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## Promoting Residential Integration Through the Fair Housing Act: Are Qui Tam Actions a Viable Method of Enforcing “Affirmatively Furthering Fair Housing” Violations?

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**PROMOTING RESIDENTIAL INTEGRATION  
THROUGH THE FAIR HOUSING ACT: ARE *QUI  
TAM* ACTIONS A VIABLE METHOD OF  
ENFORCING “AFFIRMATIVELY FURTHERING  
FAIR HOUSING” VIOLATIONS?**

*Matthew J. Termine\**

*This Note uses United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County as an entry point into a discussion of residential segregation, the Fair Housing Act (FHA), and enforcement of the FHA’s desegregation provision—the “Affirmatively Furthering Fair Housing” (AFFH) duties. This Note explains why the Anti-Discrimination Center selected a qui tam action via the Federal False Claims Act to enforce Westchester’s duties. After highlighting the inadequacies of the FHA enforcement scheme, this Note explores the viability of qui tam as a solution.*

*Two issues are central to determining whether qui tam is a viable solution. First, a circuit split concerning the admissibility of information garnered through Freedom of Information Act requests in qui tam actions threatens to prevent national adoption of Anti-Discrimination Center-type actions. Second, this Note places qui tam enforcement of AFFH duties within the context of “public law” litigation and analyzes where such actions stand relative to commentators’ criticism and support for “public law” litigation. This Note concludes that the circuit split should be resolved in favor of admitting Freedom of Information Act evidence and that Anti-Discrimination Center-type actions have the potential to withstand some common pitfalls observed in traditional “public law” litigation.*

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INTRODUCTION: *UNITED STATES EX REL. ANTI-DISCRIMINATION CENTER OF METRO NEW YORK, INC. V. WESTCHESTER COUNTY*

In August 2009, the Anti-Discrimination Center of Metro New York (the Center), together with the U.S. Department of Justice, won an extraordinary \$62.5 million settlement in a residential desegregation case against Westchester County, New York (Westchester).<sup>1</sup> The size of the settlement, which represented seven years of U.S. Department of Housing and Urban Development<sup>2</sup> (HUD) funding to Westchester, was not the only extraordinary characteristic. The way in which the Center initiated the litigation was also extraordinary and the creativity required to improve

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1. United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., No. 06-cv-2860-DLC, slip op. at 37 (S.D.N.Y. Aug. 10, 2009) (approving the settlement reached between the United States, the Anti-Discrimination Center (the Center) and Westchester County (Westchester)); Press Release, Anti-Discrimination Center, Inc. of Metro New York, Anti-Discrimination Center Wins Unprecedented \$62.5 Million Settlement In Housing De-Segregation Case Against Westchester County (Aug. 10, 2009), available at <http://www.antibiaslaw.com/sites/default/files/files/ADCrelease20090810.pdf> [hereinafter Anti-Discrimination Center Press Release].

2. The U.S. Department of Housing and Urban Development (HUD) was created as a cabinet-level executive agency through the enactment of the Department of Housing Development Act of 1965. 42 U.S.C. §§ 3532–3533 (2006) (establishing HUD, describing the general duties of the Secretary of HUD and establishing posts for eight assistant secretaries, general counsel, and declaring that each officer of HUD shall be appointed by the President); see *Mission*, U.S. DEP’T OF HOUSING AND URBAN DEVELOPMENT, <http://portal.hud.gov/portal/page/portal/HUD/about/mission> (last visited Nov. 11, 2010) (“HUD’s mission is to create strong, sustainable, inclusive communities and quality affordable homes for all.”). In fiscal year 2009, HUD’s budget was \$41.833 Billion. U.S. DEP’T OF HOUS. & URBAN DEV., FY 2010 BUDGET: ROAD MAP FOR TRANSFORMATION 2–3 (2009) [hereinafter HUD’s FY 2010 BUDGET PROPOSAL]. The vast majority of this money was distributed through five categories of programs: tenant-based rental assistance (38% of budget); project-based rental assistance (17%); the Public Housing Operating Fund (11%); Community Development Block Grants (9%); and Homeless Assistance Grants (4%). See *id.* (stating HUD’s total budget and individual program spending).

conditions in Westchester highlighted one of the many legal hurdles Westchester faced in advancing residential integration.<sup>3</sup>

In *United States ex rel. Anti-Discrimination Center of Metro New York v. Westchester County*,<sup>4</sup> the Center used a novel approach, asserting the ancient *qui tam* action<sup>5</sup> by way of the Federal False Claims Act (FCA).<sup>6</sup> The liability theory took advantage of a complicated fund-granting mechanism used by HUD that requires all HUD grantees such as Westchester County to certify that they are in compliance with the Fair Housing Act (FHA).<sup>7</sup> The fund-granting mechanism requires grantees to undertake a very specific analysis of the grantee's community, an Analysis of Impediments, to determine what "impediments to fair housing choice" exist and explain how the federal funds will be used to overcome the impediments.<sup>8</sup> Among the particular requirements of this analysis is a HUD mandate that grantees analyze and consider racial impediments such as the concentration of minority groups.<sup>9</sup> Underlying HUD's fund-granting mechanism is a desire on the part of HUD to fulfill its statutory duty under

3. Two more conventional approaches to housing desegregation litigation are: (1) alleging that HUD itself has failed to comply with a provision of the Fair Housing Act (FHA) or (2) alleging intentional discrimination on the part of local officials. *See* *Thompson v. U.S. Dep't. of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 524 (D. Md. 2005) (holding HUD liable for locating housing projects within heavily segregated Baltimore City and failing to consider locations in surrounding communities); *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907, 914 (N.D. Ill. 1969) (holding the Chicago Housing Authority liable for a "deliberate policy to separate the races").

4. No. 06 Civ. 02860 (DLC), 2009 U.S. Dist. LEXIS 35041 (S.D.N.Y. Apr. 24, 2009).

5. *Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which translates to: "who as well for the king as for himself sues in this matter." BLACK'S LAW DICTIONARY 1368 (9th ed. 2009). A *qui tam* action is defined as an "action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." *Id.*; *see also* *United States ex rel. Dunleavy v. Cnty. of Del.*, 123 F.3d 734, 738 (3d Cir. 1997) (defining *qui tam* as when a "private person with knowledge of fraud against the government, acting as a de facto 'attorney general,' [instigates] litigation on the government's behalf against the parties responsible").

6. 31 U.S.C. §§ 3729–3733. Recently, the False Claims Act (FCA) has been in the headlines in connection with the UBS tax evasion scandal. *See, e.g.*, Lynnley Browning, *Banker Aims at Blowing the Whistle*, N.Y. TIMES, Nov. 27, 2009, at B1. Bradley C. Birkenfield, a former private banker at UBS, the Swiss bank, tipped federal authorities off to business practices that allowed wealthy Americans to hide billions of dollars overseas. *Id.* Although Birkenfield was implicated in the scheme and sentenced to forty months in federal prison, his attorneys have alleged a claim to "several billion dollars" of the recovery via the FCA. *Id.*

7. 24 C.F.R. § 91.225(a) (2010) (requiring "certifications, satisfactory to HUD, [to be] included in the [grantee's] annual submission to HUD").

8. *Id.* § 91.225(a)(1) (requiring each jurisdiction to "submit a certification that it will affirmatively further fair housing, which means that it will conduct an analysis to identify impediments to fair housing choice within the jurisdiction [and] take appropriate actions to overcome the effects of any impediments identified").

9. 1 U.S. DEP'T OF HOUS. & URBAN DEV., FAIR HOUSING PLANNING GUIDE 2–8 [hereinafter FAIR HOUSING PLANNING GUIDE] (defining impediments to fair housing choice as "any actions, omissions, or decisions which have the effect of restricting housing choices or the availability of housing choices on the basis of race, color, religion, sex, disability, familial status, or national origin." (emphasis added)).

the FHA to “affirmatively . . . further” fair housing (AFFH)<sup>10</sup> and facilitate the grantee’s fulfillment of their independent statutory duty to AFFH.<sup>11</sup> The certification process minimizes potential HUD liability because HUD only grants funds when grantees have affirmatively certified that they are in compliance with the FHA.<sup>12</sup> Furthermore, it overlays the grantee’s independent AFFH duty with a contractual assertion that is subject to FCA actions such as the *qui tam* action initiated by the Center.<sup>13</sup>

The Center succeeded in its action against Westchester, but the question remains: Why did the Center rely on the particularities of HUD’s fund-granting mechanism and commence such a complex and costly<sup>14</sup> *qui tam* litigation against Westchester? Contrary to lawyerly intuition, the Center did not select the *qui tam* action because it was the most advantageous of various theories of liability that it could have used against Westchester.<sup>15</sup> In fact, as this Note will explain, the *qui tam* action might have been the only theory of liability available to a private party, such as the Center, challenging Westchester’s actions.<sup>16</sup> The FHA’s enforcement scheme does not include a direct cause of action against HUD grantees for failure to comply with AFFH duties, and this Note suggests that a causal link may exist between this deficiency and the persistency of residential segregation in the United States.

Over forty years after the passage of the FHA, our cities and suburbs remain highly segregated.<sup>17</sup> Although alarming, this finding should not be

10. Throughout this Note, “AFFH” will be used to refer to the FHA requirement that all federal funds be used “affirmatively to further” fair housing. See 42 U.S.C. § 3608(e)(5).

11. See 42 U.S.C. § 3608(d) (stating that “[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development . . . in a manner *affirmatively to further* the purposes of this subchapter” (emphasis added)); FAIR HOUSING PLANNING GUIDE, *supra* note 9, at 1–2 (defining “affirmatively furthering fair housing” as a requirement that grantees (1) conduct an analysis to identify impediments to fair housing choice within the jurisdiction; (2) take appropriate actions to overcome the effects of any impediments identified through the analysis; and (3) maintain records “reflecting the analysis and actions taken in this regard”).

12. *Cf. Anderson v. City of Alpharetta*, 737 F.2d 1530, 1535-36 (11th Cir. 1984) (explaining that one of HUD’s main sources of pressure is withholding funds to HUD grantees for noncompliance).

13. See *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, 495 F. Supp. 2d 375, 384 (S.D.N.Y. 2007) (explaining that “[i]n order to state a claim premised on a ‘legally false’ certification theory, the defendant must have certified compliance with a statute or regulation ‘as a condition to governmental payment’” (citations omitted)).

14. See Nat’l Comm’n on Fair Hous. & Equal Opportunity, Pub. Hearing at 4 (Sept. 22, 2008) (testimony of Michael Allen) (noting that the *qui tam* litigation technique used by the Center is “expensive”).

15. See *id.* (recommending that Congress “[m]ake the AFFH obligation enforceable by private parties (including fair housing and other community groups) who are knowledgeable about impediments to fair housing and about appropriate actions to overcome those impediments”).

16. *Id.*

17. See COUNCIL OF ECON. ADVISERS FOR THE PRESIDENT’S INITIATIVE ON RACE, CHANGING AMERICA: INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING BY RACE AND HISPANIC ORIGIN 67 (Sept. 1998), <http://www.gpoaccess.gov/eop/ca/pdfs/ca.pdf> [hereinafter INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING] (reporting that non-

completely unexpected. The FHA was enacted 102 years after the Thirteenth Amendment banned slavery. During this century-long period, housing discrimination was widespread in the private sector as well as in local and national government.<sup>18</sup> By the time the FHA was enacted in 1968, much of the damage had already been done; the freight train of residential segregation had been put into motion and only decisive affirmative action could reverse its course.<sup>19</sup> To combat this, the FHA focuses its efforts on prohibiting discrimination in housing markets—as complemented by a formal enforcement scheme.<sup>20</sup> However, the FHA’s only true desegregative tool—the AFFH provision—attached to all federal money channeled through HUD is not afforded a statutory enforcement scheme.<sup>21</sup> As one of the only desegregation tools available to parties such as the Center, it is important to determine whether the *qui tam* action is a viable alternative to a formal enforcement scheme within the FHA.

This Note uses *Anti-Discrimination Center* as an entry point into a discussion of residential segregation, the FHA, and enforcement of the FHA’s desegregation provision—the AFFH duties. This Note attempts to explain why the Center used the *qui tam* action and what this tells us about the inadequacies of the FHA enforcement scheme. Pointing to the potential inadequacies, this Note explores the viability of *qui tam* as a solution. Two issues, the first practical and the second theoretical, are central to the *qui tam* viability discussion. The first issue is the relevance of the circuit split at the heart of Westchester’s motion to dismiss to future *Anti-*

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Hispanic blacks, on average, live in neighborhoods composed of less than 30% percent non-Hispanic whites even though non-Hispanic whites make up almost 75% of the overall population); PAUL A. JARGOWSKY, BROOKINGS INST., STUNNING PROGRESS, HIDDEN PROBLEMS: THE DRAMATIC DECLINE OF CONCENTRATED POVERTY IN THE 1990S 5 fig.2 (May 2003) (reporting that nearly three out of four people living in neighborhoods of high concentrations of poverty were black or Latino).

18. See CHARLES M. LAMB, HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS 64 (2005) (noting that George Romney’s Operation Breakthrough faced “towering obstacles to suburban integration” such as exclusionary zoning measures); Guido Calabresi, *Preface* to THE FAIR HOUSING ACT AFTER TWENTY YEARS 7 (Robert G. Schwemm ed., 1989) (noting that the FHA and Veteran’s Association mortgage assistance programs “until the late 1950s explicitly rejected the development of integrated communities”).

19. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 63–64 tbl.3.1 (1993) (noting that the average northern city had a black-white dissimilarity of 84.5% in 1970—meaning that over 84% of blacks “would have to move to achieve an even, or ‘integrated,’ residential configuration”).

20. *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1133 (2d Cir. 1973) (noting that the FHA was “designed primarily to prohibit discrimination in the sale, rental, financing, or brokerage of private housing and to provide federal enforcement procedures for remedying such discrimination”).

21. See 42 U.S.C. § 3602(f) (2006) (defining “discriminatory housing practice” as “an act that is unlawful” under § 3604 (discrimination in the sale or rental of housing), § 3605 (discrimination in residential real estate-related transactions), § 3606 (discrimination in the provision of brokerage services) or § 3617 (interference, coercion, or intimidation), but not including failure to comply with § 3608(e)(5)).

*Discrimination Center*-type actions.<sup>22</sup> Second, this Note places use of *qui tam* to enforce AFFH duties within the context of “public law” litigation and determines where it stands relative to support for, and criticism of, “public law” litigation.

Part I places *Anti-Discrimination Center* in historical context and describes the legislative history of both the FHA and the FCA. Part II presents a circuit split over whether *qui tam* actions based on state or municipal “administrative reports” are barred by the FCA’s public disclosure. Part III concludes that state or municipal reports should not be barred because admission of such reports is consistent with the purpose of the FCA. Part IV places *Anti-Discrimination Center*-type actions within the paradigm of “public law” litigation and discusses some advantages and disadvantages of using *qui tam* as an enforcement mechanism. Part V concludes that *qui tam* has potential as an enforcement mechanism of the FHA’s desegregation provision.

#### I. SEGREGATION, THE FAIR HOUSING ACT, AND *QUI TAM* ACTIONS

Part I places *Anti-Discrimination Center* in historical context and describes the legislative history of both the FHA and the FCA. Part I.A explains the societal forces behind residential segregation and introduces theories as to why residential segregation is difficult to eradicate.

Part I.B turns to the enactment of the FHA. A brief legislative history of the FHA is presented that attempts to distinguish between the intentions of Congress as a whole and the intentions of the framers of the FHA. Turning to federal court interpretations of the FHA, this Note focuses on the AFFH duties of § 3608(e)(5). This part compares the enforcement mechanism supporting the anti-discrimination provisions with the enforcement provisions of § 3608(e)(5) and highlights the inability of parties such as the Center to bring direct actions against HUD grantees.

Part I.C explains HUD’s Community Development Block Grant program with the aim of detailing the types of missteps that lead to *Anti-Discrimination Center*-type grantee liability. The process of analyzing impediments to fair housing is explained and connected to the enforcement of the AFFH duties. Part I.C.3 turns to the efficacy of relying on HUD to enforce AFFH duties and points out potential problems with the enforcement scheme. Part I.C also introduces benefits and disadvantages of overlaying the HUD enforcement scheme with “public law” litigation enforcement.

Part I.D connects the FCA and *qui tam* actions to residential desegregation litigation. A brief history of the FCA is offered in Part I.D.1. Part I.D.2 then turns to the inner workings of the modern FCA and the public disclosure bar which limits parasitic actions “based on” publicly available information.

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22. Throughout this Note, “*Anti-Discrimination Center*-type actions” will refer to a private party’s use of the *qui tam* provisions of the FCA to enforce HUD grantees’ AFFH obligations.

Part I.E concludes Part I with a discussion of the paradigm of “public law” litigation,<sup>23</sup> with the hope of understanding where the *Anti-Discrimination Center* action stands in relation to other private actions enforcing “public laws.” This concept is originally presented by the late Harvard Law School Professor Abram Chayes, in his piece, *The Role of the Judge in Public Law Litigation*,<sup>24</sup> Chayes detailed the distinction between traditional litigation that is a “vehicle for settling disputes between private parties about private rights”<sup>25</sup> and “public law litigation,” which is a mode of litigation that uses the courts to foster social change.<sup>26</sup> This section sets up the framework to judge the viability of using *Anti-Discrimination Center*-type actions to enforce AFFH obligations.

#### A. *The Complicated Problem of Residential Segregation*

Understanding the chronological development of residential segregation will aid in the discussion of whether the *qui tam* action is a viable method of enforcing the AFFH duties and solving the problem of residential segregation. Part I.A.1 introduces residential segregation as an artificial phenomenon rooted in our country’s long history of individual and institutional discrimination. The evolution of segregation forces is tracked between the Civil War and Civil Rights Era. Part I.A.2 confronts the proposition that segregation has persisted in the face of extensive civil rights reform including explicit prohibitions of discrimination in the housing markets. Two theories are presented that elucidate the complexity of modern day residential segregation. The first theory attempts to explain how barely-measurable racial preferences can lead to staggeringly segregated residential neighborhoods. The second theory presents a unique characteristic of neighborhood selection and shows how an uneven income distribution amongst the races can have a drastic impact on residential segregation outcomes. The complexity of the segregation problem, as depicted through the two theories in Part I.A.2, are relevant to the discussion of the viability of *Anti-Discrimination Center*-type actions in Parts II and III.

##### 1. Artificial Beginning

When residential segregation is viewed as a late-blooming offshoot of the institution of slavery, the artificial and insidious nature of racial isolation

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23. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (listing the “characteristic features of the public law model” as: (1) a “party structure [that is] sprawling and amorphous”; (2) “traditional adversary relationship [that] is suffused and intermixed with negotiating and mediating”; and (3) a “trial judge [who is] the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court,” but noting that different fields “display in varying degrees the features of public law litigation”).

24. *Id.*

25. *Id.* at 1282.

26. *Id.* at 1281–82.

shines through.<sup>27</sup> The early origins can be traced back to a ghetto-creating trifecta: (1) the economic status of African Americans in the late nineteenth century, (2) the high concentration of African Americans in southern states at that time, and (3) the rapid urbanization of northern cities during the industrial revolution.<sup>28</sup>

In 1870, eighty percent of all blacks lived in the rural south.<sup>29</sup> Housing in the South was largely integrated—a fact attributable to the preceding years of slavery and the practice of housing slaves close to their master’s compound.<sup>30</sup> Despite their integration, southern African Americans lived in “appalling poverty relative to their white counterparts.”<sup>31</sup> White southerners took advantage of the vulnerable position of blacks by binding them in sharecropping contracts that strongly favored the white landowners and merchants.<sup>32</sup> Black codes<sup>33</sup> reinforced the master-slave dichotomy and maintained the status quo: economic subordination of the newly freed slaves.<sup>34</sup> This concentration of economically disadvantaged blacks set the stage for an industrial revolution-induced black migration to cities and the creation of segregated urban ghettos.<sup>35</sup>

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27. See MASSEY & DENTON, *supra* note 19, at 19 (“The emergence of the black ghetto did not happen as a chance by-product of other socioeconomic processes.”); REPORT OF THE NAT’L ADVISORY COMM’N ON CIVIL DISORDERS I (1968) [hereinafter KERNER COMM’N REPORT] (“[W]hite society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.”); C. Michael Henry, *Introduction: Historical Overview of Race and Poverty from Reconstruction to 1969*, in RACE, POVERTY AND DOMESTIC POLICY 1, 7 (C. Michael Henry ed., 2004) (describing “the problems of race and poverty [as] a significant part of the damning legacies of slavery”); Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 803 (1996) (arguing that “segregation was not a normal or natural part” of the growth experienced by northern cities and a “host of private, public, and governmental actors deliberately created residential segregation”).

28. See *infra* notes 35–51 and accompanying text.

29. MASSEY & DENTON, *supra* note 19, at 18.

30. See *id.* at 25 (noting that in the South, “African Americans were scattered widely among urban neighborhoods and were more likely to share neighborhoods with whites than with members of their own group”). This practice was designed, in part, “to prevent the formation of a cohesive African American Society.” *Id.* at 24. However, southern residential segregation increased during the antebellum period as former slaves moved away from their master’s compound. See STEPHEN GRANT MEYER, AS LONG AS THEY DON’T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS 14–15 (2000) (describing segregation in the South during the antebellum period).

31. Henry, *supra* note 27, at 1.

32. Roger L. Ransom & Richard Sutch, *Debt Peonage in the Cotton South After the Civil War*, 32 J. ECON. HIST. 641, 655 (1972) (noting the weak position of the indebted tenants relative to the landlord).

