

# MISSED OPPORTUNITY: FURTHERING FAIR HOUSING IN THE HOUSING CHOICE VOUCHER PROGRAM

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## I

### INTRODUCTION

The premier rental housing program created in part to reduce isolation of low-income renters is marked by a series of missed opportunities to provide expanded housing choice and upward socioeconomic mobility for those harmed by racial and economic segregation. From the outset, the Housing Choice Voucher (HCV) Program was beset by widely recognized structural flaws limiting housing choice, which have persisted for decades. The use of vouchers to assist families displaced by wide-scale public-housing demolitions and disasters such as Hurricane Katrina exemplifies that the United States Department of Housing and Urban Development (HUD) never structured the program to address segregation, deconcentrate low-income persons, expand housing choice, or further fair housing. HUD's issuance of a new Fair Housing Act (FHA) rule, designed to affirmatively further fair housing, explicitly imposes detailed fair housing planning obligations on the public-housing authorities (PHAs) that administer voucher programs. These obligations provide the potential, yet again, for the HCV Program to achieve its intended purpose and expand housing choice for all.

Part I of the article describes the HCV Program's structure, purpose, and failure to fulfill its potential for expanding housing choice. In particular, part I discusses several structural flaws known by HUD since the program's inception, including failure to establish neighborhood-level rents, failure to administer the HCV Program regionally, failure to require that program participants be informed about housing choices, and general failure to affirmatively further fair housing in the HCV Program. Part II discusses the role of informed housing choice in transforming the HCV from a short-term instrument of survival to a

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long-term tool of opportunity. Part III conducts a case study using the dramatic expansion of HCV use in post-Katrina New Orleans following the hurricanes and accelerated public housing demolitions; this case study examines the clustering of vouchers and the extent to which the HCV Program delivers housing choice in a nondiscriminatory manner. Part V proposes tools for reforming the historical flaws in the HCV Program to affirmatively further fair housing.

## II

### THE UNTAPPED POTENTIAL OF HOUSING VOUCHERS TO EXPAND HOUSING CHOICE AND COMBAT EXISTING SEGREGATION

Affordable housing strategies include both “supply-side” and “demand-side” approaches.<sup>1</sup> The HCV Program is a demand-side approach relying on the private market to rent to low-income tenants in exchange for a subsidy. Supply-side approaches include building hard units of public housing administered by public-housing authorities, or creating tax incentives for private developers to build affordable units. Both approaches are necessary for a comprehensive affordable housing strategy that furthers fair housing and promotes inclusive communities.

The HCV Program is the largest national rental assistance program.<sup>2</sup> The structure of the program has remained essentially the same since Congress created it in 1974 as the Section 8 Existing Housing Program.<sup>3</sup> The HCV Program is administered by local PHAs. Participants are responsible for finding suitable housing in the private market and must pay at least thirty percent of their monthly adjusted gross income on rent and utilities. The PHA pays a subsidy to the landlord to help cover the difference between what the tenant can afford and the payment standard—what the PHA considers a reasonable rent.<sup>4</sup> The typical voucher household is very low-income at twenty-two percent of the area median.<sup>5</sup>

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1. See JILL KHADDURI, KIMBERLY BURNETT & DAVID RODDA, U.S. DEP'T OF HOUS. & URBAN DEV., TARGETING HOUSING PRODUCTION SUBSIDIES, LITERATURE REVIEW 3 (2003), <https://www.huduser.gov/publications/pdf/targetinglitreview.pdf>.

2. CTR. ON BUDGET & POL'Y PRIORITIES, LOUISIANA FACT SHEET: THE HOUSING CHOICE VOUCHER PROGRAM (2015), [http://www.cbpp.org/sites/default/files/atoms/files/3-10-14hou-factsheets\\_la.pdf](http://www.cbpp.org/sites/default/files/atoms/files/3-10-14hou-factsheets_la.pdf) (last updated July 6, 2015).

3. INGRID GOULD ELLEN & JESSICA YAGER, U.S. DEP'T OF HOUS. & URBAN DEV., RACE, POVERTY, AND FEDERAL RENTAL HOUSING POLICY, HUD AT 50: CREATING PATHWAYS TO OPPORTUNITY 103, 106 (2015), <https://www.huduser.gov/hud50th/HUDat50Book.pdf>.

4. U.S. DEP'T OF HOUSING AND URBAN DEV. (HUD), HOUSING CHOICE VOUCHERS FACT SHEET (2015), [http://portal.hud.gov/hudportal/HUD?src=/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](http://portal.hud.gov/hudportal/HUD?src=/topics/housing_choice_voucher_program_section_8).

5. Kirk McClure, *Which Metropolitan Areas Work Best for Poverty Deconcentration with Housing Choice Vouchers?*, 15 CITYSCAPE 209, 210 (2013), <http://www.huduser.gov/portal/periodicals/cityscpe/vol15num3/ch15.pdf>.

The HCV Program, as the current name suggests, provides the *potential* for greater housing choice and socioeconomic mobility for low-income families that participate. Vouchers create the possibility that families, armed with data and information, can exercise choices about where to live. By extension, such choices might open up areas of greater opportunity for families than traditionally available to them, such as neighborhoods with fewer environmental and health hazards, higher quality schools, and job growth. Indeed, an objective of the 1974 Act authorizing the Section 8 program includes “the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income. . . .”<sup>6</sup>

Despite its purpose, the HCV Program on the whole fails to deconcentrate voucher families or give them access to opportunity. Voucher families live near lower performing schools than low-income families receiving no housing assistance at all.<sup>7</sup> A national study examining voucher use in the fifty most populous metro areas from 2000 to 2008 finds that “households using vouchers are more economically and racially segregated than an extremely low-income comparison group.”<sup>8</sup> Although the expansion of voucher use nationally has been tied to the idea of poverty deconcentration, studies have shown that voucher programs frequently perpetuate the poverty and racial concentration they are intended to challenge.<sup>9</sup>

In fact, the HCV Program is not even structured to ensure poverty deconcentration, especially for minority households.<sup>10</sup> From the outset, HUD incorporated, and later failed to remedy, structural features in the Section 8 program that undermined Congress’s explicit goal of reducing isolation of income groups in the program. These structural features also failed to further fair housing by compromising housing choice and perpetuating racial and economic segregation.<sup>11</sup> These features include the creation of a single-voucher payment standard for an entire region, which steered voucher families to the lowest-cost neighborhoods; the failure to ensure regional administration of

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6. Housing and Community Development Act of 1974 (HCDA), 42 U.S.C. § 5301(c)(6) (1999).

7. Ellen & Yager, *supra* note 3, at 114.

8. Molly W. Metzger, *The Reconcentration of Poverty: Patterns of Housing Voucher Use, 2000 to 2008*, 24 HOUSING POL’Y DEBATE 544, 544 (2014).

9. *See id.*; Florence Wagman Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 HOW. L.J. 913, 925-26 (2005) (“[U]se of Section 8 for desegregation and deconcentration has been very rare.”); *see also* Elizabeth Julian, “Deconcentration” as Policy: HUD and Housing Policy in the 1990s, *The Nimby Report* 5 (March 2004) (“While the tenant based Section 8 program established in the mid-1970s theoretically offered an opportunity for low income families to escape concentrated poverty, such an opportunity was never the reality for minority families.”).

10. *See* Kirk McClure, Alex F. Schwartz & Lydia B. Taghavi, *Housing Choice Voucher Location Patterns a Decade Later*, 25 HOUSING POL’Y DEBATE 215, 215, 233 (2015).

11. *See infra* Section I.D.

vouchers or facilitate freedom of movement throughout the region; the failure to require counseling and search assistance to help voucher families make informed housing choices based on data and other information related to neighborhood opportunity; and the failure to ensure that voucher programs complied with the affirmative mandates of the FHA.<sup>12</sup>

#### A. Regional Fair Market Rents for Vouchers Limit Housing Choice

HUD has traditionally determined the payment standard for the HCV Program by setting a single “fair market rent” at the fortieth or fiftieth percentile of rents for the entire metropolitan area.<sup>13</sup> The structure of the rent-payment standard is an impediment to housing choice because it steers voucher holders to the lowest-income neighborhoods in a metropolitan region.<sup>14</sup> The flaws in the regional payment standard have not come to light in recent years; HUD has been aware of them for decades.<sup>15</sup>

In 1977, the Comptroller General issued a Report to the Congress entitled “Major Changes are Needed in the New Leased-Housing Program.”<sup>16</sup> The problems noted as hindering the program included setting fair market rents (FMR) “too low for program success.”<sup>17</sup> The report specifically noted that “HUD’s decision to prepare single FMR schedules for entire [metropolitan areas] is questionable. [This decision] ignores important distinctions between metropolitan central cities and suburban areas as well as among suburban areas . . . .”<sup>18</sup> In this regard, the report recommended that HUD “develop separate FMR schedules for individual housing submarket areas instead of one FMR schedule for an entire [metro area or county group]. . . .”<sup>19</sup>

Despite a recommendation in 1977 that HUD alter its method of setting rents for the HCV Program, HUD did not remedy this impediment to housing choice until 2010 in response to litigation. A Dallas civil rights organization, the Inclusive Communities Project (ICP), filed a complaint in 2007 challenging HUD’s method of setting a single fair market rent for the twelve-county metro Dallas region as steering black Section 8 participants into predominantly minority areas.<sup>20</sup> HUD then announced a demonstration project in which it would set rents according to “small areas” in certain selected metropolitan

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12. See *infra* Sections I.A–D.

