Comments of the Chicago Lawyers' Committee for Civil Rights, the Lawyers' Committee for Civil Rights and Economic Justice, the Lawyers' Committee for Civil Rights of the San Francisco Bay Area, the Mississippi Center for Justice, Public Counsel, The Public Interest Law Center, and the Washington Lawyers' Committee for Civil Rights and Urban Affairs to Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, Docket No. FR-6111-A-01

I. Executive Summary

The Fair Housing Act ("FHA") expresses our resounding national condemnation of segregation and policies or practices that deny housing and neighborhood choice to African Americans and members of other protected classes. Simultaneously, the FHA expresses our resounding national affirmation of an integrated society. In enacting the law, Congress launched an effort to reverse residential segregation created by generations of intentional and structural discrimination and promote housing opportunities. In so doing, Congress recognized that it is not enough to guard against "disparate treatment"—acts animated by an intent to discriminate. Redressing practices that adversely and disparately impact those the FHA protects requires eradication of policies that are neutral on their face but have a discriminatory effect. The Supreme Court recently reinforced that the FHA "looks to results."[1] Indeed, over the past several decades, every Circuit Court of Appeals as well as the Supreme Court has recognized that policies or practices that result in restricting housing choice without a legitimate and necessary reason are prohibited under the Fair Housing Act.

Despite the progress toward desegregation that has occurred over the 50 years since the FHA was enacted, both segregation and discrimination remain serious problems. A lack of housing opportunity and practices that continue to segregate by race force the majority of African Americans and other people of color to live in racially and/or ethnically segregated neighborhoods, often with lower quality schools, few employment opportunities, difficult transportation to more resource-rich neighborhoods or downtown areas, and a dearth of basic amenities, including grocery and other stores, medical facilities and the like.

As discussed below, courts have used the U.S. Department of Housing and Urban Development disparate impact rule ("HUD Rule" or "Rule") since its inception to guide their decisions in a variety of cases that question whether private or public housing providers are unduly restricting housing and neighborhood choice. The range of policies and practices to which the Rule has been applied demonstrates its administrability, versatility and utility. For example, the Rule has preserved housing choice and prevented unnecessary displacement of low-income tenants of color and holders of subsidies as a result of a private owner's renovation plans. *See infra* at 7. It has also promoted integration and afforded low-income persons of color the opportunity to participate in redevelopment that would likely increase the number of people of color living in an almost exclusively white city. *See infra* at 10.

While allowing courts to condemn practices that create or perpetuate segregation, the Rule effectively accommodates the interests of property developers and municipalities. Applying the Rule, courts have sustained plans or practices of housing providers that further substantial and

[1] *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2519 (2015).

legitimate interests for which there is not a less discriminatory alternative. Consistent with the Supreme Court's ruling in *Inclusive Communities,* courts have applied the Rule as requiring demonstration of a "robust causality" between a practice and its impact before they will find a practice impermissibly discriminatory under the FHA. In sum, the HUD Rule effectively balances and resolves competing interests while advancing the fundamental purpose and unrealized mission of the Fair Housing Act. There is no reason to dilute or weaken such a tried and truly effective tool.

II. Introduction

The signatories to these comments bring unique perspective and expertise to combatting segregation. Since their founding, starting in the late 1960s, the mission of these Lawyers' Committees was, and continues to be, to fight civil rights violations, racial injustice and poverty in our communities through litigation and advocacy, enlisting the *pro bono* resources of the private bar. The Committees have witnessed and participated in development of the case law and regulations that have given life to the FHA and have seen how HUD's disparate impact rule has provided a balanced method to achieve integration and housing opportunity. Fair and equal housing opportunity remains a central goal of each Committee's work, as we continue to address the persistent patterns of housing segregation in communities across the country. Based on our historical perspective and current knowledge and experience, we strongly support a reaffirmation of the Rule and urge HUD to avoid amendments that would diminish its even-handed effectiveness.

A. The Backdrop for, and Purpose of the Fair Housing Act

In response to the serious social unrest of the 1960s that emerged from frustration with pervasive structural discrimination, Lyndon Johnson convened the National Advisory Committee on Civil Disorders, known as the Kerner Commission, to investigate the origins of that disorder and to identify ways to avoid such unrest in the future.[2] The Commission found that "segregation and poverty have created in the racial ghetto a destructive environment totally unknown to most white Americans."[3] It concluded that the United States was "moving toward two societies, one Black, one white - - separate and unequal."[4] The Commission warned that the only way to avoid becoming a divided society marked by inequality would be to invest in large-scale improvement of racial ghettos while pursuing a program that would integrate substantial numbers of African Americans into mainstream society.[5] To accomplish the goal of integration, the Commission recommended a "comprehensive and enforceable federal open housing law to cover the sale or rental of all housing, including single-family homes."[6] Congress responded by enacting a

[2] Exec. Order No. 11365, 3 CFR 674 (1966-1970 Comp.).

[3] Report of the National Advisory Commission on Civil Disorders, Summary of Report, Introduction & Chapters 4-6 (Why it happened); *see also Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2516.

[4] *Id.*

[5] Report of the National Advisory Commission on Civil Disorders, Chapter 16 The Future of Cities.

[6] Report of the National Advisory Commission on Civil Disorders, Summary of Report, Recommendations, Housing.

sweeping new law, the Fair Housing Act ("FHA"),[7] based on that recommendation.

The FHA is remedial and not punitive. Its goal is to create opportunity for integration. Congress designed the FHA to prohibit and provides remedies for activities that intentionally discriminate against members of a protected group ("disparate treatment") and activities that may not be discriminatory on their face but disproportionately and adversely "make [housing] unavailable" to them ("disparate impact").[8] The FHA has a two-fold focus: to prohibit denial of housing based on discriminatory animus or intent, *and* to prohibit practices that adversely and disparately exclude members of protected classes or foster or perpetuate segregation, without regard to animating intent. The Supreme Court recently reaffirmed that the FHA is intended to counter segregative practices broadly—both those that are so intended and those that prevent housing and neighborhood choice in practice, in upholding its prohibition of disparate impact. The Court concluded that, like Title VII and the ADEA, the FHA's "operative text looks to results"[9] and acknowledged that the core FHA purpose is to remove "artificial, arbitrary, and unnecessary barriers."[10] With respect to disparate impact liability, the Court recognized that the statutory language providing for disparate impact claims—"otherwise make [housing] unavailable"—referred to the consequences of an action rather than the actor's intent.[11] Disparate impact liability, as the Court acknowledged, "plays a valuable role in uncovering discriminatory intent," namely a chance to counteract "unconscious prejudices and disguised animus that escape easy classification as disparate treatment" and thereby "prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping."[12]

B. The Goal of Fair Housing Has Not Been Achieved and Segregation Persists in Most Cities in the United States.

The FHA's prohibition of facially neutral policies that have a discriminatory impact in practice has fostered progress over the past 50 years. It is undeniable that, since the passage of the FHA, segregation in America, while still a pernicious problem, has decreased by nearly a third. Application of the disparate impact doctrine has contributed to that improvement and has led to profound changes in neighborhoods across the United States. In a series of anti-segregation cases starting in 1977,[13] even before promulgation of HUD's disparate impact regulation, federal appellate courts repeatedly upheld challenges to segregative policies based on findings of disparate impact. Notable examples include a successful challenge to a city's siting and assignment policies for public housing that had a discriminatory effect on the basis of race,[14] and a challenge to a municipality's decision to construct multifamily affordable housing only in "urban renewal areas,"

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[7] 42 U.S.C. § 3601.

[8] 135 S. Ct. at 2518.

[9] 135 S. Ct. at 2519.

[10] *Id.* at 2522.

[11] 135 S. Ct. at 2511.

[12] 135 S. Ct. at 2522.

[13] *Metropolitan House Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977).

[14] *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3d Cir. 1977); *see also* David Troutt, *Inclusion Imagined: Fair Housing as Metropolitan Equity*, 65 BUFFALO L. REV. 5 (2017).

which, coupled with a related refusal to rezone, would have adversely impacted African-American residents.[15]

The resulting progress is tangible. In 1960, the average "segregation index" for cities in the United States was 86.2. That means that 86.2% of African Americans would have had to change their place of residency to achieve total integration.[16] A study by the Brookings Institute that examined 2015 Census data determined that the average segregation index measured across 52 metropolitan areas—with populations greater than one million and African American populations exceeding 200,000—had decreased to roughly 60.[17]

Despite some laudable progress, segregative practices, and the consequent additional inequities and lack of opportunity that accompany segregation, persist, at great cost to people of color. Most urban areas remain highly segregated by race. For example, Milwaukee, New York, Chicago, and Detroit all have segregation indices that are greater than 75. Only seven urban areas had an index below 50, and none were below 40.[18] And while many cities may be integrated when viewed from a regional basis, they are extremely segregated when viewed at the neighborhood level. By this measure, Philadelphia is the fourth most segregated, following Chicago, Atlanta and Milwaukee.[19]

Those patterns mirror the segregation of old. The Washington, DC area is illustrative: In 1980, the population of most of the city's eastern census tracts and those in the near eastern suburbs was greater than 60% African American, while the western part of the region had African American populations under 20%.[20] *See also* Exhibit B (Map 1). Almost 40 years later, those proportions remain substantially the same in the city and eastern suburbs. *See* Exhibit B (Map 2). Indeed, even as more African Americans are moving to the suburbs and some young whites are moving back to the city,[21] African Americans often continue to end up segregated, both in the city and in new suburban communities.[22] In sum, despite geographic shifts—shifts that often

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[15] *NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988); *see also* David Troutt, *Inclusion Imagined: Fair Housing as Metropolitan Equity*, 65 BUFFALO L. REV. 5 (2017).

