

# Segregation Autopilot: How the Government Perpetuates Segregation and How to Stop It

“Nearly everything the Government touches turns to segregation, and the Government touches nearly everything.” —Senator Edward Brooke, 1968

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*ABSTRACT: Housing segregation is a defining feature of the American landscape. Scholars have thoroughly documented the government’s historic collusion in segregating people by race. But far from correcting its reprehensible past, the government continues to perpetuate housing segregation today. As if on autopilot, its spending and regulatory activities routinely reinforce housing segregation. Not only is this immoral and bad policy, it is against the law. The government has a statutory duty to conduct its business in a manner that reduces housing segregation. This duty arises from a unique civil rights directive passed by Congress over fifty years ago in the Fair Housing Act of 1968. The “affirmatively furthering fair housing” (“AFFH”) mandate imposes an overlooked and under-enforced obligation on every federal agency—not just HUD—to take affirmative steps to reduce segregation. This article explores new ground by looking beyond HUD to expose how agencies across the government sustain housing segregation, then proposes an administrative law framework to counteract the government’s segregative influence.*

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## I. INTRODUCTION

The United States government is not a neutral bystander to housing segregation.<sup>1</sup> Although its segregative influence is not as evident today, its contemporary activities produce the same outcome as the past: “hyper-segregated” metropolitan regions plagued by race-based zip-code disparities.<sup>2</sup>

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1. I use “segregation” to refer to housing segregation. On its relationship to school segregation, see generally Philip Tegeler & Michael Hilton, *Disrupting the Reciprocal Relationship Between Housing and School Segregation*, in *A SHARED FUTURE: FOSTERING COMMUNITIES OF INCLUSION IN AN ERA OF INEQUALITY* 436 (Christopher Herbert, Jonathan Spader, Jennifer Molinsky & Shannon Rieger eds., 2018), [https://www.jchs.harvard.edu/sites/default/files/A%20Shared%20Future\\_Final\\_102918.pdf](https://www.jchs.harvard.edu/sites/default/files/A%20Shared%20Future_Final_102918.pdf) [<https://perma.cc/65V4-UVMQ>]. For a parallel analysis of how the federal government has subsidized and perpetuated school segregation, see generally Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847 (2018).

As I make clear below, “integration” strategies can only partially ameliorate place-based inequality. See Heather R. Abraham, *Fair Housing’s Third Act: American Tragedy or Triumph?*, 39 YALE L. & POL’Y REV. 1, 4 n.3 (2020) (acknowledging how legal structures and lack of political will constrain segregation reduction and proposing pragmatic policymaking to achieve the equitable distribution of resources across neighborhoods). For critiques of integration, see generally SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* (2004); and *THE INTEGRATION DEBATE: COMPETING FUTURES FOR AMERICAN CITIES* (Chester Hartman & Gregory D. Squires eds., 2010).

2. See, e.g., RICHARD H. SANDER, YANA A. KUCHEVA & JONATHAN M. ZASLOFF, *MOVING TOWARD INTEGRATION: THE PAST AND FUTURE OF FAIR HOUSING* 1 (2018) (“There are many small answers[] [that explain persistent inequality,] but we believe there is one giant answer: housing segregation. For most of the twentieth century, nearly all urban African-Americans lived in highly

As if on autopilot, its spending and regulatory activities routinely reinforce segregation. But this posture is not preordained. The government has the authority and tools to counteract housing segregation. This Article takes on the government's segregative effect in two original ways: First, it exposes a litany of examples of how the government sustains segregation not simply in HUD programs, but across executive departments. Second, it offers an administrative law framework to detect and dismantle its segregative footprint. Moreover, this Article answers the call for more critical legal scholarship in administrative law, an area of law that is often perceived as procedural—and therefore racially neutral—when it is anything but neutral.<sup>3</sup>

Segregation is a costly self-imposed error. It is not a natural phenomenon. It is government-subsidized and government-reinforced. “Actions of government in housing cannot be neutral about segregation. They will either exacerbate or reverse it. Without taking care to do otherwise, exacerbation is more likely.”<sup>4</sup>

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segregated conditions.”). On hypersegregation, see Tanvi Misra, *America Has Half as Many Hypersegregated Metros as It Did in 1970*, BLOOMBERG CITYLAB (May 21, 2015, 7:56 AM), [www.citylab.com/equity/2015/05/america-has-half-as-many-hypersegregated-metros-as-it-did-in-1970/393743](http://www.citylab.com/equity/2015/05/america-has-half-as-many-hypersegregated-metros-as-it-did-in-1970/393743) [<https://perma.cc/ZSD5-KJNG>] (defining a “hyper-segregated” city as one meeting four of five segregation-related criteria, a concept developed by sociologist Douglas S. Massey and Nancy A. Denton); see also Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOCIO. F. 571, 579 (2015) (observing “that . . . [twenty-one] metropolitan areas . . . remained hypersegregated in 2010”); Douglas S. Massey & Nancy A. Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions*, 26 DEMOGRAPHY 373, 373 (1989) (describing the five dimensions of segregation relevant to a hypersegregation analysis).

3. See, e.g., Symposium, *Racism in Administrative Law*, YALE J. ON REGUL. (2020), [www.yalejreg.com/topic/racism-in-administrative-law-symposium](http://www.yalejreg.com/topic/racism-in-administrative-law-symposium) [<https://perma.cc/KC54-ABCC>]; Bijal Shah, *Toward a Critical Theory of Administrative Law*, by Bijal Shah, YALE J. ON REGUL. (Jul. 30, 2020), [www.yalejreg.com/nc/toward-a-critical-theory-of-administrative-law-by-bijal-shah](http://www.yalejreg.com/nc/toward-a-critical-theory-of-administrative-law-by-bijal-shah) [<https://perma.cc/59L3-DFXB>]; Joy Milligan & Karen Tani, *Seeing Race in Administrative Law: An Interdisciplinary Perspective*, by Joy Milligan & Karen Tani, YALE J. ON REGUL. (Sept. 16, 2020), [www.yalejreg.com/nc/seeing-race-in-administrative-law-an-interdisciplinary-perspective-by-joy-milligan-and-karen-tani](http://www.yalejreg.com/nc/seeing-race-in-administrative-law-an-interdisciplinary-perspective-by-joy-milligan-and-karen-tani) [<https://perma.cc/5X2U-5ZXF>] (“[A]dministrative law, as traditionally taught and studied, often avoids confronting questions of race and racial inequality. The core of administrative law focuses instead on questions of comparative institutional power and competency, most often translated into procedural requirements for agencies or rules of deference for judicial review.”).

Critical Race Theory provides the foundation for understanding the structural racism that permeates administration of the programs discussed in this article. See, e.g., Khiara M. Bridges, *The Deserving Poor, The Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049, 1113 (2017) (“[C]ritical theorists of race understand that race is always present and consistently relevant, even when one is not thinking about it . . . . Arguably, in the post-civil rights era, not thinking about race is the very mechanism by which race and racial inequality are reproduced.”).

4. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 190 (2017); see also William R. Tisdale, Metro. Milwaukee Fair Hous. Council, *Fair Housing Strategies for the Future: A Balanced Approach*, 4 CITYSCAPE: J. POL’Y DEV. & RSCH. 147, 147 (1999) (“[I]rrefutable historical evidence suggests that racial isolation and segregation patterns do not result from natural selection, free choice, or mere happenstance. Nor are they significantly linked to economic factors. Rather, conscious and deliberate actions were taken to design, construct, and maintain policies and practices that impede equal access to housing opportunities. Those practices, coupled with contemporary acts and long-standing institutionalized discrimination, have drawn the current boundaries of racial segregation.”). On the causes of

This Article uses the term “autopilot” to reflect this phenomenon—that the government perpetuates housing segregation unless redirected. The term “autopilot” is not intended to downplay the significance of civil rights achievements that curbed the government’s more direct segregative practices like redlining, but simply to highlight that the government still perpetuates segregation today.

Segregation’s impact is far-reaching.<sup>5</sup> Segregated neighborhoods nurture countless other inequities, resulting in a grossly distorted opportunity map that betrays the cruel reality that where you live can determine your future.<sup>6</sup> Segregation’s steep costs spill over into virtually all aspects of American life.<sup>7</sup> Some of the documented ways segregation infiltrates our society include how it drives the racial wealth gap, undermines metropolitan GDP, drastically diminishes access to life opportunities like quality education and healthcare, and ultimately results in highly unequal health outcomes like shorter life expectancy and higher homicide rates for communities of color.<sup>8</sup> “Dozens of other outcomes tell the same story. Indeed, on almost any measure one can pick, outcomes for African-Americans are unambiguously worse—often dramatically worse—in the highly segregated areas.”<sup>9</sup>

By contrast,

[g]reater integration tends to improve black proximity to jobs. It almost always increases school integration (much more reliably than school integration fosters housing integration) and, in general, improves the quality of public services for blacks. There is wide agreement that segregation tends to concentrate poverty, and thus,

residential segregation, see MARIA KRYSAN & KYLE CROWDER, *CYCLE OF SEGREGATION: SOCIAL PROCESSES AND RESIDENTIAL STRATIFICATION* 3–7, 17–65 (2017).

5. See, e.g., Abraham *supra* note 1, at 1, 3 n.2 (describing segregation’s enduring effects, from the racial wealth gap to reduced GDP).

6. See *Life Expectancy: Could Where You Live Influence How Long You Live?*, ROBERT WOOD JOHNSON FOUND. (2020), [www.rwjf.org/en/library/interactives/whereyouliveaffectshowlongyoulive.html](http://www.rwjf.org/en/library/interactives/whereyouliveaffectshowlongyoulive.html) [<https://perma.cc/6YAA-KR6N>]; M. Gabriela Alcalde, *Zip Codes Don’t Kill People—Racism Does*, HEALTH AFFS. FOREFRONT (Nov. 29, 2018), [www.healthaffairs.org/doi/10.1377/hblog20181127.606916/full](http://www.healthaffairs.org/doi/10.1377/hblog20181127.606916/full) [<https://perma.cc/2RMC-KEQU>]. See generally KRYSAN & CROWDER, *supra* note 4 (describing segregation’s cyclical self-perpetuation).

7. See generally Abraham, *supra* note 1 (detailing the consequences of segregation).

8. E.g., ROTHSTEIN, *supra* note 4, at 180–83 (exploring how segregation impacts the racial wealth gap). See generally Sam Fulwood III, *The Costs of Segregation and the Benefits of the Fair Housing Act*, in *THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT* 40 (Gregory D. Squires ed., 2018) (exploring segregation’s domestic and international empirical impact); GREGORY ACS, ROLF PENDALL, MARK TRESKON & AMY KHARE, *URB. INST., THE COST OF SEGREGATION: NATIONAL TRENDS AND THE CASE OF CHICAGO, 1990–2010* (2017), [www.urban.org/research/publication/cost-segregation/view/full\\_report](http://www.urban.org/research/publication/cost-segregation/view/full_report) [<https://perma.cc/NEK7-9K2W>] (exploring segregation’s impact on income, education, life expectancy, and homicide rate); see also METRO. PLANNING COUNCIL, *THE COSTS OF SEGREGATION* 4–5, 19 n.1 (2017), [www.metroplanning.org/uploads/cms/documents/cost-of-segregation.pdf](http://www.metroplanning.org/uploads/cms/documents/cost-of-segregation.pdf) [<https://perma.cc/BK3R-Q7EJ>] (describing segregation’s effect on gross domestic product).

9. SANDER ET AL., *supra* note 2, at 3.

lower segregation sharply reduces the number of blacks living in high-poverty neighborhoods . . . .<sup>10</sup>

Thus, the gains that come with lower segregation accrue particularly to the households that need it most.<sup>11</sup> This body of research tells us that segregation will systematically undermine even the most well-intending social programs designed to target the lowest income households.<sup>12</sup> Segregation itself must be addressed.

But what the government can build it can also dismantle.<sup>13</sup> Effective tools exist to reverse course.<sup>14</sup> One such tool is an underused provision of the Fair Housing Act of 1968. The “affirmatively furthering fair housing” (“AFFH”) mandate is a one-of-a-kind civil rights duty.<sup>15</sup> It requires every federal agency—and by extension every state and local receiving federal funds—to take affirmative steps to undo segregation in its housing and development activities. Unlike some civil rights laws,<sup>16</sup> its scope is not limited to one agency or program. Its plain language extends to “[a]ll executive departments and agencies [that] administer . . . programs [or] activities relating to housing and

10. *Id.* at 4.

11. *Id.* at 5 (“Most African-Americans may be unaware of the statistics, but they are certainly aware of the sense of stagnation; it fuels frustration, racial hostility, a sense of futility. It is also deeply discouraging to policy makers and analysts . . . . [I]t is not too strong to say that a sense of fatalism pervades much of the policy discussion about black/white gaps in American society.”).

12. *See, e.g.,* KRYSAN & CROWDER, *supra* note 4, at 3–7.

13. SANDER ET AL., *supra* note 2, at 15 (“The durability of black/white segregation can make it seem as though racial residential patterns are locked in place, impervious to change. But this is not true; . . . the nature and contours of American housing segregation have been shaped and reshaped by manifold factors—black and white migration patterns, civil rights laws, market forces, and continually evolving racial attitudes. The key to creating effective fair housing policies for the future is to understand the forces shaping segregation’s evolution in the past.”).

14. *Id.* at 7 (“[W]e can set even our most highly segregated metropolitan areas on a path toward much more moderate levels of black/white segregation—and do so more easily than most observers might imagine.”).

15. *See* 42 U.S.C. § 3608 (2018). The Act contains two provisions collectively known as the AFFH mandate. The first subsection reads: “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 [fair housing] and shall cooperate with [HUD] to further such purposes.*” *Id.* § 3608(d) (emphasis added). In virtually identical language, a subsequent subsection directs HUD to “administer programs and activities relating to housing and urban development in a manner *affirmatively to further [fair housing].*” *Id.* § 3608(e)(5) (emphasis added). In addition to a federal agency liability, federal grantees like states and municipalities may also be liable for failure to comply with their AFFH duties. *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 21:5 (2021) (discussing legal theories for “HUD’s failure to influence local governments” and grantee certification).

16. Most landmark civil rights statutes contemplate enforcement by a single agency, such as the Voting Rights Act of 1965, as amended, 52 U.S.C. §§ 10301–14, 10501–08, and the Help America Vote Act of 2002, 52 U.S.C. §§ 20901–1145.

urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) . . . .”<sup>17</sup>

Unleashing the AFFH mandate’s potential has profound real-world implications. Even modest reductions in segregation can meaningfully improve access to opportunity and quality of life for communities of color. For instance, a decline of just eight points on the 100-point Dissimilarity Index that measures segregation “may eliminate as much as [one-third] of the black/white difference on key outcomes in education, employment, and earnings. This means that even a partially successful policy of housing desegregation can have enormously consequential results for millions of African-Americans.”<sup>18</sup>

But until now, the federal government has failed to enforce the mandate.<sup>19</sup> After decades of equivocating, U.S. Department of Housing and Urban Development (HUD) promulgated its first substantive AFFH regulation in 2015.<sup>20</sup> However, the Trump Administration quickly rescinded it.<sup>21</sup> In 2021, the Biden administration issued a final interim rule that restored definitions

17. 42 U.S.C. § 3608(d).

18. SANDER ET AL., *supra* note 2, at 12 (citation omitted). The Dissimilarity Index is a uniform scale that quantifies segregation on a scale of zero to 100 (or sometimes zero to one). *See, e.g.*, JOHN ICELAND, DANIEL H. WEINBERG & ERIKA STEINMETZ, U.S. CENSUS BUREAU, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980–2000, at 8–9 (2002), <https://www.census.gov/prod/2002pubs/censr-3.pdf> [<https://perma.cc/JNgW-466W>]. Higher scores reflect higher segregation. *Id.* The Index measurement:

captures the degree to which blacks and whites are evenly spread among neighborhoods in a city. Evenness is defined with respect to the racial composition of the city as a whole. If a city is 10% black, then an even residential pattern requires that every neighborhood be 10% black and 90% white. Thus, if a neighborhood is 20% black, the excess 10% of blacks must move to a neighborhood where the black percentage is under 10% to shift the residential configuration toward evenness.

DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 20 (1993) (footnote omitted).

19. For a regulatory history, see Abraham, *supra* note 1, at 13–48; Raphael W. Bostic & Arthur Acolin, *Affirmatively Furthering Fair Housing: The Mandate to End Segregation*, in THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT 189, 190–91 (Gregory D. Squires ed., 2018) (describing HUD’s “early retreat” from its AFFH duty); and Raphael W. Bostic, Katherine O’Regan & Patrick Pontius, with Nicholas F. Kelly, *Fair Housing from the Inside Out: A Behind-the-Scenes Look at the Creation of the Affirmatively Furthering Fair Housing Rule*, in FURTHERING FAIR HOUSING: PROSPECTS FOR RACIAL JUSTICE IN AMERICA’S NEIGHBORHOODS 74, 77–85 (Justin P. Steil, Nicholas F. Kelly, Lawrence J. Vale & Maia S. Woluchem eds., 2021).

20. *See* Final Rule, Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,272 (July 16, 2015) (to be codified at 24 CFR pts. 5, 91, 92, 570, 574, 576, 903).

21. In 2020, the Trump Administration promulgated a weak replacement rule that elevated local control above civil rights. *See* Final Rule, Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899, 47,899 (Aug. 7, 2020) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903). While it could not eliminate the mandate from statute, the Trump Administration reinterpreted the mandate to allow “any action . . . rationally related to promoting fair housing” to satisfy it. *See id.* at 47,904. For a description of HUD’s initial suspension of the Obama-era rule and subsequent litigation, see Abraham, *supra* note 1, at 39–48.

for AFFH-related terms and resumed HUD technical assistance to grantees engaged in voluntary AFFH planning, but the interim rule stopped short of reinstating any mandatory AFFH process.<sup>22</sup> One year later, the Biden administration still has not released a proposed AFFH rule. Meanwhile, segregation flourishes.<sup>23</sup> While housing segregation decreased after passage of the original Fair Housing Act in 1968, progress plateaued after a decade.<sup>24</sup> Since 1980, most communities have only seen modest improvements.<sup>25</sup>

Desegregation has been “far from universal and . . . many metropolitan areas [have experienced] ‘stalled integration.’”<sup>26</sup> Today, the vast majority of Black metropolitan residents live in places with “high” or “very high” segregation<sup>27</sup> and approximately twenty-one large metropolitan areas remain “hypersegregated.”<sup>28</sup>

Despite government foot-dragging, the AFFH mandate’s statutory directive stands: “[*All federal*] agencies *shall* administer their programs and activities relating to housing and urban development . . . in a manner

22. See Interim Final Rule, Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779, 30,779 (June 10, 2021) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903). The rule restores Obama-era definitions but indicates that HUD will promulgate a separate Notice of Proposed Rulemaking detailing a grantee’s specific AFFH obligations. See *id.*

23. E.g., Tracy Hadden Loh, Christopher Coes & Becca Buthe, *Separate and Unequal: Persistent Residential Segregation Is Sustaining Racial and Economic Injustice in the U.S.*, BROOKINGS (Dec. 16, 2020), [www.brookings.edu/essay/trend-1-separate-and-unequal-neighborhoods-are-sustaining-racial-and-economic-injustice-in-the-us](http://www.brookings.edu/essay/trend-1-separate-and-unequal-neighborhoods-are-sustaining-racial-and-economic-injustice-in-the-us) [<https://perma.cc/QV6V-GVZ2>].

24. See SANDER ET AL., *supra* note 2, at 139–41 (describing the 1970s as “the [c]ritical [d]ecade”); *id.* at 143–65 (analyzing “[i]mplementation of the [FHA]” in the 1970s).

25. *Id.*; see *id.* at 10 tbl.o.3 (explaining that in 60 metropolitan areas, progress in the 1970s was significantly greater than in subsequent decades); see also Massey, *supra* note 2, at 578–79, 582 (“Abundant evidence suggests that racial discrimination did not end with civil rights legislation so much as go underground to become clandestine and less visible.”).

26. Massey, *supra* note 2, at 578 (citing JOHN R. LOGAN & BRIAN J. STULTS, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS 2–4 (2011), <https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf> [<https://perma.cc/V2H5-JKTU>]). See also generally Douglas S. Massey & Jacob S. Rugh, *Segregation in Post-Civil Rights America: Stalled Integration or End of the Segregated Century?*, 11 DU BOIS REV. 205, 205–32 (2014) (discussing stalled integration).

27. SANDER ET AL., *supra* note 2, at 1–10.

28. Massey, *supra* note 2, at 579–80. “Hypersegregated” is a defined term, used to describe regions that meet four out of five types of segregation measurements. See Misra, *supra* note 2. The degree of segregation varies by city, with the highest segregation generally occurring in urban areas in the East and Midwest. 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, 131–32 (2011). According to 2020 Census data, and using a Dissimilarity Index to measure Black-white segregation, the most segregated metropolitan regions today are Newark; Milwaukee; Detroit; New York; Chicago; Gary; Miami; Philadelphia; Cleveland; St. Louis; Nassau/Suffolk County, NY; and Buffalo. *Ethnic/Racial Group Populations: Total All*, DIVERSITY & DISPARITIES, <https://s4.ad.brown.edu/projects/diversity/SegSorting2020/Default.aspx> [<https://perma.cc/B7ZG-ZUS4>] (viewing the Dissimilarity Index and picking subcategory White-Black/Black-White All).

affirmatively to further [fair housing].”<sup>29</sup> This Article is the first to explore how agencies have—or have not—applied the mandate. Scholars generally treat fair housing as HUD’s domain despite the mandate applying to all federal agencies engaged in housing-related activities. This Article therefore looks beyond HUD to explore how other agencies contribute to segregation, and how they could mitigate it.<sup>30</sup> Virtually all agencies engage in housing-related activities, even the Department of Defense and Internal Revenue Service. As such, each agency is legally obligated by the AFFH mandate to take individualized steps to counteract its segregative impact that begins within the agency and extend outward through cross-agency collaboration. It is untenable to tackle segregation from one relatively small office within HUD.

This Article unfolds as follows: Part I begins with AFFH mandate’s scope. It examines the contours of the statutory duty, which have largely been defined by case law, before tackling the untouched question of how far the mandate actually reaches—namely which agencies and activities are implicated?

Part II offers a novel contribution to the literature: a litany of examples of how the government’s contemporary activities produce and reinforce segregation. This Part audits how the government’s “segregation autopilot” operates in practice. It describes the complex interplay between layered systems that shape housing and urban development—among them transportation, education, and the natural environment. Part II thus explains how government investments and regulatory activities—or the lack thereof—reinforce segregated living. Drawing on specific agency programs, it substantiates the Article’s central argument that a collaborative, multiagency approach to dismantling segregation is not simply what the AFFH mandate requires as a matter of law, it is a more realistic strategy to mitigating government-perpetuated segregation.

Finally, Part III presents a set of prescriptions to disengage the autopilot setting. It proposes several administrative law tools, including agency-specific AFFH regulations, racial equity audits, interagency memoranda of understanding, and interpretive guidance to identify and reverse segregation-perpetuating activities. In addition to administrative tools, it identifies potential collaborative interagency models, drawing from analogous problems that cut across agencies, like climate change and public health crises.

Regulatory reform may seem like a lackluster solution to pervasive segregation. But contemporary segregation is a product of regulatory action—and regulatory reform is a critical step toward normalizing system-wide thinking about structural racism. The United States has never invested the time and resources to audit how the government perpetuates housing

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29. 42 U.S.C. § 3608(d) (2018) (emphasis added); *see supra* note 15 and accompanying text.

30. For a comparison of federal spending on HUD Community Development Block Grants and non-HUD programs that contribute to segregation, *see infra* Table 1 and notes 150–56 and accompanying text.

segregation, let alone enacted legal reforms to mitigate it.<sup>31</sup> This Article offers the AFFH mandate as an entry point for regulatory reform that finally recognizes and rectifies the federal government's weighty influence on our segregated landscape.

## II. SCOPE OF THE AFFIRMATIVE DUTY

Racial segregation is a defining feature of American society.<sup>32</sup> Harsh reminders of its far-reaching consequences have been on display in recent years. The COVID-19 pandemic exposed ubiquitous inequality through its disproportionate impact on communities of color,<sup>33</sup> in some cases traceable to historically redlined Black neighborhoods.<sup>34</sup> Simultaneously, George Floyd's murder, and the public discourse it sparked, challenged structural inequality in virtually all U.S. institutions.

The AFFH mandate is unique among civil rights laws. First, its explicitly affirmative language sets it apart. It reads:

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[,] [fair housing,] and shall cooperate with [HUD] to further such purposes.<sup>35</sup>

Despite this distinction from other civil rights laws, the mandate has been overlooked in academic literature and underemployed as a litigation tool. It has also been underdeveloped as a matter of administrative law—the government has side-stepped it, likely because it threatens entrenched interests.<sup>36</sup> Decades later, the AFFH has reemerged. Indeed, few observers

31. E.g., Stephen Menendian, Samir Gambhir & Arthur Gables, *The Roots of Structural Racism Project*, OTHERING & BELONGING INST. (June 30, 2021), <https://belonging.berkeley.edu/roots-structural-racism> [<https://perma.cc/NEG3-679D>] (“[U]nlike school desegregation, the nation never embarked upon a national project to integrate neighborhoods, let alone declared an unambiguous commitment to that goal. There has never been a *Brown v. Board of Education*-like decision for housing . . .”).

32. Douglas S. Massey, *Still the Linchpin: Segregation and Stratification in the USA*, 12 RACE & SOC. PROBS. (SPECIAL ISSUE) 1, 1–2 (2020); see also MASSEY & DENTON, *supra* note 18, at 9 (“Residential segregation is the principal organizational feature of American society that is responsible for the creation of the urban underclass.”).

33. Menendian et al., *supra* note 31.

34. See, e.g., Gareth Cook, *The Economist Who Would Fix the American Dream*, THE ATL. (July 17, 2019, 3:47 PM), [www.theatlantic.com/magazine/archive/2019/08/raj-chettys-american-dream/592804](http://www.theatlantic.com/magazine/archive/2019/08/raj-chettys-american-dream/592804) [<https://perma.cc/6LVT-QKYN>] (tracing neighborhoods in Charlotte).

35. 42 U.S.C. § 3608(d) (2018) (addressing the “purposes” of fair housing). In virtually identical language, a subsequent subsection directs HUD to “administer [its] programs and activities relating to housing and urban development in a manner *affirmatively to further* [fair housing].” *Id.* § 3608(e)(5) (emphasis added).

36. Richard Nixon, for instance, shut down HUD Secretary George Romney's “Open Communities” initiative after “supporters in the South and in white Northern suburbs took their

imagined it would feature prominently in a presidential campaign, until Donald Trump tweeted to suburban voters in 2020 that enforcing the mandate threatens the “Suburban Lifestyle Dream.”<sup>37</sup>

Finally, the mandate is unique because of its broad scope. It extends across the executive branch to all federal agencies that administer housing-related programs. Informed by these unique qualities, this section examines the mandate in two steps. First is the duty itself—*what must federal agencies do?* Second is the breadth—*which government activities are duty-bound?* The answers demonstrate that the AFFH mandate is broader than currently interpreted or enforced. The mandate extends beyond HUD to a universe of programs and activities administered by dozens of agencies. This fact illustrates the need for more sophisticated cross-agency collaboration to implement the mandate.