13. Ellen & Yager, *supra* note 3, at 106 (also stating the payment standard is calculated at 90 to 110 percent of the fair market rent).

14. *Id.* at 116.

15. See *infra* notes 16–19 and accompanying text.

16. U.S. COMPTROLLER GENERAL, B-171630, MAJOR CHANGES ARE NEEDED IN THE NEW LEASED-HOUSING PROGRAM (1977).

17. *Id.* at 1.

18. *Id.* at 21.

19. *Id.* at 29.

20. Complaint at 25, Inclusive Communities Project, Inc. v. United States Department of Housing and Urban Development, No. 3-07CV0945 (N.D. Tex. May 29, 2007). The author is a member of the Board of Directors of ICP.

regions, including Dallas.<sup>21</sup> In its announcement of the demonstration project, HUD stated that it expected “small area FMRs [to] provide Section 8 tenants with greater ability to move into opportunity areas where jobs, transportation, and educational opportunities exist, and prevent undue subsidy in lower-rent areas.”<sup>22</sup>

A key obstacle to addressing the payment standard is the assumption that increased rents in high-opportunity areas would increase net program costs and limit the number of households able to participate in the program. This tension between maximizing the number of people served, regardless of location, and maximizing choice and access to high-opportunity neighborhoods runs throughout HUD’s housing programs.<sup>23</sup> A recent study of the Dallas demonstration project, however, found that “zip code-level rent ceilings causes rent increases in expensive neighborhoods and decreases in low-cost neighborhoods, with little change in aggregate rents.”<sup>24</sup> Moreover, the study’s authors noted that while generic rent increases in the voucher program primarily benefited landlords without improving neighborhood quality, a “ZIP code policy improves neighborhood quality for voucher recipients substantially.”<sup>25</sup> Thus, despite the misnomer of the metro-wide “fair market” rent, it appears HUD has been paying premium rent in low-cost neighborhoods and below-market rent in high-opportunity neighborhoods.

HUD issued a Proposed Rule on June 16, 2016, proposing the use of Small Area FMRs in place of the current single FMR approach in certain metropolitan areas.<sup>26</sup> These small-area FMRs are designed “to address high levels of voucher concentration” and “to provide HCV tenants with a greater ability to move into areas where jobs, transportation, and educational opportunities exist.”<sup>27</sup>

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21. Section 8 Housing Choice Voucher Program—Notice of Demonstration Project, 75 Fed. Reg. 27,808, 27,809 (May 18, 2010); *see also* Proposed Fair Market Rents for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program Fiscal Year 2011, 75 Fed. Reg. 46958 (August 4, 2010).

22. 75 Fed. Reg. at 27,808. After the demonstration program in which voucher rents were set by zip code ended, ICP challenged HUD’s subsequent decision to decrease rents in white-area zip codes and to increase rents in zip codes with high poverty rates. *See* Complaint at ¶ 2, Inclusive Communities Project, Inc. v. United States Department of Housing and Urban Development, No. 14-cv-01465 (N.D. Tex. Apr. 22, 2014).

23. Ellen & Yager, *supra* note 3, at 104.

24. ROBERT A. COLLINSON & PETER GANONG, THE INCIDENCE OF HOUSING VOUCHER GENEROSITY (2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2255799](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2255799).

25. *Id.*

26. Establishing a More Effective Fair Market Rent System; Using Small Area Fair Market Rents in Housing Choice Voucher Program Instead of the Current 50<sup>th</sup> Percentile FMRs, Proposed Rule, 81 Fed. Reg. 39,218 (June 16, 2016).

27. *Id.*

## B. The HCV Program Lacks Regional Administration and Fails to Promote Regional Mobility

The irony of the regional “fair market rent” approach is that traditionally there is nothing regional about housing voucher administration. The voucher programs are administered by local city and county housing authorities operating within submarkets of a region, subjecting households to bureaucratic obstacles and duplicative requirements when they want to cross jurisdictional lines between city and suburb or between suburbs.<sup>28</sup> HUD has been aware of the potential benefits of regional voucher administration for decades.<sup>29</sup> The Comptroller General recommended regional administration of the voucher program in its 1977 report, encouraging “the formation of PHAs with regional, metropolitan, and/or State-wide jurisdiction to give certificate holders greater mobility and freedom of choice within market areas.”<sup>30</sup> In addition to the fair housing benefits of regional voucher administration, the 1977 report also noted the economic efficiencies of “aggregat[ing] allocations for several communities or jurisdictions [so as to create] a PHA with area-wide responsibility.”<sup>31</sup> In the years ahead, HUD will operate in an increasingly tight fiscal environment, lending greater urgency to “regional collaboration and pooling of resources among housing authorities” to achieve “economies of scale.”<sup>32</sup> In the summer of 2014, HUD issued a proposed rule that seeks to increase administrative efficiencies for PHAs to form consortia for the purpose of administering voucher programs.<sup>33</sup> The proposed rule is designed to maximize resident housing choice by removing administrative burdens associated with using vouchers across jurisdictional lines within a region.<sup>34</sup> This is a positive development, but without concrete incentives, it is unclear whether PHAs will volunteer to collaborate with one another.

## C. No Requirement to Inform Voucher Families of Their Housing Choices

There is no requirement that counseling be provided to inform voucher households of the myriad characteristics of neighborhoods within a region, including: educational options and quality measures assigned to public schools; employment and transportation resources; demographic information, such as

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28. U.S. COMPTROLLER GENERAL, *supra* note 16, at 45 (“A family that wishes greater mobility . . . will have to qualify and be certified in each PHA jurisdiction in which it plans to shop for housing and will have to fulfill a number of duplicative requirements . . .”); *see also* Ellen & Yager, *supra* note 3, at 125 (recommending greater portability of vouchers).

29. *See infra* notes 30–31 and accompanying text.

30. U.S. COMPTROLLER GENERAL, *supra* note 16, at 56.

31. *Id.* at 55.

32. Ellen & Yager, *supra* note 3, at 124 (noting the fair housing benefits of regional collaboration among housing authorities).

33. Streamlining Requirements Applicable to Formation of Consortia by Public Housing Agencies, 79 Fed. Reg. 40,019, 40,020 (July 11, 2014).

34. *Id.* at 40,021.

poverty rates; environmental quality and public safety features; and social supports.<sup>35</sup> Yet HUD has known for decades that “choice” is dependent on information. The Comptroller General recommended in its 1977 Report that PHAs “promote greater choice of housing by . . . advising families of their opportunity to lease housing in [all areas in which the PHA is not legally barred from entering contracts] . . . .”<sup>36</sup>

The housing counseling “mobility” programs initially arose from litigation, the first being the Gautreaux program in Chicago created in 1976 by consent decree.<sup>37</sup> More recently, programs have emerged in Dallas and Baltimore.<sup>38</sup> HUD initiated research demonstrations motivated by the early, positive Gautreaux findings.<sup>39</sup> The mobility programs have generally coupled counseling and search assistance with special-purpose housing vouchers available for use in neighborhoods that are low poverty or less racially segregated.<sup>40</sup>

Pre-move mobility counseling increases the ability of voucher families to find housing in low-poverty neighborhoods and post-move counseling helps families remain there.<sup>41</sup> In HUD’s Moving to Opportunity for Fair Housing (MTO) research demonstration, families with no search assistance or housing counseling moved to neighborhoods with “significantly higher poverty and crime rates” compared with families who received assistance and were restricted to using vouchers in low-poverty areas.<sup>42</sup> Experts recommend that pre-move counseling “should seek the best-possible initial placements for families, not the quickest placements.”<sup>43</sup> Post-move counseling can target problems with landlords and units, which constituted the major causes of tenants leaving units in the MTO program.<sup>44</sup> Nationally, both black and white families exit poor neighborhoods over time, but black families are “much more likely to fall back into poor areas through subsequent moves.”<sup>45</sup>

A vast array of literature documents the link between neighborhoods, physical and mental health, and life prospects.<sup>46</sup> Early research of the Gautreaux

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35. See Ellen & Yager, *supra* note 3, at 125 (recommending a requirement that neighborhood information be provided to voucher holders).

