IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

The Inclusive Communities Project, Inc., Plaintiff, v. The United States Department of the Treasury and the Office of the Comptroller of the Currency Defendants.	No. 3:14-cv-3013-D

MOTION TO DISMISS FIRST AMENDED COMPLAINT

Pursuant to Fed. R. Civ. P. 12(b)(1) and (6), and LR 7.1, defendants, the United States Department of the Treasury and the Office of the Comptroller of the Currency, hereby move to dismiss plaintiff's First Amended Complaint ("FAC") for lack of subject-matter jurisdiction and for failure to state a claim on which relief may be granted.

Dated: October 30, 2015

Respectfully submitted,

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

RULES AND REGULATIONS

LEGISLATIVE MATERIALS

I. INTRODUCTION

Plaintiff, the Inclusive Communities Project, Inc. ("ICP"), brings claims under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*; 42 U.S.C. § 1982; and the Fifth Amendment against the Internal Revenue Service ("IRS") and the Office of the Comptroller of the Currency ("OCC") alleging that these agencies administer Low Income Housing Tax Credits ("LIHTCs") and are jointly responsible for perpetuating segregation in LIHTC units in the City of Dallas, Texas. Plaintiff contends that both defendants have abdicated their duty to affirmatively further fair housing and have engaged in discriminatory housing practices that make dwellings unavailable. Plaintiff further alleges that both defendants are motivated by racially discriminatory intent. While each of plaintiff's claims suffers from the specific defects described below, it bears mention that this entire lawsuit is based on a faulty premise regarding defendants' roles with respect to LIHTCs. Plaintiff completely ignores the role of the Texas Department of Housing and Community Affairs ("TDHCA"), which, by statute, selects the location of affordable housing projects and awards LIHTCs to those projects. Despite the absence of any judicially manageable statutory language, plaintiff asks this Court to interpret the FHA to require both defendants to take very specific actions that would override the congressionally mandated criteria for selecting LIHTC projects. This Court should reject plaintiff's attempt to rewrite the statutory scheme and should dismiss this lawsuit.

More specifically, plaintiff's First Amended Complaint ("FAC") fails to state a claim for relief under 42 U.S.C. § 3608(d) because it cannot identify an applicable waiver of sovereign immunity that encompasses plaintiff's claims. Plaintiff cannot use the waiver of immunity provided by the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, because it has an adequate remedy against the TDHCA. Nor can plaintiff show that § 3608(d) provides this Court with any judicially manageable standards to review the defendants' roles with respect to LIHTCs. Additionally, plaintiff cannot obtain, under the APA, the programmatic review and relief it seeks against the IRS and the OCC.

Plaintiff likewise fails to state a claim for relief under 42 U.S.C. § 3604(a) because plaintiff cannot show that either the IRS or the OCC made housing unavailable because they are not

sufficiently involved in the provision of housing, housing-related services, or land-use policy. Plaintiff also fails to state a claim under § 3604(a) because it has not alleged a sufficient causal connection between the alleged disparate impact and any identified policy or policies of the IRS or the OCC. Nor has plaintiff stated a claim for intentional discrimination under 42 U.S.C. § 1982, § 3604, or the Fifth Amendment.

Accordingly, this Court should dismiss plaintiff's FAC and enter judgment for defendants.

II. BACKGROUND

A. Low Income Housing Tax Credits

Congress established Low Income Housing Credits in the Tax Reform Act of 1986. *See* Pub. L. No. 99-514, 100 Stat. 2085 (Oct. 22, 1986), *as amended,* 26 U.S.C. § 42. LIHTCs provide tax incentives to encourage individuals and corporate entities to invest in the construction and rehabilitation of affordable rental housing. Investors claim credits over a ten-year period for a percentage of costs that have previously been incurred in developing the affordable housing property. To qualify for a credit, project sponsors must restrict rents on at least 40 percent of units for renters earning no more than 60 percent of the area's median income or at least 20 percent of the units for renters earning 50 percent or less of the area's median income. *Id.* § 42(g)(1).

1. State Housing Credit Agencies' Role in LIHTCs

Congress provides in the Tax Reform Act of 1986 a formula to allocate an annual housing credit ceiling to each state based, among other things, on population. 26 U.S.C. § 42(h)(3)(C). The Act vests authority in state housing credit agencies ("HCAs") to award LIHTCs to affordable housing projects based on a system reflecting each state's priorities for the desired type, location, and ownership of affordable housing. *Id.* § 42(m)(1). A project sponsor structures project ownership, primarily through limited partnerships, to allow the LIHTCs to pass through to the private investors. Project sponsors then use LIHTCs to raise equity from private investors to build or rehabilitate affordable rental housing units. Investors may then invest in the limited partnership either directly or indirectly through investment into a syndicated LIHTC-equity fund.

All 50 states, the District of Columbia, and the possessions of the United States have

established HCAs to participate in LIHTCs. Congress requires each HCA to develop a Qualified Allocation Plan ("QAP"), which sets out the state's priorities and selection criteria for awarding LIHTCs. *See id.* § 42(m)(1)(A), (B). Congress requires state QAPs to give preference to projects that: (i) serve the lowest-income residents; (ii) serve income-eligible residents for the longest time-frame; and (iii) both are located in Qualified Census Tracts (defined as tracts with a poverty rate of 25 percent, or tracts in which 50 percent of the households have incomes below 60 percent of the area median income) and will contribute to a concerted community revitalization plan. *See id.* § 42(m)(1)(B)(ii). State QAPs must also include, but are not limited to, the following additional selection criteria: (i) location; (ii) housing needs; (iii) whether a project includes the use of existing housing as part of a community revitalization plan; (iv) sponsor characteristics; (v) tenant populations with special housing needs; (vi) public housing waiting lists; (vii) individuals with children; (viii) projects intended for eventual tenant ownership; (ix) energy efficiency; and (x) the historic nature of the project. *See id.* § 42(m)(1)(C). Congress gives HCAs discretion to adopt more rigorous criteria aimed at meeting specific housing needs. *See id.* § 42(d)(5).[1] HCAs must provide a written explanation to the public for any selection that does not follow the selection criteria in its QAP. *Id.* § 42(m)(1)(A)(iv).

Congress gives primary oversight of the LIHTC program to state HCAs, *see id.* § 42(m)(1)(B)(iii), (2), requiring each HCA to establish its own QAP in conformity with Congress's directives, and mandating that each QAP set out the HCA's procedures for monitoring noncompliance and notifying the IRS of noncompliance. *See id.* §§ 42(*l*)(3), (m)(1)(B)(iii).

