

**AFFIRMATIVELY FURTHERING FAIR HOUSING IN THE  
DEEP SOUTH: OBAMA’S AFFH RULE WON’T MAKE RURAL  
AMERICA LESS SEGREGATED**

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AFFIRMATIVELY FURTHERING FAIR HOUSING IN THE DEEP SOUTH: OBAMA'S AFFH RULE WON'T MAKE RURAL AMERICA LESS SEGREGATED

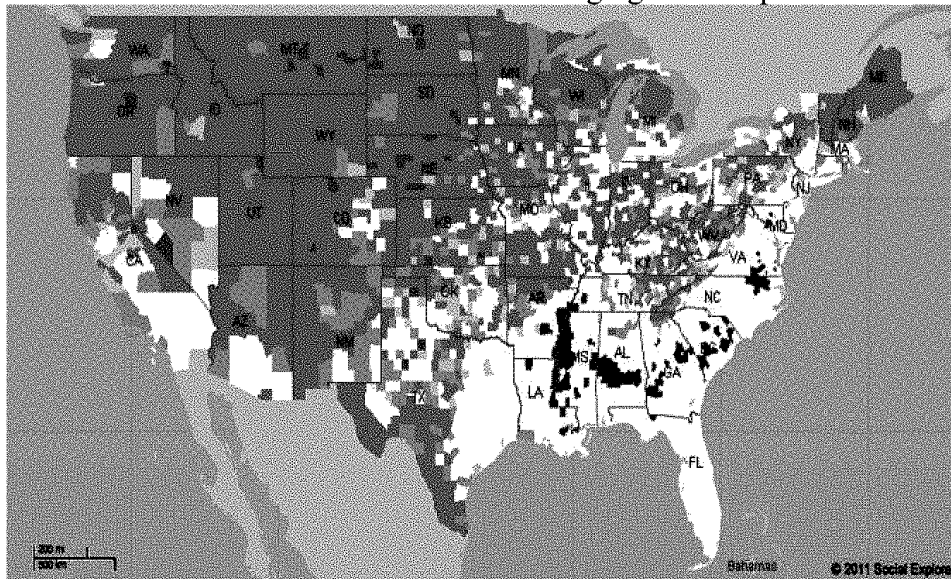
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INTRODUCTION

LAST year marked the fiftieth anniversary of the passage of the 1968 Fair Housing Act. The Act's grand purpose was to make "open housing" available to all Americans.<sup>1</sup> Open housing, simply put, is the term that embodies the opportunity all Americans should have to live in the community of their choosing without, or in spite of, structural or systemic and private discrimination. Fifty years later, the Act's goal remains largely unfulfilled, as many small towns and rural areas in the United States are still racially segregated.

**Figure 1**

U.S. 2010 Black-White Segregation Map<sup>2</sup>



*Red areas reflect census block groups that are disproportionately white. The redder the area, the fewer African Americans. Gray areas are disproportionately African American. White areas are those where neither race is disproportionate.*

To the extent that the Act has failed to achieve open housing, there is plenty of blame to go around. Much of it lies at the door of the Depart-

<sup>1</sup> Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968); 42 U.S.C. § 3601 (1968).

<sup>2</sup> Social Explorer, <https://static.socialexplorer.com/pub/blog/wp-content/uploads/2011/04/Picture-6.png> (last visited June 6, 2018).

ment of Housing and Urban Development (HUD), the federal agency that has the legal duty to affirmatively further fair housing across all of its programs.<sup>3</sup> Through its grantmaking programs for housing and community development, HUD reaches into every corner of the United States. HUD thus possesses a relatively unfettered opportunity: it can use its grantmaking as a powerful incentive for communities to achieve open housing and can deny grants to communities that fail to do so. Historically, however, through both Democratic and Republican administrations, HUD has failed to capitalize on this opportunity. In fact, HUD has traditionally been enthusiastically non-partisan in its refusal to steward such a mission-critical effort.

In 2015, however, during the Obama administration, HUD adopted the Affirmatively Furthering Fair Housing Rule (“AFFH Rule”), intended to revitalize the way in which HUD and its grantees ensure that they meet the open housing goals of the Fair Housing Act.<sup>4</sup> The rule requires local communities receiving HUD grants to use more specific census data in order to develop and implement analyses and plans that affirmatively and meaningfully address ongoing patterns of housing segregation in those communities.<sup>5</sup> The Trump administration has suspended the implementation of this regulation.<sup>6</sup> This article argues, however, that even with full implementation of the AFFH Rule, small towns and rural areas in the Deep South would remain as segregated as ever. Indeed, the full promise of the Fair Housing Act will remain unrealized in small towns and rural areas until HUD or Congress recognizes and corrects the urban bias in HUD’s attempts to ensure fair housing.

While most fair housing legal scholarship focuses on urban, residential segregation, this article focuses instead on the ongoing and relatively static patterns of housing segregation through the lens of race in the Deep South. To illustrate the existence and consequence of the urban bias in HUD’s fair housing mechanisms, this article explores as a specific case study the problem in Mississippi, where the author teaches and practices fair housing law. The article marshals data demonstrating that

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<sup>3</sup> “The Secretary of Housing and Urban Development shall...administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title.” 42 U.S.C.A. § 3608(e)(5) 3 n.3 (West 2016).

<sup>4</sup> Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272-01 (July 16, 2015) (to be codified at 24 C.F.R. pt. 5).

<sup>5</sup> *Id.* See also Alana Semuels, *Can Better Data Help Solve America’s Housing Problems?*, THE ATLANTIC (July 8, 2015), <https://www.theatlantic.com/business/archive/2015/07/new-hud-rules-fair-housing/397997>.

<sup>6</sup> 83 Fed. Reg. 683, January 5, 2018; Suspension Withdrawn 83 Fed. Reg. 23,928, May 23, 2018; Assessment Tool Withdrawn 83 Fed. Reg. 23,922, May 23, 2018; *Nat’l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14 (D.D.C. 2018).

in Mississippi, housing segregation is highly concentrated and follows consistent and predictable patterns that still escape serious notice by HUD.

Rural segregation in the Deep South matters because over ninety percent of nonmetropolitan blacks are concentrated in the census-defined South.<sup>7</sup> In 2010, 55% of the black population in the United States lived in the South, and 105 Southern counties had a black population of 50% or higher.<sup>8</sup> Census data shows that residential segregation for blacks in rural America is as bad as or worse than residential segregation and poverty in urban America.<sup>9</sup> More concerning still is the fact that many majority-black areas are significantly worse off than majority-white areas in terms of a host of traditional social welfare indicators.<sup>10</sup>

There are many reasons why places with a tragic racial history like Mississippi and the Deep South more generally remain overwhelmingly racially segregated half a century after Congress passed the Fair Housing Act. Individual personal preference about where to live offers a partial

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<sup>7</sup> John B. Cromartie & Calvin L. Beale, *Increasing Black-White Separation in the Plantation South, 1970-90*, in RACIAL/ETHNIC MINORITIES IN RURAL AREAS: PROGRESS AND STAGNATION 54, 1980-90 (Linda L. Swanson ed., 1996). The Census-defined South includes sixteen states: Texas, Oklahoma, Arkansas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, Florida, South Carolina, North Carolina, Kentucky, West Virginia, Maryland, Virginia, the District of Columbia, and Delaware. U.S. CENSUS BUREAU, *Census Regions and Divisions of the United States*, [https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us\\_regdiv.pdf](https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us_regdiv.pdf) (last visited Apr. 12, 2019). The “Deep South” is not a Census-defined region. For the purposes of this article, I am using the term to describe the states that today include the census block groups shown in Figure 1 that are disproportionately African American.

<sup>8</sup> U.S. CENSUS BUREAU, *The Black Population: 2010*, 2010 CENSUS BRIEFS (2011).

<sup>9</sup> Lichter, Parisi, Grise and Taquino, *National Estimates of Racial Segregation in Rural and Small Town America*, 44 DEMOGRAPHY, no. 3, 2007, at 570-71 (“the black-white segregation index for nonmetropolitan places was 66.6 in 2000, compared with 58.70 for metropolitan places . . . over  $\frac{3}{4}$  of all nonmetropolitan places had black-white residence patterns that were highly segregated in 2000, and only 3.3 experienced low segregation. In comparison, about 52% of metropolitan places were highly segregated along black-white lines, while nearly 13% experienced low segregation”); see also Cromartie, *supra* note 7; Lichter, Parisi, Taquino, and Beaulieu, *Race and the Micro-Scale Spatial Concentration of Poverty*, CAMBRIDGE J. OF REGIONS, ECON. AND SOC<sup>Y</sup> at 51, 58 (county level data masks concentrated poverty in rural areas); but c.f. Ana-María González Wahl & Steven E. Gunkel, *From Old South to New South? Black-White Residential Segregation in Micropolitan Areas*, 27 SOC. SPECTRUM 507 (2007).

<sup>10</sup> Don E. Albrecht, et al. *Minority Concentration, Disadvantage, and Inequality in the Nonmetropolitan United States*, 46 THE SOC. QUARTERLY no. 3 at 503, 503-23 (2005).

explanation,<sup>11</sup> as does ongoing discrimination in housing markets characterized by private and public acts of discrimination or policies that have a disparate negative impact on protected groups.<sup>12</sup> Each of these factors contributes to the problem of ongoing segregated living patterns in the Deep South.

This article theorizes that open housing has also failed to materialize because HUD regulations that require grantees to affirmatively further fair housing in their communities are ineffective in design—and are particularly ill-suited to rural, less populated areas. The regulations, including the AFFH Rule, have significant, perhaps inadvertent, deficits that allow small town governments and their state counterparts to adhere to policies that perpetuate racial segregation by following old residential living patterns. This article addresses those deficits and their impact on integration of rural communities in the Deep South. The author uses Mississippi as an example to show that through its indirect grantmaking to small towns and rural areas, HUD supports Mississippi and its local governments even as they fail to affirmatively further fair housing. Mississippi's failures pass legal scrutiny because of an unfortunate double standard in past and present HUD regulations.

For an urban or metropolitan area to receive a HUD grant, federal regulations require it to produce an assessment or analysis showing that the grantee is working toward breaking down barriers to open housing in its jurisdiction. When it comes to rural areas and small towns, it is the state itself—not the town, county, or other rural area that actually receives HUD funding—that produces an assessment *for the entire state* (called the “non-entitlement area”) rather than for the particular local government that will benefit from the grant. This article argues that state assessments of non-entitlement areas do not provide granular enough information to identify where overt discrimination or disparate impact segregation is ongoing in small towns and rural areas. Furthermore, the ability of a private plaintiff to successfully sue a rural area or small town like the plaintiffs did to enforce Westchester County, New York's duty to affirmatively further fair housing<sup>13</sup> is nearly impossible, as federal regulations require only that rural areas and small towns make the vaguest of promises regarding affirmatively furthering fair housing.

This is a problem that disproportionately affects half of the states in the country. Overall, in 2016, HUD granted approximately 65% of its

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<sup>11</sup> See SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 17-19 (2005).

<sup>12</sup> *Id.*

<sup>13</sup> *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y.*, 668 F. Supp. 2d 548, 550 (S.D.N.Y. 2009); see also Stephen F. Hayes, *Enforcing Civil Rights Obligations Through False Claims Act*, 1 Colum. J. Race & L. 29 (2011).

grant dollars to urban and metropolitan areas that answer directly to HUD regarding their efforts to affirmatively further fair housing. In some states less than 20% of HUD funding went to small towns and rural areas. In California and Nevada, for example, HUD funding to small towns and rural areas was only about 15% in 2016.

**Table 1<sup>14</sup>**  
2016 HUD Allocations by Entitlement Jurisdiction and State Jurisdiction

|           | <b>Entitlement</b> | <b>State</b> | <b>Total Funding</b> | <b>Entitlement Grants as % of Total</b> |
|-----------|--------------------|--------------|----------------------|---|
| <b>NJ</b> | 110,650,731        | 17,548,575   | 128,199,306.00       | 86.31                                   |
| <b>CA</b> | 480,677,464        | 82,956,811   | 563,634,275.00       | 85.28                                   |
| <b>NY</b> | 383,433,713        | 80,054,164   | 463,487,877.00       | 82.73                                   |
| <b>MD</b> | 58,923,259         | 15,764,946   | 74,688,205.00        | 78.89                                   |
| <b>FL</b> | 181,003,069        | 50,326,617   | 231,329,686.00       | 78.24                                   |
| <b>IL</b> | 168,173,725        | 48,411,311   | 216,585,036.00       | 77.65                                   |
| <b>NV</b> | 26,006,164         | 9,132,362    | 35,138,526.00        | 74.01                                   |
| <b>PA</b> | 174,582,876        | 62,490,102   | 237,072,978.00       | 73.64                                   |
| <b>AZ</b> | 55,010,104         | 20,307,952   | 75,318,056.00        | 73.04                                   |
| <b>WA</b> | 58,670,904         | 22,173,712   | 80,844,616.00        | 72.57                                   |

<sup>14</sup> The data in Table 1 was compiled by the author using budget figures made available to the public at the Office of Housing and Urban Development website. The author tallied the grants made to the Entitlement jurisdictions in each state and compared these totals to the grant to the non-entitlement area. These data include all FY2016 Community Development Block Grants (CDBG); HOME Investment Partnerships (HOME), Housing Opportunities for Persons with AIDS (HOPWA); Emergency Solutions Grants (ESG); and Housing Trust Fund (HTF). The data is on file with the author and is available at [https://www.hud.gov/program\\_offices/comm\\_planning/about/budget/budget16](https://www.hud.gov/program_offices/comm_planning/about/budget/budget16) (last visited July 22, 2019).