36. U.S. COMPTROLLER GENERAL, *supra* note 16, at 44.

37. Alexander Polikoff, *Racial Inequality and the Black Ghetto*, 1 NW. J. L. & SOC. POL’Y 1, 10 (2006).

38. See *infra* notes 91, 94, 95, 97 and accompanying text.

39. Ellen & Yager, *supra* note 3, at 115.

40. MARGERY AUSTIN TURNER & SUSAN J. POPKIN, URBAN INSTITUTE, WHY HOUSING CHOICE AND MOBILITY MATTER (2010). But see Xavier de Souza Briggs & Margery Austin Turner, *Assisted Housing Mobility and the Success of Low-Income Minority Families: Lessons for Policy, Practice, and Future Research*, 1 NW. J. L. & SOC. POL’Y 25, 58 (2006) (noting that some families may be better served by services addressing readiness to move rather than by mobility counseling).

41. Briggs & Turner, *supra* note 40, at 39–41.

42. *Id.* at 33.

43. *Id.* at 40.

44. *Id.* at 41.

45. *Id.* at 39.

46. XAVIER DE SOUZA BRIGGS, BROOKINGS INSTITUTION PRESS, THE GEOGRAPHY OF

program documented that families who moved to suburban, resource-rich Chicago neighborhoods achieved meaningful gains in education, employment, and long-term earnings.<sup>47</sup> For example, children in the Gautreaux mobility program who moved to suburbs were more likely than children from similar families moving within Chicago to complete high school, take college-track courses, attend college, and enter the work force.<sup>48</sup> More recent research shows that Gautreaux women who moved to integrated, resource-rich neighborhoods spent significantly more time employed and considerably less time on welfare.<sup>49</sup>

In the MTO demonstration of the mid-1990s, HUD provided mobility counseling and search assistance to families living in public and assisted housing projects—in Baltimore, Boston, Chicago, Los Angeles, and New York—who agreed to use vouchers in census tracts with poverty rates below ten percent.<sup>50</sup> The most substantial findings relate to improvements in physical and mental health and perceptions of safety for women and adolescent girls. In particular, women and girls “enjoyed significant improvements in mental health, including reductions in psychological distress and depression and increasing feelings of calm and peacefulness.”<sup>51</sup> Qualitative research suggests that escaping from environments in which adolescent girls were targets for sexual harassment and pressure “appears to offer a tremendous sense of relief and freedom,”<sup>52</sup> contributing to short-term health and well-being as well as potential long-term benefits, such as staying in school. Participants in the MTO demonstration cited the desire to escape unsafe places as their primary motivation for moving.<sup>53</sup>

Although an interim evaluation found no evidence that MTO contributed to significant educational, employment, or earnings gains, and further indicated that MTO boys did not share the benefits enjoyed by MTO girls,<sup>54</sup> more recent evidence gathered from tax returns shows that MTO children who were younger than age thirteen when their families moved to lower-poverty neighborhoods experienced significant improvements in college attendance rates and earnings.<sup>55</sup> The study finds that “every year spent in a better area during childhood increases college attendance rates and earnings in adulthood”;

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47. Briggs & Turner, *supra* note 40, at 45.

48. James E. Rosenbaum, *Changing the Geography of Opportunity by Expanding Residential Choice: Lessons from the Gautreaux Program*, 6 HOUSING POL’Y DEBATE 231, 263–64 (1995).

49. Briggs & Turner, *supra* note 40, at 48–49.

50. Turner & Popkin, *supra* note 40, at 4.

51. Briggs & Turner, *supra* note 40, at 45. The research also noted significant reductions in rates of adult obesity. *Id.*

52. *Id.* at 48.

53. *Id.* at 49.

54. Turner & Popkin, *supra* note 40, at 5 (few MTO families moved to suburbs or integrated neighborhoods and few stayed in low-poverty neighborhoods).

55. RAJ CHETTY, NATHANIEL HENDREN & LAWRENCE F. KATZ, THE EFFECTS OF EXPOSURE TO BETTER NEIGHBORHOODS ON CHILDREN: NEW EVIDENCE FROM THE MOVING TO OPPORTUNITY EXPERIMENT 23 (2015), [http://scholar.harvard.edu/files/hendren/files/mto\\_paper.pdf](http://scholar.harvard.edu/files/hendren/files/mto_paper.pdf).

this finding is “consistent with recent evidence that the duration of exposure to a better environment during childhood is a key determinant of an individual’s long-term outcomes.”<sup>56</sup> The mobility research confirms what many already know about housing opportunity: it is linked to many other kinds of transformative life opportunities.

#### D. Government Failure to Affirmatively Further Fair Housing in the HCV Program

The FHA has always obligated PHAs, as HUD program participants, not only to refrain from discrimination, but also to “take actions to address segregation and related barriers . . . as often reflected in racially or ethnically concentrated areas of poverty.”<sup>57</sup> HUD has been aware of the structural barriers to housing choice in the voucher program for decades.<sup>58</sup> In 1977, the Office of the Comptroller General in its Report to Congress specifically discussed “Impediments to Furthering the Deconcentration Goal” of the Act authorizing the Section 8 program.<sup>59</sup> After describing the voucher program as “the major vehicle for deconcentration,” the Report reiterated the role that low FMRs played in restrict[ing] shoppers’ choices to housing of marginal quality in minority and lower income areas.”<sup>60</sup> Although some officials stated they would not approve leasing units in “blighted areas, high-crime areas, and areas characterized by air pollution, rodent infestation, and other serious environmental deficiencies,” others saw “little choice” but to approve leases in these blighted neighborhoods so long as the *units* met the program’s “quality” standards.<sup>61</sup>

A year later, in 1978, the General Accounting Office (GAO) reviewed whether HUD’s administration of the Section 8 program was achieving the legislative objective of reducing isolation and deconcentrating housing for low-income persons.<sup>62</sup> The GAO made three key findings:

1. Key HUD housing and community development personnel are not sure whether deconcentration is a prime objective of the Section 8 program,
2. HUD has provided little formal direction in defining deconcentration or in establishing procedures to achieve it, and

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56. *Id.*

57. Final Rule on Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,274 (July 16, 2015).

58. *See infra* notes 59–65 and accompanying text.

59. U.S. COMPTROLLER GENERAL, *supra* note 16, at 42–45.

60. *Id.* at 43.

61. *Id.* at 43–44.

62. Letter from the Director of the U.S. General Accounting Office to the Secretary of Housing and Urban Development, B-17163 (Oct. 20, 1978), <http://www.gao.gov/assets/130/124496.pdf>.

3. the extent of deconcentration achieved through the Section 8 program is not readily determinable because HUD has not developed the criteria needed to measure this factor.<sup>63</sup>

The GAO recommended that HUD clearly define the deconcentration objective of the Section 8 program, issue guidelines to assist field offices to meet the objective, and develop a system for measuring results that would include measurement criteria, goals, and data-collection mechanisms.<sup>64</sup> One of the most notable recommendations in the 1978 letter was the warning that “steps should be taken now, before substantial numbers of units are occupied.”<sup>65</sup>

Although HUD has undertaken some demonstration programs,<sup>66</sup> it has resisted the kind of structural change required to remove barriers to housing choice in the voucher program.<sup>67</sup> In July 2015, however, HUD issued a Final Rule interpreting its obligation to ensure that its programs and activities be administered in a manner that affirmatively furthers fair housing.<sup>68</sup> This Rule is much-anticipated, comprehensive regulatory guidance “designed to improve the fair housing planning process by providing better data and greater clarity to the steps that program participants must undertake “to meet their affirmative fair housing mandates.”<sup>69</sup> The purpose of the new Rule is to “aid program participants in taking meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination.”<sup>70</sup> This purpose closely mirrors HUD’s definition of affirmatively furthering fair housing.<sup>71</sup>

In the new Rule, HUD has replaced the requirement that grantees prepare an analysis of impediments with the Assessment of Fair Housing (AFH). HUD commits to provide all stakeholders, including PHAs, “with local and regional data on patterns of integration and segregation, racially or ethnically concentrated areas of poverty, access to housing and key community assets that afford opportunity [including education, employment, low-poverty neighborhoods, transportation, and environmental health], and

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63. *Id.*

64. *Id.*

65. *Id.*

66. See Ellen & Yager, *supra* note 3, at 115 (discussing the Regional Opportunity Counseling Program of 1997); see also, e.g., U.S. COMPTROLLER GENERAL, *supra* note 16, at 57–58.

67. See, e.g., Robert Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s “Affirmatively Further” Mandate*, 100 KY. L.J. 125 (2012) (comprehensively reviewing HUD’s AFFH regulations, guidance, enforcement, and inaction leading up to the new rule).

68. Final Rule on Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015). The obligation to affirmatively further fair housing applies to all executive branch departments and agencies administering housing and urban development programs. *Id.*; see also 42 U.S.C. § 3608.

69. Final Rule on Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,273.

70. 24 C.F.R. § 5.150 (2015).

