

# A SEAT AT THE TABLE: CHANGING THE GOVERNING STRUCTURE OF LOW INCOME HOUSING TAX CREDIT PROGRAM ADMINISTRATION TO REFLECT CIVIL RIGHTS VALUES AND FAIR HOUSING

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*The Low Income Housing Tax Credit (“LIHTC”) program is the largest existing program for the development of low-income affordable rental housing in the country. The program is administered by the United States Department of Treasury and the Office of Comptroller of the Currency (“OCC”), federal agencies by statute that have regulatory and supervisory authority over financial institutions. However, while 42 U.S.C. § 3608(d) provides that federal agencies that have regulatory authority over financial institutions need to administer their programs in a manner that affirmatively furthers fair housing, part of Treasury’s policies under the LIHTC statute gives preference for affordable housing projects being developed in areas that are already predominantly minority and contain concentrated poverty. Neither the Treasury nor the OCC have any regulations, guidance, reports, or audits that further fair housing by enforcing federal nondiscrimination policies or their legal duty to overcome patterns of racial segregation in housing. This Note argues that Treasury and OCC should take a larger role in affirmatively furthering fair housing under the Fair Housing Act by reforming their governing structure and policies to reflect civil rights values. Specifically, the Treasury should explicitly acknowledge the authority Title VI and the Fair Housing Act in their policies and regulations, establish a centralized, federal governing body to assure state housing finance agencies are in compliance with civil rights laws, and require state housing finance agencies (“HFA”) to establish governing bodies that are inclusive of the communities they serve.*

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## I. INTRODUCTION

The Low Income Housing Tax Credit (“LIHTC”) program is administered by the United States Department of Treasury and the Office of Comptroller of the Currency (“OCC”); these federal agencies have regulatory and supervisory authority by statute over financial institutions. However, while 42 U.S.C. § 3608(d) provides that federal agencies with regulatory authority over financial institutions need to administer their programs in a manner that affirmatively furthers fair housing, part of the Treasury’s policies under the LIHTC statute gives preference for affordable housing projects developed in areas that are predominantly minority and contain concentrated poverty.<sup>1</sup> There is evidence suggesting the Treasury and OCC’s policies subject families to racial segregation and increasingly distressed neighborhood conditions.<sup>2</sup> Further, these practices lead to discrimination against persons because of their race and color, and therefore violate 42 U.S.C. § 3604(a).

Neither the Treasury nor OCC have any regulations, guidance, reports, or audits that further fair housing by enforcing federal nondiscrimination policies or their legal duty to overcome patterns of racial

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<sup>1</sup> See I.R.C. § 42(d)(5)(B)(ii)(I) (West 2016) (qualifying areas with a poverty rate of twenty-five percent or higher or where at least half of the households have an income below sixty percent of the area median gross income).

<sup>2</sup> These regulations require that state LIHTC administrators give preference to developers who plan to site their low-income housing in communities that are already concentrated with poor residents and little economic and educational opportunities. While the Fair Housing Act aims to deconcentrate poverty and promote racial integration, LIHTC polices prefer development in high-poverty areas. See LANCE FREEMAN, SITING AFFORDABLE HOUSING: LOCATION AND NEIGHBORHOOD TRENDS OF LOW INCOME HOUSING TAX CREDIT DEVELOPMENTS IN THE 1990S, BROOKINGS INST. 10 (2004), [http://www.brookings.edu/~media/Files/rc/reports/2004/04metropolitanpolicy\\_freeman/20040405\\_Freeman.pdf](http://www.brookings.edu/~media/Files/rc/reports/2004/04metropolitanpolicy_freeman/20040405_Freeman.pdf).

segregation in housing. This Note argues that the Treasury and OCC should take a larger role in affirmatively furthering fair housing under the Fair Housing Act by reforming their governing structure and polices to reflect civil rights values.

Part II of this Note explains the problems attached to racial and economic segregation, describes the obligations mandated under Title VI and Title VIII of the Civil Rights Act of 1968, and elaborates on the duty to affirmatively further fair housing in the United States. Part III discusses the Treasury's role in fostering this segregation through their administration of the LIHTC Program and describes various proposals for reform to the statute. Part IV of this Note proposes specifically that the Treasury: (1) explicitly acknowledge the authority Title VI and the Fair Housing Act in their policies and regulations; (2) establish a centralized, federal governing body to assure state housing finance agencies are in compliance with civil rights laws; and (3) require state housing finance agencies (HFA) to establish governing bodies that are inclusive of the communities they serve.

## II. CONCENTRATED POVERTY, AFFIRMATIVELY FURTHERING FAIR HOUSING, AND THE LOW INCOME HOUSING TAX PROGRAM

The duty to affirmatively further fair housing was first introduced when Congress enacted the Fair Housing Act in 1968.<sup>3</sup> This duty requires the United States Department of Housing and Urban Development (HUD), HUD grantees, and entities involved in the administration of other federal housing and community development programs to take proactive steps to support residential integration and other important goals of the FHA.<sup>4</sup> However, since its inception, enforcement of the duty has been limited—with the impact of concentrated poverty and segregation continuing to be a pervasive problem for housing administration. The current LIHTC administration subjects families to racial segregation and increasingly distressed neighborhood conditions instead of affirmatively furthering fair housing.

### A. The Problem With Concentrated Poverty And Benefits Of Mixed-Income Housing

At the inception of government-funded affordable housing, proponents argued that targeting poor, minority neighborhoods for low income housing construction would have a revitalizing effect by increasing government participation, community investment, and improving physical appearance.<sup>5</sup> However, recent studies have revealed that targeting low-income housing alone does not produce these same effects. For example, in 2003 HUD commissioned a literature review to summarize conclusions about the effect of developing low-income units in poor, segregated neighborhoods and suggested that adding more units in these neighborhoods may further depress the value of the housing and contribute to additional long-term problems for families.<sup>6</sup> This depression creates “distressed neighborhoods” that are characterized by extreme poverty, lack of employment, low educational opportunities, and high proportions of single-parent households.<sup>7</sup> Furthermore, these areas of high distress are predominantly concentrated with minority populations. For example, a Brookings Institute study on the spread of concentrated poverty determined that minority populations “make up a disproportionate share of residents in higher-poverty suburban tracts and experienced

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<sup>3</sup> Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90–284, 82 Stat. 81 (codified at 42 U.S.C. §§ 3601–3619).

<sup>4</sup> 42 U.S.C. § 3608(d)(e)(5) (1988).

<sup>5</sup> See PAUL S. GROGAN & TONY PROSCIO, COMEBACK CITIES: A BLUEPRINT FOR URBAN NEIGHBORHOOD REVIVAL 99–101 (2000); AVIS C. VIDAL, REBUILDING COMMUNITIES: A NATIONAL STUDY OF URBAN COMMUNITY DEVELOPMENT CORPORATIONS 96–98 (1992).

<sup>6</sup> See JILL KHADDURI, KIMBERLY BURNETT & DAVID RODDA, ABT ASSOC., TARGETING HOUSING PRODUCTION SUBSIDIES: LITERATURE REVIEW 68–73 (2003). See also JILL KHADDURI, KIMBERLY BURNETT & DAVID RODDA, ABT ASSOC., MAKING THE BEST USE OF THE LOW INCOME HOUSING TAX CREDIT 19–22 (2004).