|           |             |             |                |       |
|-----------|-------------|-------------|----------------|-------|
| <b>HI</b> | 15,603,064  | 6,678,862   | 22,281,926.00  | 70.03 |
| <b>TX</b> | 227,265,757 | 100,856,462 | 328,122,219.00 | 69.26 |
| <b>MI</b> | 106,088,691 | 52,290,774  | 158,379,465.00 | 66.98 |
| <b>CO</b> | 36,756,020  | 18,284,402  | 55,040,422.00  | 66.78 |
| <b>MA</b> | 87,118,390  | 44,823,603  | 131,941,993.00 | 66.03 |
| <b>OH</b> | 127,571,418 | 68,698,193  | 196,269,611.00 | 65.00 |
| <b>VA</b> | 49,151,099  | 30,472,980  | 79,624,079.00  | 61.73 |
| <b>UT</b> | 19,243,592  | 12,030,647  | 31,274,239.00  | 61.53 |
| <b>MN</b> | 41,820,444  | 28,180,740  | 70,001,184.00  | 59.74 |
| <b>MO</b> | 50,337,875  | 35,515,912  | 85,853,787.00  | 58.63 |
| <b>RI</b> | 13,785,542  | 11,669,698  | 25,455,240.00  | 54.16 |
| <b>LA</b> | 38,292,499  | 33,419,631  | 71,712,130.00  | 53.40 |
| <b>WI</b> | 44,393,646  | 39,626,672  | 84,020,318.00  | 52.84 |
| <b>IN</b> | 44,162,770  | 46,008,002  | 90,170,772.00  | 48.98 |
| <b>SC</b> | 26,066,725  | 30,237,767  | 56,304,492.00  | 46.30 |
| <b>AL</b> | 29,382,397  | 37,028,178  | 66410575.00    | 44.24 |
| <b>TN</b> | 33,710,066  | 42,743,155  | 76,453,221.00  | 44.09 |
| <b>DE</b> | 6,490,288   | 8,489,616   | 14,979,904.00  | 43.33 |
| <b>OK</b> | 17,792,613  | 23,288,534  | 41,081,147.00  | 43.31 |
| <b>NC</b> | 46,032,225  | 66,696,371  | 112,728,596.00 | 40.83 |
| <b>KS</b> | 13,937,356  | 23,102,378  | 37,039,734.00  | 37.63 |
| <b>KY</b> | 21,582,394  | 38,468,383  | 60,050,777.00  | 35.94 |
| <b>NE</b> | 9,542,414   | 17,279,806  | 26,822,220.00  | 35.58 |

|           |            |               |               |       |
|-----------|------------|---------------|---------------|-------|
| <b>NM</b> | 8,523,427  | 18,413,828    | 26,937,255.00 | 31.64 |
| <b>IA</b> | 14,537,903 | 33,167,982    | 47,705,885.00 | 30.47 |
| <b>WV</b> | 8,122,846  | 21,002,432    | 29,125,278.00 | 27.89 |
| <b>ME</b> | 7,022,933  | 18,259,103    | 25,282,036.00 | 27.78 |
| <b>ID</b> | 4,620,881  | 15,111,607    | 19,732,488.00 | 23.42 |
| <b>AR</b> | 8,531,690  | 28,900,329    | 37,432,019.00 | 22.79 |
| <b>NH</b> | 4,210,169  | 14,986,456    | 19,196,625.00 | 21.93 |
| <b>AK</b> | 2,296,965  | 8,842,168     | 11,139,133.00 | 20.62 |
| <b>MT</b> | 2,619,939  | 12,488,521    | 15,108,460.00 | 17.34 |
| <b>MS</b> | 6,259,302  | 36,523,998    | 42,783,300.00 | 14.63 |
| <b>ND</b> | 1,658,854  | 10,130,467    | 11,789,321.00 | 14.07 |
| <b>SD</b> | 867,036    | 11,787,893    | 12,654,929.00 | 6.85  |
| <b>WY</b> | 684,721    | 9,636,575     | 10,321,296.00 | 6.63  |
| <b>VT</b> | 724,881    | 13,078,737    | 13,803,618.00 | 5.25  |
| <b>DC</b> | 0          | 2,169,963,931 | 2,169,963,931 | 0     |

However, as shown in Table 1, in about half of the states, more than 50% of 2016 HUD grants went to small towns and rural areas from which HUD requires no direct fair housing assessment or planning. In some states, like Vermont, South Dakota, and Wyoming, HUD granted more than 90% of funds to small towns and rural areas in the non-entitlement area. In Indiana, Arkansas, New Hampshire, Alaska, Montana, Mississippi, and North Dakota, HUD granted at least 75% of funding to non-entitlement areas. Except for Virginia and Maryland, all of the states containing census block groups characterized as disproportionately African American in Figure 1 are states in which small towns and rural areas receive more than 50% of HUD funds (Figure 1 and Table 1).

In 2016, approximately 85% of HUD's Mississippi funding was allocated for distribution to small towns and rural areas. As a practical matter, this means that in Mississippi—which has a long, difficult history with racial discrimination that continues to this day—HUD financially supports vast swaths of the state that may continue to engage in unas-



sessed and unchecked behaviors and policies that are either intentionally discriminatory or have a discriminatory effect.

This article examines several Mississippi rural areas and small towns to illustrate certain concepts relating to present-day residential segregation and how the duty to affirmatively further fair housing plays out in these less populated, non-entitlement areas in the Deep South. This article theorizes that rural areas and small towns avoid both HUD scrutiny and self-scrutiny about ongoing housing segregation. For too long, federal policy has minimized the problem of rural racial segregation. To the extent that we want to rededicate ourselves to fair housing fifty years after the Fair Housing Act's implementation, we can no longer afford to ignore rural America.

### I. THE DUTY TO AFFIRMATIVELY FURTHER FAIR HOUSING

The Fair Housing Act's main purpose is to provide for "fair housing throughout the United States."<sup>15</sup> In other words, in addition to prohibiting individual acts of discrimination, the Act also created a positive duty to affirmatively further fair housing throughout the country.<sup>16</sup> This duty applies only to HUD and its related executive departments and agencies. To satisfy this duty, HUD and other federal agencies must administer their programs and activities related to housing and urban development in a manner that ensures that those programs and activities affirmatively further the policies and purposes of the Fair Housing Act throughout the United States.<sup>17</sup>

The Supreme Court has defined HUD's duty to affirmatively further fair housing as a mandate to eliminate segregation and to work toward creating integrated and balanced living patterns.<sup>18</sup> By the time Congress passed the Fair Housing Act in 1968, a Kennedy-era executive order<sup>19</sup> already banned discrimination by public housing authorities, and Congress itself banned discrimination in all programs and activities receiving federal financial assistance.<sup>20</sup> Nevertheless, HUD and HUD-funded pub-

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<sup>15</sup> 42 U.S.C. § 3601 (2019).

<sup>16</sup> Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1386 (2012).

<sup>17</sup> 42 U.S.C. §§ 3601, 3608(d), 3608(e)(5) (2019).

<sup>18</sup> *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1968) (quoting Senator Walter Mondale, the primary drafter of the legislation); 114 Cong. Rec. 3422 (1968); see Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 KY. L.J. 125, 127-28 n.18 (2012).

<sup>19</sup> Exec. Order No. 11063, 27 Fed. Reg. 11527 (Nov. 20, 1962).

<sup>20</sup> 42 U.S.C. § 2000(d) (2019); *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971).

lic housing authorities continued to discriminate.<sup>21</sup> The Fair Housing Act's passage and clear mandate was intended in large part to root out pernicious ongoing public housing discrimination that HUD condoned.<sup>22</sup>

However, the Fair Housing Act's mandate extends beyond the activities of HUD-funded local public housing authorities. Its reach extends to all recipients of HUD-related funding, including all states and political subdivisions that are HUD grantees and that receive funding through HUD's largest funding program, the Community Development Block Grant program ("CDBG"). The CDBG program was created as part of the Housing and Community Development Act of 1974,<sup>23</sup> which requires that any CDBG grant shall be made only if the grantee certifies to the satisfaction of the Secretary that "the grant will be conducted and administered in conformity with the Civil Rights Act of 1964 and the Fair Housing Act, and the grantee will affirmatively further fair housing."<sup>24</sup>

## II. LACK OF HUD OVERSIGHT OF SMALL TOWNS AND RURAL AREAS ENCOURAGES RESIDENTIAL SEGREGATION TO PERSIST

By 1983, federal law and regulations required all direct HUD grantees to certify in writing that they were in fact affirmatively furthering fair housing in their own jurisdictions.<sup>25</sup> In 1988, HUD regulations were amended to state that a grantee would be in compliance with this promise if the grantee conducted an "analysis of impediments" ("AI") to fair housing in the grantee's jurisdiction and developed and implemented an action plan to tackle identified impediments.<sup>26</sup> Amendments to CDBG regulations passed in 1995 required HUD grantees' analyses to go a step further—to develop a Consolidated Plan ("ConPlan"),<sup>27</sup> which, in essence, is a coordinated housing affordability strategy for each HUD grantee's jurisdiction.<sup>28</sup> In 1996, HUD released the Fair Housing Plan-

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<sup>21</sup> RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); *see also* Michelle Gazvanir Collins, *Opening Doors to Fair Housing: Enforcing the Affirmatively Further Provision of the Fair Housing Act through 42 U.S.C. Sec. 1983*, 110 COLUM. L. REV. 2135, 2138-40.

<sup>22</sup> Schwemm, *supra* note 18, at 136-44.

<sup>23</sup> 42 U.S.C. § 5301 (2019).

<sup>24</sup> 42 U.S.C. § 5304(b) (2019); PL 98-181 (HR 3959), PL 98-181, Nov. 30, 1983, 97 Stat. 1153.

<sup>25</sup> PL 98-181 (HR 3959), PL 98-181, Nov. 30, 1983, 97 Stat. 1153; 42 U.S.C §§ 5304, 5306; 24 C.F.R. § 570.601 (2015).

<sup>26</sup> 53 Fed. Reg. 34,416 (Sept. 6, 1988); 24 C.F.R. § 570.904(c) (2019).

<sup>27</sup> 24 C.F.R. § 91.1(a)(2) (2006).

<sup>28</sup> In 1990, Congress passed the National Affordable Housing Act of 1990, a law that required CDBG grantees to create and implement a ConPlan. 42 U.S.C. § 705(b)(1) (1990). This requirement was later incorporated into 1995

ning Guide to provide grantees with additional information regarding CDBG requirements.<sup>29</sup> These self-assessment and detailed planning requirements would appear sufficient to ensure that small towns and rural areas in the Deep South would acknowledge ongoing fair housing failures and take steps toward integration. The Housing and Community Development Act of 1974 required small towns and rural areas that applied for HUD funds to develop a Housing Assistance Plan or HAP.<sup>30</sup> This requirement was eliminated with amendments to the Act made by Congress in 1981.<sup>31</sup> Since then, neither CDBG regulations, nor the Fair Housing Planning Guide, nor other federal law obligate small towns or rural areas to comply with any of these substantive grantee requirements.

The CDBG program is HUD's largest grantmaking program.<sup>32</sup> The program awards federal funding based upon an area's population, and HUD grantees take two main forms: "Entitlement jurisdictions," which are areas with significant population sizes, like urban and metropolitan areas; and "State jurisdictions," which pass funding on to rural areas and small towns in the parts of the state that are not in an Entitlement jurisdiction (the "non-entitlement area").<sup>33</sup>

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HUD regulations. 60 Fed. Reg. § 1878-1918 (Jan. 5 1995); 24 C.F.R. §§ 91.225(a)(1), 91.325(a)(1). These regulations also apply to the HOME, ESG, and HOPWA programs.

<sup>29</sup> OFFICE OF FAIR HOUS. AND EQUAL OPPORTUNITY, U.S. DEP'T OF HOUS. AND URBAN DEV., FAIR HOUSING PLANNING GUIDE, Vol. 1, 3-9-3-10 (1996), <http://hdl.handle.net/2027/mdp.39015039076305> and <http://hdl.handle.net/2027/mdp.39015038549377> (last visited July 22, 2019).

<sup>30</sup> 42 U.S.C.A. § 5306(d) (West 2004) governs grants to non-entitlement areas. 42 U.S.C.A. § 5306(d)(7) (West 2004) states that no funding may be distributed to any unit of general local government located in a non-entitlement area unless such unit of general local government certifies that it will affirmatively further fair housing, but it does not describe what this promise would require the unit of local government to do.

<sup>31</sup> See Paula J. Lemerman, *The Community Development Block Grant Program: Past and Future*, 3 PUB. L. FORUM 205, 208 (1983).

<sup>32</sup> ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES (2015), 6-9. Ongoing financial support of the Tenant-based Rental Assistance (the Housing Choice Voucher Program) and of Public Housing operating funds are HUD's largest expense items. In terms of its grantmaking, the CDBG program is HUD's largest program. HUD FY2018 Budget Appropriations: In Brief, 3 - 4, 7 - 8 (2018), <https://fas.org/sgp/crs/misc/R44931.pdf>. HUD has other grant programs in addition to the CDBG program that are also subject to Fair Housing Act constraints, among them the Section 8 program, which is administered by local housing authorities, and the HOME, ESG, and HOPWA programs, each of which are administered by state agencies.

<sup>33</sup> The statute defines the terms "State" and "unit of general local government" and "non-entitlement area." The regulation defines "entitlement" as the amount of funds which a metropolitan city or urban county unit of general local government is entitled to receive under the Entitlement grant program. 24

Briefly, both for definitional purposes and by way of contrast, “Entitlement jurisdictions” are defined as cities with populations of greater than 50,000 or urban counties with a population of over 200,000. Entitlement jurisdictions receive grants directly from HUD, and these jurisdictions are directly responsible for demonstrating to HUD that they have properly assessed fair housing in their jurisdiction and for certifying to HUD that they are affirmatively furthering fair housing. State jurisdictions are easiest to understand in contrast to Entitlement jurisdictions.<sup>34</sup> Simply put, a State jurisdiction receives HUD funding for “non-entitlement areas” in the State that are not included within the boundaries of an Entitlement jurisdiction. By definition these are small towns, counties, or rural areas. These communities do not receive funding directly from HUD. Instead, HUD makes the grant to individual states—the State jurisdiction—and the State jurisdiction then distributes the funding to “state-funded jurisdictions”—the small towns and rural areas—within the non-entitlement area.<sup>35</sup> As a result, the State jurisdiction administers HUD grants on HUD’s behalf throughout the non-entitlement area.<sup>36</sup> It is through these types of grants that States fund CDBG programs at the small-town and rural-area level.

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C.F.R. § 570.3 (2019). Various HUD publications use the term “State jurisdiction” to describe a state grantee that receives HUD grant funds for distribution to the “non-entitlement areas” of a state and the term “Entitlement jurisdiction” to describe units of general local government that directly receive HUD grants. For the sake of simplicity, the author is also using “state jurisdiction,” “non-entitlement area” and “Entitlement jurisdiction” to describe HUD grantees.

<sup>34</sup> There are other HUD-funded jurisdictions. Eligible “Insular areas” include Guam, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands. 24 C.F.R. § 570.405 (1996). Hawaii’s non-entitlement areas are treated the same as entitlement areas for all purposes except for how funding is allocated and the funding source. 24 C.F.R. § 570.429 (2007).

<sup>35</sup> The Community Development Block Grant Program was created as a part of the Housing and Community Development Act of 1974. As initially enacted, HUD funds were distributed via an application process. At this time, small towns and rural areas in a non-entitlement area were required to apply for funding, which required them to develop a Housing Assistance Plan or HAP. Later, this funding mechanism was changed to allocation of funding through a formula based upon the population of an area and other factors. 1981 amendments to the Act shifted funding to the states and eliminated the requirement that units of local government do planning or assessment in order to be eligible for a HUD grant. From the inception of the CDBG program, HUD did little to review applications for funding or the planning and assessments associated with that process. After the 1981 amendments, small towns and rural areas no longer had to do any planning or assessments in order to receive HUD funds from the State jurisdiction. *See* Lemerman, *supra* note 31.

<sup>36</sup> 24 C.F.R. § 570.480, et seq.

