



CHAPMAN LAW REVIEW

Citation: Kylene B. Hernandez, *The Fair Housing Problem with Accessory Dwelling Units in California*, 25 CHAP. L. REV. 415 (2022).

--For copyright information, please contact chapmanlawreview@chapman.edu.

The Fair Housing Problem with Accessory Dwelling Units in California

*Kylene B. Hernandez**

INTRODUCTION	416
I. ADUS: A GENERAL BACKGROUND	418
II. CALIFORNIA’S HOUSING CRISIS AS IT EXISTS TODAY	424
A. Defining the Housing Crisis	424
B. The Real California Nuisance: Unreasonable Obsession with Single-Family Zoning.....	426
C. Who is Impacted? Race as a Proxy for Income.....	430
III. FAIR HOUSING LAWS: WHERE DO ADUS FIT IN?.....	433
A. The FHA: Incomplete in Both Intent and Effect....	434
B. The Deafening Silence of the FEHA.....	438
1. What is a Household?.....	439
2. Idleness of the FEHA.....	441
C. Disparate Impact: An Impossible Evidentiary Question	444
IV. MOVING FORWARD.....	452
A. An Obvious First Step: The Repeal of Article 34 ...	452
B. Much Ado About Zoning	454
C. Using RHNA as Intended	455
D. Away with Mrs. Murphy.....	456
E. Reinvigorating the FEHA in State Court.....	457
CONCLUSION	458

* J.D. Candidate 2022, Chapman University Dale E. Fowler School of Law. M.A. Stanford University, 2018. B.A. Stanford University, 2017. I would like to thank Professor Kenneth Stahl for his guidance and wit during this writing process, and for trusting me to tackle such an important topic. Special thanks to Professor Sherry Leysen, without whom this Note would not have made it past the second page. To my fellow editors on the *Chapman Law Review*: I so appreciate your patience and the time you spent on improving this Note. And last, but certainly not least, I would like to thank and dedicate this Note to my law school queens and to my family; I do not know where I would be without your unwavering love and support.

“History shows that settled compromises endure.”¹

INTRODUCTION

California and unaffordability are effectively synonymous. *Living* in California is a misnomer for most people, and to say one is *surviving* in California is even a stretch. With an exceptionally high cost of living and not enough housing to meet the needs of the state’s total population,² it is no wonder that “even California’s least expensive housing markets are more expensive than [the national] average.”³ As California’s housing crisis continues to worsen,⁴ housing advocates continue to push forward innovative strategies to create “new housing units for all income levels” throughout the state.⁵ One recent strategy is the building of accessory dwelling units (“ADUs”).⁶

While there is great potential for ADUs to increase the housing supply, and this potential is only heightened due to the

¹ Robin Fretwell Wilson, *Bargaining for Civil Rights: Lessons from Mrs. Murphy for Same-Sex Marriage and LGBT Rights*, 95 B.U. L. REV. 951, 973 (2015).

² See *Addressing a Variety of Housing Challenges*, CAL. DEPT OF HOUS. & CMTY. DEV., <http://www.hcd.ca.gov/policy-research/housing-challenges.shtml> [http://perma.cc/8P74-PZEN] (last visited Feb. 7, 2022) (revealing that California needs to produce 180,000 additional homes annually to meet the state’s housing needs); Noah Buhayar & Christopher Cannon, *How California Became America’s Housing Market Nightmare*, BLOOMBERG (Nov. 6, 2019), <http://www.bloomberg.com/graphics/2019-california-housing-crisis/> [http://perma.cc/6EH8-V4CR] (suggesting that California needs millions of new homes to solve its housing crisis, a feat which likely will not be accomplished until 2050).

³ See MAC TAYLOR, CALIFORNIA’S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES 3, 7 (2015), <http://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf> [http://perma.cc/66QX-YJ9Q] (“Today, an average California home costs \$440,000, about two-and-a-half times the average national home price (\$180,000). Also, California’s average monthly rent is about \$1,240, 50 percent higher than the rest of the country (\$840 per month).”).

⁴ See SARAH MAWHORTER & CAROLINA REID, LOCAL HOUSING POLICIES ACROSS CALIFORNIA: PRESENTING THE RESULTS OF A NEW STATEWIDE SURVEY 5–6 (2018), http://californialanduse.org/download/Terner_California_Residential_Land_Use_Survey_Report.pdf [http://perma.cc/7WEG-76FE].

In August 2018, a two bedroom, 1,100-square-foot townhome in San Jose listed for \$1.1 million. A one bedroom, 650-square-foot apartment in Oakland rents for \$3,090 per month. Increasing housing prices have touched jurisdictions across California: over the past two years, rents have increased by 26 percent in Sacramento, 23 percent in Long Beach, and 28 percent in Stockton. The need for more housing is visible in nearly all communities in the state. One obvious solution to this problem is to encourage more housing construction, but this is often harder than it sounds.

Id.

⁵ See DAVID GARCIA, ADU UPDATE: EARLY LESSONS AND IMPACTS OF CALIFORNIA’S STATE AND LOCAL POLICY CHANGES (2017), http://ternercenter.berkeley.edu/wp-content/uploads/pdfs/ADU_Update_Brief_December_2017_.pdf [http://perma.cc/N8AR-WMGV].

⁶ See *id.* (“Since 2015, there has been significant progress in clearing the way for more ADUs in California in the state legislature.”).

many incentives offered to private homeowners in doing so,⁷ crucial first steps must take place. Specifically, homeowners must want to build an ADU, have the financial means to do so,⁸ take steps to begin construction, and then *choose what kinds of people will be living in their own backyard*.⁹ Unfortunately, most of the literature on ADUs neglects this final piece of the puzzle. This Note sets out to fill that gap by considering ADUs in the context of both state and federal fair housing laws.

According to one scholar, the Fair Housing Act of 1968¹⁰ is “the least successful of the civil rights acts.”¹¹ While hoping that “[o]vercoming discrimination that denied protected classes residency in high-opportunity areas would produce integrated communities of more equal opportunity. The problem has been that discrimination has matured in less recognizable ways and segregation has calcified, leading to more concentrated poverty, re-segregation and widening economic inequality.”¹²

As this Note will argue, current fair housing laws are inadequate and ineffective when considering modern housing relationships, primarily as a result of carefully carved out exemptions within those fair housing laws which were designed to address housing discrimination in the traditional real estate market.¹³ ADUs drastically change the contextual landscape of fair housing laws: private homeowners will be the landlords of a sectioned-off portion of land zoned for single-family use, while simultaneously maintaining permanent residence on the same parcel of land. Therefore, current fair housing laws might render the purpose of ADUs moot if homeowners will discriminate based on race. In the alternative, people may discriminate based on

⁷ See, e.g., CITY OF SANTA CRUZ ECON. DEV. HOUS. & CMTY. DEV. DIV., 2019 ACCESSORY DWELLING UNITS: FEE WAIVER INFORMATION AND APPLICATION 1 (2019), <http://www.cityofsantacruz.com/home/showpublisheddocument?id=80873> [<http://perma.cc/V9ZU-YQKK>].

⁸ See KAREN CHAPPLE ET AL., ADUS IN CA: A REVOLUTION IN PROGRESS 15 (2020), <http://www.aducalifornia.org/wp-content/uploads/2020/10/ADU-Progress-in-California-Report-October-Version.pdf> [<http://perma.cc/R4VT-XV57>].

In Los Angeles, the average cost estimate is \$148,000 while in the San Francisco Bay Area it is \$237,000 In fact, ADU construction costs in the Bay Area can exceed \$800 per square foot, equaling \$400,000 for a 500 square foot ADU. The lower cost of construction could make ADU construction in Los Angeles more accessible for lower-income homeowners

Id.

⁹ See *id.* at 18.

¹⁰ See Fair Housing Act of 1968, Pub. L. No. 90-284, § 801, 82. Stat. 73, 81 (codified as amended in 42 U.S.C. §§ 3601–3619).

¹¹ David D. Troutt, *Inclusion Imagined: Fair Housing as Metropolitan Equity* 1 (Rutgers Sch. of L. Newark Rsch. Paper No. 152, 2016), <http://ssrn.com/abstract=2777563> [<http://perma.cc/FZU4-BU7W>].

¹² *Id.*

¹³ See discussion *infra* Part III.

socioeconomic status (“SES”), which will undoubtedly have a racial impact.¹⁴ To provide an adequate opportunity for ADUs to fulfill their intended purpose, the questions presented by this Note must first be answered.

Part I defines ADUs and places them in the context of the housing crisis by summarizing recent housing legislation and providing preliminary data on ADUs in California. Part II offers a necessary history of California’s housing crisis as it currently exists. I first touch on the current state of affairs in California, providing elemental data so as to understand the urgency of the crisis. Then I consider California’s problematic obsession with exclusionary zoning practices and how they intersect with America’s long history of residential racial segregation. Historically marginalized groups, particularly black Americans, are among the most vulnerable in California’s critical housing market. Thus, housing discrimination becomes a necessary point for discussion. Part III dissects both state and federal fair housing laws in order to identify how ADUs will fit into the legal framework. The defects in federal law coupled with the uncertainty of California state law leads to a probable finding that private homeowners will be able to engage in both overt and subtle modes of racial discrimination in the rental of ADUs. In recognizing the need for change, Part IV demands that housing reform continue within California, and that the outdated exemptions in both state and federal fair housing law need to seriously be reconsidered in light of 21st century housing relationships.

I. ADUS: A GENERAL BACKGROUND

ADUs, colloquially known as “granny flats” or “in-law units,” are located on the property of a single-family home but cannot be sold separately from the main house. Typically located in converted garages, backyards, or basements, ADUs provide a “low-cost means of increasing local housing supply” simply by utilizing an existing attached or standalone building.¹⁵ The cost of the ADU, and the subsequent rental price, will predominantly depend on the design, options, and size.¹⁶ For example, converting a garage into an ADU in Orange County, California will cost anywhere from \$70,000 to

¹⁴ See generally Jesus Hernandez, *Race, Market Constraints, and the Housing Crisis: A Problem of Embeddedness*, 1 KALFOU: J. COMPAR. & RELATIONAL ETHNIC STUD. 29, 52–53 (2014) (arguing that “economic relations are clearly fused with social content,” whereby exclusionary market practices have created a hierarchy in which economics and race are highly correlated).

¹⁵ CHAPPLE ET AL., *supra* note 8, at 7.

¹⁶ See *The New 2022 Orange County Granny Flat and Garage Conversions Guide*, GREATBUILDZ, <http://www.greatbuildz.com/blog/orange-county-granny-flat-adu-guide/> [<http://perma.cc/G26X-C2PW>] (last visited Mar. 26, 2022).

\$120,000.¹⁷ In the alternative, total ground-up construction in the same area will more likely be in the \$100,000 to \$400,000 range.¹⁸ While ADUs were once very prevalent throughout the country,¹⁹ support for ADUs and their implementation throughout California has only recently begun.²⁰ This is partially due to the state legislature’s commitment back in 2016 to lay a strong “foundation for a proliferation of ADUs statewide.”²¹ Unfortunately, notwithstanding awareness of the immediacy of the housing crisis,²² change was slow. But in the latter half of 2019, the California Legislature took a crucial step by adopting some of the most significant housing legislation ever passed.

In an effort to address the “issue of affordability . . . head on[.]”²³ Governor Newsom, in August and October of 2019, signed into law a series of bills to lift local restrictions on the building of ADUs.²⁴ For a long time, “cities hostile to the Californian dream of affordable housing . . . have found ways to ban [ADUs].”²⁵ Now, if local ordinances make it difficult to fit an ADU on property zoned for single-family use, these new state laws all but “guarantee each home one backyard detached ADU, and potentially a small Junior ADU [(“JADU”)] converted from existing space like a garage.”²⁶ The following is a brief, superficial discussion of each of the four critical bills.

The general purpose of each bill is the same: to remove many of the barriers to developing ADUs, for they are a crucial form of housing production that can be part of the solution to California’s

¹⁷ *See id.*

¹⁸ *See id.*; KAREN CHAPPLE ET AL., IMPLEMENTING THE BACKYARD REVOLUTION: PERSPECTIVES OF CALIFORNIA’S ADU OWNERS 3 (Apr. 22, 2021), <http://www.aducalifornia.org/wp-content/uploads/2021/04/Implementing-the-Backyard-Revolution.pdf> [<http://perma.cc/7TKN-SWNT>] (“The median statewide construction cost of an ADU is \$150,000.”).

¹⁹ *See* John Infranca, *Housing Changing Households: Regulatory Challenges for Micro-Units and Accessory Dwelling Units*, 25 STAN. L. & POL’Y REV. 53, 54 (2014).

²⁰ *See* CHAPPLE ET AL., *supra* note 8, at 5.

²¹ GARCIA, *supra* note 5.

²² *See infra* Table 1.

²³ Sophia Bollag, *Governor Signs California Housing Laws on Granny Flats, Zoning*, SACRAMENTO BEE, Oct. 10, 2019, at 9A.

²⁴ *See Governor Newsom Signs Legislation 8.30.19*, OFF. OF GOVERNOR GAVIN NEWSOM (Aug. 30, 2019), <http://www.gov.ca.gov/2019/08/30/governor-newsom-signs-legislation-8-30-19/> [<http://perma.cc/9QUD-X5HU>]; *Governor Gavin Newsom Signs 18 Bills to Boost Housing Production*, OFF. OF GOVERNOR GAVIN NEWSOM (Oct. 9, 2019), <http://www.gov.ca.gov/2019/10/09/governor-gavin-newsom-signs-18-bills-to-boost-housing-production/> [<http://perma.cc/2Q8U-AD3J>].

²⁵ *Let’s Triplexize California*, CAL. RENTERS LEGAL ADVOC. & EDUC. FUND [hereinafter *Triplexize*], <http://carlaef.org/adus/> [<http://perma.cc/GS7Z-YB2Y>] (last visited Mar. 1, 2022); *see also* discussion *infra* Section II.B.

²⁶ *Triplexize*, *supra* note 25.

housing crisis.²⁷ AB 68 and AB 881 have significant overlap, and because of this, they were consolidated into one bill.²⁸ Generally speaking, these two bills remove many of the barriers and restrictions that local governments have placed on the building of ADUs.²⁹ Additionally, SB 13 prohibits owner-occupancy requirements and reduces the financial and related costs for homeowners who choose to build ADUs.³⁰ Finally, AB 670, signed into law by Governor Newsom on August 30, 2019, prevents homeowners' associations from "banning or unreasonably restricting on single-family lots on the construction of [ADUs]."³¹ Together AB 68, AB 881, and SB 13 amend section 65852.2 of the Government Code,³² which will go into effect on January 1, 2025.³³

As a preliminary matter, it is important to recognize why ADUs are so appealing to the California Legislature. In a state crippled by such grave opposition to denser housing options (i.e., apartment complexes and other forms of multi-family housing), ADUs can neutralize homeowner opposition by allowing them to profit from new development in their very own backyard. ADUs are a potential solution to the statewide fear of high-rise complexes by adding only gentle density rather than completely dismantling California's strict adherence and preference for single-family zoning.³⁴ Indeed, 92% of all ADUs are built on land zoned for single-family residential housing.³⁵ By removing some of the barriers to ADU development and permitting one ADU and one

²⁷ See Assemb. 68, 2019–2020 Reg. Sess. (Cal. 2019); Assemb. 881, 2019–2020 Reg. Sess. (Cal. 2019); S. 13, 2019–2020 Reg. Sess. (Cal. 2019); Assemb. 670, 2019–2020 Reg. Sess. (Cal. 2019); *Accessory Dwelling Unit Handbook*, CAL. DEPT OF HOUS. & CMTY. DEV. 8 (Dec. 2020), http://www.hcd.ca.gov/policy-research/docs/adu_december_2020_handbook.pdf [<http://perma.cc/4RKC-W9BV>].

