

Housing Choice: A Contemporary Theory for Fair Housing Litigation

*Brook Hill**

Introduction	75
I. Housing Choice Has Historically Been Expanded for White People and Limited for Black People by Government Resources.....	77
II. The History of Disparate Housing Choice Has Had Lasting Impacts and Continues.....	81
III. Lawyers Can Help to Expand Housing Choice.....	83
A. Helping Black people move to areas where they are underrepresented.....	84
1. Source of Income Discrimination.....	84
2. Exclusionary Zoning.....	87
B. Preventing displacement related to gentrification.....	89
C. Lawyers can help Black people live in neighborhoods that are not gentrifying without making quality of life compromises.....	93
1. Challenging discriminatory services and facilities under the Fair Housing Act	94
2. Holding housing providers accountable for neglect with the implied warranty of habitability and consumer protection statutes	95
IV. Conclusion.....	97

Introduction

This article is an attempt to articulate a theory that can guide contemporary fair housing legal work in a way that reflects the needs and desires of Black communities and other communities of color who have long been the victims of housing-related injustices.¹ Prior to the passage of the Fair

*Brook Hill is a community organizer and movement lawyer. He joined the Lawyers' Committee for Civil Rights Under Law in August 2023, as Counsel, after nearly a decade with the Washington Lawyers Committee for Civil Rights and Urban Affairs. Throughout his legal career he has focused on representing community-based organizations and organized groups of tenants in collective or class-action cases dealing with housing discrimination, uninhabitable conditions and other tenants' rights issues. Mr. Hill also sits on the Shared Leadership Team of ONE DC, a community-based organization fighting for affordable housing, tenants' rights and workers' rights. At ONE DC, he works closely with organizers and member Tenant Unions on membership development, organizing strategy, and political education. Before law school, Mr. Hill was a community organizer for NY ACORN and later NY Communities for Change (NYCC), organizing around foreclosure prevention and tenants' rights.

1. This article focuses on the Black people and communities in contrast to white people—because of the Black community's unique history of exclusion—while attempting

Housing Act (Title VIII), the housing choices of Black people and other people of color were severely limited and subject to the most extreme forms of exploitation while the choices of white people were greatly expanded by government resources. Title VIII's Declaration of Policy states, "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."² For Black people and other people of color, fair housing ought to mean that they have the same housing choices as white people.

In the five decades since the passage of Title VIII, most systemic fair housing litigation and the rhetoric around fair housing advocacy has focused on integration as the foundational pursuit of fair housing.³ Where Black people and other people of color would choose to live, given options and resources, is often lost in the pursuit of racial balance even as limited housing choices and exploitation persist. There is still not enough housing that is accessible to Black people being built in predominantly white areas. As cities have gentrified in recent decades, some neighborhoods have become more diverse through an influx of white newcomers while displacing thousands of Black residents in a manner that is antithetical to housing choice. Worse, the problems—beyond crime and policing—in majority Black neighborhoods that are not being gentrified are largely ignored, which makes choosing to live in those neighborhoods a choice riddled with quality-of-life compromises. Although it is my hope that individual fair housing attorneys can use this article to help them choose cases, it is also an attempt to reconceptualize fair housing generally.

I argue that fair housing choice should be elevated above integration as the bedrock value that fair housing advocates strive for. For there to be true fair housing choice, Black people and other people of color must have the same menu of choices as white people who are seeking housing. That means that they should be able to choose to move to areas where non-whites are underrepresented, which requires the removal of barriers to affordability like source of income discrimination and exclusionary zoning. They should also be able to choose to remain in areas that are experiencing

also to acknowledging that the housing choices of other communities of color and even some ethnic minorities that today might be considered white have also been restricted to some extent because of race.

2. 42 U.S.C. § 3601.

3. Jorge Andres Soto & Deidre Swesnik, *The Promise of the Fair Housing Act and the Role of Fair Housing Organizations*, AM. CONST. SOC'Y FOR L. & POL'Y (Jan. 2012), https://www.acslaw.org/wp-content/uploads/2018/04/Soto_and_Swesnik_-_Promise_of_the_Fair_Housing_Act_1.pdf (describing Title VIII's dual purpose of eliminating discrimination and promoting integration); Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOCIO. F. 571 (June 30, 2015), available at <https://onlinelibrary.wiley.com/doi/10.1111/socf.12178> (examining Title VIII's success at desegregating American); Paul A. Jargowsky, Lei Ding & Natasha Fletcher, *The Fair Housing Act at 50: Success, Failures, and Future Directions*, 29 HOUS. POL'Y DEB. 694, 695 (Aug. 19, 2019), available at <https://www.tandfonline.com/doi/full/10.1080/10511482.2019.1639406>.

economic revitalization and demographic shifts, which means preventing displacement of longtime residents when neighborhoods are redeveloped or are otherwise gentrified. Finally, they should be able to choose to remain in areas that are majority-minority and not experiencing economic revitalization or demographic shifts without compromising on access to public safety, consumer goods, healthcare, or education.

Most systemic fair housing litigation and advocacy in the decades since the Fair Housing Act was passed have focused on the first prong; the choice to move to areas where non-whites are underrepresented. There have been very few challenges to practices that contribute to gentrification and the displacement of Black people from inner-city neighborhoods or to practices that further disinvestment in majority-minority communities. For there to be real fair housing choices for Black and other people of color, they must be able to make the choice to live in any of the types of neighborhoods described above. Fair housing attorneys can help both through litigation and specialized policy advocacy.

Although policymakers should certainly use this theory to improve pathways through which households of color can move to high-opportunity areas, protect residents of gentrifying neighborhoods from displacement, and invest in majority-minority communities in ways that meet the needs of current residents, this essay is primarily directed at lawyers and the fair housing centers with which they partner. It focuses on how systemic litigation can be used to expand housing choice, but also explores other policy-related tasks with which it may be strategic for a fair housing attorney to assist. I also suggest that fair housing attorneys be willing to engage in impact litigation under statutes other than the Fair Housing Act, in part because they may be better positioned to take those cases than other litigators. I developed this theory with colleagues in the Housing Justice practice at the Washington Lawyers' Committee for Civil Rights as a way to assess what fair housing would look like in a material sense for Black D.C. residents, to measure the impact of particular areas of work, and to describe our work to funders and other stakeholders. It is my hope that other fair housing litigators and advocates can use it in a similar way.

The essay begins by highlighting how government policy provided successive generations of white households the room and resources to choose where to live in contrast to Black households who were denied similar choices and instead forced to live in places that enhanced choices for white households. It goes on to describe ways that housing choice continues to be limited for Black households and the types of cases and or legal work that fair housing lawyers and advocates can take to improve housing choice in each of the three areas listed above.

I. Housing Choice Has Historically Been Expanded for White People and Limited for Black People by Government Resources.

A hallmark of being a white American has long been not only having the freedom to choose where to live but also access to the resources to make the

choice meaningful in a material sense. On the one hand, whether the land grants of the nineteenth century or multilayered subsidies that supported the creation of today's suburban communities, this country has given generations of white households choices about where to live and the resources to effectuate those choices. A hallmark of being Black in America, on the other hand, has been denial of choice about where to live—quite literally as landlords and realtors blatantly denied them the ability to rent and buy property as well as through government enforced housing discrimination.

Much has been written about systemic discrimination in the mortgage and real estate markets over the past century, but white privilege and Black exclusion in housing began much earlier. Prior to the Civil War, several programs transferred land for housing to white households at greatly discounted rates. Notably, between 1776 and 1855, the federal government transferred 61 million acres of land for free in Ohio, Michigan, Illinois, and Louisiana by issuing what were known as “Bounty Land Warrants” to military veterans.⁴ By 1855, the government had issued over 500,000 bounty land warrants.⁵

Prior to the Civil War, over ninety percent of African Americans were enslaved,⁶ and laws often prohibited free Black people from owning property.⁷ Many northern states also placed restrictions on entry by free Black people, and some barred them from entry entirely.⁸ Thus, while white settlers before the Civil War were able to take advantage of Bounty Land Warrants or other government programs that transferred land to settlers for free or at discounted rates, the will of slaveholders and discriminatory state laws combined to restrict where both free and enslaved Black people could live and whether they could own property.