33. John Silard, *A Constitutional Forecast: Demise of the “State Action” Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 869 (1966) (describing the “Black Codes” as laws “which severely restricted [African Americans] in the enjoyment of rights which the law affirmatively protected for . . . white citizen[s]” and prejudiced African Americans “in such areas of life and commerce as purchase of realty, equality of criminal penalties and proceedings, trade or business”).

34. KIRT H. WILSON, THE RECONSTRUCTION DESEGREGATION DEBATE: THE POLITICS OF EQUALITY AND THE RHETORIC OF PLACE, 1870–1875, at 13 (2002) (noting that “[t]he North might call the former slaves ‘freedmen,’ [while] South Carolina law . . . maintain[ed] the caste system that defined ‘servants’ in very different terms than their ‘masters’”).

35. *Id.*

In the years following the January 1863 implementation of the Emancipation Proclamation,<sup>36</sup> growing numbers of African Americans moved to northern and midwestern cities.<sup>37</sup> Race relations in the North remained, for the most part, stable and only modest levels of residential segregation existed.<sup>38</sup> Sociologists and historians note the development of a class of elite African American professionals that served white clients as lawyers and doctors.<sup>39</sup> By 1916, the migration<sup>40</sup> achieved an increased intensity as the military-industrial build-up to World War I drew more than 500,000 African Americans over the next three years from the rural south to northern and midwestern cities.<sup>41</sup> This influx had a dramatic effect on race relations and “[n]orthern whites viewed this rising tide of black migration with increasing hostility and considerable alarm.”<sup>42</sup> An upsurge in racial violence and a decrease in white willingness to interact and transact business with African Americans virtually eliminated the existence of the class of elite African American professionals, creating an increasingly exclusionary environment for newly arrived African American city-dwellers.<sup>43</sup> The seeds of tense race relations were planted by the 1960s, when another 1.38 million blacks left the South for northern cities.<sup>44</sup>

White northerner’s decreased willingness to interact with blacks amplified the effect of institutional structures, further entrenching the segregation of the races. Racially restrictive covenants—provisions written into property deeds preventing the transfer of property to certain races—were used throughout the Great Migration.<sup>45</sup> Despite the 1948 invalidation of racially restrictive covenants,<sup>46</sup> for the next twenty years the covenants

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36. 12 Stat. 1268 (1863) (declaring, through two executive orders, that those slaves of the Confederate States of America not returning to Union control by January 1, 1863 were free).

37. See CHARLES M. LAMB, *HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS* 27 (2005) (noting only 400,000 African Americans left the South in the 1930s followed by nearly 1.5 million in the 1940s and again in the 1960s); MASSEY & DENTON, *supra* note 19, at 27–29 (noting that the “outflow” of African Americans was only 70,000 during the 1870s and 80,000 during the 1880s compared to 877,000 in the 1920s); MEYER, *supra* note 30, at 30.

38. See MEYER, *supra* note 30, at 13.

39. See MASSEY & DENTON, *supra* note 19, at 22, 23 (describing the small but highly successful black elite class in Cleveland, Chicago, Detroit, and Milwaukee).

40. See Karl Taeuber, *Causes of Residential Segregation*, in *THE FAIR HOUSING ACT AFTER TWENTY YEARS* 33, 34 (Robert G. Schwemm ed., 1989) (referring to the migration of southern African Americans to northern and midwestern cities as the “great migration”).

41. See MASSEY & DENTON, *supra* note 19, at 29.

42. *Id.*

43. *Id.* at 34 (noting that the “initial impetus for ghetto formation came from a wave of racial violence . . . that swept over northern cities in the period between 1900 and 1920”).

44. REYNOLDS FARLEY & WALTER R. ALLEN, *THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA* 113 (1987).

45. See NAT’L COMM’N ON FAIR HOUS. AND EQUAL OPPORTUNITY, *THE FUTURE OF FAIR HOUSING* 7 (2008) (noting that “deeds in nearly every new housing development in the North prevented the use or ownership of homes by anyone other than the Caucasian race” (citation and internal quotation marks omitted)).

46. *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding that the states “in granting judicial enforcement of the restrictive agreements . . . have denied petitioners the equal protection of the laws [and] therefore, the action of the state courts cannot stand”). The FHA

continued to be incorporated into deeds as unenforceable but “valuable signals for current and would-be property owners in covenanted neighborhoods.”<sup>47</sup> Blockbusting, a “real estate practice[] in which brokers encourage[d] owners to list their homes for sale by exploiting fears of racial change within [the owner’s] neighborhood,” was commonplace between the late 1950s and late 1960s.<sup>48</sup> The Federal Housing Administration, the federal government mortgage lending arm, disseminated guidelines to field offices that called for protection of neighborhoods from the “infiltration of inharmonious racial groups.”<sup>49</sup> Attitudes of white northerners and institutional actions provided more than sufficient staying power, but these triggered yet another segregation force: white flight.<sup>50</sup> As racial tension increased and institutional players pushed whites and blacks into, and then out of, city neighborhoods, whites, with the requisite mobility, eventually fled to the suburbs.<sup>51</sup> These forces set the stage for an internalization of residential segregation’s staying power.<sup>52</sup> By the time Congress and the courts prohibited discriminatory individual and institutional action in the housing markets, segregation’s internal staying power had taken hold.<sup>53</sup>

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distributed materials recommending the use of racially restrictive covenants even after the *Shelley* decision. See, e.g., FED. HOUS. ADMIN., UNDERWRITING MANUAL: UNDERWRITING AND VALUATION PROCEDURE UNDER TITLE II OF THE NATIONAL HOUSING ACT 323 (1936) (recommending the use of neighborhood demographics to predict housing valuations); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 208 (1985) (commenting that the materials recommending the racially restrictive covenants were used after *Shelley*).

47. See Theodore M. Shaw, *Missouri v. Jenkins: Are We Really a Desegregated Society?*, 61 FORDHAM L. REV. 57, 58 (1992) (noting anecdotally that a house the author purchased in Michigan had a restrictive covenant running in its deed through the 1950s until the 1960s); Richard R. W. Brooks, *Covenants & Conventions* 12 (Nw. Univ. Sch. of Law, Law and Econ. Research Paper Series, Research Paper No. 02-8, 2002), available at [http://ssrn.com/abstract\\_id=353723](http://ssrn.com/abstract_id=353723) (arguing that the impact of covenants did not vanish after the Supreme Court ruled their enforcement unconstitutional).

48. Dmitri Mehlhorn, *A Requiem for Blockbusting: Law, Economics, and Race-Based Real Estate Speculation*, 67 FORDHAM L. REV. 1145, 1145 (1998); see Taeuber, *supra* note 40, at 35 (describing the practice of blockbusting).

49. FED. HOUS. ADMIN., *supra* note 46, at 323 (“The infiltration of inharmonious racial groups will produce the same effects as those which follow the introduction of nonconforming land uses which tend to lower the levels of land values and to lessen the desirability of residential areas.”)

50. KERNER COMM’N REPORT, *supra* note 27, at 12–13 (stating that the second of two related social movements that were causally connected to residential segregation was the departure of urban whites from Northern cities to suburban enclaves).

51. Cf. Steven E. Asher, *Interdistrict Remedies for Segregated Schools*, 79 COLUM. L. REV. 1168, 1181 (1979) (noting that institutional players such as the FHA-instituted policies that encouraged white flight from the cities).

52. See *infra* Part I.A.2 (introducing two theories that may explain the internalization of residential segregation’s staying power).

53. See DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 427 (6th ed. 2008) (stating that “nearly one third of the African-American population reside in blocks that are more than 90 percent black, and nearly half of the white population live on blocks that are more than 90 percent white”); MASSEY & DENTON *supra* note 19, at 48 tbl.2.4 (stating that the isolation index, which measures the extent to which blacks live within neighborhoods that are predominantly black, increased in Northern cities from 31.7 in 1930 to 73.5 in 1970).

## 2. Sophisticated Staying Power

The relationship between individual choice and aggregate results is central to the discussion of the internal staying power of residential segregation. Every time an individual moves into or out of a neighborhood, there is a situation in which individual choice impacts the composition of both neighborhoods the individual is both moving to and from.<sup>54</sup> Nobel Laureate and University of Maryland economics professor Thomas Schelling<sup>55</sup> posits that individual choices in the housing market can transform small differences in groups' attitudes about neighborhood diversity into "strikingly polarized results."<sup>56</sup> The Schelling thesis causally links "discriminatory individual behavior" to housing segregation, but defines "discriminatory" as "an awareness, conscious or unconscious, of sex or age or religion or color or whatever" that influences decisions on where to live.<sup>57</sup> This nuanced definition is at the heart of why Professor Schelling's model is relevant to assessing the efficacy of the FHA in integrating our neighborhoods: the theory uncovers the mechanics behind the observation that mere racial awareness perpetuates segregation.

In setting forth his thesis, Schelling uses so-called chessboard experiments in which each chess piece represents a family of one race or another.<sup>58</sup> He further assumes residents: (1) are race conscious and (2) have a mild racial preference (e.g., whites do not want to be out-numbered more than two-to-one and vice versa).<sup>59</sup> He begins with a mixed

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54. HGTV, for example, is a television network developed around the search for suitable living. See HGTV PROGRAM GUIDE, [www.hgtv.com](http://www.hgtv.com) (follow "On TV" hyperlink; then follow "Program Guide" hyperlink) (last visited Nov. 11, 2010) (listing "House Hunters," "Income Property," "Property Virgins," "My First Place," among other house-selection related shows).

55. Thomas Schelling won the 2005 Nobel Prize in Economics along with Robert Aumann "for having enhanced our understanding of conflict and cooperation through game-theory analysis." The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2005, NOBEL FOUNDATION, [http://nobelprize.org/nobel\\_prizes/economics/laureates/2005/](http://nobelprize.org/nobel_prizes/economics/laureates/2005/) (last visited Nov. 11, 2010). Although much of Schelling's work focused on game-theory, in the 1970s he leveraged his work in the area of individual decision-making to analyze the aggregate effects of individual decisions. See THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 11-43 (1978).

56. W.A.V. Clark, *Residential Preferences and Neighborhood Segregation: A Test of the Schelling Segregation Model*, 28 DEMOGRAPHY 1, 15 (1991); see also Thomas C. Schelling, *On the Ecology of Micromotives*, 25 PUB. INT. 61, 80-82 (1972) (arguing that "processes of separation, segregation, sharing, mixing, dispersal . . . have a feature in common. The consequences are aggregate but the decisions are exceedingly individual"); Thomas C. Schelling, *Dynamic Models of Segregation*, 1 J. MATHEMATICAL SOC. 143, 144 (1971) [hereinafter Schelling, *Dynamic Models of Segregation*].

57. Schelling, *Dynamic Models of Segregation*, *supra* note 56, at 144; see also John Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U. L. REV. 363, 390 (1966) ("There exists a 'tipping point'—a given percentage of [African Americans], after which the departure of whites from the areas will be greatly accelerated.")

58. See Schelling, *Dynamic Models of Segregation*, *supra* note 56, at 144.

59. See *id.*; Tim Harford, *The Logic of Life: Racial Segregation and Thomas Schelling*, <http://timharford.com/2009/03/the-logic-of-life-racial-segregation-and-thomas-schelling/>

neighborhood and, in the first round, moves any chess piece that is in a neighborhood that fails to meet the family's mild racial preference to a neighborhood that does.<sup>60</sup> He repeats this move again and again.<sup>61</sup> Eventually, the mild racial preference of not wanting to be outnumbered more than two-to-one in a given neighborhood creates a completely segregated environment.<sup>62</sup> This example shows that "although . . . individuals may be rational and tolerant, the society we produce together may be neither rational nor tolerant."<sup>63</sup>

One somewhat unrealistic aspect of the Schelling thesis is that it assumes there is perfect mobility between neighborhoods for all residents.<sup>64</sup> The distribution of economic resources between races is far from uniform and this fortifies the staying power of segregation.<sup>65</sup> The Tiebout Sorting, developed by the late University of Washington economics professor, Charles Tiebout,<sup>66</sup> says that the mechanics of matching individual preferences to public expenditure on the local level is vastly different from the same on the national level.<sup>67</sup> The basic problem on the national level is that often there is a wide range of views on a given issue. As an example, consider the amount of money the federal government decides to spend on maintaining our national parks. Ultimately, the federal government's chosen level of expenditure matches only a sliver of the many individual preferences.<sup>68</sup> Professor Tiebout argues that this problem does not occur at the local level because individuals are free to move in and out of neighborhoods based on their local public expenditure preferences.<sup>69</sup> Professor Tiebout views each town as offering a different menu of public expenditure (e.g., high or low expenditure on schooling and maintenance of

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(last visited Nov. 11, 2010) (presenting a visual demonstration of Schelling's segregation model).

60. See John Kaplan, *supra* note 57, at 390; Schelling, *Dynamic Models of Segregation*, *supra* note 56, at 144.

61. See Schelling, *Dynamic Models of Segregation*, *supra* note 56, at 144.

62. See *id.*

63. See *id.*

64. See *id.* at 144–45 (accounting for this deficiency and pointing out that this paper might be positioned in "third place" behind institutional discrimination and the effect of disparities in economic resources between the races).

65. See INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING *supra* note 17, at 35 (presenting the median family income for African Americans (\$26,000), Hispanics (\$26,000), whites (\$47,000) and Asians (\$49,000); noting that "Asian and non-Hispanic white families have much higher median incomes than black or Hispanic families" and "[t]he median income of black families as a percentage of non-Hispanic white median family income was about the same in 1997 as in 1967, at less than 60 percent").

66. Charles Tiebout revolutionized the way economists think about the free-rider problem and spending choices made at the local level. See Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289, 303 (2002) (acknowledging the prominence of Tiebout's theory).

67. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. OF POL. ECON. 416, 418 (1956) ("The consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods.").

68. HANDBOOK OF SOCIAL CHOICE AND WELFARE 18–21 (Kenneth Joseph Arrow & Amartya Sen eds., 2002) (explaining the overarching problem of selecting a level of expenditure for a group with varied preferences for the level of spending).

69. Tiebout, *supra* note 67, at 418.

city parks).<sup>70</sup> Overlaying this theory with the uneven income distribution between the races, the diversity in public expenditure from one town to the next creates a situation where low-income earners inevitably select towns with low public expenditure and correlative low tax rates.<sup>71</sup> Together, the theories from Professors Schelling and Tiebout help to explain how segregation remains despite efforts to root out purposeful discrimination in the housing market.

*B. The Fair Housing Act, the Department of Housing and Urban  
Development and Enforcement of the Act*

Part I.A.1 detailed some of the social and economic forces behind residential segregation. In Part I.B.1 the U.S. Congress confronts the problem of civil disorder and identifies residential segregation as an significant precipitating factor.

1. The Fair Housing Act and § 3608(e)(5)<sup>72</sup>

In the spring of 1967, violent race riots broke out in Newark and Detroit.<sup>73</sup> Amidst increasing political pressure to ameliorate the rising racial tensions, President Lyndon B. Johnson formed the National Advisory Commission on Civil Disorders (the Commission).<sup>74</sup> The President asked the Commission to investigate “[t]he origins of the recent major civil disorders in our cities, including the basic causes and factors leading to such disorders.”<sup>75</sup> The Commission spent nine months investigating, and delivered a comprehensive 426-page document—The Kerner Commission Report (the Report)—which begins with the Commission’s basic conclusion: “Our nation is moving toward two societies, one black, one white—separate and unequal.”<sup>76</sup> The Commission elevated the issue of

70. Schuck, *supra* note 66, at 304 (connecting Tiebout Sorting to residential segregation and noting that expenditure differences across localities enables residents with similar taxing and spending preferences to group themselves in communities that satisfy them).

71. Edwin S. Mills & Wallace E. Oates, *The Theory of Local Public Services and Finance: Its Relevance to Urban Fiscal and Zoning Behavior*, in FISCAL ZONING AND LAND USE CONTROLS: THE ECONOMIC ISSUES 1, 5 (1975) (“Once we recognize that the demand for public services is systematically related to income, we see that the Tiebout model implies powerful tendencies toward segregation by income level.”); Alexandra M. Greene, Note, *An Examination of Tiebout Sorting and Residential Segregation Through a Racialized Lens*, 8 CONN. PUB. INT. L.J. 135, 143–47 (2008) (connecting Tiebout Sorting to the problem of residential segregation).

72. 42 U.S.C. § 3608(e)(5) (2006).

73. LAMB, *supra* note 18, at 41–42 (describing the role that the 1967 riots played in lead up to the Kerner Commission Report and passage of the Fair Housing Act of 1968).

74. Exec. Order No. 11,365, § 3, 32 Fed. Reg. 11111 (Aug. 1, 1967) (establishing the National Advisory Commission on Civil Disorders).

75. *Id.* at 11112.

76. KERNER COMM’N REPORT, *supra* note 27, at 1; see John Charles Boger, *Race and the American City: The Kerner Commission in Retrospect—An Introduction*, 71 N.C. L. REV. 1289, 1296–97 (1993) (noting the importance of the Commission’s basic conclusion). The opening statement of the Kerner Report continues:

Reaction to last summer’s disorders has quickened the movement and deepened the division. Discrimination and segregation have long permeated much of

residential segregation from a mere fact of life in America to one of the precipitating factors of the racial riots, labeling it as something that could lead to “the destruction of basic democratic values.”<sup>77</sup>

The Report outlined three alternative strategies the country could take in response to the Report’s central finding: (1) the “Present Policies Choice” would have maintained the status quo of near nonintervention, (2) the “Enrichment Choice” would have substantially increased social services in inner-city neighborhoods but not have made a concerted effort to integrate, and (3) the “Integration” choice would have incentivized a mobilization of inner-city African Americans and actively desegregated American cities.<sup>78</sup> Implicit in the conclusions of the Report was recognition that merely ending discrimination in the housing markets would not be enough to stem the tide of racial isolation and tension in American cities.<sup>79</sup>

Congress, at the urging of President Johnson, took notice of the Report<sup>80</sup> and, in the “tense days following the assassination of Martin Luther King, Jr.,”<sup>81</sup> passed the Civil Rights Act of 1968, which is now known as the FHA.<sup>82</sup> Through the Act, Congress acknowledged the connection between residential segregation and rising racial tensions. However, the Act’s focus on prohibiting racial discrimination in the housing markets likely reflected an unrealistic view of what it would take to solve the residential segregation

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American life; they now threaten the future of every American. This deepening racial division is not inevitable. The movement apart can be reversed. Choice is still possible. Our principal task is to define that choice and to press for a national resolution. To pursue our present course will involve the continuing polarization of the American community and, ultimately, the destruction of basic democratic values.

KERNER COMM’N REPORT, *supra* note 27, at 1; *see also* Susan Olzak, Suzanne Shanahan & Elizabeth H. McEneaney, *Poverty, Segregation, and Race Riots: 1960 to 1993*, 61 AM. SOC. REV. 590, 607–10 (1996) (reporting results from a sociological study that supports the Kerner Report’s finding that racial isolation is correlated with social unrest).

77. KERNER COMM’N REPORT, *supra* note 27, at 1.

78. *Id.* at 395–96; *see* Boger, *supra* note 76, at 1305 (stating that the Kerner Commission “warned America that it must choose among three mutually exclusive policy alternatives”).

79. Both the “Enrichment Choice” and the “Integration Choice” emphasize positive action on the part of the government instead of mere prohibitions on racial discrimination in the housing markets. *See* Boger, *supra* note 76, at 1302–03.

80. *See* 114 Cong. Rec. 9557 (1968) (statement of Rep. Anderson) (“In voting for this bill I seek . . . to reward and encourage the millions of decent, hardworking, loyal, black Americans who do not riot and burn. I seek to give them the hope that the dream of owning a home in the suburbs or a decent apartment in the city will not be denied the man who was born black.”); LAMB, *supra* note 18, at 42 (arguing that the Kerner Report “probably” influenced Congress’s views on segregation leading up to the Fair Housing Act of 1968 vote).

81. Richard H. Sander, Comment, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 NW. U. L. REV. 874, 880 (1988) (noting the connection between the assassination of Martin Luther King, Jr. and the timing of Congress passing the FHA); *see also* Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 149 (1969) (stating that “the assassination of Martin Luther King sped action in the House of Representatives”).

82. Civil Rights Act of 1968, Pub. L. No. 90-284, tit. VIII (Fair Housing), 82 Stat. 73 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619 (2006)).

problem.<sup>83</sup> The Act provided that racial discrimination in the housing markets would be eradicated in three successive phases.<sup>84</sup> The first phase banned discrimination in either the sale or rental of housing on the basis of race, color, religion or national origin in housing owned, operated or guaranteed by the federal government.<sup>85</sup> The next two phases applied this prohibition first to private multi-family dwellings and then to single-family dwellings.<sup>86</sup> The three-phased attack on discrimination was the principal mechanism by which Congress hoped to influence the country to move toward an imprecise vision of “fair housing.”<sup>87</sup>

The chief architects of the FHA, Senators Edward Brooke and Walter Mondale, viewed “fair housing” broadly.<sup>88</sup> Their perception of the problem and potential solutions aligned more closely with the Report, but it was their appreciation for the politics of desegregation that can be credited as their enduring legacy. The architects recognized that an all-out attack on segregation through legislative adoption of the “Integration Choice” would be politically impractical in 1968.<sup>89</sup> They opted for a second-best solution: a requirement that all federal funds allocated to affordable housing programs be used “affirmatively to further” fair housing.<sup>90</sup> In doing so, the FHA defers to HUD and the federal courts to define and enforce the AFFH

83. See *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1133 (2d Cir. 1973) (“It is true that the Act was designed primarily to prohibit discrimination in the sale, rental, financing, or brokerage of private housing and to provide federal enforcement procedures for remedying such discrimination . . . .”); see also Dubofsky, *supra* note 81, at 158–61 (noting that the bulk of Senate floor debate focused on the discrimination provisions).