As a HUD grantee, a State jurisdiction for a non-entitlement area has a dual responsibility: on the one hand, it is directly responsible to HUD regarding its own duty to affirmatively further fair housing within the state generally,<sup>37</sup> and on the other, a State jurisdiction is also responsible for ensuring that the state-funded jurisdictions in the non-entitlement area—the small towns and rural areas referred to as units of general local government or “UGLGs”—are themselves affirmatively furthering fair housing. As a part of this role, a State jurisdiction has the duty to conduct all the analyses and develop all the plans that HUD requires for the entire non-entitlement area.<sup>38</sup> In addition, CDBG regulations require UGLGs to certify that they are affirmatively furthering fair housing.<sup>39</sup> Federal law does not require any UGLG to conduct its own fair housing analysis or to formulate a fair housing plan as a part of its certification that it is affirmatively furthering.<sup>40</sup> HUD-related federal dollars should only be granted to those communities where the policies and purposes of the Fair Housing Act are actually being affirmatively furthered and where the jurisdiction has a plan in place, based upon reliable and accurate data, to provide for open housing. To the extent that HUD does not actually ensure that UGLGs in State jurisdictions are affirmatively furthering fair housing, HUD is not properly administering its programs and is thereby violating the Fair Housing Act.

### III. PEOPLE IN THE DEEP SOUTH ARE STILL PLAGUED BY THE FAILURE OF SMALL TOWNS AND RURAL AREAS TO AFFIRMATIVELY FURTHER FAIR HOUSING

Millions of African Americans migrated from the Southern United States beginning in the 1930s and continuing through the 1960s.<sup>41</sup> One effect of this mass migration was to increase the African American net population in the communities where they eventually settled, while decreasing their corresponding population in the places they left behind.<sup>42</sup> More recently, some of these families have migrated back. Recent research shows that beginning in the 1980s, some African American families returned to those same rural areas of the South that African Americans left during the early and middle parts of the twentieth century. At around the same time, African Americans, who for historical reasons had

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<sup>37</sup> OFFICE OF FAIR HOUS. AND EQUAL OPPORTUNITY, U.S. DEP'T OF HOUS. AND URBAN DEV., FAIR HOUSING PLANNING GUIDE, Vol. 1, 3-3, 3-4 (1996).

<sup>38</sup> *Id.*

<sup>39</sup> 24 C.F.R. §570.487 (2015).

<sup>40</sup> See *infra* note 102.

<sup>41</sup> See generally, ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION (2010); CHARLES M. LAMB, HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS 26-28 (2005).

<sup>42</sup> Wahl & Gunkel, *supra* note 9, at 510-12.

resided primarily only outside the city limits—on the physical margins of small towns in the Deep South—began to move into the city limits in greater numbers.<sup>43</sup> As the number of African Americans increased in these areas, whites moved out, and the number of whites living in these areas decreased.<sup>44</sup> The result, in instance after instance, was a marked increase in the number of majority-black small towns and counties in the Deep South.<sup>45</sup> Figure 1 illustrates this demographic phenomenon by showing whole geographic regions comprised of majority-black counties (the gray areas), with virtually no majority-white counties in the Deep South (which would appear as a shade of red).

But the demographic change that Figure 1 reflects tells only part of the story, and to the extent that it is viewed as a metric indicative of positive change in housing segregation, the demographic is misleading. The average black citizen currently living in a non-metropolitan, rural area or small town in the South is highly likely to be confronted with significant levels of neighborhood-level residential segregation.<sup>46</sup> Also, despite the fact that the last fifty years have witnessed significant population changes in many of these communities, the vast majority have nevertheless retained their historically segregated housing patterns, even though the municipality or county has become majority black. In other words, although some African Americans in small towns and rural areas in the South are now living in and using neighborhoods that historically would have been reserved for whites only, this demographic shift is more of an encroachment into discrete areas from which whites have decamped.<sup>47</sup>

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<sup>43</sup> *Id.*; Lichter, et. al., *supra* note 9, at 570, 575, 577.

<sup>44</sup> See Charles S. Aiken, *A New Type of Black Ghetto in the Deep South*, 80 ANNALS ASS'N OF AM. GEOGRAPHERS 223 (1990).

<sup>45</sup> See Richelle L. Winkler & Kenneth M. Johnson, *Moving Toward Integration? Effects of Migration on Ethnoracial Segregation Across the Rural-Urban Continuum*, 53 DEMOGRAPHY 1027 (2016) (“The findings demonstrate that while people of color are migrating into predominantly white counties, whites are generally moving out of more diverse counties and concentrating in counties with higher proportions of white (white flight).”).

<sup>46</sup> The dissimilarity index measures how persons in particular groups are either distributed or concentrated in some areas. A score of zero indicates complete integration. A score of 100 indicates complete segregation. A score of 0 to 30 indicates a low level of segregation. A score above 60 is considered high segregation. Schwemm, *supra* note 18; Douglas S. Massey & Nancy A. Denton, *The Dimensions of Residential Segregation*, 67 SOC. FORCES 281 (1988); Wahl & Gunkel, *supra* note 9, at 517. The average segregation index for black persons living in nonmetro areas is 62.6. Domenico Parisi, Daniel T. Lichter, & Michael C. Taquino, *The Buffering Hypothesis: Growing Diversity and Declining Black-White Segregation in America's Cities, Suburbs, and Small Towns?*, 2 SOC. SCI. 125, 151 (2015).

<sup>47</sup> Cromartie & Beale, *supra* note 7, at 1980-90.

Core white neighborhoods in the Deep South remain white enclaves that are not open to blacks.

Figure 1 also depicts many white-shaded counties in the Deep South that are neither majority white nor majority black. It should not be assumed, however, that these white-shaded areas are racially integrated. Because the population data underlying Figure 1 is county-level or census block group data, the most we can discern about the specific racial characteristics of these communities is that non-majority numbers of blacks and whites reside in the same county, not whether they are actually spatially assimilated—living near each other—within the county or within a small town or a neighborhood.<sup>48</sup> To glean data on spatial assimilation, we must look at census block level data. That data shows that the dissimilarity index<sup>49</sup> for small-town residents within places that appear integrated or diverse at the county level (the white-shaded areas in Figure 1) is, in fact, as high as the most segregated urban communities across the rest of the country.<sup>50</sup> The following examples illustrate the quotidian residential segregation that persists in the Deep South, which Mississippi exemplifies, and how that segregation is disguised by misuse of census data.

#### A. *Batesville, Mississippi: An Average Mississippi Town*

The City of Batesville, Mississippi, a small town in Panola County, sits at the intersection of two major Mississippi highways: Highway 278, which runs east-west, and Interstate 55, which runs north-south. The total population of Panola County was approximately 34,000 in 2017.<sup>51</sup> In 2017, 48.5% of Panola County residents were white and 50.4% were black.<sup>52</sup> In terms of county-level data, then, Panola County and the City of Batesville within it appear to be an integrated county that is neither disproportionately white nor black. Indeed, the percentage of black individuals in the population is higher than the 2017 state average of 37.6%.<sup>53</sup> In Figure 1, Panola County is one of the counties in Mississippi shaded white. Figure 2, which shows where the population of Panola County lives using census-tract-level data, shows just how segregated

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<sup>48</sup> Lichter et al., *supra* note 9.

<sup>49</sup> See *supra* note 45.

<sup>50</sup> Schwemm, *supra* note 18, at 131 (regarding urban areas: dissimilarity index in the Nation's largest metropolitan areas was 79 in 1970, 73 in 1980; 67 in 1990; 65 in 2000; and 50 in 2010. A score above 60 is considered to be highly segregated.).

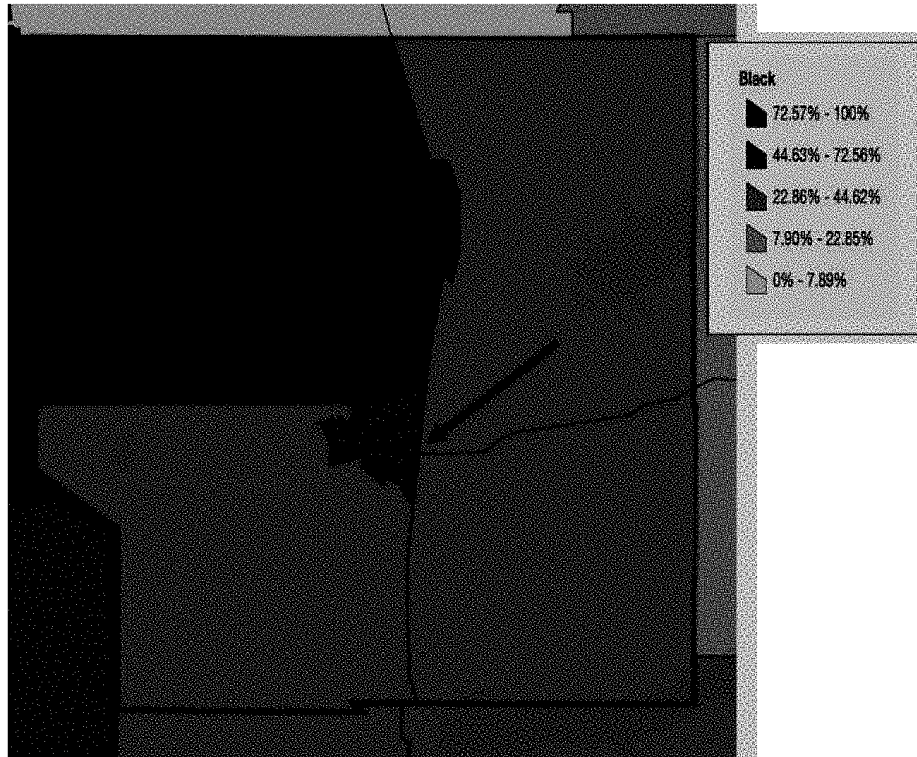
<sup>51</sup> U.S. CENSUS BUREAU. American Community Survey: 2013-2017 ACS 5-year Estimates. <https://www.census.gov/programs-surveys/acs/technical-documentation/table-and-geography-changes/2017/5-year.html> (last visited July 22, 2019).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

the white and black populations are within the county itself. Blacks who live in Panola County are highly concentrated in the northwestern part of the county, while non-blacks are the majority in the southeastern quarter.

**Figure 2**  
Panola County, Mississippi Census Tracts by Race<sup>54</sup>



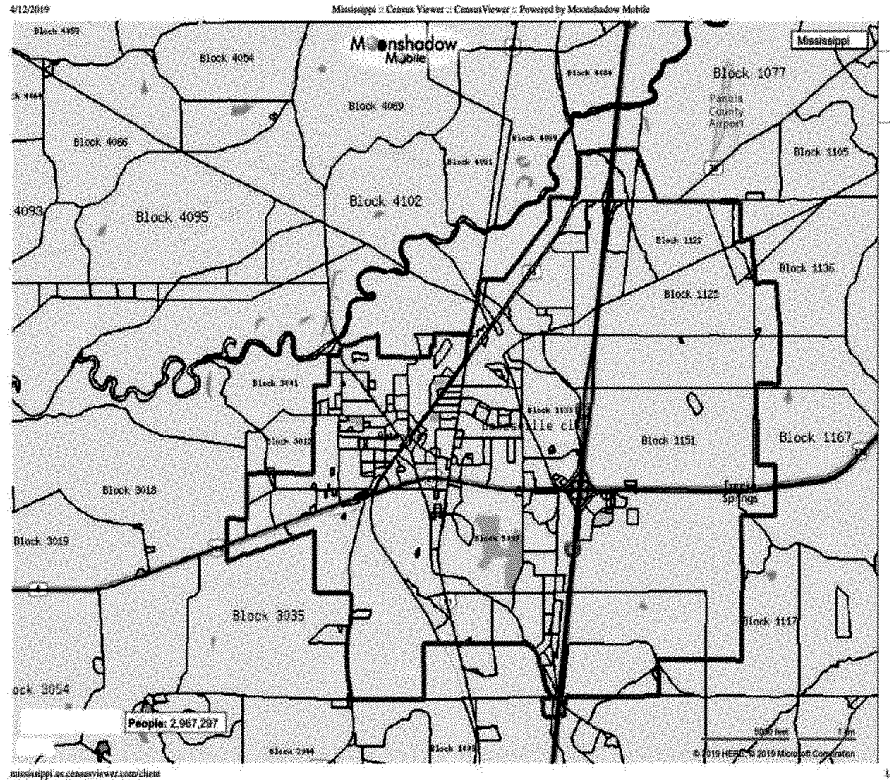
Likewise, the City of Batesville (located where the black arrow points in the center of Figure 2) has a total population of 7,400, which is 52% white and 47% black. Figure 2 shows all six census tracts in Panola County, three of which comprise the whole City of Batesville. Figure 2 gives the impression that the census tracts in the City of Batesville are well-integrated because they are between 42% and 51% African American. Figure 3 shows how smaller census blocks that make up the larger census tracts in Batesville. Focusing on the data at the census block level, Figure 4 shows that Batesville is actually highly racially segregated. Black residents (denoted by black squares) reside overwhelmingly south and west of Martin Luther King Boulevard and the railroad tracks that run along Broadway Street. Whites (denoted by red squares) reside

<sup>54</sup> African American Population by Census Tract, Panola Cty., Miss. U.S. DEP'T HOUS. & URBAN DEV., <https://egis.hud.gov/cart/> (last visited June 5, 2019) (type "Panola County, Mississippi" in search bar. Click the "Demographics" tab. Select "Black" under "Selected Geography Demographic Breakdown.").



overwhelmingly on the opposite side of Martin Luther King Boulevard and the railroad tracks.

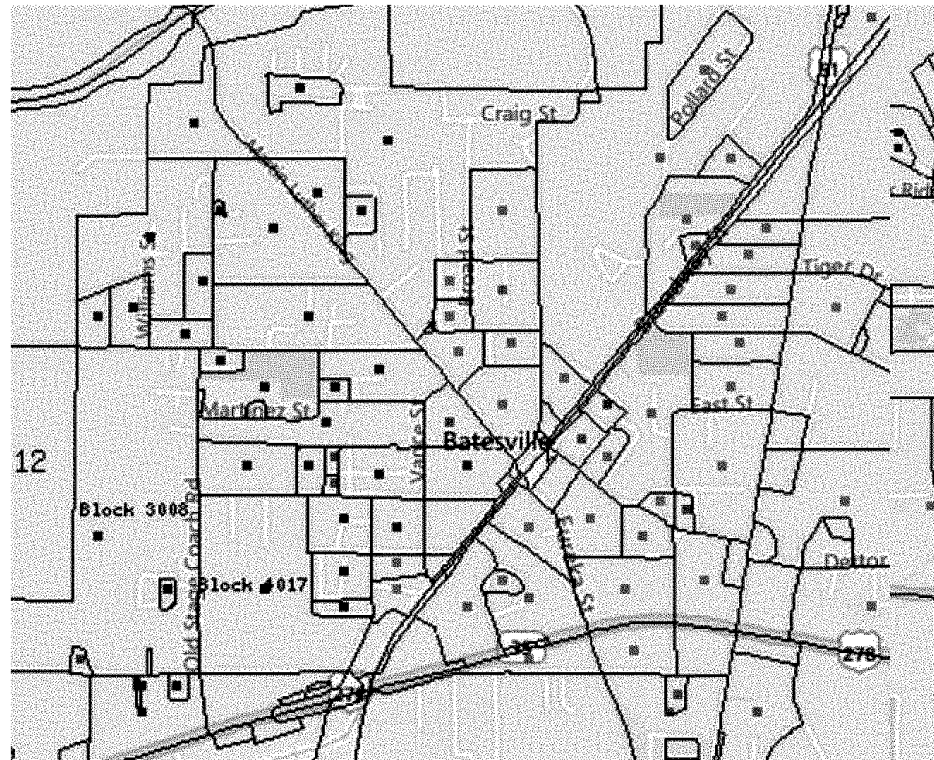
**Figure 3**  
City of Batesville Census Blocks<sup>55</sup>



*The city limits of the City of Batesville, Mississippi are bordered in blue. Census blocks within the city limits have a black border.*

<sup>55</sup> CENSUS VIEWER, <http://mississippi.us.Censusviewer.com> (last visited Apr. 13, 2019).

