

PROVIDING FOR FAIR HOUSING IN NEW FEDERAL INFRASTRUCTURE SPENDING

Principles developed by:

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I. Background

Across the United States, residential racial segregation has a profound impact on where individuals and families live, as well as their access to quality education, good jobs, and clean air and water. This persistent segregation is the result of a long history of intentionally discriminatory policies and practices at all levels of government – though with states and localities often following the lead of the federal government – and in the private sector. Of particular relevance to the discussion of a potentially transformative infrastructure package, many of the most pernicious of these policies were embedded in New Deal-era programs that facilitated a recovery from the Great Depression for white Americans but redlined communities of color and Black neighborhoods in particular. In the present day, housing discrimination remains all too common though it is at times harder to detect than it once was and may be more likely to be embedded in facially neutral policies that disproportionately harm people of color, persons with disabilities, women, families with children, and others with protected characteristics. The infrastructure package must account for this legacy.

Federal civil rights laws – including the Fair Housing Act and Title VI of the Civil Rights Act of 1964 – have helped in the effort to foster inclusive communities that afford opportunity to their residents. However, segregation and housing discrimination persist due to a lack of resources for enforcement, judicial decisions that have weakened these laws in practice, and challenges in keeping pace with the changing shape of discrimination. In particular, the Fair Housing Act's duty to "affirmatively further fair housing" (AFFH) has been neglected. Although the Obama Administration tried to breathe new life into the duty through a 2015 regulation, for most of the Fair Housing Act's history, it sat dormant. The duty to AFFH has tremendous untapped potential to remedy the legacy of residential racial segregation due to its focus on bold, proactive action, informed by data analysis and community engagement.

In both its 2015 rule and in a recently issued Interim Final Rule, HUD has defined AFFH by saying that "affirmatively furthering fair housing means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws." This definition should guide both Congress and the Biden Administration as they design an infrastructure package that advances racial equity.

Notwithstanding this general definition, different housing and community development programs serve different roles, and present different obstacles, in furthering fair housing. For instance, some programs are

more geared toward producing newly constructed housing whereas others prioritize the rehabilitation and preservation of different housing – types of activities with very different fair housing impacts depending on where they are located. Therefore, Congress should structure new appropriations with the following principles in mind for each type of assisted housing or category of programmatic activity.

II. Funding categories & AFFH principles

1) Funds for new housing construction, rehabilitation and acquisition

Existing HUD Site and Neighborhood standards, originally adopted to implement the Fair Housing Act's affirmative provisions and prevent the perpetuation of segregation in siting of low-income housing, are crucial to preserve, but have generally been ineffective in directing HUD project based investments into low poverty, higher opportunity areas with high performing schools,¹ strong neighborhood health characteristics, and other resources.

The duty to AFFH requires government agencies and recipients implementing housing programs to take active measures to remedy residential segregation and disparities in access to opportunity, while also fostering meaningful community integration for persons with disabilities. This means expanding the housing choices available to low-income families of color beyond the higher poverty, segregated neighborhoods where subsidized housing has traditionally been located (largely due our country's history of racial segregation); areas that also face deep resource disparities due to discrimination. It also means incorporating permanent supportive housing units into larger developments in which a large majority of units are not reserved for persons with disabilities. To further this aim and to serve as a counter-balance to the current preponderance of subsidized housing in low-income areas, the housing infrastructure components of this bill should emphasize the location of new low-income housing in low poverty, well-resourced neighborhoods and communities, as well as reserving housing funds for the important uses of housing preservation, anti-displacement goals, condition improvements, and local community ownership.

This can be most effectively accomplished with a set-aside approach, similar to Low Income Housing Tax Credit (LIHTC) allocation systems in some states. Set-asides should operate differently for new construction resources than for other kinds of resources, in order to expand housing options outside of the prevailing patterns of segregation while at the same time ensuring that low-income areas (including rural areas) are able to obtain needed housing condition improvements and preservation funds. In keeping with this approach, Congress should provide for provisions such as the following in its new housing spending:

- For funds supporting new construction, provide for targeting of resources in a way that avoids further poverty concentration and lack of access to opportunity among subsidized households by setting aside a substantial portion of new construction funds for high opportunity areas. Any new construction resources that are spent in higher-poverty areas must be in neighborhoods experiencing measurable gentrification and displacement pressures; or be a component of a detailed, robust community revitalization plan bringing non-housing improvements to the area. New low income housing development in higher poverty areas must ensure that low-income households benefit from revitalization of neighborhoods where many of them have long lived and have strong community ties. Existing HUD site and neighborhood standards must remain in effect. Ensure that newly constructed housing meets a variety of housing needs, including housing for families with children and accessible housing.