84. See Dubofsky, *supra* note 81, at 156.

85. *Id.* at 160–61.

86. *Id.* at 161.

87. John W. Mashek, *President Signs Civil Rights Bill; Pleads for Calm*, N.Y. TIMES, Apr. 12, 1968, at 1 (noting that the Act’s “major provision is intended to end racial discrimination in the sale and rental of [eighty percent] of the nation’s homes and apartments”).

88. 114 Cong. Rec. 2281 (1968) (statement of Senator Brooke).

Today’s Federal housing official commonly inveighs against the evils of ghetto life even as he pushes buttons that ratify their triumph—even as he OK’s public housing sites in the heart of the [African American] slums, releases planning and urban renewal funds to cities dead-set against integration, and approves the financing of suburban subdivisions from which [African-Americans] will be barred. These and similar acts are committed daily by officials who say they are unalterably opposed to segregation, and have the memos to prove it . . . . But when you ask one of these [HUD administrators] why, despite the 1962 fair housing order most public housing is still segregated, he invariably blames it on regional custom, local traditions, personal prejudices of municipal housing officials.

*Id.* Westchester officials used a similar tactic when confronted with their failure to locate housing projects outside primarily African-American neighborhoods: they pointed to the municipalities and claimed they had no authority over them to direct placement of the projects. See *supra* notes 16–17 and accompanying text (describing the reaction of Westchester officials); *infra* Part I.C.1 (discussing the relationship between HUD grantees and individual municipalities).

89. See Dubofsky, *supra* note 81, at 159 (noting the negotiating required to pass the FHA with virtually no explicit provisions for proactive desegregation).

90. 42 U.S.C. § 3608(e)(5) (2006).

duty consistent with the Act.<sup>91</sup> The next section will examine how the courts have interpreted this language.

## 2. Federal Courts and the AFFH Duties of § 3608(e)(5)

Federal courts have uniformly held that the AFFH requirement of § 3608(e)(5) is functional and not simply a “restate[ment of] HUD’s existing legal obligation.”<sup>92</sup> In *NAACP v. Secretary of Housing & Urban Development*,<sup>93</sup> the U.S. Court of Appeals for the First Circuit reasoned that statements of the FHA’s framers do not comport with the theory that the AFFH duty is simply a reiteration of the government’s Fifth Amendment Equal Protection obligation.<sup>94</sup> Interpreting the intent of Senator Brooke, the court noted that “a purpose of [the FHA] is to remedy the ‘weak intentions’ that have led to the federal government’s ‘sanctioning discrimination in housing throughout this Nation.’”<sup>95</sup> This court contrasted this idea with Senator Brooke’s point that the FHA “does not promise to end the ghetto . . . but it will make it possible for those who have the resources to escape.”<sup>96</sup> The court found that the purpose of the FHA “reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”<sup>97</sup>

The First Circuit went on to note that the plain meaning of “affirmatively to further” seemed to impose more on HUD than simply a prohibition on

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91. *See infra* Part I.B.2.

92. *See, e.g., NAACP v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 154 (1st Cir. 1987) (rejecting HUD’s argument “that § 3608(e)(5) imposes upon HUD only an obligation not to discriminate”); *Thompson v. U.S. Dept. of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 417 (D. Md. 2005) (stating that the duty holds HUD to a “high standard [and] in this case to have a commitment to desegregation”); *Project B.A.S.I.C. v. Kemp*, 776 F. Supp. 637, 642 (D. R.I. 1991) (noting that “while HUD has discretion in carrying out its duty, the duty itself is not discretionary” and must be exercised in favor of fair housing).

93. 817 F.2d 149 (1st Cir. 1987).

94. *See* U.S. CONST. amend. V; *NAACP*, 817 F.2d at 154. In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the U.S. Supreme Court reasoned that in light of the Equal Protection duty imposed upon the states, “it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.” *Id.* at 500. Thus, the Court extended Equal Protection duties to the federal government through the Due Process Clause of the Fifth Amendment. *Id.* Prior to the enactment of the FHA plaintiffs commonly used Equal Protection to prevent HUD and local housing authorities from placing housing projects in heavily nonwhite concentrated areas. *See, e.g., Gautreaux v. Chicago Hous. Auth.*, 265 F. Supp. 582, 583 (N.D. Ill. 1967) (holding that the plaintiffs “have the right under the Fourteenth Amendment to have sites selected for public housing projects without regard to the racial composition of either the surrounding neighborhood or of the projects themselves.”). It should be noted that the obligation under Equal Protection only goes so far as to say that HUD and local authorities cannot, as the defendants did in *Gautreaux*, intentionally build projects in areas of high racial concentrations. *See id.* at 583–84 (“A showing of affirmative discriminatory state action is required.”); *see also id.* (dismissing a claim that the Chicago Housing Authority violated its duty to select sites for public housing in a manner which would alleviate existing patterns of residential segregation).

95. *NAACP*, 817 F.2d at 154 (quoting 114 Cong. Rec. 2281 (1968) (statement of Sen. Brooke)).

96. *Id.* at 154 (quoting 114 Cong. Rec. 2281 (statement of Sen. Brooke)).

97. *Id.* at 155.

discrimination.<sup>98</sup> The court interpreted the words within the context in which they were written and the reality that discrimination had infiltrated all aspects of American life.<sup>99</sup> If the AFFH language was interpreted as merely imposing a prohibition of intentional discrimination on HUD, the court reasoned, then fair housing would not be “affirmatively furthered” with respect to private and institutional actors that significantly contribute to the working of the housing market.<sup>100</sup>

U.S. Supreme Court precedent supports the First Circuit’s interpretation of the underlying purpose of the FHA. The plaintiffs in *Trafficante v. Metropolitan Life Insurance*,<sup>101</sup> two current tenants of the apartment complex in question, alleged that the actions of the landlord had caused them to: (1) lose the social benefits of living in an integrated community, (2) miss out on business opportunities which would arise in an integrated environment, and (3) suffer embarrassment and economic damages from being stigmatized as living in a “white ghetto.”<sup>102</sup> In concluding that the current tenant-plaintiffs had standing under the FHA, the Court stated, “The person on the landlord’s blacklist is not the only victim of discriminatory housing practices; [so] is . . . ‘the whole community.’”<sup>103</sup> The Court reasoned that recognition of standing to a broad range of private actors under the act was consistent with Senator Mondale’s vision to move toward “truly integrated and balanced living patterns.”<sup>104</sup>

*a. Application of § 3608(e)(5) to HUD*

HUD has been found liable under § 3608(e)(5) in two distinct scenarios: (1) where HUD itself has failed in its AFFH duty<sup>105</sup> and (2) where HUD knows of a downstream failure by a grantee to comply with the FHA.<sup>106</sup>

In the 1970 decision *Shannon v. U.S. Department of Housing & Urban Development*,<sup>107</sup> the U.S. Court of Appeals for the Third Circuit became the first circuit court to hold HUD liable under theory (1).<sup>108</sup> The *Shannon* court explicitly stated that § 3608(e)(5) imparts a duty on HUD to consider the impact that a given project might have on an area’s concentration of

98. *Id.* at 154.

99. *See id.* at 155.

100. *Id.* at 154 (“[I]t is difficult to see how HUD’s own nondiscrimination *by itself* could significantly ‘further’ the ending of such discrimination.” (emphasis added)).

101. 409 U.S. 205 (1972).

102. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208, 211 (1972) (quoting Sen. Mondale).

103. *Id.* at 211 (quoting Sen. Jarvis).

104. *See id.* (citations and internal quotation marks omitted).

105. *See Glendale Neighborhood Ass’n v. Greensboro Hous. Auth.*, 901 F. Supp. 996, 1009 (M.D. N.C. 1995) (holding that HUD’s failure to follow site selection regulations is a violation of AFFH duty resulting in HUD’s liability).

106. *Anderson v. City of Alpharetta*, 737 F.2d 1530, 1536–37 (11th Cir. 1984) (noting that HUD can be held liable where HUD knows of a downstream failure but continues to fund the noncompliant grantee).

107. 436 F.2d 809 (3d Cir. 1970).

108. *Id.* at 822.

racial minorities.<sup>109</sup> More recently, in *Thompson v. U.S. Department of Housing & Urban Development*,<sup>110</sup> the U.S. District Court for the District of Maryland applied this principle to the entire city of Baltimore, which was heavily segregated and found that HUD had insufficiently considered “public housing opportunities beyond the City limits” of Baltimore.<sup>111</sup> The court focused the inquiry on whether the efforts were effective in “disestablishing segregation.”<sup>112</sup> Locating housing projects within Baltimore, an area that was heavily concentrated with a nonwhite population, did not fulfill HUD’s duty to “affirmatively further” fair housing.<sup>113</sup>

The second theory by which HUD can be held liable under § 3608(e)(5) is a situation in which HUD is “aware” of a grantee’s noncompliance with the Act and fails to terminate its funding.<sup>114</sup> In *Anderson v. City of Alpharetta*,<sup>115</sup> the plaintiffs unsuccessfully argued that HUD should be held liable for failing to prevent the municipal housing authority from acting in contravention of the AFFH requirement prior to HUD approval of the housing projects.<sup>116</sup> The court held that to hold HUD responsible in this failure to monitor-type claim HUD must be: (1) aware of the violation and (2) currently providing federal funds to the grantee.<sup>117</sup>

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109. *Id.* at 816. In response to *Shannon*, HUD developed site selection regulations that would ensure compliance with both the substantive and procedural requirements of the *Shannon* decision. See discussion *infra* Part I.C.1–2 (detailing the components of the Community Development Block Grant (CDBG) fund-granting mechanism such as the Consolidated Plan, various certifications of the grantee, and Analysis of Impediments).

110. 348 F. Supp. 2d 398, 450 (D. Md. 2005).

111. *Id.* at 450 (D. Md. 2005); *id.* at 408 (“The Court finds . . . that Plaintiffs have proven a statutory claim . . . with respect to HUD, and its failure adequately to consider a regional approach to desegregation of public housing . . .”).

112. *Id.* at 448. The court concluded that HUD defines the area in which it is appropriate to analyze potential remedial efforts as the “housing market area.” *Id.* The “housing market area” in turn is defined by a Metropolitan Statistical Area that includes the area within Baltimore City limits as well as surrounding municipalities. *Id.* at 503. The racial composition of the Baltimore City area was found to be sixty-four percent African American compared to the twenty-eight percent within the Metropolitan Statistical Area. *Id.* With knowledge of these facts, HUD located eighty-nine percent of the Metropolitan Statistical Area’s public housing within the City of Baltimore. *Id.* “As a result, Baltimore City has become a ‘regional magnet’ for families unable to afford housing . . .” *Id.* at 504.

113. *Id.* at 508; see *Shannon*, 436 F.2d at 811–14 (holding HUD liable for approving federal assistance for a public housing project without considering its effect: to force it into compliance with the Act by cutting off existing federal financial assistance).

114. See, e.g., *Anderson v. City of Alpharetta*, 737 F.2d 1530 (11th Cir. 1984); *Client’s Council v. Pierce*, 711 F.2d 1406 (8th Cir. 1983); *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971).

115. 737 F.2d 1530 (11th Cir. 1984).

116. *City of Alpharetta*, 737 F.2d at 1534–35.

117. *Id.* at 1537 (explaining that policy considerations support the rule of holding HUD liable for knowingly funding noncompliant grantees: “the termination of federal funds is virtually the only weapon available to HUD in its efforts to enforce” the FHA).

*b. Application of § 3608(e)(5) to Grantees*

In *Otero v. New York City Housing Authority*,<sup>118</sup> the U.S. Court of Appeals for the Second Circuit was confronted with a situation in which the New York City Housing Authority (the Authority) decided that white residents were needed in a federally funded housing project to prevent the racial composition from reaching a “tipping point” that would have caused the project’s racial composition to spiral to a completely segregated and all non-white state.<sup>119</sup>

The court found constitutional and statutory sources for the Authority’s obligation to “act affirmatively to achieve integration” and then approved the Authority’s strategy.<sup>120</sup> The Equal Protection Clause prohibits housing authorities from implementing a tenant assignment policy that assigns a tenant of a given race to an area for the very reason that the area is highly concentrated with the tenant’s race.<sup>121</sup> The court turned to § 3608(e)(5) of the Act for the Authority’s statutory obligation: “[a]ction must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation.”<sup>122</sup> Section 3608(e)(5) clearly states that the AFFH duty applies to the Secretary of HUD but the *Otero* court held that this duty also applies to “other agencies administering federally-assisted housing programs.”<sup>123</sup> Even after HUD transfers federal funds to the Authority, the statutory obligation to “affirmatively further” fair housing remains.<sup>124</sup>

3. Direct Challenge of AFFH Violations is Not Available

The enforcement provisions of the FHA provide three methods of enforcement: (1) suits by the Attorney General,<sup>125</sup> (2) administrative complaints to HUD,<sup>126</sup> and (3) court actions brought by private plaintiffs.<sup>127</sup> Provisions of the Act significantly limit the scope of each of the three

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118. 484 F.2d 1122 (2d Cir. 1973).

119. *Id.* at 1122–30.

120. *Id.* at 1133.

121. *Id.* (citing *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969)) (implying that the exclusion of the strategy overruled in *Gautreaux* indirectly channels a housing authority’s efforts toward integration by channeling racial minorities to low concentration areas).

122. *Id.* at 1134.

123. *Id.*; *see also* *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 73 (D. Mass. 2002) (extending the AFFH duty to a local housing authority).

When viewed in the larger context of [the FHA], the legislative history, and the case law, there is no way—at least, none that makes sense—to construe the boundary of the duty to affirmatively further fair housing as ending with the Secretary . . . [t]hese regulations unambiguously impose mandatory requirements on the [public housing authorities] not only to *certify* their compliance . . . but actually to *comply*.

*Id.* at 73, 75.

124. *See Otero*, 484 F.2d at 1134.

125. *See* 42 U.S.C. § 3614 (2006).

126. *See id.* § 3612.

127. *See id.* § 3613.

methods of enforcement.<sup>128</sup> Suits by the Attorney General are only allowed when the defendant engages in a “pattern or practice” of discrimination, or when the discrimination raises “an issue of general public importance.”<sup>129</sup>

The FHA enforcement scheme unsurprisingly aligns with the central focus of the Act: the prohibition of discrimination in housing markets.<sup>130</sup> Notably, there is not a statutory provision that provides direct enforcement of § 3608(e)(5).<sup>131</sup> The enforcement mechanism that does exist is derivative.<sup>132</sup> In *NAACP*,<sup>133</sup> for example, the First Circuit held that the Administrative Procedures Act (APA)<sup>134</sup> allows federal courts to review claims that the Secretary of HUD is not affirmatively furthering the purposes of the FHA.<sup>135</sup> The APA creates a presumption that final agency action and determinations of whether the agency action conforms with statutory obligations are judicially reviewable.<sup>136</sup> Therefore, any final agency action on the part of HUD, including approving the location of a housing project or providing funds to a grantee, is reviewable under the APA and § 3608(e)(5)’s AFFH obligations.<sup>137</sup>

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128. Eugene R. Gaetke & Robert G. Schwemm, *Government Lawyers and Their Private “Clients” Under the Fair Housing Act*, 65 GEO. WASH. L. REV. 329, 331–33 (1997).

129. 42 U.S.C. § 3613. This restriction positions the Attorney General as a “minimal” participant in the FHA enforcement scheme. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972). This minimal level of participation is evidenced by the fact that “in the seven years that preceded enactment of the [FHA], the Justice Department brought an average of only ten fair housing cases per year.” Gaetke & Schwemm, *supra* note 128, at 332.

130. See 42 U.S.C. § 3602(f) (defining “discriminatory housing practice” as “an act that is unlawful” under § 3604 (discrimination in the sale or rental of housing), § 3605 (discrimination in residential real estate-related transactions), § 3606 (discrimination in the provision of brokerage services), or § 3617 (interference, coercion, or intimidation); but not including failure to comply with § 3608(e)(5) as a “discriminatory housing practice”); Nat’l Comm’n of Fair Hous. & Equal Opportunity, Pub. Hearing at 4 (Sept. 22, 2008) (testimony of Michael Allen) (noting that the narrow definition of “discriminatory housing practice” in 42 U.S.C. § 3602 does not include “a failure to comply with the obligations of § 3608(e)(5)” and therefore prevents the AFFH obligation from being enforceable by private parties such as fair housing and community groups).

131. Robert G. Schwemm, *Discriminatory Housing Statements and 3604(c): A New Look at the Fair Housing Act’s Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 195 n.24 (2001) (“Claims based on § 3608 . . . are not covered by the FHA’s enforcement provisions and therefore must be brought pursuant to the Administrative Procedure Act.”).

132. See *supra* Introduction (describing the *Anti-Discrimination Center* action).

133. 817 F.2d 149 (1st Cir. 1987).

134. Administrative Procedures Act, 5 U.S.C. §§ 701–706.

135. *NAACP*, 817 F.2d at 151 (rejecting the district court’s finding that it could not legally review the claim the court wrote, “We believe . . . that the court has the power to review appellant’s claim that the Secretary has not ‘administer[ed]’ certain HUD programs ‘in a manner affirmatively to further’ the Act’s basic policy”).

136. *Id.* at 152 (“This ‘presumption’ of judicial reviewability, now codified in the [Administrative Procedure Act] applies not only to ‘[a]gency action made reviewable by statute,’ but also to any other ‘final agency action for which there is no other adequate remedy in a court . . . .’”).

137. See *id.* at 157.

The standard of review under the APA is extraordinarily deferential to HUD.<sup>138</sup> For example, HUD's decision to approve a subsidized housing project will be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>139</sup> The duty is "essentially procedural."<sup>140</sup> So long as HUD adheres to the "procedural" requirements of the Act and, in the case of housing project site selection, as long as HUD at least considers the relevant racial and environmental factors, the duty is met.<sup>141</sup> Furthermore, unlike the enforcement options available to individuals alleging discrimination under the FHA, aggrieved persons alleging § 3608(e)(5) violations cannot bring actions against HUD grantees.<sup>142</sup> The FHA's reliance on HUD to enforce the grantee's AFFH duties implicates HUD's granting mechanism. In the next section this Note focuses on the fund granting mechanism used in the Community

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138. See *supra* note 136 and accompanying text. The U.S. Supreme Court applied the "arbitrary and capricious" standard in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Commenting on how narrow the inquiry is, the Court stated:

To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

*Id.* at 416.

139. Administrative Procedures Act, 5 U.S.C. § 706(2)(A); see also *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 339 F.3d 702, 710, 712–13 (8th Cir. 2003) (holding "that HUD cannot be forced to require the City to comply with the certifications it made," but rejecting the district court's view that (1) the court has "little authority to direct an agency on exactly what to do, exactly how to do it, and exactly how to fund it," and (2) HUD's subjective belief that it "has taken all necessary steps to further fair housing" is enough to fulfill its AFFH duty); *Alschuler v. HUD*, 686 F.2d 472, 485 (7th Cir. 1982) (holding that HUD's analysis of the impact of a proposed project on the racial composition of the community was not "arbitrary and capricious" because HUD did not rely on a "materially distorted picture of the racial and economic balance of the relevant area"); *Bus. Ass'n of Univ. City v. Landrieu*, 660 F.2d 867, 875 (3d Cir. 1981) (holding that "[h]ousing decisions . . . require a subtle assessment of past and future housing trends" and the decision of whether or not to characterize the population of a proposed project as part of one neighborhood or the other in analyzing the impact on racial composition of the area is "clearly a judgment within the purview of informed administrative discretion"); *S.E. Chi. Comm'n v. HUD*, 488 F.2d 1119, 1131 (7th Cir. 1973) (holding that an extensive memorandum supporting HUD's strategy to integrate a community will not be found to be "arbitrary and capricious" decision made solely on the grounds that the strategy "bore some risk of failure").

140. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978) (holding that once an agency meets procedural requirements, the court cannot interject itself within the area of discretion of the executive). Cf. *Thompson v. U.S. Dep't. of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 421 (D. Md. 2005) (holding that while HUD analyzed the racial impact of housing projects the Department too narrowly circumscribed the potential solutions to the high nonwhite concentrations in Baltimore City).

141. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION DATABASE § 21:3 (2009).

142. Administrative Procedures Act, 5 U.S.C. § 701(1) (stating that the Administrative Procedures Act only applies to federal agencies).

Development Block Grant (CDBG) program, which is similar to the mechanisms used in each of HUD's fund granting programs.<sup>143</sup>

### C. Dispersal of HUD Funds

The dispersal of HUD funds is central to Anti-Discrimination-type actions. The FCA action is based on the complicated fund-granting mechanism and the requirement the grantees conduct an Analysis of Impediments that complies with HUD guidelines. The next section address this fund-granting mechanism.

#### 1. Community Development Block Grants

The CDBG program, representing about ten percent and \$3.9 billion of HUD's annual budget,<sup>144</sup> is designed as a flexible fund-granting mechanism that enables state and local governments to channel funds toward a number of eligible community development needs.<sup>145</sup> This flexibility is apparent when the range of projects and activities funded by CDBGs are examined. The most basic way CDBGs are used is to finance public facilities and improvements.<sup>146</sup> The funds also allow community-based organizations to deliver public services such as child day-care, adult literacy programs and assistance for the homeless.<sup>147</sup> A third category of CDBG fund use is economic development aimed at creating jobs for low or medium income persons.<sup>148</sup> While eligible uses are varied, HUD has developed specific procedures for granting funds and monitoring their implementation. Many of these procedures are designed to ensure that HUD and the grantees are in compliance with the FHA and CDBG regulations.

