Facing Segregation

HOUSING POLICY SOLUTIONS FOR A STRONGER SOCIETY

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Affirmatively Furthering Fair Housing and the *Inclusive Communities Project* Case*

BRINGING THE FAIR HOUSING ACT INTO THE TWENTY-FIRST CENTURY

Philip D. Tegeler

The Supreme Court's powerful 2015 decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* (hereinafter *ICP v. Texas*) affirmed the principle that policies with a significant disparate impact on the basis of race can be challenged under the Fair Housing Act.[1] The ruling, coming in the aftermath of racial uprisings in Ferguson, Missouri, and Baltimore, Maryland, emphasized the anti-segregation origins of the Fair Housing Act of 1968 for a new generation. The Court reflected on a period of "social unrest in the inner cities" during the 1960s, and for the first time since 1990,[2] cited the Kerner Commission report of President Johnson's National Advisory Commission on Civil Disorders (1968): "The [Fair Housing Act] must play an important part in avoiding the Kerner Commission's grim prophecy that '[o]ur Nation is moving toward two societies, one black, one white—separate and unequal'. . . . The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society."[3]

A few months after the Court's decision, the federal government finalized a comprehensive new regulation implementing the original pro-integration clause of the Fair Housing Act.[4] The new rule, titled "Affirmatively Furthering Fair Housing" (AFFH), echoes the *ICP* case with its focus on the structural forces that drive segregation. But the rule also acknowledges the ways in which our understanding of fair housing and structural discrimination has evolved. It

*I am grateful for insightful comments from Megan Haberle and Heather Smitelli, and indebted to the many colleagues we have worked with in the development of the AFFH rule and on the amicus campaign in support of the *ICP v. Texas* case in the Supreme Court.

focuses on the need for equalization of resources and assets in racially isolated communities, and it recognizes that the goals of fair housing include equal access to quality education, transportation, and healthy environments. The new rule looks at race and poverty intersectionally, affirming that "racially concentrated areas of poverty" are a particular fair housing concern.[5] Moreover, the rule marks a shift from a private, complaint-based model of fair housing enforcement to one with a greater reliance on administrative oversight and compliance.

Disparate impact analysis has been part of American civil rights law from the beginning, but the pendency of the *ICP* case had temporarily put this principle in question under the Fair Housing Act. It is not surprising that the US Department of Housing and Urban Development (HUD) waited for the Supreme Court's ruling before releasing the final AFFH rule because the new HUD rule goes "all in" on the court's structural approach to racial segregation and disparities. Throughout the rule and its accompanying reporting tool, there is an emphasis on segregation outcomes and disparities in access to resources across different racial and ethnic groups. Largely framed in terms of nonintentional policies, the causes of these disparities are explored, as are the societal structures that create racial segregation and disparities in access to opportunity. For example, of the 40 "potential contributing factors" listed in HUD's *AFFH Rule Guidebook* (US Department of Housing and Urban Development 2015*a*, 205), only two ("private discrimination" and "community opposition") fit the traditional intentional-discrimination framework. The remaining factors, which are also reflected in the Assessment of Fair Housing tool, are largely structural: issues like "access to financial services," "admissions and occupancy policies," "displacement of residents due to economic pressures," "lack of affordable, accessible housing in a range of unit sizes," "lack of public investment in specific neighborhoods," "location of environmental health hazards," "location of proficient schools and school assignment policies," "occupancy codes and restrictions," "siting selection policies," and so on (2015*a*, 205–19).

Taken together, the *ICP* case and the AFFH rule have brought the Fair Housing Act back to its roots as an anti-segregation tool, but they also represent a much-needed modernization of the federal government's approach to fair housing, an approach that acknowledges segregation's role in driving the persistent racial and economic disparities in American society.

