USING STATE LAW TO ENFORCE "AFFIRMATIVELY FURTHER" FAIR HOUSING OBLIGATIONS: NO LONGER FITTING A SQUARE PEG IN A ROUND HOLE

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PART I: INTRODUCTION

> "*For as long as there is residential segregation, there will be a de facto segregation in every area of life. So the challenge is here to develop an action program*."
> Dr. Martin Luther King, Jr. (1963)[1]

The United States has a deep-rooted housing problem. Decades of discriminatory laws, regulations, policies, and practices have created pockets of racially segregated communities of color, many of which experience disproportionately high rates of social and economic harms, such as crime, poverty, environmental hazards, and chronic health conditions.[2] The *status quo* is neither just nor sustainable.

This is not a new realization. The Kerner Commission report (the "Kerner Report") issued in 1968, made extensive findings regarding the unequal treatment and conditions of Black Americans and warned that the nation was "moving toward two societies, one black, one white—separate and unequal."[3] Partially in response to the Kerner Report, the federal government enacted the historic Fair Housing Act of 1968 ("FHA"),[4] which has as its primary purpose the promotion of "fair housing throughout the United States."[5] To accomplish that goal, the FHA does more than merely ban discriminatory conduct in the housing market.[6] Rather, it implicitly acknowledges the history of housing discrimination in the United States[7] and imposes affirmative obligations on certain government actors to ameliorate the persistent effects of such discrimination. It does so, first, by requiring the Secretary of the Department of Housing and Urban Development ("HUD") to "administer the programs and activities relating to housing and urban development in a manner *affirmatively to further* the policies of this title."[8] Second, it imposes a similar requirement on all executive departments and agencies with respect to their housing- and urban development-related programs."[9] Given the historical background of discrimination and its

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[1] Sharon Carlson, Dr. Martin Luther King Jr.'s visit to WMU, Western Michigan Univ. (December 18, 1963) (transcript available at https://libguides.wmich.edu/mlkatwmu/speech).

[2] Nat'l Advisory Comm'n on Civ. Disorders, Rep. U.S., DOJ, NCJ No. 8073 (1967).

[3] KERNER COMMISSION, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1(1968) [hereinafter KERNER COMMISSION REPORT].

[4] 42 U.S.C. §§ 3601-3619; *see also* U.S. DEP'T OF JUST., C.R. DIV., HOUS. & CIV. ENFORCEMENT SEC., OPENING THE DOOR: HIGHLIGHTS IN FAIR HOUSING ENFORCEMENT 3, https://www.justice.gov/media/1219921/dl?inline#:~:text=The%20Kerner%20Commission%20indicated%20that,%2C%20including%20single%20family%20homes.%E2%80%9D.

[5] 42 U.S.C. § 3601.

[6] 42 U.S.C. § 3604.

[7] *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW (Liverright, 2017).

[8] 42 U.S.C. § 3608(e)(5) (emphasis added).

[9] 42 U.S.C. § 3608(d).

remaining vestiges, the mandate to affirmatively further fair housing ("AFFH") is necessary to make meaningful progress toward achieving housing equality in the United States.[10] Indeed, as one Senator put it in advocating for passage of the FHA: "[W]here a family lives, where it is allowed to live, is inextricably bound up with better education, better jobs, economic motivation, and good living conditions."[11]

The lofty promise of the AFFH mandate, however, has not always been voluntarily fulfilled by HUD and other government actors. Early cases demonstrated the power and efficacy of using the courts to hold government actors accountable for their AFFH obligations.[12] With time, however, judicial enforcement of AFFH obligations became less successful. While there are many complex reasons for the absence of robust enforcement mechanisms, one is of central importance to this Article. Namely, state and municipal government actors—not federal ones—are often the primary decision makers for housing-related decisions that most intimately impact communities.[13] For example, decisions such as whether and where to build affordable housing or how to manage a public-housing waiting list primarily lie with local government, rather than with the federal government under HUD.[14] Yet, the pathways to challenging the conduct of local government under the AFFH mandate have become increasingly limited and unwieldy.[15] Indeed, courts have made clear that there is no private right of action under the AFFH mandate, and the limited options that exists for suing the federal government are not available when the would-be defendant is a local government actor.[16] Communities impacted by segregation and housing discrimination are, thus, left with little or no recourse.

This Article proposes that using the federal AFFH mandate to challenge the conduct of local government is akin to trying to fit a square peg in a round hole; the solution does not fit the problem. It further suggests that there is a better enforcement option: state law. In recent years, numerous states and municipalities have passed legislation and regulations that impose AFFH

[10] To those not familiar with fair housing law, the title of this Article can seem a bit unwieldy and, possibly even, grammatically incorrect. But, alas, this is the terminology used in the statute and in the related jurisprudential dialogue.

[11] 114 CONG. REC. 2276-2707 (1968).

[12] *See*, *e.g.*, Shannon v. U.S. Dep't of Hos. & Urban Dev., 436 F.2d 809 (3d Cir. 1970).

[13] For conciseness and ease of reading, I will refer to states, counties, cities, and their housing agencies or authorities as "local governments."

[14] *See*, *e.g.*, David Brand & Jon Campbell, *Gov. Hochul's Ambitious Housing Plan Meets Suburban Blockade*, GOTHAMIST (Jan. 30, 2023), https://gothamist.com/news/gov-hochuls-ambitious-housing-plan-meets-suburban-blockade; *see also*, *Tenant Selection and Assignment Plan*, N.Y.C. HOUS. AUTH. (Feb. 12, 2020), https://www1.nyc.gov/assets/nycha/downloads/pdf/TSAPlan.pdf.

[15] *See infra* Section II.

[16] *See infra* Section III.

obligations on the local level.[17] The focus of this Article is one such piece of state legislation passed in New York in December 2021.[18] The New York AFFH law ("NYAFFH") has as its core justification to "ensure not only that New York will no longer participate in harmful, discriminatory practices but that the state will actively seek to create more diverse, inclusive communities."[19] This Article argues that the NYAFFH is enforceable by private persons in New York state courts and, thus, fills the vacuum left by federal law and regulations. For local governments that are willing to take meaningful action to eliminate vestiges of housing discrimination, New York should be an example—albeit an imperfect one.

Part II of this Article provides a non-exhaustive and high-level summary of both the history of housing discrimination in the United States and the federal AFFH mandate. Part III discusses the challenges relating to enforcing the AFFH mandate, including the limitations on a private right of action against local government actors. Part IV discusses the NYAFFH and, specifically, whether it includes an implied private right of action. Also addressed is whether the NYAFFH is enforceable via a special proceeding in New York, known as an Article 78 writ of mandamus.[20] Part V offers a policy suggestion that states and municipalities that prioritize fair housing should pass AFFH legislation and specifically include a private right of action and other features to make enforcement—and thus meaningful change—realistic. This Article concludes with some thoughts about why a private right of action against states and municipalities, while not a panacea, is nonetheless critical. Namely, it would return some modicum of power to the communities that have been harmed by the legacy of segregation and discrimination—power that will allow them to hold their local leaders accountable.

PART II: HOUSING DISCRIMINATION IN THE UNITED STATES AND THE AFFH

A. High-Level Overview of Housing Discrimination in the United States[21]

As Richard Rothstein thoughtfully and thoroughly explains in his book *The Color of Law*, segregation "is not the unintended consequence of individual choices and of otherwise well-meaning law or regulation but of unhidden public policy that explicitly segregated every metropolitan area in

[17] *See infra* note 115.

[18] N.Y. PUB. HOUS. LAW § 600 (Mckinney 2021).

[19] N.Y.S.B. 1353 (2021) (Sponsor Memo).

[20] N.Y. C.P.L.R. §§ 7801, 7803(1) (CONSOL. 2014).

[21] This section is by no means intended to give a thorough history of the voluminous history of housing discrimination in the United States. For such accounts, *see* ROTHSTEIN, *supra* note 7.

the United States. The policy was so systematic and forceful that its effects endure to the present time."[22] Examples of laws and government-endorsed policies that created and perpetuated segregation are abundant. They include, but certainly are not limited to, the following:

> Public housing—which in its early years was a sought-after refuge for low- and middle-income families—was explicitly segregated and provided only limited options for Black Americans.[23] In certain places like New York City, when white flight caused the demographics of public-housing residents to transition to being primarily people of color, new developments were placed in isolated locations with little economic activity and/or in predominantly low-income Black communities.[24] The demographic changes also coincided with the beginning of the federal government's disinvestment in public housing, leaving developments subject to horrific conditions.[25]
>
> Federal agencies whose mission included promoting home ownership refused to insure mortgages to Black families while doing the same for white ones. This made buying a home much more expensive for Black families and effectively blocked them from the opportunity to move to suburban areas and build intergenerational wealth.[26]
>
> Government endorsed discrimination in the fields of real estate and lending such that it became nearly impossible for Black home buyers to purchase homes, especially in white neighborhoods.[27]
>
> Members of certain white communities used violence and other forms of harassment to intimidate Black people who had moved in without any government deterrence or criminal punishment.[28]
>
> Courts enforced covenants in deeds that precluded homes from being sold to anyone who was not white, all but ensuring that certain neighborhoods were off limits to people of color.[29]
>
> Governments sponsored initiatives such as so-called "urban renewal" or "slum clearance."[30] Those policies involved efforts by government to raze entire neighborhoods that comprised significant Black and Latinx

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[22] *See* ROTHSTEIN, *supra* note 7, at viii.

