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**Submitted Electronically via Regulations.gov**

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Office of Fair Housing and Equal Opportunity  
United States Department of Housing and Urban Development  
Office of the General Counsel  
451 7<sup>th</sup> Street, SW Room 10276  
Washington DC 20410-0500

**RE: *Comments regarding Docket No. HUD-2020-0011  
FR-6123-P-02 Docket RIN: 2577-AA97  
HUD's Implementation of the Affirmatively Furthering Fair Housing Duty***

Dear Assistant Secretary Enzel:

On behalf of the NAACP Legal Defense & Educational Fund, Inc. (LDF), we submit the following comments on the Affirmatively Furthering Fair Housing Proposed Rule.

Founded by Thurgood Marshall in 1940, LDF is the nation's oldest civil rights legal organization. For more than 80 years, LDF has helped African Americans secure their civil and constitutional rights. Throughout its history, LDF has challenged public and private policies and practices that deny African Americans opportunities and choices in housing and further isolate African American communities<sup>1</sup>. One of Justice Marshall's early victories in the Supreme Court came in *Shelley v. Kramer*, 334 U.S. 1 (1948), in which the Court held that state enforcement of racially restricted covenants violated the Equal Protection Clause of the Fourteenth Amendment. LDF has always been a pioneering force in our nation's quest for greater equality and will continue to advocate on behalf of African Americans, both in and outside of the courts, until equal justice for all Americans is attained.

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<sup>1</sup> *See, e.g.*, *McGhee v. Sipes*, 334 U.S. 1 (1948) (companion case to *Shelley v. Kraemer*, 334 U.S. 1 (1948)) (racially restrictive covenants); *Cent. Ala. Fair Hous. Ctr. v. Lowder Realty Co.*, 236 F.3d 629 (11th Cir. 2000) (racial steering); *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994) (racial discrimination in public housing and assistance programs); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) (redlining); *Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (exclusionary zoning); *Thompson v. U.S. Dep't of Hous. & Urb. Dev.*, No. 95309, 2006 WL 581260 (D. Md. Jan. 10, 2006) (federal government's obligation to further fair housing affirmatively); *Consent Decree, Byrd v. First Real Estate Corp. of Ala.*, No. 95-CV-3087 (N.D. Ala. May 14, 1998) (racial steering); *Brown v. Artery Org., Inc.*, 654 F. Supp. 1106 (D.D.C. 1987) (redevelopment plans that unfairly eliminate affordable housing)

Over the course of several administrations, LDF has urged HUD to take meaningful steps to ensure full compliance to affirmatively further fair housing (hereinafter “AFFH”), as well as those of its grantees.<sup>2</sup>

### **THE INTENT OF THE FAIR HOUSING ACT, AND PARTICULARLY THE MANDATE TO AFFH, WAS TO UNDO HISTORIC PATTERNS OF SEGREGATION AND DISCRIMINATION AND TO PROVIDE ACCESS TO OPPORTUNITY**

Enacted in the wake of Dr. Martin Luther King, Jr.'s tragic assassination, Title VIII of the Civil Rights Act of 1968, known as the Fair Housing Act (“FHA” or “Act”). -and its mandate that HUD and its grantees affirmatively further fair housing -is a powerful tool for combating the structural inequality resulting from decades of public and private segregative practices. Section 3608 of the FHA requires that HUD programs and activities be administered in a manner that affirmatively furthers the goals of the Fair Housing Act.<sup>3</sup>

The federal government’s role in perpetuating residential segregation and limiting opportunity for black people has been well documented<sup>4</sup> and demonstrates the necessity for the AFFH mandate. The Thurgood Marshall Institute, a multidisciplinary center within LDF, recently published a report entitled, *The Black-White Racial Wealth Gap*<sup>5</sup> which examines the historical foundations and contemporary drivers of the black-white racial wealth gap, including the federal policies which restricted residential/housing opportunities for black people such as the Homestead

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<sup>2</sup> On the fortieth anniversary of the Fair Housing Act, LDF and other national civil rights organizations convened a National Commission on Fair Housing and Equal Opportunity, which conducted hearings around the country on housing discrimination and concluded that residential segregation remains pervasive and “discrimination continues to be endemic, intertwined into the very fabric of our lives.” The Commission recommended that HUD strengthen its enforcement of the affirmatively furthering obligation by establishing a regulatory structure to ensure that programs receiving federal funds advance fair housing. The Commission suggested that HUD undertake compliance reviews of grantees and impose sanctions on grantees out of compliance with affirmatively furthering requirements. NAT’L COMM’N ON FAIR HOUS. AND EQUAL OPPORTUNITY, *THE FUTURE OF FAIR HOUSING* (2008).

