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### FAIR HOUSING, UNFAIR HOUSING

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#### ABSTRACT

*The Affirmatively Furthering Fair Housing rule, promulgated under the Obama administration and swiftly repealed under the Trump administration, was the most significant fair housing effort in decades. But for all its ambitions, the rule had a fundamental weakness. It was (intentionally) focused on process and not able to support prescriptive, readily-enforceable mandates to improve racial equity in housing. This Essay argues that this weakness stems from the open-ended meaning of “fair housing.” With little consensus—even within the fair housing community—as to what fair housing demands, it was nearly impossible for the federal government to demand state and local governments “affirmatively further” anything in particular. To make matters worse, the judiciary may have locked in that open-ended understanding of fair housing, limiting how HUD can strengthen its regulatory framework.*

*In light of this diagnosis, this Essay offers a new path forward: focusing less on promoting “fair housing,” and more on eliminating practices known to contribute to unfair housing. Here, there is more clarity: some practices routinely impede racial equity in housing. HUD can encourage the elimination of these practices while still permitting states and cities to*

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*define their own positive visions of racial equity. Doing so could pair the best of HUD's previous bottom-up framework with new tools to promote concrete action. This Essay closes by detailing a framework for how to integrate a renewed focus on unfair housing into the Affirmatively Furthering Fair Housing process.*

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## INTRODUCTION

In the heat of the 2020 election, Donald Trump attempted to elevate one of his more obscure regulatory efforts into a major campaign issue. In tweets and speeches, Trump promised to protect “people living their Suburban Lifestyle Dream” from the threat of “low-income housing built in your neighborhood.”<sup>1</sup> “It’s been hell for suburbia,” he announced.<sup>2</sup> Trump’s rhetoric was characteristically inflammatory and flirted with an outright embrace of residential segregation; even the sober New York Times deemed it “racist.”<sup>3</sup>

Trump, in his particular way, was describing his administration’s repeal of an Obama-era rule (“the 2015 Rule”) meant to help implement the Fair Housing Act’s mandate that the federal government and its grantees “affirmatively further” fair housing (AFFH).<sup>4</sup> The repealed rule was, in fact, modest and accommodating of local preferences, perhaps to a fault: it is not clear that a single unit of housing was built anywhere as a direct result of the rule. And besides which, by 2020, the Trump administration had already effectively suspended the 2015 Rule.<sup>5</sup> But while Trump’s description of the Rule’s effect was unmoored from reality, his instinct for the racial fault lines of American politics was sound. The Fair Housing Act’s affirmative mandate to end segregation is a potentially transformative provision of law, targeted at one of the country’s most intractable civil rights problems.<sup>6</sup> The 2015 Rule was to be the first step in rejuvenating that mandate, after a half-

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1. Annie Karni, Maggie Haberman & Sydney Ember, *Trump Plays on Racist Fears of Terrorized Suburbs to Court White Voters*, N.Y. TIMES (Jan. 20, 2020), <https://www.nytimes.com/2020/07/29/us/politics/trump-suburbs-housing-white-voters.html> [<https://perma.cc/XJ2L-ZFVH>].

2. *Id.*

3. *Id.* In addressing the “Suburban Housewives of America,” Trump added a dash of sexism as well. *See id.*

4. *Id.* See also 42 U.S.C. § 3608 (2018).

5. See Nat’l Fair Hous. All. v. Carson, 330 F. Supp. 3d 14, 32–35 (D.D.C. 2018) (discussing regulatory history).

6. JOHN R. LOGAN & BRIAN J. STULTS, US2010 PROJECT, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS (2011), <https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf> [<https://perma.cc/DVW9-33YM>].

century in which it went all-but-entirely unenforced. Modest as it was, this was the path chosen for finally addressing segregation.

With the Biden Administration now at work restoring and revising the 2015 Rule,<sup>7</sup> it is time to take stock of what that Rule intended and accomplished—and how it can overcome the limitations holding it back. This Essay argues that the AFFH process has been shaped, and weakened, by the indeterminacy of the concept of “fair housing.” Activists and scholars alike have fought for a half-century over competing visions of fair housing; HUD has accepted a capacious and flexible definition; and the Supreme Court has arguably locked in that open-endedness. Without a fixed goal of *what* to further, it is difficult to prescribe *how* to further it in any enforceable way. So long as AFFH implementation focuses primarily on the question “what is fair housing?” it will be hemmed in—legally and intellectually—from offering practical prescriptions for concrete reforms and driving actual policy change. Better, I argue, to ask: what is *unfair* housing?

## I. FURTHERING FAIR HOUSING

The Fair Housing Act’s affirmative mandate is a unique provision in civil rights law. The FHA has antidiscrimination provisions analogous to other civil rights statutes, prohibiting both intentional discrimination in housing and policies causing an unjustified disparate impact.<sup>8</sup> But it also tasks all executive agencies, as well as any state or local government accepting federal housing funds, with the additional duty to “affirmatively further” fair housing.<sup>9</sup> This obligation goes beyond stopping discrimination; covered public entities must proactively work towards the actual ending of segregation.<sup>10</sup> The FHA has its own weaknesses as a statutory scheme, but the AFFH mandate is rightly celebrated as an exceptional and potent tool.<sup>11</sup>

And the Obama administration’s attempt, after a half-century of neglect, to give that mandate an effective and enforceable structure was rightly celebrated as advancing the Congressional injunction to “replace the ghettos ‘by truly integrated and balanced living patterns.’”<sup>12</sup> The history of the FHA’s “affirmatively furthering” mandate is one of false starts and

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7. Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779 (Jun. 10, 2021).

8. 42 U.S.C. § 3604 (2018).

9. 42 U.S.C. § 3608 (2018).

10. NAACP v. Sec’y of Hous. & Urb. Dev., 817 F.2d 149, 155 (1st Cir. 1987).

11. Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1225 (2011).

12. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting 114 CONG. REC. 3422 (statement of Sen. Mondale)).

unfulfilled promise.<sup>13</sup> Immediately after the Act’s enactment, HUD Secretary George Romney embraced the provision, attempting to use infrastructure funds as leverage to build subsidized housing in all-white suburbs; President Richard Nixon swiftly shut down Romney’s efforts.<sup>14</sup> Efforts to codify an AFFH process in regulation during the Clinton Administration were halted after HUD Secretary Henry Cisneros was replaced with Andrew Cuomo, who was less committed to the issue and abandoned the rulemaking process once opposition emerged.<sup>15</sup> HUD eventually required grantees to develop a fair housing planning document, called an “Analysis of Impediments to Fair Housing Choice,” but weak standards and weaker oversight left that process woefully ineffective.<sup>16</sup> Litigants made important use of the FHA’s affirmative mandate in a handful of cases,<sup>17</sup> but without a private right of action,<sup>18</sup> opportunities were few. With that halting past as context, it is no surprise that the 2015 Rule—indeed, *any* rule promising systematic implementation of the AFFH mandate—was embraced by fair housing advocates.

