

ARTICLE

**DEEP IN THE HEART OF TEXAS:  
FOUNTAIN VIEW, FAIR HOUSING, AND TITLE VI**

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*Deep in the Heart of Texas: Fountain View, Fair Housing, and Title VI*  
UNT DALLAS L. REV. ON THE CUSP, Spring 2018

*There is a land, a western land, mighty wonderful to  
see. It is the land I understand, and it's there I long  
to be.*

—Opening Lyrics of “Deep in the Heart of  
Texas”<sup>1</sup>

## **Introduction**

On January 11, 2017, the U.S. Department of Housing and Urban Development (HUD) issued a letter finding noncompliance with Title VI of the Civil Rights Act of 1964 (Title VI) to the City of Houston.<sup>2</sup> Title VI, part of several 1960’s civil rights laws, forbids discrimination on the basis of race, color, or national origin in all HUD-assisted and other federally funded programs.<sup>3</sup> The City had blocked a proposal to develop Fountain View, a multifamily Low Income Housing Tax Credit (LIHTC) housing development in a predominately white, safe, well-resourced Houston neighborhood.<sup>4</sup> During its investigation, HUD found evidence that the City’s actions had the purpose or effect of discriminating on the basis of race or national origin.<sup>5</sup> While the facts deal with that particular situation, the reality is that Fountain Views exist across the State of Texas and the country. But the results of HUD’s investigation of the Fountain View saga signal that denying development of low income housing that is likely to house people of color in predominantly white neighborhoods, under certain circumstances, may be a violation of Title VI.

### **I. Title VI’s Role in Fair Housing Enforcement**

#### *A. The Birth of Title VI: The Civil Rights Act of 1964*

Spurred by civil rights activists’ demands and signed into law by Texas native President Lyndon B. Johnson, the Civil Rights Act was Congress’s attempt

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<sup>1</sup> Lyrics by June Hershey and music by Don Swander, <http://textarkivet.atspace.cc/texas1.htm> (last visited March 28, 2017).

<sup>2</sup> Letter From Garry L. Sweeney, Dir., U.S. Dep’t of Hous. & Urban Dev., to Sylvester Turner, Mayor, City of Hous. (January 11, 2017), <https://www.houstonpublicmedia.org/articles/news/2017/01/13/183650/breaking-hud-says-houston-broke-law-nixing-affordable-housing-complex/>.

<sup>3</sup> See Civil Rights Act of 1964, tit. VI, 42 U.S.C. §2000d to 2000d-7 (2012).

<sup>4</sup> Letter from Garry L. Sweeney to Sylvester Turner, *supra* note 2, at 2.

<sup>5</sup> *Id.* at 1.

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to address discrimination in multiple aspects of American society.<sup>6</sup> The Civil Rights Act pointedly addresses public accommodation and employment and, in Title VI, specifically seeks to secure equality in every area that federal funds touch.<sup>7</sup>

The introduction and ultimate passage of the Civil Rights Act did not occur easily. A historic recitation of the then-longest filibuster and the incidents that occurred before and after the Civil Rights Act was passed may be best studied in other writings.<sup>8</sup> It should be noted, however, that votes in favor of the bill aligned more with geographic affiliation than with party affiliation.<sup>9</sup> Following prayer vigils in support of the bill at the Lincoln Memorial, held by religious organizations and students, President Johnson signed the Civil Rights Act into law on July 2, 1964.<sup>10</sup>

*B. HUD's Title VI Process*

HUD has used one of its executive functions—Title VI enforcement authority—to make findings of civil rights violations against other political subdivisions. Any person or protected class harmed by prohibited discrimination under Title VI may file a complaint with HUD within 180 days of the alleged discriminatory behavior.<sup>11</sup> To the extent possible, HUD will keep the complainant's identity confidential.<sup>12</sup> Upon receipt of the complaint, HUD must promptly investigate the matter.<sup>13</sup> If HUD makes no findings of noncompliance, it

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<sup>6</sup> *The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIBRARY OF CONGRESS, <https://www.loc.gov/exhibits/civil-rights-act/civil-rights-act-of-1964.html> (last visited Mar. 27, 2017).

