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Via Federal eRulemaking Portal

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Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500

RE: Comments on Proposed Rule: Docket No. FR-6123-P-02; *Affirmatively Furthering Fair Housing*, 85 Fed. Reg. 2041 (January 14, 2020), RIN 2577-AA97

Dear Mr. Santa Anna:

This letter is submitted by Attorneys General of the States of California, New York, Colorado, Connecticut, Delaware, District of Columbia, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington in response to the above-referenced notice of proposed rulemaking (the Proposed Rule) issued by the Department of Housing and Urban Development (HUD). The Proposed Rule would seek to replace the Affirmatively Furthering Fair Housing Rule promulgated by HUD in 2015 (the 2015 Rule), which is widely regarded as a significant step forward in fulfilling HUD's duty under the Fair Housing Act (FHA) to affirmatively further fair housing. A similar group of Attorneys General opposed the August 16, 2018 Advanced Notice of Proposed Rulemaking¹ regarding HUD's intention to revise the 2015 Rule.²

As feared, the Proposed Rule dismantles the 2015 Rule. The Proposed Rule, if adopted, would drastically scale back HUD's oversight in identifying and addressing barriers to fair housing and redirect resources to issues outside the realm of fair housing. Crucially, the Proposed Rule is silent about combatting segregation and promoting integration, which are at the

¹ Affirmatively Furthering Fair Housing: Streamlining and Enhancements, 83 Fed. Reg. 40,713 (Aug. 16, 2018).

² State Attorneys General, Comment to FR-6123-A-01, 3–4 (Oct. 15, 2018), *available at* <https://www.regulations.gov/document?D=HUD-2018-0060-0639>. The Attorneys General's October 15, 2018 letter is also attached to, and is incorporated into, this comment. *See* Appendix A.

heart of any effort to further fair housing. Because the Proposed Rule would undermine efforts to promote fair housing in our communities and ignore HUD's statutory mandate to affirmatively further fair housing, its adoption would be both contrary to the purpose of the FHA and arbitrary and capricious.

The Proposed Rule is just the latest effort by HUD to undo fair housing protections and to ignore entrenched segregation in our communities. In August of last year, HUD proposed a rule to weaken existing disparate impact regulations, making it harder for people in protected classes to challenge discriminatory housing policies or practices. A similar group of Attorneys General opposed that proposed rule.³ Likewise, here, the undersigned Attorneys General oppose any effort by HUD to undercut fair housing efforts with the adoption of the Proposed Rule. For the reasons discussed herein, we urge HUD to withdraw the Proposed Rule in its entirety.

I. BACKGROUND

To understand the numerous substantive defects of the Proposed Rule, it is critical first to understand the historical need for HUD's statutory duty to affirmatively further fair housing and HUD's prior efforts to satisfy that duty.

A. HUD Has a Duty to Affirmatively Further Fair Housing.

The FHA provides that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."⁴ The FHA prohibits discrimination in home sales or rentals and other housing-related transactions based on race, color, religion, sex, familial status, national origin, or disability and in a separate provision, the FHA also requires HUD to "administer [its] programs and activities relating to housing and urban development in a manner affirmatively to further the policies" of the FHA.⁵ Participants in HUD's programs (program participants), including local governments, states, and public

³ State Attorneys General, Comment to FR-6111-P-02 (Oct. 18, 2019), *available at* <https://www.regulations.gov/document?D=HUD-2019-0067-2830>. The Attorneys General's October 18, 2019 letter is also attached to, and is incorporated into, this comment. *See* Appendix B.

⁴ 42 U.S.C. § 3601 (1968).

⁵ *Id.* §§ 3604–06, 3608(e)(5). Other federal agencies are also required to administer their programs and activities relating to housing and urban development in a manner that affirmatively furthers fair housing. *Id.* § 3608(d).

housing authorities (PHAs),⁶ likewise have a statutory duty to affirmatively further fair housing.⁷ Taken together, HUD must ensure that its program participants take affirmative steps to further fair housing.

Congress intended for HUD's duty under the FHA to affirmatively further fair housing to go beyond prohibiting discrimination—HUD must take meaningful action to undo historic patterns of housing segregation and promote integration.⁸ This policy of the FHA is evident not only in the two separate provisions described above, but also in the FHA's legislative history. Congress passed the FHA in 1968, just months after the release of the findings of the National Advisory Commission on Civil Disorders (the Kerner Commission), which was established by President Lyndon B. Johnson.⁹ The Kerner Commission identified residential segregation, unequal housing, and economic conditions in the inner cities as significant underlying causes of the racial unrest in that decade.¹⁰ The Kerner Commission also found that “[n]early two-thirds of all nonwhite families living in the central cities today live in neighborhoods marked by substandard housing and general urban blight,” and that both open and covert racial discrimination prevented African-American families from obtaining better housing and moving to integrated communities.¹¹ The Kerner Commission concluded that “[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.”¹²

Government at all levels supported and contributed to these separate and unequal societies. For instance, zoning and land-use decisions deliberately excluded racial and ethnic

⁶ HUD specifically defines a “program participant” as either (1) a jurisdiction (i.e. a state or local government) that is required to submit a consolidation plan under four HUD programs (the Community Development Block Grant, the Emergency Solutions Grant, the HOME Investment Partnerships, and the Housing Opportunities for Persons with AIDS) or (2) a public housing agency receiving assistance under sections 8 or 9 of the United States Housing Act of 1937 (42 U.S.C. § 1437f or 42 U.S.C. § 1437g). *See* 24 C.F.R. 5.152; *id.* at 5.154(b).

⁷ The Housing and Community Development Act of 1974, Cranston-Gonzalez National Affordable Housing Act, and Quality Housing and Work Responsibility Act of 1998 all require covered HUD program participants to certify as a condition of receiving federal funds that they will affirmatively further fair housing. *See* 42 U.S.C. §§ 5304(b)(2); 5306(d)(7)(B); 12705(b)(15); 1437C-1(d)(16).

⁸ *See, e.g., N.A.A.C.P. v. Sec’y of Hous. & Urban Dev.* (“*N.A.A.C.P.*”), 817 F.2d 149, 155 (1st Cir. 1987).

⁹ *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.* (“*Inclusive Communities*”), 135 S. Ct. 2507, 2516 (2015) (citing Exec. Order No. 11,365, 32 Fed. Reg. 11,111 (July 29, 1967)).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

minority families from suburbs,¹³ courts enforced racially restrictive covenants that prevented racial and ethnic minorities from purchasing property in certain areas,¹⁴ and the Federal Housing Administration explicitly redlined neighborhoods based on race.¹⁵ In other words, this racial discrimination was government-sanctioned.

Aware of these troubling findings by the Kerner Commission, Congress passed the FHA “intend[ing] the FHA to remedy segregated housing patterns and the problems associated with them—segregated schools, lost suburban job opportunities for minorities, and the alienation of whites and blacks caused by the ‘lack of experience in actually living next’ to each other.”¹⁶ As the United States Supreme Court has recognized, Congress intended for the FHA to create “truly integrated and balanced living patterns”—not simply to prohibit future discrimination.¹⁷ Stated

¹³ See 114 CONG. REC. 2,277 (1968) (“Statement of Sen. Mondale”) (“Negroes who live in slum ghettos . . . have been unable to move to suburban communities and other exclusively White areas. In part, this inability stems from a refusal by suburbs and other communities to accept low-income housing An important factor contributing to exclusion of Negroes from such areas, moreover, has been the policies and practices of agencies of government at all levels.”).

¹⁴ *Inclusive Communities*, 135 S. Ct. at 2515 (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

¹⁵ Terry Gross, *A ‘Forgotten History’ of How the U.S. Government Segregated America*, NATIONAL PUBLIC RADIO (May 3, 2017), available at <https://www.npr.org/2017/05/03/526655831/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america>; see also 114 CONG. REC. 2,278 (“Statement of Sen. Mondale”) (“A sordid story of which all Americans should be ashamed developed by this country in the immediate post World War II era, during which the FHA, the VA, and other Federal agencies encouraged, assisted, and made easy the flight of white people from the central cities of white America, leaving behind only [African Americans] and others unable to take advantage of these liberalized extensions of credits and credit guarantees. Traditionally the American Government has been more than neutral on this issue. The record of the U.S. Government in that period is one, at best, of covert collaborator in policies which established the present outrageous and heartbreaking racial living patterns which lie at the core of the tragedy of the American city and the alienation of good people from good people because of the utter irrelevancy [*sic*] of color.”).

¹⁶ Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s “Affirmatively Further” Mandate*, 100 KY. L.J. 125, 127–28 (2012); see also H.R. REP. NO. 100-711, at 15 (1988), as reprinted in 1988 U.S.C.C.A.N. 2173, 2176 (explaining that the enactment of the FHA directly followed the assassination of Dr. Martin Luther King, Jr.).

¹⁷ *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (“[A]s Senator Mondale . . . said, the reach of the proposed [FHA] law was to replace the ghettos ‘by truly integrated and balanced living patterns.’”) (quoting 114 CONG. REC. 3,422)); see also *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 94–95 (1977) (“This Court has expressly recognized that

otherwise, the FHA not only sought to expand housing choices for protected class members by prohibiting discrimination, but also sought to break down residential segregation by building a racially integrated country.¹⁸

Consistent with the FHA's underlying policy, courts have held that HUD's duty to affirmatively further fair housing (AFFH) under the FHA requires it to take meaningful steps toward desegregation and integrated housing.¹⁹ "Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation . . . of racial groups whose lack of opportunities the Act was designed to combat."²⁰ HUD itself has recognized that the duty to affirmatively further fair housing requires more than a prohibition of discrimination, noting that "[i]n examining the legislative history of the Fair Housing Act and related statutes, courts have found that the purpose of the AFFH mandate is to ensure that recipients of federal housing and urban development funds do more than simply not discriminate: it obligates them to take proactive steps to address segregation and related barriers for those protected by the Act, particularly as reflected in racially and ethnically concentrated areas of poverty."²¹

But residential segregation persists today, over fifty years after the FHA's passage. As the Supreme Court noted, "[d]e jure residential segregation by race was declared unconstitutional almost a century ago, but its vestiges remain . . . , intertwined with the country's

substantial benefits flow to both whites and blacks from interracial association and that Congress has made a strong national commitment [in the FHA] to promote integrated housing.").

¹⁸ See 114 CONG. REC. 2,275–76 (1968) (Senator Mondale discussing the purpose of the FHA, including Congress's commitment "to the principle of living together" and to promoting racially integrated neighborhoods).

¹⁹ See, e.g., *N.A.A.C.P.*, 817 F.2d at 155 ("[E]very court that has considered the question has held or stated that Title VIII imposes upon HUD an obligation to do more than simply refrain from discriminating (and from purposely aiding discrimination by others)."); *Clients' Council v. Pierce*, 711 F.2d 1406, 1425 (8th Cir. 1983) ("Congress enacted section 3608(e)(5) to cure the widespread problem of segregation in public housing."); *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970) (remanding HUD decision about a proposed project change for HUD to consider the "substantial net reduction in supply of housing in the project area available to racial minority families," as well as the "substantial net increase in racial minority families in the area as a result of the project," which "is an equally obvious consideration"); *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty.*, 495 F. Supp. 2d 375, 387–88 (S.D.N.Y. 2007) ("In the face of the clear legislative purpose of the Fair Housing Act, enacted pursuant to Congress's power under the Thirteenth Amendment as Title VIII of the Civil Rights Act of 1968, to combat racial segregation and discrimination in housing, an interpretation of 'affirmatively further fair housing' that excludes consideration of race would be an absurd result.").

²⁰ *Otero v. N. Y. City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973).

²¹ Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,712 (July 19, 2013).

economic and social life.”²² The most recent United States Census data shows that racial segregation declined only modestly in each decade since the FHA’s ban on discrimination in housing.²³ Years after the Kerner Commission report, communities across the country remain separate and unequal, divided along racial, ethnic, and economic lines. This enduring dynamic creates segregated communities of concentrated poverty that lack the educational and economic opportunities available in other communities, resulting in severe intergenerational consequences for the most disadvantaged members of society.

One reason for the continued entrenchment of residential segregation is that, for decades, HUD had not effectively carried out its responsibility to enforce the FHA’s affirmatively furthering fair housing requirements. As explained in detail below, HUD provided few guidelines to, and little oversight over, its program participants’ efforts to further fair housing and remove barriers to integration. Finally, in 2015, HUD developed a more rigorous process that showed great promise to address persistent segregation and increase access to opportunity and housing. If the Proposed Rule goes into effect, this progress would be stymied, further entrenching segregation and impeding integration in communities nationwide.

B. HUD’s History of AFFH Rulemaking Counsels Against The Proposed Rule’s Lax Regulatory Requirements.

1. HUD’s Analysis of Impediments Proved Ineffective for Program Participants to Meet Their Duty to Affirmatively Further Fair Housing.

For decades, HUD entirely failed to fully meet its obligation to enforce the FHA’s AFFH provision.²⁴ In the mid-1990s, HUD promulgated regulations in an effort to meet the mandate to affirmatively further fair housing by requiring program participants to conduct an “Analysis of Impediments to Fair Housing Choice” (AI) as part of a “consolidated plan” setting forth their housing development goals.²⁵ The AI process required each program participant to (1) “submit a

²² *Inclusive Communities*, 135 S. Ct. at 2515 (citing *Buchanan v. Warley*, 245 U.S. 60 (1917)).

²³ See John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census*, DIVERSITY & DISPARITIES (2011), available at <https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf>; Aaron Williams & Armand Emamdjomeh, *America Is More Diverse Than Ever—But Still Segregated*, THE WASHINGTON POST (May 10, 2018), available at <https://www.washingtonpost.com/graphics/2018/national/segregation-us-cities/>.

²⁴ See Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (Jun. 25, 2015), available at <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law>.

²⁵ Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. at 1878, 1905, 1910, 1912 (Jan. 5, 1995). In 1988, prior to these regulations, HUD issued regulations requiring Community Development Block Grants grantees to certify they were

certification that it will affirmatively further fair housing, which means that it will conduct an analysis to identify impediments to fair housing choice within the jurisdiction,” (2) “take appropriate actions to overcome the effects of any impediments identified through that analysis,” and (3) “maintain records reflecting the analysis and actions in this regard.”²⁶ HUD defined “impediments to fair housing choice” as (1) “[a]ny actions, omissions, or decisions taken because of race, color, religion, sex, disability, familial status, or national origin which restrict housing choices or the availability of housing choices,” and (2) “[a]ny actions, omissions, or decisions which have the effect of restricting housing choices or the availability of housing choices on the basis of race, color, religion, sex, disability, familial status, or national origin.”²⁷ HUD only recommended, but did not require, program participants to update their AIs at least once every 3 to 5 years.²⁸ Nor did HUD require program participants to submit AIs to HUD for review.²⁹ Instead, HUD required program participants to provide HUD with just a summary of the AI and the participant’s accomplishments during the last year.³⁰ HUD could request a program participant’s AI but did so only in the event of a complaint “or as part of routine monitoring.”³¹ Finally, the AI process did not require program participants to engage the public or seek their feedback on impediments to fair housing choice.³²

The AI process was widely criticized as an ineffective paper exercise. Litigation, reports, testimonies, and government studies called into question the AI requirements and the effectiveness of HUD’s oversight and enforcement.³³ Criticism included the absence of requirements or guidance around the content and format of AIs, and widespread non-compliance due to the lack of any requirement that grantees submit the AIs for review.

satisfying the AFFH requirement. *See* Community Development Block Grants, 53 Fed. Reg. 34,468 (September 6, 1988). The 1988 regulations had similar elements as the final AI Rule. *Id.* The AI Rule, however, made the above three actions requirements of certification. *See* 60 Fed. Reg. at 1878, 1905, 1910, 1912.

²⁶ 60 Fed. Reg. at 1878, 1905, 1910, 1912, 1916–17.

²⁷ U.S. DEP’T OF HOUS. & URBAN DEV., FAIR HOUSING PLANNING GUIDE 2–8 (1996), available at <https://www.hud.gov/sites/documents/FHPG.pdf>.

²⁸ *Id.*

²⁹ *Id.* at 2–7.

³⁰ *Id.*

³¹ *Id.*

³² Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,315 (July 16, 2015).

³³ *See* NAT’L COMM’N ON FAIR HOUS. & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING 10 (2008), available at <https://lawyerscommittee.org/wp-content/uploads/2015/08/The-Future-of-Fair-Housing-National-Commission-on-Fair-Housing-and-Equal-Opportunity.pdf>. (“HUD requires no evidence that anything is actually being done [to affirmatively further fair housing] as a condition of funding and it does not take adverse action if jurisdictions . . . fail to [do so]”).

In 2010, the U.S. Government Accountability Office (GAO) published a study identifying critical deficiencies in the AI process.³⁴ The GAO study found that HUD's lack of oversight and accountability contributed to serious compliance issues. The study made several key findings. First, a substantial number of AIs were outdated or nonexistent: GAO estimated that 29% of all AIs were at least 6 years old, and that at least 11% were created in the 1990s.³⁵ GAO did not receive any AIs from 25 grantees and several grantees provided documents that did not appear to be AIs, suggesting that some grantees may not have maintained the required AI documents.³⁶ Second, the content of many AIs was lacking. Among current AIs, the "vast majority" did not include timeframes for implementing recommendations.³⁷ In light of these and other shortcomings, GAO "found limited assurances that grantees are placing needed emphasis on preparing AIs as effective planning tools to identify and address potential impediments to fair housing."³⁸ The study concluded that "HUD's limited regulatory requirements and oversight may help explain why many AIs are outdated or have other weaknesses."³⁹ GAO recommended "that, through regulation, HUD require grantees to update their AIs periodically, follow a specific format, and submit them for review."⁴⁰

HUD itself has also acknowledged that the AI process was deeply flawed. In 2009, HUD published findings in an internal study that were later echoed in many of GAO's findings.⁴¹ HUD found that the department's oversight was limited and that many AIs were outdated or appeared to have been prepared in a " cursory fashion only."⁴² In 2010, a HUD official admitted that the department had not always fulfilled its obligation to assist project participants in meeting AFFH requirements.⁴³ HUD stated, however, that it was in the process of developing a rule that

³⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, HOUSING & COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS (2010), (GAO study), available at <https://www.gao.gov/assets/gao-10-905.pdf>.

³⁵ *Id.* at 9–10.

³⁶ *Id.*

³⁷ *Id.* at 1, 9.

³⁸ *Id.* at 9–10.

³⁹ *Id.* at 1.

⁴⁰ *Id.*

⁴¹ U.S. DEP'T OF HOUS. & URBAN DEV., ANALYSIS OF IMPEDIMENTS STUDY (2009).

⁴² *Id.*

⁴³ *Housing Fairness Act of 2009: Hearing on H.R. 476 Before the Subcomm. on Hous. and Community Opportunity & the Comm. on Financial Services*, 118th Cong. 6 (2010) ("Statement of Assistant Secretary for Fair Housing and Equal Opportunity John D. Transvina") ("HUD has not always ensured that our money is spent in ways that fulfill this obligation [to AFFH]."); see also GAO Study, *supra* note 34, at 2–3.

would provide the necessary guidance.⁴⁴ In 2013, with the publication of a new proposed rule, HUD published guidance that recognized many “shortcomings” of the AI process. Notably, HUD acknowledged that “the parameters of the [AI] analysis are not clear enough, HUD provides no data, and the standards of review are not transparent.”⁴⁵

In short, for many decades, HUD program participants continued to receive federal housing grant funding despite failing to meaningfully examine or implement ways to desegregate their local communities and integrate protected classes.

2. In 2015, HUD Develops a Rule With a Robust Process to Ensure That Program Participants Are Affirmatively Furthering Fair Housing.

Following the 2009 HUD and 2010 GAO studies on the inefficacy of the AI process, HUD spent years gathering information, consulting stakeholders, and developing a more robust system to improve compliance with AFFH obligations and to increase HUD’s oversight.

HUD’s efforts culminated in the replacement of the AI process with the 2015 Rule. Through the 2015 Rule, HUD sought to improve upon the AI process in five major ways: (1) creating a standardized reporting process that HUD would systematically enforce for accuracy and completeness; (2) providing national data to program participants to consider in identifying fair housing goals; (3) requiring program participants incorporate fair housing planning into their goals statements for other planning processes, such as the consolidated plan; (4) facilitating collaboration between program participants; and (5) requiring program participants conduct community meetings to gather public input as part of their assessment process.⁴⁶

As a threshold matter, the 2015 Rule provides, for the first time, a definition of “affirmatively furthering fair housing,” as “taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.”⁴⁷ Instead of a cursory AI submission, the 2015 Rule requires program participants to produce an Assessment of

⁴⁴ Statement of Assistant Secretary for Fair Housing and Equal Opportunity John D. Transvina, *supra* note 43.

⁴⁵ U.S. DEP’T OF HOUS. & URBAN DEV., A NEW ASSESSMENT PROCESS TO AFFIRMATIVELY FURTHER FAIR HOUSING (“A New Assessment”) 2 (2013) *available at* https://www.huduser.gov/portal/publications/pdfpdf/affht_userFriendlyGuide.pdf; *see also* 78 Fed. Reg. at 43,710 (“As recognized by HUD staff, program participants, civil rights advocates, the GAO, and others, the fair housing elements of current housing and community development planning are not as effective as they could be, do not incorporate leading innovations in sound planning practice, and do not sufficiently promote the effective use of limited public resources to affirmatively further fair housing.”).

⁴⁶ 80 Fed. Reg. at 42,273.

⁴⁷ *Id.* at 42,353.

Fair Housing (AFH). As part of an AFH, program participants are required to (1) meaningfully evaluate fair housing issues⁴⁸ in their geographic area such as segregation, conditions that restrict fair housing choice,⁴⁹ and disparities in access to housing, (2) identify factors that primarily contribute to the creation or perpetuation of fair housing issues, and (3) establish fair housing priorities and goals.⁵⁰

HUD also created an AFH data tool to enable local government program participants to satisfy the requirements of the AFH. Known as the Local Government Assessment Tool, it provides local government program participants with instructions for preparing an AFH as well as access to national data on patterns of integration and segregation, racially and ethnically concentrated areas of poverty, and areas with disproportionate housing needs and disparities in access to opportunity.⁵¹ HUD promised to deliver similar tools for State and PHA program participants.⁵² By providing this data, HUD intended to help program participants determine which factors contribute to fair housing issues.⁵³ Additionally, HUD concluded that the local data provided by program participants would be “vital to understanding fair housing issues and further fair housing choice in a community.”⁵⁴ Program participants are therefore required to supplement HUD’s national data with their own readily available local data, including information obtained through the community participation process.⁵⁵ The data-driven approach of the 2015 Rule represents a marked shift from the AI regime, which lacked any such data requirements.

Under the 2015 Rule, HUD holds program participants accountable for failing to meaningfully address how their housing development plans will reduce patterns of segregation specific to their communities and expand access to opportunity. Specifically, within 60 days of receipt of a program participant’s AFH, HUD must determine whether an AFH is acceptable or

⁴⁸ A “fair housing issue” is defined as “a condition in a program participant’s geographic area of analysis that restricts fair housing choice or access to opportunity, and includes such conditions as ongoing local or regional segregation or lack of integration, racially or ethnically concentrated areas of poverty, significant disparities in access to opportunity, disproportionate housing needs, and evidence of discrimination or violations of civil rights law or regulations related to housing.” *Id.* at 42,354.

⁴⁹ “Fair housing choice” means “that individuals and families have the information, opportunity, and options to live where they choose without unlawful discrimination and other barriers related to [protected characteristics].” *Id.*

⁵⁰ *Id.* at 42,272.

⁵¹ *Id.* at 42,282, 42,289, 42,355.

⁵² *Id.*

⁵³ *Id.* at 42,275, 42,289.

⁵⁴ *Id.* at 42,335.

⁵⁵ *Id.* at 42,335, 42,340.

non-acceptable.⁵⁶ HUD bases its acceptance determination on whether the AFH is substantially complete and consistent with fair housing and civil rights law.⁵⁷ If a portion of an AFH, such as analysis of a key issue, is not accepted, the entire AFH is rejected. HUD must accept an AFH before it will release funding or approve a program participant's consolidated plans.⁵⁸

The AFH process is not a top-down, prescriptive process. HUD envisioned an iterative, collaborative process, where it would work closely with program participants and provide guidance and technical assistance. For example, as part of any AFH rejection, HUD's written notification of the rejection must include the reasons for that decision and guidance on how the program participant could revise the AFH for acceptance.⁵⁹ HUD anticipated that, at the beginning of the transition from the AI to the AFH process, initial AFH submissions would need some work to achieve compliance. Accordingly, the 2015 Rule provides a flexible resubmission framework that gives program participants additional time to refile rejected AFHs.⁶⁰

The AFH's iterative approach proved successful at helping program participants comply with their duty to affirmatively further fair housing. A study comparing the 28 AFHs submitted between October 2016 and July 2017 to the 27 AIs previously submitted by the same program participants found that AFH submissions had "significantly more goals with measurable objectives or goals representing new policies" as compared to the AI submissions.⁶¹ Another study of the first 49 submissions observed that HUD provided "detailed and constructive" feedback to AFH submissions it initially rejected.⁶² The study concluded that the 2015 Rule was effective in helping program participants meet their AFFH obligations:

Over the first year and a half of enforcement, HUD has engaged in intensive and thorough enforcement to ensure that the majority of issues of noncompliance are identified, and has employed a collaborative strategy to remedy them. The majority

⁵⁶ 24 C.F.R. § 5.162(a)(1).

⁵⁷ *Id.* § 5.162(a)(2)

⁵⁸ 80 Fed. Reg. at 42,311–12.

⁵⁹ 24 C.F.R. § 5.162(a)(1).

⁶⁰ *Id.* § 5.162(c).

⁶¹ See Justin Steil & Nicholas Kelly, *The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance* 33 (Sept. 15, 2017) (unpublished working paper) available at <https://furtheringfairhousing.mit.edu/sites/default/files/documents/Steil%20Kelly%20Fairest%20of%20them%20All%202018%2005%2008.pdf>; see also Olatunde C.A. Johnson, *Unjust Cities? Gentrification, Integration, and the Fair Housing Act*, 53 U. RICH. L. REV. 835, 869 (2019).

⁶² Justin Steil & Nicholas Kelly, *Survival of the Fairest: Examining HUD Reviews of Assessments of Fair Housing*, 29 HOUSING POLICY DEBATE 736, 748 (2019), available at <https://dusp.mit.edu/sites/dusp.mit.edu/files/attachments/publications/Steil%20Kelly%202019%20Survival%20of%20the%20Fairest%20Examining%20HUD%20AFFH%20Reviews.pdf>.

of the AFHs that were initially not accepted were promptly revised and accepted, suggesting that this approach has been working.⁶³

In sum, the 2015 Rule enables HUD and program participants to meet their duty to affirmatively further fair housing. The 2015 Rule requires program participants to use data-driven analyses, identify locality-specific patterns of historic segregation, and enlist input from community stakeholders. And crucially, whereas the AI process left grantees shouldering all responsibility with no guarantee of feedback from HUD, the 2015 Rule committed HUD's resources and support to substantively assist grantees in meeting their obligations under the law. Indeed, HUD's current leadership acknowledges that the AFH process is superior to the prior AI process in aiding program participants in meeting their duty to affirmatively further fair housing.⁶⁴

But despite the early demonstrations of the 2015 Rule's effectiveness, HUD, under the current administration, published a notice on January 5, 2018 that it was suspending the 2015 Rule, effective immediately, until 2024 for a majority of program participants.⁶⁵ HUD also discontinued its current review of pending AFHs. Despite the acknowledged fact that the AFH process was superior, HUD instructed program participants to return to the former AI process.