A Brief History of the AFFH Rule

In an editorial marking the release of the AFFH rule, the *New York Times* reflected on how many years it had taken HUD to effectively implement the Fair Housing Act's anti-segregation provision:

> The fact that it has taken nearly 50 years since the law's passage for these common-sense changes to materialize is all the more distressing, given that federally sanctioned housing discrimination has played a central role in racial ghettoization.
>
> The Fair Housing Act was intended to break down historic patterns of segregation. But it was undercut from the start by federal officials, including presidents who believed that segregation was the natural order of things. . . . The new rule . . . provides a clear, forceful definition of the law. It explains that affirmatively furthering fair housing means "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. (*New York Times* 2015, paras. 4–5, 8)

The AFFH provision of the Fair Housing Act is separate from the act's anti-discrimination sections, which were interpreted in the *ICP v. Texas* case.[6] The core anti-discrimination provisions provide a basis for establishing the liability of public or private defendants for discriminatory or segregative actions or policy, in response to a lawsuit or HUD administrative complaint. The AFFH provision of the act, in contrast, applies to governmental agencies engaged in housing and urban development. It requires the agencies to not only avoid discriminatory actions but also take affirmative steps to promote fair housing. This provision has been consistently interpreted as the act's pro-integration clause, requiring affirmative action by HUD and its grantees to promote residential integration. This understanding was developed in a series of desegregation cases brought against HUD beginning in the early 1970s.[7] It was extended to state and local grantees by case law and statute.[8] In 1994, HUD affirmed the responsibility of grantees to plan and report on their fair housing progress, implementing a new regulatory and reporting procedure known as the Analysis of Impediments to Fair Housing. But clear metrics and accountability standards were absent. By the beginning of the Obama administration, the Analysis of Impediments process had become an empty bureaucratic ritual for many jurisdictions. This was exemplified by major litigation against Westchester County, New York, in a 2005 suit alleging that the county had falsely certified its compliance with its AFFH obligations.[9] Partly as a result of the Westchester litigation, HUD announced in 2009 its plans to develop a more substantial AFFH regulation, which would standardize the reporting expectations across jurisdictions, explicitly incorporating race and poverty assessments, and would expand the scope of the planning obligation to include public housing agencies.

The development and implementation of the AFFH rule spanned 8 years and the tenure of two HUD secretaries during the Obama administration. The department began conducting "listening sessions" in 2009, and these continued for 2 years. In 2010, the US Government Accountability Office released *HUD*

Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans, a report that heightened the perceived urgency of reform by explicitly stating what was already well known: many local jurisdictions did not take their fair housing planning and reporting obligations seriously, and the lack of compliance was traceable to the lack of clear requirements on the content of the plans, the absence of requirements for updating or submission of plans, and the lack of oversight by HUD.

Following the report's release, HUD embarked on a series of extended consultations with cities and counties that would be affected by a new rule. Two more years passed before HUD released its proposed AFFH rule in July 2013, and the proposal prompted a record number of public comments.[10] It would take HUD another 2 full years to release the final rule and even longer to release the reporting forms, guidebook, and data tools that accompanied the report.

The final AFFH rule, issued in July 2015,[11] requires thousands of jurisdictions and public housing agencies that receive HUD funds, and all 50 states, to go through a structured planning process every 5 years. That process is intended to explore the extent of racial and economic segregation in the community and region, and it examines in detail the disparities in neighborhoods' access to opportunity. Accompanied by a robust community engagement effort, the process is to lead to the development of concrete goals and strategies in the jurisdiction's Consolidated Plan, Public Housing Agency Plan, and other, related planning documents.

The "Balanced Approach": Fair Housing and Neighborhood Reinvestment

The inclusion of neighborhood revitalization in the final AFFH rule represents a major shift in HUD's interpretation of the Fair Housing Act's AFFH provision. That shift entails support for a "balanced approach,"[12] with investment inside and outside of racially segregated areas. A major part of the delay and controversy in the development of the rule can be traced to concerns from low-income jurisdictions and housing-industry groups that the new rule might prevent the continued development of low-income housing in high-poverty, segregated neighborhoods. In the preamble to the final rule, HUD noted the following:

> A substantial number of commenters who expressed support for the rule stated that the proposed rule did not provide a balanced approach to investment of Federal resources. Commenters stated that the proposed rule appeared to solely emphasize mobility as the means to affirmatively further fair housing and, by such emphasis, the rule devalued the strategy of

