

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

NATIONAL FAIR HOUSING ALLIANCE,
TEXAS LOW INCOME HOUSING
INFORMATION SERVICE, and
TEXAS APPLESEED,

Plaintiffs,

v.

BEN CARSON and U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT,

Defendants.

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

SECOND AMENDED COMPLAINT

INTRODUCTION

1. Fifty years ago, Congress enacted the Fair Housing Act, 42 U.S.C. § 3601, *et seq.* That Act is best known for barring a variety of forms of housing discrimination. Less attention has been paid to its requirement that the Secretary of the U.S. Department of Housing and Urban Development (HUD) “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of” that Act. *Id.* § 3608(e)(5). Although this Affirmatively Furthering Fair Housing (AFFH) requirement was of great importance to Congress in enacting the Act, for decades, HUD inadequately enforced it. The agency has permitted more than 1,200 grantees—mostly local and state government entities—to collectively accept billions of dollars in federal housing funds annually without requiring them to take meaningful steps to address housing and lending discrimination, racial segregation and other fair housing problems that have long plagued their communities.

2. Recognizing that the AFFH requirement had not been adequately enforced, HUD in 2015 promulgated—through notice-and-comment rulemaking—the AFFH Rule, a regulation

requiring covered program participants, including cities and counties around the country, to take meaningful action to address longstanding segregation and otherwise carry out the Fair Housing Act's requirements. The AFFH Rule creates a rigorous process to ensure that recipients of federal housing funds identify local fair housing problems and then commit to taking concrete steps to correct them (under HUD's supervision and with considerable community input), while giving those jurisdictions flexibility to respond to local conditions. At the Rule's core is the requirement that jurisdictions prepare and submit for HUD review an Assessment of Fair Housing (AFH), a document that includes both the jurisdiction's self-diagnosis of fair housing impediments and a plan to overcome them. Jurisdictions must create these AFHs by reference to a standardized Assessment Tool that HUD creates and publishes (after notice and comment and clearance from the Office of Management & Budget) to focus jurisdictions' analysis on certain required elements of an effective and compliant AFH.

3. In January 2018, HUD issued a notice suspending for almost three years the requirement that jurisdictions prepare AFHs and submit them for HUD review, effectively suspending the Rule itself. Plaintiffs sued. Less than two weeks later, in May 2018, HUD withdrew that notice, but the agency simultaneously replaced it with another notice that accomplishes the same result by withdrawing the Assessment Tool, thus making it impossible for jurisdictions to prepare and submit AFHs. Plaintiffs National Fair Housing Alliance (NFHA), Texas Low Income Housing Information Service (Texas Housers), and Texas Appleseed bring this suit to challenge HUD's suspension of the Tool, which in effect suspends the AFFH Rule, as a violation of the Administrative Procedure Act (APA).

4. The effect of HUD's action is that jurisdictions return to the dysfunctional process that was in effect from 1995 to 2015, pursuant to which HUD required only an annual

certification that a jurisdiction had studied fair housing impediments, taken “appropriate actions” to address them, and maintained related records. As both HUD and the Government Accountability Office found, putting local jurisdictions on the honor system is ineffective. When pressed, many jurisdictions could not produce any documentation supporting their certifications; others had prepared documents that made no concrete promises or otherwise did not translate into action on the ground to address fair housing concerns. A False Claims Act suit against Westchester County, New York revealed that the County had certified compliance for years without ever assessing whether racial segregation was a problem, let alone committing to addressing the barriers to integration that were well known to exist in Westchester.

5. In response to these revelations and to ensure greater accountability for compliance with civil rights laws, in 2009, HUD began an exhaustive, six-year process of crafting a more effective AFFH enforcement regime, culminating in the promulgation of the AFFH Rule in 2015. This Rule requires every covered jurisdiction to develop, submit for HUD review, make public, and implement a planning document—called an Assessment of Fair Housing (AFH)—that includes concrete plans to address local fair housing issues.

6. The Rule requires jurisdictions to provide extensive notice to stakeholders and to solicit public comment about fair housing problems in various communities; to consult with fair housing groups and other interested entities; and to encourage and respond to public comment on drafts of their AFHs. Jurisdictions must submit their AFHs for HUD review (along with explanations about why comments from stakeholders were or were not incorporated), and HUD must carefully review them. HUD must reject those AFHs not meeting the specified requirements and require the submission of revised, compliant versions. In short, the AFFH Rule requires jurisdictions to take meaningful action to demonstrate their eligibility for federal

housing funds by addressing local fair housing issues, while requiring HUD to monitor their compliance. It includes a schedule on which various jurisdictions are to submit their first AFHs, beginning in 2016, 2017, and 2018 for a small number of jurisdictions and then ramping up in 2019.

7. In the approximately two years since it went into effect, the AFFH Rule has already paid dividends. Many jurisdictions that have gone through the AFH drafting process have committed to concrete reforms that will improve the lives of their most vulnerable residents and create more integrated, inclusive communities. They have, for example, committed to provide help for residents of predominantly African-American neighborhoods who disproportionately face unwarranted evictions; make zoning processes more inclusive for people with disabilities; and create affordable rental units in high-opportunity neighborhoods. The jurisdictions have done so after soliciting input from their communities, accepting comments from fair housing organizations and others on their initial drafts, and undergoing review by HUD (which, sometimes, has required revisions). This robust process has led to a newfound commitment to take meaningful steps towards affirmatively furthering fair housing.

8. Even before becoming Secretary of HUD, Defendant Ben Carson criticized the AFFH Rule, which he compared to “failed socialist experiments” such as “mandated busing” of schoolchildren. After he became Secretary, HUD began cutting back implementation efforts. For example, it reduced the technical assistance that it provided to help local jurisdictions craft effective and compliant AFHs.

9. On January 5, 2018, HUD abruptly announced, without prior notice or opportunity to comment, that it was suspending the AFFH Rule’s requirement that local governments complete and submit AFHs. Plaintiffs sued on May 9, 2018. On May 23, 2018,

HUD withdrew that notice, purporting to reinstate the AFFH Rule, but simultaneously issued two others in the Federal Register that instructed participants not to follow the AFFH Rule's requirements. In the first such notice, at 83 Fed. Reg. 23922, HUD withdrew the Assessment Tool, thereby making it impossible for jurisdictions to complete and submit AFHs to HUD, and thus effectively suspending the AFFH Rule indefinitely.

10. In the second notice, HUD explicitly directed participants not to comply with the regulatory requirements of the AFFH Rule, and instead to submit an AFFH certification "in accordance with the requirements that existed prior to August 17, 2015," the effective date of the AFFH Rule. 83 Fed. Reg. 23297, col. 3. The notice indicates that HUD will not review such certifications—and determine a jurisdiction's eligibility to receive federal funds—pursuant to the requirements of the AFFH Rule, but pursuant to the requirements of the 2014 version of 91 C.F.R. § 91.225(A)(1).

11. Through its actions, HUD excused these jurisdictions from compliance with the AFFH Rule, and obliged each to develop an Analysis of Impediments (AI), "in accordance with the HUD Fair Housing Planning Guide." *Id.* The result of such HUD action is not a somewhat more robust AI process, with portions of the AFFH Rule remaining active, but is in effect a wholesale repudiation—without prior notice or an opportunity for comment—of the entire AFFH Rule regime and a reversion to the very failed process the AFFH Rule had replaced.

12. HUD had no authority to suspend the Tool or to suspend the Rule in any other way without notice-and-comment procedures. The AFFH Rule specifically provides that federal housing money may not continue to flow to jurisdictions without a HUD-approved AFH. Yet HUD's action permits exactly that result for most jurisdictions in the country. Meanwhile, by abandoning the AFH process, HUD has excused compliance with a host of non-discretionary

duties related to that process, including meeting regulatory deadlines for submitting AFHs and providing community members and groups with the opportunity to advance goals and strategies consistent with their fair housing missions through the public participation process.

13. Additionally, HUD's withdrawal of the Assessment Tool was arbitrary and capricious. HUD stated that the Assessment Tool had proved to be "unworkable." It based this conclusion on (1) the fact that it rejected 17 of the first 49 initially submitted AFHs, which it blamed on the Assessment Tool, and (2) its estimate that it has spent \$3.5 million so far on the AFFH Rule, an amount it said could not "scale" to the number of jurisdictions yet to submit AFHs for review. HUD did not adequately explain how these facts support withdrawing the Assessment Tool and excusing local governments from further compliance with the Rule, and they do not. In particular, HUD failed to explain why some local governments' failure to follow the Rule's clear requirements demonstrated any fundamental deficiency in the Assessment Tool. It failed to demonstrate that its expenditures will increase dramatically as more jurisdictions submit AFHs. And above all, it failed to demonstrate that its concerns warrant the drastic step of withdrawing the Assessment Tool and shutting down the AFH process. Indeed, HUD did not consider *any* less disruptive alternatives.

14. By returning to the dysfunctional, pre-AFFH Rule regime that HUD itself concluded did not work, HUD also is violating its statutory duty under the Fair Housing Act to ensure that federal funds are used to affirmatively further fair housing. Decades of experience have shown that, left to their own devices, local jurisdictions will simply pocket federal funds and do little to further fair housing objectives. HUD made no attempt to reconcile its withdrawal of the Tool and instruction to return to the process that was in effect before the AFFH Rule with its own prior finding that the Rule is necessary.

15. HUD's action is perceptibly impairing Plaintiffs' mission-oriented activities in communities across the country. Plaintiffs, organizations with purposes that include promoting fair housing, are already having their missions frustrated by HUD's action and are having to expend additional resources from other important activities to remedy the effects of HUD's action. HUD's suspension of the AFH process has deprived them of vast amounts of information that enable them to carry out their activities more effectively and has deprived them of effective fora—both locally and before HUD—to seek redress for their fair housing concerns.

16. Plaintiffs bring this action seeking preliminary and permanent injunctive relief, including a ruling that the two May 2018 Notices withdrawing the Assessment Tool and instructing participants to revert to the AI process—like the January 2018 notice before them—constitute unlawful agency action. They seek an order that HUD rescind those actions and take all necessary steps to implement and enforce the AFFH Rule.

17. Fifty years after the passage of the Fair Housing Act, it is well past time that HUD carries out its statutory duty to ensure that jurisdictions that take federal housing funds fulfill their end of the bargain and affirmatively further fair housing. HUD failed for decades to require local jurisdictions to take meaningful action with respect to racially segregated communities and other obvious fair housing issues. It finally created a regulatory scheme to ensure that jurisdictions receiving federal funds effectuate the Act's requirements, but now has unlawfully abandoned it. Judicial intervention is necessary to vindicate the rule of law and to bring fair housing to communities that have been deprived of it for too long.

PARTIES

18. The National Fair Housing Alliance (NFHA) is a national, nonprofit, public service organization incorporated under the laws of the Commonwealth of Virginia with its principal place of business in Washington, DC. NFHA is a nationwide alliance of private, nonprofit, fair housing organizations, including organizations in 28 states. NFHA's mission is to promote residential integration and combat discrimination in housing based on race, national origin, disability, and other protected classes covered by federal, state, and local fair housing laws.

19. Plaintiff Texas Low Income Housing Information Services (Texas Housers) is a non-profit corporation with offices in Austin, Fort Worth, Hidalgo County, and Houston, Texas. It is the principal statewide advocacy group focused on expanding housing opportunities for low-income residents of Texas.

20. Plaintiff Texas Appleseed is a non-profit organization headquartered in Austin, Texas. Its mission is to promote social and economic justice for all Texans, including by ensuring that all Texas families can recover in the wake of natural disasters; that communities are rebuilt to be more resilient; and that all families have the opportunity to live in safe, decent neighborhoods with equal access to educational and economic opportunity.

21. Defendant U.S. Department of Housing and Urban Development (HUD) is an executive branch agency of the United States Government. It is charged with administering a variety of federally funded programs and funding sources. It also is responsible for ensuring that federal programs and activities relating to housing and urban development affirmatively further fair housing.

22. Defendant Ben Carson is the Secretary of HUD and is sued in his official capacity.

JURISDICTION AND VENUE

23. This Court has jurisdiction over this matter under 28 U.S.C. § 1331 and 5 U.S.C. § 702.

24. Venue is proper in this District under 28 U.S.C. § 1391(b) and 5 U.S.C. § 703 because the claims arose in the District, Defendants reside in this District, and a substantial part of the events giving rise to this action occurred in the District.

FACTUAL ALLEGATIONS

A. Overview of the Fair Housing Act's AFFH Provisions and Historical Context

25. HUD sends billions of dollars in federal funds each year to state and local jurisdictions, and those communities regularly certify both that they do not discriminate and that they are taking affirmative steps to further fair housing. But until recently, the agency has largely neglected to require those communities to do anything meaningful to fulfill those promises. HUD thus failed, until the promulgation of the AFFH Rule at issue in this case, to give appropriate force to a central part of the Fair Housing Act. That law does not simply bar overtly discriminatory actions, but also requires that federal funds are spent in ways that ameliorate (rather than exacerbate) long-standing patterns of residential segregation. It also requires that recipients of federal funds work toward those fair housing goals in the operation of their housing and community development policies, practices, and programs.