HUD’s strategy in the 2015 Rule was to focus on process and planning—essentially strengthening the existing Analysis of Impediments framework—rather than directly mandating particular policy changes or penalizing specific outcomes. Under the Rule and its accompanying Assessment Tools, HUD provided grantees with standardized data and maps to help them identify local fair housing issues.<sup>19</sup> The grantees were then required to develop a plan, called an Assessment of Fair Housing (AFH), which identified the factors (public and private) contributing to those fair housing issues and proposed local strategies to address them.<sup>20</sup> Grantees had to develop their AFH with robust community participation, both to gather

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13. JUSTIN P. STEIL, NICHOLAS F. KELLY, LAWRENCE J. VALE & MAIA S. WOLUCHEM, *FURTHERING FAIR HOUSING: PROSPECTS FOR RACIAL JUSTICE IN AMERICA’S NEIGHBORHOODS* 3, 4 (2021) [hereinafter “FURTHERING FAIR HOUSING”].

14. Heather R. Abraham, *Fair Housing’s Third Act: American Tragedy or Triumph?*, 39 *YALE L. & POL’Y REV.* 1, 19–21 (2021).

15. Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (Oct. 29, 2012, 1:26 PM), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law> [<https://perma.cc/UXR3-6CXL>].

16. U.S. GOV’T ACCOUNTABILITY OFF., GAO-10-905, *HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS’ FAIR HOUSING PLANS* (2010), <https://www.gao.gov/assets/gao-10-905.pdf> [<https://perma.cc/VC5Y-K6TL>].

17. *E.g.*, *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 37 (D. Mass. 2002); *Thompson v. U.S. Dep’t of Hous. & Urb. Dev.*, 348 F. Supp. 2d 398, 458 (D. Md. 2005); *U.S. ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cnty.*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009).

18. *NAACP v. Sec’y of Hous. & Urb. Dev.*, 817 F.2d 149, 152–54 (1st Cir. 1987).

19. *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42,272 (July 16, 2015) [hereinafter “2015 Rule”].

20. *Id.*

information and, more importantly, to elevate fair housing issues in the political process.<sup>21</sup> HUD was to review the AFHs, but deferentially: AFHs were to be rejected only if inconsistent with civil rights law or “substantially incomplete.”<sup>22</sup>

The goal was to leave state and local governments with extensive policy discretion but “encourage a more engaged and data-driven approach to assessing the state of fair housing and planning actions.”<sup>23</sup> Indeed, as a legal matter, compliance with the 2015 Rule did not discharge a grantee’s statutory obligation to affirmatively further fair housing; it was meant only to assist grantees in doing so (realistically, though, overseeing the Rule’s planning process was likely to occupy much of HUD’s attention).<sup>24</sup> The 2015 Rule has been deemed a “metaregulation,” a regulation meant to encourage its subjects to create their own regulatory responses.<sup>25</sup> Notably, this strategy only emerged over the course of the rulemaking process; under an early path not taken, HUD planned to hold grantees to outcome-oriented “fair housing performance standards.”<sup>26</sup>

The 2015 Rule functioned for just over a year before the Trump Administration withdrew the Assessment Tools on which it relied,<sup>27</sup> and eventually repealed the entire AFFH regulatory framework.<sup>28</sup> That brief window, though, marked the federal government’s most fully-realized effort to address segregation in decades. Research has shown that the Rule led grantees to develop stronger fair housing plans than the previous “Analysis of Impediments” process, with more concrete commitments for action,<sup>29</sup> and that HUD’s review of those plans was rigorous and constructive.<sup>30</sup> But whether those plans materialized into policy change—much less whether they improved conditions on the ground—remains unclear. Even optimistic

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21. See Katherine M. O’Regan & Ken Zimmerman, *The Potential of the Fair Housing Act’s Affirmative Mandate and HUD’s AFFH Rule*, 21 CITYSCAPE 87, 90 (2019). The focus on data was also meant to strengthen community capacity.

22. 2015 Rule, 80 Fed. Reg. at 42,299.

23. *Id.* at 42,349.

24. *Id.* at 42,316.

25. Justin Steil & Nicholas Kelly, *The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance*, 29 HOUS. POL’Y DEBATE 85, 88 (2019).

26. *Compare Affirmatively Furthering Fair Housing Rulemaking in the Unified Agenda*, RIN No. 2501-AD33 (Spring 2011), <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201104&RIN=2501-AD33> with *Affirmatively Furthering Fair Housing Rulemaking in the Unified Agenda*, RIN No. 2501-AD33 (2012), <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=2501-AD33>.

27. *Nat’l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14, 32-35 (D.D.C. 2018).

28. *Preserving Community and Neighborhood Choice*, 85 Fed. Reg. 47,899 (Aug. 7, 2020).

29. Steil & Kelly, *supra* note 25.

30. Justin Steil & Nicholas Kelly, *Survival of the Fairest: Examining HUD Reviews of Assessments of Fair Housing*, 29 HOUS. POL’Y DEBATE 736, 747-49 (2019).

accounts of the Rule describe it as creating a supportive structure for political change over the long term, not immediately generating results.<sup>31</sup>

Today, the Biden Administration has begun to reassess the AFFH process.<sup>32</sup> HUD seems likely to restore some sort of planning-based process.<sup>33</sup> However, HUD has also indicated interest in revising the details of AFFH planning to achieve two goals. On the one hand, HUD hopes to strengthen the process's ability to achieve "material, positive change."<sup>34</sup> On the other, it wants to reduce burdens on grantees, who had complained that the 2015 Rule required them to develop arduous, sprawling multi-hundred-page plans.<sup>35</sup> These goals are potentially in tension: if HUD retains a planning-based approach to AFFH, simply reducing the amount of planning demanded seems unlikely to improve fair housing outcomes.

This Essay, though, argues that these two weaknesses stem from a shared feature of the AFFH process. The problem—and therefore the path to the solution—lies in the difficulty of implementing an affirmative mandate to move towards fair housing when fair housing, as an end state towards which to strive, is not easily defined: intellectually, politically, or legally. The meaning of fair housing is multi-faceted, contested, and open-ended. That open-endedness, in turn, renders the affirmative mandate hard to translate into clear, enforceable, prescriptive standards.

