

June 14, 2017

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

Re: Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, Docket No. HUD-2017-0029, 82 Fed. Reg. 22344

Dear Secretary Carson,

On behalf of the undersigned civil rights organizations, we thank you for this opportunity to comment on the Federal Register notice regarding HUD's Regulatory Reform Agenda. Like other Americans, we have a shared interest in the aims of the federal Fair Housing Act, advancing the ability of us all to live free from discrimination and enjoy the benefits of housing choice and integrated communities. The Act conveys deep and extensive benefits in life opportunities, secure housing, personal dignity, and interracial contact. These are enduring and intergenerational gains. Conversely, discrimination and segregation are equally deep and widespread, and (as Congress has recognized) require proportionate action to address.

HUD has a central mission of protecting and advancing fair housing. We write to urge you to ensure that any regulatory or deregulatory activity pursued by HUD not jeopardize or recede from that crucial obligation. Specifically, we stress the ongoing need for our body of existing regulations and guidance implementing the Fair Housing Act. We also remind you of the care taken in constructing those rules, such that they reflect the best interests of communities and individuals throughout our country, as well as the law.

We address several of these rules in individual detail below. These include the Affirmatively Furthering Fair Housing Rule and accompanying guidance; the Discriminatory Effects Rule; and other rules advancing the important interests set forth by the Fair Housing Act.

I. Proper Criteria for Regulatory Review, Modification, and Rescission

To the extent that HUD engages in retrospective regulatory review, the agency should focus on ways it can *improve* its performance, including in advancing its civil rights mission. E.O. 13771 (which requires regulatory offsetting) poses a direct threat to HUD's ability to advance its Congressional directives. We urge HUD to take great care with any implementation of that order, which we are also concerned will divert valuable agency resources.

Just as when it passes a new regulation, an agency's actions to rescind or modify regulations are subject to administrative and substantive statutory obligations.¹ This requires that agencies engage in reasoned decision-making to interpret the laws and assess how best to execute the authority granted them by

¹ See, e.g. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983)(holding that the Administrative Procedure Act's arbitrary and capricious standard applies to agency's rule rescission, and reversing the rescission at issue); *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795 (D.C. Cir. 1983) (applying arbitrary and capricious standard of review to rule rescission).

Congress.² Although executive orders may, within limits, be used to set policy for agencies regarding rulemaking, E.O. 13771 does not supersede those requirements.³ In acting on E.O. 13771 or 13777 (or otherwise taking regulatory or deregulatory action), HUD must adhere to the requirements of the APA, the tenets of reasoned decision-making (including appropriate consideration of a regulation’s benefits), and the Congressional directives of substantive fair housing law. This means that HUD must still regulate to advance the purposes of the underlying statutes, including the Fair Housing Act.

Furthermore, as addressed below, HUD’s fair housing rules do not meet the specific criteria of E.O. 13777 and the Federal Register notice, and instead advance important statutory interests, respond to strong current needs, and convey important benefits that outweigh their costs. With regard to these rules, HUD has already engaged in a full and reasoned determination of the need for those rules and their effective design. This determination was based on an abundant body of knowledge about the need for strong, modernized fair housing measures and the need to improve consistency and civil rights performance by both HUD and HUD’s recipients.

II. HUD’s Fair Housing Regulations and Guidance Advance Important Congressional Mandates

The Congressional directives underlying HUD’s body of fair housing regulations are important and longstanding obligations. These obligations undergird the AFFH regulation, the discriminatory effects regulation, and other regulations that implement the AFFH directive and nondiscrimination protections. They also undergird the body of sub-regulatory fair housing guidance, which provides further clarity and consistency for HUD’s recipients and other actors regarding the law.

Congress has charged HUD with the “authority and responsibility” of implementing the Fair Housing Act,⁴ which seeks “to provide, within constitutional limitations, for fair housing throughout the United States”;⁵ to “remove the walls of discrimination which enclose minority groups”;⁶ and to foster “truly integrated and balanced living patterns.”⁷ The Act provides for protection from discrimination, including both intentional and disparate impact discrimination (which also includes the reinforcement of segregation).⁸ It also requires HUD to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies [of the legislation].”⁹

The Act’s “Affirmatively Furthering Fair Housing” provision is the foundation for the AFFH Rule, its accompanying Assessment Tools, and also for a range of other regulations and guidance in numerous HUD programs (discussed below). While HUD has primary responsibility for effectively interpreting and coordinating that “affirmatively furthering fair housing” (AFFH) obligation, it is also a direct legal duty

² See *id.* at 43 (an agency must consider the factors Congress intended for it to consider and may not “rely on factors which Congress has not intended it to consider”).

³ The application of an offsetting framework such as that of E.O. 13771 raises clear and predictable conflicts with the Administrative Procedure Act and substantive statutory directives. The order does not allow for adequate consideration of substantive statutory directives or regulatory benefits, while applying arbitrary cross-cutting and off-setting criteria that lack any legislative basis. Regulatory standards found elsewhere provide for a more balanced and reasonable approach, as with Executive Order 12866 (2011), which instructs consideration of both costs and benefits, including benefits such as equity, human dignity, fairness, and distributive impacts.

