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

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| NATIONAL FAIR HOUSING ALLIANCE, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>BEN CARSON, *et al.*,<br><br>Defendants. | Civ. Action No. 1:18-cv-1076-BAH |

**MEMORANDUM OF POINTS AND AUTHORITIES**
**IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ........ iii

INTRODUCTION ........ 1

BACKGROUND ........ 2

I. Statutory and Regulatory Background ........ 2

II. HUD's Suspension of the Rule and this Litigation ........ 3

STANDARD OF REVIEW ........ 4

ARGUMENT ........ 5

I. Plaintiffs Allege Cognizable Injury. ........ 5

A. HUD's Suspension of the AFFH Rule Impairs Plaintiffs' Ability to Carry Out Their Missions. ........ 6

B. Because of HUD's Action, Plaintiffs Have Diverted Their Resources in Ways that Confer Standing Under Settled Precedent. ........ 12

II. Plaintiffs Have Adequately Alleged Traceability and Redressability. ........ 16

CONCLUSION ........ 18

# TABLE OF AUTHORITIES

**Cases** **Pages**

*Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler*, 789 F.2d 931 (D.C. Cir. 1986) ....................7, 9, 15

*ASPCA v. Feld Entertainment, Inc.*, 659 F.3d 13 (D.C. Cir. 2011) ....................10

*Barr v. Clinton*, 370 F.3d 1196 (D.C. Cir. 2004) ....................5

*City of Dania Beach, Fla. v. Fed. Aviation Admin.*, 485 F.3d 1181 (D.C. Cir. 2007) ....................11

*Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136 (D.C. Cir. 2011) ....................5, 10, 16

*Fair Emp't Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268 (D.C. Cir. 1994) ....................9, 13

*Haase v. Sessions*, 835 F.2d 902 (D.C. Cir. 1987) ....................4

*Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) .................... *passim*

*Hills v. Gautreaux*, 425 U.S. 284 (1976) ....................15

*League of Women Voters of U.S. v. Newby*, 838 F.3d 1 (D.C. Cir. 2016) ....................6, 9, 16

*Lemon v. Geren*, 514 F.3d 1312 (D.C. Cir. 2008) ....................11

*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) ....................5

*N.A.A.C.P., Boston Chapter v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149 (1st Cir. 1987) ....................15

*Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032 (9th Cir. 2015) ....................14

*Nat'l Fair Hous. All. v. Travelers Indemnity Co.*, 261 F. Supp. 3d 20 (D.D.C. 2017) ....................14

*Open Communities Alliance v. Carson*, 286 F. Supp. 3d 148 (D.D.C. 2017) ....................9, 12, 13, 14

*PETA v. U.S. Dep't of Agriculture*, 797 F.3d 1087 (D.C. Cir. 2015) ....................5, 8, 9, 15, 16

*Spann v. Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990) ....................14

*Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89 (D.C. Cir. 2002) ....................11

*Thomas v. Principi*, 394 F.3d 970 (D.C. Cir. 2005) ....................5

*Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. 2005) ....................15

*Warth v. Seldin*, 422 U.S. 490 (1975) ....................5

**Statutes and Regulations** **Pages**

24 C.F.R. § 5.154 .......... 2, 6

24 C.F.R. § 5.158 .......... 3, 6

24 C.F.R. § 5.160 .......... 2

24 C.F.R. § 5.162 .......... 6

24 C.F.R. § 91.100(a)(1) .......... 6

24 C.F.R. § 91.105(b) .......... 8

80 Fed. Reg. 42,300 (July 16, 2015) .......... 10

83 Fed. Reg. 683 (Jan. 5, 2018) .......... 4

83 Fed. Reg. 23,922 (May 23, 2018) .......... 4

83 Fed. Reg. 23,927 (May 23, 2018) .......... 4, 17

83 Fed. Reg. 23,928 (May 23, 2018) .......... 4

## INTRODUCTION

The U.S. Department of Housing and Urban Development and Secretary Ben Carson (collectively, HUD) withdrew the tool used by local governments to comply with the Affirmatively Furthering Fair Housing (AFFH) Rule and instructed local governments to revert to the ineffective process that was in place before the Rule's promulgation, effectively suspending the Rule. This unlawful action has directly harmed Plaintiffs, three nonprofit organizations dedicated to promoting fair housing. As the Amended Complaint and declarations submitted by Plaintiffs describe, HUD's suspension of the Rule has impeded Plaintiffs' ability to carry out their mission-related activities. In particular, the Rule's suspension deprives Plaintiffs of critical procedural protections that make it far easier to develop and promote local policies that affirmatively further fair housing. Plaintiffs have lost, among other things, a source of rich information regarding local fair housing issues and local governments' compliance with stated fair housing commitments and obligations. They also have lost multiple fora for advancing their missions, both locally and before HUD. As a result, Plaintiffs have had to divert resources from other projects to counteract the effects of the suspension.

