Housing Advisory Commission

HOUSING ADVISORY COMMISSION

AGENDA

Special Meeting **Thursday, April 7, 2022** **7:00 pm**	Mike Uberti, Secretary HAC@cityofberkely.info

PUBLIC ADVISORY: THIS MEETING WILL BE CONDUCTED EXCLUSIVELY THROUGH VIDEOCONFERENCE AND TELECONFERENCE

Pursuant to Section 3 of Executive Order N-29-20, issued by Governor Newsom on March 17, 2020, this meeting of the Housing Advisory Commission will be conducted exclusively through teleconference and Zoom videoconference. Please be advised that pursuant to the Executive Order, and to ensure the health and safety of the public by limiting human contact that could spread the COVID-19 virus, there will not be a physical meeting location available.

To access the meeting remotely using the internet: Join from a PC, Mac, iPad, iPhone, or Android device use: https://us06web.zoom.us/j/88371004605. If you do not wish for your name to appear on the screen, then use the drop down menu and click on "rename" to rename yourself to be anonymous. To request to speak, use the “raise hand” icon on the screen.

To join by phone: Dial US: 1-669-900-6833 and Enter Meeting 883 7100 4605. If you wish to comment during the public comment portion of the agenda, press *9 and wait to be recognized by the Chair.

Written communications submitted by mail or e-mail to the Housing Advisory Commission by 5:00 p.m. the day before the meeting will be distributed to the members of the Committee in advance of the meeting and retained as part of the official record. City offices are currently closed and cannot accept written communications in person.

All agenda items are for discussion and possible action.

Public comment policy: Members of the public may speak on any items on the Agenda and items not on the Agenda during the initial Public Comment period. Members of the public may also comment on any item listed on the agenda as the item is taken up. Members of the public may not speak more than once on any given item. The Chair may limit public comments to 3 minutes or less.

1. **Roll Call**
2. **Agenda Approval**
3. **Public Comment**
4. **Approval of the March 3, 2022 Special Meeting Minutes** (Attachment 1)
5. **Discussion and Possible Action on a Housing Preference Policy** – All/Staff/Healthy Black Families (Attachment 2)

6. **Update on Council Items (Future Dates Subject to Change)**
    a. Resolution Making Required Findings Pursuant to the Government Code and Directing City Legislative Bodies to Continue to Meet Via Videoconference and Teleconference

7. **Announcements/Information Items**

8. **Future Items**

9. **Adjourn**

Attachments

1. Draft March 3, 2022 Special Meeting Minutes
2. Anna Cash and Mike Uberti, HHCS, Housing Preference Policy

Communications to Berkeley boards, commissions or committees are public record and will become part of the City's electronic records, which are accessible through the City's website. Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to a City board, commission or committee, will become part of the public record. If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service or in person to the Secretary of the commission. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the Secretary for further information.

Written communications addressed to the Housing Advisory Commission and submitted to the Commission Secretary will be distributed to the Commission prior to the meeting. This meeting will be conducted in accordance with the Brown Act, Government Code Section 54953. Any member of the public may attend this meeting. Questions regarding this matter may be addressed to Mark Numainville, City Clerk, (510) 981-6900.

COMMUNICATION ACCESS INFORMATION:

	To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at (510) 981-6418 (V) or (510) 981-6347 (TDD) at least three business days before the meeting date.

Housing Advisory Commission

HOUSING ADVISORY COMMISSION
Thursday, March 3, 2022

Time: 7:03 pm
Held via Video and Teleconference

Secretary – Mike Uberti
HAC@cityofberkeley.info

DRAFT MINUTES

1. **Roll Call**
   Present: Nico Calavita, Sara Fain, Xavier Johnson, Libby Lee-Egan, Mari Mendonca, Debbie Potter, Ainsley Sanidad, and Leah Simon-Weisberg.
   Absent: Alexandria Rodriguez (unexcused).
   Commissioners in attendance: 8 of 9
   Staff Present: Mike Uberti and Anna Cash.
   Members of the public in attendance: 9
   Public Speakers: 12

2. **Agenda Approval**
   Action: M/S/C (Potter/Fain) to approve the agenda.
   Vote: Ayes: Calavita, Fain, Johnson, Lee-Egan, Mendonca, and Potter. Noes: None. Abstain: None. Absent: Rodriguez (unexcused), Sanidad (unexcused), and Simon-Weisberg (unexcused).

3. **Public Comment**
   There were two speakers during public comment.

4. **Approval of the February 3, 2022 Special Meeting Minutes**
   Action: M/S/C (Potter/Mendonca) to accept the February 3, 2022 Special Meeting Minutes.
   Vote: Ayes: Calavita, Fain, Johnson, Lee-Egan, Mendonca, Potter, and Simon-Weisberg. Noes: None. Abstain: None. Absent: Rodriguez (unexcused) and Sanidad (unexcused).

5. **Discussion and Possible Action on the City of Berkeley's Draft Annual Action Plan (AAP) PY 2022 for Department of Housing and Urban Development (HUD)**
Public Comment: 2

Action: M/S/C (Simon-Weisberg/Johnson) to recommend the City Council Recommend the adoption Annual Action Plan (AAP) for Federal Program Year (PY) 2022 for the City of Berkeley's Community Development Block Grant (CDBG) Public Facility Improvement Project including the Fred Finch Youth Center application with an extra 10% contingency to the current proposal.

Vote: Ayes: Calavita, Fain, Johnson, Lee-Egan, Mendonca, Potter, Sanidad, and Simon-Weisberg. Noes: None. Abstain: None. Absent: Rodriguez (unexcused).

6. **Discussion and Possible Action on Citywide Affordable Housing Requirements**
Public Comment: 8

Action: M/S/C (Potter/ Simon-Weisberg) to recommend the City Council:

- Amend Berkeley Municipal Code (BMC) Chapter 23.328, updating the citywide Affordable Housing Requirements (AHR) in the Zoning Ordinance; with the following amendments to the staff recommendations:
    - Initiate an in-lieu fee evaluation study within one year;
    - Track the distribution of fees, onsite units, and mixed compliance projects and report within two years, with the intent to reevaluate the ordinance if onsite units are not increasing over time from the current baseline; and
    - Tie rent increases for inclusionary units to 65% of CPI consistent with Rent Board calculations for rent increases.
- Repeal existing administration and zoning code sections that refer to affordable housing requirements, BMC Section 22.20.065, and Section 23.312.040(A)(6);
- Rescind Resolution No. 68,074-N.S. related to fees, exemptions, and administration of inclusionary affordable housing and in-lieu programs;
- Adopt a Resolution addressing regulations for a voucher program and establishing an in-lieu fee pursuant to BMC Section 23.328.020(A)(2).

Vote: Ayes: Calavita, Fain, Johnson, Lee-Egan, Mendonca, Potter, Sanidad, and Simon-Weisberg. Noes: None. Abstain: None. Absent: Rodriguez (unexcused).

7. **Discussion and Possible Action to Appoint a Housing Trust Fund Subcommittee**
Action: M/S/C (Fain/Simon-Weisberg) to appoint a Housing Trust Fund Subcommittee with Commissioners Johnson, Potter, and Mendonca and Lee-Egan through February 28, 2023.

Vote: Ayes: Calavita, Fain, Johnson, Lee-Egan, Mendonca, Potter, Sanidad, and Simon-Weisberg. Noes: None. Abstain: None. Absent: Rodriguez (unexcused).

8. Update on Council Items (Future Dates Subject to Change)

9. Announcements/ Information Items

10. Future Items

11. Adjourn

Action: M/S/C (Johnson/Mendonca) to adjourn the meeting at 10:35 pm.

Vote: Ayes: Calavita, Fain, Johnson, Lee-Egan, Mendonca, Potter, Sanidad, and Simon-Weisberg. Noes: None. Abstain: None. Absent: Rodriguez (unexcused).

Approved:

_____, Mike Uberti, Secretary

Department of Health, Housing, & Community Services

April 7, 2022

To: Housing Advisory Commission

From: Anna Cash, Partnership for Bay's Future Fellow, Health, Housing, and Community Services

Mike Uberti, Senior Community Development Project Coordinator, Health, Housing, and Community Services

Subject: Housing Preference Policy

RECOMMENDATION

Staff is requesting the Housing Advisory Commission (HAC) consider the implementation information in this report in combination with the policy options presented at the February 3, 2022 meeting to recommend preference options for a Housing Preference Policy.

SUMMARY

A Housing Preference Policy (HPP) will assist people with ties to Berkeley, households with children, and residents experiencing homelessness, to receive priority for new affordable housing units. The HPP is intended to apply to units created by the City's Below Market Rate (BMR) and non-profit affordable Housing Trust Fund (HTF) programs.

As part of a Partnership for the Bay's Future (PBF) Challenge Grant, the City of Berkeley has been working with community partners East Bay Community Law Center (EBCLC) and Healthy Black Families (HBF) to engage in a community-driven process to design the Housing Preference Policy.

This policy would not automatically apply to existing affordable units due to regulatory agreements that regulate specific properties. Preferences will not apply to Shelter Plus Care units assigned under the BMR program as they are case-managed and do not have a lottery system. It is still being determined how the Housing Portal will incorporate Section 8 assigned BMR units; applicability to those units will be dependent on whether they are included on the Housing Portal. Staff are advocating for Section 8 vouchers to be included on the Housing Portal. The policy's applicability to HTF units may vary dependent on the use of state and/or federal funding sources that carry specific residency requirements (e.g., Homeless, Seniors, Transition Aged Youth).

Fair Housing law requires a disparate impact analysis (DIA) for preferences. This analysis assesses how racial groups and protected classes will be impacted by a preference policy and determines what percentage of units can receive preferences

without creating disparate impacts on protected classes under state or federal law. Other funding agencies (county, state, federal) that contribute funding to the City's nonprofit affordable housing need to approve this analysis before permitting use of a preference policy on those units. Staff's intent is for the policy to be applied to the maximum percentage of units permitted by disparate impact analysis. Research from other cities shows this analysis will limit the number of affordable housing units the policy can apply to; it will not be able to be applied to 100% of units. This analysis also has implications for the timeline of applying preferences to HTF units.