**Figure 4**  
The City of Batesville, Mississippi<sup>56</sup>



*Census block data shows that African Americans (black dots) live west of the railroad tracks and south of Martin Luther King Boulevard and whites (red dots) live outside of this area.*

For those who are unfamiliar with Batesville, county-level data, census-tract data, and census-block-group data deceptively fail to reveal racial segregation in housing at the neighborhood level. In fact, reliance on county-level and census-tract data in small towns and rural areas masks ongoing *de facto* segregation:

Unlike the case in America's big cities and suburbs, economic and ethnoracial segregation in rural America is often invisible, hidden away in forgotten or out-of-the-way places, in isolated areas dependent on agricul-

<sup>56</sup> Census 2010 Data of Batesville, Miss., CENSUS VIEWER, <http://mississippi.us.Censusviewer.com/client> (last visited July 10, 2018) (under "Census 2010 Race," click the arrow to the left of "county." Select "Panola" and zoom in as needed.). On this map, the black dots represent black population and red dots represent white population at the Census block level.

ture or natural resources, or in areas of chronic or persistent poverty (e.g., the Mississippi Delta).<sup>57</sup>

Batesville is not an aberration in Mississippi or in the Deep South in general. This pattern is reflected throughout many of Mississippi's rural counties, which is to say throughout broad portions of the state more generally and areas that are shaded white in Figure 1. For example, in Figure 5a, the dark green, blue, and dark blue counties, primarily in the Mississippi Delta, are those with either a disproportionate share of African Americans—a share that exceeds the state average by at least 10%—or are majority-black areas. Figure 5b shows that whites still live in the disproportionately African American areas, but are highly concentrated in discrete places (shown by bright red clusters) within those areas.

Figure 5a<sup>58</sup>

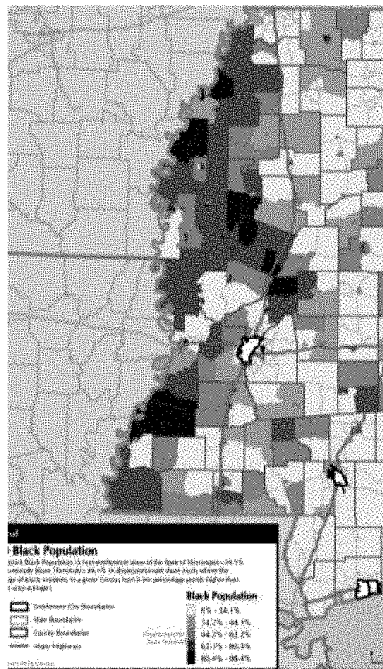
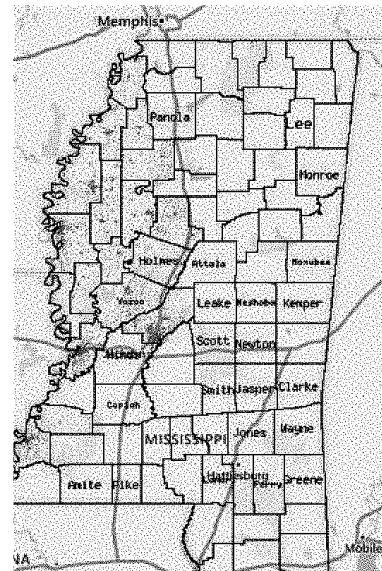


Figure 5b<sup>59</sup>



<sup>57</sup> Daniel T. Lichter, Domenico Parisi & Michael C. Taquino, *Emerging Patterns of Hispanic Residential Segregation*, 81 RURAL SOC. 483 (2016).

<sup>58</sup> Black population in Mississippi by census tract, STATE OF MISS. DEV. AUTHORITY, 2015 – 2019 MISSISSIPPI CONSOLIDATED PLAN FOR HOUSING AND COMMUNITY DEVELOPMENT 25 (2015).

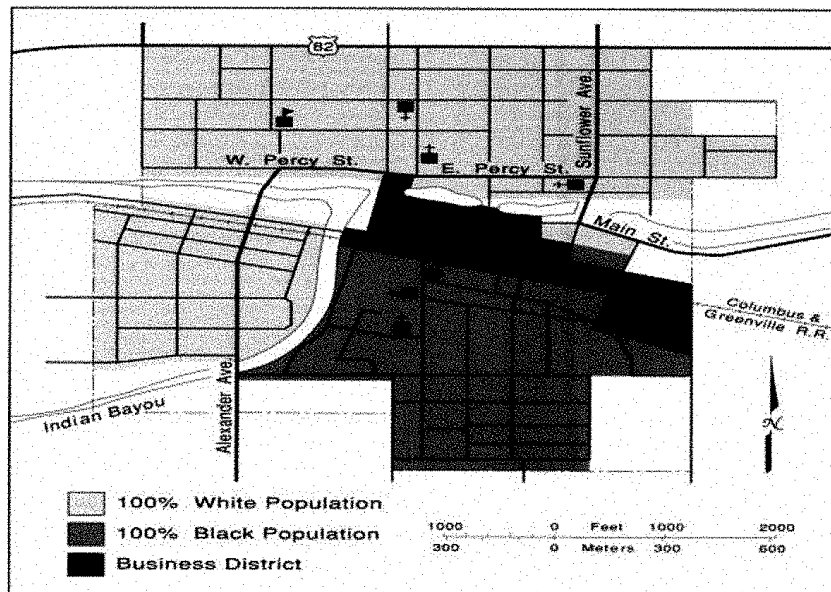
<sup>59</sup> White population in Mississippi in 2010 by county, <http://mississippi.us.Censusviewer.com> (last visited June 8, 2018) (under “Map Controls” and “Boundaries,” select “Counties.” Under “Data Source,” select “Census 2010 Race,” “Race,” then “White Alone.”).

B. *Indianola, Mississippi: A Struggling Majority Black Town in the Mississippi Delta*

As in much of Mississippi and the Deep South, in the Mississippi Delta town of Indianola, whites have long segregated themselves from blacks. In a 1939 book, Yale anthropologist Hortense Powdermaker described the town's housing situation this way:

The railroad divides the town roughly according to color. "Across the Tracks" is used as the name of the "Negro" district, a label with obvious implications. Across the Tracks is a life but little known to the Whites, who rarely go there. In contrast to the homogenous aspect of the white section, Across the Tracks runs the gamut of possibilities between comfort and poverty . . . side by side live . . . the moderately well-to-do and the very poor . . . all thrown together because all are Negroes.<sup>60</sup>

**Figure 6**  
Indianola, Mississippi in 1940<sup>61</sup>



In 1950, Indianola had 4,369 residents, 51.6% of whom were African American and highly racially segregated from the white population (Figure 6). Forty years later, in 1980, Indianola's overall population was 8,221 and 50% African American. In 2000, Indianola's population was

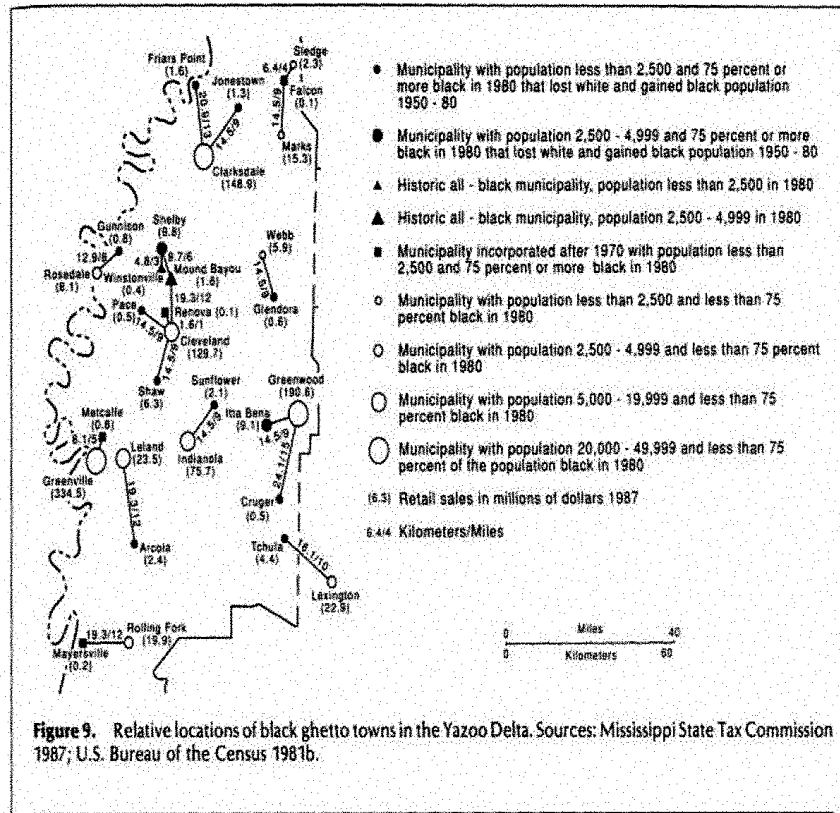
<sup>60</sup> HORTENSE POWDERMAKER, *AFTER FREEDOM: A CULTURAL STUDY IN THE DEEP SOUTH* (1939); see also Aiken, *supra* note 44.

<sup>61</sup> In 1940, Indianola's population was 3,604, and was 54% African American. *Id.*

12,066 and 73.38% black and 25.73% white.<sup>62</sup> In 2010, its population had declined to 10,683, 79.38% of which was black.<sup>63</sup> By 2017 the population had declined again, this time by roughly six hundred persons, to 10,047, 84% of whom were black.<sup>64</sup>

Like Indianola, many towns in the Mississippi Delta have been predominantly African American for decades (Figure 7). Nevertheless, while some blacks have moved into traditionally white areas, towns like Indianola are still overwhelmingly segregated by race, following historic patterns. Furthermore, when blacks have moved into traditionally white neighborhoods, whites have fled and are still fleeing.

**Figure 7**  
Predominately Black Towns by Population in the  
Mississippi Delta in 1980<sup>65</sup>



<sup>62</sup> Indianola, Miss. Population: Census 2010 and 2000 Interactive Map, Demographic, Statistics, Quick Facts, CENSUS VIEWER, <http://censusviewer.com/city/MS/Indianola>, (last visited July 22, 2019).

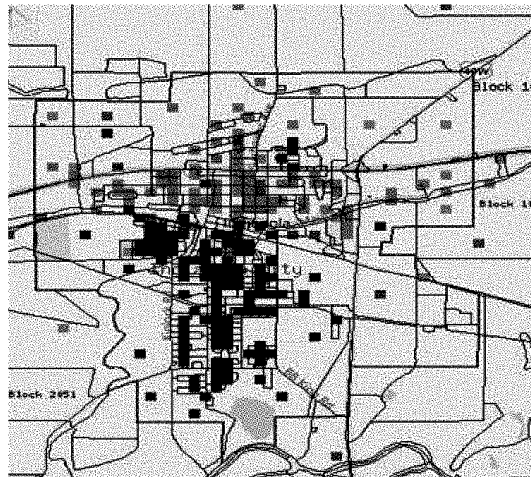
<sup>63</sup> *Id.*

<sup>64</sup> Indianola, Miss. Census Profile, <https://Censusreporter.org/profiles/16000US2834740-indianola-ms/> (last visited July 12, 2018).

<sup>65</sup> Aiken, *supra* note 44, at 239, Figure 9.

Figures 8 and 9 illustrate this pattern. Figure 8 shows Indianola's 2000 population by race (with black squares representing African Americans and red squares representing whites). It mirrors the observations that Powdermaker recorded in 1939, with a clear racial dividing line falling along the railroad tracks.<sup>66</sup> Figure 9 shows that by 2010, blacks had begun to move into traditionally white neighborhoods north of the tracks. As this happened, a white flight occurred and left only 18.75% of the population of Indianola white, a decline from 25.73% in 2000.<sup>67</sup>

**Figure 8**<sup>68</sup>  
2000 Indianola by Race



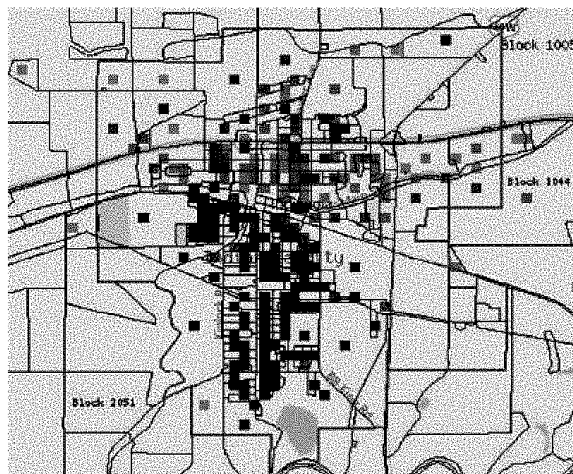
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<sup>66</sup> Aiken, *supra* note 44, at 229 (citing POWDERMAKER, *supra* note 60).

<sup>67</sup> Indianola, Miss. Population: Census 2010 and 2000 Interactive Map, Demographic, Statistics, Quick Facts, CENSUS VIEWER, <http://censusviewer.com/city/MS/Indianola> (last visited July 22, 2019).

<sup>68</sup> 2000 Census Data of Indianola, Miss., CENSUS VIEWER, <http://mississippi.us.Censusviewer.com/client> (last visited July 22, 2019) (under “Census 2000 Race,” click the arrow to the left of “county.” Select “Sunflower” and zoom in as needed.). On this map, the black dots represent black population and red dots represent white population at the Census block level.