HUD's arguments that Plaintiffs nonetheless lack standing fail to account for the very specific harms Plaintiffs are suffering as a direct consequence of HUD's unlawful suspension, none of which requires speculation about how particular local governments will behave. HUD's position is also irreconcilable with controlling case law, including *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and D.C. Circuit precedent holding that organizational plaintiffs have standing to challenge agency actions that interfere with their ability to carry out their missions, divert their resources, and deprive them of information. This Court should deny HUD's motion to dismiss for lack of standing.

## BACKGROUND

### I. Statutory and Regulatory Background

The background relevant to this case is set out more fully in Plaintiffs' memorandum in support of their renewed motion for a preliminary injunction and for expedited summary judgment, ECF Doc. 19-11 ("PI Br."). Plaintiffs here summarize only that portion relevant to Defendants' motion to dismiss.

Under the regime that predated the AFFH Rule—and to which HUD has directed local jurisdictions to revert—the agency required funding recipients to do very little beyond make a bare certification that they were affirmatively furthering fair housing. *See* PI Br. at 5. In 2015, HUD promulgated the AFFH Rule. The Rule includes a series of concrete requirements for local jurisdictions that make it easier for organizations such as Plaintiffs—whose missions include investigating fair housing issues and violations, educating the public about such issues, and promoting local fair housing initiatives—to carry out activities that further their missions.

For example, the AFFH Rule requires local governments to submit Assessments of Fair Housing (AFHs) to HUD for review; establishes a timeline for submission; identifies the required content and provides the structure for an AFH; requires participants to commit to "meaningful" goals following a detailed analysis; ensures that participants recount their progress on prior fair housing commitments; imposes robust community participation requirements for the process; provides the public with the right to comment on a draft AFH; and requires the incorporation of actions and strategies based on AFH goals into local governments' Consolidated Plans as a condition of receipt of funding. 24 C.F.R. § 5.160 (describing submission and timeline requirements); 24 C.F.R. § 5.154 (describing the content of the AFH, including the use of HUD-provided data, and the incorporation of strategies and actions into Consolidated Plans and Public

Housing Agency Plans); 24 C.F.R. § 5.158 (describing community participation requirements). The rule also provides for HUD's oversight of these requirements, with consequences for non-complying participants, including potential non-acceptance of the AFH and non-approval of the Consolidated Plan.

These aspects of the AFFH Rule greatly enhanced Plaintiffs' ability to gather information about local fair housing issues and to further fair housing. For example, the Texas Plaintiffs have used the Rule's public participation and AFH-preparation requirements to increase community engagement, heighten public knowledge about fair housing issues that otherwise escape scrutiny, and force jurisdictions like Hidalgo County, Texas that historically have ignored fair housing issues to grapple with them explicitly and publicly. ECF Doc. 18 ("Am. Compl.") ¶¶ 122-123. They have relied on the Rule's comment and consultation procedures to ensure that jurisdictions like Hidalgo County hear their views and those of community members they serve. *Id.* ¶ 123. And, until HUD's abrupt suspension of the Rule, they anticipated using the Rule's HUD review process to require Hidalgo County and other Texas jurisdictions that have proven uninterested in taking meaningful action to affirmatively further fair housing without oversight and consequences to do so. *Id.* ¶¶ 124-125. As Plaintiffs alleged in detail, Plaintiff National Fair Housing Alliance (and its members) similarly benefited from the AFFH Rule and similarly are injured by its suspension. *Id.* ¶¶ 111-115, 144-145.

