

AFFH ROLE IN HOUSING POLICY WITHOUT LONG-LASTING REFORM FOR AGRICULTURAL WORKERS

I. INTRODUCTION

The United States has long recognized the importance of a stable housing market and affordable housing.¹ Fair opportunities to achieve and gain personal fulfillment are quintessential elements of the national mantra known as the American Dream.² Realization of the American Dream is more likely to be obtained when individuals and families are able to obtain quality and affordable housing.³ There is perhaps no better observation of the vivacity of the American Dream than that which is observed in the experiences of the agriculture worker.⁴ Many agricultural workers are immigrants seeking an opportunity for fair and equal treatment, which has evaded them for much of their lives due to activities that have been detrimental to agriculture workers.⁵

A tradition of extensive government oversight in the housing market has shaped legislation to provide for many housing programs in the United States.⁶ A review of how these programs were developed and have affected the agriculture worker population in the United States

¹ David Min, *How Government Guarantees Promote Housing Finance Stability*, 50 HARV. J. ON LEGIS. 437, 442-443 (2013).

² JAMES TRUSLOW ADAMS, THE EPIC OF AMERICA 214-215 (1931) (defining the American Dream as the “dream of a land in which life should be better and richer and fuller for everyone, with opportunity for each according to ability or achievement.” *Id.* at 214. Truslow emphasizes that the American Dream does not represent a quest for wealth or material abundance, but rather a vision for self-actualization and personal fulfillment. *Id.* at 214. He writes: it “is not a dream of motor cars and high wages merely, but a dream of social order in which each man and each woman shall be able to attain to the fullest stature of which they are innately capable, and be recognized by others for what they are, regardless of the fortuitous circumstances of birth or position.” *Id.* at 214).

³ See Min, *supra* note 1.

⁴ See generally Min, *supra*, note 1 at 438 (explaining the agricultural worker connection).

⁵ 29 C.F.R. § 500.1 (2017).

⁶ Min, *supra* note 1 at 452.

provides a unique measuring stick to determine the effectiveness of housing programs.⁷

Specifically, the Department of Housing and Urban Development (“HUD”) has recently issued the self-proclaimed “final rule” in what is known as Affirmatively Furthering Fair Housing (“AFFH”).⁸ AFFH is a regulation issued by President Barack Obama pursuant to the Fair Housing Act of 1968, and Executive Order 12892.⁹ The Fair Housing Act was originally created in part to prohibit discrimination in the housing industry by making it unlawful to refuse to rent or otherwise discriminate against a person because of their race, color, religion, or national origin.¹⁰ Sex was added as a protected class in 1974, and disability and familial status were added in 1988.¹¹ Specifically, the Act provides that the housing policy of the United States is to provide its citizens with fair housing and gives instructions to “affirmatively further fair housing.”¹² Although agriculture or migrant workers are not a specific federally protected class, many agriculture workers are protected because of their status as a minority race or national origin.¹³

AFFH requires cities, housing authorities, and other governmental entities that receive specific types of federal money for housing programs to examine their housing patterns and look for racial bias.¹⁴ AFFH seeks to address many of the pitfalls public housing programs have endured over the past fifty years.¹⁵ Less than effective public housing policy has seemed to cause perpetuating concentrated poverty and results contrary to the intent of housing policy.¹⁶ These results are categorically known as the disparate impact theory.¹⁷ The disparate

⁷ See generally Affirmatively Furthering Fair Housing, 80 Fed. Reg. 136 (Jul. 16, 2015).

⁸ Affirmatively Furthering Fair Housing, 80 Fed. Reg. 136 (Jul. 16, 2015).

⁹ 24 C.F.R. § 570.601 (2016).

¹⁰ 42 U.S.C. § 3604 (2016).

¹¹ *Id.*

¹² 42 U.S.C. § 3601 (2016).

¹³ 42 U.S.C. § 3604 (2016).

¹⁴ *Id.*

¹⁵ Carl F. Horowitz, *Pitfalls of Housing Redistribution*, 143 U. PA. L. REV. 1379, 1381 (1995).

¹⁶ HUD’s New Regulation Affirmatively Furthers Fair Housing, LAW360 (Jul. 17, 2015), <http://www.law360.com/articles/679998/hud-s-new-regulation-affirmatively-furthers-fair-housing>.

¹⁷ Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 357 (2013).

impact theory suggests that certain policies are illegal if they have a disproportionate “adverse impact” on persons in a protected class.¹⁸ The disparate impact theory is commonly recognized in employment and discrimination cases.¹⁹

A major criticism of AFFH is that it threatens to empower the federal government with the ability to socially engineer and diversify neighborhoods throughout America.²⁰ Furthermore, AFFH seems to fail to provide a solution to the housing issues facing agriculture workers.²¹ Specifically, for agriculture workers, AFFH has been criticized for its failure to recognize minority groups, including migrant workers and residents in rural areas as groups that need protection.²² Advocates for these groups point out that these vulnerable populations are disproportionately members of federally-protected classes, and HUD should encourage program participants to address their housing barriers as part of their efforts to affirmatively further fair housing.²³

The AFFH final rule allows HUD to exercise unprecedented power in zoning and land use by requiring local government and instrumentalities to document efforts to further fair housing as a requisite to receiving specific types of funding.²⁴ Opponents argue that this power is an example of radical government oversight that threatens abolish municipal boundaries of local jurisdictions.²⁵ Proponents of the AFFH suggest that it furthers the goal of the Fair Housing Act of 1968 and provides a tool to identify areas affected by fair housing problems.²⁶

This comment analyzes the AFFH HUD rule to understand its purpose, scope, and impact on migrant workers. The comment begins

¹⁸ See generally *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

¹⁹ See generally *Id.*

²⁰ Kevin D. Williamson, *Massive Government Overreach: Obama’s AFFH Rule is Out*, NATIONAL REVIEW, <http://www.nationalreview.com/corner/420896/massive-government-overreach-obamas-affh-rule-out-stanley-kurtz> (last visited Feb. 21, 2017).

²¹ See Michael Patrick Leahy, *War on Suburbs: Castro and Obama Rev Up Affirmative Housing*, BREITBART (Jul. 29, 2015), <http://www.breitbart.com/big-government/2015/07/29/castro-and-obama-unite-to-subjugate-americas-suburbs-with-unlawful-affirmatively-furthering-fair-housing-rule/>.

²² *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 136, 42283 (Jul. 16, 2015).

²³ *Id.*

²⁴ See generally Leahy, *supra* note 21.

²⁵ *Id.*

²⁶ *Id.*

with a historic overview of affordable housing programs in the United States and the motivations and bipartisanship efforts necessary for their creation. Part I provides an introduction about how AFFH may impact agriculture workers. Part II reviews the factual background and timeline of housing programs. Part III provides information about housing and employment conditions for agriculture workers. Part IV takes a closer look at the Fair Housing Act of 1968 and the Migrant Seasonal Agricultural Protection Act to understand what type of benefits these Acts have for the agricultural worker. Part V, discusses the role of the Housing and Urban Development department and AFFH. Part VI explores how AFFH may be used to establish liability through the disparate impact theory, how AFFH may open the door for the federal government's role in land use, and how that may affect the agriculture worker. In addition, part VI analyzes why executive orders are vulnerable to repeal and can be an ineffective way of implementing policy changes. Part VII provides recommendations on how bipartisan support can help create sustainable housing policy that will have a positive effect on agricultural workers. Lastly Part VIII includes that sound effective housing policy is necessary and possible through bipartisan public service. The issue is whether AFFH will provide meaningful improvements to further fair housing goals or instead become additional layers of bureaucracy subject to being repealed by subsequent administrations causing an adverse effect on those who have the greatest need, like the agricultural worker.

II. FACTUAL BACKGROUND

The majority of agricultural workers earn a meager wage as compared to other industries in the United States.²⁷ Therefore, the agriculture worker populations are often eligible to meet their housing needs through an affordable housing program.²⁸ A brief historic overview of the significant events and housing policies are illustrative of the government's role in housing in America.²⁹

The National Housing Act of 1934 introduced the Federal Housing Administration to help stabilize the mortgage market with standards

²⁷ See Fact Sheet – Wage and Hour Division. U.S. DEP'T OF LABOR, <https://www.dol.gov/whd/regs/compliance/whdfs12.htm> (last visited Feb. 22, 2017).

²⁸ *Affordable Housing*. U.S. DEP'T OF HOUS. & URBAN DEV., https://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/ (last visited Feb. 22, 2017).

