

## Subsidized Housing Enforcement Policy: What Next?

By Lynne Holt and Mary Galligan

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### A. Introduction

There is always a question regarding the most effective ways to reduce the incidence of discriminatory practices in housing. Public policies today to improve compliance and enforce anti-discrimination housing laws continue to be controversial as does the role of the federal government tasked with that responsibility.

There are at least two major ways at the federal level to reduce housing-related segregation. One is to change the law to make requirements governing compliance more rigorous and the other is to increase enforcement of existing law. Developments in 2015 addressed both compliance and enforcement. The first was the U.S. Supreme Court decision in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc. (Inclusive Communities)* which addressed the disparate-impact of housing policies. The second was the Department of Housing and Urban Development's promulgation of the rule on "Affirmatively Furthering Fair Housing" (AFFH).

In this paper we analyze the support of and resistance to efforts to end housing segregation preceding and following the Supreme Court decision on disparate impact and the enactment of the final AFFH rule. We give examples to show that federal support for civil rights enforcement in housing seems to be weakening.

The remainder of this paper is organized as follows:

- Background
- Description of the AFFH rule and implications for enforcement
- Responses to the AFFH rule
- The U.S. Supreme Court's opinion on *Inclusive Communities* and subsequent circuit court decisions
- Conclusion

### B. Background

Unfair and racially discriminatory housing practices are nothing new and the federal government, if anything, has been an accomplice in perpetuating them. Examples of unfair practices are recounted in great detail in Richard Rothstein's recently published book *The Color of Law: A Forgotten History of How Our Government Segregated America*.<sup>1</sup> Rothstein points to two federal government practices developed and implemented by the Federal Housing Administration (FHA), the predecessor to the U.S. Department of Housing and Urban Development (HUD) which was created in 1968. The first was the civilian housing program after World War II which created segregated public housing by frequently demolishing

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<sup>1</sup> Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America*, New York: W.W. Norton & Company, May 2017. See also National Public Radio (NPR), Interview of Richard Rothstein by Ari Shapiro "The Color of Law' Details How U.S. Housing Policies Created Segregation," May 17, 2017, <http://www.npr.org/2017/05/17/528822128/the-color-of-law-details-how-u-s-housing-policies-created-segregation>.

neighborhoods that were to some extent integrated. The second was the use of public subsidies in the form of bank loan guarantees that were applied to developments and subdivisions that denied home sales to African-Americans. These practices were often combined with restrictive deeds that prohibited resales of homes to African-Americans. These two developments preceded the Fair Housing Act which was passed in 1968.<sup>2</sup>

The Act, as amended, prohibits discrimination in the sale, rental, or financing of dwellings and other housing-related activities on the basis of race, color, religion, sex, disability, familial status, or national origin.<sup>3</sup> While the law has done much to reduce the most egregious discriminatory practices over the past half century, its provisions could only affect practices post-enactment. As Rothstein points out, racially segregated housing patterns throughout the country were already firmly in place when the Fair Housing Act was enacted.<sup>4</sup> Furthermore, public policies aimed at fair housing, affordable housing and community economic development may at times work at cross purposes. Specifically, such policies may have competing goals, different regulatory authorities, and different funding streams.<sup>5</sup>

Exclusionary local zoning practices continue to be one source of racial segregation. For example, when communities zone exclusively for single-family homes and property tract sizes that raise the cost of housing, thereby excluding all but the most affluent people from an area, new neighborhoods become at least economically, if not also racially, segregated. Moreover, using the same or similar tools, communities have refused to allow low- and moderate-priced housing to be built at all, apparently in an attempt to prevent racial integration. Courts have not found such behavior to violate the Fair Housing Act.<sup>6</sup> Likewise, when communities receive HUD support to establish public housing or other forms of subsidized housing, they may confine those units to areas which were already segregated or are not attractive due to the absence of amenities. Residents in subsidized housing tend to be minority and must be low-income. If their housing is located in already segregated areas, they tend to face associated barriers to accessing employment, transportation, good schools, food stores, child care, and health care.

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<sup>2</sup> The U.S. Supreme Court has repeatedly found racial discrimination in housing to be unconstitutional. See, for example *Buchanan v. Warley* (1917) [finding that locally-established segregated residential areas violated the property owners' right to equal protection under the US Constitution]; *Shelley v. Kraemer* (1948) [finding that restrictive covenants that discriminate by race violate minority groups' equal protection rights]; *Reitman v. Mulkey* (1967) [striking down a California constitutional provision that prevented the State from limiting housing discrimination]; and *Jones v Alfred H. Mayer Co.* (1968) [finding that housing discrimination was banned by the Civil Rights Act of 1866.]

<sup>3</sup> See 42 U.S.C. 3604, "Discrimination in the Sale or Rental of Housing and Other Prohibited Practices," <https://www.gpo.gov/fdsys/search/pagedetails.action?packageId=USCODE-2010-title42&granuleId=USCODE-2010-title42-chap45-subchapl-sec3604>.