2. The Internal Revenue Service's Role in LIHTCs

The IRS assesses and collects revenue in the United States, taking into consideration special deductions from taxable income or credits (including LIHTCs) against a taxpayer's income tax

[1] Congress provides HCAs with authority to award enhanced LIHTCs for projects located in Difficult Development Areas ("DDAs") and Qualified Census Tracts ("QCTs"). *See* 26 U.S.C. § 42(d)(5)(B). DDAs are locations that have high construction, land, and utility costs relative to the area median gross income. Congress also gives HCAs authority to designate certain specific buildings not already in DDA or QCTs for enhanced LIHTCs. *See id.*

liability. Because Congress gives state HCAs the primary role in administering and monitoring LIHTCs, the IRS's role with respect to LIHTCs is limited to responding to any noncompliance reported by a state HCA by denying or recapturing LIHTCs claimed by an investor. *Id.* § 42(j).

3. The Office of the Comptroller of the Currency's Role in LIHTCs

The OCC charters, regulates, and supervises all national banks and federal savings associations as well as federal branches and agencies of foreign banks. The OCC's role with respect to LIHTCs is limited to reviewing national bank and federal saving association investments in LIHTC projects or LIHTC-equity funds under the public welfare investment authority to ensure compliance with certain safety and soundness requirements. *See* 12 U.S.C. § 24 (Eleventh) (authorizing national banks to "make investments directly or indirectly, each of which is designed primarily to promote the public welfare, including the welfare of low- and moderate-income communities or families (such as by providing housing, services, or jobs)," so long as such investments do not "expose the association to unlimited liability."). The OCC plays no role in administering LIHTCs, the selection of LIHTC projects, or the award of LIHTCs to projects. Nor does the OCC have any authority to review or oversee LIHTC projects. Because Congress has determined that LIHTCs are an appropriate mechanism for encouraging individuals and corporate entities to invest in the construction and rehabilitation of affordable rental housing, OCC regulations provide that projects that qualify for LIHTCs, as determined by state HCAs, are acceptable public welfare investments. *See* 12 C.F.R. §§ 24.3, 24.6(a)(4).[2]

B. 42 U.S.C. § 3601 *et seq.,* 42 U.S.C. § 1982, and the Fifth Amendment

Title VIII of the Civil Rights Act of 1968 (commonly known as the Fair Housing Act

[2] As noted above, banks can make either a direct investment in a specific LIHTC project or can invest in a syndicated LIHTC-equity fund that, in turn, invests in one or more affordable housing projects. The vast majority of national bank investments in LIHTC are made indirectly through LIHTC equity funds. When a national bank invests in a syndicated LIHTC-equity fund, the OCC does not normally receive information about the specific location of the equity fund's investments.

Moreover, national banks in good standing need only notify the OCC after they have already made the LIHTC investment. *See* 12 C.F.R. §§ 24.2(e), 24.5(a). The vast majority of filings submitted to the OCC are "after-the-fact" notices of investment made by institutions pursuant to 12 C.F.R. § 24.5(a).

"FHA"), Pub. L. No. 90-284, 82 Stat. 73, *as amended,* 42 U.S.C. § 3601 *et seq.,* prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status, and disability. Section 3604 makes it unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of" that person's protected status under the FHA. *Id.* § 3604(a). Section 3608(d) provides that "[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter." *Id.* § 3608(d).

Section 3613 provides any "aggrieved person" with a right to bring suit in federal court alleging a "discriminatory housing practice." *Id.* § 3613(a); *see also id.* § 3602(f) (defining a "discriminatory housing practice" as an act that is "unlawful under section 3604, 3605, 3606 or 3617."). The FHA does not provide a right of action to enforce § 3608. *See id.* § 3613 (permitting private rights of action to challenge discriminatory housing practices).

The Civil Rights Act of 1866, 29 Cong. Ch. 31, Apr. 9, 1866, 14 Stat. 27, *codified at* 42 U.S.C. § 1982, prohibits intentional discrimination on the grounds of race in real estate transactions. *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968); *Hanson v. Veterans Admin.,* 800 F.2d 1381, 1386 (5th Cir. 1986). The Due Process Clause of the Fifth Amendment to the U.S. Constitution prohibits, among other things, intentional discrimination by the government on the basis of race and national origin. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 265 (1977).

C. Plaintiff's First Amended Complaint

Plaintiff's FAC alleges that the IRS "administer[s], through regulation, supervision, and other activities, the LIHTC program" and that the OCC "administers, through regulation, supervision, and other activities, the national banks' investments in LIHTC projects." FAC ¶ 14; *see also, e.g., id.* ¶¶ 1, 2, 15, 16, 20, 21, 156, 168, 172. Plaintiff alleges that the IRS and the OCC "have abdicated their duty under 42 U.S.C. § 3608(d) to administer and regulate these housing programs in a manner that does not perpetuate racial segregation in housing." *Id.* ¶ 3; *see also id.* ¶ 187. Plaintiff alleges that the

IRS and the OCC "refus[e] to use their regulatory and supervisory authority to prevent the perpetuation of segregation" in LIHTC units. *Id.* ¶ 165; *see also id.* ¶¶ 36, 46, 77, 78, 93, 97, 133, 173, 174, 177-79, 181-82, 188. Plaintiff further alleges that the IRS's and the OCC's "policies and practices . . . are discriminatory housing practices that perpetuate racial segregation by making dwellings unavailable." *Id.* ¶ 188. Plaintiff alleges that defendants "accept and condone racial segregation" in the LIHTC program and that they were motivated at least in part by discriminatory intent. *Id.* ¶¶ 4, 191; *see also id.* ¶¶ 133, 134, 166, 192-93.

Plaintiff requests that this Court enjoin: (i) the OCC from approving national bank investments in LIHTC projects "unless the development of the units will contribute to a concerted community revitalization plan and program;" (ii) defendants to require that the profits, dividends, and other distributions from tax credit investments or interest income from debt investments received by banks from their public welfare investments in LIHTC projects be devoted in part to housing mobility counseling services; (iii) defendants "to provide guidelines and incentives that will focus on providing national bank investments in LIHTC units in locations that do not subject low income minority families to conditions of racial segregation;" and (iv) defendants "to prohibit the use of non-federal eligibility and selection criteria for LIHTC allocations in the Dallas area which . . . interfere with tax credit allocation decisions that affirmatively further fair housing." *Id.* ¶ 195.

III. ARGUMENT

A. Plaintiff Cannot Identify an Applicable Waiver of Sovereign Immunity to Maintain its Suit Against the IRS and the OCC

Plaintiff fails to identify any applicable waiver of the sovereign immunity by the United States and thus cannot maintain its claims against the IRS and OCC.

Federal courts are courts of limited jurisdiction. Absent jurisdiction conferred by statute, district courts lack power to consider claims. *Veldhoen v. U.S. Coast Guard,* 35 F.3d 222, 225 (5th Cir. 1994). This limitation is doubly significant for suits against the federal government, which, absent express waiver, are barred by the doctrine of sovereign immunity. *Id.* Thus, "the United States, as sovereign, is immune from suit save as it consents to be sued *and the terms of its consent to be sued in any*

court define that court's jurisdiction to entertain the suit." *Hercules, Inc. v. United States,* 516 U.S. 417, 422 (1996) (emphasis added, citations and internal punctuation omitted). Moreover, a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed," *United States v. King,* 395 U.S. 1, 4 (1969), and must be strictly construed, not enlarged beyond what the express waiver language requires. *Ruckelshaus v. Sierra Club,* 463 U.S. 680, 685-86 (1983).