<sup>3</sup> Fair Housing Act, 42 U.S.C. § 3608 (1968).

<sup>4</sup> RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA*, (Liveright Pub. Corp., 1st ed. 2017) (*describing the ways government and courts upheld racist policies to maintain the separation of whites and Blacks and the devastating impact of generations of African-Americans who faced housing segregation and were denied other economic rights*); NAACP LEGAL DEF. & EDUC. FUND AND THE INST. ON ASSETS & SOC. POL’Y, *THE BLACK-WHITE RACIAL WEALTH GAP* (2019) (*finding that the existing and historic policies of exploitation, segregation and discrimination perpetuates and widens the racial wealth gap*); BRUCE MITCHELL & JUAN FRANCO, *HOLC “REDLINING” MAPS: THE PERSISTENT STRUCTURE OF SEGREGATION AND ECONOMIC INEQUALITY* (2018) (*finding that economic and racial segregation created by redlining persists in many cities*).

<sup>5</sup> NAACP LEGAL DEF. & EDUC. FUND AND THE INST. ON ASSETS & SOC. POL’Y, *THE BLACK-WHITE RACIAL WEALTH GAP* (2019).

Act of 1862; the Servicemen's Readjustment Act of 1944 commonly known as the G.I. Bill, and the federally sanctioned practice of "redlining."

The congressional record indicates that lawmakers were keenly aware of the federal government's extensive role in perpetuating residential segregation and sought to use the Fair Housing Act as a vehicle to address the structural inequality. During the debate on the Fair Housing Act, Senator Edward Brooke commented that "an overwhelming proportion of public housing . . . in the United States directly built, financed and supervised by the Federal Government - is racially segregated."<sup>6</sup> Similarly, Senator Walter Mondale noted: "An important factor contributing to exclusion of Negroes from [suburban communities and other exclusively white areas], moreover, has been the policies and practices of agencies of government at all levels."<sup>7</sup> The Court later affirmed this intent in *NAACP v. Secretary of Housing & Urban Development*, where Judge Breyer stressed that the affirmatively furthering mandate "reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases."<sup>8</sup> In order to undo these harmful effects, Congress determined that additional steps were necessary beyond prohibiting discriminatory actions.

Nevertheless, since the enactment of Fair Housing Act, housing segregation remains entrenched in communities across the country, large and small, urban and rural.<sup>9</sup> Furthermore, today, the Black homeownership rate has declined to a level lower than what existed prior to the passage of the FHA.<sup>10</sup> Thus, the obligation to AFFH is still relevant and is, arguably, more vital as a tool to further the cause of racial justice, civil rights and equal protection today.

**THE FRAMEWORK ARTICULATED IN THE 2015 AFFH RULE, WAS A SIGNIFICANT STEP IN CLARIFYING AND EXPANDING HOUSING JUSTICE AND SHOULD BE REINSTATED**

Across the country, communities are plagued by many barriers to fair housing and opportunity, facing issues such as low-quality schools, lack of safe and reliable public transit, high unemployment, racial/ethnic segregation, concentrated poverty, a lack of availability of affordable housing, a lack of access/proximity to quality jobs, a lack of accessible housing, etc. The 2015 AFFH Rule was specifically designed to better equip communities to address these barriers and

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<sup>6</sup> 114 CONG. REC. 2527-28 (1968).

<sup>7</sup> 114 CONG. REC. 2277 (1968).

<sup>8</sup> 817 F.2d 149, 155 (1st Cir. 1987).

<sup>9</sup> See, e.g., John R. Logan & Brian J. Stults, The Persistence of Segregation in the Metropolis; New Findings From the 2010 Census at 2-3 (2011) available at <http://www.s4.brown.edu/us2010/Data/Report/report2.pdf>.