[23] ROTHSTEIN, *supra* note 7, at 17-20; AFFORDABLE HOUSING IN NEW YORK: THE PEOPLE, PLACES, AND POLICIES THAT TRANSFORMED A CITY (Nicholas Dagen Bloom & Matthew Gordon Lasner eds., 2016).

[24] Rothstein, *supra* note 7, at 34-37; Bloom & Lasner, *supra* note 23, at 120-21.

[25] *See* Jackson Gandour, *"The Tenant Never Wins" Private Takeover of Public Housing Puts Rights at Risk in New York City,* HUMAN RIGHTS WATCH (Jan. 27, 2022), https://www.hrw.org/report/2022/01/27/tenant-never-wins/private-takeover-public-housing-puts-rights-risk-new-york-city.

[26] DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE
UNDERCLASS 51–54 (1993); ROTHSTEIN, *supra* note 7, at 63-75.

[27] ROTHSTEIN, *supra* note 7, 65–67.

[28] MASSEY & DENTON, *supra* note 26, at 30–35 (1993).

[29] ROTHSTEIN, *supra* note 7, at 77-93.

[30] MASSEY & DENTON, *supra* note 26, at 55 –56.

> residents—ostensibly in the name of maintaining housing standards—which pushed them further into segregated urban areas and disallowed their enjoyment of the amenities of nearby white neighborhoods.[31]

Segregated Black neighborhoods also faced disproportionate harms. The limited housing opportunities for Black residents effectively confined them to small geographic areas, which naturally became densely populated and, in the words of some scholars, "hypersegregated."[32] The natural result was overcrowding and subdividing of existing housing stock.[33] This in turn led to faster deterioration, increased dilapidation, and, at times, wholesale abandonment of properties.[34] In a cruel twist of market forces, the deteriorated housing stock did not result in a concomitant reduction in rental values.[35] Indeed, instead of rents experiencing a decline based on an inferior housing stock, as one might intuit to be a natural market response, rents remained high based because of the "captive market."[36] That is, landlords could maintain artificially high prices because limited housing options for Black residents (based on segregation) created enduring demand in segregated neighborhoods but with limited supply.[37] Deteriorating housing stock has been proven to have a contagious effect on surrounding buildings and communities.[38] Thus, through forced overcrowding, government policy set certain communities up to fail.

There is also a school of thought that posits that segregation itself is a primary cause of poverty and related societal harms, such as crime, low

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[31] ROTHSTEIN, *supra* note 7, 126–31.

[32] MASSEY & DENTON, *supra* note 26, 74–78.

[33] KERNER COMMISSION REPORT, *supra* note 3, at 259.

> By restricting the area open to a growing population, housing discrimination makes it profitable for landlords to break up ghetto apartments for denser occupancy, hastening housing deterioration. Further, by creating a 'back pressure' in the racial ghettos, discrimination keeps prices and rents of older, more deteriorated housing in the ghetto higher than they would be in a truly free and open market.

Id.

[34] MASSEY & DENTON, *supra* note 26, at 131–32.

[35] KERNER COMMISSION REPORT, *supra* note 3, at 258 ("The combination of high rents and low incomes forces many Negroes to pay an excessively high pro portion of their income for housing").

[36] *See, e.g.*, Henry Gomory & Matthew Desmond, *Extractive landlord strategies: How the private rental market creates crime hot spots*, EVICTION LAB, (May 11, 2023), https://evictionlab.org/extractive-landlords-and-crime/ ("Tenants looking to rent in low-income markets often lack other housing options, making them a captive market. Landlords . . . are able to fill their properties, despite their neglect, because their tenants rarely have other places that will take them.").

[37] Justin P. Steil, Nicholas F. Kelly, Lawrence J. Vale, & Maia S. Woluchem, *Introduction: Fair housing: Promises, Protests, and Prospects for Racial Wquity in* Housing, *in* FURTHERING FAIR HOUSING: PROSPECTS FOR RACIAL JUSTICE IN AMERICA'S NEIGHBORHOODS 3 (Justin P. Steil et al. eds., 2020).

[38] MASSEY & DENTON, *supra* note 26, at 131 ("Studies suggest that the property owners are extremely sensitive to small signs of physical deterioration. The presence of even a small number of dilapidated buildings is taken as a signal that the neighborhood is going 'downhill.'").

educational achievement, and unemployment.[39] The theory is that segregation acts to concentrate not just race but also poverty in small geographic areas, and when there are economic downturns or other shocks to the system—such as a recession or the closure of a manufacturing plant—the economic impacts are felt more strongly in highly segregated communities.[40] Indeed, such shocks cause a domino effect of loss of employment, poverty, failed retail businesses, and further abandonment of properties.[41] Those results in turn create other negative consequences, such as higher levels of crime.[42] Climbing out of the hole created by these discriminatory policies can be difficult, thereby creating an intergenerational effect.[43] Indeed, many of the issues described above—including high levels of segregation—are not problems confined to the past; they persist to this day.[44] And numerous studies have shown that segregated, low-income areas are correlated with negative quality-of-life outcomes, such as health problems, lower earning potential, lack of socioeconomic mobility, and lack of political power.[45]

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[39] MASSEY & DENTON, *supra* note 26, at 118–147 ("[R]acial segregation acts to concentrate poor [B]lacks in a small number of neighborhoods, raising the poverty rate to which they are exposed[.]").

[40] MASSEY & DENTON, *supra* note 26, at 126 ("If racial segregation concentrated poverty in space, it also focuses and amplifies any *change* in the economic situation of [B]lacks. . . . [T]he greater the segregation, the smaller the number of neighborhoods absorbing the shock and the more severe the resulting concentration of poverty."); *id.* at 135. ("[S]egregation concentrates the loss in income and consumer demand that accompany any economic downturn. . . . [P]oor [B]lacks live in neighborhoods that typically contain only the barest rudiments of retail trade. They are left without goods and services that are routinely available to the poor of other groups.").

[41] MASSEY & DENTON, *supra* note 26, at 147. Segregation also necessarily limits the political power of segregated communities, making it difficult, if not impossible, to get necessary resources. *Id.* at 153–60.

[42] MASSEY & DENTON, *supra* note 26, at 137–39.

[43] MASSEY & DENTON, *supra* note 26, at 137.

[44] *See* John R. Logan & Brian Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2020 Census*, DIVERSITY AND DISPARITIES PROJECT, BROWN UNIV. (2020), https://s4.ad.brown.edu/Projects/Diversity.

[45] Steil, Kelly, Vale & Woluchem, *supra* note 37, at 7; *see also* Dolores Acevedo-Garcia, Clemens Noelke & Nancy McArdle, *The Geography Of Child Opportunity: Why Neighborhoods Matter For Equity First Findings From The Child Opportunity Index 2.0*, DIVERSITY DATA KIDS (2020), https://www.diversitydatakids.org/sites/default/files/file/ddk_the-geography-of-child-opportunity_2020v2_0.pdf ("Children's race and ethnicity are strong predictors of access to opportunity"); Chetty & Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-Level Estimates*, HARVARD UNIV. (2015), https://scholar.harvard.edu/files/hendren/files/nbhds_paper.pdf ("[T]hese results suggest that neighborhoods matter for children's long-term outcomes and suggest that at least half of the variance in observed intergenerational mobility across areas is due to the causal effect of place."); Barbara Sard & Douglas Rice, *Creating Opportunity for Children: How Housing Location Can Make a Difference*, CTR. ON BUDGET & POL'Y PRIORITIES, 13 (2014), https://www.cbpp.org/sites/default/files/atoms/files/10-15-14hous.pdf;

> [C]hildren living in neighborhoods of concentrated disadvantage had reduced verbal ability—which research shows is a major predictor of educational, employment, and other important life outcomes—by a magnitude equal to one to two years of schooling. Equally

The foregoing paragraphs are not intended to do justice to the long and horrific history of housing discrimination in the United States. Rather, they are intended to demonstrate that government behavior—both action and willing inaction—has created two separate and unequal societies: one that was open to whites only and which had a higher level of opportunity, and one for all others.

B. The Fair Housing Act and the Obligation to Affirmatively Further Fair Housing

The FHA was a monumental piece of legislation that was passed in large part to end the blatant and rampant discriminatory conduct described above. In addition to prohibiting discrimination,[46] the FHA requires HUD and all executive branch departments and agencies to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title," which includes affirmatively furthering fair housing.[47]

HUD is not only required to abide by the AFFH mandate, but it also sets requirements for its state and local partners.[48] Since 1974, HUD has issued grants to certain state and local governments known as Community Development Block Grants ("CDBG").[49] According to HUD, the CDBG "provides annual grants on a formula basis to states, cities, and counties to develop viable urban communities by providing decent housing and a suitable living environment, and by expanding economic opportunities, principally for low- and moderate-income persons."[50] For years after passage of the FHA, the federal government did little to support or enforce the AFFH mandate, but that changed in 1983 when Congress amended the CDBG program to require a certification from recipients attesting that the "grant will be conducted and administered in conformity with the Civil Rights Act of 1964 and the Fair Housing Act, and the grantee will affirmatively further fair housing."[51] In so doing, Congress tied critical CDBG funding to the AFFH obligations.[52]

> striking, the harmful effects not only became stronger the longer that children were exposed to such environments but lingered even after children had left the neighborhoods.