HUD's suspension of the 2015 Rule signaled its intention to replace it with a rule that was less effective at helping program participants and HUD fulfill their statutory mandate to affirmatively further fair housing.

3. Although the 2015 Rule Has Demonstrated Early Success in Helping Program Participants Affirmatively Further Fair Housing, HUD Inexplicably Proposes a New Rule to Replace the 2015 Rule.

The Proposed Rule, if adopted, would systematically gut the 2015 Rule and replace it with a cursory process that would not assist program participants in meeting their AFFH obligation for several reasons. As a threshold matter, the Proposed Rule entirely omits any reference to addressing segregation or promoting integration, and does not require program participants to consider whether their actions redress, or contribute to, residential segregation. Indeed, the Proposed Rule does not even once mention the word "integration." Aside from referring to protected characteristics under the FHA, the Proposed Rule inexplicably does not discuss race. Further, the Proposed Rule conflates affordable housing with fair housing by redefining the duty to affirmatively further fair housing as primarily being an analysis of the cost of housing. Finally, the Proposed Rule would fail to provide program participants with substantive guidance or requirements to assist program participants in fulfilling their duty to

⁶³ *Id.*

⁶⁴ *Nat'l Fair Hous. Alliance v. Carson* ("Nat'l Fair Hous. Alliance"), 330 F. Supp. 3d 14, 23 (D.D.C. 2018).

⁶⁵ Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, 83 Fed. Reg. 683 (January 5, 2018).

affirmatively further fair housing. The States' specific concerns about the Proposed Rule are discussed below.

First, the Proposed Rule narrowly redefines “affirmatively furthering fair housing” as “advancing fair housing choice within the program participant’s control or influence.”⁶⁶ “Fair housing choice,” in turn, is defined as meaning “within a HUD program participant’s sphere of influence, that individuals and families have the opportunity and options to live where they choose, within their means, without unlawful discrimination related to [protected characteristics].”⁶⁷ Read together, the Proposed Rule defines affirmatively furthering fair housing as merely requiring a program participant to advance individuals’ and families’ options to live where they choose, within their means, without discrimination.

Second, the Proposed Rule would replace the 2015 Rule’s strong AFH process with a cursory certification process. Under the Proposed Rule, program participants would be required to identify three fair housing choice obstacles or goals they plan to address in the next five years.⁶⁸ These self-identified goals or obstacles do not need to be comprehensive or based on any specific data sets or any HUD-prescribed mode of analysis.⁶⁹ Program participants would not be required to provide HUD with any data to support their identified goals or obstacles.⁷⁰ Instead, program participants would need only include a “brief description of how accomplishing the goal or ameliorating the obstacle affirmatively furthers fair housing in that jurisdiction.”⁷¹ In fact, HUD estimates that the entire proposed AFFH process would take program participants only 10 hours to complete.⁷²

No “brief description” would be required if a program participant chooses from a list of 16 “obstacles which HUD considers to be inherent barriers to fair housing choice.”⁷³ The Proposed Rule’s list of “inherent barriers” includes factors that HUD believes increase housing costs and restrict the development of affordable housing, such as “inflexible or unduly rigorous design standards,” “source of income restrictions on rental housing,” and “arbitrary and unnecessary labor requirements.”⁷⁴ The list also includes obstacles to safe housing, such as the concentration of substandard housing stock in a particular area, high rates of housing-related lead poisoning, and lack of a sufficient supply of decent, safe, and sanitary housing that is affordable

⁶⁶ Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2045 (Jan. 14, 2020).

⁶⁷ *Id.*

⁶⁸ *Id.* at 2045, 2056–58.

⁶⁹ *Id.* at 2045, 2057–58.

⁷⁰ *Id.* at 2047.

⁷¹ *Id.* at 2046, 2056–58.

⁷² *Id.* at 2051.

⁷³ *Id.* at 2056–58.

⁷⁴ *Id.*

and accessible to people with disabilities.⁷⁵ Under the Proposed Rule, HUD would not require program participants explain how addressing an “inherent barrier” would help to advance “truly integrated and balanced living patterns.”⁷⁶

Program participants would be required to update HUD annually on steps they have taken to accomplish the goals or to ameliorate the obstacles they identified.⁷⁷ But HUD proposes to conduct only a rational basis review of these updates.⁷⁸ If a program participant’s actions are “rationally related to the goal and obstacles identified” in its AFFH summary, HUD would accept the annual performance report.⁷⁹ HUD states that it “is seeking only to confirm that program participants are fulfilling their statutory duty and will trust, in the absence of evidence to the contrary, that a jurisdiction’s preferred method of affirmatively furthering fair housing is a valid method of fulfilling its statutory duty.”⁸⁰ Thus, this provision of the Proposed Rule would abdicate HUD’s oversight responsibilities, reverting the AFFH obligations to a paper exercise that will not result in any meaningful review of program participants’ actions.

Third, the Proposed Rule would establish an ambiguous system to rank and score program participants receiving Community Development Block Grants.⁸¹ Under this ranking system, high-performing program participants would be eligible to receive benefits for which other program participants would not be. HUD has not developed or published the specific method and data sets it intends to use to rank program participants.⁸² Instead, HUD proposes three factors it would use to rank program participants: (1) whether the participant has any adjudicated complaints of violations of the FHA or related statutes against it brought by or on behalf of HUD or by the United States Department of Justice (DOJ) in the last 5 years; (2) the availability of affordable housing in the participant’s jurisdiction; and (3) housing quality and physical conditions of housing in the participant’s jurisdiction.⁸³ HUD characterizes the first factor—adjudicated complaints of violations—as “[o]ne of the key ways HUD would confirm that program participants fulfill their AFFH responsibilities.”⁸⁴ HUD proposes several possible metrics to measure the second factor—availability of affordable housing—including, *inter alia*, housing prices, fair market rents, the burden housing costs place on very-low- to moderate-income families, and “the amount of additional burden local regulations place on the housing

⁷⁵ *Id.*

⁷⁶ *Trafficante*, 409 U.S. at 211.

⁷⁷ 85 Fed. Reg. at 2050.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 2047.

⁸² *Id.*

⁸³ *Id.* at 2047–48.

⁸⁴ *Id.* at 2047.

market.”⁸⁵ HUD proposes to measure the last factor—housing quality and physical conditions—by the prevalence of housing with lead-based paint hazards, the quality of housing according to HUD Real Estate Assessment Center inspection scores,⁸⁶ and “worst-case housing needs data,”⁸⁷ which document lack of kitchen facilities and adequate plumbing and overcrowding.⁸⁸

High-performing program participants would be eligible for various benefits. These benefits may include preference points on a Notice of Funding Availability (NOFA),⁸⁹ eligibility to receive additional program funds, and eligibility for “various forms of regulatory relief, either from the AFFH process itself or as part of the larger programmatic regulatory requirements.”⁹⁰ “Most improved” program participants would also be eligible for the benefits given to high performing program participants.⁹¹

For low-ranking program participants, HUD’s proposed enforcement measures are ambiguous and unlikely to incentivize them to take steps to affirmatively further fair housing. HUD vaguely proposes to “consider the accuracy” of some low-performing program participants’ AFFH certifications.⁹² The program participant would then have an opportunity to provide HUD with additional information to demonstrate that they are “affirmatively furthering fair housing to the best of their ability.”⁹³ HUD could either find the additional information

⁸⁵ *Id.* at 2048.

⁸⁶ HUD’s Real Estate Assessment Center conducts physical property inspections of properties that are owned, insured or subsidized by HUD, including public housing and multifamily assisted housing. *See* Uniform Physical Condition Standards and Physical Inspection Requirements for Certain HUD Housing, 65 Fed. Reg. 77,230 (Dec. 8, 2000); Public Housing Assessment System Physical Condition Scoring Process Interim Scoring, Corrections and Republication, 66 Fed. Reg. 59,084 (Nov. 26, 2001).

⁸⁷ HUD regularly collects and reports data on “worst case housing needs.” HUD defines “worst case housing needs” as “very low-income renters who do not receive government housing assistance and who paid more than one-half of their income for rent, lived in severely inadequate conditions, or both.” U.S. DEP’T OF HOUS. & URBAN DEV., WORST CASE HOUSING NEEDS: 2017 REPORT TO CONGRESS iv (2017), *available at* <https://www.huduser.gov/portal/sites/default/files/pdf/Worst-Case-Housing-Needs.pdf>.

⁸⁸ 85 Fed. Reg. at 2048.

⁸⁹ A NOFA is a notice published each year by HUD, describing discretionary funding available on a competitive basis that year through HUD grant programs. The NOFA also explains specific factors and criteria” on which HUD will base its funding awards. *See Funding Opportunities*, U.S. DEP’T OF HOUS. & URBAN DEV., *available at* <https://www.hud.gov/grants>.

⁹⁰ 85 Fed. Reg. at 2048–49.

⁹¹ *Id.* at 2049.

⁹² *Id.*

⁹³ *Id.*

sufficient, or reject the AFFH certification and provide the program participant with the specific steps it must follow for HUD to accept the certification.⁹⁴ But HUD does not identify the criteria it would use to make this decision. Under the Proposed Rule, if HUD rejects a certification and the program participant fails to “provide adequate assurances that it will affirmatively further fair housing, the grant may be withheld.”⁹⁵

Fourth, the Proposed Rule would not require PHAs to submit a certification that includes their AFFH goals and obstacles.⁹⁶ Instead, PHAs would only be required to certify that they (1) affirmatively further fair housing in their programs and in areas under their direct control and (2) have “consulted” with the local jurisdiction on efforts to affirmatively further fair housing.⁹⁷ If a PHA has been subject to a HUD or DOJ finding of a violation of the FHA in the previous two years, the PHA must include with its certification an explanation of the steps it is taking to resolve the violation.⁹⁸

In short, the Proposed Rule focuses more on the development and conditions of housing, rather than any aspect of fair housing. Developing affordable housing and promoting safe and healthy housing conditions are important goals, but they are not the focus of the FHA which is to promote “truly integrated and balanced living patterns.”⁹⁹ Thus, HUD’s Proposed Rule is fundamentally misguided. HUD’s disregard of fair housing is most clearly demonstrated by the fact that “integration” is not mentioned once in the body of the Proposed Rule. Moreover, the Proposed Rule would provide no meaningful enforcement of program participants’ efforts to affirmatively further fair housing. Finally, the Proposed Rule would not require program participants to identify, let alone address, any disparities among protected classes or any concentrations of poverty in their geographic areas.

C. States Have a Critical Need for a Strong AFFH Rule.

1. History of Legal Segregation in the Housing Context.

People from racial and ethnic minority groups have been historically subject to systematic discrimination in the housing and land use context. This systemic discrimination has forced these groups out of white communities, and expanded housing opportunities, particularly homeownership, for whites, resulting in segregated communities. Such practices are enabled by

⁹⁴ *Id.*; 24 C.F.R. § 91.500(c) provides, “Within 15 days after HUD notifies a jurisdiction that it is disapproving its plan, it must inform the jurisdiction in writing of the reasons for disapproval and actions that the jurisdiction could take to meet the criteria for approval. Disapproval of a plan with respect to one program does not affect assistance distributed on the basis of a formula under other programs.”

⁹⁵ 85 Fed. Reg. at 2049.

⁹⁶ *Id.* at 2050.

⁹⁷ *Id.* at 2050, 2060.

⁹⁸ *Id.*

⁹⁹ *Trafficante*, 409 U.S. at 211.

cases like *Village of Euclid v. Amber Realty*,¹⁰⁰ in which the U.S. Supreme Court approved municipalities' practice of zoning as a reasonable exercise of state police power. Municipalities have sometimes misused their zoning power to create zoning restrictions that excluded minority and low-income residents from white and affluent communities.¹⁰¹

Legal segregation also persisted through the inclusion of racially restrictive covenants in property deeds designed to keep communities for whites only. For example, deeds recorded on homes would include clauses stating that future owners were not allowed to sell the property to black owners.¹⁰² The covenants also permitted white neighbors to sue each other for selling homes to black people, increasing the likelihood that these covenants would be enforced.¹⁰³ Communities with these covenants existed throughout the country.¹⁰⁴ This practice was legally permissible until the Supreme Court's 1948 ruling in *Shelley v. Kraemer*¹⁰⁵ but the vestiges of these racially restrictive covenants persist.

In addition to these state and local government policies, the federal government's policies and practices also promoted segregation. In the 1930s, the federal government created the Home Owners' Loan Corporation (HOLC) to give mortgage loans to homebuyers, with the goal of slowing the nation's rate of home foreclosures.¹⁰⁶ HOLC also created maps that detailed which neighborhoods it deemed were safe or unsafe credit risks for mortgage lenders, with the best areas marked in green, the worst as red, and in between areas as orange and yellow.¹⁰⁷ While most black individuals lived in areas that HOLC redlined, only a third of whites did.¹⁰⁸ Moreover, the main difference between red areas and yellow areas on the HOLC maps was that red areas had higher numbers of black residents.¹⁰⁹ Similarly, the Federal Housing Administration, an agency created to insure home loans, incorporated factors such as the

¹⁰⁰ 272 U.S. 365 (1926).

¹⁰¹ Kimberly Quick & Richard D. Kahlenberg, *Attacking the Black-White Opportunity Gap That Comes from Residential Segregation*, THE CENTURY FOUND. (June 25, 2019), available at <https://tcf.org/content/report/attacking-black-white-opportunity-gap-comes-residential-segregation/?agreed=1>.

¹⁰² Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* 78-81 (2017).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 78–81.

¹⁰⁵ 334 U.S. 1 (1948).

¹⁰⁶ Amy E. Hillier, *Redlining and the Homeowners' Loan Corporation*, 29 JOURNAL OF URBAN HISTORY 394, 394 (2003).

¹⁰⁷ *Id.* at 395.

¹⁰⁸ Jacob Krimmel, *Persistence of Prejudice: Estimating the Long Term Effects of Redlining* 12 (Working Paper, Dec. 21, 2018) (using population data from 1940).

¹⁰⁹ *Id.* at 13.

presence of racial and ethnic minorities in a neighborhood in criteria it used to determine whether it would insure a particular mortgage.¹¹⁰ In turn, mortgage lenders that relied on FHA insurance used these maps to make financing decisions.¹¹¹ Because these maps significantly influenced lenders' decisions, black families were particularly unlikely to qualify for favorable home loan terms and enjoy homeownership.¹¹²

The federal government also advanced segregation through the Federal Housing Administration's policy not to insure mortgage loans unless the properties were located in all-white neighborhoods, even if there were only a handful of black families.¹¹³ This policy had an impact on numerous communities. As one example, a group of racially mixed workers in Palo Alto, California in 1948 failed to obtain financing under this policy when they sought to create a housing development for their families.¹¹⁴ These Federal Housing Administration policies and practices created segregated white-only communities throughout the United States.¹¹⁵

The legacy of these government policies persists today to harm racial and ethnic minorities. And importantly, communities are not harmed just by the historical vestiges of past segregation policies and practices. Contemporary policies and practices, by both governmental and private entities, build off of historical policies and practices to promote segregation and stymie integration. For example, because lenders' policies under the Federal Housing Administration maps prevented racial and ethnic minorities from receiving loans on the favorable terms offered to white families, lenders saw an opportunity to market riskier loan products to minority families who wanted to own homes. To the extent racial and ethnic minorities were offered mortgage loans, they were more likely to be marketed subprime loans, due to the unavailability of traditional banking in neighborhoods with a high proportion of minority households.¹¹⁶ The extension of subprime loans to racial and ethnic minorities led to further disparities between black and white neighborhoods. Studies of subprime loans show that those loans are concentrated in neighborhoods with a high proportion of minority households, and minority households are overall more likely than white households to receive subprime loans.¹¹⁷ This pattern is consistent even when controlling for neighborhood characteristics other

¹¹⁰ Hillier, *supra* note 106 at 403.

¹¹¹ *Id.* at 403–07; Krimmel, *supra* note 108 at 8.

¹¹² Krimmel, *supra* note 108 at 11–24; Rothstein, *supra* note 102 at 63–64.

¹¹³ Rothstein, *supra* note 102 at 64–65.

¹¹⁴ *Id.* at 11–12.

¹¹⁵ *Id.* at 70–73.

¹¹⁶ Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOCIOLOGICAL REV. 629, 630–33 (2010).

¹¹⁷ Paul S. Calem, et al., *The Neighborhood Distribution of Subprime Mortgage Lending* 12–13 (University of Pennsylvania Law School Institute for Law and Economics, Research Paper No. 03-39), available at http://ssrn.com/abstract_id=478581.

than race.¹¹⁸ The prevalence of subprime loans in these communities also led to higher rates of foreclosure during the financial crisis of 2008, further perpetuating inequality between white neighborhoods and majority-minority neighborhoods.¹¹⁹

2. Because Segregation Is Entrenched, There Is an Urgent Need to Affirmatively Further Fair Housing.

As described above, segregation remains entrenched due to both historical and contemporary policies and practices. Due to the lack of effective policies requiring governments to take affirmative steps to reverse discrimination, the same or similar patterns of racial segregation in many communities, and the resulting harms, have persisted for almost a century.

Segregation harms not only individuals by denying them housing choice, it affects the quality of life for people in segregated communities in other, significant ways. Research shows that throughout the nation there are stark differences in quality of life between residents of white communities and those in black and Latinx¹²⁰ communities. In the decades since HOLC created its color-coded maps, redlined neighborhoods have been more likely to have decreased housing supply and population density than yellow-lined neighborhoods, suggesting that redlined neighborhoods are still viewed as less desirable and attract less economic investment.¹²¹ Residents of census tracts that HOLC designated as “red” were found to be 2.4 times more likely than residents of “green” neighborhoods to have visited the emergency room for asthma, and red tracts have higher measures of diesel particulate matter, a risk factor for asthma.¹²² Homes located in areas assigned lower ratings under the HOLC program still had lower average home values, decades later.¹²³

These disparities between redlined and other neighborhoods are consistent with differences in the health and access to resources between whites and racial and ethnic minorities generally. For example, on a nationwide level, predominantly black neighborhoods have half as

¹¹⁸ *Id.* (analyzing household data in Chicago and Philadelphia, although some of the disparity is explained by individual credit ratings).

¹¹⁹ Rugh & Massey, *supra* note 116 at 641.

¹²⁰ The terms “Latinx,” “Hispanic,” and “Latino” are used interchangeably throughout this document to refer to people of Mexican, Puerto Rican, Cuban, Central American, South American, Dominican, Spanish and other Hispanic descent; they may be of any race, gender, or sex.

¹²¹ Krimmel, *supra* note 108 at 20-28.

¹²² Anthony Nardone, et al., *Associations between historical residential redlining and current age-adjusted rates of emergency department visits due to asthma across eight cities in California: an ecological study* (2020) 4 THE LANCET PLANETARY HEALTH e24, e26-e28 (Using data from eight California cities).

¹²³ Ian Appel & Jordan Nickerson, *Pockets of Poverty: The Long-Term Effects of Redlining* (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2852856, at 24 (using 1990 home values).

many chain supermarkets compared to predominantly white neighborhoods, and Hispanic communities have one-third as many.¹²⁴ Research shows that neighborhood characteristics such as walkability, crime, social cohesion, and proximity to the healthy food and community assets, like green space, contribute to health outcomes.¹²⁵ Living in neighborhoods of low socioeconomic status is linked to increased likelihood of diseases including obesity, cardiovascular disease and mental illness.¹²⁶ Racial and ethnic minorities are more likely to live close to hazardous waste sites, landfills, and other hazards,¹²⁷ which leads to increased risk of asthma, cancer, obesity, infant mortality, and babies born with low birth weight.¹²⁸

Likewise, segregation is a significant cause of health disparities between racial and ethnic groups, even when controlling for the individual characteristics of people living in segregated areas.¹²⁹ For example, people in segregated neighborhoods are more likely to be underserved by health care providers, as health care facilities in those areas are less likely to be able to attract providers, because these facilities cannot sufficiently compensate them for their services.¹³⁰ Neighborhood segregation is also linked to the likelihood of hospital closings, leaving only safety-net hospitals in segregated neighborhoods that are financially strained and linked to poor health outcomes.¹³¹ These negative health outcomes then further strain states' healthcare systems.

¹²⁴ Sarah Treuhaft & Allison Karpyn, *The Grocery Gap: Who Has Access to Healthy Food and Why It Matters*, POLICYLINK & THE FOOD TRUST 13 (2010), available at http://thefoodtrust.org/uploads/media_items/grocerygap.original.pdf.

¹²⁵ Sacoby Wilson, et al., *How Planning and Zoning Contribute to Inequitable Development, Neighborhood Health, and Environmental Injustice*, 1 ENVTL JUSTICE 211, 213 (2008).

¹²⁶ *Id.*; Treuhaft & Karpyn, *supra* note 124 at 8.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Kellee White, et al., *Elucidating the Role of Place in Health Care Disparities: The Example of Racial/Ethnic Residential Segregation*, 47 HEALTH SERVS. RESEARCH 1278, 1280–85 (2012).

¹³⁰ *Id.* at 1280–82.

¹³¹ Vann R. Newkirk II, *America's Health Segregation Problem*, THE ATLANTIC (May 18, 2016) <https://www.theatlantic.com/politics/archive/2016/05/americas-health-segregation-problem/483219/> (citing M. Ko, et al., *Residential Segregation and the Survival of U.S. Urban Public Hospitals*, MED. CARE RES.REV. (June 2014)).

School segregation also generally follows housing segregation.¹³² Funding for schools is often tied to property taxes.¹³³ Where surrounding property values are low, as in segregated neighborhoods, schools often have “fewer resources, higher teacher turnover and a lower quality of education.”¹³⁴ Children from racial and ethnic minority groups are more likely to attend segregated schools with fewer resources, whereas white children of any income level are likely to attend well-funded schools with higher-income student families.¹³⁵ Residential insecurity and mobility also adversely impact student engagement and educational attainment.¹³⁶ Children in poor black and Latinx households are most acutely affected, living near schools with median math and reading scores in the 17th and 27th percentiles, respectively, while the median test scores for schools closest to poor white families are in the 47th percentile.¹³⁷ These disparities echo in graduation rates.¹³⁸ In the 2013-2014 school year, students who are black, Latinx, low-income, or have a disability were at least 10% less likely to graduate high school than white students.

Similarly, blacks living in less segregated neighborhoods have better employment levels and earnings compared to those in highly segregated areas.¹³⁹ Black children who attended

¹³² Anurima Bhargava, *The Interdependence of Housing and School Segregation*, 1, A Shared Future: Fostering Communities of Inclusion in an Era of Inequality (Apr. 2017), available at https://www.jchs.harvard.edu/sites/default/files/A_Shared_Future_Chapter_24_Interdependence_of_Housing_and_School_Segregation.pdf; URBAN INST., *Segregated Neighborhoods, Segregated Schools?* (Nov. 28, 2018), <https://www.urban.org/features/segregated-neighborhoods-segregated-schools>.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Emma Garcia & Elaine Weiss, *Segregation and Peers’ Characteristics In The 2010-2011 Kindergarten Class 60 years after Brown v. Board*, ECON. POLICY INST. 6–8, in *Bolder Approach to Education* (2014), available at <https://www.epi.org/files/2014/epi-segregation-and-peers-characteristics.pdf>; Erica Frankenberg, et al., *Harming our Common Future: America’s Segregated Schools 65 Years after Brown*, THE CIVIL RIGHTS PROJECT AND CTR. FOR EDU. & CIVIL RIGHTS 25 (May 10, 2019), available at <https://escholarship.org/uc/item/23j1b9nv>.

¹³⁶ Bhargava, *supra* note 132.

¹³⁷ Debby Goldberg, Comment to FR-6123-A-01, NAT’L FAIR HOUSING HOUS. ALLIANCE 7 (Oct. 15, 2018), available at <https://www.regulations.gov/document?D=HUD-2018-0060-0600> (citing Ellen, Ingrid Gould and Keren Mertens Horn, “do federally assisted households have access to high performing public schools?” Poverty & Race Research Action Council (Nov. 2012)).

¹³⁸ *Id.* (citing <https://www.ed.gov/news/press-releases/us-high-school-graduation-rate-hits-new-record-high-0>).

¹³⁹ Quick & Kahlenberg, *supra* note 101.

segregated schools have lower academic achievement and earnings as adults, while the opposite is true for black children who attended integrated schools.¹⁴⁰ Low employment rates may also be due to poor access to transportation in segregated areas. Non-white individuals are four times more likely than white individuals to rely on public transportation to get to and from work, yet they often live in neighborhoods that are underserved by public transportation.¹⁴¹ Racial and economic segregation, which slows local economic growth, further interferes with low-income adults' employment prospects, especially for black adults with low incomes.¹⁴²

Additionally, segregation and concentrations of poverty are self-perpetuating. Segregated homes in areas of concentrated poverty will lower the tax base, thus limiting the State's ability to invest in building affordable housing.¹⁴³ Similarly, as noted above, concentrations of poverty will lower reduce the property-tax funds available to schools, and poor schools may lead to even lower property values. Because the harms of segregation are widespread and entrenched, the States need a strong rule on the statutory mandate to affirmatively further fair housing to help their communities eradicate segregation.

3. The Harms of Segregation to Individual States Exemplify the Need for a Strong AFFH Rule.

The experiences of the states below illustrate the wide range of harms stemming from segregation and the resulting need for a strong AFFH rule that will enable HUD to carry out and vigorously enforce the FHA's mandate to affirmatively further fair housing.

a. California

California residents have endured the longstanding harms of decades-long federal, state, and local policies that created segregated communities. Notably, because of the high housing

¹⁴⁰ Stephen Menendian & Arthur Gales, *Racial Segregation in the San Francisco Bay Area, Part 4: Effects of Segregation*, OTHERING & BELONGING INST. AT UC BERKELEY (Oct. 30, 2019), available at https://belonging.berkeley.edu/racial-segregation-san-francisco-bay-area-part-4#footnoteref6_0hag6bd.

¹⁴¹ HARVARD MED. SCHOOL, *Race and Ethnicity: Clues to Your Heart Disease Risk?*, HARVARD HEART LETTER (July 17, 2015), <https://www.health.harvard.edu/heart-health/race-and-ethnicity-clues-to-your-heart-disease-risk>; ROBERT WOOD JOHNSON FOUND., "Metro Map: New Orleans, Louisiana" (June 19, 2013), available at <http://www.rwjf.org/en/library/infographics/new-orleans-map.html>; LEADERSHIP CONF. EDUC. FUND, *Where We Need to Go: A Civil Rights Roadmap for Transportation Equity* (March 2011), available at <http://www.protectcivilrights.org/pdf/docs/transportation/52846576-Where-We-Need-to-Go-A-Civil-Rights-Roadmap-for-Transportation-Equity.pdf>.

