IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL FAIR HOUSING ALLIANCE, *et al.*,	*	
	*	
Plaintiffs,		
	*	No. 18-cv-01076
v.		
	*	
BEN CARSON, *et al.*,		
	*	
Defendants.		

* * * * * * * * * * * * *

BRIEF OF THE STATES OF MARYLAND, CALIFORNIA, MASSACHUSETTS, VIRGINIA, AND WASHINGTON; THE DISTRICT OF COLUMBIA; AND THE CITIES OF AUSTIN, TEXAS; NEW ORLEANS, LOUISIANA; OAKLAND, CALIFORNIA; PORTLAND, OREGON; SEATTLE, WASHINGTON; AND TOLEDO, OHIO AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR PRELIMINARY INJUNCTION AND FOR SUMMARY JUDGMENT

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are the States of Maryland, California, and Washington, the Commonwealths of Massachusetts and Virginia, the District of Columbia, and the Cities of Austin, Texas; New Orleans, Louisiana; Oakland, California; Portland, Oregon; Seattle, Washington; and Toledo, Ohio. *Amici* are recipients of funds from the Department of Housing and Urban Development ("HUD") and states in which HUD grantees are located, and are subject to HUD's 2015 Affirmatively Furthering Fair Housing Rule. Ostensibly the beneficiaries of HUD's decision to withdraw a key element of its Affirmatively Furthering Fair Housing Rule, *amici* have a responsibility to take affirmative steps to ensure increased opportunities for fair housing within their jurisdictions, and a strong interest in seeing that HUD meets its obligations to assist HUD grantees in facilitating fair housing opportunities.

Amici submit this brief pursuant to Local Rule LCvR 7(o)(1). No party's counsel has authored this brief in whole or in part, and no party's counsel or other person contributed money that was intended to fund the preparation or submission of this brief.

ARGUMENT

HUD's decision to withdraw its Local Government Assessment Tool—an essential component of its long-overdue Affirmatively Furthering Fair Housing Rule—results in an indefinite suspension of a carefully tailored regulatory scheme years in the making. *Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments*, 83 Fed. Reg. 23,922 (May 23, 2018). By taking this drastic step without first soliciting public comment, HUD ignored the views of the stakeholders in whose

interest it purported to act, as well as bedrock principles of administrative procedure. HUD's May 23, 2018 order marks the *second time* since January that the agency has attempted to dismantle the Affirmatively Furthering Fair Housing Rule without first providing notice and soliciting public comment. Worse, HUD's primary justification for repealing its assessment tool—the supposedly high percentage of Assessments of Fair Housing ("Assessments") that HUD failed to initially accept—is actually evidence that the Affirmatively Furthering Fair Housing program is functioning as HUD intended. By primarily relying on an erroneous justification, HUD acted in a prototypically arbitrary and capricious manner by withdrawing the assessment instrument. The Court should grant Plaintiffs' motion.

I. THE AFFIRMATIVELY FURTHERING FAIR HOUSING RULE ASSISTS HUD GRANTEES IN MEETING THEIR OBLIGATION TO PROMOTE FAIR HOUSING OPPORTUNITIES.

The 2015 Affirmatively Furthering Fair Housing Rule corrected deficiencies that made its predecessor ineffective, and provides HUD grantees much-needed help in meeting their statutory obligations. Now, HUD's May 23, 2018 order withdrawing the assessment tool without any firm plans for replacing it will delay the new rule's benefits indefinitely. This will upset significant progress that has already been made under the new regime, and frustrate the Fair Housing Act's mandate of facilitating the promotion of fair housing options.

