



October 15, 2018

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

**Re: Docket No. FR-6123-A-01: Affirmatively Furthering Fair Housing: Streamlining and Enhancements**

To Whom It May Concern:

New York University's Furman Center for Real Estate and Urban Policy appreciates the opportunity to submit comments on HUD's Advance Notice of Proposed Rulemaking, Affirmatively Furthering Fair Housing: Streamlining and Enhancements.<sup>1</sup> The NYU Furman Center advances research and debate on housing, neighborhoods, and urban policy by providing academic and empirical research, promoting frank and productive discussions among stakeholders, and providing essential data and analysis to practitioners and policymakers.<sup>2</sup>

The Furman Center has conducted considerable research over many years on residential segregation and the connections between housing and neighborhood conditions, or "opportunities."<sup>3</sup> We also have researched the relationship between various land use and housing policies and economic and racial segregation.<sup>4</sup> During the 2013-2014 academic year, the Furman Center oversaw NYU's Straus Institute for the Advanced Study of Law and Justice fellowship program. This program brought together eleven scholars from around the world to spend the year at NYU researching residential segregation and inequality. In September 2013, we convened 60 leading researchers, practitioners, and policymakers for a two-day roundtable to assess the current state of research and policy analysis regarding racial and economic segregation and integration in neighborhoods and schools. On Martin Luther King Day in 2014, the Furman Center launched *The Dream Revisited*, an online platform to bring leading academics, researchers, practitioners, advocates, and government officials together for thoughtful debates about the challenges associated with segregation, and to generate the new thinking needed to help address those challenges. Discussion 16 of *The Dream Revisited* focused on HUD's Affirmatively Furthering

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<sup>1</sup> 83 Fed. Reg. 40713 (Aug. 16, 2018).

<sup>2</sup> These comments do not represent the institutional views (if any) of NYU, NYU's School of Law, or NYU's Wagner Graduate School of Public Service. The Furman Center is grateful for the conscientious research assistance provided by students at NYU School of Law and the NYU Wagner Graduate School of Public Service: Tessa Arthur, Rachel Flaherty, Isaac Guttman, and Michael Quinn.

<sup>3</sup> For a summary of our recent research related to residential segregation, see Appendix A.

<sup>4</sup> See Appendix B.

Fair Housing final rule.<sup>5</sup> On November 29, 2017, the Furman Center hosted a policy breakfast, “New York City’s Upcoming Assessment of Fair Housing: Lessons from Other Cities,” which featured a moderated panel of experts who were early submitters of Assessments of Fair Housing.<sup>6</sup> Most recently, on June 20, 2018, the Furman Center hosted a roundtable discussion for nearly 40 academics, research groups, community-based organizations, and government agencies that focused on how advocates and scholars in the education and housing fields can work together to decrease segregation and promote integration in both domains.

In the five decades since the passage of the Fair Housing Act (FHA), integration has remained elusive. Most Americans continue to live in segregated cities and neighborhoods.<sup>7</sup> This contributes to persistent inequities in access to opportunity by race and economic status. Black-white segregation on average has fallen steadily, but very slowly, and levels of segregation among Hispanics and Asians have held roughly constant since 1980. Most of those who have studied HUD’s efforts over the decades have concluded that HUD has failed to provide recipients of federal funding with sufficient tools to meet their statutory duty “affirmatively to further” fair housing,<sup>8</sup> and to effectively enforce this obligation.<sup>9</sup> Yet despite early evidence that the Affirmatively Furthering Fair Housing (AFFH) rule at issue in the proposed rulemaking improves upon the processes it replaced, HUD proposes suspending the rule after less than two years of experience. To do so would ignore substantial evidence that HUD’s proposed alternatives have been persistently and demonstrably ineffective and consign yet another generation to live in segregated and unequal neighborhoods.

## I. Recent Trends in Racial Segregation

Although segregation has decreased since the FHA was enacted, integration has been slow and inconsistent. While black-white segregation has declined since 1980, black and white people nevertheless rarely shared neighborhoods in 2010.<sup>10</sup> Despite rapidly increasing Hispanic and Asian populations, these groups also have remained largely segregated from white people since 1980.<sup>11</sup> By some measures, white-Hispanic segregation may even be increasing.<sup>12</sup> In 2010, the average American state had a black-white dissimilarity index of 73, meaning that 73 percent of black

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<sup>5</sup> NYU FURMAN CENTER FOR REAL ESTATE AND URBAN POLICY, A NEW APPROACH TO AFFIRMATIVELY FURTHERING FAIR HOUSING (2015), <http://furmancenter.org/thestoop/entry/a-new-approach-to-affirmatively-furthering-fair-housing>.

<sup>6</sup> NYU FURMAN CENTER FOR REAL ESTATE AND URBAN POLICY, NEW YORK CITY’S UPCOMING ASSESSMENT OF FAIR HOUSING: LESSONS FROM OTHER CITIES (2017), <http://furmancenter.org/thestoop/entry/watch-live-new-york-citys-upcoming-assessment-of-fair-housing-lessons-from>.

<sup>7</sup> Paul A. Jargowsky, *The Persistence of Segregation in the 21st Century*, 36 L. & Ineq. 207 213 (2018).

<sup>8</sup> 42 U.S.C. §§ 3608(d), (e)(5) (2006).

<sup>9</sup> See *infra* notes 55-76.

<sup>10</sup> JOHN R. LOGAN & BRIAN J. SHULTS, US2010 PROJECT, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS 2-4 (2011), <https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf>. For an overview of residential segregation across American states and cities, see Daniel T. Lichter, Domenico Parisi & Helga De Valk, *Residential Segregation, PATHWAYS: STATE OF THE UNION 2016* (2016), <https://inequality.stanford.edu/sites/default/files/Pathways-SOTU-2016-Residential-Segregation-3.pdf>.

<sup>11</sup> Jorge De La Roca, Ingrid Gould Ellen & Katherine M. O’Regan, *Race and Neighborhoods in the 21<sup>st</sup> Century: What Does Segregation Mean Today?*, 47 REGIONAL SCI. & URB. ECON. 138 140 (2014).

<sup>12</sup> *Id.*

people would need to move within the state in order for black and white populations to be integrated.<sup>13</sup> Similarly, 66 percent of Asians and 61 percent of Hispanics, on average, would need to move within their states to achieve integration.<sup>14</sup>

People of color remain a scant minority in most of the neighborhoods where integration is taking place.<sup>15</sup> During the 1990s and 2000s, integration was largely a result of the movement of black households into predominantly white neighborhoods.<sup>16</sup> In the last two decades white residents have been “more willing to live with a token number of blacks and Latinos, but they are still unwilling to distribute evenly across black and Latino neighborhoods.”<sup>17</sup> Building on Schelling’s famous study that showed how extreme segregation can result from even modest preferences to live among same-race neighbors, Card, Mas and Rothstein (2008) have found continued empirical evidence of that phenomenon among whites,<sup>18</sup> and Ellen (2000) shows that white people remain generally resistant to moving to neighborhoods in which the majority of residents are people of color.<sup>19</sup>

Black people especially have been left out of integration and its accompanying benefits. Segregation decreases most quickly in metro areas with small black populations; conversely, metropolitan areas with large black populations living in poverty showed the highest levels of black-white segregation, as measured by the dissimilarity index, in 2010.<sup>20</sup> Whereas the share of neighborhoods in which less than 2.5 percent of the population is black has declined,<sup>21</sup> the proportion of black people living in integrated neighborhoods actually *decreased* from 41 percent in 1970 to around 21 percent in 2010.<sup>22</sup> Even in relatively integrated cities, people’s day-to-day lives remain highly segregated.<sup>23</sup>

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<sup>13</sup> Daniel T. Lichter, Domenico Parisi & Michael C. Taquino, *Spatial Segregation*, PATHWAYS: STATE OF THE STATES 30 (2015).

