note 102, at 11.

128. *Id.* at 12.

129. *Id.* at 11.

130. U.S. DEPT. OF HOUS. AND URBAN DEV., *supra* note 71.

131. EHOC, *ACLU Urge 6 St. Louis County Municipalities to Drop Laws that Punish Domestic Violence Victims*, ACLU MO. (Jan. 24, 2019), <https://www.aclu-mo.org/en/news/ehoc-aclu-urge-6-st-louis-county-municipalities-drop-laws-punish-domestic-violence-victims> [<https://perma.cc/SB9G-62T4>].

132. Dept. Of Hous. and Urban Dev., *supra* note 27 (“The Affirmatively Furthering Fair Housing (AFFH) regulations promulgated by this final rule: a. Replace the AI with a more effective and standardized Assessment of Fair Housing (AFH) through which program participants identify and evaluate fair housing issues, and factors contributing to fair housing issues (contributing factors)”).

## III. AFFORDABLE HOUSING

*“Not all dense housing is affordable, but all affordable housing is dense.”*<sup>133</sup>

The AFFH Rule does more than address segregation stemming from racial discrimination; the Rule calls for dismantling all practices with a discriminatory effect. The AFFH’s mandate on local governments to take “meaningful actions” to undo segregation and discrimination is defined as “significant actions that are designed and can be reasonably expected to achieve a material positive change that affirmatively furthers fair housing by, for example, *increasing fair housing choice* or decreasing disparities in access to *opportunity*.”<sup>134</sup> Exclusionary and economic zoning are housing practices that deny access to opportunity and overwhelmingly decrease fair housing choices for minorities. In this section, this author argues that housing practices based on income are a hindrance towards affordable housing. These practices have similar affects to the ordinances discussed *supra* and contribute to a grave stalemate in moving towards a fair housing system.

A. *Exclusionary/Economic Zoning*

Exclusionary zoning ordinances are ordinances that restrict community development to certain types of buildings, most commonly, detached single-family homes.<sup>135</sup> These ordinances often constrain development by requiring minimum lot sizes and limiting housing density, forbidding builders from developing apartment buildings or townhouses in certain areas.<sup>136</sup> By limiting building to certain allotments, this type of zoning artificially drives up the price of housing units, keeping out individuals whose income can only afford dense housing.<sup>137</sup> Dense housing is a more viable option for low-income residents and developers for four main reasons: (1) density provides more units per acre, so land costs are cheaper for the developer;<sup>138</sup> (2) dense units like apartments have fewer exterior walls, which keeps construction costs lower;<sup>139</sup> (3) compact developments reduce infrastructure costs for trunk lines and treatment

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133. Brent Toderian, *The Link Between Density and Affordability*, Planetizen (April 22, 2008, 11:00 AM), <https://www.planetizen.com/node/30877> [<https://perma.cc/AU4S-9EBG>].

134. Dept. Of Housing and Urban Dev., *supra* note 27 (emphasis added).

135. *Exclusionary Housing Practices*, EQUITABLE HOUS. INST., <https://www.equitablehousing.org/exclusionary-housing-policies.html> [<https://perma.cc/N3DA-8UVN>] (last visited Jan. 20, 2020).

136. *Id.*

137. Richard Kahlenberg, *An Economic Fair Housing Act*, THE CENTURY FOUND. (Aug. 3, 2017), <https://tcf.org/content/report/economic-fair-housing-act/> [<https://perma.cc/874A-4W5W>].

138. *Id.*

139. *Id.*

facilities;<sup>140</sup> and (4) dense housing increases overall supply relative to demand, resulting in lower prices for consumers.<sup>141</sup>

However cost-beneficial, exclusionary and economic zoning ordinances carry with them a history of discrimination and racism.<sup>142</sup> Initially drafted as racial ordinances that explicitly forbade individuals of color from buying in White-majority areas, economic zoning took flight after the Supreme Court struck down racial zoning policies in *Buchanan v. Warley*.<sup>143</sup> In *Buchanan*, the Court held that racial zoning ordinances violated the Fourteenth Amendment and affirmed that the Constitution entitled “a colored man to acquire property without state legislation discriminating against him solely because of color.”<sup>144</sup> The 1917 decision turned the tide from racial zoning to economic zoning.<sup>145</sup> In 1916, just eight cities in the United States had zoning ordinances.<sup>146</sup> That number multiplied to 1246 cities in the twenty years following the *Buchanan* decision.<sup>147</sup>