<sup>10</sup> JAMES H. CARR, MICHELA ZONTA, STEVEN P. HORNBERG & WILLIAM SPRIGGS, STATE OF HOUSING IN BLACK AMERICA (2019) [http://www.nareb.com/site-files/uploads/2019/09/NAREB\\_Shiba2019\\_small-compressed.pdf](http://www.nareb.com/site-files/uploads/2019/09/NAREB_Shiba2019_small-compressed.pdf); See also, John Wake, *Why Isn't The Black Homeownership Rate Higher Today Than When the 1968 Fair Housing Act Became Law*, FORBES, (May 16, 2019, 9:40 AM), <https://www.forbes.com/sites/johnwake/2019/05/16/heres-why-the-black-homeownership-rate-is-the-same-50-years-after-1968-fair-housing-act/#28c57a2130cd>

provided a framework and resources which significantly clarified the obligation to affirmatively further fair housing and empowered communities to fulfill the AFFH mandate set forth in the Fair Housing Act of 1968.

For many years, local officials sought greater clarity and guidance from HUD about what they should be doing to affirmatively further fair housing. HUD's previous approach to implementing this mandate – through the requirement that grantees periodically develop an Analysis of Impediments to Fair Housing Choice – was neither well-structured nor well-administered, as the U.S. Government Accountability Office (GAO) pointed out in its 2010 report on this subject<sup>11</sup> and as documented in HUD's own internal report conducted in 2009<sup>12</sup>. The framework embodied in the 2015 AFFH Rule addresses many of the criticisms that GAO highlighted, and provides HUD grantees with more structure, clearer guidance, and the needed resources for identifying and addressing fair housing problems in their communities.

The 2015 AFFH Rule was the product of a comprehensive two-year process of outreach and study. In contemplating its design HUD engaged policy experts, fair housing and civil rights groups, mayors, counties, and states, community leaders, advocates, stakeholders, program participants, etc.<sup>13</sup> The Rule was also piloted in 74 geographically and regionally diverse communities<sup>14</sup> and over 1000 formal comments were submitted and reviewed to inform its design.

The key components of the 2015 AFFH rule are based on the 2010 GAO recommendations and the lessons learned from the pilot program implemented by HUD during the development of the rule.<sup>15</sup> It requires program participants to complete an Assessment of Fair Housing (AFH) which evaluates access to opportunity in neighborhood public services (e.g. quality public schools; public transit) and associated inequities in the allocation of resource investments, and to contextualize trends in local markets.<sup>16</sup>

Overall, the 2015 rule equipped local communities with the data and resources needed to make informed decisions about how to allocate resources and deploy strategies to address discrimination, segregation and access to opportunity. HUD now criticizes the rule as “complex” and “burdensome.” However, this criticism underestimates the complexity of working to overcome and proactively remedy decades of discrimination.

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<sup>11</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, HOUS. & CMTY. GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS, (2010).

<sup>12</sup> *Id* at 2.

<sup>13</sup> 80 Fed. Reg. 42,272; GAO Report at 29.

<sup>14</sup> <https://www.hudexchange.info/programs/sci/>

<sup>15</sup> FHEA RESULTS SUMMARIES: SUSTAINABLE COMMUNITIES INITIATIVE GRANTEEES (2015), [https://www.hud.gov/sites/documents/FHEARESSUMM\\_CV.PDF](https://www.hud.gov/sites/documents/FHEARESSUMM_CV.PDF).

<sup>16</sup> 24 CFR §§ 5, 91, 92, et al. (2015).

HUD’s “rejection” of AFH submissions under the 2015 Rule has been unfairly presented as evidence that the process was inefficient, when in fact it proves the opposite.<sup>17</sup> Rather than returning to a system where program participants were able to submit subpar, outdated AIs that lacked specific, measurable goals, the AFH created a universe where participants were provided necessary feedback and opportunities to strengthen proposals to ensure that HUD grantees adequately fulfill their statutory obligation to AFFH. Through partnership and collaboration, previously “rejected” AFHs could be revised, resubmitted and approved. This is, indeed, the level of oversight encouraged by the GAO and necessary to ensure federal funds are being leveraged to AFFH, as required.

