From the Editor-in-Chief
Stephen R. Miller .................................................................................................................v

From the Chair
Kelly Rushin Lewis ............................................................................................................vii

Heard from HUD
The Case for Eliminating Regulatory Barriers to Housing
Benjamin S. Carson, Sr., M.D. ........................................................................................325

From the Reading Room
Foreclosed: Mortgage Servicing and the Hidden Architecture
of Homeownership in America
Review by Nathalie Martin..............................................................................................329

Digest of Recent Literature
Emma Elliott, Arete “Arlene” Koutras, Sarah Markenson-Bussel,
Theresa Omansky & Kurt Stiegel ....................................................................................347

Organizational Profile
Beyond Legal Aid: Transforming How Legal Services
to the Poor Are Delivered
Jackie Casey ......................................................................................................................357

Articles
Two Steps Forward: Promoting Inclusive Infill Development with Middle
Housing by Right and Increased Protections for Tenants
Sarah J. Adams-Schoen ....................................................................................................363

State and Local Laws Banning Source-of-Income Discrimination
Robert G. Schwenm .........................................................................................................373

Affirmatively Further Fair Housing: California’s Response to a Changing
Federal Landscape
Renee M. Williams ...........................................................................................................387

Proposed Retroactive Changes to the LIHTC Program Raise Tax and
Constitutional Issues
Eric S. Pettit .....................................................................................................................397

Supportive Housing Under Section 8013: Room and Need for Growth
Michele A. Yankson .........................................................................................................407
The Journal of Affordable Housing & Community Development Law is the official quarterly publication of the Forum on Affordable Housing & Community Development of the American Bar Association. It is targeted toward attorneys and other housing and community development specialists. It provides current practical information, public policy, and scholarly articles of professional and academic interest.

Disclaimer: The opinions expressed in the articles published in the Journal of Affordable Housing & Community Development Law are those of the authors and do not reflect those of the American Bar Association or the Forum on Affordable Housing and Community Development Law.

Membership: For information about membership in the Forum, please contact the ABA Service Center, 321 North Clark Street, Chicago, Illinois 60654-7598, 1-800-285-2221, FAX 312-988-5528, or visit americanbar.org.

Back Issues: Back issues are available for $15 per copy plus $3.95 shipping and handling charges. Contact ABA Service Center, 321 North Clark Street, Chicago, Illinois 60654-7598, 1-800-285-2221, FAX 312-988-5528, or ShopABA.org.

Member Address Changes: Send your member number and new address to coa@americanbar.org or change online at www.americanbar.org.

Permission to reprint: Requests to reproduce portions of this issue should be addressed to Contracts, Copyrights & Policies, American Bar Association, 321 North Clark Street, Chicago, Illinois 60654-7598, FAX 312-988-6030, or e-mail copyright@americanbar.org.


Journal of Affordable Housing & Community Development Law (ISSN 1084-2268 (print); ISSN 2163-0305 (online)) is published as a membership benefit by the American Bar Association, 321 North Clark Street, Chicago, Illinois 60654-7598. Subscriptions are available to nonmembers at an annual rate of $60. Postmaster: Send address changes to Affordable Housing Member Records, American Bar Association, ABA Service Center, 321 North Clark Street, Chicago, IL 60654-7598.
Welcome to the Winter 2019 issue of the Journal of Affordable Housing and Community Development Law. This is my first issue as editor-in-chief of the Journal, and I want to begin by first acknowledging the significant contributions of the Journal’s previous editor, Tim Iglesias, a law professor at the University of San Francisco School of Law. Prof. Iglesias edited the Journal for several years and worked with me considerably to assist this transition, for which I am grateful. I am also grateful that Prof. Iglesias stays on as a senior editor of the Journal.

This issue begins with our Heard from HUD column, which provides comments from HUD Secretary Dr. Benjamin S. Carson, Sr., on the President’s recent affordable housing executive order.

Nathalie Martin, an associate dean and law professor at the University of New Mexico School of Law, offers a book review of Foreclosed: Mortgage Servicing and the Hidden Architecture of Homeownership in America. Foreclosed, which was written by Professor Christopher K. Odinet, a law professor at the University of Oklahoma College of Law, provides an in-depth analysis, as well as considerable narrative, about hidden aspects of the mortgage industry both during the mortgage crisis of the last decade and today.

Our Literature Digest, edited by Emily Blumberg and Sara Silverstein Ferrara of Klein Hornig LLP, continues to profile important recently published articles and studies.

Our organizational profile features Beyond Legal Aid, which is based in Chicago and was previously known as the Community Activism Law Alliance (CALA).

The issue then presents several longer articles looking at current state and local government approaches to addressing affordable housing. Sarah J. Adams-Schoen, a law professor at the University of Oregon School of Law, reviews two recent Oregon statutes that seek to address the “missing middle” housing crisis. The first statute permits higher density in many locations by mandating certain zoning changes, while the second statute provides rent stabilization and new protections for tenants. Next, Robert G. Schwemm, a law professor at the College of Law at the University of Kentucky, provides a review of state and local government laws banning source-of-income discrimination. Renee Williams, a staff attorney at the National Housing Law Project in San Francisco, provides the third article in this series. Ms. Williams’s article investigates California’s new statute,

Stephen R. Miller is the Associate Dean for Faculty Development and Professor of Law, University of Idaho College of Law-Boise. Contact: millers@uidaho.edu.
based largely on the Obama-era HUD rule to “affirmatively further fair housing,” which will operate at the state level through California local governments’ general plans that are similar to comprehensive plans in other states.

This issue also offers two additional articles that address federal statutes and their implementation. Eric Pettit, a partner in the Los Angeles office of Boies Schiller Flexner LLP, addresses potential constitutional issues raised by proposed retroactive changes to the Low-Income Housing Tax Credit (LIHTC) program. Michele A. Yankson, a New York City-based lawyer, offers a critique of statutory federal supportive housing standards and their lack of implementing regulations.

I hope you enjoy this issue of the Journal. Please feel free to contact me about issue themes or article ideas, and I look forward to meeting many of you at Forum events in the near future.

Boise, Idaho
November 2019
From the Chair

Kelly Rushin Lewis

I have long appreciated the collegiality that I have found throughout the American Bar Association’s Forum on Affordable Housing & Community Development Law, and I take my responsibilities as Chair of the Forum in all seriousness. Over the next year, it is my goal to further strengthen our group’s position as leaders in legal scholarship and policy development.

While the responsibilities of leading this dynamic organization can be somewhat daunting, the opportunities I see before us are very exciting. As I have noted previously, some of my specific objectives include creating substantive content and programming to help newer and more experienced members stay on top of emerging legislation at every level and across all regions; working more closely with the Internal Revenue Service, the U.S. Department of Housing and Urban Development, and other federal and state agencies and legislative bodies to provide comments on proposed laws, regulations, and initiatives; increasing our outreach to other non-lawyer professionals (such as developers, agency employees, government employees, bankers, and investors); and working with my fellow Forum officers, the Governing Committee, committee chairs and co-chairs, liaisons, and members to implement our subcommittee structure and establish greater efficiencies and transparency to develop the next generation of Forum leadership and build valuable networks.

These days, leadership is on the minds of many Americans. As we head into next year’s elections, people across the country are being asked to identify and vote for the individuals they believe should represent them and their fellow citizens in Washington, D.C., in state capitals, and in cities and towns across the nation.

It is not my intent to wade into the push-and-pull of politics in this column. However, I do think it is important to note that the months preceding a national election offer us an opportunity, as professionals and as citizens, to help shape the platforms of our preferred candidates—and their subsequent legislation and policies—should they be elected to office.

Of particular interest to this organization are, of course, the affordable housing and community development platforms and policy proposals of the current U.S. presidential candidates (the roster of which will certainly have changed between the writing of this column and its publication). Where do the candidates stand today on issues such as Opportunity Zones, Low Income Housing Tax Credits (LIHTC), housing discrimination and

Kelly Rushin Lewis is a partner in the Birmingham office of Jones Walker where she leads the firm’s national Tax Credit Finance Team.
residential segregation, income averaging, and so on? Do they even have a position on these issues? Do their records demonstrate a commitment to furthering the goals of affordable housing and community development? With affordable housing (or lack thereof) at an all-time crisis stage in virtually every part of the country, having a strong position on this issue should be central to the candidates’ platforms.

The candidates’ answers to these questions can help us, as a Forum and as individual members, do more than simply make a choice on the November 2020 ballot. Between now and the election, we have an opportunity to work with candidates and their campaigns, helping provide them with relevant information necessary to the development of effective policy. Such interactions can also establish the groundwork for productive, successful working relationships with our yet-to-be-determined elected and appointed officials. We came very close in 2017 to losing two effective tools—the Historic Tax Credit and tax-exempt bonds—so we have seen the importance of staying connected to our legislators.

At the moment, there is a fairly extensive list of presidential candidates, particularly among Democrats. Let us take a high-level look at some of the better-known contenders, acknowledging that this review is cursory at best, intended to start a dialogue, and aimed at encouraging additional inquiry, rather than to take a specific position on any of the issues or candidates. (And again, I reiterate that this summary was written well before publication and that circumstances may have changed in the interim.)

The official campaign website of the current U.S. president, Donald J. Trump, does not have a “platform” section. Searches of the website using the terms “housing” (two hits), “community” (four hits) and “development” (one hit) list only headlines that the campaign considers demonstrative of past accomplishments. None of these headlines provides, via hyperlinks, access to additional detail or direct us toward a discussion of future plans. Of course, such information may be unnecessary, as we have nearly three years of experience with Mr. Trump—and his HUD Secretary Dr. Benjamin S. Carson, Sr.—upon which to assess his past policies (and possibly predict future initiatives).

Over the course of the summer of 2019, all of the major Democratic presidential candidates released housing plans. Some have detailed pages on their campaign websites: see, for example, Sen. Elizabeth Warren’s “Safe and Affordable Housing” page, Sen. Cory Booker’s “Housing” page, former HUD Secretary Julián Castro’s “Fair Housing + Climate” section, Sen. Kamala Harris’s “Combatting the Racial Home Ownership Gap” page, Mayor Pete Buttigieg’s “Community Homestead Act” section, and Sen. Bernie Sanders’s “Housing for All” page.

Other Democratic candidates have published affordable housing and economic development platform papers on third-party, non-campaign websites or have inserted paragraphs on their websites that offer more or less specific (and sometimes very detailed) proposals within the context of other policy statements. These include former Vice President Joseph Biden,
Representative Tulsi Gabbard, Senator Amy Klobuchar, Beto O’Rourke, Tom Steyer, and John Yang.

And, of course, most of these candidates also have her or his own record of legislative votes and proposals to which we can refer when seeking a better understanding of their potential platforms and policy initiatives. I would encourage all of us to become as informed as possible.

Why am I dedicating this much space in my column to the U.S. presidential election? Because I believe that, regardless of where our political affiliations lie, we all agree that safe, secure, and affordable housing matters. We all agree that strong communities matter. And I believe that we, as highly experienced lawyers in the areas of affordable housing and community development, are perhaps better positioned than any other group to help our future leaders understand these issues and act on them for the betterment of all Americans. It is incumbent on us to let our potential leaders—as well as our families, friends, and colleagues—know the fundamental importance of housing and the ripple effect that it has on issues ranging from criminal justice to healthcare, not to mention its role as a stimulus for job creation and the overall economy.

I would once again like to thank you all for placing your confidence in me as Chair of our Forum. This is our organization and we have such an impressive future ahead of us. I look forward to building it with you.
The Case for Eliminating Regulatory Barriers to Housing

Benjamin S. Carson, Sr., M.D.
Secretary, U.S. Department of Housing and Urban Development

Housing affordability has become an increasingly popular topic within the media, primarily due to the impact it has on families’ pocketbooks. In 2017, more than thirty-five million renter and owner households spent greater than thirty percent of their incomes on housing (“cost-burdened”), and more than eighteen million renter and owner households spent greater than half of their incomes (“severely cost-burdened”).

Although rising housing costs can be attributed to a variety of factors, one major area continues to garner bipartisan attention: the need to reduce regulatory barriers that unnecessarily increase the cost of construction and development and decrease the supply of housing. Artificial, arbitrary, and unnecessary regulatory and administrative burdens increase the cost of building and development and constrain a community’s ability to increase its supply of housing. One study has found that regulations at all levels of government account for nearly twenty-five percent of the cost of new single-family home construction and development on average.¹ For new multifamily construction and development, regulations at all levels account for between thirty-two and forty-two percent of project cost,² particularly in high cost areas.

The Trump administration is intensely focused on this issue, principally manifested on June 25, 2019, by the creation of an inter-agency White House Council on Eliminating Regulatory Barriers to Affordable Housing.

This council, which I have the privilege to chair, is tasked with (among several things) reviewing laws, regulations, and administrative practices on all levels of government that artificially raise the costs of development and contribute to shortages in housing supply; identifying practices and strategies that most successfully reduce and remove said laws, regulations, and administrative practices; assessing the actions that each council member agency can take to reduce regulatory barriers that unnecessarily raise the costs of housing development; and recommending federal, state, local, and tribal actions that can ultimately reduce regulatory barriers to the development of affordable housing.

The U.S. Department of Housing and Urban Development (HUD) will continue to do its part to reduce regulatory barriers at the federal level and will work with our agency partners to do the same. One recent example is the issuance of a new rule that will ease restrictions on using FHA mortgage insurance to purchase condominiums (the “condo rule”) that has increasingly become a critical source of entry-level housing. However, as acknowledged by the executive order, reducing the regulatory underbrush on the development and construction of housing requires the participation of all levels of government. Regulatory barriers—including minimum lot size requirements or restrictive density allowances, undue parking requirements, inordinate impact and developer fees, and protracted permitting and entitlement review processes—are known to inhibit development and to lead to a daunting shortage in housing supply for low- and middle-income households. Many communities are grappling with this issue, and states and localities are responding with various strategies. For example, San Diego has demonstrated a concerted effort by expediting permitting for projects that meet specified standards of sustainability and affordability. Many other communities such as Denver, Colorado; Leesburg, Virginia; and Goodyear, Arizona have set up one-stop administration of permitting processes.

Reviewing and modernizing outdated regulations, laws, and ordinances with an eye towards facilitating housing development or preservation is a useful exercise regardless of a community’s market conditions. However, the practice is especially needed in Opportunity Zones. This new federal place-based initiative, created through the 2017 Tax Cuts & Jobs Act, encourages investors with capital gains to deploy money into economically distressed neighborhoods. By investing in these low-income areas certified as Opportunity Zones, investors can benefit from various tax elections.

The White House Opportunity and Revitalization Council, which is led by Executive Director Scott Turner and which I have the honor to chair, is the federal government’s inter-agency group focused on targeting, streamlining, and coordinating federal resources and support towards the nation’s 8,764 Opportunity Zones. In fact, the council has already undertaken more than 150 action items across the member agencies. Through

this council, we are also learning the strengths, weaknesses, and areas of potential growth for these historically underinvested communities, as Scott Turner and our team have already visited more than forty cities since mid-April. During these travels, all types of community stakeholders have a common question that remains at the forefront: “How do we attract investment into our Opportunity Zones?”

As we approach the two-year anniversary of the Opportunity Zone legislation, it is clear that cities and localities are continuing to look for ways to maximize this initiative for their economically distressed areas. There is not a one-size-fits-all answer to the question above, yet taking a close look at the local regulatory environment can be a useful strategy. The real estate community yearns for the closest thing to certainty in terms of budget and scheduling before committing to a project, and thus providing the comfort of knowing to developers and investors—as it relates to approval processes—makes a world of difference. Most importantly, identifying key community needs and tailoring zoning parameters to achieve those needs should be a priority for local officials.

One case study that should be given attention is being played out in the city of Austin, Texas. The city’s Planning Commission is currently considering an initiative that would modify the city code to allow Opportunity Zone property with general commercial services zoning to add, if desired, a vertical mixed-use designation. The idea behind the proposed initiative is to facilitate and secure more housing production—particularly affordable housing—in conjunction with commercial activity. While this may not be the ultimate problem-solver in addressing housing shortfalls, it is exciting that localities are viewing Opportunity Zones as a newfound way to rethink strategies around housing supply and affordability.

HUD’s work on reducing regulatory barriers to housing and revitalizing distressed communities is indicative of our strong commitment to improving the quality of life for Americans living in urban, suburban, and rural areas. Fortunately, many non-profit organizations and private sector businesses are deeply committed to this same goal. Working together with the general public, we are confident that we can make real progress in addressing some of our nation’s most pressing housing and community development challenges.
FROM THE READING ROOM

Future Financial Crisis Not Foreclosed

Nathalie Martin

Foreclosed: Mortgage Servicing and the Hidden Architecture of Homeownership in America
Christopher K. Odinet
Cambridge University Press (2019)
217 pages. $120.00 (cloth); $34.99 (paper)

Introduction

We all long to be connected to one another. In American society and others, one way we connect is by having a permanent place to call home. For decades, we have promoted homeownership as the American dream.

1. Many thanks to Clair Gardner for her superb assistance with this book review and to my colleague Joe Schremmer for keeping me up to date on foreclosure practice today, a decade after the crisis. I am also grateful for the financial support of the University of New Mexico School of Law, and for the roof over my own head.

2. Rachel D. Godsil & David Simunovich, Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of Homeownership, 77 Fordham L. Rev. 949, 959 (2008). Indeed, even the symbolic significance of homeownership can create a powerful sense of belonging for groups that have often been excluded from traditional homeownership. As Irma Muñoz, a Senior Manager with Fannie Mae, described:

   I would give speeches on wealth building and about the impact that homeownership has on communities, but I never truly understood what I was saying until very recently. Two years ago, my siblings and I bought our parents their first home in the United States. Soon after they moved in, we were having dinner together. I had never seen as much peace in my parents’ eyes as I saw that night. I had never seen them as happy as they were. Home ownership did that for them. After they became homeowners, they became voters. They are involved in the community. They participate in the school system. They advocate for other Latinos in the area. And after September 11, my parents’ house instantly had an American flag on the garage door.

   My parents feel fully like a part of this country. Home ownership was the catalyst to make sure that they felt like part of the United States.

   Id.

Homeownership is a proxy for wealth given that the more one has, the more likely one is to own a home. While at times that dream has become a nightmare, homeownership has nevertheless been associated with many positive outcomes and obviously affects more than just where a family sleeps. It provides stability, which has been tied to better outcomes for children. As such, homes play a role in upward mobility, beyond just the wealth they represent. They signify purpose, belonging, and a sense of community beyond one’s self and one’s family.

While homeownership was once reserved primarily for white middle class and wealthy Americans, in the past two decades a higher percentage of lower income persons and persons of color have been able to buy homes. Unfortunately, the path to homeownership for many of these newcomers has been fraught with discrimination and predation. These problems came to a head during the 2008 recession, as Professor Christopher Odinet’s book *Foreclosed: Mortgage Servicing and the Hidden Architecture of Homeownership in America* illuminates.

I am currently researching debt inequality and persons of color, with Professor Pamela Foohey of the Indiana University Maurer School of Law. This research is what first led me to Professor Odinet’s book. The book’s description of how the financial crisis hit minority communities is particularly illuminating. For example, as Odinet explains, Wells Fargo and other lenders targeted African-American borrowers for refinancing. Lenders referred to subprime loans made in minority communities as “ghetto loans” and to borrowers as mud people, people who do not pay their bills, and people with bad credit. Some lenders used biblical names to attract religious borrowers and even held events at black churches to try to sell the loans as good deals, even though they were anything but.

---


5. Adams, *supra* note 3, at 575. These are my conclusions, not Professor Odinet’s. In fact, he appears to question some of these assumptions in his conclusion. See Odinet, *supra* note 3, at 158.


10. *Id.*

11. *Id.*

12. *Id.*
By the time the crisis hit in 2008, fifty percent of all loans made to African-American borrowers were subprime, and African-American borrowers were 2.4 times as likely as white people to be in a subprime loan. This was true even though many borrowers were equally creditworthy. As a result, the negative effects of the crisis on acquired wealth was felt disproportionately on families of color. While the average white family saw an eleven percent drop in wealth as a result of the crisis, in the same period African-American families saw wealth decline by thirty-one percent and Hispanic families by forty-five percent.

On the question of how and to what extent the financial crises robbed wealth from the middle class, particularly from middle class communities of color, Professor Odinet’s book is the absolute authority. As such, it has been a real asset to current work, including my own with Professor Foohey, on how debt structures in communities of color exacerbate the wealth gap. But also offers much more. It is worth reading for anyone, as one reviewer said, “with a mortgage.”

Foreclosed discusses the effects of the crisis on communities of color, but also answers many lingering questions about the curious way in which all homeowners were treated during the crisis. It also asks and answers the critical question of whether the problems that occurred during the crisis, which crashed the entire global economy, have been resolved. Spoiler alert as to that last question: the answer is no. We could be setting ourselves up for yet another crisis of the same or greater magnitude.

As Foreclosed’s subtitle suggests, the book’s primary contribution is its explanation of the magical mystery world of mortgage servicing. The portions of the book dedicated to this topic explain so much about why homeowners were ignored, why the home loans leading up to the crisis were so bad to begin with, how the many hands that touched the average mortgage got paid, and how so many cottage industries profited from the whole hot mess.

I knew a fair amount about this topic before I picked up this book. I was practicing law in our clinic at the University of New Mexico School of Law around the time the financial crisis hit. Having come from the corporate

13. Id. at 22.
14. Id.
15. Id. at 37.
16. Id.
17. ODINET, supra note 3 (back cover, comments of Rashmi Dyal-Chand, Professor of Law, Northeastern School of Law).
18. Id. at 109–59.
19. Id. at 153–59.
20. Id. at 40–61.
21. Id. at 43.
22. Id. at 15–39.
23. Id. at 50–61.
24. Id. at 94.
work-out world before academia, there were several things about the “let’s make a deal” world of loan modifications that did not square either with my former experience as a commercial bankruptcy attorney or with my experience with opposing counsel.  

First, lenders did not really want to make a deal. This was true even when it was clear that the foreclosure would be a blood bath, perhaps generating fifty percent or even less, but a feasible modification could result in a much bigger payoff to the lender. Second, lenders’ lawyers did not seem to have any authority. They could not do the basic math on the modification benefits or perhaps were simply reluctant to do so. The final realization that they would play no part in any future work-out for a clinic client was that many could not even provide a payoff figure. I recall being given an 800 number to call. Obviously, the relationship between lenders (or perhaps it was actually the servicer, I now know) and their attorneys was no ordinary attorney-client relationship. The lawyers appeared more like decoys, time-wasting middlemen who would ultimately add weeks or months of delay to an already tragic process.

Time after time, our clients’ paperwork was lost, and we were asked to resubmit. Time after time, clients were put on three-payment, artificially low modification plans and then foreclosed immediately thereafter. Time after time, clients were foreclosed upon in the middle of a work-out or modification. I now know that this was an actual “thing” with an actual name: dual-tracking. In some cases, perhaps our least favorite, our clients’ status was neither foreclosure nor a path to ownership but some odd never-never land of in-between. One couple vacated as requested and then filed for bankruptcy to relieve themselves of their deficiency claim. When trying to buy a home four years later, they were informed that the bank had never foreclosed. This is why I tell anyone being foreclosed to “stay put until they come for you.”

If you are wondering whether to read a book about something that happened over a decade ago, and wondering if we should care about this relic of history, the answer is a resounding yes. Very little of substance has changed on the regulatory front. Indeed, if anything like the 2008–2009 recession ever happens again, we will know exactly what to expect. We will know because what happened before will likely happen again, as Professor Odinet explains.

So, what exactly did happen? As most of us know, the 2008–2009 financial crisis, also known as the Great Recession, caused endless pain to the economy as a whole, but few of us know what it was about the current

25. I primarily represented borrowers in out-of-court workouts and Chapter 11 bankruptcies.
26. Id. at 6, 50 (noting that this happened primarily because of understaffing).
27. See id. at 1, 39.
28. Id. at 44, 50.
lending scheme that allowed something this big to happen, with so little
warning to those who could have prevented it.

Lead up to the Crisis

While the growth of mortgage securitization led to the crisis, many
other structural changes in how Americans obtained mortgage loans were
already in place. A long while ago, Americans borrowed from local banks
and paid that same lender back over the course of the mortgage. If a bank
kept that loan on its books as an asset—"keeping its own paper"—there
was a strong incentive to lend only to borrowers who could pay back their
mortgages. Things changed when mortgage originators began selling their
loan portfolios, rather than holding on to their originated loans. This pro-
cedure split the origination from the risk, and there was an incentive to do
more loans that were not as financially sound, more loans that might not
geret paid back. Originally in the 1970s, these loans were sold to Freddie
Mac and Fannie Mae to help create liquidity so perspective homeowners
in parts of the country where banks had less cash could also buy homes.
Fannie’s and Freddie’s underwriting standards—or analysis of the ability
to repay—were sound. These standards did a good job of measuring the
likelihood of borrower repayment. This original separation of origination
from risk did not result in a slew of mortgages that people could not repay.

In the 1980s and 1990s, as other institutions like Wall Street firms began
buying mortgage loans, underwriting became more lax. Originators had
less concern about a borrower’s ability to repay. The loans could be sold to
some group of investors, regardless of the risk. People with lower credit
scores could now get loans, but these loans also carried higher interest
rates, thus exacerbating the likelihood of default.