<sup>7</sup> 42 U.S.C. §§ 2000d to 2000d-7.

<sup>8</sup> It is worth noting that the compromise bill, later known as The Civil Rights Act of 1964, passed the Senate by a vote of seventy-three to twenty-seven on June 19, 1964. *Adoption of a Resolution (H. Res. 789) Providing for Housing Approval of the Bill as Amended by the Senate*, GOVTRACK, <https://www.govtrack.us/congress/votes/88-1964/h182>. The Texas state holiday, Juneteenth, also falls on June 19th in remembrance of the late news that arrived to enslaved Africans in Texas in 1865. See Teresa Palomo Acosta, *Juneteenth*, TEXAS STATE HISTORICAL ASSOCIATION, <https://tshaonline.org/handbook/online/articles/lkj01> (last modified Oct. 6, 2017).

<sup>9</sup> GOVTRACK, *supra* note 8.

<sup>10</sup> *The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIBRARY OF CONGRESS, <https://www.loc.gov/exhibits/civil-rights-act/civil-rights-act-of-1964.html> (last visited Mar. 27, 2017).

<sup>11</sup> 24 C.F.R. § 1.7(b) (2003). A responsible HUD official may extend the 180-day deadline. *Id.*

<sup>12</sup> *Id.* § 1.7(e).

<sup>13</sup> *Id.* § 1.7(c).

informs the grant recipient.<sup>14</sup> If HUD finds noncompliance, it informs the grant recipient and seeks to resolve the matter informally.<sup>15</sup> An act of noncompliance that is not corrected by informal means may subject the grantee to a loss of federal funds.<sup>16</sup>

Dallas stands with Houston as another large Texas city that has been subject to HUD's Title VI process.<sup>17</sup> On November 22, 2013, HUD issued a letter finding noncompliance against the City of Dallas following a complaint filed in early 2010.<sup>18</sup> HUD cited noncompliance with Title VI as well as other relevant laws.<sup>19</sup> Almost a year later, HUD and the City of Dallas entered into a voluntary compliance agreement on November 5, 2014.<sup>20</sup>

HUD, like other federal agencies, maintains a certain level of discretion in pursuing enforcement of Title VI in housing matters.<sup>21</sup> When the agency fails to act, persons and entities who have been harmed may seek redress through the courts only in instances of intentional discrimination.<sup>22</sup>

## **II. The Houston Housing Authority's Fountain View Proposal**

HUD's non-compliance findings were grounded in the City of Houston's refusal to issue a "Resolution of No Objection" for the Houston Housing

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<sup>14</sup> *Id.* § 1.7(d)(2).

<sup>15</sup> *Id.* § 1.7(d)(1).

<sup>16</sup> *Id.* § 1.8.

<sup>17</sup> See Letter from Garry L. Sweeney, Dir., U.S. Dep't of Hous. & Urban Dev., to Charles Estee, City of Dall. (Nov. 22, 2013), <https://static1.squarespace.com/static/58b9e76e17bffc3590518d43/t/58bf2e62db29d64f40ff2d2a/1488924259372/HUD+Letter+of+Findings+of+Non-Compliance+reduced.pdf> (multifamily housing-related decisions by the City of Dallas).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1.

<sup>20</sup> Voluntary Compliance Agreement between U.S. Dep't of Hous. & Urban Dev. and City of Dall. (Nov. 5, 2014), <http://dallascityhall.com/departments/fairhousing/DCH%20Documents/pdfs/dallas-hud-executed-vca.pdf>.

<sup>21</sup> See U.S. DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL, SECTION VII, PROVING DISCRIMINATION-DISPARATE IMPACT 45, <https://www.justice.gov/crt/case-document/file/923556/download> (last visited Mar. 3, 2018).

<sup>22</sup> *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001). U.S. DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL, SECTION IX: PRIVATE RIGHT OF ACTION AND INDIVIDUAL RELIEF THROUGH AGENCY ACTION 3, <https://www.justice.gov/crt/case-document/file/923581/download> (last visited Mar. 28, 2017).

