

Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate

Robert G. Schwemm¹

"For as long as there is residential segregation, there will be de facto segregation in every area of life. So the challenge is here to develop an action program."

– Martin Luther King, Jr. (1963)²

INTRODUCTION

A key goal of the 1968 Fair Housing Act ("FHA"),³ which was passed as an immediate response to Dr. King's assassination,⁴ was to replace the ghettos with "truly integrated and balanced living patterns."⁵ It hasn't happened. Today, more than four decades after the FHA's passage, "residential segregation remains a key feature of America's urban landscape,"⁶ continuing to condemn new generations of minorities to a second-class set of opportunities and undercutting a variety of national goals for all citizens.⁷

But recent developments dealing with an underutilized provision of the FHA – § 3608's mandate that federal housing funds be used "affirmatively

¹ Ashland-Spears Distinguished Research Professor, University of Kentucky College of Law. I thank Michael Allen, Rob Breymaier, Sara Pratt, Franklin Runge, and Sarah Welling for their ideas and helpful comments on this paper.

² Martin Luther King, Jr., Speech at Western Michigan University (Dec. 18, 1963), *available at* <http://www.wmich.edu/library/archives/mlk/transcription.html>.

³ Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 73, 81-89 (1968) (codified as amended at 42 U.S.C. §§ 3601-3631 (2006)).

⁴ For a review of the FHA's history, including the role of Dr. King's assassination, see ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION: LAW AND LITIGATION* § 5:2 (2011).

⁵ 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale). For more on this goal, see *infra* Part I.A-B.

⁶ Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 629 (2010). For more on segregation in the United States, see *infra* Part I.C.1.

⁷ See *infra* notes 62-66 and accompanying text.

to further the [FHA's] policies"⁸ – hold out new hope that this law may yet prove effective in dismantling segregated housing patterns. These patterns, however, are deeply entrenched, and their powerful defenders are already mounting a counter-attack. Thus, the ultimate fate of the new § 3608-based effort to advance residential integration remains to be determined – as does resolution of the larger question of whether Americans will ever truly embrace the FHA's goal of an integrated society.

Part I of this Article provides some background, first on the FHA's integration goal, then on the particular mandate of § 3608, and finally on the data showing that, despite the FHA, high levels of segregation continue to plague the Nation's housing markets. Part II examines the forty-year history of § 3608 from the FHA's inception through modern times. Part III describes a recent § 3608-based lawsuit involving Westchester County, New York, the resolution of which in 2009 may start a new era of more aggressive enforcement of § 3608. Finally, Part IV reviews post-*Westchester* developments, which have not only produced a number of specific ideas for pro-integration initiatives, but also raise the possibility that § 3608's new promise might yet be undermined.

I. THE FAIR HOUSING ACT'S UNFULFILLED GOAL OF RESIDENTIAL INTEGRATION

A. *The FHA's Goal of Integration and § 3608's "Affirmatively Further" Mandate*

Enacted in 1968, the federal Fair Housing Act⁹ is a "comprehensive open housing law"¹⁰ designed to carry out a "policy that Congress considered to be of the highest priority."¹¹ The FHA begins by declaring that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."¹² Then, in language that is "broad and inclusive,"¹³ the statute outlaws a wide range of discriminatory housing practices and provides for enforcement through administrative

8 42 U.S.C. §§ 3608(d), (e)(5) (2006). For a more detailed description of this mandate and the history of section 3608, see *infra* Part I.A–B.

9 Fair Housing Act, Pub. L. No. 90–284, 82 Stat. 73, 81–89 (1968) (codified as amended at 42 U.S.C. §§ 3601–3631 (2006)).

10 *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968).

11 *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972); see also *Meyer v. Holley*, 537 U.S. 280, 290 (2003) (agreeing with the lower court that the FHA's objective is an "overriding societal priority"); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982) (noting "the broad remedial intent of Congress embodied in the Act").

12 42 U.S.C. § 3601 (2006).

13 *Trafficante*, 409 U.S. at 209; accord *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995).

proceedings and private and government lawsuits.¹⁴ The FHA also includes a provision – in a subsection of § 3608 – that directs the U.S. Department of Housing and Urban Development (“HUD”) to administer its “programs and activities relating to housing and urban development in a manner affirmatively to further the [FHA’s] policies.”¹⁵ This mandate to “affirmatively further” fair housing (sometimes referred to as “AFFH”) is also imposed on all other federal departments and agencies in a separate subsection of § 3608.¹⁶

The FHA does not define what its policy of “providing for fair housing throughout the United States” means, nor what is meant by § 3608’s mandate that federal housing programs be administered to “affirmatively further” FHA “policies.”¹⁷ 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.¹⁸ The Congress that passed the 1968 FHA

14 42 U.S.C. §§ 3604–3606, 3617 (2006) (containing the FHA’s substantive prohibitions); 42 U.S.C. §§ 3610–3614 (2006) (containing the FHA’s enforcement provisions).

15 42 U.S.C. § 3608(e)(5) (2006).

16 *Id.* § 3608(d) (“All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of [the FHA] and shall cooperate with the Secretary [of HUD] to further such purposes.”). For cases discussing this provision, see *Jorman v. Veterans Admin.*, 579 F. Supp. 1407, 1418 (N.D. Ill. 1984) (interpreting § 3608(d) and holding that VA’s mortgage program is subject to this provision) and *City of Camden v. Plotkin*, 466 F. Supp. 44, 53–54 (D.N.J. 1978) (holding the Census Bureau is not subject to this provision).

17 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.

18 Senator Mondale opined that the FHA’s purpose was to replace the ghettos with “truly integrated and balancing living patterns.” *See* 114 CONG. REC. 3422 (1968).

The Supreme Court quoted this statement by Sen. Mondale, the FHA’s principal sponsor in the Senate, in its first FHA decision as evidence of the FHA’s intent. *Trafficante*, 409 U.S. at 211. *See generally* *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526–27 (1982) (noting that statements of the Senator who sponsored the language Congress enacts “are an authoritative guide to the statute’s construction”); *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (“[A] statement of one of the legislation’s sponsors . . . deserves to be accorded substantial weight in interpreting the statute.”).

Other comments by Senator Mondale attesting to the FHA’s concern for fostering integrated housing include those which decry the prospect that “we are going to live separately in white ghettos and Negro ghettos.” 114 CONG. REC. 2276 (1968). Senator Mondale believed the FHA reflects Congress’s commitment “to the principle of living together” and to promoting integrated neighborhoods where residents of different races would live together in “harmony.” *Id.*; *see also infra* note 20 and accompanying text.

In addition to Senator Mondale’s comments, other proponents of the FHA in both the Senate and the House repeatedly argued that it was intended not only to expand housing choices for individual minorities, but also to foster racial integration for the benefit of all Americans. On the House side, for example, Representative Cellar, Chairman of the House

was aware of the recently published conclusion of the National Commission on Civil Disorders that the Nation was dividing into two racially separate and unequal societies,¹⁹ and thus intended the FHA to remedy segregated housing patterns and the problems associated with them – segregated schools, lost suburban job opportunities for minorities, and the alienation of whites and blacks caused by the “lack of experience in actually living next” to each other.²⁰

B. § 3608's Intended Role: Background and Legislative History

Racial segregation in America's public housing was both illegal and pervasive when the 1968 FHA was passed, and the legislative history of § 3608 shows that it was intended to buttress existing legal resources in order to mount a stronger attack on “the widespread problem of segregation in public housing.”²¹ Ever since 1954 when the Supreme Court decided *Brown v. Board of Education*,²² the Constitution had been understood to bar government from maintaining racially separate facilities. This mandate included public housing authorities, and numerous cases thereafter challenged their segregative policies.²³ The most famous example was the *Gautreaux* litigation in Chicago, where a court in the 1960s found that the Chicago Housing Authority had intentionally chosen building sites and assigned tenants based on race to maintain segregation;²⁴ in a companion case, HUD's funding and other support for the CHA's segregative policies were also held unlawful.²⁵

Judiciary Committee, spoke of the need to eliminate the “blight of segregated housing and the pale of the ghetto.” 114 CONG. REC. 9559 (1967). Congressman Ryan saw the FHA as a way to help “achieve the aim of an integrated society.” *Id.* at 9591. According to Senator Javits, the intended beneficiaries of the FHA were not only blacks and other minorities groups, but also “the whole community.” *Id.* at 2706.

19 See SCHWEMM, *supra* note 4, at 5–4 to –5 (discussing the significance in the FHA's history of the Report of the National Commission on Civil Disorders).

20 Statement of Senator Mondale, 114 CONG. REC. 2275 (1968). See also *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 94–95 (1977) (noting that in the FHA, Congress “made a strong national commitment to promote integrated housing” for the benefit of “both whites and blacks”). For more on the integration theme in the FHA's legislative history, see SCHWEMM, *supra* note 4, §§ 2:3, 7:3.

21 *Clients' Council v. Pierce*, 711 F.2d 1406, 1425 (8th Cir. 1983).

22 *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

23 See, e.g., *infra* notes 24–25 and accompanying text; see also *Heyward v. Pub. Hous. Adm.*, 238 F.2d 689, 97–98 (5th Cir. 1956); *Banks v. Perk*, 341 F. Supp. 1175, 1178–80 (N.D. Ohio 1972); *Hicks v. Weaver*, 302 F. Supp. 619, 623 (E.D. La. 1969).

24 See *Gautreaux v. Chi. Hous. Auth.*, 265 F. Supp. 582 (N.D. Ill. 1967); *Gautreaux v. Chi. Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969). For a comprehensive history of the *Gautreaux* litigation by the plaintiff's principal attorney, see ALEXANDER POLIKOFF, *WAITING FOR GAUTREUX: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO* (2006).

25 See *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971) (awarding summary judgment

The early 1960s produced other legal tools designed to help challenge such segregation. In 1962, President Kennedy issued Executive Order 11063, which prohibited racial discrimination in federally assisted housing.²⁶ Two years later in Title VI of the Civil Rights Act of 1964, Congress banned discrimination in all programs and activities that received federal financial assistance,²⁷ which included public housing authorities.²⁸ Title VI explicitly authorized federal agencies like HUD to cut off funding to entities whose programs or activities engaged in racial discrimination.²⁹

Despite these laws and cases like *Gautreaux*, public housing remained heavily segregated in 1968.³⁰ Against this background, the Congress that passed the FHA sought not only to ban housing discrimination, but also, by the inclusion of § 3608, to require HUD and other federal agencies to adopt a more aggressive approach to ending segregation in federally assisted housing. In debates on the FHA, Senator Brooke, one of the law's principal sponsors, pointed out that “an overwhelming proportion of public housing . . . directly built, financed and supervised by the Federal Government – is racially segregated[,]”³¹ which meant that “our Government, unfortunately, has been sanctioning discrimination in housing throughout this Nation.”³² Senator Brooke concluded that Title VI had not achieved its goal, because “[r]arely does HUD withhold funds or defer action in the name of desegregation. In fact, if it were not for all the printed guidelines the housing agencies have issued since 1964, one would scarcely know a Civil Rights

to the plaintiffs based on the determination that HUD's support violated the Constitution and Title VI); *see also* *Hills v. Gautreaux*, 425 U.S. 284 (1976) (addressing the remedial phase of this case against HUD).

26 Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (Nov. 24, 1962), *reprinted as amended* in notes for 42 U.S.C. § 1982 (2006).

27 42 U.S.C. § 2000d (2006).

28 *See, e.g.*, *Gautreaux v. Romney*, 448 F.2d 731, 738 (7th Cir. 1971) (applying the same Title VI standard in evaluating HUD's conduct as applies to local housing authority); *see also* *Garrett v. City of Hamtramck*, 503 F.2d 1236, 1246–47 (6th Cir. 1974) (holding that because HUD officials were aware of the discriminatory impact of the housing plan they had approved, HUD was also responsible for city's violation of Title VI).

While Executive Order 11,063 and Title VI clearly covered public housing, they did not explicitly provide for a private right of action, although the Supreme Court eventually recognized such a right under Title VI, at least for intentional discrimination. *See* *Alexander v. Sandoval*, 532 U.S. 275, 279–80 (2001) (noting that “private individuals may sue to enforce § 601 of Title VI” and that § 601 “prohibits only intentional discrimination”); *see also* *Montgomery Imp. Ass'n v. U.S. Dep't of Hous. & Urban Dev.*, 645 F.2d 291, 293, 295–97 (5th Cir. 1981) (recognizing a private right of action under Title VI in the context of a challenge to HUD's funding decisions).

29 42 U.S.C. § 2000d–1 (2006).

30 *See, e.g.*, R. ALLEN HAYS, *THE FEDERAL GOVERNMENT AND URBAN HOUSING: IDEOLOGY AND CHANGE IN PUBLIC POLICY* 132–33 (2d ed. 1995).

31 114 CONG. REC. 2528 (1968).

32 *Id.* at 2281.

Act had been passed.”³³ Senator Mondale also addressed government’s role in maintaining racial segregation in housing:

Negroes who live in slum ghettos . . . have been unable to move to suburban communities and other exclusively White areas. In part, this inability stems from a refusal by suburbs and other communities to accept low-income housing. . . . An important factor contributing to exclusion of Negroes from such areas, moreover, has been the policies and practices of agencies of government at all levels.³⁴

The FHA, according to Senator Mondale, was needed because of the

sordid story of . . . the immediate post World War II era, during which the [Federal Housing Administration], the VA, and other Federal agencies encouraged, assisted, and made easy the flight of white people from the central cities of white America, leaving behind only the Negroes and others unable to take advantage of these liberalized extensions of credits and credit guarantees. . . . The record of the U.S. Government in that period is one, at best, of covert collaborator in policies which established the present outrageous and heartbreaking racial living patterns which lie at the core of the tragedy of the American city and the alienation of good people from good people because of the utter irrelevancy of color.³⁵

C. Residential Segregation Continues

1. Data from the Decadal Censuses.—By the time the 1968 FHA was passed, high levels of racial segregation in America’s housing had become entrenched as a result of a half-century of explicitly discriminatory policies by both private and public entities (e.g., racial zoning, restrictive covenants, public housing policies, urban renewal, and federal mortgage programs).³⁶

³³ *Id.* at 2527-28. Senator Brooke also noted:

What adds to the murk is officialdom’s apparent belief in its own sincerity. 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 the 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, and have the memos to prove it. . . . But when you ask one of these gentlemen why, despite the 1962 fair housing Order, most public housing is still segregated, he invariably blames it on regional custom, local traditions, personal prejudices of municipal housing officials.

Id. at 2281.

³⁴ *Id.* at 2277.

³⁵ *Id.* at 2278.

³⁶ For a historical review of this segregation and its causes in 1900–1970, see Douglas S. Massey, *Origins of Economic Disparities: The Historical Role of Housing Segregation*, in SEGREGATION: THE RISING COSTS FOR AMERICA 39 (James H. Carr & Nandinee K. Kutty eds., 2008); see also SCHWEMM, *supra* note 4, §§ 3:2–4 (describing racial zoning, restrictive covenants, and discrimination in public housing during this time).

Prior to the beginning of the twentieth century, race-based practices designed to impose residential segregation were virtually unknown, and the levels of black-white segregation were “not terribly different from those observed for European immigrant groups in the same period.” Massey, *supra*, at 43; see also DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 17, 30–31 (1993) (“[B]efore

Despite the FHA's integration goal and over four decades of housing markets operating under the FHA's ban on discrimination, race-based residential segregation remains high, with only modest declines shown in each decadal census from 1970 through 2010.³⁷ In addition, segregation between whites and Hispanics – the Nation's fastest growing and now largest minority group – has remained virtually unchanged during much of this period.³⁸ All this has occurred even as racial and national origin minorities became a larger part of the U.S. population and are now projected to become the “majority” by mid-century.³⁹

Segregation in particular communities is commonly measured on a 100-point “dissimilarity” index, with 100 indicating total segregation (i.e., all blacks and all whites live in separate areas) and zero indicating a population that is randomly distributed by race.⁴⁰ A score above 60 is considered highly segregated.⁴¹ Using this measure, the overall segregation index for the Nation's largest metropolitan areas, which account for the great majority of the black population,⁴² was 79 in 1970; 73 in 1980; 67 in 1990; 64 in 2000; and 59 in 2010.⁴³

1900, . . . blacks and whites lived side by side. . . . [L]evels of residential segregation between blacks and whites began a steady rise at the turn of the century that would last for sixty years [L]evels of racial isolation in northern cities began to move sharply upward after 1900, and especially after 1910.”)

Black-white segregation and black-isolation levels in major U.S. cities had become extremely high by 1940 and remained so through the 1960s. *See* Massey, *supra*, at 42, 44, 65–66 (providing charts reflecting such levels from 1900 through 1970).

37 *See* JOHN R. LOGAN & BRIAN J. STULTS, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS 2 (2011), *available at* <http://www.s4.brown.edu/us2010/Data/Report/report2.pdf>; Barrett A. Lee et al., *Beyond the Census Tract: Patterns and Determinants of Racial Segregation at Multiple Geographic Scales*, 73 AM. SOC. REV. 766, 768 (2008); *see also* Rugh & Massey, *supra* note 6 and accompanying text.

38 *See* BROOKINGS INST., STATE OF METROPOLITAN AMERICA: ON THE FRONT LINES OF DEMOGRAPHIC TRANSFORMATION 52 (2010), *available at* <http://www.brookings.edu/metro/StateOfMetroAmerica.aspx> [hereinafter DEMOGRAPHIC TRANSFORMATION].

At the time of the 2010 census, the overall U.S. population was 308.7 million, of whom 16.3% were Hispanics and 12.6% were African-Americans. KAREN R. HUMES ET AL., U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010 4 (2010), *available at* <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>. As in the census, this Article uses “black” and “African-American” interchangeably. *See id.* at 2–3.

39 *See* DEMOGRAPHIC TRANSFORMATION, *supra* note 38, at 51–52 (“[C]ontinued faster growth of Hispanic, Asian, and black populations [will] put the country as a whole on track to reach ‘majority minority’ status by 2042.”).

40 *See* MASSEY & DENTON, *supra* note 36, at 20.

41 *Id.*

42 *See* DEMOGRAPHIC TRANSFORMATION, *supra* note 38, at 51 (“More than three-quarters of racial and ethnic minorities today live in the nation's 100 largest metro areas”).

43 LOGAN & STULTS, *supra* note 37, at 4. The comparable figures for Hispanics were 50 in 1980; 50 in 1990; and 51 in 2000. *Id.* at 11.

As of 2010, one demographer commented that “[w]hen we measure the level of segregation of Hispanics and Asians, there's really been no change since 1980.” *Morning Edition:*

The degree of segregation varies substantially among cities and different regions of the country, with the highest segregation generally occurring in urban areas in the East and Midwest. In 2000, for example, twelve cities – including New York, Chicago, Philadelphia, and Washington, D.C. – continued to have a black–white dissimilarity index of over 80.⁴⁴ As for Hispanic–white segregation, many major cities – including New York, Los Angeles, Chicago, Philadelphia, Atlanta, Dallas, Houston, and Milwaukee – had dissimilarity indices in the 60–70 range.⁴⁵

Another noteworthy fact is that minorities have increasingly moved to suburban areas during the past two decades.⁴⁶ This does not necessarily result in more integration, however, because many of these minorities have simply “re–segregated in separate communities within the suburbs.”⁴⁷

In the 1990s, the continuing grip of segregation produced a classic commentary dramatically entitled *American Apartheid*, which concluded that racial segregation is “the principal organizational feature of American society that is responsible for the creation of the urban underclass” and that the “urban ghetto . . . represents the key institutional arrangement ensuring the continued subordination of blacks in the United States.”⁴⁸ Little has changed since then. By 2009, 75% of all blacks still lived in only 16% of the Census Block Groups, and 50% lived in Census Block Groups that had a combined black and Hispanic population of 67%.⁴⁹ The 2010 census data

Segregation in America: “Dragging On and On” (NPR radio broadcast Feb. 18, 2011), available at <http://www.npr.org/2011/02/18/133848837/segregation-in-america-dragging-on-and-on> (quoting John Logan, Brown Univ.).