As opposed to unconstitutional racial zoning addressed in *Buchanan*, the Supreme Court upheld economic zoning in its 1926 *Village of Euclid v. Ambler Realty Co.* decision.<sup>148</sup> In *Ambler*, the district court considered a claim by Ambler Realty against the Village of Euclid for a due process violation which limited the company from using the land as it pleased, without compensation.<sup>149</sup> Specifically, Euclid prohibited Ambler from developing apartment complexes.<sup>150</sup> The district court even cited racial and income segregation as motives for Euclid’s exclusionary zoning.<sup>151</sup> Nonetheless, the Supreme Court likened apartment complexes to nuisances, while failing to take into consideration people who are forced to rent apartment space due to the financial inability to rent or purchase single-family homes.<sup>152</sup> The decision thus allowed for exclusion from neighborhoods on the basis of income.<sup>153</sup>

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140. *Id.*

141. *Id.*

142. Kahlenberg, *supra* note 137.

143. *Id.*

144. *Buchanan v. Warley*, 245 U.S. 60, 79 (1917).

145. Kahlenberg, *supra* note 137.

146. *Id.*

147. *Id.*

148. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926).

149. *Id.* at 384.

150. *Id.* at 382.

151. *Ambler Realty Co. v. Euclid*, 297 F. 307, 310 (1924).

152. *Ambler Realty Co.*, 272 U.S. at 371.

153. *Id.* at 397.

### B. *Disparate Impact*

Decisions like *Buchanan*<sup>154</sup> and *Ambler Realty*<sup>155</sup> have had a lasting impact on people of color and those of low-socioeconomic classes.<sup>156</sup> The exclusionary practices that took on a new form with economic zoning still achieved the same discriminatory effect as racial zoning ordinances, which is primarily exhibited by public housing practices.<sup>157</sup> There are two main public housing programs in the United States: Low-Income Housing Tax Credit (“LIHTC”)<sup>158</sup> and Housing Choice Vouchers (“HCV”) (Section 8 housing vouchers).<sup>159</sup> Both programs are subject to the Rule.<sup>160</sup> And both programs have similar effects to discriminatory ordinances.<sup>161</sup>

LIHTC allows for a state to receive a set amount of tax credits based on population to distribute to private and for-profit housing developers.<sup>162</sup> The credits are allocated based on a Qualified Allocation Plan that addresses housing needs.<sup>163</sup> Only sixty-eight percent of LIHTC-assisted households report data on race and ethnicity, but of that number, thirty-eight percent of households receiving the voucher are minorities.<sup>164</sup> Seventy-nine percent of recipients fall into the extremely low income to very low income category, with thirty-seven percent spending more than thirty percent of their income on rent.<sup>165</sup>

States tend to perpetuate segregation by keeping low-income housing in lower-income areas. In one year, Texas was awarded 9.7 billion dollars as part of the program to build and refurbish affordable apartment homes.<sup>166</sup> Three

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154. *Buchanan v. Warley*, 245 U.S. 60, 63 (1917).

155. *Ambler Realty Co.*, 272 U.S. at 373.

156. Kahlenberg, *supra* note 137.

157. *Id.*

158. *Id.*

159. *Id.*

160. Rev. Rul. 2016–29. The United States Department of Housing and Urban Development issued final regulations regarding obligations under the Act to Affirmatively Further Fair Housing. *See id.*; *see also* 80 Fed. Reg. 42272 (2015). HUD states in the preamble, “From its inception [in 1968], the [Act] ... has not only prohibited discrimination in housing related activities and transactions but has also provided, through the duty to affirmatively further fair housing . . . for meaningful actions to be taken to overcome the legacy of segregation.” Rev. Rul. 2016-29. “AFFH was firmly established Federal housing policy when § 42 was enacted, and there is no suggestion that Congress intended § 42 to diverge from that policy.” *Id.* Section 42(m)(1)(A)(ii), therefore, is subject to policy considerations of the AFFH. *Id.*

161. *See infra* notes 162–185 and accompanying text.

