# AFTER *SFFA*: AFFIRMATIVELY FURTHERING FAIR HOUSING AS A REMEDY TO FEDERAL HOUSING DISCRIMINATION

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*Nearly sixty years after the passage of the Fair Housing Act (FHA), racial segregation, housing discrimination, and consequent disparities in health and opportunity stubbornly persist. Yet the Department of Housing and Urban Development has made limited use of the FHA's most powerful provision: its mandate to affirmatively further fair housing. In recent years, new barriers to meeting this mandate emerged. Still, affirmatively furthering fair housing remains constitutionally viable and urgently necessary, even in the face of shifting equal protection doctrine. This Note begins by tracing the contested meaning of "affirmatively furthering fair housing" in the courts and executive branch. It then examines how* Students for Fair Admissions v. Harvard *creates new constitutional roadblocks to governments seeking to affirmatively further fair housing today. In response, this Note proposes a process for crafting race-conscious policy within the many constraints of current equal protection jurisprudence. Finally, it outlines an application of this process to affirmatively furthering fair housing. By doing so, this Note reaffirms the continued need for affirmatively furthering fair housing, the continued possibility of this work in the face of constitutional changes, and specific avenues forward for state and federal actors dedicated to building "truly integrated and balanced living patterns."*



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## Introduction

On February 28, 1968, the National Advisory Commission on Civil Disorders described three fundamental forces of racial inequality in the United States: first, "pervasive discrimination and segregation"; second, "white exodus" into racially exclusionary suburbs; and third, "racial ghettos [where] segregation and poverty have intersected to destroy opportunity and hope."[1] The Commission recommended national programs to address grossly inadequate housing in neighborhoods of racialized poverty.[2] Weeks later—after Dr. Martin Luther King Jr.'s assassination and ensuing race riots—President Johnson urged the nation's lawmakers to pass fair housing legislation in honor of Dr. King.[3] On April 11, 1968, Congress passed the Fair Housing Act (FHA).[4]

The FHA prohibits racial discrimination in the sale, rental, financing, and brokerage of housing.[5] The FHA additionally charges the Secretary of Housing and Urban Development (HUD) with the authority and responsibility to "administer their programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter"—a provision now colloquially known as the mandate to "affirmatively further fair housing," or AFFH.[6] In 1972, the Supreme Court described the FHA's purpose as adopting the National Advisory Commission on Civil Disorders' recommendation of national legislation to replace concentrated racialized poverty with "truly integrated and balanced living patterns."[7] Yet for nearly fifty years, federal agencies did little to affirmatively promote progress toward residential integration.[8]

This stagnation appeared to reverse course by 2015, which marked a zenith of both judicial and executive recognition of the FHA's intent to reduce separate and unequal housing conditions.[9] In July 2015, the Department of Housing and Urban Development (HUD) passed its

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1 Nat'l Advisory Comm'n on Civ. Disorders, Report of The National Advisory Commission on Civil Disorders 91 (1968) (hereinafter Kerner Commission Report).

2 *Id.* at 260–63.

3 Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, ProPublica (June 25, 2015), https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law [https://perma.cc/86MX-CMCV].

4 Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73.

5 42 U.S.C. §§ 3604–3606.

6 42 U.S.C. § 3608(e).

7 Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 3422); *see also* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc., 576 U.S. 519, 530 (2015) (noting that Congress adopted the Kerner Commission's recommendation and passed the FHA in response to the social unrest following Martin Luther King Jr.'s assassination).

8 *See infra* text accompanying notes 38–47.

9 *See* 576 U.S. at 529–30 (noting that the FHA responded to housing discrimination that trapped non-white families in "substandard housing and general urban blight").

first regulation requiring grantees to meaningfully engage in AFFH.[10] The 2015 AFFH Rule required grantees to consider data on residential segregation and racial inequality in housing, to identify impediments to fair housing choice, and to describe how they would address these impediments.[11] But this AFFH process was short-lived. By 2018, the first Trump administration had effectively gutted the 2015 Rule.[12] Before the Biden administration could issue a new final rule on AFFH, the Supreme Court upended equal protection doctrine.

On July 29, 2023, the Supreme Court ruled that the use of race as a factor in higher education admissions decisions is unconstitutional.[13] In the wake of *Students for Fair Admissions v. Presidents and Fellows of Harvard College* (*SFFA*), public attention focused on diversity initiatives in education.[14] Yet *SFFA* also cast a long shadow over policies to address racial inequality in other areas, including housing.[15] And with the advent of the second Trump administration, HUD in 2025 once again terminated federal requirements and support for local planning to affirmatively further fair housing.[16]

These changes come at a time when racial segregation, housing discrimination, and consequent racial gaps in health and opportunity stubbornly persist.[17] The text and context of the FHA plainly charge HUD with affirmatively furthering progress against these problems.[18]

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[10] *See* Heather R. Abraham, *Fair Housing's Third Act: American Tragedy or Triumph?*, 39 Yale L. & Pol'y Rev. 1, 33–36 (2020) (describing the 2015 AFFH Rule).

[11] *Id.*; *see also* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272, 42272 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 92, 570, 574, 576, 903).

[12] *See* Abraham, *supra* note 10, at 39–42 (describing the first Trump administration's initial regulatory rollback of AFFH).

[13] *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 43 S. Ct. 2141, 2175 (2023) (finding that race-based admissions programs cannot be reconciled with the Equal Protection Clause).

[14] *See generally* Elissa Nadworny, *Why the Supreme Court Decision on Affirmative Action Matters*, NPR (June 29, 2023), https://www.npr.org/2023/06/29/1176715957/why-the-supreme-court-decision-on-affirmative-action-matters [https://perma.cc/LCX6-J6V3] (discussing the broad implications of the rejection of race-conscious admissions on diversity initiatives in education); Sarah Hinger, *Moving Beyond the Supreme Court's Affirmative Action Rulings*, ACLU (July 12, 2023), https://www.aclu.org/news/racial-justice/moving-beyond-the-supreme-courts-affirmative-action-rulings [https://perma.cc/FEP5-875K] (assessing the impact of eliminating affirmative action on college enrollment, admissions, and campuses for students of color).

[15] *See infra* notes 87–90.

[16] *See* Affirmatively Furthering Fair Housing Revisions, 90 Fed. Reg. 11020 (Mar. 3, 2025) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903) (reinstating pre-1994 interpretation of AFFH).

[17] *See* Council of Econ. Advisors, Racial Discrimination in Contemporary America (2024), https://bidenwhitehouse.archives.gov/cea/written-materials/2024/07/03/racial-discrimination-in-contemporary-america [https://perma.cc/J3RX-X2RB] (summarizing evidence of continuing racial bias in access to neighborhoods and capital).

[18] *See infra* Section I.B.

But without an administration dedicated to realizing these goals, state and local governments seeking to continue AFFH-oriented planning are left in a zone of constitutional uncertainty with immense legal risk. This Note examines *SFFA* and subsequent cases to ground recommendations for states that still seek to dismantle racial segregation and inequality in housing.

This Note proceeds in four parts. Part I discusses the contested meaning of AFFH. Since the passage of the FHA, executive branch leaders and courts have put forth varying interpretations of the AFFH charge, the scope of the FHA's protections, and ultimately, visions of equality rights. Part II identifies how *SFFA* and subsequent cases impose new constraints on meaningful AFFH processes. Specifically, *SFFA* staked out a narrow view of interests that justify race-conscious policy, expressed skepticism of the salience of racial oppression today, and focused on temporally limiting race-conscious remedies. Part III charts out a policymaking process for redressing racial segregation and inequality within the new constitutional framework suggested by *SFFA*. This process would identify a concrete racial injury, trace how the group harmed in the past is approximately congruent to a racial group today, tailor the race-conscious mechanism to the congruent present group, and find ways to ground temporal limits in outcomes. Part IV describes how applying this process can place AFFH policies on more solid constitutional ground. The well-documented history of federal housing discrimination justifies policies to remedy the continued effects of that discrimination today.

## I
## The Contested Scope of Affirmatively Furthering Fair Housing

The Fair Housing Act (FHA) opens by stating that it is "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the [country]."[19] The FHA proceeds to prohibit discriminatory housing practices, including discrimination in the sale, rental, financing, and brokerage of housing on the basis of race.[20] It also charges the HUD Secretary with administering "the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter."[21] A similar provision requires all executive agencies to administer their housing- and development-related programs "in a manner affirmatively to further the

19 42 U.S.C. § 3601.
20 *Id.* §§ 3604–3606.
21 *Id.* § 3608(e).

purposes of this subchapter."[22] These two provisions are now colloquially known as the mandate to "affirmatively further fair housing," or "AFFH."

Since its inception, the meaning of AFFH has been contested by administrators, courts, and scholars. This contest breaks down into three levels of dispute. First, what tools can agencies use to "affirmatively further" fair housing? Second, what are the "purposes" and "policies" of the Fair Housing Act? Finally, what "constitutional limitations" constrain policies to provide for fair housing?

### *A. Federal Tools to "Affirmatively Further" Fair Housing*

Courts and administrators have long debated the scope of HUD's duty to affirmatively further fair housing.[23] One contingent advocates for restricting federal funding to localities without a plan to address segregated and unequal housing conditions.[24] The other would read the AFFH provisions as requiring no such federal action, and instead as merely coextensive with a prohibition on intentionally discriminatory housing practices.[25] Early appellate decisions took a middle position: that HUD must make informed decisions about housing and urban development that consider its impact on residential segregation.[26] Yet administrations largely neglected the AFFH mandate until 2015, and since then, HUD regulations on AFFH have flip-flopped between requiring comprehensive planning processes toward integrated, equal housing opportunities and no requirements whatsoever.[27]

The text of the FHA suggests that the AFFH duty extends beyond merely prohibiting discriminatory housing practices. Section 3608(e) of the FHA, which details specific duties of the HUD Secretary, differentiates between duties related to "discriminatory housing practices" and the "policies of this subchapter."[28] The FHA defines

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[22] *Id.* § 3608(d).

[23] *See infra* text accompanying notes 33–55.

[24] *See infra* text accompanying note 39–40, 48; *see also Affirmatively Furthering Fair Housing*, Nat'l Fair Hous. All., https://nationalfairhousing.org/issue/affirmatively-furthering-fair-housing [https://perma.cc/27D6-F7FW] (describing AFFH as "all about . . . expanding opportunity and creating communities where we all can thrive").

[25] *See infra* text accompanying notes 41, 50; *see also* Press Release, U.S. Dep't of Hous. & Urb. Dev., Secretary Scott Turner Cuts Red Tape by Terminating AFFH Rule (Feb. 26, 2025), https://www.hud.gov/news/hud-no-25-034# [https://perma.cc/68Q6-YPZZ] (describing the second Trump administrations' removal of AFFH requirements as eliminating "onerous paperwork . . . and restrictive demands made up by the federal government"); Exec. Order No. 14,281, 90 Fed. Reg. 17537, 17537 (Apr. 28, 2025) (describing legal liability for policies that have a racially disparate impact as "wholly inconsistent with the Constitution").

[26] *See infra* text accompanying notes 33–37.

[27] *See infra* text accompanying notes 48–53.

[28] 42 U.S.C. § 3608(e).

"discriminatory housing practices" as those specifically prohibited by the Act, namely discrimination in housing sales, rentals, financing, or brokerage on the basis of a protected characteristic.[29] The first four provisions of § 3608(e) direct the HUD Secretary to make and publish "studies with respect to the nature and extent of discriminatory housing practices," and to support various entities with technical assistance "to prevent or eliminate discriminatory housing practices."[30] Only § 3608(e)(5)—the AFFH provision—declines to limit HUD's authority to the prohibited discriminatory practices.[31] Instead, the AFFH provision more broadly charges HUD with a duty to affirmatively further "the policies of this subchapter."[32]

Early appellate decisions held that AFFH requires HUD to adopt some procedure to evaluate whether a federally funded housing project would advance the policies of the FHA.[33] In 1970, the Third Circuit held that HUD must use "some institutionalized method" to consider the effects of subsidized housing site selection on residential segregation.[34] In 1973, the Second Circuit held that AFFH also required local housing authorities to place public housing tenants in ways that considered and reduced residential segregation.[35] In 1987, a First Circuit opinion—penned by then-Judge Breyer—held that AFFH requires something more of HUD than "simply [to] refrain from discriminating (and from purposely aiding discrimination by others)."[36] Instead, AFFH obligates HUD to assess the extent to which a proposed project would limit or increase the supply of housing that is genuinely open to all races, and thus its impact on the racial and socioeconomic composition of the surrounding area.[37]

Yet until 2015, HUD implemented no uniform procedure to meaningfully consider the impact of its funding on residential segregation.[38] HUD's inaction originated in strongly opposing views within the Nixon presidency, the first administration faced with implementing the FHA. On one side, then-HUD Secretary George

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29 *Id.* § 3602(f).

30 *Id.* § 3608(e).

31 *Id.*

32 *Id.*

33 *See* Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's Affirmatively Further Mandate*, 100 Ky. L.J. 125, 137–41 (2011) (identifying key early cases).

34 Shannon v. U.S. Dep't of Hous. & Urb. Dev., 436 F.2d 809, 821 (3d Cir. 1970).

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

36 NAACP v. Sec'y of Hous. & Urb. Dev., 817 F.2d 149, 155 (1st Cir. 1987).

37 *Id.* at 156.

38 *See* Abraham, *supra* note 10, at 13, 19–32 (summarizing HUD's "legacy of inaction" on AFFH).