Id.

46 42 U.S.C. § 3604.

47 42 U.S.C. § 3608(d), (e)(5).

48 *See infra* notes 48–67 and accompanying text.

49 42 U.S.C. §§ 5301–5322.

50 *Community Development Block Grant Program*, U.S. DEP'T OF HOUS. AND URBAN DEV., https://www.hud.gov/program_offices/comm_planning/cdbg (updated last Dec.2, 2022).

51 42 U.S.C. § 5304(b).

52 42 U.S.C. § 5311(a).

In 1988, HUD issued the following related regulations governing the compliance standards of the AFFH mandates:

> In reviewing a recipient's actions in carrying out its housing and community development activities in a manner to affirmatively further fair housing in the private and public housing sectors, absent independent evidence to the contrary, the Department will consider that a recipient has taken such actions in accordance with its certification if the recipient meets the following review criteria:
> (1) The recipient has conducted an analysis to determine the impediments to fair housing choice in its housing and community development program and activities. The term "fair housing choice" means the ability of persons, regardless of race, color, religion, sex, or national origin, of similar income levels to have available to them the same housing choices.[53]

Although the regulations required grantees to perform so-called analyses of impediments to fair housing ("AIs"), there was a general lack of compliance and enforcement.[54] Indeed, grantees normally did not even have to submit the AIs to HUD for review.[55]

Yet, in 2015, after years of engagement with stakeholders and experts, HUD issued a final AFFH Rule.[56] In so doing, HUD acknowledged that its prior approach to ensuring local partners complied with the AFFH requirements had "not been as effective as originally envisioned."[57] The 2015 Rule required HUD grantees to submit an Assessment of Fair Housing ("AFH"), as described in the regulation:

> A program participant's strategies and actions must affirmatively further fair housing and may include various activities, such as developing affordable housing, and removing barriers to the development of such housing, in areas of high opportunity; strategically enhancing access to opportunity, including through: Targeted investment in neighborhood revitalization or stabilization; preservation or rehabilitation of existing affordable housing; promoting greater housing choice within or outside of areas of concentrated poverty and greater access to areas of high opportunity; and improving community assets such as quality schools, employment, and transportation.[58]

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[53] Community Development Block Grants, 53 Fed. Reg. 34416 (Sept. 6, 1988). In 1988, Congress also passed significant amendments to the FHA, both expanding its reach—for example to discrimination on the basis of disability—and regarding HUD's ability to enforce the law. *See* Fair Housing Amendments Act, Pub. L. 100–430, 102 Stat. 1619 (1988).

[54] *Affirmatively Furthering Fair Housing Interim Rule Fact Sheet*, U.S. DEP'T HOUS. & URBAN DEV., https://www.hud.gov/sites/dfiles/FHEO/documents/10_6_21_AFFH_IFR_Fact_Sheet.pdf (last visited Apr. 16, 2023) ("[HUD] did not have a process in place to systematically verify compliance.).

[55] *Id.*

[56] Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272 (July 16, 2015).

[57] *Id.*

[58] 24 C.F.R. § 5.150 (2021).

The regulations required submission of the AFH prior to the submission of CDBG applications, thereby allowing HUD to determine a jurisdiction's compliance with the AFFH requirements before issuing a grant.[59]

The forward momentum of such changes[60] did not, however, last. Instead, the AFFH rule has been involved in what might be described as a game of regulatory ping pong. Specifically, the AFFH rule was repealed in 2020 during the final months of the Trump administration.[61] Then in yet another reversal, in 2021, HUD repealed the revocation, and reinstated select aspects of the 2015 rule.[62]

In February 2023, HUD issued a revamped Proposed AFFH Rule in the Federal Register,[63] which allowed the public to review the proposed regulations and provide comments.[64] HUD describes the purpose of the Proposed AFFH Rule as follows:

> Notwithstanding progress in combatting some types of housing discrimination, the systemic and pervasive residential segregation that was historically sanctioned (and even worsened) by Federal, State, and local law, and that the Fair Housing Act was meant to remedy has persisted to this day. In countless communities throughout the United States, people of different races still reside separate and apart from each other in different neighborhoods, often due to past government policies and decisions. Those neighborhoods have very different and unequal access to basic infrastructure

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59 Steil, Kelly, Vale & Woluchem, *supra* note 36, at 5–6.

60 It should be noted that there have been and continue to be activists, scholars, and commentators who disagree with the AFFH's focus on integration. As one author puts it, this approach "resist[s] the idea . . . that poor neighborhoods can be good neighborhoods—conditioned, crucially, on the provision of public goods in the form of a full range of effective public services." Howard Hussock, *Affirmatively Furthering Fair Housing: Are There Reasons for Skepticism?, in* FURTHERING FAIR HOUSING: PROSPECTS FOR RACIAL JUSTICE IN AMERICA'S NEIGHBORHOODS 127 (Justin P. Steil et al. eds., 2020); *see also generally* Vicki Been, *Gentrification, Displacement and Fair Housing: Tensions and Opportunities*, *in* FURTHERING FAIR HOUSING: PROSPECTS FOR RACIAL JUSTICE IN AMERICA'S NEIGHBORHOODS 169 (Justin P. Steil et al. eds., 2020) (discussing the tensions between AFFH policies and the risk for displacement of Black and other communities of color). In the 1960s, the Black Power movement rejected integration as a sought-after goal, and instead focused on the goal of fighting white supremacy. *See* Alexander von Hoffman, *The Origins of the Fair Housing Act of 1968, in* FURTHERING FAIR HOUSING: PROSPECTS FOR RACIAL JUSTICE IN AMERICA'S NEIGHBORHOODS 47, 57–59 (Justin P. Steil et al. eds., 2020).

61 Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47899 (Aug. 7, 2020).

62 Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30779 (June 10, 2021); *see also* Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8524 (Feb. 9, 2023) (Proposed Rule), https://www.govinfo.gov/content/pkg/FR-2023-02-09/pdf/2023-00625.pdf (noting that in 2021, "HUD did not reinstate [all] provisions from the 2015 AFFH Rule, but committed to further implementation of the AFFH mandate at a future date").

63 Issuance of a "proposed rule" is a necessary step in the administrative law process, and which precedes the codification of rules and regulations promulgated by Executive Branch agencies. *See* OFFICE OF THE FEDERAL REGISTER, A GUIDE TO THE RULEMAKING PROCESS 4 (2011)

64 *See* Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516 (Feb. 9, 2023) (Proposed Rule), https://www.govinfo.gov/content/pkg/FR-2023-02-09/pdf/2023-00625.pdf.

> (streets, sidewalks, clean water, and sanitation systems) and other things that every thriving community needs, such as access to affordable and accessible housing, public transportation, grocery and retail establishments, health care, and educational and employment opportunities—frequently because government itself has intentionally denied resources to the neighborhoods where communities of color live. And this segregation is perpetuated by policies that effectively preclude mobility to neighborhoods where opportunity is greater.
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> . . . .
>
> This proposed rule implements the Fair Housing Act's Affirmatively Furthering Fair Housing (AFFH) mandate across the Nation to address these inequities and others that cause unequal and segregated access to housing and the platform it provides for a better life. The proposed rule is intended to foster local commitment to addressing local and regional fair housing issues, both requiring and enabling communities to leverage and align HUD funding with other Federal, State, or local resources to develop innovative solutions to inequities that have plagued our society for far too long. The proposed rule is meant to provide the tools that HUD—together with other Federal, State, and local agencies, as well as public housing agencies—can use to overcome centuries of separate and unequal access to housing opportunity.[65]

The Proposed Rule defines affirmatively furthering fair housing as:

> [T]aking meaningful actions that, taken together, reduce or end significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into well-resourced areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws and requirements. The duty to affirmatively further fair housing extends to all of a program participant's activities, services, and programs relating to housing and community development; it extends beyond a program participant's duty to comply with Federal civil rights laws and requires a program participant to take actions, make investments, and achieve outcomes that remedy the segregation, inequities, and discrimination the Fair Housing Act was designed to redress.[66]

Under the Proposed Rule, HUD will require its program partners to submit an "Equity Plan" relating to their compliance with AFFH obligations, which HUD can challenge and potentially restrict program funding (among

[65] *Id.* at 8516–17.

