UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL FAIR HOUSING ALLIANCE, *et al.*, Plaintiffs, v. BEN CARSON, *et al.*, Defendants.	Civ. Action No. 1:18-cv-01076

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendants, the U.S. Department of Housing and Urban Development (HUD) and Secretary Ben Carson, abruptly suspended—without notice-and-comment procedures—the core requirements of a regulation known as the Affirmatively Furthering Fair Housing (AFFH) Rule. Promulgated in 2015, the Rule implements a key provision of the Fair Housing Act, which not only bars housing discrimination, but also requires recipients of federal funds to take affirmative steps to combat racial segregation and otherwise affirmatively further fair housing. Although this "affirmatively furthering fair housing" provision, 42 U.S.C. § 3608(e)(5), has been part of the Fair Housing Act for 50 years, HUD has permitted local jurisdictions to largely ignore that duty even as they collect billions of dollars in federal grants annually for housing and community development. The AFFH Rule changes that.

The Rule requires jurisdictions to undertake a rigorous process of assessing local fair housing needs and making concrete plans to address them, including by soliciting community participation and addressing the comments submitted. A jurisdiction must memorialize its work in a detailed document called an Assessment of Fair Housing (AFH), which HUD must review. If the AFH does not meet the Rule's requirements, HUD must reject it, explain its reasons, and then work with the jurisdiction to fashion a compliant AFH. In no uncertain terms, the Rule provides that jurisdictions that do not go through this process and emerge with HUD-approved AFHs may no longer receive federal housing and community development funds.

On January 5, 2018, HUD suspended the AFFH Rule's core requirements, including the requirement that participating jurisdictions submit AFHs and HUD's duty to review AFHs, until each jurisdiction's next scheduled AFH submission date that falls after October 31, 2020.

Because of the submission schedule, the practical effect of HUD's action is to nullify the AFFH Rule's requirements until 2024 or 2025 for most participating jurisdictions.

HUD's action violates the Administrative Procedure Act (APA) in three ways. First, HUD failed to undertake required notice-and-comment procedures before suspending the Rule's requirements. Second, in suspending the Rule's requirements, HUD acted arbitrarily and capriciously by failing to articulate a reasoned basis for its decision. The grounds it stated—that it had rejected as inadequate some of the AFHs submitted, that jurisdictions had to expend resources preparing AFHs and the agency had to expend resources to review them, and that better technical assistance could improve jurisdictions' understanding of their obligations—do not remotely justify the action HUD took. Finally, HUD's suspension of the Rule's requirement is an abdication of the duty the Fair Housing Act assigns it to ensure that its funding recipients affirmatively further fair housing. HUD promulgated the AFFH Rule in response to mounting evidence that its previous system—which largely amounted to putting jurisdictions on the honor system—resulted in jurisdictions accepting federal funds without taking meaningful steps to affirmatively further fair housing.

Plaintiffs National Fair Housing Alliance (NFHA), Texas Low Income Housing Information Service (Texas Housers), and Texas Appleseed are organizations dedicated to promoting fair housing. Plaintiffs benefit from the Rule, and their work is frustrated by HUD's suspension of the Rule's requirements. The Rule requires local governments to engage with issues central to Plaintiffs' missions, such as residential segregation, that have gone unaddressed for many years. It also permits plaintiffs to seek redress before HUD if those governments fail to adequately assess local housing conditions and make concrete plans to address them. HUD's

suspension of the Rule's requirements makes it much harder for Plaintiffs to advance local policies that foster residential integration and access to opportunity.

Plaintiffs ask this Court for a preliminary injunction requiring HUD to reinstate immediately the AFH process and take all other steps necessary to properly implement the duly promulgated AFFH Rule. They also move for summary judgment to secure a final judgment expeditiously.

STATEMENT OF FACTS

I. The AFFH Statutory Requirement and Background to the AFFH Rule

Since its enactment in 1968, the Fair Housing Act has required more than the avoidance of housing discrimination. It also requires the federal government and its grantees to take affirmative steps to promote residential integration, undo the legacy of racial segregation, and otherwise further fair housing. Specifically, the Act requires HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [the Fair Housing Act]," 42 U.S.C. § 3608(e)(5). This "affirmatively furthering fair housing" provision ensures that the Fair Housing Act constitutes "an obligation to do more than simply refrain from discriminating," *NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149, 155 (1st Cir. 1987), and also powers affirmative movement towards integration in communities across the country, as Congress intended. *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2525-26 (2015).

This AFFH provision imposes obligations on both HUD and its grantees. As HUD found in the preamble to the proposed AFFH Rule, grantees are obligated "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." 78 Fed. Reg. 43,710, 43,712 (July 19,

2013). HUD, meanwhile, must wield the leverage it has over its grantees to ensure that they do so. *See NAACP*, 817 F.2d at 155; *Shannon v. U.S. Dep't of Hous. and Urban Dev.*, 436 F.2d 809, 819-21 (3d Cir. 1970).

That leverage is potentially enormous, because HUD is slated to distribute almost $5.5 billion this fiscal year through housing block grant programs. By far the largest such program—accounting for almost two-thirds of the total, and reaching every corner of the United States—is the Community Development Block Grant (CDBG) program, which provides annual funding to approximately 1,210 grantees, mostly units of state and local government. [1] Local governments eligible for CDBG funds, known as "entitlement communities," include the principal cities of Metropolitan Statistical Areas (MSA)s; other metropolitan cities with populations of at least 50,000 persons; and qualified urban counties with populations of at least 200,000 persons. 42 U.S.C. §§ 5302, 5306.

The CDBG program includes requirements for how these funds are used. Additionally, HUD has a long-standing regulatory scheme to monitor how these funding recipients use their money. Each CDBG recipient must develop a document called a Consolidated Plan every three to five years and submit it to HUD for review and approval. *See* 24 C.F.R. §§ 570.302, 91.200-91.230. The Consolidated Plan sets out community development priorities and multi-year goals based on housing and community development needs, housing and economic market conditions, and available resources. Most local government participants are on a five-year Consolidated Plan cycle under which they are next due to submit plans on various dates in 2019 or 2020. As set forth below, this time frame also controls their first submission deadlines under the AFFH Rule.

[1] See *Advocates and Congressional Champions Secure Increased Funding for Affordable Housing in 2018*, National Low Income Housing Coalition (Mar. 22, 2018), http://nlihc.org/article/advocates-and-congressional-champions-secure-increased-funding-affordable-housing-2018.

CDBG recipients must certify, among other things, that they will affirmatively further fair housing. 42 U.S.C. § 5304(b)(2). However, until the AFFH Rule's promulgation, recipients were not required to submit to HUD any fair housing equivalent of the Consolidated Plan, *i.e.*, a detailed explanation of planned activities and how they will conform to the statutory requirement. Accordingly, jurisdictions could obtain these annual grants while doing very little to affirmatively further fair housing, despite HUD's legislative mandate to ensure their compliance.

In the years immediately prior to the AFFH Rule's promulgation, HUD told participating jurisdictions periodically to conduct a written "Analysis of Impediments to Fair Housing Choice" (AI). HUD instructed grantees to identify impediments to fair housing choice, take appropriate actions to overcome the effects of any such impediments, and maintain records reflecting the analysis and actions taken. Grantees had to certify that they had conducted an AI and were taking appropriate actions to overcome identified impediments. *See* Former 24 C.F.R. § 91.225(a)(1) (replaced in 2015 by AFFH Rule).

HUD, however, conducted almost no oversight of this process. Under that system, HUD did not require grantees to submit their AIs to HUD for review or approval. HUD did not require that the impediments identified be meaningful, did not provide adequate guidance as to what would be "appropriate actions" to overcome these impediments, and did not implement a system for compliance review. In short, HUD imposed no consequences when a grantee failed to produce or update an AI or to take the actions described in an AI. With HUD failing to meaningfully oversee its grantees, jurisdictions around the country routinely skirted their obligations to affirmatively further fair housing and falsely certified their compliance with even the weak requirements that HUD imposed.