1. Neither § 3608 of the Fair Housing Act Nor the Constitution Provides Plaintiff With a Cause of Action Against the IRS and the OCC

Neither 42 U.S.C. § 3608 nor the Fifth Amendment provide a right of action against the IRS or the OCC. *See Jones v. OCC,* 983 F. Supp. 197, 202 (D.D.C 1997) (no private right of action against federal government under § 3608 of the FHA; review only available through Administrative Procedure Act ("APA")), *aff'd,* No. 97-5341, 1998 WL 315581 (D.C. Cir. May 12, 1998); *NAACP v. HUD,* 817 F.2d 149, 152 (1st Cir. 1987) (same); *see also Robbins v. U.S. Bureau of Land Mgt.,* 438 F.3d 1074, 1085 (10th Cir. 2006) (reviewing due process claim against federal agency under the framework set forth in the APA).

Section 3608(d) of the FHA requires "executive . . . agencies . . . [to] administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes of this subchapter." 42 U.S.C. § 3608(d). Congress, however, did not provide a private right of action to enforce § 3608. *See* 42 U.S.C. § 3613 (permitting private rights of action to challenge discriminatory housing practices). Nor can § 3608(d) be construed to provide an implied right of action. *See Alexander v. Sandoval,* 532 U.S. 275, 286-87 (2001) ("[P]rivate rights of action to enforce federal law must be created by Congress . . . . Statutory intent . . . is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.") (citations omitted). As a result, a person aggrieved by the federal government's alleged failure to adhere to § 3608(d) "must seek relief not under Title VIII, but under the APA." *Jones,* 983 F. Supp. at 202-03 (citing *NAACP,* 817 F. 2d at 154; *Latinos Unidos de Chelsea En Accion v. HUD,* 799 F.2d 774 (1st Cir. 1986); *Lee v. Pierce,* 698 F. Supp. 332, 334 (D.D.C. 1988)).

2. The APA's Waiver of Sovereign Immunity Does Not Apply to Plaintiff's § 3608 Claims Against the IRS and the OCC Because Plaintiff Has Another Adequate Remedy

The only potential waiver of sovereign immunity that could apply to plaintiff's claims under 42 U.S.C. § 3608(d) against the IRS and the OCC appears in the APA, 5 U.S.C. §§ 701-706. By its plain terms, however, the APA's waiver does not apply in this case because plaintiff has an adequate remedy against the Texas Department of Housing and Community Affairs ("TDHCA"), project sponsors, or other direct actors allegedly engaged in the allegedly discriminatory conduct.

The APA provides a limited waiver of sovereign immunity for "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The APA "does not make every agency action subject to judicial review." *Heckler v. Chaney,* 470 U.S. 821, 828 (1985). Indeed, "[w]here, as here, no relevant agency statute provides for judicial review, the APA authorizes judicial review only of 'final agency action for which *there is no other adequate remedy in a court.*'" *Belle Co., L.L.C. v. U.S. Army Corps of Eng'rs,* 761 F.3d 383, 387-88 (5th Cir. 2014) (quoting 5 U.S.C. § 704), *cert. denied sub nom. Kent Recycling Services, LLC v. U.S. Army Corps of Engineers,* 135 S. Ct. 1548 (2015) (emphasis added); *Ala.-Coushatta Tribe of Tex. v. United States,* 757 F.3d 484, 489-90 (5th Cir. 2014) ("The requirement of "finality" comes from § 704 and has been read into § 702 in cases where review is sought pursuant only to the general provisions of the APA."); *see also Turner v. Sec'y of HUD,* 449 F.3d 536, 539-41 (3d Cir. 2006) (APA action against HUD for failure to enforce the FHA barred because plaintiff had right to bring "private suits directly against perpetrators of allegedly discriminatory practices"); *Wash. Legal Found. v. Alexander,* 984 F.2d 483, 486 (D.C. Cir. 1993) ("implied right of action" to bring discrimination claims under civil rights statutes [such as 42 U.S.C. § 1982] against non-federal entity is an adequate remedy under § 704 of the APA and "preclude[s] a remedy" against federal agency).

This Court's Memorandum Opinion and Order on defendants' first motion to dismiss erroneously held that that "ICP's claim brought under § 3608 via the second sentence of § 702 is not subject to the requirement of § 704 that 'there is no other adequate remedy in a court.'" Mem. Op. & Order, at 9, ECF No. 28, Aug. 4, 2015 (quoting 5 U.S.C. § 704). Respectfully, this ruling is plainly

contrary to Fifth Circuit precedent, which holds that, for any cause of action arising under the APA rather than a separate statute, § 704 is a limit on the APA's waiver of sovereign immunity. *See Belle Co.,* 761 F.3d at 395-96 & n.5; *Alabama-Coushatta Tribe,* 757 F.3d at 489-90 (finality requirement "has been read into § 702 in cases where review is sought pursuant only to the general provisions of the APA;" no such requirement "when judicial review is sought pursuant to a statutory or non-statutory cause of action that arises completely apart from the general provisions of the APA"); *Taylor-Callahan-Coleman Counties Dist. Adult Probation Dep't v. Dole,* 948 F.2d 953, 956, 959 (5th Cir. 1991) (APA's final agency action requirement applied to due process and APA claims). As explained above, neither the FHA nor the Fifth Amendment provide plaintiff with a right of action against the United States. Plaintiff is therefore subject to the APA's limitations on its waiver of sovereign immunity set out in § 704. *See Veldheon,* 35 F.3d at 225; *see also Turner,* 449 F.3d at 539-41. Accordingly, Fifth Circuit precedent demands that this Court reconsider and reverse its prior ruling that APA § 704 does not limit the waiver of sovereign immunity in § 702. *See Zarnow v. City of Wichita Falls, Tex.,* 614 F.3d 161, 171 (5th Cir. 2010) ("the law-of-the-case doctrine does not operate to prevent a district court from reconsidering prior rulings").