<sup>4</sup> See NPR interview in ftn.1.

<sup>5</sup> Tim Iglesias, "Affordable Housing, Fair Housing and Community Development: Joined at the Hip, We Need to Learn to Walk Together." *Journal of Affordable Housing & Community Development Law* [serial online]. January 2017, 25(2):195-201. Available from: Index to Legal Periodicals & Books Full Text (H.W. Wilson), Ipswich, MA.

<sup>6</sup> See, for example, *Arlington Heights v. Metropolitan Housing Development Corp.* (1977), where the U.S. Supreme Court found that while zoning restrictions that effectively prohibit low-income housing exclude certain residents, they do not rise to proof of the intent to discriminate.

Research findings show that housing segregation affects the future health and earnings of residents deprived of opportunities available in more integrated, affluent neighborhoods.<sup>7</sup>

Exposure to greater opportunities does not necessarily eradicate poverty because most low-income families that move to neighborhoods offering work and higher incomes do not stay in them. Even in “better” neighborhoods, low-income families still face multiple barriers to better educational and employment outcomes. Yet, some exposure to neighborhoods with more opportunities and amenities is better than no exposure. Families residing in low-poverty neighborhoods, even if only temporarily, experience lower poverty rates than families that never leave distressed, high-poverty neighborhoods.<sup>8</sup>

Two actions in 2015 -- the U.S. Supreme Court decision in *Inclusive Communities* and HUD’s promulgation of the AFFH rule -- added tools to a toolkit for strengthening compliance with, and enforcement of, housing-related anti-discrimination laws. The U.S. Supreme Court decision in *Inclusive Communities* addressed the disparate impact of housing policies, acknowledging that the theory of disparate impact<sup>9</sup> is “cognizable,” that it is a theory of liability recognized under the Fair Housing Act. In that context, a disparate-impact analysis may be used to support discrimination claims although the burden of proof on the plaintiff is limited and qualified. The Supreme Court decision stemmed from a claim by a nonprofit organization, Inclusive Communities Project, Inc., that the Texas Department of Housing and Community Affairs violated the Fair Housing Act by distributing Low Income Housing Tax Credits in a way that furthered housing segregation. The AFFH rule changes the process under which localities identify impediments to affordable housing through the use of a geospatial database designed and maintained by HUD. The rule is linked to the disparate- impact theory because allegations of noncompliance with the rule might be based on disparate-impact considerations and arguments. Both the AFFH rule and *Inclusive Communities* are explained in greater detail below.

After almost 50 years of sometimes uneven progress toward elimination of racial segregation in housing, the Fair Housing Act continues to generate controversy. The AFFH rule and *Inclusive Communities* engendered both supporters and detractors. The rule was promulgated and the U.S Supreme Court decision was issued during the Obama administration. Since that time, the Trump administration has

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<sup>7</sup> See “Section II: The Impact of Segregation,” which summarizes findings of economists in Jonathan Zasloff, “The Price of Equality: Fair Housing, Land Use, and Disparate Income,” 48 Colum. Human Rights L. Rev. 98. See also research findings in Kenneth Jost, “Housing Discrimination,” *CQ Researcher*, November 6, 2015, 948-949.

<sup>8</sup> These are the findings from a Moving to Opportunity demonstration study which was launched in the early 1990s. This study sought to evaluate the effects of vouchers used by very low-income families to move from high-poverty to high-opportunity neighborhoods. The evaluation occurred over a 10 to 14-year demonstration period. See Margery Austin Turner, Jennifer Comey, Daniel Kuehn, and Austin Nichols with Kaitlin Franks and David Price, “Helping Poor Families Gain and Sustain Access to High Opportunity Neighborhoods,” Urban Institute, October 2011, <https://www.urban.org/sites/default/files/publication/26731/412455-Helping-Poor-Families-Gain-and-Sustain-Access-to-High-Opportunity-Neighborhoods.PDF>. See also Casey Dawkins, “The Spatial Pattern of Low Income Housing Tax Credit Properties: Implications for Fair Housing and Poverty Deconcentration Policies,” *Journal of the American Planning Association*, Summer, 2013, 79:3, 222, [finding that properties developed with the tax credit are more highly clustered than expected in seven of the nation’s 10 largest metropolitan areas and that “several neighborhood characteristics, including poverty rates, the census tract percent Black, and the census tract percent Hispanic, each contribute to higher levels of [tax credit development] clustering” as do statutory requirements of the tax credit program.]

<sup>9</sup> According to the Merriam-Webster legal dictionary, the definition of “disparate impact” is “an unnecessary discriminatory effect on a protected class caused by a practice or policy (as in employment or housing) that appears to be nondiscriminatory.” See <https://www.merriam-webster.com/legal/disparate%20impact>.

taken a different stance toward civil rights and regulations in general. As discussed below, the rule and the disparate-impact decision continue to be controversial.