In 2008, the National Commission on Fair Housing and Equal Opportunity reported: "The current federal system for ensuring fair housing compliance by state and local recipients of housing assistance has failed. . . . HUD requires no evidence that anything is actually being done as a condition of funding and it does not take adverse action if jurisdictions are directly involved in discriminatory actions or fail to affirmatively further fair housing." National Commission on Fair Housing and Equal Opportunity, *The Future of Fair Housing: Report of the National Commission on Fair Housing and Equal Opportunity* 44 (2008), *available at* http://www.naacpldf.org/files/publications/Future%20of%20Fair%20Housing.pdf. *See also* The Opportunity Agenda, *Reforming HUD's Regulations to Affirmatively Further Fair Housing* 7 (2010), *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).

HUD's inadequate enforcement of the AFFH mandate came to a head in a False Claims Act case brought against Westchester County, New York. In that case, a whistleblower organization alleged that the County had defrauded the United States for years by continually certifying to HUD its compliance with the Fair Housing Act, even as it was deliberately concentrating affordable housing for families in a small number of heavily African-American and Latino cities and distributing CDBG funds to overwhelmingly white suburbs that refused to allow the development of affordable housing. *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc., v. Westchester Cty.*, 495 F. Supp. 2d 375 (S.D.N.Y. 2007); *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc., v. Westchester Cty.*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009). The district court found that the County could produce no evidence that it even evaluated

race-based impediments to fair housing, let alone did anything about them, while accepting more than $50 million in federal housing funds during the relevant years. 668 F. Supp. 2d at 562.

Following *Westchester*, HUD took a closer look at the actions grantees were taking in exchange for billions of dollars of federal funds every year. As part of an internal study, HUD asked participating jurisdictions to produce their AIs for review. More than a third of jurisdictions could not or would not produce any AI at all. Of those that did produce an AI, HUD rated 49 percent as "needs improvement" or "poor." HUD found that only 20 percent of AIs committed jurisdictions to doing *anything* on a set timeframe. *See* U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *Analysis of Impediments Study* (2009).

At the same time, the Government Accountability Office (GAO) undertook a detailed review of the AI process. It released its conclusions in a 2010 report to Congress, 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 found that many jurisdictions, lacking any oversight or accountability, failed to make even minimal efforts to comply with the AI system. For example, the GAO found that 29 percent of jurisdictions had not completed an AI within the last five years, as recommended by HUD's *Fair Housing Planning Guide*, while 11 percent had not done so within the last 10 years; for another 6 percent, the date of completion could not be determined. These jurisdictions effectively had no operative AI at all. Many jurisdictions could not even produce a document labeled an AI, and others produced perfunctory documents—or, in one case, an e-mail.

Even for those jurisdictions that had operative AIs, the GAO found little evidence that the AIs made any practical difference in the operation or priorities of local housing agencies. The GAO reviewed many of the AIs that grantees had completed (and used as the basis for certifying compliance with the Fair Housing Act). It found most of them contained little more than aspirational statements of vague goals. It found, for example, that most AIs reviewed "lack time frames for implementing identified recommendations," making it impossible "to establish clear accountability." GAO Report at 31.

II. The AFFH Rule

In 2009, in response to the growing and uncontroverted evidence that it was failing in its statutory duty to ensure that recipients of federal funds were affirmatively furthering fair housing, HUD began a years-long process of formulating a better system. That comprehensive process included outreach to government officials throughout the country, publication of a proposed rule in 2013, and consideration of thousands of responsive comments. It culminated in the 2015 promulgation of the AFFH Rule. *See* Decl. of Janet Hostetler (describing HUD development of the AFFH rule).

As HUD explained in proposing the Rule in 2013, it was not seeking to "mandate specific outcomes." 78 Fed. Reg. 43,711. Rather, the AFFH Rule structures decision-making processes in ways that ensure that local fair housing concerns are heard, considered, and ultimately acted upon on a regular basis, with HUD review of the result providing accountability. Under the Rule, jurisdictions can no longer fail to produce an AI altogether, nor can they produce one like Westchester's that entirely ignores obvious racial segregation.

At the heart of the AFFH Rule is the requirement that participating jurisdictions produce an Assessment of Fair Housing, or AFH. They must do so using a HUD-created template that ensures a standardized process. 24 C.F.R. § 5.154(d).

To complete an AFH, jurisdictions first must identify local fair housing issues by answering a series of questions regarding, for example, residential racial segregation, racially or ethnically concentrated areas of poverty, and the housing needs of persons with disabilities. They must provide narrative description and analysis of local conditions (including by reference to HUD-provided maps) and describe policies and practices that influence those conditions. 24 C.F.R. §§ 5.154(d)(2), (d)(3).

The jurisdiction then must make concrete plans to address these issues, including metrics for assessing whether it is successfully achieving the goals it has set. While the initial AFHs are an exercise in goal-setting, subsequent AFHs must review progress toward these goals, such that the process provides a cycle of accountability. 24 C.F.R. § 5.154(d)(7). The bottom line is that the AFHs must articulate a plan by which the jurisdiction will take "meaningful actions to further the goals identified in the AFH," 24 C.F.R. § 91.225(a)(1), *i.e.*, "significant actions that are designed and can be reasonably expected to achieve a material positive change that affirmatively furthers fair housing." 24 C.F.R. § 5.152. These steps may vary from jurisdiction to jurisdiction, depending on local conditions and needs, but every jurisdiction must commit to taking meaningful steps towards addressing its barriers to fair housing.

Through the process, a jurisdiction must provide for "meaningful community participation," including through public hearings that are publicized "to reach the broadest audience." 24 C.F.R. § 5.158(a). It also must permit public review of, and comment on, an initial AFH draft. *Id.* It must consult with a number of designated community organizations, including

but not limited to fair housing organizations. 24 C.F.R. §§ 91.100(a), (e)(1). This consultation "must occur at various points in the fair housing planning process." 24 C.F.R. § 91.100(e)(3).

A jurisdiction then must submit its completed AFH to HUD for review. Its submitted AFH must include a summary of comments received and explanations for why it did not accept any changes to the draft AFH that commenters recommended. 24 C.F.R. § 5.154(d)(6). HUD must then review the AFH, which it "will not accept" if it "finds that the AFH or a portion of the AFH is inconsistent with fair housing or civil rights requirements or is substantially incomplete," 24 C.F.R. § 5.162(b)(1). "Substantially incomplete" includes, among other things, failure to meet required community participation and consultation requirements. 24 C.F.R. § 5.162(b)(1)(ii)(A). If HUD does not accept an Assessment, it must specify the reasons for non-acceptance and "provide guidance on how the AFH should be revised in order to be accepted." 24 C.F.R. § 5.162(b)(2).

The AFFH Rule links this required AFH submission and review to each jurisdiction's Consolidated Plan schedule. A jurisdiction must submit its AFH several months in advance of its consolidated plan, to permit review and, if necessary, revision without holding up acceptance of the Consolidated Plan and the continued flow of federal funds. 24 C.F.R. § 5.160; *see* 80 Fed. Reg. 42,311 (explaining that AFH submission is in advance of Consolidated Plan to permit rigorous review and revision without delaying federal funding). But if the jurisdiction ultimately submits a Consolidated Plan without an approved AFH, that "will *automatically* result in the loss of CDBG funds to which the jurisdiction would otherwise be entitled." 24 C.F.R. § 5.162(d)(1) (emphasis added). HUD thus has no discretion to continue funding jurisdictions for which it has not approved an AFH.

Since the AFFH Rule's promulgation in 2015, the new process has greatly improved jurisdictions' commitments to affirmatively further fair housing. One study comparing the twenty-eight AFHs submitted to HUD between October 2016 and July 2017 with the AIs previously prepared by the same participants found striking improvements. Whereas the AIs had contained nebulous goals, the AFHs contained concrete ones with quantifiable metrics of success, concrete policies to be enacted, and projected timelines to hold them accountable. *See* generally Decl. of Justin Steil.

For example, Paramount, California committed to making specified amendments to its zoning ordinance (by specific deadlines) to make its housing more inclusive, such as by allowing group homes for people with disabilities in residential zones. *See* Decl. of Justin Steil ¶ 20. New Orleans, Louisiana promised to create 140 affordable rental units in high opportunity areas by 2021. *See* Decl. of Maxwell Ciardullo ¶ 10. Chester County, Pennsylvania similarly committed to creating 200 new affordable units in high opportunity neighborhoods across the county by 2021. *See* Decl. of Justin Steil at ¶ 20.

