UNITED STATES DISTRICT COURT
DISTRICT OF THE DISTRICT OF COLUMBIA

OPEN COMMUNITIES ALLIANCE, *et al.*, Plaintiffs, v. BEN CARSON, *et al.*, Defendants.	Civ. Action No. 1:17-cv-02192 (BAH) Chief Judge Beryl A. Howell

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

The response of Defendants Department of Housing and Urban Development and Secretary Ben Carson (collectively, "HUD") to Plaintiffs' Motion for a preliminary injunction only confirms the illegality of HUD's suspension of the Small Area FMR Rule's requirements.

In its response, HUD now has made public the Suspension Memorandum signed by Secretary Carson. This memorandum confirms that HUD did not examine local circumstances in any of the 23 metropolitan areas where it suspended the Rule's requirements. Moreover, although the Suspension Memorandum relies heavily on the Interim Evaluation's analysis of the small area FMR demonstration projects, it fails to explain how that report's findings were surprising or unaccounted for by the Final Rule, which should have been the relevant question. Put simply, the agency did not treat the already promulgated Small Area FMR Rule as binding law. Rather, HUD acted as though it wrote on a clean slate, with the discretion to disregard any provision of the Rule with which it now disagrees without explaining its change of course.

In a futile attempt to defend its action, HUD argues that the Rule itself confers unreviewable discretion to suspend its own requirements for any reason. HUD's arguments are unconvincing and its interpretation of the relevant regulatory provision unreasonable. That provision *requires* HUD to designate certain areas for immediate, mandatory use of small area FMRs, while giving the Secretary authority to suspend such a designation in limited circumstances. HUD's attempt to rewrite this provision—as one that confers complete discretion as to whether to immediately make small area FMRs mandatory anywhere—ignores much of the provision's text, as well as the agency's own description of it in the Rule's preamble.

Meanwhile, HUD does not even argue that its decision-making conformed to well-established requirements for when an agency changes course. Instead, it suggests that it acted in

response to unexpected new evidence and novel concerns. The record refutes that claim. None of HUD's stated concerns is new; indeed, HUD explicitly relies on industry comments that merely restate objections the agency considered and rejected (or otherwise addressed) in crafting the Rule. Moreover, HUD fails to explain how evidence from demonstration project sites—which used small area FMRs without key protections that the Final Rule added, drawing from the demonstration project experience—can suggest that those same protections are inadequate.

HUD also argues in passing that its litigation-prompted solicitation for comment on its already final action will moot these claims. Not so. HUD's belated publication of notice does not cure either HUD's acting beyond its authority in suspending the Rule or its arbitrary and capricious reasoning. It merely illustrates the importance of injunctive relief to ensure that HUD complies with the procedures required by the Administrative Procedure Act ("APA").

Finally, HUD argues that Plaintiffs have failed to make out the required showing of irreparable harm. With respect to Ms. Carter and Ms. Moore, this argument is premised almost entirely on the unsupported notion (contradicted by HUD's own findings in promulgating the Rule) that the Rule will not help voucher holders secure housing that will improve their lives. With respect to the Open Communities Alliance ("OCA"), HUD relies on an incorrect view of the irreparable harm required to win preliminary relief where an organization cannot recover its losses in later proceedings. HUD also errs in arguing that this Court can enjoin its action only as applied to those areas where the Plaintiffs reside. It now has confirmed that it took only a single, nationwide action; setting that unlawful action aside requires it to be invalidated everywhere.

This Court should enjoin HUD's unlawful action immediately and require the use of small area FMRs pursuant to the Rule beginning on January 1.

ARGUMENT

I. Plaintiffs Are Likely to Prevail on the Merits

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

As Plaintiffs explained in their opening brief, and as HUD does not dispute, HUD lacks freestanding authority to suspend the Small Area FMR Rule without following notice-and-comment procedures. HUD relies entirely on the contention that the Rule authorizes its own wholesale suspension, entirely at HUD's discretion, for any reason that HUD deems appropriate. *See* HUD's Opposition to Plaintiffs' Motion for Preliminary Injunction ("HUD Br.") at 20 (arguing that regulation "commits the suspension of Small Area FMRs to HUD's discretion"). This reading of the relevant regulatory provision, 24 C.F.R. § 888.113(c)(4), is not supported by that provision's text, by HUD's own authoritative description of it in the Rule's preamble, or by its place in the regulatory scheme.

1. HUD's Regulation Did Not Confer on HUD Unreviewable Discretion to Suspend the Final Rule.

Seeking to avoid judicial review, HUD invokes 5 U.S.C. § 701(a)(2), which excludes from the APA's judicial review provisions agency actions "committed to agency discretion by law." HUD Br. at 19. That exclusion, however, "is a very narrow exception" to the presumption of judicial review of agency action. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *see also Am. Petroleum Tankers Parent, LLC v. United States*, 943 F. Supp. 2d 59, 66 (D.D.C. 2013). It applies only where the relevant statute or regulation "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," *Cody v. Cox*, 509 F.3d 606, 610 (D.C. Cir. 2007) (internal citation/quotation omitted). Where the question is in doubt, courts "adopt the reading that accords with traditional

understandings and basic principles: that executive determinations generally are subject to judicial review." *Kucana v. Holder*, 558 U.S. 233, 251 (2010) (internal quotation omitted).

The text of 24 C.F.R. § 888.113(c)(4), read against that provision's larger context, cabins HUD's suspension authority in two ways that provide a "meaningful standard" for this Court's review. HUD either ignores altogether the portions of the provision that provide these judicially reviewable limits on its authority to suspend small area FMR designations or offers unconvincing reasons why this Court should treat them as superfluous.

