

# How States Can Affirmatively Further Fair Housing: Key Leverage Points and Best Practices



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Front cover photos are of the following state houses:

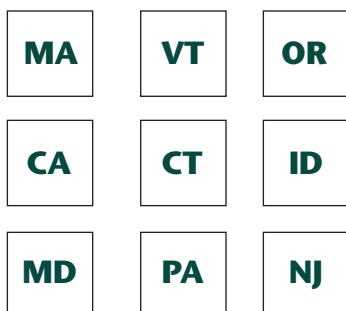


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Credit: Mutual Housing at Springlake, Woodland, CA

## I. Introduction

As the federal government reestablishes its commitment to Affirmatively Furthering Fair Housing (AFFH), with the possibility of a renewed AFFH rule and planning process later this year, state governments have the potential to make a major contribution to the future of fair housing.<sup>1</sup> This potential was never realized in the initial rollout of the 2015 rule, in part because of a delay in completing the “Assessment of Fair Housing” template that was intended to be used by states in their AFFH planning – the rule had already been suspended before the state AFH form was released. Thus, despite their ongoing substantive legal obligation to AFFH, the states’ obligation to conduct AFHs never took effect. Yet state governments offer a critical and unique platform through which to advance fair housing. In whatever form the new AFFH rule takes, state governments will have an important role to play.

This paper sets out a series of seven initiatives that states can take to affirmatively further fair housing, both as part of a new federal AFFH process, and in their role as independent policymaking authorities outside the sometimes unpredictable framework of the federal government. Section III will discuss these initiatives with examples of successes from states from around the country. The goal of this paper is to encourage more states to adopt legislation and programs like those described here in the hope that the integration mandate of the Fair Housing Act will continue to be advanced.

State governments have the potential to make a major contribution to the future of fair housing.

<sup>1</sup> See Megan Haberle, Peter Kye, & Brian Knudsen, *Reviving and Improving HUD’s Affirmatively Furthering Fair Housing Regulation: A Practice-Based Roadmap*, Poverty & Race Research Action Council 11 (2020), <https://prrac.org/pdf/improving-affh-roadmap.pdf>.





North Hills Manor, Upper Dublin Township, Montgomery County. Credit: Montgomery County Housing Authority (PA)

## II. Recent History of AFFH Implementation

Title VIII of the Civil Rights Act of 1968, known as the Fair Housing Act, requires the U.S. Department of Housing and Urban Development (HUD), federal agencies, and recipients of federal housing and community development funds from HUD, including states and localities, to “affirmatively further the policies and purposes of the Fair Housing Act” (to “affirmatively further fair housing,” or “AFFH”).<sup>2</sup> This obligation requires HUD funding recipients – including states, localities, counties, and housing authorities – to take “meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially or ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.”<sup>3</sup>

The goal of affirmatively further fair housing is far from met, however. As the U.S. Supreme Court noted in 2015, “much progress remains to be made in our Nation’s continuing struggle against racial

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2 42 U.S.C. 3608; see also U.S. Dep’t of Hous. & Urb. Dev., *Affirmatively Furthering Fair Housing (AFFH)*, [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/affh](https://www.hud.gov/program_offices/fair_housing_equal_opp/affh) (last accessed July 20, 2021).

3 See 24 CFR 5.151; see also Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779 (June 10, 2021).

isolation” – while the Court also acknowledged “the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.”<sup>4</sup>

Despite the need to continue this work, the federal government in recent years has vacillated on its commitment to AFFH. In 2015, HUD published a final rule on AFFH establishing a standardized process, known as an Assessment of Fair Housing (AFH), that recipients of certain HUD funding would use to help them meet their long-standing obligations to AFFH.<sup>5</sup> With the change of administration in 2016 came a change in the federal government’s commitment to AFFH. After an initial suspension of the 2015 AFFH rule by the Trump Administration, the 2020 “Preserving Communities and Neighborhood Choice” rule repealed the 2015 AFFH rule and allowed funding recipients to certify “compliance” provided they took “some active step to promote fair housing” seeking to preserve “flexibility for jurisdictions to take action based on the needs, interests, and means of the local community, and respects the proper role and expertise of state and local authorities.”<sup>6</sup>

The U.S. Supreme Court noted in 2015, “much progress remains to be made in our Nation’s continuing struggle against racial isolation” [and acknowledged] “the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.”

As part of an anticipated reinstatement of a version of the 2015 AFFH rule, the Biden Administration released an Interim Final Rule (IFR) in 2021, “Restoring Affirmatively Furthering Fair Housing Definitions and Certifications,” which requires funding recipients to submit certifications that they will affirmatively further fair housing in connection with their consolidated plans, annual actions plans, and public housing agencies.<sup>7</sup> In rescinding the 2020 rule, the 2021 IFR does not yet require program participants to undertake any specific fair housing planning to support their certifications, though it commits HUD to restoring planning guidance and providing technical assistance to those that wish to undertake AFH or other forms of fair housing planning.<sup>8</sup> Requirements for reinstatement of an AFFH planning process similar to the 2015 AFH are expected later this year.

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4 *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 546-47 (2015).

5 *See* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (summarizing improvements and enhancements to fair housing regulations at the time).

6 Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899-47,902 (Aug. 7, 2020).

7 *See* Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779 (June 10, 2021).

8 *See id.* at 30,783.

# III. Key Leverage Points for States to Affirmatively Further Fair Housing

As fair housing advocates have previously argued,<sup>9</sup> state governments are well suited to help lead the country toward a more integrated and inclusive society by adopting fair housing-focused initiatives. This report summarizes seven types of initiatives that states could consider in setting meaningful goals in their AFFH plans: (1) prescribing limits on exclusionary zoning; (2) encouraging a fair allocation of affordable housing across jurisdictions; (3) helping recipients of housing vouchers through statewide anti-discrimination laws, housing mobility programs, and elimination of housing authority jurisdictional limitations; (4) enacting enforceable state-level affirmatively furthering fair housing laws; (5) following best practices in fair housing finance; (6) implementing state-level rental assistance programs and tenant protections; and (7) assisting with home ownership for low-income and first generation buyers.

## A. Prohibitions on Exclusionary Zoning

Zoning is an exercise of the state's police power that is generally delegated to local governments.<sup>10</sup> States that have not completely relinquished this power can affirmatively further fair housing by taking some of that power back, and barring local jurisdictions from imposing zoning restrictions that exclude or make it difficult to develop affordable housing. While there is no perfect model to point to, some states have started down the road of zoning reform, and their experiences with what they have been able and not able to achieve provide insights into what a robust state law might look like.<sup>11</sup>

A recent White House release identified some of the most common forms of exclusionary zoning:<sup>12</sup>

Exclusionary zoning laws place restrictions on the types of homes that can be built in a particular neighborhood. Common examples include minimum lot size requirements, minimum square footage requirements, prohibitions on multi-family homes, and limits on the height of buildings...

Other frequently encountered exclusionary zoning provisions relate to off-street parking and landscaping requirements. Such restrictions can have a direct effect on the supply of housing and an indirect effect on its affordability.<sup>13</sup> Again, the White House has recently noted:<sup>14</sup>

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9 See Megan Haberle & Philip Tegeler, *Coordinated Action on School and Housing Integration: The Role of State Government*, 53 U. Rich. L. Rev. 949, 950-52 (2019) (identifying state-level laws and programs as opportunities to succeed as "drivers of integration in a way that is distinct from either federal or local interventions").

10 1 Am. Law. Zoning § 2:9 (5th ed. 2021). All states have adopted enabling legislation which delegates some zoning to localities.

11 There are local municipalities around the country that have adopted prohibitions on single-family zoning and other individual exclusionary zoning practices. See, e.g., Minneapolis, MN (How Minneapolis Ended Single-Family Zoning (tcf.org), Berkeley, CA ('A symbolic step': Berkeley to end exclusionary zoning by 2022 (dailycal.org)), but this report is focused principally on state-level initiatives.

12 Cecilia Rouse et al., *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, The White House, <https://www.whitehouse.gov/cea/blog/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market/> (June 17, 2021).

13 See Solomon Greene and Ingrid Gould Ellen, *Breaking Barriers, Boosting Supply: How the Federal Government Can Help Eliminate Exclusionary Zoning*, Urban Institute (Sept. 25, 2020), <https://www.urban.org/research/publication/breaking-barriers-boosting-supply>.

14 Exclusionary Zoning, *supra* note 11.



Exclusionary zoning laws enact barriers to entry that constrain housing supply, which, all else equal, translate into an equilibrium with more expensive housing and fewer homes being built.

It is important to note that zoning reform alone will not guarantee the production of housing that is affordable to a range of incomes, as in a true “fair share” affordable housing requirement (see below). However, it is an important first step toward addressing the discriminatory impacts of local zoning laws and promoting more equitable housing production and distribution. Three states offer good examples of attempts to curtail specific exclusionary zoning practices – Connecticut, Oregon, and Vermont.<sup>15</sup>

In 2021, Connecticut passed HB-6107 (Public Act 21-29) which updated the state’s zoning enabling act.<sup>16</sup> The law contains several key provisions to curb exclusionary practices and promote fair housing. Under the law, zoning regulations in Connecticut must permit accessory apartments as of right, without a permit or hearing and must allow for the development of housing that will meet needs identified in the state’s consolidated plan for housing.<sup>17</sup>

In addition, HB-6107 prevents towns in Connecticut from enacting zoning regulations that place a cap on the number of multifamily, mixed-use, or middle housing (duplexes, triplexes, quadplexes, cottage clusters, and townhouses) units. Towns in Connecticut also cannot pass zoning regulations that mandate homes have a minimum square footage (except for public health reasons) and are limited in how many parking spaces they can require for all new housing units.<sup>18</sup>

Significantly, with the law’s passage, Connecticut became the first state to include in its zoning enabling act a requirement that all zoning regulations affirmatively further fair housing.<sup>19</sup>

Connecticut also now requires zoning regulations to promote housing choice and economic diversity in housing, including for low- and moderate-income households. HB-6107 also requires zoning regulations in Connecticut to address significant disparities in housing needs and disparities in access to opportunity, requirements that help to achieve the purpose of AFFH.



In 2019, Oregon adopted HB 2001,<sup>20</sup> which eliminates single-

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15 See also *Breaking Barriers*, supra note 13, at 7 (listing variable zoning reform efforts among states).

16 2021 Conn. Pub. Act No. 21-29 (Reg. Sess.), <https://www.cga.ct.gov/2021/ACT/PA/PDF/2021PA-00029-R00HB-06107-PA.PDF>.

