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RE: 24 CFR Parts 5, 91, 92, 570, 574, 576, and 903 [Docket No. FR-5173-P-01, RIN No. 2501-AD33], Comments on the Affirmatively Furthering Fair Housing (AFFH) Proposed Rule

Dear Ms. Acevedo:

On behalf of the American Civil Liberties Union (ACLU), the ACLU of Florida, the ACLU of Maryland, the ACLU of Wisconsin, our over half a million members, countless additional activists and supporters, and fifty-three affiliates nationwide, we write to urge the Department of Housing and Urban Development (HUD) to adopt stronger enforcement mechanisms to ensure that every State, jurisdiction, and Public Housing Authority meets its obligation to affirmatively further fair housing, including by conducting a more thorough and substantive review of each plan submitted and monitoring the execution of the plan, and by ensuring that every resident of a jurisdiction, including minorities, limited-English proficient people, and people with disabilities, is able to participate in the community planning process.

The ACLU supports both the right of every American to access housing and housing financing free of discrimination on the basis of race, sex, sexual orientation and identity, religion, national origin, familial or marital status, age, disability, status as a recipient of public assistance, or a past criminal conviction, and the implementation of policies and programs that further residential and societal integration. In our work, we have advocated at both the state and federal level for increased enforcement of civil rights in the housing context, greater choice in housing options for those who receive governmental assistance, the development of housing programs that promote integration, including among those with a disability that necessitates a reasonable accommodation, and for the removal of housing restrictions on people with past convictions or people who reside in housing where illegal activity has occurred (such as victims of domestic violence). Through litigation, the ACLU has also challenged violations of the

Fair Housing Act[1] and the Equal Credit Opportunity Act[2] by private actors, and brought challenges to discriminatory government policies on site selection, tenant selection and relocation, Section 8 Voucher administration, and exclusionary suburban housing and zoning policies.

We are pleased to submit these comments, which reflect and synthesize the experience of the ACLU with affirmatively furthering fair housing at the local, state, and federal levels through litigation, legislative and administrative advocacy, and public education.

Introduction

When the Fair Housing Act was enacted as Title VIII of the Civil Rights Act of 1968, Congress explicitly stated that it is "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[3] A unanimous Supreme Court enunciated the fundamental principles that guide all Fair Housing Act decisions: the Act as a whole is "broad and inclusive," implements a "policy that Congress considered to be of the highest priority," and must be given "a generous construction" to achieve the policy.[4] Indeed, the intention of the Fair Housing Act was not only to prohibit discrimination,[5] it was to promote "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."[6]

Unfortunately, the imperative of the Fair Housing Act[7] – that the U.S. government take direct and concrete steps to promote and support integration in housing and proactively hold jurisdictions accountable for their failures to do the same – has never been realized. Decades of weak or nonexistent enforcement of the obligation to affirmatively further fair housing[8] have

[1] The FHA prohibits both discrimination by housing providers, such as landlords, or even local governments, as well as discrimination by banks and other financial institutions whose practices have a disparate impact on individuals based on race, religion, sex, national origin, familial status, or disability. 42 U.S.C. §§3601- 3619 (2006).
[2] The ECOA prohibits discrimination against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age, receipt of income from a public assistance program, or because an individual has exercised, in good faith, any right under the Consumer Credit Protection Act. 15 U.S.C. §1691 (2006).
[3] 42 U.S.C. § 3601.
[4] *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 93 S.Ct. 364, 367 -368 (1972); *see also, Arlington Heights II*, 558 F.2d 1283, 1289, citing, inter alia, *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 97 (1977) ("Congress has made a strong national commitment to promoting integrated housing") & *Griffin v. Breckinridge*, 403 U.S. 88, 97 (1971) (U.S. Supreme Court has interpreted civil rights statutes broadly).
[5] 42 U.S.C. 3601 et seq.
[6] *Arlington Heights II*, 558 F.2d at 1289 (citation omitted).
[7] Section 808(e)(5) of the Fair Housing Act (42 U.S.C. 3608(e)(5)) requires that HUD programs and activities be administered in a manner affirmatively to further the policies of the Fair Housing Act.
[8] As noted in the Proposed Rule, in the decades following the original enactment of the Fair Housing Act, Congress reiterated the obligation to affirmatively further fair housing in multiple housing and community development statutes, including "requiring in the Housing and Community Development Act of 1974, the Cranston-Gonzalez National Affordable Housing Act, and in the Quality Housing and Work Responsibility Act of 1998, that covered HUD program participants certify as a condition of receiving

resulted in an entrenched disregard for ongoing residential segregation in communities throughout the United States, with some jurisdictions even creating or funding programs that exacerbate segregation. As a consequence, nearly five decades after the Fair Housing Act became law, the United States remains deeply segregated by neighborhood.[9] While this residential segregation cannot be wholly attributed to the failure to affirmatively further fair housing, and discrimination by individuals and financial institutions persists, many Americans still find their housing choices limited by who they are and the structural decisions made at all levels of government.

The negative consequences of residential segregation and the spatial isolation of groups of people extend significantly beyond the housing sphere. Housing and the opportunity for residential mobility is inexorably related to diversity throughout society, including in schools and the workplace. Conversely, residential segregation – particularly by race, ethnicity, or disability – remains one of the most significant impediments to equality in the United States.[10] It is for that reason that the most residentially segregated areas in the U.S. are also typically the areas in which people have the least likelihood to move up the income ladder[11] or, in other words, to achieve the American dream.

Residential segregation – particularly by race, ethnicity, or disability – does not just limit the economic mobility and integration of traditionally marginalized groups; it isolates people in neighborhoods with vastly inferior resources. Indeed, where an individual lives determines whether he or she has access to jobs and schools in the community, public transportation, grocery stores with fresh food, hospitals and other medical centers, community centers, libraries, and cultural opportunities, among other resources.[12] Nearly fifty years ago, Congress recognized that "where a family lives, where it is allowed to live, is inextricably bound up with better education, better jobs, economic motivation, and good living conditions."[13] In 2013, this principle is equally or even more salient – ensuring true equality in America means that every person has the opportunity to live in communities with these essential resources. However, this will only occur if the government finally undertakes its unfulfilled obligation to bring equality of access to resources to every community. The ACLU applauds HUD for recognizing this reality in its proposed rule by providing data on and accounting for disparities in what the rule refers to

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federal funds that they will affirmatively further fair housing." Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710, 43,712 (July 19, 2013) (to be codified at 24 CFR Parts 5, 91, 92, 570, 574, 576, and 903) (citing 42 U.S.C. 5304(b)(2), 5306(d)(7)(B), 12705(b)(15), 1437C-1(d)(16)).