First, the provision does not authorize wholesale suspension of the requirement that each affected Public Housing Authority ("PHA") use small area FMRs. Rather, it authorizes the localized suspension of "*a* Small Area FMR designation from *a* metropolitan area," or (even more granularly) the "temporar[y] exempt[ion]" of "*a* PHA in *a* Small Area FMR metropolitan area from use of the Small Area FMRs." 24 C.F.R. § 888.113(c)(4) (emphasis added). HUD does not explain how this language authorizes suspension of the Rule with respect to *all* 175 affected PHAs in *all* 23 affected areas without analysis of local conditions. HUD reads this provision as though it authorizes suspension of "all Small Area FMR designations" or exemption of "all affected PHAs." But it does not.

For this reason alone, HUD's arguments fail. Whatever discretion HUD may have to suspend the small area FMR designation for a single metropolitan area, it may not suspend *all* such designations—effectively suspending the Rule itself—without localized determinations.

Second, the provision by its plain terms authorizes HUD to suspend a small area designation only after a "disaster" that "results in the loss of a substantial number of housing units"; a "sudden influx of displaced households"; or "[o]ther events as determined by the Secretary." 24 C.F.R. § 888.113(c)(4)(i), (ii), (iii). This language requires the Secretary to find a

relevant "event," a term that must be construed consistent with its two exemplars. *See* Plaintiffs' Motion for Preliminary Injunction ("Pls.' Br.") at 26-27. This Court can readily review whether such an "event" has occurred.

Here, HUD points to no real-world "event" at all, let alone one consistent with the textual examples. It points only to the Interim Report, which describes preliminary findings from a demonstration project that concluded *before* HUD issued the Rule.[1] *See* HUD Br. at 22. That is not an "event"; it is one preliminary study of events occurring in the years before the Final Rule. Nothing changed in the real world since the Rule's promulgation except HUD's leadership. And as described in Section I.B, *infra*, nothing in the Interim Report was particularly surprising.

Even if the Interim Report could be considered an "event" of some sort, it certainly is not of the same character as "the loss of a substantial number of housing units" or a "sudden influx of displaced households." 24 C.F.R. § 888.113(c)(4)(i), (ii). As Plaintiffs argued in their opening brief, the interpretive principle of *ejusdem generis* ordinarily requires that the more general term "event" be construed consistent with the more specific examples preceding it. Otherwise, the two exemplar events would be entirely superfluous. *See* Pls.' Br. at 26.

In response, HUD offers multiple competing constructions of the regulation. These constructions all ignore relevant regulatory language, the overall regulatory scheme, and HUD's own description of its suspension authority in the Rule's preamble.

HUD argues, first, for unbridled discretion such that it need not point to an "event" at all. The agency rips from the middle of 24 C.F.R. § 888.113(c)(4) this sentence: "HUD may suspend a Small Area FMR designation from a metropolitan area, or may temporarily exempt a PHA in a

[1] HUD does not appear to argue that the other reasons it gave for suspending the Rule's requirements—the filing of comments in the "Reducing Regulatory Burden" docket and its own bare assertion that PHAs are unready to comply—constitute "events."

Small Area FMR metropolitan area from use of the Small Area FMRs, when HUD by notice makes a documented determination that such action is warranted." HUD Br. at 21, 23. This sentence, HUD contends, confers unlimited authorization to suspend the Rule's requirements. *Id.* at 23 ("There are no conditions on that permission.").

HUD overstates the discretion that sentence confers even standing alone. It equates this sentence with one authorizing suspension of the Rule "at any time for any reason the [Secretary] considers appropriate." HUD Br. at 21 (quoting *Steenholdt v. Federal Aviation Admin.*, 314 F.3d 633, 638 (D.C. Cir. 2003)). The Rule, however, contains no such language. HUD makes Plaintiffs' case by illustrating how to write a rule that confers the discretion it claims.

The more fundamental problem for HUD, however, is that the provision does not end there. The next sentence imposes exactly the "conditions" that HUD contends are missing by setting forth the "[a]ctions that may serve as the basis of a suspension of Small Area FMRs." 24 C.F.R. § 888.113(c)(4). HUD's construction would make this sentence entirely superfluous.

Second, HUD retreats to arguing that it has complete discretion as to what is an "event" justifying suspension. It concedes that this interpretation requires ignoring the two specific examples preceding the word "events" that, under standard *ejusdem generis* principles, should inform that word's construction. HUD argues that *ejusdem generis* gives way where the "obvious purpose" of the provision requires ignoring the exemplar events. HUD Br. at 23-24. But here the "obvious purpose" *supports* construing "event" by reference to the two regulatory exemplars.

The most authoritative evidence of the agency's contemporaneous intent in drafting the provision—the Rule's preamble—makes clear that HUD intended precisely the restricted meaning of "events" that the two textual examples suggest. The preamble states that, to suspend a small area FMR designation, HUD must make "a documented finding of adverse rental

housing market conditions . . . (for example, the metropolitan area experiences a significant loss of housing units as a result of a natural disaster)." *See* 81 Fed. Reg. 80,569 (Nov. 16, 2016); Pls.' Br. at 26-27. Language in a preamble "may serve as a source of evidence concerning contemporaneous agency intent" regarding the meaning of regulatory terms, *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999).[2] Plaintiffs explained that the preamble confirms the intent to limit the Secretary's authority to suspend small area designations to certain types of events. *See* Pls.' Br. at 26. HUD effectively concedes the point.