¹⁴² Vicki Been & Sophie House, Comment to FR-6123-A-01, N.Y. UNIV. FURMAN CTR. 6-7 (Oct. 15, 2018), available at <https://www.regulations.gov/document?D=HUD-2018-0060-0405>.

¹⁴³ See, e.g., Decl. of RuthAnne Visnauskas ("Visnauskas Decl.") ¶¶ 22, *Nat'l Fair Housing Alliance*, No. 18-cv-1076, Doc. No. 26-1 (June 5, 2018).

demand in California from the time of redlining through the passage of the FHA, the impacts of redlining are more pronounced in California than in some other states.¹⁴⁴ For example, the divergence index—which measures the difference between a community’s racial composition to a larger geographic area or region—rose in seven of the nine counties of the San Francisco Bay Area between 1970 and 2010.¹⁴⁵ Segregation has harmed California residents in numerous ways. For example, California census tracts with higher percentages of black and Latinx populations are the most likely in the state to be burdened with high levels of air pollution.¹⁴⁶ Tracts with high percentages of black residents have higher rates of asthma and low birth weight.¹⁴⁷ In the San Francisco Bay Area specifically, black and Latinx people living in segregated neighborhoods have higher rates of poverty, worse health outcomes, lower life expectancy, and lower educational attainment, in comparison to black and Latinx people living in neighborhoods with more white residents.¹⁴⁸ Children from segregated neighborhoods are more likely to live in poverty as adults compared to children from families with similar incomes, but who lived in less segregated neighborhoods.¹⁴⁹

California’s public schools are also highly segregated, with over half of Latinx students attending schools that have between a 90 and 100 percent Latinx student body. Likewise, almost as many black students in California schools attend schools that have almost entirely non-white student bodies, despite California having a low proportion of black students overall.¹⁵⁰

Recognizing an urgent need to address segregation, California enacted its own Affirmatively Furthering Fair Housing law (“California AFFH Law”).¹⁵¹ The California legislature’s decision was motivated in part by its prediction that HUD, under a new administration, was likely to alter the 2015 Rule.¹⁵² The final version of the California AFFH

¹⁴⁴ *Id.*

¹⁴⁵ Stephen Menendian & Richard Rothstein, *Putting Integration on the Agenda*, 28 J. Affordable Housing & Community Dev. L. 147, 176, n. 38 (2019) (citation omitted).

¹⁴⁶ Raoul S. Liévanos, *Racialized Structural Vulnerability: Neighborhood Racial Composition, Concentrated Disadvantage, and Fine Particulate Matter in California*, 16 INT’L JOURNAL OF ENVTL RESEARCH & PUBLIC HEALTH 14–15 (2019).

¹⁴⁷ *Id.*

¹⁴⁸ Menendian & Gailles, *supra* note 140.

¹⁴⁹ *Id.*

¹⁵⁰ Frankenberg, et al., *supra* note 135, at 26–30.

¹⁵¹ 2018 Cal. Legis. Serv. Ch. 958 (Assembly Bill 686).

¹⁵² The California legislature noted that in January 2017, Congress was considering bills that would undo the 2015 federal rule and also prevent federal funds from being used to support HUD’s database of disparities within communities between racial groups and access to housing. *See Housing discrimination: affirmatively further fair housing: AB 686, Hearing Before Assembly Committee on Housing and Community Development* 2018-2019 (Cal. 2018).

Law indeed closely mirrors the 2015 Rule. For example, the definition of affirmatively furthering fair housing under the California AFFH Law is substantively the same as the one in the 2015 Rule.¹⁵³ The California AFFH Law also requires local governments to incorporate affirmatively further fair housing as part of their regular housing planning process. State law existing prior to the California AFFH Law requires local governments to submit to the California Department of Housing and Community Development (CADHCD) a planning document demonstrating that the local government has zoned sufficient land to meet the housing needs of all income groups, as well as outlining its housing-related goals, obstacles, and plans to address its population's housing needs.¹⁵⁴ The California AFFH Law now also requires local governments to assess fair housing issues within their community, and assess the jurisdiction's ability to address impediments to fair housing choice.¹⁵⁵ Local governments must use federal, state, and local data to find patterns of segregation and integration, racially or ethnically concentrated areas of poverty, and unequal areas of opportunity and housing needs, and evaluate risk of displacement.¹⁵⁶ Local governments must determine what factors contribute to these patterns and decide their localities' fair housing priorities and goals, and how they will measure progress in meeting these goals.¹⁵⁷ The California AFFH Law also extends to the state itself, its agencies and officers, including the CADHCD, and public housing authorities.¹⁵⁸

The California AFFH Law, like the 2015 Rule, is an encouraging step forward for California communities. But the suspension of the 2015 Rule and the potential implementation of the Proposed Rule threaten the efficacy of the California AFFH Law. First, because the California AFFH Law and the Proposed Rule have different primary focuses (fair housing and affordable housing, respectively) and impose different obligations, HUD program participants within California may find it onerous to develop and implement fair housing policies consistent with both federal and state law. Approximately 184 California cities and counties would need to

¹⁵³ The California AFFH Law defines affirmatively furthering fair housing as: “[T]aking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a public agency's activities and programs relating to housing and community development.” Cal. Gov't Code § 8899.50(a)(1).

¹⁵⁴ Cal. Gov't Code § 65583, *et seq.*

¹⁵⁵ *Id.* § 65583(c)(9).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* § 8899.50(a)(2).

comply with both the Proposed Rule and the California AFFH Law.¹⁵⁹ Under the California AFFH Law, these cities and counties must consider existing patterns of segregation when deciding which areas to zone for affordable housing through their housing planning process and avoid concentrating housing affordable to low-income families in areas of low opportunity.¹⁶⁰ Simply allowing high-density housing in areas that already have such housing would likely be inconsistent with the California AFFH Law, as it would not address segregation or disparities in access to opportunity, or break up areas of concentrated poverty. To meet their obligations under the California AFFH Law, local governments would likely need to take steps such as re-zoning parcels suitable for multi-family projects in or near areas currently dominated by single-family homes, which tend to have higher incomes, access to high-quality schools, parks, and other resources

In contrast, the Proposed Rule's ranking system would reward program participants for high housing supply, without taking fair housing concerns into account. For many California cities and counties, continuing to build housing affordable to low-income people in areas that already contain high-density housing is expedient, as the local governments do not have to contend with opposition from affluent neighbors or go through any re-zoning process. The Proposed Rule would incentivize local governments to build housing quickly, at the lowest possible cost, without considering whether locations of new housing projects would reinforce patterns of segregation. Moreover, the proposed rule fails to analyze and consider where housing is most needed: A focus on affordable housing supply does nothing to address inequality and insufficient housing choice for persons in protected classes. In short, complying with the California AFFH Law is an entirely different process than complying with the Proposed Rule, which is focused on building housing and deregulation. In fact, some measures will work at cross purposes. Whereas California AFFH requirements may discourage building in certain areas (such as concentrations of poverty), the Proposed Rule would consider that a barrier to building affordable housing. To the extent that the Proposed Rule undercuts California AFFH Law, California cities and counties may be forced to choose between complying with and being eligible for funding between HUD and state programs, and risk losing resources that help their communities.

The Proposed Rule would also likely discourage California cities and counties from taking other steps to reduce segregation, as they are required to do under the California AFFH Law. For example, cities and counties may consider enacting inclusionary housing ordinances, which are local laws requiring developers of market-rate housing to set aside a certain percentage of units as affordable to low-income people. Inclusionary housing ordinances can be helpful

¹⁵⁹ There are 184 entitlement jurisdictions in California that receive Community Development Block Grant funding directly from HUD. *See HUD Awards and Allocations*, U.S. DEP'T OF HOUS. & URBAN DEV EXCHANGE, <https://www.hudexchange.info/grantees/allocations-awards/> (last visited February 20, 2020, using search criteria "California" and "CDBG: Community Development Block Grant Program.")

¹⁶⁰ Cal. Gov't Code § 65583.2(a).

tools to ensure that at least some affordable units exist in areas of high opportunity, and in some instances may help cities and counties comply with the California AFFH Law.¹⁶¹

The CADHCD also anticipates that confusion of California cities and counties regarding the relationship between the Proposed Rule and the California AFFH Rule is likely to lead to increased requests for technical assistance from the Department. These requests will divert staff resources and time and may require the CADHCD to hire additional staff.

Given the above challenges with complying with both state and federal obligations, California, and program participants within it, would also realize significantly increased compliance costs as a result of the Proposed Rule's implementation and the loss of HUD's publicly available data and technical assistance. The California legislature estimated the costs of compliance with the California AFFH Law by considering the fact that entities would be able to use at least some portions of their federal AFH analyses as well as the HUD-provided data to meet the state mandate.¹⁶² But if the Proposed Rule is implemented, HUD program participants within California would have to prepare two separate assessments without HUD's data and technical assistance.

¹⁶¹ See *id.* § 65583(c)(5) (requiring jurisdictions to promote fair housing opportunities throughout the community); *id.* § 65583(c)(9)(A)(v) (requiring jurisdictions to develop strategies and actions to promote fair housing goals). The Proposed Rule would also be in tension with the California's system for awarding state housing funding. The CADHCD awards state money through competitive processes to finance affordable housing. Consistent with the goals of the 2015 Rule, California undertook a two-year effort to analyze siting of the state's affordable housing portfolio and access to opportunity. This analysis resulted in Opportunity Area Maps jointly created by CADHCD and the California Tax Credit Allocation Committee. CALIFORNIA TAX CREDIT ALLOCATION COMMITTEE, *TCAC/HCD Opportunity Area Maps*, <https://www.treasurer.ca.gov/ctcac/opportunity.asp>. As measured by these maps, opportunity "can be thought of as all the pathways to better lives, including through health, education, and employment." CALIFORNIA FAIR HOUSING TASK FORCE, *Opportunity Mapping Methodology*, 1 (Nov. 27, 2018), <https://www.treasurer.ca.gov/ctcac/opportunity/final-opportunity-mapping-methodology.pdf>. The maps inform regulations related to the siting of new construction, large-family Low Income Housing Tax Credit developments in California, which have historically been concentrated in low- resource and segregated areas. CAL. HEALTH & SAFETY CODE § 50199.10; CAL CODE REGS. tit. 4, § 10325. This Tax Credit program is the predominate housing finance program in California and CADHCD's funds, such as the Multifamily Housing Program funds, are often layered on top of tax credit funding. The mapping tool incentivizes opportunities for families to live in high-resourced neighborhoods. Both the California Tax Credit Allocation Committee and CADHCD's Multifamily Housing Program (MHP) provide competitive points for the siting of deals in high opportunity areas. *Id.*; CAL CODE REGS. tit. 25, § 7320(b)(2), available at <https://www.hcd.ca.gov/grants-funding/active-funding/mhp/docs/Round-1-MHP-Final-Guidelines.pdf>.

¹⁶² *Housing discrimination: affirmatively further fair housing: AB 686, Assembly Floor Analysis* 2018-2019 (Cal. 2018); Cal. Gov't Code § 65583(c)(9)(B).

Indeed, HUD program participants, including ones in California, benefited greatly from HUD's feedback during the AFH process.¹⁶³ For example, in response to HUD's response to its draft AFFH identifying each goal as high priority, Los Angeles County re-worked its fair housing goal list to assess which of its goals deserved higher ranking and more resources.¹⁶⁴ With HUD's technical assistance, Los Angeles County, like other California entities, was able to improve its fair housing analyses. If the Proposed Rule is enacted in place of the 2015 Rule, California and other states would miss out on HUD's rigorous assistance, and its data, which is critical to their compliance with the state mandate.

b. New York

The legacy of redlining and other now-banned discriminatory housing policies continue to impact New York residents. Segregation persists in New York particularly for racial and ethnic minorities living in poverty. "Minorities are more than twice as likely to be in poverty than white residents," and black and Latinx New Yorkers specifically are "almost seven times as likely to live in high-poverty neighborhoods than white New Yorkers."¹⁶⁵ Although the number of New York residents living in the most segregated neighborhoods has steadily decreased, the degrees of segregation in metropolitan areas with large black populations has generally remained unchanged. In New York City, the dissimilarity index¹⁶⁶—one measure of racial segregation—has remained at moderate to high levels between 1990 and 2012-2016.¹⁶⁷ Troublingly, the New York City metropolitan area ranks among the top three most segregated cities in the nation for black Americans, as well as for Latinx and Asian Americans.¹⁶⁸ Other cities in New York have concerning levels of segregation. One estimate of the dissimilarity index for black and white Long Island residents (indexing segregation levels) places it 10th among 50 metropolitan areas with the largest black populations in the country, with black residents mostly living in just 11 of

¹⁶³ Justin Steil & Nicholas Kelly, *supra* note 62 at 746–47.

¹⁶⁴ *Id.* at 747.

¹⁶⁵ Rachel Fee, Comment to FR-6123-A-01, NEW YORK HOUS. CONFERENCE 1 (Oct. 15, 2018) (citing National Equity Atlas, Percent People Below Poverty by Race Ethnicity: New York, 2015 (2018)), available at <https://www.regulations.gov/document?D=HUD-2018-0060-0398>.

¹⁶⁶ The dissimilarity index "examines the evenness with which two racial groups are distributed across a geographic area, such as a neighborhood." The index "ranges from 0, which represents perfect integration, to 100, which indicates total segregation. According to guidance from HUD published in 2015, dissimilarity scores of 0 to 39 represent 'low' segregation; 40 to 54 represents 'moderate' segregation; and 55 to 100 represents 'high' segregation." CITY OF NEW YORK, *Where We Live NYC* ("*Where We Live NYC*"), 24, 75–76 (2019), <https://wherewelive.cityofnewyork.us/wp-content/uploads/2020/02/Where-We-Live-NYC-Draft-Plan.pdf>.

¹⁶⁷ *Id.*

¹⁶⁸ WESTCHESTER RESIDENTIAL OPPORTUNITIES, INC., *Affirmatively Furthering Fair Housing Toolkit 2* (2014), <https://wroinc.org/wp-content/uploads/2017/07/INT-Affirmatively-Furthering-Fair-Housing-1.pdf>.

its 291 communities.¹⁶⁹ Syracuse ranks ninth¹⁷⁰ and the Buffalo-Niagara metropolitan area ranks sixth.¹⁷¹ In Westchester County, black and Latinx residents account for 15% and 22% of the population, respectively, but are concentrated in four of the county's forty-four jurisdictions.¹⁷²

A 2014 report scores New York's schools as the most segregated in the country.¹⁷³ Forty years ago, seminal cases that linked housing and school segregation in Yonkers, Rochester, and Buffalo forced school desegregation to be a significant component of New York's education policy.¹⁷⁴ But as schools turned their focus away from desegregation, integration rates decreased.¹⁷⁵ Minority students' isolation from white students has increased over the years, and as schools have become more heavily minority, they have also become more low-income.¹⁷⁶ Indeed, segregated, low-performing schools are concentrated in high-poverty areas.¹⁷⁷

New York State and program participants within it need a strong AFFH rule to ensure continued progress in the provision of fair housing. While housing segregation is a state (and nationwide) problem, its solutions often lie in local policy.¹⁷⁸ A strong AFFH rule, like the 2015 Rule, ensures that program participants within New York will carry out their statutory duty to

¹⁶⁹ Olivia Winslow, *Dividing Lines, Visible and Invisible*, *NEWSDAY* (Nov. 17, 2019), <https://projects.newsday.com/long-island/segregation-real-estate-history/>.

¹⁷⁰ CNY FAIR HOUSING ET AL., *Analysis of Impediments: Syracuse and Onondaga County 2014*, 7 (2014), <http://media.syracuse.com/news/other/2014/11/17/CNY-Fair-Housing-Report.pdf>.

¹⁷¹ Anna Blatto, *A City Divided: A Brief History of Segregation in Buffalo*, *PARTNERSHIP FOR THE PUBLIC GOOD & OPEN BUFFALO* 2 (Apr. 2018), https://ppgbuffalo.org/files/documents/data-demographics-history/a_city_divided_a_brief_history_of_segregation_in_the_city_of_buffalo.pdf.

¹⁷² *Affirmatively Furthering Fair Housing Toolkit*, *supra* note 168 at 3.

¹⁷³ John Kucsera & Gary Orfield, *New York State's Extreme School Segregation: Inequality, Inaction and a Damaged Future*, *UNIV. OF CALIFORNIA: THE CIVIL RIGHTS PROJECT* (Mar. 2014), <https://escholarship.org/uc/item/5cx4b8pf>.

¹⁷⁴ *Id.* at vi.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at vii.

¹⁷⁷ *Where We Live NYC*, *supra* note 166 at 93. Integration for people with a disability is defined differently and more difficult to quantify or analyze. *Id.* Although patterns of neighborhood concentration, "integration" for people with disabilities "is also viewed from a building perspective, and the focus is on whether those living with disabilities are isolated from those without disabilities." *Id.*

¹⁷⁸ *See* Visnauskas Decl., *supra* note 143 at ¶¶ 12–14.

identify barriers to fair housing and overcome them.¹⁷⁹ At the same time, the AFH process allows for greater data sharing and coordination between program participants, facilitating a deeper understanding of how residential segregation affects New York residents. Indeed, program participants within New York, like program participants in California, have already observed that the 2015 Rule has facilitated their ability to affirmatively further fair housing. For example, the New Rochelle Development Department found that the new AFH process paved the way to creating clear and measurable goals for furthering fair housing and gave “a deeper understanding of fair-housing issues in New Rochelle and the interventions necessary to address those issues.”¹⁸⁰ It benefitted from two trainings, hands-on assistance, and data sets that HUD provided.¹⁸¹ The Proposed Rule would threaten to deprive New York program participants of the tools and oversight incorporated into the 2015 Rule and necessary to meet their AFFH obligation.

c. *New Mexico, Pennsylvania, and Illinois*

New Mexico, one of the few “majority minority” states, has a Latinx population that, in 2016, amounted to nearly half of the total population, yet, for the last decade, has been mostly concentrated in just six census tracts in three counties.¹⁸² Under the 2015 Rule, governments were obligated to work against the consolidation of communities of color, but, under the Proposed Rule, it is possible that the segregation of communities of color in New Mexico would increase and reflected in documents furnished under the Home Mortgage Disclosure Act (HMDA) showing racial disparities in lending by some private lenders.¹⁸³ The same is true with other protected classes, such as persons with disabilities, who are largely concentrated in the northwest corner of New Mexico as of the 2000 census¹⁸⁴ and, by 2016, constituted 30% or higher of the population in only ten census tracts.¹⁸⁵ The persistence of economic segregation under the Proposed Rule is also of particular concern for New Mexico, where the poverty rate

¹⁷⁹ *Id.* at ¶ 15.

¹⁸⁰ Decl. of Adam Salgado (“Salgado Decl.”) ¶ 14(a), (d), *Nat’l Fair Housing Alliance*, No. 18-cv-1076, Doc. 26-2 (June 4, 2018).

¹⁸¹ *Id.* at ¶ 12, 14.

¹⁸² NEW MEXICO MORTGAGE FINANCE AUTHORITY, *Analysis of Impediments to Fair Housing Choice*, to be submitted to HUD in Spring 2020, 8 (noting that New Mexico’s Hispanic population constituted 47.9% of the state’s overall population).

¹⁸³ *Id.* at 59–63 (reviewing private lender responses submitted under the HMDA indicating that conventional single family home purchases in 2017 were denied for approximately 8% of Caucasian applicants but denied for 11% of Latinx applicants. The MFA-AI also noted that 17% of low-income Black applicants earning less than 80% of the area median income were denied loans, 1.6 times the rate of low-income Caucasian applicants.).

¹⁸⁴ *Id.* at 12.

¹⁸⁵ *Id.* at 15.

has soared to 75% in some areas, particularly in the northwestern corner of the state with high concentrations of American Indian residents.¹⁸⁶

Pennsylvania also experiences persistent segregation and likewise desires a strong AFFH rule. As one example, over 70% of non-Latinx White residents in Philadelphia—and over 80% of White residents in the City of Philadelphia itself—would need to move in order for Whites and African Americans to be evenly distributed across all neighborhoods.¹⁸⁷ Reports suggest that these patterns of segregation may be in large part the result of, or exacerbated by, redlining, discrimination, and related fair housing problems in and around Philadelphia.¹⁸⁸ Indeed, a February 2018 report cited the City of Philadelphia as having one of the most egregious patterns of potential discrimination in mortgage lending.¹⁸⁹ The report triggered an investigation by Pennsylvania Attorney General Josh Shapiro, as well as actions by certain leaders at the federal, state, and city levels.¹⁹⁰ In Erie, similarly troubling reports have surfaced of redlining, discrimination, and present-day inequality.¹⁹¹ Weakening AFFH regulations, through an adoption of the Proposed Rule, runs the real risk of undercutting the legal and policy imperative to aggressively tackle the fair housing impediments at the state and local levels in Pennsylvania.

In fact, program participants in Pennsylvania have already observed how a strong AFFH rule, like the 2015 Rule, helps them aggressively address fair housing issues. In Pittsburgh, for example, an Affirmatively Furthering Fair Housing Task Force spearheaded by the Pittsburgh Commission on Human Relations issued its final report in April 2019.¹⁹² This commission was

¹⁸⁶ *Id.* at 24–25.

¹⁸⁷ See CENSUSSCOPE, Segregation: Dissimilarity Indices: Philadelphia, PA-NJ, http://www.censusscope.org/us/m6160/chart_dissimilarity.html; CENSUSSCOPE, Segregation: Dissimilarity Indices: Pennsylvania, http://www.censusscope.org/us/s42/rank_dissimilarity_white_black.html.

¹⁸⁸ See Jake Blumgart, *How Redlining Segregated Philadelphia*, NEXT CITY (Dec. 8, 2017), <https://nextcity.org/features/view/redlining-race-philadelphia-segregation>.

¹⁸⁹ See Aaron Glantz & Emmanuel Martinez, *For People of Color, Banks Are Shutting the Door on Homeownership*, REVEAL: THE CTR. FOR INVESTIGATIVE REPORTING (Feb. 15, 2018), <https://www.revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership/>.

¹⁹⁰ See Aaron Glantz, *We Exposed Modern-Day Redlining in 61 Cities. Find Out What's Happened Since*, REVEAL: THE CTR. FOR INVESTIGATIVE REPORTING (Oct. 25, 2018), <https://www.revealnews.org/blog/we-exposed-modern-day-redlining-in-61-cities-find-out-whats-happened-since/>.

¹⁹¹ See Jonathan Burdick, *Tracing Erie's History of Redlining*, ERIE READER (Feb. 13, 2019), <https://www.erie reader.com/article/tracing-eries-history-of-redlining>.

¹⁹² Bob Damewood & Paul O'Hanlon, *Policy Recommendations of the Affirmatively Furthering Fair Housing Task Force* (Apr. 2019), https://apps.pittsburghpa.gov/redtail/images/5697_AFFH_Report_FINAL.pdf.

the culmination of an extensive six-year effort to make good on the 2015 Rule's requirement that it identify barriers to fair housing and make recommendations. The sixty-two-page report contains twelve recommendations.

Finally, for residents of Illinois, who historically have suffered extensive housing discrimination and segregation,¹⁹³ reducing state and local government enforcement of the FHA's AFFH obligation will likely spell a decrease in the availability of fair housing.

II. DISCUSSION¹⁹⁴

A. The Proposed Rule Would Violate the Administrative Procedure Act Because It Is Contrary to Law.

The Proposed Rule must be rejected for many reasons, including that it would be contrary to law and thus invalid under the Administrative Procedure Act (APA). Federal agencies only have the authority to adopt regulations that are based on a permissible and reasonable construction of the governing statute.¹⁹⁵ Regulations that are "manifestly contrary to the statute" are beyond the agency's authority to adopt, are "in excess of statutory jurisdiction, authority," and are "not in accordance with law," in violation of the APA.¹⁹⁶ Such is the case here.

Several of the Proposed Rule's provisions are contrary to clear Congressional intent and frustrate the policy to affirmatively further fair housing that Congress sought to implement in passing the FHA.¹⁹⁷ As described below, the Proposed Rule would change the definition of AFFH and replace the robust AFH process with a certification requirement that would be wholly ineffective to carry out HUD's duty to affirmatively further fair housing. Further, HUD proposes a toothless review of program participants' efforts to affirmatively further fair housing and will rank them on factors entirely unrelated to fair housing. The Proposed Rule would also rank CDBG-fund recipients on metrics that do not measure their efforts to address segregation and

¹⁹³ See Whet Moser, *Housing Discrimination in America Was Perfected in Chicago*, CHICAGO MAGAZINE (May 5, 2014), <https://www.chicagomag.com/city-life/May-2014/The-Long-Shadow-of-Housing-Discrimination-in-Chicago/>; Natalie Prochaska, *How Champaign's Segregated North End Was Created 1940-1960*, THE PUBLIC I (Jan. 2016), <http://publici.ucimc.org/2016/01/how-champaigns-segregated-north-end-was-created-1940-1960/>; Lolly Bowean, *Segregation Declines in Chicago, But City Still Ranks High, Census Data Show*, CHICAGO TRIBUNE (Jan. 4, 2016), <http://www.chicagotribune.com/news/ct-segregation-declines-neighborhoods-change-met-20160103-story.html>.

¹⁹⁴ In addition to the arguments discussed here, the Attorneys General directly address questions HUD posed in the notice in Appendix C.

¹⁹⁵ *Chevron U.S.A., Inc. v. Nat. Res. Def Council*, 467 U.S. 837, 842-43 (1984); see also 5 U.S.C. § 706(2)(B).

¹⁹⁶ *Chevron*, 467 U.S. at 844

¹⁹⁷ *Id.* at 842-44; see also *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1175 (9th Cir. 2002) (no deference if agency interpretation is contrary to clear congressional intent or frustrates the policy Congress sought to implement).

promote segregation and remove any meaningful requirements. Finally, the Proposed Rule removes a requirement that PHAs demonstrate their AFFH efforts. These proposed changes contravene HUD's AFFH mandate to take meaningful actions to replace segregated living patterns with truly integrated and balanced living patterns in its programs.

1. The Proposed Rule's Definition of AFFH Contravenes AFFH's Meaning under the FHA and as Reflected in Longstanding Case Law.

The Proposed Rule's definition of AFFH conflicts with both Congressional intent and decades of established case law holding that affirmatively furthering fair housing means more than freedom from discrimination. The Proposed Rule defines AFFH as "acting in a manner consistent with reducing obstacles within the participant's sphere of influence to providing fair housing choice."¹⁹⁸ The Proposed Rule in turn defines fair housing choice as "within a HUD program participant's sphere of influence, that individuals and families have the opportunity and options to live where they choose, within their means, without unlawful discrimination related to race, color, religion, sex, familial status, national origin, or disability."¹⁹⁹

The Proposed Rule's definition of AFFH flatly disregards Congress's intent, and the conclusion of the courts, that AFFH means "more than simply refrain[ing] from discriminating themselves or from purposely aiding discrimination by others."²⁰⁰ Rather, AFFH means taking actions "to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation[.]"²⁰¹ Moreover, in meeting its statutory obligation to affirmatively further fair housing, HUD must "consider the effect of a HUD grant on the racial and socio-economic composition of the surrounding area."²⁰² Indeed, HUD itself, in explaining the 2015 Rule, acknowledged that the AFFH requirement "is not only a mandate to refrain from discrimination but a mandate to take the type of actions that undo historic patterns of segregation and other types of discrimination and afford access to opportunity that has long been denied."²⁰³

Unlike the Proposed Rule's definition of AFFH, the 2015 Rule's definition appreciates the "substantial difference between a statute that merely exhorts officials not to discriminate in effect (a negative obligation) and one that exhorts them to take steps to promote fair housing (an affirmative obligation)."²⁰⁴ To that end, the 2015 Rule defines AFFH as

taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that

¹⁹⁸ 85 Fed. Reg. at 2053.