²⁹ JENNIFER STOLOFF, *A BRIEF HISTORY OF PUBLIC HOUSING*. ii, (2012).

for construction and mortgage insurance on home loans.³⁰ In turn, the Housing Act of 1937, marks one of the earliest significant events in the history of United States housing policy.³¹ As the nation attempted to bounce back from the devastating effects of The Great Depression between 1929 and 1939, the Housing Act of 1937 provided government paid subsidies to be given to local public housing agencies.³² These subsidies were specifically intended to provide support to families with low incomes and provide housing agencies the ability to develop and manage housing projects.³³ An explosion of additional government social programs were created in the wake of World War II in the late 1930s through 1945 in what is known as the New Deal.³⁴ President Franklin Roosevelt is credited with rallying the bipartisan support needed to develop social program expansions in the New Deal.³⁵ Each of these programs was designed to provide stabilization for the nation's economy and its citizens.³⁶ A few years later, President Harry Truman enacted the Housing Act of 1949 in effort to further stabilize a struggling U.S. housing market.³⁷ The Housing Act of 1949 provided expansive federal oversight in the housing market in the form of mortgage insurance and construction of public housing as part of what is known as Harry Truman's domestic legislation commonly called the Fair Deal.³⁸ Although the passage of the Housing Act of 1949 endured legislative stalemates, cooperating legal parties and bipartisanship ensured the law passed.³⁹ This marked

³⁰ 12 U.S.C. § 1708 (2016).

³¹ *Id.*

³² *1937: Housing Act (Wagner-Steagall Act)* BOSTON FAIR HOUSING, <http://www.bostonfairhousing.org/timeline/1937-Housing-Act.html> (last visited Feb. 20, 2017).

³³ *Id.*

³⁴ *See The New Deal*, US HISTORY, <http://www.ushistory.org/us/49.asp> (last visited Feb. 20, 2017).

³⁵ *See Id.*

³⁶ *See Id.*

³⁷ Alexander Von Hoffman, *A Study in Contradictions: The Origins and Legacy of the Housing Act of 1949*, 11 HOUS. POL'Y DEBATE 299, 310 (2000).

³⁸ *See The Fair Deal -Boundless Open Textbook*, BOUNDLESS, <https://www.boundless.com/u-s-history/textbooks/boundless-u-s-history-textbook/the-cold-war-27/the-truman-administration-210/the-fair-deal-1174-9248/> (last visited Feb. 22, 2017).

³⁹ Von Hoffman, *supra* note 37, at 308.

a significant fifteen-year period in which the federal government established a significant role in the nation's housing market.⁴⁰

Twenty years later, amidst a nation torn by racial segregation and civil rights movements, The Housing and Urban Development Act of 1965 provided major revisions and expansions to federal housing policy.⁴¹ President Lyndon B. Johnson signed the Fair Housing Act of 1968 into law, proclaiming it as the single most important breakthrough in federal housing policy since the 1920s.⁴² Following president John F. Kennedy's assassination in November 1963, Johnson won reelection in 1964, and implemented several social programs in what he called the Great Society.⁴³ This included Johnson signing the HUD department into legislation.⁴⁴ The Housing and Community Development Act of 1974 created what is known as Section 8 Housing which authorizes Entitlement Community grants to be administered by HUD to provide subsidies for affordable housing.⁴⁵ The Community Development Block Grant ("CDBG") Entitlement Program provides annual grants to entitled cities and counties to develop urban communities by providing housing and a suitable living environment and by expanding economic opportunities, principally for low-and moderate-income persons.⁴⁶

In recent years, housing programs have become more entrepreneurial by attracting private developers and diversifying affordable housing with additional programs other than traditional government public housing.⁴⁷ Evidence of such entrepreneurialism is found in the creation of the Low Income Housing Tax Credit ("LIHTC") program in 1986.⁴⁸ In the LIHTC program, local housing authorities and developers are able to create limited partnerships as subsidiaries or affiliates and

⁴⁰ STOLOFF, *supra* note 29, at 4.

⁴¹ 42 U.S.C. § 3532 (2016).

⁴² 42 U.S.C. § 9816 (2016).

⁴³ See generally *Lyndon Johnsons Great Society*. U.S. HISTORY, <http://www.ushistory.org/us/56e.asp> (last visited Feb 20, 2017).

⁴⁴ 42 U.S.C. § 9816 (2016).

⁴⁵ See generally *Housing and Community Development (HCD) Act of 1974*, HUD EXCHANGE <https://www.hudexchange.info/resources/documents/Housing-and-Community-Development-Act-1974.pdf> (last visited Feb. 24, 2017).

⁴⁶ *Community Development Block Grant Entitlement Program*. HUD EXCHANGE, <https://www.hudexchange.info/programs/cdbg-entitlement/> (last visited Jan 7, 2017).

⁴⁷ STOLOFF, *supra* note 29, at 5.

⁴⁸ See *Low Income Housing Tax Credits*, HUD USER, <https://www.huduser.gov/portal/datasets/lihtc.html> (last visited Feb 20, 2017).

become general partners in tax credit projects.⁴⁹ In addition, as traditional government housing units have aged and are in need of repair the Cranston-Gonzalez National Affordable Housing Act of 1990 and the subsequent Homeownership and Opportunity for People Everywhere of 1992 provided funding for distressed public housing.⁵⁰ Furthermore, the Quality Housing and Work Responsibility Act in 1998 was designed to create more properties with a mix of affordable and market rate apartments to decrease concentration of poverty in public housing.⁵¹ In 2009, home values were drastically reduced in what is known as the Great Recession.⁵² The Great Recession prompted the federal government to lower interest rates and eased credit requirements to combat the high unemployment and reduced home prices.⁵³ While much of the American Recovery and Reinvestment Act focused on job creation, over thirteen billion dollars was allocated to various government administered housing programs.⁵⁴ Here again, the Recovery and Reinvestment act was met with opposition, but established the bipartisan support needed to implement meaningful change.⁵⁵ As the housing markets continue to rebound from the great recession, it is important that future housing policy be administered with bipartisan support to ensure timely improvements for agriculture workers.⁵⁶

III. AGRICULTURE WORKERS HOUSING CONDITIONS & EMPLOYMENT OVERVIEW

⁴⁹ CHARLES L. EDSON, *AFFORDABLE HOUSING-AN INTIMATE HISTORY* (2011).

⁵⁰ *About HOPE VI*, U.S. DEP'T OF HOUS. & URBAN DEV., https://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/hope6/about (last visited Feb. 20, 2017).

⁵¹ *Id.*

⁵² *Federal Reserve History: The Great Recession of 2007-09*. FEDERAL RESERVE HISTORY, <http://www.federalreservehistory.org/Events/DetailView/58> (last visited Dec. 12, 2016).

⁵³ *Id.*

⁵⁴ *HUD Implementation of the Recovery Act*. PORTAL HUD.GOV, <http://portal.hud.gov/hudportal/HUD?src=/recovery/about> (last visited Aug. 11, 2016).

⁵⁵ *See generally H.R. (111th): American Recovery and Reinvestment Act of 2009*, GOVTRACK <https://www.govtrack.us/congress/votes/111-2009/s61> (last viewed Feb. 20, 2017).

⁵⁶ *Id.*

Agricultural workers in the United States fulfill approximately 761,000 positions with an anticipated decrease of six percent per year.⁵⁷ While agricultural workers fulfill a variety of tasks, including maintaining farms, crops, livestock, and operating machinery, most agricultural workers are described as laborers.⁵⁸ The level of education to become an agriculture worker is usually less than a high school diploma.⁵⁹ On-the-job training, practical experiences, and trial and error usually offset a lack of education attainment.⁶⁰ Most agricultural work is done outdoors which requires workers to perform their work duties in all types of weather.⁶¹ Many agricultural workers perform seasonal work schedules that require long workdays to accommodate planting or harvesting duties.⁶² In 2015, the average full time agricultural worker earned a median income of \$9.66 per hour or annual income of \$20,090.⁶³

“The National Agricultural Workers Survey is an employment-based, random-sample survey of U.S. crop workers that collects demographic, employment, and health data in face-to-face interviews.”⁶⁴ The survey began in 1989 and has since interviewed more than 56,000 workers.⁶⁵ According to survey findings, nearly seventy percent of farmworkers were born in Mexico.⁶⁶ Farmworkers in the United States are of an average age of thirty-eight.⁶⁷ Seventy-two percent of all farmer workers are men.⁶⁸ Furthermore, “nearly two

⁵⁷ *Agricultural Workers*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/ooh/farming-fishing-and-forestry/agricultural-workers.htm> (last visited Jul. 15, 2016).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *National Agricultural Workers Survey*. U.S. DEP'T OF LABOR. <https://www.doleta.gov/agworker/naws.cfm> (last visited Aug. 20, 2016).

⁶⁵ *Id.*

⁶⁶ *Findings from the National Agricultural Workers Survey (NAWS) 2013-2014*. U.S. DEP'T OF LABOR. https://www.doleta.gov/agworker/pdf/NAWS_Research_Report_12_Final_508_Compliant.pdf (last visited Apr. 3, 2017).