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Authority's (HHA) proposal to develop Fountain View.<sup>23</sup> HUD found that the decision "was motivated either in whole or in part by the race, color, or national origin of the likely tenants."<sup>24</sup> The agency also highlighted the City's LIHTC approval process and observed that "applications are influenced by racially motivated opposition to affordable housing and perpetuate segregation."<sup>25</sup>

The HHA request to develop Fountain View required little of the City of Houston. The LIHTC process required only that the City adopt a "Resolution of No Objection" for the 233-unit development.<sup>26</sup> The complex was to include: market rate units (20%); units for families at sixty percent or less of the area median income (70%); and units for families at thirty percent or less of the area median income (10%).<sup>27</sup> With funding from the 4% state tax credit pool, tax-exempt bonds, HUD CDBG Disaster Recovery funds, and HHA's Capital Funds, *no City of Houston funds were sought for Fountain View.*<sup>28</sup>

The Fountain View neighborhood's predominantly white non-Hispanic makeup differs greatly from the housing authorities' participant population.<sup>29</sup> According to the HUD Resident Characteristics Report, Blacks/African Americans comprise 79% of the HHA's 2,972 program participants.<sup>30</sup> The census tract where the complex would have been sited houses a population that is 86.9% white, 3% Black and 10.5% Hispanic of any race.<sup>31</sup> The findings stated that "[t]enants of the average LIHTC development in Houston are 57.9% black and 33.1% Hispanic."<sup>32</sup>

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<sup>23</sup> Letter from Garry L. Sweeney to Sylvester Turner, *supra* note 2, at 1. Receipt of a "resolution of no objection" from a municipality is a necessary requirement for developers seeking funds via the Texas 4% low income housing tax credit program rules.

<sup>24</sup> *Id.* at 3.

<sup>25</sup> *Id.* at 1.

<sup>26</sup> See Letter from Garry L. Sweeney to Sylvester Turner, *supra* note 2.

<sup>27</sup> *Id.* at 2.

<sup>28</sup> *Id.* at 2-3.

<sup>29</sup> *Resident Characteristics Report*, U.S. Dep't of Hous. & Urban Dev., (Feb. 28, 2018) <https://pic.hud.gov/pic/RCRPublic/rcrmain.asp> (follow "Public Housing Agency" hyperlink; then search "Within a State" field for "TX - Texas" and search "Select HA" for "TX005 - Houston Housing Authority"; then search within "Report" for the tabs "Race/Ethnicity" and "Units").

<sup>30</sup> *Id.*

<sup>31</sup> Letter from Garry L. Sweeney to Sylvester Turner, *supra* note 2, at 3.

<sup>32</sup> *Id.*

### III. Race-based NIMBYism<sup>33</sup>

The facts cited as the bases of HUD’s findings are familiar. Both community opposition and local Texas demographics have given way to affordable housing-siting battles when the likely tenants have been low income families of color. Beyond traditional NIMBYism, this can appropriately be referred to as race-based NIMBYism.

#### *A. Foes of the Fountain View Proposal*

Opponents of the Fountain View Proposal publicly complained about the Fountain View affordable housing plans.<sup>34</sup> Describing themselves as a “grassroots coalition of local residents, parents and businesses,” the political action committee’s (PAC) website housed their complaints while serving as a recruitment and fundraising tool.<sup>35</sup> In the coalition’s summary opposing the project, it opines, “[t]his project is wasteful, uncoordinated government spending at its worst. HHA picked one of the most congested areas in Houston to build its most ambitious and expensive low-income housing project without coordinating its plan with the community and the local school district.”<sup>36</sup>

