



THE ARKANSAS JOURNAL OF SOCIAL CHANGE AND PUBLIC SERVICE

ARTICLES

When YIMBY is Not Enough: The Need for LIMBY - Locals
in My Backyard
Kevin Frazier, J.D., M.P.A.

Affirmative Action: A Mismatch for Correcting A Tradition
of Racial Wealth Gap Discrimination
L. Darnell Weeden, Esq.

STUDY

Hair Drug Testing of Children: A Study of Utilization and
Interpretation
Liza Murray, M.D.

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ABOUT THE JOURNAL

The Arkansas Journal of Social Change and Public Service is a vehicle for identifying and addressing the pressing needs of our society. It examines issues lying at the intersection of policy, public interest, academia, and the law, raising awareness of topics insufficiently examined in traditional scholarly publications.

The Journal seeks contributions in a variety of formats not only from academics, but also from advocates, students, and members of the general public in an effort to provide the broadest possible array of analysis and opinion. This approach fosters dialogue that reaches beyond a single discipline or perspective.

Reflecting the fact that world events do not occur in semi-annual installments, the Journal's content is dynamic, with frequent updates occurring through the efforts of its staff and outside contributors.

The Journal will serve as a gathering place and a rallying point for those committed to public service, public policy, and public advocacy. A candid and open exchange of ideas will provide guidance in the formation of initiatives not only in Arkansas but throughout the world.

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EDITOR'S PREFACE

Elizabeth Kimble

It is with great pleasure that the 2022-2023 Editorial Board presents Volume 12, Issue 1 of the Arkansas Journal of Social Change and Public Service. Publication truly takes a village, and this Issue highlights that notion with pieces that reference local Arkansas cities, pieces written in our backyards, and pieces that discuss how we admit others into our community institutions.

Montana Supreme Court law clerk Mr. Kevin Frazier begins this issue with a simple question: What happens when you cannot afford to live in your own hometown? In *When YIMBY is Not Enough: The Need for LIMBY – Locals in my Backyard*, Mr. Frazier takes a provocative look at who is truly to blame for the affordable housing crisis to find innovative solutions in this ode to local communities. Affecting more than just big tech towns, cities from Bentonville to Boise are struggling to address this basic human need.

In *Affirmative Action: A Mismatch for Correcting a Tradition of Racial Wealth Gap Discrimination*, Roberson King Professor of Law L. Darnell Weeden delves into how traditional affirmative is both fraught as a legal theory while failing to address its original imperative: correcting the special kind of wrong America has wrought. He then suggests a new, race-neutral way forward using the Thirteenth Amendment that threads the needle on both counts.

Finally, doctors, nurses, and child advocates come together to discuss the implications of using hair drug tests on child welfare. Arkansas Children's Hospital has led the way in evaluating child maltreatment since 2003, creating a specialized outpatient clinic for suspected victims of maltreatment (the "Team for Children at Risk" (TCAR) clinic. While demand has increased from fewer than 20 to over 300 requests, there was no evaluation of how the hair drug testing results were being used and interpreted by team members, including court-ordered evaluations. Authors Liza Murray, MD; Thanh Thanh Dai, MD; Rachel Clingenpeel, MD; Jennifer Livingston, APRN, CPNP-PC; B.C. "Toss" Worthington, RNP, BSN, SANE-P; and Karen Farst, MD-MPH invited over 300 interested parties to complete their research, and we are pleased to present the results of their survey.

Together, these pieces highlight the importance of building a better community, starting right in our own backyard.

WHEN YIMBY IS NOT ENOUGH: THE NEED FOR LIMBY – LOCALS IN MY BACKYARD

*Kevin Frazier, J.D., M.P.A.**

I. INTRODUCTION

For too long, the importance of a hometown has been understated and understudied. Our democracy is premised on strong, small, geographical communities. The crafters of our Constitution assumed and accounted for elected representatives having strong ties to small communities and fiercely advocating for their neighbors.¹ Centuries later, the strength of our communities continues to influence the caliber of democracy and the possibility of achieving individual aspirations. That strength is waning.

The nationalization of everything, which describes the increasingly national focus of news media, political parties, and civic discourse, and the absence of locally oriented alternative institutions and forums, has been accelerated by the ease with which some of us can work, shop, and live with few, if any, connections to our physical community.² As some Americans become less attached and, eventually, less willing to assist their neighbors, some of those neighbors will suffer immensely – as will our democracy, which was intended to operate as place of compromise among the competing interests of many views emerging from small districts rather than as a battleground for two ideologies.

For many Americans, especially those with less formal education, the strength of their community and their ability to remain in such a community is essential to their social, emotional, and financial well-being. This article advocates for YIMBY (Yes, In My Backyard) housing proponents to become stalwarts of LIMBY (Locals In My Backyard). Locals, here, refers to individuals born to a community (“true locals”) or who have established roots in a community through long periods of residency there (“adopted locals”).

* Mr. Frazier currently serves as clerk to Montana Supreme Court Chief Justice Mike McGrath. He holds a J.D. from the University of California, Berkeley, School of Law, an M.P.A. from the Harvard Kennedy School, and a B.S. in Economics from the University of Oregon. Beginning the 2023 Academic Year, he will serve as a Visiting Professor at the Knudson School of Law at the University of South Dakota. He is profoundly grateful for the support of his fiancé, Dalton Fusco, as well as for the scholars who helped motivate me to write this paper including, but not limited to, Rafael Carbonell of the Harvard Kennedy School and Kathryn Abrams of the UC Berkeley School of Law.

¹ See, e.g., James Madison, *The Federalist* No. 10 (detailing how the structure of the U.S. Congress accounted for representatives having ties to their respective local communities).

² See *infra* VI. THE DEMOCRATIC IMPORTANCE OF LIMBY.

This shift in thinking – from YIMBY to LIMBY – will strengthen our democracy and provide housing for those most in need of remaining connected to their community.

LIMBY is a new and necessary way of thinking about affordable housing. Policies designed to increase affordable housing have failed for two reasons: first, policymakers paying inadequate consideration to the implementation of those policies; and second, those same officials insufficiently analyzing how those policies would affect current residents.³ As a result of those failures, current residents have found it harder and harder to stay in their adopted or original hometowns. Even cities that have received praise for passing purportedly impactful affordable housing policies have seen locals flee to cheaper jurisdictions. Policymakers must do more than just think about increasing the supply of housing; they must also weigh the extent to which those new units will allow current residents to stay in their hometowns.

The first part of this article analyzes the current housing markets in Bend, Oregon and Boise, Idaho to show that Americans with excess income and wealth are forcing residents of those communities to move away from where they possess support systems critical to personal well-being and where they have the sort of local knowledge that's essential to being a good citizen. The second part reviews housing policies, with a focus on those enacted by City of Portland and the State of Oregon, to reveal how they have failed to increase supply and to halt the displacement of residents. The third part dives into the especially damaging effect that short term rentals (STRs) have had on the ability of Americans to stay put. The fourth part recommends policies that give residents more choice as to whether they stay in their community or not while also making the housing market more equitable. The fifth part briefly discusses the legality of such policies. Sixth, and finally, the article concludes with a reminder of the importance of strong, small, geographical communities.

II. HOUSING IN THE 21ST CENTURY: LOCAL RESIDENTS ARE INCREASINGLY LOSING THEIR HOMETOWNS

If voting by feet can be trusted, then Americans are very much in favor of staying in their adopted or original hometowns. “Three-quarters of adults say it is at least somewhat important to them personally to live in a community where family is nearby, including 36% who say it is very

³ See Joe Cortright, *Inclusionary Zoning: Portland's Wile E. Coyote Moment Has Arrived*, City Observatory (Mar. 9, 2021), <https://cityobservatory.org/inclusionary-zoning-portlands-wile-e-coyote-moment-has-arrived/>

important,” according to a May 2022 Pew poll.⁴ In recent decades, Americans lived with comparatively less fear of being involuntarily ejected from their hometowns due to housing costs.⁵ In other words, most Americans had the option to stay put, if they wanted to do so – and many decided just that. Back in 2008, excluding military and education, 37 percent of Americans had never resided outside of their hometown.⁶ More recently, as of 2015, the “typical” American adult lived less than twenty miles away from their mom.⁷ Surely, in some cases, many of these Americans would have preferred to live elsewhere. Generally, though, a hometown carries benefits, such as the possibility of free childcare provided by loved ones and knowledge of local issues, that no other place can provide (without paying for those benefits or spending enough time in that area to acquire those benefits). What’s important for this article, however, is the fact that in prior decades fewer Americans felt forced to look for a new community.⁸ Geographic stability and predictability allows residents to make investments in themselves and in their community that may have positive externalities; all else equal, the law and public policy should favor such externalities.

The ability to choose your geographic community or to remain in your current one can be imperative to an individual’s well-being. The ability to reside in our hometowns comes with tremendous emotional, social, and financial benefits.⁹ Emotionally, our hometowns contain the memories of friendships made, neighborhoods formed, and maturation completed. Socially, hometowns are where our social capital may be at its highest: there, you can rely on friends, neighbors, and your doctor (whom you’ve seen for decades) to help you out on a moment’s notice, to vouch for you when that job opportunity comes up, and to support you in other professional and

⁴ Kiley Hurst, *More Than Half of Americans Live Within an Hour of Extended Family*, PEW RESEARCH CENTER (May 18, 2022), <https://www.pewresearch.org/fact-tank/2022/05/18/more-than-half-of-americans-live-within-an-hour-of-extended-family/>

⁵ See Sophie Kasakove, *With Cases Piling Up, an Eviction Crisis Unfolds Step by Step*, THE NEW YORK TIMES (Nov. 7, 2021), <https://www.nytimes.com/2021/11/07/us/evictions-crisis-us.html> (reporting a spike in concerns among Americans about the possibility of being evicted).

⁶ Paul Taylor et al., *American Mobility: Who Moves? Who Stays Put? Where's Home?* PEW RESEARCH CENTER (Dec. 29, 2008), <https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2010/10/Movers-and-Stayers.pdf>.

⁷ Quoctrung Bui and Claire Cain Miller, *The Typical American Lives Only 18 Miles From Mom*, THE NEW YORK TIMES (Dec. 23, 2015), <https://www.nytimes.com/interactive/2015/12/24/upshot/24up-family.html>.

⁸ Kasakove, *supra* note 5.

⁹ See generally Rainesford Stauffer, *The Case for Moving Back to Your Hometown*, THE ATLANTIC (May 6, 2021), <https://www.theatlantic.com/family/archive/2021/05/move-back-hometown-big-city-small-town-success-failure/618819/>.

personal endeavors.¹⁰ Relatedly, hometowns are often where our financial security is highest given the social capital that exists there and the availability of familial and formal financial support when times get tough.¹¹

Yet, more and more Americans are losing the ability to decide where they call home. Certain Americans in certain parts of the country have accumulated sufficient economic resources to move anywhere (and, in many cases, push anyone out).¹² Geographically, these Americans tend to live in "[b]ig, techy metros like San Francisco, Boston, and New York with populations over 1 million" people where the economy has "flourished" since the end of the Great Recession.¹³ Median income in these areas grew from \$54,000 in 2008 to \$61,000 in 2018.¹⁴ Comparatively, the median income outside of these bubbles started at \$55,000 in 2008 before declining by \$2,000 to \$53,000 in 2018.¹⁵

Demographically, white Americans are likely to have higher incomes and greater wealth – and, therefore, more means to move to more places – than non-white Americans.¹⁶ More elderly Americans also demonstrate more control over their location when compared to members of younger generations. Older Americans with greater savings have had more success in controlling their choice of community. Consider that, of all homeowners,¹⁷ Americans in the 65-and-over cohort constitute a third of homeowners and are acquiring homes at a faster rate than younger Americans.¹⁸

Academically, Americans with more formal education are more likely

¹⁰ Bui & Miller, *supra* note 7.

¹¹ See, e.g., Jonathan Mintz, *Neighborhood Financial Services Study: An Analysis of Supply and Demand in Two New York City Neighborhoods*, New York City Department of Consumer Affairs at 10 (June 2008) (summarizing how residents in New York City neighborhoods often rely on neighbors for short-term loans and financial advice)

¹² Even before lifestyle migration took off during the pandemic, specific groups of Americans were disproportionately being displaced by individuals with enough income to choose where they would like to live. From 2000 to 2013, at least 135,000 black and Hispanic residents were uprooted from their local community due to an influx of wealthy individuals moving into the area. Jason Richardson et al., *SHIFTING NEIGHBORHOODS: GENTRIFICATION AND CULTURAL DISPLACEMENT IN AMERICAN CITIES*, National Community Reinvestment Coalition at 4 (Mar. 19, 2019).

¹³ Clara Hendricksen et al., *Countering the Geography of Discontent: Strategies for Left-behind Places*, BROOKINGS (Nov. 2018), <https://www.brookings.edu/research/countering-the-geography-of-discontent-strategies-for-left-behind-places/>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FEDERAL RESERVE (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.html>.

¹⁷ *Id.*

¹⁸ *Id.*

to live outside of their hometowns than those with, for example, a high school degree or less.¹⁹ Only fourteen percent of Americans without a high school degree live away more than an hour's drive from any extended family.²⁰

Yet, as the supply of housing stagnates with respect to demand and the cost of housing soars,²¹ low-income Americans may have no other choice than to move away from where their social and human capital is the highest. White, educated Americans residing in economically prosperous cities (“WEEMs” – White, Educated Elders in Metros) have the greatest ability to move to a new community or to choose to stay put, due to their financial situation.²² For WEEMs, rapidly rising housing prices represent a financial inconvenience. However, for non-WEEMs, an increase in rent can force life-altering decisions such as moving away from loved ones. Unfortunately, more and more Americans are confronting economic headwinds that may force them to look elsewhere for a community to call home.²³

Housing as an asset has become too financially lucrative to expect that lower-income individuals in many communities will ever have a chance to remain in their hometowns. Sixty-seven of the top 100 housing markets experienced record-high appreciation at some point in 2021 and, among the other thirty-three markets, home prices increased by at least nine percent.²⁴ Similarly, rents for apartments in professionally managed properties jumped by nine percent in the first quarter of 2022 when compared to the year prior.²⁵ To make matters worse, the supply of homes for sale and rental units reached all-time lows in recent years. For example, rental vacancy rates in the professionally managed apartment stock hit an all-time low of less than five percent in the third quarter of 2021.²⁶

¹⁹ Hurst, *supra* note 4 (reporting that nearly a third of all individuals with graduate degrees live without any extended family within an hour's drive).

²⁰ *Id.*

²¹ Conor Dougherty and Ben Casselman, *We Need to Keep Building Houses, Even if No One Wants to Buy*, NEW YORK TIMES (July 23, 2022), <https://www.nytimes.com/2022/07/23/business/housing-market-crisis-supply.html> (providing an overview of reasons for an extensive housing shortage that has caused housing prices to increase).

²² See *supra* notes 12-19 and accompanying text.

²³ Alvin Chang, *Those Who Leave Home, and Those Who Stay*, VOX 8:17 AM (Jul. 25, 2018), <https://www.vox.com/policy-and-politics/2017/6/15/15757708/hometown-stay-leave> (reporting that buying a home is one of the main reasons people move, which demonstrates that the housing shortage is forcing locals priced-out of their communities to gaze at the markets in other locations).

²⁴ Joint Center for Housing Studies of Harvard University, *The State of the Nation's Housing* 10 (2022), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_State_Nations_Housing_2022.pdf

²⁵ *Id.* at 1.

²⁶ *Id.*

A. Locals Have Already Been Displaced from Communities Without LIMBY Policies

The LIMBY policies presented in this article can help the remaining Americans push back against those with the capacity to push them out of their communities. Unfortunately, many Americans in communities such as Bend, Oregon and Boise, Idaho have already lost their ability to stay put.

1. Overview of Bend, Oregon

Bend, Oregon locals have recently experienced the financial pressure and displacement caused by an influx of WEEMs. In the 1990s, less than 21,000 people resided in the then-sleepy mountain town.²⁷ The city's growth then accelerated in periods of substantial in-migration.²⁸ During the four-year period between 2007 and 2011, 1,694 Californians moved to the area. Locals sensed that their community had become a target of folks looking for a change of scenery.²⁹ Then, another wave came between 2012 and 2014 and deepened that sense. The majority of the 3,411 new residents to Deschutes County (of which Bend is the county seat) came from California.³⁰ By 2015, the once-21,000-person town became a city of more than 84,000 – an increase of 410%;³¹ Californians made up 16% of that growth.³²

The resulting unease felt by locals, however, has yet to manifest in responsive policies meant to prioritize locals staying in their community.³³ Consequently, the California in-migration culminated in many locals having to find a new place to call home. The locals that withstood the surge in population faced an unfortunate side effect of being lucky enough to remain in Bend – an inadequate and expensive housing market that made it particularly difficult to stick around

Different policies could have mitigated the displacement of Bendites – a decade ago, Bend's housing market was in a very different place. Back in 2012, Bend had a surplus of 1,486 housing units according to the Up for

²⁷ Ken Maes, *Bendifornia: What's Driving the Northern California Migration*, Oregon Business (Nov. 5, 2015), <https://www.oregonbusiness.com/article/item/15244-bendifornia-what-s-driving-the-northern-california-migration>

²⁸ See Xiaomin Ruan et al., Population Res. Cen., *Coordinated Population Forecast for Deschutes County, Its Urban Growth Boundaries (UGB), and Area Outside UGBs 2015-2065* (2015), <https://www.bendoregon.gov/home/showpublisheddocument/30925/636312296303400000>.

²⁹ Aaron West, *Migration Numbers Show Continuing 'Californication' of Bend*, AP News (Sept. 19, 2016), <https://apnews.com/article/b15514226f4e406b858a704c98a53ea9>

³⁰ *Id.*

³¹ Maes, *supra* note 27.

³² *Id.*

³³ See *infra* notes 48-51 and accompanying text.

Growth Housing Underproduction dataset.³⁴ Then, a switch flipped, and the attempted policy solutions did not emerge in time to keep locals in town.³⁵ Demand to live in the area soared and the housing stock has lagged woefully behind. In 2013, there was a shortage of 2,803 units of housing.³⁶ By 2019, the shortage had grown to 6,550.³⁷ The housing shortage worsened during the COVID-19 pandemic.³⁸ In the summer of 2020, as a consequence of insufficient supply and growing demand, home sale prices in Bend increased by 15 percent.³⁹

Many locals have felt pressure to move out due to the resulting unaffordability of housing in the area; indeed, a share of them have already succumbed to that pressure and moved away from the place they called home. A survey of Bend residents (Bendites) by the Bend Chamber of Commerce revealed that two-thirds of residents knew someone who had left the city because of the unaffordability of housing.⁴⁰ The affordable housing manager at the City of Bend admitted that the city is struggling to make enough space for folks, like essential workers, to stay in town.⁴¹

To Bend's credit, it has tried to make it easier for locals to stay in the city by accelerating efforts to increase affordable housing.⁴² More than 1,000 units were added between 2020 and 2022 and the city anticipates the creation of an additional 1,600 units in the near future.⁴³ However, even if the city succeeds in creating new housing, there are no policies in place to increase the odds of that housing ending up in the hands of locals.⁴⁴ Instead, WEEMs will likely win in head-to-head contests against Bend residents over any

³⁴ Up for Growth, *2022 Housing Underproduction Dataset*, <https://www.upforgrowth.org/form/underproduction-data-download> (last visited Aug. 27, 2022) [hereinafter, Up for Growth].

³⁵ See *infra* notes 48-51 and accompanying text.

³⁶ Up for Growth, *supra* note 34.

³⁷ *Id.*

³⁸ Noah Chast, *Bend Says It's 'Ahead Of The Curve' in Battling Housing Crisis, Compared to Other Oregon Cities*, KTVZ (July 14, 2022, 4:51 PM), <https://ktvz.com/news/2022/07/14/bend-ahead-of-the-curve-in-battling-housing-crisis-compared-to-other-oregon-cities/>.

³⁹ Laurel Brauns, *The Bubble That Won't Burst*, The Source Weekly (Oct. 7, 2020), <https://www.bendsource.com/bend/the-bubble-that-wont-burst/Content?oid=13398133>.

⁴⁰ *Bend Chamber Workforce Housing Initiative*, Bend Chamber, <https://bendchamber.org/workforce-housing-initiative/> (last visited Aug. 27, 2022).

⁴¹ Brauns, *supra* note 39.

⁴² Chast, *supra* note 38.

⁴³ *Id.*

⁴⁴ See generally *Affordable Housing, City of Bend*, <https://www.bendoregon.gov/government/departments/economic-development/affordable-housing-program> (last accessed Sept. 16, 2022) (containing no policies specifically tailored to assisting natives to Bend or long-term residents in their respective efforts to stay in Bend).

houses that come onto the market.⁴⁵ Nationally, out-of-state migrants to new communities similar to Bend may have as much as \$200,000 more in their housing budget, which allows them to outbid locals.⁴⁶ In Boise, the average out-of-state buyer has a budget of \$738,000 whereas the average local has a budget of just \$494,000.⁴⁷

To Bend's discredit, this issue has been on the horizon for a long time. In 2016, for example, a state economist pointed out that "meaningful contributors to [Bend's] local workforce were being priced out of the local housing market."⁴⁸ Moreover, even professionals earning well above a median wage at that time lacked the financial resources to purchase a home in the area going for the median price.⁴⁹

Furthermore, some of the policies under consideration by the City may diminish what makes Bend such a special place to call home in the first place. For instance, the head of the Bend Chamber of Commerce has advocated for expansion of the urban growth boundary (UGB) around the city.⁵⁰ The UGB, when compared to jurisdictions with few, if any, restrictions on sprawl, encourages denser development and ensures that the outdoor areas unique to Central Oregon remain protected. So far, state officials have denied efforts by Bend to spread out (rather than build up).⁵¹ If city officials rush to expand the UGB without instituting any policies to prioritize locals when it comes to affordable housing, then the resulting housing will only diminish outdoor recreation while perpetuating the displacement of locals.

Other policy ideas to address the housing crisis in Bend similarly do not prioritize locals and will likely have unintended negative consequences. For instance, some officials have championed the legalization and rapid development of accessory dwelling units ("ADUs") as a meaningful way to increase the supply of affordable housing.⁵² So far, ADU policies have lacked

⁴⁵ See, e.g., Conor Dougherty, *The Californians Are Coming. So Is Their Housing Crisis.*, N.Y. Times (Feb. 21, 2021), <https://www.nytimes.com/2021/02/12/business/economy/california-housing-crisis.html>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Damon Runberg, *Revisiting "Who Can Afford Housing in Bend?"*, Southern Oregon Business Journal (June 9, 2021), <https://southernoregonbusiness.com/revisiting-who-can-afford-housing-in-bend/>.

