CIVIL RIGHTS

U.S. Government Actions to Reduce Civil Rights In Housing

ROLLBACK

OCTOBER 2019
This document is the **housing** component of the ERASE Racism Report “Civil Rights Rollback: U.S. Government Actions to Reduce Civil Rights in Housing and Public Education”
Civil rights in America are under attack from the federal government, under President Trump’s administration, in a way that has not been seen since before the early 1960s. It’s a startling reality that requires a new level of monitoring, vigilance, and activism on the part of all Americans who care about civil rights.

This document is the housing component of the ERASE Racism Report *Civil Rights Rollback: U.S. Government Actions to Reduce Civil Rights in Housing and Public Education*. It provides an analysis of the federal government’s latest efforts to roll back civil rights in housing. It has been created by ERASE Racism—with essential research by the Lawyers’ Committee for Civil Rights Under Law.

The report’s focus is national, because these rollbacks affect all Americans. It includes several spotlights that highlight implications for New York’s Long Island, because that is where ERASE Racism is based and because the spotlights illustrate how federal changes affect specific communities.

The end of the report includes a Civil Rights Tracker for housing. It is designed to help concerned citizens keep track of numerous government activities that deserve to be addressed with our own relentless activism.

It’s time for Americans to join together to defend and restore the essential civil rights that underpin our nation’s stated commitment to equal rights under the law. It’s time to join together on the path to justice. This report lights the way.

V. Elaine Gross
*President*
ERASE Racism
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The Civil Rights Tracker summarizes the legal actions discussed in this report. Please visit [www.eraseracismny.org](http://www.eraseracismny.org) for updates to this Tracker.
OVERVIEW

Over nearly two decades, ERASE Racism has advanced civil rights in housing and public school education—with notable successes on New York’s Long Island, statewide, and through national coalitions. Under the Obama administration, the Department of Housing and Urban Development, the Department of Education, and the Department of Justice all took noteworthy steps to support and advance civil rights, as these agencies are mandated to do by law.

That began to change with the 2017 inauguration of President Trump, whose own statements and those of his administration have undercut the federal government’s, mostly bi-partisan, commitment to civil rights. They have reflected, at best, disregard for the rights of people of color and, at times, have been directly confrontational. Efforts to fight back against the civil rights rollbacks from the current administration have not resulted in the success we need to stem the concrete harm experienced by communities of color.

In 2019, ERASE Racism commissioned the Lawyers’ Committee for Civil Rights Under Law to research actions and proposals by the current administration that directly affect civil rights law. This report is the result of that research. A snapshot of its sobering findings includes the following:

- The U.S. Department of Housing and Urban Development has acted deliberately to gut critical components of the enforcement infrastructure for the Fair Housing Act of 1968. It has done so in several key ways, among others: suspending the policies, procedures, and tools instituted to effectively improve municipal planning efforts to further fair housing; and, proposing to nullify the Fair Housing Act’s Discriminatory Effects Standard, also known as Disparate Impact, by shifting the burden of proof onto the plaintiff at every step of a Disparate Impact discrimination claim.

Some of the federal government’s proposed rollbacks in civil rights protection have been delayed and, in a few instances, successfully opposed. But the trend is clear. Civil rights are under attack. It is now necessary to watch out for the federal government: to monitor its proposals, educate the public about them, and work to counter those that are contrary to furthering civil rights.
Discrimination in Housing and Recent Changes

The Fair Housing Act of 1968 (FHA) was enacted to ensure equal and fair access to housing options for all people. It not only provides enforcement mechanisms to prevent discrimination in the rental or sale of housing based on race, color, national origin, religion, sex, disability and familial status. It also provides remedies for those who have been discriminated against. Despite these important protections, Congress realized that simply prohibiting discrimination and redressing the injuries that occur when discrimination happens is not enough. Recent policy shifts are undermining the mandates of the FHA.

The Rise and Fall of the Duty to Affirmatively Further Fair Housing

The duty to Affirmatively Furthering Fair Housing (AFFH) is a critical component of the FHA. It seeks to prevent discrimination and dismantle existing segregation. To bolster the FHA, AFFH was included.

The AFFH duty falls on the shoulders of the Secretary of the US Department of Housing and Urban Development (HUD). This duty requires HUD to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further” the goals and priorities of the Fair Housing Act.