<sup>14</sup> *Id.*

<sup>15</sup> See Jackelyn Hwang, *Residential Mobility by Whites Maintains Segregation Despite Recent Changes*, NYU FURMAN CENTER (Dec. 2016), <http://furmancenter.org/research/iri/essay/residential-mobility-by-whites-maintains-segregation-despite-recent-changes>.

<sup>16</sup> Ingrid Gould Ellen, Katherine O’Regan & Keren Horn, *Pathways to Integration: Examining Changes in the Prevalence of Racially Integrated Neighborhoods*, 14 CITYSCAPE 33 41 (2012).

<sup>17</sup> Junia Howell & Michael O. Emerson, *Preserving Racial Hierarchy Amidst Changing Racial Demographics: How Neighborhood Racial Preferences Are Changing While Maintaining Segregation*, 41 ETHNIC & RACIAL STUD. 2770 2783 (2018).

<sup>18</sup> David Card, Alexandre Mas & Jesse Rothstein, *Tipping and the Dynamics of Segregation*, 123 Q. J. ECON. 177 212 (2008).

<sup>19</sup> INGRID GOULD ELLEN, *SHARING AMERICA’S NEIGHBORHOODS* (2000).

<sup>20</sup> LOGAN & STULTS, *supra* note 10, at 6-7; Jacob S. Rugh & Douglas S. Massey, *Segregation in Post-Civil Rights America: Stalled Integration or End of the Segregated Century?*, 11 DU BOIS REV.: SOC. SCI. RES. RACE 205 214 (2014).

<sup>21</sup> Janice Fanning Madden & Matt Ruther, *The Paradox of Expanding Ghettos and Declining Racial Segregation in Large U.S. Metropolitan Areas, 1970-2010*, 40 J. HOUS. ECON. 117 119 (2018).

<sup>22</sup> Ronald J.O. Flores & Arun Peter Lobo, *The Reassertion of a Black/Non-Black Color Line: The Rise in Integrated Neighborhoods Without Blacks in New York City, 1970-2010*, 35 J. URB. AFF. 255 266 (2012).

<sup>23</sup> In a study of the everyday movements of residents in the 50 largest American cities, Wang et al. (2018) found that residents of primarily black and Hispanic neighborhoods, whether or not they were poor, were “far less exposed to either nonpoor or white middle-class neighborhoods than residents of primarily white neighborhoods.” Qi Wang, Nolan Edward Phillips, Mario L. Small & Robert J. Sampson, Proceedings of the National Academy of Sciences of the United States of America, *Urban Mobility and Neighborhood Isolation in America’s 50 Largest Cities* 1 (2018), <http://www.pnas.org/content/pnas/early/2018/07/03/1802537115.full.pdf>.

Segregation is particularly prevalent for people of color living in poverty. Between 2006 and 2010, the average Hispanic New Yorker lived in a neighborhood with a poverty rate of 25 percent, and the average black New Yorker lived in a neighborhood with a poverty rate of 22 percent. The poverty rate in the typical white New Yorker's neighborhood, by contrast, was 13 percent.<sup>24</sup> These figures reflect similar disparities nationwide; across America, high-poverty neighborhoods are disproportionately populated by racial and ethnic minorities.<sup>25</sup> Further, between 2000 and 2011, the number of black and Hispanic people living in high-poverty neighborhoods increased by 39 and 51 percent, respectively.<sup>26</sup> Racially disparate rent burdens and housing costs fortify the link between segregation and poverty.<sup>27</sup> Research has repeatedly shown that people of color pay higher rent than white people for identical units; in a study released this year, Early et al. (2018) found that black people paid, on average, 2.5 percent more than white people for identical housing.<sup>28</sup> They also found that moving into neighborhoods with higher white populations increased the rent premium for black households.<sup>29</sup> These burdens are compounded by racial disparities in wealth and income: black and Hispanic people earn lower wages than their white counterparts,<sup>30</sup> have significantly less wealth,<sup>31</sup> and are disproportionately likely to live in poverty.<sup>32</sup>

The interaction of racial segregation and poverty leads to areas of concentrated poverty and hyper-segregation. At the same time, white people continue to live primarily among other white people. Between 2011 and 2015, the average white resident of a metropolitan area lived in a neighborhood that was 72 percent white, and 16 percent more white than the metropolitan area overall.<sup>33</sup> Emerson and Howell (2017) thus observe that even white people who live in racially diverse cities frequently “live together with other minorities in the same communities but at the

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<sup>24</sup> Ingrid Gould Ellen, Jessica Yager & Maxwell Austensen, *The Paradox of Inclusion and Segregation in the Nation's Melting Pot*, in The Walter Stafford Project on Inequality in New York City 11 (forthcoming 2018).

<sup>25</sup> PAUL A. JARGOWSKY, THE CENTURY FOUNDATION AND RUTGERS CTR. FOR URB. RESEARCH & EDUC., CONCENTRATION OF POVERTY IN THE NEW MILLENNIUM: CHANGES IN PREVALENCE, COMPOSITION, AND LOCATION OF HIGH POVERTY NEIGHBORHOODS 4 (2013).

<sup>26</sup> *Id.*

<sup>27</sup> JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., RENTER COST BURDENS BY RACE AND ETHNICITY (2016), [http://www.jchs.harvard.edu/ARH\\_2017\\_cost\\_burdens\\_by\\_race\\_table](http://www.jchs.harvard.edu/ARH_2017_cost_burdens_by_race_table).

<sup>28</sup> Dirk W. Early et al., *Racial Rent Differences in U.S. Housing Markets* 3 (2018), <http://economics.virginia.edu/sites/economics.virginia.edu/files/papers/ECO-DISCRIMINATION-TEXT-TABLES-6-18-18.pdf>; Patrick Bayer et al., *Racial and Ethnic Price Differentials in the Housing Market*, 102 J. URB. ECON. 91, 98-99 (2017).

<sup>29</sup> Early et al., *supra* note 28, at 11.

<sup>30</sup> Eileen Patten, *Racial, Gender Wage Gaps Persist in U.S. Despite Some Progress*, PEW RESEARCH CTR. (July 1, 2016), <http://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/>.

<sup>31</sup> Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RESEARCH CTR. (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/>.

<sup>32</sup> U.S. CENSUS BUREAU, *POV-01. Age and Sex of All People, Family Members, and Unrelated Individuals Iterated by Income-to-Poverty Ratio and Race*, <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pov/pov-01.html>. See also Margaret C. Simms, Karina Fortuny & Everett Henderson, *Racial and Ethnic Disparities Among Low-Income Families*, THE URB. INSTITUTE (Aug. 2009), <https://www.urban.org/sites/default/files/publication/32976/411936-Racial-and-Ethnic-Disparities-Among-Low-Income-Families.PDF>.