⁴⁹ *Id.*

⁵⁰ Bola Gbadebo, *Bend Chamber Leads Initiative to Address Housing Affordability, Availability*, KTVZ, <https://ktvz.com/news/bend/2021/10/26/bend-chamber-convenes-business-coalition-in-bid-to-create-more-workforce-housing/>.

⁵¹ See Brauns, *supra* note 39 ("Adding to the shortage is the fact that there was very little building in Bend at all between 2008 and 2016 as the city struggled to get a new UGB expansion approved by the state[.]").

⁵² Gbadebo, *supra* note 50.

any sort of bias toward helping locals stay put.⁵³ And, where ADUs have been a focus of housing advocates, they have yet to report real changes in affordability and supply.⁵⁴ One last shortcoming – discussion of ADUs takes up valuable political resources with little return on investment.⁵⁵ Every new policy idea requires countless hours of public consultation, city development of new permitting processes, and city development of new forms, etc.

Action for action’s sake – by touting the merits of ADUs, for instance – will do nothing to help locals remain in Bend. Nor will such action help the displacement of other aspects of what makes Bend special. Right now, locals are being forced to rely on their deep roots to find affordable housing. One local – Justin – attributes his continued presence in Bend to the fact that through “friends of friends” he has avoided the local rental market.⁵⁶ Justin’s dedication to Bend illustrates the lengths locals will go to stay close to their roots and to their community. However, for folks who have yet to forge friendships with homeowners, the discovery of housing through social connections is unlikely, which explains why so many Bend locals were displaced.

The experience of other locals, such as my friend, McKyla, reveals the limits of deep roots when it comes to helping locals withstand the pressures exerted by WEEMs moving into Bend. McKyla grew up in Bend, had family and friends in Bend, and worked for the local library. Her boyfriend had similarly deep roots. Despite their efforts to save, which included living with McKyla’s parents for more than a year, they could not compete against WEEMs in the housing market. Ultimately, McKyla had to move to Portland, Oregon – effectively trading the comfort of her hometown for a home she could actually afford.

The upshot of these stories is that Bend is increasingly home to WEEMs who can afford the high cost of living.⁵⁷ Meanwhile, former Bend

⁵³ See generally *Accessory Dwelling Unit Quick Reference Guide*, City of Bend (Sept. 9, 2022) (restating City of Bend guidance and laws – none of which requires specific efforts to prioritize Bendites when selecting sellers or tenants).

⁵⁴ See Kathleen Gallagher, *ADUs Could Help Solve Hawaii's Homeless Issue, but the Sewers Need to be Fixed First*, Pacific Business News, <https://www.bizjournals.com/pacific/blog/2015/12/adus-could-help-solve-hawaii-homeless-issue-but.html>; Noelle Fujii-Oride, *ADUs Seemed Like a Simple Solution to Hawai'i's Housing Crisis*, Hawaii Business Magazine (June 1, 2022), <https://www.hawaiibusiness.com/accessory-dwelling-units-adu-affordable-housing-hawaii-real-estate/>.

⁵⁵ See Fujii-Oride, *supra* note 54 (describing the resources expended by government officials to push for policies allowing for ADU development).

⁵⁶ Brauns, *supra* note 39.

⁵⁷ Damon Runberg, *Central Oregon Migration Patterns BEFORE the Onset of the Pandemic*, State of Oregon Employment Department (Feb. 11, 2022), <https://www.qualityinfo.org/-/central-oregon-migration-patterns-before-the-onset-of-the->

locals are looking for new homes in new places. A failure to pass LIMBY policies in one community, such as Bend, results in the displacement of locals who then end up displacing locals in other communities. Boise, Idaho is currently struggling against this kind of secondary displacement – where residents are trying to figure out how to stay put as WEEMs and displaced locals from California, Oregon, and Washington seek their own slice of a finite Boise.⁵⁸

2. Overview of Boise, Idaho

An Idahoan making minimum wage would need to work more than 80 hours every week to afford to a fair-market one-bedroom apartment. A report by the National Low Income Housing Coalition specified that the state's minimum wage would need to double and then some – to \$18.87.⁵⁹ from its current \$7.25.⁶⁰ – to allow a person to afford a one-bedroom home without being rent burdened (i.e., spending more than 30% of their income on housing). Consider that 19,000 people in Idaho work in retail and earn \$14.42 per hour.⁶¹ Many of these people have no chance at staying in their hometown when outsiders from California and elsewhere are coming to town with cash offers and deep savings. The tenuous hold locals have on their home is even more shaky in one part of Idaho – Boise.

Population growth in the Boise area resulted in an increase in rent of twenty percent in just one year.⁶² Unsurprisingly, many residents now find themselves in an untenable position: stay and pay more than fifty percent of their income on rent, or leave and move away from their community.⁶³ The folks causing this displacement threat are generally not from Idaho – instead, they tend to fit the WEEM profile. As of 2016, more than one in five new

pandemic [hereinafter, Runberg BEFORE].

⁵⁸ *See id.*

⁵⁹ *How Much Do You Need to Earn to Afford a Modest Apartment in Your State?*, National Low Income Housing Coalition at 22 (2022), <https://www.nlihc.org/oor> (last visited Aug. 27, 2022).

⁶⁰ *Wage & Hour FAQs*, Idaho Dept. of Labor, <https://www.labor.idaho.gov/dnn/Businesses/Idaho-Labor-Laws/W-H-Frequently-Asked-Questions-FAQs#:~:text=What%20is%20the%20minimum%20wage,90%20calendar%20days%20of%20employment> (last visited Aug. 27, 2022).

⁶¹ Shaun Goodwin, *Over 136,000 Idahoans Can't Comfortably Afford to Live. Here's How Much They Need to Make*, Idaho Statesman (Aug. 26, 2022), <https://www.idahostatesman.com/news/business/article264063196.html#storylink=cpyhttps://www.idahostatesman.com/news/business/article264063196.html>.

⁶² Kimber Wymore, *High Rent, Low Pay, and No Where to Go: The Affordable Housing Crisis*, Boise State University (n.d.), <https://www.boisestate.edu/presidents-writing-awards/high-rent-low-pay-and-no-where-to-go-the-affordable-housing-crisis/>

⁶³ *Id.*

residents to Idaho came from California.⁶⁴ Relatedly, Los Angeles, Seattle, and Portland – all places struggling with affordable housing – export the majority of new Boise residents.⁶⁵

The sustained population growth combined with the unrealized investment in the housing stock has put Boise in an even worse housing situation than Bend; Boise is 13,000 units of housing short of the existing demand.⁶⁶ The resulting housing pressure has made the entire region unaffordable for those seeking to stay in their hometown. Not only is Boise one of the top twenty-five metro areas to which people moved from even pricier cities, its surrounding cities, like Nampa, Meridian, and Caldwell, are growing at an even faster rate.⁶⁷ So, if you were born in Boise, but were displaced by a Bend resident who was forced out by a Berkeley resident, you may have to move away from your home region – not just your hometown.

Idahoans simply lack the financial resources to compete with outsiders. For this reason, it is not enough simply to increase supply; policymakers must also help locals tap into that supply. One Boise State University student concerned about this issue wrote that “[d]ata reported in 2017 from the Bureau of Labor Statistics reported Boise wages rose 1.9 percent, while the population rose 2.6 percent and the cost of housing rose 3.3 percent.”⁶⁸ A survey of rental prices conducted by Apartment List shows that the housing market changes during the pandemic exacerbated the economic pressures on locals – between March of 2020 and August of 2022, rents in Boise increased by 45.3%.⁶⁹

The need for LIMBY policies in Idaho has never been higher. This is a need that Idahoans have been aware of, as evidenced by the Housing Trust Fund established in 1992 by the Idaho State Legislature.⁷⁰ The Fund – a

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See Up for Growth, *supra* note 34.

⁶⁷ Erika Bolstad, ‘Let’s Try Something New’ Meets the National Housing Squeeze, Pew (July 18, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/07/18/lets-try-something-new-meets-the-national-housing-squeeze>.

⁶⁸ Wymore, *supra* note 62.

⁶⁹ Apartment List Research Team, *Apartment List National Rent Report*, Apartment List (Aug. 30, 2022), <https://www.apartmentlist.com/research/national-rent-data> (Boise-specific information was obtained by using the Apartment List City-Level Rent Estimates tool to select Boise).

⁷⁰ Kelcie Moseley-Morris, *Idaho’s Housing Trust Fund was Empty for 30 Years. That May Soon Change*, Idaho Capital Sun (Jan. 4, 2022), <https://idahocapitalsun.com/2022/01/04/idahos-housing-trust-fund-was-empty-for-30-years-that-may-soon-change/#:~:text=Idaho%20established%20a%20state%20Housing,empty%20for%20nearly%2030%20years>.

LIMBY policy – was meant to match funds for federal affordable housing programs. However, the legislature never put any money into the fund.⁷¹ So, though the state legislature recognized the value of limiting involuntary displacement, it failed to assist locals seeking to stay put.⁷² Absent a meaningful intervention in the immediate future, many Idahoans stand to be displaced – especially locals in Boise.

B. The Displacement of Locals Results in Significant Social Costs

Displacement has a cascading effect: locals displaced from their hometowns by WEEMs end up displacing others. More than fifty percent of Californians have considered leaving the state because of high housing prices.⁷³ Wherever they go, they drive up the housing prices by bringing new demand to an area that likely already had a shortage of housing. Consequently, locals in that area are forced to look for new communities. The result is a seemingly unstoppable displacement of individuals from their hometown across the US that will continue unabated unless new policies and priorities take hold.

When WEEMs start arriving in a community or state, policymakers in those areas are often caught flatfooted. Montana provides an example. From 2010 to 2020, the population of Montana increased by ten percent.⁷⁴ During that same window, the number of housing units only increased by seven percent.⁷⁵ Where housing prices have soared in the Treasure State, locals have had to detach their roots and try to make it work in another place – either elsewhere in Montana or further afield. My uncle Paul,⁷⁶ for instance, lived in Bozeman – a particularly popular destination for WEEMs – for decades.⁷⁷ By the early 2010s, he was priced (forced) out and uprooted to a community more than thirty miles from where he had spent decades making friends and connections.

Locals of mountains towns in nearby states have also been forced on their heels by in-migrations of WEEMs. In Frisco, Colorado, city officials

⁷¹ *Id.*

⁷² *Id.*

⁷³ Alix Martichoux, *53 Percent of Californians Want to Leave the State, According to New Survey*, SFGate (Feb. 13, 2019), <https://www.sfgate.com/expensive-san-francisco/article/move-out-of-bay-area-california-where-to-go-cost-13614119.php>

⁷⁴ *Montana Housing Shortage*, Pew Charitable Trusts (Nov. 29, 2021), https://leg.mt.gov/content/publications/fiscal/2023-Interim/November-2021/Horowitz_Montana_HousingShortage_29Nov2021.pdf.

⁷⁵ *Id.*

⁷⁶ For privacy reasons, my uncle's name has been changed.

⁷⁷ Sarah Vowell, *My Beloved College Town Has a Problem: It's Too Popular*, N.Y. Times (May 12, 2021), available at: <https://www.nytimes.com/2021/05/12/opinion/bozeman-montana-housing.html>

estimate that forty-five percent of its homes are “vacant second homes.”⁷⁸ So while WEEMs look for convenient ski cabins, everyone else is scavenging and scrabbling for any chance to stay put. The huge percentage of Frisco’s housing stock effectively catering to out-of-town interests has had a devastating effect on locals. One coffee shop owner discussed the fact that her employees have to sleep in their cars or in the woods.⁷⁹ Other residents describe neighborhoods that lack any sense of community because so many of the homes lack residents for parts of the year.⁸⁰

Some small business owners have tried to provide workforce housing on a small scale by, for instance, buying apartments and renting them below market rate to their employees.⁸¹ But that strategy has a number of flaws, including, but not limited to the following: it relies on the good graces and financial means of small business owners; it may result in employees feeling forced to work for the same business; and, it only addresses one part of the larger crisis of preventing displacement. Efforts by small business owners and others to keep locals in town would be easier if WEEMs resisted the temptation to turn the town’s limited housing stock into stock homes or vacation rentals.⁸² The resulting increase in housing supply would increase the odds of locals having a chance at finding a home of their own – odds that would further increase if officials enacted LIMBY policies that gave those locals a leg up in the market.

Another reason for officials proactively passing LIMBY policies is that displacement has exponential costs. When a community welcomes thousands of new residents, many current residents may end up on the streets before they find a new community to call home. For instance, according to the Annual Homeless Assessment Report in 2020, between 2007 and 2020 Montana experienced a 146% increase in the number of chronically homeless people.⁸³ These individuals have fewer and fewer places to go, all else equal,

⁷⁸ Luke Vidic, *With 45% of Properties Used as Second Homes, Frisco Officials Brainstorm Plans for Workforce Housing Improvements*, Summit Daily (June 20, 2022), <https://www.summitdaily.com/news/with-45-of-properties-used-as-second-homes-frisco-officials-brainstorm-plans-for-workforce-housing-improvements/>.

⁷⁹ Jonathan Ellsworth, *Mountain Town Economics, Pt 1: Affordable Housing, Short-Term Rentals, & More (Ep.177)*, Blister (Aug 9, 2021), <https://blisterreview.com/podcasts/mountain-town-economics-affordable-housing-short-term-rentals-more-ep-177>.

⁸⁰ *Id.*

⁸¹ Anna P. Kambhampaty, *Workers in the Catskills Can’t Find Housing. Bosses are Trying to Help*, N.Y. Times (Aug. 19, 2022), <https://www.nytimes.com/2022/08/19/realestate/hudson-valley-housing-workers.html> (describing numerous instances of small business owners creating their own housing solutions for employees).

⁸² See *supra* notes 78-79 and accompanying text.

⁸³ Meghan Henry et al., *The 2020 Annual Homeless Assessment Report to Congress*,

as WEEMs arrive. As the number of individuals experiencing homelessness increases, city budgets feel the strain; by way of example, each homeless person in Billings costs over \$15,000 per year in public services.⁸⁴ The proactive enactment of LIMBY policies can reduce these costs. When Denver invested in housing to assist locals in desperate need of shelter to stay in town, benefits of the investments more than offset costs that would have been spent on local emergency services.⁸⁵

An influx of new residents may place too high of a demand on public services, especially those public services performed by former locals who were displaced by the new residents. Montana again provides a case study: a Missoula hospital has dealt with staffing troubles caused by workers living further and further away from town because of the absence of affordable housing.⁸⁶ To stem these costs, policymakers must pass policies specifically designed with LIMBY in mind, rather than copying failed policies that have gained headlines but done little to reduce displacement.

III. CURRENT AFFORDABLE HOUSING POLICIES HAVE FAILED

A litany of policies exist that aim to make housing more affordable and, as an intentional or unintentional byproduct, help locals stay in place. However, these policies are not sufficient to reduce the nationalization of everything and to increase the odds of locals not being displaced. First, a lot of these policies simply do not work. Moreover, many of these policies have no explicit preference for locals and, consequently, do little to increase the density of people most likely to prioritize community matters over national ones.⁸⁷ Analysis of policies in Portland, Oregon shows both of these shortcomings. Prior to addressing what policies could reduce the displacement of locals, we must first understand why current affordable housing policies fall short.

Affordable housing policies in the City of Portland and the State of Oregon receive a lot of press as innovative steps forward.⁸⁸ But a glimpse at

HUD (Jan. 2021) at 68, <https://www.huduser.gov/portal/sites/default/files/pdf/2020-AHAR-Part-1.pdf>.

⁸⁴ Brenda Beckett, *Welcome Home Billings*, City of Billings at 5 (n.d.)

⁸⁵ See generally *Denver Permanent Supportive Housing Pay for Success Project*, Government Performance Lab at the Harvard Kennedy School, https://govlab.hks.harvard.edu/files/govlabs/files/denver_psh_pfs_project_feature.pdf?m=1549048848

⁸⁶ Emily Schabacker, *Montana Hospitals Facing Unprecedented Financial Crisis*, Billings Gazette (Aug. 14, 2022), https://billingsgazette.com/lifestyles/health-med-fit/montana-hospitals-facing-unprecedented-financial-crisis/article_951729e0-1a7c-11ed-86cd-c74d25b44229.html#tracking-source=mp-homepage

⁸⁷ See *infra* notes 89-96 and accompanying text.

⁸⁸ See, e.g., Catie Gould, *Affordable Housing in Oregon is About to Catch a Big Break*

the housing market and state of community in Portland makes clear that these policies are not having nearly a large enough effect on increasing the supply of affordable housing nor assisting locals. As of May 5, 2022, despite years of passing and implementing the policies discussed below, Portland and Oregon still faced severe housing crises.⁸⁹

In 2019, Oregon Governor Kate Brown signed a bill altering zoning laws in towns with more than ten thousand residents to mandate that duplexes and fourplexes could be built in areas zoned for single-family homes.⁹⁰ While advocates are still optimistic that the law could substantially increase the supply of housing in the state, that increase has not materialized fast enough to prevent the displacement of Portlanders today.⁹¹ And, even if new units eventually materialize, there is no guaranteeing that locals of Portland or Oregon will benefit from that increase. No prior increase to the supply of housing has been reserved for locals at the greatest risk of displacement.⁹²

In 2016, Portland's City Council passed an inclusionary zoning (IZ) law that required all new apartment buildings with more than twenty units to reserve a percentage of their units for low- and moderate-income housing.⁹³ Apparently to avoid this requirement, developers responded by simply not making any buildings with twenty or more units. Once the requirement was fully in force, the total number of units development dropped by about two-thirds.⁹⁴ This lack of developer interest is reflected in permit applications as well: since the new requirements went into place, applications have dropped

from *Parking Mandates*, Strong Towns (July 13, 2022), <https://www.strongtowns.org/journal/2022/7/13/affordable-housing-in-oregon-is-about-to-catch-a-big-break-from-parking-mandates> (outlining myriad affordable housing interventions in the Portland metro area).

⁸⁹ Julie Sabatier, *Outlook for Affordable Housing in Oregon Could be Getting Worse*, OPB (May 5, 2022), <https://www.opb.org/article/2022/04/27/outlook-for-affordable-housing-in-oregon-could-be-getting-worse/>.

⁹⁰ Abe Asher, *How Will Oregon Address Its Growing Affordable Housing Crisis*, Portland Mercury (Nov. 26, 2021), <https://www.portlandmercury.com/Housing/2021/11/26/37064855/how-will-oregon-address-its-growing-affordable-housing-crisis>; H.B. 2001, 80th OR. Leg. Ass. (2019).

⁹¹ *See id.* (“[T]he effects of those policy changes to increase housing density may not be entirely apparent for years, and thousands of Oregonians are facing housing instability today.”); *see also* Anthony Dedousis, *Single-Family Zoning and Exclusion in L.A. County: Part 1*, City Observatory (May 24, 2021), https://cityobservatory.org/la_exclusion_pt1/ (discussing how reform of single-family zoning in Los Angeles could eventually result in more affordable housing).

⁹² *See* Asher, *supra* note 90.

⁹³ Joe Cortright, *Inclusionary Zoning: Portland's Wile E. Coyote Moment Has Arrived*, City Observatory (Mar. 9, 2021), <https://cityobservatory.org/inclusionary-zoning-portlands-wile-e-coyote-moment-has-arrived/> [hereinafter, Cortright Wile]; PORTLAND, OR., Code § 30.01.120 (2016).

⁹⁴ *Id.*

from more than 6,000 per year, in both 2016 and 2017, to about 2,600 in 2020.⁹⁵ Absent the city taking immediate action to relax the IZ requirements, developers appear likely to continue refraining from constructing buildings with twenty or more units – hindering their ability to add to the City’s housing supply and, therefore, keeping rents high.

While Portland and Oregon have taken action on housing, it is not the sort that will likely aid locals because the actions taken thus far have focused on increasing homeownership without paying sufficient consideration to the identity of the eventual homeowners. Officials eager to assist locals must acknowledge the main flaw with many affordable housing policies so that they can begin to select policies better suited to the goal of keeping true and adopted locals in town. Ironically, the main flaw with several affordable housing policies is their focus on increasing access to homeownership. While this seems like a laudable goal, economist Joe Cortright points out that “[s]teps to amplify demand in a surging market tend to drive prices up further, which further enriches incumbent homeowners at the expense of first-time buyers.”⁹⁶ In other words, “Promoting homeownership primarily helps those who are selling homes, not those who are buying them.”⁹⁷

Unfortunately, officials have not only insisted on enforcing outdated and inadequate affordable housing policies, but they have also failed to stem other threats to the ability of locals to stay in town: namely, short-term rentals.

IV. OFFICIALS HAVE FAILED TO LIMIT AIRBNB-INDUCED DISPLACEMENT

Airbnbs, Vacation Rentals by Owner (VRBOs) and other short-term rentals (STRs) have had a particularly negative impact on locals and their ability to avoid displacement. A few examples help make clear how STRs have put undue pressure on non-WEEM locals to move out of their hometowns. In Los Angeles, just nine of the city’s ninety-five neighborhoods accounted for 73% of Airbnb’s revenue in the area, according to a 2015 study.⁹⁸ Rents in these Airbnb-centric neighborhoods increased by 16% from 2013 to the third quarter of 2014, whereas the average rent increase for the remainder of the neighborhoods only increased by 12% over the same time

⁹⁵ *Id.*

⁹⁶ Joe Cortright, *Who Got Trillions? We Found the Real Speculators Profiting from Higher Housing Costs*, City Observatory (May 5, 2021), <https://cityobservatory.org/who-got-trillions-we-found-the-real-speculators-profiting-from-higher-housing-costs/> [hereinafter, Cortright Trillions].

⁹⁷ *Id.*

⁹⁸ Roy Samaan, *Airbnb, Rising Rent, and the Housing Crisis in Los Angeles*, LAANE (Mar. 2015) at 18 (Table 1), <https://www.laane.org/wp-content/uploads/2015/03/AirBnB-Final.pdf>.

period.⁹⁹ Locals to these neighborhoods who faced any sort of financial hardship have likely had to flee for cheaper pastures. It is not just locals of LA who deserved more from their officials with respect to limiting STR-induced displacement.