[16] Report of the National Advisory Commission on Civil Disorders, Chapter 6 The Formation of Racial Ghettos ("In other words, to create an unsegregated population distribution, an average of over 86 percent of all Negroes would have to change their place of residence within the city." Perfect integration exists where the percentage of African Americans living in a particular neighborhood is consistent with their percentage of the population in a larger geography, like the city or state).

[17] Frey, William H., Census Shows Modest Declines in Black-White Segregation, Brookings Institution, December 8, 2015.

[18] Census Shows Modest Declines, Excel Table.

[19] *See* https://fivethirtyeight.com/features/the-most-diverse-cities-are-often-the-most-segregated/.

[20] Shuetz, Jenny, Metropolitan Areas are Still Segregated, but its More Complicated than "chocolate city, vanilla suburbs," The Avenue, Brookings, December 8, 2017.

[21] Census Shows Modest Declines.

[22] Diep, Francie, *The New Housing Segregation in America; An Analysis of United States Census Data Since 1990 Uncovers how Infrequently Black and White Americans Live Together Today*, Pacific Standard, Aug. 4 2015. (In the metropolitan Washington, DC area, for example, large sections of Prince Georges

accompany the gentrification of many cities—people of color remain confined to specific, racially concentrated neighborhoods. Many of these same racially concentrated neighborhoods overlap with economically concentrated areas of poverty, which is part of why segregation has such a great social cost.

Chicago presents another example of pervasive segregation. For decades, Chicago has maintained its ranking as one of the most segregated cities in the country. Measured on a dissimilarity index, 82.5% of all African Americans and whites in Chicago would have to move to produce an even racial distribution across the city, a mark only slightly better than 30 years ago. This figure also remains high between African Americans and Latinos (80.8%) and between Latinos and whites (60.9%) in the city. And even after the most explicit and notorious discriminatory housing policies and practices have ended, racial segregation is maintained in part because of "subtle but consequential discrimination throughout the housing industry." This has enormous consequences as Chicago's racial and ethnic spatial segregation directly correlates to outcomes in economic prosperity, education and health. Decades of entrenched segregation in Chicago have resulted in economic disparities among racial and ethnic groups to be wider today than during the civil rights era. For example, in 2016, 70.50% of African American families and 64.43% of Latino families did not earn a living wage, compared with 34.03% of white families.[23]

Segregation significantly harms communities of color. The neighborhood where a person lives plays a critical role in determining the types of opportunities to which that individual will be exposed.[24] Higher levels of Black/white segregation correlate with lower incomes, lower educational attainment, worse health outcomes, and higher rates of homicide for African Americans.[25]

Thus, the national mission to ensure equal housing opportunity, for which the FHA is an indispensable tool, remains unfulfilled. Housing discrimination is still widespread, and practices that segregate, including those that are based on seemingly neutral policies, continue to deny housing and neighborhood choice and the opportunities that accompany choice.

County, just east of the DC city limits, have become segregated African American communities over the last generation.)

[23] "A Tale of Three Cities: The State of Racial Justice in Chicago." Institute for Research on Race and Public Policy, University of Illinois Chicago, May 19, 2017, available at: http://stateofracialjusticechicago.com/a-tale-of-three-cities/; Loury, Alden. "More than half of Chicago family households do not earn a living wage." Metropolitan Planning Council, June 28, 2018, available at: http://www.metroplanning.org/news/8593/More-than-half-of-Chicago-family-households-do-not-earn-a-living-wage.

[24] *See supra* note 20 ("Metropolitan Areas Are Still Segregated").

[25] Gregory Acs, Rolf Pendall, Mark Trekson, Amy Khare, *The Cost of Segregation, National Trends and the Case of Chicago 1990-2010*, Metropolitan Housing and Communities Policy Center, Urban Institute, March 2017; *see also* http://www.philly.com/philly/health/20160809_Study_of_Phila__neighborhoods_finds_big_disparities_in_health-care_access_by_race.html?arc404=true.

III. HUD's Current Disparate Impact Rule Has Helped Reduce Barriers that Perpetuate Racial Segregation and Limit Housing Choice.

Continued segregation of urban areas is often perpetuated by practices that are not discriminatory on their face but have the predictable and virtually inevitable effect of foreclosing housing opportunity to members of protected classes. One all-too common example is a landlord in a middle class or higher opportunity neighborhood who refuses to rent to holders of Housing Choice Vouchers.[26] The housing provider that adopts such a policy disproportionately forecloses housing opportunities to low-income people of color. Nationally, 62% of Housing Choice Voucher holders are designated as racial minorities. In Washington, D.C., 92% of voucher holders are African American even though African Americans represent only 48.3% of the city's population.[27] Similarly in Philadelphia 84.4% of voucher holders are African American even though African Americans represent only 43% of the population.[28] But for the availability of disparate impact liability, it would be extremely difficult for many denied housing because of their source of income to challenge policies that disparately exclude people of color from the very expanded housing opportunities the Housing Choice Voucher Program (and the FHA for that matter) are intended to help families achieve.

The FHA provides a vehicle to challenge these practices. Discrimination against voucher holders disproportionately affects African Americans, and voucher holders will likely continue to be consigned to low-income, racially concentrated neighborhoods. The inability to use a voucher in an opportunity neighborhood ensures that voucher holders are concentrated where housing providers accept subsidies but offer lower quality housing. In DC, for example, seventy percent of voucher holders are concentrated in a small number of high-poverty neighborhoods.[29] In Chicago, where approximately 87% of voucher holder heads of household are African American, voucher participants continue to be concentrated on the highly segregated and predominantly African American, South and West Sides of Chicago. The four community areas with the highest number of voucher participant households are some of the most segregated and poverty stricken in Chicago: Austin (83% African American), North Lawndale (89% African American), Auburn Gresham (97% African American) and South Shore (94% African American). The South Shore neighborhood has more voucher participants than 32 other mobility areas combined, the majority

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[26] Housing Choice Vouchers are tenant-based subsidies that are not linked to any particular housing complex, building, or unit, but rather enable families with a Housing Choice Voucher to rent housing in the private market, at market rates, provided the rent does not exceed the Program's limitations (i.e., the rental rates or payment standards set by the DCHA). One of the primary goals of the Voucher Program is to provide low-income families with the opportunity to obtain rental housing outside of areas of concentrated poverty. *See Housing Choice Vouchers Fact Sheet*, available at: https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/about/fact_sheet.

[27] *See* HUD Picture of Subsidized Housing 2015 report for the District of Columbia Public Housing Authority.

[28] *See* "Table 48: Race/Ethnicity Data," available at: http://ohcdphila.org/wp-content/uploads/2017/01/afh-2016-for-web.pdf.

[29] FY17 Performance Oversight Hearing Responses to Pre-Hearing Questions, Presented to the District of Columbia Committee on Housing & Neighborhood Revitalization, February 2017.

of which are located on the north side of the city.[30] Patterns similar to those in D.C. and Chicago can be found in Philadelphia and other major cities.[31]

Recognition of the need and ability to bring disparate impact claims under the FHA, without more, however, is insufficient. The statute provides limited guidance on how to adjudicate disparate impact claims. HUD's disparate impact rule, codified at 24 C.F.R. § 100.500, provides a roadmap to achieve the statutory objective through a workable, balanced framework that gives litigants and the courts a predictable analysis by which to resolve competing interests. It sets forth a method by which all can measure whether facially neutral policies or practices have a disproportionate effect on members of a protected group or perpetuate segregation and whether the policy is necessary to further legitimate business or governmental interests. Significantly, it incorporates the teachings of prior case law that endorsed a framework similar to that proposed under HUD's Rule to decide disparate impact claims and which considered the same priorities that later drove the Court to strike a balance between parties' varying interests in *Inclusive Communities*.[32]

The Rule requires three sequential steps. First, a plaintiff must prove that the challenged policy *actually* causes or "predictably will cause" a disproportionate impact on protected individuals or that it "increases, reinforces, or perpetuates segregated housing patterns." 24 C.F.R. § 100.500(c)(1); *see also* 24 C.F.R. § 100.500(a). Without evidence of a statistical disparity or other evidence of adverse impact sufficient to survive scrutiny by a court, a plaintiff's claim will fail at the first stage of the analysis.