A previous report for the February HAC meeting focused on policy options, including the outreach and research conducted to develop these recommendations. The policy options that Staff put forward in that meeting are summarized in Attachment 1, and materials from that meeting can be found on the HAC website: https://www.cityofberkeley.info/uploadedFiles/Clerk/Level_3_-_Commissions/HAC%20agenda%20PACKET%202022-02-03.pdf.

This memo focuses on implementation considerations, including adoption, disparate impact analysis, timeline, alignment with existing programs/policies, program implementation, and staffing.

DISPARATE IMPACT ANALYSIS

County, state, and federal agencies will require approval for Preferences for any projects they fund (i.e., the City's HTF-supported properties). It is important to note that this approval can take several months and occurs on a project-by-project basis. These approvals will not be relevant for BMR units as no funding applies to these programs. These approvals will typically include DIA. DIA assesses how racial groups and protected classes will be impacted by a preference policy and determines what percentage of units can receive Preferences without creating disparate impacts on a protected class.

DIA dictates what percentage of units the preference policy can be applied to. Staff's intent is for the policy to be applied to the maximum percentage of units permitted by DIA. Research from other cities shows that this analysis will limit the number of affordable housing units the policy can apply to; it will not be able to be applied to 100% of units. Preferences will not be able to be implemented on HTF units until DIA has been approved by the relevant funding agencies.

Disparate Impact Analysis Plan

Any proposed preferences may require DIA, to the extent that racial demographic information is available. Geography-based preferences, such as the proposed redlined areas preference, will require a DIA based on precedent from other cities. In San Francisco, a disparate impact analysis found that setting aside 40% of units in the lottery for people meeting a neighborhood preference would not have a disparate impact.[1] The policy options proposed by staff mimic the success of San Francisco and

[1] The US Department of Housing and Urban Development (HUD) determined in 2016 that it could not support this neighborhood preference on a specific project, the Willie B. Kennedy Apartments. In this

Portland to address historic racial disparities while balancing the demands of Fair Housing law.

Staff have been in contact with California Department of Housing and Community Development (HCD) about the agency's forthcoming guidelines on assessment of preference policies. The timing of the release of these guidelines will impact Staff's ability to move forward DIA efforts. Staff may recommend hiring a consultant to conduct DIA dependent on the scale and need. DIA will be conducted on HAC's policy recommendations in order to inform Council decisions.[2]

IMPLEMENTATION

Timeline

A Housing Preference Policy would need to have a phased adoption process:

A. Conduct DIA on recommendations
B. Adoption of HPP by City Council
C. Adopt Administrative Guidelines and align policy with other policies/programs
D. Conduct education and outreach for property managers and prospective tenants
E. Coordinate preferences with the Housing Portal and apply HPP to BMR units
F. DIA approvals process for HTF (nonprofit affordable) units as needed
G. Data collection and assessment with racial equity framework

A phased approach provides an opportunity to pilot the implementation of the preferences on eligible BMR units, which come online in smaller quantities than HTF projects. Staff will collect data and assess how the policy is meeting its goals while DIA is going through the approvals process. It is not clear when HCD will release their guidelines, and how long the approval processes may take. It is possible that approvals will take several months.

Overall Process

The City is currently transitioning its new BMR and HTF leasing process to the Alameda County Housing Portal ("Housing Portal"). The Housing Portal will incorporate the City's Preferences into the uniform application. The Preferences will create a point system that will apply to lotteries for new listings. An applicant may select as many Preferences as they qualify for to receive a priority.

Staff met with representatives from local affordable housing providers to discuss application and verification models. This planning ensured the proposed policy options

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case, the surrounding neighborhood had disproportionately more white residents than the overall city. The City proposed and was approved for an alternative preference, based on neighborhoods' displacement risk level.

[2] See Redwood City's Request for Proposals for a DIA consultant (https://www.redwoodcity.org/Home/Components/RFP/RFP/1516/4032), and analysis conducted (https://meetings.redwoodcity.org/AgendaOnline/Documents/ViewDocument/ATTACHMENT%20D%20%E2%80%93%20LIVE-WORK%20POLICY%20ANALYSIS%20BY%20SEIFEL%20CONSULTING.pdf?meetingId=2250&documentType=Agenda&itemId=5223&publishId=9209&isSection=false).

are consistent with the City's current practices for application and verification. Staff will document these processes in administrative guidelines and regulatory agreements to ensure a standardized applicability.

Existing Residency Requirements

Both BMR and HTF units have established residency requirements that would not have Preferences applied:

A. BMR: BMR projects that have units affordable to very low-income households (up to 50% of area median income) are required to dedicate those units to residents with Section 8 vouchers or Shelter Plus Care certificates. Preferences will not apply to Shelter Plus Care units as they are case-managed, and do not have a lottery system. It is still being determined how the Housing Portal will incorporate Section 8 units; applicability to those units will be dependent on whether they are included on the Housing Portal. Staff are advocating for Section 8 vouchers to be included on the Housing Portal.

B. HTF: HTF projects are typically funded by a variety of sources, including the State of California's Department of Housing and Community Development (HCD) and the federal Department of Housing and Urban Development (HUD). These agencies will need to approve any Preferences that apply to a project with their funding. Typical projects also carry specific residency requirements that may or may not support preferences, such as senior housing. Preferences will not apply to units that are case-managed with targeted funding, such as Coordinated Entry for homeless households, as they do not use a lottery.

   Preferences would be applied to units that are filled via Housing Portal applications, applying to the maximum number of HTF units permitted by a disparate impact analysis. Different funding sources will be reviewed for the overlap in their residency requirements with the Preferences. Regulatory agreements will indicate how to apply Preferences consistent with funding requirements (if possible). In instances where specific residency requirements apply, preferences could be used to re-sort lottery rankings for applicants that meet funding-tied residency requirements, before lottery results are finalized. Staff will need to work with property managers and developers to determine an efficient implementation strategy for lotteries.

Policy Goals & Legal Considerations

There was also discussion at the February Housing Advisory Commission meeting of a race-specific preference for Black/African American applicants. This was a priority recommendation of the Community Leaders Group and a priority in the Healthy Black Families' "Right to Return, Right to Stay" survey. The goal of such a preference would be to address Berkeley's history of housing and racial injustices, particularly to the African American community.

Staff recognizes this history of racial discrimination in Berkeley and its ongoing impacts. For example, 83% of today's gentrifying areas in the East Bay were rated as

"hazardous" (red) or "definitely declining" (yellow) by HOLC during redlining.[3] The existing segregation of communities caused by government redlining, as well as by local exclusionary zoning policies, enabled the racialized component of the foreclosure crisis, as redlining created large areas of concentrated communities of color into which subprime loans were channeled. And Black people have been disproportionately displaced from Berkeley. Between 1990 to 2018, Berkeley lost 49% of its Black population. Between 2000 to 2018, while Berkeley's African-American household population decreased, Berkeley's white, Latinx and Asian household populations all grew slightly. Black people are disproportionately represented in Berkeley's homeless population; since 2006, 65% of homeless service users in Berkeley are African-American, when African-American people comprise less than 8% of the overall population.

Staff appreciates the work of the Community Leaders Group to craft comprehensive recommendations and, together with partners on the Challenge Grant, made extensive efforts to put forward policy options for the Housing Advisory Commission's consideration that are responsive to and inclusive of the Community Leaders Group's work and knowledge. This included historical research on racial discrimination in housing in Berkeley. In addition, EBCLC conducted legal research on potential legal pathways for a race-specific preference. Staff, the City Attorney's Office, and EBCLC explored potential avenues to accommodate this recommendation in depth. However, given current legal frameworks described below, a legal strategy was not identified that would be defensible in court.

Race-specific preferences are not permissible under California's Proposition 209, which amended the California constitution to prohibit governmental institutions from considering race, sex, or ethnicity, in the areas of public employment, public contracting, and public education. Publicly funded affordable housing is a form of public contracting. Race-specific preferences are generally impermissible under the Equal Protection clause of the 14th amendment of the United States Constitution, which guarantees that no person or class of people can be denied the same protections under the law that are enjoyed by others. A legal brief that details the legal limitations of preferences – including Fair Housing law and constitutional challenges – is included as Attachment 2.

The City of Berkeley is currently making historic investments in affordable housing. Ensuring that new affordable housing units can be made available to those with ties to Berkeley, and particularly to those that have faced discrimination, is identified as a top priority by Council and the community. Staff recognizes the community's demand to account for historic injustice to Berkeley's communities of color. The proposed policy options are intended to provide a pathway to legally implement a policy that will achieve these outcomes in the near-term.

The proposed policy options aim to address racial equity through preferences, including:

[3] See https://www.urbandisplacement.org/about/what-are-gentrification-and-displacement/.

- First priority for those who lost their homes due to eminent domain during the construction of Ashby and North Berkeley BART stations, which impacted African American families;[4]
- Preference for applicants with residential ties to Berkeley's redlined areas, where African American households were predominantly concentrated due to exclusionary policies;
- Preference for those displaced by foreclosure, which disproportionately impacted African American households, and;
- Preference for homeless applicants and those at-risk of homelessness; Black people are disproportionately represented in Berkeley's homeless population.

This proposal aims to account for legal limitations and achieve racial equity outcomes that will begin to mitigate displacement and help community members who have been displaced return to the community. These policy options were shared with the Community Leader's Group prior to coming to the commission (Attachment 1).

These policy options are intended to recognize historic racial injustice caused and/or facilitated by government action and the ongoing displacement of Berkeley's African American community. The City will implement a racial equity framework to monitor and report on the outcomes of the adopted policy.

Attachments:

Attachment 1: Policy Options Summary
Attachment 2: Columbia Law Review: Perpetuating segregation or turning discrimination on its head? Affordable housing residency preferences as anti-displacement measures.
Weblink: https://columbialawreview.org/content/perpetuating-segregation-or-turning-discrimination-on-its-head-affordable-housing-residency-preferences-as-anti-displacement-measures/
Attachment 3: Staffing

[4] LA Times coverage of the pilot program in Santa Monica to give preference to those displaced by eminent domain and their descendants highlights that Black people who lost their homes to eminent domain had more constrained options than their white counterparts. This was due to lower assessed home values for Black families, and segregation in the broader housing market. See https://www.latimes.com/podcasts/story/2022-01-31/the-times-podcast-santa-monica-evictions-10-freeway-construction.