## II. THE OPEN-ENDED MEANING OF FAIR HOUSING

Under the Fair Housing Act, the government is obligated to affirmatively further fair housing. But from the FHA's enactment, the meaning of fair

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31. See Michael Allen, *HUD's New AFFH Rule: The Importance of the Ground Game*, in *THE DREAM REVISITED: CONTEMPORARY DEBATES ABOUT HOUSING, SEGREGATION, AND OPPORTUNITY IN THE TWENTY-FIRST CENTURY* (Ingrid Gould Ellen & Justin Peter Steil eds., 2019); Olatunde C.A. Johnson, *Towards a Law of Inclusive Planning: A Response To "Fair Housing for a Non-Sexist City,"* 134 HARV. L. REV. F. 312, 321–22 (2021). This long timeline was intentional; the architects of the Rule have written that they thought it might be "as far as twenty years down the road[] when some communities would start seeing the needle really move." Raphael W. Bostic, Katherine O'Regan, Patrick Pontius & Nicholas F. Kelly, *Fair Housing from the Inside Out: A Behind-the-Scenes Look at the Creation of the Affirmatively Furthering Fair Housing Rule*, in *FURTHERING FAIR HOUSING*, *supra* note 13, at 74, 79–80. The *first* Assessments of Fair Housing might merely be plans and promises, but their regular revision and reevaluation would provide opportunities for HUD to assess actual progress. However, by pushing the moment of accountability too far into the future, this approach left the Rule unable to survive long enough to realize its own theory of change.

32. Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779 (Jun. 10, 2021).

33. Marcia L. Fudge, *Opinion: How the Biden Administration is Pushing the Country Toward Fairer Housing*, WASH. POST (June 10, 2021, 6:00 AM), <https://www.washingtonpost.com/opinions/2021/06/10/marcia-fudge-hud-fair-housing-act/>.

34. Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. at 30,789 (Jun. 10, 2021).

35. *Id.*; see also *Affirmatively Furthering Fair Housing*, 85 Fed. Reg. 2041 (Jan. 14, 2020).

housing has been hotly contested, with advocates of racial equity offering two competing visions. The “mobility” approach to fair housing emphasizes the need for racial integration and improved access to high-opportunity places. The “place-based” approach instead emphasizes community development and transforming segregated, poor neighborhoods into high-opportunity places. This dichotomy, like most, is overstated, but even so, it is foundational to the politics of fair housing.<sup>36</sup>

The debate between mobility and place-based strategies predates the FHA itself. When Martin Luther King brought his civil rights campaign north, marching into mob violence in the Chicago suburbs in 1966, not all black civil rights activists agreed with his priorities. “We were never fighting for the right to integrate,” said Stokely Carmichael, “we were fighting against white supremacy.”<sup>37</sup> As the battle lines hardened, the open housing movement in turn spurned efforts to ameliorate conditions in the ghetto, with the chair of the National Campaign against Discrimination in Housing likening urban redevelopment efforts to compromise with “Attila or Hitler or Beelzebub.”<sup>38</sup>

This history haunts the contemporary conversation about AFFH today. Navigating the mobility versus place-based debate was among the most contentious issues HUD faced in drafting the AFFH rule, internally and externally.<sup>39</sup> Rulemaking documents make clear that this controversy extended through the notice-and-comment process.<sup>40</sup> Though HUD eventually built consensus around a “neutral” and “balanced” approach (essentially, HUD asked grantees to pursue both strategies, while warning against solely investing affordable housing resources in areas of racially-concentrated poverty), the fight slowed the rulemaking process by years.<sup>41</sup>

Nor did the “balanced approach” fully resolve the conflict. In implementing the 2015 Rule, local governments found navigating the mobility/place-based debate a particularly fraught element of producing

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36. Nestor M. Davidson, *Reconciling People and Place in Housing and Community Development Policy*, 16 GEO. J. ON POVERTY L. & POL’Y 1 (2009); see also David Troutt, *Inclusion Imagined: Fair Housing as Metropolitan Equity*, 65 BUFF. L. REV. 5, 9 (2017) (offering synthesis of different fair housing visions).

37. Alexander von Hoffman, *The Origins of the Fair Housing Act of 1968*, in FURTHERING FAIR HOUSING, *supra* note 13, at 47, 57.

38. *Id.* at 58.

39. Bostic et al., *supra* note 31, at 88–89. See also Philip D. Tegeler, *Affirmatively Furthering Fair Housing and the Inclusive Communities Project Case: Bringing the Fair Housing Act into the Twenty-First Century in FACING SEGREGATION, HOUSING POLICY SOLUTIONS FOR A STRONGER SOCIETY* 77, 80 (Molly W. Metzger & Henry S. Webber eds., 2018).

40. 2015 Rule, 80 Fed. Reg. at 42,278.

41. Bostic et al., *supra* note 31, at 88–89. Considering that the larger AFFH rulemaking was nicknamed the “Civil War Project” inside HUD, that this issue stood out for its difficulty indicates how explosive this debate remains. *Id.* at 77.

their own fair housing plans.<sup>42</sup> In Kansas City, for example, staff called HUD “naive” for thinking that people living in disadvantaged neighborhoods would ever want to move.<sup>43</sup> Scholars, too, continue the fight, sometimes in the strongest terms.<sup>44</sup> Critics of mobility-based approaches argue that they are racist: stigmatizing communities of color and denying them investment while demanding people of color move to white neighborhoods as their path to opportunity.<sup>45</sup> Critics of place-based strategies argue that by aiming only to improve segregated neighborhoods, place-based strategies effectively endorse a “separate-but-equal” approach.<sup>46</sup> While many see these strategies as both valuable, and even complementary at times, the conflict remains live.

These high-level debates then filter down into a plethora of policy-level disagreements. Should affordable housing developments in low-income neighborhoods give preference to current residents, potentially preventing displacement but locking in segregation? What mix of market-rate, moderate-income, and deeply-affordable homes should be built, and in which neighborhoods?<sup>47</sup>

All agree that AFFH requires the government to do more than stop discriminating; it requires proactively repairing the damage of decades of housing discrimination and building a new, fairer housing system. But how? What new system? On this, there is no consensus, and never has been. The affirmative meaning of fair housing has been left open ended, including by HUD. And now, it may need to remain so, as a matter of law.

The Supreme Court’s 2015 *Inclusive Communities* decision was a landmark decision for fair housing. Shocking many observers,<sup>48</sup> the Court affirmed the availability of disparate impact liability under the Fair Housing Act. Justice Kennedy’s opinion embraced the urgency of integration,

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42. Nicholas F. Kelly, Maia S. Woluchem, Reed Jordan & Justin P. Steil, *The Promise Fulfilled? Taking Stock of Assessments of Fair Housing*, in FURTHERING FAIR HOUSING, *supra* note 13, at 93, 109.

43. *Id.* at 119.

44. For a more generous conversation about these issues, see INGRID GOULD ELLEN & JUSTIN PETER STEIL, *THE DREAM REVISITED* 29–44 (2019).

