

Civil Rights Strategies To Increase Mobility

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ABSTRACT. Increasing mobility across state, regional, and local lines can be a promising strategy for families currently stuck without jobs in poor and segregated neighborhoods. But policies at these levels have established and sustained segregation, thereby making exit from these neighborhoods difficult. Moreover, even when poor individuals enter a new community, they often confront additional barriers, including community opposition, exclusionary zoning that limits affordable housing, and landlord discrimination. I argue that federal leadership, changes to the Fair Housing Act, and different approaches to state and local planning may clear the path for increased mobility across state and regional lines. Evidence shows that these steps are likely to improve educational opportunities, provide upward trajectory in income, and offer upward mobility for movers. Ultimately, however, it will take political will to prevent community opposition, discrimination, and zoning barriers from blocking movers into new communities.

INTRODUCTION

Longstanding barriers of racial discrimination and income inequality impair local, regional, and national mobility. In his Article, *Stuck! The Law and Economics of Residential Stagnation*, David Schleicher fails to recognize that overcoming these barriers will require serious commitments of political will, resources, and planning. Thus, while there is much to be said for Schleicher's argument that "American law creates stickiness" in housing and labor markets, his analysis has limited utility because he neglects the role of racial discrimination in reducing mobility. Because he does not fully consider the ways in which past federal, state, and local government policies have contributed to segregation and structural barriers to mobility in most major metropolitan areas, his focus on government "cures," at least with respect to housing mobility for people of color and those who are poor, is incomplete.

The reality is that significant numbers of individuals are “stuck” in segregation and poverty, with recognized adverse consequences. Living in segregation and poverty is associated with disparities in college graduation rates, professional employment, and earnings;¹ poorer health outcomes;² exposure to elevated levels of crime and violence; pervasive joblessness;³ and chronic physical and psychological health conditions.⁴ Although, for example, poor African-Americans actually move quite frequently, those moves occur within limited geographic areas, so that each move simply replicates the status quo of place disadvantage.⁵ No matter how attractive the possibility of a high-paying job—or any job at all—in another geographic area may be, people who cannot move to better employment opportunities in their own community cannot be expected to move across the country for a potential job without removal of significant institutional and attitudinal barriers.

Schleicher’s discussion of the barriers associated with relocating for work ignores the effect of discrimination on those trying to exit and enter communities based on available employment. While he accurately recognizes that “[h]ousing costs eat up a larger percentage of a poor person’s paycheck than that of a wealthy person,” meaning that “low-income persons simply may not be able to afford the cost of living in rich, land-use-restricted areas,”⁶ he fails to recognize the existence of other important barriers, such as racism and NIMBYism (“not in my backyard”), directed toward entering residents, lack of affordable housing availability outside of poor and segregated areas, and the absence of financial resources and knowledge that could support such moves. These barriers exist at both the exit and entry points of communities.

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1. Ingrid Gould Ellen et al., *The Significance of Segregation in the 21st Century*, 15 CITY & COMMUNITY 8, 8-13 (2016), <http://onlinelibrary.wiley.com/doi/10.1111/cico.12146/pdf> [<http://perma.cc/6BH9-BD6D>].
 2. Dolores Acevedo-Garcia et al., *Toward a Policy-Relevant Analysis of Geographic and Racial/Ethnic Disparities in Child Health*, 27 HEALTH AFFAIRS 321, 321-323 (2008), <http://content.healthaffairs.org/content/27/2/321.full.pdf+html> [<http://perma.cc/PT2T-5X94>].
 3. Robert Wagmiller, *Race, Residential Segregation, Suburbanization, and the Spatial Segregation of Jobless Men*: Paper Presented at the Annual Meeting of the American Sociological Association (Aug. 12, 2005) http://citation.allacademic.com/meta/p_mla_apa_research_citation/o/2/o/5/5/pages20552/p20552-1.php [<http://perma.cc/NL2E-ND9V>].
 4. Douglas S. Massey & Jonathan Tannen, *Segregation, Race, and the Social Worlds of Rich and Poor*, in *THE DYNAMICS OF OPPORTUNITY IN AMERICA: EVIDENCE AND PERSPECTIVES* 13, 13-33 (Irwin Kirsch & Henry Braun eds., 2016), <http://link.springer.com/content/pdf/10.1007%2F978-3-319-25991-8.pdf> [<http://perma.cc/UE3F-M6FN>].
 5. *Id.* at 31.
 6. David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 115-16 (2017).

Moving beyond Schleicher's commentary on microeconomic tools and macroeconomic policy, this Response examines the ways in which governments have created and sustained communities that limited (and continue to limit) the mobility of low-income families and families of color. These actions originated in racial discrimination and have resulted in exclusionary conduct in communities that extends well beyond the preservation of stability. Opposition to affordable housing for job seekers is often fueled by communities' discriminatory attitudes about allowing the entry of people of color. This opposition frequently results in the rejection of new affordable housing projects, even when it would be in the community's best interest to welcome new job seekers.⁷

Contemporary research suggests that there are significant benefits to increased mobility, such as access to better education choices and job outcomes, improved health, and enhanced upward mobility.⁸ Increasing mobility, however, also requires political and moral will, and the application of multiple civil rights tools, including the dispersal of information about affordable housing availability at the national level, robust housing counseling, and financial support for individual moves. Furthermore, civil rights planning and enforcement in communities that receive movers will be necessary to provide a route forward out of discrimination, segregation, and lack of opportunity.

This Response proceeds in five Parts. Part I of this Response discusses the historic patterns of government-supported segregation, the benefits of spatial mobility for residents of segregated areas, and government failures in addressing segregation. Part II focuses on local barriers to mobility. Part III examines the availability of government programs, especially the Housing Choice Voucher program, as important vehicles for mobility and points out the limitations of

7. SARA PRATT & MICHAEL ALLEN, HOUS. ALL. OF PA., ADDRESSING COMMUNITY OPPOSITION TO AFFORDABLE HOUSING DEVELOPMENT: A FAIR HOUSING TOOLKIT (2004), <http://www.fhncsp.com/Links/toolkit.pdf> [<http://perma.cc/HD4C-RYQ3>].

8. See Jennifer Darrah & Stefanie DeLuca, "Living Here Has Changed My Whole Perspective": How Escaping Inner-City Poverty Shapes Neighborhood and Housing Choice, 33 J. POL'Y ANALYSIS & MGMT. 350, 358 (2014); Gina Kline, *Thompson v. HUD: Groundbreaking Housing Desegregation Litigation, and the Significant Task Ahead of Achieving an Effective Desegregation Remedy Without Engendering New Social Harms*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 172 (2007); Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, HARVARD UNIV. (2016), http://scholar.harvard.edu/files/hendren/files/mto_paper.pdf [<http://perma.cc/9SUT-VTMN>]; Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-Level Estimates*, HARVARD UNIV. (2015), http://scholar.harvard.edu/files/hendren/files/nbhds_paper.pdf [<http://perma.cc/976S-F2LR>]; Lora Engdahl, *New Homes, New Neighborhoods, New Schools: A Progress Report on the Baltimore Housing Mobility Program*, POVERTY & RACE RES. ACTION COUNCIL (2009), <http://www.prrac.org/pdf/BaltimoreMobilityReport.pdf> [<http://perma.cc/3H3J-LRGJ>].

these programs for increasing job-triggered mobility. Part IV discusses a federal government planning process tied to the Fair Housing Act and other related actions as possible vehicles to support mobility. Part V concludes with a series of recommendations for supporting increased mobility.