¹⁹⁹ *Id.*

²⁰⁰ *N.A.A.C.P.*, 817 F.2d at 155 (internal quotation marks and citations omitted).

²⁰¹ *Id.*

²⁰² *Id.* at 156.

²⁰³ 80 Fed. Reg. at 42,274.

²⁰⁴ *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 72 (D. Mass. 2002).

restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.²⁰⁵

There is no reason to depart from the 2015 Rule’s well-reasoned definition and to embrace one that is devoid of affirmative obligations to address barriers to fair housing. Critically, the proposed definition does not include any reference to addressing segregation and fostering integration. This directly contradicts the intent of the FHA “to further the dual goals of preventing the increase of segregation in housing and attaining open, integrated residential housing patterns.”²⁰⁶

Moreover, the Proposed Rule’s definition, if adopted, would limit AFFH to actions that are within a program participant’s “sphere of influence.” As described in more detail below, defining AFFH so narrowly would disincentivize a program participant from collaborating with neighboring program participants and other entities to address barriers to fair housing that are regional in nature and not completely within a program participant’s control. Further, AFFH, under the proposed definition, would involve only increasing access to housing that is “within [a person or family’s] means.” Defining AFFH in such a way would give program participants permission not to address government policies or actions that prevent the construction of affordable housing in predominantly wealthy and white neighborhoods, which in turn would “exacerbates the stark segregation in America’s cities.”²⁰⁷ This narrow definition of AFFH, if adopted, would have substantial implications for HUD’s ability to fulfill its statutory duty.

- 2. Because the Proposed Rule Would Not Require Program Participants to Meaningfully Examine Ways to Desegregate and Provide Access to Fair Housing for Protected Classes, HUD Cannot Carry Out Its Duty to Affirmatively Further Fair Housing.**
 - a. Unlike the 2015 Rule, the Proposed Rule Would Requires Program Participants Only to Self-Identify Goals and Obstacles to Fair Housing, Without Any Meaningful Guidance or Standards.**

The Proposed Rule would gut the provisions of the 2015 Rule that provides HUD with meaningful oversight of program participants’ efforts to further fair housing. Critically, the Proposed Rule would abandon the AFH process in its entirety. Rather, the Proposed Rule would

²⁰⁵ 24 C.F.R. § 5.152 (emphasis added).

²⁰⁶ *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 458 (D. Md. 2005) (citing *Otero*, 484 F.2d at 1134).

²⁰⁷ *Ave. 6E Investments, LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 502 (9th Cir. 2016) (citation omitted).

change the 2015 Rule’s requirement that each program participant certify that it will “affirmatively further fair housing, which means [1] that it will take meaningful actions to further the goals identified in the AFH . . . and [2] that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing.”²⁰⁸ Under the Proposed Rule, program participants would no longer be required to certify that they will take “meaningful actions” to affirmatively further fair housing or that they will not take actions inconsistent with their AFFH obligation. Program participants instead would simply have to identify “three goals . . . or obstacles to fair housing choice . . . that the program participant intends to achieve or ameliorate, respectively” and provide a “brief description” of how addressing those goals or obstacles will affirmatively further fair housing.²⁰⁹

The Proposed Rule’s requirement to provide a “brief description” of goals or obstacles to fair housing choice stands in sharp contrast to the 2015 Rule’s robust AFH analysis. Unlike the Proposed Rule, the 2015 Rule requires program participants to use an assessment tool, which included a series of questions, and HUD-provided data and maps to assess, *inter alia*, (1) patterns of integration and segregation; (2) racially or ethnically concentrated areas of poverty; (3) disparities in access to opportunity; and (4) disproportionate housing needs.²¹⁰ Under the 2015 Rule, program participants must supplement the HUD-provided data with local data, subject to a HUD determination of that local data’s statistical validity and relevance.²¹¹ By contrast, the Proposed Rule would only require the identity of three goals or obstacles related to “fair housing choice”—even for complex or large program participants. Moreover, those three goals or obstacles would not need to be based “on any HUD-prescribed specific mode of analysis or data.”²¹² Rather, they only would need to “reflect the practical experience and local insights of the program participant” and any “objective quantitative and qualitative data” the program participant—not HUD—deems “appropriate.”²¹³

Under the 2015 Rule, program participants are also required to set goals to address fair housing issues and overcome contributing factors, prioritizing the factors that “that limit or deny fair housing choice or access to opportunity, or negatively impact fair housing or civil rights compliance.”²¹⁴ Program participants must also identify the “metrics and milestones” for achieving their fair housing goals.²¹⁵ Given the rigorous nature of the AFH analysis in the 2015 Rule, the resulting AFH can serve as an effective planning document for program participants. Indeed, a study of 28 AFHs submitted to HUD between October 2016 and July 2017 found that

²⁰⁸ 24 C.F.R. § 5.154(d).

²⁰⁹ 85 Fed. Reg. 2045, 2056-58.

²¹⁰ 24 C.F.R. § 5.154(d).

²¹¹ *Id.* § 5.152.

²¹² 85 Fed. Reg. at 2045, 2058.

²¹³ *Id.* at 2057–58.

²¹⁴ 24 C.F.R. § 5.154(d)(4)(ii).

²¹⁵ *Id.* § 5.154(d)(4)(iii).

AFHs approved by HUD (following HUD's technical assistance) included specific and measurable goals.²¹⁶

By contrast, the Proposed Rule would require only a "brief description" of the three goals or obstacles, with no standards on prioritizing the goals or obstacles with the greatest impact on fair housing. Nor is there any requirement that program participants would have to identify metrics or milestones. In fact, the Proposed Rule's limited certification requirement is so cursory that, if the Proposed Rule is adopted, "HUD expects that the AFFH process will result in only 10 hours per response."²¹⁷

The Proposed Rule's "brief description" of self-identified goals or obstacles—devoid of any supporting documentation or data—would not likely serve as a useful fair housing planning tool, like the AFHs submitted under the 2015 Rule. Moreover, because goals or obstacles need not be informed by HUD-provided data and local data, the Proposed Rule would leave open the possibility that program participants that are hostile to fair housing objectives would identify goals or obstacles that are unrelated, or even inimical to, fair housing, or that are so broad or general as to be meaningless.

In fact, it appears that HUD, through the Proposed Rule, is actually seeking to incentivize program participants to focus on issues that are unrelated to fair housing, and some that are even hostile to the protected classes under the FHA. The Proposed Rule includes a list of 16 "inherent barriers" to fair housing choice. If a program participant identifies one of those "inherent barriers" as one of its three goals or obstacles, it need not even provide a brief description as to how ameliorating that barrier will affirmatively further fair housing.²¹⁸ Remarkably, all but three of these 16 "inherent barriers" are not squarely related to fair housing. For example, one such non-fair housing-related "inherent barrier" listed by HUD is the "[c]umbersome or time-consuming construction or rehabilitation permitting and review procedures."²¹⁹ It is very difficult to see how this issue—which could affect homebuyers of any race, ethnicity, gender, or disability status—impacts fair housing choice. Other "inherent barriers" reflect antagonism to racial, economic, and environmental justice for the very protected classes HUD is mandated to support. Specifically, HUD considers as "inherent barriers" to fair housing the following: "rent control," "[u]nduly burdensome wetland or environmental regulations," "[a]rbitrary or excessive energy and water efficiency mandates," and "[a]rbitrary or unnecessary labor requirements."²²⁰ HUD is effectively incentivizing program participants to choose one of these non-fair housing related "inherent barriers"—some of which in fact support protected classes—by removing the minimal requirement that they provide even a "brief description" of that inherent barrier. By encouraging program participants to divert their resources towards non-fair housing issues, the Proposed Rule directly violates HUD's statutory duty to affirmatively further fair housing.

²¹⁶ See, generally Steil & Kelly, *supra* note 61.

²¹⁷ 85 Fed. Reg. at 2051.

²¹⁸ 85 Fed. Reg. at 2056–58.

²¹⁹ *Id.*

²²⁰ *Id.*

Still other “inherent barriers,” like “high rates of housing-related lead poisoning,” do disproportionately harm black and Latinx people and thus may relate to fair housing.²²¹ But under the Proposed Rule, HUD would make no distinction between efforts to address lead poisoning generally and one that effectively targets lead poisoning in communities with primarily black and Latinx people. The former action is not fair housing-related but the latter is. HUD, under the Proposed Rule, would not penalize a program participant if it identified this “inherent barrier” but took no steps to understand or address it as a fair housing matter.

Finally, the Proposed Rule’s list of “inherent barriers” does not include racially restrictive zoning which, as described above, state and local governments have used to maintain segregation.²²² In summarizing the Proposed Rule, HUD acknowledges that “changes to zoning laws [would] be a useful and appropriate tool to further fair housing choice.”²²³ But HUD nonetheless curiously leaves out racially restrictive zoning in its list of “inherent barriers” to fair housing and reassures program participants that “no jurisdiction may have their certification questioned because they do not choose to undertake zoning changes.”²²⁴ The fact that HUD ignores a long-recognized barrier to integration in its list of “inherent barriers” undercuts any argument that this list advances HUD’s statutory mandate to affirmatively further fair housing.

In short, the 2015 Rule’s AFH analysis strikes the right balance of providing guidance to program participants on identifying fair housing issues in their area while giving wide latitude on setting goals, metrics, and milestones on addressing those fair housing issues. That balanced approach is missing entirely in the Proposed Rule. Program participants are provided little guidance on how to identify and address goals or obstacles and are, in fact, encouraged to focus on non-fair housing “obstacles,” some of which specifically benefit the populations most likely to be subjected to segregation and discrimination. Given that the Proposed Rule’s revised certification requirement lacks any meaningful standards or guidance, it is inconsistent with HUD’s statutory duty to affirmatively further its programs.

b. Under the Proposed Rule, HUD Would No Longer Commit to Providing Data or Maps that Would Help Program Participants Identify and Prioritize Fair Housing Goals and Obstacles.

The Proposed Rule would not require program participants to use any HUD-provided data and maps. By implication, under the Proposed Rule, HUD would no longer commit to collecting and providing that data, and making it publicly available. Without such data, there would be no way for a program participant to determine the profile of segregation or integration

²²¹ *G.M.M. ex rel. Hernandez-Adams v. Kimpson*, 116 F. Supp. 3d 126, 130 (E.D.N.Y.,2015) (citations omitted).

²²² *See also Inclusive Communities*, 135 S. Ct. at 2521–22 (collecting cases on zoning laws that “function unfairly to exclude minorities from certain neighborhoods without any sufficient justifications.”).

²²³ 85 Fed. Reg. at 2046

²²⁴ *Id.*

and the racial or ethnic concentrations of poverty in its community. In turn, there would be no way for a program participant to meaningfully identify obstacles or goals to fair housing in their community. Further, stakeholders, particularly advocates and the people they serve, would lose valuable information that they could use to hold program participants accountable on fair housing issues.

Program participants themselves have recognized the value of HUD's data and maps. New York City has explained that the HUD data and mapping are among the "most critical resources" of the AFH data tool and allowed "localities of all sizes to understand and address patterns of segregation and unequal access to opportunity."²²⁵ Similarly, Seattle observed that the AFH data and mapping was a "tremendous step forward" and that "[p]roviding a central uniform data set is common sense for HUD to be able to compare AFH responses nationwide."²²⁶ Seattle cautioned—as we do here—that "HUD will be negligent . . . if it pulls the AFFH mapping tool and database without replacing it with a viable alternative."²²⁷

Additionally, if program participants are not required to consider local data under the Proposed Rule, any self-identified goals or obstacles would necessarily be subjective, and run the risk of being arbitrary or even hostile to fair housing. The reason is that local data, coupled with HUD-provided data, provides a more complete and nuanced profile of segregation, integration, and other factors affecting access to fair housing. But the Proposed Rule does not require the use of any "HUD-prescribed specific mode of analysis or data" but just that the program participants' AFFH goals or obstacles "reflect" the "practical experience and local insights" of the program participant."²²⁸ The Proposed Rule does not include any standards or definition of "practical experience" and "local insight." This qualitative approach is wholly deficient at identifying obstacles to fair housing or the goals to overcome them.

HUD itself has recognized the fundamental importance of a data-driven approach to affirmatively furthering fair housing. In justifying the 2015 Rule, HUD explained that HUD-provided and local data will "make program participants better able to evaluate their present environment to assess fair housing issues such as segregation, conditions that restrict fair housing choice, and disparities in access to housing and opportunity, identify the factors that primarily contribute to the creation or perpetuation of fair housing issues, and establish fair housing priorities and goals."²²⁹ HUD's about-face on the issue of data in its Proposed Rule lays bare HUD's intention to avoid its statutory duty to affirmatively further fair housing.

²²⁵ Elizabeth Strojan, Comments to FR-5173-N-13, CITY OF NEW YORK, (July 18, 2018), available at <https://www.regulations.gov/document?D=HUD-2018-0039-0011>.

²²⁶ Jennifer Yost, Comments to FR-5173-N-13, CITY OF SEATTLE (Mar. 6, 2018), available at <https://www.regulations.gov/document?D=HUD-2018-0001-0051>.

²²⁷ *Id.*

²²⁸ 85 Fed. Reg. at 2045, 2057, 2058, 2061.

²²⁹ 80 Fed. Reg. at 42,272.

c. The Proposed Rule Greatly Diminishes the Critical Role of the Public in Identifying Fair Housing Goals and Barriers.

The Proposed Rule would also eliminate the 2015 Rule's separate public participation process, which required, *inter alia*, that a program participant (1) provide for "meaningful community participation" in the AFH process, including holding public hearings on affirmatively furthering fair housing,²³⁰ and (2) summarize in its AFH the comments received, and explanations as to why any recommended changes to the draft AFH were not accepted.²³¹

In contrast, the Proposed Rule would direct program participants simply to fold any discussion of AFFH issues into the public hearings required as part of the consolidation plan process.²³² But the consolidation plan process, and its related public hearings, are focused on issues of affordable housing and general community development.²³³ While there may be overlap between those issues and fair housing, any discussion of AFFH in the consolidation plan public hearings would be less focused, and less purposeful than the public discussion outlined in the 2015 Rule. As a result, program participants would likely lose out on the valuable insight of protected classes, fair housing advocates, and other stakeholders. Furthermore, stakeholders would likely miss an opportunity to hold program participants accountable for their commitment to affirmatively further fair housing.

Moreover, without community engagement, program participants would run the risk of identifying only vague, general goals or obstacles to affirmatively furthering fair housing that are not specific to that geographic area. This likely consequence of the Proposed Rule is contrary to HUD's commitment to providing program participants "the flexibility . . . to take action based on the needs, interests, and means of the local community, [which] respects the proper role and expertise of state and local authorities."²³⁴

The proposed elimination of a separate community participation requirement overlooks the critical value of community participation in informing any meaningful effort to affirmatively further fair housing. A study of AFHs submitted to HUD between October 2016 and July 2017 found that program participants benefited greatly from "robust community engagement" which

²³⁰ 24 C.F.R. § 5.158(a); *see also* 80 Fed Reg. at 42,300 ("public input is a fundamental and necessary component in the AFH process").

²³¹ 24 C.F.R. § 5.154(d)(6).

²³² 85 Fed. Reg. at 2045, 2054, 2055–56, 2059.

²³³ *See Consolidated Plan*, U.S. DEP'T OF HOUS. & URBAN DEV EXCHANGE, <https://www.hudexchange.info/programs/consolidated-plan/> ("The Consolidated Plan is designed to help states and local jurisdictions to assess their affordable housing and community development needs and market conditions, and to make data-driven, place-based investment decisions. The consolidated planning process serves as the framework for a community-wide dialogue to identify housing and community development priorities . . .").

²³⁴ 85 Fed. Reg. at 2045.

helped them “craft creative goals that could meaningfully advance fair housing.”²³⁵ Program participants without similar community engagement “struggled to identify such [fair housing] goals.”²³⁶ The experience of New York City is illustrative. New York City engaged in robust public outreach as required by the 2015 Rule by assembling a stakeholder group of over 150 leaders in housing development and advocacy, as well as by engaging more than 700 New York City residents in a series of focus-group meetings.²³⁷ Although HUD’s suspension of the 2015 Rule obviated the need to submit an AFH report, New York nonetheless completed its AFH and released “Where We Live NYC” in 2019. The City’s combination of public engagement and deep research identified nine primary impediments to fair housing.²³⁸ New York observed that “[c]ommunity participation provides a more nuanced understanding of underlying barriers to housing choice and access to opportunity, helping us prioritize contributing factors and develop goals that adequately respond to local challenges. Community input also provides a rich narrative of how fair housing issues affect the everyday lives of residents, especially when quantitative data on a specific population or protected class is limited.”²³⁹ New York further observed that community participation “strengthens trust and relationships between the City and local communities, especially those traditionally left out of government decision-making processes” and lends legitimacy to program participants’ efforts to affirmatively further fair housing.²⁴⁰

Finally, the Proposed Rule, unlike the 2015 Rule, would not require program participants to provide any information on the community feedback it received and the reasons why recommendations were not accepted. Thus, there would be no way for HUD to assess the adequacy of the participants’ actions, which is a boon for program participants that have historically resisted addressing segregation and promoting integrated housing. Because community participation is critical to any meaningful effort to address fair housing issues, the diminished role of the community in the Proposed Rule would frustrate HUD’s ability to carry out its statutory duty to affirmatively further fair housing.

d. The Proposed Rule Would Render HUD Powerless to Ensure that its Program Participants Are Affirmatively Furthering Fair Housing.

Under the Proposed Rule’s revised certification requirement, program participants would be unlikely to meaningfully examine ways to desegregate their communities, promote integration, and address other fair housing issues. And the revised certification requirement would give a program participant wide latitude to focus on goals or obstacles that are unrelated

²³⁵ See Steil & Kelly, *supra* note 62 at 748.

²³⁶ *Id.*

²³⁷ *Where We Live NYC*, *supra* note 166 at 34.

²³⁸ *Id.* at 178.

²³⁹ Strojan, *supra* note 225.

²⁴⁰ *Id.*

to fair housing—or even hostile to it—so long as the program participant can briefly describe how they “reflect the practical experience and local insights of the program participant.”²⁴¹

Compounding these above deficiencies, the Proposed Rule would render HUD nearly powerless to hold program participants accountable for failing to address goals or obstacles to affirmatively furthering fair housing. In contrast to the iterative process of review and approval in the 2015 Rule, the Proposed Rule would require program participants to provide, as part of its annual performance report on its consolidated plan, an update on “actions taken pursuant to the . . . certification to affirmatively furthering fair housing and any measurable results of those action.”²⁴² HUD would then evaluate the actions taken by a program participant and deem them “satisfactory” if the actions taken are “rationally related to the goals or obstacles identified in the jurisdiction’s certification to affirmatively further fair housing.”²⁴³ As with a program participant’s initial identification of goals and obstacles, the Proposed Rule would not require a program participant provide any data to support its representations of the steps it has taken to address those goals and obstacles. HUD would simply “trust” that a program participant’s “preferred method of affirmatively furthering fair housing is a valid method of fulfilling its statutory duty” absent “evidence to the contrary.”²⁴⁴ However, under the Proposed Rule, HUD, would not commit to identifying or considering any contrary evidence.

By taking a program participant’s stated efforts to affirmatively further fair housing at face value, HUD would effectively abdicate its obligation under the FHA to ensure that its programs are, in fact, furthering fair housing. The Proposed Rule would in effect allow HUD to rubberstamp, for example, a program participant’s representation that it has taken steps to dismantle rent control as a “valid method” to affirmatively further fair housing even if there is no documentation that (1) the program participant has actually taken any such steps and (2) undoing rent control would have any impact on decreasing segregation or promoting integration. Stated otherwise, HUD’s highly deferential review under the Proposed Rule would reduce HUD’s oversight of affirmatively furthering fair housing efforts to a paper exercise, with no functional difference from the AI process. HUD is thus sending a clear message by using the lowest level of review of program participants’ AFFH efforts in its Proposed Rule: Under the Proposed Rule, HUD would not—nor could it—fulfill its duty to affirmatively further fair housing in its programs.

HUD contends that any higher level of review amounts to a form of second-guessing that the U.S. Supreme Court warned against in *Inclusive Communities*. Not so. *Inclusive Communities* only cautioned against premising disparate impact liability on “second-guess[ing] which of two reasonable approaches.” *Inclusive Communities* did not limit HUD’s authority to evaluate whether a program participant has committed to advancing fair housing *in the first place*. Moreover, the Supreme Court made clear that program participants are required to

²⁴¹ 85 Fed. Reg. at 2057–58.

²⁴² *Id.* at 2059.

²⁴³ *Id.*

²⁴⁴ *Id.* at 2050.

demonstrate that their approach is “*necessary* to achieve a valid interest.”²⁴⁵ HUD’s deferential standard of review is thus inconsistent with *Inclusive Communities*, which requires that while a reasonable approach cannot be second-guessed, it must also be necessary to achieve a valid interest.

3. HUD’s Proposed Ranking System is Unrelated to Fair Housing and Thus is a Wholly Ineffective Mechanism to Enable HUD to Carry Out Its Duty to AFFH.

HUD also proposes an annual analysis and ranking system to identify program participants that are “especially succeeding at affirmatively furthering fair housing” as well as program participants needing additional assistance.²⁴⁶ The threshold definition for “especially succeeding” is absent in the regulation. Notably, this ranking system is wholly divorced from each program participant’s progress toward its three AFFH goals, the AFFH requirement described above. Instead, HUD eschews its prior rationale regarding “the unique needs and difficulties faced by individual program participants” in favor of a broad and prescriptive comparison ranking program participants using nine common factors,²⁴⁷ intended to assess whether a program participant has (1) an adequate supply of affordable housing, and (2) an adequate supply of available quality housing.²⁴⁸

The nine factors HUD proposes to evaluate are:

1. Median home value and contract rent.
2. Household cost burden.
3. Percentage of dwellings lacking complete plumbing or kitchen facilities.
4. Vacancy rates.
5. Rates of lead-based paint poisoning.
6. Rates of subpar Public Housing conditions.
7. Availability of housing accepting housing choice vouchers throughout the program participant’s jurisdiction.
8. The existence of excess housing choice voucher reserves.
9. Availability of housing accessible to persons with disabilities.²⁴⁹

²⁴⁵ *Inclusive Communities*, 135 S. Ct. at 2522-23 (emphasis added).

²⁴⁶ 85 Fed. Reg. at 2053.

²⁴⁷ *Id.* at 2041; *see also id.* at 2045 (revising the definition of AFFH to allow program participants to create custom approaches based on their “unique circumstances.”); *id.* at 2051 (claiming the proposed rule allows program participants to determine how to AFFH based on their “unique combination of resources, economic situations, and local needs.”).

²⁴⁸ *Id.* at 2053.

²⁴⁹ *Id.* at 2053–54.

As discussed above, these factors—while important for individuals to secure affordable, safe, and healthy housing—do not relate to the core issues of segregation and other discrimination that are at the heart of the FHA.

HUD intends to create a ranking score in a separate Federal Register notice and then divide program participants into six categories:

1. Program participants with population growth and tight housing markets.
2. Program participants with population growth and loose housing markets.
3. Program participants with population decline and tight housing markets.
4. Program participants with population decline and loose housing markets.
5. States with significant population growth.
6. States without significant population growth.²⁵⁰

“Tight” and “loose” housing markets are not defined, nor is “significant” population change. Again, these categories do not connect with the FHA’s purposes.

Under the Proposed Rule, outstanding program participants and most-improved program participants may be eligible during a two-year period for additional points in NOFAs²⁵¹, additional program funds, and regulatory relief from AFFH requirements. The nature of these benefits is suggested but not actually set forth in the Proposed Rule. Low-ranking program participants will be subject to remedial action.²⁵² A program participant would be ineligible to be considered “outstanding” if it, in the past five years, (1) has been found by a court or administrative law judge to be in violation of civil rights laws in a case brought by HUD or the DOJ, (2) has had HUD disapproved of the previous consolidated plan AFFH certification, (3) or has had HUD declare an annual performance report unsatisfactory.²⁵³ These metrics do not relate to affirmatively furthering fair housing, are fundamentally flawed, and remain woefully incomplete.

a. HUD’s Proposed Ranking System Does Not Relate to Affirmatively Furthering Fair Housing.

By ranking program participants’ fair housing efforts predominately on the supply of housing, the Proposed Rule would conflate housing choice with fair housing. HUD’s proposed ranking is primarily concerned with developing housing, rather than focusing on fair housing as FHA requires. HUD itself acknowledges this, providing a disclaimer that the ranking “is not a determination that the jurisdiction has complied with the [FHA].”²⁵⁴

²⁵⁰ *Id.*

²⁵¹ See U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 89 (describing NOFAs).

²⁵² *Id.* at 2054.

²⁵³ 24 C.F.R. § 5.155 (d)(3)(i) and (ii).

²⁵⁴ 85 Fed. Reg. at 2053.

As described above, the AFFH statutory mandate is rooted in integrating neighborhoods after years of public policies that explicitly segregated every major metropolitan area in the United States.²⁵⁵ The history of government-sanctioned segregation and the ongoing use of policies and practices that promote segregation and hinder integration are the reasons AFFH obligations are targeted not at simply building more housing, but *where* that building occurs. Rewarding program participants for building low-income housing in concentrations of poverty, away from public transportation, near toxic sites, and in failing school districts is an anathema to AFFH obligations. As one court reviewing AFFH compliance put it, “[a]s a matter of logic, providing more affordable housing for a low-income racial minority will improve its housing stock but may do little to change any pattern of discrimination or segregation. Addressing that pattern would at a minimum necessitate an analysis of where the additional housing is placed.”²⁵⁶

HUD makes no mention or argument regarding its proposed departure from concerns with where housing is placed. Instead, HUD justifies its Proposed Rule with an uncited and unsupported statement that “increasing the availability of affordable housing in a community would help low-income families.”²⁵⁷ This overbroad, blanket statement neglects the harm HUD itself has historically recognized can result from increasing concentrations of poverty.²⁵⁸ In fact, research has demonstrated that concentrated poverty can—once certain tipping points are reached—profoundly impact crime, school attendance, and persistent poverty.²⁵⁹ Instead of the Proposed Rule’s singular focus on supply, AFFH should be concerned with thoughtfully considering *where* people are housed, a concept wholly absent in HUD’s rankings (or elsewhere

²⁵⁵ See, e.g., Rothstein, *supra* note 102 at Preface VII-VIII (“Today’s residential segregation in the North, South, Midwest, and West is not some unintended consequence of individual choices and of otherwise well-meaning law or regulation but of unhidden public policy that explicitly segregated every metropolitan area in the United States.”); see also, *Inclusive Communities*, 135 S. Ct. at 2514.