Philadelphia's AFH identified widespread evictions in predominantly minority neighborhoods as a substantial barrier to fair housing. The city committed to taking concrete steps in response, including creating an "Eviction Prevention Project" pursuant to which lawyers and advocates will represent those facing unjust eviction. *See* Decl. of Daniel Urevick-Ackelsberg at ¶ 10. The Philadelphia AFH also highlighted the inability of low-income homeowners to secure capital to repair their homes and committed the City to funding a program to help low-income homeowners make basic repairs and to help persons with disabilities adapt their homes for their needs. *Id.* at ¶ 11.

Not only has the AFH process spurred jurisdictions to make these concrete commitments, it also has guaranteed a far greater level of public engagement than jurisdictions provided under the AI process. *See* Letter from Katherine O'Regan, Faculty Director, NYU Furman Center (Mar. 6, 2018), https://www.regulations.gov/document?D=HUD-2018-0001-0036 (Furman Center Letter). To fulfil the AFFH Rule's public-participation requirement, jurisdictions have held more public meetings and taken greater steps to ensure that more members of the public were aware of the process and had the opportunity to participate. *See also* Decl. of Daniel Urevick-Ackelsberg Decl. ¶¶ 5-6; Decl. of Maxwell Ciardullo Decl. ¶¶ 7-8. Their AFHs contain greater acknowledgment and consideration of the public's input. For example, Nashville, Tennessee's AFH spent 107 pages detailing public comments received and its response to them; by contrast, it had devoted nine pages of its AI to such topics. Furman Center Letter at 8.

III. HUD's Suspension of the AFFH Rule

On January 5, 2018, without providing advanced notice or opportunity for comment, HUD published a three-page notice in the Federal Register abruptly suspending key requirements of the AFFH Rule. *See* 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) (Notice) (Attached to Complaint as Ex. A).

HUD announced that local governments would not be required to submit AFHs until their next scheduled submission date after October 31, 2020. 83 Fed. Reg. 684. In practice, given the schedule on which AFHs are due, this delay means that most program participants will not have to complete an AFH until 2024 or 2025.[2] This delay applies not only to program participants

[2] As described above, AFH submission dates are tied to Consolidated Plan submissions. *See* 24 C.F.R. §§ 570.302, 91.200.230; *see also* 24 C.F.R. 5.160. Most CDBG grantees' Consolidated Plans are renewed on a five-year cycle that, in turn, results in their next AFH submission dates

whose AFHs were coming due, but also to participants to which HUD had granted extensions of time to submit previously due AFHs. Additionally, HUD immediately discontinued its review of AFHs, including those submitted already. Only the small number of participants whose AFHs HUD has already approved are required to comply with their HUD-approved commitments.

HUD stated that delay of the AFFH Rule is necessary because, "[b]ased on initial reviews," the agency concluded that "program participants need additional time and technical assistance to adjust to the new AFFH process and complete AFH submissions that can be accepted by HUD." 83 Fed. Reg. 684. This conclusion, it stated, was "informed" by the fact that HUD had not initially accepted 17 of the first 49 AFH submissions. *Id.* HUD stated that many program participants were struggling to meet the requirements of the AFFH rule, "such as developing goals that could be reasonably expected to result in meaningful actions[.]" 83 Fed. Reg. 684-85. Further, HUD said, "program participants struggled to develop metrics and milestones that would measure their progress as they affirmatively further[] fair housing." *Id*. at 685. The result of "program participants' frequent misunderstanding of how to set clear goals, metrics, and milestones," HUD stated, was often "non-accepted AFHs." *Id*.

HUD stated that "additional technical assistance may result in program participants better understanding their obligations under the AFFH Rule." 83 Fed. Reg. 685. It stated that such enhanced technical assistance would result in fewer resources expended by program participants "because they are more likely to submit an initial AFH that can be accepted by HUD." *Id.* HUD further stated that "significant staff resources were required" to decide that an AFH does not comply with the AFFH Rule's requirements. *Id.* HUD also said it "believes it can use this time"

falling between January 2018 and October 2020. Because these dates are before October 31, 2020, the jurisdictions will not have to submit AFHs until their next scheduled submission five years later.

while the AFFH Rule's requirements are suspended to improve the Assessment Tool (the Data and Mapping Tool and User Interface) it offers to help AFH preparation. *Id*.

In lieu of the suspended AFFH process, HUD instructed jurisdictions to revert to the AI process, *i.e.*, prepare an Analysis of Impediments without HUD assistance, "take appropriate actions," and then "maintain records reflecting the analysis and actions," without submitting anything for HUD review. 83 Fed. Reg. 685. HUD did not acknowledge that the AFFH Rule responded to GAO and HUD findings that the AI process was ineffective. Although it failed to take comments *before* acting, HUD solicited comment on its already-taken action. *Id*.

ARGUMENT

To secure a preliminary injunction, Plaintiffs must show "that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of equities in [their] favor, and accord with the public interest." League of Women Voters of the U.S. v. Newby, 838 F.3d 1, 6 (D.C. Cir. 2016). Here, each of those factors weighs strongly in favor of issuing the requested preliminary injunction.

First, Plaintiffs are likely to prevail on the merits. Once a rule is finalized, an agency "is itself bound by [it] until that rule is amended or revoked." Clean Air Council v. Pruitt, 862 F.3d 1, 9 (D.C. Cir. 2017). Yet HUD—without engaging in notice-and-comment procedures—suspended each program participant's obligation to prepare and submit an AFH until that participant's next scheduled AFH after October 31, 2020. This action effectively suspends the AFFH Rule for years for most jurisdictions, because their obligations are tied to the AFH process. HUD acted unlawfully in revising the AFFH Rule without undertaking notice-and-comment rulemaking.

Further, HUD's actions were arbitrary and capricious. HUD did not sufficiently explain why the fact that 17 of the 49 initial AFH submissions it reviewed were inadequate, such that HUD could not accept them without revision, justified its action. The Rule *contemplates* that HUD will review AFHs, initially deny those not meeting the AFFH Rule's requirements, and work with jurisdictions to formulate acceptable AFHs. Indeed, it builds in time between initial HUD review and the time by which a jurisdiction must have an accepted AFH to receive federal funding specifically to permit "pass-back" of drafts between a jurisdiction and HUD. HUD did not explain why evidence of the AFH review process working as intended justified suspending it. Moreover, HUD's notice did not consider significant evidence. It did not acknowledge that most of those 17 initial denials were followed by acceptance of a revised AFH, nor did it acknowledge that the AFH process was achieving substantial benefits. Although HUD alluded to a compliance burden, it did not explain why such a burden—which HUD anticipated in promulgating the Rule but found was outweighed by the AFFH Rule's benefits—now justified suspending the Rule's requirements. Finally, although HUD stated that it could improve its "technical assistance" to make the process easier for participants, it did not explain why a perceived need to improve its technical assistance justified suspending the Rule's requirements at all, let alone for two years (and effectively much longer for most CDBG recipients).

Moreover, HUD's action was not in accordance with law because it represents an abdication of the Secretary's statutory duty to affirmatively further fair housing pursuant to 42 U.S.C. § 3608(e)(5). HUD has already concluded that the AI process did not satisfy its

obligations under the Fair Housing Act or ensure that recipients of federal funding satisfy their statutory obligations. Nonetheless, HUD returned to that failed process.

Second, Plaintiffs will suffer irreparable harm absent a preliminary injunction. Plaintiffs' missions include educating governmental entities—and the communities they serve—about barriers to fair housing and working to advance the implementation of policies that meaningfully address them. The AFFH Rule established processes that assure that Plaintiffs' evidence and views are considered, ensure community participation in governmental decision-making, and otherwise advance Plaintiffs' fair housing missions. Plaintiffs have invested heavily in using the Rule's procedural requirements to drive meaningful action at the local level to address deep-rooted patterns of racial segregation and other fair housing problems. HUD's abrupt suspension of the Rule's requirements has impaired Plaintiffs' current programs and makes it far harder for Plaintiffs to advance their missions. Additionally, Plaintiffs must divert significant time and resources from previously planned activities to counteract the effects of HUD's suspension of the AFFH Rule's requirements.