I. THE PERSISTENCE OF SEGREGATION AND ITS EFFECTS ON MOBILITY

A. *Historic Patterns of Government-Supported Segregation*

It is now well-established that historical barriers created by federal, state, and local government laws and regulations directly created and sustained segregated and poor areas across the country.⁹ For decades, establishing and maintaining residential segregation lay at the heart of government housing policy, from federally mandated public housing segregation and residential segregation,¹⁰ to government-instituted land use and zoning policies,¹¹ to the creation of “sundown towns,” where black individuals were not welcome to stay at night despite being able to enter during the daytime,¹² to the Federal Home Loan redlining of black neighborhoods for federally supported loans.¹³ The federal

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9. See RICHARD ROTHSTEIN, *COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).
 10. Richard Rothstein, *What Have We—De Facto Racial Isolation or De Jure Segregation?*, 40 HUM. RTS. MAG. (2014), http://www.americanbar.org/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_3_poverty/racial_isolation_or_segregation.html [<http://perma.cc/W3DK-MG79>]. (“Civilian public housing began during the New Deal. Harold Ickes, director of the Public Works Administration, established a ‘neighborhood composition rule’ that public housing should preserve the racial composition of neighborhoods where it was placed. Because many urban neighborhoods then housed both black and white (mostly immigrant) low-income families, the rule resulted in placing all-black projects in neighborhoods that were only predominantly black, further concentrating the black population.”).
 11. Christopher Silver, *The Racial Origins of Zoning in American Cities*, in *URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS* (June Manning Thomas & Marsha Ritzdorf eds., 1997), <http://www.asu.edu/courses/aph294/total-readings/silver%20-%20racialoriginsofzoning.pdf> [<http://perma.cc/CQ8C-3P26>].
 12. See JAMES LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* (2006).
 13. The Home Owners’ Loan Corporation (HOLC) was created in June 1933 by federal congressional action. In 1935, the Federal Home Loan Bank Board asked HOLC to review almost 250 cities and create “residential security maps” to indicate the level of security for real-estate investments. The lowest level of security was for areas that were racially identifiable. See, e.g., ROBERT K. NELSON ET AL., *MAPPING INEQUALITY*, (Robert K. Nelson & Edward L. Ayers eds., 2017), <http://dsl.richmond.edu/panorama/redlining> [<http://perma.cc/TX6C-F468>].

government led and directed, in many ways, the institution and perpetuation of racial segregation and isolation in the United States.¹⁴

The effects of these discriminatory practices, although later partially mitigated by judicial intervention, remain in communities large and small across the country. Several lawsuits have successfully challenged segregation and the behavior that causes segregation. Courts have struck down racially restrictive covenants,¹⁵ addressed internal segregation in public housing,¹⁶ challenged community segregation by race and the Department of Housing and Urban Development (HUD)'s failure to act to counter it,¹⁷ confronted housing siting decisions that increase segregation,¹⁸ ended zoning practices that perpetuate segregation,¹⁹ and, more recently, held that the Fair Housing Act includes an obligation to avoid policies and practices that have a disparate impact based on race or that perpetuate segregation.²⁰ However, continuing patterns of segregation reveal the effects of past discrimination. Indeed, in some instances, overtly segregative practices still exist.²¹ These past government actions, as well as those of present public and private actors, have created long-lasting and harmful patterns of segregation and poverty, which themselves constitute barriers to mobility.

The effects of these barriers on individuals, families, and communities have been extensively documented. Patrick Sharkey, who has studied issues relating to economic mobility in segregated neighborhoods and the so-called "racial

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14. See, e.g., 114 CONG. REC. 2280 (1968) (quoting *Hearing on the Fair Housing Act of 1967 Before the Subcomm. on Hous. and Urb. Aff. of the Comm. on Banking and Currency*, 90th Cong. 1 (1967)) ("We make two general assertions: (1) that American cities and suburbs suffer from galloping segregation, a malady so widespread and so deeply imbedded in the national psyche that many Americans, Negroes as well as whites, have come to regard it as a natural condition; and (2) that the prime carrier of galloping segregation has been the Federal Government. First it built the ghettos; then it locked the gates; now it appears to be fumbling for the key. Nearly everything the Government touches turns to segregation, and the Government touches nearly everything.").
 15. *Shelley v. Kraemer*, 334 U.S. 1 (1948).
 16. *Jaimes v. Toledo Metro. Hous. Auth.*, 758 F.2d 1086 (6th Cir. 1985).
 17. *NAACP v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149 (1st Cir. 1987), *superseded by statute*, Fair Housing Amendments Act of 1988, 42 U.S.C. § 3613 (2012); *Walker v. U.S. Dep't of HUD*, 734 F. Supp. 1231, 1272 (N.D. Tex. 1989), *rev'd in part*, *Walker v. U.S. Dep't of Hous. & Urban Dev.*, 912 F.2d 819 (5th Cir. 1990).
 18. *Shannon v. U.S. Dep't of Hous. & Urban Dev.*, 436 F.2d 809, 821 (3d Cir. 1970).
 19. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988).
 20. *Tex. Dept. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).
 21. See, e.g., Stephanie Wang, *Federal Authorities Investigate Fair Housing Complaints Against Noblesville, Hamilton County*, INDIANAPOLIS STAR (July 6, 2017, 8:10 PM), <http://www.indystar.com/story/news/local/hamilton-county/2017/07/06/hud-investigates-noblesville-hamilton-county-fair-housing-complaints/440015001> [http://perma.cc/MZ8T-SHQ2].

mobility gap,” charts downward economic mobility among black children, concluding that there is a lingering influence of neighborhood inequality. He shows that even when a child is raised by parents with similar jobs, levels of income, and aspirations for their child, segregation means that the “black child will be raised in a residential environment with higher poverty, fewer resources, poorer schools, and more violence than that of a white child,” contributing to generational downward mobility in income and fewer opportunities for spatial mobility.²²

Schleicher’s commentary on spatial mobility and the Moving to Opportunity Program overlooks more recent, and promising, research on improved mobility outcomes. Recent research on the effects of the Gautreaux mobility program²³ has found that the program demonstrably provided benefits from increased spatial mobility for young children. Raj Chetty and his colleagues have found in a longitudinal study that moving to a lower-poverty neighborhood significantly improves college attendance rates and earnings for children who were young (below age thirteen) when their families moved. These children also live in better neighborhoods themselves as adults and are less likely to become single parents.²⁴

Chetty and Nathaniel Hendren’s major study of the impact of neighborhoods on mobility more broadly recognizes that children whose parents move across county lines to a better neighborhood with higher incomes ultimately earn more throughout their own working lives.²⁵ According to Chetty and Hendren, counties that produce better outcomes for children in low-income families tend to have “five characteristics: lower rates of residential segregation by income and race, lower levels of income inequality, better schools, lower rates of violent crime, and a larger share of two-parent households.”²⁶ This research supports the intuitive idea that greater spatial mobility for families can lead to upward economic mobility and better outcomes for individuals. In addition, mobility to higher opportunity areas with less segregation and poverty,

22. PATRICK STARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* 116 (2013).

23. Dorothy Gautreaux initiated a lawsuit against the Chicago Housing Authority (“CHA”) in 1966 challenging its site selection and tenant assignment practices as racially segregative and discriminatory. As part of the settlement of the lawsuit, CHA was required to use its Section 8 vouchers to site public housing residents in more diverse areas in Chicago and in largely white and affluent suburbs outside of Chicago. The Gautreaux program to implement the settlement was a large, judicially -mandated mobility program. For a more detailed examination of this program and the subsequent Moving to Opportunity pilot mobility program, see *id.* at 141-152.