### A. WHAT DUTY?

As a remedial measure, the AFFH mandate is designed to counteract the government’s starring role as a segregation architect.<sup>38</sup> This Section examines

complaints directly to the president.” Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015, 1:26 PM), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law> [https://perma.cc/3VWR-DWGB]; see also CHARLES M. LAMB, HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS 91, 95 (2005) (describing Nixon’s reelection calculus with respect to southern and suburban voters).

Perhaps there is no better illustration of early implementation failures than a 1972 Senate oversight hearing during which senators questioned agency heads about their lack of progress in implementing their AFFH and Title VI obligations. *Equal Opportunity in Lending: Hearings Before the Comm. on Banking, Hous. & Urb. Affs.*, 94th Cong. 11 (1976) (statement of William Proxmire, Chairman, S. Comm on Banking, Hous. & Urb. Affs.) (“[T]he failure of the three bank agencies to breathe life into [§ 3608] is one of the longest run acts in Washington . . . . For eight years the agencies seem to have been sound asleep, in spite of considerable prodding.”).

37. E.g., Donald J. Trump (@realDonaldTrump), TWITTER (July 29, 2020, 9:19 AM), <https://web.archive.org/web/20200729162019/https://twitter.com/realDonaldTrump/status/1288509568578777088> [https://perma.cc/QH9Z-53B9] (“I am happy to inform all of the people living their Suburban Lifestyle Dream that you will no longer be bothered or financially hurt by having low income housing built in your neighborhood . . .”); Donald J. Trump (@realDonaldTrump), TWITTER (July 29, 2020, 12:19 PM); Donald J. Trump (@realDonaldTrump), TWITTER (July 29, 2020, 9:19 AM), <https://web.archive.org/web/20200729162041/https://twitter.com/realDonaldTrump/status/1288509572223651840> [https://perma.cc/K2MY-RMAL] (“ . . . Your housing prices will go up based on the market, and crime will go down. I have rescinded the Obama-Biden AFFH Rule! Enjoy!”); Sylvan Lane, *Trump Claims Decision to Repeal Fair Housing Rule Will Boost Home Prices, Lower Crime*, THE HILL (July 29, 2020, 1:41 PM), <https://thehill.com/policy/finance/509595-trump-claims-decision-to-repeal-fair-housing-rule-will-boost-home-prices-lower> [https://perma.cc/VAE5-J354]; see also Donald J. Trump & Ben Carson, *We’ll Protect America’s Suburbs*, WALL ST. J. (Aug. 16, 2020, 4:02 PM), <https://www.wsj.com/articles/well-protect-america-s-suburbs-11597608133> [https://perma.cc/MB96-AQPU] (describing progressive housing initiatives as “destructive”).

38. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982) (describing “the broad remedial intent of Congress embodied in the Act”); see also SCHWEMM, *supra* note 15, § 7:2 (describing the Act’s broad construction as first declared by the Supreme Court in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972)); *Young v. Pierce*, 544 F. Supp. 1010, 1017 (E.D.

the baseline statutory language, judicial interpretation, and legislative history to elucidate what duty the AFFH imposes on the government. Two intertwined duties emerge: An agency must: (1) consider and “assess negatively those aspects of a proposed course of action that would further” segregation<sup>39</sup>; and (2) cooperate with HUD to ensure a proposed action does not interfere with another agency’s desegregation efforts. This Article focuses on the first duty, which has been the subject of virtually all legal analysis to date, but it raises the second duty as ripe for development.<sup>40</sup>

Congress passed the Fair Housing Act in 1968 after a series of civil rights reforms.<sup>41</sup> In 1964, Congress had prohibited discrimination on the basis of race in a variety of spheres, from voting to public accommodations to employment, but not housing.<sup>42</sup> After years of stymied efforts, housing was considered one of the most challenging civil rights frontiers.<sup>43</sup> Most people know the Fair Housing Act as a non-discrimination law that prohibits differential

Tex. 1982) (noting that the Act’s scope “is majestic, and its enforcement provisions are commensurately broad”). On the government’s role, FHA co-author Senator Edward Brooke described how the government perpetuated segregation, even after Congress passed Title VI of the Civil Rights Act of 1964:

Today’s Federal housing official commonly inveighs against the evils of ghetto life even as he pushes buttons that ratify their triumph—even as he ok’s public housing sites in the heart of Negro slums, releases planning and urban renewal funds to cities dead-set against integration, and approves financing of suburban subdivisions from which Negroes will be barred. These and similar acts are committed daily by officials who say they are unalterably opposed to segregation . . . .

114 CONG. REC. 2,281 (1968) (statement of Senator Brooke).

39. *N.A.A.C.P. v. Sec’y of Hous. & Urb. Dev.*, 817 F.2d 149, 156 (1st Cir. 1987).

40. The phrase “shall cooperate” with HUD is itself a duty. Empirically, since nearly all AFFH advocacy has centered on HUD’s programs and activities, no one has examined this secondary duty, which is especially important for non-HUD agencies. At a minimum, the second duty should be understood as not interfering with HUD’s efforts to reduce segregation by funding or regulating activities that would undermine those efforts. There is reason to believe that an agency violates its AFFH duty if it fails to cooperate with HUD. This deserves more attention and development. *See generally* Memorandum on Fair Housing, 30 WEEKLY COMP. PRES. DOC. 114 (Jan. 17, 1994) (describing the duty of every agency to coordinate with HUD). *See* Exec. Order No. 12,892, 3 C.F.R. 849, 850 (1995), *reprinted in* 42 U.S.C. § 1982 (1994).

41. *See History of Fair Housing*, U.S. DEP’T HOUS. & URB. DEV., [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/aboutfheo/history#:~:text=The%201968%20Act%20expanded%20on,Housing%20Act%20\(of%201968\)](https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history#:~:text=The%201968%20Act%20expanded%20on,Housing%20Act%20(of%201968)) [<https://perma.cc/HMJ4-S49V>] (detailing its enactment that followed “a long and difficult journey. From 1966-1967, Congress regularly considered the fair housing bill, but failed to garner a strong enough majority for its passage”).

42. The Civil Rights Act of 1964, Pub. L. No. 88-352, § 101(a), 78 Stat. 241, 241 (codified as amended throughout U.S.C. Title 42 (2018)).

43. *See, e.g.*, WALTER F. MONDALE & DAVID HAGE, *THE GOOD FIGHT: A LIFE IN LIBERAL POLITICS* 55–68 (2010) (discussing the politics of getting a fair housing bill through Congress in the 1960s). For a more detailed history of the legislative fight for fair housing, see 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION*, 200–05 (2014); LAMB, *supra* note 36, at 26–35; and Hannah-Jones, *supra* note 36, at 8 (“[Fair housing] came right to the neighborhoods across the country. This was civil rights getting personal.” (quoting floor sponsor Senator Walter Mondale)).

treatment based on protected class.<sup>44</sup> But the Act has a second and distinct objective—reducing housing segregation.<sup>45</sup> In the words of one of the Act’s senate floor sponsors, it was not limited to prohibiting discrimination but also designed to achieve “truly integrated and balanced living patterns.”<sup>46</sup>

The mandate’s statutory text declares:

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[,] [fair housing,] and shall cooperate with [HUD] to further such purposes.<sup>47</sup>

In virtually identical language, a subsequent subsection directs HUD to “administer [its] programs and activities relating to housing and urban development in a manner affirmatively to further [fair housing].”<sup>48</sup> Collectively, these provisions are known by the moniker “AFFH” or “affirmatively further fair housing.”<sup>49</sup>

44. See 42 U.S.C. § 3604(a)–(f) (2018).

45. E.g., *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (noting “the reach of the [FHA] was to replace the ghettos ‘by truly integrated and balanced living patterns’”); see also Walter F. Mondale, Opinion, *Walter Mondale: The Civil Rights Law We Ignored*, N.Y. TIMES (Apr. 10, 2018), <https://www.nytimes.com/2018/04/10/opinion/walter-mondale-fair-housing-act.html> [<https://perma.cc/WNB8-P2W7>] (co-author of the Fair Housing Act) (“At times, critics suggest the law’s integration aims should be sidelined in favor of colorblind enforcement measures that stamp out racial discrimination but do not serve the larger purpose of defeating systemic segregation. To the law’s drafters, these ideas were not in conflict. The law was informed by the history of segregation, in which individual discrimination was a manifestation of a wider societal rift. Though the overarching aim of the law was to create integrated communities, Congress could not simply direct the whole of America to start integrating. Instead, like all laws, the Fair Housing Act tried to accomplish its goal through a variety of more-detailed provisions[] [to] facilitate integration.”). See generally Bostic & Acolin, *supra* note 19 (describing the Act’s dual objectives).

46. 114 CONG. REC. 3,422 (1968) (statement of Sen. Walter F. Mondale); see also George C. Galster, *The Evolving Challenges of Fair Housing Since 1968: Open Housing, Integration, and the Reduction of Ghettoization*, 4 CITYSCAPE: J. POL’Y DEV. & RSCH. 123, 123 (1999) (describing at least three legislative goals: elimination of discrimination, “creation of stable[] [and] racially diverse neighborhoods[,]” and “reduction of ghettos occupied by poor minority households”).

47. 42 U.S.C. § 3608(d).

48. *Id.* § 3608(e)(5).

49. Building on a prior article that examines HUD’s implementation of § 3608(e), this Article focuses on the broader language in § 3608(d) that extends to all executive departments and agencies. Since the language is virtually identical, case law interpreting § 3608(e) are equally relevant in interpreting § 3608(d). See Schwemm, *supra* note 28, at 127 n.17, 137–44 (2011) (“The AFFH mandate to HUD in § 3608(e)(5) speaks in terms of the FHA’s ‘policies’ whereas the AFFH mandate to other departments and agencies in § 3608(d) refers to the FHA’s ‘purposes.’ No significance has ever been attached to this difference.”). On terminology, the AFFH acronym is sometimes referred to as “affirmatively furthering fair housing.”

“Th[e] [AFFH] mandate is not as nebulous as it may appear at first glance.”<sup>50</sup> At a high level of abstraction, “[i]f fair housing means that a person’s housing choice should not determine their access to opportunity and amenities, then AFFH means taking steps to eliminate or reduce existing disparities in income, housing, and other areas.”<sup>51</sup> The primary question for this Section is how that concept translates to an agency’s duty.

To date, the Supreme Court has not considered the duty’s scope, but it has repeatedly acknowledged housing integration as a primary objective of the Fair Housing Act.<sup>52</sup> Nevertheless, federal courts have reached a baseline “consensus” on the mandate’s meaning.<sup>53</sup> At least seven federal circuits have opined on HUD’s AFFH duty. Of those circuits, nearly all have interpreted

50. Memorandum from Off. of the Gen. Couns. on Civil Rights Authority and Responsibility of the Board to Off. of Hous. & Urb. Affs., at \*33 (June 30, 1972) (on file at 1972 WL 125725) (describing the origins of the phrase from the concept of “affirmative action” under the National Labor Relations Act); *see also Equal Opportunity in Lending: Hearings Before the Comm. on Banking, Hous. and Urb. Affs.*, 94th Cong. 158–59 (1976) (citing in the record a 1968 Memorandum from President Lyndon B. Johnson describing the new AFFH duty and directing the head of each agency “to take all necessary steps within your authority to see that full affirmative action is taken to accomplish the policies of Title VIII.”); Schwemm, *supra* note 28, at 127 (“The FHA does not define . . . what is meant by § 3608’s mandate that federal housing programs be administered to ‘affirmatively further’ FHA ‘policies.’ However, the statute’s legislative history makes clear that Congress intended the FHA not only to eliminate housing discrimination against minorities, but also to replace segregated living patterns with integrated ones.”).

51. Bostic & Acolin, *supra* note 19, at 193.

52. *E.g.*, *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (describing the purpose of the Act as the “replace[ment of] the ghettos ‘by truly integrated and balanced living patterns’”); *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 546–47 (2015) (“The Court acknowledges the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.”). *See also generally* *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979) (upholding standing based on injury of denial of integrated community); *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 95 (1977) (describing the Act’s “strong national commitment to promote integrated housing” (citing *Trafficante*, 409 U.S. at 205)). For a full history, see Interim Final Rule, *Restoring Affirmatively Furthering Fair Housing Definitions and Certifications*, 86 Fed. Reg. 30,779, 30,781 (June 10, 2021) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903) (“While the Supreme Court has never had occasion to consider the scope of the AFFH provision, it has consistently recognized and noted the Fair Housing Act’s broad and remedial goals and has repeatedly observed that the Act is meant not just to bar discrete discriminatory acts, but to affirmatively counteract the nation’s long history of racial segregation and discriminatory housing practices and policies.”).

The following cases rely on the statutory text, legislative history, and historical context. Unless otherwise indicated, the following authorities do not rely on recent rulemakings, which remain in flux. For a description of the regulatory back-and-forth, see Abraham, *supra* note 1, at 39–48; and Interim Final Rule, *Restoring Affirmatively Furthering Fair Housing Definitions and Certifications*, 86 Fed. Reg. at 30,782–83 (describing regulatory history).

53. *See, e.g.*, *N.A.A.C.P. v. Sec’y of Hous. & Urb. Dev.*, 817 F.2d 149, 155 (1st Cir. 1987). Even the Trump Administration’s hostile interpretation of the AFFH mandate recognized the “judicial consensus.” Final Rule, *Preserving Community and Neighborhood Choice*, 85 Fed. Reg. 47,899, 47,902 (Aug. 7, 2020) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903) (“HUD’s rule is consistent with the judicial consensus that AFFH requires more than simply not discriminating. Grantees may not be passive. They must actually promote fair housing . . .”).

the AFFH mandate as imposing an affirmative duty requiring an agency to consider the impact of its proposed actions on racial segregation, thus producing a baseline consensus.<sup>54</sup> Only the Eleventh Circuit has interpreted it more narrowly.<sup>55</sup> The cases below highlight the core consensus in the caselaw.

In *N.A.A.C.P., Boston Chapter v. HUD*, then-First Circuit Judge Stephen Breyer summarized nearly two decades of case law: “[E]very court that has considered the question has held . . . that [the mandate] imposes upon HUD an obligation to *do more than simply refrain from discriminating* (and from purposely aiding discrimination by others).”<sup>56</sup> The AFFH mandate, the court explained, “reflects [Congress’s] desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”<sup>57</sup>

Finding “no reason to contradict the consensus opinion set out in these many cases,”<sup>58</sup> the First Circuit concluded that an agency violates its AFFH duty (1) in more obvious cases, when it demonstrates “*purposive* support of discrimination,”<sup>59</sup> and (2) in more subtle cases, when it “fail[s] to ‘consider [the] effect [of the agency’s grant] on the racial and socioeconomic composition of the surrounding area.’”<sup>60</sup> The duty thus includes an “obligation to evaluate alternative courses of action in light of their effect upon open housing” to

54. *E.g.*, *N.A.A.C.P.*, 817 F.2d at 155 (citing various cases discussing the duty); *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1125 (2d Cir. 1973); *Shannon v. U.S. Dep’t of Hous. & Urb. Dev.*, 436 F.2d 809, 822–23 (3d Cir. 1970); *Jaimes v. Lucas Metro. Hous. Auth.*, 833 F.2d 1203, 1208 (6th Cir. 1987); *Alschuler v. Dep’t of Hous. & Urb. Dev.*, 686 F.2d 472, 482 (7th Cir. 1982); *Clients’ Council v. Pierce*, 711 F.2d 1406, 1425 (8th Cir. 1983); *Anderson v. Alpharetta, Ga.*, 737 F.2d 1530, 1537 (11th Cir. 1984); *see also* SCHWEMM, *supra* note 15, § 21:1 n.25 (first citing *Clients’ Council*, 711 F.2d at 1425; then citing *Alschuler*, 686 F.2d at 482; then citing *Jorman v. Veteran’s Admin.*, 579 F. Supp. 1407, 1418 (N.D. Ill. 1984); then citing *Young v. Pierce*, 544 F. Supp. 1010, 1017–18 (E.D. Tex. 1982); then citing *Schmidt v. Bos. Hous. Auth.*, 505 F. Supp. 988, 996–97 (D. Mass. 1981); then citing *King v. Harris*, 464 F. Supp. 827, 837 (E.D. N.Y. 1979); and then citing *Blackshear Resident’s Org. v. Hous. Auth. of City of Austin*, 347 F. Supp. 1138, 1146 (W.D. Tex. 1971)).

55. *Anderson*, 737 F.2d at 1537 (11th Cir. 1984). *But see* *N.A.A.C.P.*, 817 F.2d at 156 (distinguishing the Eleventh Circuit’s decision in *Alpharetta*); *see also* SCHWEMM, *supra* note 15, § 21:1 (discussing the judicial consensus).

56. *N.A.A.C.P.*, 817 F.2d at 155 (emphasis added). In that case, the Boston NAACP sued HUD for violating § 3608(e)(5) in how it administered its Community Development Block Grant and Urban Development Action Grant programs in Boston. *Id.* at 151. For a broader discussion of AFFH jurisprudence, *see* Schwemm, *supra* note 28, at 137–44; *see also* SCHWEMM, *supra* note 15, §§ 21:1–7 (describing cases interpreting 42 U.S.C. § 3608 (2018)).

57. *N.A.A.C.P.*, 817 F.2d at 155; *see also id.* at 154 (rejecting the government’s narrow reading of the mandate and noting that “[i]f one assumes that many private persons and local governments have practiced discrimination for many years and that at least some of them might be tempted to continue to discriminate even though forbidden to do so by law, it is difficult to see how HUD’s own nondiscrimination by itself could significantly ‘further’ the ending of such discrimination by others”).

58. *Id.* at 155.

59. *Id.* at 156.

60. *Id.* (second alteration in original).

ensure open housing.<sup>61</sup> This means an agency “[must] assess negatively” the aspects of a proposed agency action that would “limit the supply of . . . open housing” and “assess positively [the] aspects that would . . . increase [the] supply.”<sup>62</sup> If it is satisfying its duty, the court observed, an agency’s net effect over time should be an increase, not decrease, in “the supply of open housing.”<sup>63</sup> The court thus recognized a cause of action against HUD “*not for something it did but for not doing what it was obliged to do*”—for example, failing to “use[] . . . its immense leverage under” its grantmaking authority “to provide adequate desegregated housing.”<sup>64</sup> Critically, the court rejected the government’s defense that the AFFH mandate lacks adequate standards against which to judge the lawfulness of an agency’s conduct.<sup>65</sup>

Other appellate courts have similarly concluded that an agency’s AFFH duty is an affirmative one. In *Shannon v. HUD*, the Third Circuit sustained a challenge to HUD’s administration of a public housing financing program in Philadelphia.<sup>66</sup> It held that an agency’s discretion is defined and limited by “the national policy against discrimination . . . and in favor of fair housing.”<sup>67</sup>

According to the Third Circuit, an agency must consider a project’s impact on racial segregation. Specifically, it “must utilize some institutionalized method” that considers “the relevant racial and socio-economic information” before approving federally subsidized projects.<sup>68</sup> In making this determination,

61. *Id.* at 157.

62. *Id.* at 156; *see also* Nestor M. Davidson & Eduardo M. Peñalver, *The Fair Housing Act’s Original Sin: Administrative Discretion and the Persistence of Segregation*, in PERSPECTIVES ON FAIR HOUSING 132, 132–33 (Vincent J. Reina, Wendell E. Pritchett & Susan M. Wachter eds., 2020) (“Courts have made clear that this statutory language means that it is not enough to combat the pathologies of the private market or even for the federal government to refrain from actions that foster segregation. Rather, the FHA charges the federal government with the task of affirmatively bending its resources and regulatory power to ‘assist in ending . . . segregation, to the point where the supply of genuinely open housing increases.’” (quoting *N.A.A.C.P.*, 817 F.2d at 155)).

63. *N.A.A.C.P.*, 817 F.2d at 156.

64. *See* Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIA. L. REV. 1011, 1028 (1998) (emphasis added) (quoting *N.A.A.C.P.*, 817 F.2d at 156). In terms of causes of action, courts are split over whether the mandate is enforceable as a private right of action under Section 1983. *See* 1 HOUSING DISCRIMINATION PRACTICE MANUAL § 2:17 n.11 (2022) (first citing *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33 (D. Mass. 2002); then citing *Wallace v. Chi. Hous. Auth.*, 298 F. Supp. 2d 710 (N.D. Ill. 2003); then citing *Anderson v. Jackson*, No. 06–3298, 2007 WL 4582232, at \*3–4 (E.D. La. Feb. 6, 2007); then citing *S. Middlesex Opportunity Council, Inc. v. Framingham*, No. 07–12018-DPW, 2008 WL 4595369, at \*14–16 (D. Mass. Sep. 30, 2008); and then citing *Thomas v. Butzen*, No. 04 C 5555, 2005 WL 2387676, at \*10 (N.D. Ill. Sep. 26, 2005)). At a minimum, litigants may enforce it against executive agencies under the narrower judicial review authorized by the Administrative Procedure Act. *See* 5 U.S.C. § 706(1)–(2) (2018); *N.A.A.C.P.*, 817 F.2d at 160–61.

65. *Id.* at 158 (“[W]e believe that the court can find adequate standards against which to judge the lawfulness of HUD’s conduct.”).

66. *Shannon v. U.S. Dep’t of Hous. & Urb. Dev.*, 436 F.2d 809, 822–23 (3d Cir. 1970).

67. *Id.* at 819.

68. *Id.* at 821.

the agency may not “remain blind to the very real effect that racial concentration has had in the development of urban blight . . . . Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy.”<sup>69</sup>

The Second Circuit agreed that an agency must consider its potential effect on housing segregation to satisfy its AFFH duty. In *Otero v. New York City Housing Authority*, the court considered an AFFH challenge to tenant-selection procedures.<sup>70</sup> Confirming that an agency’s AFFH duties extends to its grantees,<sup>71</sup> the court described the housing authority’s duty as requiring “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>72</sup> The duty requires the grantee to consider “the impact of proposed . . . housing programs on the racial concentration in the area in which the proposed housing is to be built.”<sup>73</sup>

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69. *Id.* at 820–21.

70. *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1125 (2d Cir. 1973).

71. For legal authorities on a grantee’s AFFH obligations, see Schwemm, *supra* note 28, at 139–40 n.91 (first citing *Garrett v. Hamtramck*, 503 F.2d 1236, 1247 (6th Cir. 1974); then citing *Banks v. Perk*, 341 F. Supp. 1175, 1182 (N.D. Ohio 1972); then citing *Crow v. Brown*, 332 F. Supp. 382, 391–92 (N.D. Ga. 1971); then citing *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 140 n.18, 146 (3d Cir. 1977); and then citing *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep’t of Hous. & Urb. Dev.*, 723 F. Supp. 2d 14, 21–24 (D.D.C. 2010)) (“In any event, it is now clear that HUD grantees may be required to certify that they are affirmatively furthering fair housing as a condition of receiving their grants pursuant to current HUD regulations.”). Subsequent AFFH regulations have reinforced that the AFFH obligation extended not just to a participant’s federal funds, but all of its programs and activities related to housing and urban development. See *Final Rule, Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42,272, 42,353 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903) (defining “Affirmatively Further Fair Housing” to require that the obligation “extends to all of a program participant’s activities and programs relating to housing and urban development”); see also *Interim Final Rule, Restoring Affirmatively Furthering Fair Housing Definitions and Certifications*, 86 Fed. Reg. 30,779, 30,790 (June 10, 2021) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903) (reinstating the same definition).

There is also a compelling argument that Congress has embedded an AFFH duty in various federal grant programs by legislating against the backdrop of various AFFH certification requirements. See, e.g., *Interim Final Rule, Restoring Affirmatively Furthering Fair Housing Definitions and Certifications*, 86 Fed. Reg. at 30,780 (“Congress has repeatedly reinforced the AFFH mandate for funding recipients, embedding within the Housing and Community Development Act of 1974, the Cranston-Gonzalez National Affordable Housing Act of 1990, and the Quality Housing and Work Responsibility Act of 1998, the obligation that certain HUD program participants certify, as a condition of receiving Federal funds, that they will AFFH.”); *Id.* at 30,782 (“It is well-settled that Congress is presumed to be aware of an administrative or judicial interpretation of a statutory provision and to adopt that interpretation when it re-enacts that statute or uses the same statutory language elsewhere without change.”).

72. *Otero*, 484 F.2d at 1125.

73. *Id.* at 1134 (“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 [Fair Housing] Act was designed to combat.”).

Also instructive is *Jaimes v. Toledo Metropolitan Housing Authority*, in which the Sixth Circuit considered whether HUD violated its duty when a public housing authority failed to desegregate its segregated public housing. The Sixth Circuit explained that, at a minimum, liability would extend to situations in which “[HUD] is aware of a grantee’s discriminatory practices but has made no effort to force [the grantee] to comply with the Fair Housing Act by cutting off existing federal financial assistance.”<sup>74</sup> Applying the appellate court’s instructions on remand, the district judge summarized: “[A]t a minimum, HUD may not expend federal funds in a manner that promotes or fails to deter discrimination in public housing” and “[b]ecause HUD took no action” after learning of the racial segregation in public housing units, “HUD was administering federal funds in a manner that violated its duty affirmatively to further the goal of desegregation of public housing.”<sup>75</sup> The district court’s summary of the AFFH duty has been recognized as “among the clearest statements of the special responsibilities that § 3608 places on HUD in its role as a funding source.”<sup>76</sup>

Today, courts continue to adopt the prevailing interpretation.<sup>77</sup> A contemporary illustration is *Thompson v. HUD*,<sup>78</sup> in which the plaintiffs sued the local housing authority—a HUD grant recipient—for perpetuating “the legacy of racially segregated public housing in Baltimore.”<sup>79</sup> Explaining that the AFFH mandate requires a grant recipient “to consider the effect of its policies on the racial and socioeconomic composition of the surrounding area,” the court held HUD had violated its AFFH duty by limiting its desegregation efforts in public housing to the Baltimore city limits instead of the metropolitan region.<sup>80</sup> “In ordering HUD to take a regional approach, the court found that the AFFH mandate requires HUD to adopt policies ‘whereby the effects of past segregation in Baltimore City public housing

74. *Jaimes v. Lucas Metro. Hous. Auth.*, 833 F.2d 1203, 1208 (6th Cir. 1987).

75. *Jaimes v. Toledo Metro. Hous. Auth.*, 715 F. Supp. 835, 840–41 (N.D. Ohio 1989).

76. SCHWEMM, *supra* note 15, § 21:4. The exception to the judicial consensus described in this section is *Anderson v. Alpharetta, Ga.*, 737 F.2d 1530 (11th Cir. 1984). Distinguishable on its facts, the court “rejected a § 3608 claim based on HUD’s failure to pressure local officials in suburban Atlanta into accepting low-income housing.” *Id.* at § 21:5 (discussing what the First Circuit labeled as the “overly narrow” *Alpharetta* decision).

77. For a restatement of this case law, see Interim Final Rule, Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779, 30,780–82 (June 10, 2021) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

78. See generally *Thompson v. U.S. Dep’t of Hous. & Urb. Dev.*, 348 F. Supp. 2d 398 (D. Md. 2005) (concerning racial segregation in public housing).

79. *Economic Justice: Case: Thompson v. HUD, NAACP LEGAL DEF. FUND* (2022), <https://www.naacpldf.org/case-issue/thompson-v-hud> [<https://perma.cc/WP5D-2J8A>] (describing *Thompson’s* impact); *Thompson*, 348 F. Supp. 2d at 404.