17 *Id.*

18 *Id.*

19 Desegregate Connecticut, *2021 Legislative Reforms*, (Jan. 28 2022), <https://www.desegregatect.org/hb6107>.

20 ORS 197.758 *et seq.*



family zoning in many residential areas in the state. In cities with more than 25,000 residents, duplexes, triplexes, fourplexes, and “cottage clusters” are now allowed on parcels that were previously reserved for single-family houses; in cities of at least 10,000, duplexes would be allowed in single-family zones. The law took effect July 1, 2021 for medium cities and takes effect on July 1, 2022 for larger cities. Because it is such a recent initiative, there is no track record yet of its effect on the cost and availability of housing, and the state has acknowledged the effect

will be gradual.<sup>21</sup> Nevertheless, the law contains some important advances toward fair housing.

To aid cities in implementing the new law, Oregon adopted Model Codes, which provide guidance to cities in implementing the new law and will be imposed on cities that do not come into compliance. Noteworthy elements of the Model Code for Medium Cities are provisions allowing duplexes to meet the same standards that have historically applied to single-family homes. These include standards that relate to minimum and maximum lot size, minimum and maximum setbacks and building height. Also included in the Model Code for Medium Cities are prohibitions on most minimum front setbacks of greater than 20 feet and minimum rear setbacks of greater than 15 feet, along with a ban on any requirement for off-street parking.<sup>22</sup>

The Model Code for Large Cities applies, with some variations, not only to duplexes, but also to triplexes, quadplexes, cottage clusters, and townhouses. For duplexes, the permitted and prohibited design standards are like those under the Model Code for Medium Cities. For triplexes, quadplexes, cottage clusters, and townhouses, the Model Code eases limits on density, number of units allowed, allowed offsets and height restrictions, off-street parking, lot coverage, landscaping, and open space. The clear goal of these Model Codes is to enable landowners and developers to increase the supply of housing by allowing denser development.

The significance of the Oregon law can be seen by comparing it to another approach that simply has not proved to be meaningful in increasing the availability of affordable housing. The well-known Minneapolis ordinance that eliminates single-family zoning has not produced the hoped-for expansion of housing options, and as one commentator has observed:<sup>23</sup>

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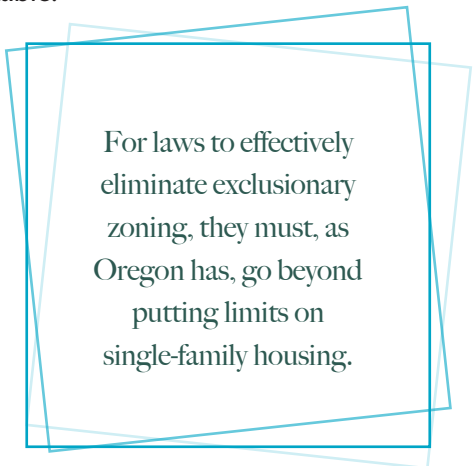
21 Or. Dep’t of Land Conservation and Dev., *Housing Choices (House Bill 2001)*, <https://www.oregon.gov/lcd/UP/Pages/Housing-Choices.aspx> (last visited Oct. 17, 2021).

22 Or. Dep’t of Land Conservation and Dev., *Medium Cities Middle Housing Model Code 7 (2020)* <https://www.oregon.gov/lcd/UP/Documents/OAR660046%20EXHIBIT%20A%20-%20Medium%20Cities%20Middle%20Housing%20Model%20Code.pdf>.

23 James Brasuell, *Zoning Reforms Underwhelm in Minneapolis as Development Market Holds Course*, Planetizen News,

Although single-unit zoning limits these useful types of housing, so do myriad other restrictions on how and where housing can be built: minimum lot size requirements, parking requirements, height limits and more . . . The [Minneapolis] reform was not paired with any increase in allowable height or size for structures themselves. So, three units can now be built where only one was permitted before, but the allowable built space is the same. It remains to be seen how profitable it will be for homeowners or builders to subdivide houses or build two or three new units that are much smaller than a single-unit house would be permitted to be. Allowing larger buildings could make more triplex conversions more comfortable and profitable.

For laws to effectively eliminate exclusionary zoning, they must, as Oregon has, go beyond putting limits on single-family housing and also address the other features of zoning laws that have the same practical effect, including restrictions regarding setbacks, building height, lot coverage, lot sizes, and off-street parking.



For laws to effectively eliminate exclusionary zoning, they must, as Oregon has, go beyond putting limits on single-family housing.

Vermont's approach to exclusionary zoning combines statewide proscriptions against specific zoning practices and support for local communities to facilitate growth in the supply of fair and affordable housing. State law expressly prohibits any municipality from, for example, discriminating against mobile homes and modular or prefabricated housing, small-scale residential care homes for the disabled, small-scale childcare operations and small-scale in-home businesses. Additionally, no municipality can exclude multi-unit dwellings, and regulation of such dwellings must be reasonable.<sup>24</sup> Accessory dwelling units are also expressly authorized by state law, sharply limiting what individual communities can do to constrain property owners from creating such units.<sup>25</sup>

Vermont has implemented these requirements in a way that expressly seeks to preserve the character of the state. State laws encourage the development of compact village and town centers and preservation of rural areas between towns and cities, while also prohibiting communities from adopting zoning bylaws that would be exclusionary in effect.<sup>26</sup>

The state does not just specify standards for local zoning bylaws, it also requires that they be filed with the state, and the Attorney General is empowered to take action with respect to local bylaws that violate requirements of state law "relating to equal treatment of housing and adequate provision of affordable housing."<sup>27</sup>

Perhaps as an outgrowth of the prescriptive approach Vermont law takes on issues of fair and affordable housing, the state also provides municipalities with extensive, accessible training materials.

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<https://www.planetizen.com/news/2020/09/110400-zoning-reforms-underwhelm-minneapolis-development-market-holds-course>, (Sept. 2, 2020) (quoting Emily Hamilton of Bloomberg CityLab).

24 24 V.S.A. § 4412.

25 24 V.S.A. § 4302.

26 24 V.S.A. § 4412.

27 24 V.S.A. § 4453.

The Vermont Agency of Commerce and Community Development<sup>28</sup> and the Vermont Human Rights Commission directly provide training and fund others to provide training so that communities that likely could not do so on their own can turn to the state for support in developing compliance and best practices materials. For example, the state recently produced a guide for local municipalities as to how they can amend their zoning codes to promote affordable housing consistent with maintaining the rural/small village quality for which Vermont is known.<sup>29</sup>

## B. Encouraging Fair Allocation of Affordable Housing Across Jurisdictions

To further the goals of AFFH, states can play an important role in advancing equity across local boundaries, whether by compelling adherence to state law or through encouraging collaborative efforts. As discussed below, several Northeastern states and California have taken this path.



Photo Credit: Fair Share Housing Center

### New Jersey

Described as the “gold standard”<sup>30</sup> for state law innovations that remedy exclusion through better housing distribution, the New Jersey Fair Housing Act<sup>31</sup> was forged through litigation before the state’s Supreme Court, in what is known as the *Mount Laurel* Doctrine.<sup>32</sup> In the twin decisions of *Mount Laurel I* (1975) and *Mount Laurel II* (1983), the New Jersey Supreme Court ruled that municipal land use regulations that prevent affordable housing

opportunities are unconstitutional and ordered all New Jersey municipalities to “plan, zone for, and take affirmative actions to provide realistic opportunities for their ‘fair share’ of the region’s need for affordable housing.”<sup>33</sup>

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28 See, e.g., Vt. Agency of Com. and Cmty Dev., *Events, Trainings, and Workshops*, <https://accd.vermont.gov/housing/events> (last visited Oct. 17, 2020); Vt. Plan. Info. Ctr., *Home Page*, <http://www.vpic.info/index.html> (last visited Oct. 17, 2020).

29 See Vt. Agency of Com. and Cmty Dev., *Enabling Better Places: A Zoning Guide for Vermont Neighborhoods* (Aug. 2020) <https://accd.vermont.gov/sites/accdnew/files/documents/CD/CPR/CPR-Z4GN-Guide-Final-web.pdf>. (“The model code reforms presented within this Guide are intended to be calibrated locally but integrated simply, without the need for expensive consultants or extensive process; rather, they offer standards that, when adjusted to a specific village or town context, may significantly impact the accessibility and affordability of the housing that Vermont communities are able to offer.”).

30 Thomas Silverstein, *State Land Use Regulation in the Era of Affirmatively Furthering Fair Housing*, 24 J. of Affordable Hous. & Cmty. Dev. L., 305, 317 (2015).

31 N.J. Stat. Ann. §§ 52:27D-301-329.9.

32 See Fair Share Hous. Ctr., *Mount Laurel Doctrine*, <https://fairsharehousing.org/mount-laurel-doctrine/> (last visited July 21, 2021).

33 *Id.*



In response to those decisions, the state legislature passed the Fair Housing Act of 1985 creating the Council on Affordable Housing (“COAH”), which was responsible for determining each municipality’s fair share of the regional need for affordable housing.<sup>34</sup> Once COAH established the proportion of the allocated unit, municipalities had to develop plans for developing their fair share of affordable housing.<sup>35</sup> Municipalities could have their fair share housing plans certified by COAH if the plans were consistent with COAH’s guidelines and if the plans would “make the achievement of the municipality’s fair share of low and moderate income housing realistically possible.”<sup>36</sup> If municipalities did not adopt effective plans, they opened themselves up to civil suits from affordable housing advocates and developers in “builder’s remedy” suits.<sup>37</sup>

After a 2015 decision by the New Jersey Supreme Court, the COAH was dissolved because of its inability, over a period of more than fifteen years, to adopt regulations for municipalities to follow in certifying their fair housing plans.<sup>38</sup> With the COAH dissolved, its power was given to the courts, which could certify the plans through the grant of declaratory judgments.<sup>39</sup> In 2017, after 300 declaratory judgments actions were commenced throughout the state,<sup>40</sup> the Court reaffirmed municipalities’ *Mount Laurel* obligations to their citizens and found that (1) municipalities must address the needs for low- and moderate-income housing that arose during the post-1999 period (when COAH failed to promulgate viable rules); (2) towns are obligated to provide a realistic opportunity for their fair share of affordable housing; and (3) in determining municipalities’ “fair share,” trial courts are required to use an expansive definition of municipalities’ “present need,” for affordable housing.<sup>41</sup> Since that time, all but three of the original cases filed have resulted in adoption of fair share plans to implement their fair share obligations, with over 50,000 affordable homes planned to be developed as a result.

New Jersey’s statute also uses a regional approach to affordable housing which allows for a more equitable distribution of housing among communities to better meet regional housing needs and overcome segregation.

