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The Promise of the Fair Housing Act and the Role of Fair Housing Organizations

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The Promise of the Fair Housing Act and the Role of Fair Housing Organizations

Jorge Andres Soto and Deidre Swesnik*

The federal Fair Housing Act (Title VIII of the Civil Rights Act of 1968, as amended) has the dual mission to eliminate housing discrimination and promote residential integration. Just as it was when the Fair Housing Act was enacted, it is in the United States' national interest today to achieve true integration through the enforcement and expansion of fair housing rights. Housing opportunities affect the quality of health outcomes for families, the quality of education children of color and all children are afforded, the availability of jobs, and what the future holds for the United States. Private fair housing organizations and government fair housing enforcement agencies are working to this end, but more support is needed to achieve the elimination of housing discrimination in all its forms.

Private non-profit fair housing organizations play a crucial role in both educating the public about fair housing and enforcing fair housing laws. They investigate 66 percent of all fair housing complaints made in the United States. That is almost twice as much as all federal, state, and local government agencies combined, despite the fact that non-profit organizations have many fewer resources. In 2010, there were 28,851 complaints of housing discrimination investigated by private non-profit fair housing organizations, the U.S. Department of Housing and Urban Development (HUD), the U.S. Department of Justice (DOJ), and state and local government fair housing agencies. Unfortunately, this number represents less than one percent of the estimated annual incidence of housing discrimination in the United States, an amount exceeding well over four million acts of discrimination.¹ That amounts to at least 11,000 incidents of housing discrimination each day throughout the United States.

Fair housing in the United States remains a pressing civil rights issue. Housing discrimination is perpetuated both by individuals and systemically at the local, state, and federal levels. Consequently, in addition to continued fair housing enforcement, the nation needs fixes to its overall housing and community structures. Discrimination stands in the way of establishing fair housing choice for all people regardless of identity characteristics. In addition, some types of discrimination, including those based on sexual orientation, source of income, and marital status, are still not protected at the federal level.² The demographic composition of the U.S. population is dynamic, and federal protections need to change along with it.

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¹ NATIONAL FAIR HOUSING ALLIANCE, 2004 FAIR HOUSING TRENDS REPORT (2004). Figures based on calculations by John Simonson of the Center for Applied Public Policy at the University of Wisconsin - Platteville. These figures document only the incidents of discrimination based on race and national origin in rental and sales. This does not account for disability or familial status discrimination, two of the top three forms of reported discrimination.

² In 2010, 12.5 percent of the housing discrimination complaints received by fair housing organizations were alleged on the basis of protection only available at the local and state levels. That is, one eighth of housing discrimination complaints received by fair housing organizations came from groups not protected under federal law. These

Private non-profit fair housing organizations have been instrumental in confronting and eliminating individual and systemic discrimination. From challenging exclusionary zoning by local communities, eliminating restrictive covenants on home-buying, and ending policies that have a disparate impact on people of color, including minimum loan amounts and insurance policies based on discrimination posing as “moral hazard,” to investigating discrimination by individuals, fair housing organizations have kept the goals of the Fair Housing Act alive by opening more opportunities to all people.

Where we live and our access to fair housing choice directly affect our educational and health outcomes and life opportunities. But discriminatory housing policies and practices have restricted opportunities for people of color, who are much more likely than white families to live in impoverished and resource-poor neighborhoods. In fact, three times as many poor African Americans and over twice as many poor Latinos currently live in resource-poor neighborhoods as compared to poor whites.³ African Americans, regardless of income, are likely to live in a poor neighborhood over the course of a decade, while only ten percent of whites are expected to do the same.⁴ Prospering communities, on the other hand, have access to good schools, healthcare, jobs, grocery stores, commercial enterprises, transportation, and financial services, among other benefits.

In less than 30 years, people of color will constitute the majority of the United States population. U.S. Census data from 2010 found that almost half of all babies born in the United States today belong to a racial or ethnic “minority” group. In many cities, people of color are already in the majority.⁵ The elimination of individual and systemic acts of discrimination affecting the life choices of racial and ethnic protected groups is paramount to achieving a productive and capable U.S. workforce to compete on a global level. The work of private non-profit fair housing organizations is instrumental to achieving a nation complete with equal housing from which a competitive and productive citizenry can flourish.

We begin this Issue Brief with a brief history of the Fair Housing Act. In Part II we describe the enforcement mechanisms of fair housing, focusing on the role of private fair housing organizations and testing designed to detect housing discrimination. In Part III we discuss how fair housing organizations, like the National Fair Housing Alliance (NFHA), challenge discrimination and feature current cases and issues that highlight the persistence of housing discrimination. We conclude the Issue Brief with specific policy recommendations to amend fair housing law and expand the reach and scope of fair housing choice.

I. The Evolution of Federal Fair Housing Laws

included complaints based on sexual orientation, source of income, marital status, medical condition, age, and student status, as well as complaints by victims of domestic violence and Section 8 voucher holders. NATIONAL FAIR HOUSING ALLIANCE, THE BIG PICTURE: HOW FAIR HOUSING ORGANIZATIONS CHALLENGE SYSTEMIC AND INSTITUTIONALIZED DISCRIMINATION, 2011 FAIR HOUSING TRENDS REPORT 17 (2011).

³ SEGREGATION: THE RISING COSTS FOR AMERICA 14 (James Carr & Nandinee Kutty eds., 2008).

⁴ *Id.*

⁵ Press Release, United States Census Bureau, An Older and More Diverse Nation by Midcentury (Aug. 14, 2008), available at <http://www.census.gov/newsroom/releases/archives/population/cb08-123.html>.

While the Fair Housing Act has been the primary vehicle through which fair housing protections have been provided and expanded, the first legal foundations for challenges to housing discrimination were in place as early as the Reconstruction Era. Early fair housing cases primarily challenged instances of governmental discrimination. Prior to the Fair Housing Act, local zoning ordinances requiring racial separation and racially restrictive covenants were challenged using the Fourteenth Amendment and the Civil Rights Act of 1866.⁶ In 1948, the Supreme Court held for the first time that enforcement of racially restrictive covenants by state courts was in violation of the Equal Protection Clause of the Fourteenth Amendment.⁷ The Civil Rights Act of 1866⁸ was understood to prohibit only governmental discrimination until 1968, when the Supreme Court in *Jones v. Alfred H. Mayer Co.* interpreted it to also prohibit private discrimination.⁹

The push for fair housing, then known as “open housing,” reached a critical point in the summer of 1965 when civil rights groups invited the Reverend Dr. Martin Luther King, Jr. and the Southern Christian Leadership Conference (SCLC) to join them in a major nonviolent protest against institutionalized housing discrimination in Chicago. On January 7, 1966, Dr. King and the SCLC announced plans for the Chicago Freedom Movement, an effort to expand civil rights organizing to the North, and Dr. King moved his family to the segregated slums of Chicago.¹⁰

That summer, race riots erupted on Chicago’s West Side, and black demonstrators marching through an all-white neighborhood were met with violent hostility. Then Mayor Richard J. Daley became intent on ending the Chicago Freedom Movement demonstrations and agreed to meet with Dr. King and several housing boards. The meeting resulted in an agreement in which the Chicago Housing Authority promised to build public housing with limited height restrictions, which would offer geographically distributed rental housing options to African Americans, and the Mortgage Bankers Association agreed to make mortgages available to persons of all races.¹¹ At the time Dr. King said, “Never before have such far-reaching and creative commitments been made and programs adopted and pledged to achieve open housing in a community,” but that it was only “the first step in a 1,000 mile journey.”¹² Unfortunately, following the summit, city officials failed to take concrete steps to implement the open housing agreement.¹³ Such failures at the local level to guarantee free housing choice for African Americans highlighted the need for fair housing protections at the federal level. Since the Chicago Freedom Movement, Dr. King has been associated with the fight for fair housing.