HUD argues, nonetheless, that regulatory purpose to confer unlimited authority can be gleaned from the fact that the "events" triggering suspension of a small area FMR designation are "determined by the Secretary." HUD Br. at 25. But that language merely provides the Secretary with the authority to determine whether a qualifying event merits suspension of a small area FMR designation. That is, the Secretary is not *required* to suspend a small area FMR designation every time a designated area experiences a disaster.

Finally, HUD argues as to *how ejusdem generis* informs proper construction of the key term "events." HUD Br. at 26. This argument, like HUD's others, fails to account for the meaning and purpose of 24 C.F.R. § 888.113 as a whole. As Plaintiffs explained, the common theme of the two exemplar events—a disaster and influx of displaced households—is that both are "unexpected events resulting in a sudden change in localized local market conditions." Pls.'

[2] *See, e.g.*, *Booker v. Edwards*, 99 F.3d 1165, 1168 (D.C. Cir. 1996) (relying on preamble of HUD regulation to help discern regulation's meaning); *see also Halo v. Yale Health Plan, Dir. of Benefits & Records Yale Univ.*, 819 F.3d 42, 52 (2d Cir. 2016) ("[I]t does not make sense to interpret the text of a regulation independently from its preamble.") (internal quotation marks omitted) (quoting Kevin M. Stack, *Interpreting Regulations*, 111 Mich. L. Rev. 355, 361 (2012)); *cf. Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 288-89 (2009) (in upholding agency action, finding it consistent with agency's construction of relevant regulation in preamble).

Br. at 26. Far from being "arbitrarily derived" to suit a litigation position, HUD Br. at 26, this construction honors the "cardinal principle" of interpretation that a court must "give effect, if possible, to every clause and word." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal citation omitted). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme," for example where "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (internal citation omitted). Here, HUD's claims regarding its suspension authority are not remotely "compatible with the rest of the law."

No freestanding provision authorizes suspension of small area FMR designations. There is, rather, one unified provision—24 C.F.R. § 888.113(c)(4)—which begins by *requiring* HUD to make small area FMR designations (using specified criteria, not HUD's whim) immediately upon the Rule's promulgation and every 5 years thereafter. The suspension language follows, permitting HUD to suspend an area's (or PHA's) designation between cycles. Thus, suspension is the exception to the general rule that a designated small area will remain such until the next cycle. It therefore must be construed in a manner that complements—rather than contradicts—the mandate that HUD make small area FMR designations in accordance with specific criteria.

Against this background, what is relevant about the two exemplar events is that they affect the dynamics of the local private rental market in ways unforeseen when HUD designated small areas. A disaster reduces private rental supply; an influx of displaced households increases demand. Either way, such unexpected events may affect whether the area still meets the Rule's criteria for small area FMR designation, such as having a sufficient private market vacancy rate. *See* 24 C.F.R. § 888.113(c)(1) (setting out criteria). They also may render annually calculated small area FMRs temporarily unreliable in certain neighborhoods.

HUD counters that, instead, both are "market conditions resulting in negative impacts on voucher families," and so any event that arguably meets that much broader standard authorizes suspension. HUD Br. at 26. The Secretary did not articulate this standard in the Suspension Memorandum. In any event, such a standard for suspension decisions would be misplaced in the context of 24 C.F.R. § 888.113(c) as a whole. Whether market conditions have "negative impacts on voucher families," HUD Br. at 26, has nothing to do with whether any area meets regulatory criteria for small area designation or whether its FMRs remain reliable. Nor does HUD's stated reason for acting (that the Rule could result in fewer rental units priced below the relevant FMRs and thus "available" to Housing Choice Voucher ("HCV") holders, *see* HUD Br. at 27).

Under HUD's reading, the agency must regularly designate small areas, using objective criteria set forth in the regulation, but then has absolute discretion to suspend any or all of them for reasons having nothing to do with whether those criteria continue to be met. HUD's construction would set a single provision at war with itself simply because HUD did not restate the overall thrust of 24 C.F.R. § 888.113(c)—requiring HUD to designate areas in which small area FMRs are mandatory, according to specified criteria—in each subsequent sentence. Plucking phrases out of context in this manner is not fair or reasonable interpretation. *See Am. Chem. Council v. Johnson*, 406 F.3d 738, 741 (D.C. Cir. 2005) (where statute elsewhere makes clear that it pertains to "toxic" chemicals, it was unreasonable for agency to seize on sentence in which "toxic" modifier was not included as authority that it could regulate non-toxic chemicals).

The bottom line is that it is HUD, not Plaintiffs, that offers a "dramatic rewriting of regulatory language," HUD Br. at 23-24. HUD's position is unreasonable and its claim that it "has not adopted any prior conflicting interpretations of its regulation," *id.* at 26, is incorrect. HUD offered just such a conflicting interpretation in the Rule's preamble.

2. HUD's Belated Publication of a Notice Soliciting Comment Does Not Cure HUD's Procedural Violation.

HUD asserts that its publication on December 11, 2017 (the due date of this reply brief) of a notice soliciting comment on its suspension moots any procedural objection. HUD Br. at 32; *see* Notice, Solicitation of Comment (published Dec. 11, 2017), attached as Exhibit A to Samberg-Champion Decl. This argument is meritless. If anything, HUD's belated notice simply confirms the illegality of its suspension of the Small Area FMR Rule's requirements.

The publication of notice and soliciting of comments regarding an action already taken does not moot a challenge to that action. Indeed, the notice does not purport to publish a proposed rule; does not state that the agency will act in response to comments received; and does not otherwise purport to be a recognized step in the APA's notice-and-comment process. Rather, the notice simply confirms that HUD already has taken the relevant final action—delay of a final rule—without complying with required procedures. Notice at 5. HUD's belated request for comment effectively acknowledges that HUD should have used notice-and-comment procedures in the first place, yet it does not address that error by properly instituting such procedures.