⁴ 42 U.S.C. § 3608(a) (1988).

⁵ 42 U.S.C. § 3601 (1968).

⁶ *Evans v. Lynn*, 537 F.2d 571, 577 (2d Cir. 1975) (citing 114 Cong. Rec. 9563 (1968) (statement of Rep. Celler)).

⁷ *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (citing 114 Cong. Rec. 3422 (1968) (statement of Sen. Mondale)).

⁸ See, e.g., 42 U.S.C. § 3604 (2010); *Texas Dep’t. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) (affirming that disparate impact is cognizable under the Fair Housing Act).

⁹ 42 U.S.C. § 3608(e)(5).

of all agencies administering housing and urban development programs and of HUD's recipients, including states, localities, and public housing authorities.¹⁰

As both the statute and case law indicate, HUD is required to act in accordance with these fair housing duties and implement an effective framework for civil rights compliance. This must entail meaningful regulations, guidance, and oversight by the agency. *See Shannon v. U.S. Dep't of Hous. & Urban Dev.*, 436 F.2d 809, 819 (3d Cir. 1970) (holding that agency "discretion must be exercised within the framework of the national policy against discrimination in federally assisted housing...and in favor of fair housing," and that HUD "must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socioeconomic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts"¹¹); *NAACP v. Sec'y of HUD*, 817 F.2d 149, 155-57 (1st Cir. 1987) (holding HUD liable for its "failure, over time, to take seriously its minimal Title VIII obligation to evaluate alternative courses of action in light of their effect on open housing" and its failure to use its authority to "assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases"); *Jaimés v. Toledo Metro. Hous. Auth.*, 715 F.Supp. 835 (N.D. Ohio 1989) (HUD liable for failure to AFFH where continued to provide funds despite awareness of discriminatory effects of housing authority practices); *Thompson v. U.S. Dep't. of Hous. & Urban Dev.*, 348 F.Supp.2d 398 (D. Md. 2005) (HUD must undertake regional strategies to AFFH).

While the content of HUD's fair housing obligations has gained clarity in the courts, the need for meaningful rules to fulfill those obligations is also informed by our current knowledge of segregation and discrimination, and our evolving understanding of their causes and harms. Housing discrimination and segregation were deeply ingrained forces shaping American society and geography at the time the Act was passed, and HUD has continued to make progress in addressing them. Both HUD's longstanding and its recent fair housing regulations have been crucial steps along that trajectory.¹²

¹⁰ The courts have long established that the AFFH duty directly binds state and local entities, as well public housing authorities. *See, e.g., Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1133 (2d Cir.1973) (42 U.S.C. § 3608(e)(5)'s AFFH integration duty extends through the Secretary of HUD to "other agencies administering federally-assisted housing programs," in that case public housing authorities); *Reese v. Miami-Dade Cty.*, 210 F. Supp. 2d 1324, 1329 (S.D. Fla. 2002) (the AFFH requirement "imposes a binding obligation on the states"), *aff'd*, 77 Fed.Appx. 506 (11th Cir. 2003); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 73 (D. Mass. 2002) ("The actions of the PHAs must also take place within the framework of the duty to affirmatively further fair housing"); *U.S. ex rel. Anti-Discrimination Ctr. Of Metro N.Y., Inc. v. Westchester Cty., N.Y.*, No. 06 CIV 2860(DLC), 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009). *See* 42 U.S.C. § 3608(d) (1988). *See also* the Quality Housing and Work Responsibility Act of 1998, 42 U.S.C.A. § 1437v (2015); the Housing and Community Development Act (42 U.S.C. § 5304); United States Housing Act, 42 U.S.C. § 1437c-1(d) (15).

¹¹ *See also* Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 Vand. L. Rev. 1747, 1793 (2005) ("In response to *Shannon* and *Gautreaux*, HUD promulgated siting regulations for construction of new public housing, Section 8 new construction, and senior housing. The regulation set out various requirements for sites, crucially prohibiting new construction in "an area of minority concentration." In addition, the regulation prohibited the siting of projects in neighborhoods of high poverty concentration, resegregating neighborhoods, neighborhoods detrimental to family life, those with urban blight, and those without access to basic, decent public facilities and services, or reasonable proximity to jobs. Although all these conditions tend to coexist, the regulatory scheme specifies them as independent prohibitions, requiring that each needs to be observed before new construction of federally subsidized low-income housing can commence."); *Bus Ass'n of Univ. City v. Landrieu*, 660 F.2d 867, 868 (3d Cir. 1981) ("in light of *Shannon* and the subsequent passage by Congress of the Housing and Community Development Act of 1974 ... HUD has since promulgated regulations requiring its officials to consider, prior to the approval of a new low income housing project, the impact of the project on the concentration of racial and low income persons.").

