Housing Solutions Lab
Helping cities plan, launch, and evaluate equitable housing policies

Legal Frameworks for Addressing Racial Disparities in Housing

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I. Introduction

Racial inequities in housing—the result of decades of discrimination by all levels of government and the private sector—are well-documented, as are their insidious effects.[1] Years of exclusionary and predatory practices have left households of color locked out of homeownership opportunities or included on exploitative terms.[2] Neighborhood segregation and the racialized concentration of poverty continue to drive unequal outcomes in health, education, and economic opportunity.[3] And, in a nationwide housing instability crisis that the pandemic has made even more acute, people of color are more likely to be evicted and more likely to become homeless.[4]

These disparities demand responses, and cities across the country are working to develop new and innovative housing policies that redress the harms of discrimination.[5] Many of these approaches have focused on addressing racial disparities indirectly, by targeting by income, at the neighborhood level, or through other proxies. A small number have explored ways to compensate households harmed by discrimination more directly.[6] However, the legal considerations involved in crafting policies to address racial disparities in housing are complex, given the Supreme Court's

1. *See* Sheryll Cashin, White Space, Black Hood: Opportunity Hoarding and Segregation in the Age of Inequality (2021); Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America (2017); Jessica Trounstine, Segregation by Design: Local Politics and Inequality in American Cities (2018); Ingrid Gould Ellen, Jorge de la Roca, and Justin Steil, *The Significance of Segregation in the 21st Century*, 15 City & Community 1, 8 (2016).

2. *See, e.g.*, Keeanga-Yamahtta Taylor, Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership (2019).

3. *See, e.g.*, Raj Chetty et al., *The Opportunity Atlas: Mapping the Childhood Roots of Social Mobility*, 49 (Opportunity Insights Working Paper, Working Paper No. 25147, 2018), https://opportunityinsights.org/wp-content/uploads/2018/10/atlas_paper.pdf; Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 Am. Econ. Rev. 855, 856 (2016); Jorge De La Roca, Ingrid Gould Ellen & Katherine M. O'Regan, *Race and Neighborhoods in the 21st Century: What Does Segregation Mean Today?*, 47 Reg'l Sci. & Urb. Econ. 138, 140 (2014); Jens Ludwig et al., *Long-Term Neighborhood Effects on Low-Income Families: Evidence from Moving to Opportunity*, 103 Am. Econ. Rev. 226 (2013).

4. Peter Hepburn, Renee Louis & Matthew Desmond, *Racial and Gender Disparities Among Evicted Americans*, Eviction Lab (Dec. 16, 2020),https://evictionlab.org/demographics-of-eviction/; Sophia Wedeen, *Black and Hispanic Renters Face Greatest Threat of Eviction in Pandemic*, Joint Ctr. for Hous. Stud. of Harv. Univ. (Jan. 11, 2021), https://www.jchs.harvard.edu/blog/black-and-hispanic-renters-face-greatest-threat-eviction-pandemic; Vincent A. Fusaro, Helen G. Levy & H. Luke Shaefer, *Racial and Ethnic Disparities in the Lifetime Prevalence of Homelessness in the United States*, 55 Demography 2119 (2018).

5. Ruben Anguiano, *Taking the Next Steps to Address Past Planning Harms*, Local Hous. Sol., https://localhousingsolutions.org/lab/notes/taking-the-next-steps-to-address-past-planning-harms/ (last visited Mar. 12, 2022); *Evanston Local Reparations*, City of Evanston (last visited Mar. 12, 2022), https://www.cityofevanston.org/government/city-council/reparations; *Mapping Prejudice*, Univ. of Minn., https://mappingprejudice.umn.edu/ (last visited Mar. 12, 2022); *Segregated Seattle*, The Seattle Civ. Rts. & Lab. Hist. Project (last visited Mar. 12, 2022), https://depts.washington.edu/civilr/segregated.htm; *Confronting Racism in City Planning and Zoning*, Louisville Metro Plan. & Design Serv., https://louisvilleky.gov/government/planning-design/confronting-racism-zoning (last visited Mar. 12, 2022).

6. *See Evanston Local Reparations*, City of Evanston (last visited Mar. 12, 2022), https://www.cityofevanston.org/government/city-council/reparations; Reparations, City of Asheville (last visited Mar. 18, 2022), https://www.publicinput.com/avlreparations.

interpretation of the Fourteenth Amendment's Equal Protection Clause as well as the federal Fair Housing Act. Understanding the approaches courts have favored and disfavored, as well as the evidence required to defend racially-targeted policies against legal challenges, can be daunting.