With lists of articles, documents, and links to media coverage on its website, the coalition of neighbors utilized their ample resources and campaigned aggressively against Fountain View.<sup>37</sup> The opponents’ more detailed comments against development included concerns about elementary school overcrowding despite planned construction of a new elementary school in the area.<sup>38</sup> Moreover, their complaint about unfair competition with other apartment owners made no comment about whether nearby apartment owners make units available to housing choice voucher holders.<sup>39</sup> (LIHTC complexes, unlike regular market landlords, may not turn away HHA’s housing choice voucher holders simply because they use the federal subsidy.)<sup>40</sup> Coalition members and their supporters argued against

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<sup>33</sup> NIMBY stands for “not in my backyard.” See DICTIONARY.COM, [HTTP://WWW.DICTIONARY.COM/BROWSE/NIMBY?S=T](http://www.dictionary.com/browse/nimby?s=t) (last visited Oct. 31, 2017)

<sup>34</sup> *About Us*, STOP FOUNTAINVIEW PROJECT, <http://stopfountainviewproject.org/stop-fountainview-project/> (last visited Apr. 9, 2017).

<sup>35</sup> *Id.*

<sup>36</sup> STOP FOUNTAINVIEW PROJECT, <http://stopfountainviewproject.org/> (last visited Apr. 9, 2017).

<sup>37</sup> *See id.*

<sup>38</sup> *Supra* note 37.

<sup>39</sup> *See id.*

<sup>40</sup> 26 U.S.C. § 42(h)(6)(B)(iv).

the proposal at public meetings.<sup>41</sup> Journalistic coverage described the opponents as having mounted a “fierce campaign” that enlisted support of local, state, and federal elected officials.<sup>42</sup> HHA chief executive officer Tory Gunsolley observed that coalition members had not made any arguments about school overcrowding, traffic, or similar concerns when private developers built a neighboring market rate apartment complex.<sup>43</sup> But HHA’s interest proved no match for the privately-funded PAC. If a political win had not resulted, the PAC was prepared to seek legal redress for its perceived harm.<sup>44</sup>

*B. A Familiar Melody: Race-Based NIMBY Talking Points*

In its findings, HUD quoted resident statements from the Fountain View public meeting that are familiar refrains.<sup>45</sup> Comments included concerns about an increase in crime, accumulation of trash, a decline in real estate values, and school overcrowding.<sup>46</sup>

Recent fair housing history has been replete with similar complaints when housing for lower income populations of color have been the subject of local governmental decisions. In *Avenue 6E Investments, LLC v. City of Yuma, Arizona*, residents of a majority white neighborhood complained of impending crime, one homeowner stating that the developers’ proposal “would create ‘a low cost, high crime neighborhood.’”<sup>47</sup> In *Mhany Management, Inc. v. County of Nassau, Village of Garden City, New York*, residents rang out with complaints not just at public meetings but also in distributed flyers, making such statements as, “[w]ill Garden City property values decrease if over 300 apartments are built at the site . . . ?” and “[i]sn’t our school district crowded enough now?”<sup>48</sup> In Dallas, fourteen

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<sup>41</sup> *Supra* note 37.

<sup>42</sup> *Housing Project has some on Edge*, available at <http://www.houstonchronicle.com/business/real-estate/article/Affordable-housing-proposal-puts-neighbors-on-edge-6842340.php> (last visited April 9, 2017).

<sup>43</sup> *Id.*

<sup>44</sup> *See supra* note 37.

<sup>45</sup> Letter from Garry L. Sweeney to Sylvester Turner, *supra* note 2, at 3–4.

<sup>46</sup> *Id.*

<sup>47</sup> *See Ave. 6E Invs., LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 499 (9th Cir. 2016) (zoning case brought by developers under § 1983 and the Fair Housing Act involving affordable housing with anticipated Hispanic residents).

<sup>48</sup> *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 591–96 (2d Cir. 2016) (zoning case brought against the Village of Garden City under § 1983, the Fair Housing Act, and the Equal Protection Clause).

neighborhood associations joined forces to mount litigation against the Dallas Housing Authority when it planned to site public housing in one of the City's northern-most predominantly white neighborhoods.<sup>49</sup>

*C. The History of Segregation in All Large Texas Cities as a Starting Point for Analysis*

When planning for housing, large metropolitan areas should first consider the respective histories of segregation, which may reveal that discrimination has resulted in spatial separation of people based on race and ethnicity. None of the large metropolitan areas of Texas, including Austin, Dallas, Fort Worth, Houston, and San Antonio, have been inoculated from the effects of discriminatory practices and policies.<sup>50</sup> In applying an equitable frame consistent with civil rights laws when making affordable housing-siting decisions, it is important for decision makers to study which groups of people have been steered to live in, near, or away from certain areas based on their race and ethnicity.

