DISCRIMINATION AND SEGREGATION IN HOUSING:

Continuing Lack of Progress in United States Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination

Report to the U.N. Committee on the Elimination of Racial Discrimination,

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The Lawyers' Committee for Civil Rights Under Law, Washington, DC

The Leadership Conference on Civil & Human Rights, Washington, DC

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National Association for the Advancement of Colored People (NAACP), Baltimore, MD

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I. INTRODUCTION

This Shadow Report to the United Nations Committee on the Elimination of Racial Discrimination is submitted on behalf of United States civil society organizations and academic experts. In spite of U.S. legal standards that are substantially similar to CERD treaty requirements, U.S. policy has failed to address both societal and government discrimination, and continues to support racially and economically segregated housing patterns. Specifically, the United States has failed to respond adequately to the CERD Committee's 2008 findings on housing segregation and discrimination. Although some limited progress has been made since 2008, the United States remains in non-compliance with both the CERD treaty and its own domestic legal standards.

A. Legal Obligations Related to Housing Segregation

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)[1] sets forth obligations with respect to housing that are similar to those required by U.S. domestic civil rights law. Both sets of requirements address the significant barriers to racial equality in residential choice that perpetuate segregation and thwart shared access to social resources, including quality education, employment, and community diversity. Those barriers include discrimination by private and public actors, whether proven as intentional or having a needlessly discriminatory effect. They also include policies that perpetuate segregation or fail to apply government resources to promote integration, still a pressing need given the entrenched legacy of segregative federal programs. Domestically, the American public has a strong and longstanding interest in integration and fair housing choice, and the establishment of a legal framework to promote those rights was a hallmark success of the 1960s civil rights movement. This historical focus, still resonant today, has been required largely because of the role of federal programs in enforcing, reinforcing, and incentivizing segregation.[2]

Under CERD, the United States has accepted the following specific obligations:

- To ensure the compliance of "all public authorities and public institutions, national and local" with the obligation not to engage in racial discrimination.[3]
- To "review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which," regardless of intent, "have the effect of creating or perpetuating racial discrimination wherever it exists."[4]
- To "particularly condemn racial segregation" and "undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction."[5] In 1995, the Committee on the Elimination of Racial Discrimination issued a detailed interpretation of Article 3 explaining that the duty to eradicate segregation includes not only the obligation to cease active discrimination, but

[1] The United States signed and ratified CERD in 1994.
[2] This occurred, for example, through race-based home lending programs ("redlining") and the consolidation of subsidized housing in high-poverty, high-minority neighborhoods. *See, e.g.,* Douglas S. Massey & Nancy A. Denton, *American Apartheid*, 52-58 (1993).
[3] CERD, art. 2 § (1)(a), Dec. 21, 1965, 660 U.N.T.S. 195.
[4] *Id.* at art. 2 § (1)(c).
[5] *Id.* at art. 3.

also the obligation to take affirmative steps to eliminate the lingering effects of past discrimination.[6] It recognized that, although conditions of complete or partial racial segregation may in some countries have been created by governmental policies, a condition of partial segregation may also arise as an intended or unintended consequence of the actions of private persons.

- To "undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of" the right to housing, and the right to own property alone as well as in association with others.[7]

Domestic civil rights law makes similar requirements of the U.S. government. The Fair Housing Act (the "FHA" or "Act")[8] broadly prohibits discrimination on the basis of race and other protected characteristics.[9] Liability under the FHA encompasses disparate impact discrimination and the perpetuation of segregation, as the federal government has long recognized and as the United States Department of Housing and Urban Development ("HUD") has articulated through regulations.[10] The FHA requires that HUD enforce the terms of the law as they relate to discrimination in private housing transactions and in credit markets in conjunction with the United States Department of Justice ("DOJ").[11] Other civil rights laws provide related protections: for example, Title VI of the 1964 Civil Rights Act prohibits discrimination on the basis of race in federally-funded programs, and the Equal Credit Opportunity Act[12] encompasses protections specific to fair lending in the housing market.

As well as prohibiting discrimination, the FHA requires that the government take measures to toward the Act's aim of achieving "truly integrated and balanced living patterns."[13] The FHA also requires the federal government and all agencies and grantees involved in federally funded housing to "affirmatively further" fair housing.[14] The Act directs the federal government to take affirmative steps to remedy private discrimination, to avoid governmental policies that perpetuate segregation, and to reverse historical patterns of segregation and discrimination.[15]

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[6] U.N. Comm. on the Elimination of Racial Discrimination, Aug. 18, 1995, General Recommendation 19, Racial segregation and apartheid (Forty-seventh session, 1995), ¶ 140, U.N. Doc. A/50/18, *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 208 (2003), *available at* http://www1.umn.edu/humanrts/gencomm/genrexix.htm.
[7] CERD, *supra* note 3, art. 5 §§ (d)(v), (e)(iii).
[8] 42 U.S.C. §§ 3601-3631 (2000).
[9] *See Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972), holding that the FHA has a "broad and inclusive" scope.
[10] 24 C.F.R. 100 (implementing the FHA's discriminatory effects standard); *see also* 78 Fed. Reg.11460 (Feb. 15, 2013), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=discriminatoryeffectrule.pdf.
[11] Exec. Order No. 12,892, 3 C.F.R. 849 (1995); *see also* 42 U.S.C. § 3608 ("The authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development."); 15 U.S.C. § 1691e(k) (providing for notification to HUD of Equal Credit Opportunity Act complaints raising potential FHA violations).
[12] 15 U.S.C. §§ 1691-1691f, § 1691 (1991) (prohibiting discrimination on the basis of race and other characteristics "with respect to any aspect of a credit transaction").
[13] *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (stating the purpose of the FHA and citing 114 Cong. Rec. 2706 at 3422 (statement of Sen. Mondale)).
[14] 42 U.S.C. § 3608(d).
[15] *Id.*

B. 2008 Concluding Observations

Concluding its 2008 review of United States performance under CERD, the Committee observed that concrete, intensified measures on the part of the U.S. government were needed to reduce segregation:

> *Concluding Observation 16: Housing and residential segregation*
> The Committee is deeply concerned that racial, ethnic and national minorities, especially Latino and African American persons, are disproportionately concentrated in poor residential areas characterised by sub-standard housing conditions, limited employment opportunities, inadequate access to health care facilities, under-resourced schools and high exposure to crime and violence. (Article 3)
> The Committee urges the State party to intensify its efforts aimed at reducing the phenomenon of residential segregation based on racial, ethnic and national origin, as well as its negative consequences for the affected individuals and groups. In particular, the Committee recommends that the State party:
> (i) support the development of public housing complexes outside poor, racially segregated areas;
> (ii) eliminate the obstacles that limit affordable housing choice and mobility for beneficiaries of Section 8 Housing Choice Voucher Program; and
> (iii) ensure the effective implementation of legislation adopted at the federal and state levels to combat discrimination in housing, including the phenomenon of "steering" and other discriminatory practices carried out by private actors.

Despite the clear obligations of CERD and U.S. domestic law, and the specific recommendations of the Committee, the government has taken few meaningful steps to reduce racial segregation. Even as the United States has grown more diverse, segregation has persisted, and continues to exclude members of minority[16] groups from adequate educational, employment, health, and other resources.[17]

C. Failure to Meet These Obligations is Severely Constraining Residential Choice and Life Opportunities for Vulnerable Populations.