⁶ ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 3:1-3 (2001). *See also* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

⁷ *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948).

⁸ 42 U.S.C. § 1982 states that “[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”

⁹ SCHWEMM, *supra* note 6, at § 27:1.

¹⁰ MARTIN LUTHER KING AND THE GLOBAL FREEDOM STRUGGLE, KING INSTITUTE ENCYCLOPEDIA, CHICAGO CAMPAIGN (1966), http://mlk-kpp01.stanford.edu/index.php/encyclopedia/encyclopedia/enc_chicago_campaign/ (last visited January 12, 2012).

¹¹ *Id.*

¹² David Halvorsen, *Cancel Rights Marches*, CHI. TRIB., Aug. 27, 1966, at 1.

¹³ KING INSTITUTE ENCYCLOPEDIA, *supra* note 10.

The National Advisory Commission on Civil Disorders, better known as the Kerner Commission, stated its “basic conclusion” in its groundbreaking report in 1968: “Our nation is moving toward two societies, one black, and one white— separate and unequal.” Unless conditions were remedied, the Commission warned, the country faced a “system of ‘apartheid’” in its major cities.¹⁴

In response to the growing racial divide, Congress attempted without success to pass a federal fair housing law in 1966 and 1967. Unfortunately, it took a national tragedy to serve as catalyst for the pending legislation. On April 4, 1968, Dr. King was assassinated. President Lyndon B. Johnson urged Congress to expedite the passage of the Fair Housing Act. Just a few days later, on April 11, 1968, and just before Dr. King’s funeral, Title VIII of the Civil Rights Act of 1968, better known as the Fair Housing Act, became law.

The Fair Housing Act originally prohibited discrimination in real estate sales, rental, lending, insurance, and all related services based on race, color, religion, and national origin. Among other things, the Fair Housing Act specifically prohibits: refusal to rent or sell housing; refusal to negotiate for housing; making housing unavailable; denial of a dwelling; setting different terms, conditions or privileges for the sale or rental of a dwelling; providing different housing services or facilities; falsely denying the availability of housing for inspection, sale or rental; blockbusting;¹⁵ denying persons access to or membership in a facility or service related to the sale or rental of housing;¹⁶ refusing to make a mortgage loan; refusing to provide information regarding loan products; imposing different terms and/or conditions on a loan, including interest rates, points, or fees; discriminating in the appraisal of property; refusing to purchase a loan; or advertising or making statements that indicate limitations or preferences based on membership of a protected group.

The Fair Housing Act of 1968 also allowed HUD to receive complaints of housing discrimination and refer those complaints to state or local agencies with fair housing laws substantively equivalent to the Fair Housing Act or process complaints internally and resolve them internally through conciliation.¹⁷ While HUD could investigate and resolve cases through conciliation, it had no enforcement powers. In addition, punitive damages were limited to \$1,000 when the Act was first enacted.

Subsequent amendments to the Fair Housing Act added much needed additional protections and enforcement powers. In 1974, sex was added as a protected class as part of the Housing and Community Development Act.¹⁸ In 1988, the Fair Housing Amendments Act was passed, which significantly expanded the scope of the law and provided for a much more powerful enforcement process. The 1988 amendments added people with disabilities and families with children (familial status) as protected groups. The amendment also modified the definition of discriminatory housing practices to include acts of interference, coercion, and the

¹⁴ REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (THE KERNER REPORT) (1968), *available at* <http://www.blackpast.org/?q=primary/national-advisory-commission-civil-disorders-kerne-report-1967>.

¹⁵ The act of persuading owners to sell or rent housing for profit based on information or perceptions related to the residency of members of the protected classes.

¹⁶ Examples include denying access to multiple listing services for the purchase and/or rental of housing.

¹⁷ 42 U.S.C. § 3601 (2006).

¹⁸ Pub. L. 93-383, § 808, 88 Stat. 633, 729 (1974).

intimidation or threatening of individuals in the exercise of their rights in housing-related sales, rentals, or lending. Prior to the 1988 amendments, HUD was limited to informal methods of complaint resolution and could impose no sanctions against violators of the Fair Housing Act. For the first time, with the amendments, HUD could investigate *and* conduct enforcement actions if it found probable cause to believe housing discrimination occurred. HUD could also refer certain cases to DOJ, such as zoning cases and cases where a pattern or practice of housing discrimination appears. Once HUD determines there is reasonable cause to believe discrimination has occurred, it can issue a “charge” of discrimination. The case is then heard before an administrative law judge, or if any party elects, the case may be litigated in federal court. If either party elects, DOJ can commence an action on behalf of the aggrieved person. In addition, the limitation on punitive damages was removed, and civil penalties were added.

In 1987, Congress created HUD’s Fair Housing Initiatives Program.¹⁹ FHIP is a competitive grant program administered by HUD that provides funding to fair housing organizations to combat discrimination in the housing, rental, sales, lending, and insurance markets. Components of the program include the Private Enforcement Initiative (PEI) that enables private fair housing groups to carry out testing and other enforcement activities; the Education and Outreach Initiative (EOI) that funds groups to engage in initiatives that educate the general public about fair housing rights, responsibilities and compliance with the law; and the Fair Housing Organizations Initiative (FHOI) that builds the capacity and effectiveness of fair housing groups and funds the creation of new organizations. According to HUD, “FHIP funding is a critical component of the U.S. civil rights enforcement infrastructure.”²⁰ FHIP is the only federal stream of funding dedicated to supporting the activities of fair housing organizations.

In 2010, fair housing organizations, investigated 66 percent of the complaints filed nationwide; that is almost twice as much as all federal, state, and local government agencies combined. Having the knowledge of their communities on the ground, fair housing organizations are often the most effective enforcers of the Fair Housing Act, rooting out discrimination and representing victims of discrimination effectively. For example, according to HUD, 71 percent of the HUD cases in which a fair housing organization is a complainant result in conciliation or a cause, versus 37 percent of cases not referred to them by fair housing organizations.²¹ Testing is a vital tool that fair housing organizations use to root out discrimination and to resolve cases.