Once a plaintiff satisfies the first step of the process, the housing provider has the opportunity to demonstrate that the challenged policy or practice is necessary to achieve "substantial, legitimate, non-discriminatory interests."[33] Following such a demonstration, a plaintiff may prevail only by showing that "the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."[34] Through this burden-shifting process, the Rule strikes a critical balance between competing interests: housing providers and municipalities will not be liable for practices

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[30] City of Chicago, Analysis of Impediments to Fair Housing Choice, February 2016, available at: https://www.cityofchicago.org/content/dam/city/depts/cchr/AdjSupportingInfo/AdjFORMS/2016%20Adjudication%20Forms/2016AItoFairHousing.pdf; "Not Welcome: The Uneven Geographies of Housing Choice." Chicago Policy Research Team, The University of Chicago; 2017, available at: https://docs.wixstatic.com/ugd/e6d287_68e7a1962fe54cbab7598e2cb2346109.pdf ; "Equitable Mobility in the Housing Choice Voucher Program." Policy Research Collaborative at Roosevelt University; 2018, available at: https://blogs.roosevelt.edu/prc/2018/05/14/equitable-mobility-in-the-housing-choice-voucher-program/.

[31] *See* "HCV Program" at 240, available at: http://ohcdphila.org/wp-content/uploads/2017/01/afh-2016-for-web.pdf.

[32] *See Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 513 (9th Cir. 2016) (discussing the countervailing needs of developers and municipalities recognized by earlier courts and pointing to the FHA's intended burden-shifting as a means of balancing such differing interests) (citing *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 385 (3d Cir. 2011)).

[33] 24 C.F.R. § 100.500(c)(1).

[34] 24 C.F.R. § 100.500(c)(2)-(3).

or policies that may have an adverse impact on a protected class, unless a court determines that their policy rationale is not legitimate or the plaintiff proves that a less discriminatory alternative can meet those interests.

The Supreme Court endorsed the burden-shifting framework in *Inclusive Communities* as the methodology "for adjudicating disparate-impact claims."[35] The Court remanded the case to the district court "for further proceedings consistent with [its] opinion."[36] Further, the Court discussed the approach set forth in the HUD Rule, signaling that the district court should reconsider its assessment of plaintiff's claims in light of HUD's burden-shifting framework.[37]

A. The Existing Disparate Impact Rule Places a Substantial Initial Burden on the Plaintiff.

Cases that followed HUD's issuance of the Rule illustrate how that framework has allowed plaintiffs to challenge unnecessary barriers to housing and neighborhood choice that perpetuate segregation while permitting housing providers latitude to pursue legitimate business or governmental interests. In order to challenge a policy or practice that has a discriminatory effect, a plaintiff is required to prove the policy "caused or predictably will cause a discriminatory effect."[38] This often requires the plaintiff to use demographic analyses to demonstrate how a policy disproportionately adversely affects a protected class, as the following examples illustrate:

(1) *Ave. 6E Invs., LLC v. City of Yuma*[39]involved the city of Yuma's decision to deny a developer's application to rezone a parcel to accommodate higher densities necessary to build affordable housing which would disproportionately exclude Hispanics from purchasing affordable homes. Plaintiffs used statistics from the City's Analysis of Impediments to Fair Housing Choice to show that Hispanic home seekers would be more likely than whites to purchase higher density, cheaper homes. The City's own data showed that nearly all of the affordable housing in the city was located in areas where more than 75% of the households were Hispanic. Conversely, the parcel the plaintiffs sought to redevelop was in a part of the city where whites made up more than 75% of the population. Taken together, the court concluded that Plaintiffs' statistics showed that the city's refusal to rezone the property would disproportionately result in making less housing available to Hispanics.

(2) *Borum v. Brentwood Vill., LLC*[40] is a pending case involving a challenge to a redevelopment plan that would drastically reduce the number of rental units for families, another vulnerable population protected under the FHA. Plaintiffs used data documenting the household

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[35] *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2514.

[36] *Id.* at 2526.

[37] *See Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2515. The Court additionally cited to HUD's position that a defendant's burden at the second step is analogous to the requirement that "'an employer's interest in an employment practice with a disparate impact be job related.'" *Id.* (citing *Discriminatory Effects Standard*, 78 Fed. Reg. 11470 (2013)).

[38] 24 C.F.R. § 100.500(c)(1).

[39] 818 F.3d 493 (9th Cir. 2016).

[40] 218 F. Supp. 3d 1 (D.D.C. 2016).

composition of each resident family to show that Defendants' elimination of all four- and five-bedroom apartments and its reduction of three-bedroom units would disproportionately adversely affect families as compared to non-families and cause a disparate impact on the basis of "familial status."[41] In denying Defendants' Motion to Dismiss, the District Court accepted Plaintiffs' statistical analysis as a sufficient basis for pursuing their claim that families with minor children were more likely to live in units with three or more bedrooms, and found that, as a result, families were more than three times as likely as non-families to be adversely affected by the proposed redevelopment. Accordingly, it held that the plaintiffs had stated a claim under the FHA for discrimination based on familial status.[42]

(3) *Crossroads Residents Organized for Stable & Secure ResiDencieS (CROSSRDS) v. MSP Crossroads Apts. LLC*[43] ("Crossroads") was a challenge to a landlord's dramatic rent increase and decision to exclude Housing Choice Voucher holders. The plaintiffs alleged that most tenants using housing subsidies to pay their rent were African American, that African Americans were over-represented in the apartment complex compared to the surrounding area, and that a high percentage of African Americans in the Twin Cities were low-income renters who would not be able to afford the increased rents. Plaintiffs' allegations of those factors in their complaint, according to the Court, were sufficient to "support an inference that would ultimately be able to show a disparate impact through statistical analysis" and thus met plaintiff's initial burden in a FHA disparate impact analysis.[44]

Yuma, *Borum*, and *Crossroads* thus demonstrate the utility of the HUD Rule that requires those seeking to challenge a policy or practice to base the contention on a sound statistical analysis that is likely to demonstrate that a particular policy will have a disproportionate negative impact on the protected group. When plaintiffs are unable to make that initial showing, their claims likely fail. In addition, although the Supreme Court affirmed the viability of the disparate impact analysis, it made clear that a disparate impact claim that relies on a statistical analysis "must fail" if the plaintiff does not demonstrate a causal connection between the policy and the statistical disparity. *Inclusive Communities Project, Inc.*, 135 S. Ct. at 2523-24. Thus, on remand, the district court rejected the claim, finding that the plaintiffs had not tied their showing of statistical disparity to a particular policy.[45]

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[41] The FHA prohibits discrimination based on "familial status." *See* 42 U.S.C. § 3604. Relatedly, 42 U.S.C. § 3602(k) defines familial status under the FHA.

[42] *Borum*, 218 F. Supp. 3d at 22-23.

[43] Lexis 86965, 21 (D. MN 2016).

[44] *Id*. The Court therefore denied defendants' motion to dismiss, finding that the plaintiffs had provided sufficient evidence to satisfy the first step of a FHA analysis, thereby shifting the burden to defendants to provide a legitimate business reason for the exclusion of persons receiving housing subsidies from the complex.

[45] Instead, the plaintiffs claimed that the defendant's use of discretion, in the aggregate, amounted to a policy. The court reasoned that if discretionary acts created the disparity, the exercise of discretion, as opposed to a policy, suggested that the case should be properly re-fashioned as a disparate treatment case. Lexis 114562 (N.D.T. DC 2016).

Following *Inclusive Communities*, courts have applied a "robust causality" standard when assessing whether plaintiffs have met their initial burden. For example, in *Ellis v. City of Minneapolis*, the district court determined that Plaintiffs' claim of disparate impact failed because they did not provide sufficient factual support to show that enforcement of unlawful housing code policies against inner-city landlords was plausibly connected to preventing tenants from renting units or to tenant displacement. 2016 WL 1222227, at *11, 21-22 (D. Minn. Mar. 28, 2016), *aff'd*, 860 F.3d 1106 (8th Cir. 2017). The court found Plaintiffs' allegation that "the Defendants' policies have 'directly caused' displacement of protected class members and the unavailability of rental units for those individuals" too conclusory to demonstrate a plausible causal link between the policy and the alleged adverse impact. *Id.* at 23.[46]

Thus, *Ellis* and other cases addressing the "robust causality" standard illustrate how courts are adept at meeting the strictures of *Inclusive Communities* when conducting a burden-shifting framework analysis under the HUD Rule because they have been able to repeatedly incorporate and conduct the "robust causality" analysis at step one.

B. The Second Step of the Burden Shifting Framework Strikes the Right Balance of Interests.

The second step of the burden shifting framework's requirement that defendants prove that a challenged policy is necessary to achieve "substantial, legitimate, nondiscriminatory interests" is critical to ensuring a balanced approach. By requiring defendants to make this showing with supporting evidence, the Rule ensures that defendants do not create pretextual or unnecessary reasons for denying housing opportunities in a manner that disproportionately affects members of protected classes. This type of assessment adheres to *Inclusive Communities*' admonition that the FHA "is not an instrument to force housing authorities to reorder their priorities," but instead a tool to ensure that "those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation."[47] As the Court further recognized, providing private and public actors the opportunity "to state and explain the valid interest served by their policies"—or step two of the burden-shifting framework—serves as "an important and appropriate means of ensuring that disparate impact liability is properly limited."[48]

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[46] *See also Paige v. New York City Hous. Auth.*, 2018 WL 1226024, at *3 (S.D.N.Y. Mar. 9, 2018) (finding no causal connection between the housing authority's failure to complete lead inspections and the purported disproportionate impact on families because plaintiffs had failed to show such families had moved out or not rented units as a result of the incomplete inspections); *National Fair Housing Alliance v. Travelers Indemnity Company*, 261 F. Supp. 3d 20, 33 (D.D.C. 2017) (concluding that facts showing that Housing Choice Voucher recipients were more likely to be members of a protected class was sufficient to show a causal connection between the insurers' policy of refusing to provide insurance to landlords renting to tenants with vouchers and the resulting disparate impact).