The legal protections noted above offer a solid foundation for anti-discrimination and integrative actions by the U.S. government. However, measures to *implement* those protections—whether through enforcement against discriminatory actors or through the design of federal housing programs—are significantly inadequate. The continuation of restricted housing choice and segregation has severe consequences for racial minorities and the nation as a whole.

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[16] For the purpose of consistency with the terminology employed by the Committee, we use the terms "minority" or "minorities" rather than people of color. Several cities across the United States have a population that is majority people of color today, and the U. S. Census estimates that by 2042, people of color will constitute a majority of the entire U.S. population.

[17] *See* The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census, John R. Logan (Brown University) and Brian J. Stults (Florida State University). March 24, 2011, *available at* www.s4.brown.edu/us2010/Data/Report/report2.pdf.

Segregation conveys disparities in financial and social investment and a lack of access to the resources that broaden life opportunities, such as quality schools and a healthy neighborhood environment.[18] Relative to white households, minority households not only are poorer, but also are disproportionately concentrated in poorer neighborhoods regardless of income.[19] The cumulative effects of social isolation and concentrated poverty compound across generations.[20] For many Americans, these hampered life choices can be attributed at least in part to government policies. For example, children in subsidized housing are less likely to access quality schools than other poor children.[21]

The consequences of segregation can be particularly acute for those who both are racial minorities and are vulnerable for other structural reasons, such as discrimination on the basis of disability, age, gender, immigration status, sexual orientation, or gender identity. Among households reliant on federal subsidized housing programs, disproportionate numbers are female-headed or include members with disabilities; in addition, black households living in public housing are four times more likely than their white counterparts to live in census tracts where the poverty rate exceeds 40%, while among voucher holders, 12% of black households live in high poverty census tracts compared to 4% of white households.[22] Racial segregation is associated with greater odds of death for older African Americans, and older African Americans are more likely than any other age groups to live in neighborhoods disadvantaged by racial segregation.[23]

II. GOVERNMENT POLICIES AND PROGRAMS FAIL TO ERADICATE (AND FREQUENTLY REINFORCE) RACIAL SEGREGATION

Since the previous CERD reporting cycle in 2007, federal agencies have reasserted a commitment to fair housing and residential integration. Positive steps include heightened fair housing enforcement and new support for integration in the language of some programmatic

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[18] *See, e.g.*, Finch, B.K., Do, D.P., Basurto-Davila, R., Bird, C., Escarce, J., & Lurie, N. (2008) "Does Place Explain Racial Health Disparities? Quantifying the Contribution of Residential Context to the Black/White Health Gap in the United States". Social Science & Medicine, 67(8): 1258-1268; Rosenbaum, Emily (2008) "Racial/Ethnic Differences in Asthma Prevalence: The Role of Housing and Neighborhood Environments", Journal of Health & Social Behavior, 49: 131-45; Schwartz, Heather (2010) "Housing Policy Is School Policy", Washington, DC: The Century Foundation, Inc.

[19] Logan, John R (2011) "Separate and Unequal: The Neighborhood Gap for Blacks, Hispanics, and Asians in Metropolitan America", US2010: Discover America in a New Century, *available at* www.s4.brown.edu/us2010/Data/Report/report0727.pdf.

[20] *See, e.g.*, Sharkey, Patrick (2013) *Stuck In Place: Urban Neighborhoods and the End of Progress Towards Racial Equality*. Chicago: University of Chicago Press.

[21] *Do Federally Assisted Households Have Access to High Performing Public Schools?* Ingrid Gould Ellen and Keren Mertens Horn, Furman Center for Real Estate and Urban Policy at New York University (prepared for the Poverty Race & Research Action Council), *available at* www.prrac.org/full_text.php?item_id=12623&newsletter_id=0&header=Current%20Projects.

[22] *Who Lives in Federally Assisted Housing? Characteristics of Households Assisted by HUD programs*, Nat'l Low Income Housing Coalition (based on analysis of HUD's Picture of Subsidized Households data).

[23] Joseph J. Sudano et al., Neighborhood Racial Residential Segregation and Changes in Health or Death Among Older Adults, 19 Health Place 80 (Jan. 2013), http://1.usa.gov/1le6FlF; *see also* Enterprise Community Partners Inc., et al, Summit on Aging in Place in Public Housing, 1 (May 10, 2011), *available at* http://bit.ly/1n6xHti (noting that the "large and rapidly expanding population of low-income older adults face the dual challenges of finding affordable, safe housing that can accommodate changing needs as they grow older.").

guidance and regulations.[24] However, agencies have not yet enacted specific policy reforms to ensure that their programs avoid perpetuating discrimination or that effectively undertake to eradicate segregation, as the treaty requires. Much of the progress has been incremental and rhetorical.

With regard to anti-discrimination enforcement, agencies remain constrained by limited resources. In addition, the elimination of discrimination and segregation requires that the scope of legal protection be expanded beyond the current federal fair housing laws, to cover characteristics (such as source of income and sexual orientation and gender identity) that render members of minority groups especially vulnerable.

A. Programs of the Department of Housing and Urban Development

While the last six years have seen advances in HUD enforcement of the AFFH requirement in local jurisdictions, HUD has failed to make the necessary structural reforms to its own programs to come into compliance with CERD, and to respond to the CERD Committee's 2008 recommendations. Most significant is the need for a final AFFH regulation as discussed below. However, there is a danger that this regulation will still fall short of its potential as a tool for treaty compliance if it lacks robust oversight and enforcement mechanisms.

1) Need for multi-programmatic and structural reforms

At HUD, the first term of the Obama administration yielded several significant policy statements in support of integration. HUD's comprehensive 2010-2015 Strategic Plan, setting the agenda across federal housing programs, calls for subsidized housing to "expand families' choices of affordable rental homes located in a broad range of communities"[25] and focuses on housing as a "platform for improving quality of life"[26] in order to "increase the number of HUD-assisted households with school-aged children who have access to schools scoring at or above the local average"; "improve the health of HUD-assisted residents"; and "increase the average income of HUD-assisted households."[27] HUD also announced new fair housing requirements for its grantees, in which grant applicants are encouraged to identify specific activities and outcomes that affirmatively further fair housing by decreasing segregation and concentrated poverty.[28] As a positive measure, HUD took the significant regulatory step of implementing the Fair Housing Act's discriminatory effects standard, which includes activities or policies that reinforce

[24] *See, e.g.*, U.S. Dept. of Housing and Urban Development, FY 2010-2015 HUD STRATEGIC PLAN 4 (May 2010), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_4436.pdf; *see generally* Affirmatively Furthering Fair Housing in HUD Housing Programs: A First Term Report Card, Poverty & Race Research Action Council (Jan. 2013), *available at* www.prrac.org/pdf/HUDFirstTermReportCard.pdf.