¹² *See, e.g., Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 95 (1977) (characterizing Title VIII as "a strong national commitment to promote integrated housing"). *See also N.A.A.C.P. v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 154 (1st Cir. 1987)(citing 114 Cong. Rec. 2281 (1968) (statement of Sen. Brooke) (a purpose of Title VIII

III. The Fair Housing Regulations and Guidance Provide Substantial Benefits

In addition to their firm grounding in the Fair Housing Act and other federal statutes, HUD's fair housing related regulations confer major economic and societal benefits. A major goal of the Fair Housing Act, as noted above, is to combat racial segregation and discrimination, and to the extent that racial segregation and discrimination impose costs on individuals and society, a reduction in segregation and discrimination represents significant benefits. These benefits far outweigh any costs associated with these rules.

Segregation imposes significant economic costs on society and on individuals. High levels of black-white segregation are associated with lower per capita income for blacks, lower educational attainment for both blacks and whites, and higher homicide rates.¹³ Childhood exposure to neighborhoods of concentrated poverty is linked to significantly diminished educational outcomes and adult income levels.¹⁴ "Segregation . . . isolates disadvantaged groups from access to public and private resources, from sources of human and cultural capital, and from the social networks that govern access to jobs, business connections, and political influence."¹⁵ Residential segregation contributes to African Americans' physical distance from jobs,¹⁶ and access to important social networks that connect youth and adults to employment.¹⁷

Racial and economic segregation also have significant negative health impacts for adults and children,¹⁸ which increase both personal costs and costs to society.¹⁹ Health impacts associated with high rates of segregation include increased risk for asthma and cancer from airborne toxins,²⁰ higher infant mortality

is to remedy the "weak intentions" that have led to the federal government's "sanctioning discrimination in housing throughout this Nation"); id. at 2526-28 (statement of Sen. Brooke) (reviewing history of federal fair housing efforts); id. at 9577 (statement of Rep. Cohelan) (decrying historical "neglect" of minorities); id. at 9595 (statement of Rep. Pepper) (lamenting government's slowness in establishing truly "equal" rights)).

¹³ Gregory Acs, Rolf Pendall, Mark Treskon & Amy Khare, *The Cost of Segregation: National Trends and the Case of Chicago 1990-2010* (The Urban Institute, 2017).

¹⁴ Patrick Sharkey, *Stuck in Place* (2013).

¹⁵ Elizabeth Anderson, *The Imperative of Integration 2* (2010).

¹⁶ Michael A. Stoll, *Job Sprawl and the Spatial Mismatch between Blacks and Jobs*, Brookings Inst. Metro. Policy Program (Feb. 2005), www.law.wustl.edu/landuselaw/Articles/Brookings_jobsprawl.pdf.

¹⁷ Douglas S. Massey & Nancy A. Denton, *American Apartheid* 109, 161-62, 166 (1993).

¹⁸ See generally David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 *Pub. Health Reps.* 404, 409 (2001), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC1497358/pdf/12042604.pdf

¹⁹ B.K. Finch, D.P. Do, R. Basurto-Davila, C. Bird, J. Escarce, & N. Lurie, *Does Place Explain Racial Health Disparities? Quantifying the Contribution of Residential Context to the Black/White Health Gap in the United States*, *Social Science & Medicine* (2008), 67(8): 1258-1268.

²⁰ Margery Austin Turner & Dolores Acevedo-Garcia, *Why Housing Mobility? The Research Evidence Today*, *Poverty & Race* (Jan-Feb 2005); Emily Rosenbaum, *Racial/Ethnic Differences in Asthma Prevalence: The Role of Housing and Neighborhood Environments*, *Journal of Health & Social Behavior* (2008), 49: 131-45. *Breathing Easier: Community-Based Strategies to Prevent Asthma 2* (Joint Ctr. For Political and Economic Studies 2004); Evalyn N. Grant et al., *The Relation of Socioeconomic Factors and Racial/Ethnic Differences in US Asthma Mortality* 90 (*Am. J. Pub. Health* 2000); *Healthy People 2010: Understanding and Improving Health* 12 (U.S. Dep't of Health & Human Servs. 2d ed. 2000), www.healthypeople.gov/2010/document/pdf/uih/2010uih.pdf?visit=1.

rates,²¹ and reduced average life expectancy.²² There is also evidence that the experience of racial discrimination itself has negative health impacts, including higher blood pressure levels and more frequent diagnoses of hypertension.²³ Racially or ethnically isolated communities are much more likely to experience environmental hazards and associated adverse health impacts than are integrated communities, including proximity to disposal sites, municipal waste facilities, power plants, and other sources of pollution.²⁴ Residents of segregated communities are significantly more likely to be exposed to toxic chemicals,²⁵ to breathe high concentrations of harmful air pollutants,²⁶ and to live in lead-compromised housing.²⁷

