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Is the Fight for Fair Housing Over?

KRISTON CAPPS AUG 22, 2018

Another question: Will it ever start?

Over the summer, the Trump administration has taken steps to rewrite standards on fair housing, potentially weakening federal levees against discrimination. State and local officials, along with groups devoted to racial justice and affordable housing, are lining up to defend these rules.

This week, more than 100 fair housing and social justice organizations across the country called on the administration to preserve a federal rule designed to protect minorities from discrimination. The NAACP, Human Rights Campaign, and Center for Responsible Lending are among the 153 national and local groups to sign the letter to the U.S. Department of Housing and Urban Development. At issue is the disparate impact standard, one of two anti-discrimination rules that HUD Secretary Ben Carson has opened up for potential revision since June.

In a separate letter, attorneys general from 17 states echoed the call from housers: Leave the disparate impact rule alone. "In the five years since the Rule was finalized, the issues of segregation and discrimination in housing and lending have not abated," the letter reads. If anything, soaring housing costs and tight lending standards have made the case for vigilance more urgent.

But there may not be much that advocates can do to force the federal government to enforce fair housing. Late on Friday, a court dismissed a lawsuit that would require Carson and HUD to adhere to the federal government's policy on desegregation. Developments in just the last week—following half a century of inconsistent interpretation—raise the question: Is fair housing still the law? And does the nation's top housing official think so?

For advocates, this uncertainty is an issue of cosmic importance. Signatories from nearly 50 national groups, plus dozens more organizations from 36 states and the District of Columbia —representing the interests of disabled people, racial minorities, LGBTQ populations, tenants, veterans, and more—expressed that HUD's decision on disparate impact could put at risk its critical obligations under the Fair Housing Act. "Achieving truly fair and equitable housing in all neighborhoods is one of the greatest challenges our nation faces," their letter reads.

Fair housing is a challenge stretching back at least 50 years (and arguably further, all the way back to Reconstruction). Both of the parallel policies at hand—on discrimination and desegregation—flow from the Fair Housing Act of 1968. The law may be less clear today than it was when it was passed.

The subject of the letters from advocates and state attorneys is a legal doctrine that bans more subtle forms of discrimination. In 2015, the U.S. Supreme Court ruled that housing practices that disproportionately negatively affect minorities are prohibited, even when discrimination is not the explicit, stated goal of those practices. That's the disparate impact standard, and it informs everything from renting to lending to building. A policy that concentrates low income housing vouchers in poor, minority neighborhoods, for example, is every bit as discriminatory as a whites-only listing—per a disparate impact reading of the Fair Housing Act.

HUD formalized its longstanding policy on disparate impact (or "discriminatory effects") in 2013, two years before the Supreme Court's landmark decision in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*. But in June, HUD reversed course, issuing an advanced notice of proposed rulemaking to change its disparate impact rule. Since its own rule preceded the court's decision, the department has argued, HUD needs to reconsider. That's too clever by half, according to the attorneys general of states from North Carolina to Massachusetts. Their letter says that "the Rule is entirely consistent with the United States Supreme Court's 2015 ruling [. . .] which HUD has no power to alter, and other developments since 2013 only reinforce the need for it to remain unchanged."

The other rule under the microscope is HUD's Affirmatively Furthering Fair Housing (AFFH) rule, first promulgated by the Obama administration to fanfare in 2015. Much as with HUD's disparate impact rule, the AFFH rule is an effort to codify an obligation set forth by the Fair Housing Act. The 1968 law requires jurisdictions that accept HUD funds to "affirmatively further" fair housing—in other words, to *actively* desegregate.

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It's never worked. In fact, it took the federal government 50 years to formalize its Affirmatively Furthering Fair Housing rule. But five years in, HUD's rule could be undone by the Trump administration. First, in January, HUD moved to delay its implementation; then, in May, the department scrapped one of the tools necessary for jurisdictions to abide by the AFFH rule. That prompted a lawsuit from the National Fair Housing Alliance and housing advocates from Texas, but the case was dismissed on Friday. The U.S. District Court for the District of Columbia found that the plaintiffs lacked standing.

"We disagree with the opinion, and the outcome, and we are considering how to proceed with the case," says Morgan Williams, general counsel for the National Fair Housing Alliance. "The [fair housing] mandate was neglected under the Fair Housing Act for the 50 years that it had been in operation when the rule came into place—one that we think is being neglected under the current status of HUD procedures."

Last week, HUD issued another advanced notice of proposed rulemaking, this time for the AFFH rule. Under Carson, HUD could white-out the Obama administration's fair-housing legacy by gutting the rules that spell out how the department enforces fair housing law.

Carson even suggested that the AFFH rule could be significantly altered, telling *The Wall Street Journal* that it might be used to prompt local jurisdictions to ease up on restrictive zoning policies. Intentional misdirection or not, this diversion sparked a debate about what HUD can do to prompt more affordable housing construction (and also why that won't work).

While the issues of affordable housing and fair housing are deeply interwoven, they aren't the same thing. Even if HUD uses the power of the purse to incentivize density and growth, that's not the same as desegregation. An alternative rule like the one Carson has in mind does nothing to ensure that Houston rebuilds more equitably with Hurricane Harvey recovery funds, for example. A zoning bonus won't make Houston build low-income housing in neighborhoods of opportunity.

Congress could take action to shore up fair housing law. Rep. Maxine Waters, the ranking member on the House Financial Services Committee, introduced the Strengthening Fair Housing Protections Act back in June to walk back several changes made under Carson's tenure. In addition to reversing the department's actions on disparate impact and desegregation, this law would go so far as to restore language removed from the department's mission statement addressing "inclusive and sustainable communities free from discrimination." The bill was moved to subcommittee earlier this month.

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After Congress passed the Fair Housing Act in 1968, George Romney, housing secretary under President Richard Nixon, had a stick-and-carrot approach to the new desegregation rule. Under his "Open Communities" rule, HUD would not accept applications for funds from communities that weren't breaking down racial barriers. But Nixon struck it down: "I am convinced that while legal segregation is totally wrong that forced integration of housing or education is just as wrong," he wrote in a memo.

Federal law requires us to do better. Advocates and state lawyers say that rules passed in this century allow the country to meet the standard it set 50 years ago. But the Trump administration may be backtracking on what is possible and what is allowed.

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