45. Edward G. Goetz, Anthony Damiano & Rashad Williams, ‘Opportunity Areas’ Shouldn’t Just Be Places With a Lot of White People, SHELTERFORCE (Jan. 4, 2021), <https://shelterforce.org/2021/01/04/opportunity-areas-shouldnt-just-be-places-with-a-lot-of-white-people/> [<https://perma.cc/PN8X-D8XX>]; see also EDWARD G. GOETZ, *THE ONE-WAY STREET OF INTEGRATION: FAIR HOUSING AND THE PURSUIT OF RACIAL JUSTICE IN AMERICAN CITIES* 42–43 (2018).

46. Stacy Seicshnaydre, *Disparate Impact and the Limits of Local Discretion After Inclusive Communities*, 24 GEO. MASON L. REV. 663, 700 (2017).

47. Cf. Thomas Silverstein & Diane Glauber, *Leveraging the Besieged Assessment of Fair Housing Process to Create Common Ground Among Fair Housing Advocates and Community Developers*, 27 J. AFFORDABLE HOUSING & CMTY. DEV. L. 33, 36–39 (2018) (arguing that this debate has always been counter-productive, because it focuses advocates’ energy on a zero-sum game).

48. Every appellate court had already reached this same conclusion, but the Court’s repeated grants of certiorari led most to predict a contrary outcome. Seicshnaydre, *supra* note 46, at 663 n.3.

closing with the Kerner Commission's "grim prophecy that '[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.'"<sup>49</sup> But in doing so, the Court also explained the limits of the FHA's reach.<sup>50</sup> Among those limits (and importantly, in dicta), *Inclusive Communities* arguably resolved the mobility/place-based debate, as a legal matter, by declaring both strategies potentially consistent with fair housing and leaving states and local governments to choose their preferred path. In doing so, *Inclusive Communities* suggests that the federal judiciary may look askance at any AFFH process which it deems too prescriptive for states and local governments. The debate between mobility and place-based strategies has not only defined the development of the AFFH process, but may have entrenched the open-ended nature of that process, as a matter of law.<sup>51</sup>

*Inclusive Communities* was, on its facts, a case about the role of mobility and place-based strategies. In the underlying dispute, plaintiffs asserted that Texas had discriminatorily prevented Low-Income Housing Tax Credits from being used in higher-income, whiter suburbs and concentrated low-income housing in predominantly Black, lower-income, urban neighborhoods.<sup>52</sup> And although the Court had before it only the abstracted legal question whether disparate impact claims were available under the FHA, it opined on the merits, suggesting that there, federal civil rights law took no stand. The Court deemed it "difficult to say as a general matter that a decision to build low-income housing in a blighted inner-city neighborhood instead of a suburb is discriminatory, or vice versa" and "paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable."<sup>53</sup> At least under the FHA's antidiscrimination provisions,<sup>54</sup> *Inclusive Communities* suggests that

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49. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc., 576 U.S. 519, 546 (2015).

50. These limitations have proven nettlesome, because the Court elided whether it was describing existing law or instead imposing new constraints. This confusion is compounded by *Inclusive Communities*' unclear relationship to HUD's parallel effort to codify a disparate impact standard in regulation. Compare *Inclusive Cmty. Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 901–03 (5th Cir. 2019) with *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016).

51. Separate from these points, *Inclusive Communities* also supports the 2015 AFFH Rule and its approach in important ways. See Tegeler, *supra* note 39.

52. *Inclusive Communities*, 576 U.S. at 526.

53. *Id.* at 541–42.

54. The doctrinal relevance of *Inclusive Communities* to the AFFH process is at most indirect. That was a case about disparate impact, not the affirmative mandate, and based on entirely different statutory provisions. Still, the Court's opinion on the legitimacy of place-based and mobility-based strategies is likely to bear great weight in any legal framework.

either mobility or place-based approaches can, within reason, be acceptable fair housing strategies.

This deferential approach towards questions of housing policy may then extend into judicial understandings of the FHA's affirmative mandate, as evidenced by one particular line of dicta from *Inclusive Communities*. In explaining why disparate impact defendants must be "given latitude" to pursue a range of legitimate interests, the Court wrote that "[t]he FHA does not decree a particular vision of urban development. . . ."<sup>55</sup> With respect to the FHA's antidiscrimination provisions, this line's import is clear enough: any non-discriminatory practice is permissible, and a broad range of interests can suffice to justify disparate impacts.<sup>56</sup> But if applied to the FHA's affirmative mandate, what does it mean? How can the statute require the affirmative promotion of some state of the world, called "fair housing," which goes beyond merely ending discrimination, without endorsing a vision of what that state of the world looks like? Taken literally, this line appears to threaten *any* robust AFFH mandate. It risks reducing the affirmative mandate to a vague and unenforceable hortatory clause or a superfluous repetition of the statute's antidiscrimination provisions.

Making too much of this sentence would be a plain misreading of the statute.<sup>57</sup> And yet, it seems all too likely that language from the Supreme Court, language which could be read as denying the Fair Housing Act's intent to mandate any particular path to a more egalitarian housing system, will be used to limit future AFFH efforts. Put differently, a statement expressing caution about *courts'* ability to conclusively settle this sensitive debate—a debate marked by unresolved normative and empirical questions outside judicial competence—might be used to limit *agencies'* ability to make progress on the same. The Trump Administration has already cited this language in repealing the 2015 AFFH Rule, and did so without regard for the context in which it was issued.<sup>58</sup> Given the conservative turn of the federal judiciary, courts may soon follow. Protecting AFFH will require more than lawyerly parsing of the text of *Inclusive Communities*.

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55. *Id.* at 542.

56. Seicshnaydre, *supra* note 46, at 674.

57. This would be a misreading for at least four reasons. First, courts have consistently made clear that the AFFH mandate is neither hortatory nor superfluous. *See, e.g., NAACP v. Sec'y of Hous. & Urb. Dev.*, 817 F.2d 149, 155 (1st Cir. 1987). Second, in context, the Court was plainly describing the particular factual dispute before it, over the siting of affordable housing. Third, while the Court's language states that the "FHA" does not decree any particular vision of urban development, the Court had before it only the Act's antidiscrimination provisions. And fourth, *Inclusive Communities* makes clear that challenges to exclusionary zoning are the "heartland" of disparate impact liability; the FHA *does* limit some local discretion over urban development.

58. Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,903 (Aug. 7, 2020).