The financial costs of segregation include systematic discrimination in credit and wealth loss for families of color and predominantly “minority” communities, at a toll for entire cities. A major historical driver of wealth disparities was the creation of a dual housing market in the mid-twentieth century, with explicit policies of “redlining” preventing access to homeownership in African American neighborhoods,²⁸ and

²¹ Anthony Polednak, *Black-white Differences in Infant Mortality in 38 Standard Metropolitan Statistical Areas*, *American Journal of Public Health*, 1991:81(11):1480-2; *Healthy People 2010: Understanding and Improving Health* 12 (U.S. Dep’t of Health & Human Servs. 2d ed. 2000), www.healthypeople.gov/2010/document/pdf/uih/2010uih.pdf?visit=1; Rachel Morello-Frosch & Russ Lopez, *The Riskscape and the Color Line: Examining the Role of Segregation in Environmental Health Disparities*, 102 *Envtl. Res.* 181, 190-91 (2006).

²² Joint Center for Political and Economic Studies, *Place Matters: Ensuring Opportunities for Good Health for All* (2012); Joseph J. Sudano et al., *Neighborhood Racial Residential Segregation and Changes in Health or Death Among Older Adults*, *Health Place* 80, (Jan. 2013), <http://1.usa.gov/1le6FIF>.

²³ Vickie M. Mays et al., *Race, Race-Based Discrimination, and Health Outcomes Among African Americans* 58 *Ann. Rev. of Psychology* (2007). See generally *Unequal Health Outcomes in the United States: A Report to the U.N. Committee on the Elimination of Racial Discrimination* (CERD Working Group on Health and Environment 2008).

²⁴ *Environmental Equity: Reducing Risk for All Communities* 15, U.S. Env’tl. Prot. Agency (1992), available at <http://infohouse.p2ric.org/ref/32/31476.pdf>; *Toxic Wastes and Race in the United States: A National Report of the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites* 15, United Church of Christ, Comm’n for Racial Justice (1987), available at <http://www.ucc.org/about-us/archives/pdfs/toxwrace87.pdf>. See also *Siting Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities*, U.S. Gen. Accounting Ofc., (1983), available at <http://archive.gao.gov/d48t13/121648.pdf>; Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: 1987–2007*, 38-47 (2007), available at www.ucc.org/justice/advocacy_resources/pdfs/environmental-justice/toxic-wastes-and-race-at-twenty-1987-2007.pdf.

²⁵ Seema Arora & Timothy N. Cason, *Do Community Characteristics Influence Environmental Outcomes? Evidence from the Toxics Release Inventory*, 1 *J. App. Econ.* 413, 415-16 (1998).

²⁶ See, e.g., Lara P. Clark et al., *National Patterns in Environmental Injustice and Inequality: Outdoor NO₂ Air Pollution in the United States* 2 (2014), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC3988057/pdf/pone.0094431.pdf (observing that “reducing NO₂ concentrations to levels experienced by whites . . . for all nonwhites” would prevent 7,000 deaths from ischemic heart disease each year); Marie Lynn Miranda et al., *Making the Environmental Justice Grade: The Relative Burden of Air Pollution Exposure in the United States*, 8 *Int’l J. Env’tl. Res. Pub. Health* 1755, 1768-69 (2011), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC3137995/pdf/ijerph-08-01755.pdf; Jeremy L. Mennis & Lisa Jordan, *The Distribution of Environmental Equity: Exploring Spatial Nonstationarity in Multivariate Models of Air Toxic Releases*, 95 *Annals Soc’y Am. Geog’rs* 249 (2005); Russ Lopez, *Segregation and Black/White Differences in Exposure to Air Toxics in 1990*, 110 *Env’tl. Health Persp.* 289 (2002). See also Jayajit Chakraborty & Paul A. Zandbergen, *Children at Risk: Measuring Racial/Ethnic Disparities in Potential Exposure to Air Pollution at School and Home*, 61 *J. Epidem. Cmty. Health* 1074, 1074 (2007).

²⁷ *Environmental Equity: Reducing Risk for All Communities*, U.S. Env’tl. Prot. Agency (1992), available at <http://infohouse.p2ric.org/ref/32/31476.pdf>.

²⁸ Douglas S. Massey, *Origins of Economic Disparities: The Historical Role of Housing Segregation*, in *Segregation: The Rising Cost for Americans* (James H. Carr & Nandinee K. Kutty, eds., 2008)

FHA underwriting practices simultaneously supporting suburban home ownership and barring African American participation in new suburban developments.²⁹ The subprime lending boom and accompanying predatory lending practices in the 1990s and 2000s built on these historic patterns of segregation to target communities of color with more expensive and riskier home loan products.³⁰ The resulting foreclosure crisis led to massive loss of wealth for African American and Latino families who lost their homes,³¹ as well as ongoing segregation and costs for municipalities.³² Today, racial segregation continues to depress property values and drive the racial wealth gap.³³

Although most of the research has looked at the cost of segregation, from which benefits of reducing segregation can be directly inferred, there is also a growing body of research on the benefits of affirmative integration, particularly for low income families of color living in racially and economically isolated communities. More integrated communities offer greater access to high performing schools, improved municipal services, and jobs. Evidence from the HUD Moving to Opportunity demonstration has established that moving from high to low poverty neighborhoods can significantly reduce rates of diabetes, extreme obesity, and major depression.³⁴ And children who moved from high to low poverty neighborhoods at an early age had higher incomes as adults, were less likely to be single parents, and were more likely to go to college compared to children who did not move to low-poverty neighborhoods.³⁵ In addition to these concrete benefits, racial integration has also been shown to reduce racial prejudice and racial stereotyping, and increase cross racial tolerance and understanding.³⁶ And

²⁹ Richard Rothstein, *The Color of Law* (2017).

