



January 11, 2018

Regulations Division
Office of General Counsel
451 7th Street S.W., Room 10276
Department of Housing and Urban Development
Washington, DC 20410-0500

Submitted electronically through www.regulations.gov

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

FAIZ SHAKIR
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

Re: Docket No. FR-6070-N-01: "Notice for Suspension of Small Area Fair Market Rent (Small Area FMR) Designations"

To Whom It May Concern:

The American Civil Liberties Union (ACLU) and the ACLU of Maryland (ACLU-MD) submit the following comments in response to the Notice published on December 12, 2017, "Notice of Suspension of Small Area Fair Market Rent (Small Area FMR) Designations."

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee to everyone in this country. The ACLU advances equality through litigation and policy advocacy, including by challenging housing discrimination experienced by people of color; survivors of domestic violence, and sexual assault; and lesbian, gay, bisexual, transgender, and queer (LGBTQ) people. The ACLU of Maryland is a non-profit organization which works to ensure, among other things, that all people in the state of Maryland are free from all types of discrimination. The ACLU-MD was one of plaintiffs' counsel in the *Thompson v. HUD* case through which the Baltimore Regional Housing Partnership (BRHP), in partnership with HUD and the Housing Authority of Baltimore City, has been administering the nation's largest housing mobility program. Through this work, we have more than a decade of experience utilizing rent subsidies calibrated to neighborhood market rents as a means to expand fair and affordable housing opportunities for low income families who have previously been confined to segregated, disinvested communities.

While not involved as counsel in *Open Communities Alliance et al v. Carson*, we concur with the recent decision of the U.S. District Court that the original suspension of the Small Market Fair Market Rent (SAFMR) rule violated the Administrative Procedure Act. We understand that the suspension proposed in this notice is now moot but wish to comment because of the importance of SAFMR Rule. There are very real

consequences to further delay in implementing this long studied, long overdue, and cost effective reform to the Housing Choice Voucher program.

The low income families that HUD serves desire the choice to live in safe neighborhoods with strong schools and economic opportunities. As we enter 2018, the 50th anniversary of the Fair Housing Act, there can no longer be any question that residential racial segregation remains deeply entrenched in our nation, or that HUD programs have played a role in causing and perpetuating that segregation, a story told in meticulous detail by Richard Rothstein in *the Color of Law*.¹ The regionally-determined Fair Market Rent system is one HUD policy that has had a powerful discriminatory impact on African American and Latino voucher families throughout the nation. Nor can there be any doubt that families in communities across the nation want the opportunity to live in non-segregated communities. Wherever they exist, the demand for housing mobility programs far exceeds capacity. Last year, for example, BRHP reluctantly closed the waiting list for the Baltimore Housing Mobility Program when it reached more than 14,000 Baltimore families. On the other hand, for existing voucher holders that do not wish to take advantage of the SAFMR to access higher opportunity areas, the SAFMR rule has numerous built-in protections to protect their choice.

HCV families will be harmed if they are forced to continue waiting for HUD to implement SAFMRs. Let there be no mistake, continued segregation is not a benign, victimless, or inevitable condition. A large and mounting body of economic, sociological, and now medical research has conclusively catalogued the ways in which the exposure of human beings, especially children, to the hardships and stress of high-poverty environments impairs cognitive development, produces marked disparities in health and life expectancy, and stunts economic mobility.² The Baltimore City Health Department, for example, has documented a 15-20 year disparity in life expectancy between high-poverty, virtually all Black neighborhoods such as Sandtown/Harlem Park, and the city's affluent white neighborhoods such as Roland Park, even when those neighborhoods are immediately adjacent as is the case comparing Pimlico and neighboring Mt. Washington.³

Even the proponents of further study and delay have been forced to concede that there is a strong body of research supporting the public policy objectives of the SAFMR rule. The speculative fears of "unintended consequences" are far outweighed by the very real and well-documented harms that families continue to suffer under metrowide FMRs that exclude them from lower poverty areas and expose their children to on-going *cumulative* harm. As the

¹ Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017).

² See, e.g., Amanda L. Roy et al., *Instability Versus Quality: Residential Mobility, Neighborhood Poverty, and Children's Self-Regulation*, 50 *Developmental Psychol.* 1891 (2014); Darrell J. Gaskin et al., *Disparities in Diabetes: The Nexus of Race, Poverty, and Place*, 104 *Am. J. of Pub. Health*, 2147 (2014); Pew Charitable Tr., *Mobility and the Metropolis* (2013), http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2013/mobilityandthemetropolispdf.pdf.