### **C. Description of AFFH Rule and Implications for Enforcement**

One way HUD has tried to reduce racial and, by extension, economic discrimination attributed to zoning practices and other local policies is through implementation of a policy included in the Fair Housing Act requiring localities to “affirmatively further fair housing (AFFH).” While this requirement has been part of the Fair Housing Act since 1968, it was only defined in 2015 in HUD’s final AFFH rule.

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>10</sup>

The words “transforming racially and ethnically concentrated areas of poverty into areas of opportunity...” suggest that economic transformation is also part of the overall objective of the rule. Moreover, in justifying the need for the rule, HUD made the case for the link between racial segregation and economic barriers:

Despite genuine progress and a landscape of communities transformed in the more than 40 years since the Fair Housing Act was enacted, the ZIP code in which a child grows up all too often remains a strong predictor of that child's life course. There are communities that remain segregated by classes protected by the Fair Housing Act. Racially-concentrated areas of poverty exist in virtually every metropolitan area. Disparities in access to important community assets prevail in many instances.<sup>11</sup>

Changing the nature of zip codes obviously affects land use practices. The 2015 AFFH rule establishes requirements for communities, states, and entities that receive HUD funding and for Public Housing Authorities. Specifically, the rule addresses the planning efforts undertaken by those communities to reduce segregation in land use, with the intent of making planning processes more data driven.

Before the AFFH rule took effect in 2015, communities had to identify impediments to affordable housing and certify that they had documented those impediments. Communities were not required to update the list of impediments, there was no definition of what constituted impediments, and there was no guidance as to what communities should do to remove impediments.<sup>12</sup> Both HUD in 2009 and the Government Accountability Office (GAO) in 2010 identified problems with the old process. The GAO found specifically

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<sup>10</sup> See 80 FR 42271, Section 5.152, July 16, 2015.

<sup>11</sup> Ibid., at 42348 [Need for rule], <https://www.federalregister.gov/documents/2015/07/16/2015-17032/affirmatively-furthering-fair-housing#citation-16-p42346>.

<sup>12</sup> Alana Semuels, “Can Better Data Help Solve America's Housing Problems?” *The Atlantic*, July 8, 2015, <https://www.theatlantic.com/business/archive/2015/07/new-hud-rules-fair-housing/397997/>.

that the analyses of impediments were outdated and the quality was erratic. The GAO report also underscored the need for and recommended inclusion of more standards (time frames, submittal requirement to HUD) and a format that would provide guidance to grant recipients.<sup>13</sup>

Table 1 displays a comparison of the process required prior to the 2015 rule with the process created by the rule.<sup>14</sup> In the table, references to “program participants” are to the entities that receive federal assistance and that engage in covered planning processes.

<b>Table I: What is New About the AFFH Process?</b>		
<b>Element of Plan</b>	<b>Assessment of Fair Housing Required by 2015 Rule</b>	<b>Analysis of Impediments Used Prior to 2015 Rule</b>
Program participants required to identify barriers to fair housing and propose steps to overcome them	X	X
The process is governed by regulations rather than HUD guidance	X	
HUD provides uniform data to program participants	X	
Program participants must ensure the opportunity for public participation	X	
Collaboration among program participants is allowed and encouraged	X	
Reports are submitted to HUD	X	
Reports are made publicly available	X	
Regulations provide that reports must be updated	X	
Reproduced from Congressional Research Service, <i>The Fair Housing Act: HUD Oversight, Programs, and Activities</i> , May 5, 2017. Sources: CRS analysis of U.S. Department of Housing and Urban Development, “Affirmatively Furthering Fair Housing,” 80 Federal Register 42272-42371, July 16, 2015; and U.S. Department of Housing and Urban Development, <i>Fair Housing Planning Guide Volume 1</i> , March 1996, <a href="http://www.hud.gov/offices/fheo/images/fhpg.pdf">http://www.hud.gov/offices/fheo/images/fhpg.pdf</a> .		

<sup>13</sup> Libby Perl, *The Fair Housing Act: HUD Oversight, Programs, and Activities*, Congressional Research Service, May 5, 2017, 18, <https://fas.org/sgp/crs/misc/R44557.pdf>.

<sup>14</sup> *Ibid.*, at 21.

The AFFH rule injects into the planning process a mapping tool that enables the assessment of fair housing issues using data provided by HUD. Cities, regions, or housing authorities must submit a document called an “Assessment of Fair Housing” to HUD for its review. That document must include an analysis of integration patterns and barriers to access to high-quality affordable housing, incorporating local data, and include community input on actions to be taken in response to the analysis. HUD can reject parts of a community’s Assessment of Fair Housing if that plan is determined to be incomplete or is inconsistent with fair-housing laws. Even though the new assessment requirement did not immediately apply to all jurisdictions receiving HUD funding, those jurisdictions are still required to certify that they are affirmatively furthering fair housing utilizing the prior process. As has always been the case, HUD can block funding for those programs if the certification is not in compliance with the requirement.<sup>15</sup>

In short, the process established by the 2015 rule provides a mechanism for improving accountability. As one report, “The Case for Fair Housing: 2017 Fair Housing Trends,” put it, the process “spells out strategies to address each of the fair housing priorities identified, along with timeframes, metrics, and the agencies responsible for carrying them out.”<sup>16</sup>

In 2016, HUD ordered 22 jurisdictions to comply with the rule, including Kansas City, New Orleans, and Philadelphia, with an additional 105 committed to compliance in 2017, including the cities of Denver, Boston, Nashville, Los Angeles and Buffalo.<sup>17</sup> However, most jurisdictions have until 2019 to comply with the rule.