**Figure 9**<sup>69</sup>  
2010 Indianola by Race



The encroachment of blacks and other minorities into traditionally white neighborhoods and the resulting white flight from those areas has helped create black “ghetto-like” regions like the Mississippi Delta and other areas throughout the Deep South that are similar in some ways to their counterparts in urban areas. They typically lack a strong tax base, jobs, access to public transportation, and private investment. They are also typically characterized by underperforming schools, widespread availability of businesses like payday lenders and discount liquor stores that target the poor, an almost complete lack of grocery stores with fresh produce, lack of medical care, few or no banks or lawyers, and little or no public investment in infrastructure.<sup>70</sup>

At least in theory, residents of small towns should have more opportunity to achieve racial assimilation than their urban counterparts because small-town populations are in closer physical proximity to each other.<sup>71</sup> Research shows, however, that small towns and rural areas are as segregated at the *microspatial* level as their urban counterparts. As a result, rural areas and small towns battle the same sorts of problems with segregation and its effects as urban communities:

[S]egregation concentrates poverty, which results in under-funded and ineffective institutions in minority communities. Minority residents of segregated communities

<sup>69</sup> 2010 Census Data of Indianola, Miss., CENSUS VIEWER, <http://mississippi.us.Censusviewer.com/client> (last visited July 22, 2019) (under “Census 2000 Race,” click the arrow to the left of “county.” Select “Sunflower” and zoom in as needed.) On this map, the black dots represent black population and red dots represent white population at the Census block level.

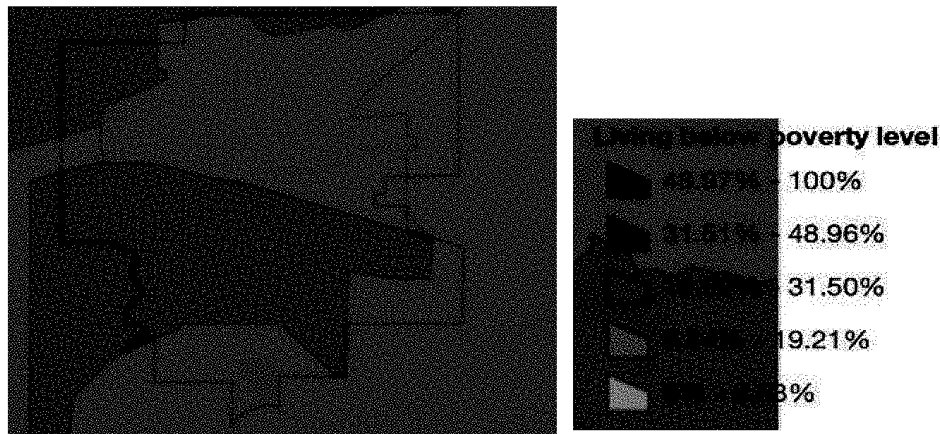
<sup>70</sup> See, e.g., Aiken, *supra* note 44, at 223, 238-42; Albrecht et al., *supra* note 10, at 508, 520.

<sup>71</sup> See, e.g., Wahl & Gunkel, *supra* note 9, at 507, 523-25, 528-30.

not only lack the advantages of strong institutions, but they also have only limited contact with successful members of either the minority or majority community. Segregation has thus been instrumental in creating a structural niche in which a deleterious set of attitudes and behaviors has arisen and flourished. The result is a set of mutually reinforcing and self-feeding spirals of decline.<sup>72</sup>

Concentrated minority population in a particular geographic location is in and of itself not problematic. It becomes a problem, however, when minority concentration is coupled with high rates of poverty and lack of opportunity. In Indianola, Mississippi, the predominant pattern of residential segregation corresponds neatly with high household poverty. In 2017, the poverty rate south of the railroad tracks was between 31.5% and 48.96%. North of the tracks the rate shrinks to between 9.54% to 19.2%. Compare Figure 9 to Figure 10.

**Figure 10**  
Poverty in Indianola, MS in 2017<sup>73</sup>



*C. Oxford, Mississippi: A Thriving, Disproportionately White College Town*

If census-tract and census-block-group data disguises segregation in majority-black small towns and rural areas, what about majority-white towns that, relative to their majority-black counterparts, appear to be integrated and more economically successful? Oxford, Mississippi, provides an illustrative example. A small, but thriving university town—home to the state university—in north Mississippi’s Lafayette County,

<sup>72</sup> Don E. Albrecht, *Poverty, Inequality and Social Justice in Nonmetropolitan America*, RESEARCHGATE, Mar. 2000, publication 279899565.

<sup>73</sup> HUD CART report for Indianola City, MS (last visited July 13, 2018).



Oxford had a 2017 population of 24,000.<sup>74</sup> Of that number, 74.7% were white, a significantly higher percentage of whites than the overall state average of 59.2%. The resulting percentage of blacks in Oxford is correspondingly less than the state's overall percentage: 20.8% as compared to 37.8% statewide. Figure 5a of Mississippi's most recent ConPlan analysis of population location by race effectively disguises Oxford's disproportionately white population.<sup>75</sup> It also fails to show that there is a notable concentration of blacks in discrete neighborhoods in Oxford. Figure 11a is a map highlighting that the City of Oxford is mainly comprised of four census tracts,<sup>76</sup> that the city limits are not contiguous with these four tracts, and that the city limits extend somewhat into four other census tracts.<sup>77</sup> Figure 11b shows the percentage of whites within the four main tracts and those contiguous with them. Figure 11b demonstrates that in three of the census tracts, the percentage of whites may exceed the 74.7% of whites who comprise the population of Oxford (the three darkest blue tracts).<sup>78</sup> The other three tracts have a white population ranging between approximately 57% and 73%.

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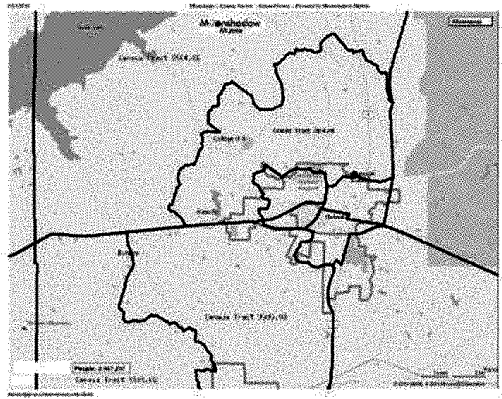
<sup>74</sup> See CENSUS VIEWER, *supra* note 55 (search for Oxford, Miss.) (showing that in 2000, whites were 75.77%, blacks 20.28%, and Hispanics 1.08% of the Oxford population. In 2010, whites were 72.29%, blacks 21.83%, and Hispanics 2.46% of the population).

<sup>75</sup> See MISSISSIPPI DEVELOPMENT AUTHORITY, 2015-2019 MISSISSIPPI CONSOLIDATED PLAN 22 (2015) ("Geographic analysis of racial distribution was conducted by calculating the percentage share of total population within each census tract of the particular sub-population; i.e., racial or ethnic group. That share was then plotted on a geographic map. The goal of this analysis was to identify areas with disproportionate concentrations of each sub-population. HUD defines a population as having a disproportionate share when a portion of a population is more than 10 percentage points higher than the jurisdiction average.").

<sup>76</sup> U.S. DEPT. OF COMMERCE, ECON. AND STATISTICS ADMIN., U.S. CENSUS BUREAU, 2010 Census – Census Tract Reference Map: Lafayette County, Miss., [https://www2.Census.gov/geo/maps/dc10map/tract/st28\\_ms/c28071\\_lafayette/D C10CT\\_C28071\\_001.pdf](https://www2.Census.gov/geo/maps/dc10map/tract/st28_ms/c28071_lafayette/D C10CT_C28071_001.pdf) (census tracts 9502.01, 9502.02, 9503.01, and 9503.02) (last visited July 22, 2019).

<sup>77</sup> *Id.* (census tracts 9501, 9505.01, 9504.01, and 9505.03) (last visited July 22, 2019).

<sup>78</sup> *Id.* (census tracts 9502.02, 9503.01 (primarily comprised of the University of Mississippi campus and reflects in part the student population), and 9505.01) (last visited July 22, 2019).

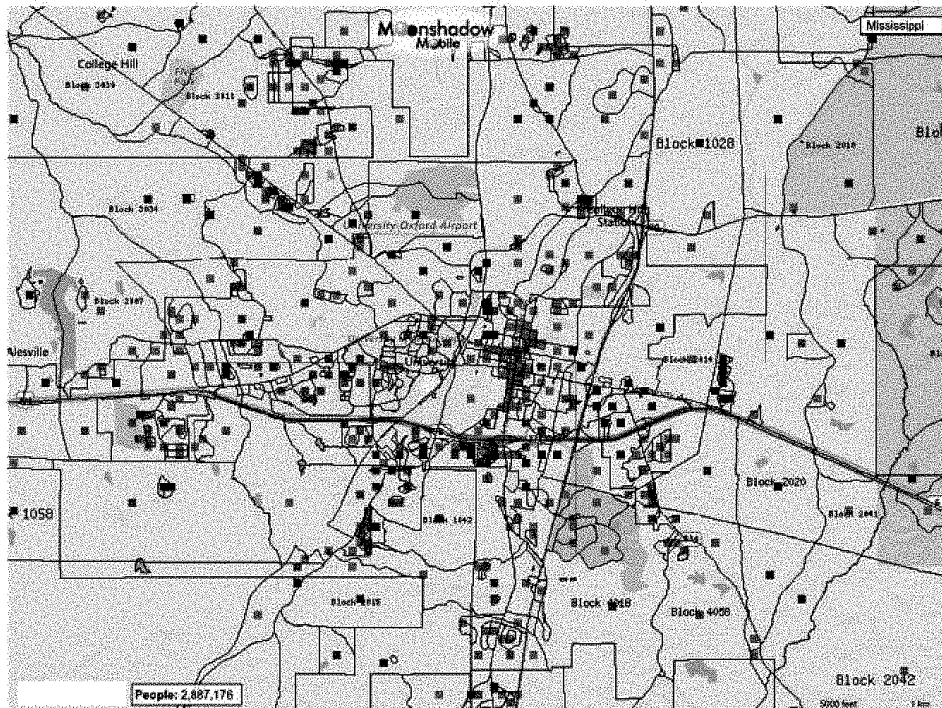
Figure 11a<sup>79</sup>Figure 11b<sup>80</sup>

Census-block-level data from 2010 clearly shows, however, that within the census tracts that appear unsegregated, African Americans were concentrated within specific census blocks, with blacker squares showing blocks that are predominately African American and redder squares predominantly white (Figure 12).

<sup>79</sup> CENSUS VIEWER, *supra* 55 (search for Oxford, Miss. with “2010 US Census Tracts” and “Municipalities” overlays from the drop-down “Boundaries” category).

<sup>80</sup> Community Assessment Reporting Tool: Demographics by race showing census tracts by white population for Oxford, Mississippi, U.S. DEPT. OF HOUS. AND URBAN DEV., <https://egis.hud.gov/cart/> (last visited April 13, 2019) (enter “Oxford City” in the search bar in the upper-right-hand corner of the page. Select “Oxford City” in the Location Search Results. Select “Demographics” from the menu at the top. On the right-hand side of the page, under “Selected Geography Demographic Breakout,” select “White.” Select the “i” logo on the map to view the legend.).

**Figure 12**  
Oxford, Mississippi 2010 Census Block-Level Data by Race<sup>81</sup>



The blue arrows within Figure 12 highlight this phenomenon. Each arrow points to a cluster of Oxford neighborhoods that are disproportionately African American. The blue arrow pointing east shows one of the areas within Oxford that is composed primarily of black residents. Census blocks 1004, 1005, 1006, and 1007 are overwhelmingly African American. 1004 and 1005 are in and around Martin Luther King Jr. Drive, a historically African American section of town, formerly known as “Freedmen Town.”<sup>82</sup> These blocks are 90% and 100% black, respec-

<sup>81</sup> 2010 U.S. Census Data for Mississippi, CENSUS VIEWER, <http://mississippi.us.Censusviewer.com/client> (last visited July 22, 2019) (under “Map Controls” select “Boundaries” and “2010 Census Blocks.” Under “Data Sources” select “2010 Census Race.” Select “Race” then select “White Alone” and “Black or African American Alone.” Zoom in on Oxford as needed.) Red squares show a concentration of white residents. Black squares are also concentrated in several Census blocks in Oxford.

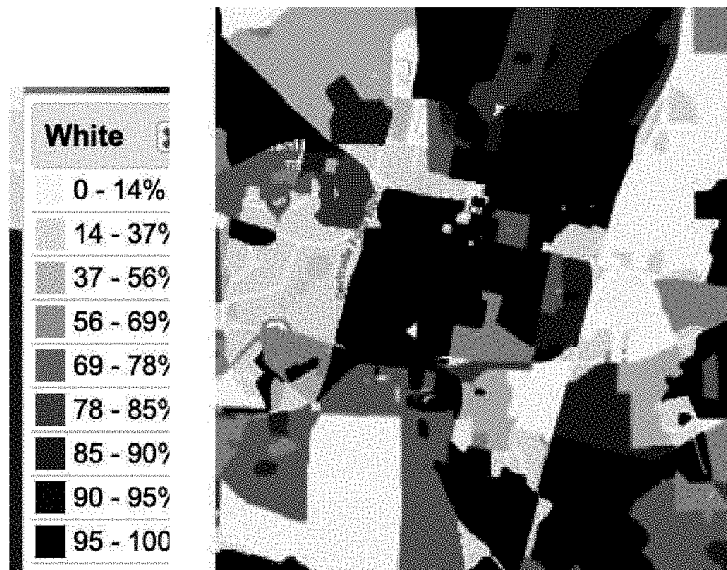
<sup>82</sup> Freedmen Town was a community of freedmen from Lafayette County after the Civil War. These men moved to Oxford, MS to work and lead their lives as United States citizens. They settled this area and built churches, schools, and participated in other rights and responsibilities as United States citizens. *Freedmen Town Historical*, HISTORICAL MARKER PROJECT, [https://www.historicalmarkerproject.com/markers/HM1XXJ\\_freedmen-town-historical\\_Oxford-MS.html](https://www.historicalmarkerproject.com/markers/HM1XXJ_freedmen-town-historical_Oxford-MS.html) (last visited April 20, 2019).

tively.<sup>83</sup> Blocks 1006 and 1007 comprise local public housing, which has 345 residents, approximately 99% of whom are black.<sup>84</sup> The arrow pointing south points to the Brittany Woods neighborhood, which is located just outside the Oxford city limits and adjacent to one of the largest Low-Income Housing Tax Credit properties in Oxford. Brittany Woods includes six census blocks with a total population of 523 persons. All six of these blocks are over 90% black with the exception of one, which is 86.9% black.<sup>85</sup> The arrow pointing north highlights a separate neighborhood, until recently located just outside the city limits, that has been a predominantly black neighborhood at least since early in the twentieth century. It includes five census blocks with a total population of eighty-nine persons, 100% of whom are black.<sup>86</sup>

The darkest purple census blocks in Figure 13 are areas within the Oxford city limits where the population is 95% to 100% white. The lighter purple blocks are 90% to 95% white. Oxford not only has a disproportionate share of whites relative to similarly situated areas in other parts of the state, but Figure 13 illustrates that the white population is highly concentrated in discrete white enclaves within the city.