26. The AFFH requirement, like much else in the Fair Housing Act, arose from the findings of the National Advisory Committee on Civil Disorders ("Kerner Commission"). In 1967, President Johnson charged the Kerner Commission with studying the causes of recent

urban unrest and recommending solutions. The Kerner Commission's report, released in February 1968, found "[p]ervasive discrimination and segregation in employment, education and housing." *Report of the National Advisory Commission on Civil Disorders: Summary of Report*, at 9 (1968), <https://www.hsdl.org/?view&did=35837>. It noted that federal money was being spent in ways that contributed to this discrimination and segregation and recommended, among other things, that "[f]ederal housing programs must be given a new thrust aimed at overcoming the prevailing patterns of racial segregation." *Id.* at 24.

27. When Congress enacted the Fair Housing Act weeks later, in the immediate aftermath of the assassination of Dr. Martin Luther King, Jr. and in response to the recommendations of the Kerner Commission, it sought to replace racially segregated neighborhoods with "truly integrated and balanced living patterns." *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (citing 114 Cong. Rec. 3422, statement of FHA sponsor Senator Walter Mondale). Consistent with this legislative purpose, in addition to barring discrimination in housing, the FHA also imposed on HUD the obligation to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter." 42 U.S.C. § 3608(e)(5). Effective implementation of this provision is central to the "Fair Housing Act's continuing role in moving the Nation toward a more integrated society." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507, 2525-26 (2015).

28. As the Fair Housing Act's legislative history and subsequent case law make clear, this duty to "affirmatively further fair housing" requires HUD to address segregation and other barriers to fair housing not just in its own policies and practices, but also in its oversight of its state and local jurisdictions and other entities that receive HUD grants. HUD's duty under the

Fair Housing Act requires it to “do more than simply refrain from discriminating,” *NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149, 155 (1st Cir. 1987). Rather, HUD also must ensure that the Fair Housing Act powers affirmative movement towards integration in communities around the country, as Congress intended.

29. Since soon after the passage of the Fair Housing Act, federal courts have recognized that HUD must adopt processes to ensure that local governments administering federal housing programs abide by this congressional mandate. In *Shannon v. U.S. Department of Housing and Urban Development*, 436 F.2d 809, 821 (3rd Cir. 1970), the court concluded that HUD “must utilize some institutionalized method” for assessing local compliance. Similarly, in *NAACP v. Secretary of Housing and Urban Development*, the First Circuit held HUD liable for its failure to use its authority to “assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.” 817 F.2d at 155.

30. In response to these and other rulings, HUD adopted only modest measures that barely staunched the flow of federal funds to projects and entities that failed to further fair housing objectives. For more than two decades, the agency neglected to adopt any system for ensuring that fair housing concerns were taken seriously by the many cities, towns, and counties that collectively receive billions of dollars every year through the Community Development Block Grant (CDBG) and HOME Investment Partnership (HOME) programs, notwithstanding that the Fair Housing Act obligates all such grantees to affirmatively further fair housing and obligates HUD to ensure that they do.

31. In Fiscal Year 2017, HUD distributed \$4.615 billion in federal grants devoted to housing block grant programs, accounting for about a tenth of HUD’s annual budget.¹ In Fiscal Year 2018, that amount is slated to rise to almost \$5.5 billion.² By far the largest such program—accounting for about two-thirds of the total, and reaching every corner of the United States—is the CDBG program, which provides annual block grants to approximately 1,210 grantees, mostly units of state and local government. *Id.*; see also *Community Development Block Grant Program – CDBG*, U.S. Department of Housing & Urban Development (last accessed May 4, 2018), http://www.hud.gov/program_offices/comm_planning/communitydevelopment/programs.

32. The CDBG program, which began with the Housing and Community Development Act of 1974, is one of HUD’s longest continuously running funding programs. HUD awards CDBG grants to local governments to carry out a wide range of community development activities directed toward revitalizing neighborhoods, fostering economic development, and providing improved community facilities and services. Local governments eligible for CDBG funds, known as “entitlement communities,” include the principal cities of Metropolitan Statistical Areas (MSAs); other metropolitan cities with populations of at least 50,000; and qualified urban counties with populations of at least 200,000 (excluding the population of entitled cities).

33. Entitlement communities have discretion to develop their own programs and funding priorities, so long as they use CDBG funds consistent with certain statutory objectives, such as benefitting low- and moderate-income persons. 42 U.S.C. § 5304(b)(3). They may, for

¹ See *Key Programs of the U.S. Department of Housing and Urban Development Budget*, Novogradac & Company LLP (Mar. 22, 2018), <https://www.novoco.com/atom/168201>.

² Peter Lawrence, *Congress Agrees to Historic Funding for HUD in Fiscal Year 2018 Omnibus Spending Bill*, Novogradac & Company LLP (Mar. 22, 2018), <https://www.novoco.com/notes-from-novogradac/congress-agrees-historic-funding-hud-fiscal-year-2018-omnibus-spending-bill>

example, use CDBG funds to rehabilitate affordable housing; acquire land for new affordable housing development; improve infrastructure and public facilities in low- and moderate-income areas; or foster economic development that creates jobs for low- and moderate-income workers.

34. Each CDBG recipient must develop a document called a Consolidated Plan every three to five years and submit it to HUD for review and approval. See 24 C.F.R. §§ 570.302, 91.200-91.230. The Consolidated Plan sets out community development priorities and multiyear goals based on housing and community development needs, housing and economic market conditions, and available resources. Other than consultation and certification requirements, federal regulations do not separately require a Consolidated Plan to address fair housing concerns, and HUD does not explicitly require jurisdictions to examine such concerns as part of the content of the Consolidated Plan process, except in connection with an Assessment of Fair Housing that already has been developed and approved in accordance with now-suspended aspects of the AFFH Rule.

35. CDBG recipients also submit to HUD each year Annual Action Plans, which summarize the specific actions and activities planned and the federal and non-federal resources that will be used. HUD uses these submissions to monitor communities' use of CDBG funds to achieve the goals of the CDBG program. HUD regulations do not separately require the content of Annual Action Plans to address fair housing concerns (other than by reference to an AFH developed through the now-suspended AFH process).

36. The majority of local governments participating in the CDBG program are on a five-year cycle and renewed their Plans most recently in 2014 or 2015. Thus, they are due to submit their next proposed Plans on various dates in 2019 or 2020. As discussed below, this timeframe also controls the timing of when the AFFH Rule requires these governments to, for

the first time, submit to HUD for review and approval their Assessments of Fair Housing. The Rule thus specifically requires governments around the country in the coming months to engage in the robust process (including engagement of the community and local fair housing groups) that the AFFH Rule mandates.

37. CDBG recipients must certify that their grants will be conducted and administered in conformity with the Civil Rights Act of 1964 (which bars discrimination by recipients of federal funds on the basis of race, color, and national origin) and the Fair Housing Act. They also must certify that they will affirmatively further fair housing. 42 U.S.C. § 5304(b)(2); *see also* 24 C.F.R. § 570.601. But until the AFFH Rule's promulgation, they were not required to submit to HUD any fair housing equivalent of the Consolidated Plan, *i.e.*, an explanation of how they will conform to the AFFH requirement. Until the mid-1990s, HUD required its grantees merely to sign a bare certification that they complied with the 42 U.S.C. § 3608(e)(5).

38. In the mid-1990s, HUD finally promulgated regulations requiring each CDBG grantee to periodically conduct a written "Analysis of Impediments to Fair Housing Choice" (AI). This regulation instructed grantees to identify impediments to fair housing choice, take appropriate actions to overcome the effects of any such impediments, and maintain records reflecting the analyses and actions taken.

39. This system was virtually toothless. HUD did not require the grantees to submit their AIs to HUD for review or approval, and the AIs themselves had no required format or goals. HUD required grantees only to certify that they had conducted an AI and were taking appropriate actions to overcome identified impediments. The agency did not require that the impediments identified be meaningful, provided no mandatory template, did not offer guidance as to what would be "appropriate actions" to overcome these impediments, and did not adopt a

system for compliance review. Nor did HUD require local jurisdictions to make widely available to the public either the AIs or their underlying data and analysis. At best, AIs were paper exercises in the planning of fair housing policy that sat on municipal shelves and never translated into actual policy; at worst, meaningful assessments of fair housing problems and solutions never appeared, even on paper.

40. HUD conducted almost no oversight of this process. It did not review AIs and, except for publishing a non-binding *Fair Housing Planning Guide* in 1996, did not provide any guidance or technical assistance to grantees. It imposed no consequences when a grantee failed to produce or update an AI or to take the actions described in an AI. With HUD failing to meaningfully oversee its grantees in accordance with 42 U.S.C. § 3608, jurisdictions around the country routinely skirted their AI obligations and falsely certified their compliance with even these weak requirements.

41. In 2008, the National Commission on Fair Housing and Equal Opportunity—a body co-chaired by former HUD Secretaries Jack Kemp (a Republican) and Henry Cisneros (a Democrat)—reported: “The current federal system for ensuring fair housing compliance by state and local recipients of housing assistance has failed.... 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.” National Commission on Fair Housing and Equal Opportunity, *The Future of Fair Housing: Report of the National Commission on Fair Housing and Equal Opportunity* 44 (2008), available at <http://www.naacpldf.org/files/publications/Future%20of%20Fair%20Housing.pdf>. See also *The Opportunity Agenda, Reforming HUD’s Regulations to Affirmatively Further Fair Housing* 7 (2010), available at [15](https://opportunityagenda.org/sites/default/files/2017-</p></div><div data-bbox=)

03/2010.03ReformingHUDRegulations.pdf (stating that “[a] range of housing experts, civil rights groups, and former HUD officials have documented the inadequacy of the current AI process,” and detailing that testimony).

42. HUD’s countenancing of rampant non-compliance with the AFFH mandate came to a head in a False Claims Act case brought against Westchester County, New York. In that case, a whistleblower organization alleged that the County had defrauded the United States for years by continually certifying to HUD its compliance with the Fair Housing Act, even as it was deliberately concentrating affordable housing for families in a small number of heavily African-American and Latino communities and distributing CDBG funds to overwhelmingly white suburbs that refused to allow the development of affordable housing. *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc., v. Westchester Cty., N.Y.*, 495 F. Supp. 2d 375 (S.D.N.Y. 2007); 668 F. Supp. 2d 548 (S.D.N.Y. 2009)

43. The *Westchester* case publicly exposed the failings of the AI process and the annual “certification” process. On summary judgment, the district court found that the County could produce no evidence that it even evaluated race-based impediments to fair housing, let alone did anything about them, while annually certifying compliance and accepting more than \$50 million in federal housing funds during the relevant years. 668 F. Supp. 2d at 562.

44. Following the *Westchester* decisions, HUD took a closer look at what its grantees were doing in exchange for billions of dollars of federal funds every year. It engaged in a series of hearings, listening sessions, and internal reports, and it concluded that the AI process was not working.

45. For the first time, HUD asked participating jurisdictions to produce their AIs for review, and the results were unacceptable. More than a third of jurisdictions could not or would

not produce any AI at all. Of those that did produce an AI, HUD rated 49 percent as “needs improvement” or “poor.” HUD found that only 20 percent of AIs committed jurisdictions to doing *anything* on a set timeframe. See U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *Analysis of Impediments Study* (2009).

46. At the same time, the Government Accountability Office (GAO) was undertaking a detailed review of the AI process. It released its conclusions in a 2010 report to Congress, GAO-10-905, *Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans* (2010), available at <https://www.gao.gov/assets/320/311065.pdf> (GAO Report).

47. The GAO Report highlighted the weaknesses of the AI process and urged HUD to reform the system of fair housing oversight of HUD grantees. The report found that many jurisdictions, lacking any oversight or accountability, failed to make minimal efforts to comply even with the lax requirements of the AI system.

48. For example, the GAO found that 29 percent of jurisdictions had not completed an AI within the last five years, as recommended by HUD’s *Fair Housing Planning Guide*, while 11 percent had not done so within the last 10 years; for another 6 percent the date of completion could not be determined. Since the purpose of an AI was to be a planning document for a 5-year period, these jurisdictions effectively had no operative AI at all. Many jurisdictions could not produce a document labeled an AI, and others produced perfunctory documents—or, in one case, an e-mail.

49. Even for those jurisdictions that had operative AIs, the GAO found little evidence that the AIs made a practical difference. The GAO reviewed many of the AIs that grantees had completed (and used as the basis for certifying compliance with the Fair Housing Act) and found

most of them contained little more than aspirational statements of vague goals. It found, for example, that most AIs reviewed “lack time frames for implementing identified recommendations,” making it impossible “to establish clear accountability.” GAO Report at 31. Moreover, because HUD never established clear rules as to the most basic substantive and procedural “requirements” it meant to impose—*e.g.*, a timeline on which AIs should be completed, a process for completing them, the documents’ form and content—it was virtually impossible for HUD field offices to participate meaningfully in the process and ensure compliance even if they wanted to do so. *Id.* at 25.

50. By the time the GAO Report was issued, HUD had begun the process of formulating the AFFH Rule, and the GAO Report contained specific recommendations that the Rule largely incorporated. In particular, the GAO Report recommended that HUD establish standards and a common format for grantees to use in their planning documents; that grantees be required to include time frames for completing promised actions; and that grantees be required to submit these documents to HUD for comprehensive review on a regular basis. GAO Report at 32-33.

51. Based on the GAO Report, a vast record of rulemaking comments, and its own experience, HUD concluded that the AI process did not work. That was for myriad reasons; among other things, the AI drafting process “was not well integrated into the planning efforts for expenditure of funds made by HUD program participants,” and “HUD has not, in a systematic manner, offered to its program participants the data in HUD’s possession that may better help them frame their fair housing analysis.” Final Rule: Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,275 (July 16, 2015) (AFFH Rule).