This contrast in housing prospects did not change greatly after the Civil War. In 1862, Congress passed the Homestead Act, which transferred over 246 million acres of land to 1.6 million U.S. citizens, the overwhelming majority of whom were white, between 1862 and 1934.⁹ For a filing fee

4. Jeffrey Seikan, *Object 2: Bounty Land Warrant*, U.S. DEP'T VETERANS AFFS. (Jan. 7 2022), <https://department.va.gov/history/100-objects/object-2-bounty-land-warrant>.

5. *Id.*

6. Ellora Derenoncourt et al., *Wealth of Two Nations: The U.S. Racial Wealth Gap 1860-2020* 5 (Nat'l Bureau Econ. Rsch., Working Paper 30101, June 2022), <http://www.nber.org/papers/w30101>.

7. Roy W. Copeland, *In the Beginning: Origins of African American Real Property Ownership in the United States*, 44 J. BLACK STUD. 646, 647 (Sept. 2013).

8. *Race Based Legislation in the North 1807-1850*, PBS: RES. BANK, <https://www.pbs.org/wgbh/aia/part4/4p2957.html> (last visited Feb. 15, 2024); SHIRELY ANN WILSON MOORE, SWEET FREEDOM'S PLAINS: AFRICAN AMERICANS ON THE OVERLAND TRAILS 1841-1869, at 17-21 (Nat'l Parks Serv. Jan. 31 2012), <https://www.nps.gov/oreg/learn/history/culture/upload/Sweet-Freedom-s-Plains-508.pdf>.

9. *Id.*; see also Larry Adelman, *A Long History of Racial Preferences for Whites*, PBS: RACE—THE POWER OF AN ILLUSION (2003), https://www.pbs.org/race/000_About/002_04-background-03-02.htm; Andrew Muhammad et al., *African Americans and Federal Land*

of \$12 (approximately \$300 today), a person could lay claim to 160 acres of land, provided that they cultivated and maintained the land for five years.¹⁰ It is estimated that nearly 50 million Americans, one in four adults, are descendants of somebody who received land under the Homestead Act.¹¹ The Southern Homestead Act of 1866 was hailed at the time as a vehicle for extending the benefits of homesteading on public land to Black people,¹² but it did not work as intended for a variety of reasons.¹³ When Congress repealed the Act in 1876, only 6,000 of nearly 22,000 successful patents went to Blacks.¹⁴

The inequality associated with the land grant process was not the only way that state actors restricted housing choice for Black people after the Civil War. In the South, vagrancy laws, convict leasing, enticement laws, and emigrant agent laws¹⁵ limited the residential mobility of Black people.¹⁶ Black people who managed to migrate north despite these restrictions were confined by exclusionary zoning ordinances to certain neighborhoods and overcharged for rent.¹⁷

As the United States struggled to emerge from the Great Depression, disparities in housing choice continued. Beginning in the 1930s, the federal

Policy: Exploring the Homestead Acts of 1862 and 1866, 46 APPLIED ECON. PERSP. & POL'Y 95 (2023), available at <https://onlinelibrary.wiley.com/doi/10.1002/aepp.13401> (Although Black people were not expressly excluded from the Homestead Act, evidence indicates that few were able to take advantage of the land offered by the Act. Having been released from enslavement penniless and homeless most did not have the means to homestead. Racism and discrimination were also barriers to access. The nine states with the largest number of homesteads are also the states with the lowest present day Black populations.).

10. Muhammad et al., *supra* note 9, at 97.

11. *Id.*

12. *Id.* at 102–05.

13. *Id.* at 6.; see also Richard Edwards, *African Americans and the Southern Homestead Act*, 39 GREAT PLAINS Q. 103, 105, 113 (2019) (noting that the land was forested or swampy for the most part and not very well suited to agriculture and most of the formerly enslaved did not have the resources to set up farms); Muhammad, *supra* note 9, at 6 (noting that many of the formerly enslaved were bound by wage-labor contracts that made them ineligible); Edwards, *supra*, at 113 (noting that as time went on, Black people became increasingly the targets of white supremacist violence).

14. Edwards, *supra* note 13, at 111, 124 (citing MICHAEL L. LANZA, AGRARIANISM AND RECONSTRUCTION POLITICS: THE SOUTHERN HOMESTEAD ACT (1990)).

15. David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on African American Interstate Migration* (George Mason Law & Economics Working Paper No. 96-03, Aug. 6 1996) (Emigrant agent laws regulated recruiters who sought to recruit Blacks to move North for work and greatly restricted the practice.)

16. *Id.*

17. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 44–49 (2017); compare *Buchanan v. Warley*, 245 U.S. 60 (1917) (declaring racial zoning ordinances unlawful), with *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926) (permitting zoning ordinances that prevent apartments from being built in certain neighborhoods).

government used its financial strength to ensure the transfer of even more previously underdeveloped land into the hands of a new generation of white Americans while simultaneously ensuring the same opportunity remained closed to Blacks. In 1934, as part of the New Deal, Congress and the President made mortgage lending much more accessible by creating the Federal Housing Administration (FHA).¹⁸ The FHA and the Veterans Administration (VA) insured bank mortgages up to eighty percent of the home's value,¹⁹ shifting the majority of the risk from the banks to the government.²⁰ The FHA and VA also insured construction loans taken from banks by developers who were building developments consisting of thousands of homes.²¹ By 1948, most housing being constructed across the country was insured by the federal government.²² By the early 1970s, eleven million Americans had purchased homes with FHA or VA financing.²³

More than half of mortgage borrowers during this period earned less than the equivalent of \$40,000 in today's dollars.²⁴ Today these homes sell for prices well out of reach for households with annual incomes of \$40,000.²⁵ Families who were able to buy new suburban homes in the 1940s have gained over \$200,000 in wealth in the decades since.²⁶ Low-cost FHA and VA mortgage lending played an outsized role in creating the contemporary American middle class.²⁷ That middle class was almost entirely white. Between 1934 and 1968, ninety-eight percent of FHA loans went to white borrowers.²⁸ By 1970, seventy percent of white households owned their own homes, a stark contrast to 1940 when most households of all races were renters, and to Black people, the majority of whom rent their homes to this day.²⁹

While the FHA was funding the creation of new suburbs, it refused to guarantee mortgages for Blacks and discouraged banks from making loans in older urban neighborhoods where Black people outside of the South

18. ROTHSTEIN, *supra* note 17, at 64.

19. *Id.*

20. MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 106 (2017).

21. *Id.* at 71.

22. *Id.*

23. THOMAS W. HANCHETT, THE OTHER SUBSIDIZED HOUSING; FEDERAL AID TO SUBURBANIZATION, 1940s-1960s, FROM TENEMENTS TO TAYLOR HOMES; IN SEARCH OF AN URBAN HOUSING POICY IN TWENTIETH CENTURY AMERICA, THE PENNSYLVANIA STATE UNIVERSITY PRESS (2000), <https://www.historysouth.org/wp-content/uploads/2015/12/The-Other-22Subsidized-Housing22-Federal-Aid-To-Suburbanization-.pdf>.

24. BARADARAN, *supra* note 20, at 107.

25. ROTHSTEIN, *supra* note 17, at 182-83.

26. *Id.*

27. BARADARAN, *supra* note 20, at 107.

28. *Id.* at 108.

