

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL FAIR HOUSING ALLIANCE,
et al.,

Plaintiffs,

v.

BENJAMIN S. CARSON, SR., M.D., in his
official capacity as Secretary of Housing and
Urban Development, *et al.*,

Defendants

Civ. Action No. 1:18-cv-01076-BAH

**AMICUS BRIEF OF POLICYLINK IN SUPPORT OF PLAINTIFFS' RENEWED
MOTION FOR PRELIMINARY INJUNCTION AND FOR SUMMARY JUDGMENT**

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PolicyLink respectfully submits this Amicus Brief in Support of Plaintiffs’ Renewed Motion for Preliminary Injunction and for Summary Judgment pursuant to the Court’s June 1, 2018 Order (ECF No. 19). Plaintiffs request that the Court grant Plaintiffs’ preliminary injunction motion requiring the United States Department of Housing and Urban Development (“HUD”) to rescind its recent notices issued May 23, 2018 withdrawing the HUD Local Government Assessment Tool (the “Assessment Tool”), take all other steps necessary to ensure implementation of the Affirmatively Furthering Fair Housing Rule (the “AFFH Rule”), grant Plaintiffs’ request for summary judgment and enter final judgment in Plaintiffs’ favor.. .

INTEREST OF AMICUS CURIAE

PolicyLink is a 19-year-old non-profit national research and action organization that is dedicated to advancing racial and economic equity in our Nation. Funded by national major foundations and through contracts with the federal and state governments, it has focused on a wide range of racial justice and economic issues. For the past ten years, through its multiple equitable development initiatives, PolicyLink has been committed to developing and furthering policies that address the endemic national issue of racial concentration of poverty, particularly through persistent housing segregation in the United States.

PolicyLink’s interest in this case stems from its substantial participation in the development and implementation of the AFFH Rule at issue in this case for more than nine years, dating back to 2009. As we show below, PolicyLink’s contributions to the development of the AFFH Rule were substantial. In 2010, PolicyLink’s CEO was asked by HUD Secretary Shaun Donovan to sit on the task force that reviewed the failures of the existing process and then developed the data, tools and process that became the new rule. When HUD developed this new framework, it determined to test the rule through pilot projects, using some 74 government

grantees as test subjects from 2010 to 2015. HUD contracted with PolicyLink to provide technical assistance and support to these grantees. During this assignment, PolicyLink worked closely with a team led by the HUD Secretary's office and comprised of members from the divisions of Fair Housing and Equal Opportunity, Policy Development and Research, the Office of Sustainable Housing and Communities, and regional HUD administrators to share knowledge on the needs and progress of the pilot grantees, utilize grantee feedback to improve the data tools, evaluate the assessments produced, and share lessons learned to inform the development of the draft and final rule.

And when the rule was officially promulgated in July 2015 after this thorough testing and refinement, and after receiving thousands of comments about the proposed rule, PolicyLink was tasked in 2016-2017 via a subcontract with HUD to train hundreds of program participants on the new Rule's provisions and requirements. During that same time frame, in the first year of the Rule's implementation, PolicyLink also provided direct technical assistance to three of the first twenty municipalities to comply with the Rule – in addition to providing generalized guidance to many other jurisdictions via referrals from HUD – all in an effort to ensure that municipalities receiving HUD funds could meet their obligations under the new Rule. Beyond the work that it did for HUD, PolicyLink devoted significant staff time to educating stakeholders, and to recruiting their feedback and submitting comments to HUD and the federal register, in order to ensure that HUD and the municipalities that it funded would have the most vetted and effective mechanism to further the goal of fair housing.

PolicyLink will not duplicate the arguments made by the Plaintiffs in their Complaint and Motion for Preliminary Injunction, though it strongly endorses them. Instead, PolicyLink offers its unique vantage point having been involved in the development of the AFFH Rule from its

beginnings, through its development to its implementation. PolicyLink brings extensive knowledge of the care, planning, tool development, and training that HUD went through in developing the rule. PolicyLink is thereby in a position to demonstrate that the new administration at HUD has acted in an arbitrary and capricious way by so abruptly and carelessly suspending the effective and rigorously-vetted rule on the flimsiest of pretexts, first directly and then through withdrawing its Assessment Tool.

SUMMARY OF ARGUMENT

The Fair Housing Act provides more than a ban on discrimination – it requires HUD and grantees that receive federal housing funds to take *affirmative* steps to promote fair housing objectives.¹ This is an essential tool to end persistent housing segregation and the resultant lack of economic opportunity.² Yet despite this legislative mandate, for years HUD allowed its program participants to effectively ignore their obligation to further fair housing by permitting them to submit certifications to HUD that mouthed that their policies furthered fair housing but did nothing to make fair housing objectives a reality.³

HUD’s dereliction of its statutory duty caused both the United States Government Accountability Office (“GAO”) and HUD’s own Office of Policy Development and Research to conclude that HUD’s existing policies were insufficient to improve fair housing in the United States, which set HUD on a path to propose and promulgate the AFFH Rule. As we show below, HUD’s process in implementing the Rule was thoughtful, deliberate, and rigorous, and involved years of careful planning and development. A vital component of the AFFH Rule, which was

¹ 42 U.S.C. § 3608(e)(5).

