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Courtney L. Anderson

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# Integrate and Reactivate the 1968 Fair Housing Mandate

COURTNEY LAUREN ANDERSON\*

## Introduction

The Fair Housing Act (“FHA” or “Act”) was enacted in 1968 with the objective to “provide, within constitutional limitations, for fair housing throughout the United States.”<sup>1</sup> The racial segregation and tensions that were rampant throughout the United States in the 1960s were the genesis of this legislation, which aimed to create a more integrated society.<sup>2</sup> The FHA bans practices that are motivated by a

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\* Courtney Lauren Anderson is an Assistant Professor of Law at Georgia State University College of Law. The author wishes to thank Professors Natsu Saito, Tanya Washington, and Florence W. Roisman for graciousness and valuable feedback. The author also wishes to thank all who provided feedback at the 38th Annual Health Law Professors Conference, and the faculty at Georgia State Law. The author’s research assistants Christian Dennis and Mark Moore were also integral parts of the conceptualization and creation of this Article.

1. Fair Housing Act of 1968, 42 U.S.C. § 3601 (1968).
2. See 114 CONG. REC. 2985 (1968) (statement of Sen. Proxmire) (noting that Title VIII will establish “a policy of dispersal through open housing . . . look[ing] to the eventual dissolution of the ghetto and the construction of low to moderate income housing in the suburbs.”). See also Stanley P. Stocker-Edwards, *Black Housing 1860–1980: The Development, Perpetuation, and Attempts to Eradicate the Dual Housing Market in America*, 5 HARV. BLACK LETTER L.J. 50 (1988). Senator Walter Mondale stated that Title VIII represents “an absolutely essential first step” toward reversing the pattern of “two separate Americas constantly at war with one another.” 114 Cong. Rec. 2274 (1968). See also *id.* at 2524 (Statement of Sen. Brooks) (“Discrimination in the sale and rental of housing has been the root cause of the widespread patterns of de facto segregation which characterizes America’s residential neighborhoods.”). See also

racially discriminatory purpose, as well as those that “have a disparate impact on minorities.<sup>3</sup> Considered as a whole, the Act is designed to fulfill “the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups.”<sup>4</sup>

The FHA has failed in its integrationist mission. A contributing factor to this failure is the narrow view that courts take when presented with a case that implicates the FHA. Nearly every instance—and these instances are few and far between—of plaintiffs successfully bringing a claim under the FHA involves a case in which the claimant alleges explicitly discriminatory intent that prohibited a protected class from acquiring access to housing.<sup>5</sup> Clearly, such obvious prejudiced incidents are in line with what the FHA seeks to prohibit. To illustrate, section 3604 of the FHA makes it unlawful to “refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race.”<sup>6</sup> This Section is meant to prohibit acts and laws that prevent certain individuals from attaining housing due to their membership in a protected class.<sup>7</sup> However, the section 3604 mandate to affirmatively further fair housing requires more than a reactionary punishment to a narrow category of cases.<sup>8</sup>

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*Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (stating the FHA’s goal of creating “truly integrated and balanced living patterns” (quoting 114 Cong. Rec. 2706, 3422 (1968))); *Southend Neighborhood Improvement Ass’n v. Cnty. of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984) (“The [Fair Housing] Act is concerned with ending racially segregated housing.”).

3. See *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).

4. *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973) (“Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.”).

5. *Metro. Hous. Dev. Corp. v. Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977); see, e.g., *Williamson v. Hampton Mgmt. Co.*, 339 F. Supp. 1146 (N.D. Ill. 1972). See, e.g., *Kormoczy v. Sec’y, U.S. Dep’t of Hous. & Urban Dev.*, 53 F.3d 821, 822–24 (7th Cir. 1995).

6. 42 U.S.C. § 3604(a) (2015).

7. 42 U.S.C. § 3604(d) (2015).

8. 42 U.S.C. § 3608 (2015).

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Section 3608 of the FHA requires “all executive departments and agencies [to] administer their programs and activities relating to housing and urban development (including any federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of the [FHA].”<sup>9</sup> Although this language may seem revolutionary on its face, the ambiguity and lack of substantive remedies that has been afforded in the clause reduces the meaningful and practical impact it will have.

On July 19, 2013, the Department of Housing and Urban Development (“HUD”) sought to change this by issuing a proposed rule titled “Affirmatively Furthering Fair Housing” (“Proposed Rule”).<sup>10</sup> The stated purpose of this rule is to provide recipients of HUD funds with the tools they need to fulfill their statutory obligation “to take steps proactively to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities for all.”<sup>11</sup> The tools that HUD will provide include data describing the demographics of neighborhoods, the disproportionate housing needs of protected classes, integration and segregation trends, and the racial and ethnic makeup of areas that have high concentrations of poverty.<sup>12</sup> HUD will also detail the proximity of neighborhoods to critical assets and stressors, such as schools, transportation, environmental hazards, and employment opportunities.<sup>13</sup> HUD is providing this data in order to reduce the time, effort, and expense that HUD program participants currently have to expend in collecting this material.<sup>14</sup> HUD grantees will use this data to assess determinants of fair housing, set fair housing priorities and goals, devise action plans to better affirmatively further fair housing, namely through the enhanced coordination among community and investment planning, and public sector housing

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9. 42 U.S.C. § 3608(c) (2015).

10. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43710 (proposed July 19, 2013) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576 & 903).

11. *Id.*

12. *Id.*

13. *Id.*

14. Affirmatively Furthering Fair Housing Rule, 80 Fed. Reg. 42272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576 & 903).

decisions.<sup>15</sup> Recipients of HUD funds transmit this information to the agency via the Assessment of Fair Housing, which will replace the Analysis of Impediments.<sup>16</sup> This Assessment of Fair Housing is designed to analyze fair housing patterns and obstacles.<sup>17</sup> HUD also intends for this data to assist other government agencies with their planning policies, and dissemination of pertinent civil rights data to public and private stakeholders.<sup>18</sup> In addition to providing the data described above, HUD will incorporate fair housing planning into other development initiatives. These initiatives include community development, and land-use policies.<sup>19</sup> The Proposed Rule also purports to encourage collaborations across regions<sup>20</sup> and that fair housing practices live.<sup>21</sup>

The Proposed Rule takes an expansive view of affirmatively furthering fair housing as exemplified by its intent to “reduce disparities in access to key community assets based on race, color, religion, sex, familial status, national origin, or disability, thereby improving economic competitiveness and quality of life.”<sup>22</sup> This language shows a significant shift from court opinions discussing this FHA issue that have sought to “prevent low cost public housing units [from being constructed] in neighborhood[s] where they do not belong.”<sup>23</sup> Despite the promise of this broad interpretation of the FHA’s intent, HUD has limited its prediction of the impact of the Proposed Rule to administrative niceties. These include alleviating the burden of compiling data on § 3608 and providing clarity on an admittedly confusing and ineffective procedure, Analysis of Impediments, that currently measures compliance with the

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15. Affirmatively Furthering Fair Housing Rule, 80 Fed. Reg. 42272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576 & 903).

16. *Id.*

17. *Id.*

18. *Id.*

19. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43710.

20. *Id.*

21. *Id.*

22. Affirmatively Furthering Fair Housing Rule, 80 Fed. Reg. at 42273.

23. *United States v. Yonkers Bd. Educ.*, 624 F. Supp. 1276, 1310 (S.D.N.Y. 1985).

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affirmatively furthering mandate.<sup>24</sup>

This Article sees the potential in the Proposed Rule as extending beyond logistical ease. HUD has provided the foundation to permit subject matters that indirectly affect housing, but directly affect the creation of integrated neighborhoods. The Proposed Rule can also increase the data plaintiffs are required to provide to make a prima facie disparate impact case under the Act and supports the movement to permit individuals to bring a private right of action under the FHA without utilizing additional enforcement mechanisms.

Part I of this Article provides a summary of the FHA, primarily sections 3604 and 3608, and gives insight into their intent,<sup>25</sup> success, and shortcomings. Part II describes the Proposed Rule, and how the creation of this rule was driven by a realization that increasing measurability and effectiveness of section 3608 required substantive remediation of the process by which this mandate is evaluated. Part III critiques the Proposed Rule with particular emphasis on how HUD limits the very rule that it drafted by virtue of not acknowledging the far-reaching potential of the Proposed Rule. Parts IV and V advance the promise of the Proposed Rule into substantive legal remediation by explaining how it can add the substance the lawmakers intended the FHA to possess.

## I. The Fair Housing Act

Part I provides an overview of the FHA of 1968, giving specific attention to its primary substantive sections, 3604 and 3608.<sup>26</sup> Part A discusses the genesis of the FHA and its grounding in decades of pervasive racial segregation of housing. This Part also analyzes the Act's primary enforcement mechanisms to promote fair housing by prohibiting discriminatory intent in housing availability. Part B looks at the requirement under section 3608 that government agencies

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24. *Kormoczy*, 53 F.3d 821.

25. See generally Florence W. Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333 (Summer 2007).

26. Fair Housing Act of 1968, 42 U.S.C. §§ 3604, 3608 (1968).

“affirmatively further fair housing.”<sup>27</sup> Going beyond simply banning discriminatory behavior, the affirmatively furthering clause creates a duty for proactive measures in federal and state actions. Part B also summarizes the requirements and challenges with judicial review and enforcement of those duties.

### A. Background and Purpose of the Fair Housing Act

The FHA of 1968 seeks to eliminate bias in housing decisions in the United States.<sup>28</sup> Namely, it prohibits discrimination in the sale, rental, and financing of housing on the basis of race or color, religion, sex, national origin, familial status, or disability.<sup>29</sup> Originally introduced in 1966 by the Johnson administration, Congress passed the FHA in the wake of Dr. Martin Luther King, Jr.’s assassination.<sup>30</sup> Because the final statutory language resulted from a Senate compromise amendment to an omnibus House civil rights bill, the legislative history is sparse with no committee reports, and the hearing records are limited to discussing the broad objective of ending urban racial ghettos.<sup>31</sup> In the decades following its passage, most states and many local governments have enacted their own fair housing laws that are equivalent to the FHA.<sup>32</sup>

Sections 3604 and 3608 of the FHA contain its primary substantive provisions. Section 3604 prohibits discrimination in the sale or rental of a dwelling or in the terms, conditions, or privileges of sale or rental of a dwelling.<sup>33</sup> Furthermore, it bars discrimination in the “provision of services or facilities in connection therewith.”<sup>34</sup> This

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27. 42 U.S.C. § 3608 (1968).

28. 42 U.S.C. § 3601 (2015).

29. *Id.*

30. Robert G. Schwemm, *The Fair Housing Act After 40 Years: Continuing the Mission to Eliminate Housing Discrimination and Segregation: Cox, Halprin, and Discriminatory Municipal Services Under the Fair Housing Act*, 41 *IND. L. REV.* 717, 757 (2008).

31. Robert G. Schwemm, *Discriminatory Housing Statements and 3604(c): A New Look at the Fair Housing Act’s Most Intriguing Provision*, 29 *FORDHAM URB. L.J.* 187, 198 (2001).

32. *Id.* at 275.

33. 42 U.S.C. § 3604(a), (b) (2015).

34. 42 U.S.C. § 3604(b).

section also forbids discriminatory intent in representing dwelling availability for inspection, sale, or rental to a party.<sup>35</sup> Likewise, it bans inducing or attempting to induce the sale or rental of a dwelling by appeal to the discriminatory motives of the seller.<sup>36</sup> Combined, these provisions seek to eliminate the impact of discriminatory intent on the availability of housing, providing a cause of action where such conduct occurs.

Section 3608(d) grants the Secretary of HUD the authority and responsibility to administer the provisions of the FHA.<sup>37</sup> The Act as written does not sit passively, providing only a cause of action for an aggrieved party. Rather, it creates a duty for all federal executive departments and agencies to affirmatively further fair housing.<sup>38</sup> Through a 1994 executive order, President Clinton expanded the authority of HUD and directed stronger measures be taken to affirmatively further fair housing in federal programs in order to better address still pervasive housing discrimination.<sup>39</sup> The order also created the President's Fair Housing Council, a cabinet level organization comprised of the heads of numerous executive agencies, designed to increase coordination across the executive branch in affirmatively furthering fair housing.<sup>40</sup>

The FHA responds to a long history of racial discrimination in housing and in the United States.<sup>41</sup> In the late nineteenth and early

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35. 42 U.S.C. § 3604(c).

36. 42 U.S.C. § 3604(d).

37. 42 U.S.C. § 3608(a).

38. 42 U.S.C. § 3608(d) ("All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner *affirmatively to further the purposes of this subchapter* and shall cooperate with the Secretary to further such purposes." (emphasis added)).

39. Exec. Order No. 12892, 3 C.F.R. § 849 (1995), *reprinted as amended in* 42 U.S.C. § 3608 app. at 5012–14 ("If all of our executive agencies affirmatively further fair housing in the design of their policies and administration of their programs relating to housing and urban development, a truly nondiscriminatory housing market will be closer to achievement.").

