AGGRESSIVELY AND AFFIRMATIVELY FURTHERING FAIR HOUSING: GRANTEES OBLIGATED TO LITIGATE

INTRODUCTION

The Fair Housing Act (FHA) was passed in reaction to years of blatant discrimination in private housing and America's growing problems within major metropolitan areas.[1] Politicians recognized that discrimination and segregation in America's housing had a compounding effect on society as a whole.[2] Growing concentrations of minorities throughout America's inner cities led to extreme poverty and higher crime rates.

After years of national debate over the need for a law addressing housing discrimination, the National Advisory Committee on Civil Disorders released a report detailing the effects of residential segregation.[3] The report concluded that America was "moving toward two societies, one black, one white—separate and unequal."[4]

Following this report, Congress passed a fair housing bill, but with a few changes from Lyndon B. Johnson's original proposal.[5] Most importantly, the Senate version of the bill, the version that was ultimately passed, withdrew several enforcement tools that would greatly hinder the ability to eliminate discrimination and integrate housing.[6] Weak enforcement is a common trend throughout the history of the Fair Housing Act. The purpose of the Affirmatively Further Fair Housing duty was to ensure that the

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[1] *See generally* CHARLES M. LAMB, HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS (2005).

[2] *Id.* at 39.

[3] *See generally* U.S. RIOT COMM'N, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

[4] *Id.* at 1.

[5] LAMB, *supra* note 1, at 40-41.

[6] ROBERT G. SCHWEMM, *1966-1968: The Legislative History of the 1968 Fair Housing Act*, *in* HOUSING DISCRIMINATION LAW AND LITIGATION § 5.2 (2017) ("[t]he most important change made in the Mondale-Brooke proposal by the Dirksen substitute was to eliminate the 'cease and desist' power that had been proposed for HUD as part of the administrative remedy in favor of 'informal methods of conference, conciliation, and persuasion'").

Federal Government was not only prohibiting discrimination, but also taking strides toward integrating American communities.[7]

A combination of poor federal oversight and weak enforcement tools has kept the Department of Housing and Urban Development (HUD) and grantees from meeting their integrative goals.

Fortunately, with recent developments in Supreme Court jurisprudence and new policy focused on improving HUD oversight of the affirmatively further obligation, discriminatory lending, a most cited impediment to integration,[8] can be effectively combatted.

Part I of this Comment will discuss the history of the Fair Housing Act and the affirmatively further obligation, focusing on the litigation and legislation that has defined affirmatively furthering. Part II of this Comment will argue that pursuing disparate treatment and disparate impact claims under the Fair Housing Act falls within the new definition of affirmatively furthering fair housing, and that HUD should utilize its authority to withdraw funding if grantees refuse to address impediments to fair housing. This Comment will also address the difficulties of pursuing this strategy as a tool to promote fair housing, and why withdrawing funding to motivate grantees falls within the discretion of the Department of Housing and Urban Development.

I. BACKGROUND

In 1968, the 90th United States Congress passed the Fair Housing Act into law.[9] After years of discrimination and the fight to recognize housing as a right to be held in the highest regard, the Fair Housing Act would declare "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[10] Senator Mondale of Minnesota, the main sponsor of fair housing legislation, remarked

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[7] Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211-12 (1972).

[8] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-905, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS 9 (2010).

[9] Fair Housing Act, Pub. L. No. 90-284, §§ 801-819, 82 Stat. 73, 81-89 (1968) (codified as amended at 42 U.S.C. § 3601-3619 (2012)).

[10] 42 U.S.C. § 3601 (2012).

that the purpose of this Act was to replace ghettos with "truly integrated and balanced living patterns."[11] The purpose of integrative housing is to benefit communities and society as a whole, not just those minority groups who have been historically denied access to housing choice.[12]

There are two purposes the Fair Housing Act serves that are relevant to this proposal. First, the Act declares it unlawful for anyone engaging in residential real estate-related transactions to discriminate against any person involved in the transaction because of race, color, religion, sex, handicap, familial status, or national origin.[13] Second, the Act placed an initial duty on the Secretary of Housing and Urban Development to administer programs in a manner that affirmatively furthers fair housing.[14] This affirmatively further obligation was set in place to provide an integrative prong to the legislation.

A. History of the Affirmatively Further Duty

The Federal Government had in the past considered housing needs for America by enacting legislation.[15] The first substantial step towards a prohibition on discrimination came in the Civil Rights Act of 1964, directing that the Federal Government avoid discrimination in housing programs.[16] In 1968, Congress enacted the Fair Housing Act, declaring intentional discrimination unlawful and requiring the Department of Housing and Urban Development to assess the integrative effects of federal programs.

The Affirmatively Further Fair Housing obligation has not seen the same effective enforcement as other steps towards providing fair housing throughout the United States. Regardless, the drafters thought it important to the success of the Fair

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[11] 114 CONG. REC. 3422 (1968).

[12] *See* Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973).

[13] 42 U.S.C. § 3605(a) (2012).

[14] 42 U.S.C. § 3608(e)(5) (2012) (stating the function is to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter").

[15] *See generally* Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (1949).

[16] 42 U.S.C. § 2000d (2012) (stating "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance").

Housing Act to go beyond mandating that individuals refrain from engaging in discriminatory conduct, which is why Congress included Section 3608.[17] Section 3608 explicitly places the affirmatively further obligation on the Secretary of Housing and Urban Development.[18] Section 3608 also requires that "[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes of [the Fair Housing Act] and shall cooperate with the Secretary to further such purposes."[19] The Department of Housing and Urban Development now has the option of pulling funding should grantees not cooperate.

1. Judicial Interpretation

Following inception of the Fair Housing Act in the 1960s, litigation arose disputing what obligations were actually placed on the Department of Housing and Urban Development and other local housing authorities. Through this litigation, courts began to shape the meaning of affirmatively furthering fair housing.

Starting in 1970, courts interpreted affirmatively further to mean that a recipient[20] had to look at the effects of local planning action and prevent discrimination in housing resulting from that action.[21] The Second Circuit in 1973 was satisfied that the affirmative duty required consideration be given to the impact that proposed public housing programs would have on the racial integration of the area in which the program was to be carried out.[22] The court went even further to state that "[a]ction must be taken to fulfill, as much as possible, the goal of open, integrated

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[17] NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 154 (1st Cir. 1987) (stating "the history of Title VIII suggests that its framers meant to do more than simply restate HUD's existing legal obligations").