⁶⁷ *Id.*

⁶⁸ *Id.*

thirds of farmworkers were married and more than half had children.”⁶⁹

Housing conditions for migrant workers are often less than the conditions found in affordable housing markets.⁷⁰ As the agriculture worker migrates with the cycle of crops they aim to cultivate, many workers are dependent on temporary or seasonal housing, which is often dilapidated and unsafe.⁷¹ Conditions are often unsanitary, crowded, and poorly ventilated which often create risk to workers health, and exposure to diseases and heat strokes.⁷² In some cases, landlords operating unlicensed migrant facilities go undetected.⁷³ As shown in other segments of society where the average educational attainment is low, such as single parents or neighborhoods with low income, substandard or discriminatory treatment from landlords often goes unreported.⁷⁴ Funding and assistance for affordable housing must be developed with bipartisan support to create lasting housing assistance that meets the challenges agriculture workers face.⁷⁵ Substandard housing conditions including crowded unsanitary conditions and dwellings that are lacking basic utilities are a common issue for agricultural workers.⁷⁶ In addition, often times agricultural workers live in rural areas and have to travel for vital services like health clinics, and public transportation, and often have to pay higher amounts for rent.⁷⁷

There are different types of housing available for agricultural workers including government housing, grower-owned housing, and

⁶⁹ *Id.*

⁷⁰ Teresa Wiltz, *States Struggle to Provide Housing for Migrant Farmworkers*, STATLINE (May 02, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/05/02/struggle-to-provide-housing-for-migrant-farmworkers>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ See generally, Robert Holly, *More than half-century after “Harvest of Shame,” migrant farmworkers in the U.S. still face deplorable conditions*, INVESTIGATE MIDWEST, <http://investigatemidwest.org/2016/11/07/more-than-half-century-after-harvest-of-shame-migrant-farmworkers-in-the-u-s-still-face-deplorable-conditions>. (last visited Nov. 7, 2016).

⁷⁴ See, *Farmworker Housing*, MIGRANT LEGAL ACTION PROGRAM, <http://www.mlap.org/housing-1> (last visited Feb. 20, 2017).

⁷⁵ *Id.* (describing housing challenges for migrant workers).

⁷⁶ See *Housing*, NAT’L FARM WORKER MINISTRY <http://nfwm.org/education-center/farm-worker-issues/housing/> (last viewed Feb. 20, 2017).

⁷⁷ *Id.*

privately rented housing.⁷⁸ Eligibility to qualify for affordable subsidized housing usually requires farm workers to be documented.⁷⁹ Growers are required to provide housing for guest workers on a special temporary visa called H-2A.⁸⁰ However, H-2A workers do not account for a significant amount of workers.⁸¹ Many agriculture workers living in grower-owned housing have rent deducted from their paycheck.⁸² For privately rented housing workers' pay directly to the owner of the property.⁸³ Grower-owned and privately rented housing often enables the landowner to develop a monopoly in isolated rural areas where housing is limited and workers have no alternative but to agree to the cost of housing.⁸⁴ In locations such as this, a housing policy that provides for consumer protections is desperately needed for agricultural workers.⁸⁵

One of the most effective ways of understanding the problems in agriculture worker housing is to speak to a person who has experienced the living conditions, such as Mario Gonzalez.⁸⁶ Mario Gonzalez migrated from Mexico to the United States in 1993 while his father was a migrant worker in an area known as the San Joaquin Valley in central California.⁸⁷ At the age of thirteen, Mario began working full time in the fields of a farm owner performing work that included operating tractor equipment and various labor duties.⁸⁸ Mario remembers some of his coworkers renting what he describes as shacks.⁸⁹ Some structures were converted garages or in some scenarios

⁷⁸ *Id.*

⁷⁹ See *HUD's Public Housing Program*, U.S. DEP'T OF HOUS. & URBAN DEV. https://portal.hud.gov/hudportal/HUD?src=/topics/rental_assistance/phprog (last visited Feb. 25, 2017).

⁸⁰ *H-2A Guestworker Program*, FARMWORKER JUSTICE, <https://www.farmworkerjustice.org/content/h-2a-guestworker-program> (last Feb. 25, 2017).

⁸¹ *Housing*, *supra* note 76.

⁸² See *Fact Sheet #49: The Migrant and Seasonal Agricultural Worker Protection Act* U.S. DEP'T OF LABOR, <https://www.dol.gov/whd/regs/compliance/whdfs49.pdf> (last updated Jul. 2008).

⁸³ *Housing*, *supra* note 76.

⁸⁴ *Id.*

⁸⁵ *Id.* (describing difficulties for farm workers including expense, lack of hygienic facilities and substandard housing).

⁸⁶ Email Interview with Mario Gonzalez, Program Manager, Immigration Advocate (Dec. 12, 2016).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

rooms made out of pallets against a sturdy backdrop of a barn or warehouse.⁹⁰ When asked about their habitability, Mario stated that what he remembers most is that the structures provided very little protection for the farmworkers during the cold winter months.⁹¹

Mario grew up working primarily with grapevines, corn fields, cotton fields and alfalfa in central California where work was continuous throughout the year.⁹² The grapevines required year-round attention beginning with the harvest in the late summer through the fall and then the trimming in the winter and tying of the vines in the late winter.⁹³ The migrant community that traveled with the work was around during the coldest part of the season and endured in the shabby dwellings.⁹⁴

While attending Fresno Pacific University, Mario was personally challenged while acting as a member of the student council.⁹⁵ A position was created within the Commuter Council in collaboration with the nuns at St. Anthony of Mary Claret to lead a group of students on a “missionary” trip to visit migrants at a local migrant camp.⁹⁶ Mario describes the migrant camp as a sort of “hidden community” located in west Fresno County in central California.⁹⁷ Mario was shocked by the way the men lived.⁹⁸ Mario explains that one group of men resided in a building designed to host several men while a second group resided in a barn not designed for human habitation.⁹⁹ The barn was very old and had several cracks that the men had covered with their towels and bed linings.¹⁰⁰ Although the building was in disrepair, Mario remembers how clean and tidy the men kept the living area.¹⁰¹ Mario was able to get to know the migrant workers during his visits and would often discuss the issues facing migrant workers over shared meals.¹⁰² The two groups of men only had access to a small shared

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

stove to cook with.¹⁰³ Some of the men would opt to purchase food prior to arriving back home at a nearby liquor store or from a taco truck.¹⁰⁴ Mario and the nuns were able to visit and pray for the men on several occasions before the migrant workers moved north to Washington for the apple picking season.¹⁰⁵

When asked what types of housing challenges are facing migrant workers Mario cited the fact that many of the migrant workers are men and are willing to put up with poor living conditions to save a few extra dollars to be able to send back home to family.¹⁰⁶ This includes taking cold showers and living in conditions most other people would not.¹⁰⁷ Mario also explains that landlords or camp operators know they can get away with providing poor conditions because the workers transient nature moves them before they are able to report the conditions or request better accommodations.¹⁰⁸ Mario also explains that many of the workers do not have health insurance and must work seven days a week to ensure they do not lose their jobs and ability to travel to the next job.¹⁰⁹ Missing a day of work could cause a migrant worker to lose their job.¹¹⁰

When asked about the causes of the problems with migrant housing Mario cites a greed associated with a capitalistic economy eager to cut cost and maximize profits.¹¹¹ To improve the conditions in migrant housing, Mario suggests increased monitoring and code enforcement to enforce adequate housing conditions.¹¹² In addition, Mario believes additional funding for non-profits to assist with the inspections for habitability and report back to public officials who could enforce regulation, repairs, or impose fines would help solve the housing problem.¹¹³

IV. HOUSING PROGRAMS FOR AGRICULTURE WORKERS

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

A review of housing programs that primarily facilitate housing for agriculture workers can be seen as early as 1862 with Abraham Lincoln's creation of the United States Department of Agriculture ("USDA").¹¹⁴ Much of the early U.S. economy was based on agriculture and like other programs, the department of agriculture was crucial to the US during the great depression. Today, the USDA includes the Office of Rural Development ("RD"), which was established by the 1990 Farm Bill, and amended the Consolidated Farm and Rural Development Act of 1972.¹¹⁵ RD provides farm labor direct loans and grants, and housing programs for both single family and multifamily properties.¹¹⁶ Like many of the other housing agencies in American History, the RD uses public funds for housing programs.¹¹⁷ Sustainability for funding for such programs requires political cooperation and support through congressional appropriations.¹¹⁸ Without bipartisan support, agricultural workers could be at risk of losing these vital services.¹¹⁹

The Community Facilities Programs administrated by the USDA provides affordable funding to develop essential community facilities in rural areas.¹²⁰ The essential community facilities are intended to provide important services to local communities in mostly rural areas.¹²¹ These types of programs that are specifically designed to infuse rural areas with funding are important to agriculture workers because many agriculture workers live in rural areas.¹²²

¹¹⁴ See Wayne D. Rasmussen, *Lincoln's Agricultural Legacy*, U.S. DEP'T OF AGRIC., <https://www.nal.usda.gov/lincolns-agricultural-legacy> (last visited Feb. 20, 2017).