[47] *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2522.

[48] *Id.* Post-*Inclusive Communities*' cases and prior case law adopted similar views in striking a balance between the need to cabin disparate impact liability and ensure thorough scrutiny of defendant's proffered business interests:

> We need not be concerned that this approach is too expansive because the establishment of a *prima facie* case, by itself, is not enough to establish liability under the FHA. It simply results in a more searching inquiry into the defendant's motivations—precisely the sort of

Application of this second step of the Rule's framework is illustrated in *MHANY v. Cty. of Nassau.*[49] In *MHANY*, Garden City and Nassau County initially approved an affordable housing project, but, after holding public hearing, the City and County "downzoned" the property such that only single-family homes could be built, making affordable housing infeasible. After first finding that plaintiffs had satisfied the first step set out in the Rule by showing that the reconsidered zoning decision disproportionately burdened African Americans, the court turned to its consideration of defendants' purported business interests. Defendants justified downzoning the parcel in order to build townhomes, create a buffer zone between neighborhoods, protect the character of their neighborhoods, and prevent increased traffic and overcrowding schools. The court examined and ultimately rejected several of the governments' contentions, finding the plan to downzone the property did not achieve those goals. As a result of its examination, the court also concluded that the "desire to maintain the character of the neighborhood" was a thinly veiled reflection of residents' discriminatory animus toward people of color, thereby casting additional significant doubt on the legitimacy of defendant's purported business interests. This last finding reveals an important by-product of the disparate impact analysis—its application ferreted out the covert discrimination masked in seemingly neutral policies that the FHA was intended to prohibit.

However, the court's careful parsing of defendants' business interests demonstrates the utility and essential even-handedness of the application of the HUD rule. Despite its rejection of the foregoing rationales, the court accepted the legitimacy and nondiscriminatory character of defendants' interests in preventing increased traffic and overcrowding neighborhood schools. Unlike their other explanations, defendants had supported those asserted interests with evidence. For example, defendants' zoning expert testified that the zoning classification selected would create less traffic than the designation sought by the plaintiffs. They also submitted evidence that showed the potential for overcrowded neighborhood schools. The court held that, by offering these reasons and supporting them with evidence, defendants had met their burden at the second stage.

C. Requiring Plaintiffs to Prove that There is a Less Discriminatory Alternative Protects Defendants Where a Policy with a Discriminatory Effect is Truly Necessary to Achieve a Valid Interest.

Once a defendant convinces the court that it has a substantial, legitimate interest for the challenged policy, the Rule shifts the burden back to plaintiffs to persuade the court that there is a less discriminatory alternative to achieve the purported goal. It is HUD's Rule that has made clear on which party the burden lies at the third step. For example, in *Inclusive Communities*, the Court remanded the case to the district court, noting that HUD had issued its disparate impact regulation while the appeal to the Court was pending.[50] Unlike the framework under the Rule, the lower court had previously assigned the burden of establishing a less discriminatory alternative that could achieve defendants' stated business interests on defendants rather than on plaintiffs. In addition to

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inquiry required to ensure that the government does not deprive people of housing "because of race."

See also Ave. 6 E Invs., LLC, 818 F.3d at 513 (citing *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 385 (3d Cir. 2011)).

[49] Lexis 153214 (E.D.N.Y. 2017) (citing 819 F.3d 581).

[50] *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2514-15, 2526.

clarifying the party on whom the burden lies, as the *MHANY* and *Crossroads* cases illustrate, the analysis required under the third step of the HUD Rule protects policies that are truly necessary.

In *MHANY*, after weighing evidence offered by experts on both sides of what the court had determined were defendants' valid concerns, the court found that the difference in traffic between the zoning designation sought by the plaintiffs and that sought by defendants was *de minimis*. In addition, the court relied on expert testimony to find that defendants' plan would create more pressure on the local schools than the alternative offered by the plaintiffs. Therefore, the court held that, while defendants had raised legitimate concerns, the plaintiffs had satisfied their burden at the third stage of proving there was a less discriminatory alternative.[51]

Similarly, in *Crossroads*, plaintiffs proposed an alternative that satisfactorily addressed what the court had determined was defendants' legitimate interest in undertaking renovations at their aging property – an alternative that combined a different approach to financing with a more modest set of proposed renovations. [52]

Thus, these cases show how the HUD Rule, as currently structured, guides courts in a balanced analysis to ensure that the rights and interests of residents and housing providers, developers or governments, are all considered and weighed in a rigorous and predictable manner.

IV. HUD's Specific Questions

A. Does the Disparate Impact Rule's burden of proof standard for each of the three steps of its burden-shifting framework clearly assign burdens of production and burdens of persuasion, and are such burdens appropriately assigned?

Yes. As demonstrated above, *see supra* at 7-12, the HUD Rule's burden of proof standard clearly assigns burdens at each step in the process. The Rule, as currently framed, provides litigants, courts, and public and private entities an effective and predictable roadmap. As the cases reflect, it enables courts to cull situations that present "arbitrary, artificial, and unnecessary" barriers to meaningful housing and neighborhood choice from those that do not, in the very first stage of the analysis. It also assures housing providers and policymakers that an initial showing of disparate impact does not go unanswered. Defendants have a meaningful opportunity to demonstrate that the questioned practice or policy effectuates substantial and legitimate business or governmental needs. While they must show more than "hypothetical or speculative" reasons for the challenged practice, such a threshold is readily achievable unless the practice is either subterfuge for impermissible and intended discriminatory results or lacks a sufficient basis and prevents housing choice. Defendants' demonstration of a legitimate and necessary interest will carry the day, unless those challenging the policy or practice show that there is a way to accommodate the interests of both parties—to achieve that stated interest in a less discriminatory manner. This division of burdens appropriately puts the onus of showing a less discriminatory alternative on the party who originally objected to the policy. The Rule thus effectuates a fair

[51] Lexis 153214 at 24-36.

[52] *Crossroads*, LEXIS 86965 at 23.

method of problem solving within the opportunity-oriented framework of national housing policy, as embodied in the Fair Housing Act.

B. Are the second and third steps of the Disparate Impact Rule's burden-shifting framework sufficient to ensure that only challenged practices that are artificial, arbitrary, and unnecessary barriers result in disparate impact liability?

Yes. Ultimately, the Rule places a significant burden squarely on those challenging a practice to overcome the "legitimate and necessary" justification. The burden requires an affirmative, supported alternative designed to accommodate the defendant's interest, albeit in a less-discriminatory manner. Plaintiffs have only prevailed in cases where they have succeeded in showing that the defendant's legitimate and necessary interests could be so served. The current Rule requires both sides to be rigorous, avoiding speculation or unsupported hypotheses. The burden imposed on plaintiffs right at the outset is a strong deterrent to pursuit of "unmeritorious" claims and makes the survival of weak or unsupported contentions unlikely from the start. However, were the showing required of defendants eased to permit a less rigorous defense of policies that disproportionately and adversely affect members of protected classes, the Rule would eliminate the check it currently embodies on pretextual or unnecessarily segregative practices. Such a result would undermine the very purpose of the Rule and the FHA, whose purposes and goals the Rule must protect and further.

C. Does the Disparate Impacts Rule's definition of "discriminatory effect" in 24 CFR 100.500(a) in conjunction with the burden of proof for stating a *prima facie* case in 24 CFR 100.500(c) strike the proper balance in encouraging legal action for legitimate disparate impact cases while avoiding unmeritorious claims?

Yes. HUD's definition of discriminatory effect in 24 CFR 100.500 (a), in conjunction with the plaintiff's burden articulated by 24 CFR 100.500 (c), sets a sufficiently high bar to ensure that only legitimate disparate impact cases proceed through the courts. As the case law demonstrates, and as explained above, this is because a claim of disparate impact liability must be supported from the outset of a case with data that tends to show a causal link between the challenged policies and the alleged disparity. This threshold for establishing a *prima facie* case ensures that only policies that create significant and legitimate disparities will result in legal action.

D. Should the Disparate Impact Rule be amended to clarify the causality standard for stating a prima facie case under *Inclusive Communities* and other Supreme Court rulings?