[9] Dustin A. Cable, *The Racial Dot Map*, WELDON COOPER CTR. FOR PUB. SERV., http://demographics.coopercenter.org/DotMap/index.html (last visited Sept. 10, 2013).

[10] See, e.g. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF AN UNDERCLASS (1993); WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1990).

[11] David Leonhardt, *In Climbing Income Ladder, Location Matters*, N.Y. TIMES, July 22, 2013, available at http://www.nytimes.com/2013/07/22/business/in-climbing-income-ladder-location-matters.html?pagewanted=all&_r=0; RAJ CHETTY ET AL., THE ECONOMIC IMPACTS OF TAX EXPENDITURES: EVIDENCE FROM SPATIAL VARIATION ACROSS THE U.S. (2013), *available at* http://obs.rc.fas.harvard.edu/chetty/tax_expenditure_soi_whitepaper.pdf.

[12] john a. powell, *Race, Place, & Opportunity*, AMER. PROSPECT, Sept. 21, 2008, *available at* http://prospect.org/article/race-place-and-opportunity.

[13] 114 Cong. Rec. 2276-2707 (1968).

as "community assets," which "means measurable differences in access to educational transportation, economic, and other important assets."[14]

Finally, this rulemaking on affirmatively furthering fair housing comes at a particularly critical junction. The implosion of the housing industry during the recent major recession hit minority households hardest due to discrimination in housing finance and a lack of government oversight and regulation sufficient to check the unscrupulous practices in mortgage lending. From 2005 to 2009, Hispanics and African Americans lost 72 percent of home equity, while whites lost 52 percent.[15] Since minority households relied on home equity for a greater proportion of their household wealth, these losses substantially increased the wealth gap between whites and minorities during that same time period.[16] Further, communities impacted by high foreclosure rates – which are disproportionately communities of color – were left with a reduced tax base and an increased demand for services.[17] The cumulative effect of these trends was a reinforcement of already stark residential segregation nationally, during a time when it is projected that minority households will produce more than 70 percent of net household growth through 2020.[18] Thus, while the United States is near the tipping point of becoming a majority minority nation, we are still living in geographic isolation, at a significant shared cost to all Americans. The issuance of this proposed rule on Affirmatively Furthering Fair Housing is an initial step towards "fulfilling the original promise of the Fair Housing Act,"[19] but it will remain a hollow promise if the final rule fails to significantly strengthen the enforcement and accountability measures for state and local jurisdictions and Public Housing Authorities (PHAs).

I. HUD's Enforcement of the Obligation to Affirmatively Further Fair Housing Must be Strengthened in the Final Rule.[20]

When Congress considered the legislation that would become known as the Fair Housing Act, it was during the height of civil unrest of the 1960s. In response to this civil unrest in major cities across the United States, President Johnson created a National Advisory Commission on Civil Disorders, which became known as the Kerner Commission, named after its Chairman, Governor Otto Kerner, Jr. of Illinois. The Kerner Commission report, which was introduced into the Congressional Record shortly after its release, warned that, "Our nation is moving toward

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[14] Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710 at 43,730.

[15] JOINT CTR. FOR HOUSING STUDIES, STATE OF THE NATION'S HOUSING 15 (2012), *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2012.pdf [hereinafter Joint Center].

[16] *Id*. at 14-15 ("In 2005, the median wealth of white households was 11 times that of black households. At last measure in 2009, the differential had increased to 20 times. Over the same period, the median wealth of whites jumped from seven times the median wealth of Hispanics to 18 times.").

[17] See ELLEN SCHLOEMER ET AL., CTR. FOR RESPONSIBLE LENDING, LOSING GROUND: FORECLOSURES IN THE SUBPRIME MARKET AND THEIR COST TO HOMEOWNERS 24 (2006), *available at* http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosure-paper-report-2-17.pdf.

[18] Joint Center, *supra* note 15, at 4.

[19] Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710.

[20] This section of the ACLU's comments not only addresses general recommended changes to the proposed rule, it also is responsive to two specific questions that HUD posed: HUD questions for comment: #2, "HUD requests comment on how the goals and priorities arising out of the AFH would influence local regulations, sitting decisions, infrastructure investments, and policies, in comparison to the existing process using the AI," and #10, "Are there appropriate indicators of effectiveness that should be used to assess how program participants have acted with regard to the goals that are set out?"

two societies, one black, one white – separate and unequal."[21] The report also blamed the growing unrest on racism, which not only kept most black citizens residentially segregated in the inner city areas, but also simultaneously denied them the economic opportunity available to white residents in the suburbs. Then-Senator Walter Mondale, one of the lead sponsors of the Fair Housing Act in 1968, referenced the Kerner Commission findings during a cloture vote, stating, "Their choice is whether to send America further along the road of polarization and the ultimate destruction of a democracy based upon equality – or to indicate to Americans and to the world that we are not a racist society."[22]

Despite the urgent imperative of the federal government to not only enforce the FHA's anti-discrimination provisions, but also to take concrete action to integrate and promote access to economic opportunity for all Americans, the potential promise of the FHA was never fully realized. In the almost fifty years since its original enactment, we still live in two societies, separate and unequal. The consequences of this residential segregation infect our entire society, from our schools and workplaces, to the criminal justice system and political participation across the country. Decades have gone by, but the critical need for HUD to fulfill the promise of the FHA to promote integration and access to basic opportunity resources – like good schools, clean air, and public transportation – is just as urgent.

Under the current Affirmatively Furthering Fair Housing enforcement framework, state and local jurisdictions and PHAs essentially operate in a system of voluntary compliance with their AFFH obligation. The state and local jurisdictions and PHAs, along with other program participants, annually certify that they are complying with their obligation, which extends to all of their programs and policies – not only those that are federally funded. However, in the absence of any meaningful enforcement of this obligation, both the Government Accountability Office and HUD found that a significant number of jurisdictions and program participants failed to comply with even the basic pretense of fulfilling their affirmatively furthering fair housing obligation – having a current document that described their plan to AFFH, with specific benchmarks and timeframes for completion.[23]

Unfortunately, the proposed rule sets out a continuation of this lax enforcement structure, which renders the obligation to affirmatively further fair housing hollow in many jurisdictions. As stated in the proposed rule, HUD envisions that "the ultimate effect of the rule will depend upon the policy preferences of individual program participants, including whether it is favorably predisposed toward fair housing policies, the character of the local bureaucracy, and whether the limited incentives of the rule will affect the program participant's active engagement in its fair

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[21] John Herbers, *Panel On Civil Disorders Calls For Drastic Action To Avoid 2-Society Nation*, N.Y. TIMES (Feb. 29, 1968).