<sup>7</sup> WILLIAM O'HARE & MARK MATHER, THE GROWING NUMBER OF KIDS IN SEVERELY DISTRESSED NEIGHBORHOODS: EVIDENCE FROM THE 2000 CENSUS 3–6 (2003), <http://www.prb.org/pdf/KidsDistressedNeighborhoods.pdf>.

concentrated disadvantage at higher rates than White residents.”<sup>8</sup> Twenty-three percent of poor White residents lived in higher-poverty suburban tracts in 2008-2012 compared to fifty-three percent of poor Blacks and fifty-four percent of poor Latinos.<sup>9</sup>

Patterns of discrimination and segregation that restrict poor minorities to these distressed neighborhoods have direct effects on their quality of life and potential life outcomes. Diane L. Houk clearly stated in an article for the Fair Housing Justice Center, “[r]esidential racial isolation fuels a vicious, self-sustaining cycle of inequality and contributes to the racialization of poverty.”<sup>10</sup> For example, because of their concentration in distressed, racially segregated cities and inner suburbs, many poor Black and Latino residents attend overwhelmingly low-income schools.<sup>11</sup> Growing up in predominately poor neighborhoods and attending very low-income schools can create many barriers to academic achievement and occupational success. Neighborhoods with concentrated poverty also tend to have very high crime rates that put families in more dangerous and stressful environments.<sup>12</sup> This segregation and isolation can lead to great health disparities largely from inadequate health care facilities, poor quality, expensive food, stress, and the concentration of environmental dangers.<sup>13</sup>

Conversely, recent studies have shown the increasing benefits of integration programs and mixed income housing. In the heavily studied Gautreaux program, researchers found that “women with low incomes who moved to the largely White, opportunity rich suburbs experienced improved employment and earnings.”<sup>14</sup> The Gautreaux children also performed significantly better in school after moving to more affluent areas.<sup>15</sup> This study also showed that the families residing in “revitalizing areas” had less substantial gains as the families who moved to the suburbs.<sup>16</sup> In a recent study, the Fair Housing Justice Center surveyed some of the more successful mixed income-housing units that were developed in areas with a low concentration of poverty.<sup>17</sup> The report stressed the importance of housing choice for low-income minorities. While they showed that preserving and developing new low income housing has its benefits, they showed that giving low-income, minority populations the choice to move to areas of less concentrated poverty will encourage diverse populations to interact, reduce stereotypes and biases, and have access to a wider range of employment and educational opportunities.<sup>18</sup>

## B. Background Law

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<sup>8</sup> ELIZABETH KNEEBONE, *THE GROWTH AND SPREAD OF CONCENTRATED POVERTY, 2000 TO 2008-2012*, BROOKINGS INST. (2014), <http://www.brookings.edu/research/interactives/2014/concentrated-poverty#/M10420>.

<sup>9</sup> *Id.*

<sup>10</sup> DIANE L. HOUK, ERICA BLAKE & FRED FREIBERG, FAIR HOUSING JUSTICE CENTER, *INCREASING ACCESS TO LOW-POVERTY AREAS BY CREATING MIXED-INCOME HOUSING* 4–5 (2007).

<sup>11</sup> Further, approximately twenty-five percent of poor Black and Latino residents live in neighborhoods of high poverty. See PAUL A. JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY* 135–36 (1997).

<sup>12</sup> CATHERINE CUBBIN, *WHERE WE LIVE MATTERS FOR OUR HEALTH: NEIGHBORHOODS AND HEALTH* 5 (2008).

<sup>13</sup> See, e.g., Robert Bullard, *Building Safe, Just, and Healthy Communities*, 12 TUL. ENVTL. L. J. 373, 380–85 (1999).

<sup>14</sup> Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1762 (2005). See also James E. Rosenbaum & Susan J. Popkin, *Employment and Earnings of Low-Income Blacks Who Move to Middle-Class Suburbs*, in *THE URBAN UNDERCLASS* 342, 343–348 (1991).

<sup>15</sup> John Goering, *Political Origins and Opposition*, in *CHOOSING A BETTER LIFE?: EVALUATING THE MOVING TO OPPORTUNITY SOCIAL EXPERIMENT* 37, 40 (John Goering & Judith D. Feins eds., 2000).

<sup>16</sup> Orfield, *supra* note 14, at 1762–63.

<sup>17</sup> HOUK, BLAKE & FREIBERG, *supra* note 10, at 4–5.

<sup>18</sup> *Id.*

The Fair Housing Act of 1968 (FHA), also known as Title VIII of the Civil Rights Act of 1968, was an attempt to find a comprehensive solution to the problem of unlawful discrimination in housing based on race, color, sex, national origin, or religion.<sup>19</sup> It provides a statutory framework for regulating the practices of all federal government entities in the United States involved in housing and encourages the investigation of discriminatory housing practices.<sup>20</sup> The FHA is one of the most comprehensive pieces of civil rights law. It not only covers discrimination in the sale, rental and financing of housing based on race, religion, and national origin, but also covers discrimination in other housing-related activities such as advertising, zoning practices, and new construction design. The FHA mandates that HUD and other federal agencies administer their programs in a manner that affirmatively furthers fair housing.<sup>21</sup> The FHA has been amended on several occasions to address housing discrimination based on sex (1974), and against people with disabilities and families with children (1988).<sup>22</sup>

The vague terminology of the FHA mandates that the federal government “affirmatively [...] further” fair housing, but did not clarify exactly what that means or how it can be done.<sup>23</sup> These unguided practices have led to confusion, litigation, and calls for reform by civil rights advocates who struggled with finding ways to apply the “affirmatively further” fair housing doctrine to real life scenarios. While the parameters of and expectations attached to the law are still contested today, perhaps the most guidance has come from Courts that scrutinize the practices on a case-by-case basis. For example, in 1987 then-Judge Stephen Breyer wrote that the Act created “an obligation to do more than simply refrain from discriminating.”<sup>24</sup> The decision in *NAACP, Boston Chapter v. Secretary of Housing and Urban Development* expressed that § 3608 required the agency to take affirmative action both to stop discrimination and to desegregate housing.<sup>25</sup> Here, the First Circuit found “an intent that HUD do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases” under Title VIII.<sup>26</sup>

One major concept that has emerged out of the judicial and legislative debate surrounding the duty to affirmatively further fair housing is the idea that such approval processes should promote racial and social integration. Courts have interpreted this duty to require that the federal government support racial integration and therefore would prohibit the federal government and its grantees from developing low-income housing in high-minority, low-income concentrated areas.<sup>27</sup>

The FHA contains two overarching goals. First, the Act seeks to end housing discrimination and promote diverse, inclusive communities.<sup>28</sup> For example, the Act explicitly lists a set of nonexclusive prohibited practices including discriminatory sales, rentals, and advertising based on a person’s race, color, national origin, handicap, religion, sex, or familial status.<sup>29</sup> Second, the Act seeks to address a legacy of racial segregation and

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<sup>19</sup> Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified at 42 U.S.C. §§ 3601–3619).

<sup>20</sup> *The Fair Housing Act*, DEPARTMENT OF JUSTICE (Nov. 23, 2015), [http://www.justice.gov/crt/about/hce/housing\\_coverage.php](http://www.justice.gov/crt/about/hce/housing_coverage.php).

<sup>21</sup> 42 U.S.C. §§ 3601–3631 (1968).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* § 3608.

<sup>24</sup> *NAACP v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 154 (1st Cir. 1987).

<sup>25</sup> *Id.* at 151.

<sup>26</sup> *Id.* at 155.

<sup>27</sup> *See, e.g., Shannon v. United States Dep’t. of Hous. & Urban Dev.*, 436 F.2d 809 (3d Cir. 1970); *Sec’y of Hous. & Urban Dev.*, 817 F.2d at 149 (stating that Title VIII imposes a duty on HUD beyond simply refraining from discrimination); and *Gautreaux v. Chicago Hous. Auth.*, 503 F.2d 930, 931–34 (7th Cir. 1974).

<sup>28</sup> 42 U.S.C. § 3604 (2016). *See also* 114 CONG. REC. 9563 (1968) (statement of Rep. Celler); 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale).