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143. U.S. DEP'T OF HOUS. & URBAN DEV., GUIDELINES FOR PREPARING CONSOLIDATED PLAN AND PERFORMANCE AND EVALUATION REPORT SUBMISSIONS FOR LOCAL JURISDICTIONS 1 (2009), [http://www.hud.gov/offices/cpd/about/conplan/toolsandguidance/guidance/pdf/local\\_guidelines\\_09-11.pdf](http://www.hud.gov/offices/cpd/about/conplan/toolsandguidance/guidance/pdf/local_guidelines_09-11.pdf) (last visited Nov. 11, 2010) [hereinafter GUIDELINES FOR PREPARING CONSOLIDATED PLAN] (listing the CDBG, HOME Investment Partnerships (HOME), Emergency Shelter Grant (ESG), and Housing Opportunities for Persons with AIDS (HOPWA) as four formula programs that use the Consolidated Plan to allocate funds).

144. HUD's FY 2010 BUDGET PROPOSAL, *supra* note 2, at 3 (showing the 2009 CDBG program expenditure to be \$3.9 billion).

145. *See Top to Bottom Review of the Three-Decades-Old Community Development Block Grant Program: Is the CDBG Program Still Targeting the Needs of Our Communities?: Hearings Before the Subcomm. on Federalism and the Census*, 109th Cong. 7–8 (2005) (statement of Roy A. Bernardi, Deputy Secretary, HUD) (“The CDBG program is the Federal Government’s largest single grant program to assist local jurisdictions in undertaking a variety of community development activities targeted to improving the lives of low and moderate-income Americans.”); U.S. DEP'T OF HOUS. & URBAN DEV., CDBG FORMULA TARGETING TO COMMUNITY DEVELOPMENT NEED iii (2005) [hereinafter CDBG FORMULA] (describing the primary objectives of the CDBG program); *Community Development Block Grant Program*, HUD, <http://www.hud.gov/offices/cpd/communitydevelopment/programs/> (last visited Nov. 11, 2010) (describing the CDBG program as a “flexible” funding source).

146. *See* GUIDELINES FOR PREPARING CONSOLIDATED PLAN, *supra* note 143, at 6.

147. *Id.*

148. *See id.* at 5.

State and local governments apply for CDBG funding by completing a Consolidated Plan.<sup>149</sup> The Consolidated Plan is an opportunity for the local jurisdiction to establish a “unified vision for community development actions” and provide evidence to HUD of the community’s compliance with various regulations, including the FHA’s AFFH requirement.<sup>150</sup> The Consolidated Plan requires communities to conduct an Analysis of Impediments (AI)—a comprehensive study of various impediments to fair housing—and to certify that the jurisdiction’s plans for the CDBG funds are compliant with the grantee’s AFFH duty.<sup>151</sup> The Consolidated Plan requirement and accompanying certification process is the key element of HUD’s AFFH enforcement scheme. If the community fails to submit the Plan or certify AFFH compliance, the jurisdiction will not receive federal funds.<sup>152</sup>

HUD prioritizes all state and local government CDBG requests using the CDBG Formula.<sup>153</sup> The formula incorporates the elements of community development listed in the CDBG statute, 42 U.S.C. § 5301, such as poverty, neighborhood blight, deteriorated housing, physical and economic distress, and isolation of income groups.<sup>154</sup> The formula aims to identify areas where the community development needs are greatest.<sup>155</sup>

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149. 24 C.F.R. § 91.2(a)(1) (2009) (listing the Consolidated Plan regulatory requirements); GUIDELINES FOR PREPARING CONSOLIDATED PLAN, *supra* note 143, at 1 (describing the Consolidated Plan as a “means to meet the submission requirements” for the CDBG program).

150. GUIDELINES FOR PREPARING CONSOLIDATED PLAN, *supra* note 143, at 1.

151. *Id.* at 25–26.

152. FAIR HOUSING PLANNING GUIDE, *supra* note 9, at i (describing the consolidated plan and the certification that communities will affirmatively further fair housing as “a condition of receiving Federal funds”).

153. CDBG FORMULA, *supra* note 145, at 1–3 (providing an introduction to HUD’s use of the CDBG formula).

154. 42 U.S.C. § 5301 (2006) (listing the community development objectives of the CDBG program).

155. CDBG FORMULA, *supra* note 145, at iii (explaining that Congress designed the formula to “provide larger grants to communities with relatively high community development need and smaller grants to communities with relatively low community development need”). The CDBG funds are divided into two pools: 70% is allocated to entitlement communities (defined as eligible metropolitan cities and counties) and 30% is allocated to states to serve non-entitled communities. *Id.* at vii. Two formulas are used to rate each recipient category. Formula A takes into account a given community’s metropolitan share of population (weighted at 25%); poverty (weighted at 50%); and overcrowding (weighted at 25%). *Id.* at vii, viii. Formula B takes into account a given community’s growth lag or the difference between the community’s actual growth and the growth it would have had if it grew as an average community did since 1960 (weighted at 20%); the community’s share of metropolitan area poverty (weighted at 30%); and the community’s share of pre-1940 housing (weighted at 50%). *Id.* at vii–viii. The community’s CDBG “need” is calculated by taking the higher (i.e. the score that would allocate more funds to the community) of the two scores and allocating based on that score. *Id.* The effectiveness of the CDBG formula in quantifying “need” in a way that does justice to the legislative intent of § 5301 has been questioned. *Id.* at 96 (concluding that “serious consideration should be given to changing the formula to improve its targeting [of community] need”).

## 2. Analysis of Impediments

The AI component of the Consolidated Plan and AFFH certification requires that grantees certify that they “will conduct an analysis to identify impediments to fair housing choice within the area, take appropriate actions to overcome the effects of any impediments . . . and maintain records reflecting the analysis.”<sup>156</sup> This requirement aligns the CDBG fund-granting mechanism with the federal court’s interpretation of HUD’s AFFH duty.<sup>157</sup> HUD has a duty to analyze the impact a housing project might have on the racial concentration of minorities in the community.<sup>158</sup> The AFFH language requires HUD to use its grant programs to move towards an ideal of “genuinely open housing.”<sup>159</sup> The AI requirement calls on the grantees, with intimate knowledge of their community, to detail all the impediments that have so far prevented the community from achieving “genuinely open housing.”<sup>160</sup>

HUD defines AI as a “review of impediments to fair housing choice in the public and private sector.”<sup>161</sup> “Impediments” are further defined as “any actions, omissions, or decisions taken because of race, color, religion, sex, disability, familial status, or national origin that restrict housing choices or the availability of housing choices.”<sup>162</sup> HUD’s regulations mandate that the AI be completed, kept on record and that the grantee certify the AI has been completed, but rarely audits the grantee’s AI to ensure that it sufficiently analyzed impediments.<sup>163</sup> Thus, grantees expend varying degrees of effort in fulfilling the AI requirement.

## 3. HUD Enforcement of § 3608(e)(5)

Numerous enforcement provisions of the FHA allow aggrieved parties to bring direct suits against those who intentionally discriminate in the housing markets.<sup>164</sup> The FHA’s AFFH duties lack a similar enforcement provision: parties must rely on derivative actions.<sup>165</sup> HUD’s AFFH duties can be enforced through the APA, but the extremely deferential “arbitrary and capricious” standard of review limits many potential causes of action

156. 24 C.F.R. § 91.425 (a)(1)(i) (2010); *see also id.* § 570.601(a)(2).

157. CDBG FORMULA, *supra* note 145, at 5.

158. *See* *Alschuler v. Dep’t. of Hous. & Urban Dev.*, 686 F.2d 472, 482 (7th Cir. 1982) (holding that HUD and HUD grantees have a duty to consider racial impediments to fair housing).

159. 114 CONG. REC. 2281 (1968) (statement of Sen. Brooke) (stating that the FHA reflects a “desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”)

160. *Id.*

161. FAIR HOUSING PLANNING GUIDE, *supra* note 9, at 4-4.

162. *Id.*

163. *See* CITY OF OAKLAND, CMTY. & ECON. DEV. AGENCY, FAIR HOUSING PLANNING: ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING 49–63 (2005) (detailing the racially segregated housing patterns in the City of Oakland).

164. *See, e.g.*, Fair Housing Act, 42 U.S.C. § 3613 (2006) (providing for private enforcement of prohibitions against “discriminatory housing practices”).

165. *See supra* Part I.B.

against HUD.<sup>166</sup> Municipal or state violation of AFFH duties can theoretically be challenged through a § 1983 action, but some courts are becoming reluctant to entertain claims based on § 3608(e)(5) against state or local government entities.<sup>167</sup> In light of these restrictions, enforcement of AFFH violations is left in the hands of HUD.<sup>168</sup>

Advocacy groups have noted that HUD has not “developed the enforcement tools or the political will to take on the powerful constituent groups, like mayors, governors and county executives who are the primary recipients of CDBG” funds.<sup>169</sup> The argument is that HUD, and its office of Community Planning and Development which oversees the CDBG program, views these elected officials as “[their] chief constituents.”<sup>170</sup> There is not any data available that would definitively prove that HUD is ineffective in enforcing the AFFH obligations of its grantees.<sup>171</sup> However, there is sufficient evidence that levels of segregation have only dissipated moderately since the enactment of the FHA in 1968.<sup>172</sup> There is also anecdotal evidence of HUD’s inability to effectively enforce the AFFH obligation. For example, consider HUD’s inaction with respect to Westchester during a seven-year false claims period. At a recent housing policy conference a “long-time HUD employee said he could think of only three instances over 20 years in which HUD” terminated CDBG funding for failure to comply with the AFFH duty.<sup>173</sup>

#### D. *The False Claims Act and Qui Tam Actions*

The FHA enforcement scheme was developed to complement the main thrust of the FHA: prohibition of discrimination. The AFFH requirement is the only desegregation provision in the Act and can only be enforced derivatively. HUD’s AFFH duties can be enforced through the APA, but the extremely deferential “arbitrary and capricious” standard of review limits many potential causes of action against HUD. These deficiencies in the FHA enforcement scheme motivated the Center to bring a *qui tam* action under the FCA. Part I.D.1 introduces the FCA and the legislative purpose behind the *qui tam* provision. Part I.D.2 connects the *qui tam* provisions to AFFH enforcement and explores a circuit split over whether Analysis of Impediments reports can be used as the basis for *qui tam* actions.

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166. See *supra* Part I.B.

167. NAT’L COMM’N ON FAIR HOUS. & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING 61 (2008) (making the case for a direct cause of action to enforce AFFH duties).

168. See *supra* note 106 (noting that HUD can be held liable if it knowingly funds a noncompliant grantee).

169. Allen, *supra* note 14, at 2.

170. *Id.* at 3.

171. *Id.*

172. See *infra* note 244 (noting the level of segregation present in Westchester).

173. Nat’l Comm’n of Fair Hous. & Equal Opportunity, Pub. Hearing at 4 (Sept. 22, 2008) (testimony of Michael Allen).

### 1. Historical Background of the False Claims Act

The first iteration of the FCA was signed into law by President Abraham Lincoln in 1863.<sup>174</sup> Congress hoped to reduce fraud on the part of military suppliers during the Civil War by creating a statutory right of recovery for fraudulent claims against the government.<sup>175</sup> The innovative mechanism used by Congress was a *qui tam* provision that allowed any individual<sup>176</sup> (known as the relator) to file a claim on behalf of the government and reap fifty percent of a recovery amount.<sup>177</sup> Recognizing the difficulty in maintaining perfect oversight in the administration of large federal government operations, the FCA took advantage of: (1) the knowledge of private individuals to detect fraud<sup>178</sup> and (2) the resources of the private citizen to bring the fraud in front of the court and follow it through until judgment.<sup>179</sup> “Lincoln’s law,” as the FCA was known to many, would prove to be only a temporary solution: it was heavy on the incentives, but light on a nuanced approach to balancing the incentives with limitations to counter parasitic action on the part of *qui tam* relators.<sup>180</sup> Two phases of amendments have honed “Lincoln’s law” into the modern FCA, which will be briefly discussed below.<sup>181</sup>

After years of relatively low government spending, the FCA emerged during the New Deal as a tool to prevent fraud in large-scale public works projects.<sup>182</sup> Soon after its reemergence, the FCA failed to serve its purpose when the Supreme Court, in *United States ex rel. Marcus v. Hess*,<sup>183</sup> upheld a parasitic claim based solely on an indictment previously filed by the government.<sup>184</sup> This type of action was antithetical to the purposes of the

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174. Act of March 2, 1863, 12 Stat. 696–699 (codified as amended at 31 U.S.C. §§ 3729–3733 (2006)).

175. *United States ex rel. Lissack v. Sakura Global Capital Mkts., Inc.*, 377 F.3d 145, 151 (2d Cir. 2004) (“Congress enacted the [FCA] in 1863 with the principal goal of stopping the massive frauds perpetrated by large private contractors during the Civil War.” (quoting Vt. Agency of Nat. Res. v. *United States ex rel. Stevens*, 529 U.S. 765, 781 (2000))).

176. The constitutionality of *qui tam* standing has been a topic of frequent scholarly discussion. See, e.g., J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 544 (2000) (noting the constitutional debate).

177. *Lissack*, 377 F.3d at 151.

178. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547 (1943) (“[O]ne of the chief purposes of the Act . . . was to stimulate action . . . and large rewards were offered to stimulate actions by private parties.”).

179. See Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 TENN. L. REV. 455, 458 (1998).

180. Gary W. Thompson, *A Critical Analysis of Restrictive Interpretation Under the False Claims Act’s Public Disclosure Bar: Reopening the Qui Tam Door*, 27 PUB. CONT. L.J. 669, 672–73 (1998).

181. See Meador & Warren, *supra* note 179, at 459–60 (noting that Congress amended the FCA once in 1943 and a second time in 1986).

182. See *id.* at 459.

183. 317 U.S. 537 (1943).

184. See *id.* at 542 (“We think the conduct of these respondents comes well within the prohibition of the statute, which includes ‘every person who . . . causes to be presented, for payment . . . any claim upon or against the Government of the United States . . . knowing such claim to be . . . fraudulent’ (quoting Act of March 2, 1863, 12 Stat. 696–99 (codified as amended at 31 U.S.C. §§ 3729–3733 (2006))).”)

Act because the private party did not expose information concerning a fraudulent claim, instead the party simply beat the government to the courthouse when the Department of Justice was already en route.<sup>185</sup> This type of claim is parasitic in the sense that the party bringing the claim attempts to siphon off a percentage of the government's claim without benefiting the government.<sup>186</sup> Congress reacted quickly to the apparent flaw in the functioning of President Lincoln's FCA and in 1943 amended the FCA to include a provision only allowing *qui tam* actions "based upon information, evidence and sources not in the possession . . . of the United States."<sup>187</sup>

In the years following the adoption of the 1943 FCA amendment, it became clear that the bar on information "in the possession of the United States" went too far.<sup>188</sup> It prevented private citizens from bringing a very useful set of actions in which the relator, through a *qui tam* suit, shows the government that information already in government hands amounts to fraud when the government otherwise would not have come to this conclusion.<sup>189</sup> The other problem created by the restriction was that it was very difficult for the private citizen to determine whether or not the information was "in the possession of the United States" prior to initiation of the suit.<sup>190</sup>

The pendulum of restrictions on *qui tam* actions swung back in 1986 and settled somewhere between the liberal provisions of "Lincoln's law" and the restrictive 1943 amendments.<sup>191</sup> The 1986 amendments repositioned Congress's attempt to block parasitic *qui tam* actions by shifting focus from whether the government was "in possession" of the information to whether the act was based upon information that was publicly disclosed.<sup>192</sup> Accordingly, the 1986 amendments added the following language to the FCA:

No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media, unless the action is brought by the Attorney General

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185. See *Marcus*, 317 U.S. at 537.

186. Thompson, *supra* note 180, at 697.

187. *Id.* at 676.

188. See *id.*

189. Act of December 23, 1943, 57 Stat. 608 (codified as amended at 31 U.S.C. §§ 3729–3733 (2006)).

190. See James Roy Moncus III, Note, *The Marriage of the False Claims Act and the Freedom of Information Act: Parasitic Potential or Positive Synergy?*, 55 VAND. L. REV. 1549, 1556 (2002).

191. United States *ex rel.* Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1154 (3d Cir. 1991) (noting that the intent of the 1986 amendments to the FCA was to "have the *qui tam* suit provision operate somewhere between the almost unrestrained permissiveness represented by the *Marcus* decision . . . and the restrictiveness of the post-1943 cases, which precluded suit even by original sources").

192. See *id.*

or the person bringing the action is an original source of the information.<sup>193</sup>

This provision, referred to as the FCA's public disclosure bar, more accurately pinpoints the parasitic *Marcus*-type action that Congress intended to discourage with the 1943 Amendments to the FCA.<sup>194</sup> What constitutes "public disclosure," and each of the enumerated forms of public disclosure such as "administrative report," has been contested.

The FCA imposes liability on any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval."<sup>195</sup> The FCA further defines "knowingly" as when a person "(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required."<sup>196</sup> Thus, the FCA requires mere "reckless disregard of the truth or falsity of the information" rather than the more stringent intent requirement of common law fraud.<sup>197</sup>

*Qui tam* actions are derivative in nature—the *qui tam* relator is suing on behalf of the government—and the procedural requirements of the FCA reflect a desire to balance the right of the U.S. Government to sue on the government's behalf with the right of the relator to bring information exposing fraud forward, initiate the action, and claim a portion of the recovery.<sup>198</sup> Under the *qui tam* provision of the FCA, "[a] person may

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193. The False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

194. See Moncus, *supra* note 190, at 1556–57 (describing the modern public disclosure bar).

195. 31 U.S.C. § 3729(a)(1).

196. 31 U.S.C. § 3729(b).

197. See Chen-Cheng Wang *ex rel.* United States v. FMC Corp., 975 F.2d 1412, 1420 (9th Cir. 1982) ("The [FCA's] scienter requirement is something less than that set out in the common law, where the words 'to defraud' commonly refer to wronging one in his property rights by dishonest methods or schemes, and usually signify the deprivation of something of value by trick, deceit, chicane or overreaching." (citation and internal quotation marks omitted)).

198. 31 U.S.C. § 3730(b) (stating that suits are brought in the name of the government); Thomas R. Lee, Comment, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543, 571 (1990) (describing the standing of *qui tam* relators as "derivative" and questioning the ability of *qui tam* relators to satisfy Article III standing requirements). The procedural requirements of a *qui tam* suit are, in many ways, analogous to the more common shareholder derivative suit. In shareholder derivative suits, the shareholder attempts to sue officers and directors of the corporation on behalf of the corporation itself. See Carol B. Swanson, *Juggling Shareholder Rights and Strike Suits in Derivative Litigation: The ALI Drops the Ball*, 77 MINN. L. REV. 1339, 1340 (1993) (describing shareholder derivative suits as permitting shareholders to sue "derivatively on their corporation's behalf"). The challenge for the courts is to balance the shareholder's right to sue with the board's right to manage the corporation—after all, the suit is being brought on behalf of the corporation. *Id.* (noting the conflict between permitting shareholders to champion their corporation's rights and the right of corporations to resolve internal conflicts without court intervention). Courts, namely the Delaware Chancery Court, have developed procedural rules that force the shareholder to either make a demand to the board of directors to bring the suit themselves or prove that such demand would be futile. See *id.* at 1343–53 (describing the shareholder demand requirement and the futility exception). The

bring a civil action for a violation of [the FCA] for the person and for the United States Government.”<sup>199</sup> “The action shall be brought in the name of the government.”<sup>200</sup> The FCA gives the United States the option to “either intervene and prosecute the action, or allow the original plaintiff—the *qui tam* relator—to proceed with the suit.”<sup>201</sup> The government has sixty days to investigate the matter and decide whether or not to intervene.<sup>202</sup> Even when the government opts not to intervene, the government retains an option to intervene at a later date.<sup>203</sup> Whether or not the government intervenes, “the relator is entitled to a portion of the proceeds if the prosecution is successful.”<sup>204</sup>

## 2. Interaction Between the Public Disclosure Bar and Freedom of Information Requests for Analysis of Impediments

As Parts I.B and I.C demonstrated, the AFFH duty imposed on HUD grantees is intimately connected to the grantee’s obligation to analyze impediments of fair housing. In *Anti-Discrimination Center*, for example, Westchester’s failure to analyze racial impediments was used as the basis for liability.<sup>205</sup> As was recognized in Part I.C.2, HUD relies on the grantee’s certification that a proper analysis was conducted and does not take possession of or audit the report.<sup>206</sup> One difficulty that relators, such as the Center, run into in bringing an *Anti-Discrimination Center*-type action is gaining access to the grantee’s AI report. The relator must gain access to the report to determine if the analysis was conducted properly, which often requires a state law freedom of information request such as the Center’s State of New York Freedom of Information Law (FOIL)

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demand requirement is similar to the FCA’s procedural requirements that allow the United States to intervene in *qui tam* actions if the government so desires. See 31 U.S.C. § 3730(b)(2).

199. 31 U.S.C. § 3730(b)(1).

200. *Id.*

201. *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1153 (2d Cir. 1993) (discussing the relationship between the relator and the government in *qui tam* actions).

202. 31 U.S.C. § 3730(b)(2).

203. *Id.* § 3730(c)(2)(D)(3). In fact, the government used this second intervention provision in *Anti-Discrimination Center* to intervene more than three years after the Center filed the original complaint. See *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y. v. Westchester Cnty.*, 495 F. Supp. 2d 375, 378 (S.D.N.Y. 2007) (noting that the United States had not yet intervened); *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, No. 06-cv-02860-DLC, 2009 U.S. Dist. LEXIS 35041, at \*1 (S.D.N.Y. Apr. 24, 2009) (noting that the United States intervened).

204. 31 U.S.C. § 3730(b)(2). The amount the relator receives varies between fifteen and twenty-five percent of all damages awarded. See *id.* § 3730(d). The damages awarded can be as much as three times the amount of the fraudulent claims. See *id.* § 3729(a) (stating that the false claimant is liable “for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages the Government sustains”).