Attachment 1. Policy Options

The policy options below were presented at the February 3, 2022 Housing Advisory Commission meeting. These policy options are the product of community outreach and research described in the report for the February 3 HAC meeting, which is available at this link: https://www.cityofberkeley.info/uploadedFiles/Clerk/Level_3_-_Commissions/HAC%20agenda%20PACKET%202022-02-03.pdf.

Preference	Proposed Preference Details
Displacement due to eminent domain for BART	First priority, separate lottery: Descendant of someone whose home was seized via eminent domain to develop Ashby/North Berkeley BART.
Displaced due to foreclosure	1 point: Displaced due to foreclosure in Berkeley since 2005.
Families with children	1 point: household with at least one child aged 18 or under.
Homeless or at risk of homelessness	1 point: At-Risk of Homelessness in Berkeley/with former address in Berkeley OR 1 point: Literally Homeless in North Alameda County
Ties to redlined areas	1 point: Residential ties to Berkeley's redlined areas – current or former address of applicant.
Ties to redlined areas – historical	1 point: Residential ties to Berkeley's redlined areas – current or former address of parent/guardian or grandparent of applicant.

VOL. 118 NO. 3

• NOTE •

PERPETUATING SEGREGATION OR TURNING DISCRIMINATION ON ITS HEAD? AFFORDABLE HOUSING RESIDENCY PREFERENCES AS ANTI-DISPLACEMENT MEASURES

*Zachary C. Freund**

Affordable housing residency preferences give residents of a specific geographic "preference area" prioritized access to affordable housing units within that geographic area. Historically, majority-white municipalities have sometimes used affordable housing residency preferences to systematically exclude racial minorities who reside in surrounding communities. Courts have invalidated such residency preferences, usually on the grounds that they perpetuate residential segregation in violation of the Fair Housing Act.

More recently, as gentrification spurs rising housing costs in many formerly majority-minority urban neighborhoods, cities including New York and San Francisco have implemented intramunicipal residency preferences as a mechanism for mitigating gentrification-induced displacement. These cities' policies offer residents preferred access to affordable housing units in their own neighborhoods, relative to both nonresidents and to city residents living in other neighborhoods. Proponents of these policies contend that their use on an intracity level preserves rather than excludes minority communities, thereby inverting the traditional discriminatory application of such preferences. Opponents of the policies argue that any residency preference implemented in a racially segregated area necessarily perpetuates segregation and violates the law.

This Note examines how neighborhood-level, anti-displacement residency preferences should be understood under the relevant law. It observes that the neighborhood-level residency preference is a potent anti-displacement tool that suffers from an emerging mismatch between fair housing goals and fair housing law. Neighborhood-level anti-displacement residency preferences likely suffer from the same legal defects

as intercity preferences used to exclude minority applicants, and may even be at heightened risk because they are more likely to be expressly race-conscious. Despite the fact that these preferences aim to promote accessible affordable housing for low-income and minority residents, they do so in response to displacement pressures that the Fair Housing Act does not contemplate and in a manner that arguably clashes with its anti-segregationist objective. If neighborhood-level residency preference policies are to be effectively and legally utilized to address issues of urban displacement, either courts' approaches to such policies or the policies themselves must evolve.

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* J.D. Candidate 2018, Columbia Law School.

INTRODUCTION

In an era of gentrification-induced displacement, it is uncertain whether efforts to preserve existing neighborhood demographics should be understood as extending or subverting fair housing practices. Municipalities use residency preference policies to restrict access to affordable housing units on the basis of applicants' place of residence. Historically, residency preference policies have been challenged and invalidated when they exclude minority applicants from affordable housing in majority-white suburbs. [1] As gentrification elevates housing prices, many low-income and minority residents are displaced from their neighborhoods or even from their cities entirely. [2] Cities, including San Francisco and New York, have offered residents preferred access to affordable housing in their own neighborhoods in an effort to mitigate population displacement. [3]

Proponents of these policies contend that their use on an intracity level preserves rather than excludes minority communities. San Francisco's City Attorney, for example, maintained that the city's residency preference plan takes a formerly exclusionary tool and "flips it on its head." [4] New York City officials have similarly warned that invalidating their policy would "turn the [Fair Housing Act] on its head." [5] Not everyone agrees, however, that neighborhood-level residency preferences amount to an inclusionary headstand. New York's community preference policy is the subject of a federal lawsuit, [6] and San Francisco's effort to use residency preferences as a lifeline for the city's dwindling African American population was blocked by the Department of Housing and Urban Development (HUD). [7] In both cases, opponents claim that the policies violate the Fair Housing Act by perpetuating segregated housing patterns. [8]

Conventional legal analysis suggests that residency preferences are invalid in residentially segregated locales, regardless of whether the preference favors primarily white or primarily nonwhite residents. [9] Moreover, affirmative-action-minded preferences may be at heightened legal risk because they are more likely to be expressly race conscious. [10] Put simply, the

neighborhood-level residency preference is a potent anti-displacement tool that suffers from an emerging mismatch between fair housing goals and fair housing law.

This Note examines how neighborhood-level, anti-displacement residency preferences should be understood under the relevant law. Part I describes the legal history of exclusionary, intercity residency preferences and details New York's and San Francisco's efforts to implement and defend intracity preferences. Part II analyzes both the potential value and legal vulnerabilities of anti-displacement, intracity residency preferences and concludes that they are unlikely to withstand legal challenge. Part III proposes several solutions to this dilemma, suggesting alternative approaches to the residency preference model and urging a more expansive understanding of fair housing goals in light of gentrification pressures.

I. OVERVIEW OF AFFORDABLE HOUSING RESIDENCY PREFERENCES

The Fair Housing Act (FHA) [11] and the federal regulations through which HUD enforces it endow local governments with the authority to govern applicant eligibility for affordable housing units. [12] Public Housing Authorities (PHAs) may, within certain limits, restrict eligibility or create a priority system for eligibility on the basis of any legally permissible criteria. [13] Many local governments elect to restrict eligibility on the basis of applicants' geographical residence in order to protect their own residents from losing affordable housing opportunities to nonresidents. [14]

No court has held that residency preference policies are per se illegal, and HUD has tacitly endorsed the proper use of such policies. [15] The case law regarding residency preferences, however, suggests that residency preferences are often on tenuous legal ground. Courts have repeatedly found that residency preferences, when applied in racially segregated areas, facilitate or perpetuate segregation by limiting the opportunities for proximate nonresidents of color to procure affordable housing in predominantly white municipalities. [16] Against this legal backdrop, cities have encountered resistance to the implementation of intracity residency preferences, even when they are enacted with the purported intention of supporting communities of racial minorities. [17]

This Part examines the trajectory of the legal controversies surrounding affordable housing residency preferences. Section I.A introduces residency preferences and residency requirements generally, as well as the relevant legal boundaries on affordable housing residency preferences. Section I.B charts the existing case law on residency preferences in affordable housing. Sections I.C and I.D address recent controversies surrounding the preference policies of New York and San

Francisco, respectively.

A. BACKGROUND ON RESIDENCY PREFERENCES

1. *Residency Requirements and Preferences.* — The landscape of residency requirements and preferences is extensive and varied. [18] Litigation over such policies often invokes the Article IV Privileges and Immunities Clause, [19] which is understood to prohibit governmental discrimination on the basis of state and municipal residency, [20] and the Dormant Commerce Clause doctrine, under which states are generally proscribed from implementing economic protectionism. [21] Nonetheless, these doctrines have notable exceptions, [22] and states frequently enact laws and regulations that endow state residents with preferential access to jobs, social services, and other opportunities—or that foreclose nonresidents from accessing those opportunities entirely. [23] Residency requirements and preferences are also enacted at the municipal level for similar reasons as their state-level counterparts: the earmarking of local opportunities for residents, the stimulation of the local economy, and parochialism. [24]

Common residency requirements impose restrictions on who may vote, [25] hold public office, [26] receive construction contracts for public works, [27] and earn welfare benefits, [28] among other activities. [29] Durational requirements discriminate between longstanding and recent residents, often by establishing waiting periods before new residents are eligible for public benefits such as welfare, voter eligibility, or in-state tuition. [30]

Residency *preferences*, while less restrictive than residency requirements, nonetheless raise related legal and policy questions by conferring upon residents prioritized access to jobs, goods, or services. Residency preferences are utilized in affordable housing to provide residents of a "preference area" with prioritized access to local public (or publicly funded) housing. Local governments around the country have frequently proposed and implemented these preference policies, [31] which are the focus of this Note. Subsequent references to "residency preferences" in this Note refer specifically to residency preferences in the affordable housing context rather than to residency preferences generally.

2. *Relevant* Legal *Boundaries.* — Affordable housing residency preferences, particularly those enacted in racially segregated areas, are most commonly challenged as violations of the FHA. Enacted as Title VIII of the Civil Rights Act of 1968, the Fair Housing Act [32] embraced a clear integrationist purpose from the outset. The goals of the FHA, according to its cosponsor Senator Walter Mondale, were to cultivate "truly integrated and balanced living patterns," [33] address the problem of Americans "liv[ing] separately in white ghettos and Negro ghettos," and promote "the principle of living together." [34] Two major catalysts for the FHA's passage were the assassination of Dr. Martin Luther King, Jr. and the release of the Kerner Report, commissioned by President Lyndon B. Johnson, which described the increasing segregation of U.S. society. [35]

While the text of the FHA does not explicitly announce its integrationist aims, courts and scholars have understood its provisions to embrace that purpose in light of its legislative history. [36] The FHA's "affirmatively further" language, which instructs HUD to administer its programs "in a manner affirmatively to further the purposes" of the Act, [37] is commonly understood as a "mandate to promote racial integration." [38] Regulations promulgated by HUD reassert the FHA's integrationist mandate and indicate that disparate impact liability [39] may constitute a violation. [40] In its 2015 decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, [41] the Supreme Court affirmed that the FHA [42] prohibits both intentional discrimination and discriminatory consequences under a disparate impact standard. [43]

In addition to claims brought pursuant to the Fair Housing Act, residency preference policies may also be subject to constitutional challenges alleging racial discrimination in violation of the Fourteenth Amendment's Equal Protection Clause or unconstitutional restriction of the fundamental right to travel and migration. [44]

B. JUDICIAL REVIEW OF RESIDENCY PREFERENCES

Until recently, [45] legal challenges to residency preference policies have followed a predictable pattern: A suburban municipality with predominantly white residents implements a residency preference for its affordable housing, and neighboring nonresidents claim that the policy discriminates against racial minorities. [46] This section explores the existing case law and examines the situations in which courts have affirmed, invalidated, or called into question the legality of residency preference policies.