## II. HUD's Suspension of the Rule and this Litigation

On January 5, 2018, HUD issued a notice that suspended these regulatory requirements by extending the deadline for local governments' submission of their AFHs until the next date on which they would have an AFH due after October 31, 2020. *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). HUD's notice instructed local governments that would have otherwise completed AFHs to return to the failed AI process. *Id.* at 685. On May 23, 2018, shortly after Plaintiffs filed suit, HUD published in the Federal Register three notices that (1) withdrew HUD's January 5, 2018 notice, *Affirmatively Furthering Fair Housing: Withdrawal of Notice Extending the Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants*, 83 Fed. Reg. 23,928 (May 23, 2018); (2) withdrew approval of the second version of the Local Government Assessment Tool, which had been in use since January 13, 2017, *Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments*, 83 Fed. Reg. 23,922 (May 23, 2018); and (3) instructed local government program participants not to follow the AFFH Rule's requirements in the absence of an approved assessment tool, *Affirmatively Furthering Fair Housing (AFFH): Responsibility to Conduct Analysis of Impediments*, 83 Fed. Reg. 23,927 (May 23, 2018). As Plaintiffs explained in their prior briefing, the effect of these latter two notices is to suspend indefinitely the AFFH Rule's requirements described above. PI Br. at 17-21.

In response to these Notices, Plaintiffs filed an Amended Complaint and a renewed motion for preliminary injunction and for summary judgment, which is fully briefed. Defendants filed a motion to dismiss Plaintiffs' claims for lack of subject matter jurisdiction, ECF Doc. 38 ("Motion to Dismiss"); that motion is the only topic of this response. Argument on all pending motions is scheduled for August 9, 2018.

## STANDARD OF REVIEW

In deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), courts "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987) (quoting

*Warth v. Seldin*, 422 U.S. 490, 501-02 (1975). Courts must grant plaintiffs "the benefit of all inferences that can be derived from the facts alleged." *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005) (quoting *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004)). With respect to standing, general factual allegations of injury may suffice at the pleading stage, for on a motion to dismiss the Court presumes that general allegations embrace those specific facts that are necessary to support the claim. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

## ARGUMENT

Plaintiffs have alleged facts that, under binding precedent, constitute injuries in fact traceable to Defendants' actions and redressable by this Court. It is well established that an organization has standing to challenge agency action that frustrates an organization's ability to carry out its mission, makes it harder for the organization to provide core programmatic services, and requires the organization to divert resources to efforts to counteract the effect of that action. *PETA v. U.S. Dep't of Agriculture*, 797 F.3d 1087 at 1097 (citing *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011)); *see also Havens*, 455 U.S. at 379. Here, Plaintiffs have alleged facts supporting each of these types of injuries, all of which are redressable by this Court.

### I. Plaintiffs Allege Cognizable Injury.

Plaintiffs have alleged facts that demonstrate that HUD's suspension of the AFFH Rule impairs their ability to carry out their respective missions. In particular, HUD's action deprives Plaintiffs of concrete, procedural rights under the AFFH Rule, including their rights to information, participation, and meaningful HUD review of local governments' AFHs. As a consequence, Plaintiffs have had to divert resources from other programmatic activities to seek to remedy the effects of HUD's conduct, including through efforts to secure voluntary conduct

from local jurisdictions that should be mandatory pursuant to the AFFH Rule without the need for Plaintiffs' additional resource expenditure.

### A. HUD's Suspension of the AFFH Rule Impairs Plaintiffs' Ability to Carry Out Their Missions.

HUD's suspension of the AFFH Rule and reversion to the ineffective AI process harms Plaintiffs in several ways. HUD's action deprives Plaintiffs of many of the Rule's procedural protections, such as the requirements that jurisdictions solicit community participation (including the specific obligation to consult with fair housing groups), respond to public comments, and undergo HUD review (where Plaintiffs can participate). *See, e.g.*, 24 C.F.R. § 5.158 (describing the overarching public participation requirements for the AFH); 24 C.F.R. § 91.100(a)(1) (listing the types of organizations with which program participants must consult, including fair housing groups); 24 C.F.R. § 5.154(d)(6) (requiring program participants to respond to public comments); 24 C.F.R. § 5.162 (providing for HUD review and acceptance or non-acceptance of program participants' AFH submissions). It also excuses municipalities from publicly making measurable commitments towards fair housing, thereby hindering Plaintiffs' ability to obtain the information necessary to monitor and ensure jurisdictions' compliance with the requirement to affirmatively further fair housing. HUD's action thus "perceptibly impair[s]" Plaintiffs' ability to carry out their missions. *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016); *see* PI Br. at 35-43; Reply Br. (ECF Doc. 37) at 19-22.