[25] *Id.* at 11.
[26] *Id.* at 24.
[27] *Id.* at 25.
[28] Notice of HUD's Fiscal Year (FY) 2010 Notice of Funding Availability (NOFA); Policy Requirements and General Section to HUD's FY2010 NOFAs for Discretionary Programs, 75 Fed. Reg. 33323 (June 11, 2010), *available at* http://edocket.access.gpo.gov/2010/pdf/2010-14004.pdf (announcing the availability on HUD's website of its FY2010 NOFA Policy Requirements and General Section to HUD's FY2010 NOFAs for Discretionary Programs (June 4, 2010).

segregation. The regulation clarifies the legal standard to be used in enforcing these long-standing protections of the FHA and has broad applicability.[29]

However, HUD has taken only tentative steps with other needed regulations—most significantly, one that would provide structure and accountability for HUD grant recipients' obligation to affirmatively further fair housing. HUD is required to enforce and oversee the AFFH mandate across federal housing programs, and the mandate applies directly to its recipients as well. In July 2013, HUD issued a proposed AFFH regulation intended to provide a clear, data-driven system for fair housing planning and compliance among grantees. This proposed regulation has languished since regulatory comments closed in September 2013, without a clear commitment to a date for finalization.[30]

2) Need for program-specific reforms

a) Voucher administration

The Section 8 Housing Choice Voucher Program (HCV) is our largest low income housing program, serving over 2 million families. Unfortunately, a number of program's design features have the effect of steering low income families into racially concentrated, lower opportunity areas. Since the issuance of the 2008 Concluding Observations, HUD has recognized the program's limitations, and has been actively engaged in an internal process of review, but there have been few external signs of progress, and no final regulation changes.

Multiple aspects of the HCV Program merit redesign. Among these:

Rent assessments: The current system for setting Fair Market Rents (FMRs) has long been criticized for limiting voucher holders' ability to move into higher opportunity neighborhoods and for its tendency to steer families into higher poverty areas.[31] Early in the first term of the Obama Administration, HUD embarked on the design of new and more accurate system for setting FMRs by zip code ("Small Area FMRs"), which could expand families' access to housing in somewhat more expensive areas with higher quality schools, lower crime rates, and healthier living environments. However, this important program has not yet been implemented, and an initial pilot study has been repeatedly delayed.

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[29] 24 C.F.R. 100 (implementing the FHA's discriminatory effects standard); *see also* 78 Fed. Reg.11460 (Feb. 15, 2013), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=discriminatoryeffectrule.pdf.

[30] The regulation appeared in the semi-annual regulatory calendar as anticipated for release in December 2014.

[31] *See, e.g.*, Florence Wagman Roisman, *End Residential Racial Segregation: Build Communities That Look Like America*, 2 HARV. L. & POL'Y REV. 1, 3 (2008) (arguing that HUD should increase FMRs for vouchers to be used in communities with "excellent resources and concomitantly high rents" to encourage integration); Barbara Sard, "How to Promote Housing Integration and Choice Through the Section 8 Voucher Program," Testimony before the National Commission on Fair Housing and Equal Opportunity, October 6, 2008, www.cbpp.org/files/10-6-08hous-testimony.pdf (citing metropolitan-wide FMRs that are too low to make units affordable in low-poverty areas); Margery Austin Turner, Susan Popkin, & Mary Cunningham, *Section 8 Mobility & Neighborhood Health* 31-33 (2000) (presenting concerns about FMR levels as barriers to integration and deconcentration of voucher holders, as well as Section 8 "submarkets"); Philip D. Tegeler, Michael L. Hanley, & Judith Liben, *Transforming Section 8: Using Federal Housing Subsidies to Promote Individual Housing Choice and Desegregation*, 30 Harv. C.R.-C.L. L. Rev. 451, 477 (1995) (citing inadequate FMRs as an impediment to the regional use of vouchers).

The proposal to set local FMRs at the zip code level in metropolitan areas is an important first step in improving voucher holders' access to a broader range of housing choices. Enactment of this policy would help facilitate residential integration and voluntary deconcentration of poverty. In addition, it would more accurately reflect local conditions and, over time, achieve more appropriate rent levels in many neighborhoods.

Wrong incentives in voucher administration: The current assessment system for public housing authorities managing Section 8 (Section 8 Management Assessment Program, or SEMAP)[32] prioritizes quick "utilization" of vouchers and maximum use of voucher budget authority, which is sometimes misinterpreted by PHAs in the field as a reason to house families as quickly as possible, without regard to location issues. A flat per-voucher "administrative fee" incentivizes PHAs to move families to the easiest, most segregated locations for fast lease-ups. SEMAP gives PHAs little or no credit or incentive for helping families move to less racially isolated, higher opportunity areas. The deconcentration "bonus" in SEMAP is only worth a few points, and is not even used by many PHAs. If families move across PHA borders to a lower poverty community, they are not counted at all. And because it is only a bonus, PHAs are not evaluated poorly by HUD if they have highly segregated and concentrated programs. The current system will perpetuate segregation unless HUD amends the SEMAP rule to provide much stronger incentives for PHAs to promote deconcentration (including across jurisdictional lines), and to reduce the emphasis on utilization rates, where delays in renting up are the result of efforts to assist households with mobility moves.[33]

Voucher portability across jurisdictions: By legislation, the voucher program in theory permits holders to move freely across PHA jurisdictional lines to rent apartments. Yet the current "portability" rules have never worked smoothly, either for PHAs or the tenants they serve. They instead pose obstacles for voucher families who want to move and disincentives for PHA staff to help families move. Late in the first Obama term, HUD issued a proposed rule and request for comments that suggested modest steps to streamline portability rules.[34] This proposed rule remains in draft form. It also failed to remedy a number of problems with the current rule, such as complications in billing among public housing authorities and prohibitive housing application and search processes for tenants seeking to port.

b) Pilot initiatives and demonstration programs

During the first term, HUD has provided some leadership in supporting pilot housing mobility programs, but has been reluctant to commit to a broader initiative. Yet as programs in Baltimore, Dallas, Chicago, and Westchester County have amply demonstrated, one-on-one housing mobility counseling is a cost-effective way of helping HCV families access higher opportunity communities. HUD sought to include housing mobility support in the Rental Assistance

[32] 24 C.F.R. Part 98550.
[33] For a more detailed analysis and recommendations on reforms to the SEMAP rule, *see* PRRAC's April 8, 2011 comments at http://prrac.org/pdf/SEMAP-4-8-11.pdf.
[34] *See* Letter to Regulations Division, Office of General Counsel, U.S. Department of Housing and Urban Development. Re: Public Housing and Section 8 Programs: Housing Choice Voucher Program: Streamlining the Portability Process, 77 Fed. Reg. 18731, (May 29, 2012), *available at* www.prrac.org/pdf/portability_fairhousing_comments_5-29-12.pdf.

Demonstration (see below), though Congress did not support this aspect of the program.[35] Other than these few efforts, HUD has not included housing mobility counseling funds in its annual budget proposal, even though these programs have returned substantial benefits for families for relatively small investment in the cities where they have been implemented. Even without additional funding for housing mobility counseling, HUD and housing authorities could do more to incorporate housing mobility into their routine administration of the voucher program: for example, by providing listings of apartments in higher-opportunity, nonsegregated areas.

HUD manages a number of demonstration programs intended to incentivize reforms on a small scale, in order to incubate and assess potentially broader policy changes. Programs such as the Rental Assistance Demonstration, the Moving to Work program, and the Choice Neighborhoods Initiative contain minor incentives for public housing authorities to promote mobility and residential choice, but integration and mobility have not been required or strongly incentivized as components of such programs.[36]

3) Staffing for HUD's Office of Fair Housing and Equal Opportunity

HUD's Office of Fair Housing and Equal Opportunity (FHEO) has the authority to enforce the Fair Housing Act. FHEO investigates and adjudicates complaints of housing discrimination, provides guidance and regulations concerning liability and compliance with the Fair Housing Act and other federal civil rights laws, and is required to ensure that all federal housing and community development programs and funding are administered in such a way that promotes diverse, inclusive communities. Staffing for FHEO has dwindled in the last several years. In 2014, HUD's FHEO has approximately 527 full-time employees, compared to the all-time high of 750 in 1994. The National Commission on Fair Housing and Equal Opportunity in 2008 recommended providing funding to staff FHEO with at least 750 full-time employees.[37] HUD has chronically understaffed its Office of Fair Housing and Equal Opportunity since the 1990s, limiting the United States' ability to effectively curb residential segregation or to comply with its CERD obligations.