1. *FHA Disparate* Impact *Claims.* — Residency preferences are perhaps most susceptible to FHA disparate impact challenges that allege the policies have a segregative effect. Such challenges emphasize the demographic disparities between the "preference area" population and the nearby populations that are excluded or disadvantaged by the residency preference. In *United States v. Housing Authority of Chickasaw*, a virtually all-white city [47] in Mobile County, Alabama, administered its low-rent housing program subject to a "citizenship requirement." [48] The court found that, because of the racial disparities between Chickasaw and the remainder of Mobile County, [49] the residency requirement effectively "exclude[d] non-Caucasians from ever establishing residency" in Chickasaw and therefore established a disparate impact. [50] The court held that Chickasaw authorities had violated the FHA on that basis. [51]

Similarly, in *Langlois v. Abington Housing Authority*, the District Court of Massachusetts—evaluating cross-motions for summary judgment—found a prima facie case of disparate impact based on the comparative demographics of the suburbs with residency preferences [52] and the surrounding urban areas. [53] When a "community has a smaller proportion of minority residents than does the larger geographical area from which it draws applicants," the court indicated, a residency preference

policy "*cannot but* work a disparate impact on minorities." [54]

2. *Intentional Discrimination Claims.* — In some cases, courts have also regarded a disparity in the racial demographics of the preference area and surrounding area as evidence of intentional discrimination or equal protection violations. In *Comer v. Cisneros*, the Second Circuit vacated the district court's grant of summary judgment to defendants, including the dismissal of plaintiffs' equal protection racial discrimination claims. [55] The court affirmed those claims' potential validity based on the stark demographic distinction between the included and excluded populations. [56] It suggested that the preference policy operated as a "proxy for race" that obstructed minorities' efforts to "integrate into suburban life." [57]

More recently, in *United States v. Town of Oyster Bay*, the Eastern District of New York determined that intentional discrimination could be plausibly inferred from strong evidence of disparate impact. [58] The decision identified stark racial disparities as an "important starting point" [59] for intentional discrimination and found that Oyster Bay's stated goal of prioritizing its own residents could be plausibly interpreted "to suggest a discriminatory motive" in light of those demographic disparities. [60] The court denied petitioner's motion to stay the proceedings pending the Supreme Court's decision in *Inclusive Communities* regarding disparate impact liability under the FHA, [61] because Oyster Bay's preference policy rendered intentional discrimination a separate, cognizable cause of action. [62]

3. *Validity of Governmental Interests.* — A major theme that runs throughout residency preference case law is the interrogation of governmental justifications for administering preference policies. In *Chickasaw*, authorities justified the "citizenship requirement" on two grounds: It allowed the city to better provide for the needs of its own low-income residents, and it prevented Chickasaw's affordable housing from becoming a "dumping ground for social undesirables." [63] The court deemed both justifications to be "legitimate" concerns that precluded any inference of discriminatory intent, thereby defeating the federal government's intentional discrimination claim. [64] Similarly, in *Fayerweather v. Town of Narragansett Housing Authority*, the District Court of Rhode Island found a residency preference to be rationally related to the town's valid interest in prioritizing its own residents' housing needs. [65]

More recent case law, however, casts doubt on the rationales approved by the *Chickasaw* and *Fayerweather* courts, which suggest that residency preferences can be justified by a desire to prioritize local residents' interests. The *Langlois* court denounced this kind of circular justification, which treats the desire to prioritize local residents as a legitimate basis for prioritizing local residents, as invalid. [66] It held that the defendants' proffered rationales were extensions of that logic. [67] Defendant PHAs could only rebut the plaintiffs' prima facie case of disparate impact, the court determined, by offering a "record of local conditions and needs" that justified the residency preferences and by showing that no less discriminatory alternative was available to address those

needs. [68] The *Oyster Bay* court demonstrated a similar skepticism of circular justifications by treating the defendant's stated desire to prioritize and benefit its own residents as evidence of discriminatory purpose, given the demographic discrepancies between the preference area and surrounding vicinity. [69]

4. *Case Law Patterns and Trends.* — Even when courts have invalidated the specific residency preference at issue, they have taken care to affirm the general validity of such preferences. The *Chickasaw* court noted the "valid purpose" of prioritizing the housing needs of "established community members vis-a-vis newcomers." [70] The eventual settlement for the *Comer* parties did not provide for the wholesale abolishment of residency preferences in the Buffalo area but rather for an expansion of the preference area to the entire county, which effectively extended the preference to minority residents of Buffalo whom it had previously excluded. [71] A 2011 New York state court decision granting a preliminary injunction against proposed rezoning suggested that the operation of New York City's residency preference system perpetuated segregation, but the court posited that an extension of the preference to residents of the neighboring community district "might act to correct the imbalance in the applicant pool." [72] These cases suggest that courts' objections to residency preferences are usually confined to the preferences' specific applications and that courts may cure identified problems through modification rather than abolishment.

On the whole, the trajectory of the case law on residency preferences exhibits two particularly notable trends. First, the decisions indicate an increasing judicial willingness to view disparate impact not only as a harm itself but also as evidence of intent or unconstitutionality. While the influence of the *Oyster Bay* decision should not be overstated, it does indicate a possible shift in the jurisprudence toward treating disparate impact as a "starting point" and probing facially neutral residency preferences for discriminatory intent. This is a far cry from the *Chickasaw* court's unwillingness, thirty-four years prior, to infer discriminatory intent even from the stated purpose of keeping "undesirables" out of an all-white suburb. [73]

Second, the case law evinces increasing skepticism of circular justifications and a reluctance to treat residency preferences as presumptively valid. Decisions such as *Comer*, *Langlois*, and *Oyster Bay* suggest that when significant demographic disparities exist, the prioritization of local residents' access to affordable housing may not be legitimate simply for reasons of parochialism.

C. NEW YORK'S COMMUNITY PREFERENCE POLICY AND THE WINFIELD LAWSUIT

1. *The Community Preference Policy.* — New York City's residency preference system, which the city calls the "community preference policy," gives applicants from each community district [74] a preference in securing new affordable housing units within that same district, relative to applicants who reside in other districts. [75] The policy was established in the late 1980s with the original stated purpose of enabling residents of low-income neighborhoods to take advantage of the city's

redevelopment efforts. [76]

New York City facilitates the development of new affordable housing units through incentives for developers, including direct subsidies, site acquisition, and tax credits and exemptions. [77] Developers are required to select residents for affordable units by soliciting applicants and conducting a lottery [78] and must consider certain mandated "set-asides" or preferences when assigning units. [79] New York City expanded the application of the community preference from thirty percent to fifty percent of units in 2002, and it has remained at that level since. [80] An intermunicipal residency preference policy also applies: All applicants residing in New York City must be processed and assigned before any nonresidents. [81]

2. *The* Winfield *Lawsuit.* — In July 2015, three plaintiffs represented by the Anti-Discrimination Center filed a lawsuit against New York City alleging that the community preference policy perpetuates segregation and violates the FHA and New York City's Human Rights Code. [82] The plaintiffs are African American women, residents of New York City, and income eligible for New York City's affordable housing. Each entered lotteries for new affordable housing developments located in Manhattan community districts in which she did not reside and was not selected. [83] The complaint argues that the city's "outsider-restriction policy" impairs low-income residents' mobility, making it more difficult for them to obtain housing in "neighborhoods of opportunity." [84]

The complaint illustrates New York City's residential segregation at the community district level. [85] Given these patterns, the lawsuit alleges, the city's preference policy renders it liable for violating the FHA under both a disparate impact theory and an intentional discrimination theory. [86] It claims that New York City's segregated and discriminatory history, its rejection of alternative policies that would promote integration, and its continued implementation of the "outsider-restriction policy" despite awareness of (or deliberate indifference to) its segregative impact "demonstrate that the . . . policy constitute[s] intentional discrimination." [87]

New York maintains that longstanding residents of gentrifying neighborhoods have earned preferential opportunities to remain and enjoy the benefits of revitalization, because they endured disinvestment and "persevered through years of unfavorable living conditions." [88] New York's reliance on longstanding residency as a justification for community preferences is undermined, potentially, by the nondurational nature of the policy. The *Winfield* plaintiffs criticize the policy on these grounds, noting that it assigns preferences "regardless of length of residency in the community district" and "even if [the applicant] established residency in the community district on the final day of the application period." [89] Durational residency preferences, however, are disfavored by HUD [90] and may violate the constitutional right to travel and migration. [91] As a result, the city may be unable to legally tailor community preferences to the "longstanding resident" argument through which it attempts to justify them.