[22] 90th Cong., 2nd sess., Cong. Rec. 114 (March 2, 1968) at 4898.

[23] U.S. GOV'T ACCOUNTABILITY OFFICE, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS 21 (2010) ("In sum, our findings that many AIs are outdated, may not be prepared as required, or lack time frames and signatures, together with the findings of HUD's study, raise significant questions as to whether the AI is effectively serving as a tool to help ensure that all grantees are committed to identifying and overcoming potential impediments to fair housing choice as required by statutes governing the CDBG and HOME programs and HUD regulations.") [hereinafter GAO Study].; U.S. DEP'T OF HOUSING & URBAN DEV., POLICY DEV. DIV., OFF. OF POLICY DEV. & RES., ANALYSIS OF IMPEDIMENTS STUDY, 2009 [hereinafter HUD Study].

housing obligations."[24] Moreover, the proposed rule specifically states that, "the specific actions of a local government or PHA that would generate benefits for protected classes are not prescribed, obligated, or enforced by this proposed rule."[25]

The ACLU urges that the final rule include concrete enforcement mechanisms. When the Fair Housing Act was enacted in 1968, as now, some jurisdictions and state were more favorably inclined than others to enforce civil rights laws and promote integration and equality of opportunity. But, the federal government's role in carrying out its statutory and administrative obligations does not hinge on local and state preferences. It would be unimaginable for HUD to defer to a state or local jurisdiction's preference not to enforce the FHA's anti-discrimination provisions; the same principle should apply to a state or local jurisdiction's obligation to AFFH.

a. States, Jurisdictions, and Public Housing Authorities Should Affirmatively Further Fair Housing Through <u>Both</u> Enhancing Neighborhood Assets <u>and</u> Promoting Residential Mobility/Greater Residential Integration.

The proposed rule currently provides that a "program participant's strategies and actions may include strategically enhancing neighborhood assets (e.g. through targeted investment in neighborhood revitalization or stabilization) ***or*** promoting greater mobility and access to areas offering vital assets such as quality schools, employment, and transportation, consistent with fair housing goals," (emphasis added).[26] As this section is drafted, it implies that program participants may elect, in the alternative, to meet their obligation to affirmatively further fair housing either through targeted investments in resource-scare, residentially-segregated neighborhoods or through programs and policies that facilitate the mobility and access of those residents to resource-rich neighborhoods to achieve greater integration.

However, it is likely that program participants will need to employ both of these tools – targeted investments to enhance neighborhood assets and promoting greater mobility and integration – in order to meet their full statutory obligation to affirmatively further fair housing. The term "or" should be changed to "and," so that the sentence reads, "…***and*** promoting greater mobility and access to areas…" (emphasis added). This will ensure that the final rule both permits and requires program participants to use the full range of policies and programs under their authority to promote residential integration within their jurisdiction and the regional housing market.

Beyond other actions a program participant also chooses to pursue, it should never be permitted to ignore or set a lower priority on strategies designed to promote "greater mobility and access to areas offering vital assets such as quality schools, employment, and transportation, consistent with fair housing goals,"[27] particularly where there is a history of residential segregation in the area or the participant has engaged in discriminatory practices. To do so would contravene the very purpose of the Fair Housing Act, as well as HUD's regulatory authority under the statute.

[24] Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710 at 43,726.
[25] *Id.*
[26] *Id*. at 43,729 (§ 5.150 Affirmatively Furthering Fair Housing: purpose).
[27] *Id*.

Beyond the congressional intent evident throughout the record of hearings and floor statements on the Fair Housing Act, the plain language of Section 3608 of the statute requires that "programs and activities relating to housing and urban development" are carried out "in a manner affirmatively to further the purposes of this subchapter."[28] This obligation extends beyond the FHA's prohibition of discrimination in the sale, rental, and financing of residences and other housing-related transactions – it requires that every program and policy be administered in a way that promotes integration and reduces discrimination.[29] And, as HUD recognized in this proposed rule, Congress has repeatedly reinforced both the existence of this mandate and its importance by including language in the Housing and Community Development Act of 1974, the Cranston-Gonzalez National Affordable Housing Act, and in the Quality Housing and Work Responsibility Act of 1998 that condition the receipt of federal funds on program participants certifying their compliance with the AFFH obligation.[30]

The ACLU recommends that the final rule on Affirmatively Furthering Fair Housing contain both a correction of this misleading language and an explanatory section confirming that HUD did not mean to signal a retreat from enforcing its AFFH obligation under the Fair Housing Act.

b. In Order to be an Effective Tool, the Assessment of Fair Housing (AFH) Must Account for All Protected Classes Under the Fair Housing Act.

The proposed rule provides that the Assessment of Fair Housing (AFH) should "address integration and segregation, concentrations of poverty, disparities in access to community assets, and disproportionate housing needs based on race, color, religion, sex, familial status, national origin, or handicap."[31] However, the specified required elements of the AFH analysis do not mandate inclusion of all of the protected classes under the Fair Housing Act. For instance, § 5.154(d)(2) states that "…the analysis will (i) Identify integration and segregation patterns and trends across *protected classes* within the jurisdiction and region; (iii) Identify whether

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[28] 42 U.S.C. §3608(d) (2006).

[29] *See, e.g. Otero v. N.Y. City Hous. Auth*., 484 F.2d 1122 (2d Cir. 1973); *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970).

[30] Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710 at 43,712 n.2 ("Section 104(b)(2) of the Housing and Community Development Act (HCD Act)(42 U.S.C. 5304(b)(2)) requires that, to receive a grant, the state or local government must certify that it will affirmatively further fair housing. Section 106(d)(7)(B) of the HCD Act (42 U.S.C. 5306(d)(7)(B)) requires a local government that receives a grant from a state to certify that it will affirmatively further fair housing. The Cranston-Gonzalez National Affordable Housing Act (NAHA) (42 U.S.C. 12704 et seq.) provides in section 105 (42 U.S.C. 12705) that states and local governments that receive certain grants from HUD must develop a comprehensive housing affordability strategy to identify their overall needs for affordability and supportive housing for the ensuing 5 years, including housing for homeless persons, and outline their strategy to address those needs. As part of this comprehensive planning process, section 105(b)(15) of NAHA (42 U.S.C. 12705(b)(15)) requires that these program participants certify that they will affirmatively further fair housing. The Quality Housing and Work Responsibility Act of 1998 (QHWRA), enacted into law on October 21, 1998, substantially modified the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.) (1937 Act) and the 1937 Act was more recently amended by the Housing and Economic Recovery Act of 2008, Public Law 110-289 (HERA). QHWRA introduced formal planning processes for PHAs – a 5-Year Plan and an Annual Plan. The required contents of the Annual Plan included a certification by the PHA that the PHA will, among other things, affirmatively further fair housing.").