29. *After 50 Years; How Much Has Changed?*, NAT'L ASS'N REALTORS (Sept. 2018), <https://www.nar.realtor/sites/default/files/documents/Sept2018.pdf>.

were concentrated.³⁰ Middle- and high-income Black households had to pay more for less—in comparison to white households with similar or lesser economic means who were able to move to growing suburbs—purchasing older homes with higher down payments and interest rates.³¹ Over time, Black homeowners gained far less equity in those homes.³² Families who could not afford the higher down payments were often forced to buy homes on contract sales where they made a monthly payment to the deed holder, but did not accumulate equity and could be easily evicted if they missed a payment.³³ As a result of pervasive lending discrimination mandated by the federal government, Black people were locked out of the prosperous capital building decades of the 1940s through the 1960s.³⁴ Wealth generated by subsidized land ownership has become the means by which many white people continue to exercise a privileged menu of housing choices. The denial of that wealth and enduring racist attitudes and assumptions about housing and real estate continue to limit the housing choices of Black people and other people of color.

II. The History of Disparate Housing Choice Has Had Lasting Impacts and Continues.

In 1967, in the wake of riots in dozens of cities in the United States, what has become known as the Kerner Commission published the Report of the National Advisory Commission on Civil Disorders.³⁵ It reported that the riots were caused by white racism, pervasive discrimination, and segregation that had created Black ghettos full of residents that were frustrated by unfulfilled promises, powerlessness, and police brutality.³⁶ At the time, two-thirds of non-white households lived in neighborhoods characterized by substandard housing and general disrepair.³⁷ While nearly seventy percent of white households owned their homes, only forty percent of Black households were homeowners.³⁸ The report recommended that the government pass a national open housing law, reorient federal housing programs to ensure that low-income housing was built outside of ghetto areas, and build six million units of housing affordable for low- and moderate-income families.³⁹

30. ROTHSTEIN, *supra* note 17, at 65–67.

31. *Id.*

32. *Id.* at 182.

33. *Id.* at 65–67.

34. BARADARAN, *supra* note 20, at 127.

35. REPORT OF THE NAT'L ADVISORY COMM'N ON CIV. DISORDERS, U.S. DEP'T OF JUST.: OFFICE OF JUST. PROGRAMS (1967), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/national-advisory-commission-civil-disorders-report>.

36. *Id.* at 5.

37. *Id.* at 13.

38. *After 50 Years*, *supra* note 29.

39. REPORT OF THE NAT'L ADVISORY COMM'N, *supra* note 35.

In 1968, Congress passed the Fair Housing Act with the goal of promoting fair housing throughout the United States.⁴⁰ What the federal government did not do was meaningfully adjust its programs to allow for the creation of low-income housing outside ghetto areas,⁴¹ nor did it invest in the creation of millions of new units of housing for low- and moderate-income households.⁴² In fact, in 1973 the Nixon administration announced a moratorium on spending for new public housing.⁴³ This announcement initiated the government's retreat from public housing and increasing reliance on Section 8 housing vouchers⁴⁴ and, later, Low Income Housing Tax Credits, neither of which produced more than tens of thousands of units per year and the latter of which does not target the lowest income renters and often leaves residents struggling with cost burden.⁴⁵

Instead of the subsidized path to suburban homeownership afforded earlier generations of white Americans, Black people got a statute that purported to provide them the choice to move into the suburbs but only if they could afford to do so.⁴⁶ Most could not. By the early 1970s, real wages for all Americans had stagnated, and, between 1973 and 1980, they fell for Black people.⁴⁷ During the same time, home prices increased by forty three percent.⁴⁸ As a result, the ways in which government housing policies have disadvantaged Black people have become nearly permanent.⁴⁹

Stagnant wages and rapidly rising home prices meant that most Black people remained renters, unable to build equity and trapped in declining neighborhoods characterized by increased exposure to violence, decreased exposure to educationally or occupationally successful adults, less accessible healthcare, groceries, and financially strapped schools serving

40. 42 U.S.C. § 3601.

41. BARADARAN, *supra* note 20, at 166–67, 219.

42. Sheri Thompson, *Affordable Housing: A Crisis Decades in the Making*, WALKER & DUNLOP INC. (Apr. 15, 2023), <https://www.walkeranddunlop.com/insights/2023/04/15/affordable-housing-crisis-decades-making>; *Public Housing History*, NAT'L LOW INCOME HOUS. COAL. (Oct. 17 2019), <https://nlihc.org/resource/public-housing-history>.

43. Eugene J. Morris, *The Nixon Housing Program*, 9 REAL PROP., PROB. & TRUST J. 2 (1974).

44. United States Department of Housing and Urban Development, *Housing Choice Vouchers Facts Sheet* (The Housing Choice or Section 8 voucher program is a housing assistance program for low-income households that allows them to find private housing and the federal government pays the portion of the rent that is above 30% of the voucher holders income), available at https://www.hud.gov/topics/housing_choice_voucher_program_section_8.

45. Thompson, *supra* note 42; NICHOLAS DAGEN BLOOM, *PUBLIC HOUSING THAT WORKED: NEW YORK IN THE TWENTIETH CENTURY* (2009).

46. ROTHSTEIN, *supra* note 17, at 183.

47. *Id.* at 181.

48. *Id.*

49. *Id.* at 183.

disproportionately disadvantaged children.⁵⁰ Today most Black people are still renters,⁵¹ the racial wealth gap exceeds \$200,000 per household,⁵² discriminatory policies and practices still limit housing choices for Black people, and the average Black American is still isolated in segregated, devalued neighborhoods.⁵³

Black people continue to be largely denied the housing choices available to their white peers. For example, in 2016, the average white, first-time home buyer in Washington, D.C., could afford sixty seven percent of homes for sale in the District, while the average Black, first-time buyer could afford only nine percent of the homes. Most rental units available to very low-income households were in high-poverty, segregated neighborhoods east of the Anacostia River.⁵⁴ That both more well-off home seekers who want to buy and those with lower incomes who wish to rent find their choices severely restricted by race is unacceptably familiar. The next section talks about how fair housing attorneys can help to expand the menu of choices available to Black home seekers.

III. Lawyers Can Help to Expand Housing Choice.

Income inequality, lack of wealth, and higher debt remain real barriers to Black homeownership, but so does lower access to credit as a result of lending discrimination.⁵⁵ A variety of other public and private housing policies also continue to prevent Black people from choosing to move to areas where they are underrepresented. Economic development fueled by changing white housing preferences and discriminatory redevelopment plans make it hard for Black people to choose to remain living in changing neighborhoods that have been home for decades. In historically Black neighborhoods that are not threatened with gentrification-fueled displacement, generations of disinvestment and a contemporary undervaluing makes remaining in majority Black neighborhoods—by choice or because of lack thereof—a reality riddled with quality-of-life compromises.

50. *Id.* at 187.

51. Herman, Alexander, *In Nearly Every State People of Color Are Less Likely to Own Homes Compared to White Households*, JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV. (Feb. 8 2023), <https://www.jchs.harvard.edu/blog/nearly-every-state-people-color-are-less-likely-own-homes-compared-white-households>.

52. ROTHSTEIN, *supra* note 17, at 183.

53. Tracy Hadden Loh, Christopher Coes & Becca Buthe, *The Great Real Estate Reset—Separate and Unequal: Persistent Residential Segregation Is Sustaining Racial and Economic Injustice in the U.S.*, BROOKINGS (Dec. 16, 2020), <https://www.brookings.edu/articles/trend-1-separate-and-unequal-neighborhoods-are-sustaining-racial-and-economic-injustice-in-the-us>.

54. Leah Hendy & Serena Lei, *A Vision for an Equitable DC*, URB. INST. (Dec. 12, 2016), <https://www.urban.org/features/vision-equitable-dc>.

