

An “All-Out” Effort to Achieve Desegregation and Equality of Opportunity: Assessment of Fair Housing 2.0

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Introduction

At the outset of a new presidential administration the nation is at a critical juncture in addressing the racial inequities that were brought even more to the forefront during the past year. Both the racial justice reckoning of 2020 and the continuing impact of the COVID–19 pandemic make clear that the country must act. Longstanding, and persisting patterns of residential racial and economic segregation have played a major role in limiting the life opportunities of children, and these effects have multi–generational consequences. For example, children’s outcomes related to incarceration, earnings, and even teenage birth rates can vastly vary by neighborhood—even when those neighborhoods are only a mile apart.¹ Although the country has made some strides in overcoming past racial discrimination, the slow pace of progress was recently laid bare by the concentration of COVID–19 cases and unemployment spikes in neighborhoods where African Americans predominate.

One tool that could promote racial and economic integration, and, as a result, improve outcomes in our communities, is fair housing

law. Passed more than 50 years ago, the Fair Housing Act represents a watershed in the country’s civil rights history. Yet, most people agree that the law has yet to achieve the impact that its framers hoped for. Recent trends in American urban and suburban areas open new possibilities to harness the law to bring about greater equity. Policy and enforcement activities can support not just efforts to increase housing choice and access for people who belong to one or more of the law’s protected classes but can also help all neighborhoods offer decent and quality housing, and access to opportunity.

This brief draws on structured interviews conducted with former officials at the Department of Housing and Urban Development (HUD), local housing officials in New Orleans, Houston, Kansas City (MO), Indianapolis, and Philadelphia, and fair housing experts and advocates. The interviews explored what was successful about how localities addressed fair housing through the Assessment of Fair Housing (AFH)—introduced in the Obama administration and rolled back during

¹ See Raj Chetty, John Friedman, Nathaniel Hendren, Maggie Jones, & Sonya Porter, *The Opportunity Atlas: Mapping the Childhood Roots of Social Mobility, Opportunity Insights & U.S. Census Bureau (Jan. 2020)*, available at https://opportunityinsights.org/wp-content/uploads/2018/10/atlas_summary.pdf.

the Trump administration— improvements that would make it more useful if implemented again in some form, and areas for enhancement beyond the scope of the 2015 Affirmatively Furthering Fair Housing (AFFH) rule and planning process.

We recommend using AFH as a framework to significantly increase racial justice through a coordinated approach to racial and economic integration in American communities. To achieve this goal, we propose that the Biden Administration’s revived AFH should, at least in part, reaffirm the goal of making all communities opportune places—and clarify that the purpose is not to just bar subsidized housing production in, or help people depart from places that now are not. Through better cooperation of federal agencies, led by the Domestic Policy Council (DPC) and in support of local efforts to better coordinate activities and investments in ways that significantly accelerate integration, the AFH has the potential to build on the unique strengths of all places at the same time as increasingly strong enforcement of the Fair Housing Act ensures equal access to the array of places—both of which are vital steps towards ending segregation.

Overview of the Fair Housing Act and the Affirmatively Furthering Fair Housing Provision

The Fair Housing Act’s Passage

The Fair Housing Act of 1968 was the culmination of more than half a century of advocacy among leaders who understood that racial segregation limited opportunities for people of color and constrained the potential of the country. Fair housing advocates made many arguments, but they focused particularly on the

Section 808 of the Fair Housing Act: Administration

(d) Cooperation of Secretary and executive departments and agencies in administration of housing and urban development programs and activities to further fair housing purposes

All executive departments and agencies shall administer their programs and activities related to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

need to open suburban communities to middle-class African Americans. In the 1968 floor debate over the bill, Senator Walter Mondale (D-MN) argued, “[i]t is impossible to gauge the degradation and humiliation suffered by a man in the presence of his wife and children—when he is told that despite his university degrees, despite his income level, despite his profession, he is just not good enough to live in a white neighborhood.”² The bill, supporters argued, would enable the private market to work as it should. Those with the ability to pay would be able to choose where they wanted to live. “[T]he basic purpose of this legislation,” said Mondale, “is to permit people who have the ability to do so to buy any house offered to the public if they can afford to buy it. It would not overcome the economic problem of those who could not afford to purchase the house of their choice.”³

On March 11, 1968, the Senate passed the Civil Rights Bill of 1968 by a vote of 71-20. The House of Representatives delayed consideration at first, but Dr. Martin Luther King Jr.’s assassination on April 4, 1968, brought a quick vote on the Senate measure, which President Johnson signed a week after Dr. King’s death.

² 114 Cong. Rec. 3421–22 (1968).

³ *Id.*

The Fair Housing Act of 1968 prohibited discrimination in the sale or rental of housing, and it allowed aggrieved parties to sue for damages.⁴ It also prohibited discrimination by mortgage lenders and real estate brokers, and it directed HUD to adopt “affirmative” programs to promote fair housing.⁵ Unlike the fair employment provisions of the Civil Rights Bill of 1964, which created the Equal Employment Opportunity Commission (EEOC) to investigate claims of discrimination and pursue relief, the Fair Housing Act did not create new government infrastructure. Instead, the Act gave HUD the responsibility for overseeing the law’s implementation. This had the effect of narrowing the application of the new law from what had been the bill designers’ broader intent. Rather than matching enforcement to the breadth of issues revealed by the Kerner Commission as critical to equity, opportunity, and justice, fair housing became just one of many responsibilities within HUD’s purview, and proponents lacked the funding necessary to create an effective enforcement infrastructure and were thus often unable to make it a top priority for the agency. Yet, one thing is clear from the language of the 1968 Act, in particular from Section 808: legislators recognized that furthering and implementing fair housing required a collaborative effort, one which would require the cooperation of “[a]ll executive departments and agencies.”