205. *Anti-Discrimination Ctr.*, 2009 U.S. Dist. LEXIS 35041, at \*3 (stating that contrary to Westchester’s duty to conduct an AI, including racial impediments, Westchester failed to do so).

206. See *supra* notes 156–63 and accompanying text.

request.<sup>207</sup> The nature of this critical piece of evidence, and the means by which private parties gain access to it, interact with the unique nature of a *qui tam* action. The *qui tam* provisions of the FCA attempt to encourage private parties to ferret out fraud against the government while disincentivizing parasitic *Marcus*-type actions.<sup>208</sup> The public disclosure bar is the mechanism used to balance<sup>209</sup> these competing interests and circuit courts are divided on the issue of how the bar relates to state and municipal government reports garnered through FOIL-type requests.<sup>210</sup>

It is important to understand what issues are at play when the public disclosure bar is applied to state FOIL-type requests, as these same issues will be confronted by the next district court hearing an *Anti-Discrimination Center*-type action. The application of the disclosure bar is a three-pronged analysis. First, the court must determine whether the action is “based upon” a “public disclosure” of the wrongdoing.<sup>211</sup> Second, the court determines

207. See *supra* notes 156–63 and accompanying text.

208. See *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992) (noting that the 1986 amendments to the FCA “attempt to strike a balance between encouraging private citizens to expose fraud and avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of the fraud”).

209. *United States ex rel. Dunleavy v. Cnty. of Delaware*, 123 F.3d 734, 740 (3d Cir. 1997) (“[T]he 1986 amendments were an attempt to correct what Congress perceived as a century old imbalance between the under-deterrence of the original Act, which permitted ‘parasitic’ *qui tam* actions to be brought by individuals with no independent knowledge of fraud, and the over-deterrence of the 1943 amendments which denied jurisdiction over all *qui tam* actions ‘based on evidence or information the government had when the action was brought.’” (quoting 31 U.S.C. § 3730(b)(4) (1982) (superseded))).

210. *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, 495 F. Supp. 2d 375, 380 (S.D.N.Y. 2007) (noting that circuits are divided on the issue of whether state government reports, hearings, audits, and investigations are encompassed by the public disclosure bar of the FHA). Compare *Dunleavy*, 123 F.3d at 745 (holding that the FCA’s public disclosure bar does not prohibit actions based on “non-federal government sources”), and *United States ex rel. Schwedt v. Planning Research Corp.*, 39 F. Supp. 2d 28, 31–33 (D.D.C. 1999) (holding that an audit performed by an outside accounting firm for the federal government qualifies for the public disclosure bar), with *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 918 (9th Cir. 2006) (holding that state agency audit reports constitute public disclosures and are barred by the public disclosure bar), and *Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir. 2003) (rejecting the *Dunleavy* approach and concluding that compliance audits conducted by a state agency authorized to administer a cooperative federal/state program are “public disclosures”).

211. Although the determination of what amount of information is required to constitute “public disclosure” was not an important factor in *Anti-Discrimination Center*, it may be helpful to briefly explain the analysis. Many cases refer to a passage in the U.S. Court of Appeals for the District of Columbia Circuit case of *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994). The D.C. Circuit explained the leading theory on the issue as follows:

[I]f  $X + Y = Z$ ,  $Z$  represents the *allegation* of fraud and  $X$  and  $Y$  represent its essential elements. In order to disclose the fraudulent *transaction* publicly, the combination of  $X$  and  $Y$  must be revealed, from which readers or listeners may infer  $Z$ , *i.e.*, the conclusion that fraud has been committed.

*Id.* at 654; see, also *United States ex rel. Ondis v. City of Woonsocket*, 587 F.3d 49, 54 (1st Cir. 2009) (citing to, and following, the *Springfield Terminal* court’s description of the information required to constitute “public disclosure”). To infer that fraud has been committed ( $Z$ ), one needs knowledge of a misrepresented state of facts ( $X$ ) and a true state of facts ( $Y$ ). Unless the court finds disclosures of both the  $X$  and  $Y$  variables the fraud cannot

whether the mode of disclosure is enumerated in the statute.<sup>212</sup> In *Anti-Discrimination Center*-type actions, the question is whether the wrongdoing was disclosed as an “allegation[] or transaction[]” in an “*administrative*, or Government Accounting Office *report*, hearing, audit, or investigation.”<sup>213</sup> Third, if the court determines that the wrongdoing was publicly disclosed as an enumerated public disclosure, the relator must prove that she is the “original source” of the information.<sup>214</sup>

Circuit courts unanimously agree that freedom of information requests constitute a “public disclosure” within the meaning of the FCA *qui tam* provisions.<sup>215</sup> In a leading case, *United States ex rel. Mistick PBT v. Housing Authority of Pittsburgh*,<sup>216</sup> the Third Circuit considered whether an FCA action based upon letters sent to HUD and later obtained through a Freedom of Information Act (FOIA) request constituted “public disclosure” of the wrongdoing.<sup>217</sup> The court explained that the central purpose of FOIA is “to ensure that government activities are opened to the sharp eye of public scrutiny.”<sup>218</sup> Furthermore, the court noted that FOIA declares that “[e]ach agency shall make available to the public certain specified categories of information.”<sup>219</sup> Citing to the Supreme Court’s view that disclosure pursuant to a FOIA request constituted public disclosure within the meaning of the Consumer Products Safety Act,<sup>220</sup> the *Mistick PBT* court wrote “[w]e see no sound basis for construing ‘public disclosure’ any more narrowly” in the FCA context.<sup>221</sup> Applying *Mistick PBT* to the Center’s New York State FOIL request, Judge Denise L. Cote reasoned that the AI report was “publically disclosed” and qualified for the first prong of the FCA’s public disclosure bar.<sup>222</sup> A similar outcome is likely for the next *Anti-Discrimination Center*-type action.

Unlike the first prong, there is considerable disagreement among circuit courts as to how to apply the second, mode of disclosure, prong to

be considered publicly disclosed. *Dunleavy*, 123 F.3d at 741. This analysis can be thought of as complementing the analysis required to determine whether an alleged disclosure is a “public disclosure”. See *infra* notes 220–27 and accompanying text.

212. See 31 U.S.C. § 3730(e)(4)(A) (2006) (emphasis added).

213. *Id.* (emphasis added).

214. See *id.* (stating that the action is barred if disclosed by an enumerated mode of disclosure “unless the action is brought by the Attorney General or the person bringing the action is an original source of the information”).

215. Moncus, *supra* note 190, at 1581 (noting that the “courts of appeals have almost universally agreed,” but arguing that the logic of this interpretation is “incongruous with both the legislative and judicial history” of the FCA).

216. 186 F.3d 376 (3d Cir. 1999).

217. *Id.* at 379 (3d Cir. 1999) (explaining the factual background of the case).

218. *Id.* at 383 (quoting U.S. Dep’t of Justice v. Reporters Comm., 489 U.S. 749, 774 (1989)).

219. *Id.* (alteration in original) (quoting 5 U.S.C. §552(a)).

220. *Id.* (citing Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc., 447 U.S. 102 (1980)); see Consumer Product Safety Act, 15 U.S.C. §§ 2051–2084 (2006).

221. *Mistick*, 186 F.3d, at 383.

222. *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, 495 F. Supp. 2d 375, 383 (S.D.N.Y. 2007) (“In sum, although the Center’s claim is based on publicly disclosed information obtained through a FOIL request, the information was not obtained from a source enumerated in the Section 3730(e)(4)(A) jurisdictional bar.”)

information garnered via a freedom of information request from a state or municipal agency.<sup>223</sup> The conflict stems from ambiguity in the list used to enumerate modes of disclosure barred from FCA actions.<sup>224</sup> The FCA fails to distinguish between a state and federal modes of disclosures and leaves the courts with the responsibility of determining whether an enumerated mode of disclosure references state or federal “administrative . . . report, hearing, audit, or investigation.”<sup>225</sup> The ambiguity is magnified in *Anti-Discrimination Center*-type actions in which the state report is arguably “connected significantly to federal regulations and funds.”<sup>226</sup> Some circuit courts have argued that analysis of the modes of disclosure listed in § 3730(e)(4)(A), and specifically the words “congressional” and “Government Accounting Office,” are federal in nature and should lead to the inference that “federal” should also modify “administrative reports.”<sup>227</sup> Other courts rely more heavily on the purpose behind the public disclosure bar and view use of a state or municipal administrative report tied to a federal program to be more parasitic than beneficial.<sup>228</sup> The disagreement among circuit courts is central to the viability of the *qui tam* action in enforcing AFFH obligations against HUD grantees because if reports such as the AI report qualify for the public disclosure bar, the *qui tam* action will fail unless the relator can prove that she was an “original source.”<sup>229</sup> Part II.A will explore this conflict in more detail.

The third prong of the public disclosure bar is an exception to the general rule that public disclosure by way of an enumerated mode of disclosure is barred.<sup>230</sup> If the relator is an “original source” of the public disclosure, the suit is not barred.<sup>231</sup> The Act explicitly states that a relator is an “original source” if the relator (1) “has direct and independent knowledge of the information on which the allegations are based,” and (2) “has voluntarily provided the information to the Government before filing an action.”<sup>232</sup> Courts have interpreted “direct knowledge” to require a relator who bases her lawsuit on an enumerated public disclosure to have witnessed some aspect of the fraudulent activity—not simply to have collected the information from others.<sup>233</sup> “Independent knowledge” has been interpreted

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223. See *supra* note 210 and accompanying text.

224. See *supra* note 210 and accompanying text.

225. See 31 U.S.C. § 3730(e)(4)(A).

226. *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 918–19 (9th Cir. 2006) (holding that state reports “connected significantly to federal regulations and funds” constitute “administrative reports” and therefore cannot be used in conjunction with FCA claims).

227. See *United States ex rel. Dunleavy v. Cnty. of Delaware*, 123 F.3d 734, 745 (3d Cir. 1997) (applying the concept of *noscitur a sociis* or “a word is known by the company it keeps”).

228. See *Bly-Magee*, 470 F.3d at 918; *United States ex rel. Hays v. Hoffman*, 325 F.3d 982, 988–91 (8th Cir. 2003);

229. See 31 U.S.C. § 3730 (e)(4)(A).

230. *Id.*

231. *Id.*

232. *Id.* at § 3730(e)(4)(B).

233. Robert L. Vogel, *The Public Disclosure Bar Against Qui Tam Suits*, 24 PUB. CONT. L.J. 477, 502 (1995).

as a requirement that the relator have information “that was not derived from the public disclosure.”<sup>234</sup> Finally, the requirement that the relator voluntarily provide the information to the government has been interpreted to bar a relator from capitalizing on a situation in which she has been compelled to reveal the information.<sup>235</sup>

*E. Analyzing Anti-Discrimination Center as “Public Law” Litigation*

Part I.D discussed some of the practical concerns surrounding the use of *qui tam* to enforce AFFH obligations. Part I.E analogizes the Center’s use of *qui tam* to the paradigm of “public law” litigation detailed in Professor Chayes’ piece *The Role of the Judge in Public Law Litigation*<sup>236</sup> in hopes of finding a framework in which the viability of using *qui tam* to enforce a HUD grantee’s AFFH obligations can be measured. The discussion briefly turns back to the particulars of Anti-Discrimination Center as additional context is provided for presentation of the dispute as a means of enforcing civil rights and facilitating structural change. Part I.E.1 presents some of the issues relevant to achieving structural change within HUD. Part I.E.2 then goes on to explain why representation of the parties should not be taken for granted in “public law” litigation. Part I.E.3 introduces the problem of positively impacting segregation—actually achieving the goals of the FHA.

In *Anti-Discrimination Center*, the Center alleged that Westchester fraudulently asserted that it had conducted a sufficient AI, fulfilled its AFFH duty, and was in compliance with FHA. Using this theory, the Center requested that Westchester repay all the CDBG<sup>237</sup> funds received from HUD between the years 2000 and 2006.<sup>238</sup>

Initially, Westchester officials wrote the claim off, calling it “garbage.”<sup>239</sup> Westchester attempted to shift blame to the individual municipalities by asserting that it did not have power to influence the way

234. *Id.*

235. *Id.* at 503. Although Judge Cote did not find it necessary to analyze the third prong of the public disclosure bar, the third prong may provide relators, such as the Center, a way around a disadvantageous ruling under prong two. The Center arguably had direct and independent knowledge of where Westchester was channeling HUD funds, but it is unclear whether the court would require direct knowledge of the faulty AI report. *See infra* note 244 (describing Westchester’s failure to build subsidized housing across all municipalities).

236. Chayes, *supra* note 23.

237. The CDBG program was created with the enactment of the Housing and Community Development Act of 1974. 42 U.S.C. §§ 5301–5321 (2006). The program is designed to be flexible by providing communities with resources to “address a wide range of unique community development needs.” Community Development Block Grant Program, <http://www.hud.gov/offices/cpd/communitydevelopment/programs/>. The program provides funds to both local and state governments. *Id.*; *see supra* Part I.C.1 (describing the CDBG fund-granting mechanism in detail).

238. Complaint at 2, *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, 495 F. Supp. 2d 375 (S.D.N.Y. 2007) (No. 06-cv-2860-DLC) (claiming Westchester falsely represented compliance with the FHA and “improperly received more than \$45 million in federal funds”).

239. Sam Roberts, *Housing Accord in Westchester*, N.Y. TIMES, Aug. 11, 2009, at A1.

funds were spent by each municipality.<sup>240</sup> In papers filed before Judge Cote, Westchester moved to dismiss the claim. Latching on to one side of a circuit split, Westchester argued that FCA actions cannot be “based upon” a municipal report garnered through New York’s FOIL request.<sup>241</sup> On July 13, 2007, Judge Cote sided with the Third Circuit, among other circuits, in approving the use of a municipal report obtained through a FOIL request and denying Westchester’s motion to dismiss.<sup>242</sup> Upon completion of discovery, Judge Cote granted in part the Center’s motion for summary judgment, agreeing that there was no genuine issue of material fact that the County submitted false certifications as to its AFFH compliance.<sup>243</sup> Judge Cote found that during the seven-year false claims period, Westchester failed to consider race as an impediment to fair housing. This failure was an affront to explicit requirements of HUD and was astounding considering Westchester’s highly segregated geographic distribution of race. The failure to analyze race as an impediment resulted in Westchester placing nearly all of its housing units supported by CDBG funds within high minority concentration municipalities.<sup>244</sup> In response to these findings, on

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240. Fernanda Santos, *Judge Faults Westchester County on Desegregation Efforts*, N.Y. TIMES, Feb. 27, 2009, at A24 (“Westchester County officials contend that they have no legal authority to tell municipalities how to use their land. They have said they found reasonably priced land where developers could build lower-cost homes and then recommended to villages and towns how many each of them should have . . . .”); see *supra* Part I.C.1 (discussing the relationship between HUD grantees and individual municipalities).

241. Defendant’s Motion to Dismiss at 11, *Anti-Discrimination Center*, 495 F. Supp. 2d 375 (arguing that the approach used by the U.S. Court of Appeals for the Ninth Circuit, which would disallow use of state or municipal reports garnered through a freedom of information requests in FCA actions, should be adopted by the U.S. District Court for the Southern District of New York); see *generally* New York Freedom of Information Law, N.Y. Pub. Officers Law §§ 85–89 (McKinney 2008). The New York FOIL is patterned after the federal Freedom of Information Act, 5 U.S.C. § 552 (2006). Ralph J. Marino, *The New York Freedom of Information Law*, 43 FORDHAM L. REV. 83, 83 (1974). FOIA generally provides that any person has the right to request access to federal agency records or information. *Id.* FOIL picks up where FOIA leaves off and applies this general principal to State of New York agencies. See *id.*

242. *Anti-Discrimination Ctr.*, 495 F. Supp. 2d at 376 (holding that “a local government entity that certifies to the federal government that it will affirmatively further fair housing as a condition to its receipt of federal funds must consider the existence and impact of race discrimination on housing opportunities and choice in its jurisdiction”).

243. *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, 668 F. Supp. 2d 548, 562 (S.D.N.Y. 2009) (holding that Westchester fraudulently certified its actions since “there is simply no evidence that . . . the County[] . . . analyzed race-based impediments to fair housing”).

244. Plaintiff’s Initial Expert Report of Andrew Beveridge at 16, *Anti-Discrimination Ctr.*, 495 F. Supp. 2d 375 (describing the allocation of CDBG sponsored housing units in Westchester). During a ten-year period beginning in 1990, Westchester allocated 5000 housing units to be built but only 1639 of the allocated units were actually built. *Id.* at 13. In addition, there were 670 units built beyond allocated number in six communities. *Id.* The report observes:

When one looks at the racial composition of these three groups (“over allocation jurisdictions,” “under allocation jurisdictions,” and “zero unit jurisdictions”), the differences are stark: the “over allocation jurisdictions” were 24.2 percent non-Hispanic black, and 46.8 percent non-Hispanic white; the “under allocation jurisdiction” were 11.5 percent non-Hispanic black and 65.9 percent non-Hispanic

August 10, 2009, Westchester tacitly recognized its weak bargaining position and agreed to spend \$62.5 million to compensate HUD and the Center for the fraudulent assertions.<sup>245</sup>

The settlement reached between the Center, the United States, and Westchester involved more than a simple transfer of the CDBG funds acquired through false claims.<sup>246</sup> Westchester was facing upwards of a \$180 million penalty when the treble damages provision of the FCA is taken into account; which gave the Center and the United States significant bargaining power.<sup>247</sup> Westchester is “repaying” the government by building \$50 million of affordable housing and locating the housing in those municipalities with the lowest concentrations of African Americans and Latinos.<sup>248</sup> The settlement also includes a requirement that Westchester conduct a new AI to determine what impediments are impacting fair housing choice.<sup>249</sup> The settlement specifically states that barriers such as “race” and “municipal resistance” must be examined.<sup>250</sup> The court has appointed an independent monitor to ensure Westchester’s compliance with the settlement and has retained jurisdiction over the case.<sup>251</sup>

The purpose of the Anti-Discrimination Center action and the settlement reached between the government, the Center and Westchester can be divided into three related components: (1) affecting structural problems within HUD and Westchester, (2) providing sufficient representation of

white; and the “zero unit jurisdictions” were 2.5 percent non-Hispanic black, and 84.3 percent non-Hispanic white.

*Id.* at 14.

245. Stipulation and Order of Settlement and Dismissal at 37, *Anti-Discrimination Ctr.*, 668 F. Supp. 2d 548 (approving the settlement reached between the Center, the government, and the County).

246. *See id.* at 6 (“The County shall [construct at least 750 affordable housing units] solely through County funds, and not from any Federal, State, or other funding sources.”).

247. *See* False Claims Act, 31 U.S.C. § 3729(a) (2006) (describing the liability for submitting false claims as “a civil penalty of not less than \$5,000 and not more than \$10,000 . . . plus 3 times the amount of damages which the Government sustains”).

248. Stipulation and Order of Settlement and Dismissal at 6–7, *Anti-Discrimination Center*, 668 F. Supp. 2d 548 (mandating that no less than 630 of the housing units must be located in municipalities with fewer than three percent African American and Latino populations).

249. *Id.* at 25 (“The County shall complete, within one hundred twenty calendar days . . . an [AI] with the guidance in HUD’s Fair Housing Planning Guide . . .”).

250. *See id.* at 24–25 (mandating that Westchester review racial and ethnic barriers to fair housing).

251. *Id.* at 11 (“The Government, in its sole discretion but with input from the County, shall select a monitor to be appointed by the Court . . .”). It should be noted that the Center is already displeased with the performance of the monitor. *See Westchester Legislators Still Looking to Undercut Settlement Order*, ANTI-DISCRIMINATION CTR. (Nov. 30, 2009), <http://www.antibiaslaw.com/news/westchester-legislators-still-looking-undercut-settlement-order> (noting displeasure over an apparent meeting between the Monitor and officials from Westchester County municipalities). The Center quotes Westchester County Legislator Peter Harkham as stating “[i]t was an extremely positive exchange with Mr. Johnson where we had a frank discussion on implementation issues—especially the need for local workforce housing to get buy in from municipalities.” *Id.* The Center disagrees with the idea of getting “buy in” from the municipalities when an order was issued. *Id.* “A federal court order is not supposed to be some starting point in a continuing negotiation . . .” *Id.*

those negatively impacted by segregation, and (3) positively impacting the problem of segregation. It is unclear whether *Anti-Discrimination Center*-type actions achieve these purposes. To assist in answering this question, this Note turns to the concept of “public law” litigation.

Professor Chayes introduces the concept of “public law” litigation juxtaposing it against the traditional conception of adjudication.<sup>252</sup> Traditional litigation, or the “private law model,” “reflected the late nineteenth century vision of society, which assumed that the major social and economic arrangements would result from the activities of autonomous individuals.”<sup>253</sup> The role of the courts was not to impose on the interaction of the autonomous individuals, but simply to oversee the interactions and enforce remedies only when one party is entrenched in “universal attitudes” or norms.<sup>254</sup> One small step closer to the societal reach of “public law” litigation, traditional litigation clarified the law and shaped future behavior of similarly situated parties.<sup>255</sup> The position of the trial judge was subjugated to the point of “passivity” on three fronts: first, appellate courts were given heightened status in line with the idea that litigation was a way to clarify the law; second, because “the immediate impact of the judgment was confined to the parties”; and third, because there was a very limited conception of relief and a strong presumption for money damages.<sup>256</sup>

The “public law model” cuts against many of the characteristics aligned with the traditional conception of adjudication. *Gautreaux v. Chicago Housing Authority*<sup>257</sup> is a paradigmatic example of “public law” litigation in the context of housing segregation.<sup>258</sup> The plaintiffs, African-American tenants of and applicants for public housing, sued the Chicago Housing Authority (CHA) and HUD on behalf of all similarly situated parties and challenged the constitutional validity of the site selection policy used by CHA.<sup>259</sup> They claimed that CHA and HUD, in violation of 42 U.S.C. §§ 1983 and 1985, “intentionally chose sites for family public housing and adopted tenant assignment procedures . . . for the purpose of maintaining existing patterns of residential separation of races in Chicago.”<sup>260</sup> The U.S. District Court for the Northern District of Illinois dismissed HUD as a defendant, but granted the plaintiffs’ motion for summary judgment against

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252. See Chayes, *supra* note 23, at 1285.