[18] 42 U.S.C. § 3608 (2012).

[19] 42 U.S.C. § 3608(d) (2012).

[20] A "recipient" includes all political subdivisions, public agencies, organizations, institutions, or individuals "to whom Federal financial assistance is extended, directly or through another recipient, for any program or activity, or who otherwise participates in carrying out such program or activity." 24 C.F.R. § 1.2(f) (2017).

[21] Shannon v. U.S. Dep't of Hous. & Urban Dev., 436 F.2d 809, 816-17 (3d Cir. 1970).

[22] *See* Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973).

residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat."[23]

Unfortunately, the "affirmatively further" purpose of the Fair Housing Act has not seen the development and enforcement the Second Circuit called for in 1973.

2. Clinton Executive Order

The Federal Government neglected the affirmatively further duty for nearly twenty-six years, as recognized by the agency charged with enforcement.[24] However, in 1994, President Bill Clinton issued Executive Order 12892.[25] The purpose of this executive order was to amend the Fair Housing Act in order to affirmatively further fair housing in all Federal programs and activities relating to housing and urban development throughout the United States.[26] Specifically, the order required the Secretary to promulgate regulations regarding programs and activities of executive agencies related to housing and urban development that would aid in the national goal of affirmatively furthering fair housing.[27] In hopes of creating an enforcement tool, the order provides that should an executive agency conclude that a participant is not complying with the promulgated rules, the executing agency may cancel or terminate any current agreements or contracts and refuse to extend any further aid.[28]

The rules promulgated by the Secretary of Housing and Urban Development in response to this executive order focused more on procedural hurdles than substantial steps towards fair housing.

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[23] *Id.*

[24] "However, we also know that the Department itself has not, for a number of reasons, always been successful in ensuring results that are consistent with the Act." *Fair Housing Planning Guide Vol. 1*, U.S. DEP'T OF HOUS. & URBAN DEV., https://www.hud.gov/sites/documents/FHPG.PDF [https://perma.cc/RZU2-EYUD] (last visited Mar. 27, 2018) [hereinafter *Planning Guide*]. This is the HUD planning guide referencing the Department's failure to always fulfill the obligation to affirmatively further fair housing.

[25] Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 17, 1994).

[26] *Id.*

[27] *Id.* at 2940.

[28] *Id.* at 2941.

First, the recipient had to certify that they had conducted an analysis of impediments[29] to housing choice within their jurisdiction.

Second, the recipient had to conjure a plan to either eliminate or alleviate those impediments to housing choice. For example, in a 2011 analysis of impediments, the Baltimore Metropolitan Council said its strategy to overcome predatory and discriminatory lending was to provide consumer education and monitor bank lending policies.[30]

Finally, the recipient had to keep records of the analysis and plan to be submitted to the Department of Housing and Urban Development for review. To assist federal grantees in preparing an analysis of impediments and a fair housing plan, HUD published a Fair Housing Planning Guide in 1996.[31]

3. Failure to Enforce

In the years following the Clinton Executive Order, the Department of Housing and Urban Development and grantees continued to fall short of this obligation to affirmatively further fair housing. The United States Government Accountability Office (GAO)[32] issued a report in 2010 detailing the shortcomings of HUD oversight and CDBG[33] grantees' failure to fulfill their

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[29] HUD defines impediments to fair housing choice as any "actions, omissions, or decisions" made on the basis of "race, color, religion, sex, disability, familial status, or national origin which restrict housing choices or the availability of housing choices." *Planning Guide*, *supra* note 24, at 2-8.

[30] MULLIN & LONERGAN ASSOCIATES INCORPORATED, ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE: BALTIMORE METROPOLITAN REGION (Oct. 2011), http://resources.baltimorecountymd.gov/Documents/Planning/neighborhoodimprovement/aicounty111206.pdf [https://perma.cc/FE82-ZU7N] [hereinafter *Analysis, Baltimore*].

[31] *Planning Guide*, *supra* note 24 (stating "[t]his *Guide* is written to provide you with information on how to conduct an Analysis of Impediments to Fair Housing Choice (AI), undertake activities to correct the identified impediments, and the types of documentary records to be maintained").

[32] The U.S. Government Accountability Office is an independent, non-partisan agency that works for Congress to investigate how the Federal Government spends taxpayer dollars.

[33] The Community Development Block Grant (CDBG) program is one of the longest-running grant programs in the history of HUD. The program began in 1972 and now "provides annual grants on a formula basis to 1209 general units of local government and States." *Community Development Block Grant Program—CDBG*, U.S. DEP'T OF HOUS. & URBAN DEV.,

obligations.[34] After reviewing four hundred forty-one different analyses of impediments submitted by grantees, the GAO estimated that twenty-nine percent of those analyses were prepared before 2004, eleven percent of which were prepared during the 1990s.[35] This was very concerning given the fact grantees are required to update their analysis of impediments every five years. Furthermore, twenty-five of the grantees failed to provide the reports, suggesting they did not even prepare or maintain the required documents.[36]

The GAO performed a detailed review of sixty analyses of impediments to assess the validity of the content provided and determine the most common cited impediments to fair housing.[37] The GAO reached two very important points in this report. First, lending discrimination was one of the most frequently cited impediments to fair housing throughout the country.[38] Second, a majority of the reports did not include a timeframe for implementing a plan to overcome their cited impediments.[39] Determining whether or not grantees are actually achieving or attempting to achieve goals is nearly impossible without benchmarks and timetables for implementation.[40]

HUD's inability to successfully oversee grantees' duties to affirmatively further fair housing has also been highlighted by third party litigation. The Anti-Discrimination Center of Metro New York sued Westchester County, New York, in 2007, challenging Westchester's certifications that it was acting to affirmatively further fair housing as CDBG grantees.[41] Westchester County had failed to even consider race as an

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https://www.hud.gov/program_offices/comm_planning/communitydevelopment/programs [https://perma.cc/8V83-WZTE] (last visited Mar. 27, 2018).

[34] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-905, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS 2-3 (2010).