<sup>29</sup> 42 U.S.C. § 3604 (2016).

housing inequality in the United States by requiring agencies to administer their programs in a way that *affirmatively* furthers fair housing. 42 U.S.C. § 3608(d) specifically provides that,

All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.<sup>30</sup>

To receive HUD grants, grantees must agree to affirmatively further fair housing under 42 U.S.C. § 3805(d)(5), if HUD knows that a grantee has violated the requirement it is required to seek compliance or withdraw funds to compel it.<sup>31</sup> States must also certify that local governments receiving funds through larger, federally funded programs (Community Development Block Grant program, Comprehensive Housing Affordability Strategy, Public Housing Authority Plan, etc.) are affirmatively furthering fair housing.<sup>32</sup> The obligation to affirmatively further fair housing applies to all housing and housing-related activities in a jurisdiction, whether publicly or privately funded.<sup>33</sup>

Additionally, Title VI of the Civil Rights Act of 1964 forbids discrimination based on race, or color, either by intent or as a result of a potentially neutral policy or practice.<sup>34</sup> HUD released Title VI regulations that include the mandate to administer programs in a way that affirmatively seeks to overcome discrimination.<sup>35</sup> Recent housing policies put forth by HUD have placed increasing importance on deconcentrating poverty through the development of LIHTC properties.<sup>36</sup>

Lastly, in Executive Order 12892, the executive branch required that the Department and state HFAs closely monitor “all Federal programs and activities relating to housing and urban development throughout the United States,” which would include tax credit properties, for discriminatory practices.<sup>37</sup> It also requires them to affirmatively promote non-discrimination and racial integration in various ways, including analyzing the racial concentration effects of LIHTC project locations and adopting procedures that work to combat racial segregation.<sup>38</sup>

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<sup>30</sup> *Id.* § 3608(d).

<sup>31</sup> The Housing and Community Development Act of 1974 made this requirement explicit: “[T]he grantee will affirmatively further fair housing.” 42 U.S.C. § 5304(b)(2) (2006). *See also* Anderson v. City of Alpharetta, Ga., 737 F.2d 1530, 1537 (11th Cir. 1984) (describing HUD’s obligation not just to refrain from discriminatory acts itself, but also to act “when HUD is aware of a grantee’s discriminatory practices and has made no effort to force it into compliance with the Fair Housing Act by cutting off existing federal financial assistance to the agency in question”).

<sup>32</sup> U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY, FAIR HOUSING PLANNING GUIDE (1996), <http://www.hud.gov/offices/ftheo/images/fhpg.pdf>.

<sup>33</sup> *Id.*

<sup>34</sup> 42 U.S.C. § 2000d (2016).

<sup>35</sup> Letter from Mass. Law Reform Inst. to Internal Revenue Serv. (Mar. 30, 2004), <http://www.prrac.org/pdf/IRSletter.pdf>.

<sup>36</sup> CASEY J. DAWKINS, U.S. DEP’T OF HOUS. & URBAN DEV., EXPLORING THE SPATIAL DISTRIBUTION OF LOW INCOME HOUSING TAX CREDIT PROPERTIES 1 (2011), [https://www.huduser.gov/portal/publications/pdf/Dawkins\\_ExploringLIHT\\_AssistedHousingRCR04.pdf](https://www.huduser.gov/portal/publications/pdf/Dawkins_ExploringLIHT_AssistedHousingRCR04.pdf); *see also* Rule to Deconcentrate Poverty and Promote Integration in Public Housing, 65 Fed. Reg. 81,214 (Dec. 22, 2000) (to be codified at 24 C.F.R. pt. 903).

<sup>37</sup> Exec. Order No. 12892, 59 Fed. Reg. 2939 (1994).

<sup>38</sup> POVERTY & RACE RESEARCH ACTION COUNCIL, CIVIL RIGHTS MANDATES IN THE LOW INCOME HOUSING TAX CREDIT (LIHTC) PROGRAM (2004), <http://www.prrac.org/pdf/crmandates.pdf> (last visited Jan. 21, 2015). *See also* Shannon v. Dep’t of Hous. & Urban Dev., 436 F.2d 809 (3d Cir. 1970).

### C. The Low Income Housing Tax Credit Program

At the time the FHA was passed, almost all federal housing subsidies for affordable housing construction were distributed by HUD or the Department of Agriculture.<sup>39</sup> In the early 1970s, President Richard Nixon issued a moratorium on nearly all large scale, federally subsidized public housing projects and public housing construction declined dramatically over the next few years.<sup>40</sup> Until the mid 1980s, the primary low-income housing programs were subsidy-based and included public housing and Section 8.<sup>41</sup> In 1986, Congress began to replace direct subsidies almost entirely with housing developed through the Low Income Housing Tax Credit program.<sup>42</sup> However, unlike other forms of federal affordable housing programs such as voucher programs, public housing, and Section 8, rent for LIHTC apartments do not adjust alongside a resident's actual income.<sup>43</sup> Instead, the program only ensures that the rent will be held down to a level considered affordable by local standards rather than ensuring that an individual tenant household will not have to pay more than thirty percent of its income for rent.<sup>44</sup>

The LIHTC is currently the largest program that provides for the development of low-income rental housing in the United States.<sup>45</sup> Since its inception, the LIHTC program has been responsible for providing about five billion dollars annually in tax credits and creating and preserving about 2.4 million units of affordable rental housing nationally for low-income households.<sup>46</sup> Some stipulate that the LIHTC program finances about ninety percent of all affordable rental housing produced annually.<sup>47</sup> The LIHTC program was introduced under the Tax Reform Act of 1986 and is implemented mainly through state agencies that distribute the credit to developers on a competitive basis.

The program encourages investors to support the development of affordable rental housing by providing them with tax credits that can be used for the restoration, new construction, or acquisition of buildings.<sup>48</sup> The tax credit program allows owners of residential rental property to claim tax credits for thirty

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<sup>39</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, ELDERLY HOUSING: FEDERAL HOUSING PROGRAMS THAT OFFER ASSISTANCE FOR THE ELDERLY 1–2 (2005), <http://www.gao.gov/assets/250/245318.pdf>.

<sup>40</sup> BARRY G. JACOBS, GUIDE TO FEDERAL HOUSING PROGRAMS 21 (2d ed. 1986).

<sup>41</sup> NAT'L LOW INCOME HOUS. COAL., 2004 ADVOCATES' GUIDE TO HOUSING & COMMUNITY DEVELOPMENT POLICY 96 (2004), [http://nlihc.org/sites/default/files/2012-Advocates-Guide\\_0.pdf](http://nlihc.org/sites/default/files/2012-Advocates-Guide_0.pdf).

<sup>42</sup> See Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, 2189–2208 (codified as amended in scattered sections of 26 U.S.C.).

<sup>43</sup> For comparisons to other federal affordable housing programs see U.S. DEP'T OF HOUS. & URBAN DEV., HOW YOUR RENT IS DETERMINED: FACT SHEET FOR PROJECT-BASED SECTION 8 (2010), <http://www.hud.gov/offices/fheo/promotingfh/11-Fact-Sheet-S-8-English.pdf>; U.S. DEP'T OF HOUS. & URBAN DEV., HOW YOUR RENT IS DETERMINED: FACT SHEET FOR PUBLIC HOUSING AND HOUSING CHOICE VOUCHER PROGRAMS (2002), [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/programs/ph/rhiip/factsheet](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/rhiip/factsheet).

<sup>44</sup> See *FY 2011 Income Limits: Frequently Asked Questions*, U.S. DEP'T OF HOUS. & URBAN DEV., [http://www.huduser.org/portal/datasets/il/il11/faq\\_11.html#q11](http://www.huduser.org/portal/datasets/il/il11/faq_11.html#q11) (last visited Mar. 29, 2016).

<sup>45</sup> U.S. DEP'T OF HOUS. & URBAN DEV., WHAT HAPPENS TO LOW-INCOME HOUSING TAX CREDIT PROPERTIES AT YEAR 15 AND BEYOND? (2012). Roughly 2.2 million LIHTC-financed properties were placed in service from 1987 through 2009, the last year for which they had data. The authors estimate the total in 2011 was 2.4 million. The LIHTC program has outstripped both public housing and HUD-assisted, privately owned housing.

<sup>46</sup> HUD estimates the total in 2011 was 2.4 million. See *id.* See also *Low-Income Housing Tax Credits*, HUDUSER.ORG, <http://www.huduser.org/datasets/lihtc.html> (last visited Mar. 29, 2016).

<sup>47</sup> See SIMON KAWITZKY, FRED FREIBERG, DIANE L. HOUK & SALIMAH HANKINS, FAIR HOUSING JUSTICE CENTER, CHOICE CONSTRAINED, SEGREGATION MAINTAINED: USING FEDERAL TAX CREDITS TO PROVIDE AFFORDABLE HOUSING (2013).