<sup>33</sup> Joe Cortright, *How Diverse Are the Neighborhoods White People Live In?*, CityObservatory: CityCommentary (Sep. 1, 2017), <http://cityobservatory.org/how-diverse-are-the-neighborhoods-white-people-live-in/>.

same time live apart from them with mostly white neighbors.”<sup>34</sup> For example, in 2010, the average white resident of New York City lived in a neighborhood that was 63 percent white, despite the fact that only one-third of the city’s residents are white.<sup>35</sup> Goetz has documented the “extreme segregation of whites and of the affluent,” and with it the emergence of white “racially concentrated areas of affluence.”<sup>36</sup> In Goetz’s study of fifteen metro areas, areas of concentrated affluence averaged 93 percent white.<sup>37</sup>

## II. Harms of Segregation

HUD has justified its intent to suspend the AFFH rule in part by citing a study by Harvard economists which describes the effect that moving to a lower-poverty neighborhood has on the economic outcomes of children in families with low incomes.<sup>38</sup> HUD claims that “peer-reviewed literature indicates that the positive outcomes of policies focused on deconcentrating poverty are likely limited to certain age and demographic groups.”<sup>39</sup>

HUD misreads or misunderstands the study and its conclusions.<sup>40</sup> The Harvard study finds “robust evidence that children who moved to lower-poverty areas when they were young (below age 13) are more likely to attend college and have substantially higher incomes as adults. These children also live in better neighborhoods themselves as adults . . . .”<sup>41</sup> For adolescents, moving provided fewer years of exposure to the lower-poverty neighborhood, and the disruptive effects of moving appeared to outweigh the beneficial effects of that exposure on their earnings, college attendance, and other outcomes as adults.<sup>42</sup> But the study specifically notes that it is “limited by the fact that the MTO experiment only randomized voucher offers; it did not randomize the age at which children moved, which could be correlated with other unobservable factors.”<sup>43</sup>

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<sup>34</sup> Daniel T. Lichter, Domenico Parisi & Michael C. Taquino, *Together but Apart: Do US Whites Live in Racially Diverse Cities and Neighborhoods?*, 43 *POPULATION AND DEV. REV.* 229-230 (2017).

<sup>35</sup> Ellen, Yager & Austensen, *supra* note 24, at 8.

<sup>36</sup> Edward G. Goetz, Tony Damiano & Jason Hicks, *Racially Concentrated Areas of Affluence: A Preliminary Investigation* 11, 16 (Univ. of Minn. Humphrey Sch. of Pub. Aff., Working Paper, 2017), <https://conservancy.umn.edu/bitstream/handle/11299/192356/RCAA-Goetz.pdf?sequence=1&isAllowed=y>.

<sup>37</sup> *Id.* at 16.

<sup>38</sup> Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 *AM. ECON. REV.* 855-856 (2016).

<sup>39</sup> 83 Fed. Reg. 40713-40714 (proposed Aug. 16, 2018).

<sup>40</sup> Indeed, Lawrence Katz, one of the study’s authors, has rejected HUD’s characterization of the study, stating: “I have a quite different interpretation of the findings from our 2016 MTO study. Overall, the research shows that deconcentrating poverty is likely to greatly improve the health and well-being of low-income families and to have long-run economic and educational benefits for the children of low-income families.” Henry Grabar, Ben Carson Ends Obama-Era Efforts to Reduce Housing Segregation, *SLATE* (Oct. 11, 2018, 7:33 PM), <https://slate.com/business/2018/08/ben-carson-ends-obama-era-efforts-to-reduce-housing-segregation.html>.

<sup>41</sup> Chetty, Hendren & Katz, *supra* note 37, at 899. More recent research by Chetty and his colleagues bolsters the conclusions of the Harvard study, finding that “[m]oving to a neighborhood that is just a mile or two away can change children’s average earnings by several thousand dollars a year and have significant effects on a spectrum of other outcomes ranging from incarceration to teenage birth rates. Raj Chetty et al. (2018), *The Opportunity Atlas: Mapping the Childhood Roots of Social Mobility* 49 (Opportunity Insights, Working Paper), [https://opportunityinsights.org/wp-content/uploads/2018/10/atlas\\_paper.pdf](https://opportunityinsights.org/wp-content/uploads/2018/10/atlas_paper.pdf).

<sup>42</sup> Chetty, Hendren & Katz, *supra* note 37, at 858.

<sup>43</sup> *Id.* at 885.

HUD's interpretation thus ignores the study's careful parsing of what could be learned from the experiment about the effects moving to a lower poverty neighborhood has on adolescents. It elides the study's obvious and stated conclusion that neighborhood quality has a dramatic impact on a child's future outcomes. Contrary to HUD's characterization, the study presents a clear and resounding case for the cruciality of providing less-segregated, higher-opportunity neighborhoods to *all* children as early in life as possible, and provides no reason for HUD to retreat from the AFFH rule.

It is also worth noting that the Harvard study was limited in its evaluation, looking only at adults' economic outcomes.<sup>44</sup> Previous evaluations of the same MTO experiment found that "moving to lower-poverty areas greatly improved the mental health, physical health, and subjective well-being of adults as well as family safety."<sup>45</sup> Further, the Harvard study specifically notes that the positive effects it finds for children may be "mediated by parental health and stress, which were improved by the MTO treatments."<sup>46</sup>

HUD's reliance on the Harvard study also ignores the considerable body of evidence about how segregation affects the quality of education a person receives as well as that person's exposure to violence; their health; and other key determinants of one's life chances. Merely attending school in a racially-isolated, high-poverty neighborhood (an area of "concentrated disadvantage") reduces a black student's verbal ability—a powerful indicator of future life outcomes—as significantly as if that student missed an entire year of school.<sup>47</sup> In hyper-segregated areas, black residents are exposed to higher levels of violent crimes,<sup>48</sup> which has been shown to have detrimental effects on children's performance in school.<sup>49</sup>

Living in a highly-segregated, high-poverty neighborhood is associated with lower life expectancy and a sharp increase in greater health risks like infant mortality.<sup>50</sup> Additionally, racial

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<sup>44</sup> Chetty, Hendren & Katz, *supra* note 38, at 888-89.

<sup>45</sup> *Id.* at 856 (citing as examples of the previous work Lawrence F. Katz, Jeffrey R. Kling & Jeffrey B. Liebman, *Moving to Opportunity in Boston: Early Results of a Randomized Mobility Experiment* 37 (NBER, Working Paper, 2000); Jeffrey R. Kling, Jeffrey B. Liebman & Lawrence F. Katz, *Experimental Analysis of Neighborhood Effects*, 75 *ECONOMETRICA* 83 (2007); Susan Clampet-Lundquist & Douglas S. Massey, *Neighborhood Effects on Economic Self-Sufficiency: A Reconsideration of the Moving to Opportunity Experiment*, 114 *Am. J. Soc.* 107 (2008); Jens Ludwig et al., *Long-Term Neighborhood Effects on Low-Income Families: Evidence from Moving to Opportunity*, 103 *AM. ECON. REV. PAPERS & PROCEEDINGS* 226 (2013)).