There have been no formal evaluations measuring the impact of the rule to date. Nonetheless, projections and early implementation anecdotes provide some insight. An article published immediately after the rule was issued presented three scenarios that could stem from the AFFH implementation:

1. Sellers might leave neighborhoods that face greater desegregation and, in doing so, destabilize them, thereby creating a buyer’s market that would contribute to depressed housing prices;
2. Opportunities might be created in suburbs facing desegregation as suburbanites move to urban areas and gentrify those areas; and
3. Communities may face public opposition to desegregation and decide to forgo participation in federal housing programs, thus making access to affordable housing even more constrained.<sup>18</sup>

Even though it has been only two years since the AFFH rule was promulgated, and the rule has not been implemented in all jurisdictions, some benefits have been identified. For example, the National Fair

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<sup>15</sup> Ed Gramlich, “Affirmatively Furthering Fair Housing (AFFH): For Jurisdictions and Public Housing Agencies Not Yet Required to Comply with the 2015 AFFH Rule,” *2017 Advocates’ Guide*, National Low Income Housing Coalition, April 2017, [http://nlihc.org/sites/default/files/AG-2017/2017AG\\_Ch07-S03\\_AFFH-For-Jurisdictions\\_2015-Rule\\_No-Compliance.pdf](http://nlihc.org/sites/default/files/AG-2017/2017AG_Ch07-S03_AFFH-For-Jurisdictions_2015-Rule_No-Compliance.pdf).

<sup>16</sup> National Fair Housing Alliance, *The Case for Fair Housing: 2017 Fair Housing Trends Report*, April 19, 2017, <http://nationalfairhousing.org/wp-content/uploads/2017/07/TRENDS-REPORT-2017-FINAL.pdf>.

<sup>17</sup> Jake Blumgart, “Fair Housing Still Has a Chance Under Trump,” *Slate*, March 14, 2017, [http://www.slate.com/articles/business/metropolis/2017/03/the\\_affirmatively\\_furthering\\_fair\\_housing\\_rule\\_is\\_s\\_till\\_working\\_under\\_trump.html](http://www.slate.com/articles/business/metropolis/2017/03/the_affirmatively_furthering_fair_housing_rule_is_s_till_working_under_trump.html);

<sup>18</sup> Ann D. Fulmer, “Affirmatively Furthering Fair Housing Rule: HUD’s Role in Social Engineering?” *Mortgage Banking*, September 2015, 91, 93.

Housing Alliance cites New Orleans' AFFH community engagement process as beneficial. The planning effort required by the rule identified concerns of renters, persons who were not proficient in English, persons with disabilities, and neighborhoods that were vulnerable to gentrification and that were underserved. Input from these groups and others helped inform priorities for the planning process.<sup>19</sup> The Executive Director of Greater New Orleans Fair Housing Center noted that the process was more transparent, participatory, and honest than what she had anticipated.<sup>20</sup> The President and CEO of the National Low Income Housing Coalition also spoke of additional information gained from the planning tools:

The city leaders and city hall administrators we've talked to like this [process] and want to work within the new rules. It requires them to look at and unwind what might have been decades of segregated communities. It requires them to take a look at their community and find where there are high concentrations of segregation and poverty and disparity of opportunities exist. How did we get here, what led us here, and what can we do? <sup>21</sup>

However, not all city officials see the benefits of the new planning process. Detractors criticize the rule in terms of its added paperwork and burden to communities. The Executive Director of the Central Texas Housing Consortium in Temple, Texas, with oversight of 1,200 units of public housing and vouchers, claimed it was a huge administrative burden for its staff.<sup>22</sup> The Board of County Commissioners of Douglas County, Colorado, an affluent suburban county near Denver, voted in June 2016 to turn down \$700,000 in CDBG money, also subject to the AFFH planning process requirements. The Board considered the rule "unreasonable, unachievable, [and] ill-conceived," and one commissioner cited a significant concern with the new mapping tool.<sup>23</sup>

In addition to resistance on the part of local governments, other barriers to implementation exist: HUD has limited expertise and resources to support and enforce the AFFH rule and state and local governments lack the staff and expertise and sometimes access to the technical assistance necessary to comply with requirements.<sup>24</sup>

It is true that HUD has some programmatic capacity at the state and local level that is directed toward enforcement of fair housing laws. HUD's Federal Housing Assistance Program (FHAP), initiated in 1979, provides federal funding to state and local governments that have passed anti-discriminatory housing laws that are substantially the same as the federal Fair Housing Act. Specifically, HUD provides financial and technical support to 35 state and 50 local government agencies authorized to investigate complaints about housing discrimination and litigate them where necessary. Another program, the Fair Housing Initiatives Program (FHIP), provides grants to a network of non-governmental organizations to assist them

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<sup>19</sup> National Fair Housing Alliance, *The Case for Fair Housing: 2017 Fair Housing Trends Report*, at 99.