B. Absence of civil rights standards within the Department of the Treasury

The Low Income Housing Tax Credit (LIHTC) program is the largest federal low income housing development program, with 1,539,619 units placed in service between 1995 and 2009.[38] Yet this program still lacks meaningful civil rights guidance. This vacuum continues despite advocates' repeated urging that HUD and Treasury formulate regulations and guidance to implement Title VIII's AFFH mandate, as well as Title VI of the 1964 Civil Rights Act

[35] U.S. Department of Housing and Urban Development, Investing in People and Places: FY 2011 Budget Request (2010), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_4220.pdf.
[36] *See* Affirmatively Furthering Fair Housing in HUD Housing Programs: A First Term Report Card, Poverty & Race Research Action Council (Jan. 2013), *available at* www.prrac.org/pdf/HUDFirstTermReportCard.pdf.
[37] The Future of Fair Housing: Report of the National Commission on Fair Housing and Equal Opportunity (December 2008), p. 44, *available at* www.prrac.org/projects/fair_housing_commission/final_report.php.
[38] *See* HUD Office of Policy Development & Research, New Low Income Housing Tax Credit Data Available, Table 2, at http://www.huduser.org/portal/datasets/lihtc/topical9509.pdf.

(prohibiting discrimination in federally-funded programs) and other civil rights laws.[39] These rules are needed to provide guidance to the state housing finance agencies (HFAs) that administer the program, and to provide applicants to the program with equal access to program benefits, and access to non-segregated communities and high performing schools.

Primary responsibility for developing civil rights guidance for the LIHTC program lies with the Treasury Department, which administers the program. Treasury rules are needed to ensure that LIHTC residents and applicants have at a minimum the antidiscrimination protections they would have within similar HUD-run programs—particularly in the areas of site selection, affirmative marketing, tenant selection, design and accessibility standards, source of income discrimination protections, and other program incentives to promote racial integration.[40] They should further assist state HFAs in interpreting the LIHTC statute's selection priorities and preference criteria for state Qualified Allocation Plans, which lack content in the Code of Federal Regulations[41]—including defining the "concerted community revitalization plans" that grant projects in "qualified census tracts" preferred status.[42]

In addition, Treasury has yet to issue regulations or other guidance implementing Title VI of the 1964 Civil Rights Act. A landmark piece of civil rights legislation still neglected by the Treasury Department after almost 50 years, Title VI was passed to ensure that the government would fully divest itself of discrimination—and do so consistently across the initiatives and programs it supports.[43] Title VI rules would ensure that the LIHTC program offers the same substantive and procedural civil rights protections as do other government-supported housing programs.

C. Discriminatory residential lending and finance

Continued residential segregation and the history of excluding racial minorities from access to sustainable mortgage credit created model conditions for predatory lending to poor households in

[39] *See, e.g.*, Letter to Michael Barr, U.S. Dept. of the Treasury, re Title VI, Section 504, and Title VIII Regulations and Guidance at the Dept. of the Treasury (Oct. 26, 2010), *available at* www.prrac.org/pdf/civil_rights_ letter_to_Michael_Barr_10-26-10.pdf; Letter to Assistant Attorney General Thomas Perez, DOJ Civil Rights Division (Aug. 9, 2010), *available at* www.prrac.org/pdf/LIHTC_ letter_to_AAG_Perez_8-9-10.pdf; Letter to Michael Stegman, U.S. Dept. of the Treasury (May 15, 2012), *available at* www.prrac.org/pdf/Letter_to_Michael_Stegman_re_fair_housing_regs_5-15-12.pdf.

[40] The Fair Housing Act explicitly extends AFFH obligations to all federal agencies involved in housing- and development-related programs, as does Executive Order 12892, 59 Fed. Reg. 2939 (Jan. 17, 1994), which clarifies the statutory duties placed on Treasury. The Act also requires that HUD take a leadership and coordinating role among agencies in implementing §3608. The "primary authority" for AFFH is vested in HUD, and Executive Order 12892 requires each agency head administering housing programs to "cooperat[e] with the Secretary of Housing and Urban Development, who shall be responsible for exercising leadership in furthering the purposes of the Act." §2-201, 202; *see also* 42 U.S.C. § 3608(d).

[41] 101 26 U.S.C. § 42(m)(1); 26 C.F.R. §1.42-17(a)(1) and (2).

[42] 26 U.S.C. § 42(m)(1)(B)(ii)(III).

[43] Title VI's broad applicability across programs and activities receiving federal assistance was designed to "insure the uniformity and permanence of the nondiscrimination policy," 110 Cong. Rec. 6544 (Statement of Sen. Humphrey); *see also* 110 Cong. Rec. 2468 (1964) "Title VI enables the Congress to consider the overall issue of racial discrimination separately from the issue of the desirability of particular Federal assistance programs." As with Title VIII, Title VI was in part a correction to past government sponsorship of discrimination.

communities of color.[44] This has led to the loss of wealth built over generations in neighborhoods of color, representing over half of the total cost of the foreclosure crisis in the United States.[45]

1) Discrimination in housing finance

Fannie Mae and Freddie Mac, the secondary mortgage market entities known as the Government Sponsored Enterprises (GSEs), have a statutory duty to serve underserved markets and played an important role in providing access to homeownership for borrowers of color. Unfortunately, the GSEs have not properly served borrowers of color and in fact have taken actions which have prevented equitable access to homeownership.

For example, the GSEs have unnecessarily relied upon credit profile factors that bear modest relationships to credit risk but have a disparate impact on borrowers of color. At the discretion of their regulator, the Federal Housing Finance Agency (FHFA), the GSEs have adopted pricing policies that divide loans into categories based on a variety of factors, including down payment (loan to value ratio), credit score, and product type.[46] Based on these factors, they imposed additional fees for purchasing a mortgage from the originating lender that rely on the amount of down payment provided and credit score of the borrower, which has a disparate impact on borrowers of color. In December 2013, the GSEs announced further increases in their fee price adjustments, to take effect in the spring of 2014.[47]

2) Need to Protect against Discrimination in the Treatment of Foreclosed Homes

Federal banking regulators are failing to guard against the discriminatory treatment of minority communities in the aftermath of the housing crisis. Real Estate Owned (REO) properties are homes that have gone through foreclosure and are now owned by banks, investors, Fannie Mae, Freddie Mac, the Federal Housing Administration (FHA), or the U.S. Department of Veterans Affairs. A nationwide investigation into the maintenance and marketing practices of REO properties by banks found that major banks around the nation maintain and market REO homes in white communities significantly better than in communities with higher concentrations of minorities.[48] Failures by banks to maintain and market properties pose health risks to neighboring families, bring down neighboring home values, devastate the recovery in entire communities of color, and encourage investor purchasers over owner-occupant purchasers of those homes.