II. Fair Housing Testing: A Key Tool to Revealing Discrimination

The Fair Housing Act has a dual purpose: to eliminate housing discrimination and segregation and to promote integration nationwide. Today, the mission of the Fair Housing Act is carried out by both governmental and private enforcement agents. HUD conducts complaint intake, investigation, and administratively decides cases. DOJ initiates complaints in federal

¹⁹ FHIP is authorized under Section 561 of the Housing and Community Development Act of 1987, Pub. L. No. 100-242, 101 Stat. 1942 (codified as amended at 42 U.S.C. § 3616 (2006)). For more information on FHIP regulations and eligibility requirements, see 24 C.F.R. § 125 (2011).

²⁰ Raphael Bostic, Assistant Secretary for Policy Development and Research, U.S. Department of Housing and Urban Development, *Foreword* to DB CONSULTING GROUP, INC., STUDY OF THE FAIR HOUSING INITIATIVES PROGRAM, at iii (2011).

²¹ DB CONSULTING GROUP, INC., STUDY OF THE FAIR HOUSING INITIATIVES PROGRAM 55 (2011).

court when HUD finds reasonable cause to believe that the Fair Housing Act has been violated and either party to an administrative complaint elects to have the case decided in federal court, or when it sees patterns and practices of fair housing violations to be in conflict with the interests of the federal government. State and local government agencies that receive Fair Housing Assistance Program (FHAP) funding through HUD also investigate and process fair housing complaints. Private non-profit fair housing organizations conduct investigation and enforcement for the purposes of eliminating housing discrimination on individual and systemic levels. Individuals may also file complaints in court separately or with a fair housing organization.

Fair housing organizations often use testing to discern whether discrimination is taking place. Fair housing testing is the simulation of housing transactions by “testers”²² who are vetted and trained by fair housing organizations and held to legal evidentiary standards when claims of housing discrimination are made and pursued in courts. Testing helps to evaluate whether housing providers maintain discriminatory policies or engage in discriminatory treatment. Testing provides objective evidence that corroborates fair housing complaints or may provide evidence showing whether a housing provider has engaged in a discriminatory housing practice.

In a test, fair housing organizations may use pairs of individuals who pose as home seekers. They are similarly qualified, but one tester is a member of a protected class and another tester is not and acts as a “control” tester for purposes of comparison. If testing for discrimination against families with children, for example, a fair housing organization may send one tester posing as a parent and a similarly qualified tester posing as a childless home seeker. When testing for race-based discrimination, one tester may be African-American and the other may be white. In paired testing, testers are substantially similar to each other, especially in ways that are important to one’s qualifications to rent or buy housing or to obtain a mortgage loan or homeowners insurance policy. The “protected” tester (African American, parent, person with a disability, etc.) is slightly better qualified. Testers document their experiences and fair housing organizations compare their reporting documents and test narratives to determine whether differential treatment based on protected status occurred. While paired testing is used in many situations, single person testing can also document discrimination, including when discriminatory statements are made or when determining the existence of discriminatory policies or architectural features that do not comply with federally mandated design and construction requirements. Organizations may also choose other varieties of testing in addition to single person and paired testing.

Fair housing organizations, DOJ, HUD, and even the housing industry, employ fair housing testing. Testers are trained to be objective in their observations and reporting, and in no reported case or HUD decision has any tester been impeached. Testing alone can provide the evidentiary basis of a discrimination claim against a housing provider, and courts have recognized the utility of testing, making it a routine tool for determining the extent of housing discrimination. Courts have long accepted the use of testers to investigate and prove claims of

²² As the Supreme Court explained in 1982, “testers” are “individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful . . . practices.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982).

housing discrimination.²³ In 1973, the Tenth Circuit Court of Appeals observed that “[i]t would be difficult . . . to prove discrimination in housing without this means of gathering evidence.”²⁴

The Supreme Court has additionally affirmed that fair housing testing conducted by organizations may be a basis for standing to bring claims under the Fair Housing Act. Individual testers can make fair housing claims under the Fair Housing Act if they are given inaccurate information as to the availability of housing, and fair housing organizations may be able to bring claims if the incidence of housing discrimination has the effect of diverting organizational resources.²⁵

HUD also employs testing for research purposes and occasionally for its own investigations. Since 1977, HUD has conducted three separate research studies designed to measure the level of discrimination encountered by minorities in the housing market. The 1977 Housing Market Practices Survey (HMPS) measured discrimination against African Americans in housing markets throughout the United States. In 1989, HUD conducted a Housing Discrimination Study (HDS) to document discrimination against African Americans and Latinos. The most recent study, HDS 2000, documented discrimination against African Americans, Latinos, American Indians, Asian Americans, Pacific Islanders, and persons with disabilities. Over time, all studies have documented high levels of discrimination in both rental and real estate markets throughout the nation. Each study utilized paired testing to measure and document the level of discrimination in housing markets.

Federal banking regulators have assessed the utility of testing. For example, the Office of the Comptroller of the Currency (OCC) called matched-pair testing a “valuable tool” when used properly. In order to use the tool properly, the OCC said it would contract with private fair housing organizations when possible, as “testers from fair housing organizations were more professional and thorough [than other testing groups contracted as part of the pilot program].”²⁶

Housing and housing-related services industries also use testing to evaluate their own practices. NFHA and other fair housing organizations frequently have contracts with rental, real estate, mortgage lending, and homeowners insurance providers to conduct compliance testing.²⁷

Testing is a proven tool to uncover discrimination, whether it is against individuals or an entire class of people. Fair housing organizations and others are using testing and other investigative tools more and more to uncover systemic discrimination and to make systemic change.

III. How Fair Housing Organizations Challenge Local and Systemic Discrimination

²³ SCHWEMM, *supra* note 6, at § 32:2.

²⁴ Hamilton v. Miller, 477 F.2d 908, 910 n.1 (10th Cir. 1973).

²⁵ See *Havens*, 455 U.S. 363.

²⁶ OFFICE OF THE COMPTROLLER OF THE CURRENCY, FAIR LENDING PILOT TESTING PROGRAM SUMMARY REPORT (1996).

²⁷ In 1996, Congress created a legal privilege for lenders for data gathered in voluntary self-tests to assess compliance with the Fair Housing Act and Equal Credit Opportunity Act. The results of voluntary self-testing do not need to be disclosed provided that appropriate corrective action is taken to address possible violations that may be discovered. This privilege was meant to create an incentive to self-test. 12 C.F.R. § 202 (2011).