> making investments in neighborhoods with racially/ethnically concentrated areas of poverty (RCAPs/ECAPs). They stated that the proposed rule could be read to prohibit the use of resources in neighborhoods with such concentrations. Commenters stated that the proposed rule, if implemented without change, would have the unintentional effect of shifting resources away from low-income communities of color, and threaten targeted revitalization and stabilization investments in such neighborhoods if jurisdictions misinterpreted the goals of deconcentration and reducing disparities in access to assets, and focused only on mobility at the expense of existing neighborhood assets. Commenters stated that the final rule must clarify that program participants are expected to employ both strategies—(1) to stabilize and revitalize neighborhoods that constitute RCAPs/ECAPs, and (2) enhance mobility and expand access to existing community assets. Commenters stated that these should not be competing priorities.[13]

In response, HUD agreed to support "a balanced approach to affirmatively furthering fair housing by revising the 'Purpose' section of the rule and the definition of 'affirmatively furthering fair housing.'"[14] Thus, in its revised definition of AFFH, HUD allows for housing investments that preserve existing low-income housing, even where such investments have the effect of perpetuating segregation. But, consistent with prior case law interpreting the Fair Housing Act, the rule pointedly does *not* authorize as a "fair housing" strategy the new construction of low-income housing in segregated areas. The new definition of AFFH indicates the following:

> [AFFH] may include various activities, such as developing affordable housing, and removing barriers to the development of such housing, in areas of high opportunity; *strategically enhancing access to opportunity, including through: targeted investment in neighborhood revitalization or stabilization; preservation or rehabilitation of existing affordable housing;* promoting greater housing choice *within or* outside of areas of concentrated poverty and greater access to areas of high opportunity; *and improving community assets such as quality schools, employment, and transportation.*[15]

What is unspoken in many of the comments, and finessed in HUD's response, is that the primary HUD resources available to low-income communities are low-income housing resources, which have historically been the drivers of racial and economic segregation in these neighborhoods. In our siloed system of government spending, HUD has little direct control over "community assets such as quality schools, employment, and transportation," although local jurisdictions may have flexibility to invest such funds more equitably, and the federal government is beginning to recognize the importance of alignment of its grant programs' goals across agencies (e.g., Castro, King, and Foxx 2016). Also, HUD has never specified precisely what constitutes a reasonable balance

between housing mobility and community reinvestment, though it does note that a gross *imbalance* would not satisfy the rule:

> There could be issues, however, with strategies that rely *solely* on investment in areas with high racial or ethnic concentrations of low-income residents to the exclusion of providing access to affordable housing outside of those areas. For example, in areas with a history of segregation, if a program participant has the ability to create opportunities outside of the segregated, low-income areas but declines to do so in favor of place-based strategies, there could be a legitimate claim that HUD and its program participants were acting to preclude a choice of neighborhoods to historically segregated groups, as well as failing to affirmatively further fair housing as required by the Fair Housing Act.[16]

HUD's broad concessions in continuing to permit some significant degree of low-income housing investment in highly segregated communities are contradicted by most of the federal case law cited in the AFFH rule's preamble. Those cases focused on ending the perpetuation of segregation and redirecting federal low-income housing investment away from segregated neighborhoods. However, an important strand of fair housing case law also focuses on the importance of reinvestment to improve and equalize existing housing and neighborhood conditions, particularly in the context of public housing desegregation. An example is the court-ordered remedy in the landmark case of *Walker v. HUD*, a 1985 class action challenging both segregation and unequal conditions for public housing residents in Dallas, Texas. That remedy included both an ambitious housing mobility program and a community revitalization plan to begin to equalize housing and neighborhood conditions for the existing residents.[17] Attorneys for the plaintiffs in that seminal case explained:

> When we address the problems caused by deliberate racial discrimination in public housing programs, the application of traditional dual system liability and remedy principles developed in the school desegregation cases should be considered. Such an approach offers the opportunity both to equalize African-American projects with white-occupied assisted housing and to provide effective access for African-American families to a wide choice of housing opportunities (Julian and Daniel 1989, 667).

Consistent with the aspirations represented by the *Walker* case, most fair housing and civil rights groups supported the final rule's balanced approach to fair housing even while recognizing that it does not specify the extent of balance between mobility and revitalization. They also recognized that the rule does not provide leverage to obtain the resources that poor communities most need (in education, transportation, employment, and public health). Defining what "balance" means in specific local contexts, and using the AFFH rule to leverage

nonhousing resources for struggling communities, will be part of the challenge for advocates as the new rule is implemented at the state and local level.