44 WILLIAM H. FRAY & DOWELL MYERS, RACIAL SEGREGATION IN U.S. METROPOLITAN AREAS AND CITIES, 1990–2000: PATTERNS, TRENDS, AND EXPLANATIONS 49 (2005). By contrast, many western metropolitan areas and cities had indices of less than 40. *Id.*

In 2010, the ten most segregated cities, in order, were Milwaukee, New York, Chicago, Detroit, Cleveland, Buffalo, St. Louis, Cincinnati, Philadelphia, and Los Angeles. Daniel Denzler, *The 10 Most Segregated Urban Areas in America*, SALON (Mar. 29, 2011, 7:55 AM EDT), http://www.salon.com/2011/03/29/most_segeregated_cities/singleton/ (last visited Sept. 20, 2011).

45 FRAY & MYERS, *supra* note 44, at 55.

46 WILLIAM H. FREY, BROOKINGS INST., MELTING POT SUBURBS: A CENSUS 2000 STUDY OF SUBURBAN DIVERSITY 13 (2001), available at <http://www.brookings.edu/es/urban/census/frey.pdf> (“Minority suburbanization increased markedly during the 1990s,” with minorities in 2000 constituting “more than a quarter (27.3 percent) of suburban populations in the nation’s largest metropolitan areas, up from 19.3 percent in 1990.”).

By 2008, a majority of all racial/ethnic groups in major metropolitan areas lived in the suburbs. See DEMOGRAPHIC TRANSFORMATION, *supra* note 38, at 60. For more on the 2010 figures, see DEMOGRAPHIC TRANSFORMATION, *supra* note 38, at 60; see also Sabrina Tavernise & Robert Gebeloff, *Immigrants Make Paths to Suburbia, Not Cities*, N.Y. TIMES, Dec. 15, 2010, at A13 (evaluating the census data and concluding that majority of immigrants moved to suburbs, not cities).

47 See FREY, *supra* note 46, at 13.

48 MASSEY & DENTON, *supra* note 36, at 9, 18.

49 Sydney Beveridge, *Customized Social Explorer Maps Illustrate Segregation for Remapping Debate Feature*, SOC. EXPLORER, Jan. 19, 2011, available at <http://www.socialexplorer.com/pub/>

confirms that “the United States is still a residentially segregated society.”⁵⁰ Commenting on the slow pace of change revealed by the 2010 census, one demographer noted: “If we take the current rate of change and extend it over 50 years, blacks then would be as segregated as Hispanics are today. And Hispanics are not exactly fully integrated into the society. Now that’s . . . my grandchildren’s lifetime that we’re talking about, and that seems very, very slow.”⁵¹ Other commentators have reached similar conclusions regarding the persistent and seemingly intractable nature of modern American residential segregation.⁵²

2. Segregation: Causes and Consequences.—What accounts for segregation’s continuing grip, over four decades after the FHA outlawed race-based discrimination in housing? A number of factors seem to be at play.⁵³ One is economics. Whites generally have more money than minorities and therefore can afford to live in a wider range of communities, especially those with higher priced housing.⁵⁴ In addition, many whites have a stronger preference than minorities for predominantly white neighborhoods as opposed to integrated neighborhoods, and the groups’ respective willingness to pay more for houses in their preferred areas tends to perpetuate segregation.⁵⁵

blog/?p=643. For commentaries on the 2000 figures, see Margery Austin Turner, *Limits on Housing and Neighborhood Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 IND. L. REV. 797, 799–801 (2008).

50 Craig Gurian, *New Maps Show Segregation Alive and Well*, REMAPPING DEBATE, Apr. 20, 2011, <http://www.remappingdebate.org/map-data-tool/new-maps-show-segregation-alive-and-well> (quoting William H. Frey, Senior Fellow with the Metropolitan Policy Program at Brookings Institution).

51 *Segregation in America: “Dragging On and On,”* *supra* note 43. For more on Professor Logan’s analysis of the 2010 figures, see LOGAN & STULTS, *supra* note 37.

52 See, e.g., Florence Wagman Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 HOW. L.J. 913, 916 (2005) (“[T]he 2000 Census demonstrated that, while residential racial segregation of Blacks has been declining slightly, it still is at such high levels that if it continued to decline at the same rate, it would be decades before a moderate level of segregation were reached.”); see also Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965, 1975 (2000) (concluding with respect to housing segregation that “the magnitude of the problem has remained relatively static over the last half century”).

53 See, e.g., JAMES H. CARR & NANDINEE K. KUTTY, *SEGREGATION: THE RISING COSTS FOR AMERICA* 263–71 (2008); see also Lee, *supra* note 37 (creating a new approach to determine and predict racial segregation).

54 See PAUL TAYLOR ET AL., *WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS* 1–2 (2011) (“The median wealth of white households is 20 times that of black households and 18 times that of Hispanic households,” and “about a third of black (35%) and Hispanic (31%) households had zero or negative net worth in 2009, compared with 15% of white households.”), available at http://pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf.

55 See MASSEY & DENTON, *supra* note 36, at 95–96 (“[C]ontrasting attitudes of blacks and whites create a huge disparity in the demand for housing in racially mixed neighborhoods”

Another cause of segregation is housing discrimination against racial minorities, which remains at a discouragingly high rate despite the FHA. National testing studies show that white home-seekers are favored over their black and Hispanic counterparts about 20% of the time in rental and sales situations.⁵⁶ A common form of such discrimination is “racial steering,” which involves directing home-seekers of different races to different areas and whose obvious effect is to perpetuate segregation.⁵⁷ Each year, tens of thousands of FHA complaints are filed,⁵⁸ and these complaints represent “only a fraction of instances of housing discrimination” that actually occur

and “small differences in racial tolerances between blacks and whites can lead to a high degree of residential segregation.”).

Such preferences may, of course, change over time. For example, black preferences for integrated as opposed to heavily black neighborhoods may have waned in recent years. *See* SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM XII* (2004) (opining that blacks “have become integration weary”); *cf.* Casey J. Dawkins, *Recent Evidence on the Continuing Causes of Black-White Residential Segregation*, 26 *J. URB. AFF.* 379, 396 (2004) (summarizing evidence that black choice is a relatively small part of the explanation for residential segregation).

⁵⁶ *See* MARGERY AUSTIN TURNER ET AL., *DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I HDS 2000 iii-iv* (2002) (reporting, based on a 2000 nationwide testing program, that whites were favored over blacks 21.6% of the time in rental tests and 17.0% in sales tests and over Hispanics 25.7% of the time in rental tests and 19.7% in sales tests), *available at* http://www.huduser.org/Publications/pdf/PhaseI_Report.pdf.

Race-based mortgage and home-insurance discrimination is also widespread. *See, e.g.*, Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 *HARV. C.R.-C.L. L. REV.* 375, 385-95 (2010) (discussing mortgage discrimination); *INSURANCE REDLINING: DISINVESTMENT, REINVESTMENT, AND THE EVOLVING ROLE OF FINANCIAL INSTITUTIONS* (Gregory D. Squires ed., 1997) (discussing insurance discrimination).

⁵⁷ *See* TURNER ET AL., *supra* note 56, at 6-6 (reporting, based on a 2000 national testing study, that “[w]hite and black homebuyers were consistently steered to neighborhoods (census tracts) that promoted or perpetuated segregation”); *see also* JOHN YINGER, *CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION* 51-61 (1995) (discussing the results of an earlier national testing study of steering). According to the Supreme Court,

[Racial steering is the] practice by which real estate brokers and agents preserve and encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups.

Havens Realty Corp. v. Coleman, 455 U.S. 363, 366 & n.1 (1982).

⁵⁸ U.S. DEPT. OF HOUS. & URB. DEV., *LIVE FREE: ANNUAL REPORT ON FAIR HOUSING FY2010*, 19 (2011), *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=ANNUALREPORT2010.PDF> (reporting that over 10,000 FHA complaints were filed with HUD and state and local fair housing agencies in each of the last four fiscal years); NATIONAL FAIR HOUSING ALLIANCE, *A STEP IN THE RIGHT DIRECTION: 2010 FAIR HOUSING TRENDS REPORT 20* (2010) [hereinafter *TRENDS REPORT*] (reporting that private fair housing groups received 20,173 and 19,924 complaints in, respectively, 2008 and 2009), *available at* <http://www.nationalfairhousing.org/LinkClick.aspx?fileticket=APout1nxpwg%3d&tabid=3917&mid=5321>.

annually,⁵⁹ which is estimated to be about 4,000,000.⁶⁰

The economic/attitudinal causes of segregation and on-going discrimination reinforce one another. As one noted expert has observed, “segregation is not simply an incidental outcome of the discriminatory system but is, in fact, a key reason why discrimination is so hard to eliminate – an outcome that becomes a cause.”⁶¹

Whatever the causes, the perpetuation of residential segregation has had devastating consequences. Racial minorities confined to ghetto-like enclaves suffer from reduced educational, employment, financial, and other opportunities and are exposed to greater levels of crime and disease.⁶² Whites suffer as well,⁶³ in part because segregation reinforces their negative stereotypes of minorities, leading many to move to ever more remote and expensive areas to avoid having minority neighbors.⁶⁴ Residential segregation undermines national unity, dictating that racial divisions continue to characterize virtually every area of American life.⁶⁵ Nor are its costs merely intangible; from a purely financial standpoint, housing discrimination and segregation cost individuals billions of dollars every year.⁶⁶

3. *Continuing Governmental Discrimination and the Failed Promise of § 3608.*— As the proponents of the 1968 FHA recognized, race-based housing

59 U.S. DEP’T OF HOUS. & URB. DEV., THE STATE OF FAIR HOUSING: FY 2008 ANNUAL REPORT ON FAIR HOUSING 2 (2009), available at <http://www.hud.gov/content/releases/fy2008annual-rpt.pdf>.

60 TRENDS REPORT, *supra* note 58, at 20.

61 YINGER, *supra* note 57, at 214.

62 See, e.g., CASHIN, *supra* note 55, at 127–66, 202–60; MASSEY & DENTON, *supra* note 36, at 148–85; YINGER, *supra* note 57 at 135–58; Nancy A. Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 IND. L. REV. 1199, 1205–09 (2001).

Generally, “racial housing patterns correlate[] closely with patterns of school quality, employment opportunities, infrastructure investment, and health quality among other opportunity and quality-of-life factors.” James Robert Breymaier, *The Need to Prioritize the Affirmative Furthering of Fair Housing: A Case Statement*, 57 CLEV. ST. L. REV. 245, 245 (2009) (citing Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 1007 (2005) (reviewing MICHAEL J. KALARMAN, JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004)).

63 See, e.g., Breymaier, *supra* note 62, at 252 (“[Segregated housing patterns] are harmful to everyone. Promoting integrated communities would stimulate positive changes to improve affordable housing dispersion, balanced economic development, equitable school improvement, and sustainable growth patterns.” (citing Chiquita Collins & David Williams, *Segregation and Mortality*, 14 SOC. F. 495, 497–500 (1999))).

64 See, e.g., CASHIN, *supra* note 55, at 167–201, 251–52.

65 See, e.g., ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 2 (2010); Orlando Patterson, *Inequality in America and What to Do about It*, THE NATION, July 19/26, 2010, at 18.

66 See YINGER, *supra* note 57, at 103 (calculating in 1995 that the direct “cost imposed on blacks and Hispanics by current housing discrimination comes to \$4.1 billion per year”).

discrimination by government at all levels was a major contributing factor to residential segregation,⁶⁷ and this has continued up to the present day. Throughout the FHA's history, a large portion of its cases has involved local governments, which have been accused of various discriminatory practices whose purpose or effect restricted minority housing opportunities. These practices include enforcing building codes more aggressively against minority-occupied housing;⁶⁸ providing inferior municipal services to minority neighborhoods;⁶⁹ giving preferences to local residents in predominantly white towns for subsidized housing and other housing benefits;⁷⁰ and, perhaps the most common of all, employing zoning and other land-use techniques to block or limit the location of affordable housing developments.⁷¹ This technique has been particularly effective in maintaining segregation, because demographics in most metropolitan areas mean that, as the Eighth Circuit recently observed, "it is reasonable to infer racial minorities, particularly African-Americans, [are] disproportionately affected by" municipal action that limits "the overall amount of affordable housing."⁷²

Many of these local governments have regularly received HUD grants and are therefore subject to § 3608's "affirmatively further" mandate. At the very least, therefore, these government-grantees should have been expected to curb their policies and practices that reinforce segregation. Indeed, as we shall see later, § 3608 and its implementing regulations require such grantees not only to guard against their own discriminatory actions, but also to identify discrimination by others within their jurisdiction and to devise action plans to eliminate such discrimination.⁷³ Clearly, based on the current state of race-based housing discrimination and residential segregation as described in the previous section, the promise made by § 3608 has yet to be realized.

II. FORTY YEARS OF § 3608 LAW

A. 1968–1988: Early Court Decisions Interpreting § 3608

67 See *supra* notes 31–35 and accompanying text.

68 See *Gallagher v. Magner*, 619 F.3d 823, 828–29, 833–38 (8th Cir. 2010), *petition for reh'g and reh'g en banc denied*, 636 F.3d 380 (8th Cir. 2010), *cert. granted*, 132 S. Ct. 548 (2011); *Hispanics United of DuPage Cnty. v. Vill. of Addison*, 988 F. Supp. 1130, 1141–43 (N.D. Ill. 1997).

69 See SCHWEMM, *supra* note 4, § 14:3 nn.36–37 (citing FHA cases involving discriminatory municipal services).

70 See *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 43, 69–70 (D. Mass. 2002); *United States v. Hous. Auth. of Chickasaw*, 504 F. Supp. 716, 717–18, 729–32 (S.D. Ala. 1980).

71 See SCHWEMM, *supra* note 4, §§ 11D:5, 12B:5, 13:8 to :10.

72 *Gallagher*, 619 F.3d at 835.

73 See *infra* Part II.C.2.

Early judicial commentaries on § 3608 confirmed that this provision was intended to generate forceful pro-integration action by HUD and those entities to which HUD extended financial assistance.⁷⁴ In the FHA's first two decades, some of these cases yielded appellate decisions that established important principles about § 3608, four of which are described in this section.

The first appellate decision involving § 3608 was in 1970 in *Shannon v. HUD*,⁷⁵ where the Third Circuit upheld a challenge to HUD's financial support of a public housing project in a minority area of Philadelphia that local residents claimed would increase racial concentration in their neighborhood.⁷⁶ The *Shannon* decision held that HUD could not finance this project consistent with § 3608, Title VI, and other applicable laws unless it first considered the project's impact on racial segregation in the area.⁷⁷ The Third Circuit recognized that HUD had a good deal of discretion in determining what housing projects to fund and how its funding decisions are made, but the court held that "that discretion must be exercised within the framework of the national policy against discrimination in federally assisted housing . . . [citing Title VI], and in favor of fair housing [citing the FHA]."⁷⁸ Indeed, with respect to HUD's duties under § 3608, the appellate court held that the absence of evidence of discrimination in locating the funded project here was "irrelevant,"⁷⁹ noting that under the FHA:

more is required of HUD than a determination that some rent supplement housing is located outside ghetto areas. . . . Possibly before 1964 the administrators of the federal housing programs could, by concentrating on land use controls, building code enforcement, and

⁷⁴ In addition to the appellate decisions discussed in the remainder of this section, see *Young v. Pierce*, 544 F. Supp. 1010, 1017 (E.D. Tex. 1982) (noting that the FHA is not as limited as Title VI regarding "the enforcement powers of funding agencies acting to further the fundamental principles set forth therein" and that the scope of the FHA "is majestic, and its enforcement provisions are commensurately broad").

⁷⁵ *Shannon v. U.S. Dep't of Hous. & Urban Dev.*, 436 F.2d 809 (3d Cir. 1970).

⁷⁶ *Id.* at 811–12.

⁷⁷ *Id.* at 821. According to the *Shannon* opinion:

Read together, the Housing Act of 1949 and the Civil Rights Acts of 1964 and 1968 [§ 3608] show a progression in the thinking of Congress as to what factors significantly contributed to urban blight and what steps must be taken to reverse the trend or to prevent the recurrence of such blight. In 1949 the Secretary, in examining whether a plan presented by a [Local Public Agency] included a workable program for community improvement, could not act unconstitutionally, but possibly could act neutrally on the issue of racial segregation. By 1964 he was directed, when considering whether a program of community development was workable, to look at the effects of local planning action and to prevent discrimination in housing resulting from such action. In 1968 he was directed to act affirmatively to achieve fair housing. Whatever were the most significant features of a workable program for community improvement in 1949, by 1964 such a program had to be nondiscriminatory in its effects, and by 1968 the Secretary had to affirmatively promote fair housing.

Id. at 816.

⁷⁸ *Id.* at 819.

⁷⁹ *Id.* at 820.

physical conditions of buildings, remain blind to the very real effect that racial concentration has had in the development of urban blight. Today such color blindness is impermissible. 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.⁸⁰

Shannon also held that the local-resident plaintiffs had standing to challenge HUD's flawed decision-making in this case.⁸¹ One problem was that the plaintiffs did not – and indeed could not – sue under the FHA's private enforcement provisions, which cover the statute's basic substantive provisions but not § 3608.⁸² *Shannon* held, however, that as for suits seeking to enforce § 3608's affirmative duties, “judicial review of [HUD's] actions is available” pursuant to the Administrative Procedure Act.⁸³

The *Shannon* decision provided a key building block for establishing the proposition, later endorsed by other appellate courts and the Supreme Court, that the FHA in general and § 3608 in particular were intended to promote not just nondiscrimination against individual minorities, but racial integration for the benefit of entire communities.⁸⁴ *Shannon* also led to the filing of many other cases that challenged HUD funding decisions regarding particular housing projects;⁸⁵ some similar cases, like

80 *Id.* at 820–21.

81 *Id.* at 817.

82 *See id.* at 820. Then, as now, the FHA's private complaint and enforcement procedures, while governing claims based on violations of the statute's substantive provisions in §§ 3604–3606, “do not pertain to the [HUD] Secretary's affirmative duties under [§ 3608].” *Id.*; *see also* 42 U.S.C. § 3602(f) (2006) (defining “discriminatory housing practice” under the FHA to include violations of §§ 3604–3606 and 3617, but not § 3608, which triggers the statute's private enforcement provisions under 42 U.S.C. § 3610(a)(1)(A)(i) for administrative complaints to HUD and 42 U.S.C. § 3613(a)(1)(A) for private lawsuits).

83 *Shannon*, 436 F.2d at 820; *see also id.* at 818–19 (describing review of such a claim under the Administrative Procedure Act pursuant to 5 U.S.C. § 702).

Subsequent appellate decisions agreed that § 3608–based challenges to HUD's funding decisions may be reviewed pursuant to the APA. *See, e.g.*, NAACP, Bos. Chapter v. U.S. Dep't of Hous. & Urban Dev., 817 F.2d 149, 157, 161 (1st Cir. 1987); Montgomery Improvement Ass'n, Inc. v. U.S. Dep't of Hous. & Urban Dev., 645 F.2d 291, 292–93 (5th Cir. 1981); Davis v. U.S. Dep't of Hous. & Urban Dev., 627 F.2d 942, 945 (9th Cir. 1980); *infra* note 113 and accompanying text.