3. Plaintiff Has an Adequate Remedy Against the Texas Department of Housing and Community Affairs

The APA does not waive immunity for plaintiff's claims against the IRS and the OCC because plaintiff has an adequate remedy against the TDHCA, project sponsors, or other actors directly engaged in discriminatory conduct. Indeed, plaintiff attempted to avail itself of this adequate remedy seven years ago by bringing suit against TDHCA. *See ICP v. TDHCA,* No. 3:08-cv-546-D, (N.D. Tex. Mar. 28, 2008), ECF No. 1. ICP opposed joinder of the IRS in that litigation as a necessary party. *ICP v. TDHCA,* 2008 WL 5191935 at *8; *ICP v. TDHCA,* No. 3:08-cv-546 (N.D. Tex. July 17, 2008), Resp. in Opp'n to Mot. to Dismiss at 9, ECF No. 18. This Court agreed and held that it could afford ICP complete relief in the absence of the IRS. *See ICP v. TDHCA,*

2008 WL 5191935 at *8-9. [3]

Even if it ultimately does not succeed, ICP's suit against the TDHCA is adequate, as is its ability to bring suit against project sponsors, or other actors directly engaged in discriminatory conduct. *Cf. Martinez v. United States,* 333 F.3d 1295, 1320 (Fed. Cir. 2003) ("The fact that the complaint was untimely filed . . . does not mean that court could not offer a full and adequate remedy; it merely means that [plaintiff] did not file his complaint in time to take advantage of that remedy."); *Town of Sanford v. United States,* 140 F.3d 20, 23 (1st Cir. 1998) ("A legal remedy is not inadequate for purposes of [preclusion of review under] the APA because it is procedurally inconvenient for a given plaintiff, or because plaintiffs have inadvertently deprived themselves of the opportunity to pursue that remedy."); *Sable Commc'ns of Cal., Inc. v. FCC,* 827 F.2d 640, 642 (9th Cir. 1987) (same).

Plaintiff attempts to evade the limitation on the waiver of immunity in § 704 by claiming that the relief it seeks against the IRS and the OCC is different from, or would be more effective than, the relief it has sought or obtained against the TDHCA. *See* FAC ¶ 13. This Court should reject plaintiff's contention. In *Americans Disabled for Attendant Programs Today* ("*ADAPT*") *v. HUD,* 170 F.3d 381, 390 (3d Cir. 1999), the plaintiff argued "that individual suits are not as effective as a review of HUD's national investigation and enforcement practices." *Id.* at 390. The court rejected that argument, holding, that even if plaintiff's argument were correct, "section 704 does not require an equally effective remedy, only an adequate one. In this case, direct actions will be adequate to deter individual discriminators." *Id.*; *see also Women's Equity Action League v. Cavazos,* 906 F.2d 742, 751

[3] Indeed, in light of plaintiff' prior litigation position, estoppel precludes it from now asserting that the IRS and the OCC are responsible for allowing TDHCA to select a disproportionate number of LIHTC projects in predominantly minority areas. *See New Hampshire v. Maine,* 532 U.S. 742, 750-51 (2001) (plaintiff may be estopped asserting a claim in a legal proceeding when: (1) the party's later position is "clearly inconsistent" with its earlier position; (2) the earlier court accepted the party's earlier position; and/or (3) the party taking an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party). ICP's position in its suit against TDHCA was that the state agency's decision making was the cause of the discriminatory location of LIHTC units, and this Court accepted that position in finding that TDHCA is the "sole entity" responsible for the geographical distribution of LIHTCs. *ICP v. TDHCA,* 749 F. Supp. 2d at 496-97. Plaintiff provides no legitimate reason for now allowing the change in its legal position.

(D.C. Cir. 1990) ("situation-specific litigation affords an adequate, even if imperfect, remedy."); *Coker v. Sullivan,* 902 F.2d 84, 90 n.5 (D.C. Cir. 1990) (APA "bar[s] suits where a plaintiff's injury may be remedied in another action, even if that remedy would have no effect upon the challenged agency action.") (citation omitted). Indeed, "Congress consider[s] private suits to end discrimination *not merely adequate but in fact the proper means* for individuals to enforce Title VI and its sister antidiscrimination statutes." *Women's Equity Action League,* 906 F.2d at 750-51 (citing *Cannon v. Univ. of Chicago,* 441 U.S. 677, 704 (1979)) (emphasis added); *ADAPT,* 170 F.3d at 390 ("The nature and structure of the FHA, together with its legislative history, indicate that the FHA was designed to operate like other civil rights laws."). Thus, plaintiff's suit against the TDHCA is "an adequate remedy at law for whatever additional injury a plaintiff suffered as a result of [the IRS's and the OCC's alleged] failure to remedy that violation administratively." *Garcia v. Vilsack,* 563 F.3d 519, 525 (D.C. Cir. 2009). As a result, plaintiff "[can]not maintain an action under the APA directly against [the IRS and the OCC] for failure to investigate and rectify the wrongdoing of [the TDHCA] where Congress ha[s] provided the plaintiff with a private right of action against the [TDHCA]." *Id.* at 524-25; *cf. Resident Council of Allen Parkway Vill. v. HUD,* 980 F.2d 1043, 1056 n.6 (5th Cir. 1993) ("no action under the APA will lie . . . complaining about HUD's refusal to require [a public housing authority] to spend [federally provided] funds in a particular way").

Because even a less effective remedy may suffice as an adequate alternative that bars a suit under the APA, the claims here should be dismissed. In fact, though, plaintiff's suit against the TDHCA offers a remedy that is much more effective than a remedy against the IRS. In its fourth prayer for relief, plaintiff asks this Court to enjoin the IRS to require or forbid certain HCAs from engaging certain conduct in allocating LIHTCs to affordable housing projects. *See* FAC ¶ 195. This Court could impose these requirements and prohibitions directly on the TDHCA *in plaintiff's case against the TDHCA,* and that order could require the TDHCA's conduct to change. By contrast, even if this Court were to order the IRS to order the state of Texas to add certain criteria to its QAPs or to remove some of the state-specific criteria from the QAPs, the TDHCA's revised QAP might be ineffective in preventing the TDHCA from continuing to engage in the alleged

discriminatory conduct. *See* 26 U.S.C. § 42(m)(1)(A)(iv) (mandating only a public written explanation "for any allocation of [LIHTCs] which is not made in accordance with [an HCA's] established priorities and selection criteria"—that is for any allocation inconsistent with the QAP).

Nor does plaintiff allege any direct discrimination on the part of the IRS or the OCC. Rather, plaintiff alleges that the IRS and the OCC have "accept[ed] and condone[d]" the TDHCA's selection of affordable housing units for LIHTCs, FAC ¶ 4, by their alleged *failure to prevent* the TDHCA from selecting those units for LIHTCs, or to block national banks from investing in individual LIHTCs and LIHTC equity funds. *See*, *e.g., id.* ¶¶ 66 ("OCC did not promulgate any regulation prohibiting the perpetuation of racial segregation under the public welfare standard"), 71 ("neither Treasury nor OCC ever promulgated a regulation"), 77("Neither Treasury nor OCC have any such requirements, reports, guidelines, audits, or other program elements to further the national nondiscrimination policy"), 157 ("Treasury and OCC officials consistently refuse to use their legal authority to require the elimination of racial discrimination and end the perpetuation of racial segregation"), 174 (same), 175 ("Defendants took none of the procedural or substantive actions to prevent the perpetuation of racial segregation"), 181 ("Defendants took no action to adopt any standards to mitigate or prevent segregation"). Thus, plaintiff is lodging suit "against a federal agency for failure to investigate and rectify the wrongdoing of a third party." *Garcia,* 563 F.3d at 524-25. This is exactly the sort of claim that the APA forecloses; even if "a national suit against the federal agency would be more effective, . . . the remedy in the form of a private suit against state and local governments . . . [is still] adequate to address the alleged discrimination." *Id.* at 525. Plaintiff therefore cannot avail itself of the APA's waiver of sovereign immunity.