No. *Inclusive Communities* and the cases that have followed sufficiently defined and applied the "robust causality" standard that the Supreme Court instructed lower courts to use to determine whether a plaintiff would be able to make out a *prima facie* case of disparate impact under the FHA.[53] *Inclusive Communities* defined "robust causality" as a showing of evidence demonstrating a causal connection between a policy and its disparate impact, explaining that to meet this standard, a plaintiff must "allege facts at the pleading stage or produce statistical

[53] *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2523.

evidence" sufficient to show such a causal link.[54] Because the Rule already requires plaintiffs to show that "a challenged practice *caused* or *predictably will cause* a discriminatory effect," 24 C.F.R. § 100.500, the first step of the Rule contemplates such a causality analysis. This is the very type of analysis in which courts have successfully engaged when assessing plaintiff's claims of disparate impact at step one, post-*Inclusive Communities*. *See supra* at 10 and note 46. As the cases show, courts have both accepted and rejected plaintiffs' allegations or showings of robust causality between a challenged policy or practice and an alleged adverse impact on a protected group. For example, where plaintiffs failed to show causal links between aggressive housing code enforcement and resulting displacement or reduced availability of housing, a court concluded the plaintiffs' claim could not survive, *see supra* at 10.

E. Should the Disparate Impact Rule provide defenses or safe harbors to claims of disparate impact liability (such as, for example, when another federal statute substantially limits a defendant's discretion or another federal statute requires adherence to state statutes)?

No. It is unnecessary to start carving out "safe harbors" or cataloguing defenses. When another federal statute limits a housing provider's discretion, such as, for example, a law that prevents public housing authorities or owners and operators of subsidized housing from renting to persons convicted of certain felonies, such as individuals who are registered sex offenders, the legal prohibition would certainly serve as a legitimate and substantial basis for the policy even if the result of the policy would be to disproportionately exclude members of a protected class. Indeed, the fact that the limitation is embodied in law, and not itself subject to challenge, indicates that either the Congress or the State has identified a legitimate interest, which any alternative will have to satisfy in order to prevail.

F. Are there revisions to the Disparate Impact Rule that could add to the clarity, reduce uncertainty, decrease regulatory burden, or otherwise assist the regulated entities and other members of the public in determining what is lawful?

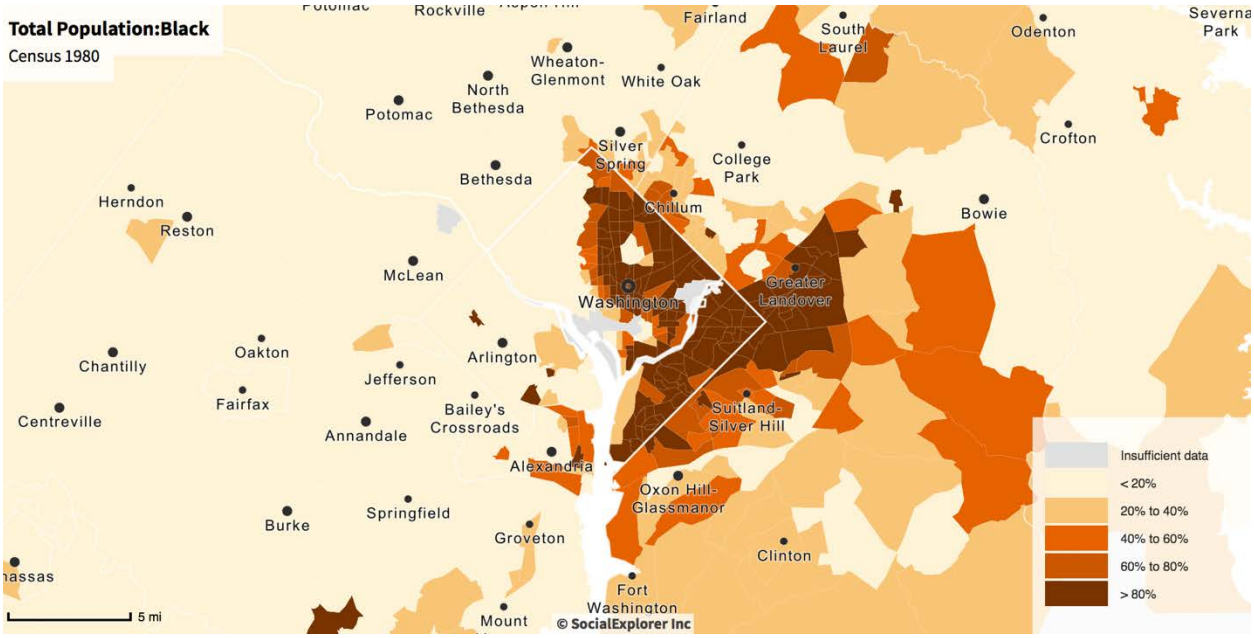
The Committees who offer these comments are of the view that no changes to the HUD Rule are required because it provides, as currently framed, a balanced, administrable approach to adjudicating disparate impact claims.