24. Chetty et al., *supra* note 8, at 3.

25. Chetty & Hendren, *supra* note 8.

26. *Id.* at 3.

greater income equality, better schools, and lower crime rates can yield better quality of life for movers.

Jennifer Darrah and Stefanie DeLuca's study of movers under a court-approved mobility program in Baltimore²⁷ is particularly encouraging because it shows that with more specialized and supportive counseling, participants in the voucher program who move from deeply segregated and poor areas to less segregated areas are successfully using vouchers to move to, and stay in, "radically different contexts" from where they began.²⁸ Movers to suburbs, however, continue to prefer, and go to great lengths to sustain, their old social networks in their former neighborhoods.²⁹ Research shows that even with greater attention to the preferences of movers, a more robust support system, and resources that increase the amount of rent support available for movers, supply side barriers remain. These include administrative management of the program, the limited supply of high-quality affordable rental units, and landlord discrimination against voucher holders.³⁰

In short, creating opportunities for mobility out of poor and segregated neighborhoods and providing resources to support both the moves and the movers can improve the success of mobility programs and, over time, increase economic mobility. Structural and administrative barriers and race-based opposition must also be removed to facilitate successful moves. Schleicher's analysis overlooks many of the benefits increased mobility can offer current residents of segregated and poor neighborhoods as well as some of the unique challenges to accomplishing and sustaining that mobility.

B. Federal Policy and Enforcement Have Not Significantly Remedied Systemic Segregation

Title VI of the 1964 Civil Rights Act³¹ and the Fair Housing Act of 1968³² prohibit discrimination on the basis of race and other enumerated characteris-

27. *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. 2005); *see also* Kline, *supra* note 8 (providing background on *Thompson v. HUD* and efforts to craft a remedy).

28. Darrah & DeLuca, *supra* note 8, at 358; *see also* Stefanie DeLuca & James E. Rosenbaum, *If Low-Income Blacks Are Given a Chance to Live in White Neighborhoods, Will They Stay? Examining Mobility Patterns in a Quasi-Experimental Program With Administrative Data*, 14 HOUSING POL'Y DEBATE 305 (2003) (examining the long-term outcomes of the *Gatreaux* program); Engdahl, *supra* note 8 (evaluating the Baltimore Housing Mobility Program).

29. Kline, *supra* note 8, at 187.

30. Darrah & DeLuca, *supra* note 8, at 376.

31. 42 U.S.C. § 2000d to d-7 (2012).

32. 42 U.S.C. §§ 3601-3619, 3631 (2012).

tics, but application of those laws has not substantially alleviated many of the lingering effects of government policies, with a few notable exceptions in individual communities on specific issues.³³ It was only recently, for example, that the federal government implemented an organized planning approach for communities based on the Fair Housing Act's requirement that activities relating to housing and urban development affirmatively further fair housing.³⁴ The process is designed both to address current discrimination and undo historical patterns of segregation and other forms of discrimination.³⁵ A 2015 rule issued by HUD created a Fair Housing Assessment vehicle, along with data and planning tools that will help local communities identify and, over time, correct longstanding products of historical discrimination. Similarly, in 2015, HUD adopted a regulation that deems actions that perpetuate segregation to be violations of the Fair Housing Act.³⁶

HUD is the lead federal agency for enforcement of the Fair Housing Act, and it funds and supports community programs and many other alternatives for affordable housing. Though it previously has not, it could also devote resources to support mobility programs beyond those stemming from the settlement of litigation, as when 14,000 African-American plaintiffs represented by the American Civil Liberties Union and the NAACP Legal Defense and Educational Fund, Inc. (LDF) successfully sued HUD in Baltimore.³⁷

Despite holding the power to support mobility and address patterns of segregation in other ways, the agency has been limited in its effectiveness because of “structural conflicts and powerful internal constituencies [that have present-

33. See, e.g., *infra* text accompanying notes 42-59.

34. See *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42,272, 42,272 (July 16, 2015) (“This rule refines the prior approach by replacing the analysis of impediments with a fair housing assessment that should better inform program participants' planning processes with a view toward better aiding HUD program participants to fulfill [their] statutory obligation.”).

35. HUD's 2015 rule defines affirmatively furthering fair housing as “taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.” 24 C.F.R. § 5.152 (2017). Meaningful actions include “replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.” *Id.*

36. 24 C.F.R. § 100.500 (2017) (“Liability may be established under the Fair Housing Act based on a practice's discriminatory effect . . . even if the practice was not motivated by a discriminatory intent.”).

37. *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. 2005).

ed] significant challenges to the ability of HUD to play an effective role in fulfilling the promise of the Fair Housing Act.”³⁸

More affirmative approaches—including the addition of improved mobility strategies to support movement across jurisdictions and states—could begin to undo administrative barriers to both intrastate and interstate mobility and improve access to jobs, educational opportunities, transit, and other community resources. But federal government policy, although belatedly beginning to address these segregative practices through a planning vehicle, has not succeeded in either halting contemporary housing discrimination or eradicating the vestiges of past governmental discrimination.³⁹ The federal government has also been successfully sued for its own role in perpetuating racial segregation and discrimination.⁴⁰

Indeed, while a broad menu of barrier-busting techniques is readily available to address the twin problems of discrimination and segregation, the federal government lacks political will to adopt these policies due to strong community opposition. This opposition to new affordable housing from neighborhood residents as well as elected and appointed officials is often race-based.⁴¹

Any effort to remove barriers to interstate mobility for persons living in poverty—in particular those that affect poor people of color—must account for both the government’s own history of institutional discrimination and its failures to dismantle it. It must also consider the substantial advantages that increased mobility, when combined with other strategies to alleviate poverty and reduce neighborhood segregation, could have for families currently constrained by longstanding residence in neighborhoods that are poor, segregated, and lacking adequate infrastructure and resources.

38. *The Future of Fair Housing*, NAT’L COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY 18 (Dec. 2008), http://www.prrac.org/projects/fair_housing_commission/The_Future_of_Fair_Housing.pdf [<http://perma.cc/KLV8-2K47>].

39. Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015, 1:26 PM), <http://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law> [<http://perma.cc/Y58H-R879>].

40. See *supra* text accompanying notes 17-19.

41. See, e.g., PRATT & ALLEN, *supra* note 7, at 7; Corianne Payton Scally, *New York State’s Affordable Housing Developers: What They Do, How They Do It*, SHELTERFORCE (Jan. 30, 2014), http://shelterforce.org/2014/01/30/new_york_states_affordable_housing_developers_what_they_do_how_they_do_it [<http://perma.cc/G4XS-4YFE>].