<sup>20</sup> See Blumgart in ftn. 17.

<sup>21</sup> Daniel J. McGraw, "Is HUD's Fair Housing Rule Here to Stay?" *Next City*, May 2, 2017, <https://nextcity.org/daily/entry/hud-fair-housing-segregation-affirmatively-furthering-fair-housing-data>.

<sup>22</sup> Ibid.

<sup>23</sup> Douglas County, Colorado, Community Development Block Grant, "Commissioners Vote to Deny 2016 Federal Block-grant Action Plan, June 29, 2016, <http://www.douglas.co.us/community/partners-and-providers/community-development-block-grant/>.

<sup>24</sup> Raphael Bostic and Arthur Acolin, University of Southern California, "What Would It Take... For the HUD AFFH Rule to Meaningfully Increase Inclusion?" April 19, 2017, [http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/panel4.1\\_acolin\\_v1.pdf](http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/panel4.1_acolin_v1.pdf).

in their efforts in addressing housing discrimination. HUD's funding assistance to its state and local partners notwithstanding, challenges remain: nonprofit and philanthropic organizations must be able to coordinate effectively with state and local partners to provide timely assistance to them.<sup>25</sup> Furthermore, the expertise developed through the FHAP and FHIP may not equip local jurisdictions and non-profit organizations to implement steps necessary to meet AFFH requirements absent significant support from HUD.

If HUD steps back from a role as the chief enforcer of fair housing policies, the responsibility might fall to local and regional governments that are responsible for zoning decisions and, assuming HUD provides adequate financial support, the fair housing partners at the local level that are funded to enforce those policies. A recent study found that state and local housing agencies funded by the FHAP were more effective than HUD at the federal level in enforcing the Fair Housing Act with respect to reaching resolutions for complaints and providing remedies. The comparison between HUD and its state and local partners spanned the years between 1989 and 2004. The most effective level of enforcement occurred at the local level through the 50 agencies receiving FHAP support, followed by state agencies.<sup>26</sup> The jury is out as to whether or not that level of effectiveness by local agencies continued after 2004 and will continue in the future under the Trump administration. Further, not all states have fair housing laws that are "substantially equivalent"<sup>27</sup> to the Fair Housing Act. While the fair housing laws may not be changed, HUD's capacity to enforce them may become less rigorous if its workload increases and the staffing and funding for enforcement are commensurately reduced.

While it is too early to know how the Trump administration under Secretary Ben Carson will enforce the AFFH rule, the early signs suggest a departure from the Obama administration's oversight and enforcement. For example, HUD's most recent response to Westchester County, New York may reflect a change in philosophies. A federal judge ruled in 2009 that Westchester had violated federal fair housing laws and ordered the county to identify impediments posed by its zoning laws to integrated housing. The county is very affluent and housing is predominantly single-family. Special permits for multi-unit housing are required by the county. Since 2009, Westchester had submitted its analyses of impediments which were always rejected by HUD. However, Westchester's submittal was finally approved in 2017 under the Trump administration which gave the County the option of deleting any conclusory statements regarding the absence of a correlation between minority populations and various zoning districts in its impediment analysis.<sup>28</sup>

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<sup>25</sup> Ibid.

<sup>26</sup> Charles S. Bullock, III, Eric M. Wilk, and Charles M. Lamb, "Bureaucratic Effectiveness and Civil Rights Enforcement," *State and Local Government Review*, 2017, 20(10), 1-18.

<sup>27</sup> Before state and local agencies can receive funding from HUD, HUD must certify that the laws governing them are substantially equivalent to the Fair Housing Act: "Substantial equivalence certification takes place when a state or local agency applies for certification and HUD determines that the agency enforces a law that provides substantive rights, procedures, remedies and judicial review provisions that are substantially equivalent to the federal Fair Housing Act. Typically, after a certification determination, HUD will refer complaints of housing discrimination that it receives to the state or local agency for investigation." See U.S. Department of Housing and Urban Development, "Substantial Equivalent Certification," HUD.GOV, [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/partners/FHAP/equivalency](https://www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHAP/equivalency).