71. 24 C.F.R. § 5.152 (2015).

disproportionate housing needs” of groups protected by the FHA.<sup>72</sup> HUD will provide data and an assessment tool tailored to each category of program participant.<sup>73</sup>

Since 1998, PHAs have had to certify in their annual plans that they will affirmatively further fair housing,<sup>74</sup> and they must continue to do so under the new Rule.<sup>75</sup> The new certification means that the PHA will take meaningful actions to further the goals in the AFH and “that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing.”<sup>76</sup> A PHA will be in compliance with its Affirmatively Furthering Fair Housing Rule<sup>77</sup> certification if it examines its programs, identifies fair housing issues and contributing factors within its programs, specifies actions and strategies to address those as well as AFH goals (in a reasonable manner in light of available resources), works with jurisdictions on the Rule’s initiatives requiring PHA involvement, and maintains corresponding records.<sup>78</sup> In a response to public comment, HUD recognizes “lack of information about housing opportunities in more affluent or diverse neighborhoods” as an impediment that limits choice.<sup>79</sup> The new Rule requires for the first time both that PHAs prepare an AFH every five years and that they incorporate strategies and actions furthering fair housing into their Annual Plans.<sup>80</sup> PHAs may, and are encouraged to, collaborate on their AFH’s with other program participants, such as local and state governments, regional entities, and other PHAs.<sup>81</sup>

As HUD makes explicit, the duty to affirmatively further fair housing is statutory—“not an administrative requirement that can be waived by HUD.”<sup>82</sup> HUD may reject an AFH if it finds that it is “inconsistent with fair housing or civil rights requirements or is substantially incomplete.”<sup>83</sup> One expert characterizes the Rule, however, as “long on ‘carrots’ but painfully short on ‘sticks,’” such that the mandate will be realized “only in communities where

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72. Final Rule on Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,348.

73. 24 C.F.R. § 5.154(d) (2015).

74. See Final Rule on Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,274 n.3 (detailing statutory planning and certification requirements).

75. 24 C.F.R. § 903.7(o) (2015).

76. *Id.*

77. Final Rule on Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,308.

78. 24 C.F.R. § 903.7(o)(3) (2015).

79. Final Rule on Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,308. HUD notes that PHAs are already scored on factors promoting choice relating to landlord outreach and tenant counseling activities. *Id.* These activities should not be merely incentivized, but required. See *id.*

80. 24 C.F.R. § 5.154(d)(5) (2015). HUD notes that prior analyses of impediments were not coordinated with the PHA Annual Plans. Final Rule on Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,348.

81. 24 C.F.R. §§ 5.156; 903.15 (2015).

82. Final Rule on Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,348.

83. 24 C.F.R. § 5.162(b) (2015).

grassroots and legal advocates mobilize and create their own enforcement strategies.”<sup>84</sup> Even then, the new Rule maintains the enduring reality that “the key to current enforcement of [affirmative fair housing] mandates lies with HUD, either through action prompted by a lawsuit, a privately initiated administrative complaint to HUD under the FHA, or on HUD’s own initiative.”<sup>85</sup> The problem is that HUD’s “civil rights record has been timid at best and [it] has often viewed its main stakeholders as the very local-government grantees whose exclusionary policies must be changed.”<sup>86</sup> The Rule encourages positive development, however, in the context of voucher administration; PHAs, like all federal grant recipients, “will be required to have an honest conversation about segregation and devise a local plan to dismantle it.”<sup>87</sup>

### III

#### HOUSING CHOICE FOR ALL?

The housing choices and mobility of African Americans are uniquely fraught and politicized. Yet policy debates about which housing choices are best miss the larger point that low-income households of color historically have had minimal neighborhood choice and mobility in the marketplace.<sup>88</sup> Expanding fair housing choice is aimed at reducing economic, racial, and social isolation; increasing freedom of movement; and creating a more balanced menu of housing options for all families. Fair housing is informed choice; it is not presumptive of any particular choice.<sup>89</sup>

As noted by housing researchers and policy analysts, “Contrary to the skepticism that the minority poor strongly prefer to live among ‘their own,’ many low-income families . . . will volunteer for the opportunity to move from high-poverty areas, typically inner cities, to better neighborhoods in the same cities or in the surrounding suburbs.”<sup>90</sup> Many housing-mobility counseling programs document far greater demand for their programs than available openings. For example, 13,000 households applied for just 2,000 restricted vouchers offered through a litigation-born mobility program in the Baltimore

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84. MICHAEL ALLEN, FURMAN CENTER FOR REAL ESTATE & URBAN POLICY, HUD’S NEW AFFH RULE: THE IMPORTANCE OF THE GROUND GAME (Sept. 2015), <http://furmancenter.org/research/iri/essay/huds-new-affh-rule-the-importance-of-the-ground-game>.

85. Schwemm, *supra* note 67, at 166.

86. *Id.* at 176.

87. Allen, *supra* note 84.

88. *See supra* notes 35–36; 58–61 and accompanying text; *see also infra* notes 95–97 and accompanying text.

89. *See* Final Rule on Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,354; 24 C.F.R. §5.152 (2015) (stating that HUD defines choice to include actual choice, protected choice, and “[e]nabled choice, which means realistic access to sufficient information regarding options so that any choice is informed”).

90. Briggs & Turner, *supra* note 40, at 31–32.

region;<sup>91</sup> the Gautreaux program applicants far exceeded program capacity for most of the program's operation.<sup>92</sup> Whereas families who were involuntarily displaced through public-housing demolition programs such as HOPE VI reported a loss of supportive ties, other families who participated, presumably voluntarily, in mobility programs reported no support networks at all in their starting-point neighborhoods and weak links to institutions there.<sup>93</sup> One woman who chose to participate in the Dallas mobility program admitted she had not yet built a social network in her new suburban neighborhood, but neither had she heard a gunshot: "'I'm going to stay out here,' she said. 'I'm not going back.'"<sup>94</sup>

Scholars have found that low-income families' perceptions of their housing options are shaped by years of living in public housing, concentrated poverty, and racial isolation, so they "tend to value *housing* units over *neighborhood* quality, because they spend much of their time in the home in order to 'keep to themselves' and avoid violence."<sup>95</sup> Research documents dramatic improvements in perceptions of neighborhood quality for families participating in assisted housing mobility efforts.<sup>96</sup> As noted by one participant in the Baltimore Housing Mobility Program, which assists voucher holders to move from public-housing neighborhoods to high-opportunity neighborhoods, "It's only in leaving that I started growing and wanting to do different things, learn different things and be something different."<sup>97</sup> Depending on how it is used, therefore, the voucher can serve as a short-term instrument of survival or a long-term tool of opportunity. An examination of voucher use by families displaced by public-housing demolitions and Hurricane Katrina illustrates this dichotomy.

#### IV

#### HOUSING CHOICE VOUCHERS AS A POST-KATRINA RECOVERY TOOL IN NEW ORLEANS: SHORT-TERM SURVIVAL OR LONG-TERM OPPORTUNITY?

The significance of the HCV Program in the New Orleans metro area post-Katrina cannot be overstated; the number of housing vouchers in use in Orleans Parish alone more than tripled from 2000 to 2010.<sup>98</sup> Housing vouchers were a

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91. Turner & Popkin, *supra* note 40, at 4.

92. Briggs & Turner, *supra* note 40, at 32.

93. See Briggs & Turner, *supra* note 40, at 37 (noting that in the MTO research demonstration program, there was "no mean impact on social support for the experimental group as a whole").

94. Binyamin Appelbaum, *Vouchers Help Families Move Far From Public Housing*, N.Y. TIMES, July 7, 2015, at A1.

95. Jennifer Darrah & Stefanie DeLuca, "Living Here Has Changed My Whole Perspective": How Escaping Inner City Poverty Shapes Neighborhood and Housing Choice, 33 J. POL. ANALYSIS MGMT. 350, 354 (2014).

96. Briggs & Turner, *supra* note 40, at 43.

97. Stefanie DeLuca & Jessi Stafford, *Finding Home: Voices of the Baltimore Housing Mobility Program*, THE CENTURY FOUNDATION (2014), <http://apps.tcf.org/finding-home>.

98. *A Picture of Subsidized Households*, U.S. Dep't of Hous. & Urban Dev. (2000, 2010), <http://www.huduser.org/portal/datasets/picture/about.html>.

primary means of assisting households displaced by Katrina, especially following demolitions of public-housing units that housed over 5,000 low-income households before the storm.<sup>99</sup> Data regarding the use of housing vouchers by low-income renters is presented in the pre- and post-disaster New Orleans housing markets.<sup>100</sup> The data presentation is followed by an analysis of market barriers to the use of housing vouchers and proposed tools for reform.