The *Source Weekly*, a local paper in Bend, Oregon, methodically describes how STRs can hasten the displacement of locals:¹⁰⁰

While city and county officials have taken numerous steps over the years to address housing and homelessness, there's one opportunity that we see rarely discussed: Short-term rentals. Those who live in some of the inner neighborhoods of the west and east sides have already seen "neighbors" replaced by "guests" over the years, and with the advent of sites such as Airbnb, it's easier than ever for a homeowner to swap what could be housing for locals with a glorified hotel accommodation for tourists. Right now, the City of Bend has over 1,000 active short-term rental licenses, required for those renting whole-house rentals for more than 30 days per year. In 2020, 115 new short-term rental land use permits were issued in Bend. If each of those homes had a conservative estimate of two long-term residents in it, it means that last year, housing for around 200 Bendites went away. In total, thousands of Bendites would have housing if those houses were treated like homes and not hotels.

This editorial helps clarify why policymakers cannot let economic development opportunities cloud their vision from seeing the dust of locals having to flee. Officials must do a better job of weighing the costs and benefits of development and displacement. Up to this point, policymakers have tipped the scales too far toward the benefits of development without adequately considering the effects of displacement on locals.

STRs have immense economic benefits for both the “host” and other locals in the community. One study of full-time Airbnb listings in Manhattan’s Lower East Side calculated that those listings earned two to

⁹⁹ *Id.* at 19.

¹⁰⁰ Editorial Board, *In a Housing Crisis, Put the Focus Back on Locals*, *Source Weekly* (Apr. 21, 2021), <https://www.bendsource.com/bend/in-a-housing-crisis-put-the-focus-back-on-locals/Content?oid=14482177>.

three times the median long-term rent.¹⁰¹ Clearly, owners have a strong interest in switching their homes to this model. Cities also have an interest in the proliferation of such arrangements, assuming they have some passed some policy taxing such rentals.¹⁰² If this assumption holds true, then the city receives substantial tax revenue that can be used to support a litany of projects, including projects focused on locals. In Frisco, Colorado, for example, revenue raised from taxes on STRs goes toward workforce housing development.¹⁰³ The case can also be made that STRs guests have a lot to offer local businesses. Tourists, after all, inevitably spend money at such establishments during their stays.¹⁰⁴

However, STRs can also undeniably displace locals. The displacement effect of in-migration is especially pronounced in neighborhoods with a high percentage of housing units operating as STRs.¹⁰⁵ More generally, studies tracking the spread of STRs in Boston and the U.S. as a whole have demonstrated links between the concentration of STRs and rising rents that exacerbate displacement. The Boston study specifically estimated that if Airbnb offerings continued to expand at the same rate as they did in 2015 over the course of the next three years, then monthly rents in Boston would be as much as \$178 higher per month starting in January of 2019 than if no Airbnb activity occurred in the city.¹⁰⁶ On an annual basis, that increase amounts to more than \$2,100 – a jump that would surely cause displacement given that just a \$100 increase in median rent can result in a nine percent spike in homelessness.¹⁰⁷ Notably, the results of the Boston

¹⁰¹ David Wachsmuth and Alexander Weisler, *Airbnb and the Rent Gap: Gentrification Through the Sharing Economy*, ENV'T & PLAN., Feb. 2018, at 20.

¹⁰² See, e.g., Mary Jane Belleza, *New Montana Tax Impacts Short Term Lodging Facilities*, KULR (June 5, 2019), https://www.kulr8.com/news/money/new-montana-tax-impacts-short-term-lodging-facilities/article_fe4c0ab2-880c-11e9-9060-878461d2b191.html (describing the impact of state taxes on short term rentals and the revenue they raise).

¹⁰³ *Short-Term Rental Taxes and Payments*, TOWN OF FRISCO, COLORADO, <https://www.frisco.gov/departments/finance/sales-and-lodging-tax/short-term-rental-license-application-process/short-term-rental-tax-information/> (last visited Oct. 11, 2022) (summarizing the purpose of a tax passed in April of 2022).

¹⁰⁴ See Josh Bivens, *The Economic Costs and Benefits of Airbnb*, ECON. POL'Y INST., Jan. 30, 2019, at 10-13 (listing examples of several studies documenting the spending habits of Airbnb visitors).

¹⁰⁵ See, e.g., Agustin Cocola-Gant, *Holiday Rentals: The New Gentrification Battlefield*, SOCIO. RSCH. ONLINE, Aug. 2016, at 2, 4 (Describing how, in the Gothic Quarter of Old Town in Barcelona, 16.8% of the homes are listed on Airbnb, and how, in a survey of forty-two Old Town residents, all but two reported issues of displacement such as tenant expulsions.).

¹⁰⁶ Mark Merante and Keren Mertens Horn, *Is Home Sharing Driving up Rents? Evidence from Airbnb in Boston*, WORKING PAPER 2016-03, 2016, at 3.

¹⁰⁷ *How COVID-19 Could Aggravate the Homelessness Crisis?*, GOV'T

study do not suggest that Airbnb users are just really excited about the Red Sox – the nationwide study estimated that “home-sharing through Airbnb alone is responsible for about 20 percent of the average annual increase in U.S. rents.”¹⁰⁸ The Boston study also illustrates the fact that the biggest beneficiaries of the fees earned through STRs are not individuals struggling to get by and trying to increase their income by occasionally listing their property; instead, listings from commercial operators account for a significant amount of listings on any one night.¹⁰⁹

Officials in cities around the world have realized the negative impact on rents caused by STRs as well as the main beneficiaries – not locals – and, belatedly, are taking policy action. Cities have attempted to mitigate the negative effects of STRs – namely, removing housing stock from the market – by adopting policies designed to limit their effect on displacement by removing housing stock from the market.¹¹⁰ Amsterdam caps how many days a year a host can rent out their entire home.¹¹¹ Singapore sets a minimum rental period of six consecutive months for public housing.¹¹² In Palma, the mayor banned short-term flat rentals.¹¹³ Although all of these policies purport to address the negative effects of STRs on the housing market, none of these policies are perfect.

When STR regulations go too far, they may stifle development that, if implemented under LIMBY policies, might reduce the displacement of locals. Research published in the Harvard Business Review concluded that “[o]n average, a 1% increase in Airbnb listings led to a 0.769% increase in permit applications, suggesting that Airbnb can play a major role in supporting local real estate markets and thus boosting local tax bases.”¹¹⁴ Since some development – through the creation of more housing – can actually reduce displacement of locals, communities should carefully evaluate whether their STR regulations will hinder the real estate market over the long term by creating too much of a disincentive for the construction of new housing.

ACCOUNTABILITY OFF. (Aug. 25, 2020) <https://www.gao.gov/blog/how-covid-19-could-aggravate-homelessness-crisis>.

¹⁰⁸ Ron Bekkerman et al., *Research: Restricting Airbnb Rentals Reduces Development*, HARVARD BUS. REV (Nov. 17, 2021) <https://hbr.org/2021/11/research-restricting-airbnb-rentals-reduces-development>; see Kyle Barron et al., *Effect of Home-Sharing on House Prices and Rents: Evidence from Airbnb*, SSRN (Mar. 4, 2020), (finding that annual Airbnb growth in a zipcode accounts for “about one fifth of actual rent growth[.]”).

¹⁰⁹ Mertante, et al., *supra* note 106 at 3, 19.

¹¹⁰ See Daniel Guttentag, *What Airbnb really does to a neighbourhood*, BBC (Aug. 30, 2018), <https://www.bbc.com/news/business-45083954>.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Bekkerman et al., *supra* note 108.

STR regulations designed to limit the displacement of locals will consider a variety of factors including, but not limited to, who is doing the hosting (i.e., corporate entity, non-local, local), how frequently they are hosting, where they are hosting, the density of STRs in specific locations, and all economic and cultural side effects of STRs.¹¹⁵ After these factors have been analyzed, the resulting regulation should be evaluated from the perspective of current and future generations of true and adopted locals. The first iteration of the resulting regulation may not weigh each of these factors appropriately, thereby causing unintended side effects. Therefore, it is imperative that the government body issuing the regulation also appropriates funds for the study of the regulation and writes a sunset provision into the regulation so that a regulation capable of improvement does not perpetually remain on the books without being improved. With sufficient data, community input, and willingness to experiment, a community can ensure that STRs do not result in the involuntarily displacement of locals.

V. POLICIES TO INCREASE SUPPLY AND DECREASE INVOLUNTARY DISPLACEMENT

Policies intended to increase the ability of locals to control whether and when they move away will only succeed in doing so if they address the specific reasons why true and adopted locals move away from their hometowns. In some cases, such tailoring will require doing more than just identifying true and adopted locals, but also determining who among those locals is truly at risk of displacement. Obviously, some affluent locals, perhaps WEEMs who moved to an area and have been there for a sufficient time to become an adopted local, most likely do not need financial assistance to stay in their community. From the stories of folks like Justin, the Bend resident who couch surfed in light of surging rents, it becomes clear that the locals that LIMBY policies have in mind are those in need of financial support and assistance navigating the housing market. This support can come in a variety of forms.

A. Rent Control Versus Housing Vouchers

“Direct, immediate, subsidized interventions like housing vouchers and rent-controlled units,” according to Abe Asher of the Portland Mercury, “would help people get back into housing quickly.”¹¹⁶ Vouchers and rent-

¹¹⁵ See Mertante et al., *supra* note 106 at 22 (listing factors policymakers may consider when evaluating certain STR regulations).

¹¹⁶ Asher, *supra* note 90 (summarizing the recommendations of Mike Wilkerson, partner and director of analytics at ECONorthwest).

controlled units would bring the effective monthly rent payment down for locals. This would save them from facing the full brunt of increases in rent caused by the arrival of numerous outsiders.

Of these two policy alternatives, housing vouchers are likely better in the long term with respect to both retaining locals and mitigating any negative effects from the policy. Rent control, by comparison, may actually result in less affordable housing over the long term. Though rent control can effectively protect those fortunate enough to live in a rent-controlled apartment, it has some unacceptable side effects. For instance, rent control incentivizes tenants to never move from that apartment. This permanence is good for the current generation of locals but may not assist younger ones.¹¹⁷ Rent control also limits the amount of rent that landlords receive and, therefore, what they can invest in maintenance and improvements to the building. A lower maintenance budget can result in decay and fewer quality buildings for younger generations of locals to eventually move into.¹¹⁸

Relative to rent control, economists generally agree that housing vouchers present a more efficient response to preventing the displacement of locals.¹¹⁹ Several factors explain the superiority of housing vouchers. Governments can narrowly tailor housing voucher amounts to market conditions at the neighborhood level,¹²⁰ thus reducing the odds of providing a local with too much or too little support to stay in their hometown. The central role that local governments play in distributing housing vouchers also reduces waste and increases the odds of support going to the appropriate families because local officials have more and better information about the people and markets in their community when compared to broadly applicable policy changes instituted at the state or federal level.¹²¹ Housing vouchers also provide the recipient with a high degree of flexibility in selecting the apartment or home of their choice because the vouchers are not building-specific.¹²² This is a marked improvement over rent control mechanisms which, as described above, do not incentivize the building owner to conduct

¹¹⁷ See Michael Hendrix, *Issues 2020: Rent Control Does Not Make Housing More Affordable*, MANHATTAN INST. (Jan. 8, 2020), <https://www.manhattan-institute.org/issues-2020-rent-control-does-not-make-housing-more-affordable>.

¹¹⁸ *Id.*

¹¹⁹ Will Fischer, *Housing Vouchers Work: Efficiently Helping Families Afford Homes*, CTR. ON BUDGET & POL'Y PRIORITIES (May 2, 2017), <https://www.cbpp.org/blog/housing-vouchers-work-efficiently-helping-families-afford-homes#:~:text=Vouchers%20reduce%20rents%20for%20low,also%20comes%20with%20cost%20control> ("Vouchers reduce rents for low-income families at a lower cost to the government than other forms of housing assistance.").

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

maintenance and improvements.

A community seeking to empower locals to voluntarily remain in their hometown could establish a housing voucher program with the intent of keeping locals in the community. Eligible recipients could prove their status as a “local” as defined by the issuing government and sufficiently demonstrate a financial need for the voucher. The issuing government would then provide the voucher on an annual basis and update the voucher amount to reflect changing market conditions. The net effect would be the retention of more locals without discouraging development.

The obvious source of funding for housing vouchers and other programs meant to further financially bolster locals comes from a surprising, but understandable and justifiable place: current homeowners. At this point in the article, some readers may have perceived it as furthering the stereotype that the biggest and sole bogeymen in the affordable housing conversation are corporate entities and short-term rentals; that perception must be corrected – it is imperative to point out that the people benefiting the most from the current housing situation are pre-existing homeowners. Increasing taxes on current homeowners can go a long way toward helping those struggling to stay put in the community they call home, as established by the following five premises provided by economist Joe Cortright:¹²³

- First, the value of residential property in 2020 increased by \$2.2 trillion.
- Second, older, white, higher income households disproportionately received those gains.¹²⁴
- Third, tax exemptions for capital gains for owner-occupied homes prevented the preponderance of those gains from being taxed.
- Fourth, the gains that homeowners received greatly exceeded the profits collected by developers, foreign investors, or Wall Street home buyers.¹²⁵

¹²³ Cortright Trillions, *supra* note 96.

¹²⁴ Cortright’s analysis of Federal Reserve data led to his estimation that “households headed by a person aged 55 and older own 56 percent of all residential housing wealth in the US.” From that estimate and the specified premises, he stated that it’s a “fair guess that these older homeowners reaped most of the gain in home values” in 2020. Cortright also noted that “highest income 20 percent of the population owns 59 percent of all the residential housing value in the US.” That means that approximately \$1.2 trillion in gains from increasing home values went to the top fifth of the population. *Id.*

¹²⁵ *The New York Times* reported that Wall Street backed investors own about \$60 billion in single family real estate, which does not amount to much given the \$35 trillion of residential investments in the US. Francesca Mari, *A \$60 Billion Housing Grab by Wall Street*, N.Y. Times (Mar. 4, 2020), <https://www.nytimes.com/2020/03/04/magazine/wall->

- Fifth, as home prices rise and members of generations buy those homes, older generations become the beneficiaries of an intergenerational transfer of wealth from young to old.¹²⁶

The funding to implement LIMBY policies could come solely from putting a little more financial pressure on the folks most benefiting from an unacceptable status quo – yes, you, homeowners. This source of funding will be sustainable for at least the short- to medium-term based on historical positive trends and projected increases in residential values.¹²⁷ Communities can develop several means to retrieve financial support from homeowners for LIMBY policies. For instance, fees can be retrieved upon any home sale or on an annual basis, akin to a property tax.¹²⁸ Or, in states like Oregon, where caps have been set on property taxes, those caps can be lifted so that taxes can be more responsive to market conditions and societal needs.¹²⁹

B. Deed Restriction Programs, Trust Funds, and No-Cost Solutions

Such fees could also support innovative approaches such as deed restriction programs.¹³⁰ One example of this approach is Crested Butte’s “Good Deed” program, in which the community pays homeowners to put a deed restriction on their property such that, upon a sale, the home cannot not be used for anti-LIMBY purposes – in other words, purposes unaligned with

street-landlords.html; Cortright Trillions, *supra* note 96.

¹²⁶ Economists Ed Glaeser and Joseph Gyourko stated that “[b]ecause homeowners tend to be older while renters are younger, the limited growth in housing supply has created an intergenerational transfer to currently older people who happened to have owned in the relatively small number of coastal markets that have seen land values increase substantially.” Ed Glaeser and Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 *J. Econ. Perspectives* 3, 21 (Winter 2018).

¹²⁷ See, e.g., Molly Grace, *Home Value Appreciation: Homeowner Expectations Vs. Reality*, Rocket (Aug. 21, 2022), <https://www.rockethomes.com/blog/housing-market/home-value-appreciation> (evaluating home value appreciation over time through analysis of federal and commercial data).

¹²⁸ See, e.g., Brauns, *supra* note 39 (outlining Oregon Governor Kate Brown’s proposed real estate sales tax for homes sold for more than \$500,000. The proposal failed but other states could learn from the legislation when developing their own policies).

¹²⁹ See *id.* (detailing the creation of a cap on property taxes in Oregon); see also Tam Moore, *Oregon’s Flawed Property Tax System Is a Choice*, *The Oregon Way / KATU* (Sept. 11, 2021), <https://katu.com/news/local/opinion-oregons-flawed-property-tax-system-is-a-choice> (summarizing potential means for reform to property tax caps).

¹³⁰ Mark Reaman, *CB Council Review Town Housing Goals and Direction*, *Crested Butte News* (June 1, 2022), available at: <https://crestedbuttenews.com/2022/06/cb-council-reviews-town-housing-goals-and-direction/>

keeping locals in their community.¹³¹ Some deed restriction programs explicitly give preference to buyers already living or working in the community, and others set a formula for the resale price at future sales. Such formulas tie the future price to area median income, for example, to prevent prices from getting out of control.¹³² Generally, deed restrictions have the greatest impact in communities where “large amounts of assistance are needed to bring home prices within reach of low- and moderate-income families, and where rapid increases in home prices are expected.”¹³³ This category includes Bend, Boise, Bozeman, and other metropolitan areas experiencing WEEM in-migration and the effects of STRs on local housing markets.

Unsurprisingly, absent enforcement, homeowners attempt to avoid the restrictions. Officials in the county home to Crested Butte estimated that nine percent of deed restricted units did not comply with the restrictions.¹³⁴ Proactive, low-cost steps, such as communities filing liens in addition to restrictions on the deed, can increase the odds of subsequent purchasers being adequately informed of the limitation.¹³⁵

Communities should also consider whether state law imposes any limits on such programs. Perpetual deed restrictions tend to succeed when it comes to preserving the long-term affordability of housing.¹³⁶ However, many states limit deed restrictions to a defined period of time.¹³⁷ In the event that a community considering implementing a deed restriction program resides in a state with limits on deed restrictions, this community would likely benefit from working with similarly situated communities to reform the law.

Finally, funding from fees and/or taxes on homeowners could serve as a source of funds for the community to lend to locals to purchase homes. Imagine a community creating a trust fund meant to supplement the offers made by locals attempting to buy their first home in their hometown. This financial boost would help locals compete with individuals from parts of the nation with vastly more financial resources and who have the capacity to make deals in cash far above the seller’s asking price.¹³⁸

¹³¹ *Id.*

¹³² *Deed-restricted Homeownership*, Local Housing Solutions (n.d.), <https://localhousingsolutions.org/housing-policy-library/deed-restricted-homeownership/> [hereinafter, Housing Solutions].

¹³³ *Id.*

¹³⁴ Reaman, *supra* note 130.

¹³⁵ Housing Solutions, *supra* note 132.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See, e.g., Rob Rogers, *Out-of-Staters Buying More Homes in Billings Sometimes Sight Unseen, Sometimes with Cash*, Billings Gazette (May 27, 2020), <https://billingsgazette.com/news/local/out-of-staters-buying-more-homes-in-billings->

Such funds could also be used to assist renters. One more time – think back to Justin in Bend. When Justin finally found a place to rent during the Summer of 2020, he realized he had insufficient savings to cover the high initial costs; the landlord was asking for first and last months' rent, as well as a deposit.¹³⁹ In total, Justin needed more than \$5,000 up front to rent that home.¹⁴⁰ Most folks do not have easy access to that kind of cash.¹⁴¹ Communities could reduce the hurdle posed by initial costs by lending money to locals. Additionally, communities could also regulate the extent to which a landlord can impose such high costs, which would come at no direct cost to the community.

Other policies require little to no funding. For instance, a community could take steps to tip the scales in favor of locals in the open market. Communities could mandate that sellers state a minimum, binding price available first to locals for a certain period of time – if any local meets that price (and other qualifications), then the seller would be bound to sell the home.¹⁴² Alternatively, as discussed below, communities could limit or ban the number and type of units that could be offered as STRs, thereby (at least in the short term) preserving more units of housing for sale to locals who intend to reside in the unit.

The status quo approach to affordable housing will not sufficiently protect locals on the verge of displacement. Current policies either do not work, do not consider locals, do not have a chance of impacting things in the short run, or a combination of those shortcomings. Locals need immediate and tailored relief. Therefore, community leaders must champion the sort of policies described in the second part of this section. Otherwise, communities will continue to fill up with out-of-towners who have no interest in doing anything other than acting on self-interest and the national news.

sometimes-sight-unseen-sometimes-with-cash/article_11b1381e-574c-5f2d-a0e6-d0b13dd3f9ab.html.

¹³⁹ Brauns, *supra* note 39.

¹⁴⁰ *Id.*

¹⁴¹ See, e.g., Emmie Martin, *This Chart Shows How Much Money Americans Have in Savings at Every Age*, CNBC, <https://www.cnbc.com/2019/03/11/how-much-money-americans-have-in-their-savings-accounts-at-every-age.html> (Nov. 23, 2020, 11:30 AM) (reporting that, among Americans thirty-four and younger, couples *without children* have an average of \$4,727 in savings).

¹⁴² See Ward Village, *Reserved Housing in Ward Village Helps Generations of Kama'āina Families Buy Homes in Honolulu*, PAC. BUS. NEWS (July 15, 2022), <https://www.bizjournals.com/pacific/news/2022/07/15/reserved-housing-in-ward-village-helps-generations.html> (providing a related example of such a policy – simply reserving homes for local resident buyers).

VI. THE LEGALITY OF LIMBY POLICIES

A. Legality of Policy Preferences for Locals

Before continuing this investigation of LIMBY policies, it is important to establish the legal legitimacy of the policies. Some readers may (reasonably) assume that legal barriers have prevented the implementation of LIMBY policies. However, it turns out that the law may pose less of a hurdle than many may have thought – as revealed by the legal analysis in this section. The following constitutional analysis pertains to a hypothetical community trust fund policy in which a city provides cash assistance to qualifying locals making offers on homes, one way in which local governments can reduce the odds of locals being displaced.