55. Rashawn Ray et al., *Homeownership, Racial Segregation and Policy Solutions to Racial Wealth Equity*, BROOKINGS (Sept. 1, 2021), <https://www.brookings.edu/articles/homeownership-racial-segregation-and-policies-for-racial-wealth-equity>.

Addressing centuries of inequality and denial of housing choice will require the efforts of policy makers and legislators, community organizers, academics, and other stakeholders. This essay is directed to attorneys, and what follows is a discussion of how attorneys can help expand fair housing choice for Black people and other people of color.

A. Helping Black people move to areas where they are underrepresented.

Cases that challenge policies and practices that prevent Black people from moving to areas where they are underrepresented is what generally comes to mind when one thinks about fair housing. These cases are still critically important. The Fair Housing Act was passed with the stated goal of helping Black people move out of segregated and declining inner-city neighborhoods.⁵⁶ Exclusionary zoning and source of income discrimination are among the most salient policies and practices that prevent Black people from moving to areas where they are underrepresented. Attorneys can help expand choice in this way by representing community-based organizations and non-profit developers seeking to develop affordable housing in suburban or mostly white neighborhoods and by working with fair housing centers and other community-based organizations to challenge source of income discrimination.

1. Source of Income Discrimination

The Housing Choice Voucher (HCV) program was created in part to help low-income households move to neighborhoods that would otherwise be financially inaccessible.⁵⁷ Under the HCV program, a voucher holder is responsible for finding housing on the private market that suits their household's needs and a subsidy is paid to the landlord to cover the amount of rent that exceeds thirty percent of the voucher holder's income.⁵⁸ Nearly half of all voucher holders are Black,⁵⁹ so this program should be a tool that reliably increases housing choice for Black people. However, discrimination against voucher holders by landlords is a pervasive problem that confines many voucher holders to housing that is in racially segregated,

56. NAACP, Boston Chapter v. Secretary of Housing & Urban Development, 817 F.2d 149, 154–56 (1st Cir. 1987); REPORT OF THE NAT'L ADVISORY COMM'N., *supra* note 35.

57. Lance Freeman, *The Impact of Source of Income Laws on Voucher Utilization and Locational Outcomes: Assisted Housing Research Cadre Report*, U.S. DEP'T OF HOUS. AND URB. DEV.: OFF. OF POL'Y DEV. & RSCH. (Feb. 2011), https://www.huduser.gov/publications/pdf/freeman_impactlaws_assistedhousingrcr06.pdf.

58. U.S. Dep't of Hous. & Urb. Dev., Housing Choice Voucher Fact Sheet, https://www.hud.gov/topics/housing_choice_voucher_program_section_8 (last visited Feb. 15, 2024).

59. U.S. Dep't of Hous. & Urb. Dev., Office of Pol'y Dev. & Rsch., Picture of Subsidized Households, <https://www.huduser.gov/portal/datasets/assthsg.html> (last visited June 7, 2024).

high-poverty neighborhoods.⁶⁰ In places with source-of-income discrimination prohibitions, voucher holders are more likely to move to low-poverty neighborhoods where people of color are underrepresented because those prohibitions protect voucher holders from discrimination that they would otherwise often encounter in low-poverty neighborhoods.⁶¹

The Fair Housing Act does not explicitly protect against discrimination based on source of income, but discrimination against voucher holders has a clear disparate impact on Black people since they make up forty eight percent of voucher holders,⁶² but only fourteen percent of the population.⁶³ Results in cases where a plaintiff alleged a violation of the Fair Housing Act because of discrimination against voucher holders are mostly negative.⁶⁴ The Second, Fifth, and Seventh Circuits have held that the Housing Choice Voucher program is voluntary and landlords cannot be held liable under the Fair Housing Act for disparate effects based on race.⁶⁵ However, twenty three states and over one hundred localities prohibit source of income discrimination.⁶⁶ Cases alleging violations of the Fair Housing Act have been more successful in jurisdictions where income discrimination has been prohibited.⁶⁷

Where source-of-income discrimination prohibitions exist, fair housing litigators can increase housing choice by working with community-based organizations and fair housing centers to enforce those protections. In the *Equal Rights Center v. Lenkin Co.*, the Washington Lawyers' Committee for Civil Rights and Urban Affairs represented the Equal Rights Center, a fair housing center located in Washington, D.C., in a claim against the

60. Daniel Teles & Yipeng Su, *Source of Income Protections and Access to Low-Poverty Neighborhoods*, URB. INST. (Oct. 2022), <https://www.urban.org/sites/default/files/2022-10/Source%20of%20Income%20Protections%20and%20Access%20to%20Low-Poverty%20Neighborhoods.pdf>; Robert G. Schwemm, *Source-of-Income Discrimination and the Fair Housing Act*, 70 CASE W. RES. L. REV. 573, 576 (2020), <https://scholarlycommons.law.case.edu/caselrev/vol70/iss3/4>.

61. J. Rosie Tighe, Megan E. Hatch & Joseph Mead, *Source of Income Discrimination and Fair Housing Policy*, 32 J. PLAN. LITERATURE 3 (2020), available at <https://journals.sagepub.com/doi/full/10.1177/0885412216670603>.

62. U.S. Dep't of Hous. & Urb. Dev., *Picture of Subsidized Households: Query Tool*, <https://www.huduser.gov/portal/datasets/assthsg.html> (last visited Feb. 15, 2024).

63. U.S. Census Bureau, *Quick Facts - United States: 2018-2022 ACS Five-Year Estimates*, <https://census.gov/quickfacts/fact/table/US/RHI225222#qf-headnote-a> (last updated Dec. 19, 2023).

64. *Appendix B: State, Local, and Federal Laws Barring Source-of-Income Discrimination*, POVERTY & RACE RSCH. ACTION COUNCIL (Mar. 2024), <https://www.prrac.org/pdf/AppendixB.pdf>; Robert G. Schwemm, *Source-of-Income Discrimination and the Fair Housing Act*, 70 CASE W. RES. L. REV. 573, 604-05 (2020), available at <https://scholarlycommons.law.case.edu/caselrev/vol70/iss3/4>.

65. Schwemm, *supra* note 60, at 604-05.

66. *Id.* at 575.

67. *Id.* at 603.

Lenkin Company for source of income discrimination at rental properties it owned or managed in Wards 1, 2, and 3 of D.C., which are located in majority-white parts of the city.⁶⁸ The case settled with a Consent Agreement wherein the Lenkin Company agreed not to discriminate against voucher holders, to place language saying as much in its advertisements for apartments, to affirmatively market to voucher holders, and to have its staff trained on applicable fair housing laws.⁶⁹

When source of income protections are not already in place, attorneys can work with community-based organizations and fair housing centers to get legislation passed prohibiting source-of-income discrimination. For example, the Lawyers' Committee for Civil Rights Under Law⁷⁰ had discussions with KC Tenants⁷¹, a city-wide tenant union in Kansas City, Missouri, about a source-of-income discrimination prohibition that they were trying to pass. The Lawyers' Committee encouraged advocates to push for language that mirrored the Fair Housing Act with respect to what types of actions would violate the provision and described the importance of a private right of action for enforcement and dedicated resources implementation. That advice was based on the Washington Lawyers' Committee's experience in the District of Columbia. The Lawyers' Committee also wrote a letter to the Kansas City Council encouraging passage of the legislation as a way of combating segregation and meeting the city's obligation under the Fair Housing Act to affirmatively furthering fair housing.

Helping to pass source of income discrimination prohibitions and bringing litigation to enforce those prohibitions are concrete ways that fair housing litigators can help Black households move to areas where they are underrepresented.