Plaintiffs' claim based on lack of proper promulgation can be mooted only by the completion of a notice-and-comment rulemaking and issuance of a new final rule. *See Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n*, 680 F.2d 810, 814 (D.C. Cir. 1982). That is because what moots the claim is not the comments, but the superseding rule. *See Natural Res. Def. Council, Inc. v. Envt'l Prot. Agency*, 683 F.2d 752, 768 (3d Cir. 1982) ("provision of post-promulgation notice and comment procedures cannot cure the failure to provide such procedures prior to the promulgation of the rule at issue"). To the extent HUD means this Court to deny preliminary relief on the assumption that the agency will quickly promulgate such a rule, there is no basis for such an assumption. HUD has not even issued a proper notice of proposed

rulemaking, let alone provided reason to think that any further determination it issues on this topic will be any more lawful than the existing one.[3]

B. HUD's Delay of the Small Area FMR Rule Was Arbitrary and Capricious.

Plaintiffs explained in their opening brief that HUD's reasoning was arbitrary and capricious because HUD failed to adequately explain how the evidence it cited justified its sudden change of course. HUD's response only confirms that failure. HUD argues that it was reasonable not to immediately require the use of small area FMRs based on certain findings in the Interim Report. Even if that were true (and it is not), that was not the question before the agency, which was not writing on a blank slate. Rather, HUD was required to explain *what changed*; for example, why the findings in the Interim Report on which it relies were unexpected and unsettled key premises underlying the Small Area FMR Rule. It makes no attempt to do so.

This failure to explain its change of position renders HUD's reasoning arbitrary and capricious for two distinct reasons. First, HUD fails to adequately explain why it is suspending the Rule based on the same concerns that it either rejected when issuing the Rule or added provisions to the Rule to remedy. Second, HUD fails to adequately explain why the benefits of immediately proceeding with the Rule—and the harms of failing to do so—that led it to promulgate that Rule over industry objection are suddenly outweighed by the same concerns.

1. HUD Fails to Adequately Explain Why the Concerns It Previously Rejected Now Justify Suspension of the Rule.

[3] Although Plaintiffs cannot litigate the legality of a non-existent determination, any subsequent action likely would suffer from many of the same arbitrary-and-capricious issues plaguing HUD's initial suspension order. Moreover, should HUD someday attempt to roll back the Small Area FMR Rule in a way that otherwise complies with Administrative Procedure Act requirements, such an action would run afoul of HUD's obligation to affirmatively further fair housing. Plaintiffs have not pressed this claim in this motion in the interests of expedition, because HUD's action is so clearly procedurally unlawful, but HUD's action is unlawful substantively as well. *See* Complaint (Doc. 1) ¶¶ 30-31, 159-163.

HUD relies largely on the Interim Report's findings to justify its suspension of the Small Area FMR Rule. However, it fails to explain how those findings were unexpected or unaccounted for by the Final Rule. That failure to explain (or even acknowledge) its change of course makes HUD's action arbitrary and capricious.

As Plaintiffs explained in their opening brief, the concerns HUD identifies based on the Interim Report analysis were ones it explicitly considered and addressed when it issued the Rule. With respect to loss of available housing units, the Rule makes use of small area FMRs mandatory throughout affected metropolitan areas, which was not the case for the demonstration project PHAs. It thus provides that units lost in some areas will be made up for by newly available units elsewhere. *See* Pls.' Br. at 15; Declaration of Will Fischer (Doc. 15-6) ¶ 7. Moreover, the Small Area FMR Rule (unlike the demonstration project) specifically targets areas where the use of small area FMRs is likeliest to result in an *increase* in units available. 81 Fed. Reg. 80,579. HUD does not explain why, given these distinctions, the (entirely expected) loss of available units in the demonstration projects informs the likely outcome in the jurisdictions affected by the Rule.

Moreover, the Rule added specific protections that were not present in the demonstration project sites to minimize harm to voucher holders in the designated areas. For example, HUD now contends that it suspended the Rule because the Interim Report's findings caused it to fear a reduction in available units in low-income neighborhoods and a potential increase in rent burden on low-income families. *See* Suspension Mem. at 5 ("Units in lower-rent zip codes that have relatively modest rents may now be too expensive for voucher families to rent . . . "); *id.* ("Another finding of concern is the potential for the Small Area FMR demonstration to increase the family's rent burden . . . "). But HUD not only expressly considered and discounted these

concerns when issuing the Rule, it created specific protections to ensure that HCV families would not see a sudden increase in their rent burden and that voucher holders would not have fewer units available to them because of lower payment standards in lower-rent zip codes.

For example, the Final Rule:

- Allows PHAs to "hold harmless" HCV tenants who see their payment standard decrease as a result of a decrease in the local FMR. 81 Fed. Reg. at 80,571.
- Limits to 10 percent the amount by which any small area FMR can drop from the area's FMR from the prior fiscal year. *Id.*
- Provides that PHAs "may establish different policies regarding how decreases in payment standards will apply [to voucher recipients in] designated areas within the jurisdiction." *Id*. at 80,573.
- Permits a PHA using small area FMRs to increase the payment standard in a zip code where the FMR has decreased. *Id*.
- Maintains the requirement that PHAs may not reduce payment standard amounts for existing tenants until, on average, 13 to 24 months following the effective date of the changed payment standards. 81 Fed. Reg. 80,573; 81 Fed. Reg. 39,233.