HUD was to require any jurisdictions that receive funding from the department to show the proactive steps they were taking to redress longstanding racial segregation and other barriers to fair housing. Jurisdictions had to complete an Analysis of Impediments to Fair Housing (AI) in conjunction with their routine consolidated plans. The AI summarizes any impediments found, specific steps the jurisdiction plans to take in addressing them, and reporting mechanisms to monitor progress. Unfortunately, however, HUD has historically failed to adequately enforce this requirement, allowing jurisdictions to receive funding without submitting AIs. Those that did were not held to any standard of rigor or formatting. In 2015, HUD decided to take a firmer stance on the duty to affirmatively further fair housing. Jurisdictions were then required to submit an Assessment of Fair Housing (AFH), a document based on a standardized assessment tool. The jurisdiction had to examine access to housing based on race, national origin, English proficiency, and a variety of socioeconomic factors. It also required consideration of transportation, access to jobs, and disability. The result was a fully fleshed-out document to be used in the planning process to break down barriers to housing for certain groups.

However, in 2018, HUD issued a notice that it would be suspending the rule for three years. After a lawsuit was filed, HUD issued a notice that the assessment tool itself
Long Island is among the nation’s 10 most racially segregated metro regions, and the obligation to affirmatively further fair housing (AFFH) is an important legal tool in combating residential segregation. It requires counties and municipalities to promote integrated living patterns to overcome historic segregation.

Residential segregation on Long Island was advanced by policies explicitly ensuring that mass-scale affordable housing created in the mid-20th Century, like Levittown, was for whites only. In 1960, not one of the 82,000 residents of Levittown’s 17,400 houses was African American. In 2017, blacks comprised only 1.73% of that population.

Nationally, between 1934 and 1962, the federal government backed $120 billion in home loans; over 98% went to whites. The resulting structural racism is hard to dislodge, but the AFFH mandate helps.

In 2014, for instance, ERASE Racism filed a civil rights complaint alleging AFFH violations by Nassau County, including funding of municipalities with restrictive zoning and housing practices. HUD found the complaint had merit; it is pending.

The AFFH mandate spotlighted other discrimination caused by local control, which stems from home rule, whereby the state transfers powers to localities, including land use. Local control is used on Long Island to exclude blacks through geographic preferences, exclusionary zoning requiring large lots for single-family homes, and the absence of affordable multi-family housing.
Implementation of the Fair Housing Act’s Discriminatory Effects Standard

In 2013, under the Obama administration, HUD issued a final rule clarifying the standard for evaluating disparate impact claims under the Fair Housing Act. The FHA prohibits unjustified policies or practices that have a disproportionate, adverse effect (“disparate impact”) on protected class members. Courts have recognized the importance of disparate impact liability since 1974, but, prior to 2013, there was inconsistency between federal judicial circuits regarding the precise framework for assessing disparate impact claims.

In the rule, HUD set forth a three-part burden-shifting framework:

• A plaintiff has the burden of proving that an identified policy or practice causes or predictably will cause a discriminatory effect on a protected group, either by disproportionately harming that group or by perpetuating the segregation of that group.12

• A defendant then has the burden of proving that its challenged policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.13

• Lastly, a plaintiff may still prevail by showing that another policy or practice could serve the defendant’s interest with less discriminatory effect.14

In 2015, the US Supreme Court affirmed the viability of disparate impact claims under the FHA, but the Court did not set forth a clear standard for how courts and administrative agencies should evaluate those claims.15 After that decision, opponents of disparate impact, including trade associations representing large banks and insurance companies, began to argue that the burden-shifting framework in the HUD rule is inconsistent with the Supreme Court’s decision.16 Despite the almost total absence of judicial decisions holding that the rule and the Supreme Court decision are inconsistent,17 HUD seems to agree with the banking and insurance industries.

On June 20, 2018, HUD issued an Advance Notice of Proposed Rulemaking soliciting public comment about the purported need for changes to the rule.18 On February 1, 2019, HUD submitted a Notice of Proposed Rulemaking to the federal Office of Management and Budget. On August 19, 2019, HUD published in the Federal Register/Vol.84, No. 160, Proposed Rule “HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard.” As feared, this proposed rule, if enacted, would make enforcing the Fair Housing Act much more difficult. It would eviscerate housing discrimination lawsuits that challenge policies that result in discrimination or perpetuate segregation even if the discrimination is not the policy’s stated intent.