**Figure 13**<sup>87</sup>

*Disproportionately White Census Blocks in Oxford*



<sup>83</sup> JUSTICE MAP, <http://www.justicemap.org/> (last visited July 23, 2018) (search for “Oxford, MS” in the search bar at the upper-left-hand-corner of the page. Click on “Advanced Mode,” then “Block Group.” Click on the appropriate Block Group on the map.).

<sup>84</sup> *Id.*

<sup>85</sup> Includes Census blocks 2059, 2056, 2057, 2040, 2046, and 2058. *Id.*

<sup>86</sup> Includes Census blocks 3006, 3007, 3051, 3052, and 3050. *Id.*

<sup>87</sup> *Id.* (last visited June 5, 2019).

One would expect that Indianola, a struggling, majority-black Delta town, and Oxford, with its notable charm and small-college-town appeal, would be fundamentally different when it comes to racial segregation in housing patterns. And, indeed, county-level and census-tract-level data would appear to confirm Oxford is not segregated compared to Indianola. But sole reliance on this data distorts residential living patterns in disproportionately white residential areas in the Deep South, making them appear to be integrated when they are not. Sociologists are well aware of this. Recent research documents precisely this phenomenon, noting that “studies show that observed levels of racial segregation generally increase as the scale of geography shifts from the macro (e.g., regions, cities, and communities) to micro level (neighborhood and blocks)”<sup>88</sup> and that “[r]ural studies that focus an analytical lens on either counties . . . or places . . . may miss microscale patterns within counties . . .”<sup>89</sup> Indianola is overwhelmingly comprised of only two census tracts along the railroad tracks.<sup>90</sup> Batesville is divided into only four census tracts.<sup>91</sup> Oxford is divided into four main census tracts.<sup>92</sup> Based on census-tract-level data alone, it is very difficult to discern microspatial patterns of residential segregation in any of these places.

Census-block-level data, on the other hand, which is more granular, is capable of showing segregated housing patterns with concentrations of both white and black populations in specific areas and neighborhoods.<sup>93</sup>

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<sup>88</sup> Lichter et al., *supra* note 57, at 489-90; William Kandel & John Cromartie, *New Patterns of Hispanic Settlement in Rural America*, U.S. DEP’T OF AGRICULTURE ECO. RESEARCH SERV. (2004); Lichter et al., *Residential Segregation in New Hispanic Destinations: Cities, Suburbs, and Rural Communities Compared*, 39 SOCIAL SCI. RES. (2010); Lichter et al., *Toward a New Macro-Segregation? Decomposing Segregation Within and Between Metropolitan Cities and Suburbs*, AM. SOC. REV. 843 (2015).

<sup>89</sup> *Id.* at 490.

<sup>90</sup> Census tracts 9504.01 and 9504.02. 2010 Census Tract Reference Map: Sunflower County, Miss., U.S. CENSUS BUREAU, [https://www2.census.gov/geo/maps/dc10map/tract/st28\\_ms/c28133\\_sunflower/DC10CT\\_C28133\\_001.pdf](https://www2.census.gov/geo/maps/dc10map/tract/st28_ms/c28133_sunflower/DC10CT_C28133_001.pdf) (last visited July 22, 2019).

<sup>91</sup> Batesville’s census tracts are 9503, 9504, 9505, and 9506. 2010 Census – Census Tract Reference Map: Panola County, Miss., U.S. CENSUS BUREAU, [https://www2.census.gov/geo/maps/dc10map/tract/st28\\_ms/c28107\\_panola/DC10CT\\_C28107\\_001.pdf](https://www2.census.gov/geo/maps/dc10map/tract/st28_ms/c28107_panola/DC10CT_C28107_001.pdf) (last visited Feb. 16, 2019).

<sup>92</sup> Oxford’s four main census tracts are 9502.01, 9502.02, 9503.01, and 9503.02. 2010 Census – Census Tract Reference Map: Lafayette County, Miss., U.S. CENSUS BUREAU, [https://www2.census.gov/geo/maps/dc10map/tract/st28\\_ms/c28071\\_lafayette/D10CT\\_C28071\\_001.pdf](https://www2.census.gov/geo/maps/dc10map/tract/st28_ms/c28071_lafayette/D10CT_C28071_001.pdf) (last visited Feb. 16, 2019).

<sup>93</sup> Craig Gurian, *New Maps Show Segregation Alive and Well*, REMAPPING DEBATE (Apr. 20, 2011), <http://remappingdebate.org/map-data-tool/new-maps-show-segregation-alive-and-well>.

As a result, it becomes apparent that, similar to rural areas described earlier, census-block-level data illustrates the physical segregation between the black and white residents in places like Oxford. Although more than 20% of Oxford's residents are black, many of those residents live in majority-black sections of the city, which appear as clusters in Figure 12. Likewise, whites in Oxford tend to live in the highly concentrated, majority white census blocks seen in Figure 13. Oxford is not unique; it is just one example of disproportionately white towns in Mississippi that have areas of high racial concentration at the census-block level that cannot be discovered by looking only at county or census-tract-level data.

#### IV. THE 2015 AFFIRMATIVELY FURTHERING FAIR HOUSING (AFFH) REGULATION DOES NOT TACKLE SMALL TOWN AND RURAL FAIR HOUSING PROBLEMS

In order for HUD to actually affirmatively further fair housing through its spending programs, HUD must require State jurisdictions to use census-block-level data as the basis for their assessments of fair housing and for their fair housing strategies for the non-entitlement area. Census-block-level data regarding race, ethnicity and income is far more diagnostic than census-tract or county-level data at illustrating persistent patterns of residential segregation that continue to plague small towns and rural areas in the Deep South.

It is common knowledge that HUD has generally fallen far short of its oversight responsibilities when it comes to ensuring that its grantees are affirmatively furthering fair housing.<sup>94</sup> A broad range of critics have produced reports showing that many HUD grantees have never provided any analysis of fair housing for their jurisdiction, and that the AIs that were provided were often so cursory that they could not be used as a baseline to define, further, or measure progress on local fair housing goals.<sup>95</sup> A 2008 report of the National Commission on Fair Housing and Equal Opportunity found that fewer than 10% of Entitlement jurisdictions had programs that meaningfully addressed fair housing concerns.<sup>96</sup>

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<sup>94</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-905, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS (2010), <http://www.Gao.gov/new.items/d10905.pdf> (last visited July 22, 2019); Reforming HUD's Regulations to Affirmatively Further Fair Housing, THE OPPORTUNITY AGENDA (2010), [https://opportunityagenda.org/files/field\\_file/2010.03ReformingHUDRegulations.pdf](https://opportunityagenda.org/files/field_file/2010.03ReformingHUDRegulations.pdf); See Austin W. King, *Affirmatively Further: Reviving the Fair Housing Act's Integrationist Purpose*, 88 N.Y.U. L. REV. 2182, 2191-92 (2013).

<sup>95</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 94.

<sup>96</sup> NAT'L COMM'N ON FAIR HOUS. AND EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING at 45 (2008),

In 2015, HUD published a new regulation—the Affirmatively Furthering Fair Housing Rule<sup>97</sup>—that more comprehensively defines HUD grantees’ duty to affirmatively further fair housing and amended prior regulations to make them conform to these changes.<sup>98</sup> The AFFH Rule uses prior CDBG and other spending program regulations as a starting place for the new rule, but it alters or adds several additional definitions and requirements. One of the most important added requirements is that grantee planning and assessments must be based in part upon specific HUD-provided population data.<sup>99</sup> The AFFH Regulation replaces the old requirement that grantees provide HUD with an AI report with a requirement grantees conduct an Assessment of Fair Housing (“AFH”), which requires more detailed information and that grantees primarily base their assessment on the data HUD provides.<sup>100</sup> (Like prior regulations, the AFH must include a ConPlan.) These changes reflect HUD’s stated goal of increasing its grantees’ compliance with the grantees’ own strategies to further fair housing.<sup>101</sup>

Under both the old regulations and the new AFFH Rule, the relationship between State and Entitlement jurisdictions and HUD is substantively different than the relationship between a state-funded jurisdiction (UGLG) and HUD. HUD grants funding directly to State and Entitlement jurisdictions and requires each to produce a fair housing assessment (the former “AI,” now “AFH”) and ConPlan that are specific to that particular jurisdiction and its fair housing challenges. On the other hand, HUD does not require state-funded jurisdictions to complete any fair housing assessments at all. Instead, HUD only requires the State jurisdiction to ensure that its state-funded jurisdictions receiving CDBG funds certify that they will affirmatively further fair housing and then

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[https://prprac.org/projects/fair\\_housing\\_commission](https://prprac.org/projects/fair_housing_commission) The\_Future\_of\_Fair\_Housing.pdf (last visited July 22, 2019).

<sup>97</sup> 24 C.F.R. § 5.150 (2019).

<sup>98</sup> See 24 C.F.R. § 5.152 (2019) (listing amendments to 24 C.F.R. pts. 91, 92, 570, 574, 576, and 903).

<sup>99</sup> The AFFH Rule defines the term “data” as HUD-provided data (HUD-provided metrics, statistics, and other quantified information required to be used with the Assessment Tool) and as local data. Local data is defined as “metrics, statistics, and other quantified information, subject to a determination of statistical validity by HUD, relevant to the program participant’s geographic areas of analysis, that can be found through a reasonable amount of search, are readily available at little or no cost, and are necessary for the completion of the AFH using the Assessment Tool.” 24 C.F.R. § 5.152 (2019).

<sup>100</sup> 24 C.F.R. § 5.151 (2019). Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903).

<sup>101</sup> U.S. DEP’T OF HOUS. & URBAN DEV., HUD STRATEGIC PLAN FY 2010-2015 21 (2010), [https://www.hud.gov/sites/documents/DOC\\_4436.PDF](https://www.hud.gov/sites/documents/DOC_4436.PDF).

enforce that promise.<sup>102</sup> Because there is no requirement that a state-funded jurisdiction specify what problems it will address or what steps it will take, a state-funded jurisdiction's certification may be no more than a bare, arguably illusory, promise by the state-funded jurisdiction that it will generally affirmatively further fair housing. Rather than requiring state-funded jurisdictions to engage in meaningful fair housing planning and assessment that can then be incorporated into the State jurisdiction's AFH and ConPlan, State jurisdictions are instead allowed to produce an assessment that treats all parts of the state that are not in an Entitlement jurisdiction as a single entity, no matter how large or how culturally or geographically diverse.<sup>103</sup> The cause for this different treatment by HUD appears to be HUD's concession to small towns and rural areas within an Entitlement jurisdiction that claim to have insufficient resources to identify, assess, or plan to eliminate fair housing barriers.<sup>104</sup> Because of this, HUD, has no direct relationship with state-funded jurisdictions, and state-funded jurisdictions are not directly accountable to HUD. Because HUD does not require a state-funded jurisdiction to perform any direct assessment of fair housing in its own community, any impediment to fair housing in a state-funded jurisdiction must be identified and assessed by the State jurisdiction, or not at all.<sup>105</sup>

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<sup>102</sup> 24 C.F.R. § 570.487(b) (2019).

<sup>103</sup> The State jurisdiction may also be required to assess units of general local government that are within an Entitlement jurisdiction but that have not received HUD funding because the general language of the AFFH Rule may be interpreted to require a State jurisdiction be the recipient. *See* Letter from Thomas Silverstein, Lawyers' Comm. for Civil Rights Under Law to Julian Castro, Sec'y, Dep't of Hous. and Urban Dev., Comments Regarding Affirmatively Furthering Fair Housing Assessment Tool for States and Insular Areas 4 (May 10, 2016); *see* Affirmatively Furthering Fair Housing Final Rule, 80 Fed. Reg. 42272, 42320-22 Thursday, (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903).

<sup>104</sup> *See* Affirmatively Furthering Fair Housing Final Rule, 80 Fed. Reg. 42272, 42345-47 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903).

<sup>105</sup> HUD is not unaware of this issue and the problems it presents, and acted to address it in its 1996 Fair Housing Planning Guide. There, HUD suggested that state jurisdictions require state-funded jurisdictions to conduct an assessment of fair housing or to complete specific fair housing actions in their respective jurisdictions. This suggestion, however, was precisely that—a suggestion—and not required by the regulations. *See* OFFICE OF FAIR HOUS. AND EQUAL OPPORTUNITY, U.S. DEP'T OF HOUS. AND URBAN DEV., FAIR HOUSING PLANNING GUIDE, Vol. 1, 3-9-3-10 (1996). Additionally, the Housing and Community Development Act of 1974 initially required units of general local governments to produce a Housing Assistance Plan in order to be eligible for a CDBG grant. This requirement was eliminated with the 1981 amendments to the Act when power and accountability was delegated to the states. *See* Lernerman, *supra* note 31, at 208-09.



Each state produces its own, unique AI or AFH, and it is not within the scope of this article to review and assess the scope or quality of each of those assessments. That said, Mississippi's 2014 analysis of impediments and 2015-2019 ConPlan provide a telling illustration of what HUD's failure to properly administer its programs in a non-entitlement area looks like in practice.<sup>106</sup>

For example, Figure 14 shows just how physically vast the non-entitlement area is in Mississippi.<sup>107</sup> Area-wise, it covers in effect the entire state. From a population perspective, in 2013, 88% of the state's residents lived in the non-entitlement area—2,619,259 of 2,984,926 citizens.<sup>108</sup>

The City of Madison, Mississippi, lies within the state's non-entitlement area. Madison is a suburb of the state capital, Jackson, which is itself an Entitlement jurisdiction. The blue arrow in Figure 14 points to the area in which the City of Madison is located. Madison's homeownership rate is almost 100%. Madison includes the census tracts in Figure 14 that are near the center of the state and shaded the darkest blue, meaning that owner occupancy rates in those tracts are between 94.1% and 100%. Figure 15 shows that these are the only census tracts in the state's entire non-entitlement area with this extremely high home ownership rate.