B. Even if the APA Provided an Applicable Waiver of Sovereign Immunity, Plaintiff Cannot Obtain Judicial Review of the IRS's and the OCC's Duty to Affirmatively Further Fair Housing

Even if this Court were to find that the APA provides an applicable waiver of sovereign immunity to review plaintiff's claims against the IRS and the OCC, and even assuming, arguendo, that the IRS's and the OCC's roles with respect to LIHTCs could be considered a federal "program" or "activity" under § 3608(d), this Court should still find that the APA does not provide for review

of plaintiff's claims brought under § 3608(d). Section 3608(d) provides no judicially manageable standard for this Court to review the IRS's and the OCC's role with respect to LIHTCs. Section 3608(d) requires an agency to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter." 42 U.S.C. § 3608(d). The policy underlying Title VIII is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. This is a broad statutory mandate. It does not require agencies to take any particular action or to develop an evidentiary record. The APA does not provide for review of plaintiff's claims under § 3608(d).

1. Any Obligation to Carry Out the Requirements of 42 U.S.C. § 3608(d) is Committed to Agency Discretion by Law

The APA precludes judicial review when the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). An action is committed to agency discretion when "no judicially manageable standards are available for judging how and when an agency should exercise its discretion, [making it] impossible to evaluate agency action for 'abuse of discretion.'" *Heckler,* 470 U.S. at 830. The APA's limitations on judicial review "protect agencies from undue judicial interference with their lawful discretion, and . . . avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton v. S. Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 66 (2004); *see also Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1971) (APA's exception to judicial review applies "where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'") (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)); *Suntex Dairy v. Block,* 666 F.2d 158, 163-64, 166 (5th Cir. 1982) (statute that did not require agency to make findings or develop evidentiary record left court without ability to gainsay the agency's determination as arbitrary, capricious, or an abuse of discretion); *cf. Ellison v. Connor,* 153 F.3d 247, 251, 253 (5th Cir. 1998) (agency regulations can render statute reviewable if regulations provide standards for a court to apply or require an evidentiary record). The APA's "arbitrary and capricious" standard does not itself supply a means of allowing for judicial review of an otherwise unreviewable statute. *See Schneider v. Feinberg,* 345 F.3d 135, 148 (2d Cir.

2003).

Section 3608(d) does not supply judicially manageable standards for this Court to review the OCC's and the IRS's roles with respect to LIHTCs. *See Heckler,* 470 U.S. at 834; *Suntex Dairy,* 666 F.2d at 164. The statute "does not mandate specific actions or remedial plans." *McGrath v. HUD,* 722 F. Supp. 902, 908 (D. Mass. 1989). Nor does it require the OCC and the IRS to consider specific factors, make findings, or develop an evidentiary record. *Suntex Dairy,* 666 F.2d at 164-65; *see also U.S. Dept. of Interior v. 16.03 Acres of Land,* 26 F.3d 349, 356 (2d Cir. 1994) (APA review only provides for courts to "ascertain whether the Secretary based his decision on a consideration of the relevant statutory factors and may not substitute their own judgment for that of the Secretary"). Thus, § 3608 does not this Court with a basis to review the OCC's and the IRS's compliance with the statute.

2. Section 706 of the APA Precludes Review of Plaintiff's Claims Against the IRS and the OCC

The APA permits a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), or "to hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). Plaintiff cannot proceed under either of these provisions because plaintiff has failed to challenge specific agency actions; instead plaintiff improperly seeks general review of the IRS's and the OCC's roles with respect to LIHTCs. *See SUWA,* 542 U.S. at 64; *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 891 (1990); *Sierra Club v. Peterson,* 228 F.3d 559, 566 (5th Cir. 2000) (environmental group's general challenge to the Forest Service's alleged failure to comply with the National Forest Management Act was not reviewable under § 706(1) as agency inaction); *Nev. Assn. of Counties v. Dep't of Interior*, No. 3:13-cv-712, 2015 WL 1130982, *2-3 (D. Nev. Mar. 12, 2015) (applying *SUWA* and *Lujan* to reject a challenge under § 706(1) or (2) to defendant's alleged failure to implement the requirements of the Wild Horse Act).

Plaintiff cannot proceed under § 706(1) of the APA because plaintiff has not alleged that the IRS or the OCC has "failed to take a *discrete* agency action that it is required to take." *SUWA,* 542

U.S. at 64 (emphasis in original). In *SUWA,* the Supreme Court dismissed an APA claim that sought to compel the Interior Department to ban off-road vehicles in a wilderness area based on a statute that required the agency to "continue to manage [wilderness areas] in a manner so as not to impair [their] suitability for preservation as wilderness." *Id.* at 59, 65. The Court found that the term "agency action," although including "a failure to act," is defined in the first instance by reference to "a list of five categories of decisions made or outcomes implemented by an agency– 'agency rule, order, license, sanction [or] relief.'" *Id.* at 62 (quoting 5 U.S.C. § 551(13)). The Court explained that:

> All of those categories involve *circumscribed, discrete agency actions,* as their definitions make clear: "an agency statement of . . . future effect designed to implement, interpret, or prescribe law or policy" (rule); a "final disposition . . . in a matter other than rule making" (order); a "permit . . . or other form of permission" (license); a "prohibition . . . or taking [of] other compulsory or restrictive action" (sanction); or a "grant of money, assistance, license, authority," *etc.,* or . . . "taking of other action on the application or petition of, and beneficial to, a person" (relief).

Id. (quoting 5 U.S.C. §§ 551(4), (6), (8), (10), (11)) (emphasis added). The Court then construed the phrase "failure to act" in § 706(1) as a failure to take one of the five agency actions earlier defined in § 551(13), emphasizing that "[t]he important point is that a 'failure to act' is properly understood to be limited, as are the other items in § 551(13), to a *discrete* action." *Id.* at 62-63 (emphasis in original). The Court thus explained that "the only agency action that can be compelled under the APA is action legally required." *Id.* at 63 (emphasis in original). Therefore, "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is required to take." *Id.* at 64 (emphasis in original). This limitation "rules out judicial direction of even discrete agency action that is not demanded by law." *Id.* at 65. The Court thus held that the APA precluded review of the case at bar because the statute in question was "mandatory as to the object to be achieved, . . . [but] it leaves [the agency] a great deal of discretion in deciding how to achieve it." *Id.* at 66.