B. HUD AFFH Rulemaking

52. In 2009, in response to the growing and uncontroverted evidence that it was failing to ensure that federal housing dollars were spent in ways consistent with the AFFH obligation, HUD began formulating a better system. The regulation that HUD formally proposed in 2013 and promulgated as a final rule in 2015 was the product of a comprehensive process of outreach and study that informed the Rule's eventual design. 80 Fed. Reg. 42,272; GAO Report at 29.

53. For example, in July 2009, HUD held a listening conference in which more than 600 people participated, both in person and remotely. As Assistant Secretary for Fair Housing John Trasviña testified to Congress the next year: "There, fair housing and civil rights groups, mayors, counties, and states all voiced their desire for HUD to amend its regulations to provide more concrete, specific information about how to develop a meaningful plan for affirmatively furthering fair housing." John D. Trasviña, Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Statement before the Subcommittee on Housing and Community Opportunity, Committee on Financial Services, U.S. House of Representatives, Hearing on H.R. 476 Housing Fairness Act of 2009 (Jan. 20, 2010), *available at* https://financialservices.house.gov/media/file/hearings/111/trasvina_-_hud.pdf.

54. After several years of gathering information, HUD published its proposed AFFH Rule on July 19, 2013. 78 Fed. Reg. 43,710 (July 19, 2013). It acknowledged that the problems revealed by the GAO, advocates, stakeholders, and program participants regarding the existing AI process required it to develop a new regime for AFFH enforcement. It determined that, under the AI regime, federal funding recipients did "not sufficiently promote the effective use of limited public resources to affirmatively further fair housing." 78 Fed. Reg. at 43,711.

55. HUD found that it was required to change course in order to carry out its statutory mission: “HUD and its grantees have a statutory duty to affirmatively further fair housing. *This is not an administrative requirement that can be waived by HUD.*” 80 Fed. Reg. at 42,348 (emphasis added).

56. HUD explained that it was not seeking to “mandate specific outcomes” for jurisdictions. 78 Fed. Reg. at 43,711. Rather, the AFFH Rule would structure decision-making processes in ways that ensured that jurisdictions would assemble, analyze, and make public relevant information; local fair housing concerns would be heard, considered, and ultimately acted upon on a regular basis; HUD review of the resulting product would provide immediate accountability; and fair housing organizations and community members would have publicly available, concrete commitments from local jurisdictions, which they could use to monitor progress. It would no longer be possible for jurisdictions to fail to produce an AI altogether, or to produce one that entirely ignored fair housing concerns (as Westchester’s had), without HUD detecting and remedying the violation.

57. To accomplish this, the AFFH Rule introduced the Assessment of Fair Housing, or AFH, as the core planning and oversight tool that integrates fair housing considerations into jurisdictions’ regular planning processes. HUD would review the adequacy of jurisdictions’ plans—but it would also assist them, in a variety of ways, rather than leaving them at sea as to how to comply with their obligation to affirmatively further fair housing. HUD committed to providing participants with national data and meaningful direction, including clear standards to follow and ample technical support. 78 Fed. Reg. at 43,714; *see also* 80 Fed. Reg. at 42,275 (reiterating these “key features” of the rule). HUD received 1,025 comments on the proposed rule.

58. HUD published its final AFFH Rule on July 16, 2015, with an effective date of August 17, 2015. The final rule addressed the public comments HUD had received and made changes in response, such as strengthening the requirement that, within the AFH, participants identify “meaningful actions” to further fair housing. The final rule also provided for a staggered AFH submission schedule, to reduce the burden on HUD and program participants and give smaller participants extra time to prepare. It described HUD’s plans to issue guidance and technical assistance to assist with the regulation’s rollout.

59. The AFFH Rule provides for a consistent template (the AFH) that participants must complete, engage the public in reviewing, and submit to HUD for oversight at regular intervals. 24 C.F.R. § 5.154(d). Participants must use the AFH to identify local fair housing issues and make concrete plans to address them—including measurable goals and metrics for measuring success—with public input and HUD review. While the initial AFHs are an exercise in goal-setting, subsequent AFHs must review progress toward these goals, such that the process provides a cycle of accountability. 24 C.F.R. § 5.154(d)(7).

60. Under the AFFH Rule, a funding recipient “must certify that it will take meaningful actions to further the goals identified in its AFH,” 24 C.F.R. § 91.225(a)(1), with “meaningful actions” defined as “significant actions that are designed and can be reasonably expected to achieve a material positive change that affirmatively furthers fair housing.” 24 C.F.R. § 5.152.

61. In conjunction with this “meaningful action” requirement, HUD for the first time provided a regulatory definition of what it means to affirmatively further fair housing. HUD defined “AFFH” as:

taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that

restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.

24 C.F.R. § 5.152.

62. Thus, the regulation guarantees performance of the statutory duty to affirmatively further fair housing by requiring meaningful steps towards achieving the Fair Housing Act's ambitious goals. Those steps may vary widely from jurisdiction to jurisdiction, depending on the local conditions and needs described in the AFH, but the constant is that HUD must require every jurisdiction to identify and commit to meaningful steps towards addressing its own barriers to fair housing, as supported by specific local circumstances.

63. Following its promulgation of the AFFH Rule, HUD issued a standardized Assessment Tool, as required by the rule to implement the AFH process. The Assessment Tool was separately subject to public notice and comment under the Paperwork Reduction Act and is to be updated at regular intervals. In preparing their AFHs, local governments must use the Assessment Tool, which organizes all the required elements of an AFH into a template for simpler preparation and review. 24 CFR § 5.154(d). HUD determined that requiring program participants to use a common Assessment Tool to create their AFHs would ensure that "AFHs are developed consistently and will facilitate objective, consistent reviews." 80 Fed. Reg. at 42,311.

64. The Assessment Tool for local governments was initially approved through the Paperwork Reduction Act process for a one-year period. *See Affirmatively Furthering Fair Housing Local Government Assessment Tool-Information Collection Renewal: Solicitation of*

Comment-30-Day Notice Under Paperwork Reduction Act of 1995, 81 Fed. Reg. 57,601 (Aug. 23, 2016). After several rounds of comments and revisions, the current version of the Assessment Tool for local governments was approved in January 2017 through the Paperwork Reduction Act process for a three-year period. *See Affirmatively Furthering Fair Housing: Announcement of Renewal of Approval of the Assessment Tool for Local Governments*, 82 Fed. Reg. 4,388 (Jan. 13, 2017). HUD did not withdraw the prior version while it was obtaining approval of the current one.

65. The Tool contains questions that local governments are required to answer by reference to, among other things, HUD-provided local data and maps. Local governments must provide a narrative description and analysis of local fair housing conditions and describe policies and practices that influence those conditions. They must assemble relevant information and then provide an analysis of, among other things, residential racial segregation, racially- or ethnically-concentrated areas of poverty, disparities in access to opportunity (such as jobs or education), and the housing needs of persons with disabilities. 24 C.F.R. § 5.154(d)(2), (3). The version of the Tool for local governments that HUD withdrew in its May Notices can be seen here: <http://nationalfairhousing.org/wp-content/uploads/2018/05/Assessment-of-Fair-Housing-Tool-For-Local-Governments-2017-01.pdf>.

66. To facilitate this detailed analysis, the Rule provides for HUD to publicly issue a variety of maps and provide data customized for each participant. All of this information has been posted on HUD's website. For each participating jurisdiction, a user can see patterns of residential segregation by race, national origin, and disability; the location of affordable housing; and details such as transit, job proximity, and school proficiency. These maps and data are available at <https://egis.hud.gov/affht/>. In addition, local jurisdictions must supplement the HUD-

provided data with local data such as code enforcement and zoning applications that are readily available to the jurisdictions themselves but much more difficult for those outside government to obtain. 24 C.F.R. ¶ 5.152.

67. The AFFH Rule provides that, in preparing the AFH, the funding recipient must provide for “meaningful community participation,” including through public hearings—publicized by “means designed to reach the broadest audience”—and through public review of an initial AFH draft. 24 C.F.R. § 5.158(a); *see also* 80 Fed Reg. at 42,300 (“public input is a fundamental and necessary component in the AFH process”). The jurisdiction also must consult with a number of designated community organizations, including but not limited to fair housing organizations, *see* 24 C.F.R. § 91.100(a), (e)(1), as well as “any organizations that have relevant knowledge or data to inform the AFH and that are sufficiently independent and representative to provide meaningful feedback to a jurisdiction on the AFH, the consolidated plan, and their implementation.” 24 C.F.R. § 91.100(e)(2). This consultation “must occur at various points in the fair housing planning process,” including not only with respect to the drafting of the AFH, but also with respect to implementation of the AFH’s goals through the Consolidated Plan. 24 C.F.R. § 91.100(e)(3).

68. The completed AFH must include a summary of comments received, and explanations as to why any recommended changes to the draft AFH were not accepted. 24 C.F.R. § 5.154(d)(6).

69. Once a funding recipient has prepared and submitted an AFH, the Rule specifically contemplates and requires an iterative process between HUD and funding recipients. It calls on HUD not simply to pass judgment on AFHs, but to help funding recipients improve them and meet the AFFH Rule’s rigorous requirements.

70. The AFFH Rule requires HUD to review every Assessment of Fair Housing. HUD must “determine whether the program participant has met the requirements for providing its analysis, assessment, and goal setting,” 24 C.F.R. § 5.162(a). The agency may not “accept an AFH if HUD finds that the AFH or a portion of the AFH is inconsistent with fair housing or civil rights requirements or is substantially incomplete,” 24 C.F.R. § 5.162(b). An AFH can be “substantially incomplete” for, among other things, failure to meet the required community participation and consultation requirements. 24 C.F.R. § 5.162(b)(1)(ii)(A). If HUD does not accept an Assessment, it must specify the reasons the Assessment has not been accepted and “provide guidance on how the AFH should be revised in order to be accepted.” 24 C.F.R. § 5.162(b)(2). If an Assessment fails to meet any required element, HUD must deem it incomplete and require revision, even if other elements are complete. 24 C.F.R. § 5.162(b)(1)(ii)(B).

71. The AFFH Rule establishes that each jurisdiction must complete and submit an AFH every three to five years—depending on that jurisdiction’s Consolidated Plan submission schedule—and do so in a way that integrates the fair housing concerns identified in the AFH into the Consolidated Plan that CDBG recipients already prepare on a similar schedule. 24 C.F.R. § 5.160.

72. Each CDBG recipient must complete and submit an AFH ahead of its Consolidated Plan schedule, so that financial and other commitments to implement the AFHs can be included in the next Consolidated Plan. Both the process of developing the Consolidated Plan and the Plan’s substance must then reflect various components of the AFH. *See* 24 C.F.R. § 5.160(a)(1)(i); 80 Fed. Reg. at 42,287; *see also* 24 C.F.R. § 91.105(e)(1)(i) (requiring that Consolidated Plan hearings include presentation of “proposed strategies and actions for

affirmatively furthering fair housing consistent with the AFH”); 24 C.F.R. § 91.215(a)(5)(i) (CDBG participant must “[d]escribe how the priorities and specific objectives of the jurisdiction...will affirmatively further fair housing by setting forth strategies and actions consistent with the goals and other elements identified in an AFH”).

73. In order to ensure that HUD’s review could be rigorous, HUD considered and rejected a proposal that a funding recipient submit an AFH at the same time as its proposed Consolidated Plan. HUD reasoned that it was necessary to build in several months’ gap between the submissions to ensure that, prior to submission of the Consolidated Plan, “the affected communities would have already had the opportunity to review and comment on the AFH, HUD will have the opportunity to identify any deficiencies in the AFH, and the program participant will have the opportunity to correct any deficiencies, prior to incorporation of the AFH into the consolidated plan or PHA Plan, such that funding to program participants will not be delayed.” 80 Fed. Reg. at 42,311. Thus, HUD deliberately constructed a schedule that permits it to carefully review, provide feedback, and potentially to initially reject AFHs—and then work with jurisdictions to improve them—as part of the routine process rather than as an extraordinary event (or “failure”) that seriously endangers federal funding.

74. Prior to its suspension of the Assessment Tool—and the AFH process which relies upon it for completion—a local government was required to reference within its Consolidated Plan the fair housing elements that had been reviewed and accepted by HUD as part of the jurisdiction’s AFH. *See* 24 C.F.R. § 91.500(b); *see also* 80 Fed. Reg. at 42,299. The AFFH Rule made an accepted AFH a requirement for HUD’s approval of the Consolidated Plan, 24 C.F.R. § 5.162(d), which in turn is a prerequisite for funding by the CDBG program. The AFFH Rule gives HUD only limited authority to excuse non-compliance with these

requirements; if any jurisdiction fails to submit a Consolidated Plan that includes an approved AFH by August 16 of the federal fiscal year in question, that failure “will *automatically* result in the loss of the CDBG funds to which the jurisdiction would otherwise be entitled.” 24 C.F.R. § 5.162(d)(1) (emphasis added). In the absence of an AFH process that could result in an accepted AFH, there is no regulatory mechanism for ensuring the robust consideration of fair housing in, or prior to, the Consolidated Plan, and the Rule’s explicit conditioning of eligibility for funding on having a HUD-accepted AFH is a dead letter.