Third, HUD will suffer no cognizable harm if forced to follow the law, and the public interest otherwise favors an injunction. "There is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters*, 838 F.3d at 12 (D.C. Cir. 2016). And whatever weight HUD's stated concerns might otherwise bear, here "there is precious little record evidence" documenting them. *Id.* at 13.

This Court should grant a preliminary injunction requiring HUD to immediately rescind its order delaying the AFFH Rule's requirements and otherwise fully implement the AFFH Rule. For much the same reasons, it also should grant Plaintiffs summary judgment.

I. Plaintiffs Are Likely to Prevail on the Merits.

A. HUD Failed to Follow Required Notice-and-Comment Procedures.

HUD effectively suspended the AFFH Rule for most jurisdictions receiving federal housing funds without observing the notice-and-comment procedures required by the APA. The APA requires that, before issuing a substantive rule, an agency must publish a "notice of proposed rule making" in the Federal Register, 5 U.S.C. § 553(b), and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." *Id.* § 553(c). These requirements apply to "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *Id*. § 551(4). Once a rule is final, the agency "is itself bound by [it] until that rule is amended or revoked," and it "may not alter such a rule without notice and comment." *Clean Air Council*, 862 F.3d at 9 (internal brackets omitted).

The AFFH Rule is a substantive regulation that could be promulgated only by notice-and-comment rulemaking and can be altered only by notice-and-comment rulemaking. The Rule requires, among other things, that (a) participants comply with the Assessment process—including following procedures such as soliciting community input—and submit AFHs according to an explicit timeline, 24 C.F.R. § 5.150 *et seq.*; (b) HUD undertake review of every submitted AFH, determine whether it meets certain specified requirements, 24 C.F.R. § 5.162(a), disapprove those which do not and work with jurisdictions to craft a compliant AFH, 24 C.F.R. §§ 5.162(b), (c); and (c) HUD disapprove a Consolidated Plan (and deny federal housing money) for those jurisdictions that, after that process is followed, still lack an accepted AFH, 24 C.F.R. § 5.162(d). The Rule sets out specific requirements for participating jurisdictions and HUD alike.

Because the AFFH Rule significantly changes grantees' and HUD's own obligations, HUD used notice-and-comment rulemaking for its promulgation.

The suspension of the AFFH Rule's assessment process until after October 31, 2020—and, for many jurisdictions, the delay for years after that of the requirement to engage in the Assessment process and submit an AFH for HUD review—changes substantive provisions of a final rule. HUD's suspension of the AFFH Rule's assessment process until after October 31, 2020, effectively amends or rescinds the AFFH Rule for an additional five years for the 900-plus jurisdictions with due dates during the suspension period. Most participants will not be required to submit AFHs until 2024 or 2025 (their next five-year cycle), and HUD has stated that it will not review their AFFH compliance until that time.

The delay defers not only jurisdictions' obligation to submit AFHs for review, but also the associated obligations that jurisdictions solicit and consider community input, analyze fair housing needs, and proactively address barriers. Meanwhile, HUD is deferring its own legal obligations to review AFHs, require certifications that satisfy the AFFH Rule, and condition federal funding on compliance with the AFFH Rule. In short, HUD is excusing itself and funding recipients from carrying out non-discretionary requirements of the Rule that have the "force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) (internal quotation marks and citation omitted). As the D.C. Circuit has explained in the context of an agency notice staying the effective date of a final rule, such action "is essentially an order delaying the rule's effective date," and "such orders are tantamount to amending or revoking a rule." *Clean Air Council*, 862 F.3d at 6.

Because the "suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under [the] APA," such action requires compliance

with the APA's procedural requirements. *Envtl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983); *see Open Communities All. v. Carson*, No. 17-2192 (BAH), 2017 WL 6558502, at *10 (D.D.C. Dec. 23, 2017) (stating that agency's two-year suspension of rule "ordinarily would require notice and comment"); *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 17 (D.D.C. 2012). Otherwise, "an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date." *Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 762 (3d Cir. 1982); *see Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (holding that an agency's suspension of a rule was "a paradigm of a revocation," constituting "a 180-degree reversal of [the agency's] former views as to the proper course") (internal quotation marks and citation omitted); *Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 813 (D.C. Cir. 1983) ("[S]uspension of the permit process … amounts to a suspension of the effective date of regulation … and may be reviewed in the court of appeals as the promulgation of a regulation."); *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 n.28 (D.C. Cir. 1981) ("[T]he December 5 order was a substantive rule since, by deferring the requirement that coal operators supply life-saving equipment to miners, it had 'palpable effects' upon the regulated industry and the public in general") (internal citation omitted); *see Nat. Res. Def. Council, Inc., v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004) (stating that "altering the effective date of a duly promulgated standard could be, in substance, tantamount to an amendment or rescission").

Because HUD substantively revised the AFFH Rule without undertaking notice-and-comment procedures, it failed to observe procedures required by law. The Court should therefore hold unlawful and set aside HUD's Notice and suspension of the AFFH Rule. *See* 5 U.S.C. § 706(2)(D).

B. HUD's Suspension of Core Provisions of the AFFH Rule Was Arbitrary, Capricious, and Contrary to Law.

Plaintiffs are also likely to prevail on the merits because HUD's suspension of the AFFH Rule and delay of the deadlines for AFH submissions by local government program participants was arbitrary and capricious. In making these decisions, HUD (1) did not adequately justify the professed concerns underlying the decision; (2) ignored the AFFH Rule's benefits and otherwise failed to acknowledge much of the relevant record before it; and (3) failed to adequately explain why it was reinstating a process which it previously rejected as insufficient to satisfy its statutory obligation to ensure that funding recipients affirmatively further fair housing.

Agency action is "arbitrary and capricious" under the APA if the action was not based on a "reasoned analysis" that indicates the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (internal quotation marks omitted); *see also Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 407 (D.C. Cir. 1996). Agency action is also arbitrary and capricious if the agency "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 [made a decision that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. A court cannot "supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* (internal quotation marks and citation omitted). "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Id.* at 50 (citations omitted); *accord S. Co. Servs., Inc. v. Fed. Energy Regulatory Comm'n*, 416 F.3d 39, 47 (D.C. Cir. 2015). In conducting its review, the Court should not "rubber-stamp the agency

decision"; instead, it must "engage in a 'substantial inquiry' into the facts, one that is 'searching and careful.'" *Mingo Logan Coal Co., Inc. v. EPA*, 70 F. Supp. 3d 151, 161 (D.D.C. 2014) (internal quotation marks and citations omitted).

1. HUD Failed to Adequately Justify Its Decision to Delay the Deadline for Submission of AFHs and to Effectively Suspend the AFFH Rule.

The reasons HUD offered for delaying AFH submission deadlines fail to justify that action, are not supported by the record, are contradicted by HUD's own justifications for the rule, and frustrate the objectives of the Fair Housing Act.

First, HUD made no attempt to explain why it is problematic or unexpected—let alone sufficiently so to warrant a dramatic change of course—that 17 of the first 49 AFH submissions were not initially accepted. In fact, the AFFH Rule anticipates that HUD will initially not accept some AFHs, but instead will provide feedback for the jurisdiction to use in revising its AFH. *See* 24 CFR §§ 5.162(a) and (b). The AFFH Rule also provides requirements and time frames governing this "pass-back" process, to ensure that initial non-acceptance does not endanger eventual receipt of federal funding and is otherwise routine and indeed beneficial. *See, e.g.*, 24 C.F.R. §§ 5.162(b)-(c) (when AFH is rejected, HUD must identify the reasons AFH was not accepted, provide guidance on how AFH should be revised, and allow program participant at least 45 days to revise and resubmit AFH). In promulgating the Rule, HUD required that AFHs be submitted months in advance of Consolidated Plans and rejected a proposal that the documents be submitted and reviewed concurrently, precisely so that it could initially reject AFHs—and then work with jurisdictions to improve them—as a routine part of the process. 80 Fed. Reg. 42,311.