More and more mortgage loans were bundled and turned into invest-
ments through the process of securitization. These investments found

29. See id. at 1 (definition of securitization), 25–31 (description of securitization).
30. Id. at 16.
31. Id. at 6 (reference to the movie It’s a Wonderful Life).
32. Id. at 27 (describing how risk was offloaded onto third parties).
33. Fannie Mae and Freddie Mac are government-sponsored enterprises (GSEs). They
are private companies sponsored by the government, and, while they are separate com-
panies that compete with one another, they have the same business model. They each buy
mortgages on the secondary mortgage market, pool those loans together, and then sell
them to investors as mortgage-backed securities in the open market. Id. at 16. 28. Fannie
Mae buys mortgage loans primarily from commercial banks, while Freddie Mac primar-
ily buys mortgage loans from smaller banks, sometimes called “thrift” banks. Together
the two companies keep money moving through the U.S. housing economy, which allows
more people to buy homes through this increased liquidity. Id. at 16, 28.
34. Id. at 17–22, 25–31 (describing risk separation and securitization).
35. Id. at 27–28.
36. Id. at 17.
37. Id. at 28.
their way into the asset portfolios of powerful Wall Street banks and retirement funds all over the world. The loan documents, the note, and the mortgage were placed in a trust for the benefit of investors who knew precious little about their investments. Investors were placed in classes or tranches. For slightly less interest, a senior class of investors could get paid first. For slightly more interest, mezzanine investors could get paid second, and, for an even higher interest rate, an investor group would agree to be paid last out of the stream of payments. As long as most homeowners were paying their mortgages, all tranches got paid. Servicers, the mysterious middlemen upon which Foreclosed ultimately focuses, took their cut of the payments and passed the rest on to the trust for distribution to investors. All was well, until it was not.

Lenders had a voracious appetite for new loans and began making loans to people who could not afford them. Part of the reason why many of the weaker loans were unaffordable was because they were incredibly expensive for borrowers. Many included adjustable interest rates that were designed to go up, regardless of what the prime interest rate was. These mortgages would carry a low or teaser interest rate for a short time and would then shoot up, sometimes drastically to double digits like thirteen percent or eighteen percent or more. As expensive as they were for borrowers, they were a gold mine of up-front fees for lenders and investors. As Professor Odinet explains, these loans were designed to fail, and fail they did. Prior to the crisis, as housing values continued to go up, homeowners could avoid default after an interest rate spike by refinancing. A bubble of overvalued homes was created and then began to deflate before

38. Id. at 27.
39. Id. at 26.
40. Id. at 29–30, 44–45.
41. Id. at 29–30.
42. Id.
43. Id. at 44–45.
44. Id. at 40–43.
45. Id. at 28.
46. Id. at 18–19.
47. “The prime rate is an interest rate determined by individual banks. It is often used as a reference rate (also called the base rate) for many types of loans[,]” Board of Governors of the Federal Reserve System, https://www.federalreserve.gov/faqs/credit_12846.htm (last visited Oct. 8, 2019).
48. Odinet, supra note 3, at 18. Professor Odinet explains that, after the teaser rate expired, “the interest rate would spike, causing the monthly payments to increase dramatically—often doubling.” According to Odinet, “By one account, [some] interest rates would start around 18 percent but then jump after a period up to nearly 30 percent.” Id.
49. Id. at 18–19.
50. Id. at 22.
51. Id. at 18.
popping entirely. Once those values began to drop back down or correct, refinancing was no longer available. The loans were incredibly weak in their economic substance, but, because of the opaque way in which securitization worked, investors never really knew what they were buying. While this background is provided in the book, in readable terms, the rest of the book, described below, covers new territory.

Yet There in the Middle Sat the Servicer

Prior to Foreclosed, few of us knew why the system in place was for dealing with defaulted mortgages was so weak. The book’s primary contribution is the way in which it pulls back the curtain on the middlemen in the mortgage world—mortgage servicers and their various agents. The average person did not even know that these middlemen existed when the crash hit, and the servicers themselves could hardly have been less prepared for the financial crisis. Rather than simply collecting and passing on payments, and checking on taxes and insurance escrows, now servicers had to deal with hordes of homeowners in crisis.

The mortgage servicer is the homeowner’s only contact person when the homeowner needs to talk about her mortgage. And servicers were overwhelmed. They were poorly regulated and thinly capitalized going into the crisis. They lacked well-trained staff and the financial ability to hire more well-trained staff. Most servicers hired offshore or overseas staff who made minimum wage or less and who were not the least bit prepared to provide high-touch counseling to tens of thousands of defaulting homeowners.

Servicers had a tremendous amount of discretion in determining whether to try to work out a loan in default (by doing a loan modification) or simply foreclose, but little time, energy, or incentive to actual modify loans. In addition to being deeply short-staffed, servicers perceived a conflict of interest to exist among the various tranches of investments in the trust, which was convenient given their lack of resources to do high-touch modifications.

52. Id. at 32–33.
53. Id.
54. Id. at 30–31.
55. Id. at 45.
56. Id. at 40–61, 93–105.
57. Id. at 2.
58. Id. at 40–45, 122–23.
59. Id. at 40–45.
60. Id. at 42.
61. Id. at 122–23.
62. Id. at 53.
63. Id. at 45–46.
Additionally, servicer contracts required servicers to pay investors even when they were not receiving payments from homeowners.\textsuperscript{64} They were also required to pay even when they were allegedly attempting to do a loan modification or work-out.\textsuperscript{65} This fee structure added to the lack of incentive to modify bad loans. It also caused near-insolvency among servicers. At one point, for one large servicer, OCWEN, its trust obligations ate up about forty-five percent of its total assets. By 2011, at the height of the foreclosure crisis, seventy-nine percent of OCWEN’s assets were being eaten up in trust obligations.\textsuperscript{66} OCWEN announced that, unless they could speed up foreclosures or otherwise engage in loss mitigation, it would need to breach all its service obligations and go bankrupt.\textsuperscript{67}

There was one way out however, and that was to transfer the serving rights to bad loans to another servicer, as Odinet explains. These transfers were confusing to homeowners, who thought their loans were sold and sold and sold again, but it was not the loans being sold. It was the servicing rights.\textsuperscript{68}

Whatever their name, these transfers created more anguish for homeowners, more delays, new contact persons, starting over in the already impossible-to-understand modification process. Homeowners in the middle of a modification, who had already spent hours on their paperwork, would be notified that their loan servicing rights were sold. The homeowner would need to start all over again. This process could happen to the same family numerous times. It interfered with making a deal and led to a flood of foreclosed homes on the market. As depicted by the movie \textit{The Big Short},\textsuperscript{69} entire neighborhoods were left vacant and decaying.\textsuperscript{70}

### The Mysteries of MERS

When foreclosure happened, more chaos ensued. As a lawyer working in the trenches at that time, I recall the chaos caused by the Mortgage Electronic Registration System (MERS). MERS is a database created by the mortgage banking industry to deal with securitization.\textsuperscript{71} MERS supposedly tracks ownership and servicing rights for all mortgages that are originated in the United States, but one thing that MERS did not do is keep track of the paperwork that a lender needs to foreclose, namely the original note and the mortgage.

\begin{itemize}
  \item \textsuperscript{64} Id. at 54–57, 123.
  \item \textsuperscript{65} Id. at 123.
  \item \textsuperscript{66} Id.
  \item \textsuperscript{67} Id.
  \item \textsuperscript{68} Id. at 3.
  \item \textsuperscript{69} \textit{The Big Short} (Paramount Pictures 2015).
  \item \textsuperscript{70} Id.
  \item \textsuperscript{71} Odinet, supra note 3, at 80.
\end{itemize}
As Odinet explains, the creation and use of MERS led to the loss and destruction of loan-related paperwork and information. A typical securitization involves between four to five transfers. Securitization transfers through land records created administrative chaos, yet MERS was created to lower the cost of doing business for mortgage servicers. Under the MERS system, MERS owned all the mortgages across the country. Despite relatively obvious problems in retrospect, the entire mortgage market embraced MERS wholeheartedly.

The MERS system changed the way loans were owned. Under the MERS system, the lender was entitled to seek payment on the debt, but MERS actually owned the collateral. This approach split up the debt, or promissory note, and the mortgage. It was a troublesome development given that the mortgage’s existence was dependent on the debt.

Eventually, the MERS system broke down. The lender owned the debt, MERS owned the mortgage, and the mortgage servicers/mortgage middlemen (who owned neither the debt (note) nor the mortgage) actually conducted the foreclosure. Numerous ownership transfers between parties left many foreclosure cases completely defective, as MERS failed to keep track of promissory notes and transfer documentation.

Additionally, under the MERS system, endorsements on the original promissory notes were inconsistently obtained, and it was not uncommon for promissory notes to get completely lost in the process.

---

72. *Id.* at 92.
73. *Id.* at 79.
74. Odinet notes that “legally [the] act of recording the mortgage assignment was typically not necessary, but that finer point seemed to have escaped these supposedly sophisticated financial firms.” *Id.*
75. *Id.* at 80.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* Under the MERS system, MERS was labeled as the lender’s “nominee.” Odinet explains that “a nominee is an ambiguous term with no foundation, either under law or in the mortgage contract, that would reveal the precise nature of the relationship between the lender (who [held] the right to enforce the debt) and MERS (who [held] the security interest in the home).” *Id.*
80. *Id.*
81. *Id.* at 81.
82. *Id.* at 81–82.
83. *Id.* at 82.
84. *Id.* According to Odinet, “The securitization process was so fast and furious—particularly in the subprime, private-label market—no one cared to pay any attention to keeping the paperwork together or making sure that long-standing principles of commercial law were being followed.” *Id.* at 83.
85. *Id.*
notes were destroyed, leaving only a scanned copy. Yet the original note is typically required to foreclose. Moreover, there is only one original note—never two or more—because the note is an instrument much like a check.

All this lost paperwork caused foreclosing servicers’ attorneys to engage in “all kinds of legal acrobatics to try and prove they had the right to foreclose on people’s homes.” When mortgage servicers lacked the necessary documentation for foreclosure, they sometimes produced documents called allonges to prove an endorsement had been obtained. The authenticity of these documents was frequently called into question.

In other cases, mortgage servicers would suddenly come up with necessary foreclosure documentation. According to Odinet, another way mortgage servicers worked around the “legal roadblocks” presented by MERS was through a practice known as “robo-signing.” The practice of robo-signing involved servicer employees signing affidavits asserting the servicers’ right to foreclose without conducting any research as to the proof of these assertions.

MERS and robo-signing presented problems for homeowners because homeowners could not identify the correct party to pay, which sometimes meant homeowners would be asked to pay twice. In other instances, foreclosure actions were brought against homeowners who owed no debt at all. These problems, along with the supreme non-responsiveness of servicers to homeowners, and a refusal of MERS to disclose any information about the ownership of home loans, led to foreclosure chaos.

Our clinic at the University of New Mexico School of Law saw some bizarre examples of these “attorney gymnastics” in our cases. For instance,

86. Id. MERS’s failure to keep adequate track of promissory notes was problematic during foreclosures because “[u]nder the [Uniform Commercial Code], without the ability to enforce the note, one cannot enforce any accompanying mortgage.”


88. Odinet, supra note 3, at 83.
89. Id. at 85.
90. Id. at 86.
91. Id.
92. Id. at 87. According to Odinet “These became known as ‘tah-dah indorsements’ because they arrived just in the nick of time.” Id.
93. Id. at 88.
94. Id.
95. Id. at 88–89.
96. Id. at 89–90.
97. Id. at 90.
98. Id. at 90–91. These issues created problems with “clear title to property” because oftentimes it would not be documented that a homeowner had paid off a loan.
in *Bank of New York v. Romero*, the lender accidentally produced photocopies of two totally different notes, calling the authenticity of all the documents into question. It was a circus.

The New Mexico Supreme Court ultimately found the note in this case faulty and held that, while the mortgage follows the note, the note does not follow the mortgage. In other words, more than a mortgage is needed to foreclose; a legitimate note is also necessary. Moreover, the court held that MERS can only transfer what it has and that no other lender (so far) claims an interest in the foreclosure does nothing to prove a case.

In a subsequent case in our clinic, *Bank of America v. Quintana*, the New Mexico Supreme Court had an opportunity to weigh in on the general issue of robo-signing and phony documentation. The servicer in *Quintana* was First Financial Loan Servicing, but, after default, LaSalle Bank foreclosed, claiming to be the trustee of a packet of securitized loans. LaSalle attached a note and mortgage and claimed holder-in-due-course status, which, if true, would cut off borrower defenses such as fraud or misrepresentation. A lender can only be a holder in due course, however, if that lender did not know about any defaults at the time it received a transfer of the note.

Two endorsements were on the note, but neither was dated. A month after LaSalle started its foreclosure action, Bank of America filed an amended

---


Possession of a note specially indorsed to another does not by itself demonstrate that the possessor is entitled to enforce the instrument Demonstration of the actual “transfer” is required.

Bank “servicer’s testimony from servicer records when the records are not even attached and the records were regarding a time frame when the servicer was not servicing do not meet evidentiary muster because hearsay, no business record exception for the testimony instead of the records themselves, and no demonstration of personal knowledge by the testifying party.

MERS can only transfer what it has. What MERS had was a nominal agency to the original Lender in the Deed of Trust. MERS had no interest in the Note.

The deed follows the note The converse is not true. The note does not follow the deed.

The “no one else claimed it so it must be ours” argument (so logically unsounds, it kills me, but I hear it all of the time) is annihilated.

*Id.*

100. *Id.*

101. *Id.*


complaint saying *it* was the new assignee of the note and mortgage, with a retroactive assignment back to the time right after the loan was closed. Presumably, Bank of America did so to show it took the note before default or with no notice of default, thus preserving its holder-in-due-course status. Yet, Bank of America had received its interest in the loan way before LaSalle foreclosed, so why, the court wondered, did the wrong party foreclose in the first place?

Ms. Quintana alleged lack of standing again. Relying on *Romero*, the court found that Bank of America lacked standing and denied the foreclosure. The court found that Bank of America was not the proper holder of the note because it had not shown how it got the note, or any real chain of title. The affiant on the lender affidavit, Steven Barrett, claimed to be familiar with documents, but the court found otherwise. In reality, Barrett had no first-hand knowledge of anything, and thus the lender could not prove standing through Barrett. The court also determined that, according to Fannie Mae records, Fannie Mae actually owned this loan and was suing Merrill Lynch for lack of underwriting standards. In light of all of this, foreclosure was denied. These examples are but a few of the chaos that ensued.

Together these cases helped clean up what was a very messy foreclosure practice at the time in New Mexico. Nevertheless, as Odinet points out, the time and money needed to defend these cases is unthinkable. Most borrowers simply could not engage the process this way.104

**Layers of Nefarious Agents and the Resulting Break-in Foreclosures**

As a person who has represented borrowers either in private practice or in a law clinic for over three decades, my favorite parts of *Foreclosed* relate to the direct experiences of homeowners. As mentioned previously, my clinic students and I lived these experiences with our shell-shocked clients. One thing neither we, nor our clients, experienced was the crimes and other nefarious acts of servicers’ agents that Odinet refers to as “break-in” foreclosures.105

Odinet offers a description of what may be the most bizarre underbelly of the foreclosure crisis: the fraudulent and criminal acts of servicers’

---

104. Odinet, *supra* note 3, at 86–90. When we first started taking foreclosure cases in the clinic, we noted that there were hardly any lawyers for borrowers. At the same time, the law firms handling foreclosure cases on behalf of lenders in our area, sometimes known as foreclosure mills, handle hiring ten to twenty law students at a time to handle the massive cases. This meant that at any given moment, twenty to thirty percent of the upper-class students at our Law School were learning how to bring foreclosure actions. We eventually created an externship to trade students to handle the other side, but the lack of legal services was clearly present. As they say, possession “of a lawyer” really is ninety percent of the law. What we saw in practice was an incredible lack of legal services for those defending foreclosure actions.

105. *Id.* at 93–105.
agents. Servicers were short-handed and relied on third-party property contractors to monitor and clean out homes in foreclosure. The cottage industry of mortgage field services grew exponentially. Two or three companies could provide these services, and contractors could hire subcontractors, and so on. As the chain grew, the care that went into the work declined. The incentives and payment structure of these tenuous relationships, combined with lack of guidance, unfettered discretion, and lack of reliable background checks led to incredible abuses by these third-party servicer’s agents. None of these agents had privity of contract with homeowners, and thus none owed any duty directly to homeowners. No one was checking their work.

There are many stories of break-in foreclosures in the book; here are a few. In one case, Mimi Ashe, a recent widow living in Truckee, California, came home to discover that “Rolex watches, home videos, and, most tragically, the urn containing the remains of Mrs. Ashe’s late husband, Robert” had been taken from her home. In another example, an Atlanta homeowner was arrested when he tried to enter his own home after a Safeguard contractor locked him out. In this Atlanta case, the homeowner was not even being foreclosed. The contractor actually went to the wrong house. Renters faced similar abuses. Nicole Corum came home to her rental house and discovered that all of her belongings were gone, including her seven-year-old son’s toys. The place was also torn to pieces. And she was current on her rent.

Servicers displayed a complete lack of care when conducting background checks on the third-party contractors who were responsible for securing the property. In one case, a contractor made an incorrect determination that a home had been abandoned. He then helped himself to a
laptop, an iPad, and several bottles of wine. Perhaps not surprisingly, this particular contractor “had been arrested six times in that state for an array of crimes including burglary and robbery, as well as attempting to sell stolen goods.”\textsuperscript{119} In another case, it was discovered that a contractor was a registered sex offender.\textsuperscript{120}

Solutions

Odinet suggests several solutions to this incredibly complex morass; before reviewing them, I must confess to feeling a bit defeated. Under the current U.S. economic realities, coming up with meaningful reform will be difficult. That does not mean we should give up, but it does mean Odinet’s solutions may prove unrealistic for the moment. Where his solutions fall short, the failure is on the current economic system and structure, in which large lenders and other parties’ control most of our country’s wealth.\textsuperscript{121} Given this political and financial reality, Odinet has done his best to suggest meaningful reform.

The crisis led to the passage of the Dodd-Frank Act\textsuperscript{122} and thus to the creation of the Consumer Financial Protection Bureau (CFPB). Because the Dodd-Frank Act and the resulting CFPB were put in place precisely because of the financial crisis, one would certainly think that those measures would address and to some extent fix the problem. In some ways, these new laws and the new regulatory body did address the problem, but the problem kept morphing and changing.

Servicers were regulated if they were divisions of banks, which was fairly common at the time. Some servicers were not banks, however, but were non-banks, entities that Odinet (and others) call “shadow banks.”\textsuperscript{123} Unlike real banks, shadow banks were not and still are not well-regulated. Indeed, they remain outside the realm of much of the regulation designed to protect us from another crisis. Shadow banks escape most forms of

\textsuperscript{119.} Id. at 100–01.
\textsuperscript{120.} Id. at 101.
\textsuperscript{121.} As self-styled plutocrat and billionaire Nick Hanaur, who owns six houses, a yacht, and a private plane, explains:

At the same time that people like [me] are thriving beyond the dreams of any plutocrats in history, the rest of the country—the 99.99 percent—is lagging far behind. The divide between the haves and have-nots is getting worse really, really fast. In 1980, the top 1 percent controlled about 8 percent of U.S. national income. The bottom 50 percent shared about 18 percent. Today the top 1 percent share about 20 percent; the bottom 50 percent, just 12 percent.


\textsuperscript{123.} Id. at 7–8, 123–26.
consumer protections, including the Truth in Lending Act, the Fair Debt Collection Practices Act, and pretty much every law protecting consumers.

Moreover, shadow banks are on their ways to taking over most mortgage servicing in the United States. The other 93.4% of mortgages were serviced by banks. By 2015, this percentage had increased to about 25% with some estimates as high as 31% of all mortgages. Indeed, among the mostly subprime, private-label mortgages, shadow banks service an alarming 74% of loans. This means that banks are slowly moving their mortgage servicing off-site. This transfer makes some degree of economic sense. Banks are more heavily regulated, and thus it is more costly for them to service loans than for unregulated servicers.

There are costs to this transition, however. Banks have a social contract with the public. They serve the community, and most work hard to maintain a decent reputation. Shadow banks, on the other hand, are owned by private equity and are concerned solely with profits and cost-cutting. They operate with low margins and as cheaply as possible.

The other big difference between banks and non-banks is that banks must retain reserves for their future obligations and servicers need not. Given that non-bank servicers are still undercapitalized, these firms are in no way ready to deal with another downturn. If we have one, things will roll out in exactly the same way. The vulnerability of the economy and of borrowers remains.

Odinet also addresses how to better regulate servicers. The current system, Odinet explains, is both overly complex and underdeveloped. This is the worst form of regulation because compliance is expensive but provides few benefits. To address these deficiencies, Odinet suggests a federalism model, which would incorporate consumer and prudential policies, without impeding the rights of states to further regulate.

He suggests federal licensing requirements that include safety and soundness standards, created jointly by state regulators and relevant federal agencies. These licensing requirements would be similar to the requirements mandated for mortgage originators, but the requirements for

124. Id. at 7.
125. Id. at 8.
126. Id.
127. Id. at 123.
128. Id. at 122–23.
129. Id. at 109.
130. Id.
131. Id. at 127.
132. Id. at 127–29. Odinet’s proposal for federally regulating mortgage servicers is based on the success of the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE) Act and the Nationwide Multistate Licensing System (NMLS), a system of license requirements for mortgage originators.
servicers would also include a prudential component.\textsuperscript{133} This prudential component would force servicers to also have reserves, given their serious liquidity problems.\textsuperscript{134} Odinet first suggests using the Proposed Regulatory Standards for Non-Bank Mortgage Servicers as model for enacting a prudential standard.\textsuperscript{135} This would obviously make servicing more expensive and could even shift some of the servicing back to banks. In any case, the solution to servicers’ malfeasance is to require them to be more financially sound.

Second, Odinet proposes that after the licensing and prudential standard requirements are federally enacted, model state legislation should be created to meet and operationalize these requirements for state-regulated servicers.\textsuperscript{136} All mortgage servicers could be required “to go through NMLR [the Nationwide Mortgage Licensing and Registry] for registration, renewal, amendment, and surrender processes.”\textsuperscript{137} Requiring all mortgage servicers to register with NMLR would help regulate nonbank mortgage servicers that do not have a connection to a federally chartered bank.\textsuperscript{138}

Third, Odinet suggests that a standing committee be formed to govern the mortgage servicing licensure system.\textsuperscript{139} It could operate in much the same way that Uniform Commercial Code is curated on an ongoing basis.\textsuperscript{140} This committee could respond in real time to the dynamic and constantly changing nature of the mortgage servicing industry in a coordinated way.\textsuperscript{141}

Odinet also addresses the problem of lack of access to and increased cost of mortgage credit for black and Latino borrowers.\textsuperscript{142} Mortgage servicers control who has access to credit because mortgage servicers charge more to service loans that are considered higher risk.\textsuperscript{143} Mortgage servicers are hesitant to take on higher-risk loans because of the potential costliness of servicing delinquent loans.\textsuperscript{144} When mortgage servicers do service

\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id. Areas of prudential regulation under the Proposed Regulatory Prudential Standards for Non-Banks include “capital, risk management, data standards, data protection, liquidity, corporate governance, transferring servicing rights, and change of control matters.” Id. at 129–30.
\textsuperscript{136} Id. at 130.
\textsuperscript{137} Id. at 127, 130.
\textsuperscript{138} Id. at 130.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id. at 130–31.
\textsuperscript{142} Id. at 119.
\textsuperscript{143} Id. Since these same borrowers are also often being charged higher interest rates for the risks underlying their loans, this practice is double-dipping and doubly harmful to minority borrowers.
\textsuperscript{144} Id.
higher-risk loans, the servicers pass these added costs back to borrowers.145 This practice is especially problematic for communities of color because African-American and Latino individuals tend to have lower credit scores, which affects what loans they may qualify for.146 In other situations, black and Latino borrowers may have satisfactory credit profiles, but are still deemed a credit risk.147 To combat this problem, Odinet suggests providing government subsidies to mortgage servicers who manage loans given to borrowers who are deemed high-risk.148 Government subsidies would incentivize mortgage servicers to accept these types of loans, which could increase access to credit for underserved borrowers.149

Odinet also suggests ways to reform the standard Fannie Mae- and Freddie Mac-approved mortgage forms to eliminate the right to inspect the home at any time without notice to the homeowner, found in clause 7 and, even more critically, to revise clause 9. Clause 9 currently shifts property rights related to physical control over the home to lenders before a foreclosure occurs.150 These rights include doing whatever the lender deems necessary to protect a lender’s collateral. These premature property rights have led to many abuses. They arise not just when a homeowner misses a payment, but also when other, non-monetary defaults occur, such as leaving the home vacant for some period of time.151

Odinet notes the irony that, in some ways, renters have better rights than homeowners and suggests invoking a “breach of the peace” standard similar to that which applies to repossessions under Article 9 of the Uniform Commercial Code.152

He then chronicles how unsuccessful most homeowners have been when pursuing servicers for their agents’ nefarious acts. In response, he suggests a model law that would create a tailored cause of action imposing liability on servicers’ agents, which would create an affirmative and broad duty of good faith upon servicers and their agents.153 He also suggests a robust system for credentialing and checking the background of contractors, and standards for making sure servicers’ contractors have adequate training that would allow them to secure a foreclosed home with “a careful hand.”155

145. Id. at 120.
146. Id. at 119.
147. Id. at 120.
148. Id.
149. Id.
150. Id. at 132–36.
151. Id.
152. Id. at 135.
153. Id. at 146.
154. Id. at 102.
155. Id.
Odinet also suggests solutions to the MERS morass to ensure that lenders have their paperwork in order before they sue. It is remarkable that lenders do not already have to have their paperwork in order before they sue and, as a result, still get away with shoddy paperwork in some courts.