40. *Id.*

41. Swati Prakash, Comment, *Racial Dimensions of Property Value Protection Under the Fair Housing Act*, 101 CALIF. L. REV. 1437, 1445–46 (2013).

twentieth century, racial segregation codified racial preferences through express racial zoning and racially restrictive covenants. In *Buchanan v. Warley*, the Supreme Court of the United States struck down racial zoning as unconstitutional.<sup>42</sup> Almost a decade later, in *Village of Euclid v. Ambler Realty Co.*, the Court decided to uphold zoning land by use and density, finding this a valid exercise of the police powers of local governments, which began the shift from de jure to de facto racial segregation.<sup>43</sup> Justice Sutherland's majority opinion gave segregationists their new argument by equating apartment buildings to a nuisance, particularly when placed next to single-family residential uses.<sup>44</sup> As African Americans were much more likely to rent than own detached housing, segregating within residential uses acted as an effective proxy for race, justified in the name of preserving property values.<sup>45</sup> Throughout the twentieth and into the twenty-first century, courts have upheld ordinances on the basis of preserving such values.<sup>46</sup> This trend accelerated with post World War II "white flight" and the increasingly suburbanized sprawl of the new millennium.<sup>47</sup>

Throughout the twentieth century, both public and private sector actions worked to create residential segregation.<sup>48</sup> Initially, private homeowners sought to maintain white neighborhoods through the use of racially restrictive covenants.<sup>49</sup> Even after the courts finally stopped enforcing these covenants in 1948, the growing real estate industry took up the gauntlet of maintaining residential segregation.<sup>50</sup> It became common practice in the real estate industry to profit off white fears of

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42. *Buchanan v. Warley*, 245 U.S. 60, 74 (1917) (holding racial zoning unconstitutional on the limited basis racially based restraints on the alienation of property violated Due Process Clause of the Fourteenth Amendment).

43. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

44. *Id.* at 394.

45. See William Collins and Robert Margo, *Home Ownership and Race from the End of the Civil War to the Present*, 101 AM. ECON. REV., 355 (May 2011).

46. Prakash, *supra* note 41, at 1483.

47. *Id.* at 1454.

48. *Id.* at 1455.

49. *Id.* at 1457.

50. See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

racial minorities though “panic selling” in transitional neighborhoods and “blockbusting.”<sup>51</sup> The federal government supported residential segregation housing through mortgage guarantee programs that refused to insure or subsidize home mortgages in integrated neighborhoods, justified as market-based risk aversion.<sup>52</sup> The federal government also subsidized public infrastructure, such as highways and utility improvements, which were specifically sited to impact racial minority housing.<sup>53</sup> These impacts were self-reinforcing as local governments zoned more industrial and commercial development near the new infrastructure, causing increasingly harmful externalities to minority communities.<sup>54</sup> Today, the cycle continues as remediation of “blight” has become the justification for widespread destruction and redevelopment of minority residential neighborhoods.<sup>55</sup>

The FHA directly addresses many of these historical issues: section 3604 directly attacks discriminatory intent in housing availability.<sup>56</sup> This section bans not only baseline bias and discrimination, but also responds directly to the practices of the real estate industry that were prevalent throughout the last century. Section 3608 addresses the more ambitious goal of eliminating disparate impact.<sup>57</sup> The section’s affirmatively furthering requirement responds to the federal government’s practices that, while at least seeming facially neutral or market-based, had the real effect of entrenching and subsidizing racially segregated housing patterns.<sup>58</sup>

Although the FHA professed noble goals, the Act as passed in 1968 included enforcement mechanisms too weak to effectively enforce the antidiscrimination provisions.<sup>59</sup> Originally, private

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51. Prakash, *supra* note 41, at 1460.

52. *Id.* at 1454.

53. *Id.* at 1456.

54. Prakash, *supra* note 41, at 1452.

55. *Id.* at 1456.

56. 42 U.S.C. § 3604(c).

57. 42 U.S.C. § 3608(d) (2015).

58. *See* 42 U.S.C. § 3608.

59. Melissa Rothstein & Megan K. Whyte, Issue Brief, *Teeth in the Tiger: Organizational Standing as a Critical Component of Fair Housing Act Enforcement* 3 AM. CONST. SOC’Y (Apr. 2012) [https://www.acslaw.org/sites/default/files/Rothstein\\_](https://www.acslaw.org/sites/default/files/Rothstein_)

enforcement provided only nominal relief, and federal agencies enforced mere handfuls of cases over the first two decades of the Act's existence.<sup>60</sup> Congress sought to redress the lack of enforcement by passing the Fair Housing Amendments Act of 1988.<sup>61</sup> The amendments added an administrative enforcement procedure, which can impose civil fines of up to \$10,000 for the first offense, \$25,000 for the second offense within five years, and \$50,000 after two or more offenses within seven years.<sup>62</sup> Congress also toughened private enforcement by removing the \$1,000 cap on punitive damages and authorizing the award of attorneys' fees to all successful plaintiffs.<sup>63</sup> Finally, Congress added disabled persons and families with children as protected classes.<sup>64</sup>

While generally positive, many commentators still express disappointment with the FHA's impact.<sup>65</sup> In particular, the FHA's failure to provide relief for plaintiff's bringing disparate impact claims has become more pronounced in the last couple of decades.<sup>66</sup> Unfortunately, the statute has been unable to correct the implicit and systemic bias underlying and maintaining segregation.<sup>67</sup> Only

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60. Fair Housing Act of 1968, Pub. L. No. 90-284, § 812(c), 82 Stat. 73, 82 (1968) (limiting the remedies for private civil enforcement to injunctive relief, actual damages, and \$1,000 in punitive damages); James A. Kushner, *An Unfinished Agenda: The Federal Fair Housing Enforcement Effort*, 6 YALE L. & POL'Y REV. 348 (1988) (finding that U.S. Department of Justice had handled approximately 30 FHA cases by 1979 but dropped to virtually nonexistent enforcement throughout the early years of the Regan administration).

61. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988).

62. 42 U.S.C. § 3612(g)(3) (2015).

63. 42 U.S.C. § 3613(a), (c) (2015).

64. 42 U.S.C. §§ 3604–3606.

65. Prakash, *supra* note 41, at 1461–62.

66. Stacey E. Seichshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357 nn.221-22 (2013).

67. Wendell E. Pritchett, *Where Shall We Live? Class and the Limitations of Fair Housing Law*, 35 URB. L. 399, 469–70 (2003) (“Housing discrimination and racial segregation, while they are intimately related, are not the result of the same set of factors. Achieving racial integration would require an assessment of the interaction

focusing on the transactional aspects of housing is insufficient to correct pervasive segregation. Unfortunately, recent court decisions are narrowing the focus of FHA enforcement to just those transactional aspects by construing it to only apply to actions taken before or during acquisition of the property.<sup>68</sup> These cases severely limit the potential extension of FHA's enforcement mechanisms to related non-housing issues—those that do not directly affect the ability of those residents to live where they desire—or to protect critical neighborhood assets.

### B. Affirmatively Furthering Clause

With the affirmatively furthering clause, Congress expressed a goal much broader than merely providing a mechanism to redress discriminatory intent. Indeed, one of the early FHA cases decided by the Supreme Court of the United States noted that the legislative intent of the clause created an obligation for proactive measures to address existing segregation and related barriers.<sup>69</sup> Lower courts have supported this interpretation of the affirmatively furthering clause, requiring recipients of federal HUD funds do more than simply not discriminate; rather, they must actively promote integration.<sup>70</sup>

The FHA leaves the precise scope of the affirmatively furthering

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of race and class in the creation of American communities.”).

68. See *Cox v. City of Dallas*, 430 F.3d 734, 742–43 (5th Cir. 2005) (“§ 3604(a) gives no right of action to current owners claiming that the value or ‘habitability’ of their property has decreased due to discrimination in the delivery of protective city services.”); *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, 388 F.3d 327 (7th Cir. 2004) (holding § 3604(a) was designed only to address “the widespread practice of refusing to sell or rent homes in desirable residential areas to members of minority groups”).

69. *Trafficante*, 409 U.S. at 211 (“the reach of the proposed law was to replace the ghettos ‘by truly integrated and balanced living patterns’” (quoting Sen. Walter F. Mondale)).

70. See, e.g., *Shannon v. U.S. Dep’t of Hous. & Urb. Dev.*, 436 F.2d 809, 816, 821–22 (3d Cir. 1970) (holding that the FHA requires HUD to affirmatively further fair housing by considering the racial and socioeconomic effects of its site selection decisions for public housing).

clause to the determination of the Secretary of HUD.<sup>71</sup> Interpreting the Act and subsequent executive orders, HUD places a number of affirmative duties on funding recipients. The primary requirement is that any federal or state agency receiving federal housing funds must analyze “impediments” to fair housing in their program and “take appropriate actions to overcome the effects of any impediments identified through that analysis.”<sup>72</sup> This most often affects local governments through participation in the Community Development Block Grant (“CDBG”) program, a common source of federal funding for the revitalization of low-income communities.<sup>73</sup> HUD’s Fair Housing Planning Guide provides local government CDBG recipients with requirements for the analysis of impediments as well as best practices for implementation of programs that actively reduce the barriers to fair housing.<sup>74</sup> After completing the analysis, each funding recipient must submit a written affirmation certifying that the program will affirmatively further fair housing.<sup>75</sup> Other requirements for certain HUD grants include development of five-year comprehensive housing affordability strategies and implementation plans.<sup>76</sup>

Despite steps taken to increase implementation of fair housing in the regulatory and administrative setting, today’s potential plaintiffs face significant problems enforcing the affirmatively furthering clause of section 3608. The first hurdle for a plaintiff is the issue of standing, because the FHA does not create a private enforcement provision to challenge the actions of HUD or funding recipients, for failing to meet their obligations under section 3608.<sup>77</sup> Private parties seeking to enforce section 3608 have turned to the Administrative Procedures

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71. 42 U.S.C. § 3608(a).

72. 24 C.F.R. § 91.225(a)(1) (2015).

73. See U.S. DEP’T OF HOUS. & URB. DEV., THE IMPACT OF CDBG SPENDING ON URBAN NEIGHBORHOODS (2002).

74. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, U.S. DEP’T OF HOUS. & URB. DEV., *Fair Housing Planning Guide* (1996), <http://www.hud.gov/offices/fheo/images/fhpg.pdf>.

75. *Id.*

76. 42 U.S.C. § 12705 (2012).

77. Rothstein & Whyte, *supra* note 59, at 10.

Act (“APA”),<sup>78</sup> 42 U.S.C. § 1983, and the False Claims Act (“FCA”)<sup>79</sup> for standing to enforce the mandate.<sup>80</sup>

In 1970, *Shannon v. U.S. Department of Housing and Urban Development* became the first appellate decision involving section 3608, establishing a private party’s right to challenge HUD’s actions under the affirmatively furthering mandate.<sup>81</sup> In *Shannon*, a group of local resident plaintiffs challenged HUD’s decision to fund a public housing project that they claimed would increase racial concentrations in that portion of Philadelphia.<sup>82</sup> The court held judicial review of agency’s compliance with section 3608 was available pursuant to the APA.<sup>83</sup> More importantly, *Shannon* set the tone for all future FHA litigation by establishing the proposition that the purpose of the FHA, specifically section 3608, was racial integration for the benefit of entire communities and not merely to prevent discrimination against individual minorities.<sup>84</sup> Other section 3608 cases also endorsed this proposition.<sup>85</sup>

These initial cases established a broad view of which aggrieved parties were within the “zone of interest” required for standing under the APA.<sup>86</sup> All plaintiffs must pass the threshold question for APA

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78. 42 U.S.C. § 1983 (2015).

79. 31 U.S.C. § 3729 (2015).

80. Rothstein & Whyte, *supra* note 59, at 10.

81. *Shannon*, 436 F.2d at 820.

82. *Id.* at 811–12.

83. *Id.* at 820.

84. *Shannon*, 436 F.2d at 816–17.

85. See, e.g., *Clients’ Council v. Pierce*, 711 F.2d 1406, 1425 (8th Cir. 1983); *Alschuler v. U.S. Dep’t of Hous. & Urb. Dev.*, 686 F.2d 472, 482 (7th Cir. 1982); *Jorman v. Veterans Admin.*, 579 F. Supp. 1407, 1418 (N.D. Ill. 1984); *Young v. Pierce*, 544 F. Supp. 1010, 1017-18 (E.D. Tex. 1982); *Schmidt v. Bos. Hous. Auth.*, 505 F. Supp. 988, 996-97 (D. Mass. 1981); *Blackshear Residents Org. v. Hous. Auth. of Austin*, 347 F. Supp. 1138, 1146 (W.D. Tex. 1972).

86. *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399–400 (1987) (“The ‘zone of interest’ test is a guide for deciding whether, in view of Congress’ evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to

suits: whether they are sufficiently aggrieved by agency action to gain standing.<sup>87</sup> The test for standing in this case is whether the interest they are claiming was harmed was an interest Congress intended to protect.<sup>88</sup> In *Shannon*, the Third Circuit held plaintiffs' interest in challenging discriminatory site selection for subsidized housing was within the "zone of interest" Congress intended to protect with the FHA.<sup>89</sup> The *Shannon* plaintiffs argued that a concentration of low rent public housing located in an area of minority "racial concentration" would have adverse social and planning consequences.<sup>90</sup> In its first FHA case, decided in 1972, the Supreme Court of the United States endorsed this broad purpose, finding Congress's intent was to replace racial ghettos with "truly integrated and balanced living patterns."<sup>91</sup>

Soon after *Shannon*, the Second Circuit further expanded the interpretation of section 3608's broad goal of racial integration.<sup>92</sup> In *Otero v. Park City Housing Authority*, minority families challenged the New York City Housing Authority's ("Authority") decision not to give displaced minority families first priority in leasing a HUD-funded affordable housing development.<sup>93</sup> The Authority based its decision on its duty under section 3608 to promote racial integration, and gave some white families priority in moving into the majority non-white area.<sup>94</sup> The Second Circuit upheld the Authority's position, stating that the Authority was obligated "to take affirmative steps to promote racial integration even though this may in some instances not operate to the immediate advantage of some non-white persons."<sup>95</sup>

Unfortunately for private proponents of the affirmatively furthering mandate, the APA provides few remedies, and then only

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permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.").

87. Administrative Procedure Act § 10, 5 U.S.C. § 702 (2015).

88. *Shannon*, 436 F.2d at 818.

89. *Id.* at 818.

90. *Id.* at 819.

91. *Trafficante*, 409 U.S. at 211.

92. *Otero*, 484 F.2d at 1124.

93. *Id.* at 1125–29.