"Racially Concentrated Areas of Poverty"

The final AFFH rule requires grantees to identify and prioritize "racially concentrated areas of poverty" in their jurisdictions,[18] to consider remedial steps to deconcentrate racial and poverty concentration in these areas, and to direct enhanced resources into these neighborhoods. This focus on *poverty* as an element of fair housing analysis is not new, but it has never before been as explicitly set out as it is in the new rule. Notably, poverty is not mentioned in the 1968 Fair Housing Act, though the segregation of low-income families of color by government policy was a fundamental context for congressional consideration of the act (Roisman 2007). Similarly, poverty is not a protected class under the Fair Housing Act, but disparate impact cases, especially those challenging exclusion of low-income housing, rely heavily on the disproportionately high representation of people of color among low-income populations and the disproportionate housing needs faced by low-income families.[19] Both the case law and academic research on the harms of segregation have focused on concentrated poverty's particular harms to low-income families of color and the durability of racial and poverty concentration over time. As the Supreme Court noted in *Texas v. ICP*, "*De jure* residential segregation by race was declared unconstitutional almost a century ago, but its vestiges remain today, intertwined with the country's economic and social life."[20] The 2005 district court opinion in *Thompson v. HUD* is a good example of this line of analysis:

> Baltimore City should not be viewed as an island reservation for use as a container for all of the poor of a contiguous region including Anne Arundel, Baltimore, Carroll, Harford and Howard Counties. Baltimore City contains only approximately 30% of the Baltimore Region's households. In 1940, 19 percent of the population of Baltimore City was African-American. By 2000, the population of Baltimore City was 64 percent African-American, while the population of the rest of the Baltimore Region was 15 percent Black.[21]

Regulatory comments criticizing the inclusion of "racially concentrated areas of poverty" as a particular focus of the new rule prompted the following response from HUD:

> HUD agrees with the comment that the Fair Housing Act does not prohibit discrimination on the basis of income or other characteristics not specified in the Act, and it is not HUD's intent to use the AFFH rule to expand the characteristics protected by the Act. HUD would note that the

> majority of its programs are meant to assist low-income households to obtain decent, safe, and affordable housing and such actions entail an examination of income. . . . Accordingly, it is entirely consistent with the Fair Housing Act's duty to affirmatively further fair housing to counteract past policies and decisions that account for today's racially or ethnically concentrated areas of poverty or housing cost burdens and housing needs that are disproportionately high for certain groups of persons based on characteristics protected by the Fair Housing Act. Preparation of an [Assessment of Fair Housing] could be an important step in reducing poverty among groups of persons who share characteristics protected by the Fair Housing Act. . . . In addition, a large body of research has consistently found that the problems associated with segregation are greatly exacerbated when combined with concentrated poverty. That is the legal basis and context for the examination of RCAPs/ECAPs, as required by the rule.[22]

In this light, the focus on poverty concentration in the AFFH rule is not so much a departure from prior practice as it is a recognition of the reality of segregation and of the impact of federal programs and policy on low-income families of color.

The Recognition of Housing's Role as a Platform

Sociologists have long recognized the relation of housing segregation to racial disparities in health, education, and employment. This recognition began with Gunnar Myrdal in 1944: "Housing segregation necessarily involves discrimination . . . [it] permits any prejudice on the part of public officials to be freely vented on Negroes without hurting whites" (618).

Douglas Massey and Nancy Denton elaborated on this insight in 1993: "Residential segregation is the institutional apparatus that supports other racially discriminatory processes and binds them together into a coherent and uniquely effective system of racial subordination" (8).

And Patrick Sharkey expanded this analysis in 2013 by focusing on the intergenerational impacts of living in high-poverty segregated neighborhoods, concluding that "African Americans have been attached to places where discrimination has remained prevalent despite the advances in civil rights made in the 1960s; where political decisions and social policies have led to severe disinvestment and persistent, rigid segregation" (5). He notes that "the effect of living within severely disadvantaged communities accumulates over generations" (7).