Evolution of Fair Housing Law

Scholars and policymakers criticized the Fair Housing Act (FHA) for several decades for its lack of effectiveness. Just before Congress passed the Fair Housing Amendments Act of 1988, Arthur Flemming argued that the original FHA “did not have the teeth it required if we

were really going to deal with the issue of fair housing in a meaningful and effective way.”⁶ Many critics argued that the law as originally passed prevented structural change because it relied almost exclusively on individual plaintiffs to redress individual cases of discrimination. The result, many argued, had been that only affluent Blacks were able to use the FHA as a tool for protection of their rights. The 1988 Act substantially improved the FHA by, for example, increasing penalties for violations of the law, giving HUD additional tools and greater authority to investigate and charge claims of discrimination, including complaints brought by the Secretary of HUD at their own initiative, and adding prohibited bases of conduct.⁷

Still, segregation persisted, and many scholars have argued that housing discrimination laws remain weak. Professor Reginald Leamon Robinson, for example, asserted “[d]espite its lofty legislative goal, the Act has not ended housing discrimination and its malignant cousin, housing segregation,”⁸ and Professor John Calmore concluded that, “[a]mong modern civil rights laws, fair housing law persists as the *least* effective.”⁹

Several changes during the administration of President Barack Obama increased the government’s power to prohibit discrimination and promote racial integration. In February of 2013, HUD issued a rule titled “Implementation of the Fair Housing Act’s Discriminatory Effects Standard.”¹⁰ For many years the discriminatory effects standard, which recognizes that not all discrimination is conscious and overt, was an accepted theory of proof for HUD investigations and charges, and it had been accepted in virtually all federal districts. Thus,

⁴ See Pub. L. No. 90-284, 82 Stat 81.

⁵ These programs included, among other things, studies into the nature and extent of discriminatory housing practices and reports and recommendations based on these studies. See Pub. L. No. 90-284, 82 Stat 85.

⁶ Arthur S. Flemming, *The Politics of Fair Housing*, 6 YALE L. & POL’Y REV. 385, 386 (1988).

⁷ Pub. L. 100-430, 102 Stat. 1619.

⁸ Reginald Leamon Robinson, *The Racial Limits of the Fair Housing Act: The Intersection of Dominant White Images, the Violence of Neighborhood Purity, and the Master Narrative of Black Inferiority*, 37 WM. & MARY L. REV. 69, 109 (1995), available at <https://scholarship.law.wm.edu/wmlr/vol37/iss1/8>.

⁹ John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1071 (1998), available at <https://repository.law.miami.edu/umlr/vol52/iss4/8> (emphasis added).

¹⁰ *Implementation of the Fair Housing Act’s Discriminatory Effects Standard*, 78 Fed. Reg. 11,459 (U.S. Dep’t of Hous. & Urb. Development Feb. 15, 2013).

discrimination comes about when a facially neutral policy or practice has a disproportionately adverse effect on a particular group. The discriminatory effects standard increases the likelihood of addressing more systemic claims of discrimination.

In January of 2015, in a decision that surprised many, the United States Supreme Court ruled that a finding of disparate impact was sufficient to prove a violation of the FHA. In the case, *Texas Department of Housing and Community Affairs vs. The Inclusive Communities Project*, the court interpreted the phrase “or otherwise make unavailable” in section 808(a) of the FHA to mean that if a defendant’s actions had the result of adversely affecting a protected group, and they were “artificial, arbitrary, and unnecessary barriers, then such activities violated the FHA.”¹¹ These changes increased the tools available to promote neighborhood integration, but left work to be done to achieve equality of opportunity across our society.

2015 Affirmatively Furthering Fair Housing Rule

In July of 2015, HUD promulgated the Affirmatively Furthering Fair Housing (AFFH) Rule.¹² The AFFH Rule signaled a movement to the earlier, broader understanding of the law’s mandate, and its potential. Notably, the 2015 rule encouraged, among other things, both meaningful community engagement in the planning process through resident input, the participation of public housing authorities, regional cooperation in the planning process, and the consideration of factors beyond housing itself that contribute to inequality between communities.

HUD revised the rule to “equip communities that receive HUD funding with data and tools to help them meet long-standing fair housing obligations in their use of HUD funds.”¹³

Historically, all communities receiving HUD support were required to show that their activities furthered fair housing goals. But for many years these requirements were vague, and enforcement was spotty, at best. Under the AFFH Rule, HUD would work with recipients of federal funds to gather information and create a streamlined process to “help communities analyze challenges to fair housing choice and establish their own goals and priorities to address the fair housing barriers in their community.”¹⁴ Though Republicans in Congress criticized the rule, HUD officials viewed it as a means to focus attention on the many local factors that promote segregation or impede racial integration. These factors can range from identifying racially or ethnically concentrated areas of poverty to educational, employment, transportation, or environmental burdens that may contribute to a disparate access to housing opportunities.