84 The Supreme Court's first FHA decision, handed down in 1972, cited *Shannon* with approval and determined that the FHA's purpose was to replace the ghettos with “truly integrated and balanced living patterns.” *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972). Other early § 3608 decisions endorsed this proposition. *See, e.g.*, Clients' Council v. Pierce, 711 F.2d 1406, 1425 (8th Cir. 1983); *Alschuler v. U.S. Dep't of Hous. & Urban Dev.*, 686 F.2d 472, 482 (7th Cir. 1982); *Jorman v. Veterans Admin.*, 579 F. Supp. 1407, 1418 (N.D. Ill. 1984); *Young v. Pierce*, 544 F. Supp. 1010, 1017–18 (E.D. Tex. 1982); *Schmidt v. Bos. Hous. Auth.*, 505 F. Supp. 988, 996–97 (D. Mass. 1981); *Blackshear Residents Org. v. Hous. Auth. of Austin*, 347 F. Supp. 1138, 1146 (W.D. Tex. 1972). For more on the FHA's goal of integration, *see supra* notes 18–20 and accompanying text.

85 *See, e.g.*, *Garrett v. City of Hamtramck*, 503 F.2d 1236, 1247 (6th Cir. 1974); *Graves v. Romney*, 502 F.2d 1062, 1062 (8th Cir. 1974); *Jones v. U.S. Dep't of Hous. & Urban Dev.*, 390

the *Gautreaux* litigation, had preceded *Shannon* and were based on other theories,⁸⁶ but *Shannon* provided them and future cases with an additional legal tool in § 3608. Eventually, *Shannon* and similar cases prompted HUD to adopt new regulations dealing with its housing funding decisions that were designed both to make sure HUD is informed in advance about the segregative impact of these decisions and to avoid as far as possible funding decisions that would add to racial concentration.⁸⁷

Three years after *Shannon*, many of its views about § 3608 were endorsed by the Second Circuit in *Otero v. New York City Housing Authority*, a case that dealt with how the defendant Authority should select tenants for two of its new apartment projects.⁸⁸ These projects, which were funded by HUD, were built in an area whose racial makeup was changing from white to minority, and many minority families had been relocated to make way for the new buildings.⁸⁹ These relocated families were promised first priority for units in the new projects, but the Authority later reneged on this promise in favor of some white families in order to avoid increasing minority concentration in the area. The displaced families sued, but the Second Circuit upheld the Authority's position, holding that it was obligated, based on § 3608, "to take affirmative steps to promote racial integration even though this may in some instances not operate to the immediate advantage of some non-white persons."⁹⁰ According to *Otero*, HUD's duties under § 3608, which the Second Circuit assumed also applied to HUD grantees like the Authority,⁹¹ meant that:

F. Supp. 579, 590 (E.D. La. 1974); *Blackshear Residents Org.*, 347 F. Supp. at 11145–49.

86 See *supra* notes 24–25 and accompanying text; see also *Banks v. Perk*, 341 F. Supp. 1175 (N.D. Ohio 1972) (enjoining Cleveland officials, based on their constitutional violations, from locating future public housing projects in minority neighborhoods).

87 See SCHWEMM, *supra* note 4, 21–13 to –14. This is not to say that *Shannon*-type issues have wholly abated. For example, in 2005, despite one commentator opining that the idea that HUD "should no longer be permitted to routinely build new low-income housing in segregated, high-poverty neighborhoods" was a point "won" decades ago, Philip D. Tegeler, *The Persistence of Segregation in Government Housing Programs*, in *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 197, 197* (Xavier de Souza Briggs ed., 2005), a federal judge held HUD liable for doing this very thing in the Baltimore area throughout the prior three decades. *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 524 (D. Md. 2005). For more on this case, see Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 353 (2007).

88 *Otero v. Park City Hous. Auth.*, 484 F.2d 1122, 1124 (2d Cir. 1973).

89 See *id.* at 1125–29.

90 *Id.* at 1124–25; see also *id.* at 1133 (citing § 3608 as a key source for the Authority's "obligation to act affirmatively to achieve integration in housing").

91 A number of other courts agreed. See, e.g., *Garrett v. City of Hamtramck*, 503 F.2d 1236, 1247 (6th Cir. 1974); *Banks v. Perk*, 341 F. Supp. 1175, 1182 (N.D. Ohio 1972), *aff'd in part, rev'd in part on other grounds*, 473 F.2d 910 (6th Cir. 1973); *Crow v. Brown*, 332 F. Supp. 382, 391–92 (N.D. Ga. 1971). Others, however, were not so sure. See, e.g., *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 140 n.18, 146 (3d Cir. 1977) (avoiding the issue and noting some disagree-

[C]onsideration [must] be given to the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built. 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.⁹²

Like *Otero* and *Shannon*, most early § 3608 cases dealt with the tenant selection or siting processes for HUD–assisted public housing.⁹³ Some, however, went beyond these scenarios. For example, in *Resident Advisory Board v. Rizzo*,⁹⁴ the Third Circuit reviewed a district court’s determination that HUD and various Philadelphia officials had violated § 3608 by blocking construction of a federally subsidized housing project proposed for a white area.⁹⁵ HUD did not appeal,⁹⁶ but the local defendants did, and the Third Circuit, while affirming their liability, chose to base that liability on the Constitution and the FHA’s § 3604(a) rather than § 3608.⁹⁷ *Rizzo* thus became one of a number of appellate decisions in the 1970s dealing with challenges to exclusionary zoning and other municipal land–use practices that generally relied on the FHA’s substantive prohibitions in § 3604 rather than § 3608.⁹⁸

The last of the significant early § 3608 decisions was *NAACP, Boston Chapter v. HUD* [hereinafter *Boston*],⁹⁹ a case that grew out of a challenge

ment in post–*Otero* cases); see also *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep’t of Hous. & Urban Dev.*, 723 F. Supp. 2d 14, 21–24 (D.D.C. 2010), *aff’d in part, rev’d in part on other grounds*, 639 F.3d 1078 (D.C. Cir. 2011) (holding that state defendants who received HUD funds are not subject to § 3608 after upholding plaintiffs’ § 3604(a) claims against these defendants).

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. See *infra* Part II.C.2; see also *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 75 (D. Mass. 2002) (holding that public housing agencies must “affirmatively further fair housing”).

92 *Otero*, 484 F.2d at 1134.

93 See *supra* notes 24–25, 86.

94 *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977).

95 See *Rizzo*, 425 F. Supp. 987, 1013–21 (E.D. Pa. 1976), *aff’d in part, rev’d in part*, 564 F.2d 126 (3d Cir. 1977).

96 *Rizzo*, 564 F.2d at 140.

97 *Id.* at 140, 145–46.

98 In addition to *Rizzo*, see *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179, 1184–85 (8th Cir. 1974). For similar decisions after 1980, see *NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), *aff’d per curiam*, 488 U.S. 15 (1988); *Keith v. Volpe*, 858 F.2d 467, 482–84 (9th Cir. 1988); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *United States v. City of Parma*, 661 F.2d 562, 574 (6th Cir. 1981).

99 *NAACP, Bos. Chapter v. U.S. Dep’t of Hous. & Urban Dev.*, 817 F.2d 149 (1st Cir. 1987) [hereinafter *Boston*].

to HUD's funding activity in Boston, which eventually resulted in a 1987 opinion by the First Circuit authored by then Judge, now Justice, Breyer.¹⁰⁰ In this case, the NAACP accused HUD of various failings in the "administration of its Community Development Block Grant (CDBG) and Urban Development Action Grant (UDAG) programs," which allegedly violated "HUD's duty 'affirmatively to further' the Fair Housing Act's policies."¹⁰¹

The trial in the *Boston* case showed that that city's housing was highly segregated and that "neither the city nor HUD had sought to obtain or to provide UDAG funds for low-income housing," leading the district court to conclude that HUD had violated § 3608 by failing "to use its 'immense leverage under UDAG' to provide 'desegregated housing so that the

100 *See id.* at 151.

101 *Id.* The CDBG and UDAG programs were created by the 1974 Housing and Community Development Act to provide federal funds to local communities for, respectively, housing-related public improvement projects and development in economically distressed urban areas. *See* 42 U.S.C. §§ 5301–5317 (2006) (creating the CDBG); 42 U.S.C. § 5318 (2006) (creating the UDAG). The CDBG program, which is further discussed *infra* notes 134–41 and accompanying text, has since grown to be a multi-billion-dollar-per-year source of federal funds for local communities, while the UDAG program expired after 1988 when Congress no longer funded it. *See* Ingrid W. Reed, *The Life and Death of UDAG: An Assessment Based on Eight Projects in Five New Jersey Cities*, 19 PUBLIUS: J. FEDERALISM 93, 93 (1989).

In addition to the *Boston* case, other § 3608-based litigation had challenged funding decisions under these programs. *See, e.g.*, *Montgomery Imp. Ass'n v. U.S. Dep't of Hous. & Urban Dev.*, 645 F.2d 291, 292–94 (5th Cir. 1981); *Davis v. U.S. Dep't of Hous. & Urban Dev.*, 627 F.2d 942, 943–45 (9th Cir. 1980) (upholding standing of local residents to challenge CDBG grants in an opinion by then Judge, now Justice, Kennedy); *Coal. for Block Grant Compliance v. U.S. Dep't of Hous. & Urban Dev.*, 450 F. Supp. 43, 52 (E.D. Mich. 1978) (upholding standing of Detroit residents who sought to move to suburban Livonia to challenge the latter's HUD grants); *cf. City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032, 1033–34, 1040, 1048 (2d Cir. 1976) (reversing on standing grounds a successful challenge by Hartford and its low-income residents to CDBG awards to local suburbs where the individual plaintiffs allegedly wanted to live).

Some of these cases were brought against suburban communities that had found the programs' AFFH requirements so unpalatable that they had simply withdrawn their applications for federal funds. *See, e.g.*, *City of Parma*, 661 F.2d at 574–75 (determining, in FHA case against a Cleveland suburb, that the defendant City's failure to provide for low-income housing goals in its initial CDBG application and its subsequent decision to withdraw that application rather than establish such goals were motivated by its desire to exclude low-income persons, including blacks, in violation of the FHA); *Angell v. Zinsser*, 473 F. Supp. 488, 501–02 (D. Conn. 1979) (enjoining Hartford suburb, which had previously attempted to withdraw its application for a future grant to receive CDBG funds rather than comply with HUD's directive to take additional steps to assure compliance with the program's fair housing goals, from withdrawing its CDBG application based on a showing that the decision to withdraw might well have been made for unlawful discriminatory reasons); *see also Hope, Inc. v. Cnty. of DuPage*, 717 F.2d 1061, 1069 (7th Cir. 1983), *rev'd en banc on other grounds*, 738 F.2d 797, 822 (7th Cir. 1984) (identifying the fact that the defendant County had rejected a community block grant as evidence of its purposeful discrimination against low-income and minority residents); *Davis*, 627 F.2d at 944 (noting defendant City's threat to forego CDGB funds if it lost the current litigation).

housing stock is sufficiently large to give minority families a true choice of location.”¹⁰² Later, however, the trial court decided it could not order any relief because it lacked “legal authority to review [HUD]’s compliance with [§ 3608’s] ‘affirmative furtherance’ mandate,”¹⁰³ but the First Circuit disagreed.

Justice Breyer’s opinion in *Boston* began by agreeing with the district court that § 3608 does not create a private right of action that can be enforced directly in court.¹⁰⁴ The opinion went on to conclude, however, that a § 3608-based claim of this kind could be judicially reviewed under the Administrative Procedure Act,¹⁰⁵ which meant that a court did have authority to order appropriate relief.¹⁰⁶

With respect to the merits of the NAACP’s claim, Justice Breyer noted that “the right at issue—the right to HUD’s help in achieving open housing—is a significant one.”¹⁰⁷ Furthermore, he rejected HUD’s claim that § 3608 “imposes upon HUD only an obligation not to discriminate.”¹⁰⁸ As Justice

¹⁰² *Boston*, 817 F.2d at 151.

¹⁰³ *Id.* at 152.

¹⁰⁴ *Id.* at 152–54 (following *Latinos Unidos de Chelsea v. U.S. Dep’t of Hous. & Urban Dev.*, 799 F.2d 774, 791–93 (1st Cir. 1986)). Subsequent decisions generally agreed. *See* *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep’t of Hous. & Urban Dev.*, 723 F. Supp. 2d 14, 24 (D.D.C. 2010), *aff’d in part, rev’d in part on other grounds*, 639 F.3d 1078 (D.C. Cir. 2011); *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 418 (D. Md. 2005); *Pleune v. Pierce*, 697 F. Supp. 113, 119–20 (E.D.N.Y. 1988); *Lee v. Pierce*, 698 F. Supp. 332, 342 (D.D.C. 1988); *cf. Montgomery Improvement Ass’n.*, 645 F.2d 291, 293–97 (5th Cir. 1981) (holding that a private cause of action exists under the nondiscrimination provisions of the grant authorizing statute here (the 1974 Housing and Community Development Act, *see supra* note 101) and therefore finding it unnecessary to decide whether such a cause exists under § 3608).

¹⁰⁵ *Boston*, 817 F.2d at 157–60 (citing 5 U.S.C. § 706(2)(A), the APA’s provision authorizing a court to hold unlawful and set aside agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”). The claim here was seen not as focused only on “individual instances” of HUD behavior, but rather as based on “HUD’s practice over time, its *pattern* of behavior, [that] reveals a failure ‘affirmatively . . . to further’ [the FHA’s] fair housing policy,” as required by § 3608. *Id.* at 158.

¹⁰⁶ *Id.* at 160–61 (citing 5 U.S.C. § 706(2)(A)). HUD argued that the “inaction” it was being accused of here was inappropriate for APA review, but Justice Breyer disagreed, concluding that:

On these facts, we are not sure what difference, if any, there may be between HUD’s “failure to exercise” the discretion conferred upon it by § 3608(e)(5) and its “abuse” of that discretion as revealed in a pattern of HUD activity. We conclude that the court is empowered to order a remedy either for an act or a related omission of the sort here present.

Id. at 161.

¹⁰⁷ *Id.* at 157.

¹⁰⁸ *Id.* at 156. That limited obligation, according to *Boston*, was already imposed by the Constitution, whereas the FHA is “a statute that instructs HUD to administer its grant programs so as ‘affirmatively to further’ the Act’s fair housing policy[, which] requires something more of HUD than simply to refrain from discriminating itself or purposely aiding the discrimination of others.” *Id.*

Breyer wrote:

[The FHA's] framers meant to do more than simply restate HUD's existing legal obligations. . . . [A]s a matter of language and of logic, a statute that instructs an agency "affirmatively to further" a national policy of nondiscrimination would seem to impose an obligation to do more than simply not discriminate itself. If 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.¹⁰⁹

Thus, the First Circuit held that § 3608 requires HUD to "consider [the] effect [of a HUD grant] on the racial and socio-economic composition of the surrounding area."¹¹⁰ If this were done "in any meaningful way, one would expect to see, over time, if not in any individual case, HUD activity that tends to increase, or at least, that does not significantly diminish, the supply of open housing."¹¹¹ The *Boston* opinion did recognize that HUD funding decisions were entitled to substantial deference¹¹² and could only be set aside under the APA if they amounted to "arbitrary" or "capricious" action.¹¹³ However, because the district court's finding seemed to endorse the NAACP's claim "that HUD's pattern of grant activity in Boston reflects a failure, over time, to take seriously its minimal [FHA] obligation to evaluate alternative courses of action in light of their effect upon open housing[.]" the First Circuit found "the existence of a plausible claim of a [FHA] violation."¹¹⁴

¹⁰⁹ *Id.* The *Boston* opinion also concluded that:

[T]he [FHA's] supporters saw the ending of discrimination as a means toward truly opening the nation's housing stock to persons of every race and creed. . . . This broader goal. . . . reflects the 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.

Id.

¹¹⁰ *Id.* at 156 (quoting *Anderson v. City of Alpharetta*, 737 F.2d 1530, 1537 (11th Cir. 1984)); *accord* *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 339 F.3d 702, 713 (8th Cir. 2003).

In *Anderson*, the Eleventh Circuit rejected a § 3608 claim against HUD for not doing more to counteract "the deliberate foot-dragging of local governments" in failing to construct sufficient low-income public housing in the Atlanta suburbs. *Anderson*, 737 F.2d at 1532. The *Anderson* court held that such "inaction" by HUD did not violate § 3608. *Id.* at 1537.

¹¹¹ *Boston*, 817 F.2d at 156.

¹¹² *Id.* at 157 ("Clearly, HUD possesses broad discretionary powers to develop, award, and administer its grants and to decide the degree to which they can be shaped to help achieve [the FHA's] goals.")

¹¹³ *Id.* at 158. Prior decisions had also reviewed § 3608 claims under the APA's "arbitrary or capricious" standard. *See* cases cited *supra* note 83.

¹¹⁴ *Boston*, 817 F.2d. at 157. On remand, the district court did determine that HUD's action violated § 3608 in a sufficiently arbitrary and capricious manner to justify a remedial order. *See* *NAACP v. Kemp*, 721 F. Supp. 361, 370 (D. Mass. 1989).

With the First Circuit's decision in the *Boston* case, lower-court interpretations of § 3608 had established the following propositions: (1) HUD's duties – and by extension those of its grantees – included not merely the avoidance of discriminatory action, but the requirement to take affirmative steps to achieve racial integration in the particular housing markets funded; (2) private enforcement of this mandate could not be done through the FHA's normal enforcement mechanisms nor based on a private right of action under § 3608, but only through an APA-based claim;¹¹⁵ and (3) because of (2), courts could only set aside HUD actions that were determined to be an “arbitrary or capricious” violation of § 3608, and such APA-based claims could only result in injunctive relief and not also damages or attorney's fees.¹¹⁶ As the next section shows, these propositions were reinforced by Congress in 1988.

B. 1988: Amendments to the FHA and New HUD Regulations

In 1988, Congress passed a major set of amendments to the FHA, known as the Fair Housing Amendments Act of 1988 (FHAA).¹¹⁷ The FHAA made extensive changes to the FHA, including adding “familial status” and “handicap” to the bases of forbidden discrimination in the statute's

¹¹⁵ Whether a private action to enforce § 3608's mandates can be brought under 42 U.S.C. § 1983 had not been authoritatively determined at this time. *See Price v. City of Stockton*, 390 F.3d 1105, 1109–15 (9th Cir. 2004) (holding that certain parts of the 1974 statute authorizing the CDBG program created rights under, and therefore may be enforced through, 42 U.S.C. § 1983); *Davis v. U.S. Dep't of Hous. & Urban Dev.*, 627 F.2d 942, 946 n.1 (9th Cir. 1980) (avoiding the issue of whether § 1983 may be used to enforce claim against city receiving CDBG funds); *see also Alschuler v. U.S. Dep't of Hous. & Urban Dev.*, 686 F.2d 472, 477–80 (7th Cir. 1982) (suggesting that a private right of action exists to enforce HUD's post-*Shannon* site-concentration regulations).

This issue remains uncertain today. *See Michelle Ghaznavi Collins, Note, Opening Doors to Fair Housing: Enforcing the Affirmatively Further Provision of the Fair Housing Act Through 42 U.S.C. § 1983*, 110 COLUM. L. REV. 2135, 2163–70 (2010) (summarizing conflicting lower court cases after *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)); *see also Walker v. City of Lakewood*, 272 F.3d 1114, 1127 (9th Cir. 2001) (suggesting that there is no private right of action under the 1974 Act that created the CDBG and UDAG programs).