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[44] Rugh, Jacob S. and Massey, Douglas S., "Racial Segregation and the American Foreclosure Crisis," American Sociological Review 2010 75:629.
[45] Bocian, et al., *Collateral Damage: The Spillover Costs of Foreclosures*, Center for Responsible Lending, 2012.
[46] These are known as loan level price adjustments, or LLPAs. Fannie Mae's current LLPA fees are available at www.fanniemae.com/content/pricing/llpa-matrix.pdf. *Accessed June 17, 2014.*
[47] Mel Watt, the new director of the agency overseeing the GSEs, has announced the postponement of the fee increases until he has had a chance to review the proposal.
[48] National Fair Housing Alliance, *The Banks are Back – Our Neighborhoods are Not: Discrimination in the Maintenance and Marketing of REO Properties*, April 2012; numerous HUD administrative complaints filed against Bank of America, Deutsche Bank, US Bank, Wells Fargo.

No uniform regulatory structure exists for how banks must maintain and market REO properties, and the federal government has failed to conduct effective oversight of REO maintenance and marketing practices by financial institutions they regulate. All efforts to counteract REO discrimination have been taken by non-governmental agencies. In June 2013, over a dozen non-governmental fair housing organizations settled a major complaint of discrimination based on the maintenance and marketing of REO properties owned by Wells Fargo Bank, N.A., with settlement funds to be used in 19 cities. Similar complaints of discrimination have been filed against Bank of America, Deutsche Bank, U.S. Bank, and Safeguard Properties, the largest property preservation company in the United States. Government actors should pursue similar actions, with settlement funds applied to support homeownership, assist with rebuilding neighborhoods of color impacted by the foreclosure crisis, and promote diverse, inclusive communities.

3) Discrimination by HUD in its Treatment of Distressed Borrowers of Color

Many REO properties and other distressed home assets are owned or insured by the federal government, and the disposition policies for these properties discourages opportunities for homeownership for minorities. HUD's FHA mortgage insurance program historically has served low-income and borrowers of color. However, its treatment of defaulted FHA notes has disproportionately harmed borrowers of color. One such example is the treatment of defaulted FHA-insured mortgage notes under HUD's Distressed Asset Stabilization Program (DASP). Under this program, pools of delinquent loans insured by FHA are sold off to investors at bargain prices. HUD has suggested that this gives investors an incentive to restructure the loans with a lower principal balance, and makes them affordable for current homeowners, thus preventing further foreclosures. Once these loans are sold, the participating lenders receive their full insurance claim. The loans then lose their FHA-insurance, and homeowners lose the benefits of FHA's loss mitigation program.

Though the share of borrowers of color purchasing FHA loans dropped during the subprime boom, the overall number of FHA loans purchased by minorities has rebounded since the collapse of the subprime sector,[49] and in 2013 FHA accounted for 54% of purchase mortgage financing for African-American and Hispanic borrowers.[50] Between 2011 and 2014, roughly 73,000 mortgages were sold to private investors in a series of auctions under the DASP program. In December alone, HUD sold 13,661 loans that had unpaid principal balances totaling more than $2.6 billion.[51] Many of the loans sold in this pool qualified for FHA loss mitigation but wrongfully were included in the sale and lost FHA loss mitigation options for the homeowners.

[49] Harriet Newburger, "FHA Lending: Recent Trends and Their Implications for the Future", Federal Reserve Bank of Philadelphia, December 2011, p. 7.
[50] U.S. Dept. of Housing and Urban Development, "Financial Status of the FHA Mutual Mortgage Insurance Fund FY2013," December 13, 2013.
[51] SEBA Professional Services, LLC, Single Family Loan Sale 2014-1 ("SFLS 2014-1") National-Regional Part 2 Sale Results Summary, December 17, 2013.

D. Discrimination in Disaster Recovery Programs

1) Discrimination in the Federal Administration and Use of Disaster Recovery Funding

In the aftermath of Hurricane Katrina, the federal government provided major disaster recovery funding for both Louisiana and Mississippi. The State of Louisiana used HUD funds to administer the Road Home Program, the single largest housing recovery program in U.S. history. As originally administered, the Road Home Program formula used to allocate grants for rebuilding to homeowners had a discriminatory impact on African-American homeowners. The formula, 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. As in many other American cities throughout the country, home values in African-American neighborhoods are lower than values of comparable homes in white neighborhoods.[52] Program data for Road Home showed that African Americans were more likely than white grant recipients 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. Such disparate allocations slowed down recovery efforts in African-American communities. Non-governmental organizations filed suit against HUD and the State of Louisiana and settled the case, changing the formula allocation to provide assistance to 13,000 individuals and over $500 million in grant home rebuilding funds.

2) Discrimination by States in the Dispersal of Disaster Recovery Funding

In October 2012, Hurricane Sandy devastated parts of Atlantic Seaboard, with particularly destructive impact on communities of color in New Jersey and New York. The United States Congress appropriated federal funding under the Community Development Block Grant (CDBG) Disaster Recovery program to be administered through HUD to make available to states. HUD's Notice for use of these funds required that each grantee "conduct an assessment of community impacts and unmet needs to guide the development and prioritization of planned recovery activities."[53]

Non-governmental organizations analyzed the plan submitted by the State of New Jersey and investigated the treatment of minority program participants and determined that New Jersey failed to include the required assessments and equitably implement disaster recovery. The State's plan was unfair to lower-income renters, who are disproportionately African-American and Latino, by prioritizing aid to homeowners, who are disproportionately white. Information on the State's Spanish-language services administration website was not fully bilingual and had inaccurate application deadlines. An investigation also found that Latinos were rejected at a rate of 1.5 times and African-Americans 2.5 times the rate of non-Hispanic white people who applied for the State's primary homeowner rebuilding program, and renters were given

[52] For example, an investigation showed that 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.

[53] 78 Fed. Reg. 14330. In conducting this assessment, "[i]mpacts must be described by type at the lowest geographic level practicable *(e.g.*, city/county level or lower if available) .... [and] must pay special attention to neighborhoods with high percentages of damaged homes and provide a demographic analysis *(e.g.*, race, ethnicity, disability, age, tenure, income, home value, structure type) in those neighborhoods to identify any special needs that will need to be addressed." 78 Fed. Reg. 14333.

disproportionately small amounts of relief compared to homeowners.[54] The organizations filed suit against the State of New Jersey and later settled, achieving $215 million for rebuilding homes, $15 million for rental assistance, required a reexamination of previously denied program applications, and set firm targets to assist those most affected by Hurricane Sandy left out of the State's recovery efforts.

E. Federal Enforcement of the AFFH Obligation among Jurisdictions

Compliance with the AFFH provision at the state and local level currently is monitored through regular fair housing certifications by grantees, and regular local development and publication of the "Analysis of Impediments to Fair Housing" (AI), which must assess local barriers to integration and identify steps necessary to overcome these barriers. HUD historically has had a very limited enforcement program for ensuring state and local compliance with the AFFH obligation.[55] In 2008 the National Commission on Fair Housing and Equal Opportunity issued a report entitled "The Future of Fair Housing" assessing the state of fair housing in the United States forty years after the enactment of the Fair Housing Act. With respect to the Act's AFFH requirement, this report concluded that "the current federal system for ensuring fair housing compliance by state and local recipients of housing assistance has failed."[56] Similarly, a 2009-2010 Government Accountability Office (GAO) investigation of compliance by state and local governments with the AFFH requirement found both compliance by the recipients of federal funding and enforcement of AFFH requirements by HUD to be lacking.[57]

The HUD Office of Fair Housing and Equal Opportunity has been re-energized under the Administration of President Barack Obama, and for the first time since the Act passed in 1968 there has been significant enforcement of the AFFH requirement by HUD: (1) it has participated in and sought increased AFFH enforcement in several federal court cases involving AFFH issues; (2) it has processed and investigated private fair housing complaints where the primary allegations were violations of the AFFH requirement; (3) it has significantly increased its review of local Analyses of Impediments to Fair Housing (AIs), and some have been rejected; and (4) it has undertaken several compliance reviews concerning the AFFH requirement leading to voluntary compliance agreements addressing AFFH requirements.[58] Despite this progress, the historical lack of enforcement in this area indicates a need for structural reforms to sustain progress in desegregation into future administrations—including an AFFH regulation providing meaningful standards and oversight mechanisms.