New York City's additional justification for its policy is a pragmatic one: It serves as an effective means of "overcoming local resistance" to development and construction and therefore facilitates the creation of affordable housing. [92] Community preferences are often popular with local residents and community organizations, who might otherwise oppose affordable housing development in their own neighborhoods. [93] As the city pursues a significant initiative to increase affordable housing, [94] it may rely particularly heavily on the neighborhood-level goodwill that community preferences generate [95] —a factor that the *Winfield* complaint dismisses as mere political expedience. [96]

In October 2016, the *Winfield* court denied New York City's motion to dismiss. [97] The court held that the plaintiffs pleaded sufficient facts to allege both their disparate impact and intentional discrimination theories. [98] The decision ascribed to the community preference policy the "very purpose" of preserving "the existing racial and ethnic makeup of local communities." [99] As of March 2018, the litigation is ongoing with the parties engaged in discovery. [100]

D. SAN FRANCISCO'S NEIGHBORHOOD RESIDENT HOUSING PREFERENCE

1. *Ordinance Enacted.* — Unlike New York's community preference policy, which New York City predominantly justifies in race-neutral terms, San Francisco enacted its "resident housing preference" ordinance in November 2015 with the express purpose of addressing race-specific gentrification and displacement issues. [101] Under the ordinance, the lotteries for forty percent of new affordable housing units prioritize applicants who reside either within the project's supervisorial district or within a one-half-mile "buffer zone." [102]

Local politicians and civil rights advocates lauded the ordinance as a possible antidote to the "alarming rate of displacement" among San Francisco's African American population, which declined from 13.4% in 1970 to 5.5% in 2014. [103] Even those city officials who opposed the ordinance seemed to be more concerned with its particulars than its principle. [104]

2. *San Francisco and HUD Clash.* — In August 2016, HUD, then under the leadership of Obama appointee Julián Castro, denied San Francisco's proposal to implement the supervisorial district preference plan for the Willie B. Kennedy Apartments, [105] a new affordable housing development for senior citizens located in the historically African American neighborhood Western Addition. [106] HUD indicated that the proposed policy "could limit equal access to housing and perpetuate segregation," and that it "may also violate the Fair Housing Act." [107]

The outcry against HUD's rejection of the resident preference plan was widespread and vehement. Civil rights advocates decried the decision, and the president of the local NAACP chapter called on the city to fight back in court. [108] Both local and national politicians lambasted HUD's decision and lobbied HUD on the policy's behalf. [109] Implicit in the reaction was a suggestion that the FHA's

traditional integrationist aims might be inapt in the face of rapid gentrification and that concerns about segregation *within* San Francisco should be superseded by the concern that minority populations were being displaced from the city entirely. As San Francisco's City Attorney articulated in a letter to HUD, "San Francisco's Plan addresses gentrification forces that were unknown when the Fair Housing Act was passed in 1968, and is not what Congress intended the Fair Housing Act to address." [110]

3. *Displacement Preference.* — On September 21, 2016, HUD reaffirmed its disapproval of the neighborhood-based preference but approved an alternative plan that the city had proposed: Forty percent of units in the Willie B. Kennedy Apartments would be subject to a preference for San Francisco residents at an "elevated risk of displacement." [111] This preference was extended to all income-eligible lottery applicants who resided in "neighborhoods undergoing extreme displacement pressure," as determined by census tract. [112] Residents from at least five neighborhoods, including Western Addition, were eligible. [113]

City officials celebrated the decision as a "monumental victory" and downplayed the distinction between the policy they had initially proposed and the one that HUD approved. [114] National politicians and journalists joined in hailing the new preference plan as a triumph and a model for other cities. [115] The celebration over HUD's acquiescence to an anti-displacement policy threatens to obscure the significant distinction between the policy that HUD rejected and the one that it approved. [116] HUD's response to the initial proposal demonstrates a seeming indifference toward the specific population that a residency preference is designed to exclude or to benefit. The anti-displacement strategy may indeed be a model for future affordable housing preferences; if so, it is likely because the law does not recognize a distinction between a policy like San Francisco's and those enacted by white suburban enclaves.

II. RESIDENCY PREFERENCES AS ANTI-DISPLACEMENT EFFORTS: INVERTING OR EXTENDING A DISCRIMINATORY PRACTICE?

In the face of rapid urban gentrification and rising housing costs, affordable housing is in high demand and low-income communities face increasing displacement pressures. [117] Against this backdrop, local governments may turn to residency preferences as an anti-displacement tool. In one sense, these residency preferences share an inherent parochialism with their exclusionary counterparts. To treat displacement as a problem is to presume that those who are currently in a place possess a superior claim to it. Yet there is also something distinct about residency preferences

deployed to preserve the very communities that such preferences have often been exercised to exclude: low-income, urban-dwelling racial minorities. Residency preferences in New York City and San Francisco purport to reorient a discriminatory tool toward an inclusionary end.

Although preferences designed to preserve minority communities arguably serve a different objective than those that are designed to exclude such communities, the distinction may not be legally meaningful. The "anti-displacement" policies, like their exclusionary counterparts discussed in section I.B, strive to keep existing residents in place. [118] In doing so, they reinforce existing housing patterns and demographics. Therein lies the problem: Intracity residency preferences may be a valuable tool for local governments to combat displacement pressures on low-income minority residents, but they are likely not a valid one. If courts treat affirmative-action-minded preferences in a manner consistent with existing doctrine, such policies may be subject to equal or even greater legal vulnerability than their more classically exclusionary counterparts.

This Part examines both the value and vulnerabilities of neighborhood-level residency preferences enacted to preserve minority communities. Section II.A describes the underlying displacement pressures that motivate and inform these policies and discusses residency preferences' potential to mitigate those effects. Section II.B examines the potential legal validity of such policies under each of the prominent applicable federal doctrines: FHA disparate impact liability, FHA intentional discrimination liability, equal protection law, and the right to travel.

A. RESIDENCY PREFERENCE POLICIES AS AN ANTI-DISPLACEMENT MEASURE

1. *Urban Gentrification and Displacement.* — The relationship between gentrification and displacement is at once intuitive and elusive. An influx of higher-income residents into a community and the ensuing elevation of the local cost of living can compel preexisting, lower-income residents to relocate. [119] Even so, the displacement narrative of gentrification exists alongside an opposing (though perhaps not incompatible) narrative of "social mixing," which suggests that middle-income residents' migration into lower-income neighborhoods yields increased integration and enhances community resources to the benefit of the preexisting residents who remain. [120]

Although concerns and research about gentrification date back to the 1960s, by most accounts gentrification in the United States (and the attention paid to it) became increasingly pervasive in the late 1990s and ensuing years. [121] The effects of gentrification are varied, context dependent, and difficult to quantify—in part because studies of displacement pursue the difficult task of measuring absence and because displaced individuals are difficult to identify, locate, and survey. [122] Additionally, the distinction between forced relocation and voluntary relocation is not always clear-cut. The decision to relocate in response to rising costs may fall along a continuum of voluntariness [123] and may be attributable to a range of interrelated and indirect factors. [124] Though displacement can often be directly attributed to a surging housing market, it may also result

from gentrification-induced actions such as housing demolition, evictions, and redevelopment. [125]

The prevailing understanding is that gentrification causes displacement, [126] with the burden often falling disproportionately on the lowest-income residents of gentrifying neighborhoods. [127] Displacement is most often studied at the neighborhood level: Certain neighborhoods become sites of displacement, others become destinations for displaced populations, and still others fill both roles. [128] However, displacement also occurs at the municipal and regional levels. [129] Low-income minority populations are more likely than low-income white populations to live in concentrated poverty, [130] and urban displacement disproportionately affects African Americans. [131]

Gentrifying neighborhoods often undergo stark demographic transitions in both socioeconomic and racial composition. A 2016 report on the effects of gentrification in New York City between 1990 and 2010 identified fifteen of fifty-five city neighborhoods as "gentrifying," meaning that they were low-income areas in 1990 that experienced rent growth above the city median over the ensuing two decades. [132] Between 1990 and 2010–2014, mean household rents in gentrifying neighborhoods increased by 34.3%—over twelve percent more than the citywide increase of 22.1%. [133] Average household income among New York City residents, adjusted for inflation, remained relatively steady over the same period [134] but rose by nearly fourteen percent in gentrifying neighborhoods. [135] Moreover, during the same period, the white population in gentrifying areas increased, despite the fact that it declined significantly within the city as a whole. [136] Meanwhile, the black population declined very slightly citywide while declining steeply in gentrifying areas. [137] Similarly, in Western Addition, the San Francisco neighborhood of the Willie B. Kennedy Apartments, the African American percentage of the population declined from roughly eighty percent in 1970, to thirty percent in 2000, [138] to fifteen percent in 2010. [139]

2. *Potential Value of Residency Preferences.* — Research indicates that public interventions such as rent regulation and subsidized housing are the most effective way to counterbalance displacement pressures. [140] With affordable housing in high demand as gentrification pressures mount, the application of residency preferences is a topic of paramount concern—both for residents who wish to take advantage of the preferences to avoid displacement and for those seeking to relocate to neighborhoods in which the preferences limit their ability to obtain affordable housing.

Residency preferences operate to the benefit of existing low-income residents in the neighborhoods in which such preferences are implemented. Because racial minorities in the United States experience disproportionately high levels of poverty, [141] and because the racial wealth gap is particularly severe in urban areas, [142] some interested parties frame the operation of intracity preferences as a civil rights issue. In San Francisco, local politicians expressed particular frustration with HUD's treatment of the preference policy as a discriminatory device rather than an inclusionary tool. [143] The policy, they insisted, would work to the advantage of minority communities. [144] The national media seized on this theme with articles that painted the policy as a lifeline for

minority communities and cast its potential contravention of the FHA as an unfortunate paradox. [145]

In New York, where the preference applies to all community districts regardless of demographics, the city and its allies also emphasize the policy's particular value to minority communities. [146] One housing developer, for example, advertised that the preference would "help the area retain its traditional Latino identity," [147] and the city contends that abolishing the preference policy "would turn the FHA on its head." [148] Certain commentators endorse a targeted application of the policy but balk at its extension to more affluent and majority-white neighborhoods. [149] However, both sides of the *Winfield* litigation reject the notion that the preference should be applied only to neighborhoods with high concentrations of low-income minority residents. The policy's proponents suggest that it serves low-income minorities even in whiter and more affluent neighborhoods, [150] while its detractors insist that its segregative effect harms racial minorities in any setting. [151]

Clearly, residency preference policies can operate to preserve minority communities in the face of gentrification pressures—whether one understands that to be a desirable result is another matter. For cities with this goal, these policies may prove to be an appealing tool for mitigating displacement and preserving racial and socioeconomic diversity. The effectiveness of such policies, however, will depend upon their legal validity.