¹¹⁶ *See* 5 U.S.C. § 702 (2006) (providing for actions “seeking relief other than money damages”). Extensive equitable relief may be awarded in such cases. *See, e.g., Kemp*, 721 F. Supp. at 365–74. For more on the relief available in an APA suit against federal defendants, *see SCHWEMM, supra* note 4, at 12B–30 to –31.

The APA's waiver of sovereign immunity also does not cover attorney's fee awards. *See Boston*, 817 F.2d at 153. However, fee awards in successful § 3608 cases may be available under the Equal Access to Justice Act if HUD's position is not “substantially justified.” 28 U.S.C. § 2412(b), (d)(1)(A) (2006); *see also Boston*, 817 F.2d at 153 (implying that fees would be available under 42 U.S.C. § 2412(b) in a § 3608 case). For other fair housing cases involving fee awards under the Equal Access to Justice Act, *see SCHWEMM, supra* note 4, at 12B–33 n.20.

¹¹⁷ Fair Housing Amendments Act of 1988, Pub. L. No. 100–430, 102 Stat. 1619 (1988).

main substantive provisions¹¹⁸ and strengthening both the FHA's private and governmental enforcement mechanisms in response to Congress's perception that continuing high levels of housing discrimination had resulted in part from the inadequate enforcement system of the 1968 law.¹¹⁹ The FHAA also directed HUD promptly to issue rules interpreting the newly amended FHA,¹²⁰ which HUD did in early 1989.¹²¹ The FHAA did not, however, make any changes to § 3608's requirements that HUD and other federal agencies administer their housing programs "affirmatively to further" the FHA's policies.¹²²

In making these other changes to the FHA while leaving § 3608's mandates and enforcement unchanged, Congress in the FHAA is presumed to have adopted settled judicial interpretations of this provision.¹²³ This presumption applies even when the judicial interpretations involved are those of a limited number of appellate courts.¹²⁴

Just days before the FHAA's enactment, HUD adopted an extensive set of regulations governing its CDGB program that spelled out the

118 See 42 U.S.C. §§ 3604–3606 (2006); SCHWEMM, *supra* note 4, at § 5:3. Another substantive change made by the FHAA was to expand § 3605's prohibition of mortgage discrimination and other residential real estate-related transactions. See 42 U.S.C. § 3605; SCHWEMM, *supra* note 4, at 18–2 to –5.

119 See 42 U.S.C. §§ 3610–3614 (2006); SCHWEMM, *supra* note 4, at 5–8, § 5:4, nn.22–24 and accompanying text, §§ 24:1—:2. The FHAA's new enforcement system provided, *inter alia*, that private complaints could be filed with HUD and ultimately result in charges that were prosecuted by government lawyers either before a HUD administrative law judge or in federal court. See SCHWEMM, *supra* note 4, at § 24. Private complainants could also bypass this system and file suit directly in court, as was also true under the 1968 FHA. See 42 U.S.C. § 3613(a) (2006); SCHWEMM, *supra* note 4, at § 24:1, n.11 and accompanying text.

120 42 U.S.C. § 3614a (note on Initial Rulemaking).

121 24 C.F.R. §§ 100, 103, 105, 110, 115, 180 (2011) (promulgated at 54 Fed. Reg. 3232–3317 (Jan. 23, 1989)). Courts are required to give substantial deference to these HUD regulations in interpreting the FHA. See *Meyer v. Holley*, 537 U.S. 280, 287–88 (2003); *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984); SCHWEMM, *supra* note 4, at 7–13 to –15. For more on the deference owed to HUD's interpretations of the FHA, see *infra* note 159.

122 See 42 U.S.C. § 3608(d), (e)(5) (2006). Another provision that the FHAA left intact was the statute's anti-harassment ban, 42 U.S.C. § 3617, whose substantive prohibitions were, like § 3608's, re-enacted verbatim. However, the FHAA did make § 3617–based claims subject to the FHA's regular enforcement methods, see 42 U.S.C. § 3602(f), SCHWEMM, *supra* note 4, at 20–2 to –3, whereas § 3608's enforcement was not changed.

123 See *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1616 (2010) (“We have often observed that when ‘judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.’” (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (holding that “Congress is presumed to . . . adopt [prior judicial] interpretation when it re-enacts a statute without change”).

124 See *Jerman*, 130 S. Ct. at 1616 (employing this doctrine based on three federal appellate decisions).

AFFH duties of grantees under this program.¹²⁵ These regulations provided that CDBG grants would be made only if a grantee certified to HUD's satisfaction that its grant would be conducted and administered in conformity with the FHA and that "the grantee [would] affirmatively further fair housing."¹²⁶ According to these regulations, a grantee would be considered to be in compliance with this certification requirement if it (1) conducted an analysis of fair housing impediments and (2) took action designed to address conditions identified as limiting fair housing choice, both elements of which were described in some detail in the governing regulation.¹²⁷ CDBG grantees were also required to maintain records documenting the actions they had carried out "to remedy or ameliorate any impediments to fair housing choice in the recipient's community," such as the development of a fair housing analysis of impediments.¹²⁸

C. The 1988–2009 Period: CDBG's Growth and Civil Rights Mandates

1. *The Growing Importance of CDBG.*—By 1988, federal funds for the construction of new public housing had generally dried up. The principal program designed to foster new construction of affordable housing was the Low Income Housing Tax Credit (LIHTC) program,¹²⁹ but LIHTC

¹²⁵ See Amendments to Community Development Block Grant Regulations, 53 Fed. Reg. 34,416 (Sept. 6, 1988). These regulations had been pending as a proposed rule for almost four years, since October 31, 1984. See *id.* For more on the CDBG program, see *supra* note 101 and *infra* Part II.C.1.

¹²⁶ 24 C.F.R. § 570.601 (2010) (adopted at 53 Fed. Reg. 34,456 (Sept. 6, 1988)). According to later judicial commentary, this certification system was designed to ensure that HUD grants are spent consistent with each grant program's civil rights requirements and in recognition that HUD lacked the resources to closely monitor the thousands of its CDBG grantees. See *United States ex rel. Anti-Discrimination Ctr. v. Westchester Cnty.*, 495 F. Supp. 2d 375, 384–89 (S.D.N.Y. 2007) [hereinafter *Westchester I*] (citing *Comer v. Cisneros*, 37 F.3d 775, 792 (2d Cir. 1994)).

¹²⁷ 24 C.F.R. § 570.904(c) (2010) (adopted at 53 Fed. Reg. 34,468 (Sept. 6, 1988)). With respect to the first element of conducting "an analysis to determine the impediments to fair housing," the regulations provided that this analysis should include six specified areas, including "[p]ublic policies and actions affecting the approval of sites and other building requirements used in the approval process for the construction of publicly assisted housing." § 570.904(c)(1). With respect to the second element of "taking action" to address these impediments, the regulations provided that these actions may include six specified items, including "[a]ctivities which assist in remedying findings or determinations of unlawful segregation or other discrimination involving assisted housing within the recipient's jurisdiction." *Id.* § 570.904(c)(2)(v).

¹²⁸ 24 C.F.R. § 570.506(g) (2010) (adopted at 53 Fed. Reg. 34,454 (Sept. 6, 1988)). The "analysis of impediments" referred to in this regulation was the one "described in § 570.904(c)." *Id.*; see *supra* note 127.

¹²⁹ 26 U.S.C. § 42 (2006); see also J. William Callison, *Achieving Our Country: Geographic Desegregation and the Low-Income Housing Tax Credit*, 19 S. CAL. REV. L. & SOC. JUST. 213, 225 (2010) ("For many years, the LIHTC has been the largest federal program to finance the de-

is administered by the Treasury Department, which had not – and still has not – issued regulations indicating how § 3608’s mandates apply to this program.¹³⁰ Furthermore, the UDAG program, which was a key element of the *Boston* case, has since expired.¹³¹ Thus, the key remaining sources of federal housing funds subject to § 3608 were Section 8¹³² and the Community Development Block Grant [hereinafter CDBG] program.¹³³

Today, CDBG is HUD’s largest grant program subject to § 3608’s mandates, accounting for some \$3.6 billion in fiscal year (FY) 2009¹³⁴ and

velopment and rehabilitation of affordable rental housing for low-income households.”). *See generally id.* at 233–61 (describing the LIHTC program); Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1777–83 (2005).

130 *See Callison, supra* note 129, at 251–55; Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 MIAMI L. REV. 1011, 1029–49 (1998); *see also* 26 C.F.R. § 1.42–9(a) (2006) (providing that, in Treasury regulation, LIHTC units must be for “use by the general public” and that this requirement is satisfied if units are rented consistent with “housing policy governing non-discrimination, as evidenced by [specified] rules or regulations of [HUD]”).

For an example of a FHA case arising out of LIHTC developments, *see* Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs, 749 F. Supp. 2d 486, 491–92 (N.D. Tex. 2010) (awarding partial summary judgment against Texas agency accused of perpetuating segregation by limiting its approval of LIHTC projects in Dallas to minority neighborhoods).

131 *See supra* note 101.

132 *See Comer v. Cisneros*, 37 F.3d 775, 781–82 (2d Cir. 1994) (describing the Section 8 rental program, codified at 42 U.S.C. § 1437f (2006 & Supp. 2010), and the AFFH and other fair housing mandates that apply to it).

Section 8 programs are tenant-based or project-based. Under the tenant-based Section 8 program, also known as the Housing Choice Voucher program, a low-income tenant receives a voucher for the Section 8 subsidy that can be given to a landlord who agrees to participate in the program and complies with its requirements. 42 U.S.C. § 1437f(f)(7), (o). Under the project-based Section 8 program, the owner of a multifamily rental property can enter into a Housing Assistant Payment contract with the local housing authority or HUD for a contract-specific time period. *Id.* § 1437f(o)(13). Such a contract is termed “project-based” because the subsidy remains with the building when the tenant moves. *Id.* § 1437f(f)(6), (o)(13). “The Housing Choice Voucher Program (HVC) is currently the largest rental-assistance program administered by HUD.” Stacy E. Seicshnaydre, *How Government Housing Perpetuates Racial Segregation: Lessons from Post-Katrina New Orleans*, 60 CATH. U. L. REV. 661, 674 (2011). For more background on the Section 8 program, *see* Tamica H. Daniel, *Bringing Real Choice to the Housing Choice Voucher Program: Addressing Voucher Discrimination Under the Federal Fair Housing Act*, 98 GEO. L. REV. 769, 769–94 (2010); SCHWEMM, *supra* note 4, at 29–13 to –14.

133 In 1992, Congress created an important new program for revitalizing public housing that came to be known as “HOPE VI,” which is subject to § 3608’s AFFH mandates. *See Darst-Webbe Tenant Ass’n Bd. v. St. Louis Hous. Auth.*, 339 F.3d 702, 707 (8th Cir. 2003); *see also* Herbert R. Giorgio Jr., *HUD’s Obligation to “Affirmatively Further” Fair Housing: A Closer Look at HOPE VI*, 25 ST. LOUIS U. PUB. L. REV. 183 (2006) (describing the HOPE VI program and the *Darst-Webb* litigation).

134 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-905, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS’ FAIR HOUSING PLANS 4–5 (2010) [hereinafter GAO REPORT], *available at* <http://www.gao.gov/new>.

providing “annual grants on a formula basis to 1209 general units of local government and States.”¹³⁵ Other HUD programs subject to § 3608 include the HOME Investment Partnership [hereinafter HOME] program, which provided about \$1.8 billion in grants in FY 2009, and a number of smaller programs.¹³⁶

As noted above,¹³⁷ the CDBG program was created by Congress in 1974 to provide grants to local jurisdictions to develop “viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income.”¹³⁸ CDBG grants are made to units of local governments and states (and their consortia); the former are cities in metropolitan areas with populations of over 50,000 and urban counties with more than 200,000 people (known as “entitlement communities”), while smaller “non-entitlement” localities may receive funds indirectly through grants made to their states or as part of a consortium led by an entitlement community.¹³⁹ In Kentucky, for example, CDBG grants in FY 2010 were made to nine entitlement jurisdictions (the largest being Louisville–Jefferson County, which received \$12,915,486) and to the state of Kentucky (which received \$29,720,742).¹⁴⁰ The cities and urban counties

items/d10905.pdf.

135 *Community Development Block Grant Program—CDBG*, HUD.Gov, <http://www.hud.gov/offices/cpd/communitydevelopment/programs> (last visited Aug. 4, 2011) [hereinafter *HUD—CDBG Website*].

136 GAO REPORT, *supra* note 134, at 5. The HOME program, which was created by Congress in 1990, is now “the largest government–sponsored affordable housing production program . . . and provides grants to states and localities, often in partnership with local nonprofit groups. These grants are used to fund a wide range of activities that build, buy and rehabilitate affordable housing for rent or sale and provide direct rental assistance to low–income people.” *Id.* Other HUD programs subject to § 3608 include the Emergency Shelter Grants (ESG) program, which provides grants to help homeless persons and was funded at about \$1.7 billion in FY 2009, and the Housing Opportunities for Persons with AIDS (HOPWA) program, which provides grants to help low–income persons with HIV/AIDS and was funded at about \$310 million in FY 2009. *Id.*; *see also supra* note 133 and accompanying text (discussing the HOPE VI program).

137 *See supra* note 101 and accompanying text.

138 42 U.S.C. § 5301(c) (2006). “CDBG funds may be used for a wide variety of housing, community and economic development activities” in any of “90 different categories” chosen by the individual grantee–jurisdiction to meet its “local needs.” *CDBG Expenditure Reports*, HUD.Gov, http://portal.hud.gov:80/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/budget/disbursementreports (last visited Sept. 24, 2011).

139 HUD, “BASICALLY CDBG” COURSE TRAINING MANUAL 1–4, 1–5 (2007) [hereinafter *BASICALLY CDBG*], *available at* http://portal.hud.gov:80/hudportal/documents/hoodoc?id=DOC_16470.pdf.

140 HUD, *COMMUNITY PLANNING AND DEVELOPMENT PROGRAM FORMULA ALLOCATIONS FOR FY 2010*, HUD.Gov, <http://www.hud.gov/offices/cpd/about/budget/budget10/> (last visited July 5, 2011). Besides Louisville–Jefferson County, the other eight Kentucky entitlement jurisdictions (and the amount of their grants) were Ashland (\$746,634), Bowling Green

that participate as entitlement communities account for the largest part of the CDBG program, receiving seventy percent of its appropriations; these communities automatically receive an annual allocation of funds, whose amount is determined by a set formula.¹⁴¹

The 1974 statute that created CDBG and certain other HUD grant programs made them subject to that law's nondiscrimination mandate, which was patterned after Title VI's.¹⁴² In addition, this statute requires CDBG recipients to certify to HUD's satisfaction that their grant "will be conducted and administered in conformity with the Civil Rights Act of 1964 . . . and the Fair Housing Act . . . and the grantee will affirmatively further fair housing."¹⁴³

HUD regulations implementing the 1974 law have consistently repeated the statutory requirement that CDBG grantees certify that they will comply with the FHA and will "affirmatively further fair housing."¹⁴⁴ As noted above, HUD's 1988 amendments to these regulations provided for annual performance reviews that required, *inter alia*, each grantee to show it had "carried out its CDBG-funded program in accordance with civil rights certifications" and with the FHA and various other civil rights laws, which included "the grantee's . . . [certification] that it will affirmatively further fair housing."¹⁴⁵

2. The 1990s: Further § 3608–Based Regulations and Guidance.—In 1990, Congress amended the CDBG statute to require jurisdictions applying for grants to certify they were following a "housing affordability strategy" that included a five-year estimate of the jurisdiction's housing needs for low- and moderate-income people, which came to be known as a "Consolidated Plan."¹⁴⁶ The 1990 amendments again required that all CDBG grantees provide a "certification that the jurisdiction will affirmatively further fair housing."¹⁴⁷

(\$610,765), Covington (\$1,786,407), Elizabethtown (\$172,458), Henderson (\$275,017), Hopkinsville (\$313,015), Lexington–Fayette County (\$2,278,561), and Owensboro (\$588,736). *Id.*

¹⁴¹ BASICALLY CDBG, *supra* note 139, at 1–4.

¹⁴² See 42 U.S.C. § 5309(a) (2006) (banning discrimination based on race, color, national origin, religion, or sex in "any program or activity . . . [receiving] funds made available under this chapter"). For more on Title VI's nondiscrimination mandate, see *supra* notes 27–29 and accompanying text.

¹⁴³ 42 U.S.C. § 5304(b)(2) (2006).

¹⁴⁴ 24 C.F.R. § 91.225(a)(1) (2011); see also 24 C.F.R. §§ 91.325(b)(5), 91.425(a)(1)(i) (2011); 24 C.F.R. § 570.303 (1988). The HUD regulations governing the CDBG and other grant programs created by the 1974 law are set forth in 24 C.F.R. § 91 and 24 C.F.R. § 570.

¹⁴⁵ 24 C.F.R. § 570.904(a), (c); see also *supra* note 127 and accompanying text (describing 24 C.F.R. § 570.904(c)).

¹⁴⁶ 42 U.S.C. § 12,705(b)(1) (2006) (part of the National Affordable Housing Act of 1990). For more on the Consolidated Plan, see *infra* note 156.

¹⁴⁷ 42 U.S.C. § 12,705(b)(15). Thus, by 1994, it was clear, according to the Second Cir-

In 1995, HUD adopted new regulations governing the CDBG and all other HUD community planning and development grant programs.¹⁴⁸ The 1995 regulations, which have remained in effect with minor amendments to this day, govern grantees' Consolidated Plans and require a single performance report for all HUD grant programs.¹⁴⁹ With respect to the grantees' AFFH obligations, the 1995 regulations require each grantee to submit to HUD a yearly certification that it "will affirmatively further fair housing."¹⁵⁰ This means, according to the regulations, that the grantee will do three specific things: "[1] conduct an analysis to identify impediments to fair housing choice within the jurisdiction, . . . [2] take appropriate actions to overcome the effects of any impediments identified through that analysis, and [3] maintain records reflecting the analysis and actions in this regard."¹⁵¹ The earlier version of this regulation had also included these three elements,¹⁵² but the 1995 regulations made them "requirements" rather than merely "performance standards" for AFFH.¹⁵³

As part of its new 1995 regulatory requirements concerning grantees' AFFH responsibilities, HUD announced that each jurisdiction-recipient "is expected to have conducted its first analysis of impediments" [AI] within one year of the effective date of the 1995 regulations (i.e., February

cuit, that:

As conditions to receive CDBG funds, the grantee must (1) "affirmatively further fair housing" . . . ; (2) administer the grant in conformance with [Title VI] . . . (non-discrimination in federally assisted programs); and the FHA . . . ; and (3) submit an annual performance report for HUD's review . . . [that] must address the CDBG recipient's compliance with Title VI and [the FHA], and the recipient's efforts at meeting the statutory obligations to promote fair housing.

Comer v. Cisneros, 37 F.3d 775, 783 (2d Cir. 1994).

¹⁴⁸ Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. 1878–1918 (Jan. 5, 1995). Besides CDBG, the new regulations governed the HOME Investment Partnership (HOME), Emergency Shelter Grant (ESG), and Housing Opportunities for Persons with AIDS (HOPWA) programs. *Id.* at 1878.

¹⁴⁹ *Id.* at 1878.

¹⁵⁰ 24 C.F.R. § 91.225(a)(1) (2011); *see* 24 C.F.R. §§ 570.487(b) (2011), 570.601(a)(2) (2011).

¹⁵¹ 24 C.F.R. § 91.225(a)(1) (2011); *see* 24 C.F.R. §§ 91.325(a)(1), 91.425(a)(1)(i) (2011) (setting forth similar requirements for states and consortia that receive CDBG funds).