² *Id.*

³ See U.S. DEP’T OF HOUS. & URB. DEV., A NEW ASSESSMENT PROCESS TO AFFIRMATIVELY FURTHER FAIR HOUSING, (2013), https://www.huduser.gov/publications/pdf/affht_userFriendlyGuide.pdf.

created during this development process, is the Assessment of Fair Housing (“AFH”). As part of the Assessment of Fair Housing, local governments and housing agencies use a template, the Assessment Tool, to (1) identify contributing factors to housing segregation through an analysis of HUD-supplied data to identify areas of racially concentrated poverty, (2) solicit community feedback to address the factors, and finally (3) develop policies to eliminate obstacles and open pathways to opportunity for these communities. HUD program participants successfully used the Assessment Tool to complete Assessments of Fair Housing, first in a pilot project of 74 grantee regions that comprised over 114 million people, and later in the first round of Assessment of Fair Housing submissions to HUD in 2016-17.

But after finally developing a process to push HUD grantees to satisfy the requirements of the Fair Housing Act, and spending years in pilot projects to ensure that the new process worked, HUD has effectively shut down the AFFH Rule by withdrawing the Assessment Tool. HUD’s “justifications” for this action cannot be reconciled with the Fair Housing Act or the history and development of the AFFH Rule and its components.

First, the Assessment Tool was thoughtfully developed over a number of years, which included testing during a four-year pilot phase. Yet, at no point during this process did HUD identify “significant deficiencies” warranting withdrawal of the tool. While 32 of the first 49 complying jurisdictions successfully completed their Assessments of Fair Housing, the fact that 17 of the first program participants failed to submit an acceptable Assessment of Fair Housing on their first try merely demonstrates that local jurisdictions had become accustomed to HUD’s utter failure to enforce the Fair Housing Act’s mandate before the AFFH Rule. HUD had finally put a vigorous program requiring jurisdictions to take steps to meet fair housing objectives. Also, HUD phased in the number of jurisdictions complying with the Rule so that the first

assessments could serve as case examples to later-submitting jurisdictions. This progressive approach to the Rule's roll-out demonstrates that HUD saw the initial Assessment of Fair Housing submissions as an iterative process, intended to provide additional guidance for future submissions. And in any event, HUD conveniently omits that nearly *all* of the jurisdictions ultimately submitted acceptable Assessments of Fair Housing with guidance from HUD, as contemplated by the AFFH Rule.

Second, HUD's argument that it cannot increase its technical assistance resources to meet the anticipated higher demand is unsupportable, particularly given HUD's choice to engage all of its technical assistance resources already appropriated and HUD's request for fewer resources in its 2018 budget request. HUD's budget includes ample provision for such technical assistance, and HUD has multiple resources for technical assistance that it has simply chosen not to deploy, including an open subcontract with PolicyLink that it has not assigned to any requesting grantees.

Third, HUD's abandonment of the Assessment of Fair Housing for local governments is an unjustifiable return to a regime that HUD and the Office of Government Accountability have already determined fails to satisfy HUD's legislative mandate. For the above reasons, HUD's ad hoc justifications are arbitrary and capricious and should be rejected by the Court.

FACTS

1. Development of the "Opportunity Framework" and HUD Data Assessment Tool

The Fair Housing Act mandates that HUD administer "programs and activities relating to housing and urban development in a manner affirmatively to further the policies" of the statute to provide for fair housing throughout the United States.⁴ As more fully discussed in the Plaintiffs' Memorandum of Law in Support of the Renewed Motion for Preliminary Injunction and

⁴ 42 U.S.C. § 3608(e)(5).

Summary Judgment (“Plaintiff’s Memorandum”) at pp. 6-7, it had become clear by 2009 that both HUD and its grantees receiving billions of dollars in federal housing funds every year were failing to comply with this statutory obligation to affirmatively further fair housing in the United States.

HUD’s prior mechanism to fulfill that obligation – the requirement that jurisdictions receiving federal funds complete an Analysis of Impediments to Fair Housing Choice (“AI”) – was insufficient to the task. HUD provided little guidance to local jurisdictions on how to complete the AI process and, as noted in an internal study by HUD’s Office of Policy Development and Research, HUD did not review the AIs to ensure their compliance with the Fair Housing Act.⁵ Further, since jurisdictions knew that AIs were not subject to HUD review, many jurisdictions did not meaningfully address the obstacles to fair housing or propose solutions to overcome them.⁶ Some did not even bother to prepare one.⁷ Even where program participants diligently completed the AI process, HUD exercised little or no oversight to ensure that program participants adapted their community development planning and resource allocation to address the issues identified during the AI process.

The result was that billions of dollars in HUD money went to localities that not only did not affirmatively further fair housing but had a long history of exclusionary zoning and racial steering policies that were perpetuating, rather than ending, racial and economic segregation.⁸

⁵ See U.S. DEP’T OF HOUSING & URB. DEV., POL. DEV. DIV., *ANALYSIS OF IMPEDIMENTS STUDY*, 16 (2009).

⁶ See, e.g., Ex. 1. to Brown Decl. (HUD Administrative Complaint) ¶ 7((i) – (j))

⁷ See U.S. DEP’T OF HOUSING & URB. DEV., *ANALYSIS OF IMPEDIMENTS STUDY*, *supra*, at 6.

⁸ See Rose Decl., Ex. 2 (Letter from over 140 organizations to HUD Office of General Counsel, (Mar. 6, 2018)), at 2.