<sup>48</sup> OFF. OF THE COMPTROLLER OF THE CURRENCY, LOW-INCOME HOUSING TAX CREDITS: AFFORDABLE HOUSING INVESTMENT OPPORTUNITIES FOR BANKS (2014).

percent to seventy percent of the present value of new and rehabilitated housing developments.<sup>49</sup> For a period of fifteen years, a property owner must rent at least twenty percent of the project's units to households with incomes at or below fifty percent of the area median gross income or rent at least forty percent of the units to households with incomes at or below sixty percent of the area median gross income in order to qualify for the program.<sup>50</sup> Under the LIHTC statute, the Internal Revenue Service ("IRS") reserves the right to reclaim previous declared credits during the fifteen-year period if the project fails to fulfill its obligations under the regulations.<sup>51</sup>

Property owners can claim these taxes annually over a ten-year period and use the tax credits in a variety of ways including offsetting taxes on other income or selling them to investors to raise capital for the development costs of a project.<sup>52</sup> This federal tax credit program uniquely requires that developers not simply claim the credits on their income tax return, but rather that the credits be allocated through state HFAs.<sup>53</sup> HFAs calculate the tax credit based on a percentage of costs acquired during the process of developing the affordable housing property.<sup>54</sup> Interestingly, developers are largely restricted in their choice for affordable housing project location by the amount of money the developer can get upfront for selling the rights to a tax credit.<sup>55</sup>

The United States Department of Treasury, through the IRS, administers and regulates the operation and disbursement of the LIHTCs through state and local housing credit agencies.<sup>56</sup> They allocate these federal tax credits to state housing credit agencies ("HCA") based on each state's population.<sup>57</sup> In order to receive the funds, each state's allocation agency must develop a Qualified Allocation Plan ("QAP") "that relates the use of the tax credits to the housing needs and priorities and controls for competition."<sup>58</sup>

The federal government created a Qualified Census Tract bonus, hoping to promote the construction and restoration of developments in lower-income communities.<sup>59</sup> Projects in "qualified census tracts" are located in areas where "[fifty] percent or more of the households have an income which is less than [sixty] percent of the area median gross income."<sup>60</sup> Section 42 (m)(1)(B)(ii) of the federal tax code requires that a QAP give preference in allocating housing credit dollar amounts among selected projects to:

- (I) projects serving the lowest income tenants;
- (II) projects obligated to serve qualified tenants for the longest periods; and

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<sup>49</sup> Orfield, *supra* note 14, at 1777.

<sup>50</sup> *Id.*

<sup>51</sup> OFF. OF THE COMPTROLLER OF THE CURRENCY, *supra* note 48.

<sup>52</sup> KAWITZKY, FREIBERG, HOUK & HANKINS, *supra* note 38, at 8.

<sup>53</sup> James A. Long, *The Low-Income Housing Tax Credit in New Jersey: New Opportunities to Deconcentrate Poverty Through the Duty to Affirmatively Further Fair Housing*, 66 N.Y.U. ANN. SURV. AM. L. 75, 81–82 (2010).

<sup>54</sup> *Low Income Housing Tax Credit*, U.S. DEP'T OF HOUS. AND URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/lihtcmou](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/lihtcmou) (last visited June 5, 2016).

<sup>55</sup> Long, *supra* note 53, at 82.

<sup>56</sup> 26 U.S.C. § 42 (2013); 26 C.F.R. § 1.42-0–1.42-18 (1990).

<sup>57</sup> OFF. OF THE COMPTROLLER OF THE CURRENCY, LOW-INCOME HOUSING TAX CREDITS: AFFORDABLE HOUSING INVESTMENT OPPORTUNITIES FOR BANKS 1, 3, March 2014, <http://www.occ.gov/topics/community-affairs/publications/insights/insights-low-income-housing-tax-credits.pdf> [hereinafter OCC].

<sup>58</sup> 1986: *Low-Income Housing Tax Credit (LIHTC)*, THE FAIR HOUS. CTR. OF GREATER BOS., <http://www.bostonfairhousing.org/timeline/1986-Low-Income-Housing-Tax-Credit.html> (last visited Jan. 21, 2015).

<sup>59</sup> U.S. DEP'T. OF HOUS. AND URBAN DEV., WHAT HAPPENS TO LOW-INCOME HOUSING TAX CREDIT PROPERTIES AT YEAR 15 AND BEYOND? (2012), [https://www.huduser.gov/portal/publications/hsgfin/lihtc\\_report2012.html](https://www.huduser.gov/portal/publications/hsgfin/lihtc_report2012.html).

<sup>60</sup> 26 U.S.C. § 42(d)(5)(B)(ii)(I).



- (III) projects which are located in qualified census tracts and the development of which contributes to a concerted community revitalization plan.<sup>61</sup>

The project is then eligible for a tax credit calculation that uses an increased property eligibility of 130% of its original eligible basis.<sup>62</sup> As a helpful tool, states can use data from the Distress Indicator Index created by the Treasury for the Community Development Financial Institutions Fund program, which ranks every census tract across the country from zero to four, with four indicating the highest level of distress based on a combination of poverty, median family income, and unemployment levels.<sup>63</sup>

In addition, the OCC, an independent bureau of Treasury, administers national banks' investments in LIHTC projects.<sup>64</sup> The OCC plays a critical role in the development of affordable housing because they must approve all federally regulated national bank investments in LIHTC real estate developments by finding that the investment is designed primarily to promote the public welfare.<sup>65</sup> The "OCC estimates that eighty-five percent of the \$9.5 billion in equity from corporate investors used to finance LIHTC projects in 2012 came from the banking sector."<sup>66</sup> The national banks benefit from the use of the tax credits by using it to offset profits or through receiving cash proceeds from the sale of the project.<sup>67</sup>

In 1992, public welfare provisions allowing national banks to own LIHTC projects became law and they are still in effect today.<sup>68</sup> It included a public welfare-based requirement that the profits and other distribution or interest from equity or debt investments received by the bank from the public welfare investment be devoted to activities that primarily promote the public welfare as determined by the OCC.<sup>69</sup> Profits, dividends, and tax credits are restricted for qualifying public purposes rather than general bank use.<sup>70</sup> However, instead of providing more restrictions in an attempt to affirmatively further fair housing, the OCC has relaxed many of their constraints. Between the years 1995 and 2003, the OCC removed all non-financial regulatory requirements for public welfare eligibility. In 1995, they removed the reinvestment provision, which was the "provision that require[d] a bank to reinvest profits, dividends, and other distributions from community development investments in activities that promote the public welfare."<sup>71</sup> In 1999, the OCC eliminated the community benefit and support elements of the regulation by allowing states to decide their importance on a discretionary basis.<sup>72</sup> This rule, *inter alia*, permitted eligible national banks to self-certify any public welfare investment, expanded the types of investments that a national bank may self-certify by removing geographic restrictions, revised and expanded the illustrative list of eligible public welfare investments and removed the private market financing requirement for public welfare investments.<sup>73</sup>

<sup>61</sup> *Id.* at § 42(d)(5)(ii)(I).

<sup>62</sup> *Id.* at § 42(d)(5)(B)(i).

<sup>63</sup> *Treasury and OCC Sued, Administration of LIHTC Fails Fair Housing Act*, NAT'L LOW INCOME HOUS. COALITION (Sept. 2, 2014), <http://nlihc.org/article/treasury-and-occ-sued-administration-lihtc-fails-fair-housing-act>.

<sup>64</sup> OCC, *supra* note 57.

<sup>65</sup> 12 U.S.C. § 24 (Eleventh) (2008); 12 C.F.R. § 24.3 (2008).

<sup>66</sup> *Treasury and OCC Sued, Administration of LIHTC Fails Fair Housing Act*, *supra* note 63.

<sup>67</sup> OCC, *supra* note 57. The Community Reinvestment Act allows federal regulatory agencies to examine whether banking institutions are complying with the regulations and "take this information into consideration when approving applications for new bank branches or for mergers or acquisitions." Section 804 of Title VIII of the Act of 1977 (Pub. L. No. 95-128; 91 Stat. 1148). The Office uses a variety of methods to encourage national banks to invest in LIHTCs, for instance offering them advantageous regulatory consideration under the Community Reinvestment Act.