¹ See, e.g., [Housing and Educational Opportunity: Characteristics of Local Schools Near Families with Federal Housing Assistance \(Ingrid Gould Ellen & Keren Horn, July 2018\)](#)

- For non-public housing funds supporting preservation (including where existing affordable housing is rebuilt or replaced), require that HUD ensure that significant funds are set aside for acquisition or preservation of housing assets in low poverty or demonstrably gentrifying neighborhoods or communities, while also ensuring that low-income communities can obtain needed resources to improve housing conditions. HUD should be required to develop guidance on how to assess and balance these needs. HUD should also be charged with providing guidance on how to assess gentrification trends, including through the use of local data.
- For funds set aside for public housing capital improvement and redevelopment in highly racially and poverty concentrated neighborhoods, require full replacement of public housing units and that the balance between off-site and on-site should reflect informed resident choice, which should have a determinative role in deciding the number of units replaced offsite. Offsite units should be prioritized for highly-resourced, low-poverty neighborhoods or contribute to housing preservation in neighborhoods experiencing actual gentrification and displacement pressures. (Current rules that require PHAs in some cases to consider resident preferences and apply siting criteria are frequently disregarded; clear guidance and oversight resources must be provided.)

2) Housing unit/development improvements in low income/low-resourced areas

It is also critical that Infrastructure Bill funding be devoted to supporting low-income and lower-resourced communities where deep disparities and racial inequities remain in terms of housing quality, affordability, environmental harm, and community and commercial disinvestment. To that end, strategic resources should be deployed to support community growth and ensure longstanding community residents are the beneficiaries of that investment and not displaced by it. Core priorities must include:

- Invest in existing federally assisted rental housing, which is disproportionately in areas of concentrated racial discrimination, to address needed capital improvements that have gone neglected for decades. Too often these low-income residents have had to suffer under terrible and even dangerous housing conditions, until federal authorities finally respond, but often at the point that the housing is not capable of rehabilitation, which often then results in the displacement of these families and the permanent loss of needed affordable housing in a community.
- Invest in climate resilience and response efforts for the federally assisted rental stock, including weatherization, energy retrofitting, and flood protective measures. Ensure that these measures are developed so as to directly benefit low-income residents and reduce their costs as it relates to energy assistance and climate and disaster preparedness.
- Take proactive steps to address the fact that federally assisted rental housing residents, due to federal, state, and local land use policies born out of systemic racism, often live proximate to multiple environmental health risks, including from soil, water, and air. Invest in policies and programs that can prevent, mitigate, and clean-up these harms and offer the impacted households a mobility choice to move with federal housing subsidies and full relocation assistance.
- Ensure unit-for-unit replacement of potentially lost site-based federally assisted housing units in any redevelopment of federally assisted housing. Permit off-site replacement of units in higher resourced areas and require resources and support to current or former residents so they have a meaningful chance and choice to select a site-based option.

- For all developments funded under the infrastructure bill, grant full choice-mobility rights to tenants, in the manner provided for in the Rental Assistance Demonstration (where the tenant has the right to exchange subsidized unit for a Housing Choice Voucher after one year).

3) The importance of expanding and improving the Housing Choice Voucher program alongside project-based investments

A major expansion of the Housing Choice Voucher program will be a necessary complement to the expansion of project-based housing infrastructure, for several reasons. First, development of project based low income housing can take years, and many low-income families are in dire need of housing now. Second, in spite of the opportunity set-asides recommended above, a significant amount of new project-based housing will be located in higher poverty and more racially segregated communities (which have been subject to disinvestment and other forms of discrimination impacting access to health determinants, well-resourced schools, and other aspects of opportunity). Federal housing policy needs to recognize that a significant number of low-income families with children may want a wider range of housing choices, which vouchers can provide, especially in the short run, while we also channel a range of investments to the areas that need them. Finally, expansion of the voucher program will take pressure off the stock of new project-based housing, by expanding low-income access to market rate housing in the private market.