The 1995 regulations also established performance review criteria for CDBG grantees that specifically set forth similar fair housing requirements. This regulation simply states: "See the requirements in the Fair Housing Act . . . , as well as section 570.601(a), which sets forth the grantee's responsibility to certify that it will affirmatively further fair housing." 24 C.F.R. § 570.904(c) (2011). The 1988 version was more detailed. *See supra* note 127 (quoting 24 C.F.R. § 570.904(c) (1988)).

¹⁵² *See supra* notes 127–28 and accompanying text.

¹⁵³ Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. at 1895.

6, 1996).¹⁵⁴ A new AI need not be done every year thereafter,¹⁵⁵ but grantees would have to provide a summary of their AIs in other required reports to HUD. These reports included a “Consolidated Plan” every five years that specifies how grantees intended to use their federal funds to address the housing needs of low- and moderate-income people (within which grantees must provide their AFFH certifications annually);¹⁵⁶ an “Annual Action Plan” laying out how the grantees planned to achieve these overall objectives;¹⁵⁷ and a yearly performance report on the progress made in carrying out their Annual Action Plans.¹⁵⁸

HUD announced in its commentary to the 1995 regulations that it would shortly issue additional guidance to assist grantees in fulfilling these new requirements,¹⁵⁹ and the next year, it complied by publishing a “Fair Housing Planning Guide.”¹⁶⁰ According to this *Guide*, the three elements

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* Although “AIs are not to be submitted to, or be approved by, HUD[,] . . . HUD could request submission of the AI in the event of a complaint or as part of routine monitoring.” HUD, FAIR HOUSING PLANNING GUIDE 2–7 (1996) [hereinafter 1996 HUD GUIDE], *available at* <http://www.hud.gov/offices/fheo/images/fhpg.pdf>.

¹⁵⁶ The Consolidated Plan serves four main functions: “[a] planning document for the jurisdiction,” “[a] submission for federal funds under HUD’s formula grant programs,” “[a] strategy to be followed in carrying out HUD programs,” and “[a] management tool for assessing performance and tracking results.” 24 C.F.R. § 91.1(b) (2006).

¹⁵⁷ As part of the Consolidated Plan process, each grantee is required to make annual Action Plan submissions to HUD, which address the goals and objectives for the grantee as they related to the categories discussed above. *Id.* §§ 91.220, 91.420. The Action Plan includes the grantee’s annual applications for funding, as well as the grantee’s annual express certification that it would AFFH. *Id.* §§ 91.225, 91.425. The grantee also makes annual submissions, called Consolidated Annual Performance and Evaluation Reports (“CAPERs”), reviewing the “progress it has made in carrying out its strategic plan and its action plan” over the previous year. *Id.* § 91.520(a).

¹⁵⁸ GAO REPORT, *supra* note 134, at 7–8. In the 1996 HUD GUIDE, *see supra* note 155, HUD explained the relationship of a grantee’s AI and its Consolidated Plan. This guide noted that grantees should prepare AIs using a “Fair Housing Perspective,” which means that:

[W]hile the explanation of barriers to affordable housing to be included in the Consolidated Plan may contain a good deal of relevant AI information[, it] may not go far or deep enough into factors that have made poor housing conditions more severe for certain groups in the lower-income population than for others. Jurisdictions should be aware of the extent to which discrimination or other causes that may have a discriminatory effect play a role in producing the more severe conditions for certain groups.

¹⁵⁹ 1996 HUD GUIDE, *supra* note 155, at 2–20, 2–21.

¹⁵⁹ Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. 1878, 1878–79 (Jan. 5, 1995).

¹⁶⁰ 1996 HUD GUIDE, *supra* note 155. To the extent this guide includes interpretations of the FHA or FHA-based regulations, these interpretations are “entitled to respect” to the extent that they have the “power to persuade.” *United States ex rel. Anti-Discrimination Ctr. v. Westchester Cnty.*, 668 F. Supp. 2d 548, 563 (S.D.N.Y. 2009) [hereinafter *Westchester II*] (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000)) (holding that the HUD GUIDE, being “firmly rooted in the statutory and regulatory framework and consistent with the case

making up the “affirmatively furthering” goal (i.e., conducting an AI, taking appropriate actions, and maintaining relevant records) require a grantee, *inter alia*, to “[a]nalyze and eliminate housing discrimination in the jurisdiction” and to “[p]rovide opportunities for inclusive patterns of housing occupancy regardless of race, color, religion, sex, familial status, disability and national origin.”¹⁶¹ A proper AI involves “[a]n assessment of conditions, both public and private, affecting fair housing choice for all protected classes.”¹⁶² Such impediments are “actions, omissions or decisions” which “restrict housing choices or the availability of housing choices,” or which have the effect of doing so, based on “race, color, religion, sex, disability, familial status, or national origin,”¹⁶³ including “[p]olicies, practices, or procedures that appear neutral on their face.”¹⁶⁴ HUD’s suggested AI format included a housing profile describing “the degree of segregation and restricted housing by race, ethnicity, disability status, and families with children[, and] how segregation and restricted housing supply occurred.”¹⁶⁵ Finally, the *Guide* stated that “[g]rantees are strongly encouraged to annually update their analysis of impediments,”¹⁶⁶ and elsewhere HUD recommended that “grantees update their AIs every 3 to 5 years.”¹⁶⁷

To summarize, CDBG grantees as of 1995 were required to provide HUD with AFFH certifications every year and, as part of this process, to provide a new AI in 1996, with the presumption that their AIs would regularly be updated and that they would be taking appropriate actions to overcome impediments identified in these AIs and maintaining records to demonstrate their AI process and related actions. Failure to meet these requirements was grounds for even “entitlement” recipients to lose their HUD grants.¹⁶⁸

law, is persuasive on the issue of whether” the defendant conducted a proper AI). *See generally* Fed. Express Corp. v. Holowecki, 552 U.S. 389, 397 (2008) (holding that “the agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force”).

161 1996 HUD GUIDE, *supra* note 155, at 1–3.

162 *Id.* at 2–7. Such an AI should also include a “comprehensive review of a jurisdiction’s laws, regulations, and administrative policies, procedures, and practices” and “[a]n assessment of how those laws, etc. affect the location, availability, and accessibility of housing.” *Id.*

163 *Id.* at 2–8.

164 *Id.* at 2–17.

165 *Id.* at 2–28.

166 BASICALLY CDBG, *supra* note 139, at 19–2.

167 GAO REPORT, *supra* note 134, at 6.

168 *See* United States v. Inc. Island Park, 888 F. Supp. 419, 450–53 (E.D.N.Y. 1995) (awarding summary judgment to the United States in action against CDBG recipient for its fraudulently failing to AFFH and ordering return of defendant’s CDBG funds for a multi-year period).

3. *2000–2008: The Grantees’ Responses and HUD Inaction.*—The record of CDBG grantees in complying with their post–1995 AFFH requirements has been mixed at best. In reviewing grantees’ AIs covering the period 2005–2009, the General Accounting Office determined that 6% of these AIs were from dates “unknown” and an additional “29 percent . . . were prepared in 2004 or earlier, including 11 percent that date from the 1990s.”¹⁶⁹ Even as to the remaining 64% whose AIs were fairly recent, the GAO questioned “the usefulness of many such AIs as fair housing planning documents . . . [because] a significant majority of the current AIs did not identify time frames for implementing the recommendations or contain the signatures of top elected officials as . . . suggested in HUD’s guidance.”¹⁷⁰

HUD’s response was indifferent. Few grants were denied or rescinded, nor, apparently, were any of the grantees with out–dated or inadequate AIs criticized or threatened with remedial action.¹⁷¹ HUD–sponsored materials as of 2002 dealing with the AFFH and AI requirements did bemoan the fact that “[d]uring the past thirty–seven years, Congress has spent more than one trillion dollars in a failed attempt to remedy the effects of a dual housing market in America.”¹⁷² These HUD materials “traced the evolution of the dual market to, *inter alia*, African–Americans migrating to cities and encountering obstacles ‘designed to segregate them from the majority, and

169 GAO REPORT, *supra* note 134, at 9–10. In 2009, HUD completed an internal study that found “that many AIs were outdated or appeared to have been prepared in a cursory fashion and found that the department’s oversight was limited.” *Id.* at 2 (citing U.S. DEPT. OF HOUS. & URB. DEV., ANALYSIS OF IMPEDIMENTS STUDY (2009)). The goal of this study was “to assess the extent to which the AIs were produced in accordance to HUD’s 1996 *Fair Housing Planning Guide*. *Id.*

170 *Id.* at 9–10; see NAT’L COMM’N ON FAIR HOUS. & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING 45 (2008) [hereinafter NATIONAL FAIR HOUSING REPORT] (estimating that less than 10% of CDBG entitlement jurisdictions have programs “that really address fair housing concerns in their communities”), available at <http://www.nationalfairhousing.org/LinkClick.aspx?fileticket=w23zLzobpwA%3d&tabid=3917&mid=8614>.

Still, some CDBG grantees did do serious AIs for their areas. See, e.g., *id.* at 45 & nn.246–47 (listing Atlanta, Boston, Los Angeles, Richmond, and Toledo as examples of communities with strong AFFH efforts). For more on those jurisdictions that have produced appropriate AIs, see *infra* note 274 and accompanying text.

171 Matthew J. Termine, *Promoting Residential Integration through the Fair Housing Act: Are Qui Tam Actions a Viable Method of Enforcing “Affirmatively Furthering Fair Housing” Violations?*, 79 FORDHAM L. REV. 1367, 1392 (2010) (“[A] ‘long–time HUD employee said he could think of only three instances over 20 years in which HUD’ terminated CDBG funding for failure to comply with the AFFH duty”); Breymaier, *supra* note 62, at 249 (stating that HUD has never denied funding to a CDBG recipient because of its failure to AFFH). *But cf.* Inc. Island Park, 888 F. Supp. at 458 (ordering, in a case brought by the United States, a refund of CDBG money from a municipality that fundamentally failed to AFFH).

172 *Westchester II*, 668 F. Supp. at 555–56 (quoting 2002 HUD–sponsored training materials entitled “Affirmatively Furthering Fair Housing [:] Conducting the Analysis of Impediments and Beyond”).

to maintain a dual society,”¹⁷³ but neither this observation nor the on-going failure of CDBG grantees to adequately meet their AFFH responsibilities led to any significant action by HUD in terms of withholding funds.

III. A NEW APPROACH: THE *WESTCHESTER* LITIGATION

A. *The Plaintiff's Claim and the District Court's Decisions*

This inertia was disrupted by a novel suit brought in 2006 by a private fair housing organization, the Anti-Discrimination Center of Metro New York (“ADC”), against Westchester County, New York.¹⁷⁴ Westchester County covers a wealthy suburban area immediately north of New York City; the county has a population of approximately 950,000 people and some 45 local governmental units ranging in size from small villages with a few thousands residents to the city of Yonkers with some 200,000 residents.¹⁷⁵

The metropolitan area, of which Westchester is a part, is one of the most segregated in the country.¹⁷⁶ Within Westchester, racial concentration is extreme: the County’s northern areas are virtually all white, while in the south, a few communities have substantial black populations (as high as 59%) but many others are less than 1% black.¹⁷⁷

¹⁷³ *Id.* at 556.

¹⁷⁴ *Westchester I*, 495 F. Supp. 2d 375 (denying motion to dismiss); United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., 668 F. Supp. 2d 548 (deciding cross motions for summary judgment).

For a description of this litigation by the architects of the plaintiff’s position, see Craig Gurian & Michael Allen, *Making Real the Desegregating Promise of the Fair Housing Act: “Affirmatively Furthering Fair Housing” Comes of Age*, 43 CLEARINGHOUSE REV. 560 (2010); Michael Allen, *No Certification, No Money: The Revival of Civil Rights Obligations Under HUD Funding Programs*, 78 PLAN. COMM’RS J. 16 (2010).

¹⁷⁵ See FURMAN CENTER FOR REAL ESTATE & URBAN POLICY, NEW YORK UNIVERSITY, AN OVERVIEW OF AFFIRMATIVE MARKETING AND IMPLICATIONS FOR THE WESTCHESTER FAIR HOUSING SETTLEMENT 3 n.1 (2011), available at http://furmancenter.org/files/publications/Furman_Center_Review_of_Affirmative_Marketing.pdf.

¹⁷⁶ See JOHN ICELAND & DANIEL H. WEINBERG, U.S. CENSUS BUREAU, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980–2000 69 (2002), available at http://www.census.gov/hhes/www/housing/housing_patterns/pdf/censr-3.pdf; see also *supra* text accompanying notes 44–45 (listing the New York City metropolitan area as one of the most segregated in the country).

¹⁷⁷ See WESTCHESTER COUNTY DEPARTMENT OF PLANNING DATABOOK 44 (2011), available at <http://planning.westchestergov.com/images/stories/DataBook/population.pdf> (providing data for all Westchester municipalities’ populations by race); WESTCHESTER COUNTY, N.Y.: PERCENT BLACK PERSON BY CENSUS TRACT, 2000 (2011), available at http://giswww.westchestergov.com/wcgis/Census/2010_Tracts_Minority.pdf (providing map depicting the concentrations of Westchester’s black population).

Furthermore, the municipalities in Westchester have a long history of actively opposing integration efforts, particularly by restricting affordable housing to the County’s few minority areas (e.g., southwest Yonkers) and only allowing such housing in white areas if it is restricted

The ADC's suit alleged that each year from 2000 through 2006, Westchester County applied to HUD for CDBG and other federal funds on behalf of itself and a consortium of most of the municipalities in the county.¹⁷⁸ According to the ADC, Westchester County obtained over \$50 million dollars in federal grants in the 2000–2006 period,¹⁷⁹ during which it did not meet its AFFH responsibilities by, *inter alia*, not properly analyzing impediments to fair housing choice in its area or taking appropriate action to overcome these impediments as required by HUD's regulations.¹⁸⁰

What made this suit novel was that it was brought not under these regulations or § 3608, but rather under the False Claims Act ("FCA").¹⁸¹ The FCA is a federal statute dating back to the Civil War that authorizes private parties to bring *qui tam* suits in the name of the United States against those who have submitted false or fraudulent claims for payment

to local residents or the elderly. See *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1186 (2d Cir. 1987) (affirming determination that local officials were responsible for intentionally segregating Yonkers' housing and schools by race). For a detailed description of the *Yonkers* litigation, see Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.–C.L. L. REV. 289, 324–64 (2002). Professor Schuck notes that, even after Yonkers' segregative land-use policies were held to violate the FHA, it continued to receive CDBG funds. *Id.* at 347.

For more on segregation in Westchester, see *infra* note 199 and accompanying text.

¹⁷⁸ *Westchester I*, 495 F. Supp. 2d at 377. The complaint focused on the period of April 1, 2000, to April 1, 2006, *id.*, although Westchester had in fact received CDBG funds for more than 30 years. See WESTCHESTER COUNTY URBAN CONSORTIUM, COMMUNITY DEVELOPMENT BLOCK GRANT: PROGRAM MANUAL FOR FY 2012–2014, at 2 (noting that "[t]he Westchester Urban County Consortium has received CDBG funding since the program was established in 1976"), available at http://planning.westchestergov.com/images/stories/pdfs/cdbg/programmanual_complete.pdf.

The Westchester consortium was made up of some 40 local municipalities, i.e., all of the governmental units in the county except for Mount Pleasant, Mount Vernon, New Rochelle, White Plains, and Yonkers, the latter four of which were themselves "entitlement communities" and therefore received their own grants directly. See CDBG Performance Profiles New York, HUD.GOV, http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/community_development/library/performanceprofiles/ny.

¹⁷⁹ *Westchester II*, 668 F. Supp. 2d at 550. The CDBG grants awarded to Westchester and its consortium were the main focus of this litigation, *Westchester I*, 495 F. Supp. 2d at 386 n.7, although the consortium also received some federal funds under the Emergency Shelter Grant, HOME Investment Partnership, and Housing Opportunities for Persons with AIDS programs. See *Westchester II*, 668 F. Supp. 2d at 552 n.4.

¹⁸⁰ *Westchester II*, 668 F. Supp. 2d at 550. For a review of the certifications that CDBG recipients are required to file with HUD, see *supra* notes 144–45, 150–53, 156–57 and accompanying text.

¹⁸¹ *Westchester II*, 668 F. Supp. 2d at 550; False Claims Act, 31 U.S.C. §§ 3729–3733 (2006). This was not the first time the FCA had been used as the basis for a § 3608–related suit, see *supra* note 168 (describing *United States v. Inc. Island Park*, 888 F. Supp. 419, 437–44 (E.D.N.Y. 1995)), but it was the first time a private complainant rather than the United States initiated such a suit.

to the federal government.¹⁸² The ADC alleged that Westchester County violated the FCA by falsely certifying to HUD that it had properly engaged in the required AFFH process during the years that the County received CDBG funds.¹⁸³

Pursuant to the FCA's procedures, this suit was kept under seal while the United States decided whether to intervene and take over the case as lead plaintiff.¹⁸⁴ After some delays, the Government finally determined in late 2006 that it would not intervene, leaving the ADC to proceed on its own, and its complaint was served on Westchester in early 2007.¹⁸⁵

In order for the ADC to sue under the FCA, its claim had to be based on "non-public" information,¹⁸⁶ which the ADC alleged came from Westchester County's responses to an ADC request made under New York state's Freedom of Information Law ("FOIL").¹⁸⁷ Westchester responded with a motion to dismiss, claiming both that the suit was improper because it was based on the types of public reports barred by the FCA and also that the County's AFFH certifications were not fraudulent. The district court denied this motion in mid-2007.¹⁸⁸ It first held that, although the information obtained by the ADC through its FOIL request was indeed public, that information "was not obtained from a source enumerated in the [FCA's] Section 3730(e)(4)(A) jurisdictional bar."¹⁸⁹

The court then proceeded to uphold the merits of the ADC's claim. The gist of the parties' dispute here was whether Westchester was required

182 31 U.S.C. §§ 3729(a), 3730(b)(1). For more on the False Claims Act and its remedial provisions, see *infra* notes 184–89, 205–07 and accompanying text.

183 See *Westchester I*, 495 F. Supp. 2d at 376–77.

184 See 31 U.S.C. § 3730(b)(2); see also 31 U.S.C. § 3730(e); *Westchester I*, 495 F. Supp. 2d at 378.

185 See 31 U.S.C. § 3730(c)(3); *Westchester I*, 495 F. Supp. 2d 375, 378.

186 At the time, the FCA foreclosed *qui tam* suits that were "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." 31 U.S.C. § 3730(e)(4)(A). This provision has since been amended and now forecloses *qui tam* suits if the allegations are "based upon the public disclosure of allegations or transactions . . . in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S.Ct. 1885, 1889 n.1 (2011) (quoting 31 U.S.C. § 3730(e)(4)(A)).

187 *Westchester I*, 495 F. Supp. 2d at 380. Westchester's FOIL "responses consisted in part of state and local administrative reports produced following an administrative investigation." *Id.*

188 *Id.* at 377.

189 *Id.* at 383. Four years later, the Supreme Court in a different case interpreted the FCA's § 3730(e)(4)(A) to forbid private suits based on reports generated under the federal Freedom of Information Act. *Schindler*, 131 S.Ct. at 1889–96; see also *supra* note 186 (describing recent amendment to 31 U.S.C. § 3730(e)(4)(A)). By the time *Schindler* was decided, however, the ADC's claim against Westchester County had been settled. See *infra* note 209 and accompanying text.