[T]he California Legislature found and declared that, among other things, California is facing a severe housing crisis and ADUs are a valuable form of housing that meets the needs of family members, students, the elderly, in-home health care providers, people with disabilities and others. Therefore, ADUs are an essential component of California's housing supply.

Id.

²⁸ See Benjamin Donel, *California's New Accessory Dwelling Units Laws: What You Should Know*, FORBES (Mar. 12, 2020, 8:30 AM), <http://www.forbes.com/sites/forbesfinancecouncil/2020/03/12/californias-new-accessory-dwelling-units-laws-what-you-should-know/?sh=51f27d317a30> [<http://perma.cc/8FZY-4THV>].

²⁹ See *id.* (pointing out that approval time and size requirements were some of the critical barriers to building ADUs prior to the passage of these bills).

³⁰ See *id.*

³¹ *Id.* ("Presently, many HOAs have CCRs ('conditions, covenants and restrictions') that prevent people from building ADUs Regardless, HOAs now need to have a way for people to construct ADUs if they so choose.")

³² See Assemb. 68, 2019–2020 Reg. Sess. (Cal. 2019); Assemb. 881, 2019–2021 Reg. Sess. (Cal. 2019); Assemb. 13, 2019–2020 Reg. Sess. (Cal. 2019).

³³ See CAL. GOV. CODE § 65852.2.

³⁴ See generally discussion *infra* Section II.B.

³⁵ See CHAPPLE ET AL., *supra* note 8, at 15.

JADU on single-family parcels, this legislation has basically tripled the zoning capacity in California areas zoned as single-family. Thus, the *potential* of ADUs in fulfilling their intended purpose is extraordinary, especially considering that two-thirds of California cities and counties “perceive a strong appetite among homeowners to add ADUs to their properties.”³⁶

Despite the recency of the bills, initial studies and literature give us an initial sense of where ADUs are taking us within the context of the housing crisis. First, the number of ADU permits issued in California increased by over 150% between 2018 and 2019,³⁷ and actual ADU completions more than tripled over the same time period.³⁸ According to a 2020 study, 87% of surveyed California jurisdictions indicated they had adopted an ADU ordinance.³⁹ And the majority of these jurisdictions did so between 2017 and 2020.⁴⁰ Furthermore, between 2018 and 2019, the counties with the highest rates of actual ADU production were Los Angeles, Santa Clara, and San Diego (some of the cities most in need of additional housing supply).⁴¹ In fact, the overall trend in California is that ADU production is occurring in “diverse, transit-accessible neighborhoods where a greater share of homeowners have recently purchased their homes and still have a mortgage.”⁴² Nevertheless, those homeowners with high home values are far more likely to be the ones constructing ADUs.⁴³ Finally, lack of space is not a primary motivator in

³⁶ See Andrew Hall, *Much Ado About ADUs: New Legislation and Emerging Legal Issues from California’s Attempt to Create Affordable Housing*, 39 CAL. REAL PROP. J. 25, 33 (2021) (internal citation omitted).

³⁷ See CHAPPLE ET AL., *supra* note 8, at 5; see also HALL, *supra* note 36, at 30 (“ADU permits and, more importantly, completions have skyrocketed over the past few years. While there were 5,911 ADU permits issued in 2018, a whopping 15,571 were issued in 2019. Moreover, ADU *completions* jumped from 1,984 in 2018 to 6,668 in 2019.”) (internal citations omitted); Haisten Willis, *Accessory Dwellings Offer One Solution to the Affordable Housing Problem*, WASH. POST (Jan. 7, 2021), http://www.washingtonpost.com/realestate/accessory-dwellings-offer-one-solution-to-the-affordable-housing-problem/2021/01/07/b7e48918-0417-11eb-897d-3a6201d6643f_story.html [<http://perma.cc/9MNT-6HF2>] (“In California, legislative changes helped pave the way for an 11-fold increase in ADU permits between 2016 and 2019 Los Angeles alone issued 15 ADU permits in 2013, 80 in 2016, then 2,342 in 2017 and 6,747 in 2019.”). It is important to note that this data pre-dated the new legislation, meaning these numbers are only going to keep rising.

³⁸ CHAPPLE ET AL., *supra* note 8, at 13.

³⁹ *Id.* at 12.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 15; see also Kristen Kopko & Andrew Warfield, *ADU Case Study—Pre-Approved ADUs: A Tool for Revitalizing California’s Affordable Housing Struggle*, UC RIVERSIDE, <http://icsd.ucr.edu/case-study-adu> [<http://perma.cc/5G8P-43ND>] (last visited Mar. 13, 2022) (analyzing a pre-approved ADU program in Encinitas, California as well as presenting policy recommendations for other counties throughout California).

⁴³ See CHAPPLE ET AL., *supra* note 8, at 16.

choosing to build an ADU, for almost 70% of ADUs are built on parcels where the main house has at least three bedrooms.⁴⁴

With all this data in mind, the California Legislature maintains that ADUs will play a vital role in alleviating the state housing crisis. These are not massive, multi-family buildings that will disrupt the residential character of neighborhoods. And the laws are not intended do so either. Instead, the new legislation is supposed to alleviate the burden on homeowners and make it easier to increase the supply of ADUs by reducing the ability of local governments to say no as they have historically done in the past.⁴⁵ California, like other states, is “increasingly willing to preempt local government[]”⁴⁶ in the face of its deepening housing crisis. Not only have researchers estimated that ADU units across the state “could account for approximately 40% of the state’s housing need,”⁴⁷ adding an ADU will generate monthly income and increase the resale value of property.⁴⁸ Thus, there is a mutual benefit in utilizing ADUs that makes them far more desirable than alternative housing policies.

At the same time, there is still significant and warranted uncertainty: will ADUs *actually* provide fair and affordable housing? For example, it may be that cities are simply going to rely on ADUs to meet their regional housing needs. In 1969, the California Legislature enacted a law requiring “all local governments (cities and counties)” to “adequately plan to meet the housing needs of everyone in the community.”⁴⁹ Despite the Housing and Community Development (“HCD”) utilizing a specialized formula to arrive at each local government’s regional

⁴⁴ See *id.* at 15.

⁴⁵ See Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1068 (2017) (“Although [land use] is often considered a ‘traditional’ local concern, the record of local governments using their authority therein to exclude ‘undesirable’ uses, like low-income housing, is legion.”).

⁴⁶ John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 829 (2019).

⁴⁷ See CHAPPLE ET AL., *supra* note 8, at 7; see also *New Poll Finds that 25% of Homeowners Would Add an In-Law Unit, Creating 400,000 New Affordable Housing Units*, BAY AREA COUNCIL (Apr. 12, 2017), <http://www.bayareacouncil.org/community-engagement/new-poll-finds-that-25-of-homeowners-would-add-an-in-law-unit-creating-400000-new-and-affordable-housing-units/> [<http://perma.cc/E954-JD2L>] (finding that an ADU added to just 10% of the 1.5 million single-family properties in the Bay Area would add 150,000 new units).

⁴⁸ See *How Much Value Does an ADU Add?*, ARCHITECTS LA (Jan. 27, 2021), <http://architectsla.com/how-much-value-does-adu-add/> [<http://perma.cc/7KBC-QBC4>] (“[D]etached ADUs, in particular, have the potential to increase your property value by a whopping 20–30%.”).

⁴⁹ See *Regional Housing Needs Allocation*, CAL. DEP’T OF HOUS. AND COMTY. DEV., <http://www.hcd.ca.gov/community-development/rhna/index.shtml> [<http://perma.cc/86Y9-J8SD>] (last visited Feb. 8, 2022); see also CAL. GOV. CODE § 65584.

housing needs assessment (“RHNA”), even the HCD notes that this is a “general plan” that is to serve as a mere “blueprint.”⁵⁰ Thus, the RHNA calculations is simply theoretical: the local governments do not have to build the housing, they must simply have the theoretical capability to accommodate the housing needs. Indeed, studies have shown that there is often “no measurable relationship between compliance [with RHNA requirements] and overall housing production.”⁵¹ Thus, even if California is becoming a lot more serious about requiring cities to make plans to accommodate thousands of new housing units by relying on ADUs,⁵² the fact remains that compliance with RHNA includes identifying sites for new housing that may have little to no chance of ever being developed.⁵³

There are other barriers to the actual implementation of ADUs⁵⁴ and their subsequent use as affordable housing. According to a survey provided to Los Angeles County residents, 50% of respondents said they were either unlikely or highly unlikely to add an ADU to their property.⁵⁵ Indeed, only “half of California’s new ADUs serve as income-generating rental units,” whereas 18% serve as no-cost housing to friends or relatives of the homeowner.⁵⁶ Not to mention the fact that the average square footage of ADUs recently built in California is *just 615 square feet*.⁵⁷ This uncertainty as to the efficacy of constructing ADUs in a manner to actually increase the affordable housing supply is only exacerbated by unanswered questions regarding legal framework of ADUs. For purposes of this Note, the most relevant issue deals with who will be occupying these ADUs,

⁵⁰ See *Regional Housing Needs Allocation*, *supra* note 49.

⁵¹ See PAUL G. LEWIS, CALIFORNIA’S HOUSING ELEMENT LAW: THE ISSUE OF LOCAL NONCOMPLIANCE 69 (2003).

⁵² See *generally* SCAG REGIONAL ACCESSORY DWELLING UNIT AFFORDABILITY ANALYSIS, SCAG 1 (2020), http://scag.ca.gov/sites/main/files/file-attachments/adu_affordability_analysis_120120v2.pdf?1606868527 [<http://perma.cc/AM7G-LEZW>] (“Government Code section 65583.1 details how jurisdictions may consider alternative means of meeting RHNA beyond vacancy and underutilized sites. The potential for [ADUs] or [JADUs] is one of these available alternative means.”).

⁵³ *But see id.* (“A jurisdiction must include an analysis of the anticipated *affordability* of ADUs in order to determine which RHNA income categories they should be counted toward.”) (emphasis added).

⁵⁴ See CHAPPLE ET AL., *supra* note 8, at 18 (recognizing financial barriers, lack of desire and awareness, and total disinterest in becoming a landlord as primary concerns).

⁵⁵ See YAMILLET BRIZUELA, ASSESSING THE UNTAPPED HOUSING CAPACITY IN LA COUNTY RESIDENTIAL NEIGHBORHOODS, 31–34 (2020) (revealing responses such as: “I don’t want to deal with living with other people on the same property. This is why I moved out of apartments,” “I would rather find other avenues to help with housing. I don’t want strangers on my property,” and “there is a level of discomfort in having a stranger live in your backyard”).

⁵⁶ See *About Accessory Dwelling Units*, ADU CAL., [http://www.aducalifornia.org/#:~:text=\(APR\)%20data-,ADU%20production,to%20the%20state's%20housing%20supply](http://www.aducalifornia.org/#:~:text=(APR)%20data-,ADU%20production,to%20the%20state's%20housing%20supply) [<http://perma.cc/WU2K-6Y7N>] (last updated Aug. 16, 2021).

⁵⁷ See CHAPPLE ET AL., *supra* note 8, at 15.

rather than who will have the means to build them. But before diving into the legal problem that this Note sets out to unveil, an overview of California's current housing environment is necessary.

II. CALIFORNIA'S HOUSING CRISIS AS IT EXISTS TODAY

The housing crisis and lack of affordability are not issues limited to California. However, the unparalleled cost of living in the state, coupled with judicially sanctioned local housing restrictions and legislative deadlock make California unique in the crippling lack of affordable housing. Moreover, because of the many state and federally accepted forms of racial residential segregation, black Californians are uniquely and disproportionately impacted by the wealth disparity and lack of affordable housing in California. The following discussion looks at each of these details in order to demonstrate who is most likely to build ADUS, who is mostly likely to need to rent them out, and the likelihood that these are racially distinct groups.

A. Defining the Housing Crisis

One particular article redefined California's "housing crisis" so as to prevent the further "sapping [of] its urgency."⁵⁸ More specifically, the article noted that there are actually three separate housing crises in California, each affecting a different segment of California's population:

The first and most urgent crisis is the 150,000 homeless Californians sleeping in shelters or on the streets It's the most shameful symptom of how things have gone so wrong here, and is trending in the wrong direction. The second housing crisis involves the 7.1 million Californians living in poverty when housing costs are taken into account. While not homeless, 56% of these low-income Californians see more than half of their paychecks devoured by rising rents. Skewing black and brown, these are the renters who face intense displacement and gentrification pressures, live in overcrowded and unsafe housing conditions, and have fled urban cores for cheaper exurbs over the past two decades. California's third housing crisis afflicts a younger generation of middle-class and higher-income Californians While lower-income Californians have struggled to afford the state for decades, the term "housing crisis" and its attendant publicity really only came into vogue once richer Californians started seriously considering moving [out of California].⁵⁹

⁵⁸ See Matt Levin, *Commentary: Five Things I've Learned Covering California's Housing Crisis that You Should Know*, CAL MATTERS (Jan. 6, 2021), <http://calmatters.org/housing/2021/01/california-housing-crisis-lessons/> [<http://perma.cc/XB3J-VK3T>].

⁵⁹ *Id.*

In necessarily recharacterizing California's housing crisis, this three-pronged approach acknowledges that it is now a problem for everyone. Even those individuals who never thought that they would be forced to "spend half their income on housing" must now "choose between extra space or extra miles for a commute, or decide which landlord to trust in a market with just about everything in their favor."⁶⁰ Indeed, residents in Los Angeles must earn "nearly \$50 an hour" just to afford the *average* monthly rent in the City of Angels.⁶¹ Assuming that this wage earner works a fifty-two-week year at forty hours per week, this means that an annual salary of \$104,000 is the minimum necessary to afford *rent* in this part of southern California. Furthermore, at the end of 2019, the median cost to *buy* a house in California exceeded \$600,000, more than double the national median.⁶²

It seems that the booming economy, gorgeous coastline, unbeatable weather, and excellent food can no longer compete with the extraordinary costs associated with living in California.⁶³ According to a 2019 survey, 53% of all California residents were considering leaving the state due to the high cost of living, with 63% of California's millennials sharing the same sentiment.⁶⁴ The same report noted that California's housing crisis is a greater threat to its economy than any costs associated with healthcare, crime, or higher education combined.⁶⁵ More simply put: there are economic benefits which derive from adequate affordable housing that go beyond putting a roof over someone's head.⁶⁶ So how did we get here? How did we get to a place where, as one scholar puts

⁶⁰ See Liam Dillon, *I've Covered California's Housing Crisis for Years. Living it is a Different Story*, L.A. TIMES (Nov. 4, 2019), <http://www.latimes.com/california/story/2019-11-04/california-housing-crisis-reporter-rent-double-move-sacramento-los-angeles> [<http://perma.cc/85F9-JF8P>].