[31] *Id*. at 43,731.

significant disparities in access to community assets exist across *protected classes* within the jurisdiction and region; and (iv) identify whether disproportionate housing needs exist across *protected classes* within the jurisdiction and region," (emphasis added). Then, § 5.154(d)(3) references the preceding section in the required elements of the analysis: "…the assessment will identify the primary determinants influencing conditions of integration and segregation, concentrations of poverty, disparities in access to community assets, and *disproportionate housing needs based on protected class as identified under paragraph (d)(2) of this section*," (emphasis added). Read together, these provisions in the proposed rule allow jurisdictions to limit the AFH analysis to a subset of the classes protected under the Fair Housing Act.

While it is possible that the data and research provided to a state or local jurisdiction will indicate that not all of the protected classes under the FHA are residentially segregated in that particular state or locality, it is highly unlikely that the analysis will indicate that any one of the protected classes does not have either "disproportionate housing needs" or "significant disparities in access to community assets." The ACLU encourages HUD to consider the needs of all protected classes, including those that have historically sat on the margins of fair housing analyses – notwithstanding the substantial challenges these individuals face in accessing housing and community assets.[32] To facilitate an exhaustive AFH analysis, HUD-provided data must address each protected class. For example, data on the location of domestic violence shelters and their proximity to public schools, transportation, and other services would help program participants to reduce disparities in access to community resources based on sex.

If a state or jurisdiction makes the determination that its AFH plan does not need to address the need to affirmatively further fair housing for that particular group(s), then it should offer an explanation of this determination. However, the baseline presumption should be that every AFH analysis will discuss every protected class in each analysis section, with an explanatory note where the AFH authors elect to only discuss a subset of the protected classes. This will not only encourage jurisdictions to examine the disparate housing needs and level of segregation of each protected class within their region, but it will also encourage research and planning strategies to account for intersectionality[33] – i.e. the distinct experiences of members of one or more protected classes. For instance, women who are members of racial and ethnic minority groups may have disproportionate housing needs in a jurisdiction based not only on their identity as a member of a racial or ethnic minority group, but also their identity as women.

Further, although the proposed rule provides that the "AFH will address integration and segregation,"[34] it neglects to require jurisdictions and PHAs to examine exclusionary and discriminatory policies, practices, ordinances, and other laws that perpetuate the exclusion of protected classes from certain neighborhoods or housing options or that discriminate against a protected class. For example, across the country, there are municipal ordinances that impose penalties based on a tenant's alleged misconduct or repeated calls to the police. These ordinances, often known as chronic nuisance ordinances, generally provide for a fine or other

[32] U.S. CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY 2 (2012) (reporting that on average, 30 percent of homeless adults in the survey cities were severely mentally ill, 18 percent were physically disabled, and 16 percent were victims of domestic violence).
[33] *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).
[34] Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710 at 43,731 (Proposed § 5.154(d) Assessment of Fair Housing (AFH); Content).

penalty against a landlord after a rental unit exceeds the threshold number of calls to the police specified by the local ordinance. In order to avoid these penalties, many landlords seek to eliminate the "nuisance" by evicting the unit's tenants. In practice, chronic nuisance ordinances may violate the rights of protected groups, including women, people with disabilities, and people of color.

In particular, women seeking police assistance in response to domestic violence may face eviction for "too many" calls to the police.[35] Thus, enforcement of a chronic nuisance ordinance against a survivor may violate the FHA in two ways: first, an ordinance that specifically includes domestic violence as a nuisance activity may violate the FHA for intentional discrimination on the basis of sex, by penalizing a victim based on a gender stereotype about abused women.[36] Second, a chronic nuisance ordinance may have a disparate impact on women, who make up the vast majority of domestic violence victims.[37] For example, a study analyzing the impact of a Milwaukee chronic nuisance ordinance found that domestic violence accounted for only 3.8% of city residents' calls to police, but constituted 16% of 911 calls that were classified as a nuisance – a significant overrepresentation.[38]

Another group that typically receives short shrift in fair housing analyses, including the current Analysis of Impediments, is people with disabilities. First, to the extent that states and jurisdictions consider accessibility at all, they typically restrict their analysis to whether their housing stock meets the minimum federal requirement – 5%. Second, if they examine the rates of disability in their population, states and jurisdictions tend to rely on U.S. Census data, which significantly under-counts the true proportion of people with a physical disability. This results in a significant disparity between the number of people who need accessible housing, and those who actually receive it.

Even for the fortunate minority who receive accessible housing, it is likely to be segregated, in violation of the Americans with Disabilities Act (ADA).[39] In recent years, HUD has made significant strides in building integrated, accessible housing, but it is crucial that states and local jurisdictions undertake this same initiative and factor it into their AFH plans. Specifically, the ACLU recommends that HUD's new data include a professional review of the number of accessible units and the number of adaptable units in the housing stock for each state,

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[35] *See* Erik Eckholm, *Victims' Dilemma: 911 Calls Can Bring Eviction*, N.Y. TIMES (Aug. 16, 2013).
[36] Determination of Reasonable Cause, *Alvera v. Creekside Village Apartments*, No. 10-99-0538-8 (Dep't of Hous. & Urban Dev. Apr. 13, 2001) (establishing domestic violence victim's right to bring a sex discrimination claim under the FHA).
[37] Memorandum from Sara K. Pratt, Deputy Sec'y for Enforcement and Programs, Office of Fair Hous. & Equal Opportunity, U.S. Dep't of Hous. & Urban Dev. to FHEO Office Directors and FHEO Regional Directors: Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act and the Violence Against Women Act (Feb. 9, 2011) (explaining that, "even when consistently applied, women may be disproportionately affected by [zero-tolerance] policies because, as the overwhelming majority of domestic violence victims, women are often evicted as a result of the violence of their abusers.") [hereinafter FHEO Guidance on Housing Discrimination Against Domestic Violence Victims].
[38] Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 131-32 (Feb. 2013), *available at* http://asr.sagepub.com/content/78/1/117.
[39] *Olmstead v. L.C.*, 527 U.S. 581 (1999).

jurisdiction, and program participant. The final AFFH rule should then require that part of the jurisdiction's analysis of data include a statistically significant sampling of residents and their mobility needs. Since mobility needs may be impacted by orthopedic disabilities or heart or lung-related disabilities that make climbing stairs difficult or dangerous, it would be ideal for HUD to provide a standardized, methodologically-rigorous survey for each AFH participant to implement to determine the difference between the percentage of residents who have mobility disabilities and the percentage of apartments that are accessible or adaptable. This would be one major marker of fair and integrated housing for people with disabilities. And, a clear goal for the housing integration of people with disabilities would be to ensure that the regional housing stock has a sufficient number of accessible units to meet demand.