¹¹⁵ 41 CFR 102-83.50 – *What is the Rural Development Act of 1972*, CORNELL UNIVERSITY LAW SCHOOL, <https://www.law.cornell.edu/cfr/text/41/102-83.50> (last visited Feb, 20 2017).

¹¹⁶ *Community Facilities Program*, U.S. DEPT. OF AG. RURAL DEV., <https://www.rd.usda.gov/programs-services/all-programs/community-facilities-programs> (last visited Feb. 20, 2017).

¹¹⁷ *Id.* (RD uses public funds to provide low interest direct loans, grants, and a loan guarantee program).

¹¹⁸ 31 U.S.C. § 1301 (2016).

¹¹⁹ See generally EDSON, *supra*, note 49 (discussing important housing programs).

¹²⁰ *Community Facilities Program*, *supra* note 116.

¹²¹ *Community Facilities & Direct Loan Program*, U.S. DEPT. OF AG. RURAL DEV., <http://www.rd.usda.gov/programs-services/community-facilities-direct-loan-grant-program> (last visited Feb. 20, 2017).

¹²² Eduardo Gonzalez, Jr. *Migrant Farm Workers: Our Nations Invisible Population*, EXTENSION (Oct. 5, 2005), <http://articles.extension.org/pages/9960/migrant-farm-workers:-our-nations-invisible-population>.

Programs available through State funds like the California Department of Housing and Community Development oversee the Office of Migrant Services whose mission is to assist migrant farmworker families in obtaining support services and safe affordable housing during the busy harvest seasons.¹²³ Another noteworthy program dedicated to providing services is the Caesar Chavez Foundation (“CCF”), which is named after the iconic migrant worker proponent and is dedicated to improving working conditions for in the agricultural industry.¹²⁴ The CCF, a 501(c) 3 non-profit organization, assists in building and renovating thousands of affordable housing units.¹²⁵ CCF has contributed over 300 single-family homes and more than 4,300 affordable multi-family sites in California, Arizona, New Mexico, and Texas.¹²⁶

A. *The Fair Housing Act of 1968*

Title VIII of the civil rights act of 1968 is also known as The Fair Housing Act of 1968 (“FHA”).¹²⁷ Congress passed the FHA to impose a comprehensive solution to the problem of unlawful discrimination in housing.¹²⁸ FHA declares that it is “the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States”.¹²⁹ Accordingly, the FHA prohibits, among other things, discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions because of “race, color, religion, sex, familial status, national origin, or handicap.”¹³⁰ These

¹²³ *Office of Migrant Services (OMS)*, CA DEP’T OF HOUS. & COMM. DEV., <http://www.hcd.ca.gov/financial-assistance/office-of-migrant-services/> (last visited Aug 11, 2016).

¹²⁴ *Mission Statement*, CAESAR CHAVEZ FOUNDATION http://www.chavezfoundation.org/_page.php?code=0140020000000000&page_ttl=Mission+Statement&kind=1 (last visited Feb. 25, 2017).

¹²⁵ *About Us*, CAESAR CHAVEZ FOUNDATION, http://www.chavezfoundation.org/_page.php?code=0140000000000000 (last visited Feb. 25, 2017).

¹²⁶ *Id.*

¹²⁷ *See generally The Fair Housing Act*, U.S. DEP’T OF HOUS. & URBAN DEV., https://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_op/p/progdesc/title8 (last visited Feb. 25, 2017).

¹²⁸ *Id.*

¹²⁹ 42 U.S.C. § 3601 (2016).

¹³⁰ 42 U.S.C. §§ 3604 (2016).

categories are referred to as protected classes.¹³¹ Many states have added additional categories of protected classes.¹³²

Section 808(d) of the FHA requires all executive branch departments and agencies administering housing and urban development programs and activities to administer these programs in a manner that affirmatively furthers fair housing.¹³³ Section 808(e)(5) requires HUD programs and activities to be administered in a manner affirmatively furthering the policies of the FHA.¹³⁴ Liability may be established under the Fair Housing Act based on a practice's discriminatory effect.¹³⁵ A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of a person's status in a protected class.¹³⁶

B. The Migrant and Seasonal Agricultural Worker Protection Act

The Migrant and Seasonal Agricultural Worker Protection Act ("MSPA") of 1983 is the leading federal law with the purpose of protecting agriculture workers by providing federal labor protections for working conditions, payment of wages, housing, and transportation.¹³⁷ In enacting MSPA, Congress stated that the purpose was to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers.¹³⁸ Each person who owns or controls a facility or real property which is used as housing for any migrant agricultural worker must ensure that the facility or real property complies with all substantive Federal and State safety and health standards applicable to such housing.¹³⁹ Under MSPA, Migrant housing must be inspected and certified with a certification of occupancy prior to being occupied by agriculture

¹³¹ *The Fair Housing Act*, *supra* note 127.

¹³² *Id.*

¹³³ 42 U.S.C. § 3608 (2016).

¹³⁴ 24 C.F.R. § 5.150 (2017).

¹³⁵ *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2522 (2015).

¹³⁶ *Id.* at 2511.

¹³⁷ *Migrant and Seasonal Agricultural Worker Protection Act (MSPA)*, U.S. DEP'T OF LABOR, <https://www.dol.gov/whd/mspa/> (last visited Feb. 20, 2017).

¹³⁸ 29 C.F.R. § 500.1 (2017).

¹³⁹ 29 C.F.R. § 500.130 (2017).

workers. Violations of MSPA may result in civil or other penalties.¹⁴⁰ While MSPA has provided many benefits, housing conditions for agriculture workers are still among the worst in the nation.¹⁴¹ There is a need for a bipartisan supported and sustainable housing policy that affirmatively furthers fair housing for agriculture workers.¹⁴²

V. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND AFFIRMATIVELY FURTHERING FAIR HOUSING

The Housing and Urban Development (“HUD”) is a cabinet department in the executive branch of the federal government.¹⁴³ Congress has given HUD authority to administer the FHA, including authority to issue regulations interpreting the FHA.¹⁴⁴ Specifically, 42 U.S.C. § 3608(a) gives the Secretary of HUD the “authority and responsibility for administering this Act,” and § 3614(a) provides expressly that “[t]he Secretary may make rules . . . to carry out this subchapter.”¹⁴⁵ First FHA prohibits discrimination in housing related transactions.¹⁴⁶ Second, FHA establishes a duty to affirmatively further fair housing to overcome segregation and unequal opportunities in housing.¹⁴⁷ Local and state governments and public housing agencies must certify in writing that they are affirmatively furthering fair housing.¹⁴⁸ HUD holds the power to determine the size of each grant.¹⁴⁹

HUD administers a variety of housing programs and grants throughout the nation.¹⁵⁰ The Community Development Block Grant

¹⁴⁰ See generally *Migrant and Seasonal Agricultural Worker Protection Act (MSPA)*, *supra* note 137.

¹⁴¹ Holly, *supra* note 73.

¹⁴² See EDSON *supra* note 49.

¹⁴³ 42 U.S.C. § 3532 (2016).

¹⁴⁴ 42 U.S.C. § 3608 (2016).

¹⁴⁵ 42 U.S.C. § 3608(a) (2016).

¹⁴⁶ 42 U.S.C. § 3604 (2016).

¹⁴⁷ *Affirmatively furthering fair housing and the accessibility requirements of the Fair Housing Act*, U.S. DEPT. OF HOUS. & URBAN DEV., <https://www.hud.gov/offices/fheo/library/AFFHnotice.pdf> (last visited Feb. 24, 2017).

¹⁴⁸ 24 C.F.R. § 903.23(c) (2015).

¹⁴⁹ *Community Development Block Grant Program*, U.S. DEPT. OF HOUS. & URBAN DEV., https://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/comm_unitydevelopment/programs (last visited Feb. 24, 2017).