⁶¹ See Jamie Yuccas, "There's no way out of this": Lack of Affordable Housing Contributes to Los Angeles Homeless Crisis, CBS NEWS (July 5, 2019), <http://www.cbsnews.com/news/homeless-population-los-angeles-county-california-rises-2019-07-05/> [<http://perma.cc/Q5S5-HUUJ>].

⁶² See Buhayar & Cannon, *supra* note 2.

⁶³ See *Addressing a Variety of Housing Challenges*, CAL. DEP'T OF HOUS. & CMTY. DEV., <http://www.hcd.ca.gov/policy-research/housing-challenges.shtml> [<http://perma.cc/UZA4-6NNP>] (last visited Feb. 7, 2022) (finding that "the majority of Californian renters—more than 3 million households—pay more than 30 percent of their income toward rent, and nearly one-third—more than 1.5 million households—pay more than 50 percent of their income toward rent").

⁶⁴ See *2019 Edelman Trust Barometer: Special Report California*, EDELMAN 1, 7 (Jan. 2019), http://www.edelman.com/sites/g/files/aatuss191/files/2019-02/2019_Edelman_Trust_Barometer_Special_Report_California_0.pdf [<http://perma.cc/555A-8BPN>].

⁶⁵ See *id.* at 8.

⁶⁶ See Jeff Montejano, *The Economic Consequences of California's Housing Crisis*, THE ORANGE CNTY. REG. (June 20, 2019) <http://www.oregister.com/2019/06/20/the-economic-consequences-of-californias-housing-crisis/> [<http://perma.cc/54JF-FFXE>] (referencing a study that reported a state economic loss of over \$140 billion per year due to California's housing shortage).

it, California must shamefully boast that it has “the nation’s highest poverty rates in one of the world’s most successful economies[?]”⁶⁷ Over the years, the answer has become quite clear: local barriers to new housing development not only limiting housing supply, but they continue to “threaten to exacerbate income inequality and stifle GDP growth.”⁶⁸

B. The Real California Nuisance: Unreasonable Obsession with Single-Family Zoning

“Zoning is the quintessential [local] government power.”⁶⁹

When considering local barriers to new housing development, the best place to start is at the Supreme Court. In *Village of Euclid v. Ambler Realty Co.*, the Court held that a zoning ordinance was constitutional because it was supported by a rational basis: separating incompatible uses.⁷⁰ In analogizing with the common-law doctrine of nuisance, the Court stated that governments have the authority to protect the public from undesirable structures and industries.⁷¹ Ambler, a property owner holding land on the west side of the village, sued the municipality after it adopted a comprehensive zoning plan to regulate and restrict the location and size of trade, industries, and apartment homes, as well as the more desirable single-family houses.⁷² Because the zones in which Ambler’s property fell into prohibited him from selling land to a developer, Ambler argued that the zoning ordinance violated constitutional due process rights under the Fourteenth Amendment.⁷³ But the Court disagreed,⁷⁴ and *Euclid’s* acquiescence to unmitigated zoning plans, so long as the locality’s “public interest” is somehow arbitrarily served, has yet to be overturned. Subsequently, California’s own courts followed the

⁶⁷ See Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California’s Housing Crisis*, 24 HASTINGS ENV’T L.J. 21, 23 (2018).

⁶⁸ See Infranca, *supra* note 46, at 826 (citing The White House, Housing Development Toolkit 1, 2 (2016), http://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf) [<http://perma.cc/7H2B-Z2ES>].

Local policies acting as barriers to housing supply include land use restrictions that make developable land much more costly than it is inherently, zoning restrictions, off-street parking requirements, arbitrary or antiquated preservation regulations, residential conversion restrictions, and unnecessarily slow permitting processes. The accumulation of these barriers has reduced the ability of many housing markets to respond to growing demand.

Id.

⁶⁹ Infranca, *supra* note 46, at 825.

⁷⁰ See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926).

⁷¹ See *id.* at 387–88.

⁷² See *id.* at 379–80.

⁷³ See *id.* at 384.

⁷⁴ See *id.* at 390.

Supreme Court's guidance,⁷⁵ and the electorate in the state's largest cities continue to benefit.⁷⁶

The decision in *Euclid* created an unintended but lasting impact: “[t]he entitlements associated with a property right in land [after *Euclid*] became mostly concerned with assuring the homeowner’s security—protecting her from intrusions and changes in the residential environment.”⁷⁷ The Supreme Court was willing to “damage[] the values of certain properties” in order to “promote the values of other properties.”⁷⁸ Thus, California homeowners have a vested property interest, but *only* if they reside in zones designated as single-family residential, and there is little incentive to support new development that might decrease the value of that property right. Instead, maintaining the status quo ensures that these early homeowners will reap the benefits of their long-term investment in real property.⁷⁹ However, other scholars maintain that the exclusionary attitudes of homeowners are far simpler: they want racial and economic uniformity.⁸⁰

⁷⁵ See, e.g., *Miller v. Bd. of Pub. Works*, 234 P. 381, 386 (Cal. 1925) (“[W]e think it may be safely and sensibly said that justification for residential zoning may . . . be rested upon the protection of the civic and social values of the American home.”); *Magruder v. Redwood City*, 265 P. 806, 808 (Cal. 1928) (“The right of municipalities of this state to enact zoning ordinances is now settled beyond any doubt, and has received the sanction of both the [L]egislature and the courts.”); *Lockard v. Los Angeles*, 202 P.2d 38, 42 (Cal. 1949) (assuming that zoning ordinances are “adopted to promote the public health, safety, morals, and general welfare.”); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Porterville*, 203 P.2d 823, 825 (Cal. Ct. App. 1949) (justifying a single-family restrictive zoning ordinance because it “tends to promote and perpetuate the American home and protect its civic and social values.”); *Los Angeles v. Gage*, 274 P.2d 34, 45 (Cal. Ct. App. 1954) (upholding the constitutionality zoning provisions that required nonconforming existing uses to be discontinued within five years because it was a valid exercise of police power).

⁷⁶ See Vivian Ho, *California Housing Bill’s Failure Comes Amid Fierce Debate on How to Solve Crisis*, THE GUARDIAN (Jan. 31, 2020), <http://www.theguardian.com/us-news/2020/jan/31/california-housing-crisis-bill-failure-debate>; Mawhorter & Reid, *supra* note 4, at 13; CHAPPLE ET AL., *supra* note 8, at 27 (finding that 71% of local jurisdictions in California have yet to seriously consider zoning law changes).

⁷⁷ Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 YALE J. ON REGUL. 91 (2011). This protection from intrusion in the zoning sense mirrors the protection of the right to associate under the First Amendment which will be discussed in Part III of this Note.

⁷⁸ See *id.* at 137.

⁷⁹ See generally Kenneth A. Stahl, *Reliance in Land Use Law*, 2013 BYU L. REV. 949, 951–53 (2013) (explaining that homeowners are hostile to new development for fear that their property values will decline with the incorporation of undesirable nuisances).

⁸⁰ See Cecile Murray & Jenny Schuetz, *Is California’s Apartment Market Broken? The Relationship Between Zoning, Rents, and Multifamily Development*, TERNER CTR. FOR HOUS. INNOVATION 4 (July 2019), http://www.brookings.edu/wp-content/uploads/2019/07/20190711_metro_Is-California-Apartment-Market-Broken-Schuetz-Murray.pdf [https://perma.cc/Y2RW-PCGZ]; see also Timothy J. Choppin, *Breaking the Exclusionary Land Use Regulation Barrier: Policies to Promote Affordable Housing in the Suburbs*, 82 GEO. L.J. 2039, 2049 (1994); Hernandez, *supra* note 67, at 22 (finding that more often than not, lawsuits under the California Environmental Quality

In addition to being judicially backed by both the Supreme Court and its own state courts, California's local governments are equally culpable and are often the very tool that homeowners use to perpetuate the maintenance of single-family zoning. Municipalities (contrary to popular belief that the state government needs to just step in to solve the problem)⁸¹ have "considerable control over its land use regulation[.]"⁸² According to a study by Berkeley's Turner Center, most of California's local jurisdictions provide considerably less land for multifamily housing as compared to both single-family *and* nonresidential uses.⁸³ Between 2013 and 2017, "[c]ities with some of the state's highest rents" failed to issue a single multifamily construction permit.⁸⁴ Even cities that do zone for multifamily housing find alternative ways to regulate and limit the "nuisance" that such buildings create, such as restricting apartment buildings to less than four stories.⁸⁵ When challenged, courts have given these local government strategies considerable deference and support.⁸⁶ And when SB 50—one of the most ambitious proposals introduced in the Senate to combat restrictive zoning plans and allow for small apartment buildings in single-family zoned neighborhoods—was up for approval in January of 2020, only two cities supported the measure, whereas fifty-seven cities were fervently opposed.⁸⁷

Notwithstanding a desire to do so, the California Legislature has historically failed to provide an adequate remedy to address the worsening problem, until now. Table 1 identifies results from a very simple search conducted on California's Legislative Information website: it lists the number of Senate and Assembly bills introduced during each identified session year that included the keyword "affordable housing."⁸⁸

Act are "aimed at promoting . . . the discriminatory 'Not In My Backyard' (NIMBY) agendas of those seeking to exclude housing, park, and school projects that would diversify communities by serving members of other races and economic classes" rather than actually protecting the environment).

⁸¹ See Liam Dillon, *Gov. Gavin Newsom Threatens to Cut State Funding from Cities that Don't Approve Enough Housing*, L.A. TIMES (Mar. 11, 2019, 5:20 PM), <http://www.latimes.com/politics/la-pol-ca-gavin-newsom-housing-plan-201903011-story.html> (discussing Newsom's proposal to withhold state tax dollars from communities who fail to approve developments for new housing).

⁸² See Kenneth A. Stahl, *The Challenge of Inclusion*, 89 TEMP. L. REV. 487, 526 (2017).

⁸³ See Murray & Schuetz, *supra* note 80, at 5.

⁸⁴ See Jill Cowan, *How Fixing California's Housing Crisis is Like Playing Whac-a-Mole*, N.Y. TIMES (Sept. 17, 2021), <http://www.nytimes.com/2019/08/21/us/california-housing-crisis-local-regulations.html> [<http://perma.cc/3TQE-VRLW>].

⁸⁵ See Murray & Schuetz, *supra* note 80, at 6.

⁸⁶ See Stahl, *supra* note 79, at 982.

⁸⁷ See S.B. 50, Cal. S. Rules Comm. 14–19 (2020).

⁸⁸ See *generally* Bill Search, CAL. LEGIS. INFO, <http://leginfo.ca.gov/faces/billSearchClient.html> [<http://perma.cc/2Z62-WLST>].

Table 1. California Legislative Bills with “Affordable Housing”

	2005– 2006	2007– 2008	2009– 2010	2011– 2012	2013– 2014	2015– 2016	2017– 2018	2019– 2020
Senate	26	37	33	27	26	48	48	84
Assembly	52	82	54	42	59	94	105	159
TOTAL	78	119	87	69	85	142	153	243

If nothing else, the consistent increase in legislative bills discussing affordable housing over the last few years is circumstantial evidence of both the magnitude of the crisis and the unfortunate conclusion that most bills will be unsuccessful. The legislation, at least its potential to affect change, is not the issue. Rather, there is a disconnect between what must be done, and what politicians are willing to do. While single-family zoning may have been the catalyst that most heavily contributed to California’s inadequate housing supply, it is the failure to remedy its long-lasting impacts that has sent California on this downward trajectory. With the 2019 ADU bills, it looks like we are moving in the right direction. Unlike SB 50, which sought to drastically transform and effectively eliminate exclusive single-family zoning,⁸⁹ ADUs are far more politically acceptable given historic local resistance to zoning changes. But as this Note will show, ADUs are not the Holy Grail, for ADUs necessarily intersect with another crucial aspect of the housing crisis as it exists in California: the long-lasting consequences of racial residential segregation.⁹⁰

⁸⁹ See Liam Dillon & Taryn Luna, *California Bill to Dramatically Increase Home Building Fails for Third Year in a Row*, L.A. TIMES (Jan. 30, 2020), <http://www.latimes.com/california/story/2020-01-29/high-profile-california-housing-bill-to-allow-mid-rise-apartments-near-transit-falls-short> [<http://perma.cc/LUU6-EW34>]

(“The legislation would have allowed for the construction of mid-rise apartment complexes near transit and job centers and fourplexes in most single-family neighborhoods.”).

⁹⁰ See PHILOMENA ESSED, UNDERSTANDING EVERYDAY RACISM: AN INTERDISCIPLINARY THEORY 29 (1991) (“To summarize: Anti-Black racism in the United States is still characterized by overall segregation, in particular in residential areas.”); see also Rachel F. Moran, *Whatever Happened to Racism?*, 79 ST. JOHN’S L. REV. 899, 900 (2005) (citing MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 36–37 (2003)).

C. Who is Impacted? Race as a Proxy for Income

Preference for the single-family, despite its massive impact and contribution to California's housing crisis, is not the whole of the story. In fact, it barely scratches the surface when it comes to housing Californians most vulnerable residents:

By restricting the construction of these multi-family, high-density units, suburban officials are effectively shutting the door on the types of new residents who might otherwise not be able to afford homes in their city. In this way, a facially neutral zoning restriction, such as limiting lot sizes, has the second-order effect of preserving a community's racial or economic homogeneity.⁹¹

For many legal and social scholars, racial discrimination is “one of the causes of the affordable housing crisis, or at the very least” significantly contributes to it.⁹² Others make note of the fact that “exclusionary zoning laws that discriminate by income . . . [arrived] shortly after explicit zoning by race was struck down by the Supreme Court.”⁹³ Thus, the lack of affordable housing resulting from “income disparities” is simply a means of circumventing 20th century prohibitions against racial discrimination. Others indicate that *both* racial and economic discrimination continue to persist as a way to oppose affordable housing despite federal and state mechanisms that seek to eradicate racial discrimination.⁹⁴ While this Note is neither a comprehensive history of racial zoning nor the first to discuss the policies which perpetuated it, a brief discussion is crucial to understand the role, if any, that ADUs will play in alleviating California's housing crisis.