In order to ensure that each state, jurisdiction, or PHA fully accounts for every protected class within their region, the ACLU recommends that the final rule include the following revisions to the proposed rule (indicated in ***bold italics***):

§ 5.154(d)(2) Analysis of data: Based upon HUD-provided fair housing data, available local or regional data, and community input, the analysis will:

- (i) Identify integration and segregation patterns and trends ***within the jurisdiction and region***;

  …
- (iii) Identify whether ***there are*** significant disparities in access to community assets ***for all*** protected classes ***as compared to other groups*** within the ***same*** jurisdiction and region; and
- (iv) Identify whether ***there are*** disproportionate housing needs ***for each protected class as compared to other groups*** within the ***same*** jurisdiction and region.

§ 5.154(d)(3) Assessment of determinants of fair housing issues: Using an assessment tool provided by HUD, the assessment will identify the primary determinants influencing conditions of integration and segregation, ***including discriminatory policies, practices, and statutes,*** concentrations of poverty, disparities in access to community assets, and disproportionate housing needs ***among each of the protected classes as compared to other groups within the same jurisdiction and region***.

Further, the final rule should clarify that HUD will broadly interpret the protections of the Fair Housing Act in carrying out its obligation to affirmatively further fair housing. In particular, states and local jurisdictions should account for discrimination and residential segregation, and disproportionate housing needs and access to community resources among the LGBT community within their region as part of the sex-based protections of the FHA. This administrative determination would align with the decisions of federal courts across the country, which have recognized protections for LGBT individuals on the basis of sex as a protected class.[40]

[40] The First, Second, Third, Seventh, Eighth, Ninth, and Tenth U.S. Circuit Courts have held that discrimination against gender non-conforming people, including lesbian and gay people, is sex discrimination. *See Higgins v. New Balance Athletic Shoe, Inc*., 194 F.3d 252, 261 n.4 (1st Cir. 1999); *Simonton v. Runyon*, 232 F.3d 33, 37 (2d Cir. 2000); *Prowel v. Wise Business Forms, Inc*., 579 F.3d 285 (3rd Cir. 2009); *Doe by Doe v. City of Belleville*, 119 F.3d 563, 580-81 (7th Cir. 1997), vacated and

c. The AFH Plans Should Mandate Goals for Mitigating and Addressing Every Fair Housing Issue Identified in the AFH.

As the proposed rule is written, state and local jurisdictions are required to "(i) Identify and prioritize fair housing issues arising from the assessment and justify the chosen prioritization; and (ii) Identify the most significant fair housing determinants related to these priority issues and *set and prioritize one or more goal(s) for mitigating or addressing the determinants*," (emphasis added). The ACLU does not object to the planning requirement imposed in Section (i); it is a beneficial process for state and local jurisdictions to undertake an analysis to prioritize fair housing issues, so that the jurisdiction can allocate resources in a strategic way both short and long-term. But, no jurisdiction or PHA should have the option to select only one goal to address or mitigate its identified fair housing issues. The AFH should address some action(s) that can reasonably be taken to address each impediment to fair housing present within its jurisdiction and housing market.

First, and foremost, each jurisdiction and PHA should be required to meet the mandatory goals of the Fair Housing Act – the promotion of integration and the strategic use of HUD funding and other federal resources towards the achievement of that end. Progress towards integrated communities should be a baseline presumption of each AFH plan – not an optional goal subject to local priorities and competing policy objectives. This would align the statutory expectations of HUD with those of the jurisdictions and grantees, as anticipated by the Fair Housing Act.

In *N.A.A.C.P. v. Secretary of Housing and Urban Development*, now-Justice Stephen Breyer wrote that a case before the First Circuit challenging HUD's execution of its affirmatively furthering fair housing obligation "seems to call for a more straightforward evaluation of whether agency activity over time has furthered the statutory goal, and, if not, for an explanation of why not and a determination of whether a given explanation, in light of the statute, is satisfactory."[41] Thus, the First Circuit held that the Act obligated HUD "[to] do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open

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remanded on other grounds, 523 U.S. 1001 (1998); *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1041 (8th Cir. 2010); *Nichols v. Azteca Rest. Enters*., 256 F.3d 864, 874-75 (9th Cir. 2001); *Medina v. Income Support Div*., 413 F.3d 1131, 1135 (10th Cir. 2005).

Further, the First, Sixth, Ninth, and Eleventh U.S. Circuit Courts, and U.S. District Courts in other jurisdictions, have also held that discrimination against transgender people is sex discrimination. *See Rosa v. Park W. Bank & Trust Co*., 214 F.3d 213, 215-16 (1st Cir. 2000); *Barnes v. City of Cincinnati*, 401 F.3d 729, 741 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008); *Michaels v. Akal Security, Inc*., No. 09-cv-1300, 2010 WL 2573988, at * 4 (D. Colo. June 24, 2010); *Lopez v. River Oaks Imaging & Diag. Group, Inc*., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); *Mitchell v. Axcan Scandipharm, Inc*., No. Vic. A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); *Tronetti v. TLC HealthNet Lakeshore Hosp*., No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); *Doe v. United Consumer Fin. Servs*., No. 1:01 CV 111, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001).

[41] 817 F.2d 149, 158 (1st Cir. 1987).

housing increases."[42] Similarly, jurisdictions and program participants should be held to this same basic standard – are their goals furthering integration? What is the quantitative evidence that their actions over time are increasing the integrative housing opportunities made available to protected classes, especially racial minorities historically subject to segregation?[43] If not, what is the justification for this lack of progress, and the proposed remedy?

For example, the AFH can be a powerful tool for ensuring that jurisdictions and program participants consider goals for mitigating the fair housing issues faced by domestic violence survivors, the vast majority of whom are women. Domestic violence is a primary cause of homelessness for women and children, and as HUD has recognized, survivors often face fair housing problems related to experiencing violence.[44] To ensure that jurisdictions and program participants consider their obligation to affirmatively further fair housing with respect to survivors, the AFH should describe programs to help victims, prevent violence, and enhance safety. Such an assessment relates closely to what is required by the Violence Against Women Act (VAWA),[45] and would help inform how the consolidated plan addresses the fair housing issues faced by survivors. Moreover, this assessment could be used to coordinate the requirements of the low income housing tax credit program, now covered by VAWA,[46] with the new fair housing planning effort.