A community trust fund policy could be contested under the Privileges and Immunities Clause of Article IV of the U.S. Constitution, which protects non-residents from discrimination by a state.¹⁴³ According to the *Piper* test, “[a] State may discriminate against nonresidents only where its reasons are ‘substantial,’ and the difference in treatment bears a close or substantial relationship to those reasons.”¹⁴⁴ Under these rules, residents of the state in which the policy was enacted could not bring a Privileges and Immunities Clause claim. Article IV does not serve as a basis for residents to contest policies. The Privileges and Immunities Clause only protects non-residents against discrimination implicating fundamental privileges of citizenship.¹⁴⁵

To prevail in a case challenging the constitutionality of a community trust fund policy, non-residents must show that the policy implicates a fundamental privilege of citizenship, which the U.S. Supreme Court has narrowly defined as the “right of citizens to ‘ply their trade, practice their occupation, or pursue a common calling.’”¹⁴⁶ Even if a regulation does implicate such a privilege, the intent of the law may result in the U.S. Supreme Court upholding the law despite its effects on out-of-state residents.¹⁴⁷ Only laws enacted for “the protectionist purpose of burdening out-of-state citizens” have been struck down by the U.S. Supreme Court.¹⁴⁸ However, since the interest of non-residents in this situation is purchasing a home, it is unlikely that they will be able to show the policy infringes on an

¹⁴³ See *Toomer v. Witsell*, 334 U.S. 385, 395, *reh’g denied*, 335 U.S. 837 (1948).

¹⁴⁴ *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 288 (1985).

¹⁴⁵ See, e.g., *Haw. Boating Ass’n v. Water Transp. Facilities Div.*, 651 F.2d 661, 666, (9th Cir. 1981) (declining to extend Article IV protections to mooring fees).

¹⁴⁶ See *McBurney v. Young*, 569 U.S. 221, 227 (2013) (quoting *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978)).

¹⁴⁷ See *id.* at 227-30.

¹⁴⁸ See *id.* at 227-30. (citation omitted).

interest that is “basic to the maintenance or well-being of the Union.”¹⁴⁹ However, even if a court construed buying a home as covered by the Privileges and Immunities Clause, a state or city could persuasively argue that a LIMBY law such as a community trust fund does not have a protectionist purpose, but rather aims to assist locals in accessing the milestone of homeownership.¹⁵⁰ Therefore, the community trust fund policy will likely survive judicial scrutiny under the Privileges and Immunities Clause.

Opponents of the policy may claim that the government has an obligation to level the playing field for all people trying to live in the relevant jurisdiction. However, the Equal Protection Clause does not “demand that a statute necessarily apply equally to all persons.”¹⁵¹ Similarly, it “does not require that things which are different in fact . . . to be treated as though they were the same.”¹⁵² The *McGowan v. Maryland* court, when not addressing a policy affecting a fundamental right or a suspect class, further specified that “statutory discrimination will not be set aside if any state of facts reasonable may be conceived to justify it.”¹⁵³ If Bend, Boise, or Bozeman instituted our hypothetical policy, then the government would have no problem finding a state of facts to justify additional housing support for locals.

The Equal Protection Clause of the Fourteenth Amendment is triggered when similarly situated people are treated differently.¹⁵⁴ When a state or local law affects a fundamental right or a member of a discrete, insular minority, then a court will apply a strict scrutiny standard of review in an Equal Protection analysis.¹⁵⁵ In other words, the court will determine whether the policy is narrowly tailored to advance a compelling government interest.¹⁵⁶ However, in most other cases, a court conducting an Equal Protection analysis will apply the lower standard of rational basis, under which the law must be reasonably related to a legitimate government purpose.¹⁵⁷ This lower standard increases the odds of the hypothetical policy surviving constitutional review.

The Supreme Court of the United States has so far only included race,

¹⁴⁹ See *Baldwin v. Fish and Game Comm'n.*, 436 U.S. 371, 389 (1978).

¹⁵⁰ See generally Joel Rakhimov, *On the Constitutionality of Charging In-state Tuition*, HARV. UNDERGRADUATE. L. REV. (2020), <https://hulr.org/fall-2020/on-the-constitutionality-of-charging-in-state-tuition> (summarizing the longevity of unsuccessful challenges to the constitutionality of providing resident students with lower tuition).

¹⁵¹ *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966).

¹⁵² *Id.* (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)).

¹⁵³ *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

¹⁵⁴ *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 602 (2008).

¹⁵⁵ *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).

¹⁵⁶ See *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987).

¹⁵⁷ See *Heller v. Doe*, 509 U.S. 312, 319–20 (1993).

national ancestry, ethnic origin, and alienage (with respect to state-level action, as opposed to federal action) within the category of a suspect class.¹⁵⁸ The Court has declined to expand that classification to include age, wealth, and people with mental disabilities.¹⁵⁹ Generally, a group will not be deemed as a suspect class where that group does not possess a trait that is immutable or unalterable.¹⁶⁰ It follows that potential homebuyers not identified as locals by a government enacting a LIMBY policy would likely not qualify as a suspect class. Their non-local status is neither immutable nor unalterable. Furthermore, since the Supreme Court has specified that wealth is not a suspect class,¹⁶¹ a LIMBY policy limiting its financial support to locals earning less than a certain income per year would also be reviewed under rational basis. Therefore, an income-based form of differentiation would be constitutionally permissible.

Courts have already upheld policy preferences for local residents with respect to public housing. For example, the federal district court in *Langlois v. Abington Hous. Auth.* specified that public housing authorities could adopt residency preferences, such as a preference for locals, but cautioned that such a preference should be “adopted or implemented in accordance with an extensive list of nondiscrimination and equal opportunity requirements” in federal law.¹⁶² The *Langlois* court additionally conditioned the legality of a preference for locals on the extent to which the government offered “a record of conditions and needs that demonstrate that a residency preference would correct [the] housing problems” motivating the underlying policy.¹⁶³ The condition set by the *Langlois* court, to the extent it applies to our hypothetical policy, would likely not be a problem for Bend, Boise, or Bozeman in developing a policy to favor locals. These communities have plenty of evidence to show why locals need additional support in the housing market.

However, governments seeking to implement a community trust fund or any related LIMBY policy should take affirmative steps to ensure that the policy is not adopted as a result of any discriminatory intent. If a policy has a disparate effect on race, then the court may start there in assessing if an underlying discriminatory intent motivated the adoption of the policy.¹⁶⁴ Courts will make a “sensitive inquiry into such circumstantial and direct

¹⁵⁸ See *Thompson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996), *cert. denied*, 519 U.S. 948 (1996).

¹⁵⁹ See, e.g., *Murgia*, 427 U.S. at 314–14 (explaining age is not a suspect class suspect to scrutiny).

¹⁶⁰ See *id.* at 312–14.

¹⁶¹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 29 (1973).

¹⁶² *Langlois v. Abington Hous. Auth.*, 234 F.Supp.2d 33, 68 (2002).

¹⁶³ *Id.* at 70.

¹⁶⁴ *Mhany Mgmt. Inc. v. County of Nassau*, 819 F.3d 581, 598 (2d Cir. 2016).

evidence as many be available.”¹⁶⁵ The extent to which a LIMBY policy may have a disparate effect on race varies from community to community based on the composition of that community as well as the community’s definitions of “local.” The odds of discriminatory intent serving as the implicit or explicit motive for any right to hometown policy can be diminished by adhering to the government’s normal policy-making procedures and developing a thorough record that indicates the government’s non-discriminatory purposes for the policy.¹⁶⁶

Assuming governments sufficiently diminish concerns of any discriminatory intent, they can also bolster the legal rationale for group-specific zoning (i.e., zoning for locals) by citing related case law upholding housing policies intended to advance local interests, even at the expense of certain groups. Lower courts have specifically opted not to regard another group of residents with relatively few ties to the community – college students – as a suspect class.¹⁶⁷ They have denied students that status, in part, based on a lack of evidence that society has historically nor irrationally expressed prejudice against students¹⁶⁸ and, in part, on the fact that “[r]estrictions on activities generally engaged in only by teens or young adults have been upheld in other contexts.”¹⁶⁹

For similar reasons, courts would likely not afford the protections provided by “suspect class” status to residents who have spent only a few years in a location and, therefore, are not regarded by the government as a “local.” Like college students, newcomers to a city “have not faced a long history of discrimination, are not an insular minority, and have not been classified according to an immutable trait acquired at birth.”¹⁷⁰ However, if a government opted to prefer only “true locals,” those born in the community, rather than a group including “adopted locals,” then a court might find it necessary to apply strict scrutiny on the basis that the location of one’s birth is an immutable trait acquired at birth.

Given that a suspect classification angle will likely fail, those challenging a community trust fund policy will then have to try to categorize it as affecting a fundamental right. This will prove to be difficult. “[T]he courts have held that these rights can be found in those explicitly enumerated

¹⁶⁵ *Id.*

¹⁶⁶ *See* Winfield v. City of New York, 2016 U.S. Dist. LEXIS 146919, 23, 2016 WL 6208564.

¹⁶⁷ *See* Fed. Hill Capital, LLC v. City of Providence, 2018 R.I. Super. LEXIS 14, 11 (collecting cases in which courts opted not to treat college students as a suspect class).

¹⁶⁸ *See, e.g.*, Bloomberg Landlords Ass’n v. Town of Bloomsberg, 912 F. Supp. 790, 805 (1995).

¹⁶⁹ *Id.* (collecting cases).

¹⁷⁰ SPUR at Williams Brice Owners Ass’n, Inc. v. Lalla, 415 S.C. 72, 781 S.E.2d 115, 123 (S.C. 2015).

in the Bill of Rights, as well as other implied constitutional guarantees that are deemed fundamental to our society of ordered liberty.”¹⁷¹ Courts inquiring into whether a right constitutes a “fundamental right” may also look to the “traditions and [collective] conscience of our people” to determine whether a right is “so rooted [there] . . . as to be ranked as fundamental.”¹⁷² A few states, within the context of fundamental rights protected by their respective state constitution, have expanded this list of rights. For instance, Rhodes Island includes the rights of fishery and the privileges of the shore as fundamental rights.¹⁷³

However, where a court can regard legislation as economic or social legislation, then it will most likely not regard it as implicating a fundamental right.¹⁷⁴ In *Village of Belle Terre v. Boraas*, the Court upheld a zoning ordinance that restricted occupancy of single-family homes to traditional families – defined as “one or more persons related by blood, adoption, or marriage, living and cooking together as a single household unit[.]”¹⁷⁵ Similar zoning ordinances restricting who can live in a certain kind of housing have also been upheld.¹⁷⁶

Where such restrictions have been overturned under the Equal Protection Clause, the court’s determination has often been that the proposed restrictions did not rationally relate to the problems occurring in the relevant jurisdiction.¹⁷⁷ For instance, a Rhode Island court determined that town’s zoning law, which prohibited more than three unrelated individuals from sharing a residential unit, was unconstitutional under the Equal Protection Clause.¹⁷⁸ That court noted that the restriction contradicted the determinations of local officials with respect to necessary housing policies and were not crafted in response to any sort of crisis nor even a “substantial change in circumstances” that would warrant the restrictions.¹⁷⁹ The connection between LIMBY policies providing financial support to local homebuyers and the underlying crisis of displacement caused by the sudden proliferation of newcomers is surely strong enough to avoid being declared unconstitutional under the Equal Protection Clause. This likelihood is strengthened by the fact that the Supreme Court of the United States has permitted district courts to consider “local tradition and custom” in an equal

¹⁷¹ Fed. Hill Capital, LLC, 2018 R.I. Super. LEXIS at 12 (internal quotations omitted).

¹⁷² See *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

¹⁷³ R.I. Const. Art. I, §§ 16-17.

¹⁷⁴ See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974).

¹⁷⁵ *Id.* at 1.

¹⁷⁶ See Fed. Hill Capital, 2018 R.I. Super. LEXIS at 15 (collecting cases).

¹⁷⁷ See generally *Distefano v. Haxton*, 1994 R.I. Super. LEXIS 98, 1994 WL 931006, 1 (R.I. Super. Dec. 12, 1994).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 38–39.

protection analysis.¹⁸⁰ Overall, courts will likely not find that there is a fundamental right of choice in housing; therefore, local governments are likely free to use LIMBY policies to assist locals in their aim to remain in their community.

The Fourteenth Amendment also prevents state or local governments from taking action in “an arbitrary or capricious fashion,” as doing so would violate a person’s substantive due process rights.¹⁸¹ However, plaintiffs challenging legislation on substantive due process grounds will only succeed on such a claim if they can prove that the government’s action was “clearly arbitrary and unreasonable” as well as “having no substantial relation to the public health, safety, morals, or general welfare.”¹⁸² Governments can reduce the odds of LIMBY policies being overturned on substantive due process grounds by following the same advice as for Equal Protection: follow the traditional policy-making procedures and develop an extensive record outlining the need for the policy.

B. Legality of LIMBY Policies Related to Short-Term Rentals

Short-term rentals displace locals, as discussed above. The emergence of Airbnb and other STR platform caught many cities off guard and, consequently, unregulated.¹⁸³ Now communities such as New Buffalo, Michigan are doing their best to stop the spread of these rentals given the deleterious impact of such rentals on locals seeking to stay put. When New Buffalo issued a moratorium on permits for STRs in the city,¹⁸⁴ resident property owners dragged the City into court – attacking the legality of the ordinance.¹⁸⁵ Some of those attacks were specific to the manner in which New Buffalo implemented the moratorium; others were grounded in the constitution and, therefore, are relevant to cities considering similar policies. Notably, the court did not find the latter arguments to be particularly

¹⁸⁰ *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

¹⁸¹ *Sinaloa Lake Owners Ass’n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989).

¹⁸² *Id.*

¹⁸³ See, e.g., Times Editorial Board, *Editorial: Wrong Way on Airbnb*, L.A. Times (Apr. 30, 2015), <https://www.latimes.com/opinion/editorials/la-ed-rentals-airbnb-20150430-story.html> (describing Los Angeles as being “[c]aught off guard” by the popularity of “room-sharing services.”)

¹⁸⁴ David Johnson, *New Buffalo Short-Term Rental Ordinance Opposed, Supported and Approved*, Harbor County News (Dec. 4, 2021), https://www.harborcountrynews.com/news/new-buffalo-short-term-rental-ordinance-opposed-supported-and-approved/article_2a0a138a-4f8c-11ec-a1e2-1b04b48b3b5c.html.

¹⁸⁵ Jamie A. Hope, *New Buffalo’s Mayor Takes Hardball Approach to Short-Term Rentals*, Capitol Confidential (Mar. 18, 2022), <https://www.michigancapitolconfidential.com/new-buffalos-mayor-takes-hardball-approach-to-short-term-rentals>.

strong.¹⁸⁶

First, the plaintiffs relied on the Commerce Clause to end the moratorium.¹⁸⁷ “When a law protects in-state economic interests and, as a result, imposes a burden on out-of-state competitors, a court will apply a Dormant Commerce Clause review,” according to the *Moskovic* court.¹⁸⁸ Courts will almost invariably invalidate state laws that “explicitly discriminate against interstate commerce.”¹⁸⁹ They will also strike down “laws that appear neutral but have an ‘impermissibly protectionist purpose or effect.’”¹⁹⁰ However, the *Moskovic* court did not think the Dormant Commerce Clause should invalidate the moratorium because, on its face, the moratorium treated residents and non-residents alike, as well as interstate and intrastate commerce.¹⁹¹ The court also did not identify any discriminatory or protectionist intent on behalf of New Buffalo.¹⁹²

Given its finding that New Buffalo’s moratorium on STR permits did not implicate the Dormant Commerce Clause’s prohibition on express protectionism, the court then considered if the undue burden test would render the moratorium unconstitutional.¹⁹³ Under that test, “laws will be upheld unless they impose burdens on interstate commerce that clearly exceed their local benefits.”¹⁹⁴ As applied to the moratorium, the court determined that it posed no undue burden “whatsoever” on interstate commerce.¹⁹⁵ The court supported this conclusion by pointing out that “the burden [created by the moratorium] is the same regardless of whether the homeowner or renter are from the state or not.”¹⁹⁶ It also noted that it had received no notice of any regulation that had been struck down under the Dormant Commerce Clause merely because it negatively affected business transactions that could involve out-of-state participants.¹⁹⁷

The *Moskovic* court also doubted the strength of Equal Protection claims raised by the plaintiffs.¹⁹⁸ As discussed above in the analysis of the *Langlois* case, the *Moskovic* court noted that the plaintiffs would struggle to show that the moratorium implicated a fundamental right or affected a

¹⁸⁶ *Moskovic v. City of New Buffalo*, 2021 U.S. Dist. LEXIS 72576, at 8, (W.D. Mich. Apr. 15, 2021).

¹⁸⁷ *Id.* at 2.

¹⁸⁸ *Id.* at 8 (quoting *Garber v. Menendez*, 888 F.3d 839, 843 (6th Cir. 2018)).

¹⁸⁹ *Id.* (quoting *Garber v. Mendez*, 888 F.3d 838, 843 (6th Cir. 2018)).

¹⁹⁰ *Id.*

¹⁹¹ *Moskovic*, 2021 U.S. Dist. LEXIS 72576 at 8.

¹⁹² *Id.*

¹⁹³ *Id.* at 8.

¹⁹⁴ *Id.* at 9 (quoting *Garber v. Menendez*, 888 F.3d 839, 843 (6th Cir. 2018)).

¹⁹⁵ *Moskovic*, 2021 U.S. Dist. LEXIS 72576 at 9.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

suspect class.¹⁹⁹ Furthermore, it was obvious to the court that New Buffalo had a rational basis for the moratorium on STR permits.²⁰⁰ The city had documented its interest in monitoring the use of homes for STRs as well as its concern “for the well-being of the community.”²⁰¹

Finally, one short paragraph was enough for the court to evaluate and reject the substantive due process claims raised in *Moskovic*.²⁰² Although the plaintiffs argued that the moratorium deprived them of their “right to operate their business [and] use their property” and that the city’s denial of their STR permits occurred without a “rational relationship to a legitimate government interest,”²⁰³ the court disagreed and flatly stated, “Local governments have a legitimate interest in regulating the use of property within their jurisdiction”²⁰⁴

The holding in *Moskovic* should reassure cities considering taking actions to limit STRs that they likely can do so on legally strong ground. Like the City of New Buffalo, these communities should thoroughly document their rationale for whatever policy they opt to implement, and they should tailor their policy to avoid concerns about impermissible discrimination and interference with interstate commerce.

VI. THE DEMOCRATIC IMPORTANCE OF LIMBY

A. Displacement of Locals Diminishes the Vibrancy and Viability of Local Democratic Institutions

Municipal and local governments develop and defend the character of their community.²⁰⁵ Community character forms from a combination of “sociocultural, economic, geographical, and environmental factors.”²⁰⁶ External alterations to those factors can diminish the extent to which a community can cooperatively work towards a shared vision.²⁰⁷ The result is a less cohesive community in which democracy breaks down.

The COVID-19 pandemic and the myriad political, cultural, and economic shifts it produced served as an external shock that rippled through communities of every size in every part of the country.²⁰⁸ Communities that

¹⁹⁹ *Id.* at 10.

²⁰⁰ *Id.* at 11.

²⁰¹ *Moskovic*, 2021 U.S. Dist. LEXIS 72576, at 11 (citation omitted).

²⁰² *Id.* at 11–12.

²⁰³ *Id.* (citations omitted).

²⁰⁴ *Id.* at 12.

²⁰⁵ Sarah Swan, *Constitutional Off-Loading at the City Limits*, 135 HARV. L. REV. 831, 838 (“Municipalities carefully construct and fiercely protect their community character.”).

²⁰⁶ *Id.*

²⁰⁷ See *infra* notes 217–20 and accompanying text.

²⁰⁸ See, e.g., Ellen Barry, *Drained by a Year of Covid, Many Mayors Head for the Exit*,

previously had succeeded in sustaining and protecting a distinct community character suddenly found themselves struggling to avoid a fractured existence. Kalispell, Montana regrettably serves as an example of such fracturing.

“Montanans used to live and let live. Today bitter confrontations dim Big Sky Country.”²⁰⁹ In the article following this headline, journalist Lisa Rein described a community “desperate for unity” after having been “jittery for months.”²¹⁰ As evidence, Rein outlined a parade of pickup trucks full of Trump supporters passing regularly through town, neighbors being “cleaved” by differences in opinions on mask mandates, Facebook groups once reserved for conversations about nature being subsumed by politics and even “being ‘suspicious’ of the new people moving here,” and the suicides of nine teenagers in the span of a little more than a year.²¹¹ From these events, Rein concluded that a community once capable of rallying together to solve problems was now at serious risk of letting any new “political issues” tear it apart.²¹² The mayor even declared that his town was “going through a divorce.”²¹³

How can representatives of such a community – one where national issues dominate and divide – effectively voice the needs and address the concerns of their constituents?

The nationalization of everything has broken down the protections that used to allow communities to remain intact. Rein attributes some of the discord in Kalispell to the fact that “national passions erupted” in the community.²¹⁴ Events in Washington, D.C., were given more attention and weight by more residents than the issues immediately before them and most applicable to the well-being of their community.

As has proven true in once cohesive communities across the U.S., these events “convuls[ed] everything from the school district and the public library to daily interactions” and were given airtime by “old-school Republicans, backers of [Trump], increasingly vocal Democrats and out-of-

N.Y. TIMES (Apr. 11, 2021), <https://www.nytimes.com/2021/04/11/us/covid-burnout-mayors.html> (reviewing how mayors in communities across the U.S. resigned from office due to the governing burdens imposed by COVID-19 and its effects).

²⁰⁹ Lisa Rein, *Montanans Used to Live and Let Live. Today Bitter Confrontations Dim Big Sky Country*, WASH. POST (Oct. 25, 2021, 6:00 AM), https://www.washingtonpost.com/politics/montana-extreme-trump/2021/10/22/0f82afbc-0037-11ec-a664-4f6de3e17ff0_story.html.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

state transplants.”²¹⁵ Local traditions gave way to national skirmishes, which require all participants to pick one side or the other. So, it comes as no surprise that one Kalispell resident concluded that “[t]here’s no middle anymore” and another asserted that “[t]he extremists have stolen everything.”²¹⁶

People with new or relatively few ties to a community are less likely to invest in the perpetuation of local institutions, such as local newspapers, that are critical to our democracy.²¹⁷ It turns out WEEMs are especially unlikely to watch or read local news.²¹⁸ Thus, as WEEMs squeeze into new communities, they may not only displace locals but also deprive a local newspaper of subscribers.²¹⁹ The displacement of likely subscribers may contribute to the demise of local news and the role it plays in our democracy.