[54] *Id.*

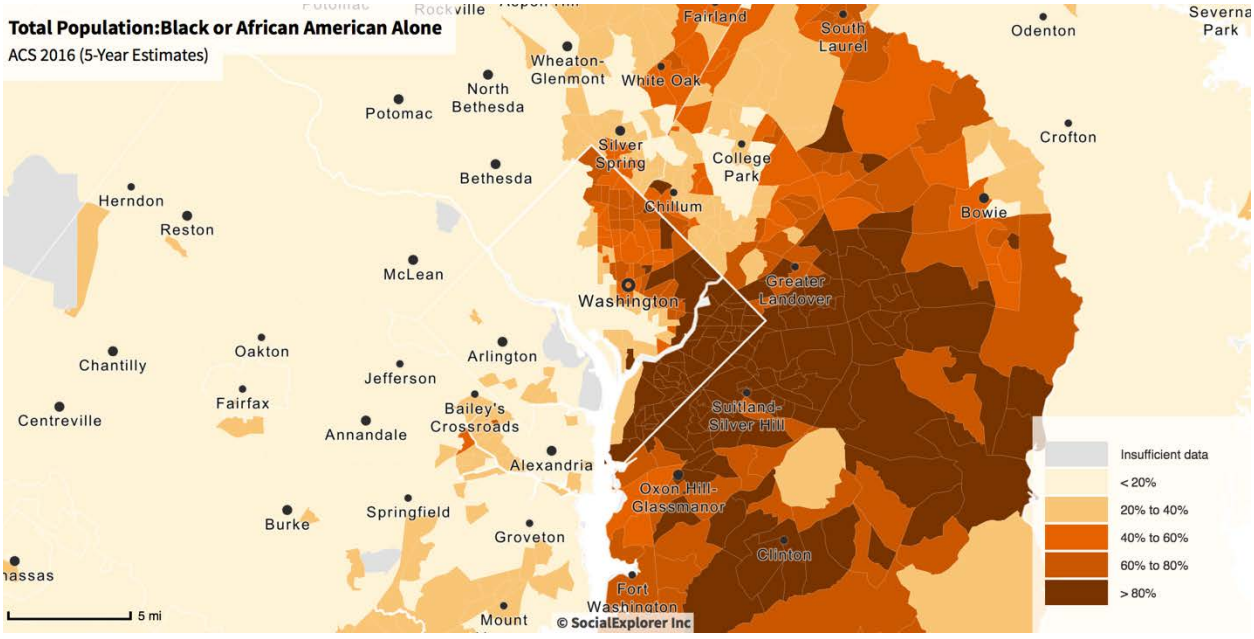
Exhibit A: Mapping the Black Population

District of Columbia

Map 1: District of Columbia Black Population 1980

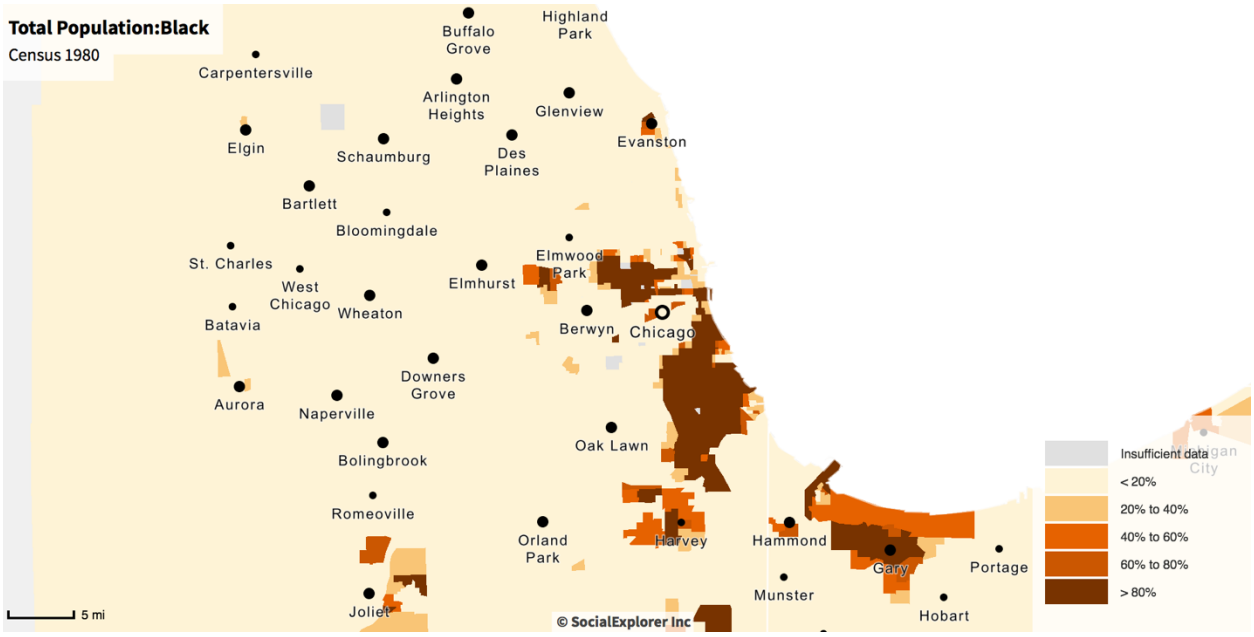


Map 2: District of Columbia Black Population 2016

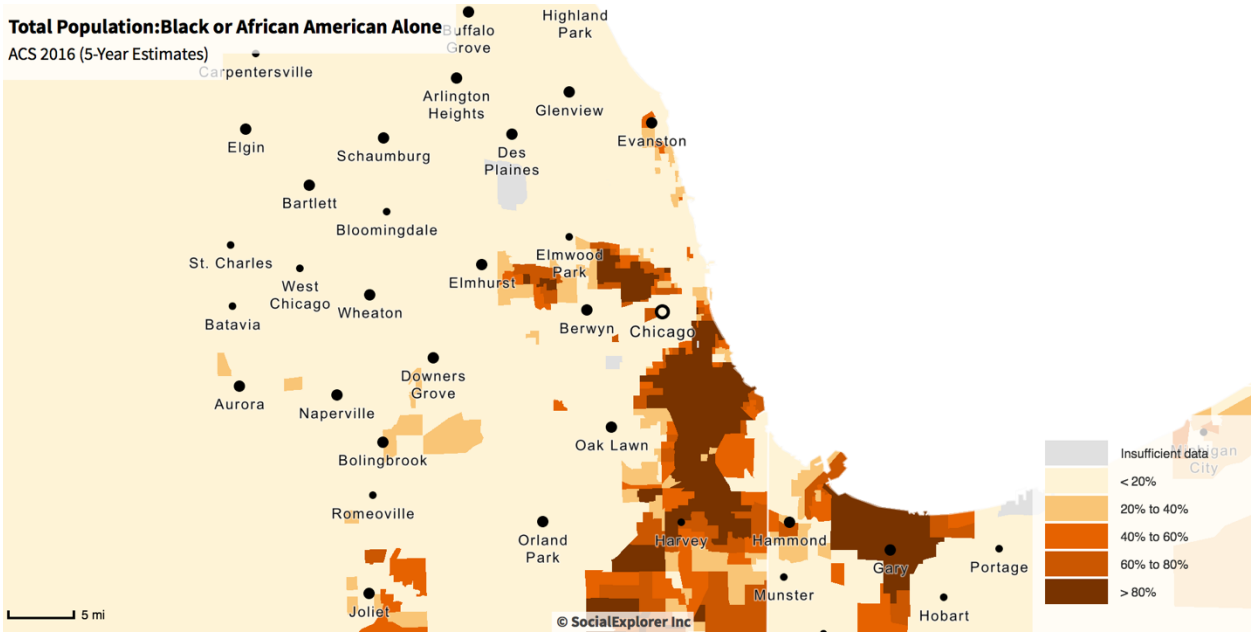


Chicago

Map 3: Chicago Black Population 1980

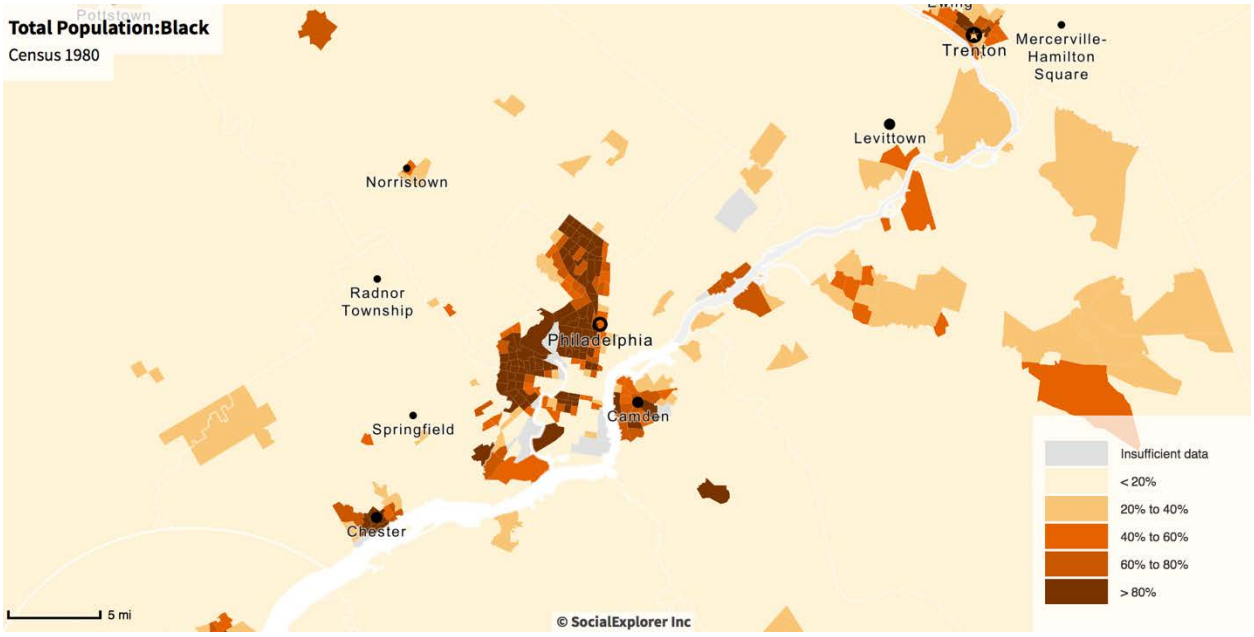


Map 4: Chicago Black Population 2016