94. *Id.*

95. *Id.* at 1124–25.

after highly deferential judicial review. First, the APA limits claims to review of federal agency action, providing no relief for state or local agency actions.<sup>96</sup> Even when reviewing a federal agency's actions, review is highly deferential and limited to enjoining actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."<sup>97</sup>

On its face, 42 U.S.C. § 1983 seems to fill the gap by creating a private cause of action directly against state and local housing agencies. Any agency accepting HUD funding is subject to the affirmatively furthering mandate, and § 1983 provides a wide spectrum of relief for the deprivation of any civil or constitutional rights, including monetary, punitive, injunctive, and declarative relief.<sup>98</sup> Unfortunately, recent case law has called into question the broad standing of private plaintiffs under § 1983.<sup>99</sup> The Supreme Court of the United States has recently held that private enforcement of federal funding provisions under § 1983 require an "unambiguously conferred right."<sup>100</sup> The vagueness of section 3608's affirmatively furthering mandate makes one question whether Congress unambiguously intended an individually enforceable right, especially considering the section's textual concern of controlling regulatory agencies. Recent courts have split on whether section 3608 is enforceable through § 1983.<sup>101</sup> As a result, at this time § 1983 is not a viable option for widespread private enforcement of the affirmatively furthering mandate.

Recently, *Anti-Discrimination Center of Metro New York, Inc. v. Westchester County* breathed new life into private enforcement of

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96. See 5 U.S.C. § 704 (1966).

97. 5 U.S.C. § 706(2)(a) (1966).

98. See 42 U.S.C. § 1983.

99. Rothstein & Whyte, *supra* note 59, at 11.

100. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 279–283 (2002) ("We made clear that unless Congress speak[s] with a clear voice, and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983.").

101. Compare *Wallace v. Chi. Hous. Auth.*, 298 F. Supp.2d 710, 714 (N.D. Ill. 2003) and *Langlois v. Abington Hous. Auth.*, 234 F. Supp.2d 33 (D. Mass. 2002) with *S. Middlesex Opportunity Council, Inc. v. Town of Framingham*, No. 07-12018-DPW, 2008 WL 4595369, at \*14–\*16 (D. Mass. Sept. 30, 2008) and *Thomas v. Butzen*, No. 04 C 5555, 2005 WL 2387676, at \*10 (N.D. Ill. Sept. 26, 2005).

section 3608.<sup>102</sup> In a novel legal move, a private advocacy organization, the Anti-Discrimination Center of Metro New York (“ADC”), sued Westchester County, an affluent predominately white suburb of New York City.<sup>103</sup> On behalf of a multi-government consortium, Westchester County obtained approximately \$50 million in federal CDBG funds from HUD between 2000 and 2006.<sup>104</sup> ADC sued under the FCA, a federal statute dating back to the Civil War, which authorizes private parties to bring *qui tam* suits in the name of the United States government against parties who have submitted false or fraudulent claims to the federal government for payment.<sup>105</sup> ADC alleged that Westchester County falsely certified to HUD that it conformed to the affirmatively furthering mandate during the challenged funding period.<sup>106</sup>

Successful FCA claims require showing that the fraud was knowingly committed.<sup>107</sup> Furthermore, the statute imposes a high evidentiary burden by requiring the enforcing party to rely on evidence not readily available to the public.<sup>108</sup> The ADC based its FCA claim on internal documents obtained through New York’s Freedom of Information Law.<sup>109</sup> Westchester County moved to dismiss, claiming the suit was barred due to ADC’s use of public information and claimed that the certifications were not fraudulent.<sup>110</sup> The court held that although the information was public, the documents were “not obtained from a source enumerated in the section 3730(e)(4)(A)

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102. U.S. *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., 668 F. Supp. 2d 548 (S.D.N.Y. 2009).

103. See Ford Fessenden, *County Sued Over Lack of Affordable Homes*, N.Y. TIMES (Feb. 4 2007), [http://www.nytimes.com/2007/02/04/nyregion/nyregionspecial2/04we.html?n=Top%2FReference%2FTimes%20Topics%2FSubject%2FHousing-&\\_r=0](http://www.nytimes.com/2007/02/04/nyregion/nyregionspecial2/04we.html?n=Top%2FReference%2FTimes%20Topics%2FSubject%2FHousing-&_r=0).

104. *Westchester*, 668 F. Supp. 2d at 550.

105. 31 U.S.C. §§ 3729(a), 3730(b)(1) (2009).

106. *Westchester*, 668 F. Supp. 2d at 561.

107. 31 U.S.C. § 3729.

108. 31 U.S.C. § 3730(e)(4).

109. Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s “Affirmatively Further” Mandate*, 100 KY. L.J. 125, 155 (2012).

110. *Id.* at 150.

jurisdictional bar [of the FCA].”<sup>111</sup> As a result, the United States Department of Justice intervened and negotiated a settlement agreement.<sup>112</sup> In the settlement, Westchester County was required to spend over \$51 million to create affordable housing units.<sup>113</sup> In such glaring instances of fraud, the FHA as written is helpful in bolstering a plaintiff’s case. However, plaintiffs utilizing the APA or 42 U.S.C. § 1983 would be able to leverage the ability to bring a disparate impact claim under the FHA. While HUD initially hailed the settlement as a “landmark civil rights settlement,” it has led to years of continued legal wrangling with little indication that Westchester County has taken any concrete steps to fully comply with the affirmatively furthering mandate.<sup>114</sup>

The post-*Westchester* changes to the FCA again leave proponents of the affirmatively furthering mandate disappointed. Future FCA claims will require true “whistleblower” information.<sup>115</sup> The statute’s requirement for an “original source” of information as a basis for a claim is unlikely to be overcome simply by analysis of publicly available data.<sup>116</sup> The other significant limitation of the FCA is that it bars claims against a State, limiting plaintiffs to claims against municipalities under the statute.<sup>117</sup> Short of a Congressional amendment creating a direct cause of action for private enforcement of section 3608, the future of enforcement of the affirmatively furthering mandate lies firmly in HUD’s hands. HUD’s Rule shows initiative to create forward momentum on this issue.<sup>118</sup>

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111. U.S. *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., 495 F. Supp. 2d 375, 383 (S.D.N.Y. 2007) (Subsequent to this ruling, 31 U.S.C. § 3730(e)(4)(A) was amended to preclude qui tam suits based on information obtained from public disclosure statutes.).

112. Stipulation and Order of Settlement and Dismissal, U.S. *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., 668 F. Supp. 2d 548 (S.D.N.Y. 2009), <http://www.westchesterhousingmonitor.org/files/Stipulation.pdf>.

113. *Id.*

114. Schwemm, *supra* note 109, at 160–63.

115. *Westchester*, 495 F. Supp. 2d at 379.

116. False Claims Act § 3730(e)(4), 31 U.S.C. § 3729 (2015).

117. 31 U.S.C. § 3729(a).

118. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43710.

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## II. Affirmatively Furthering Fair Housing Proposed Rule

The Proposed Rule “has come from necessity due to possible inefficiencies of the current system and uses various approaches to achieve its goal. This Article has framed the Proposed Rule in a more consumable form for purposes of evaluating its impact on the FHA. However, this Article does not purport to be a quick or all-inclusive guide to the Proposed Rule.

HUD created the Proposed Rule to correct the negative aspects of the current system used to assess compliance with section 3608 of the FHA and to provide guidance to communities, agencies, and individuals in fulfilling the FHA’s original promise of affirmatively furthering fair housing.<sup>119</sup> The Proposed Rule attempts to serve this purpose by aiding communities in their efforts to assess housing determinants or prioritize issues for response, and communities taking meaningful action to affirmatively further fair housing.<sup>120</sup> In order for the objectives of the Proposed Rule to be realized, the current state or process it is designed to improve must be understood. As such, Part II discusses the current process and the problems that plague it. After establishing the current state and process of the FHA, Section B will discuss the details concerning the Proposed Rule, including its purpose, goals, process, the changes being made, negative aspects, and the subsequent impact.

### A. Analysis of Impediments

The current process under which entities are evaluated for compliance with section 3608 of the FHA is called the Analysis of Impediments (“AI”). The AI is a review of both private and public sector impediments that must be conducted by entities prior to their

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119. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43710.

120. *Id.*

receipt of federal housing and community development funds.<sup>121</sup> The AI was to be used in affirmatively furthering fair housing by reviewing barriers, such as policies, practices, or procedures, which have the effect of creating a discriminatory housing environment.<sup>122</sup> HUD defines these barriers or “impediments” to fair housing choices as “any action, omission, or decision taken or that will have the effect of discrimination which restricts housing based on race, color, religion, sex, disability, familial status, [or] national origin.”<sup>123</sup> Additionally, the AI was to be used as a tool for essential community and business leaders (e.g. lenders, housing providers, policy makers, etc.) to better plan and implement actions to further fair housing.<sup>124</sup> Specifically, the AI was expected to target local laws, procedures, and practices, and assess its impact on the furthering access to fair housing.<sup>125</sup>

HUD’s suggested format for AI packages includes five general areas of coverage, with the expected introduction and executive summary at the forefront of the package.<sup>126</sup> Following the introduction and executive summary, HUD’s suggested format includes “jurisdictional background,” such as demographics, income levels, and similar dynamics unique to the jurisdiction.<sup>127</sup> The next suggested inclusion is an evaluation of the jurisdiction’s current state, such as compliance rates, complaints, acts that resulted in fines or suits filed by the United States Department of Justice.<sup>128</sup> One of the most important suggested sections calls for the identification of barriers or “impediments” to fair housing.<sup>129</sup>

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121. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, U.S. DEP’T OF HOUS. & URB. DEV., FAIR HOUSING PLANNING GUIDE VOL. 1, 2-7 (1996).

122. U.S. GOV’T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS’ FAIR HOUSING PLANS 5 (2010).

123. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 74, at 2-8.

124. U.S. GOV’T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 5.

125. *Id.*

126. *Id.* at 7.

127. *Id.*

128. *Id.*

129. *Id.*

According to HUD's Fair Housing Planning Guide,<sup>130</sup> data collected for the AI consists of "generic data items" that includes zoning and land use policies, tax assessment practices, patterns of public or /assisted housing, occupancy in section 8 housing,<sup>131</sup> the type and amount of fair housing complaints or suits, and lastly, data from the Home Mortgage Disclosure Act. Public policies and practices involving housing and housing-related activities are also considered data under the AI system.<sup>132</sup> Importantly, there is no requirement for participants to actually collect or create new data in order to complete the AI. The AI system is not inflexible and entities are afforded the discretion to use existing data in its AI package.<sup>133</sup> The codified rule mandates that participants "conduct an analysis to identify impediments to fair housing choice within the State, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard."<sup>134</sup> As such, entities may fall well within the current platform's requirements even when using established data from federal agency databases and studies, academic studies, private housing reports, and other creditable sources.<sup>135</sup>

Once entities obtain the necessary data and compile their AI reports, HUD encourages the entities to share the information with the public, government leaders, and other organizations that are also required to complete the AI.<sup>136</sup> It is important to note that AI's are normally not submitted to HUD for review or consideration.<sup>137</sup> Instead, HUD only receives an entity's summary of its AI and any

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130. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 74, at 1.

131. See generally U.S. DEP'T OF HOUS. & URB. DEV., HOUSING CHOICE VOUCHERS FACT SHEET, [http://Portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_in\\_dian\\_housing/programs/hcv/about/fact\\_sheet](http://Portal.hud.gov/hudportal/HUD?src=/program_offices/public_in_dian_housing/programs/hcv/about/fact_sheet) (Oct. 6, 2015, 8:00 PM) (describing the Housing Choice Voucher program [often referred to as § 8] as the "federal government's major program for assisting very low-income families, the elderly, and the disabled to afford decent, safe, and sanitary housing in the private market.").

132. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 74, at 2-9.

133. *Id.*

134. 24 C.F.R. § 91.325(a) (2015).

135. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 74, at 2-9.

136. *Id.* at 2-21.

137. *Id.* at 2-24.

accomplishment it may have achieved.<sup>138</sup> Under the AI process, HUD serves more as an overseer or administrator of the certification process, which requires completion of the AI for government funding.<sup>139</sup> HUD becomes more involved only after complaints or suggestions indicate that actions taken were inadequate.<sup>140</sup> Keeping with its administrative role and sparse involvement, under the AI process, HUD delegates the collection and dissemination of data, research, and information largely to the participants completing the AI.<sup>141</sup>

A report<sup>142</sup> prepared for Congress created by the United States Government Accountability Office (“GAO”) detailed many problems with the AI process, and ultimately served as a major catalyst for the creation of the Proposed Rule.<sup>143</sup> The GAO found the AI process to be ineffective and inefficient.<sup>144</sup> The negative aspects are present in the areas of supervision, administrative resources, and a general lack of clear direction.<sup>145</sup> One significant issue with the AI process is the way AIs are created by participants and treated by HUD. In its report, the GAO found that HUD fell short in regulating AIs in many aspects, including the frequency of updates and even the contents of the AI.<sup>146</sup> The GAO also found that HUD’s regulatory requirements pertaining to AIs are limited; particularly that there is no specific requirement for participants to submit AIs to HUD for review or approval.<sup>147</sup> Although HUD may require participants to submit information

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138. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 74, at 2–24.

139. U.S. GOV’T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122.

140. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 74, at 2–24.

141. *Id.*

142. U.S. GOV’T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122.

143. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43710.

144. U.S. GOV’T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 31.

145. *Id.* at 29–32.

146. U.S. GOV’T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 6.

147. *Id.* at 6.