This "pass-back" process created by the AFFH Rule anticipates what actually happened in implementation. Most of the submissions HUD initially rejected were subsequently improved

through a collaborative process between HUD and the jurisdictions, and all but a few were accepted after revision. *See* Decl. of Justin Steil at ¶ 30. Accordingly, what HUD characterizes as a problem—that 17 submissions were initially rejected—was the expected outcome of the process and, indeed, made the Rule more successful, because most jurisdictions improved their AFHs sufficiently to be accepted. Moreover, knowing that HUD has initially rejected some submissions has put other jurisdictions on notice of that possibility, encouraging them to do a better job in their initial submissions to avoid such outcomes. *See* Decl. of Daniel Urevick-Ackelsberg at ¶¶ 10-13 (describing the importance in Philadelphia's process of the prospect of HUD's searching review of the AFH).

HUD's Notice suggests, without explicitly saying so, that a 35-percent initial non-acceptance rate is too high. But HUD offered no explanation why any number of initial non-acceptances is problematic, other than to allude to unspecified expenditure of resources. The AFFH Rule anticipates such an expenditure of resources, particularly initially with respect to the many jurisdictions that had not taken the AI process seriously. *See* 80 Fed. Reg. 42,273 (estimating that jurisdictions would incur compliance costs of $25 million, with variance depending on their prior conduct, while HUD would incur costs of $9 million). HUD did not contend that compliance costs were proving greater than expected, let alone marshal facts that would support such a conclusion. HUD thus acted arbitrarily and capriciously by suspending the AFFH Rule's requirements based on events that were anticipated and built into the Rule.

Second, HUD did not explain how its action addresses the purported "problem" that it initially did not accept some AFHs, but instead sent feedback and required revision. HUD did not say what is wrong with its current technical assistance that, if changed, would result in fewer initial non-acceptances. Nor did it offer any other evidence or reasoning that connects the initial

non-acceptance of some AFHs to gaps in HUD's technical assistance. Although improved technical assistance is always welcome, HUD made no showing that it is a reasonable solution to the "problem" that HUD claims warrants suspension of the Rule's requirements.

That is enough to make HUD's decision arbitrary and capricious, but had HUD attempted to explain how improved technical assistance would "solve" the "problem" of initial non-acceptances and pass-backs, it would have had difficulty doing so. In reality, HUD's initial rejections of AFHs have generally been because jurisdictions failed to include basic components of a functional AFH, not because anything is deficient in HUD's current guidance. For example, municipalities whose AFHs HUD rejected ignored segregation in an entire section of their jurisdiction; failed to include any metrics or milestones to measure improvements in fair housing; failed to analyze the data HUD provided to the jurisdiction; and/or failed to consider housing barriers for key constituents, such as persons residing in public housing. *See* Decl. of Justin Steil at ¶¶ 21-27.

Moreover, HUD did not explain why improving its technical assistance requires the lengthy suspension of the AFH process. HUD did not explain what improvements it plans to make. It does not say how long it expects those improvements to take. It does not explain why it cannot take any necessary actions without suspending the AFH process. It did not explicitly state that it has failed to provide adequate technical assistance thus far, and even if it did, an agency cannot rely on its own decision not to take steps to properly implement a final rule as a reason why it cannot do so going forward. *See Bellevue Hosp. Ctr. v. Leavitt*, 443 F.3d 163, 179 (2d Cir. 2006) (rejecting argument that, because "agency failed to complete the predicate task" on schedule, it could "cite [] that very failure as an excuse for less than full compliance with its second task"); *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009) ("DHS

should not now expect to excuse its violation of the APA by pointing to the problems created by its own delay."); *see also League of Women Voters*, 838 F.3d at 14 (for purposes of analyzing equities, finding that agency could not rely on "the confusion resulting from its own improper action" to oppose "an injunction against that action").

All of this is to say that the agency set forth its "facts found" and its "choice made" but made no attempt to draw "a rational connection" between the two. *State Farm*, 463 U.S. at 43. That makes its action arbitrary and capricious.

2. HUD Ignored the Benefits of Ongoing Implementation of the AFFH Rule.

HUD also acted arbitrarily and capriciously because, while focusing on the purported costs of compliance, it ignored the benefits already accruing from the AFH process—including from the non-acceptance and revision of some initial AFHs. In promulgating the Rule, HUD acknowledged that compliance with the Rule's requirements would impose some burden on itself and program participants, but it found those costs outweighed by the Rule's "positive impacts" that "entail changes in equity, human dignity, and fairness." 80 Fed. Reg. 42,349. In suspending those requirements, HUD did not acknowledge its previous finding, let alone explain why it now weighed costs and benefits differently.

Such an unexplained "180 degree turn away from [precedent is] arbitrary and capricious," and an agency's decision "to reverse its position in the face of a precedent it has not persuasively distinguished is quintessentially arbitrary and capricious." *La. Pub. Serv. Comm'n v. Fed. Energy Regulatory Comm'n*, 184 F.3d 892, 897 (D.C. Cir. 1999) (citation omitted). "The agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126

(2016), *citing FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Encino Motorcars*, 136 S. Ct. at 2126, *citing Fox Television Stations, Inc.*, 556 U.S. at 515-16.

Here, HUD is suspending the AFFH Rule's requirements based largely on the burden of compliance for itself and its funding recipients, a cost that it considered and found to be outweighed by the Rule's benefits when promulgating the Rule, without even acknowledging—let alone explaining—its change in course. Not only did HUD reverse its own weighing of costs and benefits without acknowledging that it was doing so, it also "entirely failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, in considering only what it believed to be the costs of immediate implementation and not the benefits. *California v. U.S. Bureau of Land Mgmt.*, 227 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017).

In addition, had HUD considered the benefits of the Rule so far, it would have found no reason to change course, because the Rule has conferred the benefits HUD expected. One study of the twenty-eight AFHs submitted to HUD between October 2016 and July 2017—that is, the majority of the 49 on which HUD based its decision—compared those submissions to the AIs previously prepared by the same participants and found striking improvements. Whereas the AIs contained "nebulous goals," the AFHs contained "more concrete ones." *See* Decl. of Justin Steil ¶ 17; *see id.* ¶¶ 9-20 (giving examples). In the past, most municipalities' AIs did not set even a single goal that included a quantifiable metric of success or concrete policy to be enacted. Now, almost all included in their AFHs promises specific enough that HUD and local advocates can hold municipalities responsible for keeping them. *See* Decl. of Justin Steil. ¶¶ 9-20.

These are exactly the sort of concrete commitments towards affirmatively furthering fair housing that jurisdictions accepting federal funds should make to comply with their Fair Housing Act obligations, but did not do so in the absence of HUD oversight. The Rule's accountability standards, required goals and timetables, enhanced community participation requirements, required HUD review, and the potential pass-back process for rejected AFH submissions were beginning to drive substantial change on the ground. *See* Decl. of Daniel Urevick-Ackelsberg, (describing the AFH process in Philadelphia); Decl. of Maxwell Ciardullo (describing the AFH process in New Orleans).

By contrast, as HUD found in promulgating the Rule—but did not acknowledge in suspending it—when left to their own devices, localities do not take the necessary steps to effectively address segregation, concentrated poverty, and disparities in access to opportunity. In promulgating the AFFH Rule, HUD found that it needed a new and robust planning approach to ensure that local governments and other grantees take actions that are consistent with the Act. 80 Fed. Reg. 42,275. Relying upon, among other things, the GAO Report and its own experience, HUD concluded that the AI process was inadequate and resulted in program participants giving little priority to fair housing because of HUD's lack of oversight. *Id.* at 42,275; *see id.* at 42,438 (acknowledging that AI process had been "highly criticized as not an effective AFFH tool"). In suspending the Rule's requirements, HUD failed to adequately explain why it was reverting to the same process—leaving local government program participants without guidance or oversight—which it previously found to be inadequate at fulfilling the agency's obligations under the Fair Housing Act.