#### A. The Role of Housing Vouchers in the Post-Katrina Recovery Landscape

HUD reports 17,347 vouchers used in Orleans Parish in 2010, up from about 8,400 in 2005 and 4,763 in 2000.<sup>101</sup> In the entire metropolitan area (including Jefferson, Orleans, Plaquemines, St. Bernard, St. Charles, St. John the Baptist, and St. Tammany Parishes), there were 25,439 voucher households in 2010, compared with 7,978 in 2000.<sup>102</sup>

Many former public-housing residents and other low-income households received housing vouchers after they were displaced by Katrina and the demolition of nearly 5,000 public-housing units.<sup>103</sup> The public-housing developments demolished since Katrina have been rebuilt, but gradually, on a smaller scale, and in a mixed-income fashion, reducing the number of public-housing units on-site to slightly more than 600.<sup>104</sup> Housing administrators justified public-housing demolitions, which were underway even before the storm, based on high-poverty concentrations and poor living conditions pre-Katrina.<sup>105</sup> Meanwhile, the reliance on the private market to fill the affordable housing gap neglected to account for the post-disaster housing shortage—over fifty percent of New Orleans rental units were destroyed—and the reluctance of

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99. Gwen Filosa, *Demolition Approved for New Orleans' Public Housing*, TIMES-PICAYUNE (Sept. 21, 2007), [http://blog.nola.com/times-picayune/2007/09/demolition\\_approved\\_for\\_new\\_or.html](http://blog.nola.com/times-picayune/2007/09/demolition_approved_for_new_or.html).

100. See McClure, Schwartz & Taghavi, *supra* note 10, at 219-21 (explaining that privacy restrictions limit public access to voucher unit addresses). HUD makes available, and this article utilizes, the census tract locations where vouchers are being used. HUD provides 2010 voucher location data using census tracts drawn in 2000. Census tract locations do not provide the most granular picture of neighborhood conditions experienced by voucher households; census tracts may be too large to reveal the clustering of voucher households within the tracts. Nevertheless, the data do provide insight on broad patterns of occupancy and access to opportunity.

101. *Picture of Subsidized Households*, HUD, <https://www.huduser.gov/portal/datasets/picture/yearlydata.html> (compiling query data using year options 2000, 2004–2007, and 2010, Orleans Parish for the Summary Level option, and Housing Choice Vouchers for the Program option).

102. *Id.*

103. Filosa, *supra* note 99.

104. Katy Reckdahl, *End of an Era for New Orleans Public Housing*, NEW ORLEANS ADVOCATE (Feb. 27, 2014), <http://theadvocate.com/news/neworleans/6625562-148/photos-iberville-demolition-marks-end>; Richard Webster, *New Orleans Public Housing Remade after Katrina. Is it Working?*, TIMES-PICAYUNE (Aug. 20, 2015), [http://www.nola.com/katrina/index.ssf/2015/08/new\\_orleans\\_public\\_housing\\_dem.html](http://www.nola.com/katrina/index.ssf/2015/08/new_orleans_public_housing_dem.html).

105. MARY AUSTIN TURNER, BARIKA X. WILLIAMS, GLENN KATES, SUSAN J. POPKIN & CAROL RABENHORST, URBAN INSTITUTE, AFFORDABLE RENTAL HOUSING IN HEALTHY COMMUNITIES: REBUILDING AFTER HURRICANES KATRINA AND RITA 8–9 (May 2007).

many jurisdictions to bring back, much less create new, rental housing.<sup>106</sup> As noted in *The New Orleans Index at Five*, efforts to redevelop and reform affordable rental housing post-Katrina “d[id] not equal the scale of the housing lost or provide enough affordable homes to those who lost a home they could afford pre-Katrina.”<sup>107</sup> It is difficult to determine exactly where the displaced low-income residents are using the vouchers now, but an analysis of voucher use in the metro area before and after Katrina provides some insight on this question.

The transition from project-based (supply-side) rental assistance to tenant-based (demand-side) assistance reflects a federal policy shift and is consistent with national trends. For example, from 1995 through 2012, approximately 500,000 units of public housing and privately owned assisted housing were demolished or discontinued, whereas Congress funded 800,000 additional housing vouchers in the same period.<sup>108</sup> As of 2012, there were 2.2 million households assisted with housing vouchers nationwide.<sup>109</sup>

Wider housing choice may assist families with children, thirty-nine percent of whom lived in poverty in New Orleans in 2013, overcome the documented negative health effects of living in poverty. As noted in a recent report by The Data Center, “Scientific research shows that child poverty can lead to chronic, toxic stress that disrupts the architecture of the developing brain . . . ,” making poverty perhaps “the single greatest threat to children’s healthy brain development.”<sup>110</sup> The HCV Program assists more families with children than all other HUD rental assistance programs combined.<sup>111</sup> In Louisiana, over half of voucher households included children in 2014.<sup>112</sup>

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106. *Id.* at 1 n.1; see, e.g., Stacy Seicshnaydre, *How Government Housing Perpetuates Racial Segregation: Lessons from Post-Katrina New Orleans*, 60 CATHOLIC U. L. REV. 661 (2011) (discussing the failure to create new rental housing units after Hurricane Katrina).

107. Kalima Rose & Laura Tuggle, *Community Action: Bringing People Home to Stronger Neighborhoods*, THE NEW ORLEANS INDEX AT FIVE 7 (2010), [https://www.policylink.org/sites/default/files/NOLA\\_HOUSING\\_RECOVERY\\_2010.PDF](https://www.policylink.org/sites/default/files/NOLA_HOUSING_RECOVERY_2010.PDF).

108. BARBARA SARD & DOUGLAS RICE, CTR. ON BUDGET AND POL’Y PRIORITIES, CREATING OPPORTUNITY FOR CHILDREN: HOW HOUSING LOCATION CAN MAKE A DIFFERENCE (2014), <http://www.cbpp.org/research/creating-opportunity-for-children>.

109. McClure, *supra* note 5, at 209.

110. VICKI MACK, THE DATA CTR., NEW ORLEANS KIDS, WORKING PARENTS, AND POVERTY (2015), [www.datacenterresearch.org/reports\\_analysis/new-orleans-kids-working-parents-and-poverty/](http://www.datacenterresearch.org/reports_analysis/new-orleans-kids-working-parents-and-poverty/).

111. BARBARA SARD & THYRIA ALVAREZ-SANCHEZ, CTR. ON BUDGET AND POL’Y PRIORITIES LARGE MAJORITY OF HOUSING VOUCHER RECIPIENTS WORK, ARE ELDERLY, OR HAVE DISABILITIES (2011), <http://www.cbpp.org/sites/default/files/atoms/files/12-2-11hou.pdf>. For a detailed analysis and set of recommendations regarding how housing vouchers can improve the housing choice and well-being of families with children, see generally Barbara Sard & Douglas Rice, *Creating Opportunity for Children, How Housing Location Can Make a Difference* (Oct. 15, 2014), <http://www.cbpp.org/sites/default/files/atoms/files/10-15-14hou.pdf>.

112. *Louisiana Fact Sheet: The Housing Choice Voucher Program*, CTR. ON BUDGET AND POL’Y PRIORITIES 1, [http://www.cbpp.org/sites/default/files/atoms/files/3-10-14hou-factsheets\\_la.pdf](http://www.cbpp.org/sites/default/files/atoms/files/3-10-14hou-factsheets_la.pdf) (last updated July 6, 2015).

## B. Where Voucher Households Lived Pre-Katrina

Prior to Katrina, voucher households in the New Orleans metro area, compared with their national counterparts, had less access to low-poverty neighborhoods and were more concentrated in extreme-poverty neighborhoods.<sup>113</sup> HUD published a study in 2003 examining voucher location patterns in the top fifty metropolitan areas using 1998 voucher data and 1990 census data.<sup>114</sup> HUD found that nearly thirty percent of voucher households nationally lived in low-poverty neighborhoods.<sup>115</sup> This compared to six percent of households in metro New Orleans.<sup>116</sup> The HUD study also revealed that twice as many metro New Orleans voucher households (twenty-one percent) lived in neighborhoods of extreme poverty compared with their national counterparts (ten percent).<sup>117</sup>

HUD's study also revealed racial disparities in voucher household access to low-poverty neighborhoods, which credits the observation that “[b]y allowing them to live in more socioeconomically integrated settings, American society tends to afford the white poor a chance at upward mobility that it denies to many of its poor black and Latino citizens.”<sup>118</sup> For example, nineteen percent of white voucher households used vouchers in low-poverty neighborhoods in metro New Orleans, compared with only six percent of black households. Conversely, the study reported that ten times as many black voucher households (twenty-one percent) used vouchers in neighborhoods of extreme poverty in metro New Orleans when compared with their white counterparts (two percent).<sup>119</sup>

Although voucher households in pre-Katrina New Orleans were more concentrated in poor neighborhoods than their national counterparts, they were less concentrated by poverty when compared with families in public housing. In metro New Orleans, no public-housing families lived in low-poverty or even middle-class neighborhoods; eighty-three percent of families lived in

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113. For purposes of this article, “low-poverty neighborhoods” refer to census tracts with less than ten percent of residents living below the poverty line. “Middle-class neighborhoods” refer to census tracts with less than twenty percent of residents living below the poverty line. “High-poverty neighborhoods” refer to census tracts with thirty percent or more residents living below the poverty line. “Extreme-poverty neighborhoods” will refer to census tracts with forty percent or more residents living below the poverty line.