B. LEGAL VULNERABILITIES FACED BY INTRACITY, ANTI-DISPLACEMENT RESIDENCY PREFERENCES

This section extrapolates from existing case law to assess how neighborhood-level preferences will fare under each of the major grounds for legal challenge. Because the existing law deals almost exclusively with challenges to residency preferences in predominantly white communities, [152] it is uncertain whether courts will interpret intracity, anti-displacement preferences as subject to the same legal standards. The most likely scenario, however, is that courts will take a traditionally antagonistic approach to such policies' furtherance of existing racial demographics in segregated neighborhoods. As a result, neighborhood-level residency preferences enacted to mitigate gentrification-induced displacement will likely bear the same risk of disparate-impact-based invalidation as their exclusionary precursors and possibly an elevated risk of intentional-discrimination-based invalidation.

This section examines how neighborhood-level residency preferences can be understood in the context of each of their four major federal legal obstacles: FHA disparate impact liability, FHA intentional discrimination liability, equal protection racial discrimination claims, [153] and the constitutional right to travel.

1. *FHA Disparate Impact Claims.* — The most common basis for legal challenges to residency

preference policies is an assertion that such policies contravene the Fair Housing Act. [154] HUD regulations lay out the standard for disparate impact liability under the FHA, indicating that "[a] practice has a discriminatory effect where it actually or predictably results in a disparate impact" or "creates, increases, reinforces, or perpetuates segregated housing patterns." [155] Such a practice may nonetheless be lawful, however, if supported by a "legally sufficient justification"—one necessary to achieve a legitimate interest that could not be served by an alternative practice with a less discriminatory impact. [156] In 2015, the Supreme Court's decision in *Inclusive Communities* affirmed disparate impact liability under the FHA. [157] The decision clarified that such claims require both a showing of a harmful impact on a protected class *and* either of two requirements: (1) proof that the defendant lacked a legitimate interest in implementing its practice or (2) proof that the defendant could have achieved its interest with a less discriminatory alternative. [158] In the wake of *Inclusive Communities*, scholars have suggested that residency preferences might be particularly ripe for challenge under the disparate impact theory. [159]

a. *Harmful Impact.* — The first and most crucial question in evaluating a disparate impact challenge levied against an anti-displacement residency preference is whether the preservation of existing neighborhood populations yields a discriminatory impact. Under the prevailing view, neighborhood-level residency preferences have a clearly discriminatory effect because they seek to perpetuate existing housing patterns in segregated cities. The *Winfield* court appeared to subscribe to this perspective; in denying New York City's motion to dismiss, it attributed to New York City the goal of preserving existing residential demographics. [160] HUD, in rejecting San Francisco's proposed residency preference, articulated a similar position by suggesting that the policy might perpetuate segregation. [161] From this perspective, any housing policy that reinforces segregated patterns necessarily effectuates a disparate impact.

b. *Legitimate Interest.* — If a discriminatory impact is found, the success of challenges brought against neighborhood preferences will hinge on how receptive courts are to cities' justifications for the preference. An anti-displacement rationale for neighborhood preferences could be articulated in at least three different ways: as an interest in protecting current residents against displacement, as an interest in sustaining low-income and minority communities, and as an interest in promoting neighborhood stability.

The first of these interests, if framed as the retention of current residents, arguably suffers from the very circularity that the *Langlois* court rejected. [162] Given the increasing skepticism courts have shown toward such rationales, [163] a court might refuse to regard this as a legitimate justification. If the implicated interest is framed, however, as protecting individuals against a looming threat of displacement rather than as retaining the neighborhood's specific residents, it may be more viable. Local governments might argue that they are prioritizing existing residents not because they are residents but because they are the population most vulnerable to the consequences of gentrification in their own neighborhood. [164]

The second category of interest focuses on sustaining minority communities within the city, as San Francisco advertised that its residency preference plan was designed to do. [165] While this interest is not plagued with the circularity problem, it faces another obstacle: The preservation of racially and culturally specific communities is arguably contrary to the clear integrationist mandate of the FHA. [166] Race-conscious affirmative action measures have been deemed permissible under Title VII of the Civil Rights Act, [167] and an extension of that case law to Title VIII would pave the way for affirmative action housing measures.

Case law indicates that the FHA's integrationist mandate may be set aside when it conflicts with the Act's antidiscrimination mandate. In *United States v. Starrett City Associates*, the Second Circuit struck down racial "ceiling quotas" that were integrative in that they promoted a racially heterogeneous population within a housing development but discriminatory in that they disproportionately deprived minority applicants of access to the development. [168]

That decision might provide precedential support for upholding an inverse policy: one that is segregative but antidiscriminatory. While this presents a plausible pathway for cities to defend a neighborhood preference's disparate impact through an affirmative action rationale, it requires that courts willingly conflate anti-displacement objectives with antidiscrimination objectives. It is not clear that courts would embrace a governmental interest in preserving a neighborhood's racial and ethnic composition under a statute enacted to disrupt those very patterns. [169]

The third possible category of governmental interest—one directed at neighborhood stability—certainly sounds legitimate, but this justification might crumble upon interrogation of the specific instability at issue. If the instability is the displacement of current residents and the influx of new residents, this argument merely reframes the circular rationale. If the instability is the shifting of neighborhood demographics and the erosion of "culture," then the justification is a different spin on the "preserve minority communities" justification.

Other forms of instability might indeed be valid concerns, but residency preferences are unlikely to be the least discriminatory means of achieving them. [170] For example, while mitigating elevated housing costs and a lack of socioeconomic diversity is presumably a legitimate governmental interest, it can be addressed simply through the development of affordable housing units in the neighborhood; assigning those units according to a residency preference policy is not a necessary measure.

Similarly, while New York may have struck upon a valid interest in claiming that its community preference policy helps to mitigate NIMBY-like opposition to new development, [171] it is hard to imagine that a disparate impact-inducing residency preference plan would be deemed the best possible means to achieve that interest. While neighborhood-level preferences might be a useful tool to combat community opposition, they are far from the only strategy. [172] A city defendant

would be hard-pressed to prove that no alternative exists that would create a less severe disparate impact.

Finally, city defendants will not be able to justify neighborhood-level residency preferences aimed at mitigating the displacement effects of gentrification through the well-established rationale of municipal protectionism. In cases involving intercity residency preferences, courts have often recognized a government's desire to ensure that its services are available to its own residents as a legitimate interest. [173] In the wake of *Langlois*, it is less clear whether this admittedly circular justification is valid; [174] what *is* clear, however, is that it is unavailable to cities with neighborhood-level—rather than intermunicipal—preferences. The desire to ensure that city services are available for city residents does not explain a policy that prioritizes certain city residents over others.

Considering the available justifications and their likelihoods of success, anti-displacement residency preferences enacted at the neighborhood level may be particularly vulnerable to FHA disparate impact liability. Absent a judicial embrace of affirmative-action-oriented rationales that justify neighborhood-level preferences through their potential to preserve communities of racial minorities, such preferences lack a reliably "legitimate" justification. These policies may be no more likely than their exclusionary, intercity counterparts to survive disparate impact challenges, and they may be even more vulnerable without the ability to lean on the once-reliable protectionist justification.

2. *FHA Intentional Discrimination Claims.* — It is possible that anti-displacement neighborhood preferences might also suffer an elevated susceptibility to FHA intentional discrimination claims due to the race-conscious nature of neighborhood preferences. If the *Oyster Bay* decision and *Winfield* memorandum are any indication, courts may be increasingly willing to entertain claims of intentional discrimination. [175] And given the FHA's strictly integrationist ambitions, [176] courts may condemn the deliberate perpetuation of segregated housing patterns regardless of whether its purported purpose is to preserve or exclude minority communities.

To be sure, courts are unlikely to reach for intentional discrimination liability under the FHA when disparate impact liability is cognizable, barring an egregious display of animus or deliberate discrimination—and preferences aimed at protecting low-income communities against displacement are particularly unlikely to be deemed egregious. The ostensibly inclusionary aim of such policies, however, means that the policies are more likely to be overtly race conscious, which may, in turn, make segregative intent easier to prove. San Francisco city officials, for example, were much more candid about their intention that the residency preference policy operate to preserve existing racial demographics [177] than the defendant in *Chickasaw*—a case in which the court deemed credible the defendant's claims that it did not intend the policy's segregative effects. [178]

Because the alleged disparate impacts created by anti-displacement, neighborhood-level residency

preferences may be more plainly deliberate (or even the preferences' very purpose), such policies are more likely to invite FHA intentional discrimination claims. If courts decline to endorse affirmative action efforts to preserve minority communities under the FHA, administrators of anti-displacement preferences might be uniquely vulnerable to intentional discrimination liability.

3. *Equal Protection Racial Discrimination Claims.* — Equal protection racial discrimination claims are rarely brought to challenge residency preferences, in part because the existence of disparate impact liability under the FHA makes a statutory violation much easier to establish than a constitutional violation, [179] and in part because even policies that effectuate a stark disparate impact are likely to be facially race neutral. [180] Nonetheless, the Second Circuit in *Comer v. Cisneros* looked favorably upon the plaintiffs' claim that they had suffered a constitutional harm under the Equal Protection Clause, at least so far as to hold that plaintiffs could survive summary judgment. [181]

As discussed above, race-conscious policymaking is more likely to be provable in the affirmative action context. [182] Policies that target African American and Latino communities for preservation and protection against displacement may more transparently consider race, thereby rendering equal protection liability somewhat more plausible. While exclusionary intercity residency preferences have largely been insulated from equal protection liability, [183] ostensibly inclusionary intracity preferences raise obvious equal protection concerns. By treating neighborhood residency as, in the words of the *Comer* court, a "proxy for race," [184] these policies would merit strict scrutiny. The paradox here is a familiar one from the affirmative action context: Practices that prioritize racial minorities are more constitutionally vulnerable than facially race-neutral policies that impose an adverse disparate impact upon minorities. [185] The more carefully residency preferences are targeted at protecting nonwhite communities against displacement, the more constitutionally problematic they become.