<sup>46</sup> Chetty, Hendren, & Katz, *supra* note 38 at 891 (citing Jens Ludwig et al., *Neighborhoods, Obesity, and Diabetes: A Randomized Social Experiment*, 365 *NEW ENGLAND J. MED.* 1509 (2011); Jens Ludwig et al., *Neighborhood Effects on the Long-Term Well-Being of Low-Income Adults*, 337 *SCI.* 1505 (2012)).

<sup>47</sup> Robert J. Sampson, Patrick Sharkey & Stephen W. Raudenbush, *Durable Effects of Concentrated Disadvantage on Verbal Ability Among African-American Children* (Proceedings of the National Academy of Sciences of the United States of America: 2008), <http://home.uchicago.edu/sraudenb/files/DurableEffects08.pdf>.

<sup>48</sup> Gregory Acs et al., *The Cost of Segregation: National Trends and the Case of Chicago, 1990-2010*, *The Urb. Institute* 6 (March 2017).

<sup>49</sup> Patrick Sharkey, Amy Ellen Schwartz, Ingrid Gould Ellen & Johanna Lacoé, *High Stakes in the Classroom, High Stakes on the Street: The Effects of Community Violence on Students' Standardized Test Performance*, 1 *Soc. Sci.* 199 209 (May 2014).

<sup>50</sup> Michael R. Kramer & Carol R. Hogue, *Is Segregation Bad for Your Health?*, 31 *Epidemiology Rev.* 178 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4362512>; *see also* Jens Ludwig et al., *Long-Term Neighborhood Effects on Low-Income Families: Evidence from Moving to Opportunity*, 103 *AM. ECON. REV.* 226 (2013); Barbara Sard & Douglas Rice, *Creating Opportunity for Children: How Housing Location Can Make a Difference*, *CTR. ON*

and economic segregation interferes with low-income adults' employment prospects, especially for black adults with low incomes.<sup>51</sup> Economies in areas with higher levels of segregation tend to grow more slowly or for shorter periods of time.<sup>52</sup>

There is ample evidence, therefore, that racially and economically integrated neighborhoods provide greater opportunities than those with significant racial segregation and concentrated poverty, and that living in racially and economically integrated neighborhoods provides substantial benefits to children and adults with low incomes. To argue that the AFFH rule is not appropriate because the Harvard study shows that economic benefits of living in less-segregated and lower-poverty neighborhoods are highest when children live in those neighborhoods for more of their lives makes a mockery of the FHA. The evidence supports *more* rather than less vigorous effort to ensure that every community provides fair housing for all its residents in every neighborhood. The fact that much of the damage of segregation is done by the time children reach adulthood does not suggest that we should weaken our efforts to achieve fair housing. Instead it shows the imperative of achieving fair housing quickly to ensure that we don't harm yet another generation.

### III. Failures of Past Efforts to Further Fair Housing

#### HUD's Search for a Fair Housing Rule

Section 3608 of the FHA requires HUD to administer its programs "in a manner affirmatively to further the purposes" and policies of the Act.<sup>53</sup> Over the years HUD has attempted, in fits and starts, to specify what the jurisdictions and public housing authorities (PHAs) it funds must do to comply with this duty to affirmatively further fair housing. These sporadic attempts by Congress and HUD to regulate and enforce the AFFH provision largely failed,<sup>54</sup> at least until the AFFH regulation was adopted in 2015.

The first attempt to enforce the FHA's mandate came in the early 1970s, when HUD Secretary George Romney quietly launched the "Open Communities" initiative, requiring HUD officials to "reject applications for water, sewer and highway projects from cities and states where local policies fostered segregated housing."<sup>55</sup> The initiative, however, was quickly quashed after

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BUDGET AND POLICY PRIORITIES (Oct. 15, 2014), [https://www.cbpp.org/research/creating-opportunity-for-children#\\_1](https://www.cbpp.org/research/creating-opportunity-for-children#_1).

<sup>51</sup> Margery Austin Turner & Karina Fortuny, *Residential Segregation and Low-Income Working Families*, The Urban Institute (Paper 10, Feb. 2009), <https://www.urban.org/sites/default/files/publication/32941/411845-Residential-Segregation-and-Low-Income-Working-Families.PDF>; Margery Austin Turner, *Residential Segregation and Employment Inequality*, in *Segregation: The Rising Costs for America* 151, 153-55 (James H. Carr & Nandinee K. Kutty eds., 2008).

<sup>52</sup> Acs et al., *supra* note 48, at 6; Corey Chan, *Separate and Suffering: The Damaging Effects of Residential Segregation on Metropolitan Economies*, CHI. POL. REV. (Jan. 29, 2014), <http://chicagopolicyreview.org/2014/01/29/separate-and-suffering-the-damaging-effects-of-residential-segregation-on-metropolitan-economies/>; CHRIS BENNER & MANUEL PASTOR, EQUITY, GROWTH, AND COMMUNITY: WHAT THE NATION CAN LEARN FROM AMERICA'S METRO AREAS 45, 229 (2015).

<sup>53</sup> 42 U.S.C. §§ 3608(d), (e)(5) (2006).

<sup>54</sup> NAT'L COMM'N ON FAIR HOUS. AND EQUAL OPPORTUNITY, *THE FUTURE OF FAIR HOUSING* 37-38 (2008) [hereinafter *THE FUTURE OF FAIR HOUSING*].

<sup>55</sup> Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA

public outcry, and this backtracking set the stage for decades of inattention to the fair housing mandate. In the 1980s, Congress amended the Housing and Community Development Act<sup>56</sup> to require PHAs and cities receiving certain HUD grants to “certify” their compliance with Section 3608, without any guidance as to what compliance actually meant. Five years later, HUD issued a regulation setting forth a standard for compliance but, again, provided no concrete guidance to grantees.<sup>57</sup> For numerous reasons—including competing objectives at HUD, inadequate staffing, and a generally weak regulatory design—the amended law and new regulation did little to further fair housing.<sup>58</sup>

## Failures of the AI Process

In the 1990s, through Executive Order 12,892<sup>59</sup> and ensuing HUD regulations, the government began to define communities’ obligations under Section 3608 more clearly. Under the regulations adopted by HUD in 1995, jurisdictions were required to file annual certifications attesting that they were affirmatively furthering fair housing. Specifically, jurisdictions were required to: identify local impediments to fair housing choice; take appropriate actions to overcome the effects of any impediments; and keep records of the analysis and actions taken.<sup>60</sup> They also had to prepare an “Analysis of Impediments to Fair Housing Choice” (AI) within a year of the new regulations and include a summary of the AI in future reports. In 1996, HUD published a Fair Housing Planning Guide with recommendations (not requirements) about how grantees should prepare their AIs and keep them up-to-date, suggesting that jurisdictions update their AIs every three to five years.<sup>61</sup>

Several design flaws, however, hampered the effectiveness of the AI process. In 2010, a report by the Government Accountability Office (GAO) identified various weaknesses in the process. Drawing both on its own analysis and on the findings of a 2009 internal study by HUD, the GAO highlighted the wide variation in the format and quality of AIs, attributing the variation to the absence of any required process for preparing and updating their analyses.<sup>62</sup> Many AIs consisted merely of reports that jurisdictions were otherwise required to submit to HUD,<sup>63</sup> and more than 35 percent of AIs the GAO reviewed were outdated. Most problematically, they appeared to be of little practical value to communities and HUD. Only 12 of the 441 AIs the GAO

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(June 25, 2015), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law>.