A. The Analysis of Impediments Model that Preceded the Current Rule Was Ineffective.

The Fair Housing Act mandates that HUD administer its programs "in a manner affirmatively to further" the Fair Housing Act's policy of "provid[ing], within constitutional limitations, for fair housing throughout the United States." *See* 42 U.S.C. §§ 3601, 3608(d), (e)(5). Despite this mandate, HUD failed for decades to fully embrace its obligation to affirmatively further fair housing. *See, e.g.*, *NAACP v. Secretary of Hous. and Urban Dev.*, 817 F.2d 149, 154 (1st Cir. 1987) (rejecting HUD's position that the mandate to affirmatively further fair housing only required HUD "simply to refrain from discriminating itself or purposely aiding the discrimination of others"); *NAACP v. Harris*, 567 F. Supp. 637, 644 (D. Mass. 1983) (finding that HUD's failure to use its "immense leverage" to provide "desegregated housing so that the housing stock is sufficiently large to give minority families a true choice of location" "seriously impede[d]" HUD's obligation to affirmatively further fair housing); *see also* Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law* (June 25, 2015), *available at* https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law. In 1996, HUD, acknowledging its "failures" to "affirmatively further fair housing in the programs it administers," promulgated regulations assigning that responsibility to grantees. HUD, *Fair Housing Planning Guide*, 1-2 (Mar. 1996), *available at* https://www.hud.gov/sites/documents/FHPG.PDF; *Consolidated Submission for Community Planning and Development Programs*, 60 Fed. Reg. 1878 (January 5, 1994) (codified at 24 C.F.R. Part 91). As a result of these failures, HUD

required grantees to conduct an "Analysis of Impediments to Fair Housing Choice," an exercise intended to require jurisdictions to identify barriers to fair housing and create plans to overcome them. *See id* at 1905, 1910.

The Analysis of Impediments model turned out to be another unproductive step in carrying out the Fair Housing Act's mandates concerning fair housing for local governments. In 2010, the Government Accountability Office published an assessment of the Analysis of Impediments process, finding that "it is unclear whether the [Assessment of Impediments] is an effective tool for grantees . . . to identify and address impediments to fair housing." U.S. Gov't Accountability Office, GAO-10-905, *Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans* (2010), *available at* https://www.gao.gov/assets/320/311065.pdf (the "GAO Report"). The GAO Report found that, among other shortcomings, "HUD regulations do not establish requirements for updating [Analyses of Impediments] or their format, and grantees are not required to submit [Analyses of Impediments] to the department for review." HUD acknowledged the deficiencies of the Analysis of Impediments process when it promulgated the 2015 Affirmatively Furthering Fair Housing Rule, noting the lack of clear guidelines or parameters as to what an Analysis of Impediments should contain or how HUD would evaluate it. *See Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42,272, 42,312 (Jul. 16, 2015). As the entities previously responsible for the preparation of Analyses of Impediments, *amici* also recognize that this previous process was deeply flawed. HUD's

hands-off approach and lack of guidance offered *amici* little insight as to whether they were meeting their affirmative obligations under the FHA.

The Affirmatively Furthering Fair Housing Rule, by contrast, provides clarity about what *amici* must do in order to affirmatively further fair housing in their jurisdictions. The Rule establishes, for the first time, a definition for the term "affirmatively further fair housing," which includes "taking meaningful actions" to, in addition to complying with civil rights and fair housing laws, "address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, [and] transforming racially and ethnically concentrated areas of poverty into areas of opportunity." 24 C.F.R. § 5.152. Critically, the Rule replaced the Analysis of Impediments model and required, instead, that program participants create an Assessment of Fair Housing using the Local Assessment Tool. The Local Assessment Tool, developed through regular notice and comment rulemaking, requires local governments to answer a series of standardized questions designed to properly identify and assess fair housing issues in developing their housing development goals. Consequently, under the Rule, there is now a standardized reporting process that provides jurisdictions with the data and guidance necessary to properly evaluate and assess whether they are meeting their obligations. *See id.* §§ 5.160 through 5.166. And, crucially, whereas the Analysis of Impediments process left grantees shouldering all responsibility with no guarantee of feedback from HUD, the Affirmatively Furthering Fair Housing Rule represents a commitment of resources and support by HUD to substantively assist grantees in meeting their obligations under the law.

HUD's May 23, 2018 notice upends all these improvements for local governments. While reminding HUD grantees that they must continue to meet their obligations to further fair housing, HUD instructed plan participants that have not yet submitted Assessments to revert to the flawed Analysis of Impediments procedures under which HUD abdicates all responsibility for supporting compliance with the Fair Housing Act's mandates. *See* 83 Fed. Reg. at 23,926; *Affirmatively Furthering Fair Housing (AFFH): Responsibility to Conduct Analysis of Impediments*, 83 Fed. Reg. 23,927 (May 23, 2018). Thus, HUD has undercut jurisdictions that have devoted significant resources to compliance with the Affirmatively Furthering Fair Housing Rule, created uncertainty as to how HUD will hold grantees accountable for expenditure of federal funds, and potentially increased grantees' litigation exposure. *See* 80 Fed. Reg. at 42,273 (concluding that the Affirmatively Furthering Fair Housing Rule would result in "fewer instances of litigation pertaining to the failure to affirmatively further fair housing"). All of this also comes at the expense of the significant benefits that have already resulted from the Affirmatively Furthering Fair Housing Rule.