II. LOCAL GOVERNMENT BARRIERS TO MOBILITY

Schleicher's analysis correctly identifies zoning and land use restrictions as significant barriers to mobility.⁴² In addition, he effectively demonstrates that early arrivers almost universally opt for "stability" by pulling up the figurative drawbridge behind them, even when doing so limits the community's potential for economic development. What Schleicher fails to identify, however, is how the preference for stability manifests itself in ways that disproportionately deprive families of color and low-income people of access to good schools, good jobs, and safe neighborhoods. That is, local ordinances limiting the development of affordable homeownership and rental housing are not exclusively neutral, microeconomic decisions about zoning and land use. Rather, they are more often motivated explicitly by resistance to racial and economic diversity in the community.⁴³

The ingenuity of private and public anti-diversity forces is remarkable. Across the country, they have supported the adoption and enforcement of a wide range of policies, including outright prohibitions of affordable multifamily housing, refusals to zone any land for multifamily housing, and impositions of minimum lot size and maximum density regulations, which make it impossible to develop affordable housing.⁴⁴ Other techniques include limits on the number of bedrooms in rental housing, bans and moratoria on construction of multifamily housing, zoning restrictions across a community limiting multifamily development to two family units, and the imposition of exorbitant fees relating to multifamily development.⁴⁵ Because most funding and other financial support for affordable housing is directed to rental housing, limits on siting and development of multifamily housing effectively exclude affordable

42. Schleicher, *supra* note 6, at 114-17.

43. Margery Austin Turner, *Why Haven't We Made More Progress in Reducing Segregation?*, NYU FURMAN CTR. (Apr. 2014), <http://furmancenter.org/research/iri/essay/why-havent-we-made-more-progress-in-reducing-segregation> [<http://perma.cc/BYR4-WKW9>]; see also Tim Iglesias, *Managing Local Opposition to Affordable Housing: A New Approach to NIMBY*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 78, 79 (2002) (indicating that "hardening of racial and economic attitudes and increasing opposition to growth and development of all kinds suggest[s] that local opposition is likely to remain and even get worse."); sources cited *supra* note 41.

44. See Iglesias, *supra* note 43.

45. For a general description of zoning and land use practices that may discriminate in violation of the Fair Housing Act, see *Joint Statement of the Department of Housing and Urban Development and the Department of Justice: State and Local Land Use Laws and Practices and the Application of the Fair Housing Act*, U.S. DEP'T HOUSING & URB. DEV. & U.S. DEP'T JUST. (Nov. 10, 2016), <http://www.justice.gov/crt/page/file/909956/download> [<http://perma.cc/MQ5F-25XM>].

housing. Even when local zoning permits multifamily housing, it may limit the number of units or the type of design in ways that financially preclude investment in affordable housing in the community.

Whether or not exclusionary zoning was initially adopted with the intent to discriminate or merely intended as a community stability and organization strategy, the zoning process often becomes a forum for community opposition based on explicit racial and ethnic bias, for broader-based “not in my back yard” opposition, explicit and implicit expressions of stereotyping and discrimination, and a stage for increasing community division over race and income.⁴⁶ Local review processes can lead elected officials to support their constituents’ sometimes racist opposition in name of electoral politics. For example, in 2016, Houston community opposition to the first public housing site in the city to be located outside of racially segregated areas met community opposition in a public hearing: one citizen told city officials that the development would introduce an “unwelcome resident who, due to poverty and lack of education, will bring the threat of crime, drugs, and prostitution to the neighborhood.”⁴⁷ Elected officials sided with the opposition, and the mayor vetoed the proposal, which would have brought affordable housing to an upscale high opportunity neighborhood that was 3% black. Although objective evidence showed no factual support for this type of stereotypical thinking, the decision was made to bar the housing.⁴⁸

The power of deep-seated prejudices underlying local zoning and land use policies cannot be overstated. Even when the absence of affordable housing has a demonstrable negative effect on existing low-income white residents (including seniors, people with disabilities, and children), or when it makes it harder to retain teachers, firefighters, and retail workers, some communities continue to resist the introduction of affordable housing.

The situation in St. Bernard Parish, Louisiana, in the wake of Hurricane Katrina provides a classic example of this resistance. Despite the devastation of the parish’s housing stock, local elected officials employed a range of racially-

46. See PRATT & ALLEN, *supra* note 7; “Why Not In Our Community?”: *Removing Barriers to Affordable Housing*, U.S. DEP’T HOUSING & URB. DEV. (Feb. 2005), <http://www.huduser.gov/Publications/pdf/wnioc.pdf> [<http://perma.cc/9NY9-FDGC>].

47. John Eligon et al., *Program to Spur Low-Income Housing Is Keeping Cities Segregated*, N.Y. TIMES (July 2, 2017), <http://www.nytimes.com/2017/07/02/us/federal-housing-assistance-urban-racial-divides.html> [<http://perma.cc/G7T2-XVT5>].

48. HUD’s fair housing staff conducted an investigation of the Houston decision and issued a final determination that Houston’s actions violated Title VI of the 1964 Civil Rights Act, a federal civil rights law prohibiting racial discrimination. *HUD Finds Houston in Noncompliance with Title VI of Civil Rights Act*, NAT’L LOW INCOME HOUSING COALITION (Jan. 30, 2017), <http://nlihc.org/article/hud-finds-houston-noncompliance-title-vi-civil-rights-act> [<http://perma.cc/N66U-MDX5>].

motivated ordinances to block the development of new multifamily housing. Parish officials adopted and defended a “blood relative” ordinance that forbade rentals of single family homes to tenants unrelated to the owner, even though the clear impact was to exclude people who were not white.⁴⁹ When a federal court declared that ordinance intentionally discriminatory,⁵⁰ local officials amended their zoning rules to restrict rental opportunities and require an onerous and expensive hearing process for rental approvals,⁵¹ “down zoned”⁵² to limit available land for multifamily housing, and made numerous efforts to halt development of affordable rental housing, even when the housing would serve employees of a planned hospital. The same judge found that these actions were also motivated by racial animus.⁵³ Rather than “acquiescing in, and even pandering to the exaggerated fears and race and class based prejudice of some of its citizens,” Judge Helen G. Berrigan called on officials to “courageously challenge those assumptions.”⁵⁴ In an order holding the parish in contempt for ignoring previous orders of the court, she wrote:

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49. See *Greater New Orleans Fair Hous. Action Ctr. v. Saint Bernard Parish*, 641 F. Supp. 2d 563, 565 n.1 (E.D. La. 2009) (“[T]he ‘blood relative’ ordinance [is] shorthand for a housing ordinance passed by the St. Bernard Parish Council on September 19, 2006, that stated: ‘No person . . . shall rent, lease, loan, or otherwise allow occupancy or use of any single-family residence located in an R-1 zone by any person or group of persons, other than a family member(s) related by blood within the first, second or third direct ascending or descending generation(s), without first obtaining a Permissive Use Permit from the St. Bernard Parish Council.’”).
50. *Saint Bernard Parish*, 641 F. Supp. 2d at 578; see also *St. Bernard Parish*, GREATER NEW ORLEANS FAIR HOUSING ACTION CTR., <http://www.gnofairhousing.org/programs/enforcement/st-bernard-parish> [<http://perma.cc/3QBF-X8T6>].
51. ST. BERNARD PARISH, LA., ORDINANCE SBPC 697-12-06 (Dec. 19, 2006).
52. “Down zoning” is the process of rezoning land to reduce the density of housing, often to restrict or limit development. See Bethany Y. Li, *Now Is the Time!: Challenging Resegregation and Displacement in the Age of Hypergentrification*, 85 *FORDHAM L. REV.* 1189, 1204 (2016) (“Downzoning has become the urban equivalent of exclusionary zoning in suburbs. Exclusionary zoning in suburbs can restrict lot sizes or ban multifamily housing to prevent developers from building low-income housing and exclude low-income people from living in certain neighborhoods. Similarly, downzoning—and the often accompanying contextual zoning—in urban neighborhoods restricts development and aims to retain the existing neighborhood character. As with exclusionary zoning in suburbs, downzoning in affluent urban neighborhoods shuts out low income people.”).
53. *Greater New Orleans Fair Hous. Action Ctr. v. Saint Bernard Parish*, 648 F. Supp. 2d 805 (E.D. La. 2009) (finding evidence of intentional discrimination from racially based community opposition).
54. *Greater New Orleans Fair Hous. Action Ctr. v. Saint Bernard Parish*, No. 06-CV-7185, 2009 WL 2969502, at *4 (E.D. La. Sept. 11, 2009) (granting plaintiffs’ motion for contempt based in part on references to transcripts in the trial record of unchallenged comments made by members of the public at public planning commission hearings).