Despite the tumultuous litigation surrounding the state’s Fair Housing Act, fair housing advocates point out that New Jersey’s law has many benefits. The law promotes the production of units affordable to households earning below 30 percent of area median income (AMI) as well as between 30 and 50 percent of AMI.<sup>42</sup> This focus is broader than that of some other states and can possibly aid racial integration, given that the correlation between socioeconomic status and race is likely more significant for families earning less than 50% of AMI.

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<sup>34</sup> *Id.*

<sup>35</sup> See Silverstein, *supra* note 26, at 318.

<sup>36</sup> N.J. Stat. Ann. §§ 52:27D-314 b.

<sup>37</sup> See, e.g., *In re Petition for Substantive Certification Filed by the Twp. of Warren*, 622 A.2d 1257 (N.J. 1993) (lawsuit brought by public advocate representing three public interest entities); *Mount Olive Complex v. Twp. of Mount Olive*, 774 A.2d 704 (N.J. Super. Ct. App. Div. 2001) (lawsuit brought as a “builder’s remedy”).

<sup>38</sup> See *In re N.J.A.C. 5:96 & 5:97*, 110 A.3d 31, 35 (2015).

<sup>39</sup> *Id.*

<sup>40</sup> *In re Declaratory Judgment Actions Filed By Various Municipalities*, 152 A.3d 915, 919 (2017).

<sup>41</sup> *Id.* at 923, 927, 928-29.

<sup>42</sup> See Silverstein, *supra* note 26, at 318.



Households of color are more likely than White households to be low-income or very low-income.<sup>43</sup> The law has also helped produce a significant amount of affordable housing, with about 65,000 units of affordable housing built just between 1987 and 1999.<sup>44</sup>

New Jersey's statute also uses a regional approach to affordable housing which allows for a more equitable distribution of housing among communities to better meet regional housing needs and overcome segregation.<sup>45</sup> Moreover, the law creates a planning process that can provide an opportunity for robust community engagement on housing issues.<sup>46</sup> New Jersey's regional approach, under which the state is divided into six regions, estimates the present need for low- and moderate-income housing in each region, and then allocates a share of the obligation to address that need to each political subdivision within the region, has several other benefits.<sup>47</sup> Regional coordination within states prevents exclusionary zoning imposed in one jurisdiction from causing heightened costs in another.<sup>48</sup> It also addresses the quality of neighborhoods, combats desegregation and amplifies regional affordability.<sup>49</sup> Finally, it creates greater coordination between political entities for public

transit to connect areas of affordable housing.<sup>50</sup>



## Massachusetts

Chapter 40B, also known as the Comprehensive Permit Law, was enacted in 1969 to “help address the shortage of affordable housing statewide by reducing unnecessary barriers created by local approval processes, local zoning, and other restrictions,”<sup>51</sup> and to advance racial integration in the state.<sup>52</sup>

43 *Id.* (citing Margaret C. Simms et al., *Racial & Ethnic Disparities Among Low-Income Families* 11 (2009), <https://www.urban.org/sites/default/files/publication/32976/411936-racial-and-ethnic-disparities-among-low-income-families.pdf>).

44 Testimony in Support of HB 6611 On behalf of Reverend Eric Dobson and Adam Gordon of the Fair Share Housing Center in New Jersey, <https://cga.ct.gov/2021/PDdata/Tmy/2021HB-06611-R000312-Dobson,%20Eric,%20Reverend-6611%20Support-TMY.PDF>.

45 *Id.*

46 *See id.* (stating “a planning process informed by robust community engagement can empower historically marginalized communities, avoid the selection of low-quality sites for rezoning, and build long-term political support for the statute”).

47 Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 *Hastings L.J.* 79, 150 n. 95 (2019).

48 Andrea J. Boyack, *Responsible Devolution of Affordable Housing*, 46 *Fordham Urb. L.J.* 1183, 1248 (2019).

49 *Id.* (citing Lavea Brachman, *New State and Federal Policy Agendas: Realizing the Potential of America's Legacy Cities and Their Regions*, in *REBUILDING AMERICA'S LEGACY CITIES: NEW DIRECTIONS FOR THE INDUSTRIAL HEARTLAND* 276-77 (Alan Mallach ed., 2012)).

50 *Id.*

51 Citizens' Hous. & Plan. Ass'n, *Fact Sheet on Chapter 40B The State's Affordable Housing Zoning Law*, <https://www.chapa.org/sites/default/files/Fact%20Sheet%20on%20Chapter%2040B%202011%20update.pdf> (last updated Oct. 2011).

52 *See* Krefetz S., “The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience with a State Legislative Effort to Overcome Exclusionary Zoning.” 22 *West N Engl Law Rev.* (2001).

The goal of Chapter 40B is to make at least ten percent of housing stock in every community affordable for low- to moderate-income households.<sup>53</sup> The state streamlines this process by permitting developers wanting to construct this type of housing “to file a single application for a comprehensive permit with a local zoning board of appeals[,] rather than seeking separate approval from each local board having jurisdiction over the project.”<sup>54</sup> The local boards are then able “to approve affordable housing developments under flexible rules if at least 20-25% of the units have long-term affordability restrictions.”<sup>55</sup>

Chapter 40B has received criticism because it allows a developer to appeal an adverse local decision to the State Department of Housing and Community Development (DHCD) in communities where affordable units make up less than 10% of its year-round housing or 1.5% of its land area.<sup>56</sup> On the other hand, communities that have not met the minimum thresholds can receive one- or two-year exemptions from the Zoning Board of Appeals by adopting a “housing production plan” and meeting other short-term production goals.<sup>57</sup>

Despite this criticism, the impact of Chapter 40B has been a positive one. As of December 2020, 76 communities had met the goal – a large increase over the number of communities from a decade earlier.<sup>58</sup> Additionally, 108 communities have developed Affordable Housing Production Plans approved by DHCD with expiration dates ranging from late 2021 to 2026.<sup>59</sup> It is unclear how many of these plans will result in actual housing production, but at least fifteen of those communities have been certified as meeting the benchmarks in their plans entitling them to “safe-harbor” protections from Chapter 40B proposals.<sup>60</sup> Since its passage, Chapter 40B has been directly responsible for nearly all affordable housing construction outside of the Commonwealth’s largest cities, including approximately 70,000 total units, 35,000 of which are restricted to households making less than 80% of the area median income.<sup>61</sup> According to MassHousing, an independent, quasi-public agency charged with providing financing for affordable housing in Massachusetts, Chapter 40B helps communities achieve housing goals by “providing a flexible zoning approval process that allows for the creation of new homes for individuals, families, and older adults, across a range of incomes.”<sup>62</sup>

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53 *Town of Hingham v. Dep’t of Hous. & Cmty. Dev.*, 887 N.E.2d 231, 233 (Mass. 2008).

54 *Id.*

55 Mass.gov, *Chapter 40 B Planning and Information*, <https://www.mass.gov/chapter-40-b-planning-and-information> (last visited July 21, 2021).

56 Citizens’ Hous. & Plan. Ass’n, *supra* note 47.

57 *Id.*

58 See Mass. Dep’t of Hous. and Cmty Dev., *Subsidized Housing Inventory*, <https://www.mass.gov/doc/subsidized-housing-inventory/download> (last visited Sep. 10, 2021); Citizens’ Hous. & Plan. Ass’n, *supra* note 47 (explaining that, as of July 2011, 47 cities and towns were “appeal proof” for either meeting the 10% goal, meeting the land area standard, or having exemptions).

59 Mass. Dep’t of Hous. and Cmty Dev. *Housing Plans: Approval / Expiration Dates. September 2003 to August 2, 2021*, <https://www.mass.gov/doc/hpp-plans-approval-expiration-september-2003-august-2-2021/download> (last visited Sep. 11, 2021).

60 Mass. Dep’t of Hous. and Cmty Dev., *Certified Communities*, (Aug. 13, 2021), <https://www.mass.gov/doc/dhcd-certified-communities/download>.

61 See MassHousing, Chapter 40B and MassHousing, <https://www.masshousing.com/en/programs-outreach/planning-programs/40b> (last visited Sep. 11, 2021).

62 *Id.*

In addition to housing production goals, Section 40B regulations include important anti-discrimination provisions, such as a prohibition on “first-come, first-serve” tenant selection, required affirmative marketing, and limits on local admission preferences.

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## Connecticut

In 1989, the Connecticut Affordable Housing Land Use Appeals Procedure, more commonly known as §8-30g, was created with the purpose of establishing a set of procedures for the state’s superior courts to enforce when an affordable housing developer

appeals a denial by a local zoning commission.<sup>64</sup> Like Massachusetts’ Chapter 40B, §8-30g, places the burden on municipalities in which less than 10% of the housing is affordable to prove that a rejection of an affordable housing development proposal is supported by “sufficient evidence in the record” under a three-part test<sup>65</sup> (in contrast to standard zoning appeals in which the applicant bears the burden of proof). Unlike the Massachusetts law, §8-30g relies on the state court system for its implementation. If a municipality fails to provide adequate evidence to justify its refusal to approve an affordable



housing proposal, the superior court may modify or even reverse the decision of the local board.<sup>66</sup>

Despite its intended purpose of ensuring the availability of affordable housing throughout the state, §8-30g has drawn criticism because Connecticut remains highly segregated, partly as a result of the law’s moratorium provision.<sup>67</sup> Under this provision, a town in which less than 10% of housing units are

63 See program guidelines at <https://www.mass.gov/doc/guidelines-gl-c40b-comprehensive-permit-projects-subsidized-housing-inventory/download>.

64 Conn. State Dep’t of Housing, *Affordable Housing Appeals Listing*, <https://portal.ct.gov/DOH/DOH/Programs/Affordable-Housing-Appeals-Listing> (last visited Sep. 11, 2021).

65 Conn. Gen. Stat. §8-30g(g).

66 *Id.* See also Conn State Dep’t of Housing, *supra* note 60 (explaining that the Affordable Housing Land Use Appeals Procedure requires municipalities prove “(a) the decision was necessary to protect substantial public interests in health, safety, or other matters the municipality may legally consider; (b) the public interests clearly outweigh the need for affordable housing; and (c) public interests cannot be protected by reasonable changes to the affordable housing development; or the application which was the subject of the decision from which the appeal was taken, would locate affordable housing in an area which is not assisted housing,” as defined by the law).