<sup>56</sup> 42 U.S.C. §5306 (d)(7)(B), <https://www.law.cornell.edu/uscode/text/42/5306>.

<sup>57</sup> Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s “Affirmatively Further” Mandate*, 100 KY. J. OF L. 125, 133 (Mar. 2011).

<sup>58</sup> Hannah-Jones, *supra* note 55.

<sup>59</sup> Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 17, 1994). President Clinton’s 1994 executive order directed HUD to promulgate regulations detailing a “method” by which PHAs and communities could assess and address obstacles to fair housing in their jurisdiction. It also created the cabinet-level Fair Housing Council to “review the design and delivery of Federal programs and activities to ensure that they support a coordinated strategy to affirmatively further fair housing.”

<sup>60</sup> 42 C.F.R. §§ 570.487, 570.601, 570.904 (1995).

<sup>61</sup> Schwemm, *supra* note 57, at 150-52.

<sup>62</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-905, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS’ FAIR HOUSING PLANS 22 (2010) [hereinafter GAO REPORT].

<sup>63</sup> *Id.* at 15.

reviewed, for example, included timeframes for initiatives designed to overcome impediments to fair housing.<sup>64</sup> The report also noted that most AIs failed to include the signatures of top elected officials, as recommended by the Fair Housing Planning Guide. The widespread omission of such signatures undermined the AIs' legitimacy by "[raising] questions as to whether the officials endorse the analyses and support suggested actions in the AIs and are accountable for implementing them."<sup>65</sup> Under the current regime, the GAO concluded, AIs "add limited value going forward in terms of eliminating potential impediments to fair housing that may exist across the country."<sup>66</sup>

In a report marking the 40th anniversary of the Fair Housing Act in 2008, former HUD Secretaries identified the crux of the issue: "HUD requires no evidence that anything is actually being done as a condition of funding and it does not take adverse action if jurisdictions are directly involved in discriminatory actions or fail to affirmatively further fair housing."<sup>67</sup> Indeed, HUD rarely, if ever, has withheld funding from, or taken action against, a community that did not fulfill its obligations under Section 3608 regulations.<sup>68</sup> Weak enforcement in turn signaled to PHAs and communities that they could neglect fair housing. As the GAO report noted, "HUD's limited regulatory requirements and oversight" allowed many jurisdictions to place a "low priority on ensuring that their AIs serve as effective planning tools."<sup>69</sup>

#### **IV. The AFH Process**

##### **Development of the AFH Process**

The GAO recommended that HUD improve the clarity, timeliness, and accountability of the AI process. First, the GAO urged HUD to establish clearer "standards for grantees to follow in updating their AIs and the format that they should follow in preparing the documents."<sup>70</sup> Noting that the AI process had been plagued by untimely filings, the GAO recommended that HUD require that grantees "submit their AIs to the department on a routine basis" and set timelines for implementing their fair housing plans, and that HUD staff verify the timeliness of the AIs.<sup>71</sup> Finally, the GAO recommended that HUD increase its oversight over grantees; "assess the progress that grantees are achieving in addressing identified impediments"; provide feedback throughout the assessment process; and create accountability for noncompliance.<sup>72</sup>

HUD's commendable response was to dedicate substantial resources to improving the AI process. From 2010 to 2012, HUD's Office of Policy Development developed a system to provide HUD grantees with data useful for assessing fair housing issues in their jurisdictions.<sup>73</sup> HUD also

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<sup>64</sup> *Id.* at 19.

<sup>65</sup> *Id.* at 19-21.

<sup>66</sup> *Id.* at 31.

<sup>67</sup> THE FUTURE OF FAIR HOUSING, *supra* note 54, at 44.

<sup>68</sup> Hannah-Jones, *supra* note 55.

<sup>69</sup> GAO REPORT, *supra* note 62, at 22.

<sup>70</sup> *Id.* at 34.

<sup>71</sup> *Id.* at 33.

<sup>72</sup> *Id.*

<sup>73</sup> Declaration of Kalima K. Rose, Nat'l Fair Hous. All. v. Carson, No. 18-cv-01076-BAH, 2018 U.S. Dist. LEXIS 139679 (D.D.C. Aug. 17, 2018), (No. 18-cv-01076-BAH).

tested a Fair Housing and Equity Assessment among 74 grantee jurisdictions participating in the Sustainable Communities voluntary grant program. Based in part on that pilot, HUD issued a proposed AFFH rule in 2013, and engaged in a notice and comment process that drew more than 1,000 comments.<sup>74</sup> The Rule was promulgated in 2015<sup>75</sup> and created the Assessment of Fair Housing (AFH) process, a “collaborative federal mandate, requiring states and localities to create their own unique fair housing plans.”<sup>76</sup>

The design of the AFH process responds to several inadequacies in the AI process. First, the AFH process aims to provide grantee jurisdictions with the tools they need to develop clear and specific fair housing goals, and requires grantees to articulate the specific strategies they will take to achieve their goals. HUD provides each grantee with standardized national, regional, and local fair housing data, as well as an Assessment Tool to guide and structure their analysis of the data. Grantees must use the data and Assessment Tool to analyze segregation, disproportionate housing needs, racially or ethnically concentrated areas of poverty, and disparities in access to opportunities in their jurisdictions. They then must identify “factors that cause, increase, contribute to, maintain, or perpetuate” these problems.<sup>77</sup> HUD also requires grantees to share data and analysis with the public through a mandatory public engagement process.<sup>78</sup> Grantees must enumerate specific goals for advancing fair housing, identify relevant metrics and milestones as well as parties responsible for achieving those goals, and develop strategies and actions to realize the goals set out in their AFHs.<sup>79</sup> The AFH process also provides deadlines for compliance and reporting, and requires jurisdictions to specify timelines for implementing their policies, in an attempt to address the delays and lack of clear timeframes that hampered the AI process.<sup>80</sup>

The AFH process was designed to increase grantees’ and HUD’s accountability for affirmatively furthering fair housing. HUD reviews all jurisdictions’ AFHs and has the authority to accept or reject assessments. Non-acceptances must be accompanied by feedback informing grantees “of the reasons why HUD has not accepted the AFH and the actions that the program participant may take to resolve the nonacceptance.”<sup>81</sup> Early studies, outlined below, suggest that this process resulted in improvements in the assessments undertaken by grantees. By contrast, under the AI process, which did not provide for such review, HUD’s 2009 internal report found no evidence that jurisdictions were improving their AIs over time.<sup>82</sup>

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<sup>74</sup> Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42271 (July 16, 2015).

<sup>75</sup> *Id.*

<sup>76</sup> Justin Steil & Nicholas Kelly, “*Survival of the Fairest? An Analysis of Affirmatively Furthering Fair Housing Compliance*,” *forthcoming*, Housing Policy Debate (2018).

<sup>77</sup> 24 C.F.R. § 5.154(a) (2018).