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[54] *Latino Action Network, et al. v. State of New Jersey*, HUD Complaint 02-13-0303-8

[55] For a comprehensive history of the United States' failure to implement the AFFH obligation of the Fair Housing Act, *see* Nikole Hannah-Jones, "Living Apart: How the Government Betrayed a Landmark Civil Rights Law," *ProPublica*, Oct. 29. 2013.

[56] The Future of Fair Housing: Report of the National Commission on Fair Housing and Equal Opportunity (December 2008), p. 44, *available at* www.prrac.org/projects/fair_housing_commission/final_report.php.

[57] 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 (2010).

[58] See full discussion in Affirmatively Furthering Fair Housing in HUD Housing Programs: A First Term Report Card, Part II, PRRAC, NFHA, & LCCR (Jan. 2013), *available at* www.prrac.org/pdf/HUDFirstTermReportCardPartII.pdf

IV. INTERSECTIONAL ISSUES AND NEED FOR ADDITIONAL PROTECTIONS

A. Intersection of LGBT Status and Race and National Origin

LGBT individuals and families often experience upfront hostility from landlords, real estate agents, and lenders when looking for housing. In 2011, the National Gay and Lesbian Task Force and the National Center for Transgender Equality released the results of their comprehensive national survey on transgender discrimination. The survey found that of the 6,450 transgender and gender non-conforming study participants, many experienced gender identity discrimination in housing: 19 percent had been denied a home or apartment; 19 percent had experienced homelessness; and 11 percent had been evicted. Those who had experienced homelessness were 2.5 times more likely to have been incarcerated than those who had not experienced homelessness, and more than four times more likely to have done sex work than those who had not experienced homelessness.[59]

In June, 2013, HUD released its first study on the incidence of housing discrimination against same-sex couples in rental housing. HUD's study found that same-sex couples experience discrimination in the online rental housing market, relative to heterosexual couples. HUD also found that same-sex couples received fewer responses to email inquiries than heterosexual couples.[60] While HUD's study is significant, it provides no analysis of the intersection of sexual orientation status and race and national origin in housing discrimination. HUD should conduct further research into housing discrimination against LGBT minorities.

B. Discrimination on the Basis of Source of Income

Finding safe, affordable housing in racially and economically integrated communities continues to be one of the biggest challenges for poor families of all protected classes. Several federal programs, including HUD's Section 8 Voucher (also known as the Housing Choice Voucher) program, exist to help low-income people afford housing and achieve housing mobility. However, demand for housing assistance vouchers from government programs far exceeds their availability. Even when families get assistance, many are met with outright discrimination by landlords who refuse to accept housing vouchers or other housing assistance and income subsidies. Landlords across the nation engage in discrimination based on source of income on a daily basis.

Minorities are disproportionately victims of source of income discrimination. The United States Census estimates that in 2011 more than 46 million people lived in poverty, making up 15 percent of the overall population.[61] Poverty in the United States disproportionately affects minorities, and 27.6 percent of African-Americans, 25.3 percent of Hispanics of any race, and

[59] Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*. Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011.
[60] U. S. Dept. of Housing and Urban Development, "An Estimate of Housing Discrimination Against Same-Sex Couples," June 2013.
[61] The U.S. Census follows the methodology of the Office of Management and Budget's Statistical Policy Directive 14 to determine a set of dollar value thresholds that each vary by family size and composition to determine who lives in poverty.

12.3 percent of Asian Americans live in poverty, compared to 9.8 percent of non-Hispanic whites.[62] Between November 1, 2012, and February 28, 2013, African-American households represented 46 percent of all tenant-based voucher households and Latino households represented 15 percent.[63] There are also disparate impacts on communities of color based on local population demographics and historical segregation patterns.

Two studies by private fair housing organizations illustrate the level of source of income discrimination that actually occurs across regions and cities. In July 2008 in the Fair Housing Justice Center in New York City investigated whether real estate brokers and agents were complying with the New York City Human Rights Law which prohibits housing discrimination based on source of income. The Center identified over 3000 rental advertisements indicating a limitation or discrimination based on source of income within a matter of days. Another study conducted by the Greater New Orleans Fair Housing Action Center (GNOFHAC) determined that landlords were denying apartments to voucher holders 82 percent of the time: 75 percent of landlords refused to accept housing vouchers, and an additional 7 percent placed conditions upon voucher holders, making it virtually impossible for a voucher holder to rent the apartment. Only 18 percent of housing providers tested stated they would accept housing vouchers as rental payment free from additional terms or conditions and barriers to rental.[64] This type of discrimination is often fueled by racial stigmas and stereotypes falsely associated with racial and ethnic minority status. In New Orleans, where 99 percent of the Housing Choice Voucher holders in 2009 were African American, communities of color are disproportionately impacted by source of income discrimination.

C. Sexual Harassment against Women of Color in Rental Housing

The typical victims of sexual harassment in housing tend to be poor women of color who are also single mothers.[65] Many sexual harassment cases involve tenants living in subsidized or affordable housing. Landlords often touch women without consent; grant or deny housing and housing benefits in exchange for sex; and retaliate against women when they refuse sexual advances.[66] Low-income women are often reluctant to report incidents of sexual harassment by landlords because of risk of eviction, blacklisting, or retaliation from homeowners and

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[62] DeNavas-Walt, Carmen, Bernadette D. Proctor, and Jessica C. Smith, U.S. Census Bureau, Current Population Reports, P69-243, *Income, Poverty, and Health Insurance Coverage in the United States: 2011*, U.S. Government Printing Press, Washington, D.C., 2012.

[63] U.S. Dept. of Housing and Urban Development, *Resident Characteristics Report*, Tenant Based Voucher. Accessed March 29, 2013, *available at* https://pic.hud.gov/pic/RCRPublic/rcrmain.asp.

[64] 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*, New Orleans.

[65] S*ee* Nicole A. Forkenbrock Lindemyer, Note, Sexual Harassment on the Second Shift: The Misfit Application of Title VII Employment Standards to Title VII Housing Cases, 18 LAW & INEQ. 351, 371 (2000).