80. See *Thompson*, 348 F. Supp. 2d at 409, 459, 463; see also *Garrett v. Hamtramck*, 335 F. Supp. 16, 27 (E.D. Mich. 1971) (requiring HUD to consider programs’ impacts on minorities and assist in relocation efforts in light of displacement by a program), *rev’d on other grounds*, 503 F.2d 1236 (6th Cir. 1974).

may be ameliorated by the provision of public housing opportunities beyond the boundaries of Baltimore City.”<sup>81</sup>

Today it is undisputed that the AFFH mandate requires more than neutral, nondiscriminatory action. Even the most sparing interpretation acknowledges the “judicial consensus” that an agency—and its grantees—must do more than prohibit discrimination.<sup>82</sup> At a minimum, they must account for the impact of their decisions on racial segregation in housing.<sup>83</sup> Put another way, every federal agency has a “hierarchy of obligations”: First, the agency itself must take steps to affirmatively promote fair housing.<sup>84</sup> Second, it “must not ‘fund a grantee [that] engage[s] in . . . discriminatory conduct’ in a way that furthers discriminatory conduct, but instead ensure that grantees take parallel affirmative steps to promote fair housing.”<sup>85</sup>

### B. WHOSE DUTY?

The mandate’s plain language reaches beyond HUD—but how far? This Section explores which programs and activities in which agencies are subject to the mandate. Since most AFFH advocacy has targeted HUD programs,

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81. Interim Final Rule, Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. at 30,781 (quoting *Thompson*, 348 F.Supp.2d at 462). Another contemporary example is *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y.*, which involved a False Claims Act claim predicated on the AFFH mandate. 668 F. Supp. 2d 548, 550 (S.D.N.Y. 2009). The court held the grantee’s certification violated its AFFH obligation because it failed to adequately consider the impact of race on housing opportunities in its jurisdiction. *Id.* at 564. Holding that Westchester had falsely certified seven annual AFFH certifications, the court granted partial summary judgment in favor of the plaintiff. *Id.* at 569–70. Critically, the court stressed that “[t]he AFFH certification was not a mere . . . formality[] but . . . a substantive [obligation].” *Id.* at 569. *Westchester* “reaffirms that municipalities disbursing federal housing funds must take care to consider the impact of race discrimination and segregation as part of their obligations to affirmatively further fair housing.” 1 HOUSING DISCRIMINATION PRACTICE MANUAL *supra* note 64, § 2:17; Schwemm, *supra* note 28, at 163 (“*Westchester*’s real significance is that it provided a wake-up call to the federal government regarding the fact that its 1200 CDBG grantees could be, and should be, required to do what for many years the law has mandated as a condition of receiving HUD funds. At a minimum, these requirements mean that local governments should not be allowed to use their land-use and other powers in ways that frustrate efforts to provide integrated housing.”).

82. See, e.g., Final Rule, Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899, 47,902 & nn.42–43 (Aug. 7, 2020) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903) (replacing the Obama administration’s 2015 interpretation of the AFFH rule with the Trump administration’s interpretation); see also *Jaimes v. Toledo Metro. Hous. Auth.*, 715 F. Supp. 835, 840 (N.D. Ohio 1989) (describing the Sixth Circuit’s instructions on remand as holding, “at a minimum, [that an agency] may not expend federal funds in a manner that promotes or fails to deter discrimination” and may not fail to take action when it learns that its federal funds were by a grantee in such a manner).

83. Additionally, § 3608 sets forth a second AFFH duty: An agency “shall cooperate with” HUD in furtherance of AFFH objectives. 42 U.S.C. § 3608(d) (2018). This duty is discussed *supra* note 40.

84. Roisman, *supra* note 64, at 1026.

85. See *id.* at 1026–27.

there is a vacuum of literature and case law on the mandate's scope.<sup>86</sup> The statute imposes a duty on "[a]ll executive departments and agencies," limited by three phrases: (1) "programs and activities," (2) "relating to," and (3) "housing and urban development."<sup>87</sup> Taking each phrase in turn, this Section assesses the statute's reach.

The first phrase—the "programs and activities" of federal agencies—is not defined by the Fair Housing Act. In common usage, a "program" is simply "a plan or system under which action may be taken toward a goal."<sup>88</sup> An activity is a "function or dut[y]."<sup>89</sup> Together, they span virtually all of an agency's functions. There does not appear to have been any legislative debate on the phrase, and there are no judicial opinions on point. It is probably uncontroversial then that the phrase encompasses the daily functions of an agency.

It is noteworthy that Congress has made only one amendment to the AFFH mandate. In 1988, it inserted a parenthetical phrase identifying which agencies have AFFH duties: "(including any Federal agency having regulatory or supervisory authority over financial institutions)."<sup>90</sup> This language was added "to clarify that federal agencies having regulatory or supervisory authority over financial institutions are required cooperate with the Secretary [to affirmatively further fair housing]."<sup>91</sup> In other words, the amendment clarifies—and reinforces—the AFFH's broad scope.

86. The exception is scholarship—and litigation—concerning the mandate's application to the Low Income Housing Tax Credit ("LIHTC") Program. *See generally, e.g., id.* (describing the mandate's application to LIHTC); Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747 (2005) (arguing that the way LIHTC concentrates publicly subsidized housing violates the Fair Housing Act). In litigation, the Inclusive Communities Project has challenged LIHTC policies for violating the AFFH obligation and petitioned Treasury to adopt AFFH regulations. *See Inclusive Cmty. Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 654 (5th Cir. 2019), *aff'd in part* No. 14-cv-3013-D, 2019 WL 459643 (N.D. Tex. Feb. 6, 2019); *see also Low-Income Housing Tax Credit Desegregation*, DANIEL & BESHARA, P.C., <https://www.danielbesharalawfirm.com/lowincome-housing-tax-credit-desegregation> [<https://perma.cc/67EZ-WC9V>] (explaining the firm's petitions for regulations that define the mandate's applicability to various Treasury programs). Litigation against other agencies has been very limited, as described in this Section.

87. *See* 42 U.S.C. § 3608(d).

88. *Program*, MERRIAM-WEBSTER (2022), <https://www.merriam-webster.com/dictionary/program> [<https://perma.cc/6WV2-8VS8>]. For simplicity, the terms "programs" and "activities" are used interchangeably and as shorthand for the phrase "programs and activities."

89. *Activity*, MERRIAM-WEBSTER (2022), <https://www.merriam-webster.com/dictionary/activity> [<https://perma.cc/FYQ2-G6YT>].

90. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 7(a), 102 Stat. 1619 (1988) (codified as amended at 42 U.S.C. § 3608 (2018)). For other persuasive authority on the definition of "program or activity," see Roisman, *supra* note 64, at 1025 n.79 ("That the provision of low-income housing tax credits is a program or activity seems clear." (first citing *Alexander v. U.S. Dep't of Hous. & Urb. Dev.*, 441 U.S. 39, 64 (1979); and then citing 29 U.S.C. § 794(b)(1)(A) (1994)).

91. *See* H.R. REP. NO. 100-711, at 32 (1988) (Comm. on the Judiciary); *see* SCHWEMM, *supra* note 15, § 21:1 n.3. Moreover, Congress legislated against a backdrop of caselaw on the AFFH's scope. *See, e.g.,* Interim Final Rule, Restoring Affirmatively Furthering Fair Housing Definitions

Likewise, two executive orders have defined the phrase expansively to include all government spending and regulatory activities.<sup>92</sup> For instance, Executive Order (“EO”) 12982 (1994), states that the mandate “shall include programs and activities operated, administered, or undertaken by the Federal Government,” such as “grants; loans; contracts; insurance; guarantees; and Federal supervision or exercise of regulatory responsibility (including regulatory or supervisory authority over financial institutions).”<sup>93</sup> Ultimately, the phrase “programs and activities” does not appear to limit the mandate’s scope.<sup>94</sup>

The second phrase, “relating to,” deserves brief mention if only to acknowledge the flexibility it lends to interpreting the third and more limiting phrase. Courts have routinely interpreted the phrase as expansive in other contexts.<sup>95</sup> The phrasal verb “relate to” means “to be connected with (someone or something).”<sup>96</sup> It does not impose or necessitate a direct or even particularly strong relationship. Whereas Congress could have selected a more limiting phrase to narrow the mandate’s scope, it did not.<sup>97</sup>

The third and most forceful phrase is “housing and urban development.” The mandate’s scope turns on which programs and activities reasonably qualify

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and Certifications, 86 Fed. Reg. 30,779, 30,782 (June 10, 2021) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903) (first citing *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752 (2018)); then citing *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998); and then citing *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 576 U.S. 519, 536–38 (illustrating the notion of “implicit ratification”).

92. See Exec. Order No. 12,892, 3 C.F.R. 849, 850 (1995), *reprinted in* 42 U.S.C. § 1982 (1994) (Clinton); Exec. Order No. 12,259, 3 C.F.R. 307, 308 (1981), *reprinted in* 42 U.S.C. §§ 1982, 3608 notes (1988) (Carter).

93. Exec. Order No. 12,892, 3 C.F.R. 849, 850 § 1-102 (1995). Its definition is virtually identical to that of an executive order issued by President Carter in 1980. See Exec. Order No. 12,259, 3 C.F.R. 307, 308 § 1-102 (1981). However, the Clinton executive order added the parenthetical phrase, “(including regulatory or supervisory authority over financial institutions)” to mirror the aforementioned legislative amendment to the statutory text enacted by the Fair Housing Amendments Act of 1988. See *supra* note 90 and accompanying text.

94. Moreover, the Act’s language does not limit the waiver of the government’s sovereign immunity to discrete acts, which suggests the mandate applies more broadly than the limited universe of agency actions that are judicially reviewable under the Administrative Procedure Act. See 5 U.S.C. § 551(13) (2018) (defining “agency action”); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64–65 (2004) (interpreting whether a challenged government program constitutes an “agency action”); *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 882 (1990) (same).

95. See, e.g., *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386–91 (1992).

96. *Relate to*, MERRIAM-WEBSTER (2022), <https://www.merriam-webster.com/dictionary/relate%20to> [<https://perma.cc/NFR9-CGXQ>].

97. It does not appear Congress debated its phrase, and courts have not considered this question. The closest case appears to be *City of Camden v. Plotkin*, discussed below, in which the district court considered whether the challenged U.S. Census Bureau program was “relat[ed] to housing and urban development.” 466 F. Supp. 44, 53 (D.N.J. 1978) (quoting 42 U.S.C. § 3608). The court narrowly focused on the phrase “housing and urban development,” not taking into account the flexibility of the phrase “relating to.” *Id.* at 53–54 (quoting 42 U.S.C. § 3608(c)).

as “housing and urban development,” (or at least “relate to” them).<sup>98</sup> The Fair Housing Act does not define the phrase.<sup>99</sup> Taken in two parts, “housing,” is commonly defined as “shelter” or “lodging”<sup>100</sup> and, by Black’s Law Dictionary, as “[s]tructures built as dwellings for people, such as houses, apartments, and condominiums.”<sup>101</sup> Although the Act does not define housing, it defines “[d]welling,” as “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.”<sup>102</sup> For purposes of this Article, the definition of “dwelling,” is a reasonable proxy for the arguably broader term “housing.”<sup>103</sup>

By contrast, “urban development” appears somewhat more limiting. “Urban” commonly refers to a city or metropolitan area, often but not exclusively measured by population.<sup>104</sup> “Development” is a more expansive word, meaning the act, process, or result of developing—with “developing” understood as producing something, making something available or usable, or—more narrowly—making it suitable for commercial or residential purposes. While Congress did not define “urban development” in the Fair Housing Act,

98. This Article offers examples of programs that are likely to qualify as “housing” or “urban development” but does not attempt to catalog the many programs that may qualify. Identifying qualifying programs within an agency should be one component of an interagency coordination effort, as discussed in Part IV.

99. Given its pervasive common usage, even bedrock housing statutes rarely define “housing.” Rather, regulations promulgating those laws appear to define housing as categories of shelter or dwellings when limiting its application to specific contexts. *See generally, e.g.*, Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (codified as amended at 42 U.S.C. §§ 1471–90 (2018)) (farm housing projects); Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified as amended at 42 U.S.C. §§ 5301–22 (2018)) (community development block grants and housing and urban development laws); Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, 89 Stat. 1124 (codified as amended at 12 U.S.C. §§ 2801–11 (2018)) (mortgage data disclosure).

100. *Housing*, MERRIAM-WEBSTER (2022), <https://www.merriam-webster.com/dictionary/housing> [<https://perma.cc/JJD3-Z8V3>].

101. *Housing*, BLACK’S LAW DICTIONARY (11th ed. 2019); *see also House, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES* (1856), <https://legal-dictionary.thefreedictionary.com/housing> [<https://perma.cc/E5UJ-YSBE>] (“A place for the habitation and dwelling of man. This word has several significations, as it is applied to different things. In a grant or demise of a house, the curtilage and garden will pass, even without the words ‘with the appurtenances,’ being added.”).

102. 42 U.S.C. § 3602(b) (2018).

103. Ultimately, the term “housing” does not appear to be a term of art, but simply what people ordinarily mean to describe where people live.

104. *See Urban*, MERRIAM-WEBSTER (2022), <https://www.merriam-webster.com/dictionary/urban> [<https://perma.cc/4VDJ-RZ4Z>] (“[O]f, relating to, characteristic of, or constituting a city”); *Urban*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“Of, relating to, or involving a city or town; not rural.”); *cf. Rural*, MERRIAM-WEBSTER (2022), <https://www.merriam-webster.com/dictionary/rural> [<https://perma.cc/BE3T-79FS>] (“[O]f or relating to the country, country people or life, or agriculture”).

it provided context for the phrase when it established a new executive agency—HUD—to formally coordinate “housing and urban development.” Its legislative purpose statement suggests that “urban development” can reasonably be understood as the process of making resources available or usable in a manner that affects a metropolitan area.<sup>105</sup> In other words, despite initial appearances, “housing and urban development” is a rather capacious phrase that spans or “relate[s] to” many policy areas.

Finally, there is the conjunctive connector. Theoretically, the phrase “housing *and* urban development” could limit the mandate to activities that involve both housing *and* urban development. However, “and” is frequently interpreted as “or” in common and legal usage.<sup>106</sup> Moreover, a variety of linguistic and statutory canons of interpretation support a more expansive interpretation.<sup>107</sup> Additionally, there are compelling practical and policy reasons

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105. In its legislative purpose statement, the Department of Housing and Urban Development Act provides for “sound development of the Nation’s communities and metropolitan areas in which the vast majority of its people live and work” and administering programs that “provide assistance for housing and for the development of the Nation’s communities.” Department of Housing and Urban Development Act, Pub. L. No. 89-174, § 2, 79 Stat. 667, 667 (1965) (current version at 42 U.S.C. § 3531 (2018)). Principally, it identifies the Act’s tasks as maximizing the coordination of federal activities that “have a major effect upon urban community, suburban, or metropolitan development [and] to encourage the solution of problems of housing, urban development, and mass transportation through State, county, town, village, or other local and private action, including promotion of interstate, regional, and metropolitan cooperation . . . .” *Id.* This language implies that these federal activities stretch across multiple agencies. Indeed, the Act amended a variety of titles of the U.S. Code, among them statutes governing education and banking programs. EO 11668 explains that “all other Federal executive departments and agencies shall cooperate and work with [HUD] in providing appropriate advice and financial support so as to ensure that the above described objectives are carried out . . . .” Exec. Order No. 11,668, 37 Fed. Reg. 8057, 8058 § 4 (April 21, 1972), *reprinted in* 42 U.S.C. § 3531 note (2018).

106. *See, e.g.*, BRYAN A. GARNER, GARNER’S MODERN ENGLISH USAGE 49 (4th ed. 2016); *see also* OfficeMax, Inc. v. U.S., 428 F.3d 583, 600–01 (6th Cir. 2005) (Rogers, J., dissenting in part) (illustrating how “and” operates as the disjunctive “or” in context).

107. *See, e.g.*, Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 402 (1950) (remedial purpose); Chisom v. Roemer, 501 U.S. 380, 390, 399 (1991); *see also* Smith v. Brown, 35 F.3d 1516, 1522–23 (Fed. Cir. 1994) (further statutory scheme); Massachusetts v. Morash, 490 U.S. 107, 115 (1989) (the whole statute); ABNER J. MIRVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 24 (1997) (the whole statute); Nat’l Credit Union Admin. v. First Nat’l Bank & Tr. Co., 522 U.S. 479, 502–03 (1998) (same).

It appears highly unlikely that Congress intended to draw a substantive line between urban and rural programs. Historical context suggests Congress was simply using the phrase from its recently established Department of “Housing and Urban Development.” Indeed, this divide would seem to produce unintended, and even absurd, results. The fact that HUD’s name included Housing *and* Urban Development—and it deals with both housing and urban development (but not always the overlap of the two)—also suggests the statutory phrase should be read more expansively. It is also possible that the phrase “housing *and* urban development” has itself become a term of art—a phrase that indicates a sphere of activities rather than one read for each word’s individual meaning. For more on phrases versus words, see generally Samuel L. Bray, “*Necessary and Proper*” and “*Cruel and Unusual*”: *Hendiadys in the Constitution*, 102 VA. L. REV. 687 (2016); and Anya Bernstein, *Before Interpretation*, 84 U. CHI. L. REV. 567 (2017).

to believe the mandate is broader than the narrowest possible reading, especially given that the non-housing development activities are “relate[d] to” and impact residential zoning, and thereby residential segregation. The Fair Housing Act’s broad remedial objectives counsel a broader reading toward reducing discrimination and segregation. Infrastructure grants that support transportation and the electric grid are closely relate to housing.<sup>108</sup> An unnecessarily narrow interpretation would ignore how housing actually functions. A broader interpretation aligns with the Act’s remedial purpose,<sup>109</sup> and its legislative history reinforces a broad reading.<sup>110</sup>

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For more on the relationship between housing, development, and segregation, see SOLOMON GREENE & INGRID GOULD ELLEN, *URB. INST., BREAKING BARRIERS, BOOSTING SUPPLY: HOW THE FEDERAL GOVERNMENT CAN HELP ELIMINATE EXCLUSIONARY ZONING* 11–12 (2020), [https://www.urban.org/sites/default/files/publication/102963/breaking-barriers-boosting-supply\\_1.pdf](https://www.urban.org/sites/default/files/publication/102963/breaking-barriers-boosting-supply_1.pdf) [<https://perma.cc/D3SR-YWCM>] (discussing the importance of broadly defining concepts of transportation and infrastructure to reflect the reality of the relationship between housing, development, and segregation); see also *2021 Report Card for America’s Infrastructure: America’s Infrastructure Scores a C*, AM. SOC’Y CIV. ENG’RS, <https://infrastructurereportcard.org> [<https://perma.cc/9KVS-ZZWP>] (defining “infrastructure” using eighteen categories, many of which touch on urban development).

108. See, e.g., Letter from Julián Castro, Sec’y, U.S. Dept. of Hous. & Urb. Dev., John B. King, Jr., Sec’y, U.S. Dept. of Educ. & Anthony R. Foxx, Sec’y, U.S. Dept. of Transp. 2–3 (June 3, 2016), [www2.ed.gov/documents/press-releases/06032016-dear-colleagues-letter.pdf](http://www2.ed.gov/documents/press-releases/06032016-dear-colleagues-letter.pdf) [<https://perma.cc/c/5SMJ-4MFV>]; see also Zoé Hamstead et al., *Thermally Resilient Communities: Creating a Socio-technical Collaborative Response to Extreme Temperatures*, 1 *BLDGS & CITIES*, 218, 218–32 (2020) (illustrating the relationship between housing “hot zones” and infrastructure).

This nexus is critical because many agencies do not identify housing or development agencies despite that they administer such programs. In other words, AFFH-qualifying programs may appear “incidental to program mission.” See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., *GAO-15-110, TRANSPORTATION DISADVANTAGED POPULATIONS: NONEMERGENCY MEDICAL TRANSPORTATION NOT WELL COORDINATED, AND ADDITIONAL FEDERAL LEADERSHIP NEEDED* 11 (2014) (illustrating program administration challenges when “incidental to program mission” services are administered by many agencies (emphasis omitted)). If so, an agency may need more technical assistance, prodding, and oversight, to carry out its AFFH duties. See SHANTI ABEDIN ET AL., *NAT’L FAIR HOUS. ALL., MAKING EVERY NEIGHBORHOOD A PLACE OF OPPORTUNITY: 2018 FAIR HOUSING TRENDS REPORT* 69 (2018), [https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report\\_4-30-18.pdf](https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report_4-30-18.pdf) [<https://perma.cc/5JYT-249J>] (working across silos to advance fair housing).

109. For a discussion of the Act’s remedial purpose, see *supra* note 38 and accompanying text; and *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982).

110. In terms of legislative history, the first indication of its broad scope is a substantive amendment that expanded enforcement from one agency to many. As introduced, “the Act would have established [HUD] as the sole authority for enforcing the Act.” Memorandum from Off. of the Gen. Couns. on Civil Rights Authority and Responsibility of the Board to Off. of Hous. & Urb. Affs., at \*33 (June 30, 1972) (on file at 1972 WL 125725). However, the proposed single-agency approach “was severely criticized in both houses of Congress and was a principal point of objection during the filibuster on the bill. As a result, the bill was amended in the course of Senate debate to diffuse administrative authority to the other departments and agencies . . .” *Id.* (footnote omitted). In other words, from the outset, the AFFH was intended as an interagency imperative.

Second, Congress has made one substantive amendment to the text of § 3608(d). In the Fair Housing Amendments Act of 1988, it inserted expansive language explicitly clarifying that the mandate applies to “any Federal agency having regulatory or supervisory authority over

Beyond the plain language of the statute, there is a small body of relevant case law. The issue of the mandate's programmatic scope has appeared before federal courts on at least four occasions. The courts reached the question in two of the four cases.

In *Jorman v. Veterans Administration*, the court observed that the mandate applied to the VA's Loan Guaranty Service, a program providing home loan guarantees for qualifying veterans, noting: "By any standard [the] Service is engaged in 'activities relating to housing.'"<sup>111</sup> In that case, the plaintiffs claimed that the Service's administration of home guaranties "contributed to white flight" and neighborhood segregation in Chicago.<sup>112</sup> Given the urban setting, it does not appear the court or the parties considered whether the program involved "urban development." By contrast, in *City of Camden v. Plotkin*, the plaintiffs sued the U.S. Census Bureau on the theory that undercounting city residents undermined the city's competitiveness for a federal job program.<sup>113</sup> The court ruled the Bureau could not be held liable because the plaintiffs had failed to allege the program was "directly concerned with any housing *or* redevelopment programs."<sup>114</sup>

Interestingly, the court's interpretation both broadened and narrowed the nexus: On one hand, it suggests the program needs to "directly" concern housing or redevelopment, which seems to contradict the statute's phrasal verb "related to." On the other hand, the court read the phrase "housing and urban development" in the disjunctive as "housing *or* redevelopment," which broadens the mandate.<sup>115</sup>

In two additional cases, district courts assumed that Section 3608(d) applied to the program or activity but ruled against the AFFH claims on the merits. The first case involved a challenge to the Farmers Home Administration's ("FmHA") administration of rural rental housing as having discriminatory impact on families with children.<sup>116</sup> The court did not limit the mandate's applicability to exclusively "urban" programs, noting that the federal

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financial institutions," a phrase that did not appear in the original 1968 version. See Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 7, 102 Stat. 1619, 1623 (1988) (codified as amended at 42 U.S.C. §§ 3601-19 (2018)) (inserting expansive language into § 3608(d)). This amendment speaks to the cross-agency and coordinating objective of the mandate. Moreover, it buttresses a broad interpretation of the types of programs "relating to" "housing and urban development," as such regulatory agencies typically oversee financial transactions that go beyond exclusively housing or urban infrastructure. See *id.*

111. *Jorman v. Veterans Admin.*, 579 F. Supp. 1407, 1416 (N.D. Ill. 1984).

112. *Id.* at 1411, 1415.

113. *City of Camden v. Plotkin*, 466 F. Supp. 44, 46 (D.N.J. 1978).

114. *Id.* at 54 (emphasis added).

115. *Id.* (emphasis added). As a practical matter, these cases counsel fair housing advocates to clearly establish the connection between a program or activity and "housing" or "urban development" (ideally both) to maximize the likelihood of success. In *Plotkin*, it appears litigants may have been able to establish the connection but did not adequately allege it. See *id.*; *Debolt v. Espy*, 832 F. Supp. 209, 215 (S.D. Ohio 1993).

116. *Debolt*, 832 F. Supp. at 215.

defendants acknowledged the AFFH mandate applied to FmHA programs.<sup>117</sup> The second case implicated the Office of the Comptroller of the Currency (“OCC”), which monitors banks for Fair Housing Act compliance.<sup>118</sup> Again, the court did not question the claim’s applicability to the OCC regulatory activities, and did not pause to analyze whether those services required a nexus to urban development.<sup>119</sup> Ultimately, the court ruled against plaintiffs on the merits.<sup>120</sup>

Finally, two executive orders are persuasive in interpreting the mandate’s scope. Most recent is EO 12892, issued by President Clinton.<sup>121</sup> It established an interagency AFFH enforcement scheme, assigning responsibility to the head of each executive agency to “ensur[e] that its programs and activities relating to housing and urban development are administered in a manner affirmatively to further the goal of fair housing . . . .”<sup>122</sup> EO 12892 also created the “President’s Fair Housing Council,” a cabinet-level coordinating body.<sup>123</sup> It explicitly named to the Council the heads of all but three agencies—notably excluding the Departments of State, Commerce, and Energy. This membership list suggests that the Clinton Administration considered each agency’s activities and concluded that all but three agencies administered programs related to housing and urban development.<sup>124</sup>

117. *See id.* at 215–16.

118. *Jones v. Off. of the Comptroller of the Currency*, 983 F. Supp. 197, 199 (D.D.C. 1997), *aff’d*, 1998 WL 315581 (D.C. Cir. 1998).

119. *See id.* at 202–05.

120. *Id.* at 205.

121. The first executive order, issued by President Carter, Exec. Order No. 12,259, 3 C.F.R. 307, 307 (1981), was superseded by an executive order with a more robust enforcement scheme, issued by President Clinton in 1994, Exec. Order No. 12,892, 3 C.F.R. 849, 854 § 6-607 (1995). The latter remains in effect, as it has not expired or been revoked.

122. Exec. Order No. 12,892, 3 C.F.R. 849, 850 § 2-202 (1995). Discussed in more detail below, EO 12,892 orders HUD—and subsequently every agency—to issue AFFH-specific regulations. For instance, it directs HUD to issue regulations that “describe the types of programs and activities” subject to the mandate; “the responsibilities and obligations of applicants, participants, and other persons and entities involved in housing and urban development programs and activities”; and “a method to identify impediments in programs or activities that restrict fair housing choice and implement incentives that will maximize the achievement of practices that affirmatively further fair housing.” *Id.* at 851–52 § 4-401 (a) (2), (4), (5). As to other agencies, it directs them to develop their own, agency-specific AFFH regulations and submit them to HUD to review for “consistency among the operations of the various executive agencies and . . . provide comments.” *Id.* at 852 § 4-402, to -403. A memorandum issued with EO 12892 describes the executive order as requiring “the heads of departments and agencies, including the Federal banking agencies, to cooperate with [HUD] in identifying ways to structure agency programs and activities to affirmatively further fair housing and to promptly negotiate memoranda of understanding with [HUD] to accomplish that goal.” Memorandum on Fair Housing, 30 WEEKLY COMP. PRES. DOC. 114, 115 (Jan. 17, 1994).