That segregation has led to millions of Americans, primarily minorities, living in areas of concentrated poverty, often without adequate schools, transportation and job opportunities.⁹

In September 2010, the United States Government Accountability Office (“GAO”) released a report concluding that “HUD need[ed] to enhance its requirements and oversight of jurisdictions[’ fair housing plans].”¹⁰ The report explained that the AI process was ineffective to identify and address impediments to fair housing. The GAO further explained that the ineffectiveness of the AI process was attributable, at least in part, to “HUD’s limited regulatory requirements and oversight.” *Id.* at 2.

PolicyLink, as an organization devoted to promoting racial and economic justice, including fair housing, and deeply versed in utilizing data-driven approaches for addressing racial disparities, was already working in communities across the country to implement more effective local fair housing policies that would create better connections to economic opportunities for those living in areas of concentrated poverty.¹¹ Within days of President Obama taking office, PolicyLink wrote a series of memoranda to his transition team with recommendations relating to economic and social equity.¹² These memoranda included recommendations to expand affordable housing, to verify that affordable housing is being built in all communities, not just those with concentrations of poverty, and to increase fair housing enforcement.¹³ In those strategies, PolicyLink recommended that HUD provide training for nonprofit organizations and government officials responsible for developing housing policies, and argued that a “HUD-managed system . . . needs to be integrated with a council of key

⁹ *Id.*

¹⁰ U.S. GOV’T ACCOUNTABILITY OFF., GAO-10-905, HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS’ FAIR HOUSING PLANS (Sept. 2010), at 1, <https://www.gao.gov/new.items/d10905.pdf>.

¹¹ Rose Decl., ¶4.

¹² *Id.* ¶5 & Ex. 1.

¹³ *See generally id.*

training groups.”¹⁴ PolicyLink’s approaches to technical assistance and training would later become key components of the Assessment of Fair Housing required by the AFFH Rule.¹⁵

PolicyLink became involved early in HUD’s efforts to overhaul the AI process. In October 2010, HUD Secretary Donovan convened a Task Force of top officials at the agency and fair housing experts from outside the agency (the “Fair Housing Task Force”). The Fair Housing Task Force’s purpose was to develop a policy to satisfy the Fair Housing Act’s requirements that would in fact further fair housing and break the pattern of residential segregation and lack of access to opportunity in the United States.¹⁶ Secretary Donovan invited Angela Glover Blackwell, the founder and CEO of PolicyLink, to participate. The Fair Housing Task Force developed a new framework for implementing HUD’s fair housing obligations, which it called an “opportunity framework.”¹⁷ This framework was the initial step in the development of the Assessment Tool.

The “opportunity framework” is a two-step process built on the concept of “access” to opportunity. The framework first requires data analysis to identify populations of segregated, racially-concentrated poverty, and to evaluate access to “opportunity structures” within the local region. These include consideration of access to quality schools, jobs, transit, healthy food, and clean air.¹⁸ These opportunity structures are considered important components in fair housing, as physical proximity to these important structures dramatically enhances or constrains an

¹⁴ *Id.*, ¶6.

¹⁵ See U.S. DEP’T OF HOUS. & URB. DEV., A NEW ASSESSMENT PROCESS TO AFFIRMATIVELY FURTHER FAIR HOUSING (2013), https://www.huduser.gov/publications/pdf/affht_userFriendlyGuide.pdf.

¹⁶ Rose Decl., ¶9.

¹⁷ *Id.*, ¶10.

¹⁸ john powell, *From Poverty to Prosperity: An Opportunity Framework and Analysis for Economic and Social Mobility in Kansas City Region*, HAAS INSTITUTE, 7 (Dec. 14, 2015), <https://haasinstitute.berkeley.edu/poverty-prosperity-opportunity-framework-and-analysis-economic-and-social-mobility-kansas-city>.

individual's chances of success in life.¹⁹ The opportunity framework's data analysis step is intended to identify and measure barriers to access to opportunity in the geographic area of interest.

The second step in the "opportunity framework" requires translation of the data analysis into real working plans, including resource allocation, to address the identified disparities. The ultimate goal of the framework is to remediate "opportunity segregation," *i.e.*, the fact that affordable housing is often physically separated from communities with rich opportunities. In this sense, the opportunity framework provides an analytical tool to guide public policy development and resource allocation.

In order to support this framework, HUD's Office of Policy Development and Research, led by Assistant Secretary Raphael Bostic (now President of the Federal Reserve Bank of Atlanta) spent approximately two years – from 2010 to 2012 – developing an integrated data and mapping system to provide HUD grantees the fair housing and opportunity data applicable to their geographic area. With such data, local governments could follow the Task Force's opportunity framework – which evolved into HUD's Assessment Tool – to (1) analyze the obstacles to fair housing in their jurisdiction and (2) develop steps to remedy those obstacles. In developing the data and mapping tool, which is a component of HUD's Assessment Tool, HUD built off of the "opportunity mapping" concept presented through expert testimony in landmark fair housing litigation, *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, No. MJG 95-309 (D. Md. Nov. 21, 2002).²⁰

¹⁹ *Id.* at 8-11.

²⁰ For the expert testimony relied upon by HUD, *See* Remedial Phase Expert Report of John Powell, *Thompson v. HUD*, No. MJG 95-309, (D. Md. Aug. 19, 2005), available at http://kirwaninstitute.osu.edu/docs/publications/powellremedialreport_submit_3_10_06.pdf.