[66] *See, e.g.*, Press Release, U.S. Dept. of Justice, Justice Department Obtains Record $1.1 Million Verdict in Sexual Harassment Case Against Landlord in Kansas City, Missouri (May 13, 2004) (noting that most of the victims in a sexual harassment case were lower‐income, single women who had limited opportunities to seek other housing); Press Release, Fair Hous. Advocates Ass'n, Jury Awards $31,452 in Sexual Harassment Case (May 14, 2002) (noting that a single mother delayed reporting incidents of sexual harassment because she did not want to risk homelessness).

landlords.[67] It is especially dangerous for women to report sexual harassment committed by landlords, who hold a key to a home.[68]

Over the years, several court decisions have established the contours of the law, relying in large part on sexual harassment law developed in the fair employment context under Title VII of the 1964 Civil Rights Act.[69] Federal courts have referenced the lack of administrative clarity on HUD's position regarding sexual harassment in housing.[70] In 2000, HUD released a proposed regulation concerning sexual harassment in housing but never finalized the rule. Today, there remains a longstanding need for a HUD regulation to establish HUD's position on sexual harassment in housing and to do so with clarity.

Such a regulation would be consistent with judicial decisions interpreting the Fair Housing Act to cover sexual harassment and other harassment in housing and would provide victims of harassment discrimination, the housing industry, and the public with clear information about the type of conduct that is prohibited by the Fair Housing Act.

D. Age, Disability, and Segregation

As increasing numbers of the current population cross the threshold into retirement, racial discrimination in nursing home care is an issue of growing importance. As a result of racially discriminatory admission practices, nursing homes remain heavily segregated, with African Americans disproportionately residing in poorer quality nursing homes than their Caucasian counterparts.[71] Unsurprisingly, these nursing homes often have "serious deficiencies, lower

[67] Maggie E. Reed, Linda L. Collinsworth & Louise F. Fitzgerald, *There's No Place Like Home: Sexual Harassment of Low-Income Women in Housing*, PSYCHOL. PUB. POL'Y & L. 439, 440 n.2 (2005).
[68] *See, e.g., United States v. Koch,* 352 F. Supp. 2d 970 (D. Neb. 2004).
[69] *See, e.g., Shellhammer v. Llewellyn*, Fair Housing Fair Lending Report., para 15742 (W.D. Ohio 1983), *aff'd* 770 F. 2nd 167 (6th Cir. 1985) (unpublished); *Krueger v. Cuomo*, 115 F. 3rd 487 (7th Cir. 1997); *Honce v. Vigil*, 1 F.3d 1085 (10th Cir. 1993); *Henson v. City of Dundee*, 682 F. 2d 897(11th Cir. 1982); *HUD v. Kogut*, HUDALJ 09-93-1245-1 (April 17, 1995); *Beliveau v. Caras*, 873 F. Supp. 1393, 1397 (C.D. Cal. 1995); *Williams v. Poretsky Mgm't*, 955 F. Supp. 490 (D. Md. 1996); *New York ex rel. Abrams v. Merlino*, 694 F. Supp 1101 (S.D.N.Y. 1988); *Reeves v. Carrollsburg Condominiums*, 1997 U.S. Dist. LEXIS 21762 (Dec. 18, 1997); *United States v. Koch,* 352 F. Supp. 2d 970 (D. Neb. 2004).
[70] *See, e.g., DiCenso v. Cisneros*, 96 F.3d 1004, 1007 (7th Cir. 1996), in which the Seventh Circuit noted that it could not defer to HUD's interpretation of a hostile housing environment –under the agency deference doctrine set forth in *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984) because, unlike the Equal Employment Opportunity Commission, which *had* issued guidelines defining sexual harassment as a form of sex discrimination, "HUD has not even enacted guidelines regarding hostile housing environment sex discrimination."
[71] "Several research studies show that even when payment status is controlled there are still significant inequities in access and quality of nursing home care that are only explained based on a difference in the patient's race." David Falcone & Robert Broyles, *Access to Long-Term Care: Race as a Barrier*, 19 J. HEALTH POL. POL'Y & L. 583, 588-91 (1994); Mary L. Fennell et al., *Facility Effects on Racial Differences in Nursing Home Quality of Care*, 15 AM. J. MED. QUALITY 174, 174-76 (2000); David B. Smith, *The Racial Integration of Health Facilities*, 18 J. HEALTH POL. POL'Y & L. 851, 862-64, 866 (1993); William G. Weissert & Cynthia Matthews Cready, *Determinants of Hospital-to-Nursing Home Placement Delays: A Pilot Study*, 23 HEALTH SERVICES RES. 619, 632, 642 (1988).

staffing ratios, and greater financial vulnerability."[72] Further research shows that as a result of there being fewer African Americans in nursing homes than Caucasians, "African American patients are delayed transfer to nursing homes until they can be placed in the same room with other African Americans or can be transferred to predominantly African American nursing homes."

One study surveying 60 senior communities centered in Chicago's Metropolitan areas shines light on the additional nexus between racial housing discrimination and disability. Despite the fact that African-Americans participants were less likely—as a group—to have a disability than the Caucasian participants, the African-Americans participants on the whole reported being more heavily discriminated against with regard to their senior care than any other ethnic group.[73]

In enforcing the FHA, HUD should proactively address this aspect of housing discrimination.

V. RECOMMENDATIONS

A. Recommendations for Congressional Action

HUD is responsible for administering federal funds for fair housing enforcement and education to non-government fair housing organizations and city and state civil and human rights agencies. HUD has begun to take a greater systemic approach to fair housing enforcement. For years, HUD handled only individual cases of housing discrimination. However, in the last six years, HUD has worked closely with fair housing organizations and has directed its funding and staffing resources to pursuing enforcement activities that have a widespread impact of opening housing to many. In 2013, these private fair housing organizations investigated 69 percent of all reported instances of housing discrimination in the United States. However, HUD's fair housing enforcement grants made to these private groups remain significantly underfunded. To reasonably support heightened fair housing enforcement (including a new AFFH rule), and to be consistent with the findings of the National Commission on Fair Housing and Equal Opportunity,[74] we recommend that Congress increase funding for the Fair Housing Initiatives Program to at least $52 million annually and the Fair Housing Assistance Program to at least $40 million.

HUD itself must have the necessary permanent enforcement and investigations staff in its Office of Fair Housing and Equal Opportunity to conduct proper and timely investigations of

[72] David B. Smith et al., *Separate and Unequal: Racial Segregation And Disparities in Quality Across U.S. Nursing Homes*, 26 Health Affairs 1448, 1448 (Sep. 2007), *available at* http://bit.ly/1pXghEv (noting that blacks are more likely than whites to seek care from facilities with significantly fewer up-to-date technological resources).
[73] John Marshall Fair Housing Legal Support Center, *Senior Housing Research Project Final Report*, at 191, 194, 269 (2007), *available at* http://bit.ly/U3NAsp (noting that the overwhelming majority of all African American participants (70%) experienced racial discrimination in the housing context, yet only 25% reporting suffering from disabilities. One facility was even reported to inform disabled inquirers of a 15 year waiting list, while nondisabled inquirers were told the waiting list was significantly shorter – i.e. between 3 and 12 months long). The study notes: "Predictably, there was a significant disparity among the racial groups: 51 percent of minorities indicated that they were victims of housing discrimination compared to 18 percent of Caucasian respondents". *Id.* at 185.
[74] The Future of Fair Housing: Report of the National Commission on Fair Housing and Equal Opportunity, December 2008.

administrative complaints of housing discrimination, as well as compliance reviews of states and cities efforts to comply with the Fair Housing Act's requirement to affirmatively further fair housing. We recommend that Congress provide appropriations to fund HUD's FHEO staffing with at least 750 full time employees.