As the Amended Complaint sets out and the declarations submitted by Plaintiffs further describe, the Rule's suspension has affected Plaintiffs' ability to carry out ongoing activities and further their missions. For example, Texas Plaintiffs have used the AFH process's structure and requirements in places such as Hidalgo County to educate community members and organizations, organize individuals to attend public meetings, develop and submit public

comments, and otherwise more efficiently and effectively further fair housing objectives. Am. Compl. ¶¶ 121-123. In Hidalgo County, they were poised to receive additional benefit from the Rule when HUD required the County to revise its initial, non-compliant AFH submission and submit one that, among other things, engaged with Texas Plaintiffs' comments. *Id.* ¶ 124. But now that HUD has suspended the Rule, Hidalgo County has stated that it will not revise its AFH to address the problems HUD identified or otherwise work with Texas Plaintiffs to identify and remedy long-standing fair housing problems. *Id.* ¶ 125. Moreover, as a result of HUD's action, Texas Plaintiffs no longer have the focused AFH process to provide a locus for grassroots education and organizing elsewhere. *Id.* ¶¶ 131, 134.

The Amended Complaint describes other ways in which HUD's suspension of the AFFH Rule concretely interferes with Plaintiffs' ability to efficiently and effectively obtain important information and work with community members and government entities to achieve fair housing objectives. For example, the standardized AFH process enables NFHA to work with its members around the country to identify and address recurring local issues, but HUD's suspension of that process deprives NFHA of that benefit. Am. Compl. ¶ 145; *see also, e.g.*, *id.* ¶ 127 (Texas Plaintiffs deprived of efficient process for monitoring spending of disaster relief money).

Organizations suffer cognizable harm from agency actions that deprive them of regularized "access to information and avenues of redress they wish to use in their routine" activities in furtherance of their missions, as HUD's action does with respect to Plaintiffs here. *See Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler*, 789 F.2d 931, 937-38 (D.C. Cir. 1986). In *Action Alliance*, for example, organizations that represented the elderly challenged an agency's decision to adopt one regulatory scheme for regulated entities instead of another, stronger one. The stronger regulatory scheme would have required regulated entities to

perform a self-evaluation and submit it to the agency; required them to submit compliance information on a regular basis; and allowed parties such as plaintiffs to challenge additional actions of the regulated entities as unlawful. 789 F.2d at 935. The plaintiffs alleged that the agency's decision to adopt the weaker scheme hindered their ability to disseminate information and provide services to their clients. *Id.* at 938-39. As the D.C. Circuit held, plaintiffs had standing to challenge this decision because losing the benefits of the stronger regulatory scheme "ma[de] it more difficult for the organizations to assist elderly persons to know, enjoy, and protect their rights under the ADA." *Id.* at 939.

Similarly, in *PETA*, an advocacy organization challenged an agency action that (1) eliminated the agency complaint process as a forum for redress, forcing the organization "to expend resources to seek relief through other, less efficient and effective means" and (2) ended production of inspection reports that the organization "could use to raise public awareness." 797 F.3d at 1091-92. These actions caused the organization to "redirect[] its resources in response to" the agency's "unlawful failure to provide the means by which PETA would otherwise advance its mission." *Id.* at 1097.

The action challenged here harms Plaintiffs in similar ways. The AFFH Rule requires local governments to gather and publicly document information about local fair housing issues. *See* 24 C.F.R. § 91.105(b) (requiring that local governments make HUD-provided data and other pertinent information available to participants in the community engagement process). It also provides a forum and structured process for Plaintiffs and others to influence fair housing planning and then challenge local governments' failure to affirmatively further fair housing. HUD's suspension of the Rule deprives Plaintiffs of all the benefits derived from jurisdictions soliciting community participation, consulting with fair housing groups, responding to public

comments, undergoing HUD review (in which Plaintiffs can participate), and publicly making measurable commitments towards fair housing.

HUD's action thus deprives Plaintiffs of vital information and an effective enforcement process, forcing Plaintiffs to pursue their missions "through other, less efficient and effective means." *PETA*, 797 F.3d at 1091. This confers organizational standing under settled D.C. Circuit law. *See also Fair Emp't Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994) (finding standing where defendant's actions "made the Council's overall task more difficult" by "reduc[ing] the effectiveness of any given level of outreach efforts"); *League of Women Voters*, 838 F.3d at 9 (where "new obstacles" imposed by a defendant's action "unquestionably make it more difficult for [organizational plaintiffs] to accomplish their primary mission[,] . . . they provide injury for purposes…of standing"); *Open Communities Alliance v. Carson*, 286 F. Supp. 3d 148, 178 (D.D.C. 2017). While HUD argues that its action cannot harm Plaintiffs because the Rule does not directly regulate them, *see* ECF Doc. 38-1 ("HUD Br.") at 13 ("This is not a case where HUD is requiring Plaintiffs to take burdensome steps or incur costs in order to lobby for fair-housing outcomes; HUD has required nothing of Plaintiffs whatsoever."), it does not explain how this makes Plaintiffs any differently situated than the plaintiffs in *Action Alliance* and *PETA*.