<sup>28</sup> Specifically, Westchester County was given the option of "1. acknowledg[ing] where a correlation exists between zoning and where Black/Asian American and Hispanic populations reside; or, 2. at a minimum, remov[ing] conclusory statements that find 'no correlation' between zoning and Black/African American and Hispanic

HUD's capacity in terms of staff and funding to enforce the rule also may reflect a pull-back. The Trump administration's proposed FY 2018 budget for fair housing act initiatives is essentially the same as the FY 2017 amount. However, the administration's budget for salaries and expenses of the Office of Fair Housing and Equal Opportunity is approximately \$2 million less than the FY 2017 annualized CR level. In the HUD budget justification, the agency describes a plan to provide technical assistance to program participants involved in completing Assessments of Fair Housing (AFH), stating that "development and delivery of guidance and training materials began in fiscal year 2015 and is ongoing. . . . In fiscal year (FY) 2018, HUD anticipates receiving over 100 AFH submissions from program participants followed by over 3,000 AFHs in fiscal year 2019 and nearly 2,000 in fiscal year 2020. [The Office of Fair Housing and Equal Opportunity] will review these AFH submissions for compliance with standards established in regulations." Despite the projected increase in compliance reviews, HUD's FY 2018 budget includes a reduction of staff in the Office of Fair Housing.<sup>29</sup>

Congress has also attempted to stall implementation of the rule. The House-passed an FY 2018 appropriation bill (H.R. 3354) that was reported to the Senate in late September included the amounts for fair housing activities as recommended by the President. The bill also includes a provision specifically aimed at hindering implementation of the AFFH: "None of the funds made available by this Act may be used by the Department of Housing and Urban Development to direct a grantee to undertake specific changes to existing zoning laws as part of carrying out the final rule entitled "Affirmatively Furthering Fair Housing" (80 Fed. Reg. 42272 (July 16, 2015)) or the notice entitled "Affirmatively Furthering Fair Housing Assessment Tool" (79 Fed. Reg. 57949 (September 26, 2014))."<sup>30</sup> If that provision is enacted in the appropriation, implementation of the rule will be significantly hindered, if not stopped.

#### **D. Responses to the AFFH Rule**

Attempts to desegregate housing often trigger political polarization. The AFFH in particular elicited controversy.

Advocates of the rule argue that AFFH provides a means of enforcing the Fair Housing Act regulations that have been in effect since the 1960s.<sup>31</sup> By requiring the collection and analysis of data on barriers to desegregation, it is harder to deny that segregation exists. Detractors, on the other hand, hold a different view. For example, the conservative *National Review* characterized AFFH as a regionalist approach initiated by President Obama which essentially annexes suburbs to cities by requiring more affluent suburbs to transfer money to less affluent cities. This transfer would result from a requirement that all

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populations given the facts relating to the demographic patterns and the various zoning districts, as already contained in the Supplemental Zoning Analysis." See Letter from Jay Golden, Regional Director, Office of Fair Housing and Equal Opportunity, HUD, to Kevin J. Plunkett, Deputy County Executive, Westchester County, re: United States ex rel. Anti-Discrimination Center v. Westchester County 06 civ. 2860 (DLC) - Zoning Analysis., <http://nlihc.org/sites/default/files/HUDResponse20170504.pdf>. HUD approved Westchester County's impediment analysis on July 14, 2017.

<sup>29</sup> U.S. Department of Housing and Urban Development, "FY 2018 Congressional Justifications," <https://www.hud.gov/sites/documents/35-FairHSNGActs.pdf> and <https://www.hud.gov/sites/documents/54-FHEO.PDF>, accessed October 8, 2017 from [https://www.hud.gov/program\\_offices/cfo/reports/fy18\\_CJ](https://www.hud.gov/program_offices/cfo/reports/fy18_CJ).

<sup>30</sup> See CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/3354/actions>.

<sup>31</sup> Faine Greenwood, "In the Age of Trump, We Need to Protect Map Databases," Slate.com, May 11, 2017, [http://www.slate.com/articles/technology/future\\_tense/2017/05/why\\_we\\_need\\_to\\_protect\\_map\\_databases\\_in\\_the\\_age\\_of\\_trump.html](http://www.slate.com/articles/technology/future_tense/2017/05/why_we_need_to_protect_map_databases_in_the_age_of_trump.html).

communities must compare their demographics to the region as a whole in order to receive federal HUD moneys.<sup>32</sup> The political responses to AFFH reflect detractors' views that AFFH is a threat to personal freedom and an example of government overreach.<sup>33</sup>

Even prior to the release of HUD's AFFH rule in July 2015, Representative Paul Gosar of Arizona introduced in 2014 an amendment to prohibit the use of tax moneys to enforce the AFFH rule. The amendment passed 229 to 193, with all but 11 Republicans supporting it and Democrats unanimously opposed to it.

Legislation was introduced in January 2017 by Representative Gosar to nullify the AFFH and any subsequent notice or rule that would be substantially similar. The bill would also prohibit the use of federal funds for the operation of a geospatial database to point to racial disparities or disparities in accessing housing.<sup>34</sup> Senator Lee of Utah introduced an identical bill to Representative Gosar. Neither bill has received action to date.