¹⁵⁰ See *id.*

(“CDBG”) is a program that is designed to address a many different community development needs.¹⁵¹ Beginning in 1974, the CDBG program is one of the longest continuously run programs and provides annual grants on a formula basis to 1209 general units of local government and States.¹⁵² In the past, HUD required recipients of the CDBG and other funding sources such as Emergency Solutions Grant, The HOME Investment Partnerships program, The Housing Opportunities for Persons with AIDS, and Public Housing Agencies receiving assistance under Section 8 or 9 of the United States Housing Act of 1937 to complete an analysis of impediments (“AI”).¹⁵³ For CDBG, HOME, and other community planning and development programs, AFFH requires a jurisdiction have an analysis of impediments to fair housing choice, to take appropriate action to overcome the effects of impediments, and keep records reflecting the analysis and showing actions taken.¹⁵⁴ For Public Housing and Voucher programs administered through a public housing agency, AFFH requires a process of examining its programs, identifying any impediments to fair housing choice in those programs, addressing the impediments in a reasonable fashion in view of available resources, working with local jurisdictions to carry out any of their AFFH work, and keeping records to show the analysis of actions.¹⁵⁵ HUD’s office of Fair Housing and Equal Opportunity planning guide describes an AI as a comprehensive review of jurisdictions law’s regulations, and administrative policies procedures and practices, an assessment of how those laws, regulations, and practices affect the location, availability, and accessibility of housing.¹⁵⁶

An impediment is defined as an obstruction, hindrance, or obstacle.¹⁵⁷ The AI is made up of various factors that may include a community profile, household profile, private sector practices and public policies.¹⁵⁸ The community and household profile provides information regarding population, race and ethnicity, education,

¹⁵¹ *Id.*

¹⁵² 24 C.F.R. § 570.1 (2017).

¹⁵³ U.S. DEP’T OF HOUS. & URBAN DEV., FAIR HOUSING PLANNING GUIDE 5-12 (3rd ed. Mar. 1996) (hereinafter FHPG).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 2-16.

¹⁵⁶ *Id.* at 5-6.

¹⁵⁷ *Impediment*, DICTIONARY.COM, <http://www.dictionary.com/browse/impediment> (last visited Feb. 24, 2017).

¹⁵⁸ FHPG, *supra* note 153, at 2-16.

household income and size, vacancy rates, and other factors relating to housing.¹⁵⁹ The private sector practices and public policies section includes, inter alia, information about local real estate practices, mortgage lending, code enforcement, and specific funding programs for housing.¹⁶⁰ Recommendations about how to implement the appropriate action to overcome the impediments is usually stated in the form of findings and actions.¹⁶¹

AI's must be updated in cycle with the timeframe of a jurisdiction's consolidated plan.¹⁶² The consolidated plan is a long-term, usually five years, statement of housing needs for people with low income.¹⁶³ The consolidated plan must address and plan to deal with the needs on a priority basis.¹⁶⁴ Regulations requiring the AI do not directly require public participation in CDBG or consolidated plan.¹⁶⁵ However, HUD does encourage jurisdictions to schedule meetings for public comment and input to coincide with the consolidated plan.¹⁶⁶ The final AFFH rule emphasizes a new component of public participation.¹⁶⁷

VI. ANALYSIS OF THE IMPACT OF AFFH FINAL RULE ON AGRICULTURE WORKERS.

A. Changes to the Analysis of Impediments and Implementation of the New Rule

Part of the procedure used in the AI approach required each agency or jurisdiction to collect their own data and analyze any impediments to Fair Housing.¹⁶⁸ A criticism of the AI approach is that it was overly burdensome and required local planning agencies to dedicate significant time and resources to its creation.¹⁶⁹ In many cases, the effort dedicated to AI was treated as onerous and completed by hiring

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 3-7.

¹⁶¹ *Id.* at 3-14.

¹⁶² *Id.* at 4-3.

¹⁶³ *Id.* at 2-6.

¹⁶⁴ *Id.* at 5-3.

¹⁶⁵ Affirmatively Furthering Fair Housing, 80 Fed. Reg. 136, 42292 (Jul. 16, 2015).

¹⁶⁶ 24 C.F.R. § 5.156 (2017).

¹⁶⁷ J. Rosie Tighe. *HUD's New AFFH Rule: Will it Work?*, ROOFLINES (Aug. 5, 2013), http://www.rooflines.org/3372/huds_new_affh_rule_will_it_work/

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

outside consultants at an inflated cost.¹⁷⁰ Furthermore, the process of completing the AI often satisfied requirements of the Fair Housing Act but did not create a procedure that could provide a much needed impact for protected classes.¹⁷¹ In response to feedback from program participants, civil rights advocates, and the U.S. Government Accountability Office, HUD candidly admits the AI was not as effective as originally envisioned.¹⁷² Among its limitations is the lack of regulatory guidance, lack of clarity about what constitutes an impediment to fair housing choice or an appropriate action to overcome it.¹⁷³

In 2013 HUD initiated a rulemaking process for a more effective way of addressing fair housing issues and created the AFFH final rule of AFFH.¹⁷⁴ In July of 2015, President Barack Obama issued the regulation as part of Executive Order 12982.¹⁷⁵ The final rule for AFFH is intended to be a more effective approach for participants to identify fair housing issues and establish the appropriate goals to correct them.¹⁷⁶ Replacing the AI and implementing a new mechanism for achieving the goals of AFFH is what HUD calls an Assessment Tool.¹⁷⁷ Local governments and public housing authorities that were required to develop the AI will now be required to use the assessment tool beginning in 2017, 2018, and 2019 depending on what type of program the recipients participate in.¹⁷⁸ The tool also requires a community participation process, assessment of past goals and actions, fair housing analysis, and fair housing goals and priorities which will allow migrant worker to comment and express their concerns.¹⁷⁹ The community participation process described in the Assessment Tool requires documentation of outreach activities, media outlets used, and a description of efforts made to reach the public, including those

¹⁷⁰ *Id.*

¹⁷¹ Affirmatively Furthering Fair Housing, *supra* note 165, at 42348.

¹⁷² HUD Releases Final Affirmatively Furthering Fair Housing Rule, NAT'L LOW INCOME HOUS. COALITION (Jul. 13, 2015), <http://nlihc.org/article/hud-releases-final-affirmatively-furthering-fair-housing-rule>.

¹⁷³ *Id.*

¹⁷⁴ Affirmatively Furthering Fair Housing, *supra* note 165, at 42272.

¹⁷⁵ Executive Order 12892, U.S. DEP'T OF HOUS. & URBAN DEV., https://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_op/p/FHLaws/EXO12892 (last visited Feb. 24, 2017).

¹⁷⁶ 24 C.F.R. § 5.150 (2017).

¹⁷⁷ 24 C.F.R. § 5.151 (2017).

¹⁷⁸ 24 C.F.R. § 5.160 (2017).

¹⁷⁹ 24 C.F.R. § 5.158 (2017).

representing populations that are typically underrepresented in the planning process including persons who are limited English proficient.¹⁸⁰ This process provides a fundamental opportunity for migrant workers to be given notice and a chance to be heard.¹⁸¹

HUD suggests these processes will provide basic parameters to ensure participants are affirmatively furthering fair housing.¹⁸² In addition, the AFFH rule creates a new emphasis on regional approaches to fair housing problems and an opportunity for public input about fair housing issues and appropriate uses for HUD funds.¹⁸³ A regional approach has the potential to help migrant workers shed light on some of the housing conditions they endure, that may have otherwise gone undetected by a system of impediment analysis that was completed by individual jurisdictions and was often kept exclusive of one another.¹⁸⁴ In addition, a new centralized form of data distribution offers an opportunity to identify the barriers migrant workers have faced in housing policy that may have previously varied depending on the source of information used to evaluate housing policy.¹⁸⁵ In contrast, the needs of the populous areas in a region may overshadow the smaller populations found in rural areas where migrant workers are often employed if a migrant worker are unable to highlight the issues they are facing.¹⁸⁶ The effectiveness of the regional approach to data distribution and its effect on migrant workers is widely unknown.¹⁸⁷

One of the most significant changes implemented with the new rule is that HUD will provide the agencies with data and information regarding trends needed to appropriately evaluate their housing programs and plans.¹⁸⁸ The hope is that the new rule will enable local housing planners to work independently of consultants used to obtain

¹⁸⁰ U.S. DEP'T OF HOUS. & URBAN DEV., ASSESSMENT OF FAIR HOUSING TOOL (Dec. 2015), <https://www.hudexchange.info/resource/4865/assessment-of-fair-housing-tool/>.

¹⁸¹ *See id.*

¹⁸² 24 C.F.R. § 5.150 (2017).

¹⁸³ Affirmatively Furthering Fair Housing, *supra* note 165, at 42359.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *See generally id.*

¹⁸⁷ *See generally HUD's New Regulation Affirmatively Furthers Fair Housing, supra*, at note 16.

¹⁸⁸ *See Tighe, supra* note 167.

and analyze the needed data, and create savings and efficiencies.¹⁸⁹ Much needed savings and efficiencies provided to local housing agencies has the potential to improve services for the migrant worker by providing increased funding available to housing program administrators.