This brief provides an introduction to the legal frameworks governing housing initiatives that aim to address racial disparities, with the goal of equipping local policymakers to assess the risks of different approaches and develop strategies that make sense for their jurisdictions.[7] It begins with a review of the constitutional limitations on state actors' abilities to develop policies and programs based on race. This review shows the importance of the distinction between "race-conscious" policies that explicitly rely on race and "race-neutral" policies that do not: courts hold race-conscious policies—even those that aim to benefit oppressed groups—to more demanding standards. Although these legal constraints emerged to prevent malign racial discrimination, courts have interpreted them to apply to interventions that rely on race as a deciding factor even when the intent is to help, rather than hurt, a group that has suffered discrimination in the past. The second half of the brief focuses on the Fair Housing Act, which covers both state and private actors.

This brief lays out the basic contours of the doctrine and focuses on the requirements that courts have imposed on racial equity initiatives in the past. This area of the law contains many unsettled questions, and the composition of the Supreme Court has changed significantly since many major cases were decided.[8] The doctrine is unlikely to become more accommodating of race-conscious remedies, and may become substantially less so. Accordingly, this brief should serve as a starting point for further analysis by local attorneys and policymakers to assess the risks and viability of different approaches in jurisdictions doing the important work of redressing discrimination and segregation.

II. The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment, which guarantees to all people in the United States "the equal protection of the laws," limits state and local governments' abilities to confer benefits or impose burdens based on race.[9] Under this framework, policies and programs that make explicit racial distinctions, also known as race-conscious policies, are subject to stricter judicial scrutiny than policies that are race-neutral on their face. Race-conscious policies, even those based on distinctions intended to benefit oppressed groups or compensate for past discrimination, receive the highest level of scrutiny from courts. Race-neutral policies, by contrast, receive more lenient treatment by courts, even though they may, in practice, disproportionately benefit or burden different racial groups. The sections below outline the frameworks courts use to review legal challenges to race-neutral and race-conscious policies.

7. Cities should consult with counsel about issues related to program design and implementation.

8. Furthermore, in 2022, the Court will hear a case—Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, consolidated with the similar case Students for Fair Admissions, Inc. v. University of North Carolina—that could significantly alter the legal landscape of affirmative action. Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll. (Harv. Corp.), 397 F.Supp.3d 126, 196 (D. Mass. 2019), *affm'd*, 980 F.3d 157 (1st Cir. 2020), *cert granted*, 2022 WL 199375 (U.S. Jan 24, 2022) (No. 20-1199); Students for Fair Admissions, Inc. v. Univ. of N.C., No. 1:14-cv-954, 2018 WL 4688388 (M.D.N.C. Sep. 29, 2018) *cert granted sub nom*. Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll. (Harv. Corp.), 2022 WL 199375 (U.S. Jan 24, 2022) (No. 20-1199).

9. The Fourteenth Amendment, which applies to state and local governments, is the focus of this brief. U.S. Const. amend. XIV, § 1. The Fifth Amendment imposes similar equal protection restrictions on the federal government. *See* Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954).

A. Race-Neutral Housing Policies

Race-neutral policies do not draw distinctions based on race. Courts do not subject race-neutral policies to strict scrutiny (the most demanding form of judicial review). Instead, unless the challenging party can provide sufficient evidence to demonstrate that the motivation behind the policy was racial,[10] race-neutral programs face a more lenient standard of review known as "rational basis," under which a policy is upheld if the government can show that the policy is rationally related to a legitimate governmental objective. Race-neutral programs that are income-targeted—such as income restrictions on public housing or free legal services provided to low-income tenants—are subject to rational basis review if challenged.[11]

Race-conscious policies, even those based on distinctions intended to benefit oppressed groups or compensate for past discrimination, receive the highest level of scrutiny from courts. Race-neutral policies, by contrast, receive more lenient treatment by courts, even though they may, in practice, disproportionately benefit or burden different racial groups.