4. *Right-to-Travel Claims.* — Residency requirements are most often deemed to be in violation of the constitutional right to travel [186] when they discriminate not merely on the basis of state residency [187] but on the basis of *duration* of state residency. [188] As a result, residency preferences for affordable housing are consistently devoid of durational components. There is no indication that cities enacting neighborhood-level residency preferences are likely to break with this precedent, particularly in light of administrative regulations that prohibit durational preferences for PHA-administered waiting lists. [189]

Nonetheless, anti-displacement rationales for residency preferences are particularly intertwined with a duration-based logic. New York City's defense of its preference policy leans heavily on the idea that longstanding residents have built equity in their neighborhoods, and the *Winfield* complaint criticizes New York's policy for failing to distinguish between longstanding residents and recent arrivals. [190] Cities could turn to durational preferences to more closely target the goal of retaining longtime residents. In that case, as with equal protection liability, an odd irony arises: The

more a city tailors a residency preference to protecting the desired population—in this case, longstanding residents of a neighborhood—the more likely its policy is to violate the Constitution.

It is also possible that the intracity–intercity distinction may matter in the case of right-to-travel liability. The Supreme Court has made it clear that only *state-level* durational residency requirements, which contravene the fundamental right to interstate travel, are unconstitutional. [191] Appellate courts have generally extended that same constitutional protection to intrastate travel between municipalities. [192] It is conceivable that the law might not recognize such a right on the hyperlocal, intramunicipal level; at some point, perhaps, the alleged right is too geographically limited to be understood as "travel" or "migration." If so, cities might be able to implement durational neighborhood-level residency preferences without running afoul of the constitutional right to travel.

Overall, the efficacy of neighborhood-level residency preferences is severely undermined by their legal vulnerabilities. Residency preferences implemented at the neighborhood level to combat gentrification-induced displacement may, as their proponents contend, turn exclusionary residency preferences on their head. [193] And yet, the legality of these policies appears to be at best uncertain and—if courts adhere to a traditional reading of the FHA that strictly condemns all segregated neighborhoods—perhaps even unlikely. An inherent mismatch exists between the existing law and emerging policies. These preferences aim to effectuate the FHA's goal of promoting fair housing for low-income and minority residents, but they do so in response to displacement pressures that the FHA does not contemplate [194] and in a manner that clashes with the FHA's anti-segregationist objective.

III. "LEGALIZING" ANTI-DISPLACEMENT RESIDENCY PREFERENCES: POTENTIAL SOLUTIONS TO THE POLICY-LAW MISMATCH

If neighborhood-level residency preferences are to be effectively and legally utilized to address issues of urban displacement, either courts' approaches to such policies or the policies themselves must evolve. This Part advocates for a combination of these strategies, with primary reliance on an alternative understanding of how neighborhood-level housing patterns relate to integrationist goals. Section III.A argues that courts should interpret such policies as consistent with the FHA's integrationist aims when the impending displacement would result in a less integrated and diverse municipality. Section III.B identifies five possible adjustments that would render neighborhood-level residency preferences more legally viable.

A. REFRAMING THE CONVERSATION: RESIDENCY PREFERENCES AS INTEGRATION-PRESERVATION MEASURES

While San Francisco's attempt to utilize residency preferences to preserve the African American population in Western Addition was blocked by HUD because it ostensibly perpetuated segregation, [195] it might well be reinterpreted as an effort to preserve integration. After all, San Francisco's dwindling African American population, which declined from 13.4% in 1970 to 5.5% in 2014, [196] suggests that many residents displaced from neighborhoods with concentrated African American populations leave the city entirely. In the face of encroaching homogenization, policies that perpetuate segregated neighborhoods may nonetheless serve a larger-scale integrationist purpose.

The crucial factor here is the breadth of the applicable geographical and conceptual scope. Gentrification scholars have called for a broader inquiry that examines gentrification as a municipal and regional phenomenon rather than a strictly neighborhood-level occurrence. [197] Critics of this "[g]eographic myopia" [198] argue that it overlooks critical factors in the gentrification analysis and cite both academic and practical benefits to widening the geographic lens. [199] By similarly broadening the scope through which one views housing patterns, the perpetuation of certain neighborhood-level segregation might be viewed as a means of promoting comparatively macroscopic integration. Legal scholars have drawn attention to the tractable nature of interpretive lenses, which are expanded or constricted to facilitate a particular perspective and, often, outcome. [200] Narrower lenses—sometimes applied unconsciously—may simplify the narrative at the expense of context or nuance. [201]

In the case of housing, an inquiry into integration and segregation as strictly neighborhood-level patterns may miss the forest for the trees. If minority residents are displaced from their city at an elevated rate, the preservation of certain segregated neighborhoods may in fact be a corrective to segregation at the municipal or regional level. This argument should not be misunderstood as advocating the abandonment of efforts to achieve neighborhood integration or as conflating integration and diversity; rather, it promotes the pragmatic recognition that integration *requires* diversity. When residency preference policies seek to preserve the diversity of a population against the alternative of homogenizing displacement, they may act in support of integrationist goals—even if their localized effect is to perpetuate segregated patterns.

Furthermore, residency preference policies in gentrifying neighborhoods may be reinterpreted as necessary to effectuate the integrationist or "social mixing" potential of gentrification. [202] Arguably, a preference policy that seeks to preserve a neighborhood's preexisting demographics perpetuates segregation only if the neighborhood demographics are static and homogenous; in gentrifying neighborhoods, such a policy can help to realize and stabilize integrated housing patterns. Without residency preferences, a gentrifying neighborhood may move from low income

and predominantly minority to higher income and predominantly white, with only a fleeting transitional window of integrated living.

Racial and socioeconomic demographics in gentrifying neighborhoods are attributable not only to the identities of those who are displaced but also to the identities of new arrivals. [203] As a result, demographics in gentrifying neighborhoods may change swiftly. Data from New York City indicate that the average household income in gentrifying neighborhoods (adjusted for inflation) rose 6.1% between 2005 and 2010–2014. [204] During the same period, the citywide average income rose just 0.06%. [205] Between 2000 and 2010, the share of white residents in New York City overall decreased by over seven percent, [206] but the share of white residents increased by over twenty percent in gentrifying neighborhoods. [207] Given the pace of demographic shifts in gentrifying neighborhoods, the idea that residency preferences in such neighborhoods perpetuate preexisting patterns seems misguided. Rather, these preferences are better understood as promoting a more persistent and less transitory kind of integration in the midst of rapidly changing demographics.

This reframed approach calls into question the assumption that neighborhood-level residency preferences perpetuate segregation. When viewed in the context of gentrification's homogenizing potential, residency preference policies that seek to preserve minority communities are a weapon against segregation, not its facilitator. When properly implemented, they should not be understood to create discriminatory or segregative effects subject to disparate impact liability. In this light, residency preferences are a tool of integration preservation consistent with the FHA's provisions and purpose.

B. RETHINKING RESIDENCY PREFERENCES

Neighborhood-level residency preferences are not inherently invalid, and their potential legal vulnerabilities can be mitigated by strategic adjustments. This section addresses five possible strategies for rethinking anti-displacement residency preferences so that they are more likely to both avoid and survive legal challenge.

1. *Extend Fewer Preferences.* — First, neighborhood-level residency preferences may be both less objectionable and more legal when they apply to a smaller proportion of available housing units. Opponents of residency preferences in New York and San Francisco have identified the extent of those preferences [208] as one basis for their criticism. [209] By applying the preference to a smaller portion of units in a given development, cities and housing authorities might provoke less controversy.

Narrowing the extent of residency preferences could also help such policies survive legal challenge. While a narrower preference may not be more closely tailored to any of the likely governmental justifications, it might render such justifications less necessary by reducing the preference's

disparate impact. A reduced preference might therefore be regarded as less discriminatory than a more expansive one, because it does not so much perpetuate existing housing patterns as prevent them from utter disruption. [210]

For proponents of neighborhood-level residency preferences, the curtailed approach described here bears an obvious downside. A reduced preference will serve fewer residents and protect a more limited subset of the existing population against displacement. The proposed adjustment, therefore, is not one that would strengthen residency preferences so much as strike a compromise.

2. *Expand the Geographic Scope of Preference Areas.* — A second adjustment to neighborhood-level residency preferences would strategically expand the geographic preference area to encompass more racially diverse populations. Concerns that residency preferences exacerbate segregated housing are most prominent and forceful where the preferences apply to geographical areas whose populations are made up of either predominantly white or predominantly minority residents. [211] By expanding the geographic scope to more diverse areas or pairing demographically distinct neighborhoods together into a single preference area, residency preferences could help protect against displacement without directly preserving the specific racial composition of individual neighborhoods.

Versions of this approach have been among the most popular solutions to the problem of segregation-perpetuating residency preferences. The *Comer* settlement expanded the challenged residency preference to the entirety of Erie County, so that residents of Buffalo were included in—rather than excluded by—the preference's scope. [212] The *Langlois* decision spoke approvingly of a "tempered approach" to residency preferences, in which urban and suburban PHAs would partner and extend preferences reciprocally to one another's residents. [213] A New York state court decision suggested that the "imbalance" in the community preference policy's applicant pool might be mitigated by the merging of two community districts into a single preference area. [214]

One potential pitfall of this approach is that its most effective iteration would require a race-conscious design of expanded preference areas, which could invite controversy and legal challenges. Additionally, larger preference areas diminish the preference's ability to protect against displacement at the hyperlocal level and to promote community preservation in individual neighborhoods. Residents of low-income, predominantly minority communities would compete for affordable housing in their neighborhoods on equal footing with residents of certain nearby—and potentially majority-white—neighborhoods, though they would also have equal access to affordable units in those other neighborhoods.