[35] *Id.* at 9.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty., 495 F. Supp. 2d 375, 376-77 (S.D.N.Y. 2007).

impediment to fair housing during the years 2000-2006.[42] The court denied Westchester's motion to dismiss on the basis that "an analysis of impediments that purposefully and explicitly . . . avoids consideration of race in analyzing fair housing needs fails to satisfy the duty affirmatively to further fair housing."[43] Westchester settled the case and agreed to build 750 units of fair and affordable housing in areas of low diversity, pay the United States $30 million, expend $30 million of county funds, and submit oversight and enforcement authority to a court appointed monitor.[44] While the shortcomings of Westchester are attributable to its misconduct, the Department of Housing and Urban Development is charged with monitoring its actions and progress as a grantee.

4. 2015 New Rule

In response to the GAO report, the internal report by the Department of Housing and Urban Development, and the *Westchester* settlement, the Obama Administration began to shift political focus to the "affirmatively further" obligation.[45] In 2013, HUD proposed a rule to strengthen the process by which participants assess fair housing issues and establish goals to overcome those issues.[46]

The rule, later adopted in 2015, provided for five major revisions to the affirmatively further duty. First, the Analysis of Impediments system would be replaced with a standardized Assessment of Fair Housing through which participants would identify fair housing issues and factors contributing to fair

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[42] *Id.* at 377.

[43] *Id.* at 388.

[44] *Westchester County Agrees to Develop Hundreds of Units of Fair and Affordable Housing in Settlement of Federal Lawsuit*, U.S. DEP'T OF JUSTICE (Aug. 10, 2009), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/westchester_pr.pdf [https://perma.cc/E75N-XD2B].

[45] Athena Jones, *Obama Administration Announces New Fair Housing Rules*, CNN (July 8, 2015), http://www.cnn.com/2015/07/08/politics/fair-housing-rules-obama-administration/index.html [https://perma.cc/RU2B-ZBGZ]; Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710 (proposed July 19, 2013) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576 & 903) (laying out the proposed rule).

[46] 24 C.F.R. §§ 5, 91, 92, 570, 574, 576 & 903 (2017).

housing issues.[47] Second, participants would be provided data that must be considered when establishing goals to address the contributing factors in order to facilitate improved planning and decision making.[48] Third, fair housing planning would be incorporated into the current planning processes, which in turn would incorporate "fair housing priorities and goals more effectively into housing, and community development decision[]making." Fourth, HUD would promote regional collaboration across multiple jurisdictions.[49] Finally, the public would be given an opportunity to provide input about issues, goals, and priorities relating to the use of federal funding through community participation.[50]

The rule adopted in 2015 also amended several definitions to improve guidance and enforcement. The rule redefines "[a]ffirmatively furthering fair housing" as

> taking 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.[51]

Also significant, and very important to this Comment, the rule defines fair housing choice for the first time. "*Fair housing choice* means that individuals and families have the information, opportunity, and options to live where they choose without unlawful discrimination and other barriers related to race, color, religion, sex, familial status, national origin, or disability."[52] Fair housing issues are defined as

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[47] Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015). A fair housing contributing factor "creates, contributes to, perpetuates, or increases the severity of one or more fair housing issues." *Id.* at 42,354.

[48] *Id.* at 42,273.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 42,353. This language is significantly different from that of the Clinton Executive Order, which simply defined affirmatively further as performing the analysis, planning to address the impediments, and maintaining the records for HUD review.

[52] *Id.* at 42,354 (emphasis in original). The rule also goes on to define the difference between actual choice, protected choice, and enabled choice.

> a condition in a program participant's geographic area of analysis that restricts fair housing choice or access to opportunity, and includes such conditions as ongoing local or regional segregation or lack of integration, racially or ethnically concentrated areas of poverty, significant disparities in access to opportunity, disproportionate housing needs, and evidence of discrimination or violations of civil rights law or regulations related to housing.[53]

The motivation behind this new approach tracks the same narrative as earlier amendments to the affirmatively further obligation.[54] However, several housing advocates feel that the new rule still lacks substance and effective enforcement tools to integrate American cities.[55] A more enforcement driven and goal oriented approach, within the new rule promulgated in 2015, is necessary to truly advance fair housing.

II. DISCUSSION

A. Defining Meaningful Action to Affirmatively Further Fair Housing

As stated above, a consistent problem throughout the history of the affirmatively further obligation has been defining what is required of grantees and then holding them accountable. The judiciary believes that the obligation requires grantees and HUD to do more than prohibit discrimination, but to act in a manner to "promote racial integration."[56] In 1995, the proposed rule defined affirmative steps as certifying that the recipient has performed an

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[53] *Id.*

[54] "This new approach is designed to empower program participants and to foster the diversity and strength of communities by overcoming historic patterns of segregation, reducing racial or ethnic concentrations of poverty, and responding to identified disproportionate housing needs consistent with the policies and protections of the Fair Housing Act." *Id.* at 42,273.

[55] *See, e.g.*, Austin W. King, *Affirmatively Further: Reviving the Fair Housing Act's Integrationist Purpose*, 88 N.Y.U. L. REV. 2182, 2185-86 (2013); Jonathan J. Sheffield, *At Forty-Five Years Old the Obligation to Affirmatively Further Fair Housing Gets a Face-Lift, but Will It Integrate America's Cities?*, 25 U. FLA. J.L. & PUB. POL'Y 51, 51-52 (2014); Brian J. Connolly, *Promise Unfulfilled? Zoning, Disparate Impact, and Affirmatively Furthering Fair Housing*, 48 URB. LAW. 785, 788 (2016).

[56] Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1125 (2d Cir. 1973).

analysis of impediments, determining a plan to eliminate those impediments, and maintaining records of those first two steps.

In 2015, the newly adopted rule replaced the term "proactive steps" in the definition of the affirmatively further obligation with the term "meaningful actions" and then defined "meaningful actions."[57] HUD refers to this action in the executive summary as "actions to be taken to overcome the legacy of segregation, unequal treatment, and historic lack of access to opportunity in housing."[58] Then, HUD explicitly defines the term to mean "significant actions that are designed and can be reasonably expected to achieve a material positive change that affirmatively furthers fair housing by, for example, increasing fair housing choice or decreasing disparities in access to opportunity."[59]

Requiring that municipalities pursue litigation falls within the context of increasing fair housing choice and decreasing disparities in access to opportunity. Discriminatory lending practices contribute to segregation within communities and a lack of housing choice. For example, in a case discussed below, a financial lender would offer less favorable loan terms on properties valued at seventy-five thousand dollars or less. The discriminatory effect of this policy was restricted access to financing, limiting access to housing choice.