This case stands on all fours with *SUWA.* As was the case with the statute at issue in *SUWA,* 42 U.S.C. § 3608(d) provides a mandatory objective to be achieved (affirmative furtherance

of fair housing), but provides federal agencies with a great deal of discretion in determining how best to achieve that objective. The FHA's mandate that certain federal agencies act "affirmatively to further" fair housing provides no more specific statutory guidance than the mandate of the statute at issue in *SUWA* requiring the agency to "continue to manage [wilderness areas] in a manner so as not to impair [their] suitability for preservation." Plaintiff has not identified a circumscribed, discrete agency action required by § 3608(d) that either the IRS or the OCC are required to take. Similarly, like the *SUWA* plaintiff, ICP is not entitled to an order compelling compliance with the broad statutory mandate of § 3608(d) and thus cannot maintain a claim for agency inaction under § 706(1) of the APA.[4]

Nor can plaintiff proceed with their § 3608(d) claim under § 706(2) of the APA. The Supreme Court has also rejected broad programmatic attacks as "agency action" under § 706(2). *See Lujan,* 497 U.S. at 891 (holding that "respondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made") (emphasis in original). In *Lujan,* the Court held that under the terms of the APA, [plaintiff] must direct its attack against some particular 'agency action' that causes it harm." *Id.*

In this case, plaintiff has failed to specify a particular agency action that it is challenging. Rather, the focus of plaintiff's FAC is the agencies' alleged failure to act, including the failure to promulgate specific regulations under § 3608(d). *See, e.g.,* FAC ¶¶ 71 ("neither Treasury nor OCC ever promulgated a regulation or took any other action to prohibit the perpetuation of racial segregation…); 72 ("OCC did not promulgate a regulation or take any other action…"); 73 ("OCC

[4] Nor is plaintiff's claim justiciable simply because the FAC identifies particular projects that have received LIHTCs. Plaintiff has not limited its challenge to any particular project but rather generally alleges that the federal defendants' implementation of LIHTCs is flawed. *See Sierra Club,* 228 F.3d at 566-67 (rejecting, pursuant to § 706 of the APA, environmental groups' challenge to the Forest Service's alleged failure to comply with the National Forest Management Act in maintaining forests despite complaint identifying specific timber sales because, the court held, the group was really challenging the entire program); *Nev. Ass'n of Counties,* 2015 WL 1130982, at *4 (finding case unreviewable under § 706 of the APA even though complaint described "many individual actions" involving federal defendant's oversight, because the actions merely exemplified the alleged flaws in the program).

still did not promulgate a regulation or take any other action to prohibit the perpetuation of racial segregation…"); 93 ("Neither Defendant takes any action in the administration of the LIHTC program…"); 156 ("The challenged actions are Treasury and OCC excluding compliance with the Fair Housing Act…from the scope of their regulatory and supervisory authority."); 165 ("Since the enactment of the Fair Housing Act, the Defendants have continued their actions refusing to use their regulatory and supervisory authority to prevent the perpetuation of racial segregation in the LIHTC program"); *see also id.* ¶¶ 174, 175, 179, 181, 184 & 185 (alleging similar failures to act). Plaintiff does not request that this Court overturn any specific approvals of investments in LIHTC units, nor do they request that the Court set aside any particular project that has earned LIHTCs. *Id.* ¶ 195. Rather, plaintiff's requested relief seeks implementation of new rules and guidelines that would govern future LIHTC projects. *See id.* This is exactly the type of wholesale relief that is foreclosed by *Lujan* and better addressed to Congress. *See Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 865-66 (1984) ("Judges are not experts in the field, and are not part of either political branch of the Government. . . . The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones"); *Nev. Ass'n of Counties,* 2015 WL 1130982 at *4 (holding that plaintiff's request for relief that the court "'declar[e] the duties and responsibilities of Defendants under the [Wild Horse Act] and applicable rules, regulations, and directives, the [APA], and other applicable statutes and regulations'" was evidence that claim was not justiciable agency action under § 706(2)).

Like the plaintiffs in *SUWA* and *Lujan,* plaintiff's challenge here seeks "wholesale improvement" of defendants' alleged ability to regulate state HCA allocations of LIHTCs. Thus, this Court should decline to afford plaintiff such review under either § 706(1) or (2) of the APA.

C. Plaintiff Fails to State a Claim Under 42 U.S.C. § 3604

1. Neither the IRS nor the OCC Engaged in Discriminatory Housing Practices

Plaintiff fails to state a claim under 42 U.S.C. § 3604(a) because neither the IRS's nor the OCC's roles with respect to LIHTCs are too attenuated to have made housing unavailable. *See Jones,* 983 F. Supp. at 197 (§ 3604 only applies to "actor *directly involved* in providing housing or providing

services," not one who "merely supervises" such actors) (emphasis added). In *Jones,* the plaintiff challenged the OCC's approval of a bank's acquisition of a subsidiary under § 3604(a), alleging that the OCC's approval was a violation of the OCC's duty to provide fair housing under § 3604(a). *See id.* The court held that the OCC could not be held liable under § 3604(a) because it merely regulated the financial institutions alleged to have discriminated against plaintiff. *Id.* The court explained that the OCC "has provided neither housing nor housing-related services to consumers, or to plaintiff in particular; it therefore could not have denied housing or made it unavailable to anyone." *Id.* The court further held that "[t]he impact of alleged discriminatory practices by the institutions the OCC supervises cannot be attributed to the OCC itself." *Id.* This reasoning applies with equal force to plaintiff's claim under 42 U.S.C. § 1982.

Indeed, not every act that might affect the availability of housing is actionable under § 3604(a). *See, e.g., Jersey Heights Neighborhood Ass'n v. Glendening,* 174 F.3d 180, 192 (4th Cir. 1999) (State's selection of location for a new highway through a predominately African–American neighborhood did not otherwise make housing unavailable because "section 3604(a) does not reach every event that might conceivably affect the availability of housing.") (quotation marks and citation omitted); *Clifton Terrace Assocs., Ltd. v. United Technologies Corp.,* 929 F.2d 714, 722 (D.C. Cir. 1991) (elevator company's refusal to service elevators in buildings in predominantly African–American neighborhood did not "otherwise make [housing] unavailable"); *Edwards v. Johnston Cnty. Health Dep't,* 885 F.2d 1215, 1221 (4th Cir.1989) (challenge to county's inspections and permits allowing allegedly substandard housing for predominately non-white migrant farm workers did not "otherwise make [housing] unavailable"); *AHF Cmty. Dev., LLC v. City of Dallas,* 633 F. Supp. 2d 287, 300-01 (N.D. Tex. 2009) (plaintiff's challenge to county's allegedly discriminatory code enforcement and nuisance abatement not actionable under § 3604).