The AFFH rule required that jurisdictions undertake an Assessment of Fair Housing (AFH), which replaced the previous Analysis of Impediments (AI) requirement. After suspending the AFFH requirements in 2018, including the requirement for localities to conduct an AFH, former HUD Secretary Ben Carson stated: “After reviewing thousands of comments on the proposed changes to the AFFH regulation, we found it to be unworkable and ultimately a waste of time for localities to comply with, too often resulting in funds being steered away from communities that need them most.”¹⁵ HUD replaced the AFFH Rule with the Preserving Neighborhood and

¹¹ 576 U.S. 519, 543-44 (2015).

¹² *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42,271 (U.S. Dep’t of Hous. & Urb. Development July 16, 2015).

¹³ Press Release, U.S. Dep’t of Hous. & Urb. Development, HUD Announces Final Rule of Affirmatively Furthering Fair Housing (July 8, 2015), <https://archives.hud.gov/news/2015/pr15-084.cfm>.

¹⁴ *Id.*

¹⁵ Press Release, U.S. Dep’t of Hous. & Urb. Development, Secretary Carson Terminates 2015 AFFH Rule (July 23, 2020), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_20_109.

Community Choice rule which dramatically diluted the obligation and historic meaning of affirmatively furthering fair housing (i.e., effectively stating that the production of more affordable housing will solve fair housing issues), and separately, HUD moved to severely limit the discriminatory effects standard.¹⁶ Upon taking office, President Joe Biden ordered a review of the Preserving Neighborhood and Community Choice rule with the goal of revitalizing the effort to produce more equitable neighborhoods.¹⁷

Fair Housing Issues That Remain Today

As the Biden administration gets underway, segregation remains a problem in cities and regions across the US. Yet, residential dynamics are different than they were during the 1988 FHA Amendment debates. Since 2000, the fortunes of many American cities have reversed the trend of declining populations so prevalent in the last half of the 20th century—emblematic perhaps of an evolving preference for urban living, most notably among affluent Whites, while suburban African American populations also continued to grow. These trends have brought modest declines in racial segregation; nationally, Black-White residential segregation (as measured by the Index of Dissimilarity, or D) peaked across the US between 1960 and 1970 and has been declining slowly since.¹⁸ The Index is a widely used measure of segregation that estimates the share of a geography’s non-

Hispanic White population that would have to make an integrative move to a different census tract in order to achieve complete integration (in which all tracts have the same proportions of each racial/ethnic group as exist citywide). Although complete integration is not necessarily the goal of fair housing, and there is no standard range of D values that are considered to represent successful integration, the index is a useful tool for understanding the degree to which different groups are isolated within a geography.

Still, even in cities where this measure has declined, high levels of segregation remain. In Philadelphia, the Index of Dissimilarity (D)—indicates that 61.4% of the city’s non-Hispanic White population would have to move to achieve representative integration.¹⁹ That is down from 65.8% a decade earlier, but still probably many years’ worth of moves if every change of address was integrative, and at its current level, still reflects what experts consider a highly segregated city.²⁰ In comparison, Wayne County, in which Detroit is located, had one of the highest D values in the nation. The counties that contain most of Houston and all Indianapolis, cities from which interviewees for this brief hail, had lower but steady values that indicate persistent levels of segregation; about half of White Harris County residents and about 40% of White Marion County residents would have to move to achieve integration.

¹⁶ *The National Fair Housing Alliance’s comment on HUD’s proposed 2020 rule on affirmatively furthering fair housing provides a comprehensive evaluation of the AFH rational and process as well as HUD’s 2020 proposed rule on the topic.* <https://nationalfairhousing.org/wp-content/uploads/2020/03/NFHA-Comments-on-HUDs-2020-Proposed-AFFH-Reg-3.16.20.pdf>

¹⁷ *Preserving Community and Neighborhood Choice*, 85 Fed. Reg. 47,899 (U.S. Dep’t of Hous. & Urb. Development Aug. 7, 2020).

¹⁸ William H. Frey, *Even as Metropolitan Areas Diversify, White Americans Still Live in Mostly White Neighborhoods*, Brookings (Mar. 23, 2020), <https://www.brookings.edu/research/even-as-metropolitan-areas-diversify-white-americans-still-live-in-mostly-white-neighborhoods/> (“Even as metropolitan areas diversify, white Americans still live in mostly white neighborhoods.”).

¹⁹ *White to Non-White Racial Dissimilarity (5-year estimate) Index for Cook County, IL*, FRED, available at <https://fred.stlouisfed.org/series/RACEDISPARITY017031> (updated Dec. 10, 2020).

²⁰ *Dissimilarity index 2009-2019*: <https://fred.stlouisfed.org/series/RACEDISPARITY042101>. Massey and Denton introduced the concept of “Hypersegregation” in 1989, and a 2015 follow-up found that the extent of Black “hypersegregation” had improved. According to research from 2017, 32% of African American residents of metropolitan areas and 26.3% of all African Americans still lived in “hypersegregated” areas. Douglas S. Massey & Nancy A. Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Dimensions*, 26 *DEMOGRAPHY* 373 (1989), available at <https://www.jstor.org/stable/pdf/2061599.pdf>; Douglas S. Massey & Jonathan Tannen, *A Research Note on Trends in Black Hypersegregation*, 52 *DEMOGRAPHY* 1025 (2015), available at <https://doi.org/10.1007/s13524-015-0381-6>.

Figure 1.