Another goal of the new assessment tool approach is to reduce litigation by reducing the data collection requirements and providing much clearer guidelines for how a community can reduce barriers to fair housing.¹⁹⁰ The idea is that the elimination of data gathering for municipalities and the newly reformed explanation of steps to be taken should foster greater compliance with the Fair Housing Act while reducing the cost burden for municipalities.¹⁹¹ A less complicated path to compliance should provide for less instances of litigation where housing administrators must defend their fair housing efforts.¹⁹² This has the potential to incentivize rural areas governed by small government agencies to reap the benefits of program dollars to be funneled into areas populated with migrant workers.¹⁹³ However, in the original rule proposed in 2013, HUD estimated a significant burden to comply with AFFH equaling greater than 1,600,000 hours.¹⁹⁴ Increased administrative burdens threaten to reduce resources needed for agricultural workers.¹⁹⁵ The effectiveness of the rule appears to be highly speculative and opinions regarding the future impact the AFFH rule will have on the housing market are spun to deliver whichever message the writer hopes will come to fruition.¹⁹⁶ Such high amounts of discrepancy between potential outcomes goes to show a lack of bipartisan support and potential for long lasting housing reform that is desperately needed for vulnerable populations like the agriculture worker.¹⁹⁷ In other words, the extremely varying opinions about AFFH reveal that it does not have the strength of support like some of the other housing policy changes found in the New Deal, and after the Great Recession that helped shape the housing landscape in

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* (discussing the reduced burdens for municipalities).

¹⁹⁴ HUD's *New Regulation Affirmatively Furthers Fair Housing*, *supra* note 16.

¹⁹⁵ *Id.*

¹⁹⁶ Leahy, *supra* note 21 (discussing a possible lack of coverage by mainstream media and apparent suppression by a democratic led presidency).

¹⁹⁷ Von Hoffman, *supra* note 36, at 307.

America.¹⁹⁸ All the while the housing needs of agriculture workers are sidelined.¹⁹⁹

The AFFH rule has been met with support, but also fierce opposition and some opponents labeling it as the “War on the Suburbs”.²⁰⁰ Groups opposing AFFH explain the war on suburbs as HUD attempting to reengineer American neighborhoods.²⁰¹ An example of support can be seen by the National Low Income Housing Coalition (“NLIHC”) who enthusiastically endorsed the final AFFH rule, and pledged to help realize successful implementation.²⁰² “NLIHC is an organization that includes state and local housing coalitions, residents of public and assisted housing, nonprofit housing providers, homeless service providers, fair housing organizations, faith based organizations, public housing agencies, and others.”²⁰³ NLIHC supports the AFFH final rule and pledged to contribute to its implementation.²⁰⁴

On the opposing side, in May of 2016 Senator Mike Lee from Utah attempted to defund AFFH by purposing an amendment that would prohibit the use of appropriated funds for HUD to be used for AFFH, while Senator Susan Collins from Maine was successful in passing an amendment that has been criticized by republican supporters.²⁰⁵ Both sides of the issue also seem to be unclear on what type of burden AFFH will create for data collection and cost to the federal government.²⁰⁶ The potential effectiveness of the savings and

¹⁹⁸ *Id.*

¹⁹⁹ See generally Holly, *supra* note 73.

²⁰⁰ Leahy, *supra* note 21.

²⁰¹ *Id.*

²⁰² Diane Yentel, *Letter re. Docket No. FR-5173-N-08 Affirmatively Furthering Fair Housing Assessment Tool for States and Insular Areas: Solicitation of Comment—60-Day Notice Under Paperwork Reduction Act of 1995*, NAT’L LOW INCOME HOUS. COALITION (May 10, 2016), http://nlihc.org/sites/default/files/NLIHC-Comments_State-Assessment-Tool.pdf.

²⁰³ *Recap Tract Current and Historic*, U.S. DEP’T OF HOUS. & URBAN DEV., https://egis-hud.opendata.arcgis.com/datasets/320b8ab5d0304daaa7f1b8c03ff01256_0 (last visited Feb. 24, 2017).

²⁰⁴ Yentel, *supra* note 202.

²⁰⁵ Stanley Kurtz, *Senate AFFH Floor Debate: Lee and Shelby vs. Isakson and Collins*, THE CORNER, <http://www.nationalreview.com/corner/435713/senateaffh-floor-debate-lee-andshelby-vs-isakson-and-collins> (last visited May 23, 2016).

²⁰⁶ See generally, *Affirmatively Furthering Fair Housing Final Rule: Regulatory Impact Analysis*, U.S. Dep’t of Hous. & Urban Dev., https://www.huduser.gov/portal/sites/default/files/pdf/AFFH_Regulatory_Impact_Analysis_FinalRule.pdf (last visited Feb. 24, 2017).

efficiencies provided by AFFH, and its impact on the agriculture worker population, is highly uncertain. One area where AFFH may create new liability that may prove beneficial to underserved populations including migrant workers, is through the disparate impact theory.²⁰⁷

B. Disparate Impact Theory

While AFFH is designed to further fair housing and reduce discriminatory practices for all protected classes, AFFH does not specifically enumerate protections for agriculture workers.²⁰⁸ In large part, AFFH is aimed at addressing housing policy to overcome historic patterns of segregation.²⁰⁹ HUD gained what many supporters would call a major victory for AFFH with Supreme Court's decision in *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).²¹⁰ In this case, the Inclusive Communities Project, Inc. ("ICP") claimed that applications for low income tax credit properties were being disproportionately approved in African American communities while disproportionately denying applications in neighborhoods with primarily Caucasian residents.²¹¹ The ICP also argues that the concentration of these types of units in minority areas has contributed to maintaining and perpetuating segregated housing patterns.²¹² In comparison, the same affect is experienced by agriculture workers who populate a specific geographical area because of their vicinity to the crops they cultivate.²¹³ Thus, a cycle of negative effects is prolonged by the allocation of government funds having an adverse impact on migrant workers.²¹⁴ The AFFH rule provides a legal remedy for migrant workers if the connection between an agency's policy and its disparate impact is established.²¹⁵

²⁰⁷ See generally Seicshnaydre, *supra* at note 17.

²⁰⁸ Affirmatively Furthering Fair Housing, *supra* note 165, at 42283.

²⁰⁹ *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522 (2015).

²¹⁰ *Id.* at 2507.

²¹¹ *Id.* at 2514.

²¹² *Id.* at 2515.

²¹³ Wiltz, *supra*, note 70.

²¹⁴ *Id.* (discussing underfunded inspection program for migrant workers).

²¹⁵ See generally Angela E. Kleine, Tom Noto & Joe Rodriguez, *Disparate-Impact Doctrine Survives Supreme Court Review*, 31 WESTLAW J. CORP. OFFICERS & DIRECTORS LIABILITY 1 (2015).

Most people consider a discriminatory act as an intentional act that is done with a specific motive or desire to either inflict harm or is intended to deny a person from receiving equal treatment.²¹⁶ However, there is a long-standing, but newly reemphasized antidiscrimination theory found in *Inclusive Communities* known as disparate impact that may extend liability for discrimination even if the policy appears to be neutral.²¹⁷ The theory of disparate impact holds that practices in employment, housing, or other areas may be considered discriminatory and illegal if they have a disproportionate "adverse impact" on persons in a protected class.²¹⁸

In *Inclusive Communities*, the Supreme Court analyzed whether a disparate impact theory was cognizable under the Fair Housing Act of 1968.²¹⁹ In a 5-4 decision, the majority opinion held that disparate impact is cognizable under the FHA because, the statute's text refers to the consequences of an action and disparate impact is consistent with the FHA's statutory purpose.²²⁰ A major concern in the courts decision involved whether AFFH would help end perpetuating discrimination or motive participants to pursue racial quotas to avoid liability.²²¹

Section 804(a) of the FHA makes it unlawful "to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."²²² The majority opinion in *Inclusive Communities* focused on the phrase "otherwise make unavailable" to reach the conclusion that the phrase refers to "the consequences" of an action rather than the actor's intent.²²³ It analogized the FHA's use of the "otherwise make unavailable" phrase to Title VII and the Age

²¹⁶ *Discrimination Law and Legal Definition*, US LEGAL,

<https://definitions.uslegal.com/d/discrimination/> (last visited Feb. 24, 2017).

²¹⁷ *Does the Supreme Court Ruling on Disparate Impact Affect Your Business?*, KIMBALL, TIREY & ST. JOHN LLP (Jul. 2015), <http://www.kts-law.com/does-the-supreme-court-ruling-on-disparate-impact-affect-your-business/>.

²¹⁸ *Id.*

²¹⁹ *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2513 (2015).

²²⁰ *Id.* at 2518.

²²¹ Kleine, *supra* note 215, at 1.