<sup>78</sup> *Id.* § 5.154(d)(1)-(3).

<sup>79</sup> *Id.* § 5.154(d)(4)-(5); Justin Steil & Nicholas Kelly, *The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance 7* (The Future of Housing Policy in the U.S. Conference, Working Paper, 2017).

<sup>80</sup> 24 C.F.R. § 5.154 (2018).

<sup>81</sup> *Id.* §§ 5.160 (providing for HUD review of initial submissions), 5.162 (“HUD’s review of an AFH is to determine whether the program participant has met the requirements for providing its analysis, assessment, and goal setting, as set forth in § 5.154(d). The AFH will be deemed accepted after 60 calendar days after the date that HUD receives the AFH, unless on or before that date, HUD has provided notification that HUD does not accept the AFH. In its notification, HUD will inform the program participant in writing of the reasons why HUD has not accepted the AFH and the actions that the program participant may take to resolve the nonacceptance.”).

<sup>82</sup> NYU Furman Center for Real Estate and Urban Policy, Comment Letter on Proposed Rule Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants

## Early Evidence About the AFH Process

Contrary to HUD's claims that the new system has failed, early evidence indicates that the AFH process has improved upon the AI process. Although the AFH process was actively in use for less than two years, researchers at MIT and the Furman Center have gleaned insights from its early operations. MIT professor Justin Steil and his co-author Nicholas Kelly compared 28 of the first AFHs (as modified in response to HUD's comments on initial submission) with those municipalities' previous AIs.<sup>83</sup> They found "dramatic improvement over the prior AI regime" in several key areas.<sup>84</sup>

First, Steil and Kelly found that AFHs included "more new policies with measurable objectives" than previous AIs from the same municipalities.<sup>85</sup> AFHs were also more likely than AIs to specify policies and programs designed to achieve their enumerated goals. Pointing to scholarship on goal-setting, Steil and Kelly argue that the greater emphasis on specificity and measurability provided for in the AFH process render it more robust and transparent than the AI process.<sup>86</sup>

Steil and Kelly also observed that HUD's consistent provision of feedback benefited grantees in the AFH process. They found that the relatively high percentage of AFHs not accepted after their first submission indicated that the process was working well, because "non-acceptances provided participants with the opportunity to respond to HUD feedback and to strengthen their final AFHs so as to meet their fair housing obligation."<sup>87</sup> Under the AFH process, nearly all of the AFHs submitted early in the process were eventually accepted. By contrast, the GAO and HUD reports found a larger share of AIs to be substantively unacceptable or untimely, but without feedback from HUD, such failings were not addressed. Thus, Steil and Kelly note that the AFH process's active "pass-back" system "should be seen as a strength of the new rule, not a failure," disputing HUD's characterization of the number of AFHs initially rejected as a sign of the AFH process's shortcomings.<sup>88</sup>

The Furman Center studied the public engagement processes jurisdictions used in the AI and AFH processes, and found considerably more robust engagement under the latter. We presented these results in response to HUD's proposed delay of the AFFH rule in March 2018.<sup>89</sup> We compared 19 of the 28 AFHs that were submitted with the most recent AI each of those jurisdictions filed before the AFFH rule came into effect.<sup>90</sup> We observed that engagement

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3 (Mar. 6, 2018), [http://furmancenter.org/files/NYUFurmanCenter\\_CommentsAFHDelay\\_6MAR2018.pdf](http://furmancenter.org/files/NYUFurmanCenter_CommentsAFHDelay_6MAR2018.pdf).

<sup>83</sup> The AFHs Steil and Kelly considered had been modified in response to HUD's comments on their initial submissions. *See* 24 C.F.R. §§ 5.154(d), 5.160-162.

<sup>84</sup> Steil & Kelly, *supra* note 76, at 36.

<sup>85</sup> *Id.* at 20.

<sup>86</sup> *Id.* at 15.

<sup>87</sup> Justin Steil & Nicholas Kelly, *Snatching Defeat from the Jaws of Victory: HUD Suspends AFFH Rule That Was Delivering Meaningful Civil Rights Progress*, 26 POVERTY & RACE, Oct.-Dec. 2017, at 1.

<sup>88</sup> *Id.*

<sup>89</sup> NYU Furman Center, *supra* note 82.

<sup>90</sup> We considered AFHs filed between October 2016 (the first submission date) and July of 2017 filed by jurisdictions for which we could locate both an AFH and an AI.

processes were stronger in the AFH process with respect to: the number of opportunities for public engagement; the inclusiveness of those opportunities; the provision of data allowing HUD to assess public engagement; documentation and consideration of public input; and cross-jurisdictional or cross-sector engagement.<sup>91</sup> Jurisdictions used a wider range of communication strategies to solicit public participation and created more meaningful opportunities for participation under their AFH processes than in the processes used to prepare their AIs.<sup>92</sup> The final AFHs also consistently documented the engagement process, and quantified the extent of community participation, making the extent of public engagement more transparent than under the AI process. We noted that a likely source of these improvements is the inclusion of greater guidance about what kinds of public engagement should be used under the AFH process, as well as clarity that jurisdictions will be held accountable for public engagement. By contrast, the public engagement required of jurisdictions completing AIs was poorly understood,<sup>93</sup> and grantees rarely provided enough detail about the scope of their public engagement processes to permit HUD to assess the engagement.<sup>94</sup>

We also interviewed jurisdictions that were the first to file AFHs in order to put together a roundtable about lessons learned from their experiences, and heard many report that they found the AFH process both extremely helpful and more meaningful than the AI process. For example, representatives from New Orleans and Los Angeles—both early adopters of the AFH process—participated in the roundtable and lauded many aspects of the process.<sup>95</sup>

To be sure, some jurisdictions have found the extent of the analysis and level of detail required by the AFH process daunting, and many of the first jurisdictions using the process relied upon technical assistance that will be difficult to scale up for all jurisdictions. Such challenges are expected, however, in the introduction of any new system. First movers are pioneers, and those who come after benefit from the lessons learned during the initial implementation. That the implementation of a new program is not completely smooth does not justify abandoning it. Instead, it suggests that HUD should make improvements to simplify the process, document the lessons learned, and create opportunities for peer learning between the first movers and those who file their AFHs later. HUD could address each of the concerns it raises in the ANPR by investing in those natural next steps, rather than suspending the AFFH rule altogether. Further, HUD appears to be ignoring the evidence documenting the infirmities of the AI process. The decision to abandon a new, but apparently improved, system after just two years of experience, and revert to a process known to be deeply flawed, yet left in place for many years without improvement, defies common sense.

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<sup>91</sup> NYU Furman Center, *supra* note 82 at 2.

<sup>92</sup> *Id.* at 5-6.

<sup>93</sup> For example, the *Fair Housing Planning Guide*—HUD’s primary resource for jurisdictions compiling an AI—notes that “HUD does not expect the jurisdiction to follow the strict citizen participation requirements for their *first* [AI],” but that “HUD does expect the jurisdiction to develop an AI that involves and addresses concerns of the entire community.” See U.S. DEP’T HOUS. & URBAN DEV., FAIR HOUSING PLANNING GUIDE 2-5 (1996), <https://www.hud.gov/sites/documents/FHPG.PDF>.