One major feature of residential racial segregation is the role that both state and federal governments have played in its development. For example, in *The Color of Law*, Richard Rothstein provides a remarkable history of de jure racial segregation in America as a whole: “[s]egregation by intentional government action” through laws and public policy.⁹⁵ In fact, one legal scholar maintains that reinforcing racial segregation and “preventing ‘the coming of colored people into a district’” was the

⁹¹ Bradley Pough, *Neighborhood Upzoning and Racial Displacement: A Potential Target for Disparate Impact Litigation?*, 21 U. PA. J. L. & SOC. CHANGE 267, 272 (2018).

⁹² Paulette J. Williams, *The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions*, 31 FORDHAM URB. L.J. 413, 422 (2004).

⁹³ Richard D. Kahlenberg, *Taking on Class and Racial Discrimination in Housing*, THE AM. PROSPECT (Aug. 2, 2018), <http://prospect.org/civil-rights/taking-class-racial-discrimination-housing/> [<http://perma.cc/FXV9-Z7J7>].

⁹⁴ See Choppin, *supra* note 80, at 2054.

⁹⁵ See RICHARD ROTHSTEIN, *THE COLOR OF LAW*, at viii (2017); *but see* Tex. Dep't Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc., 576 U.S. 519, 528–29 (2015) (claiming that “[d]e jure residential segregation by race was declared unconstitutional” in 1917, but then going on to note all the private and governmental policies instituted throughout the 20th century to maintain such segregation).

real reason that zoning ordinances took off in the 20th century.⁹⁶ Single-family homeownership in the Bay Area was reserved for white families due to both financing and land use regulations tailored or aimed at maintaining racial segregation.⁹⁷

Moreover, in cities like Los Angeles, governments purposely allowed toxic waste facilities and other dangerous entities into predominantly black areas so as to avoid any sort of “deterioration of white neighborhoods.”⁹⁸ And well into the second half of the twentieth century, California, like all states, incorporated a racially-motivated method of assessing risk known as redlining, whereby the racial and socioeconomic composition of residents were used to determine home values.⁹⁹

The most relevant consequence of redlining and racially motivated zoning, at least for purposes of this Note, is that families of color (particularly black families) were denied the opportunity to take a necessary first step into “middle class stability and wealth accumulation” through homeownership.¹⁰⁰ Indeed, in 2019 throughout the country, “homeownership was lowest among Black Americans.”¹⁰¹ For most U.S. families, the home is the greatest asset.¹⁰² And on average, white families in the U.S. have twenty times more wealth than families of color, a disparity that has only increased over time.¹⁰³ During the first quarter of 2020, only 44% of black families owned their home in the U.S., which is far lower than the 73.7% of white homeowners.¹⁰⁴ Unsurprisingly, these national

⁹⁶ See ROTHSTEIN, *supra* note 95, at 52 (positing that nuisance law and favoring single-family zoning was simply a front to ensure that there was no racial mixing in housing).

⁹⁷ See Hernandez, *supra* note 67, at 37; see also ROTHSTEIN, *supra* note 94, at 65 (highlighting the FHA’s policy of discouraging banks from loaning to older, urban neighborhoods because of its tendency to primarily house only “lower class occupancy”). As home ownership directly correlates with *who* will build ADUs, this historic practice and its long-lasting effects ought to be considered when proclaiming that ADUs will provide more housing.

⁹⁸ See ROTHSTEIN, *supra* note 95, at 55.

⁹⁹ See *id.* at 64 (describing the creation of color-coded maps identifying risk, whereby “[a] neighborhood earned a red color if African Americans lived in it” regardless of whether it was a middle-class area).

¹⁰⁰ See Hernandez, *supra* note 67, at 38.

¹⁰¹ *Homeownership Rates Show that Black Americans Are Currently the Least Likely Group to Own Homes*, USA FACTS (Oct. 16, 2020, 2:27 PM), <http://usafacts.org/articles/homeownership-rates-by-race/> [<http://perma.cc/45YV-JWGM>].

¹⁰² Junia Howell & Elizabeth Korver-Glenn, *Homes in Black and Latino Neighborhoods Still Undervalued 50 Years After U.S. Banned Using Race in Real Estate Appraisals*, U.S. NEWS (Sept. 24, 2020, 11:54 AM), <http://www.usnews.com/news/cities/articles/2020-09-24/homes-in-black-and-latino-neighborhoods-still-undervalued-50-years-after-us-banned-using-race-in-real-estate-appraisals> [<http://perma.cc/4YX6-N3TR>].

¹⁰³ See *id.*

¹⁰⁴ Michele Lerner, *One Home, a Lifetime of Impact*, WASH. POST (July 23, 2020), <http://www.washingtonpost.com/business/2020/07/23/black-homeownership-gap/?arc404=true> [<http://perma.cc/KA2R-VGRG>].

numbers are higher than those in California, where only 63.4% of white Californians own their home, which is nearly double the 34.8% of black Californians who own their home.¹⁰⁵ Of those families that do own homes, black families are five times as likely to own a home in a formerly redlined neighborhood than they are to own a home in a formerly greenlined (predominantly white) neighborhood.¹⁰⁶

Throughout the country, housing contributes to 27% of the wealth gap between white and black Americans.¹⁰⁷ This resulting wealth disparity is starkly visible in California, due to the skyrocketing home values and California's 2.2 million black residents who disproportionately struggle to find affordable housing.¹⁰⁸ It is the most urbanized counties, such as Los Angeles and those in the Bay Area, which yield the highest disparities.¹⁰⁹ While over 40% of California households fall within the federal definition of "housing cost burdened," a recent study found that almost 25% of black Californians were forced to expend well over half of their income towards housing costs.¹¹⁰ And while much of the discussion thus far has focused on disparities between white and black *homeownership*, the gap between the wealth of homeowners and the wealth of renters has also only increased over time.¹¹¹ Within this group, 60.6% of black renters in California are cost-burdened compared to 48% of white renters in California.¹¹² Finally, despite the fact that black Californians make up just over 5% of the state's total population, nearly 30% of the 150,000 Californians experiencing homelessness are black.¹¹³

The aforementioned facts and statistics highlight the following: Any discussion of the lack of affordable housing in California is necessarily and inextricably linked to the wealth disparities resulting from the century-long effects of racial and

¹⁰⁵ See *Housing, RACE COUNTS* [hereinafter RACE COUNTS], <http://www.racecounts.org/issue/housing/> [<http://perma.cc/9WBH-7XXM>] (providing racially-based housing statistics by state, county, and city in California).

¹⁰⁶ Lerner, *supra* note 104.

¹⁰⁷ Dean Starkman, *The \$236,500 Hole in the American Dream: The Wealth Gap Between Black and White Families is Greater than Ever. Here's How to Close It*, THE NEW REPUBLIC (June 30, 2014), <http://newrepublic.com/article/118425/closing-racial-wealth-gap> [<http://perma.cc/M3SX-HFHZ>].

¹⁰⁸ Matt Levin, *Black Californians' Housing Crisis, by the Numbers*, CAL MATTERS (June 19, 2020), <http://calmatters.org/housing/2020/06/black-californians-housing-crisis-by-the-numbers/> [<http://perma.cc/CX8S-76DJ>].

¹⁰⁹ See RACE COUNTS, *supra* note 105.

¹¹⁰ Levin, *supra* note 108.

¹¹¹ See Hernandez, *supra* note 67, at 38; see also Howell & Korver-Glenn, *supra* note 102 (noting how the increase of high housing costs coupled with stagnant wages further perpetuates racial and socioeconomic disparities).

¹¹² See RACE COUNTS, *supra* note 105. Cost burdened means spending more than 30% of income on housing.

¹¹³ Levin, *supra* note 108 ("No major California ethnic group is as over-represented in the state's homeless count as Black people.").

residential segregation. These strategies, many of which still exist today,¹¹⁴ have led to patterns of racial residential segregation that impact property values in California and throughout the country. As mentioned earlier in this Note, homeowners with historically high home values are the ones most likely to build an ADU,¹¹⁵ implying that black Californians are less likely to own a home renting out an ADU¹¹⁶ and more likely to be living in the ADU. Indeed, one of the first ever surveys of ADU owners reveals that the disparity in the racial composition of homeowners that recently constructed an ADU is strikingly similar to the racial composition of California homeowners generally.¹¹⁷ Therefore, as this Note analyzes California ADU legislation and how it might serve its intended purpose, an appropriate question is whether ADUs fall within the purview of both state and federal fair housing laws, such that ownership disparities due to historic racial residential segregation do not obviate the ability of ADUs to create a new housing supply.

III. FAIR HOUSING LAWS: WHERE DO ADUS FIT IN?

Thus far, this Note has clarified two fundamental truths regarding California's housing crisis that guide the following discussion on fair housing laws. First, the housing crisis and lack of affordable housing has only gotten worse over time. Hoping to maintain the desirable American family, preference for single-family zoning at the local level eliminated the possibility for denser housing, thereby limiting the housing supply while demand exponentially increased. Second, the individuals who have been most targeted by discrimination in housing and, therefore, suffered the most due to the lack of affordable housing are minorities, especially black Americans. Despite the new wave of middle-class Californians who are also struggling to find housing in California, this is not a twenty-first century phenomenon for black Californians. As California legislators hope to use ADUs to increase the availability of affordable housing, it is critical to point out the inevitable: Private homeowners will have the discretion to choose who rents out the ADU on their private

¹¹⁴ See, e.g., KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT 7–8, 13, 17–18 (2019) (arguing that black Americans never had a chance to acquire affordable housing, as they simply went from being redlined to becoming the prime target of high-risk mortgage investments); Infranca, *supra* note 46, at 831–32 n.38.

¹¹⁵ See *supra* notes 37–44 and accompanying text.

¹¹⁶ See Chapple et al., *supra* note 18, at 3–5, 7 (“[T]he ADU revolution has been slow to reach low-income homeowners of color.”).

¹¹⁷ *Id.* at 7. Unsurprisingly, 71% of all California homeowners who constructed an ADU identify white, whereas only 2% identify as black or African American. *Id.*

property. Therefore, any analysis of the potential of ADUs to alleviate the housing crisis is incomplete without understanding both state and federal fair housing laws.

While there are relevant distinctions between certain provisions in the federal Fair Housing Act of 1968 (“FHA”)¹¹⁸ and California’s Fair Employment and Housing Act of 1959 (“FEHA”),¹¹⁹ state fair housing laws were intended to mirror those that were passed by Congress. Unfortunately, as we will see, fair housing laws were designed to address discrimination in the traditional housing market rather than to regulate arrangements with private homeowners.¹²⁰ Specifically, the anti-discrimination laws were created to fight the strategies discussed earlier in the Note: Commercial property owners and lenders engaging in, encouraging, and benefitting from overt discrimination.¹²¹ Thus, the purpose of the fair housing laws was not to force people to live together. Moreover, fair housing laws are improperly designed to deal with the lack of affordable housing as it exists today.

The [FHA] prohibited future discrimination, but it was not primarily discrimination (although this still contributed) that kept African Americans out of most white suburbs after the law was passed. It was primarily unaffordability. The right that was unconstitutionally denied to African Americans in the late 1940s cannot be restored by passing a Fair Housing law that tells their descendants they can now buy homes in the suburbs, if only they can afford it. The advantage [given to the] white lower-middle class in the 1940s and ‘50s has become permanent.¹²²

A. The FHA: Incomplete in Both Intent and Effect

Congress passed the FHA amid decades of redlining, widespread racial discrimination in the sale and rental of housing, and perhaps the failure of the Supreme Court’s decision in *Shelley v. Kraemer*¹²³ to successfully deter practices aimed at racial residential segregation.¹²⁴ The FHA, originally part of the

¹¹⁸ See Fair Housing Act of 1968, Pub. L. No. 90-284, § 801, 82 Stat. 73, 81 (codified as amended at 42 U.S.C. §§ 3601–3619).

¹¹⁹ See CAL. GOV’T CODE §§ 12900–96.

¹²⁰ Allison K. Bethel, *A New Home for Haters—Online Home Sharing Platforms: A Look at the Applicability of the Fair Housing Act to Home Shares*, 53 U. RICH. L. REV. 903, 916 (2019).

¹²¹ See *id.*

¹²² ROTHSTEIN, *supra* note 95, at 183.

¹²³ See *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948) (holding that state judicial enforcement of restrictive covenants based on race violates the equal protection of the law under the Fourteenth Amendment).

¹²⁴ See Brenna R. McLaughlin, *#AirbnbWhileBlack: Repealing the Fair Housing Act’s Mrs. Murphy Exemption to Combat Racism on Airbnb*, 2018 WIS. L. REV. 149, 156 (2018); see also Diane J. Klein & Charles Doskow, *Housingdiscrimination.com?: The Ninth Circuit (Mostly) Puts Out the Welcome Mat for Fair Housing Acts Suits Against*

Civil Rights Act of 1968, declares that “[i]t is the policy of the United States to provide . . . for fair housing throughout the United States” for all.¹²⁵ The historical context surrounding the Civil Rights Act of 1968 necessarily implies that race was the predominant, if not the key, factor in passing this monumental legislation.¹²⁶ The relevant provision of the FHA makes it unlawful to “refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”¹²⁷ To make out a claim under the FHA, courts must determine if a “dwelling” is involved,¹²⁸ if a protected class is involved,¹²⁹ if a “discriminatory housing practice” has occurred,¹³⁰ and *whether an exception applies*.

The breadth of the exceptions makes the coverage of the FHA incomplete. While the FHA sought to provide new remedies for discriminatory practices in the sale and rental in housing,¹³¹ the FHA also allows for exceptions, one of which is colloquially known as the “Mrs. Murphy” exemption.¹³² In its simplest terms, Mrs. Murphy *exempts* the following from the scope of section 3604 (the FHA’s general statute prohibiting discrimination):

Roommate-Matching Websites, 38 GOLDEN GATE U. L. REV. 329, 339–40 (2008).

¹²⁵ See Fair Housing Act of 1968, Pub. L. No. 90-284, § 801, 82 Stat. 73, 81 (codified as amended at 42 U.S.C. §§ 3601–19).

¹²⁶ See McLaughlin, *supra* note 124, at 156–58 (providing contextual history of the passage of the FHA, including the social and political leaders at the forefront during the Civil Rights Movement).

¹²⁷ 42 U.S.C. § 3604(a). For purposes of the FHA, the term dwelling “means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.” 42 U.S.C. § 3602(b).

¹²⁸ Since the passage of the FHA, the definition of dwelling has been broadly interpreted, thereby expanding the breadth of the Act’s coverage so that it is not just limited to traditional housing. See Bethel, *supra* note 120, at 909 n.43, 910 n.48 (providing comprehensive caselaw interpreting the scope and requirements of housing so as to constitute a “dwelling” for purposes of the FHA). So long as the dwelling is intended to be used as a residence, despite the duration of the stay or the physical makeup of the dwelling, it generally falls within the scope of the FHA and its protections. See *id.* But that does not mean all is fine and well, because this broad interpretation of dwelling is also employed in the FHA’s exemption.

¹²⁹ This Note’s discussion is limited to racial discrimination and will not address the Mrs. Murphy exemption in the context of other protected classes. The intent of this Note is not to discredit other protected classes, but simply as a means to focus in on the historical background of residential racial segregation.