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regarding activities that affirmatively further fair housing,<sup>148</sup> the lack of a mandate for the completion of an AI is yet another erosion of the effectiveness of the AI process. This is especially true when considering the GAO's reiteration that "the AI is a tool that is intended to serve as the basis for fair housing planning; provide essential information to policymakers, administrative staff, housing providers, lenders, and fair housing advocate[s]; and assist in building public support for fair housing efforts."<sup>149</sup>

Examining the participant's role in the AI process, the GAO has found participants to be equally responsible for eroding the effectiveness of the AI process by not adequately preparing AIs.<sup>150</sup> The GAO's evaluation discovered many participants did not complete or update their AI, or, where an AI was created, failed to provide adequate information.<sup>151</sup> For example, many of the AIs reviewed by the GAO that were considered "current" did not provide an expected timeframe for implementing proposed actions to mitigate the noted impediments, despite HUD's suggestion for inclusion of such timeframes.<sup>152</sup> Notably, HUD's unenforceable "suggestion" for the inclusion of timeframes did not amount to a mandate, even though, as stated by the GAO, the absence of timeframes reduces accountability and the ability to quantify progress.<sup>153</sup> Moreover, fifty-two of the sixty current AIs reviewed by the GAO lacked signatures of top elected officials, which may raise questions as to the support that elected officials are willing to provide in addressing issues hindering the requirement to affirmatively further fair housing.<sup>154</sup> Since HUD does not provide specific guidance as to the length of time that must lapse before an AI is considered outdated, the GAO, using HUD's general guidance and its own interviews, stipulates that an AI

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148. U.S. GOV'T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 17.

149. *Id.* at 6.

150. *Id.* at 5.

151. *Id.* at 15.

152. *Id.* at 18.

153. *Id.* at 9.

154. *Id.* at 20.

six or more years old should be deemed “outdated.”<sup>155</sup> Using six or more years as a benchmark, the GAO found that twenty-nine percent of AIs reviewed were outdated, and at least ten percent of the outdated AIs were over *twenty years* old.<sup>156</sup> Thus, many of these documents are not adequate tools for furthering the purpose of the FHA because current impediments are likely to go undocumented, unrealized, and thereby uncorrected.<sup>157</sup>

Administrative and enforcement issues are problematic and fall squarely on HUD.<sup>158</sup> The GAO found that HUD lacks the resources and faces competition with other priorities within its own organization, which negatively affects its capacity to review AIs and other fair housing related documents.<sup>159</sup> Moreover, the GAO reports that HUD has often failed to ask participants for their AI documentation during onsite visits.<sup>160</sup> This neglect in administrative oversight further erodes the effectiveness of the AI process, as studies have found that audits, specific investigations, visits, and a greater level of enforcement, would improve the AI process.<sup>161</sup> The GAO’s report noted a disturbing practice regarding HUD’s degree of enforcement. For instance, there are questions as to how many entities are receiving government funds without completing an AI.<sup>162</sup> Additionally, lack of HUD enforcement was evident when the GAO was unable to obtain reports from a number of participants, despite HUD’s requirement that all participants maintain AI records.<sup>163</sup> In addition to the lack of records and adequately completed AIs, a

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155. U.S. GOV’T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 10.

156. *Id.*

157. U.S. GOV’T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 10–11.

158. *Id.* at 22.

159. *Id.*

160. *Id.*

161. See Philip Tegeler, Megan Haberle, & Ebony Gayles, *Affirmatively Furthering Fair Housing in HUD Housing Programs: A First Term Report Card*, 22 J. AFFORDABLE HOUS. & CMTY. DEV. L. 27 (2013).

162. U.S. GOV’T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 14.

163. *Id.*

number of AI reports that were reviewed by the GAO lacked sufficient information and were packaged in a manner that left GAO officials unsure as to the document's status as an actual AI.<sup>164</sup> Examples of what the GAO obtained from participants that were tendered as AIs include: (1) a four-page survey of residents regarding fair housing issues;<sup>165</sup> (2) a two-page document that included only two sentences describing a fair housing impediment, with the remainder of the document discussing the progress of "implementing a local statute pertaining to community preservation"<sup>166</sup>; and (3) a four-page document describing the community, and no information regarding impediments or corrective actions.<sup>167</sup>

### B. Purpose, Goals and Overview of the Proposed Rule

The Proposed Rule generally seeks to further the legislative intent of the FHA by using fair housing strategies and actions in addition to planning.<sup>168</sup> Key principles of the FHA consist of overcoming themes of segregation, suppressed choice, and the lack of inclusive communities.<sup>169</sup> The Proposed Rule has the potential to be a response to inefficient and inadequate administrative support, and an overall process that lacks the essential oversight needed to attain the legislative intent of the FHA.<sup>170</sup> Similar to the AI process, the Proposed Rule focuses on fair housing planning.<sup>171</sup> However, the Proposed Rule presents a new take on planning, which furthers its broader purpose of improving the manner in which participants meet

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164. U.S. GOV'T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 14.

165. *Id.*

166. *Id.*

167. *Id.* at 15.

168. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43729.

169. *Id.* at 43710.

170. *See supra* Section I.

171. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43713 ("...this proposed rule is intended in particular to improve fair housing planning by more directly linking it to housing and community development planning processes currently undertaken by program participants as a condition of their receipt of HUD funds.").

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the requirements imposed by HUD to affirmatively further fair housing and improve fair housing choices for all people.<sup>172</sup>

In addition to improving the process, the Proposed Rule aims to provide in-depth data and resources to aid participants and “increase compliance and fewer instances of litigation.”<sup>173</sup> The four goals of the Proposed Rule, as observed through the data collected by HUD are: (1) reducing segregation, (2) eliminating racially and ethnically concentrated areas of poverty, (3) narrowing the gaps that result in protected classes having severe housing problems, and (4) reducing disparities in access to critical neighborhood assets.<sup>174</sup>

In order to fully comprehend the potential impact of the Proposed Rule’s goal of reducing disparities in access to critical neighborhood assets, it is imperative to provide background information. This will provide a more robust understanding of the characteristics of neighborhoods, which strike at the core of individuals’ livelihoods and bear on a range of outcomes.<sup>175</sup> Notably, HUD focuses its collection of data on six “dimensions,” that consist of: (1) neighborhood school proficiency, (2) poverty, (3) labor market engagement, (4) job accessibility, (5) health hazard exposure, and (6) transit access.<sup>176</sup> The rationale and history resulting in the need for these “dimensions” are based on what has been called “environmental segregation” or “environmental racism.”<sup>177</sup> The concept of environmental segregation provides that a greater percentage of localities that tend to have the worst environmental aspects tend to be occupied or slated for communities whereby a greater part of the population are minorities.<sup>178</sup> What makes up these environmental aspects has long been debated, but often seen “environmental aspects” generally consist of pollution,

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172. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43710, 43716-29.

173. *Id.* at 43712.

174. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, U.S. DEP’T OF HOUS. & URB. DEV., AFFIRMATIVELY FURTHERING FAIR HOUSING, REGULATORY IMPACT ANALYSIS 7 (2013), <http://www.regulations.gov/#!docketDetail;D=HUD-2013-0066>.

175. *Id.* at 4.

176. *Id.* at 4-5.

177. Prakash, *supra* note 41, at 1456.

178. *Id.* at 1455-56.

zoning, or quality of available municipal services.<sup>179</sup> HUD admits that the environmental aspects that further environmental segregation are not limited to the six dimensions on which HUD will procure data.<sup>180</sup> HUD notes that crime, housing unit lead, and radon levels are aspects or dimensions as well.<sup>181</sup> However, HUD has opted not to gather data on these dimensions due to inconsistency in the data, and instead “encourages program participants to supplement the [required] data ... with robust locally available data on these other assets and stressors....”<sup>182</sup>

The Proposed Rule aims to make a number of changes that include: (1) HUD providing uniform data for participants to use in their respective Assessments of Fair Housing (hereinafter “AFH”); (2) the adoption of a fair housing assessment and planning tool (the AFH) to replace the current AI;<sup>183</sup> (3) better direction regarding the purpose of the AFH and how it will be assessed; (4) a new HUD review procedure; and (5) a greater link between the AFH and participant planning that occurs as a result of the AFH.<sup>184</sup> The Proposed Rule will implement a new process that succinctly fits into what can be classified as four progressive courses of action (hereinafter “COA”), whereby subsequent COA’s are not only a progression of the prior COA, but rely on the effectiveness, usefulness, and quality of the prior COA.

*First COA: HUD Provides Data to Program Participants.* The first COA proposes a stark change from the AI process. Currently, participants utilize their own resources to acquire data to identify impediments in fair housing choices within its respective jurisdictions.<sup>185</sup> As a result, HUD has found that participants often rely on third party consultants to acquire the necessary data.<sup>186</sup> Under

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179. Prakash, *supra* note 41, at 1455.

180. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, U.S. DEP’T OF HOUS. & URB. DEV., AFFIRMATIVELY FURTHERING FAIR HOUSING, DATA DOCUMENTATION 5 (2013).

181. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 180.

182. *Id.*

183. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43714.

184. *Id.*

185. *Id.* at 43710, 43713.

186. *Id.*

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the Proposed Rule, HUD would take over the researching and gathering role, and provide national and local data of impediments to participants.<sup>187</sup> By providing the data to program participants, HUD expects a reduction in the burdens previously imposed on participants, thereby allowing participants to better perform under the AFH.<sup>188</sup>

*Second COA: HUD Program Participants Evaluate Data of Impediments.* The second COA requires program participants, using the data provided by HUD in the first COA, to evaluate and note patterns of segregation, integration, and disparities in neighborhoods.<sup>189</sup>

*Third COA: HUD Program Participants Develop and Submit AFH Assessment.* The third COA requires program participants use the information interpreted from the data provided by HUD, information gathered from its own evaluations, and concerns arising from the data, in order to complete and submit an AFH to HUD.<sup>190</sup>

*Fourth COA: HUD Reviews the AFH Submitted by the Program Participant.* Once HUD receives the AFH from program participants, they are required to review it using new standards pursuant to the Proposed Rule.<sup>191</sup> If HUD approves the AFH, the program participants are required to inform the program in which the entity participates.<sup>192</sup> If the AFH is not approved, then HUD will inform the program participant why its AFH was not accepted, as well as explain the remedial actions that are required, and in some cases, HUD may assist the program participant in implementing those remedial measures.<sup>193</sup>

### C. Authority for the Proposed Rule

The Proposed Rule finds its authority and purpose broadly in

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187. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43715.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

Title VIII of the Civil Rights Act of 1968 (also known as the FHA).<sup>194</sup> The 90th Congress firmly established its intent in codifying the FHA through its plain proclamation that “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”<sup>195</sup> Keeping within its intent, the FHA mandates broad prohibitions on discriminatory acts related to housing.<sup>196</sup> The Administration section of the FHA also gives the Proposed Rule its authority, declaring that “[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any federal agency having regulatory or supervisory authority over financial institutions) in a manner *affirmatively to further* the purposes of this subchapter and shall cooperate with the HUD Secretary to further such purposes.”<sup>197</sup>

Additionally, an Executive Order in 1994 vested the Secretary of HUD with the power to ensure applicable governmental departments and agencies operate in a manner that furthers the purpose of the FHA.<sup>198</sup> Both the legislative and executive branches established a duty for agencies and participants to further the purpose of the FHA. In addition to executive and legislative influence, the judiciary has also weighed in,<sup>199</sup> and through its interpretation has reiterated the significance of acting in a manner that furthers the FHA. With intent and interpretation clear, the policy of acting in a manner that furthers the purpose of the FHA is soundly grounded.

Rulemaking allows agencies to regulate activities that fall within its reach.<sup>200</sup> In order for an agency to make rules, it must be granted authority by Congress.<sup>201</sup> The need to enact rules may arise directly

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194. 42 U.S.C. §§ 3601–3619 (2015).

195. 42 U.S.C. § 3601 (2015).

196. 42 U.S.C. §§ 3603–3607 (2015).

197. 42 U.S.C. § 3608(d) (2015) (emphasis added).

198. Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 20, 1994).

199. See *Otero*, 484 F.2d 1122 (finding the Housing Authority was “under an obligation to act affirmatively to achieve integration in housing. The source of that duty is both constitutional and statutory.”).

200. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

201. Maeve P. Carey, LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE 2

from a legislative mandate, or new developments,<sup>202</sup> interest groups, requests from other agencies, problems affecting society that fall under the agency's authority, directives, problems with the subject agencies current policies, and a number of other influencers.<sup>203</sup> Generally, participation in the rulemaking process involves not only the proposing agency, but often times the public, other agencies, the executive branch, and at times the legislative branch. Agencies may publish an Advance Notice of Proposed Rulemaking in the Federal Register, which serves as an invitation for the public to assist in formulating and improving the draft proposed rule.<sup>204</sup> Additionally, proposed rules serve as notice to the public of an agency's plans to resolve a problem and/or change its goals.<sup>205</sup> Prior to the actual proposed rule being published in the Federal Register, where any member of the public may comment, the executive branch (particularly the President of the United States) and the Office of Information and Regulatory Affairs (hereinafter "OIRA") are afforded the opportunity to review the rule.<sup>206</sup> The President and OIRA are more likely to review the proposed rule when it raises significant policy issues, that is, when it has significant economic effects.<sup>207</sup>

Once the proposed rule is open for public comments, the public has a predetermined amount of time to submit comments, often 30 to 60 days, or longer periods for more complicated proposed rules.<sup>208</sup> After the comment period has ended, the agency, having determined that its proposed rule would actually accomplish the goals it set out, developed a proposed final rule.<sup>209</sup> Similar to the draft proposed rule,

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(2013), <https://www.hsd1.org/?view&did=739691>.

202. New developments may include the need for corrective actions due to the rise of unexpected or unintended events. For example, a rule may be enacted in order to close a loophole in a governmental program.

203. NAT'L ARCHIVES & RECORDS ADMIN., OFF. FED. REG., A GUIDE TO THE RULE MAKING PROCESS 2 (2011), [https://www.federalregister.gov/uploads/2011/01/the\\_rule\\_making\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rule_making_process.pdf).