67 Daniel Chapple, *Relief for Those Who Need It Least: How Conn. Gen. Stat. S 8-30g’s Moratorium Provision Rewards Towns for Making Inadequate Strides in Addressing Housing Segregation in Connecticut and Offers Lessons for the Nation*, J. Affordable Housing & Community Dev. L., 2020, 299, 324.



affordable can apply, based on a points system, for a four or five-year moratorium, which, if granted by the State's Department of Housing, would exempt it from the burden of proof under §8-30g.<sup>68</sup> While this moratorium provision can be used to allow towns to add affordable housing on an incremental basis, it also allows towns to meet minimum requirements while adding relatively few units of affordable housing over a longer period of time, thus frustrating the purpose of the law.<sup>69</sup>

Given the failure of §8-30g to meet its full affordable housing goals, members of the Connecticut General Assembly introduced various zoning reform bills during the 2021 legislative session, including bills proposing a fair share planning and zoning system similar to that of New Jersey.<sup>70</sup> Proponents of these bills argue that this so called "Fair Share Zoning" sets basic statewide rules while largely leaving specific planning and zoning decisions up to towns, as long as "their efforts are working to generate housing that contributes to meeting the regional need for affordable housing."<sup>71</sup> If successful, this plan would generate almost 300,000 units of market rate and affordable units over 10 years, while boosting the state's economy overall. By creating more housing, research shows that the state and its localities would attract relocating businesses, which would translate to more good-paying jobs, lessen the burden on cities to maintain affordable housing options, and create close to \$2 billion in tax revenue by allowing families with children to move out of high poverty areas.<sup>72</sup> To date, however, this proposal to adopt a fair share zoning system has not yet been enacted.

## California

Under California's "Housing Element" law, municipalities must zone properties to absorb each community's allocation of the future need for housing for each income bracket.<sup>73</sup> The administration of the law is done through the California Department of



68 *Id.* at 310.

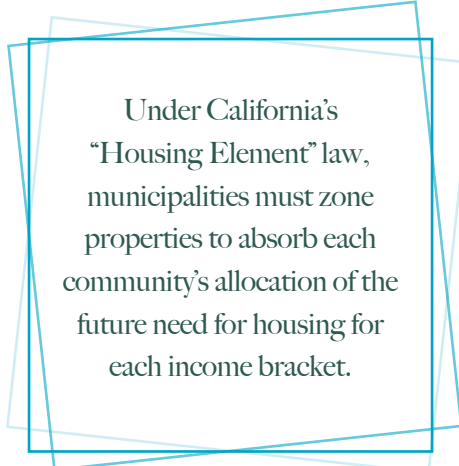
69 *See id.* at 312-19 (explaining how the town of Westport has managed to meet the moratorium requirements while continuing housing practices that keep out those unable to afford market prices); *see also* Jacqueline Rabe Thomas, *Separated by Design: How Some of America's Richest Towns Fight Affordable Housing*, PROPUBLICA (May 22, 2019, 5:00 AM), <https://www.propublica.org/article/how-some-of-americas-richest-towns-fight-affordable-housing> (explaining how Westport's exclusionary zoning practices have barred Black and Latino residents of surrounding municipalities from living there).

70 *See* H.B. 6611, Gen. Assemb., 2021 Leg. (Ct. 2021); *see also* H.B. 6287 HB, a discussion bill which would modify the Connecticut state code to "(1) assess state and regional affordable housing needs, (2) allocate those needs on a regional basis, (3) set affordable housing planning and zoning goals for each town based on its capacity for such housing and its current role in providing such housing consistent with state and federal law, (4) articulate a process to create and obtain approval for municipal fair share plans, (5) develop a schedule to implement such policies, (6) designate a process to enforce such policies, and (7) provide for state support to meet affordable housing needs beyond those met through the fair share process."

71 Open Cmty. All., *HR 6287: Fair Share Zoning The Right Thing to Do – and the Smart Thing to Do 2*, [https://d3n8a8pro7vnm.cloudfront.net/opencommunitiesalliance/pages/763/attachments/original/1615398227/HB\\_6611\\_-\\_Fair\\_Share\\_Zoning\\_-\\_Right\\_Thing-Smart\\_Thing-2-25-2021.pdf?1615398227](https://d3n8a8pro7vnm.cloudfront.net/opencommunitiesalliance/pages/763/attachments/original/1615398227/HB_6611_-_Fair_Share_Zoning_-_Right_Thing-Smart_Thing-2-25-2021.pdf?1615398227) (last visited July 21, 2021).

72 *Id.* at 2. *See also* [https://www.ctoca.org/fair\\_share\\_policy\\_2021](https://www.ctoca.org/fair_share_policy_2021).

73 *See* Cal. Gov't Code Ann. § 65583(a)(1).



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Housing and Community Development (CDHCD), with authority to determine regional housing needs delegated to the various councils of regional governments throughout the state.<sup>74</sup> For example, a municipality in Los Angeles County is subject to the determinations of the CDHCD as well as the Southern California Association of Governments.<sup>75</sup>

The Housing Element law is more detailed and prescriptive than the Massachusetts or Connecticut laws – it requires, among other things, a numerical affordable housing target for each jurisdiction, a site-specific land inventory for affordable housing, a mandate to zone for emergency shelters, a plan to eliminate local barriers to affordable housing, and steps to preserve existing private market affordable housing. The Housing Element law also provides significant leverage to affordable housing advocates: if a jurisdiction’s affordable housing plan (or implementation) is inadequate, commercial and residential market rate development can be significantly restricted until the plan is brought into compliance. The Housing Element law was significantly strengthened by the passage of California’s “Affirmatively Furthering Fair Housing” law in 2018, which attaches the AFFH obligation to each jurisdiction’s Housing Element plan (see discussion of the CA AFFH law below).

The takeaway for other states looking to adopt similar “fair share” legislation is to focus on a set of fundamental unifying principles. Thomas Silverstein of the Lawyers’ Committee for Civil Rights Under Law suggests the key principles are: (1) empowering local governments and community stakeholders to engage in a collaborative planning process that increases acceptance of their “fair share” obligations while avoiding the risk of poor planning for improper site selection for affordable housing; (2) ensuring that planning and enforcement actions focus on those at the lowest end of the socioeconomic scale; (3) requiring affirmative fair housing marketing of units created under their state’s programs; and (4) providing for private litigation by developers and advocates.<sup>76</sup>

## C. Supporting Families with Housing Vouchers through Statewide Anti-Discrimination Laws and Housing Mobility Programs

States can play a role in helping recipients of housing assistance, such as Housing Choice Vouchers, through statewide source of income anti-discrimination laws. Housing Choice Vouchers, funded by HUD, are administered locally or regionally by public housing agencies (PHAs), which are usually local public housing authorities but which can also include state or local governments. As of 2021, 20 states and the District of Columbia have passed such laws prohibiting discrimination in the housing market

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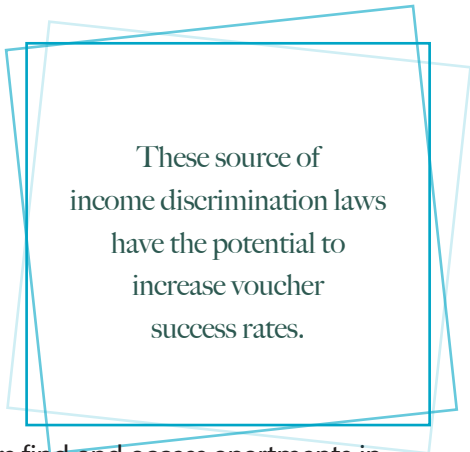
<sup>74</sup> See Silverstein, *supra* note 26, at 320.

<sup>75</sup> Advocates acknowledge that this model increases the possibility of methodological inconsistency in determining municipalities’ allocation of regional housing needs, but they assert this drawback also has the benefit of increasing local buy-in to the system by allowing responsiveness to local issues. See Silverstein, *supra* note 26.

<sup>76</sup> *Id.* at 322.



based on source of income; 16 of these protect families with vouchers.<sup>77</sup> These source of income discrimination laws have the potential to increase voucher success rates,<sup>78</sup> support geographic mobility for families with vouchers, and reduce the concentration of vouchers in low rent neighborhoods.<sup>79</sup> The strongest source of income discrimination laws include provisions to avoid common excuses for non-compliance, and strong enforcement provisions.<sup>80</sup>



These source of  
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success rates.

States can also affirmatively further fair housing by funding regional housing mobility programs that assist families with vouchers find and access apartments in low poverty, high opportunity communities<sup>81</sup> Currently, housing mobility programs are supported by state governments in New York, Massachusetts, Connecticut, Pennsylvania and New Jersey.

A number of other states run statewide HCV programs on behalf of HUD, and some also provide state-funded rental assistance programs similar to the HCV program. In addition to funding housing mobility programs, these states can further fair housing by removing impediments to mobility in their housing voucher programs, by setting higher “exception payment standards” (rent caps) in more expensive zip codes using HUD’s Small Area Fair Market survey, and by removing other barriers for voucher tenants seeking to access higher opportunity communities – for example, with security deposit assistance and reimbursement for moving costs.<sup>82</sup> State governments can also support fair housing goals of the voucher programs by providing additional financial incentives to recruit new landlords into the program.

States can also take steps to reform restrictive “area of operation” laws limiting housing authority jurisdiction to specific geographic areas.<sup>83</sup> These laws can have the effect of limiting the housing choices available to low-income families with vouchers, perpetuating segregation. By giving housing authorities wider, regional jurisdiction, states can remove barriers for families who want to move across municipal borders. Reform of these laws would also give housing authorities the ability to locate project-based vouchers or replacement public housing in lower poverty areas.

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77 Poverty & Race Research Action Council, *Expanding Choice: Practical Strategies for Building a Successful Housing Mobility Program*, Appendix B, <https://www.prrac.org/pdf/AppendixB.pdf>. (last updated Nov. 2021). See also Robert G. Schwemm, *Source-of-Income Discrimination and the Fair Housing Act*, 70 Case W. Rsrv. L. Rev. 573 (2020).

78 Meryl Finkel & Larry L. Buron, *Study on Section 8 Voucher Success Rates: Volume I Quantitative Study of Success Rates in Metropolitan Areas* (2001), <https://www.huduser.gov/Publications/pdf/sec8success.pdf>; Lance Freeman, *The Impact of Source of Income Laws on Voucher Utilization*, 22 Hous. Pol’y Debate 297 (2012).

79 SOI laws, on their own, may modestly expand geographic choice for voucher families – but they are an important foundation for voucher programs that are affirmatively helping families widen their choices. See Peter Bergman, et al., *Opportunity Insights, Creating Moves to Opportunity: Experimental Evidence on Barriers to Neighborhood Choice* (2019), <https://opportunityinsights.org/paper/cmtol/>; See also Alison Bell, et al., Ctr. Budget & Pol’y Priorities, *Prohibiting Discrimination against Renters Using Housing Vouchers Improves Results*, <https://www.cbpp.org/research/housing/prohibiting-discrimination-against-renters-using-housing-vouchers-improves-results> (last updated Dec. 20, 2018).