**IV. Reactions to the Finding of Noncompliance Issued to the City of Houston**

Houston's mayor took issue with the Title VI finding of noncompliance and sought relief from the Trump administration rather than initially seeking to resolve the matter with a voluntary compliance agreement.<sup>51</sup> However, Houston's mayor also announced initiatives that promise to address some of the issues raised in the finding of noncompliance regarding the lack of affordable housing options for low income families in areas outside historically segregated, blighted, under-

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<sup>49</sup> Muriel Sims, *Welcome to the Neighborhood*, DALLAS OBSERVER (Jul. 16, 1998, 4:00 AM), <http://www.dallasobserver.com/content/printView/6401848>; *Walker v. HUD*, THE LAW FIRM OF DANIEL & BESHARA, P.C., <https://www.danielbesharalawfirm.com/walker-v-hud/> (last visited April 9, 2017); John Harden, *Maps Show Visible Racial Divides in Major Texas Cities*, HOUSTON CHRONICLE (Jul. 24, 2015, 5:06 PM), <http://www.houstonchronicle.com/news/houston-texas/article/Highways-interstates-reinforce-divides-in-Texas-6399606.php>.

<sup>50</sup> John D. Harden, *Maps Show Visible Racial Divides in Major Texas Cities*, HOUSTON CHRONICLE (July 24, 2015), <http://www.houstonchronicle.com/news/houston-texas/article/Highways-interstates-reinforce-divides-in-Texas-6399606.php>.

<sup>51</sup> See Press Release, Mayor's Office of the City of Houston, City to Consider 12 Affordable Home Devs. (Feb. 14, 2017), <http://www.houstontx.gov/mayor/press/affordable-home-developments.html> (Mayor announcing City of Houston's February 2017 support of affordable housing proposals in six low poverty neighborhoods); Leah Binkovitz, *After HUD Investigation Found Civil Rights Violations, Houston Moves on Affordable Housing*, THE URBAN EDGE (Feb. 15, 2017), [http://urbanedge.blogs.rice.edu/2017/02/15/after-hud-investigation-found-civil-rights-violations-houston-moves-on-affordable-housing/#.WeVh\\_xNSxE7](http://urbanedge.blogs.rice.edu/2017/02/15/after-hud-investigation-found-civil-rights-violations-houston-moves-on-affordable-housing/#.WeVh_xNSxE7).



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resourced neighborhoods.<sup>52</sup> Whether the mayor's promises to improve options for low income families are kept, is yet to be seen.<sup>53</sup>

While resolution of the finding of noncompliance was pending, local affordable fair housing advocates asked HUD to reject certifications from the City (and HHA) that state they are complying with their obligations under Title VI, the Fair Housing Act, and other civil rights laws.<sup>54</sup> The Texas Low Income Housing Information Service (TLIHS) asked HUD to "act promptly to declare the certifications inaccurate and unsatisfactory to the Secretary."<sup>55</sup> TLIHS argued that HUD may not ignore unresolved Title VI determinations and is not authorized to continue or grant new funding until resolution of the noncompliance findings and receipt of accurate compliance certifications from the City.<sup>56</sup>

The City of Houston and HUD resolved the finding of noncompliance through a voluntary compliance agreement on March 2, 2018.<sup>57</sup>

### Conclusion

Affordable housing proposals throughout Texas continue to land on the desks of elected officials and other decision makers.<sup>58</sup> Low income renters of

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<sup>52</sup> See MAYOR'S OFFICE OF THE CITY OF HOUSTON, *supra* note 53.