253. *Id.*

254. *Id.* (noting that even *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), was viewed as “an outgrowth of the judicial duty to decide otherwise-existing private disputes”).

255. See *id.*

256. See *id.* at 1286–87.

257. 436 F.2d 306 (7th Cir. 1970).

258. *Id.* at 307–08 (describing the history of the litigation); see *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907, 914 (N.D. Ill. 1969) (finding CHA liable for intentional racial discrimination in public housing site selection); *Gautreaux v. Chicago Hous. Auth.*, 304 F. Supp. 736, 737 (N.D. Ill. 1969) (entering remedial order judgment), *aff’d*, *Gautreaux*, 436 F.2d at 313; see also Schuck, *supra* note 66, at 319 (noting that *Gautreaux* is one of only a few housing desegregation cases that has succeeded in moving a substantial number of blacks to previously white suburbs).

259. *Gautreaux*, 296 F. Supp. at 908.

260. *Id.*

CHA in February of 1969.<sup>261</sup> The court found that while CHA's selection was not "necessarily motivated by racial animus," "a deliberate policy to separate the races cannot be justified by the good intentions with which other laudable goals are pursued."<sup>262</sup> The court ordered that within twenty days the parties should formulate "a comprehensive plan to prohibit the future use and to remedy the past effects of CHA's unconstitutional site selection and tenant assignment procedures."<sup>263</sup>

Five months after the court ordered summary judgment on behalf of the plaintiffs, having conferred with both the plaintiffs and CHA, the court issued a judgment order.<sup>264</sup> The judgment required CHA to purchase and construct low-rise buildings and distribute them across all neighborhoods.<sup>265</sup> The order also included a requirement that CHA assign tenants of all races throughout Chicago neighborhoods in hopes of allowing African Americans to move into predominately white neighborhoods.<sup>266</sup> The judgment was met with significant "political resistance [which] impeded the program's implementation" and eighteen years after the initial judgment the court appointed a receiver to administer the order.<sup>267</sup>

Although HUD was dismissed by the trial court in 1969, the U.S. Court of Appeals for the Seventh Circuit decided that HUD was improperly dismissed as a defendant and was liable for the CHA-implemented site selection program.<sup>268</sup> The court ordered that HUD fund a program aimed at opening up housing barriers and allowing inner-city African Americans to move into neighborhoods outside of the Chicago city limits. HUD's appeal to the Supreme Court was denied. This marked the first time the Court upheld an interdistrict remedy in a segregation case.<sup>269</sup>

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261. *Gautreaux v. Romney*, 448 F.2d 731, 740 (7th Cir. 1971) (granting Plaintiff's motion for summary judgment), *aff'd*, *Hills v. Gautreaux*, 425 U.S. 284 (1976).

262. *Gautreaux*, 296 F. Supp. at 914. The CHA claimed that the 'racial character of the neighborhood' was never a factor in the selection of a suitable site. *Id.* at 914. Furthermore, they claimed that so called "White sites" had been selected at the initial stage of site selection and the eventual selection of sites in highly concentrated African American neighborhoods reflected the officials' intentions to further low cost housing in those neighborhoods and combat urban blight. *Id.*

263. *Id.*

264. *Gautreaux v. Chicago Hous. Auth.*, 304 F. Supp. 736, 737 (N.D. Ill. 1969).

265. *Id.* at 738-39 (stipulating that not more than one-third of the housing units be located in the "General Public Housing Area of the City of Chicago," defined as all areas with less than thirty percent non-white population).

266. *See id.* at 737-43.

267. Schuck, *supra* note 66, at 320 (discussing the history of the *Gautreaux* litigation).

268. *Gautreaux v. Romney*, 448 F.2d 731, 740 (7th Cir. 1971). Citing to *Cooper v. Aaron*, 358 U.S. 1, 78 (1958), the court reasoned that HUD's efforts to desegregate Chicago were equivalent to the local school board's efforts in *Aaron*. *Gautreaux*, 448 F.2d at 738. The school board in *Aaron* was held liable when it "abandoned [plans to desegregate the Little Rock, Arkansas schools] in the face of stiff community and state governmental resistance." *Id.* HUD was not absolved from liability because of similar "stiff community and state governmental resistance." *See id.* at 739-40 (holding the HUD Secretary liable).

269. *Hills v. Gautreaux*, 425 U.S. 284, 299 (1976) (holding that "[t]he relevant geographic area for purposes of the respondents' housing options is the Chicago housing market, not the Chicago city limits").

In contrast to the “private law model,” the role of the trial court in “public law” litigation, as is evident throughout the *Gautreaux* litigation, is elevated. The trial court does more than simply apply the law handed down by the appellate courts—it is the architect of a complicated remedial scheme. The *Gautreaux* litigation featured private parties suing on behalf of not only themselves but everyone else similarly situated.<sup>270</sup> The relief sought and received in *Gautreaux* did more than provide the plaintiffs and similarly situated parties with one-time compensation for past harms.<sup>271</sup> The *Gautreaux* litigation had the effect of restructuring the way CHA and HUD conduct housing programs.<sup>272</sup> The benefits are theoretically available to not only the plaintiffs and similarly situated parties today, but to all similarly situated parties in the future.

Professor Chayes acknowledged that the characteristics of “public law” litigation are far from static and that it is difficult to classify a given model in a bipolar public versus private dichotomy. However, Professor Chayes developed a list of characteristics that are often present in “public law” litigation:

- (1) The scope of the lawsuit is not exogenously given but is shaped primarily by the court and parties.
- (2) The party structure is not rigidly bilateral but sprawling and amorphous.
- (3) The fact inquiry is not historical and adjudicative but predictive and legislative.
- (4) Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees.
- (5) The remedy is not imposed but negotiated.
- (6) The decree does not terminate judicial involvement in the affair: its administration requires the continuing participation of the court.
- (7) The judge is not passive, his function limited to analysis and statement of governing legal rules; he is active, with responsibility not only for credible fact evaluation but for organizing and shaping litigation to ensure a just and viable outcome.
- (8) The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.<sup>273</sup>

It is not clear where *Anti-Discrimination Center*-type actions stand relative to Professor Chayes’ “public law” litigation paradigm. The average action brought under the *qui tam* provisions of the FCA has many components that fit squarely within the “private law” model. Putting aside the derivative component of *qui tam*, the action is very similar to common law fraud.<sup>274</sup> The government is simply seeking redress for a wrong

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270. See *supra* note 259 and accompanying text.

271. See Schuck, *supra* note 66, at 319–21.

272. *Id.* at 321.

273. Chayes, *supra* note 23, at 1302.

274. See *supra* note 197 and accompanying text (comparing an action under the FCA to common law fraud).

committed in a private contractual dealing.<sup>275</sup> The action has nothing to do with *restructuring* social institutions; in fact, it is the preeminent social institution itself, the federal government, seeking redress.<sup>276</sup> Additionally, the redress sought is purely monetary: the government seeks compensation from the fraudulent party in an amount three times more than the damage caused by the fraudulent act.<sup>277</sup> The trial judge is subjugated to a role of applying the law handed down to her from the appellate courts: she simply types the damages figure the jury comes up with into a calculator and multiplies by three.

The *Anti-Discrimination Center*-type action is not the average action brought under the *qui tam* provisions of the FCA.<sup>278</sup> Although the claim was brought under the pretext of a *qui tam* claim, the Center was only incidentally concerned with (1) being rewarded under relator compensation provisions of the FCA and (2) returning money to the government.<sup>279</sup> The Center brought the action as a way of achieving redress for all citizens of Westchester—especially those who had not been given access to fair housing.<sup>280</sup> The treble damages provisions of the FCA motivated Westchester to settle with the United States and the Center.<sup>281</sup> This allowed the United States and the Center to negotiate a settlement that included strict requirements that Westchester comply with their AFFH duties.<sup>282</sup> Judge Cote was not relegated to applying law but was involved in approving the complex settlement.<sup>283</sup> Depending on its success, the settlement could improve life for residents in Westchester.<sup>284</sup> Furthermore, the suit brought by the Center had a governmental restructuring component and is likely to have effects on the way HUD and Westchester conduct their affairs.<sup>285</sup>

It is clear that *Anti-Discrimination Center*-type actions have many characteristics that fit within the “public law” litigation paradigm. In order to determine how successful the Center’s action, and future *Anti-Discrimination Center*-type actions, might be at improving conditions for Westchester residents, remedying the problem of residential segregation, and restructuring institutional players such as Westchester and HUD, this

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275. See *supra* notes 5, 198 (explaining the basic components of a *qui tam* suit).

276. See *supra* note 198 and accompanying text (stating that *qui tam* actions are derivative in nature and the relator is suing on behalf of the government).

277. See *supra* note 247 and accompanying text (explaining the FCA’s treble damages provision).

278. See *supra* note 6 (describing a more typical *qui tam* action in which the government recovered money damages from individuals caught in a tax evasion scheme).

279. See Allen, *supra* note 14, at 3 (describing his firm’s action against Westchester as desegregation litigation).

280. See *id.*

281. See Joseph Berger, *In Westchester, an Open Plea to Accept a Housing Accord*, N.Y. TIMES, Aug. 17, 2009, available at <http://www.nytimes.com/2009/08/18/nyregion/18spano.html> (stating that members of the Westchester legislature “believed they had no choice because penalties for not approving it would amount to \$180 million”).

282. See *supra* notes 246–51 (describing the settlement).

283. See *supra* notes 246–51 (describing the settlement).

284. See *supra* note 244 (describing segregated conditions prior to the settlement).

285. See *supra* note 172 and accompanying text.

Note turns to some of the criticisms of the public law model and determines how *Anti-Discrimination Center*-type actions stand up to the criticism.

### 1. Solving Structural Problems Within HUD and Municipalities

The settlement in *Anti-Discrimination Center* has elements of a structural remedy.<sup>286</sup> Through the *qui tam* settlement, the United States and the Center have changed the relationship between Westchester and HUD. Arguably, the *Anti-Discrimination Center* action, along with the settlement, has changed the relationship between HUD and all CDBG grantees. There has been much ink spilled on whether this type of judicial action is proper<sup>287</sup> or whether judicial action in this area is effective at restructuring executive agencies and the like.<sup>288</sup> *Qui tam* does not bring too much new to the table in terms of whether judicial action in this area is proper. But as part of the discussion in Part II.B and III.B, we will examine the effectiveness of judicial action and determine whether some of the unique qualities of the *qui tam* suit have a positive or negative effect on the viability of the *qui tam* action to provide structural change in institutions.<sup>289</sup>

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286. See Owen M. Fiss, *The Supreme Court 1978 Term*, 93 HARV. L. REV. 1, 19 (1979) (defining a “structural suit” as “one in which a judge, confronting a state bureaucracy over values of constitutional dimension, undertakes to restructure the organization to eliminate a threat to those values posed by the present institutional arrangements”); Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It’s Still Moving!*, 58 U. MIAMI L. REV. 143, 144 (2003) (identifying “structural reform injunctions” as injunctions that “enjoin[] the defendant institution from acting in a particular unconstitutional fashion [and] order[] forward-looking, affirmative steps to prevent future deprivations”).

287. See, e.g., OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 1307 (1978) (noting the separation of powers argument against judicial structural reform but concluding “it has always been hard to classify all government activity into three, and only three, neat and mutually exclusive categories”).

288. Compare FISS, *supra* note 287, at 90 (“The average judge turned out to be more heroic than the average legislator.”), with Gilles, *supra* note 286, at 146 n.16 (noting that extra-legal “discomfort with the role of the judge is most evident in legislation that aims to limit the ability of litigants to bring claims seeking structural relief”). It could be argued that the failure of Congress to include a direct remedy for violations of AFFH duties reflected “discomfort” on the part of Congress that parties such as the Center would bring actions such as *Anti-Discrimination Center*. See *supra* Part I.B.3 (stating that there is no direct action available to enforce AFFH obligations).

289. After a flood of structural reform litigation following *Brown v. Board of Education*, 347 U.S. 483 (1954), the Supreme Court has become increasingly hostile to structural reform and injunctions. See Gilles, *supra* note 286, at 145 (acknowledging a decrease in structural injunctions being brought). This point is contrasted by a reality described by Professor Myriam Gilles of Cardozo School of Law, “There continue to exist sufficiently egregious, systemic constitutional issues that inspire (or could inspire) the requisite breadth of support and depth of reformist zeal to motor the machinery of the structural reform injunction.” *Id.*; see also Myriam Gilles, *Representational Standing: United States ex rel. Stevens and the Future of Public Law Litigation*, 89 CAL. L. REV. 315, 316 (2001) (noting that the decision “marks a radical reconfiguration of the landscape facing legislators seeking to vest private actors with standing to enforce federal laws”). Professor Gilles would likely agree that this point also applies to statutory civil rights such as AFFH duties. Thus, it could be argued that the *Anti-Discrimination Center* action acts as an expansion of the standing requirement, which allowed the Center to get around artificially strict standing rules.

## 2. Representation of the Parties

In an article entitled *The Supreme Court 1978 Term*,<sup>290</sup> Yale Law School Professor Owen Fiss remarked, “[o]nce we take the group perspective on the victim, it also becomes clear that the spokesman need not—indeed cannot—be the victim.”<sup>291</sup> Professor Fiss touches on a key point: in public law litigation the party structure is “sprawling and amorphous”—the plaintiffs are those before the court, those similarly situated, and those who will be similarly situated in the future.<sup>292</sup> Furthermore, an individual victim may not want to come forward, as they are in “such a vulnerable position.”<sup>293</sup> There are problems of representation in “public law” litigation and Fiss remarks that “[a]s an affirmative matter this means that the court must determine whether the interests of the victim group are adequately represented.”<sup>294</sup> This potential problem for public law must be examined in the *qui tam* context because the next relator might seize the chance to bring home their share of the reward and not care about enforcing the AFFH duties.<sup>295</sup> This issue will be discussed in Parts II.B and III.B.

## 3. Positively Impacting the Problem of Segregation

As discussed in Part I.A.2, housing markets are complicated organisms that have developed powers to remain segregated despite prohibition of discrimination and very slight racial preferences.<sup>296</sup> In a piece entitled *Judging Remedies: Judicial Approaches to Housing Segregation*,<sup>297</sup> Yale Law School Professor Peter Schuck explores the interaction between the complexity of the housing market and judicial efforts to desegregate communities.<sup>298</sup> In analyzing the successes and failures of three prominent housing desegregation cases, including the previously mentioned *Gautreaux* case, Schuck made four principal observations: (1) the housing market’s “persuasive influence over housing choices” often “constrains” and “distorts” attempts by the government and judiciary to influence the choices,<sup>299</sup> (2) “a ubiquitous classism rejects the idea that people should have a right to live in a neighborhood they cannot afford,” (3) “politically mobilized communities strongly oppose the kinds of diversity the courts have mandated,” and (4) “courts possess only the crudest, most limited

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290. 93 HARV. L. REV. 1 (1979).

291. Fiss, *supra* note 286, at 19.

292. *See* Chayes, *supra* note 23, at 1302.

293. *See* Fiss, *supra* note 286, at 20.

294. *See id.*

295. *See supra* notes 198–204 and accompanying text (discussing the derivative nature of the *qui tam* suit).

296. Schuck, *supra* note 66, at 366; *see also supra* Part I.A.2 (describing two theories that may explain the staying power of residential segregation).

297. 37 HARV. C.R.-C.L. L. REV. 289 (2002).

298. Schuck, *supra* note 66, at 289 (discussing “how the law has defined and handled the goal of residential diversity”).

299. *See supra* notes 54–71 (discussing two ways the housing markets distort governmental intervention).

tools for [creating] diversity amid these obstacles.”<sup>300</sup> Schuck found that when courts use “command-and-control” approaches in which they order very specific decrees and are not reticent to the very political nature of their entrenchment into the housing market, they are often met with hostility and are not successful in desegregating the community.<sup>301</sup> When courts impose their will on a community without recognizing the strong backlash that this is likely to create, the remedy often fails to improve conditions in the community. Although Schuck focuses on remedy, this theory is applicable to the question of whether *qui tam* and enforcement of AFFH duties will succeed in positively impacting the problem of residential segregation—to be discussed further in Parts III and IV.

## II. DISSECTING THE CIRCUIT SPLIT: ARE *QUI TAM* ACTIONS BASED ON STATE OR MUNICIPAL “ADMINISTRATIVE REPORTS” BARRED?

Part I framed the problem of residential segregation and introduced the main tool used to combat segregation’s continued existence—AFFH duties imposed on HUD and HUD grantees. Especially pertinent to the subjects to which the Note now turns, Part I.D presented a circuit split that has the potential to decrease the applicability of *qui tam* actions to enforce AFFH duties. Part II analyzes each side of this conflict.

*Anti-Discrimination Center*-type actions function at the crossroad of two complicated statutory schemes.<sup>302</sup> Along one axis of this crossroads, a combination of the FHA and regulations imposed by HUD, requires HUD grantees to conduct an AI to fair housing, to analyze the impact of racial impediments, and finally to certify that this analysis has been conducted in compliance with HUD regulations as a precondition of receiving funds.<sup>303</sup> Along the other axis, the *qui tam* provisions of the FCA attempt to filter out parasitic actions brought by opportunistic relators. In order for an *Anti-Discrimination Center*-type action to succeed, the relator must avoid the public disclosure bar by successfully arguing that the AI report garnered through a FOIA-type request is not an “administrative report” under prong two of the public disclosure analysis or, alternatively, argue that the relator is an “original source” under prong three.<sup>304</sup>

This section will examine three approaches taken in interpreting prong two and the application of the meaning of “administrative report” to a state or municipal report such as an AI report. The Third Circuit has held that a state or municipal report garnered through a FOIA-type request is not an “administrative report” because § 3730(e)(4)(A) provides a narrow

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300. Schuck, *supra* note 66, at 366.

301. *Id.* at 368 (noting a judge’s “use [of a] simple dualistic categories to explain complex phenomena” and the resulting failure to integrate the community).

302. See Fair Housing Act, 42 U.S.C. §§ 3601-3608 (2006); False Claims Act, 31 U.S.C. §§ 3729-3733.

303. FAIR HOUSING PLANNING GUIDE, *supra* note 9, at i-iii (describing the consolidated plan and the certification that communities will affirmatively further fair housing as “a condition of receiving Federal funds”).

304. See *supra* notes 215-22 and accompanying text.

definition of the bar and such a reading is consistent with the “purpose and tenor” of the 1986 Amendments.<sup>305</sup> The Eighth Circuit, in finding that reports garnered through FOIA-type requests are “administrative reports,” argues that the Third Circuit approach leads to “anomalous” results.<sup>306</sup> The Ninth Circuit sides with the Eighth Circuit and finds that the state/federal distinction advanced by the Third Circuit is inconsistent with Ninth Circuit precedent and legislative intent behind the FCA.<sup>307</sup>

#### A. *The Third Circuit Approach*

The Third Circuit was the first of the three circuit courts to weigh in on the issue with its ruling in *United States ex rel. Dunleavy v. County of Delaware*.<sup>308</sup> Dunleavy, the relator, claimed that an agreement between the County of Delaware (the County) and the federal government required the County to follow certain HUD regulations that limited the ways in which the County could spend HUD funds and imposed a requirement to submit an annual Grantee Performance Report (GPR) to HUD.<sup>309</sup> He further alleged that the County violated this agreement when it acquired a tract of land with HUD funds that was not eligible to be purchased under the agreement.<sup>310</sup> Dunleavy claimed that this action triggered the reporting requirement provisions of the agreement: when the County failed to report the purchase and return the HUD funds, it effectively fraudulently accepted the funds from the government.<sup>311</sup> The County countered that the facts of this purchase were not only “publicly disclosed” under the first prong of the public disclosure bar analysis, but were also disclosed, under prong two, through an enumerated mode of disclosure—an “administrative report.”<sup>312</sup> The disclosure occurred in a GPR that the County was required to submit to HUD as part of the reporting scheme mandated in the agreement between the County and HUD.<sup>313</sup> The report was fraudulent because it contained the misrepresented state of facts: non-disclosure of the impermissible purchase of the tract of land.<sup>314</sup> The Third Circuit used four theories to support its finding that the GPR is not an “administrative report” as used in § 3730(e)(4)(A).

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305. *See infra* notes 308–46 and accompanying text.

306. *See infra* notes 347–68 and accompanying text.

307. *See infra* notes 357–73 and accompanying text.

308. *See United States ex rel. Dunleavy v. Cnty of Del.*, 123 F.3d 734, 745–46 (3d Cir. 1997) (holding that a county report is not an “administrative report” as used in § 3730(e)(4)(A), but not citing to any precedent on this point).

309. *Id.* at 735–36.

310. *Id.*

311. *Id.* at 736–37.

312. *Id.* at 743–44.

313. *Id.* at 735–36.

314. *Id.* at 743.