Surely, the leadership of St. Bernard Parish, so aggressive and positive in their recovery efforts for their parish, also recognize that the overwhelming majority of poorer African-Americans are not criminals who “sit in the yard or the balcony all day with the music up, screaming at their neighbors, dealing drugs” nor are they coming up the street, “gang-banging somebody or . . . kicking the door down every couple of days,” all comments made by members of the public at the public hearings and unchallenged by the presiding public officials Indeed, at the . . . Planning Commission meeting, one commissioner himself reportedly cited “shooting– drive-by shootings, juveniles sticking guns in teachers’ faces” as relevant factors in decid[ing] whether to grant a routine re-subdivision of the property needed to obtain a building permit.

Leadership is not finding an angry crowd and getting in front of it to goad it on. A leader takes people where they want to go, and a great leader takes people where they do not necessarily want to go but ought to be.⁵⁵

These strenuous efforts to exclude incoming residents were not tied to economic protectionism or to family or neighborhood stability, but rather to racial prejudice. In Westchester County, New York, similar zoning issues have been litigated in a long running series of cases, where funding to the county was first suspended, then terminated, over its failure to remediate local zoning barriers.⁵⁶ Recent decisions in two federal courts of appeals have also found Fair Housing Act violations in the application of exclusionary zoning actions combined with discriminatory community animus toward the proposed occupants of affordable housing.⁵⁷

These examples could be multiplied. In *Avenue 6E Investments, LLC v. City of Yuma*, over the advice of its own experts, the city refused to rezone land designed for large lot, single family homes, for which there was no market, to

55. *Id.*

56. *See, e.g., Westchester Cty. v. U.S. Dep’t. of Hous. and Urban Dev.*, 802 F.3d 413 (2d Cir. 2015).

57. *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493 (9th Cir. 2016), *remanded*, *Ave. 6E Invs., LLC v. City of Yuma*, 217 F. Supp. 3d 1040 (D. Ariz. 2017); *MHANY Mgmt., Inc. v. Cty. Of Nassau*, 819 F.3d 581 (2d Cir. 2016); *see also Comm. Concerning Cmty. Improvement v. Modesto*, 583 F.3d 690, 703 (9th Cir. 2009) (finding that a “statistically significant” difference existed between “the proportions of Latinos . . . excluded and included” from certain housing areas); *Pacific Shores Props v. Newport Beach*, 730 F.3d 1142 (9th Cir. 2013) (finding that the plaintiffs created a triable issue of fact that the ordinance was enacted in order to discriminate against them on the basis of disability).

more affordable single-family housing with prices ranging from \$120,000 to \$175,000.⁵⁸ This housing would primarily have housed Hispanic homeowners. Community opposition included repeated assertions that this housing would bring crime and criminals to the area, complaints about “ownership demographics” in the proposed development, and claims that unsupervised juveniles would roam the streets of the neighborhood.⁵⁹ The Ninth Circuit found that, taken as true, the allegations set forth in the complaint presented a plausible claim for intentional and disparate impact discrimination based on national origin, relying in part on statements from community opposition as signals of discriminatory intent.⁶⁰

In Nassau County, New York, community opposition emerged to a proposal to rezone a plot, as recommended by the County’s expert, for multifamily development. Although the development was repeatedly described as likely to be “upscale” housing not funded by HUD, community opposition focused on concerns about siting affordable housing, lowered property values, and overcrowded schools, which the district court read to reflect racial animus.⁶¹ The rezoning proposal was changed to require development that was more likely to be single family housing that would not be affordable. In the subsequent legal challenge, the Second Circuit upheld the district court’s finding of race based animus. The court relied in part on vocal community opposition expressing concerns about changes to “the flavor” and “the character” of the community that would be brought about by the introduction of affordable housing.⁶²

Race-based community animus also emerges outside the context of zoning and land use decisions. For example, in Dubuque, Iowa, the fear of incoming residents from Chicago (likely to be African-American) who were using rental subsidy vouchers for mobility became a national conservative cause célèbre.⁶³ Local officials initially sought to resist newcomers by establishing local preferences for residents of Dubuque and of Iowa, removing a preference for very low-income voucher holders, and simply refusing to deploy vouchers after the local preference holders had been served. HUD investigated and found that

58. *Ave. 6E Invs. LLC v. City of Yuma*, No. 2:09-cv-00297, 2013 WL 2455928, at *3 (D. Ariz. June 5, 2013) (granting the city’s motion for summary judgment).

59. *Ave. 6E Invs.*, 818 F.3d at 499.

60. *Id.* at 496-97.

61. *MHANY Mgmt., Inc. v. Inc. Vill. of Garden City*, 985 F. Supp. 2d 390, 416-18 (E.D.N.Y. 2013); *see also MHANY Mgmt.*, 819 F.3d at 609 (discussing the findings of the district court).

62. *MHANY Mgmt.*, 819 F.3d at 592-94; *MHANY Mgmt.*, 985 F. Supp. 2d at 403.

63. *See, e.g., Stanley Kurtz, How Obama Stole Dubuque*, NAT’L REV. (Jan. 13, 2016, 9:53 AM), <http://www.nationalreview.com/corner/429693/affh-preview-obamas-hud-takes-over-dubuque-iowa> [<http://perma.cc/DC48-7UEB>].

these practices intentionally discriminated on the basis of race and had a disparate impact based on race. The agency later threatened to cut off funding for the city's housing programs unless the issue was remediated.⁶⁴ A subsequent agreement resolved the matter and restored access to voucher use without residency preferences. This allowed residents from out of state to move to a more secure and higher opportunity housing choice in another state.⁶⁵ These examples suggest that modest incentives to encourage mobility for affordable housing residents or voucher holders will be doomed to fail because of discrimination. More aggressive prescriptive measures are necessary.

III. MOBILITY SUPPORTED BY THE HOUSING CHOICE VOUCHER PROGRAM

What might these measures involve? Housing Choice Vouchers ("HCVs") are often credited with increasing access to housing in the private market and providing more mobility to low-income voucher holders. On occasion, HCVs have been used as a desegregative, mobility-enhancing remedy in settlements against HUD and housing providers,⁶⁶ and they are often used as a vehicle to provide housing to residents displaced by demolition or natural disaster, or when expiration of HUD Housing Assistance Program contracts has resulted in the displacement of residents. Most HCVs are assigned to individuals who may use their purchasing power to secure housing from any willing landlord, including those in higher opportunity areas. HCV eligibility is based on household income, and is targeted to low and very low-income households.