3. HUD's Action Is Contrary to the Fair Housing Act.

By reverting to a failed regulatory system that HUD has already found to be inadequate, HUD is failing to carry out its affirmative duties under the Fair Housing Act, 42 U.S.C. § 3608(e)(5). HUD concluded in promulgating the AFFH Rule that, in the absence of HUD oversight and guidance, federal funds were flowing to jurisdictions that did not, in turn, take the necessary steps to affirmatively further fair housing. *See* 78 Fed. Reg. 43,710 (jurisdictions' actions under the AI regime "do not sufficiently promote the effective use of limited public resources to affirmatively further fair housing"); *see also* Decl. of Janet Hostetler ¶¶ 3-7 (describing HUD process). HUD found that it had to exercise additional oversight to fulfil its own statutory responsibilities and ensure that federal funding recipients fulfilled their own.

HUD was correct. As courts have consistently found, the Fair Housing Act imposes on HUD a duty to provide a strong system of oversight and accountability that ensures recipients of federal funds actually take meaningful steps to affirmatively further fair housing. *See Shannon*, 436 F.2d at 819-21; *NAACP*, 817 F.2d at 158. That duty was not satisfied when HUD required only a bare certification of compliance from its funding recipients, based on the overwhelming and undisputed evidence of rampant non-compliance. HUD's affirmative obligation to ensure that federal funds are spent in a way that furthers fair housing carries with it the responsibility to gather information necessary to enforce this statutory duty, and then to institute procedures by which it can review that information carefully and in accordance with set standards.

For example, in *Shannon*, the Second Circuit held that, in order to select sites for federally funded housing projects without improperly causing increased racial segregation, HUD "must utilize some institutionalized method" that ensures that "it has before it the relevant racial and socio-economic information necessary for compliance with its duties." 436 F.2d at 821. It

was not permitted to claim that it did not know it was spending federal money in a manner that contributed to racial segregation when it did not make reasonable efforts to know. *Accord Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1133-34 (2d Cir. 1973) (finding that "affirmative duty placed on the Secretary of HUD" requires HUD to take account of racial impact of proposed actions; "[a]ction must be taken 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 Act was designed to combat").

Likewise, in *NAACP*, 817 F.2d at 158, the First Circuit held that "HUD's practice over time" of failing to provide standards by which to measure compliance with the statutory requirement that it affirmatively further fair housing and failing to oversee the city's fair housing performance could constitute a violation of 42 U.S.C. § 3608. The court added that HUD's responsibilities include, "at a minimum, an obligation to assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of action that would increase that supply." *Id.* at 156.

Finally, in *Thompson v. United States Department of Housing and Urban Development*, 348 F. Supp. 2d 398 (D. Md. 2005), the court found that HUD violated 42 U.S.C. § 3608 by permitting Baltimore and its housing authority to distribute federal housing assistance in a manner that limited the opportunities for predominantly African-American public housing residents and Housing Choice Voucher users to reside outside the City proper. It found that HUD failed to "seriously and thoroughly consider" the effects of these policies on long-standing racial segregation or possible alternatives that, by regionalizing the voucher system, would permit

voucher holders to seek housing more broadly and thus promote desegregation. *Id.* at 464. Ultimately, it concluded:

> HUD has had, and continues to have, a duty to forward the goal of open, integrated residential housing, which can only be achieved by ameliorating the effects of past discriminatory segregation. Federal Defendants' abdication of their statutory responsibilities stems from their failure *to even consider,* in any adequate way, regionalization policies.

Id. at 465.

It thus is clear that HUD has a duty to have some process that reasonably ensures that federally funded jurisdictions affirmatively further fair housing. HUD violated that duty by suspending the AFFH Rule and reverting to the AI process. As the case law and record of the AFFH rulemaking establish, the AI process—under which jurisdictions provide HUD no meaningful information about local fair housing conditions or the manner in which they plan to address them—neither provides HUD with the information necessary to fulfill its duty nor provides meaningful standards by which to measure whether jurisdictions are "complying" with their certifications. As HUD itself acknowledged, the AI process was ineffective at ensuring that jurisdictions take seriously their obligation to affirmatively furthering fair housing. *See* 78 Fed. Reg. 43,710 (AI process did not "sufficiently promote the effective use of limited public resources to affirmatively further fair housing").

In its notice, HUD does not explain why this process will work any better now than it did in the past. It does not, and could not, claim that its suspension of the AFFH Rule's core requirements leaves it in compliance with its own affirmative duties under 42 U.S.C. § 3608. For this reason as well, HUD's delay is arbitrary and capricious and contrary to the Fair Housing Act. *Cf. Chem. Mfrs. Ass'n v. EPA*, 217 F.3d 861, 865–67 (D.C. Cir. 2000) (finding an agency compliance date that frustrated statutory objectives to be arbitrary and capricious).

II. Plaintiffs Will Suffer Irreparable Harm in the Absence of a Preliminary Injunction.

HUD's unlawful suspension of the AFFH Rule's core requirements is causing, and absent an injunction will continue to cause, irreparable harm to Plaintiffs Texas Housers, Texas Appleseed, and NFHA. HUD's action has "perceptibly impaired the organization[s'] programs" and makes accomplishment of the organizations' missions more difficult. *League of Women Voters*, 838 F.3d at 8-9; *Open Communities Alliance*, 286 F. Supp. 3d at 178 (D.D.C. 2017). Accordingly, injunctive relief is warranted. *See League of Women Voters*, 838 F.3d at 9 (enjoining agency action that interfered with organizational plaintiff's ability to further its mission).

A. HUD's Action Is Harming the Texas Plaintiffs.

HUD's suspension of the AFFH Rule's requirements has impaired Plaintiffs Texas Housers' and Texas Appleseed's (collectively, the "Texas Plaintiffs") ability to carry out their missions. Texas Housers focuses on expanding housing opportunities for low-income Texas residents, *see* Decl. of John Henneberger ¶ 2, while Texas Appleseed's mission is to promote social and economic justice for all Texans and ensure that all families can live in safe, decent neighborhoods with access to educational and economic opportunity. Sloan Decl. ¶ 2. Both organizations have long-standing projects to ensure that federal funds, including disaster relief money following recent hurricanes, are spent consistent with civil rights obligations. *See* Henneberger Decl. ¶ 3, Sloan Decl. ¶ 3.

The AFFH Rule created the opportunity for Texas Plaintiffs to finally hold local governments in Texas responsible for addressing long-standing racial segregation and other fair housing issues. In reliance on the Rule's requirements and procedures, Texas Plaintiffs have invested thousands of dollars in staff time and out-of-pocket resources to ensure that local

jurisdictions throughout Texas take fair housing seriously through the AFH process. *See* Henneberger Decl. ¶¶ 7, 9. HUD suspended the AFFH Rule's core requirements just as those efforts were beginning to bear fruit. Texas Plaintiffs now will have to devote considerably more resources attempting to ensure that the communities they serve win fair housing commitments from localities like the ones that the AFH process would have provided.

For example, backed by the AFFH Rule's community participation requirements, the Texas Plaintiffs invested heavily to promote robust community participation when Hidalgo County prepared its AFH. Henneberger Decl. ¶¶ 8, 9; Sloan Decl. ¶¶ 13-14. Hidalgo County has long ignored the fair housing needs of many of its residents, including those living in "*colonias*," *i.e.*, plots of land outside incorporated cities that often lack infrastructure such as water, sewage, electricity, and paved roads. Both Texas Plaintiffs worked extensively to ensure that Hidalgo County considered the needs of *colonias* residents and other community members. Among other things, they prepared a lengthy comment letter advising County officials that the AFFH Rule required them to provide multiple forums for interested residents to participate; ensure that materials were prepared in Spanish; and provide notice and opportunity to participate to *colonias* residents. Because Texas Plaintiffs could point to specific requirements of the AFFH Rule, Hidalgo County complied, and many more community views were heard as a result. Henneberger Decl. ¶ 8.

Hidalgo County nevertheless submitted an AFH to HUD that failed to grapple with the publicly stated needs of *colonias* residents or to engage with the comments Texas Plaintiffs and others provided. Texas Plaintiffs sent HUD a letter alerting the agency to these problems. Henneberger Decl. ¶ 10. On December 12, 2017—just before it issued the January 5, 2018 order at issue here—HUD rejected the submitted AFH, requiring the County to submit a revised one

by March 12, 2018. Henneberger Decl. ¶ 11. Sloan Decl. ¶ 15. Hidalgo County's AFH thus is one of the 17 initially rejected submissions upon which HUD relies to suspend the rule.