“to identify racial discrimination and segregation as impediments to ‘fair housing’ when it certifies as a condition for receipt of federal funds that it will affirmatively further fair housing.”¹⁹⁰ Westchester argued that its AIs properly focused on housing affordability and income issues rather than race and that “income is arguably a better proxy for determining need than race when distributing housing funds.”¹⁹¹ The ADC countered that this approach ignored § 3608’s mandates and resulted in increased racial segregation in the county through the location of subsidized housing in areas where minorities were already concentrated.¹⁹²

The district court sided with the ADC, concluding that “an interpretation of ‘affirmatively further fair housing’ that excludes consideration of race would be an absurd result.”¹⁹³ The court held that a grantee that certifies to HUD that it will AFFH as a condition of receiving federal funds must analyze “the existence and impact of race discrimination on housing opportunities and choice in its jurisdiction.”¹⁹⁴ Thus, the court concluded:

The complaint alleges that Westchester violated the FCA when it submitted a false certification to obtain federal funds. It alleges that Westchester did not consider the existence and impact of race discrimination on housing opportunities and choice but nonetheless certified that it would administer its grant in conformity with the two governing statutes and would affirmatively further fair housing. This is sufficient to state a claim.¹⁹⁵

The parties then engaged in a year of discovery, after which both moved for summary judgment. On February 24, 2009, the district court denied Westchester’s motion and granted in part ADC’s motion.¹⁹⁶ The court found the undisputed facts established that during the 2000–2006

190 *Westchester I*, 495 F. Supp. 2d at 383–84.

191 *Id.* at 389.

192 *See id.* at 387–89.

193 *Id.* at 388.

194 *Id.* at 376.

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

Id. at 387.

195 *Id.* at 387; *see also id.* at 384 (holding that the complaint “does state a claim for a violation of the FCA”). The court also held that the ADC stated its complaint of fraud with sufficient particularity to satisfy the pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure. *Id.* at 389–90.

196 *United States ex rel. Anti-Discrimination Ctr. v. Westchester Cty.*, 668 F. Supp. 2d 548, 550 (S.D.N.Y. 2009).

period: (1) Westchester received over \$52 million in CDBG funds;¹⁹⁷ (2) Westchester made annual certifications to HUD that it would AFFH;¹⁹⁸ (3) Westchester was aware that the County's housing was highly segregated by race when it prepared and submitted its AIs;¹⁹⁹ (4) Westchester's AIs, by focusing only on affordable housing and not racial discrimination and segregation, failed to analyze how the County's placement of affordable housing affected race-based segregation and, in fact, the County's production and placement of affordable housing actually increased such segregation;²⁰⁰ (5) the County never funded or assisted the production of affordable housing in any municipality that opposed such production and, in fact, at least sixteen Westchester municipalities had not created a single unit of affordable housing as of mid-2005;²⁰¹ and (6) Westchester never deemed any of its municipalities to be failing to AFFH nor to be impeding the County's ability to AFFH and, as such, did not withhold any funds or impose any sanctions on any participating municipalities for failure to AFFH.²⁰²

Based on these findings, the court held that Westchester's "certifications to HUD were false when they represented that the County would take appropriate actions to overcome the effects of race-based impediments to fair housing choice that its analysis had identified."²⁰³ As to the further

197 *Id.* at 559. The County submitted "payment vouchers to HUD to draw down the funds from a line of credit. Approximately 25 payment vouchers per month were approved for payment." *Id.* at 560. For more on the significance of these payment vouchers, see *infra* note 203.

198 *Westchester II*, 668 F. Supp. 2d at 552-53.

[T]he County submitted two Consolidated Plans (one covering the years 2000-2004 and one covering the years 2004-2008). It also submitted annual Action Plans (with express AFFH certifications). . . . The County included its 2000 and 2004 AIs in the Consolidated Plans it submitted to HUD, although the regulations did not require that the AIs themselves be submitted to HUD.

Id. at 553.

199 *Id.* at 559. "According to the 2000 census, over half of the municipalities in the Consortium had African-American populations of 3% or less." *Id.* The existence of racial concentration in parts of the County was well known to local officials, as was the fact that such concentration "may decrease if affordable housing opportunities were available in predominantly white areas and African-Americans chose to live or move to those areas." *Id.*; see also *supra* notes 176-77 and accompanying text.

200 *Westchester II*, 668 F. Supp. 2d at 559, 562.

201 See *id.* at 559. This was despite the fact that in 1993 the County had set a goal of creating 5000 new affordable housing units. *Id.* Furthermore, "[w]hen the County consider[ed] where to acquire land for affordable housing, it [sought] the concurrence of the municipality where the land is situated, and . . . the County [did] not acquire any such land without the municipality's agreement." *Id.*

202 *Id.*

203 *Id.* at 565. "Because the County never did the required analysis of race-based impediments, it never created a contemporaneous record of how its management of the HUD-acquired funds or any other 'appropriate' steps it could take would overcome the effects of

issue of whether the County *knowingly* submitted false certifications, the court held that the evidence was disputed and therefore denied summary judgment.²⁰⁴

At this stage, therefore, the ADC had established all but one of the elements necessary for a FCA case (i.e., the knowledge element).²⁰⁵ Based on the FCA's relief provisions, the ADC stood to recover \$40–\$50 million if it ultimately prevailed on this remaining issue,²⁰⁶ although it could not obtain injunctive or other equitable relief.²⁰⁷

B. Government Intervention and Settlement

A few months before the summary judgment ruling, Barack Obama was elected president and, upon taking office in January of 2009, appointed new senior officials at HUD and the Department of Justice. In August 2009, the Justice Department moved to intervene in the *Westchester* litigation.²⁰⁸ Immediately after this motion was granted, Justice on behalf of HUD settled with Westchester County in an order that required the County to pay damages and to develop and implement a housing policy that combats residential segregation.²⁰⁹ At the time, HUD described this order as a

those impediments." *Id.*

The court also held that the County's submission of individual monthly payment vouchers, *see supra* note 197, amounted to false claims as well, because the "requests for payments asked the United States to pay certain grant money—grant money that [sic] been expressly conditioned on the certification that the County would AFFH. As such, the requests for payment of those grants funds impliedly certified their compliance with the grant requirements, including the requirement to AFFH." *Id.* at 567.

²⁰⁴ *Id.* at 567–70. The County argued that the FCA also required proof that the defendant's falsehood damaged the United States, but the court rejected this argument. *Id.* at 568.

²⁰⁵ *See id.* at 568–71. According to the district court, the elements that the ADC needed to show to establish Westchester's liability under the FCA were that Westchester "(1) made a claim, (2) to the United States government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the federal treasury." *Id.* at 560 (citing *Mikes v. Straus*, 274 F.3d 687, 695 (2d Cir. 2001)). Because Westchester did not challenge the existence of Elements (1), (2), and (5), *id.*, and because the court granted the ADC's motion for summary judgment on Element (3), only Element (4) was in dispute after this decision. *Id.* at 570–71.

²⁰⁶ *Id.* at 559. The FCA provides for civil penalties and treble damages, *see* 31 U.S.C. § 3729(a) (2006), and when, as here, the Government chooses not to intervene in a *qui tam* action, a private plaintiff "stands to receive between 25% and 30% of the proceeds of the action." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1890 (2011) (citing 31 U.S.C. § 3730(d)(2)). If the Government does intervene, the private party bringing the action is entitled to a lesser percentage of the recovery. *See* 31 U.S.C. § 3730(d)(1).

²⁰⁷ *See* 31 U.S.C. § 3730(d)(2).

²⁰⁸ Memorandum of Law of the U.S. of Am. in Support of Its Application to Intervene, *United States ex rel. Anti-Discrimination Ctr. v. Westchester Cnty.*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (No. 06–2860), 2009 WL 2899691.

²⁰⁹ *See* Stipulation & Order of Settlement & Dismissal, *United States ex rel. Anti-Discrimination Ctr. v. Westchester Cnty.*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (No. 06–2860)

“landmark civil rights agreement” and “a historic civil rights settlement,”²¹⁰ and HUD Secretary Donovan announced that the agreement signaled “a new commitment by HUD” to ensuring equal housing opportunities.²¹¹

The *Westchester* settlement order requires the County within seven years to spend \$51.6 million to develop at least 750 affordable housing units, primarily in municipalities with overwhelmingly white populations.²¹² The order called for the district court to retain jurisdiction to oversee the progress of these activities and for the court to appoint a Government-selected Monitor to deal with the plan’s details.²¹³ In addition, Westchester agreed to pay \$7.5 million to the ADC, along with \$2.5 million for the ADC’s attorney’s fees.²¹⁴

C. Post-Settlement Phase

The post-settlement phase of this litigation has not gone smoothly.²¹⁵ The settlement order required the approval of Westchester’s Board of Legislators, which it gave on September 22, 2009,²¹⁶ but not before a number of members expressed opposition.²¹⁷ In the next county-wide

[hereinafter *Settlement Order*]; see also Press Release, U.S. DOJ, Westchester Cnty. Agrees to Develop Hundreds of Units of Fair and Affordable Hous. in Settlement of Fed. Lawsuit (Aug. 10, 2009), available at http://www.justice.gov/crt/about/hce/documents/westchester_pr.pdf (describing the settlement order).

210 See Press Release, HUD, HUD and Justice Announce Landmark Civil Rights Agreement in Westchester Cnty. (Aug. 10, 2009), available at http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2009/HUDNo.09-149.

211 *Id.*; see also *Housing Fairness Act of 2009: Hearing on H.R. 476 Before the Subcomm. on Hous. and Cmty. Opportunity of the H. Comm. on Fin. Servs.*, 111th Cong. 1 (2010) [hereinafter *Trasviña Statement*] (statement by HUD Assistant Sec’y for Fair Hous. and Equal Opportunity John D. Trasviña) (“HUD has not always fulfilled its obligation to ensure that our money is spent in ways that affirmatively further fair housing. In this new day, however, there is a Department-wide commitment to incorporate our mandate to affirmatively furthering fair housing into all of our work so that we can fulfill our shared goal of truly integrated and balanced living patterns.”).

212 See *Settlement Order*, *supra* note 209, paras. 2–3, 5–7, 39. The \$51.6 million figure is a combination of \$30 million that the County agreed to spend out of its own funds and \$21.6 million, which was the portion that HUD would reserve for the County out of the \$30 million Westchester agreed to pay to the United States to resolve the FCA claims. See *id.* paras. 2–3.

213 *Id.* paras. 9–14.

214 Press Release, *supra* note 210.

215 See, e.g., Daniel Denvir, *Segregation in the Land of Limousine Liberalism*, SALON July 1, 2011, http://www.salon.com/news/politics/war_room/2011/07/01/denvir_westchester_segregation.

216 See Monitor’s Report Regarding Implementation of the Stipulation & Order of Settlement & Dismissal for the Period of July 7, 2010 Through October 25, 2010 at 1, U.S. *ex rel.* Anti-Discrimination Ctr. v. Westchester Cnty., 668 F. Supp. 2d 548 (S.D.N.Y. 2010) (No. 06–2860) [hereinafter *Monitor’s Report*].

217 See Joseph Berger, *In Westchester, an Open Plea to Accept a Housing Accord*, N.Y. TIMES,

election, the County's chief executive was defeated by a candidate whose campaign strongly criticized the settlement and who, since taking office, has been publicly hostile to the order's requirements of locating subsidized housing in affluent white areas and of the County's having to take action against recalcitrant municipalities.²¹⁸

Meanwhile, the court-appointed Monitor ordered the County to make quarterly reports on a series of issues as part of the Implementation Plan called for in the consent order.²¹⁹ The County's first such report, filed in January 2010, was found unacceptable by the Monitor.²²⁰ A revised report submitted in March 2010 was also found deficient, with the Monitor concluding that it fell "short of a true plan to comply with either the [Consent Decree's] specific terms or its overarching goal of building a more integrated Westchester."²²¹ Some progress was perceived in the County's third iteration, filed in August 2010, but the Monitor still did not find this sufficient to accomplish the decree's terms and objectives.²²²

Both as part of the consent agreement and in response to the court's ruling that Westchester's prior AFFH certifications were false, the County was obligated to submit a new AI to HUD.²²³ Westchester submitted a proposed AI in July of 2010, after receiving a six-month extension from HUD from the December 2009 deadline called for in the settlement decree. HUD rejected this proposal in December 2010, finding the County's effort substantially "incomplete and unacceptable because it fails to link the information the County presents with a set of sufficiently responsive actions."²²⁴ HUD gave Westchester another four months to identify these actions, which included "overcoming exclusionary zoning practices; addressing location of affordable housing; promoting fair housing choice of voucher holders and other lower-income and minority households; increasing availability of affordable housing for families with

Aug. 17, 2009, <http://www.nytimes.com/2009/08/18/nyregion/18spano.html>.

218 See Op-Ed., *Astorino Shirks Housing Duty*, JOURNAL NEWS (Westchester, N.Y.), July 17, 2011, at 14 (responding to press conference held by new County Executive Rob Astorino), available at <http://www.lohud.com/article/20110717/OPINION/107170332/A-Journal-News-editorial-Astorino-shirks-housing-duty>.

219 See *Monitor's Report*, note 216, at 2.

220 See *id.* at 5.

221 See *id.* at 5; Monitor's Report Regarding Implementation of the Stipulation & Order of Settlement & Dismissal for the Period of February 11, 2010 Through July 6, 2010 at 10, *U.S. ex rel. Anti-Discrimination Ctr.*, 668 F. Supp. 2d 548 (No. 06-2860).

222 See *Monitor's Report*, *supra* note 216, at 6.

223 For Westchester's AI obligations pursuant to the consent agreement, which are independent of and supplemental to requirements imposed on the County as a CDBG recipient, see *Settlement Order*, *supra* note 209, at para. 32.

224 Letter from John D. Trasviña, Assistant Sec'y for HUD, to Kevin Plunkett, Deputy Cnty. Exec., Westchester Cnty. (Dec. 21, 2010), available at http://www.pprac.org/pdf/12-21-2010_HUD_Response_to_Westchester_AI.pdf.

children; and combating local opposition to affordable housing.”²²⁵ The County’s second proposed AI was submitted in April 2011, but HUD again found it unacceptable.²²⁶

In May 2011, the ADC, the original plaintiff in the litigation, filed a motion with the court to intervene and to enforce the settlement order, contending that the County’s delays and non-compliance required more aggressive action than the Monitor, HUD, and the Justice Department were producing.²²⁷ According to the ADC’s lawyer, instead of changing Westchester’s approach to AFFH during this period, the County was “continuing the same attitudes and policies that landed it in trouble in the first place.”²²⁸

In short, two years of post-settlement activity has shown that Westchester has no more appetite for locating affordable housing in its white areas than prior to this litigation. Furthermore, this continuing resistance has yielded little in the way effective enforcement of the law’s AFFH mandates from HUD and the Monitor beyond chastising words.

D. Westchester’s *Significance*

The *Westchester* litigation has the potential to energize enforcement of § 3608 and heighten compliance with its AFFH mandates. The fact that CDBG funds go to some 1200 jurisdictions – and many more receive such funds as members of a consortium like Westchester’s – means that a huge number of local governments are by law committed to affirmatively furthering fair housing. Furthermore, in the current economic climate, these entities can ill afford to put their “entitlement” grants at risk by the kind of behavior that Westchester engaged in. The overall dollar amounts involved are huge, particularly compared to the relatively small amount of federal funding that supports general fair housing enforcement.²²⁹

²²⁵ *Id.*

²²⁶ See Letter from John D. Trasviña, Assistant Sec’y for HUD to Kevin Plunkett, Deputy Cnty. Exec., Westchester Cnty. (May 13, 2011) (on file with author). Shortly thereafter, HUD also rejected Westchester’s “Action Plan” and its AFFH certification for FY 2011. See *id.* “The most recent rejection of the County’s AI occurred on July 13, 2011, when HUD rejected the County’s June 13 revised AI submission.” *United States ex rel. Anti-Discrimination Ctr. v. Westchester Cnty.*, No. 06 Civ. 2860, 2012 WL 13777, at *3 (S.D.N.Y. Jan. 4, 2012).

²²⁷ Motion to Intervene ¶ 4, *United States ex rel. Anti-Discrimination Ctr. v. Westchester County*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (No. 06-CV-2860); Motion to Enforce Consent Decree Pursuant to Consent Decree, ¶ 58 at ¶ 2, *Westchester II*, 668 F. Supp. 2d 548 (No. 06-2860). The motion was denied in early 2012. See *United States ex rel. Anti-Discrimination Ctr.*, No. 06 Civ. 2860, 2012 WL 13777.

²²⁸ See Press Release, Anti-Discrimination Center, Statement on Motions to Enforce and to Intervene (June 1, 2011), <http://www.antibiaslaw.com/westchester-false-claims-case/june-1-2011-adc-statement-motions-enforce-and-intervene>.

²²⁹ For example, since 1989, HUD has had a Fair Housing Initiatives Program (FHIP) that supports private fair housing enforcement efforts, but the total amount of HUD’s FHIP

Even if one were to assume that many CDBG grantees take their AFFH responsibilities seriously – a fact that in itself should encourage more integration²³⁰ – those, like Westchester, that have ignored the racial aspects of these responsibilities are now at least threatened with the potential of significant revenue loss.

This is not to say that such recalcitrant grantees all face the kind of litigation brought against Westchester. The specific facts of that case that supported a False Claims Act charge, particularly its reliance on FCA-required non-public information, may exist in only a few situations involving CDBG grantees.²³¹ However, while using the FCA to enforce § 3608's mandates may not often be possible,²³² these mandates have their own legal bases, which certainly may be enforced by HUD and, in some situations, by privately initiated complaints to HUD or otherwise.²³³ *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. And yet, for decades, this is precisely how many communities behaved. *Westchester* presumably reminded HUD that it has the power to withhold funds from jurisdictions whose actions negatively impact minority housing opportunities in white areas. But no one should suppose this will be easy. As *Westchester's* post-settlement phase demonstrates, heavily segregated entitlement jurisdictions are unlikely to make significant changes without a fight.²³⁴ And they are particularly

grants has averaged only about \$13 million dollars per year. See KENNETH TEMKIN ET AL., STUDY OF THE FAIR HOUSING INITIATIVES PROGRAM at x (2011), available at http://www.huduser.org/Publications/pdf/FHIP_2011.pdf. Furthermore, federal enforcement of fair housing “has been inconsistent and soft” in part because “HUD’s Office of Fair Housing and Equal Opportunity is chronically understaffed, under-funded, and marginalized within the HUD structure.” Breymaier, *supra* note 62, at 247; see also NATIONAL FAIR HOUSING REPORT, *supra* note 170, at 17 (“HUD has chronically understaffed its fair housing enforcement, and many staff are poorly trained and directed about how to accomplish fair housing enforcement.”).

230 See *infra* notes 274–88 and accompanying text.

231 See *supra* notes 186–89 and accompanying text; see also Termine, *supra* note 171, at 1421–23.

232 But see E-mail from Michael Allen, Partner, Relman, Dane & Colfax, PLLC, to the author (Aug. 9, 2011, 11:56 EST) (on file with author) (stating that Mr. Allen, who was one of the ADC’s lawyers in the *Westchester* case, is currently counsel in three other such FCA-AFFH cases, all of which are presently under seal, see *supra* note 184 and accompanying text, and thus cannot now be made public).

233 See *supra* notes 142–66 and accompanying text; *infra* note 252–65 and accompanying text.

234 See Schuck, *supra* note 177, at 366 (concluding, based on analysis of prior housing desegregation cases, that “politically mobilized communities strongly oppose the kinds of

unlikely to change unless HUD rouses itself and becomes willing to use more than rhetorical flourishes as part of its enforcement arsenal.²³⁵

IV. POST-*WESTCHESTER* DEVELOPMENTS

A. *Privately Initiated Litigation: Court Suits and Complaints to HUD*

As noted in the previous section, the potential represented by the *Westchester* precedent is huge in terms of the large number of local communities whose participation in the CDBG program require AFFH actions and the amount of federal dollars at stake. This remains true even though the current Congress has substantially cut CDBG appropriations,²³⁶ for even a lower funding level in the \$3 billion per year area would provide much needed revenue for local governments whose finances are stressed in these difficult economic times.