These provisions, and others, authorize PHAs to protect against the very short-term dangers that HUD now claims justify suspending the Rule. They ensure that, over the next two years, tenants will not be subject to suddenly increased rent burden and the supply of housing available to voucher holders will not suddenly decrease. (And while these provisions also protect against longer-term problems, that is irrelevant; the effects over the next two years are the only ones that matter with respect to the reasonableness of a two-year suspension.)

HUD fails to adequately explain how a study of the demonstration project sites, where those protections were *not* in place, can empirically demonstrate that the measures HUD created to address these concerns are insufficient. Lacking evidence, it relies on speculation. *See* HUD Br. at 30 (relying on speculation that Final Rule's protections "*may* only slow the pace of those loss of units") (emphasis added); *id.* (pointing to purported concern for choices available to "families that must move to a new unit" and families on waiting list without attempting to quantify whether their choices will increase or decrease under the Rule). Remarkably, HUD relies heavily on its assessment that vouchers in some of the demonstration project sites are underutilized, *even after acknowledging that the Interim Report did not conclude that use of small area FMRs was the reason for this*. HUD Br. at 13, 29; Suspension Memorandum at 6. It is insufficient for HUD to assert in conclusory fashion that "the tenant protections provided in the final rule [are] inadequate to address the concerns raised by the Interim Report," HUD Br. at 30; it must explain *why* (and with evidence) it has changed its mind regarding their adequacy.[4]

Such an unexplained "180 degree turn away from [precedent is] arbitrary and capricious," and an agency's decision "to reverse its position in the face of a precedent it has not persuasively distinguished is quintessentially arbitrary and capricious." *La. Pub. Serv. Comm'n v. Fed. Energy Regulatory Comm'n,* 184 F.3d 892, 897 (D.C.Cir.1999). "'[T]he core concern underlying the prohibition of arbitrary and capricious agency action' is that agency 'ad hocery' is impermissible." *Ramaprakash v. Fed. Aviation Admin. & Nat'l Transp. Safety Bd.*, 346 F.3d

[4] HUD similarly offers an inadequate explanation for why it has failed to develop guidance for PHAs. It now claims that the need for guidance arose recently because it "is tied to the worrisome findings in the Interim Report." HUD Br. at 31. But this is just not so. HUD promised to produce guidance for the PHAs—including to head off the very concerns on which HUD now relies—contemporaneously with the Final Rule's release. *See* Pl. Br. at 14. HUD still offers no cognizable explanation for its failure to do so.

1121, 1130 (D.C. Cir. 2003) (quoting *Pacific N.W. Newspaper Guild, Local 82 v. Nat'l Labor Relations Bd.*, 877 F.2d 998, 1003 (D.C. Cir. 1989)); *see also ANR Pipeline Co. v. Fed. Energy Regulatory Comm'n*, 71 F.3d 897, 901 (D.C. Cir. 1995) ("Where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious."). That is exactly what happened here.

In its Suspension Memorandum, HUD also cites comments responding to the Reducing Regulatory Burden Notice it published in May 2017, but fails to discuss them meaningfully. *See* Suspension Mem., at 7 (citing unnamed concerns about Rule and implementation timeline). HUD calls it a "red herring" that Plaintiffs point out that those comments contained nothing new and instead (literally) incorporated comments that HUD already considered in promulgating the Rule. HUD Br. at 31. All that matters, HUD argues, is whether those comments contain "valid concerns." *Id.* But the question is not whether those comments would have made it reasonable for HUD not to promulgate the Rule in the first place. Rather, the question—which HUD does not even try to answer—is why comments previously rejected or otherwise addressed now justify a policy change.[5] HUD asks this Court to review its action under the deferential standard of review applicable to initial agency decisions. *See* HUD Br. at 28. This ignores that "review of an

[5] As Plaintiffs explained earlier, *see* Pls.' Br. at 32, HUD's reliance on these comments also fails to satisfy arbitrary and capricious review because the Suspension Memorandum fails to provide any specifics as to which comments mattered and why. An agency may not rely on such vague generalizations. *See Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 101 (D.D.C. 2006) ("Merely describing an impact and stating a conclusion of non-impairment is insufficient, for this merely sets forth the facts found and the choice made, without revealing the "rational connection" (quotation marks omitted)). In its opposition brief, HUD for the first time identifies sentiments expressed in those comments that it deems relevant to its action. HUD Br. at 31. Those arguments are impermissible post-hoc rationalizations, *see Riffin v. Surface Trans. Board*, 592 F.3d 195, 198 (D.C. Cir. 2010); *Manin v. Nat'l Transp. Safety Bd.*, 627 F.3d 1239, 1242-43 (D.C. Cir. 2011). In any event, HUD still does not (and cannot) contend that the comments said anything *new* such as to support a change of course.

agency action is more demanding where the challenged decision stems from an administrative about-face." *Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 189 (D.D.C. 2008).

For example, in *Louisiana Public Service Commission v. Federal Energy Regulatory Commission*, the agency's dismissal of a complaint that a public utility misallocated costs contained reasoning that directly conflicted with its previous practice regarding the relevant calculation. 184 F.3d at 896. The D.C. Circuit reversed the agency's decision after finding that the agency adopted the precise argument that it had previously rejected when distinguishing the types of services. *Id*. The same logic applies here. HUD now accepts the very same arguments in suspending the Small Area FMR Rule that it rejected when promulgating the Rule, without even acknowledging its change in course.

2. HUD Failed to Adequately Consider the Benefits of the Small Area FMR Rule and the Costs of Suspending It.

In response to Plaintiffs' argument that HUD failed to adequately consider the benefits of the Small Area FMR Rule, HUD asserts that it fully considered the Rule's benefits but found them outweighed by harms. HUD Br. at 29. No such balanced consideration appears in HUD's Suspension Memorandum.