This is especially so because the limited case law on AFFH at times espouses a similar—though more modest—discomfort with constraining public authorities’ capacity to set urban policy. In *Shannon v. HUD*, for example, the Third Circuit emphasized that the FHA’s affirmative mandate leaves HUD with “broad discretion” to set housing strategies, so long as it does not ignore “social factors” (there, racial concentration).<sup>59</sup> The court explained that HUD could set many different goals for its own housing policy—and that even desegregation need not always predominate—but that it must clearly consider the harms of “increasing or perpetuating racial concentration,” and make choices informed by the FHA’s affirmative mandate. *Shannon* suggests that any AFFH process must maintain some meaningful degree of deference to public priorities; it should elevate fair housing issues within public decision-making processes but not displace those processes.<sup>60</sup> Language from early First and Second Circuit opinions can be read similarly.<sup>61</sup>

Cases like *Shannon* and *Inclusive Communities* thus pose a dilemma for the Fair Housing Act—the same dilemma, at its heart, as is presented by the unresolved, unresolvable debates over the place-based and mobility-based meanings of fair housing. On the one hand, the FHA provides an affirmative mandate to further fair housing. On the other, no single, affirmative, national vision can describe—or prescribe—what policies, practices or conditions fair housing demands. How can HUD or its grantees know what to further—or be told what to further—if they have before them many legitimate options, and if the FHA does not endorse any choice from among them?

The 2015 AFFH rule solved this problem by turning to process. It did *not* decree any particular vision of urban development. Instead, it helped grantees develop their own vision of fair urban development. It provided standardized data and analytic tools, then—based partially on federalism concerns similar to those espoused by the Supreme Court<sup>62</sup>—gave state and local governments extensive discretion to set their own fair housing goals and develop their own solutions.<sup>63</sup> Under the 2015 Rule, HUD asked the

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59. 436 F.2d 809, 819 (3d Cir. 1970).

60. *Id.*

61. *See, e.g., NAACP v. Sec’y of Hous. & Urb. Dev.*, 817 F.2d 149, 156, 159 (1st Cir. 1987) (Breyer, J.) (suggesting part of AFFH duty includes obligation to “consider [the] effect” of its actions on the supply of open housing, but that judicial review is cabined so as not to “pose a serious threat to the agency’s effectiveness.” (first quoting *Anderson v. City of Alpharetta*, 737 F.2d 1530 (11th Cir. 1984))); *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973) (requiring that “consideration be given” to segregation).

62. 2015 Rule, 80 Fed. Reg. 42,309 (July 16, 2015).

63. *Id.* at 42,273.

questions, but states, cities, and public housing authorities gave their own answers.

But letting states and local governments define their own visions of urban development, whatever its (very real) benefits, comes at significant cost—these are the weaknesses of the 2015 Rule that the Biden Administration is now trying to solve.<sup>64</sup> This strategy depends on local buy-in and local politics;<sup>65</sup> though the Rule provided scaffolding for those politics, progress is slow and not guaranteed. The 2015 Rule provided no fixed targets for policy change, no clear focus on outcomes; HUD’s role prioritized technical assistance, not enforcement. When fair housing is not reducible even to a few definite over-arching goals, it cannot be crystallized into clear metrics or policy prescriptions. An extended, bottom-up planning process is an understandable, perhaps necessary, alternative. And while HUD’s initial embrace of an open-ended planning process was initially a policy choice, it is now, post-*Inclusive Communities*, not clear how differently HUD could choose.<sup>66</sup> If so, the AFFH process will necessarily remain open-ended, with room for states and local governments to self-define fair housing within very broad bounds.<sup>67</sup>

Early results indicate that the 2015 Rule was headed towards success on its own terms. But those terms reflect a compromise with the limitations of fair housing, including the political, practical, and legal difficulties with offering a fixed path towards fair housing applicable to all communities. Even accepting these limitations, though, the FHA’s affirmative mandate can be made more concrete, prescriptive, and enforceable.

### III. FROM FAIR HOUSING TO UNFAIR HOUSING

HUD may not be able to direct which choice of a fair housing future local governments pursue, whether because there is no political or scholarly consensus or because the courts will not allow it. But this does not require leaving the AFFH planning process entirely open ended. The FHA still

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64. See Jonathan Zasloff, *The Price of Equality: Fair Housing, Land Use, and Disparate Impact*, 48 COLUM. HUM. RTS. L. REV. 98, 145 (2017) (criticizing 2015 Rule as “quite tepid”).

65. See Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 737 (2020) (describing AFFH Rule as “a statement of municipal good government ideology” that officials can “use to understand where their priorities should lie”).

66. Once again, I doubt this is the correct reading of *Inclusive Communities*. See *supra* note 54. But such a reading nevertheless seems a threat to many imaginable alternative AFFH enforcement systems.

67. Perhaps ironically, the Trump Administration’s first AFFH proposal, which would have transformed the process into one which ignored race and other protected characteristics and instead focused exclusively on forcing deregulation of housing markets, would also run afoul of these principles. Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2,041–53 (proposed Jan. 14, 2020).

requires HUD and its grantees to work to remedy unfair housing practices and conditions—even those which are not litigable under the Act’s antidiscrimination provisions. An AFFH process that focuses more intensely on practices known to impede fair housing, and relies less on developing a vision of the good, could be enforced far more readily without sacrificing local autonomy.

Doctrinally, start by returning to *Inclusive Communities*, and the fear that its limitations on disparate impact liability might be used to foreclose meaningful enforcement of the FHA’s affirmative mandate. Luckily, there is a better reading of the Court’s language. The FHA may not “decree a particular vision of urban development.” But it surely forecloses many particular visions of urban development.<sup>68</sup>

Most obviously, the FHA prohibits visions of urban development built around racial segregation, as *Inclusive Communities* itself makes clear. This is not a minor point. Segregation was the foundation for many of the nation’s most respectable and influential visions of urban development. In advancing the concept of zoning during the 1910s and ’20s, many of the nation’s foremost urban planners—men like Frederick Law Olmstead, Jr., a president of the American City Planning Institute; Alfred Bettman, a director of the National Conference on City Planning; and Columbia Law professor Ernst Freund, a father of American administrative law—understood that zoning’s goals were (among other things) expressly segregationist.<sup>69</sup> From the 1930s through the 1960s, federal, state and local officials used urban renewal to cordon off “slums” from wealthier neighborhoods or downtowns, based on pseudo-scientific theories of “contagion” and blight often defined in plainly racial terms.<sup>70</sup> The real estate industry *prided* itself on protecting the racial character of neighborhoods, deeming the maintenance of segregation the height of professional ethics.<sup>71</sup> These were dominant visions of urban development in their time. The FHA was enacted precisely to reject their legitimacy and legality. Indeed,

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68. This reading of *Inclusive Communities* shares some similarities with Stacy Seicshnaydre’s, *supra* note 46, which also engages with the imprecisions of that opinion’s treatment of local discretion. However, she recasts the Court’s analysis within an integrationist frame focused on removing barriers to housing choice. I see that reading as aggressive. While I fully agree that “[i]t would be a gross misreading of *Inclusive Communities* to suppose that local government discretion in setting a housing and community development agenda is unlimited and unreviewable,” *id.* at 689, I take the Court to have expressed real concerns with limitations on investing housing resources in poor, predominantly non-white neighborhoods. Accordingly, I suspect that *Inclusive Communities* treats more ends as legitimate under the FHA, and forecloses fewer visions of urban development, than Seicshnaydre admits.

69. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 51–52 (2017).

70. RICHARD H. SANDER, YANA A. KUCHEVA & JONATHAN M. ZASLOFF, *MOVING TOWARD INTEGRATION: THE PAST AND FUTURE OF FAIR HOUSING* 88 (2018).

71. ROTHSTEIN, *supra* note 69, at 62.

*Inclusive Communities* itself recognized this, identifying litigation against exclusionary zoning ordinances (surely a prominent vision of urban development today) as the “heartland” of disparate impact liability under the FHA.<sup>72</sup> This is not to say that every element of these visions is forever tainted—neither zoning nor eminent domain is a *per se* violation of the Fair Housing Act—but rather to illustrate the straightforward proposition that *some* visions of urban development *are* inconsistent with fair housing. These historical examples are the easy cases, but the principle can be extended.

Take zoning. There are heated debates over whether permitting increased density in low-income neighborhoods promotes racial equity.<sup>73</sup> But there is a near-consensus that permitting increased development in low-density, high-opportunity areas usually promotes racial equity.<sup>74</sup> And I have seen no argument that the most restrictive zoning rules—say, multi-acre lot minimums—do not tend to exclude, including along racial lines.<sup>75</sup> There are many zoning strategies that could be considered to further fair housing; mandatory four-acre estates are assuredly not among them. Thus, without decreeing what style of zoning constitutes fair housing, the Fair Housing Act might preclude many options.

Recognizing that there are policies which, under almost any telling, will usually impede fair housing allows for another way out of the dilemma identified in Part II: one which permits adding substance to the 2015 Rule’s focus on process. The statutory mandate to affirmatively further fair housing requires HUD and local governments to pursue some vision of fair housing,

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72. *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 539–41 (2015).

73. See Vicki Been, Ingrid Gould Ellen & Katherine O’Regan, *Supply Skepticism: Housing Supply and Affordability*, 29 HOUS. POL’Y DEBATE 25 (2018). It is worth noting that new research clearly indicates that increased development mitigates rent increases, even at the neighborhood scale. See Shane Phillips, Michael Manville & Michael Lens, *Research Roundup: The Effect of Market-Rate Development on Neighborhood Rents*, UCLA LEWIS CTR. (Feb. 17, 2021), <https://www.lewis.ucla.edu/research/market-rate-development-impacts/> [<https://perma.cc/LA8E-RHZX>].

74. See, e.g., MATTHEW RESSEGER, *THE IMPACT OF LAND USE REGULATION ON RACIAL SEGREGATION: EVIDENCE FROM MASSACHUSETTS ZONING BORDERS* (2013), [https://scholar.harvard.edu/files/resseger/files/resseger\\_jmp\\_11\\_25.pdf](https://scholar.harvard.edu/files/resseger/files/resseger_jmp_11_25.pdf) [<https://perma.cc/B46R-J5DZ>] (measuring relationship of zoning restrictions to segregation); Jonathan Rothwell, *Land Use Politics, Housing Costs, and Segregation in California Cities*, U.C. BERKELEY TERNER CTR. (Sept. 2019), <http://californialanduse.org/download/Land%20Use%20Politics%20Rothwell.pdf> [<https://perma.cc/JWH6-NAW3>]; SANDER ET AL., *supra* note 70, at 440 (taking contrarian view on relative importance of land use to segregation, but still finding that “restrictions on multifamily construction. . . contribute directly to structural segregation”).

75. Attempts to justify such regulations are always on different grounds, like preserving “open-space.” See *Robert E. Kurzius, Inc. v. Inc. Vill. of Upper Brookville*, 414 N.E.2d 680, 684 (N.Y. 1980).

whichever vision they may favor. But it also requires them to abandon all actions and ameliorate all conditions inconsistent with fair housing.

To implement this second mandate, HUD should develop a list of specific housing practices—public and private—deemed especially likely to impede fair housing and therefore subject to heightened administrative scrutiny. This list would include practices historically or quantitatively associated with discrimination, segregation, and other forms of unfair housing, and would be regularly revised to reflect what HUD learned from research, enforcement actions, and grantees' own fair housing planning efforts. Jurisdictions could maintain those listed policies (or allow private practices to continue). But they would need to justify why, in their specific context and in careful detail, such policies would not make housing less fair, or fully mitigate the fair housing impacts of those choices.

Return to the example of large-lot zoning. HUD could require any jurisdiction with such zoning provisions to explain, quantitatively and concretely, why it furthers fair housing to mandate that homeowners purchase large yards to live in that town. It could demand an analysis of alternatives, in which the jurisdiction compares the effects of large-lot zoning on racial equity and integration to more modest lot size standards and to alternative means of achieving the purported purpose of the rule. And HUD should not accept conclusory justifications: hazy claims of “rural character” will not do, and if a jurisdiction wants to assert that its water quality demands such zoning, it will need to provide a complete hydrological analysis and consider technological alternatives.<sup>76</sup> HUD would not dictate the appropriate response to large-lot zoning: one jurisdiction might show that, in context, its policy did not impede fair housing;<sup>77</sup> another might ease its lot size requirements; a third might mitigate those requirements' effects through alternative means. But no jurisdiction could maintain such a policy without quantifying its precise impacts in order to justify or address them.

This would play out very differently from the 2015 Rule. Under that framework, local governments were asked to examine whether their land use laws impeded fair housing, but they were not required to analyze any particular element of their zoning, nor to adopt land use reforms as a fair housing strategy. For example, the Kansas City regional fair housing plan—

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76. Cf. ROBERT C. ELLICKSON, *ZONING AND THE COST OF HOUSING: EVIDENCE FROM SILICON VALLEY, GREATER NEW HAVEN, AND GREATER AUSTIN* 55–59 (2020) (describing relationship of low-density zoning and water issues).

77. Perhaps if a small area subject to large-lot zoning was truly rural and there were ample opportunities for affordable housing development in the non-rural areas of a jurisdiction, such zoning would, practically, have no exclusionary effect.

considered an especially robust document—made clear that land use reform was not a priority,<sup>78</sup> and restricted its analysis to vague statements about a “lack of diverse housing options throughout the region.”<sup>79</sup> The Kansas City plan did not examine any specific zoning provisions, whether minimum lot sizes, multi-family bans, or otherwise. With this proposed revision, fair housing plans could not overlook a fixed set of issues especially likely to impede fair housing, letting them escape scrutiny altogether.