162. 26 U.S.C. § 42 (2012).

163. 26 U.S.C. § 42(c) (2012).

164. Corianne Payton Scally et al., *The Low-Income Housing Tax Credit: How it Works and Who it Serves*, URBAN INST. V (July 2018), [https://www.urban.org/sites/default/files/publication/98758/lihtc\\_how\\_it\\_works\\_and\\_who\\_it\\_serves\\_final\\_2.pdf](https://www.urban.org/sites/default/files/publication/98758/lihtc_how_it_works_and_who_it_serves_final_2.pdf) [<https://perma.cc/43YS-8KAW>].

165. *Id.*

166. Karisa King, *Goals Unmet for Affordable Housing Tax Credit Program in Texas*, HOUSTON CHRONICLE (April 23, 2012, 10:42 AM), <https://www.chron.com/news/houston-texas/>

fourths of the credits were allocated to impoverished, African American and Hispanic majority neighborhoods.<sup>167</sup> In Harris County, Texas, three percent of tax-credited apartments are located in White-majority areas, with ninety-one percent confined to minority-majority areas.<sup>168</sup> This is problematic when considering that neighborhoods with high concentrations of minority residents are home to one of every three affordable units across the state, about twice the rate for all rental housing.<sup>169</sup>

Factors that are taken into consideration when handing out these tax credits include community support and financial feasibility, both which exacerbate the effect of condensing impoverished minorities.<sup>170</sup> In San Antonio, for example, residents protested the building of a low-income apartment complex for senior citizens, citing lowered property values, traffic, and crime as concerns.<sup>171</sup> The president of the home owner's association specifically noted that the single-family home dominated area was at stake with the addition of an apartment complex, and that it wasn't a good "fit" for the area.<sup>172</sup> Within two months, the prospects of the apartment building were shot and a public funding bid was withdrawn from the area.<sup>173</sup> Financial feasibility is also a driving factor in the choice to allocate tax credits under LIHTC.<sup>174</sup> Low-income housing is often condensed to low-income, disadvantaged neighborhoods because land is cheaper there.<sup>175</sup> This allows for more units to be developed in these areas than in wealthier, affluent communities.<sup>176</sup>

Housing Choice Vouchers, or Section 8 vouchers, pose a similar issue.<sup>177</sup> HCVs differ from LIHTC because HCVs go to individual families.<sup>178</sup> In theory,

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article/Goals-unmet-for-affordable-housing-tax-credit-3501640.php [https://perma.cc/696H-JBHE].

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. King, *supra* note 166.

172. *Id.*

173. *Id.*

174. Kahlenberg, *supra* note 137.

175. *Id.*

176. *Id.*

177. *See infra* notes 178–183 and accompanying text.

178. *Section 8 Information, Common Issues, and FAQ's*, AFFORDABLE HOUS. ONLINE (2019), <https://affordablehousingonline.com/section-8-housing> [https://perma.cc/S6R9-2FC4].

Under the Low-Income Housing Tax Credit, each state receives a set amount of tax credits based on population size. State housing agencies distribute the credits to private and for-profit housing developers based on a Qualified Allocation Plan (QAP) that considers local housing needs . . . In theory, the nation's largest low-income housing program, the Section 8 voucher, could promote integration, because vouchers go to individual families and can be used in any neighborhood. But in practice, in most states, landlords can reject Section 8 housing vouchers because income, unlike race, is not a protected class.

this method of housing would allow for families to integrate into higher-income, higher opportunity areas, but the method by which the vouchers are offered and accepted greatly limits families.<sup>179</sup> The voucher is intended to pay the balance of a rent payment that exceeds thirty percent of a renter's monthly income.<sup>180</sup> This would be sufficient if families were on average only spending near 30% of their monthly income on housing, as suggested by the United States Housing Act of 1937,<sup>181</sup> but that is not the case for the average American family.<sup>182</sup> A 2017 report of Harvard's Joint Center for Housing Studies found that nearly half of all renters, approximately 21 million Americans, spend more than thirty percent of their monthly income on housing.<sup>183</sup> About a quarter of renters, approximately 11 million families, spend more than *half* of their income on housing needs.<sup>184</sup> This trend is only expected to increase with home prices rising twice as fast as wages.<sup>185</sup> HUD Resident Characteristic Reports also provide a glimpse into the families that are receiving such aid. As of January 31, 2020, forty-three percent of public housing recipients are Black or African American and twenty-five percent are Hispanic or Latino.<sup>186</sup>