Prior to HUD's action, Texas Plaintiffs were in the process of achieving a victory that went to the core of their missions. Hidalgo County was required to fully assess the housing needs of all its residents, including but not limited to those in the *colonias*, and to consider input from the community, including Texas Plaintiffs, as to how to address those needs. Moreover, it was required to do so on a tight and fixed schedule, under HUD's supervision. After HUD's unlawful action, the County now has no obligation to do any of these things. HUD's action "unquestionably make[s] it more difficult for the [Texas Plaintiffs] to accomplish their primary mission," which constitutes "injury for purposes both of standing and irreparable harm." *League of Women Voters*, 838 F.3d at 9.

Texas Plaintiffs' experience across the state demonstrates that HUD's willingness to oversee the behavior of recipients of federal funds dramatically alters Texas Plaintiffs' ability to advocate for fair housing in Texas. *See* Henneberger Decl. ¶¶ 4-5 (stating that Texas failed to address civil rights concerns in distribution of disaster relief money until Texas Housers filed HUD complaint and HUD required action); Sloan Decl. ¶ 4 (same). Many Texas communities are deeply resistant to acknowledging or correcting their own histories of segregation and lack of fair housing. Without the mandatory structure of the AFH process, it is much more difficult for Texas Plaintiffs to coax meaningful change from them. *See* Henneberger Decl. ¶ 21 (without AFH process to require engagement it is difficult to "secure a forum for a substantive conversation with a jurisdiction" about these issues). Since HUD suspended their obligations, jurisdictions already are slowing their work on fair housing and are abandoning the careful

examinations into their own responsibility for racial and ethnic disparities that the Rule requires. Henneberger Decl. ¶ 14.

A government action that directly reduces a plaintiff organization's ability to realize results on a project core to its mission irreparably harms that organization. *See League of Women Voters*, 838 F.3d at 8-9 (government policy that directly reduced a voting rights organization's ability to register voters irreparably harmed the organization). HUD's suspension of the AFFH Rule's requirements is doing exactly that to Texas Plaintiffs.

Moreover, HUD's action forces Texas Plaintiffs to expend more resources to try to bring fair housing to Hidalgo County than they would with the benefit of the AFH process. For example, Texas Housers must meet regularly with community groups in Hidalgo County to keep them engaged in long-term efforts to secure fair housing, rather than being able to mobilize less frequently for a comprehensive effort. Texas Housers must appear regularly at public hearings and otherwise press local government officials to address discrete fair housing issues. Henneberger Decl. ¶13. Without the focused AFH process, these efforts necessarily will be both less effective and less efficient, requiring more resource expenditure for less mission advancement.

Similarly, in Corpus Christi, Texas Plaintiffs consulted extensively with local advocates and submitted comments regarding policies necessary to equitably address the devastating impact of Hurricane Harvey on the City of Corpus Christi and surrounding region. Henneberger Decl. ¶ 15 Sloan Decl. ¶ 17. The City barely acknowledged these issues in the AFH it submitted to HUD on January 4, 2018, a day before HUD suspended the AFH process. Under the AFFH Rule's procedures, Texas Plaintiffs would be able to comment to HUD regarding this failure to meaningfully address important fair housing issues. After an initial non-acceptance of the

defective AFH, Texas Plaintiffs would be able to work with Corpus Christi to grapple seriously with these concerns in a revised AFH, then hold the City accountable for executing the actions it promised in that AFH. Now, Texas Plaintiffs have no such centralized process for requiring the City to conduct disaster recovery equitably, even as hundreds of millions of dollars in federal disaster relief money flow to the region. In order to ensure equitable disaster recovery, they will have to expend resources laboriously monitoring the use of this federal money on a project-by-project basis across the state. Henneberger Decl. ¶ 15.

The Texas Plaintiffs will continue to promote fair housing around the state, but they have lost the benefit of the AFFH Rule's substantive and procedural requirements, pursuant to which municipalities must consult with them at regular intervals; review and engage with their comments and concerns; reach out to community members; and proactively consider and respond to specific fair housing issues. Jurisdictions such as Hidalgo County that should be implementing fair housing initiatives right now are not doing so because of HUD's action. Other jurisdictions that have AFHs due relatively soon are failing to engage in the process because of HUD's suspension of the Rule's requirements and the uncertainty that creates. See Henneberger Decl. ¶ 16. Texas Plaintiffs also have lost the benefit of HUD's review of submitted AFHs (alongside Texas Plaintiffs' comments on them), along with the prospect of HUD's non-acceptance of AFHs that inadequately assess barriers to fair housing or fail to make concrete promises to correct them. For all these reasons, HUD's suspension of local government program participants' obligations under the AFFH Rule and its own requirement to supervise those local governments is "at loggerheads" with Texas Plaintiffs' mission and "has made the organization[s'] activities more difficult," *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1429-30 (D.C. Cir. 1996) (internal quotation marks, citation, and emphasis omitted).

In addition, as a result of HUD's unlawful action, Texas Plaintiffs have had to divert resources to numerous activities that would be unnecessary if the AFFH Rule remained effective. Those activities include writing letters, seeking meetings, and otherwise educating a host of jurisdictions about how to fulfil their obligations to affirmatively further fair housing in the absence of the AFH process. Sloan Decl. ¶¶ 19-23; Henneberger Decl. ¶¶ 16, 19. They have to expend resources convincing jurisdictions to take steps that would have been mandatory under the AFFH Rule. *See Open Communities Alliance*, 286 F. Supp. 3d at 178 (finding irreparable harm caused by need for similar diversion of resources to advocating for entities to do voluntarily what they would have been required to do under suspended rule). They also will have to address discrete fair housing issues one by one, rather than having one process in which a jurisdiction resolves how it will handle multiple fair housing issues. *See, e.g.*, Sloan Decl. ¶¶ 17, 24; Henneberger Decl. ¶¶ 19, 21.

Moreover, Texas Plaintiffs have had to forego many other planned activities as a result, including research, data analysis, policy and legal support, and public education in response to civil rights issues created by Hurricane Harvey. Henneberger Decl. ¶¶ 17-18. They also planned, but now have been forced to delay, projects to protect the land rights of African Americans who own "heir property" (land passed down informally from generation to generation without recorded transactions) and to provide input on the revision of Austin's zoning code. Sloan Decl. ¶ 25. *See Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1140-41 (D.C. Cir. 2011) ("diversion of resources to programs designed to counteract the injury" to an organization's mission constitutes injury).

B. HUD's Action Is Harming NFHA.

The irreparable harm that Texas Plaintiffs are suffering in one region exemplifies the harm that NFHA and its members are suffering around the country. NFHA is a nationwide alliance of private, non-profit fair housing organizations. Its mission is to promote residential integration and combat discrimination in housing based on race, national origin, disability, and other protected classes covered by federal, state, and local fair housing laws. It accomplishes this mission through, among other things, public policy initiatives, member education, advocacy, community development, investigations, and enforcement. Rice Decl. ¶¶ 1, 2.

Because it is so critical to NFHA's mission that local jurisdictions comply with their statutory obligation to affirmatively further fair housing, NFHA has worked for many years to encourage HUD to do more to enforce that requirement. When HUD has been unwilling to do so, NFHA has had to expend resources in an effort to secure the outcomes that the Fair Housing Act requires. For example, when HUD's *Fair Housing Planning Guide* proved inadequate as a template for developing AIs, NFHA developed and disseminated its own template, which was widely distributed and used nationally. Rice Decl. ¶ 5. Because of its experience with the failed AI process, and its commitment to addressing segregation in America, NFHA was among the leading advocates involved in educating the fair housing community and policymakers about the AI process's failures and pushing for the creation of the AFFH Rule. Rice Decl. ¶¶ 7, 9-13. NFHA was among the groups that created and supported the National Commission on Fair Housing and Equal Opportunity, a bi-partisan group headed by two former HUD Secretaries that concluded in 2008 that the AI process had failed and recommended specific changes that were part of the impetus for the AFFH Rule. Rice Decl. ¶ 8.