³⁰ See, e.g., Amici Curiae Brief of the American Civil Liberties Union, National Consumer Law Center, And Legal Momentum, et al., *Texas v. ICP*; U.S. Dep't of Hous. & Urban Dev. & U.S. Dep't of the Treasury, *Curbing Predatory Home Mortgage Lending* (2000) (“borrowers in black neighborhoods [were] five times as likely to refinance in the subprime market than borrowers in white neighborhoods...”).

³¹ Debbie Gruenstein Bocian et al., Ctr. for Responsible Lending, *Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages* (2006) (“the spillover wealth lost to African-American and Latino communities between 2009 and 2012 as a result of depreciated property values alone will be \$194 billion and \$177 billion, respectively.”); Melvin Oliver, “Subprime as a Black Catastrophe,” *The American Prospect* (September 20, 2008).

³² See, e.g., Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc., and Brief of Amicus Curiae Lawyers' Committee for Civil Rights under Law and National Fair Housing Alliance, et al., *Wells Fargo and Bank of America v. City of Miami*, 137 S.Ct. 1296 (2017).

³³ George Lipsitz and Melvin Oliver, “Integration, Segregation, and the Racial Wealth Gap,” in *The Integration Debate: Competing Futures for America's Cities* (C. Hartman and G. Squires, Eds) (Routledge, 2010).

³⁴ J. Ludwig, L. Sanbonmatsu, L. Gennetian, E. Adam, G. J. Duncan, L. F. Katz & T.W. McDade, *Neighborhoods, Obesity, and Diabetes—a Randomized Social Experiment*, *New England Journal of Medicine* 365(16), 1509-1519 (2011); J. Ludwig, G. Duncan, L. Gennetian, L. Katz, R. Kessler & L. Sanbonmatsu, *Moving to More Affluent Neighborhoods Improves Health and Happiness over the Long Term Among the Poor*, MacArthur Foundation Policy Research Brief (2014), available at https://www.macfound.org/media/files/HHM_-_Moving_to_More_Affluent_Neighborhoods_Improves_Health_and_Happiness.pdf.

³⁵ R. Chetty, N. Hendren & L.F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, *The American Economic Review* 106(4), 855-902 (2016).

³⁶ Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, *J. Personality & Soc. Psychol.* 751 (2006), available at <http://blogs.law.columbia.edu/genderandsexualitylawblog/files/2012/04/A-Meta-Analytic-Test-of-Intergroup-Contact-Theory.pdf>. Roslyn Arlin Mickelson & Mokubung Nkomo, *Integrated Schooling, Life Course Outcomes, and Social Cohesion in Multiethnic Democratic Societies*, 36 *Rev. of Res. in Educ.* 197 (Mar. 2012), available at www.schooldiversity.org/pdf/Mickelson_Nkomo_%20RRE_2012.pdf, at 210-11, 218, 222-23. Genevieve Siegel-Hawley, *How Non-Minority Students Also Benefit from Racially Diverse Schools*, National Coalition on School Diversity Research Brief No. 8, 2-3 (Oct. 2012), available at www.schooldiversity.org/pdf/DiversityResearchBriefNo8.pdf.

because increased residential integration is associated with access to integrated schools, children also gain the positive short and long term benefits of school integration.³⁷

IV. Specific Fair Housing Regulations and Guidance

In issuing the AFFH rule, discriminatory effects rule, and other fair housing rules, HUD undertook careful assessment of its statutory obligations and of the benefits (and costs) of its regulatory designs. That body of research, knowledge, and laws regarding our nation's fair housing problems remains pressing, and HUD's determinations regarding the need for these regulations remain valid. These rules are far from being "outdated, ineffective, or excessively burdensome." Rather, they are a crucial means of achieving important fair housing ends and addressing the costs of discrimination and segregation, and were carefully designed to be effective without undue burden.