114. DEBORAH J. DEVINE, ROBERT W. GRAY, LESTER RUBIN & LYDIA B. TAGHAVI, U.S. DEPT. OF HOUSING AND URBAN DEV., OFF. OF POL’Y DEV. & RES., HOUSING CHOICE VOUCHER LOCATION PATTERNS: IMPLICATIONS FOR PARTICIPANTS AND NEIGHBORHOOD WELFARE (Jan. 2003), [http://www.huduser.gov/publications/pdf/location\\_paper.pdf](http://www.huduser.gov/publications/pdf/location_paper.pdf).

115. *Id.*

116. *Id.*

117. *Id.* The national figures include only voucher households with children present. *Id.* at 31.

118. SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 246 (2004).

119. Devine, *supra* note 117, at 36 tbl. III-5.

neighborhoods of extreme poverty; and nearly all public-housing residents (ninety-seven percent) lived in high-poverty neighborhoods.<sup>120</sup>

### C. Where Voucher Households Lived Post-Katrina

After Katrina, voucher households in the New Orleans metro area continued to have less access to low-poverty neighborhoods than their national counterparts, with notable clustering of Orleans Parish voucher users in certain census tracts.<sup>121</sup>

#### 1. Housing Voucher Use in Metro New Orleans

A recent national study examining voucher household's access to low-poverty neighborhoods by metro area reported that nineteen percent of voucher households in 2010 were located in low-poverty metropolitan census tracts "with only very minimal encouragement . . ."<sup>122</sup> The study describes this figure as "a baseline . . . under the standard administration of the HCV [Program]."<sup>123</sup> By contrast, the study reports that nine percent of metro New Orleans voucher households used vouchers in low-poverty tracts in 2010.<sup>124</sup> New Orleans in 2010 was in the bottom quartile of all U.S. metro areas with respect to voucher household access to low-poverty neighborhoods and among the five worst performing large metros (population greater than 800,000).<sup>125</sup> The performance of New Orleans reflects a regional phenomenon. The south-central region of the United States has the lowest average percentage of voucher holders living in low-poverty neighborhoods.<sup>126</sup> However, the overall trend in the New Orleans metro is toward less poverty concentration, whereas the overall trend nationally is toward greater poverty concentration and less access to low-poverty neighborhoods for voucher holders.<sup>127</sup>

Additionally, white voucher households in metro New Orleans in 2010 continued to have much greater access to low-poverty neighborhoods than black voucher households: twenty-one percent of whites used vouchers in low poverty neighborhoods compared with only nine percent of blacks.<sup>128</sup> By

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120. Devine, *supra* note 117, at 40 tbl. III-9. See Turner & Popkin, *supra* note 40, at 2–3 for a discussion of national research tracking former public-housing residents using vouchers to relocate.

121. See *infra* notes 122–125; 132–134 and accompanying text.

122. McClure, *supra* note 5, at 216–17.

123. *Id.* at 217.

124. *Id.* at 231.

125. *Id.* at 217–20.

126. *Id.* at 218–19.

127. McClure, Schwartz & Taghavi, *supra* note 10, at 223–25.

128. McClure contributed additional data analysis for this case study relating to HCV use at the metro New Orleans level (on file with author). See *A Picture of Subsidized Households*, U.S. Dep't of Hous. & Urban Dev. (2000, 2010), <http://www.huduser.org/portal/datasets/picture/about.html>; U.S. Census Bureau: Census 2010; Daniel H. Weinberg, *U.S. Neighborhood Income Inequality in the 2005–2009 Period*, American Community Survey Reports, 2005–2009 (2011), <http://www.census.gov/prod/2011pubs/acs-16.pdf>.

contrast, six percent of whites used vouchers in neighborhoods of extreme poverty compared with fifteen percent of blacks.<sup>129</sup> Compared to the HUD study, these post-Katrina data reveal that black voucher households in metro New Orleans are trending toward less extreme-poverty concentration even though there are still large numbers of vouchers (2,992) being used in extreme-poverty neighborhoods.<sup>130</sup>

The post-Katrina data also reveal that Hispanic household access to low-poverty neighborhoods by 2010 in metro New Orleans was twelve percent; this is slightly better than blacks, but worse than whites. Hispanic representation in extreme-poverty neighborhoods, also twelve percent, was lower than blacks, but higher than whites.<sup>131</sup>

## 2. Housing Voucher Use in Orleans Parish

The question arises whether the tripling of vouchers in Orleans Parish resulted in voucher households settling in clustered patterns. An examination of voucher households reported by HUD in 2010 reveals that twenty-five percent of voucher households used them in five percent of the census tracts (for a total of 4,279 vouchers used in nine tracts). In each of these nine tracts, more than 300 vouchers were used, which is triple the amount that would be present if vouchers were evenly distributed across all tracts. The number of vouchers appearing in these tracts ranged from 318 to 843.<sup>132</sup> Seven of the nine census tracts are located in New Orleans East, six of the nine tracts in this group are in high-poverty areas, and all of them are in neighborhoods with fewer than twenty-five percent white residents.<sup>133</sup>

When considering census tracts with 200 or more vouchers present, or double the amount of vouchers that would be present if evenly distributed, forty-two percent of vouchers are concentrated in thirteen percent of the census tracts (for a total of 7,320 vouchers used in twenty-two census tracts). Overall, nearly three-quarters of these census tracts are in high-poverty areas and more

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129. *Id.* Nationally in 2010, the disparity was less stark but still notable, with about thirty percent of whites in metro areas able to access low-poverty neighborhoods compared with seventeen percent of blacks. McClure, *supra* note 5, at 221.

130. McClure contributed additional data analysis for this case study relating to HCV use at the metro New Orleans level; *see supra* note 128.

131. *Id.*; *A Picture of Subsidized Households*, U.S. Dep't of Hous. & Urban Dev. (2000, 2010), <http://www.huduser.org/portal/datasets/picture/about.html>. McClure's data also revealed that Hispanic households comprised less than one percent of voucher households in 2000, whereas they comprised four percent of voucher households in 2010.

132. *See A Picture of Subsidized Households*, U.S. Dep't of Hous. & Urban Dev. (2010), <http://www.huduser.org/portal/datasets/picture/about.html>; U.S. Census Bureau: *Census 2010, American Community Survey 2010 5-year estimates*, <http://www.census.gov/programs-surveys/acs/data/summary-file.2010.html>.

133. HUD uses Census 2000 tracts to report 2010 voucher data, whereas this case study uses Census 2010 census boundaries to report poverty and race data. Because some of the 2000 census boundaries changed in 2010, this case study defines a 2000 tract as high poverty if any part of the tract was a high-poverty tract in 2010.

than three-quarters of them are in neighborhoods with fewer than twenty-five percent white residents. Maps accompanying an earlier release of this case study show the distribution of vouchers across all census tracts in Orleans Parish along with their corresponding poverty rates and percent white population.<sup>134</sup>

John Lovett conducted an analysis of Orleans Parish voucher use at the neighborhood level using 2010 data supplied by the Louisiana Office of Community Development and the Data Center.<sup>135</sup> He similarly found that “the ten New Orleans neighborhoods with the highest number of voucher households [ranging from 318 to 2,588 voucher holders] are overwhelmingly African American, while nine out of the ten neighborhoods with the lowest number of voucher households are predominantly white.”<sup>136</sup> Lovett noted the need for “further investigation to understand the effect this voucher distribution surge is having on the quality of voucher holders’ lives and access to opportunity.”<sup>137</sup>

The literature reports that clustered use of vouchers in general can result from “the manner through which voucher holders learn of available units and willing landlords.”<sup>138</sup> The clustering of vouchers in narrow geographies of Orleans Parish underscores the need for recruitment of a broader pool of landlords in high-opportunity neighborhoods and better counseling and search assistance. Small landlord pools “relegate tenants, in effect, to a less competitive submarket of landlords.”<sup>139</sup>

### 3. Market Limitations on Voucher Household Mobility

It is easy to comprehend how the tripling in the number of vouchers used in Orleans Parish between 2000 and 2010 could contribute to limited choice of neighborhoods after Katrina. However, other market challenges also played a role. One expert observes greater entry into low-poverty census tracts “in soft [buyers’] markets and markets with a high percentage of total tracts that are low-poverty tracts.”<sup>140</sup> New Orleans voucher holders have been disadvantaged because Orleans Parish has neither.