204. *Id.* at 4.

205. *Id.*

206. *Id.* at 3.

207. *Id.*

208. *Id.* at 5.

209. *Id.* at 204.

the President and OIRA are afforded an opportunity to review the draft final rule.<sup>210</sup> The next and final step involves publishing the final rule with an effective date.<sup>211</sup>

#### D. Distinguishing the Proposed Rule from AI

The Proposed Rule aims to enact about 42 amendments or additions, most of which are minor changes. The amendments fall within sections 5, 91, 92, 570, 574, and 903 of Title 24 of the Code of Federal Regulations (hereinafter "C.F.R."), with the majority of the changes concentrated within section 91, the Consolidated Submissions for Community Planning and Development Programs section. Not all of the Proposed Rule amendments are negligible. The Proposed Rule includes significant amendments to a number of sections, such as section 5(A). In this section the Proposed Rule adds sections 5.150-164. Particularly worth noting is section 5.154, which establishes the AFH requirement that will replace the current AI.<sup>212</sup> Under the Proposed Rule, HUD program participants must develop the AFH using the information and data provided by HUD.<sup>213</sup> This is a noteworthy change from the AI process. Under the AI system, the participants use "significant staff and other resources to complete [the AI] without adequately informing subsequent planning and action."<sup>214</sup>

Another noteworthy addition is section 5.158, which requires the involvement of the community via participation and coordination in creating the AFH.<sup>215</sup> Furthermore, section 5.162 creates the presumption that an AFH is valid after 60 days of its receipt by HUD.<sup>216</sup> This presumption is overcome by written notice from HUD informing the participant that the AFH was not accepted and the reason why it was not accepted.<sup>217</sup> In an addition to the

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210. NAT'L ARCHIVES & RECORDS ADMIN., *supra* note 203, at 7.

211. *Id.*

212. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43717.

213. *Id.*

214. *Id.* at 43719.

215. *Id.*

216. *Id.* Reg at 43717.

217. *Id.*

creation of new sections, the Proposed Rule implements significant amendments. For example, paragraph (a)(2) of section 570.601 was amended to explicitly specify that fair housing planning include taking “meaningful actions” to further the items identified in the AFH.<sup>218</sup> For a breakdown of the changes to be enacted by the Proposed Rule, see the “Affirmatively Furthering Fair Housing Proposed Rule Changes” table.<sup>219</sup>

With the intent of assisting communities and developing a strategy to further the policy of the FHA, the Proposed Rule shifts the burden of data collection from the participant to HUD, or specifically

218. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43723.

219. *See id.*

Affirmatively Furthering Fair Housing Proposed Rule Changes			
§	Type	§	Type
5.150	New	91.415	Amendment
5.152	New	91.420	Amendment
5.154	New	91.425	Amendment
5.156	New	91.505	Amendment
5.158	New		
5.160	New	92.104	Amendment
5.162	New	92.508	Amendment
5.164	New		
5.166	New	570.3	Amendment
		570.441	Amendment
91.5	Amendment	570.480	Amendment
91.100	Amendment	570.486	Amendment
91.105	Amendment	570.490	Amendment
91.110	Amendment	570.506	Amendment
91.115	Amendment	570.60	Amendment
91.215	Amendment		
91.220	Amendment	574.530	Amendment
91.225	Amendment		
91.230	Amendment	576.500	Amendment
91.235	Amendment		
91.315	Amendment	903.2	Amendment
91.320	Amendment	903.7	Amendment
91.325	Amendment		

to HUD's Office of Policy Development and Research.<sup>220</sup> HUD will use nationally uniform sources, supplemented by local and regional information, to gather data in order to provide more uniform and accurate information.<sup>221</sup> HUD expects the data collected to largely reflect five broad areas in which participants are required to address in their AFH.<sup>222</sup> The areas of focus consist of: (1) geographic, (2) racially/ethnically concentrated areas of poverty, (3) disparity in access to community assets, (4) segregation, and (5) disproportional housing needs.<sup>223</sup> By gathering such data, it is apparent that the Proposed Rule seeks to address the cost imposed on society by the adverse effects of environmental segregation on public health.

HUD's AFFH Data Documentation draft<sup>224</sup> provides a precise breakdown of the areas of data collected, calculations, formulas, and other measures used to create the "data" that will be subsequently provided to participants.

*Geographical/Demographic Data:* One area of data collection is that of demographics, though HUD couches it more broadly as geographic information.<sup>225</sup> HUD intends to use nationally uniform sources such as census data,<sup>226</sup> which will serve as the primary source for demographic/geographic information. However, as a supplement to the census data, there may also be limited use of information from the American Community Survey.<sup>227</sup> These sources of information will be used to gather data on race, ethnicity, and poverty in the subject communities.<sup>228</sup> Unfortunately, HUD has not provided specific details regarding the use or purpose of the demographic data, separate from its use as a foundational supplement to other data

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220. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43717.

221. *Id.*

222. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 1.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

collected.<sup>229</sup> Nevertheless, even without further guidance, the gathering of demographical data may nonetheless serve a purpose as standalone information for participants.

*Racially/Ethnically-Concentrated Areas of Poverty:* HUD intends to provide participants with information regarding whether areas within its jurisdiction may be considered Racially/Ethnically-Concentrated Areas of Poverty, or “RCAPs/ECAPs” as coined by HUD.<sup>230</sup> HUD uses a two-part test to determine whether a locality should be deemed a RCAP/ECAP. The first part of the test involves a simple threshold: “RCAP/ECAPs must have a non-white population of 50 percent or more.”<sup>231</sup> The second part of the test is similarly straightforward, requiring the lesser of either a poverty rate that is higher than forty percent of the Federal Poverty Rate, or a poverty rate that is three times the average tract poverty rate for the metro/micro area.<sup>232</sup>

A thorough examination of RCAP/ECAP determination results in the realization that the racial/ethnic threshold test is pinned to “non-white” individuals. It is true that many of the Nation’s impoverished areas are made-up of non-whites,<sup>233</sup> however this threshold test runs the risk of excluding the poor white population. One may argue that the data point being gathered is for “racially/ethnically-concentrated” areas and therefore excluding poor whites is not a major issue, or is to be expected. Nonetheless, we know that poor whites may face the same injustices that the FHA is designed to eliminate. Unfortunately until the law is finalized and fully enforced, we will not know whether the failure to consider poor whites will have any impact on achieving the FHA’s purpose.

*Disproportionate Housing Needs:* As defined by HUD,

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229. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43710.

230. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 1.

231. *Id.*

232. *Id.*

233. Algernon Austin, *African Americans are Still Concentrated in Neighborhoods with High Poverty and Still Lack Full Access to Decent Housing*, ECON. POL’Y INST. (July 22, 2013), <http://www.epi.org/publication/african-americans-concentrated-neighborhoods/>.

“disproportionate housing needs” refers to “a circumstance when the members of a racial or ethnic group within an income level experience housing problems at least 10 percentage points more frequently than the entire population within the same income level.”<sup>234</sup> Data regarding “disproportionate housing needs” will be customized for HUD’s purposes by the United States Census Bureau, and be obtained through the Comprehensive Housing Affordability Strategy data.<sup>235</sup> The data will attempt to capture the extent of housing issues for low-income households in a particular area.<sup>236</sup>

*Community Asset Indicators:* HUD intends to provide participants with data regarding the degree in which a community offers “important community assets” and the degree to which groups of people have access to such assets.<sup>237</sup> Important community assets are social services that help facilitate a good quality of life, including quality of schools, job centers, and transit.<sup>238</sup> Specifically, HUD will focus on six areas that have been shown to have a significant bearing on community assets, including proximity to environmental health hazards, job accessibility, poverty, school quality, labor market engagement (e.g., job centers), and transit access.<sup>239</sup> Regarding the collection of data for the six specific areas, HUD intends to use school-level data from state examinations to determine the quality of schools.<sup>240</sup> Although job accessibility and transit access may appear to positively correlate, HUD’s data regarding these two areas are not necessarily interrelated and are based upon different factors. Job accessibility is based upon a locale’s distance from small, medium, and large employment centers, with larger employment centers carrying more weight.<sup>241</sup> Whereas transit access is based upon data gathered from the General Transit Feed Specification (hereinafter

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234. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 1.

235. *Id.* at 9.

236. *Id.*

237. *Id.* at 4.

238. *Id.*

239. *Id.* at 4–5.

240. *Id.* at 5.

241. *Id.* at 6.

“GTFS”) exchanges to determine the distance between rail and bus stops.<sup>242</sup> Regarding poverty, HUD will continue its trend of using established data, and use the percentage of households that receive cash-welfare, and the family poverty rate to develop the reported poverty data.<sup>243</sup> Health hazard exposures will be based upon information from the Environmental Protection Agency, and it is expected that labor market engagement will be based upon the unemployment rate, labor force participation rate, and education level of the individuals in the subject locale.<sup>244</sup> Although HUD proposes to offer a wide breadth of information, it has also included restraints to its data collection and reporting, limiting its collection of information to data that is “closely linked to neighborhood geographies and could be measured consistently at smaller levels across the country.”<sup>245</sup>

*Segregation:* To analyze segregation and provide appropriate data to participants, HUD intends to use different indices to measure this highly dimensional category.<sup>246</sup> For instance, HUD plans to use a dissimilarity index and isolation index in combination with predicted values based on racial/ethnic minority shares for a particular jurisdiction.<sup>247</sup>

### III. A Critique of the Proposed Rule

Despite the GOA’s scathing review of the current AI process, the Regulatory Impact Analysis indicates that the Proposed Rule does little to change the course of present cost and administrative inefficiencies.<sup>248</sup> As a result, success of attaining the goals of the FHA appear to rest solely on the structure of the Proposed Rule, because it

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242. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 6.

243. *Id.* at 7.

244. *Id.* at 6.

245. *Id.* at 5.

246. *Id.* at 2.

247. *Id.* at 2–3.

248. *Id.* at 10–11.

is unlikely the government will be able to point to an ancillary result (e.g., saving local governments money or instituting a more efficient process), and claim a success. In short, if the Proposed Rule fails to provide substantive assistance, it could be as inefficient and complicated as AI. Notable areas of concern include: (1) costs to federal government and participants, (2) administrative burden, and (3) uncertainty of impact.<sup>249</sup>

### A. Cost to Federal Government and Participants

HUD expects there to be an implementation cost of \$3 million to \$9 million dollars—a cost HUD qualifies as “marginal.”<sup>250</sup> Aside from implementation costs, HUD does not expect an increase in compliance costs.<sup>251</sup> HUD grounds its expectations on the belief that cost increases will affect only a few areas of the compliance process, which will be offset by reductions in cost in other areas.<sup>252</sup> Although HUD expects only marginal cost differences, HUD also concedes “the demands of the new process may result in a net increase of administrative burden for non-compliant entities....”<sup>253</sup> HUD’s concession is echoed and broadened by the National Association of Housing and Redevelopment Officials (“NAHRO”), which boasts a commanding 3,100 agencies, whose members manage over 970,000 public housing units.<sup>254</sup> NAHRO has found that the “proposed rule adds substantial administrative burden and cost [to Public Housing Authorities] without providing incremental resources.”<sup>255</sup> Although the NAHRO’s interests may be harmed by the Proposed Rule, the issues

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249. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 9–18.

250. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 180, at 9.

251. *Id.* at 9.

252. *Id.*

253. *Id.* at 10.

254. Tamar Greenspan, National Association of Housing and Redevelopment Officials, Comment Letter On Affirmatively Furthering Housing Proposed Rule (2013), <http://www.nahro.org/sites/default/files/searchable/NAHRO%20AFFH%20Comments.pdf>.

255. *Id.*

raised by the group are nonetheless legitimate. Additionally, though the NAHRO does not outline specific sources of the “substantial administrative burden,” one only need look to the Proposed Rule itself. As detailed in what will be codified as 24 C.F.R. § 5.156, participants will still be required to analyze and address local fair housing issues that affect housing within its jurisdiction *in addition to* being “encouraged” to perform regional assessments.<sup>256</sup> Moreover, the Proposed Rule will create 24 C.F.R. § 5.158, which requires participants to involve the community in their plans.<sup>257</sup> Minor “encouragements” and requirements proposed by HUD appear to entail minimal additional effort on their own, but their cumulative impact may support NAHRO’s claim. While there appears to be conflicting expectations between HUD, local governments, and local participants, it is unknown whether the Proposed Rule possesses issues regarding the federal government. For instance, the Proposed Rule does not provide details regarding the cost that the federal government may incur as a result of implementing or operating under the provisions of the Proposed Rule.

## B. Administrative Issues

Since participants are currently required to create plans and reports for certification, HUD does not anticipate that the Proposed Rule will drastically affect the time participants expend creating reports.<sup>258</sup> However, and importantly, HUD expects a negative impact on its own staff.<sup>259</sup> There is no indication in the Proposed Rule that there will be an increase in HUD’s workforce. At first glance this may appear to be a good cost-saving point, however, the idea of not increasing HUD’s resources, monetarily or in human capital, is contrary to what one would expect when considering the new burdens that the Proposed Rule will place on HUD. This

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256. *Affirmatively Furthering Fair Housing*, 78 Fed. Reg. at 43719.

257. *Id.*

258. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174.