³ Baltimore City Health Department, *Life Expectancy at Birth by Community Statistical Area*, <http://health.baltimorecity.gov/sites/default/files/Life-expectancy-2013.pdf>. Sandtown residents have the same life expectancy as North Koreans.

economist Raj Chetty concludes: “We find very clear evidence of linear childhood exposure effects, suggesting that **each year in a better childhood environment really matters.**”⁴

In practice, SAFMRs are not burdensome to administer. It is not surprising that the change to SAFMRs has been met with reluctance by some Public Housing Authorities (PHAs). Fear of change is an inherent element of bureaucratic inertia, but actual experience in the Baltimore region, where BRHP uses a variation on small area FMRs even more granular than zip code based SAFMRs, has shown that implementation of the SAFMR rule will be neither costly nor burdensome.

As HUD is aware, BRHP is the voucher administrator for the *Thompson* vouchers, now numbering about 3,800. For more than a decade, the program has utilized Exception Payment Standards at the census tract level, not just the larger zip code level, to calibrate rent subsidies to neighborhood market rents.⁵ The large number of census tracts in the region are grouped into several ranges based on census tract rent levels, making them fairly easy to apply. BRHP has developed a simple to use web-based tool through which staff, landlords, and voucher holders can enter an address and read out the applicable payment standard amount. BRHP currently makes this tool available, free of charge, to other PHAs that institute housing mobility programs. BRHP also uses open data to update payment standards and free, open source software to produce maps of the region by payment standard. Even without offering mobility counseling similar to that of BRHP, the SEMAP Equal Opportunity Indicator *already* requires PHAs to provide voucher holders with similar maps and to display them at voucher briefing sessions.

Low income families of color have long been steered into high-poverty, segregated communities by government policy and practice. By design, HUD’s regionally-based “Fair Market Rent” calculation for the Housing Choice Voucher (HCV) program sets HCV rents too low to give families meaningful access to rental units in higher opportunity communities. In contrast, census tract-based Exception Payment Standards used in the Baltimore Housing Mobility Program give those HCV families a meaningful choice of where to live. These market-calibrated rent subsidies are a key part of the reason that locational outcomes for BRHP families far exceed those of other voucher holders in the Baltimore region. As HUD is aware, virtually zero Housing Authority of Baltimore City (HABC) voucher families live in higher opportunity communities, leaving them in under-resourced schools and, often, violent neighborhoods. Regionwide, only 20% of voucher holders live in higher opportunity areas.⁶

⁴ Raj Chetty, *Improving Opportunities for Economic Mobility: New Evidence and Policy Lessons*, Fed. Res. Bank of St. Louis (2017), https://www.stlouisfed.org/~media/Files/PDFs/Community-Development/EconMobilityPapers/Section1/EconMobility_1-1Chetty_508.pdf?la=en. Chetty’s policy recommendations include implementation of SAFMRs.

⁵ Belying the notion that the less granular approach of zip code-based SAFMRs are too complex to administer, this census tract-based approach has been endorsed by local PHAs, among other governmental and non-profit entities in the Baltimore Regional Housing Plan, *Strong Communities, Strong Region: The Baltimore Regional Housing Plan and Fair Housing Equity Assessment*, Baltimore Metropolitan Council (November 2014). http://baltometro.org/phocadownload/Publications/OpportunityCollaborative/170508_Strong-Communities-Strong-Region_The_Baltimore_Regional_Housing_Plan_and_Fair_Housing_Equity_Assessment-November_2014.pdf.

⁶ *Id.* Notably, BRHP voucher holders comprise a portion of this 20%. Otherwise, the percentage would be even lower.

Delay in implementation of the mandatory SAFMR rule would allow overpayments for properties in low rent areas to continue. The structure of regionwide FMRs means those FMRs exceed actual market rents in many lower rent neighborhoods. As a result, landlords are able to charge more for units occupied by voucher holders than the same unit could command on the open market. Georgetown University sociologist Eva Rosen documented cases in Baltimore in which landlords charged as much as \$250 more than other identical units in the same building.⁷ One of the largest landlords in Baltimore, with hundreds of properties in the HCV program, has admitted that the rents HABC vouchers provide are “30-50% higher than the landlords’ market tenancy alternative.”⁸ This is consistent with the findings of the Small Area FMR Demonstration Evaluation that Housing Assistance Payments (HAP) decreased by nearly 30% in low rent zip codes.⁹ In a time of fiscal uncertainty and austerity, the continued overpayment of inflated rents to landlords cannot be justified.