Further, the obligation to affirmatively further fair housing is not limited to one protected class or to one of the multitude of barriers to full integration; it is a general obligation owed to all residents of a jurisdiction, no matter what the history or current status of the protected groups within that jurisdiction. While state and local jurisdictions may have limited resources, particularly in a time of state budget cuts, they have the ability to set their own goals, over a period of time, to fulfill their obligation to affirmatively further fair housing. Thus, the ACLU recommends that the final rule clarify that the jurisdiction must identify at least one goal to address and/or mitigate each fair housing issue identified in the analysis as a discriminatory barrier. Although resource constraints in jurisdictions may limit the scope of one or more of the fair housing goals, it is critical for long-term planning and regional integration for the

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[42] *Id*. at 154.

[43] This statement is also responsive to HUD's question: "Are there appropriate indicators of effectiveness that should be used to assess how program participants have acted with regard to the goals that are set out?" Ultimately, the most meaningful measure of effectiveness is a count of the expansion over time (i.e. net increase) in desegregative housing opportunities in the regional housing market of which the participant is a part that are occupied by and actually available to members of protected classes, especially those burdened by current or historic segregation and discrimination, and the portion of a participants resources directed toward this goal.. The measurement of these trends should, at a minimum, include both assisted units (including LIHTC) located in areas of with poverty rates and minority populations below the regional average that are made available without local residency preferences, and the trends in the leasing of vouchers in those areas. (In addition, this metric should also track the number and availability of affordable housing opportunities occupied by people of color In "hot market" areas where traditionally minority neighborhoods face exclusionary market pressures). The metric should similarly track decreases, if any, in integrated and affordable housing opportunities in specific geographic areas, and the relative dearth of affordable housing in areas with exclusionary practices and/or historically few people of color.

[44] FHEO Guidance on Housing Discrimination Against Domestic Violence Victims, *supra* note 37.

[45] 42 U.S.C. §§ 1437c-1(a)(2), (d)(13).

[46] 42 U.S.C. § 14043e-11(a)(3)(J).

jurisdiction to identify and execute even modest goals for each fair housing issue or barrier identified.

In order to reflect this obligation, the ACLU recommends the following wording changes (indicated in ***bold italics***):

> § 5.154(d)(4) Identification of fair housing priorities and general goals: Consistent with the analysis and assessment conducted under paragraphs (d)(2) and (3) of this section, the AFH must:
> …
> (ii) Identify the most significant fair housing determinants related to these priority issues and set and prioritize one or more goal(s) for mitigating or addressing ***each of*** the determinants…

d. In Order to Achieve Progress on AFFH, the AFH Should Mandate the Inclusion of Clearly Articulated Benchmarks and a Timeline for Completion for Each Goal Contained within the AFH Plan.

Under HUD's proposed rule, there is no obligation for jurisdictions or other program participants to include any benchmarks and timeframes for completion towards the achievement of their affirmatively furthering fair housing goals, which is a step backwards from the current expectations of HUD contained in its nearly two decade-old Fair Housing Planning Guide. The Fair Housing Planning Guide provides that "[t]he jurisdiction should define a clear set of objectives with measurable results that it intends to achieve. The sole measure of success for FHP is the achievement of results. These objectives should be directly related to the conclusions and recommendations contained in the [Analysis of Impediments]."[47] Specifically, HUD recommended in the Fair Housing Planning Guide that the AFFH plan "list fair housing action(s) to be completed for each objective," "determine the time period for completion," and "[s]chedule actions for a time period which is consistent with the Consolidated Plan cycle."[48]

The GAO, in its study of jurisdictions' compliance with their AFFH obligation, stressed the necessity of including benchmarks and timeframes for completion,[49] and specifically recommended that in the final AFFH rule "HUD require grantees to include time frames for implementing recommendations and the signatures of responsible officials"[50] in order "to facilitate efforts to measure grantees' progress in addressing identified impediments to fair housing and to help ensure transparency and accountability."[51] As a proposed structure, the ACLU recommends that the final AFFH rule mandate the inclusion of benchmarks and timeframes for completion for each goal under the four general categories of affirmatively furthering fair housing activity in the proposed rule: "modifying local regulations and codes,

[47] U.S. DEP'T OF HOUSING & URBAN DEV., OFF. OF FAIR HOUSING & EQUAL OPPT., FAIR HOUSING PLANNING GUIDE VOL. 1 2-22, 1996 [hereinafter Fair Housing Planning Guide].
[48] *Id*.
[49] GAO Study, *supra* note 23, at 19-20 (it "is generally consistent with our view that time frames are an important component of effective strategic and other planning process.").
[50] *Id*. at 33.
[51] *Id*. at 32-33.

constructing new developments, creating new amenities, and facilitating the movement of people."[52]

e. It is Essential that HUD Implement Consequences for a Jurisdiction's Failure to Execute its AFH Plan, Including the Withholding of Funds Until the Jurisdiction Takes Good Faith Steps to Meet its Obligation to Affirmatively Further Fair Housing.

The proposed rule implements a material consequence for jurisdictions and PHAs that fail to submit their AFH – the automatic loss of CDBG funds to which the jurisdiction would otherwise be entitled and an unspecified, potential reduction in the PHA's funding.[53] This enforcement mechanism is a step towards ensuring that all jurisdictions are, at a minimum, completing an AFH (previously an "Analysis of Impediments"). However, it is possible that jurisdictions will continue to complete cursory analyses of their communities' segregation and barriers to integration (an AFH plan) simply to comply with this procedural requirement.

When the GAO recently conducted a detailed analysis of compliance with the obligation to affirmatively further fair housing across the country, it found that not all jurisdictions had a document that could be identified as an "Analysis of Impediments," (AI) despite the fact that these program participants annually certified their compliance. Of the jurisdictions which claimed to have an AI, approximately one-third were more than 5 years old and unlikely to be responsive to either current or future fair housing needs.[54] But, even among the jurisdictions which provided the GAO with an AI created within the previous five years, many of them lacked three crucial elements - benchmarks for overcoming impediments, a time frame for meeting those benchmarks, and the signature of a local elected official to signify their commitment to the plan.[55] A subset of these official AIs were woefully inadequate, including "a four-page description of the community itself, [without identifying] impediments to fair housing," and "a two-page document that largely discussed its progress in implementing a local statute pertaining to community preservation and that contained two sentences describing a fair housing impediment."[56]