²²² *Texas Dep't of Hous.* 135 S. Ct. at 2518.

²²³ Kleine, *supra* note 215, at 3.

Discrimination in Employment Act of 1967 use of the phrase “otherwise adversely affect.”²²⁴

Applying the disparate impact theory exposes municipalities to the hazards of litigation and liability exposure if the housing plan is determined to have a disparate impact.²²⁵ If additional litigation opportunities are created because of the AFFH rule, this will act in contrary HUD’s goal of reducing litigation costs by providing centralized data.²²⁶ For example, if a city adopts a housing element of the city’s general plan that limits the amount of multifamily housing units, or concentrates those units in a specific part of town, the predominant renters of those housing units, who may be agriculture workers or of a specific protected class, are now impacted by that decision.²²⁷ The effect of applying the disparate impact theory to housing discrimination is still uncertain and may lead to additional litigation.²²⁸ Commentators have expressed concern that shifting development of new affordable housing to so-called “areas of opportunity”, characterized as areas with higher income and with greater access to employment, education, transportation, health services and other resources, will mean importing populations to suburban areas creating city type environments.²²⁹ Many of the agriculture workers live in areas that are not characterized as “areas of opportunity” because of the high costs associated with developing sophisticated transportation systems or infrastructure designed to support a strong economy in small rural towns.²³⁰ Infrastructure cost are typically higher in rural areas than urban areas.²³¹ This is of no fault of the agriculture worker, as it is often geographically impossible to develop urban areas of commerce in rural locations.²³² As seen in President Johnson’s “war on poverty”, in the past a major policy

²²⁴ *Texas Dep’t of Hous.*, 135 S. Ct. at 2518.

²²⁵ *Id.*

²²⁶ See Tighe, *supra* note 167 (discussing goals of reduced litigation).

²²⁷ *Texas Dep’t of Hous.*, 135 S. Ct. at 2521.

²²⁸ Kleine *supra* note 215, at 6.

²²⁹ Leahy, *supra* note 21.

²³⁰ See generally, *Strengthening the Rural Economy-Strengthening Rural Infrastructure*, WHITEHOUSE,

<https://www.whitehouse.gov/administration/eop/cea/factsheets-reports/strengthening-the-rural-economy/strengthening-rural-infrastructure> (last visited Feb. 24, 2017).

²³¹ *Id.*

²³² *Id.* (discussing the fact that fewer people live in rural areas, making cost of infrastructure higher).

approach was to distribute funds to areas that lacked resources in order to build up the community infrastructure.²³³ AFFH reverses course and now requires funds for low-income families be distributed to areas proven to have established opportunities which are often found in urban areas.²³⁴

While the intent of AFFH appears to be genuine, it is ironic that it may have a disparate impact on agriculture workers and migrant housing because of a lack of progress with the disparate impact doctrine.²³⁵ The new assessment tool requires recipients of the grant money to create a plan that will strategically funnel the funds into areas that include what HUD refers to “access to opportunity.”²³⁶ The idea can be explained as a sort of reverse gentrification, where rather than providing an influx of wealthy residents to areas in need of renovation, low-income families are integrated to affluent neighborhoods.²³⁷ This creates a problem for agriculture workers because many agriculture workers migrate with the seasons or live in areas within a close proximity of the fields and crops they tend.²³⁸ Many of these rural communities do not have the solutions to what HUD calls contributing factors of disparities and access to opportunity, such as, availability of public transportation, private investment in neighborhoods, access to financial services, and other public investments.²³⁹

The San Joaquin Valley in central California is home to many agricultural workers and is known as the “nation’s salad bowl” because of its array of fruits and vegetables.²⁴⁰ Eight counties comprise the San Joaquin Valley, including all of Kings County, most of Fresno, Kern, Merced, and Stanislaus counties, and portions of

²³³ See generally Lyndon Johnsons *Great Society*, *supra* note 43.

²³⁴ See generally, The Poverty to Prosperity Program and the CAP Economic Policy Team, *Expanding Opportunities in America’s Urban Areas*, CENTER FOR AMERICAN PROGRESS (March 23, 2015), <https://www.americanprogress.org/issues/poverty/reports/2015/03/23/109460/expanding-opportunities-in-americas-urban-areas/>.

²³⁵ See generally Seicshnaydre, *supra* at note 17.

²³⁶ 24 C.F.R. § 5.150 (2017).

²³⁷ Rachel D. Godsil, *The Gentrification Trigger: Autonomy, Mobility, and Affirmatively Furthering Fair Housing*, 78 BROOK. L. REV. 319, page 321 (2013).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *San Joaquin Valley (CA)*, JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES, <http://jointcenter.org/content/san-joaquin-valley-ca> (last visited Feb. 24, 2017).

Madera, San Luis Obispo, and Tulare counties.²⁴¹ The San Joaquin Valley is home to more than 3.7 million residents with over 1.4 million, and nearly forty percent of the population located in the four largest cities of Fresno, Bakersfield, Modesto, and Stockton.²⁴² Furthermore, nearly five-hundred thousand of the 1.2 million housing units are located in the four largest cities.²⁴³ The sheer volume of population and housing units concentrated in the area's largest cities explain why funding for infrastructure has been invested in areas other than the rural communities where the majority of agricultural population resides.²⁴⁴ Because of this, the definition of "access to opportunity" will not be found in areas populated by agricultural workers, causing a further separation between funding sources and those who need it most.²⁴⁵

Without these types of access to opportunity the program funds may not be able to be invested in areas with a population predominantly consisting of agriculture workers in rural communities and may not make a significant increase against segregation.²⁴⁶ Developing additional affordable housing in new areas is needed, but its efforts can potentially create social engineering without guaranteed results.²⁴⁷ A congressional solution powered by bipartisan approach rather than an executive order implemented through an executive cabinet would likely yield a result that does not exclude agricultural workers found in many of the rural areas in America.²⁴⁸

²⁴¹ *San Joaquin Valley Fact Sheet*, VALLEY CAN, http://www.valleycan.org/fact_sheets_info/sjv_fact_sheet.php.html (last visited Feb. 24, 2017).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ Census Quick Facts. CENSUS, <http://www.census.gov/quickfacts/table/PST045215/0675000,0648354,0603526,0627000>.

²⁴⁵ *Affirmatively Furthering Fair Housing*, *supra* note 165, at 42279.

²⁴⁶ *HUD's New Regulation Affirmatively Furthers Fair Housing*, *supra* note 16. (explaining the procedure AFFH requires to document steps to reduce segregation in exchange for HUD financial assistance).

²⁴⁷ *Id.*

²⁴⁸ *See generally* Tod Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, HERITAGE FOUNDATION (Feb. 21, 2001), <http://www.heritage.org/research/reports/2001/02/the-use-and-abuse-of-executive-orders-and-other-presidential-directives>. (explaining constitutional separation of powers for the President).

C. Local Land Use Decisions

Another criticism of AFFH is that land use decisions may not be controlled by local decision makers.²⁴⁹ Commentators have cautioned that the proposed rule includes HUD into local land use decisions that may impede local control and zoning.²⁵⁰ Local control and decision making of land use is fundamental in American law and has received support from the United States Supreme Court.²⁵¹ A successful 1970 California initiative that required voters to approve new public housing in their jurisdiction was upheld by the United States Supreme Court against a constitutional challenge in *James v. Valtierra*, 402 U.S. 138 (1971).²⁵² The Court held that a State constitutional provision requiring low-rent housing projects to be approved by a majority vote in the community was constitutional.²⁵³ The court found the provision did not violate the supremacy clause, privileges and immunities clause, or equal protection clause.²⁵⁴ AFFH appears to erode this holding because data provided by HUD and the regional decision making mechanisms in the final rule have the ability to overrule local land use decisions.²⁵⁵ In fact, HUD admits, its principal enforcement tool is withholding federal financial assistance to local agencies, which ultimately, has the harshest impact on the persons it was designed to serve, the agricultural worker.²⁵⁶

HUD asserts that determination about the “goals, priorities, strategies, and actions” that communities take to further fair housing goals should be made at a local level.²⁵⁷ Opponents however are concerned that the AFFH rule will open the door for the Federal government to determine zoning, rents, and other services.²⁵⁸ Local control of land use and zoning is important to agriculture workers because local support is often the determining factor as to whether or

²⁴⁹ Affirmatively Furthering Fair Housing, *supra* note 165, at 42309.

²⁵⁰ *Id.*

²⁵¹ Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 111-112 (2001).

²⁵² *James v. Valtierra*, 402 U.S. 138, (1971).

²⁵³ *Id.* at 139.

²⁵⁴ *Id.* at 139.

²⁵⁵ Leahy, *supra* note 21.

²⁵⁶ HUD's New Regulation Affirmatively Furthers Fair Housing, *supra* note 15.