Non-Hispanic White Racial Dissimilarity Index in Selected Counties											
	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Cook County, IL (Chicago)	59.9	59.1	58.5	58.3	58.1	57.7	57.4	57.1	56.7	56.3	56.0
Davidson County, TN (Nashville)	46.2	45.7	44.0	44.7	44.6	43.8	43.7	43.2	42.1	42.8	43.7
Denver County, CO	52.5	51.9	51.3	51.1	50.6	49.6	49.6	49.3	49.5	49.1	48.6
Duval County, FL (Jacksonville)	40.4	39.6	40.1	39.1	39.9	38.6	38.9	38.0	38.5	38.4	38.0
Harris County, TX (Houston)	52.2	52.5	52.2	52.3	52.2	52.4	52.1	52.0	52.0	52.0	51.3
Marion County, IN (Indianapolis)	38.2	38.6	38.6	37.2	37.8	38.0	38.2	38.6	39.4	38.5	39.9
Orleans Parish, LA	63.8	63.4	63.7	63.5	63.6	64.2	64.2	63.6	62.9	62.0	61.8
Philadelphia, PA	65.8	65.7	64.8	64.7	64.8	64.1	63.8	64.0	62.0	61.9	61.4
San Francisco County, CA	38.5	38.3	38.3	37.6	37.9	38.5	37.8	37.7	37.3	37.2	36.4
Washington, D.C.	66.9	66.2	65.2	64.6	63.9	62.6	61.5	59.9	58.6	57.2	56.2
Wayne County, MI (Detroit)	75.1	73.7	72.9	72.3	72.0	71.3	70.7	69.9	69.3	68.5	68.3

Source: Federal Reserve Bank of St. Louis, Analysis of U.S. Census ACS 5-year estimate

Reinstating the Obama-era rule would not be sufficient given the extent of segregation and housing choice limitations, as well as its design flaws, discussed in the next section. Another initiative from the Obama Administration offers a potential framework for a broadened approach to fair housing—an approach that could expand on the Fair Housing Act’s call for cooperation among executive departments and agencies. For example, in 2009 President Obama established the White House Office of Urban Affairs through an executive order.²¹ That EO identified at least 10 different federal agencies, including HUD, DOT, and EPA, to work closely together for the “development of the policy agenda for urban America.”²² To effectuate that goal, the Office established four working groups: (1) Place-Based Policy Review; (2) Sustainable Communities Initiative; (3)

Regional Innovation Clusters Initiative; and, (4) Neighborhood Revitalization Initiative.

Such a cross-agency approach could bolster fair housing efforts through better coordination of federal activities and investments with the goal of targeting them to support local integration plans. But, to be successful, the Biden Administration should learn from the obstacles that limited prior success. Critics of the White House Office of Urban Affairs have argued that the Office never clearly delineated what it intended to accomplish,²³ that it had only limited regulatory authority to work through jurisdictional boundaries,²⁴ and that its activities dropped off after the departure of its first director.²⁵ In addition, they have argued that the early pilot efforts like the Sustainable Communities and Promise Neighborhood initiatives never received the funding necessary

²¹ Exec. Order. No. 13,503, 74 Fed. Reg. 8139 (Feb. 24, 2009), available at <https://www.federalregister.gov/documents/2009/02/24/E9-4068/establishment-of-the-white-house-office-of-urban-affairs>.

²² *Id.*

²³ Danielle Schlanger, *Obama’s Urban Affairs Office Brings Hope But Not Much Change*, HUFFPOST (July 26, 2013), https://www.huffpost.com/entry/white-house-office-of-urban-affairs_n_3654660.

²⁴ Dayo Olopade, *What Happened to the Office of Urban Policy?*, THE ROOT (April 27, 2009, 6:49 AM), <https://www.theroot.com/what-happened-to-the-office-of-urban-policy-1790869304>.

²⁵ *Id.*; see also Schlanger, *supra* note 23 (“The Office of Urban Affairs is [an] example of a grand idea that was implemented in a half-hearted way, and then lost its momentum over time[.]”).

to scale up and have national impact. However, the framework of cross-department coordination, which was used in the above-mentioned initiatives provides an opportunity

for the Biden Administration to use federal funding in ways that promote integration and achieve better outcomes.

The Importance of Finding and Investing in Strength in All Neighborhoods

The Market Value Analysis (MVA) is a data-based, field-validated, stakeholder-informed, geographically granular examination of the housing market conditions across a community. Communities use their MVAs for many purposes that support the FHA’s AFFH provision.

The MVA is predicated on a “build from strength” approach to community investment; even in distressed areas, identify nodes of strength and invest in those to amplify community benefit. MVAs are created with the assistance of a stakeholder group that meets multiple times throughout the project. Stakeholder groups are diverse demographically, as well as by the sectors and neighborhoods represented.

In the AFH context, Philadelphia used its MVA to better understand the racial aspects of evictions. The initial analysis of eviction patterns showed that the eviction rate was substantially higher in neighborhoods with higher percentages of Black residents. In an effort to explore that observation further, Census tracts were categorized based on the MVA and then within those categories differentiated by racial composition. This analysis showed that within economically similar markets, Black neighborhoods had substantially higher eviction rates—even in middle and stronger neighborhoods. This helped the City understand that, over and above the economic aspects of evictions, there is a fair housing issue to address. Since Philadelphia’s AFH was completed, the city has done several things, including launching an eviction taskforce that produced a set of recommendations regarding issues related to equal access to the court; eviction (and illegal eviction) prevention; and, tenant education. The City also passed “universal representation” legislation, is deploying more of its CDBG-funded resources to eviction prevention and assistance and added capacity to its housing counseling network to better support tenants facing eviction, the majority of whom are Black.