Not long after the assassination of Dr. King, Senator Edward Brooke (R-MA), one of the key drafters of the Fair Housing Act along with Senator Walter Mondale (D-MN), described the fundamental political anathema challenging true equality and perpetuating institutionalized segregation in the United States:

Today's Federal housing official commonly inveighs against the evils of ghetto life even as he pushes buttons that ratify their triumph -- even as he ok's public housing sites in the heart of Negro slums, releases planning and urban renewal funds to cities dead-set against integration, and approves the financing of suburban subdivisions from which Negroes will be barred. These and similar acts are committed daily by officials who say they are unalterably opposed to segregation, and have the memos to prove it. . . . But when you ask one of these gentlemen why, despite the 1962 fair housing Order, most public housing is still segregated, he invariably blames it on regional custom, local traditions, personal prejudices of municipal housing officials.²⁸

In his remarks, Senator Brooke described local and federal complicity in the perpetuation of housing segregation in the United States. Despite the passage of the Fair Housing Act, historical, social, and political patterns of segregation and practices of housing discrimination continue throughout the United States. These patterns and practices harken back to the days of *de jure* segregation, when overt and blatant acts of discrimination were commonplace. But patterns and practices of segregation and discrimination remain embedded in the fiber of national, state, and local policies and laws.

Fair housing organizations have worked for decades to challenge the institutional patterns and practices of states, counties, and municipalities. The cases below demonstrate the work that fair housing organizations are doing to shine light on some of the areas where real opportunities for all people are lacking. They also point to the need for changes to the fair housing statutes and administrative enforcement to eliminate discriminatory patterns and practices and to promote integration.

A. Discriminatory Lending Practices and the Foreclosure Crisis

In the aftermath of the foreclosure crisis, communities of color have experienced a disproportionate loss of wealth. An analysis conducted by the Pew Research Center found that between 2005 and 2009, median wealth adjusted for inflation fell by 66 percent among Latino households and 53 percent among African-American households, compared with 16 percent among white households.²⁹ Several reasons account for the disproportionately high rates of foreclosure among people of color, among those being the peddling of high-cost subprime, predatory loans in communities of color. The Center for Responsible Lending found that, among borrowers with good credit, African Americans and Latinos received high interest rate loans

²⁸ 114 CONG. REC. 2281, 2527-28 (1968).

²⁹ RAKESH KOCHHAR ET AL., PEW RESEARCH CTR., TWENTY-TO-ONE: WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS 1 (2011).

more than three times as often as white borrowers among loans originated between 2004 and 2008.³⁰ Several cities, which once had vibrant middle-class African-American communities, have seen an unprecedented dismantling of the wealth attained through decades of homeownership. Cities have seen entire neighborhoods in communities of color emptied by such discriminatory lending practices.

Recent fair housing organization cases and investigations conducted by our organization and its members illustrate how discriminatory mortgage lending practices played a part in the foreclosure crisis and how bank discrimination continues to affect the housing market recovery. For example, NFHA member Metropolitan St. Louis Equal Housing Opportunity Council (EHOC) recently alleged that the First National Bank of St. Louis failed to offer services and locate branches in African-American neighborhoods. Under a settlement brokered by HUD, the bank was required to invest over \$2.5 million in St. Louis, North St. Louis County, and St. Clair County, Illinois. In addition to improving services and lending in these neighborhoods, the agreement required that the bank open a new branch, provide counseling and financial literacy courses to residents, and provide better financial products.³¹ Terms of the agreement sent a clear message: banks must serve all people equally and must not perpetuate a dual credit system, where geography alone determines the types of financial services to which people have access.

NFHA's own investigations into how banks maintain their foreclosed properties uncovered discrimination by major lenders that points to the challenges of achieving a healthy and equitable economic recovery. Our organization and three member organizations – the Connecticut Fair Housing Center, the Miami Valley Fair Housing Center, and Housing Opportunities Made Equal – released a report in April 2011 with their findings of a year-long investigation of 624 bank-owned properties located in Washington, DC's Maryland suburbs, Dayton, Ohio, New Haven and Hartford, Connecticut, and Richmond, Virginia.³² The groups' evaluation tool included a 100-point scale, subtracting points when properties were poorly maintained or created an eye sore with poor curb appeal. The groups found that banks are discriminating in the treatment of their properties, as they generally take greater care to maintain and secure the properties that they own in white neighborhoods than they do in African-American neighborhoods and Latino neighborhoods. Although many properties in white neighborhoods received passing grades and had well-maintained and trash-free lawns, secured entrances, and generally nice upkeep, the properties in African-American neighborhoods and Latino neighborhoods were more likely to receive below average or failing grades due to cracked foundations, leaky roofs, and "warning" signs out front.

B. Housing Discrimination in Federal Programs

Government agencies also perpetuate discrimination and segregation – historically and today. In the aftermath of Hurricane Katrina, for example, the State of Louisiana used HUD

³⁰ DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, LOST GROUND, 2011: DISPARITIES IN MORTGAGE LENDING AND FORECLOSURES 5 (2011).

³¹ Metropolitan St. Louis Equal Hous. Opportunity Council v. First Nat'l Bank of St. Louis, No. 07-10-0153-8 (FHEO Conciliation Agreement approved Dec. 17, 2010).

³² NATIONAL FAIR HOUSING ALLIANCE, HERE COMES THE BANK, THERE GOES OUR NEIGHBORHOOD: HOW LENDERS DISCRIMINATE IN THE TREATMENT OF FORECLOSED HOMES (2011).

funds to administer the Road Home Program – the single largest housing recovery program in U.S. history. As originally administered, the program’s formula used to allocate grants to homeowners had a discriminatory impact on African-American homeowners. Like in many cities throughout the country, home values in African American neighborhoods are lower than values of comparable homes in white neighborhoods. The Road Home Program formula, which was approved by HUD, provided up to \$150,000 for repairs and rebuilding based on either the pre-storm home value or the cost to rebuild the home, whichever was lower. Road Home program data showed that African Americans were more likely than whites to have their grants based upon the much lower market value of their homes before Katrina hit, instead of the estimated cost to repair the damage. For example, one African-American plaintiff whose rebuilding grant was based upon pre-storm value received a \$1,400 grant from the State to rebuild her home; however, she would have received a grant of \$150,000 had her rebuilding grant been based on the estimated cost of damage to the home. Such disparate allocations slowed down recovery efforts in African-American communities.

In a class action lawsuit brought by NFHA, the Greater New Orleans Fair Housing Action Center (GNOFHAC), and five African-American homeowners against HUD and Louisiana, the Road Home formula allocation was challenged on its discriminatory application and impact on African Americans. Under the terms of a settlement agreement reached in 2011, HUD and Louisiana were ordered to direct additional funds to individuals in heavily affected parishes whose grants were based on pre-storm valuations of their homes. The case settled for \$473 million, providing full relief for 13,000 homeowners.