Schleicher correctly criticizes the HCV program for not providing adequate resources to support moves.⁶⁷ Recent HUD actions have provided some improvements but do not enact the types of changes that would make a real difference in mobilizing voucher holders. Schleicher also attributes the limited use of vouchers to support mobility to their lack of portability.⁶⁸ "Portability"

64. Letter of Findings of Noncompliance from Betty J. Bottiger, Dir., Office of Fair Hous. & Equal Opportunity, U.S. Dep't Hous. & Urban Dev. to Roy D. Buol, Mayor, Dubuque, Iowa (June 17, 2013), <http://nlihc.org/sites/default/files/Dubuque-LOF.pdf> [<http://perma.cc/A8G9-6DL5>].

65. Office of Fair Hous. & Equal Opportunity, *Voluntary Compliance Agreement Between the U.S. Department of Housing and Urban Development and Dubuque, Iowa*, U.S. DEP'T HOUSING & URB. DEV. (2014), <http://www.cityofdubuque.org/DocumentCenter/View/22707> [<http://perma.cc/NAZ6-K5HR>].

66. *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Thompson v. HUD*, 348 F. Supp. 2d 398, 406, 467 (D. Md. 2005).

67. Schleicher, *supra* note 6, at 127 n.220.

68. *Id.*

in the voucher program refers to the process through which families can transfer or “port” their rental subsidy when they move to a location outside the jurisdiction of the public housing agency (PHA) that first gave them the voucher when they were selected for the program.⁶⁹ However, in 2016, HUD published a final rule that increases the ability of voucher holders to use vouchers in other jurisdictions and other states, as long as a voucher holder has the financial resources to move as well as access to one of the vouchers.⁷⁰ Although a positive change, this expanded voucher applicability is not likely to result in increased moves by voucher holders without supporting resources and information.⁷¹

On the whole, the HCV program has never fulfilled its promise of expanding housing choice for low-income families. Waiting lists in most locations are years long, and local preferences set priorities – for example, for homeless individuals – that effectively exclude many voucher holders who are under-housed or cost-burdened. In addition, many landlords who could participate in the program do not, often for discriminatory or ostensibly economic reasons.⁷² Because discrimination against voucher holders may occur either directly or indirectly because of the race or national origin of the voucher holder, serious consideration should be given to amending the Fair Housing Act to prohibit discrimination based on income source across the country.⁷³ Market rate multi-family housing providers have fought this effort at the local and national level,⁷⁴ although evidence shows significant levels of discrimination against

69. 24 C.F.R. § 982.4(b) defines portability as “[r]enting a dwelling unit with Section 8 tenant-based assistance outside the jurisdiction of the initial PHA.”

70. 24 C.F.R. §§ 982.353-355; *Housing Choice Voucher (HCV) Family Moves with Continued Assistance, Family Briefing, and Voucher Term’s Suspension*, U.S. DEP’T HOUSING & URB. DEV. (June 6, 2016), <http://portal.hud.gov/hudportal/documents/huddoc?id=pih2016-09.pdf> [<http://perma.cc/49P5-LXG8>].

71. See *supra* text accompanying notes 23-30.

72. However, because some voucher programs have a population that is disproportionately black, refusal to accept voucher holders may be challenged under the Fair Housing Act as having a disproportionate impact based on race. See, e.g., *Graoch Assocs. #33 v. Louisville-Jefferson Cty. Metro Human Relations Comm’n*, 508 F.3d 366, 374-77 (6th Cir. 2007); see also, *Expanding Choice: Practical Strategies for Building a Successful Housing Mobility Program, Appendix B, State, Local, and Federal Laws Barring Source-of-Income Discrimination*, POVERTY & RACE RES. ACTION COUNCIL (May 2017), <http://www.prrac.org/pdf/AppendixB.pdf> [<http://perma.cc/Y3UH-WM3B>] (identifying states and fifty-nine local jurisdictions where discrimination based on source of income, generally defined as including use of a voucher, is prohibited).

73. *The Future of Fair Housing*, *supra* note 38, at 62-63.

74. *Fair Housing: Source of Income Discrimination Fact Sheet*, NAT’L MULTIFAMILY HOUSING COUNCIL, <http://www.nmhc.org/Advocacy/Fair-Housing--Source-of-Income-Discrimination-Fact-Sheet> [<http://perma.cc/RV5V-MEYZ>]. Efforts to add a source of income prohibition to the Austin, Texas fair housing law were actively opposed by the local

voucher holders, including unequal treatment between black and white testers posing as voucher holders.⁷⁵

As rental costs escalate, a voucher often does not cover enough of the high rents in many localities to provide meaningful assistance. Even with recent increases in payment standards, or Fair Market Rent calculations, individuals with vouchers are often priced out of markets other than those located in segregated and poor neighborhoods.⁷⁶ The way in which HUD calculates FMRs has been challenged as perpetuating racial discrimination and for failing to affirmatively further fair housing in Dallas.⁷⁷ In addition, families already housed with vouchers often are unable to choose where they live and when they will move, because they are forced out by unforeseen circumstances, such as job loss, illness, or family issues.⁷⁸ They lack readily available resources to help them identify housing that will accept vouchers even in local communities, and there are almost never any resources for counseling or funds to support interstate moves, or any moves by voucher holders more generally.⁷⁹

apartment association, which filed a lawsuit to block its implementation. Press Release, Austin Apartment Ass'n, Austin Apartment Association Lawsuit Says Austin's Source of Income Ordinance Violates State and Federal Law (Dec. 12, 2014), <http://www.prnewswire.com/news-releases/austin-apartment-association-lawsuit-says-austins-source-of-income-ordinance-violates-state-and-federal-law-300009238.html> [<http://perma.cc/K8GA-DYKK>]. Ultimately, the Texas state legislature passed a bill, SB 267, blocking the provision. 2015 Tex. Sess. Law Serv. Ch. 1140 (West) (codified as amended at TEX. LOC. GOV'T CODE ANN. § 250.007 (West 2016)).

75. *Will You Take My Voucher?: An Update on Housing Choice Voucher Discrimination in the District of Columbia*, EQUAL RTS. CTR. (2013), http://equalrightscenter.org/wp-content/uploads/will_you_take_my_voucher.pdf [<http://perma.cc/C3E4-KQD6>].
76. See, e.g., Kirk McClure et al., *Vouchers and Neighborhood Distress: The Unrealized Potential for Families With Housing Choice Vouchers to Reside in Neighborhoods with Low Levels of Distress*, 18 CITYSCAPE 207 (2016); Molly Metzger & Danilo Pelletiere, *Patterns of Housing Voucher Use Revisited: Segregation and Section 8 Using Updated Data and More Precise Comparison Groups* (Ctr. for Soc. Dev., George Warren Brown Sch. of Soc. Work, Working Paper No. 15-22, 2015), <http://csd.wustl.edu/Publications/Documents/WP15-22.pdf> [<http://perma.cc/G7ZA-CYYB>].
77. Complaint, Inclusive Cmty. Project, Inc. v. Dep't of Hous. & Urban Dev., No. 3:14-0945-L (N.D. Tex. 2015).
78. Stephanie DeLuca, *Why Don't More Voucher Holders Escape Poor Neighborhoods?*, FURMAN CTR. 1-2 (Oct. 2014), <http://furmancenter.org/research/iri/essay/why-dont-more-voucher-holders-escape-poor-neighborhoods> [<http://perma.cc/ML24-4CQS>] (finding that most families do not choose to move at all, with moves catalyzed by forces that require immediate and often involuntary relocation).
79. Douglas Rice & Barbara Sard, *Realizing the Housing Voucher Program's Potential to Enable Families to Move to Better Neighborhoods*, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 12, 2016), <http://www.cbpp.org/sites/default/files/atoms/files/11-9-15housing.pdf> [<http://perma.cc/TAX8-ZFZD>].