²⁵⁶ See *U.S. ex rel. Anti-Discrimination Center of Metro N.Y., Inc. v. Westchester County*, 668 F.Supp.2d 548, 564–65 (S.D.N.Y., 2009).

²⁵⁷ 85 Fed. Reg. at 2048.

²⁵⁸ HUD OFF. OF POLICY DEV. & RESEARCH, EVIDENCE MATTERS: UNDERSTANDING NEIGHBORHOOD EFFECTS OF CONCENTRATED POVERTY (Winter 2011), <https://www.huduser.gov/portal/periodicals/em/winter11/highlight2.html> (“Studies have illustrated that crime and delinquency, education, psychological distress, and various health problems, among many other issues, are affected by neighborhood characteristics. Thresholds, or tipping points, also prove important.”).

²⁵⁹ *Id.* (“In a recent review of research, [Professor George C.] Galster notes that studies suggest ‘that the independent impacts of neighborhood poverty rates in encouraging negative outcomes for individuals like crime, school leaving, and duration of poverty spells appear to be nil unless the neighborhood exceeds about 20 percent poverty, whereupon the externality effects grow rapidly until the neighborhood reaches approximately 40 percent poverty; subsequent increases in the poverty population appear to have no marginal effect.’”).

in the Proposed Rule, for that matter). If the Proposed Rule's ranking system is implemented, HUD would not be able to effectively measure program participants' efforts to affirmatively further fair housing because the system simply would not measure the factors most relevant to fair housing. HUD, as noted above, does not deny this.

b. The Proposed Rule's Ranking System Would Unduly Penalizes High-Cost Cities and Conflate Housing Quality with Fair Housing, and Therefore Would Not Promote Fair Housing.

Several of HUD's factors are outside of any program participant's control and only serve to penalize large, urban areas, with high housing costs without regard to any fair housing goals. The median home value, contract rent, and vacancy rates only indicate the relative wealth of that area, and thus ranking a program participant based on those factors will reveal nothing about that program participant's efforts to AFFH. Moreover, the median price of housing, rents, and vacancy rates are driven by market forces outside of a program participant's control. Separating out program participants by population growth and "tight" housing markets does little to account for the program participant's control, as even program participants significantly investing in AFFH may rank low under these factors. High-cost cities that receive a low ranking under the Proposed Rule may "have their AFFH certifications questioned," but HUD does not explain what this questioning would involve and HUD retains significant discretion to penalize low-ranking jurisdictions as it sees fit, which could lead to targeting of certain program participants over others.²⁶⁰ Moreover, it may improperly penalize program participants that are significantly investing in affirmatively furthering fair housing. Similarly, household cost burdens, typically defined as the percentage of income paid toward rent but undefined in the Proposed Rule, would target high-cost cities even if those cities have policies to ameliorate those effects, such as a higher minimum wage.²⁶¹ HUD has also recognized criticisms of the household cost burden as a measure of affordable housing, given that "households earning the same annual income spend considerably different amounts of money on basic necessities" and income is often underreported.²⁶²

²⁶⁰ 85 Fed. Reg. at 2049 ("HUD proposes to use the identification of the lowest performers in AFFH to target its resources in many areas, such as grant administration and regulatory oversight, not just in civil rights enforcement.").

²⁶¹ JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUS. (2018) *available at* https://www.jchs.harvard.edu/sites/default/files/HarvardHarvard_JCHS_State_of_the_Nations_Housing_2018.pdf ("Despite a small decrease, the cost-burdened share of households in California was still 42 percent in 2016, with rates in New York and New Jersey nearly as high at 39 percent. These states are home to 17 of the 25 metros with the highest burden rates in the country. Los Angeles tops the list (47 percent), followed by Miami, Santa Barbara, and Atlantic City.")

²⁶² U.S. DEP'T OF HOUS. & DEV., OFF. OF POLICY DEV. & RES., *Rental Burdens: Rethinking Affordability Measures*, PD&R EDGE (Sept. 22, 2014), https://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_092214.html.

The metrics regarding quality (dwellings lacking kitchens and plumbing, rates of lead-based paint poisoning, rates of subpar housing conditions) similarly miss the mark. While advancing housing quality standards is a worthwhile endeavor, these factors do not necessarily relate to AFFH. While substandard housing is often disproportionately located in communities of color, HUD's proposed ranking system would not measure how substandard housing in a program participant's area impacts protected classes. Metrics on "quality housing" as they specifically relate to disproportionate harms to protected classes could include the safety of the neighborhood, quality of the school system, proximity to toxic sites, access to public transportation, and other metrics identified in the 2015 Rule. These metrics, despite their clear connection to fair housing, are curiously not part of HUD's proposed ranking system.

The Proposed Rule's other three metrics may have at least some relation to AFFH. The denial of housing choice vouchers is a documented cause of discrimination and contributes to racial and economic disparities within program participants.²⁶³ Excess housing choice vouchers may relate to fair housing, but HUD has failed to explain its rationale for the metric or what prompted its inclusion. Finally, the availability of accessible housing is important, but it is inadequate. A more complete AFFH factor would be the availability of accessible housing *throughout the jurisdiction* and would include disability services, which are an essential part of fair, supportive housing.²⁶⁴

The factors that HUD proposes are not focused on fair housing issues and do not specifically measure any progress a program participant has made in overcoming barriers to fair housing. Instead, HUD proposes to judge program participants on a hodgepodge of factors, outside of a program participant's control and without regard to their impact on protected classes, thus creating an arbitrary ranking.

c. The Proposed Rule's Fair Housing Adjudication Penalty Is Flawed and Would Be Ineffective at Evaluating AFFH Efforts.

Under the Proposed Rule, HUD would not be able to designate a program participant as "outstanding" if, in the past five years, it has been found by a court or administrative law judge to be in violation of civil rights laws in a case brought by HUD or the DOJ.²⁶⁵ While potentially

²⁶³ Kriston Capps, *See How Landlords Pack Section 8 Renters Into Poorer Neighborhoods*, CITYLAB (January 9, 2019) available at <https://www.citylab.com/equity/2019/01/section-8-housing-government-low-income-vouchers-renters/579496/>.

²⁶⁴ Ehren Dohler, et. al, *Supportive Housing Helps Vulnerable People Live and Thrive in the Community*, CTR. FOR BUDGET & POLICY PRIORITIES (May 31, 2016), available at <https://www.cbpp.org/research/housing/supportive-housing-helps-vulnerable-people-live-and-thrive-in-the-community>.

²⁶⁵ 85 Fed. Reg. at 2054. Under the Proposed Rule, HUD would also not be able to designate a program participant as outstanding if, in the past five years, it (1) has had HUD disapprove of the previous consolidated plan's AFFH certification or (2) has had HUD declare an annual performance report unsatisfactory. *See id.*

relevant to a program participant's obligation to refrain from discrimination, these provisions do not address a program participant's AFFH performance.

First, while HUD has the data and capacity to do so, HUD has apparently not analyzed how many program participants would be affected by this metric. HUD tracks its adjudicated complaints in annual Office of Fair Housing and Equal Opportunity (FHEO) Reports and, as these reports show, fully adjudicated fair housing claims are rare, as most claims—fair housing or otherwise—settle. In 2017, of the 17 DOJ fair housing-related case outcomes, only two had a final judgment.²⁶⁶ And in 2017 there was just one administrative law judge (ALJ) adjudicated claim.²⁶⁷ In 2016, of the 19 DOJ fair housing case outcomes there were zero final judgments.²⁶⁸ And there was just one ALJ adjudicated claim.²⁶⁹ Similarly, in 2014 and 2015 there was only one DOJ fair housing case that had a final judgment.²⁷⁰ There were no ALJ adjudicated claims in 2015, and one in 2014.²⁷¹ That amounts to just three final judgments from DOJ fair housing cases and three ALJ adjudicated claims over those four years. Moreover, these tiny handful of cases include claims brought against individual housing providers as well as the type of entities subject to the AFFH obligation. Compounding this problem is HUD's proposed rule that would limit the ability to bring disparate impact claims, which may further diminish the likelihood of successful adjudications.²⁷² Thus, this metric is essentially meaningless, as HUD's own data show. Similarly, HUD has not counted the number of program participants with rejected consolidated plans or unsatisfactory annual performance reports. Without having done its due diligence of the impact of such a metric, especially when HUD possesses the relevant data, HUD acts arbitrarily and capriciously in making its proposal.

Moreover, fair housing adjudications do not accurately measure if a program participant is working to affirmatively further fair housing. Whether a program participant has adjudicated

²⁶⁶ U.S. DEP'T OF HOUS. & URBAN DEV., OFF. OF FAIR HOUSING & EQUAL OPPORTUNITY, 2017 ANN. REPT. at 20–21, *available at* https://www.hud.gov/sites/dfiles/FHEO/images/FHEO_Annual_Report_2017-508c.pdf. (the rest were settled out of court, by consent decree, or the investigation closed).

²⁶⁷ *Id.* at 19.

²⁶⁸ U.S. DEP'T OF HOUS. & URBAN DEV., OFF. OF FAIR HOUSING & EQUAL OPPORTUNITY, 2016 ANN. REPT. at 24–26, *available at* <https://www.hud.gov/sites/documents/FY2016FHEOANNUALREPORT.PDF>. (all were settled by consent decree, dismissed, or the investigation closed)

²⁶⁹ *Id.* at 24.

²⁷⁰ U.S. DEP'T OF HOUS. & URBAN DEV., OFF. OF FAIR HOUSING & EQUAL OPPORTUNITY, 2014-15 ANN. REPT. at 32–34, *available at* <https://www.hud.gov/sites/documents/FY14-15FHEOANNRERT.PDF>.

²⁷¹ *Id.* at 31.

²⁷² HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854 (Aug. 19, 2019).

fair housing claims against it does not indicate whether a program participant has identified and is working to rectify fair housing issues. Nor does “being free of adjudicated fair housing claims” measure affirmative steps taken to advance fair housing. Even regarding violations, as identified above, public and private fair housing enforcement often result in settlements that are short of an adverse ruling against the program participants. HUD requests comments on other methods of counting civil rights cases, but again has not informed itself on issues within its control before making such a request.²⁷³ In fact, for nearly a decade, HUD’s General Section NOFA Policy conditioned eligibility for an award from HUD on the resolution of civil rights matters.²⁷⁴ Open matters that affect eligibility include HUD-initiated fair housing charges, various DOJ lawsuits, receipt of a letter of findings identifying fair housing non-compliance, and receipt of a cause determination from a substantially equivalent state or local fair housing agency.²⁷⁵ A HUD determination of compliance with any settlement before the NOFA deadline resolves the matter.²⁷⁶ HUD, without reason or rationale, arbitrarily proposes a metric at odds with its own NOFA policy.

HUD’s proposed penalty would further weaken its enforcement power in the Proposed Rule. HUD has yet to determine what benefits an “outstanding” designation entails, and presumably there would be no consequence for any program participant that would not otherwise have an “outstanding” designation. Instead, as in the NOFA context, final judgments should be a dispositive determination of a failure to AFFH and trigger meaningful disqualification from receipt of CDBG funds and/or other remedial action.²⁷⁷

This proposed penalty is also hampered by the inherently under-inclusive nature of claims that are actually reported, let alone forwarded to HUD or DOJ for adjudication. For example, in a state with a population of over 39 million people, California’s Department of Fair Employment and Housing mediated just 873 complaints, settled 792 cases, and litigated 29 cases in 2018 (latest year available) and not all of those cases involved fair housing claims.²⁷⁸ Many

²⁷³ 85 Fed. Reg. at 2047.

²⁷⁴ See, e.g., U.S. DEP’T OF HOUS. & URBAN DEV., General Section to HUD’s Fiscal Year 2017 Notice[s] of Funding Availability for Discretionary Programs (General Section) (“General Section to HUD’s Fiscal Year 2017 NOFA”), FR-6100-N-01, <https://files.hudexchange.info/resources/documents/FY-2017-NOFA-Policy-Requirements-and-General-Section.pdf>; U.S. DEP’T OF HOUS. & URBAN DEV., FY 1998 Super Notice of Funding Availability for National Competition Programs (1998), <https://archives.hud.gov/funding/1998/suprnofa/natcomp/4361natn.cfm>.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ CAL. DEP’T OF FAIR EMPLOYMENT AND HOUS., 2018 ANN. REP. at 3 and 17, available at <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/01/DFEH-AnnualReport-2018.pdf>. Indeed, fair housing claims only represent a limited number of the complaints handled by the

fair housing claims are not reported due to lack of legal resources or a lack of affordable legal representation in the area that would bring an individual's claim. Perversely, a program participant that puts resources into legal assistance for people suffering discrimination would face penalties under the Proposed Rule, due to the number of increased claims that will be uncovered and brought to its attention. Additionally, bringing complex legal claims regarding zoning and disparate impact are beyond the means of most individuals receiving HUD assistance, so using such formal complaints as a measure of AFFH compliance is inherently flawed. HUD has not accounted for any of these factors in its Proposed Rule.

d. The Proposed Rule's Ranking Would Discourage Collaboration.

HUD believes that the Proposed Rule would encourage program participants "to share lessons learned from unsuccessful efforts and successful efforts alike."²⁷⁹ However, under the ranking and rewards framework HUD proposes, these program participants would be in zero-sum competition to be "outstanding." Winners would reap NOFA and financial benefits and losers would face remedial action including the potential of losing HUD funding.²⁸⁰ HUD has not analyzed how or why program participants would share and provide assistance in this competitive landscape. Instead, this competitive system would discourage any program participant from helping a "competitor" program participant.

4. The Proposed Rule Would Remove Any Meaningful Public Housing Authority AFFH Requirement.

Under the 2015 Rule, public housing authorities (PHAs) are required to certify that they would affirmatively further fair housing in their programs and in areas under their direct control and "address fair housing issues and contributing factors in [their] programs."²⁸¹ As discussed above, under the Proposed Rule, PHAs "would not be required to submit a certification detailing AFFH goals and obstacles."²⁸² PHAs' AFFH certification requirement would be reduced to "to certif[ying], in every applicable annual plan, that they have *consulted* with the jurisdiction on how to satisfy their obligations to AFFH. This participation and certification would fulfill their AFFH responsibilities."²⁸³ The Proposed Rule would further require PHAs to demonstrate their efforts to AFFH only through their participation in the consolidated plan process.²⁸⁴ There would be no requirement that a PHA conduct any analysis of its own policies or practices to

Department of Fair Employment and Housing. Of the 20,822 complaints received by the Department in 2018, only 784 involved fair housing claims. *See id.* at 9.

²⁷⁹ 85 Fed. Reg. at 2049

²⁸⁰ *Id.* at 2049 (ranking low may trigger HUD review, a process which can culminate in HUD withholding grants).

²⁸¹ 24 C.F.R. § 903.7(o).

²⁸² 85 Fed. Reg. at 2050.

²⁸³ *Id.* at 2045 (emphasis added).

²⁸⁴ *Id.* at 2041.

determine if they are having an adverse effect on fair housing. Nor would PHAs required to collect, measure, or examine any data or take any action if fair housing issues are identified. Finally, if the PHA has been received a HUD letter or a HUD or DOJ adjudication finding a violation of the FHA in the last two years, the PHA would need to explain what steps it has taken to resolve the violation.²⁸⁵ There is no provision requiring HUD to find that the steps the PHA took were adequate.

a. Consultation Alone Does Not Adequately Further Fair Housing.

Under the Proposed Rule, the only AFFH requirement for PHAs would be to consult with the jurisdiction. HUD proposes eliminating its 2015 provisions that ensures consultation was ongoing and that defined consultation to provide structure and meaning.²⁸⁶ In effect, under the Proposed Rule, HUD would abdicate its concurrent and independent AFFH responsibility to monitor PHA use of federal funds.²⁸⁷ The requirement to consult, without any further definition, requirement to act, or actual HUD oversight, is effectively meaningless.

Even prior to the 2015 Rule, courts rejected this unrestrained approach to PHA AFFH compliance. For example, in *Langlois v. Abington Housing Authority*, the court partially granted the plaintiff's motion for summary judgment under the AFFH provision of the FHA, finding:

Whatever “affirmative furtherance” may mean in other settings, in this setting it is clear. It should have occurred to the PHAs, prior to their adoption of the 1998 plans, to, at the very least, investigate the potential implications for fair housing of the proposed residency preferences and application processes. [. . .] They did not bother to keep the kinds of records that would enable them to determine the impact of their new processes. They did not bother to identify potential impediments to fair housing that their application procedures might present.²⁸⁸

²⁸⁵ *Id.* at 2060.

²⁸⁶ For example, the Proposed Rule eliminates a provision that requires consultation “at various points in the fair housing planning process, meaning that, at a minimum, the jurisdiction will consult with the organizations [. . .] in the development of both the AFH and consolidated plans [and . . .] shall specially seek input into how the goals identified in an accepted AFH inform the priorities and objectives of the consolidated plan.” 24 C.F.R. § 91.05(e)(3).

²⁸⁷ See *Young v. Pierce*, 628 F. Supp. 1037, 1054–55 (“It has been clear at least since the passage of Title VIII—if not from the date of Executive Order 11063 and HUD’s inception as a federal agency—that HUD has had an affirmative duty to eradicate segregation. A necessary prerequisite for fulfilling this duty is to obtain information about discrimination practiced under HUD’s auspices.”); 42 U.S.C. § 3534(a) (placing PHA responsibilities under HUD).

²⁸⁸ *Langlois v. Abington Housing Authority*, 234 F.Supp.2d 33, 78 (D.Mass. 2002); see also *Otero*, 484 F.2d at 1124; *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994).

The Proposed Rule would follow the same hands-off approach by removing any requirement that a PHA investigate the fair housing implications of its practices and policies. This would allow PHAs to return to practices that violate their AFFH responsibilities without consequences from HUD.

b. PHAs Can Cause Segregation through Policies and Practices.

HUD cautions that *Inclusive Communities* warned against forcing housing authorities to reorder their priorities to “remedy mere statistical imbalances in housing.”²⁸⁹ HUD presumes that PHAs are vulnerable to *de facto* and unmeritorious disparate impact claims, ignoring PHAs’ long history of fair housing violations. Indeed, as recently as November 2018, HUD announced a \$1.5 million settlement against a PHA for violations of the Fair Housing Act and Section 504 of the Rehabilitation Act.²⁹⁰ And since 2008, DOJ has settled by consent decree claims against no fewer than nine PHAs (Altoona, Pa.; Bossier City, La.; Eastman, Ga.; Los Angeles County, Calif.; Royston, Ga.; Ruston, La.; Wayne County, Ill.; Wheeling, W. Va.; Winder, Ga.) that their policies resulted in unlawful discrimination on the basis of race prohibited by the Fair Housing Act.²⁹¹ One 2017 consent decree required new advertising, adopting a new complaint policy, new training regarding disability discrimination, enhanced recordkeeping, and establishing a reasonable accommodation policy (among other requirements).²⁹² Clearly, HUD appreciates the adverse impact of PHA policies and practices on fair housing, yet inexplicably seeks to remove any requirement that PHAs analyze those policies and practices and take action to affirmatively further fair housing.

Indeed, there are many ways that PHAs have historically fostered segregation and could continue to do so without HUD oversight. PHAs have control of both where public housing is constructed and who is admitted to live in that housing. Throughout recent history, a number of PHAs have used that authority to increase segregation.²⁹³ PHA policies and practices that have contributed to segregation include, but are not limited to:

- proposing public housing for demolition or disposition
- determining the tenant selection plan, including residency preferences

²⁸⁹ 85 Fed. Reg. at 2041.

²⁹⁰ *PHA Pays \$1.5M to Resolve Disability Discrimination Claims*, FAIR HOUSING COACH, (November 18, 2019) available at <https://www.fairhousingcoach.com/article/pha-pays-15m-resolve-disability-discrimination-claims>.

²⁹¹ *U.S. v. Trumbull* (“*Trumbull*”), Case No: 4:17-cv-00101, Dkt. # 9-1; *see also* <https://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1>.

²⁹² *See Trumbull*, *supra* note 291 at 4-11.

²⁹³ Philip D. Tegeler, *Housing Segregation and Local Discretion*, 3 J. L. & Pol’y 209, 221-229 (1994), available at <https://brooklynworks.brooklaw.edu/jlp/vol3/iss1/4>; *see also*, e.g., *Young*, 628 F. Supp. at 1048-52 (documenting numerous PHA policies advancing segregation in Texas).

- determining the portability of vouchers
- advertising the opening and closing of wait lists, including determining where and what languages to advertise in
- making upward adjustments to allowable rent payments
- extending the initial certificate period during a family's housing search
- determining and weighing an applicant's federal preference status
- purging names from wait-lists without adjusting for the high rate of mobility of applicants
- requiring applicants to personally appear at the PHA office to pick up or fill out applications
- failing to engage in affirmative marketing to attract out-of-town applicants
- limiting the provision of housing search assistance offered to individual applicants
- failing to coordinate with other housing authorities so that there are multiple wait-lists and admissions procedures that must be accessed at separate physical locations
- failing to implement Small Area Fair Market Rents

Each of these discretionary actions have a discriminatory effect.²⁹⁴ PHAs would not be required to review these or any other policies or practices under HUD's Proposed Rule. PHAs are uniquely situated to exacerbate or ameliorate segregation, yet the Proposed Rule has no meaningful requirement that they take actions to affirmatively further fair housing.

B. The Proposed Rule Would Violate the Administrative Procedure Act Because It Is Arbitrary and Capricious.

Under the APA, courts must “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in

²⁹⁴ Peggy Bailey & Anna Bailey, *Trump Administration's Proposed Rule Would Perpetuate Racist and Discriminatory Housing Practices*, CTR. FOR BUDGET & POLICY PRIORITIES (Oct. 18, 2019), available at <https://www.cbpp.org/research/housing/trump-administrations-proposed-rule-would-perpetuate-racist-and-discriminatory> (“For instance, some public housing agencies administering vouchers have implemented preferences for residents already living in their communities. When housing agencies in white communities with lower poverty rates use residency preferences, they can prevent people of color from participating in the local voucher program (and gaining access to those communities), thereby creating a disparate impact on people of color and reinforcing segregation. Claims that such residency preferences disparately impact potential voucher holders on the basis of race have led to several settlements that eliminated or modified the use of residency preferences.”).

accordance with law.”²⁹⁵ Agency action is “arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”²⁹⁶ When an agency reverses course by changing a prior policy, the agency must provide a “reasoned explanation,” and show that “the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better.”²⁹⁷

HUD also has no reasoned explanation for the Proposed Rule which undoes critical provisions of HUD’s 2015 Rule, as described above. Nor did HUD undergo a thoughtful analysis of the Proposed Rule’s impacts or adequately consider alternatives. Because the Proposed Rule lacks any indicia of reasoned decision-making, it is arbitrary and capricious and would violate the APA.²⁹⁸

1. HUD Arbitrarily Reverses Its Prior Analysis that Underlies the 2015 Rule.

If adopted, the Proposed Rule would be arbitrary and capricious because it reverses HUD’s prior analysis and position without reasoned support.²⁹⁹ As described in more detail above, HUD determined that the “[AI] process for affirmatively furthering fair housing is insufficient to ensure that program participants are meeting their obligation in a purposeful manner as contemplated by law.”³⁰⁰ HUD, in recognizing the need for a stronger AFFH rule, observed that “the parameters of the [AI] analysis are not clear enough [and] HUD provides no data.”³⁰¹ HUD initiated rulemaking in 2013 “[i]nformed by lessons learned in localities across the country, and with program participants, civil rights advocates, other stakeholders, and the

²⁹⁵ 5 U.S.C. § 706(2)(a); *see also United States v. Mead Corp.*, 533 U.S. 218, 227, 229 (2001).

²⁹⁶ *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.* (“*State Farm*”), 463 U.S. 29, 42 (1983).

²⁹⁷ *F.C.C. v. Fox Tel. Stations, Inc.* (“*Fox Tel.*”), 556 U.S. 502, 515 (2009).

²⁹⁸ Rulemaking under the APA is unlawful where it is “arbitrary, capricious . . . or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

²⁹⁹ *See Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1209 (2015) (explaining that “the APA requires an agency to provide more substantial justification when ‘its new policy rests upon factual findings that contradict those which underlay its prior policy’”) (quoting *Fox Tel.*, 556 U.S. at 515).

³⁰⁰ 78 Fed. Reg. at 43,710, 43,717.

³⁰¹ A New Assessment, *supra* note 45.

U.S. Government Accountability Office all commenting to HUD that the AI approach was not as effective as originally envisioned.”³⁰²

In 2015, HUD finalized a rule that “strengthen[ed] the process for program participants’ assessments of fair housing issues and contributing factors and for the establishment of fair housing goals and priorities by requiring use of an Assessment Tool, providing data to program participants related to certain key fair housing issues, and instituting a process in which HUD reviews program participants’ assessments, prioritization, and goal setting.”³⁰³ As described above, the 2015 Rule recognizes the need for individual grantees to conduct their own data analysis with the assistance of both HUD-provided data and locally-sourced data and knowledge and to use that analysis to tailor their plans to affirmatively further fair housing. The 2015 Rule empowers program participants to decide the best method to comply with AFFH for their own situations, rather than picking from a one-size fits all list. And the 2015 Rule allows for cooperation between program participants rather than competition through a ranking system.

HUD now seeks to reverse course with its Proposed Rule. HUD once assessed that an AFFH rule is deficient without HUD-provided data to identify fair housing issues; HUD now seeks neither to provide nor require use of such data. HUD once reasoned that community participation is critical to identifying fair housing needs and goals; it now seeks to do away with a community participation requirement. HUD sought to avoid program participants having to assess their fair housing issues and goals from a one-size-fits-all list; it now seeks to encourage program participants to choose from a list of “inherent barriers” to satisfy their AFFH obligations. In short, though it once conceded that the 2015 Rule was more effective than the AI approach, HUD now seeks to impose a rule that shares the lax enforcement and unclear guidelines and support as the AI approach. HUD does not sufficiently explain—nor can it—why it “believes [the Proposed Rule] to be better.”³⁰⁴

2. HUD’s Justifications for the Proposed Rule are Conclusory and Unsupported by the Record.

Contrary to the APA’s requirement that HUD engage in “reasoned decisionmaking,”³⁰⁵ and that HUD’s “decreed result . . . be logical and rational[,]”³⁰⁶ HUD’s justifications for the Proposed Rule are conclusory statements,³⁰⁷ devoid of necessary factual support or unsupported

³⁰² 80 Fed. Reg. at 42,272.

³⁰³ *Id.*

³⁰⁴ *Fox Tel.*, 556 U.S. at 515.

³⁰⁵ *State Farm*, 463 U.S. at 52.

³⁰⁶ *Allentown Mack Sales & Service, Inc. v. N.L.R.B.*, 522 U.S. 359, 374 (1998).