Race-neutral housing policies can often address underlying racial disparities. Down payment assistance programs for first-time homebuyers, for example, can help to provide homeownership opportunities to people of color whose access to wealth-building and lending mechanisms has been limited by discrimination. Likewise, vouchers that subsidize rental housing for low-income tenants disproportionately serve Black households, in large part because legacies of discrimination have led to contemporary income and housing disparities.[12] However, these targeting measures are less precise than explicit racial designations, and so require more attention to implementation to ensure that communities of color—and the most marginalized members of those communities—actually receive their benefits. Conscientious engagement with residents and with trusted community partners is vital to ensuring that race-neutral programs and policies reach people suffering from legacies of discrimination.[13]

10. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including "[t]he impact of the official action," "[t]he historical background of the decision," and "[t]he specific sequence of events leading up to the challenged decision." Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977).

11. *See* Califano v. Aznavorian, 439 U.S. 170, 174 (1978) ("Social welfare legislation, by its very nature, involves drawing lines among categories of people, lines that necessarily are sometimes arbitrary. This Court has consistently upheld the constitutionality of such classifications in federal welfare legislation where a rational basis existed for Congress' choice."); City of Dall. v. Stanglin, 490 U.S. 19, 27 (1989) ("The rational-basis standard is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.") (internal citations omitted).

12. Martha Galvez, Solomon Greene, Alyse D. Oneto & Patrick Spauster, *Protecting Housing Choice Voucher Holders from Discrimination*, URB. INST. (Oct. 2020), https://www.urban.org/sites/default/files/publication/103088/protecting-housing-choice-voucher-holders-from-discrimination.pdf.

13. *Resident-Centered Community Building: What Makes it Different?*, ASPEN INSTITUTE (June 2012), https://www.aspeninstitute.org/wp-content/uploads/files/content/docs/pubs/CCLE-Report_3-14-13_Reduced.pdf; James Capraro, Collective Impact in Neighborhood Revitalization (4 part series), COLLECTIVE IMPACT FORUM (Dec. 11-22, 2014); https://www.collectiveimpactforum.org/blog/32226; Danielle Bergstrom, Kalima Rose, Jillian Ollinger & Kip Holley, *The Community Engagement Guide for Sustainable Communities*, POLICYLINK (2012), https://www.policylink.org/resources-tools/community-engagement-guide-for-sustainable-communities; *Index of Community Engagement Techniques*, TAMARACK INSTITUTE https://cdn2.hubspot.net/hubfs/316071/Resources/Tools/Index%20of%20Engagement%20Techniques.pdf?__hstc=&__hssc=&hsCtaTracking=cee0990e-2877-474b-93f7-c21defcae9b5%7C0769d43e-10f2-41a2-ab08-4c5c9fc8c4ba (last visited Mar. 14, 2022) (providing tools for five levels of community engagement: inform, consult, involve, collaborate, and empower); *Best and Promising Practices: Trauma-Informed Community Building- A Model For Strengthening Communities in Trauma Affected Neighborhoods*, URB. INST. (Dec. 13, 2014), https://societyhealth.vcu.edu/media/society-health/pdf/Best-Practices-Trauma-TICB-12.3.14.pdf. More recent resources examine community outreach and engagement practices in the context of the current pandemic. *See, e.g.*, Chandra Rouse & Mary Ayala, *Community Engagement for the Health Action Plan*, ENTER. CMTY. PARTNERS (June 2020), https://www.enterprisecommunity.org/sites/default/files/2021-06/aug2020_community_engagement_covid_19_final_web_0.pdf; Eva H. Allen, Jennifer M. Haley, Joshua Aarons & DaQuan Lawrence, Leveraging Community Expertise to Advance Health Equity, Urb. Inst. (July 2021), https://www.urban.org/sites/default/files/publication/104492/leveraging-community-expertise-to-advance-health-equity_0_0.pdf.

B. Race-Conscious Housing Policies

Race-conscious housing policies, if challenged, face much harder battles in court than race-neutral policies. Courts apply strict scrutiny to race-conscious policies even if the policies were designed to achieve integrative or benign goals.[14] This standard was first articulated in legal challenges to pernicious race-based classifications, such as anti-miscegenation laws.[15] The Court later extended this searching standard of review to all race-based classifications, even those with purportedly beneficent motivations.[16]

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The application of strict scrutiny means that the government can only provide a benefit or impose a burden on the basis of race to achieve a compelling government interest, using methods narrowly tailored to achieve that interest.[17] The following sections elaborate on those requirements.

i. Strict Scrutiny's Compelling Interest Requirement

A government entity enacting a race-conscious policy must provide *substantial evidence that the policy serves a compelling governmental interest*.[18] The Supreme Court has recognized only one compelling interest relevant to race-conscious housing policies: a government's interest in redressing its own violations of the Constitution or antidiscrimination laws.[19] This interest does not extend to remedying discrimination by another level of government or by society writ large.[20] Cities considering race-conscious housing measures must be able to provide substantial evidence of the ways in which the same entity now enacting the policy has discriminated in the past, as well as the ways in which the harms resulting from that discrimination persist into the present.[21]

14. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.").