123. Exec. Order No. 12,892, 3 C.F.R. 849, 850 § 3 (1995).

124. *Id.* at § 3-301 (naming to the council “the Secretary of Health and Human Services, the Secretary of Transportation, the Secretary of Education, the Secretary of Labor, the Secretary of Defense, the Secretary of Agriculture, the Secretary of Veterans Affairs, the Secretary of the

Together, the statute's plain language, case law, and legislative history, and two executive orders counsel a broad interpretation of the AFFH mandate's scope. Its breadth—which extends to “[a]ll executive departments and agencies,” is only limited by three phrases: (1) “programs and activities”; (2) “relating to”; and (3) “housing and urban development.”<sup>125</sup> Ultimately, only the third phrase places any material limit on its scope, and even then it only limits the subject matter of the activity to the very broad categories of housing and urban development activities.

### III. HOW THE GOVERNMENT SEGREGATES

Segregation's lasting power is in the interrelated systems that reinforce it.<sup>126</sup> Although not all systems are strictly federal, the national government's influence is undeniable—particularly in how it spends money and regulates.<sup>127</sup>

Treasury, the Attorney General, the Secretary of the Interior, the Chair of the Federal Reserve, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Chair of the Federal Deposit Insurance Corporation, and such other officials of executive departments and agencies as the President may, from time to time, designate.”) The only agencies not expressly named were the Department of State, Commerce, and Energy. *See id.*

For more on the President's Fair Housing Council, see Memorandum on Fair Housing, 30 WEEKLY COMP. PRES. DOC. 114, 115 (Jan. 17, 1994) (“The President's Fair Housing Council shall review the design and delivery of Federal programs and activities to ensure that they support a coordinated strategy to affirmatively further fair housing. The Council shall propose revisions to existing programs or activities, develop pilot programs and activities, and propose new programs and activities to achieve its goals.”). Ultimately, political will waned and the Council stopped meeting. *See* Heather R. Abraham, “*Don't Blame Stokely Carmichael*”: *The Need for Federal Fair Housing Leadership*, 29 J. AFFORDABLE HOUS. & CMTY. DEV. L. 555, 561–62 (2021) (citing Hannah-Jones, *supra* note 36). In 1998, the Clinton administration attempted to promulgate a substantive HUD AFFH regulation. *See* Fair Housing Performance Standards for Acceptance of Consolidated Plan Certifications and Compliance with Community Development Block Grant Performance Review Criteria, 63 Fed. Reg. 57,882, 57,882 (Oct. 28, 1998) (to be codified at 24 C.F.R. pts. 91, 570). It would have clarified grantee AFFH certification requirements and added standards for HUD to evaluate whether certifications were satisfactory and stated penalties for non-compliance. *See id.* at 57,882–85. The proposed rule was never finalized.

A bipartisan national report on fair housing enforcement argues for reinstating the President's Fair Housing Council. This is discussed at more length in Part IV. *See* NAT'L COMM'N ON FAIR HOUS. & EQUAL OPPORTUNITY, *THE FUTURE OF FAIR HOUSING* 51–52 (2008) [hereinafter NATIONAL COMMISSION REPORT], [www.nationalfairhousing.org/wp-content/uploads/2017/04/Future\\_of\\_Fair\\_Housing.pdf](http://www.nationalfairhousing.org/wp-content/uploads/2017/04/Future_of_Fair_Housing.pdf) [https://perma.cc/XK2T-L24H].

125. *See* 42 U.S.C. § 3608(d) (2018).

126. *E.g.*, NATIONAL COMMISSION REPORT, *supra* note 124, at 51 (“The multi-disciplinary approach of Executive Order 12892 recognizes that access to new housing opportunities may be constrained by other government policies and systems that have adapted to entrenched patterns of metropolitan segregation.”). *See generally* ROBERT P. JONES, *THE END OF WHITE CHRISTIAN AMERICA* 155–56 (2016) (“[T]here are virtually no American institutions positioned to resolve these persistent problems of systemic and social segregation.”).

127. On subnational enforcement of civil rights and local innovations, see generally Olatunde C.A. Johnson, *The Local Turn: Innovation and Diffusion in Civil Rights Law*, 79 L. & CONTEMP. PROBS. 115 (2016) (exploring subnational innovations and the political economy behind them). For more on how layered policies shape segregation, see MEGAN HABERLE, PETER KYE & BRIAN KNUDSEN, *REVIVING AND IMPROVING HUD'S AFFIRMATIVELY FURTHERING FAIR HOUSING*

Dismantling housing segregation is a widely acknowledged “linchpin” to dismantling multiple forms of structural racism.<sup>128</sup> As such, it is a threshold through which we must pass to disrupt racism’s other forms.

This Part audits the government’s contemporary activities, exposing a litany of activities that produce and perpetuate segregation. Building on articles examining HUD’s AFFH obligations,<sup>129</sup> this Article looks beyond HUD to other federal agencies that may not be cognizant of their segregative footprint. These agencies often see residential segregation as “incidental to program mission.”<sup>130</sup> Yet mission identity is often critical to effective enforcement. The more the government’s segregative effect goes unrecognized—and unaddressed—the more challenging it is to redirect the government’s cumulative impact. The following illustrations substantiate this Article’s central argument: A collaborative, interagency framework is required to detect and dismantle the federal government’s segregative footprint.<sup>131</sup>

The federal government’s historic role in the underwriting of housing segregation is well documented. It notoriously separated people by race in public housing, systematically denied federally insured mortgages to communities of color, enforced private racial covenants, and bulldozed Black neighborhoods in the name of “urban renewal” and “slum clearance.”<sup>132</sup> In

REGULATION: A PRACTICE-BASED ROADMAP 2, 8–9 (2020), <https://prrac.org/pdf/improving-affh-roadmap.pdf> [<https://perma.cc/N9TJ-GBWT>] (“For example, federal funding incentives, overlaid on local zoning decisions, act on a systemic level to shape the locational patterns of subsidized and other affordable housing. Priorities and bureaucratic structures within public housing administration, set by the federal government, tend to reinforce jurisdictional fragmentation among local housing authorities and to focus them on short-term needs and efficiencies, rather than on fair housing goals. . . . Unequal resources meanwhile still concentrate in segregated communities, as they long have, impeding access to quality schools, employment, health, economic development, stable housing, and other aspects of life opportunity.”)

128. See Massey, *supra* note 32, at 1; Menendian et al., *supra* note 31.

129. See generally, e.g., Abraham, *supra* note 1 (analyzing the AFFH mandate); Blake Emerson, *Affirmatively Furthering Equal Protection: Constitutional Meaning in the Administration of Fair Housing*, 65 *BUFF. L. REV.* 163 (2017) (offering HUD’s AFFH regulation as an illustration of how agencies implement constitutional law); Elizabeth Julian, *The Duty to Affirmatively Further Fair Housing: A Legal as well as Policy Imperative*, in *A SHARED FUTURE: FOSTERING COMMUNITIES OF INCLUSION IN AN ERA OF INEQUALITY*, *supra* note 1, at 268 (describing the mandate as both a legal duty and policy imperative to integrate society).

130. See *supra* note 108 (discussing housing-related programs that are “incidental to program mission”).

131. For more on the promise of cabinet-level leadership as one strategy for reducing segregation, see Abraham, *supra* note 124, at 558–60.

132. See, e.g., ROTHSTEIN, *supra* note 4, at 17–37, 59–75 (discussing public housing and federally insured mortgages); RAYMOND A. MOHL, POVERTY & RACE RSCH. ACTION COUNCIL, *THE INTERSTATES AND THE CITIES: HIGHWAYS, HOUSING, AND THE FREEWAY REVOLT 2* (2002), <https://www.prrac.org/pdf/mohl.pdf> [<https://perma.cc/8K8V-QUDB>] (discussing highway construction); MARK GOLDMAN, *CITY ON THE EDGE: BUFFALO, NEW YORK 187–210* (2007) (discussing urban renewal); STACY SEICSHNAYDRE, ROBERT A. COLLINS, CASHAUNA HILL & MAXWELL CIARDULLO, *THE DATA CTR., RIGGING THE REAL ESTATE MARKET: SEGREGATION, INEQUALITY, AND DISASTER RISK 5* (2018), [https://www.datacenterresearch.org/reports\\_analysis/rigging-the-real-estate-mar](https://www.datacenterresearch.org/reports_analysis/rigging-the-real-estate-mar)

the public consciousness, government segregation is relegated to the past. But the unforbearing fact is that it continues today, “officially sanctioned” or not.<sup>133</sup>

Agencies enable segregation in three routine ways:

- (1) Spending money on exclusionary activities (*i.e. affirmatively furthering segregation*),
- (2) Failing to enforce existing laws or treating regulated parties differently (*i.e. not enforcing or selectively enforcing*), and
- (3) Failing to modify existing programs to promote fair housing (*i.e. not furthering fair housing or furthering the status quo*).<sup>134</sup>

The following illustrations touch each of these modes, underscoring how even ostensibly innocuous activities contribute to housing segregation.

#### A. ILLUSTRATION 1: DEPARTMENT OF TRANSPORTATION

“Transportation policy has always been a driver of inequality.”<sup>135</sup> For instance, “[t]he benefits and burdens of our transportation system—highways, roads, bridges, sidewalks, and public transit—have been planned, developed, and sustained to pull resources from Black communities are that subsequently

ket-segregation-inequality-and-disaster-risk [https://perma.cc/HJ93-gDLA] (“The Housing Acts of 1949 (slum clearance) and 1954 (urban renewal) authorized the displacement of African Americans from urban neighborhoods in close proximity to downtown business districts, or otherwise deemed desirable for development, and forced relocation to more economically isolated and racially segregated residential areas. The program earned the nickname of ‘Negro clearance’ because ‘[b]y the end of the 1950s, nearly nine out of every ten displaced families that were compelled to move into low-rent [public] housing were non-white.’” (alterations in original) (quoting Arnold R. Hirsch, “Containment” on the Home Front: Race and Federal Housing Policy from the New Deal to the Cold War, 26 J. URB. HIST. 158, 159 (2000)); GREGORY D. SQUIRES, CAPITAL AND COMMUNITIES IN BLACK AND WHITE: THE INTERSECTIONS OF RACE, CLASS, AND UNEVEN DEVELOPMENT 51 (1994) (describing how “[f]ederal housing policy has reinforced” private discriminatory practices).

Some scholars have documented how other regimes replicated U.S. practices. *See, e.g.*, ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS 81–85 (2020) (describing how the Nazi party replicated U.S. segregation tactics).

133. Deborah N. Archer, “White Men’s Roads Through Black Men’s Homes”: Advancing Racial Equity Through Highway Reconstruction, 73 VAND. L. REV. 1259, 1306 & nn.286–88 (2020) (describing the legal distinction between “officially sanctioned” racial inequality and policies that have the same effect).

134. In other words, inaction or superficial action that leaves intact “the white privilege and Black subordination fostered by systems of interlocking private and public power.” *Id.* at 1271 (citing Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1757 (1993) (describing the “substantive inequality of power and resources” after *Brown v. Board* that remained after *Milliken v. Bradley*)).

135. Deborah N. Archer, *Transportation Policy and the Underdevelopment of Black Communities*, 106 IOWA L. REV. 2125, 2127 (2021).

deployed and invested to the benefit of predominantly white communities and their residents.”<sup>136</sup>

The U.S. Department of Transportation (“DOT”) promotes segregation in several ways. DOT bankrolls exclusionary zoning,<sup>137</sup> prioritizes automobile-centric investment at the expense of transit-oriented development that would improve housing mobility,<sup>138</sup> and builds highways in a way that reinforces segregation.<sup>139</sup> This illustration focuses on DOT’s influence on local zoning.

136. *Id.*; see also Audrey G. McFarlane, *Black Transit: When Public Transportation Decision-Making Leads to Negative Economic Development*, 106 IOWA L. REV. 2369, 2372–73 (2021) (discussing the cancellation of Baltimore’s Red Line rail project to underscore the need for Congress and regulators to structure transportation funding in a manner that proactively accounts for the likelihood of cancellation of proposed federally funded public transportation projects).

137. *E.g.*, MELISSA WINKLER, UP FOR GROWTH POLICY BRIEF: LEVERAGING FEDERAL FUNDS TO INCENTIVIZE LAND USE AND ZONING REFORM 2 (2021) (“Zoning and land use policy decisions are concentrated locally, but the housing underproduction crisis is a national concern, and the federal government, via its massive funding streams, has the power to influence states and localities to participate in quality reform that will mitigate the economic and social impacts of the underproduction of homes.”).

138. *E.g.*, Archer, *supra* note 135, at 2143 (“The focus on highways—as opposed to more accessible buses, subways, and light rails—has helped to keep steady work just out of reach for many Black communities. Communities of color and low-income communities use public transit at higher rates than white and wealthy communities do. Black and Latinx people account for 54 percent of public transit users, including 62 percent of bus riders. And, Black people are almost six times as likely as whites to use public transit. This is especially true with respect to urban transit as ‘over 88 [percent] [of Black people] live in metropolitan areas and over 53 [percent] live inside central cities.’ The disparities are also a function of need, as 24 percent of Black households do not own a car.” (alterations in original) (footnotes omitted) (quoting Robert D. Bullard, *Addressing Urban Transportation Equity in the United States*, 31 FORDHAM URB. L.J. 1183, 1190 (2004)); *Id.* at 2142–43 (“Another example of this imbalance is the funding allocations within the Fixing America’s Surface Transportation Act (‘FAST Act’). The FAST Act is a \$305 billion highway bill that was the first long-term national transportation spending package in a decade. It authorized \$305 billion over fiscal years 2016–2020 for transportation initiatives. However, highway funding accounted for \$207.4 billion of that funding. Although the FAST Act also allocated funding for public transportation, that number pales in comparison to the highway allocation. The FAST Act authorized \$61.1 billion in funding for public transportation. This amount was split between several programs . . . . The State of Good Repair Program provides funding primarily for repairing and upgrading rail transit systems. This program received \$12.97 billion. In comparison, the Bus and Bus Facilities Formula Grants Program, which provides funding for capital expenses to purchase and rehabilitate buses and to [construct] [bus-]related facilities, received \$3.74 Billion. Unsurprisingly, Black people are more likely to take the bus than . . . white commuters . . . .” (footnotes omitted)).

139. *See id.* at 2135–36. These illustrations are just a glimpse into DOT’s segregative effect. Another is the interstate highway system. Emerging scholarship connects the racially destructive history of the highway system with today’s segregation. Professor Deborah Archer observes the precarious moment of opportunity at hand. “The interstate highway system is on the verge of transformational change as aging highways around the country are crumbling or insufficient to meet growing demand, and they must be rebuilt or replaced.” Archer, *supra* note 133, at 1268–69. Thus, “[t]he possibility of significant infrastructure development offers an opportunity to redress some of the harm caused by the interstate highway system, to strengthen impacted communities, and to advance racial equity. Still, there is a risk that federal, state, and local highway builders will repeat the sins of the past, relying on the ‘traditional patterns of highway politics and policy

For state and local governments, DOT has become the Rich Uncle Pennybags<sup>140</sup> of large-scale projects. It funds high-dollar projects across more communities than virtually any other agency, primarily through infrastructure grants.<sup>141</sup> Its unparalleled reach makes it a critical leverage point for reducing the government's segregative footprint. Moreover, because transportation and housing policy are interconnected, any desegregation efforts must track this cross-cutting relationship.<sup>142</sup>

focused on growth and expansion' at the expense of communities of color and low-income populations whose homes, businesses, and community institutions again stand in the path of the bulldozers." *Id.* at 1269 (footnote omitted) (quoting Raymond A. Mohl, *The Expressway Teardown Movement in American Cities: Rethinking Postwar Highway Policy in the Post-Interstate Era*, 11 J. PLAN. HIST. 89, 89–90 (2012)).

140. Rich Uncle Pennybags is the original mascot of the board game Monopoly. *Mr. Monopoly*, FANDOM: MONOPOLY WIKI, [https://monopoly.fandom.com/wiki/Mr.\\_Monopoly](https://monopoly.fandom.com/wiki/Mr._Monopoly) [<https://perma.cc/EP3J-387H>].

141. *E.g.*, Jenny Schuetz, *HUD Can't Fix Exclusionary Zoning by Withholding CDBG Funds*, BROOKINGS (Oct. 15, 2018), <https://www.brookings.edu/research/hud-cant-fix-exclusionary-zoning-by-withholding-cdbg-funds> [<https://perma.cc/9JJS-TLTR>] (concluding the "CDBG [program is not well targeted to induce local zoning reform because it] is designed to assist less wealthy communities—not exclusionary suburbs"); *see also* Abraham, *supra* note 1, at 42–43 n.164, 59–60 n.215 (explaining that while some communities reject HUD funding, others may not have the luxury of rejecting sizeable transportation funding despite the strings attached). Using transportation programs is especially valuable because it elucidates the deep connection between housing and transportation. Moreover, widespread "land use reform . . . require[s] [action] across localities from [large] metropolitan areas, suburban cores, and [adjacent] areas. DOT grants and funding streams are some of the only federal-level dollars that touch all of these communities." WINKLER, *supra* note 137, at 6.

142. Reflecting this relationship, congressional appropriations combine transportation and housing as "THUD"—"Transportation, Housing, and Urban Development." *See, e.g.*, MAGGIE MCCARTY & DAVID RANDALL PETERMAN, CONG. RSCH. SERV., R46465, TRANSPORTATION, HOUSING AND URBAN DEVELOPMENT, AND RELATED AGENCIES (THUD) APPROPRIATIONS FOR FY2021, at 1 (2020).

On the relationship between transportation planning and AFFH, see Richard A. Marcantonio, Aaron Golub, Alex Karner & Louise Nelson Dyble, *Confronting Inequality in Metropolitan Regions: Realizing the Promise of Civil Rights and Environmental Justice in Metropolitan Transportation Planning*, 44 *FORDHAM URB. L.J.* 1017, 1048–52 (2017) (discussing the importance of integrating AFFH principles into DOT programming). On the role of Metropolitan Planning Organizations ("MPOs"), see Myron Orfield & Thomas F. Luce Jr., *Governing American Metropolitan Areas: Spatial Policy and Regional Governance*, in *MEGAREGIONS: PLANNING FOR GLOBAL COMPETITIVENESS* 252 (Catherine L. Ross ed., 2009); Memorandum from Myron Orfield, Professor of L., Univ. of Minnesota, on Coordination with US DOT to Improve Regional Planning to Erika Poethig, Special Assistant to the President for Hous. and Urb. Pol'y, White House Domestic Policy Council 1 (Feb. 21, 2021) (on file with author) (discussing a proposal to improve regional planning); and THE SUMMIT FOR CIV. RTS., AN AGENDA FOR RACIAL JUSTICE AND MIDDLE CLASS OPPORTUNITY FOR ALL AMERICANS WITHIN A METROPOLITAN FRAMEWORK 13, [https://buildingoneamerica.org/sites/default/files/attachments/draft\\_summit\\_for\\_civil\\_rights\\_transition\\_recommendations\\_o.pdf](https://buildingoneamerica.org/sites/default/files/attachments/draft_summit_for_civil_rights_transition_recommendations_o.pdf) [<https://perma.cc/2AW9-3P9Q>] ("[MPOs] . . . should be expanded to support regional housing plans. Plans should include assigning fair-share housing need allocations across the regions based on a regional demographics housing need assessments and metropolitan opportunity indexing. MPOs should be authorized to disburse federal housing subsidies and other community development funds in accordance with regional housing plans.").

Exclusionary zoning is a case in point. DOT provides grants to even the most exclusionary communities, despite widespread political agreement that exclusionary zoning curtails housing supply and fuels segregation.<sup>143</sup> Common examples of exclusionary land use policies are minimum lot sizes, minimum square footage, parking requirements, prohibitions on multi-family homes, and height limits.<sup>144</sup> “In most U.S. cities, zoning laws prohibit the construction of [multi-family homes (duplexes and larger)] on at least [75%] of [its] available land.”<sup>145</sup> Such restrictions have the effect of separating wealthier white

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143. See, e.g., RICHARD D. KAHLENBERG, THE CENTURY FOUND., *TEARING DOWN THE WALLS: HOW THE BIDEN ADMINISTRATION AND CONGRESS CAN REDUCE EXCLUSIONARY ZONING* 3 (2021), <https://tcf.org/content/report/tearing-walls-biden-administration-congress-can-reduce-exclusionary-zoning> [<https://perma.cc/RPZ6-UAMW>] (“Economists from across the political spectrum agree that zoning laws that ban anything but single-family homes artificially drive up prices—for houses in exclusive neighborhoods and for multi-unit rental dwellings alike—by limiting the supply of housing that can be built in a region, just as surely as OPEC constricting the production of oil drives up oil prices.” (footnote omitted)); see also Vanessa Brown Calder, *What Secretary Carson Should Know About Affirmatively Furthering Fair Housing (AFFH)*, CATO INST.: CATO AT LIBERTY (May 10, 2018, 1:01 PM), <https://www.cato.org/blog/what-secretary-carson-should-know-about-affirmatively-furthering-fair-housing-affh> [<https://perma.cc/86UA-JEPV>] (“A major cause of racial segregation is already known: zoning regulation. [It] segregates by race because race is frequently correlated with income. Zoning segregates by income through density limits, minimum lot sizes, and by reducing the supply of housing in cities, thereby creating regional housing affordability issues that push low-income racial minorities out.”); GREENE & GOULD ELLEN, *supra* note 107, at 7 (describing “President Trump[’s] . . . executive order establishing a White House Council on Eliminating Regulatory Barriers to Affordable Housing, which [was] charged with quantifying the effects of local zoning laws and . . . recommending ‘best practices for removal.’” (footnotes omitted)).

For examples of affluent communities with exclusionary practices, see Jacqueline Rabe Thomas, *Separated by Design: How Some of Connecticut’s Wealthiest Towns Fight Affordable Housing*, HARTFORD COURANT (May 25, 2019, 6:00 AM), [www.courant.com/politics/hc-pol-affordable-housing-zoning-connecticut-part-1-20190527-4hgfyffvh2ti7bo4am4o3k2q-story.html](http://www.courant.com/politics/hc-pol-affordable-housing-zoning-connecticut-part-1-20190527-4hgfyffvh2ti7bo4am4o3k2q-story.html) [<https://perma.cc/4P62-BC2Q>] (describing Westport, CT, and “more than three dozen Connecticut towns [that] have blocked construction of any privately developed duplexes and apartments within their borders for the last two decades, often through exclusionary zoning requirements”); and Moses Gates, *To Prevent Worsening Inequality, Put Affluent Neighborhoods on NYC Rezoning List*, METROPOLITICS: DEBATES (Nov. 17, 2015), <https://metropolitcs.org/To-Prevent-Worsening-Inequality.html> [<https://perma.cc/FA67-XXR6>] (listing target communities for mandatory inclusionary zoning). See generally NOAH KAZIS, NYU FURMAN CTR., *ENDING EXCLUSIONARY ZONING IN NEW YORK CITY’S SUBURBS* (2020), [https://furmancenter.org/files/Ending\\_Exclusionary\\_Zoning\\_in\\_New\\_York\\_City\\_Suburbs.pdf](https://furmancenter.org/files/Ending_Exclusionary_Zoning_in_New_York_City_Suburbs.pdf) [<https://perma.cc/5GKJ-DSS4>] (comparing reform models by jurisdiction).

144. Cecilia Rouse, Jared Bernstein, Helen Knudsen & Jeffery Zhang, *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, WHITE HOUSE: COUNCIL OF ECON. ADVISERS BLOG (June 17, 2021), [www.whitehouse.gov/cea/blog/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market](http://www.whitehouse.gov/cea/blog/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market) [<https://perma.cc/7ZSD-LX3D>]. In addition to zoning, communities subject affordable housing developers to cumbersome procedures (e.g., special approval from voters or zoning boards), permitting timelines, and misaligned fees. See *id.*; Anika Singh Lemar, *Overparticipation: Designing Effective Land Use Public Processes*, 90 FORDHAM L. REV. 1083, 1107, 1149 (2021) (describing how public pressure influences zoning outcomes).

145. KAHLENBERG, *supra* note 143, at 2; Alex Baca, Patrick McAnaney & Jenny Schuetz, “Gentle” Density Can Save Our Neighborhoods, BROOKINGS (Dec. 4, 2019), [www.brookings.edu/research/gentle-density-can-save-our-neighborhoods](http://www.brookings.edu/research/gentle-density-can-save-our-neighborhoods) [<https://perma.cc/K5HM-QRNY>] (“On roughly 75%

suburbs from communities of color in inner-city and inner-ring suburbs (who often lack adequate transportation).<sup>146</sup>

In the United States, most land use decisions are made at the state and local level,<sup>147</sup> where local officials face pressure from constituents to limit new construction and density, explicitly racist or not.<sup>148</sup> Additionally, in many communities, affordable housing developers confront near-insurmountable obstacles in trying to build multifamily or “missing middle” homes like duplexes, triplexes, and cottage homes, which are necessary to expand housing mobility and decrease segregation.<sup>149</sup> Collectively, these pressures and procedures exclude economically and racially diverse residents.

The Surface Transportation Block Grant program (“STBG”) is one of a multitude of DOT grant programs that perpetuate housing segregation.<sup>150</sup>

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of land in most cities today, it is illegal to build anything except single-family detached houses. The origins of single-family zoning in America are not benign: Many housing codes used density as a proxy for separating people by income and race.”).

146. See, e.g., KAHLBERG, *supra* note 143, at 2, 8; Baca et al., *supra* note 145. See generally Rouse et al., *supra* note 144 (“Restrictions in housing supply also limit labor mobility, because workers cannot afford to move to higher productivity cities that have high housing prices. This leads workers to remain in lower productivity places. One study finds that this misallocation of labor has led to a significant decrease in the U.S. economic growth rate since the 1960s; another study finds that this misallocation could cost up to 2 percent of GDP.”).

147. Laura Frederick, *Land Use*, ENV’T L. INST., <https://www.eli.org/keywords/land-use> [<https://perma.cc/WGN5-CMRA>]; see also VANESSA BROWN CALDER, CATO INST., POLICY ANALYSIS NO. 823: ZONING, LAND-USE PLANNING, AND HOUSING AFFORDABILITY 3 (2017), <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa-823.pdf> [<https://perma.cc/VS92-74RJ>] (“Local planning and zoning regulation directs the design and development of buildings, neighborhoods, and cities.”). For a discussion of federalism in the context of local zoning, see GREENE & GOULD ELLEN, *supra* note 107, at 6 (making the case for federal involvement in managing local land use policies and zoning decisions that lead to housing shortages and entrenched segregation, and explaining why the federal government has played a limited role to date).

148. See GREENE & GOULD ELLEN, *supra* note 107, at 4 (describing how “narrow interests” drive zoning decisions and how the government can “correct for these political failures and contain negative spillovers to neighboring communities”); Stacy E. Seicshnaydre, *How Government Housing Perpetuates Racial Segregation: Lessons from Post-Katrina New Orleans*, 60 CATH. U. L. REV. 661, 671–74, 684–90 (2011) (describing the “anywhere-ists” and the “nowhere-ists” who want either as much or as little public support, respectively, resulting in the placement of housing as dictated by “the ‘path of least resistance’”); Singh Lemar, *supra* note 144, at 1104; Edward Glaeser, *Land Use Restrictions and Other Barriers to Growth*, CATO INST.: CATO ONLINE F. (Dec. 1, 2014), [www.cato.org/cato-online-forum/land-use-restrictions-other-barriers-growth](http://www.cato.org/cato-online-forum/land-use-restrictions-other-barriers-growth) [<https://perma.cc/7NQD-5SKR>] (“In the past 25 years, construction has come to face enormous challenges from any local opposition. In some areas it feels as if every neighbor has veto rights over every project.”).