B. Litigation as Meaningful Action to Affirmatively Further Fair Housing

Housing advocates and politicians intended for litigation to be an important enforcement tool for fair housing. In 1967, President Lyndon B. Johnson, in forming a coalition to support a law against housing discrimination, campaigned for the need to pass legislation that would authorize the Attorney General to bring suits against those exhibiting patterns and practices of housing discrimination.[60] Disparate impact has been a tool recognized for the past thirty years to achieve the goals stated in

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[57] Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,277 (July 16, 2015).

[58] *Id.* at 42,272.

[59] *Id.* at 42,354.

[60] 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 1968-69, at 62 (1970).

the Fair Housing Act. In 1994, the Department of Justice, HUD, and nine other federal agencies issued a policy statement recognizing disparate impact as a method of proof of lending discrimination under the Fair Housing Act.[61]

An overwhelming majority of appellate courts recognized that the Fair Housing Act prohibits practices and policies that have a disparate impact on protected classes.[62]

HUD also promulgated a final rule in 2013 to clarify the disparate impact theory framework under the Fair Housing Act.[63] The purpose of establishing disparate impact theory was to "prohibit practices with an unjustified discriminatory effect, regardless of whether there was an intent to discriminate."[64]

The Supreme Court affirmed the lower court's position in a recent case, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*.[65] The court opined that "[r]ecognition of disparate-impact claims is consistent with the FHA's central purpose," which is preventing segregation and discrimination in America's housing market.[66] Disparate impact under the Fair Housing Act, however, requires more than statistical disparity.[67] A claim of disparate impact fails if the statistical disparity is not a result of policies or practices implemented by the defendant.[68]

It is also worth noting that housing advocates and local governments recognized the importance of including disparate

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[61] Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266 (Apr. 15, 1994).

[62] Michael G. Allen, Jamie L. Crook & John P. Relman, *Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective*, 49 HARV. C.R.-C.L. L. REV. 155, 156 (2014) (collecting cases).

[63] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013). This rule establishes the burden shifting framework requiring plaintiffs to make out a prima facie case. If the plaintiff does so, the defendant is then given the opportunity to prove the practice is necessary to achieve one or more nondiscriminatory interests. The plaintiff then has the opportunity to prove the nondiscriminatory interest could be achieved by other practices.

[64] *Id.*

[65] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2516-26 (2015) (holding that disparate-impact claims are cognizable under the Fair Housing Act).

[66] *Id.* at 2521.

[67] *Id.* at 2522.

[68] *Id.* at 2523.

impact under the Fair Housing Act, likely in consideration of the cases that will be discussed below.[69] The majority went as far as to quote an *amicus* brief for the State of Massachusetts: "[w]ithout disparate impact claims, States and others will be left with fewer crucial tools to combat the kinds of systemic discrimination that the FHA was intended to address."[70]

Additionally, several local governments have taken on successful litigation against lending institutions in the past ten years, providing meaningful action towards housing choice and fair housing.

1. *Mayor and City Council of Baltimore v. Wells Fargo Bank*

In January 2008, the City of Baltimore[71] filed a complaint alleging that Wells Fargo Bank had engaged in reverse redlining[72] in predominantly African-American neighborhoods throughout Baltimore.[73] The City alleged that such lending practices in African-American neighborhoods led to a disproportionate amount of foreclosures, causing an increase in vacant homes, leading to financial losses incurred by the City of Baltimore.[74]

The City specifically pled that the foreclosures led to a significant decline in property value, resulting in a decrease in tax revenue, an increase in the number of abandoned and vacant homes, an increase in criminal activity, increased expenditures for police and fire protection, increased expenditures to secure

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[69] "[M]any of our Nation's largest cities—entities that are potential defendants in disparate-impact suits—have submitted an *amicus* brief in this case supporting disparate-impact liability under the FHA." *Id.* at 2525.

[70] *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S.Ct. at 2525.

[71] The City of Baltimore received $19,386,093.00 in CDBG funds in the year 2017. *About Grantees: Baltimore, MD*, HUD EXCHANGE, https://www.hudexchange.info/grantees/baltimore-md [https://perma.cc/DXQ9-JWJB] (last visited Mar. 27, 2018). Thus, the City of Baltimore has an obligation to administer plans in a manner that affirmatively furthers fair housing.

[72] Reverse redlining occurs when a lender or insurer targets particular neighborhoods that are predominantly non-white, not to deny residents loans or insurance, but rather to charge them more than in a non-redlined neighborhood where there is more competition. *See generally* Andrew Lichtenstein, *United We Stand, Disparate We Fall: Putting Individual Victimes of Reverse Redlining in Touch with Their Class*, 43 LOY. L.A. L. REV. 1339 (2010).

[73] Mayor & City Council of Balt. v. Wells Fargo Bank, N.A., 677 F. Supp. 2d 847, 851 (D. Md. 2010).

[74] *Id.* at 849.

abandoned homes, additional expenditures to acquire and rehabilitate vacant properties, and additional expenditures for administrative, legal, and social services.[75]

In a third amended complaint, the City was able to identify two specific practices that Wells Fargo engaged in leading to mass foreclosures.[76] First, the City alleged Wells Fargo deliberately steered borrowers into less favorable loan terms than they qualified for.[77] Second, the City alleged Wells Fargo approved unqualified borrowers for refinancing or home-equity loans that it knew the borrowers could not afford.[78]

The judge denied Wells Fargo's motion to dismiss the third complaint on the basis that the City had narrowed their focus to these practices, which satisfied a causal link between the statistical discrepancies and these predatory lending practices.[79] First, had it not been for steering into unfavorable loan terms, borrowers presumably would have been able to continue to make payments and remain in possession of the home.[80] Second, absent Wells Fargo's unaffordable refinance and home-equity loans, borrowers would have continued to make their monthly payments and occupy their property.[81]

As a result, the Department of Justice intervened in the litigation and helped secure a settlement that would compensate the city and individual borrowers nationwide. The settlement required Wells Fargo to pay "$50 million in direct down-payment assistance to borrowers in Baltimore and seven other communities;" minority borrowers who were steered into unfavorable mortgages would receive an average of $15,000.00.[82]

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[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 851.