The MVA created for Indianapolis became a core component of its Neighborhood Investment Strategy (NIS). Combined with additional social and demographic data (including analysis of R/ECAP areas), the strategy—led by sister CDFI Indianapolis Neighborhood Housing Partnership—“... recognizes that neighborhoods of all types have different needs, and encourages efficient, impactful and leveraged deployment of limited resources... [NIS] seeks to coordinate public, private, philanthropic, and non-profit community development investments in order to maximize their impact in the broader community while also becoming more relevant to the needs of a plethora of neighborhood conditions.” Supporting all neighborhoods within a community, with a data-based understanding of the market conditions, is part and parcel of a successful, wholistic AFH strategy.

The Delaware State Housing Authority (DSHA), which allocates the state’s Low-Income Housing Tax Credits, awards extra points in its Qualified Allocation Plan if the proposer is working in an MVA-defined “Area of Opportunity.” DSHA also used its MVA to inform distribution of competitively awarded proceeds from its Strong Neighborhood Housing Fund, a revolving fund intended to direct housing dollars into areas across the state for the acquisition, renovation, and sale of vacant, abandoned, foreclosed, or blighted property.

Lessons from Implementing the Assessment of Fair Housing

In order to catalog the lessons from the implementation of the 2015 AFFH Rule, this research effort conducted interviews with multiple former HUD officials who worked at HUD at the time of the design and implementation of AFH, officials and practitioners from jurisdictions that conducted an AFH under the new rule (New Orleans, Philadelphia, and Kansas City, MO), as well as those that have only conducted Assessments of Impediments (AI), but sought to include some of the principles of the AFH (Indianapolis and Houston). We also interviewed several academic experts and advocates.

Was the New AFH Process Better Than the AI?

There was general agreement among interviewees that the completed AFHs were an improvement over the old AIs, which many believed had become a “check the box” exercise.²⁶ The AFH plans were more thoughtful and, in contrast to the AI, mandated quantifiable goals. Local officials reported that the required use of data in the AFH improved their ability to identify impediments, tell the story of their jurisdiction, have meaningful conversations with various stakeholders, and come up with metrics to gauge progress.

AFHs also featured enhanced and more authentic public notice and engagement beyond that which was common with the AI.²⁷

Local officials noted that the AFH process increased public participation from individuals and groups beyond the usual fair housing advocates who had previously been involved in AIs and continued to provide important insights. Under the AFH, communities heard from a wider array of residents (through, for example, resident surveys)²⁸ and neighborhood housing advocates who “gave more life” to the plan. Similarly, one official noted that, unlike the community meetings required for CDBG plans and funding which are often mechanical, the public engagement process involved in the AFH along with coordination and data sharing among multiple (non-federal) public agencies in order to complete the AFH (e.g., city planning departments, housing authorities, metropolitan planning organizations) promoted more meaningful thinking about what it would really take to advance fair housing. Interviewees noted that the AFH also allowed for sometimes difficult conversations that were necessary to set fair housing objectives. There was general agreement among interviewees that quantifiable fair housing metrics were viewed as a welcome innovation that brought focus and accountability to the plans.

Additionally, interviewees noted the importance of the enhanced access to data and mapping—tools that some communities used beyond the AFH process—and of the HUD review of their AFH plans. Generally, it was reported, communities submitting AFHs were able to work with HUD’s feedback on their completed plans and create improved resubmissions.

²⁶ This assessment of interviewees in many ways paralleled the GAO’s 2010 report titled “Housing and Community Grants: HUD Needs to Enhance its Requirements and Oversight of Jurisdictions’ Fair Housing Plans” finding a set of flaws in the AI and HUD’s implementation of the AI process. In fact, GAO reports that the 2015 AFFH Rule closed out its 2010 procedural findings. U.S. Gov’t Accountability Off., GAO-10-905, *Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans* (2010), available at <https://www.gao.gov/assets/gao-10-905.pdf>.

²⁷ Justin Steil and Nicholas Kelly chronicle the evolution and quality of AFH submissions, noting through their analyses a general improvement in the quality of the AFH plans, the rigor of HUD’s review (as well as improved resubmissions following HUD rejections), creation of tangible goals, and improvement over the AI process. See, e.g., Justin Steil & Nicholas Kelly, *Snatching Defeat from the Jaws of Victory: HUD Suspends AFFH Rule that was Delivering Meaningful Civil Rights Progress*, 26 *POVERTY & RACE RSCH. ACTION COUNCIL*, Oct.–Dec. 2017, at 1, 12.; Justin Steil & Nicholas Kelly, *The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance*, 29 *HOUS. POL’Y DEBATE* 85 (2019).

²⁸ For example, Philadelphia’s AFH was informed by 5 resident focus groups (1 of which was in Spanish), approximately 5,000 responses to a resident survey (inclusive of approximately 1,000 public housing tenants) in both English and Spanish. In addition, there were three public hearings, more than a hundred public comments received and reviewed on the plan, and numerous stakeholder group meetings around the AFH and its goals. See *City of Philadelphia and the Philadelphia Housing Authority: Assessment of Fair Housing* (Dec. 23, 2016), available at <https://www.phila.gov/media/20190502115754/afh-2016-for-web.pdf>. This, the Philadelphia interviewees note, far exceeded what was ever done under the AI process.