149. WINKLER, *supra* note 137, at 2. For more on why zoning matters, see *id.* (“While many policies actively influence the production of homes in cities and states, exclusionary zoning policies often create the most significant impact on whether homes get built. Zoning laws in this country have a history of racial exclusion and de jure (‘by law’) segregation.”); see also Glaeser, *supra* note 148 (making a case for elimination of local land use power similar to Massachusetts state code Chapter 40B, which loosens local restrictions for affordable housing on a case-by-case basis).

150. Similar grant programs include the National Highway Performance Program, Infrastructure for Rebuilding America grants, Transportation Infrastructure Financing and

STBG is analogous to HUD's Community Development Block Grant ("CDBG") program, a key AFFH leverage point. DOT grants, however, have a broader reach, affecting more segregation-producing systems than CDBG funds.<sup>151</sup> Moreover, as illustrated by Table 1, the government spends significantly more on STBG and other non-HUD programs than it does on CDBG.

STBG provides federal grants to states and localities for the construction, rehabilitation, and preservation of transportation networks and infrastructure projects.<sup>152</sup> Eligible projects include roads, bridges, tunnels, transit projects, recreational trails, and research and development.<sup>153</sup> Averaging \$1.6 billion annually, grants are quite flexible.<sup>154</sup> STBGs are critical funds for states and localities. The problem with STBG is two-fold. First, these grants are given to communities with exclusionary zoning with no expectation of reform. Second, operating on a hyper-segregated map, these grants are routinely spent to preserve and maintain existing highway and road networks that were designed decades ago to intentionally, or incidentally, separate neighborhoods by race. Taken together, the interplay between transportation and housing brims with opportunity. One promising opportunity is reducing exclusionary zoning by requiring STBG and other DOT grants to be tied to local land use reform.<sup>155</sup> Another is assigning competitive grants to local applicants that voluntarily commit to specific zoning reform.<sup>156</sup>

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Innovation Act grants, Better Utilizing Investment to Leverage Development grants, and the Grants for Bus and Bus Facilities competitive grant program. See *Search Grants*, GRANTS.GOV, <https://www.grants.gov/web/grants/search-grants.html> [<https://perma.cc/D6DF-CUUB>] (filtering by "Department of Transportation").

151. See WINKLER, *supra* note 137, at 3–7.

152. See ROBERT S. KIRK, CONG. RSCH. SERV., R47022, FEDERAL HIGHWAY PROGRAMS: IN BRIEF 5 (2022).

153. *Id.*

154. WINKLER, *supra* note 137, at 3.

155. *E.g., id.* at 3–4; GREENE & GOULD ELLEN, *supra* note 107, at 3–12.

156. See generally Abraham, *supra* note 124 (explaining that DOT resources are an especially important leverage point because affluent communities that can afford to reject HUD community development funds are rarely in a position to reject transportation and infrastructure funds from DOT).

**Table 1. Federal Expenditures by Program**<sup>157</sup>

Agency	Program	Expenditure
USDA	Single-Family Housing Loan Guarantees	\$23.0 billion
DOT	Surface Transportation Block Grants	\$11.6 billion
Treasury	Low Income Housing Tax Credit	\$9.5 billion
HUD	Community Development Block Grants	\$3.4 billion

*B. ILLUSTRATION 2: DEPARTMENT OF THE TREASURY*

Treasury has a considerable footprint. It shapes segregation in countless ways, from administering tax incentives that support wealthier white households at the expense of poorer Black households to “misdirected” tax incentives that skew housing opportunities by race.<sup>158</sup>

157. Data for the STBG, LIHTC, and CDBG programs were originally compiled by WINKLER, *supra* note 137, at 3–4. The USDA data are available through the U.S. Department of Agriculture’s Website. See RURAL DEV., U.S. DEP’T OF AGRIC., USDA RURAL DEVELOPMENT: A PORTFOLIO WITH A PURPOSE: FISCAL YEAR 2020 FUNDING 1 (2020), [https://www.rd.usda.gov/sites/default/files/RD\\_2020\\_FundingNumbers\\_120420.pdf](https://www.rd.usda.gov/sites/default/files/RD_2020_FundingNumbers_120420.pdf) [<https://perma.cc/J5DH-Y3FV>].

158. See, e.g., TATJANA MESCHÉDE, JAMIE MORGAN, ANDREW AURAND & DAN THREET, MISDIRECTED HOUSING SUPPORTS: WHY THE MORTGAGE INTEREST DEDUCTION UNJUSTLY SUBSIDIZES HIGH-INCOME HOUSEHOLDS AND EXPANDS RACIAL DISPARITIES 5–6 (2021), [https://nlihc.org/sites/default/files/NLIHC-IERE\\_MID-Report.pdf](https://nlihc.org/sites/default/files/NLIHC-IERE_MID-Report.pdf) [<https://perma.cc/BTT7-B5QL>] (explaining how certain tax incentives benefit high-income households and perpetuate racial inequity); Henry Korman, *Biden’s Executive Order on Racial Equity: Don’t Forget that Federal Regulation of the Financial System Must Affirmatively Further Fair Housing*, in RACIAL JUSTICE IN HOUSING FINANCE: A SERIES ON NEW DIRECTIONS 27, 31 (Megan Haberle & Sophia House eds., 2021), <http://www.prrac.org/pdf/racial-justice-in-housing-finance-series-2021.pdf> [<https://perma.cc/63JK-8YVM>] (“There are hundreds of individual and corporate tax benefits throughout the Internal Revenue Code, with a value measured in the trillions of dollars. The use of bonds to fund housing market and bank stabilization efforts where dividends are exempt from taxation dates to the Depression-era bonds and debentures issued by HOLC, the FHA, the U.S. Housing Authority, the FHLB, FDIC, and Fannie Mae, all of whom are responsible for the racially identified dual housing market. Tax-exempt bonds remain a significant feature of present-day housing and urban renewal initiatives, including bonds issued by the GSEs and housing finance agencies.”); see also WILL FISCHER & BARBARA SARD, CTR. ON BUDGET & POL’Y PRIORITIES, CHART BOOK: FEDERAL HOUSING SPENDING IS POORLY MATCHED TO NEED: TILT TOWARD WELL-OFF HOMEOWNERS LEAVES STRUGGLING LOW-INCOME RENTERS WITHOUT HELP 1–3 (2017), [www.cbpp.org/sites/default/files/atoms/files/12-18-13hous.pdf](http://www.cbpp.org/sites/default/files/atoms/files/12-18-13hous.pdf) [<https://perma.cc/9FHE-64PF>] (discussing how federal housing policies benefit higher income homeowners). To the extent that these policies are set by Congress, Treasury nonetheless has discretion in how it administers these policies, as well as authority to advocate for congressional reforms and appropriations, which Congress is more likely to adopt upon Treasury’s recommendation.

This illustration focuses on how Treasury oversees the allocation of housing tax credits with little regard for where the housing is built, resulting in the concentration of government-subsidized units in racially or ethnically concentrated areas of poverty.<sup>159</sup> Unknown to many, Treasury administers the country's largest affordable housing development program. "The low-income housing tax credit (LIHTC) program is the federal government's primary policy tool for encouraging the development and rehabilitation of affordable rental housing"<sup>160</sup> "and . . . largest source of new affordable housing in the United States."<sup>161</sup> It incentivizes affordable housing development through tax incentives distributed to states, which allocate them to housing projects. Cost savings are passed to low-income consumers in the form of lower rental costs for designated units.<sup>162</sup> In all, LIHTC has contributed to building or redeveloping over "3.23 million housing units" since its inception.<sup>163</sup>

A boon to supply, the problem is *where* LIHTC housing is built.<sup>164</sup> The program tends to build in racially or ethnically concentrated areas of poverty,

Additionally, agencies within Treasury are also responsible for regulating private institutions like banks that finance housing, as discussed in Illustration 3. *See infra* Section III.C.

159. Critical to understanding the low-income housing tax credit ("LIHTC") program, Treasury has largely decentralized the process, allowing tax credit allocating agencies across the country to oversee LIHTC administration without conferring power to reduce how the program fuels segregation. *LIHTC Database: List of LIHTC-Allocating Agencies Providing Data for the LIHTC Database and Their Web Addresses*, HUD USER, [https://lihtc.huduser.gov/agency\\_list.htm](https://lihtc.huduser.gov/agency_list.htm) [<https://perma.cc/SA63-2PBU>].

"R/ECAP" is a defined term. MID-AM. REG'L COUNCIL, FAIR HOUSING ASSESSMENT 2, <https://www.marc.org/Regional-Planning/Housing/pdf/5-RECAPs> [<https://perma.cc/E6CK-AT9N>]. "HUD created a census-tract-based definition of racially/ethnically-concentrated areas of poverty (R/ECAP) to help jurisdictions identify areas of racial or ethnically concentrated poverty. A R/ECAP is defined as a tract that is at least 50 percent nonwhite and a poverty rate that exceeds 40 percent." RUTH GOUREVITCH, SOLOMON GREENE & ROLF PENDALL, URB. INST., PLACE AND OPPORTUNITY: USING FEDERAL FAIR HOUSING DATA TO EXAMINE OPPORTUNITY ACROSS US REGIONS AND POPULATIONS 5, 22 n.9 (2018), [https://www.urban.org/sites/default/files/publication/98674/place\\_and\\_opportunity\\_brief\\_1.pdf](https://www.urban.org/sites/default/files/publication/98674/place_and_opportunity_brief_1.pdf) [<https://perma.cc/LDD9-JB52>].

160. MARK P. KEIGHTLEY, CONG. RSCH. SERV., RS22389, AN INTRODUCTION TO THE LOW-INCOME HOUSING TAX CREDIT Summary Page (2021).

161. *Low-Income Housing Tax Credits*, NAT'L HOUS. L. PROJECT, [www.nhlp.org/resource-center/low-income-housing-tax-credits](http://www.nhlp.org/resource-center/low-income-housing-tax-credits) [<https://perma.cc/79NP-H7LK>].

162. KEIGHTLEY, *supra* note 160, at 1.

163. *Low-Income Housing Tax Credit (LIHTC)*, HUD USER: OFF. OF POL'Y DEV. & RSCH., [www.huduser.gov/portal/datasets/lihtc.html](http://www.huduser.gov/portal/datasets/lihtc.html) [<https://perma.cc/8VR4-WJPV>] (noting that 3.23 million units were built between 1987 and 2018, with "[a]n average of almost . . . 106,400 units . . . placed in service annually between 1995 to 2018").

164. *E.g.*, SIMON KAWITZKY, FRED FREIBERG, DIANE L. HOUK & SALIMAH HANKINS, FAIR HOUS. JUST. CTR., CHOICE CONSTRAINED, SEGREGATION MAINTAINED: USING FEDERAL TAX CREDITS TO PROVIDE AFFORDABLE HOUSING 1, 9–11 (2013), [www.fairhousingjustice.org/wp-content/uploads/2013/08/FHJCLIHTREREPORT-Aug13-Fullv1-7-WEB.pdf](http://www.fairhousingjustice.org/wp-content/uploads/2013/08/FHJCLIHTREREPORT-Aug13-Fullv1-7-WEB.pdf) [<https://perma.cc/TY75-ZT7V>]; *see also* Roisman, *supra* note 64, at 1013 ("Perhaps the most blatant of the federal shortcomings is the failure of the nation's largest subsidized housing program to secure information about its compliance with civil rights laws and to act effectively to prevent discrimination and segregation."); *id.* at 1019–20 ("This suggests that our major contemporary housing subsidy program is producing

as opposed to a cross-section of neighborhoods.<sup>165</sup> In the words of one investigative reporter: “The government encourages banks to invest in low-income housing. And while that sounds good, it is trapping people in poverty. We are doing the exact opposite of the thing we’re supposed to be fixing. This is what systemic racism looks like.”<sup>166</sup> But the government does not have to stand by while LIHTC developers build low-income housing in racially concentrated areas. It can exercise more oversight over site selection.

Given its outside impact, the LIHTC stands apart as one of the only non-HUD programs to be challenged in court for violation of the AFFH mandate.<sup>167</sup> In 2014, “[t]he [nonprofit] Inclusive Communities Project, Inc. . . . sued [Treasury] and the Office of the Comptroller of the Currency (‘OCC’),” for violating the AFFH mandate.<sup>168</sup> The Inclusive Communities Project alleged that a state credit-allocating agency, the Texas Department of Housing and Community Affairs, had adopted scoring criteria and otherwise

separate and unequal housing.”). In addition to building location, other factors that influence whether LIHTCs perpetuate segregation are the racial concentration of tenants and changes to neighborhood racial demographics in areas that receive credits. See Keren M. Horn & Katherine M. O’Regan, *The Low Income Housing Tax Credit and Racial Segregation* 10–16 (NYU Furman Ctr., Working Paper, 2011), <https://furmancenter.org/research/publication/the-low-income-housing-tax-credit-and-racial-segregation> [<https://perma.cc/67ST-WNS4>]. One working paper argues that the LIHTC program does not perpetuate segregation. See *id.* at 5. But see KAWITZKY ET AL., *supra* note 164, at 9–10 (responding to the working paper’s analysis).

165. For a detailed case study of how LIHTC has accelerated resegregation, see Myron Orfield & Will Stancil, *Why Are the Twin Cities So Segregated?*, 43 MITCHELL HAMLINE L. REV. 1, 27–32 (2017) (describing LIHTC allocation in the Minneapolis–St. Paul metropolitan region). “The advent of a new federal program, [LIHTC], also helped accelerate resegregation of the Twin Cities.” *Id.* at 27. “In 2012, about 25% of the region’s population and housing units were located in Minneapolis and Saint Paul. However, more than twice this share of the region’s subsidized housing was located there—59 percent of all subsidized units and 53 percent of LIHTC units.” *Id.* at 28 n.126 (quoting INST. ON METRO. OPPORTUNITY, REFORMING SUBSIDIZED HOUSING POLICY IN THE TWIN CITIES TO CUT COSTS AND REDUCE SEGREGATION 3 (2014), [https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1115&context=imo\\_studies](https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1115&context=imo_studies) [<https://perma.cc/7EAV-HMY3>]); see also John Eligon, Yamiche Alcindor & Agustin Armendariz, *Program to Spur Low-Income Housing Is Keeping Cities Segregated*, N.Y. TIMES (July 2, 2017), [www.nytimes.com/2017/07/02/us/federal-housing-assistance-urban-racial-divides.html?smid=tw-share&\\_r=1](http://www.nytimes.com/2017/07/02/us/federal-housing-assistance-urban-racial-divides.html?smid=tw-share&_r=1) [<https://perma.cc/BNC2-2VJE>] (“The Treasury Department, which administers the program, includes no provisions in its regulations that address segregation. That, fair-housing advocates argue, runs afoul of the Fair Housing Act, which requires government agencies that administer housing programs to do so in a way that reduces racial segregation. ‘It’s been clear for a long time that the tax-credit program is perpetuating racial segregation[]’ . . . .” (quoting fair-housing attorney Michael Daniel)).

166. *E.g.*, Teresa Woodard (@twoodard8), TWITTER (Feb. 28, 2021, 7:16 PM), <https://twitter.com/twoodard8/status/1366195548651466752> [<https://perma.cc/ANR5-MZUP>] (posting video on LIHTC allocation in Dallas, TX, by investigative journalist David Schechter).

167. See *supra* note 86 and accompanying text.

168. *Inclusive Cmty. Project, Inc. v. Dep’t of Treasury*, 946 F.3d 649, 652 (5th Cir. 2019), *affg in part* 2019 WL 459643 (N.D. Tex. 2019). For a description of other LIHTC litigation, see Horn & O’Regan, *supra* note 164, at 7.

administered credits in a way that perpetuated racial segregation.<sup>169</sup> For instance, it alleged that “96% of . . . LIHTC projects (161 of 168) . . . were [sited] in [racially-]concentrated areas . . . .”<sup>170</sup>

The Fifth Circuit ultimately dismissed the claims for lack of standing, but the litigation offers two lessons for AFFH litigation. First, AFFH claims against Treasury may be actionable.<sup>171</sup> Second, the complaint offers at least one model for demonstrating Treasury’s AFFH obligations and the empirical connection between LIHTC site selection criteria and segregation.<sup>172</sup>

Evidence of the program’s segregative effect exists for other jurisdictions.<sup>173</sup> Also useful, plaintiff’s counsel recently submitted petitions to urge Treasury, IRS, and OCC to adopt AFFH regulations.<sup>174</sup> These petitions present a compelling case that these agencies have an AFFH obligation they have failed to satisfy.<sup>175</sup> They also spell out two reform opportunities: First, that the

169. See *Inclusive Cmty.*, 946 F.3d at 649–53.

170. *Id.* at 654.

171. The district court initially denied the government’s motion to dismiss, but the Fifth Circuit later dismissed the case on the basis that the plaintiff had not identified a final agency action it could challenge. See *id.* It did not hold that Treasury lacked an AFFH duty. See *Inclusive Cmty. Project, Inc. v. U.S. Dep’t of Treasury*, No. 14-cv-3013-D, 2015 WL 4629635, at \*10–15 (N.D. Tex. Aug. 4, 2015); *Inclusive Cmty. Project, Inc. v. U.S. Dep’t of Treasury*, No. 14-cv-3013-D, 2016 WL 6397643, at \*6 (N.D. Tex. Oct. 28, 2016) (“Considering that there are precedents that support the conclusion that § 3608(d) supplies judicially manageable standards and that the Fifth Circuit has not spoken to the contrary, the court concludes that ICP has pleaded a plausible claim under § 3608(d) and that the claim should not be dismissed on the basis that any obligation to carry out the requirements of § 3608(d) is committed to agency discretion by law.”).

172. See generally First Amended Complaint, *Inclusive Cmty. Project, Inc. v. U.S. Dep’t of Treasury*, No. 14-cv-3013-D, 2016 WL 6397643 (N.D. Tex. Oct. 28, 2016), ECF No. 29, (stating a § 3608 claim that Treasury perpetuated racial segregation in LIHTC units in violation of 42 U.S.C. § 3608(d)); see also *Inclusive Cmty. Project, Inc.*, 946 F.3d at 654 (“Black voucher families often suffered the effects most acutely, and ICP alleged that the current racial segregation in Dallas public housing was equivalent to the conditions under city-sanctioned *de jure* segregation but with more than three times as many units.”).

173. Plaintiff’s counsel website features case studies of how Treasury and the OCC perpetuate segregation. See generally, e.g., DANIEL & BESHARA, P.C., MODERN FEDERAL NEIGHBORHOOD SEGREGATION (2020), <https://web.archive.org/web/20201022164254/www.danielbesharalawfirm.com/modern-federal-neighborhood-segregation> [<https://perma.cc/UP5Q-DC6R>] (noting cases involving Ridgewood Terrace, Woodridge Apartments, and Mountain View Apartments).

174. See *Low-Income Housing Tax Credit Desegregation*, DANIEL & BESHARA, P.C., <https://www.danielbesharalawfirm.com/lowincome-housing-tax-credit-desegregation> [<https://perma.cc/G2YK-TH9L>] (listing March 19, 2021 Petitions for Rulemaking). These petitions build on earlier academic literature arguing for Treasury to promulgate AFFH regulations. See, e.g., Roisman, *supra* note 64, at 1032–48; Orfield, *supra* note 86, 1790–803.

175. Laura B. Beshara & Michael M. Daniel, Petition for Rulemaking at 26 C.F.R. § 1.42-17 to Affirmatively Further Fair Housing, at 1–4 (Mar. 19, 2021) [hereinafter Treasury-IRS Petition], <https://static1.squarespace.com/static/61af25763e561d7c6ac7f6be/t/61b9899a4e166818f1a6a02b/1639549375719/Treasury+package+to+LB+%26+MD+3-19-21-compressed.pdf> [<https://perma.cc/4YK4-T5TG>] (Treasury & IRS); Laura B. Beshara & Michael M. Daniel, Petition for Rulemaking at 12 C.F.R. § 24.3, 24.6, 25.23 to Affirmatively Further Fair Housing, at 1–6 (Mar. 19, 2021), <https://static1.squarespace.com/static/61af25763e561d7c6ac7f6be/t/61b987c990>

federal government exercise greater discretion over credit allocation, rather than outsourcing decisions to state and local authorities who face pro-segregative pressures from developers and residents.<sup>176</sup> Second, that Treasury and related agencies promulgate regulations addressing: (1) LIHTC site selection and location criteria that prevents racial segregation, (2) elimination of local municipal veto and elected official veto that would prevent LIHTC projects in predominantly white areas, and (3) defining and enforcing terms like “concerted community revitalization plan” that determine when building in high-poverty areas is appropriate.<sup>177</sup>

### C. ILLUSTRATION 3: HOUSING FINANCE SYSTEM AGENCIES

Similarly influential is the “housing finance system, where private market forces intertwine with and benefit from government support and regulation.”<sup>178</sup> Housing finance regulations and expenditures influence everything from who qualifies for a mortgage to where affordable housing is built.<sup>179</sup> Working in tandem, the public-private partnership between regulators and private capital has shaped our neighborhoods for decades.<sup>180</sup> This illustration focuses on the segregative impact of the mortgage market as currently regulated.<sup>181</sup>

8df1586acd12c5/1639548907935/OCC+package+for+LB+%26+MD+3-19-21-compressed.pdf [https://perma.cc/4ABG-QX]3] (OCC); see also Rev. Rul. 2016-29, 2016-52 I.R.B. 875, 876 (acknowledging the AFFH mandate’s application to IRS policy).

176. See, e.g., Treasury-IRS Petition, *supra* note 175, at 4; Jerusalem Demsas, *60 Percent of Likely Voters Say They’re in Favor of Public Housing. So Why Isn’t There More of It?*, VOX (Jan. 26, 2021, 10:00 AM), <https://www.vox.com/22248779/affordable-housing-public-housing-poll-homelessness-crisis-covid-19-nimby-yimby-zoning> [https://perma.cc/KW5B-WB6g] (describing the political forces that influence local decision-making); see also Singh Lemar, *supra* note 144, at 1112–50 (same).

177. See Treasury-IRS Petition, *supra* note 175, at 1–2; see also Roisman, *supra* note 64, at 1031 (explaining that Treasury should amend its regulations to acknowledge its AFFH duty under § 3608 as applied to the LIHTC program and specify what housing credit agencies and developers must do to comply with their AFFH and other fair housing obligations); Orfield, *supra* note 86, at 1790–803 (describing why, under governing law, the fair housing duty must be accorded priority over qualified census tract preference and then offering recommendations); Peter Kye, *How the Federal Government Can Promote Fair Housing in the LIHTC Program*, in RACIAL JUSTICE IN HOUSING FINANCE: A SERIES ON NEW DIRECTIONS, *supra* note 158, at 106, 106 (explaining various ways for Treasury “to meet its AFFH responsibilities and increase geographic balance in the [LIHTC] program”).

178. Megan Haberle & Philip Tegeler, *A Call to Remedy Segregation and Advance Housing Justice: Federal Strategies for 2021 and Beyond*, POVERTY & RACE, Nov.–Dec. 2020, at 7, 10, [www.prrac.org/newsletters/nov-dec2020.pdf](http://www.prrac.org/newsletters/nov-dec2020.pdf) [https://perma.cc/V5LL-46KH].

179. E.g., Daniel Immergluck, *Racial Justice and the Mortgage Market: Recommendations to the Biden Administration Regarding the Future of the GSEs*, in RACIAL JUSTICE IN HOUSING FINANCE: A SERIES ON NEW DIRECTIONS, *supra* note 158, at 43, 44–45.

180. Korman, *supra* note 158, at 33 (“That collaboration proved highly effective at cementing in place residential segregation, the extraction of wealth from racially identified places and households of color, and the maintenance of dual, segregated credit, finance, and housing systems.”).

181. Beyond the scope of this Article, promising proposals exist to reduce segregation perpetuated by housing finance agencies, including: racial equity analyses in housing finance,

As a starting point, we must acknowledge that “[t]he tools used by federal financial regulators to create the modern features of racial inequity are still in use today . . . .”<sup>182</sup> The most relevant government regulators in the housing finance system are Treasury, the Federal Reserve, the Federal Home Loan Bank system, the Office of Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, the Internal Revenue Service, the Securities and Exchange Commission, and government-sponsored enterprises (“GSEs”).<sup>183</sup> Each entity has a unique segregative imprint. Collectively, their “[e]fforts to combat segregation have not been as forceful as the private and public forces that created and reinforce it.”<sup>184</sup> To the contrary, equity-conscious government regulation has receded in recent years.<sup>185</sup>

In the housing finance arena, the government does more than regulate private markets. It “often lead[s] existing[] private markets,” meaning, it sets industry norms that private markets follow.<sup>186</sup> One way is setting loan standards, like national standards for “conforming mortgages” and single-family and multifamily underwriting.<sup>187</sup> It “can [also] create, or replace, private market

reparations programs that would reduce the pervasive and enduring racial homeownership gap (a primary driver of the racial wealth gap), better enforcement of fair housing laws against real estate actors and industry data collection, and land trusts and other alternative forms of ownership that eases the pressures profit-driven land values built on the value of exclusion. For further discussion, see generally CMTY. CHANGE, *NEW DEAL FOR HOUSING JUSTICE: A HOUSING PLAYBOOK FOR THE NEW ADMINISTRATION* (2021), <https://communitychange.org/wp-content/uploads/2021/01/New-Deal-for-Housing-Justice.Policy-Paper.Community-Change.1.2020.pdf> [<https://perma.cc/Q4ZZ-TXY7>] (proposing various policy recommendations); see also Henry Louis Taylor, Jr., *Land Values and the Enduring Significance of Racial Residential Segregation*, *POVERTY & RACE*, Jan.–Apr. 2021, at 1, 1–2, 4, 13, <http://www.prtac.org/newsletters/jan-apr2021.pdf> [<https://perma.cc/7ZT3-C8YP>] (describing how systemic racism influences land values and proposing strategies to disrupt the current land valorization system).

182. Korman, *supra* note 158, at 28. See generally KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985) (exploring the ways in which the American government contributed to suburbanization in the mid-1900s, as well as the contemporary policy implications of that suburbanization).

183. Korman, *supra* note 158, at 28–29; see *Who Regulates My Bank or Credit Union?*, APPRAISAL SUBCOMM., <https://refermyappraisalcomplaint.asc.gov/default.aspx> [<https://perma.cc/QF9K-V6V4>] (click on *Who Regulates My Bank* tab from Home Page).

184. Megan Haberle & Sophia House, *Introduction* to *RACIAL JUSTICE IN HOUSING FINANCE: A SERIES ON NEW DIRECTIONS*, *supra* note 158, at 2, 3.

185. See, e.g., Korman, *supra* note 158, at 33 (“Trump’s Executive Order 13772 became the basis for a series of Treasury Department policy actions that eroded fair housing protections within the federal financial regulatory structure. These included weakening the enforcement activities of the Consumer Finance Protection Bureau (CFPB), watering down reporting requirements for private label mortgage backed securities (including the kind of securities that led to the predatory lending and financial crises of 2008); stalling the implementation of improvements to the Home Mortgage Disclosure Act reporting requirements; OCC’s relaxation of CRA standards; regulatory relief from fair housing liability for discriminatory lending for lenders relying on ‘big-data’ and underwriting algorithms; and relief for property insurers from Fair Housing liability.”).

186. *Id.* at 31 (detailing historic and modern examples of government market-leading).