[79] Mayor & City Council of Balt. v. Wells Fargo Bank, N.A., No. JFM-08-62, 2011 WL 1557759, at *6 (D. Md. Apr. 22, 2011).

[80] *Mayor & City Council of Balt.*, 2011 WL 1557759, at *3.

[81] *Id.*

[82] Luke Broadwater, *Wells Fargo Agrees to Pay $175M Settlement in Pricing Discrimination Suit*, BALT. SUN (July 12, 2012), http://www.baltimoresun.com/news/breaking/bs-md-ci-wells-fargo-20120712-story.html [https://perma.cc/2QUU-5BH4].

2. *City of Memphis and Shelby County v. Wells Fargo Bank*

The City of Memphis and Shelby County initiated a similar lawsuit in 2011 against Wells Fargo.[83] In the complaint, the City of Memphis highlighted the discrepancy of foreclosures between home loans made by Wells Fargo in predominantly African-American and predominately Caucasian tracts of Shelby County.[84] The City cited significant decline in property value, the reduction in property tax value, the cost in providing additional government services to foreclosed homes, and increased municipal expenses as damages resulting from Wells Fargo lending practices.[85]

In defeating Wells Fargo's motion to dismiss, the City of Memphis not only achieved standing to pursue the narrow claims that it had alleged, but also successfully alleged a disparate impact claim based on certain facially-neutral policies. First, Wells Fargo loan originators were given wide discretion in issuing loans; however, they were given large incentives to drive consumers towards more profitable subprime loans.[86] Naturally, loan officers would drive consumers towards inopportune loan terms in order to line their own pockets with bigger margins.[87] Second, Wells Fargo would provide discounts and more favorable loan terms for properties valued in excess of $400,000, while at the same time increasing interest rates for properties valued at $75,000 and below.[88]

The disproportionate foreclosure statistics coupled with the lending policies proved enough for the City to properly plead a disparate impact claim and survive Wells Fargo's motion to

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[83] City of Memphis v. Wells Fargo Bank, N.A., No. 09-2857-STA, 2011 WL 1706756 (W.D. Tenn. May 4, 2011).

[84] *City of Memphis*, 2011 WL 1706756, at *1. From 2005-2008, 54.2% of foreclosures occurred in predominantly African-American neighborhoods in the City of Memphis; only 23.6% of foreclosures occurred in predominantly Caucasian tracts. *Id.* From 2004-2008, Wells Fargo made loans with interest rates at least three percent above the federally established benchmark to 63% of its African-American borrowers in the city, but to only 26% of its Caucasian borrowers in the city. *Id.*

[85] *Id.* at *3.

[86] *Id.* at *2.

[87] *Id.*

[88] *Id.* at *14 The court also noted that properties valued at $75,000 or less were three times more likely to be located in predominately African-American areas of the city and county. *Id.*

dismiss.[89] The City was later able to secure a settlement requiring Wells Fargo to pay $3 million to the City and County to support economic development and $4.5 million in grants for mortgage down payments and set a lending goal of $425 million to residents—a quarter of which would be allotted to low and moderate-income borrowers.[90]

3. *City of Los Angeles v. Wells Fargo Bank*

The City of Los Angeles also filed a complaint against Wells Fargo in 2015.[91] However, the court in this case dismissed the suit based on the City's inability to show a disproportionate effect on minorities.

In their initial complaint, the City alleged that eight different types of "predatory" home loans were issued to minority borrowers.[92] A main focus of the City's disparate impact claim was the use of "high-cost" loans—loans that were three percentage points above a federally established benchmark.[93] However, the City's claim failed as the statistical disparity was too small and the specific policy that led to the statistical disparity was not identified.[94]

The City alleged that of the 4,260 loans issued to minority borrowers, twelve were "high cost" loans issued to owners occupying their home, warranting a prima facie case for disparate impact under the Fair Housing Act.[95] However, an expert

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[89] *Id.* at *15.

[90] James O'Toole, *Wells Fargo Pledges $432.5M in Lending, Payments to Settle Lawsuit*, CNN (May 31, 2012), http://money.cnn.com/2012/05/30/news/companies/wells-fargo-memphis/index.htm [https://perma.cc/496S-CCRF].

[91] City of Los Angeles v. Wells Fargo & Co., No. 2:13-CV-09007-ODW(RZx), 2015 WL 4398858 (C.D. Cal. July 17, 2015).

[92] *City of Los Angeles*, 2015 WL 4398858, at *1 (identifying "(1) high-cost loans (defined by the City as loans with an interest rate three percentage points or more above the federally established benchmark); (2) subprime loans; (3) interest-only loans; (4) balloon payment loans; (5) loans with prepayment penalties; (6) negative-amortization loans; (7) no-documentation loans; and (8) adjustable rate mortgage loans with 'teaser' rates").

[93] *Id.* at *2.

[94] *See* Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2512 (2015) (recognizing that a disparate impact claim under the FHA must be based on more than a statistical disparity, the claim must seek to remove a policy that is "artificial, arbitrary, and unnecessary").

[95] *City of Los Angeles*, 2015 WL 4398858, at *7.

commissioned by the City even noted in his analysis that the disparities highlighted for similarly situated African-American borrowers and Non-Hispanic White borrowers were "not statistically significant."[96]

The City failed to identify a policy contributing to the statistical disparity, so they argued that the disparate impact was a result of a lack of policy. There is no authority to support that disparate impact claims are designed to invoke new policies. The Supreme Court said in *Inclusive Communities* that disparate impact claims must solely seek to remove such barriers.[97]

Furthermore, the City was hurt by the suggestion that Wells Fargo should analyze the issuance of high-cost loans on the basis of race and then issue loans on the basis of race to correct the disparity. The court interpreted this to be the equivalent of a racial quota, which the Supreme Court explicitly denounced in *Inclusive Communities*.[98]

4. A Standard for Determining When It Is Proper to Pursue Disparate Impact Claims

For this proposal to be effective, it is critical that HUD and grantees meticulously select viable claims. The three cases discussed above, though lacking consideration by appellate courts, could help HUD define a standard and gauge the success of a disparate impact claim.