C. Anti-Immigrant Laws and Municipal Ordinances

Anti-immigrant state laws and municipal ordinances almost explicitly encourage housing discrimination against people based on national origin. Although citizenship status is not a protected class under the Fair Housing Act, housing rights are conferred upon people on the basis of personhood, regardless of citizenship status. Several recently enacted measures violate Sections 810 and 813 of the Fair Housing Act, both of which state that any person who claims to have been injured by a discriminatory housing practice can bring claims of housing discrimination.³³ Housing rights are also reinforced under the Civil Rights Act of 1866, which states that all “persons within the jurisdiction of the United States,” not just citizens or residents, have the right “in every state and territory to make and enforce contracts... and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.”³⁴ Furthermore, federal court interpretation of the Fair Housing Act and the Civil Rights Act of 1870 provide a framework from which immigrant housing rights can be upheld.³⁵

³³ Fair Housing Act, Pub. L. 90-284, 82 Stat. 85 (codified as amended at 42 U.S.C. § 3610 & § 3613 (2006)).

³⁴ Civil Rights Act of 1866, 14 Stat. 27 (codified as amended at 18 U.S.C. § 242 (2006) and 42 U.S.C. §§ 1981–1982 (2006)).

³⁵ See *Espinoza v. Hillwood Square Mutual Assoc.*, 522 F.Supp. 559 (E.D. Va. 1981) (asserting that the Fair Housing Act prohibits discrimination based on citizenship status when it had the intention or effect of discrimination based on national origin); *Anderson v. Conboy* 156 F.3d 167, 169 (2d Cir. 1998) (proscribing “private alienage discrimination with respect to the rights set forth in the [Civil Rights Act of 1870].”).

In 2003, HUD published a memo acknowledging that since September 11, 2001, landlords throughout the country had been “developing procedures to protect their buildings and residents,” which includes screening prospective tenants for citizenship status. HUD recognized that these tactics have an illegal discriminatory impact, particularly on the basis of national origin, and advised that investigations into citizenship status be uniformly applied to applicants.³⁶

Fair housing organizations have most recently challenged sections of Alabama’s anti-immigrant HB 56. In November 2011, NFHA members including the Central Alabama Fair Housing Center in Montgomery, the Fair Housing Center of Northern Alabama in Birmingham, and the Center for Fair Housing, Inc. in Mobile, along with two residents on behalf of a class, filed a lawsuit under the federal Fair Housing Act and the Supremacy and Due Process Clauses of the U.S. Constitution. The Alabama fair housing organizations and the individual plaintiffs specifically challenged the enforcement of Section 30 of HB 56, which charges criminal penalties on any person attempting to enter into any “business transaction” with the state without proof of U.S. citizenship or lawful immigration status. Mobile home residents who could not provide documentation proving lawful residency or citizenship status would face the risk of felony charges or civil and criminal penalties if they attempted to renew their homes’ tags as required under Alabama’s mobile homes statute or if they let tags expire after the November 30th renewal deadline. The challenged enforcement of Section 30 of HB 56 put undocumented immigrants in danger of being driven from their homes by making it impossible for them to comply with the mobile homes statute.

The U.S. District Court for the Middle District of Alabama has blocked the Revenue Commissioners for Alabama and Montgomery County from requiring any person attempting to pay the annual mobile-home registration renewal fee to provide proof of U.S. citizenship or lawful immigration status and from refusing to issue mobile-home tags to any person who cannot prove U.S. citizenship or lawful immigration status. The Revenue Commissioner was also instructed to notify all county officials of the court’s order. The case is ongoing.

D. Failure to Affirmatively Further Fair Housing

Under the Fair Housing Act, state and local governments that receive federal housing and community development funding through participation in HUD programs – such as the Community Development Block Grant (CDBG)³⁷ and the HOME Investment Partnerships Programs³⁸ – are federally mandated to “Affirmatively Further Fair Housing” (“AFFH”).³⁹ Receipt of such HUD funding is contingent upon a jurisdiction’s certification of compliance with fair housing law, yet HUD has no regulatory requirement for grantees to provide documentation of actions taken to remove impediments to fair housing, and no regulatory commitment of adverse action that HUD may take against a jurisdiction found in noncompliance with its certifications. Fair housing organizations across the country have made a commitment to enforcing the mandate to affirmatively further fair housing as a means by which they can

³⁶ U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, RESPONSE TO CONCERNS ABOUT HOUSING SECURITY FOLLOWING SEPTEMBER 11, 2001 (2003).

³⁷ 24 C.F.R. § 570 (2011).

³⁸ 24 C.F.R. § 92 (2011).

³⁹ 42 U.S.C. § 3608 (2006); *see also* Exec. Order No. 12892, 59 Fed. Reg. 2939 (1994).

challenge systemic housing discrimination. Only within the last few years, has HUD taken adverse action to address a jurisdiction's failures to affirmatively further fair housing or its direct involvement in discriminatory actions. HUD is also currently working on a proposed regulation to implement the AFFH mandate in the Fair Housing Act.

The Fair Housing Act explicitly requires that all agencies administering housing and community development programs, including their funding recipients, act in a way that affirmatively furthers fair housing.⁴⁰ This mandate extends well beyond HUD to other federal agencies, including the Department of Education, the Department of the Treasury, and any other agency administering this funding. In one example, the AFFH mandate has been found by courts to mean that HUD must “do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”⁴¹ Despite the current statutory requirement to affirmatively further fair housing, the National Commission on Fair Housing and Equal Opportunity observed in 2008 that the three largest federal programs – the Section 8 voucher program, public housing, and the Low Income Housing Tax Credit – do little to further fair housing and, in some cases, effectively create and maintain segregated housing patterns.⁴²

In April 2006, the Anti-Discrimination Center filed a complaint against Westchester County, New York for its failure to affirmatively further fair housing. The case is the first of its kind to use the federal False Claims Act to enforce a jurisdiction's obligation to affirmatively further fair housing. The Anti-Discrimination Center alleged that Westchester County received \$52 million in federal funding and certified that it was in compliance with its obligations to affirmatively further fair housing in order to receive those funds. In February 2009, after several years of litigation, a motion to dismiss, and comprehensive discovery, the U.S. District Court for the Southern District Court of New York granted partial summary judgment, finding that Westchester County had committed several hundred false certifications and specifically found that false certification of complying with the mandate to affirmatively further fair housing was of serious consequence. Shortly after, DOJ intervened on behalf of HUD in the matter and negotiated a consent decree in which Westchester County was ordered to spend \$52 million on the development of affordable housing in predominantly white areas, and to pay \$7.5 million to the Anti-Discrimination Center for its share as Relator⁴³ of the false claims made by the County.⁴⁴

In another case, the Metropolitan Milwaukee Fair Housing Council (MMFHC) filed a housing discrimination complaint in March 2011 against Waukesha County, Wisconsin, an affluent county outside of Milwaukee. A recent *Salon.com* article analyzing 2010 Census data

⁴⁰ 42 U.S.C. § 3608 (2006).

⁴¹ NAACP v. Sec'y of Hous. & Urban Development, 817 F.2d 149, 155 (1st Cir. 1987) (Breyer, J.).

⁴² THE NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING: REPORT OF THE NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY 38-40 (2008).

⁴³ Under the False Claims Act, a private individual or “whistleblower” with knowledge of past or present fraud on the federal government can sue on behalf of the government to recover civil penalties and damages.