³⁰⁷ *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146 (D.D.C. 1993) (rejecting as arbitrary rule change that was based on “conclusory” justification); *Int’l Ladies’ Garment Workers’ Union, AFL-CIO v. Dole*, 729 F. Supp. 877, 879–80 (D.D.C. 1989) (“[T]he Secretary’s conclusory assurances” that a new rule will ensure effective enforcement of the enabling statute were “unsupported by the record” and thus arbitrary and capricious).

by the factual record. Stated otherwise, HUD fails to provide a “coherent explanation” of its decision,³⁰⁸ and fails to justify departures from past practice.³⁰⁹ For these reasons, HUD’s Proposed Rule is arbitrary and capricious.

a. HUD Fails to Consider Research that Found that Affordable Housing is Not Fair Housing.

HUD asserts that “[h]aving a supply of affordable housing that is sufficient to meet the needs of a jurisdiction’s population is crucial to enabling families to live throughout the jurisdiction and promoting fair housing for all protected classes”³¹⁰ But HUD’s statement ignores research confirming that the availability of *affordable* housing is not coextensive with *fair* housing. As explained above, the term “fair housing” arose out of a movement to integrate exclusionary white communities to non-white residents. Affordable housing alone, though an important tool, does not fix the problem of residential segregation and discrimination. According to HUD’s own research, affordable housing built with funds from programs like the Low-Income Housing Tax Credit (LIHTC), for example, tend to be clustered in high-density and high-poverty areas rather than low-poverty, opportunity-rich areas.³¹¹ An increase in affordable housing development, therefore, does not on its own promote integration. By not promoting more equitable distribution of affordable housing opportunities, the Proposed Rule fails to further fair housing as HUD seeks to do.³¹²

b. HUD Fails to Support Claims that the 2015 Rule was Financially “Overly Burdensome.”

The claim that the 2015 Rule requirements are financially “overly burdensome to both HUD and grantees”³¹³ is unvetted. The 2015 Rule anticipated a significant expenditure of compliance resources, estimating that program participants would incur compliance costs of \$25

³⁰⁸ *Clark Cnty. v. FAA*, 522 F.3d 437, 443 (D.C. Cir. 2008).

³⁰⁹ *Mfrs. Ry. Co. v. Surface Transp. Bd.*, 676 F.3d 1094, 1096 (D.C. Cir. 2012).

³¹⁰ 85 Fed. Reg. at 2048.

³¹¹ U.S. DEP’T OF HOUS. & URBAN DEV., OFFICE OF POLICY DEV. & RESEARCH, *Expanding Opportunity Through Fair Housing Choice* (2014), <https://www.huduser.gov/portal/periodicals/em/spring14/highlight1.html>.

³¹² *Id.*; see also Christina Rosales, John Henneberger & Zoe Middleton, *By Removing “Racial Segregation and Inequality” From Its Definition of Fair Housing, HUD Is Sending a Dangerous Message*, THE DALLAS MORNING NEWS (Jan. 24, 2020), <https://www.dallasnews.com/opinion/commentary/2020/01/24/by-removing-racial-segregation-and-inequality-from-its-definition-of-fair-housing-hud-is-sending-a-dangerouse-message/> (describing how tax credit led developers to add affordable housing solely to communities of color).

³¹³ 85 Fed. Reg. at 2042.

million and HUD would incur costs of \$9 million.³¹⁴ Yet the Proposed Rule makes no mention of these projections and does not contend that expenditures to date were proving greater than expected. In addition to failing to “examine[] the relevant data,”³¹⁵ HUD acts arbitrarily by failing “to adequately account” for relevant costs and benefits.”³¹⁶

Importantly, the only costs for program participants HUD asserts are excessive remain unquantified. In its notice on the Proposed Rule, HUD repeatedly maligns the use of outside consultants as unreasonably diverting resources,³¹⁷ but provides no estimation as to their cost. HUD also fails to consider how many program participants hired consultants and whether those program participants previously used consultants to complete AIs. In fact, of the 49 initial AFH submissions, nine credited a consultant for assistance in preparation but at least eight of those nine municipalities also used consultants in their prior AI submission.³¹⁸ HUD also inaccurately cites comments about the costs of AFFH-specific hearings as “creat[ing] high additional costs for jurisdictions.”³¹⁹ Although the cited comments acknowledge the importance and benefits of public feedback, neither comment specifies that separate outreach imposes a “high” cost.³²⁰ Indeed, the two program participants whose comments HUD cite—the Michigan State Housing Development Authority and Douglas County, Colorado—had yet to complete their own AFH processes.

HUD’s own estimation of purportedly “burdensome” administrative costs also lack detail or context. Of the projected \$9 million implementation budget, HUD asserts that it has “spent over \$3.5 million to provide technical assistance to the initial 49 jurisdictions.” However, no accounting follows. HUD does not make clear how much of that money went towards one-time expenditures, such as the training or building of the assessment tools. HUD also fails to quantify the cost per submission to the agency, other than to represent, without specifics, that a consultant

³¹⁴ 80 Fed. Reg. at 42,273.

³¹⁵ *State Farm*, 463 U.S. at 43.

³¹⁶ *Council of Parent Attorneys & Advocates, Inc. v. DeVos*, 365 F. Supp. 3d 28, 53–55 (D.D.C. 2019); see also *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) (“When an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable.”).

³¹⁷ 85 Fed. Reg. at 2042.

³¹⁸ Decl. of Justin Steil (“Steil Decl.”) ¶ 29, *Nat’l Fair Housing Alliance*, No. 18-cv-1076, Doc. No. 19-8 (May 29, 2018).

³¹⁹ 85 Fed. Reg. at 2043.

³²⁰ Tiffany King, Comment to FR-6123-A-01, MICH. STATE HOUS. DEV. AUTH. 1 (Oct. 16, 2018), available at <https://www.regulations.gov/document?D=HUD-2018-0060-0369> (speculating that consolidating public participation would allow “input on the AFFH without additional and unnecessary cost burdens”); Jennifer Eby, Comment to FR-6030-N-01 2 (June 14, 2017), available at <https://www.regulations.gov/document?D=HUD-2017-0029-0222> (supporting consolidated process generally because “[f]unding and time are finite resources”).

estimated that it would “need 538 full-time employees” to review the 2019 submissions. It is impossible to verify the factual basis or reasonableness for that estimate without access to the consultation report, which is not public. These figures are therefore too vague to confirm the agency’s administrative costs.

HUD fails to consider the ways that the 2015 Rule mitigates anticipated costs. HUD staggered AFH submissions under the 2015 Rule over four years to allow the majority of program participants to benefit from the example set by early-submitting participants and more time to utilize assessment tools,³²¹ but in proposing a new rule, HUD does not consider that program participants submitting AFHs in the future may expend fewer resources by incorporating the data collected or solutions devised in other AFHs. HUD also fails to consider the probability that each participant’s initial cost burden would ease with time, as one program participant has noted.³²² HUD also unfairly discounts the cost-savings that result by participating in regional AFHs, which HUD acknowledges allow participants to “pool knowledge and resources.”³²³ Absent analysis of the true costs of compliance with the 2015 Rule and the accompanying benefits, HUD cannot support its assertion that it is unduly burdensome and cannot rely on its cost-benefit analysis to depart from the 2015 Rule.

c. Contrary to HUD’s Contention, the 2015 Rule’s Participation Requirement Is Not “Duplicative” of the Consolidated Plan Requirements.

HUD also criticizes community participation requirement of the 2015 Rule as unnecessarily duplicative of existing public participation requirements for the consolidated plan.³²⁴ As described above, under the 2015 Rule, a program participant must hold a public hearing, separate and apart from the biannual hearings on the consolidated plan, before publishing a proposed AFH for comment.³²⁵ In claiming that this community participation requirement is a waste of resources, HUD fails to consider contrary views from program participants that have undertaken the 2015 Rule process. In addition to the examples provided above, the City of Seattle explained that “[t]he advantage of the AFH is that it builds on the Consolidated Plan and adds the fair housing filter to compare population needs and see common

³²¹ U.S. DEP’T OF HOUS. & URBAN DEV., AFFH: FAQ for Program Participants, 2–3 (Dec. 31, 2015), <https://files.hudexchange.info/resources/documents/AFFH-FAQs.pdf>; see also Declaration of Franklin A. Lenk, Mid-America Regional Council ¶ 5, No. 18-cv-1076, *Nat’l Fair Housing Alliance*, Doc. No. 19-3 (May 29, 2018) (“Subsequent cohorts won’t face this same time constraint, and have the benefit of using prior AFH’s as models.”).

³²² Salgado Decl., *supra* note 180 at ¶ 13 (anticipating that New Rochelle will build on prior experience with the 2015 Rule and complete next AFH assessment with fewer costs and less need for HUD assistance).

³²³ 85 Fed. Reg. at 2042.

³²⁴ *Id.* at 2042.

³²⁵ 80 Fed. Reg. at 42,362.

denominators that affect communities across the income spectrum.”³²⁶ A non-profit organization in Pennsylvania likewise described how the community participation requirement allowed for a much-needed focus on AFFH issues:

These provisions foster a much more inclusive fair housing process that reflects the problems that community residents feel are most pressing, and also incorporates the expertise of stakeholders who can offer solutions to the problems identified. For example, in Delaware County, PA, the enhanced community participation process resulted in the inclusion of the issue of discrimination by municipalities against protected classes with regards to zoning and land use decisions, discriminatory code enforcement, and discrimination against members of protected classes in other municipal policies and practices.³²⁷

In contrast, consolidated plan hearings are “designed to obtain input regarding local housing and community development needs, to identify areas of needs to prioritize, and to fund relevant activities in those priority areas,” not fair housing issues, which “entail very different concepts and sometimes even different stakeholders.”³²⁸ Outreach corresponding with community participation requirement was also more robust, involving more widely broadcasted opportunities for participation at times and places more accessible to members of different communities than previously required for AIs.³²⁹ The 2015 Rule’s community participation requirement is therefore in no way duplicative of the consolidated plan participation process.

Counterintuitively, HUD expects that under the Proposed Rule, which would eliminate a community participation requirement, a “larger share of the local community will be motivated to participate in local discussions on how to AFFH . . . resulting in a stronger AFFH effort and help reduce housing discrimination.”³³⁰ There is no apparent basis for such optimism.

³²⁶ Debra Rhinehart, Comment to FR-6123-A-01, CITY OF SEATTLE (Oct. 16, 2018), available at <https://www.regulations.gov/document?D=HUD-2018-0060-0558>.

³²⁷ Rachel Wentworth, Comment to FR-6123-A-01, HOUSING EQUALITY CTR. OF PA. (Oct. 16, 2018), available at <https://www.regulations.gov/document?D=HUD-2018-0060-0536>.

³²⁸ Jacky Morales-Ferrand, Comment to FR-6123-A-01, CITY OF SAN JOSE HOUS. DEP’T 2 (Oct. 15, 2018), available at <https://www.regulations.gov/document?D=HUD-2018-0060-0673>.

³²⁹ See Vicki Been & Katherine O’Regan, Comment to FR-5173-N-15, N.Y. UNIV. FURMAN CENTER 10 (Mar. 6, 2018), available at <https://www.regulations.gov/document?D=HUD-2018-0001-0036>.

³³⁰ 85 Fed. Reg. at 2044.

**d. The 2015 Rule’s Abrupt Suspension, Not the Rule Itself,
Precluded the Results HUD Claims to Seek.**

HUD states that the 2015 Rule “made it difficult to evaluate and compare jurisdictions over time.”³³¹ But there is no factual foundation for this statement because HUD suspended the 2015 Rule and its implementation was thus short-lived. Specifically, AFHs operate in five-year cycles³³² and program participants that submitted AFHs under the 2015 Rule in 2017 have yet to complete their five-year plans or submit any results to HUD, as required by the 2015 Rule.³³³ Accordingly, there is no basis to any conclusion that outcomes were difficult to evaluate or compare.³³⁴

HUD’s critique is also unfounded because it suggests that comparison to other program participants is necessary. HUD does not point to any study, report, or case law that suggests that a comparison of program participants advances efforts to further fair housing. To that end, the 2015 Rule simply requires that program participants take action “to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the [FHA] was designed to combat.”³³⁵ It does not call for any form of competition among program participants, such that the success of one program participant must be quantified in the same way as another.

In any event, the 2015 Rule provides HUD with the data to assess whether a program participant is affirmatively furthering fair housing. Approved AFH Plans set forth specific “metrics and milestones” against which the program participant’s progress may be judged.³³⁶ These AFHs provide a few examples of such measurable AFFH efforts:

- Paramount, California, committed to making (by explicit deadlines) specific amendments to its zoning ordinance to make its housing more inclusive, such as allowing group homes for people with disabilities in residential zones;
- Temecula, California, committed to the goal of amending its zoning codes to allow for 100 affordable housing units in census tracts that do not have high poverty rates;
- New Orleans, Louisiana, promised to increase homeownership by Section 8 voucher recipients by 10 percent annually;

³³¹ *Id.* at 2043.

³³² *See* 80 Fed. Reg. at 42,350.

³³³ *Id.* at 42,287 (“[A]s part of the AFH review process, HUD will include review of benchmarks and outcomes, as reflected in a program participant’s goals.”).

³³⁴ There is also no statutory requirement to compare jurisdictions as opposed to assessing the individual participant’s efforts to affirmatively further fair housing.

³³⁵ *Otero*, 484 F.2d at 1134 (emphasis added).

³³⁶ 80 Fed. Reg. at 42,287.

- Chester County, Pennsylvania, committed to creating 35 new affordable rental units in high opportunity neighborhoods; and
- El Paso County, Colorado, similarly promised to assist in the development of 100 publicly supported affordable housing units in areas of opportunity.³³⁷

These submissions suggest that, to the contrary of HUD's assertion, the 2015 Rule facilitates HUD's assessment of program participants' AFFH efforts.

e. HUD Ignores Critical Facts that Render Its Proposed Penalty For Program Participants With Final Adjudications An Ineffective Mechanism to Evaluate AFFH Efforts.

HUD's proposed ranking system would penalize a program participant by denying it an "outstanding designation" if, in the past five years, it has been found by a court or administrative law judge to be in violation of civil rights laws in a case brought by HUD or the DOJ. HUD concludes that considering claims for which there had not been "an opportunity for a hearing and full finding of facts" would unfairly penalize participants. But, as explained above, HUD has not assessed annual Office of Fair Housing and Equal Opportunity (FHEO) Reports and other research that would have demonstrated that final adjudications are exceedingly rare³³⁸ and thus, an unhelpful metric by which to penalize program participants on their AFFH efforts.

Nor does HUD analyze the impact of this proposed penalty's disregard for private claims, claims resolved through settlement, or findings from other relevant fair housing agencies, which are more common than full adjudications. For instance, in 2018, the New York State Department of Human Rights, which handles matters referred to it by HUD, handled 43 probable cause determinations in New York City alone: 22 were based on disability discrimination or failure to provide reasonable accommodations, six on the basis of sex, six on national origin, four on race or color, four familial status, four retaliation, two on sexual orientation, two on religion or creed, and one on domestic violence.³³⁹ That same year, the DOJ settled three fair housing complaints, including two which required apartment buildings to retrofit nearly 300 units so as to bring them into greater compliance with the FHA's accessibility requirements. None of these categories of fair housing dispositions would be considered under the Proposed Rule, though they may inform an assessment of a program participant's fair housing efforts.

HUD provides no reasoned explanation for why it has chosen this narrow enforcement mechanism when, for nearly twenty years, it disqualified program participants with

³³⁷ Comment from the State Attorneys General, *supra* note 2 at 7.

³³⁸ Ed Gramlich, Abbreviated Summary and Assessment: HUD's Proposed AFFH Rule, NAT'L LOW INCOME HOUS. COALITION, 6 (Jan. 9, 2020) *available at* <https://nlihc.org/sites/default/files/NLIHC-Summary-and-Analysis-of-2020-Proposed-AFFH-Rule.pdf>.

³³⁹ *Where We Live NYC*, *supra* note 166 at 173–74.

unadjudicated civil rights claims from competitive grant funding.³⁴⁰ Specifically, before even applying for competitive grant funding under a NOFA,³⁴¹ HUD required applicants to resolve to its satisfaction, *inter alia*, mere charges of civil rights violations by HUD, DOJ lawsuits raising FHA violations, and a cause determination by a state or local fair housing agency.³⁴²

HUD does not express any concern that the NOFA test is overly harsh, and provides no reason not to take a similar approach in the Proposed Rule. HUD also ignores the fact that it is

³⁴⁰ See, e.g., General Section to HUD's Fiscal Year 2017 NOFA, *supra* note 274; U.S. DEP'T OF HOUS. & URBAN DEV., FY 1998 Super Notice of Funding Availability for National Competition Programs (1998), <https://archives.hud.gov/funding/1998/suprnofa/natcomp/4361natn.cfm>.

³⁴¹ See U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 89 (describing NOFAs).

³⁴² More specifically, applicants who had the following charges, cause determinations, lawsuits, or letters of findings, which had not been resolved to HUD's satisfaction, were ineligible for funding:

- (1) Charges from HUD concerning a systemic violation of the Fair Housing Act or receipt of a cause determination from a substantially equivalent state or local fair housing agency concerning a systemic violation of a substantially equivalent state or local fair housing law proscribing discrimination because of race, color, religion, sex, national origin, disability or familial status;
- (2) Status as a defendant in a Fair Housing Act lawsuit filed by the DOJ alleging a pattern or practice of discrimination or denial of rights to a group of persons raising an issue of general public importance under 42 U.S.C. 3614(a);
- (3) Status as a defendant in any other lawsuit filed or joined by the DOJ, or in which the DOJ had intervened, or filed an amicus brief or statement of interest, alleging a pattern or practice or systemic violation of Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, Section 109 of the Housing and Community Development Act of 1974, the Americans with Disabilities Act or a claim under the False Claims Act related to fair housing, non-discrimination, or civil rights generally including an alleged failure to affirmatively further fair housing;
- (4) Receipt of a letter of findings identifying non-compliance with Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, Section 109 of the Housing and Community Development Act of 1974; or the Americans with Disabilities Act; or
- (5) Receipt of a cause determination from a substantially equivalent state or local fair housing agency concerning a systemic violation of provisions of a state or local law prohibiting discrimination in housing based on sexual orientation, gender identity, or lawful source of income.

See, e.g., General Section to HUD's Fiscal Year 2017 NOFA, *supra* note 274.

unfairly penalizing local government jurisdictions for claims brought against PHAs within the jurisdiction, which will have no duty to document or justify their AFFH efforts under the Proposed Rule.³⁴³ Just two years ago, the federal government sued the New York City Housing Authority (“NYCHA”) for allegedly “repeatedly ma[king] false statements to HUD” and to the public in response to reports that children—who were mostly poor and minority—developed dangerously high levels of toxic lead while living in NYCHA housing.³⁴⁴ Under the Proposed Rule, NYCHA “would not be required to submit a certification detailing AFFH goals and obstacles.” Because that matter settled instead of resulting in an adjudicated negative finding, NYCHA would not be required to include any “explanation of what steps the PHA has taken and is taking to resolve the violation.”³⁴⁵

f. HUD Does Not Include Critical Details in Proposed Ranking System Proposal.

HUD’s ranking system is devoid of essential details that would allow for informed comment. HUD attempts to deflect this criticism by stating that “[t]he regulatory text is intended to be a broad outline,” and that the evaluation of data and the ranking methodology will be figured out in later Federal Register notices. But the holes regarding how a program participant will be ranked and the consequences of such a ranking are central to the system being proposed. Basic questions are left unanswered, including:

- What is the threshold for an “outstanding” program participant?
- What is the threshold for a “low-ranking” program participant?
- Which data sources will be used?
- How will each factor be weighed?
- What is the definition of a “tight” housing market?
- What is the definition of a “loose” housing market?

³⁴³ See 85 Fed. Reg. at 2050; see also *id.* at 2054 (“No jurisdiction may be considered an outstanding AFFH performer if the jurisdiction or, *for a local government, any PHA operating within the jurisdiction*, has in the past five years been found by a court or administrative law judge in a case brought by or on behalf of HUD or by the DOJ to be in violation of civil rights law unless, at the time of the submission of the AFFH certification, the finding has been successfully appealed or otherwise set aside.” (emphasis added)).

³⁴⁴ *United States v. N.Y.C. Housing Auth.* (“*N.Y.C. Housing Auth.*”), No. 18-cv-5213 (S.D.N.Y. 2018), Doc. No. 1 (Compl.) ¶ 1; Greg B. Smith, *EXCLUSIVE: Brooklyn Tot Has High Levels of Toxic Lead While NYCHA Denies Paint is a Problem*, NEW YORK DAILY NEWS (Apr. 13, 2015) <https://www.nydailynews.com/new-york/brooklyn/exclusive-toxic-lead-paint-problem-poor-nabes-article-1.2182957> (“Most of those young children with dangerous levels of lead are poor: 76% receive Medicaid. And most are minorities — 23% black, 31% Hispanic and 26% Asian.”).

³⁴⁵ *N.Y.C. Housing Auth.*, *supra* note 344, Doc. Nos. 73, 75.

- What population growth or decline is “significant”?
- What happens with states where the population does not change significantly?
- How many NOFA points will be awarded to “outstanding” program participants?
- In which programs will NOFA points be awarded?³⁴⁶
- What other benefits can be expected for outstanding program participants?
- What is the threshold and point of comparison for a most improved program participant?
- What kind of remedial resources will be available to low-ranking program participants?

Additionally, HUD states that it “is also considering using different data sets for different categories of program participants” but provides no other information.³⁴⁷ The lack of detail and apparent amorphous shape of the ranking system is too incomplete to be properly evaluated, vetted, and commented on. HUD itself cannot know the impacts of its proposed regulation before answering these fundamental questions about its proposal.

g. By Discouraging a Collaborative Approach to Addressing Fair Housing Issues, HUD Disregards the Benefits of Such Collaboration.

The Proposed Rule would eliminate a provision of the 2015 Rule that permits regional collaborations among program participants on their AFFH activities.³⁴⁸ This change is consistent with HUD’s proposed new definition of AFFH as limited to actions within a program participant’s “sphere of influence.”³⁴⁹ HUD states simply, without any support,³⁵⁰ that joint or

³⁴⁶ HUD identifies the Choice Neighborhood Planning and Implementation Grants, Jobs-Plus, lead-based paint reduction programs, ROSS and FSS programs, and the Fair Housing Initiative Program, where it *may* be appropriate to award points, but has not committed to any of these or others. 85 Fed. Reg. at 2049. HUD also suggests that program participants could be rewarded with regulatory relief, including from AFFH regulatory requirements. *Id.* at 2049. Any meaningful AFFH rule would not allow program participants to cease their AFFH review and actions because they are doing better than other program participants.

³⁴⁷ *Id.* at 2047.

³⁴⁸ *Id.* at 2054; *see also* 24 C.F.R. § 5.156.

³⁴⁹ 85 Fed. Reg. at 2045

³⁵⁰ HUD cites to “Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments,” published May 23, 2018, at 83 FR 23922” to support this observation. That Notice in turn only references one regional AFH to support that observation, stating that “HUD determined that each of the 19 program participants [within the regional AFH] would have met the regulatory standards for nonacceptance.” 83 Fed. Reg. at 23,924.

regional collaboration AFHs “had the same defects as individual AFHs.”³⁵¹ HUD cites to its Notice on withdrawing the 2015 Rule’s Local Government Tool as supporting that statement,³⁵² but that notice in turn only references *one* unidentified regional AFH, stating that “HUD determined that each of the 19 program participants [within the regional AFH] would have met the regulatory standards for nonacceptance.”³⁵³ HUD thus only has paltry support for this broad statement. Furthermore, HUD ignores the straightforward fact that regional collaborations promote efficiency and account for the many factors contributing to segregation, ethnic and racial concentrations of poverty and fair housing barriers that cut across regional lines and demand regional solutions. Indeed, HUD itself understood that “the inclusion of a larger regional analysis for participants is necessary to put the local fair housing issues into context required by the Fair Housing Act and case law (*e.g.*, *Thompson v. HUD*).”³⁵⁴ Without meaningful explanation, HUD now seeks to reverse course and eliminate the ability to engage in a regional analysis. In doing so, HUD would frustrate its own and program participants’ ability to affirmatively further fair housing, in contravention of the FHA.

3. HUD Mischaracterizes the Viability of the 2015 Rule.

HUD claims that it is “necessary to revise” the 2015 Rule rather than modify it because the 2015 Rule’s requirements are “overly burdensome to both HUD and grantees,” “ineffective in helping program participants meet their reporting obligations,” and “too prescriptive in outcomes for jurisdictions.”³⁵⁵ HUD’s arguments against the 2015 Rule lack merit and are unsupported by the record.

a. The 2015 Rule Does Not Prescribe Outcomes.

HUD’s primary unfounded justification is that the 2015 Rule is “too prescriptive in outcomes for jurisdictions” and “discouraged innovation.”³⁵⁶ In fact, the 2015 Rule does not prescribe any goals or metrics.³⁵⁷ Rather, it grants participants “considerable choice and flexibility in formulating goals and priorities” without dictating “precise outcomes.”³⁵⁸ To that end, the 2015 Rule provides program participants with tools and resources to identify impediments to fair housing. Informed by these local conditions and by public input,

³⁵¹ 85 Fed. Reg. at 2042.

³⁵² *Id.*

³⁵³ 83 Fed. Reg. at 23,924.

³⁵⁴ 80 Fed. Reg. at 42,296.

³⁵⁵ 85 Fed. Reg. at 2042.

³⁵⁶ *Id.* at 2042, 2043. Curiously, HUD also states that the 2015 Rule focused too much on process and not enough on evaluating fair housing results.

³⁵⁷ *See* 80 Fed. Reg. at 42,349 (“The regulations, however, do not prescribe, compel, or enforce concrete actions that must be taken by HUD’s program participants.”).

³⁵⁸ *Id.* at 42,273.

communities are then free to set as many or as few goals as they see fit.³⁵⁹ According to a Massachusetts Institute of Technology (“MIT”) study of AFHs under the 2015 Rule, the subsequent task of defining achievable metrics and milestones that actually achieve fair housing goals is challenging and “requires municipal creativity and innovation.”³⁶⁰

New Rochelle, New York, whose AFH plan was accepted, illustrates the 2015 Rule’s flexibility. When developing concrete AFFH goals, the city concluded that “building a certain number of units of affordable housing [] were not achievable in New Rochelle, given [] high building and development costs.”³⁶¹ It instead adopted goals with “clear and measurable metrics” that included a mixture of rental assistance, additional units of affordable housing, and the creation of a resource guide.³⁶² Ithaca, New York, which also had a successful submission, identified ways to reduce pressure on the city’s limited rental market that drew from local resources, pledging to “engage Cornell University administration to expand the supply of on-campus and Cornell-affiliated student housing to keep pace with yearly enrollment increases.”³⁶³ The participants’ experiences and the provisions of the 2015 Rule itself directly contradict HUD’s principal argument that the rule confined participants to prescribed results.

In claiming that the 2015 Rule was “too prescriptive,” HUD suggests that the 2015 Rule improperly “decree[s] a particular vision of urban development,” in conflict with the Supreme Court’s holding in *Inclusive Communities*, whereas the Proposed Rule “allow[s] for flexibility and innovation.”³⁶⁴ HUD selectively, and misleadingly, quotes *Inclusive Communities*, but even taking that quote on its face, it is the Proposed Rule that “decrees a particular vision”—one of unfettered housing construction in whatever location the developer chooses, without restrictive zoning measures or other regulations, specified by HUD, blocking those efforts, as described below in more detail. By contrast, as discussed below, the 2015 Rule allowed program participants to adjust their goals and strategies in their local decisionmaking process, considering both local input and HUD-provided data, to determine the most effective ways to address fair housing.

b. HUD Mischaracterizes the Positive Preliminary Results of the 2015 Rule’s Implementation.