[66] *Id.* at 8857 (to be codified at 24 C.F.R. § 5.152).

other enforcement mechanisms) as a result thereof.[67] As of this writing, however, the final regulations have not yet been officially codified.[68]

Yet, while HUD has played a critical role in setting AFFH standards and encouraging local governments to comply, it lacks the ability to act as a comprehensive enforcer.[69] Moreover, the outcome of the next presidential election may impact the future of the AFFH rule and how the government enforces it, if at all. Thus, as discussed in the following section, private persons have played an important role in holding government actors—including HUD—to account when they fall short. And, as I argue below,[70] even if HUD had unlimited resources and consistently good intentions, should not traditionally marginalized communities and those with lived experience of housing discrimination have independent power to enforce their rights?

PART III: AFFH ENFORCEMENT—AND LACK THEREOF

The twin goals of the AFFH rule are "to end housing discrimination and segregation."[71] Since the passage of the FHA, private parties have tried to enforce the AFFH through judicial means to ensure that those twin goals were being properly pursued, and plaintiffs had some initial success in doing so.

For example, in *Shannon v. HUD*,[72] the U.S. Court of Appeals for the Third Circuit ("Third Circuit") reviewed a case in which a group of Philadelphia residents and business owners sued HUD based on its approval of a plan to have high-density affordable housing built in a predominantly Black neighborhood of Philadelphia.[73] The plaintiffs alleged that HUD had violated its AFFH duties because "in reviewing and approving this type of

[67] *Id.* at 8572 (to be codified at 24. C.F.R. § 5.162); *id.* at 8575–76 (to be codified at 24. C.F.R §§ 5.170, 5.172 (describing enforcement and compliance procedures).

[68] *See* U.S. DEP'T HOUS. & URB. DEV., AFFIRMATIVELY FURTHERING FAIR HOUSING (AFFH), https://www.hud.gov/AFFH (last visited Oct. 28, 2023).

[69] *See* Elizabeth Julian, *The Duty to Affirmatively Further: Fair Housing: A Legal as well as Policy Imperative*, JOINT CTR. HOUS. STUD. 5-6 (2017), https://www.jchs.harvard.edu/sites/default/files/a_shared_future_duty_to_affirmatively_further_fair_housing.pdf (noting the resource and policy limitations on HUD's enforcement capacity); Megan Haberle, *Furthering Fair Housing: Lessons for the Road Ahead*, *in* FURTHERING FAIR HOUSING: PROSPECTS FOR RACIAL JUSTICE IN AMERICA'S NEIGHBORHOODS 210, 214 (Justin P. Steil et al. eds., 2020).
("One contributing problem has been [HUD] reticence to engage in rigorous oversight or create accountability for local policies, even among federal funding recipients."); *c.f.* Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 KY. L.J. 125, 166 (2012) (noting the important settlements HUD has achieved through the administrative complaint process).

[70] *See infra* Part VI.

[71] U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y, Inc. v. Westchester Cnty., N.Y. 668 F. Supp. 2d 548, 564 (S.D.N.Y. 2009).

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

[73] *Id.* at 812.

project for the site chosen, HUD had no procedures for consideration of and in fact did not consider its effect on racial concentration in that neighborhood or in the City of Philadelphia as a whole."[74] Critically, the Third Circuit held that it could review HUD's "adherence to its own procedural requirements" in ensuring that its actions would "affirmatively promote fair housing."[75] The Third Circuit ultimately agreed with the plaintiff that HUD had failed to consider race in connection with its approval and remanded the case with a directive for HUD to comply with its AFFH obligations.[76] Other courts of appeals followed suit in finding HUD liable for AFFH violations.[77]

Several years later, consistent with the holding of *Shannon*,[78] but perhaps more explicitly stated, the U.S. Court of Appeals for the First Circuit ("First Circuit") issued a pair of decisions that made clear there was no direct private right of action against HUD—rather, the path to enforcing HUD's AFFH obligations via the judicial system was via the Administrative Procedures Act ("APA").[79] The issue of a private right of action came to the fore in *Latinos Unidos de Chelsea En Accion (LUCHA) v. Secretary of Hous. & Urban Development*.[80] There, the First Circuit held "that a remedy against HUD for failure to comply with section 3608 (d) is available only pursuant to the [APA]." One year later, in *NAACP v. HUD*,[81] the First Circuit elaborated that there was no private right of action against federal actors, but that the APA remained a viable tool for challenging arbitrary and capricious conduct. Further, the NAACP alleged that HUD's acts and omissions in connection with its administration of the CDBG grant violated various civil rights statutes, including HUD's AFFH obligation.[82] The First Circuit explained why, in its view, the only viable path against HUD involved the APA:

> Given these (and related) principles of administrative law, as set forth in the APA, it is not surprising that cases discussing a "private right of action" implied from a federal statute do not involve a right of action against the federal government. Rather, they typically involve statutes that impose obligations upon a nonfederal person (a private entity or a nonfederal agency

[74] *Id.*

[75] *Id.*

[76] *Id.* at 822–23.

[77] Clients' Council v. Pierce, 711 F.2d 1406, 1425 (8th Cir. 1983) ("Because we have found HUD liable for a constitutional violation, it certainly cannot have met its responsibility to promote fair housing").

[78] *Shannon*, 436 F.2d 809.

[79] 5 U.S.C. §§ 701–706 (2011).

[80] Latinos Unidos de Chelsea en Accion (Lucha) v. Sec'y of Hous. & Urb. Dev., 799 F.2d 774, 793 (1st Cir. 1986).

[81] N.A.A.C.P. v. Sec'y of Hous. & Urb. Dev., 817 F.2d 149 (1st Cir. 1987).

[82] *Id.* at 151.

> of government). The statute typically provides that the federal government will enforce the obligations against the nonfederal person. The "private right of action" issue is whether Congress meant to give an injured person a right himself to enforce the federal statute directly against the nonfederal person or whether the injured person can do no more than ask the federal government to enforce the statute."
>
> . . . .
>
> [N]o special circumstance exists in this case, or under Title VIII, that would call for other than APA review. Hence, we affirm our holding that Congress intended no special private right of action against the federal government.[83]

From that point forward, the weight of authority was that HUD could only be sued under an APA theory, which was used successfully in at least one notable case.[84]

A separate question arises, however, when dealing with the AFFH obligations of local government, which are not subject to the federal APA.[85] In the early 1970s—before *NAACP v. HUD*—the U.S. Court of Appeals for the Second Circuit held that the AFFH obligations lie not just with HUD, but with public housing agencies that partner with HUD,[86] such as the New York City Housing Authority ("NYCHA"). Indeed, the court held that NYCHA was "obligated [under Section 3608] to take affirmative steps to promote racial integration."[87] Shortly after this holding in *Otero v. NYCHA*, a district

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[83] *Id.* at 153–54.

[84] Thompson v. U.S. Dep't of Hous. Urb. Dev., 348 F. Supp. 2d 398 (D. Md. 2005). In *Thompson*, the district court found that HUD had failed in its AFFH obligations by not taking a regional approach to the placement of public housing in the greater-Baltimore area, stating:

> It is high time that HUD live up to its statutory mandate to consider the effect of its policies on the racial and socio-economic composition of the surrounding area and thus consider regional approaches to promoting fair housing opportunities for African–American public housing residents in the Baltimore Region. This Court finds it no longer appropriate for HUD, as an institution with national jurisdiction, essentially to limit its consideration of desgregative programs for the Baltimore Region to methods of rearranging Baltimore's public housing residents within the Baltimore City limits.

Id. at 463. *Thompson* also recounts the cases that invoked the APA to enforce HUD's AFFH obligations. *Id.* at 422.

[85] The APA is specifically addressed to "agency" action, which by definition is "each authority of the Government of the United States," with some enumerated exceptions. 5 U.S.C. § 701(b)(1) (2011).

[86] Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122 (2d Cir. 1973). Public housing authorities are also subject to the Quality Housing and Work Responsibility Act of 1998, which, among other things, obligates them to provide:

> [C]ertification by the public housing agency that the public housing agency will carry out the public housing agency plan in conformity with title VI of the Civil Rights Act of 1964, the Fair Housing Act, section 504 of the Rehabilitation Act of 1973, and title II of the Americans with Disabilities Act of 1990, and will affirmatively further fair housing.

42 U.S.C. § 1437c-1.

[87] *Otero*, 484 F.2d at 1124.

court judge found in *Resident Advisory Board v. Rizzo* that the city of Philadelphia had violated its AFFH obligations.[88] The court in *Rizzo* held that "the affirmative duty required by Title VIII of the 1968 Civil Rights Act applies not only to HUD but applies as well to other governmental agencies administering federally financed housing programs."[89] The court proceeded to hold:

> The cancellation of the Whitman Park Townhouse Project had a racially disproportionate effect, adverse to Blacks and other minorities in Philadelphia. The waiting list for low-income public housing in Philadelphia is composed primarily of racial minorities. Of the 14,000 to 15,000 people on the waiting list for public housing in Philadelphia . . . 85% are Black, and 95% are considered to be of racial minority background. . . . Obviously those in housing projects, which are overwhelmingly Black, and those on the public housing waiting list, are those least able to move out of the poorer, racially impacted areas of Philadelphia. The evidence also established that Blacks in Philadelphia who are concentrated in the three major Black areas of Philadelphia, have the lowest median income in comparison with the total population of Philadelphia and live in the poorest housing in Philadelphia. The Whitman Park Townhouse Project was a unique opportunity for these Blacks living in racially impacted areas of Philadelphia to live in an integrated, non-racially impacted neighborhood in furtherance of the national policy enunciated in Title VIII of the Civil Rights Act of 1968. Public housing offers the only opportunity for these people, the lowest income Black households, to live outside of Black residential areas of Philadelphia. Cancellation of the project erased that opportunity and contributed to the maintenance of segregated housing in Philadelphia.[90]

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[88] Resident Advisory Bd. v. Rizzo, 425 F. Supp. 987 (E.D.Pa. 1976), *modified by*, 564 F.2d 126 (3d Cir. 1977), *later proceeding at*, 503 F. Supp. 383 (E.D. Pa. 1980).