15. *See, e.g.* Loving v. Virginia, 388 U.S. 1 (1967).

16. *Croson*, 488 U.S. at 493.

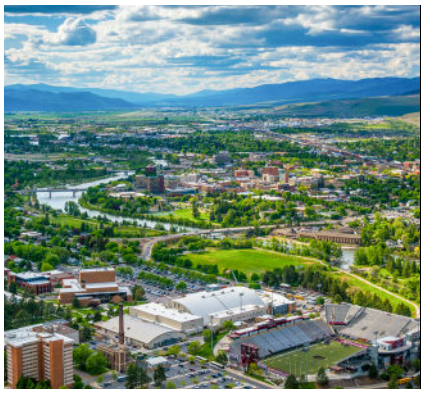
17. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 223–24 (1995) ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) ("[W]hen a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest."). Collecting data on racial demographics thus should not trigger strict scrutiny unless it affects the subsequent "distribution of benefits or imposition of burdens." *Id.*

18. In other words, the government must prove both that it has a compelling interest as its purpose and that the policy actually serves that interest, although the latter requirement is usually subsumed into the narrow tailoring inquiry. Some cases refer to a "substantial" rather than "compelling" government interest. *See Bakke*, 438 U.S. at 320.

19. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986) ("[I]n order to remedy the effects of prior discrimination, it may be necessary to take race into account."). The Court has also recognized that publicly-funded universities have an interest in promoting diversity in higher education, but has held that such diversity must be defined in terms broader than race and ethnicity. *See* Grutter v. Bollinger, 539 U.S. 306, 324–25 (2003) ("It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, that can justify the use of race...Rather, [t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.") (quoting Bakke, 438 U.S. at 313-15). The Court opined about the benefits of integration in early Fair Housing Act cases. *See, e.g.*, Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 111, (1979) ("As we have said before, '[t]here can be no question about the importance' to a community of 'promoting stable, racially integrated housing.'") (quoting Linmark Assocs., Inc. v. Willingboro Twp., 431 U.S. 85, 94 (1977).); Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (quoting Senator Mondale's description of the goals of the FHA as "truly integrated and balanced living patterns."). Nevertheless, the Court has not extended the diversity interest beyond the education sphere, and in Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 held that Grutter's recognition of a university's interests in diversity (defined more broadly than race and ethnicity) did not extend to elementary and secondary school districts' purported interests in racial and ethnic diversity. 551 U.S. 701, 724–25 (2007).

20. *See Wygant* 476 U.S. at 274 (noting that "This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."); Croson, 488 U.S. at 499 ("[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.").

21. *See* Pigford v. Glickman, 206 F.3d 1212 (D.C. Cir. 2000).



One foundational case provides an example of how courts are likely to scrutinize a local government's evidentiary showings. In *City of Richmond v. Croson*, the Supreme Court invalidated the city of Richmond's preferential hiring program for minority contractors, which established a quota requiring that 30% of construction contracts be awarded to minority-owned firms.[22] Richmond at the time had a population that was 50% Black, but minority-owned firms had in recent years received only 0.67% of prime construction contracts.[23] Substantial research, including Congressional findings relied upon in an earlier Supreme Court case, documented pervasive racial discrimination in the construction industry nationwide.[24] The Court found this evidence insufficient to establish a compelling interest justifying Richmond's racial quota, observing that the city had provided "no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors."[25]

Croson established, and subsequent cases affirmed, the necessity of "direct evidence" of city government discrimination to justify race-conscious local housing policies.[26] But assessing how any such claims will fare in court is complicated by the fact that the Supreme Court has not affirmed a remedial program since deciding *Croson* in 1989.[27]