This proposal learns from the leading planning-based regulatory framework in American law: environmental review.<sup>80</sup> The National Environmental Policy Act (NEPA) requires federal agencies to produce an environmental impact statement (EIS) before taking actions significantly affecting the environment.<sup>81</sup> Like the 2015 Rule, NEPA uses data and public participation to reshape politics, airing out potential environmental issues to steer policymakers towards more ecologically-friendly paths.<sup>82</sup> NEPA has, without a doubt, proven transformative.<sup>83</sup> In part, NEPA succeeded by inserting environmental considerations into bureaucratic processes; in part, by empowering outside activists with newly-disclosed data and litigation opportunities.<sup>84</sup>

But as Bradley Karkkainen has argued, another important mechanism of environmental review is its creation of an incentive structure.<sup>85</sup> Preparing a full EIS can cost millions of dollars and take years. Accordingly, agencies strive to rework their projects—ahead of time—to avoid findings of significance that trigger a full EIS; the EIS is the price paid for projects likely to cause environmental harm.<sup>86</sup> The 2015 AFFH Rule already adopted NEPA’s focus on reshaping politics through data analysis, public participation, and elevating an issue before decisionmakers. My proposal

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78. MID-AMERICA REGIONAL COUNCIL, PLAN FOR AFFIRMATIVELY FURTHERING FAIR HOUSING § XI, at 4–5 (2016), [http://web.mit.edu/afs/athena.mit.edu/org/f/fairhousing/AFHs/MO\\_KS\\_KansasCity\\_AFH.pdf](http://web.mit.edu/afs/athena.mit.edu/org/f/fairhousing/AFHs/MO_KS_KansasCity_AFH.pdf) [https://perma.cc/48YY-YDTB].

79. *Id.* at §IV-B, at 18; §VI-F, at 16; § VII, at 23–24.

80. As an equity-focused, data-oriented planning process, the AFFH process shares much in common with the burgeoning area of racial equity impact studies, which are similarly modeled on environmental review. See Deborah N. Archer, “White Men’s Roads Through Black Men’s Homes”: *Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1321–26 (2020). An important distinction is of timing and scope: whether the analysis is tied to a particular action or more holistic.

81. 42 U.S.C.A. § 4332 (Westlaw through Pub. L. No. 117-39).

82. Bradley C. Karkkainen, *Towards a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903, 904–05 (2002).

83. *Id.* at 906, see also William H. Rodgers, Jr., *The Most Creative Moments in the History of Environmental Law: “The Whats”*, 2000 U. ILL. L. REV. 1, 31 (2000).

84. Karkkainen, *supra* note 82, at 904–05 (collecting sources).

85. *Id.* at 919, 936.

86. *Id.*

adds NEPA's incentive structure, demanding more costly and time-consuming analyses if grantees maintain policies likely to impede fair housing. Grantees can pay the toll and justify their policies—but if they are made to pay, many will choose not to.

This increased burden of justification would supplement, not replace, the 2015 Rule's more open-ended planning process; indeed, it simply adds another aspect of planning. Jurisdictions would still examine the particular, local causes of segregation and place-based disparities and develop their own vision for addressing them. Having none of the listed policies would not serve as a safe harbor, for it would not discharge a grantee's obligations to develop their own path towards their own positive vision of fair housing.<sup>87</sup> Segregation is too deeply rooted in our cities, too interwoven into generations of decisions about urban development, to be defeated with a single, pre-set toolkit.<sup>88</sup> This is especially true for states, which have a broader range of powers and programs than most local governments. And there are many different ways to address the inherited legacies of past discrimination. But where there is clarity about “worst practices,” more specificity—and a tilt towards enforcement—can be added into the planning process.

In many cases, listing the practices likely to impede fair housing would help connect the existing fair housing planning and antidiscrimination enforcement processes. Litigation has identified many practices that are often, but not always, discriminatory. My proposal would ensure that these are consistently scrutinized in the AFFH process. Residency preferences for subsidized housing present a good example. Public housing authorities are permitted to prioritize local residents in allocating affordable housing units and commonly do so,<sup>89</sup> but courts have repeatedly found that residency preferences enacted in predominantly white communities have an illegal disparate impact against non-residents of color and perpetuate segregation.<sup>90</sup> From a fair housing perspective, these preferences are not *per se* illegal—

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87. The “safe harbor” question was a major issue in the development of the 2015 Rule. HUD rejected regulated parties' request for a safe harbor, foreseeing bad actors treating a safe harbor as a ceiling for compliance rather than a floor. 2015 Rule, 80 Fed. Reg. 42,316 (July 16, 2015). This proposal avoids that issue: it only increases HUD's scrutiny.

88. HUD's best effort to offer its grantees guidance through a list of best practices was necessarily offered at a very high level of abstraction. See HUD, AFFIRMATIVELY FURTHERING FAIR HOUSING RULE GUIDEBOOK 126–29 (2015).

89. See 24 C.F.R. § 5.655 (2000), 24 C.F.R. § 982.207 (2016). Outright residency requirements are prohibited, however. 24 C.F.R. § 982.207(b)(1)(i).

90. See, e.g., *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 37 (D. Mass. 2002); *United States v. Hous. Auth. of City of Chickasaw*, 504 F. Supp. 716, 732 (S.D. Ala. 1980); Renee Williams, *Recent Developments in Challenges to Residency Preferences*, 43 HOUS. L. BULL. 129 (July 2013) <https://www.nhlp.org/wp-content/uploads/Recent-Developments-in-Challenges-to-Residency-Preferences-July-2013.pdf> [<https://perma.cc/F4Q3-6EM8>].

but they should be suspect.<sup>91</sup> Requiring special scrutiny of such practices in AFFH planning is a burden-shifting strategy: rather than require plaintiffs to challenge each policy, state and local governments would need to justify them. This would systematize and dramatically accelerate the review of such policies—and by spotlighting them for HUD, reduce the agency’s own administrative burden in doing so.<sup>92</sup>

It would also provide a mechanism for operationalizing HUD guidance on fair housing. For example, in 2016 HUD published a guidance document indicating how landlords and property managers may consider a potential tenant’s criminal history without violating the Fair Housing Act.<sup>93</sup> Litigation to enforce this guidance has, as ever, been slow.<sup>94</sup> The AFFH planning process, if it required special justification of certain suspect uses of tenants’ criminal history, could provide another forum for aggrieved individuals and civil rights organizations to lodge complaints—and to spur states and cities to more directly regulate landlords’ use of criminal history.<sup>95</sup>

That said, it is worth underscoring that refocusing the FHA’s affirmative mandate towards “worst practices” does not limit that mandate’s reach to acts of discrimination. Many actions and conditions which are not amenable to antidiscrimination litigation—whether for evidentiary and procedural reasons or because they are not considered housing discrimination as a matter of law—should still be subject to scrutiny under the former. Furthering fair housing requires more than not discriminating; it means repairing the damage discrimination created. The list of practices held up for special scrutiny under AFFH should not be limited to practices that are already illegal.