[89] *Id.* at 1015; *see also* Blackshear Residents Org. v. Hous. Auth. of City of Austin, 347 F. Supp. 1138, 1140 (W.D.Tex. 1971);

> However, there is ample evidence upon which to conclude, without reaching constitutional issues, that the Housing Authority and HUD employed procedures for selecting and approving the Project TEX 1-9 site that did not result in adequate consideration of factors bearing on the racial character of the site, as required by the Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the Fair Housing Act of 1968, 42 U.S.C. §§ 3601, 3608(d)(5). This Court so holds, and enjoins local and federal defendants from further proceeding with Project TEX 1-9 at the site in question until the requisite factors have been considered through the implementation of adequate procedures.

Id.

[90] *Rizzo*, 425 F. Supp. at 1018; *see also* Banks v. Perk, 341 F. Supp. 1175, 1182 (N.D. Ohio 1972), *aff'd in part*, *rev'd in part*, 473 F.2d 910 (6th Cir. 1973):

> The Fair Housing Act of 1968, 42 U.S.C. § 3601 et seq. in establishing a national policy of fair housing throughout the United States carried with it the clear implication that local housing authorities in conjunction with Federal agencies responsible for housing programs are to affirmatively institute action the direct result of which was to be the implementation

On appeal, the Third Circuit modified the decision without addressing the District Court's findings relating to Section 3608 and instead affirmed the holding based exclusively on the FHA's anti-discrimination provisions in Section 3604.[91]

The consensus after *NAACP v. HUD* was that local government and housing agencies could still be held liable for AFFH violations, not directly, but rather via the civil-rights enforcement statute.[92] The two seminal cases are *Langlois v. Abington Housing Authority*,[93] and *Wallace v. Chicago Housing Authority*.[94] In both *Langlois* and Wallace, the district courts concluded that the AFFH statute contemplated—or, at least did not prohibit—enforcement by the public against local housing authorities via 42 U.S.C. § 1983.[95] Importantly, these case were not outliers at the time.[96]

This theory, however, was called into question by two Supreme Court decisions, *Gonzaga Univ. v. Doe*[97] and *City of Rancho Palos Verdes, Cal. v.*

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of the dual and mutual goals of fair housing and the elimination of discrimination in that housing.

91 Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 140 (3d Cir. 1977); *id.* at 152.

92 42 U.S.C. § 1983 (1996).

93 Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 73 (D. Mass. 2002):

> The remaining question is whether the mandatory obligation imposed by § 3608(e)(5) on the Secretary of HUD can be enforced against the PHAs. When viewed in the larger context of Title VIII, the legislative history, and the case law, there is no way—at least, none that makes sense—to construe the boundary of the duty to affirmatively further fair housing as ending with the Secretary.

94 Wallace v. Chicago Hous. Auth., 298 F. Supp. 2d 710, 719 (N.D. Ill. 2003), *on reconsideration in part*, 321 F. Supp. 2d 968 (N.D. Ill. 2004) (holding that "it is clear that the Fair Housing Act does aim to 'confer individual rights upon a class of beneficiaries' and that "Congress did not intend to allow § 1983 plaintiffs to pursue an action under § 3608").

95 *Langlois*, 234 F. Supp. 2d at 73; *Wallace*, 298 F. Supp. 2d at 719.

96 Anderson v. Jackson, No. 06-3298, 2007 WL 458232, at *4 (E.D. La. Feb. 6, 2007) ("[B]ecause Plaintiffs' § 3608 claims are enforceable against HUD *and* HANO, they can maintain a private right of action. In addition, genuine issues of material fact remain disputed as to whether Defendants failed to affirmatively further fair housing."); Cabrini-Green Loc. Advisory Council v. Chicago Hous. Auth., No. 04 C 3792, 2005 WL 61467 (N.D. Ill. Jan. 10, 2005);

> The Wallace court also rejected Defendants' argument that no § 1983 claim exists under the FHA and QHWRA because the language of those statutes fail to clearly and unambiguously create rights for a protected class. . . . Again, the Wallace court was addressing the same statutory sections which are at issue in this case. Defendants make no novel arguments, nor have they attempted to distinguish the Wallace opinion, which the Court finds persuasive.

Id. (citation omitted); Reese v. Miami-Dade Cnty., 210 F. Supp. 2d 1324, 1329 (S.D. Fla. 2002) ("[T]he Court finds that the duty to "affirmatively" further fair housing imposes a binding obligation upon the States. Accordingly, the County Defendants' motion to dismiss count X should be denied."); In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 848 A.2d 1, 13 (N.J. Super. Ct. App. Div. 2004) ("We are therefore satisfied that [a state agency] is subject to the 'affirmatively to further' requirement under Title VIII.").

97 Gonzaga Univ. v. Doe, 536 U.S. 273 (2002).

Abrams,[98] in which the Supreme Court severely limited the use of Section 1983 claims to instances when it appeared that Congress intended for a statute to be enforced by private parties. Specifically, in *Abrams*, the Court held that "to sustain a § 1983 action, the plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs."[99] Given the longstanding holding that the AFFH mandate did not create an individually enforceable right against HUD, courts began to hold that there was no right of action against states and localities even under a Section 1983 theory.[100] For example, in *Thomas v. Butzen*,[101] the district court held that "there is nothing in section 3608(e)(5) in particular, or the FHA in general, that suggests Congress intended for HUD's duty to further fair housing to confer enforceable rights on individuals like plaintiffs. Plaintiffs' section 1983 claims based on that section are, therefore, dismissed with prejudice."[102] Other courts followed suit and jeopardized the ability of plaintiffs to invoke Section 1983 to enforce the AFFH obligations.[103] Thus, since *Butzen*, the ability to rely on Section 1983 has been seriously called into question.

Perhaps in light of the weakness of using Section 1983, another creative method to enforce the AFFH obligations against local governments has developed. In *United States ex rel. Anti-Discrimination Center of Metro N.Y., Inc. v. Westchester County*,[104] an organization dedicated to fighting housing discrimination brought a False Claims Act[105] ("FCA") case against

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98 City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005).

99 *Id.* at 120.

100 *See generally* Michelle Ghaznavi Collins, *Opening Doors to Fair Housing: Enforcing the Affirmatively Further Provision of the Fair Housing Act Through 42 U.S.C. S 1983*, 110 COLUM. L. REV. 2135, 2165–66 (2010) (noting that Abrams and Gonzaga "implicitly shut the door on this theory").

101 Thomas v. Butzen, No. 04 C 5555, 2005 WL 2387676, at *11 (N.D. Ill. Sept. 26, 2005).

102 *Id.*

103 MHANY Mgmt. Inc. v. Cnty. of Nassau, 843 F. Supp. 2d 287, 334–35 (E.D.N.Y. 2012), *aff'd in part, vacated in part, remanded,* 819 F.3d 581 (2d Cir. 2016) ("Having conducted its own analysis, as set forth below, the Court agrees with the *Thomas* and *Framingham* decisions and concludes that Section 3608 does not give rise to rights enforceable against state actors under Section 1983"); *see also* South Middlesex Opportunity Council, Inc. v. Town of Framingham, No. CIVA 07-12018-DPW, 2008 WL 4595369, at 17 (D. Mass. Sept. 30, 2008) ("Based on *Gonzaga,* I find that even if certain other provisions of the FHA confer individual rights, § 3608 does not"); Churches United for Fair Hous., Inc. v. De Blasio, 119 N.Y.S.3d 467, 467 (N.Y. App. Div. 1st Dep't 2020) ("Because there is no private right of action for enforcement of Section 3608—let alone any 'unambiguously conferred right'—petitioners may not use 42 USC § 1983 as a mechanism to sue for enforcement of section 3608."); Asylum Hill Problem Solving Revitalization Ass'n v. King, 890 A.2d 522, 535 (Conn. App. Ct. 2006) ("The defendant contends that, applying the *Gonzaga University* analysis, § 3608(d) does not create the unambiguous right required. We agree with the defendant that the standard set forth under *Gonzaga University* controls and that the plaintiffs cannot meet that standard").

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

105 31 U.S.C. §§ 3729–3733.