In order to ensure substantive compliance with the obligation to affirmatively further fair housing – rather than a continuation of the simply procedural, "check the box," certification – the ACLU recommends that HUD analyze and monitor the implementation of each AFH. If a jurisdiction or PHA is not making good faith and reasonable efforts to meeting the benchmarks contained within its AFH plan, HUD should condition or hold grant funds in escrow until the

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[52] Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710 at 43,726.
[53] *Id*. at 43,732 (Proposed § 5.160(b) AFH submission requirements; late submission ("…If a consolidated plan program participant fails to submit an AFH in a timely manner, HUD may establish a date after AFH acceptance for the jurisdiction to submit its consolidated plan, but in no event past the August 16 deadline provided in 24 CFR 91.15. Failure to submit a consolidated plan by August 16 of the federal fiscal year for which funds are appropriated will automatically result in the loss of the CDBG funds to which the jurisdiction would otherwise be entitled. If a PHA preparing its own AFH fails to submit the AFH in a timely manner, the PHA must submit its AFH no later than 75 calendar days before the commencement of the PHA's fiscal year to avoid any impact on their funding.")).
[54] GAO Study, *supra* note 23, at 10.
[55] *Id*. at 19.
[56] *Id*. at 14-15.

jurisdiction or PHA demonstrates tangible progress towards meeting its AFH goals. This consequence would not permanently penalize the residents of a certain jurisdiction or PHA, anymore than those residents are penalized by HUD sanctions for a jurisdiction or PHA's failure to comply with other (often less weighty) regulations, but it would create much-needed accountability for program participants. Presumably, if jurisdictions and PHAs are going to be allowed to set out their own goals for affirmatively furthering fair housing, as well as their plan for addressing impediments and furthering integration, their interim benchmarks reflect reasonable achievements and they should be held to them. HUD articulated such an expectation in its Fair Housing Planning Guide, stating that "the local communities will define the problems, develop the solutions, and be held accountable for meeting the standards they set for themselves."[57] However, if a significant change in circumstances in the jurisdiction occurs, then HUD may take that into account when assessing whether the jurisdiction is making a reasonable, good faith effort to meet its AFH plan benchmarks in a timely manner.

The ACLU also recommends that the final rule incorporate the progress of each jurisdiction or PHA in meeting the benchmarks contained within their AFH into the existing regulations under which HUD reviews grantee performance. In order to reflect this obligation, the ACLU recommends the following wording changes (indicated in ***bold italics***) to § 91. 520:

> § 91.520 Performance reports:
> (a) General. Each jurisdiction that has an approved consolidated plan shall annually review and report, in a form prescribed by HUD, on the progress it has made in carrying out its strategic plan and its action plan. The performance report must include a description of the resources made available, the investment of available resources, the geographic distribution and location of investments, the families and persons assisted (including the racial and ethnic status of persons assisted), actions taken to affirmatively further fair housing, ***including the jurisdiction's progress in executing its AFH plan in a timely manner,*** and other actions indicated in the strategic plan and the action plan. This performance report shall be submitted to HUD within 90 days after the close of the jurisdiction's program year.

II. The Final Rule on Affirmatively Furthering Fair Housing Should Provide for a More Substantive Review of a State's Obligation to Affirmatively Further Fair Housing and Should Clarify that HUD's Acceptance of an AFH Plan Does Not Create a Safe Harbor from Litigation for a Jurisdiction, State, or PHA.

a. The Final Rule Should Provide for a More Rigorous Standard of Administrative Review of a State's Obligation to Affirmatively Further Fair Housing.

The proposed rule continues the extremely deferential administrative standard of review of a jurisdiction's affirmatively furthering fair housing performance. This standard of review provides that "the Secretary will give maximum feasible deference to the State's interpretation of the statutory requirements and the requirements of this regulation, *provided that these interpretations are not plainly inconsistent with the Act* and the Secretary's enforcement responsibilities to achieve compliance with the intent of Congress as declared in the Act"

[57] Fair Housing Planning Guide, *supra* note 47, at i.

(emphasis added).[58] In fact, the proposed rule is so lenient that a jurisdiction will be found in compliance with its affirmatively furthering fair housing obligation even if its actions are woefully inadequate or ineffectual, as long as the "activities undertaken by units of general local government *were not plainly inappropriate* to meeting the primary objectives of the Act, this regulation, the State's community development objectives, and the State's responsibility to affirmatively further fair housing" (emphasis added).[59]

This standard not only grants an enormous amount of deference to the actions of States, but it also could be read to allow the State to justify their actions by claiming that they were intended to further another objective of the Fair Housing Act unrelated to AFFH or to advance community development objectives – which can be wholly unrelated to promoting integration or dismantling housing barriers. This is not consistent with the language or purpose of the Fair Housing Act, and if the final Affirmatively Furthering Fair Housing rule is to have any effect, HUD must adopt a more balanced standard of review. The ACLU recommends that HUD refuse to grant deference to the State's interpretation of its actions, and that HUD solely evaluate how the State's actions related to its obligation to affirmatively further fair housing. Although this requirement may be written into the final rule in multiple ways, we would recommend the following changes (indicated in ***bold italic***):

- § 570.480(c) General
    - Recommended revision: "In exercising the Secretary's responsibility to review a State's performance, the Secretary will [***consider***] the Secretary's enforcement responsibilities to achieve compliance with the intent of the Congress as declared in the Act. The Secretary will [***determine***] that a State has failed to carry out its certification in compliance with requirements of the Act (and this regulation) [**if**] the Secretary finds that procedures and requirements adopted by the State are insufficient to [***meet***] the primary objectives of the Act, this regulation, [and the State's responsibility to affirmatively further fair housing (see § 570.487(b)).]"

b. The Final Rule Should Clarify that an Accepted AFH Plan Does Not Provide Any Determination of Compliance With the Obligation to Affirmatively Further Fair Housing, Including, But Not Limited to, Any "Safe Harbor" Provision.

Although the proposed rule does not provide for any sort of "safe harbor" from litigation and specifically states that acceptance of an AFH plan does not represent a determination by HUD that the jurisdiction or PHA has met its obligations,[60] it does make multiple references to

[58] Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710 at 43,741 (§ 570.480(c)).
[59] *Id*. at 43,741 (§ 570.480(c)).
[60] *Id*. at 43,719 (§ 5.162(a)(2) ("HUD's acceptance of an AFH means only that, for purposes of administering HUD program funding, HUD has determined that the program participant has provided the required elements of an AFH as set forth in § 5.154(d). HUD's acceptance does not mean that HUD has determined that a jurisdiction has complied with its obligation to affirmatively further fair housing under the Fair Housing Act; has complied with other provisions of the Act; or has complied with other civil rights laws, regulations or guidance.")).

an anticipated outcome of reduced litigation after the rule is implemented.[61] While the ACLU shares HUD's aspiration that the final AFFH rule produces a renewed effort by jurisdictions and PHAs across the country to promote and dismantle barriers to integration and to use targeted investments to improve access to community assets across all groups, it is possible that the rule – as currently written – will not produce greater compliance. If so, then litigation will continue to serve as the primary avenue for residents and public-interest organizations to advocate for and achieve greater compliance and, ultimately, greater integration.