2. The Fair Housing and Equity Assessment (Pilot Phase of the AFH Process)

HUD tested the Assessment Tool and the Fair Housing Task Force’s proposed “opportunity framework” as part of a program named the Sustainable Communities Initiative, which began in 2010. The Sustainable Communities Initiative was intended to “improve regional planning efforts that integrate housing and transportation decisions and increase the capacity to improve land use and zoning.”²¹ Under the Initiative, HUD awarded Regional Planning Grants to 74 geographically and economically diverse municipalities and regions through a competitive process. HUD budgeted and Congress appropriated approximately \$165 million for these grants.²²

Regional Planning Grant recipients, including local governments within the region, were required to conduct a regional Fair Housing and Equity Assessment (“FHEA”) to serve as pilots for the Rule. The FHEA process included many of the components that were ultimately included in the AFFH Rule and its required Assessment of Fair Housing, including the use of data and mapping tools and community collaboration to inform community planning and identification of remedies. As later incorporated into the Assessment of Fair Housing, the process of developing a FHEA required three phases: (1) data analysis using the package of data, tables, and free online map services provided by HUD; (2) deliberation between housing officials and community stakeholders—many of whom were marginalized in the previous AI process because government officials did not actively engage the community; and (3) decision-making based on the data analysis and community engagement to remove obstacles to fair housing and create new housing

²¹ U.S. DEP’T OF HOUS. & URB., LEVERAGING THE PARTNERSHIP: DOT, HUD, AND EPA PROGRAMS FOR SUSTAINABLE COMMUNITIES, 7 (Apr. 2010), <https://www.epa.gov/sites/production/files/2014-02/documents/leveraging.pdf>.

²² *Id.*

opportunities.²³ FHEA participants, including housing and transportation agencies and community stakeholders, used an early version of the Assessment Tool to guide them in these efforts.

HUD also created a vigorous and deliberate process for educating governments and local non-profits participating in the FHEA program on how to conduct their analysis. Over a period of approximately four years, PolicyLink, under a contract and subcontract with HUD, provided technical assistance and capacity building support in partnership with federal, regional and local HUD officials via in-person Leadership Academies with cohorts of 10-12 grantees, webinar-based training, one-on-one coaching, peer learning programs, and office hours during which grantees could call and have their questions answered.²⁴ PolicyLink was also responsible for reviewing draft FHEAs for some of the grantees, and providing them with feedback along with HUD-appointed reviewers.²⁵

During the pilot project, PolicyLink participated in a team comprised of the office of the HUD Secretary, Policy Research and Development, Fair Housing and Equal Opportunity, and the office of Sustainable Housing and Communities to address refinements to the data tool, the provision of technical assistance, and to identify lessons learned from the process to inform the official Rule.²⁶ This working group met from 2011-2014 to develop tools and guidance, and to refine HUD's data tools.

PolicyLink was also required to report to HUD on a quarterly basis and to include in its reports what it had learned from reviewing the FHEAs.²⁷ During this time, HUD catalogued the FHEAs in a database to inform the development of the AFFH Rule and to be used for in-service

²³ Rose Decl., Ex. 2.

²⁴ *Id.* ¶17.

²⁵ *Id.* ¶18.

²⁶ Rose Decl., ¶22.

²⁷ *Id.* ¶20.

training.²⁸ All of these steps helped to prepare HUD officials to review and critique the Assessments of Fair Housing that would be required of localities receiving HUD funds under the AFFH Rule.

At the conclusion of the FHEA process, regional planning grantees submitted their assessments to HUD. The results were overwhelmingly positive. The FHEA process not only provided grantees with a tool for addressing regional fair housing issues; it galvanized communities to develop partnerships across sectors, including housing, transportation and economic development to challenge existing barriers to opportunity and inclusion in housing. The FHEA also enabled policymakers to be more thoughtful in their investments of federal housing funds to advance regional fair housing opportunities.

For example, Chicago rewrote its land use code after recognizing during the FHEA process that its prior regulations had created exclusionary barriers.²⁹ Similarly, the Twin Cities of Minneapolis and St. Paul mandated new infrastructure investment priorities for racially concentrated areas of poverty identified during the data analysis phase of the FHEA, and began conditioning the grant of transportation funding on affordable housing development.³⁰

The FHEA process also helped regions identify impediments to fair housing that would have otherwise gone undetected. St. Louis's assessment, for example, revealed that Housing

²⁸ *Id.* ¶21.

²⁹ See CHICAGO AREA FAIR HOUSING ALLIANCE, FAIR HOUS. & EQUITY ASSESSMENT, METROPOLITAN CHICAGO, (2013), 105-10, <http://www.cmap.illinois.gov/documents/10180/198094/Chicago%20Region%20FHEA%20November%202013%20HUD%20Submission.pdf/b0c6946e-4425-49fe-8d0a-f336903bc464>.

³⁰ For background into the opportunity assessment, see METROPOLITAN COUNCIL, CHOICE, PLACE AND OPPORTUNITY: AN EQUITY ASSESSMENT OF THE TWIN CITIES REGION (2014), <https://metro council.org/Planning/Projects/Thrive-2040/Choice-Place-and-Opportunity/FHEA/FHEA-Sect-1.aspx>; For details as to transit funding see U.S. DEP'T OF HOUS. & URB. DEV., FHEA RESULTS SUMMARIES: SUSTAINABLE COMMUNITIES INITIATIVE GRANTEES, 2 (2015), https://www.hud.gov/sites/documents/FHEARESSUMM_CV.PDF.