“In the 15 years leading up to 2020, more than one-fourth of the country’s newspapers disappeared,” writes Penelope Muse Abernathy of the University of North Carolina.²²⁰ That depressing and troubling trend is accelerating: three hundred newspapers closed between 2018 and 2020, causing more than six thousand journalists to lose their professional roles.²²¹ Not only has the number of local papers dwindled, many of those remaining have been acquired by national media companies.²²² Whereas local papers used to have pages filled with distinct, hyperlocal content, individual papers under common national ownership now share a tremendous amount of content, which tarnishes the local product by making it “look and feel homogenized.”²²³

²¹⁵ Rein, *supra* note 209 (internal quotations omitted).

²¹⁶ *Id.*

²¹⁷ See generally, U.S. DEP’T OF LABOR, BUREAU OF LABOR STAT., USDL-16-0363, VOLUNTEERING IN THE UNITED STATES—2015 (2016), (disclosing survey findings that individuals with kids volunteer more in a community, which suggests they have more ties to the community and a greater interest in its well-being than those without kids or similar connections to their community).

²¹⁸ See also Michael Barthel et al., *Older Americans, Black Adults and Americans with Less Education More Interested in Local News*, PEW RSCH. CTR. (Aug. 14, 2019), available at: <https://www.pewresearch.org/journalism/>

2019/08/14/older-americans-black-adults-and-americans-with-less-education-more-interested-in-local-news/.

²¹⁹ See *id.*

²²⁰ Penelope Muse Abernathy, *The Local News Landscape in 2020: Transformed and Diminished*, US NEWS DESERTS, <https://www.usnewsdeserts.com/reports/news-deserts-and-ghost-newspapers-will-local-news-survive/the-news-landscape-in-2020-transformed-and-diminished/> (last visited Oct. 12, 2022).

²²¹ *Id.*

²²² See generally Benjamin LeBrun et al., *Buying the news: A quantitative study of the effects of corporate acquisition on local news*, New Media & Society (2022).

²²³ See, e.g., Michael Hiltzik, *Local news decline takes big toll on society*, L.A. Times (Aug. 29, 2022), <https://www.latimes.com/business/story/2022-08-29/decline-of-local-news>.

The homogeneity of content from one newspaper to the next makes it easier than ever to follow national news: there is more of it and, in many cases it is of higher quality. Local newspapers (specifically, locally-owned-and-operated newspapers²²⁴) may not publish pieces likely to win any awards and may not do so until enough consumers deliberately choose to prioritize and financially support this source of news. Readers concerned about the cause and impacts of anti-LIMBY policies and market conditions ought to consider not only subscribing themselves but also gifting subscriptions to local papers to others in their community.

A vibrant local paper can raise awareness of locals facing displacement. Locals rely on community papers to “keep them informed, to keep their elected officials and business leaders honest, and to provide the glue that brings neighbors together as a community,” writes Michel Hiltzik.²²⁵ In the absence of that glue, neighbors may not care if locals get displaced because – for them – their physical location has little impact on their daily activities. They can stay home to work, order food, and even socialize. The downstream effects of such a lack of engagement are significant. In a place without a local newspaper, the sense of community gets “sap[ped],” communal knowledge suffers “incalculable” losses, and voter turnout decreases;²²⁶ additionally, people have to look for other sources of news.²²⁷

National issues and media are inherently devoid of local context.²²⁸ If these issues get prioritized, then residents feel no need to understand how issues are playing out in their community. When local news organizations were more common and well-funded, communities could have forged a consensus around the right approach to mask mandates. In that setting, teachers such as Kari Elliott, who had served as a public school educator in Montana for nearly 30 years, would have had a meaningful voice in the process of reaching that local consensus.²²⁹ As professionals like Elliott with vested stakes in local news and the local community get pushed out of those places due to a lack of LIMBY policies, national news and perspectives may

²²⁴ See *id.* (mentioning that Gannett, a single company, owns more than 400 local weeklies and dailies in all but four states and that Lee Enterprises, another company, owns 77 newspapers in 26 states).

²²⁵ *Id.*

²²⁶ See *id.*

²²⁷ See *id.*

²²⁸ Sara Fischer, *The Local News Crisis is Deepening America's Divides*, Axios (July 4, 2022), <https://www.axios.com/2022/07/04/local-newspapers-news-deserts> (discussing how national news falls to fill the gaps in coverage when local news organizations leave a community).

²²⁹ Rein, *supra* note 209 at 43.

fill the vacuum.²³⁰ In Kalispell, many people opted to repeat nationally-oriented talking points they read on Facebook, Twitter, and the like. Still, the town had enough residents committed to the community to rebuke some efforts to rob the community of its cohesion – of the five challengers to community’s school board (all running in opposition to masks) only one succeeded.²³¹ Elliott attributed their losses to the fact that “[m]ost of the parents still trusted in the public schools.”²³² That sort of trust cannot be forged without a commitment to a community.

A commitment to a community can exist within a town or city of any size. Just as Kalispell residents have been rebuilding their cohesive community by resisting the temptation to nationalize everything and exploring LIMBY policies such as workforce housing,²³³ residents of neighborhoods in big cities like San Francisco can start spending more time meeting people on their block (rather than online), picnicking in their local parks (rather than flying to other states), and attending Board of Supervisor meetings (rather than endlessly scrolling through Twitter and retweeting to show their partisan bona fides). Obviously, it will be harder for the numerous residents of San Francisco to be as cohesive as the residents of Kalispell who are fewer in number, but San Francisco would still be a much stronger community if its respective neighborhoods, such as the Sunset and the Mission, took meaningful steps to forge cohesive communities within the larger municipal context.

In the news vacuum left by the closing or nationalization of a local paper, there is no guaranteeing that community members will fill the gap with quality news. The co-founder of Report for America, Steven Waldman, noted that in many cases that gap is filled by “misinformation engines” operated by political insiders, ideologues, and corporate public relations departments.²³⁴

²³⁰ See, e.g., Andre M. Perry, *Too Many Teachers Can’t Afford to Live Near Their Schools*, Brookings (June 20, 2019), <https://www.brookings.edu/blog/the-avenue/2019/06/20/too-many-teachers-cant-afford-to-live-near-their-schools/>; see also VOTE SD5 Students ARE the Future, Facebook (n.d.), <https://www.facebook.com/people/VOTE-SD5-Students-ARE-the-Future/100064831908839/> (indicating the willingness of the challengers to focus on non-local issues, such as critical race theory and the spread of communism).

²³¹ Rein, *supra* note 209 at 43.

²³² Rein, *supra* note 209 at 43; see generally Our Solutions, YIMBY Action (n.d.), <https://yimbyaction.org/2021/solutions/> (last visited Oct. 4, 2022) (demonstrating that supporters of affordable housing also prioritize high quality schools and community funding for schools).

²³³ See, e.g., Heidi Desch, *Kalispell Council to Take Input on Workforce Housing Funding Proposal*, Daily Inter Lake (Sept. 19, 2022), <https://dailyinterlake.com/news/2022/sep/19/kalispell-council-takes-input-workforce-housing-fu/>.

²³⁴ Steve Waldman, *Our Local-News Situation Is Even Worse Than We Think*, Columbia

These engines encourage the discord seen in places like Kalispell. LIMBY policies can help reverse the nationalization of news and of politics in general by helping the people most invested in a community stay in that community and participate fully in its democratic self-governance.

B. WEEMs with Political Agendas Heighten Extremism in Their New Communities

“The U.S. is becoming more geographically polarized. Red zip codes are getting redder and blue zip codes are getting bluer. And this is because people are purposefully moving to places that reflect their views,” observed National Public Radio’s Ari Shapiro in his introduction to a recent episode of *Consider This*.²³⁵ Montana’s swing to the right and the bluing of Bend demonstrate this polarization. Like ecosystems disrupted by outside forces, the political equilibriums that had been achieved in Montana and Bend (equilibriums that locals appreciated) have been lost due to in-migration by individuals looking for (among other things) a political haven for their national ideological aims. For similar reasons, in places like Idaho, a community with a clear preference for one political party has become hyper-partisan due to outsiders self-selecting that location as the place to vigorously indulge their partisan preferences.

For Montanans, Idahoans, and Bendites, the result of in-migration is a more extreme bent in their political identity as well as a diminished focus on local issues. Although the Republican Californians that moved to Idaho and Montana did not do so because of the local flavor of Republicanism in those destinations, the new residents will vote straight tickets in local, state, and federal elections despite not having paid attention to political platforms related to local issues.

Bend provides an example of how new residents can insist on enforcing national perspectives on the local community and, over time, change the political identity of that community. For decades, Deschutes County leaned Republican.²³⁶ Like other areas outside of the Portland bubble but relatively close to the western half of the state, it had a reputation for producing center-of-the-road elected officials.²³⁷ The steady and substantial

Journalism Review (Feb. 25, 2022), https://www.cjr.org/local_news/local_reporters_decline_coverage_density.php.

²³⁵ *Red Zip Codes Are Getting Redder, Blue Zip Codes Are Getting Bluer*, NPR (Feb. 21, 2022), <https://www.npr.org/transcripts/1081277034>.

²³⁶ Rhea Panella and Barney Lerten, *For First Time, Deschutes County Democrats Slightly Outnumber Republicans*, KTVZ (Feb. 11, 2020), <https://ktvz.com/news/bend/2020/02/11/for-first-time-deschutes-county-democrats-slightly-outnumber-republicans/>.

²³⁷ See Andrew Selsky, ‘No Way Out’: *Changing Demographics in Central Oregon*

influx of Californians changed the political orientation of Deschutes County politics. That tilt became a skew to the left in 2018 when the arriving Californians, who made up two-thirds of the area's in-migration that year, came from heavily Democratic areas of a state that votes deep blue on the whole.²³⁸ The other arrivals that year came from other liberal bastions such as Seattle and Portland.²³⁹ When a state economist reviewed the party registration information after this influx of outsiders, he speculated that the growth in the number of Democrats "could be a reflection of the political party affiliation of the new residents, rather than longtime locals shifting their party affiliation."²⁴⁰

It is not wrong for new residents to bring their political preferences with them nor is it wrong for them to be robust participants in their new home's civic arena. However, it seems problematic when those moving to an area do so in sufficient numbers to deny long-time locals the chance to have their views represented.

If Bend had LIMBY policies in place, then fewer Californians would have ended up in Central Oregon and the odds of the political character of the community remaining a little closer to its historical norm would have increased. Now, those local, moderate Bendites either have to move out (if they can afford to do so) to find an area that reflects their preferred political culture (which is hard to find) or stay (if they can afford to do so) and tolerate the changes imposed by new residents who never experienced the benefits or drawbacks of the Bendite culture.

As they have done in Oregon, WEEMs with ideological goals have also impacted Montana's politics. Although California has a reputation as a "blue" state, it appears that "redder" Californians have a particular interest in moving to Montana. The influx of conservative Californians may help explain why a historically "purple" Montana has gotten a lot redder in recent years. Billings Mayor Bill Cole has described the political leanings of new residents, by noting that many Californians perceive Montana as "more

Underscore West Coast Political Shift, Associated Press (Feb. 26, 2020), <https://www.statesmanjournal.com/story/news/politics/2020/02/26/>

changing-demographics-central-oregon-underscore-political-shift-gop-republicans-democrats/4878767002/. (Mark Hatfield, a pragmatic governor, was from Dallas, Oregon; Tom McCall, took over for Hatfield and followed his pragmatic ways, grew up in Prineville, Oregon; John Kitzhaber, yet another pragmatic governor, represented Roseburg, Oregon in the state legislature; Dave Frohnmayer, an even-keeled attorney general who almost became governor, was from Medford, Oregon; and, more recently, Bend residents had elected Cheri Helt, widely regarded as a moderate, as their state representative).

²³⁸ See Runberg BEFORE, *supra* note 57 at 12.

²³⁹ *Id.*

²⁴⁰ Andrew Selsky, *Shifting Demographics Drive GOP Nosedive on US West Coast*, Associated Press (Feb. 27, 2020), <https://smdp.com/2020/02/27/shifting-demographics-drive-gop-nosedive-on-us-west-coast/> (quoting economist Damon Runberg).

red,”²⁴¹ and that is a selling point for at least some of the new residents.

Mayor Cole’s anecdotal report on the political leanings of new Montanans from California does have some empirical support. Considering the Republican Party’s historic and fervent opposition to taxes,²⁴² the fact that fifty-eight percent of Californians considering leaving their state identified high taxes as at least one reason for their move provides an indication as to the partisan leanings of new Montanans.²⁴³ It is presumable that the people fleeing a high tax state would vote for policies that avoid a similar outcome in their new home.

Now that the scales have been tipped in places like Bend and states like Montana, researchers anticipate that they will continue to careen away from each community’s original identity. The author of “The Big Sort,” Bill Bishop, observed that “[g]roups of like-minded people tend to become more extreme over time in the way that they’re like-minded.”²⁴⁴ The effect of outsiders skewing politics in one direction is to attract more like-minded outsiders, displacing original residents, unless officials take steps to help locals already invested in a community stay in that community. This has problematic national implications because more extreme political communities will elect hyper-partisan officials unlikely to compromise even when doing so may assist the nation.

VI. CONCLUSION

LIMBY policies are not about forcing people to stay put, but instead giving more Americans the means to choose when and if they will move. Although living in one’s hometown offers many benefits, as discussed above, sticking around too long in certain communities can have negative effects on individuals as well as those around them. Some research suggests that locals in certain communities miss out on exposure to other people, culture, and experiences and, consequently, become insular.²⁴⁵ Relatedly, economic

²⁴¹ Anna Cooban, *Conservatives Are Moving to Billings, Montana, from Coastal Cities to be Around People Who Share Their Views, the Mayor Says*, Insider (Aug. 2, 2021), <https://www.businessinsider.com/moving-to-montana-from-coasts-conservatives-republicans-billings-mayor-2021-8>.

²⁴² See Jonathan Chait, *For Republicans, the Time Is Never Quite Right to Tax the Rich*, *Intelligencer* (Apr. 1, 2021), <https://nymag.com/intelligencer/article/biden-tax-corporations-rich-republicans-infrastructure-congress.html> (referring to the Republican Party’s general and long-term opposition to taxation).

²⁴³ Steven Malanga, *Calculating the Californication*, *City Journal* (Winter 2020), <https://www.city-journal.org/california-migration-politics>

²⁴⁴ John Burnett, *The Widening Political Chasm Is Revealed in Real Estate Data*, NPR (Feb. 17, 2022), <https://www.kunc.org/2022-02-17/the-widening-political-chasm-is-revealed-in-real-estate-data>.

²⁴⁵ Chang, *supra* note 23 (citing research by the Public Religion Research Institute on

analysis has shown that remaining in areas with concentrated poverty may hinder the health and economic well-being of community members.²⁴⁶ Nevertheless, it is important that locals have the power to decide if the benefits of that community outweigh the drawbacks and, as a result, justify remaining in their hometown. Policymakers may want to encourage individuals in struggling communities to search for new homes, but neither the law nor any other force beyond an individual's control should compel them to leave.

Fortunately, community leaders are becoming aware of the value of LIMBY policies. A return to Bend, Oregon provides a great example of this awareness. A 2021 editorial by the Editorial Board of *The Source Weekly*, a local paper, made clear that locals are hungry for a leader brave enough to prioritize Bendites.²⁴⁷ The *Source Weekly* editors laid a strong foundation for any leader seeking to champion LIMBY policies. They pointed out that displacement from the status quo was resulting in empty communities filled with STRs and failing businesses unable to recruit and retain workers.²⁴⁸ They acknowledged that the actions necessary to advance that right might require “taking uncomfortable actions,”²⁴⁹ and they advocated for density and other measures that would allow for sensible growth without diminishing the attributes that make the city so wonderful.²⁵⁰ They also directly pointed out that favoring the interests of locals would come at an economic cost.²⁵¹ In other words, the editors of this local newspaper did nearly everything but coin the phrase “Locals In My Backyard.”²⁵²

It is past time for a movement in favor of LIMBY to take off. YIMBYs began the conversation by asking, “What do we need to build?” and answering, “Affordable housing.” LIMBYs need to ask and answer the next question, “Who are we building for?” The answer is already out there in places such as the *Source Weekly*'s editorial. Surely the folks at the *Source Weekly* are not alone in sensing that residents of communities like Bend are eager to see their local governments help them prevent the involuntarily displacement of locals. What is required for the proliferation of LIMBYism is what every movement needs: refinement of the message, dissemination of the message, and insistence on the message.

One starting idea: the housing crisis is not just an economics problem

some of the downsides of remaining in a specific and small community).

²⁴⁶ *See id.* (“People who left the community they grew up in tend to be more educated and earn higher incomes.”)

²⁴⁷ Editorial Board, *supra* note 100.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

– in fact, first and foremost, it is a people problem. How can we empower people to live and thrive in the communities of their choice? LIMBYism is about putting people at the heart of every affordable housing policy and making sure that everyone has a right to choose their hometown.

One starting place: Bentonville, Arkansas. Though Bentonville and its suburbs, such as Bella Vista, may not receive as much attention as mountain towns for being filled up by WEEMs and having locals pushed out, this slice of the state is facing the same pressures as Boise, Bozeman, and Bend. More specifically, the northwest corner of Arkansas has seen more housing dedicated to STRs as the popularity of its destination towns grows;²⁵³ organizations are actively recruiting out-of-state visitors to become permanent residents;²⁵⁴ and, drastic increases in the cost of housing.²⁵⁵

This region is ready for a LIMBY message. Stakeholders such as the Northwest Arkansas Council (NAC) know that a balance must be struck between recruit of new residents and retention of old ones. NAC’s most recent regional strategy document acknowledged that construction of affordable housing must occur to maintain the area’s quality of life.²⁵⁶ YIMBYs would applaud NAC’s commitment to “[p]ut significant additional focus and investments on addressing the challenges of growth, providing affordable housing and preserving character and quality of life.”²⁵⁷ After all, NAC is appropriately answering the question asked by YIMBYs – “What do we need to build?” However, what NAC and other stakeholders throughout the region need to answer next is “Who are they building for?” Right now, the answer appears to be high-skilled, out-of-town workers.²⁵⁸ While some housing should definitely go toward outside talent, LIMBYs must also take action to ensure housing for locals remains a priority and becomes a reality.

Once the message of LIMBYism takes off in a place such as

²⁵³ See News Release, *Foliage and Football Destinations Top Labor Day Weekend and Fall Travel in the US, Airbnb* (Aug. 16, 2022), <https://news.airbnb.com/foilage-football-and-fresh-water-destinations-top-labor-day-weekend-and-us-fall-travel-trends/> (listing Bella Vista as one of the top destinations for Airbnb guests in the Fall of 2022).

²⁵⁴ See, e.g., *Life Works Here, Northwest Arkansas Council*, <https://findingnwa.com/incentive/> (touting the quality of life in the area and citing the increase in remote work as a reason for non-locals to move to the region).

²⁵⁵ News Release, RE/MAX National Housing Report for May 2022, Re/Max (May 2022), https://remaxnews.cdn.prismic.io/remaxnews/dcc12f52-08ec-4602-97b8-5c6247530877_May+2022_REMAXNHR_FINAL.pdf (reporting that Fayetteville, Arkansas had the second highest year over year increase in median sales price of homes among metro areas in the U.S.).

²⁵⁶ *Northwest Arkansas Regional Strategy 2022-2026*, NWA at 2 (n.d) (https://nwacouncil.org/wp-content/uploads/2022/07/NWAC_RegionalStrategy2022.pdf) (accessed on Sept. 21, 2022).

²⁵⁷ *Id.* at 4.

²⁵⁸ See generally *id.*

Bentonville, there is no stopping it. Locals of communities around the U.S. will realize they have a stake in their community that should not be susceptible to displacement by outside forces with few or no roots in that community. As that recognition spreads, more and more people will ask, “I know we’re building affordable housing, but who are we building for?”

* * *

AFFIRMATIVE ACTION: A MISMATCH FOR CORRECTING A TRADITION OF RACIAL WEALTH GAP DISCRIMINATION

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I. INTRODUCTION

The issue to be addressed is whether a legally risky affirmative action policy, which considers race or social economic factors without giving any facial consideration to the after-effects of slavery in promoting educational diversity or economic justice, is a reasonable solution for correcting generations of racial discrimination. Governmental policies authorizing race-based affirmative action have been construed as a thinly disguised attempt to practice reverse hostile race-based discrimination.¹ Aggressive attacks on race-based affirmative action grew significantly during the 1990s.² Nevertheless, supporters of race-based affirmative action continue to argue that it is required as a form of social diversity medication for past racial discrimination.³ In sharp contrast, the enemies of race-based affirmative action have made known their belief that, because affirmative action represents one-sided preferences based on race, affirmative action constitutes reverse racial discrimination.⁴

The heavy focus on a traditional affirmative action remedy is a distraction from a real public debate about what is needed to close the nation's racial wealth gap and correct the after-effects of slavery and generations of racial discrimination. An argument can be made that the affirmative action apple pie was never actually intended to close the wealth gap between Black Americans and White Americans, but that it was offered as a form of racial appeasement allowing primarily the Black upper class to have greater access to the nation's more prestigious universities. The American racial wealth gap has been described by researchers as "the economic disparities between Black and [W]hite Americans, with a [W]hite-to-Black per capita wealth ratio of 6 to 1."⁵ Professor Michelle Alexander has implicitly suggested that the struggles around affirmative action may

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¹ 9 West's Fed. Admin. Prac. § 11466, *Affirmative Action and Reverse Discrimination—The Future of Affirmative Action*, Westlaw (database updated July 2022).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Ellora Derenoncourt et al., *Wealth of Two Nations: The U.S. Racial Wealth Gap, 1860–2020*, at 1 (Nat'l Bureau Econ. Rsch., Working Paper No. 30101, 2022), <https://www.nber.org/papers/w30101>.

have intentionally been designed to distract people from focusing in on challenging the structures that perpetuates the racial wealth gap.⁶ Unlike the typical affirmative action debate, “the racial wealth gap underscores the importance of slavery and post-slavery institutions for the persistence of the wealth gap.”⁷

There are good reasons for examining the plausible, unintended, harmful consequences associated with race-based and class-based affirmative action attempting to correct generations of racial discrimination without a link to the after-effects of slavery. It is necessary and proper, during a discussion of the future of affirmative action, to review some of the race and class-based affirmative action issues confronting the courts, lawmakers, and commentators. The affirmative action debate must focus on the continuing harmful economic after-effects of slavery on the lives of Americans who were freed from involuntary slavery. A discussion of affirmative action which ignores slavery as an oversized factor undermines any articulated commitment to economic justice and social equality. In twenty-first century America, those who suffer from the six-to-one racial wealth gap⁸ lack the competitive middle-class resources to live in the better neighborhoods or to attend the good schools, buy homes, or use discretionary money to invest in the stock market.