What About the AFH Could Have Worked Better?

Interviewees were clear that the creation of the AFH could benefit from several changes that we identify below as three concrete action steps.

(1) Provide additional *financial and expert assistance to communities so that they can create a righteous AFH.*

Local officials reflected that moving from the data to actions that would directly impact the identified impediments was difficult. In other words, while HUD to a certain extent provided the technical assistance to work with these new tools, there was less substantive training on how to address the findings the data produced. It was frustrating for jurisdictions to know problems but not what to do about them; the remedies to long-standing, complex fair housing issues were not self-evident. While the AFH introduced a wealth of valuable data, that was only solving part of the problem. Officials interviewed perceived that most of HUD's technical assistance was too heavily focused on how to use the data and mapping tool. There was no investment in building local capacity to develop and implement strategies moving forward. There was generalized agreement that localities needed help identifying the kinds of interventions that would address the wide variety of inequities uncovered in the analysis.²⁹ Stated more plainly, although help was needed to technically respond to the 90+ questions that comprised the AFH, more HUD assistance was really needed on the substance of how to address persistent segregation.

Limited financial support was an issue for creating the AFH plans and for

implementation. The AFH was a big task that involved, in some instances, teams of consultants or in other instances, a vastly increased workload on local staff. Local officials said that the cap on administrative costs in the CDBG program made creating the plan difficult given the amount of work and interagency coordination expected. HUD could allow for greater latitude to spend administrative funds on the AFH process. Interviewees noted that HUD itself did not have a large enough group of highly trained staff to engage significantly with all of the communities completing their plans.

Local officials also noted a lack of new funds for acting on the completed AFH. Some noted that CDBG was already too limited to fully address the issues in their communities and using those limited dollars for fair housing planning undermines the intent of these funds. Some cities looked to philanthropy, bonds, tax increment financing, and housing trust funds—but leveraging other federal funding sources (e.g., transportation, education, environment, small business) could exceed these sources by orders of magnitude. The American Recovery Plan and the potential federal infrastructure investments provide opportunities to accelerate this work, provided the funds are targeted to such efforts and federal inter-agency coordination requires that these funds be used to promote equity and integration.

(2) *Improve the quality of the data and mapping tool so that the data are fresh, accurate, and speak to the questions a community raises. If a community has alternative data and mapping tools, those should suffice.*

There was near universal agreement among both veterans of HUD and local officials that

²⁹ One interviewee noted that HUD created a set of "thought pieces" on substantive issues, such as addressing food deserts, which would have been responsive to the substantive challenges that communities confronted with their AFH plans. Those policy papers never made their way to local communities that needed this type of support.

the concept of the AFH tool was better than the execution. While communities agreed that having all of that data about their community in one place allowed them to analyze their fair housing issues in an unprecedented way, they also reported problems with the functionality and uneven content of the mapping tool. Additionally, the accuracy and completeness of some of the data was reported to be suspect, as well as out-of-date. For example, the opportunity indices (like access to jobs or transportation) did not always comport with what local officials knew of their communities, and yet, localities were forced to include these data in their plan. Interviewees noted that even when they knew the generated tables were incorrect, they were forced to include them in their plan along with their own data.

(3) Clarifying that a manageable set of meaningful data-based goals support an actionable and righteous AFH.

HUD and local officials shared concerns that the number, length, and complexity of mandated report components (including maps and data tables) were overwhelming. One former official noted “It’s 96 questions . . . everyone found everything important” which made the process overwhelming. Although setting goals was universally seen as a strength of AFH, some officials said they would prefer to set fewer, but more meaningful, goals in order to allow communities to focus resources and to make efforts easier to track.

Interviewees with knowledge of the inner workings of HUD were unanimous in reporting that competing interests and perspectives among the developers of the AFH yielded some significant design flaws, a not uncommon outcome when federal government officials initiate a substantial procedural change. Interviewees noted that turf battles—not unprecedented between HUD’s Office of Fair Housing and Equal

Opportunity (FHEO), Community Planning and Development (CPD), Policy Development and Research (PDR), and the Office of General Counsel (OGC)—caused the process to drag on far too long. It is worth noting, AFH as rolled out in 2015 was intended as a pilot, of sorts: communities around the country would engage in the process and provide HUD with feedback which would be used to improve the process going forward. But because AFH did not get rolled out until late in the Obama administration, the research and development cycle never had a chance to materialize.

The Basis for a New and Improved AFH 2.0

When Congress wrote the FHA back in 1968, it explicitly acknowledged the importance of what we now call an “all-of-government” effort to ensure fair housing and equal opportunity for all. Segregation was not just HUD’s problem to solve or that of the communities that work with HUD—although Congress made HUD the federal agency lead. The law required virtually every federal agency to look consciously at its policies, regulations, and resourcing decisions to ensure that they are consistent with creating integrated communities of equal opportunity. Recall the language of Section 808(a) of the FHA explicitly requires the action of “[a]ll executive departments and agencies” to further the Act’s goals of fair housing through their respective programs. The inter-agency commitment necessary to fully achieve the Act’s goals has never been achieved, but with new-found commitment and dramatically expanded investments, now might be the time that we finally make significant progress towards integrated and flourishing communities.