However, recent research shows that families will move, and stay in their new locations, when a combination of available housing subsidies and intense housing counseling, along with security deposit assistance, supports their moves.⁸⁰ Further support could include assistance with the costs of housing searches and moving. Thus, Schleicher's suggestion that the federal government incentivize moves to areas where jobs exist has some appeal,⁸¹ especially where low unemployment and lower housing costs could make the area more attractive to movers.

A few communities have open waiting lists for Section 8 vouchers, but the overwhelming majority of them have closed, multiyear waiting lists.⁸² Lists of available housing with landlords that accept vouchers are usually available in local program offices and sometimes at the state level,⁸³ but websites that allow voucher holders to search for available housing by city and state provide limited information.⁸⁴ Further, the lists do not connect open housing for voucher holders to job opportunities or incentivize moves in any way. No national resources are known to exist that tie affordable housing availability to job opportunities, although such a resource could help encourage intrastate and interstate mobility.

IV. AFFORDABLE HOUSING AND THE OBLIGATION TO AFFIRMATIVELY FURTHER FAIR HOUSING

Another potential solution is affordable rental housing. Schleicher focuses on homeownership opportunities and the barriers that they pose to mobility,⁸⁵ but for many movers, affordable rental housing is the more important need.

80. Darrah & DeLuca, *supra* note 8. See also DeLuca, *supra* note 78, at 2 (“Families are faced with an implicit trade-off: searching in higher opportunity neighborhoods where they must navigate unfamiliar places with unknown landlords while their time is running out, risking potential homelessness through the loss of their precious subsidy, versus searching in lower opportunity neighborhoods where they are more likely to find an available unit in time.”).

81. See Schleicher, *supra* note 6, at 152-53.

82. See *Section 8 Waiting Lists Open Now*, AFFORDABLE HOUSING ONLINE, <http://affordablehousingonline.com/open-section-8-waiting-lists> [<http://perma.cc/9EL7-KMNY>] (showing three open waiting lists for Housing Choice Vouchers in the entire country when accessed on July 21, 2017).

83. See, e.g., *Housing Choice Voucher Waiting List Web Site*, UNITED WAY OF CONN., <http://www.cthcvp.org/account/new> [<http://perma.cc/US9R-KSSZ>].

84. *About GoSection8*, GOSECTION8, <http://www.gosection8.com> [<http://perma.cc/EN8M-74R6>].

85. Schleicher, *supra* note 6, at 127-30.

The general lack of availability of affordable rental housing and the absence of local strategies to support and sustain affordable housing in higher opportunity areas are significant barriers to spatial mobility. The HCV program does not meet the housing needs of very low-income populations.⁸⁶ The more than 11.2 million severely cost-burdened renter households spend more than half of their income on housing.⁸⁷ The median “housing wage”—that is, the wage necessary to afford rent without spending more than 30% of income on rent—is \$26.56 per hour for a newly constructed modest rental unit.⁸⁸ For all rental housing, the “housing wage” is \$21.21 per hour for a two bedroom unit.⁸⁹ The gap between rental rates and actual incomes nationally suggests that a strategy of expanding affordable housing in higher wage areas might have some success, especially if those areas have relatively low costs of living.

Schleicher contends that some cities are burdened with excessive housing stock, and ultimately suggests that local government barriers and political controversy that pose challenges to destruction of the stock could be overcome.⁹⁰ Every state and the District of Columbia have a shortage of affordable and available rental homes for low-income households: the shortage ranges from 8,731 units in Wyoming to 1,110,803 units in California.⁹¹ In an era in which affordable housing options are in short supply in virtually every city of any size, Schleicher’s notion⁹² that excess housing could be destroyed or repurposed seems short-sighted when that housing could be used by communities to house incoming job seekers. Single family housing and other available stock could be refurbished and used for rental or homeownership, following existing models, such as the work done by Neighborworks, Habitat for Humanity, and other similar groups.⁹³ That work would restore neighborhoods, support the tax

86. *Out of Reach 2017: The High Cost of Housing*, NAT’L LOW INCOME HOUSING COALITION 1, 5-6 (2017), http://nlihc.org/sites/default/files/oor/OOR_2017.pdf [<http://perma.cc/7XWR-94PT>].

87. *Id.* at 1.

88. *Id.* at 2.

89. *Id.* at 1.

90. Schleicher, *supra* note 6, at 135-39.

91. *The Gap: A Shortage of Affordable Homes*, NAT’L LOW INCOME HOUSING COALITION (Mar. 2017), http://nlihc.org/sites/default/files/Gap-Report_2017_interactive.pdf [<http://perma.cc/9SAU-YUM8>].

92. Schleicher, *supra* note 6, at 135-39.

93. See, e.g., Stockton Williams, *Preserving Multifamily Workforce and Affordable Housing; New Approaches for Investing in a Vital National Asset*, URB. LAND INST. (2015), <http://uli.org/wp-content/uploads/ULI-Documents/Preserving-Multifamily-Workforce-and-Affordable-Housing1.pdf> [<http://perma.cc/82VJ-KCVH>]

base, and provide badly needed affordable housing, including housing for new job seekers.

However, increasing the availability of affordable housing, whether through rental or homeownership opportunities, will not address civil rights concerns around segregation and concentrations of poverty. This extends beyond the phenomenon of being priced out of the housing market. Instead, we are confronted by the further issue of making affordable housing available in areas of higher opportunity outside of areas that are concentrated by race or national origin and poverty.

The Fair Housing Act is designed to fulfill “the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups.”⁹⁴ The Act also requires the Secretary of the Department of Housing and Urban Development to consider “the impact of proposed public housing programs on the racial concentration” in the area in which the public housing will be built.⁹⁵ To the extent then, that a state or city receives HUD funds, the jurisdiction is required to consider race and areas of racial concentration in making decisions about the siting of housing.

In 2015, HUD adopted a regulatory process to ensure that federal housing funds are used to affirmatively further fair housing. That process requires states and most local governments to describe and evaluate the extent to which their laws and policies are sufficient to overcome any legacy of segregation, unequal treatment, and historic lack of access to opportunity in housing.⁹⁶

Through that process, they are required to take “significant actions that are designed and can be reasonably expected to achieve a material positive change that affirmatively furthers fair housing by, for example, increasing fair housing choice or decreasing disparities in access to opportunity.”⁹⁷

This process requires local jurisdictions, regional consortia, and states to conduct a fact-based assessment of segregation and poverty patterns, the state of fair housing choices for affordable housing generally, and for HCV programs in particular. In addition, local entities will develop plans that increase mobility to areas with better job access, improved education, less poverty, and better transportation options. Examining the data provided by HUD augmented by local knowledge will encourage assessment and remediation of patterns of segregation with respect to affordable housing, voucher use, and expanded mobili-

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

95. *Id.* at 1133-34.

96. 24 C.F.R. §§ 5.150-.164 (2017).

97. 24 C.F.R. § 5.152 (2017).

ty programs with effective supports.⁹⁸ The new assessment tool also recognizes the role that exclusionary zoning, community opposition, lack of job access, public education, and transportation options play in diminishing mobility. These analyses, if conducted with care, have the potential to foster local discussion and actions that will support increased mobility, at least at the local, regional, and state levels.⁹⁹ The strength of the collaborative planning work required by the new regulation will depend on HUD's reaction to poor quality assessments.