Congress also recognized the role of housing as a platform when it enacted the Fair Housing Act in 1968. The HUD preamble to the final AFFH rule quoted the Congressional Record: "The Act recognized that 'where a family

lives, where it is allowed to live, is inextricably bound up with better education, better jobs, economic motivation, and good living conditions.' "[23]

The role of housing as a platform for access to opportunity in other areas has been a consistent theme of housing desegregation litigation, from *Gautreaux* (1974) to *Walker* (1989) to *Thompson* (1995) and to *ICP* (2015).[24] For example, the *Walker* district court opinion approving the class settlement includes crime, exposure to environmental toxins, and access to utilities as aspects of fair housing[25]; the *ICP* district court opinion cites school quality[26]; and *Gautreaux's* 1974 court of appeals decision focuses on access to employment:

> [The trial judge's] warning that "By 1984 it may be too late to heal racial divisions," rather than a cliché, is a solemn warning as to the interaction of "White flight" and "black concentration." It is the most serious domestic problem facing America today. As Assistant Secretary Simmons further advises: "As Whites have left the cities, jobs have left with them. After 1960, three-fifths of all new industrial plants constructed in this country were outside of central cities. In some cases as much as 85% of all new industrial plants located outside central cities were inaccessible to Blacks and other minorities who swelled ghetto populations." These words also convey a solemn warning, i.e., we must not sentence our poor, our underprivileged, our minorities to the jobless slums of the ghettos and thereby forever trap them in the vicious cycle of poverty which can only lead them to lives of crime and violence.[27]

The AFFH rule *operationalizes* these fair housing principles as part of the fair housing planning process, requiring an explicit analysis of access to opportunity by geographic area. The rule defines "significant disparities in access to opportunity" as "substantial and measurable differences in access to educational, transportation, economic, and other important opportunities in a community, based on protected class related to housing."[28] It also provides detailed analytical tools for assessing these disparities. The new Assessment of Fair Housing tool supplies index scores for school proficiency, labor market engagement, jobs proximity, transportation costs, transit trips, and environmental health. Scores are arrayed by geographic area, with concurrent demographic analysis of neighborhood race and poverty rates.

In the area of environmental health, for example, the Assessment of Fair Housing tool requires a review of the "location of environmental health hazards":

> Relevant factors to consider include the type and number of hazards, the degree of concentration or dispersion, and health effects such as asthma, cancer clusters, obesity, etc. Additionally, industrial siting policies and incentives for the location of housing may be relevant to this factor (US Department of Housing and Urban Development 2015*b*, Appendix C, 9).

The inclusion of public health metrics provides an important opening for public health advocates and practitioners, who have increasingly recognized the predominant importance of social determinants for health outcomes but have often been frustrated by the limited "jurisdiction" of public health interventions to affect those determinants (Carey, Crammond, and Keast 2014). The new HUD rule will help the public health community engage more effectively in this arena.

Equitable access to quality public schools is also directly emphasized as a fair housing issue:

> The geographic relationship of proficient schools to housing, and the policies that govern attendance, are important components of fair housing choice. The quality of schools is often a major factor in deciding where to live and school quality is also a key component of economic mobility. Relevant factors to consider include whether proficient schools are clustered in a portion of the jurisdiction or region, the range of housing opportunities close to proficient schools, and whether the jurisdiction has policies that enable students to attend a school of choice regardless of place of residence. Policies to consider include, but are not limited to, inter-district transfer programs, limits on how many students from other areas a particular school will accept, and enrollment lotteries that do not provide access for the majority of children. (US Department of Housing and Urban Development 2015*b*, Appendix C, 9)

This tight connection between housing and school policy, long recognized by advocates and academics, was highlighted in 2016 by a joint guidance letter from the secretaries of Housing, Education, and Transportation. The letter exhorted state and local policymakers to work together across their separate silos in order to foster integrated and inclusive communities and schools (Castro, King, and Foxx 2016).