C. *Why the AFFH Guarantees Affordable Housing: Mixed-Income Neighborhoods and their Success*

Efforts to combat economically exclusionary housing have taken off in some local governments and have proven successful.<sup>187</sup> Policies focused on establishing mixed-income neighborhoods allow for the needs of already existing members of a community to be met while also paving way for mobility of lower-socioeconomic status families and individuals into areas that are being redeveloped.<sup>188</sup> A study conducted in 2013 tracked nearly 700 people in Chicago

Kahlenberg, *supra* note 137.

179. See King, *supra* note 166.

180. See AFFORDABLE HOUS. ONLINE, *supra* note 178.

181. 42 U.S.C. § 9816 (1974).

182. *America's Rental Housing*, JOINT CTR. HOUS. STUD. HARVARD U. 4 (2017), [https://www.jchs.harvard.edu/sites/default/files/harvard\\_jchs\\_americas\\_rental\\_housing\\_2017\\_0.pdf](https://www.jchs.harvard.edu/sites/default/files/harvard_jchs_americas_rental_housing_2017_0.pdf) [<https://perma.cc/CL4J-R853>].

183. *Id.*

184. *Id.*

185. Mitchell Hartman, *Home Prices Rise Much Faster than Wages and Consumer Prices*, MARKETPLACE (Nov. 28, 2017), <https://www.marketplace.org/2017/11/28/home-prices-rise-much-faster-wages-and-consumer-prices/> [<https://perma.cc/GGA2-VL9R>].

186. U.S. DEPT. OF HOUS. AND URBAN DEV., RESIDENT CHARACTERISTICS REPORT AS OF DEC. 31, 2019. [https://hudapps.hud.gov/public/picj2ee/Mtcsrcr?category=rcr\\_familystatus&download=false&count=0](https://hudapps.hud.gov/public/picj2ee/Mtcsrcr?category=rcr_familystatus&download=false&count=0) [<https://perma.cc/VNH6-R6ER>].

187. See *infra* notes 167–192 and accompanying text.

188. Robert J. Sampson et al., *Achieving the Middle Ground in an Age of Concentrated Extremes: Mixed Middle-Income Neighborhoods and Emerging Adulthood*, 660 ANNALS AM. ACAD. POL. SOC. SCI., 13 (July 2015).

neighborhoods as they were exposed to various income dynamics through adulthood.<sup>189</sup> The study ultimately concluded that “concentration of income extremes is persistent in the lives of individuals almost as much as in neighborhoods” because exposure to middle-income neighborhoods “is infrequent and unstable.”<sup>190</sup> Latin-Americans, for example, were more likely than other races to be exposed to middle-income neighborhoods and those individuals end up transitioning into similar neighborhoods over time.<sup>191</sup> This trend results in greater racial and economic diversity in a given community, while also “inducing more income-mixing in the middle of the income distribution, perhaps offsetting what would otherwise be larger losses in the middle class as income inequality and the spatial separation of the poor and affluent increase.”<sup>192</sup> The crux of the study is that confining low-income, minority families to low-income areas repeats the cycle of poverty, effectively offering no method of mobility.<sup>193</sup> The types of exclusionary zoning ordinances that confine affordable, low-income housing typically have the effect of confining the residents in such areas to a lower-socioeconomic class for the span of their lives.<sup>194</sup>

When these observations are rooted in action, affordable housing is far from an unattainable goal.<sup>195</sup> The most sweeping change tackling such ordinances has been seen at the state level in a few localities.<sup>196</sup> In 1976, the California Supreme Court held in *Associated Home Builders v. City of Livermore* that where an “ordinance may strongly influence the supply and distribution of housing for an entire metropolitan region, judicial inquiry must consider the welfare of that region.”<sup>197</sup> About fifteen years later, the New Hampshire Supreme Court followed suit when it struck down the City of Britton’s exclusionary zoning ordinance, holding that each municipality must provide a “realistic opportunity” for construction of its “fair share” of affordable housing.<sup>198</sup> Such practices are also being tackled at the legislative level. For example, Massachusetts currently has proposed incentives for cities to relax exclusionary zoning rules with an

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189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. Sampson, *supra* note 188, at 13.