Conclusion

The conclusion of *Foreclosed* ties the mortgage foreclosure debacle to the much broader and deeper problems underlying the financial services industry as a whole. It is a useful, if not depressing, guide to all that has been dismantled since the 2016 election. This conclusion points to but does not outright acknowledge that the wealth structure of our country, and the campaign contribution rules, will likely need to change before significant reform can occur.

I hope that this prediction of Wall Street and congressional inaction is unduly pessimistic and that the prospect of another crisis will catapult lawmakers of all stripes into action. In any case, the book *Foreclosed* is a spellbinding read, and I recommend it to anyone who cares about justice in America, as well as to anyone who cares about the stability of our economy.

156. *Id.* at 147–51.
157. *Id.* at 152–59.
This article explores the Low-Income Housing Tax Credit (LIHTC) program, which, while it has become the primary and most successful federal program for producing new units of affordable housing, is not without its faults and criticism. One critique of the program is the “misapplication problem.” The standard federal rules of the LIHTC program require that twenty percent of the project’s units be affordable to households making at or below fifty percent of the area median income (AMI) or that forty percent of the units be affordable to households making at or below sixty percent AMI, and the rent for such units should be restricted so that households pay no more than thirty percent of their gross income for housing. As a result, the LIHTC program typically produces housing affordable to households ranging from thirty percent to sixty percent AMI. Many LIHTC projects are developed in areas where with a surplus of housing units at the same price point, rather than being developed in communities of opportunity, where housing for households ranging from thirty percent to sixty percent AMI is less likely to exist.

As the author explains, the LIHTC program is administered by the states. Each state receives an annual per capita allocation of tax credits, which it then awards to private real estate developers through a competitive process. Awards are based on a proposed project’s score under the state’s “qualified allocation plan” (QAP). The federal statute authorizing the LIHTC program requires states to enact a QAP and provides ten factors that each state must incorporate into its project selection criteria: (1) project location, (2) housing needs characteristics, (3) project characteristics, (4) sponsor characteristics, (5) tenant populations with special housing needs, (6) public housing waiting lists, (7) tenant populations of individuals with children, (8) projects intended for eventual tenant ownership, (9) energy efficiency of the project, and (10) historic nature of the project. The statute does not provide explicit direction on how such criteria should

Contributors: Emma Elliott, Reno & Cavanaugh PLLC; Arete “Arlene” Koutras, Windels Marx; Sarah Markenson-Bussel, Klein Hornig LLP; Theresa Omansky, Greenspoon Marder LLP; and Kurt Stiegel, Klein Hornig LLP
be incorporated, and, as a result, states’ QAPs vary significantly in their allocation priorities.

State QAPs fall into one of four categories in terms of how they consider rent differentials when scoring projects that have applied for competitive LIHTCs: (1) rent differential as threshold requirement, (2) rent differential as incentive, (3) clear reference to rent differential with no instrumental relationship, and (4) no clear reference to rent differential. The first category, rent differential as a threshold requirement, describes state QAPs that require projects to demonstrate a rent differential between local market rents and LIHTC restricted rents, with some states actually requiring a ten percent differential between such rents to receive an allocation. The second category, rent differential as incentive, refers to states that incentivize projects to demonstrate that a rent differential exists through their scoring system, although showing a rent differential is not a requirement for receiving an award. The third category, clear reference with no instrumental relationship, is the most common and essentially leaves unspecified the impact and number of points awarded for showing a rent differential. The fourth category, no clear reference to rent differential, applies to QAPs that make no clear reference to showing a rent differential between market and proposed LIHTC rents.

In 2013, the National Council of Housing Market Analysts issued the Model Content Standards for Rental Housing Market Studies (Model Standards), which focus on whether the LIHTC project will be financially feasible based on an analysis of the rent differential issue. Numerous states falling into the third category have integrated the Model Standards into their market study requirements. Under the Model Standards, analysis of financial feasibility includes determining whether the proposed development either constitutes “crowding-out” market rate housing, where the development of non-below-market LIHTC housing in gentrifying neighborhoods could benefit the LIHTC program long-term by preserving affordability in the event of future market escalation, or upgrades housing quality, offering superior amenities as a new LIHTC project regardless of where the project is located (whether it is located in a community of opportunity or a neighborhood in need of revitalization that offers similar rents but in older buildings).

This article argues that the following four obstacles might be encountered by states when trying to address the misallocation problem: (1) lack of state housing finance agency autonomy to determine project locations; (2) federal framework limitations including the failure to require below-market rents (by demonstrating a rent differential) as a default threshold requirement (or explicit advantage) under a state’s QAP; (3) the unavailability of federal subsidies for land costs (which deters building in locations where land costs are high regardless of need); and (4) political opposition from organizations, such as Not in My Back Yard (NIMBY) advocates. It concludes with the recommendation that states revise their QAP criteria to require that LIHTCs be awarded to projects that offer at least a ten-percent rent advantage in order to curtail the misallocation problem.
The State of the Nation’s Housing—2019

Joint Center for Housing Studies of Harvard University


Harvard University’s Joint Center for Housing Studies published its report on the state of housing in the United States in 2019. The report provides empirical data and analysis of the state of the current housing market, demographic drivers, homeownership, the rental housing market, and housing challenges, and it summarizes its findings into several takeaways.

The report explains that while household growth has returned to a normal pace, housing production remains constrained. The housing that is being developed is primarily built for a higher-end market, thereby further exacerbating housing affordability concerns for the middle- and lower-income markets. The cost burden is particularly heavy on renters. The report states that over forty-seven of renter households remained cost burdened, outnumbering the population of cost-burdened homeowners by more than three million nationwide. Finally, the report opines that much greater public efforts will be necessary to close the gap between what families can afford and the cost of producing and providing decent housing.

Going Local to Support Fair Housing: Establishing the Move to PROSPER Housing Mobility Program

Jason Reece, Rachel Kleit & Amy Klaben


In Columbus, Ohio, a unique local housing mobility initiative seeks to meet the community’s needs in the face of dwindling affordable housing resources and federal retrenchment. The initiative, Move to PROSPER (MTP), serves low-income, single women with one to three children under the age of thirteen, who qualify for but do not receive housing assistance. Only twenty-five percent of eligible individuals are able to access housing assistance in central Ohio. In addition, the MTP initiative is unique because, as a nonprofit/private partnership, it relies exclusively on internal subsidies and philanthropic funds for financial support and receives no local or federal government funding.

The authors, who represent the co-founders and program evaluator of the MTP initiative, describe the stages of successfully developing a local housing initiative. In the case of MTP, these steps included (1) engaging the potentially eligible population through focus groups to determine the priorities and concerns of single mothers and their families; (2) building relationships with rental property owners and management entities, social
services providers, and potential funders; and (3) solidifying a local and national advisory committee to guide program design. The authors also discuss challenges and implications of the program to aid others seeking to design local fair housing initiatives. The authors conclude that, by focusing on a local initiative and operating outside the framework of traditional government funding, they have been able to expand fair housing opportunities at a time when it is otherwise challenging to do so.

One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018

Hamutal Bernstein, Dulce Gonzalez, Michael Karpman & Stephen Zuckerman
Urban Institute (May 2019)
(https://www.urban.org/sites/default/files/publication/100270/one_in_seven_adults_in_immigrant_families_reported_avoiding_public_7.pdf)

Public debate about immigration policies has intensified since the 2016 presidential election due to heightened deportation and cuts to refugee and asylee admissions. In October 2018, the Trump administration published a proposed rule altering “public charge” determinations that make it more challenging for immigrants to obtain permanent residency (green card) or temporary visas. The rule looks at certain subjective factors that are believed to indicate a higher likelihood that an immigrant will use public benefits or, in other words, be a public charge in the future, including receipt of noncash public benefits, income level, English proficiency, and educational attainment. Notably, the noncash public benefits that are considered under the rule include receipt of Section 8 housing subsidies and living in public housing. Because of this new rule, immigrant families are avoiding public benefit programs for fear of losing out on a future green card for which they would otherwise (or previously) qualify. Hispanic adults are more than twice as likely to report chilling effects of this rule on their families, with some families refusing to sign up for eligible programs providing critical services like Medicaid or the Supplementary Nutrition Assistance Program (SNAP). The uncertainty of the rule is not only discouraging access to public benefits, but it is also causing psychological problems and long-term effects on the health and well-being of immigrant families. One exception in the proposed rule indicates that children who received benefits will not be considered a negative factor for an adult family member’s future immigration application and refugees.

Data were collected from the Well-Being and Basic Needs Survey of noncitizens ages eighteen to sixty-four with a final sample of 1,950 adults in immigrant families used for purposes of determining effects of the proposed rule. The main findings were that approximately one in seven adults (13.7%) in immigrant families reported chilling effects, while the figure for low-income immigrant families was even higher at 20.7%. A general awareness of the proposed rule was quite high at 62.9% of adults in immigrant families.
Closing the Divide: Creating Equitable, Inclusive, and Affordable Communities

Enterprise Community Partners Regional Affordable and Fair Housing Roundtable (2019)


This article details the regional housing and affordability crisis in the New York City metro area (NYC), where sixty-six percent of households rent housing (as opposed to owning their home). Additionally, it discusses the fair housing challenges facing NYC, and it proposes certain policy priorities to combat the housing challenges in NYC and across the state of New York (“State”).

NYC is the third most segregated city for African Americans and the second most segregated city for Asian Americans and Latinos. Fifty years after the passage of the Fair Housing Act, the promise of fair housing has not been fulfilled because enforcement of fair housing laws are passive and the nature of discrimination has changed over the years. “While housing discrimination fifty years ago was often overt, a literal slammed door in people’s faces, housing discrimination today is often far more subtle and difficult for ordinary home-seekers to detect.” The Trump administration has also rolled back several fair housing gains, including the Affirmatively Furthering Fair Housing (AFFH) rule.

Demand for affordable housing is rapidly increasing, and supply is not keeping up. One issue in the State stems from the reformation of rent-control laws, which allow landlords to automatically increase rent upon vacancy, that is, an “Eviction Bonus,” thereby providing both an incentive for landlords to evict their tenants and a clear path for them to increase rents. Furthermore, once the rental price of a unit is at least $2,774.76 (“Legal Rent”), the unit permanently exits the State regulatory system, and there is no limit to future rent increases.

Some of the proposed policy priorities that would help create more equitable communities in NYC and across the State are highlighted below:

1. **End the Eviction Bonus.** When an apartment is vacated, an automatic rent increase of 20% currently is allowed. This encourages landlords to evict tenants and enables landlords to increase rent, thereby explaining the 49% citywide total increase in stabilized rents above inflation between 2011-2014.

2. **End vacancy deregulation.** Once a rent stabilized apartment reaches the Legal Rent threshold, it should not be permanently deregulated for all future tenants.

3. **Fix the incentive structure surrounding major capital improvements.** When landlords make major capital improvements to apartment buildings or improvements to individual apartments, landlords are allowed...
to increase the rent, which further enables landlords to displace current tenants.

4. Inform tenants of their rights. Tenants need to know their rights when they enter into a lease and what they can do in the event of harassment, displacement, or eviction.

5. Create a statewide Housing Appeals Board (HAB). A HAB should be formed and given the authority to override local zoning decisions if a decision may limit or exclude viable affordable housing from being developed.

6. Encourage increased density and maximize the benefits of Mandatory Inclusionary Housing. Create mixed-income multifamily housing in low-poverty areas in combination with community amenities like public transit, retail, and access to nonprofit services.

7. Increase protections for justice-involved individuals. Expand protected classes to include arrest and conviction records. Other cities, including Seattle, San Francisco, and Washington, DC, have modified their municipal codes to reduce barriers to housing for those with arrest and conviction records. NYC should follow their example.

The Growing Shortage of Affordable Housing for the Extremely Low Income in Massachusetts

Nicholas Chiumenti

New England Public Policy Center, Federal Reserve Bank of Boston (2019)

This report examines the shortage of affordable and available (AA) housing units for Massachusetts’s extremely low-income (ELI) renter households at both the state and local levels. In 2016, there was less than one AA unit for every two ELI renter households. Much of the state’s inventory of affordable housing is at risk of becoming unaffordable to ELI households when subsidies end and the owners of these expiring use units are allowed to raise rents. By 2025, the attached subsidies will expire for 9,110 subsidized units occupied by ELI households in 2016. While most of these units are located in several larger cities and major metropolitan areas, twenty-five smaller cities and towns are also at risk of having all of their subsidized housing expire by that time. Preserving all of the expiring use units—not just those units occupied by ELI households—while adequately growing the state’s subsidized inventory, would come at a substantial cost.

The report suggests that to address the housing needs of ELI households, geographic considerations would allow subsidy programs to take advantage of market differences. In areas where rents are low and the inventory of market-supplied housing is high, rental assistance subsidies
for renter households should be prioritized to take advantage of local market conditions that are favorable to such subsidies, while addressing these areas’ high rates of rent burden. Communities with lower rents are associated with higher rates of rent burden, which suggests that, in some cases, low incomes share the blame for the high rate of rent burden that ELI households experience. Conversely, in areas with less affordable housing stock overall, tax-credit and other supply-oriented subsidies should be more heavily targeted. Finally, the report points out that preserving expiring subsidies in smaller cities and towns will ensure broader access to affordable housing throughout Massachusetts, as many smaller cities and towns are at risk of losing most or all of their subsidized units by 2025.

Improving America’s Housing 2019

Joint Center for Housing Studies of Harvard University

This article provides a snapshot of the current home and rental remodeling market, which is marked by a recent increase in spending by rental property owners to upgrade their units. Following the housing crisis, rental demand has surged, which has prompted owners to invest in substantial upgrades to their units. The steady uptick in house prices in many markets has helped lift improvement and repair spending. However, several market forces may temper the growth in improvement spending. For example, a decline in homeowner mobility—down almost half over the past four decades—will slow the remodeling market because households typically spend more on improvements during their first few years of occupancy. One factor behind declining mobility is an aging population less likely to move (although more likely to spend on home accessibility improvements to their existing homes as they seek to age in place). Additionally, younger would-be first-time home buyers are facing affordability barriers due to recent economic and housing market conditions, which has led to lower homeownership rates among younger households as well.

Estimating the Gap in Affordable and Available Rental Units for Families

Whitney Airgood-Obrycki & Jennifer Molinsky

Joint Center for Housing Studies of Harvard University

This article explores the challenges that low- and middle-income families with children encounter when searching for an affordable, adequately-sized, and safe unit of rental housing. The authors attempt to quantify the
gap in housing appropriately sized for families, focusing on “whether there is a sufficient number of units to meet the demand of renter families at all income levels and across geographies.”

First, the article details the obstacles that families face in their search for appropriate rental housing, including tight supply of affordable units, difficulty identifying suitably-sized units, discrimination in housing searches, and issues relating to safety and quality. Renter households with children typically encounter difficulty finding a suitably sized unit, which for a family requires more than a one- or two-bedroom unit. The recession caused a shift in new construction to smaller apartments and caused an increase in roommate households in units that would otherwise be available to households with children, especially in high-cost urban areas and areas with high student populations. Discrimination against households with children adds to the challenges that families face in searching for rental housing, as do landlords seeking to discourage or deter renter families due to lead-based paint hazards. NIMBYism has also contributed to the lack of construction of affordable rental units for families with children on the assumption that more children will exacerbate overcrowded schools and overburdened local budgets.

Next, the article presents its definitions and methods. As defined in the article, the family size supply gap is the difference between the number of renter households with children and the number of units that are affordable, right-sized, and available. The focus of this article is on three key variables: cost, size, and availability. The article then describes renter families in its sample and examines the family rental housing supply gap. The supply gap is the largest for extremely low income (ELI) renters, especially for two-bedroom apartments, which are in particularly short supply. The authors further examine the supply gap in four major metropolitan areas: Boston, Atlanta, Chicago, and Los Angeles. The article looks to single family rentals (SFRs) as an important source of affordable housing for families. It finds that SFRs make up a substantial share of affordable and available family-sized housing but tend to be concentrated in the southern metropolitan areas.

This article concludes that, in metropolitan areas across the country, there is an insufficient supply of units affordable to low-income renter families, which is exacerbated by imperfect sorting of households by income and household size. For example, higher income renters occupy units that would be affordable to those with lower incomes, and renter families compete with childless households, particularly for two-bedroom apartments, which are in particularly short supply in metropolitan regions across the country. The authors emphasize the importance of increasing the public and private low-income rental supply and providing rental assistance for households in the private rental market. Recommendations include suggesting that communities with inclusionary housing programs consider requiring that a certain share of units be sized for families at two bedrooms and that municipalities consider putting resources into affordable housing
for students or young professionals to reduce some of the competition for housing suitable for families. The authors also suggest that boosting the conversion of SFRs to rentals, which does not require community approval and community support, has the potential to combat NIMBY opposition and increase affordable housing in existing neighborhoods.
Beyond Legal Aid: Transforming How Legal Services to the Poor Are Delivered

Jackie Casey

Lawyers have tremendous power to change people’s lives through legal representation and systemic advocacy. At Beyond Legal Aid (formerly known as the Community Activism Law Alliance) in Chicago, founded by Lam Ho in 2014, a group of lawyers and activists are changing how lawyers and communities work together. The Beyond Legal Aid model of “community activism lawyering” shifts the practice of law from a transactional relationship focused on an individual client/case crisis to a transformative proactive partnership for systemic change. Lawyers serve individual clients, yet, with the promise of preventing future crises, better systems are put in place to address critical community needs.

Our legal system is fraught with gaps. Today, justice is not available to millions fighting for necessary and critical human needs such as affordable housing, fair wages, an education, a life free of violence, and citizenship. Despite this crisis, funding for legal aid dropped by approximately sixty percent in the last decade, as the number of people living in poverty increased, deepening the divide between those who can obtain justice and those who cannot.

By uniting lawyers with activists, Beyond Legal Aid leverages the combined resources of each to achieve a more significant impact than what lawyers or activists working alone can deliver. Beyond Legal Aid’s model is community-located and directed. Lawyers visit clients in their communities at organizations they trust and can more easily access. Lawyers come to understand their clients in the context of the socio-political movements happening in their communities (e.g., protecting affordable housing, immigrant rights, and racial justice) in which their clients are often involved. Beyond Legal Aid partners with community-based organizations that provide space, administrative services, language translation services, and other support so legal services can be delivered cost-effectively.

---

Jackie Casey is a lawyer and the Assistant Executive Director of the American Bar Endowment (ABE). She has dedicated her career to serving in leadership roles with several non-profits working on diverse justice, health, and human service issues. Most recently at the ABE and the American Bar Association, she has helped advance access to justice and improve the justice system through fund development and grantmaking.
Beyond Legal Aid’s partners organize law-driven activism activities in support of the clients’ cases, leveraging its and the partner organization’s resources and expertise to run activism-law clinics focused on issues and challenges faced by many community members. Beyond Legal Aid’s partners create responsive and relevant services by making decisions to best meet the needs of prospective clients, including hours of operation, priority areas of law, eligibility criteria, location, and types of services. This level of responsive service allows the organization to serve clients such as sex workers and undocumented immigrants that federally-funded legal aid programs cannot accept.

Beyond Legal Aid’s mission uniquely combines law and activism. While its lawyers help individual clients, representation is done in partnership with both the client and the community partner, empowering that community and, it is hoped, leaving it with a long-lasting positive change from which others can benefit. Beyond Legal Aid’s attorneys balance individual and class action cases with projects supporting community partners’ activism goals and objectives. As a result, a new paradigm thrives where grassroots activism informs lawyering to create systemic change.

For example, last summer, after a fire occurred on the top floor of an eighteen-unit apartment building in Chicago, the landlord attempted to mass-evict families with as little as ten days’ notice. Beyond Legal Aid worked with its community partner, the Autonomous Tenants Union (ATU), to build solidarity and collective power among the tenants. In addition to defending against the evictions in court, Beyond Legal Aid attorneys helped the tenants form a “tenants union” to obtain relief outside of court as well. Jake Marshall, a tenant union member, described the success of this combined strategy:

Beyond Legal Aid’s services play a crucial role in helping ATU resist evictions, fight gentrification, and build community power. So many people lack access to legal resources. They provided the resources and empowered our community at the same time. In the beginning, a lot of tenants didn’t feel that we could win the ability to remain in the building. They felt defeated and said they were just going to move out. The attorneys listened to us and implemented a legal strategy based on our goals, which included putting our neighborhood more in control of the people who live there. As we worked with Beyond Legal Aid and learned more about our rights, I could see people feeling more empowered.

As a result of the tenant union and Beyond Legal Aid’s work together, they achieved an agreement with the landlord that exceeded both their initial expectations and legal remedies. Altogether, they obtained over $25,000 in waived rent, relocation assistance, and reimbursement for utilities and property damage. The agreement also gave them right of first refusal for yearly leases (even when they did not currently have leases) after the renovation of their units. The tenant union continues to defend its members’ rights collectively, long after the litigation finished.
Organizational Profile

Beyond Legal Aid’s model frequently uses the law creatively to achieve objectives beyond winning cases. It represented SOMOS-Logan Square, a tenants’ union that “brings attention to displacement through actions, protests, media coverage and education,” against a noted developer with a history of eliminating affordable housing. The developer tried to force tenants out by allowing conditions in the building to deteriorate and retaliating against leaders in the tenants’ union. Even after SOMOS and Beyond Legal Aid organized a rally outside the alderman’s office to seek his intervention, the developer refused to negotiate. The union did not seek the organization’s legal help to fight eviction cases; instead, they engaged it to use the legal process to give the tenants a voice and compel the developer to engage with them directly and negotiate with them collectively.

After brainstorming with attorneys Wally Hilke and Kevin Cruz, SOMOS, the tenants’ union, decided to pursue a rarely used litigation strategy that is known to have limited success. Eviction proceedings are expedited in Illinois and often bar tenants from raising affirmative claims. Generally, landlords have a tactical advantage—they can strike first, forcing tenants to be on the defensive as they try to avoid eviction. To achieve the union’s objective, Beyond Legal Aid turned to a little-used provision in the Chicago housing ordinance, a right to sue for injunctive relief requiring the landlord to ensure safe and habitable conditions. Tenants gathered evidence to support an affirmative suit against the landlord, culminating in a motion for a preliminary injunction, which was scheduled for hearing before any tenant’s first eviction trial date. This litigation stalled the eviction process—eliminating the developer’s advantage—and forced the developer to respond to the tenant union’s claims. While the attorneys may not ultimately win the injunction (the case is currently pending), the union met its primary activism goal. The developer was forced to directly and collectively negotiate with the tenants. As Hilke, the lead attorney on the case explained, “[T]he tenants’ union members are seniors, families, and working-class people. They want safe, secure, stable homes, and [they now] know that no developer is above the law. They know that when we fight, we can win.”

In addition to supporting the creation, development, and organizing of tenants’ unions to fight community development that threatens affordable housing and community health, CALA has also advocated for community benefits agreements. Many of CALA’s partner communities are in areas experiencing significant commercial and industrial development, often with the same adverse consequences. With community benefits agreements, community members negotiate both the terms of the construction and investments in the community developers must make. For example, through its partnership with Enlace in the Little Village neighborhood on the west side of Chicago, CALA supported a coalition of organizations and residents against an industrial developer. Concerned about the environmental impact of a multinational corporation’s factory expansion in the neighborhood, the coalition mobilized public and political support to
block the development unless the corporation reached an agreement with the community. CALA attorneys helped the coalition negotiate a community benefits agreement that called for a company funded environmental impact study and commitment to implement findings; the launch of a jobs-opportunity program for residents; establishment of a committee with community and factory representatives to monitor compliance; and a donation of land for use by community youth. The group of approximately twenty community activists, with CALA’s legal support, successfully fought for an investment that will benefit the over 80,000 residents of Little Village for years to come. Additionally, as a result of the campaign’s success, the coalition has become a permanent entity, and CALA serves as ongoing counsel, supporting its work to ensure community influence over development proposals and helping grow its resources and capacity.

Community activism lawyering model is a version of community lawyering created by its founder, Lam Ho, and pioneered by Beyond Legal Aid. Mr. Ho drew on his education, years of experience as a community lawyer, and his time as a community organizer to develop the model. Mr. Ho envisioned a model of lawyering that challenged lawyers to reflect on their power within, a legal (aid) system that lets those with law degrees determine justice for those without and to practice in a way that shifts this power. Community organizing puts those affected by community challenges in the driver’s seat. Community activism lawyering seeks to do the same. When community and movement lawyers are genuinely committed to being led by those most directly impacted, they can help people and communities achieve self-determined goals.