The Supreme Court guides the disparate impact framework in its *Inclusive Communities* opinion.[99] Plaintiffs must identify more than a statistical discrepancy, as that discrepancy must be attributable to an arbitrary and unnecessary barrier in the form of an institutional policy.[100] Furthermore, the solution cannot be a racial quota requiring lenders to provide certain borrowing opportunities to minorities to counter the alleged disparate impact.[101]

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[96] *Id.*
[97] *Inclusive Cmtys. Project*, 135 S. Ct. at 2512.
[98] *Id.*
[99] *Id.* at 2511-12.
[100] *Id.* at 2522.
[101] *Id.* at 2524.

The duty that falls on HUD and grantees is deciding whether or not certain discrepancies highlighted in the Assessments to Fair Housing will make out a prima facie case under the *Inclusive Communities* framework. The Los Angeles claim failed specifically because the discrepancy was less than .28 percent, based on over 4,200 loans issued.[102] The City of Memphis alleged that over 46 percent of Wells Fargo home loans issued in African-American tracts of the county were experiencing foreclosures, while only 20.1 percent of home loans made in Caucasian tracts of the county went into foreclosure.[103]

Second, and most difficult, is determining the lending policy to which the discrepancy is attributable. The City of Los Angeles had its claim dismissed because it was unable to point to a policy implemented by Wells Fargo that caused the alleged racial discrepancy. Alleging that a statistical discrepancy exists because of the lack of policies guarding against disparate impact is not a viable claim. Grantees will have to single out a policy, such as providing predatory loans on lower valued homes, that can be linked to the statistics covered in the fair housing assessments.

Finally, the remedy that the government seeks cannot be the equivalent of a racial quota to offset policies that have a disparate impact. Pursuing damages, like the settlement Memphis and Baltimore received, would not be a racial quota. In those cases, Wells Fargo is providing injured individuals with monetary compensation for their losses, making available a certain amount of financing for low and moderate income individuals, and discontinuing the discriminatory policies and practices.

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[102] City of Los Angeles v. Wells Fargo & Co., 2:13-CV-09007-ODW(RZx), 2015 WL 4398858, at *7 (C.D. Cal. July 17, 2015).

[103] City of Memphis v. Wells Fargo, N.A., No. 09-2857-STA, 2011 WL 1706756, at *1 (W.D. Tenn. May 4, 2011).

C. Grantees Are in a Favorable Position to Bring Disparate Treatment and Disparate Impact Claims

1. Grantees Are Collecting Data and Preparing Reports That Make Out Viable Disparate Impact and Disparate Treatment Claims

Grantees were initially required to provide an analysis of impediments, a data driven assessment of all things contributing to lack of housing choice or fair housing. In 2015, the rule changed, but grantees are still required to research and build an analysis similar to the analysis of impediments. The GAO report concluded that discriminatory lending was one of the most common impediments cited when they reviewed 60 analyses of impediments in 2010.[104]

The City of Memphis paid for the creation of an analysis of impediments in 2011, two years after they filed a lawsuit against Wells Fargo.[105] This analysis reported that African-Americans and Hispanics were 3.29 times and 2.58 times more likely than Non-Hispanic Whites to be denied loans.[106] The analysis provided charts and data supporting the growing foreclosure effect on the racial wealth divide, and illustrated the density of bank-owned properties in minority neighborhood tracts.[107]

The City of Los Angeles also had an analysis of impediments prepared in 2011.[108] The report charted mortgage denial rates segmented by race or ethnicity. African-American applicants with an income level of $75,000 had a denial rate of 34.8 percent compared to 24.5 percent for White applicants.[109] The report also

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[104] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-905, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS 9 (2010).

[105] *See generally City of Memphis: Analysis of Impediments to Fair Housing Choice*, METROPOLITAN MILWAUKEE FAIR HOUSING COUNCIL (2011), http://s3.relmanlaw.com.s3.amazonaws.com/database/Tennessee2011CityofMemphis.pdf [https://perma.cc/J7VL-ZDQ8].

[106] *Id.* at 41.

[107] *Id.* at 41, 43.

[108] *Analysis of Impediments to Fair Housing Choice Study and 2013-2018 Fair Housing Strategy*, COMTY. DEV. COMM'N OF THE CTY. OF L.A. (Oct. 7, 2011), https://www.lacdc.org/programs/community-development-block-grant/plans-and-reports/final-2011-analysis-of-impediments [https://perma.cc/3BVN-JYZ7].

[109] *Id.* at 134.

charted how Hispanic households were offered high interest rate loans at a much higher frequency than non-Hispanic households, at 19.8 percent versus only 7.9 percent.[110]

The City of Baltimore had the most extensive analysis of impediments prepared in 2011; prior to this, neither the City nor the County had prepared an analysis of impediments since 1994.[111] The Home Mortgage Disclosure Act data for Baltimore County provided that Black and Hispanic mortgage holders in Baltimore County were consistently more likely to have high-cost loans than White mortgage holders—a pattern consistent with mortgage discrimination.[112] The same report concluded that mortgage loan denial and high-cost lending disproportionately affected minority applicants. Upper-income African-American households were denied mortgage loans at a rate of 20.6 percent while lower-income White applicants were denied at a rate of 13.3 percent.[113] Lower-income Hispanic households accounted for 5.9 percent of originations and 36.7 percent of high-cost loans.[114]

All three of these cities pursued claims against financial lenders; two of them reached settlements that helped provide housing choice to their communities. Also, it is important to note that these reports will only improve in accuracy and depth as more resources are committed to affirmatively furthering fair housing.[115] Through the 2015 promulgated rule, HUD made a new commitment to provide grantees with local and regional data on integrated and segregated living patterns, racially or ethnically concentrated areas of poverty, and disproportionate housing needs based on protected classes.[116]

2. Recent Developments in Case Law

The *Inclusive Communities* decision holding disparate-impact claims cognizable under the Fair Housing Act is not the only

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[110] *Id.* at 143.

[111] *Analysis, Baltimore, supra* note 30, at 100.

[112] *Id.* at 97.

[113] *Id.* at 94.

[114] *Id.* at 117.

[115] Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,273 (July 16, 2015).