187. *Id.*

[mortgages],” “suppl[y] public capital directly to private interests,” and “shap[e] . . . market[] behavior by serving as an insurer and risk mitigator.”<sup>188</sup>

In this regard, the government also has an equalizing role. GSEs have a mandate to carry out secondary market mortgage purchases for low- and moderate-income housing. In furtherance of that goal, they purchase loans for low-income and very low-income family rental housing. This helps serve “underserved markets” and assists primary lenders in making credit available in areas with concentrations of poverty. In short, the government has abundant authority—and many would argue moral responsibility—to reshape a legacy system that has historically tied profit and value to racism and segregation.<sup>189</sup> But it hasn’t.

In the mortgage market, the government’s segregative effect is two-fold. First, it fails to regulate. It lends, injects capital, guarantees, and otherwise intervenes in the market without fulfilling its primary role as regulator. Second, it fails to employ its equalizing power (such as GSEs) to lead the private market in a pro-equity direction.<sup>190</sup> Absent this leadership, the very forces that created the dual housing market now sustain it.

One leverage point is enforcement. The government can better control the destructive practices like predatory financial schemes, (i.e., loans with risk-inducing terms like prepayment penalties, contract-for-deed selling, unfair risk-based pricing, etc.)<sup>191</sup> persistent lending discrimination (including

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188. Haberle & House, *supra* note 184, at 3.

189. *Id.* (“Most infamously, the federal government codified racist lending and appraising practices in underwriting standards for HOLC loans in the Home Owner’s Loan Act and in the FHA’s loan standards for insured home mortgages.”); see also Elizabeth K. Julian, *Inclusive Communities Financial Institutions: Investing in a More Ambitious Vision for the Future*, POVERTY & RACE, Sept.–Oct. 2015, at 1, 1–2, 6, 11, <https://prrac.org/newsletters/sepoct2015.pdf> [<https://perma.cc/Z6EM-JMPU>] (describing the promise of Community Development Financial Institutions to counteract market forces that perpetuate racial inequality).

190. See generally KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (2019) (discussing the history of unequal and predatory lending based on race); Kathleen C. Engel & Patricia A. McCoy, *From Credit Denial to Predatory Lending: The Challenge of Sustaining Minority Homeownership*, in SEGREGATION: THE RISING COSTS FOR AMERICA 81 (James H. Carr & Nandinee K. Kutty eds., 2008) (same).

191. Loan-level price adjustments (“LLPAs”) are not race-neutral. Adam J. Levitin, *How to Start Closing the Racial Wealth Gap*, AM. PROSPECT (June 17, 2020), <https://prospect.org/economy/how-to-start-closing-the-racial-wealth-gap> [<https://perma.cc/76AB-KZDV>] (“LLPAs may appear race-neutral, but their structure compounds existing racial wealth disparities. Because LLPAs are higher for low-down-payment mortgages, they fall more heavily on borrowers with less savings for a down payment. And because LLPAs are more costly for borrowers with worse credit scores, they fall disproportionately on those with low and moderate incomes, who are in turn disproportionately minorities. This creates a vicious circle: Because of the racial wealth gap, LLPAs are more likely to exacerbate the racial homeownership gap, which further reinforces the racial wealth gap.”).

algorithms that produce biased outcomes), and which neighborhoods financial institutions serve.<sup>192</sup>

The government also routinely intervenes in the market to provide capital to private interests, but it does so in a manner that fails to account for historic exclusion.<sup>193</sup> Instead, it could reform GSEs (or their successors) into government-owned corporations that prioritize lending and loan liquidity for affordable housing in the most under-resourced areas.<sup>194</sup> It can reorient and restructure its housing investment funds like the Capital Magnet Fund to support opportunity. These “funds can provide flexible capital that can be used by mission-driven organizations, community land trusts, local government agencies, and other entities to acquire and preserve existing affordable properties, especially in high-opportunity areas or areas where families face the threat of displacement.”<sup>195</sup>

Likewise, the government could strengthen the Federal Housing Administration to provide better-targeted affordable, low down-payment mortgages to families with lower wealth or credit scores, making the secondary market more robust and improving GSE effectiveness.<sup>196</sup> The Federal Housing

192. See Mark Weber, Mikhail Yurochkin, Sherif Botros & Vanio Markov, *Black Loans Matter: Distributionally Robust Fairness for Fighting Subgroup Discrimination* 7 (Dec. 11, 2020) (unpublished manuscript), <https://arxiv.org/pdf/2012.01193.pdf> [<https://perma.cc/C52U-3G4E>] (describing how “machine learning models can learn a variety of sophisticated subgroup discrimination schemes while satisfying group fairness metrics for compliance” and making recommendations to detect and mitigate discrimination); Jennifer Miller, *Is an Algorithm Less Racist Than a Loan Officer?*, N.Y. TIMES (Sept. 18, 2020), [www.nytimes.com/2020/09/18/business/digital-mortgages.html](http://www.nytimes.com/2020/09/18/business/digital-mortgages.html) [<https://perma.cc/A8C5-MA5U>] (discussing algorithms in lending); Stella J. Adams, *Putting Race Explicitly into the CRA*, in *REVISITING THE CRA: PERSPECTIVES ON THE FUTURE OF THE COMMUNITY REINVESTMENT ACT* 167, 169 (Prabal Chakrabarti, David Erickson, Ren S. Essene, Ian Galloway & John Olson eds., 2009), <https://community-wealth.org/sites/clon.e.community-wealth.org/files/downloads/report-chakrabarti-et-al.pdf> [<https://perma.cc/2AYY-MSMP>]; Shara Tibken, *The Broadband Gap’s Dirty Secret: Redlining Still Exists in Digital Form*, CNET (June 28, 2021), [www.cnet.com/features/the-broadband-gaps-dirty-secret-redlining-still-exists-in-digital-form](http://www.cnet.com/features/the-broadband-gaps-dirty-secret-redlining-still-exists-in-digital-form) [<https://perma.cc/8SX4-SV9F>] (describing how internet providers decide where to invest money to upgrade their networks, leaving poorer communities with no or slow internet legacy networks that can’t meet today’s demands, “even though they usually pay as much as their wealthier neighbors who have gigabit fiber connections”).

193. See generally Allen J. Fishbein, *Filling the Half-Empty Glass: The Role of Community Advocacy in Redefining the Public Responsibilities of Government-Sponsored Housing Enterprises*, in *ORGANIZING ACCESS TO CAPITAL: ADVOCACY AND THE DEMOCRATIZATION OF FINANCIAL INSTITUTIONS* 102 (Gregory D. Squires ed., 2003) (discussing how GSEs could contribute to pro-equity reform).

194. Immergluck, *supra* note 179, at 46–50.

195. POVERTY & RACE RSCH. ACTION COUNCIL, *A VISION FOR FEDERAL HOUSING POLICY IN 2021 AND BEYOND* 5 (2020) (footnote omitted), <https://prrac.org/a-vision-for-federal-housing-policy-in-2021-and-beyond> [<https://perma.cc/BT24-V7YA>].

196. Immergluck, *supra* note 179, at 49; see also Korman, *supra* 158, at 29 (discussing recent GSE history and GSE reform opportunity).

The FHLB system and Fannie Mae were funded with federal contributions to prop up a failing single-family housing finance system. Both institutions were established for the purpose of creating liquidity in the mortgage markets and flowing public capital to private interests, all in service of a segregated home lending system. Their

Administration could “be a critical source of countercyclical home finance, especially for Black borrowers and neighborhoods.”<sup>197</sup> Without these reforms, we are likely to see the return of the “‘private label’ Wall Street securitization machine that financed the junk mortgages of the housing bubble . . . [and] an uneven regulatory playing field that favors Wall Street.”<sup>198</sup> Such products and peddlers should not operate with impunity. Interagency coordination is

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role in the nationwide system of redlining and racial segregation is well known. The racial disparities and the racial wealth gap created by this public-private partnership persist. It bears reminding that Fannie Mae and Freddie Mac were both saved in 2008 from defaulting on the guarantees made to buyers of their mortgage-backed securities by preferred stock purchase arrangements with the Treasury. As the government-sponsored enterprises . . . emerge from [conservatorship], and as policymakers consider the long outstanding questions about the future role of the GSEs, it is crucial to insist that they also play a role in undoing the generational harms caused by their racialized origins.

Korman, *supra* 158, at 29 (footnote omitted).

The Community Reinvestment Act (“CRA”) is another desegregation tool. While the CRA is beyond the scope of this Article, it warrants mention. As originally conceived, the CRA “was not intended to promote desegregation.” Josh Silver, *CRA Could Do a Better Job Promoting Integration, in RACIAL JUSTICE IN HOUSING FINANCE: A SERIES ON NEW DIRECTIONS*, *supra* note 158, at 60, 60. Rather, it “was geared toward channeling private sector capital, specifically bank financing, to revitalize low- and moderate-income . . . neighborhoods.” *Id.* Nevertheless, these objectives are closely connected—redlining accelerates neighborhood decline and poverty-correlated racial separation when residents cannot obtain loans to buy or repair homes or invest in small businesses. Thus, Congress established through the CRA “an affirmative obligation on banks to serve the credit needs of [underbanked] communities . . .” *Id.* The “CRA is an income-based law,” but its performance measures test for evidence of racial discrimination, which, if found, can result in punitive measures for a bank. *Id.* at 61.

To date, CRA efforts have focused on economic develop to revitalize neighborhoods, but they need not stop there. *See id.* at 62. They can also focus on “lending in a pro-integrative manner—for example, in ways that help poor people move into middle-income neighborhoods or that facilitate middle-income households’ moves into poorer neighborhoods.” *Id.* However, the CRA’s performance measures can be revised to not only prioritize integration but also tie the CRA more explicitly to fair housing planning requirements promulgated by HUD (*e.g.* AFFH obligations). *See id.* Moreover, banking agencies involved in the CRA—the Federal Reserve Board, Office of the Comptroller of the Currency, and FDIC—can update their CRA regulations to promote desegregation. *See id.* at 68–69. Foremost, guidance and regulations need to take a less “timid” approach to desegregation. *Id.* at 61. Likewise, existing interagency guidance (such as the interagency Q&A document) should be revised to more effectively promote integration. *Id.* at 63 (“The agencies developed an interagency question and answer (Q&A) document with items on mixed-income housing and gentrifying neighborhoods.”). Practice manuals and other guidance can show banks how to use financing to combat segregation and better integrate neighborhoods with the relatively large flow of investments the CRA has historically directed to low-income neighborhoods. *Id.* at 69. Finally, the CRA could better discourage or prohibit harmful partnerships, like working with realtors that promote racial steering and otherwise violate fair housing requirements. *See id.* at 70.

197. Immergluck, *supra* note 179, at 49.

198. *Id.* at 47 (quoting Adam J. Levitin & Susan M. Wachter, *Mortgage Market Déjà Vu*, AM. PROSPECT (July 1, 2020), <https://prospect.org/economy/mortgage-market-deja-vu> [<https://perma.cc/BKF6-QLTC>]).

especially important in this arena, where multiple government entities influence access to private capital.

D. ILLUSTRATION 4: FEDERAL EMERGENCY MANAGEMENT AGENCY

FEMA's segregative effect can be characterized as a series of missed opportunities to redraw the segregation map. FEMA literally rebuilds from the ground up. With the freedom of a fresh start, it could materially decrease segregation in recovering communities, but it often replicates the past instead.<sup>199</sup>

Disasters create many challenges, not least of which is how best to use limited resources to rebuild and recover. . . . [They] force us to confront questions about whether to rebuild in ways that perpetuate segregation, a condition that plagues many communities, or whether to take a different approach.<sup>200</sup>

The question is how to “use . . . federal dollars that flow to [disaster-affected] communities” in ways that eschew historic patterns of segregation so they are not replicated in the rebuilding process.<sup>201</sup> Ideally, disaster response would affirmatively remedy historic patterns by building even more affordable housing in high opportunity areas.<sup>202</sup>

FEMA's activities are far-reaching, encompassing disaster preparedness programs, counseling, and legal services, among others.<sup>203</sup> Its most visible role is providing post-disaster recovery assistance—like Treasury's LIHTC program.<sup>204</sup>

Empirically, disaster relief programs have been riddled with burdensome requirements that fuel racial disparities in who receives disaster support. FEMA has administered its recovery programs in a manner that benefits white households more than communities of color. One simple example is FEMA's

199. SEICSHNAYDRE ET AL., *supra* note 132, at 6 (“In the rebuilding efforts, black households also saw echoes of the highway building and slum clearance programs of the mid-century.”).

200. ABEDIN ET AL., *supra* note 108, at 83.

201. *Id.*

202. For a discussion of the positive outcomes of access to “high opportunity” neighborhoods, see generally Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855 (2016) (analyzing the effects on children of relocation to neighborhoods with lower poverty rates); and Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-Level Estimates* (May 2015) (unpublished manuscript), [http://scholar.harvard.edu/files/hendren/files/nbhds\\_paper.pdf](http://scholar.harvard.edu/files/hendren/files/nbhds_paper.pdf) [<https://perma.cc/KQJ7-7NRE>] (analyzing the outcomes for children who move to “better” neighborhoods as measured by factors like access to education and lower crime).

203. 2022–2026: *FEMA Strategic Plan*, FEMA (Dec. 16, 2021), [www.fema.gov/about/mission](http://www.fema.gov/about/mission) [<https://perma.cc/8KPP-PHK2>]; *Programs to Support Disaster Survivors*, FEMA (Nov. 3, 2021), [www.fema.gov/assistance/individual/disaster-survivors](http://www.fema.gov/assistance/individual/disaster-survivors) [<https://perma.cc/URoK-EYPT>].

204. See SEICSHNAYDRE ET AL., *supra* note 132, at 6 (describing the inequitable distribution of “Road Home” grants after Hurricane Katrina); see also Seicshnaydre, *supra* note 148, at 686–87 (describing the inequitable distribution of subsidized housing units after Hurricane Katrina).

proof of homeownership requirements. Historically, FEMA has required potential post-disaster beneficiaries to prove ownership of their property in ways that disproportionately burden communities of color. This is especially true in the context of state heir property laws that have fractioned ownership in poorer Black communities.<sup>205</sup> This has resulted in disproportionate benefits for affluent white families. Proof of homeownership requirements have undermined FEMA's Individuals and Households Program and have implications in its National Flood Insurance Program and buyout efforts of the Hazard Mitigation Program.<sup>206</sup> FEMA should mitigate this by documenting and studying the racial impact of its requirements to draw connections between requirements that disproportionately exclude Black, Latinx, and other households of color from disaster recovery funds.

Other post-disaster redevelopment programs illustrate how disaster relief perpetuates segregation, including The Road Home Program, the Disaster Housing Assistance Program, and the Gulf Opportunity Zone Tax Credit Program<sup>207</sup> (the first two programs are principally administered by HUD and

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205. See, e.g., Lesley Albritton & Jesse Williams, *Disasters Do Discriminate: Black Land Tenure and Disaster Relief Programs*, 29 J. AFFORDABLE HOUS. & CMTY. DEV. L. 421, 435–39 (2021) (“The fact that FEMA does not take the racial composition or income characteristics of a geographical area into account when determining whether exceptions to typical ownership requirements apply means that there is little consideration of the underlying reasons why heir property may be prevalent in a particular geography or of the reasons why a community has not availed itself of legal mechanisms for showing ownership.”); see also Heather K. Way & Ruthie Goldstein, *Heir Property Owners and Federal Disaster Aid Programs: Opportunities for a More Equitable Recovery When Disaster Strikes*, 30 J. AFFORDABLE HOUS. & CMTY. DEV. L. 467, 467–81 (2022) (describing the phenomenon and offering solutions to make disaster recovery more equitable).

206. See Albritton & Williams, *supra* note 205, at 443–44 (discussing the Community Development Block Grant Disaster Recovery program administered by HUD); see also Travis Brandon, *Sea Level Rise Planning for Socially Vulnerable Communities: A More Equitable Approach to Federal Buyout Programs*, 97 U. DET. MERCY L. REV. 435, 444–47 (2020) (noting that recent studies have shown FEMA initiatives to disproportionately benefit white residents).

As detailed below, while some disaster relief programs are administered by HUD or other agencies, they are typically coordinated with FEMA, reinforcing the interconnected nature of federal funds across agencies. See also *Advocacy Groups Settle Civil Rights Complaint Against State of New Jersey Involving Superstorm Sandy*, RELMAN COLFAX (May 30, 2014), [www.relmanlaw.com/civil-rights-litigation/cases/Sandy.php](http://www.relmanlaw.com/civil-rights-litigation/cases/Sandy.php) [<https://perma.cc/G24GFXDG>] (describing litigation against New Jersey for violation of its AFFH obligation (among other claims) and including the parties' Voluntary Compliance Agreement and Conciliation Agreement that resolved the litigation).

207. Morgan Williams & Nisha Arekapudi, *Disasters' Long-Term Impact on Fair Housing: Rebuilding as an Engine to Perpetuate or Challenge Entrenched Segregation*, in BUILDING COMMUNITY RESILIENCE POST-DISASTER: A GUIDE FOR AFFORDABLE HOUSING AND COMMUNITY ECONOMIC DEVELOPMENT PRACTITIONERS 1,151, 1,152 (Dorcas R. Gilmore & Diane M. Standaert eds., 2013) (“Tracking federal disaster funds and recent rebuilding efforts on the Gulf Coast . . . depicts how government-subsidized housing programs in post-disaster regions can comport with and compound historic patterns of segregation and inequity.”). The authors also examine how the redevelopment of public housing (administered by HUD and public housing authorities) can exacerbate or otherwise recreate segregation. *Id.* at 1176–85; see also KEVIN FOX GOTHAM & MIRIAM GREENBERG, *CRISIS CITIES: DISASTER AND REDEVELOPMENT IN NEW YORK AND NEW ORLEANS* 14 (2014) (describing the “unequal patterns of metropolitan growth that reproduce

the third by Treasury, but all are administered in coordination with FEMA recovery efforts).<sup>208</sup> The Road Home Program is a particularly acute illustration of how well-intended disaster recovery programs replicate segregation. It provided flexible grants to help cities, counties, and states recover from presidentially declared emergencies. Its stated purpose was “to restore communities by helping families rebuild and return to their homes.”<sup>209</sup> “Despite [its] promising objective, many homeowners’ efforts to return to their communities were hindered by disparities that were built into the program’s very design and operation.”<sup>210</sup> The grant formula used pre-storm values, which created a recovery program that linked housing assistance to the depressed values of families’ pre-storm hyper-segregated housing and resulted in larger rebuilding short-falls for Black residents.<sup>211</sup> For instance, residents of the predominantly Black Lower Ninth Ward ended up with an average \$75,000 rebuilding shortfall per home, whereas residents of the predominantly white Lakeview neighborhood had shortfalls of \$44,000 per

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racial and class-based inequalities and segregation” and uneven recovery efforts following 9/11 and Hurricane Katrina).

208. See Williams & Arekapudi, *supra* note 207, at 1185–86 (“In response to Hurricane Katrina, FEMA launched a voucher program to assist displaced families in need of rental housing. Taking over long-term rental assistance for approximately 45,000 displaced families, HUD then created the Disaster Housing Assistance Program in 2007.” (footnote omitted)); Lisa K. Bates, *Post-Katrina Housing: Problems, Policies, and Prospects for African-Americans in New Orleans*, 36 BLACK SCHOLAR 13, 14 (2006) (“At the federal level, FEMA and HUD manage temporary housing arrangements for declared disasters, with inefficient and confusing overlap between the two agencies’ programs, rules, and timetables.”). For FEMA-specific vouchers, such as the Katrina Disaster Housing Assistance Program, see James H. Perry & Monika Gerhart-Hambrick, *Housing Choice in Crisis: Short-Term Post-Hurricane Katrina Relief*, in BUILDING COMMUNITY RESILIENCE POST-DISASTER: A GUIDE FOR AFFORDABLE HOUSING AND COMMUNITY ECONOMIC DEVELOPMENT PRACTITIONERS 1069, 1076–100 (Dorcas R. Gilmore & Diane M. Standaert eds., 2013). These short-term programs experienced the same shortcomings discussed in this illustration and notes, including voucher discrimination and a lack of available housing at which to use vouchers. *Id.* at 1081–85. See generally GREATER NEW ORLEANS FAIR HOUS. ACTION CTR., HOUSING CHOICE IN CRISIS: AN AUDIT REPORT ON DISCRIMINATION AGAINST HOUSING CHOICE VOUCHER HOLDERS IN THE GREATER NEW ORLEANS RENTAL HOUSING MARKET (2009), <https://storage.googleapis.com/wzuk/users/user-33549461/documents/5b47887358f3cNIEdgKN/HousingChoiceInCrisis2009.pdf> [<https://perma.cc/5N5B-8S37>] (auditing voucher discrimination in the greater New Orleans rental housing market).

In response to an administrative complaint, HUD recently found that the State of Texas and its General Land Office discriminated on the basis of race and national origin in the allocation of more than \$4 billion in CDBG funds designated for disaster recovery. See Letter from Christina Lewis, Region VI Dir., Off. of Fair Hous. & Equal Opportunity, to George P. Bush, Comm’r, Tex. Gen. Land Off. (Mar. 4, 2022), <https://files.ctctusercontent.com/c7a20609001/fed8aeab-3ec4-4494-bbeg-f343f1ce3922.pdf?rdr=true> [<https://perma.cc/ZVG8-TW67>].

209. Williams & Arekapudi, *supra* note 207, at 1157 (quoting Complaint for Declaratory & Injunctive Relief at 2, Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep’t of Hous. & Urb. Dev., 639 F.3d 1078 (D.C. Cir. 2011) (No. 08-cv-01938), 2008 WL 5242538).

210. *Id.* at 1158.

211. *Id.* at 1158–59.

home.<sup>212</sup> “The implementation of the Road Home program resulted in the steering of hundreds of millions of rebuilding dollars away from African-American communities, increasing the indices of blight in these neighborhoods and perpetuating the historic undervaluing of African-American neighborhoods in the region.”<sup>213</sup>

Ultimately, FEMA has substantial discretion and leverage to depart from the past by allocating and coordinating resources toward more equitable outcomes.

*E. ILLUSTRATION 5: ENVIRONMENTAL PROTECTION AGENCY*

The EPA also perpetuates segregation, if in less perceptible ways. A critical component of reversing segregation’s legacy is leveraging the government’s authority over the release of environmental contamination and remediation of polluted sites.<sup>214</sup> It is well documented that poor communities of color live in closer proximity to health-threatening pollution.<sup>215</sup> This inequity extends segregation’s deleterious effects, inhibiting access to the opportunity that does exist. But the EPA has untapped authority to reduce racial impacts in federally funded projects.<sup>216</sup> The EPA offends in all three of

212. *Id.* at 1156 (citing *Implementation of the Road Home Program Four Years After Hurricane Katrina: Hearing Before the Subcomm. on Hous. & Cmty. Opportunity of the H. Comm. On Fin. Servs.*, 111th Cong. (2009) (statement of Matthew Colangelo, Dir., Econ. Just. Grp, NAACP Legal Def. Fund)). In 2008, the Greater New Orleans Fair Housing Action Center, National Fair Housing Alliance, and five homeowners brought a class action lawsuit representing a class of 20,000 Black homeowners challenging the Road Home formula’s disparate impact based on race. *Id.* at 1159; see also Complaint for Declaratory & Injunctive Relief at 1–5, Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep’t of Hous. & Urb. Dev., 639 F.3d 1078 (D.C. Cir. 2011) (No. 08-cv-01938), 2008 WL 5242538. The case settled for over \$60 million in 2011. See Notice of Dismissal at 2, Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep’t of Hous. & Urb. Dev., No. 08-cv-01938, 2008 WL 5242638 (D.D.C. July 8, 2011). For a discussion of the Gulf Opportunity Zone Tax Credit Program and Disaster Housing Assistance Program, see Williams & Arekapudi, *supra* note 207, at 1154–65.

213. Williams & Arekapudi, *supra* note 207, at 1161 (footnote omitted).

214. See generally ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY (3d ed., Taylor & Francis 2018) (1990) (exploring effects that the siting of environmentally toxic facilities has on the African American community).

215. E.g., SHRIVER CTR. ON POVERTY L. & EARTHJUSTICE, POISONOUS HOMES: THE FIGHT FOR ENVIRONMENTAL JUSTICE IN FEDERALLY ASSISTED HOUSING 41 (2020), [www.povertylaw.org/report/poisonoushomes](http://www.povertylaw.org/report/poisonoushomes) [<https://perma.cc/H8FR-LKVM>] (surveying the research in the Superfund context); Vann R. Newkirk II, *Trump’s EPA Concludes Environmental Racism is Real*, ATL. (Feb. 28, 2018), [www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315](http://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315) [<https://perma.cc/F8PW-V9D5>]. The Shriver Center report offers historical context with respect to federal housing: “The siting of federally assisted housing on or near environmental contamination has not been accidental or isolated. Federally assisted housing was intentionally placed near contaminated areas, and industry was often sited near existing federally assisted housing, without consideration of the public health implications to residents.” SHRIVER CTR. ON POVERTY L. & EARTHJUSTICE, *supra* at 12.

216. See generally Letter from Emily A. Benfer, Dir., Health Just. Project & Kate Walz, Dir., Hous. Just., to Julian Castro, Sec’y, Dep’t of Hous. & Urb. Dev. (Feb. 11, 2016), <https://prprac.org>

the major ways that agencies promote segregation: It spends money on exclusionary activities, fails to modify program to affirmatively promote fair housing, and fails to enforce or selectively enforcing civil rights laws.<sup>217</sup> This illustration focuses on the EPA's failure to exercise its regulatory authority as its most pronounced segregative effect.<sup>218</sup>

The EPA has both direct and indirect roles in assessing and permitting federal projects. Under the National Environmental Policy Act (NEPA), an agency must assess the environmental impact of proposed "major federal actions."<sup>219</sup> A common example that triggers an agency's obligation is DOT

/pdf/Petition\_for\_Rulemaking\_24\_CFR\_35\_2-11-16.pdf [https://perma.cc/CW4L-FE37] (explaining the connection between the AFFH mandate and the federal government's obligation to reduce environmental hazards like lead poisoning disparities by race).

217. On selective enforcement, see Julia Mizutani, Note, *In the Backyard of Segregated Neighborhoods: An Environmental Justice Case Study of Louisiana*, 31 GEO. ENV'T L. REV. 363, 370–72 (2019) (discussing the EPA's differential enforcement based on race). See also Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law: A Special Investigation*, NAT'L L.J., Sept. 21, 1992, at 1, www.ejnet.org/ej/nlj.pdf [https://perma.cc/4ATC-L6YC] (finding that the federal government "favors white communities over minority communities under environmental laws meant to provide equal protection for all citizens" in the hazardous site clean-up process and in prosecuting polluters); U.S. COMM'N ON CIV. RTS., ARE RIGHTS A REALITY?: EVALUATING FEDERAL CIVIL RIGHTS ENFORCEMENT 29 & n.143, 235 nn.1530–34, 237–39 nn.1546–58, 286–87 nn.1928–33, 365–66 nn.2475–84 (2019), https://www.usccr.gov/files/pubs/2019/11-21-Are-Rights-a-Reality.pdf [https://perma.cc/Y5F8-775C] (discussing how budget limitations result in a form of "selective enforcement"). See generally Jeffrey Fagan, Garth Davies & Adam Carlis, *Race and Selective Enforcement in Public Housing*, 9 J. EMPIRICAL LEGAL STUD. 697 (2012) (examining selective enforcement of public housing policies by race).