<sup>68</sup> Barry Wildes, *A Look Inside...*, COMMUNITY DEVELOPMENT INVESTMENTS 2 (2010), [http://www.occ.gov/static/community-affairs/community-developments-investments/fall10/CD\\_Investments\\_PWI\\_Fall\\_2010.pdf](http://www.occ.gov/static/community-affairs/community-developments-investments/fall10/CD_Investments_PWI_Fall_2010.pdf).

<sup>69</sup> 12 C.F.R. § 24.4(a)(4); 58 FR 68464 (1993).

<sup>70</sup> Brief of Plaintiff at 11–12, *Inclusive Communities Project, Inc. v. U.S. Dep't of Treasury* (No. 3:14-CV-3013-D), 2015 WL 4629635 (N.D. Tex. Aug. 4, 2015).

<sup>71</sup> 12 C.F.R. § 24.4(a) (1995).

<sup>72</sup> 64 FR 70988 (1999).

<sup>73</sup> *Id.*

### III. THE LIHTC PROGRAM'S EFFECT ON CONCENTRATED POVERTY AND RECENT LITIGATION

Patterns of discrimination and segregation can lead to long-term debilitating effects on poor, minority populations especially when promoted by the federal government. The Treasury and OCC's preference for investments in LIHTC units in predominantly minority and distressed locations and the lack of guidelines that prohibit LIHTCs from being used for units in racially segregated minority neighborhoods marked by conditions of distress subjects low-income, minority families to conditions of racial segregation and constitutes discrimination against persons because of race and color.

#### A. The Approval Process Encourages Concentrated Poverty And Housing Segregation

The Treasury and OCC's LIHTC allocation practices of giving priority to development proposals for low-income housing in census tracts that are already occupied by a high percentage of poverty leads to the preservation of segregation and encourages discrimination against persons because of their race and color, in violation of the FHA. The current regulations require that state LIHTC administrators give preference to developers who plan to site their low-income housing in communities that are already destabilized by a concentration of poor residents and a lack of economic and educational opportunities. In fact, the LIHTC policies that prefer development in minority, high-poverty areas seem to be in direct contrast with some of the overarching goals of the FHA to affirmatively further fair housing by deconcentrating poverty and promoting racial integration.<sup>74</sup>

In particular, a study conducted by the Fair Housing Justice Center which focused on LIHTC housing in New York City and its suburbs determined that seventy-one percent of the LIHTC affordable housing units were located in areas of "high or extreme poverty."<sup>75</sup> In addition, seventy-seven percent of the LIHTC affordable housing units were located in minority neighborhoods.<sup>76</sup> A Brookings study found that the neighborhoods containing LIHTC housing contained disproportionate shares of Black residents.<sup>77</sup> While Blacks made up only fifteen percent of total metropolitan residents in 2000, they accounted for twenty-six percent of the LIHTC neighborhoods population.<sup>78</sup> Blacks also made up thirty-four percent of the population in central-city LIHTC neighborhoods, versus their fifteen percent proportion in suburban LIHTC neighborhoods.<sup>79</sup> Furthermore, Abt Associates conducted another study in 2006 analyzing LIHTC units with two or more bedrooms used between 1995 and 2003, located in metropolitan areas with populations greater

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<sup>74</sup> See LARRY BURON, SANDRA NOLDEN, KATHLEEN HEINTZI & JULIE STEWART, ABT ASSOCIATES, INC., ASSESSMENT OF THE ECONOMIC AND SOCIAL CHARACTERISTICS OF LIHTC RESIDENTS AND NEIGHBORHOODS (2000); William Callison, *Achieving Our Country: Geographic Desegregation and the Low-Income Housing Tax Credit*, 19 S. CAL. J. LAW & SOCIAL JUSTICE 213 (Spring 2010); Orfield, *supra* note 42; Florence Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 MIAMI L. REV. 1011 (1998); BUILDING OPPORTUNITY: CIVIL RIGHTS BEST PRACTICES IN THE LOW INCOME HOUSING TAX CREDIT PROGRAM, PRRAC AND LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW (2008), <http://www.prrac.org/LIHTC.php>.

<sup>75</sup> The data examined more than 52,000 low-income rental units produced under the LIHTC program over the ten years between 1998 and 2007. SIMON KAWITZKY, FRED FREIBERG, DIANE L. HOUK & SALIMAH HANKINS, FAIR HOUS. JUSTICE CTR., CHOICE CONSTRAINED, SEGREGATION MAINTAINED: USING FEDERAL TAX CREDITS TO PROVIDE AFFORDABLE HOUSING 19 (2013).

<sup>76</sup> *Id.* at 24.

<sup>77</sup> LANCE FREEMAN, BROOKINGS INST., SITING AFFORDABLE HOUSING: LOCATION AND NEIGHBORHOOD TRENDS OF LOW INCOME HOUSING TAX CREDIT DEVELOPMENTS IN THE 1990S 10 (2004), [http://www.brookings.edu/~media/Files/rc/reports/2004/04metropolitanpolicy\\_freeman/20040405\\_Freeman.pdf](http://www.brookings.edu/~media/Files/rc/reports/2004/04metropolitanpolicy_freeman/20040405_Freeman.pdf).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

than 250,000.<sup>80</sup> They reported that thirty-four percent of all metropolitan family LIHTC units were in neighborhoods with low poverty rates, with twenty-nine percent being in neighborhoods with ten to twenty percent poverty rates and thirty-seven percent were in neighborhoods with greater than twenty percent poverty rates.<sup>81</sup> While some states have made progress in recent years, several states “place only a small fraction of the LIHTC family housing in census tracts in which fewer than ten percent of all people are poor,” including Arizona, Connecticut, the District of Columbia, Idaho, Illinois, Kentucky, Massachusetts, Pennsylvania, and South Carolina.<sup>82</sup> By denying low-income, minority families more opportunities to leave inner-city communities in favor of better schools and safer neighborhoods, states are overlooking an opportunity to break the cycle of intergenerational poverty and patterns of racial segregation in housing.

### B. The Approval Process Does Not Affirmatively Further Fair Housing

The LIHTC statute fails to affirmatively further fair housing as required by law. According to HUD, federal agencies must ensure that entities under their supervision, including non-federal bodies, do not engage in acts and omissions that result in or have the effect of discrimination or segregation.<sup>83</sup> While it is clear that the FHA and duty to affirmatively further fair housing is binding on the Department of Treasury and OCC,<sup>84</sup> this responsibility is not directly reflected in the LIHTC statute. The Treasury and OCC currently do not have any regulations, guidance, reports, or audits to further fair housing by enforcing federal nondiscrimination policies and their legal duty to overcome patterns of racial segregation in housing. While Title VI explicitly mandates that all federal agencies adopt regulations prohibiting discrimination and segregation based on race and disability in programs distributing federal financial assistance, the Department of Treasury does not have any stated policy or guideline referencing these basic nondiscrimination rules required of all federal agencies.<sup>85</sup> There are no specific site selection or affirmative marketing requirements in the Department of Treasury’s LIHTC regulations.<sup>86</sup> Decisions about which projects to fund are entirely delegated to state housing finance agencies.<sup>87</sup> In fact, the Department of Treasury uses a competitive process that awards special preference for those that are developing housing in segregated, concentrated areas, which seems to have an opposite effect of affirmatively furthering fair housing.

Brief references to the Department’s obligations under the Fair Housing Act can be found in the IRS regulations, referencing broad regulations governing HUD-assisted housing.<sup>88</sup> In addition, the Treasury has a “general public use” rule for the LIHTC program, which imposes penalties for acts of discrimination against individual renters of tax credit units.<sup>89</sup> However, it fails to address some of the more pertinent obligations,

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<sup>80</sup> ABT ASSOCIATES INC., ARE STATES USING THE LOW INCOME HOUSING TAX CREDIT TO ENABLE FAMILIES WITH CHILDREN TO LIVE IN LOW POVERTY AND RACIALLY INTEGRATED NEIGHBORHOODS? (2006).