[116] *Id.*

recent Supreme Court opinion to improve the viability of municipality claims. In 2017, the Supreme Court took on the issue of municipality standing under the Fair Housing Act. While this opinion eliminated an effective defense for lenders, the Court left some important questions unanswered.[117]

a. Bank of America Corp. v. City of Miami

The City of Miami brought an action against multiple mortgage lenders under the Fair Housing Act in 2014, claiming that those lenders had engaged in racially discriminatory practices in the residential housing market, causing the City to suffer economic harm.[118]

The City alleged that both the intentional discrimination and the disparate-impact discrimination of Bank of America caused a disproportionately high number of foreclosures in the minority neighborhoods of Miami.[119] A regression analysis was offered to show that African-Americans borrowing from Bank of America were 1.581 times more likely to receive a predatory loan than Caucasian borrowers; Latino borrowers were 2.807 times more likely.[120] The complaint further alleged that loan officers were intentionally targeting these minority neighborhoods for high cost loans and increased interest rates, points, and fees.[121] The damages alleged were based on reduced property tax revenues and the increase in expenditures on municipal services to remedy the unsafe and dangerous conditions of the vacant homes.

A plaintiff's claim is barred if his "'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that' Congress authorized

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[117] *See* Bank of America Corp. v. City of Miami, 137 S. Ct. 1296 (2017). A popular defense to fair lending litigation is to attack the municipalities' ability to achieve Article III standing under the Constitution. *See, e.g.*, County of Cook v. Wells Fargo & Co., 115 F. Supp. 3d 909, 913-14 (N.D. Ill. 2015).

[118] City of Miami v. Bank of America Corp., No. 13-24506-CIV, 2014 WL 3362348, at *1 (S.D. Fla. July 9, 2014).

[119] *Id.*

[120] *Id.*

[121] *Id.*

the plaintiff to sue."[122] The District Court dismissed the City's claim based on the Eleventh Circuit's determination of the zone of interest limitation under the Fair Housing Act.[123] According to *Nasser*, the interest in the value of a property does not implicate protection under the Fair Housing Act. Therefore, the Court ruled that the City lacked the proper standing because its complaints of decreased tax revenue and increased municipal services were outside the "zone of interest" protected by the statute.[124]

Additionally, the Court addressed whether or not the City had properly pleaded proximate cause because a "statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute."[125] The District Court ruled that the City had failed to isolate the lending practices as the cause of the foreclosures, stating that the independent actions of a multitude of third parties broke the causal chain.[126]

The City of Miami subsequently appealed to the Eleventh Circuit.[127] Pointing out the flaws in the lower court's interpretation of *Nasser*, the Eleventh Circuit held that the City's allegations fell within the zone of interest under the FHA.[128] The City specifically alleged that its injury resulted from policy motivated by racial discrimination or resulted in a disparate impact on minority consumers; the *Nasser* claim was completely unrelated to race.[129]

Addressing the issue of proximate causation, the Eleventh Circuit rejected the Bank's argument that plaintiffs must satisfy a "directness requirement" when pleading causation under the FHA.[130] It referenced the law of torts and drew on foreseeability as the correct standard for proximate cause liability.[131]

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[122] Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1389 (2014) (citing Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2210 (2012)).

[123] *See* Nasser v. City of Homewood, 671 F.2d 432, 437 (11th Cir. 1982).

[124] *City of Miami*, 2014 WL 3362348, at *4.

[125] *Lexmark*, 134 S. Ct. at 1390.

[126] *City of Miami*, 2014 WL 3362348, at *5.

[127] City of Miami v. Bank of America Corp., 800 F.3d 1262 (11th Cir. 2015).

[128] *Id.* at 1266-67.

[129] *Id.* at 1278.

[130] *Id.* at 1280.

[131] *Id. at* 1282.

Bank of America petitioned the Supreme Court, and it granted certiorari in 2016. Relying on the broad interpretation of standing under the Fair Housing Act, the Court affirmed that the City's damages fell within the zone of interest protected by the statute.[132] However, the Court rejected the Eleventh Circuit's interpretation that foreseeability was sufficient to establish proximate cause.[133] "Rather, proximate cause under the FHA requires 'some direct relation between the injury asserted and the injurious conduct alleged.'"[134] The City of Miami argued in its brief that the direct relation was satisfied by the Bank's interference with the City's interest in an integrated community;[135] however, the Court did not recognize this argument in its opinion.[136] The Supreme Court declined to "draw the precise boundaries of proximate cause" and remanded the case to the lower court to define the contours of proximate cause under the FHA.[137]

b. Defining the Correct Standard Under the FHA

What is the proper proximate cause standard under the Fair Housing Act? The Supreme Court will most likely be facing this question again soon, possibly deciding a disagreement between lower courts. A few cities have filed lawsuits following the success of Baltimore and Memphis, and the issue of proximate cause stands at the forefront of these cases.

The City of Oakland filed a lawsuit in 2015 against Wells Fargo in the Northern District of California, alleging a cause of action similar to the one alleged by Miami.[138] The National Fair Housing Alliance, Lawyer's Committee for Civil Rights Under Law, Poverty and Race Research Action Council, and Housing

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[132] Bank of America Corp. v. City of Miami, 137 S. Ct. 1296, 1303 (2017). *See generally* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91 (1979).

[133] *Bank of America Corp.*, 137 S. Ct. at 1306.

[134] *Id.* (quoting Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268 (1992)).

[135] Brief of Respondent City of Miami at 50-57, Bank of America Corp. v. City of Miami, 137 S. Ct. 1296 (2017) (No. 15-1111).

[136] *Bank of America Corp. v. City of Miami*, 137 S. Ct. at 1306.

[137] *Id.*

[138] Complaint, City of Oakland v. Wells Fargo & Co., No. 3:15-CV-04321-SK, 2015 WL 5582203 (N.D. Cal. 2015).