In two sentences, the Suspension Memorandum cursorily notes that the demonstration project showed an increase in the number of HCV recipients moving to high-income neighborhoods and a decrease in costs for participating PHAs—that is, it acknowledges that small area FMRs were having the desired effects, without discussing why those results matter. Suspension Memorandum at 5. HUD devotes the remainder of the eight-page memorandum to discussing what it believes are the costs associated with implementation of the Rule. It thus fails to adequately consider the benefits of using small area FMRs—and the costs of not doing so—that led it to promulgate the Rule. HUD's failure to consider this evidence renders its decision

arbitrary and capricious. *See, e.g.*, *Morall v. Drug Enf't Admin.*, 412 F.3d 165, 178 (D.C. Cir. 2005) ("DEA's decision does not withstand review because the agency decisionmaker *entirely ignored* relevant evidence."); *Robinson v. Nat'l Transp. Safety Bd.*, 28 F.3d 210, 215-16 (D.C. Cir. 1994) (holding action arbitrary and capricious where Board ignored relevant testimony).

As HUD noted when it promulgated the Rule (but ignored when suspending it), the opportunity to move to higher income neighborhoods has important and life-changing benefits for voucher families. These benefits go beyond improved housing, including access to better schools, safer neighborhoods, more health care facilities, and improved job opportunities. 81 Fed. Reg. at 80,575. And, as HUD acknowledged in the final Rule, high poverty areas as a whole (and not merely individual voucher holders) benefit from reductions in concentrated neighborhood poverty. *Id*. at 80,569. HUD entirely fails to address or consider these benefits in suspending the Rule. Moreover, HUD does not mention, let alone consider, evidence in the Interim Report demonstrating that—as the Final Rule contemplates—overall subsidy costs to the government fell as a result of use of small area FMRs. Interim Report at ix-x.

The Suspension Memorandum devotes almost eight pages to the supposed costs of the Rule to, but does not devote a single sentence to the costs of *suspending* the Rule. For example, suspension of the Rule will ensure the continued concentration of voucher holders in low-income neighborhoods. *See* 81 Fed. Reg. at 80,570. Indeed, since the Small Area FMR Rule ended and replaced the 50th Percentile Rule—HUD's prior program to address HCV voucher concentration—HUD's suspension of the Rule's requirements leaves voucher holders with even less access to housing in higher opportunity, lower poverty areas than before. HUD does not explain why this situation now is tolerable when it previously was not.

HUD may have implicitly assumed such costs are acceptable for a two-year period, but that would conflict with its findings when promulgating the Rule. As HUD acknowledged then, "recent research demonstrates that long term outcomes for families improved the sooner the family is able to move out of areas with high poverty rates." 81 Fed. Reg. at 39,224. Accordingly, the longer HCV recipients remain in low-income neighborhoods, the greater the negative effects on their and their children's health, education, and earning potential.

II. HUD's Delay of the Small Area FMR Rule Will Irreparably Harm Plaintiffs

A. Plaintiffs Crystal Carter and Tiara Moore Will Suffer Irreparable Harm If HUD's Violation of the APA Is Not Enjoined.

In their opening brief, Plaintiffs explained how Crystal Carter and Tiara Moore had specific plans to immediately move to better opportunity using the enhanced voucher value that the Small Area FMR Rule provided them, and how HUD's unlawful suspension of the Rule irreparably deprived them of that opportunity for at least two years. In response, HUD essentially contends that these individual Plaintiffs will not suffer irreparable harm from the Rule's suspension because the Rule will not help its intended beneficiaries obtain the housing they desire and because such housing will not materially improve their lives. HUD Br. at 33-34. This position contradicts the findings of HUD's own rulemaking and is unsupported by the Interim Report on which HUD so heavily relies.

As HUD does not dispute, the suspension of the Rule immediately deprives voucher holders like Ms. Carter and Ms. Moore of a more valuable voucher for at least two years, in turn depriving them of the opportunity to seek and procure desired housing that the Rule is intended to provide them. That loss of voucher value and concomitant opportunity is a concrete harm that warrants preliminary injunctive relief. HUD demands more certainty as to how Plaintiffs would take advantage of that opportunity than the law requires. *See, e.g.*, *Bonnette v. D.C. Ct. of App.*,

796 F. Supp. 2d 164, 187 (D.D.C. 2011) (granting preliminary injunction to require accommodations that gave test-taker better chance of passing bar exam, without requiring certainty that these accommodations would change outcome); *Mova Pharm. Corp. v. Shalala*, 955 F. Supp. 128, 131 (D.D.C. 1997) (granting preliminary injunction to pharmaceutical company deprived of statutory right to exclusively market a drug without requiring proof of how movant would profit from exclusivity), *aff'd* 140 F.3d 1060 (D.C. Cir. 1998).[6]

With respect to Ms. Carter, HUD demands myriad unnecessary and unrealistic details. First, it faults her for not pointing to specific housing for which she has applied in Simsbury. HUD Br. at 34. But until the Rule is in effect, applying for such housing is futile; the whole premise underlying the Small Area FMR Rule is that voucher holders like Ms. Carter cannot utilize their vouchers to rent units in places like Simsbury because current payment standards are not sufficient to make units in those areas affordable to voucher holders. What Ms. Carter has established—and all that is required—is that she intends to apply for and obtain such housing as soon as it is possible for her to do so. Carter Decl. at 1.