As important as the leverage provided by the CDBG program continues to be, however, the *Westchester* case's reliance on the False Claims Acts means that its model may be of only limited value as a technique for enforcing § 3608.²³⁷ In 2010, Congress considered, but did not pass, a proposed FHA amendment that would have provided for private enforcement of § 3608's mandates.²³⁸ Without such an amendment, court enforcement of these mandates outside the context of a FCA suit is difficult,²³⁹ and such actions have not been particularly successful in the post-*Westchester* era.

For example, in *Gallagher v. Magner*,²⁴⁰ the Eighth Circuit, in considering claims by low-income landlords that the City of St. Paul, Minnesota,

diversity the courts have mandated").

235 Termine, *supra* note 171, at 1392 ("HUD has not 'developed the enforcement tools or the political will to take on the powerful constituent groups, like mayors, governors and county executives who are the primary recipients of CDBG' funds." (quoting Nat'l Comm'n on Fair Hous. & Equal Opportunity, Pub. Hearing at 2 (Sept. 22, 2008) (testimony of Michael Allen, Partner, Relman, Dane & Colfax, PLLC))).

236 See HUD, FY2012 BUDGET SUMMARY 12, 35 (2011) (noting the following Community Development Block Grant budgets per fiscal year: FY 2007 \$3.772 billion; FY 2008 \$3.866 billion; FY 2009 \$3.900 billion; FY 2010 \$4.450 billion; FY 2011 \$3.380 billion).

237 See *supra* notes 186–89 and accompanying text.

238 Housing Opportunities Made Equal (HOME) Act, H.R. 6500, 111th Cong. § 3(f) (2010) (proposing to amend the FHA's definition of a discriminatory housing practice to include "a failure to comply with [§ 3608(e)(5)] or a regulation made to carry out [§ 3608(e)(5)]"). For an alternative way of amending the FHA to provide for private enforcement of § 3608 by changing this provision's language to justify a private right of action under 42 U.S.C. § 1983, see Collins, *supra* note 115, at 2183–84.

239 For a discussion of these techniques, see *supra* notes 82–83, 104, 112–13, 115–16 and accompanying text.

240 *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010), *reh'g and reh'g en banc denied*, 636 F.3d 380 (8th Cir. 2010), *cert. granted*, 132 S. Ct. 548 (2011).

was enforcing its building code more aggressively against them because their tenants were predominantly minority, rejected most of the plaintiffs' claims, including one based on § 3608.²⁴¹ *Gallagher* held that the § 3608 claim was subsumed within plaintiffs' other FHA claims, concluding that "the City's duty to 'affirmatively further fair housing' has no independent significance" apart from plaintiffs' other FHA claims.²⁴² Other recent cases alleging FHA violations by municipalities also succeeded or failed based on the FHA's other prohibitions, often without even mentioning § 3608.²⁴³

Other cases that did include § 3608 claims have, like *Gallagher*, also not relied directly on that provision for whatever success they produced. One noteworthy example, *Greater New Orleans Fair Hous. Action Ctr. v. HUD*,²⁴⁴ involved HUD funds designed to help parts of Louisiana recover from Hurricane Katrina.²⁴⁵ Here, two fair housing groups and five individuals

²⁴¹ See *id.* at 831–33, 838–43. The court did uphold one of the plaintiffs' claims based on the FHA's § 3604(a) that alleged the defendant's practices had a disparate impact on minorities. See *id.* at 833–38.

²⁴² *Id.* at 839.

²⁴³ See, e.g., *Mt. Holly Citizens in Action, Inc. v. Twp. of Mt. Holly*, 658 F.3d 375, 381–87 (3d. Cir. 2011) (upholding minority residents' impact-based claim that township's condemnation of their housing complex violated the FHA's § 3604(a)); *NAACP v. City of Kyle, Tex.*, 626 F.3d 233 (5th Cir. 2010), *aff'g* No. A-05-CA-979-LY, 2009 WL 6574497 (E.D. Tex. Mar. 20, 2009) (rejecting on standing grounds claim based on the FHA's § 3604(a) that city's zoning changes had a disparate impact on minorities); *Rivera v. Inc. Vill. of Farmingdale*, 2011 WL 1260209 (E.D.N.Y. Mar. 30, 2011) (finding sufficient evidence of intentional and impact-based discrimination to deny defendants' summary judgment motion in § 3604 claim alleging that Hispanic residents of low-income building were targeted by municipal redevelopment program); *S. Middlesex Opportunity Council, Inc. v. Town of Framingham*, 752 F. Supp. 2d 85, 97–103 (D. Mass. 2010) (upholding claim of intentional discrimination by operator of group homes for disabled people based on the FHA's § 3604(f)(1)); *Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 749 F. Supp. 2d 486, 498–502 (N.D. Tex. 2010) (holding that undisputed evidence established discriminatory impact and inference of discriminatory intent by Texas agency's limiting its approval of low-income housing projects in Dallas to minority neighborhoods in violation of § 3604(a) and § 3605(a)); *United States v. Town of Garner, N.C.*, 720 F. Supp. 2d 721 (E.D.N.C. 2010) (upholding claims on behalf of group home based on the FHA's "reasonable accommodation" provision in § 3604(f)(3)(B)); *Williams v. City of Antioch, No. C 08-02301*, 2010 WL 3632197 (N.D. Cal. Sept. 2, 2010) (certifying class action in FHA-based case alleging city's harassment of black Section 8 tenants).

²⁴⁴ *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev.*, 639 F.3d 1078 (D.C. Cir. 2011) [hereinafter *Greater New Orleans Fair Hous. Action Ctr. II*].

²⁴⁵ For more on cases involving Katrina-related HUD funds and § 3608, see *infra* notes 254–56 and accompanying text. Such funds were also involved in Mississippi State Conference NAACP v. United States Department of Housing and Urban Development, 677 F. Supp. 2d 311 (D.D.C. 2010), *dismissed pending appeal*, 2010 WL 4629468 (D.C. Cir. Nov. 16, 2010), where the NAACP and other private parties accused HUD of violating the CDBG statute, but not § 3608, in allowing the State of Mississippi to improperly divert some \$570 million in CDBG funds away from low-income housing to expand commercial areas of Gulfport. The district court dismissed the case on standing grounds, *id.* at 313–14, and while the plaintiffs' appeal was pending, HUD and the state agreed to a settlement. See *Recent Settlements*, FAIR HOUSING–FAIR LENDING, Dec. 1, 2010, at 11 (describing \$132 million settlement designed to

sued HUD and the state, alleging that Louisiana's formula for distributing its special Katrina-related CDBG funds negatively impacted minority homeowners in New Orleans. The plaintiffs initially claimed that this violated the FHA's § 3604(a), § 3605(a), and § 3608,²⁴⁶ but only their § 3604(a) claim survived.²⁴⁷ The district court entered a limited preliminary injunction in favor of the plaintiffs,²⁴⁸ but the D.C. Circuit reversed, holding that they had failed to prove a negative racial impact in violation of § 3604(a).²⁴⁹ The parties then reached a settlement in mid-2011.²⁵⁰

This case, though impressive in terms of the ultimate relief obtained and the possible value of a lurking § 3608 claim, makes clear that the key to current enforcement of § 3608's mandates lies with HUD, either through action prompted by a lawsuit, a privately initiated administrative complaint to HUD under the FHA,²⁵¹ or on HUD's own initiative. With respect to administrative complaints, fourteen privately initiated § 3608-based claims were pending as of April 2011.²⁵² Some of the more noteworthy included²⁵³:

assist relocation of hurricane-displaced families).

246 *Greater New Orleans Fair Hous. Action Ctr. II*, 639 F.3d at 1081; *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev.*, 723 F. Supp. 2d 1, 4 n.6 (D.D.C. 2010) [hereinafter *Greater New Orleans Fair Hous. Action Ctr. I*] (listing, in trial court's initial decision, these three bases for plaintiffs' claims).

247 *See Greater New Orleans Fair Hous. Action Ctr. I*, 723 F. Supp. 2d 21–24 (dismissing claims based on § 3605(a) and § 3608 after upholding § 3604(a) claim); *see also Greater New Orleans Fair Hous. Action Ctr. II*, 639 F.3d at 1079 (citing only § 3604(a)).

248 *Greater New Orleans Fair Hous. Action Ctr. I*, 723 F. Supp. 2d 11 (D.D.C. 2010), *rev'd*, 639 F.3d 1078 (D.C. Cir. 2011).

249 *Greater New Orleans Fair Hous. Action Ctr. II*, 639 F.3d at 1085–89. Only the state appealed, while HUD, though a defendant and subject to the district court's injunction, took no part in the appeal. *Id.* at 1080.

250 Michael A. Fletcher, *HUD to Pay \$62 Million to La. Homeowners to Settle Road Home Lawsuit*, WASH. POST, July 6, 2011, http://www.washingtonpost.com/business/economy/hud-to-pay-62-million-to-la-homeowners-to-settle-road-home-lawsuit/2011/07/06/gIQAts-FN1H_story.html (reporting settlement in which HUD would pay “as much as \$62 million to 1,300 Louisiana homeowners” on top of “changes the Obama administration and state of Louisiana made in the program nearly two years ago that allowed more than 13,300 low- and moderate-income homeowners to receive \$470 million in grants to supplement the initial rewards they received from the rebuilding program”)

251 *See supra* note 119 (describing the FHA's provision for administrative complaints to HUD).

252 E-mail from Sara Pratt, Deputy Assistant Sec'y for Enforcement and Programs, Office of Fair Hous. and Equal Opportunity, HUD, to author (Sept. 27, 2011, 9:08 A.M.) (on file with author).

253 In addition to the cases described in the text, other complaints filed with HUD include one against Jefferson Parish, Louisiana, and one against Atlanta, Georgia. E-mail from Michael Allen, Partner, Relman, Dane & Colfax, PLLC, to the author (Aug. 9, 2011, 11:56 EST) (on file with author); *see also* Jennifer Medina, *Subsidies and Suspicion: Seeking a Better Life, California Renters Encounter Resistance*, N.Y. TIMES, Aug. 11, 2011, at A12 (describing private lawsuit accusing the California cities of Lancaster and Palmdale of harassing Section 8 tenants on racial grounds and reporting that HUD “notified Lancaster last month that it

In Texas in late 2009, two private fair housing groups filed a complaint challenging the state's plan for distributing some \$1.7 billion in Katrina-related CDBG funds, alleging that Texas engaged in race and national origin discrimination in violation of the FHA's § 3604(a) and § 3604(b) and also failed to AFFH by not analyzing the fair housing impact of the state's plan for use of these funds.²⁵⁴ More particularly, the state's allocating HUD funds to certain east Texas jurisdictions with a history of resistance to racial integration in housing allegedly was resulting in discrimination and increased segregation. This case was resolved in May of 2010 in a settlement agreement that called for HUD to release these CDBG funds in exchange for various concessions by Texas, including that the state would re-allocate the funds to affirmatively further fair housing and would produce an updated AI for public comment and approval.²⁵⁵

HUD's Katrina-related grants were also involved in a 2010 complaint filed against the State of Louisiana based on discriminatory actions by one of that state's subgrantees, the virtually all-white St. Bernard Parish, in blocking affordable housing. On March 17, 2011, HUD threatened to cut funds to the state unless it made St. Bernard comply with the FHA, noting that the Parish government had acted to keep out African-Americans by restricting rental housing in defiance of numerous court rulings finding civil rights violations and the "State remains responsible to assure that St. Bernard Parish complies" with CDBG requirements.²⁵⁶

In Illinois, the City of Danville was accused of racial and disability discrimination in the operation of its public housing and housing voucher programs in violation of the FHA's § 3604(a) and § 3604(b) and also of failing to AFFH by repeatedly certifying it had conducted an AI when it had not done so and was in fact promoting policies that had the effect of discriminating and perpetuating segregation.²⁵⁷ In a separate action, the City of Joliet, having been embroiled in long-standing litigation accusing it of using its eminent domain power to destroy a HUD-subsidized, predominantly black housing complex for racial reasons, was the target of a complaint to HUD, which resulted in HUD's

would investigate the accusations" and the city "could lose hundreds of thousands of dollars in federal grants").

254 *Texas Will Improve Compliance with Duty to Affirmatively Further Fair Housing*, FAIR HOUSING–FAIR LENDING, June 1, 2010, at 3 (reporting settlement in *Texas Low–Income Housing Information Service v. State of Texas*, No. 06–10–0410–8 (HUD May 25, 2010), <ftp://ftp.tdha.state.tx.us/pub/dr-files/AppendixA.pdf>, which provided for Texas to update its AI and document how its municipal subgrantees were meeting their AFFH obligations, use \$152 million for low- and moderate-income housing, set aside \$100 million to rebuild subsidized housing in three counties, and provide up to \$5 million for relocation of tenants with rental subsidies).

255 *See id.*; Press Release, U.S. Dep't of Hous. & Urban Dev., HUD Applauds Revised \$1.7 Billion Texas Disaster Plan (May 25, 2010) (providing a link to the settlement agreement and describing the "extensive relief" called for therein), *available at* http://portal.hud.gov:80/hudportal/HUD?src=/press/press_releases_media_advisories/2010/HUDNo.10-106.

256 *See* Letter from Mercedes M. Márquez, HUD Assistant Sec'y for Cmty. Planning & Dev., to Paul W. Rainwater, Comm'r of Admin., La. Office of Cmty. Dev. (Mar. 17, 2011) (on file with author); *see also* Complaint, Greater New Orleans Fair Hous. Action Ctr. v. Louisiana, No. 061012618 (HUD Jan. 28, 2011) (private complaint filed with HUD) (on file with author). In early 2011, HUD initiated its own FHA complaint against St. Bernard Parish. *See* Complaint, U.S. Dep't of Hous. & Urban Dev. v. St. Bernard Parish, No. 00–11–0024–8 (HUD Jan. 28, 2011) (on file with author).

257 *Recent Complaints*, FAIR HOUSING–FAIR LENDING, Dec. 1, 2010, at 11 (reporting the filing of *Chambers v. City of Danville*).

threat to withhold the City's CDBG funds.²⁵⁸

In Wisconsin, a private fair housing organization alleged in a 2011 complaint that Waukesha County, which covers Milwaukee's western suburbs and receives some \$2.5 million in CDBG and other HUD funds, failed to comply with its AFFH duties by allowing its constituent communities to use their land use powers to block affordable housing on racial grounds.²⁵⁹

In Delaware, Sussex County was accused by a private organization in late 2010 of blocking a proposed housing development for low- and moderate-income people based on race and national origin discrimination and of disregarding its AFFH responsibilities.²⁶⁰

In California, a fair housing organization alleged that Marin County failed to promote access to affordable housing for minorities and persons with disabilities as part of its general AFFH responsibilities. HUD investigated and offered the County a Voluntary Compliance Agreement in late 2010 that resulted in the County's undertaking to produce a new AI with public input.²⁶¹

These cases represent an unprecedented effort to use § 3608 as a way of enforcing the FHA's basic substantive provisions against local governments and encouraging these governments to take a more aggressive role in promoting residential integration. Still, such individual cases are, by definition, limited to a few specific geographic areas. For § 3608-based efforts to have a nationwide impact requires more general action by HUD and by the CDBG grantees themselves, topics that are dealt with, respectively, in the next two sections.

B. HUD-Initiated Actions

²⁵⁸ Press Release, U.S. Dep't of Justice, United States Sues City of Joliet to Preserve Affordable Housing for Low-Income Residents, Mostly African-American (Aug. 4, 2011) (describing HUD-referred suit alleging that Joliet's attempted condemnation of this complex violates the FHA), *available at* http://www.justice.gov/usao/iln/pr/chicago/2011/pr0804_02.pdf. Some of the background litigation is reflected in *New West, L.P. v. City of Joliet*, 491 F.3d 717 (7th Cir. 2007), and *City of Joliet v. New West, L.P.*, 562 F.3d 830 (7th Cir. 2009).

²⁵⁹ *Recent Filings*, FAIR HOUSING—FAIR LENDING, May 1, 2011, at 9 (reporting on *Metropolitan Milwaukee Fair Housing Council v. Waukesha County*); *see also* MSP Real Estate, Inc. v. City of New Berlin, Nos. 11-C-281, 11-C-608, 2011 WL 3047681 (E.D. Wis. 2011) (alleging that defendant, a Waukesha County suburb of Milwaukee, blocked a proposed affordable housing development based on racial hostility in violation of the FHA's § 3604(a) and § 3617); *see also* Complaint, United States v. City of New Berlin, No. 2:11-CV-00608 (E.D. Wis. June 23, 2011), *available at* <http://www.justice.gov/crt/about/hce/documents/newberlincomp.pdf>; Press Release, U.S. Dep't of Justice, Justice Department Files Lawsuit Against City of New Berlin, Wisconsin, for Blocking Affordable Housing (June 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/June/11-crt-831.html>.

²⁶⁰ *Recent Filings*, FAIR HOUSING—FAIR LENDING, Jan. 1, 2011, at 9 (reporting on *Diamond State Community Land Trust of Dover v. Sussex County*).

²⁶¹ *Id.*; *see also* Aaron Glantz, *Marin Officials Tepid on Diversity Plan*, BAY AREA CITIZEN, Mar. 29, 2011 (describing the settlement and post-settlement events), <http://www.bayciti-zen.org/housing/story/marin-officials-tepid-diversity-plan/2/>. Marin's draft AI is available at www.marincdbg.com.

Whether *Westchester's* promise is fulfilled depends largely on how HUD responds to this new environment, both with respect to its duty to require individual grantees to more effectively meet their AFFH obligations and in its establishing general standards that are better designed to result in more compliance with these obligations than has been the norm in the past four decades. On these matters, in the time since the *Westchester* settlement, HUD's record has been mixed.

1. Individual Enforcement.—Besides HUD's roles as a co-defendant in § 3608 cases and an investigator/prosecutor of the § 3608-based administrative claims brought to it,²⁶² HUD is responsible for reviewing the more than 1200 CDBG grantees' certifications that they will AFFH, which includes their AIs. For HUD to take this work seriously – as it seems not to have done for much of the past two decades during which AIs have been a crucial part of the AFFH certification process²⁶³ – will require a much greater commitment and effort.

HUD's current strategy for doing this job is to enhance its staff size and training while conducting targeted reviews of grantees' AFFH-related submissions.²⁶⁴ The results of this effort are yet to be known.

2. New Regulations and Guidance.—In 2009, HUD began a review of its existing AFFH regulations. In January 2010, a senior HUD official told Congress that “the department was working on a proposed regulation to enhance AFFH compliance.”²⁶⁵ A tentative time frame for proposing this rule was given as December of 2010,²⁶⁶ but HUD has not yet produced such a rule.²⁶⁷

Features of a new regulation would presumably include “enhancements

²⁶² See *supra* Part IV.A.

²⁶³ See *supra* Part II.C.

²⁶⁴ See GAO REPORT, *supra* note 134, at 46–47 (publishing Letter from John Trasviña, Assistant Sec'y for Fair Hous. & Equal Opportunity, U.S. Dep't of Hous. & Urban Dev., to Orice Williams, Fin. Mkts. & Cmty. Invs. Dir., Gov't Accounting Office (Sept. 3, 2010)) (noting HUD's staff enhancement and training regarding AFFH and that HUD in FY2010 “has reviewed the AIs of *more than 300 recipient jurisdictions*” (emphasis in original)); see also E-mail from Sara Pratt, Deputy Assistant Sec'y for Enforcement & Programs, Office of Fair Hous. & Equal Opportunity, U.S. Dep't of Hous. & Urban Dev., to author (January 18, 2011, 10:04 EST) (noting strategy of conducting targeted AFFH reviews) (on file with author).