194. *Id.*

195. *See supra* notes 185–192 and accompanying text.

196. *See e.g.*, *Associated Home Builders etc., Inc. v. City of Livermore*, 557 P.2d 473 (1976); *Britton v. Chester*, 134 N.H. 434 (1991); *S. Burlington Cnty. N.A.A.C.P. v. Mount Laurel (Mount Laurel Two)*, 92 N.J. 158 (1983).

197. *City of Livermore*, 557 P.2d at 476.

198. *Britton*, 134 N.H. at 444.

effort to outlaw exclusionary zoning altogether.<sup>199</sup> The California legislature is considering a bill to override local zoning restrictions to allow multifamily, multi-story buildings to be constructed near mass transportation stops.<sup>200</sup>

In other states, state courts have stepped in to effectuate the FHA mandate. In the forward-moving decision of *South Burlington County. N.A.A.C.P. v. Mount Laurel Township*, the New Jersey Supreme Court held that zoning laws which have the effect of excluding low-income families violate the state constitution.<sup>201</sup> The decision created what is now regarded as the “Mount Laurel Doctrine,” which affirms that localities have an affirmative obligation to provide their “fair share” of moderate and low-income housing.<sup>202</sup> The court held that zoning policies need not intentionally exclude lower-income people—if the effect is exclusionary, that is sufficient to trigger higher judicial scrutiny.<sup>203</sup> In *Mount Laurel II*, decided in 1983, the court implemented an enforcement mechanism known as a “builder’s remedy,”<sup>204</sup> which allows developers to sue a municipality to change zoning so long as twenty percent of the development is dedicated to low- or moderate-income homes.<sup>205</sup>

Continuing to stride towards fair, affordable housing, New Jersey passed A-500 in 2008, a law that guarantees housing opportunities to low-income families making less than \$23,000 a year, and prevents wealthy towns from transferring their affordable housing obligations to poor towns through Regional Contribution Agreements.<sup>206</sup> The legislation brought with it sweeping reform to create affordable housing options across the state including: (1) establishment of a statewide 2.5% non-residential development fee;<sup>207</sup> (2) establishment of a

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199. Richard Kahlenberg, *Updating the Fair Housing Act to Make Housing More Affordable*, CENTURY FOUND. (Apr. 9, 2018), <https://tcf.org/content/report/updating-fair-housing-act-make-housing-affordable/> [<https://perma.cc/7XKL-X24U>].

200. *Id.*

201. *S. Burlington Cnty. N.A.A.C.P. v. Mount Laurel*, 67 N.J. 151, 174 (1975). (“It is elementary theory that all police power enactments, no matter at what level of government, must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws.”).

202. *Id.* at 727–28. (“[T]he universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality. It has to follow that, broadly speaking, the presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries.”).

203. *Id.*

204. *S. Burlington Cnty. N.A.A.C.P. v. Mount Laurel (Mount Laurel Two)*, 92 N.J. 158, 218 (1983).

205. *Id.*

206. N.J. P.L.2008, c. 39, § 4.

207. *Id.*

new 20 million dollar fund to create or rehabilitate housing for families earning income equal to or less than 120% of regional median income;<sup>208</sup> (3) a provision for regulated planning for affordable housing opportunities based on infrastructure and transportation;<sup>209</sup> (4) a requirement for 13% of a municipal fair share obligation, and 13% of all units funded by Balanced Housing and the statewide Affordable Housing Trust Fund, to be restricted to very-low income households (30% or less of median income).<sup>210</sup> As a result of *Mount Laurel* and the subsequent state legislation, approximately 60,000 affordable housing units have been built in New Jersey's suburbs.<sup>211</sup>