⁴⁴ For more information on U.S. *ex rel.* Anti-Discrimination Center v. Westchester County, 668 F.Supp 2d 548 (S.D.N.Y. 2009), visit <http://www.antibiaslaw.com/westchester-false-claims-case>.

named Milwaukee the most segregated city in the Country.⁴⁵ MMFHC alleged that the County discriminated on the grounds of race, color, and national origin and failed to affirmatively further fair housing. Waukesha County failed to comply with its civil rights certifications and to ensure that towns, cities, and villages within the County also complied with their obligations as sub-recipients of HUD funding. Although it received \$12.6 million in CDBG and HOME funding between 2006 and 2010, the County failed to identify impediments to fair housing choice, such as deep exclusionary zoning laws that restrict rental units and multi-family buildings to areas where African-Americans and Latinos are disproportionately likely to rent than own a home.⁴⁶

For the last five years, NFHA member Greater New Orleans Fair Housing Action Center (GNOFHAC) has worked to open St. Bernard Parish, Louisiana, to people of color. GNOFHAC originally filed suit against the parish following Hurricane Katrina, when the New Orleans-adjacent parish passed a discriminatory “blood relative ordinance,” which required residents of the nearly all-white parish to rent only to blood relatives. After GNOFHAC and the parish entered into a consent decree to resolve this federal lawsuit, the parish found new ways to limit the ability of African Americans to move into the parish. The parish subsequently violated the consent decree for discriminatorily rejecting a building permit for a multifamily affordable housing development. The parish council, among other tactics, attempted to issue a building moratorium and worked to put an anti-development referendum on the ballot. Throughout the process, a federal judge found the parish to be in contempt of court several times and, in January 2011, HUD opened its own Secretary-initiated complaint against the parish. St. Bernard Parish is the recipient of \$91 million dollars in aid from HUD. Litigation is still ongoing in the St. Bernard Parish case.

E. Denial of Basic Services

Some local municipalities perpetuate segregation and deny key services to communities of color. This violates not only their affirmatively furthering fair housing obligations, but amounts to outright discrimination in some situations. For example, for over 50 years, African-American residents of segregated Coal Run, Ohio, were denied municipal water services. In 2002, mostly African-American residents and the Fair Housing Advocates Association filed separate complaints with the Ohio Civil Rights Commission. They alleged that the City of Zanesville, Muskingum County, and East Muskingum Water Authority refused and continued to refuse public water service to African-American and other residents of Coal Run, the overwhelmingly non-white part of Muskingum County. Plaintiff residents lived within one mile of public water lines along city limits, but had to get water from within the city limits by collecting rainwater and storing that water in ways that were often dangerous for consumption. For the same time period, white residents within the same distance of public water lines were afforded access to public water services. Proceedings were initiated in federal district court and

⁴⁵ Daniel Denvir, *The 10 Most Segregated Urban Areas*, SALON, Mar. 29, 2011, http://www.salon.com/2011/03/29/most_segreated_cities/singleton/.

⁴⁶ Complaint, *Metro. Milwaukee Fair Hous. Council v. Wakesha County, Wisconsin* (2011), *available at* <http://www.reلمانlaw.com/docs/MMFHCWaukesha-Complaint.pdf>.

a decision on July 10, 2008, found overwhelmingly in favor of the plaintiffs.⁴⁷ The case later settled on appeal.

F. Housing Discrimination Not Yet Covered by Federal Law

While the Fair Housing Act provides protection against discrimination based on a number of characteristics, stronger protections are needed to ensure fair housing choice for all people. Fair housing organizations have identified several types of housing discrimination and groups of people against whom housing discrimination occurs, which is not currently addressed in the fair housing statute. Populations not currently covered by the Fair Housing Act include lesbian, gay, bisexual, and transgender (LGBT) people, people with various sources of income, unmarried couples and non-traditional families, and issues related to protections for people with disabilities. Also at issue is Fair Housing Act protections for current residents, as well as DOJ's limited investigatory powers.

LGBT individuals have long suffered from housing discrimination. As Rea Carey, Executive Director for the National Gay and Lesbian Task Force Action Fund told Congress, "[LGBT people] may experience resistance or outright hostility from a variety of sources including landlords, lenders, and realtors. When [they] disclose [their] sexual orientation or sexual identity, voluntarily or involuntarily, [they] may be subjected to violence or property damage."⁴⁸ Fair housing organizations have documented such a reality. In 2007, Michigan fair housing organizations released the results of a statewide housing discrimination investigation based on sexual orientation.⁴⁹ The centers conducted 120 paired tests in which testers posed either as same-sex couples or heterosexual married couples. Testers visited multi-family apartment complexes, real estate firms, and mortgage lenders in rural areas, small cities, large cities, and college towns. Of the 120 paired tests completed, 27 percent showed disparities in treatment which included differences in rental rates, levels of applicant encouragement, and application fees that favored heterosexual testers.

Transgender individuals have reported housing discrimination at similar levels. According to a national survey conducted by the National Center for Transgender Equality and the National Gay and Lesbian Task Force, 19 percent of transgender and gender-nonconforming respondents reported having been refused a home or apartment because of their gender expression.⁵⁰ In both the aforementioned investigations, LGBT individuals reported experiencing outright hostility.

Today, in areas not covered by more comprehensive local or state laws, it is also within a housing provider's legal right to discriminate against people on the basis of their source of lawful income. Under current federal law, there are no prohibitions against the refusal of an applicant

⁴⁷ See *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456 (S.D. Ohio 2007).

⁴⁸ Testimony of Rea Carey, Executive Director of the National Gay and Lesbian Task Force Action Fund, before House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties (Mar. 11, 2010).

⁴⁹ MICHIGAN FAIR HOUSING CENTERS, SEXUAL ORIENTATION AND HOUSING DISCRIMINATION IN MICHIGAN: A REPORT OF MICHIGAN'S FAIR HOUSING CENTERS 9 (2011), available at <http://www.fhcmichigan.org>.

⁵⁰ JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY & NAT'L GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 4 (2011).

who intends to use federal or state rental subsidies, social security benefits, or child support for rental payment. This legal loophole often acts as a legal proxy for illegal discriminatory practices, which may have a disproportionate effect on African Americans, Latinos, families with children, women, and people with disabilities, who are more likely to use federal and state programs.