Choice Vouchers (issued under the HUD Section 8 rental assistance program) were consistently used in low-income neighborhoods with relatively few jobs and transportation services, rather than in high-opportunity areas with better jobs and access to higher quality education.³¹ In other words, the impediment to fair housing was not the voucher system itself, but rather the choices made and opportunities available to voucher recipients. As a result of this discovery, St. Louis revamped its voucher program to include resources to help residents find housing choices in higher opportunity neighborhoods.

Each of these approaches is emblematic of the thoughtful and holistic approach to fair housing required by the FHEA process, and later by the Assessment of Fair Housing required by the AFFH Rule. And grantees conducted this thoughtful and holistic review successfully using HUD's Assessment Tool. As the progenitor of the AFFH Rule and its Assessment of Fair Housing requirement, the FHEAs demonstrated that the model developed by HUD's Fair Housing Task Force, in which HUD has invested approximately \$165 million through regional planning grants, *worked*.³² The pilot phase showed that while grantees needed support to assist them in implementing the new process and using the Assessment Tool, they also had a high rate of success in implementing it, with positive results for their communities.³³

But HUD's development of the AFFH Rule and the accompanying Assessment of Fair Housing did not end with this elaborate testing process. HUD proposed the AFFH Rule in July 2013, after which the Rule went through a public notice and comment period and received more

³¹ *Affordable Housing in the St. Louis Region: Achieving More Opportunity through Public Investments*, PUB. POL. RES. CTR., UMSL, 3 (Feb. 2016), <https://pprc.umsl.edu/pprc.umsl.edu/data/Metro-PDFS/2016feb-afford-housing.pdf>.

³² For more information as to community grantees and outcomes, See U.S. DEP'T OF HOUS. & URB. DEV., SUSTAINABLE COMMUNITIES REGIONAL PLANNING GRANTS (2011), https://www.hud.gov/program_offices/economic_development/sustainable_communities_regional_planning_grants.

³³ Rose Decl., ¶19.

than 1,000 comments.³⁴ Further, the Assessment Tool that is part of the Assessment of Fair Housing went through a public comment process, as required by the Paperwork Reduction Act, twice – once in December 2015 and again in August 2016.

3. Training to Prepare HUD Grantees for AFFH Rule Roll-Out

In 2014 and 2015, PolicyLink and other organizations involved in the FHEA pilot phase submitted reports to and consulted with HUD leadership on the lessons learned in the pilots. HUD incorporated these lessons to refine the Assessment of Fair Housing process and produce a detailed training curriculum for localities.³⁵

After the AFFH Rule was promulgated in July 2015, HUD grantees were then provided extensive training by HUD leadership and a team of organizations under contract with HUD, including PolicyLink, on the new Assessment of Fair Housing process and the requirements of the AFFH Rule. Between May 2016 and September 2017, HUD convened multiple trainings jurisdictions and public housing authorities for which PolicyLink was a trainer.³⁶ The curriculum for those trainings was refined several times as a result of the feedback that HUD received from program participants, with generally positive responses from participants.³⁷

In addition to training for program participants before preparing an Assessment of Fair Housing, HUD also provided technical assistance after the AFFH Rule was promulgated. As part of this technical assistance, which largely mirrored PolicyLink's role during the FHEAs, HUD contractors would (1) coach localities in the use of the Assessment Tool, (2) advise communities on effective methods of community engagement, and (3) critique whether

³⁴ *Affirmatively Furthering Fair Hous. Final Rule*, U.S. Dep't of Hous. & Urb. Dev., Rin No. 2501-AD33 (June 30, 2015), https://www.huduser.gov/portal/sites/default/files/pdf/AFFH_Final_Rule.pdf.

³⁴ Rose Decl., Ex. 5, at 5.

³⁵ *Id.* ¶24.

³⁶ Rose Decl., ¶25.

³⁷ *Id.* ¶26.

localities' action plans were sufficiently detailed to remedy the impediments identified during the Assessment.³⁸ In 2016, the first year of the Rule's implementation, PolicyLink provided technical assistance to three HUD program participants that went through the Assessment of Fair Housing process.³⁹ The effectiveness of the training and technical assistance provided by HUD throughout the implementation of the AFFH Rule is evidenced by the exemplary Assessments of Fair Housing prepared by several of the inaugural cohort in 2016. For example, the cities of New Orleans and Philadelphia submitted AFHs that were particularly hailed.⁴⁰

Inexplicably, with the appointment of a new Secretary at HUD, HUD began to pull back on the AFFH Rule. PolicyLink had been retained under a subcontract with HUD to provide support to jurisdictions preparing Assessments of Fair Housing, but due to HUD's actions, technical assistance ground to a virtual halt.⁴¹ When a community had questions about compliance with the AFFH Rule, HUD could refer those questions to a number of technical assistance providers which would then directly address the question with the local jurisdiction.⁴² However, PolicyLink stopped receiving those referrals shortly after the appointment of Secretary Carson, despite the fact HUD had already contracted and budgeted for this work.⁴³ Based on PolicyLink's interactions with HUD and its experience as a technical assistance and training provider, it appeared that HUD *chose* not to deploy its technical assistance resources, even though they had already been budgeted for, and sufficient resources to meet the technical demand were available.⁴⁴

³⁸ *Id.* ¶27.

³⁹ *Id.* ¶28.

⁴⁰ *Id.* ¶31.

⁴¹ Rose Decl., ¶33.

⁴² *Id.*

⁴³ *Id.* ¶34.