Nearly 50 years after the passage of the FHA, the AFH process helped local officials identify the underlying causes of entrenched segregation and inequality in their communities beyond those which HUD funding and

enforcement can directly address. The underlying causes localities identified ranged broadly from transportation to environmental issues—issues that generally do not fall under HUD’s sole authority or even local housing stakeholders’ authorities. As such, actually moving the needle on segregation and inequality requires influencing many policies, activities, and investments that fall outside the control of local housing departments and housing authorities, resting instead with local and state departments of education, transportation, public safety, public health and healthcare access, and the physical environment, to name a few. Addressing these impediments will also require changes to state or federal priority setting and funding decisions.³⁰

In January, President Biden took several steps that provide an opportunity to advance this work. The framework of a new and improved AFH 2.0 can be found in the issuance of the *Memorandum on Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies*, which ordered the examination of the effect of the AFFH Rule, its rollback during the Trump administration, and “any necessary steps . . . to implement the FHA’s requirements”³¹ In addition, President Biden’s *Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, which ordered a “systematic approach” to advance equity “across the Federal Government” could play an important role in an expanded housing integration effort.³² These two issuances, taken together

with the plain text of the FHA, form the foundation of an AFH that is cross-governmental and focused on not only creating plans but achieving outcomes. Effectuating a vision of community that is integrated, free from discrimination and equal in opportunity means that critical decisions of all federal agencies—not just HUD—must be part of the action plan that communities create from their assessments.

Suggestions for an AFH 2.0

President Biden’s plan to “Build Back Better” provides an opportunity for federal-state-local coordination and significantly increasing investment in our communities. Pairing that investment with the goal of racial justice requires a significant rethinking of how to spend those funds and much deeper intra- and intergovernmental cooperation. The best place to increase this coordination is through the Domestic Policy Council, the only entity with a facilitation responsibility over all the agencies that is necessary to achieve these goals.

Recognizing that AFFH and the AFH process are all-of-government efforts means that while HUD can support communities in creating high-quality, thoughtful, data-based planning documents, there must be a central organizing body that ensures coordination across federal agencies. That coordination is necessary to support creation of fully informed plans, and later, to ensure plans can be executed. This is not a totally new idea. In 1994, President Clinton issued Executive Order 12892—Leadership and Coordination of Fair Housing in

³⁰ Soon after the AFH rule went public, HUD, Education and Transportation issued a joint “Dear Colleagues” letter advising of the new AFH. Rather than requiring Education and Transportation to be part of the AFH planning and goal setting, it only encouraged cooperation. “The new process in which communities are engaging under the Affirmatively Furthering Fair Housing rule (AFFH rule) from HUD provides an opportunity for cross-agency collaboration and strong community involvement. **We urge you to take full advantage of the community participation process of the AFFH rule**, so that regional planning promotes economic mobility and equal access to the many benefits provided by affordable housing, great schools, and reliable transportation.” U.S. Dep’t of Hous. & Urb. Development, U.S. Dep’t of Educ., U.S. Dep’t of Trans. Dear Colleague Letter, available at <https://www2.ed.gov/documents/press-releases/06032016-dear-colleagues-letter.pdf> (emphasis added). The Department of Education and the Department of Transportation are only two of the many relevant agencies whose tools could be brought to bear on the issues raised in the AFH process.)

³¹ Memorandum on Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies (Jan. 26, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/>.

³² Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

Federal Programs: Affirmatively Furthering Fair Housing,³³ which created the President’s Fair Housing Council. As Section 3-302 of Executive Order 12892 states:

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.

Interviewees noted that there was limited impact of this Executive Order, but that does not mean that the framework was wrong. President Biden’s new fair housing Executive Order appropriately rests similar powers and authorities in his Domestic Policy Council (DPC), which could serve as the venue to ensure the all-of-government effort necessary to realize the vision of fair housing for all. With real commitment to require federal agencies to coordinate their efforts and to support local coordination, federal dollars could significantly accelerate community integration.

Imagine, for example, if a Department of Treasury grant or loan program required applicants to examine and certify that what was being proposed was consistent with principles of fair housing. Imagine further that applicants to the program required their local jurisdiction to certify that the proposal was consistent with the AFH for that community. Then imagine that, on a routine basis, the DPC conducted a review

of all federal grants, contracts and loans to ensure: (a) consistency with AFH; and (b) recipients were investing their federal dollars in a way that promoted the creation of equitable, strong, discrimination-free, integrated communities. And then lastly, imagine communities completing their AFHs had access to information about all federal grants, loans and contracts coming to their communities so that they had a better sense of the totality of federal investment. All of those financial resources, harmonized with the AFH, might actually begin to make a difference.³⁴

Segregation in America’s communities along racial and ethnic lines long pre-dates the FHA and HUD, so too does the inequality between these separate communities. Interviewees recognize that undoing that segregation requires more than what HUD has to offer. And it is not only a matter of creating opportunities for integration through development of affordable housing in communities where it is not already present. Some interviewees said HUD has discouraged new affordable housing where it already exists because that would further entrench segregation. We argue that comprehensive investment in neighborhoods where subsidized housing is already concentrated can make these areas opportune for development, as well. If combined with improvements such as better connections to public transit, investing in the local school, and creating high-quality recreation facilities, these areas could absorb new, high-quality affordable housing while also becoming less segregated. They would become less segregated because they would be areas where anyone, of any race or ethnicity, might like to live.