Cities' efforts to understand their own past and present discriminatory practices have increased substantially, many of them undertaken as part of HUD's 2015 Affirmatively Furthering Fair Housing (AFFH) regulations.[28] These efforts have documented the many ways in which local governments have contributed to segregation and other racial disparities in housing through practices including exclusionary zoning,[29] the segregated siting and construction of public housing,[30] and urban renewal programs that demolished and displaced housing in Black communities for highway construction or blight clearance.[31]

In *Croson*, the Court also suggested that if a city "could show that it had essentially become a 'passive participant' in a system of racial exclusion," it could "take affirmative steps to dismantle such a system" provided that it "identifies that discrimination with the particularity required by the Fourteenth Amendment."[32] The Court reasoned that a government entity "has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."[33] However, the dearth of remedial cases since *Croson* makes it difficult to assess the availability of this "passive participation" argument.

22. *See Croson*, 488 U.S. at 480.

23. *Id.* at 479.

24. *Id.* at 503-04.

25. *Id.* at 480.

26. *Id.*

27. The Second Circuit affirmed a court-ordered remedial program in Yonkers. In that case, the district court had made a finding of discriminatory intent, and the remedy was imposed by a federal court rather than a local government. U.S. v. Yonkers Bd. Of Educ., 837 F.2d 1181 (1987)

28. *See generally Affirmatively Furthering Fair Housing*, POVERTY & RACE RESEARCH ACTION COUNCIL (July 23, 2020), https://www.prrac.org/affirmatively-furthering-fair-housing/; Katherine M. O'Regan & Ken Zimmerman, *HUD's Affirmatively Furthering Fair Housing Rule: A Contribution and Challenge to Equity Planning for Mixed Income Communities*, N.Y.U. FURMAN CENTER (Aug. 2019), https://furmancenter.org/files/ORegan.Zimmerman.Affirmatively_Furthering_Fair_Housing.2019.pdf.

29. *See, e.g.*, *Analysis of Impediments to Fair Housing Choice* (Draft for Public Comment), POVERTY & RACE RESEARCH ACTION COUNCIL (Sept. 2019), http://www.prrac.org/pdf/dc-draft-ai-fair-housing-choice-09-2019.pdf.

30. *Where We Live NYC Plan*, CITY OF NEW YORK (2020), https://www1.nyc.gov/assets/hpd/downloads/pdfs/wwl-plan.pdf, 16-18.

31. *See, e.g.*, *History*, RECONNECT RONDO, https://reconnectrondo.com/vision/history/ (last visited Mar. 18, 2022); Rachael Dottle, Laura Bliss & Paula Robles, *What It Looks Like to Reconnect Black Communities Torn Apart by Highways*, BLOOMBERG, https://www.bloomberg.com/graphics/2021-urban-highways-infrastructure-racism/ (July 28, 2021).

32. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989).

33. *Id.*

ii. Strict Scrutiny's Narrow Tailoring Requirement

Courts also require that a race-conscious policy be *narrowly tailored* to achieve the government's stated compelling interest. A government's interest in remedying past instances of discrimination is not a license to implement race-conscious programs that extend beyond the scope of that discrimination. Courts evaluating whether race-conscious policies are narrowly tailored have generally required that any given policy's reliance on racial distinctions:[34]

...These targeting measures are less precise than explicit racial designations, and so require more attention to implementation to ensure that communities of color—and the most marginalized members of those communities—actually receive their benefits.

Is a last resort. Narrow tailoring requires "serious, good-faith consideration of workable race-neutral alternatives."[35] Courts thus look for evidence that policymakers have rigorously considered alternatives to race-conscious approaches and have looked favorably on evidence of previous attempts to address disparities with race-neutral mechanisms.[36] This requires more than a conclusory rejection of a race-neutral approach. Policymakers should be prepared to show why targeting assistance by income or by geography has been inadequate to address disparities.

Is not over-inclusive. A race-conscious policy must target relief only to the groups or individuals suffering harms attributable to the discrimination on which the program is predicated.[37] Courts have recently struck down several pandemic relief measures based on over-inclusiveness. For example, the Sixth Circuit enjoined a federal pandemic relief program for restaurants after finding that the government did not sufficiently justify its decision to grant priority to "individuals who trace their ancestry to Pakistan and India" but not "those from Afghanistan, Iran, and Iraq," criticizing these distinctions as reflecting a "scattershot approach" that did "not conform to the narrow tailoring strict scrutiny requires."[38] A federal district court likewise enjoined a Department of Agriculture pandemic relief program for farmers after concluding the program was overinclusive. The court reasoned that the use of race as the sole determining factor for loan forgiveness meant that even a minority-owned farm "having the most profitable year ever" that had "never been discriminated against" would nonetheless qualify for relief predicated on past discrimination.[39]

34. "In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." United States v. Paradise, 480 U.S. 149, 171 (1987).