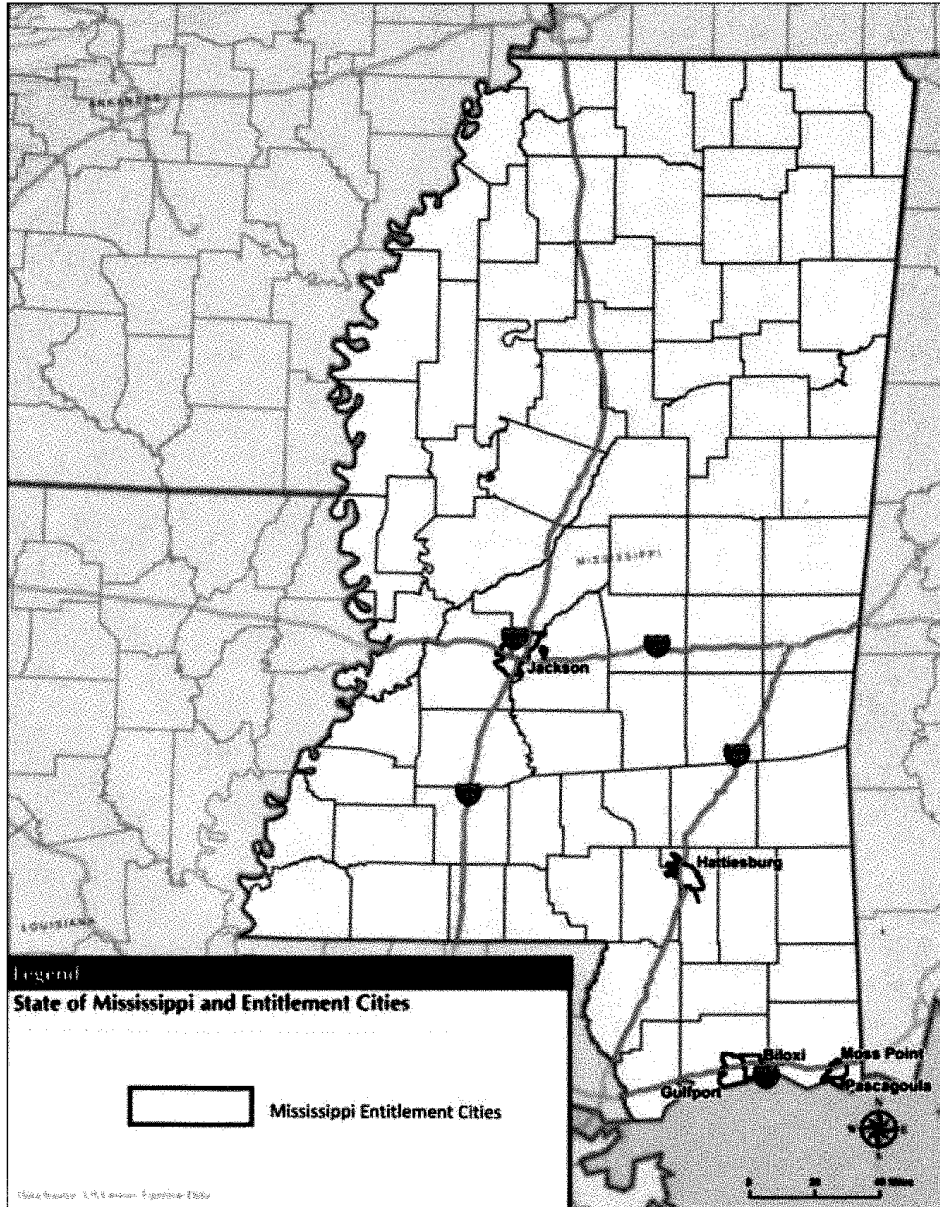
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<sup>106</sup> The Lawyers' Committee for Civil Rights did an excellent job proving a general critique of Mississippi's 2014 AI. STATE OF MISS. DEV. AUTHORITY, 2014 STATE OF MISSISSIPPI ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE 218-23 (2014).

<sup>107</sup> *Id.* at 24.

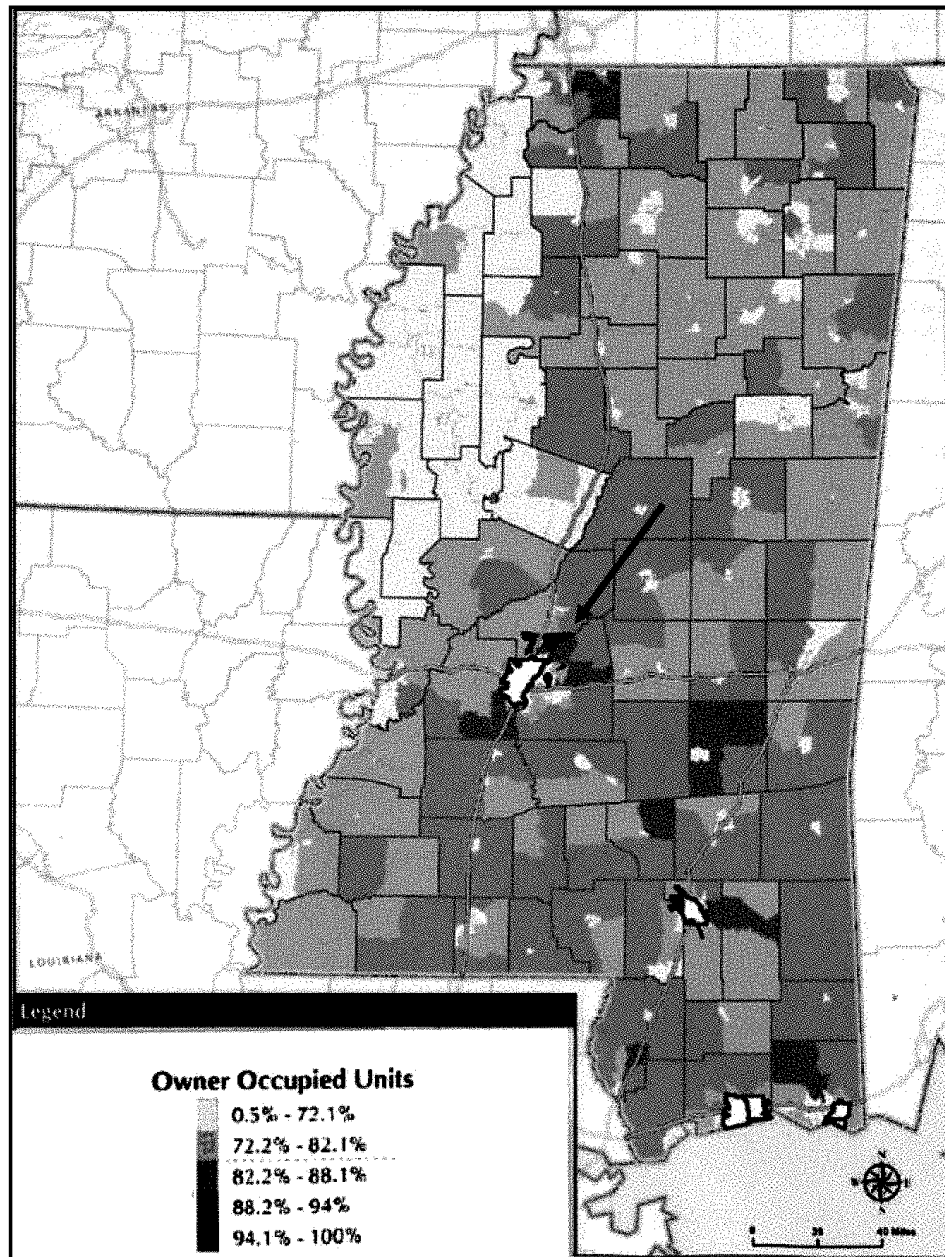
<sup>108</sup> *Id.* at 29.

**Figure 14**  
Mississippi Non-Entitlement Area<sup>109</sup>



<sup>109</sup> STATE OF MISS. DEV. AUTHORITY, 2015 – 2019 MISSISSIPPI CONSOLIDATED PLAN FOR HOUSING AND COMMUNITY DEVELOPMENT 12 (2015).

**Figure 15**<sup>110</sup>  
 Owner-Occupied Housing Units in the Mississippi State Jurisdiction  
 in 2010



From 2012 to 2016, the City of Madison had a median household income of approximately \$103,000.<sup>111</sup> The median home value was

<sup>110</sup> STATE OF MISS. DEV. AUTHORITY, *supra* note 106, at 47.

<sup>111</sup> In 2017 dollars. U.S. Census Quickfacts Madison, Miss., <https://www.census.gov/quickfacts/fact/table/madisoncitymississippi/AFN120212> (last visited July 22, 2019).

\$250,200.<sup>112</sup> For the same time period, the median income and median home value for the rest of the state were \$42,900 and \$109,300, respectively.<sup>113</sup>

The 2014 Mississippi Analysis of Impediments (“AI”) notes the unusually high percentage of owner-occupied units in the towns surrounding the City of Jackson (this would include the City of Madison) and the corresponding lack of renter-occupied units.<sup>114</sup> However, neither the AI nor the ConPlan offer any assessment or discussion regarding whether these anomalies are the result of policies in Madison that undermine open housing there. The Mississippi AI and ConPlan do not note Madison’s wealth, 3% poverty rate,<sup>115</sup> or its excellent public schools. The AI and ConPlan fail to mention that Madison has a disproportionate share of white residents, as the city’s population was over 85% white and approximately 10% black at the time of the 2010 Census.<sup>116</sup> The Appendices to the AI do reproduce comments from the Fair Housing Survey and Fair Housing Forums<sup>117</sup> that specifically mention the City of Madison, its lack of affordable housing, and overt efforts to keep out African Americans.<sup>118</sup> The AI and the ConPlan report do not, however, highlight these comments as raising any particular concerns about open housing in the non-entitlement area of the state or in Madison. The AI also does not articulate a plan to address the anomaly of Madison.

It is common knowledge,<sup>119</sup> however, that the City of Madison achieves these remarkable demographics through a strict ordinance that

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<sup>112</sup> *Id.*

<sup>113</sup> In 2016 dollars. U.S. Census Quickfacts Miss., <https://www.Census.gov/quickfacts/ms> (last visited July 22, 2018).

<sup>114</sup> STATE OF MISS. DEV. AUTHORITY, *supra* note 106, at 47-48.

<sup>115</sup> U.S. Census Quickfacts Madison Mississippi, <https://www.Census.gov/quickfacts/fact/table/madisoncitymississippi/INC110216> (last visited July 22, 2018).

<sup>116</sup> Madison Miss., Population: Census 2010 and 2000 Interactive Map, Demographics, Statistics, Quick Facts, <http://censusviewer.com/city/MS/Madison> (last visited July 22, 2018).

<sup>117</sup> The 2014 Mississippi Fair Housing Survey was the main form of public involvement in the production of the 2014 Mississippi AI. It was an online survey that was completed by 256 persons. 32% of those who responded identified themselves as homeowners, 10% as renters, 10% as property managers, and 9% as local government. In addition to the Fair Housing Survey, the State held four Fair Housing Forums at which attendees discussed the AI process and various fair housing issues. The minutes from the meetings are reproduced as an appendix to the AI. STATE OF MISS. DEV. AUTHORITY, *supra* note 108, at 117-21.

<sup>118</sup> STATE OF MISS. DEV. AUTHORITY, *supra* note 8, at 156, 159, 160, 197 (citing Tables B. 4, B. 13, B.14, and Comment 11).

<sup>119</sup> See *Supreme Court Says Madison Rental Ordinance Is Flawed*, CLARION LEDGER (July 3, 2014),

requires all landlords to post a \$10,000 bond for *each* unit of housing offered for rent.<sup>120</sup> Whatever Madison's underlying motive may be to justify this ordinance, one of its real effects is to create an expensive disincentive to the leasing—not to mention the creation of—a supply of affordable multi-family units in Madison. In addition, Madison has approved a zoning ordinance and map that do not designate a single location within the city limits where it is legal to construct multi-family housing.<sup>121</sup> The zoning ordinance has been in effect for years but has never been the subject of any action by the State jurisdiction or discussed as an impediment to fair housing in the state's AI or ConPlan. Despite this rental regulation, the ordinance, and Madison's outsized wealth relative to the rest of the state, the City of Madison was the recipient of \$265,000 in CDBG funds via the state in 2014 for an infrastructure project and in 2018 for walking trails.<sup>122</sup> It does not seem plausible that the state of Mississippi is unaware of Madison's policies openly violating the state's and the city's certifications to affirmatively further fair housing. It is less clear whether HUD is aware of these policies. If HUD regulations required state-funded jurisdictions to complete a local assessment of fair housing for its jurisdiction, jurisdictions like Madison could no longer blatantly ignore the ongoing, obvious, and purposeful barriers to fair housing in their communities.

State jurisdictions should be reporting specific, local impediments to fair housing with a high level of detail or assessing residential racial segregation at a microspatial level that accounts for the day-to-day, *de facto* segregation of small towns in non-entitlement areas. The data that State jurisdictions should use to provide better analysis is already gathered by

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<https://www.clarionledger.com/story/news/local/madison/2015/07/03/ms-supreme-court-says-madison-rental-ordinance-is-flawed/29664467>.

<sup>120</sup> CITY OF MADISON BUILDING & PERMITS DEPT., Rental Inspection and Property Licensing Application, 2, <http://www.madisonthecity.com/sites/default/files/Rental%20Application%20and%20Bond%20Form.pdf> (last visited June 15, 2019).

<sup>121</sup> THE CITY OF MADISON DEP'T OF ECON. AND CMTY. DEV. SERVICES, OFFICIAL ZONING ORDINANCE OF THE CITY OF MADISON, MISSISSIPPI, July 3, 2012, <http://www.madisonthecity.com/sites/default/files/ZoningOrdinance2012-1.pdf>; CITY OF MADISON, MISS. PLANNING AND ZONING COMM'N, ZONING MAP, 2014 [http://www.madisonthecity.com/sites/default/files/ZoningMap\\_Oct2014\\_Rev1.pdf](http://www.madisonthecity.com/sites/default/files/ZoningMap_Oct2014_Rev1.pdf) (last visited June 15, 2019).

<sup>122</sup> E-mail from the author to the Mississippi Home Corporation (May 10, 2017) (in response, the author received the amount of and project activity for CDBG funds to private and public entities in Mississippi non-entitlement areas from 2010—2016.); Michael Simmons, *Supes Ask County Nursing Home for 1M to Build Walking Trails*, ONLINE MADISON (Apr. 4, 2018), [www.onlinemadison.com/Content/Default/News/Article/Supes-ask-county-nursing-home-for-1M-to-build-walking-trails/-3/592/41024](http://www.onlinemadison.com/Content/Default/News/Article/Supes-ask-county-nursing-home-for-1M-to-build-walking-trails/-3/592/41024).

the census, and State jurisdictions are capable of collecting and analyzing it. Yet the form of overly general assessment using county and census tract level data remains the sole means by which HUD ensures that state-funded jurisdictions are affirmatively furthering fair housing—even under the new AFFH Rule. It is a method that is designed to fail in states with large, non-entitlement areas.<sup>123</sup> Is it feasible for a State jurisdiction to conduct a meaningful analysis when its non-entitlement area comprises 85% of the state and includes 88% of the population? Not really, but with HUD’s help they could. HUD regulations could require State jurisdictions to help small towns and rural areas assess and plan. If this requirement were coupled with data provided by HUD at the census block level, then small towns and rural areas could meaningfully identify and assess fair housing and work with the State jurisdiction to tackle long standing patterns of segregation.