For the Housing Choice Voucher program to succeed in a major expansion, it will require significant reform to address patterns of racial segregation, poverty concentration, and lack of access to resources. These reforms, which are addressed in several pending bills before Congress and in the President's 2022 budget proposal, include much broader adoption of Small Area Fair Market Rents and other strategies for ensuring that vouchers have adequate purchasing power in higher opportunity areas, reform of the HCV Administrative Fee rule to promote expanded housing choices, substantial new funding for housing mobility services, increased landlord incentives in higher opportunity neighborhoods, provision of security deposits and holding fees to remove barriers to entry for low income families, and expanded source of income protections.

Public housing authorities may also project-base a portion of their vouchers, and should do so in ways that provide for expanded access to resources, decreased poverty concentration, and the creation of scattered-site permanent supportive housing that furthers the community integration goals of the Americans with Disabilities Act and the Supreme Court's decision in *Olmstead v. L. C.*

4) Community development— non-housing neighborhood improvements and investment

Neighborhoods characterized by concentrated poverty face greater relative service and investment needs, disproportionate environmental burdens, and a lack of access to the public and private investments that can help communities thrive. Such problems are closely linked to racial residential segregation, because throughout our nation's history, housing discrimination (by both the government and private actors) has gone hand in hand with other forms of discrimination. For example, governments have failed to provide communities of color with equal access to basic physical infrastructure, such as clean water and sewage systems; equal safety from environmental hazards such as floods and unclean air; or equal inclusion in public finance and spending, to help businesses, community centers, and other community assets thrive. Just as the AFFH mandate provides that the government must ensure that new housing resources provide for broader housing choice and do not result in deepening poverty concentration, it is important that other federal resources (for community development and infrastructure, for example) be used to remedy

neighborhood-based inequities and address the needs of low-income communities, in particular those that have faced discrimination.

Congress should target community development program spending and physical infrastructure improvements to meet the needs of under-resourced households and communities at the neighborhood level. For HUD, such programs include the Choice Neighborhoods Initiative, the proposed Community Revitalization Fund, and the Community Development Block Grant program. In addition, community development or physical infrastructure funds that flow from other agencies (such as the Treasury Department, the Environmental Protection Agency, and others) should similarly be targeted. Program spending and implementation must comply with civil rights (and environmental and labor) laws, but existing program regulations or guidance may not provide for clear targeting that will direct funds where they are most needed (and where they will help to address the ongoing harms of past and current racial inequity). Congress should provide that funding be expanded and that new funding will be better and more clearly targeted, so as to remedy the unequal access to opportunity that racial discrimination and segregation have created.

This entails:

- Expanding resources for specific neighborhood-based improvements for low-income communities, including physical infrastructure (such as water services), climate change adaptations and mitigations, environmental clean-up funds (as noted above), school capital improvements, community centers, and business development.
- Where funding is provided to states or localities by block grant or other general funding program, ensuring clear targeting for low-income households and/or neighborhoods (including those that have faced discrimination and disinvestment). For example, funds for HUD's CDBG program should be more carefully and specifically targeted than currently provided by regulations or guidance.
- Providing for the commitment of non-housing community development resources to accompany any spending on housing in low-income and/or segregated areas, as part of detailed and robust revitalization plans.
- Providing for full, multi-stage transparency in spending, and expanded community capacity to participate in implementation.
- Protecting against the risk of displacement of low- and moderate-income residents due to these community investments.
- *In addition* to clear and specific targeting, ensuring that civil rights (e.g., Title VI and Title VIII), environmental (e.g., National Environmental Policy Act), labor, and other protections are rigorously enforced across government programs (as noted in the section on enforcement, below).

5) Nondiscrimination/enforcement resources

HUD, the Department of Justice, and other agencies need expanded capacity to engage in oversight of civil rights laws and other equity requirements. This includes capacity to engage in ex ante reviews (such as HUD's civil rights reviews of redevelopments), agency-initiated program reviews of recipients, complaint processing, and technical assistance and education for both recipients and beneficiaries/community stakeholders. Furthering nondiscrimination also requires that the government

provide more robust financial support and capacity-building for fair housing organizations, which are a crucial part of the Fair Housing Act's enforcement framework.

Enforcement that promotes equality in access to opportunity in areas other than housing is also critical, requiring robust enforcement of Title VI, Title VII, NEPA, labor protections, ECOA, and other laws.