Westchester County, alleging that the county had made misrepresentations in its certifications to HUD as part of the CDBG process regarding its AFFH efforts. Despite its potential, FCA cases have not, however, been used widely or successfully since *Westchester*.[106] Indeed, there are challenges to using this theory, including finding an appropriate "whistleblower" plaintiff and avoiding the FCA's public-disclosure bar.[107]

Some plaintiffs have also resorted to suing HUD even though the allegedly offending conduct lies with local government, and courts have been wary of making too strong a causal connection. A relatively recent case involved allegations that HUD had violated the AFFH mandate by continuing to provide funding to Houston, Texas despite its allegedly continued neglect of AFFH principles.[108] The District Court dismissed the case, noting the disconnect in pursuing federal AFFH claims against HUD when local government action is at the root of the complaint: "Although Texas Housers has asked this Court to compel HUD to act, the harm it seeks to remedy flows more directly from Houston's alleged inaction" and further noted that "theory of harm relies on HUD as an instrument for altering Houston's behavior."[109] Thus, the problem of enforcing AFFH obligations against states and municipalities remains a challenging one.[110] Indeed, in recent years,

[106] U.S. *ex rel.* Mei Ling v. City of Los Angeles, CV 11-974 PSG (JCX), 2018 WL 3814498 (C.D. Cal. July 25, 2018) (dismissing complaint without prejudice); United States ex rel. Freedom Unlimited, Inc. v. City of Pittsburgh, 2016 U.S. Dist. LEXIS 43701, 96-97, 2016 WL 1255294 (W.D. Pa. 2016) (dismissing complaint); U.S. Lockey v. City of Dallas, 3:14-CV-03628-O, 2015 WL 12763511 (N.D. Tex. Dec. 12, 2015) (dismissing complaint); U.S. *ex rel.* Ellis v. City of Minneapolis, No. 11-CV-00416 PJS/TNL, 2014 WL 3928524, at *1 (D. Minn. July 24, 2014), *report and recommendation approved in part sub nom.*, Ellis v. City of Minneapolis, No. 11-CV-0416 PJS/TNL, 2014 WL 3928525 (D. Minn. Aug. 12, 2014) (recommending dismissal).

[107] *See* Graham Cnty. Soil & Water Conservation Dist. v. U.S. *ex rel.* Wilson, 559 U.S. 280, 285 (2010) ("[T]he FCA's public disclosure bar . . . deprives courts of jurisdiction over *qui tam* suits when the relevant information has already entered the public domain through certain channels").

[108] Texas Low Income Hous. Info. Serv. v. Carson, 427 F. Supp. 3d 43 (D.D.C. 2019).

[109] *Id.* at 59.

[110] It should also be noted that given HUD's national authority and the segregation-related challenges posed by regional disparities, HUD sometimes is the appropriate defendant. *See*, *e.g.*, Thompson v. U.S. Dep't of Hous. & Urb. Dev., 348 F. Supp. 2d 398 (D. Md. 2005). For an interesting exploration of the *Thompson* case and background, *see* Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333 (2007).

plaintiffs attempt to challenge local action using the APA[111] and FCA[112] have largely been unsuccessful.

PART IV: NEW YORK'S AFFIRMATIVELY FURTHERING FAIR HOUSING LAW

In the wake of the dismantling of the federal AFFH rule under the Trump administration, several states and municipalities have incorporated AFFH obligations into their laws and regulations.[113] New York enacted the NYAFFH in December 2021.[114] The New York State Legislature identified the following as its underlying policy, writing:

> By creating an obligation to affirmatively further fair housing for all state agencies and localities administering housing-related programs and laws, we will ensure not only that New York will no longer participate in harmful, discriminatory practices but that the state will actively seek to create more diverse, inclusive communities. The state and localities will work to overcome historic patterns of segregation, achieve truly balanced and integrated living patterns, promote fair housing choice, and foster neighborhoods that are free from discrimination. Fair housing advances economic opportunity and helps close the wealth gap that has disadvantaged communities of color for generations. Homeownership is the biggest source

[111] Inclusive Cmtys. Project, Inc. v. Dep't of Treasury, 946 F.3d 649, 660 (5th Cir. 2019) (affirming dismissal of an AFFH claim from against OCC based on lack of standing); Washington v. HUD, 2019 U.S. Dist. LEXIS 127027, *58-59, 2019 WL 5694102 (E.D.N.Y. July 29, 2019) (recommending dismissal of an AFFH claim brought against HUD under the APA because "plaintiffs allege no facts from which it might plausibly be inferred that the [HUD program] is causing or maintaining segregation"); Jones v. Off. of Comptroller of Currency, 983 F. Supp. 197, 204 (D.D.C. 1997),*aff'd*, No. 97-5341, 1998 WL 315581 (D.C. Cir. May 12, 1998) ("With the deferential APA standard of review in mind, the Court finds that the manner in which the OCC handled plaintiff's complaint regarding FNBC's acquisition of Wolcott is in itself substantial evidence that the OCC has met its statutory mandate to further the goals of the Fair Housing Act").

[112] *See* City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005).

[113] CAL. GOV. CODE § 8899.50 (West 2022) (requiring the administration of programs and activities to affirmatively further fair housing, which is defined as "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 and ethnically concentrated areas of poverty into areas of opportunity"); 20 ILL. COMP. STAT. ANN. 1315/40 (West 2007) (requiring applicants for Youthbuild funds to, among other things, certify that they "will affirmatively further fair housing"); ME. REV. STAT. ANN. tit. 30-A, § 4741 (2021) (requiring the Maine State Housing Authority to "ensure that any Maine State Housing Authority funding or any state or local funding is used in a manner that will affirmatively further fair housing"); MD. HOUS. & CMTY. DEV. § 2-302 (West 2021) (requiring "an update on the actions being taken by local jurisdictions to affirmatively further fair housing"); MD. HOUS. & CMTY. DEV. § 2-402 (West 2021) (requiring, among other things, "political subdivisions and housing authorities to affirmatively further fair housing" and further requiring them "to submit an assessment of fair housing to the Department as part of the housing element of a comprehensive plan"); Boston Zoning Code § 80-1 (including affirmatively furthering fair housing obligations within the development zoning review process).

[114] N.Y. PUB. HOUS. LAW § 600 (McKinney 2021).

> of wealth-building, and a family's neighborhood can determine access to jobs, schools, and a healthy environment.115

The core of the law provides that the Commissioner of the New York's Department of Housing and Community Renewal ("HCR") and "all covered housing agencies shall administer all such programs and activities related to housing and community development in a manner that affirmatively furthers fair housing and shall cooperate with the commissioner to further such purpose."[116] Specifically, the HCR Commissioner and covered housing agencies are required to "take meaningful actions"[117] to:

> (a) identify and overcome patterns of residential segregation and housing discrimination;
> (b) eradicate racially or ethnically concentrated areas of poverty;
> (c) reduce disparities in access to opportunity;
> (d) eliminate disproportionate housing needs;
> (e) provide the public reasonable and regular opportunities to comment on fair housing issues and participate in the development and advancement of affirmative fair housing policy; and
> (f) encourage and maintain compliance with article fifteen of the executive law and any other applicable anti-discrimination or fair housing law.[118]

Finally, the law requires New York's HCR Commissioner to prepare reports for the Legislature, which should "include any significant initiatives, policies, or programs undertaken in furtherance of fair housing and any recommendations for improving the state of fair housing in New York."[119]

Noticeably absent from the statute, however, is an enforcement provision. While this is disappointing, it does not mean that the law is toothless. Indeed, there are ways that laws can be judicially enforced even when an explicit private right of action is not provided.[120] The remaining

115 N.Y.S.B. 1353 (2021) [hereinafter Committee Report].

116 N.Y. PUB. HOUS. LAW § 600(2) (McKinney 2021).

117 *Id*. at § 600(3).

118 *Id.*

119 *Id.* at § 600(5).

120 Many laws have a section that explicitly provides a remedy to individuals that are injured by a violation thereof. For example, 42 U.S.C. § 3613 is the subsection of the Fair Housing Act entitled "Enforcement by private persons" and provides the details of how private individuals can enforce the Fair Housing Act. But, as addressed in the following two subsections, the absence of such a provision in a law does not mean that courts will necessarily foreclose the possibility that individuals can receive judicial relief for violations of such a law. *See* 42 U.S.C. § 3613.

sections of this part explore two of them: (1) an implied right of action;[121] and (2) a writ of mandamus under New York's CPLR Article 78.[122]

A. Implied Right of Actions in New York

There is a strong possibility that a court would find the NYAFFH to be enforceable via an implied private right of action. The New York Court of Appeals has identified three factors for consideration to determine if a private right of action exists: "'(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme.'"[123]

The NYAFFH easily meets the first requirement. The justification for the statute makes clear that its goal is to promote diverse communities with equal access to opportunities that were traditionally reserved for whites.[124] Under the FHA, the Supreme Court has construed standing broadly—not only for people of color that are victims of discrimination, but also white people who have been deprived the public good of living in integrated neighborhoods.[125] Thus, here, it is fair to infer that anyone harmed by government's failure to take meaningful steps to promote integration and equitable communities would satisfy the first element. Second, regarding legislative intent, the purpose of the NYAFFH is to take action to ensure "that New York will no longer participate in harmful, discriminatory practices but that the state will actively seek to create more diverse, inclusive communities."[126] If covered housing agencies failed to abide by the mandate, a private right of action would promote the legislative purpose since individuals would be acting as private attorneys general.