In arguing that Plaintiffs nonetheless lack standing, HUD largely ignores these benefits of the AFFH Rule. HUD acknowledges the importance of the AFFH Rule's public participation requirements but incorrectly suggests that Plaintiffs have not been deprived of its benefits because local governments continue to be subject to public participation requirements as they create their Consolidated Plans. *See* HUD Br. at 13-14. But the public participation requirements to which HUD refers, which govern the Consolidated Plan process, are not equivalent to those

imposed as part of the AFH process that HUD has suspended. The AFH process includes a fair housing analysis and the establishment of concrete fair housing goals, with public participation focused on those requirements. The subsequently-drafted Consolidated Plan serves different purposes; it incorporates fair housing commitments already established through the focused AFH process, rather than providing a comparable forum for analyzing the fair housing landscape and adopting concrete fair housing goals. For these reasons, HUD in the Final Rule considered and rejected a proposal to require public comment only during the Consolidated Plan process, finding that the "AFH is a distinct document" for which "public input is a fundamental and necessary component." 80 Fed. Reg. 42,300 (July 16, 2015). That HUD has left intact the requirement to consult with appropriate authorities and solicit community input regarding Consolidated Plan development does not remedy the harm caused by suspending the AFH process, including its distinct public participation requirements.

HUD also errs in suggesting that the effect of its actions on Plaintiffs' activities does not count because all that is impaired is Plaintiffs' "lobbying" for local governments to make fair housing commitments consistent with their statutory obligations. HUD Br. at 12. As the D.C. Circuit has recognized, "[m]any of our cases finding *Havens* standing involved activities that could just as easily be characterized as advocacy—and indeed, sometimes are." *ASPCA v. Feld Entertainment, Inc.*, 659 F.3d 13, 27 (D.C. Cir. 2011); *see id.* (pointing to *Equal Rights Center* and *Abigail Alliance* as examples). Where, as here, the challenged agency action is "at loggerheads with the organization's mission," *ASPCA*, 659 F.3d at 27 (internal quotations omitted), its interference with the organization's advocacy efforts is an injury conferring standing. Indeed, as described above, it is well established that agency action that cuts off an administrative avenue for an organization's advocacy harms it sufficiently to confer standing.

Finally, HUD contends that Plaintiffs cannot claim injury from HUD's action depriving them of the benefits of the AFFH Rule's required procedures unless Plaintiffs can prove exactly how local governments' conduct would change if the localities were required to comply with the AFFH Rule. HUD Br. at 14-15. That is not the law. "A plaintiff asserting procedural injury 'never has to prove that if he had received the procedure the substantive result would have been altered.'" *City of Dania Beach, Fla. v. Fed. Aviation Admin.*, 485 F.3d 1181, 1186 (D.C. Cir. 2007) (quoting *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 94 (D.C. Cir. 2002)). Rather, all a plaintiff must establish is "that the procedural step was connected to the substantive result." *Veneman*, 289 F.3d at 94-95. For example, a party alleging that an agency failed to provide required notice-and-comment procedures need not demonstrate that the agency would have reached a different outcome if those procedures had been followed; it is enough that the procedures are meant to influence the outcome. *Id.* at 95; s*ee, e.g.*, *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) (plaintiffs were harmed due to the failure to follow procedural requirements that could have opened the agency's eyes to environmental consequences and potentially persuaded it to alter its proposal).