The Shift in Focus from Private Enforcement to Administrative Oversight and Compliance

Like other civil rights era statutes, the Fair Housing Act relied on the federal courts to enable private enforcement against both private and public acts of discrimination. Although the case law evolved in a positive direction after 1968, it was difficult to pursue a claim without an attorney, and enforcement of the act was sporadic. The Fair Housing Amendments Act of 1988 was intended to strengthen private enforcement by creating an administrative complaint mechanism to supplement court enforcement and by enhancing court-awarded attorneys fees available to prevailing plaintiffs.[29]

The 1988 amendments also added new "protected classes."[30] Through the Fair Housing Initiatives Program, the 1988 act began a funding stream to support private fair housing groups across the country in assisting victims of discrimination. In spite of these added incentives, complaints against private acts of discrimination continued to be only a partial solution to the continuing problem of discrimination and segregation in the housing market (Schwemm 2007).

The new AFFH rule is part of a larger trend to use federal administrative oversight and the federal spending power, as an alternative to private enforcement, in promoting civil rights compliance (Pasachoff 2014). These cross-agency "equality directives" (Johnson 2012, 1343) include a proactive assessment of the racial impacts of government actions (e.g., Tegeler 2016) and require federal grantees to avoid adverse impacts on protected classes. In the case of the AFFH rule, they require grantees to take affirmative steps to promote integration. This kind of civil rights funding oversight has the *potential* to change behavior more profoundly than scattered civil rights lawsuits, but it is also highly dependent on the willingness of the federal agency to actually enforce its own directives—that willingness is in turn dependent on the priorities of the political leadership in Washington.

The more proactive federal stance represented by the AFFH rule is a move away from HUD's passive complaint-driven approach to enforcement. Although the Fair Housing Act calls for enforcement "within constitutional limitations,"[31] HUD has never come close to the limits of its statutory and constitutional power over state and local government in the area of civil rights. The department routinely defers to local zoning, jurisdictional limitations, local residency preferences, local notification and approval requirements for public housing, and so on (Tegeler 1994). The new AFFH rule asserts a much stronger federal oversight role over such local government practice. Indeed, the new rule's expectation that local governments no longer participate in exclusionary housing policies has elicited strong "federalism" objections from conservative media outlets. For example, one commentator protested that "AFFH repudiates the core principles of our constitutional system by allowing the federal government to effectively usurp the zoning powers of local governments" (Kurtz 2015, para. 2).[32]

Notwithstanding these protests, the new rule is fully consistent with the current regulatory relationship between federal authority and local government, which largely bypasses the state governments (Davidson 2007). It is also the latest iteration of repeated federal and state efforts to impose a more regional structure on metropolitan government administration—efforts that have often foundered when affordable housing was brought into the discussion (Dreier, Mollenkopf, and Swanstrom 2014).

Conclusion

HUD has a long and ambiguous history in relation to civil rights, shifting between its roles as chief enforcer of the Fair Housing Act and a chief facilitator of state and local discriminatory practices (Rothstein 2017). It has often been brought to account for its segregated policies by the federal courts and has been required to incorporate fair housing goals throughout its administration of housing programs (Poverty & Race Research Action Council 2017; Ellen and Yager 2015). The 2015 AFFH rule, adopted in the wake of the landmark *ICP v. Texas* decision, is the latest phase in this ongoing saga.

Since this chapter was first written, our country has gone through a seismic shift in presidential leadership, veering sharply to the right, with an administration espousing deregulation for deregulation's sake as a major policy goal.[33] In this spirit, in the 50th anniversary year of the Fair Housing Act, HUD has taken the extraordinary step of suspending compliance with the AFFH rule, effectively exempting almost 1,000 jurisdictions from the rule's requirements for an indefinite period.[34] And HUD has indicated its intention to begin the process of amending the rule itself.[35] Whether or not the suspension is permitted to stand, the AFFH rule has given state and local governments a modernized set of tools to address segregation and its consequences.

Notes

1. 135 S. Ct. 2507 (2015).

2. See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 585–86 (1990).

3. ICP, 135 S. Ct. at 2525–26 (citation omitted).

4. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903 (2016)).

5. Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,348.

6. For the AFFH provision, see 42 U.S.C. §3608.

7. For a good summary of these cases, see Roisman (2007).

8. See Otero v. New York City Housing Authority, 484 F.2d 1182 (2d Cir. 1973); Housing and Community Development Act of 1974, 42 U.S.C. § 5304(b)(2) (2016).