⁴⁴ *Id.*, Ex. 5 (Letter from over 140 organizations to HUD Office of General Counsel, *supra*, at 5)

4. HUD's Suspension of the AFFH Rule

HUD suspended the AFFH Rule on January 5, 2018.⁴⁵ In response, PolicyLink led the development and submission of comments to HUD opposing the suspension, which was signed by over 140 civil rights, affordable housing and other organizations.⁴⁶ Many of these organizations had been involved in and provided input on development of the AFFH Rule at its various stages and their contributions were key factors in the early successes of the Rule. In stark contrast to the considerable input that HUD solicited and received from those organizations in promulgating the Rule, HUD suspended it without warning or input.⁴⁷

Then, on May 18, 2018, after this lawsuit was filed, HUD rescinded the suspension and instead withdrew, effective immediately, the availability of its Local Government Assessment Tool.⁴⁸ HUD also issued a notice advising local governments that they could satisfy their obligation to affirmatively further fair housing by preparing an AI under the old pre-2015 regulations instead of preparing an Assessment of Fair Housing—notwithstanding the fact that HUD itself had already concluded that the pre-2015 regulations were ineffective to satisfy its statutory obligation to affirmatively further fair housing.⁴⁹

⁴⁵ For further information about HUD's suspension notice, see Pl's Mem. at pp. 11-13.

⁴⁶ Rose Decl., ¶37; *see also* Rose Decl., Ex. 5.

⁴⁷ Rose Decl., Ex. 5, at 1 & 5.

⁴⁸ U.S. DEP'T OF HOUS. & URB. DEV., AFFIRMATIVELY FURTHERING FAIR HOUSING: WITHDRAWAL OF THE ASSESSMENT TOOL FOR LOCAL GOVERNMENTS (May 18, 2015), https://www.hudexchange.info/resources/documents/FR-Notice-AFFH-Withdrawal-of-Local-Government-Assessment-Tool.pdf?utm_source=HUD+Exchange+Mailing+List&utm_campaign=59bcea2e4c-HUD_Announces_Three_New_AFFH_Feder_2018_05_18&utm_medium=email&utm_term=0_f32b935a5f-59bcea2e4c-19386353

⁴⁹ U.S. DEP'T OF HOUS. & URB. DEV., AFFIRMATIVELY FURTHERING FAIR HOUSING (AFFH): RESPONSIBILITY TO CONDUCT ANALYSIS OF IMPEDIMENTS (May 18, 2018), https://www.hudexchange.info/resources/documents/FR-Notice-AFFH-AI-Notice.pdf?utm_source=HUD+Exchange+Mailing+List&utm_campaign=59bcea2e4c-HUD_Announces_Three_New_AFFH_Feder_2018_05_18&utm_medium=email&utm_term=0_f32b935a5f-59bcea2e4c-19386353.

This attempted bureaucratic slight-of-hand, in effect, merely continued the arbitrary suspension of the AFFH Rule under a different name.

ARGUMENT

1. HUD's Actions Are Arbitrary And Capricious.

Agency action – whether it be rule promulgation, suspension, or revocation – is invalid if it is arbitrary and capricious. 5 U.S.C. § 706; *see Nat'l Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 45 (1983) (holding that rule revocation is subject to the same standard of review as rule promulgation). It is well-settled that “where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.” *See e.g. ANR Pipeline Co. v. F.E.R.C.*, 71 F.3d 897, 901 (D.C. Cir. 1995); *Wis. Valley Improvement v. F.E.R.C.*, 236 F.3d 738, 748 (D.C. Cir. 2001).

In reviewing agency action, a court must assess whether an agency has articulated a “rational connection between the facts found and the choice made.” *Kisser v. Cisneros*, 14 F.3d 615, 619 (D.C. Cir. 1994). An agency also acts arbitrarily and capriciously if its explanation is based on “facts that an agency knows are false at the time it relies on them.” *Mo. Pub. Serv. Comm'n v. F.E.R.C.*, 337 F.3d 1066, 1075 (D.C. Cir. 2003); *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 619 (D.C. Cir. 2017). Similarly, an agency's action is arbitrary and capricious if its “reasons and policy choices” deviate “from or ignore the ascertainable legislative intent.” *Small Refiner Lead Phase-Down Task Force v. U.S. Env'tl. Prot. Agency*, 705 F.2d 506, 520 (D.C. Cir. 1983); *Chem. Mfrs. Ass'n v. Env'tl. Prot. Agency*, 217 F. 3d 861, 865-67 (D.C. Cir. 2000). Ultimately, the “core concern underlying the prohibition of arbitrary or capricious agency action” is to avoid “sanction[ing] impermissible ‘ad hocery’ on the part of the [agency].” *Pac. Nw. Newspaper Guild, Local 82 v. N.L.R.B.*, 877 F.2d 998, 1003 (D.C. Cir. 1989).

Further, it is well settled that an agency acts arbitrarily and capriciously if it “offered an explanation for its decision that runs counter to the evidence before the agency[] or 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 45. As set forth in detail in the Plaintiffs’ Memorandum at pp. 21-32, the reasons HUD gives for its January and May suspensions are both contrary to the evidence before it and implausible.