### 1. Section 3730(e)(4)(A) as an Exhaustive List

There is circuit court precedent for the proposition that the list of enumerated sources in § 3730(e)(4)(A) is exhaustive.<sup>315</sup> The Third Circuit argued that construction of the list, and more specifically the fact that Congress did not qualify the list through the use of “such as” or “for example,” allows the inference that the list is exhaustive.<sup>316</sup> The court used the exclusive character of the list to transition to more specific arguments for a narrow definition of administrative reports: “[t]he only way to bring the GPR, prepared by the County, with, the language of § 3730(e)(4)(A) is for the GPR to be considered an ‘administrative . . . report.’”<sup>317</sup>

After deciding that the public disclosure bar only applies to those modes of disclosure that are enumerated in § 3730(e)(4)(A), the court turned to how to interpret “administrative report” as used in § 3730(e)(4)(A).

### 2. Doctrine of *Noscitur a Sociis*

The unqualified use of “administrative reports” in § 3730(e)(4)(A) makes it difficult to determine the intentions of Congress.<sup>318</sup> The court points out that Congress has “provided no clear legislative intent or meaning for it in the FCA.”<sup>319</sup> There are no distinctions between federal and state administrative reports in the statute.<sup>320</sup> In some of these circumstances, where a “word [is] usable in many contexts and with various shades of meaning,” the Supreme Court has turned to the doctrine of *noscitur a sociis*.<sup>321</sup> The doctrine allows the meaning of a given word to be enhanced by the surrounding words.<sup>322</sup> For example, in *Jarecki v. G. D. Searle & Co.*,<sup>323</sup> the Supreme Court used the doctrine to determine what an otherwise ambiguous use of “discovery” meant within the context of a tax statute.<sup>324</sup>

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315. *Cf.* United States *ex rel.* Fine v. Sandia Corp., 70 F.3d 568, 571 (10th Cir. 1995) (noting that the enumerated modes of disclosure in § 3730(e)(4)(A) are the only modes that trigger the public disclosure bar); United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318, 323 (2d Cir. 1992) (arguing that the list in § 3730(e)(4)(A) is exclusive); United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1499 (11th Cir. 1991) (noting the absence of the words “such as” or “for example” and arguing that there is nothing to “indicate that [the enumerated modes] are only examples of the types of ‘public disclosure’ to which the jurisdictional bar would apply”); United States *ex rel.* LeBlanc v. Raytheon Co., Inc., 913 F.2d 17, 20 (1st Cir. 1990) (rejecting the district court’s argument that § 3730(e)(4)(A) denies jurisdiction over “actions based on disclosures other than those specified”).

316. *See Dunleavy*, 123 F.3d at 744 (quoting *Williams*, 931 F.2d at 1499–1500).

317. *Id.* (omission in original).

318. *Id.* at 745.

319. *Id.*

320. *See, e.g.*, United States v. Williams, 128 S.Ct. 1830, 1839 (2008) (applying “the common sense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated”); Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 596 (2004) (remarking that interpretation of a single word is not a process by which an abstract meaning of the word is sought; instead, “we are seeking the meaning of the whole phrase”).

321. *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961).

322. *Id.* (stating that “a word is known by the company it keeps”).

323. 367 U.S. 303 (1961).

324. *Id.* at 306–07.

The Court used the entire list found in the tax statute—“exploration,” “discovery,” and “prospecting”—to come to the conclusion that “discovery” only applies to “discovery” of oil, gas, and mineral resources.<sup>325</sup>

The Third Circuit applied this doctrine to the “administrative report” as used in § 3730(e)(4)(A): “criminal, civil, or administrative hearing, in a congressional, *administrative*, or Government Accounting Office *report*, hearing, audit, or investigation, or from the news media.”<sup>326</sup> Focusing on the statute’s reference to Congress and “Government Accounting Office,” the court noted that both referents are entities of the federal government.<sup>327</sup> The court found “it hard to believe that the drafters of this provision intended the word ‘administrative’ to refer to both state and federal reports when it lies sandwiched between *modifiers* which are unquestionably federal in character.”<sup>328</sup> Of course, the bread of the Third Circuit’s “sandwich” can only be considered to be a modifier when the doctrine of *noscitur a sociis* is applied, which is not something other circuits are comfortable doing.<sup>329</sup>

Application of *noscitur a sociis* allowed the Third Circuit to conclude that § 3730(e)(4)(A) only implicated federal “administrative reports.”<sup>330</sup> Since the GPR was “prepared by” the County, the court concluded that it did not come within the meaning of federal “administrative reports.”<sup>331</sup> It is true that the report was “prepared by” the County, but it was prepared *for* the federal government.<sup>332</sup> This second point is not mentioned in the opinion, but is highlighted by both the Eighth and Ninth Circuits.<sup>333</sup>

### 3. “Information Dynamic”<sup>334</sup>

In addition to using statutory interpretation, the Third Circuit found functional support for the distinction between federal and state administrative reports. The FCA was designed as a tool to ferret out fraud against the government.<sup>335</sup> The *qui tam* provisions reflect a view that the

325. *Id.* at 306–12.

326. False Claims Act, 31 U.S.C. § 3730(e)(4)(A) (2006) (emphasis added).

327. *See* United States *ex rel.* Dunleavy v. Cnty. of Del., 123 F.3d 734, 745 (3d Cir. 1997).

328. *Id.* (emphasis added).

329. *See, e.g.,* United States *ex rel.* Hays v. Hoffman, 325 F.3d 982, 988 (8th Cir. 2003) (“We reject the Third Circuit’s textual approach and conclude that Medicaid compliance audits and audit reports conducted and prepared by the state agency authorized to administer this cooperative federal/state program are public disclosures within the meaning of § 3730(e)(4)(A).”).

330. *See* Dunleavy, 123 F.3d at 745.

331. *Id.*

332. *See supra* note 309 and accompanying text.

333. United States *ex rel.* Bly-Magee v. Premo, 470 F.3d 914, 917–18 (9th Cir. 2006); *see* Hays, 325 F.3d at 988.

334. Dunleavy, 123 F.3d at 745 (3d Cir. 1997).

335. *See supra* notes 177–82 and accompanying text (describing the reason Congress enacted the FCA).

government has imperfect information on where the fraud is occurring.<sup>336</sup> Furthermore, in a situation such as *Dunleavy*, where the party accused of the fraud is required to submit reports to the government, the reports “have been compiled and produced by a party whose principal motivation (assuming the truth of the fraud claim) is the elimination of the paper trail.”<sup>337</sup> The court inferred from the general purpose of the FCA that this was a case where Congress would want to allow the *qui tam* action.<sup>338</sup> The court did not want to create a scenario in which entities that enter into contracts with the government could effectively absolve themselves from FCA repercussions by submitting false reports to the government.<sup>339</sup>

#### 4. The “Purpose and Tenor” of the 1986 Amendments<sup>340</sup>

The FCA has been through two major revisions since its enactment in 1863.<sup>341</sup> Each revision was an attempt by Congress to find the right balance between incentivizing beneficial relators and discouraging opportunistic relators.<sup>342</sup> The 1986 amendments reflected Congress’s view that the 1943 amendments instituted a version of the public disclosure bar that prevented too many beneficial *qui tam* suits from being initiated.<sup>343</sup> Prior to the 1986 amendments, the standard barred *qui tam* suits “based upon evidence or information in the possession of the United States.”<sup>344</sup> The *Dunleavy* court reasoned that barring *qui tam* suits “based on” county reports would be an effective repeal of the 1986 amendments and a reversion to the public disclosure bar scheme of the 1943 amendments.<sup>345</sup> Similar to the “information dynamic” reasoning, the court did not think Congress intended to create a situation where simply because the report is in the possession of the federal government, the party committing the fraud is absolved. This scenario was especially troublesome to the court when the government files the papers away and “there is [no] reason to give them close attention.”<sup>346</sup> Based on the confluence of these four theories presented by the *Dunleavy* court, the Third Circuit seems committed to ensuring that the FCA is an effective tool to ferret out fraud.

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336. *Dunleavy*, 123 F.3d at 745 (noting that FCA reflects a “perceived . . . existence of ‘a conspiracy of silence’ to defraud the federal government”).

337. *Id.*

338. *See id.* at 745–46.

339. *See id.* at 745.

340. *Id.*

341. *See supra* notes 182–94 and accompanying text (reviewing the history of FCA amendments).

342. *See supra* notes 182–94 and accompanying text.

343. *See supra* notes 187–90 and accompanying text (explaining the criticisms of the public disclosure bar in the 1943 amendments).

344. *See* Act of Dec. 23, 1943, ch. 377, Pub. L. No. 78-215, 57 Stat. 608 (codified as amended at 31 U.S.C. §§ 3729–3733 (2006)).

345. *Dunleavy*, 123 F.3d at 746 (“The expansion of the FCA’s definition of ‘administrative report’ to state and local government reports would in effect return us to the unduly restrictive ‘government knowledge’ standard.”).

346. *Id.*

### B. *The Eighth Circuit Approach*

The Eighth Circuit was the next circuit court to decide whether state or municipal reports constituted “administrative reports” within the meaning of § 3730(e)(4)(A).<sup>347</sup> In *Hays*, the court distinguished and partially rejected the *Dunleavy* reasoning, determining that Medicare and Medicaid audit reports produced by a nursing home and submitted to the federal government constituted “administrative reports” and therefore FCA actions “based upon” these reports were barred.<sup>348</sup>

#### 1. *Dunleavy* Leads to “Anomalous” Results

The *Hays* court rejected the *Dunleavy* court’s textual approach to the issue based on the belief that the strict federal/state dichotomy produces “anomalous results.”<sup>349</sup> When Congress amended the FCA in 1986, it explicitly defined “claim” in such a way to include Medicare or Medicaid reports submitted to state agencies within the definition.<sup>350</sup> This was done in an effort to allow FCA actions to be brought where “there is significant Federal regulation and involvement.”<sup>351</sup> Through the definition of “claim,” Congress opened up FCA actions to a wide range of those situations, including those in which the federal government is fulfilling the claim.<sup>352</sup> The inquiry relevant to determining whether or not a request for payment is a “claim” within the meaning of the statute is whether the federal government is “significant[ly]” involved in the program. The court reasoned that it would not be consistent to ignore the federal/state distinction for purposes of the “claim” inquiry and make the same distinction determinative for purposes of the “administrative report” inquiry.

#### 2. “Prepared By or at the Behest of the Relevant Federal Agency”

Like the other circuit courts, the *Hays* court acknowledged that the enumerated modes of public disclosure in § 3730(e)(4)(A) constitute an exhaustive list and is therefore required to come up with a theory as to what is included within the definition of “administrative reports.”<sup>353</sup> The court looked to two cases that involved parties other than the federal government that produced audit reports “at the behest of” the federal government.<sup>354</sup> In *Minnesota Association of Nurse Anesthetists v. Allina Health System*

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347. United States *ex rel.* *Hays v. Hoffman*, 325 F.3d 982, 987 (8th Cir. 2003) (remarking that the application of “administrative reports” has lead to “divergent judicial interpretation”).

348. *See id.* at 989.

349. *Id.* at 988.

350. False Claims Amendments Act of 1986, Sec. 2, Pub. L. No. 99-562, 100 Stat. 3153, 3154 (codified as amended at 31 U.S.C. § 3729(c) (2006)).

351. *Hays*, 325 F.3d at 988.

352. *Id.* at 985.

353. *Id.* at 988.

354. *Id.*

*Corp.*,<sup>355</sup> the Eighth Circuit determined that an audit conducted by a private insurer as part of a program administered by the federal government constituted an “administrative audit”—which is one of the enumerated modes of disclosure in § 3730(e)(4)(A).<sup>356</sup> Reliance on this case is questionable, as the *Nurse Anesthetists* court provides no support for its reasoning and mentions it only in passing—the court determines that the audit conducted by the private insurance company is not relevant to the appeal.<sup>357</sup> In *United States ex rel. Schwedt v. Planning Research Corp.*,<sup>358</sup> the U.S. District Court for the District of Columbia expressed a view that an audit prepared by an outside accounting firm at the “behest of” the federal government satisfied the public disclosure bar.<sup>359</sup> The parties in *Schwedt* did not argue that the audit did not constitute an “administrative report” and therefore reliance on this case is also questionable.<sup>360</sup>

The Eighth Circuit’s strongest argument is a functional analysis of how the FCA fits into the Medicaid fraud detection scheme.<sup>361</sup> The court described Medicaid as “a cooperative federal-state program through which the federal government provides financial assistance to help states furnish health care to the poor.”<sup>362</sup> Medicaid regulations specify that states must audit, records of those parties claiming payment through Medicaid.<sup>363</sup> Furthermore, if the federal government receives a complaint of fraud, it defers to the states to investigate, “setting the stage for either federal or state criminal or civil enforcement actions.”<sup>364</sup> The *Hays* court distinguished *Dunleavy* on the grounds that the grantee compliance audits, which complement the GPR at issue in *Dunleavy*, are conducted by the federal government and not the states, as is the case with Medicaid audits.<sup>365</sup> The *Hays* court focused on the function the audit report plays in the reporting scheme and found that since the Medicaid reporting scheme relies on states instead of the federal government, it satisfies the public disclosure bar.<sup>366</sup> The *Hays* court accurately distinguished *Dunleavy*, but failed to fully

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355. 276 F.3d 1032 (8th Cir. 2002).

356. *Id.* at 1044.

357. *See id.* at 1043–44 (describing an audit conducted by a private insurer as an “administrative audit” within the meaning of § 3730(e)(4)(A) in a sentence that is explaining the defendant’s position on appeal and not expressing the courts view on whether an audit by a private insurance company should be considered an “administrative audit”).

358. 39 F. Supp. 2d 28 (D.D.C. 1999).

359. *Id.* at 31–33.

360. *See id.* at 31–36 (focusing on the “allegation or transaction language” and “based upon” of § 3730(e)(4)(A) and not discussing whether the audit constituted an “administrative audit”).

361. *See United States ex rel. Hays v. Hoffman*, 325 F.3d 982, 989 (8th Cir. 2003) (describing the Medicaid fraud detection scheme).

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.* (“Congress did not delegate [the audit program at issue in *Dunleavy*] to a state agency, as is the case with Medicaid.”).

366. *Id.* at 989.

explain why this distinction matters.<sup>367</sup> It seems as though the *Hays* court made a judgment that the FCA is less important to the Medicaid fraud detection scheme than it is to HUD's fraud detection scheme in *Dunleavy*.<sup>368</sup>

### C. The Ninth Circuit Approach

The Ninth Circuit followed the Eighth Circuit's decision in *Hays* through its decision in *United States ex rel. Bly-Magee v. Premo*.<sup>369</sup> In *Bly-Magee*, the relator, Bly-Magee, accused the California Department of Rehabilitation (CDR) of defrauding the federal government by "violat[ing] federal procurement standards in awarding contracts, forc[ing] the Government to 'purchase unnecessary and duplicative services,'" and "falsely certif[ying] that [CDR] had conducted audits."<sup>370</sup> Bly-Magee brought a series of suits under the FCA, but at issue in this instance of the series was whether the "public disclosure" of facts underlying the action in a published audit report produced by the California State Auditor constituted an "administrative report" under the FCA—which would trigger the public disclosure bar.<sup>371</sup>

#### 1. Likelihood of Discovering Fraud is "Heightened"

The Ninth Circuit previously decided that state and local administrative hearings were sources of public disclosure under § 3730(e)(4)(A).<sup>372</sup> From this precedent, the Court reasoned that it would be incongruous to apply a federal versus state distinction for "administrative audits" but not for "administrative hearings."<sup>373</sup> Buttressing this point with functional reasoning similar to that found in *Hays*, the Ninth Circuit found that "[t]he likelihood that the information will be brought to the federal government's attention is heightened in cases . . . where the audited program is connected significantly to federal regulations and funds."<sup>374</sup> The court noted that CDR provides services through federal and state funds within the context of federal legislation. "Essentially, CDR's operation depends on federal funding and compliance with federal regulations."<sup>375</sup> Furthermore, the federal regulation requires the state to form a committee to supply progress

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367. *See id.* (stating "while we do not disagree with the Third Circuit's decision in *Dunleavy*, we conclude the court ruled more broadly than necessary in stating that a state agency disclosure may never be an 'administrative . . . report [or] audit' for purposes of § 3730(e)(4)(A)," but not explaining why *Dunleavy* does not fit in the functional description of the Medicaid program (alteration in original)).

368. *Cf. id.*

369. 470 F.3d 914, 918 (9th Cir. 2006) ("We agree with the Eighth Circuit and now hold that the second category of sources includes non-federal reports, audits, and investigations.")

370. *Id.* at 917 (quoting the complaint).

371. *Id.*

372. *See A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1243 (9th Cir. 2000) ("The extensive public agency proceedings conducted by the Counties plainly fall within the ambit of 'administrative hearing[s]' under § 3730(e)(4)(A)." (alteration in original)).

373. *Bly-Magee*, 470 F.3d at 918 ("The federal government is no less likely to obtain information from a state administrative audit than it is from a state administrative hearing.")

374. *Id.* at 918–19.

375. *Id.* at 919.

reports to the federal government.<sup>376</sup> The *Bly-Magee* court viewed the facts in that case as more closely aligned with *Hays* than *Dunleavy*.<sup>377</sup> Like the *Hays* court, the Ninth Circuit emphasized that when the fraud detection scheme heavily relies on state participation, the public disclosure bar is triggered.<sup>378</sup>

## 2. *Dunleavy* Does Not Lead to Anomalous Results

Noting that the Third Circuit in *Dunleavy* feared creating a situation in which the state or municipal agency could absolve itself from liability by submitting a false report, the *Bly-Magee* court did not think these concerns applied to its facts.<sup>379</sup> The *Dunleavy* court thought that an agency might craft a report in such a way as to disclose enough facts to trigger the public disclosure bar, but conceal other facts that would tip off the relevant federal agency.<sup>380</sup> The Ninth Circuit first distinguished the facts of *Dunleavy* from those of *Bly-Magee* by arguing that in *Bly-Magee* the state auditor who conducts the audit was independent from the report producing agency.<sup>381</sup> This seems to undercut the *Dunleavy* reasoning as applied to *Bly-Magee*, but the Ninth Circuit was not finished with the critique of the *Dunleavy* “information dynamic” reasoning.<sup>382</sup> The Ninth Circuit proceeded to astutely note that the situation feared by *Dunleavy* was not likely to occur.<sup>383</sup> In order for the public disclosure bar to be triggered, the “allegations or transactions” underlying the fraud must appear in a public disclosure.<sup>384</sup> It is exceedingly unlikely that a state or municipal agency would be able to toe the very narrow line between disclosing enough information to truly disclose the “allegations or transactions” of the fraud without tipping off the authorities to the fraud.<sup>385</sup> The court noted that “[t]he public disclosure of ‘mere information’ relating to the claims was insufficient to trigger a jurisdictional bar to the False Claims suit.”<sup>386</sup>

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376. *Id.*

377. *See id.* at 918–19 (distinguishing *Dunleavy* and analogizing to *Hays*).

378. *Id.* at 919. (9th Cir. 2006) (analogizing to *Hays* because of the “significant federal regulation and cooperation”).

379. *Id.* (“Finally, our interpretation of § 3730(e)(4)(A) does not create the anomalous situation feared by the court in *Dunleavy*.”).

380. *See id.* (characterizing *Dunleavy*); *see also supra* notes 308–14 and accompanying text (describing the facts of *Dunleavy*).

381. *Bly-Magee*, 470 F.3d at 919; *cf. supra* notes 308–14 and accompanying text.

382. *See supra* notes 315–20 and accompanying text.

383. *Bly-Magee*, 470 F.3d at 919 (“The court feared that legitimate *qui tam* suits thus could be barred on the ground that the allegations were disclosed in reports or audits produced by the entity accused of fraud. This fear is unfounded in this case . . .” (citations omitted)).

384. *See False Claims Act*, 31 U.S.C. § 3730(e)(4)(A) (2006) (providing that “[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions” in the enumerated modes of public disclosure); *see also supra* note 211 (explaining how much information is required to constitute “public disclosure”).

385. *See Bly-Magee*, 470 F.3d at 919.

386. *Id.*

### III. ANALYSIS OF IMPEDIMENTS REPORTS SHOULD SURVIVE THE PUBLIC DISCLOSURE BAR

Part I supplied a primer in residential segregation, the AFFH duties, and how *qui tam* might be used to enforce those duties. Part II set up the circuit split conflict over whether *Anti-Discrimination Center*-type actions should be allowed to use the *qui tam* mechanism. Part III will conclude that these actions should survive the public disclosure bar.

The ability of relators such as the Center to bring *qui tam* actions against county and municipal authorities to enforce AFFH obligations depends on the relators' ability to use the authority's AI report as the basis for liability. The FCA was enacted to encourage those with information of fraud against the government to come forward, but the countervailing goal of limiting parasitic relators from beating the government to the courthouse led to the eventual enactment of the modern public disclosure bar.<sup>387</sup> The public disclosure bar prevents *qui tam* suits that are "based on" public disclosure of "administrative reports" within the meaning of § 3730(e)(4)(A).<sup>388</sup> The next court to decide an *Anti-Discrimination Center*-type action will be confronted with the issue of whether AI reports constitute "administrative reports." This Note will proceed to argue that the next court should follow Judge Cote's lead and hold that AI reports are not "administrative reports" and are therefore available to be used as a basis for a *qui tam* action to enforce AFFH obligations.

All three circuits to consider the issue recognize that modes of disclosure listed in § 3730(e)(4)(A) cannot apply to all "administrative reports" or "audits."<sup>389</sup> These words are simply too broad by themselves and would include too much under the public disclosure bar.<sup>390</sup> There are very few clues hidden in the statute and virtually no legislative history on what "administrative reports" means.<sup>391</sup> The courts are forced to determine whether Congress would have intended to include a given mode of disclosure based on the purposes behind the FCA and the public disclosure bar.<sup>392</sup> The Eighth and Ninth Circuits make strong arguments for including reports produced by the states and submitted to the federal government within the FCA's public disclosure bar. However, it is highly unlikely that Congress intended the courts to make a state/federal distinction in the case of federal housing programs—but not in the case of federal healthcare programs. Thus, we must come to a definitive answer on whether state administrative reports are "administrative reports" within the meaning of § 3730(e)(4)(A).