Second, HUD argues that higher payment standards do not *guarantee* that Ms. Carter can get the housing she desires. It speculates that landlords in Simsbury might not rent to Ms. Carter and faults her for not proving otherwise. HUD Br. at 34. Under Connecticut state law, however, a landlord's refusal to accept vouchers is unlawful. *See* Conn. Gen. Stat. § 46a-64c (2012);

[6] *See also Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1165-66 (9th Cir. 2011) (upholding preliminary injunction to require accommodations that gave test-taker better chance of passing bar exam, without requiring certainty that these accommodations would change outcome); *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (reversing denial of preliminary injunction where improper denial of driver's licenses prevented plaintiffs from applying for jobs, without showing that they necessarily would get the job); *see also Info. Scis. Corp. v. United States*, 73 Fed. Cl. 70, 127 (2006) (collecting cases holding that deprivation of right to compete for contract fairly is irreparable injury, without requiring showing that contract actually would have been won).

Comm'n on Human Rights & Opportunities v. Sullivan Assocs., 250 Conn. 763, 764-65 (Conn. 1999). In a similar vein, HUD speculates (without supporting evidence) that there may not be four-bedroom rental units available within Simsbury at rents that would be affordable to Ms. Carter even under the Small Area FMR Rule. HUD Br. at 34. This assertion is belied by HUD's own calculation, based on detailed housing market data, that $1,940 per month will be sufficient.

HUD also questions whether the benefits that would accrue to the Carters from moving to Simsbury are substantial. HUD Br. at 33-34. That is to say, it questions the Rule's conclusion that the benefits of living in a low-crime environment (and harms of living in a high-crime neighborhood) are real and argues, without authority, that Ms. Carter must demonstrate an imminent risk that she or her family will be the victims of a crime if they cannot move. *Id.* The heightened risk of victimization associated with living in a high-crime environment, however, is sufficient to constitute irreparable harm. *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148, 153 (S.D.N.Y. 1989) (granting preliminary injunction in Fair Housing Act challenge to tenant selection practices of landlord in low-crime area). HUD similarly dismisses as "speculative" that residing in a high-crime area has adverse psychological and other effects, and that moving from such an area has provable long-term benefits for children in particular. However, the Rule relies on well-documented findings of such effects.[7] HUD Br. at 34. HUD suggests that Ms. Carter's family will not see educational benefits from moving to a higher

[7] *See* Raj Chetty, et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106(4) American Economic Review 855, 858 (2016); Margery Austin Turner & Lynette Rawlings, *Promoting Neighborhood Diversity: Benefits, Barriers, and Strategies*, Urban Institute (2009), at 2. Studies evaluating mobility counseling programs for Housing Choice Voucher holders have demonstrated significant mental health benefits for individuals relocating to low-poverty areas, in significant part because of the amelioration of the stress associated with living in a high-crime environment. *See* Lora Engdahl, *New Neighborhoods, New Schools: A Progress Report on the Baltimore Housing Mobility Program*, Poverty & Race Research Action Council (2009), at 27.

opportunity neighborhood because some of her children already attend school in Simsbury, HUD Br. at 34, but that does not account for the other benefits that would accrue from moving to Simsbury, such as cleaner air, lower lead paint exposure, lower stress, and greater access to community amenities like parks and libraries. *See* Carter Decl. at 1 (expressing a desire "to live in a safer and healthier neighborhood environment" for her children).

HUD argues that the extra time the Carter children must spend commuting to and from school is not sufficiently serious harm to support a preliminary injunction. HUD Br. at 34. HUD incorrectly characterizes this as an economic harm to minimize the need for preliminary relief; in reality, the harm to the children is the opportunity cost of spending hours on a bus instead of participating in after school activities, studying, and engaging in active play. The loss of these opportunities may not be quantifiable, but it is real and irreparable.

With respect to Tiara Moore, HUD misunderstands how her intentions fit into the HCV regulatory scheme. HUD observes that the Chicago Housing Authority, as a Moving to Work PHA, has flexibility in setting payment standard amounts and argues that Ms. Moore, therefore, would not benefit from the Small Area FMR Rule. HUD Br. at 35. But Ms. Moore does not complain that she cannot live where she wants to *in Chicago*; rather, she wants to move to a low-poverty area *in DuPage County, Illinois*. Moore Decl. at 1-2. The Chicago Housing Authority does not set payment standards in DuPage County; the DuPage County PHA performs that function. 24 C.F.R. § 982.503(a)(1) (public housing authorities set payment standards for their own jurisdiction). The DuPage County PHA (unlike the Chicago Housing Authority) is not a Moving to Work PHA,[8] but it is covered by the Small Area FMR Rule. Thus, HUD's arguments

[8] The list of MTW PHAs—which includes no PHAs in DuPage County—can be found here: https://www.hud.gov/program_offices/public_indian_housing/programs/ph/mtw/mtwsites

only underscore that preliminary relief would ensure that Ms. Moore gets the opportunity to seek housing in DuPage County that HUD's unlawful suspension of the Rule denies her.

HUD also states in conclusory fashion that its arguments about why Ms. Carter's injuries are not irreparable apply equally to Ms. Moore. HUD Br. at 35. For the same reasons stated above with respect to Ms. Carter, these arguments fail with respect to Ms. Moore, who similarly has documented in concrete fashion her intentions to move to DuPage County and the benefits such a move would provide her family. *See, e.g.*, Moore Decl. at 2 (describing how her commuting time would be significantly reduced if she were able to move to DuPage County).

B. OCA Will Suffer Irreparable Harm If HUD's Violation Is Not Enjoined.

HUD does not contest that Plaintiff OCA will suffer irreparable injury from the Small Area FMR Rule's suspension. HUD Br. at 35-36. Instead, HUD argues that the harm OCA indisputably will suffer does not have a sufficiently "serious effect" to warrant preliminary relief. *Id.* at 36. This argument is premised on an erroneous view of the law.