Part I briefly discusses how using race-based affirmative action to help correct generations of racial discrimination is a legally risky and inadequate road paved with problematic intentions. Part II analyzes how the affirmative action issue was treated by lower federal courts by highlighting the Harvard case and examining the University of North Carolina case.⁹ Part II presents the implications of the economic after-effects of slavery under the Thirteenth Amendment and the Harvard affirmative action publicity. Finally, Part IV recommends a revised constitutional model for affirmative action based on the neutrality of the slave provision in the Thirteenth Amendment.

⁶ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 234 (2010).

⁷ Derenoncourt et al., *supra* note 5, at 4.

⁸ *Id.* at 1.

⁹ See Nina Totenberg & Eric Singerman, *The Supreme Court Adds Affirmative Action to its Potential Hit List*, NPR, <https://www.npr.org/2022/01/24/1003049852/supreme-court-adds-affirmative-action-to-its-potential-hit-list> (Jan. 24, 2022, 5:39 PM) (announcing that the United States Supreme Court will review affirmative action programs at Harvard and the University of North Carolina).

II. TRADITIONAL AFFIRMATIVE ACTION IS LEGALLY RISKY AND INADEQUATE

What is the purpose of affirmative action programs? Generally, “[a]ffirmative action programs have been established by government units to correct generations of racial discrimination.”¹⁰ However, using affirmative action to correct generations of racial discrimination is a risky public policy road paved with problematic intentions.¹¹ Supporters of race-based affirmative action “who believe they are doing good can end up doing bad (the law of unintended consequences). There is no value in simply planning to do good if you don't actually do it.”¹² One of the problems with race-conscious college admissions programs is that they are virtually impossible to implement.¹³ The Court will hold that race-based admissions programs are prohibited by the equal protection principle or that a state may prohibit race-based affirmative action programs without violating equal protection.¹⁴

Historically speaking, when those who plan to do good by implementing race-based affirmative action believe they cannot actually implement their good intentions, they look to class-based admissions as a plausible alternative.¹⁵ From a pragmatic perspective, class-based affirmative action appears to be less problematic than race-based affirmative action because class-based affirmative action is easier to defend against an allegation of an unconstitutional equal protection violation.¹⁶ Indeed, “the Court has never found that classifications on the basis of income are suspect.”¹⁷ Advocates of class-conscious affirmative action contend that race-based affirmative action programs usually benefit people who are not truly as disadvantaged as other members of their minority group.¹⁸ When

¹⁰ 9 West’s Fed. Admin. Prac., *supra* note 1, § 11466.

¹¹ See Josef Essberger, *The Road to Hell is Paved with Good Intentions*, Eng. Club https://www.englishclub.com/ref/esl/Sayings/Quizzes/Religion/The_road_to_hell_is_paved_with_good_intentions_917.php (last visited Nov. 22, 2022).

¹² *Id.*

¹³ Khiara M. Bridges, *Class-Based Affirmative Action, or the Lies That We Tell About the Insignificance of Race*, 96 B.U. L. Rev. 55, 61 (2016).

¹⁴ *Id.* at 61 & n.29 (“Justice Kennedy, for one, conceptualizes the move toward class-based (or otherwise non-race-based) avenues as a means to remedy the race-salient problem of the underrepresentation of racial minorities in academic classes to be an intended and desired eventuality -- and not a guileful effort to duck the requirements of the Constitution. See also *Grutter*, 539 U.S. at 394 (Kennedy, J., concurring) (“Were the courts to apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives.”)).

¹⁵ *Id.* at 61.

¹⁶ *Id.* at 63.

¹⁷ *Id.*

¹⁸ *Id.* at 88; see also *id.* at 88 n.153 (citing Richard D. Kahlenberg & Halley Potter, *A Better Affirmative Action: State Universities that Created Alternatives to Racial Preferences* (2012) (arguing that the racial minorities who actually benefit from race-conscious

compared to race-based affirmative action, “class-based programs will more successfully target those who are disadvantaged, ensuring that those who are benefitted are actually deserving in that regard.”¹⁹

Although some are willing to extend a greater degree of toleration to class-based affirmative action than race-based affirmative action, it is nevertheless a problematic act of symbolism.²⁰ Class-based affirmative action, despite its likelihood of being upheld as constitutionally valid, will not help to correct generations of racial discrimination in a truly significant way.²¹ Its symbolism fails to adequately address the bigger fight for economic equal justice.²² Thus, neither race-based affirmative action nor class-based affirmative action will help correct generations of racial discrimination plus the after-effects of slavery in impairing economic equality.²³

Race-based affirmative action is not adequate to promote educational equality and diversity in college admission and diversity.²⁴ Race-based affirmative action is so problematic that its good intentions may have lost their symbolic value because of an enduring greater legal struggle.²⁵

The battle over [race-based] affirmative action in higher education is part of a larger legal struggle. The contemporary conservative legal movement was formed in part to strike down anti-discrimination laws and race-conscious policies designed to promote diversity. That movement says dividing people up by race is unconstitutional, that the Constitution is "colorblind" and that all Americans should be treated as individuals, not as members of a racial or ethnic group.²⁶

admissions programs enjoy a large degree of class privilege and/or come from privileged subpopulations (such as immigrant groups)).

¹⁹ *Id.* at 88; *see also id.* at 88 n.154 (citing Tung Yin, *A Carbolic Smoke Ball for the Nineties: Class-Based Affirmative Action*, 31 LOY. L. REV. 213, 257 (1997) (delineating Kahlenberg's position that class preferences benefit the actual victims of class injury in a way that race “preferences” do not)).

²⁰ Haley Tenore, *Opinion: Affirmative Action Is Not the Way to End Discrimination*, STATE PRESS (Feb. 24, 2021) <https://www.statepress.com/article/2021/02/spopinon-affirmative-action-is-not-the-way-to-end-discrimination#>.

²¹ Bridges, *supra* note 13, at 80–94 (citations omitted).

²² *Id.*

²³ *Id.*

²⁴ Tenore, *supra* note 20 (“It feels as though universities are more focused on tokenism, rather than making sure marginalized students succeed. This is where the issue lies.”).

²⁵ *Id.* (“Affirmative action is peak performative activism . . .”).

²⁶ John Blake, *The Supreme Court May Ban Affirmative Action, but the World That*

According to a Gallup Poll conducted in 2021, sixty-two percent of Americans said that they supported the big concept of affirmative action.²⁷ However, “nearly three-quarters of Americans in a 2019 Pew Research Center survey said colleges and universities should not consider race or ethnicity in student admissions.”²⁸ Sixty-two percent of Black Americans and seventy-eight percent of White Americans said race should not be a factor in college admissions.²⁹

The fundamental problem with an affirmative action approach is that its advocates have promised more than it can deliver. These advocates suggest that affirmative action can make significant progress toward correcting generations of racial discrimination by “compensat[ing] for centuries of slavery and segregation.”³⁰ Economic research,³¹ when linked to the affirmative action debate, demonstrates that the under-representation of racial minorities at Harvard and other institutions of higher learning is directly linked to the racial wealth gap created by the after-effects of slavery and the continuing intergenerational racial discrimination. Researchers Ellora Derenoncourt, Chi Hyun Kim, Moritz Kuhn and Moritz Schularick, from the National Bureau of Economic Research, have concluded, “The racial wealth gap is the largest of the economic disparities between Black and [W]hite Americans, with a [W]hite-to-Black per capita wealth ratio of 6 to 1. It is also among the most persistent.”³²

These economic researchers have documented evidence of “the role played by initial conditions, income growth, savings behavior, and capital returns in the evolution of the gap. Given vastly different starting conditions under slavery, racial wealth convergence would remain a distant scenario, even if wealth-accumulating conditions had been equal across the two groups since Emancipation.”³³ As compared to the narrower wealth gap one would expect if wealth-accumulating conditions had been equal since Emancipation, these economic researchers stated that closing the wealth gap between Black Americans and White Americans has moved “even slower . . . over the last 150 years, with convergence stalling after 1950. Since the 1980s, the wealth gap has widened again as capital gains have predominantly benefited [W]hite households, and income convergence has stopped.”³⁴

Embraces Diversity Is Here to Stay, CNN, <https://www.cnn.com/2022/02/27/us/affirmative-action-scotus-blake-cec/index.html> (Feb. 27, 2022, 12:45 PM).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ See Derenoncourt et al., *supra* note 5.

³² *Id.* at 1.

³³ *Id.*

³⁴ *Id.*

An economic justice remedy for the centuries of exploitation created by slavery and discrimination reasonably requires more than either class-based or race-based affirmative action has to offer. “Centuries of discrimination and exploitation have left Black Americans much poorer than [W]hite Americans. . . . But any program to close the racial wealth gap must grapple with . . . wealth concentration in contemporary America. The 400 richest American billionaires have more total wealth than all 10 million Black American households combined.”³⁵ Although a degree from Harvard may provide an increase in the opportunity for economic gain,³⁶ the Harvard degree is not enough to make amends for the loss of wealth accumulation opportunity by an enslaved people.³⁷ Consider the argument that the affirmative action battle at America’s leading universities may very well be an intended consequence to preoccupy these universities with race.³⁸ A leading university preoccupied with defending race-based affirmative action is less likely to promote economic research that demonstrates increasing taxes on the privileged billionaire class is an effective tool to close the racial wealth gap.³⁹ “A comprehensive agenda to close the racial wealth gap would likely include reforms to income and estate taxation, plus new taxes on wealth and inheritance, buttressed by a substantial investment in enforcement.”⁴⁰ However, this proposed comprehensive plan to increase taxes on the super-rich will probably not survive because the billionaire class is very likely to object.⁴¹ Although affirmative action is a very inadequate measure to cure the racial disparity gap, the Supreme Court’s decision to hear a challenge to race-based affirmative action during its upcoming term

³⁵ Vanessa Williamson, *Closing the Racial Wealth Gap Requires Heavy, Progressive Taxation of Wealth*, Brookings Inst. (Dec. 9, 2020), <https://www.brookings.edu/research/closing-the-racial-wealth-gap-requires-heavy-progressive-taxation-of-wealth/>.

³⁶ *4 Reasons Why an Ivy League Education Is Worth It*, CRIMSON EDUC. BLOG (June 13, 2022), <https://www.crimsoneducation.org/us/blog/campus-life-more/benefits-of-Ivy-League/> (“Except for MIT, Harvard graduates make more money after college than graduates from any other college.”).

³⁷ See generally S. Michael Gaddis, *Discrimination in the Credential Society: An Audit Study of Race and College Selectivity in the Labor Market*, 93 *SOCIAL FORCES* 1451 (2014).

³⁸ Sofia Elena Chaclin Lee-Rodriguez & Warren Wu, *Affirmative Action: A Convenient Distraction from Institutional Inertia*, FAULT LINES (June 25, 2021), <https://faultlinesmag.com/affirmative-action-euphemism/> (last visited Oct. 21, 2022); see also Tanya M. Washington, *Jurisprudential Ties That Bind: The Means to End Affirmative Action*, 31 *HARV. J. RACIAL & ETHNIC JUST. ONLINE* 1, 34 n.138 (2015) (citing ALEXANDER, *supra* note 6, at 236).

³⁹ See generally Lee-Rodriguez, *supra* note 38 (quoting Vinay Harpalani: “As for redressing ‘other types of challenges [underprivileged students] face, . . . Harvard, the admissions process, [and] affirmative action [aren’t doing] much to address that[.] So I would like to see it do more. And I think it can do a lot more, whether Harvard wants to do that or not. . . [because] they want to maintain their elite status.”)

⁴⁰ Williamson, *supra* note 35.

⁴¹ See, e.g., David Gura, *The Super Rich Push Back Against a Wealth Tax*, NPR (Nov. 10, 2021, 5:08 AM), <https://www.npr.org/2021/11/10/1054175407/the-super-rich-push-back-against-calls-for-a-wealth-tax>.

has recently generated increased publicity and scrutiny about affirmative action in college admissions.⁴²

III. AFFIRMATIVE ACTION IN FEDERAL COURT

Researchers from the National Bureau of Economic Research strongly suggest what is really needed to promote economic equality is a tax policy to close the racial wealth gap with a program of progressive taxation aimed at billionaires.⁴³ In light of this perspective, one may wish to consider the question asked by Professor Tanya Washington: whether affirmative action is worth preserving in the context of college admissions at all.⁴⁴ After all, “affirmative action, in its current condition – weakened by the Court’s consistent calibration of constitutional rules to foreclose meaningful progress, may not be adequate for the task at hand.”⁴⁵ Affirmative action appears to be dying prematurely despite the continued existence of the problems it was implemented to solve.⁴⁶

As the Supreme Court prepares to issue its next affirmative action decision, Professor Alexander says affirmative action is a distraction, and that race-based affirmative action programs only create the appearance of racial equality because there is a continuing need to distract people from the continuing harm caused by racial discrimination.⁴⁷ In the big-picture context of the racial wealth gap between Black Americans and White Americans created by generations of slavery and racial discrimination, increasing educational diversity at Harvard is a symbolic token, at best.⁴⁸ Nevertheless, it is necessary and proper to discuss affirmative action because on October 31, 2022, the United States Supreme Court heard oral arguments in *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College*, an affirmative action case that was originally consolidated from two cases, one involving Harvard and the other involving the University of North Carolina.⁴⁹ On July 22, 2022, the Court deconsolidated the two cases,⁵⁰ thus allowing Justice Ketanji Brown Jackson to participate in the North Carolina case despite having recused herself from the Harvard case.⁵¹

⁴² See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022).

⁴³ Derenoncourt et al., *supra* note 5, at 26.

⁴⁴ Washington, *supra* note 38, at 34.

⁴⁵ *Id.* at 34 & n.137 (citing ALEXANDER, *supra* note 6 at 234).

⁴⁶ *Id.*

⁴⁷ *Id.* at 34 n.138 (citing ALEXANDER, *supra* note 6 at 236).

⁴⁸ See *supra* Part II.

⁴⁹ 142 S. Ct. 895 (2022).

⁵⁰ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 20-1199, 2022 WL 2899391, at *1 (U.S. July 22, 2022).

⁵¹ Amy Howe, *Court Will Hear Affirmative-Action Challenges Separately, Allowing Jackson to Participate in UNC Case*, SCOTUSBLOG (July 22, 2022, 6:43 PM),

The current Harvard case arises in part from a First Circuit affirmative action case, wherein Asian American plaintiffs alleged discrimination by historically White Harvard in favor of White applicants.⁵² However, since Harvard’s diversity goals do not expressly address the racial wealth gap between Black Americans and White Americans,⁵³ the battle over diversity affirmative action is a tempest in teapot. Perhaps Harvard’s “tempest in the teapot” promotion of diversity affirmative action exists because the appearance of racial diversity—as armor against generations of racial discrimination against Black people by White people—matters more than results. The future challenge for Harvard is to go beyond educational diversity and develop relevant economic data and legal theories relating to the National Bureau of Economic Research’s conclusion that the contemporary racial wealth gap issue exists as an after-effect of slavery.⁵⁴ But for slavery, the racial wealth gap, and racial discrimination, affirmative action educational diversity would not be either legally necessary or plausible.⁵⁵

A. The Harvard Case

Students for Fair Admissions, Inc. (SFFA) filed its suit in federal district court on November 17, 2014, against Harvard.⁵⁶ The suit alleged that Harvard’s undeniably race-conscious undergraduate admissions process is prohibited by Title VI of the Civil Rights Act of 1964 (“Title VI”) because it practices racial discrimination against Asian American applicants in favor of White applicants.⁵⁷ SFFA claimed that Harvard does not meet the Supreme Court’s requirements for the use of race in college admissions to promote educational diversity since the Harvard plan is fatally flawed because it utilizes the following four prohibited techniques: “(1) it engages in racial balancing of its undergraduate class; (2) it impermissibly uses race as more than a ‘plus’ factor in admissions decisions; (3) it considers race in its process despite the existence of workable race-neutral alternatives; and (4) it intentionally discriminates against Asian American applicants to

<https://www.scotusblog.com/2022/07/court-will-hear-affirmative-action-challenges-separately-allowing-jackson-to-participate-in-unc-case/>.

⁵² *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA III)*, 980 F.3d 157, 163 (1st Cir. 2020).

⁵³ Brief for Respondent at 5–6, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (2002) (No. 20-1199). *See also* Derenoncourt et al., *supra* note 5, at 1.

⁵⁴ *Id.*

⁵⁵ *See id.*

⁵⁶ *SFFA III*, 980 F.3d at 163.

⁵⁷ *Id.* (citing Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601–05, 78 Stat. 241, 252–53 (codified at 42 U.S.C. §§ 2000d–2000d-7)).

Harvard College.”⁵⁸

The district court refused to grant Harvard's motion to dismiss SFFA's suit for lack of Article III standing.⁵⁹ At the conclusion of a fifteen-day bench trial during which thirty witnesses testified, the district court issued a 130-page opinion based on the facts and applicable rules of law.⁶⁰ The district court found that Harvard met its burden of demonstrating that its admissions practice did not violate Title VI, and it entered judgment in favor of Harvard on all of the Title VI claims.⁶¹ SFFA appealed the Title VI judgment, and although Harvard repeated its argument that SFFA lacked standing, the First Circuit Court of Appeals concluded that SFFA had “associational standing to bring its claims.”⁶² The First Circuit affirmed that Harvard's race-conscious admissions practice under relevant Supreme Court affirmative action diversity precedent did not violate Title VI.⁶³

1. *Harvard's Current Admissions Practices*

Harvard's admissions process is complex and very competitive.⁶⁴ Every year, Harvard College admits a class of about 1,600 students.⁶⁵ For the entering class of 2019, Harvard acknowledged about 35,000 applications.⁶⁶ Due to the great size of its applicant pool, Harvard is not able to admit all applicants who have the ability to succeed academically.⁶⁷ “Rather, Harvard seeks students who are not only academically excellent but also compelling candidates on many dimensions.”⁶⁸ Harvard's elaborate application process contains six steps: (1) pre-application recruitment; (2) application submissions; (3) Harvard's “first read;” (4) applicant interviews by admissions representatives and alumni; (5) subcommittee recommendations by admissions representatives; and (6) final deliberation and decisions by the whole admissions committee.⁶⁹ In addition, Harvard utilizes a system of “tips” for individual applicants that may be examined during or after the third step – a “tip” being “plus factors” that might otherwise push an applicant into Harvard's admitted class.⁷⁰

⁵⁸ *Id.*

⁵⁹ *Id.*; see *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA I)*, 261 F. Supp. 3d 99, 111 (D. Mass. 2017).

⁶⁰ *SFFA III*, 980 F.3d at 163; see *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA II)*, 397 F. Supp. 3d 126, 132 (D. Mass. 2019).

⁶¹ *SFFA III*, 980 F.3d at 163 (citation omitted).

⁶² *Id.* at 164 (citation omitted).

⁶³ *Id.*

⁶⁴ *Id.* at 165.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *SFFA III*, 980 F.3d at 165.

The Harvard case demonstrates the elaborate steps that Harvard has taken to justify and implement its very problematic race-conscious diversity affirmative action admissions program. If Harvard prevails in protecting its affirmative action plan, its victory will—at best—create a symbol of educational diversity justice. At worst, a problematic “protect affirmative action” victory for Harvard will perpetuate false notions of either racial superiority or racial inferiority among racial groups seeking admission to Harvard. Contextually, Harvard’s admission process serves as a very valuable tool to support an argument for transparency in college admission decisions at all colleges—especially those with very competitive admission standards. In college admissions, race is not likely to be treated as one among many factors; rather, most people perceive race as the significant “but for” factor in the admission process. If race is indeed a significant “but for” factor, any use of race by Harvard in the admission process may very well be on the chopping block in the Supreme Court’s upcoming decision.⁷¹

Harvard takes elaborate steps to finalize its undergraduate admission decisions.⁷² The applicants presented to the full committee are discussed individually and each member of the full committee votes on admission.⁷³ An applicant is required to receive a majority of the full committee's vote in order to be offered admission.⁷⁴ The full committee vote on applicants usually results in a group of 2,000 tentative admits from whom the final 1,600 are selected.⁷⁵ To finalize the admitting class, Harvard administers a “lop process” in order to continue to reduce the pool of 2,000 tentative admits.⁷⁶

Before deciding which applications will be lopped, members of the admissions committee are informed of various demographic characteristics of the admitted applicants, including race. Admissions officers then compile a “lop list” of applicants who might be lopped. This list includes information about tentative admits -- race, athletic rating, legacy status, and socioeconomic status -- relating to some of Harvard's admissions tips. After enough applicants have been lopped, Harvard sends decisions to applicants.⁷⁷

⁷¹ See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022).

⁷² *SFFA III*, 980 F.3d at 170.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 165, 170.

⁷⁶ *Id.* at 170.

⁷⁷ *Id.*

The Court will likely require Harvard to delete race as a factor from its “lop list” process because the Court will likely not recognize racial diversity as an adequately compelling interest. Instead, the Court will likely find that considering race as a factor unconstitutionally discriminates against races not included in Harvard’s affirmative action plan.⁷⁸ As an alternative to considering race as a factor when deciding who might be lopped, Harvard could consider the race-neutral economic disparity effects of the legacy of slavery as a factor in its admission process.⁷⁹ Because of the great gap in starting conditions that exist as a result of slavery, both an education and racial wealth gap continue to persist between Black Americans and White Americans.⁸⁰

2. *Harvard Can Move Forward With a Constitutional “Badge of Slavery” Tip System*

Harvard’s defense of its affirmative action procedure starts with alleging that SFFA does not have standing to challenge the Harvard program. A federal court cannot hear a case that fails to meet the case and controversy requirements of Article III of the U.S. Constitution.⁸¹ An association has standing to sue for its members if three requirements have been met: (1) a minimum of one of its “member[s] possesses standing to sue in his or her own right; (2) the interests that the suit seeks to vindicate are pertinent to the objectives for which the organization was formed; and (3) neither the claim asserted nor the relief demanded necessitates the personal participation of affected individuals.”⁸² Harvard unsuccessfully attempted to deny SFFA an opportunity to present its challenge to Harvard’s affirmative action admissions program by alleging that SFFA did not meet the standing requirement demanded by Article III of the Constitution.⁸³ The First Circuit rejected Harvard’s lack of standing argument because “when suit was filed in November 2014, SFFA was a validly incorporated 501(c)(3) nonprofit with forty-seven members who joined voluntarily to support its mission of ‘defend[ing] human and civil rights secured by law, including the right of individuals to equal protection under the law.’”⁸⁴ SFFA has associational standing to move forward on its claim that the Harvard affirmative action plan is prohibited by Title VI.⁸⁵

⁷⁸ *Id.*

⁷⁹ *See* Derenoncourt et al., *supra* note 5.