B. The Affirmatively Furthering Fair Housing Rule Has Already Produced Important Beneficial Results.

In the short time it has been in place, HUD's Affirmatively Furthering Fair Housing Rule has led to successful outcomes in a number of jurisdictions. (*See generally* Am. Compl. ¶¶ 7, 112-13, ECF No. 18). *Amici* and other plan participants have benefited from the high-quality data and assessment tools provided by HUD pursuant to the Rule, the

Rule's focus on community engagement, and the Rule's requirement to form goals to address barriers to fair housing.

The City of Philadelphia is rightly held up by Plaintiffs as a model of the promise of the AFFH Rule. (*See* Am. Compl. ¶ 113.) Like Philadelphia, the City of New Orleans partnered with its local Public Housing Authority and community groups, yielding significant community participation in the development of their Assessment. Letter from Lisa Cylar Barrett, Director of Federal Policy, PolicyLink (Mar. 6, 2018), *available at* https://www.regulations.gov/document?D=HUD-2018-0001-0058 ("PolicyLink Letter"). Marin County formed a Community Advisory Group and an Assessment of Fair Housing Steering Committee, which has been gathering input from community members since 2016; the City of Boston has held 14 community meetings and received over 2,500 responses to a housing survey. Letter from Caroline Peattie, Executive Director, Fair Housing Advocates of Northern California (Mar. 5, 2018), *available at* https://www.regulations.gov/document?D=HUD-2018-0001-0037; Letter from Kathy Brown, Boston Tenant Corporation (Mar. 8, 2018), *available at* https://www.regulations.gov/document?D=HUD-2018-0001-0039. Undeniably, public engagement processes under the Affirmatively Furthering Fair Housing Rule have been much more robust across the board than under the Analysis of Impediments regime.

All of these results are consistent with the Affirmatively Furthering Fair Housing Rule's goal of "[e]ncourag[ing] and facilitat[ing] regional approaches to address fair housing issues, including collaboration across jurisdictions and [Public Housing Authorities]." 80 Fed. Reg. at 42,273. The first regional Assessment was submitted by

five communities in the Kansas City metropolitan area in 2016. PolicyLink Letter at 4. And other jurisdictions, including in Northeast Ohio were in the process of developing joint regional Assessment submissions at the time HUD initially attempted to suspend the Rule in its now-repealed January 5 order. Letter from Laurel Blatchford, Enterprise Community Partners (Mar. 6, 2018), *available at* https://www.regulations.gov/document?D=HUD-2018-0001-0021. The city of Seattle, which successfully completed its Assessment in 2017, praised the utility of the Assessment of Fair Housing mapping and database tools in conducting regional comparisons. Letter from Jennifer Yost, Department of Human Services, City of Seattle (Mar. 6, 2018), *available at* https://www.regulations.gov/document?D=HUD-2018-0001-0051.

These results demonstrate that by enacting the Affirmatively Furthering Fair Housing Rule, HUD has taken important strides toward improving the flawed Analysis of Impediments approach. *See Affirmatively Furthering Fair Housing*, 78 Fed. Reg. 43,710, 43,713 (Jul. 19, 2013) (noting need to revise regulations to improve promotion of fair housing). HUD's decision to indefinitely suspend the Assessment of Fair Housing requirement by withdrawing the Local Assessment Tool undermines this progress. As HUD has already concluded, meaningful improvements to fair housing choice require more collaboration with HUD and a more structured framework for program participants than previous regulations provided. *Id.* It is therefore clear from the Affirmatively Furthering Fair Housing Rule's successes and HUD's own findings that indefinitely suspending an essential component of the Rule will do serious harm to the "promot[ion of] more effective fair housing and planning." *Id.* at 43,714.