²⁵⁷ Affirmatively Furthering Fair Housing, *supra* note 165, at 42309.

²⁵⁸ *Id.*

not a program is successful.²⁵⁹ An example of this can be seen in the recent California drought.²⁶⁰ Farmers in the central valley of California have recently endured several years of poor snow pack and reduced rainfall causing a severe drought.²⁶¹ While the issue is multifaceted, much of the blame has been assigned to a complex and inconsistent system of laws, court decisions, and regulations at the state and federal levels is resulting in the mismanagement of critical water resources.²⁶² The Western Water and American Food Security Act of 2015 attempted to establish procedures to adjust Delta Smelt management measures which were created in the State Water Project (“SWP”) in California issued by the U.S. Fish and Wildlife Service (“USFWS”) on December 15, 2008.²⁶³ The effort to maintain local control of land use passed the House of Representatives, but was not passed in the Senate.²⁶⁴ In the same way, allowing land use and local planning to be determined by bureaucrats hundreds, or even thousands of miles away may have a negative impact and prove difficult to address the diverse localities where many agricultural workers reside across the United States.

C. Executive Orders

Although there is no constitutional provision or statute that explicitly permits executive orders, Presidents have long used the executive power in Article II, Section 1, Clause 1 of the Constitution that refers to the office of President as the executive.²⁶⁵ In Article II, Section 3, Clause 5, Presidents are sworn to use care and ensure that the nations laws are faithfully executed.²⁶⁶ Furthermore, the Supreme Court has furthered executive orders by recognizing the President’s ministerial

²⁵⁹ Carlson, *supra* note 251, at 119.

²⁶⁰ *California Drought*, U.S. GEOLOGICAL SURVEY, <http://ca.water.usgs.gov/data/drought/> (last updated Apr. 4, 2017).

²⁶¹ *Id.*

²⁶² *The Man-Made California Drought*, HOUSE COMMITTEE ON NATURAL RESOURCES (last visited Feb. 24, 2017).

²⁶³ *H.R. 2898 – Western Water and American Food Security Act of 2015, Summary*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/2898> (last visited Feb. 24, 2017).

²⁶⁴ *Id.*

²⁶⁵ *See Article II, Executive Branch*, NAT’L CONST. CTR., <http://constitutioncenter.org/interactive-constitution/articles/article-ii> (last visited Feb. 24, 2017).

²⁶⁶ *Id.*

and discretionary duties.²⁶⁷ Executive orders are fairly common and often used as a way of circumventing the legislative process but still must be constitutional and can be overturned.²⁶⁸ The widespread discretion given to Presidents to implement executive orders also makes them vulnerable to contrary executive orders aimed to overrule when opposing political parties are elected and executive administrations change.²⁶⁹

The forty-second President of the United States, Bill Clinton, issued executive order 12892 to require that all executive departments and agencies administer their programs and activities relating to housing and urban development in a manner that furthers the purposes of the Fair Housing Act and to cooperate with the Secretary of Housing and Urban Development.²⁷⁰ Under the direction of the President Obama, the AFFH final rule cites executive order 12892 as a principal legal authority.²⁷¹ Because the foundation of AFFH is built on a regulation propounded by an executive order, the future of AFFH is highly vulnerable.²⁷²

The Secretary of HUD is an executive cabinet position appointed by the President of the United States.²⁷³ President Trump has nominated former presidential candidate and neuro-surgeon Ben Carson, who has already been received with skepticism because of his lack of experience in government and housing issues.²⁷⁴ If approved, Carson will mark the ninth republican of seventeen total Secretaries of HUD, with the other eight secretaries being democrats.²⁷⁵ On average, each HUD secretary has served for approximately three years.²⁷⁶ The

²⁶⁷ *State of Mississippi v. Johnson*, 71 U.S. 475, 478 (1866).

²⁶⁸ See Tod Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, HERITAGE FOUNDATION (Feb. 21, 2001), (<http://www.heritage.org/research/reports/2001/02/the-use-and-abuse-of-executive-orders-and-other-presidential-directives>.) (explaining the constitutional separation of powers and potential abuse of authority by a President).

²⁶⁹ See *Id.*

²⁷⁰ *Executive Order 12892*, *supra* note 175.

²⁷¹ Affirmatively Furthering Fair Housing, 80 Fed. Reg. 136, 42284 (Jul. 16, 2015).

²⁷² See generally Gaziano, *supra* note 268.

²⁷³ 42 U.S.C. § 3532 (2016).

²⁷⁴ Trip Gabriel, *Trump Chooses Carson to Lead HUD*, N.Y. TIMES (Dec. 5, 2016), http://www.nytimes.com/2016/12/05/us/politics/ben-carson-housing-urban-development-trump.html?_r=0.

²⁷⁵ See *HUD Secretaries*, U.S. DEP'T OF HOUS. & URBAN DEV., <https://archives.hud.gov/pastsecretaries.cfm> (last visited Feb. 24, 2017).

²⁷⁶ *Id.*

combination of a housing policy such as AFFH being furthered by the vulnerable mechanism of an executive order and being led by a cabinet position lacking a record of stability creates an environment that is subject to change with the whims and directives of politicians.²⁷⁷ While government positions are designed to change, and prevent tyrannical leadership, temporary housing policy fixes without bipartisan support get volleyed between political parties without ever being effectively implemented.²⁷⁸ All the while, the agricultural worker's desire for a brighter future with a more effective housing policy remain idle.²⁷⁹

VII. RECOMMENDATIONS

The need for quality affordable housing in the United States is a legitimate concern that demands a remedy produced through sound bipartisan public policy. Housing policy in the United States has evolved to meet diverse needs throughout the nation and a significant level of government oversight and involvement has proved to be necessary in many aspects of American Society.²⁸⁰ However, the United States is experiencing extreme division as political parties and their followers consistently clash with one another on a barrage of issues, many concerned with the government's role in our society.²⁸¹ Fundamental differences drive wedges as wide as a grove between proponents on each side of the issues. Race discrimination, numerous alleged inequalities, and income gaps have given birth to social segregation, and political partisanship in communities across the nation.²⁸² There is a need for bipartisanship efforts to solve the affordable housing needs for all Americans, and especially the agriculture worker. Without genuine bipartisanship support, correctable issues become polarizing.²⁸³ Furthermore, time, money, and resources dedicated to a solution without bipartisan support is at

²⁷⁷ See generally Gaziano, *supra* note 268.

²⁷⁸ See generally Wiltz, *supra*, note 70 (discussing the effects of ineffective migrant housing and conflicting federal standards with lax enforcement).

²⁷⁹ See generally Holly, *supra* note 73.

²⁸⁰ See generally, STOLOFF *supra* note 29.

²⁸¹ See generally *Partisanship and Political Animosity in 2016*. PEW RESEARCH CENTER (Jun. 22, 2016) <http://www.people-press.org/2016/06/22/partisanship-and-political-animosity-in-2016/>.

²⁸² *Id.*

²⁸³ *Id.*

risk of being repealed or pared down to a state of ineffectiveness by a subsequently elected official from an opposing political party.²⁸⁴ The solution to providing the much-needed improvements for affordable and agriculture housing will be realized through bipartisan efforts. The proposed solution to leverage additional power to HUD by using an executive order without widespread support takes housing policy in a direction that does not provide a solution for the agriculture worker. True reform and solution will only be obtained through a policy that can be agreed upon jointly and administered by those with the ability to effectuate change across party lines.

VI. CONCLUSION

The United States has a long tradition of government oversight in the housing industry.²⁸⁵ This tradition has continuously stabilized the nation's economy and aided the nation's most vulnerable populations in time of need.²⁸⁶ The American Dream is most obtainable when its citizens have the ability to obtain meaningful employment and affordable quality housing.²⁸⁷ In times of political dysfunction, the American Dream is at risk of being delayed, or even missed by those most in need, especially the farm worker.²⁸⁸ True public service and servant leadership is needed to meet the needs of the most vulnerable in American society to develop long standing housing policy that can sustain the inevitable political changes of our great nation.

JEREMY MATTHEWS²⁸⁹

²⁸⁴ *Id.* (discussing the lack of commonality between major political parties and frustration between political parties).

²⁸⁵ *See generally*, EDSON, *supra* note 49.

²⁸⁶ *Id.*

²⁸⁷ *See generally*, ADAMS, *supra* note 2.

²⁸⁸ *See generally* Partisanship and Political Animosity, *supra* note 281.

²⁸⁹ J.D. Candidate, San Joaquin College of Law, 2019. I would like to extend my sincere gratitude to the SJALR Editorial Board. Specifically, I would like to thank Ryan Lopez for his encouragement and guidance, and Allison Ryan for extending grace to me when I needed it most. I would also like to thank friends and family who kept me motivated and allowed me to dream big.