Mr. Ho has a vision for Beyond Legal Aid – to reform legal aid and re-imagine how lawyers and communities work together in service of social justice and social change. By embedding lawyers within diverse community organizations, community-led activism benefits from legal expertise, often required to make substantial progress on housing discrimination, along with issues such as immigration, and domestic violence. In 2018, through its Opportunity Grants program, the American Bar Endowment provided seed funding so that the organization could open two new clinics serving distinct populations for the first time: to assist domestic workers and the Arab American community.

Today, Beyond Legal Aid operates nineteen community-located and directed programs across the greater Chicagoland area. It seeks to expose more and more lawyers and legal aid organizations to the advantages of this model, and ultimately change how legal aid and progressive organizations operate on a national level. Already the ground is shifting. Beyond Legal Aid is working with law schools—Harvard, NYU, Yale, DePaul, and Northeastern—that want to embed students interested in community lawyering into its CALA’s Chicago projects. Through these law school partnerships, the organization is exposing incoming generations of lawyers to this new framework of lawyering, training them in this new kind of practice, and building a talent pipeline. Just eighteen months ago, Beyond Legal Aid
actively sought community organization partners; now, these organizations seek out the organization for support.

Mr. Ho’s commitment to this evolving model is personal. He grew up in an immigrant family that relied on public benefits and soup kitchens when they first came to the United States from Vietnam. The challenges he faced and overcame — like poverty, isolation, and domestic violence — gave him a direct understanding of systemic problems and inequities, and a deeply-rooted sense of responsibility and gratitude. For almost twenty-five years, Mr. Ho has worked with low-income communities as an activist and organizer. He has worked on diverse issues, including same-sex partnerships, disability rights, racial profiling, gay men’s health, and HIV funding, and he has been a direct services provider at an AIDS hospice, to children with disabilities, and at homeless shelters and soup kitchens. In 2005, Mr. Ho went to law school, determined to combine his activism experiences with a legal career focused on bridging the gap between the law and social change.

Mr. Ho describes his motivation for founding what was then the Community Activism Law Alliance and its community activism lawyering model in terms of shifting the power of the law and putting it in the hands of the people. “You can’t discuss access to justice without thinking about how the power of the law and legal system is distributed and restricted, in courtrooms, among and by judges and lawyers, and through statutes and regulations. We are trying to make the operation of law and lawyering more equitable and more grassroots so that the people most impacted by injustice are the ones who are leading. They—sometimes with lawyers at their sides—will be the ones who will change the world.”

Mr. Ho’s choice to be an attorney was driven by the brutality and injustice faced by members of his community when he was growing up and as an adult. While it often seemed that one lawyer could do little to combat the harm he witnessed, that very experience drove Mr. Ho to consider how he would make a difference. These experiences define his work and his vision for Beyond Legal Aid’s activism-based practice, which includes:

- An undocumented victim of domestic violence who Beyond Legal Aid helped to obtained legal status speaks to almost a hundred people about her survival, urging them to join her fight.
- Lawyers work together with grassroots activists to stop a deportation already underway—convincing ICE to land the plane in Texas and return a father to his family.
- Sex workers “coming out of the shadows” at a demonstration, declaring and claiming their human rights and their worker rights.

Mr. Ho said that “the grants we are receiving, especially from a funder like the American Bar Endowment, tell us that our model for a new way of community-based lawyering is resonating with the legal profession.”
Beyond Legal Aid’s successes inspire and energize Mr. Ho because they show the strength, resilience, and creativity of “clients” and their communities in the face of injustice and the passion of the lawyers who listen to and strategize with them so that together they can create social change.

About the American Bar Endowment (ABE)

Established in 1942, the American Bar Endowment (ABE) is an independent, 501(c)(3) not-for-profit public charity. The ABE provides lawyer members of the ABA with a unique way to protect themselves, their families, and their professional endeavors through participation in a range of ABE-sponsored insurance products underwritten by New York Life Insurance Company — with the option to seamlessly give any available annual dividends* they would otherwise receive to the ABE as a tax-deductible donation. In turn, the ABE makes grants that support critical law-related public service, educational, and research programs. The ABE is proud to be a charitable organization powered by generations of lawyers committed to ensuring equal access to justice for all. To learn more about the ABE, please visit www.abendowment.org.

About Beyond Legal Aid

Beyond Legal Aid unites lawyers and activists in a collaborative pursuit for justice by leveraging legal services to benefit the most marginalized communities and individuals. The organization is changing legal aid. We are changing how lawyers and communities work together. Our lawyers work with activists to help their communities access justice and pursue social change. To learn more about Beyond Legal Aid’s work, staff, and leadership, please visit https://www.beyondlegalaid.org.

*Annual dividends are not guaranteed.
Two Steps Forward: Promoting Inclusive Infill Development with Middle Housing by Right and Increased Protections for Tenants

Sarah J. Adams-Schoen

A. Oregon HB 2001 and Middle Housing by Right......................366
B. Oregon’s New Protections for Tenants.................................369
   1. Just Cause Eviction ......................................................369
   2. Rent Stabilization .........................................................371

Seventy years ago, Congress declared that “the general welfare and security of the Nation and the health and living standards of its people require . . . a decent home and suitable living environment for every American family.”1 And yet, the gap between rents and home prices, on the one hand, and what renters and buyers can afford to pay, on the other, continues to grow.2 Over the last few decades, the national median rent has risen twenty percent faster than inflation and the median home price has risen forty-one percent faster than inflation. At the same time, “real median income of households in the bottom quartile increased only 3 percent between 1988 and 2016, while the median income among young adults in the key 25–34 year-old age group was up just 5 percent.”3 Age sixty-five and over rental

Sarah J. Adams-Schoen is an Assistant Professor at the University of Oregon School of Law, where she teaches land use law, local government law, and ocean and coastal law. This article was completed with the assistance of Laurie Hauber, Staff Attorney at the Oregon Law Center, which provides legal help to people struggling to make ends meet on matters related to their homes, livelihoods, medical care, and physical safety against domestic violence.

3. Id. at 1–2.
and homeowner households are also cost burdened. But these numbers fail to convey the human dimensions of the crisis: “Nearly half of all renters can’t afford rent, . . . over half a million Americans are homeless on any given night,” and “[m]ore than 38 million U.S. households have housing cost burdens [that] leave[ ] little income left to pay for food, healthcare, and other basic necessities.”

Part of the contradiction between the lofty goal and the persistent reality stems from a conception of a “decent home” for the American family as a kind of pastoral ideal of single-family detached homes in homogenous suburban neighborhoods. Early (and some more modern) court opinions explicitly recognized segregation of land uses—and implicitly recognized segregation of people—as a legitimate public welfare interest. In the seminal 1926 zoning case *Village of Euclid v. Ambler Realty Co.*, the Supreme Court characterized apartment buildings as “mere parasite[s],” finding that apartments, at least in residential areas, “come very near to being nuisances.” The Court reasoned that the separation of residential, business (including apartments), and industrial land uses promotes the public welfare, by among other things preserving “the residential character of neighborhood[s] and [their] desirability as a place of detached residences.”

In 1974, almost fifty years after *Euclid*, the Court in *Village of Belle Terre v. Boraas* upheld the validity of a local ordinance that defined “family” so narrowly that an owner of a home in the municipality, the entirety of which was zoned single-family residential, could not rent the home to more than two people not related by blood, adoption, or marriage. There, the Court again waxed poetic about exclusionary zoning:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

This idealization of the single-family detached home and of separation of land uses—and, ultimately, of separation of people by income, race, and ethnicity—contributed significantly to the disappearance of a range of housing types that had served a larger demographic of renters and buyers. These housing types are referred to as “middle housing” because they consist of

---

4. Id. at 30.
8. Id.
Two Steps Forward: Promoting Inclusive Infill Development

multi-unit or clustered housing types with densities greater than a lot containing a single residential home and less than a lot containing a large apartment building. Middle housing includes duplexes, triplexes, bungalows, rowhouses with multiple units, small buildings with four to six apartments or condos, and cottage court apartments. These housing types “are classified as ‘missing’ because very few . . . have been built since the early 1940s due to regulatory constraints, the shift to auto-dependent patterns of development, and the incentivization of single-family home ownership.”

In response to these problems, the 2019 legislative cycle in Oregon led to the passage of three bills that address the affordability crisis affecting the state: Oregon House Bills 2001 and 2003, and Oregon Senate Bill 608. This article focuses on HB 2001 and SB 608.

Oregon House Bill 2001 addresses “missing middle” housing by essentially requiring all Oregon cities to allow some form of middle housing as of right in areas that allow single-family homes. In other words, under this new law, the complete regulatory separation of single-family and multi-family land uses at issue in cases like Euclid and Belle Terre is no longer allowed. Although increasing middle-housing types can increase the availability of moderately priced housing in desirable communities and help retain existing diversity in neighborhoods, simply amending zoning codes to allow for middle housing by right will not, on its own, achieve these goals. As discussed below, in addition to providing for middle housing by right, HB 2001 included requirements and resources to help local governments overcome some of the barriers to the development of affordable middle housing.

Additionally, the state addressed affordability for renters head on in Oregon Senate Bill 608. SB 608 amended the state’s landlord tenant law to add a just-cause requirement for landlords to terminate a tenancy and limit the maximum rent increases allowed during a one-year period.

Oregon’s approach to its housing affordability crisis, and in particular its adoption of a requirement that cities and counties allow development of middle housing by right, should be understood within the context of Oregon’s unique statewide, centralized land-use system.14 Under that sys-

12. 2019 Or. Laws ch. 639, § 2(2)-(3) (H.B. 2001); see also 2019 Or. Laws ch. 640 (H.B. 2003) (requiring Oregon cities to analyze housing needs for current and future residents every six to eight years, adopt a housing production strategy within a year of the analysis, and directing the Oregon Housing and Community Services Department to assess regional housing needs for the next twenty years).
tem, a state agency, the Land Conservation and Development Commission (LCDC), oversees the state’s land use program and adopts mandatory statewide planning standards, called “goals,” and cities and counties prepare and adopt comprehensive plans consistent with the statewide goals and enact zoning and other regulations to implement these plans.\textsuperscript{15}

\section*{A. Oregon HB 2001 and Middle Housing by Right}

Oregon’s new missing middle housing law requires local governments to allow one or more types of middle housing, depending on the local government’s population size and whether it is within a metropolitan service district.\textsuperscript{16} Section 2(2) of the law requires cities with populations of 25,000 or more and counties and cities within a metropolitan service district to allow duplexes, triplexes, quadplexes, cottage clusters, and townhouses in all residential zones that allow single-family dwellings and to allow the development of “[a] duplex on each lot or parcel zoned for residential use that allows for the development of detached single-family dwellings.”\textsuperscript{17} Section 2(3) applies the duplex requirement to cities that have a population of more than 10,000 and fewer than 25,000, which are not in a metropolitan service district\textsuperscript{18} The law exempts cities with a population of 1,000 or fewer, lands not within an urban growth boundary,\textsuperscript{19} lands not incorporated and also lacking sufficient urban services, lands not zoned for residential use, and lands that are not incorporated and are zoned under an interim zoning designation that maintains the land’s potential for planned urban development.\textsuperscript{20}

HB 2001 also amended a provision in the state’s urban growth boundary law that required cities with populations greater than 2,500 and counties with populations greater than 15,000 to “allow in areas within the urban growth boundary zoned for detached single-family dwellings the development of at least one accessory dwelling unit for each detached single-family dwelling, subject to reasonable local regulations relating to siting and design.”\textsuperscript{21} HB 2001 added a definition of “reasonable local regulations relating to siting and design” that excludes from such regulations owner-occupancy requirements for either the primary or accessory structure and requirements to construct additional off-street parking.\textsuperscript{22}

\begin{footnotesize}
\begin{itemize}
\item[15.] Or. Rev. Stat. § 197.175; see also Sullivan, supra note 14, at 168–69.
\item[16.] H.B. 2001, 80th Or. Legis. Assembly § 2(2)–(3) (2019); see also Metropolitan Service District Act of 1997, Or. REV. STAT. ANN. §§ 268.010-268.990.
\item[17.] H.B. 2001 § 2(2); see also id. § 2(1)(b)–(c) (defining middle-housing types).
\item[18.] id. § 2(3).
\item[19.] Pursuant to Goal 14 of the statewide planning program, each city in Oregon has an Urban Growth Boundary, which is used to designate where a city expects to grow over the next twenty years. Goal 14 is “[t]o provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities.” See Or. Admin. R. 660-024.
\item[20.] H.B. 2001 § 2(4).
\item[21.] Or. REV. STAT. § 197.312.
\item[22.] H.B. 2001, § 7(5)(b).
\end{itemize}
\end{footnotesize}
Proponents of HB 2001, and of middle housing generally, cite numerous potential socio-economic-environmental benefits of middle-housing infill. Some cities seeking to attract new development and attract or retain millennials consider middle housing as a way to increase housing stock that is compatible in scale with single-family homes, provides a wider range of price points, and meets growing demands for walkable urban living.\(^\text{23}\) For example, Minneapolis recently made news by recognizing in its comprehensive plan the need to increase the supply of housing and its diversity of location and types by, among other things, allowing up to three dwelling units on an individual lot in neighborhoods “farthest from downtown that today contain primarily single-family homes.”\(^\text{24}\) Missing-middle infill can also capitalize on existing public infrastructure, decrease a locality’s carbon footprint by decreasing vehicle miles traveled and per capita energy load, decrease per capita road maintenance costs, and increase public health benefits from increased walking and decreased commutes.\(^\text{25}\)

However, single-family zoning is not the only regulatory barrier to affordable middle housing. Traditional \textit{Euclidean} zoning codes generally contain many barriers to the construction of middle housing. Bulk and area restrictions such as minimum lot area, minimum lot area per unit, minimum lot width, building setbacks, maximum building height, and floor-area ratio requirements can stymie the development of middle housing even where it is allowed by right. Parking-ratio requirements in particular may make middle housing, although allowable as-of-right, impractical for developers or unaffordable for low- and middle-income buyers.\(^\text{26}\) For example, a study of various middle-housing development scenarios in Eugene, Oregon, showed maximum unit, minimum lot size, and parking requirements as factors that can make the development of rentals unviable, or keep rental rates and sale prices in or above the high middle-market range.\(^\text{27}\) The study noted that form-based zoning requirements did not pose barriers to the various middle-housing scenarios.\(^\text{28}\)


\(^{24}\) \textit{City of Minneapolis Dep’t of Community Planning \\& Econ. Dev., Minneapolis 2040—The City’s Comprehensive Plan} 106–07 (June 2019).


\(^{27}\) \textit{Neal, supra note 25, at 78–98.}

\(^{28}\) \textit{Id.}
Oregon’s missing-middle law addresses potential local regulatory barriers to middle-housing development by prohibiting siting and design regulations that “individually or cumulatively, discourage the development of all middle housing types permitted in the area through unreasonable costs or delay.”29 The law requires local governments to adopt land use regulations and amend comprehensive plans to implement the middle-housing requirements by June 30, 2022, for cities and counties subject to the section 2(2) requirements, and by June 30, 2021, for cities subject to the section 2(3) requirements.30

Oregon’s law does not, however, directly or expressly prohibit local regulatory barriers to affordable middle housing development. The law directs local governments, as part of the planning and amendment process, to consider ways to increase the affordability of middle housing by considering ordinances and policies that include but are not limited to: “(a) waiving or deferring system development charges; (b) adopting or amending criteria for property tax exemptions . . . or property tax freezes . . . ; and (c) assessing a construction tax . . . .”31

Additionally, the prohibition against siting and design regulations that individually or cumulatively discourage the development of permitted middle-housing types may have the effect of helping to remove barriers to the development of affordable middle housing, such as minimum parking requirements. HB 2001 also amended an existing reporting requirement that required cities to submit annual reports to the Department of Land Conservation and Development identifying how many units of various types of housing were permitted and produced in the preceding year. As amended, the report must now include tallies of permitted and produced accessory dwelling units, regulated affordable accessory dwelling units, units of middle housing, and regulated affordable units of middle housing.32

To assist local governments in meeting the new requirements, the law directs the Land Conservation and Development Commission, with the assistance of the Building Codes Division of the Department of Consumer and Business Services, to develop a model middle-housing ordinance by December 31, 2020.33 Local governments that fail to adopt land use regulations and amend their comprehensive plans to implement the missing middle law by the statutory deadline “shall directly apply the model ordinance” until the local government makes the required amendments to its regulations and comprehensive plan.34 The law allows for an extension for “specific areas” only where a local government “has identified water, sewer, storm drainage or transportation services that are either significantly

30. Id. § 3(1).
31. Id. § 3(4).
32. Id. § 8(4) (amending 2018 Or. Laws ch. 47, § 1).
33. Id. § 3(2).
34. Id. § 3(3).
deficient or are expected to be significantly deficient before December 31, 2023, and for which the local government has established a plan of actions that will remedy the deficiency in those services that is approved by the [Department of Land Conservation and Development].”35

The law also amended a provision in Oregon’s building code to require the director of the Department of Consumer and Business Services to “establish uniform standards for a municipality to allow alternate approval of construction related to conversions of single-family dwellings into no more than four residential dwelling units built to the Low-Rise Residential Dwelling Code that received occupancy approval prior to January 1, 2020.”36

The law makes void and unenforceable any provision in a planned community governing document adopted on or after the Act’s effective date that “prohibit[s] or [has] the effect of unreasonably restricting the development of housing that is otherwise allowable under the maximum density of the zoning for the land.”37 Similarly, the law makes unenforceable a provision in a recorded instrument affecting real property that allows the development of a single-family dwelling on the property but prohibits the development of middle housing, as defined in the Act, or an accessory dwelling unit allowed under ORS 197.312, if the instrument is executed on or after the effective date of the Act.38

Finally, HB 2001 appropriated $3.5 million to the Department of Land Conservation and Development to fund the provision of technical assistance to local governments in implementing the new law, and directed the Department to prioritize technical assistance to cities and counties with limited planning staff and cities and counties that commit to implement the Act before the statutory deadline.39

B. Oregon’s New Protections for Tenants

Oregon Governor Kate Brown signed Senate Bill 608 into law on February 28, 2019.40 The primary components of SB 608 are a new just cause requirement for landlords to terminate a tenancy, and a limit on the maximum rent increases allowed during a one-year period.

1. Just Cause Eviction

The just-cause eviction standards require that, after the first year of occupancy, a landlord may only terminate a month-to-month tenancy for cause. The law also created an automatic rollover for fixed-term tenancies with terms ending after the first year of occupancy, automatically converting

35. Id. § 4(2).
38. Id. § 13.
39. Id. § 15.
them to month-to-month tenancies subject to the just-cause eviction standards unless the tenant gives proper notice to terminate the tenancy or the parties agree to a new fixed-term tenancy. The fixed term tenancy is exempted from the rollover if the tenant has violated the terms of the rental agreement on three separate occasions during the preceding twelve months and the landlord provided written warnings for each violation.

In terms of what constitutes just cause, SB 608 creates two classes of causes: “tenant cause[s]” and “qualifying landlord reason[s] for termination.” A landlord may terminate a lease based on a tenant cause by giving the applicable notice, which ranges from twenty-four hours to thirty days depending on the cause. Terminations based on tenant causes do not require the landlord to pay any relocation expenses. SB 608 did not limit the tenant causes for eviction under existing landlord tenant law, which recognizes a variety of tenant causes, including a tenant’s failure to pay rent or material violation of a lease, commission of various crimes, intentional and reckless torts, or extreme and outrageous conduct on or in the immediate premises of the property, governmental determination that the dwelling unit is unfit under state or local law and the landlord did not cause the unfitness, and sale of the dwelling unit at a foreclosure sale.

Termination based on a “qualifying landlord reason” requires ninety-day notice and payment of the tenant’s relocation expenses in an amount equal to one month’s rent. Qualifying landlord reasons for termination include intended occupancy of the unit by the landlord or a member of the landlord’s immediate family, demolition of the unit to convert it to nonresidential use, repairs that will make the unit temporarily uninhabitable, and acceptance of an offer to purchase the unit from a person who intends to occupy it as a primary residence. A landlord who terminates a tenancy in violation of these standards is liable to the tenant in an amount equal to three months’ rent plus actual damages, and the tenant has a defense to an action for possession by the landlord.

Landlords who own four or fewer units are exempt from SB 608’s relocation expense requirement, and landlords who live on the same property as the tenant and the property has two or fewer units are exempt from

42. Id. § 90.427(4)(c)(A).
43. Id. § 90.427(7).
44. Id. § 90.427(3)(c)(A).
45. Id. § 90.427(3)(c)(A), (4)(a).
46. Id. § 90.392.
47. Id. § 90.396.
48. Id. § 90.380(5).
49. Id. § 86.782(6)(c).
50. Id. § 90.427(5)–(6).
51. Id. § 90.427(3)(c)(B), (5).
52. Id. § 90.427(9).
53. Id. § 90.427(6)(b).
the just-cause eviction standards. The just-cause eviction standards do not apply to tenancies created by rental agreements subject to the state's Manufactured Dwelling or Floating Home Spaces law, which already contained for-cause eviction protections.

2. Rent Stabilization

Prior to SB 608, Oregon law prohibited landlords from increasing the rent during the first year of any tenancy except a week-to-week tenancy. SB 608 added to this protective measure a prohibition against rent increases in any twelve-month period in excess of 7% plus the consumer price index (CPI) cap above the existing rent. A landlord may re-set the rent to a market rate at the start of a new tenancy; however, the new rent is subject to the 7% plus CPI cap if the landlord terminated the prior tenancy with a thirty-day notice without cause or allowed a fixed-term tenancy to end during the first year of the tenancy.

A landlord who violates the statutory rent cap is liable to the tenant for three months’ rent plus actual damages. A violation is also a defense to eviction for non-payment of rent.

SB 608 exempts from the 7% plus CPI cap regulated affordable housing and new construction if the certificate of occupancy for the dwelling unit was issued less than fifteen years before the date of the rent increase notice. In summary, Oregon’s new laws take the state two steps closer to addressing the housing crisis in a way that is consistent with the state’s commitment to urban infill. The new protections for tenants directly target affordability. The missing middle-housing law includes provisions that may indirectly contribute to increased affordability and neighborhood diversity, and may have those affects simply as a consequence of increasing the quantity and diversity of housing stock—but the devil will be in the detail of the state’s model code and regulations, and in each local government’s comprehensive plan and code. Regardless, Oregon’s bold new approaches to the housing crisis will provide invaluable models, data, and lessons for state and local governments throughout the country that are struggling to find solutions to their own housing crises.

54. Id. § 90.427(8).
55. Id. § 90.427(13).
56. Id. § 90.630.
57. Id. § 90.323(3)(a).
58. Id. § 90.323(3)(c) (amending general landlord/tenant laws); id. § 90.600 (applying rent cap to rentals of manufactured dwellings and floating homes in parks and marinas).
59. Id. § 90.323(6).
60. Id. §§ 90.323(8), 90.600(5).
61. Id. §§ 90.323(7)(b), 90.600(4)(b).
62. Id. §§ 90.323(7)(a), 90.600(4)(a).
State and Local Laws Banning Source-of-Income Discrimination

Robert G. Schwemm

Introduction

Most states and many localities have civil rights laws that are substantially equivalent to the federal Fair Housing Act (“FHA”), which means they at least ban discrimination based on the seven factors outlawed by the FHA (i.e., race, color, religion, national origin, sex, familial status, and disability). Many of these state and local laws also include other protected classes, such as age, marital status, sexual orientation, and source of income.

This Article reviews state and local efforts to outlaw source-of-income discrimination. (For its part, Congress currently has multiple bills before it

Robert Schwemm is the Ashland-Spears Distinguished Research Professor at the University of Kentucky College of Law. This Article is excerpted from Robert G. Schwemm, Source-of-Income Discrimination and the Fair Housing Act, 70 Case W. Res. L. Rev. (forthcoming 2020).


3. For a list of the states with such prohibitions, see Schwemm, supra note 1, § 30:3. The FHA authorizes state and local laws to go beyond the FHA’s protections. See 42 U.S.C. § 3615; see also 24 C.F.R. § 115.204(h) (2019) (providing, in HUD’s FHA regulations, that a state or local law’s coverage of additional protected classes beyond those included in the FHA does not mean that law is not substantially equivalent to the FHA).

4. “Source-of-income” discrimination is to be distinguished from “income” discrimination. The latter deals with “how much,” rather than “where from,” and is generally viewed as compatible with fair housing laws (e.g., landlords in FHA cases have always been seen to have a legitimate interest in their tenants’ ability to pay the rent). See Schwemm, supra note 1, § 10:2 n.5 (citing cases). However, the source of a tenant’s income is a different matter; in theory, where a tenant’s income comes from should not matter to

Conclusion

385
that would add such a prohibition to the FHA. Part I of the Article provides an overview of the growing number of states and localities that have banned housing discrimination against Section 8 voucher holders and others based on a landlord, so long as that income is reasonably likely to continue and does not impose other risks or hardships on the landlord.


A number of FHA-based cases have challenged source-of-income discrimination because of its negative impact on racial minorities or other currently protected classes under the FHA, with mixed results. For an extensive review of these cases, see Robert G. Schwemm, *Source-of-Income Discrimination and the Fair Housing Act*, 70 Case W. Res. L. Rev. (forthcoming 2020).