35. Grutter v. Bollinger, 539 U.S. 306, 339 (2003); *See* also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 735 (2007) (invalidating a Seattle-based race-conscious school integration scheme in part because "several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration"); *Croson*, 488 U.S. at 507 ("[T]here does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting").

36. Upholding the affirmative action admissions program at the University of Texas, the Court noted "significant evidence, both statistical and anecdotal, in support of the University's position," including demographic data showing "consistent stagnation in terms of the percentage of minority students enrolling at the University" over the relevant time period that served as "a gauge of the University's ability to enroll students who can offer underrepresented perspectives" without affirmative action measures. Fisher v. Univ. of Texas at Austin, 136 S. Ct. 2198, 2212 (2016). The Court also noted that the university had embarked upon a year-long study seeking to ascertain whether its admissions policy was allowing it to provide 'the educational benefits of a diverse student body.'" Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2204–06 (2016).

37. *Croson*, 488 U.S. at 506 ("The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination. If a 30% set-aside was narrowly tailored to compensate black contractors for past discrimination, one may legitimately ask why they are forced to share this 'remedial relief' with an Aleut citizen who moves to Richmond tomorrow? The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation.").

38. Vitolo v. Guzman, 999 F.3d 535, 364 (2021). The court also concluded that the government's failure to explain why particular groups were included in the program weakened its compelling interest argument. *Id.* at 361.

39. Wynn v. Vilsack, 545 F.Supp.3d 1271, 1283-85 (2021).

Is not under-inclusive. Likewise, a narrowly tailored policy does not deny benefits to potential beneficiaries who may have equally valid claims based on discrimination, an issue that has also arisen in recent pandemic relief cases. In its review of the federal government's restaurant relief program, the Sixth Circuit took issue with the federal government's grant of an automatic preference to small businesses "owned and controlled"—by 51% or greater ownership—by a woman, veteran, or racial minority. This provision disqualified the plaintiff's restaurant, which was 50% owned by a Hispanic woman.[40] Viewing this cutoff at odds with the program's stated purpose of remedying past discrimination against Hispanic-owned small businesses, the court concluded that the program was underinclusive and thus not narrowly tailored.[41] Waivers can provide evidence of flexibility and guard against over-or under-inclusivity by allowing those with valid entitlements to qualify for relief who might otherwise be screened out of programs to participate.[42]

...These targeting measures are less precise than explicit racial designations, and so require more attention to implementation to ensure that communities of color—and the most marginalized members of those communities—actually receive their benefits.

Rely on flexible and evidence-based targets rather than strict racial quotas. Courts have consistently struck down programs that rely on racial quotas.[43] They have also shown skepticism towards numerical targets on other grounds, questioning, for example, the assumption that fairness requires that racial groups be represented in a program or industry in exact proportion to their share of the overall population.[44] More persuasive evidentiary showings might focus on demonstrating that a selected target reflects the proportion of their share currently in a program or industry.

Is time-limited. Courts have condemned programs that are "ageless in their reach into the past, and timeless in their ability to affect the future,"[45] looking more favorably on the inclusion of time limits on relief or provisions that guarantee periodic review and reconsideration of program criteria.[46]

40. This feature of strict scrutiny analysis stands in contrast to courts' usual deference to line-drawing. *See, e.g.*, Califano v. Aznavorian, 439 U.S. 170, 174 (1978); Hutto v. Davis, 454 U.S. 370, 374 (1982).

41. Vitolo, 999 F.3d at 363. The court did not address how allowing an ownership stake below 50% would affect the government's attempt to show that its program was narrowly tailored to provide relief only to those small businesses "owned and controlled" by specific groups.