<sup>94</sup> NYU Furman Center, *supra* note 82 at 7.

<sup>95</sup> NYU FURMAN CENTER, *supra* note 6.

## V. HUD's Proposed Course of Action Will Not Solve the Fair Housing Problem

### Past Efforts to Remove Regulatory Barriers and Thereby Increase Supply

The ANPR states that HUD is considering replacing the AFFH with changes to: “. . . (3) provide for greater local control and innovation” and “(4) seek to encourage actions that increase housing choice, including through greater housing supply.” Increasing housing supply by encouraging local experimentation and innovation is a worthy goal, but the federal government has tried many times, to little or no avail, to find ways to encourage federal, state, and local governments to reduce regulatory barriers that limit housing supply, drive up housing costs, and exclude low-income households. Further, increasing housing supply does not in any way guarantee that the additional supply will lead to *fair* housing—housing free from discrimination and segregation—as the affirmatively further fair housing mandate requires. The AFFH rule made strong, positive steps towards addressing segregation by introducing accountability and requiring grounded, localized analysis to address the failures of HUD's earlier fair housing efforts. If HUD believes it should address fair housing by focusing on barriers to housing supply, therefore, it should explain precisely how it intends to improve upon its ineffectual record in reducing barriers to increased housing supply, and show how the increased supply that will result will serve the goal of furthering *fair* housing.

The first recognition of the role that inefficient and exclusionary regulations played in limiting housing choice and supply came in 1968, the same year the Fair Housing Act was passed. Both the President's Committee on Housing (Kaiser Committee) and the National Commission on Urban Problems (Douglas Commission) found that some municipalities were using overly-restrictive zoning laws, subdivision requirements, and building codes to prevent housing affordable to lower-income groups from being built in their communities.<sup>96</sup>

Yet the problems observed by these commissions only got worse, according to President Reagan's Commission on Housing. That Commission's report, issued in 1982, noted the findings of the earlier commissions and lamented: “Despite these warnings and calls for reform, however, governments at all levels have continued to expand their regulatory control of housing.”<sup>97</sup> The Commission reviewed the recommendations of the earlier reports, noting:

In suggesting solutions, the Douglas Commission recommended greater centralization of land-use regulatory authority, reduction in incentives for fiscal and exclusionary zoning, fairer allocation of land-use costs between government and developer, and larger-scale development. Venturing farther, the Kaiser Committee recommended that the Federal government preempt local zoning and other land-use regulations in controlling Federal construction projects and low-income housing development. It favored State review of local zoning ordinances to ensure that they did not interfere with satisfying the housing needs of metropolitan areas, . . . . But unnecessary regulation has continued to grow since the Douglas and Kaiser panels' warnings . . . .<sup>98</sup>

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<sup>96</sup> NAT'L COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY (1968) (“The Kaiser Commission”).

<sup>97</sup> THE REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING xvi, 177 (1982).

<sup>98</sup> *Id.* at 179.

The Reagan President's Commission then set forth thorough and detailed recommendations about how to "reverse this trend and increase the affordability and availability of housing by reducing unnecessary government regulations."<sup>99</sup>

Despite the comprehensiveness of the Commission's proposed solutions, not even ten years went by before another commission was convened to address the issue. The Advisory Commission on Regulatory Barriers to Affordable Housing, appointed by President George H.W. Bush, and chaired by Secretary of Housing and Urban Development Jack Kemp, submitted its report, "*Not In My Back Yard*": *Removing Barriers to Affordable Housing*, in 1991. It concluded:

The negative impact of overregulation has caused concern in the affordable housing debate for several decades. In the past 24 years, no fewer than 10 federally sponsored commissions, studies, or task forces have examined the problem, including the President's Commission on Housing in 1981-1982. These study groups have made many thoughtful recommendations, usually to little avail. In the decade since 1981, the regulatory environment has if anything become a greater deterrent to affordable housing: regulatory barriers have become clearly more complex, and apparently more prevalent.<sup>100</sup>

The Commission documented, once again, the extent to which federal, state, and local regulations were adding to the cost, and decreasing the supply, of housing. And, once again, the Commission made a series of thoughtful, comprehensive, and specific recommendations, and lauded the promise of those recommendations:

Although regulatory barriers to affordable housing have proven remarkably resistant to change, this Commission is optimistic that the time is right for comprehensive regulatory reform.<sup>101</sup>

But thirteen years later, an update to *Not in My Backyard* noted that the 1991 report's "basic finding remains true today: exclusionary, discriminatory, or unnecessary regulations constitute formidable barriers to affordable housing." The 2005 report purported to "chart[] a workable and innovative strategy for HUD to help states and local communities reduce regulatory barriers. . . . includ[ing] a plan for decreasing barriers to affordable housing production at the federal level."<sup>102</sup> The strategy, however, was outlined in just four pages, and primarily involved lauding the initiatives HUD had underway.

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<sup>99</sup> *Id.* at xvi.

<sup>100</sup> "NOT IN MY BACK YARD": REMOVING BARRIERS TO AFFORDABLE HOUS., REPORT TO PRESIDENT BUSH AND SEC'Y KEMP BY THE ADVISORY COMM'N ON REGULATORY BARRIERS TO AFFORDABLE HOUS. 1 (1991), <https://www.huduser.gov/publications/pdf/notinmybackyard.pdf> [hereinafter "NOT IN MY BACK YARD" REPORT].

<sup>101</sup> *Id.* at 18.

<sup>102</sup> U.S. DEP'T OF HOUS. AND URBAN DEV., "WHY NOT IN OUR COMMUNITY?": REMOVING BARRIERS TO AFFORDABLE HOUSING 1 (2005), <https://www.huduser.gov/portal/Publications/wnioc.pdf>.

In the intervening years, scholars<sup>103</sup> and practitioners<sup>104</sup> alike have documented the continued threat that restrictive regulations pose to the supply and affordability of housing. But despite the many recommendations about how to reduce restrictions that impede the supply of affordable housing, there is no evidence that efforts to lower barriers to housing production have made much headway. Further, the federal government has few levers through which to effect such regulatory changes, given that state and local governments control the regulation of land use and development and set local affordable housing standards, while the federal government's role is confined to a limited set of financial incentives.<sup>105</sup>

Therefore, if HUD intends to substitute an approach to fair housing that relies upon reducing regulatory barriers in order to increase the supply of housing, it must articulate exactly how it is going to achieve success despite decades of prior efforts that have failed to solve the problem. It should document not only what it will do differently, but why it expects that its new programs will increase housing supply given how intractable this problem has proved to be. Specifically, it should address the challenges that have plagued past efforts, such as the difficulty of accurately and objectively quantifying both the benefits and the costs of specific regulations, so that efficient regulations can be separated from inefficient regulatory barriers.<sup>106</sup> This is often difficult to discern. For example, a study comparing California towns found no appreciable difference in prices between towns with growth controls and towns without.<sup>107</sup> Another study by several California state agencies found that, controlling for other factors, local density requirements did not have an appreciable effect on housing development costs.<sup>108</sup> Further, while quantifying the effect that regulations have on the cost of housing is not an easy task, quantifying the benefits is even more difficult. Qualitative and longer-term benefits, such as neighborhood diversity, are difficult to value, but have important effects on residents' well-being. HUD should therefore document how it will remove barriers to housing production with care and precision, not through a simplistic wide-ranging push for deregulation.