The basic features of the voucher program have remained the same over the years. HUD funds the program and administers it through local public housing agencies (“PHAs”), 24 C.F.R. § 982.151(a)(1) (2018). HUD sets rental payment-standard limits for each geographic area, and voucher holders rent units that fall within these limits. *See id.* § 982.503(a)(1). Low-income families apply for a voucher from the local PHA, which screens them for income and other eligibility requirements. *See id.* § 982.201(a). A family with a voucher seeks housing on its own, generally paying no more than thirty percent of their income for rent, with the remainder paid to the landlord by the government. *See id.* §§ 982.1(a)(3), 982.503(b). Landlords are responsible for screening prospective tenants and may use their regular selection criteria. *See id.* §§ 982.307(a)(2), 982.308(b)(2). Once an assisted family finds an appropriate unit and a landlord willing to rent to them, it seeks approval of the tenancy from the PHA, *id.* § 982.302(b), which first must inspect the apartment and determine that the rent and lease terms conform to the program’s requirements. *Id.* § 982.405. The PHA then enters into a contract with the property owner that specifies payment amounts and other terms, *id.* § 981.1(b)(2), and the property owner also enters into a written lease with the assisted family, *id.* § 982.308(b).

From a landlord’s perspective, having to deal with a PHA and HUD—including the need for inspections and uniform lease provisions—may be unappealing, and the economic incentives to participate in the program may be low in tight rental markets. As a
on their source of income. Part II then considers the legal challenges that have been mounted against such laws. Finally, Part III describes some of the cases and litigation issues that these laws have generated.

I. State and Local Source-of-Income Laws: Locations and Variety

By 2019, fifteen states and over seventy localities had enacted housing laws that ban some form of source-of-income discrimination. The states are California, Connecticut, Delaware, Maine, Massachusetts, Minnesota, New Jersey, New York, North Dakota, Oklahoma, Oregon, Utah, Vermont, Washington, and Wisconsin. The localities include New York City, Los Angeles, Chicago, Philadelphia, Washington, D.C., St. Louis, Memphis, Milwaukee, Denver, Seattle, San Francisco, and San Diego. A handful of these laws date back to the 1970s, and another twenty were passed in the 1980s and 1990s, but most—over fifty—have been enacted since 2000, with New York state and Los Angeles (both city and county) being among the most recent.

These laws reflect a variety of approaches. Some states (e.g., Massachusetts) prohibit only discrimination against recipients of Section 8 vouchers, many housing providers have refused to accept voucher holders. See Cunningham et al., supra, at 9 (concluding, based on review of numerous studies, that “research consistently finds evidence of both perceived and actual landlord discrimination against voucher holders”); infra notes 53–56 and accompanying text.


8. See id. For more on these state laws, see infra notes 14, 19–20, 35–36, 52 and accompanying text (California); notes 15, 19, 28–29, 32 and accompanying text (Connecticut); note 14 (Delaware); notes 12, 21, 27 and accompanying text (Maine); notes 12, 18, 20, 22–27, 32 and accompanying text (Massachusetts); note 13 and accompanying text (Minnesota); notes 18, 20, 32 and accompanying text (New Jersey); notes 11, 18 (New York); note 13 (North Dakota); notes 14, 16, 19 (Oregon); note 19 (Utah); notes 13, 19 (Vermont); note 18 (Washington); and notes 14, 19, 33 and accompanying text (Wisconsin).

9. See PRRAC-Protections, supra note 7, app. B. For more on some of these local laws, see infra notes 16, 19, 32, 41–46 and accompanying text (Austin, Texas); notes 15, 21, 49–50, 53, 55–56, 59–68 and accompanying text (Chicago); note 41 and accompanying text (Indianapolis); note 11 (Los Angeles city and county); note 34 (Minneapolis); notes 15, 19–20, 32 and accompanying text (Montgomery County, Maryland); notes 39–40, 51, 53–54 and accompanying text (New York City); note 34 (Pittsburgh); notes 16, 19, 32, 37–38 and accompanying text (San Francisco); and notes 16, 19, 32, 53 and accompanying text (Washington, D.C.).


11. For the New York state law, see N.Y. Exec. Law § 296.2-a(a)–(e) (passed April 12, 2019); for the laws of Los Angeles city and county, see, respectively, L.A. Mun. Code ch. IV, § 1, art. 5.6.1 (passed June 24, 2019 (effective Jan. 1, 2020)), and L.A. Cnty. Code of Ords. ch. 858 (passed January 5, 2019).
and other government housing subsidies. Others (e.g., Minnesota) outlaw discrimination based on a person’s receiving governmental “assistance,” which may or may not include housing vouchers. Others outlaw discrimination based on “source of income,” but exclude voucher holders from their protection, either explicitly in the statute or by court interpretation (e.g., California, Wisconsin). Other “source of income” laws have been interpreted to include voucher holders (e.g., Connecticut, New Jersey).

12. See Mass. Gen. Laws Ann. ch. 151B, § 4.10 (2019) (making it unlawful, inter alia, “for any person furnishing . . . rental accommodations to discriminate against any individual . . . who is a tenant receiving federal, state, or local housing subsidies . . . because the individual is such a recipient”) (further described infra notes 22–27 and accompanying text); see also ME. Rev. Stat. Ann. tit. 5, § 4581-A(4) (2019) (making it unlawful “[f]or any person furnishing rental premises . . . to refuse to rent . . . to any individual who is a recipient of federal, state or local public assistance, including . . . housing subsidies, primarily because of the individual’s status as recipient”) (further described infra note 27, para. 2).

13. See Minn. Stat. Ann. § 363A.03, subd. 47(2), .09 subd. 1 (2019) (barring housing discrimination because a tenant is “receiving federal, state, or local subsidies, including rental assistance or rent supplements”); see also N.D. Cent. Code Ann. § 14-02.4-02(19), .5-02 (1)–(2) (2019) (barring discrimination “because of . . . status with respect to . . . public assistance,” which includes tenants “receiving federal, state, or local subsidies, including rental assistance or rent supplements”); Vt. Stat. Ann. tit. 9, § 4503(a) (2019) (barring housing discrimination “because a person is a recipient of public assistance”). The Minnesota statute was interpreted to allow landlords to refuse Section 8 voucher holders in Edwards v. Hopkins Plaza Ltd. P’ship, 783 N.W.2d 171, 175-79 (Minn. App. 2010). For a critique of the Edwards opinion, see Derek Waller, Leveraging State and Local Antidiscrimination Laws to Prohibit Discrimination Against Recipients of Federal Rental Assistance, 27 J. Affordable Hous. & Community Dev. L. 401, 415–21 (2018).


Oregon’s source-of-income law, as originally enacted in 1995, explicitly did not include “federal rent subsidy payments under [Section 8] and any other local, state or federal housing assistance,” see Or. Rev. Stat. § 659A.421(d)(A) (2010), but was amended in 2013 to include such assistance. See 2013 Or. Laws Ch. 740 (H.B. 2639) (amending Or. Rev. Stat. § 659A.421(d)(A)). California amended its statute in 2019 to include vouchers and other forms of government housing assistance. See S.B. 329, 2019 Cal. Legis. Info. (enrolled Sept. 13, 2019).

State and Local Laws Banning Source-of-Income Discrimination

with some explicitly providing for voucher coverage (e.g., Oregon, Washington, D.C.).\textsuperscript{16} As a result of these laws, over a third of all households using vouchers are now protected by some form of state or local voucher-antidiscrimination law.\textsuperscript{17}

The breadth of these laws varies in other ways as well. Some apply only to rental situations (e.g., Massachusetts),\textsuperscript{18} but most cover a wider range of housing transactions by, for example, simply including “source of income” among the forbidden bases of discrimination in their fair housing laws.\textsuperscript{19}

In addition, some state laws have foreclosed certain potential defenses (e.g., a landlord’s objecting not just to voucher holders as tenants, but also to the requirements of the governmental program involved), either explicitly

\textsuperscript{16} See supra note 14, para. 2 (Oregon); Feemster v. BSA Ltd. P’ship, 548 F.3d 1063, 1069–71 (D.C. Cir. 2008) (noting that the D.C. Human Rights Act, which bans discrimination in “any transaction in real property . . . wholly or partially for a discriminatory reason based on . . . an individual’s source of income” (D.C. Code § 2–1402.21(a)(1)–(2)), “expressly defines ‘source of income’ as encompassing the Section 8 program [citing id. § 2–1402.21(e)]”; see also Austin Apartment Ass’n v. City of Austin, 89 F. Supp. 3d 886, 894–96 (W.D. Tex. 2015), appeal dismissed, No. 15-50186 (5th Cir. Aug. 6, 2015) (Austin, Texas, ordinance); City & Cty. of San Francisco v. Post, 22 Cal. App. 5th 121, 124–25, 231 Cal. Rptr. 3d 235, 238 (2018), \textit{review denied}, (July 11, 2018) (noting that San Francisco’s fair housing ordinance outlaws discrimination based on a person’s “source of income” and defines that term to include government rent subsidies (citing S.F., Cal., Police Code § 3304, subd. (a))).

\textsuperscript{17} See Alison Bell et al., supra note 10, at 2 (estimating in late 2018 that about thirty-four percent of families with vouchers “live in jurisdictions with voucher non-discrimination protections”). This estimate occurred before source-of-income laws were passed by New York State and the city and county of Los Angeles and before California expanded its law to include vouchers, which will significantly increase this figure.

\textsuperscript{18} See supra note 12 (regarding Massachusetts and Maine); New York (see N.Y. Exec. Law § 296.2-a(a) (2019)); New Jersey (see N.J. STAT. ANN. § 10:5-12(g) (2019) (limited to rental and mortgage payments)); Washington (see Wash. Rev. Code § 59.18 (2019)).

\textsuperscript{19} These include Connecticut (described infra notes 28–29 and accompanying text); California (described infra notes 35–36 and accompanying text); Oregon (see Or. STAT. ANN. § 659A.421(2)–(6) (2019)); Utah (see Utah Code Ann. § 57-21-5 (2019)); Vermont (see Vt. STAT. ANN. tit. 9, § 4503(a) (2019)); and Wisconsin (see Wis. STAT. ANN. § 106.50(1) (2019)); see also supra note 16 (describing the ordinances of Washington, D.C., Austin, Texas, and San Francisco); Montgomery Cnty. v. Glenmont Hills Assocs., 936 A.2d 325, 330–31 (Md. 2007) (quoting ordinance of Montgomery County, Maryland).
(e.g., Massachusetts) or by judicial interpretation (e.g., New Jersey). Others allow such defenses (e.g., Maine).

Two New England states provide examples of the different approaches. In 1971, Massachusetts became the first state to enact a statute prohibiting landlords from discriminating against persons using government vouchers. This statute does not apply to all of the transactions covered by the state’s fair housing law, but deals only with “rental accommodations.” As originally enacted, this provision prohibited landlords from discriminating against any recipient of public assistance or housing subsidies “solely because the individual is such a recipient.” In 1987, the state’s supreme court interpreted “solely” to allow a landlord to refuse Section 8 voucher holders because he objected to terms in the standard lease mandated by the program. Thereafter, the law was amended to remove the word “solely” and to add a further prohibition barring landlords from discriminating “because of any requirement of such public assistance, rental assistance, or housing subsidy program.” As a result, Massachusetts landlords now may neither reject recipients of any housing assistance program nor use as a defense in this situation their objection to the requirements of such a program. By contrast, Connecticut has reached a similar result through a


21. See Dussault v. RRE Coach Lantern Holdings, LLC, 86 A.3d 52, 58–60 (Me. 2014) (interpreting Maine law (further described infra note 27)); see also Godinez v. Sullivan-Lackey, 815 N.E.2d 822 (Ill. App. 2004) (holding that Chicago’s source-of-income ban includes Section 8 vouchers, but that landlords that reject voucher holders may raise defenses related to the Section 8 program).

22. See MASS. GEN. LAWS ch. 151B, § 4(10), St.1971, c. 726.

23. See DiLiddo, 876 N.E.2d at 422 n.2.

24. See id. at 427.

25. Attorney Gen. v. Brown, 511 N.E.2d 1103 (Mass. 1987). The Brown opinion distinguished between housing discrimination “solely” because a prospective tenant uses a voucher and discrimination that occurs because a landlord refuses for economic or other reasons to be subject to the voucher program’s requirements. Id. at 1108–10.

26. See DiLiddo, 876 N.E.2d at 428 (describing these amendments, which were enacted in 1990).

27. See id. at 429. Thus, landlords cannot claim that their objections to a program’s requirements amount to a “legitimate, non-discriminatory reason” for an otherwise unlawful refusal to rent. As the DiLiddo opinion put it, the amended law delineates what is “legitimate” and “nondiscriminatory” under the statute. Id. at 429. And the law does not permit a defense based on the fact that the requirements of a housing subsidy program may cause the landlord “substantial economic harm.” Id. at 429–30.

By contrast, Maine’s law, which paralleled the original version of the Massachusetts law and which outlawed discrimination “primarily” on the forbidden basis, see supra note 12, was not amended, leading that state’s supreme court to interpret it to allow
broader statute that simply added “lawful source of income” as a prohibited basis to the state’s fair housing law in 1990; and, in a 1999 decision, its state supreme court forbid landlords from refusing to rent to otherwise qualified Section 8 tenants.

II. Legal Challenges to State and Local Source-of-Income Laws

State and local laws that ban some form of source-of-income discrimination obviously go beyond the current FHA, but they are in no danger of federal preemption on this ground, because the FHA authorizes state and local laws to prohibit types of discrimination that go beyond those covered in the FHA. However, some of these laws have been challenged as being inconsistent with—and thus preempted by—Section 8’s scheme, which makes landlord participation in that program “voluntary.” Generally, these challenges have failed, but there is one exception: a 1995 decision in which the Seventh Circuit interpreted Wisconsin’s source-of-income law to not include Section 8 vouchers, in part because the court was hesitant “to allow a state to make a voluntary federal program mandatory.”

a landlord to reject voucher holders if its reason was to avoid the requirements of the voucher program. See Dussault v. RRE Coach Lantern Holdings, LLC, 86 A.3d 52, 58–60 (Me. 2014).

28. See Comm’n on Human Rights & Opportunities v. Sullivan Assoc’s., 739 A.2d 238, 241 (Conn. 1999) (describing CONN. GEN. STAT. ANN. § 46a–64c (a)(1)–(2)) as being originally passed in 1989 as part of the state’s public accommodations law, but made part of the state’s fair housing law in 1990).

29. See Comm’n on Human Rights & Opportunities, 739 A.2d at 241–42 (holding, inter alia, that the Connecticut statute bars landlords from requiring a lease that deviates from the Section 8 program’s lease specifications or any other deviations from this program’s requirements).

30. See supra note 3.

31. Courts that have described the Section 8 program as being “voluntary” for landlords include Inclusive Communities Project, Inc. v. Lincoln Property Co., 920 F.3d 890, 900 (5th Cir. 2019), reh’g and reh’g en banc denied, 930 F.3d 660 (5th Cir. 2019), and Salute v. Stratford Greens Gardens Apartments, 136 F.3d 293, 298 (2d Cir. 1998); case cited infra note 33.


The scores of different local ordinances that ban some form of source-of-income discrimination reveal an even greater variety of coverage than the states’ laws. Many of these ordinances go beyond their state’s fair housing laws, which has prompted some landlords to challenge local laws as being inconsistent with—and thus preempted by—their state’s law. The results of these challenges have varied depending on the specific language of the particular state law involved.

For example, California’s fair housing law, which since 1999 has banned source-of-income discrimination but does not cover vouchers and other government subsidies, provides that it is intended “to occupy the field . . . encompassed” by its anti-discrimination provisions. San Francisco’s source-of-income ordinance, passed a year earlier, explicitly includes voucher holders within its protection, leading landlords in that city to claim that this ordinance was preempted by the state law. In rejecting this claim, the California Court of Appeal read the state’s preemption clause narrowly, thus leaving intact San Francisco’s broader law.

Yet preemption challenges to New York City’s source-of-income law, which compels landlords to accept governmental vouchers, have achieved a modicum of success based on a state statute that prevents local governments from extending their rent-control regulations. While this law does not block the city’s basic mandate to landlords to accept vouchers, it has been held to narrow the city’s mandate so as not to compel landlords to accept a local subsidy program that requires extension of leases at the same rent.

34. See infra notes 35–46 and accompanying text; cf. Fletcher Properties, Inc. v. City of Minneapolis, 931 N.W.2d 410 (Minn. Ct. App. 2019) (reversing trial court’s ruling that Minneapolis ordinance, which bars rental discrimination against voucher holders and other public assistance recipients and based on “the requirements of a public assistance program,” violated landlords’ rights under state constitution’s due process and equal protection provisions); Apartment Ass’n of Metro. Pittsburgh, Inc. v. City of Pittsburgh, No. 107 WAL 2019, 2019 WL 4253476 (Pa. Sept. 9, 2019) (vacating and remanding for further review lower court’s determination that Pittsburgh’s source-of-income ordinance was invalid under state’s “home rule” law insofar as the ordinance requires landlords to accept Section 8 voucher holders).


38. See City & Cty. of San Francisco v. Post, 231 Cal. Rptr. 3d at 238.


In Texas and Indiana, state laws were passed in 2015—in response to ordinances enacted, respectively, by Austin and Indianapolis—barring localities from outlawing discrimination against voucher holders. Austin’s ordinance, enacted in 2014, was initially challenged unsuccessfully by local landlords, producing a decision holding that current Texas law did not preempt it. Thereafter, the state passed legislation barring all of its localities from prohibiting landlords “from refusing to lease or rent . . . to a person because the person’s lawful source of income to pay rent includes funding from a federal housing assistance program.” Austin responded with a federal lawsuit seeking to enjoin state officials from enforcing this law based on its alleged disparate impact on minorities. In 2018, the district court upheld this claim based on the FHA provision that condemns any state law purporting “to require or permit any action that would be a discriminatory housing practice” under the FHA, a ruling that Texas has appealed to the Fifth Circuit, which instructed the district court to dismiss the case for lack of jurisdiction.

III. Litigation Experience

A. Types of Cases and a Caution

Virtually all of the claims made under state and local laws banning source-of-income discrimination in housing have been brought against landlords or their agents. This is explained in part by the fact that some of these laws (e.g., those in Massachusetts and Maine) are limited to rental situations. However, most of these laws, like the FHA, also ban discrimination in


42. See Austin Apartment Ass’n v. City of Austin, 89 F. Supp. 3d 886, 892–93 (W.D. Tex. 2015) (denying preliminary injunction against city’s source-of-income ordinance that covers voucher holders based on plaintiff-association’s failure to show likelihood of success under various theories), appeal dismissed, No. 15-50186 (5th Cir. Aug. 6, 2015).

43. Tex. Loc. Gov’t Code Ann. § 250.007(a); see also Inclusive Cmtys. Project, Inc., 2018 WL 2415034, at *4–11 (dismissing on standing and jurisdictional grounds private plaintiff’s challenge to this law).

44. See infra note 45 and accompanying text; see also Inclusive Cmtys. Project, Inc., 2018 WL 2415034, *n.1 (quoting plaintiff’s allegation that, although Texas’s renter households are only 19% Black, the “Texas voucher population is 86% minority with 55% Black, Non-Hispanic tenants and 30% Hispanic tenants”).

45. See City of Austin v. Paxton, 325 F. Supp.3d 749, 759–60 (W.D. Tex. July 12, 2018), appeal filed, No. 18-50646 (5th Cir. 2018) (quoting the FHA’s 42 U.S.C. § 3615, which provides that “any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid”).


47. See supra notes 12, 18 and accompanying text.
sales, financing, insurance, and other housing transactions; and, even in these places, the vast majority of source-of-income cases have involved rental housing.

For example, Chicago’s fair housing ordinance covers a wide variety of housing transactions and has outlawed source-of-income discrimination since 1990. The agency that enforces this law—the Chicago Commission on Human Relations (“CCHR”)—has produced a total of eighteen decisions in fully litigated cases involving source-of-income discrimination, and all dealt with rental situations. A similar pattern exists in New York City and other places with an active source-of-income docket. Indeed, source-of-income claims against defendants other than landlords have produced only a handful of reported decisions.

One caution is worth noting here. Experience in places with source-of-income laws shows that such prohibitions are not a panacea for this type of discrimination. In New York City and Chicago, for example, substantial non-compliance by housing providers has continued years after enactment of the local source-of-income law. In 2018, the New York City Commission

48. See supra note 19 and accompanying text.
50. See Chi. Comm’n on Human Relations, Board Ruling Digest (2018) (describing the CCHR’s rulings in cases from 2002 through early 2018 and reporting that, of the eighteen housing cases that alleged source-of-income discrimination, all were brought against landlords or their agents). Some of these CCHR cases are discussed infra notes 60–61, 63–67, 69 and accompanying text.
State and Local Laws Banning Source-of-Income Discrimination

on Human Rights, noting “the pervasive problem of landlords refusing to rent to tenants with housing vouchers,” established a special enforcement unit “focused exclusively on combatting source of income discrimination” and used testers “to verify reports of such pervasive discrimination.” 54 In Chicago, the CCHR, having recognized that source-of-income discrimination “continues as a significant fair housing issue,” retained a local civil rights organization to conduct a tester-based study of this type of discrimination,55 the results of which were published in 2018 and showed substantial ongoing source-of-income discrimination.56

B. Cases Against Landlords

Source-of-income cases against landlords fall into two categories: (1) those in which the defendant admits its source-of-income discrimination, but tries to justify this practice; and (2) those in which the landlord denies the charge. In the former, landlords have argued that the burdens of dealing with the Section 8 program (e.g., additional paperwork; required lease provisions; inspections by government agencies) justify their not participating in this program. Some states and localities allow such a defense (e.g., Maine), while other do not, either because their laws explicitly foreclose it (e.g., Massachusetts) or by judicial interpretation of their laws (e.g., New Jersey).57

Cases in which a landlord denies the charge of source-of-income discrimination may present a variety of practices, including outright refusals to rent;58 discrimination in the terms or conditions of the rental;59 “steer-

54. N.Y. CITY COMM’N ON HUMAN RIGHTS, FISCAL YEAR 2018 ANNUAL REPORT 22 (2018); see also id. at 33–34 (reporting that the N.Y.C. Commission launched its own investigations, including testing, in almost 200 housing cases, the vast majority of which involved source-of-income discrimination).
56. See CHI. LAWYERS’ COMM. FOR CIVIL RIGHTS, FAIR HOUSING TESTING PROJECT FOR THE CHI. COMM’N ON HUMAN RELATIONS (2018) (reporting that in Chicago, even after the city’s law had banned source-of-income discrimination since 1990, tests continued to show such discrimination); see also LAWYERS’ COMM. FOR BETTER HOUSING, INC., LOCKED OUT: BARRIERS TO CHOICE FOR HOUSING VOUCHER HOLDERS 10–11 (2002) (finding, in earlier Chicago study, that seventy percent of tests showed source-of-income discrimination).
57. See supra notes 20–21 and accompanying text.
58. State and local fair housing laws that are modeled on the FHA ban not only outright refusals to rent on a prohibited basis, but also discriminatory negotiations and other practices that make housing unavailable. See 42 U.S.C. § 3604(a) (2019); SCHWEMM, supra note 1, § 13:2.
59. In addition to banning refusals to rent on a prohibited basis, state and local laws modeled on the FHA also outlaw harsher terms, stricter application requirements, and other discriminatory conditions of rental. See 42 U.S.C. § 3604(b); SCHWEMM, supra note
ing," e.g., by narrowing a prospective tenant’s options to certain properties that already accept vouchers; and/or discriminatory ads, statements, and other communications in which the defendant announces its policy against renting to government-assisted tenants.

All of these claims present issues of proof that can be decided using familiar principles that have long been established in FHA cases, as demonstrated by the eighteen decisions issued by Chicago’s CCHR over the past two decades. These principles include the possibility of proving a defendant’s unlawful motivation by direct evidence, and the fact that claims proven by direct evidence generally involve a defendant’s ads or statements that would also be unlawful, in the absence of direct evidence, use of circumstantial evidence through the “prima-facie-case” method of

1, § 14:2 nn.1–5 and accompanying text; see, e.g., Ranjit Hakin, Executive Director, Cook County [Illinois] Dep’t of Human Rights and Ethics, Memorandum Regarding Source of Income Protections Under Cook County Human Rights Ordinance (Nov. 20, 2013) (advising landlords and property managers that they should not treat “voucher holders less favorably than other potential tenants by inflating rents or screening such applicants more stringently” or by applying rent-to-income-ratio requirements in a manner that discriminates against voucher holders); see also Brown v. Tam Khuong An Nguyen, CCHR No. 15-H-7, at 4 (Jan. 12, 2017) (noting that a prima facie case of illegal discrimination under Chicago’s source-of-income ordinance may be made out by showing that the complainant “was offered housing on terms different from the offers made to others”).

60. A landlord’s “steering” has long been understood to make housing “unavailable” in violation of the FHA’s § 3604(a) and similarly worded state and local laws, see SCHWEMM, supra note 1, §§ 13:5–13:6, and may also violate other provisions of these statutes, see id., § 14:2 n.20 and accompanying text (discussing steering as a violation of the FHA’s § 3604(b)). Steering cases from the Chicago Commission on Human Relations include Hawkins v. Village Green Holding Co., LLC, CCHR No. 14-H-35, at 9 (July 12, 2018) (rejecting source-of-income steering claim based on inadequate proof).