Romney interpreted the AFFH mandate as a duty to further residential integration, advance equal opportunity to housing, and meet housing needs for all.[39] To effectuate this interpretation, Secretary Romney withheld water and sewer grants from cities that refused to build subsidized housing in predominantly white neighborhoods.[40] On the other side, President Nixon interpreted AFFH as merely prohibiting agencies from intentionally funding grantees engaging in overt discrimination.[41] Viewing Secretary Romney's approach as "forced integration," President Nixon reacted by pushing him out of the cabinet and ordering HUD to stop all efforts to pressure localities to integrate housing.[42] The inertia of President Nixon's interpretation carried through the next several administrations.[43]

In the mid-1990s, HUD began moving toward a comprehensive process for evaluating whether grantees were affirmatively furthering fair housing.[44] HUD's 1994 AFFH Rule began requiring grantees to identify impediments to fair housing choice, address those impediments, and maintain records of their process.[45] While HUD did not begin checking whether grantees actually completed this process, the rule set the stage for litigation against brazen non-compliance, and attracted an investigation by the U.S. Government Accountability Office.[46] These developments led the Obama administration to promulgate the AFFH Rule of 2015.[47]

The 2015 AFFH Rule required that all HUD grantees explicitly address fair housing concerns in existing planning processes, consider certain HUD-provided data related to fair housing, and provide

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[39] *See* Charles M. Lamb, Housing Segregation in Suburban America Since 1960, at 60 (2005).

[40] *Id.* at 84–85, 84 n.136; Dean J. Kotlowski, Nixon's Civil Rights: Politics, Principle, and Policy 56 (2001) (describing how Secretary Romney "elected to use HUD grants as leverage to spur communities into accepting low-income housing").

[41] *See* Hannah-Jones, *supra* note 3 (quoting a 1972 memo in which Nixon stated that he believed "while legal segregation is totally wrong that forced integration of housing or education is just as wrong," and asked his advisors to shop for legal advice on how to narrowly construe the FHA to avoid federal involvement in zoning issues or affordable housing).

[42] Abraham, *supra* note 10, at 20–21.

[43] *See id.* at 21 ("Nixon's recalcitrance set the tone for decades.").

[44] *See id.* at 25–32 (summarizing historical developments leading to the 2015 AFFH rule).

[45] Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. 1878, 1905, 1910, 1912, 1913, 1916, 1917 (Jan. 5, 1994).

[46] *See* Thomas Silverstein & Diane Glauber, *Leveraging the Besieged Assessment of Fair Housing Process to Create Common Ground Among Fair Housing Advocates and Community Developers*, 27 J. Affordable Hous. & Cmty. Dev. L. 33, 35 (2018) (describing how False Claims Act litigation and a GAO report detailing failures of the process made "the conclusion that HUD needed to revisit its regulatory approach to grantee compliance . . . irrefutable").

[47] *Id.*

opportunities for community participation in planning.[48] By requiring grantees to consider fair housing implications of policy decisions through a standardized process, but ultimately deferring to local insight, the 2015 Rule hewed closely to the early appellate decisions on the meaning of AFFH.

Since 2015, however, AFFH has been marked by the volatility of presidential administrations. In 2018, the first Trump administration withdrew HUD's templates for completing the AFFH process and stopped providing feedback on fair housing plans, even when grantees requested it.[49] In 2020, the Trump administration fully eliminated AFFH processes and reverted HUD's interpretation of AFFH back to the Nixon era: "[A]ny action during the relevant period rationally related to promoting fair housing, such as helping eliminate housing discrimination[,]" was sufficient engagement in AFFH.[50] Under President Biden, HUD issued an interim final rule (IFR) that reinstated a voluntary fair housing planning process and related technical assistance in 2021.[51] But the Biden administration's HUD never promulgated a final rule on AFFH, and just days after President Trump returned to the White House in January 2025, he withdrew the Biden administration's IFR and proposed rule.[52] On March 3, 2025, HUD issued a new IFR that put the first Trump administration's interpretation of AFFH back in place.[53]

The Trump administration's statements about AFFH are couched in language about local control over suburban land use decisions. The 2020 AFFH Rule described how President Trump requested that HUD "do more . . . to . . . empower local communities and to reduce the regulatory burden of providing unnecessary data to HUD."[54] In February 2025, new HUD Secretary Scott Turner stated that terminating AFFH processes "restores trust in local communities and property owners,

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48 Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272, 42273 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 92, 570, 574, 576, 903).

49 Abraham, *supra* note 10, at 39 n.149 (describing Los Angeles's comment that the city was "disappointed" to learn that HUD would no longer review and provide feedback on their fair housing plan).

50 Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47899, 47904 (Aug. 7, 2020).

51 Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30779 (June 10, 2021).

52 Affirmatively Furthering Fair Housing; Withdrawal, 90 Fed. Reg. 4686, 4686–87 (Jan. 16, 2025).

53 Affirmatively Furthering Fair Housing Revisions, 90 Fed. Reg. 11020 (Mar. 3, 2025) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

54 Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47899, 47901 (Aug. 7, 2020).

while protecting America's suburbs and neighborhood integrity."[55] These statements suggest that the volatility in AFFH regulations centers on the extent of federal involvement in local land use policy. But at a deeper level, the contest is not about what HUD can do to "affirmatively further" fair housing—it is about the purpose of the FHA.

### *B. The Policies and Purposes of the Fair Housing Act*

The FHA charges HUD with administering its programs in a manner that affirmatively furthers "the policies of this subchapter."[56] It similarly requires all executive agencies to administer their housing- and development-related programs in a manner that affirmatively furthers "the purposes of" the FHA.[57] But the FHA nowhere explicitly defines its purposes or policies, leaving open a wide zone of interpretation. Courts have long found that the FHA's purpose, as described by its original drafter and sponsor, is to realize "truly integrated and balanced living patterns."[58] However, a growing contingent of the Supreme Court may narrowly interpret the FHA's purpose as mere prohibition of intentional discrimination.[59] HUD's capacity to support fair housing planning rests on whether a majority of the Court would hold that residential integration is a purpose of the FHA at all.

#### *1. The Broad Purpose: "Truly Integrated and Balanced Living Patterns"*

Courts have long recognized that the FHA aims to realize "truly integrated and balanced living patterns."[60] Section 803(a) of the FHA prohibits refusing to sell or rent, "or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[61] Courts have interpreted the phrase "otherwise make unavailable or deny" to reach "a wide variety of discriminatory housing practices, including discriminatory zoning restrictions."[62]

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55 Katy O'Donnell, *Trump Scraps Biden-Era Fair Housing Rule*, POLITICO (Feb. 26, 2025), https://www.politico.com/news/2025/02/26/trump-scraps-fair-housing-initiative-00206274 [https://perma.cc/CNW4-LQZM].

56 42 U.S.C. § 3608(e).

57 *Id.* § 3608(d).

58 Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 3422); *see infra* text accompanying notes 68–73.

59 *See infra* Section I.B.2.

60 *Trafficante*, 409 U.S. at 209; *see infra* text accompanying notes 68–73.

61 42 U.S.C. § 3604(a).

62 Mhany Mgmt., Inc. v. Cnty. of Nassau, 819 F.3d 581, 599–600 (2d Cir. 2016) (quoting LeBlanc–Sternberg v. Fletcher, 67 F.3d 412, 424 (2d Cir. 1995)).

The FHA's legislative history also supports this interpretation. On February 29, 1968, the Kerner Commission concluded that the prior summer's race riots originated in "racial ghettos [where] segregation and poverty have intersected to destroy opportunity and hope" and recommended national action on "grossly inadequate housing."[63] On April 4, 1968, riots broke out in Washington, D.C. in the wake of Dr. Martin Luther King Junior's assassination.[64] President Johnson urged Congress to pass fair housing legislation as a tribute to Dr. King.[65] As the nation's lawmakers watched the fires from the Capitol and their city under lockdown, "[t]hey didn't dare hold it up."[66] Congress finally passed the Fair Housing Act on April 11, 1968.[67]

Courts have widely acknowledged that the text and legislative history of the FHA further support a broad reading. In 1972, the Supreme Court quoted Senator Mondale, the key sponsor of the FHA, describing its goal as "replac[ing] the ghettos 'by truly integrated and balanced living patterns.'"[68] The Circuit Courts echoed these statements. In 1987, then-Judge Breyer wrote for the First Circuit that the FHA's supporters "saw the ending of discrimination as a means toward truly opening the nation's housing stock to persons of every race and creed" and described the FHA's goal as promoting "open, integrated residential housing patterns."[69] He further cited Second Circuit, Third Circuit, Sixth Circuit, and Seventh Circuit cases reaching similar conclusions.[70] In 2015, the Supreme Court reaffirmed that "[m]uch progress remains to be made in our Nation's continuing struggle against racial isolation," that the FHA has a continued "role in moving the Nation toward a more integrated society," and that the FHA's "results-oriented language" disfavors policies that disparately obstruct housing access for certain racial groups.[71]

Obama- and Biden-era HUD regulations similarly described the FHA's purpose as promoting "truly integrated and balanced living patterns."[72] A 2013 HUD Rule highlighted how the 2011 House of

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63 Kerner Commission Report, *supra* note 1, at 91, 257.

64 Hannah-Jones, *supra* note 3.

65 *See id.* (noting that President Johnson had unsuccessfully pushed for housing legislation from 1966 to 1968, but ultimately "used the shock" following Dr. King's assassination to urge Congress to pass the long-delayed Fair Housing Act).

66 *Id.*

67 Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73.

68 Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972).

69 NAACP v. Sec'y. of Hous. & Urb. Dev., 817 F.2d 149, 155 (1st Cir. 1987); *id.* (quoting Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973)).

70 *Id.*

71 Tex. Dep't of Hous. and Cmty. Aff. v. Inclusive Cmty. Project, Inc. (*ICP*), 576 U.S. 519, 534, 546, 547 (2015).

72 Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11461 (Feb. 15, 2013) (quoting *Trafficante*, 409 U.S. at 211); Reinstatement of

Representatives reaffirmed that "the intent of Congress in passing the Fair Housing Act was broad and inclusive, to advance equal opportunity in housing and achieve racial integration for the benefit of all people in the United States."[73] A 2023 HUD Rule also stated that, "[a]s the Supreme Court reiterated more recently, the Act's expansive purpose is to 'eradicate discriminatory practices within a sector of the Nation's economy' and to combat and prevent segregation and discrimination in housing."[74]

### *2. The Narrow Construal: Intentional Discrimination Only*

While courts have long construed the FHA's purpose as remedying separate and unequal housing patterns, the Supreme Court's expanding conservative majority may come to interpret it more narrowly. In 2015, the Supreme Court granted certiorari on the question of whether disparate impact claims are cognizable under the FHA.[75] In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project* (*ICP*), a narrow 5-4 majority held that the FHA not only prohibits housing policies that *intend* to discriminate on the basis of race, but also prohibits housing policies that disparately *impact* a racial group by enacting artificial, arbitrary, and unnecessary barriers to housing opportunity.[76] The dissent, on the other hand, would have held that the FHA only prohibits housing discrimination "motivated by race or one of the other protected characteristics."[77]

Justice Alito's *ICP* dissent signaled that the conservative wing of the Court only views the FHA as prohibiting acts of intentional discrimination. Justice Alito accuses the majority of privileging a "desire to eliminate the 'vestiges' of 'residential segregation by race'"

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HUD's Discriminatory Effects Standard, 88 Fed. Reg. 19450, 19463 (Mar. 31, 2023) (quoting *Trafficante*, 409 U.S. at 211).

[73] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11461 (citing H. Res. 1095, 110th Cong. (2008) (enacted)).

[74] Reinstatement of HUD's Discriminatory Effects Standard, 88 Fed. Reg. at 19450 (quoting *Tex. Dep't of Hous. & Cmty. Aff.*, 576 U.S. at 539).

[75] The Supreme Court granted two writs of certiorari—in 2011 and 2013—before finally reaching the question in *Inclusive Communities Project*. *See* Magner v. Gallagher, 565 U.S. 1013 (2011) (granting cert to petition claiming disproportionate housing code enforcement against rental property owners disparately impacted Black residents, *see* Petition for Writ of Certiorari, *Magner*, 565 U.S. 1013 (No. 10-1032)); Twp. of Mt. Holly, N.J. v. Mt. Holly Gardens Citizens in Action, Inc., 570 U.S. 904 (2013) (granting cert to petition challenging a redevelopment plan to demolish existing affordable housing to build more expensive units on the basis of disparate impact by race, *see* Petition for Writ of Certiorari, *Twp. of Mt. Holly*, 570 U.S. 904 (No. 11-1507)); Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc., 573 U.S. 991 (2014).

[76] 576 U.S. 519, 545 (2015).

[77] *Id.* at 561 (Alito, J., dissenting).

over strict textual analysis.[78] Arguing that legislative intent "can be derived only from the words used" in a statute, the dissent states that residential integration cannot be read as a purpose of the FHA because the words "integration" and "segregation" do not appear in the text of the Act.[79] This reading is precisely the position rejected by the appellate courts in early cases brought under the AFFH provision,[80] and marks a potential turn toward President Nixon's position regarding the Fair Housing Act: that "while legal segregation is totally wrong . . . forced integration of housing or education is just as wrong."[81] While Justice Alito's *ICP* dissent garnered just four votes in 2015, the new composition of the Supreme Court could be poised to overturn decades of precedent recognizing FHA claims against policies that cause disparate harm by race.[82]

In sum, the sponsors of the Fair Housing Act hoped that it would help a racially segregated America move toward integrated and balanced living patterns, but the Act's sparse definition of its policies left room for a wide range of interpretation. Courts have long held that the FHA prohibits housing policies that disproportionately harm a particular racial group, as well as those that create or reinforce patterns of residential segregation.[83] But a growing contingent of conservative judges may instead interpret the FHA as only prohibiting policies motivated by an intent to discriminate. In the meantime, the belief that only intentional discrimination should be legally prohibited is bleeding through broader shifts in constitutional doctrine.

## II
## Constitutional Limitations: Shifting Doctrine

The FHA aims to provide for fair housing throughout the United States "within constitutional limitations."[84] In 2015, some conservative Supreme Court Justices signaled that their interpretation of the Constitution would cabin the FHA: Justice Alito's *ICP* dissent stated

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78 *Id.* at 589 (quoting the majority).

79 *Id.*

80 *See supra* Section I.A.