Whether it satisfies the final element—consistency with the legislative scheme—is a more complex question. Some cases would suggest it does. For example, courts have held that the absence of a conflicting enforcement scheme militates in favor of finding a private right of action.[127] Other factors

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[121] An implied right of action can be found where, although a statute does not "explicitly provide for a private cause of action, recovery may be had . . . if a legislative intent to create such a right of action is 'fairly implied' in the statutory provisions and their legislative history." Brian Hoxie's Painting Co. v. Cato-Meridian Cent. Sch. Dist., 556 N.E.2d 1087, 1089 (N.Y. 1990) (citations omitted).

[122] N.Y. C.P.L.R. §§ 7801–7806 (CONSOL. 2014).

[123] Haar v Nationwide Mut. Fire Ins. Co., 138 N.E.3d 1080, 1084 (N.Y. 2019) (internal citations omitted).

[124] Committee Report, *supra* note 118.

[125] Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972) (holding that the injury to a white tenant of the "loss of important benefits from interracial associations" was sufficient for standing).

[126] Committee Report, *supra* note 118.

[127] Negrin v. Norwest Mortg., Inc., 700 N.Y.S.2d 184 (N.Y. App. Div. 1999);

that courts have examined include whether the statute appears detailed and comprehensive or whether the Legislature "simply prohibited or required certain conduct, and left the mechanism of enforcement to the courts."[128] Finally, courts look to determine whether permitting a private right of action would be inconsistent with the policy goals of the statute.[129] These factors all militate toward the finding of a private right of action to enforce the NYAFFH since there is no detailed or conflicting enforcement scheme.

Yet, it is also possible that a court could conclude that the scheme as contemplated by the legislature is one of transparency only. The statute provides the HCR Commissioner's report "shall include any significant initiatives, policies, or programs undertaken in furtherance of fair housing and any recommendations for improving the state of fair housing in New York."[130] Assuming a court concludes that this report is the core of the statute, it is possible that the court would hold that a private right of action conflicts with the statutory intent.[131]

B. Article 78 Writ of Mandamus

Even if courts determine that the NYAFFH does not contain an implied private right of action, the NYAFFH is likely still enforceable via a writ of mandamus under New York's Civil Procedure Laws and Rules ("CPLR") Article 78.[132] Pursuant to CPLR 7803, New York courts can issue a

> [A] private right of action will generally be found not to exist where the Legislature has otherwise provided for public enforcement of the law. . . . However, [where] there is no regulatory agency that would otherwise enforce compliance with Real Property Law § 274-a. Thus, the recognition of a private right of action would do no harm to the legislative scheme.

Id.

[128] McLean v. City of New York, 905 N.E.2d 1167, 1172 (N.Y. 2009); *see also* City of N.Y. v. Smokes-Spirits.Com, Inc., 911 N.E.2d 834, 843 (N.Y. 2009) ("When considering similarly comprehensive enforcement schemes, we have declined to imply a private right of action").

[129] Sheehy v. Big Flats Cmnty Day, Inc., 541 N.E.2d 18, 22, (N.Y. 1989);

> Recognizing a private right of action in favor of the intoxicated youth under Penal Law § 260.20 (4) would be inconsistent with the evident legislative purpose underlying the scheme embodied in General Obligations Law §§ 11-100 and 11-101: to utilize civil penalties as a deterrent while, at the same time, withholding reward from the individual who voluntarily became intoxicated for his or her own irresponsible conduct.

Id.

[130] N.Y. PUB. HOUS. LAW § 600 (Mckinney 2021).

[131] *See supra* note 122 and accompanying text.

[132] Notably, the issue of whether the *federal* AFFH was enforceable via an Article 78 proceeding was discussed and rejected in Churches United for Fair Hous., Inc. v. De Blasio, No. 151786/2018, 2018 WL 3646976, at *13 (N.Y. Sup. Ct. Aug. 01, 2018), *aff'd*, 119 N.Y.S.3d 467 (N.Y. 2020) ("New York is that if there is no private right of action under a federal statute, an Article 78 Proceeding seeking to enforce it will not lie"). On appeal, the Appellate Division sidestepped the question, noting "[a]ssuming, arguendo, that petitioners may bring a CPLR article 78 proceeding to challenge the City's action . . . . we find that

determination on the question of whether a government "body or officer failed to perform a duty enjoined upon it by law" and issue injunctive relief. New York courts are willing to entertain claims for a writ of mandamus under statutes that lack a direct implied right of action.[133] For example, in *Patrolmen's Benevolent Association of New York v. De Blasio*, New York's Appellate Division "conclude[d] that the fact that the statute does not provide a private right of action does not preclude review of petitioner's request for injunctive relief in an article 78 proceeding."[134] In this case, New York City's police officers' union—i.e., the Patrolmen's Benevolent Association of New York ("PBA")—challenged New York City's "practice of releasing body-worn-camera footage without a court order or consent from the officer who had worn the camera" as impermissible under New York Civil Rights Law § 50-a.[135] The challenge was hybrid: it was part an Article 78 and part direct claim for violation of a substantive right.[136] The lower court dismissed the proceeding based on the theory that there "is no private right of action under Civil Rights Law § 50–a."[137] In rejecting this reasoning and holding that the PBA could challenge the practice under Article 78, the Appellate Division relied on two factors: (1) the statute created protected rights for police officers; and (2) it did not "explicitly prohibit a private right of action or otherwise manifest a clear legislative intent to negate review."[138]

The right for aggrieved persons to challenge administrative actions has for decades been couched in a standing analysis.[139] A 1975 New York Court of Appeals case made that clear there is a presumption that Article 78 review is available unless there is an indication that the legislature intended to preclude it:

> In recent years the right to challenge administrative action has been enlarged by our court. . . . In doing so, however, we have carefully examined the

the City amply met its AFFH obligation." Churches United for Fair Hous., Inc. v. De Blasio, 119 N.Y.S.3d 467, 469 (N.Y. App. Div. 2020).

133 *See infra* notes 136–140 and accompanying text. This proposition is only valid for claims brought under state law; if under federal law there is no private right of action, the inquiry ends. *See* Matter of George v. Bloomberg, 769 N.Y.S.2d 535 (N.Y. App. Div. 2003). While the Second Circuit characterized the following statement as dicta, a federal district court judge stated, "Article 78 does not provide a means for Plaintiffs to assert federal claims under statutes that do not otherwise provide for private causes of action." Jurist v. Long Island Power Auth., 538 F. Supp. 3d 254, 268 (E.D.N.Y. 2021), *aff'd in part, vacated in part, remanded sub nom.*, Powers v. Long Island Power Auth., No. 21-1755-CV, 2022 WL 3147780 (2d Cir. Aug. 8, 2022).

134 Patrolmen's Benevolant Ass'n of the City of N.Y. v. De Blasio, 101 N.Y.S.3d 280 (N.Y. App. Div. 2019).

135 *Id.* at 281.

136 *Id.*

137 *Id.*

138 *Id.*

139 *See, e.g.*, Matter of Dairylea Coop. Inc. v. Walkley, 339 N.E.2d 865 (N.Y. 1975).

> relevant statutes and precedents, ascertaining the presence or absence of a legislative intention to preclude review. Only where there is a clear legislative intent negating review . . . will standing be denied.[140]

Thus, Article 78 proceedings will be dismissed only if a court determines that the legislature specifically intended to preclude judicial review, which is not the case for the NYAFFH.[141] Given the likelihood that an Article 78 proceeding would be a viable mechanism to challenge actions or omissions under the NYAFFH, the next question is what sort of substantive challenges could be raised. "Mandamus is available . . . . only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law."[142] It is not a tool to "compel an act which involves an exercise of judgment or discretion"[143] that "'involve[s] the exercise of reasoned judgment which could typically produce different acceptable results." Rather, it is available to enforce "direct adherence to a governing rule or standard with a compulsory result."[144]

The NYAFFH has a clear legislative mandate: the core of the law provides that the HCR Commissioner and "all covered housing agencies *shall* administer all such programs and activities related to housing and community development in a manner that affirmatively furthers fair housing and shall cooperate with the commissioner to further such purpose."[145] Specifically, the HCR Commissioner and covered housing agencies are required to "take meaningful actions" in various areas to affirmatively further fair housing.[146] There is some discretion built into the statute, since reasonable people could disagree about what constitutes the mandated "meaningful action."[147] Given the mandatory language about taking meaningful action, there is not, however, any room for housing agencies flatly refusing or failing to abide by

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[140] *Id. at* 868 (internal citations omitted); *see also* N.Y.C. Lawyers' Ass'n v. Bloomberg, 908 N.Y.S.2d 872, 875 (N.Y. Sup. Ct. 2010) (stating in the context of an Article 78 proceeding challenging that "[t]o determine whether a party has standing, the court must examine the relevant statutes and precedents in order to ascertain the presence or absence of a legislative intention *to preclude review*") (emphasis added).