⁸⁰ *See id.* at 1.

⁸¹ *SFFA III*, 980 F.3d at 182–83; *see, e.g.*, Warth v. Seldin, 422 U.S. 490, 498 (1975).

⁸² *SFFA III*, 980 F.3d at 183 (quoting *United States v. AVX Corp.*, 962 F.2d 108, 116 (1st Cir. 1992)).

⁸³ *Id.* at 184.

⁸⁴ *Id.*

⁸⁵ *Id.*

As a result of receiving federal money, Harvard is subject to Title VI.⁸⁶ Because Title VI's protections are identical to those in the Equal Protection Clause of the Fourteenth Amendment, "Harvard is subject to the same limitations on its use of race in admissions as state-run institutions."⁸⁷ Harvard confesses that it thinks about race in its admissions process and sometimes gives "tips" to applicants while using race as a factor.⁸⁸ To survive a challenge under Title VI, Harvard's use of race in its admission process must meet the requirements of the strict scrutiny test.⁸⁹ Strict scrutiny requires that Harvard's use of race in its admissions process must be narrowly tailored to promote a compelling interest.⁹⁰ In the past, the Supreme Court has held that achieving student body diversity could serve as a compelling interest.⁹¹ To prove that its interest in achieving student body diversity is compelling, a university must prove that the university's justification for the use of race as a factor is clearly identified and unquestionably legitimate.⁹² SFFA's appeal before the First Circuit did not challenge the theory that Harvard has a compelling interest in diversity.⁹³ However, the First Circuit declared that Supreme Court precedent required it to judge whether Harvard's interest in promoting racial diversity is clearly identified, definite, and precise.⁹⁴

Harvard has identified specific, measurable diversity goals it is trying to achieve by using the race factor in admissions.⁹⁵ These diversity goals are more precise and open to judicial review than the diversity goals identified in the case that established diversity as a compelling interest, *Fisher II*.⁹⁶ The First Circuit relied on Harvard's Khurana Report to help it determine whether Harvard's educational diversity interest was compelling.⁹⁷ "The articulated purpose of the Khurana Report was to enable courts to assess whether Harvard's interest was sufficiently compelling to comply with strict scrutiny and Supreme Court precedent. The Khurana Committee produced the report after a thoughtful, rigorous study of the importance of diversity to

⁸⁶ *Id.* at 184–85; see 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

⁸⁷ *SFFA III*, 980 F.3d at 185; see *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978).

⁸⁸ *SFFA III*, 980 F.3d at 185.

⁸⁹ *Id.*; see *Fisher v. Univ. of Tex. (Fisher I)*, 570 U.S. 297, 309 (2013).

⁹⁰ *SFFA III*, 980 F.3d at 185; see *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

⁹¹ *SFFA III*, 980 F.3d at 185; see *Fisher I*, 570 U.S. at 310.

⁹² *SFFA III*, 980 F.3d at 185; see *Fisher I*, 570 U.S. at 310 (quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 505 (1989)).

⁹³ *SFFA III*, 980 F.3d at 185.

⁹⁴ *Id.*

⁹⁵ *Id.* at 186.

⁹⁶ *Id.* (citing *Fisher v. Univ. of Tex. (Fisher II)*, 579 U.S. 365 (2016)).

⁹⁷ *Id.*

Harvard.”⁹⁸ The Khurana Committee utilized input and data received from students, alumni, faculty, and staff, as well as other stakeholders linked to Harvard's admissions process.⁹⁹ The Khurana Report identified four specific goals: “(1) training future leaders in the public and private sectors as Harvard's mission statement requires; (2) equipping Harvard's graduates and Harvard itself to adapt to an increasingly pluralistic society; (3) better educating Harvard's students through diversity; and (4) producing new knowledge stemming from diverse outlooks.”¹⁰⁰

Despite the First Circuit's opinion to the contrary, these four identifiable goals are clearly achievable without giving any formal consideration to race as a factor. Harvard's use of race as a factor to achieve its diversity goal is problematic because it creates an implicit interest in advancing simple ethnic diversity without guaranteeing a specified percentage of the student body to any ethnic group.¹⁰¹ Moreover, Harvard's use of race as a factor in more than one step of the admission process practically defeats its problematic argument that race is not a controlling factor if all the other factors among the applicants are equal.¹⁰²

A truly broad array of qualifications and characteristics would promote Harvard's diversity interest without necessitating formal consideration of race.¹⁰³ Increasing students' exposure to significant diversity of people, cultures, ideas, and viewpoints should be done without any formal consideration of race.¹⁰⁴ As an alternative to its current admission practices, Harvard should formally consider the effects of the badges of slavery as one of many race-neutral factors in a diversity program. Consideration of the badges of slavery is race-neutral because slavery is described in race-neutral terms in the Thirteenth Amendment.¹⁰⁵ Slavery or involuntary servitude is not permitted to exist in the United States except as a punishment for those convicted of a crime.¹⁰⁶ The Thirteenth Amendment grants Congress the necessary and proper power to enact appropriate legislation to enforce the prohibition against slavery.¹⁰⁷ Congress also has the power to erase the badges of slavery under the Enabling Clause of the Thirteenth Amendment, which provides “Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery

⁹⁸ *Id.*

⁹⁹ *SFFA III*, 980 F.3d at 186.

¹⁰⁰ *Id.*

¹⁰¹ *Contra id.*

¹⁰² *Contra id.*

¹⁰³ *Contra id.*

¹⁰⁴ *Contra id.*

¹⁰⁵ U.S. CONST. amend. XIII, § 1.

¹⁰⁶ *Id.*

¹⁰⁷ U.S. CONST. amend. XIII, § 2.

in the United States.”¹⁰⁸

Harvard should consider, as an alternative to its current race-conscious affirmative action plan, a formal race-neutral admissions policy that allow survivors to share how they are being impacted by the badges and incidents of the legacy of slavery. Under this “badges of slavery” proposal, every student seeking admission to Harvard, regardless of race, would be given an opportunity to demonstrate how his or her experience, as a survivor of the incidents and badges of slavery, will contribute to educational diversity at Harvard. If Harvard’s student body diversity rationale is based on the effects of slavery without any consideration of race as a factor, Harvard will not have to prove it has a compelling interest in racial diversity to survive constitutional scrutiny.¹⁰⁹ Harvard does not need a compelling interest to justify a race-neutral “survivor of the incidents and badges of slavery” diversity approach to comply with Title VI if the plan does not consider race as a factor.¹¹⁰ Instead, Harvard’s decision to implement the educational benefits that flow from student body diversity based on those who have experienced the badges and incidents of slavery, without considering race as a factor, would be an academic judgment which is given a great deal of judicial deference.¹¹¹ The heart of SFFA’s challenge to Harvard’s use of race in its admission plan is that the plan cannot survive strict scrutiny because, in the real world of experience, virtually no college admission plan using the race factor can be narrowly tailored enough to avoid the fatal attraction of step-by-step racial discrimination.¹¹²

Harvard’s use of race is neither narrowly tailored nor consistent with Supreme Court precedent because race is not just one factor; it is an oversized factor outweighing any other single factor in the admissions process.¹¹³ Overall, race continues to be an oversized factor in America’s deliberation about educational equality and diversity, and it is a factor beyond Harvard’s control because of the history of race relations in America.¹¹⁴ Supreme Court precedent reveals that “a university’s admissions program cannot be not narrowly tailored if it (1) involves racial balancing or quotas, . . . (2) uses race as a mechanical plus factor, . . . or (3) is used despite workable race-neutral alternatives”¹¹⁵ SFFA contends that Harvard’s admissions policy is not narrowly tailored because Harvard

¹⁰⁸ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439–40 (1968).

¹⁰⁹ *See SFFA III*, 980 F.3d 157, 185 (1st Cir. 2020).

¹¹⁰ *Id.*

¹¹¹ *Id.*; *see Fisher I*, 570 U.S. 297, 310 (2013) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)).

¹¹² *Contra SFFA III*, 980 F.3d at 187–95.

¹¹³ *Contra id.*

¹¹⁴ *Contra id.*

¹¹⁵ *Id.* at 187 (citations omitted).

was improperly practicing racial balancing.¹¹⁶ Harvard's attempt to explain diversity as an unstated ratio or proportion of a specific group, where race is intentionally or incidentally an oversized factor, likely violates the prohibition against racial balancing.¹¹⁷ Harvard's use of race as an oversized factor in its admissions process cannot be considered narrowly tailored to achieve diversity when its goal is to achieve an implied (but technically unspecified) racial ratio among its admitted students.¹¹⁸ A diversity plan that monitors numbers using race as a factor implicitly creates either an acknowledged form of racial balancing – a soft quota – or an unacknowledged “bury your head in the sand” improper use of race.¹¹⁹

B. The North Carolina Case

When universities with diversity programs monitor admissions numbers using race as a factor, race is practically, and predictably, at risk of becoming an oversized single factor. In the University of North Carolina (UNC) affirmative action case that was originally consolidated with the Harvard case, the federal trial court held “that race may be used only as a ‘plus’ factor that is at times — but never nonstop — offered to an underrepresented minority (URM) applicant.”¹²⁰ The judge explained that, with regard to UNC’s admissions policies, “[r]ace is one of more than forty criteria considered in every application, and the evaluation process is flexible enough to consider all of the pertinent elements of diversity that may be present for any particular applicant.”¹²¹ Perhaps because race was one of more than forty criteria in every application, the trial court held that “UNC’s policies are clear that race may never be used as the defining feature of a candidate’s evaluation.”¹²² Unlike the federal trial court, however, the Supreme Court during its upcoming term is likely to treat the “race as a plus factor” aspect of UNC’s admissions policies as an oversized racial factor that violates the equal protection of the law principle.¹²³ Although it may be difficult to determine when the race factor is so heavily weighted that it violates the equal protection principle, the Court’s decision is likely to echo Justice Stewart’s definition of hard-core pornography: “I know it when I see

¹¹⁶ *Id.* at 188.

¹¹⁷ *Id.*

¹¹⁸ *SFFA III*, 980 F.3d at 188; *see* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 732 (2007).

¹¹⁹ *Contra SFFA III*, 980 F.3d at 188.

¹²⁰ *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580, 601 (M.D.N.C. 2021).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022).

it.”¹²⁴

Since race is perceived as an oversized single factor in the affirmative action admission program at UNC, it is not surprising that the UNC program has become a target for allegations by SFFA that the university’s public commitment to holistic admissions fails to live up to its billing.¹²⁵ SFFA claims UNC’s holistic approach fails “because UNC either conceals an improper use of race behind opaque procedures or is unable to ensure that the work of its large Admissions Office is consistent with its stated mission.”¹²⁶ The federal district court rejected the SFFA claim that UNC’s affirmative action holistic approach failed to live up to its billing by concluding “that there is no evidence that UNC conceals the improper use of race behind opaque procedures.”¹²⁷ In the North Carolina case, the Supreme Court is likely to hold that any use of race in the college admission process is invalid under the Constitution’s Equal Protection Clause.¹²⁸

C. Maintaining Racial Progress Despite Judicial Review of Race-Based Affirmative Action Programs

In the Harvard case, the First Circuit Court of Appeals interpreted the Supreme Court’s decision in *Fisher II* to support its conclusion that consideration of race by Harvard did “not operate as a mechanical plus factor for underrepresented minorities.”¹²⁹ However, the First Circuit’s interpretation of *Fisher II* is likely to be rejected in the Court’s current term.¹³⁰

The Supreme Court’s power to interpret the United States Constitution arises under its power of judicial review.¹³¹

It’s [the power of judicial review] that affirmative action supporters dread now that the high court has decided to consider the use of race in college admissions. They fear the conservative majority on the court will undo more than 50 years of racial progress in higher education, and the ripple effects could cause American institutions to

¹²⁴ See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

¹²⁵ *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F.Supp.3d at 601.

¹²⁶ *Id.*

¹²⁷ *Id.* at 602.

¹²⁸ See *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (2022).

¹²⁹ *SFFA III*, 980 F.3d 157, 190 (1st Cir. 2020) (quoting *Fisher II*, 579 U.S. 365, 375 (2016)).

¹³⁰ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022).

¹³¹ Blake, *supra* note 26,

backtrack on efforts to become more diverse.¹³²

The Court's likely condemnation of affirmative action at Harvard and UNC is not new because affirmative action has been criticized since its introduction in the mid-1960s.¹³³ Although instituted in part to "compensate for centuries of slavery and segregation[,]" affirmative action in the name of education diversity is not adequate to compensate for the after-effects of centuries of involuntary chattel slavery.¹³⁴ As the Rev. Martin Luther King Jr. stated, "[a] society that has done something special *against* the Negro for hundreds of years must now do something special *for* the Negro."¹³⁵ What American society did "special" against African Americans was to enslave them. The wealth gap experienced by African Americans today is because of the special harm they received as enslaved people and not because there was something unique about their race.¹³⁶ A society wishing to provide equitable access to higher education for any group of people, regardless of race, who can demonstrate a continuing societal disadvantage because of the after-effects of slavery is permitted to offer special affirmative action under the Thirteenth Amendment.¹³⁷

IV. THE IMPLICATIONS OF THE ECONOMIC AFTER-EFFECTS OF SLAVERY UNDER THE THIRTEENTH AMENDMENT AND THE HARVARD AFFIRMATIVE ACTION PUBLICITY

The Supreme Court's announcement on Monday January 24, 2022, that it would hear an affirmative action case involving the use of race as one factor in admissions at Harvard has generated a great deal of publicity because "[w]hen it comes to affirmative action, Harvard's program has long been a constitutional model cited by the court in dealing with programs at other schools."¹³⁸ The man behind the Harvard and UNC lawsuits, Edward Blum, is a conservative who has supported litigation hostile towards affirmative action for many years.¹³⁹ Blum has stated accurately that "polls

¹³² *Id.* (citing Joan Biskupic, *Supreme Court conservatives may have their chance to end affirmative action at universities*, CNN, <https://www.cnn.com/2021/12/09/politics/affirmative-action-supreme-court-conservatives-harvard/index.html>) and Ian Millhiser, *The Supreme Court case that could end affirmative action, explained* <https://www.vox.com/22301135/supreme-court-affirmative-action-harvard-college-race-students-for-fair-admission-ed-blum>

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* citing MARTIN LUTHER KING, JR. & CORETTA SCOTT KING, *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* (2010) (emphasis added).

¹³⁶ See Derenoncourt, *supra* note 5, at 3.

¹³⁷ U.S. CONST. amend. XIII, § 1.

¹³⁸ Totenberg & Singerman, *supra* note 9.

¹³⁹ *Id.*

conducted by Pew and Gallup have found that nearly 3 out of 4 Americans are opposed to the use of race in college admissions.”¹⁴⁰ That number, he observes, includes, “majorities of Hispanics, majorities of African Americans and majorities of Asian.”¹⁴¹ SFFA filed a ninety-nine-page brief asking the justices to reject *Grutter v. Bollinger*, the Supreme Court’s 2003 opinion affirmed the University of Michigan Law School’s use of race as a factor in making admission decisions.¹⁴²

Rachael Dane, Harvard spokesperson, defending Harvard’s race-conscious affirmative action policy, stated, “More than 40 years of Supreme Court precedent have held that race can be one of many factors considered in college admissions.”¹⁴³ Lawrence S. Bacow, Harvard University President, also offered this defense: “[C]onsidering race as one factor among many in admissions decisions produces a more diverse student body which strengthens the learning environment for all.”¹⁴⁴ Dane doubled down, declaring, “Harvard will not stop vigorously defending its race-conscious diversity admissions policy.”¹⁴⁵ However, Edward Blum, SFFA’s president, described the Harvard and UNC lawsuits before the Supreme Court as “rescue missions for the colorblind legal principles that hold together Americans of all races and ethnicities.”¹⁴⁶ Under the Thirteenth Amendment, the prohibition against slavery is a color-blind concept.¹⁴⁷ Perhaps both Blum and Harvard will soon help bring all Americans – regardless of race or ethnic identity – together to erase the racial wealth gap created by the badges of slavery.¹⁴⁸ Although the Thirteenth Amendment does not require Americans to remediate badges of slavery, the U.S. Constitution does not prohibit a voluntary, race-neutral approach to eradicating the continuing economic after-effects of slavery by anyone.¹⁴⁹

After reading the Harvard affirmative action appellate decision and the publicity surrounding the Supreme Court’s decision to reconsider race-conscious affirmative action, commentators interested in economic justice and/or economic equality should read the *Wealth of Two Nations: The U.S. Racial Wealth Gap* report.¹⁵⁰ This report will help commentators to see

¹⁴⁰ Totenberg & Singerman, *supra* note 9.

¹⁴¹ *Id.*

¹⁴² Rahem D. Hamid & Nia L. Orakwue, *SFFA Asks Supreme Court to Overturn Precedents Upholding Affirmative Action in Filing for Harvard, UNC Cases*, HARV. CRIMSON (May 4, 2022), <https://www.thecrimson.com/article/2022/5/4/affirmative-action-supreme-court-sffa-filing-may2/>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See U.S. CONST. amend. XIII, § 1.

¹⁴⁸ See Derenoncourt, et al., *supra* note 5, at 3.

¹⁴⁹ See U.S. CONST. amend. XIII, § 1.

¹⁵⁰ Derenoncourt et al., *supra* note 5.

affirmative action as a constitutionally permissible economic justice remedy under a Thirteenth Amendment “badges of slavery” rationale.¹⁵¹ Contextually, affirmative economic justice is permissible for those suffering from the badges of slavery because, “in 2019, Black Americans held just 17 cents on average for every [W]hite dollar of wealth. By comparison, the income gap is 50 cents to the dollar.”¹⁵² The significant and continuous economic impact of historical slavery on those who continue to suffer from the badges of slavery is often unacknowledged, but slavery’s continuing harmful impact is clearly recognized in the *Wealth of Two Nations: The U.S. Racial Wealth Gap* report.¹⁵³

Even with hypothetical ideal equal conditions for gathering wealth after slavery, assuming identical savings percentages as well as capital gains among Black and White Americans, a racial wealth gap of three to one would still exist today.¹⁵⁴ “The main reason for such a large and lasting gap is the enormous difference in initial wealth between Black and [W]hite Americans on the eve of the Civil War.”¹⁵⁵ Thus, even if America had practiced perfect economic justice every day without any consideration of race from the day the Civil War ended to now, a three-to-one racial wealth gap would still exist today due to the continuing effects of slavery as a plus factor.¹⁵⁶ “Although Black wealth growth outpaced that of [W]hite Americans’ between 1870 and 1930, the rate of convergence in these years lags far behind what would be expected had the two groups enjoyed equal conditions for wealth accumulation.”¹⁵⁷ Of course, the descendants of enslaved people in America did not experience economic justice in the form of a post-slavery equal playing field from 1870 to 1930.¹⁵⁸

From 1870 to 1930, the U.S. experienced widespread “expropriation of Black wealth, exclusion of Black Americans from the political process, and legally sanctioned segregation and discrimination in land, labor, and capital markets.”¹⁵⁹ The harm suffered by the descendants of enslaved people between 1870 and 1930, plus the after-effects of slavery more generally, cannot adequately be addressed by the current, limited forms of affirmative action. However, as the racial wealth gap between Black Americans and White Americans disappears, so will the justification for diversity-based affirmative action. According to researchers, a “long-run

¹⁵¹ See U.S. CONST. amend. XIII, § 1.

¹⁵² Derenoncourt et al., *supra* note 5, at 2.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 3.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

view of the racial wealth gap underscores the importance of slavery and post-slavery institutions for the persistence of the wealth gap. Until the 1860s, the vast majority of Black Americans were enslaved – contributing to building the nation’s wealth while being legally barred from accumulating wealth themselves.”¹⁶⁰ Because of slavery, “at the time of Emancipation, Black Americans embarked on freedom with extremely low levels of wealth compared to [W]hite Americans. Furthermore, post-slavery wealth accumulation by Black Americans occurred under highly unequal circumstances.”¹⁶¹

The expansion of Black wealth fell behind that of White Americans because of almost 100 years of specific capital and labor market marginalization after slavery.¹⁶² However, the widespread publicity surrounding the Harvard and UNC affirmative action cases has failed to adequately discuss the plausible Thirteenth Amendment link.¹⁶³ Commentators on the Supreme Court’s decision to hear the Harvard and UNC affirmative action lawsuits should link the need for affirmative action to the social economic conditions caused by the continuing aftershocks of slavery rather than race. Under the Thirteenth Amendment, it is constitutionally permissible to use the race-neutral legacy of slavery as a plus factor to increase educational diversity at Harvard and UNC.¹⁶⁴

V. CONCLUSION

Even if the Supreme Court avoids holding that race can never play a role in college admissions, it will likely invalidate the Harvard affirmative action plan because Harvard uses race as an oversized plus factor.¹⁶⁵ Since 1978, the Supreme Court has supported the constitutionality of affirmative action plans involving admissions three times.¹⁶⁶ However, this time, the six conservative justices on the Court (Chief Justice John Roberts, Justices Clarence Thomas and Samuel Alito, and three Trump-appointed conservatives) are likely to not approve Harvard’s use of race in its affirmative action plan.¹⁶⁷ Therefore, Harvard should introduce a revised constitutional model for affirmative action based on the racially neutral anti-slavery provision in the Thirteenth Amendment.¹⁶⁸ Harvard could implement its revised affirmative action procedure by considering every

¹⁶⁰ *Id.* at 4.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ U.S. CONST. amend. XIII, § 1.