<sup>81</sup> *Id.*

<sup>82</sup> WILLIAM L. TAYLOR, DIANNE M. PICHÉ, CRYSTAL ROSARIO & JOSEPH D. RICH, CITIZENS’ COMMISSION ON CIVIL RIGHTS & CENTER FOR AMERICAN PROGRESS, THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION 100 (2008).

<sup>83</sup> Exec. Order No. 12892, 59 FR 2939.

<sup>84</sup> *In re* Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 848 A.2d 1 (Super. Ct. App. Div. 2004) (reiterating that the duty to affirmatively further integrated housing applies to all federal housing programs, and therefore would include the LIHTC). *See also* Jones v. Office of the Comptroller of the Currency, 983 F.Supp. 197, 204 (D.D.C. 1997).

<sup>85</sup> Title VI, 42 U.S.C. § 2000d (1964); 29 U.S.C. §§ 794, 504 (2015).

<sup>86</sup> 26 U.S.C. § 42 (2013).

<sup>87</sup> *Id.* *See also* CIVIL RIGHTS MANDATES IN THE LOW INCOME HOUSING TAX CREDIT (LIHTC) PROGRAM, POVERTY & RACE RESEARCH ACTION COUNCIL (2004), <http://www.prrac.org/pdf/crmandates.pdf>.

<sup>88</sup> 26 C.F.R. 1.42-9(a) (1990). (“A residential rental unit is for use by the general public if the unit is rented in a manner consistent with housing policy governing non-discrimination, as evidenced by rules or regulations of the Department of Housing and Urban Development (HUD) (24 CFR subtitle A and chapters I through XX).”).

<sup>89</sup> Treas. Reg. § 1.42-9 (For use by the general public).

which includes a requirement that housing credit agencies take steps to prevent racial segregation and promote integrated housing choices for low-income, minority families. The Treasury also entered into a fruitless “memorandum of understanding” with HUD and the Department of Justice in 2000 to explore the implementation of fair housing standards.<sup>90</sup>

In terms of the OCC, its administration of national bank investments in LIHTC projects does not meet the public welfare standard. “[T]he granting of federal assistance for [. . .] housing and related facilities from which Americans are excluded because of their race, color, creed, or national origin is unfair, unjust, and inconsistent with the public policy of the United States as manifested in its Constitution and laws.”<sup>91</sup> Therefore, actions that maintain racial segregation of minorities into areas with concentrated poverty and distress does not satisfy the public welfare.<sup>92</sup>

The Treasury and OCC’s lack of data collection also makes them ill equipped to deal with the problem in a meaningful way. In his 2006 Comment, Lance Freeman suggests that these offices use a “don’t ask, don’t tell” approach to avoid dealing with the lack of civil rights oversight.<sup>93</sup> “By not collecting information on tenants, policy makers are in effect not asking whether the LIHTC program is truly fostering choice and opportunity. Without tenant information, there is no triggering mechanism for fair housing groups to use: There is nothing to tell.”<sup>94</sup> Having data on project applicants and residents would help to determine if the LIHTC program is helping to make neighborhoods more or less segregated over time.

### C. Reform Efforts: Retracing Recent Litigation

In response to the failure of state housing finance agencies to develop LIHTC housing in areas that avoid sustaining further racial and economic segregation, advocates in states such as New Jersey, Connecticut, and Texas have brought legal challenges.<sup>95</sup> Retracing these efforts can help to understand the gaps where future reform should aim to fill.

#### 1. New Jersey

As with most states, New Jersey’s Housing and Mortgage Finance Agency has considerable discretion when determining how to distribute the state’s LIHTC allocation. In general, the state’s QAP and practices show a preference for concentrating low-income family housing in metropolitan areas.<sup>96</sup> For example, in 2002, eighty percent of HMFA’s allocation provided funding for family units in urban areas.<sup>97</sup> Civil rights advocates brought suit to challenge these practices in the case *In re Adoption of the 2003 Low Income Housing Tax Credit*

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<sup>90</sup> Memorandum Of Understanding Regarding Low Income Housing Tax Credit, The Department Of The Treasury, The Department Of Housing And Urban Development, and The Department Of Justice, Aug. 11, 2000, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/lihtcmou](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/lihtcmou).

<sup>91</sup> Exec. Order No. 11063, 3 C.F.R. 652 (1962).

<sup>92</sup> Complaint at 17, *ICP v. Dept. of Treasury & OCC*, (No. 3:14-cv-03013-D), 2015 WL 4629635 (2015).

<sup>93</sup> Lance Freeman, *Comment on Kirk McClure’s “The Low Income Housing Tax Credit Program Goes Mainstream And Moves To The Suburbs,”* 17 HOUSING POLICY DEBATE 447, 455 (2006).

<sup>94</sup> *Id.*

<sup>95</sup> In addition, in 2003, eleven state and national fair housing groups sent a broad pre-litigation letter to the IRS administrator of the LIHTC program. Letter from Judith Liben, Philip Tegeler, Kevin D. Walsh, Erin Boggs, Gideon Anders, Elizabeth K. Julian, David J. Harris, Edward Johnson, Michael Allen, Jorge Elorza & Ilene J. Jacobs, Staff Attorney, Massachusetts Law Reform Institute, to Grace Robertson, Internal Revenue Service (Mar. 30, 2004), <http://www.prrac.org/pdf/IRSLetter.pdf>.

<sup>96</sup> Kenneth H. Zimmerman, *The Low Income Housing Tax Credit Program and Civil Rights Law: Updating the Fight for Residential Integration*, in FIFTY YEARS LATER: BROWN V. BOARD OF EDUCATION AND HOUSING OPPORTUNITY, THE NIMBY REPORT, 4, 25 (Nat’l Low Income Hous. Coal. Ed., 2004).

<sup>97</sup> *Id.*

*Qualified Allocation Plan*.<sup>98</sup> The fair housing group Fair Share Housing Center and two chapters of the NAACP claimed that the “HMFA was under a constitutional, statutory and regulatory duty to promote racial and economic integration” and the state of New Jersey violated federal and state law by concentrating LIHTC-funded housing in radically segregated, poor areas.<sup>99</sup> The state opposed the challenge arguing that its administration of the program fulfilled their constitutional and statutory obligation by encouraging housing development and revitalization in urban areas.<sup>100</sup> They also argued that they had been making reforms that continued the revitalization efforts and also promoted mixed income housing through setting aside funds from the HOPE VI program, and now offering equal preference for 100% affordable housing projects and mixed income projects.<sup>101</sup> They expressed doubt that moving funding from projects in urban areas to suburban areas would actually have the desired impact of creating more housing for inner city families.<sup>102</sup> While many amicus briefs were filed, one non-profit, the New Jersey Institute for Social Justice, provided some needed balance.<sup>103</sup> The New Jersey Institute for Social Justice argued that while the state should be mandated to comply with fair housing laws, this should not preclude allocating LIHTCs to urban areas.<sup>104</sup>

In 2004, the three-judge panel of the state’s Appellate Division issued a decision that stated state allocation of the LIHTC did fall under the Fair Housing Act’s duty to “affirmatively further” fair housing.<sup>105</sup> However, the Court also determined that the HMFA administered their program in accordance with the law.<sup>106</sup> The Court neither clarified the “affirmatively further” standard nor pointed to any direct actions that the HMFA took to align their program with the mandate. As noted by Kenneth Zimmerman, the “appellate division’s decision violates basic canons of statutory construction by ignoring completely the language of the FHA, its legislative history, or the substantial authority, including Shannon, 1970, interpreting it.”<sup>107</sup>

## 2. Connecticut

A similar case was brought in Connecticut in 2004 by a local community organization that challenged the state’s administration of the LIHTC program and asserted that federal and state law implies a private right of action to require government housing agencies to affirmatively promote fair housing.<sup>108</sup> Connecticut law explicitly requires state housing finance agencies to “affirmatively promote fair housing choice and racial and economic integration in all programs.”<sup>109</sup> However, in *Asylum Hill Problem Solving Revitalization Association v. King*, the Court ruled that there is no private right of action to enforce federal and state fair housing laws because there was no indication that federal or state fair housing law created such a right.<sup>110</sup> The Court also held that

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<sup>98</sup> In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 848 A.2d 1 (Super. Ct. App. Div. 2004).