75. HUD set the dates for submission and review of AFHs on a staggered schedule, such that only a minority of jurisdictions must submit AFHs prior to 2019. The AFFH Rule requires jurisdictions to submit their first AFH by 270 calendar days before the beginning of their next CDBG program year. 24 C.F.R. § 5.160(a)(1). For most CDBG jurisdictions, this schedule requires that jurisdictions submit AFHs between April 2019 and early October 2020. Additionally, HUD postponed until 2019 the date by which any jurisdiction receiving an award of \$500,000 or less was required to make a submission. *See* 81 Fed. Reg. 73,129 (Oct. 24, 2016). Thus, HUD structured the schedule of submissions such that 2017 and 2018 would be used as learning years in which both HUD and early-submitting jurisdictions (none of which are small jurisdictions) gained expertise with the process.

76. In the AFFH Rule, HUD committed itself to formulating specialized Assessment Tools for program participants with different needs. Accordingly, the Rule sets out different deadlines for first submissions for different types of entities, *e.g.*, larger local jurisdictions, smaller local jurisdictions, public housing authorities, and groups of entities that will participate jointly/regionally. 24 C.F.R. § 5.160(1)(i). It then provides:

If the time frame specified in this paragraph (a)(1) would result in a first AFH submission date that is less than 9 months after the date of publication of the

Assessment Tool that is applicable to the program participant or lead entity, the participant(s)' submission deadline will be extended as specified in that Assessment Tool publication to a date that will not be less than 9 months from the date of publication of the Assessment Tool.

24 C.F.R. § 5.160(1)(ii).

77. The AFFH Rule thus provides that, if HUD creates and publishes a specialized Assessment Tool for a category of program participants, any AFHs that otherwise would be due from those participants in the next 9 months are slightly postponed, to ensure that the participants have time to address the specific features of the new Assessment Tool.

78. The AFFH Rule makes concrete what had been a largely theoretical statutory obligation to affirmatively further fair housing for jurisdictions that accept federal housing funds. Those jurisdictions now must make fair housing considerations—both identifying fair housing issues and making plans to overcome them—part of their core planning processes, and HUD will regularly check their work and help them improve upon it.

C. How the Consolidated Plan Differs from the Assessment of Fair Housing

79. The content included in the Consolidated Plan does not primarily relate to fair housing or the issues faced by individuals and families protected from discrimination by the Fair Housing Act. In a local government's housing and homeless needs assessment in a Consolidated Plan, the impact of a government's actions based on race, disability status, or other protected class is not the focus; rather, that is considered along with many other factors, including ones that primarily relate to income or economic status. 24 C.F.R. § 91.205(b). Additionally, the limited obligation to consider racial disparities in assessing homelessness is not accompanied by data from HUD that facilitates such an analysis, and, if data is not available, local governments need not conduct that analysis in the Consolidated Plan. 24 C.F.R. § 91.205(c)(1)(ii).

80. The Consolidated Plan's Housing Market Analysis does not require any consideration of fair housing and race. For example, the analysis of barriers to affordable housing does not require local governments to assess neighborhood-specific barriers. 24 C.F.R. § 91.210(e). Thus, if a local government created the conditions necessary for affordable housing development overall but made such housing infeasible in predominantly non-Hispanic White neighborhoods, that serious fair housing problem could be ignored in the Consolidated Plan, though it could not be ignored in a compliant AFH. Accordingly, in practice, submitted Consolidated Plans omit acknowledgement or analysis of potential fair housing issues like neighborhood-specific exclusionary zoning.

81. An array of additional topics than an Assessment of Fair Housing would be required to acknowledge and analyze, such as unequal access to proficient schools, affordable, high-quality public transportation, and neighborhoods free from the disproportionate burdens of pollution, are entirely absent from the Consolidated Plan requirements. 24 C.F.R. § 91.200-91.230. Similarly, the Strategic Plan and Action Plan requirements within the Consolidated Plan do not provide for strategies and actions to address place-based racial disparities in access to these crucial forms of opportunity. 24 C.F.R. §§ 91.215-91.220.

82. Not only is the content of a Consolidated Plan not focused on fair housing issues, but the HUD review process for the Consolidated Plan does not include meaningful consideration of fair housing. *See* 24 C.F.R. § 91.500(b). Instead, HUD looks to see whether a local government says it has complied with community participation requirements; whether the Consolidated Plan includes the required content, which does not include fair housing (other than incorporating goals identified in the AFH, with the 2015 rule in effect); and whether a local government has made plans to assist a troubled public housing authority sharing its jurisdiction.

Id. In practice, and in recognition that a Consolidated Plan incorporates an AFH that already has been subjected to public scrutiny and HUD review through the AFH process, the Consolidated Plan approval process provides no means for HUD to routinely undertake close analysis of the validity of a jurisdiction's civil rights certifications. In fact, HUD regulations instruct that a certification of AFFH compliance in the Consolidated Plan shall presumptively "be deemed to be accurate." 24 C.F.R. §91.5. Thus, HUD does not exercise oversight over local governments' compliance with the duty to affirmatively further fair housing through its administration of the Consolidated Plan requirement.

83. As HUD concluded in the preamble to the Final AFFH Rule, "[t]he AFH is a distinct document with data, analysis, and priority and goal setting that feeds into the consolidated plan," rather than a process that affords stakeholders with the same or similar opportunities for engagement. 80 Fed. Reg. 42,272, 42,300.

84. Because HUD now is not requiring local governments to complete AFHs, the certification requirement for the Consolidated Plan necessarily has reverted to the certification from the previous rule and does not encompass the certification language from the 2015 AFFH Rule. *Compare* 24 C.F.R. § 91.225(a)(1) (2015) *with* 24 C.F.R. § 91.225(a)(1) (2014). HUD has explicitly instructed local governments to undertake the steps outlined in 24 C.F.R. § 91.225(a)(1)(2014), the certification provision that "existed prior to August 17, 2015," 83 Fed. Reg. 23927. *See* 24 C.F.R. §91.225(a)(1)(2015).

85. In short, the Assessment of Fair Housing provided an extensive process and new substantive requirements and accountability provisions for jurisdictions (and the public) to engage in prior to the adoption of the Consolidated Plan and related housing plans.

D. Secretary Carson's Public Opposition to the AFFH Rule

86. Secretary Carson has been outspoken in opposing the AFFH Rule, before and after he was nominated to his position.

87. In an article published in 2015, Secretary Carson criticized the AFFH Rule at length, equating it to “mandatory busing” of schoolchildren. Ben S. Carson, *Experimenting With Failed Socialism Again*, Wash. Times, July 23, 2015, available at <https://www.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish-/>. He condemned both the AFFH Rule and a Supreme Court decision recognizing that the Fair Housing Act bars disparate impact discrimination, stating that “based on the history of failed socialist experiments in this country, entrusting the government to get it right can prove downright dangerous.” *Id.*

88. In his confirmation hearing, Secretary Carson reiterated his hostility to the AFFH Rule. In response to a question from Senator Sherrod Brown regarding his 2015 article, Secretary Carson said:

As you probably know, that Act says that we want people who are receiving HUD grants to look around and see if they find anything that looks like discrimination and then we want them to come up with a solution on how to solve the problem. They're not responding to people saying that there's a problem, they're saying go and look for a problem and then give us a solution. And what I believe to be the case is we have people sitting around their desks in Washington D.C. deciding on how things should be done—you know—telling mayors and commissioners that you need to build this place right here and you need to put these kinds of people at it.³

³ *Housing and Urban Development Secretary Confirmation Hearing Before the Senate Banking, Housing and Urban Affairs Comm.* (Jan. 12, 2017) (statement of Ben S. Carson, Nominee, Housing and Urban Development Secretary), available at <https://www.congress.gov/recordings-and-testimony/2017/01/12/hud-secretary-nominee-ben-carson-testifies-confirmation-hearing&start=2552>.

89. In an interview after being confirmed, Secretary Carson said in response to a question about these prior statements that he “believe[s] in fair housing” but not in “extra manipulation and cost.” Accordingly, he said about the AFFH Rule: “So we just have to reinterpret it, that’s all.”⁴

90. Since Secretary Carson took office, HUD has provided no new guidance and has stopped providing the same level of technical support that it previously offered to jurisdictions preparing AFHs.

E. HUD’s January 5 and May 23 Suspensions of the AFFH Rule

91. Without providing advance notice or opportunity for comment, on January 5, 2018, HUD published a three-page notice in the Federal Register abruptly suspending the key requirements of the AFFH Rule. *See* Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, 83 Fed. Reg. 683 (Jan. 5, 2018) (attached as Exhibit A).

92. HUD’s notice announced that no local government would be required to submit AFHs until the next scheduled submission date that falls after October 31, 2020, nor would HUD review AFHs submitted to it until after that date. 83 Fed. Reg. at 684.

93. HUD stated that this suspension of the AFFH Rule’s requirements was necessary because, “[b]ased on initial reviews,” the agency concluded that “program participants need additional time and technical assistance to adjust to the new AFFH process and complete AFH submissions that can be accepted by HUD.” 83 Fed. Reg. at 684.

⁴ Joseph Lawler & Al Weaver, *Ben Carson: HUD Will “Reinterpret” Obama Housing Discrimination Rule*, Wash. Examiner, July 20, 2017, available at <https://www.washingtonexaminer.com/ben-carson-hud-will-reinterpret-obama-housing-discrimination-rule>

94. HUD stated that “additional technical assistance may result in program participants better understanding their obligations under the AFFH Rule.” 83 Fed. Reg. at 685. It further stated that “enhancing its technical assistance” would result in fewer resources expended by program participants “because they are more likely to submit an initial AFH that can be accepted by HUD.” *Id.* HUD also stated that it could use the additional time to improve the Assessment Tool. 83 Fed. Reg. at 685.

95. Although it failed to take comments before acting, HUD said it would accept comments on its action until March 6, 2018. 83 Fed. Reg. at 685. Almost all of the comments HUD received criticized its action.

96. Since issuing the January 2018 notice suspending the AFFH Rule’s requirements, purportedly to improve technical assistance, HUD has not taken any public actions aimed at improving its technical assistance.

97. On May 8, 2018, Plaintiffs filed this lawsuit and their motion for a preliminary injunction.

98. On May 18, 2018, HUD issued three related notices, all of which were published in the Federal Register on May 23, 2018.

99. The first notice withdrew the January 5 action suspending the AFFH Rule. *See* Exhibit B.

100. The second notice withdrew the Assessment Tool for local governments. *See* Exhibit C. It instructed participants that they should not follow the procedures of the AFFH Rule.

101. The third notice announced that local jurisdictions could meet their AFFH duty if they acted “in accordance with pre-existing requirements” in place before the AFFH Rule was promulgated. *See* Exhibit D.

102. The second and third notices described above are the same in practical effect as the January 5 notice suspending the AFFH Rule's requirements.

103. The May Notices (Exhibits C and D) instruct local governments to revert to the failed AI process, *i.e.*, prepare an Analysis of Impediments without HUD assistance, "take appropriate actions," and then "maintain records reflecting the analysis and actions," without submitting anything for HUD review. 83 Fed. Reg. at 23,927. HUD did not explain why it now believed this process would be effective; indeed, it did not even acknowledge that the AFFH Rule was adopted precisely because of its own conclusion (and that of GAO) that the AI process had failed to ensure that federal funds were used to affirmatively further fair housing, as the Fair Housing Act requires. *See, e.g.*, 78 Fed. Reg. at 43,711 (finding that, under the AI regime, federal funding recipients did "not sufficiently promote the effective use of limited public resources to affirmatively further fair housing").

104. Because the AI requirement is, at its core, a definition of affirmatively furthering fair housing, 24 C.F.R. § 91.225(a)(1) (2014), and one that is inconsistent with the definition of affirmatively furthering fair housing in the AFFH Rule, 24 C.F.R. § 5.152, that enhanced definition is effectively suspended.

105. As a consequence of removing the AFH requirement indefinitely, HUD has also violated the regulatory requirement that it not distribute federal funds to recipients without an approved AFH.

106. HUD stated that it was taking this action because the Assessment Tool had proved to be "unworkable" with respect to the first 49 AFH submissions HUD reviewed. HUD pointed to the fact that it initially rejected 17 of the first 49 submissions and required jurisdictions to revise them and requested that the submitters of 14 others provide revisions or addendums before

considering them. 83 Fed. Reg. at 23924. It said this “excessively high rate of unacceptable AFHs was due, in large measure, to problems with the Local Government Assessment Tool.” *Id.* It identified seven common problems in the first round of AFH submissions and, with little discussion, attributed each of them to deficiencies in the Tool. *Id.* at 23,924-25. For example, HUD observed that many jurisdictions failed to follow the AFFH Rule’s community participation requirements, with one jurisdiction giving the public only three days to comment on a draft AFH when the Rule requires at least 30. *Id.* at 23,924 (citing 24 C.F.R. § 91.105(b)(4)). HUD did not explain why such blatant failure to follow the regulatory text demonstrates that the Assessment Tool is so “unworkable” as to justify suspending the Rule.

107. HUD described the goals section as the most problematic, noting that this “was an issue in or the sole reason for the majority of initially non-accepted AFHs.” *Id.* at [p.11]. HUD failed to provide an explanation why it deemed this a failure of the Assessment Tool. As with the participation requirements, HUD also pointed to participant failures to initially follow basic directions provided in the Rule, Assessment Tool, and guidance, such as failing to provide metrics or to complete a provided chart. HUD did not explain why any of this was properly attributed to an “unworkable” Assessment Tool, nor why it could not be remedied with steps short of withdrawing the Assessment Tool and thus effectively suspending the AFFH Rule.