Non-entitlement areas already have the capacity to undertake the complimentary assessment and planning that a State jurisdiction needs in order to meet the affirmative mandate. Encouraged by the Intergovernmental Cooperation Act of 1968,<sup>124</sup> states created planning and development districts or regions that today continue to provide a range of technical, planning, and development assistance to small towns and rural areas within State jurisdictions, assistance that already includes helping with applications for HUD grants. Mississippi, for example, has ten planning and development districts that could provide the state with meaningful assessments of fair housing in those districts, especially as they also often help small towns and rural areas administer the community planning and development grants they receive.<sup>125</sup> The AFFH Rule does require jurisdictions to consult with local and regional governmental agencies, but it does not require these agencies or any other to prepare

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<sup>123</sup> Affirmatively Furthering Fair Housing Rule, *supra* note 4, at 42321 (“Commenters stated that HUD does not appear to understand how States operate, and how they are different from Entitlement jurisdictions. Commenters stated that what a State can accomplish is different from what an entitlement area can accomplish . . . . Commenters further stated that States have limited influence over local government actions that could be most effective addressing a fair housing issue, and that while there may be significant fair housing issues in a locality, a State may have no ability to influence the locality, and, therefore, a State cannot include goals for mitigating the factors contributing to the fair housing issue.”).

<sup>124</sup> 42 U.S.C.S. § 4201 (repealed 1982).

<sup>125</sup> See MISS. PLANNING AND DEV. DIST., AN ASSESSMENT OF THEIR OVERSIGHT, AND A REVIEW OF THEIR FAIRNESS IN ADMINISTERING LOAN PROGRAMS, Miss. Leg. PEER Comm., Regular Sess. (1998) [http://www.mdah.ms.gov/arrec/digital\\_archives/governmentrecords/files/legislature/peer-su/1998-rpt372.pdf](http://www.mdah.ms.gov/arrec/digital_archives/governmentrecords/files/legislature/peer-su/1998-rpt372.pdf) (last visited June 15, 2019).

fair housing assessments or plans for the small towns and rural areas they serve.<sup>126</sup> This is simply a missed opportunity.<sup>127</sup>

#### V. THE HARMFUL EFFECT ON PRIVATE ENFORCEMENT

In spite of the general consensus that HUD's administration of its CDBG and other funding programs has failed to produce meaningful local fair housing assessments from its grantees,<sup>128</sup> HUD has rarely, if ever, used its enforcement powers to withhold funding to grantee jurisdictions that are manifestly failing to meet the most basic affirmatively furthering fair housing requirements.<sup>129</sup> In contrast, private citizens have done just that, bringing suits against Entitlement jurisdictions for falsely or fraudulently certifying that they are affirmatively furthering fair housing.<sup>130</sup> One example of this was in Westchester County, New York. In that case, evidence showed that Westchester County was aware that racial and ethnic segregation and discrimination persisted in its jurisdiction, but its analysis made no mention of the discrimination or any plan

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<sup>126</sup> See 24 C.F.R. § 91.100(a)(5) (amended 2016) ("The jurisdiction also should consult with adjacent units of general local government and local and regional government agencies, including local government agencies with metropolitan-wide planning and transportation responsibilities, particularly for problems and solutions that go beyond a single jurisdiction.").

<sup>127</sup> Affirmatively Furthering Fair Housing Final Rule, *supra* note 4, at 42325 ("The commenters also stated that the opportunity presented by the revisions of the AFH process for HUD grant participants is an opportunity to build on existing capacities in regional partnerships which would further the intentions of the proposed rule to include incorporation of fair housing issues across the spectrum of regional decisions. The commenters stated that specifically, many regional planning commissions, MPOs and/or councils of government already prepare detailed assessments of housing needs within a region, utilizing many of the same data sets, assessment tools, and public participation techniques envisioned for AFH planning in the proposed rule, but that because these institutions are not formally participants in the consolidated planning process, they have not traditionally been involved in consolidated planning nor in coordinating consolidated plans with other regional land use and transportation plans.").

<sup>128</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 94, at 2.

<sup>129</sup> Collins, *supra* note 21, at 2149; Schwemm, *supra* note 18, at 153-54, n.171 (citing Matthew J. Termine, *Promoting Residential Integration through the Fair Housing Act: Are Qui Tam Actions a Viable Method of Enforcing "Affirmatively Furthering Fair Housing" Violations?*, 79 FORDHAM L. REV. 1367, 1392 (2010)); See *City of Joliet, Ill. v. New West, L.P.*, 562 F.3d 830 (7th Cir. 2009).

<sup>130</sup> See Craig Gurian and Michael Allen, *Making Real the Desegregating Promise of the Fair Housing Act: Affirmatively Furthering Coming of Age*, 43 CLEARINGHOUSE REV. J. OF POVERTY L. AND POL'Y 560, 561 (Mar. 2010).

to address it.<sup>131</sup> In *Westchester County*, the private plaintiffs sought to indirectly enforce Westchester County's duty as a HUD Entitlement jurisdiction to affirmatively further fair housing. The plaintiffs claimed that Westchester County violated the False Claims Act because it had falsely certified to HUD that it was affirmatively furthering fair housing in its jurisdiction.<sup>132</sup>

Even though census block data demonstrate that small towns and rural areas in the Deep South have long standing, ongoing patterns of racial segregation, it does not appear that either HUD or private plaintiffs have ever brought suit against a State jurisdiction<sup>133</sup> or a state-funded jurisdiction for falsely claiming to affirmatively further fair housing in the non-entitlement area or in a specific unit of general local government. There are no reported cases of private parties suing a state or state-funded jurisdiction for falsely certifying that they are affirmatively furthering fair housing.

There are several legal barriers to private enforcement against state-funded jurisdictions that are not affirmatively furthering fair housing. First, according to the Community Development Act of 1974, only "grantees" are required to certify that they are affirmatively furthering fair housing; small towns and rural areas are not "grantees" as defined by the Act.<sup>134</sup> Second, according to the 2015 AFFH Rule, only "program participants" are required to certify to HUD that they are affirmatively furthering fair housing. The term "program participant"<sup>135</sup> is defined as those jurisdictions that are required to submit a ConPlan for CDBG, ESG, HOME, and HOPWA.<sup>136</sup> Because CDBG regulations do not re-

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<sup>131</sup> See *United States ex rel. Anti-Discrimination Ctr. of Metro NY, Inc. v. Westchester Cty., NY*, No. 06 Civ. 2860 (DLC) (S.D.N.Y. 2012); see also *United States ex rel. Freedom Unlimited Inc. v. City of Pittsburgh*, 728 Fed. Appx. 101 (3d Cir. 2018) (in 2016, private parties sued the City of Pittsburgh under a similar theory and the plaintiffs survived summary judgment.).

<sup>132</sup> *United States ex rel. Anti-Discrimination Ctr. of Metro NY, Inc. v. Westchester Cty., NY*, No. 06 Civ. 2860, 2012 WL 13777 (S.D.N.Y. Jan. 4, 2012).

<sup>133</sup> U.S. CONST. amend. XI; *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468 (1987).

<sup>134</sup> See 42 U.S.C. § 5304(b)(2) (2018) (requiring a unit of general local government that receives a grant under 42 U.S.C. § 5306(d)(2)(B) certify that it will affirmatively further fair housing. However, a grantee under § 5306(d)(2)(B) is a unit of general local government that has received funding directly from HUD).

<sup>135</sup> See 24 C.F.R. § 5.152 (2019) (defining "program participant").

<sup>136</sup> See 24 C.F.R. § 5.154(b) (2019).



quire state-funded jurisdictions to submit a ConPlan, they are specifically exempt from this particular requirement.<sup>137</sup>

CDBG regulations do require a unit of general local government that receives funding from a State jurisdiction to certify that it will affirmatively further fair housing. The term “unit of general local government” includes state-funded jurisdictions in non-entitlement areas. The CDBG regulations are silent, though, on how a state-funded jurisdiction in a non-entitlement area is supposed to show that it is actually affirmatively furthering fair housing. The CDBG regulations governing grants to State jurisdictions for non-entitlement areas require the following specific certifications:

Affirmatively furthering fair housing. The Act requires the State to certify to the satisfaction of HUD that it will affirmatively further fair housing. The Act also requires each unit of general local government to certify that it will affirmatively further fair housing. The certification that the State will affirmatively further fair housing shall specifically require *the State* to assume the responsibility of fair housing planning by:

1. Taking meaningful actions to further the goals identified in an AFH conducted in accordance with the requirements of 24 C.F.R. § 5.150 through 5.180;
2. Taking no action that is materially inconsistent with its obligation to affirmatively further fair housing; and
3. Assuring that units of local government funded by the State comply with their certifications to affirmatively further fair housing.<sup>138</sup>

Under the above CDBG regulation, a State jurisdiction must satisfy the three specific requirements as set forth in § 570.487(b) in order to truthfully certify that it has affirmatively furthered fair housing. Yet, the regulation is silent about what a state-funded jurisdiction must do as a practical matter in order to truthfully certify. The language of the rule is so vague as to probably be unenforceable. Since state-funded jurisdictions are not required to produce an AFH or a ConPlan, to certify at all pursuant to the AFFH Rule, or to certify that they have actually done anything in particular under CDBG regulations,<sup>139</sup> it is unlikely that a

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<sup>137</sup> See 24 C.F.R. §§ 91.300–330 (2019); see generally 24 C.F.R. §§ 91.200–236; see also U.S. DEP’T OF HOUS. AND URBAN DEV., AFFH RULE GUIDEBOOK 5 (2015).

<sup>138</sup> 24 C.F.R. § 570.487(b) (emphasis added).

<sup>139</sup> See U.S. DEP’T OF HOUS. AND URBAN DEV., FAIR HOUSING PLANNING GUIDE, Vol. 1, 3-4, 3-5 (1996) (suggesting that a State jurisdiction require its

private plaintiff could ever successfully bring a False Claims Act claim against a small town or rural area for failing to affirmatively further.<sup>140</sup>

Other CDBG regulations require state-funded jurisdictions to undertake certain, specified activities. For example, 24 C.F.R. § 570.486 requires state-funded jurisdictions to provide for and encourage citizen participation, and 24 C.F.R. § 570.490 requires states to develop record-keeping requirements for state-funded jurisdictions. While these are substantive requirements, they are not activities that the state-funded jurisdictions are required to certify that they have engaged in or have accomplished. Because the regulations do not require state-funded jurisdictions to certify its compliance with these sections, it is unlikely that a private plaintiff can successfully enforce these regulation requirements under the False Claims Act.

For this reason, State jurisdiction certifications that the state is affirmatively furthering fair housing are particularly important for affirmatively furthering fair housing in state-funded jurisdictions. Without them, there is no other substantive certification that may be enforced. In fact, the CDBG regulations make clear that State jurisdictions, not HUD and not the state-funded jurisdiction themselves, have the primary responsibility for ensuring that state-funded jurisdictions are affirmatively furthering fair housing.<sup>141</sup> Unfortunately, however, neither the AFFH nor CDBG regulations expressly require states to assess whether either unfunded or state-funded jurisdictions are actually affirmatively furthering fair housing or to identify specific fair housing issues or obstacles contributing to segregation within those jurisdictions.

A suit against a State jurisdiction under 24 C.F.R. § 570.487(b)(3) for failing to ensure state-funded jurisdiction compliance would be a route to relief when a state-funded jurisdiction is not affirmatively furthering fair housing, except that the Eleventh Amendment prohibits such suits against the State unless Congress has specifically waived a state's sovereign immunity, which in this case, Congress has not done.<sup>142</sup>

Entitlement jurisdictions, on the other hand, are direct HUD grantees and have similar direct certification requirements as state jurisdictions

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State-funded jurisdictions to conduct fair housing planning so as to identify activities they will engage in so as to affirmatively further fair housing. This is entirely discretionary, however.).

<sup>140</sup> See, e.g., *United States ex rel. Donegan v. Anesthesia Assoc. of Kansas City*, 833 F.3d 874 (8th Cir. 2016); see also *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281 (D.C. Cir. 2015); but cf. *United States ex rel. Phalp v. Lincare Holdings, Inc.*, 857 F.3d 1148 (11th Cir. 2017).

<sup>141</sup> See 24 C.F.R. § 570.487(b)(3) (2019).

<sup>142</sup> U.S. CONST. amend. XI; 24 C.F.R. § 570.487(b)(3) (2019); see *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787-88 (2000); see also *United States ex rel. Oberg v. Kentucky Higher Educ. Student Loan Corp.*, 681 F.3d 575, 579 (4th Cir. 2012).

under both the AFFH and CDBG regulations.<sup>143</sup> As a result, it is easier for private plaintiffs to sue an Entitlement jurisdiction for false certification.

### CONCLUSION

Fair and open housing is not the norm or even a realistic expectation for Americans living in the Deep South today. Fifty-five percent of African Americans live in the South, and many of them live in places where segregation is simply still a way of life. The law is clear that states like Mississippi that are awarded HUD-related funding must affirmatively further fair housing. Despite this, very little has changed in terms of racial segregation in this part of the country.

The Obama administration should be commended for promulgating the AFFH Rule. It is the first effort by any administration since Congress passed the Fair Housing Act in 1968 to provide texture and weight to the duty to affirmatively further fair housing. HUD grantees in more populated parts of the country—Entitlement jurisdictions in particular—now have to demonstrate that their fair housing assessments are based upon meaningful data, which should lead to better analyses, and, therefore, should result in more meaningful plans and tangible outcomes.<sup>144</sup>

However, the AFFH Rule does little to change the way State jurisdictions assess, analyze, and plan to affirmatively further in the small towns and rural areas within non-Entitlement jurisdictions. HUD has made no data available to State jurisdictions that is granular enough to show where segregation is actually going on. The AFFH Rule allows State jurisdictions to produce such general assessments and ConPlans that State jurisdictions will continue to fail to discover, report, or remedy the *de facto* segregation present in the small towns and rural areas in their jurisdictions—a problem that is particularly pernicious in states where non-entitlement areas encompass a majority of the state's geographic area and/or population.

HUD missed an opportunity when it promulgated the AFFH Rule without adequately considering how to address racial segregation in the Deep South. If the Rule merely required HUD to provide census-block-level data to State jurisdictions and for State jurisdictions to base their Assessment of Fair Housing upon local analyses and local plans to affirmatively further, then AFHs encompassing small towns and rural areas would be more meaningful and enforceable. The final AFFH Rule,

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<sup>143</sup> An Entitlement jurisdiction UGLG is a “program participant” under 24 C.F.R. §§ 5.152, 5.154(b) (2019) because it is required to produce a ConPlan. See 24 C.F.R. §§ 570.303, 91.225 (2019).

<sup>144</sup> Justin P. Steil and Nicholas Kelly, *Survival of the Fairest: Examining HUD Reviews of Assessments of Fair Housing*, HOUSING POL'Y DEBATE (Feb. 1, 2019).

however, effectively gives small towns and rural areas a free pass on affirmatively furthering fair housing.

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