In this case, plaintiff alleges that the IRS's "policy and practice refusing to regulate the LIHTC program to prevent racial segregation" and the "OCC's policy and practice approving national bank investments in minority concentrated areas marked by conditions of slum, blight, and distress" constitute discriminatory housing practices that make "dwellings unavailable in

predominately White, non-Hispanic areas without slum, blight and distress" in violation of § 3604(a). FAC ¶ 188. Plaintiff, however, does not allege, nor could it credibly allege, that either the IRS or the OCC is sufficiently "involved in providing housing or providing services" related to housing to have made housing unavailable. *Jones,* 983 F. Supp. at 202. Project sponsors propose affordable housing construction or renovation projects to the TDHCA. Congress gives the TDHCA the authority to award LIHTCs to affordable housing projects based on point systems reflecting the state's priorities for the desired type, location, and ownership of affordable housing. *See* 26 U.S.C. § 42(m). Thus, it may be reasonable to consider the TDHCA to be sufficiently involved in the provision of housing and housing related services. *See* http://www.tdhca.state.tx.us/au.htm (TDHCA's mission is to "develop high quality affordable housing which allows Texas communities to thrive."). Congress, moreover, expressly gives the TDHCA primary responsibility for monitoring compliance with LIHTCs. *See* 26 U.S.C. §§ 42(*l*)(3), (m)(1)(B)(iii).

By contrast, Congress limits the IRS's role with respect to LIHTCs to responding to any noncompliance reported by the TDHCA by denying or recapturing a LIHTC claimed by an investor. *Id.* § 42(j). By Congressional design, the IRS plays no role in the selection of the location for LIHTC units. Similarly, the OCC's role with respect to LIHTCs is limited to reviewing national bank and federal saving association investments in LIHTC projects or LIHTC-equity funds under its public welfare investment authority to ensure that such investments do not "expose the association to unlimited liability." 12 U.S.C. § 24 (Eleventh). The statute does not give the OCC authority to select location of the LIHTC units or to second-guess an HCA's determination that a particular project will benefit an area. Nor should this Court accept an argument that "[t]he impact of the alleged discriminatory practices" purportedly caused by TDHCA's administration of the LIHTC program should "be attributed" to the IRS or the OCC for purposes of proceeding under § 3604(a). *See Jones,* 983 F. Supp. at 202. The IRS's and the OCC's activities "thus cannot fall within the strictures of Section 3604." *Id.*

In ruling on defendants' first motion to dismiss, this Court held that plaintiff failed to state a

claim against the IRS and the OCC for intentional discrimination, *see* Mem. Op. & Order, at 11-12, but did not reach defendants' argument that plaintiff failed to state a claim under § 3604 against the IRS and the OCC. *See id.* at 10-11. Noting the Supreme Court's recent opinion in *TDHCA v. ICP,* __ U.S. __, 135 S. Ct. 2507 (2015), this Court found that defendants had not adequately addressed plaintiff's disparate impact claims. *See* Mem. Op. & Order, at 11. Respectfully, this Court need not address the Supreme Court's opinion to rule on defendants' argument that plaintiff fails to state a claim under § 3604(a) (or § 1982) against the IRS and the OCC because these agencies do not participate in the housing market, provide housing related services, or engage in land use decision. *See Jones,* 197 F. Supp. at 202.

2. Plaintiff Has Failed to State a Prima Facie Case for Discriminatory Effects Liability Against the IRS and the OCC

Even if this Court were to consider the factors set out by the Supreme Court in *TDHCA v. ICP,* for determining whether ICP has stated a prima facie case for discriminatory effects liability against the IRS and the OCC, the Court should hold that ICP fails to allege a sufficient causal nexus between the IRS's and the OCC's actions and the alleged disparate impact on minorities.

To state a prima facie case for discriminatory effects liability under the FHA, a plaintiff must "point to a defendant's policy or policies causing that disparity." *TDHCA v. ICP,* __ U.S. __, 135 S. Ct. 2507, 2523 (2015). As the Supreme Court explained, "[a] robust causality requirement ensures that '[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create." *Id.* (quoting *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 653 (1989), *superseded by stat. on other grounds,* 42 U.S.C. § 2000e-2) (alterations in original). Thus, a plaintiff bringing a disparate impact claim must "allege facts at the pleading stage or produce statistical evidence demonstrating [the] causal connection" between the alleged disparity and the challenged practice. *Id.*

Focusing on plaintiff's disparate impact claim against the TDHCA, the Supreme Court characterized plaintiff's theory of liability as "novel," *id.* at 2522, and suggested that, on remand, the case "may be seen simply as an attempt to second-guess which of two reasonable approaches a

housing authority should follow in the sound exercise of its discretion in allocating tax credits for low-income housing." *Id.* The Supreme Court further cautioned that "it seems difficult to say as a general matter that a decision to build low-income housing in a blighted inner-city neighborhood instead of a suburb is discriminatory, or vice versa." *Id.* at 2523. On remand, this Court has decided to consider whether plaintiff has established a prima facie case, especially "through the prism of the 'robust causality requirement' envisioned by the Supreme Court." *ICP v. TDHCA,* No 3:08-cv-546-D (N.D. Tex. Oct. 8, 2015), Mem. Op. & Order, ECF No. 250.

Defendants take no position on whether plaintiff has stated a prima facie case of discriminatory effects liability against the TDHCA. Defendants emphasize, however, that if this Court finds that plaintiff has failed to state a prima facie case against the TDHCA, it cannot find that plaintiff has stated a prima facie case of disparate impact discrimination against the IRS and the OCC for declining to more actively regulate the TDHCA. Plaintiff makes no allegation against the IRS and the OCC that is not dependent on the location decisions made by the TDHCA.

Additionally, plaintiff cannot show sufficient causation between the alleged disparity in the location of LIHTC units and any IRS or OCC policy or policies; indeed, apart from alleging a failure to regulate, plaintiff does not even identify a challenged policy or policies. Plaintiff alleges that 97 percent of non-elderly LIHTC units in the City of Dallas, and 86 percent of all LIHTC units in the Dallas Metropolitan area, are located in predominantly minority census tracts. FAC ¶¶ 26, 31. In attempting to allege a prima facie case of discriminatory effects liability against the IRS and the OCC, however, plaintiff entirely ignores the roles played by project sponsors in proposing affordable housing projects for LIHTCs and by the TDHCA in selecting those projects for LIHTCs. As noted above, Congress gives the TDHCA, not the IRS or the OCC, authority to select projects for LIHTCs and monitor those projects for compliance. *See* 26 U.S.C. §§ 42(*l*)(3), (m)(1)(B)(iii). Additionally, Congress gives the OCC authority to evaluate national bank investments in LIHTC projects only from an investment risk perspective. *See* 12 U.S.C. § 24 (Eleventh). Plaintiff is thus reduced to alleging that the IRS and the OCC have "accept[ed] and condone[d]" the TDHCA's selection of those units for LIHTCs, FAC ¶ 4, by their alleged *failure to prevent* the TDHCA from