Interviewees noted AFH needs to be a priority for all Offices within HUD to support for more constructive collaboration across all the parts of

³³ Exec. Order No. 12,892 (Jan. 24, 1994), available at <https://www.govinfo.gov/app/details/WCPD-1994-01-24/WCPD-1994-01-24-Pg110>.

³⁴ A challenge for so many communities is knowing the totality of the resources that may be at their disposal to address segregation and inequality. It is not enough to know how much CDBG, HOME, CoC or ESG funds come to a community. What about the array of federal grants and contracts that are part of the toolbox to which a community has access? Although not raised by any interviewee, creating a publicly accessible clearinghouse of data would be useful. www.Grants.Gov could be that clearinghouse, with some content adjustments.

the agency; this stands in contrast to the competing visions and interests that detracted from the success of AFH 1.0. In a major step in this direction, current HUD Secretary Marcia Fudge has made a clear and convincing statement that Fair Housing “is a player” in the way HUD does its business and that it will be at the table when critical policy and resource decisions are made. The Secretary will need to continually make clear that although the Office of FHEO is small in staff and resources compared to the other Offices of HUD, AFFH is a general operating principle of the Agency and FHEO needs to be an equal voice in all critical decisions. To that end, consistent with the maxim “That which gets measured gets done,” interviewees with experience working at HUD suggested making AFH a component of the goals for all high-level staff in every part of HUD.

Interviewees also noted that there was not an ample number and experience level of staff in the Headquarters and Regional Offices to meet the needs of and obligation to communities doing their AFH. If HUD truly wishes to support communities in their efforts to create high-quality, opportune, integrated communities around the country, it will need to staff (and train) this task appropriately—both in number and experience. While the effort needs to transcend HUD, that agency needs to continue to prioritize fair housing efforts in everything that it does.

Finally, this effort depends in the end upon the community engagement that the AFH process sought to engender. The challenges of racial justice and community integration are context and history specific. Much more work needs to happen at the local level to achieve these goals. Communities do not know what intervention strategies will undo entrenched segregation and inequality under what circumstances.

Furthermore, even with the right intervention strategy, there are different expectations for how long a given strategy may take to work. Historically, a lack of broad-based political and financial support has also stymied fair housing efforts; engagement can also support the building of long-term coalitions to continue the work regardless of administration.³⁵ The community commitment to racial justice is fundamental to success. But the federal government can facilitate this commitment by providing resources, support, and coordination that will enable local communities to flourish. Federal agencies that have not been actively engaged in fair housing and relevant state and local entities will need to learn more about impediments and solutions. The federal commitment that the Biden Administration has begun to outline is a fundamental first step.³⁶

President Biden’s resounding promise to Build Back Better presents a generational opportunity to deliver on the promises of the Fair Housing Act through the reinstatement of the AFH. This administration has the opportunity to learn from history—the less than maximally impactful AI process, the vastly improved albeit flawed AFH process, and the return to a laissez faire federal perspective on the AFFH obligation—and build an AFH 2.0 on those learnings. In effect, treat the 2015 rule as the beginning of the R&D cycle for AFH, as its architects intended. Chronicled here, the wealth of knowledge of former HUD officials, local housing officials, and fair housing advocates who were intimately involved in the 2015 rollout of the AFH can attest to its strengths and weaknesses.

Most notably, as discussed in this brief, a reinstated AFH process should address three key areas. First, HUD should **provide additional financial and expert assistance to communities** so that they can create a righteous AFH crafting strategies that have a chance to reduce

³⁵ Nestor M. Davidson and Eduardo M. Peñalver, “The Fair Housing Act’s Original Sin: Administrative Discretion and the Persistence of Segregation.” In *Perspectives on Fair Housing*, Vincent J. Reina, Wendell E. Pritchett, and Susan M. Wachter, eds. University of Pennsylvania Press, 2020.

³⁶ See: <https://obamawhitehouse.archives.gov/blog/2011/07/11/announcing-strong-cities-strong-communities> and <https://www.urban.org/policy-centers/research-action-lab/projects/strong-cities-strong-communities>.

segregation and inequality. Second, HUD should work with communities to **improve the quality of data and mapping tools; do not require use of a HUD-issued tool where local data/analytics are better**. Third, HUD should improve on the AFH’s goal setting process by **clarifying that a manageable set of meaningful data-based goals will allow communities to target their resources and better track their efforts, in support of a righteous AFH**. Beyond these process matters, this administration has the opportunity to **expand on fair housing and racial justice through collaborative and invested all-of-government efforts, as we identified in this brief, grounded within the Domestic Policy Council**. While we propose that HUD retain responsibility for the AFH effort as it does for all federal fair housing matters, DPC

attention can ensure the all-of-government effort that ending segregation requires. As the framers of the Fair Housing Act stated, affirmatively furthering fair housing is a requirement of “All executive departments and agencies.” We must build back a stronger, more efficient, and collaborative AFH.

We recognize that this set of proposals represents a profound shift, and we do not explore the tremendous effort and extensive logistical challenges that would be entailed in implementing the recommendations in this paper. Instead, we are presenting a conceptual framework that we believe is supported by the nature and history of the AFFH obligation, and which rests the AFH process atop all types of investments in communities.

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