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Disparate Impact on Long Island

The Fair Housing Act's disparate impact standard has been a critical tool for fighting against structural racism on Long Island, NY. Both the Civil Rights Division of the US Department of Justice and private, non-profit, civil rights organizations have a long history of using this vital tool on Long Island. Examples include:

- In US v. Town of Oyster Bay, the federal government sued the Town of Oyster Bay, which is predominantly white, for giving preference for admission to affordable housing to Town residents and their relatives. Pending.
- In Mhany Management, Inc. v. Village of Garden City, a nonprofit affordable housing developer and a grassroots community organizing group challenged exclusionary zoning that would have precluded the development of affordable housing in the Village of Garden City, which is predominantly white. In 2014, the U. S. District Court issued a judgement against the village. The Court continues to oversee the village's actions.
- In Valdez v. Town of Brookhaven, Latino residents challenged the Town of Brookhaven's aggressive code enforcement policies, which disproportionately led to the displacement of Latino households. The parties agreed to a settlement that provided relief to the Latino residents.

Having 112 counties, towns, cities and villages impedes fair housing enforcement. Multiple municipalities, with multiple housing policies and practices = multiple legal actions to combat disparate impact.
Small Area Fair Market Rents have the potential to be a hugely important tool for desegregating neighborhoods and giving low income people access to the services and amenities available in areas with high public and private investment. 

Small Area Fair Market Rents (SAFMRs), was set to begin on January 1, 2018. Small Area Fair Market Rents have the potential to be a hugely important tool for desegregating neighborhoods and giving low income people access to the services and amenities available in areas with high public and private investment. However, in August of 2017, before the pilot program was set to officially begin, HUD announced the suspension of the SAFMR Rule for two years via individual letters to the Public Housing Authorities in the identified metropolitan areas.

A fair housing organization, Open Communities Alliance, as well as two individuals who would have benefited from the rollout of the SAFMR program, sued HUD in order to enforce the regulation. The lawsuit claimed that:

- HUD should have followed the proper procedures required by law in modifying its regulations and programs, including giving notice to the public and allowing the public to comment on their actions;
- HUD did not give sufficient reasons for its delay of the SAFMR program for two years, and the reasons HUD did give were contradicted by HUD’s own studies on the subject;
- HUD’s decision to delay the SAFMR program violated the Fair Housing Act. The SAFMR program would have brought the government...
more closely into compliance with the Fair Housing Act, including HUD’s affirmative obligations to further racial desegregation and address areas of concentrated poverty. Therefore, any attempt to undo these programs, which were a step in the right direction, was actually a step backwards. The lawsuit was successful in requiring HUD to adhere to its own regulations,22 and HUD is currently implementing SAFMRs for the 24 metro areas.

Small Area Fair Market Rents (SAFMRs) on Long Island

While Long Island was not part of HUD’s original pilot program for SAFMRs, the full implementation of the regulation is critical, as it gathers data about the success of the pilot program and allows other metro areas to affirmatively adopt SAFMRs. Now that the lawsuit against HUD has concluded with HUD required to enforce the SAFMR rule, the program presents some great possibilities for accessing highly resourced neighborhoods and communities on Long Island. For the Nassau-Suffolk, NY HUD Metro FMR Area, the metro-wide rent ceiling for a two-bedroom residence is $1,907. There are 177 zip codes on Long Island, and under the 2020 Small Area Fair Market rents, 60 of those zip codes would qualify for “Small Area FMRs”, by zip codes that are $200 or more above the current FMR for the region, (as calculated for a 2-bedroom apartment). [Data provided by PRRAC] Making these well-resourced communities accessible to housing voucher holders can help bring workers closer to their jobs, give children access to high-performing schools, and work to undo decades of entrenched residential segregation.
CONCLUSION

Vigilance is key.

Civil rights gains of recent decades are too important to be rolled back un-noticed. ERASE Racism and others will continue to monitor developments and sound the alarm, as efforts unfold that would jeopardize the rights of all Americans to fair housing and integrated public schools.

We will also participate in the public comment process on regulatory changes and, when the opportunity presents itself under a new administration, participate in the comment process when efforts are made to repair the harm. It is the responsibility of every civil rights organization and every caring citizen to make our voices heard.

With respect to housing, ERASE Racism will continue to actively support and to organize our partners to support local and state policies that advance fair housing and racially integrated affordable housing. We will also organize local residents to support the creation of multifamily housing developments with affordable units in communities where they live. We will also seek opportunities when state law and/or programs can fill the void left by the exit of the federal government from civil rights protection and advancement.

In the 21st century, there should be no place for permitting discrimination, harassment, or other discriminatory means of denying housing based on color, race, national origin, religion, gender, disability, familial status, sexual orientation, or legal source of income. There should be no discrimination in: the sale or rental of housing; land use policies that affect the availability of housing types and affordability; government housing programs that affect whether or not housing is accessible to anyone, regardless of where they currently reside; and, banking and lending policies and practices.