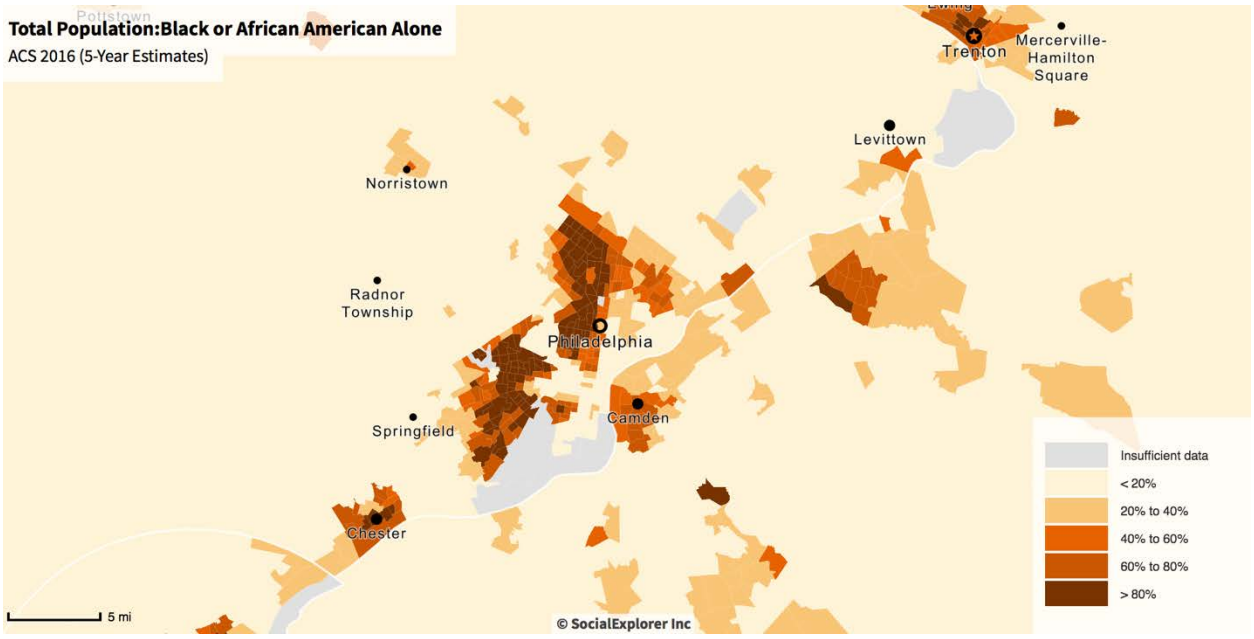


Philadelphia

Map 5: Philadelphia Black Population 1980

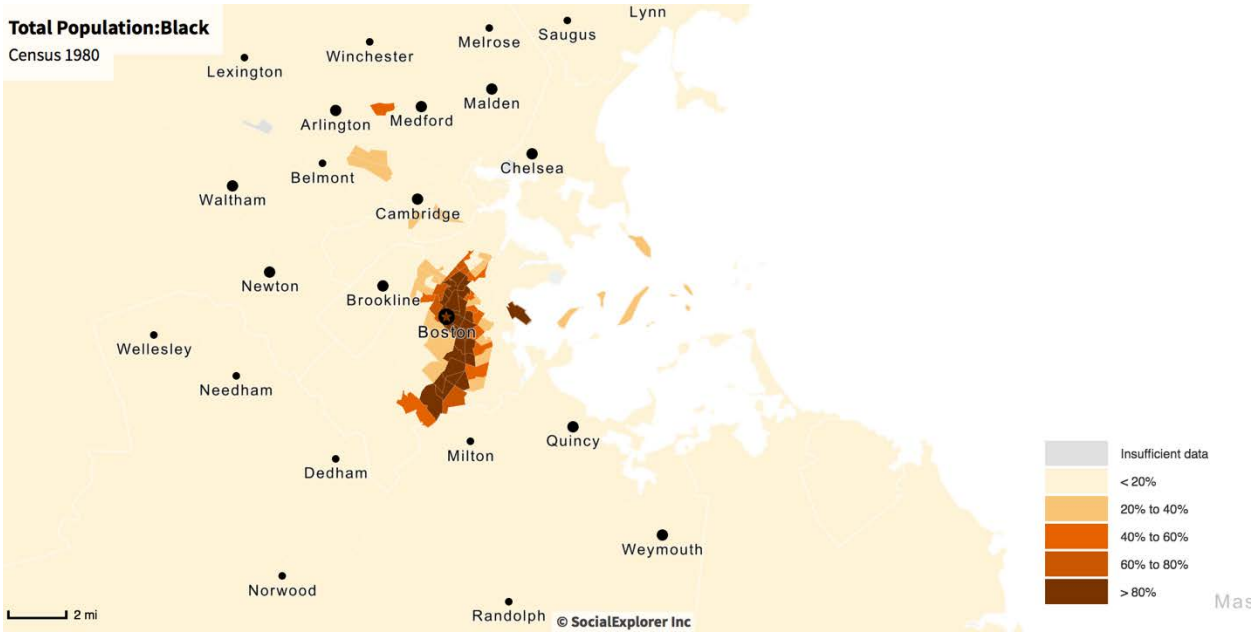


Map 6: Philadelphia Black Population 2016

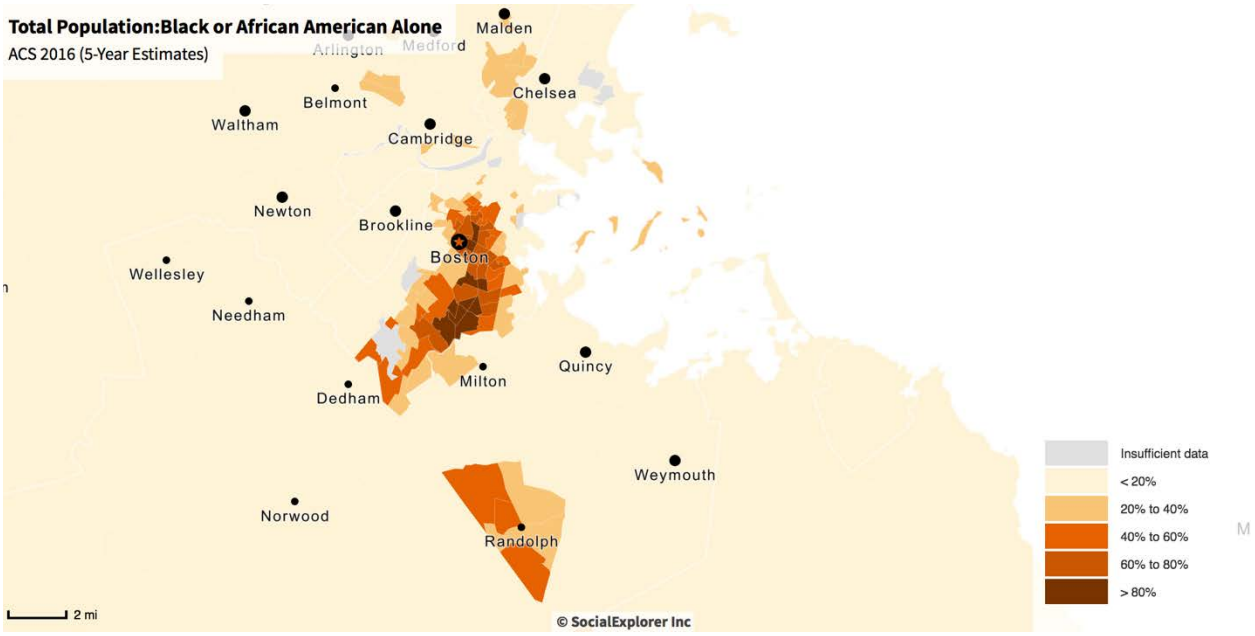


Boston

Map 7: Boston Black Population 1980

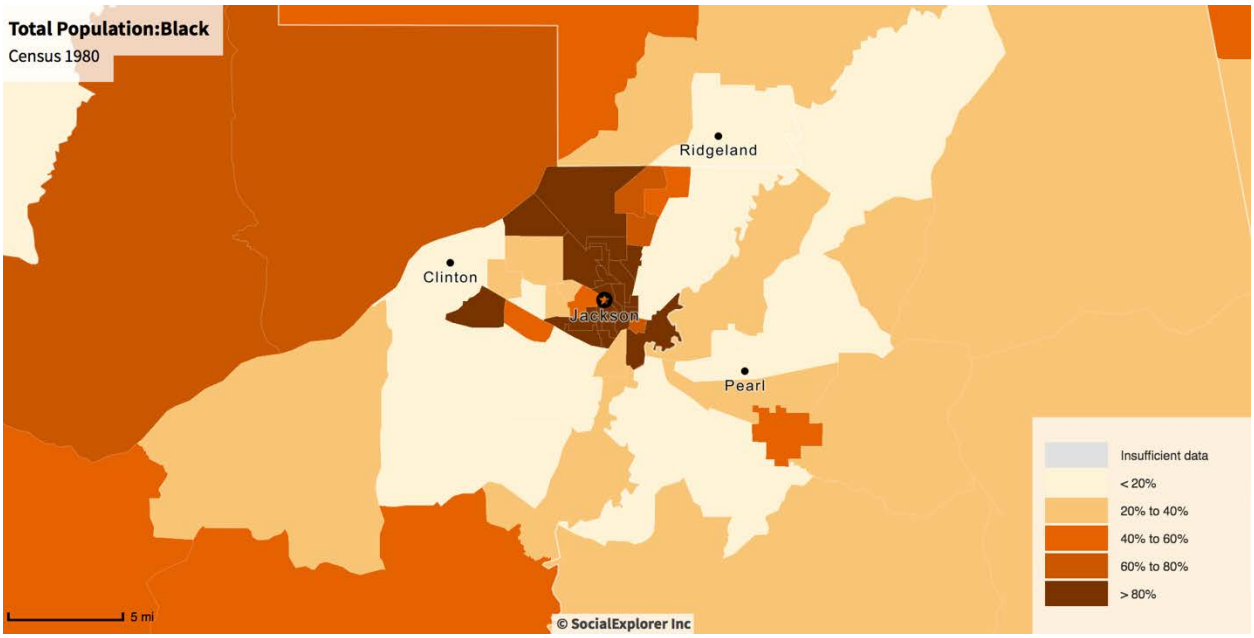


Map 8: Boston Black Population 2016

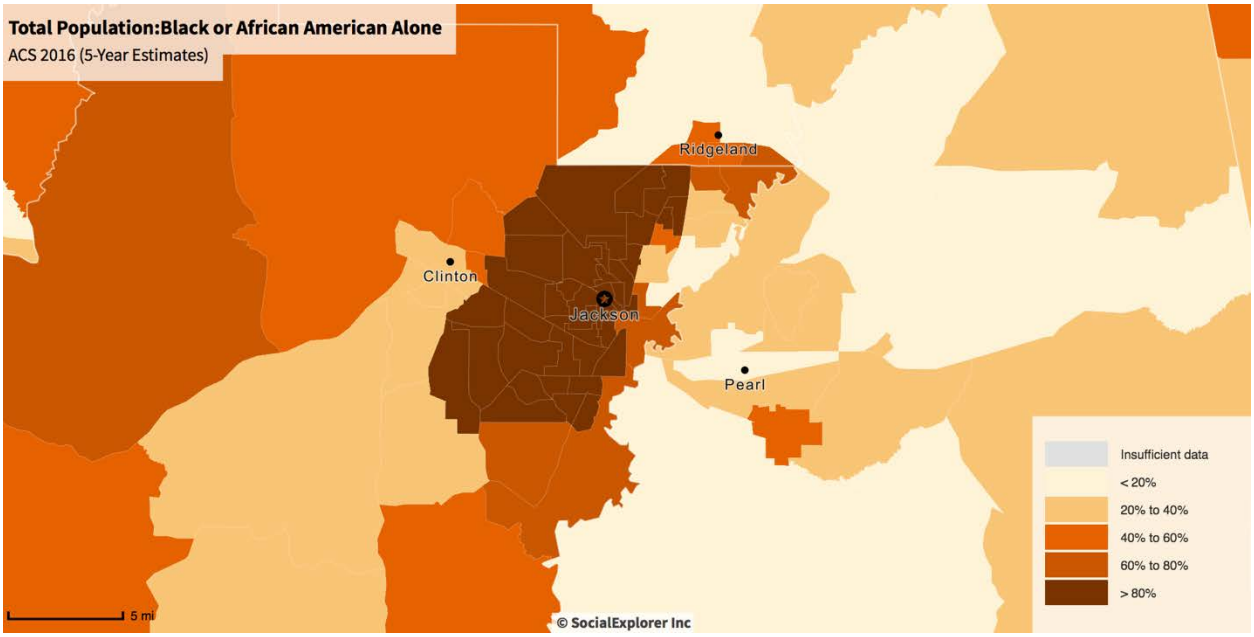