81 Hannah-Jones, *supra* note 3 (quoting Memorandum from Richard Nixon, President of the U.S., to John Ehrlichman, Assistant to the President for Domestic Affs. (Jan. 28, 1978), https://www.nixonlibrary.gov/sites/default/files/virtuallibrary/documents/jan10/032.pdf [https://perma.cc/R767-R4XH] (on file with the Richard Nixon Presidential Library and Museum).

82 *See ICP*, 576 U.S. at 557 (Alito, J., dissenting). Justice Alito was joined by Chief Justice Roberts, Justice Thomas, and Justice Scalia. *Id.*

83 *See* Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. Legis. & Pub. Pol'y 709, 715–36 (2017) (describing the history of court recognition of disparate impact and segregative effect claims).

84 42 U.S.C. § 3601.

that recognizing disparate impact claims "creates constitutional uncertainty" because such claims "may be used to 'perpetuate race-based considerations rather than move beyond them.'"[85] In 2023, the Court's ruling against affirmative action programs in higher education admissions brought the conservative take into the foreground of constitutional law, marking a major shift in equal protection doctrine and the theories underpinning it. This ruling, and lower court rulings on equal protection since, reach the heart of the debates behind the FHA's purpose and HUD's duties under it: the meaning of equality under the law. These new constitutional interpretations of equal protection shape the boundaries of policymaking to affirmatively further fair housing.

### *A. New Constitutional Limitations:* SFFA *and Its Aftermath*

On June 29, 2023, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* ruled that the use of race as a factor in higher education admissions decisions is unconstitutional.[86] Beyond education, *SFFA*'s rationale extended the shadow of constitutional law over other efforts to address racial inequality, including access to employment,[87] disproportionate maternal mortality,[88] exposure to pollution, development of public infrastructure,[89] and housing.[90]

This Part first describes how *SFFA*'s reasoning opened the door to new legal challenges against policies aimed at addressing racial inequality: Since *SFFA*, the Supreme Court has not concretely clarified the scope of equal protection doctrine, and in fact has signaled a willingness to heighten judicial scrutiny of race-conscious action. This

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[85] *ICP*, 576 U.S. at 589 (Alito, J., dissenting) (quoting the majority).

[86] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*SFFA*), 143 S. Ct. 2141, 2176 (2023).

[87] *See generally* Esther Gwen Lander & Amanda McGinn, *Impact of SCOTUS Affirmative Action Ruling on Employers*, ABA (Sept. 6, 2023), https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/issue-summer-2023/impact-of-scorus-affirnative-action-ruling-on-ers [https://perma.cc/YVL3-HCHD] (discussing anticipated increased scrutiny of workplace affirmative action and diversity policies).

[88] *See generally* Ronnie Cohen, *Backlash to Affirmative Action Hits Pioneering Maternal Health Program for Black Women*, L.A. Times (Nov. 28, 2023, 3:00 AM), https://www.latimes.com/california/story/2023-11-28/backlash-to-affirmative-action-hits-pioneering maternal-health-program-for-black-women [https://perma.cc/ZAE4-8A4W] (discussing lawsuit against program providing pregnant Black and Pacific Islander women with a stipend on the grounds that program discriminates on the basis of race).

[89] *See* Deborah N. Archer & Yuvraj Joshi, *Infrastructure Equality*, 120 Nw. L. Rev. 135, 164 (2025) (describing how "ripple effects" of legal challenges in the wake of *SFFA* "have extended across multiple domains of public policy," including pollution and infrastructure).

[90] *See generally* Olatunde C.A. Johnson, *The Remedial Rationale After* SFFA, 54 Seton Hall L. Rev. 1279 (2024) (discussing some of *SFFA*'s implications for racial remedies for discrimination in housing).

Part proceeds by detailing consequences in lower courts: Some district courts have already begun applying the rationale in *SFFA* to strike down longstanding policies—making the litigation risk very real for any state actor seeking to meaningfully further racial equality. By identifying the specific lines of reasoning in *SFFA* that threaten policies to address racial inequality, as well as the risk that they pose to governments, this Part highlights new constitutional constraints—and a narrow path forward for race-conscious policymaking to AFFH.

### *B.* Students for Fair Admissions v. Presidents & Fellows of Harvard College

In June 2023, the Supreme Court held in *SFFA* that the consideration of race as a factor in college admissions decisions is unconstitutional.[91] As the first equal protection case considered by the Court's current conservative supermajority, *SFFA* provided the first hint on how the new Court may rule on other policies related to mitigating racial inequality. Importantly, the Court indicated that it would more skeptically scrutinize any state or federal grantee's use of race according to four main constraints.

First, the Court staked out a narrow vision of compelling interests that would satisfy its review under strict scrutiny. Under equal protection doctrine, a policy that allocates benefits or burdens according to an individual's race is only constitutional if it is narrowly tailored to further a compelling government interest.[92] *SFFA* identified only two compelling interests that would permit race-based state action: "remediating specific, identified instances of past discrimination that violated the Constitution or a statute," and "avoiding imminent and serious risks to human safety in prisons."[93] The Court then rejected Harvard and UNC's stated interests in diverse student populations as insufficiently coherent.[94] In contrast to the defendants' forward-looking goals of racial diversity, the Court's concept of a compelling interest is focused on "narrow, particularized, and backward-looking" racial remedy.[95]

This backward-looking view of racial remedy is apparent in the two cases that *SFFA* cites for the proposition that remedying specific instances of past discrimination may constitute a compelling interest. In *Parents Involved in Community Schools v. Seattle School District No. 1*,

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91 *SFFA*, 143 S. Ct. at 2176.

92 *Id.* at 2162.

93 *Id.*

94 *Id.* at 2166.

95 Johnson, *supra* note 90, at 1292 (detailing the history of the remedial rationale for race-conscious policy, and where this remedial rationale stands after *SFFA*).

the Court declared that K-12 schools may only explicitly consider race in school assignment to redress de jure segregation.[96] *Shaw v. Hunt* noted *City of Richmond v. J.A. Croson Co.*'s requirements that a jurisdiction (1) point to its specific acts of past discrimination that it seeks to remedy, and (2) collect strong evidence that race-conscious remedial action is necessary *before* embarking on an affirmative action program.[97] These cases suggest that any government seeking to support certain racial groups must first identify a compelling interest in past discriminatory policies that continue to cause concrete injuries today.[98]

Second, the Court expressed skepticism about the continued relevance of racial categories, and implicitly, of racial discrimination. Harvard and UNC's affirmative action programs asked applicants to self-identify whether they were (1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African American; and/or (6) Native American.[99] The federal government, including the Census Bureau, collects, analyzes, and reports data according to these categories.[100] Yet the Court described these categories as plainly overbroad, arbitrary, or undefined.[101] For example, the Court noted a "long history of changing labels [and] shifting categories . . . reflect[ing] evolving cultural norms about what it means to be Hispanic or Latino."[102] These criticisms illustrate the importance of detailing how racial categories are rooted in past and present racial discrimination, exclusion, and disadvantage—so that race is not divorced from its origins in these shared experiences, which have promoted coalescence around racialized identities for mutual aid and protection.[103]

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[96] 551 U.S. 701, 721 (2007).

[97] Shaw v. Hunt, 517 U.S. 899, 909 (1996) (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 504 (1989)).

[98] *Id.*; *Parents Involved*, 551 U.S. at 721.

[99] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2167 (2023).

[100] *Id.* at 2254 (Sotomayor, J., dissenting).

[101] *Id.* at 2167–68 (majority opinion); *see also id.* at 2254 (Sotomayor, J., dissenting) ("Surely, not all federal [actions] . . . that flow from census data collection, are constitutionally suspect.").

[102] Mark Hugo Lopez, Jens Manuel Krogstad & Jeffrey S. Passel, *Who is Hispanic?*, Pew Rsch. Ctr. (Sept. 12, 2024), https://pewresearch.org/short-reads/2024/09/12/who-is-hispanic [https://perma.cc/XAD9-PPTJ].

[103] *See, e.g.*, Vilna Bashi, *Racial Categories Matter Because Racial Hierarchies Matter: A Commentary*, 21 Ethnic & Racial Studies 959, 960–63 (1998) (summarizing sociological articles describing how racial categories are part and parcel with racial hierarchies); Diane Hughes, James Rodriguez, Emilie P. Smith, Deborah J. Johnson, Howard C. Stevenson & Paul Spicer, *Parents' Ethnic-Racial Socialization Practices: A Review of Research and Directions for Future Study*, 42 Dev. Psych. 747, 756 (2006) (summarizing literature on parents' efforts to promote their children's awareness of, and ability to cope with, discrimination

Third, *SFFA* exhibited a formalist view of inequality primarily concerned about differential treatment of individuals on the basis of race.[104] This "anti-differentiation" view of equal protection takes issue with the mere differentiation of race, ignoring past and present racial disparities in access to opportunity.[105] An anti-subordination perspective, on the other hand, promotes a more robust vision of substantive equality and is concerned with disadvantage resulting from pervasive social stratification.[106] The Court's focus on racial differentiation, rather than subordination, enables it to frame affirmative action as unfairly advantaging underrepresented minority students "at the expense of" other students.[107] Indeed, the Court described any tip in favor of increasing underrepresented racial groups in a zero-sum set of seats as inherent discrimination *against* racial groups not benefitting from the tip.[108] This reasoning could extend to strike down any consideration of race in allocating a limited number of seats, contracts, or resources between individuals. This formal view of equality heightens the importance of identifying barriers to opportunity redressable through place-based, institutional, and infrastructural change.[109]

Fourth, the Court held that any racial remedy must be temporally limited. Referencing *Grutter v. Bollinger*'s prediction that the use of racial preferences would no longer be warranted by 2028, the Court described this end point as the reason it allowed affirmative action in the preceding decades.[110] The Court rejected UNC's claim that it would

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"as a critical component" of ethnic-racial socialization); Lisa S. Giamo, Michael T. Schmitt & H. Robert Outten, *Perceived Discrimination, Group Identification, and Life Satisfaction Among Multiracial People: A Test of the Rejection-Identification Model*, 18 Cultural Diversity & Ethnic Minority Psych. 319 (2012) (finding that multiracial identification mediates a positive relationship between perceived discrimination and life satisfaction, protecting against discrimination by providing a "collective identify where one 'fits'").

104 *See generally* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Affs. 107 (1976) (illustrating how arguments against race-conscious admissions policies frame the policies' motivations as impermissible differential treatment under the Equal Protection Clause).

105 *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. Miami L. Rev. 9, 10 (2003) (describing the anti-differentiation principle and its development in the Supreme Court).

106 *Id.* at 9.

107 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2249 (2023) (Sotomayor, J., dissenting) (quoting the majority).

108 *Id.* at 2169 (majority opinion).

109 *See* Olatunde C.A. Johnson, *The Remedial Rationale After* SFFA, 54 Seton Hall L. Rev. 1279, 1303–04 (2024) ("[W]here the barrier to opportunity is about poverty or income, underresourced social goods, wealth disparities, or unequal schools and neighborhoods, targeting those sites directly may be better than broadly deploying 'race.'"); Archer & Joshi, *supra* note 89, at 139 (describing how "supportive and inclusive infrastructure can become an engine of opportunity and equality across generations").

110 *Id.* at 2172 (citing Grutter v. Bollinger, 539 U.S. 306, 343 (2003)).

reach the logical end point of its affirmative action program when school diversity better reflected the diversity of the state.[111] The Court further described any end point related to some rough proportion of racial diversity as unconstitutional racial balancing.[112]

These constraints signaled a sea change in equal protection jurisprudence and created immense uncertainty about the new scope of the doctrine. As the Sixth Circuit described in 2024, "when and how the Government may permissibly act to remedy past discrimination" is currently "controversial, thorny, and unsettled."[113] In the wake of *SFFA*, circuit splits surfaced on two equal protection issues: the standard for examining facially neutral policies that aim to mitigate racial disparities and the permissibility of presuming that certain racial groups are eligible for federal programs dedicated to "socially disadvantaged" businesses.

### *C. Scrutiny of Racial "Policy Considerations" in Facially Neutral Policies*

*SFFA* encouraged a new swath of equal protection lawsuits against policies perceived as benefitting racial minority groups. These lawsuits resulted in a circuit split on the relevant standard for examining facially neutral policies that aim to mitigate racial disparities and invited judicial scrutiny into policymakers' motivations behind race-conscious decision-making. While *SFFA* did not overhaul the current framework of equal protection analysis, this shift has destabilized the lower level of judicial scrutiny generally applicable to facially neutral policies—heightening the visibility and importance of the policymaking *process* to reduce segregated and unequal housing conditions.

In the wake of *SFFA*, lawsuits against race-neutral admissions policies at specialized high schools exploded. When district and appellate courts ruled against the plaintiffs bringing these suits and the Supreme Court subsequently denied certiorari, racial justice advocates celebrated.[114] However, the specific facts of these cases suggest that these

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111 *Id.*

112 *Id.* (citing Fisher v. University of Texas at Austin, 570 U.S. 297, 311 (2013)).

113 Holman v. Vilsack, 117 F.4th 906, 915 (6th Cir. 2024) (quoting Vitolo v. Guzman, 999 F.3d 353, 366 (6th Cir. 2021)). The court noted as unsettled questions, "when do statistical disparities between racial groups, which may be insufficient by themselves to show intentional discrimination, nonetheless represent sufficiently probative evidence of intentional discrimination that a court may infer intent?" and "how many options must the Government evaluate to show a 'serious, good faith consideration of race-neutral alternatives?'" *Id.* (quoting *Fisher*, 570 U.S. at 312).

114 *See, e.g.*, Press Release, LatinoJustice, Asian Americans Advancing Justice & Legal Defense Fund, Supreme Court Declines to Review Federal Appellate Court's Decision Rejecting Legal Challenge to Race-Blind Admissions Policy for Thomas Jefferson High

certiorari denials provide less clarity on equal protection than publicly proclaimed, as evidenced by a circuit split on the relevant standard for examining facially neutral policies that aim to mitigate racial disparities.