61. Ads, statements, and notices that indicate a discriminatory preference or limitation violate state and local laws that include a provision like the FHA’s § 3604(c). See SCHWEMM, supra note 1, at ch. 15. For examples from the Chicago Commission on Human Relations, see infra note 64.

62. The CCHR has determined to interpret Chicago’s fair housing ordinance in line with FHA precedents. See, e.g., Nibbs v. PT Chicago, LLC, CCHR No. 14-H-61, at 14 n.8 (May 11, 2017). This is also true for most states and localities with fair housing laws. See SCHWEMM, supra note 1, § 30:2 n.4, para. 2.


64. See SCHWEMM, supra note 1, § 10:2 n.7 and accompanying text. Examples from the CCHR include Shipp v. Wagner, CCHR No. 12-H-19, at 7 (July 16, 2014), and Hutchison v. Iftekarruddin, CCHR No. 09-H-21, at 7 (Feb. 17, 2010).
proving illegal intent; if the plaintiff cannot establish a prima facie case due to not having applied to the defendant, the availability of the “futile gesture” theory to excuse this failure; and the use of testers to show that a defendant’s proffered justification for not dealing with a protected-class member is really a pretext for discrimination rather than a legitimate excuse.

Although less common than claims of intentional discrimination, disparate-impact claims based on source-of-income discrimination have also been dealt with in CCHR decisions. The Chicago cases have usually involved a voucher-holder’s challenge to a landlord’s minimum income requirement (e.g., that a tenant’s income must be at least three times the rent), with the CCHR—based on FHA precedents—recognizing that such a theory may succeed, but requiring proper statistical evidence to support such a claim.

Conclusion

Federal law allows housing providers to discriminate against people who rely on vouchers and other forms of governmental assistance, but a growing number of states and localities have banned housing discrimination based on source of income. The specific provisions of these laws vary, but together they now cover a major portion of the nation’s voucher users and also bar a form of discrimination that disproportionately harms racial minorities and other groups currently protected by the Fair Housing Act.

This Article has reviewed these state and local laws and the key cases and litigation issues they have generated. This review highlights some of the advantages—and challenges—of adding source of income to a housing law’s prohibited bases of discrimination.


67. See Schwemm, supra note 1, § 32:2 (discussing the use of testers to prove housing discrimination). In places where local fair housing laws have banned source-of-income discrimination, some enforcement agencies and advocacy groups have already used testing to produce evidence of this form of illegal discrimination. See, e.g., supra notes 55–56 and accompanying text (Chicago); supra note 54 and accompanying text (New York City and Washington, D.C.).

Banning source-of-income discrimination, though not a panacea, can help expand housing opportunities and end arbitrary limits on housing choice. Further, as Congress considers adding a source-of-income amendment to the FHA, the experience of the states and localities that have already taken this step provides both guidance and reassurance that such an amendment is workable, a factor on which Congress has previously relied in adding new protected classes to the FHA.69

69. See Schwemm, supra note 1, § 11E:1 n.1 and accompanying text (describing the 1988 Congress’s reliance on the fact that numerous states and localities had earlier banned housing discrimination against families with children in support of its decision to amend the FHA to prohibit familial status discrimination).
The duty to affirmatively further fair housing (AFFH) was widely discussed in the wake the U.S. Department of Housing and Urban Development’s (HUD) issuance of its AFFH regulation in 2015. However, this legal mandate has existed as long as the Fair Housing Act (FHA) itself. That said, HUD’s 2015 rule was, in a way, making everything old “new” again by finally providing a robust framework for recipients of HUD funds to make the AFFH obligation real, meaningful, and better understood.

The 2016 presidential election drastically shifted the trajectory of implementation of HUD’s AFFH regulation. Advocates—quite presciently, it turns out—expressed concern about whether HUD would continue its work of ensuring that HUD funding recipients complied with their duty to affirmatively further fair housing. After months of silence, and even expressions of subdued optimism about HUD’s ongoing AFFH work, the fears of those who supported full implementation of the AFFH Rule were realized. In January 2018, HUD issued the first of several notices that revealed HUD’s plans for AFFH. Effectively, implementation of the AFFH Rule was on hold indefinitely.

A year earlier, California Assemblymember Miguel Santiago introduced Assembly Bill 686 (AB 686). This bill was one of a number of pieces of legislation introduced in California in 2017 that reflected a direct response (and rebuke) to the policies of the new Trump administration. The bill’s...
introduction also came amid California’s ongoing affordable housing crisis, with renters, particularly renters of color, facing widespread displacement in an atmosphere of drastically rising rents. AB 686 sought to ensure that the obligation to affirmatively further fair housing was made explicit under state law and that California would continue the progress on AFFH that had begun during the Obama administration. Governor Jerry Brown signed AB 686 into law in 2018.

The following essay discusses the AFFH obligation, HUD’s 2015 regulation, and how AB 686 seeks to further the aims of fair housing in California.

The Duty to Affirmatively Further Fair Housing

In 1968, President Lyndon Johnson signed the FHA into law, with the law’s passage coming in the wake of the assassination of Dr. Martin Luther King, Jr. The 1968 statutory text requires the HUD Secretary to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further” the policies of the Fair Housing Act. Importantly, the FHA also required all federal executive agencies to also affirmatively further fair housing in the administration of their programs and activities related to housing and urban development. The FHA text does not provide a definition of what it means to “affirmatively further fair housing.” An oft-cited federal First Circuit court decision notes, however, that the FHA “requires something more of HUD than simply to refrain from discriminating itself or purposely aiding the discrimination of others.” The court added that Congress had intended that “HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”

2. For additional background on the AFFH obligation and HUD’s roll-back of the 2015 AFFH Rule, see generally Nat’l Hous. Law Project, HUD Housing Programs: Tenants’ Rights § 13.5.4.2 (5th ed. 2018).


5. Id. § 3608(d).

6. NAACP v. HUD, 817 F.2d 149, 154 (1st Cir. 1987).

7. Id. at 155.
Court decisions, as well as federal statutes and regulations, have underscored the connection between the statutory AFFH obligation and HUD programs. Taken together, these legal authorities mandated (and continue to require) that HUD programs certify that they would affirmatively furthering fair housing; in other words, the law requires that recipients of federal housing dollars take affirmative steps to address the perpetuation of segregation. Before the 2015 HUD AFFH Rule, HUD funding recipients were required to conduct an Analysis of Impediments to Fair Housing Choice (AI); take “appropriate actions to overcome the effects of any impediments identified through that analysis”; and keep records of these efforts. While the AI was intended to assist HUD grantees with fair housing planning, one of the major shortcomings of the AI process was that HUD did not review all grantees’ AIs as a matter of course.

In 2010, the U.S. Government Accountability Office (GAO) issued a report after conducting an evaluation of HUD grantees’ compliance with the AI requirement upon requesting and reviewing a subset of grantees’ AI documents. Among the documents reviewed, the GAO found AIs of widely varying quality—with many AIs being out of date, or lacking clear time frames for completing recommendations included within the AI document. The GAO concluded that “while HUD regulations have required the preparation of AIs for many years, whether they serve as an effective tool for grantees that receive federal funds through the CDBG [Community Development Block Grant] and other programs to identify and address impediments to fair housing within their jurisdictions is unclear.”

8. See, e.g., United States ex rel. Anti-Discrimination Center of Metro N.Y., Inc. v. Westchester County, 495 F. Supp. 2d 375, 376 (S.D.N.Y. 2007) (holding that “a local government entity that certifies to the federal government that it will affirmatively further fair housing as a condition to its receipt of federal funds must consider the existence and impact of race discrimination on housing opportunities and choice in its jurisdiction”); Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 73 (D. Mass. 2002) (“There is no way—at least, none that makes sense—to construe the boundary of the duty to affirmatively further fair housing as ending with the [HUD] Secretary.”).

9. See e.g., 42 U.S.C.A. § 5304(b)(2) (requirement that Community Development Block Grant (CDBG) grantees certify that they will affirmatively further fair housing); id. § 1437c-1(d)(16) (requirement that annual PHA plan include a certification that the PHA will affirmatively further fair housing); 24 C.F.R. § 91.225(a)(1)(2019) (Consolidated Plan regulation requiring local governments to submit a certification that it will follow AFFH).


12. Id. at 9 (noting that while most AIs were up to date, twenty-nine percent dated back to 2004 (or earlier), with eleven percent being prepared in 1990s, and that “a significant majority of the current AIs did not identify time frames for implementing the recommendations”).

13. Id. at 31.
report posited that HUD’s prior lack of detailed regulations and HUD oversight regarding the AI may have led many grantees to “place a low priority on ensuring that their AIs serve as effective planning tools.” The GAO recommended that HUD “expeditiously” complete AFFH regulations to address these significant deficiencies in the AI process.

HUD’s 2015 Regulation and Subsequent Roll-Back

In 2015, HUD finalized its AFFH Rule, in part as a response to the GAO findings, along with other feedback about the AI’s ineffectiveness as a fair housing planning document. The Rule established a framework requiring recipients of HUD block grant funds (e.g., Community Development Block Grants) and public housing agencies (PHAs) to complete a planning process called an Assessment of Fair Housing (AFH). This meant that states, local governments that received CDBG funds from HUD directly, and PHAs would have to conduct this AFH. As the AFH was incorporated into the broader Consolidated Plan and PHA Plan processes, HUD review and acceptance of the AFH was required to receive HUD funds. Failure to successfully submit an AFH to HUD could have resulted in the delay or loss of HUD funds. The requirement that HUD funding recipients submit this fair housing assessment to HUD to obtain funding was one of the defining features of the 2015 AFFH Rule, raising the prospect of a level of accountability that markedly differed from what was required under the AI framework. Other key aspects of the 2015 AFFH Rule included HUD’s provision of a variety of national uniform data to assist with grantees’ analysis; HUD-provided required questions and instructions (called “Assessment Tools”) that would guide grantees through the analysis; and an emphasis on robust community engagement.

Under the 2015 Rule, HUD required its funding recipients to analyze fair housing issues within the jurisdiction and region using HUD-provided data, community input, and other local data and knowledge. These fair housing issues included segregation, racially or ethnically concentrated areas of poverty, disparities in access to opportunity (e.g., access to educational, employment, and transit opportunities), disproportionate housing needs (including issues such as overcrowding, habitability issues, and

14. Id. at 22.
15. See id. at 32.
17. Id. at 42,275.
18. The block grant programs covered by the AFFH Rule included Community Development Block Grant (CDBG), HOME, Housing Opportunities for Persons with AIDS (HOPWA), and Emergency Solutions Grant (ESG) funds. See generally 24 C.F.R. § 5.154 (2019).
19. Id. § 5.162(d).
20. Id.
21. See generally id. § 5.154.
cost burden), and civil rights compliance.\textsuperscript{22} For each fair housing issue, jurisdictions and PHAs were required to identify those policies or practices (termed “contributing factors”) that create, perpetuate, contribute to, or increase the severity of one or more fair housing issues.\textsuperscript{23} Examples of potential contributing factors include “Community opposition [to housing],” “Displacement of residents due to economic pressures,” “Land use and zoning laws,” and the “Lack of affordable, accessible housing in a range of unit sizes.”\textsuperscript{24}

Put another way, the core analysis of the AFH goes something like this: does this contributing factor (such as “Displacement of residents due to economic pressures”) perpetuate one or more fair housing issues, such as segregation or disparities in access to employment or educational opportunities? Once these contributing factors are identified, funding recipients were required to devise goals that would overcome the impacts of the contributing factors—complete with metrics and milestones.\textsuperscript{25} The Rule also defined key concepts such as “affirmatively further fair housing,” a definition that reflected the Rule’s overall approach allowing for both grantee solutions that would expand access to housing opportunities in lower-poverty, less segregated areas, while also allowing for investment in historically disinvested areas.\textsuperscript{26} The appropriate “balance” in terms of what solutions to pursue would be determined by local needs identified in the AFH through information such as public participation feedback and local data.

An evaluation of early AFHs concluded that “the AFFH Rule is associated with significantly more goals with measurable objectives or goals representing new policies than is the AI regime.”\textsuperscript{27} In other words, the structure of the AFH was beginning to produce results.

Unfortunately, HUD did not provide the AFH framework adequate time to be implemented in full, citing the number of AFHs that HUD determined did not meet the 2015 AFFH Rule’s standards.\textsuperscript{28} In January 2018, HUD issued a notice that effectively suspended implementation of the

\begin{itemize}
\item \textsuperscript{22} Id. § 5.154(d); id. § 5.152 (definition of “fair housing issue”).
\item \textsuperscript{23} Id. § 5.152 (definition of “fair housing contributing factor”).
\item \textsuperscript{25} 24 C.F.R. § 5.154(d)(4) (2019).
\item \textsuperscript{26} Id. § 5.152 (definition of “affirmatively furthering fair housing”).
\item \textsuperscript{27} Justin Steil & Nicholas Kelly, The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance 100 (2018), available at https://dusp.mit.edu/sites/dusp.mit.edu/files/attachments/publications/Steil%20Kelly%202019%20The%20Fairest%20of%20Them%20All.pdf.
\end{itemize}
AFFH Rule for the majority of grantees for a period of several years. In the wake of a federal lawsuit challenging HUD’s suspension of the Rule, HUD withdrew the January 2018 notice and instead withdrew the Assessment Tool for Local Governments. Functionally, this withdrawal meant that the AFFH Rule was on hold indefinitely because local government grantees could not complete their AFHs without this Assessment Tool (and other grantees, such as states and PHAs, were not fully implementing the AFFH Rule at that time anyway, although PHAs could and were joining the AFHs of local jurisdictions). HUD issued a notice reminding grantees that complete a Consolidated Plan of their obligations to complete an AI. However, given the inherent shortcomings of the AI, the same issues that arose pre-2015 will continue at the federal level for the foreseeable future.

Housing advocates filed a lawsuit to challenge HUD’s actions to stall implementation of the AFFH Rule. That lawsuit was dismissed by the federal district court. As of early September 2019, the federal Office of Information and Regulatory Affairs was reviewing HUD’s proposed amendments to the 2015 AFFH Rule. Based on the abstract of the proposal, HUD’s forthcoming proposed changes to the AFFH Rule will likely focus on “streamlining” AFFH compliance. Many housing and civil rights advocates believe that such “streamlining” will lead to a return to the days of little oversight and scant accountability for recipients of federal funds.

Assembly Bill 686: California’s Response

To counter what many predicted would be a significant roll-back, if not outright withdrawal, of the AFFH regulation, AB 686 was introduced in the California state legislature in 2017. The bill became law in 2018, and was effective January 2019. AB 686 can be most easily described as having two main components: a generalized AFFH obligation, and a planning requirement that would become part of the existing Housing Element in local general plans mandated by state law. This division reflects a similar division in federal law, where there is a generalized AFFH obligation...

29. See generally id.
34. Id.
required by the FHA itself, as well as a planning requirement represented in the 2015 AFFH Rule by the Assessment of Fair Housing (AFH).

**California’s General AFFH Obligation**

The generalized California AFFH obligation largely takes its wording from the FHA and the HUD AFFH Rule, with some variations. The state statute declares, “A public agency shall administer its programs and activities relating to housing and community development in a manner to affirmatively further fair housing, and take no action that is materially inconsistent with its obligation to affirmatively further fair housing.”35 Public agencies under the California statute include the state of California and its departments, boards, and commissions; all cities and counties within the state; and public housing authorities.36 The coverage of multiple state agencies and departments is an acknowledgment that many state government entities play a role in establishing policies and practices that impact housing and people’s ability to access housing. For example, the California Tax Credit Allocation Committee (CTCAC) administers the state and federal versions of the Low-Income Housing Tax Credit (LIHTC) program,37 which have clear implications for affordable housing investment across the state.

Under the new state law, affirmatively furthering fair housing is defined to mean “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.”38 Furthermore, affirmatively furthering fair housing means “taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, 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.”39 Using the language of the federal AFFH regulation, these state law provisions speak to the affirmative nature of the AFFH obligation. As noted earlier in this essay, the driving principle behind the AFFH obligation is that it is not sufficient to simply refrain from discriminating; rather, to affirmatively further fair housing, an entity—whether that be a city, a county, or a state—must take meaningful steps to overcome existing segregation patterns and disparities in access to opportunities such as quality education, jobs, and transit. While the obligation to affirmatively further fair housing is often rightly discussed in terms of ensuring that

---

35. Cal. Gov’t Code § 8899.50(b) (West 2019).
36. Id. § 8899.50(a)(2).
39. Id.
decisionmakers take steps to address the long history of racially discriminatory housing policies (e.g., redlining, blockbusting, etc.), the federal AFFH Rule and its supporting implementing documents make clear that the same fair housing analysis and goalsetting to address fair housing barriers should also be undertaken with respect to other groups protected by fair housing law, that is such as persons with disabilities and families with children. Furthermore, the state law does not require that a public agency covered by the AFFH obligation take (or prohibit that public agency from taking) one particular action. This reflects the idea in the federal regulation that decisions regarding what actions to take to affirmatively further fair housing should be driven by locally based analysis and community input.

The federal AFFH Rule is important to understanding AB 686 not only because the stand-alone state AFFH obligation relies heavily on wording, concepts, and terms used in federal law, but also because the California law itself requires that the AFFH general obligation be interpreted consistently with the AFFH Rule as published in 2015, regardless of subsequent HUD action to scale back or withdraw the federal rule. The California law also states that the AFFH obligation “extends to all of a public agency’s activities and programs relating to housing and community development.” This is another concept derived from federal law, specifically language in the HUD 2015 regulation.

**Fair Housing Planning Through the Housing Element**

Although HUD is expected to scale back the 2015 Assessment of Fair Housing (AFH) requirements in future rulemaking, aspects of the AFH as envisioned in the 2015 AFFH Rule will live on in California because of AB 686. The second component of AB 686 is the incorporation of elements of the AFH analysis into an existing planning document called the “Housing Element.”

One major distinction between California’s AFFH law and the HUD AFFH Rule is that the HUD-mandated fair housing assessment was anchored in the receipt of certain types of federal funds, such as CDBG. In California, the AFFH obligation is not attached to specific state funding and therefore is broader than federal law in terms of entities covered by a planning requirement. Instead, the Housing Element is a state law requirement that every local government (i.e., cities and counties) in California is required to adopt, “as part of the local general plan,” which fulfills the

40. Id. § 8899.50(d).
41. Id. § 8899.50(c).
42. Id. § 8899.50(a)(1).
44. CAL. GOV’T CODE § 65583 (West 2019).
role of a comprehensive plan in other states. A California jurisdiction’s general plan has been called “a constitution for all future developments within [a] city.” Thus, local jurisdictions “may not take actions inconsistent with” the general plan. One of the key features of the Housing Element is that local jurisdiction’s compliance with Housing Element law requirements can be enforced via litigation. The Housing Element must consist of “an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, financial resources, and scheduled programs for the preservation, improvement, and development of housing.” Furthermore, the Housing Element shall identify “adequate sites for housing,” including rental housing, mobile homes, emergency shelters, and factory-built housing. The document must also “make adequate provision for the existing and projected needs of all economic segments of the community.” Among other requirements, the Housing Element must include a “program” of actions that a jurisdiction is taking or intends to take to meet the objectives of the Housing Element. One of the components of this “program” includes an assessment of fair housing—with the identification of fair housing issues and contributing factors; analysis of federal, state, and local data; and the naming of fair housing priorities and goals, complete with metrics and milestones. While ABA 686—and, therefore, jurisdictions’ obligation to affirmatively further fair housing under state law—went into effect in January 2019, the incorporation of the fair housing assessment into the “program” applies to Housing Elements that will be revised on or after January 1, 2021.

Implementation efforts by the California Department of Housing and Community Development (HCD), the state department that reviews Housing Elements submitted by jurisdictions, will be crucial. Jurisdictions, particularly those that have never engaged in meaningful fair housing

---

46. O’Loane v. O’Rourke, 42 Cal. Rptr. 283 (Ct. App. 1965); see also HOUSING ELEMENT MANUAL, supra note 45, at 19 (noting that the general plan “is the preeminent planning document, sitting atop the hierarchy of local land use measures”).
47. HOUSING ELEMENT MANUAL, supra note 45, at 20.
49. CAL. GOV’T CODE § 65583.
50. Id.
51. Id.
52. Id. § 65583(c).
53. Id. § 65583(c)(9)(A).
54. Id. § 65583(c)(9)(C); see also HOUSING ELEMENT MANUAL, supra note 45, at 102.
planning, will need guidance on how to analyze and identify goals regarding critical fair housing issues such as segregation within the broader context of meeting that jurisdiction’s overall housing needs. Fortunately, back in 2017, former HCD Director (and Obama administration HUD official) Ben Metcalf expressed support for the federal AFFH Rule’s construct and pledged to move forward with advancing the AFFH obligation despite any actions taken at the federal level.55

What All of This Means

Within AB 686, California’s communities have a real opportunity to continue the important work that was started at the federal level with HUD’s 2015 AFFH Rule, while also adapting the fair housing assessment to the existing Housing Element process in California. It is hoped that the Housing Element process and its renewed focus on fair housing will begin meaningful conversations in communities across the state about those contributing factors that perpetuate segregation and disparities in the availability of educational and employment opportunities for communities of color, persons with disabilities, and other populations historically denied equal housing opportunities.

Such conversations have been long overdue; fortunately, California has taken action to ensure that this conversation will take place. In a state that is experiencing a devastating affordable housing crisis that is driving the displacement of communities of color, this conversation must also be followed by action. In fact, the AFFH obligation included in the FHA over fifty years ago was grounded in this idea of the need to take affirmative steps to overcome deeply entrenched patterns of housing discrimination. California now has an opportunity to lead on affirmatively furthering the promise of the Fair Housing Act in the face of a federal retreat.

Proposed Retroactive Changes to the LIHTC Program Raise Tax and Constitutional Issues

Eric S. Pettit

I. Section 303 Seeks to Transform Property Rights

   A. A Unilaterally Exercisable ROFR Is an Oxymoron
   B. Section 303(b) Is an Appropriation, Not a Clarification
   C. Conflicting Language in Section 303 Precludes Its Retroactive Application

II. Section 303 Is Inconsistent with Bedrock Tax Principles

   A. Who Owns What?
   B. Elevating Form Over Substance to Evade the “Substance-Over-Form” Doctrine

III. Retroactive Application of Section 303 Would Effect an Unconstitutional Taking

   A. Section 303’s Retroactivity Provisions Violate the Takings Clause
   B. Congress Can’t Have Its Cake and Eat It Too
   C. The American Taxpayer Will Pay for This

IV. Conclusion

The Low Income Housing Tax Credit (LIHTC) program provides federal tax credits to promote private investment in the construction of affordable housing. Congress established the LIHTC program more than thirty years ago, and it remains the most important resource for creating affordable housing in the United States today, with more than three million affordable LIHTC units placed in service between 1987 and 2017.

In addition to fostering private investment in the construction of affordable housing, the LIHTC program also encourages the involvement of nonprofit entities in the development and operation of LIHTC properties. As one incentive to nonprofit participation, the current LIHTC program

---

Eric S. Pettit is a partner in the Los Angeles office of Boies Schiller Flexner LLP. Mr. Pettit has substantial experience representing investor limited partners in Low Income Housing Tax Credit partnership disputes, including the Western District of Washington case discussed in the article (Senior Hous. Assistance Grp. v. AMTAX Holdings 260, LLC, No. C17-1115 RSM).

allows the owner of a LIHTC-eligible property—typically a partnership or limited liability company in which the investor has an ownership stake of ninety-nine percent or greater—to grant nonprofits and other eligible stakeholders (e.g., tenant groups) a “right of first refusal” (ROFR) to purchase the property at a below-market price should the owner elect to sell at the end of the fifteen-year period during which the property generates tax credits. Before settling on this safe harbor for a below-market ROFR, Congress considered permitting nonprofits to hold a below-market option, but ultimately decided that, because an option can be exercised unilaterally to force an unwilling owner to sell, granting a below-market option could impact the true ownership of the property for tax purposes and thereby undermine the foundation on which the entire LIHTC program is built.

The balance Congress struck between promoting nonprofit involvement in LIHTC properties while respecting bedrock tax principles and avoiding tax shelters has been in place for decades. During that period, thousands of LIHTC partnership agreements have granted a below-market ROFR to nonprofits based on the parties’ reasonable, investment-backed expectations as to what right was being conveyed (i.e., a right to purchase if the owner decides to sell). On June 4, 2019, however, Senator Maria Cantwell of Washington introduced a bill that would retroactively redefine ROFR in the LIHTC context such that, just like an option, it could be exercised unilaterally against the will of the property owner.

As currently drafted, Section 303 of the so-called Affordable Housing Credit Improvement Act of 2019 (AHCIA):

- seeks to fundamentally transform well-settled property rights in the guise of a “clarification” of existing law;
- is contrary to bedrock tax principles on which the LIHTC program is based, including the “economic substance” doctrine and the “substance-over-form” doctrine; and
- would constitute a per se taking under the Fifth Amendment of the United States Constitution.