Other examples of states aiming their efforts at inclusionary housing include a 1959 decision by the Virginia Supreme Court in *Board of Supervisors of Fairfax County v. Carper*, where the court struck down a zoning ordinance requiring a minimum lot size for development.<sup>212</sup> The court reasoned that while the cost of supplying governmental services should be considered in determining the reasonableness of a zoning ordinance, a barrier may not by reason of governmental economy be set up against the natural influx of citizens who desire to live in an area.<sup>213</sup> Similarly, in 1970, the Pennsylvania Supreme Court renounced an ordinance that prevented the building of apartment complexes.<sup>214</sup> In *Appeal of Girsch*, the court reasoned that

Apartment living is a fact of life that communities like Nether Providence must learn to accept . . . . If Nether Providence is located so that it is a place where apartment living is in demand, it must provide for apartments in its plan for future growth; it cannot be allowed to close its doors to others seeking a "comfortable place to live."<sup>215</sup>

Another local government acting in line with the goal of affirmatively furthering fair housing is Montgomery County, Maryland.<sup>216</sup> The state legislature adopted a policy that when a developer builds more than a certain number of units, 12.5% to 15% of a developer's new housing stock must be affordable for low-income and working-class families.<sup>217</sup> In a 34-year period, the program produced more than 12,000 moderately priced homes, of which the housing authority has the right to purchase one-third for public housing.<sup>218</sup>

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208. *Id.*

209. *Id.*

210. *Id.*

211. *What is the Mount Laurel Doctrine?*, FAIR SHARE HOUS. CTR., <http://fairsharehousing.org/mount-laurel-doctrine/> [<https://perma.cc/6RYT-XX4N>] (last visited Jan. 27, 2020).

212. *Bd. of Supervisors of Fairfax Cnty. v. Carper*, 200 Va. 653, 659 (1959).

213. *Id.* at 661.

214. *Appeal of Girsch*, 437 Pa. 237, 245 (Pa. 1970).

215. *Id.* at 246.

216. Kahlenberg, *supra* note 199.

217. *Id.*

218. *Id.*

In an attempt to encourage development of subsidized housing in high opportunity areas, Nevada provides points in competition for tax credits to developments built at a distance away from other subsidized housing.<sup>219</sup> A HUD report found that forty percent of Nevada housing tax credit units were in high-opportunity, low-poverty neighborhoods, compared with only 2.3% of housing tax credit units in Arizona.<sup>220</sup>

#### CONCLUSION

When the Fair Housing Act was passed in 1968, it sought to change the status quo of a largely racist and discriminatory housing system.<sup>221</sup> The Affirmatively Further Fair Housing provision of the FHA was directly aimed at dismantling a history of segregation in housing by mandating communities to take actions to effectively undo historic patterns of segregation and discrimination, and afford access to opportunity.<sup>222</sup> After decades of little to no enforcement, the Obama Administration set out to create a plan that would set into motion the AFFH. The AFFH Rule set out basic parameters to guide public sector housing and community development planning and investment decisions to help program participants fulfill their obligation to affirmatively further fair housing. With the Supreme Court's 2015 *Inclusive Communities Project, Inc.*<sup>223</sup> ruling in hand, the Administration implemented an Assessment tool that would operate with the goal of furthering fair housing. These efforts were set to a halt with a change in administration that immediately stalemated enacting the Rule.

With examples of cities and states that have worked toward fair and affordable housing, it is clear that this Rule is a tool that can tremendously effectuate equal housing. The Rule would call for repeal or revision of discriminatory ordinances, like nuisance, crime-free housing, and economic ordinances, that have disadvantaged minorities for over a century. The Rule would strictly guide localities in creating better, fair housing policies with its Assessment tool, ultimately reducing the disparate impact such ordinances have on minority, low-income individuals and families. The Rule would also uphold

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219. *Id.*

220. *Id.*

221. President Lyndon B. Johnson, Address at the Passage of the Fair Housing Act (April 11, 1968) (“On an April afternoon in the year 1966, I asked a distinguished group of citizens who were interested in human rights to meet me in the Cabinet Room in the White House. In their presence that afternoon, I signed a message to the Congress. That message called for the enactment of ‘the first effective federal law against discrimination in the sale and the rental of housing’ in the United States of America.”).

222. 42 U.S.C. § 3608 (1968).

223. *Tex. Dept. of Hous. and Cmty. v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2526 (2015).

the purpose of the FHA and the AFFH and pave the way for equal opportunity in housing and quality of life.

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