¹³⁰ See 42 U.S.C. § 3602(f).

¹³¹ See 42 U.S.C. § 3604 (prohibiting discrimination on any basis in the sale, rental, or negotiation of housing).

¹³² See James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 605 n.3 (1999) (providing contextual history of the Mrs. Murphy exemption).

“rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.”¹³³ In other words, so long as the homeowner lives in the house or in one of the units in the apartment complex that she rents out, and the apartment complex contains four or fewer units, the FHA does not apply to her: she is free to racially discriminate without facing liability under the FHA. As one scholar pointed out, “[t]he existence of an exemption for owner-occupied dwellings announces that our nation still tolerates discrimination.”¹³⁴ Interpreted in the context of the rental of ADUs, Mrs. Murphy may have disastrous consequences for those most in need of affordable housing in California, as demonstrated in Part II, Section C of this Note.

As Congress pointed out, homeowners have “the right to choose who is pattering around in [their] living room.”¹³⁵ That may be true, but that argument is woefully misleading when interpreting the statutory language. Perhaps most problematic to the exception is that it is overinclusive with respect to its intended purpose: to “protect the associational and privacy rights of people who share intimate living space.”¹³⁶ Why is that overinclusive? Because this broad exception also protects those individuals that own small apartment buildings and *live in separate units*,¹³⁷ as would be the case for those living in ADUs. Despite the argument that the Mrs. Murphy exemption was to protect the First Amendment right to association, the exemption was in actuality “necessary to make the FHA more palatable to white Americans opposed to open housing.”¹³⁸ At the end of the day, a Mrs. Murphy renting out an ADU will have an entirely separate entrance and living space. In fact, the homeowner might be able to avoid contact with the family renting out the ADU altogether. The intimate settings sought to be protected no longer exist in the ADU context. So why should the exemption? Unfortunately, based on prior statutory interpretation, owners

¹³³ 42 U.S.C. § 3603(b)(2). For purposes of the FHA, “family” also includes a single individual. See 42 U.S.C. § 3602(c).

¹³⁴ Walsh, *supra* note 132, at 607.

¹³⁵ See Adam Liptak, *Fair Housing, Free Speech and Choosy Roommates*, N.Y. TIMES (Jan. 22, 2007), <http://www.nytimes.com/2007/01/22/us/22bar.html> [<http://perma.cc/5UH6-6UN3>].

¹³⁶ Rigel C. Oliveri, *Discriminatory Housing Advertisements On-Line: Lessons from Craigslist*, 43 IND. L. REV. 1125, 1154 (2010); see also *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619–20 (1984) (explaining that the purpose of the constitutional right to intimate association is to protect the intimacy of individuals that resemble that of a family).

¹³⁷ See 42 U.S.C. § 3603(b).

¹³⁸ See Walsh, *supra* note 132, at 610.

who rent out their ADUs will likely be able to employ the exemption, and victims of discrimination will not have a cognizable action under federal law.

In fact, some legal scholars have already touched on modern housing arrangements and whether they fall within the purview of the FHA. Airbnb, an online marketplace for short-term lodging that has taken off over the last decade, allows hosts to offer public accommodations to an unlimited cohort of potential renters. Because Airbnb hosts provide housing, affirmative findings in which Airbnb facilitates racial discrimination, and further reducing racial integration, may provide a cause of action under the FHA.¹³⁹ This tends to be the case: minority users are “systematically denied lodging by Airbnb hosts.”¹⁴⁰ While one would hope that Airbnb guests would have a prima facie case against Airbnb for discrimination in violation of the FHA, courts have actually held that the Mrs. Murphy exemption applies to these shared-living arrangements in which spare bedrooms or units are rented out.¹⁴¹ In this regard, as a mode of shared living, ADUs appear to be facially similar to Airbnbs. Moreover, if associational rights are protected under the kind of temporary housing that Airbnbs provide,¹⁴² it logically follows that long-term living arrangements (i.e., ADUs), in which the association is more frequent and pervasive, will have the same protection.

Regardless of the legislative intent behind the passage of California’s ADU laws, it appears that homeowners who build and subsequently rent ADUs will have the freedom under federal law to discriminate in any manner and on the basis of any protected characteristic. As the Eighth Circuit pointed out, the FHA “prohibit[s] all forms of [housing] discrimination, sophisticated as well as simpleminded, and thus disparity of treatment between whites and blacks, burdensome application procedures, and tactics of delay, hindrance, and special treatment must receive short shrift from the courts.”¹⁴³ Of course, that is assuming there is no exemption, which it looks like there will be. This is in part because Senator Walter Mondale’s outdated and problematic rationale for the Mrs. Murphy

¹³⁹ See Dayne Lee, *How Airbnb Short-Term Rentals Exacerbate Los Angeles’s Affordable Housing Crisis: Analysis and Policy Recommendations*, 10 HARV. L. & POL’Y REV. 229, 244 (2016).

¹⁴⁰ *Id.* Unsurprisingly, on the flip side, studies show that black American Airbnb hosts tend to earn 12% less than white American hosts for similar listings. *Id.*

¹⁴¹ See McLaughlin, *supra* note 124, at 153–54.

¹⁴² See Jaleesa Bustamante, *Airbnb Statistics*, IPROPERTYMANAGEMENT (Feb. 2, 2022), <http://ipropertymanagement.com/research/airbnb-statistics> [<http://perma.cc/DHL6-AEQ3>] (finding that the average Airbnb stay is just 4.3 nights).

¹⁴³ *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir. 1974).

exemption in the FHA utterly disregards the goal of ADUs amid the current state of affairs in California: “Where the loss in [FHA] coverage represents a very small fraction of the total housing supply—now and in the future—then I think we can give one slice of the loaf in order to save the remainder of the loaf.”¹⁴⁴

Should ADUs, one of the only success stories of the California Legislature in fighting the housing crisis, be considered a “slice of the loaf?” Should overt discrimination, or discrimination in which homeowners are likely to use race as a proxy for income,¹⁴⁵ be excluded from the purview of the FHA because of a rationale that was intended to allow white homeowners the right to discriminate in “limited” circumstances in order to gain approval of the FHA? Unfortunately, whether such discrimination *should* occur is irrelevant as the FHA and its Mrs. Murphy currently read. When there is a Mrs. Murphy within the broad statutory language, the FHA allows and turns a blind eye to such enumerated modes of discrimination.

B. The Deafening Silence of the FEHA

Like many states, California adopted its own fair housing laws through the passage of the FEHA and the Unruh Civil Rights Act.¹⁴⁶ The general provision in the FEHA prohibiting housing discrimination in California provides the following:

It shall be unlawful: [f]or the owner of any housing accommodation to discriminate against or harass any person because of the race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information of that person.¹⁴⁷

Notably, the FEHA has expanded its reach by including more protectable characteristics in its general prohibition statute as compared to the FHA. This indicates that the California Legislature likely intended to provide broader protections and fewer exceptions in the context of housing discrimination.

¹⁴⁴ 114 CONG. REC. 2495 (1968).

¹⁴⁵ See Lu-in Wang, *Race as a Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013, 1017 (2004).

¹⁴⁶ CAL. CIV. CODE § 51 (West, Westlaw through Ch. 10 of 2022 Reg. Sess.). Because the Unruh Act prohibits *business* establishments from engaging in housing discrimination, it will not be discussed further in this Note, which is singularly concerned with non-business homeowners. See *Legal Records and Reports*, CAL. DEP'T OF FAIR EMP. AND HOUS., <http://www.dfeh.ca.gov/legalrecords/> [<http://perma.cc/M59J-GNWU>] (last visited Mar. 10, 2022).

¹⁴⁷ CAL. GOV. CODE § 12955(a) (West, Westlaw through Ch. 10 of 2022 Reg. Sess.). For purposes of the FEHA, “housing accommodation” is broadly construed to incorporate a seemingly limitless variety of housing, including the FHA’s own definition of dwelling. See *id.*; see also CAL. CODE REGS. tit. 2, § 12005(o) (2022).

Even still, like the FHA's Mrs. Murphy exemption, California expressly limits the applicability of its general prohibition. Discrimination for relevant purposes of the FEHA does *not* include the "[r]efusal to rent or lease a portion of an owner-occupied single-family house to a person as a roomer or boarder living within the household, provided that no more than one roomer or boarder is to live within the household."¹⁴⁸ Generally, the Supremacy Clause in the U.S. Constitution declares that federal law is the supreme law of the land.¹⁴⁹ However, when state law provides for *more* protections compared to those afforded by federal law, the former will prevail.¹⁵⁰ This appears to be the case for California's state fair housing law: the FEHA exemption provides broader protections for tenants, rather than homeowners, because its version of Mrs. Murphy is limited to a single-family home if and only if the homeowner rents to only one individual. But this simplistic assumption is misguided, as this Note will point out in the discussion below.

1. What is a Household?

Unfortunately, there is little guidance from California courts¹⁵¹ and agencies interpreting its Mrs. Murphy exemption. For example, does "household" mean that the tenant has to live in the same *physical* unit? Must the tenant share customary living spaces, such as a kitchen or living room, with the homeowner for the FEHA exemption to apply? ADUs can be either attached or detached to the main housing unit; does it matter for purposes of the FEHA exemption? Because ADUs are meant to be incorporated in areas zoned for traditional single-family housing, is this enough to satisfy the "single-family" requirement?

While the California Supreme Court has not provided an answer in the context of the FEHA, an en banc decision from 1980 provides some useful discussion. In *City of Santa Barbara v. Adamson*, the California Supreme Court held that the city ordinance's definition of family as either (1) related persons living together as a single household unit in a dwelling unit or (2) a group of not to exceed five persons, excluding servants, living together as a single housekeeping unit in a dwelling unit violated

¹⁴⁸ CAL. GOV. CODE § 12927(c)(2)(A).

¹⁴⁹ See U.S. CONST. art. VI, cl. 2.

¹⁵⁰ See, e.g., 42 U.S.C. §§ 3610(g)(2)(C), 3612(a); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986).

¹⁵¹ A simple search of section "12927(c)(2)" on both Westlaw and LexisNexis yields just three cases in which California state courts have addressed and interpreted this seemingly limited exemption.

the State Constitution.¹⁵² Despite invalidating this particular provision, the Court's analysis is crucial for purposes of this Note for two reasons: first, despite an invalid and unconstitutional provision, the Court upheld a strict local zoning ordinance;¹⁵³ second, the Court provided guidance on how to interpret "household" in the FEHA's Mrs. Murphy context.

First, it is clear that California interprets the terms "household unit" and "dwelling unit" as distinct from each other. Thus, despite the FEHA's reliance on federal law in construing its own definitions,¹⁵⁴ it seems that the term "household" was specifically employed in California's own Mrs. Murphy to be much narrower than the traditional, broad definition of "dwelling" utilized by the FHA.¹⁵⁵ Second, the analysis employed by the California Supreme Court provides further guidance on how to properly construe the meaning of a "household":

Appellants' *household* illustrates the kind of living arrangements prohibited by the ordinance's rule-of-five. They chose to reside with each other when Adamson made it known she was looking for congenial people with whom to *share her house*. Since then, they explain, they have become a *close group* with social, economic, and psychological *commitments* to each other. They *share* expenses, rotate chores, and eat evening meals *together* . . . Emotional support and stability are provided by the members to each other; . . . they have chosen to *live together* mainly because of their compatibility.¹⁵⁶

Again, the language implies that there is some intimate and familial nature to the living arrangement. While sharing a house might include even detached parts of the house (i.e., ADUs), sharing meals as a "close group" and deciding to "live together" suggests both emotion *and* physical togetherness. Thus, a household likely requires the sharing of those customary living spaces such that residents are actually *living together*.

Despite this seemingly narrow interpretation of "household" given that particular passage, the *Adamson* court later used conflicting language, which is particularly relevant within the context of ADUs. When proposing alternatives for the City of Santa Barbara in their quest to "establish, maintain and protect the essential characteristics of the [residential] district," the court stated the following: "Traffic and parking can be handled by limitations on the number of cars (applied evenly to all

¹⁵² See *City of Santa Barbara v. Adamson*, 610 P.2d 436, 442 (Cal. 1980).

¹⁵³ See discussion *supra* Section II.B.

¹⁵⁴ See generally CAL. CODE REGS. tit. 2, § 12005(o) (2022).

¹⁵⁵ See *Adamson*, 610 P.2d at 442.

¹⁵⁶ *Id.* at 438 (emphasis added) (citation omitted).

households) and by off-street parking requirements.”¹⁵⁷ Does that mean that the main house and the ADU (or junior ADU) are separate households for purposes of parking requirements? It is unlikely: the narrow interpretation of household is at odds with the amended language of section 65852.2 of the California Government Code, which provides for five circumstances prohibiting a city from changing the parking standards on one’s *parcel* of land upon the adoption of an ADU.¹⁵⁸ In other words, a city is unlikely to deal separately with the main house and the ADU when determining applicable parking standards.

Thus, the confusion surrounding the term “household” still persists because it is used in an array of different contexts. Despite the initial reading of the FEHA and its narrow exceptions, a narrow interpretation of household logically follows. But, according to the Ninth Circuit, the same constitutional concerns regarding the right to intimate association, which were used to justify the need for the Mrs. Murphy exemption in the federal FHA, are also applicable to the FEHA.¹⁵⁹ Despite the argument that California’s exemption to FEHA is far more limited than FHA’s Mrs. Murphy,¹⁶⁰ this Ninth Circuit interpretation might lead federal and state courts to broaden its application of the exemption, especially due to the lack of data, literature, and legal recognition of both the FEHA and its exceptions.

2. Idleness of the FEHA

Adding to the uncertainty with FEHA in the housing context, the law is used to combat discrimination in the employment context far more often than it is implicated to fight housing discrimination. Of the 22,584 complaints filed in 2019 with the Department of Fair Employment and Housing (“DFEH”)—California’s government agency responsible for receiving, investigating, and prosecuting violations of FEHA—only 934 (just over 4%) dealt with housing.¹⁶¹

¹⁵⁷ *Id.* at 440–42 (emphasis added).

¹⁵⁸ CAL. GOV’T CODE § 65852.2(d) (West, Westlaw through Ch. 12 of 2022 Reg. Sess.). The circumstances are: (1) the accessory dwelling unit is located within one-half mile walking distance of public transit; (2) the accessory dwelling unit is located within an architecturally and historically significant historic district; (3) the accessory dwelling unit is part of the proposed or existing primary residence or an accessory structure; (4) when on-street parking permits are required but not offered to the occupant of the accessory dwelling unit; and (5) when there is a car share vehicle located within one block of the accessory dwelling unit. *Id.*

¹⁵⁹ See Fair Hous. Council v. Roommate.com, LLC, 666 F.3d 1216, 1222 (9th Cir. 2012).