259. *Id.* at 9.

administrative shortcoming is even acknowledged by HUD, which states:

The regulation [the Proposed Rule] would place additional burden on HUD staff. HUD must not only review and approve the AFH, but assist program participants in identifying and analyzing elements and factors that drive or maintain disparity in fair housing choice, and in developing strategies to overcome such disparity. Much of the additional effort on the part of HUD staff is likely to be the result of increasing review activity that is not currently performed.<sup>260</sup>

The NAHRO has also commented that HUD does not have the staff capacity to properly monitor and oversee the requirements contained within the Proposed Rule.<sup>261</sup> Administrative shortcomings are not a new concern, however, and the GAO's report to Congress references HUD officials when it states that "staffing constraints will undermine officials' oversight capacity and ability to implement corrective measures."<sup>262</sup> Additionally, the Proposed Rule does not put forth information regarding competing demands on HUD's staff—another area of concern reported by the GAO.<sup>263</sup> In the GAO's report, the AI was viewed as a "low priority" due to "competing demands and limited resources."<sup>264</sup> Thus, it can be deduced that the Proposed Rule will likely result in HUD performing a greater share of administrative duties, in conjunction with providing extensive data to participants. However, HUD has not commented on any increase in human resources to assist with these increased responsibilities and there is no indication that HUD has addressed these issues as a preliminary matter.

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260. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 12.

261. Tamar Greenspan, *supra* note 254.

262. U.S. GOV'T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 25.

263. *Id.*

264. *Id.*

### C. Uncertainty of Impact

It would be difficult to find any regulation, or modification to a regulation, that includes definite and accurate outcomes prior to the regulation's release. Therefore, it is unsurprising that HUD is unable to provide definite assurances regarding the future impact of the Proposed Rule. As HUD has indicated, it is difficult to "predict how a jurisdiction would use the information [data provided by HUD], what decisions they would reach, and precisely how those decisions would affect the protected classes."<sup>265</sup> What is disheartening about HUD's efforts is the amount of uncertainty throughout the Proposed Rule's new process. Although HUD does not specifically address this issue, there is uncertainty regarding the quality of data that HUD will obtain given HUD's administrative environment,<sup>266</sup> which provides the foundation of the Proposed Rule and furtherance of the FHA's policies.

Aside from foundational uncertainty, there is still some insecurity about the effect that the Proposed Rule will have on the FHA's overall goals. Take for instance fair housing prioritization within jurisdictions. HUD recognizes that the data it provides local jurisdictions may confirm and support what the jurisdiction already knows, or contrarily, may prove informing.<sup>267</sup> Regardless of the relevancy or novelty of the data, there is still uncertainty with respect to how a jurisdiction sets its goals or policies in response to the data – again assuming the data is adequate.<sup>268</sup> In line with this admission, HUD has also found uncertainty in predicting "the exact policy choices that [a] jurisdiction will make and the impact that the jurisdiction's choice will have on furthering the intent of the FHA."<sup>269</sup> Will response to the data result in resident opposition,

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265. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 12.

266. U.S. GOV'T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 22.

267. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43712.

268. U.S. GOV'T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 16.

269. *Id.* at 17–18.

preventing the local jurisdiction from taking certain action in their particular neighborhood, or as coined by HUD, “NIMBYism” (Not in my backyard)?<sup>270</sup>

HUD has outlined a number of uncertainties impacting four broad “steps” in its process. The steps outlined for purposes of reconciling uncertainties includes: (1) HUD providing data, (2) jurisdictions prioritizing actions in response to the data, (3) policy decisions of jurisdictions, and (4) the extent of the improvements/actions by the jurisdiction.<sup>271</sup> HUD has not specified any uncertainties within the first step.<sup>272</sup> Under step two, the prioritization of jurisdictions, HUD has outlined at least three uncertainties (one being the competing legitimate interests among various policies).<sup>273</sup> In step three, HUD identified the participants’ available resources as an uncertainty that may impact the Proposed Rule’s effectiveness.<sup>274</sup> In the final step, HUD recognized the extent of improvement as an uncertainty, and elaborated that the extent of any improvement in a jurisdiction will depend on a number of factors such as, individual family choices, policies of nearby jurisdictions, and choices of private and nonprofit actors.<sup>275</sup>

The uncertainties of the Proposed Rule appear plentiful, nonetheless, these uncertainties are arguably no more numerous than any other regulation that purports to amend and create new requirements. The two areas of concern for purposes of this Article include—quality of data and usability of the data—are both areas in which HUD has not provided a large amount of information. These uncertainties go directly to the issue of whether the Proposed Rule will truly further the FHA’s intent.

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270. U.S. GOV’T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 17.

271. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 13.

272. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174.

273. *Id.*

274. *Id.*

275. *Id.*

#### D. HUD's Interpretation of the Impact of the Proposed Rule

Notwithstanding the acknowledged uncertainties, HUD believes a number of benefits associated with the Proposed Rule may be realized. One such benefit is that of clarity.<sup>276</sup> HUD hopes that the Proposed Rule will convey the agency's goals to participants in a manner that is clearer than those conveyed in the AI process.<sup>277</sup> HUD also expects more "focus[ed] participant attention and decision making" as an ancillary benefit from increased clarity and better understanding of HUD's goals.<sup>278</sup> Moreover, HUD anticipates that the Proposed Rule will "provide greater resources" for participants to use, which HUD hopes will result in greater compliance amongst its participants and reduce litigation.<sup>279</sup> HUD also suggests that the collection of data, as prescribed by the Proposed Rule, may reduce "logistical barriers."<sup>280</sup>

The benefits that HUD largely addresses with the Proposed Rule relate to the process of compliance and planning.<sup>281</sup> However, HUD has not opined as to whether the Proposed Rule will create or recognize a benefit at the core of the matter, which is to affirmatively further fair housing. HUD has not directly related how the increases in data will affirmatively further fair housing. For instance, HUD states, "through this rule, HUD commits to provide states, local governments ... [and] the general public with local and regional data ... [and as a result] program participants should be better able to evaluate their present environment to assess fair housing

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276. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 1.

277. *Id.*

278. *Id.*

279. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43712.

280. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 2.

281. See Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43712 (stating "HUD is confident, however, that the rule will create a process that allows for each jurisdiction to not only undertake meaningful fair each jurisdiction to not only undertake meaningful fair housing planning, but to have capacity and a well-considered strategy to implement actions to affirmatively further fair housing").

issues . . . .”<sup>282</sup> In addition to assisting in the creation of plans to correct identified issues—assuming the data will be accurate and adequate—the Proposed Rule has great potential to provide victims of discriminatory housing practices with a legal remedy and increase their likelihood of success in prevailing when claiming a violation of section 3608 of the FHA.

However, HUD has not explicitly addressed this benefit in the Proposed Rule. HUD’s concession that the Proposed Rule will increase the administrative burden, on its already limited staff, decreases the likelihood of success for the Proposed Rule as it pertains to HUD’s general purpose of the rule that will “refine existing requirements . . . .”<sup>283</sup> Moreover, until housing discrimination victims test the new resources (e.g., the HUD-provided data) in pursuit of a viable legal remedy, there is no way to determine the true value of the data and its impact on the pursuit of fair housing.

#### **IV. Integrating the Proposed Rule into Housing Integration**

HUD has stated the four goals of the Proposed Rule: (1) reducing segregation, (2) eliminating racially and ethnically concentrated areas of poverty, (3) narrowing the gaps that result in protected classes experiencing severe housing problems, and (4) reducing disparities in access to critical neighborhood assets.<sup>284</sup> As previously discussed in Part III of this Article, HUD also restricts its predictions about the benefits of the Proposed Rule to administrative issues. Although these technical factors will benefit the landscape of fair housing, HUD has not elaborated on the Proposed Rule’s potential to create a path for individual plaintiffs to successfully bring a claim under section 3608 of the FHA. The Proposed Rule has the high likelihood of making this benefit a reality for three distinct reasons.

First, the Proposed Rule supports the contention that the scope of the FHA is not limited to cases directly in the category of housing.

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282. *Affirmatively Furthering Fair Housing*, 78 Fed. Reg. at 43712.

283. *Id.*

284. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 7.

This is the most significant benefit of the FHA that is left unexplored by the Proposed Rule. Plaintiffs bringing non-housing cases have found little success under section 3608 of the FHA because many courts have ruled that issues outside of the housing purview are also outside of the intent of the FHA.<sup>285</sup> However, the Proposed Rule has the explicit goal of reducing disparities in access to critical neighborhood assets in affirmatively furthering fair housing.<sup>286</sup> The neighborhood assets, as described earlier in this Article, range from employment, healthy environments, and transit access (none of which are “housing,” but all of which affect housing). This objective has the potential to increase the number of plaintiffs’ positive outcomes and the prevalence of non-housing cases brought under the FHA.

Secondly, the data that will be collected and synthesized pursuant to the Proposed Rule will assist plaintiffs in making the requisite prima facie case for disparate impact when bringing a claim under section 3608. The ability to prevail in a disparate impact claim often turns on the availability of reliable statistics to prove one has been discriminated against since there is an absence of evidence of intent to do the same.<sup>287</sup> The Proposed Rule would increase this data significantly. Finally, the Proposed Rule incorporates the concerns and issues of private individuals in its reformation of evaluating compliance with the “affirmatively furthering mandate.”

The remainder of this Article will detail these three benefits of the FHA beginning with how the Proposed Rule illustrates the broad intent of the FHA, leading then to the notion that cases with primary issues other than housing discrimination (non-housing cases) should

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285. See *Jersey Heights Neighborhood Ass’n v. Glendening*, 174 F.3d 180 (4th Cir. 1999); *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 254 F. Supp. 2d 486 (D.N.J. 2003); *Laramore v. Ill. Sports Facilities Auth.*, 722 F. Supp. 443 (N.D.Ill. 1989); *Mackey v. Nationwide Ins. Companies*, 724 F.2d 419 (4th Cir. 1984); *Southend Neighborhood Imp. Ass’n v. Cnty. of St. Clair*, 743 F.2d 1207 (7th Cir. 1984); *Edwards v. Johnston Cnty. Health Dep’t*, 885 F.2d 1215 (4th Cir. 1989).

286. *Affirmatively Furthering Fair Housing*, 78 Fed. Reg. at 43715.

287. See *Mountain Side Mobile Estates P’ship v. Sec’y of Hous. & Urb. Dev.*, 56 F.3d 1243, 1252 (10th Cir. 1995) (stating “[f]or purposes of this opinion, we shall assume . . . that a Title VIII plaintiff may establish a prima facie case of discriminatory impact by proof of national statistics relative to U.S. households as presented here.”).

be heard under the Act. For purposes of this article, non-housing cases are those lawsuits that allege discrimination by a defendant that affects residents of a protected class in a neighborhood, but does not directly affect the ability of those resident to live where they desire. The Proposed Rule's goal of reducing disparities in access to critical neighborhood assets stresses the importance of situating the fairness of housing within the broader context of neighborhood amenities and stressors. The Proposed Rule is premised on a foundation that is contrary to the framework used by the majority of the courts who opine on these cases. As illustrated by the Proposed Rule, HUD interprets the FHA broadly and believes that the theories plaintiffs often use as the premise of their non-housing cases are central to the goal of the Act.<sup>288</sup> However, courts rarely find in favor of a plaintiff who brings a non-housing case under the FHA<sup>289</sup>

The remainder of Part IV explains why it may be advantageous for a plaintiff to bring a non-housing discrimination claim under the FHA. Then, it will provide an overview of significant non-housing cases that have been brought under the FHA, with a focus on why the courts often find that these types of cases fail to state a cognizable claim under the Act. As these cases are typically brought under section 3604, the analysis is concentrated in that portion of the FHA. The author then argues that the Proposed Rule, which focuses on section 3608, takes a view contrary to the court when examining the relevancy of non-housing arguments to the FHA. The Proposed Rule will also assist a plaintiff bringing a disparate impact claim under the FHA with constructing his or her prima facie case, because it will provide increased data.<sup>290</sup> This suggests that non-housing cases may have a higher likelihood of success if they are brought under section 3608 of the FHA.

It may seem counterintuitive to seek a remedy for a non-housing issue under the FHA; however, the FHA is arguably more

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288. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43714.

289. See, e.g., *Jersey Heights*, 174 F.3d 180.

290. "[T]he provision of nationally uniform data that will be the predicate for and help frame program participants' assessment activities . . ." Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43714.

advantageous when compared to other nondiscrimination laws and statutes. The FHA has a strong civil rights administrative enforcement scheme,<sup>291</sup> and permits the bringing of disparate impact claims in addition to claims of discriminatory intent.<sup>292</sup> Another aspect of the FHA that plaintiffs find attractive is that while some laws require that the defendant receive federal funding, under the FHA, a claim may be filed against a defendant that receives funds from HUD, whether directly or via pass-throughs from a HUD grantee.<sup>293</sup>

All federal circuit courts that have analyzed the cognizance of disparate impact in this context have found that the intent of the FHA was to allow disparate impact claims<sup>294</sup> in addition to discriminatory intent claims.<sup>295</sup> Although disparate impact allows plaintiffs to bring a claim without providing evidence of discriminatory intent,<sup>296</sup> the burden of proving disparate impact under the FHA can be insurmountable. While there is no normative framework across the court system that dictates how to best make a prima facie disparate

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291. Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1348–49 (2012).

292. 42 U.S.C. § 3604(c) (2015).

293. See Austin W. King, Note, *Affirmatively Further: Reviving the Fair Housing Act's Integrationist Purpose*, 88 N.Y.U. L. REV. 2182 (2013) (“The statute places the same burden on ‘[a]ll executive departments and agencies’ in carrying out housing programs. To receive HUD grants, grantees must agree to affirmatively further fair housing. If HUD knows that a grantee has violated the requirement, it is required under 42 U.S.C. § 3805(d)(5) to seek compliance and even compel it through withdrawal of funds. The reach of AFFH is extraordinary: Every state and virtually every urban and suburban county and major municipality (collectively, ‘entitlement communities’) accepts HUD funds. Further, when states and counties pass funds to non-entitlement communities, the grantee is responsible for the sub-grantee’s compliance.”); see also Jonathan J. Sheffield, Jr., *At Forty-five Years Old the Obligation to Affirmatively Further Fair Housing Gets a Face-lift, but Will it Integrate America’s Cities?*, SOC. JUST., Paper 52 (2013), [http://ecommons.luc.edu/cgi/viewcontent.cgi?article=1051&context=social\\_justice](http://ecommons.luc.edu/cgi/viewcontent.cgi?article=1051&context=social_justice); see also Rothstein & Whyte, *supra* note 59, at 70.