HUD does not explicitly argue that Plaintiffs fail to meet that standard, nor would any such argument have merit, given the obvious purpose of the AFFH Rule's procedural requirements of influencing local jurisdiction's substantive commitments. Nonetheless, HUD suggests that Plaintiffs must allege injury to their ability to provide "direct services." HUD Br. at 15. It cites no case law for this proposition, which, again, cannot be reconciled with the precedent cited above. HUD also suggests, again without citing case law, that Plaintiffs are not harmed because the agency action does not change local governments' underlying statutory obligation to affirmatively further fair housing. *Id.* But it is HUD's conduct, not that of local

governments, that is the source of Plaintiffs' harm. The AFFH Rule carries out the agency's *own* statutory obligation to ensure that recipients of federal funding affirmatively further fair housing. HUD suggests that Plaintiffs are not harmed by the suspension of the *requirement* that local governments take certain actions so long as those governments have the option of carrying them out *voluntarily*, but this ignores the extensive record—on which HUD itself relied in finding the AFFH Rule necessary—establishing that local governments will regularly fail to take meaningful action voluntarily. It also ignores Plaintiffs' unrebutted record establishing that local governments in fact are already choosing not to carry out the AFFH Rule's requirements voluntarily. *See, e.g.*, Second Henneberger Decl. (ECF Doc. 19-6) ¶¶ 12, 14-15, 17. Even if Plaintiffs could convince them to do so, it would be at the cost of additional resources. *See OCA*, 286 F. Supp. 3d at 178 (plaintiff organization was harmed by government action that required it expend resources trying to get entities to do voluntarily what they otherwise would be required to do).

**B. Because of HUD's Action, Plaintiffs Have Diverted Their Resources in Ways that Confer Standing Under Settled Precedent.**

By removing the procedural protections and clear accountability structure of the AFFH Rule, HUD has compelled Plaintiffs to divert significant resources to efforts to counteract the effects of the suspension.[1] For example, Texas Plaintiffs have had to develop educational materials about the Rule's suspension and local governments' continuing statutory duty to affirmatively further fair housing. Am. Compl. ¶ 130. They are providing counseling to stakeholder organizations about how to achieve fair housing progress in the face of HUD's

[1] HUD misses the mark in arguing that Plaintiffs' past conduct is irrelevant to this inquiry. *See* HUD Br. at 10. Plaintiffs do not point to that conduct as constituting their injury-in-fact. Rather, they rely on it as evidence that makes plausible their stated intention to divert resources going forward in response to HUD's suspension of the Rule.

action. *Id.* And they are putting greater resources into community education efforts, without the benefit of the focused AFH process to do it more efficiently. *Id.* ¶ 131. Similarly, NFHA has had to spend time providing guidance for its members about how to proceed in the face of the uncertainty HUD's action has created and how to advance fair housing objectives without the AFH process established by the Rule. This guidance includes individualized counseling for some members, requiring considerable staff time. *Id.* ¶ 150. This diversion of resources is similar to that undertaken by other plaintiffs that the Supreme Court, the D.C. Circuit, and this Court have held to have standing—and it is pleaded in far greater detail than is required to survive a motion to dismiss. *See, e.g.*, *Havens*, 455 U.S. at 379 (organization pleaded harm by alleging that it "had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices"); *Fair Emp't Council of Greater Washington,* 28 F.3d at 1276 (finding standing where defendant's actions "made the Council's overall task more difficult" by "reduc[ing] the effectiveness of any given level of outreach efforts"); *OCA*, 286 F. Supp. 3d at 178.

Because HUD unlawfully suspended the AFFH Rule, Plaintiffs have had to divert resources to attempt to generate the same local fair housing commitments that the Rule would have required as a matter of law. Consequently, they have had to forego other important mission-related activities. For example, Texas Appleseed had planned to provide direct services to African-American families that own "heir property" to assist them in obtaining clear title to their land, Am. Compl. ¶ 135, but now cannot do so because of HUD's action. Texas Plaintiffs have had to curtail education and outreach efforts concerning environmental justice issues in Beaumont and Port Arthur and limit their education, outreach, and legal and policy support regarding efforts to ensure an equitable recovery from Hurricane Harvey in Houston. *Id.* ¶¶ 133-

34. NFHA, similarly, has been forced to divert resources from planned activities such as events to commemorate the 50th anniversary of the passage of the Fair Housing Act, the publication of its annual trends report, technical assistance to its members regarding equitable disaster recovery, and federal fair lending advocacy. *See* Goldberg Decl. (ECF Doc. 37-2) ¶ 14. These consequences of HUD's action also confer standing. *See Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032 (9th Cir. 2015) (when Nevada refused to enforce a statute requiring voter registration at public assistance offices, plaintiff diverted resources to step into the breach and register people who should have been served); *OCA*, 286 F. Supp. 3d at 178.