The recent changes, moreover, were the direct result of a Washington federal court decision in which one of the largest affordable housing nonprofits in Washington, the Senior Housing Assistance Group (SHAG), was found to have acted in bad faith and with unclean hands by attempting to conflate a ROFR with an option in the same way that Section 303 of the

---

AHCIA would accomplish legislatively.\(^6\) For these reasons, explained further below, enacting proposed Section 303 as currently drafted would have significant negative repercussions on the affordable housing industry that Congress must consider and address.

**I. Section 303 Seeks to Transform Property Rights**

The United States Supreme Court has recognized that “the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.”\(^7\) “Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.”\(^8\)

The revised version of Section 303, however, purports to convert ROFR into options retroactively, thereby disrupting “predictability and stability” with respect to contractual property rights, where the presumption against retroactivity is strongest.\(^9\) Describing this change as a “clarification” cannot mask the transformation and appropriation of core property rights that Section 303 seeks to effect, and contradictory provisions in Section 303(c) do not establish a clear intent by Congress to have it apply retroactively.

**A. A Unilaterally Exercisable ROFR Is an Oxymoron**

Under well-established common law in virtually every state in the country, whether a purchase right can be exercised unilaterally or instead only defensively to block a sale to a third party is the decisive factor in determining whether that right is properly described as an option or a ROFR.\(^10\) As noted above, Congress relied on this distinction decades ago when it rejected an earlier version of the LIHTC legislation that would have allowed nonprofits to hold a below-market option, and instead limited the below-market purchase right to a defensive ROFR.\(^11\) Investors

---

8. Id. (emphasis added).
9. Id. at 271 (“The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance”) (emphasis added).
10. See, e.g., Uno Rests., Inc. v. Boston Kenmore Realty Corp., 805 N.E.2d 957, 962 (Mass. 2004) (“A right of first refusal is not an option to purchase property at a certain price, but a limitation on the owner’s ability to dispose of property without first offering the property to the holder of the right’’); Bennett Veneer Factors Inc. v. Brewer, 441 P.2d 128, 132 (Wash. 1968) (unlike a “normal option contract[,]” a right of first refusal is a “preemptive right” that gives “the prospective purchaser the right to buy upon terms established by the seller; but only if the seller decides to sell”) (emphasis added).
11. See Kaye, supra note 4, at 896 (explaining that, by selecting a ROFR over an option, Congress ensured that “non-profit groups [do not have] . . . the power to compel an
and other stakeholders have similarly relied on this distinction for the last thirty years when negotiating partnership agreements that include a below-market ROFR as permitted under the existing LIHTC program. It would offend basic notions of fairness and due process to not only redefine a ROFR as an option, but to do so retroactively when investors and other stakeholders who relied on the prior, well-established meaning of the term do not have a time machine that allows them to go back and renegotiate their prior deal based on this material change in the law.\textsuperscript{12}

The current version of Section 303, however, eviscerates the very distinction on which Congress and investors previously relied. Specifically, Section 303(b)(3) provides that “[f]or purposes of determining whether an option, including a right of first refusal, to purchase property is described in the preceding sentence—(i) such option or right of first refusal may be exercised with or without the approval of the [owner], and (ii) a right of first refusal may be exercised in response to any offer to purchase the property, including an offer by a related party."\textsuperscript{13} In addition to conflating a ROFR with an option and ignoring the key difference between the two, this provision encourages nonprofits to solicit sham offers and engage in the exact same conduct that the judge in the SHAG case in Washington recently found to be in bad faith.

B. Section 303(b) Is an Appropriation, Not a Clarification

The drafters of the recent revisions to the AHCIA use the heading “Clarification with Respect to Right of First Refusal and Purchase Options” when describing Section 303(b).\textsuperscript{14} As explained above, however, far from being a “clarification” of the well understood meaning of ROFR, Section 303(b) completely redefines that right so that it is a ROFR in name only, and an option in reality. Moreover, because the right at issue allows the holder to purchase the property at a below-market price, this transformation would have the practical effect of appropriating the real property of an unwilling seller to sell”); see also 136 Cong. Rec. S30528 (daily ed. Oct. 18, 1990) (describing Section 42(i)(7) ROFR as applying “should the owner decide to sell”).

\textsuperscript{12} It is beyond the scope of this article to analyze the due process implications of the retroactive conversion of a below-market ROFR under Section 42(i)(7) to a below-market option. Such analysis, however, would need to address that (a) investors committed billions of dollars of capital over the course of decades in reliance on an understanding of real property rights that has been well-established for even longer; (b) but for that understanding—which was confirmed by the distinction Congress drew between ROFR and options when it created the safe harbor for below-market ROFR in the first place—those investors would not have agreed to give nonprofits the ROFR that they are now seeking to transform through legislation; and (c) the legislation would reverse—without any procedural recourse—a prior court judgment that LIHTC investors obtained through expensive and hard-fought litigation and could result in the transfer of thousands of parcels of real property from one set of private individuals to another.

\textsuperscript{13} S. 1703, 116th Cong., 1st Sess., Title III, § 303(b)(3).

\textsuperscript{14} Id. § 303(b).
LIHTC owners and giving it to other private parties (i.e., the nonprofits who are pushing for the passage of the legislation).

The risk that this legislation as currently drafted would result in the appropriation of private property is not simply a theoretical concern. In 2017, Washington-based nonprofit SHAG filed a lawsuit in federal court in Seattle seeking to compel the sale to SHAG of seven affordable housing properties based on SHAG’s purported exercise of its below-market ROFR. SHAG took the same position that the revised version of Section 303 seeks to codify—that is, that a below-market LIHTC ROFR can be exercised against the owner’s objection and in the absence of a bona fide third party offer. Chief Judge Ricardo Martinez of the United States District Court for the Western District of Washington not only rejected that position, but also found that certain third party offers that SHAG solicited in what it described as a “belt and suspenders” approach were shams and that SHAG had “unclean hands” as a result of its bad faith conduct.15

Apparently undeterred by this ruling, SHAG and other nonprofits are now seeking to do an end run around Judge Martinez’s decision and accomplish legislatively what they failed to achieve in court. Indeed, the version of Section 303 originally introduced by Senators Cantwell and Hatch in 2017 would have only permitted below-market options in the future, and the new, retroactive version was only proposed after SHAG lost at trial. While proposing legislation that would supersede a judicial decision might be appropriate when there are compelling policy reasons to do so, it appears that the proposal to retroactively transform ROFR into options was not the outcome of a reasoned policy debate that considered all of the problems described in this article, but instead a power play by SHAG and its allies to appropriate from investors the significant increase in market value that LIHTC properties have experienced over the last decade.

C. Conflicting Language in Section 303 Precludes Its Retroactive Application

Because of the strong presumption against retroactivity discussed above, courts will not apply federal legislation retroactively “absent clear congressional intent favoring such a result.”16 The language of Section 303, however, does not evidence such intent. While Section 303(c) states that the amendment redefining a ROFR as an option (i.e., Section 303(b)) “shall apply to agreements . . . entered into before, on, or after the date of the enactment of this Act,”17 it also includes a “savings” clause providing that “[n]o provision of this amendment shall supercede [sic] the agreement among the parties as to the manner of execution or terms of a right of first refusal or option permitted” by the LIHTC program.18 As explained further

16. Landgraf v. USI Film Prod., 511 U.S. 244, 280 (1994).
17. S. 1703, 116th Cong., 1st Sess., Title III, § 303(c)(2) (emphasis added).
18. Id. § 303(c)(3).
in connection with the takings analysis below, these two provisions—Section 303(c)(2) and 303(c)(3)—are in direct conflict with one another and do not, taken together, demonstrate “clear congressional intent” to apply Section 303 retroactively.

II. Section 303 Is Inconsistent with Bedrock Tax Principles

The legislative proposal to convert below-market ROFR to options not only reverses the reasoned decision Congress made three decades ago, but also ignores the fundamental tax principles that prompted Congress to forgo a below-market option in the first place.

A. Who Owns What?

Under fundamental tax principles on which Congress based the LIHTC program, an investor’s right to use tax credits generated by a LIHTC property is predicated on and determined by the investor’s ownership interest in the entity that owns the property.19 This is why LIHTC investments are typically structured so that the investor has an ownership stake of 99% or greater in the entity that owns the property—that is, so that ninety-nine percent or more of the tax credits earned by the LIHTC property’s owner can be claimed by the investor. As a result, any change in the law that could impact the true ownership of the LIHTC property for tax purposes would call into question the right of investors to use the tax credits generated by the properties and thereby jeopardize the continuing viability of entire LIHTC program.

As currently drafted, Section 303 would do exactly that. Under distinct but related tax principles commonly referred to as the “economic substance” doctrine and the “substance-over-form” doctrine that apply well beyond the LIHTC context, a taxpayer will not be considered the true owner of an asset unless the taxpayer has a meaningful upside potential— independent from the tax benefits the asset provides.20 Proposed Section 303 transforms what has always been a defensive ROFR into an offensive right to compel a sale at a below-market price of debt plus taxes, which typically yields no funds whatsoever to the owner or the investor. Thus, proposed Section 303 gives the option holder carte blanche to exercise its below-market purchase right without the consent of the property’s nominal owner (i.e., the LIHTC partnership) and shifts any meaningful tax-independent upside in the success of the project from the owner to the nonprofit holding the below-market option.

Applying well-established IRS precedent intended to eliminate sham tax shelters, proposed Section 303 could require treating the nonprofit

---

20. Id. at 461 (holding that investor in similar rehabilitation tax credits was not a “bona fide partner” eligible to receive the credits because it “lacked a meaningful stake in either the success or failure” of the partnership).
option holder as the true owner of the LIHTC project. This would prevent LIHTC investors from receiving and using the tax credits generated by the project and would eviscerate the entire LIHTC program. No sane investor would be willing to commit capital to a LIHTC project if the tax credits were going to flow to the nonprofit (which usually makes no investment in the projects) and not to the investor (who typically contributes millions of dollars). Thus, proposed Section 303 threatens to upend decades of well-established tax law, yet nothing in the legislation suggests that this is the intended result. Alternatively, if existing tax principles are honored, the entire LIHTC program will be undermined.

B. Elevating Form Over Substance to Evade the “Substance-Over-Form” Doctrine

Those responsible for revising Section 303, moreover, opted against imposing a retroactive below-market option directly, as that would have highlighted the inconsistency with the tax principles described above as well as the unconstitutional taking that, for the reasons discussed below, could result if the legislation passes. Instead, by purporting to “clarify” that the “right of first refusal” previously established by Congress is the functional equivalent of an option, the drafters of Section 303 ironically are attempting to elevate form over substance to evade the “substance-over-form” doctrine. As noted above, however, a unilaterally exercisable ROFR is an oxymoron, and any “clarification” to the contrary accomplishes nothing more than to strip the term of its substance and replace it with doublespeak that may be politically expedient but lacks any underlying coherence.

III. Retroactive Application of Section 303 Would Effect an Unconstitutional Taking

“The Fifth Amendment’s Takings Clause prevents Congress and other government actors from depriving private persons of vested property rights except for a ‘public use’ and upon payment of ‘just compensation.’” As revised, however, Section 303 would arguably retroactively create new below-market option rights for nonprofits, resulting in the transfer of real property from one private party to another without just compensation in violation of the Takings Clause of the Fifth Amendment to the United States Constitution.


A. Section 303’s Retroactivity Provisions Violate the Takings Clause

As noted above, Section 303(c)(2) of the AHCIA provides that the amendment redefining a ROFR as an option (i.e., Section 303(b)) “shall apply to agreements among the owners of a project (including partners, members, their affiliated representatives, and designated entities described in subparagraph (A)) entered into before, on, or after the date of the enactment of this Act.”23 To the extent that this language is interpreted to apply Section 303’s purported “clarification” retroactively—which, for reasons discussed above, it should not be—the proposed legislation would effectively result in transfers of real property from one set of private parties to another without just compensation.24 Indeed, if enacted as currently drafted, Section 303 could result in the physical appropriation of real property from private owners, which constitutes a per se taking under binding Supreme Court precedent.25

B. Congress Can’t Have Its Cake and Eat It Too

As discussed above, Section 303(c)(3) of the AHCIA provides that “[n]o provision of this amendment shall supercede [sic] the agreement among the parties as to the manner of execution or terms of a right of first refusal or option permitted” by the LIHTC program.26 While this “savings” provision, read in isolation, would appear to avoid the rewriting of existing contracts, it is incompatible with the language of Section 303(b)(2), which states unequivocally that the proposed legislative changes to the common law meaning of a ROFR are intended to apply to agreements entered into before those changes are enacted.27 Congress cannot have its cake and eat it too: it cannot pass legislation that redefines the universally accepted “manner of execution [and] terms” of a ROFR for contracts entered into before its enactment while simultaneously providing that it does not supersede

23. S. 1703, 116th Cong., 1st Sess., Title III, § 303(c)(2) (emphasis added).
24. Put another way, the legislation would convey to the nonprofit ROFR holder all of the benefits of that purchase right (and more), while forcing the investor to bear all of the burdens without the concomitant protections against a compelled sale at a below-market price.
25. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982) (“When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking”); Horne v. Dep’t of Agric., 135 S. Ct. 2419, 2427 (2015) (“Such an appropriation is perhaps the most serious form of invasion of an owner’s property interests, depriving the owner of the ‘the rights to possess, use and dispose of the property’” (quoting Loretto, 458 U.S. at 435)).
27. The “savings” clause in Section 303(c)(3) is also incompatible with the notion that Section 303(b) is a “clarification” rather than a material modification of well-established property rights. If the change were in fact simply a clarification of existing law, then there would be no need to include a provision in the legislation confirming that existing contractual terms remain in full force and effect notwithstanding the change.
“the manner of execution or terms” of any ROFR included in those existing agreements.

C. The American Taxpayer Will Pay for This

Even assuming that these transfers are motivated by a genuine public purpose, and thus are not facially unconstitutional, the government is required under the Takings Clause to provide just compensation when it appropriates property from a private owner, and it may not sidestep the Takings Clause by disavowing—or redefining out of existence—traditional property rights long recognized under state law.28 Because (a) just compensation is normally measured by the appropriated property’s fair market value,29 and (b) Section 303 as currently drafted could be interpreted to require owners to sell LIHTC properties at prices that are indisputably below fair market value, the new legislation, if enacted, could require the government—and ultimately, the American taxpayer—to compensate owners for the difference between the below-market purchase prices and fair market value.

This is not the only feature of the revised legislation that prevents it from being revenue neutral. In addition, by transferring millions—if not billions—of dollars of wealth from taxpayers to tax-exempt nonprofits, the new legislation would significantly reduce the total amount of taxes the government would receive in connection with the thousands of existing LIHTC properties subject to below-market ROFR. Yet there is no indication that Congress is aware of the existence of this revenue issue, let alone its size and the impact it would have on the federal budget.

IV. Conclusion

Section 303 as currently drafted raises serious legislative, tax, and constitutional concerns that have not been adequately considered or addressed by Congress. If enacted without revision, it could threaten the viability of the very program that the bill purports to promote, while undermining core property and tax law principles with potentially far broader and unforeseen implications.

28. Phillips v. Wash. Legal Found., 524 U.S. 156, 167 (1998) (“[A] State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law.”); see also Stop the Beach Renourishment, Inc. v. Florida Dep’t of Envtl. Prot., 560 U.S. 702, 715 (2010) (“If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.”).

Supportive Housing Under Section 8013: Room and Need for Growth

Michele A. Yankson

I. Introduction

The recent freeing of over 2,000 people incarcerated in federal prison dramatically illustrates a question, raised so often when an incarcerated person is freed, regarding what life-sustaining resources these often-traumatized individuals should have as they transition back into their communities. Housing, of course, is among the most important of resources needed in this transition. Stable and adequate housing is essential to health; there is perhaps no greater impediment to life stability than the removal of a safe place to live. A transitioning person without wealth, family members with space to spare, or other adequate resources needs a broader communal response to meet this housing need. Shelters have long existed as one communal response to transition; indeed, they are often overcrowded and filled with the most vulnerable members of our society.

The focus of this article is on supportive housing’s role as a communal response to the transition out of incarceration. Supportive housing
combines affordable housing with sustained social services to improve long-term outcomes for individuals that face complex challenges. Historically, supportive housing was designed to provide people who were homeless, or at risk of becoming homeless, with an affordable home and supportive social services. Thus, supportive housing appears to do what it suggests: provide extra support to those who need a bit more than a paycheck to live independently and safely. It is a communal response to helping vulnerable individuals who lack the essential resources for independent living.

Federal statutory law provides the basis for what could be a broad supportive housing mandate. In 1990, Congress enacted 42 U.S.C. § 8013 as part of the Section 811 Supportive Housing for People with Disabilities program. Section 811 authorizes resources to aid in the creation and maintenance of supportive housing for people with disabilities. The statute applies to both physical and mental disabilities. Section 8013 lauds important goals. It has the explicit purpose of “enabling individual[s] with disabilities to live with dignity and independence within their communities” and to “expand[] the supply of supportive housing.” Crucially, it instructs that supportive housing providers accommodate disabled persons’ “individualized needs” and predicates provider eligibility on the ability to do so.

Nevertheless, the Department of Housing and Urban Development (HUD), the agency tasked with enforcing Section 8013, has yet to take many meaningful steps toward realization of the statute’s promise. For

2. These services can, theoretically, encompass a variety of treatment models, all structured with an eye toward offering comprehensive and sustained support to tenants. “Assertive Community Treatment” and “Housing First” approaches, for example, promote active participation in tenants’ recovery process and offer intensive and personalized service; the traditional “Continuum of Care” approach, on the other hand, emphasizes “housing readiness,” and may impose certain psychiatric or sobriety requirements prior to placement in housing. See Jill Owczarzak et al., What Is “Support” in Supportive Housing: Client and Service Providers’ Perspectives 72(3) Hum. Organ. 254 (2013) (describing different models).

3. Id.


5. 42 U.S.C. § 8013

6. See CONG. RESEARCH SERV. SECTION 811, supra note 4. The selection process for determining eligibility for assistance requires a consideration of “the extent to which the [provider] applicant has demonstrated that appropriate supportive services will be available on a long-term consistent basis,” and “the extent to which the location and design of the project will facilitate the provision of community-based supportive services and address other basic needs.” Id.

7. Government reports indicate that HUD and DHHS intend to “work together” to enforce and implement the Section 811 program. See U.S. DEP’T OF HOUSING AND URBAN DEVELOPMENT, STATUS REPORT, SECTION 811 PROJECT RENTAL ASSISTANCE, BRINGING PERMANENT SUPPORTIVE HOUSING TO SCALE 13 (Jan. 2014), available at https://www
instance, there have been virtually no implementing regulations directed at the implementation of supportive housing for those with mental disabilities. This leaves supportive housing providers with little federal guidance regarding what services should entail in this context. This situation persists even though the statute requires that supportive housing providers “make available supportive services that address the individual needs of persons with disabilities occupying such housing,” among other requirements.8

This article argues that the statutory language requires HUD and the Department of Health and Human Services (DHHS) to do more. First, the article argues that the absence of regulation concerning the provision of services for those with mental disabilities is a problematic gap. Further, the lack of such regulation is all the more problematic given the regulations promulgated by HUD related to “good cause” evictions for suspected criminal activity.

Second, this article argues that federal action is necessary and that simply relying on state and local enforcement will not suffice. Even if some state and local governments have filled gaps left by the agencies’ regulatory failure, guidance at the federal level remains essential regarding how efficacy is measured, sustained, and promoted. This is especially true given the overlap between populations served by supportive housing and matters of federal concern.

Third, the article questions whether the agencies’ failure to act could trigger a plausible challenge under the Administrative Procedure Act (APA). It concludes that the lack of any action by the Department charged with enforcing the statute could make way to a challenge under some section of the APA, though a specific challenge regarding mental-health services is unlikely to succeed. Finally, the article concludes that even if no legal challenge under the APA takes place, recent changes in federal law related to the formerly incarcerated population ought to give Congress a reason to consider legislation that seeks to provide resources to the recently released population. Section 8013 is one such statute.

II. Section 8013, Implementation, and the Good Cause Eviction Standard

This section of the article further describes Section 8013: what is covered in Section 8013’s broader statutory scheme; how Section 8013 has been implemented; and the problematic gap regarding what constitutes adequate services, which is particularly of issue in the context of mental disabilities.
A. Coverage

Section 811 of Supportive Housing for Persons with Disabilities program, from which Section 8013 is derived, was created as part of the Cranston-Gonzalez Affordable Housing Act of 1990 (P.L. 101-625). The stated purpose was to “make available supportive services that addressed the individual health, mental health, and other such needs of a disabled person” and to “promote and facilitate community integration for people with significant and long-term disabilities.” In other words, the program contemplated by Section 811 marked a move away from stand-alone housing for disabled people to units for disabled individuals dispersed among traditional residential housing. Section 811 is consistent with contemporaneous judicial decisions reflecting a shift towards favoring residential integration for people with disabilities. Olmstead v. L.C., a Supreme Court decision issued just a year after Section 811’s passage in 1991, declared that individuals with disabilities have the right to live in communities rather than in institutions. Olmstead’s holding evidences agreement with Section 811 imperatives.

The Act’s stated purpose, and its provisions for incentivizing performance and selecting eligible programs, centralizes the duty of supportive service providers to ensure long-term, continuing, and effective supportive services. Funding to supportive housing providers, which are typically “non-profit” organizations, comes in the form of capital grants, which are not required to be repaid so long as (1) the housing provided remains affordable for low-income tenants; and (2) the housing provider provides adequate supportive services. Selection of housing services providers is contingent on their ability to provide “long-term” supportive services. Currently, approximately 27,000 supportive housing units receive such assistance.

Section 8013, “supportive housing for people with disabilities,” deals with several specific disabled groups including those with “chronic mental disability,” which is defined under the statute as “severe and persistent mental and emotional impairment” that seriously limits life activities, and those with HIV or suffering from a drug or alcohol addiction, provided

9. See Cong. Research Serv. Section 811, supra note 4 (describing history of statute and larger program of which it is a part).
11. Nonprofit entities, it should be mentioned, are not always resistant to hypercapitalist and financially exploitative practices and policies. See, e.g., Wendi C. Thomas, The Nonprofit Hospital That Makes Millions, Owns a Collection Agency, and Relentlessly Sues the Poor, ProPublica (June 27, 2019) (demonstrating how non-profit entities can reap tax and other financial benefits, while exploiting the poor and potentially failing to provide the services they are legally required to provide).
14. Id.
Supportive Housing Under Section 8013: Room and Need for Growth

they meet the definition of disabled per other sections of the statute.\textsuperscript{15} Thus, the statute does not include HIV or those with alcohol or drug addiction on their own if such an individual does not also have a separate disability recognized under the statute.

The “supportive housing” definition matches the statute’s lofty goals, albeit broadly. It states that supportive housing refers to dwelling units that “are designed to meet the permanent housing needs of low-income persons with disabilities” who are “located in housing that make available supportive housing services that address the individual health, mental health and or other needs of such persons.” Thus, the definition of an appropriate supportive housing provider stresses that it be one who is able to provide services meeting the “individualized” needs of the disabled person. The Secretary, under the statute, is required to take “such action” to ensure that supportive housing providers make these services available.

Despite this language, the statute’s integration-based goals, and its mandate that available services facilitate permanent residency and meet the individualized needs of a disabled tenant, there is no guidance providing any roadmap for the baseline level of what satisfies this statutory language. This lack of guidance applies at two crucial points: (1) when a supportive housing provider is applying for a capital grant, and (2) after receiving funding and the provider is carrying out its obligation to provide statutory-compliant services. There is perhaps less concern for the first point, as Section 8013 specifies selection criteria that ostensibly are followed by applicants.\textsuperscript{16} But after a provider receives grant funding and begins implementing services, there is no guidance on how to assess whether the services rendered comply with the statute, much less whether they are long-term and consistent. For instance, how does the Secretary reconcile these provisions with other parts of the statute, such as those allowing for evictions based on a finding of good cause?

None of these questions is answered by the status quo in the federal statute or implementing regulations. As demonstrated below, these gaps create the potential for services provided for those with chronic mental

\textsuperscript{15} Id.

\textsuperscript{16} When organizations apply to HUD for Section 811 capital grants, they must submit a supportive services plan that has been certified by the appropriate state or local agency responsible for overseeing services to persons with disabilities as being well-designed to serve the needs of the prospective residents. The supportive services plans must include the following information (among other requirements): (1) a detailed description of the service needs of the population that will be served; (2) a list of community service providers that will provide services, and letters of intent from those providers; (3) the experience of the proposed service providers; (4) a description of how state and local agencies will be involved in the project; and (5) the applicant’s commitment to provide services for residents. While project sponsors are required to ensure that supportive services are available, they cannot require residents to accept them. See Cong. Research Serv. Sect. 811, supra note 4, at 15.
illness to be inadequately addressed by supportive housing providers, which could, in turn, be exacerbated by overlapping statutory provisions concerning termination of tenancy, including those concerning eviction for “good cause.”