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91. A separate question, currently the subject of litigation and intense controversy, is whether neighborhood preferences in racially diverse cities violate the Fair Housing Act. *See Winfield v. City of New York*, 2016 WL 6208564 (S.D.N.Y. Oct. 24, 2016) (challenging New York City’s community preference policy); Zachary C. Freund, *Perpetuating Segregation or Turning Discrimination on its Head? Affordable Housing Residency Preferences as Anti-Displacement Measures*, 118 COLUM. L. REV. 833 (2018). Because such preferences are not clearly understood to be contrary to fair housing goals, HUD might treat them differently.

92. *See* Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2,041 (Jan. 14, 2020).

93. HUD, OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (2016), [https://www.hud.gov/sites/documents/HUD\\_OGCGUIDAPPFHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF) [<https://perma.cc/HY6F-MVBR>].

94. One leading case, brought in 2014, was settled in 2019. *See The Fortune Society v. Sandcastle Towers Housing Development Fund Corp.*, RELMAN COLFAX, <https://www.relmanlaw.com/cases-fortune> [<https://perma.cc/57NV-B3NV>].

95. *See* Emily Nonko, *The Fair Chance Housing Policy Movement Catching On Across the Country*, NEXTCITY (Feb. 25, 2021), <https://nextcity.org/daily/entry/the-ban-the-box-housing-policy-movement-catching-on-across-the-country> [<https://perma.cc/S4PX-KBRK>].

Creating a system for increased scrutiny of the practices most likely to impede fair housing further complements the 2015 Rule in at least two important ways. First, it plugs an important gap in the 2015 Rule. Under that Rule, a covered jurisdiction was required to submit two certifications to HUD, along with its AFH: a certification “that it will affirmatively further fair housing” and a certification “that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing.”<sup>96</sup> But the 2015 Rule only provided a new operational process for the effectuating first, positive certification. This proposal would help operationalize the obligations related to the second, negative certification.

Second, a “worst practices” list would also pair nicely with the 2015 Rule’s emphasis on political participation. At the national level, the regular revision of the list would provide a focal point for advocacy, as groups work to marshal evidence that particular practices are consistent and significant impediments to fair housing. Locally, activists could fight for the removal of listed practices, including between the years when a jurisdiction must update its fair housing plan. The list could even spark organizing in the many jurisdictions that do not receive HUD funds and thus were not required to create fair housing plans, a group which includes some of the most affluent and exclusionary locations in the country.<sup>97</sup> Listed policies might be addressed quite quickly, nationwide, as grantees receive clear instructions on what to avoid doing.

Finally, focusing the AFFH planning process on eliminating the most common, concrete impediments offers particular advantages for protected characteristics other than race. Racial segregation was, appropriately, the central focus on the 2015 Rule; segregation remains a defining, poisonous feature of American cities and overcoming segregation should remain at the center of affirmatively furthering fair housing. But the FHA’s affirmative mandate applies to the Act’s other protected characteristics as well, and in ways that are even less defined. The disputes over what constitutes “fair housing” for race are hard-fought, but there is a shared understanding, based on legislative intent and decades of judicial interpretation, that the Fair Housing Act was intended to promote residential integration. It is much harder to offer a fully-articulated, affirmative vision of what “fair housing” means, beyond nondiscrimination, for the FHA’s other protected

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96. 2015 Rule, 80 Fed. Reg. at 42,365–67 (July 16, 2015).

97. See Jenny Schuetz, *HUD Can’t Fix Exclusionary Zoning by Withholding CDBG Funds*, BROOKINGS (Oct. 15, 2018), <https://www.brookings.edu/research/hud-cant-fix-exclusionary-zoning-by-withholding-cdbg-funds/> [https://perma.cc/EAF9-GC2K]. How to further fair housing in these locations is among the most important questions for a future AFFH process. This proposal helps, but is not primarily addressed to that question.

characteristics, like religion, family status, or sex.<sup>98</sup> Any AFFH planning around these characteristics is likely to be even more free form than planning around race. This has its benefits—in particular, AFFH planning may help generate new accounts of fair housing in these under-theorized areas<sup>99</sup>—but it does not lend itself to enforcement. The nature of AFFH planning outside the context of race makes it all the more necessary to police the worst practices we can identify.

### CONCLUSION

The 2015 Rule was an important step forward in giving meaning to the Fair Housing Act’s promise to dismantle segregation. But it was incomplete.<sup>100</sup> By focusing on fair housing planning, the Rule was likely to drive change primarily in those jurisdictions that actively embraced the opportunity to re-examine their own practices.

HUD perhaps cannot set forth a fully prescriptive set of instructions for what its grantees should do: there is little scholarly or political consensus on the issue and there could be serious judicial skepticism. We do not know, and perhaps cannot know, exactly what an elusive concept like “fair housing” means across city and suburb, across 50 states and across seven different protected characteristics. There is value in working through that concept in particular times and places. But doing so need not preclude the construction of a robust regulatory regime. It is no easy task to imagine, much less demand, fair housing. It is time to refocus on unfair housing.

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98. In a recent article, I suggested that for sex, affirmatively furthering fair housing required dismantling the legacy of the gendered “separate spheres” ideology. *See* Noah M. Kazis, *Fair Housing for a Non-Sexist City*, 134 HARV. L. REV. 1683 (2021). But I offered no comprehensive vision of fair housing for sex; the statute provided no basis for doing so, segregation is not a particular issue with sex, and there are many competing accounts of sex equality.

99. *See id.* at 1755–56. Relatedly, many jurisdictions found the fair housing planning process especially useful for identifying issues around accessibility for people with disabilities. Kelly et al., *supra* note 42, at 114.

100. Of course, there are many important ways to improve on the 2015 Rule, compatible with the suggestion presented here. For one useful list, see Megan Haberle, Peter Kye & Brian Knudsen, *Reviving and Improving HUD’s Affirmatively Furthering Fair Housing Regulation: A Practice-Based Roadmap*, PRRAC (Dec. 2020), <https://prrac.org/pdf/improving-affh-roadmap.pdf> [<https://perma.cc/NG6R-4K2E>]. The recommendation that HUD reconsider states’ special AFFH obligations, including with respect to their oversight of local governments that are not themselves HUD grantees, is especially critical. *Id.*