80 See “Crafting a Strong and Effective Source of Income Discrimination Law” (PRRAC, 2020), <http://www.prrac.org/pdf/crafting-a-strong-and-effective-source-of-income-discrimination-law.pdf>.

81 See generally, Poverty & Race Research Action Council, *Expanding Choice: Practical Strategies for Building a Successful Housing Mobility Program* (2013), <http://www.prrac.org/pdf/ExpandingChoice.pdf>.

82 Philip Tegeler, *Housing Choice Voucher Reform: A Primer for 2021 and Beyond* (PRRAC, 2020), <https://www.prrac.org/housing-choice-voucher-reform-agenda/>.

83 See, e.g., Connecticut General Statutes 8-39(a), which is currently the subject of a fair housing complaint filed with HUD.

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## D. State-level Affirmatively Furthering Fair Housing Laws

Federal law requires states (as well as other entities) to administer programs relating to housing in a way that affirmatively furthers fair housing. However, these obligations extend only to government entities that receive housing and community development funds from the federal government, and as noted, federal enforcement has been limited.<sup>84</sup> Several states have recognized these limitations (and responded to vacillating federal

commitment to the AFFH requirement) by implementing their own legislation to require public agencies and other entities to address fair housing and equity issues.

The leading example is from California, which in 2018 passed Assembly Bill 686 as a statewide framework to affirmatively further fair housing in the state. The passage of AB 686 “enshrined the duty to affirmatively further fair housing within California state law, regardless of future federal actions.”<sup>85</sup> The law was passed to expand the reach of the AFFH requirement within the state, to add to its enforceability by incorporating it into the state’s Housing Element Law, and to ensure that the principles of the 2015 federal AFFH rule remained in place in California despite the federal suspension and repeal of the rule.<sup>86</sup> The California AFFH rule was significantly strengthened in 2021 by Assembly Bill 1304 which clarified that the AFFH obligation also exists independent of the housing element law and added specificity to the requirements of the AFFH.<sup>87</sup>

AB 686 requires all public agencies in California to administer programs and activities relating to housing and community development in a manner to affirmatively further fair housing and to take no

AB 686 requires all public agencies in California ... to affirmatively further fair housing.

action that is materially inconsistent with this obligation,<sup>88</sup> and imposes requirements on all public entities, including the state, counties, localities, and housing authorities. Local governments must analyze and summarize fair housing issues in their jurisdictions as part of the Housing Element planning process, including assessment of existing segregation and inclusion trends and current fair housing practices. Local governments must also evaluate and address how particular sites available for the development of housing will meet the needs of households at all income levels and will AFFH by replacing segregated living patterns with truly integrated and balanced living patterns.<sup>89</sup>

<sup>84</sup> See 42 U.S.C. 3608.

<sup>85</sup> See Cal. Dep’t of Hous. & Cmty. Dev., Guidance for All Public Entities and for Housing Elements 13, [https://www.hcd.ca.gov/community-development/affh/docs/affh\\_document\\_final\\_4-27-2021.pdf](https://www.hcd.ca.gov/community-development/affh/docs/affh_document_final_4-27-2021.pdf), (last updated Apr. 2021).

<sup>86</sup> See *Id.*

<sup>87</sup> AB 1304, Reg. Sess., Ch. 357 (Cal. 2021).

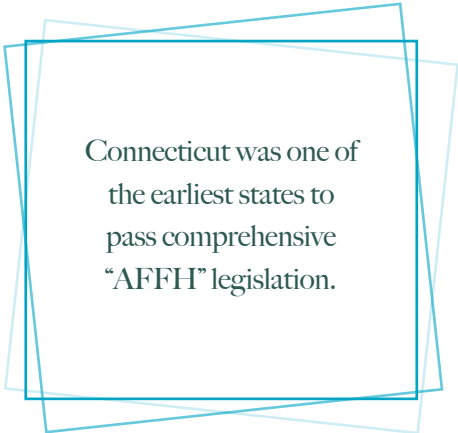
<sup>88</sup> AB 686, Reg. Sess., Ch. 958 (Cal. 2018).

<sup>89</sup> See Cal. Dep’t of Hous. & Cmty. Dev., *supra* note 81, at 12.

Based on the findings from the needs assessment and the site inventory analysis with respect to AFFH, local jurisdictions must assess contributing factors to fair housing barriers and adopt policies with programs that remediate identified fair housing issues and/or further promote fair housing.

Massachusetts is considering legislation, Bill H. 1441 and Bill S. 861, that would create a state-level duty to affirmatively further fair housing.<sup>90</sup> The proposed law creates a commission to establish how communities can meet this duty including making specific lists of actions that a public entity can take as well as the minimum number of specific actions that must be taken by an entity. The legislation makes it explicit that every city and town must take meaningful action to fulfill its obligation, evaluates compliance with the obligation to AFFH every three years, and creates a cause of action to seek injunctive and equitable relief if a jurisdiction does not comply.<sup>91</sup>

Connecticut was one of the earliest states to pass comprehensive “AFFH” legislation, designed to address the state’s high levels of housing segregation, Public Act 91-36 in 1991. Among other things, this law required the Department of Housing (DOH) and Connecticut Housing Finance Authority (CHFA) to promote fair housing choice and racial and economic integration in all programs administered or supervised by such housing agencies, which echoed the federal AFFH requirement.<sup>92</sup> The 1991 law also required affirmative marketing plans for all state funded developments, housing mobility provisions in the state “Rental Assistance Program,” and detailed annual reporting. Unfortunately, in a 2006 decision, the Connecticut Supreme Court decided that the 1991 law was unenforceable by private parties,<sup>93</sup> and so states considering similar laws should include clear enforcement language.



Connecticut was one of the earliest states to pass comprehensive “AFFH” legislation.

State-level disparate impact protections can also be a valuable way to affirmatively further fair housing. Fifty of fifty-one jurisdictions in the United States have enacted their own state-level fair housing laws. Many state fair housing laws have been interpreted, following federal caselaw, to allow claims based on discriminatory effect, as distinguished from discriminatory intent. Progressive housing rights advocates have suggested that making discriminatory effect explicit in state-level fair housing laws can preserve future disparate impact challenges if the federal standards continue to erode.<sup>94</sup>

State fair housing laws can also expand fair housing protections beyond the categories protected in the Fair Housing Act, such as by prohibiting discrimination based on an individual’s sexual orientation, gender identity, or source of income.<sup>95</sup>

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90 Bill H. 1441., 192d Gen. Court (Mass. 2021-2022).

91 Bill S. 861., 190th Gen. Court (Mass. 2017-2018).

92 Open Communities Alliance, Step 1: Plan!, [https://d3n8a8pro7vhmx.cloudfront.net/opencommunitiesalliance/pages/281/attachments/original/1486675231/OCA\\_Data\\_Analysis\\_-\\_2017.pdf?1486675231](https://d3n8a8pro7vhmx.cloudfront.net/opencommunitiesalliance/pages/281/attachments/original/1486675231/OCA_Data_Analysis_-_2017.pdf?1486675231)

93 *Asylum Hill Problem Solving Revitalization Association v. King*, 277 Conn. 238 (2006).

94 Robert Schwemm, *Fair Housing Litigation after Inclusive Communities: What’s New and What’s Not*, 115 Colum. L. Rev. Sidebar 106, 112 (2015).

95 The Pol’y Surveillance Program, *State Fair Housing Protections*, <https://lawatlas.org/datasets/state-fair-housing-protections-1498143743/> (last visited July 22, 2021).

## E. Best Practices in Fair Housing Finance and Development of Subsidized Housing

There are several provisions in the federal tax code that provide favorable tax treatment for developers of low-income rental housing, including the low-income housing tax credit, the rehabilitation credit, the exclusion of interest on state and local government qualified private activity bonds for rental housing, accelerated depreciation for rental housing, and exceptions from the passive activity loss rules for rental real estate activities.<sup>96</sup>



Crest Manor, Abington Township, Montgomery County. Credit: Montgomery County Housing Authority (PA)

The Low-Income Housing Tax Credit (LIHTC), which was enacted as part of the 1986 Tax Reform Act, provides a tax incentive for non-profit and for-profit developers to construct or rehabilitate affordable rental housing for low- and moderate-income households. It is administered by the U.S. Treasury Department, but state housing finance agencies play an important role in distributing tax credits and have much discretion in the annual “Qualified Allocation Plans”

(QAPs) that can guide developers on key issues of siting, targeted populations, affirmative marketing, and tenant selection, through tax credit requirements, set-asides, and incentives.

The LIHTC program is the largest low-income housing development program in the country. Since the mid-1990s, it has supported the construction or rehabilitation of about 110,000 affordable rental units each year.<sup>97</sup> Through this program, the federal government issues tax credits to state and territorial governments who then award the credits to private developers to create or preserve affordable rental housing projects for low-income persons. Once the affordable housing project is in place, the developers can claim the LIHTC over a 10-year period.<sup>98</sup>

96 See generally Joint Comm. on Taxation, *Present Law and Data Relating to Tax Incentives for Rental Housing* (2017), <https://www.jct.gov/publications/2017/jcx-40-171>.


97 The Tax Pol’y Ctr., *Briefing Book, Key Elements of the U.S. Tax System*, <https://www.taxpolicycenter.org/briefing-book/what-low-income-housing-tax-credit-and-how-does-it-work>. (last visited July 22, 2021).

98 *Id.* Many types of rental housing are eligible for LIHTC, so long as: (1) at least 20 percent of the project’s units are occupied by tenants with an income of 50 percent or less of area median income adjusted for family size (AMI); (2) at least 40 percent of the units are occupied by tenants with an income of 60 percent or less of AMI; or (3) at least 40 percent of the units are occupied by tenants



While the LIHTC has been successful in producing and preserving critical affordable housing units, it has certain drawbacks. From a fair housing perspective, there is a significant problem with the program's tendency to locate a majority of its low-income family units in higher poverty, racially concentrated neighbor-hoods, so as to perpetuate segregation.<sup>99</sup>

In order to affirmatively further fair housing, states have an obligation to ensure, through the QAP and ancillary state funding support, that a larger share of family units are developed in low poverty, high opportunity communities.<sup>100</sup>



States have an obligation to ensure... that a larger share of family units are developed in low poverty, high opportunity communities.