Fair housing organizations have also identified barriers to fair housing choice for people receiving state and federal subsidies. In a report released by the Greater New Orleans Fair Housing Action Center (GNOFHAC) in 2009, 82 percent of landlords contacted by GNOFHAC in the New Orleans area exhibited discriminatory conduct when considering applicants with Housing Choice Vouchers. Landlords either refused to accept housing vouchers or required voucher holders to meet other terms or conditions that they would not require of non-voucher recipient applicants.⁵¹

Some courts have accepted the argument that people are not protected by the Fair Housing Act after they have acquired a home or apartment. In a case against the City of Dallas, the Fifth Circuit held that the City's refusal to clean up an illegal dump in an African-American neighborhood did not constitute a violation of the Fair Housing Act, arguing that while their refusal made housing in the neighborhood less habitable, it technically did not make housing unavailable.⁵² The Circuit's argument contradicts HUD regulations and other court rulings that have held that the refusal of municipal services and harassment based on membership in a protected group are violations of the Fair Housing Act. This misinterpretation of the Fair Housing Act's definition of discriminatory housing practices is in direct conflict with other prohibitions laid out in the Act, namely the prohibition against providing housing under different terms and conditions based on protected group status.

Unmarried couples, regardless of their gender, currently have no housing protections under the federal Fair Housing Act. Landlords with traditional concepts of partnership and family are currently not prohibited from refusing housing to unmarried partners. The Fair Housing Act must allow for the recognition of all types of families in the U.S.

In addition, the rights of people with disabilities to accessible housing have recently been challenged by judicial misinterpretation. The Fair Housing Act's two-year statute of limitations has been interpreted by certain courts to prevent people with disabilities from exercising their full fair housing rights. In 2008, the Ninth Circuit Court of Appeals applied a restrictive interpretation of the Fair Housing Act's statute of limitations by barring initiation of design and construction litigation any time after two years from when a multi-family development receives final occupancy permits.⁵³ Such a restrictive interpretation effectively allows multifamily housing developers the ability to engage in practices that render housing inaccessible to people with disabilities for decades if violations go unnoticed within the first two years of occupancy.

⁵¹ GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER, HOUSING CHOICE IN CRISIS: AN AUDIT REPORT ON DISCRIMINATION AGAINST HOUSING CHOICE VOUCHER HOLDERS IN THE GREATER NEW ORLEANS RENTAL HOUSING MARKET 10 (2009).

⁵² *Cox v. Dallas*, 430 F.3d 734, 749 (5th Cir. 2005).

⁵³ *Garcia v. Brockway*, 526 F.3d 456, 466 (9th Cir. 2008).

Disabled persons also encounter barriers that greatly affect their access to fair real estate-related products. Currently, there is no provision in the Fair Housing Act or the Equal Credit Opportunity Act that requires merchants of real estate-related products to make reasonable accommodations for people with disabilities. Deaf and blind persons are particularly vulnerable and may not have access to full and complete information of housing finance and insurance products at various stages of the purchasing process. Current fair housing and lending laws do not prohibit lenders from processing home loan and insurance sales without ever conducting communication with a deaf applicant through telephone relay system, or without ever providing a blind person with terms and conditions in Braille format. In a real estate system that encourages mortgage and insurance sales through a compensation-based incentive structure, a lack of protections as described not only denies people with disabilities fair access to good products, but it also leaves people with disabilities vulnerable to discriminatory practices.

Finally, while fair housing organizations and HUD conduct enforcement and investigation of violations of fair housing laws, DOJ lacks the authority needed to more effectively conduct its oversight activities. DOJ does not have pre-litigation investigatory powers to protect the public from deceitful lending and housing practices as they occur. It is therefore limited in pre-empting systemic practices in violation of the fair housing laws. During the subprime lending crisis, DOJ relied upon the federal regulators to refer instances of lending discrimination to them. At the height of the subprime lending boom, very few referrals came in as mortgage lenders engaged in potentially discriminatory lending patterns.

IV. Addressing Fair Housing Obstacles of Today and Tomorrow

Senator Brooke described the complicity within the federal government for the failures of American freedom and democracy to people of color. Although there are now local, state and federal institutions tasked with enforcing civil rights in housing, there remains room for aggressive enforcement with potentially systemic consequences for the advancement of equality in housing that state and local agencies have failed to accomplish. This section discusses possible policy steps that must be taken to address barriers that impede full functioning of the existing fair housing framework and to modernize our civil rights infrastructure as it relates to housing and the need for additional protections against discrimination.

A. Bringing the Fair Housing Act into the 21st Century

The Fair Housing Act must be amended to include prohibitions against groups currently not protected. Several steps can be taken to address the need for additional housing protections and discrimination observed by fair housing organizations throughout the United States. To address the issues identified, we propose the following policy recommendations⁵⁴:

⁵⁴ The Housing Opportunities Made Equal (HOME) Act (H.R. 3030 and S. 1605) introduced by Representative Jerrold Nadler (D-NY) and Senator John Kerry (D-MA) in the 112th Congress reflects these policy recommendations.

- Federal statutory protection for LGBT individuals in housing and housing finance activities must be provided as several states and cities have done.⁵⁵ The Fair Housing Act and the Equal Credit Opportunity Act must be amended to address discrimination against LGBT individuals in the sale and rental of housing, the financing of housing, and in brokerage services on the basis of sexual orientation and gender identity. Sexual orientation and gender identity must be added to the Fair Housing Act’s list of protected classes.
- Marital status must be added to the list of protected groups so as to outlaw discrimination against unmarried home seekers.
- Source of income must be included in the Fair Housing Act to protect all households with various legal sources of income, including housing vouchers and child support.
- The definition of “familial status” must be changed to accurately reflect contemporary family arrangements to include anyone standing *in loco parentis* of one or more individuals who are under the age of 18.
- The definition of “discriminatory housing practice” must be clarified to include a specific provision that explicitly clarifies that discriminatory action is prohibited regardless of whether it occurred before or after housing is acquired, thus avoiding misinterpretations of what constitutes unlawful housing behavior.
- The definition of “discriminatory housing practice” must also be changed to make clear that a failure to affirmatively further fair housing may be remedied through a private right of action.
- The Fair Housing Act must be amended to specifically outlaw the failure to provide reasonable accommodations to people with disabilities in real-estate related transactions.
- The statute of limitations to pursue litigation of violations of the design and construction requirements must be set to expire only when such violations are corrected in compliance with federal accessibility standards.
- The Fair Housing Act and the Equal Credit Opportunity Act must be amended to provide the Department of Justice with pre-litigation subpoena power to compel the production of documents from entities subject to investigation and prior to initiation of formal litigation.

B. National Expansion of Fair Housing Testing and Enforcement

In spite of the fact that most incidents of housing discrimination in the United States go unreported, there exists relatively little federal commitment to assist fair housing organizations in the enforcement of fair housing laws. There are many factors to consider when understanding why most housing discrimination is unreported: acts of housing discrimination are often subtle; segregation of protected groups goes unchallenged and continues to be widely accepted, while integration is thought of as a dream and not a possible reality; many individuals don’t know their rights under fair housing laws or lack confidence in the government enforcement process; and fair housing organizations conducting enforcement receive few dedicated resources.

⁵⁵ For a map of states with nondiscrimination laws for the LGBT community, see http://www.thetaskforce.org/reports_and_research/nondiscrimination_laws.