68. Complaint, *Equal Rights Ctr. v. Lenkin Co. Mgmt. Inc.*, 2017-CA-002547-B (D.C. Super. Ct. 2017), available at <https://www.courthousenews.com/wp-content/uploads/2017/04/DCHousing.pdf>; DC HEALTH MATTERS, 2024 DEMOGRAPHICS (2024).

69. Consent Decree, *Equal Rights Ctr. v. Lenkin Co. Mgmt. Inc.*, No. 2017 CA002547 B (D.C. Super. Ct. 2017), <https://equalrightscenter.org/wp-content/uploads/erc-lenkin-consent-order.pdf>.

70. The Lawyers' Committee for Civil Rights Under Law is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to mobilize the nation's leading lawyers as agents for change in the Civil Rights Movement. Today, the Lawyers' Committee uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of our democracy real. The Lawyers' Committee implements its mission and objectives by marshaling the pro bono resources of the bar for litigation, public policy, advocacy and other forms of service by lawyers to the cause of civil rights., <https://www.lawyerscommittee.org/mission/>.

71. "KC Tenants is the citywide tenant union, an organization led by a multigenerational, multiracial, anti-racist base of poor and working class tenants in Kansas City. KC Tenants organizes to ensure that everyone in KC has a safe, accessible, and truly affordable home." KC TENANTS (2019), <https://kctenants.org/about>.

2. Exclusionary Zoning

Exclusionary zoning policies serve as another enduring barrier to Black households choosing to live in many suburban areas.⁷² Areas with lower density zoning tend to have higher rates of segregation.⁷³ Lower-density zoning increases existing home prices and prevents the development of multifamily housing that might be more affordable and even, under the most extreme ordinances, modestly priced single-family homes on small lots.⁷⁴ In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, the Supreme Court described zoning laws that operate to exclude minorities from certain neighborhoods as being “at the heartland of disparate impact liability.”⁷⁵

Combatting discriminatory zoning policies is especially important in high-cost regions where gentrification is displacing long-time Black and other residents of color from historically segregated inner-city neighborhoods. Typically, former residents of gentrifying neighborhoods are pushed to areas with greater segregation and concentrated poverty simply for lack of other options.⁷⁶ Many residents facing displacement from gentrifying neighborhoods may want to remain and should be able to do so. However, if exclusionary zoning is overcome, allowing affordable housing to be built in high-opportunity suburbs, then at least those being displaced will be able to choose to not move to segregated neighborhoods if that is their preference. Additionally, eliminating exclusionary zoning may reduce gentrification pressure by making it easier for would-be gentrifiers to find housing outside of neighborhoods at risk of gentrification.

In *MHANY Management, Inc. v. County of Nassau*, the Lawyers Committee represented nonprofit development and property management company Mutual Housing Association of New York (MHANY) and grassroots organizing group New York Communities for Change (NYCC).⁷⁷ In that case, the Village of Garden City, a wealthy white suburb of New York City, initially accepted a plan developed by a consultant to rezone the site of a former county social services building for residential multifamily use (R-M).⁷⁸ However, after multiple public hearings where residents voiced strong opposition to multifamily zoning because of purported traffic and

72. Jonathan Rothwell & Douglass S. Massey, *The Effects of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFF. REV. 779–806 (July 1, 2009), available at <https://oar.princeton.edu/bitstream/88435/pr1gx83/1/nihms453809.pdf>.

73. *Id.* at 792.

74. *Id.*

75. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 539 (2015).

76. Olatunde C.A. Johnson, *Unjust Cities? Gentrification, Integration, and the Fair Housing Act*, 53 U. RICH. L. REV. 835, 843–44 (2019), available at https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3719&context=faculty_scholarship.

77. *MHANY Mgmt., Inc. v. County of Nassau*, 819 F.3d 581 (2d Cir. 2016).

78. *Id.* at 590.

school overcrowding concerns and demanded that the Village guarantee that the site would not be used for affordable housing, the Village changed course.⁷⁹ Ultimately, the Village rezoned the property to allow for the construction of residential townhomes (R-T) and not multifamily housing, and the County, which had asked the Village to initiate the rezoning as a precursor to selling off the site, acquiesced to that zoning classification.⁸⁰

MHANY's predecessor New York ACORN Housing Company and NYCC's predecessor New York ACORN had been following the process to rezone the site and objected to the R-T rezoning of the site because it would make building affordable housing impossible.⁸¹ MHANY's objections were unsuccessful, and the County selected a developer who planned to build single family homes as the purchaser for the property.⁸² Thereafter New York ACORN and four individual plaintiffs filed suit alleging that the decision to rezone the property for townhomes instead of multifamily housing violated the Fair Housing Act because the decision was racially discriminatory and would have a disparate impact on minority groups.⁸³ New York ACORN Housing Company would join the case six months later.

With respect to the intentional discrimination claim, the Second Circuit held that the fact that Garden City was almost entirely white, the lack of affordable housing in Garden City, the number of minorities who would have been able to obtain housing in a multifamily development, the forceful and repeated nature of residents' objections to affordable housing and undesirable residents, and the abrupt change of course together supported the conclusion that county officials were knowingly responsive to the residents' racial animus.⁸⁴ The Second Circuit also held that plaintiffs had established a *prima facie* case that the Village's decision violated the disparate impact prong of the Fair Housing Act by showing that by changing the zoning of the site from R-M to R-T decreased the availability of housing to minorities in a municipality where the minority population is less than five percent.⁸⁵ On remand, the district court held that the plaintiffs had met their burden of proving that multifamily zoning would have served the Village's interests in not increasing traffic or school crowding and would have been less discriminatory than the zoning designation that only allowed for townhomes.⁸⁶

In light of the fact that Garden City is over ninety-five percent white and has long resisted the development of affordable housing,⁸⁷ MHANY's

79. *Id.* at 591–94.

80. *Id.* at 596.

81. *Id.* at 598–99.

82. *Id.*

83. *Id.* at 599.

84. *Id.* at 606–11.

85. *Id.* at 620.

86. *Id.* at 581.

87. *Id.* at 590.

victory is a great example of the type of case that can help increase the ability of Black people and other people of color to live in areas where they are underrepresented. It is worth noting in transitioning to how fair housing attorneys can combat displacement that dismantling exclusionary zoning should be done thoughtfully in a manner that increases the ability of low-income people to move into majority white neighborhoods and not in a manner that increases gentrification and displacement in Black neighborhoods.⁸⁸

B. Preventing displacement related to gentrification

In recent years, many of the nation's largest cities have been experiencing gentrification, which represents a new threat to housing choice for African Americans.⁸⁹ Gentrification is the process of wealthy, usually white, newcomers moving into disinvested central city neighborhoods that have been populated predominantly by African Americans or other people of color and transforming those neighborhoods to meet their tastes.⁹⁰

Proponents of gentrification argue that it is good for cities and the poor residents of cities because it promotes investment in disinvested neighborhoods, increases cities' tax bases and ability to provide services, creates jobs for low-income residents, and improves access to consumer goods.⁹¹ Some have even looked to gentrification as a method to achieve integration.⁹² Municipalities have also used the economic and racial diversity that comes with gentrification as a justification for developments that will displace Black residents.⁹³

Despite hopes of the phenomenon's proponents, the process of gentrification has led to the involuntary displacement of thousands of Black residents from central cities.⁹⁴ Some literature questions whether gentrification

88. *Housing Advocates Fight for Equitable Zoning Practices*, ALL. FOR HOUS. JUST. (Dec. 5, 2023), <https://www.allianceforhousingjustice.org/post/housing-advocates-fight-for-equitable-zoning-policies>.

89. Jason Richardson et al., *Shifting Neighborhoods: Gentrification and Cultural Displacement in American Cities*, NAT'L CMTY. REINVESTMENT COAL. (Mar. 19, 2019), <https://nrcr.org/gentrification>; Johnson, *supra* note 76, at 835, 836.