selecting those units for LIHTCs, or to block national banks from investing in individual LIHTCs and LIHTC equity funds. *See*, *e.g., id.* ¶¶ 66 ("OCC did not promulgate any regulation prohibiting the perpetuation of racial segregation under the public welfare standard"), 71 ("neither Treasury nor the OCC ever promulgated a regulation"), 77(Neither Treasury nor OCC have any such "requirements, reports, guidelines, audits, or other program elements to further the national nondiscrimination policy"), 157 ("Treasury and OCC officials consistently refuse to use their legal authority to require the elimination of racial discrimination and end the perpetuation of segregation"), 174 (same), 175 ("Defendants took none of the procedural or substantive actions to prevent the perpetuation of racial segregation"), 181 ("Defendants took no action to adopt any standards to mitigate or prevent segregation").[5] To defendants' knowledge, no court has ever allowed a discriminatory effects claim against a government entity to proceed based on an alleged failure to prevent or remedy another party's policy or policies from imposing a disparate impact. Plaintiff nevertheless seeks to hold the IRS and the OCC "liable for racial disparities they did not create." *TDHCA v. ICP,* 135 S. Ct. at 2523. Plaintiff thus fails to state a prima facie case for discriminatory efforts liability against the IRS and the OCC. *See id.*

D. Plaintiff Fails to State a Claim for Intentional Discrimination Against the IRS and the OCC Under the Fifth Amendment, 42 U.S.C. § 1982, or 42 U.S.C. § 3604

Plaintiff's claims of intentional discrimination also fail because of the causation problems set

[5] Indeed, plaintiff only alleges two discrete instances of the OCC approving a national bank LIHTC investment in a predominantly minority census tract during the applicable six-year statute of limitations. FAC ¶¶ 103, 114. Plaintiff fails to allege whether national banks invested in these projects directly or indirectly through a syndicated LIHTC-equity fund. If it was the latter, the national bank would not have notified the OCC as to the location of the investments. *See supra* n.2. Nor does plaintiff allege whether the OCC even had the opportunity to review these investments before the banks made these investments. *See id.* (citing 12 C.F.R. §§ 24.2(e), 24.5(a)). The remainder of plaintiff's allegations fall well outside the six-year statute of limitations to bring claims against the United States. *See* 28 U.S.C. § 2401(a) ("every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."); *Ctr. for Biological Diversity v. Hamilton,* 453 F.3d 1331, 1334 (11th Cir. 2006) ("Unlike an ordinary statute of limitations, § 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed" against the plaintiff) (quoting *Spannaus v. Dep't of Justice,* 824 F.2d 52, 55 (D.C. Cir. 1987)); *id.* ("If an event or series of events should have alerted a reasonable person to act to assert his or her rights at the time of the violation, the victim cannot later rely on the continuing violation doctrine"); *Impro Prods., Inc. v. Block,* 722 F.2d 845, 851 n. 12 (D.C. Cir. 1983) (six-year statute of limitations claims applies to constitutional claims).

out above. Additionally, plaintiff fails to state a claim for intentional discrimination against the IRS and the OCC since it does not allege, nor could it reasonably allege, that the challenged conduct of the IRS and the OCC meets the standards necessary to state a claim for intentional discrimination.

Deliberate discrimination requires proof of discriminatory intent. *Gallagher v. Magner,* 619 F.3d 823, 831 (8th Cir. 2010) (citing *Int'l Bd. of Teamsters v. United States,* 431 U.S. 324, 335 n. 15 (1977)); *Dirden v. HUD,* 86 F.3d 112, 114 (8th Cir. 1996) ("To prevail on a claim under . . . 42 U.S.C. § 1982 and the Fair Housing Act, 42 U.S.C. § 3601 *et seq.,* a plaintiff must prove discriminatory intent."). "Purposeful discrimination," however, "'implies more than intent as volition or intent as awareness of consequences.'" *Ashcraft v. Iqbal,* 566 U.S. 662, 676 (2009) (quoting *Pers. Adm'r of Mass. v. Feeney,* 442 U.S. 256, 279 (1979)). "It implies that the decisionmaker . . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney,* 4424 U.S. at 279.

In this case, plaintiff's FAC makes repeated allegations about the IRS's and OCC's knowledge of discriminatory conduct of third parties (such as the TDHCA, project sponsors, and investors) and their alleged failure to address that discrimination. *See*, *e.g.,* FAC ¶¶ 1 (Defendants *knowingly*, consistently, and repeatedly *allow* and approve investments in LIHTC units that perpetuate racial segregation and unequal conditions") (emphasis added), 4 ("Defendants' discriminatory intent to *accept and condone* racial segregation in their Programs") (emphasis added), 174 ("Treasury and OCC officials consistently *refuse to use their legal authority* to require an end to the perpetuation of racial segregation in the LIHTC program") (emphasis added), 176 ("Defendants *did not enact* any such standards [to prevent the concentration of LIHTC units in predominantly minority areas] for use in the LIHTC program or in the public welfare program."), 177 ("Defendants *have no such regulations* or other guidance for the [state] government and private entities administering the LIHTC program"), 181 ("Defendants *took no actions* to adopt any standards to mitigate or prevent segregation."), 182 ("Defendant Treasury has no such requirements to further the national policy of racial integration in housing."), 184 ("Defendants *knew* LIHTC owners in Texas were discriminating against Section 8 participants."), 186 ("Defendants held the view that racial segregation and discrimination *were*

acceptable."). None of these allegations rise to the level of intent required to show discriminatory intent in violation of the Fifth Amendment, 42 U.S.C. § 1982, or 42 U.S.C. § 3604(a). *See Ricketts v. City of Columbia, Mo.,* 36 F.3d 775, 781 (8th Cir. 1994) ("A discriminatory purpose is more than a mere awareness of the consequences.") (internal quotation marks and citation omitted). Thus, plaintiff fails to state a claim of intentional discrimination in violation of the Fifth Amendment, 42 U.S.C. § 1982, or 42 U.S.C. § 3604(a).

IV. CONCLUSION

This Court should grant defendants' motion to dismiss and enter judgment for defendants. A proposed order is attached.

Dated: October 30, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I electronically submitted the foregoing document with the clerk of court of the U.S. District Court, Northern District of Texas, using the Court's electronic case filing system, which caused a copy of this filing to be served on all counsel and/or *pro se* parties of record.

s/ James D. Todd, Jr.
JAMES D. TODD, JR.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

The Inclusive Communities Project, Inc., Plaintiff, v. The United States Department of the Treasury and the Office of the Comptroller of the Currency Defendants.	No. 3:14-cv-3013-D

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Before this Court is Defendants' Motion to Dismiss Plaintiff's First Amended Complaint.

For good cause shown, it is hereby ORDERED that:

1. Defendants' Motion is GRANTED; and, it is hereby further ORDERED that

2. The Clerk is directed to enter JUDGMENT for Defendants.

SO ORDERED.

Dated: _____

_____
SIDNEY A. FITZWATER
United States District Court Judge