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<sup>103</sup> See Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply* 42 (NBER, Working Paper No. 20536, 2014), <http://www.nber.org/papers/w20536.pdf> (surveying the literature and concluding that “[t]he vast majority of studies have found that locations with more regulation have higher house prices and less construction”). See also Kristoffer Jackson, *Do Land Use Regulations Stifle Residential Development? Evidence from California Cities*, 91 J. URB. ECON. 45-46 (2016); Christian A.L. Hilber & Wouter Vermeulen, *The Impact of Supply Constraints on House Prices in England*, 126 ECON. J. 358-359 (2016).

<sup>104</sup> See, e.g., URBAN LAND INST. ET AL., *BENDING THE COST CURVE: SOLUTIONS TO EXPAND THE SUPPLY OF AFFORDABLE RENTALS* (2014), <https://www.enterprisecommunity.org/download?fid=790&nid=3688>; PAUL EMRATH, NAT'L ASSOC. OF HOME BUILDERS, *HOW GOVERNMENT REGULATION AFFECTS THE PRICE OF A NEW HOME* (2011).

<sup>105</sup> “NOT IN MY BACK YARD” REPORT, *supra* note 100, at 9.

<sup>106</sup> John M. Quigley & Larry A. Rosenthal, *The Effects of Land Use Regulation on the Price of Housing: What Do We Know? What Can We Learn?*, 8 *Cityscape* 69, 70 (2005).

<sup>107</sup> *Id.* at 84-85.

<sup>108</sup> CAL. DEP'T OF HOUS. AND CMTY. DEV. ET AL., *AFFORDABLE HOUSING COST STUDY: ANALYSIS OF THE FACTORS THAT INFLUENCE THE COST OF BUILDING MULTI-FAMILY AFFORDABLE HOUSING IN CALIFORNIA* 34 (Oct. 2014), <http://www.hcd.ca.gov/policy-research/plans-reports/docs/FinalAffordableHousingCostStudyReport-with-coverv2.pdf>. When controlling for other factors, affordable housing projects where the project had to be altered because of local design and review requirements were on average 7% more expensive than other developments; whereas projects facing community opposition (measured by four or more community meetings as a proxy for opposition) were on average 5% more expensive than other developments.

Regulation is also not the only barrier to integration at the local level. Community opposition to lower-cost housing and to increased density and growth perpetuates housing segregation.<sup>109</sup> Further, white residents have been shown to avoid neighborhoods with significant black populations and are willing to pay more to live in more homogenous areas, which further reinforces housing segregation patterns.<sup>110</sup> And, while research suggests that overt housing market discrimination has become less prevalent, it persists in more subtle forms.<sup>111</sup> Community opposition to affordable housing, housing market discrimination, and the compounding of individual choices about where to live present serious barriers to fair housing, requiring more complex and nuanced solutions than simply removing regulations.

### **Increasing the Supply of Housing Will Not Necessarily Result in *Fair* Housing**

Further, even a successful effort to “encourage . . . greater housing supply” would not guarantee that the FHA’s mandate that HUD and its grantees act “affirmatively to further” fair housing will be achieved. More housing does not necessarily mean more housing choice.<sup>112</sup> The FHA’s requirement that HUD and HUD grantees further fair housing is thus distinct from both housing supply and housing affordability. The courts have recognized this distinction, rejecting analyses of impediments that were “conducted through the lens of affordable housing, rather than *fair* housing,” as the FHA mandates.<sup>117</sup> Indeed, the HUD Fair Housing Planning Guide stresses that affordable housing does not by itself affirmatively further fair housing and, accordingly, the necessity of separately analyzing how housing opportunities are restricted for those in protected classes.<sup>118</sup>

As with deregulation, a precise and targeted approach to housing supply is necessary to ensure that a push to increase supply makes housing in racially- and economically- integrated neighborhoods affordable and accessible to low-income populations. Otherwise, deregulation may simply result in more high-end housing for affluent and disproportionately white residents, without promoting fair housing. In a recent study of New York City’s new construction, for example, the Furman Center found that new units are increasingly more expensive than older units; in 2016, the gap in rent charged between newly-constructed units and other units was \$400 per month, up from \$50 per month, in constant dollar, in 2010. Thus, as the city’s housing supply increased, it also became less accessible to low-income people.<sup>119</sup> Focusing exclusively on supply, though it may

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<sup>109</sup> Vicki Been, *City NIMBYs*, 33 J. LAND USE & ENVTL. LAW, 217 (2018); Tiffany Manuel, *Dismantling the Narratives that Constrain Public Support for Fair Housing: The Urgent Need to Reframe the Public Conversation to Build Public Will*, 27 J. AFFORDABLE HOUS. 92 (2018).

<sup>110</sup> ELLEN, *supra* note 19; Schwemm, *supra* note 57, at 133 (citing DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 95-96 (1993)).

<sup>111</sup> Margery Austin Turner, *Why Haven’t We Made More Progress in Reducing Segregation?*, NYU FURMAN CENTER (Apr. 2014), <http://furmancenter.org/research/iri/essay/why-havent-we-made-more-progress-in-reducing-segregation>.

<sup>112</sup> Vicki Been, Ingrid Gould Ellen and Katherine O’Regan, *Supply Skepticism: Housing Supply and Affordability, forthcoming*, Housing Policy Debate (2018).

<sup>117</sup> *United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, 668 F. Supp. 2d 548, 562 (S.D.N.Y. 2009).

<sup>118</sup> *Id.* at 563.

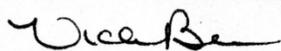
<sup>119</sup> Vicki Been, Stephanie Rosoff & Jessica Yager, NYU FURMAN CENTER, *2017 Focus: Changes in New York City’s Housing Stock*, in *State of New York City’s Housing & Neighborhoods – 2017 Report* 14 (2017), [http://furmancenter.org/files/sotc/SOC\\_2017\\_FOCUS\\_Changes\\_in\\_NYC\\_Housing\\_Stock\\_1JUN2018.pdf](http://furmancenter.org/files/sotc/SOC_2017_FOCUS_Changes_in_NYC_Housing_Stock_1JUN2018.pdf).

be worthwhile, is a distinct endeavor from advancing fair housing, and will not be sufficient to fulfill the FHA's mandate.

## **VI. Conclusion**

After decades of ineffective enforcement of the fair housing mandate, the pernicious effects of segregation remain widespread in American cities, at an enormous social cost and in disregard of the Fair Housing Act. While HUD's efforts to fulfill its obligation to affirmatively further fair housing over four decades have continuously fallen short, evidence suggests that the AFH process may be able to deliver results—yet HUD plans to suspend that process after less than two years of implementation. Returning to old and ineffective systems will deliver predictably lackluster results. Most distressingly, yet more Americans will grow up under the scourge of segregation. At this juncture, HUD has a choice between working to improve an approach that shows initial promise or returning to an approach that has indisputably failed. We urge HUD to choose the former path.

Sincerely,



Vicki Been  
Faculty Director



Sophie House  
Legal Fellow