90. Johnson, *supra* note 76, at 837; Jamie Draper, *Gentrification and Integration*, ___ J. POL. PHIL. ___ (2023) (early view), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/jopp.12312>; J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405, 406 (2003).

91. Johnson, *supra* note 76, at 841–43; Byrne, *supra* note 90, at 405, 406, 415–23; Lance Freeman & Frank Braconi, *Gentrification and Displacement New York City in the 1990s*, 70 J. AM. PLAN. ASS'N 39 (2007), available at <http://dx.doi.org/10.1080/01944360408976337>.

92. Johnson, *supra* note 76, at 835; Draper, *supra* note 90, at 7.

93. City of Norfolk's Memo Re Motion for Summary Judgment, *Bryant v. City of Norfolk*, No. 2:20-cv-00026-RCY-RJK, 2021 WL 765405, at 14 (E.D. Va. 2020) ("Spending more than \$200 million to create a mixed-income, integrated community cannot possibly be considered perpetuating segregation.").

94. Tara Bahrampour, Marissa J. Lang & Ted Mellnik, *White People Have Flocked Back to City Centers—and Transformed Them*, WASH. POST (Feb. 6, 2023), <https://www>

leads to displacement, but the results are mixed and depend on what is considered displacement.⁹⁵ While some neighborhoods may appear to integrate in the early stages of gentrification, many neighborhoods later resegregate as majority white.⁹⁶ Black and other residents of color are displaced from gentrifying neighborhoods by rising rents, deteriorating housing conditions, and discriminatory redevelopment plans.⁹⁷ Housing choices for displaced residents are severely constrained. Instead of finding new housing options in high-opportunity neighborhoods, most people displaced by gentrification find that they have no choice other than to

.washingtonpost.com/dc-md-va/interactive/2023/us-city-white-population-increase; Margaret Kimberly, *Gentrification and the End of Black Communities*, HAMPTON INST. (Aug. 21, 2021), <https://www.hamptonthink.org/read/gentrification-and-the-end-of-black-communities>; Jason Richardson, Bruce Mitchell & Juan Franco, *Shifting Neighborhoods: Gentrification and Cultural Displacement in American Cities*, NAT'L CMTY. REINV. COAL. (Mar. 19, 2019), <https://ncrc.org/gentrification>.

95. Compare Kristen Capps, *Study: No Link Between Gentrification and Displacement in NYC*, BLOOMBERG NEWS (July 31, 2019), <https://www.bloomberg.com/news/articles/2019-07-31/did-gentrification-displace-low-income-nyc-kids> (study finding that low-income children are less likely to move out of gentrifying neighborhoods than non-gentrifying neighborhoods); and Freeman & Braconi, *supra* note 87 (finding low rates of mobility for poor households in gentrifying neighborhoods than non-gentrifying neighborhoods), with Ashley J. Quiang, Christopher Timmins & Wen Wang, *Displacement and the Consequences of Gentrification* (Working Paper Nov. 2021), https://sites.duke.edu/christophertimmins/files/2021/11/displacement_paper_2021_11.pdf (finding that low-income renters are more likely to move out of gentrifying neighborhoods), and Public Affairs, *New York City Gentrification Creating Islands of Exclusion, Study Finds*, BERKELEY NEWS (Apr. 10, 2019) (finding that seventy-one neighborhoods transitioned from low-income to having a median income over two hundred percent of the regional median income between 1990 and 2016).

96. Draper, *supra* note 90; Themis Chronopolis, "What's Happened to the People?" *Gentrification and Racial Segregation and in Brooklyn*, 24 J. AFR. AM. STUD. 549, 550 (Sept. 5, 2020), available at <https://doi.org/10.1007/s12111-020-09499-y>; Daniel Lauber, *District of Columbia Analysis of Impediments to Fair Housing Choice 2006–2011*, D.C. DEP'T HOUS. & CMTY. DEV. 174 (Apr. 2012), <https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/DC%20AI%202012%20-%20FINAL.pdf>; Freeman, Lance, *There Goes the Hood: Views of Gentrification from the Ground Up*, at 78, Temple University Press. Philadelphia, 2006; Newman, Kathe et al., *The Right to Stay Put, Revisited: Gentrification and Resistance to Displacement in New York City*, Urban Studies Journal Limited. Vol 43 No. 23. 2006. Sage Publications, https://files.eportfolios.macaulay.cuny.edu/wp-content/uploads/sites/5806/2017/04/16142354/The_Right_to_Stay_Put_Revisited_Gentrification_and.pdf.

97. Eliana Golding, *A Holistic and Reparative Agenda for Ending Displacement in DC*, D.C. FISCAL POL'Y INST. (Nov. 15, 2023), <https://www.dcfpi.org/all/agenda-for-ending-displacement>; The Uprooted Project, U. Tex. Austin, *Understanding Gentrification and Displacement*, <https://sites.utexas.edu/gentrificationproject/understanding-gentrification-and-displacement> (last visited Feb. 15, 2024).

move to economically isolated, racially segregated, high-poverty neighborhoods.⁹⁸ Those who are not displaced often are not able to enjoy the benefits commonly associated with integrated neighborhoods as wealthy white newcomers exercise school choice to avoid neighborhood schools and use different neighborhood amenities, such as grocery stores, than longtime residents.⁹⁹

Residential and cultural displacement associated with gentrification make it a modern-day social phenomenon whereby Black housing choice is restricted in order to enhance white housing choices. Helping communities to challenge redevelopment plans that threaten to displace low-income residents of color by ensuring that such plans do not have a racially disparate impact or perpetuate segregation is one way that fair housing litigators can help African Americans choose to remain in gentrifying neighborhoods.

Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly is an example of a case where fair housing litigation was used to prevent permanent resident displacement. In *Mt. Holly*, residents of the Mount Holly Gardens neighborhood challenged a plan to demolish the homes in their neighborhood and replace them with more expensive homes.¹⁰⁰ Most of the Gardens neighborhood residents were low income and would not be able to afford the newly developed homes.¹⁰¹ The neighborhood was also home to the only concentration of minority residents in the Township.¹⁰²

Residents of the Gardens neighborhood filed suit alleging that the Township's redevelopment plan violated the Fair Housing Act because it had disproportionately displaced minority residents.¹⁰³ The Third Circuit found that the residents had established a prima facie case that the Township's plan violated the Fair Housing Act by showing that a greater percentage of Black and Hispanic Gardens households would be negatively affected than the percentage of white Gardens households and that a greater percentage of white residents in the Township would be able to afford the new units than Black residents.¹⁰⁴ The court found that the Township had a legitimate interest in repairing blighted neighborhoods but also found that the plaintiffs had presented expert testimony showing that those interests could be met without demolishing and reconstructing the neighborhood.¹⁰⁵

98. Olatunde C.A. Johnson, *Unjust Cities? Gentrification, Integration, and the Fair Housing Act*, 53 U. RICH. L. REV. 835, 843–44 (2019), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3719&context=faculty_scholarship.

99. *Id.* at 845–48.

100. *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 377 (3d Cir. 2011).

101. *Id.*

102. *Id.*

103. *Id.* at 380–82.

104. *Id.* at 382.