Defendants erroneously argue that this diversion of resources does not harm Plaintiffs because Plaintiffs still are using their scarce resources in the service of their missions to advance fair housing. HUD Br. at 11-12, 16-17. This argument flies in the face of controlling case law, beginning with *Havens*. In that case, the plaintiff organization suffered cognizable harm when, in response to the defendant's discriminatory conduct that frustrated its mission, it diverted resources to "identify[ing] and counteract[ing] the defendant's racially discriminatory steering practices," 455 U.S. at 379—activity that was fully consistent with the organization's broader fair housing mission, but would not have been undertaken absent the defendant's conduct. *See also Spann v. Colonial Village, Inc.*, 899 F.2d 24, 28-29 (D.C. Cir. 1990) (plaintiffs engaged in additional education and counseling to counter the distorting effect that discriminatory advertisements had on potential renters in the local housing market). The logic of HUD's argument is that only organizations with ancillary (or nonexistent) prior commitments to fair housing can claim that diversion of resources to fair housing work constitutes a concrete harm. Courts have correctly rejected such reasoning. *See Nat'l Fair Hous. All. v. Travelers Indemnity*

*Co.*, 261 F. Supp. 3d 20, 28 (D.D.C. 2017) (to have standing, plaintiffs need not divert their resources to activities inconsistent with their missions).

Similarly unsupported is HUD's assertion that Plaintiffs cannot claim injury for use of resources to pursue the same fair housing goals that HUD purportedly supports. HUD Br. at 11. That HUD has an institutional obligation to pursue fair housing objectives but is failing to do so crystalizes Plaintiffs' justiciable conflict with the agency rather than eliminating it. For example, in *PETA*, an animal rights group challenged the failure to protect birds by the Department of Agriculture, whose mandate (like PETA's) includes animal welfare. *See PETA*, 797 F.3d at 1095. Plaintiffs here are in the same position with respect to HUD as the plaintiffs in *PETA* were with respect to the Department of Agriculture.

Likewise, HUD makes no attempt to reconcile its argument with the many cases in which HUD has been held liable to parties injured by HUD's discriminatory actions and its failure to meet its statutory obligation to ensure that recipients of federal funding affirmatively further fair housing. *See, e.g.*, *Hills v. Gautreaux*, 425 U.S. 284 (1976); *N.A.A.C.P., Boston Chapter v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149 (1st Cir. 1987); *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. 2005).

HUD also argues that Plaintiffs lack standing because they do not allege that HUD has forced them to incur total costs exceeding their normal budgets to counteract the effects of HUD's unlawful actions. HUD Br. at 11. Once again, the same could be said for the plaintiffs in *Havens*, *PETA*, and *Action Alliance*. Organizations are not required to allege extraordinary costs to have standing where, as here, they allege that the challenged agency action is at loggerheads with their missions and perceptibly impairs their activities. *See, e.g.*, *PETA*, 797 F.3d at 1096-97.

In such cases, the organization's diversion of resources is "merely a symptom of that programmatic injury." *League of Women Voters*, 838 F.3d at 9.

HUD's argument that Plaintiffs' injuries are "self-inflicted" ones attributable to Plaintiffs' budgetary choices rather than HUD's actions, HUD Br. at 12, likewise is foreclosed by binding precedent. As the D.C. Circuit has held, standing does not "depend on the voluntariness or involuntariness of the plaintiffs' expenditures," *Equal Rights Ctr.*, 633 F.3d at 1140; *see PETA*, 797 F.3d at 1097 (same). Where, as here, plaintiff organizations allege that the agency's actions perceptibly impaired their activities and missions, all they must show with respect to diversion of resources is that they "undertook the expenditures in response to, and to counteract, the effects of the defendants' alleged discrimination rather than in anticipation of litigation." *Equal Rights Ctr.*, 633 F.3d at 1140. Here, HUD does not contend, nor could it, that Plaintiffs have provided the education, counseling, and other activities described in the complaint in anticipation of litigation, rather than in response to HUD's unlawful actions.

## II. Plaintiffs Have Adequately Alleged Traceability and Redressability.

HUD also argues that Plaintiffs' injuries are not traceable to HUD's action and would not be redressed by reinstatement of the Tool and the Rule's protections. It suggests that Plaintiffs' injuries are caused not by its suspension of the AFFH Rule's requirements and instruction to local governments to revert to the AI process, but by the independent decisions of local governments not to comply with the statutory obligation to affirmatively further fair housing. HUD Br. at 18-22. This argument relies on a mischaracterization of Plaintiffs' injuries, which directly flow from HUD's action and would be redressed by an injunction requiring the reinstatement of the AFFH Rule. Plaintiffs do not challenge local government decisions, but

rather HUD's suspension of the Rule, which carries out its own, independent statutory obligation.