New Jersey and Pennsylvania are two states with good track records of incentives and set-asides in their annual QAPs to promote LIHTC development in lower poverty, less segregated communities.<sup>101</sup>

Another potential fair housing issue in the LIHTC program is the lack of truly long-term affordability in some LIHTC projects. To qualify for a LIHTC, the housing project must be retained as low-income housing for at least 30 years, but the units are not required to be permanently affordable.<sup>102</sup> Some states require longer affordability periods, and others should do the same. Alternatively, the federal government should put a system in place to maintain affordability in the long-term. Additionally, some studies have found that the LIHTC is inefficient because it is so time consuming and complex. A study by the State of Washington found that it takes as much as twice as long to apply for financing through the LIHTC program than it would to raise private investment.<sup>103</sup> Finding ways to streamline the process (while strengthening civil rights oversight) should be a priority.

States can also create financing solutions that provide affordable homes. For example, the Massachusetts Housing Partnership (MHP) Fund is a statewide public non-profit agency that uses mandatory lines of credit from the banking industry to provide long-term loans for affordable housing and neighborhood development. MHP was established in 1985 to increase the state's overall rate of housing production, and in 1990, Massachusetts passed an interstate banking act that requires companies that acquire Massachusetts banks to make funds available to MHP for affordable housing.<sup>104</sup> It is the only state in the nation that requires banks in the state to make funds available for

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with income averaging no more than 60 percent of AMI, and no units are occupied by tenants with income greater than 80 percent of AMI.

99 Will Fischer, *Low-Income Housing Tax Credit Could Do More to Expand Opportunity for Poor Families*. Center on Budget and Policy Priorities (2018), <https://www.cbpp.org/research/housing/low-income-housing-tax-credit-could-do-more-to-expand-opportunity-for-poor>; Poverty & Race Research Action Council, *Civil Rights Mandates in the Low Income Housing Tax Credit (LIHTC) Program* (2004), <http://www.prrac.org/pdf/crmandates.pdf>.

100 See generally, Peter Kye, "How the Federal Government Can Promote Fair Housing in the LIHTC Program," in *Racial Justice in Housing Finance: A Series on New Directions* (PRRAC, May 2021), <http://www.prrac.org/pdf/racial-justice-in-housing-finance-series-2021.pdf>.

101 Sarah Oppenheimer, *Building Opportunity II: Civil Rights Best Practices in the LIHTC Program* (PRRAC 2015), <http://www.prrac.org/pdf/BuildingOpportunityII.pdf>.

102 Urb. Inst., *The Low-Income Housing Tax Credit How It Works and Who It Serves* (2018), [https://www.urban.org/sites/default/files/publication/98758/lithc\\_how\\_it\\_works\\_and\\_who\\_it\\_serves\\_final\\_2.pdf](https://www.urban.org/sites/default/files/publication/98758/lithc_how_it_works_and_who_it_serves_final_2.pdf).

103 Corianne Payton Scally, *The Low-Income Housing Tax Credit How It Works and Who It Serves*, Urb. Inst., 13 (Jul 2018), [https://www.urban.org/sites/default/files/publication/98758/lithc\\_how\\_it\\_works\\_and\\_who\\_it\\_serves\\_final\\_2.pdf](https://www.urban.org/sites/default/files/publication/98758/lithc_how_it_works_and_who_it_serves_final_2.pdf).

104 Mass. Hous. P'ship, *About Us*, <https://www.mhp.net/about-us>. (last visited July 22, 2021).



affordable housing. MHP's programs also incentivize home ownership. To date, MHP programs have helped over "21,000 low-income and moderate-income families purchase their first home with over \$3.7 billion in private financing."<sup>105</sup>

State governments  
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Housing Trust  
Fund, HOME, and  
CDBG funds.

Just as states have discretion to influence the location of low-income housing through the LIHTC program, they also have discretion in the management and development of other project-based affordable housing, whether it is funded by the federal government or by the state. For example, state governments have substantial flexibility in their allocation of federal Housing Trust Fund, HOME, and CDBG funds, and can use that authority to affirmatively further fair housing in the location of that housing.<sup>106</sup> While balance in the location of housing investments is important, that "balance" must be viewed in the context of historical affordable housing investments, and the actual ability of low-income families of color to access less segregated, higher opportunity communities.

## F. Preventing Renter Displacement: State-Level Tenant Protections

The COVID-19 pandemic has laid bare the need for state-level rental assistance protections. According to data collected from August 18-30, 2021 by the Center on Budget and Policy Priorities (CBPP), a nonpartisan research and policy institute, 10.8 million adult renters are behind on rent.<sup>107</sup> This accounts for 15% of all adult renters in the United States.<sup>108</sup>

These statistics are even worse among people of color and low-income families.<sup>109</sup> Over that same time period (August 18-30, 2021), CBPP reported that 22% of Black renters, 19% of Asian renters, 18% of Latino renters, and 18% of American Indian, Alaska Native, Native Hawaiian, Pacific Islander, and multiracial adults taken together said they were not caught up on rent compared to 10% of white renters.<sup>110</sup> CBPP found that 22% of renters living with children were behind on rent and that nearly one in three children in renter households faced food hardship.<sup>111</sup>

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<sup>105</sup> *Id.*

<sup>106</sup> See "A Vision for Federal Housing Policy in 2021 and Beyond" (PRRAC, July 2020), <http://www.prrac.org/pdf/vision-for-federal-housing-policy-2021-beyond.pdf>.

<sup>107</sup> Ctr. on Budget & Policy Priorities, *Tracking the Covid-19 Recession's Effects on Food, Housing, and Employment Hardships*, <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and> (updated Sep 10, 2021).

<sup>108</sup> *Id.*

<sup>109</sup> See U.S. Dep't of Hous. & Urb. Dev., *Housing Discrimination Under the Fair Housing Act*, [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/fair\\_housing\\_act\\_overview#\\_Who\\_Is\\_Protected?](https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview#_Who_Is_Protected?) (last visited Sep. 11, 2021).

<sup>110</sup> Ctr. On Budget & Pol'y Priorities, *supra* note 103.

<sup>111</sup> *Id.*

Data collected by Eviction Lab at Princeton University<sup>112</sup> concurred with CBPP's findings, concluding that the eviction crisis is replete with inequalities among racial and family-status lines.<sup>113</sup> Data shows that nearly a quarter of Black tenants live in a county where the eviction rate for Black tenants is double the rate for white tenants.<sup>114</sup> And these disparities in eviction are even worse for Black women. Black women are at least twice as likely as white renters to face eviction in 17 states.<sup>115</sup>

Black women are at least twice as likely as white renters to face eviction in 17 states.

Thus, it should come as no surprise that evictions disproportionately affect families with children. According to Eviction Lab, families with children are three times more likely to be evicted as other similarly situated tenants.<sup>116</sup> In effect, having children is one of the strongest predictors of the risk of eviction, making eviction an issue with “multigenerational consequences affecting a child’s health, education and development.”<sup>117</sup>

While the federal government stepped in to respond to the eviction crisis during the pandemic, including through the CDC’s eviction moratorium,<sup>118</sup> the moratorium was met by legal challenges<sup>119</sup> and was ultimately temporary.<sup>120</sup> Given the temporary nature of the federal protections for renters, it is especially important that states provide adequate state-level rental assistance in order to curb the potential deluge of evictions and ensure that their citizens are able to live in affordable homes. States should provide for both immediate and longer-term solutions.

Families with children are three times more likely to be evicted as other similarly situated tenants.

In addition to rapid implementation of Emergency Rental Assistance, states have several options for protecting renters. In a recent paper in the *Indiana Health Law Review*, Sam Gilman discussed four such targets for state policy: (1) eviction protections; (2) foreclosure protections; (3) a civil right to counsel; and (4) civil debt conversion.<sup>121</sup>

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112 Eviction Lab, *About Eviction Lab*, <https://evictionlab.org/about/> (last visited Sep. 11, 2021).

113 Devin Rutan and Renee Louis, *To Root Out Segregation, Biden Must Tackle Evictions*, Bloomberg (July 12, 2021, 9:25 AM EDT), <https://www.bloomberg.com/news/articles/2021-07-12/evictions-are-a-part-of-housing-discrimination>.

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

118 See Ctr. for Disease Control & Prevention, *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, <https://www.cdc.gov/coronavirus/2019-ncov/covid-eviction-declaration.html> (last updated June 29, 2021).

119 See *Supreme Court Leaves CDC Eviction Moratorium In Place*, Assoc. Press, (June 29, 2021), <https://apnews.com/article/us-supreme-court-courts-supreme-courts-health-coronavirus-pandemic-157f6feec3197dd34cba492fd1b92f71> (discussing the Court’s decision to reject a plea by landlords to end the CDC’s moratorium on evicting millions of tenants who are not paying rent during the coronavirus pandemic).

120 See Ctr for Disease Control & Prevention, *supra* note 114 (ending July 31, 2021); Ctr. for Disease Control & Prevention, *CDC Director Extends the Eviction Moratorium for 30 Days*, <https://www.cdc.gov/media/releases/2021/s0624-eviction-moratorium.html> (last visited July 22, 2021) (stating the moratorium “is intended to be the final extension”).

121 Sam Gilman, *The Return on Investment of Pandemic Rental Assistance: Modeling A Rare Win-Win-Win*, 18 Ind. Health L. Rev. 293, 309-11 (2021).

In his analysis, Gilman explains that “[t]he most successful moratoria prevent the initiation of the eviction process and . . . bar hearings and execution.”<sup>122</sup> Policies based on moratoria shift the burden



of proof from tenants to landlords, requiring the landlords to demonstrate, for example, that they are in compliance with applicable policies like the CDC’s moratorium. While there are exceptions to this approach for evictions involving dangers to public safety, these policies should prevent eviction for non-payment of rent or minor lease violations.<sup>123</sup>

Gilman uses eviction data from Massachusetts to show the difference between a policy that bars the initiation of evictions by landlords and one that places the

burden on tenants.<sup>124</sup> Data from the Massachusetts Trial Court Department of Research and Planning, showed that, between April and October 2020, the state prevented eviction filings, except in public safety cases, resulting in a significant drop in cases.<sup>125</sup> Then, in mid-October 2020, the moratorium was lifted, and landlords could again file eviction cases. Eviction filings promptly rose to pre-pandemic levels.<sup>126</sup> In response, on December 31, 2020, Governor Charlie Baker signed into law Chapter 257 of the Acts of 2020 that delayed eviction cases for individuals with pending applications for rental assistance,<sup>127</sup> and the filings again dipped.<sup>128</sup>

With the fate of renters intrinsically tied to the housing market for their landlords, states can offer foreclosure protections to accompany eviction moratoria. Using the model of the Coronavirus Aid, Relief and Economic Security Act (“CARES” Act),<sup>129</sup> which applied to federally-insured mortgages,

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122 *Id.* at 309.