¹⁶⁰ See Scott M. Badami, *United States: The FHA’s “Mrs. Murphy” Exemption—A 50 State Guide*, MONDAQ (Apr. 23, 2013), <http://www.mondaq.com/unitedstates/real-estate/235406/the-fhas-mrs-murphy-exemption--a-50-state-guide> [<http://perma.cc/5H7L-6NSX>].

¹⁶¹ See Kevin Kish, *2019 Annual Report*, CAL. DEP’T OF FAIR EMP. AND HOUS. 8 (2019), http://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/10/DFEH_2019AnnualReport.pdf [<http://perma.cc/W9NC-7N3Z>].

In fact, there were only four civil complaints filed by the DFEH in 2019, none of which were based in the housing context.¹⁶²

Even more problematic is the fact that, up until 2019, the DFEH had never provided any sort of guidance or set of regulations interpreting the anti-discrimination laws in the FEHA's housing context.¹⁶³ But according to Kevin Kish, the Director of the DFEH, the "Council's biggest accomplishment in 2019 was the completion of the first ever housing regulations interpreting the fair housing provisions of the [FEHA]."¹⁶⁴ Yet, there is no guidance whatsoever regarding California's Mrs. Murphy: there is no separate definition for "household" as used in the section 12927(c)(2)(A), nor is there any actual reference to the provision itself, further exacerbating the lack of clarity with respect to FEHA and its Mrs. Murphy exemption.¹⁶⁵ According to *Brown v. Smith*, California courts of appeal will look to the FHA when interpreting the FEHA if and when they need guidance.¹⁶⁶ At this moment in time, state courts are in crucial need of guidance. Unfortunately, relying on the interpretation of federal law and the breadth of its Mrs. Murphy is not what California tenants need.

California's FEHA, and the application of its Mrs. Murphy exemption to ADUs, is far less clear than one would hope. Why are there so few lawsuits? A possible rationale is synonymous with one of Justice Ruth Bader Ginsburg's (many) iconic dissents: "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."¹⁶⁷ In other words, there are no lawsuits under the FEHA because its anti-discrimination provisions within the housing context are working. On the other hand, the limited number of housing lawsuits filed under the FEHA could in large part be due to the multi-step "Complaint Flowchart" that guides

¹⁶² See *id.* at 17.

¹⁶³ See *id.* at 4. This is critical, particularly because the FEHA dates back to 1963.

¹⁶⁴ See *id.*

¹⁶⁵ See CAL. CODE REGS. tit. 2, § 12005(o) (2022).

¹⁶⁶ See 64 Cal.Rptr.2d 301, 305 (1997). An interesting alternative comes from *Chun v. Del Cid*, where the court was tasked with interpreting whether the Rent Stabilization Ordinance of the City of Los Angeles exempted a property from its purview because the property was a single-family dwelling. See 246 Cal.Rptr.3d 488, 489 (2019). Although this case is only persuasive at best, for it did not interpret the FEHA, the court found that the exemption *did not* apply because there were separate living and communal areas. See *id.* at 494–95. The purpose of the exemption was to protect the intimacy of the family, whether related or not, who had to live and coexist together. See *id.* at 495. Reemphasizing that this case is not on point, it does provide an alternative, and perhaps more accurate, interpretation of the intent behind California's Mrs. Murphy exemption to the FEHA: to *narrowly* limit the protections to the intimate relationships of *roommates* rather than families in separate units on a single property.

¹⁶⁷ *Shelby Cnty. v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

the trajectory of any complaint filed with the DFEH.¹⁶⁸ There are several steps that must be taken prior to prosecuting a claim, and if the DFEH finds that the initial complaint is without merit, it will simply be dismissed.¹⁶⁹

Despite these preliminary musings, an answer was provided through my own personal contact with the DFEH. The initial response from the DFEH proved inconclusive, as I was informed it was unlikely that anyone could provide an accurate reason for a specific quantity (or lack thereof) of lawsuits.¹⁷⁰ The only data readily accessible was simply the number of lawsuits, but no adequate reason as to why the number is so low.¹⁷¹ But shortly thereafter, a far more useful, albeit anticlimactic answer was provided: fair housing litigators prefer federal court.

Even though a unanimous jury verdict is necessary in federal court,¹⁷² the simple truth is that Federal Rules of Civil Procedure are preferable for the fair housing plaintiff. Specifically, California state courts are incredibly busy and, consequently, some issues may not receive the review they require. Indeed, fair housing claims can be very intense. On the other hand, federal courts have the following: stricter timelines; procedures on how parties will meet and confer in a way that is preferential for plaintiffs, including a Magistrate judge that will work closely with the parties; specific persons to handle discovery motions, negotiations, and settlements; and far more efficiency regarding court appearances and paperwork.¹⁷³ But most importantly, the FEHA, like so many other state fair housing regulations, largely tracks federal law and existing regulations from U.S. Department of Housing and Urban Development (“HUD”).¹⁷⁴ The bottom line is that federal courts have handled most of the precedent, meaning that federal law is more pronounced simply due to a larger body of law and a longer tradition of bringing forth fair housing claims. Indeed, even though state law is more pronounced today, California courts presented with fair housing claims must turn to Ninth Circuit precedent. Essentially then, the FEHA is moribund simply because federal law is more likely to yield a favorable

¹⁶⁸ See *Complaint Flowchart (Non-Employment)*, CAL. DEP'T OF FAIR EMP. & HOUS. (2018), <http://dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH-A03P-Eng-ComplaintFlowchart-General.pdf> [<http://perma.cc/GN27-AEZE>].

¹⁶⁹ See *id.*

¹⁷⁰ See e-mail from DFEH Contact Center, to author (Apr. 22, 2021, 16:04 PST) (on file with author).

¹⁷¹ See *id.*

¹⁷² See FED. R. CIV. P. 48(b).

¹⁷³ See generally William R. Slomanson, *California-Federal Procedure Contrast: A Proposal*, 327 FED. RULES DECISIONS 1301, 1311–40 (2018).

¹⁷⁴ See *Sisemore v. Master Fin. Inc.*, 60 Cal. Rptr. 3d 719, 746 (Ct. App. 2007).

outcome because that is where the precedent is. But this conclusion is incredibly problematic because it merely reinforces the need for more interpretation of the FEHA: how can the FEHA yield more favorable results if it is never interpreted?

An initial read of the FEHA hints at broader protections to those bringing fair housing claims, and the likelihood of success in federal courts balances out these disparities. If federal and state courts evaluate claims under the FHA and the FEHA similarly, whereby available remedies are the only distinction,¹⁷⁵ claims under both federal and state law will likely be unsuccessful due to the applicable Mrs. Murphy exemption and the inadequate interpretation of “household.” But *even if* Mrs. Murphy is repealed or amended in the future (as this Note later suggests), ADU renters who feel they have been subjected to unlawful housing discrimination are not in the clear just yet. What housing discrimination currently looks like, and the burden of proof that claimants must satisfy, are issues completely distinct from a problematic Mrs. Murphy.

C. Disparate Impact: An Impossible Evidentiary Question

In 1991, the Civil Rights Division of the United States Department of Justice (“DOJ”) established the Fair Housing Testing Program (the “Program”).¹⁷⁶ Its purpose: to “identify unlawful housing discrimination based on race, national origin, disability, or familial status in violation of the [FHA]” using testers.¹⁷⁷ These testers are individuals who pose as potential renters “without any bona fide intent to rent or purchase housing.”¹⁷⁸ But even before the adoption of the Program, the Supreme Court held that a tester has standing to sue under the FHA, despite having no intent to buy or rent a home, because the injury suffered was of the kind the FHA was designed to guard

¹⁷⁵ See Olivia Solon, *Airbnb Host Who Canceled Reservation Using Racist Comment Must Pay \$5,000*, THE GUARDIAN, <http://www.theguardian.com/technology/2017/jul/13/airbnb-california-racist-comment-penalty-asian-american> [<http://perma.cc/89Z9-SPHA>] (July 14, 2017, 12:44 PM) (highlighting that both federal and state remedies provide for damages and injunctive relief in housing discrimination claims, but state remedies might also incorporate public policy remedies, such as mandating anti-discrimination training).

¹⁷⁶ See *Fair Housing Testing Program*, U.S. DEPT OF JUST., <http://www.justice.gov/crt/fair-housing-testing-program-1> [<http://perma.cc/T4XL-9959>] (last updated Dec. 3, 2021). The Program was spearheaded after a 1989 survey found that “[twenty-five] metropolitan areas revealed widespread discrimination in the sale and rental of housing.” See Andrea Panjwani, *Beyond the Beltway: Testers, Fair-Housing Organizations Fight Bias Under the Fair Housing Act*, 4 J. AFFORDABLE HOUS. & CMTY. DEV. L. 15, 15 (1994) (finding that 60% of black Americans suffered racial discrimination when trying to rent in the cities with the highest cases of widespread discrimination).

¹⁷⁷ *Fair Housing Testing Program*, *supra* note 176.

¹⁷⁸ *Id.*

against.¹⁷⁹ In the federal system alone, the Program has resolved more than 109 unlawful practices and recovered more than \$14.3 million in damages.¹⁸⁰ The primary piece of evidence in finding violations of the FHA involve “misrepresenting the availability of rental units or offering different terms and conditions” based on protected characteristics such as race.¹⁸¹ Recognizing the need to detect housing discrimination at the state level, local California governments have adopted their own testing practices.¹⁸² Moreover, in a recent budget proposal for the 2021-22 fiscal year, the DFEH requested \$3.9 million over the next two years, in addition to eight new full-time positions, to aid the DFEH in “build[ing] a fair housing testing program and attendant enforcement capability.”¹⁸³ This current budget push only further evidences California’s awareness of its housing crisis and the racial disparity thereof.

In the ADU context, the applicability of the disparate impact standard arises because homeowners may not explicitly discriminate based on race. Nevertheless, based on the statistics referenced to above,¹⁸⁴ homeowners renting out ADUs may implicitly favor people from their own SES, resulting in an enormous racial disparity.

Assuming that a fair housing plaintiff is not barred by Mrs. Murphy (in state or federal court) in the future, or that the term “household” narrows the FEHA’s Mrs. Murphy which might reinvigorate its use, there is still the difficult burden in making out a successful claim under federal and state fair housing law. Scholars have pointed out that America is “[i]n an era . . . characterized by . . . egalitarian ideals,” where unconscious biases drive our behavior more so than “overt racial

¹⁷⁹ See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982) (“Whereas Congress, in prohibiting discriminatory refusals to sell or rent . . . required that there be a ‘bona fide offer’ to rent or purchase, Congress plainly omitted any such requirement insofar as it banned discriminatory representations . . .”).

¹⁸⁰ See *Fair Housing Testing Program*, *supra* note 176.

¹⁸¹ See *id.*

¹⁸² See, e.g., *Fair Housing Testers Needed*, FAIR HOUS. FOUND., <http://fhfca.org/testers/> [<http://perma.cc/5Z3F-V7NX>] (last visited Feb. 13, 2022) (posting an advertisement for testers in both Los Angeles and Orange County); *Become a Fair Housing Investigator*, FAIR HOUS. ADVOC. OF N. CAL., <http://www.fairhousingnorcal.org/become-an-investigator.html> [<http://perma.cc/9T7K-QFP5>] (last visited Feb. 13, 2022) (explaining the importance of housing discrimination testers and the need for volunteers).

¹⁸³ See HOUSING EQUITY OUTREACH & ENFORCEMENT, BUDGET CHANGE PROPOSAL, 1700-001-BCP-2021-GB, STATE OF CAL. DEP’T OF FAIR EMP. & HOUS (Feb. 2020), http://esd.dof.ca.gov/Documents/bcp/2122/FY2122_ORG1700_BCP4444.pdf [<http://perma.cc/BM26-V6CQ>] (noting that, prior to fiscal year 2019-20, there were no fair housing testing programs).

¹⁸⁴ See discussion, *supra* Section II.C.

bigotry.”¹⁸⁵ Because of this, limiting actionable claims to intentional discrimination is inadequate in modern times: “[S]ituations in which discrimination is easy to see are not the ones in which it is most likely to be found.”¹⁸⁶ As a result, the last decade has seen a massive increase in the legal discussion surrounding disparate impact claims, including formal recognition by the courts.

Current fair housing laws recognize two types of discrimination: intentional discrimination and disparate impact. However, the latter was not always recognized.¹⁸⁷ Today, this alternative “allow[s] claimants to avoid the onerous burden of proving intent.”¹⁸⁸ By 2013, twelve federal circuit courts recognized disparate impact claims under the FHA, albeit with differing application and burden of proof standards.¹⁸⁹ To alleviate this disconnect across federal circuit courts, the Secretary of HUD issued a regulation to establish a burden-shifting framework for adjudicating claims of disparate impact under the FHA in 2013.¹⁹⁰ In its most general terms, the framework provides that courts ought to assess discriminatory effect of a challenged practice, whether the discrimination is justified or necessary to achieve a “substantial, legitimate, nondiscriminatory interest,” and whether less discriminatory alternatives exist for the challenged practice.¹⁹¹ But less than two years later, when the Supreme Court was first presented with a claim of disparate impact

¹⁸⁵ See Wang, *supra* note 145, at 1017; see also Eduard Bonilla-Silva, *The Linguistics of Color Blind Racism: How to Talk Nasty about Blacks without Sounding “Racist,”* 28 CRITICAL SOCIO. 41, 46 (2002) (“[P]ost-civil rights racial norms disallow the open expression of *direct* racial views and positions”); ESSED, *supra* note 90, at 26–27; Moran, *supra* note 90, at 900 (“Race-conscious remedies have been used for decades, and the evil of racism that they addressed seems to be in decline. Yet, racial inequality remains a robust feature of American life by nearly any commonly accepted measure of well-being.”); Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment*, 79 BROOK. L. REV. 1141, 1161 (2013) (“Although overt racism has been forced underground, the inequality of the system remains.”); Lincoln Quillian, *Does Unconscious Racism Exist?*, 71 SOC. PSYCH. Q. 6 (2008). *But see, e.g.*, Solon, *supra* note 175 (discussing an Airbnb host who canceled a reservation, just minutes before the guest arrived, via text message declaring she would not rent to an Asian guest).

¹⁸⁶ See Wang, *supra* note 145, at 1020; see also Margery Austin Turner et al., *Executive Summary: Housing Discrimination Against Racial and Ethnic Minorities 2012*, U.S. DEPT. OF HOUS. & URB. DEV. 9, June 2013 (“The most blatant forms of discrimination have declined since the passage of the 1968 Fair Housing Act.”).

¹⁸⁷ See Quinn Marker, *Zoning for All! Disparate Impact Liability Amidst the Affordable Housing Crisis*, 88 U. CIN. L. REV. 1105, 1110 (2020).

¹⁸⁸ Conor Arpey, *The Multifaceted Manifestations of the Poor Door: Examining Forms of Separation in Inclusionary Housing*, 6 AM. U. BUS. L. REV. 627, 634 (2017).

¹⁸⁹ See Marker, *supra* note 187, at 1111.

¹⁹⁰ See 24 C.F.R. § 100 (2013).