HUD asserts, incorrectly, that an organization such as OCA can obtain preliminary injunctive relief only where "the claimed monetary loss 'threatens the very existence of the movant's business.'" HUD Br. at 36 (quoting *Wis. Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985). This is a misleading partial quotation from the relevant passage in *Wisconsin Gas Co.*, which sets that high bar for preliminary relief where (unlike here) monetary relief *can* be obtained later. The full sentence is as follows: "*Recoverable* monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." 758 F.2d at 674 (citing *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n.3 (D.C. Cir. 1977)) (emphasis added).

Here, OCA's monetary losses are *not* recoverable because the Administrative Procedure Act does not provide a damages remedy. 5 U.S.C. § 702. *Wisconsin Gas Co.* thus does not apply. Rather, imminent and unrecoverable economic loss is "more than sufficient, especially when considered together with the other [preliminary injunction] factors" to constitute irreparable harm. *Brendsel v. Office of Fed. Hous. Enter. Oversight*, 339 F. Supp. 2d 52, 67 (D.D.C. 2004); s*ee also Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 243 (D.D.C. 2014) (finding that unrecoverable economic harm was imminent where a cost would be incurred following an upcoming deadline). Absent preliminary relief, OCA will be required to divert a substantial amount of its limited resources—hundreds of hours of staff time, from an organization with three full-time employees—to redressing the effects of HUD's action, resources that it cannot recover. *See* Samberg-Champion Decl., Ex. B.[9] No more is required. *See, e.g.*, *Sherley v. Sebelius*, 704 F. Supp. 2d 63, 72 (D.D.C. 2010), vacated on other grounds, 644 F.3d 388 (D.C. Cir. 2011).

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

HUD argues in perfunctory fashion that the equities disfavor injunctive relief. The only basis for this assertion is the (largely unsupported) claim that immediate implementation of the Rule will drive voucher families into "homelessness." HUD Br. at 37. Nothing in the Interim

[9] As Plaintiffs' opening brief explained, and as further detailed in the attached Declaration of Erin Boggs, because of the suspension, OCA will need to devote significant resources to (among other things) attempting to secure the voluntary adoption of small area FMRs by public housing authorities in the Hartford metropolitan area—resources it otherwise would not have to expend. Boggs Decl. at 5. The effort necessary to do so is immense in proportion to OCA's limited resources. There are 20 public housing authorities in the Hartford area in addition to the Connecticut Department of Housing, which administers the HCV Program across Connecticut. To persuade these public housing authorities to voluntarily adopt small area FMRs, OCA will have to schedule meetings with the leadership of 21 different entities, prepare individualized materials and talking points for those meetings, hold follow-up meetings as needed, attend and travel to public hearings for the entities' public housing agency plans, and prepare and submit written and oral comments on those plans.

Report supports this assertion, which contradicts HUD's findings in promulgating the Rule. For the reasons stated herein and in Plaintiffs' opening brief, the public interest in fact supports preliminary relief, to ensure (among other things) that HUD follows the law.

IV. Plaintiffs' Requested Injunction Is Not Overbroad

Finally, HUD argues that Plaintiffs may only secure an injunction against enforcement of its Suspension Order as applied to the metropolitan areas in which Plaintiffs reside—the Chicago and Hartford areas.[10] *See* HUD Br. at 37-38. This argument rests on the erroneous premise that HUD made discrete and severable determinations with respect to each of the 23 areas affected by the Small Area FMR Rule. As the documents HUD attached to its opposition make clear, HUD did no such thing. Rather, it made a single determination, reflected in the memorandum signed by Secretary Carson on August 10, to suspend the requirements of the Small Area FMR Rule for non-localized reasons. An order of this Court setting that memorandum aside necessarily will invalidate HUD's suspension of the Small Area FMR Rule's requirements for each area.

The very caselaw that HUD cites in fact supports Plaintiffs. In *State of Nebraska Department of Health & Human Services v. Department of Health and Human Services*, 435 F.3d 326 (D.C. Cir. 2006), the plaintiff did not challenge the policies at issue "on their face[s]," but rather application of those policies to itself. *Id.* at 329 (brackets in original). Because the plaintiff did not seek vacatur of the policies, it was not entitled to an injunction accomplishing such vacatur. *Id.* at 330. Here, by contrast, Plaintiffs do not challenge a specific application of a broader HUD action, but rather challenge the action itself (HUD's wholesale suspension of the Small Area FMR Rule's requirements). This Court is empowered to vacate that action in its

[10] HUD excludes Chicago, where Tiara Moore resides, presumably based on HUD's position that Ms. Moore lacks standing, a position that is incorrect as explained in the text.

entirety if it finds the agency action unlawful. *See* 5 U.S.C. § 706(2) ("The reviewing court *shall hold unlawful and set aside* agency action, findings, and conclusions" that violate the Administrative Procedure Act) (emphasis added); *Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 671 (D.C. 2006) ("'Set aside' usually means 'vacate.'").

CONCLUSION

For the reasons stated in this brief and in Plaintiffs' opening brief, this Court should grant Plaintiffs a preliminary injunction requiring HUD to vacate the memorandum signed by Secretary Carson suspending the requirements of the Small Area FMR Rule, rescind its notices that it will not enforce the Small Area FMR Rule's requirements for affected PHAs, and take all other necessary steps to ensure that the affected PHAs use payment standards based on small area FMRs beginning on January 1, 2018, as HUD's regulation requires.

Dated: December 11, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2017 I filed the foregoing Plaintiffs' Reply Memorandum of Law in Support of Motion for a Preliminary Injunction on CM/ECF, which shall serve as notice of filing on all counsel of record.

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