HUD's suspension of the AFFH Rule's requirements—requirements that NFHA itself helped shape and that facilitate NFHA's ability, directly and through its members, to successfully advocate for the advancement of fair housing priorities around the country—"unquestionably make[s] it more difficult" for NFHA "to accomplish [its] primary mission." *League of Women Voters*, 838 F.3d at 9. NFHA engages in a variety of activities aimed at advancing fair housing priorities around the country. The AFFH Rule's requirements, when in effect, make NFHA's efforts more efficient and effective. *See* Goldberg Decl. ¶ 6. Not only does the Rule provide NFHA and its members greater ability to ensure that fair housing considerations are included in municipal planning decisions, but its standardized process and formalized rules make it much simpler for NFHA to advise and assist its members in effectively engaging at the local level. HUD now has removed those regulatory benefits, directly harming NFHA's ability to achieve fair housing and help its members do the same. Rice Decl. ¶ 26; Goldberg Decl. ¶¶ 6-7, 9.

In response to HUD's unlawful action, NFHA has had to redirect considerable financial and human resources to educating and counseling its members, civil rights organizations, and other stakeholders about HUD's action and how to achieve fair housing locally under much more challenging circumstances. Rice Decl. ¶¶ 21-24; Goldberg Decl. ¶¶ 9-11. NFHA has begun giving presentations on those subjects, including to its own members, the members of the Americans for Financial Reform Housing and Foreclosure Working Group, and the Leadership Conference on Civil and Human Rights Fair Housing and Fair Lending Task Force, *see* Goldberg Decl. ¶ 11 (describing three such presentations on HUD's action and how to combat its effects). It is developing written materials to help members, as well as counseling and providing technical support to individual members, many of which were working with localities in some

stage of the AFH process at the time of HUD's January 5 action and, accordingly, face challenges like those described above with respect to the Texas Plaintiffs. *See* Goldberg Decl. ¶ 13. NFHA has individually educated and counseled at least 16 of its members on the ramifications of the Notice on efforts to ensure robust fair housing planning. *See* Goldberg Decl. ¶ 12.

The resources NFHA must spend on such activities will increase in the coming months, as more local governments begin preparing their Consolidated Plans. In the absence of HUD oversight, NFHA is preparing to devote substantial resources to outreach, public education, and advocacy to assist its members and community groups in working to ensure that jurisdictions formulate AIs that are robust as possible (given the circumstances) and then monitoring compliance. Through this work, NFHA plans to blunt, as best it can, the negative impact of HUD's action. Goldberg Decl. ¶ 13. This work would be entirely unnecessary if participation in the AFH process remained mandatory, as it was before HUD's action. *See Open Communities Alliance*, 286 F. Supp. 3d at 178 (finding irreparable harm where plaintiff, to accomplish its mission as effectively, would have to convince entities to do voluntarily what they would have been required to do under suspended rule).

III. The Balance of Equities and the Public Interest Support Plaintiffs' Request for Preliminary Relief.

In evaluating whether to issue a preliminary injunction, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (internal quotation marks and citation omitted). In addition to evaluating the relative effect of the injunction on each party, a court must also consider whether the requested relief would serve the public interest, and these inquiries are often intertwined. *See League of Women Voters*, 838 F.3d

at 12. As described above, Plaintiffs are experiencing serious and irreparable harm that warrants immediate injunctive relief. No countervailing consideration makes such an injunction improper.

A preliminary injunction would cause little or no harm to HUD. HUD would not be harmed by being ordered to follow the AFFH regulation, which was based on a lengthy administrative record and notice-and-comment rulemaking, and HUD's grantees would not be harmed by being required to follow a process that is part of a properly promulgated regulation and ensures that they carry out their statutory duty to affirmatively further fair housing. HUD did not find that either it or its grantees were experiencing harm beyond the burdens specifically contemplated.

Moreover, "[t]here is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters*, 838 F.3d at 12 (citing *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511–12 (D.C. Cir. 2016); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)). It is well-established, for purposes of preliminary injunction analysis, that the "[p]ublic interest is served when administrative agencies comply with their obligations under the APA." *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (internal quotation marks and citation omitted); *Open Communities Alliance*, 268 F. Supp. 3d at 179 (noting "substantial public interest" in having agencies abide by the APA); *Patriot, Inc. v. U.S. Dep't of Hous. and Urban Dev.*, 963 F. Supp. 1, 6 (D.D.C. 1997) ("[T]he public interest is best served by having federal agencies comply with the requirements of federal law, particularly the notice and comment requirements of the APA") (internal citations omitted); *Gulf Coast Mar. Supply, Inc. v. United States*, 218 F. Supp. 3d 92, 101 (D.D.C. 2016) (same); *see also Cresote Council v. Johnson*, 555 F. Supp. 2d 36, 40 (D.D.C. 2008) (there is a "general public interest in open and accountable agency decision-making").

That is particularly true with respect to the AFFH Rule, which was intended to provide—and already has provided—"substantial benefit not only for program participants but also for the communities they serve and the United States as a whole." 80 Fed. Reg. 42,273. The Rule promotes residential integration and equal access to opportunity. It also promotes government planning that is accountable and responsive to local needs. In promulgating the rule, HUD found that any burdens the Rule might impose on itself and on local jurisdictions were outweighed by the Rule's benefits to the country. Nothing has changed that would upset that balance.

CONCLUSION

This Court should grant Plaintiffs a preliminary injunction requiring HUD to rescind the delay and suspension of requirements of the AFFH Rule and to take all other necessary steps to ensure implementation of the AFFH Rule on the schedule that was in place before that action. This Court also should grant summary judgment to Plaintiffs and enter final judgment in Plaintiffs' favor.

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Respectfully submitted,

/s/ Sasha Samberg-Champion

Sasha Samberg-Champion (DC Bar No. 981553)
Sara Pratt (DC bar admission pending)
Michael G. Allen (DC Bar No. 409068)
RELMAN, DANE & COLFAX PLLC
1225 19th Street, NW, Suite 600
Washington, DC 20036
(202) 728-1888
ssamberg-champion@relmanlaw.com
spratt@relmanlaw.com
mallen@relmanlaw.com

Jon Greenbaum (DC Bar No. 489887)
Joseph D. Rich (DC Bar No. 463885)
Thomas Silverstein (DC Bar No. 1552406)

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave., NW
Washington, DC 20005
(202) 662-8331
jrich@lawyerscommittee.org

Philip Tegeler (DC Bar No. 1002526)
Megan Haberle (DC bar admission pending)
POVERTY & RACE RESEARCH ACTION COUNCIL
740 15th Street NW, Suite 300
Washington, DC 20005
(202) 360-3906
ptegeler@prrac.org
Rachel Goodman
Sandra Park
AMERICAN CIVIL LIBERTIES UNION
125 Broad St., 18th Floor
New York, NY 10004
(212) 549-2500
rgoodman@aclu.org
spark@aclu.org

Arthur B. Spitzer (DC Bar No. 235960)
AMERICAN CIVIL LIBERTIES UNION OF THE DISTRICT OF COLUMBIA
915 15th Street, NW - 2nd floor
Washington, DC 20005-2302
Tel. 202-457-0800
Fax 202-457-0805
aspitzer@acludc.org

Ajmel Quereshi (DC Bar No. 1012205)
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
1444 I Street NW
Washington, DC 20005
(202) 682-1300
aquereshi@naacpldf.org

Sherrilyn A. Ifill (NY Bar No. 2221422)
Samuel Spital (NY Bar No. 4334595)
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor

New York, NY 10006
(212) 965-2200

Allison M. Zieve (DC Bar No. 424786)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for all Plaintiffs

Morgan Williams (*pro hac vice* application forthcoming)
NATIONAL FAIR HOUSING ALLIANCE
1101 Vermont Ave. NW, Suite 710
Washington, DC 20005
(202) 898-1661
mwilliams@nationalfairhousing.org

Attorney for Plaintiff National Fair Housing Alliance

Madison Sloan (*pro hac vice* application forthcoming)
TEXAS APPLESEED
1609 Shoal Creek Bld. # 201
Austin, TX 78701
(512) 473-2800
msloan@texasappleseed.net

Attorney for Plaintiff Texas Appleseed