42. U.S. v. Paradise, 480 U.S. 149, 171 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.").

43. "Even in the context of mandatory desegregation, we have stressed that racial proportionality is not required ..." Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 732–33 (2007). *See* also Croson at 507 ("Second, the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population."); Bakke at 298 ("If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."). The Court has looked favorably on the use of race and ethnicity as a "plus" factor in the context of university admissions, where individual applications can be reviewed holistically. *See* Grutter v. Bollinger, 539 U.S. 306, 315 (2003).

44. *Croson*, 488 U.S. at 501.

45. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986). *See* also Grutter, 539 U.S. at 342 (holding that "race-conscious admissions policies must be limited in time"); U. S. v. Starrett City Assocs., 840 F.2d 1096, 1102 (2d Cir. 1988) ("Since the goal of integration maintenance is purportedly threatened by the potential for 'white flight' on a continuing basis, no definite termination date for Starrett's quotas is perceivable.").

46. *See* Fullilove v. Klutznick, 448 U.S. 448, 487 (1980).

III. The Fair Housing Act

The Fair Housing Act (FHA) covers both public and private actors and prohibits discrimination in the provision, terms and conditions, or advertising of housing. Under the FHA, it is unlawful "to refuse to sell or rent," discriminate "in the terms, conditions, or privileges of sale or rental of a dwelling," discriminate in advertising, or "otherwise make unavailable or deny based on race, color, religion, sex," or other protected statuses.[47] The phrase "otherwise make unavailable or deny" expands the scope of the Act's reach significantly.[48] Some states and cities also have fair housing or anti-discrimination laws to which cities contemplating racially-targeted initiatives should be attentive.[49]

As in the Equal Protection context, courts subject policies that use race as a factor in access to housing in order to promote integration or remedy racial disparities to the same degree of scrutiny as policies that perniciously use race as an exclusionary factor.[50] The standards that would govern a challenge to such a policy are unclear, though a handful of lower federal court cases are potentially instructive and suggest that cities defending challenges to race-conscious housing programs should be prepared to face standards similar to strict scrutiny. In *United States v. Starrett City Associates*, a private developer in New York City sought to use racial quotas to maintain "a racially integrated community" in one of its housing projects. The Second Circuit struck down the policy under the Fair Housing Act because "the use of quotas generally should be based on some history of racial discrimination or imbalance within the entity seeking to employ them," and because the developer's quota policy had no definite termination date.[51] The court suggested, however, that a race-conscious housing policy could be upheld if it were temporary, flexible, and designed to achieve FHA's goal of integration.[52]

Judicial orders to site public housing in more integrated neighborhoods based on Fair Housing Act violations have received inconsistent treatment by reviewing courts.[53] In a 1976 case, *Hills v. Gautreaux*, the Supreme Court also affirmed a district court's authority to enter a remedial order against HUD based on violations of the Fair Housing Act and the Equal Protection Clause.[54] More than ten years later, the Second Circuit upheld a court-ordered race-conscious desegregation program in Yonkers, New York that required the construction of new public housing units in nonminority areas.[55] However, in *Walker v. City of Mesquite*, the Fifth Circuit vacated a federal district court order that, as in Yonkers, required the Dallas Housing Authority to construct a new housing project in a majority-White neighborhood to remediate its past practice of concentrating public housing projects in communities of color.[56] The appeals court concluded that "a race-conscious remedy should be the remedy of last resort," race-neutral alternatives "had not been given a fair try," and "other criteria than a racial standard" could achieve the desegregated siting of new public housing, explicitly analogizing to the Equal Protection narrow tailoring analysis.[57]

47. 42 U.S.C. § 3604(a)-(c).

48. Robert Schwemm, Housing Discrimination: Law and Litigation (2021).

49. Map of State Fair Housing Protections, LAW ATLAS (Aug. 1, 2019), https://lawatlas.org/datasets/state-fair-housing-protections-1498143743.

50. *See, e.g.*, U.S. v. Starrett City Assocs., 840 F.2d 1096 (2d Cir. 1988).

51. 840 F.2d 1096, 1101–1102 (2d Cir. 1988).

52. *Id.*

53. COMPARE Hills v. Gautreaux, 425 U.S. 284 (1976), AND U.S. v. Yonkers Bd. Of Educ., 837 F.2d 1181 (1987) WITH Thompson v. U.S. Dep't of Hous. & Urb. Dev., 348 F. Supp. 2d 398, 408 (D. Md. 2005) AND Walker v. City of Mesquite, 169 F.3d 973 (5th Cir. 1999).