B. Lack of Guidance Is Exacerbated by the Good Cause Eviction Standard, Which Leaves the Mentally Ill Particularly Vulnerable

Individuals with “chronic mental illness” constitute a population particularly vulnerable to housing instability. The barriers to housing for those with mental illness have been long-studied and discussed. Housing providers routinely discriminate against these groups. Many shelters are also unavailable to people with mental disabilities. Structurally, individuals with mental illness or disabilities have an extremely high rate of poverty, making it difficult for them to secure housing and to retain housing once obtained.

In the supportive housing context, it also potentially provides a more difficult population to adequately serve. In other words, it may be difficult, or at least less obvious, to define and determine what types of services tend to promote an individual’s health and needs. Whereas those with physical disabilities may be reasonably accommodated or supported by structural changes or accommodations to a building, what supports or accommodates someone with a mental illness is often less certain.

Thus, in the context of chronic mental disability, the answer to the question of what constitutes support tending to meet the individualized health needs of a person becomes more elusive, a troubling concern given that this group is particularly at risk of long-term homelessness. Likewise, given the lack of clarity as to what are appropriate services, it is difficult to determine whether a supportive housing provider is providing statutorily-compliant services after receiving funding authorized by Section 8013. The absence of statutory answers to these questions creates a real potential—especially when considered in tandem with the clauses relating to good cause eviction under Section 8013 and other overlapping housing statutes—that those with chronic mental disability will receive inadequate support and face continued risk of homelessness.

20. Thomas, *supra* note 18 (noting that federal policies limit the amount of income and assets people receiving SSI can have, making it difficult for them to prepare financially for a crisis (e.g., death of an older caregiver)).
The federal statutory section, 42 U.S.C. § 8013(i)(2)(B), provides that an owner wishing to terminate a tenancy can do so only for “serious or repeated violation of the terms and conditions of the lease,”21 “violation of applicable Federal, State or local law,”22 or “other good cause,”23 provided that the owner provides written notice at least thirty days before the termination (or refusal to renew).24 As the “good cause” standard allows evictions based on a variety of unenumerated circumstances, the statute gives supportive housing providers considerable leeway to terminate a tenancy. For instance, a supportive housing provider can commence an eviction proceeding based on the claim that a tenant has engaged in purportedly objectionable conduct (nuisance, for example), conduct that it is not hard to imagine can, in many circumstances, be traced back to the tenant’s underlying disability.

A story, taken from the author’s former practice, highlights this problem. Bronx community member S.L. had a history of incarceration and drug use, and he was placed in a supportive housing building after a period of time in a shelter. S.L. also suffered from mental health issues causing emotional instability for which he had previously received treatment. At first, the permanency of his housing created an important step in his road to recovery and reintegration. At some point, however, he began to have emotionally charged incidents with staff in the housing entity. He lived alone and did not have much immediate social support. S.L. was unaware of the services the housing unit provided, or if any at all were provided. He did not receive consistent services.

After several incidents involving S.L. and members of staff, the supportive housing provider initiated eviction proceedings against him. In its court papers, the supportive housing entity asserted that S.L. had engaged in objectionable conduct and/or had committed a nuisance. S.L. faced eviction in large part due to the personal challenges that made him an appropriate supportive-housing tenant. In other words, rather making available the support needed by S.L., S.L. was evicted for the very reason he was in supportive housing.

This case illustrates a dynamic that is not uncommon. Considering the low evidentiary standard in housing court,25 the fact that many tenants in

---

22. Id.
23. Id.
24. Id.
25. To commence an eviction proceeding, the provider needs only state allegations in the form of a complaint filed after service of a thirty-day notice of termination. Although the complaint must pass pleading requirements as to sufficiency and specificity, there is no inquiry in housing court as to whether the alleged activities could have been mitigated by supportive-housing services. At trial, which could occur just weeks after service of the court summons, the supportive-housing tenant may be unrepresented. To make its case, the supportive housing provider need only introduce evidence of the alleged activity, such as an incident report or testimony from staff. After trial, the supportive-housing
housing court are unrepresented by an attorney, the particular challenges faced by tenants with disabilities, and the lack of a third-party oversight over or input into the process, there is potential for “good cause” evictions to be sustained without much scrutiny into the cause or the activity underlying the eviction.26

tenant could be evicted if the factfinder determines that the legal standard is met by the preponderance of the evidence. There is, therefore, nothing in the structure or substance of the housing court process that mandates an inquiry into the type of services provided and whether adequate provision of those services could have avoided the need for eviction.

26. Nevertheless, it could be argued that a tenant’s potential entitlement to a reasonable accommodation under the Fair Housing Act or Section 504 of the Rehabilitation Act provides protection against eviction based on disability. However, the reasonable accommodation mechanism can be insufficient to fully protect the rights of supportive-housing tenants in this context. The Fair Housing Act, 42 U.S.C. §§ 3601 – 3619, prohibits disability discrimination, including “the refusal to make reasonable accommodations in rules, policies, practices, or services when such accommodations are necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f)(3)(B); Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act (2004), https://www.hud.gov/sites/dfiles/FHEO/documents/huddojstatement.pdf.

Section 504 of the Rehabilitation Act outlines the process for obtaining a reasonable accommodation. As applied to this context, it would go as follows: upon or before the commencement of an eviction proceeding, a supportive-housing tenant could the request a reasonable accommodation—that is, withdrawal of eviction proceedings—based on his or her disability. From there, the housing provider must either provide the reasonable accommodation, or deny it based on unreasonableness grounds, for example if it will cause an undue burden or hardship on the provider. If the housing provider denies the reasonable accommodation on this ground, it can propose less-burdensome alternatives that still meets the requester’s needs. This is known as the interactive process. See https://www.hud.gov/programdescription/sec504.

This process could be an inadequate. First, the act does not protect persons with disabilities who pose a danger to others. “The Act does not protect an individual with a disability whose tenancy would constitute a ‘direct threat’ to the health or safety of other individuals or result in substantial physical damage to the property of others unless the threat can be eliminated or significantly reduced by reasonable accommodation.” Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act (2004), https://www.hud.gov/sites/dfiles/FHEO/documents/huddojstatement.pdf.

Granted, the housing provider should not have to risk the health safety of its other tenants or staff to accommodate another tenant. However, supportive housing providers should be equipped to deal with people who have a variety of disabilities, some of which may pose some kind of threat to other people. And, of course, “direct threat” can be used as a catch-all term, and almost any case can be presented as one which poses a threat to other tenants. Second, the reasonable accommodation process could pose a significant burden for supportive housing tenants. Under Section 504, “An applicant or resident is not entitled to receive a reasonable accommodation unless she requests one.” The fact that this burden rests entirely on a supportive-housing tenant presents at least two
A supportive housing provider, thus, may evict based on purported “good cause” that is, in reality, a reflection of the provider’s inability to make available the individualized services as required by Section 8013. The statutory silence as to how “good cause” eviction provisions should be evaluated or should interact with provisions requiring the delivery of services, in particular individualized services for those with “chronic mental illness,” is a distressing omission. It gives supportive housing providers too much leeway to evict without review as to whether supportive services were available to the tenant. The deleterious effects of this omission are exacerbated given that supportive housing may be the only means for those evicted to live independently and outside of a state-supported institution.

Provisions in overlapping and related statutes further exacerbate this problem. For example, several statutes regulating activity within federally subsidized housing (thus, by definition, applying to all Section 8013 dwellings) authorize termination of an individual’s tenancy on the basis of “criminal activity,” violent or otherwise.\textsuperscript{27} Even if landlords generally should be able to evict someone on the basis of causing an extreme disturbance or threat to the safety of other tenants, the duties in the supportive housing context are not so straightforward.

Specifically, in the supportive-housing context, unlike other subsidized housing settings, the landlord is required to make available services that would mitigate the severity of potentially anti-social behavior, including those that may be perceived as violent. In other words, for tenants who have “chronic mental illness,” such illnesses could manifest in a way that could perhaps both accurately and inaccurately construed as violent or criminal,\textsuperscript{28} which may create a fear of violence that is both real and perceived. Conceivably, the individualized services that should be available

\footnotesize{problems. One, the supportive-housing tenant is likely unrepresented by an attorney and therefore might lack the knowledge of the availability of a reasonable accommodation. And two, the tenant’s possible mental impairments or other challenges could make actually requesting one particularly onerous. Eviction proceedings can be fraught and confusing for tenants. Requiring a pro-se disabled, or otherwise challenged, tenant to assert a nuanced and effective request in the midst of this chaos is perhaps unduly burdensome. Finally, the duties enshrined in Section 8013 appear to be much greater than those implied by Section 504 of the Rehabilitation Act. Under Section 8013, supportive housing programs must make available “long-term and consistent services” specifically tailored to tenants’ needs. These requirements could potentially run up against the “undue hardship” analysis invoked by Section 504. Thus, although potentially an important tool in protecting the rights of supportive housing tenants, the reasonable accommodation process could fall short in some respects.\textsuperscript{27} See, e.g., 24 CFR §§ 5.100, 5.859, 5.861(2016).

\textsuperscript{28} Marie E. Rueve et al., Violence and Mental Illness, Psychiatry (May 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2686644 (arguing that common perception assumes mental illness and violence are “inextricably linked” which creates stigma for those with mental illness).}
to them should include services designed to reduce this behavior or to mitigate the potential that their behavior is perceived in such a way that leads to their eviction or homelessness. Failure to address how Section 8013’s provisions for individualized services should work in conjunction with these separate statutory provision for eviction, thus, only exacerbates the eviction risk of those with “chronic mental illness.” For instance, when does the duty to provide such services end such that an eviction is warranted? The statute does not provide an answer, and HUD or DHHS has not taken any action that would provide further clarification.

As the system exists now, so long as a provider states on paper what services will be provided, what happens after is seldom scrutinized. Although there may be logical public health, federalism, and market-based reasons for allowing broad discretion when it comes to evicting tenants in this context, such discretion may also weaken the affirmative protections offered by Section 8013.

The above problems aside, it could be argued that Section 8013’s implementation was intended to rely on states and local governments to design procedures that ensure both front-end and ongoing support for those with chronic mental illness. If that were the case, states and local governments have not risen to the challenge.

C. State and Local Oversight Is Insufficient

The above statutory language suggests a floor of what services must be provided. The question then becomes whether states are providing a level of guidance above what Section 8013 requires such that further clarity at the federal level is unnecessary. This article argues that state and local government oversight and enforcement leave much to be desired.

For instance, in New York City, supportive housing facilities treat three distinct communities: (1) those with substance use histories; (2) those with mental illness; and (3) those with prior criminal justice involvement. Supportive housing funded by the New York City Department of Housing Preservation and Development (HPD) is described as “permanent, affordable housing with on-site support services to serve the needs of the most

---

29. A HUD status report suggests an intended scheme that “allows states to systematically target resources for high-priority populations, including people living in institutional settings or who are homeless,” and posits that “[s]tate health and human services/Medicaid agencies [would be] responsible for identifying target population(s), ensuring sufficient outreach to these populations, making timely referrals to PRA units, and making available appropriate, voluntary support services.” See Section 811 PROJECT RENTAL ASSISTANCE, supra note 7, at 3. Though, as this suggests, it may be the case that the implementation of these services is being left to the states, the federal government has yet to make clear what these services should substantively entail.

Supportive Housing Under Section 8013: Room and Need for Growth

vulnerable New Yorkers, including the homeless and disabled.31 Residents are “low-income or formerly homeless individuals who may have chronic health conditions, such as a psychiatric disability, substance abuse problem or HIV/AIDS.” However, in New York City, no clear oversight body exists. That is, no centralized institutional mechanism determines the value and efficacy of supportive housing providers. The New York City Coalition on the Continuum of Care, a public interest organization, has standards and evaluates various housing units.32 However, given the organization’s lack of authority, there are no clear consequences for a low score from the organization.

California uses a mix of state, local, and federal funding to provide upwards of 60,000 beds for the chronically homeless population, which includes those with mental illness or substance abuse histories.33 The State articulates two goals for the program: (1) enhancing opportunities for people with disabilities to live in integrated community settings; and (2) reducing the costs associated with institutionalizing people who need access to affordable housing in order to avoid institutionalization, or who may otherwise end up homeless.34 There is little information, however, regarding supportive services and how those might be monitored and evaluated at the state level.

Indiana currently has 1,400 permanent supportive housing units serving those with a “serious, persistent mental illness” or “chronic chemical addiction.”35 Notably, the state offers a reoccurring program to help develop and train supportive housing providers.36 However, it remains unclear how this provider performance is monitored and how providers are evaluated, especially with regards to support of those with chronic mental disability.

The Georgia HUD 811 program provides a set-aside of subsidized rental units at designated apartment buildings located around the state. The actual supportive services are administered through a system that employs agencies known as “referral agents” to connect supportive housing tenants

with services in the community. Thus, the entity responsible for the provision of services is a third party, not the particular housing provider. The referral agent is responsible for providing support for the individual once the individual is placed in a subsidized rental unit. Information provided by the state suggests that support is thought of as including “maintaining relationship with the landlord,” “behavior health and primary care” support, and “crisis management” support. Again, however it is unclear how this system is monitored both to be effective and to reduce the impacts of vulnerability to eviction potentially experienced by the chronically mentally-ill population. The oversight gap is particularly troubling considering that the entities charged with the provision of services is different from the entity providing housing and receiving the grant money. One non-profit, the Georgia Supportive Housing Association, provides resources for the supportive housing community, but does not appear to provide any formalized methods of overseeing the provision of supportive housing services in the state.

As these examples demonstrate, there is often little back-end evaluation of how supportive housing providers fare with regard to supporting those with chronic mental illness on the state and local level. While the programs overall tend to demonstrate ambitious goals beyond those set forth under federal law, there is still great potential (especially considering the good cause framework described above and similar statutes) for the population with chronic mental illness to simply slip through the cracks. Without regulatory guidance at the federal level, or other legislative clarification, there is no real reason for state or local governments to deliver this support. To the contrary, the resources involved with adequately providing support for this population may even disincentivize providing that support. Relying on state and local governments to fill in the gaps left by the federal statute, therefore, is not a solution with clear results. In response, this article argues for judicial challenges to HUD’s and DHHS’s failure to regulate, while also discussing potential weaknesses of this approach.

III. Potential for Judicial Review Likely Weak

A. APA Interpretive Norms and Potential for APA Challenge

The APA allows a person to sue a federal agency for failure to regulate, for undue delay in regulating, or for other arbitrarily or capriciously conduct. When a person or group believes that an agency has failed to properly enforce a statute or provide interpretative guidance, that person may have a cause of action under the APA. Unfortunately for many advocates, the ways to successfully bring such a challenge are limited. The below


articulates some interpretive norms under the APA and applies those to the problem addressed herein.

**Reviewability.** First, reviewability of agency action or inaction is prohibited if the statute expressly precludes judicial review or if agency action is committed to agency discretion by law.39 The latter is a narrow exception, and it has been reasoned to refer to “rare instances” where “statutes are drawn in such broad terms that in a given case there is no law to apply.”40 This has often been construed to mean that the statute leaves the agency with such broad discretion in carrying out the statute’s provisions such that judicial review is prohibitively inconsistent with the statutory scheme.41

**Final agency action requirement.** Agency action can also be challenged where it is arbitrary, capricious, an abuse of discretion, and contrary to law.42 The challenged action must be “final,” meaning first that it must mark the consummation of the agency’s decision-making process.43 In addition, “the action must be one by which rights or obligations have been determined, or from which legal consequences will flow,”44 which means that the action must bind on the agency in some way or alter the “legal scheme” in which the agency operates.45

**Failure to act and the “legally required” requirement.** Failure to act can be considered final agency action.46 Failure to act as final agency action requires a plaintiff to show that it is the functional equivalent of final agency action.47 Section 706(1) of the APA allows a court to “compel agency action unlawfully withheld or unreasonably delayed.”48 A Section 706(1) claim, however, “can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take.”49 “These limitations rule out several kinds of challenges,” including requests for “judicial direction of even discrete agency action that is not demanded by law,”50 and invokes norms regarding institutional expertise and agency discretion.51 The “legal requirement” standard involves analysis of the plain terms of the statute to see if it requires the agency to act in some certain

---

42. 5 U.S.C. § 706(2).
44. Id.
45. Id.
46. 5 U.S.C. § 706(2).
50. Id. at 64, 65.
51. Id.
Where no clear definitive language requires an agency to act, such a challenge will likely fail the legal requirement standard.

B. Application to Section 8013

One challenge to HUD’s failure to promulgate relations enforcing Section 811 is an APA challenge based on action unreasonably withheld or delayed. As explained above, there have been few regulations promulgated pursuant to Section 811 and none promulgated tending to guide the provision of supportive services generally or specifically as to supportive services of the chronically mentally ill. The statute provides that the HUD Secretary “shall take such action to ensure that . . . supportive housing for persons with disabilities assisted under this section shall . . . make available voluntary supportive services that address the individual needs of persons with disabilities occupying such housing.” 53 A court could interpret this language as implicating a requirement to promulgate rules, such as standards articulating the type of services for the populations identified in the statute, or a mechanism for oversight. Potentially then, a challenge lies here, as no action has been taken by the agencies to ensure local compliance with the statute’s charge that services must be available to meet individualized needs of a resident of supportive housing. At the very least, some requirements should indicate what services should be made available and how the efficacy of those services should be evaluated.

Recent Supreme Court decisions make this a difficult challenge to mount. In Norton v. Southern Utah Wilderness Alliance, several environmental groups brought suit to compel the Bureau of Land Management to comply with a statutory directive to “manage” certain wildlife areas. In denying the APA challenge, the court articulated a standard to attempt to find the proper balance between preserving agency discretion in carrying out policy objectives while allowing for review in failures to act in accordance to law. Judicial review for failure to act was only proper where there was “discrete agency action” that the agency is “legally required” to take. 54 Norton distinguished between a claim requesting “programmatic improvements” or claims of “general deficiencies in compliance” versus challenges involving failures to take a “precise, definite act.” 55 The former would be an improper area for judicial review, while the latter would not. The Court found the plaintiff’s request to compel compliance with provisions regarding management to be essentially a request too general and concerned with programmatic improvements to allow for judicial review.

52. Id. (implying that one factor in determining whether agency action is demanded by law is the presence of a “specific statutory command requiring an agency to promulgate regulations by a certain date”).
55. See id. at 66.
The Court offered that one example that would meet this standard is failure to act when “specific statutory language require[s] rule promulga-
tion by a certain deadline.” Norton did not hold explicitly that this level of specificity was always required, and the language in Norton suggests that the absence of this specific statutory language is not per se determinative.

Cases applying Norton appear to be exacting in determining whether its standard is met. For example, the Ninth Circuit in Center for Biological Diversity (CFBD) v. Veneman precluded a challenge requesting agency action arguably more specific than the one rejected in Norton. There, plaintiff sought to compel the United States Forest Service to consider fifty-seven river areas for protection while planning for use of federal land. This, plaintiff argued, was a tailored request (involving only certain enumerated rivers) for discrete action (consideration of these areas in the agency’s land-use plans). Nevertheless, the court concluded that this did not satisfy the “discrete agency action” standard because the Norton court suggested, in dicta, that a “failure to consider” challenge would also fail. Arguably, however, the action requested in CFBD is less clearly construed as “programmatic improvements” in the binary invoked by Norton. This, perhaps, demonstrates a strong presumption against judicial review without a high level of specificity in requested action.

The Fourth Circuit in Village of Bald Head v. U.S. Army Corps of Engineers appeared to analyze the “discrete agency action” standard as involving two separate elements—“discreteness” and “legally required”—and, as for the former element, suggested that only those actions defined in § 551(13) would apply. It could be argued that this sort of analysis presents a sort of Catch-22. On one end, the “discrete” requirement forces the advocates to select a specific activity that an agency has failed to take (and, to meet standing, there must be a level of particularity involved anyway). But in doing so, the advocate typically would run into the problem that specific activities may be rarely identified in authority carrying the force of law and thus would not be “legally required.” Thus, some courts’ treatment

57. Ctr. for Biological Diversity (CFBD) v. Veneman, 394 F.3d 1108 (9th Cir. 2003).
58. Cf. Veterans for Common Sense v. Dep’t of Veteran Affairs, No. 08-16728, 2011 WL 1770944 (9th Cir. May 10, 2011) (denying APA review because the statute did not “specifically obligate” the VA to act in the particular way that the plaintiffs put forth, even though agency deficiencies were apparent in the record and even though the VA’s internal policies suggested action to remedy the problem) (vacated en banc and APA claim dismissed for lack of jurisdiction, Veterans for Common Sense v. Shinseki, 678 F.3d 1013 (9th Cir. 2012)); see also American Anti-Vivisection Section v. U.S Dep’t of Agric., No. 18-cv-001138 TNM, *11 (D.D.C. Dec. 10, 2018) (denying bird advocacy group’s request for Department of Agriculture to issue bird specific regulations because, though the statute required promulgation of regulations for animals generally, it did not specifically obligate such action with regard to birds).
60. Id. at 195.
of Norton presents a formidable hurdle for successful challenges under § 706(1) when an agency fails to take action.

Section 8013’s inclusion of “such action” in “the secretary shall take such action to ensure that” supportive services are made available invokes “action” as defined by 5 U.S.C. § 551(13), which defines “agency action” as a rule, order, license, sanction, or relief in whole or in part.† Perhaps, then, a cogent APA challenge lies in HUD’s and DHHS’s failure to take any “action” with regard to supportive housing insofar as “action,” refers to the particular set of actions defined under § 551(13) of the APA. And, some sort of action is legally required given the statute’s invocation of the word “shall.” Thus, a court could conceivably compel HUD to take this action, “to perform a ministerial or non-discretionary act,” or “to take action upon a matter” without “directing how it shall act.”§

The specific problem identified in this paper—lack of guidance for services for those with “chronic mental illness”—presents a more difficult claim. Nothing in the statute or elsewhere requires that these agencies must take action as it pertains to the chronically mentally ill. It is true that the statute’s language requires that the agencies ensure of services that meet a person’s “individualized needs” and that this could be construed as requiring action specifically responsive to the each population identified at the statute. Nonetheless, this analysis would likely fail the Norton legally required standard because Section 8103 does not specifically state that HUD must take action, for example through the promulgation of regulations specifically targeting this group.

Thus, a legal challenge would be hard-pressed to succeed given current precedent and also analytical norms in the context of agency decision-making. The next section suggests that Congress should amend Section 8013 and that there is currently good reason to do so.

IV. Congress Should Amend Section 8013, Especially Given Recent Policy Reform

As this article noted earlier, the need for robust and effective supportive housing measures bears relevance to recent trends toward decarceration and release. The First Step Act, passed in 2018, made reforms to criminal sentencing, inter alia, and marks a “large[] step by the federal government to reduce the amount of people in federal custody.”∥ Indeed, many

---

† 5 U.S.C. § 551(13).
§ Norton, 542 U.S. at 64 (citing Attorney General’s manual on the Administrative Procedure Act 108 (1947)).
individuals who return home from a period of incarceration can lack the sort of housing stability that would sustain successful reintegration to society. The story of S.L. highlighted earlier is one of many; that is, even once a person secures housing, long-term maintenance of that housing can be precarious.

Supportive housing, therefore, can be of great importance for this population. On an individual level, those reentering society after a period of incarceration can face high rates of housing and neighborhood discrimination spurred by stigma, resistance, and misinformation. An interconnected web of structural barriers exist, as well. Individuals with certain offenses are often ineligible for public housing, and they also face incredible difficulty entering the private housing market due to, among other things, low incomes, diminished access to employment, potential ineligibility for rental assistance subsidies, and lack of informational support and resources, as well as landlord practices.

Further, mental illness and incarceration intersect. Rates of people in jail or prison with a serious mental illness range from fourteen to twenty-five percent, more than double the percentage of the general adult population. In other words, “as many as 375,000 people with serious mental illnesses are incarcerated on any given day, rather than living in community or therapeutic settings.” Thus, along with the above, those recently released from prison could also be grappling with mental illness, which, as described above, presents additional difficulties to finding adequate and stable housing. Therefore, the problem of weak federal guidance regarding what constitutes “support” for those with mental illness impacts this population as well.

If HUD will not promulgate standards to guide provision of services, and given difficulties of judicial review described in the previous section, Congress should amend Section 8013. It should do this to include requirements as to what services should entail and to clarify how supportive housing services might interact with other HUD regulations relating to good cause evictions. It might, for example, include language indicating that supportive housing services should be geared toward ameliorating

---

66. Id.
potential for eviction. It might also specify how supportive housing providers could be evaluated. The “good cause” eviction provision might also be amended to include that good cause ought to not include action or activities related to the disabilities identified in the statute.

With federal reform leading to a possible uptick of people released from federal custody and into their communities, this is an area of federal concern. Recent proposed legislation points in the right direction in the context of public housing and people with criminal justice involvement, specifically in seeking to reduce the barriers to public housing that this group faces. But the issues with supportive housing addressed in this article also impact the formerly incarcerated. While the dynamics are quieter, they could be no less profound. Once housed, how can we work to ensure that individuals will be adequately supported? How do we ensure that the millions allocated for supportive housing reach the most vulnerable though perhaps most difficult to serve? Congress should go further and consider laws that have less direct, though no less meaningful, impacts on the criminal justice population and the disabled population as a whole.

V. Conclusion

Given the crucial gap filled by supportive housing and the strong language of 42 U.S.C. § 8013, more should be done at the federal level to ensure supportive housing tenants are adequately served.