In addition, political action to rescind the rule surfaced in July when a group of Republican senators wrote a letter to HUD Secretary Ben Carson asking him to repeal the rule. In their letter, the senators contended that "the rule would extend the reach of the federal government beyond its authority and could take away state and local governments' ability to make local zoning decisions."<sup>35</sup> The senators also argued that the burden would be shifted to local communities that would need to make significant changes to their zoning laws. The rule represents what they deemed to be a continuation of a "punitive" policy crafted by the Obama administration to apply the disparate-impact theory which was affirmed by the U.S. Supreme Court in 2015.<sup>36</sup>

For his part, Secretary Carson indicated that he would "reinterpret" the rule but did not explain what he meant by the term "reinterpret." On another occasion, he referred to the rule as an attempt at legislating racial equality. However, he referred to the Supreme Court's decision on disparate impact as the justification for not rescinding the rule.<sup>37</sup>

## **E. The U.S. Supreme Court's *Inclusive Communities* Opinion and Subsequent Circuit Court Decisions**

The U.S. Supreme Court's decision on disparate impact in *Inclusive Communities* reflects much of the polarization that the AFFH rule has engendered. The case was decided on a 5-4 vote with Justice Kennedy

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<sup>32</sup> Stanley Kurtz, "Attention America's Suburbs: You Have Just Been Annexed," *National Review*, July 20, 2015, <http://www.nationalreview.com/corner/421389/attention-americas-suburbs-you-have-just-been-annexed-stanley-kurtz>.

<sup>33</sup> See Greenwood in fn. 31.

<sup>34</sup> H.R. 482, "Local Zoning Decisions Protection Act of 2017," 115<sup>th</sup> Congress 2017-2018, <https://www.congress.gov/bill/115th-congress/house-bill/482/text?q=%7B%22search%22%3A%5B%22Gosar%22%5D%7D&r=1>.

<sup>35</sup> See letter From Senator Lee and Representative Gosar and others asking Secretary Carson to rescind AFFH rule, July 14, 2017, [https://www.scribd.com/document/353797381/Sen-Lee-Rep-Gosar-and-Colleagues-Send-Letter-Asking-Sec-Carson-to-Rescind-Zoning-Rule#from\\_embed](https://www.scribd.com/document/353797381/Sen-Lee-Rep-Gosar-and-Colleagues-Send-Letter-Asking-Sec-Carson-to-Rescind-Zoning-Rule#from_embed).

<sup>36</sup> Ibid.

<sup>37</sup> National Low Income Housing Coalition, "House GOP Members Call for HUD to Rescind AFFH Rule, Secretary Carson Says HUD will 'Reinterpret' the Rule," July 24, 2017, <http://nlihc.org/article/house-gop-members-call-hud-rescind-affh-rule-secretary-carson-says-hud-will-reinterpret-rule>.

writing the majority opinion. While the opinion made the disparate-impact theory “cognizable,” it also limited its applicability in discrimination claims to a showing of “robust causality.”

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.<sup>38</sup>

Racial considerations are permitted in justifying remedies to successful claims. Nonetheless, the Supreme Court opinion clearly did not give carte blanche to such claims:

Policies, whether governmental or private, are not contrary to the disparate-impact requirement unless they are “artificial, arbitrary, and unnecessary barriers.” Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision. These limitations are also necessary to protect defendants against abusive disparate-impact claims.<sup>39</sup>

The Court goes on to state: “While the automatic or pervasive injection of race into public and private transactions covered by the FHA has special dangers, race may be considered in certain circumstances and in a proper fashion.”<sup>40</sup>

The question, of course, is how to operationalize the Supreme Court’s decision. A three-step process must be followed: 1. the plaintiff must show that the policy or practice has a disparate impact (“robust causality requirement”); 2. The defendant must show a “substantial, legitimate” interest for maintaining the policy or practice; and 3. Assuming the defendant produces the requisite evidence, the plaintiff must prove that a less restrictive means of realizing the defendant’s policy objectives exists.

While the Court’s majority in the decision sought to limit the theory’s applicability, Justice Alito in his dissent argued that the Court’s finding invites constitutional questions and may have perverse consequences of allowing race to drive housing decisions so that parties can avoid litigation. The three-step process governing disparate-impact claims applies mostly to banks and other lending institutions which have been the defendants in such cases.

In the context of lending policy, the three-step process requires plaintiffs to accomplish two things: 1. show that a statistical disparity resulted from a defendant’s loan; and 2. show that the lending policy in question caused that outcome. Causality alone is also not sufficient because the plaintiff must show “robust causality.”

Yet, the guidance provided by the majority in the Court’s decision raised questions in terms of implications. Would the decision result in racial quotas on the part of potential defendants? Justice Kennedy, in writing for the majority, admitted that it was a danger. According to a Wall Street Journal article, the adoption of racial quotas would be the logical result so that housing authorities could prevent future impact discrimination claims from arising. In short, the argument goes, housing authorities would

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<sup>38</sup> *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, No. 13-1371, 576 U.S. \_\_\_\_ (2015).