A three-pronged approach to expanding fair housing enforcement activities should be pursued by Congress. Congress should authorize funds, on a biennial basis, for a nationwide enforcement testing program to measure patterns of discriminatory treatment of groups protected under the Fair Housing Act in rentals, real estate sales, lending practices, and related services. Secondly, the Fair Housing Initiatives Program must be reauthorized to at least \$52 million with no less than 75 percent of total funding for private enforcement and no more than 10 percent of total funding for education and outreach. Finally, HUD must administer a competitive matching grant program for private nonprofit organizations to examine the causes of systemic housing discrimination and segregation and their effects on education, poverty, and economic development.⁵⁶

C. Empowering the Mandate to Affirmatively Further Fair Housing

While HUD's strengthened enforcement of the AFFH mandate within the last few years is commendable, the lack of regulatory guidance, regulatory commitment to taking adverse action against noncompliant HUD grantees, and technical assistance to HUD program funding recipients perpetuate the ability of cities, counties, and states to stand idly by as segregation persists—all the while enjoying the use of federal funding.

While some states and municipalities have more robust fair housing protections than the federal government, many utilize discriminatory zoning, land use ordinances, and building ordinances. Members of protected groups have no private right of action under the Fair Housing Act's AFFH mandate to pursue litigation on the basis of a city's failure to remove discriminatory policies which restrict the fair housing choice of covered groups under the Fair Housing Act.

The following policy recommendations could be adopted to bolster administrative and private enforcement of the Fair Housing Act's mandate to affirmatively further fair housing:

- HUD must make a commitment and take demonstrable actions to assure that its own programs serve to affirmatively further fair housing. Administration of its public housing, CDBG, HOME Investment Partnership, and other housing and community development programs must explicitly consider the implications those programs may have on fair housing choice.
- HUD must promulgate strong regulations regarding the federal obligation to affirmatively further fair housing and do so immediately. The regulatory structure must provide comprehensive guidelines on what kinds of actions are appropriate to identify fair housing impediments, what constitutes appropriate evidence, what kinds of patterns to look for, a description of the entire scope of policies that must be analyzed, and how to define and measure actions taken to address or remove impediments. The AFFH regulation must also include explicit sanctions and actions to be taken by HUD in response to a grantee's failure to affirmatively further fair housing. HUD must also allow for private regulatory enforcement by qualified fair housing organizations to conduct review of analyses of impediments. HUD is currently working on a regulation.

⁵⁶ The Veterans, Women, Families with Children, and Persons With Disabilities Housing Fairness Act (H.R. 284) introduced by Representative Al Green (D-TX) in the 112th Congress reflects these policy recommendations.

- The Fair Housing Act must be amended to provide for a private right of action by individuals who have been discriminated against by a jurisdiction's failure to affirmatively further fair housing.

D. Re-Affirming Disparate Impact under the Fair Housing Act

Disparate impact has been recognized by courts nationwide as a valid method for proving housing discrimination since the early 1970's. All eleven circuit courts that have ruled on disparate impact have endorsed the concept. HUD and DOJ stand by it.

In November, the U.S. Supreme Court granted cert in *Magner v. Gallagher*, a case from St. Paul, Minnesota, which puts at risk the use of the disparate impact theory in the fair housing context. The Supreme Court is to decide the questions of (1) whether disparate impact claims are cognizable under the Fair Housing Act; and (2) if so, what test should be used to analyze them. Also in November, HUD released draft regulations that provide uniform standards for disparate impact claims that are brought under the Fair Housing Act.

This is a critical issue for the fair housing and civil rights movements in this country because disparate impact remains a powerful tool in combating contemporary discrimination. Contemporary discrimination is not always the result of blatant, intentional acts that result in "smoking gun" evidence. NFHA and 85 other national and local organizations submitted comments to HUD on its draft regulation on the disparate impact theory under the Fair Housing Act. The comments respond to HUD's three step "burden shifting" standard for disparate impact claims, which requires that (1) the plaintiff show a practice that has a disparate impact on a protected class; (2) the defendant respond with a legitimate, nondiscriminatory purpose for the practice; and (3) if such purpose is demonstrated by the defendant, the plaintiff show an alternative policy or decision that could serve the legitimate, nondiscriminatory purpose, but in a less discriminatory manner. We suggest that the burden of proof to establish a less discriminatory alternative be assigned to the defendant or respondent to show that there is no less discriminatory alternative to a policy or practice that has a disparate impact on protected groups. In addition, NFHA and many other organizations will be submitting *amici curiae* to the Supreme Court stating that disparate impact claims are cognizable under the Fair Housing Act and referring the Court to the long-standing recognition of disparate impact by the courts, federal regulators, HUD, and DOJ.

V. Conclusion

The issues and cases cited in this issue brief point to the seemingly persistent condition of segregation, housing discrimination, and the lack of careful thinking when considering policies and practices that limit the social mobility and opportunities for people of color. As we reflect on the current state of segregation in the United States, we are reminded of the warnings detailed by the Kerner Commission. The United States remains a racially and ethnically stratified nation. The U.S. is at a critical point in its history where the convergence of catastrophe and social movements has the potential to spark true expansion of fair housing rights. The 2009 American Community Survey estimated that there are well over 5.5 million disabled veterans in the United

States.⁵⁷ The creation of long-term accessible housing is an integral component to the successful reintegration of our disabled veterans. Also, at a time when the LGBT rights movement seems headed toward increasing victories, it is imperative that the LGBT community achieve federal fair housing rights as well. As the Occupy Wall Street Movement has taken to the streets to remind the public of the massive income inequality in the United States, it is important to recognize the role that predatory mortgage lending practices had in the failure of the economy and the need for retribution for people of color hardest hit.

Time and time again, the fair housing movement reaches the same conclusion – we need to eliminate entrenched discrimination if we are to change the face of our country. While we must address each and every individual complaint that we receive, that is simply not enough. We cannot truly call ourselves a nation of equality while so many of our people are in communities without access to basic health services, banks, grocery stores, decent schools, or transportation. But by promoting diverse, inclusive communities and fighting discrimination, we can instead create and maintain equal access to these vital services. All around the country, private fair housing organizations are striving to make this happen, by combating discrimination at the local level, fighting small landlords who try to keep children out, for example, all the way up to the federal government, challenging its old and new policies that have a discriminatory impact on people of color and others.

Today, we have the opportunity to address housing discrimination and segregation as part of the overall economic recovery. As we head toward becoming a nation mostly populated by people of color, the opportunities afforded to them continue to be decided according to the potential benefit of today's status quo, and not according to that of tomorrow's. The economic vitality of the United States depends just as much on healthy and prosperous people of color as it does on the health and prosperity of the U.S. middle class. Housing discrimination is alive and well. All levels of government must work together with and in support of private non-profit fair housing organizations to ensure that policies are in place for a robust and competitive U.S. population.

⁵⁷ UNITED STATES CENSUS BUREAU, 2009 AMERICAN COMMUNITY SURVEY (2009), http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=ACS&_submenuId=&_lang=en&_ts=.