By 2024, the Fourth, First, and Second Circuits had announced different standards for evaluating whether race-neutral admissions policies at specialized high schools might violate the Equal Protection Clause. In opinions upholding the new admissions policies for specialized high schools in Fairfax County, Virginia and Boston Public Schools, the Fourth and First Circuits stated that equal protection liability for a facially race-neutral policy requires a showing that the policy both (1) disproportionately impacts a certain racial group, and (2) is motivated by discriminatory intent.[115] In a similar case challenging new, race-neutral selection criteria for specialized high schools in New York City, the Second Circuit held that equal protection liability for a facially race-neutral policy only requires proof of discriminatory intent.[116] Justices Alito, Thomas, and Gorsuch have expressed agreement with the Second Circuit's position.[117]

The Second Circuit's opinion furthers *SFFA*'s erosion of a key distinction previously present in equal protection jurisprudence. As described by Professor Blake Emerson, the Court formerly distinguished between "the permissible use of *racial data and racial policy considerations* . . . from the suspect use of racial *criteria of decision*"—that is, criteria used to directly determine the allocation of government benefits or burdens.[118] By collapsing equal protection liability for facially-neutral policies—which currently require disparate impact *and* discriminatory intent—into a one-factor analysis of discriminatory intent, the Second Circuit stance expands equal

School for Science and Technology (Feb. 20, 2024), https://www.naacpldf.org/wp-content/uploads/TJvBdof-Ed-02202024.pdf [https://perma.cc/7SLH-DHUF].

115 Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 879 (4th Cir. 2023), *cert. denied*, No. 23-170, 2024 WL 674659 (Feb. 20, 2024); Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for Bos., 89 F.4th 46, 59 (1st Cir. 2023).

116 Chinese Am. Citizens All. of Greater N.Y. v. Adams, 116 F.4th 161, 165 (2d Cir. 2024).

117 Justice Alito, joined by Justice Thomas, wrote separately from the Supreme Court's denial of certiorari for *Boston Parent Coalition* to question whether disparate impact on a disadvantaged group is necessary to make out an equal protection claim against a facially neutral policy. Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for Bos., 145 S. Ct. 15, 17 (2024) (Alito, J., dissenting from denial of certiorari). In a statement respecting the denial of certiorari, Justice Gorsuch stated that although Boston's replacing of the challenged admissions policy "greatly diminishe[d] the need for . . . review," that the denial of certiorari should not be taken as agreement with the decision below. He indeed emphasized that Justice Alito expressed "a number of significant concerns about the First Circuit's analysis, concerns I share and lower courts facing future similar cases would do well to consider." *Id.* at 15.

118 Blake Emerson, *Affirmatively Furthering Equal Protection: Constitutional Meaning in the Administration of Fair Housing*, 65 BUFF. L. REV. 163, 166, 193 (2017).

protection liability beyond race-conscious criteria of decision into racial policy considerations. The uncertainty around the permissible extent of racial policy considerations erodes the distinction between explicitly race-conscious policy mechanisms and race-neutral ones, disincentivizing honest public discussions about current racial disadvantage and policy solutions.[119]

Unfortunately, the Court's denials of certiorari do not concretely clarify the extent to which racial policy considerations are permissible. In *Coalition for TJ v. Fairfax County School Board*, plaintiffs alleged that changes to the admissions policy for Thomas Jefferson High School for Science and Technology (TJ) discriminated against Asian American students.[120] The Fourth Circuit, upholding the policy, emphasized that the adopted policy was "fully race-blind" and was not accompanied by any "projections of the proposed policy's impact on TJ's student demographics, whether racial or otherwise."[121] *Boston Parents Coalition for Academic Excellence v. School Committee for the City of Boston* (*Boston Parents Coalition*) more explicitly considered the demographic implications of high school admissions policies during COVID-19, but the case only arrived at the Supreme Court after the end of the pandemic-era policies, potentially mooting the case and "greatly diminish[ing] the need for [] review."[122] Because *Coalition for TJ* did not present a policy clearly driven by a purpose to reduce racial disparities, and *Boston Parents Coalition* presented justiciability issues, the Supreme Court's certiorari denials for these cases did not cleanly constrain the boundaries of equal protection liability for facially-neutral policies. The heightened scrutiny of policymaking intent raises litigation risk and the importance of carefully crafted policymaking processes to reduce racial inequality.

### *D. Presumptions of Social Disadvantage for Certain Racial Groups*

The threat of shifting equal protection jurisprudence is also clear in cases enjoining longstanding federal programs for "socially and economically disadvantaged" groups. These programs defined "social disadvantage" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a

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119 *Id.* at 168 (describing how such uncertainty "strongly encourages state actors to conceal and soften [race-conscious] policies" in ways that "undermine[] democratic values and prevent[] forthright, evidence-based rational deliberation about racism and racial inequality").

120 68 F.4th at 871.

121 *Id.* at 875, 883.

122 *Bos. Parents Coal.*, 145 S. Ct. at 15 (Gorsuch, J., concurring in the denial of certiorari).

group without regard to their individual qualities," and presumed social disadvantage for individuals of certain racial or ethnic groups.[123] Several circuits have long upheld the use of such presumptions.[124] But a recent string of losses in the Sixth Circuit led federal agency defendants to end their use of this presumption, showing just how draconianly lower courts may apply the reasoning in *SFFA* to race-conscious policy.[125]

In July 2023, the Eastern District of Tennessee struck down the Small Business Administration (SBA) 8(a) program.[126] The Small Business Act of 1953 directed the SBA to acquire and fulfill procurement contracts from other government agencies with performance by "socially and economically disadvantaged" small businesses.[127] Congress defined eligible businesses as those "at least 51% owned by a socially and economically disadvantaged individual," and charged the SBA with making determinations of social disadvantage.[128] In accordance with Congressional findings, SBA regulations presumed social disadvantage for Black, Hispanic, Native, and Asian Americans.[129] All other applicants could show social disadvantage by submitting evidence of an "objective distinguishing feature" that led to "chronic and substantial" disadvantage "experienced in American society" and that "negatively impacted . . . entry into or advancement in the business world."[130]

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123 Hierholzer v. Guzman, 125 F.4th 104, 107 (4th Cir. 2025) (citing 15 U.S.C. § 637(a)(5)). Congress described relevant economic disadvantage as impaired "ability to compete in the free enterprise system . . . due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* at 108 (citing § 637(a)(6)(A)).

124 *Compare* Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp., 713 F.3d 1187, 1196 (9th Cir. 2013) (affirming the constitutionality of a California program designed to increase federal transportation contracts with contractors of presumptively disadvantaged identities); H.B. Rowe Co. v. Tippett, 615 F.3d 233, 257 (4th Cir. 2010) (permitting North Carolina's use of race- and gender-conscious bid evaluation on government contracts); Midwest Fence v. U.S. Dep't of Transp., 84 F. Supp. 3d 705, 727 (N.D. Ill. 2015) (holding that an Illinois program establishing targets for presumptively disadvantaged business participation survived strict scrutiny due to its flexibility, race-neutral measures, and strong basis in evidence); Rothe Dev. Corp. v. U.S. Dep't of Def., 107 F. Supp. 3d 183, 209–10 (D.D.C. 2015) (rejecting the claim that the Section 8(a) program violates the constitutional rights of businesses outside presumptively disadvantaged groups) *with* Mid-America Milling Co., LLC v. U.S. Dep't of Transp., 2024 WL 4267183, at *8 (E.D. Ky. Sept. 23, 2024) (noting its departure from other circuits that have "weighed this type of evidence and concluded that it sufficiently provides persuasive evidence of specific instances of discrimination and its continuing effects," and rather basing its holding on a 2021 Sixth Circuit case).

125 *See Hierholzer*, 125 F.4th at 110–11 (describing changes to remove the race-conscious presumption from the Small Business Administration program after a district court ruling in the Eastern District of Tennessee).

126 Ultima Servs. Corp. v. U.S. Dep't of Agric., 683 F. Supp. 3d 745 (E.D. Tenn. 2023).

127 *Id.* at 755.

128 *Id.* at 755–56.

129 *Id.* at 755, 756.

130 *Hierholzer*, 125 F.4th at 108 (quoting 13 C.F.R. § 124.103(c)(1)–(2)).

The Eastern District of Tennessee held that the 8(a) program's definition of social disadvantage was not justified by a compelling government interest.[131] Citing *SFFA*, the court concluded that the SBA did not have a compelling interest due to its lack of data on "whether any racial group is underrepresented in a particular industry relevant to a specific contract."[132] The court also circumscribed permissible compelling interests to remedying "*intentional* discrimination in the past,"[133] and held that the 8(a) program was not narrowly tailored because it lacked a temporal limit and used "over and underinclusive" racial categories.[134] *Ultima* enjoined the presumption and required all applicants to the 8(a) program to submit evidence of social disadvantage.[135]

In September 2024, *Mid-America Milling Company, LLC v. United States Department of Transportation* enjoined a similar presumption of social disadvantage for the Disadvantaged Enterprise (DBE) program.[136] Since 1983, federal law has "required that ten percent of federal highway construction funds be paid to small businesses owned and controlled by 'socially and economically disadvantaged individuals.'"[137] The DBE program presumed social disadvantage for Black, Native, and Asian Americans, as well as women.[138] All other applicants could receive DBE certification by writing a personal narrative describing "specific acts or omissions by others, which impeded his progress or success in education, employment, and/or business" and "how and to what extent the discrimination caused the owner harm."[139] Applying many of the same arguments made by the *Ultima* court, the Eastern District of Kentucky also enjoined the Department of Transportation's presumption of social disadvantage.[140]

These cases demonstrate how the logic of *SFFA* could extend to strike down other programs to mitigate racially unequal access to opportunity. Courts could circumscribe a compelling interest to

131 *Ultima*, 683 F. Supp. 3d at 752.

132 *Id.* at 765. This reasoning evinced one of Justice Sotomayor's critiques of *SFFA*: that its requirement of "measurable," "focused," and "concrete" interests, alongside its prohibition of specific numerical goals as "racial balancing," is merely "designed to render strict scrutiny 'fatal in fact.'" Students for Fair Admissions, Inc. v. Presidents & Fellows of Harvard Coll., 143 S. Ct. 2141, 2253–54, 2256 (2023) (Sotomayor, J., dissenting) (citing Grutter v. Bollinger, 539 U.S. 306, 326 (2003)).

133 *Ultima*, 683 F. Supp. 3d at 766 (citing Vitolo v. Guzman, 999 F.3d 353, 361 (6th Cir. 2021)).

134 *Id.* at 771–72.

135 *Id.* at 774.

136 No. 3:23-cv-00072-GFVT, 2024 WL 4267183, at *1 (E.D. Ky. Sept. 23, 2024).

137 *Id.*

138 49 C.F.R. § 26.5 (2024).

139 49 C.F.R. § 26.67 (2024).

140 *Mid-Am. Milling Co.*, 2024 WL 4267183, at *1.

remediating *intentional* discrimination—despite that courts currently recognize that certain policies disparately impacting certain racial groups violate federal civil rights law. Courts could find that the evidence of past discrimination is not detailed enough to warrant the current remedy. Courts could find that presuming members of a certain racial group generally face "social disadvantage" is an impermissible stereotype. And courts could take issue with any longstanding program as impermissibly exceeding appropriate temporal limits.

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Shifting equal protection doctrine creates massive uncertainty in the scope of permissible policies to affirmatively further fair housing. *SFFA* called into question the evidence needed to demonstrate that a state actor has a compelling interest in enacting race-conscious policy and signaled that the Court would skeptically view any affirmative efforts to address current racial disparities. This view of equal protection questions any policymaking motivated by a future-looking vision of equal opportunity, rather than remedying a narrow set of egregious instances of intentional racial discrimination. Equal protection litigation after *SFFA* has also invited judges to scrutinize whether policymaking processes impermissibly considered race, creating perverse incentives for risk-averse policymakers to avoid open discussions about the current state of residential segregation and inequality—rather than making data more transparent, as encouraged by Obama- and Biden-era AFFH policies.[141]

*SFFA* thus changed the risk of litigation for state and local governments seeking to redress structural discrimination. Furthermore, the uncertain boundaries of equal protection liability mean that even evaluating litigation risk is a difficult task. As lawsuits abound about the "discriminatory intent" of efforts to redress racially unequal access to opportunity, more risk-averse entities may react by restricting policies to race-blind mechanisms, minimizing public statements about reducing racial inequality, or even limiting consideration of data on racial disparities. Avoiding discussion of race can certainly help avoid judicial disapproval,[142] but race-blind policies and policymaking processes

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[141] *See* Blake Emerson, *Affirmatively Furthering Equal Protection: Constitutional Meaning in the Administration of Fair Housing*, 65 BUFF. L. REV. 163, 209–10 (2017) (describing how the Obama-era AFFH policy "point[ed] toward a more compelling framework for equal protection analysis that focuses on transparent, inclusive, and evidence-based race-conscious policy").

[142] *See* Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 875 (4th Cir. 2023) (upholding admission policy that was "fully race-blind"), *cert. denied*, No. 23-170, 2024 WL 674659 (Feb. 20, 2024).

may be inadequate to meaningfully repair race relations, redress discriminatory injuries, or reduce stubborn racial disparities.[143]

## III
## A Process for Policy Design to Mitigate Racial Segregation and Inequality Post-*SFFA*

Over the past several decades, public officials have devised many programs to redress the continued impacts of discriminatory policies and practices that segregated and oppressed people of color. These programs vary widely. Policy aims vary: For example, some policies seek to eliminate racially disparate access to social services, and some seek reparations for racial discrimination.[144] Policy targets vary: Policies can support individuals, organizations, or places.[145] Policy delineations of racial groups vary: Some differentiate between white/non-white or Black/non-Black; others use the minimum census categories; and others are still more granular.[146]

Equal protection doctrine does not prohibit any of these choices, but *SFFA* and subsequent equal protection cases indicate that state actors should carefully consider both policymaking processes and

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[143] *See, e.g.*, Adewale A. Maye, Econ. Pol'y Inst., The Myth of Race-Neutral Policy (2022), https://www.epi.org/publication/the-myth-of-race-neutral-policy [https://perma.cc/7N9F-XBBF] (laying out key arguments); Tiffany Jones & Andrew Howard Nichols, Educ. Trust, Hard Truths: Why Only Race-Conscious Policies Can Fix Racism in Higher Education 6–10 (2020), https://edtrust.org/wp-content/uploads/2014/09/Hard-Truths-Why-Only-Race-Conscious-Policies-Can-Fix-Racism-in-Higher-Education-January-2020.pdf [https://perma.cc/5S8A-S3UQ] (describing why income-based policies are inadequate to close the racial gap in higher education attainment).