Existing fair lending laws should be enforced to address the barriers to homeownership created by the GSEs for borrowers of color. Legislative efforts to reform the system to limit taxpayer liability must not only maintain the role that the GSEs have played in providing access to credit, but also expand it. This would include ensuring that housing finance entities affirmatively serve the credit needs of all communities.

Today, it is legal to discriminate against a person in housing based on their lawful source of income. This has a disparate impact on minorities. Congress should pass the Home Opportunities Made Equal Act (HOME Act),[75] which would extend protections of the Fair Housing Act to persons based on their lawful source of income, sexual orientation, gender identify, and marital status. The bill also strengthens other portions of the Fair Housing Act.

Congress should also conduct extensive hearings on the treatment of REO properties, and examine the efficacy of the supervision that government agencies conduct of entities that own or service these properties, with a focus on how they affect access to homeownership for minorities. Title VI of the 1964 Civil Rights Act prohibits discrimination on the basis of race in federally-funded programs and activities, but private parties currently are unable to access the judicial system for protection against discriminatory effects discrimination under Title VI: the statute does not extend a private right of action for disparate impact claims. As a result, the public must rely on federal agency enforcement—unlike in other areas of civil rights law for which they may access the courts directly to find redress. Congress should restore a right of action for disparate impact discrimination under Title VI, allowing members of the public to protect themselves fully from discrimination and ensure fairness and accountability in government-funded programs, including housing and development programs.[76]

B. Recommendations for Executive Action

Compliance with CERD and the obligations of domestic law provides that the federal government's agencies must coordinate in affirmatively furthering fair housing and contribute to the elimination of segregation in the United States. Compliance requires concrete, structural-level reforms. We recommend the executive branch of government take the following steps.

- Meaningful implementation of the affirmatively furthering fair housing obligation (including finalization of HUD's Affirmatively Furthering Fair Housing Rule) by HUD and across all agencies administering housing programs. This includes strong ongoing oversight by HUD and additional enforcement resources.

[75] In 2013, Senator Sherrod Brown of Ohio introduced the HOME Act in the U.S. Senate (S. 1242) and Representatives Jerrold Nadler and John Conyers introduced the HOME Act in the U. S. House of Representatives (H.R. 2479) during the 113th Congress.

[76] The U.S. Supreme Court erased this right with its decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001); private parties previously were able to sue to enforce disparate impact regulations promulgated under Title VI.

- Treasury should issue civil rights standards for the Low Income Housing Tax Credit Program, including Title VI of the 1964 Civil Rights Act and the Fair Housing Act (including its affirmatively furthering provision). This should include siting standards directing a significant portion of family units to low poverty, non racially concentrated communities, while preserving units that are affordable to the lowest income families.
- HUD should redesign all federal rental housing programs to meet affirmative obligations to address segregation, with both strong standards (that is, mandatory requirements) and strong incentives for mobility and affordable housing siting. In the Section 8 program, HUD should implement small-area Fair Market Rents to increase the range of neighborhoods available to voucher holders. HUD should revise the Section 8 Management Assessment Program (SEMAP) and Section 8 Administrative Fee system to reward PHAs for improved opportunity outcomes for families. Additionally, the voucher portability process should be revised to minimize hurdles and information barriers for clients. Additional funding should be provided for mobility programs, particularly in segregated metropolitan areas.
- Increased staffing of HUD's office of Fair Housing and Equal Opportunity to conduct additional compliance reviews of entitlement jurisdictions' efforts to affirmatively further fair housing.
- As the government noted in its submission, HUD has issued a regulation implementing the discriminatory effects standard of the Fair Housing Act and reinforcing the longstanding interpretation of that law. However, effective enforcement requires increased government support. Such increased support should include:
  - The HUD Secretary's increased initiation of complaints using the discriminatory effects standard to challenge discriminatory lending practices.
  - HUD's meaningful independent evaluation of all HUD housing and community development programs for their impacts on residential segregation.
- HUD should withdraw funds from entitlement jurisdictions and local participants of programs if administration of those funds and programs yields discriminatory results or increases residential segregation.
- HUD should conduct systemic enforcement of source of income discrimination using the disparate impact doctrine and discriminatory effects standard.
- Reconvene the President's Fair Housing Council. The Administration should implement Executive Order 12892 to reaffirm the Fair Housing Act's mandate that all Federal programs and activities relating to housing and urban development affirmatively further fair housing. The President should reconvene the President's Fair Housing Council consisting of the Secretaries, Directors, and Commissioners of the Federal departments and regulatory agencies, and appoint the Secretary of the Department of Housing and Urban Development as its chair. The purpose of the Council is to review the "design and delivery of Federal programs and activities to ensure that they support a coordinated strategy to affirmatively further fair housing."

The need for additional policy changes has been reinforced by the foreclosure crisis and its exposure of unfair lending practices. Reforms needed in this area include:

- Guidance from HUD and the financial regulatory agencies on compliance with the obligation to maintain and market REO properties in a nondiscriminatory manner.

Require that all government agencies with REO properties, and supervisory authority over private market entities that conduct business in the REO space, abide by a nationally-uniform disposition process that treats borrowers and communities fairly, and prioritizes homeownership opportunities while also driving equitable conversion of REO properties to much-needed rental housing that serves all communities, especially extremely low and low and moderate income households.

- HUD and federal banking regulators, including the Consumer Financial Protection Bureau, the Federal Reserve Board, and the Office of Comptroller of the Currency, should use their authority to conduct a nationwide investigation of bank and maintenance servicer policies and practices with regard to REO properties.
- HUD should put protections in place to avoid wrongful sales of FHA-insured loans that qualify for loss mitigation to achieve the best possible outcomes for all homeowners. HUD should rigorously scrutinize loss mitigation reviews of servicers, ensure compliance and monitoring and reporting of servicing outcomes, expand outreach to homeowners adversely harmed in DASP sales, post all sales requirements, promote the purchase of loans by non-governmental organizations, and require private investor purchasers to provide sustainable loss mitigation for homeowners through a transparent process.
- Further steps need to be taken to address the barriers to homeownership created by the GSEs for borrowers of color by enforcing existing fair lending laws. The Federal Housing Finance Agency should undertake comprehensive review of all actions planned by the GSEs, for their impact on the ability of minorities to access homeownership.

VII. RECOMMENDED QUESTIONS

- What further steps will the government take to ensure consistent, meaningful enforcement of the Fair Housing Act, including its obligation to affirmatively further fair housing and its disparate impact standard?

- How does the government intend to carry out its obligations under CERD, including that of addressing segregation, with specific regard to the Low Income Housing Tax Credit Program?

- What steps has the government taken with regard to the Committee's recommendation on eliminating obstacles to housing choice and mobility, and what additional steps does it plan to take?

- Have U.S. low income housing programs become more segregated, or less segregated, since the 2008 CERD Committee report?

- When will HUD release its final AFFH regulation and how does it plan to conduct a meaningful review of all required Assessments of Fair Housing?

- What steps will the government take to ensure racial and ethnic equity in access to residential credit and housing finance?

- How does the executive branch of the United States government intend to work with Congress to expand the protections afforded under the Fair Housing Act to include protection for source of income, sexual orientation, gender identity, and marital status?

- What steps will the United States take to provide HUD's Office of Fair Housing and Equal Opportunity with the necessary personnel resources to effectively enforce the Fair Housing Act?

- What leadership will the executive branch provide to require that all federal agencies administering housing and community development programs meet their obligations to affirmatively further fair housing?