ACKNOWLEDGEMENTS

ERASE Racism expresses its gratitude to the Lawyers’ Committee for Civil Rights Under Law for its substantive contributions to this report and its advice throughout the process, both of which were essential and are greatly valued. We thank especially two staff members at the Lawyers’ Committee: Thomas Silverstein, Counsel at the Fair Housing & Community Development Project and Genevieve (“Genzie”) Bonadies Torres, Counsel at the Educational Opportunities Project.
ENDNOTES

Housing

1 42 U.S.C. § 3608(e)(5).

2 N.A.A.C.P., Boston Chapter v. Secretary of Housing & Urban Development, 817 F.2d 149, 155 (1st Cir. 1988).


7 24 C.F.R. § 5.154(d).


12 24 C.F.R. § 100.500(c)(1).

13 24 C.F.R. § 100.500(c)(2).

14 24 C.F.R. § 100.500(c)(3).


17 The U.S. Court of Appeals for the Fifth Circuit is an outlier. See Inclusive Communities Project v. Lincoln Property Co., 920 F.3d 890 (5th Cir. 2019).


# CIVIL RIGHTS TRACKER – HOUSING

A summary of the legal actions discussed previously in this report distilled into a Civil Rights Tracker. Please visit [www.eraseracismny.org](http://www.eraseracismny.org) for updates of this Tracker.

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<th>PROPOSED OR IMMINENT</th>
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<tr>
<td>1. In 2013, HUD issued a rule setting the standard for evaluating disparate impact claims under the Fair Housing Act. HUD issued a Notice of Proposed Rulemaking in 2019 that, if finalized, would establish a standard for Disparate Impact claims in HUD administrative proceedings that would be virtually impossible for civil rights advocates to satisfy.</td>
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<td>2. In 2018, HUD issued an Advanced Notice of Proposed Rulemaking seeking input on possible changes that would likely weaken the Department’s 2015 Affirmatively Furthering Fair Housing rule, which governs how state and local governments, as well as public housing authorities, comply with their civil rights obligations.</td>
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<td>3. In 2019, HUD proposed a rule that would, over time, prohibit families that include both individuals who are citizens, or who have documented immigration status, and individuals who are undocumented from residing in many types of federally subsidized housing.</td>
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<td>4. In 2019, HUD announced its intention to propose the repeal of its Equal Access rule, which prohibits discrimination against transgender individuals in federally funded homeless shelters.</td>
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<td>5. In 2019, HUD proposed changes to its regulations governing Section 3 of the Housing and Urban Development Act of 1968, which promotes economic opportunity for low income residents in projects assisted with HUD funds. These changes would weaken enforcement of Section 3 by taking oversight responsibility away from HUD’s Office of Fair Housing and Equal Opportunity.</td>
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<td>6. In 2015, jurisdictions receiving HUD funds were asked to submit Assessments of Fair Housing in order to continue receiving funds. In 2018, this rule was suspended, and the assessment tool used to standardize these reports was withdrawn, preventing jurisdictions from using it to submit AFHs. A lawsuit was brought forward to reinstate this tool, and its decision is pending.</td>
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<td>7. In 2017, HUD withdrew a proposed rule dating from the Obama administration that would have modernized regulations applicable to the demolition and disposition of public housing. The abandoned proposed rule would have promoted civil rights in that process.</td>
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<tr>
<td>8. In 2018, HUD withdrew a proposed rule dating from the Obama administration that would have streamlined the process of creating consortia of public housing authorities, thereby making it easier for Housing Choice Voucher holders to move to areas of opportunity.</td>
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<td>9. HUD attempted to delay the Small Area Fair Market Rent (SAFMR) program, originally set to begin on January 1, 2018, by two years. A lawsuit was successfully brought forward to require HUD to adhere to the original deadline.</td>
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<td>10. In 2018, HUD proposed increasing tenant rent obligations for households living in public housing or utilizing Housing Choice Vouchers. For now, HUD has abandoned this plan in light of a public backlash that highlighted the Department’s lack of statutory authority for the change.</td>
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ERASE Racism is a regional civil rights organization based on Long Island, NY, that exposes and addresses the devastating impact of historical and ongoing structural racism, particularly in public school education and housing. It does so through research, policy advocacy, legal action, and educating and mobilizing the public—driving policy change at local, regional, and statewide levels and through national coalitions. It has been recognized locally and nationally for its cutting-edge work.