¹⁹¹ See *Tex. Dep’t Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 527 (2015); see also Robert G. Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After Inclusive Communities*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 685, 692–97 (2016) (providing analysis on the general progression of a housing-related disparate impact claim).

following HUD's regulations, the Court "limited its bite"¹⁹² by instituting a "robust causality requirement" to ensure that racial imbalance, alone, will not stand on its own to make out a disparate impact claim.¹⁹³ Properly understood, "disparate impact claims concentrate on discriminatory *results* of practices and policies" as an alternative to a showing of discriminatory intent.¹⁹⁴ Unfortunately, the Court's interpretation of the disparate impact standard effectively blurred the distinction between intentional discrimination and disparate impact when Justice Kennedy stressed that disparate impact liability could not be "imposed based solely on a showing of a statistical disparity."¹⁹⁵ In effect, a claim arising out of disparate impact theory must *prove* intent rather than *infer* intent.

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, petitioner argued that the Texas Department of Housing & Community Affairs violated the FHA when it disproportionately allocated housing tax credits to predominantly low-income, black inner-city neighborhoods compared to tax credits given in predominantly white suburban neighborhoods.¹⁹⁶ The resulting effect was the perpetuation of segregated housing patterns.¹⁹⁷ But by narrowing its application of the disparate impact standard, the Supreme Court chose to protect "housing authorities and private developers" from "being held liable for racial disparities"¹⁹⁸ rather than utilize the FHA to its fullest extent. Moreover, the Court feared that claims of disparate impact under the FHA would "cause race to be used and considered in a pervasive way," thereby raising "serious constitutional questions."¹⁹⁹ Consequently, the Supreme Court undermined HUD's desire to make disparate impact claims more cognizable under the FHA, and lower federal courts have subsequently followed the

¹⁹² See Marker, *supra* note 187, at 1112.

¹⁹³ See 576 U.S. at 542.

¹⁹⁴ See Arpey, *supra* note 188, at 634 (emphasis added).

¹⁹⁵ See 576 U.S. at 540.

¹⁹⁶ *Id.* at 526.

¹⁹⁷ *Id.*

¹⁹⁸ See *id.* at 541–42.

¹⁹⁹ *Id.* at 542–43 ("Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision."); see also Lindsey E. Sacher, *Through the Looking Glass and Beyond: The Future of Disparate Impact Doctrine under Title VIII*, 61 CASE W. RESV. L. REV. 603, 604, 616 (2010) (positing that the disparate impact doctrine may directly conflict with the Fourteenth Amendment's guarantee of equal protection because it mandates "race-conscious decision making"); Adam Weiss, Grutter, *Community, and Democracy: The Case for Race-Conscious Remedies in Residential Segregation Units*, 107 COLUM. L. REV. 1195, 1197 (2007) (discussing the fact that changes in the Supreme Court's equal protection jurisprudence have made lower courts "hesitant to use race" in the context of awarding race-conscious remedies to promote housing desegregation).

Court's guidance.²⁰⁰ Additionally, despite California's express regulatory language aimed at combating disparate impact in housing practices,²⁰¹ its state courts similarly defer to the hesitancy of the *Inclusive Communities* Court.

For example, in the summer of 2020, a California state appellate court interpreted the FEHA's disparate impact claim in a similar light. Despite a series of projects in the Los Angeles area that would create a barrier to fair housing by displacing lower-income Latino and black residents, the court acknowledged the "robust causality requirement" identified in *Inclusive Communities* by noting that neither the FHA nor the FEHA requires housing authorities to "reorder their priorities" by creating affordable housing.²⁰² As a result, proving disparate impact is no small feat: both federal and state courts require a strong showing of causality, despite the disparate impact standard being tailored at challenging practices that have a "disproportionately adverse effect on minorities."²⁰³

Absent a showing of intentional discrimination, the FHA and the FEHA claim to offer an alternative in disparate impact claims. However, courts have historically precluded this as a viable option. And when it comes to disparate impact claims in the context of ADUs, another challenge for complainants will likely arise: how does a private homeowner fit within a contextual analysis that predominantly deals with landlords existing in a more commercial setting? General examples of disparate impact claims include, but are not limited to, the following examples:²⁰⁴

1. Rather than using income as a standard, apartment complexes require potential tenants to have a full-time job, thereby having a disparate impact on disabled individuals (i.e., veterans) who might otherwise be able to afford the apartment despite not having the ability to work full-time;

²⁰⁰ See Marker, *supra* note 187, at 1114–18 (offering a general account of recent circuit court decisions, which continue to provide inconsistent application of a standard in proving a disparate impact claim under the FHA).

²⁰¹ See CAL. CODE REGS. tit. 2, § 12060 (2021) ("A practice that is proven under Section 12061 to create, increase, reinforce, or perpetuate segregated housing patterns is a violation of the [FEHA] independently of the extent to which it produces a disparate effect on protected classes.")

²⁰² AIDS Healthcare Found. v. City of L.A., 264 Cal. Rptr. 3d 128, 139–40 (Ct. App. 2020).

²⁰³ See 576 U.S. 519, 559 (emphasis added).

²⁰⁴ See NFHA *Disparate Impact is Illegal Discrimination: A Guide to Understanding Disparate Impact Under the Fair Housing Act*, NFHA (2019), <http://nationalfairhousing.org/wp-content/uploads/2019/03/Disparate-Impact-Info-Pack-2019-Updated.pdf> [<http://perma.cc/MC53-3YN9>].

2. Absent a legitimate reason for the policy, a local government prevents denser, more affordable housing from being developed, thereby excluding people of color in that area;²⁰⁵ and
3. Lending practices in which officers can use their own discretion in determining loan policies, which has led to higher prices for women who have similar credit profiles to male counterparts.

So where do ADUs fit into this analysis? As the Supreme Court noted in *Inclusive Communities*, there must first exist a causal connection with statistical evidence.²⁰⁶ However, a homeowner renting out an ADU is a private individual. And unlike the examples enumerated above, which demonstrate an entity's consistent practices over time, a private homeowner is simply renting out a unit on private property, most likely zoned for single-family use.²⁰⁷

If Homeowner A chooses to require a tenant to work full-time²⁰⁸ (either as a student or member of the workforce) or prefers people with "local ties" as opposed to "outsiders,"²⁰⁹ is that enough to make out a disparate impact claim under fair housing laws? Based on the Supreme Court's analysis and interpretation, the answer is no.²¹⁰ A disparate impact claim, which alleges that a single homeowner acted in a way to negatively impact racial minorities in these isolated contexts, is unlikely to survive the dismissal stage. Research testing under the Program is based on "covering many different housing providers, rather than multiple

²⁰⁵ See *Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 17 (1988).

²⁰⁶ See 576 U.S. at 543.

²⁰⁷ CHAPPLE ET AL., *supra* note 8, at 15 (revealing that 92% of California ADUs are built on parcels zoned for single-family residential use).

²⁰⁸ Effective on January 1, 2020, California's state fair housing laws prohibit source of income discrimination. Therefore, landlords "cannot refuse to rent to someone, or otherwise discriminate against them, because they have a housing subsidy, such as a Section 8 Housing Choice Voucher, that helps them to afford their rent." *Source of Income FAQ*, DFEH (Feb. 2020), http://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/02/SourceofIncomeFAQ_ENG.pdf [<http://perma.cc/UGV5-F9P7>].

²⁰⁹ See Schwemm & Bradford, *supra* note 191, at 694.

²¹⁰ See 576 U.S. at 543.

A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact. For instance, a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all.

Id.

tests to clearly establish discrimination by a single provider.”²¹¹ Indeed, the requirements for offering substantial and actionable data to meet this initial burden of proof are tenuous: *significant* discriminatory effects are crucial.²¹² In fact, the Court noted that “private policies are not contrary to the disparate-impact requirement unless they are ‘artificial, arbitrary, and unnecessary barriers.’”²¹³

A potential alternative for claimants might be to bring suit under a theory of vicarious liability, which the Supreme Court recognizes under the FHA (so it is likely the FEHA will track).²¹⁴ A handful of local governments and coalitions in California are considering building ADUs and subsidizing them for homeowners who are willing to rent to lower-income families.²¹⁵ Rather than sue individual homeowners, some might try to go after the companies to demonstrate the requisite policy has a significant discriminatory effect. Though it is likely that remedies will be limited to arbitration.²¹⁶

Even if the claim were to survive the initial dismissal stage, defendant homeowners will still have an opportunity to rebut the presumption by providing a legitimate interest. And courts have broadly construed this “case-specific, fact-based inquiry”²¹⁷ to provide discretionary and considerable leeway.²¹⁸ In fact, courts may even further broaden the scope of “legitimate interest” so as to continue encouraging folks to construct ADUs. If defendants are successful, claimants must yet again provide sufficient evidence to affirmatively demonstrate that there are alternative policies with *less* discriminatory effect than the one adopted by defendant.²¹⁹ This presents yet another evidentiary issue for claimants seeking to enforce fair housing rights in the context of ADUs: claimants

²¹¹ See Turner et al., *supra* note 186, at 14 (noting the “nuanced narratives” required by enforcement protocols to determine “exactly what happened in an individual test” that may or may not yield evidence of discrimination).

²¹² See Schwemm & Bradford, *supra* note 191, at 698–700.

²¹³ See 576 U.S. at 543 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

²¹⁴ See Meyer v. Holley, 537 U.S. 280, 285 (2003).

²¹⁵ See *ADU Aid Programs Across the U.S.*, VILLA, <http://villahomes.com/blog/adu-aid-programs> [<http://perma.cc/2MHD-MJXN>] (last visited Feb. 8, 2022) (identifying financing programs in Los Angeles, Marin County, Newport Beach, Pasadena, and Santa Cruz that incentivize homeowners who agree to rent out their ADUs to low-income tenants).

²¹⁶ See McLaughlin, *supra* note 124, at 164, 173.

²¹⁷ See Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 32,11460, 32,11470 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

²¹⁸ See Schwemm & Bradford, *supra* note 191, at 696 nn.47–48 (referencing caselaw that has yielded different results in ascertaining if defendants can meet this burden).

²¹⁹ See *id.* at 697; see also Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 32,11460, 32,11473 (Feb. 15, 2013) (“HUD agrees that a less discriminatory alternative must serve the respondent’s or defendant’s substantial, legitimate nondiscriminatory interests, must be supported by evidence, and may not be hypothetical or speculative.”).

must prove that a readily identifiable alternative would impact a *lower proportion* of members of a protected class (i.e., racial minorities) than the original proportion impacted by the *individual* homeowner's facially neutral practice.²²⁰ And more likely than not, such evidence will be unavailable in the context of ADUs to make the necessary comparison.²²¹

Why is this burden so difficult to meet? As the Supreme Court pointed out, these limitations are necessary because without them, private entities (i.e., homeowners) may no longer wish to construct affordable housing units for low-income families and individuals, thereby upsetting the very purpose of the state and federal fair housing laws—and ADUs—if defendants were to be subjected to “abusive disparate-impact claims.”²²² This takes us back to the balancing of “rights” that the Supreme Court engaged in in *Euclid*:²²³ it is the abuse suffered by homeowners with ADUs that will be the underlying concern rather than the individuals who are still unable to maintain affordable housing.

In the years since the 1926 Supreme Court ruling [which upheld the constitutionality of local zoning practices], numerous white suburbs in towns across the country . . . prevent[ed] low-income families from residing in their midst. Frequently, class snobbishness and racial prejudice were so intertwined that when suburbs adopted such ordinances, it was *impossible* to disentangle their motives and to prove that the zoning rules violated constitutional prohibitions of racial discrimination.²²⁴

Almost one hundred years later—as we cling to the promise of egalitarian ideals—and after decades of social unrest, extensive findings of significant residential segregation, and unequal housing for racial minorities, discriminatory practices are still permissible so long as they are facially “unintentional.”²²⁵ More likely than not, claimants will not have access to the necessary data when they are discriminated against in the process of renting out an ADU.

²²⁰ See Schwemm & Bradford, *supra* note 191, at 747; see also Hila Keren, *Law and Economic Exploitation in an Anti-Classification Age*, 42 FLA. ST. U. L. REV. 313, 317–18 (2015) (noting that the current judicial approach of anti-classification within the racial context makes it incredibly difficult for claimants to satisfy a burden which requires the comparison of groups).

²²¹ See Schwemm & Bradford, *supra* note 191, at 747.

²²² See *Tex. Dep't Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 544 (2015) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

²²³ See *supra* notes 77–78 and accompanying text.

²²⁴ ROTHSTEIN, *supra* note 95, at 53 (emphasis added).

²²⁵ See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 269–70 (1977) (reasoning that conformity to general practices, despite the fact that the policy rationale “[bore] more heavily on racial minorities,” was enough to defeat “an inference of invidious purpose”).

IV. MOVING FORWARD

To be clear, the purpose of this Note is *not* to argue that ADUs are wholly irrelevant and should not be utilized. Instead, the purpose is to address how the legislative intent with the passage of the four bills may be moot given the current structure of both state and federal fair housing laws. Fair housing laws were designed to remedy a segregated housing market, yet legal scholars are quick to recognize that the FHA, and by extension its state counterparts, have been the least effective of any of the civil rights laws.²²⁶ Victims of discrimination in search of affordable housing should not have the burden of additional time and cost required by filing suit. Moreover, because state fair housing laws are rarely used, and federal fair housing laws do not provide a remedy absent litigation,²²⁷ housing plaintiffs in the ADU market may not have an adequate remedy. So, while ADUs might be a piece of the puzzle in alleviating the housing crisis, they will only be a small piece given the practical effect of fair housing laws. To address these issues, this Part provides additional solutions that might help California in the way it needs.

A. An Obvious First Step: The Repeal of Article 34

Rather than rely exclusively on the discretion of private homeowners or alternative civil rights law,²²⁸ the California Legislature should work closely with local governments—the very entities that generally oppose bills that change or disrupt the housing landscape in California.²²⁹ One necessary call-to-action is for the repeal of article 34 in California’s State Constitution.²³⁰ While a lofty goal, the change is long overdue. section 1 of article 34 states the following:

No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which

²²⁶ See John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 UNIV. MIAMI L. REV. 1067, 1071 (1998).

²²⁷ See Theresa Keeley, *An Implied Warranty of Freedom from Sexual Harassment: The Solution for Harassed Tenants Where the Fair Housing Act Has Failed*, 38 U. MICH. J. L. REFORM 397, 444 (2005).

²²⁸ See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. §§ 1981–82); see also Joseph Tobener, *Housing Discrimination in California: What Is It and What Can Tenants Do About It*, TOBENER RAVENSCROFT (June 10, 2021), <http://www.tobenerlaw.com/housing-discrimination-in-california-what-is-it-and-what-can-tenants-do-about-it/> [http://perma.cc/G72W-WATF] (“In addition, it is important to point out that regardless of the federal FHA and state FEHA exemptions, the 1866 Civil Rights Act permits no exemptions with respect to race. It is illegal to discriminate on the basis of race for any and all housing transactions.”).