<sup>99</sup> *Id.* at 9.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 9–10.

<sup>102</sup> *Id.* at 10.

<sup>103</sup> Brief In Support Of Motion To Appear As Amici Curiae And On The Merits, In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 848 A.2d 1 (App. Div. 2004), <http://www.njisj.org/assets/documents/amicusbrief--FINALVERSION.pdf>.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 13.

<sup>106</sup> *Id.* at 15.

<sup>107</sup> Zimmerman, *supra* note 96, at 28.

<sup>108</sup> *Asylum Hill Problem Solving Revitalization Ass’n v. King*, 2004 WL 113560 (Conn. Super. Ct. Jan. 5, 2004), *aff’d*, 277 Conn. 238, 890 A.2d 522 (2006).

<sup>109</sup> Public Act 91-362 (codified in part at Conn. Gen. Stat. § 8-37cc(b)), <https://www.cga.ct.gov/ps91/Act/pa/1991PA-00362-R00HB-05523-PA.htm>.

<sup>110</sup> *Asylum Hill*, 2004 WL 113560 at \*10.

the agency bringing the suit lacked standing because it was not a private resident that would benefit from the law's enforcement.<sup>111</sup>

### 3. Texas

Perhaps the most interesting case has been filed just last year in Texas. The Inclusive Communities Project (ICP) filed suit in August of 2014 alleging that the Treasury and the OCC administer the LIHTC program in the Dallas, TX metro area in a manner that is discriminatory and that violates their duty to affirmatively further fair housing. “As of 2013, [ninety-seven percent] of non-elderly LIHTC units in the City of Dallas were located in census tracts with more than [fifty percent] minority residents.”<sup>112</sup> The plaintiffs cite a HUD report that states from 1995 to 2006, sixty-nine percent of the seven county-Dallas metropolitan area LIHTC units were in tracts with over fifty percent minority population, totaling 24,325 units.<sup>113</sup> Ninety-one percent of the non-elderly LIHTC units in the Dallas were located in a census tract with a Treasury Distress Index of three or four and concentration of minority residents greater than fifty percent.<sup>114</sup> This represents 18,398 of the City's non-elderly LIHTC units. Eighty-nine percent of the total \$661,512,325 LIHTC allocation for non-elderly developments in Dallas was in census tracts with a Distress Index of three or four and a concentration of minority residents greater than fifty percent.<sup>115</sup> Lastly, 27,632 of the Dallas metro area LIHTC units, or seventy-three percent are in a census tract with a Distress Index of three or four and a concentration of minority residents greater than fifty percent.<sup>116</sup>

The suit also targets the OCC specifically for approving national bank investments in these LIHTC units that fail to meet public welfare requirements. ICP argues that the “public welfare is not satisfied by actions that perpetuate racial segregation of Blacks or Hispanics into minority concentrated areas marked by conditions of slum, blight, and distress,” and goes directly against the FHA.<sup>117</sup> They further stipulate that the OCC should follow the public welfare standards issued in Executive Order No. 11063, which prevents federal assistance for housing that excludes Americans because of their race, color, creed or national origin because it is inconsistent with public policy.<sup>118</sup>

ICP asserts that the Treasury and OCC “knowingly, consistently, and repeatedly allow and approve investments in LIHTC units that perpetuate racial segregation and unequal conditions.”<sup>119</sup> As a remedy, the lawsuit sought to enjoin Treasury's and OCC's approval of investments in LIHTC projects by regulated banks unless the units contribute to a meaningful community revitalization plan; to mandate that the Treasury and OCC require banks to use their public welfare investments in part for housing mobility counseling services for families in concentrated low-income, minority areas; and to enjoin the Treasury to provide clear guidelines and incentives for national bank investments in LIHTC unit that do not perpetuate racial segregation, and from being able to allocate LIHTC tax credits in a way that does not affirmatively further fair housing under 42 U.S.C. § 3604.<sup>120</sup>

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<sup>111</sup> *Id.* at \*7.

<sup>112</sup> Complaint at 17, ICP v. Dept. of Treasury and OCC, (No. 3:14-cv-03013-D), 2015 WL 4629635 (2015); Exec. Order No. 11063, 3 CFR 652 (1959–1963 Comp.).

<sup>113</sup> *Id.* at 14.

<sup>114</sup> *Id.* at 15.

<sup>115</sup> *Id.* at 17.

<sup>116</sup> *Id.* at 16.

<sup>117</sup> *Id.* at 17.

<sup>118</sup> Exec. Order No. 11063, 3 CFR 652 (1962).

<sup>119</sup> Brief for Plaintiff at 1, ICP v. Dept. of Treasury and OCC, (No. 3:14-cv-03013-D), 2015 WL 4629635 (2015).

<sup>120</sup> *Id.*

#### IV. REFORMING THE LIHTC PROGRAM THROUGH REFORMING ITS GOVERNING STRUCTURE

Since its inception, the Federal LIHTC program has operated with little civil rights oversight. With the increased litigation and the growing problem of racial segregation and discrimination, this should change immediately. This section will look at the various solutions that have been proposed in recent years and will propose proper guidance for actually implementing these changes in a substantive way.

Many scholars have attempted to provide suggestions for the best ways that state housing finance agencies, the Treasury or OCC, can make meaningful changes to their policies and practices. In her well-cited 1998 article, Professor Florence Roisman suggested three amendments to the Treasury's policies governing the LIHTC program.<sup>121</sup> For one, she argued that the Treasury should amend its regulations to explicitly acknowledge the authority of Title VIII and HUD's Title VIII regulations as well as its obligation to affirmatively further fair housing.<sup>122</sup> Second, Roisman argued that the Treasury should amend its regulations to provide better guidance to the state housing finance agencies for how to administer the LIHTC program in accordance with civil rights law.<sup>123</sup> Lastly, she suggests that the Treasury should modify their regulations to specify what developers must do to satisfy civil rights obligations.<sup>124</sup> While many scholars who advocate for reform would argue for similar changes, there is still debate over why and how the Treasury should make these changes.

##### A. Approaches to Implementing Reform

Many approaches to implementing civil rights reform to the LIHTC statute have emerged over recent years. There are several that provide interesting and promising methods. Professor Myron Orfield, director of the Institute on Metropolitan Opportunity, argues that in order to construct effective reform to the current LIHTC statute, the obligation to affirmatively further fair housing must be prioritized over the Qualified Census Tract program.<sup>125</sup> Orfield also suggests that housing credit-agencies should be required to develop "concerted revitalization plans" to place LIHTC projects in places that can sustain long-term integration, prevent resegregation, and incorporate principles of opportunity-based housing.<sup>126</sup>

Henry Korman, a housing attorney with experience in HUD and legal services, put forth several reasons why implementing civil rights strategies in affordable housing programs would come with difficulties.<sup>127</sup> These problems include pushback from restrictive communities and local governments that insulate the existing segregation, the lack of available funds on the state and local level to contribute to community planning, development, and implementation of successful programs, and the extent to which federal agencies are engaged in implementation, oversight, enforcement, and financial support.<sup>128</sup> Korman proposed that states should take an "underwriting" approach to incorporating civil rights values when providing affordable housing, making fair housing duties a consideration at every stage of the development and management process.<sup>129</sup> Governments

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<sup>121</sup> Roisman, *supra* note 74.

<sup>122</sup> *Id.* at 1047.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *See* Orfield, *supra* note 14.

<sup>126</sup> *Id.* at 150.

<sup>127</sup> *See* Henry Korman, *Underwriting for Fair Housing? Achieving Civil Rights Goals in Affordable Housing Programs*, 14 J. AFFORDABLE HOUS. 292 (2005).

<sup>128</sup> "[E]qual housing opportunity has true efficacy if housing providers are cognizant of people; supportive of individual human needs within the context of a community; and protective of the right to live free of bias and fear, near to real social and economic opportunity, without regard to race, color, ethnic origin, disability, age, and other protected characteristics." *Id.* at 312.

<sup>129</sup> *Id.* at 303.

should treat civil rights concerns with the same level of attention given to any other risk underwritten in a real estate transaction.