Jackson

Map 9: Jackson Black Population 1980

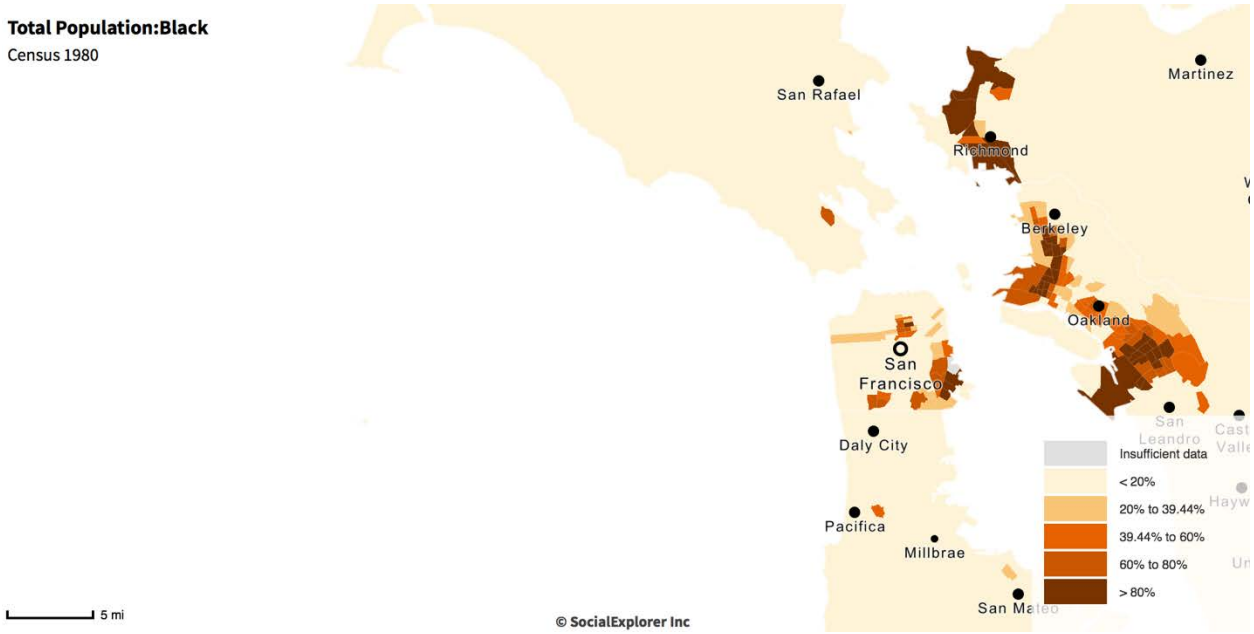


Map: 10 Jackson Black Population 2016

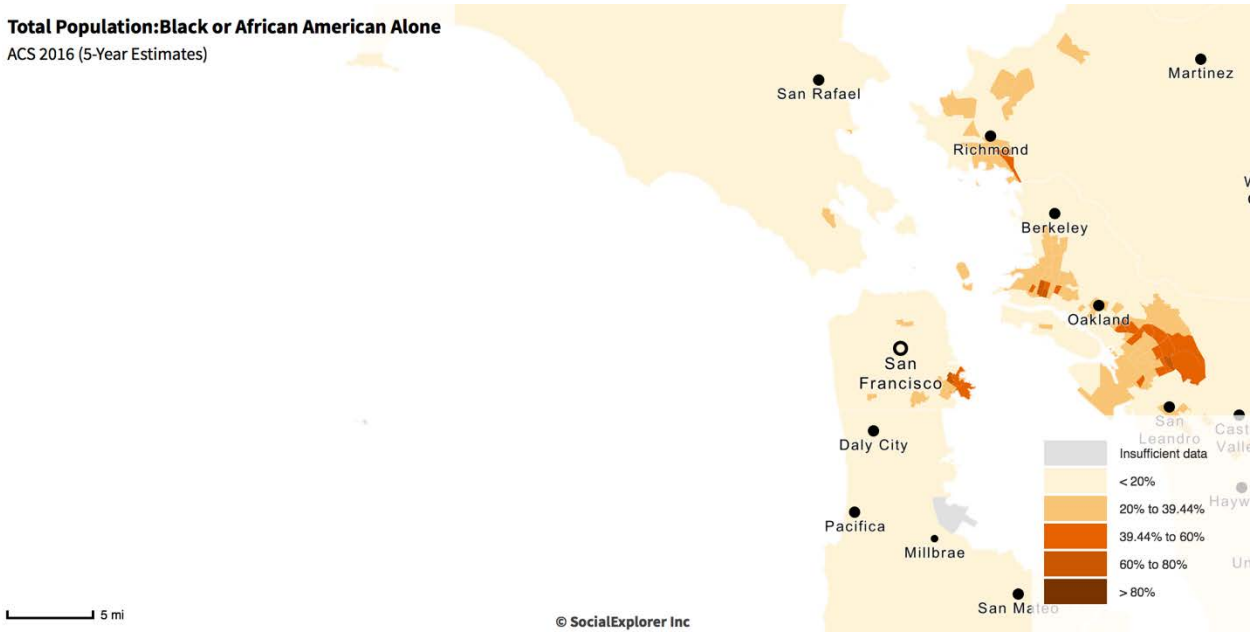


San Francisco

Map 11: San Francisco Black Population 1980

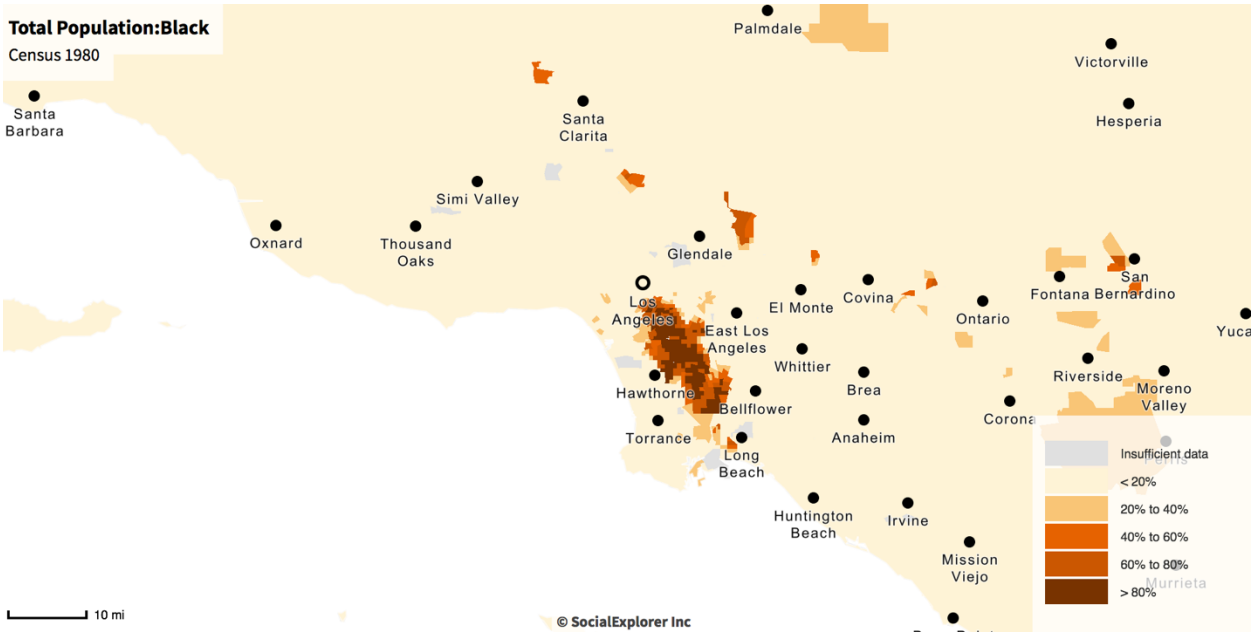


Map 12: San Francisco Black Population 2016



Los Angeles

Map 13: Los Angeles Black Population 1980



Map 14: Los Angeles Black Population 2016