9. By 2005, when the Westchester litigation was filed, the Analysis of Impediments process had deteriorated to the point where Westchester County, in its annual filings to receive HUD community development funds, routinely certified its compliance with the AFFH provisions of the act by submitting fair housing plans that included no mention of race, and the annual filings asserted that the construction of subsidized housing in already high-poverty, segregated areas satisfied the county's fair housing obligations.

10. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710 (proposed July 19, 2013).

11. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015).

12. 80 Fed. Reg. at 42,277.

13. 80 Fed. Reg. at 42,278.

14. 80 Fed. Reg. at 42,272.

15. 24 C.F.R. § 5.150 (2016) (italics added for emphasis).

16. 80 Fed. Reg. at 42,279 (italics added for emphasis).

17. Walker v. HUD, CA3 85-1210-R (N.D. Tex. Jan. 20, 1987) (consent decree). See also Julian (2008).

18. 24 C.F.R. § 5.154.

19. See, for example, Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988); aff'd in part, 488 U.S. 15 (1988).

20. ICP v. Texas, 135 S. Ct. at 2515–16.

21. Thompson v. HUD, 348 F. Supp. 2d 398, 408 (D. Md. 2005). See also Massey and Denton (1993); Sharkey (2013).

22. 80 Fed. Reg. at 42,283.

23. 80 Fed Reg. at 42,274 (quoting 114 Cong. Rec. 2276, 2707 (Feb. 8, 1968)).

24. Gautreaux v. Chicago Housing Auth., 503 F.2d 930 (7th Cir. 1974); Walker v. HUD, 734 F. Supp. 1231 (N.D. Tex. 1989); Thompson v. HUD, 348 F. Supp. 2d 398 (D. Md. 2005); Texas Department of Housing and Community Affairs v. Inclusive Communities Project, 135 S. Ct. 2507 (2015).

25. Walker v. HUD, 734 F. Supp. 1231, 1266–1267 (N.D. Tex. 1989) (approving consent decree) (citation omitted).

26. ICP v. Texas, 860 F. Supp. 2d 312, 329–30 (N.D. Texas 2012) (citation omitted).

27. Gautreaux v. Chicago Housing Auth., 503 F.2d 930, 938 (7th Cir. 1974) (citation omitted).

28. 24 C.F.R. § 5.152.

29. Fair Housing Amendments Act of 1988, Pub. L. Mo. 100-430, 102 Stat. 1619 (codified as amended in scattered sections of 28 and 42 U.S.C.).

30. 42 U.S.C. § 3606 (2016).

31. 42 U.S.C. § 3601.

32. Conservative commentators had similar things to say about the Supreme Court's "overreaching" in the *ICP* case. See, for example, Barone (2015, para. 10): "Disparate-impact doctrine [will] overturn local zoning laws and place low-income housing in suburbs across the nation." This concern that HUD might somehow override zoning rules led to an amendment to the 2017 federal budget bill prohibiting HUD from directing local governments to change their zoning laws through the AFFH rule (Consolidated Appropriations Act of 2017, Pub. L. No. 115-131, 131 Stat. 135, 790 (2017)).

33. Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs," 82 Fed. Reg. 9339 (Feb. 3, 2017); Executive Order 13777, "Enforcing the Regulatory Reform Agenda," 82 Fed. Reg. 12,285 (Mar. 1, 2017); "Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777," 82 Fed. Reg. 22,344 (May 15, 2017).

34. Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, 83 Fed. Reg. 683 (Jan. 5, 2018); superceded by three notices, posted on May 23, 2018, which substitute a withdrawal of the Assessment of Fair Housing form for the original suspension of compliance (with the same basic effect). See *Notice: Withdrawal*, 83 Fed. Reg. 23,928 (May 23, 2018); *Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local*

Governments, 83 Fed. Reg. 23,922 (May 23, 2018); *Affirmatively Furthering Fair Housing (AFFH): Responsibility to Conduct Analysis of Impediments*, 83 Fed. Reg. 23,927 (May 23, 2018).

The author is co-counsel in the federal litigation filed to challenge the suspension of the rule, *National Fair Housing Alliance et al. v. Carson*, which commenced after this article was originally written.

35. Affirmatively Furthering Fair Housing: Streamlining and Enhancements (Advance notice of proposed rulemaking), 83 Fed. Reg. 40,713 (Aug. 16, 2018).

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