<sup>53</sup> John Henneberger, *Proclaiming Defiance of Housing Desegregation Order, Houston Mayor Takes a Small Step to End the Practice*, TEXAS HOUSERS (Feb. 15, 2017), <https://texashousers.net/2017/02/15/proclaiming-defiance-of-housing-desegregation-order-houston-mayor-takes-a-small-step-to-end-the-practice/>.

<sup>54</sup> See Letter to Neal Rackleff, Anna Maria Farias and Dominique Blom from Relman, Dane & Colfax, PLLC on Oct. 31, 2017, available at <https://www.dropbox.com/s/plb9fzkyz1ioq7/2017.10.31%20M.%20Allen%20ltr%20to%20N.%20Rackleff%2C%20D.%20Blom%2C%20A.%20Farias.pdf?dl=0> via <https://texashousers.net/2017/11/14/we-demand-hud-address-city-of-houston-and-housing-authority-violations-of-civil-rights-laws/> (last visited Jan. 18, 2018).

<sup>55</sup> *Id.* at 2.

<sup>56</sup> *Id.* at 4–5.

<sup>57</sup> See Press Release, U.S. Dep't of Hous. & Urban Dev., HUD and City of Houston Reach Fair Housing Agreement (Mar. 9, 2018), [https://www.hud.gov/press/press\\_releases\\_media\\_advisories/HUD\\_No\\_18\\_020](https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_020); Press Release, City of Houston, Agreement Between City and HUD Resolves Fair Housing Findings (Mar. 9, 2018), <http://www.houstontx.gov/mayor/press/agreement-hud-fair-housing.html>; U.S. Dep't of Hous. & Urban Dev., Voluntary Compliance Agreement (Mar. 2, 2018), <https://www.hud.gov/sites/dfiles/Main/documents/VoluntaryComplianceAgreement.pdf>.

<sup>58</sup> See, e.g., TEX. DEP'T HOUSING & CMTY. AFFAIRS, 2017 9% COMPETITIVE HOUSING TAX CREDIT FULL-APPLICATION, 2017 COMMUNITY SUPPORT FROM STATE REPRESENTATIVE, <https://www.tdhca.state.tx.us/multifamily/housing-tax-credits-9pct/docs/17-StateRep-Input.xls>.

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color who long for non-segregated housing opportunities await, particularly in the wake of Hurricane Harvey's destruction, "for rent" banners and online listings that say "now leasing."<sup>59</sup> NIMBY activists keep watch for emails and placards placed on unimproved lots that announce pending affordable housing proposals. Fair housing advocates anxiously seek a shift in political will as officials annually finalize affordable housing-siting decisions.<sup>60</sup> As the stories unfold, Texas fair housing advocates and concerned elected officials can look to HUD's findings of noncompliance as a roadmap for charting the course toward fair and equitable housing decisions.

Title VI remains relevant at a time when effective fair housing enforcement by HUD's Fair Housing and Equal Opportunity office remains elusive under a new administration. It was President Johnson, signer of the Civil Rights Act, who implored civil rights activists to turn to the courts when violations of the Civil Rights Act were found.<sup>61</sup> Title VI litigation involving facts similar to those in Houston's Fountain View case may stand a chance if advocates who uncover acts of intentional discrimination turn to the courts for redress.

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<sup>59</sup> Christina Rosales, *Harvey Survivors Tell Texas Housing Urban Affairs Committee that Safe Housing is Long Overdue*, TEXAS HOUSERS (Jan. 18, 2018), <https://texashousers.net/2018/01/18/harvey-survivors-tell-texas-house-urban-affairs-committee-that-safe-housing-is-long-overdue>.

<sup>60</sup> See, e.g., John Henneberger, *We Demand HUD Address City of Houston and Housing Authority Violations of Civil Rights Laws*, TEXAS HOUSERS (Nov. 14, 2017), <https://texashousers.net/2017/11/14/we-demand-hud-address-city-of-houston-and-housing-authority-violations-of-civil-rights-laws/>.

<sup>61</sup> LIBRARY OF CONGRESS, *supra* note 10.