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134. See Stacy Seicshnaydre & Ryan C. Albright, *The New Orleans Index at Ten: Expanding Choice and Opportunity in the Housing Choice Voucher Program*, July 2015, figs. 1 & 2, <https://s3.amazonaws.com/gnocdc/reports/The+Data+CenterExpanding+Housing+Choice+in+New+Orleans.pdf>. HUD uses Census 2000 tracts to report the HUD Picture of Subsidized Housing for the year 2010. However, the Census Tract boundaries changed in Census 2010. To deal with this issue in the presentation of the maps, Census 2010 tracts were used to display the colors for the poverty and race data, then Census 2000 tracts were layered over the Census 2010 tracts with a black outline but without fill colors; the Census 2000 tracts were then labeled with the HUD Housing Choice Voucher data.

135. John A. Lovett, *Tragedy or Triumph in Post-Katrina New Orleans? Reflections on Possession, Dispossession, Demographic Change and Affordable Housing*, 40 *FORDHAM URB. L.J. CITY SQUARE* 22, 33 nn.62–63 (2013).

136. *Id.*

137. *Id.* at 35.

138. McClure, Schwartz, & Taghavi, *supra* note 10, at 217.

139. Briggs & Turner, *supra* note 40, at 41.

140. McClure, *supra* note 5, at 209.

Post-Katrina estimates indicated that over half of the New Orleans region's rental housing was destroyed.<sup>141</sup> Given the decreased supply and low vacancy rates, there has been a significant increase in the share of renters who are cost-burdened both at the metro and individual parish levels. The metro area saw an increase in households paying more than fifty percent of their household income on rent and utilities from twenty-two percent of such households in 2004 to thirty-three percent in 2013.<sup>142</sup> In Orleans Parish during the same time period, the percentage of severely cost-burdened renters increased from twenty-four percent to thirty-seven percent, and in Jefferson Parish from twenty-two percent to thirty-four percent.<sup>143</sup> The median gross rents between 2004 and 2013 in the New Orleans metro rose from \$760 to \$908, in Orleans from \$698 to \$925, and in Jefferson from \$807 to \$876.<sup>144</sup>

New Orleans is also disadvantaged because it has fewer low-poverty census tracts than the national average. In 2005 through 2009, the metro area had 126 census tracts, or thirty-two percent, meeting the low-poverty threshold, compared with forty-four percent nationwide.<sup>145</sup> The numbers are trending positively in the New Orleans metro, but trending negatively nationally.<sup>146</sup> When considering the number of units in low-poverty neighborhoods with rents below the voucher payment standard, about half of the rental units qualified.<sup>147</sup>

The scarcity of rental units, historically high-poverty rates, and the massive infusion of vouchers into the rental marketplace likely hampered voucher households' overall access to high-opportunity neighborhoods in post-Katrina New Orleans. Another factor weighing heavily on the scale with respect to the housing mobility of voucher households is housing discrimination.

#### 4. Housing Discrimination as a Market Barrier: "Go Back to Your Section 8 Home"

As evidenced by the controversy surrounding a recent pool party in McKinney, Texas, in which a white resident is alleged to have stated to a black teen "Go back to your Section 8 home,"<sup>148</sup> the stigma surrounding government

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141. Turner, *supra* note 105, at 1 n.1.

142. NIHAL SHRINATH, VICKI MACK & ALLISON PLYER, THE DATA CTR., WHO LIVES IN NEW ORLEANS AND METRO PARISHES NOW? 15 (2014).

143. *Id.*

144. *Id.* at 16.

145. Kirk McClure contributed additional data analysis for this case study based on U.S. Bureau of the Census: American Community Survey, 2005–2009. Because HUD used Census 2000 census tracts to depict HCV voucher use in 2010, and because some of these Census 2000 tracts changed in 2010, McClure used 2005–2009 American Community Survey data so that the census boundaries in his analysis would match the 2010 census boundaries used by HUD.

146. Kirk McClure contributed additional data analysis for this essay based on the U.S. Census Bureau: American Community Survey, 2005–2009.

147. *Id.*

148. Emily Badger, *How Section 8 Became a 'Racial Slur': A History of Public Housing in America*, WASH. POST (June 15, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/06/15/how-section-8-became-a-racial-slur/>. Media reports indicated that the police were called to the private pool party

housing programs persists. Allegations of harassment against Section 8 tenants by local governments have prompted HUD investigations.<sup>149</sup> Section 8 is blamed for neighborhood changes even in places where few voucher families have entered.<sup>150</sup> Research shows that small-scale, well-managed, subsidized housing does not harm receiving neighborhoods; it is rather the clustering of vouchers in high-poverty, minority neighborhoods that can be detrimental.<sup>151</sup>

A significant barrier remains in the New Orleans metro with respect to discrimination against voucher users and differential access to rental housing opportunities generally on the basis of race. Given that over ninety percent of voucher users in the New Orleans metro in 2010 were black,<sup>152</sup> the existence of rental discrimination on the basis of race serves as a real and persistent barrier to voucher users' access to housing opportunity. When considering the prevalence of discrimination on the basis of voucher use, the barriers to opportunity for voucher holders in New Orleans appear particularly acute.

Rental audits conducted by the Greater New Orleans Fair Housing Action Center (GNOFHAC) both before and after Katrina have used a method of investigation referred to as "testing."<sup>153</sup> This method engages matched pairs of testers posing as home seekers who are equally qualified to rent the advertised unit. Tester profiles and qualifications relevant to a rental transaction such as income, career path, family type, and rental history, are held constant; only one variable, such as race or voucher status, is measured.<sup>154</sup>

A 2009 GNOFHAC audit measured landlord willingness to accept rental vouchers. The audit revealed that landlords either refused to accept vouchers or imposed insurmountable requirements for voucher holders in eighty-two percent of the one hundred rental tests conducted in the greater New Orleans area.<sup>155</sup>

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when it grew too large for the security guard to handle; video captured the responding officer using what appeared to be excessive force to detain a black female teen guest. Carol Cole-Frowe & Richard Fausset, *Jarring Image of Police's Use of Force at Texas Pool Party*, N.Y. TIMES, (June 8, 2015), <http://www.nytimes.com/2015/06/09/us/mckinney-tex-pool-party-dispute-leads-to-police-officer-suspension.html>.

149. See generally Jennifer Medina, *Subsidies and Suspicion: Seeking a Better Life, California Renters Encounter Resistance*, N.Y. TIMES, August 11, 2011, at A12 (noting that HUD will investigate accusations of harassment against Section 8 tenants).

150. Badger, *supra* note 148.

151. Briggs & Turner, *supra* note 40, at 55.

152. *A Picture of Subsidized Households*, U.S. Dep't of Hous. & Urban Dev. (2000, 2010), <http://www.huduser.org/portal/datasets/picture/about.html>.

153. For background information on fair housing testing methodology, see U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, EVIDENCE MATTERS, PAIRED TESTING AND THE HOUSING DISCRIMINATION STUDIES (Spring/Summer 2014), <https://www.huduser.gov/portal/periodicals/em/spring14/highlight2.html#title>.

154. GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER, WHERE OPPORTUNITY KNOCKS THE DOORS ARE LOCKED 11 (2014), [www.gnofairhousing.org/wp-content/uploads/2014/11/11-06-14-Where-Opp-Knocks-FINAL.pdf](http://www.gnofairhousing.org/wp-content/uploads/2014/11/11-06-14-Where-Opp-Knocks-FINAL.pdf).

155. GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER, HOUSING CHOICE IN CRISIS (2009), [www.gnofairhousing.org/wp-content/uploads/2011/09/HousingChoiceInCrisis2009.pdf](http://www.gnofairhousing.org/wp-content/uploads/2011/09/HousingChoiceInCrisis2009.pdf).

A November 2014 audit measuring race-based rental discrimination examined fifty advertised properties consisting of apartment complexes, multi-family residences, and single-family homes located in Orleans Parish neighborhoods with fewer than thirty percent of families living in poverty.<sup>156</sup> The audit revealed that forty-four percent of African-American testers seeking rental housing in low-poverty neighborhoods received less favorable treatment than their white counterparts; this treatment included property owners and managers who refused to respond to inquiries or show the apartment, failed to provide rental applications, quoted less favorable terms and incentives, and imposed stricter standards.<sup>157</sup> The 2014 audit, with its focus on access to low-poverty neighborhoods, not only provides evidence that racial discrimination in the rental market persists, but also has troubling implications for the use of housing vouchers as a tool for upward socioeconomic mobility. Thus, both race-based rental audits and voucher-based audits conducted post-Katrina in the region reflect market barriers that limit housing choice for those attempting to use vouchers to gain wider housing mobility and opportunity.