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

be motivated to locate housing where it would mostly protect against lawsuits and not necessarily where the need was greatest.<sup>41</sup>

Another question concerns the interpretation of “robust causality.” Some circuit court decisions have indicated that proving the required causal relationship may sometimes be difficult. Recently, the Ninth Circuit Court of Appeals issued two decisions related to disparate-impact claims made under the Fair Housing Act. These cases were the *City of Los Angeles v. Bank of America Corporation* (9th Cir. May 26, 2017) and *Los Angeles v. Wells Fargo* (9th Cir. May 26, 2017). In both cases, the 9th District Court concluded that the plaintiff, Los Angeles, failed to show “robust” causality.<sup>42</sup>

Lending practices can trigger disparate-impact scrutiny. But other practices, such as insurance coverage, may as well. For example, in August 2017, the U.S. District Court for the District of Columbia rejected a motion by Travelers Insurance to dismiss a disparate-income claim by the National Fair Housing Alliance (NFHA). NFHA alleged that Travelers denied insurance coverage to housing providers with tenants receiving Section 8 vouchers. In its opinion, the D.C. District Court noted that the plaintiff, NFHA, met the “robust causality” requirements.<sup>43</sup>

## F. Conclusion

These are still early days for both the application of the disparate-impact theory to housing and the implementation of the AFFH. The *Inclusive Communities* decision is sufficiently recent that there is not much case law associated with it. The “robust causality” requirement may indeed prevent the filing of frivolous lawsuits or it may prevent less affluent aggrieved parties from litigating even if their claims are not frivolous. It remains to be seen.

In terms of the AFFH rule, advocates can only speculate on the degree to which it will be enforced. The Trump administration’s proposed budget for 2018 coupled with HUD’s final response to Westchester County’s analysis of impediments suggests that rigorous enforcement of the AFFH rule might not be a high priority for HUD. Moreover, HUD Secretary Carson views both the AFFH rule and the Supreme Court’s decision on disparate impact as the wrong approach. In an op-ed for the Washington Times, written in 2015 when he was candidate in the Republican primary, Secretary Carson referred to both as examples of “government engineering:”

These government-engineered attempts to legislate racial equality create consequences that often make matters worse. There are reasonable ways to use housing policy to enhance the opportunities available to lower-income citizens, but based on the history of failed socialist

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<sup>41</sup> Jason I. Riley, “The Supreme Court’s Disastrous Misreading of the Fair Housing Act; A Decision Endorsing ‘Disparate Impact’ Analysis Will Turn a Law Meant to Prohibit Discrimination Into a Vehicle for Race-Conscious Housing Markets,” *Wall Street Journal* (Online), June 30, 2015.

<sup>42</sup> Mark A. Fulks, “Living with the Robust Causality Requirement for Disparate Impact Under the Fair Housing Act,” Baker Donelson, July 28, 2017, <https://www.bakerdonelson.com/living-with-the-robust-causality-requirement-for-disparate-impact-under-the-fair-housing-act>.

<sup>43</sup> National Fair Housing Alliance Staff, “DC Federal District Court Rejects Travelers Insurance Motion to Dismiss Fair Housing Act Disparate Income Claim,” National Fair Housing Alliance, August 22, 2017, <http://nationalfairhousing.org/2017/08/22/dc-federal-district-court-rejects-travelers-insurance-motion-to-dismiss-fair-housing-act-disparate-impact-claim/>.

experiments in this country, entrusting the government to get it right can prove downright dangerous.<sup>44</sup>

While the federal government's role in "social engineering" actually contributed to racial segregation in much of the 20th Century (Rothstein's thesis), the Fair Housing Act and ensuing fair housing laws have reduced overall segregation in much of the country. Nonetheless, desegregation has been uneven and in some regions of the country segregation remains extremely persistent. Specifically, as one recent research paper observed, "as of 2010 African Americans remained hypersegregated in 21 metropolitan areas, including Milwaukee, Detroit, St. Louis, Cleveland, Chicago, New York, Philadelphia, Baltimore, and Boston, just to name a few of the nation's more prominent black communities."<sup>45</sup> In 2010, a high degree of segregation characterized the living conditions of one-third of the African-American, as well as one-fifth of the Hispanic, residents in metropolitan areas.<sup>46</sup> Absent rigorous enforcement of existing fair housing laws through HUD's funding mechanisms the only route to racial desegregation in housing, at least in the short term, may be fewer local jurisdictions engaging in processes that might undo decades of segregation, fewer complaints settled at earlier stages in HUD's procedural process and more litigation -- a time consuming and expensive avenue.

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<sup>44</sup> Ben S. Carson, "Experimenting with Failed Socialism Again," *Washington Times*, July 23, 2015, <http://www.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish/>.

<sup>45</sup> Douglas S. Massey, "The Legacy of the 1968 Fair Housing Act," *Sociological Forum*, June 30, 2015, Suppl. 1: 571-588. The online version (June 2, 2015) is accessible at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4808815/>.

<sup>46</sup> *Ibid.*