A. The AFFH Rule

The AFFH Rule, issued in 2015, responds to the need for an effective "institutionalized method"³⁸ through which HUD, and its recipients, will implement the Fair Housing Act's AFFH directive. As noted above, this legislative directive applies both to HUD and directly to HUD's grantees (including states, localities, and public housing authorities). It requires a regional approach,³⁹ and one proactively responsive to patterns of segregation and exclusion.⁴⁰

This is a longstanding Congressional obligation, but it has been increasingly clear that HUD's (and its recipients') prior approaches were inadequate. For example, the GAO recorded severe, widespread deficiencies and delays in HUD's previous Analysis of Impediments process, noting HUD's "limited regulatory requirements and oversight"; finding that "[i]n the absence of a department-wide initiative to enhance AI requirements and oversight, many grantees may place a low priority on ensuring that their AIs serve as effective fair housing planning tools"; and recommending that HUD produce a regulation placing more specific requirements on its grantees.⁴¹ The GAO report underscored the importance of meaningful substantive direction and data analysis.

Testimony and reports from multiple experts, previous HUD officials, and civil rights groups also provided abundant documentation of problems resulting from the inadequacy of AIs – such as the lack of a substantive template for recipients and that "the current mechanisms provide insufficient data for monitoring, compliance, or enforcement."⁴² Although HUD had issued its precatory "Fair Housing Planning Guide" in 1996, the lack of data provision, HUD review, or clear AI requirements were critical

³⁷ Roslyn Arlin Mickelson, *School Integration and K-12 Educational Outcomes: A Quick Synthesis of Social Science Evidence*, National Coalition on School Diversity (2016).

³⁸ *Shannon v. U.S. Dep't of Hous. & Urban Dev.*, 436 F.2d 809, 819 (3d Cir. 1970).

³⁹ *Thompson v. U.S. Dep't. of Hous. & Urban Dev.*, 348 F.Supp.2d 398 (D. Md. 2005); *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971).

⁴⁰ *E.g., N.A.A.C.P. v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 154 (1st Cir. 1987); *Cty. of Westchester v. U.S. Dep't of Hous. & Urban Dev.*, 802 F.3d 413 (2d Cir. 2015).

⁴¹ *HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans*, GAO-10-905 (Sept. 14, 2010) available at www.gao.gov/products/GAO-10-905. See also *Affirmatively Furthering Fair Housing Rule Preamble*, 80 Fed. Reg. 42275.

⁴² *Reforming HUD's Regulations to Affirmatively Further Fair Housing*, The Opportunity Agenda, available at <https://opportunityagenda.org/sites/default/files/2017-03/2010.03ReformingHUDRegulations.pdf> (stating that "[a] range of housing experts, civil rights groups, and former HUD officials have documented the inadequacy of the current AI process," and detailing that testimony).

defects of its former AFFH process. In practice, this meant that neither HUD nor many of its recipients were effectively following the directives of 42 U.S.C. §3608.

In crafting and issuing the 2015 AFFH Rule and the Assessment Tools, HUD responded to these deficiencies and to the significant body of research (discussed above) showing the abundant need for, and benefits of, a meaningful approach to AFFH. HUD engaged in a detailed and lengthy examination of the specific shortcomings of the previous process, public commentary, piloting, and consultations with stakeholders and experts (including program participants as well as advocates). All of this resulted in a final rule that has a design and scope necessary to the goals it is intended to achieve.⁴³

Together with the AFFH Assessment Tools, the rule's particular level of detail ensures a flexible yet effective approach to identifying and addressing recipients' specific, localized fair housing issues. It strikes a sensible balance in its administrative burden by providing data, soliciting additional information to the degree it is needed (but not costly), and requiring community input. Its structure provides for individualized local action and encourages cross-sector, inter-agency collaborations. The AFFH process also entails a real-world approach to community investments and planning, by analyzing fair housing in connection with related aspects of opportunity, such as transportation, education, environmental health, and employment. This type of assessment makes sense in order to effectively enable families to move to better life opportunities, as well as to ensure more equitable investments to improve all communities.

HUD's AFFH regulation also enables jurisdictions to become fully compliant with their own AFFH mandates and supplies them with legal clarity regarding the application of this responsibility in the state, local, or PHA context. As with the Rule itself, the AFFH Assessment Tools were carefully designed to provide meaningful, flexible content that would guide recipients to meet their AFFH obligations and benefit their constituents and residents.

In designing the new rule and the accompanying Assessment Tools, HUD also had the benefit of evolving data tools and technology, enabling it to provide this to participants. As with any transition to new technology, or into a newly effective regimen, the AFFH Rule will entail some costs for both HUD and recipients. However, these costs are by far outweighed by the Rule's benefits. HUD has also eased burdens through provision of data and maps; technical assistance to jurisdictions; encouragement of collaborative assessments; and a staggered submission deadline that allows both participants and HUD to learn from the process as it is rolled out. Additionally, as HUD has noted, the cost is roughly equivalent to that of participants undertaking a complete and good-faith AI, with additional clarity and data provision offered by the AFH process.⁴⁴ Cost is also partially balanced by the "reduced back-end review, compliance, and enforcement costs" that result from a lack of clarity over legal obligations.