218. Environmental injustice offers an acute example of the need for interagency coordination. See SHRIVER CTR. ON POVERTY L. & EARTHJUSTICE, *supra* note 215, at 6, 12 (describing the patchwork of housing, environmental, and health laws that perpetuate the exposure of low-income communities of color to disproportionate environmental harm); Emily A. Benfer, *Contaminated Childhood: How the United States Failed to Prevent the Chronic Lead Poisoning of Low-Income Children and Communities of Color*, 41 HARV. ENV'T L. REV. 493, 546–60 (advocating for prevention of lead poisoning by increasing enforcement through the AFFH mandate). See generally Letter from Megan Haberle & Philip Tegeler, Poverty & Race Rsch. Action Council, et al., to Charles Lee, Deputy Assoc. Assistant Adm'r for Env't Just., U.S. Env't Prot. Agency (July 28, 2016), http://prrac.org/pdf/EPA\_2020\_AFFH\_letter.pdf [https://perma.cc/8NNU-QRZT] (describing the need for agency coordination at the nexus of environmental and housing civil rights and providing specific recommendations to the EPA); Brian D. Smedley & Philip Tegeler, "Affirmatively Furthering Fair Housing": A Platform for Public Health Advocates, 106 AM. J. PUB. HEALTH 1013 (2016) (describing the geographic relationship between environmental hazards and fair housing); POVERTY & RACE RSCH. ACTION COUNCIL, STRATEGIES FOR HEALTH JUSTICE: LESSONS FROM THE FIELD (Megan Haberle & Heidi Kurniawan eds., 2018), https://rosefdn.org/wp-content/uploads/2018/12/health\_justice\_rpt1.pdf [https://perma.cc/WP8D-46R3] (compiling stories and studies related to health, housing, and the environment).

219. See 40 C.F.R. § 1508.1(q)(2)–(3) (2018) (defining "major federal actions" that trigger review); *National Environmental Policy Act Review Process*, U.S. ENV'T PROT. AGENCY (Oct. 25, 2021), www.epa.gov/nepa/national-environmental-policy-act-review-process [https://perma.cc/gYBF-PFJJ] (describing the NEPA review process); see also Archer, *supra* note 133, at 1314–21 (explaining the NEPA's legal framework). The EPA has similar review authority under other environmental laws, such as the Clean Air Act. See, e.g., *EPA Review Process Under Section 309 of the Clean Air Act*,

projects.<sup>220</sup> Such assessments can and should incorporate segregation as one element of environmental impact.<sup>221</sup> In instances where the EPA is not the assessing agency, it nevertheless has the power to review that agency's assessment and therefore has the authority to bring a project's segregative effect to light.<sup>222</sup>

The EPA also has under-exercised oversight authority in state permitting. As virtually all state environmental programs receive federal funds, environmental advocates see the EPA's Title VI authority as one key intervention point to reform or halt projects that would perpetuate segregation or have a discriminatory effect.<sup>223</sup>

Finally, perhaps the most visible example is the EPA's authority to regulate contaminated legacy sites, many in segregated communities. This includes regulatory authority over waste removal<sup>224</sup> and site clean-up,<sup>225</sup> and direct and indirect permitting authority by state regulation as it relates to "the

U.S. ENV'T PROT. AGENCY (Oct. 25, 2021), [www.epa.gov/nepa/epa-review-process-under-section-309-clean-air-act](http://www.epa.gov/nepa/epa-review-process-under-section-309-clean-air-act) [<https://perma.cc/5JSL-4UYU>].

220. See Archer, *supra* note 133, at 1316–17.

221. See *id.* at 1327. An improved better approach to avoid NEPA's shortcomings would involve explicit racial equity impact studies. *Id.* at 1314–21 (explaining NEPA's shortcomings and proposing racial equity impact studies).

222. See Clean Air Act § 309, 42 U.S.C. § 7609(a) (2018) (mandating environmental impact policy reviews). See also generally U.S. ENV'T PROT. AGENCY & OFF. OF FED. ACTIVITIES, FINAL GUIDANCE FOR CONSIDERATION OF ENVIRONMENTAL JUSTICE IN CLEAN AIR ACT 309 REVIEWS (1999), [https://www.epa.gov/sites/default/files/2014-08/documents/enviro\\_justice\\_309review.pdf](https://www.epa.gov/sites/default/files/2014-08/documents/enviro_justice_309review.pdf) [<https://perma.cc/5VR2-N4EB>] (providing guidance to EPA reviewers on analyzing environmental justice factors).

223. See, e.g., Susan Phillips, *EPA Takes Up Environmental Justice Complaint Against Philly's Permit for SEPTA Power Plant in Nicetown*, WHY:Y: PBS & NPR (July 19, 2021), <https://why.org/articles/epa-takes-up-environmental-justice-complaint-against-phillys-permit-for-septa-power-plant-in-nicetown> [<https://perma.cc/Q2ND-CDWJ>]; see also Sam Mintz, *DOT Halts Texas Highway Project in Test of Biden's Promises on Race*, POLITICO (Apr. 1, 2021, 4:43 PM), [www.politico.com/news/2021/04/01/dot-texas-highway-equity-478864](http://www.politico.com/news/2021/04/01/dot-texas-highway-equity-478864) [<https://perma.cc/U6J2-QA7K>] (describing DOT's suspension of a highway project for environmental review). For a broader discussion, see Marianne Engelman Lado, *Toward Civil Rights Enforcement in the Environmental Justice Context: Step One: Acknowledging the Problem*, 29 FORDHAM ENV'T L. REV. 1, 6–7, 7 n.21 (2017) (discussing EPA Title VI enforcement, but noting "there is reason to believe oversight is lacking across the environment and natural resources family of federal agencies, which includes the U.S. Department of Agriculture; the U.S. Department of Energy; the U.S. Fish and Wildlife Service, within the Department of Interior; and the U.S. National Oceanic and Atmospheric Administration, within the U.S. Department of Commerce; among others").

224. See Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–92; *Summary of the Resource Conservation and Recovery Act*, U.S. ENV'T PROT. AGENCY (Sept. 28, 2021), [www.epa.gov/laws-regulations/summary-resource-conservation-and-recovery-act](http://www.epa.gov/laws-regulations/summary-resource-conservation-and-recovery-act) [<https://perma.cc/K4SB-EE2T>] (The Resource Conservation and Recovery Act "gives EPA the authority to control hazardous waste from cradle to grave").

225. See Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–75; *Superfund: CERCLA Overview*, U.S. ENV'T PROT. AGENCY (Feb. 14, 2022), [www.epa.gov/superfund/superfund-cercla-overview](http://www.epa.gov/superfund/superfund-cercla-overview) [<https://perma.cc/C4NH-KZ7J>].

health and welfare of the public or environment.”<sup>226</sup> These are all regulation points at which the EPA might address segregation but rarely does.<sup>227</sup>

*F. ILLUSTRATION 6: DEPARTMENTS OF AGRICULTURE, DEFENSE, AND VETERANS AFFAIRS*

Although often overlooked, the U.S. Department of Agriculture (“USDA”), the Department of Defense (“DOD”), and the Department of Veteran’s Affairs (“VA”) administer housing to millions of Americans. This illustration explores the nexus between housing segregation and the housing programs administered by non-HUD agencies.

The USDA is deeply involved in housing policy, even though housing may not seem to fit squarely within its food, agriculture, and nutrition mission. It operates, however, a long list of housing programs, from housing finance to home renovation and repair to rental assistance.<sup>228</sup>

It also provides loans and grants to developers to build and renovate multifamily housing.<sup>229</sup> It also has a well-documented history of perpetuating segregation and discrimination, which has resulted in “record-setting settlements from 1999 through 2010.”<sup>230</sup>

Similarly, DOD has been so involved in housing that it once earned the distinction of the “nation’s largest landlord.”<sup>231</sup> Since 1996, with the passage

226. See *NPDES Permit Basics*, U.S. ENV’T PROT. AGENCY (Mar. 7, 2022), <https://www.epa.gov/npdes/npdes-permit-basics> [<https://perma.cc/QPU6-2NQ3>]. National Pollutant Discharge Elimination System (“NPDES”) permitting under the Clean Water Act is one example. The EPA authorizes states to issue NPDES permits for “an acceptable level of a pollutant.” *Id.*

227. However, in 2021, the EPA intervened in Chicago’s permitting of the General Iron recycling plant. Brett Chase, *City Says Car Shredder May Be Harmful to Residents’ Health, Compares Company’s Legal Claim to ‘Shredder Fluff,’* CHI. SUN-TIMES (June 10, 2021, 7:25 PM), <https://chicago.suntimes.com/2021/6/10/22528766/general-iron-rmg-southside-recycling-southeast-side-metal-shredder-lawsuit> [<https://perma.cc/MM4T-XNYG>] (“[Mayor] Lightfoot announced that the permitting of Southside Recycling was suspended at the request of President Joe Biden’s Environmental Protection Agency chief Michael Regan.”); see also Courtney Cobbs, *General Iron’s Relocation to the Southeast Side Is a Mobility Justice Issue*, STREETS BLOG CHI. (Mar. 8, 2021), <https://chi.streetsblog.org/2021/03/08/general-iron-recycling-plant-is-a-mobility-justice-issue> [<https://perma.cc/gDXG-HGKR>] (discussing the EPA’s intervention with the permit for General Iron).

228. Programs include the Single Family Housing Guaranteed Loan Program, the Single Family Housing Direct Home Loans Program, Housing Preservation Grants, and Single Family Housing Repair Loans and Grants. *Housing Assistance*, U.S. DEP’T OF AGRIC., <https://www.usda.gov/topics/rural/housing-assistance> [<https://perma.cc/7GZ4-M5R9>].

229. For example, Multifamily Housing Direct Loans, Multifamily Housing Loan Guarantees, and Rural Housing Site Loans. *Id.*; see also *USDA Rural Housing Programs*, NAT’L HOUS. L. PROJECT, [www.nhlp.org/resource-center/usda-rural-housing-programs](http://www.nhlp.org/resource-center/usda-rural-housing-programs) [<https://perma.cc/Z8MZ-GC7V>] (describing programs).

230. Milligan & Tani, *supra* note 3 (describing the USDA’s discrimination against Black farmers in farm lending programs and other programs as illustrations of how the administrative state has been an engine of racial inequality).

231. Gwendolyn A. Wilson, *Reconstructing the Department of Defense’s Approach to Fair Housing: Extending the AFFH Mandate to the Non-Military Civilians DOD NOW Houses*, 44 PUB. CONT. L.J. 529,

of the Military Housing Privatization Initiative (“MHPI”), DOD has shifted its housing responsibility to public-private partnerships in which “private developers own, develop, construct, and maintain housing for military families and unaccompanied servicemembers . . . .”<sup>232</sup> Unknown to many, “to ensure the financial viability of these projects, [DOD] . . . permits civilians, [including] members of the local community who potentially are unconnected to the military, to rent these housing units.”<sup>233</sup> These civilians are known as “waterfall tenants.”<sup>234</sup> In terms of homeownership, DOD administers a Homeowners Assistance Program for current or former servicemembers.<sup>235</sup>

Likewise, the VA has been in the housing business for a long time. Indeed, the VA was intimately involved in government redlining, having “adopted all of the [Federal Housing Administration’s] racial exclusion programs when it began to insure mortgages for [WWII] returning veterans.”<sup>236</sup> Today, it administers a substantial home loan program, as well as housing assistance grants to veterans.<sup>237</sup>

The direct segregative effect of these programs is largely unexamined. However, it is evident that none of these agencies have implemented substantive AFFH regulations or otherwise adopted affirmative strategies to further fair housing.<sup>238</sup> Absent regulations and affirmative efforts, the

530 (2015) (quoting Chester Hartman & Robin Drayer, Research Note, *Military-Family Housing: The Other Public-Housing Program*, 17 HOUS. & SOC’Y 67, 67 (1990)).

232. *Id.*

233. *Id.* at 531. DOD depends on civilian tenants for the financial viability of its housing projects. *Id.* at 535 & n.56.

234. *Id.* (citing U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-337, DEFENSE INFRASTRUCTURE: IMPROVED GUIDANCE NEEDED FOR ESTIMATING ALTERNATIVELY FINANCED PROJECT LIABILITIES 9 n.17 (2013); see Wilson, *supra* note 231, at 531 n.12. See also generally U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-389T, MILITARY HOUSING: DOD HAS TAKEN KEY STEPS TO STRENGTHEN OVERSIGHT, BUT MORE ACTION IS NEEDED IN SOME AREAS (2021) (discussing the DOD’s privatization of domestic housing and the need to take more action to maintain oversight over this housing); Letter from Elizabeth Warren & Thom Tillis, U.S. Sens., to Marcia Fudge, Sec’y, U.S. Dep’t of Hous. and Urb. Dev. (Mar. 12, 2021), [www.warren.senate.gov/imo/media/doc/03.12.21%20Letter%20to%20HUD%20re%20MHPI%20accessible%20housing.pdf](http://www.warren.senate.gov/imo/media/doc/03.12.21%20Letter%20to%20HUD%20re%20MHPI%20accessible%20housing.pdf) [<https://perma.cc/CNG6-C2PX>] (raising concerns about fair housing and accessibility enforcement in privatized military housing).

235. *DoD Homeowners Assistance Program (HAP)*, U.S. ARMY (May 24, 2021), [https://myarmy.benefits.us.army.mil/Benefit-Library/Federal-Benefits/DoD-Homeowners-Assistance-Program-\(HAP\)?serv=122](https://myarmy.benefits.us.army.mil/Benefit-Library/Federal-Benefits/DoD-Homeowners-Assistance-Program-(HAP)?serv=122) [<https://perma.cc/2R3J-KVAM>].

236. *A ‘Forgotten History’ of How the U.S. Government Segregated America*, NPR (May 3, 2017, 12:47 PM), [www.npr.org/transcripts/526655831](http://www.npr.org/transcripts/526655831) [<https://perma.cc/8H94-8QWC>] (interviewing author Richard Rothstein); see Louis Lee Woods II, *Almost “No Negro Veteran . . . Could Get a Loan”: African Americans, the GI Bill, and the NAACP Campaign Against Residential Segregation, 1917-1960*, 98 J. AFR. AM. HIST. 392, 392–96 (2013).

237. *VA Housing Assistance*, U.S. DEP’T OF VETERANS AFFS. (Mar. 16, 2022), [www.va.gov/housing-assistance](http://www.va.gov/housing-assistance) [<https://perma.cc/YgZZ-MX32>]; *VA-backed Veterans Home Loans*, U.S. DEP’T OF VETERANS AFFS. (Mar. 16, 2022), [www.va.gov/housing-assistance/home-loans](http://www.va.gov/housing-assistance/home-loans) [<https://perma.cc/5JPL-2VVM>].

238. DOD has acknowledged its AFFH obligations, which is more than some agencies have done. See 32 C.F.R. § 192.4(a)(1)(iii) (2018) (codifying that the Fair Housing Act “[r]equires all

government continues to inject billions of dollars into these substantial programs without regard for how they perpetuate existing segregation patterns. Strategies like affirmative marketing efforts, data tracking, and proactive outreach to racially or ethnically concentrated areas of poverty would reduce the segregative effect of these programs. After all, “the responsibility to further fair housing reaches into every aspect of affordable housing, from site selection, demolition, displacement, and relocation to architectural design, marketing, tenant selection, and occupancy policies.”<sup>239</sup>

The DOD’s MHPI program that accommodates civilian waterfall tenants is a prime opportunity. Before entering into an MHPI agreement, “DOD . . . engage[s] in a ‘housing requirements determination process’ to decide whether [the] . . . project is needed.”<sup>240</sup> Here, it could consider the housing needs of the surrounding community. For instance, it could consider how such developments—on which DOD relies financially to provide servicemember housing—could alleviate racial inequities in access to safe and affordable housing. It could consider the most strategic placement of such housing to reduce local residential segregation. It might give priority to housing placement that promotes equal access to quality schools, employment, transportation, and other community access.<sup>241</sup> These factors are increasingly important to reducing segregation in the context of the nation’s affordable housing crisis.<sup>242</sup> This program, and the other housing programs administered

Executive Departments and Agencies to administer housing and urban development programs and activities under their jurisdiction in a manner that shall reflect ‘affirmatively’ the furthering of title VIII”). The regulation goes on to describe the DOD’s anti-discrimination policies but does not address how it will affirmatively further fair housing. *See id.* § 192.4(b). Moreover, in the case of off-base housing, the regulations only specify that fair housing protections extend to DOD personnel, not civilian tenants. *See id.* § 192.4 (describing “the goal of obtaining equal treatment for all DoD personnel”); Wilson, *supra* note 231, at 537.

DOT, for instance, does not have a comparable AFFH regulation, but its Title VI-effectuating anti-discrimination regulations contain a provision requiring affirmative action in DOT programs. 49 C.F.R. § 21.5(b)(7) (“Where prior discriminatory practice or usage tends, on the grounds of race, color, or national origin to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this part applies, the applicant or recipient must take affirmative action to remove or overcome the effects of the prior discriminatory practice or usage.”); *see also* Marcantonio et al., *supra* note 142, 1069–77 (discussing DOT’s lack of AFFH-specific regulation).

239. Henry Korman, *Underwriting for Fair Housing? Achieving Civil Rights Goals in Affordable Housing Programs*, 14 J. AFFORDABLE HOUS. & CMTY. DEV. L. 292, 293 (2005) (surveying AFFH cases as they relate to fair housing obligations in federal affordable housing programs).

240. Wilson, *supra* note 231, at 537 (quoting U.S. GEN. ACCT. OFF., GAO-04-556, *MILITARY HOUSING: FURTHER IMPROVEMENT NEEDED IN REQUIREMENTS DETERMINATIONS AND PROGRAM REVIEW* 8 (2004)).

241. *See, e.g., id.* at 538. *See generally* Korman, *supra* note 239 (examining underwriting to advance fair housing).

242. *See* Emily Badger, *How the Housing Crisis Left Us More Racially Segregated*, WASH. POST (May 8, 2015), [www.washingtonpost.com/news/wonk/wp/2015/05/08/how-the-housing-crisis-left-us-more-racially-segregated](http://www.washingtonpost.com/news/wonk/wp/2015/05/08/how-the-housing-crisis-left-us-more-racially-segregated) [https://perma.cc/JB7D-V72R]; Casey Brazeal, *Study Shows Segregation Linked to Housing Shortage in Massachusetts*, PLANETIZEN (July 17, 2019, 12:00 PM), [www.planetizen](http://www.planetizen)

by USDA, DOD, and VA illustrate key opportunities to redirect federal resources in a pro-integrative direction.

Collectively, these illustrations offer a snapshot of how the federal government perpetuates segregation in its contemporary activities. Many other examples can be found in systems shaped by federal influence, often amplified by the agencies and dynamics featured above.<sup>243</sup> How, then, can the government's influence be reversed?

#### IV. HOW TO STOP IT

For decades, "HUD has served as the laboring oar of the government's fitful efforts to carry out the duty to further fair housing and dismantle federally-created racial segregation."<sup>244</sup> Laboring alone, HUD stands little chance to counteract the federal government's broader segregative effect. This Part identifies concrete steps the executive branch can take to disengage segregation autopilot. It opens with administrative law tools to implement the AFFH duty across agencies and closes with potential interagency coordination models that may prove effective at unifying agency efforts to reduce neighborhood segregation.

##### A. ADMINISTRATIVE LAW TOOLS

Beginning at the agency level and moving to the interagency level, this Section examines potential administrative law tools for detecting and dismantling an agency's segregative effect. For each tool, it elaborates on how the tool could be used to counteract segregation.

*Internal Audits.* The starting place is self-examination. Every agency should conduct a searching inquiry into its programs and activities, asking how each perpetuates segregation. An agency must humbly identify its potential segregative impact in a public, transparent manner.<sup>245</sup> Agency audits should trace funding streams as spent by grantees and contractors to evaluate how those funds affect segregation. Agencies might hire third-party auditors

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.com/news/2019/07/105262-study-shows-segregation-linked-housing-shortage-massachusetts [https://perma.cc/64GJ-WRV8].

243. These illustrations offer a non-exhaustive list of government agencies and programs that perpetuate segregation. Examples span the Department of Education, General Services Administration, and many others.

244. Korman, *supra* note 158, at 28. See generally William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1 (2003) (arguing that regulators often fail to adequately address social harms when multiple regulators share jurisdiction).

245. In this regard, an agency's acknowledgment of its segregative impact may be a form of racial reconciliation. See, e.g., *Reconciliation*, NAT'L INITIATIVE FOR BLDG. CMTY. TR. & JUST., <https://trustandjustice.org/resources/intervention/reconciliation> [https://perma.cc/5G94-ABKG]; see also *Truth and Reconciliation Commission of Canada*, GOV'T OF CAN. (June 11, 2021), [www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525](http://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525) [https://perma.cc/AA54-6CR7] (illustrating a government reconciliation initiative).

to test for segregative impact and discriminatory impact.<sup>246</sup> Audits should “review the design and delivery” of programs and, where segregative effect is detected, make recommendations for reform consistent with an agency’s AFFH obligations.<sup>247</sup> Other responses to agency audits include public listening sessions<sup>248</sup> and a public comment period.

*Assessment Tool.* The White House Domestic Policy Council or its designee should design an assessment tool analogous for agencies. It would be analogous to the AFFH assessment tool for federal grantees.<sup>249</sup> The assessment tool would contain questions to assist an agency in identifying its activities with the greatest segregative effect. Pursuant to a 2021 executive order, the federal government is already in the early stages of a similar process “to identify . . . methods . . . to assist agencies in assessing equity” and develop pilot programs to study and implement these methods.<sup>250</sup> Building on this framework, the government should design and implement a tool that guides every agency to detect and dismantle its segregative effect.

*Agency-Specific Regulations.* To date, HUD is the only agency to promulgate a substantive AFFH regulation. Each agency has different programs and challenges, and regulates different grantees, contractors, or third parties with distinct influence on neighborhoods. As such, each agency should have its own AFFH rule, drafted in coordination with HUD. Regulations should spell out the agency’s—and funding recipient’s—AFFH duties and penalties for noncompliance.<sup>251</sup> Recipient duties may include conducting racial equity impact studies for proposed projects, providing incentives for communities to reform zoning codes, or requiring state or local pass-through grantees to

246. See CMTY. CHANGE, *supra* note 181, at 22; see also *The Racial Wealth Audit: Measuring how Policies Shape the Racial Wealth Gap*, RACIAL WEALTH AUDIT, <http://racialwealthaudit.org/cgi/https://perma.cc/9PFM-3NRD> (measuring “the wealth gap between white households and households of color”).

247. Exec. Order No. 12,892, 3 C.F.R. 849, 851 § 3-302 (1995), *reprinted in* 42 U.S.C. § 1982 (1994) (creating President’s Fair Housing Council).

248. HUD has previously conducted listening sessions in the AFFH context, which offer potential models. See, e.g., Affirmatively Furthering Fair Housing and Fair Housing Plans; Notice of Informal Meeting, 74 Fed. Reg. 33,456, 33,456 (July 13, 2009). In fall 2021, it conducted a new series of AFFH listening sessions in advance of issuing a notice of proposed rulemaking for its AFFH regulation. See E-mails from Anne Brewer, Deputy Assistant Sec’y for Pub. Engagement, Dep’t of Hous. & Urb. Dev., to author (Oct. 2021) (on file with author).

249. See, e.g., Affirmatively Furthering Fair Housing Assessment Tool for Public Housing Agencies: Announcement of Final Approved Document, 82 Fed. Reg. 4373, 4373–88 (Jan. 13, 2017).

250. Exec. Order No. 13,985, 86 Fed. Reg. 7009, 7010 § 4 (Jan. 25, 2021).

251. To further the AFFH mandate in a collective manner, every agency must have a full palette of remedies at its disposal to remedy the flaws and barriers to fair housing it identifies. As one example, an agency must be able to do more than negotiate voluntary settlements with the public or private entities it regulates. It must be able to suspend or terminate contracts or grants, authority that most relevant agencies already have. See, e.g., Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 YALE L.J. 248, 254–60 (2014); see also Abraham, *supra* note 124, at 565 (discussing how agencies can better implement their AFFH duties).

promulgate their own AFFH mandates.<sup>252</sup> Learning from HUD's experience in promulgating and enforcing an AFFH regulation through the Assessment of Fair Housing process, agencies should issue related interpretive guidance and technical assistance highlighting best practices for third parties involved in their programs.<sup>253</sup>

*Internal Guidance.* Each agency promulgates and maintains a body of internal guidance documents that describes and governs an agency's day-to-day business. Some guidance informs and binds agency employees. Issuing internal guidance is less time- and resource-intensive than rulemaking, but it is also less permanent. Agencies should issue their own internal guidance as one step toward instilling AFFH principles in daily operations. However, agency-specific regulations are still critical to building a better foundation for federal enforcement.

*Racial Equity Impact Studies.* "Racial equity impact studies systematically analyze how racial and ethnic groups will be affected by a proposed action, policy, or practice."<sup>254</sup> These studies have found practical use in a variety of contexts by evaluating for, and documenting potential, racialized harm.<sup>255</sup> "[J]urisdictions have adopted racial impact study requirements in a range of contexts to help them unearth racial inequities *before harm is inflicted* on communities of color."<sup>256</sup> They have the potential to reduce discrimination by considering the "often invisible and unintentional[] production of inequitable social opportunities and outcomes."<sup>257</sup> They "can also identify the often-invisible historical influences, systemic inequalities, structures, and

252. EO 12,892 specifies what should be included in an AFFH provision. *See* Exec. Order No. 12,892, 3 C.F.R. 849, 851–52 § 4-401 (1995). It also offers a sequential approach, requiring each agency to propose an agency-specific regulation "[w]ithin 180 days of the publication of [a] final" HUD rule. *Id.* at 852 § 4-402. Empirically, HUD did not finalize an AFFH regulation in the 1990s, so agencies never followed suit. *See* discussion *supra* note 124. However, EO 12,892 has never been revoked. As such, there's a colorable argument that it has continuing legal effect and, subsequent to the Obama-era AFFH Rule in 2015, every agency is now required to promulgate its own AFFH regulation, in coordination with HUD. *See* Exec. Order No. 12,892, 3 C.F.R. 849, 850 § 1-101 (1995).

253. *See, e.g.*, U.S. DEP'T OF HOUS. & URB. DEV., AFFIRMATIVELY FURTHERING FAIR HOUSING RULE GUIDEBOOK 3–4 (2015), [www.hud.gov/sites/dfiles/FHEO/documents/AFFH-Rule-Guidebook.pdf](http://www.hud.gov/sites/dfiles/FHEO/documents/AFFH-Rule-Guidebook.pdf) [<https://perma.cc/KTR5-YETX>]. As an enforcement matter, each agency's rulemaking should allow for an administrative complaint process for challenging alleged violations. *See* Michael Allen, *Speaking Truth to Power: Enhancing Community Engagement in the Assessment of Fair Housing Process*, in A SHARED FUTURE: FOSTERING COMMUNITIES OF INCLUSION IN AN ERA OF INEQUALITY, *supra* note 1, at 252, 260–61 (discussing the role of administrative complaints in AFFH enforcement).

254. Archer, *supra* note 133, at 1321.

255. *See id.*

256. *Id.* (emphasis added).

257. *Id.* at 1322 (alteration in original) (quoting TERRY KELEHER, APPLIED RSCH. CTR., RACIAL EQUITY IMPACT ASSESSMENT 1 (2009), [https://www.raceforward.org/sites/default/files/RacialJusticeImpactAssessment\\_v5.pdf](https://www.raceforward.org/sites/default/files/RacialJusticeImpactAssessment_v5.pdf) [<https://perma.cc/gZHR-V9KG>]).

institutions that interact to create those disparities.”<sup>258</sup> Currently, the federal government uses racial impact studies to a limited extent for federal funding, including as a condition of transportation funding under Title VI.<sup>259</sup> Agencies should adopt these throughout their programs, particularly with respect to large competitive grants.