HUD posits a seven-link chain of assumptions that it contends are required to establish Plaintiffs' harm. HUD Br. at 21-22. The only link on which Plaintiffs' claims actually depend is that, with the AFFH Rule in effect, local governments would complete and submit AFHs for HUD review (while following the various rules governing the AFH process, such as the public participation requirements), but now they will not. That is not an "assumption," but the straightforward result of HUD's suspension of the AFFH Rule's requirements and direction to local governments not to submit AFHs. *See* 83 Fed. Reg. 23,927 (stating that local government program participants should complete an AI rather than an AFH due to the withdrawal of the Assessment Tool). The other links in HUD's chain appear to be based on the incorrect notion that Plaintiffs' claimed harm is based on local governments' failure to reach particular substantive outcomes. That is a misreading of Plaintiffs' complaint and motion papers.

Plaintiffs' injury derives directly from HUD's suspension of concrete requirements for local governments, such as the requirements that local governments ensure public participation and solicit input from organizations such as Plaintiffs; prepare AFHs that contain concrete and measurable commitments to fair housing objectives; undertake a step-by-step analysis that ensures that those goals accurately and meaningfully address local issues; post draft AFHs publicly and solicit and respond to comment on them; and submit those AFHs for HUD review. An order requiring HUD to reinstate those requirements—all of which make it much easier for Plaintiffs to do their work and advance their missions—would directly redress the injuries that Plaintiffs claim.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss Plaintiffs' Amended Complaint for lack of subject matter jurisdiction.

Date: July 23, 2018

Respectfully submitted,

*/s/ Sasha Samberg-Champion*
Sasha Samberg-Champion (D.C. Bar No. 981553)
Sara Pratt (DC bar admission pending, admitted *pro hac vice*)
Michael G. Allen (DC Bar No. 409068)
RELMAN, DANE & COLFAX PLLC
1225 19th Street, NW, Suite 600
Washington, DC 20036
(202) 728-1888
ssamberg-champion@relmanlaw.com
spratt@relmanlaw.com
mallen@relmanlaw.com

Jon Greenbaum (DC Bar No. 489887)
Joseph D. Rich (DC Bar No. 463885)
Thomas Silverstein (DC Bar No. 1552406)
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave., NW
Washington, DC 20005
(202) 662-8316
tsilverstein@lawyerscommittee.org

Philip Tegeler (DC Bar No. 1002526)
Megan Haberle (DC bar admission pending)
POVERTY & RACE RESEARCH ACTION COUNCIL
740 15th Street NW, Suite 300
Washington, DC 20005
(202) 360-3906
ptegeler@prrac.org

Rachel Goodman
Sandra Park
AMERICAN CIVIL LIBERTIES UNION

125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
rgoodman@aclu.org
spark@aclu.org

Arthur B. Spitzer (DC Bar No. 235960)
AMERICAN CIVIL LIBERTIES UNION
OF THE DISTRICT OF COLUMBIA
915 15th Street, NW – 2nd floor
Washington, DC 20005-2302
Tel. 202-457-0800
Fax 202-457-0805
aspitzer@acludc.org

Ajmel Quereshi (DC Bar No. 1012205)
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
1441 I Street NW, 10th Floor
Washington, DC 20005
(202) 682-1300
aquereshi@naacpldf.org

Sherrilyn A. Ifill (NY Bar No. 2221422)
Samuel Spital (NY Bar No. 4334595)
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200

Allison M. Zieve (DC Bar No. 424786)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

*Attorneys for all Plaintiffs*

Morgan Williams (admitted *pro hac vice*)
NATIONAL FAIR HOUSING ALLIANCE
1331 Pennsylvania Avenue, NW, Suite 650
Washington, DC 20004
(202) 898-1661
mwilliams@nationalfairhousing.org

*Attorney for Plaintiff National Fair Housing Alliance*

Madison Sloan (admitted *pro hac vice*)
TEXAS APPLESEED
1609 Shoal Creek Bld. # 201
Austin, TX 78701
(512) 473-2800
msloan@texasappleseed.net

*Attorney for Plaintiff Texas Appleseed*