A 2009 GNOFHAC study examining the location of landlord listings provided for voucher holders on HANO's website demonstrated that sixty-two percent of one- and two-bedroom units and seventy-three percent of three-bedroom units were located in neighborhoods designated as "low and very low" opportunity neighborhoods, when utilizing various indices of opportunity developed by the Kirwin Institute, including: educational quality, economic health and mobility, housing and neighborhood stability, public health access, and environmental quality.<sup>158</sup> Although HANO does not guarantee the suitability of properties listed on its website for voucher use, the fact that rental units in low to very low opportunity neighborhoods are enjoying such prominent placement on HANO's website is cause for concern.

## V

### TOOLS FOR REFORM

The HCV Program has consistently fallen short of its potential to assist low-income renters to access neighborhoods of greater opportunity. To that end, this article offers the following recommendations:

#### A. Provide Data and Counseling Support

It stands to reason that data and counseling can assist households to make housing choices that are informed by alternatives to high-poverty

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156. GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER, *supra* note 154, at 10.

157. *Id.* at 12–14.

158. GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER, 2009 HOUSING CHOICE VOUCHER PROGRAM (HCV) OPPORTUNITY MAPPING PROJECT (2007), [www.gnofairhousing.org/2009/12/07/opportunity-maps/](http://www.gnofairhousing.org/2009/12/07/opportunity-maps/).

neighborhoods.<sup>159</sup> Successful mobility programs in Chicago, Dallas, and Baltimore have paved the way for promising practices to be replicated on a national basis.<sup>160</sup> A robust counseling program would include effective administration of the HCV Program; recruitment and retention of landlords in high-opportunity neighborhoods; pre-move counseling to help families learn about unfamiliar neighborhoods and gain financial literacy; information about schools, transportation, employment opportunities, and other neighborhood resources; search assistance, including security deposit and transportation help; and post-move counseling and supports.<sup>161</sup> To be sure, the term “opportunity neighborhoods” is not self-defining. Experts recommend avoiding proxies such as race and poverty levels, which do not necessarily account for neighborhoods in transition, and instead identifying multiple indicators of opportunity that would be tracked over time, such as school performance.<sup>162</sup>

#### B. Set Fair Market Rates at the Neighborhood Level

HUD should implement plans to set fair market rents at the neighborhood or zip-code level rather than at the metro level, thereby expanding housing choice and opportunity.

#### C. Administer Vouchers at the Regional Level

HUD has taken steps to make it easier for PHAs to form consortia so that vouchers may be administered regionally, though regional administration remains optional.<sup>163</sup> Typically, vouchers are administered at the parish or county level, requiring any voucher holder wishing to cross parish lines to apply to multiple housing authorities with different offices and application procedures.<sup>164</sup> Moreover, the economies of scale introduced by regional administration could leverage the funding of multiple state and local jurisdictions to offset the costs associated with a robust counseling program.

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159. An exhaustive review of the successful features of mobility programs designed to assist voucher households' moves to neighborhoods of greater opportunity is beyond the scope of this article. For a comprehensive set of materials reporting expert insights on mobility program barriers, design, and implementation, see PHILLIP TEGELER, MARY CUNNINGHAM, & MARGERY AUSTIN TURNER, POVERTY & RACE RES. ACTION COUNCIL, KEEPING THE PROMISE: PRESERVING AND ENHANCING HOUSING MOBILITY IN THE SECTION 8 HOUSING CHOICE VOUCHER PROGRAM-CONFERENCE REPORT OF THE THIRD NATIONAL CONFERENCE ON HOUSING MOBILITY (2005).

160. See Lora Engdahl & Philip Tegeler, *Regional Housing Mobility: A Report from Baltimore*, 18 POVERTY & RACE at 1, 6–7 (2009).

161. *Id.*; Turner & Popkin, *supra* note 40, at 4; Turner, Williams, Kates, Popkin & Rabenhorst, *supra* note 105, at 22.

162. See Briggs & Turner, *supra* note 40, at 37 (noting the opportunity mapping strategies of the Kirwan Center [now Institute]); see also Engdahl & Tegeler, *supra* note 160, at 7 (noting that the poverty rate determinants of MTO did not by themselves ensure access to high-performing schools).

163. Final Rule on Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,322, 43,322–23 (July 16, 2015) (“Program participants should determine whether they want to collaborate with other program participants and, if so, who they want to collaborate with.”).

164. See Darrah & DeLuca, *supra* note 95, at 27.

#### D. Combat Discrimination against Voucher Households

Initiatives designed to combat housing discrimination should be supported, and protections from discrimination on the basis of voucher status should be implemented. One study found that voucher households in metro areas with source-of-income protection laws “are less racially segregated, and less clustered within specific census tracts, than [voucher] households in areas without such laws.”<sup>165</sup> The new Assessment Tool required by HUD as part of a PHA’s AFH should lead to greater transparency as to where vouchers are being used in a region relative to demographic data and other indicators of opportunity. PHAs must monitor clustering and concentrations of vouchers and advocates must monitor PHAs to ensure the HCV Program is promoting housing choice throughout the region.

#### E. Increase the Supply of Affordable Housing Units in High-Opportunity Neighborhoods

Programs like the Low-Income Housing Tax Credit program can amplify the impact of the HCV Program because tax-credit properties cannot discriminate on the basis of voucher use. The greater number of tax-credit units that are built in neighborhoods of opportunity, with access to jobs, good schools, and healthy environments, the greater access to these neighborhoods by HCV households. Also, placing affordable rental units under management by a socially responsible third party could serve as another supply-side strategy in urban and suburban neighborhoods with barriers to affordable housing development or with landlords unwilling to deal directly with a housing authority.<sup>166</sup> Recruiting a broad pool of landlords is, therefore, especially vital.

#### F. Create a More Balanced Fair Housing Policy

In the current budgetary climate, the sure response to any recommended fair housing reforms of the HCV program is that there is a lack of resources. Mobility and housing choice expenditures, however, have been dwarfed by fifty years of revitalization policies that some scholars and advocates describe as “yield[ing] very little durable progress.”<sup>167</sup> The above proposals for regional administration would create efficiencies generating more funds for mobility counseling. A more balanced funding apparatus that set aside at least some annual funding for mobility programs without the need for litigation is

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165. Metzger, *supra* note 8, at 545. See Tamica H. Daniel, *Bringing Real Choice to the Housing Choice Voucher Program: Addressing Voucher Discrimination Under the Federal Fair Housing Act*, 98 GEORGETOWN L.J. 769, 777–79 (2010) (discussing the strengths and limitations of statutes and ordinances prohibiting source-of-income-discrimination).

166. Briggs & Turner, *supra* note 40, at 41.

167. See Alex Polikoff, *Housing Mobility: Why Is It So Controversial?*, 24 POVERTY & RACE 3, 4 (2015) (borrowing a phrase from Pat Sharkey and responding to objection that spending money on mobility means serving fewer families).

recommended.<sup>168</sup> Policy experts have recommended a set aside of “opportunity vouchers” to help those low-income families living in the most segregated regions of the country, *who would like to move*, exercise the choice to enter communities with low poverty and high-performing schools.<sup>169</sup>

## VI

### CONCLUSION

This post-Katrina case study substantiates the notion that persistent structural flaws in the HCV Program must be corrected if the program is to further fair housing and reach its full potential. Both before and after Hurricane Katrina, voucher households in the New Orleans metro had less access than their national counterparts to low-poverty neighborhoods of opportunity.<sup>170</sup> Racial disparities in access to low-poverty neighborhoods also persist in the New Orleans HCV Program, and studies have documented discrimination against both African Americans and voucher households generally.<sup>171</sup> Despite large numbers of vouchers still in use in extreme-poverty neighborhoods, the trends are encouraging at the metro level, with higher percentages of black voucher households in 2010 using vouchers in low-poverty census tracts than reported in the pre-Katrina HUD Study, and a sharp drop in the percentage of black voucher households living in neighborhoods of extreme poverty.<sup>172</sup> Still, many readily available policy tools exist to counteract the tendency of voucher families to cluster in certain tracts, as is happening in Orleans Parish with twenty-five percent of the vouchers in 2010 used in a mere five percent of census tracts.<sup>173</sup> The stakes are high for low-income children in the New Orleans region and elsewhere. The HCV Program must achieve its original purpose of reducing isolation of low-income renters and assist the next generation to overcome the life-altering effects of poverty.

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168. See, e.g., Elizabeth Julian, *Mobility Works America*, 24 POVERTY & RACE 1 (2015) (proposing that mobility programs borrow funding model from “NeighborWorks America,” a community development granting and training organization funded at over \$200 million in 2012–2013).

169. Engdahl & Tegeler, *supra* note 160, at 6–7.

170. See *supra* notes 113–116; 122–125 and accompanying text.

171. See *supra* notes 119, 128 & Section III.C.4 and accompanying text.

172. See *supra* notes 116, 124, 130 and accompanying text.

173. See *supra* note 132 & Part IV.