294. See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW 48 (Bureau of National Affairs, Inc., 1983) (citing the same language in sections 3604(b), 3605, and 3631(a), and similar language in sections 3606 and 3617). See also *Inclusive Communities Project*, 135 S. Ct. 2507 (2015).

295. Seichshnaydre, *supra* note 66, at n.2.

296. 42 U.S.C. § 3608(d).

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impact case, using statistics to show disproportionate adverse effects is generally persuasive.<sup>297</sup> Part V of this Article explores in greater detail the positive impact that the Proposed Rule can have on this aspect of the FHA's burden-shifting framework.

The FHA's flexibility with respect to viable defendants and the cognizance of disparate impact claims are significant reasons as to why a plaintiff with a civil rights discrimination case, only tangentially related to the housing context, may want to bring a claim under the Act. However, all plaintiffs must still show a connection between the type of discrimination they are alleging and the type of discrimination the FHA intends to prohibit.<sup>298</sup> For example, a plaintiff claiming that a county is not affirmatively furthering fair housing, as evidenced by the county's reduction in public transportation services in underserved neighborhoods, must prove a nexus between transportation and the creation of truly integrated living patterns, as well as a general increase in fair housing opportunities for protected classes. Evidence proving this nexus requires the collection and synthesis of information evidencing the disparity.<sup>299</sup> This Article goes on to detail the problems with data collection under the FHA's current AI system. The Proposed Rule not only explicitly recognizes the connection among housing and other socioeconomic factors, but also contends that this connection was contemplated at the time of the FHA's enactment.<sup>300</sup> The Proposed Rule will also enhance the quantity and quality of data that is available for a plaintiff to use in her construction of a prima facie disparate impact claim.<sup>301</sup>

### A. Non-Housing Cases Under the FHA: The Current State

The Proposed Rule recognizes the correlation between housing

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297. Seichshnaydre, *supra* note 66, at n.2.

297. *Westchester*, 668 F. Supp. 2d 548.

298. *Inclusive Communities Project*, 135 S. Ct. at 2523 (finding that "[a] plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact.>").

299. *Inclusive Communities Project*, 135 S. Ct. at 2523.

300. *Affirmatively Furthering Fair Housing*, 78 Fed. Reg. at 43712.

301. *Id.* at 43715.

and housing proximity to other important community assets, such as hospitals, job centers, transportation, green space and schools.<sup>302</sup> HUD's requirement that funding recipients collect data on these elements as part of evidencing that they have satisfied their obligation to affirmatively further fair housing is indicative of HUD's broader interpretation of the FHA.<sup>303</sup> This more inclusive reading of the FHA is important because it will help achieve "truly integrated living patterns," which is what the FHA intended to do, but has yet to accomplish.<sup>304</sup> The Proposed Rule will be more successful in facilitating this endeavor because acknowledging that policies outside of the realm of direct housing discrimination create and maintain segregated living provides an opportunity to address those policies using the FHA.

The Proposed Rule strengthens the connection between housing and other non-housing socioeconomic elements such as environmental conditions, schools, social services, parks, and transportation systems.<sup>305</sup> This is significant because the vast majority of plaintiffs alleging discrimination in these non-housing contexts have failed to prevail under the FHA in large part because the courts have deemed these elements are too far removed from housing.<sup>306</sup> In creating this substantive connection, the Proposed Rule not only lays down a foundation for bringing these types of cases under section 3608 of the FHA, but also increases the likelihood that these cases will succeed. This is because "affirmatively furthering" is more clearly defined and more inclusive of characteristics that are inherently linked to housing.

The following information provides details on the success of bringing claims under the FHA in instances relevant to this Article. A plaintiff has a forty-two-percent likelihood<sup>307</sup> of proving defendant

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302. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43714–15.

303. *Id.* at 43711.

304. Sheffield, *supra* note 293.

305. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43711.

306. See *Jersey Heights*, 174 F.3d at 192 (finding a challenge to the highway site selection process "too remotely related to the housing interests that are protected by the Fair Housing Act").

307. Seichshnaydre, *supra* note 66, at 392–402.

liability under the FHA in cases where minority groups are excluded from living in areas that are underpopulated by the same groups or in cases where housing structures with mostly minority residents are concentrated in neighborhoods that have a high presence of these groups.<sup>308</sup> In *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, the Seventh Circuit held that housing exclusion cases are the primary focus of section 3604.<sup>309</sup> The court stated that, “[section] 3604(a) applied to the problem of exclusion.”<sup>310</sup> The remainder of Part IV.A. will examine cases brought under the FHA, in which regulations and plans arguably affect housing—protected under the FHA—but are not directly related to it. Plaintiffs seeking remedies for injury incurred from these “non-housing” cases have a lesser likelihood of success.<sup>311</sup> These losses can largely be attributed to a belief held by many courts: these cases are not within the scope of the FHA.<sup>312</sup> Courts in many of these non-housing cases have narrowly construed the purpose of the FHA, with the sentiment reflecting that, “[section] 3604(a) does not reach every event that might conceivably affect the availability of housing.”<sup>313</sup>

In *Jersey Heights Neighborhood Ass'n v. Glendenning*,<sup>314</sup> African-American landowners claimed that the construction of a new highway violated section 3604 of the FHA.<sup>315</sup> The plaintiffs contended that the highway would create a northern boundary, precluding housing expansion in that direction.<sup>316</sup> The plaintiffs argued that they

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308. Seichshnaydre categorizes these and similar cases as “housing barrier” regulations. Seichshnaydre, *supra* note 66, at 14–15.

309. *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 329 (2004).

310. Prakash, *supra* note 41, at 1437.

311. Prakash, *supra* note 41.

312. *Jersey Heights*, 174 F.3d at 192.

313. *Id.*

314. *Id.* at 180.

315. “[The plaintiffs asserted] claims against state and federal agencies and officials under the Federal-Aid Highway Act, the National Environmental Policy Act, Title VI of the Civil Rights Act of 1964, the Fair Housing Act, and the Maryland Environmental Policy Act, as well as the Equal Protection Clause and 42 U.S.C. §§ 1983 and 1985.” *Id.* at 183–84.

316. *Id.* at 192.

had been excluded from the planning process of the highway, because white residents who were affected by the proposed construction received individual notice of public hearings, while African-American residents who were similarly situated did not receive such notice.<sup>317</sup> It was their contention that in selecting the particular location for the highway, sections 3604(a) and 3604(b) were violated.<sup>318</sup> Interestingly, the *Jersey Heights* court interpreted the spirit of section 3604 as solely prohibiting discrimination, and not providing a positive right.<sup>319</sup> The court reached this conclusion by applying reasoning similar to that of the court in *Lindsey v. Normet*,<sup>320</sup> a decision that focused on statutory interpretation.<sup>321</sup>

The *Jersey Heights* court held that the plaintiffs failed to state a claim under the FHA because government agencies did not refuse to make dwellings available based on race to individuals of color by electing to situate the highway bypass at the edge of the neighborhood in a predominantly African-American neighborhood.<sup>322</sup> At the time of the decision, the city of Jersey Heights was ninety-nine percent African American, as a result of displacement from the siting of other highway and discriminatory real estate practices.<sup>323</sup> Since the residents were not barred from living in areas outside of where the highway was located, the court did not believe this created the type of housing barrier that the FHA, specifically section 3604(a), was intended to prevent.<sup>324</sup> The opinion emphasized that highway siting decisions are not related to housing, and are therefore beyond the scope of the FHA.<sup>325</sup> The court found that the statute explicitly states that the prohibition on discrimination is not limited strictly to housing, but also prohibits “the terms, conditions, or privileges of sale or rental of a dwelling, or . . . the provision of services or facilities in

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317. *Jersey Heights*, 174 F.3d at 195.

318. *Id.* at 192.

319. *Id.* at 191.

320. 405 U.S. 56, 74 (1972).

321. *Jersey Heights*, 174 F.3d at 191.

322. *Id.* at 193.

323. *Id.* at 194 (King, J., concurring); see Sheffield, *supra* note 293, at n. 169.

324. *Id.* at 192–93.

325. *Id.* at 192.

connection therewith.”<sup>326</sup> The plaintiffs argued that the highway siting decision fell into the latter clause as a “housing-related service.”<sup>327</sup> However, the court stated, “[B]ecause this challenge to the highway site selection process is too remotely related to the housing interests that are protected by the Fair Housing Act, we affirm the district court’s dismissal of this count of the complaint for failure to state a claim under the statute.”<sup>328</sup>

The court in *Laramore v. Illinois Sports Facilities Authority* also decided against classifying the siting of a stadium as a housing-related service for reasons similar to that of the *Jersey Heights* court.<sup>329</sup> The *Laramore* court found that it was likely that housing-related services within the scope of the FHA included police protection, fire protection and garbage collection, but decisions on where to locate a sports stadium are not within the purview of section 3604(b) of the FHA.<sup>330</sup>

Similarly, the court in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*<sup>331</sup> ruled that plaintiffs failed to state a claim under the FHA when the plaintiffs alleged that the granting of an air permit for the operation of a cement grinding facility in a predominantly African-American neighborhood amounted to constructive eviction.<sup>332</sup> The plaintiffs argued that the operation of this facility diminished the quality and quantity of housing in the Waterfront South neighborhood where it would be

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326. *Jersey Heights*, 174 F.3d at 192 (stating that 42 U.S.C. § 3604(b) extends to housing and housing-related services).

327. *Id.* at 192–93.

328. *Id.* (stating that 42 U.S.C. § 3604(b) extends to housing and housing-related services).

329. *Laramore v. Ill. Sports Facilities Auth.*, 722 F. Supp. 443, 452 (N.D.Ill., 1989); *Edwards v. Media Borough Council*, 430 F. Supp. 2d 445, 452–53 (E.D. Pa. 2006) (recognizing that § 3604(b) may cover police and fire protection, garbage collection, and similar municipal services, but rejecting the present claim based on defendant’s denial of a zoning variance for plaintiff’s property on the ground that this is instead “a discretionary decision comparable to administering city-owned properties or deciding where to site a highway, conduct that is not covered under § 3604(b)”).

330. *Laramore*, 722 F. Supp at 452.

331. *S. Camden Citizens in Action*, 254 F. Supp. 2d at 486.

332. *Id.* at 500.

located.<sup>333</sup> They challenged the legality of the city of Camden's pattern of siting industrial facilities that expelled high rates of environmental hazards in low-income and minority neighborhoods.<sup>334</sup> Despite the adverse health and quality of life consequences of these pollutants on housing value, the plaintiffs did not prevail.<sup>335</sup> The court cautioned against "warping [section 3604] into plenary review" and "extending the plain language of [the statute] to any official decision that has an indirect effect on the availability of housing."<sup>336</sup> Environmental hazards cases are not the only type of non-housing cases that have found little success under the FHA.<sup>337</sup>

The *South Camden* court believed that the question at issue was, "Does [the defendant] provide a service to [the plaintiff] in a manner contemplated by the Fair Housing Act?"<sup>338</sup> The court concluded that the cement-grinding permit was too indirectly tied to housing to be cognizable under section 3604(a).<sup>339</sup> Like *Laramore* and *Jersey Heights*, the court here placed this issue in a group consisting of issues that have an effect on residents in a neighborhood, but were too far removed from housing to be within the intent of the FHA.<sup>340</sup> The court distinguished these services from those that were "specific residential services" that provide "door-to-door ministrations."<sup>341</sup>

Locations of highways, roadways, stadiums and industrial facilities all affect the "economic competitiveness and quality of life" that the Proposed Rule seeks to enhance.<sup>342</sup> Residents who live near highways experience adverse health consequences at disproportionately

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333. *S. Camden Citizens in Action*, 254 F. Supp. 2d at 492.

334. Prakash, *supra* note 41, at nn. 253–257.

335. *Id.* at n.258.

336. *Id.* at n.260.

337. *Id.* at n.273.

338. *S. Camden Citizens in Action*, 254 F. Supp. 2d at 499.

339. *Id.* at 500; *see* *Reste Realty Corp. v. Cooper*, 251 A.2d 268 (N.J. 1969) ("The general rule is, of course, that a tenant's right to claim a constructive eviction will be lost if he does not vacate the premises within a reasonable time after the right comes into existence.").

340. *S. Camden Citizens in Action*, 254 F. Supp. 2d at 502.

341. *Id.* at 503.

342. EPA, *Near-Source Air Pollution Research*, <http://www2.epa.gov/air-research/near-source-air-pollution-research> (last visited Oct. 25, 2015).

higher rates than those who do not.<sup>343</sup> Car emissions are responsible for as many as fifty percent of cancers caused by air pollution,<sup>344</sup> and noise pollution increases the risk of hearing impairment.<sup>345</sup> In the case of *Jersey Heights*, the highway prevented neighbors from reaching community assets.<sup>346</sup> Neighborhoods located in and around stadiums are plagued by disproportionately high concentrations of health hazards.<sup>347</sup> The concrete parking lots that usually consume large areas of square footage can cause runoff filled with pollutants that puddle into the water supply of the surrounding neighborhoods.<sup>348</sup> In addition to contamination, this increases instances of flooding.<sup>349</sup> The days when the stadium is full brings increased traffic to the area, resulting in health hazards that accompany numerous vehicles and their emissions.<sup>350</sup> When there is a dearth of stadium visitors, the large parking lots, which could be used for economic development, take up space and prohibit the siting of neighborhood amenities.<sup>351</sup> Residing in close proximity to any of these elements results in a lower property value for homeowners and has negative implications for the economic progress of a community.<sup>352</sup> Yet, the issue of sports stadium location

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343. See TEGAN K. BOEHMER ET AL., CENTERS FOR DISEASE CONTROL & PREVENTION, RESIDENTIAL PROXIMITY TO MAJOR HIGHWAYS-UNITED STATES, 2010 (2013).