HUD also mischaracterizes the early success of the 2015 Rule, asserting that its “significant resource[]” requirement and “complexity” “resulted in a high failure rate for

³⁵⁹ *Id.* at 42,271, 42,288

³⁶⁰ Steil & Kelly, *supra* note 62 at 748.

³⁶¹ Salgado Decl., *supra* note 180 at ¶ 14(d).

³⁶² *Id.*

³⁶³ CITY OF ITHACA, Assessment of Fair Housing Submission, 88 (Nov. 3, 2017), available at <http://www.cityofithaca.org/DocumentCenter/View/6952/Ithaca-Assessment-of-Fair-Housing-AFH?bidId=>.

³⁶⁴ 85 Fed. Reg. at 2044.

jurisdictions to gain approval for their AFH.”³⁶⁵ Not so. Out of 49 AFHs submitted under the 2015 Rule’s rubric, HUD requested additional information of 14 program participants and ultimately approved 32.³⁶⁶ It strains credulity to characterize this outcome as a high failure rate. Participants whose submissions HUD initially rejected began to engage in the iterative process envisioned by the 2015 Rule, which requires that HUD provide feedback and “guidance on how the AFH should be revised in order to be accepted.”³⁶⁷ HUD thoroughly reviewed submissions and enforced the 2015 Rule’s provisions. This is precisely how HUD contemplated the 2015 Rule working. It is thus not a surprise, nor a failure, that several program participants had to revise their initial submissions given that it was the first time they were completing an AFH.

Moreover, some program participants’ initial difficulty passing the AFH review reflects decades-long inattention by both the participants and HUD to the FHA’s AFFH statutory requirement. An MIT study found that initially-rejected AFH plans reflected program participants’ struggle to set meaningful goals with concrete metrics that actually addressed identified impediments.³⁶⁸ But, after HUD provided constructive feedback and technical guidance, those AFHs improved.³⁶⁹ For instance, Lake County, Ohio, in its revised AFH submission, replaced a stated goal to “create affordable housing in areas of opportunity in the county” with one that is more specific and measurable, setting annual goals for outreach and recruitment of landlords in higher opportunity neighborhoods to participate in its Housing Choice Voucher Program. Temecula, California also improved its AFH with HUD’s help, by revising its general goal to increase the affordable housing stock in the city through an affordable Housing Overlay ordinance to include a target number of affordable housing units (2,007), a size site (at least 100 acres), and specificity on multifamily uses allowed by right.

To the extent HUD characterizes the 2015 Rule as incapable of success, its own suspension of the 2015 Rule prevented the agency from judging the rule’s true potential to help program participants carry out their AFFH obligations. The 17 submissions that were initially rejected did not have the opportunity to correct any deficiencies and gain approval of their applications before the 2015 Rule was suspended. The suspension also foreclosed the possibility of gauging the 2015 Rule’s success from the submissions of the over 1,000 other program participants scheduled to submit their AFHs between 2018 and 2020. By short-circuiting the 2015 Rule’s iterative process and implementation, HUD deprived itself of the necessary factual grounding to appraise the 2015 Rule fully.

For similar reasons, the factual record does not support HUD’s statement that “deficiencies in the Local Government assessment tool”—*i.e.*, “[t]he number of questions, the

³⁶⁵ *Id.*

³⁶⁶ 83 Fed. Reg. at 23,922, 23,923.

³⁶⁷ 24 C.F.R. § 5.162(b)(2), (c) (“HUD will provide a program participant ... with a time period to revise and resubmit the AFH, which shall be no less than 45 calendar days after the date on which HUD provides written notification that it does not accept the AFH.”).

³⁶⁸ Steil & Kelly, *supra* note 62 at 742.

³⁶⁹ Steil Decl., *supra* note 318 at ¶ 36.

open-ended nature of many questions, and the lack of prioritization between questions”—“impeded completion and HUD acceptance of meaningful assessments by program participants.”³⁷⁰ The deficiencies HUD decries attack not the adequacy of the tool but the demanding nature of the AFFH statutory requirement and the 2015 Rule’s flexibility to facilitate program participants’ compliance with it.³⁷¹ A review of the unaccepted AFHs reflects that many of the submissions’ deficiencies were simply due to program participants’ failure to follow clearly-stated requirements, such as failing to reach out to large segments of stakeholders, engage in regional data analyses, or include certain protected classes in its analyses.³⁷² Where the tool is open-ended, HUD allowed program participants more flexibility as opposed to a one-size-fits-all approach and provided guiding examples in its AFFH Rule Guidebook.³⁷³ In short, HUD can point to no facts supporting its attribution of AFH deficiencies to the Local Government Assessment Tool.

These mischaracterizations feed HUD’s larger purpose of painting growing pains as fatal flaws. HUD claims that the 2015 Rule was not working based on the initial 49 submissions in 2016 and 2017—less than 5% of the anticipated submissions due before 2020.³⁷⁴ HUD itself acknowledges that the 2015 Rule “was not fully implemented” and that there had only been a “limited roll-out,” and yet it concludes that a “new approach was required.”³⁷⁵ HUD’s conclusion that it needed overhaul the 2015 Rule entirely based on its cursory assessment of its implementation, would render any adoption of the Proposed Rule arbitrary and capricious.

³⁷⁰ 85 Fed. Reg. at 2042.

³⁷¹ See Declaration of Franklin A. Lenk (“Lenk Decl.”) ¶ 4, *Nat’l Fair Housing Alliance*, No. 18-cv-1076, Doc. No. 19-3 (May 29, 2018) (“In general, however, I believe the issues local governments experience in preparing an AFH stem not from any deficiency or lack of clarity in the Tool, but the challenge of conducting the kind of comprehensive analysis needed to perform an adequate assessment.”).

³⁷² See Steil & Kelly, *supra* note 62 at 742-43.

³⁷³ See Lenk Decl., *supra* note 371 at ¶ 4(b); see also U.S. DEP’T OF HOUS. & DEV., *AFFH Guidebook, Version 1* (Dec. 31, 2015), 114–20, available at <https://files.hudexchange.info/resources/documents/AFFH-Rule-Guidebook.pdf> (providing examples of goals, metrics, and priority-setting).

³⁷⁴ See NAT’L FAIR HOUS. ALLIANCE, List of Local Governments with AFH Due 2018-2020 (Jan. 9, 2018), <https://nationalfairhousing.org/wp-content/uploads/2018/11/AFH-lists-from-HUD-Projected-AFH-Due-Dates-1-5-2018-thru-10-31-2020.pdf>.

³⁷⁵ 85 Fed. Reg. at 2043.

4. The Proposed Rule Incorporates the Same Inflexible and Outcome-Prescriptive Elements HUD Laments.

a. The Proposed List of “Inherent Barriers” Encourages Prescribed Outcomes Not Experimentation.

Whereas HUD claims that the 2015 Rule is “overly prescriptive” and inflexible and that the Proposed Rule encourages “experimentation,” the “inherent barriers” list in fact incentivizes complacency and prescribed outcomes.

The 2015 Rule strikes an appropriate balance in requiring program participants to use tools and data to identify fair housing goals while giving wide latitude to achieve those goals through various, locally-driven means. The 2015 Rule requires program participants to use “HUD-provided data, local data, [and] local knowledge, including information gained through community participation, and the Assessment Tool,” to identify fair housing issues.³⁷⁶ And HUD intended to provide for separate Assessment Tools for public housing agencies, States and Insular Areas, and local governments respectively. HUD stressed in promulgating the 2015 Rule that “program participants have latitude to adjust their goals and strategies in their local decision making process in order to select the most effective ways to address the issues and contributing factors identified by the data and analysis.”³⁷⁷

By contrast, the Proposed Rule is driven by local insight in name only. As explained above, the Proposed Rule would permit program participants to self-identify “three goals towards fair housing choice or obstacles to fair housing choice” without providing any supporting data, local or otherwise.³⁷⁸ “The contents of the certification need not be based on any HUD-prescribed specific analysis or data but should reflect the practical experience and local insights of the jurisdiction, including objective quantitative and qualitative data as the jurisdiction deems appropriate.”³⁷⁹ HUD predicts that the AFFH process under the Proposed Rule would take a total of 10 hours per response, in part, no doubt, because participants would be able to easily select from HUD’s list of “inherent barriers” without further justification or planning.³⁸⁰ If a program participant selects a barrier not on HUD’s list, even one that is more tailored to local conditions, it must engage in some additional, albeit minimal, work—a brief description of “how accomplishing the goal or ameliorating the obstacle affirmatively furthers fair housing in that jurisdiction.”³⁸¹ By increasing the burden of tailoring, even slightly, the Proposed Rule would incentivize program participants to choose the barriers HUD has identified. This outcome-prescriptive scheme ignores the benefit of examining local barriers and requiring

³⁷⁶ 24 C.F.R. § 5.154(d)(2).

³⁷⁷ 80 Fed. Reg. at 42,339.

³⁷⁸ *See, e.g.*, 85 Fed. Reg. at 2057.

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 2051, 2056.

³⁸¹ *Id.* at 2056.

metrics and milestones, which inspired creative solutions to fair housing problems in program participants' AFH submissions under the 2015 Rule.³⁸²

Additionally, the Proposed Rule's ranking system would enshrine precisely the type of inflexibility HUD criticizes. HUD laments that "[e]very jurisdiction, regardless of their size, civil rights record, or current housing conditions, had to go through the same AFH process."³⁸³ But the Proposed Rule's "jurisdictional risk analyses" would rank each jurisdiction using the same metric: "the extent to which there is an adequate supply of affordable and available quality housing for rent and for sale to support fair housing choice."³⁸⁴ The Proposed Rule thus would disincentivize creativity and flexibility in identifying and implementing fair housing goals.

b. The Proposed Rule Would Not Allow for A True Assessment of Program Participants' Efforts to Satisfy the AFFH Requirement, Thus Discouraging Meaningful Efforts.

HUD unfairly criticizes the 2015 Rule's process-focused approach as making it difficult for HUD to measure program participants' progress over time in affirmatively furthering fair housing.³⁸⁵ But HUD ignores the fact that the Proposed Rule possesses this precise deficiency that it wrongly ascribes to the 2015 Rule.

Under the Proposed Rule, participants would be required to identify just three "concrete," but non-binding goals, which need not "cover specific areas or reach certain thresholds."³⁸⁶ Program participants may set more than three goals, but the Proposed Rule, of course, would provide no incentive to do so. Program participants' annual progress update requirements would be minimal: Program participants would not need to address all three goals or obstacles in each annual report and would need only take "some steps" towards addressing identified goals.³⁸⁷ No supporting documentation of steps taken would be required.³⁸⁸ HUD would then assess the appropriateness of those steps under a toothless "rational basis review" by HUD, as described above.³⁸⁹ In short, the Proposed Rule would not enable HUD to meaningfully measure program participants' AFFH progress over time and to hold them accountable if program participants fail to identify or address barriers or goals to fair housing specific to their localities.

³⁸² Steil & Kelly, *supra* note 62 at 747.

³⁸³ *Id.* at 2043.

³⁸⁴ *Id.* at 2053.

³⁸⁵ 85 Fed. Reg. at 2047.

³⁸⁶ *Id.* at 2045–46.

³⁸⁷ *Id.* at 2050.

³⁸⁸ *Id.* at 2059.

³⁸⁹ *Id.* at 2050.

The proposed ranking system likewise would not enable HUD to measure progress towards a program participant's efforts to affirmatively further fair housing.³⁹⁰ The reason, of course, is simple: The proposed ranking does not measure any fair housing efforts.

5. HUD Fails to Consider the Harm that Adoption and Implementation of the Proposed Rule Will Cause to the Protected Classes, States, and Local Services.

Glaringly absent from the Proposed Rule is any discussion of the harm that it would cause states, protected classes, and local services, among others. By excising considerations of concentration of poverty, racial and ethnic segregation, and access to opportunity, the Proposed Rule would stunt the progress made by states and local governments towards ensuring fair housing. HUD also fails to consider how Proposed Rule would endanger renters, workers, and the environment and reduce the availability of local services, which will further burden protected classes.

a. The Proposed Rule Would Allow Residential Segregation to Persist or Worsen.

As described in more detail above, racial, ethnic, and income-based segregation still plague our states,³⁹¹ yet the Proposed Rule would not address it. With no discussion or justification, HUD would eliminate the 2015 Rule's aims to "overcome historic patterns of segregation" and to "achieve truly balanced and integrated living patterns," as well as its requirements that program participants assess patterns of integration and segregation³⁹² and certify that they "will take no action that is materially inconsistent with its obligation to affirmatively further fair housing."³⁹³ HUD's relaxation of requirements and goals in the Proposed Rule would hamper efforts to address segregation. This is because certain policies and legislative change critical to reducing segregation can only be affected at the local level, and thus "there is little that the State can do" if local jurisdictions are not tasked with fully assessing and overcoming these barriers.³⁹⁴

Withdrawing the Local Government Assessment Tool and permanently foreclosing the availability of the other data tools would also deprive program participants of invaluable means of assessing segregation patterns in the first instance. These tools frame national census data in a way that allow localities to isolate variables, like income level or race, and better analyze the driving forces that caused those patterns.³⁹⁵ Thus, failing to require program participants to

³⁹⁰ *Id.* at 2047.

³⁹¹ CITY OF NEW YORK, *Where We Live NYC*, *supra* note 166 at 24, 75–76; *see also* discussion *supra* pp. I.C.2.

³⁹² 80 Fed. Reg. at 42,272–73.

³⁹³ *See, e.g.*, 24 C.F.R. § 91.225; *id.* § 91.325.

³⁹⁴ Visnauskas Decl., *supra* note 143 at ¶ 14.

³⁹⁵ State Attorneys General Comment Letter, *supra* note 2.

analyze and affirmatively disrupt segregation would allow such segregation, and its associated harms, to perpetuate. Critically, these harms disproportionately befall black and Latinx residents as well as people with disabilities, as discussed above.

In its Advanced Notice of this Proposed Rule, HUD attempted to downplay the need to desegregate neighborhoods and promote integration.³⁹⁶ It claimed that “peer-reviewed literature indicates that the positive outcomes of policies focused on deconcentrating poverty are likely limited to certain age and demographic groups and are difficult to implement at scale and without disrupting local decision making.”³⁹⁷ To the contrary, the study HUD cited confirms that neighborhood quality has a dramatic impact on a child’s future outcomes and that encouraging integration into lower-poverty neighborhoods at a younger age reduced the disruptive effects of moving and increased the likelihood of attending college, higher income, and improved “mental health, physical health, and subjective well-being” as adults.³⁹⁸ And, as the NYU Furman Center noted in its comment to the advance notice, the same study’s authors further found in a subsequent paper that “[m]oving to a neighborhood that is just a mile or two away can change children’s average earnings by several thousand dollars a year and have significant effects on a spectrum of other outcomes ranging from incarceration to teenage birth rates.”³⁹⁹

Just as federal, state, and local laws and practices created segregated communities of concentrated poverty, governments, and specifically HUD, have the obligation and ability to promote balanced and integrated living patterns that provide opportunity to communities of color. The Proposed Rule fails to acknowledge that power and duty, and if the Proposed Rule is adopted, such abdication would likely preserve the lack of educational and economic opportunities available in segregated communities, further entrenching them in segregation.

b. The Proposed Rule Would Eliminate Opportunities to Detect and Eradicate Discrimination against Protected Classes.

The Proposed Rule will further disadvantage protected classes by eliminating other aspects of the 2015 Rule aimed at detecting and eradicating discrimination.

First, the Proposed Rule would require no examination of whether policies deepen disparities in access to opportunity or advance housing opportunities for groups that have

³⁹⁶ 83 Fed. Reg. at 40,713–14.

³⁹⁷ *Id.*

³⁹⁸ Chetty, Raj, Nathaniel Hendren, & Lawrence Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Project*, 106 AM. ECON. REV. 856, 899 (2016); *see also* Been & House, *supra* note 142 at 5–6.

³⁹⁹ Been & House, *supra* note 142 at 5 (citing Raj Chetty et al. (2018), *The Opportunity Atlas: Mapping the Childhood Roots of Social Mobility* 49 (Opportunity Insights, Working Paper)).

historically experienced housing discrimination. In a departure from the anemic AI process,⁴⁰⁰ the 2015 Rule requires analysis of disparities in access to opportunities based on protected characteristics, including race, disability, family status, and national origin. These opportunities include high-performing schools, transportation, and jobs. The Proposed Rule would mark a return to an AI-style process that, as the GAO found, involves little introspection into local policies and conditions and therefore little meaningful change.⁴⁰¹ Such a return would allow program participants with no oversight to ignore known racial and ethnic discrimination, as was the case with Westchester County in New York. A CDBG grantee, Westchester County made no mention of known segregation and discrimination in its AI or any plan to address them and ultimately settled litigation brought by HUD by pledging to invest \$51.6 million in affordable housing.⁴⁰² HUD fails to consider the strong risk that a reversion to a system lacking in oversight would exacerbate discrimination against protected groups.

Second, HUD seeks to end AFFH-specific community participation that increase discussion and detection of discrimination in housing. Inclusive public hearing and comment on AFFH-specific proposals has led to greater discussion of discriminatory practices from a wider array of stakeholders than the more general hearings regarding Consolidated Plan allows.⁴⁰³

Finally, the new ranking system in the Proposed Rule would employ an ineffectual measure of program participants' compliance with the civil rights law that will do nothing to hold program participants accountable for patterns of discrimination. Under the Proposed Rule, a program participant cannot obtain the highest ranking of "outstanding," which may come with potential additional program funds, if it, or a PHA operating within its jurisdiction, has an "adversely adjudicated fair housing complaint" brought by HUD or DOJ within the previous five years.⁴⁰⁴ In other words, only a court or administrative law judge finding that a jurisdiction or PHA violated a civil rights law in a HUD or DOJ case will be cause for penalty under this factor,

⁴⁰⁰ Visnauskas Decl., *supra* note 143 at ¶ 17 ("AIs under the previous system "did not: . . . contain an adequate level of data analysis to fully assess the existence of demographic and housing trends and conditions that disproportionately impact members of protected classes; or include an adequate level of policy analysis and its impact on the protected classes.").

⁴⁰¹ GAO study, *supra* note 34 at 2.

⁴⁰² *Id.*

⁴⁰³ See Letter from Lisa C. Barrett, Director of Federal Policy, Comment to FR-5173-N-15, POLICYLINK (Mar. 6, 2018), available at <https://www.regulations.gov/document?D=HUD-2018-0001-0058> (detailing efforts in New Orleans, Louisiana); Letter from Caroline Peattie, Executive Director, Comment to FR-5173-N-15, FAIR HOUSING ADVOCATES OF NORTHERN CALIFORNIA (Mar. 5, 2018), available at <https://www.regulations.gov/document?D=HUD-2018-0001-0037> (detailing efforts in Marin County, California); Letter from Kathy Brown, Comment to FR-5173-N-15, BOSTON TENANT CORP. (Mar. 8, 2018), available at <https://www.regulations.gov/document?D=HUD-2018-0001-0039> (detailing efforts in Boston, Massachusetts).

⁴⁰⁴ 85 Fed. Reg. at 2047.

and that penalty only prevents a program participant from obtaining additional program funds.⁴⁰⁵ The Proposed Rule would capture a miniscule portion of fair housing cases, let alone violations of fair housing law. Local, state, and federal governments bring only about one quarter of fair housing cases and only a handful of DOJ or HUD cases in the last few years resulted in a final judgment.⁴⁰⁶ Ultimately, this underreporting will further decrease accountability for program participants to address discrimination and the role it plays in limiting fair housing opportunities.

c. HUD Fails to Consider How Its Proposed List of “Inherent Barriers,” Which Would Encourage Deregulation, Would In Turn Harm Renters, Workers, and the Environment.

The Proposed Rule would encourage program participants to deregulate housing construction and strip important worker, renter, safety, and environmental protections with no analysis of the harm likely to result. The proposed AFFH certification would scrap a tailored, data-based approach to identifying barriers to fair housing and instead direct program participants to identify goals or barriers to fair housing, untethered to any data or community input. Under the Proposed Rule, program participants may also select from a list of presumed “inherent barriers” to fair housing, as one of their three goals or barriers and they need not provide any explanation or analysis as to whether its adoption will further fair housing in the jurisdiction.

Some of these enumerated inherent barriers, as described above, would come at potentially significant social cost. “Labor requirements,” for instance, may encompass any number of wage or safety protections for workers. One such protection that directly applies in the affordable housing context exists in Section 421-a of New York Real Estate Law. That law provides a real estate tax exemption to buildings that provide a certain amount of affordable units and requires that the prevailing wage—typically a wage higher than the minimum—be paid during the duration of the tax break to building service employees, *i.e.*, otherwise low-wage workers like watchmen, guards, doormen, building cleaners, porters, janitors, gardeners, or groundskeepers.⁴⁰⁷ Depressing the wages of those workers who struggle to find housing they can afford undermines any gains by reducing up-front labor costs.⁴⁰⁸

Targeting rent controls and similar “economic restrictions” also targets the classes protected under the FHA. Such controls help protect renters with fixed or low income to maintain affordable housing, particularly in high-rent markets like New York City and San

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*; *see also* Section II.A.3(c).

⁴⁰⁷ N.Y. Real Prop. Law § 421-a(8)(ii).

⁴⁰⁸ *See* Tobias Salinger, *Doormen Not Getting Required Wages at 421-a Buildings*, DAILY NEWS (Feb. 17, 2014), <https://www.nydailynews.com/new-york/queens/doormen-lose-prevailing-wage-article-1.1617659>; Emma Whitfield, *Luxury Building Owners Who Get Tax Breaks Are Underpaying Workers With Impunity*, THE GOTHAMIST (Dec. 30, 2015), <https://gothamist.com/news/luxury-building-owners-who-get-tax-breaks-are-underpaying-workers-with-impunity>.

Francisco, not only by stabilizing rental rates but also by affording other rights.⁴⁰⁹ New York rent regulations, for instance, entitle rent stabilized tenants to receive required services, to have their leases renewed, and to greater protections from eviction.⁴¹⁰ Especially where gentrification creeps into historically-segregated neighborhoods, rent controls allow low-income renters to integrate with more affluent renters.⁴¹¹ Predictably, decontrolling housing causes rent increases and a subsequent exodus of the lower-income tenants that occupied the controlled apartments, but also causes the rents of nearby non-controlled apartment to increase.⁴¹² This displacement undermines the FHA and, of course, harms low- or no-income renters. In contrast, removing rent control regulations, which largely do *not* apply to new builds,⁴¹³ would likely not discourage affordable housing construction.

Targeting purported “[a]rbitrary or excessive energy and water efficiency mandates” may likewise burden protected classes.⁴¹⁴ Specifically, addressing these requirements may result in increased energy and utility expenses of protected classes, thus, reducing long-term affordability of units.⁴¹⁵ The U.S. Energy Information Administration found that in 2015, nearly one-third of U.S. households faced challenges in paying energy bills or sustaining adequate heating or cooling in their homes, and about 20% of households reported forgoing necessities such as food or medicine to pay an energy bill, and 14% reporting that they had received a disconnection notice for energy service.⁴¹⁶ The financial burden of paying energy bills is particularly felt by

⁴⁰⁹ Prasanna Rajasekaran, Mark Treskon, & Solomon Greene, *Rent Control: What Does the Research Tell Us about the Effectiveness of Local Action?*, URBAN INST. (Jan. 2019), available at https://www.urban.org/sites/default/files/publication/99646/rent_control_what_does_the_research_tell_us_about_the_effectiveness_of_local_action_1.pdf.

⁴¹⁰ N.Y. Comp. Codes R. & Regs. tit. 9, §§ 2524.1, 2525.5 (2020).

⁴¹¹ David H. Autor, Christopher J. Palmer, & Parag A. Pathak, *Housing Market Spillovers: Evidence from the End of Rent Control in Cambridge, Massachusetts*, JOURNAL OF POL. ECON., Vol. 122, No. 3 (June 2014), 665, available at <http://www.jstor.org/stable/10.1086/675536>.

⁴¹² *Id.* at 665, 667, 674.

⁴¹³ See, e.g., N.Y. Comp. Codes R. & Regs. tit. 9, §§ 2520.11 (2020); D.C. 35 § 42–3502.05(a)(2); Md. § 6.20.030; See NAT’L MULTIFAMILY HOUS. COUNCIL, *Rent Control Laws By State* (Sept. 20, 2019), <https://www.nmhc.org/research-insight/analysis-and-guidance/rent-control-laws-by-state/>.

⁴¹⁴ 85 Fed. Reg. at 1056.

⁴¹⁵ U.S. ENVTL. PROTECTION AGENCY, *Energy Efficiency in Affordable Housing 2* (2011), available at https://www.epa.gov/sites/production/files/2015-08/documents/affordable_housing.pdf.

⁴¹⁶ See U.S. ENERGY INFORMATION ADMIN., *Residential Energy Consumption Survey* (Sept. 19, 2018) available at <https://www.eia.gov/todayinenergy/detail.php?id=37072>.

protected and other vulnerable classes. A recent analysis of data obtained from the U.S. Census Bureau's American Housing Survey revealed that 67 percent of low-income households, 36 percent of African American households, and 34 percent of elderly households have high energy burdens that consume a disproportionate share of their income relative to other households.⁴¹⁷ Other federal agencies also report that energy costs can consumer up to 19 percent of total annual income for single, elderly, poor, and disabled persons living on social security (compared with a national average of only 4 percent).⁴¹⁸

Additionally, to the extent addressing "[a]rbitrary or excessive energy and water efficiency mandates" involves elimination of energy conservation codes, this would subvert efficiency and affordability that would benefit both protected classes and the broader public. Specifically, constructing or retrofitting buildings according to energy conservation codes, helps households to reduce their energy usage and associated utility expenses, and helps to ensure that housing remains affordable. As an example, when the Denver Housing Authority implemented energy efficiency projects in its affordable housing units, it expected a reduction in its annual energy consumption by 25 percent.⁴¹⁹ Likewise, efficiency measures, such as using ENERGY STAR projects, can save a homeowner \$200 to \$400 in utilities per year.⁴²⁰ In addition, energy efficiency has been identified as a cornerstone of New York State's strategy for achieving its greenhouse gas reduction goals recently codified into law.⁴²¹ The State has proposed to dedicate at least 20 percent of public investment in energy efficiency to Low to Moderate Income consumers to further the legislative goals and help address energy affordability issues.⁴²² HUD's characterization of energy and water mandates as an "inherent barrier" to fair housing disregards the impact elimination of those mandates would have on the very classes the FHA seeks to protect.

Eliminating wetland and environmental regulations viewed as "inherent barriers" may also lead to increased harm to vulnerable populations, including protected classes. Building on wetlands can increase exposure to hazards, including earthquakes, subsidence, flooding, and erosion for people living on the now-filled wetland and lead to the loss of important wetland functions and services for adjacent communities, such as filtration and removal of pollutants, aesthetic values, recreational opportunities, habitat for various plant and animal species of

⁴¹⁷ See AM. COUNCIL FOR AN ENERGY EFFICIENT ECONOMY, *Understanding Energy Affordability* (Sept. 9, 2019), available at <https://www.aceee.org/sites/default/files/energy-affordability.pdf>.