Any discussion of mobility in the civil rights context must consider the concomitant obligation of communities to invest in neighborhoods and segregated and poor areas, which HUD and others refer to as a "balanced approach"¹⁰⁰: "HUD's rule recognizes the role of place-based strategies, including economic development to improve conditions in high poverty neighborhoods, as well as preservation of the existing affordable housing stock, including HUD-assisted housing, to help respond to the overwhelming need for affordable housing."¹⁰¹

Rebuilding neighborhoods that have suffered through years of neglect remains a key feature of an overall strategy to address and remediate patterns of segregation and poverty. This process could include providing infrastructure improvements (for example, sidewalks, street lights, and public water supplies); increasing access to educational opportunity, transportation, and jobs; adding commercial and retail features (such as grocery stores or banks); and improving the quality of the housing stock while retaining affordability. Past efforts, including many projects funded by HUD, have often resulted in the displacement of residents, destruction of neighborhoods, loss of affordable housing, and gentrification, without producing diverse and open communities

98. See *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42,272, 42,308 (July 16, 2015) ("[T]his rule provides PHAs the option to cooperate with each other in the creation of an AFH, allowing PHAs to develop a coordinated approach to address fair housing issues. Such an approach could help to expand mobility through the creation of cooperation, agreements, memorandums of understanding (MOUs), consortia, or other tools to take regional approaches to HCV mobility policies.").

99. Michael G. Allen, *HUD's New AFFH Rule: The Importance of the Ground Game*, NYU FURMAN CTR. (Sept. 2015), <http://furmancenter.org/research/iri/essay/huds-new-affh-rule-the-importance-of-the-ground-game> [<http://perma.cc/GA7U-GDGB>] (finding that the new rule, although flawed, "sharpens a recipient's obligations to identify and overcome segregation-based impediments, but its overall tenor is one of collaboration, rather than enforcement. In fact, while the Final Rule leaves in place HUD's powers to withdraw funding in the face of non-compliance, HUD's media roll-out of the Final Rule repeatedly emphasized that 'enforcement is a last resort.'").

100. *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42,272, 42,278 (July 16, 2015).

101. *Id.* at 42,279.

with equal access and equal benefits.¹⁰² An overemphasis on mobility without investment strategies in existing neighborhoods that are segregated and poor could result in weakened communities and loss of family and neighborhood stability for residents in those areas, without any of the corresponding benefits of mobility.¹⁰³

V. MOBILITY STRATEGY RECOMMENDATIONS

A. Federal Strategies

The federal government, as an instigator and perpetuator of residential segregation, is responsible for taking concrete actions to dismantle it. Financial support for effective mobility programs should be a routine part of eligible, funded activities for public housing agencies, and Congress should provide adequate funding to support such programs. Additionally, voucher and mobility programs must include resources for robust mobility counseling, identification of opportunity areas outside of segregated poor neighborhoods, and funding for moving assistance, including security deposits, moving expenses, and additional incentives for moves to areas across jurisdictional lines, with available job opportunities and lower living costs. HUD has several additional tools to incentivize moves, including giving added weight to location outcomes in measuring public housing agency performance and rewarding those agencies that help families move to high-opportunity areas with the payment of additional administrative fees.¹⁰⁴ Model programs should be instituted along with funding for research to identify new models for successful outcomes for residents and movers.

To support mobility, Congress must also provide increased federal funding for fair housing enforcement and education. Local groups must be funded and prepared to oppose discriminatory resistance to new movers and the siting of affordable housing in opportunity areas. As part of supporting a national fair housing strategy, funding for the Fair Housing Initiatives Program (FHIP) should be increased, in particular to support new and existing groups in communities where mobility programs are being implemented. In addition, the Fair Housing Act should be amended to include discrimination based on source

102. Susan J. Popkin et al., *A Decade of Hope VI: Research Findings and Policy Challenges*, URB. INST. 45-46 (May 2004), http://www.urban.org/sites/default/files/publication/43756/411002_HOPEVI.pdf [<http://perma.cc/VPP6-K5RE>].

103. See, e.g., Roderick W. Jones & Derek J. Paulsen, *HOPE VI Resident Displacement: Using HOPE VI Program Goals to Evaluate Neighborhood Outcomes*, 13 CITYSCAPE 85, 99 (2011).

104. Rice & Sard, *supra* note 79, at 8, 12.

of income. It must also provide adequate resources for organized national education and enforcement, as well as adequate notice and assistance to landlords who would be required to increase participation in voucher programs.

Implementing improved HUD support and funding for the new HUD Affirmatively Furthering Fair Housing (AFFH) process to ensure that grantees affirmatively further fair housing must be a national priority. This entails providing HUD, landlords, and advocates with adequate resources both to participate fully at the local, regional, and state level and to develop strategies that will enhance mobility while simultaneously investing in local communities. HUD's Community Development Block Grant (CDBG) program and Public and Indian Housing office should fund the provision of technical assistance and support to improve mobility and address local segregation. Such efforts will be critical to the successful implementation of local strategies that can be models for other agencies.

B. State and Local Strategies

State, regional, and local planners and decision makers should participate in the AFFH planning process and be offered incentives to develop model plans that increase mobility based on lessons learned from other mobility programs, including the Baltimore Housing Mobility Program.

Incentives could include the prioritization of HUD's Choice Neighborhoods Implementation grants, which support redevelopment of distressed neighborhoods where job opportunities exist based on previous successes in the Choice Neighborhood program;¹⁰⁵ additional funding through the CDBG program for housing development or redevelopment in communities that are targeted for moves based on job opportunities; and national support for Housing Trust Funds in higher opportunity and job-rich areas. These incentives could increase engagement in expanding affordable housing options into new opportunity areas. In addition, HUD's new Small Area Fair Market Rent program should be funded and implemented to improve voucher holders' access to higher rent, higher opportunity areas.

Local and regional approaches to zoning should be guided by explicit federal guidance on removing zoning barriers to mobility and the siting of affordable housing. Failure to take remedial action within identified time frames could result in the delay or suspension of funding or other program sanctions

105. Information about the Choice Neighborhoods program is available at *Choice Neighborhoods*, U.S. DEP'T HOUSING & URB. DEV. http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/cn [<http://perma.cc/U2GT-MT2S>].

for not complying with civil rights laws or in civil rights enforcement actions by HUD or private litigants.

C. Cross Cutting Strategies

Federal or other sources could provide a national resource for HCV holders and others seeking affordable housing as well as encourage broader mobility. Combining existing housing search engines to provide reliable information on open waiting lists for voucher seekers, available housing for voucher holders, and information about jobs, schools, and transportation advantages could motivate movers to move across jurisdictional lines for better opportunities for their families.

The most important prerequisite for change in this area is political and moral will. As Schleicher points out, without leadership at the federal level, the challenges for mobility at the local or interstate level cannot be readily overcome. Improving job access across jurisdictional lines could be one vehicle for that leadership. However, his solutions will be incomplete unless paired with efforts to increase mobility out of poor and segregated neighborhoods and into higher opportunity areas, whether that occurs within jurisdictions or across state lines.

Policy makers and funders must set aside past haphazard, piecemeal approaches to reducing the concentration of poverty and segregation. Communities need help to institutionalize long-range changes in housing patterns and living choices, as well as associated improvements in job access, school quality, and transportation opportunities. Given the institutionalized and longstanding process of racial segregation and concentrated poverty, an organized, funded, and thoughtful series of strategies and incentives, including incentivized mobility, will be required to equitably rebuild our communities.

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