108. HUD also stated that it had “provided substantial technical assistance to this initial round of program participants, even for the AFHs that have been accepted.” 83 Fed. Reg. 23,925. It said it did not have the resources to provide the same level of assistance to the 104 local government participants scheduled to submit AFHs in 2018 and the 752 scheduled to submit in 2019. *Id.* To back up this assertion, HUD offered only that it “estimates that it has spent over \$3.5 million on technical assistance.” *Id.* It did not provide any further detail

regarding that estimate or explain its conclusion that such expenditures would scale up proportionally to the number of submissions rather than being fixed program costs (such as HUD's regional trainings), or costs in large part incurred to generate training material for ongoing use. It asserted in conclusory fashion that it did not believe future submissions would benefit from "efficiency gains over time from experience working with the Tool," 80 Fed. Reg. at 23,924, without attempting to support that conclusion.

109. HUD did not identify any legal authority permitting it, by withdrawing an already approved Assessment Tool without replacing it, to effectively suspend the requirement that covered jurisdictions submit AFHs on a timeline corresponding with their next Consolidated Plan submission.

110. HUD did not identify any legal authority permitting it not to review already submitted AFHs, notwithstanding that the AFFH Rule requires HUD to undertake such reviews and make determinations on each submitted AFH. *See* 24 C.F.R. § 5.162(a).

111. HUD did not identify any legal authority permitting it to distribute federal housing funds based solely on a certification that a jurisdiction complied with the pre-AFFH Rule requirements, notwithstanding that the AFFH Rule bars HUD from approving a Consolidated Plan in the absence of an accepted AFH. *See* 24 C.F.R. § 5.162(d) ("If a program participant does not have an accepted AFH, HUD will disapprove a consolidated plan.").

F. The AI Process under HUD's Notices

112. HUD's notice in Exhibit D states that local governments are expected to conduct an AI. 83 Fed. Reg. 23,927.

113. The notice states that local governments "should" conduct their AIs in accordance with HUD's *Fair Housing Planning Guide* with respect to the timing and content of the plans

rather than that they “shall” or “must” do so. 83 Fed. Reg. 23,927. In practice, unlike under the AFH process, local governments have discretion as to when they conduct their AIs and what content goes into them. Past experience, described in the GAO and HUD Inspector General investigations, show that jurisdictions prepare cursory AIs that often amount to no more than a few pages of description.

114. The discretionary content for an AI recommended by the *Fair Housing Planning Guide* does not mirror that required for the AFH by the AFFH Rule, and does not include or rely on the definitions of “Affirmatively Furthering Fair Housing” or “Meaningful Action” in the AFFH Rule. *Compare* 24 C.F.R. § 5.154(d) *with* Fair Housing Planning Guide (1996). In particular, the *Fair Housing Planning Guide* does not require a focused analysis of disparities in access to various dimensions of opportunity including proficient schools and environmentally healthy neighborhoods. For issues that are addressed in the *Fair Housing Planning Guide*, such as residential racial segregation, there is no guidance on the use of statistical indices for measuring that segregation, unlike the analysis of Dissimilarity Index data required in the AFH process.

115. HUD’s notice clarifying the AI requirement makes no mention of any community participation or consultation requirements that apply to the AI process and does not contend that the requirements of 24 C.F.R. §§ 91.100-91.105 apply to the AI process.

116. The notice makes clear that local governments are not expected to submit their AIs to HUD. Even when confronted with evidence of AFFH noncompliance by a recipient, submission and review of the AI by HUD is not mandatory. 83 Fed. Reg. 23,927.

117. HUD does not require review of an AI by HUD.

G. Significant Provisions of the Rule That Are No Longer in Effect

118. HUD's action has suspended local jurisdictions' core obligations under the AFFH Rule to conduct an AFH, submit that AFH to HUD for approval, incorporate strategies and actions to achieve the goals from the AFH into the Consolidated Plan, and then take those actions. Additionally, multiple mandatory provisions of the AFFH Rule that provide community stakeholders with access to information, opportunities to participate, and leverage to hold local governments accountable are no longer in effect.

119. Under the AFFH Rule, local governments were required to publish their draft and final AFHs so stakeholders would have access to the information and analysis within them. 24 C.F.R. § 91.105(b)(2). Because local governments will not conduct AFHs, HUD will not subject them to that publication requirement, and there is no similar publication requirement for the AI process.

120. Local governments were required to publish supplemental local data for community stakeholders to review during the community participation process for the AFH. 24 C.F.R. § 91.105(b)(1)(i). Without the AFH process in place, this requirement is inoperative. Additionally, there is no similar requirement for the AI process nor is there even a requirement that local governments collect and analyze local data in the AI process. Although the AFFH Rule limits the local data collection requirement to that which "can be found through a reasonable amount of search, are readily available at little or no cost, and are necessary for the completion of the AFH," 24 C.F.R. § 5.152, there is a great deal of information that fits that definition and that is not accessible to community stakeholders, including internal local government data regarding issues like building permits, code enforcement, infrastructure investments, and zoning applications.

121. Local governments were required to provide substantive responses to comments submitted by community stakeholders during the AFH public participation process that were not ultimately accepted. 24 C.F.R. § 91.105(b)(5). This requirement is no longer in effect, and there is no similar requirement for the AI process.

122. Local governments were required to provide technical assistance to groups representing persons of low- and moderate-income that request help to facilitate their submission of comments on the AFH. 24 C.F.R. § 91.105(i). This requirement is no longer operative, and there is no similar requirement for the AI process.

123. Local governments were required to accept and respond to complaints from community stakeholders regarding the AFH process. 24 C.F.R. § 91.105(j). Because there is no AFH process, they are no longer required to do so, and there is no parallel requirement for the AI process. Indeed, there currently is no administrative complaint process that community stakeholders can utilize to object to a local government's compliance with the duty to affirmatively further fair housing, whether by complaining to HUD or to the jurisdiction itself.

124. Local governments were required to consult with and proactively reach out to stakeholder groups including "community-based and regionally-based organizations that represent protected class members, and organizations that enforce fair housing laws" regarding the development of the AFH. 24 C.F.R. § 91.100(e). There is no similar requirement for the AI process.

125. The mandatory duties that the AFFH Rule places on HUD are also inoperative as a result of HUD's notices, thereby substantially reducing the rigor of its oversight of local government compliance with the duty to affirmatively further fair housing.

126. Under the AFFH Rule, HUD was required to deny acceptance to AFH submissions that were substantially incomplete (for instance, lacking the required public participation components, data analysis, or meaningful goals) or inconsistent with fair housing and civil rights requirements. 24 C.F.R. § 5.162(b)(1). Because of HUD's notices, HUD no longer has an informed basis for assessing the validity of civil rights certifications and is likely to routinely approve Consolidated Plan submissions with invalid certifications, just as it did previously under the same AI system.

127. Under the AFH process, HUD was required to accompany any decision to withhold acceptance of an AFH with written notification of the reasons for non-acceptance. This written notice was publicly available, and an invaluable source of information for community stakeholders. 24 C.F.R. § 5.162(b)(2).

128. Under the AFH process, if a local government did not have an acceptable AFH, HUD was required to deny approval of its Consolidated Plan submission, which prevented the flow of grant funds to the noncompliant local government. 24 C.F.R. § 5.162(d).

H. HUD's Experience with the First Set of AFH Submissions Provided No Reason to Suspend the Rule.

129. Not only did HUD thus lack legal authority to suspend the AFFH Rule's core requirements by withdrawing the Assessment Tool without replacing it, the evidence before it did not support this action. That some municipalities failed in their initial submissions to meet the Rule's requirements reaffirms, rather than calls into question, why HUD thought the Rule necessary in the first place: left to their own devices, many municipalities will fail to take their obligations under the Fair Housing Act seriously. That they continue to need HUD enforcement and oversight is not a reason to remove such oversight, particularly where HUD, under Secretary

Carson, has cut back on its technical assistance offerings to local jurisdictions and stopped issuing technical guidance to its own staff.

130. Even before promulgating the AFFH Rule, HUD began taking steps to prepare jurisdictions to comply with it. Since at least Fiscal Year 2012, Congress has appropriated significant funds for HUD's technical assistance efforts, and much of that money has been devoted to the implementation of the Affirmatively Furthering Fair Housing Rule.

131. HUD and its agents have designed regional, multi-day trainings delivered around the country for participating jurisdictions; drafted guidance on how to use the AFH tool; and answered questions submitted through the HUD Exchange website. At one point, HUD's agents even provided direct, on-site assistance to multiple program participants. HUD staff prepared and published the *AFFH Rule Guidebook*, while HUD staff and the agency's technical assistance contractors answered questions from program participants by phone or e-mail. Video trainings and additional fact sheets on issues such as public participation, regional assessments, and goal prioritization and formation are available on HUD's website.

132. HUD's willingness to deploy available technical resources to help jurisdictions formulate compliant AFHs changed in 2017, when HUD began to sow the bureaucratic seeds necessary to undermine or, to use Secretary Carson's word, "re-interpret" the AFFH Rule. Despite funding appropriated by Congress for technical assistance and the availability of a highly trained team of technical assistance providers, HUD has willfully and systematically underutilized technical assistance resources available to it.

133. For example, HUD no longer permitted its contractors or staff to engage in on-site technical assistance. Additionally, HUD failed to publish further guidance and ceased to monitor

and respond to questions about the AFFH Rule submitted through the HUD Exchange Ask-A-Question portal.

134. In large part due to HUD's own failure to assist them—as well as suspicion that HUD no longer has the will to enforce the AFFH Rule vigorously—some jurisdictions submitted inadequate AFHs that properly required rejection. Where HUD initially rejected an AFH, it often did so because the jurisdiction failed to include even the basic components of a functional AFH. For example, municipalities whose AFHs were rejected ignored segregation in an entire section of their jurisdiction (notwithstanding maps that should have made such segregation obvious); failed to include any metrics or milestones to measure improvements in fair housing; failed to analyze the data HUD had provided to the jurisdiction; and/or failed to consider housing barriers for key constituents, such as persons residing in public housing. That jurisdictions failed to include basic components does not reasonably demonstrate a fundamental flaw in the Assessment Tool.

135. HUD's description of the record before it when suspending the AFFH Rule's requirements also is incomplete in a way that makes its analysis unreasonable. HUD focuses only on the additional work that HUD and local jurisdictions are required to do to implement the AFFH Rule and entirely ignores the Rule's already evident benefits. Despite HUD's less than robust efforts to make the Rule work, the AFH submissions it received before suspending the Rule demonstrate that, on balance, the Rule was vastly improving jurisdictions' commitment to fair housing, which in turn was providing tangible benefits for individuals.

136. As HUD acknowledged, most of the 49 submissions it received cleared the high bar the AFFH Rule sets even in their first submission. Thus, 32 of the 49 jurisdictions were immediately on the path to finally meeting the Fair Housing Act's requirements in exchange for

the federal money they receive. HUD did not contend the Rule did not work for those jurisdictions, nor would such a contention be reasonable.

137. With respect to the 17 jurisdictions whose submissions it initially rejected, HUD paints a misleading picture by failing to acknowledge or consider relevant facts. Most of those 17 submissions that HUD initially rejected were improved through a collaborative process between HUD and the jurisdictions, and all but a few of them have already been accepted after revision. One of those that has not—from the Hidalgo County Regional Consortium (Hidalgo County) in Texas—is described further in the next section regarding harm to Plaintiffs. That submission was deeply flawed and was properly rejected; HUD’s suspension of the AFFH Rule ended the process that would have improved it.

138. Accordingly, what HUD characterizes as a failure—that 17 submissions were initially rejected—is in fact a success, because those jurisdictions were properly required to improve their inadequate AFHs. This is precisely how the Rule was written to work: HUD review, individualized feedback, and AFH revision by participants are all explicitly contemplated. See 24 CFR §§ 5.162(a) and (b). After decades in which participants had operated without oversight, it was to be expected that many participants would need assistance to meet a new level of accountability. And by and large they have, eventually, met the challenge.

139. One study of the 28 AFHs submitted to HUD between October 2016 and July 2017 (that is, the majority of the 49 on which HUD based its decision) compared those submissions to the AIs previously prepared by the same participants, and found striking improvements. Whereas the AIs contained nebulous goals, the AFHs contained more concrete ones. See Justin Steil & Nicholas Kelly, *Survival of the Fairest? An Analysis of Affirmatively Furthering Fair Housing Compliance* (Sep. 15, 2017) (working paper for The Future of Housing

Policy in the U.S. Conference, University of Pennsylvania), *available at* http://web.mit.edu/afs/athena.mit.edu/org/f/fairhousing/research/Steil_Kelly_Survival_of_Fairest.pdf. In the past, most municipalities did not set a single goal that included a quantifiable metric of success or concrete policy to be enacted. Now, almost all did.⁵

140. For example, Paramount, California committed to making (by explicit deadlines) specific amendments to its zoning ordinance to make its housing more inclusive, such as allowing group homes for people with disabilities in residential zones. New Orleans, Louisiana promised to increase homeownership by Section 8 voucher recipients by 10 percent annually. Chester County, Pennsylvania committed to creating 200 new affordable rental units in high opportunity neighborhoods across the county by 2021. El Paso County, Colorado similarly promised to assist in the development of 100 publicly supported affordable housing units in areas of opportunity. All of these commitments can be monitored and their success measured.