⁴³See *Affirmatively Furthering Fair Housing Rule Preamble*, 80 Fed. Reg. 42275 ("All these findings led HUD to the decision to offer a new approach of linking fair housing issue identification, prioritization, and goal setting with program participants' traditional planning processes related to housing and community development... To more effectively carry out its affirmatively furthering fair housing obligation... the new AFH process involved the following key features: (1) A new fair housing assessment tool; (2) the provision of nationally uniform data that would be the predicate for and would help frame program participants' assessment activities; (3) meaningful and focused direction regarding the purpose of the AFH and the standards by which it would be evaluated; (4) a more direct link between the AFH and subsequent program participant planning documents—the consolidated plan and the PHA Plan—that would tie fair housing planning into the priority setting, commitment of resources, and specification of activities to be undertaken; and (5) a new HUD review procedure based on clear standards that would facilitate the provision of technical assistance and reinforce the value and importance of fair housing planning activities.").

⁴⁴ See HUD, *AFFH Regulatory Impact Analysis*, available at www.huduser.gov/portal/sites/default/files/pdf/AFFH_Regulatory_Impact_Analysis_FinalRule.pdf.

B. Discriminatory Effects (Disparate Impact) Rule

HUD's Discriminatory Effects (or "Disparate Impact") Rule⁴⁵ similarly is far from "outdated, ineffective, or excessively burdensome." Consistent with longstanding interpretation of the Fair Housing Act by the federal courts, the disparate impact rule protects important interests in housing choice, diverse communities, and nondiscrimination, across a range of practices. Across that full range of application, it prevents only activity that lacks a legitimate nondiscriminatory justification, or where a less discriminatory alternative is available.⁴⁶

The Disparate Impact Rule was issued to formalize longstanding court decisions and agency interpretation, and to provide national consistency in the framework used to prove liability. The Supreme Court's holding that the Fair Housing Act contains a disparate impact standard⁴⁷ reinforced the long line of cases upon which HUD relied in formulating its regulation.⁴⁸ HUD, too, had long applied the standard in its adjudication and other policies.⁴⁹ Because the purpose of the rule was to provide clarity and consistency, and to articulate existing law, it does not result in any new burdens or costs.⁵⁰ In contrast, the rule provides for the public the significant benefit of uniformity and legal clarity regarding their rights, and advances the important interests of the Fair Housing Act (discussed above). HUD's subregulatory guidance on disparate impact advances similar statutory purposes and benefits. For example, HUD has recognized that "criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers," and issued important guidance clarifying that blanket policies to deny housing based solely on a prior arrest or conviction violate the Fair Housing Act.⁵¹

HUD's rule and guidance draws upon the body of established case law on disparate impact, as well as the Fair Housing Act's legislative history and HUD's own history (along with that of other agencies) in enforcement. These underlying authorities speak to the Act's "broad remedial intent"⁵² and its role in addressing a myriad of harms and causes. As they show, the Fair Housing Act's breadth is needed to address the variable and evolving nature of housing discrimination, and the degree of harm that discrimination and segregation cause.

Congress crafted the Act to address discrimination and residential segregation arising from a wide variety of sources: both private and public discrimination, including government policies on the federal, state, and local level, and a variety of industries and practices.⁵³ Those actions continue to reverberate into the

⁴⁵ *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11460 (Feb. 15, 2013).

⁴⁶ *Id.*

⁴⁷ *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015).

⁴⁸ *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11460, 11461-63 (Feb. 15, 2013).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (April 4, 2016), https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASStandCR.pdf; Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest or Records in Housing Decisions, PIH 2015-19 (Nov. 2, 2015), <https://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf>.

⁵² *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982).

⁵³ See, e.g., Kerner Commission, Report of the National Advisory Commission on Civil Disorders 467-82 (Washington: U.S. Government Printing Office 1968) (noting the role of intentional discrimination and segregation, but also unequal code enforcement, land use, lack of maintenance and investment, and other factors in constructing and perpetuating African-American ghettos); Douglas S. Massey & Nancy A. Denton, *American Apartheid* 58 (1993) (describing the combined effects of real estate industry discrimination, individual prejudice, federally

present day, including through the interaction of facially neutral policies and practices with past discrimination, in a way that reinforces segregation and causes unjustified discriminatory effects.⁵⁴ The Act’s “broad remedial intent” – including its discriminatory effects standard – aims to address this deeply ingrained and complex nature of housing discrimination and segregation. The breadth of the Fair Housing Act’s application, including its discriminatory effects standard, were reinforced by Congress in 1988, when it strengthened the Act (finding that “highly segregated housing patterns still exist across the Nation”).⁵⁵

The discriminatory effects standard has consistently been interpreted to cover, and is necessary to address, a range of both land use and other practices.⁵⁶ Numerous other cases further illustrate that disparate impact protections are necessary to fulfill the goals of the Fair Housing Act in a variety of contexts and circumstances.⁵⁷ As such cases show, the discriminatory effects standard plays an important role in protecting and advancing the benefits associated with nondiscrimination and integration, discussed above.