First, HUD has no reasoned factual basis for its assertion that 17 of the first 49 Assessments of Fair Housing being initially rejected demonstrates a problem with the Assessment Tool. The 35% figure quoted by HUD is highly misleading. While approximately 35% of submitted AFHs were initially not accepted, by the time of suspension of the AFFH Rule, only a few of those Assessments of Fair Housing remained noncompliant. The fact that some local jurisdictions were not initially in compliance simply demonstrates that, for the first time, HUD had actually done its job and had put in place a rigorous process for ensuring that local governments were in fact taking steps to affirmatively further fair housing. Far from demonstrating inefficiency, the rate of initial noncompliance and HUD’s use of resources to guide grantees to bring their Assessments of Fair Housing into compliance show that the AFFH Rule was acting exactly as it was designed to do.⁵⁰

Indeed, the GAO recommended and HUD agreed that it needed to be more involved in oversight of local governments’ compliance with the affirmatively furthering fair housing

⁵⁰ Rose Decl., Ex. 5, at 5 (“[t]he AFFH rule itself contemplates that not . . . every AFH will be accepted when it’s submitted, but that there will be some back and forth between program participants and HUD before AFHs are accepted. That is why the AFFH includes specific provisions about HUD providing written feedback and instructions regarding what might need to be changed, the availability of TA, and a 45-day period for grantees to make revisions and resubmit non-accepted AFHs.”).

requirement.⁵¹ Active review of the Assessments of Fair Housing would, of necessity, result in a higher number of initial rejections. There were no rejections of AI's under the earlier regulations simply because HUD did not bother to review them and HUD actively sought to move *away* from that regime due to its inefficacy. Thus, the 2010 GAO report stated that HUD “needs to enhance its requirements and oversight of jurisdictions.”⁵² And HUD itself acknowledged in 2009 that notwithstanding its existing regulations, which at the time included the AI process, HUD still “need[ed] to determine appropriate means for achieving compliance with [the affirmatively furthering fair housing] requirement.”⁵³ HUD also admitted that “*enhanced HUD guidance and assistance* would increase completeness and quality” and identified “better access to federal data tools” as a potential form of assistance.⁵⁴

In now reversing itself, HUD is attempting to use the very purpose of the Rule – to increase HUD's oversight over the process of grantees' plans to satisfy their obligation to affirmatively further fair housing – as an excuse for suspending the Rule. This is not a valid reason for agency action. *La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999); *see also F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books . . . And of course the agency must show that there are good reasons for the new policy.”) (internal citation omitted).

Second, HUD has not identified any evidence to support its assertion that the Assessment Tool was not a benefit to localities that have already conducted Assessments of Fair Housing and would not provide a substantial benefit to localities that will conduct the Assessments in the

⁵¹ See U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-905, *supra*, at 1.

⁵² *Id.* at 2.

⁵³ U.S. DEP'T OF HOUSING & URB. DEV., ANALYSIS OF IMPEDIMENTS STUDY, *supra*, at 16.

⁵⁴ *Id.* (emphasis added).

future. To the contrary, there is plenty of evidence establishing that HUD has already invested enormous time and effort into creating a tool that provides substantial assistance to localities committed to addressing fair housing issues.⁵⁵ The genesis of the AFFH Rule and the Assessment Tool began much earlier than when HUD published the proposed rule for notice and comment in 2013. By that time, HUD had already invested at least two years developing its integrated data and mapping system for fair housing data, devoted years and countless resources to developing the Assessment Tool from the Fair Housing Task Force's opportunity framework, and had spent \$165 million in the Regional Planning Grant program where the Fair Housing and Equity Assessments were used to test the Tool.⁵⁶ In fact, the AFFH Rule and its Assessment Tool took more than *five years* of thoughtful development and refinement.⁵⁷ Thus, there is no factual basis whatsoever for the claim that HUD needs more time to develop a tool. *Alaska v. United States Dep't of Agric.*, 273 F. Supp. 3d 102, 112 (D.D.C. 2017), *appealed* (Nov. 28, 2017) (“[The] function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.”).

Third, even assuming *arguendo* that the initial non-acceptance rate could be suggestive of issues with the Assessment of Fair Housing, HUD fails to explain how the Assessment Tool is responsible for those issues or what changes it would make to reduce issues. The Assessment Tool was rigorously tested during the FHEA phase of development.⁵⁸ Then, after promulgation of the AFFH Rule, grantees participated in comprehensive multi-day training to prepare them for implementation of the AFFH Rule and to use the Assessment Tool.⁵⁹ HUD's failure to even

⁵⁵ See generally Rose Decl.; Ex. 5 (Letter from over 140 organizations to HUD Office of General Counsel, *supra*, at 3-4)

⁵⁶ *Id.*

⁵⁷ See generally Rose Decl.

⁵⁸ *Id.* ¶15.

⁵⁹ *Id.* ¶25.

reference the training, let alone the other extensive steps taken to prepare jurisdictions for the AFH process and Assessment Tool, is evidence of its failure to premise its decision-making on an accurate factual record.