141. A representative success story is the AFH which Philadelphia completed and HUD approved. In accordance with the AFFH Rule's community participation requirements, Philadelphia conducted a survey in both English and Spanish (receiving more than 5,000 responses, including more than 900 from residents of high-poverty neighborhoods), conducted focus groups around the city, took comments on an initial (weak) draft AFH, and otherwise made far greater effort than it ever had to learn about barriers to fair housing in its own communities. The substantive results were striking. For example, the city's final AFH identified widespread evictions in neighborhoods where predominantly racial minorities live as a substantial barrier to fair housing. It committed the city to taking concrete steps in response, including creating an

⁵ Submitted AFHs can be viewed at: <https://furtheringfairhousing.mit.edu/assessment-fair-housing-city>.

“eviction prevention project” pursuant to which lawyers and advocates will represent those facing unjust eviction.

142. These outcomes are exactly the sort of concrete, locally driven commitments to fair housing that were rarely made under the AI regime and that the AFFH Rule was intended to promote, assist, and require. And they were made with greater community input, thanks to the AFFH Rule’s requirements in that regard. All utilized the Assessment Tool to arrive at these impressive outcomes.

143. One study, which was submitted to HUD in response to its call for comments on the suspension of the Rule, found that the AFH process in virtually all cases provided a greater level of public engagement than the AI process had. That meant, for example, more public meetings and notice provided in more places and media (as well as in more languages) to ensure that more members of the public were aware of the process and had the opportunity to participate. It also meant greater acknowledgment of public input in the AFH itself. For example, Nashville, Tennessee’s AFH spent 107 pages detailing public comments received and its response to them; it had devoted nine pages of its AI to such topics. *See* Furman Center Comment Letter, *available at* <https://www.regulations.gov/document?D=HUD-2018-0001-0036> (last visited Apr. 26, 2018).

144. As HUD stated in the Final Rule, the extent to which the AFFH Rule increases burden on program participants was expected to depend on how seriously those jurisdictions took their AFFH obligations all along. *See* 80 Fed. Reg. at 42,273. HUD fully expected that those jurisdictions that had flouted their obligations for years would face some increased burden when finally made to comply. It estimated that participating jurisdictions overall would incur compliance costs of about \$25 million, while HUD itself would incur about \$9 million in

resource costs. *Id.* In its May Notices, HUD cited its estimate that it has spent \$3.5 million so far as evidence that the Assessment Tool is “unworkable,” but it did not offer any basis to conclude that the amount was unreasonable or unexpected.

145. HUD also ignored that jurisdictions already have learned from the successes and failures of the first submitters and will continue to do so. Many of the first accepted AFHs have become models for other jurisdictions to follow—as those which have not been accepted have become models for what not to do; any extra time and resources that may have gone into formulating and reviewing them will not necessarily be required with respect to future submissions. HUD’s conclusory statement that “efficiency gains over time from experience working with the Tool would be unlikely to address HUD’s concerns,” 83 Fed. Reg. 23,924, is unsupported by the record.

146. While HUD has characterized its suspension of the AFH process as a temporary measure while it improves the Assessment Tool, subsequent events have called that into question. Seven months after HUD first halted the AFH process, HUD admitted in court that it had no timetable for publishing a replacement Assessment Tool or otherwise improving the existing AFH process. Instead of making that a priority, HUD has focused its resources on developing and publishing an advance notice of proposed rulemaking soliciting input on potential dramatic changes to the AFFH Rule. 83 Fed. Reg. 40713 (Aug. 16, 2018).

I. HUD's Action Causes Harm to Plaintiffs

147. Defendants' unlawful actions have caused Plaintiffs to suffer irreparable and ongoing injury for which there is no adequate remedy at law. These unlawful actions will continue to cause injury to Plaintiffs unless and until injunctive relief is granted.

148. Defendants' suspension of the AFFH Rule's core requirements is frustrating Plaintiffs' missions and perceptibly impairing their daily activities such as educating and counseling their members and other grassroots stakeholders. Plaintiffs' efforts to educate and counsel their members and other constituents about fair housing issues in communities in Texas and across the country have been made more difficult by the loss of a coordinated planning approach to fair housing issues, lack of access to information, guaranteed opportunities for community participation, and clear accountability mechanisms. Plaintiffs also have had their daily activities perceptibly impaired by the loss of a forum where they can efficiently and effectively bring their fair housing concerns to the attention of local officials and HUD and get redress.

149. In response, Texas Appleseed and Texas Housers (Texas Plaintiffs) have had to divert resources away from planned activities critical to their missions and devote them instead to counteracting the effects of Defendants' action in municipalities around Texas. NFHA, meanwhile, has had to divert resources it had planned to devote to other mission-critical activities to assisting its members around the country in similar efforts to combat the effects of Defendants' action.

1. Harm to Texas Plaintiffs

150. Both Texas Plaintiffs contributed to the development of the AFFH Rule (including by submitting comments) and have devoted considerable resources to ensuring that it

is implemented properly in Texas. They have relied heavily on the AFFH Rule's requirements, which provide them valuable information to support their education and outreach as well as procedural avenues of redress that ensure that local jurisdictions take Texas Plaintiffs' fair housing concerns seriously rather than continuing to perpetuate the patterns of residential racial segregation and discriminatory use of federal funds that historically have plagued much of Texas.

151. For example, since 2008, the Texas Plaintiffs have devoted substantial time and resources (including filing multiple complaints with HUD) to requiring state and local governments to spend federal disaster relief money in ways that are non-discriminatory and affirmatively further fair housing. They have played a large role in the creation of an AI for the State of Texas that requires specific steps to address disaster relief discrimination, including training for local grantees and a commitment to spend disaster recovery money in certain ways. They also have developed, with the State of Texas, a form for local jurisdictions to use to assess and report their compliance with AFFH requirements with respect to the use of disaster relief money and have closely monitored local jurisdictions' compliance. None of these mechanisms, however, permitted Texas Plaintiffs to effectively advocate for general (non-disaster related) AFFH compliance by jurisdictions around the State the way the AFH process did.

152. After the AFFH Rule's promulgation, the Texas Plaintiffs relied on it to help develop effective AFHs in a number of communities and regions. In particular, they have provided substantial input into the development of municipal AFHs in Fort Worth, Corpus Christi, and League City. They also have helped organize community members and assisted in the development of a regional AFH in the Hidalgo County region, covering 19 jurisdictions and housing authorities. They have spent thousands of dollars in staff time and resources in various

Texas communities, providing public education to municipalities, planners, and attorneys. These efforts have begun to pay dividends in large part because of specific protections that the AFFH Rule provides. HUD's suspension of the Rule's requirements is frustrating Texas Plaintiffs' efforts to ensure fair housing in the communities they serve.

153. The efforts of the Texas Plaintiffs, combined with the AFFH Rule's protections, have substantially increased the degree of public participation in each community's AFH process and enhanced Texas Plaintiffs' efforts to educate and counsel grassroots stakeholders and community members. The AFFH Rule amplified the ability of advocacy groups like Texas Plaintiffs to identify, publicly articulate, and force jurisdictions to grapple with local fair housing problems that previously went unaddressed. It did so through the requirements that local governments conduct an organized planning process that comprehensively addresses a myriad of fair housing issues; obtain and publish certain information that is relevant to the AFH process but is also useful for fair housing work more broadly; guarantee public participation in the fair housing planning process, taking the onus off organizations like Texas Plaintiffs to organize it; perform a robust analysis of local fair housing issues; and accept and respond to comments from Texas Plaintiffs and others. It also did so through HUD's oversight role, which makes jurisdictions accountable for AFFH compliance and provides Texas Plaintiffs with a forum dedicated to resolving issues like those Texas Plaintiffs regularly have with local jurisdictions. With the AFH process suspended, Texas Plaintiffs must repeat and redouble their efforts to ensure fair housing in the communities they serve, because there is no requirement that local jurisdictions provide such local information or consider Texas Plaintiffs' input, nor any process by which HUD will review an AFH and determine whether it complies with the AFFH Rule's procedural and substantive requirements.

154. As one illustration, the Texas Plaintiffs used the AFH process's protections to ensure that, when a consortium of program participants in Hidalgo County (collectively, the "County") prepared its AFH (as one of the first AFH submitters in Texas), community participation was more robust. Among other things, they prepared a lengthy comment letter advising County officials to provide multiple forums in which interested residents could participate, ensured that materials were prepared in Spanish, and saw to it that notice and opportunity to participate was given to the predominantly Latino population living in *colonias*, *i.e.*, plots of land outside incorporated cities that often lack infrastructure such as water, sewage, electricity, and paved roads. Hidalgo County historically has ignored the needs of the people living there (even as it takes federal funds and certifies AFFH compliance), but the AFFH Rule's requirements provided a mechanism for the Texas Plaintiffs to force the county to hear evidence of those needs.

155. The AFH that Hidalgo County submitted to HUD in 2017 nonetheless was deficient. It failed, among other things, to grapple with the publicly stated needs of *colonias*, informed residents or to engage with the comments Texas Plaintiffs and others provided. Texas Plaintiffs sent HUD a letter alerting the agency to these problems, and on December 12, 2017, HUD rejected the submitted AFH, requiring the County to submit a revised one by March 12, 2018. Hidalgo County's AFH thus is one of the 17 initially rejected submissions upon which HUD relies as a reason to suspend the Rule.

156. Relying on the AFFH Rule's requirements, Texas Plaintiffs have spent—and will in the future be required to spend—thousands of dollars in staff time and out-of-pocket expenses for educational and outreach materials to educate grassroots constituents and community members about the opportunity to finally bring fair housing to Hidalgo County. That was money

well spent with the AFH process in place, as that process guaranteed that the ultimate result—after HUD intervention, to the extent necessary—would be that Hidalgo County produced an AFH that committed it to meaningful fair housing steps and helped Texas Plaintiffs educate and counsel the community about how to achieve that progress in concrete ways.

157. HUD's action frustrates the accomplishment of these results. Now HUD will not require Hidalgo County to submit an AFH that meets the AFFH Rule's requirements and will not even require Hidalgo County to make its final AI publicly available, although it already has found that Hidalgo County has not made a sufficient commitment to affirmatively further fair housing. Since HUD's action, Hidalgo County has refused to meet with Texas Plaintiffs, submitted an AI to HUD without making it public, and has told Texas Plaintiffs that it would not make any of their requested changes. With the AFH process suspended, Texas Plaintiffs no longer have a forum for redressing their grievances and ensuring that Hidalgo County complies with its AFFH obligations, nor do they have any entitlement to know what Hidalgo County is doing purportedly in furtherance of those obligations. That greatly impairs Texas Plaintiffs' ability to carry out their mission in Hidalgo County.

158. Since HUD's actions complained of here, Plaintiff Texas Appleseed has repeatedly encountered challenges in educating and engaging local residents on fair housing issues in their communities because there is no longer a process that requires that the government listen to local residents and respond to their concerns. Prior to the withdrawal of the AFH process, Texas Appleseed could tell local residents that the local government must respond to their concerns and HUD's review would enforce that requirement in case the jurisdiction did not do so. That made it far easier for Texas Appleseed to mobilize and empower local residents to voice their concerns and be part of the process, as is part of the organization's mission. Now,

without a HUD acceptance process for an AFH, local residents have no assurance that their comments will be heard or addressed. For this reason, Texas Appleseed is now having difficulty getting community members engaged in a fair housing planning process.

159. HUD's abdication of its statutory responsibility has already required Texas Housers and Texas Appleseed to expend considerable additional resources to bring fair housing to Hidalgo County without HUD's assistance and without the benefit of the public participation requirement and mandatory provision of information embedded in the AFFH Rule. The County, no longer needing HUD approval, now has no incentive to meaningfully improve its rejected AFH or otherwise address the housing needs that have plagued many of its residents for too long. Indeed, the County has told Texas Plaintiffs that it has no intention of remedying the deficiencies from its rejected AFH now that HUD will not require it to do so. That means that Texas Plaintiffs will have to expend considerable resources making fair housing a reality in Hidalgo County that they would not have to expend if HUD were enforcing the requirements of the AFFH Rule.

160. Similarly, in the City of Corpus Christi, which also had an AFH due on January 4, 2018, the Texas Plaintiffs were able to educate and counsel local advocates to participate in the AFH's development with the aid of the community participation protections and information provision requirements of the AFFH Rule. They also submitted comments on the City's AFH, encouraging the City to incorporate changes based on the devastating impact of Hurricane Harvey on the City and surrounding region. The City nonetheless submitted an AFH that barely acknowledged massive housing loss, extended displacement, and infrastructure impacts caused by one of the costliest disasters in U.S. history. With the AFH process intact, Texas Plaintiffs would have had a forum in which to require the City eventually to acknowledge and address the

fair housing implications of Hurricane Harvey, and the resulting compliant AFH would have contained information and concrete commitments by the City that could inform Texas Plaintiffs' efforts going forward. Instead, because of HUD's unlawful suspension of the AFH process, HUD will not review that defective AFH, leaving the City with no obligation to improve it and no incentive otherwise to make concrete plans to address fair housing concerns in disaster relief. The Texas Plaintiffs will not have the benefit of being able to use the City's analysis of the impact of Hurricane Harvey on fair housing issues in their work to educate local advocates and residents, and they have been deprived of an effective procedural avenue for affecting the expenditure of disaster recovery funds in a way that addresses fair housing issues. As a result, their daily activities in furtherance of their mission will be made less efficient and effective. The Texas Plaintiffs will have to expend more resources than expected in trying to make fair housing a reality in Corpus Christi, including by monitoring the use of hundreds of millions of dollars in federal disaster relief money that will be flowing to the region for fair housing compliance. These activities will require considerably more effort and expenditure of resources than if HUD had not suspended the AFFH Rule.