II. THE COMPARATIVELY LOW RATE OF REJECTED ASSESSMENTS SHOWS THAT THE AFFH RULE IS WORKING AS INTENDED.

The loss of the benefits from the Affirmatively Furthering Fair Housing Rule would be problematic enough if it had been the product of reasoned decision-making by HUD. But it was not. In deciding to effectively suspend the Affirmatively Furthering Fair Housing Rule, HUD misunderstood the goals of its own regulations, incorrectly concluding that a 37% initial acceptance rate for Assessment submissions proved that the new process was fatally flawed.

HUD justifies its indefinite repeal of the Assessment Tool on the ground that only about a third of Assessments were initially accepted. 83 Fed. Reg. at 23,923. But this misapprehends how the Affirmatively Furthering Fair Housing program was intended to function. From its inception, HUD envisioned that the Assessment process would be an iterative one, in which grantees and HUD would work together to revise the Assessments until they met the goals of the Affirmatively Furthering Fair Housing Rule. By its very design, the Affirmatively Furthering Fair Housing program assumes that some submissions will initially be rejected. HUD intended program participants to submit their initial Assessment proposals, with HUD, in turn, providing "data, meaningful technical assistance, and guidance," in order to improve a participant's Assessment before accepting it. 78 Fed. Reg. at 43,713. HUD understood that in this back-and-forth process, many Assessments might not be accepted upon first submission, and provided that if it did not accept an Assessment, it would "provide the program participant with the specific reasons for the non-acceptance, the actions the program participant needs to take to meet the criteria

for acceptance, and, as appropriate, technical assistance to meet [Assessment] requirements." *Id.* at 43,715. And consistent with this scheme, many of the Assessments not initially accepted by HUD were subsequently accepted after collaborative revision. *See* Letter from Diane Yentel, President and CEO, National Low Income Housing Coalition at 2 (Mar. 6, 2018), *available at* https://www.regulations.gov/document?D=HUD-2018-0001-0034 (last accessed May 18, 2018).

HUD also intentionally required plan participants to submit Assessments early enough in time that HUD could work with them to "correct any deficiencies . . . such that funding to program participants will not be delayed" by an initial rejection, further indicating that HUD expected an appreciable number of Assessments not to be initially accepted. 80 Fed. Reg. at 42,311 (rejecting comments urging HUD not to review Assessments prior to reviewing other mandatory filings). Significantly, HUD's May 23 order does not identify any jurisdictions facing defunding as a result of their inability to create an acceptable AFH. 83 Fed. Reg. at 23,922.

Because the Assessment of Fair Housing procedure is collaborative by design, it is to be expected that some number of Assessments will not be accepted when they are first submitted. Indeed, HUD's commitment to providing technical assistance, useful data, and guidance to grant recipients would be meaningless if they had the ability to submit immediately acceptable Assessments without any input from HUD. The Affirmatively Furthering Fair Housing Rule was intended to *replace* a regulatory regime that did not impose meaningful standards on plan participants and which the implementing agency acknowledged was ineffective. Under the previous regulation, plan participants were able

to pay "uneven attention" to their submissions, which consequently exhibited "uneven quality." 78 Fed. Reg. at 43,713. In fact, the GAO Report found that only 64% of grantees even had current Analyses of Impediments. GAO Report at 10. The new system, in contrast, provides plan participants with clear criteria and a framework for producing substantive Assessments that will actually improve fair housing options within their jurisdictions. The acceptance rates for Assessments is consistent with HUD's having achieved the desired result of improving beneficiaries' efforts to further fair housing.

Moreover, any new program is going to require grantees to become familiar with new filing obligations, and will involve initial difficulties that must be worked out over time. But it is reasonable to expect that grantees' submissions will improve with time, even if HUD does not change the Assessment Tool. Thus, even if HUD is correct, and its Assessment Tool needs to be modified, it does not explain why a *complete withdrawal* of that tool is necessary or appropriate in the interim, especially when HUD makes no plans and establishes no timeframe for replacing it.

Against this backdrop, it is puzzling that HUD focuses on the *initial*, as opposed to *ultimate* acceptance rate as the metric of effectiveness. Indeed, if all submissions were initially accepted, it would suggest either that the new regulations had failed to adequately increase commitments to fair housing over those required under the Analysis of Impediments system, or that HUD was not taking seriously its obligation to provide guidance to participants in crafting their Assessments. It was arbitrary and capricious of HUD to treat evidence of the new program's proper functioning as evidence that it needed to be suspended, and the Court should grant the Plaintiffs' motion and correct that decision.