²⁶⁵ GAO REPORT, *supra* note 134, at 29–30 (quoting *Trasviña Statement, supra* note 211).

²⁶⁶ *Id.* at 30.

²⁶⁷ Office of Info. & Regulatory Affairs, *Affirmatively Furthering Fair Housing*, REGINFO.GOV (Spring 2011), <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201104&RIN=2501-AD33> (listing a proposed AFFH regulation as having an aspirational target date of December 2011, which means it is not likely to be published until sometime in 2012).

to the guidance provided to grantees on preparing AIs and improvements in [HUD]'s oversight and enforcement approaches.”²⁶⁸ A new regulation might also include “standards for grantees to follow in updating their AIs and the format that they should follow in preparing the [necessary] documents . . . [and] require, at a minimum, that grantees submit their AIs to the department on a routine basis to help ensure grantees compliance with requirements and guidance pertaining to these documents.”²⁶⁹ While HUD has cited its own staffing limitations as a barrier to better AFFH compliance,²⁷⁰ a number of regulatory improvements could be made without “additional staff resources[, such as] requiring grantees to submit their AIs for review, without necessarily approving them, [which] would allow [HUD] officials to perform a variety of basic tasks to better ensure their quality.”²⁷¹

As the GAO noted in September 2010: “In the absence of such regulatory requirements, the usefulness of requiring AIs as a tool to affirmatively further fair housing is diminished.”²⁷² Now, well over a year later with still no proposed rule, HUD’s record in this phase of the post-*Westchester* era is not encouraging.

C. Grantees’ Positive Responses; What a “Good” AI Would Include

The response of the hundreds of CDBG grantees to the AFFH requirements set forth by HUD, first in 1988 and then again in the mid-1990s,²⁷³ has ranged from indifference bordering on hostility (as illustrated by Westchester County) to legitimate, even creative, efforts to meet

²⁶⁸ GAO REPORT, *supra* note 134, at 30.

²⁶⁹ *Id.* at 34; *see also* Collins, *supra* note 115, at 2181 (“Fair housing advocates have actively submitted recommendations for reforming the current regulations, [] which generally focus on strengthening the definition of affirmatively further fair housing, [] increasing grantees’ accountability, [] and enabling public participation in grantees’ formulation of plans and in maintaining compliance.”).

²⁷⁰ *See* GAO REPORT, *supra* note 134, at 30, 46–47.

²⁷¹ *Id.* at 30–31.

These tasks could include verifying whether AIs (1) have been prepared as required, (2) updated in accordance with HUD guidance, (3) include all elements suggested in the 1996 fair housing guidance, and (4) are consistent with AFFH discussions in other key documents.

Id. at 31. There is a downside to having HUD take on the responsibility of reviewing and approving every AI. “That is logistically impossible, and would result in a ‘low bar’ for compliance. If HUD audited a percentage of AIs (like the IRS audits a percentage of tax returns), I think state and municipal grantees would take the matter much more seriously.” E-mail from Michael Allen, Partner, Relman, Dane & Colfax, PLLC, to author (Sept. 2, 2011, 10:44 EST) (discussing his perspective as one of the plaintiff’s lawyers in the *Westchester* litigation) (on file with author).

²⁷² GAO REPORT, *supra* note 134, at 34.

²⁷³ *See supra* notes 125–28 and accompanying text (1988); *supra* Part III.C.2 (mid-1990s).

these requirements.²⁷⁴ Grantees in the latter category have, over time, produced some serious and thoughtful AIs, updated them regularly, and, as also required by HUD's regulations, taken actions to overcome the impediments to fair housing identified in their AIs and kept records of these efforts.²⁷⁵ As a result, there is now a substantial body of materials that can provide a general blueprint for grantees' proper AFFH performance, which should prove important both in HUD's evaluation of an individual grantee's performance (as mentioned in the previous section) and for once-reluctant grantees that now want to do better, either out of a genuine desire to obey the law or as a result of having been "encouraged" along this path through litigation or the threat of lost funding.

The experiences of such grantees yield a sense of what a CDBG entitlement community should do to conduct a proper AI as part of its duty to AFFH. A proper AI would provide data and analysis with respect to at least four elements in the relevant geographic area: (1) the degree of residential segregation; (2) the location of affordable housing and the availability of Section 8 and other HUD-assisted programs for lower income persons; (3) the degree and nature of FHA-prohibited discrimination; and (4) plans for addressing the impediments to fair housing shown by the first three elements.²⁷⁶ Furthermore, the process used to produce an

274 According to AFFH-advocates, communities that have done a good job in conducting their AIs including Toledo and Bowling Green, Ohio, see Toledo Fair Hous. Ctr., *Analysis of Impediments*, FAIR HOUS. CENTER, (on file with author), and Naperville, Illinois, and Murfreesboro, Tennessee, see E-mail from Michael Allen, Partner, Relman, Dane & Colfax, PLLC, to author (Mar. 31, 2011, 10:19 A.M.) (on file with author).

Other jurisdictions that are just now becoming aware of the importance of conducting a good AI and whose experience is worth noting include Marin County, California, see *supra* note 261, and New Orleans, Louisiana, see GREATER NEW ORLEANS FAIR HOUS. ACTION CTR. & LAWYERS' COMM'N FOR CIVIL RIGHTS UNDER LAW, STRATEGIES TO AFFIRMATIVELY FURTHER FAIR HOUSING (2011), available at http://www.lawyerscommittee.org/admin/community_development/documents/files/4-28-11_Strategies_to_Affirmatively_Further_Fair_Housing.pdf.

275 See *supra* note 151 and accompanying text.

276 All of this should be done not only with a focus on race, as the district court in *Westchester* held, see *supra* notes 193–94 and accompanying text, but also, as HUD's regulations require, with respect to *all* of the FHA's prohibited bases of discrimination, i.e., race, color, national origin, religion, sex, familial status, and handicap (disability). See *supra* note 162 and accompanying text.

For example, various types of disability discrimination might be identified in AIs (e.g., multifamily residences constructed without FHA-mandated accessibility features and municipal restrictions on group homes for people with disabilities), see generally SCHWEMM, *supra* note 4, at §§ 11D:5, 11D:9, particularly since local governments can play a helpful role in curbing such discrimination. See D.C. ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, AFFIRMATIVELY FURTHERING FAIR HOUSING IN THE DISTRICT OF COLUMBIA: BRIEFING REPORT (2011) [hereinafter DC-AFFH REPORT] (calling for the District of Columbia to improve its AFFH program by, *inter alia*, conducting "accessibility surveys of new multifamily housing covered by the Fair Housing Act"), available at http://www.usccr.gov/pubs/07-13-11_DC-SAC.pdf.

AI (e.g., providing for appropriate opportunities for public engagement) is important.

With respect to the first element (segregation), the data available from the most recent census should be provided, broken down by individual neighborhood, census tract, or zip code within the grantee's jurisdiction, and compared with similar prior data to determine whether racial concentration is growing or diminishing. The resulting measures of segregation – or, put more positively, diversity – should be compared to appropriate benchmarks, such as the overall racial mix of the grantee's entire metropolitan statistical area ("MSA"). To the extent that a particular community's segregation measure is worse than the overall MSA's, the plans called for in Element (4) should include specific proposals for improving this measure, with specific goals and time frames so that the effectiveness of these proposals can be assessed periodically (i.e., at least every two years).

A similar analysis should be provided with respect to Element 2 (the location of affordable housing and available housing programs). The information here should show the racial make-up of the beneficiaries of such programs in the grantee's area and where these beneficiaries currently live, along with an analysis of how this information relates to the segregation data provided in Element (1).²⁷⁷ To the extent this element shows that affordable housing or other subsidized housing opportunities are disproportionately located in minority census tracts within the grantee's jurisdiction, Element (4) should include specific plans, again with timetables, for locating a minimum portion (e.g., 75%) of such new units and opportunities in non-minority areas.

Element 3 requires a method for determining the degree and types of unlawful housing discrimination in the area. One basis for this would be statistics from HUD, state, and/or local fair housing agencies on the number of FHA complaints received. Another technique, already adopted in some grantees' AIs, would be to require periodic testing programs conducted by a private fair housing group or other proper subcontractor.²⁷⁸

Obviously, and perhaps most importantly, Element (3) should identify not only discrimination carried out by private actors, but also that alleged to have been engaged in by the grantee itself and/or other local governments within the grantee's consortium. By way of response, the Element (4)

²⁷⁷ See DC-AFFH REPORT, *supra* note 276, at 9 (calling for the District of Columbia to improve its AFFH program by, *inter alia*, providing various additional information and services to Section 8 voucher holders).

²⁷⁸ See *id.* (calling for the District of Columbia to improve its AFFH program by, *inter alia*, undertaking "routine testing to identify discrimination in rental, sales, homeowners' insurance, steering . . . , and access to Section 8").

The discrimination identified here might include that relating to home financing as well as sales and rentals. See *id.* (calling for the District of Columbia to improve its AFFH program by, *inter alia*, increasing "oversight of lenders by examining location of branches and services offered and . . . examin[ing] lenders' portfolios for evidence of discrimination").

plans should include specific ways that the grantee intends to modify its problematic land–use and other policies, along with a more general determination of how discrimination complaints can be better dealt with, either through a state or local fair housing agency or a private fair housing organization. These agencies need to be fully funded and well functioning, so that their investigations and remedial efforts are prompt and effective.

Fair housing activities need to include educational as well as enforcement efforts, with the former ranging from simply placing fair housing messages in public areas like buses and shelters to providing materials and conducting meetings that explain the benefits of a diverse society and integrated neighborhoods.²⁷⁹ Another important educational goal that might help in dispersing affordable housing would be to change the negative, stereotyped image of this housing, so that it is more positively viewed as being for lower income workers, such as:

teachers, firemen, and people who work at the local grocery store. In essence, they are part of the community. . . . “You have to plant the seeds of productive, viable, American citizens paying taxes. That gives them an opportunity, instead of saying, ‘Oh no, we can’t do that because it’s going to bring in city folk who don’t have the income or who don’t have the same values that I believe I have.’”²⁸⁰

As for Element (4), the plans, in addition to those items already identified, should include for each grantee like Westchester County with subgrantees that the latter be required to submit yearly plans that are consistent with the grantee’s AI and address fair housing issues at the subgrantees’ level.²⁸¹

The process by which all of this is done, particularly providing for input from various constituencies, is also important. Ever since 1995, HUD’s regulations have provided detailed requirements for citizen participation in the creation of a grantee’s Consolidated Plan,²⁸² which is the overriding document that includes the grantee’s AFFH certification.²⁸³ In describing

²⁷⁹ See Breymaier, *supra* note 62, at 251 (calling for such activities).

²⁸⁰ Kelly L. Patterson & Robert Mark Silverman, *How Local Public Administrators, Non-profit Providers, and Elected Officials Perceive Impediments to Fair Housing in the Suburbs: An Analysis of Erie County, New York*, 21 HOUSING POL’Y DEBATE 165, 179–80 (2011) (quoting focus group member).

²⁸¹ E–mail from Rob Breymaier, Exec. Dir., Oak Park Reg’l Hous. Ctr. to author (Oct. 20, 2010, 11:03 CST) (on file with author).

²⁸² See 24 C.F.R. § 91.100 (2011) (requiring each entitlement jurisdiction to “consult with other public and private agencies that provide assisted housing, health services, and social and fair housing services” in preparing its consolidated plan); 24 C.F.R. § 91.105 (2011) (requiring each such jurisdiction “to adopt a citizen participation plan that sets forth the jurisdiction’s policies and procedures for citizen participation” that must “provide for and encourage citizens to participate in the development of the consolidated plan” and that “affords citizens, public agencies, and other interested parties a reasonable opportunity to examine [the plan’s] contents and to submit comments”); see also 24 C.F.R. §§ 91.110, 91.115 (2011) (same for state grantees); 24 C.F.R. § 91.401 (2011) (same for consortia grantees).

²⁸³ See *supra* notes 156 and accompanying text.

the AI process, HUD's *Fair Housing Planning Guide* has made clear since 1996 that this process should include a "continuous exchange of concerns, ideas, analysis, and evaluation of results" from "all elements of the community" and that this should be accomplished "through focus groups, an advisory commission, town meetings, or other effective means."²⁸⁴ Among other things, this process should result in the involvement of various types of people and groups in the creation of their jurisdiction's AI, including fair housing advocates and grassroots community groups.²⁸⁵ Not the least important of such groups is middle-class whites.²⁸⁶

Much of this has been known, and indeed called for, since 1996 when HUD first published its *Fair Housing Planning Guide* to help CDBG grantees meet their AFFH obligations.²⁸⁷ And to those who resist it as "social engineering," HUD Secretary Donovan's response is noteworthy:

[F]ighting segregation [isn't] social engineering. Segregation was created *by* social engineering . . . [such as] by zoning codes that shut low- and moderate-income families out of certain markets[;] by *funding* decisions that steer the development of affordable housing away from neighborhoods of high opportunity[; and] by federal dollars being

284 1996 HUD GUIDE, *supra* note 155, at 2–12.

285 See Breymaier, *supra* note 62, at 248 ("[I]nstitutional structures" found to be crucial in most stable, diverse communities "are community organizations specifically developed to promote the community as racially and ethnically diverse" (quoting Philip Nyden et al., *Chapter 1: Neighborhood Racial and Ethnic Diversity in U.S. Cities*, 4 CITYSCAPE: J. POL'Y. DEV. & RES., no. 2, 1998, at 1, 9, available at <http://www.huduser.org/Periodicals/CITYSCAPE/VOL4NUM2/ch1.pdf>); see also Peter W. Salsich, Jr., *Grassroots Consensus Building and Collaborative Planning*, 3 WASH. U. J.L. & POL'Y. 709, 738 (2000) ("[W]e will continue to win [FHA] litigation battles, but still risk losing the war[, unless we] expand our campaign to include more of the traditional methods of winning public opinion." (quoting Michael Allen, *The Limits of the Law*, in THE NIMBY REP. 6 (1999))).

286 As one integration advocate has pointed out:

To me, a tremendous benefit of affirmative furthering is that it can be framed in a way that aspires to American ideals and promotes a sense of working together. In other words, it includes middle class white people by appealing to their sense of fairness and actively seeking their participation. . . . Without whites['] willingness to be involved in the affirmative furthering of fair housing, [a jurisdiction might] be a diverse but highly segregated community at best. All the research I've done demonstrates that the lack of white participation, whether as seekers or providers of housing, is certainly the greatest impediment to fair housing and integration. . . . [T]he avoidance of engaging in fair housing activity by white (and in many cases non-black minority) housing seekers, housing developers, real estate professionals, landlords, public officials, and community organizations has created and sustained a structure of segregation that has failed to be addressed outside of a very small number of communities. So, I've been concentrating on ways to engage whites and provide reasons for them to participate in fair housing activity. . . . I would suggest a focus on structural and proactive *actions* and *outcomes* that incentivize (or force in some cases) the white establishment to participate in fair housing while trying our best not to undermine communities of color.

E-mail from Robert Breymaier, Exec. Dir., Oak Park Reg'l Hous. Ctr., to author (Oct. 20, 2010, 11:03 CST) (on file with author); see also Salsich, *supra* note 285, at 738 ("We need to speak honestly about community integration and inclusion of people who are poor, homeless, or who have disabilities. And we need to listen honestly to the concerns of people who oppose inclusion.").

287 See 1996 HUD GUIDE, *supra* note 155.

directed away from the families who need them to rebuild in the wake of disaster. Far more often than not, segregation, isolation and poverty don't occur in spite of government. They happen *because* of government—by government dollars and government decisions made with government authority.²⁸⁸

Clearly, “[l]eadership is a critical ingredient” if the FHA’s goal of AFFH is to be met,²⁸⁹ not only by HUD but also at the grassroots level. If racism, exclusion, and segregation are learned attitudes, then equality, inclusion, and integration can also be learned.²⁹⁰

CONCLUSION

One of the key goals of the 1968 Fair Housing Act was to break the grip of segregated housing patterns, both as a way for providing more opportunities for minorities and in recognition that all Americans ultimately benefit from integrated communities. Failure to accomplish the FHA’s integration goal is one of the great civil rights disappointments of the past generation. A major cause of segregation continues to be high levels of illegal discrimination, perhaps most significantly as practiced by local governments whose land–use and other policies have often had the effect, if not the outright purpose, of excluding housing opportunities for a more diverse population.

The FHA’s § 3608 requires the federal government to administer its housing programs in a way that promotes residential integration. The FHA’s proponents were well aware of the role governments had played in creating and maintaining segregated housing patterns, and, by mandating in § 3608 that HUD funds “affirmatively further fair housing,” they clearly intended to provide for a more aggressive approach to reverse this behavior. For decades, however, § 3608’s commands have been ignored. Local governments regularly failed to act according to the AFFH mandate, and HUD rarely responded with disapproval, much less forceful action. Private § 3608–based litigation produced some strong judicial decisions, but these occasional suits were subject to numerous limitations and did not result in widespread enforcement.

All of this could change as a result of a recent suit against Westchester County, New York, a wealthy suburban area whose minority population is confined to a few discrete areas. As a recipient of federal CDBG funds, Westchester has long been required to AFFH, but it never considered racial integration to be a part of this requirement. Federal dollars continued to flow into Westchester’s many all–white communities without HUD’s

²⁸⁸ Shaun Donovan, Sec’y, U.S. Dep’t of Hous. & Urban Dev., Commencement Address at Southern University at New Orleans (May 7, 2011), *available at* http://portal.hud.gov/hudportal/HUD?src=/press/speeches_remarks_statements/2011/Speech_05072011.

²⁸⁹ Patterson & Silverman, *supra* note 280, at 180.

²⁹⁰ *Id.*

apparent interest or concern until a private fair housing organization brought suit, alleging a violation of the False Claims Act. With the coming of the Obama Administration, HUD and the Justice Department intervened and engineered a promising settlement, although Westchester's compliance with the settlement order's AFFH requirements remains a matter of dispute.

The *Westchester* litigation has altered the fair housing landscape, making serious, nationwide enforcement of § 3608's AFFH commands a real possibility. At the least, this has created a potentially strong new weapon in litigation that challenges exclusionary land-use and other segregative policies by local governments.

The question remains, however, whether the political will exists to support such enforcement. At the local level, substantial resistance is likely, particularly if local civil rights and community-based organizations fail to provide a counter-weight to entrenched interests. On the national level, much depends on HUD, an agency whose civil rights record has been timid at best and which has often viewed its main stakeholders as the very local-government grantees whose exclusionary policies must be changed.²⁹¹ Furthermore, local and national elections in 2010 tended to favor those seeking a smaller federal role and more autonomy for local jurisdictions, particularly in suburban areas where Republicans are strong. One result is that the current Congress has greatly reduced the CDBG funding on which § 3608's AFFH commands largely depend, and has also shown no interest in a proposed FHA amendment to authorize private enforcement of § 3608. Even if Republicans fail to capture the White House in 2012, the past two years show that a Democratic administration hardly guarantees that the *Westchester*-enhanced view of § 3608 enforcement will result in substantial change.

Regardless of how the political winds may blow, the need today is exactly the same as Dr. King called for nearly 50 years ago—an effective anti-segregation “action program.”²⁹²

291 See NATIONAL FAIR HOUSING REPORT, *supra* note 170, at 19 (calling for HUD's fair housing responsibilities to be transferred to a new independent agency).

292 See *supra* note 2 and accompanying text.