Those who propose opportunity-based housing argue that the reform to the LIHTC program should reward applications that focus on opening up access to the “complex, interconnected web of opportunity structures [. . .] that significantly affect [. . .] quality of life” rather than only focusing on removing conditions of segregation.<sup>130</sup> This model would create greater LIHTC tax incentives to developments that support strategies that tie housing location with environmental safety, employment opportunities, and promising educational prospects.<sup>131</sup> This opportunity-based housing aims to allow low-income households and people of color to have greater participation in the reform process by opening the political processes that govern local decision-making.<sup>132</sup> Furthermore, this model relies on the government to take a greater role in reforming federal policies to combat segregated housing patterns and affirmatively further fair housing, partly achieving this by reforming the LIHTC procedural structure to further opportunity-based aims.<sup>133</sup>

## **B. Recommendations**

The Treasury should explicitly acknowledge the authority of Title VI and the FHA in their policies and regulations, establish a centralized, federal governing body to ensure state housing finance agencies are in compliance with civil rights laws, and require state HFAs to establish governing bodies that are inclusive of the communities they serve.

### **1. The Treasury Should Explicitly Incorporate Title VI And Title VIII Values**

Reform to the LIHTC statute requires compliance with Title VI of the Civil Rights Act and the FHA by explicitly acknowledging the authority of these federal laws within their policies, regulations, and practices. First, the Treasury should include LIHTC as one of the federal financial assistance programs that triggers the protections of Title VI. Second, the LIHTC statute should be revised to comprehensively list and explain each civil rights obligation in LIHTC project development, including non-discrimination by race, color, religion, sex, familial status, disability, national origin or source of income, and states’ duty to affirmatively further fair housing in their administration of the program. This would require federal and state governments to assess the goals of the program and provide better balance between the use of LIHTC funds to revitalize urban neighborhoods and promote integrated housing patterns.

This list is not comprehensive. To achieve quality reform, the Department of Treasury must work with civil rights authorities within the government and in the wider legal community. It is important that the statute provide clear guidance to federal and state administrators that this program prioritizes fair housing. For example, the Treasury must work with federal and state civil rights authorities and HUD to develop standards for development in higher poverty neighborhoods that comply with civil rights and fair housing law.<sup>134</sup> Treasury regulations could require that LIHTC developments in low-income neighborhoods should include

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<sup>130</sup> John A. Powell, *Opportunity-Based Housing*, 12:2 J. AFFORDABLE HOUS. & COMMUNITY DEV. L. 188, 190 (2003).

<sup>131</sup> See, e.g., JOHN A. POWELL, SAMIR GAMBHIR, JASON REECE & CHRISTY ROGERS, THE KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, COMMUNITIES OF OPPORTUNITY: A FRAMEWORK FOR A MORE EQUITABLE AND SUSTAINABLE FUTURE FOR ALL 7–8 (2007).

<sup>132</sup> *Id.* at 205–17. See also LISA ROBINSON & ANDREW GRANT-THOMAS, THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, RACE, PLACE, AND HOME: A CIVIL RIGHTS AND METROPOLITAN OPPORTUNITY AGENDA 87 (2004).

<sup>133</sup> *Id.* at 72–73, 85; Florence Wagman Roisman, *Long Overdue: Desegregation Litigation and Next Steps to End Discrimination and Segregation in the Public Housing and Section 8 Existing Housing Programs*, 4 CITYSCAPE: J. POL’Y DEV. & RES. 178 (1999).

<sup>134</sup> POVERTY & RACE RESEARCH ACTION COUNCIL, CIVIL RIGHTS MANDATES IN THE LOW INCOME HOUSING TAX CREDIT (LIHTC) PROGRAM (2004), <http://www.prrac.org/pdf/crmandates.pdf>.



higher-income eligibility and mixed-income housing. In addition, the Treasury could link LIHTC development with home ownership and economic development efforts as a way to encourage more opportunity-based housing.<sup>135</sup> The Department of Treasury should also amend the QAP criteria to reflect civil rights values and provide greater consistency in the ways that states implement preferences nationwide.

## **2. Establish A Governing Body To Ensure State Housing Finance Agencies Are In Compliance With Civil Rights Laws**

In order to ensure that the reforms to the LIHTC statute are ongoing and effective, the federal program should be monitored by an interagency body including, *inter alia*, federal administrators of the LIHTC, authorities from state housing finance agencies, non-profit members, and community activists. This body should be tasked with providing ongoing guidance for updating LIHTC policies and practices to ensure their compliance with fair housing laws, and assessing the goals of the LIHTC program in relation to its impact on the community. Furthermore, this body should be tasked with monitoring and establishing clear guidelines for state regulations and implementation. State governments should be required to assess their current LIHTC programs and create a report analyzing any limitations it has to affirmatively furthering fair housing as a condition of federal funding for housing and community development. They should also evaluate their QAPs as part of the analyses and require that state housing agencies submit yearly reports explaining how the criteria detailed in their QAPs were met. These reports should be made public to promote the transparency and provide a disincentive for discrimination in its administration.

This recommendation would likely increase administrative costs of the program, however, it would also enhance oversight of the program and ensure that it is achieving the policy objectives of providing racially and economically integrated affordable housing that would be in compliance with federal housing policy.

## **3. Require State HFAs To Establish Governing Bodies That Are Representative Of The Communities They Serve**

State housing finance agencies should be required to establish a governing body that is diverse and representative of the communities they serve in order to ensure that decision-making and planning reflects the diversity of residents. This change will increase the likelihood that LIHTC projects reflect the needs of all residents in the community and provide affordable housing and more effective solutions to combat segregation and discrimination. When low-income, minority populations are not given a seat at the table with critical decision-making bodies and are less involved in the development of plans, they often do not reap the benefits of these potentially transformative programs.

Also, by requiring a collection and analysis of LIHTC data within their state, housing finance agencies and their governing bodies will be able to enhance the effectiveness of the LIHTC program for all communities and allow for compliance with Title VI and Title VIII. Data collection on the state of the program “will permit officials to understand the civil rights impact of the program and to assess whether the siting and occupancy practices of tax credit developments have contributed to or ameliorated patterns of metropolitan segregation.”<sup>136</sup> The data should be comprehensive, the collection should be swift and the information should be made available to the public at the project level so that community members have the opportunity to assess the impact of the LIHTC location and racial or economic segregation. This will help to guide future implementation, affirmative marketing, and education.<sup>137</sup> The federal governing body can provide additional

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<sup>135</sup> For more information, see Alan Mallach’s proposal for the New Jersey program, *Toward A Policy Framework For The Allocation Of Low Income Housing Tax Credits*, New Jersey Institute for Social Justice (2003).

<sup>136</sup> LIHTC Data Collection Comment Letter (May 5, 2009), [http://www.prrac.org/pdf/LIHTC\\_data\\_collection\\_comment\\_letter\\_5-5-09.pdf](http://www.prrac.org/pdf/LIHTC_data_collection_comment_letter_5-5-09.pdf).

<sup>137</sup> *Id.*

support to this effort through monitoring state HFAs to ensure boards are representative of their encompassing communities.

## **V. CONCLUSION**

Neither the Treasury nor OCC have any regulations, guidance, reports, or audits to further fair housing by enforcing federal nondiscrimination policies and their legal duty to overcome patterns of racial segregation in housing under the FHA. The Fair Housing Act provides that federal agencies that have regulatory authority over financial institutions need to administer their programs in a manner that affirmatively furthers fair housing, part of Treasury's policies under the LIHTC statute gives preference for affordable housing projects being developed in areas with concentrated poor, minority families. State housing finance agencies are administering this program discretionarily, without any guidance on how to implement the program in accordance with civil rights law. The Treasury should (1) explicitly acknowledge the authority Title VI and the FHA in their policies and regulations; (2) establish a centralized, federal governing body to assure state housing finance agencies are in compliance with civil rights laws; and (3) require state HFA to establish governing bodies that are inclusive of the communities they serve. With an informed and representative governing structure, this program will fulfill its potential to successfully provide affordable housing in accordance with the Fair Housing Act of 1968.