344. *The Harmful Effects of Vehicle Exhaust*, ENVIRONMENT & HUMAN HEALTH, INC., <http://www.ehhi.org/reports/exhaust/summary.shtml> (last visited Oct. 17, 2015).

345. Meg Selig, *What Did You Say?! How Noise Pollution is Harming You*, PSYCHOL. TODAY (Sept. 25, 2013), <https://www.psychologytoday.com/blog/changepower/2013/09/what-did-you-say-how-noise-pollution-is-harming-you>.

346. *Jersey Heights*, 174 F.3d at 192-94.

347. *Id.*

348. See U.S. ENVTL. PROT. AGENCY, URBAN NONPOINT FACT SHEET: CLEAN WATER IS EVERYBODY'S BUSINESS (2003), [http://water.epa.gov/polwaste/nps/urban\\_facts.cfm](http://water.epa.gov/polwaste/nps/urban_facts.cfm).

349. *Id.*

350. See *Green Sports and Transportation: The Elephant in the Room*, U. OF PENN.: KNOWLEDGE@WHARTON (Dec. 13, 2013), <http://knowledge.wharton.upenn.edu/article/green-sports-transportation-elephant-room/>.

351. Pat Garafolo & Travis Waldron, *If You Build It, They Might Not Come: The Risky Economics of Sports Stadiums*, ATLANTIC (Sept. 7, 2012), <http://www.theatlantic.com/business/archive/2012/09/if-you-build-it-they-might-not-come-the-risky-economics-of-sports-stadiums/260900/>.

352. See Anita Wright, *Costs Far Outweigh Any Perceived Benefits of Stadium*, COLORADOAN (Nov. 22, 2012), <http://archive.coloradoan.com/article/20121122/OPIN>

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was found to be outside of the scope of the FHA.<sup>353</sup>

As described above, courts are rarely convinced that the subject matter of non-housing cases are closely related to housing to warrant relief under the FHA. These courts emphasized that the Act was meant to be limited to specific fair housing problems, rather than encompass discriminatory acts resulting from any activity effecting residents in a neighborhood. Despite the United States Supreme Court's broad reading of the FHA,<sup>354</sup> these narrow holdings have precluded many plaintiffs from recovering for injuries that have affected their residential property, which has obstructed the FHA's goal of creating "truly integrated communities."<sup>355</sup>

In contrast, the court in *Campbell v. City of Berwyn* did find a non-housing case cognizable under Section 3604(b).<sup>356</sup> In *Campbell*, an African-American family moved into a predominantly white neighborhood and experienced racially motivated attacks on their home.<sup>357</sup> The defendants provided twenty-four-hour police protection to the family, but then terminated this protection after a couple of weeks and replaced it with video surveillance.<sup>358</sup> As in *Southend*, the *Campbell* court concluded that section 3604(b) "applie[d] to services generally provided by governmental units such as police and fire protection or garbage collection."<sup>359</sup>

The court in *Campbell* also concluded that plaintiffs failed to state a claim under section 3604(a) because the police protection did not create a barrier to housing, but rather affected an interest in property that was already owned by the plaintiffs.<sup>360</sup> This court acknowledged the guidance provided in *Southend*.<sup>361</sup>

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ION04/311220031/Costs-far-outweigh-any-perceived-benefits-stadium.

353. *Laramore*, 722 F. Supp. at 452.

354. Prakash, *supra* note 41, at n.262.

355. *Id.* at n.269.

356. *Campbell v. City of Berwyn*, 815 F. Supp. 1138, 1144 (N.D.Ill.1993); *see also S. Camden Citizens in Action*, 254 F. Supp. 2d at 502.

357. *Campbell*, 815 F. Supp. at 1140.

358. *Id.* at 1142.

359. *Id.* (quoting *Southend*, 743 F.2d at 1210.).

360. *Id.* at 1145.

361. *Id.* at 1143. ("With respect to their Section 3604(a) claim, plaintiffs must allege

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## Part V: Taking the Proposed Rule Beyond Non-Housing

Pursuant to the Proposed Rule, HUD's position is that there is a connection among neighborhood assets, neighborhood stressors, and housing.<sup>362</sup> The author posits that the measuring the existence of these socioeconomic factors in the AFH proves that HUD interprets the intent of the FHA to be extensive. Specifically, that access to fair housing opportunities means that protected classes also have access to critical neighborhood assets. The Proposed Rule intends to incorporate fair housing planning into development and other policies and practices that "influence how communities and regions grown and develop."<sup>363</sup> Including the measurement of non-housing elements as the litmus test for determining whether an entity is affirmatively furthering fair housing aligns with a framework that includes truly integrated living patterns as a quality of life that extends beyond one's residence. In order to facilitate a non-housing claim under section 3608, it is imperative that the United States Congress eradicate the judiciary's misinterpretation of the intent of the FHA as shown by their reluctance to find in favor of plaintiffs bringing disparate impact claims and the refusal to allow private rights of action under section 3608.

### A. The Proposed Rule and Disparate Impact Claims

Despite the recognition that the FHA permits not only discriminatory intent claims, but also disparate impact claims, courts have been conservative in providing relief for plaintiffs under the disparate impact theory, for fear of reaching beyond the scope

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that defendants' discriminatory actions, or the discriminatory effects of such actions, affect the availability of housing to them. See *Southend*, 743 F.2d at 1210. Such actions must have a direct impact on plaintiffs' ability, as potential homebuyers or renters, to locate in a particular area or to secure housing. *Id.* In *Southend*, plaintiffs argued, *inter alia*, that in predominately black areas, where the County held tax deeds, the County did not comply with its statutory obligation to maintain its properties." *Id.*)

362. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43725.

363. *Id.* at 43711.

established by Congress.<sup>364</sup> Seichshnaydre's data shows that fewer than twenty percent of plaintiffs prevailed in their FHA disparate impact claims on appeal.<sup>365</sup> In addition to reinforcing that the intent of the FHA be interpreted broadly, the Proposed Rule provides assistance to plaintiffs attempting to prove a prima facie case in a disparate impact claim brought under section 3604 of the FHA.<sup>366</sup> This first step in the three-part, burden-shifting framework of these claims is often successfully accomplished by using statistics to show that an act or policy has a discriminatory impact on a protected class.<sup>367</sup> The lack of data has proven a deciding factor in denying plaintiffs' relief in many FHA disparate impact cases.<sup>368</sup> The Proposed Rule will increase the availability of data that can be used in proving various aspects of a prima facie case (the increased information on access to critical neighborhood assets being the most significant one for purposes of non-housing cases).<sup>369</sup>

The essence of the Proposed Rule is increasing the amount and utility of data related to housing and the segregation and integration of residential neighborhoods<sup>370</sup>—the shortcomings of the AI that were extensively examined by the GAO and detailed in Part II.A. of this Article.

## **B. The Proposed Rule and a Private Right of Action**

The Proposed Rule also suggests that permitting a private right of action under section 3608 supports the intent of the FHA, as it is incongruent to prohibit a private right of action under section 3608 while using the elements that consider an individual's quality of life to measure the effectiveness of the same section.<sup>371</sup>

Private enforcement mechanisms have been instrumental in

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364. Seichshnaydre, *supra* note 66, at n.94.

365. *Id.* at n.222.

366. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43727.

367. *Id.*

368. Seichshnaydre, *supra* note 66, at 207, nn.994–99; *but see id.* at 209–211.

369. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43727.

370. *Id.* at 43715.

371. *Id.*

bringing about the minimal racial desegregation that has occurred,<sup>372</sup> but unfortunately there is no private right of action under section 3608. HUD has only accepted claims under section 3608 of the FHA when they also allege additional discrimination claims.<sup>373</sup> Therefore, as previously discussed in Part I.B., a plaintiff must file suit under the APA, 42 U.S.C § 1983, or the FCA.<sup>374</sup> One case in recent years found in favor of a plaintiff who brought a claim under the FCA and section 3608 of the FHA. The court in *Westchester* found that the county did not meet its obligation to affirmatively further fair housing in conformance with its acceptance of over HUD funding in the form of \$52 million in Community Development Block Grant funds.<sup>375</sup> This predominantly white county failed to mention race in its AI from 2000-2006.<sup>376</sup> As stated in Part I.B. of this Article, despite the glaring defiance of the affirmatively furthering mandate, Westchester County has still not fully complied with the settlement in this case. If it were not such an anomaly for a private individual to successfully bring a claim under section 3608, perhaps compliance would not be so easy to evade.

The Proposed Rule is tailored to benefit private actors as well as public actors. HUD states that one goal of the Proposed Rule is to “provide relevant civil rights information to the community and other private and public sector stakeholders.”<sup>377</sup> HUD aims to make the goal of affirmatively further fair housing more participatory.<sup>378</sup> The Proposed Rule has the objective of bringing members of protected classes into the decision-making process regarding the use of the data collected.<sup>379</sup> The Proposed Rule also requires that program participants incorporate community participation in the AFH.<sup>380</sup> Despite the aforementioned references to be more inclusive of individuals, there is

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372. Rothstein and Whyte, *supra* note 59, at n.91.

373. Sheffield, *supra* note 293, at 94–95.

374. *Id.* at 49, 305.

375. King, *supra* note 293, at n.91.

376. *Westchester*, 668 F. Supp.2d at 558.

377. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43711.

378. *Id.*

379. *Id.* at 43715.

380. *Id.*

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no private right of action under section 3608 of the FHA.

The *Westchester* court stated:

At a minimum, when a grantee certifies that the grant will be ‘conducted and administered’ in conformity with the Civil Rights Act of 1964 and the Fair Housing Act, and certifies that it ‘will affirmatively further fair housing,’ the grantee must consider the existence and impact of race discrimination on housing opportunities and choice in its jurisdiction. In identifying impediments to fair housing choice, it must consider impediments erected by race discrimination, and if such impediments exist, it must take appropriate action to overcome the effects of those impediments.<sup>381</sup>

A significant impediment to fair housing choice has been the denial of individuals’ right to bring a private cause of action alleging infringement of that choice. Challenges to this barrier will find support for their arguments in the Proposed Rule.

## Conclusion

According to floor debates in the Senate leading up to the enactment of the FHA, the underlying policy behind Title VIII is to encourage the dispersion of urban ghettos and to create more integrated neighborhoods.<sup>382</sup> However, nearly fifty years later, that

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381. *Westchester*, 668 F. Supp. 2d at 566.

382. See 114 Cong. Rec. 2985 (1968) (statement of Sen. Proxmire) (noting that Title VIII will establish “a policy of dispersal through open housing . . . look[ing] to the eventual dissolution of the ghetto and the construction of low to moderate income housing in the suburbs.”); see also Stanley P. Stocker-Edwards, *Black Housing 1860–1980: The Development, Perpetuation, and Attempts to Eradicate the Dual Housing Market in America*, 5 HARV. BLACKLETTER L.J. 50 (1989). Senator Walter Mondale stated that Title VIII represents “an absolutely essential first step” toward reversing the pattern of “two separate Americas constantly at war with one another.” 114 Cong. Rec. 2274 (1968). See also *id.* at 2524 (Statement of Sen. Brooks) (“Discrimination in the sale and rental of housing has been the root cause of the widespread patterns of de facto segregation which characterize America’s residential neighborhoods.”).

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intention has not been fully realized. A neighborhood is more than a collection of houses. Where you live can dictate where you work, where your children go to school, and how healthy you are. Failing to incorporate these factors in the preeminent law intended to affirmatively further fair housing indicates a failure to understand the holistic composition of the very neighborhoods that the Act aims to integrate.

The Proposed Rule presents an opportunity to breathe new life into words that have had sentimental meaning, but lacked the gravitas needed to create measurable changes in laws that overtly or covertly disproportionately bar minorities from resources needed to attain a higher quality of life. HUD has focused on creating a technical roadmap for their fund recipients and others beholden to the mandates of section 3608. HUD is hopeful that this will result in a decrease in litigation, and an increase in administrative relief and efficiency that evaded the AI process. Without trivializing the importance of these benefits, the most promising benefit of the Proposed Rule is its return to the reason the FHA was enacted. Explicitly acknowledging that affirmatively furthering fair housing requires data showing the proximity of protected classes to not only housing, but also health, employment, education, and transportation amenities, recognizes the intent of the Act as not limited to the purchase, sale, rental, and siting of housing units. It follows that policies related to these non-housing elements must be challenged if they do not comply with the mandates of the Act.

Historically, this logic has been interrupted by courts' perception that the reach of the FHA does not extend beyond traditional notions of housing discrimination. Plaintiffs asserting that the siting of environmental hazards, inadequate police protection, and other neighborhood stressors in their predominantly African-American neighborhoods were not successful in claiming state activities that created such policies violated the FHA. With this Proposed Rule, the intent of the FHA can be aligned with the reality of living patterns to affirmatively further fair housing.

In accordance with the legislative intent that can be gleaned from congressional records, the United States Supreme Court has held that

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Title VIII should be afforded a “generous construction.”<sup>383</sup> The Proposed Rule opens the door for non-housing cases to be brought under section 3608. This will increase the likelihood that a plaintiff bringing a disparate impact claim can successfully meet the burden of presenting a prima facie case, since it will make available data supporting that unintentional acts that have disproportionately negative effects on protected classes. Individuals wishing to bring a private right of action under section 3608 are supported by the inclusion of individual rights in the language of the Proposed Rule. Honoring the generous construction that the 90th Congress intended begins with acknowledging that the strength of the Proposed Rule extends beyond data collection and technical assistance. Leveraging these strengths through legal recourse is the true path to creating integrated neighborhoods.

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383. *Trafficante*, 409 U.S. at 212.