*Scoring for Racial Equity.* A similar emerging proposal is a scoring system for racial impact, similar to Congressional Budget Office (“CBO”) scoring for budget impact. One approach suggests the Office of Management and Budget’s (“OMB”) should establish an equity scoring system that scores a bill—or an agency’s proposed action—to measure the racial equity impact of the proposal.<sup>260</sup> It would consider “racial economic inclusion, as well as civic engagement and social equity.”<sup>261</sup> Representatives in both chambers of Congress have introduced bills aimed to improve CBO scoring to account for racial impact.<sup>262</sup> Working with the OMB, agencies could use a racial impact scoring system to guide agency decision-making and document efforts to affirmatively further fair housing. The core analysis of a scoring system is parallel to the judiciary’s consensus interpretation of an agency’s AFFH obligation—that an agency must consider the impact of its proposed action on housing segregation by “assess[ing] negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and . . . assess[ing] positively those aspects . . . that would increase that supply.”<sup>263</sup> Once the scoring system is established, it could be used at all levels of government.

*Memoranda of Understanding.* Memoranda of Understanding (“MOUs”) define legal relationships between the agencies in a manner that increases dialogue and normalizes coordinated enforcement. An interagency tool, MOUs present a particular opportunity. Few agencies explicitly coordinate with HUD or DOJ to monitor or enforce fair housing violations. Moreover, few—if any—coordinate to affirmatively reduce segregation (as opposed to

258. *Id.*; see also *id.* at 1325–26 (describing two empirical examples of racial equity impact study programs in Seattle).

259. See *id.* at 1324 & n.376; see also *id.* at 1314–21 (discussing the opportunities and limitations of NEPA environmental impact statements).

260. Andre M. Perry & Darrick Hamilton, *Just as We Score Policies’ Budget Impact, We Should Score for Racial Equity as Well*, BROOKINGS (Jan. 25, 2021), [www.brookings.edu/blog/the-avenue/2021/01/25/just-as-we-score-policies-budget-impact-we-should-score-for-racial-equity-as-well](http://www.brookings.edu/blog/the-avenue/2021/01/25/just-as-we-score-policies-budget-impact-we-should-score-for-racial-equity-as-well) [<https://perma.cc/B3K9-8TSJ>].

261. *Id.*

262. FAIR Scoring Act, S. 2723, 117th Cong. §§ 2–3 (2021); FAIR Scoring Act, H.R. 5018, 117th Cong. §§ 2–3 (2021); Press Release, Elizabeth Warren, Warren, Bennet, Khanna, Phillips to Introduce the CBO FAIR Scoring Act (Aug. 11, 2021), <https://www.warren.senate.gov/newsroom/press-releases/warren-bennet-khanna-phillips-to-introduce-the-cbo-fair-scoring-act> [<https://perma.cc/2JPT-JJAS>].

263. *N.A.A.C.P. v. Sec’y of Hous. & Urb. Dev.*, 817 F.2d 149, 156 (1st Cir. 1987).

non-discrimination, a separate objective).<sup>264</sup> The process of drafting and implementing MOUs may also prompt agencies to rethink how they administer their programs—how they allocate resources, monitor grantees, investigate complaints, and penalize violations. The better these collaborations are defined and employed, the more effective the enforcement.<sup>265</sup>

*OIRA Rulemaking Review.* The OMB's Office of Information and Regulatory Affairs ("OIRA") could use segregative effect as a litmus test in reviewing proposed regulations. An analysis of segregative effect could be conducted by OIRA itself under the AFFH mandate, or could be exercised by a specific HUD office similar to the Small Business Administration's Office of Advocacy, which has a "mandate[] to represent the interests of small business in the regulatory process."<sup>266</sup> The designated office would screen proposed rules for rules likely to exacerbate segregation and an opportunity to object, requiring the submitting agency to propose revisions.<sup>267</sup>

*Data Collection & Sharing.* Better data collection and dissemination will inform both agencies and the public of the government's impact. The OMB is well positioned to permit uniform, transparent data collection and sharing—among agencies and to the public (or available through a freedom

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264. In 2000, Treasury and DOJ entered into an MOU with HUD to coordinate fair housing enforcement, particularly in administrative and judicial fair housing cases involving LIHTC properties and requiring the IRS to notify owners about the possible loss of credits in connection to an adverse finding or judgment. See *Memorandum of Understanding Among the Department of the Treasury, the Department of Housing and Urban Development, and the Department of Justice*, U.S. DEP'T OF JUST. (Aug. 6, 2015), <https://www.justice.gov/crt/memorandum-understanding-among-department-treasury-department-housing-and-urban-development-an-o> [https://perma.cc/MDH4-2W3K]; Korman, *supra* note 239, at 302. The MOU calls for joint fair housing training, activities to encourage monitoring and compliance, and annual civil rights meetings with state housing credit agencies. Korman, *supra* note 239, at 302. The other prominent example is an MOU between HUD and USDA to coordinate fair housing enforcement. U.S. DEP'T OF HOUS. & URBAN DEV. & U.S. DEP'T OF AGRIC., *MEMORANDUM OF UNDERSTANDING 1* (1998), [https://www.justice.gov/sites/default/files/crt/legacy/2013/04/23/USDA\\_HUD\\_MOU.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2013/04/23/USDA_HUD_MOU.pdf) [https://perma.cc/JT4W-2FT5].

A recent illustration in 2021, HUD and the Federal Housing Finance Agency ("FHFA") "entered into a first-of-its-kind collaborative agreement" to enhance their joint enforcement of the FHA. See Press Release, U.S. Dept. of Hous. & Urb. Dev., HUD and FHFA Announce Collaboration to Advance Fair Housing and Fair Lending Enforcement (Aug. 12, 2021), [https://www.hud.gov/press/press\\_releases\\_media\\_advisories/HUD\\_No\\_21\\_121](https://www.hud.gov/press/press_releases_media_advisories/HUD_No_21_121) [https://perma.cc/28M9-WKC7].

265. While this article focuses on federal enforcement, it need not be limited to federal enforcement. For more on subnational enforcement and local innovation, see generally Johnson, *supra* note 127.

266. ROBERT JAY DILGER, CONG. RSCH. SERV., R43625, SBA OFFICE OF ADVOCACY: OVERVIEW, HISTORY, AND CURRENT ISSUES 16 (2022).

267. An executive order would probably be sufficient to incorporate the AFFH duty into the OIRA rulemaking process. For a discussion of an agency's AFFH duty to cooperate with HUD's desegregation efforts, see *supra* text accompanying notes 57–63. This is the subject of a future article.

of information request).<sup>268</sup> As one example, a recent executive order establishes an Interagency Working Group on Equitable Data, discussed in more detail below.<sup>269</sup>

### B. COORDINATION MODELS

In addition to these administrative law tools, a successful implementation strategy requires defined coordination. This Section analyzes models that have been used to address analogous problems, like public health and environmental crises. Among its examples, it evaluates the Biden Administration's agency-wide equity assessment in Executive Order 13985, ultimately landing on the framework as a promising approach and offering modifications tailored to segregation reduction.

Two common collaboration models are working groups (or "councils") and "czars."<sup>270</sup> This Section explores working group models but highlights a domestic "housing segregation czar" as an alternative approach.<sup>271</sup> Interagency

268. See, e.g., Steven Brown, Graham MacDonald & Claire Bowen, *How the Federal Government Can Use Data to Make the Most of the Executive Order on Racial Equity*, URB. INST. (Jan. 29, 2021), <https://www.urban.org/urban-wire/how-federal-government-can-use-data-make-most-executive-order-racial-equity> [<https://perma.cc/4AHE-QP75>] (discussing OMB authority to define data sharing and proposals like the Foundations for Evidence-Based Policymaking Act).

269. Exec. Order No. 13,985, 86 Fed. Reg. 7009, 7011 § 9 (Jan. 25, 2021).

270. For a discussion on interagency coordination models, case studies, and lessons learned, see ALEJANDRO E. CAMACHO & ROBERT L. GLICKSMAN, REORGANIZING GOVERNMENT: A FUNCTIONAL AND DIMENSIONAL FRAMEWORK 110–15 (2019); and Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1155–81 (2012). For a case study, see Sidney A. Shapiro, *Biotechnology and the Design of Regulation*, 17 ECOLOGY L.Q. 1, 26–36 (drawing lessons from the Biological Science Coordinating Committee). See also Administrative Conference of the United States: Adoption of Recommendations, 77 Fed. Reg. 47,800, 47,810 (Aug. 10, 2012) (offering recommendations for effective agency coordination).

271. Two prominent examples of contemporary "czars" are the Ebola pandemic czar and climate change czars appointed by President Obama. For more on their roles, see Emma Roller, Rebecca Nelson, Lucia Graves & National Journal, *What Exactly Does a Government 'Czar' Do?*, ATLANTIC (Oct. 17, 2014), [www.theatlantic.com/politics/archive/2014/10/what-exactly-does-a-government-czar-do/439371](http://www.theatlantic.com/politics/archive/2014/10/what-exactly-does-a-government-czar-do/439371) [<https://perma.cc/HS4S-XPLJ>]; and Aaron J. Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2577–83 (2011). There have been numerous czars beginning during the Franklin Roosevelt administration, ranging from "cyber security czar[s]" (George W. Bush, Obama, and Trump administrations) to a "Guantanamo Base closure czar" (Obama administration) to an "inflation czar" (Carter administration) to a "rubber czar" (Franklin Roosevelt administration). See generally MITCHEL A. SOLLENBERGER & MARK J. ROZELL, THE PRESIDENT'S CZARS: UNDERMINING CONGRESS AND THE CONSTITUTION (2012) (exploring the history of presidential czars).

In April 2022, HUD Secretary Fudge announced that she had appointed a "racial equity czar" for HUD, who will function as a senior advisor to the Secretary to carry out HUD's racial equity agenda. Richard Fowler, *HUD Secretary Appoints "Racial Equity Czar," Creating Federal Template on Racial Equity*, FORBES (Apr. 14, 2022, 9:00 AM), <https://www.forbes.com/sites/richardfowler/2022/04/14/hud-secretary-appoints-racial-equity-czar-creating-federal-template-on-racial-equity/?sh=7396ae53221b>.

There are other potential models. Some effective inter-agency collaboration is defined by stages in a process or intentionally redundant overlap in regulation. CAMACHO & GLICKSMAN,

working groups typically coordinate interaction between the heads of agencies. Elevating what is currently a HUD-led effort to enforce the AFFH to an interagency working group has a host of benefits in terms of policy, process, and practical impact.<sup>272</sup> The following three examples illustrate how the government has approached analogous problems in recent years.

*The President's Fair Housing Council.* The President's Fair Housing Council was a cabinet-level interagency working group established by executive order in 1994 and designed to facilitate coordination between the head of virtually every cabinet-level agency.<sup>273</sup> It is the only AFFH interagency coordination effort to date.<sup>274</sup> The group convened once but succumbed to competing priorities, never getting off the ground.<sup>275</sup> Its strengths were the specificity of its AFFH-focused mission, detailed directives with deadlines set by Executive Order (such as agency-specific AFFH regulations and what they must address), and high-level membership in the heads of each agency, which both elevated segregation's visibility as a policy priority and insured the key decisionmakers were at the table.<sup>276</sup>

*PAVE Task Force.* Heralded as "a whole-of-government effort to ensure all Americans are treated fairly in the home appraisals process," the Interagency Task Force on Property Appraisal Valuation Equity ("PAVE") launched in 2021 to reduce home appraisal inequity.<sup>277</sup> Co-chaired by HUD Secretary Marcia

*supra* note 270, at 96–98. Other models from which to draw empirical analysis include national intelligence coordination and reorganization after 9/11, banking regulation coordination, and pollution control. The areas of environmental justice and climate change have generated some of the most research scholarship to date. *See generally* Shapiro, *supra* note 270 (describing the influence of biotechnology as it affects ecological systems); Freeman & Rossi, *supra* note 270 (explaining the issues with coordinating shared regulatory space); U.S. ENV'T PROT. AGENCY ET AL., MEMORANDUM OF UNDERSTANDING ON ENVIRONMENTAL JUSTICE AND EXECUTIVE ORDER 12898 (2011), <https://www.epa.gov/sites/default/files/2015-02/documents/ej-mou-2011-08.pdf> [<https://perma.cc/6B5KPG7H>] (describing a multi-agency agreement to implement procedures under EO 12898).

272. *See* Abraham, *supra* note 124, at 564–66.

273. Exec. Order No. 12,892, 3 C.F.R. 849, 850–51 § 3-301 (1995), *reprinted in* 42 U.S.C. § 1982 (1994) (describing the President's Fair Housing Council); *see* discussion *supra* note 124.

274. President Carter issued an AFFH Executive Order that was replaced by the 1994 executive order establishing the President's Fair Housing Council. *See supra* note 121 and accompanying text.

275. Hannah-Jones, *supra* note 36. If you don't remember the President's Council, you're not alone. Investigative Reporter Nikole Hannah-Jones summarizes its history in three short sentences: "Hobbled by the Monica Lewinsky scandal, the Clinton administration had little appetite for a public fight over integration. The President's Fair Housing Council, as far as anyone can recall, met only once. It took no action." *Id.*

276. *See id.* In 2008, a bipartisan National Commission on the Future of Fair Housing led by two former HUD Secretaries called for the reinstatement of the Fair Housing Council. *See generally* NATIONAL COMMISSION REPORT, *supra* note 124 (detailing the Commission's recommendations).

277. Robin Lovelace, *HUD News in Review: December 29, 2021*, AFFORDABLE HOUS. ONLINE (Dec. 29, 2021), <https://affordablehousingonline.com/blog/hud-news-in-review-12-29-2021> [<https://perma.cc/JT3N-5XFN>]; U.S. Dep't of Hous. & Urb. Dev., *HUD Looks Back at 2021 Accomplishments*, RIS MEDIA (Jan. 3, 2022), [www.rismedia.com/2022/01/03/hud-looks-back-2021-accomplishments](http://www.rismedia.com/2022/01/03/hud-looks-back-2021-accomplishments) [<https://perma.cc/G9AJ-2D4L>]; Marcia L. Fudge (@SecFudge), TWITTER (July 29, 2021, 2:57 PM),

Fudge and Domestic Policy Advisor Ambassador Susan Rice, the thirteen-agency PAVE seeks to identify “the . . . levers at the federal government’s disposal,” like “regulatory action, and development of standards and guidance in close partnership with industry and state and local governments, to [mitigate] discrimination in the appraisal . . . process.”<sup>278</sup> In March 2022, it issued an Action Plan that explains how bias manifests in property valuation and recommends a variety of strategic interventions to decrease bias in appraisals.<sup>279</sup>

Its strength as a coordinating model is the narrow focus of its mission. Its initial weaknesses stemmed from its unclear membership structure—particularly the risk that other agencies might not take direction from the HUD Secretary—but the model quickly came together. First, in terms of leadership, the Biden Administration soon named as co-chair Ambassador Rice, a central White House figure who also coordinates domestic policy as chair of the President’s Domestic Policy Council.<sup>280</sup> Its membership consists of the secretaries of the relevant agencies and housing finance agencies discussed in this Article.<sup>281</sup> Second, it has issued public statements about two external work products and deadlines, which increase its public accountability.<sup>282</sup> As a starting point, it studied the extent, causes, and impacts of housing mis-valuation. According to one appraiser training company, PAVE has held a series of well-attended and spirited online listening sessions to solicit feedback from key stakeholders, “includ[ing] some of the most respected names in the appraisal profession.”<sup>283</sup> Its Action Plan reflects this groundwork. It offers specific, concrete recommendations that agencies can take to “advance valuation equity,” organized in five areas: (1) strengthening “guardrails against unlawful

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<https://twitter.com/SecFudge/status/1420835886258954241?s=20> [<https://perma.cc/G7RM-LS6W>] (announcing the launch of PAVE).

278. *Fact Sheet: Biden-Harris Administration Announces New Actions to Build Black Wealth and Narrow the Racial Wealth Gap*, THE WHITE HOUSE: BRIEFING ROOM (June 1, 2021), [www.whitehouse.gov/briefing-room/statements-releases/2021/06/01/fact-sheet-biden-harris-administration-announces-new-actions-to-build-black-wealth-and-narrow-the-racial-wealth-gap](http://www.whitehouse.gov/briefing-room/statements-releases/2021/06/01/fact-sheet-biden-harris-administration-announces-new-actions-to-build-black-wealth-and-narrow-the-racial-wealth-gap) [<https://perma.cc/2S9H-9AWX>]. Appraisal discrimination perpetuates segregation. Federal entities involved in regulating this process include HUD, CFPB, OCC, and the National Credit Union Administration. Patrice Alexander Ficklin, *CFPB Prioritizing Resources Against Racial Bias in Home Appraisals*, CONSUMER FIN. PROT. BUREAU (July 2, 2021), [www.consumerfinance.gov/about-us/blog/cfpb-prioritizing-resources-against-racial-bias-home-appraisals](http://www.consumerfinance.gov/about-us/blog/cfpb-prioritizing-resources-against-racial-bias-home-appraisals) [<https://perma.cc/3XBG-ADUL>].

279. See PAVE, ACTION PLAN TO ADVANCE PROPERTY APPRAISAL AND VALUATION EQUITY 1–6 (2022), <https://pave.hud.gov/sites/pave.hud.gov/files/documents/PAVEActionPlan.pdf> [<https://perma.cc/T5X2-9N2X>].

280. Georgia Kromrei, *Susan Rice to Co-chair HUD Appraisal Task Force*, HOUSINGWIRE (July 29, 2021, 9:30 AM), [www.housingwire.com/articles/susan-rice-to-co-chair-hud-appraisal-task-force](http://www.housingwire.com/articles/susan-rice-to-co-chair-hud-appraisal-task-force) [<https://perma.cc/L2JJ-EVB6>].

281. *Id.*

282. *Id.*

283. *Appraisal: PAVE Task Force: What Does the Future Hold?*, MCKISSOCK LEARNING (Dec. 3, 2021), [www.mckissock.com/blog/appraisal/pave-task-force-what-does-the-future-hold](http://www.mckissock.com/blog/appraisal/pave-task-force-what-does-the-future-hold) [<https://perma.cc/XU5E-7RYK>].

discrimination” for all stages of valuation, (2) enhancing legal enforcement and industry accountability, (3) training and diversifying the appraiser workforce, (4) empowering consumers to know their rights and report discrimination, and (5) releasing data to study and monitor bias.<sup>284</sup>

*Racial Equity Assessments (Executive Order 13985)*. On his first day in office, President Biden issued an executive order on “advancing [racial] equity across the Federal Government.”<sup>285</sup> It tasks each government agency with conducting an “equity assessment” of its agency, addressing criteria such as “[p]otential barriers that underserved communities and individuals may face to enrollment in and access to benefits and services [of the agency’s] programs” and identifying the agency’s offices, divisions, and resources “that are responsible for advancing civil rights or whose mandates specifically include serving underrepresented or disadvantaged communities.”<sup>286</sup> In spring 2022, agencies began releasing their equity plans in response to the Order. Concerningly, HUD’s Equity Action Plan downplays the role of a restored AFFH regulation, mentioning it sparingly, and offers no suggestion that HUD is close to issuing a new proposed AFFH rule.<sup>287</sup>

The Executive Order is broad and aspirational in tone, but it offers perhaps the best existing whole-of-government coordination model for segregation—one that has room to incorporate the aforementioned administrative law tools. It features at least three elements that should be incorporated into any AFFH coordination plan:

(1) *Central Coordinator*: Leadership is critical to successful coordination. In this model, the Order specifically names the Domestic Policy Council as the primary coordinating body. This has several benefits. First, designating a specific entity or person clarifies decision-making authority. Second, designating an entity in the White House, as opposed to a co-department department under the direction of the White House, elevates the importance and centrality of the issue, increases the likelihood of agency cooperation, and decreases challenges posed by “incidental to program mission” issues that cut across many agencies.<sup>288</sup> In this way, it is superior to both the President’s Fair Housing Council and PAVE as models for addressing AFFH enforcement.

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284. See PAVE, *supra* note 279, at 5–6. The efficacy of the PAVE Report’s recommendations is the subject of a forthcoming article on my recommended strategies to decrease appraisal discrimination.

285. Exec. Order No. 13,985, 86 Fed. Reg. 7009, 7009 § 1 (Jan. 25, 2021).

286. *Id.* at 7010 §§ 5(a), (d).

287. See U.S. Dep’t Hous. & Urb. Dev., Equity Action Plan 10 (2022), <https://www.hud.gov/sites/dfiles/PA/documents/HUDEquity508compliant.pdf> [<https://perma.cc/3SMQ-K2KX>].

288. See discussion *supra* note 108 (discussing “incidental to program mission” challenges).

(2) *Methodology for Assessing and Advancing Equity*: The Order acknowledges that measuring and advancing equity can take many forms, and probably needs to be tailored to each agency's activities. The Order thus directs the Office of Management and Budget (OMB) to "study methods for assessing whether agency policies and actions create or exacerbate barriers," identify "best methods, consistent with applicable law, to assist agencies in assessing equity with respect to race, ethnicity, religion, income, geography, gender identity, sexual orientation, and disability."<sup>289</sup> OMB soon issued a request for information on "effective methods for assessing whether agency policies and actions . . . equitably serve all eligible individuals and communities, particularly those that are currently and historically underserved."<sup>290</sup> This approach is parallel to this article's recommendation that the government create an "assessment tool" to examine each agency's segregative effect. The results of OMB's study should inform the questions featured on an assessment tool and inform agency-specific AFFH regulations.

(3) *Working Group on Equitable Data*: The Order also addresses the lack of disaggregated data by race and other protected classes (critical to targeting initiatives and measuring outcomes) by establishing an equitable data working group to study the "inadequacies in existing Federal data collection programs, policies, and infrastructure across agencies, and strategies for

289. Exec. Order No. 13,985, 86 Fed. Reg. 7009, 7010 § 4(a) (Jan. 25, 2021).

290. Methods and Leading Practices for Advancing Equity and Support for Underserved Communities Through Government, 86 Fed. Reg. 24,029, 24,029 (May 5, 2021). The public submitted 598 comments. Off. of Mgmt. & Budget, *Methods and Learning Practices for Advancing Equity in Support for Underserved Communities Through Government*, REGULATIONS.GOV, [www.regulations.gov/docket/OMB-2021-0005](https://www.regulations.gov/docket/OMB-2021-0005) [<https://perma.cc/A6X3-CAAW>]. Public comments addressed methods and metrics for success and best practices for stakeholder engagement. See, e.g., Letter from Valerie Wilson, Economist & Dir. of the Program on Race, Ethnicity & the Econ., Econ. Pol'y Inst., & Kyle K. Moore, Economist, Program on Race, Ethnicity & the Econ., Econ. Pol'y Inst., to Shalanda Young, Acting Dir., Off. of Mgmt. & Budget (July 6, 2021), [www.epi.org/publication/epi-comments-on-ombs-methods-and-leading-practices-for-advancing-equity-and-support-for-underserved-communities](https://www.epi.org/publication/epi-comments-on-ombs-methods-and-leading-practices-for-advancing-equity-and-support-for-underserved-communities) [<https://perma.cc/2Q7M-D82U>]; Letter from Natalie Davis, Co-Founder & Acting Exec. Dir., U.S. of Care, to Shalanda Young, Acting Dir., Off. of Mgmt. & Budget 2 (July 2, 2021), <https://unitedstatesofcare.org/wp-content/uploads/2021/07/USofCare-OMB-RFI-Response-to-Equity.pdf> [<https://perma.cc/96Q9-2X78>].

In July 2021, OMB released its initial report with the result of its "study of methods for assessing how government practices create or exacerbate barriers to" equitable participation. Shalanda Young, *Meeting a Milestone of President Biden's Whole-of-Government Equity Agenda*, THE WHITE HOUSE: BRIEFING ROOM (Aug. 6, 2021), [www.whitehouse.gov/omb/briefing-room/2021/08/06/meeting-a-milestone-of-president-bidens-whole-of-government-equity-agenda](https://www.whitehouse.gov/omb/briefing-room/2021/08/06/meeting-a-milestone-of-president-bidens-whole-of-government-equity-agenda) [<https://perma.cc/5A9R-V2LQ>]; see OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, STUDY TO IDENTIFY METHODS TO ASSESS EQUITY: REPORT TO THE PRESIDENT 14–38 (2021), [https://www.whitehouse.gov/wp-content/uploads/2021/08/OMB-Report-on-Eo13985-Implementation\\_508-Compliant-Secure-v1.1.pdf](https://www.whitehouse.gov/wp-content/uploads/2021/08/OMB-Report-on-Eo13985-Implementation_508-Compliant-Secure-v1.1.pdf) [<https://perma.cc/FPD4-723P>].

addressing any deficiencies . . . .”<sup>291</sup> The group’s membership includes the Chief Statistician of the U.S., Chief Technology Officer, OMB Director, and Director of the U.S. Census Bureau, among others. This element of the Order is relevant to AFFH enforcement in several respects. Substantively, it recognizes that data collection and sharing is vital to advancing racial equity. Consistent with this article’s recommendations about data sharing, AFFH enforcement will require new, and easier, data collection and sharing. Procedurally, any interagency effort requires sub-working groups to work discrete objectives that will aid enforcement. Comparatively, fast-track sub-working groups like this one are a strength of this coordination model over the President’s Fair Housing Council model.

The Executive Order’s whole-of-government approach has other strengths, notably that it extends to every agency—recognizing that every agency has a role in increasing racial equity—and it sets specific deadlines for each agency report and names specific offices to provide technical assistance in the process.

The model’s primary weakness—the breadth of the effort—is perhaps inevitable given the scale of structural racial inequity. Although the procedures outlined in the Executive Order set tight deadlines (six months for agencies to send initial reports to OMB, a review period by the Assistant to the President for Domestic Policy and one year for agencies to produce specific plans), implementation will take years. These are precious years the administration may not have. Even two four-year terms may be insufficient to bring efforts to fruition.

A secondary weakness is the lack of public accountability and participation: No assessment or report is assumed to be publicly available, and while OMB requested public comment, the government has not made a public commitment to make findings public. AFFH coordination should build public accountability and participation into its framework.

Ultimately, structured agency coordination remains the *sine qua non* of AFFH enforcement.<sup>292</sup> These models offer frameworks to increase agency participation, buy-in, and output to reduce segregation. Elevating enforcement efforts from one agency to an interagency model is likely to produce superior outcomes through better detection, documentation, and dismantling of segregation-producing activities that span the federal government.<sup>293</sup> An interagency approach offers greater promise than HUD-driven AFFH enforcement.

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291. Exec. Order No. 13,985, 86 Fed. Reg. 7009, 7012 (Jan. 25, 2021).

292. See Abraham, *supra* note 124, at 564–65 (analyzing the importance of elevating desegregation in terms of policy, process, and practice).

293. *Id.*

## V. CONCLUSION

Racial segregation remains a defining feature of American society. As if on autopilot, the government routinely reinforces segregation through its investments and regulatory activities. James Baldwin once observed that he was witnessing the death of segregation, but the real question was “just how long, how violent, and how expensive the funeral [was] going to be.”<sup>294</sup> Still today, the federal government prolongs segregation’s funeral. But the government’s posture is not preordained. It has the authority to shift its influence to *affirmatively resist* segregation. That shift could make all the difference.

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<sup>294</sup> James Baldwin, *The Dangerous Road Before Martin Luther King*, HARPER’S MAG., Feb. 1, 1961, at 34.