⁴¹⁸ *Id.*

⁴¹⁹ See U.S. ENVTL. PROTECTION AGENCY, *supra* note 415 at 2.

⁴²⁰ U.S. ENERGY INFORMATION ADMIN., *supra* note 416 at 3.

⁴²¹ See Climate Leadership and Community Protection Act; Laws of New York, 2019, Chapter 106 (2019).

⁴²² See N.Y. STATE DEPARTMENT OF PUBLIC SERVICE; ENERGY RESEARCH AND DEVELOPMENT AUTHORITY, *New Efficiency: New York 3,5* (Apr. 2018), <https://www.nyserda.ny.gov/-/media/Files/Publications/New-Efficiency-New-York.pdf>.

interest, and flood protection.⁴²³ The loss of flood protection benefits provided by wetlands can lead to significant economic damages to housing stock and other infrastructure in both coastal and inland areas. For example, research in Vermont indicated that inland wetlands and floodplains decreased damages from Tropical Storm Irene in one watershed by nearly \$2 million.⁴²⁴ In New York, research has indicated that the presence of wetlands may have reduced the damages associated with Hurricane Sandy by \$140 million; the U.S. Army Corps of Engineers has recommended restoring those natural barriers to future storms.⁴²⁵ In the long term, susceptibility to natural damage and disasters may make the affordable housing that would be built on former wetlands under the Proposed Rule less safe.

Rolling back environmental protections would not only risk loss of open areas and wildlife habitats but would also promote suburban sprawl. “Sprawl has been shown fairly consistently to degrade wildlife habitat, threaten agricultural productivity, and raise the cost of public services at all levels of government,” including the provision of water, sewage, and roads.⁴²⁶ Other services that rely on population density, like public transportation, suffer, as do residents whose access to employment opportunities fade with the distance.⁴²⁷ Fiscally depressed areas drained of taxpayers who have moved to outer suburbs look to the State for

⁴²³ Jon Kusler, *Wetlands and Natural Hazards* (2009), available at https://www.aswm.org/pdf_lib/wetlands_natural_hazards_012709.pdf; see also U.S. ARMY CORPS OF ENGINEERS, NY DISTRICT, *Final Report: Integrated Hurricane Sandy General Reevaluation Report and Environmental Impact Statement, Atlantic Coast of NY, East Rockaway Inlet and Jamaica Bay* 76 (May 2019), available at <https://www.nan.usace.army.mil/Portals/37/docs/civilworks/projects/ny/coast/Rockaway/Rockaway%20Final%20Report/Rock%20Jam%20Bay%20Final%20Report%20HSGRR%205-9-19.pdf?ver=2019-05-29-124532-717>.

⁴²⁴ Keri B. Watson, et al., *Quantifying flood mitigation services: The economic value of Otter Creek wetlands and floodplains to Middlebury, VT*. ECOLOGICAL ECONOMICS 130:16-24, at 21, available at <https://pdfs.semanticscholar.org/e9fa/8b00a391b0f7768f61ae9c890372f97507b1.pdf>.

⁴²⁵ Siddharth Narayan, et al. *The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA*. SCIENTIFIC REPORTS 9463 (Aug. 2017), <https://www.nature.com/articles/s41598-017-09269-z.pdf>; see also U.S. ARMY CORPS OF ENGINEERS, *supra* note 423 at xx, 72, 76 (recommending to restore wetlands, vegetated dunes, and maritime or coastal forests, including areas filled for development, in order to manage coastal flood risk).

⁴²⁶ Rolf Pental, *Sprawl Without Growth: the Upstate Paradox*, BROOKINGS INST. SURVEY SERIES/CTR. ON URBAN & METROPOLITAN METRO. POLICY 2 (Oct. 2003).

⁴²⁷ Alan G. Hevesi, *Smart Growth in New York State: A Discussion Paper*, 5, OFFICE OF THE N.Y. STATE COMPTROLLER (May 2004).

assistance and vacant residential, commercial and industrial properties “are eyesores that have a variety of negative economic, fiscal, social and environmental impacts.”⁴²⁸

Sprawl has been of great concern to municipalities in New York. According to a study in upstate New York, land has been developed at 12 times the rate of population growth in the last two decades, and new housing units are being developed about twice as fast as new households are created, all the while houses, office buildings and industrial facilities in cities and older suburbs go unused or underutilized.⁴²⁹ In Monroe County, even though the population has remained virtually unchanged, 300 miles of new roads and hundreds of houses were built within the first years of the decade, leaving two million square feet of vacant retail space and homes empty and increasing residents’ taxes to pay for road expansion and maintenance.⁴³⁰ Counties like Onondaga and Genesee have turned to so-called “smart-growth” policies that simultaneously curb sprawl, protect the environment, and preserve tax coffers.⁴³¹

By allowing participants to select these “inherent barriers” without any justification, HUD, through the Proposed Rule, encourages their selection without regard to their resulting harm. In incentivizing these attacks on important labor, housing, and environmental protections, HUD fails to conduct necessary analyses of the significant harms that will result to our States, municipalities, and constituents, particularly those in protected classes.

**d. Program Participants that Are Compliant with 2015 Rule
Likewise Face Harm if the Proposed Rule is Adopted.**

The Proposed Rule would provide no clarity as to the fate of AFHs approved under the 2015 Rule. HUD does not make clear whether participants with approved AFH plans would be required to adhere to them if the Proposed Rule is implemented. If so, those plans incorporate an obligation to meet targets whose measurement is made far more difficult without the availability of HUD’s tools or technical guidance.

The Proposed Rule may also perversely call into question the adequacy of those approved AFH plans. Under the proposed ranking system, HUD would conduct an annual review of program participants’ efforts to increase affordable housing, as well as a number of other factors unrelated to fair housing. Although it is unclear from HUD’s vague language, program participants in the middle of carrying out approved AFHs may be subject to this ranking under the Proposed Rule. This could lead to absurd results: As one hypothetical, Ithaca, New York, which has an approved AFH under the 2015 Rule and is carrying out its AFH’s goals, may be ranked lower than program participants whose AFH plan was rejected, all because Ithaca has higher median home values and higher-than-average vacancy rates. While the Proposed Rule’s ranking system factors do not measure whether Ithaca is affirmatively furthering fair housing, the

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Id.* at 4.

⁴³¹ *Id.* at 21–22.

ranking system could nonetheless decrease Ithaca's eligibility for HUD discretionary grants.⁴³² The Proposed Rule's about-face therefore would hurt program participants compliant with the 2015 Rule and actively taking steps to further fair housing.

e. The Proposed Ranking System Would Disadvantage Cities with the Worst Housing Crises.

The same ranking system that would penalize compliant participants may also disadvantage cities and states suffering from the worst housing crises and from decades of federal funding cuts. If the Proposed Rule is adopted, program participants that lack sufficient funding to address fair housing, or which face stubborn impediments to fair housing, may earn a low ranking that will, counterproductively, jeopardize their access to HUD funding.⁴³³ One case in point involves the ranking factor of "percentage of dwellings lacking complete plumbing or kitchen facilities."⁴³⁴ Data informing this factor would likely derive from surveys from the U.S. Census Bureau that historically informed which program participants needed more fair housing funds.⁴³⁵ This factor may deprive rural areas experiencing trouble accessing water of much needed resources. According to the last census, "counties containing Indian reservations have astonishingly high percentages of households without plumbing—14 percent of households in Shannon County, South Dakota do not have full plumbing. In Apache County, Ariz., the rate is more than 17 percent. Sparsely-populated census areas in Alaska also have very high percentages."⁴³⁶

Likewise, denying grants based on "subpar [PHA] conditions" would result in a loss of funds to the areas that most require them. Further complicating the issue is HUD's Rental Assistance Demonstration ("RAD") program which transitions public housing to privately managed Section 8 housing. The majority of PHAs participating in the program are in the South.⁴³⁷ Assuming that the ranking system would not count the conditions of the historically-

⁴³² 85 Fed. Reg. at 2054.

⁴³³ David A. Raglin & Deborah M. Stempowski, *2015 American Community Survey Research and Evaluation Report*, AM. COMMUNITY SURVEY OFF. (May 29, 2015), available at https://www.census.gov/content/dam/Census/library/working-papers/2015/acs/2015_Raglin_01.pdf.

⁴³⁴ 85 Fed. Reg. at 2053.

⁴³⁵ Christopher Ingraham, *1.6 Million Americans Don't Have Indoor Plumbing: Here's Where They Live*, WASHINGTON POST, <https://www.washingtonpost.com/news/wonk/wp/2014/04/23/1-6-million-americans-dont-have-indoor-plumbing-heres-where-they-live/>.

⁴³⁶ *Id.*

⁴³⁷ U.S. DEP'T OF HOUS. & URBAN DEV., *Evaluation of HUD's Rental Assistance Demonstration (RAD)* 22–23 (June 2019), available at <https://www.huduser.gov/portal/sites/default/files/pdf/RAD-Evaluation-Final-Report.pdf>.

public housing in the RAD program, the Proposed Rule would divert the allocation of funds away from localities that need it most.

f. HUD Does Not Consider the Harm on Program Participants that Have Relied on the 2015 Rule in Their Own Legislation.

The suspension of the 2015 Rule and the potential adoption of the Proposed Rule would threaten the efficacy of the local legislation that incorporates the robust protections of the 2015 Rule. As in the case of California, state and local entities required to comply with both California's AFFH rule and the Proposed Rule may be confused as to what their obligations are and how to implement policies consistent with both. As further detailed above, the revocation of the 2015 Rule and the federal tools and guidance it provided for jeopardize those entities' ability to comply with legislation that assumed the availability such resources.

6. HUD's Failure to Consider Alternatives to the Proposed Rule is Arbitrary and Capricious.

Through its various efforts to dismantle the 2015 Rule, HUD has failed to consider any alternative short of a complete overhaul of the carefully-crafted regulatory scheme, even though several reasonable alternatives were presented to it. This violates the agency's duty to "consider and explain its rejection of 'reasonably obvious alternative[s].'"⁴³⁸ When it first invited recommendations as to "outdated, ineffective, or excessively burdensome" regulations in May 2017, HUD received comments, 60% of which were positive about the 2015 Rule and 29% of which were critical.⁴³⁹ Commenters suggested modifications to the 2015 Rule that were mostly incremental and include:

- **Modifying the Geographic Scope of the Tools.** One state recommended limiting the geographic scope of state-wide AFH to be limited to "nonentitlement portions of the State, where the States exercise[] both policy and programmatic authority or Balance of State administration for the federal block grant funds."⁴⁴⁰ Another program participant

⁴³⁸ *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013) (quoting *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1053 (D.C. Cir. 1979)); see also *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987)) (noting that an agency must consider "significant and viable" and "obvious" alternatives to a proposed action).

⁴³⁹ See GEORGETOWN UNIVERSITY LAW CTR.'S CIVIL RIGHTS CLINIC & VOTING RIGHTS INST., Comment to FR-6123-A-01 (Oct. 15, 2018), available at <https://www.regulations.gov/document?D=HUD-2018-0060-0659> (summarizing review of substantive comments to FR 6030-N-01).

⁴⁴⁰ Ben Metcalf, CA. Comment to FR 6030-N-01, DEP'T OF HOUS. & COMMUNITY DEV. 6 (June 14, 2017), available at <https://www.regulations.gov/document?D=HUD-2017-0029-0184>.

suggested excluding rural areas entirely from the AFH data analysis due to the lack of available data.⁴⁴¹

- **Limiting the Factors to be Assessed by Smaller Jurisdictions and PHAs.** Several PHAs also requested that HUD streamline the PHA tool to limit the factors assessed, such as the “identification of concentration of poverty within the jurisdiction and/or region with demographic information” and assessment of “fair housing actions including any findings, lawsuits, enforcement actions, settlements, or judgments related to fair housing or other civil rights laws.”⁴⁴²
- **Financial Resources.** One PHA suggested increasing Administrative Fees and Operating Subsidies or providing separate funding to housing authorities to complete the plan as written.⁴⁴³
- **Administrative Improvements.** The City of New York recommended streamlining online access to the tools and consolidated process.⁴⁴⁴

Rather than consider these or any other amendments to the 2015 Rule, HUD abruptly suspended the 2015 Rule in January 2018 without advance notice or opportunity for stakeholders to comment.⁴⁴⁵ HUD later revoked one of the 2015 Rule’s central features, the Local Government Assessment Tool, also without advanced notice or input.⁴⁴⁶

HUD’s rapid retreat from the 2015 Rule began less than three years after its publication, before most program participants had a chance to engage in the AFH process. Based on the submissions of only 49 out of an approximately 1,111 program participants that would submit AFH, HUD broadly criticizes the 2015 Rule as “too prescriptive in outcomes” and “overly burdensome,” but has made no effort to identify improvements to the existing regulation or

⁴⁴¹ J. Jacob Sipe, Comment to FR 6030-N-01, INDIANA HOUS. & COMMUNITY DEV. AUTH. 9 (June 14, 2017), available at <https://www.regulations.gov/document?D=HUD-2017-0029-0149>.

⁴⁴² Beka Smith, Comment to FR 6030-N-01, SEATTLE HOUS. AUTH. 1 (June 14, 2017), available at <https://www.regulations.gov/document?D=HUD-2017-0029-0110>; Jackie Dana, Comment to FR 6030-N-01, THE OFF. OF PUBLIC & INDIAN HOUS. 4 (June 14, 2017), <https://www.regulations.gov/document?D=HUD-2017-0029-0233>.

⁴⁴³ Ken Cole, Comment to FR 6030-N-01, CA. ASS’N OF HOUS. AUTHS. 2 (June 14, 2017), available at <https://www.regulations.gov/document?D=HUD-2017-0029-0291>.

⁴⁴⁴ Comment to FR 6030-N-01, CITY OF NEW YORK 15–16 (June 14, 2017), available at <https://www.regulations.gov/document?D=HUD-2017-0029-0248>.

⁴⁴⁵ Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, 83 Fed. Reg. 683 (Jan. 5, 2018).

⁴⁴⁶ Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments, 83 Fed. Reg. 23,922 (May 23, 2018).

devise an intermediary rule.⁴⁴⁷ In addition to the alternatives identified by commenters, HUD has also failed to consider retaining certain aspects of the 2015 Rule that would simply provide participants with additional resources to carry out their efforts to affirmatively further fair housing, such as keeping the community participation requirement or the Local Government Assessment Tool. Even within the context of the new ranking system, HUD does not consider providing for an iterative process to help program participants increase their ranking as an alternative to the proposed penalty of a loss of funding altogether. The agency's failure to consider these "obvious alternative[s]" would render its adoption of the Proposed Rule arbitrary and capricious.

7. HUD's Justifications for the Proposed Rule are Pretextual.

The justifications for issuing the Proposed Rule are pretext for a deregulatory agenda aimed at bolstering the interests of real estate developers. "Genuine justifications . . . that can be scrutinized by courts and the interested public" must underlie agency decisions.⁴⁴⁸ "Accepting contrived reasons would defeat the purpose of the enterprise" of requiring a "reasoned explanation."⁴⁴⁹ Agency action therefore cannot rest on "'a pretextual or sham justification that conceals the true basis for the decision.'"⁴⁵⁰ HUD's purported goal of "seek[ing] to further both the spirit and the letter of the Fair Housing Act,"⁴⁵¹ poorly masks its true motives to deregulate and ease burdens on real estate developers.

a. The Proposed Rule Furthers Unencumbered Housing Stock Development, Not Fair Housing.

As explained in greater detail above, the Proposed Rule's supply-side approach does not further "the spirit [or] the letter of the Fair Housing Act." The quantity of affordable housing is neither the sole nor the best measure of access to *fair* housing. Worse, taken in the context of the

⁴⁴⁷ 85 Fed. Reg. at 2042.

⁴⁴⁸ *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575–76 (2019); *see also SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (Agency action "requires that the grounds upon which the . . . agency acted be clearly disclosed.").

⁴⁴⁹ *Dep't of Commerce*, 139 S. Ct. at 2576.

⁴⁵⁰ *Saget v. Trump*, 375 F. Supp. 3d 280, 361 (E.D.N.Y. 2019) (citation omitted); *see also Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 176–79 (4th Cir. 2018) (rejecting agency's project approval because it was "'was a preordained decision' and the Forest Service 'reverse engineered the [process] to justify this outcome, despite that the Forest Service lacked necessary information about the environmental impacts of the project.'"); *Woods Petroleum Corp. v. U.S. Dep't of Int.*, 18 F.3d 854, 859 (10th Cir. 1994) (setting aside agency action where the "sole reason" for the action was "to provide a pretext for [the agency's] ulterior motive"); *Tummino v. Torti*, 603 F. Supp. 2d 519, 544–46 (E.D.N.Y. 2009) (finding agency action to be arbitrary and capricious when its articulated basis was "fanciful and wholly unsubstantiated" and other, impermissible considerations were evident from the record).

⁴⁵¹ 85 Fed. Reg. at 2043.

“inherent barriers” HUD encourages program participants to “ameliorate,” any affordable housing that results from the Proposed Rule would likely undermine access to fair housing. In light of the administration’s stated objective to deregulate in an effort to boost private business interests, the Proposed Rule clearly seeks to further business interests, not fair housing.⁴⁵²

The Proposed Rule’s list of “inherent barriers,” for instance, lays bare HUD’s true goals. The list contains several “obstacles” taken virtually word for word from the June 25, 2019 Executive Order Establishing a White House Council on Eliminating Regulatory Barriers to Affordable Housing.⁴⁵³ The fact that the Proposed Rule cribs from this Executive Order that has nothing to do with *fair* housing shows that, even though couched in fair housing language, the Proposed Rule is simply part of the administration’s efforts to make it cheaper for real estate developers to do business—not about combatting discrimination and segregation. It also indicates that these so-called obstacles to fair housing are not reflective of stakeholders’ experience or expert opinions on what furthers fair housing.⁴⁵⁴

⁴⁵² See, e.g., *President Donald J. Trump is Delivering on Deregulation*, White House Fact Sheets (Dec. 14, 2017) available at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-delivering-deregulation/>; Binyamin Appelbaum & Jim Tankersley, *The Trump Effect: Business Anticipating Less Regulation, Loosens Purse Strings*, N.Y. TIMES (Jan. 1, 2018) available at <https://www.nytimes.com/2018/01/01/us/politics/trump-businesses-regulation-economic-growth.html>.

⁴⁵³ Compare, e.g., proposed 24 C.F.R. § 91.255(a)(1)(i)(A)-(P) at 85 Fed. Reg. at 2056 with Exec. Order No. 13,878, 84 Fed. Reg. 30,853 (June 28, 2019) (“Federal, State, local, and tribal governments impose a multitude of regulatory barriers — laws, regulations, and administrative practices — that hinder the development of housing. These regulatory barriers include: overly restrictive zoning and growth management controls; rent controls; cumbersome building and rehabilitation codes; excessive energy and water efficiency mandates; unreasonable maximum-density allowances; historic preservation requirements; overly burdensome wetland or environmental regulations; outdated manufactured-housing regulations and restrictions; undue parking requirements; cumbersome and time-consuming permitting and review procedures; tax policies that discourage investment or reinvestment; overly complex labor requirements; and inordinate impact or developer fees. These regulatory barriers increase the costs associated with development, and, as a result, drive down the supply of affordable housing.”).

⁴⁵⁴ See, e.g., *Trump Tax Law Hurts Homeowners and Helps Real Estate Developers*, Democratic Staff Report, Committee on Oversight and Government Reform, U.S. House of Representatives (July 2018) available at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/National%20Report%20on%20Tax%20Bill%20and%20Homeowners.pdf>; Coral Davenport, *Trump Removes Pollution Controls on Streams and Wetlands*, N.Y. TIMES (Jan. 22, 2020) available at <https://www.nytimes.com/2020/01/22/climate/trump-environment-water.html> (Navigable Waters Protection Rule “strip[s] away environmental protections for streams, wetlands, and groundwater, handing a victory to farmers, fossil fuel producers and real estate developers”); Yue Stella Yu, *Real estate industry remains Trump’s top ally in 2020*, OPENSECRETS NEWS (Oct.

Indeed, several of the pre-approved activities are nakedly political attacks on environmental, housing, and labor standards, *inter alia*, rather than truly “inherent barriers” to fair housing. A program participant could meet the Proposed Rule’s requirements by, for example, certifying only that it will “ameliorate” “arbitrary or excessive energy and water efficiency mandates,” “unduly burdensome wetland or environmental regulations,” and “arbitrary or unnecessary labor requirements”—all of which undermine protections for people and the environment. And the Proposed Rule does not even limit its deregulatory agenda to the fair housing context. Rather than exempting affordable housing from purported regulatory hurdles, HUD promotes scrapping them entirely.

Another purported “obstacle[]” to fair housing is “unnecessary manufactured-housing regulations and restrictions,” which comes straight from the Manufactured Housing Association for Regulatory Reform (MHARR) and other manufactured housing associations’ comments on HUD’s Advance Notice of Proposed Rulemaking. Manufactured housing associations encouraged HUD to address what they viewed as “exclusionary zoning measures and related land-use restrictions” that prohibit new construction of manufactured homes as well as “discriminatory zoning and land-use restrictions” that have “forced the closure, sale, or abandonment of many existing manufactured housing communities[.]”⁴⁵⁵ MHARR also noted that promoting the availability of manufactured housing is a “sensible freemarket mechanism to increase housing choice and supply.”⁴⁵⁶ MHARR says nothing of how this relates to fair housing or more specifically how promoting manufactured housing availability will combat segregation; indeed, it provides no data demonstrating that manufactured housing is used by or will be used by protected classes or how increasing such housing will lead to more integrated communities.⁴⁵⁷

The Proposed Rule is designed to steer program participants to choose these “inherent barriers” that, as explained above, disincentivize independent assessments of local barriers to fair housing and are only certain to serve the administration’s deregulatory agenda and reward real estate developers rather than the protected classes HUD is mandated to support.

C. HUD Made Its Findings and Certifications Without Regard and Contrary to the Facts.

Given the uncertainty in the rankings and the impact on NOFAs and HUD funding, as described earlier, HUD cannot know whether its certifications are correct. For example, HUD has certified that the Proposed Rule is not economically significant, but without more

24, 2019) available at <https://www.opensecrets.org/news/2019/10/real-estate-industry-trump-ally-2020>.

⁴⁵⁵ Mark Weiss, Comment letter to FR-6123-A-01 Affirmatively Furthering Fair Housing: Streamlining and Enhancements, MANUFACTURED HOUS. ASS’N FOR REGULATORY REFORM 1 (Oct. 11, 2018), available at <https://www.regulations.gov/document?D=HUD-2018-0060-0370>.

⁴⁵⁶ *Id.*

⁴⁵⁷ See generally, *id.*

information regarding the rule, HUD's determination is difficult to verify. In fact, Community Development Block Grants alone had a 2019 budget of over three billion dollars and Homeless Assistance Grants had a budget of over two and a half billion dollars, with over \$415 million going to California.⁴⁵⁸ Without identifying which programs may be affected and how, the Proposed Rule's assertion regarding economic significance is unsupported, and in fact may impact jobs, the environment, public health, and other factors in California, New York, and other states.⁴⁵⁹

Other HUD certifications are also contrary to the facts. HUD certifies that it is categorically excluded from environmental review under the National Environmental Policy Act of 1969 because it is proposing fair housing and nondiscrimination standards.⁴⁶⁰ However, as described above, HUD is incentivizing program participants to relax wetland and environmental regulations to comply with AFFH requirements.⁴⁶¹ This is environmental policy masquerading as fair housing policy, and placing it within a rule with a title containing "Fair Housing" does not absolve HUD of its environmental review.

HUD also failed to analyze federalism and small entity impacts. As the Proposed Rule acknowledges, Executive Order 13132 establishes certain requirements that a federal agency must meet when it promulgates a rule that has substantial direct effects on the states, imposes substantial direct compliance costs on state and local governments, or has other federalism implications.⁴⁶² HUD summarily concludes that the Proposed Rule "does not have federalism implications and does not impose substantial direct compliance costs on State and local governments."⁴⁶³ As is demonstrated throughout this letter, this conclusion is erroneous. The Proposed Rule will significantly undermine California, New York, and other States' policies and programs and will impose substantial costs on State and local governments. Moreover, because the Proposed Rule's ranking system is incomplete, HUD cannot know or estimate the impact of its proposal on States and local governments.

Similarly, under the Regulatory Flexibility Act, whenever a federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government program participants).⁴⁶⁴ Here, HUD certified that the rule will not have a significant economic impact on small entities, despite the many small businesses, non-profits, and local governments that will be

⁴⁵⁸ *CPD Appropriations Budget*, U.S. DEP'T OF HOUS. & URBAN DEV. EXCHANGE, available at https://www.hud.gov/program_offices/comm_planning/about/budget.

⁴⁵⁹ Exec. Order No. 12,866, 3 C.F.R. § 2(f)(1) (1993).

⁴⁶⁰ 85 Fed. Reg. 2051; 42 U.S.C. §§ 4321–4347.

⁴⁶¹ See e.g., 85 Fed. Reg. at 2056.

⁴⁶² *Id.* at 2051.

⁴⁶³ *Id.*

⁴⁶⁴ 5 U.S.C. §§ 601–12 (1996).

impacted, as documented throughout this letter. By failing to properly and adequately analyze these federalism and small entity impacts, the Proposed Rule violates the APA.⁴⁶⁵

III. CONCLUSION

As detailed above, the Proposed Rule contravenes the very purpose of the FHA to address entrenched patterns of segregation and to promote integration. If it adopts the Proposed Rule, HUD would not be able to meaningfully fulfill its mandate under the FHA to affirmatively further fair housing. For all these reasons, the States strongly oppose the Proposed Rule and respectfully urge that it be rescinded.

Sincerely,



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⁴⁶⁵ See *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir.1984) (“[I]f data in the regulatory flexibility analysis—or data anywhere else in the rulemaking record—demonstrates that the rule constitutes such an unreasonable assessment of social costs and benefits as to be arbitrary and capricious, the rule cannot stand.”) (citation omitted).



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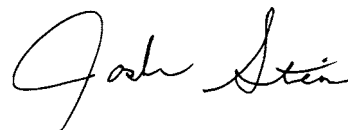
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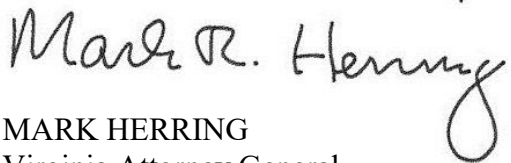
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A stylized, cursive handwritten signature in blue ink, consisting of a large loop followed by a series of smaller, connected strokes.

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A handwritten signature in blue ink, featuring a large, angular initial 'T' followed by a series of connected, somewhat jagged strokes.

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A handwritten signature in blue ink, written in a cursive style that clearly shows the first letters of the first and last names.

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A handwritten signature in blue ink, with a large, bold 'B' and 'F' followed by a long, sweeping horizontal stroke.

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