105. *Id.* at 386–87 (Even though the Third Circuit articulated a standard whereby the burden was on the defendant to prove there was not a less discriminatory alternative that would serve their legitimate interests, the court looked to evidence presented by the

Another example where the Fair Housing Act was used to combat displacement is *Bryant v. City of Norfolk*.¹⁰⁶ In that case, the City of Norfolk and its housing authority planned to demolish a public housing property, consisting of over 600 units and replace it with a development that would include only 200 units of new affordable housing.¹⁰⁷ The public housing was in a neighborhood that directly abutted one of the city's wealthiest and whitest areas.¹⁰⁸ The city planned to supply displaced residents with Housing Choice Vouchers, but doing so would require the city to temporarily prioritize them over an existing waiting list of thousands.¹⁰⁹ Additionally, it was predictable that former residents would not have been able to use their vouchers to move to high-opportunity areas. Several residents impacted by the redevelopment plan, a tenants' organization representing the residents of the three properties, and the community organizing group New Virginia Majority filed suit against the City of Norfolk, the public housing authority, and the U.S. Department of Housing and Urban Development, which awarded the city and the housing authority a competitive grant to fund the redevelopment. The suit alleged that the redevelopment plan violated the Fair Housing Act because it would have a disparate impact on the existing property's residents and would perpetuate segregation by displacing residents to other more segregated parts of the city even more isolated from areas of opportunity.¹¹⁰

While summary judgment briefing was pending, the parties settled.¹¹¹ The agreement provided a procedure that would maximize the number of former residents who would have the right to return and made substantial improvements to the Housing Choice Voucher program to ensure that those unable to return would enjoy a great deal of choice in finding replacement housing.¹¹² *Bryant v. City of Norfolk* is an example of a case where the involvement of fair housing litigators was crucial to preventing the permanent displacement of hundreds of Black families. Cases that defend a community's right to stay or return to neighborhoods that are being redeveloped are critical to ensuring fair housing choice for Black and other communities of color.

Plaintiff's expert to show there was a less discriminatory alternative that would meet the Township's stated interests. Under HUD's disparate effects rule, that would likely suffice to carry the Plaintiff's burden of proving a less discriminatory alternative. See *MHANY Mgmt. v. Cnty. of Nassau*, 819 F.3d 581 (2d Cir. 2016).

106. *Bryant v. City of Norfolk*, No. 2:20-cv-00026-RCY-RJK, 2021 WL 765405 (E.D. Va. 2020).

107. Amended Compl., *Bryant v. City of Norfolk*, No. 20-cv-00026-RCY-RJK, 2021 WL 765405 (E.D. Va. Mar. 2, 2021), ECF No. 128.

108. *Id.* at 11.

109. *Id.* at 30–35.

110. *Id.* at 5–8 & 53–4.

111. Stipulated Dismissal Ex. A Settlement Agreement, *Bryant v. City of Norfolk*, No. 20-cv-00026-RCY-RJK, 2021 WL 765405 (E.D. Va. Mar. 2, 2021), ECF No. 291-1.

112. *Id.*

Fair housing litigators can also help communities fighting displacement by supporting efforts to pass legislation that protects communities from displacement and or by joining efforts by community-based organizations and legal service providers to ensure that public housing properties are not disposed of in a way that reduces fair housing choice. For example, the Lawyers' Committee for Civil Rights Under Law¹¹³ supported the Louisville Tenants Union¹¹⁴ by writing a letter to the Louisville-Jefferson County Metro Council explaining how passing its Anti-Displacement Law would help the city to meet its obligation to affirmatively further fair housing.¹¹⁵

C. Lawyers can help Black people live in neighborhoods that are not gentrifying without making quality of life compromises.

Not all segregated, majority Black neighborhoods are gentrifying.¹¹⁶ In fact, most African Americans today live in neighborhoods that can be characterized as poor or low income.¹¹⁷ While it is likely true that many Black people would move out of those neighborhoods if given a meaningful choice to do so, it is also true that many Black people are reluctant to move to majority white neighborhoods because of concerns about racial hostility or discrimination or being disconnected from their community.¹¹⁸ Those neighborhoods that are not experiencing renewed investment driven by an influx of white, wealthy newcomers, continue to be plagued by a variety of problems related to disinvestment such as poor schools, increased crime, and lack of access to healthcare, groceries, and other goods and services.¹¹⁹ Disinvestment has made subpar housing conditions a widespread problem.¹²⁰ Fair housing litigators can address the conditions in segregated

113. LAWYERS' COMM. CIV. RTS. UNDER LAW, <https://www.lawyerscommittee.org> (last visited June 21, 2024).

114. LOUISVILLE TENANTS UNION, <https://www.louisvilletenantsunion.org/about> (last visited June 21, 2024).

115. LOUISVILLE-JEFFERSON CNTY., MO METRO GOV'T CODE OF ORDINANCES ch. 169 (2023) (requiring any development including a residential component and receiving metro resources undergo a displacement assessment and requiring any rental housing to be affordable based on the affordability levels identified in the most recent Housing Needs Assessment).

116. Jason Richardson et al., *Shifting Neighborhoods; Gentrification and Cultural Displacement in American Cities*, NAT'L CMTY. REINV. COAL. (Mar. 19, 2019), <https://nrcr.org/gentrification>.

117. BARADARAN, *supra* note 20, at 187; Christopher Coes et al., *The Great Real Estate Reset: A Data-Driven Initiative to Remake How and What We Build*, BROOKINGS (Dec. 16, 2020), <https://www.brookings.edu/articles/the-great-real-estate-reset-a-data-driven-initiative-to-remake-how-and-what-we-build>.

118. Draper, *supra* note 90.

119. ROTHSTEIN, *supra* note 17, at 187; BARADARAN, *supra* note 20, at 217.

120. David E. Jacobs, *Environmental Health Disparities in Housing*, 101 AM. J. PUB. HEALTH (Dec. 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3222490> (noting that 7.5% of African Americans live in substandard housing); Eliana Golding, *A Holistic and Reporative Agenda for Ending Displacement in DC*, D.C. FISCAL POL'Y INST. (Nov. 15,

neighborhoods using the Fair Housing Act, and, in many jurisdictions, fair housing litigators may be the best suited to pursue cases addressing housing conditions using the implied warranty of habitability and consumer protection statutes because of their familiarity with complex civil litigation.

Fair housing attorneys can help make choosing to continue living in a low-income, majority Black neighborhood a meaningful choice by bringing cases against governments and housing providers for the discriminatory provision of housing facilities and services and for failing to meet their obligation to keep rental property in good repair.

1. Challenging discriminatory services and facilities under the Fair Housing Act

Section 3604(b) of the Fair Housing Act states that it is unlawful “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.”¹²¹ An archetypal example of a case challenging the discriminatory provision of facilities and services by a municipality is *Kennedy v. City of Zanesville*.¹²²

In *Zanesville*, residents just outside the city limits of Zanesville, Ohio and a local fair housing center filed suit against the City of Zanesville and Muskingum County alleging that the defendants had engaged in discrimination that violated the Fair Housing Act by passing over their neighborhood (Coal Run) for connection to the municipal water lines in favor of more distant white neighborhoods despite multiple requests by the neighborhood’s residents to be connected.¹²³ While the litigation was pending, the neighborhood was connected to municipal water.¹²⁴

Later the court held that the plaintiffs had established a *prima facie* case that the defendants had intentionally discriminated against them by showing that they were residents of a protected class neighborhood, they requested public water service, and the requests were rejected, that the defendants provided water services to similarly situated neighborhoods that were not protected class neighborhoods,¹²⁵ and that the plaintiffs submitted evidence that the defendants proffered legitimate reasons for the denial of water service were pretextual.¹²⁶ This case is an example of how litigation against a discriminatory municipal actor can achieve victories that make the choice to live in segregated neighborhoods like Coal Run more livable

2023), <https://www.dcfpi.org/all/agenda-for-ending-displacement> (describing poor housing conditions as the second largest factor driving displacement in D.C.).

121. 42 U.S.C. § 3604(b); 24 C.F.R. § 100.65.

122. *Kennedy v. City of Zanesville*, OH, 505 F. Supp. 2d 456 (S.D. Ohio 2007).

123. *Id.* at 463.