123 See Mass. Ex. Off. of Hous. and Cmty. Dev., *Expiration of Moratorium on Evictions and Foreclosures*, <https://www.mass.gov/info-details/expiration-of-moratorium-on-evictions-and-foreclosures> (last visited July 22, 2021) (explaining Chapter 65 of the Acts of 2020 as “[t]he temporary moratorium on non-essential evictions and foreclosures”); Colo. Stat. § 13-40-107.5 (allowing for evictions for “substantial violation” and defining “substantial violation” as one that occurs on or near the premises and endangers the person, rental property, or any other person, constitutes a drug-related felony, or criminal act).

124 Gilman, *supra* note 117, at 309-10.

125 Tableau Pub., Mass. Trial Court, Dep’t of Research & Plan., *All Residential Eviction Cases, ALL Action Types, New Cases Filed by Month, CY2020 over CY2019*, <https://public.tableau.com/app/profile/drap4687/viz/MassachusettsTrialCourtSummaryProcess/SummaryProcess> (last visited July 22, 2021) (showing only 944 new cases over from April to October 2020).

126 *Id.* (showing 2,781 new cases filed in November 2020 alone).

127 Citizens Hous. & Plan. Ass’n, *Governor Signs Eviction Protection Law*, <https://www.chapa.org/housing-news/governor-signs-eviction-protection-law> (last visited July 22, 2021).

128 Tableau Pub., Mass. Trial Court, Dep’t of Research & Plan., *supra* note 121.

129 See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 4022, 134 Stat. 281 (2020).



foreclosure protection legislation should require lenders to offer a forbearance option to borrowers unable to make mortgage payments as the result of specific hardships, including the inability to collect rent from tenants impacted by COVID-19 and other difficulties.<sup>130</sup>

The District of Columbia and states like Idaho and Maryland provide examples of statewide mortgage and foreclosure relief that other states could look to implement. In DC, the COVID-19 Response Supplemental Emergency Amendment Act of 2020 and supplemental legislation require mortgage services and lenders to offer up to 90 days of payment

deferral to qualified borrowers who have been affected by the pandemic.<sup>131</sup> The law also waives late fees and penalties and prohibits negative credit reporting.<sup>132</sup> Finally, through the DC Mortgage Assistance Program COVID-19, eligible homeowners are able to access a housing assistance loan of up to \$5,000 per month for up to six months, subject to available funding.<sup>133</sup>

In Idaho, foreclosure sales and evictions of homeowners with Idaho Housing loans were postponed until June 30, 2021.<sup>134</sup> Further, the state made a special forbearance plan available to qualifying homeowners with Idaho Housing loans, also known as HomeLoanServ borrowers, through the state's Housing and Finance Association.<sup>135</sup> These plans delayed the requirement to pay a monthly mortgage payment from an initial 90 days up to 365 days.<sup>136</sup> The plan suspended negative credit reporting, late fees, and foreclosures during the period.<sup>137</sup>



130 See Gilman, *supra* note 117, at 310-11 (arguing that “foreclosure protections are critical not only to the stability of mom-and-pop landlords, but also to ensure that tenants continue living in habitable, safe homes, as landlords may not have the motivation to ensure housing quality when homes are in receivership”).

131 D.C. Act 23-286, § 202.

132 *Id.*

133 DC Hous. Fin. Agency, *COVID-19 Mortgage Relief*, <https://dchfa.org/dcmmap-covid/> (last visited July 22, 2021).

134 See Justia, *Eviction, Mortgage, & Foreclosure Relief During COVID-19: 50-State Resources*, <https://www.justia.com/covid-19/50-state-covid-19-resources/eviction-mortgage-foreclosure-relief-during-covid-19-50-state-resource/> (last visited Oct 17, 2021); Idaho Hous. & Fin. Ass’n, *COVID-19 Resources for Our Customers and Partners*, <https://www.idahohousing.com/covid-19/> (last updated Sep. 20, 2021).

135 Idaho Hous. & Fin. Ass’n, *supra* note 130.

136 Justia, *supra* note 130.

137 *Id.*



In Maryland, the state made foreclosure sales valid only if the servicer has notified the borrower of the right to request forbearance.<sup>138</sup> The borrower could request forbearance if they were experiencing a financial hardship resulted “directly or indirectly” from the pandemic.<sup>139</sup> This meant that new foreclosures could not be initiated until July 1, 2021, unless the lender or servicer certified that they had notified the borrower of the right to request forbearance.<sup>140</sup>

The final two types of protection identified in Gilman’s article—the creation of a civil right to counsel and civil debt conversion—deal with the relationship between renters and the court system. Unlike in criminal trials,<sup>141</sup> individuals have no right to counsel in civil proceedings. Many times, renters face landlords pro se in eviction proceedings. Nine times out of ten, landlords have lawyers in eviction proceedings, but fewer than ten percent of tenants are represented by counsel.<sup>142</sup> Given that many renters cannot afford to pay their rent, it is not surprising that, absent the presence of legal aid or legal services programs, which are routinely underfunded, landlords are often awarded default judgments.<sup>143</sup>

The presence of counsel in eviction cases has the potential to provide significant benefits for all parties in eviction proceedings.

Studies have shown that the presence of counsel in eviction cases has the potential to provide significant benefits for all parties in eviction proceedings.<sup>144</sup> Lawyers not only represent clients before housing courts, but they also connect them to other social services, which can help address the cumulative effect of rental arrears.<sup>145</sup> Attorneys are also better positioned to negotiate non-monetary judgment terms, lesser amounts of back-rent owed, avoidance of a formal eviction and more time to find alternative stable housing.<sup>146</sup> At the same time, communities benefit because they are saved from the cost of providing social services associated with the

disruption and displacement stemming from the eviction process, especially for low-income individuals and families.<sup>147</sup>

According to the Center for American Progress, several localities have collected data showing how the extent of representation in housing cases caused winning results for tenants.<sup>148</sup> Prior to the pandemic,

138 See Maryland Order 20-12-17-02 §§ IV.a-b (explaining protections for both Federal Mortgage Loans and Non-Federal Mortgage Loans).

139 *Id.*

140 Md. Dep’t of Labor, *Coronavirus/COVID-19: Mortgage Relief and Foreclosure Prevention - Financial Regulation*, <https://www.dllr.state.md.us/finance/consumers/firmortgagecovid.shtml> (last updated Aug. 16, 2021).

141 See U.S. Const. amend. VI (providing counsel in all criminal prosecutions); *Gideon v. Wainwright*, 372 U.S. 335, 342-44 (1963) (applying the Sixth Amendment to the states).

142 American Civil Liberties Union, *Tenants’ Right to Counsel is Critical to Fight Mass Evictions and Advance Race Equity During the Pandemic and Beyond*, <https://www.aclu.org/news/racial-justice/tenants-right-to-counsel-is-critical-to-fight-mass-evictions-and-advance-race-equity-during-the-pandemic-and-beyond/> (last visited Sep. 11, 2021).

143 *Id.*

144 See Stout, *Economic Return on Investment of Providing Counsel in Philadelphia Eviction Cases for Low-Income Tenants*, (Nov. 13, 2018), 6 <https://www.philadelphiabar.org/WebObjects/PBA.woa/Contents/WebServerResources/CMSResources/PhiladelphiaEvictionsReport.pdf>

145 See Gilman, *supra* note 117 at 311.

146 See Stout, *supra* note 140.

147 *Id.* (explaining the benefits of client representation for the City of Philadelphia).

148 Heidi Schultheis & Caitlin Rooney, *A Right to Counsel Is a Right to a Fighting Chance*, Ctr. for Am. Progress (Oct. 2, 2019), /.



three localities—New York City, San Francisco, and Newark, New Jersey—recognized the huge threat that evictions posed to renters and implemented laws providing for a right to counsel in eviction cases.<sup>149</sup> Since the start of 2021, Washington State, Maryland, and Connecticut have all enacted legislation guaranteeing counsel for indigent tenants in eviction cases.<sup>150</sup> As explained above, this will help offset the imbalance that typically exists between tenants and landlord in eviction proceedings.

Finally, civil debt conversion, a rarely used but powerful legal measure, has the ability to prevent eviction and further the purpose of AFFH.<sup>151</sup> Civil debt conversion changes rental debt into civil debt and, in so doing, removes a landlord's ability to seek their tenant's eviction on the basis of said debt.<sup>152</sup> As an example of this type of action, California enacted the Tenant Relief Act, which lasted until June 30th, 2021.<sup>153</sup> The Act allowed all unpaid rent accumulated through March 1, 2021 to be converted into consumer debt, which could be collected through small claims court.<sup>154</sup> The Act further prohibited eviction of those tenants who could not meet the 25% rent minimum through June 30, 2021.<sup>155</sup>

In the longer term, states can also pursue changes to eviction law that protect renters from no-cause evictions, or denial of access to housing based on past eviction records or blanket criminal background bars. These and other tenant protection steps in the AFFH process were recently advocated by the Alliance for Housing Justice in a letter to HUD.<sup>156</sup>

The success of state-level protections in helping renters stay in their homes during a time of severe economic uncertainty show that they can be an important part of future efforts to AFFH. States can employ these measures to ensure robust statewide rental markets and avoid the costs of renter displacement.

## G. Promoting Equal Access to Homeownership

Homeownership plays a critically important role in shaping housing stability and intergenerational wealth for families. Homeowners have more predictable housing costs than renters do and thus enjoy

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<https://www.americanprogress.org/issues/poverty/reports/2019/10/02/475263/right-counsel-right-fighting-chance>

149 *Id.*

150 See Nat'l Coal. for a Civ. Right to Couns., *Washington State is 1st State to Enact Right to Counsel for Tenants*, (July 15, 2021) [http://civilrighttocounsel.org/major\\_developments/1500](http://civilrighttocounsel.org/major_developments/1500) (updating announcement with news of public release of implementation plan for the newly-enacted statewide right to counsel); Nat'l Coal. for a Civ. Right to Couns., *Maryland is Second State with Eviction Right to Counsel*, (May 13, 2021) [http://civilrighttocounsel.org/major\\_developments/1497](http://civilrighttocounsel.org/major_developments/1497); Nat'l Coal. for a Civ. Right to Couns., *Connecticut is Third State with Eviction Right to Counsel*, (June 10, 2021) [http://civilrighttocounsel.org/major\\_developments/1367](http://civilrighttocounsel.org/major_developments/1367).

151 See Gilman, *supra* note 117, at 311.

152 *Id.*


153 2020 Cal. Legis. Serv., Ch. 37 (AB 3088) (West).

154 MYND Mgmt., *California's COVID-19 Tenant Relief Act (AB 3088) Impact on Landlords*, <https://www.mynd.co/knowledge-center/californias-covid-19-tenant-relief-act-ab-3088-impact-on-landlords>. (last updated Apr. 19, 2021).