54. *Gautreaux*, 425 U.S. 284.

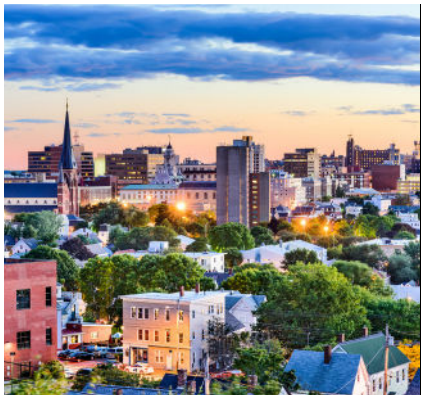
55. *Yonkers*, 837 F.2d 1181.

56. *Walker*, 169 F.2d 973.

57. *Id.* at 982-83 ("In application, arriving at an exact fit between harm and remedy requires consideration of whether a race-neutral or less restrictive remedy could be used. This is because a race-conscious remedy should be the remedy of last resort. A 'race-conscious remedy will not be deemed narrowly tailored until less sweeping alternatives—particularly race neutral ones—have been considered and tried.' ... Section 8 housing vouchers have not been given a fair try to prove their potential to desegregate. Second, other criteria than a racial standard will ensure the desegregated construction or acquisition of any new public housing.") (internal citations omitted). *See also* States v. Charlottesville Redevelopment & Hous. Auth., 718 F. Supp. 461, 469 (W.D. Va. 1989) (stating that a "race-conscious preferential policy could survive legal scrutiny if it is narrowly tailored, remedial in character, and temporary in duration").

IV. Conclusion

The demanding scrutiny courts apply to race-conscious policies requires cities, and their partners, to be thoughtful and rigorous in all aspects of program design. The considerations laid out in this brief can help cities, in consultation with counsel, assess the risk calculations of different approaches and improve the defense of policies that target racial disparities.



Designing legally sound policies first requires understanding past discriminatory mechanisms, documenting their present-day harms, and considering the range of tools that can be used to dismantle them. Many cities, including Evanston, Illinois; Louisville, Kentucky; and Seattle, Washington have already begun to engage in the work of reckoning and responding to their histories of discrimination.[58] These processes are often challenging as well as labor- and time-intensive, but can provide important insights that can inform policymaking. A number of resources are available to help policymakers understand and respond to racial disparities.[59] These include data tools that shed light on present-day racial disparities as well as frameworks for conducting neighborhood- and census-level analyses, materials that can help policymakers uncover their own cities' histories of discrimination, and policy "toolkits" that present a range of possible paths forward.[60]

58. *See, e.g.*, Anguiano, *supra* note 6; *Evanston Local Reparations*, *supra* note 6; *Mapping Prejudice*, *supra* note 6; *Segregated Seattle*, *supra* note 6; *Confronting Racism in City Planning and Zoning*, *supra* note 6.

59. *See generally Analyze Tool*, HOUS. SOLUTIONS LAB, https://localhousingsolutions.org/analyze/ (last visited Mar. 15, 2022); *Housing Needs Assessment Tool*, HOUS. SOLUTIONS LAB, https://localhousingsolutions.org/housing-needs-assessment/ (last visited Mar. 15, 2022); Introduction to Opportunity Mapping, OPEN CMTYS. ALLIANCE, https://www.ctoca.org/introduction_to_opportunity_mapping (last visited Mar. 15, 2022) ("Opportunity mapping is an analytical tool that deepens our understanding of 'opportunity' dynamics within regions. The goal of opportunity mapping is to identify opportunity-rich and opportunity isolated communities. With a basic understanding of the geography of opportunity we can then better determine who has access to opportunity resources and how to remedy opportunity inequality.").

60. *Housing Needs Assessment Tool*, *supra* note 60; Julie Nelson & Lisa Brooks, *Racial Equity Toolkit*, GOVERNMENT ALLIANCE ON RACE AND EQUITY (Dec. 2016), https://www.racialequityalliance.org/wp-content/uploads/2015/10/GARE-Racial_Equity_Toolkit.pdf; Aras Jizan, *Equipping the Homeless Sector with Racial Equity Tools*, CMTY. SOLUTIONS BLOG (Feb. 19, 2021), https://community.solutions/equipping-the-homeless-sector-with-racial-equity-tools/.

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