161. Meanwhile, with Fort Worth's AFH coming due, Texas Housers hired an employee, set up an office in that city, engaged in discussion with community leaders and municipal employees, and otherwise laid the groundwork for using the AFFH Rule's protections to ensure the development and then implementation of an AFH that would make fair housing in Fort Worth, finally, a reality. Just as it was nearly time for Fort Worth to submit a draft to HUD, HUD announced that it would no longer accept or review AFHs. As a consequence, Fort Worth decided not to complete and publish an AFH. Rather, it will rely on the former AI process to support its claim that it has met its AFFH obligations. Texas Housers thus will have to devote

additional resources in Fort Worth to sustain or recreate a climate and process in which community members are able to air their significant concerns about segregation and unequal access to opportunity for families of color. It also will have to spend more resources, in the absence of HUD review, monitoring Fort Worth's use of federal funds in order to have the information necessary to educate local advocates and residents about fair housing issues. Those are resources it would not have to expend if HUD continued to enforce the AFFH Rule.

162. The Texas Plaintiffs will continue to work to promote fair housing in those two municipalities and elsewhere in Texas by educating and counseling local advocates and residents, but they have lost the benefit of the AFFH Rule's requirements, pursuant to which municipalities must consult with them at regular intervals, must review and engage with their comments and concerns, must reach out to community members, and more. They have lost the ability to leverage public housing resources in areas like Hidalgo County where public housing agencies had planned to participate in the AFH process as part of a consortium led by municipalities—notwithstanding that PHAs were not independently required to complete and file AFHs—but now are not subject to *any* fair housing planning process. They also have lost the benefit of HUD review of submitted AFHs (and the Texas Plaintiffs' comments on them), along with the prospect of HUD non-acceptance of AFHs that inadequately assess fair housing conditions and/or fail to commit to concrete solutions. These consequences of HUD's action frustrate Texas Plaintiffs' mission of achieving fair housing for the communities they serve.

163. Texas Plaintiffs' efforts to educate grassroots groups and community residents have been made substantially harder and more expensive in the absence of an organized, interdisciplinary process to consider multiple fair housing issues in a comprehensive way. Without the AFH process in place, Texas Plaintiffs have to work on multiple issues separately in

multiple jurisdictions and with separate components of local governments. Because of the size of Texas, that means traveling to Ft. Worth and other Texas locations more frequently, spending more time educating multiple small groups of local residents about multiple issues, and attending multiple meetings. The process is also made harder because jurisdictions no longer are required to make public as a matter of course local data that informs how Texas Plaintiffs target their work. Getting it now may require labor-intensive public records requests to multiple jurisdictions and litigation over exemptions to the Texas Public Information Act.

164. Texas Plaintiffs have taken or will take many specific actions to counter the effects of HUD's suspension of the AFH submission requirement and convince local government program participants to nonetheless take their fair housing obligations seriously. Such actions include:

- Producing a video to educate the public (including affected grantees) about the impact of the Rule and grantees' continuing obligation to affirmatively further fair housing notwithstanding HUD's action;
- Developing a fact sheet for advocates statewide on the effect of HUD's action;
- Responding to continuing requests for information and resources;
- Engaging in ongoing public education efforts, including participating in community forums on fair housing in Amarillo and Fort Worth; meeting with Hidalgo County; writing advocacy pieces; and advising attorneys, community groups, and consultants working on now-suspended AFHs on the impact of HUD's suspension of the AFH submission requirement on ongoing fair housing obligations; and

- Writing letters to the 65 most immediately impacted jurisdictions regarding their continued obligation to affirmatively further fair housing, an in-process action which by itself will take about 120 hours of staff time.
- Expanding their education and counseling efforts to multiple groups of local persons in each jurisdiction around individual issues. In order to achieve the same results available to them under the organized AFH planning process, Texas Plaintiffs now must educate local residents around each geographic area affected by a particular issue, thus doubling or tripling the amount of time and cost required to educate local residents. Increasing the number of visits to Texas communities requires costs of a magnitude of two to three times the prior investment by Texas Plaintiffs in Texas communities, including the costs of airfare and other travel expenses to each of five cities where they were already working: Hidalgo, Corpus Christi, Ft. Worth, League City, and Lubbock.

165. The Texas Plaintiffs have had to divert resources in many other ways to ensure that the interest in fair housing that the AFFH Rule created is not lost while the Rule's core requirements are suspended. For example, Texas Housers' staff continues to meet on a regular basis with community groups in Hidalgo County, to keep them engaged in long-term efforts to secure additional housing and community development resources for the *colonias* and otherwise combat discrimination on the basis of national origin. Texas Housers also continues to invest resources in educating grassroots groups in Hidalgo County about their rights to equitable flood drainage, the need to reform subdivision rules, and the rights of non-English speakers to receive information about public programs in a language and format they can understand. Without the focused AFH process that provides a specific forum for articulating these grassroots concerns at

specific times—and requires the County to listen to and address them—these efforts are much more inefficient, requiring far more of Texas Housers’ time and achieving less tangible results.

166. Using administrative enforcement or litigation to address fair housing issues in the communities where they are working is not a viable alternative to HUD’s AFH process for Texas Plaintiffs. Since at least March 2013, HUD’s official enforcement policy has provided that its Fair Housing and Equal Opportunity office “will not accept a complaint directly under the Fair Housing Act that an entity has failed to affirmatively further fair housing because there is no authority under the Act to do so.” U.S. Dep’t of Hous. & Urban Dev., *Compliance-Based Evaluations of a Recipient’s Certification that it has Affirmatively Furthered Fair Housing* (March 5, 2013), at p. 3. Furthermore, there is no express private cause of action to enforce 42 U.S.C. § 3608, which is the source of the AFFH obligation. *Compare* 42 U.S.C. § 3613 (private cause of action with respect to a “discriminatory housing practice”) and 42 U.S.C. § 3602(f) (limiting “discriminatory housing practice” to acts that are unlawful under 42 U.S.C. §§ 3604, 3604, 3606 and 3617). The insufficient enforcement options outside the AFH process compounds the injury that Texas Plaintiffs suffer from the suspension of that process, which has proven to be a much more effective forum than anything else that exists for developing, articulating, and securing positive fair housing outcomes.

167. HUD’s unlawful suspension of the AFH process has greatly undermined Texas Plaintiffs’ ability to accomplish their missions and is making them divert resources to activities they would not otherwise have engaged in, just to get to an inferior result. Because of HUD’s action, Texas Plaintiffs have diverted their resources and will continue to divert their resources to educating funding recipients and community members that jurisdictions still must comply with the AFFH statutory requirements notwithstanding HUD’s refusal to enforce them. They

consequently have had to cut back on important activities they would be pursuing if not for HUD's suspension of the AFFH Rule's requirements.

168. For example, Texas Housers has been forced to hire additional staff to effectively further its mission in North Texas because HUD's unlawful action has made it more difficult and time-consuming to address multiple actions and policies in Amarillo and Lubbock that prevent low income residents of color from exercising fair housing choice and gaining equal access to public services. With the AFH process in place, Texas Housers could efficiently address these issues in a single process with local officials required to consult with Texas Housers and HUD review providing assured accountability. Without that process, Texas Housers must devote additional resources to address a dozen or more separate public policies in each city seriatim.

169. As a result of this and other diversions of resources to counteract the effects of HUD's action, Texas Plaintiffs have had to substantially curtail their grassroots outreach, education, and policy and legal support in Houston and other areas recovering from the effects of Hurricane Harvey. If not for their need to counteract the effects of HUD's action, Texas Plaintiffs would be deeply engaged in research, data analysis, policy and legal support, and public education concerning various recovery issues, including State and municipal compliance with civil rights obligations associated with federal disaster recovery funding programs and the effectiveness and efficiency of State and municipal programs offering disaster recovery services and supports to low-income families.

170. Texas Appleseed has also been required to divert the time of the head of its Disaster Recovery and Fair Housing Project away from developing a project to protect land rights of African Americans who own "heir property," *i.e.*, land that has been passed down informally from generation to generation without recorded transactions—complicating, among

other things, eligibility for federal benefits for disaster recovery—and from providing input on the revision of the zoning code in Austin, Texas, to address patterns of segregation and access to opportunity in that city. Other organizational representatives have diverted resources away from fundraising and other programmatic work to assist with these projects and to address various other capacity issues caused by the shift in focus relating to HUD’s suspension of the AFH process.

2. *Harm to NFHA*

171. The Texas-specific harm being suffered by the Texas Plaintiffs is representative of the harm that NFHA and its members are suffering around the country.

172. NFHA is a non-profit corporation dedicated to ending discrimination in housing. NFHA works to ensure equal housing opportunity for all people through leadership, education and outreach, membership services, public policy initiatives, advocacy, community development, investigation of fair housing violations, and enforcement. Its mission is being frustrated by HUD’s unlawful decision to suspend the AFFH Rule’s requirements. To counteract the effects of HUD’s action, NFHA has been forced to divert resources away from other important projects.

173. Since the late 1980s, NFHA has worked to encourage HUD to do more to implement and enforce the Fair Housing Act’s requirement that recipients of federal funds affirmatively further fair housing. Among other things, it has long called on HUD to enact procedures that ensure AFFH compliance. When HUD has been unwilling to effectively enforce the AFFH requirement, NFHA has had to expend resources in its stead.

174. When HUD modified the Analysis of Impediments process in 1995 and issued the *Fair Housing Planning Guide* in 1996, NFHA was intimately involved with the implementation of the AI process on the ground. Among other things, it trained its members and

worked with them locally to develop AIs; held educational sessions at conferences; and helped HUD identify key fair housing issues that funding recipients should address in their AIs.

175. In 2001, NFHA developed and disseminated a template for developing AIs, because HUD's *Fair Housing Planning Guide* had proven inadequate for that task. NFHA's template was widely distributed and used nationally.

176. NFHA and its members have played a key role in the development and implementation of local AIs across the country.

177. Based on its experience with the failed AI process, NFHA was one of the leading advocates pushing for the creation of the AFFH Rule to replace it. Along with partners, NFHA created and supported the National Commission on Fair Housing and Equal Opportunity. This Commission conducted five public hearings and gathered evidence regarding, among other things, HUD's progress in implementing the AFFH obligation. Its report, published in 2008, concluded that "[t]he current federal system for ensuring fair housing compliance by state and local recipients of housing assistance has failed" and recommended many specific changes. National Commission on Fair Housing and Equal Opportunity, *The Future of Fair Housing: Report of the National Commission on Fair Housing and Equal Opportunity* 44 (2008), available at <http://www.naacpldf.org/files/publications/Future%20of%20Fair%20Housing.pdf>.

178. NFHA devoted considerable resources to assisting HUD with developing the AFFH Rule. Among other things, it participated in HUD's public hearings and submitted written comments on the proposed AFFH Rule itself and the AFH template.

179. Once HUD issued the final AFFH Rule, NFHA and its members worked in local communities across the country to generate effective community participation and substantive provisions in AFHs that would make meaningful differences to communities. NFHA members

have actively participated in the AFH planning process in many jurisdictions, with NFHA providing resources, guidance, and strategic help. NFHA has posted on its website an extensive list of AFFH resources and materials to assist its members and the grantees themselves.

180. HUD's action, if not enjoined, will diminish the benefits that NFHA derives from all this work already done and will frustrate the accomplishment of NFHA's mission. NFHA engages in a variety of activities aimed at advancing fair housing priorities around the country. The AFFH Rule's requirements, when in effect, make NFHA's efforts more efficient and effective. Not only does the Rule provide NFHA and its members greater ability to ensure that fair housing considerations are included in municipal planning decisions, but its standardized process and formalized rules make it much simpler for NFHA to advise and assist its members in effectively engaging at the local level. HUD now has removed those regulatory benefits, directly harming NFHA's ability to achieve fair housing and help its members to do the same.

181. As an organization with members across the nation facing some of the same local problems, NFHA benefitted greatly from the development of model AFH provisions that NFHA could use to educate its members and counsel them as to how to replicate meaningful and effective AFHs elsewhere. For example, NFHA benefitted from the information and analysis in the New Orleans AFH, which was required to be made publicly available by operation of the Rule, in educating its members about best practices that were developed in that city through the AFH process. NFHA highlighted the example of the New Orleans AFH both in broad trainings for its members, including one held on July 26, 2017, and in one-on-one communications with members in jurisdictions going through the AFH process after New Orleans.

182. Similarly, NFHA has relied upon the local data and the analysis of that local data in the Philadelphia AFH to educate its members about best practices for effective AFFH

compliance. This information from the Philadelphia AFH was publicly available and could be referred to by members who received NFHA's training because of the access to information provision of the AFFH Rule.

183. The AFFH Rule's community participation requirements, standardized content and structure, and accountability mechanisms made NFHA's efforts to educate its members far more efficient and effective than under the old AI process. Under the Rule, NFHA had a broad reach nationally in influencing AFH processes. NFHA found that relatively modest training for each member was sufficient to empower members to effectively engage in the process locally because local governments knew that they had to comply with community participation requirements and afford fair housing groups a seat at the table.