155 *Id.*

156 See letter to HUD Secretary Fudge re implementing tenant protections in AFFH, Alliance for Housing Justice, October 12, 2021, <https://prrac.org/pdf/ahj-implementing-tenant-protections-in-affh.pdf>.

increased housing stability.<sup>157</sup> Moreover, homeowners have the opportunity to build wealth as they accumulate equity over time while renters do not. For many families, a home is their single biggest asset and accounts for a key portion of their net worth.<sup>158</sup> This translates into enormous gaps in wealth between homeowners and renters. Indeed, the 2019 Survey of Consumer Finances reported that the median homeowner has more than 40 times the household wealth of a renter - \$255,000 for the former compared to \$6,300 for the latter.<sup>159</sup> The survey also found that Black and Latino families had significantly less wealth than White families. Black families' median and mean wealth is less than 15 percent that of White families. Latino families' median and mean wealth is greater than that of Black families but far lower than that of White families.<sup>160</sup> White Americans are also far more likely than Black Americans to receive family assistance for a down payment.<sup>161</sup> Government policy has long promoted



An important goal of affirmatively furthering fair housing should include support for homeownership.

homeownership as a way to achieve prosperity. However, historic government policies denied people of color, especially Black Americans, equal access to homeownership. The federal government created or reinforced residential segregation and promoted discrimination in mortgage lending. The legacy of such exclusionary policies along with past and ongoing private discrimination have contributed to substantial racial disparities in homeownership rates. White Americans have a homeownership rate of 74% compared to 60.2% for Asian Americans and Pacific Islanders, 48.3% for Latinos, and 44% for Black families.<sup>162</sup> These disparities in homeownership directly affect how people are able to build and pass along wealth and contribute significantly to the racial wealth gap.<sup>163</sup>

This suggests that an important goal of affirmatively furthering fair housing should include support for homeownership that can enable lower income families, as well as moderate-income first-generation homebuyers who cannot afford a substantial down payment, to access homeownership.

There are a variety of models used to promote homeownership at lower income levels. However, only some place emphasis on ensuring homes purchased with government support remain permanently affordable. Some provide direct cash assistance for down payments to first time home buyers, with few strings attached and no provision for maintaining the purchased properties as affordable in the future, in order to support wealth-building. Others focus on recouping appreciation at the time properties bought with assistance are sold, which undermines the goal of using home ownership to enable

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157 Laurie Goodman and Christopher Meyer, *Homeownership is Still Financially Better than Renting* (Feb. 21, 2018), <https://www.urban.org/urban-wire/homeownership-still-financially-better-renting>.

158 Jenny Schuetz, *Rethinking Homeownership Incentives to Improve Household Financial Security and Shrink the Racial Wealth Gap* (Dec. 9, 2020), <https://www.brookings.edu/research/rethinking-homeownership-incentives-to-improve-household-financial-security-and-shrink-the-racial-wealth-gap/>.

159 Neil Bhutta et al., *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, 106 Fed. Res. Bull. 5 (Sept 2020), <https://www.federalreserve.gov/publications/files/scf20.pdf>.

160 Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances* (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm>.

161 *Id.*

162 U.S. Census Bureau, *Quarterly Residential Vacancies and Homeownership, Third Quarter 2021* (Nov. 22, 2021), <https://www.census.gov/housing/hvs/files/currenthvspress.pdf>.

163 Bhutta et al., *supra* note 155 at 170.

wealth accumulation among those historically excluded from the homeownership market. Still others have various formulas for sharing the appreciation or recouping the public investment at the time of sale. Few states appear to have programs that simultaneously promote affordable homeownership, preserve the affordable character of the homes upon sale, and also enable families to build wealth.

Vermont is one state that has such a program. The Vermont Housing and Conservation Board (VHCB) has a homeownership program that is based on a “shared equity model.” VHCB describes it as follows:<sup>164</sup>



Under the shared equity model, the home buyer’s equity upon resale is limited to 25% of appreciated value, plus the value of the principal paid down and the value of any authorized capital improvements made by the homeowner. In return, the initial purchase price of the home is reduced by the amount of the grant. Subsequent purchasers are able to benefit from the limited appreciation and purchase a home for less than market value. The original grant stays with the home upon resale, recycling the subsidy to the next buyer.

The standards for qualification depend on income level and need, among other factors. The maximum grant is either \$50,000, or 20% of the purchase price of a home. The program operates through non-profit sponsors for the individual applicants, and the sponsors work with the state agency to enforce the state’s resale covenant, which preserves the affordable character of the home going forward.<sup>165</sup>

One question that arises is whether it makes sense to limit the home buyer to retaining only 25% of the appreciated value regardless of how long the buyer owns the home, given that the owner may have contributed to the home’s value through maintenance and improvements. A sliding scale for retained equity based on the period of ownership might present an alternative. Questions of homeownership program design merit careful consideration, and may highlight the multiple objectives at stake, including both housing stability and wealth-building.

Vermont does not limit its homeownership assistance to single family homes. It also makes provision for “limited equity cooperatives” to qualify for state support. Approval of limited equity cooperatives is on a case-by-case basis, but, to qualify, two-thirds of the units must be occupied by households with incomes at or below 80% of median income on the date of initial occupancy, and the cooperative is subject to “a Housing Subsidy Covenant of perpetual duration which shall set the income limits for

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<sup>164</sup> Vt. Hous. & Cons. Bd., *Home Ownership*, <https://vhcb.org/our-programs/housing/home-ownership> (last visited Oct. 17 2021).

<sup>165</sup> *Id.*; Vt. Hous. & Cons. Bd., *Single Family Housing Resale Guidelines and Procedure* (Apr. 2013), <https://vhcb.org/sites/default/files/policy/home-ownership/resaleguidelines.pdf>.

members and the desired affordability of units in the cooperative.”<sup>166</sup> Vermont’s state-wide program appears to offer a particularly favorable combination of features, including the fact that it is available statewide and not just to a few communities that choose to implement it.

There are other tools that are available to encourage home ownership in a way that also creates a permanent stock of affordable housing, such as Community Land Trusts and Land Banks,<sup>167</sup> as well as different models for supporting affordable homeownership, including direct subsidies for down payments and loan forgiveness programs.<sup>168</sup>

In 2019, the Massachusetts Affordable Housing Alliance (MAHA), a nonprofit organization based in Dorchester, launched a pioneering program for first-generation homebuyers. The program, called Saving Towards Affordable & Sustainable Homeownership (STASH), is the first of its kind in the country and is designed to promote first-generation homeownership, close the racial homeownership gap, and increase assets for first-generation homebuyers with low to moderate incomes.<sup>169</sup> STASH provides matched savings of up to \$2,000 for down payments for prospective homebuyers who certify (via affidavit) that they are the first in their family to buy a home, make below the area median income, and complete MAHA homebuyer education classes. The vast majority of participants have been people of color. The program has completed a pilot stage and is now aiming to increase its capacity. The program has also received \$325,000 in financial support from the City of Boston to provide up to \$5,000 in down payment assistance for homebuyers who save \$2,500 and are purchasing in Boston.<sup>170</sup> The STASH program is still in its early stages but is a promising model of how programs designed to promote equity and focused on first-generation homebuyers can operate. States could consider supporting similar programs in the future and could perhaps include a repayment of the down payment grant at the point of sale and provide greater funding to help families more easily reach high-opportunity areas.

## IV. Conclusion

States have a key role to play in affirmatively furthering fair housing and can do so through a set of legal powers unique to state government – including but not limited to their administration of state housing programs and state powers over land use. It is our hope that as they begin to implement the updated Affirmatively Furthering Fair Housing requirements, state governments will learn from these efforts in sister states and implement best practices within their own borders.

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166 Vt. Hous. & Cons. Bd., Policy Position Funding of Limited Equity Cooperatives, <https://vhcb.org/sites/default/files/policy/housing/ltdequitycoops.pdf> (last visited Oct. 17, 2020).

167 Emma Zehner, *Land Banks and Community Land Trusts Partner to Unlock Affordable Housing Opportunities*, Lincoln Ins. of Land Pol’y, (Oct. 7, 2020), <https://www.lincolninst.edu/publications/articles/2020-10-opening-doors-land-banks-community-land-trusts-partner-affordable-housing>.

168 Rick Jacobus and Jeffrey Lubell, *Preservation of Affordable Homeownership: A Continuum of Strategies*, Cntr. for Hous. Pol’y (April 2007), <https://community-wealth.org/sites/clone.community-wealth.org/files/downloads/paper-jacobus-lubell.pdf>.

169 Elizabeth Harrington, Elliott Hibbler, David Nardelli, & Dandy Xu, *Enabling First Generation Homeownership in Massachusetts: Recommendations for Massachusetts Affordable Housing Alliance’s STASH program* (2020), [https://mahahome.org/sites/MAHA-PR1/files/Enabling%20First-Generation%20Homeownership%20in%20Massachusetts\\_4.19.20.pdf](https://mahahome.org/sites/MAHA-PR1/files/Enabling%20First-Generation%20Homeownership%20in%20Massachusetts_4.19.20.pdf).

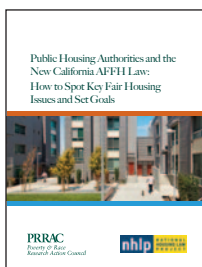
170 Boston Department of Neighborhood Development, *New Funding to Support First-Generation Homebuyers* (Feb. 11, 2021), <https://www.boston.gov/news/new-funding-support-first-generation-homebuyers.trusts-partner-affordable-housing>.



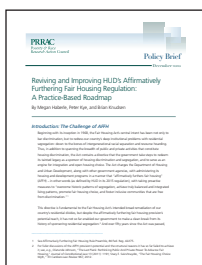
## Further reading on AFFH



Dan Rinzler and José Loya, "Addressing Segregation and Unequal Access to Opportunity in California with Affordable Housing Investments: A Path Forward for a Comprehensive Approach" (California Housing Partnership, December 2021)



*Public Housing Authorities and the New California AFFH Law: How to Spot Key Fair Housing Issues and Set Goals*  
(PRRAC & NHLP, July 2021)



*Reviving and Improving HUD's Affirmatively Furthering Fair Housing Regulation: A Practice-Based Roadmap*  
(PRRAC, December 2020)

*Housing Choice Voucher Reform: A Primer for 2021 and Beyond* (PRRAC, August 2020)

*A Vision for Federal Housing Policy in 2021 and Beyond*  
(PRRAC, July 2020)

*An Anti-Racist Agenda for State and Local Housing Agencies*  
(PRRAC, July 2020)

*Crafting a Strong and Effective Source of Income Discrimination Law*  
(PRRAC, March 2020)



Credit: Mutual Housing at Springlake, Woodland, CA

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