¹⁶⁴ *See id.*

¹⁶⁵ Totenberg & Singerman, *supra* note 9.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

applicant as an individual, looking at the economic after-effects of the badges of slavery as a plus factor and utilizing a holistic portrayal of the student without using race as a factor.¹⁶⁹ Using the race-neutral slave provision of the Thirteenth Amendment to justify diversity admissions will inspire colleges, universities, and other policymakers to explore more deeply the link between the ongoing racial wealth gap and slavery.

* * *

¹⁶⁹ *Contra id.*

HAIR DRUG TESTING OF CHILDREN: A STUDY OF UTILIZATION AND INTERPRETATION

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I. BACKGROUND

Childhood exposure to caregivers with substance use disorders can overlap with child maltreatment and neglect.¹ Such exposure is considered an adverse childhood event contributing to increased risk of long-term mental and physical health complications.² Children living in environments where parents use substances may experience anxiety disorders, ADHD, and depression, in addition to other trauma and stress-related disorders.³

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Ms. Jennifer Livingston, pediatric nurse practitioner with TCAR at ACH who previously served in pediatric hematology-oncology, completed her training at UAMS.

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Dr. Karen Farst, medical director for TCAR at ACH and professor of pediatrics at UAMS, completed undergraduate and medical school training at Texas Tech University, completed residency training in internal medicine and pediatrics, practiced privately in pediatrics, and was awarded a fellowship in child abuse pediatrics by Cincinnati Children's Hospital.

¹ Kaitlyn Petrucelli et. al., *Adverse Childhood Experiences and Associated Health Outcomes: A Systematic Review and Meta-analysis*, 97 Child Abuse and Neglect 1.1-13 (2019).

² *Id.*

³ Vincent C. Smith, et. al., *Families Affected by Parental Substance Use*, 138 AM. ACAD. OF PEDIATRICS, E1, E5 (2016).

Additionally, as compared to children of parents without substance use disorders, children of parents with substance use disorders are three times as likely to be abused physically, emotionally or sexually and are four times as likely to be neglected.⁴ Exposure to illicit substances can also put children at risk of direct harm from ingestion, and in Arkansas, it is considered child abuse to “[give] a child or [permit] a child to consume or inhale a poisonous or noxious substance not prescribed by a physician that has the capacity to interfere with normal physiological functions.”⁵ Due to the risk of harm associated with “[a]n addicted parent’s illegal drug use and instability,” Arkansas courts have previously found it can be in the best interest of a child that parents with persistent, unremedied drug use should have their parental rights involuntarily terminated.⁶ With significant risks associated with caregiver substance use, and significant legal consequences attached thereto, the identification of children exposed to substances can provide an opportunity to intervene and protect children from potential harm.

Hair drug testing is one modality to identify children exposed to illicit substances. The process of hair drug testing typically includes a collection of a 1.5-inch sample of hair, cut at the level of the scalp, allowing for testing of an approximate three-month window of drug ingestions based on an estimated 0.5-inch of hair growth per month.⁷ Hair testing for adults involves a laboratory process of washing the hair of any external residue prior to testing to isolate drugs which have been ingested and grow out into the hair follicle.⁸ However, the same is not always true for children in whom the concern is not individual use but exposure to a drug-endangered environment.⁹ Hair drug testing to identify environmental exposures does not include laboratory washing prior to testing and may identify drug residue or smoke adhering to the hair in addition to ingestions.¹⁰ Depending on the lab and tests requested, hair drug tests may vary as to the individual substances.¹¹ However, most tests can detect commonly abused substances including amphetamines, cannabinoids, cocaine, opiates, PCP (phencyclidine), benzodiazepines, and barbiturates. Hair drug tests involve a confirmatory testing process and when positive, indicate an exposure to

⁴ *Id.* at e4.

⁵ Ark. Code Ann. §12-18-103 (2010).

⁶ *Bratton v. Dep’t of Human Servs.*, 586 S.W.3d 662, 666-67 (2019).

⁷ Fritz Pragst, et. al., *State of the Art in Hair Analysis for Detection of Drug and Alcohol Abuse*, 370 CLINICA CHIMICA ACTA, 17, 18-26 (2006).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Hair Exposure Drug Testing (ChildGuard®)*, UNITED STATES DRUG TESTING LABORATORIES, <https://www.usdtl.com/testing/child-hair-drug-test-labs> (last visited Nov. 9, 2022).

¹¹ *Id.*

the specific substance identified with a quantified level of the substance detected.¹²

Despite the relative simplicity of collecting hair, sending it to a lab, and getting a report of any substances detected, the interpretation of positive and negative hair drug tests for children presents certain complications. When a hair drug test is evaluating for substance exposure, a positive result is often unable to differentiate purely environmental exposures -- with external residue adherent to the hair -- from subjects who have experienced direct harm or abuse through actions such as ingestion, inhalation, or other systemic exposure to a poisonous or noxious substance.¹³ A positive hair drug test is also unable to identify the specific route, timing, or extent of exposure based on the results.¹⁴ While there are quantified levels of a substance reported with a positive hair test, multiple factors contribute to the levels detected, and there is no evidence basis to correlate any quantified level to the type or extent of exposure.¹⁵ For instance, a child presenting for hair drug testing directly from an environment where caregivers were smoking an illicit substance may have a hair drug test positive for a substance detected at many times over the cutoff limit of detection without a detectable amount of drug entering the body through ingestion or inhalation. In contrast, a child with a potentially life-threatening ingestion months prior to the test may have a lower level detected.¹⁶

Another challenge to interpreting hair drug tests is the fact that the estimated timeline or window of detection for substances in children and infants is imprecise and impacted by various factors. In general, hair drug tests are thought to detect drug ingestions for up to three months based on rates of hair growth and the size of the sample sent for testing.¹⁷ However, this timeline is an estimation based on adult drug use. Moreover, there is individual variability in rates of hair growth; factors such as age, race, and health can influence how quickly hair grows which will therefore impact the window of detection for drug ingestions.¹⁸ Additionally, the likelihood of a positive hair drug test from a purely environmental exposure is impacted by multiple individual and cultural factors such as frequency of hair washing, hair products, and hair dye.¹⁹ Studies of adult hair drug testing have also suggested that factors such as race and hair color may influence the

¹² Pragst, *supra* note 8, at 27-29, 32.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 30.

¹⁷ *Id.*

¹⁸ *Id.* at 33-36.

¹⁹ Sharon Levy, et.al., *Testing for Drugs of Abuse in Children and Adolescents*, 133 PEDIATRIC DIG., e1798, e1799 (2014).

likelihood of a positive hair test.²⁰ In sum, hair drug tests for children may be more or less likely to be positive or negative based on a multitude of factors unrelated to drug exposure.²¹

In addition to the difficulties in technical interpretation of hair drug testing in children, it is also impossible to assign or quantify individual risk of maltreatment or harm based on hair drug testing alone. Although there is epidemiologic and population data identifying many risks of caregiver substance use as it relates to child maltreatment and adverse outcomes, population data cannot tell us the likelihood of harm to an individual child.²² Similar to how obesity puts people at risk for diabetes without indicating that every obese individual actually has diabetes, drug use in a home can put children at risk for maltreatment and harm but it does not necessarily indicate that every child in a home with caregiver substance use has been directly harmed. When it is not possible to identify when or how a child was exposed, or whether a positive test indicates an ingestion or external residue, it is not possible to state with certainty that the child was harmed or maltreated as a result of the exposure.

Considering the multitude of factors contributing to the likelihood of a hair test being positive or negative as well as limited information to guide the assessment of risk given a positive or negative test, hair drug testing results must be interpreted with caution. Recognizing the limitations of hair drug testing is critical if the tests are being used to assess for safety. When hair testing is evaluated for exposure to substances, a negative hair test cannot exclude the possibility of exposure or the associated risks and a positive hair test, while identifying a risk factor, cannot quantify the extent or risk of harm to a child.²³

Recognizing the complexities in the interpretation of hair drug testing results, in 2003, clinicians with specialized training in the evaluation of maltreatment developed a process at Arkansas Children's Hospital to allow for hair drug testing of children at a specialized outpatient clinic for suspected victims of maltreatment, now called the "Team for Children at Risk" (TCAR) clinic.²⁴ These clinicians collect hair drug tests and document the results with a detailed explanation of the meaning and limitations of the test. Hair drug testing can be requested by state investigators or caseworkers

²⁰ Gary Henderson, et. al., *Incorporation of Isotopically Labeled Cocaine into Human Hair: Race as a Factor*, 22 J. OF ANALYTICAL TOXICOLOGY 156, 156-64 (1998).

²¹ Douglas Rollins, et. al., *The Effect of Hair Color on the Incorporation of Codeine into Human Hair*, 22 J. OF ANALYTICAL TOXICOLOGY 545, 545-50 (2003).

²² D.J.P. Barker, et. al., EPIDEMIOLOGY FOR THE UNINITIATED BJM eds., 4th ed. (1997).

²³ *Id.*

²⁴ Arkansas Children's Hospital, *Team for Children at Risk*, <https://www.archildrens.org/programs-and-services/team-for-children-at-risk?&journey=symptoms> (last visited Oct. 31, 2022).

assigned to the evaluation of child maltreatment reports through the Arkansas Child Abuse Hotline, or it may be court-ordered as a part of an ongoing evaluation of child maltreatment.²⁵

Since the beginning of this clinical service, requests for hair drug testing in the TCAR clinic have substantially grown from an initial volume of fewer than twenty scheduled visits annually for evaluation of substance exposure in 2004-2005 to more than 300 scheduled visits for evaluation of substance exposure annually from 2019-2021.²⁶ Despite the growing popularity of this service, there was no evaluation of how the hair drug testing results were being utilized and interpreted by multidisciplinary team members involved in the assessment and response to child maltreatment for more than a decade. In 2020, we aimed to fill this knowledge gap by performing a survey of non-medical multidisciplinary team members involved in the assessment and response to child maltreatment to identify the perceived benefit of hair testing, perceived risk associated with positive and negative hair tests, and the accuracy of interpretation.²⁷ This article presents and discusses the results of our survey.

II. METHODS

A survey was developed by clinical team members in the Division for Children at Risk at Arkansas Children's Hospital, a division specifically dedicated to the medical evaluation of children at risk for abuse and neglect.²⁸ Rating scales were developed to measure both perceived benefit of hair drug testing and the accuracy of interpretation of both positive and negative results.²⁹ Voluntary surveys were sent to more than 300 people, including attorneys ad litem (attorneys for children), parent counsel (attorneys for parents), attorneys for the Department of Human Services (DHS), investigators for the Division of Children and Family Services (DCFS), investigators for the Arkansas State Police, Court Appointed Special Advocates (CASA), and others involved in investigating and responding to child maltreatment.

²⁵ ARK. DEPT. OF HUMAN SVCS. DIV. OF CHILDREN AND FAMILY SVCS., POLICY & PROCEDURE MANUAL (Rev. Aug. 2022).

²⁶ Interview with Karen Farst, M.D., Department of Pediatrics, Section for Children at Risk, April 1, 2022.

²⁷ See Liza Murray, M.D., Hair Drug Testing for Victims of Child Abuse: A Study of Utilization and Interpretation (Aug. 4, 2020) (unpublished research proposal) (on file with UAMS Institutional Review Board).

²⁸ See University of Arkansas for Medical Sciences, Department of Pediatrics Children at Risk, <https://medicine.uams.edu/pediatrics/specialties/sections/children-at-risk/> (last visited Oct. 31, 2022).

²⁹ Murray, *supra* note 27, at 6-7.

Perceived hair drug testing benefit was measured through rating the importance of a positive or negative hair test on a scale of never important to always important. Risk assessment was measured through rating the level of agreement on a scale of strongly disagree to strongly agree with statements of presence or absence of risk to children with a positive or negative hair test. Accuracy of interpretation was evaluated through rating the level of agreement on a scale of strongly disagree to strongly agree with an accurate and inaccurate interpretation of a hair test result.³⁰ The surveys were developed through REDCap, a secure database and survey building web application.³¹

Survey links were provided by email, and participation was voluntary and anonymous. Requests to participate were sent to Arkansas Division of Children and Family Services (DCFS) Investigators, Arkansas State Police investigators within the Crimes Against Children Division (CACD), attorneys for DCFS, attorneys ad litem, parent counsel, and Court Appointed Special Advocate (CASA) advocates. One reminder email was sent after the initial request for participation.

Statistical analysis was completed with IBM SPSS Statistics 25 and ANOVA testing was used to evaluate any significant differences between groups.³² This study was approved by the University of Arkansas Institutional Review Board.

III. RESULTS

There were 137 participants: forty-three attorneys ad litem, thirty-six DCFS investigators, twenty-seven Arkansas State Police investigators, eighteen DHS attorneys, seven CASA advocates, four parent counsel, and two identifying as “other.”

Most respondents reported that they do consider the results of hair drug tests in their role. Regarding perceived importance, 100% of respondents reported that positive hair drug tests are “usually” or “always” important, and 81.8% reported that negative hair drug tests are “usually” or “always” important. Regarding risk assessment, most respondents considered a positive hair drug test to indicate a risk to children in the home,

³⁰ *Id.*

³¹ See generally Project REDCap, https://projectredcap.org/about/?_gl=1*j50i6x*_ga*MTE1NTczNjgwOC4xNjY3MjE0MjAz*_ga_WSHLZ5232G*MTY2NzIxNDIwMi4xLjAuMTY2NzIxNTQxMS4wLjAuMA..&_ga=2.196880111.2141664962.1667214203-1155736808.1667214203 (last visited Oct. 31, 2022).

³² Robert Hoyt, et. al., *IBM Watson Analytics: Automating Visualization, Descriptive, and Predictive Statistics*, JMIR PUBLIC HEALTH SURVEILL. (2016).

with 96.4% either “strongly” or “somewhat” agreeing with that statement.³³

Table 1: Proportion of respondents agreeing with statements of risk and interpretation					
	Strongly Disagree	Somewhat Agree	Neither Agree Nor Disagree	Somewhat Agree	Strongly Agree
A positive hair test indicates a risk to the child(ren) in the home	1.5%	2.2%	0	13.9%	82.5%
A negative hair test indicates no considerable risk to the child(ren) in the home	38.7%	28.5%	16.1%	8.8%	8%
A positive hair drug test indicates that a child has been exposed to substances tested within a certain time frame	1.5%	1.5%	1.5%	21.3%	74.3%
A negative hair drug test indicates that a child has not been exposed to substances tested within a certain time frame	29.2%	25.2%	11.7%	19%	14.6%

Conversely, only 67.2% either strongly or somewhat disagreed with the statement “A negative hair test indicates no considerable risk to the child(ren) in the home.”³⁴ Regarding accuracy of interpretation, the majority (95.6%) somewhat or strongly agreed with the correct statement, “A positive hair drug test indicates that a child has been exposed to substances tested within a certain time frame.”³⁵ A smaller majority accurately interpreted a

³³ See Table 1.

³⁴ *Id.*

³⁵ *Id.*

negative hair test, with only 54.4% of respondents either strongly or somewhat disagreeing with the incorrect statement, “A negative hair drug test indicates that a child has not been exposed to substances tested within a certain time frame.” A substantial minority of respondents, 33.6%, inaccurately agreed with that statement.³⁶

There was a statistically significant relationship between respondents’ professional roles and their perception of the importance of a negative hair drug test ($p < 0.001$), as well as the accuracy of their interpretations of a negative hair drug test ($p=0.021$). A larger proportion of DCFS investigators indicated a negative hair test was “always” important, and a larger proportion of DCFS and CACD investigators inaccurately interpreted a negative hair test as an indication that a child has not been exposed to substances.³⁷

Table 2: Importance of a Negative Hair Test by Role (ANOVA <0.001)				
Role (N)	Rarely Important N (%)	Occasionally Important N (%)	Usually Important N (%)	Always Important N (%)
DHS Attorney (18)	1 (5.6)	5 (27.8)	5 (27.8)	7 (38.9)
Attorney Ad Litem (43)	1 (2.3)	10 (23.3)	15 (34.9)	17 (39.5)
DCFS (36)	0	3 (8.3)	2 (5.6)	31 (86.1)
CACD (27)	0	4 (14.8)	8 (29.6)	15 (55.6)
CASA (7)	0	0	0	7 (100)
Other (2)	1 (50)	0	0	1 (50)
Parent Counsel (4)	0	0	1 (25)	3 (75)

³⁶ *Id.*

³⁷ *See* Table 2; Table 3.

Role (N)	Strongly Disagree N (%)	Somewhat Disagree N (%)	Neither Agree nor Disagree N (%)	Somewhat Agree N (%)	Strongly Agree N (%)
DHS Attorney (18)	9 (50)	3 (16.7)	4 (22.2)	1 (5.6)	1 (5.6)
Attorney Ad Litem (43)	17 (39.5)	15 (34.9)	6 (14)	4 (9.3)	1 (2.3)
DCFS (36)	14 (38.9)	9 (25)	5 (13.9)	4 (11.1)	4 (11.1)
CACD (27)	11 (40.7)	9 (33.3)	4 (14.8)	1 (3.7)	2 (7.4)
CASA (7)	2 (28.6)	2 (28.6)	2 (28.6)	1 (14.3)	0
Other (2)	0	1 (50)	0	0	1 (50)
Parent Counsel (4)	0	0	1 (25)	1 (25)	2 (50)

IV. DISCUSSION

The accurate assessment of risks to children and harm to children in potentially unsafe or abusive environments is challenging but imperative to prevent ongoing abuse and neglect, and to avoid unnecessary and traumatic disruption to families.³⁹ Separation of children from caregivers is a distressing and potentially harmful event and while there are circumstances in which it is necessary for a child's safety, removal of a child is not without risk.⁴⁰ Utilization of various tools and assessments can be helpful in the response to child maltreatment, but accurate interpretation is crucial to make informed and consistent decisions for the safety of children. Hair drug testing is one of many tools to assess risk and harm to children; however, if results are inaccurately interpreted and inappropriately utilized to assign risk, children and families may be harmed. With this exploratory survey identifying perceived benefit and interpretation of hair drug testing, we have identified substantial variation in interpretation and inaccuracies in the interpretation of results.

³⁸ Level of agreement with "A negative hair test indicates no considerable risk to the child(ren) in the home."

³⁹ See Vivek S. Sankaran et al., *Easy Come, Easy Go: The Plight of Children who Spend Less than Thirty Days in Foster Care*, 19 U. PENN. J. OF L. & SOC. CHANGE, 207 (2016).

⁴⁰ Kimberly Howard et al., *Early Mother-Child Separation, Parenting, and Child Well-Being in Early Head Start Families*, 13 ATTACHMENT & HUM. DEV. 1, 10-13 (2011).

Given multiple environmental and personal factors (hair washing, dyes, treatments, etc.) which are known to impact hair drug test results, we know that a negative hair drug test of a child cannot exclude the possibility of exposure.⁴¹ However, 16.8% of respondents agreed that “a negative hair test indicates no considerable risk to the child(ren) in the home” and an even larger proportion of respondents (33.6%) incorrectly indicated that “a negative hair drug test indicates that a child has not been exposed to substances tested within a certain time frame.”⁴² Since most respondents also indicated that a negative hair drug test is perceived as “important,”⁴³ these results suggest that a negative result could inaccurately impact the action (or inaction) of a team member during an evaluation of suspected maltreatment.

Regarding interpretation of positive drug tests, we know that although a positive hair drug test does indicate that a child was exposed, the test result cannot identify where the child was exposed, how the child was exposed, or precisely when the child was exposed. The vast majority of respondents in this study agreed that a positive hair test indicated a true exposure, and that the positive hair test indicated a risk to the child(ren) in the home.⁴⁴ While the statement regarding risk to children may be true, a positive hair test in a child does not necessarily predict that harm will occur to a child in every case, and it is never possible to truly quantify or qualify the level of individual risk based on a hair test result.

Our study had multiple limitations which could impact results, and this small study is not generalizable to the organizations represented as a whole. As with any voluntary survey, results could be impacted by response and non-response bias, and the small number of individuals in each “role” group limits the capacity to detect significant relationships. Despite these limitations, the results are meaningful. With child maltreatment cases in Arkansas being impacted by individual interpretation of hair drug tests and individual response to cases, any variation in interpretation and utilization of hair drug testing is significant to the children and families involved.⁴⁵

However, while this study did not explore specific outcomes or actions associated with hair drug testing results, it highlights several concerning issues. When the likelihood of a positive or negative hair drug test may be influenced by individual, environmental, and cultural factors, an inaccurate

⁴¹ Fritz Pragst, et. al., *Hair Analysis of More than 140 Families with Drug Consuming Parents. Comparison between Hair Results from Adults and their Children*, FORENSIC SCI. INT. 297; 161-170 (2019).

⁴² See Table 1.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See generally *Holt v. State*, 2009 Ark. 482, ¶¶ 4, ¶¶ 9-10. (Although child maltreatment cases are confidential, similar, public decisions illustrate how courts rely on hair drug tests of children as evidence.)

interpretation of the results as a method to “rule in” or “rule out” substance exposure could lead to both over- and under-response in the assessment of a child’s safety. If a positive hair drug test is used as proof of harm or potential grounds for removal without consideration of individual, environmental and family factors there is risk of unnecessary trauma to a child and family through child welfare agency intervention. On the contrary, if a negative hair test is considered proof of less or no harm, children may remain in an unsafe environment and families may not receive services that could improve their circumstances and prevent harm from occurring.

The importance of recognizing and responding to child maltreatment cannot be overstated. Caregiver substance use as a risk factor for harm is an issue that should not be ignored. Hair drug testing can provide useful and tangible information to identify a factor contributing to a potentially dangerous environment for children.⁴⁶ However, given the multitude of variables contributing to the results and the complexities of individual cases, this test should not be over-utilized or interpreted with a simplistic understanding of risk. Hair drug tests are not able to demonstrate definitive harm or absence of harm.⁴⁷ Therefore, over-reliance on hair drug test results in the assessment of maltreatment can contribute to inaccurate assignment of risk and inequitable treatment of at-risk children and families.⁴⁸ Given substantial individual variation among multidisciplinary team members and the identification of inaccurate interpretation by individuals involved in the response to child maltreatment in Arkansas, we would caution against over-utilization of hair drug testing in the assessment of child maltreatment. Finally, when drug testing is needed, we recommend consultation with a medical provider who has specialized training in child maltreatment to determine hair drug testing utility and interpretation.

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⁴⁶ *Id.*

⁴⁷ See Colorado Office of Children, Youth, and Families, *Toxicology Resource Guide*, 2-3 (2019).

⁴⁸ *Id.*