Last, HUD cannot rely on its purported inability to “scale” technical resources as a justification for withdrawing the Assessment Tool, particularly when it has failed to deploy its available resources. PolicyLink has been involved in the development of the AFFH Rule long enough to recognize the stark drop-off in technical assistance to program participants after Secretary Carson’s appointment. During its work on FHEAs, PolicyLink and other organizations that contracted and subcontracted with HUD were regularly dispatched to answer regional government grantees’ questions and to guide their use of the Assessment Tool to analyze impediments to opportunity.⁶⁰ This trend continued during implementation of the AFFH Rule, with technical assistance providers being involved and relied upon as local governments completed their initial Assessments of Fair Housing. Yet, without explanation, after Secretary Carson assumed his position in 2017, PolicyLink and other technical assistance providers began receiving fewer and fewer assignments from HUD.⁶¹ HUD became increasingly slow to respond when program participants requested technical assistance⁶² and HUD did not take advantage of the availability of technical assistance providers that it had already contracted and budgeted for. HUD’s communications and technical assistance requests then stopped altogether.⁶³

In short, it appears that HUD *chose* not to use its resources and now claims lack of resources to implement the AFFH Rule as an excuse for withdrawing the Assessment Tool. HUD’s actions are, for this additional reason, unsupported. *See Nat’l Res. Def. Council, Inc. v.*

⁶⁰ *See* Rose Decl., ¶33.

⁶¹ *Id.*

⁶² Rose Decl. Ex. 5, at 5.

⁶³ Rose Decl., ¶33.

Rauch, 244 F. Supp. 3d 66, 96 (D.D.C. 2017) (“Suffice it to say, it is arbitrary and capricious for an agency to base its decision on a factual premise that the record plainly showed to be wrong.”); *see also Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 630-36 (1986) (setting aside agency rules because they lacked an adequate factual basis).

2. HUD’s Actions Are Inconsistent With The Fair Housing Act’s Legislative Mandate.

Almost everyone with any knowledge of the AI process that HUD relied on for years, including the GAO and HUD itself, knew that it was completely inadequate to the task of ensuring that local governments use HUD housing funds to affirmatively further fair housing. There was no oversight by HUD and no accountability by local governments. Indeed, some jurisdictions such as Westchester County, cited in the Plaintiffs’ Memorandum (p.8), had policies that the courts have held to perpetuate racial segregation (and correspondingly, lack of access to opportunity), all the while receiving millions of dollars in HUD funding.⁶⁴

And Westchester County is not the only example. Nassau County, occupied by some 1.3 million residents and like Westchester, located just outside of New York City, is one of the most segregated counties in the United States. It is in the top one half of one percent of all counties in this nation for black-white segregation.⁶⁵ Yet in its Consolidated Plans from 1995-2010 (which are required when a jurisdiction seeks CDBG funds and which must set forth how the jurisdiction will spend those funds), Nassau County informed HUD that it planned to use its federal funding in a way that *exacerbated* its already pervasive racial and economic segregation.⁶⁶

⁶⁴ See U.S. DEPT. OF HOUSING AND URB., ANALYSIS OF IMPEDIMENTS STUDY, *supra*, at 27.

⁶⁵ U.S. DEP’T OF COMMERCE, 2010 DECENNIAL CENSUS, SUMMARY FILE 1, <https://www.census.gov/prod/cen2010/doc/sf1.pdf>.

⁶⁶ By way of example, Nassau County’s 2005 Consolidated Plan stated that it “currently targets its comprehensive community development efforts in . . . lower income and minority areas” And in its 2010 Consolidated Plan, prepared after a racial steering lawsuit was filed against the

Nassau County’s AI submissions to HUD demonstrate the utter failure of the AI process to affirmatively further fair housing. As alleged in a HUD Administrative Complaint against the County filed by ERASE Racism a community group dedicated to eliminating discrimination in housing, “[w]hile the County’s most recent (July 21, 2010) Analysis of Impediments and Fair Housing Choice (“AP”) acknowledges that [the region] ‘ranks as the third most segregated suburban region’ in the country (p. 22, n.6 and accompanying text), it does not identify impediments flowing from such segregation, and proposes no appropriate actions to overcome such impediments.”⁶⁷ Nevertheless, Nassau County has received some \$191 million in federal housing funds over the last ten years.⁶⁸

The new AFFH Rule and the Assessment of Fair Housing present local jurisdictions such as Nassau County with a choice – one that is ultimately mandated by the Fair Housing Act: either end housing policies that promote segregation and begin actively furthering fair housing, or forfeit federal funds. Clearly, the AI process that HUD seeks to reinstitute has not enforced this legislative mandate and never will. HUD’s reversion back to this process, which HUD itself has determined is inadequate, fails to further the mandates under the Fair Housing Act and should be reversed on these additional grounds. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 48; *Chem. Mfrs. Ass’n*, 217 F.3d at 867 (stating that agency action must “not deviate from or ignore the ascertainable legislative intent”).

County, *see Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 623 (2d Cir. 2016), the County stated that it targeted its efforts in “several lower income areas” and proudly admitted that “[f]or three decades Nassau County has provided [HOME] funds to local governments and non-profits to acquire sites exclusively in low and moderate-income census tracts.” Brown Decl., Ex. 1 (HUD Administrative Complaint).

⁶⁷ Brown Decl., Ex. 1 (HUD Administrative Complaint) at 5.

⁶⁸ U.S. DEP’T OF HOUS. & URB. DEV., COMMUNITY PLANNING & DEVELOPMENT PROGRAM FORMULA ALLOCATIONS FOR FY 2018 (2018), https://www.hud.gov/program_offices/comm_planning/about/budget/budget18.

CONCLUSION

For the foregoing reasons, PolicyLink respectfully requests that this Court grant Plaintiffs' Renewed Motion for Preliminary Injunction and Summary Judgment.

Respectfully Submitted,

Dated: June 5, 2018

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CERTIFICATE OF SERVICE

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

/s/ Stanley J. Brown

Stanley J. Brown