[144] *See, e.g.*, Anand Sharma, Urb. Inst., Promise Neighborhoods as a Platform for Advancing Racial Equity, (2021), https://www.urban.org/sites/default/files/publication/105250/promise-neighborhoods-as-a-platform-for-advancing-racial-equity_2.pdf [https://perma.cc/UHD7-MQSR] (proposing policies dedicated to addressing racial disparities in social service access); *Task Force on Reparations*, City of Bos., https://www.boston.gov/departments/equity-and-inclusion-cabinet/task-force-reparations [https://perma.cc/E38T-N7SM] (Aug. 27, 2025) (describing its outcomes as truth, reconciliation, and reparations).

[145] *See generally* Asian & Pac. Islander Am. Scholarship Fund, The Impact of Scholarships for Asian American and Pacific Islander Community College Students (2015) (describing and evaluating a model of individually-granted scholarships to a racial minority group); Brett Theodos, Brady Meixwell & Sophie McManus, *What We Do and Don't Know About Opportunity Zones*, Urb. Inst. (Mar. 21, 2023), https://www.urban.org/urban-wire/what-we-do-and-dont-know-about-opportunity-zones [https://perma.cc/C5UZ-2SP8] (describing and evaluating a model of place-based investments in particular neighborhoods and community-based organizations).

[146] *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 723 (2007) (disapproving of the binary categories white/non-white and black/'other'); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*SFFA*), 143 S. Ct. 2141, 2167 (2023) (describing the racial categories considered by Harvard and UNC's affirmative action programs).

mechanisms for addressing racialized poverty, segregation, and other forms of racial oppression. This Part charts out a policymaking process to address drivers of structural racism within the new constraints suggested by *SFFA*: (A), identify a compelling interest by making clear their intent to remedy past discrimination and tracing past discrimination to current disparities or segregation, and (B), narrowly tailor policy mechanisms by fitting the specificity of race-consciousness to the level of evidence of past discrimination, and by setting temporal end points.

### *A. Identify a Compelling Interest in Remedying Past Discrimination*

To begin, a state must identify a compelling interest that navigates the constraints of *SFFA*: A concrete instance of past discrimination that can be traced to persistent racial harm in the present. *SFFA* stated that race-conscious policy may be justified by the compelling interest of remedying "specific, identified instances of past discrimination that violated the Constitution or a statute."[147] Earlier Supreme Court cases provide further guidance on what instances of past discrimination may justify explicit race-conscious policy today. In *City of Richmond v. J.A. Croson Co.*, the Court stated that before a state embarks on an affirmative action program, it must point to a specific instance of its own past discrimination, or participation in a system of racial exclusion practiced within its jurisdiction.[148] The state must target its support to the specific racial groups that it formerly discriminated against, not merely any racial minority.[149] The state must then demonstrate a "strong basis in evidence" for concluding that a racial remedy is necessary.[150] These guidelines suggest that governments interested in explicitly redressing systemic racism should (i) begin by excavating specific instances of past discrimination against a racial group, and (ii) trace how this past discrimination continues to shape a current problem of racial segregation or access to opportunity.

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147 *SFFA*, 143 S. Ct. at 2162.

148 *See* 488 U.S. 469, 498–99, 510 (1989) (discussing the City of Richmond's failure to identify specific evidence of past discriminatory practices).

149 *See id.* at 506 (noting the city's program was impermissible because it provided benefits for racial minorities, such as Aleut and Eskimo individuals, that there were no records of having ever lived in the city).

150 *Id.* at 510 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986)).

### *1. Excavate Discriminatory Policies That Violated the Constitution or a Statute*

State actors must identify the specific discrimination they seek to remedy *before* they adopt race-conscious relief.[151] The policymaking process should thus start with an examination of prior action within the state's jurisdiction that (1) explicitly discriminated against, (2) intended to discriminate against, or (3) disparately impacted a particular racial group. De jure segregation provides the strongest base of evidence: in *Parents Involved*, the Court held that K-12 districts may only consider race in assigning students to schools to remedy racial disparities that are traceable to segregation by law.[152]

Evidence of intentional discrimination can provide a strong basis for race-conscious remedies. Relevant evidence includes the "historical background of the challenged policy; the specific sequence of events leading up to the policy's enactment; any departures from the normal procedural sequence; and the legislative or administrative history."[153] If these circumstances indicate that a past decisionmaker adopted a particular policy "at least in part 'because of,' not merely 'in spite of,' its adverse effects" on a racial group, that policy could justify a race-conscious remedy today.[154] Every member of the Court agrees that intentional discrimination violates the Equal Protection Clause, but, absent de jure exclusion, members of the Court differ on what circumstantial evidence sufficiently proves intent to discriminate.

Evidence of disparate impact, without more, is a riskier foundation for race-conscious policy. At least four Justices would hold that the civil rights statutes do *not* prohibit policies that only have a racially disparate impact—and this contingent could grow to encompass all six conservative Justices.[155] Current law also sets a high bar for disparate impact claims. *Croson* declared that to justify race-conscious remedies, a state actor relying on statistical disparities must show that those disparities are large enough to demonstrate a pattern of discriminatory

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151 *Id.* at 504.

152 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 751 (2007).

153 Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 883 (4th Cir. 2023), *cert. denied*, No. 23-170, 2024 WL 674659 (Feb. 20, 2024) (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977)).

154 *Id.* (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

155 *See* Tex. Dep't of Hous. and Cmty. Affs. v. Inclusive Cmtys. Project (*ICP*), 576 U.S. 519, 557 (2015) (Alito, J., dissenting) (writing for himself, Roberts, C.J., Scalia, J., and Thomas, J.); *see also* Students for Fair Admissions v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2209 (2023) (Gorsuch, J., concurring) (writing separately to state that Title VI's use of the term "because of" indicates that the statute only "prohibits a recipient of federal funds from intentionally treating one person worse than another similarly situated person because of his race" or other protected characteristic).

exclusion.[156] States must also calculate these disparities from data within their jurisdiction: *Croson* stated that statistics derived from a broader geographic region or the nation at large do not sufficiently suggest that the state in question participated in discriminatory exclusion.[157] In calculating disparate impact of a state burden or benefit, the relevant disparity is the difference between the racial composition of those *selected* for the burden or benefit and the racial composition of those *eligible* for the burden or benefit—not the population at large.[158] In the context of fair housing, the Supreme Court has also announced that a disparate impact claim must rest on robust evidence that a state actor's "artificial, arbitrary, and unnecessary barriers" to housing caused the disparate impact at issue.[159]

In recent years, many state and private actors have modeled processes to identify discriminatory practices. A 2023 California Legislative Task Force report documented the state's participation in racial terror, political disenfranchisement, and discrimination in housing and infrastructure policy.[160] Several law firms have offered "civil rights audit" services to private, public, and non-profit entities, which can identify practices that exacerbate racial inequality and design remedies accordingly.[161] A 2010 article by Professor Robin A. Lenhardt outlined a model of "race audits" that asks local governments to identify whether and how "past and present decisions, systems, and structures categorized and exploited individuals or groups on the basis of race"; "spatial arrangements and policies impeded the ability of racial minorities fully to realize opportunities in areas such as education, employment, housing, and health"; and past and present structures and systems affect "intergenerational wealth, social capital, and participation" in government.[162]

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156 *Croson*, 488 U.S. at 503–04.

157 *Id.* at 504–05.

158 *Id.* at 501–02.

159 *ICP*, 576 U.S. at 543 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

160 Cal. Task Force to Study and Develop Reparations Proposals for African Americans, The California Reparations Report (2023), https://oag.ca.gov/ab3121/report [https://perma.cc/AH78-7KQS].

161 *See, e.g.*, *Racial Equity Audits and Independent Investigations*, Relman Colfax, https://www.relmanlaw.com/practices-internal-investigations [https://perma.cc/7TLX-PB8F] (last visited July 17, 2025); *Civil Rights Audits, DEI Assessments, and Culture Reviews and Investigations*, WilmerHale, https://www.wilmerhale.com/en/solutions/anti-discrimination/civil-rights-audits-dei-assessments-and-culture-reviews-and-investigations [https://perma.cc/Q893-JW22].

162 R.A. Lenhardt, *Race Audits*, 62 Hastings L.J. 1527, 1549 (2010). While Lenhardt suggests other questions too, these three are particularly salient for identifying specific instances of past discrimination, as prioritized by *SFFA*.

State actors should begin by considering these questions via internal investigations focused on identifying evidence of past discrimination that a court may recognize as unlawful. To gauge the strength of the evidence, investigations should categorize evidence into (1) explicit discrimination, (2) intentional discrimination, and (3) statistical disparities. States may wish to contract out such investigations to a third party, like an experienced civil rights law firm: *SFFA* expressed skepticism that a party who previously discriminated against a racial group could be "a trustworthy arbiter" of whether a race-conscious remedy is now necessary.[163]

### *2. Define the Injured Racial Groups in Detail*

The Court's skepticism about the continued relevance of racial categories indicates the importance of (1) defining previously injured racial groups in detail, and (2) tracing the relevance of past racial injury to current racial categories. *Croson*, noting that a vast majority of racial minority persons in Richmond were Black, struck down a race-conscious program that aimed to benefit a "random inclusion of [other] racial groups that, as a practical matter, may never have suffered from discrimination" by the City of Richmond.[164] *Parents Involved* struck down K–12 school assignment plans that it criticized as employing a "limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and Black/'other' terms in Jefferson County."[165] *SFFA* further took issue with widely recognized racial categories altogether—criticizing the consideration of "Hispanic" identity as "arbitrary or undefined."[166]

These criticisms suggest that states seeking to redress racial disparities will need to detail how prior policies categorized certain groups of people into races and systematically excluded them. Without historical grounding, a state risks criticisms that a certain racial or ethnic category is an incoherent and unconstitutional agglomeration of stereotypes.[167] Asian communities, for example, certainly encompass a

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163 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*SFFA*), 143 S. Ct. 2141, 2191 (2023) (Thomas, J., concurring) ("[T]he university respondents' histories hardly recommend them as trustworthy arbiters of whether racial discrimination is necessary to achieve educational goals."); *see id.* at 2168 (critiquing the universities' response to questioning as "essentially, 'trust us'").

164 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 506 (1989).

165 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 723 (2007).

166 *SFFA*, 143 S. Ct. at 2167.

167 *See id.* at 2210–11 (Gorsuch, J., concurring) (characterizing racial classifications used by the universities as "rest[ing] on incoherent stereotypes"); *id.* at 2168 (majority echoing the same argument).

wide range of linguistic, cultural, national, and historical backgrounds. But a pan-Asian identity emerged in the United States *because* Asian Americans have faced similar and related patterns of discrimination for centuries.[168] In the housing context, federal agencies in the 1930s explicitly designated neighborhoods with "Oriental" residents as "hazardous" lending zones.[169] To this day, neighborhoods that have hosted majority-Asian populations since the 1800s face disproportionately high poverty rates.[170]

Such histories of discrimination explain why targeting resources to certain racialized groups remains important. Given the Court's skepticism of broader racial categories like "white/nonwhite," state actors should define past and present racialization as specifically as possible.[171] If a state possesses explicit evidence of a particular racialization (like "Oriental," in redlining documents), it should explain how that racialization is congruent to a particular racial group today (like "East Asian"). In some cases, the congruent racial group today may encompass an overbroad set of individuals compared to the historical harm: for example, many East Asian residents of "ethnoburbs" from later waves of immigration do not face the same intergenerational barriers to opportunity as those living in urban ethnic enclaves that have existed for centuries.[172] If faced with these facts, the state may

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168 *See, e.g.*, Becky Little, *How the 1982 Murder of Vincent Chin Ignited a Push for Asian American Rights*, History (May 28, 2025), https://www.history.com/news/vincent-chin-murder-asian-american-rights [https://perma.cc/D9KR-97NK] (describing how the modern Asian American movement originated in the murder of Vincent Chin—a Chinese American man beaten to death by two autoworkers in Detroit who believed he was Japanese).

169 *See* Robert K. Nelson, *Mapping Inequality: Redlining in New Deal America, Search of Area Descriptions*, Univ. of Rich. Digit. Scholarship Lab [hereinafter *Area Descriptions*], https://dsl.richmond.edu/panorama/redlining/areadescriptions/oriental* [https://perma.cc/NPK4-RGH9] (showing communities described as having a large "Oriental" population as grade D); *see also* Robert K. Nelson, *Mapping Inequality: Redlining in New Deal America, Map of Oakland, California*, Univ. of Rich. Digit. Scholarship Lab, https://dsl.richmond.edu/panorama/redlining/map/CA/Oakland/areas#mapview=full&loc=11/37.8099/-122.2263 [https://perma.cc/BMD8-AHV6] (showing a map redlining neighborhoods "infiltrated" by people labeled "Oriental[] and Negro").

170 *See, e.g.*, Sydnee Yu, *Poverty in Chinatown* in *A Changing Chinatown*, ArcGIS StoryMaps (May 4, 2023), https://storymaps.arcgis.com/stories/88061f08a90a40caaaa04e5e81924347 [https://perma.cc/65T7-4NDS] (showing poverty rates in San Francisco's Chinatown); Yilun Cheng, *The Displacement of Chinatown's Low-Income Residents is Aggravated by COVID-19*, South Side Weekly (Feb. 3, 2021), https://southsideweekly.com/the-displacement-of-chinatowns-low-income-residents-is-aggravated-by-covid-19 [https://perma.cc/WEH9-ETS6] (noting disproportionately high poverty rates in Chicago Chinatown).