3. *Limit Residency Preferences to Particular Neighborhoods.* — A third approach to neighborhood-level residency preferences is to apply the preference only to neighborhoods that meet certain criteria —ideally criteria tied to the city's justification for administering the preference. Under this

approach, a city would identify specific eligible neighborhoods and extend residency preferences to all income-eligible residents of those neighborhoods. A preference policy intended to insulate residents from rising housing costs, for example, could be applied only in neighborhoods that display some threshold increase in rental prices; an expressly anti-displacement policy would be administered only in neighborhoods with sufficient patterns of displacement. [215]

FHA case law has blocked racial quotas that impose ceilings on minority populations but has suggested that "'access' quotas" designed to increase housing opportunities for racial minorities may be permissible under certain conditions. [216] Therefore, it is conceivable that a city might be able to selectively implement residency preferences in neighborhoods with threshold levels of diversity [217] —so long as it could convincingly frame its goal as the advancement of an integrated community rather than the preservation of a segregated one. [218]

Preference policies administered with these criteria would arguably operate on steadier legal ground because they would be narrowly tailored to the city's primary proffered justification. Even if the policies were found to create a disparate impact, the city might be better positioned to argue that no less discriminatory alternative existed. Moreover, the preference policy's close relationship to a valid governmental interest could help to rebuff any intentional discrimination or equal protection challenges.

A traditional residency preference policy administered under this approach would allow eligible residents in eligible neighborhoods to compete for affordable housing exclusively in their own neighborhoods. (Affordable housing in ineligible neighborhoods would, presumably, be equally available to all applicants regardless of their geographic residence.) Another permutation of this approach, by contrast, might give residents of eligible neighborhoods preferred access to affordable housing citywide regardless of its location.

San Francisco's anti-displacement preference, which HUD approved after rejecting its neighborhood-level residency preference, targets neighborhoods in this latter manner. It extends the preference to residents of specific census tracts that have experienced acute displacement and is therefore contingent on applicants' geographic residence but not on the location of the affordable housing development to which they apply. [219] Commentators and public officials widely hailed this revised approach as effective and comparatively uncontroversial, and HUD's acquiescence signals that it may also be a more legally viable solution. [220]

4. *Duration-Based Preferences.* — A fourth suggested approach also imposes strategic criteria on the operation of neighborhood-level residency preferences but does so by limiting *applicant* eligibility rather than *neighborhood* eligibility. Under this approach, residents of any neighborhood within the implementing city might be preference eligible but only if they have lived in their neighborhood for a sufficient duration. Duration-based residency preferences would function as a sort of earned

benefit, treating longevity of residence as a proxy for virtues such as commitment to the local community.

As discussed above, New York City's defense of its community preference policy relies heavily on the claim that longstanding residents of gentrifying neighborhoods have earned a right to remain by enduring years of poor living conditions. [221] This is a potentially compelling justification, and its specific focus on longtime residents of previously impoverished neighborhoods minimizes the circularity problem. It is poorly suited, however, to justifying a policy that extends preferences without regard to duration. [222]

The obvious solution is a duration-based residency preference, but such an approach raises immediate pragmatic difficulties. Is the preference extended only to applicants with a threshold duration of residency (and administered equally to all who meet the threshold), or is it available to all residents and scaled based on duration? How does the preference apply to households with members of varying duration or who inherited their current housing from a family member? Does the preference apply to every neighborhood, or does it vary according to each neighborhood's trajectory of disinvestment and gentrification? (In theory, it could be combined with the preceding approach so that only longstanding residents of *specific* neighborhoods would be eligible.)

Additionally, durational preferences often violate the fundamental right to travel. [223] It is unclear, however, whether neighborhood-level durational preferences violate that right. [224] While scaled durational preferences—those available to all residents but tiered according to duration of residency—might be less likely to invite right-to-travel liability, case law from outside the housing context indicates that such provisions may violate the Equal Protection Clause. [225] If constitutional challenges can be avoided or defeated, a durational residency preference seems like a well-tailored policy for cities concerned with rewarding longstanding residents' endurance, though determining the contours of eligibility would pose an administrative headache.

5. *Residency as a "Plus Factor."* — Finally, city governments could replicate a strategy from affirmative action doctrine by treating residency as a "plus factor" that enhances an applicant's candidacy rather than as a criterion considered in isolation. [226] This approach would grant neighborhood residents preferred access to local affordable housing while also allowing outsiders an opportunity to compete for the same units. [227] "Residence" would be accorded numeric value within a larger quantitative system.

A "plus factor" policy would mitigate equal protection concerns even if residency were viewed as a proxy for race, given that the Supreme Court has endorsed an analogous tactic in the educational setting. [228] Allowing nonresidents of the neighborhood to compete for every available unit might also alleviate objections to the policy, because residency itself would not be solely determinative. [229] The specifics of the system (in particular, the factors considered as "pluses" and the weight

accorded to them) would determine the policy's effectiveness in mitigating displacement and the extent of any disparate impact it created.

A legally defensible version of this approach would require that the preference system be tailored to a compelling, noncircular justification. If residency is merely one factor for preferred access to affordable housing rather than the determinative factor, the policy's objective cannot be the prioritization of existing residents. A successful preference system in this mold would require an array of "plus factors" directed at the specific effects of gentrification that the city wishes to address. Other "plus factors" could include involvement in community organizations, employment in the neighborhood, or other characteristics that evince a participatory approach toward community preservation.

CONCLUSION

Proponents of neighborhood-level residency preference policies recognize their potential as anti-displacement measures and regard such policies as an inclusionary reappropriation of discriminatory intercity preferences. Under existing law, however, anti-displacement residency preferences might be deemed less an inversion of discriminatory policies and more an extension of them. The demographics of the target communities may be different, but the goal of insulating an existing population is arguably unchanged.

For neighborhood-level residency preferences to operate as a useful and legally viable tool for cities seeking to mitigate gentrification-induced displacement, the demographic consequences of local housing patterns must be considered at a broader geographic level and strategic adjustments must be made to the way in which preferences are administered. Cities can utilize residency preferences to turn an exclusionary tool on its head, but a true inversion will require reframing the legal conversation and revising governmental approaches.

Attachment 3. Staffing

STAFFING

Staffing in Other Cities

The below table outlines the preferences, housing type, staffing levels, key staff responsibilities, and institution responsible for screening for preference (developer or City) in other cities with preference policies.[5]

City	Preferences	Housing Type(s)	Staff Level (FTEs)	Key Responsibilities	Institution Responsible for Screening for Preference
Santa Monica	-Displaced [6] -Live/work -Current pilot: displaced by urban renewal/eminent domain	Inclusionary and Nonprofit	1 (add'l when list open)	• Compliance monitoring for inclusionary and nonprofit units • Ongoing waitlist management and tenant referrals for inclusionary units • Verify preference qualifications for displacement preference	Developer (City for displacement preference, urban renewal pilot)
Cambridge	-Current resident -Families with children -Emergency needs[7] -Works in Cambridge	Inclusionary	2.5	• Work with applicants applying to the Rental Applicant Pool • Screen applications against the priority point system • Fill vacancies across the portfolio • Certify applicants' income during the final application stage • Re-certify tenant incomes after lease-up	City

[5] This information is up-to-date as of this 2019 report: https://www.cityofberkeley.info/uploadedFiles/Housing/Level_3_-_General/Preference%20Policy%20DCRP%20Report.pdf. More recent information was added on Santa Monica's urban renewal pilot, based on an interview with Santa Monica housing staff in January 2022.

[6] Santa Monica's displaced category includes no-fault evictions, natural disasters, reduction in housing voucher assistance, or government action

[7] Cambridge's emergency needs category includes no-fault eviction, homeless, overcrowded housing, 50% or greater rent burden, outstanding code violations.

City	Preferences	Housing Type(s)	Staff Level (FTEs)	Key Responsibilities	Institution Responsible for Screening for Preference
San Francisco	-Displaced - urban renewal -Displaced - no-fault evictions or fires -Neighborhood -Live/work	Inclusionary and Nonprofit	5.25	• Lottery administration • Marketing vacant nonprofit and inclusionary units • Annual reporting related to the preference program • Reviewing applicants' documentation related to preference eligibility during the lottery and lease-up processes.	City
Portland	-Displaced – eminent domain -Address in Interstate Corridor Urban Renewal Area -Parent/ grandparent address in Interstate Corridor Urban Renewal Area	Nonprofit in Interstate Corridor Urban Renewal Area	1.5 (up to 4 when leas-ing)	• Ongoing management of the preference policy waitlists • Conduct outreach and assist applicants • Process applications • Verify preference qualifications • Refer prospective tenants to property managers.	City
Oakland	-Displaced[8] -Neighborhood -Live/work	**Nonprofit**	0.5	• Monitoring annual reporting from rental projects in the City's portfolio - involves reviewing tenant rents and income, but staff may also review the preference qualifications of new tenants.	Developer

Staffing Needs by Phase

Staff responsibilities, at a minimum, will include aligning a policy with current programs/polices, verifying preference documentation, developing educational materials for both prospective applicants and property managers, training property managers on

[8] Oakland's displaced category includes government action, code enforcement, and no-fault eviction.

proper document collection and lottery criteria, education for the public, collecting data, and compiling evaluation reports with recommendations for continued success.

Staffing needs will vary by phase, as there will be some needs specific to establishing the program, while others will be ongoing over time for sustainable program implementation. Staff are concurrently working with other jurisdictions in Alameda County to establish a unified Housing Portal for online applications for BMR and HTF units that will effect how preferences are implemented over the long-term.

Staffing Needs – Program Set-Up
Staffing needs during program set-up will include:

A. Adopting or amending relevant Administrative Guidelines
B. Aligning with other policies and programs
C. Education and outreach
D. Establishing monitoring plans
E. Seeking policy approval with funding agencies

Staffing Needs – Ongoing
Ongoing staffing needs will include:

A. Education and outreach
B. Implementation – verifying and filing preferences
C. Ongoing monitoring and evaluation with racial equity framework
D. Seeking ongoing funding agency approvals as needed for HTF housing

<u>Staffing Needs by Program</u>
Staffing needs will also vary between BMR and HTF units. Currently, City staff verify BMR documentation prior to lease-up, and monitor HTF documentation annually following lease-up. Implementation of the Housing Preference Policy may represent a change in which City HTF monitors play a more active role in documentation verification prior to lease-up. BMR monitor workload would also increase, with the increased documentation needing to be verified for preferences. Existing documentation pertains to income, household size, and program eligibility.