HUD should clarify that the rule is not intended to foreclose litigation, the single most accessible and utilized mechanism for citizens and community organizations to hold their jurisdiction accountable for failing to affirmatively further fair housing. Thus, HUD should include specific language in the final AFFH rule to clarify that it does not provide for a more deferential standard of review or change the pleading standards in an AFFH challenge. Ideally, the final rule should also specifically disclaim any notion of a "safe harbor" for jurisdictions with a current AFH plan that has been accepted by HUD.

III. Improvements to the Proposed Rule on Community Participation and Consultation Process in the Final Rule

The proposed rule rightly recognizes the importance of encouraging and facilitating the participation of citizens (particularly low-income persons and residents of low and moderate-income neighborhoods), community-based organizations and advocates, and other interested parties in the development of the AFH plan.[62] Participation by all citizens requires, as a matter of course, that there are no barriers to people with limited English proficiency and people with disabilities. The proposed rule indicates recognition of this principle, as it specifically mandates that each jurisdiction encourage the participation of "minorities and non-English speaking persons" and "persons with disabilities."[63] In order for jurisdictions to achieve this crucial objective, we recommend the following changes.

First, each reference in the rule to "non-English speaking persons" should be changed to a variation of the phrase "limited English proficiency" or "limited-English proficient." This phrase, which is commonly found in other civil rights statutes and regulations,[64] encompasses both individuals who are non-English speaking and those whose limited proficiency in English would prevent them from being able to meaningfully participate absent language assistance, including, but not limited to, the provision of materials and translation services in their native language.

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[61] *Id*. at 43,711 ("One of HUD's aspirations for the proposed rule is that it will reduce the risk of litigation for program participants.") ("The rule would improve the fair housing planning process by providing greater clarity to the steps that program participants undertake to meaningfully affirmatively further fair housing, and at the same time provide better resources for program participants to use in taking such steps, hopefully resulting in increased compliance and fewer instances of litigation.").

[62] *Id*. at 43,735("These requirements are designed especially to encourage participation by low- and moderate-income persons, particularly those living in slum and blighted areas and in areas where CDBG funds are proposed to be used, and by residents of predominantly low- and moderate-income neighborhoods, as defined by the jurisdiction.").

[63] *Id*. at 43,735.

[64] *See, e.g.* Voting Rights Act of 1965, 42 U.S.C. 1973b, 1973j(d), 1973aa–la, 1973aa–2.

Second, the final rule should require jurisdictions to provide and implement a citizen participation plan that accounts for people with limited English proficiency and persons with disabilities. As multiple sections in the proposed rule currently read, the proposed rule only mandates that the citizen participation plan "ensure meaningful access to citizen participation by non-English speaking persons."[65] Reasonable accommodations for people with disabilities are essential to ensuring that all residents of a jurisdiction may access the proposed AFH plan, and provide meaningful input into its development. In order to ensure that residents with disabilities can participate in each step of the AFH plan, it will be necessary for the jurisdiction's proposed plan and materials to be available in formats accessible to people with communications disabilities, for any public hearings or meetings to make available sign language interpreters or other appropriate auxiliary aids and services, and for the physical buildings hosting the public hearings or meetings to be accessible to people with disabilities. Although this requirement may be written into the final rule in various ways, we would recommend the following changes (indicated in ***bold italic***):

- § 91.105(a)(4) Citizen participation plan; local governments and § 91.115(a)(4) Citizen participation plan; States
    - Recommended revision: "At a minimum, the citizen participation plan shall require that the jurisdiction take reasonable steps to provide language assistance to ensure meaningful access to citizen participation by ***persons with limited English proficiency and persons with disabilities***."

- § 91.115(b)(3)(iii) Citizen participation plan; States
    - Recommended revision: "The citizen participation plan must identify how the needs of ***residents with disabilities and limited English-proficient residents, in the case of a public hearing where a significant number of non-English speaking residents can be reasonably expected to participate, will be met***."

- § 570.441(b)(4) Citizen participation – insular areas
    - Recommended revision: "Assessing its language needs, identifying any need for translation of notices and other vital documents and, in the case of public hearings, meeting the needs of ***residents with disabilities and limited English-proficient*** residents where a significant number of ***limited English-proficient*** residents can reasonably be expected to participate. At a minimum, the citizen participation plan shall require the jurisdiction to make reasonable ***accommodations for persons with disabilities and to make reasonable*** efforts to provide language assistance to ensure meaningful access to citizen participation by ***limited English-proficient*** persons ***and persons with disabilities***;"

- § 570.486(a)(5) Local government requirements
    - Recommended revision: "…There must be reasonable notice of the hearings and they must be held at times and accessible locations

[65] Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710 at 43,735 ("At a minimum, the citizen participation plan shall require that the jurisdiction take reasonable steps to provide language assistance to ensure meaningful access to citizen participation by non-English speaking persons.").

convenient to potential or actual beneficiaries, with accommodations for persons with disabilities. Public hearings shall be conducted in a manner to meet the needs of ***people with disabilities and limited-English proficient*** residents where a significant number of ***limited-English proficient*** residents can be expected to participate."

IV. Conclusion

The original intention of the Fair Housing Act – to empower HUD to address both discrimination and to affirmatively further fair housing – was never fully realized, at a great collective cost. America remains a deeply residentially segregated society, with significant disparities in access to basic resources by neighborhood, and the perpetuation of these patterns of segregation in our schools and workplaces. While a stronger final rule on Affirmatively Furthering Fair Housing will not bridge this divide alone, it will edge the U.S. closer to the integrated society envisioned many decades ago. By strengthening the enforcement mechanisms for the AFH plans, and ensuring that all residents of each community participate in its formation and execution, HUD will be more likely to fulfill the long-dormant obligation of the federal government to affirmatively further fair housing.

The ACLU appreciates the opportunity to submit comments for this proposed rule on Affirmatively Furthering Fair Housing; please feel free to contact Michael Macleod-Ball, Washington Legislative Office Chief of Staff, at 202-675-2309, or Barbara Samuels, Managing Attorney for ACLU of Maryland's Fair Housing Project, at 410-889-8555, with any questions.

Sincerely,

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