171 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 723 (2007).

172 *See, e.g.*, Wei Li, *Beyond Chinatown, Beyond Enclave: Reconceptualizing Contemporary Chinese Settlements in the United States*, 64 GeoJournal 31 (2005) (describing broad differences between more longstanding Chinese enclaves and ethnoburbs).

consider limiting the remedy to a more specific subgroup—such as historical Chinatown residents.

### *B. Narrowly Tailor the Policy Mechanism to the Evidence of Discrimination*

After identifying instances of prior discrimination against specified racialized groups, a state must narrowly tailor its mechanism for redress to the discrimination. To demonstrate that a race-conscious policy is "narrowly tailored" to a compelling interest, the state must show that its use of race is necessary—that is, no race-neutral alternative can adequately achieve the interest.[173]

Race-neutral mechanisms may be adequate to redress some racial disparities. As Professor Olatunde C.A. Johnson articulates: "where the barrier to opportunity is about poverty or income, underresourced social goods, wealth disparities, or unequal schools and neighborhoods, targeting those sites directly may be better than broadly deploying 'race.'"[174] Allocating an equal number of specialized high school seats to each public middle school or ZIP code, for example, specifically addresses "educational inequality that is mapped onto the race and class geography of school districts and neighborhoods."[175] Policies aimed at addressing inequalities in physical infrastructure—such as transportation access, environmental hazards, and greenery—can also focus on underserved neighborhoods without explicit regard to race.[176] Where a state does not have robust evidence of prior intentional discrimination against currently disadvantaged racial groups, such race-neutral mechanisms are the safest path forward.

If race-neutral mechanisms are inadequate to address the continued effects of past discrimination, then two themes from *SFFA* become relevant in designing race-conscious policies. First, *SFFA* took a formal approach to equal protection that is primarily concerned with unfair burdens on "innocent" individuals.[177] This view suggests that differentiating between *individuals* based on race might be more concerning to the Court than differentiating between businesses, neighborhoods, or larger groups based on racial composition. Second, the Court emphasized the need for an "end point" to any consideration

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173 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*SFFA*), 143 S. Ct. 2141, 2162 (2023) (citing Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 311–12 (2013)).

174 Johnson, *supra* note 90, at 1303.

175 *Id.* at 1304.

176 *See* Archer & Joshi, *supra* note 89, at 29–30 (describing facially race-neutral policy efforts to "advanc[e] infrastructure equality").

177 *SFFA*, 143 S. Ct. at 2165 (expressing concern with "work[ing] the least harm possible to other innocent persons competing for the benefit").

of race in allocating burdens or benefits.[178] While *SFFA* stated that any consideration of race must be *time*-limited, the Court's school desegregation cases suggest other options could be available if a state has evidence of de jure segregation followed by stubbornly unchanging racial disparities.

### *1. Match Consideration of Race to the Unit of Discrimination*

Given *SFFA*'s formalist and individualistic view of equality, states should consider whether current inequalities rooted in discrimination leveled through physical spaces or entities can be adequately addressed through place-based solutions. Such an approach can avoid *SFFA*'s concern with unfairly burdening "innocent" individuals.[179] *Wygant v. Jackson Board of Education* noted the same concern with race-conscious mechanisms that "impose the entire burden of achieving racial equality on particular individuals," rather than those that impose a burden "diffused" across society.[180] In *Wygant*, Justice Powell described preferential-layoffs schemes as more concerning than racial hiring goals, which "simply do not impose the same kind of [intrusive] injury that layoffs impose."[181] While *Wygant*'s fractured opinion and subsequent cases weaken the specific distinction between hiring goals and layoff provisions, the underlying principle places particular scrutiny on policies that allocate burdens or benefits to *individuals* on the basis of their race.

*SFFA* and *Wygant* both dealt with policies that operate at an individual unit of analysis. A unit of analysis refers to the "what or whom" being studied in social science research.[182] In examining disparities in higher education admissions rates, the relevant unit of analysis is an individual. In examining the average number of public contracts awarded to minority-owned businesses, the relevant unit of analysis is the business. In examining differences in average transit-to-work time by neighborhood, the relevant unit of analysis is the neighborhood. Any allocation of resources to a unit larger than the individual can be race-neutral, as race is an individual characteristic. For example, if a state wanted to address disproportionate lack of access to public transit in majority-Black neighborhoods, allocating funding to neighborhoods without train lines (1) establishes the neighborhood as the unit of analysis, and so (2) uses a race-neutral policy mechanism,

178 *Id.* at 2170 (quoting Grutter v. Bollinger, 539 U.S. 306, 342 (2003)).
179 *See id.* at 2165.
180 476 U.S. 267, 282–83 (1986).
181 *Id.* at 282.
182 Earl Babbie, The Practice of Social Research 98–103 (12th ed. 2010).

while (3) addressing racial disparities. A race-aware approach to policymaking that ultimately uses only race-neutral mechanisms is clearly constitutional.[183]

A state actor can also allocate resources to a unit larger than the individual in race-conscious ways. At least three circuits have long upheld the use of federal policies that require certain contractors to set aside a proportion of subcontracts to businesses at least 51% owned by "socially and economically disadvantaged individuals," which are rebuttably presumed to include certain racial groups.[184] Two recent district court opinions in the Sixth Circuit disagreed about the constitutionality of such programs, creating a grey area on whether such consideration of the racial composition of a business's owners is constitutional.[185] But a race-conscious, neighborhood-level approach could try to target resources to "socially and economically disadvantaged" communities, which could presume eligibility for neighborhoods where at least 51% of residents are members of a racial group that the state previously discriminated against. To support such targeting, a state actor could develop primarily "race-neutral" metrics of eligibility—including concentrated poverty, unemployment, and other results of state-driven racial oppression—but include race as a severable component of an eligibility index.[186]

### *2. Set an End Point*

States adopting race-conscious policy must set an "end point" for that policy.[187] *SFFA* repeatedly highlighted *Grutter*'s prediction that by 2028, the use of race-conscious admissions policies would no longer be necessary.[188] It described this end point as "the reason the

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[183] *See, e.g.*, Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 871–75 (4th Cir. 2023), *cert. denied*, No. 23-170, 2024 WL 674659 (Feb. 20, 2024) (finding an admission program constitutional where it allocated a percentage of seats to each feeder school).

[184] H.B. Rowe Co. v. Tippett, 615 F.3d 233, 236, 236 n.1 (4th Cir. 2010) (quoting 49 C.F.R. § 26.5); Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp., 713 F.3d 1187, 1190 (9th Cir. 2013) (quoting 49 C.F.R. § 26.5); Midwest Fence Corp. v. U.S. Dep't of Transp., 840 F.3d 932, 936 (7th Cir. 2016) (citing 49 C.F.R. § 26.5); *see also supra* Section II.D.

[185] Ultima Servs. Corp. v. U.S. Dep't of Agric., 683 F. Supp. 3d 745, 765 (E.D. Tenn., 2023); Mid-Am. Milling Co. v. U.S. Dep't of Transp., 23-CV-72, 2024 WL 4267183, at *1 (E.D. Ky. Sept. 23, 2024).

[186] For example, Boston's Displacement Index evaluates the risk of residential displacement using sixteen factors, including demographics, amenities, and market changes. *See* City of Boston, Boston Displacement Risk Index: 2020 at 2, https://www.boston.gov/sites/default/files/file/2021/03/Boston%20Displacement%20Risk%20Map%202020_%20Summary%20Sheet.pdf [https://perma.cc/BZA4-B2XA] (last visited July 20, 2024).

[187] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2165 (2023) (quoting Grutter v. Bollinger, 539 U.S. 306, 342 (2003)).

[188] *Id.* at 2165–66, 2172; *see also id.* at 2222–25 (Kavanaugh, J., concurring).

Court was willing" to previously uphold colleges' consideration of race in admissions.[189] States averse to litigation risk should hew to some temporal limit. But for states that (1) are more risk tolerant, (2) have evidence of prior de jure segregation, and (3) can point to stubborn racial disparities in place since de jure segregation ended—school desegregation cases offer a potential path forward for more goal-oriented and flexible end points.

If a state's race-conscious policy aims to remedy prior de jure segregation that has resulted in stubborn racial disparities, it could challenge the necessity of temporal limitations by pointing to various school desegregation cases. Multiple appellate courts have approved the use of statistical measures of segregation to determine whether a school district has sufficiently integrated after de jure segregation. First, courts have considered racial isolation—in particular, the number of "racially identifiable schools" where anywhere from 70 to 90% of students are of one race.[190] An "abundance" of racially identifiable schools militates against finding that a school district has achieved unitary (de-segregated) status.[191] Second, courts have considered dissimilarity between a given school's racial composition and the overall district—for example, if the percentage of Black students at a given school varied from the district-wide composition by more than fifteen or twenty percentage points, this dissimilarity militates against finding that the district had achieved unitary status.[192] Courts have similarly considered racial dissimilarity in the context of public housing desegregation.[193]

This strategy is least risky where a state aims to remedy a history of de jure segregation. Otherwise, focusing on a certain level of racial isolation or dissimilarity risks litigation over whether the state is engaging in unconstitutional "racial balancing."[194] If a state's race-conscious policy aims to remedy discrimination that the Court may not

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189 *Id.* at 2165.

190 *See, e.g.*, Morgan v. Nucci, 831 F.2d 313, 319–20 (1st Cir. 1987) (summarizing various cases defining "racially identifiable schools" using 70%, 75%, and 90% cutoffs).

191 *Id.* at 319.

192 *See, e.g.*, Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 319 (4th Cir. 2001) (affirming district court use of "a plus/minus fifteen percent variance" to determine whether unitary status had been reached); Holton v. City of Thomasville Sch. Dist., 425 F.3d 1325, 1331 (11th Cir. 2005) (affirming that racial imbalance was not traceable to a district's former de jure segregation because in 1976, "no student attended a school whose black student population varied by more than twenty percent from the district-wide percentage of black students").

193 *See, e.g.*, Davis v. N.Y.C. Hous. Auth., 278 F.3d 64, 82 (2d Cir. 2002) (affirming a consent decree using "30% white family occupancy as a threshold signifying segregation" where only 7% of families in the system's housing projects were white).

194 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2172 (2023) (quoting Fisher v. Univ. of Tex. at Aus., 570 U.S. 297, 311 (2013))

recognize as violative of the Constitution or a statute, it may want to adopt the less-risky temporal approach to setting an end point. *SFFA* made clear the Court's preference for race-conscious policies limited in time, rather than any specific metric of racial diversity.[195] This end point could be static—like the 25 years predicted in *Grutter*—or include sunset provisions to determine whether the race-conscious policy is still necessary after given time periods.[196]

The Consumer Financial Protection Bureau's (CFPB) advisory opinion on Special Purpose Credit Programs provides a helpful example of guidelines for developing an end point to a remedial program.[197] Under the Equal Credit Opportunity Act of 1974, lenders may meet the credit needs of underserved communities through Special Purpose Credit Programs dedicated to such communities.[198] A Special Purpose Credit Program must be established and administered pursuant to a written plan that includes, among other provisions, "either (i) the time period during which the program will last or (ii) when the program will be reevaluated to determine if there is a continuing need for it."[199] "If an organization extends the program beyond [the period] . . . set forth in [the original] . . . plan, it must document the terms of that extension in order to ensure the program continues to be administered pursuant to a written plan" in accordance with ECOA.[200] Any state adopting a race-conscious policy could similarly document its justification for that policy, its proposed end point, and process for re-evaluating program need at that end point.

## IV
## Affirmatively Furthering Fair Housing as Redress to Federal Housing Discrimination

In the current political climate, state and local governments will need to lead any public efforts to redress racially separate and unequal living conditions. But the Fair Housing Act responded to widespread housing segregation and discrimination with a mandate that federal agencies affirmatively further fair housing. Nearly sixty years of

(noting that a program comparing racial group enrollment to the percentage in the general population risks being unconstitutional).

195 *See id.* at 2166 (fixating on the fact that twenty years had passed since *Grutter*).

196 Grutter v. Bollinger, 539 U.S. 306, 342 (2003).

197 Equal Credit Opportunity (Regulation B); Special Purpose Credit Programs, 86 Fed. Reg. 3762, 3765 (proposed Jan. 15, 2021) (to be codified at 12 C.F.R. pt. 1002) (advisory opinion).

198 *Id.* at 3763.

199 *Id.* at 3764–65.

200 *Id.* at 3765.

stubbornly persistent residential segregation and unequal living conditions has shown that addressing this problem at scale requires federal engagement.[201]

Federal action is even more important given the Supreme Court's disposition toward affirmative efforts to further racial equality. The federal government's nationwide project of residential segregation in the twentieth century was particularly aggressive and extensively documented: Federal agencies involved in mortgage insurance and public housing explicitly excluded people of color from housing opportunities and imposed racialized economic segregation on localities across the country.[202] Given the Court's prohibition of local action to remedy societal or national discrimination, policies to redress this federal housing discrimination should come from federal agencies.[203]

Federal agencies should help develop remedies for local housing discrimination too. Discriminatory use of federal funding by grantees exacerbated prior patterns of discrimination, justifying federal assistance to remedy the continued impact of that discrimination today.[204] For states without large planning departments or funding streams, this assistance can be the difference between meaningful AFFH processes and surface-level engagement.[205] The immensely uncertain and rapidly changing bounds of constitutional law can also make federal guidance particularly impactful in smaller localities trying to ascertain what they can do, providing clarity and lending legitimacy to local efforts.[206]

This Part charts out the role that a future Department of Housing and Urban Development (HUD) should play to carry out its AFFH duties in the context of the current Court. It identifies this

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201 *See* Tracy Hadden Loh, Christopher Coes & Becca Buthe, *The Great Real Estate Reset*, Brookings Inst. (Dec. 16, 2020), https://www.brookings.edu/articles/trend-1-separate-and-unequal-neighborhoods-are-sustaining-racial-and-economic-injustice-in-the-us [https://perma.cc/URU3-3EWW] (showing that most Americans still live in racially segregated neighborhoods).