124. *Id.* at 469.

125. *Id.* at 495.

126. *Id.* at 497–98.

The discriminatory provision of facilities and services by private landlords can also be challenged under § 3604(b). *Jimenez v. Tsai* is an example of such a case.¹²⁷ Plaintiffs, four Latinx families, successfully stated a claim for racial and national origin discrimination under § 3604(b). In *Jimenez*, the plaintiffs alleged that defendant property managers failed to make timely repairs and neglected habitability problems in an apartment complex with predominantly tenants of color.¹²⁸ The plaintiffs showed that the defendants' neglect was motivated by discriminatory animus by using survey data from another one of the defendants' properties, which was predominantly white and had no Latinx residents.¹²⁹ Tenants at that property indicated through the survey that they had no issues with repairs in their units and did not have any complaints about the speed with which the repairs were made.¹³⁰ The court found this evidence sufficient for the plaintiffs' § 3604(b) claim to survive the defendants' motion to dismiss.¹³¹ *Jimenez* shows that claims brought under § 3604(b) can be a viable way to hold large landlords who may own nice properties in white areas accountable for the condition of their properties in non-white areas.

2. Holding housing providers accountable for neglect with the implied warranty of habitability and consumer protection statutes

Rental housing conditions in segregated Black neighborhoods are often deplorable.¹³² The physical condition of much of that rental housing can be traced to the disinvestment experienced by segregated Black neighborhoods.¹³³ Substandard housing can have a variety of negative health consequences, such as asthma that is aggravated by mold.¹³⁴ As described above, Black people end up living in substandard housing because they lack other options. Fair housing litigators can help with this problem through litigation.

Most jurisdictions have an implied warranty of habitability that requires housing providers to keep rental housing habitable even if the lease does

127. *Jimenez v. Tsai*, No. 5:16-cv-04434-EJD, 2017 WL 2423186, at *18 (N.D. Cal. June 5, 2017).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Health, Housing and History; For Health Place Matters*, ENV'T & HEALTH DATA PORTAL, <https://a816-dohbesp.nyc.gov/IndicatorPublic/data-stories/housing>; Michael Brice-Saddler, *Once a Black Middle Class Haven, a D.C. Apartment Complex Falls into Disrepair*, WASH. POST (June 1, 2021), https://www.washingtonpost.com/local/dc-politics/mar-bury-plaza-dc-rent-strike/2021/06/11/922c6632-c960-11eb-afd0-9726f7ec0ba6_story.html; Gretchen Morgenson, *These Tenants Fought One of America's Largest Corporate Landlords—and Scored Some Wins*, NBC NEWS (July 5, 2023).

133. *Health, Housing and History*, *supra* note 132.

134. *Id.*

not say the provider has to make repairs.¹³⁵ Habitability is usually defined by a local housing or building code.¹³⁶ Some jurisdictions also allow tenants to bring claims for repairs under consumer protection statutes.¹³⁷ Lawyers can fashion claims for groups of tenants or entire properties based on a violation of contract theory or under consumer laws.

Fair housing attorneys at civil rights organizations may be reluctant to bring these types of cases because they see them as landlord-tenant cases that should be handled by legal aid organizations. This was the case at the Washington Lawyers' Committee for Civil Rights initially. However, because poor conditions disproportionately impact Black people and other people of color¹³⁸ and because many Legal Aid organizations are either restricted from taking class action cases or lack the resources to do so, we felt it incumbent on the Committee to take building-wide conditions cases. The examples below illustrate that challenging failures to maintain property under implied warranties of habitability or consumer protection statutes can be important impact cases.

In *Brooks v. S.M.-T.E.H. Realty 10, LLC*, Arch City Defenders represented a class of plaintiffs who were residents of Northwinds Apartments in Ferguson, Missouri. Northwinds Apartments is located in a zip code that is almost ninety percent Black.¹³⁹ The plaintiffs in this case were living in apartments with compromised structural integrity, collapsed ceilings, unsecure doors with broken locks, defective plumbing, flooding, and water damage.¹⁴⁰ The suit that they brought requested that the court enjoin the landlord from remaining in breach of their rental contracts by allowing their units to become uninhabitable.¹⁴¹ The court found that the landlord had breached the implied warranty of habitability and the rental leases and entered a permanent injunction preventing the defendant from collecting rent for the period between October 1, 2019, and January 7, 2021 (the date which the property was sold in a foreclosure sale).¹⁴²

Rodriguez v. Brookland Investments, LLC is an example of a case filed by the Washington Lawyers' Committee on behalf of a group of tenants and a tenants' organization at Franklin Arms Apartments in Northeast DC.

135. *Implied Warranty of Habitability*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/implied_warranty_of_habitability (last updated Jan. 2023).

136. *Id.*; see also D.C. Mun. Regs. tit. 14 § 304.3 (2017).

137. See D.C. CODE § 28-3901 (2023).

138. David E. Jacobs, *Environmental Health Disparities in Housing*, 101 AM. J. PUB. HEALTH S115 (Dec. 2011), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3222490>.

139. AM. CMTY. SURVEY, 5-YEAR ESTIMATES (2022), <https://data.census.gov/table/ACSDP5Y2022.DP05?q=63136>.

140. Complaint ¶¶ 11, 13, *Brooks v. S.M.-T.E.H. Realty 10, LLC*, No. 19SL-CC0486 (Cir. Ct. St. Louis, MO 2022).

141. *Brooks v. S.M.-T.E.H. Realty 10, LLC*, No. 19SL-CC0486 (Cir. Ct. St. Louis, MO 2022).

142. *Id.*

The zip code where the Franklin is located is seventy percent Black and ten percent Latinx.¹⁴³ The tenants of Franklin Arms live in apartments that have serious mold issues, leaks, broken appliances, and gas leaks, and are infested by roaches and rodents.¹⁴⁴ The elevator in the building often does not work, and the heat and hot water are unreliable.¹⁴⁵ The plaintiffs in that case seek damages and repairs for claims brought under the implied warranty of habitability and the D.C. Consumer Protection Procedures Act.¹⁴⁶ It is pending in the D.C. Superior Court.¹⁴⁷

Cases such as *Rodriguez v. Brookland Investments, LLC* and *Brooks v. S.M.-T.E.H. Realty 10, LLC* are concrete examples of how fair housing attorneys can bring impact cases around housing conditions. One quality of life compromise that Black people are often forced to make when they live in majority Black neighborhoods can be removed when attorneys take cases that result in improved housing conditions.

IV. Conclusion

It can hardly be argued that the United States does not have a dual tradition of facilitating the housing choices of white people while simultaneously restricting the choices of Black people. That tradition has created an enduring spatial and economic divide between Blacks and whites. In this article, I have argued that, to redress that divide, fair housing advocates should focus on expanding the menu of choices available to Black people instead of focusing on creating racial balance or achieving integration. This article attempts to describe several ways to facilitate Black peoples' choice; to move out of majority Black neighborhoods, to remain in those neighborhoods that are becoming economically and racially diverse because of wealthy, white newcomers, and to remain in majority Black neighborhoods that are not experiencing gentrification without making quality of life compromises. Redressing housing discrimination of the past requires us not only to pursue integration, but to ensure that Black people and other people of color have the room and resources to exercise housing choices that are equal to those that white people are able to make. Litigation cannot achieve this by itself, but it is an important tool to be deployed towards achieving fair housing choice.

143. AM. CMTY. SURVEY, 5-YEAR ESTIMATES (2022), <https://data.census.gov/table/ACSDP5Y2022.DP05?q=20018>.

144. Complaint ¶ 3, *Rodriguez v. Brookland Invs.*, No. 2023-CAB-005703 (D.C. Super. Ct. 2023).

145. *Id.*

146. *Id.*

147. *Id.*