Over-subsidization of landlords in low rent areas under the metrowide FMR reduces the number of households that can be served and inflates rents for unassisted renters. The distortion of the market that results from the use of regionwide FMRs harms unassisted renters in two ways. First, payment of above-market rents artificially inflates Per Unit Costs, reducing the number of families that can be served by PHAs. At the same time, unassisted renters competing for units face upward pressure on rents and higher rent burdens. Thus, in Baltimore, for example, we see that many of the neighborhoods with the highest concentration of vouchers are also the neighborhoods where rent burdens are highest.¹⁰

The Small Area FMR rule will increase the choices available to families with vouchers, with little or no loss of available units in the regional housing market. By design, the methodology of the metrowide FMR calculation put units with lower poverty, less segregation, and more opportunity beyond the purchasing power of HCV families. In contrast, the SAFMR Interim Evaluation showed that the SAFMRs work as intended, increasing access to units in higher opportunity areas, and that HCV holders take advantage of this access as they move to new units. It is particularly noteworthy that the SAFMR Demonstration was successful at increasing access to higher opportunity areas given that the participating PHAs provided little or no additional landlord recruitment, much less housing search assistance. As shown by experience in both Dallas and Baltimore (both areas without the benefit of codified protections against discrimination based upon source-of-income), these tools can be employed to help voucher holders secure units in higher rent areas. Moreover, to the extent that some PHAs may be concerned about “losing” high-poverty neighborhood units from the potential supply of available rentals, they will retain the flexibility to apply a 110% payment standard to specific zip codes, resulting in a net increase in the overall number of units available regionwide.

⁷ Eva Rosen, *The Power of Landlords*, The Atlantic (June 9, 2015),

<https://www.theatlantic.com/business/archive/2015/06/baltimore-housing-policy-segregation/395039/>.

⁸ Dominion Group, *Distressed and Transitional Residential Real Estate in Baltimore: The Market Today and Practical Implications on Policy and Development*, (2010) <http://www.learnthepractice.com/Article.pdf>.

⁹ Finkel et al., Small Area Fair Market Rent Demonstration Evaluation Interim Report (HUD, August 2017), at 90, <https://www.huduser.gov/portal/sites/default/files/pdf/SAFMR-Interim-Report.pdf>.

¹⁰ *State of Baltimore’s Neighborhoods: Findings from Vital Signs 15*, Baltimore Neighborhood Indicators Alliance, Jacob France Institute, Merrick School of Business, University of Baltimore (October 2017), http://cmtalliance.org/cmtalliance/uploads/File/Amanda_Presentations_T101PF.pdf.

Suspension of the mandatory Small Area FMR rule would harm neighborhoods by continuing the concentration of vouchers in “Section 8 submarkets.” The inflated HCV rents create perverse incentives to concentrate assisted housing in certain neighborhoods commonly known as “Section 8 submarkets. For example, two of the neighborhoods in Baltimore City with the highest rates of housing voucher use are Belair-Edison (420.9 per 1,000 households) and Pigtown/Washington Village (294.2 per 1,000 households). These are not the highly distressed neighborhoods of the City, but rather, second tier neighborhoods with relatively low rents and a weak homeownership market. Investors target these neighborhoods, purchasing single family row homes, in generally all cash transactions, for the specific purpose of renting them to HCV holders at above-market rents and then actively seeking out HCV families to lease there.¹¹ The concentrations of vouchers created by these practices not only concentrate extremely low income HCV households, they crowd out prospective owner/occupants and market rate renters—impeding a balanced and market-based revitalization. A change to market-based FMRs would not completely solve the problem of “Section 8 submarkets,” but it would remove the perverse incentives that now exist and should not be further delayed.

The exclusion of the Baltimore region from the list of mandatory SAFMR regions was unwarranted. Despite the fact that it is one of the nation’s most segregated regions with a long history of voucher concentration, the Baltimore metro was not one of the 50th percentile FMR areas that the SAFMR rule requires to change to SAFMRs. We not only urge HUD to move forward with implementation of the SAFMR rule but also to correct this glaring omission. Otherwise, the Baltimore region could end up without either the SAFMRs or 50th percentile FMRs, with clear discriminatory and damaging impacts on families, and impeding regional efforts to expand housing opportunities in the Baltimore metropolitan area.

We strongly concur with the U.S. District Court’s preliminary injunction ruling in *Open Communities Alliance et al v. Carson* that HUD’s attempted suspension of the mandatory Small Area FMR rule was arbitrary and capricious, and not justified by any findings of the Interim SAFMR demonstration report on which it was purportedly based. Any further suspension of the rule would irreparably harm HCV families and violate their rights under the Fair Housing Act.

Sincerely,



Faiz Shakir
National Political Director



Jennifer Bellamy
Legislative Counsel



Barbara Samuels
ACLU of Maryland
Managing Attorney,
Fair Housing

¹¹ See Rosen (2015) for a description of the marketing tactics used by HCV landlords.