The Eighth and Ninth Circuits make their strongest arguments when they attempt to distinguish their respective cases from *Dunleavy* through a comparison of the reporting schemes involved in both cases. *Dunleavy*

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387. See *supra* notes 185–94 and accompanying text.

388. See False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

389. See *supra* note 304 and accompanying text.

390. See *supra* notes 313–15, 353, 379–86 and accompanying text.

391. See *supra* notes 185–94 and accompanying text.

392. See *supra* notes 185–94 and accompanying text.

dealt with a HUD GPR produced by a county government and supplied to HUD for potential auditing.<sup>393</sup> *Hays* and *Bly-Magee* dealt with an audit report produced by a state health agency, submitted to the federal government with the potential to be audited by a state auditor.<sup>394</sup> The *Hays* and *Bly-Magee* courts correctly identify a major difference in the reporting structure in that a state auditor, independent from the state agency that prepares the report, is responsible for auditing the report and detecting fraud.<sup>395</sup> However the distinction is immaterial when analyzed in context with the purpose of the FCA.

Underlying the reasoning in *Hays* seems to be an assumption that the federally mandated reporting structure was sufficient to detect fraud and did not need to be supplemented by the FCA.<sup>396</sup> This interpretation seems to confuse the relationship between the FCA, the FCA's public disclosure bar, and the purpose underlying each. First and foremost, the purpose of the FCA is to increase the federal government's ability to recover money lost to fraud.<sup>397</sup> It was not created to supplement an already sophisticated federal fraud-detecting scheme. Instead, it was an acknowledgement of the fact that the government was ineffective at detecting fraud.<sup>398</sup> The modern public disclosure bar was developed because parasitic *Marcus*-type actions were recognized as undesirable.<sup>399</sup> The public disclosure bar functions as an exception to the general rule that the government wants to discover fraud.<sup>400</sup> The exceptions laid out in § 3730(e)(4)(A) should be interpreted within the context of what Congress intended to create with the exceptions—a mechanism to prevent relators from bringing parasitic *qui tam* suits.<sup>401</sup> The *Hays* court seems to incorrectly analyze the issue from the opposite perspective and positions the inquiry as determining whether fraud detection is needed in a given situation.<sup>402</sup>

Framing the inquiry of interpreting § 3730(e)(4)(A) from the perspective of whether a given mode of disclosure creates a substantial likelihood of parasitic actions aligns with the purpose of the public disclosure bar. Viewed in this way, there does not seem to be a reason to be especially worried about administrative reports that are produced by state agencies. In the case of administrative reports produced by the federal government, it is assumed that the government has knowledge of the report, which leads to a high likelihood that an FCA action “based upon” such reports would be parasitic. In the case of AI reports, there is less reason to be suspicious of potentially parasitic claims. The AI report is never actually submitted to

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393. See *supra* notes 308–14 and accompanying text.

394. See *supra* notes 348, 370 and accompanying text.

395. See *supra* notes 361–67 and accompanying text.

396. See *supra* note 368 and accompanying text.

397. See *supra* notes 174–79 and accompanying text.

398. See *supra* notes 178–79 and accompanying text.

399. See *supra* note 182–93 and accompanying text.

400. See False Claims Act, 31 U.S.C. § 3730(e)(4)(A) (2006) (stating the exception as opposed to the general rule).

401. See *supra* notes 209–11 and accompanying text.

402. See *supra* notes 355–68 and accompanying text.

HUD. HUD requires that the analysis be conducted and lays out specific requirements, such as the requirement to analyze racial impediments, but never audits the report.

Although this Note rejects the *Hays* court's "where do we need fraud detection" reasoning, such reasoning supports a determination that AI reports and other similar reports should not be barred. HUD is a massive federal organization with an annual budget of nearly forty-two billion dollars. Almost eight billion dollars are distributed by CDBG programs through an extremely complicated fund granting mechanism.<sup>403</sup> First, the would-be grantees conduct an AI, produce and submit a Consolidated Plan, submit certifications that they will "affirmatively further fair housing," and submit more certifications that they will comply with a long list of other regulations. Second, an arcane formula determines whether a given community will receive funds and, if they are to receive funds, how much.<sup>404</sup> Finally the money is distributed and the grantees are charged with complying with the complex regulatory scheme.

*Qui tam* was developed for this exact scenario. The government is overextended: it has developed a regulatory scheme so complicated that it could never enforce it. The government is at a disadvantage because the compliance or non-compliance with the regulations is spread thinly across fifty states and is extremely nuanced. Take, for example, Westchester's non-compliance, which was only evidenced in an AI report and the non-existence of subsidized housing in predominantly white communities. Fraud detection is very difficult in these situations. The FCA is needed and there is no substantial likelihood of parasitic action. HUD is another example of numerous federal agencies that operate in a similar manner. Complicated regulations disperse billions of dollars every year. When states, counties, or municipalities produce reports such as the AI report, the report should not be barred from being the basis of a *qui tam* suit. This situation does not present a high likelihood of producing parasitic suits and is consistent with the general rule that the FCA is designed to detect fraud when the government is at an information disadvantage.<sup>405</sup>

If the problem is analyzed from the perspective of whether the FCA served its purpose in *Anti-Discrimination Center*, the answer is almost self-evident. Westchester was in noncompliance for a seven-year period.<sup>406</sup> Throughout this period Westchester ignored HUD directives and continued to perform its AI without considering racial impediments. The government never received or audited the AI reports and relied on Westchester's certification. The information required to detect the fraud was hidden in the AI report. Only a party in the Center's position with the requisite knowledge and motivation to detect the fraud could have alerted the

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403. See *supra* note 2 (explaining the fund granting mechanism).

404. See *supra* Part I.B–C.

405. See *supra* notes 335–39 and accompanying text.

406. See *Anti-Discrimination Center* Press Release, *supra* note 1 (noting that the settlement represents seven years of funding).

government. The next court confronted with an *Anti-Discrimination*-type action should allow the AI to form the basis of the *qui tam* action.

#### IV. ENFORCEMENT OF AFFH DUTIES THROUGH *QUI TAM*: WHERE DOES *QUI TAM* FIT IN THE “PUBLIC LAW” LITIGATION FRAMEWORK?

Part III concluded that *Anti-Discrimination Center*-type actions and the requisite AI reports garnered through FOIA requests should survive the FCA’s public disclosure bar. Part IV analyzes whether *Anti-Discrimination*-type actions have the potential to succeed as “public law” litigation.

##### A. Disadvantages of Using *Qui Tam*

###### 1. Representation of the Parties

Professor Fiss warned that representation of the victims in “public law” litigation can be complicated.<sup>407</sup> The outcome of the case will affect those before the court, similarly situated parties, and even parties that are not now but will be similarly situated in the future.<sup>408</sup> In “public law” litigation it is important for the judge to determine if the victims are properly represented.<sup>409</sup> These concerns are magnified by *Anti-Discrimination Center*-type actions.

The *qui tam* provisions of the FCA provide that anyone can bring an action in the name of the government so long as they meet the various requirements of the FCA.<sup>410</sup> The FCA was not designed as a civil rights enforcement mechanism.<sup>411</sup> Instead, the government hoped to tap the public’s knowledge of fraud and resources to litigate on behalf of the government by providing a substantial monetary reward. This created a problem beyond Fiss’s worst nightmare: a situation where the representative of the injured class has completely divergent interests from the individuals that make up the injured class.<sup>412</sup> Extending this hypothetical, the relator would initiate the action in the hopes of garnering a hefty sum of the fraudulent claim. Imagine that this greedy, parasitic<sup>413</sup> relator brought the suit against Westchester. With Westchester’s back up against the wall, facing treble damages amounting to \$180 million, the greedy relator does not settle. Instead of receiving Westchester’s affirmative guarantee that Westchester will build hundreds of homes and locate them in compliance with its AFFH duties, the residents of

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407. See Fiss, *supra* note 286, at 20.

408. See *supra* notes 258–69 and accompanying text (discussing the *Gautreaux* litigation).

409. See Fiss, *supra* note 286, at 20–21.

410. See *supra* notes 198–204 and accompanying text (discussing the derivative nature of the *qui tam* action).

411. See *supra* note 177 and accompanying text (discussing the legislative purpose behind *qui tam*).

412. See Fiss, *supra* note 286, at 21 (discussing the need for interests to be aligned).

413. See *supra* note 184 and accompanying text.

Westchester receive nothing more than a tax increase to pay the treble damages.

While this example assumes that the government did not decide to intervene during any stage of the trial, it is not out of the realm of possibilities:<sup>414</sup> the United States did not intervene for the first three years of the *Anti-Discrimination Center* litigation.<sup>415</sup> Furthermore, the procedural rule that allows the government to intervene arguably worked to the Center's disadvantage at the time of settlement. In approving the settlement, Judge Cote stipulated that the Monitor charged with assuring Westchester's compliance would be appointed at the sole discretion of the United States. Most recently, the Center has expressed criticism of the Monitor's commitment to enforce the settlement exactly as it was written and signed by the parties. The intervention rule allows the same government that failed to detect Westchester's noncompliance for seven years to have the final say on how the settlement is implemented and strips the Center of its role in the implementation.<sup>416</sup>

## 2. Solving Structural Problems within HUD and Municipalities

*Gautreaux* is a paradigmatic example of "public law" litigation being used to restructure institutions.<sup>417</sup> The defendants, CHA and HUD, had intentionally placed minority residents in minority neighborhoods in violation of the constitutional rights of the residents.<sup>418</sup> This action resulted in true structural change; as a result of the action, both CHA and HUD were required to significantly change their institutional behavior.<sup>419</sup> It might be argued that *Anti-Discrimination Center*-type actions do not have the reach required to change institutional behavior to the degree that more traditional desegregation actions do. In the case of Westchester, the annual grant and length of the claim period created a large enough penalty that Westchester was forced to settle.<sup>420</sup> It is possible to imagine a municipality with a smaller annual grant and a shorter false claims period. In this situation, the municipality might simply pay the treble damages required under the FCA instead of settling. It is true that if the municipality continues to participate in HUD programs, then it will likely modify its institutional behavior so that it will not be liable for a penalty—but the municipality could alternatively simply stop participating in the HUD program. This is in contrast to *Gautreaux*, where an injunctive order was going to be the remedy if there was a finding of liability.<sup>421</sup> It could be argued that the wrong committed in *Gautreaux* was more serious, and therefore the more

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414. See False Claims Act, 31 U.S.C. § 3730(c)(3) (2006).

415. See *supra* note 203 and accompanying text.

416. See Anti-Discrimination Center Press Release, *supra* note 1 (noting that the settlement represents seven years of funding).

417. See *supra* notes 258–69 and accompanying text.

418. See *supra* notes 258–69 and accompanying text.

419. See *supra* notes 258–69 and accompanying text.

420. See *supra* note 247 and accompanying text.

421. See *supra* notes 258–69 and accompanying text.

substantive remedy makes sense, but nonetheless the ability for the defendant in a *qui tam* action simply to pay a fine limits its effectiveness in effecting structural change.

### 3. Positively Impacting the Problem of Segregation

Professor Schuck distinguishes between a “command-and-control” remedy that imposes a segregation ideal on a community and a more political approach that takes into account the resistance that the remedy is likely to meet.<sup>422</sup> Schuck concludes, based on a thorough analysis of residential segregation cases, that the former—the more authoritarian remedies—tend not to be successful.<sup>423</sup> From this perspective, it might be argued that the treble damages provision of the FCA actually gave the United States and the Center too much bargaining power.<sup>424</sup> The remedy achieved by the United States and the Center in the settlement was quite significant. It required Westchester to build specific numbers of affordable homes in the very communities that were opposed to affordable housing being built.<sup>425</sup> The opposition is evident by analyzing the distribution of affordable housing placement during the false claims period and is supported by Professor Schuck’s observation that “a ubiquitous classism rejects the idea that people should have a right to live in a neighborhood they cannot afford.”<sup>426</sup> If this is in fact what is occurring in Westchester, there may be a strong argument that such a settlement is likely to fail.<sup>427</sup>

#### B. Advantages of Using Qui Tam

##### 1. Representation of the Parties

Professor Fiss not only commented on the extra caution judges should use when appraising representatives of “public law” litigants, but he noted that “public law” litigants tend to be vulnerable and should not be forced to volunteer as the group’s representative.<sup>428</sup> *Qui tam* allows enforcement of the HUD grantee’s AFFH duties without the need for an injured party or group representation.<sup>429</sup> The other benefit *qui tam* provides is that it allows a group such as the Center, which has the requisite knowledge and resources to traverse the complicated and overlapping fund granting mechanisms, regulatory requirements, and case law, to see the case through until settlement.<sup>430</sup>

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422. See *supra* note 298 and accompanying text.

423. See *supra* note 298 and accompanying text.

424. See False Claims Act, 31 U.S.C. § 3729(a)(1)(G) (2006).

425. See *supra* notes 246–251 and accompanying text.

426. Schuck, *supra* note 66, at 289.

427. See *supra* note 300 and accompanying text.

428. See Fiss, *supra* note 287, at 20.

429. See *supra* notes 198–204 and accompanying text (discussing the derivative nature of the *qui tam* action).

430. See *supra* Part I.B–D.

The procedural rule that allows the United States to intervene at anytime during the proceeding is an effective mechanism to protect against relators that do not have the best interests of the community residents in mind.<sup>431</sup> The United States even has the opportunity to intervene just prior to settlement to broker a deal between the relator, the HUD grantee, and the United States.<sup>432</sup> So long as the United States intervenes in appropriate circumstances, it allows fervent advocates such as the Center to bring actions against noncompliant grantees such as Westchester, but provides a safeguard against an opportunistic relator.

## 2. Solving Structural Problems Within HUD and Municipalities

The *qui tam* action has the power to effect structural change within the institutions of HUD and HUD grantees in two ways. First, the prospect of treble damages pushes the parties toward a settlement.<sup>433</sup> The United States and the Center had the clear advantage—leveraging the potential of a \$180 million fine.<sup>434</sup> This leverage only increases the relator's ability to impact the structure of HUD and HUD grantees. In *Anti-Discrimination Center*, Westchester agreed to some fairly extraordinary terms, including to expend the same amount of money they received while making false certifications to remedy their noncompliance.<sup>435</sup> This only seems fair, but the way in which Westchester is spending the money is more interesting. Westchester has agreed to build the vast majority of the affordable homes in highly concentrated white areas. Even AFFH duties would not require the stringent requirements included in the settlement.<sup>436</sup> This is evidence of immediate structural change on the part of Westchester County.<sup>437</sup>

Second, the *qui tam* suit leads to structural change by providing an example to other HUD grantees. This mode of structural change is especially effective in the case of enforcing AFFH through *qui tam* because the question of liability under this structure is actually quite straightforward. The *Anti-Discrimination Center* litigation provides other HUD grantees with a simple message: conduct a compliant AI, which includes an analysis of racial impediments to fair housing, or else you could be liable under the FCA.

## 3. Positively Impacting the Problem of Segregation

*Qui tam* has the power to positively impact segregation through the enforcement of AFFH duties. Enforcement through a flexible grant program such as CDBG alleviates many of the “command-and-control”

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431. See False Claims Act, 31 U.S.C. § 3729(a)(1)(G) (2006).

432. See *supra* notes 198–204 and accompanying text.

433. See False Claims Act, 31 U.S.C. § 3729(a)(1)(G) (describing the liability for submitting false claims as “a civil penalty of not less than \$5,000 and not more than \$10,000 . . . plus [three] times the amount of damages which the Government sustains”).

434. See *supra* note 247 and accompanying text.

435. See *supra* notes 246–51 and accompanying text.

436. See *supra* notes 246–51 and accompanying text.

437. See *supra* note 286 (defining “structural litigation”).

concerns recognized by Professor Schuck.<sup>438</sup> By way of the second mode of structural change described above, *Anti-Discrimination Center*-type actions set an example for other HUD grantees. This triggers the HUD grantees to conduct compliant AIs.<sup>439</sup> Once the report is produced and the grantee has in its possession a document that shows substantial racial segregation, the AFFH duty to do something about the racial impediment is triggered.<sup>440</sup> This all occurs behind the scenes and at all times the grantee is in control of the specific measures taken. If the community does not act on these racial impediments, then the grantee is once again open to *Anti-Discrimination Center*-type liability.<sup>441</sup> So long as visibility of the *Anti-Discrimination Center* action triggers the initial move on the part of the grantees to conduct a compliant AI, this action has the ability to avoid “command-and-control” type remedies and quietly modify the behavior of HUD grantees.<sup>442</sup>

#### PART V. *QUI TAM* IS AN EFFECTIVE MEANS OF ACHIEVING CHANGE

The problem of residential segregation is complex. Segregation was thrust upon current generations by the country’s unfortunate past. Today a combination of market idiosyncrasies, community resistance, and lax enforcement of AFFH duties have given residential segregation a seemingly indefinite life. This Note has explained that the FHA was not designed to directly combat residential segregation. Furthermore, its sole provision that allows advocates to edge communities toward integration has been significantly compromised by the lack of a complimentary enforcement scheme. *Qui tam* is the last hope, if one excludes the possibility of an amendment to the FHA, that would allow parties such as the Center to directly challenge AFFH violations. The question is, can *qui tam* be effective in this context? This Note concludes that the answer is a qualified yes.

##### A. *Representation of the Parties*

The qualification is related to the first issue we will approach. Professor Fiss eloquently put into words what everyone’s intuition tells them. The enforcement of civil rights requires representation of the finest class.<sup>443</sup> Representation is where the *Anti-Discrimination Center*-type action has the potential to go astray. When a civil rights advocacy group such as the Center brings the action, it can be quite effective. The trouble lies in the potential for relators other than advocacy groups. A relator that institutes a suit claiming a HUD grantee has defrauded the government based on AFFH certifications could forever quash the community’s right to redress. The

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438. See *supra* notes 296–300 and accompanying text.

439. See *supra* notes 156–63 and accompanying text.

440. See *supra* notes 156–63 and accompanying text.

441. See *supra* notes 242–45 and accompanying text.

442. See *supra* notes 296–301 and accompanying text.

443. See *supra* Part I.E.3.

federal government's power to intervene is not a sufficient protection. Housing segregation can be a contentious issue, especially in highly segregated communities such as Westchester. The Department of Justice cannot be relied on to uniformly intervene when intervention is needed.

For this reason it is recommended that the FCA be amended to include a provision requiring the presiding judge to investigate the ability of the relator to represent affected parties in cases where *qui tam* is used to enforce civil rights such as AFFH duties. This would guarantee the "adequate representation" called for by Professor Fiss.<sup>444</sup>

### *B. Solving Structural Problems within HUD and Municipalities*

Solving structural problems is where the *qui tam* action truly shines. HUD's lackluster enforcement of the AFFH duties has likely lulled CDBG grantees to sleep.<sup>445</sup> Completing the AI as simply an extra step on the road to federal dollars is not the correct way to approach the analysis at the heart of the only desegregation tool. *Qui tam* brings the AI reports out of the closet and onto the desk of every HUD grantee that hopes to avoid FCA liability. There may be more than simply liability at stake. In a sense, Westchester has been tarnished as the county that stole from the federal government. Counties similarly situated likely do not want to go through years of litigation with the potential of being labeled a sophisticated municipal thief.

The ability of *qui tam* to impact structural change in the specific agency that is the subject of the lawsuit itself is certainly diminished by the fact that the agency can simply opt-out of reforming its practices by settling. However, for the Westchesters of the world, *qui tam* is an excellent way to achieve structural change. The settlement is a testament to how powerful the treble damages provision is when there is a sufficient level of funding and a long enough period of fraud.

### *C. Positively Impacting the Problem of Segregation*

The concern that the treble damages provision equates to a "command-and-control" approach to the segregation problem is not completely unwarranted. The Westchester officials' reaction to the suit early on in the litigation illustrates that there are strong opinions on both sides of the issue. However, it is the complexity of the segregation problem that proves to be a stronger force to be reckoned with. These complexities flow out of the work of Professor Tiebout<sup>446</sup> and Professor Schelling<sup>447</sup> and the political elements described by Professor Schuck.<sup>448</sup> In order to counteract these forces and at least keep pace with the staying power of segregation actions, mechanisms like the *qui tam* and advocates such as the Center are essential.

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444. See *supra* notes 277–80 and accompanying text.

445. See *supra* Part I.C.3 (describing deficiencies in HUD's enforcement).

446. See *supra* notes 64–71 and accompanying text.

447. See *supra* notes 54–56 and accompanying text.

448. See *supra* notes 296–301 and accompanying text.

## CONCLUSION

This Note traced the historical roots of residential segregation and illuminated some characteristics underlying its staying power. Using this as a backdrop, deficiencies of the FHA were identified and the *Anti-Discrimination Center*-type action was presented as a potential solution to the deficiencies. This Note concludes that *Anti-Discrimination Center*-type actions have the potential to fill the gap left by the FHA enforcement mechanism for two interconnected reasons. First, reports garnered through FOIA requests should be admissible in *qui tam* suits. Second, although *qui tam* is not the perfect tool to enforce civil rights, an amendment to the FCA would improve *Anti-Discrimination Center*-type actions by preventing parasitic relators from disregarding the true victims of segregation. *Anti-Discrimination Center* should be viewed as a model for future litigants. This Note concludes that Congress should inquire as to the connection between the FCA and civil rights enforcement and consider amending the FCA to ensure sufficient representation of the parties.