202 *See, e.g.*, Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America, at xii (2017).

203 *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 504 (1989) (stating that a state or local government may not justify affirmative action programs based on national data).

204 *See id.* at 492 ("[A]ny public entity . . . has a compelling interest in assuring that public dollars . . . [do not] finance the evil of private prejudice.").

205 *See, e.g.* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272, 42289 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 92, 570, 574, 576, 903) (addressing public comments about challenges identifying determinants of fair housing problems without guidance from HUD).

206 *See* Josephine Harmon, *Strategic Behaviour and Risk Aversion in Local Governance*, 36 Socio. Lens 305, 322 (describing how asymmetrical resources between municipalities and national impact litigators "reduces local capacity to bargain and resist challenges where the [legal] landscape is less favorable"); Zachary D. Clopton & Nadav Shoked, *Suing Cities*, 133 Yale L.J. 2540, 2542–44 (describing the ways in which local governments are uniquely vulnerable to suit).

role by rooting the need for AFFH in the federal government's prior discrimination. First, it focuses on federal government policies that intentionally segregated and excluded individuals from adequate housing on the basis of race and offers related policy options. Second, it describes how the federal government funded widespread state and local discrimination, and how support for fair housing planning processes can be narrowly tailored to the harm.[207] In the absence of a HUD inclined to fill these roles, advocates, policy experts, funders, and other outside entities can help fill in the gaps.

### *A. Remediating De Jure Segregation and Exclusion*

*SFFA* stated that "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" could be a compelling government interest justifying race-conscious action.[208] The federal government's involvement in de jure racial segregation and exclusion, and the present-day impacts of these policies, make housing perhaps the clearest compelling justification for affirmative policies. This well-documented history of racial harm in housing suggests mechanisms for narrowly tailoring race-conscious policies to the harm, such as targeted homeownership supports.

#### *1. A Compelling Interest: Remedying Federal Segregation of Living Patterns by Race*

Federal agencies explicitly excluded Black Americans from home mortgage insurance and homeownership. In the 1930s, the Federal Housing Administration and Home Owners' Loan Corporation (HOLC) graded the "mortgage security" of thousands of American neighborhoods, designating each neighborhood an A ("Best"), B ("Still Desirable"), C ("Definitely Declining"), or D ("hazardous," marked in red).[209] In a practice now known as redlining, HOLC all but universally categorized majority-Black neighborhoods as "hazardous," and even the presence of a few Black families typically resulted in a "D" grade.[210] For most neighborhoods, HOLC agents filled out an "area description"

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[207] *Croson*, 488 U.S. at 492 (explaining that a city could take narrowly tailored steps to address a specific legacy of past discrimination).

[208] Students for Fair Admissions v. Presidents & Fellows of Harvard Coll., 143 S. Ct. 2141, 2162 (2023).

[209] *See* Robert K. Nelson, *Introduction to Mapping Inequality: Redlining in New Deal America*, Univ. of Rich. Digit. Scholarship Lab (2023), https://dsl.richmond.edu/panorama/redlining/introduction [https://perma.cc/D77J-52ZA] (describing the Federal Housing Administration's initiation of federal redlining practices and Home Owner Loan Corporation soon following suit).

[210] *Id.*

with a section to fill in details on current inhabitants, including preset fields for "Foreign-born families %" and "Negro %."[211] These area descriptions are also littered with racist language about the "infiltration of Negroes and Orientals" who posed a possible "threat" to the area.[212] The Federal Housing Association made similarly discriminatory evaluations.[213] Its 1936 Underwriting Manual, which describes how valuators should determine areas eligible for mortgage insurance, disparages the "threatening or possible infiltration of inharmonious racial groups" and explicitly states that "the presence of incompatible racial elements results in a lowering of the rating, often to the point of rejection."[214]

The Federal Housing Administration accordingly refused to insure mortgages for Black would-be-homeowners in "designated white" neighborhoods, as well as mortgages for prospective white homeowners in neighborhoods where Black residents were present.[215]

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211 Robert K. Nelson et al., *Map of Mobile, Alabama*, Mapping Ineq.: Redlining in New Deal Am. (2023), https://dsl.richmond.edu/panorama/redlining/map/AL/Mobile/area_descriptions/D5#loc=14/30.6818/-88.0669 [https://perma.cc/2PCJ-ZKTF] (showing the area description of a neighborhood in Mobile, Alabama, with a section for "Foreign-born" and "Negro" inhabitants). On the other hand, the clarifying remarks in HOLC area descriptions for neighborhoods graded "A" include notes on the influence of racially restrictive covenants "prohibit[ing] Asiatics and Negroes." Robert K. Nelson et al., *Map of Oakland, California*, Mapping Ineq.: Redlining in New Deal Am. (2023), https://dsl.richmond.edu/panorama/redlining/map/CA/Oakland/area_descriptions/A1#loc=12/37.8099/-122.2263 [https://perma.cc/JR44-79HB] (showing the area description of a A-graded neighborhood in Oakland, California, in which "deed restrictions prohibit[ed] Asiatics and Negroes").

212 Robert K. Nelson et al., *Map of Oakland, California*, Mapping Ineq.: Redlining in New Deal Am. (2023), https://dsl.richmond.edu/panorama/redlining/map/CA/Oakland/area_descriptions/C24#loc=12/37.8099/-122.2263 [https://perma.cc/4DWA-SFQE] (describing the "infiltration of Negroes and Orientals" as a "detrimental influence" on a neighborhood in Oakland, California); Robert K. Nelson et al., *Map of Oakland, California*, Mapping Ineq.: Redlining in New Deal Am. (2023), https://dsl.richmond.edu/panorama/redlining/map/CA/Oakland/area_descriptions/C4#loc=11/37.8101/-122.226 [https://perma.cc/Q8F3-GZCS] (describing the "infiltration" of "Orientals" as a "serious threat" to an Oakland, California neighborhood); *Area Descriptions*, *supra* note 169.

213 While the Federal Housing Administration destroyed nearly all its maps, a surviving set of records in Chicago shows that its redlining practices underpinned "the creation of a large and extensive investment desert that surrounded the existing black community." James L. Greer, *Historic Home Mortgage Redlining in Chicago*, 107 J. Ill. State Hist. Soc'y 204, 211–12, 222 (2014). Before the advent of New Deal mortgage insurance, no neighborhood in Chicago lacked home mortgage financing. *Id.* at 216.

214 Fed. Hous. Admin., Underwriting Manual: Underwriting and Valuation Procedure Under Title II of the National Housing Act ¶ 323(3) (1936). The 1938 version of the Manual also states that valuators should consider what characteristics may offer "reliable protection" against "inharmonious racial groups," such as "a high speed traffic artery or a wide street parkway," or racially restrictive deeds and zoning ordinances. Fed. Hous. Admin., Underwriting Manual: Underwriting and Valuation Procedure Under Title II of the National Housing Act ¶ 935 (1938).

215 Rothstein, *supra* note 202 at 13.

This practice imposed residential segregation across the nation.[216] The Veterans Administration issued home loans to veterans under similarly discriminatory policies.[217] The Public Works Administration not only segregated public housing facilities according to existing racial residential patterns, but further "designated many integrated neighborhoods as either white or black and then used public housing to make the designation come true—by installing whites-only projects in mixed neighborhoods it deemed 'white' and blacks-only projects in those it deemed 'colored.'"[218]

As the Federal Housing Administration excluded Black residents from higher-graded neighborhoods and refused to insure mortgages in lower-graded neighborhoods, its maps turned into a self-fulfilling prophecy of racialized economic oppression. Because most Black families could not qualify for mortgages under federal nor private policies, real estate agents could sell homes at inflated prices under predatory installment plans in which no equity accumulated from down or monthly payments.[219] These discriminatory policies, replicated by private insurance companies and leading banks, imposed artificial scarcity in housing for Black Americans, which in turn led to higher housing prices for poor living conditions.[220]

These policies still impact people of color today, and particularly Black Americans.[221] The economic and racial segregation created by redlining persists in many cities.[222] In cities where more redlined neighborhoods are still majority-minority, economic inequality and rates of racial hypersegregation are significantly higher.[223] People of color living in these formerly redlined and currently segregated neighborhoods are disproportionately likely to face substandard

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216 *Id.* at 13–14.

217 *Id.* at 70.

218 *Id.* at 21.

219 *Id.* at 96. If a single payment was late in the fifteen- to twenty-year period before ownership transferred, the speculator could evict the would-be-owner, who had accumulated no equity, then resell the home to new contract buyers. *Id.*

220 *See id.* at 96–99.

221 *E.g.*, William H. Frey, *Neighborhood Segregation Persists for Black, Latino or Hispanic, and Asian Americans*, Brookings Inst. (Apr. 6, 2021), https://www.brookings.edu/articles/neighborhood-segregation-persists-for-black-latino-or-hispanic-and-asian-americans [https://perma.cc/NRD2-XNBF] ("[S]ubstantial levels of neighborhood segregation persist for Black residents and—to a sizable, though lesser extent—for Latino or Hispanic and Asian Americans.").

222 *Id.*; *see also* Bruce C. Mitchell & Juan Franco, *HOLC 'Redlining' Maps: The Persistent Structure of Segregation and Economic Inequality*, Nat'l Cmty. Reinvestment Coal. 4 (Mar. 20, 2018), https://ncrc.org/wp-content/uploads/dlm_uploads/2018/02/NCRC-Research-HOLC-10.pdf [https://perma.cc/3CFP-WPGJ] (discussing persistent segregation and economic inequality in cities subject to redlining).

223 Mitchell & Franco, *supra* note 222.

housing conditions, toxic exposure to air and water pollution, and limited opportunities for high-quality education, well-paying employment, and access to healthcare.[224]

### 2. *Narrowly Tailored Policy Mechanisms: Targeted Homeownership Supports*

The well-documented history of de jure and intentional federal housing discrimination provides a compelling reason for the federal government to consider race-conscious remedies. Records from redlining and underwriting documents show systematic discrimination against "Negroes," "Mexicans," and "Orientals."[225] These categories are no longer used in data collection on race, but are related to the contemporary categories "Black or African American"; "Mexican" (or, arguably, a broader set of Hispanic Americans, given widespread conflation of Latin America with Mexico); and "Asian" (or, potentially, a smaller group of people of East and Southeast Asian national origin, or a broader group including "Middle Eastern or North African").[226] Understanding and detailing the national origin of individuals harmed by de jure segregative practices can help define the racial groups to benefit from a race-conscious remedy today.

Where de jure segregation has persisted as de facto segregation, the government may consider individual race to remedy the problem. Federal involvement in lending and public housing discrimination indicates that HUD can work toward AFFH using race-conscious policy to improve equal access to credit and desegregate public housing

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224 *See, e.g.*, Zinzi D. Bailey, Nancy Krieger, Madina Agénor, Jasmine Graves, Natalia Linos & Mary T. Bassett, *Structural Racism and Health Inequities in the USA: Evidence and Interventions*, 389 THE LANCET 1453–63 (2017) (health); Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods: A Constitutional Insult*, 6 RACE AND SOC. PROBS. 21–30 (2015) (education); Rashawn Ray, Andre M. Perry, David Harshbarger, Samantha Elizondo & Alexandra Gibbons, *Homeownership, Racial Segregation, and Policy Solutions to Racial Wealth Equity*, BROOKINGS INST. (Sept. 1, 2021), https://www.brookings.edu/articles/homeownership-racial-segregation-and-policies-for-racial-wealth-equity [https://perma.cc/P4LE-YGKF] (housing and wealth inequality).

225 *Area Descriptions*, *supra* note 169.

226 *See, e.g.*, David Hernández, *"3 Mexican Countries": When All Latin American Migrants Become Mexicans*, BORDER CRIMINOLOGIES (Oct. 1, 2019), https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2019/10/3-mexican [https://perma.cc/ENQ4-5EMP] (describing a 2019 Fox News graphic that described El Salvador, Guatemala, and Honduras as "3 Mexican Countries"); *Oriental*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/oriental [https://perma.cc/Z6TL-L5RX] (defining the term as "of, relating to, or coming from Asia and especially eastern Asia"); Cyma Hibri, *Orientalism: Edward Said's Groundbreaking Book Explained*, THE CONVERSATION (Feb. 12, 2023), https://theconversation.com/orientalism-edward-saids-groundbreaking-book-explained-197429 [https://perma.cc/VXM2-N8T6] (noting how "Oriental" was once used to describe any person or group of people east of Europe).

facilities that continue to be racially segregated. For example, since 1974, Congress has explicitly approved special-purpose credit programs, which allow creditors to set aside certain loans to classes of persons who would otherwise be denied credit or would receive it on less favorable terms.[227] Such classes could include, for example, "minority residents of low-to-moderate income census tracts."[228] HUD's mortgage programs could similarly extend special purpose credit to a class of persons that the federal government historically excluded from federally-insured loans. In alignment with *SFFA*, all special purpose credit programs would end or would have to be reevaluated after a specific period of time, or after the creditor has originated a pre-established number of loans to the dedicated class.[229]

### *B. Remediating Federal Funding of Local Discrimination*

In *City of Richmond v. J.A. Croson Co.*, the Supreme Court declared that federal, state, and local governments may adopt race-conscious remedies based on evidence that their spending practices exacerbated a pattern of prior discrimination.[230] Beginning in the 1950s, the federal government funded hundreds of state and local development projects that disproportionately destroyed communities of color and exacerbated racialized poverty.[231] These highway and urban renewal projects transformed local landscapes by facilitating white flight to the suburbs and displacing people of color en masse to new parts of the city.[232] These major infrastructural changes mean that not all HOLC-redlined neighborhoods are still sites of concentrated racialized poverty

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227 *See* Equal Credit Opportunity (Regulation B); Special Purpose Credit Programs, 86 Fed. Reg. 3762, 3762–63 (proposed Jan. 15, 2021) (advisory opinion) (providing guidance on special purpose credit programs).