184. HUD's abrupt suspension of the AFFH Rule's requirements has required NFHA to divert resources to educating and counseling its members, civil rights organizations, and affordable housing stakeholders about HUD's action and how to achieve fair housing locally under much more challenging circumstances. Such diversion will continue unless and until HUD's action is enjoined. Because of NFHA's long-standing commitment to and expertise regarding the AFFH statutory obligation (before and after the promulgation of the AFFH Rule), its members and other civil rights and affordable housing stakeholders look to it for education and counseling regarding HUD's notice and how to promote effective fair housing planning without the AFFH Rule's protections. NFHA is expending considerable financial and human resources on this education and counseling.

185. For example, NFHA staff gave presentations concerning the notice and its effects to the Leadership Conference on Civil and Human Rights Fair Housing and Fair Lending

Taskforce; Americans for Financial Reform Housing and Foreclosure Working Group; and the Affirmatively Furthering Fair Housing Working Group of NFHA's members.

186. The AI process to which HUD has instructed jurisdictions to return is considerably more difficult for NFHA members to navigate. For example, whereas the AFH process required jurisdictions to consult with fair housing groups such as NFHA's members, the AI process imposes no such duty. Indeed, prior to the AFFH Rule, NFHA members were routinely not even informed that jurisdictions were conducting an AI, let alone consulted for their fair housing expertise or given a meaningful opportunity to provide information and comments.

187. Thus, NFHA must expend far more resources to educate and counsel its members as to how to win a seat at the table that is no longer guaranteed to them. It must, for example, help its members draft effective letters to jurisdictions explaining why those jurisdictions should proceed with the AFH process and its attendant procedures (such as the community participation requirements) voluntarily. It then must help members effectively be heard through the process, in the absence of any requirement that jurisdictions take their input into account. All of this requires staff time that NFHA would not have had to devote absent HUD's suspension of the AFH process.

188. NFHA has attempted to do this counseling and educating of its members as efficiently as possible. For example, NFHA staff members have completed and distributed a comprehensive side-by-side analysis of the differences between the AFH and AI processes for use in educating and counseling its members. NFHA spent significant resources on developing this educational tool and will expend further resources continuing to update it. It also will continue to expend resources educating and counseling its members as to how use this tool to

assist them in persuading local jurisdictions to develop and implement meaningful fair housing plans notwithstanding HUD's abdication of its oversight responsibility.

189. To fully support its members in being effective participants in the AI process, however, NFHA has engaged in and will need to continue to engage in individualized counseling regarding HUD's action with its members located in strategic areas throughout the country. These efforts, which already have required considerable staff time, have been necessary and will continue to be necessary to educate members about how HUD's action has changed the ground rules and the most effective means for ensuring effective fair housing planning without the AFFH Rule's protections. NFHA has had to identify those areas most immediately affected by HUD's actions, such as where local government program participants submitted AFHs prior to January 5 but did not receive HUD's acceptance of their submissions, and then conduct outreach to its members and other allied local civil rights and affordable housing advocates operating in those jurisdictions.

190. The amount of resources that NFHA must divert to such activities will increase in the coming months, because most local government program participants would have had AFHs due in the next two years pursuant to the AFFH Rule. Hundreds of local governments in the coming months will have to determine whether to use the Assessment Tool (though it is "officially" withdrawn) to fulfill their AI obligations prior to developing their Consolidated Plans, and whether they will adhere to the AFFH Rule's timeline and procedural protections. NFHA will have to continue to divert resources from its planned operations to helping these jurisdictions, its members, and other civil rights and affordable housing groups further fair housing in these uncertain circumstances. And it will not be able to do so in such a targeted way, because of the much larger number of jurisdictions at issue. Effectively, HUD has off-loaded its

responsibility for ensuring AFFH compliance by this much larger number of jurisdictions to NFHA; HUD may be saving money by doing so, but at NFHA's expense.

191. In the absence of HUD oversight, NFHA is preparing to devote substantial resources to outreach, public education, and advocacy to assist its members and community groups working to ensure that jurisdictions formulate AIs that are robust as possible (given the circumstances) and then monitoring compliance. Through this work, NFHA plans to blunt, as best it can, the negative impact of HUD's action. It will have to devote resources to assisting its members and others with respect to monitoring and enforcing AFFH compliance in the absence of effective monitoring and enforcement by HUD. NFHA would not have to devote nearly the same level of resources to such tasks with the AFFH Rule in place.

192. An illustration of the difference in resource expenditure that HUD's action has required of NFHA is in Memphis, Tennessee. There, a NFHA supporting member, Memphis Area Legal Services, is working to ensure effective fair housing planning through an AI process being undertaken by the City of Memphis and Shelby County. If the AFH process were in effect, NFHA could support Memphis Area Legal Services remotely and through the type of modest efforts that NFHA generally undertook before HUD suspended that process. Because that process is not in effect, and the local governments are not following the AFFH Rule's requirements, NFHA staff have been required to travel to Memphis to provide much more intensive education and counseling efforts.

193. For example, the City of Memphis and Shelby County produced a stakeholder input survey for their AI, but they did not circulate that survey to the stakeholders they would have been required to consult in the AFH process under 24 C.F.R. § 91.100(e), including Memphis Area Legal Services, or otherwise solicit their views. NFHA had to educate and assist

Memphis Area Legal Services regarding proper distribution of the survey, assist in the survey's circulation, and educate stakeholders receiving the survey about how to raise fair housing issues when responding.

194. As a result, NFHA has had to have three different staff members travel to Memphis, with one staff member traveling multiple times, in addition to providing intensive, remote assistance. NFHA staff would not have had to engage in this travel at all if the protections of the AFFH Rule were still operative. NFHA staff have expended at least one hundred hours in unanticipated staff time in connection with their work in Memphis alone.

195. Additionally, in the absence of the protections of the AFFH Rule, there is a risk that the City of Memphis and Shelby County will not publish their draft and final AIs when they are completed, given those jurisdictions' established behavior of not adhering to the community participation requirements for the AFH process. What was once available automatically by function of the Rule could require requests under the Tennessee Open Records Act and litigation over the applicability of exemptions from disclosure under that law.

196. Furthermore, after HUD's suspension of the AFFH Rule, the Memphis Housing Authority withdrew from its partnership with the City and County to conduct a regional AFH. As a consequence, NFHA and its members have lost the ability to efficiently secure important information about public housing resources in Memphis. As a result of that non-participation, critical data about which NFHA would educate and counsel Memphis Area Legal Services is missing from the AI process. Efforts to recreate or access that information through other means for purposes of educating NFHA's members are less efficient and effective than those would have taken place but for the suspension of the Rule's requirements.

197. Because of HUD’s actions, funding recipients that already were at work on assessments—many of which would have been due not much more than a year from now—have halted their work. As a result, NFHA’s daily activities related to educating its members about fair housing conditions have been perceptibly impaired, and it has had to devote time and out-of-pocket expenditures, above and beyond those it had anticipated and budgeted for, to educate its members about those conditions. Furthermore, NFHA’s members will face a more onerous task in helping jurisdictions develop effective AFHs after the lengthy period of delay.

198. NFHA has had to divert resources away from other important mission-related activities because HUD’s action has forced it to spend more resources on AFFH compliance. It has, for example, had to delay or scale back plans to provide assistance to members on disaster recovery plans in Florida, Texas, and California and delay work with other partners to increase access to FEMA disaster data that could benefit fair housing-related improvements in disaster recovery.

CAUSES OF ACTION

First Cause of Action

Administrative Procedure Act – Agency Action Taken Without Observance of Procedure Required by Law

199. The APA empowers this Court to hold unlawful and set aside agency actions taken “without observance of procedure required by law.” 5 U.S.C § 706(2)(D).

200. Without following notice-and-comment procedure, HUD has suspended indefinitely the AFH process required by the properly promulgated AFFH Rule.

201. Without notice-and-comment procedure, HUD has reinstated the AI process that was superseded by the AFFH Rule and does not exist in current regulation.

202. Without notice-and-comment procedure, HUD has suspended all the subsidiary requirements of the AFH process, including the AFFH Rule's community participation procedural rules, by instructing participating local governments to not use the Assessment Tool and to revert to the AI process.

203. Without notice-and-comment procedure, HUD has suspended the requirement of the AFFH Rule that jurisdictions certify that they meet the Rule's definition of affirmatively furthering fair housing and has suspended the requirement that jurisdictions meet the fair housing requirements that the AFFH Rule added to the Consolidated Plan process as a condition of receipt of federal funds.

204. Pursuant to the APA, HUD was required to undertake notice-and-comment rulemaking to revise the AFFH Rule, including changing the dates on which jurisdictions are required to submit their first AFHs for HUD review.

205. By failing to engage in notice-and-comment rulemaking before taking the actions described above, HUD failed to observe procedures required by law, in contravention of the APA.

Second Cause of Action
Administrative Procedure Act – Agency Action That is Arbitrary, Capricious, or an Abuse of Discretion

206. The APA empowers this Court to “hold unlawful and set aside” agency action that is “arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law.” 5 U.S.C. § 706(2)(A).

207. HUD withdrew the Assessment Tool, thus effectively suspending the AFFH Rule's requirements, based on its conclusion that the Assessment Tool had proved to be “unworkable.” HUD failed to justify this conclusion based on facts in the record. In particular, it

did not adequately explain why any concerns it had with respect to initial non-acceptance of submitted AFHs were attributable to the Tool, as opposed to local governments failing to follow clear requirements.

208. HUD stated that it had expended too many resources assisting the 49 jurisdictions that had submitted AFHs, such that it could not scale those expenditures to assist the greater number of jurisdictions due to submit AFHs in 2018. In support, it offered only the conclusory assertion that it had expended \$3.5 million on the AFFH Rule so far. HUD failed to support its conclusion that the \$3.5 million it expended so far indicates that its expenditures will be substantially higher in future years.

209. HUD offered no explanation as to why it chose the drastic remedy of withdrawing the Assessment Tool without replacing it. HUD failed to consider less disruptive alternatives, such as formulating additional technical assistance documents that clarified points of confusion, and did not explain why it cannot improve the Assessment Tool while the existing tool is in effect, as it has done before.

210. HUD's reasoning ignores key evidence that was before the agency and improperly focuses on what the agency now perceives to be the Rule's costs without considering the benefits flowing from the Rule.

211. HUD's reasoning fails to acknowledge that almost all jurisdictions participating in the process so far have successfully submitted compliant AFHs, either on first submission or after work with HUD. It fails to acknowledge that these AFHs contain far more concrete, measurable commitments to further fair housing than were in the AIs prepared by the same jurisdictions.

212. HUD has not explained why it is acceptable to return to the AI regime that, as the agency itself has found, does not work. It did not acknowledge its own findings in promulgating the Rule regarding the ineffectiveness of the AI regime.

213. HUD's withdrawal of the Assessment Tool and instruction to participants to revert to the AI process are arbitrary, capricious, or an abuse of discretion, in contravention of the APA.

Third Cause of Action
Administrative Procedure Act – Agency Action Not in Accordance with Law

214. The APA empowers this Court to set aside an agency action that is “not in accordance with law.” 5 U.S.C. 706(2)(A).

215. In promulgating the AFFH Rule, HUD found that it needed a new and robust approach to ensuring that local governments and other grantees take actions that meet their obligations under the Fair Housing Act as recipients of federal housing funds. HUD found that its previous practices had not been effective in leading to meaningful action regarding segregation, concentrated poverty, disparities in access to community assets, and other problems that the Fair Housing Act requires funding recipients to address. It adopted the AFFH Rule to bring its own practices and its grantees' practices into compliance with the statutory requirement. 80 Fed. Reg. at 42,275.

216. HUD has an affirmative obligation under the Fair Housing Act to ensure that federal housing programs are administered, and federal housing funds spent, in a manner that furthers fair housing. The AFFH obligation requires both addressing actions that are actively discriminatory and taking affirmative steps to overcome barriers to fair housing choice that, in many cases, are the products of long-standing structural and institutional racism. 42 U.S.C. §§ 3608(d), (e)(5). As HUD has stated, where a program participant “has the ability to create opportunities outside of the segregated, low-income areas but declines to do so,” that raises a

serious question as to whether the participant is meeting its obligation to affirmatively further fair housing. 80 Fed Reg. 42279. HUD is now making a comparable decision.

217. In suspending core provisions of the AFFH Rule, HUD abdicated its statutory responsibilities. It now is once again distributing federal housing funds without ensuring that local government grantees take the steps necessary to comply with their obligation to affirmatively further fair housing.

218. HUD's effective suspension of the AFFH Rule violates the Fair Housing Act, in contravention of the APA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court:

(a) Enter a declaratory judgment that HUD's May 23, 2018 decision to withdraw its current Assessment Tool without replacing it, and to instruct participating local governments to revert to the AI process is arbitrary, capricious, an abuse of discretion or contrary to law, and without observance of procedure required by law;

(b) Issue preliminary and permanent injunctions requiring HUD to rescind its two May 23, 2018 notices withdrawing the Assessment Tool and directing local governments to revert to the pre-AFFH Rule process, and requiring HUD to timely implement and enforce all the requirements of the AFFH Rule going forward;

(c) Direct HUD to take all affirmative steps necessary to remedy the effects of the illegal conduct described herein and to prevent similar occurrences in the future;

(d) Award Plaintiffs their reasonable attorneys' fees and costs; and

(e) Order such other relief as this Court deems just and equitable.

Dated: September 14, 2018

Respectfully submitted,

/s/ Sasha Samberg-Champion

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