²²⁹ See discussion *supra* Section II.B–C.

²³⁰ See S. 2, 2021–22 Leg., Reg. Sess. (Cal. 2020).

it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.²³¹

Even though a three-judge federal district court in California determined that article 34 inferentially denies housing to poor people, and therefore racial minorities,²³² the Supreme Court reversed and upheld article 34.²³³ The majority refused to acknowledge a “clear purpose to disadvantage blacks or other racial or ethnic minorities” in the California housing market.²³⁴ In this challenge under the Equal Protection Clause under the Fourteenth Amendment, a feigned preference for democracy guided the majority’s willful blindness regarding the inherent “bias, discrimination, [and] prejudice” that is found in article 34.²³⁵ As Professor Kenneth Stahl points out, article 34 creates an assumption that land use control is a legal right conferred to California’s local governments, and there has been little success in changing that problematic narrative.²³⁶

The California Legislature, despite its commitment to provide more affordable housing, retains the provision referenced above which prevents low-rent housing projects absent electoral approval. This provision was approved prior to both state and federal fair housing laws,²³⁷ which mandates an inference that it failed to seriously consider resulting residential racial segregation. Moreover, it resulted in preference for a wide variety of real estate construction that did not include affordable housing.²³⁸ Notwithstanding three previous failed attempts to

²³¹ CAL. CONST. art. 34, § 1. For purposes of Article 34, the term “low rent housing project” means “any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise.” *Id.* For purposes of Article 34, the term “persons of low income” means “persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.” *Id.*

²³² See *Valtierra v. Hous. Auth. of City of San Jose*, 313 F. Supp. 1, 4 (N.D. Cal. 1970).

²³³ See *James v. Valtierra*, 402 U.S. 137, 142–43 (1971).

²³⁴ See George Lefcoe, *The Public Housing Referendum Case, Zoning, and the Supreme Court*, 59 CAL. L. REV. 1384, 1385 (1971).

²³⁵ See 402 U.S. at 141.

²³⁶ See Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193, 1209 (2008).

²³⁷ See CAL. CONST. art. XXXIV, § 1 (1950) (adopted eighteen years prior to the FHA).

²³⁸ See, e.g., Liam Dillon, *A Dark Side to the California Dream: How the State Constitution Makes Affordable Housing Hard to Build*, L.A. TIMES (Feb. 3, 2019, 8:30 AM), <http://www.latimes.com/politics/la-pol-ca-affordable-housing-constitution-20190203-story.html> [<http://perma.cc/KBW4-SZGK>] (referencing the decision, following the passage of Article 34, to build Chavez Ravine as the Dodgers’ new stadium in lieu of more affordable housing).

repeal article 34,²³⁹ the fight for repeal must continue. Because even if local governments have the financial capability to create lower-income housing, the law will prevent them from doing so. This obsession with local control is unique to California, no other state has a similar provision in their constitution which requires voter approval for public housing.²⁴⁰ The provision may facially prioritize the democratic ideal of voter approval, but it is undoubtedly discriminatory in purpose and effect. While repealing this “stain” on the California Constitution will not solve everything, it is a crucial step.

B. Much Ado About Zoning

As mentioned previously in this Note, ADUs are likely going to play a crucial role in providing new housing supply. However, as the law currently stands, particularly in the context of state and federal fair housing laws, ADUs are not the Holy Grail. State and local governments, in addition to the electorate as a whole, must look at other things to work in tandem with ADUs. In spite of the historic failure of legislation aimed at eliminating *Euclidian* zoning in California,²⁴¹ both local and state governments must continue to push it forward.

In February of 2021, Berkeley’s city council “unanimously approved a resolution calling for the end of exclusionary zoning by 2022.”²⁴² The decision is quite symbolic, as one of its neighborhoods was among the first parts of the nation to adopt single-family zoning in 1916.²⁴³ Indeed, because almost 82% of the Bay Area is currently zoned for residential use, this is a crucial step for the northern part of California.²⁴⁴ Ironically, anti-density zoning (i.e., continued preference for single-family zoning) actually leads to higher housing costs,²⁴⁵ and furthermore, studies show that single-family zoning leads to more racially segregated populations well into the 21st century.²⁴⁶ Holding onto the “property right” promised by exclusionary zoning perpetuates racial residential segregation. Thus, cities throughout the state

²³⁹ *See id.*

²⁴⁰ *See id.*

²⁴¹ *See supra* Table 1.

²⁴² Laura Bliss, *The Upzoning Wave Finally Catches up to California*, BLOOMBERG (Mar. 1, 2021, 5:00 AM), <http://www.bloomberg.com/news/articles/2021-03-01/california-turns-a-corner-on-single-family-zoning> [<http://perma.cc/8MVG-ZHTD>].

²⁴³ *See id.*

²⁴⁴ *See id.*

²⁴⁵ *See* Jonathan Rothwell, *Land Use Politics, Housing Costs, and Segregation in California Cities*, TERNER CTR. FOR HOUS. INNOVATION (Sept. 5, 2019), <http://turnercenter.berkeley.edu/research-and-policy/land-use-politics-housing-costs-and-segregation-in-california-cities/> [<http://perma.cc/3A9B-WYAS>].

²⁴⁶ *See id.*

ought to follow Berkeley and seriously consider adopting resolutions to allow for more density, which includes the same kind of gentle density offered by ADUs.

Notably, SB 9, colloquially referred to as the California Housing Opportunity and More Efficiency (“HOME”) Act,²⁴⁷ went into effect across California on January 1, 2022.²⁴⁸ This recent state bill effectively allows homeowners up to four residential units on their property.²⁴⁹ For example, a homeowner with land currently zoned single-family can *first* split their parcel into two and sell one-half of it and *second* build an ADU on each half of the parcel. Now, up to four families can live on a lot originally zoned single-family. The potential for the HOME Act in alleviating the housing crisis in California mirrors the potential for ADUs as pointed out in this Note. But the issue remains: the housing must be *fair* and *affordable*. If the HOME Act simply allows homeowners to replicate current segregation, the bill will simply add to the pile of ineffective housing legislation.²⁵⁰

C. Using RHNA as Intended

The effects of *Euclidian* zoning extend far beyond a preference for single-family zoning in California. Rather, the consequences of the nearly 100-year-old Supreme Court case allow local governments to evade the call to produce more affordable housing.²⁵¹ Indeed, despite more than fifty years having passed since the California Legislature established local RHNA requirements, local failure to produce sufficient low-income housing is nevertheless “compliant” with the law. This is a significant problem, especially if ADUs are to help alleviate the housing crisis. Theorizing about how ADUs can contribute without actually enforcing their production should not be sufficient compliance. Thus, another affirmative action from the state

²⁴⁷ *Senate Bill 9 is the Product of a Multi-Year Effort to Develop Solutions to Address California’s Housing Crisis*, SB 9 THE CAL. H.O.M.E. ACT, <https://focus.senate.ca.gov/sb9> [<https://perma.cc/8HHG-29PL>] (last visited Apr. 15, 2022).

²⁴⁸ Liam Dillon, *Some California Cities Try to Blunt New Duplex Law with Restrictions on New Developments*, L.A. TIMES (Nov. 30, 2021, 8:31 AM), <http://www.latimes.com/homeless-housing/story/2021-11-30/some-california-cities-aim-to-blunt-new-duplex-law> [<http://perma.cc/H25Y-Q8F8>].

²⁴⁹ *See id.*

²⁵⁰ *See* Christian Horvath et al., *The Absolute Wrong Way to Solve California’s Affordable Housing Crisis*, L.A. TIMES (July 9, 2021), <http://www.latimes.com/opinion/story/2021-07-09/california-affordable-housing-sb9> [<http://perma.cc/RE2K-ZN5W>] (“Upzoning of the sort proposed [by SB 9] does not produce more affordable housing. Rather, it increases the underlying land’s value, making new construction unnecessarily more expensive and, over time, raising values and rents throughout neighborhoods.”).

²⁵¹ *See supra* notes 80–86 and accompanying text.

government ought to be amending RHNA to hold local governments truly accountable in meeting their housing needs.

D. Away with Mrs. Murphy

As state and federal fair housing laws currently stand, ADUs might not increase the housing supply for Californians who are in the greatest need. As discussed in Parts III.B and IV of this Note, the “rights” of traditionally white homeowners necessarily eliminate the development of new housing. Mrs. Murphy continues to perpetuate the racial residential discrimination that has been historically tied to *Euclidian* zoning and government regulation: “Initially controversial, the bargain represented by Mrs. Murphy remains long after norms would judge the beneficiaries to be bigots.”²⁵² Contrary to what its major proponents have argued, “Mrs. Murphy does not seek to protect her family home from outside intrusion.”²⁵³ In the ADU context, she has already welcomed the intrusion. Instead, the “claimed right not to associate is really a claim of a right to discriminate.”²⁵⁴

While problematic from its birth,²⁵⁵ Mrs. Murphy raises additional issues in the context of ADUs. It is improper to view what each individual Mrs. Murphy is doing with her own backyard for two crucial reasons. First, the purpose of ADUs is quite clear: increase the housing supply statewide.²⁵⁶ If ADUs are going to meet this lofty goal, they cannot be viewed as something separate from the traditional real estate market. At the end of the day, “[t]he overriding fact remains that Mrs. Murphy makes her units or rooms available to the public *in return for money*.”²⁵⁷ Whether or not profit is the underlying motivation in renting out an ADU, all Mrs. Murphys are inherently engaged in a business.²⁵⁸ So, because each ADU is aggregated over the entire state for purposes of increasing the housing supply, it must therefore follow that each Mrs. Murphy is aggregated over the state. Even without further elaboration, the issue is clear: advocates of Mrs. Murphy want to protect intimate associational rights by *explicitly allowing over discrimination in the sale and rental in housing*. But it is impracticable to protect *individual*

²⁵² Wilson, *supra* note 1, at 973.

²⁵³ Walsh, *supra* note 132, at 631.

²⁵⁴ *See id.*

²⁵⁵ Compare 42 U.S.C. §§ 3603(b), 3604 (offering broad exceptions to the prohibition on housing discrimination), and 42 U.S.C. § 1982 (codifying a certain provision of the Civil Rights Act of 1866 which bans all forms of racial discrimination in the sale or rental of housing without any exceptions).

²⁵⁶ *See supra* notes 28–31 and accompanying text.

²⁵⁷ Walsh, *supra* note 132, at 631 (emphasis added).

²⁵⁸ *See id.*

associational rights while simultaneously creating new housing supply in the *aggregate*. Mrs. Murphy can have no place in the ADU rental market. And although Mrs. Murphy ought to be seriously reconsidered to take account for modern living arrangements and housing needs, amending federal law is a lofty endeavor. Nevertheless, the immediate goal is clear: to continue making changes.

E. Reinvigorating the FEHA in State Court

Historically, testers in the Program have been used to demonstrate a frequent *pattern* or *practice* of housing discrimination.²⁵⁹ According to the DOJ, a pattern or practice occurs “when the evidence establishes that the discriminatory actions were the defendant’s *regular* practice, rather than an *isolated* instance.”²⁶⁰ Thus, in the context of ADUs, an individual occurrence of housing discrimination might not be enough despite the aggregation of Mrs. Murphys discriminating throughout California. Thus, current testing procedures promulgated at both the state and federal level are insufficient in providing the requisite statistical analysis when dealing with individual homeowners renting out ADUs. For the FHA and the FEHA to successfully prohibit housing discrimination, the use of testers and the definitions of “pattern” and “practice” need to adjust to be viable in light of modern housing arrangements. Assuming the budget proposal referenced to in Part III, Section C is approved, those additional funds and full-time employees should afford due care in restructuring testing protocols and standards as they apply in California.

Additionally, for the ADU bills to accomplish their intended goal, actual interpretation of California’s own moribund fair housing laws is crucial. Federal court might be preferable to plaintiffs at this moment in time, but the literature is still missing. Interpreting California’s Mrs. Murphy provision, particularly the meaning of the word “household,”²⁶¹ may be the

²⁵⁹ For a comprehensive list of cases developed through the testing program dealing with consistent patterns of discrimination by apartment complexes, developers, nation-wide architectural firms, and hotels, see generally C.R. Div., *Housing and Civil Enforcement Section Cases: Cases Developed Through Testing Program*, U.S. DEP’T OF JUST., http://www.justice.gov/crt/housing-and-civil-enforcement-cases?search_api_views_fulltext=pattern+or+practice+of+discrimination&items_per_page=10 [<http://perma.cc/LXU6-3KU8>]. *But see* United States v. Flanagan, No. 1:09-cv-07338, 2009 WL 4239522 (N.D. Ill. Jan. 19, 2011) (alleging that, on just one instance, a homeowner admitted to making racially discriminatory statements to a tester).

²⁶⁰ C.R. Div., *A Pattern or Practice of Discrimination*, U.S. DEP’T OF JUST., <http://www.justice.gov/crt/pattern-or-practice-discrimination> [<http://perma.cc/7N5J-YFF9>] (emphasis added).

²⁶¹ See discussion *supra* Section III.B.

best place to start. Indeed, because a state can choose *not* to exempt Mrs. Murphy from its fair housing laws,²⁶² California must take this affirmative action to provide more context for homeowners and potential tenants. Moreover, unlike federal law, FEHA expressly recognizes disparate impact as a basis in bringing forth a cause of action for housing discrimination.²⁶³ Thus, the guard rails established by the Supreme Court in *Inclusive Communities* may have little impact on the reach of California's FEHA except to confine the claims to state court. While the 2019 Guidance²⁶⁴ is a step in the right direction, its recency is more than indicative that housing discrimination still needs adequate attention in the context of the FEHA, especially considering the urgency of California's housing crisis and the many legislative attempts to remedy it.

CONCLUSION

Fair housing laws, which mandate fairness, and ADUs, which seek to increase the housing supply, necessarily coexist. The historic inequities in the housing market that negatively affect marginalized groups, particularly black Americans, means that the effects of California's housing crisis are disproportionate. As ADUs continue to gain support to create more affordable housing, their intersection with fair housing laws could render them unsuccessful in their intended purpose. Discrimination by Mrs. Murphy, particularly in the ADU context, is inexcusable and unjustifiable. ADUs are a necessary first start, but they are by no means the end-all-be-all for solving California's housing crisis. And without careful critique of fair housing laws and their exemptions to maintain the effectiveness of ADUs, the California Legislature is going to have to turn elsewhere.

²⁶² See 42 U.S.C. § 3615; see also Walsh, *supra* note 132, at 633–34 (providing a sample of state fair housing laws which limit the coverage of Mrs. Murphy to ensure that “only the most intimate of Mrs. Murphy settings” are protected by the exemption).

²⁶³ See CAL. GOV'T CODE § 12955.8(b). *But see supra* notes 182–190 and accompanying text (explaining that disparate impact liability is not statutorily mandated, but is an alternative doctrine judicially created and promulgated by HUD).

²⁶⁴ See generally CAL. CODE REGS. tit. 2, § 12005(o) (2022).