228 *Id.* at 3765.

229 *Id.* (describing restrictions on "Program Duration/Reevaluation").

230 488 U.S. 469, 504 (1989).

231 Brent Cebul, Robert K. Nelson, Justin Madron & Nathaniel Ayers, *Renewing Inequality*, Univ. of Rich. Digit. Scholarship Lab, https://dsl.richmond.edu/panorama/renewal [https://perma.cc/VM8B-6RSL] [hereinafter *Renewing Inequality*].

232 *See, e.g.*, Matthew Gerken, Samantha Batko, Katie Fallon, Emma Fernandez, Abigail Williams & Brendan Chen, *Assessing the Legacies of Historical Redlining: Correlations with Measures of Modern Housing Instability*, Urban Inst. 1, 3 (Jan. 2023), https://www.urban.org/sites/default/files/2023-01/Addressing%20the%20Legacies%20of%20Historical%20Redlining.pdf [https://perma.cc/755S-SUNG]; Tom Lewis, Divided Highways: Building the Interstate Highways, Transforming American Life, at xiv (2013) ("The Interstate made long-distance commuting possible, thereby contributing to the 'white flight' that separated races and classes from each other."); *see also* Abraham, *supra* note 10, at 6 (noting how "the creation of freeways . . . literally sequestered Black communities and facilitated easy suburban access for fleeing white residents" (citing Sheryll Cashin, The Failures of Integration 113–15 (2004))).

today.[233] However, many sites of concentrated racialized poverty are still the result of federal decisions to fund specific instances of state and local discrimination. This participation in local discrimination can justify federal remedies to unequal access to opportunity in racially or ethnically concentrated areas of poverty—such as requirements that grantees participate in fair housing planning processes.

### *1. A Compelling Interest: Federal Funding of Local Discrimination*

The Housing Act of 1949 first authorized federal funding for local "slum clearance" and "redevelopment," now commonly known as urban renewal.[234] The 1949 Act declared its goal was "a decent home and a suitable living environment for every American family" and emphasized development "for predominantly residential uses."[235] But local government and private interest in *commercial* development led Congress to pass amendments that unleashed business-oriented clearance of slum conditions that federal, local, and private housing discrimination created.[236] The urban renewal projects that resulted were "one of the most sweeping and systematic instances of the modern destruction of Black property, neighborhoods, culture, community, businesses, and homes."[237]

By 1967, the federal government had funded projects displacing a third of a million families in over 600 municipalities.[238] The vast majority of these municipalities disproportionately displaced families of color.[239] Some municipalities also have evidence of intentional discrimination. For example, Arnold Hirsch's landmark history of midcentury Chicago documented the University of Chicago Chancellor's statement that urban renewal would "cut[] down the number of Negroes" in the university's surrounding neighborhood.[240] In many other

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[233] *See* Ryan Best & Elena Mejía, *The Lasting Legacy of Redlining*, FiveThirtyEight (Feb. 9, 2022, 6:00 AM), https://ryanabest.com/redlining [https://perma.cc/LY2N-D6VC] (describing how "huge demographic shifts, suburbanization, urban renewal and gentrification" have changed the landscape of many cities, so "[t]here is no one legacy when it comes to redlining").

[234] Housing Act of 1949, Pub. L. No. 81-171 § 101, 63 Stat. 413, 414 (1949) (amended 1954, 1955, and 1959).

[235] *Id.* §§ 2, 110.

[236] *See* Brent Cebul, *Tearing Down Black America*, Boston Rev. (July 22, 2020), https://www.bostonreview.net/articles/brent-cebul-tearing-down-black-america [https://perma.cc/4HYM-ZW5W] [hereinafter *Tearing Down Black America*].

[237] *Id.*

[238] *Renewing Inequality*, *supra* note 231.

[239] *Id.*

[240] *Tearing Down Black America*, *supra* note 236 (quoting Arnold Hirsch, Making the Second Ghetto: Race and Housing in Chicago, 1940-1960 153 (Univ. of Chi. Press 1998) (1983)).

municipalities, the grossly disproportionate displacement of families of color supports an inference of discrimination. Twenty-seven majority-white municipalities *only* displaced families of color.[241] For example, 100% of displaced families were families of color in Edison Township, New Jersey (which was 3% nonwhite at the time), Lubbock, Texas (8% nonwhite), Roanoke, Virginia (17% nonwhite), and Miami, Florida (23% nonwhite).[242] By 1965, federal administrators knew that the program was forcing families of color "into already crowded housing facilities, thereby spreading blight, aggravating ghettoes, and generally defeating the social purpose of urban renewal."[243]

A similar pattern of grossly disparate impact emerged in highway construction. In 1956, the Federal-Aid Highway Act allocated $24.8 billion in federal funding to states to construct a national system of interstate highways.[244] Without federal oversight, many grantees used highway construction to raze or segregate neighborhoods of color.[245] One observer of interstate construction and community displacement in Saint Paul commented that "[v]ery few blacks lived in Minnesota, but the road builders found them."[246] In other cities, highway construction "spared Black homes but became a permanent racial barrier between white and Black neighborhoods, further entrenching racial segregation and walling off economic opportunity."[247]

As with urban renewal, many of the local choices that led to this displacement can be traced to intentional discrimination. At the time the Federal-Aid Highway Act was passed, some city officials expressed that "the urban Interstates would give them a good opportunity to get rid of the local 'n-town.'"[248] In some other cities with racially restrictive zoning before the Supreme Court declared it unconstitutional, planning departments published explicitly segregationist justifications for highway site selection. A 1960 report by the Atlanta Bureau of

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241 *Renewing Inequality*, *supra* note 231.

242 *Id.*

243 *Tearing Down Black America*, *supra* note 236.

244 Federal-Aid Highway Act of 1956, Pub. L. 84-627, § 108, 70 Stat. 374, 378 (codified at 23 U.S.C. § 60).

245 *See generally* Raymond A. Mohl, *The Interstates and the Cities: Highways, Housing, and the Freeway Revolt*, 20 J. Pol. Hist. 193 (2018) (describing state and local government targeting of communities of color and community resistance).

246 Deborah N. Archer, *"White Men's Roads Through Black Men's Homes": Advancing Racial Equity Through Highway Reconstruction*, 73 Vand. L. Rev. 1259, 1265 (2020) (citing Raymond A. Mohl, *Race and Space in the Modern City: Interstate-95 and the Black Community in Miami*, *in* Urban Policy in Twentieth-Century America 100, 134 (Arnold R. Hirsch & Raymond A. Mohl eds., 1993)).

247 *Id.* at 1266.

248 *Id.* at 1275 (citing Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America 128 (2017)).

Planning, for example, noted the "'understanding' that the proposed route of [I-20] would be the boundary between the White and Negro communities."[249]

The demolition and displacement that resulted from urban renewal and highway construction further entrenched hypersegregation and concentrated poverty. Black families were particularly hard hit: widespread housing discrimination meant that neighborhood destruction forced Black families into shrinking areas of more concentrated poverty, increasing overcrowding and homelessness.[250] The freeways further encouraged white flight to suburbs that excluded families of color through explicit racial zoning and covenants, and later, exclusionary zoning.[251] Across the country, the suburbanization of white families was associated with loss of jobs and disinvestment in public infrastructure in the city centers where families of color continued to live.[252]

The current impact of urban renewal varies as widely as urban renewal policies themselves. In some places, racial isolation still persists alongside concentrated poverty and its related ills, including violence, a lack of education and employment opportunities, and health disparities.[253] In others, such as Denver and Baltimore, decades of redevelopment with disparate impact have dispersed communities of color across the region, causing other types of harm through intergenerational wealth loss and trauma.[254] Identifying the specific disparate impact of a localities' urban renewal and later redevelopment

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249 *Id.* at 1285 (citing RONALD H. BAYOR, RACE AND THE SHAPING OF TWENTIETH-CENTURY ATLANTA 61 (1996)).

250 *Id.* at 1287.

251 LEWIS, *supra* note 232; *see also* Abraham, *supra* note 10 ("[T]he creation of freeways . . . literally sequestered Black communities and facilitated easy suburban access for fleeing white residents." (citing SHERYLL CASHIN, THE FAILURES OF INTEGRATION 113–15 (2004))).

252 Archer, *supra* note 246, at 1289–90.

253 *See generally* Douglas S. Massey & Jonathan Tannen, *A Research Note on Trends in Black Hypersegregation*, 52 DEMOGRAPHY 1025 (2015) (describing changes in hypersegregation from 1970 to 2010); Lincoln Quillian, *Segregation and Poverty Concentration: The Role of Three Segregations*, 77 AM. SOCIO. REV. 354 (2012) (summarizing evidence of the impact of hypersegregation on violence, schooling, and employment outcomes and providing new models for evaluating the spatial nature of concentrated poverty).

254 *See generally* Emma Fernandez, Katie Fallon, Brendan Chen & Samantha Batko, *The Ghosts of Housing Discrimination Reach Beyond Redlining*, URB. INST. (Mar. 15, 2023), https://www.urban.org/stories/ghosts-housing-discrimination-reach-beyond-redlining [https://perma.cc/72FY-Z6DL] (showing changes in Baltimore and Denver's racial residential patterns from 1930 to 2020); Ann Pfau, Kathleen Lawlor, David Hochfelder & Stacy Kinlock Sewell, *Using Urban Renewal Records to Advance Reparative Justice*, 10 RUSSELL SAGE FOUND. J. SOC. SCIS. 113 (2024) (describing wealth loss in communities of color razed by urban renewal); MINDY THOMPSON FULLILOVE, ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT (New Vill. Press 2016) (describing the intergenerational trauma caused by community destruction and displacement).

policies both provides a stronger legal foundation for remedies, and pinpoints the specific policy problem to solve.

### 2. *Narrowly Tailored Policy Mechanisms: Support and Review of Fair Housing Planning*

The federal government can adopt narrowly tailored race-conscious policies to redress its funding of local discrimination and the resulting patterns of segregated and unequal housing.[255] Because the exact facts of local discrimination and its current impacts vary widely, no single federal approach would adequately address the various racial injuries caused by urban renewal and highway projects. However, federal agencies could require grantees to investigate their discriminatory practices and redress their impacts through a rulemaking under HUD's authority and responsibility to affirmatively further fair housing.

To strengthen the constitutional footing for a new AFFH process after *SFFA*, HUD should offer technical support to identify a compelling remedial interest and narrowly tailor mechanisms to that interest. Such technical support is narrowly tailored to the federal government's original failure to ascertain whether its funding was exacerbating local patterns of discrimination. To help grantees identify a compelling remedial interest, HUD could offer assistance for excavating and compiling records of a state's prior discrimination, as well as more granular data on patterns of residential segregation and racially or ethnically concentrated areas of poverty.

More detailed data on patterns of racial segregation can help justify continued consideration of specific racial groups today. HUD has previously supported fair housing planning by providing data on patterns of segregation and "racially or ethnically concentrated areas of poverty" (R/ECAPs).[256] HUD defined R/ECAPs as census tracts where at least 50% of the population is non-white, and the poverty rate either exceeds 40% or is three or more times the average tract poverty rate for the region.[257] Given the Court's recent skepticism of racial binaries, dedicating support to R/ECAPs may be riskier than dedicating supports to concentrated areas of poverty that also host high concentrations of a *specific* racial group that faced state discrimination in the past. For example, if a state only targeted majority-Black neighborhoods for

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255 *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 504 (1989).

256 Assessment of Fair Housing (AFH), 24 C.F.R. §§ 5.154(a), 5.154(c) (2020).

257 *Racially or Ethnically Concentrated Areas of Poverty (R/ECAPs) 2020*, Dep't of Hous. and Urb. Dev.: HUD GIS HelpDesk (Aug. 21, 2023), https://hudgis-hud.opendata.arcgis.com/datasets/35798a7569524ae48bd02625af27ba49_16/about [https://perma.cc/M59A-P94H].

urban renewal projects that razed homes to the ground, R/ECAPs may be an overbroad category toward which to target resources. A future HUD could produce a more customizable statistical tool that identifies neighborhoods currently hosting any particular racial group that may previously have been the target of state discrimination. In the meantime, state-level HUDs and nonprofits can work to develop and deploy such tools.

HUD can also help states evaluate whether race-neutral mechanisms could adequately redress current racial disparities—and if they cannot, how to narrowly tailor race-conscious remedies to the prior instance of state discrimination. For example, HUD could help evaluate whether dedicating resources to neighborhoods above a certain threshold of concentrated poverty would achieve the same result as dedicating resources to neighborhoods above a certain threshold of both concentrated poverty *and* racial segregation. Or HUD could help identify whether racially isolated and impoverished neighborhoods disproportionately lack a particular type of infrastructure or opportunity—and recommend building access to that missing resource in every neighborhood, which would subsequently target resources to reducing racial disparities. Scheduled HUD review also provides a natural "end point" to each set of policies: by requiring regular reconsideration of the fair housing landscape and related planning policies, each new set of AFFH plans would reflect the extent to which past discrimination continues to require remedies today.

## Conclusion

The FHA charges the HUD Secretary with a duty to affirmatively further fair housing.[258] For decades, courts have recognized that this duty encompasses forward-looking action to foster "truly integrated and balanced living patterns."[259] But separate and unequal housing conditions continue to persist. Although *SFFA* contracted the permissible scope of affirmative action toward racial integration and equality, an AFFH process like HUD's 2015 regulation can still exist within the confines of current equal protection doctrine. By acknowledging its role in creating current segregated housing conditions, recognizing its past racialization and exclusion of certain groups from quality housing, and helping its grantees carefully choose between race-neutral and race-conscious options to address these wrongs, HUD can and should continue to affirmatively further fair housing.

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258 Fair Housing Act, 42 U.S.C. § 3608(e).

259 *See supra* text accompanying notes 68–71.