Scholars filed an *amicus* brief that argued broad proximate cause liability is warranted under the Fair Housing Act.[139]

The brief argued that proximate cause liability is determined by the policy goals and purposes the statute intends to achieve.[140] Therefore, because Congress intended the Fair Housing Act to provide broad protections against discrimination, damages alleged by the City are within the predatory lender's proximate cause liability. The legislative history indicates that this law was necessary, not only because individuals suffered, but also because discrimination had an effect on the community.[141]

Should courts go the other direction, taking up the viewpoint of the District Court in *Bank of America Corp. v. City of Miami*,[142] the Fair Housing Act will be deprived of another enforcement tool. Recognition of organizational standing, municipality standing, and disparate impact are tools to affirmatively further fair housing. These tools will not be of much use, though, if the proximate cause standard under the FHA is too narrowly defined.

D. The Withdrawal of Grantee Funding is Within HUD's Conditional Spending Power

The Department of Housing and Urban Development has the authority to withdraw funding should a grantee not be in compliance with its duty to affirmatively further fair housing. A threat to withdraw funding to encourage grantees to pursue litigation against an impediment to fair housing does not run afoul of the Supreme Court's commandeering and conditional spending jurisprudence. Opposition to this proposal would argue that requiring grantees to pursue this type of litigation violates our country's concept of federalism and state immunity. However, a main principle of federalism is protecting citizens from government abuse, such as non-compliance with statutory

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[139] Brief for National Fair Housing Alliance et. al. as Amici Curiae Supporting Plaintiff, City of Oakland v. Wells Fargo, No. 3:15-CV-04321-SK, 2015 WL 5582203 (N.D. Cal. 2015).

[140] *Id.* at 6-7.

[141] *Id.* at 9 (quoting 114 Cong. Rec. 2,706 & 2,276 (1968)).

[142] City of Miami v. Bank of America Corp., No. 13-24506-CIV, 2014 WL 3362348 (S.D. Fla. July 9, 2014).

obligations. So long as the civil claim is viable, HUD would be helping increase beneficiaries of HUD funds.

1. The Test

The Supreme Court established a four-part test in 1987 for determining whether or not the Federal Government could use its spending power to induce state action.[143] Exercising such power must be in pursuit of "the general welfare," the condition must be unambiguous,[144] the condition must be related to the interest of the particular program or project, and the condition cannot require the grantee to act outside the limitations of the Constitution.[145]

The Supreme Court changed its rationale and focus years later in *NFIB v. Sebelius*.[146] The Court rested its analysis on the basis that spending clause legislation is "in the nature of a *contract*," and that the legitimacy of conditional spending rests on whether or not the state voluntarily or knowingly accepted the terms of that contract.[147] "Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system."[148] For a condition attached to funding to be a violation of *NFIB*, a grantee would have to be compelled by a penalty that would be insurmountable if applied.

Furthermore, the Court recognized that federal funds can be conditional, because that is the means by which the Federal Government ensures that the funds are spent according to its view of the "general Welfare."[149]

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143 *See* South Dakota v. Dole, 483 U.S. 203, 207-08 (1987).

144 *Id.* at 207. The condition must be unambiguous so that grantees can "exercise their choice knowingly, cognizant of the consequences of their participation." Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

145 *Dole*, 483 U.S. at 207-08.

146 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

147 *Id.* at 577 (opinion of Roberts, C.J.) (emphasis in original) (quoting Barnes v. Gorman, 536 U.S. 181, 186 (2002)).

148 *Id.*

149 *Id.* at 580.

2. Analysis

Pulling funding from grantees that hesitate to take meaningful action towards affirmatively furthering fair housing is well within HUD's conditional spending power.

First, affirmatively furthering fair housing by eliminating discriminatory effects and providing expansive housing choice promotes the general welfare of the United States.[150] Not only have courts recognized the importance of a proactive approach to the affirmatively further duty, but presidential administrations have as well, through amending the substantive law.[151]

Second, the condition is not unambiguous. Grantees agree when signing up for federal funding that they will take on the duty to affirmatively further fair housing. That duty and responsibility has been clearly laid out by the Clinton Executive order and the new rule in 2015.[152] Not only is there a statutory obligation, but there are also provisions in the grantee agreement that act as a contractual obligation between the Federal Government and recipients.[153]

Third, requiring grantees to pursue viable claims against financial institutions is related to the grant program's interest in providing fair housing and housing choice. Lending policies that have a discriminatory effect on protected classes limits the housing choice of those affected and obstructs the government's ability to provide fair housing throughout the country.

Finally, "meaningful action" that includes pursuing litigation is not an activity that would be unconstitutional if the grantee were to initiate the action without HUD oversight.[154]

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[150] *See generally* Julia Garrison, *Because Separate is Not Equal: The Duty to Affirmatively Further Fair Housing Can Help Revive School Integration*, 23 GEO. J. ON POVERTY L. & POL'Y 571 (2016) (discussing how the affirmatively further mandate can help provide better education to minorities and poverty burdened youth).

[151] *See* Exec. Order No. 12,892, 59 Fed. Reg. 2,939 (1994); Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015).

[152] *See supra* note 150 and accompanying text.

[153] *Funding Approval/Agreement*, U.S. DEP'T OF HOUS. & URBAN DEV., https://www.hud.gov/sites/documents/7082.PDF [https://perma.cc/P8Y6-VDYT] (last visited Mar. 29, 2018).

[154] "[T]he 'independent constitutional bar' limitation on the spending power is not . . . a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the . . . power may not be used to

CONCLUSION

Segregated communities, especially minority concentrated tracts, still exist throughout American cities today. The Fair Housing Act was passed into law not only to prohibit discrimination against those protected classes, but to also oblige the government to take an active approach to providing housing choice and integrative housing patterns.

To achieve this goal, those with the spending power and authority to do so must take "meaningful action." Through disparate treatment and disparate impact litigation, the City of Memphis and the City of Baltimore were able to rid the market of discriminatory practices and seek a remedy furthering housing choice in their cities. HUD should be able to use its authority to withdraw funding if certain grantees refuse to take the appropriate steps to pursuing viable claims under this legal framework.

The success of this new tool moving forward is dependent on the determination of a proximate cause standard. The courts should set out broad proximate cause liability under the statute because the Fair Housing Act was enacted to rid America's housing market of all discriminatory intent and discriminatory effects. The effects of discriminatory lending on grantees, such as loss in property tax value and increased municipality expenses, are foreseeable and directly related to their ability to affirmatively further fair housing.

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induce the States to engage in activities that would themselves be unconstitutional." South Dakota v. Dole, 483 U.S. 203, 210 (1987).

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