[141] The law in New York does seem to suggest that if a statute explicitly precludes a private right of action, courts may be hesitant to find that Article 78 review is available. *See*, *e.g.*, Malone v. City of New York, 144 N.Y.S.3d 689, 691 (N.Y. App. Div. 2021) (rejecting an Article 78 petition because the statute at issue "expressly precludes a private right of action to enforce the Act's provisions") (citation omitted).

[142] N.Y. Civ. Liberties Union v. State, 824 N.E.2d 947, 952–53 (N.Y. 2005).

[143] Brusco v. Braun, 645 N.E.2d 724, 725 (N.Y. 1994).

[144] N.Y. Civ. Liberties Union v. State, 824 N.E.2d at 953 (citation omitted); *see also* Klostermann v. Cuomo, 463 N.E.2d 588, 595 (N.Y. 1984) ("What must be distinguished, however, are those acts the exercise of which is discretionary from those acts which are mandatory but are executed through means that are discretionary.") (citation and internal quotation marks omitted).

[145] N.Y. PUB. HOUS. LAW § 600(2) (Mckinney 2021).

[146] *Id.* at § 600(3).

[147] *Id.*

the law.[148] So, for example, a covered housing agency that does not take *any* action or give *any* consideration to AFFH principles would likely be subject to a writ of mandamus.[149] Likewise, a covered housing agency that merely papers over the obligations and does not take any true action would have the same result.[150] Thus, courts in New York would likely be able to enforce the AFFH mandate[151] against state and local housing agencies that ignore their obligations in a manner that causes harm to groups for whose benefit the statute was enacted.[152]

PART V: A POLICY RECOMMENDATION

History has demonstrated the vital role played by individuals and communities in enforcing fair housing laws.[153] The limitations imposed on private enforcement of the AFFH mandate have, however, hampered progress toward achieving truly integrated, open, and equitable communities.[154] As one scholar has noted, the current system is set up in a manner that may allow local governments "to elude accountability."[155] With the chances of Congress amending the FHA to include a private right of action for AFFH violations unlikely,[156] the burden must shift to the states. In effect, they must hold themselves and their municipalities accountable. And while the NYAFFH[157] is a step in the right direction, there is room for improvement. What follows are some suggestions for other states and municipalities that seek to impose meaningful AFFH obligations.

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148 *Id.*

149 *C.f.* Shannon v. U.S. Dep't of Hous. & Urb. Dev., 436 F.2d 809, 822–23 (3d Cir. 1970) (directing HUD to take race into consideration in connection with its approval of plans to build federally subsidized housing in a predominantly Black neighborhood).

150 *C.f.* U.S. *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y., 668 F. Supp. 2d 548, 558 (S.D.N.Y. 2009) (finding Westchester County to have been in violation of its obligations to affirmatively further fair housing where, despite completing the required fair-housing assessments for submission to HUD, there was "no explicit reference to race, or race discrimination or segregation as an impediment to fair housing").

151 *See generally* N.Y. PUB. HOUS. LAW § 600.

152 While writing this Article, an appellate court in California concluded that California's AFFH law was enforceable via a writ of mandate, which is similar in nature to New York's Article 78 procedure. *See* Martinez v. City of Clovis, 307 Cal. Rptr. 3d 64, 132 (2023), *review denied* (July 19, 2023) (holding that "the duty to affirmatively further fair housing is enforceable in court and an ordinary writ of mandate is an appropriate mechanism for enforcing that duty"). Prior to *Martinez* decision, however, the California legislature had amended its AFFH statute to clarify that it was enforceable via a writ of mandate, after a trial court had concluded otherwise. *Id.* at 131–32.

153 *See* MASSEY & DENTON, *supra* note 26, at 197 (noting that individual lawsuits have been the primary enforcement mechanism of the Fair Housing Act).

154 *See supra* notes 43–44.

155 Haberle, *supra* note 72, at 215.

156 There have been calls for including a private right of action for years, without any change. *See, e.g.*, Collins, *supra* note 103, at 2165–66.

157 *See generally* N.Y. PUB. HOUS. LAW § 600.

First, legislation should explicitly provide for a private right of action. Ambiguity around whether one exists will delay litigation, result in uncertain and inconsistent outcomes, and could deprive aggrieved parties their day in court. Moreover, the class of persons who could invoke the private right of action should be construed broadly and include any aggrieved person or organization.[158]

Second, the legislation should allow for the recovery of attorney's fees to ensure that lower-income plaintiffs have an equal opportunity to have their claims heard in court. Otherwise, the legislation could close the courthouse doors to low-income residents affected by discriminatory practices,[159] which frequently may be the population designed to benefit from AFFH obligations.[160]

Third, the legislation should be explicitly clear about the obligations to affirmatively furthering fair housing. To require local government and agencies to take steps toward affirmatively furthering fair housing without being explicit about the means and specific goals is decidedly unhelpful.[161] Neither government housing agencies nor the communities they serve should have to guess and incur the risk of time-consuming litigation.

Fourth, transparency must be a critical component of the legislation. The oft-cited quote from Louis D. Brandeis that "[s]unlight is . . . . the best of disinfectants"[162] still rings true. Municipalities and housing agencies should be required to publish regular reports on their efforts to comply with AFFH obligations. Instead of requiring lofty but ambiguous goals, clear and detailed metrics should be required so that the plans can be measured against actual performance. This will help ensure that community members have the information they need to hold their leaders accountable.

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158 Fair housing organizations have played an integral role in bringing impact litigation and pushing for systemic change. For an exploration of the importance of organizational standing in the Fair Housing context, *see* Melissa Rothstein & Megan K. Whyte, *Teeth in the Tiger: Organizational Standing as a Critical Component of Fair Housing Act Enforcement*, AM. CONST. SOC'Y ISSUE BRIEF (April 2012), https://www.acslaw.org/wp-content/uploads/2018/04/Rothstein_and_Whyte_-_Organizational_Standing1.pdf. One organization making significant progress in the New York City metropolitan area is the Fair Housing Justice Center. Examples of their cases, settlements, and judgments they can be found at the following website: *News,* FAIR HOUSING JUSTICE CENTER, https://www.fairhousingjustice.org/news/ (last visited Apr. 16, 2023).

159 *See*, *e.g.*, David Shub, *Private Attorneys General, Prevailing Parties, and Public Benefit: Attorney's Fees Awards for Civil Rights Plaintiffs*, 42 DUKE L.J. 706, 707 (1992) ("Without an attorney's aid, the victim of civil rights violations will most likely gain no relief.").

160 *See*, *e.g.*, N.Y. PUB. HOUS. LAW § 600(3) (requiring covered parties to take steps to "eradicate racially or ethnically concentrated areas of poverty").

161 *C.f.* 42. U.S.C. § 3608(e) (requiring HUD to affirmatively further fair housing without elaboration or specification).

162 LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY 92 (1914).

Fifth, the legislation should require states to provide technical and financial help for municipalities seeking to abide by their AFFH obligations, but which lack information or resources about how to best do so. The burdens of AFFH obligations should not be shouldered by municipalities or housing agencies alone. Compliance should be a collaborative and well-organized effort.

Ultimately, no statute can, alone, undo the history of housing discrimination and reverse its present-day effects. But buy-in at all levels of government, combined with a clear and straightforward path to judicial enforcement for residents of communities that have suffered the ills of historical and structural housing discrimination, are critical tools in the toolbox.

PART VI: CONCLUSION

The fight for fair housing is in many ways the fight for equal opportunity in the United States, and AFFH obligations are a critical component of that fight. While litigation is not a panacea especially in the civil rights context,[163] it is still a necessary stick to complement the carrots of regulation and planning. And, as this Article has attempted to highlight, it is not enough that courts can in theory play a role in the fight for housing justice; it is also critical that people and communities that have been harmed by housing discrimination—whether overt or structural—can actually access the courts to fight for their rights. Indeed, over 50 years ago, the Kerner Commission Report warned of two separate and unequal societies in America.[164] While progress has been made, we cannot take that for granted or assume it will continue along the same trajectory. To ensure that we keep moving in the right direction and ensure that vestiges of segregation and discrimination are eliminated, government at all levels must take AFFH obligations seriously. And we must ensure that the courthouse doors are open to the commnity if and when government fails to do so.

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[163] *See generally* Raphael Bostic, Katherine O'Regan & Patrick Pontius with Nicholas F. Kelly, *Fair Housing from the Inside Out: A Behind-the-Scenes Look at the Creation of the Affirmatively Furthering Fair Housing Rule*, *in* FURTHERING FAIR HOUSING: PROSPECTS FOR RACIAL JUSTICE IN AMERICA'S NEIGHBORHOODS 74, 75 (Justin P. Steil et al. eds., 2020) (noting "the value of an approach to affirmatively furthering fair housing that centers more on using the AFFH process as a practical *planning tool* rather than one that relies solely on *legal enforcement*" (emphasis in the original)); *see also* Steil, Kelly, Vale & Woluchem, *supra* note 36 at 24 ("Given that there are limited avenues for either private or public enforcement through the courts for the Fair Housing Act's AFFH provision, the most viable path forward entailed having HUD use its administrative powers to set directives for state and local governments to advance racial equality.").

[164] KERNER COMMISSION REPORT, supra note 3.