III. BY REPEALING THE ASSESSMENT TOOL WITHOUT SEEKING PUBLIC COMMENT, HUD IGNORED ESTABLISHED RULES OF ADMINISTRATIVE PROCEDURE.

HUD's May 23, 2018 notice marks the second time in six months that HUD has failed to seek public comment *before* engaging in rulemaking. Both the May notice and HUD's now-repealed January 5 notice extending the deadline for submitting Assessments took immediate effect, and only set a schedule for retroactive public comment. *See* 83 Fed. Reg. at 23,926 ("HUD is immediately withdrawing the Local Government Assessment Tool."); 83 Fed. Reg. at 685 ("HUD is issuing this notice for applicability immediately upon publication[.]"). By failing to engage in true notice-and-comment rulemaking, HUD ignored basic principles of administrative law.

One of the most basic tenets of the Administrative Procedure Act is that an agency "shall give interested persons an opportunity to participate in the rulemaking," and that it may only promulgate rules "*[a]fter* consideration of the relevant matter presented[.]" 5 U.S.C. § 553(c) (emphasis added). There can be little doubt that HUD's decision to repeal the Assessment Tool constitutes a rulemaking: the D.C. Circuit has held that an agency's determination that a policy "requires reconsideration," or its decision to "delay[] [a] rule's effective date" is "tantamount to amending or revoking a rule," which is thus subject to the Administrative Procedure Act's notice-and-comment requirements. *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (2017) (per curiam) (citing *Environmental Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 813 (D.C. Cir. 1983)); *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749 (D.C. Cir. 2001) (holding that amendment to correct error in rule was subject to notice-and-comment rulemaking). Yet HUD stripped the Affirmatively

Furthering Fair Housing Rule of a fundamental component without first providing plan participants an opportunity to comment on that proposal as the Administrative Procedure Act required. Inexplicably, HUD's May 23, 2018 notice does not even acknowledge the comments HUD received when it purported to suspend the deadline for submitting Assessments in January—an action it also took without first receiving public comment—even though the January 5 and May 23 orders were both justified by the same concern over plan participants' ability to submit acceptable Assessments.[1]

HUD's reliance on the Paperwork Reduction Act to justify its failure to submit its proposal for notice and comment misses the mark. It is irrelevant that "the [Paperwork Reduction Act] establishes a notice-and-comment process for information collection approvals, but not for withdrawals," 83 Fed. Reg. at 23,923, because the Paperwork Reduction Act's silence on a particular matter cannot relieve an agency of its general obligations under the Administrative Procedure Act. And under the Administrative Procedure Act, an agency may not suspend notice-and-comment rulemaking unless it "for good cause finds (*and incorporates the finding and a brief statement of reasons therefor in the rules issued*) that notice and public procedure thereon are impracticable, unnecessary,

[1] In fact, despite receiving dozens of comments to its January 5 order, HUD never took any further action in response to the comments it received, making it all the less likely that its call for retroactive comments to its May 23 order will be anything but an empty formality.

or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B) (emphasis added).[2] HUD did not articulate any authority—much less incorporate adequate findings in its order—that would justify suspending the Administrative Procedure Act's notice-and-comment procedure here. For that reason alone, its order withdrawing the assessment tool is invalid. *See Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706-07 (D.C. Cir. 2014) (vacating rule and holding that agency violated Administrative Procedure Act by suspending notice-and-comment rulemaking without adequate justification). The Court should not allow HUD to make major modifications to its Affirmatively Furthering Fair Housing Rule without *first* considering the views of affected parties.

[2] An agency also does not need to subject "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" to public comment. 5 U.S.C. § 533(b)(3)(A). HUD has not identified how any of these exceptions would apply.

CONCLUSION

The Court should grant the Plaintiffs' Renewed Motion for a Preliminary Injunction and for Summary Judgment.

June 5, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2018, the foregoing document was filed with the Clerk of the Court and served on all counsel of record electronically through the Court's CM/ECF system.

/s/ John R. Grimm
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