HUD’s current Discriminatory Effects Rule (and its guidance) articulates this body of law and adds further value as a statement of consistency and predictability.⁵⁸ We urge HUD not to consider rescission or any modification that would impair the regulation’s full coverage, which provides important protections and is needed to advance the goals of the Act.

C. Additional Regulations and Guidance in HUD Programs

Other regulations implementing the Fair Housing Act are found throughout Chapter 24 of the Code of Federal Regulations, have been in place for decades, and are necessary for HUD to carry out its

sponsored financial discrimination, disparate “urban renewal” efforts, and public housing authority policies contributing to segregation).

⁵⁴ For instance, in the modern era’s “reverse redlining,” in which “a string of discriminatory lending products were targeted into these historically undercapitalized and segregated communities.” John A. Powell & Jason Reece, *The Future of Fair Housing and Fair Credit: From Crisis to Opportunity*, 57 Clev. St. L. Rev. 209, 222 (2009). See e.g., Richard Rothstein, *The Color of Law*, (Liveright 2017) (describing the complex causative factors of segregation and housing discrimination.)

⁵⁵ 134 Cong. Rec. H4604 (daily ed. June 22, 1988) (statement of Rep. Rodino). In the 1988 Amendments, Congress specified several limited exceptions to the Act’s reach, otherwise reaffirming the disparate impact standard that had then been recognized by nine courts of appeal (and rejected an amendment that would have required proof of intentional discrimination in disparate impact challenges to zoning decisions). See H.R. Rep. No. 100-711, at 89 (dissenting view of Rep. Swindall).

⁵⁶ See, e.g., *Texas Dept. of Hous. and Cmty. Affairs*, 135 S. Ct. 2507; *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *aff’d in part per curiam*, 488 U.S. 15 (1988) (zoning ordinance confining multifamily housing to a narrow urban renewal area); *Smith v. Town of Clarkton, N.C.*, 682 F. 2d 1055, 1065-66 (4th Cir. 1982) (town’s withdrawal from a multi-municipality housing authority effectively blocking construction of public housing units); *Dews v. Town of Sunnyvale, Tex.*, 109 F. Supp. 2d 526 (N.D. Tex. 2000) (exclusionary zoning).

⁵⁷ This includes, for example: “blood relative” rental limitations, *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par.*, 648 F. Supp. 2d 805 (E.D. La. 2009); residency preferences, *United States v. Hous. Auth. of City of Chickasaw*, 504 F. Supp. 716 (S.D. Ala. 1980), *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994), *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33 (D. Mass. 2002); unjustified refusal to rent to welfare recipients, *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246 (9th Cir. 1997), *U.S. Dep’t of Hous. & Urban Dev v. Ross*, No. 01-92- 0466-8, 1994 WL 326437, at *5, *7 (HUD ALJ July 7, 1994); homeowners insurance redlining, *Nat’l Fair Hous. All., Inc. v. Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46 (D.D.C. 2002); exclusionary mortgage lending policies, *Nat’l Cmty. Reinvestment Coal. v. Accredited Home Lenders Holding Co.*, 573 F. Supp. 2d 70 (D.D.C. 2008); and zoning restrictions on supportive living facilities, *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993).

⁵⁸ *Implementation of the Fair Housing Act’s Discriminatory Effects Standard*, 78 Fed. Reg. 11460 (Feb. 15, 2013).

congressionally and judicially mandated fair housing obligations. These include rules embedded in specific HUD program regulations and guidance governing site selection, affirmative marketing, tenant selection and assignment policy, and harassment, as well as building and construction guidelines for persons with disabilities.

In addition to these explicit regulatory implementations of the Fair Housing Act, there are also HUD programs that implement HUD's affirmatively furthering fair housing in their design. These include the "Small Area Fair Market Rent" rule,⁵⁹ which replaced an outdated and arbitrary HUD rent-setting rule for Housing Choice Vouchers (HCVs) that had been effectively steering families to segregated areas, with a more localized formula that gives HCV families access to a wider range of less segregated, lower poverty neighborhoods. It also includes recent guidance for the Rental Assistance Demonstration,⁶⁰ with civil rights protections relating to siting of new and replacement housing, and 2012 guidance on the demolition/disposition of public housing,⁶¹ which protects public housing tenants' rights in relocation and replacement housing, and includes protections against increasing segregation in the siting of replacement units. The Equal Access Rules, too, advance important social interests in housing access and choice.⁶² Each of these rules conveys important fair housing benefits.

Thank you again for this opportunity to comment. In conclusion, we strongly urge that HUD's valuable resources be focused on its performance in meeting its legislative objectives (and guiding its recipients to do the same) – including civil rights. We also emphasize the important benefits of our current fair housing rules for all communities, and the continuing need for their strong, effective implementation.

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⁵⁹ 81 Fed. Reg. 80567 (November 16, 2016).

⁶⁰ PIH-2012-32 (HA) H-2017-03, REV-3 (January 12, 2017).

⁶¹ PIH 2012-7 (February 2, 2012).

⁶² 77 Fed. Reg. 5661 (February 3, 2012).

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