Early stages of implementation of the 2015 rule demonstrated promising results. In October 2016, New Orleans became the first jurisdiction in the country to submit an AFH plan.<sup>18</sup> The plan was submitted jointly by the municipal government and the Housing Authority of New Orleans, with significant input from community leaders and organizations.<sup>19</sup> The Greater New Orleans Fair Housing Action Center designed a community engagement strategy that centered the voices of communities of color and provided needed perspective during the process of analyzing data on “public and private acts of discrimination that affect housing choices in the New Orleans market.”<sup>20</sup> Some of the recommended changes captured in the AFH included a plan to increase access to low-poverty, high opportunity neighborhoods through the Housing Choice Voucher program, improving access to employment opportunities. It also included goals addressing environmental justice, such as lead in water and housing. Finally, it recommended the establishment of a rental registry to improve equitable access to affordable rental housing. One notable concrete change that resulted from the New Orleans AFH process was a commitment by New Orleans to create 140 units of affordable rental housing by 2021.

New Orleans is not alone in validating the impact of the 2015 rule.<sup>21</sup> For instance, prior to the 2015 rule, Philadelphia, Pennsylvania evicted people of color at a disproportionate rate. The AFH process led to the creation of an Eviction Prevention Project, which included providing

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<sup>17</sup> National Fair Housing Alliance v. Ben Carson, U.S. District Court for the District of Columbia, Civ. Action No. 1:18-cv-1076-BAH (June 26, 2018), (*Declaration of Janet Hostetler referring to returned AFH submissions as “pass-backs” for revisions, not failures, as part of the review process.*)

<sup>18</sup> NAT’L LOW INCOME HOUS. COALITION, *From the Field: New Orleans Submits First Assessment of Fair Housing in the Nation*, (Oct. 31, 2016).

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

<sup>20</sup> Cashauna Hill, *Furthering Fair Housing: It’s Not Too Late to Follow New Orleans’ Lead*, HARV. JOINT CTR. FOR HOUS. STUD. (Mar. 7, 2018), available at <https://www.jchs.harvard.edu/blog/furthering-fair-housing-its-not-too-late-to-follow-new-orleans-lead/>.

<sup>21</sup> See generally, MINN. HOUS. PARTNERSHIP, KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, ET AL. FAIR HOUSING AND EQUITY ASSESSMENT IN RURAL AND SMALLER METROPOLITAN REGIONS (2015) [http://www.mhponline.org/images/stories/docs/research/Report\\_Fair-Housing-in-Rural-Regions-MHP-Kirwan-2015.pdf](http://www.mhponline.org/images/stories/docs/research/Report_Fair-Housing-in-Rural-Regions-MHP-Kirwan-2015.pdf).

legal assistance for people facing unjust evictions.<sup>22</sup> Additionally, an AFH process in California led to the creation of a group home for people with disabilities in Paramount, California.<sup>23</sup>

Moreover, communities found the AFFH process helpful to them in identifying and addressing the fair housing needs and challenges in their communities. Ellen Lee, Director of Community and Economic Development for the City of New Orleans recently testified before the United States House of Representatives Committee on Oversight and Reform regarding the 2015 AFFH Rule and noted the following:

“The New Orleans experience implementing this new regulation was overwhelmingly positive. What we were able to achieve is formidable in terms of greater efficiencies, better planning and mapping capabilities, and enhanced local decision making for our local government...New Orleans was able to achieve greater efficiencies by working closely with local housing related agencies<sup>24</sup>.”

The 2015 AFFH rule was a critical step in addressing historic and ongoing discrimination. The current proposal would completely undermine this important work by gutting the 2015 rule and proposing a new rule that ignores the legacy of segregation, effectively eliminates any accountability, and generally fails to address fair housing issues.

If HUD adopts the currently proposed rule, it will further signal the Trump administration’s prioritization of ease over compliance with civil rights law. Rather than emphasizing the burden of working to address those wrongs, Secretary Carson should shift to focusing on the burden carried by people denied access to housing due to race, national origin, and/or the other protected classes covered by the Fair Housing Act.

### **HUD’S CURRENT PROPOSAL IS AN ABSOLUTE DEPARTURE FROM THE INTENT OF THE AFFH MANDATE AND FAILS TO COMBAT HOUSING INEQUALITY**

The current proposal put forth by HUD fails to meet the intent and legal standards which define the AFFH mandate set forth in section 3608 of the Fair Housing Act in that it (1) has no requirement to consider or address discrimination; (2) has no requirement to consider or address segregation and access to opportunity; (3) fails to provide for community input regarding the barriers to housing choice; and (4) does not mention or address urban development

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<sup>22</sup> Charlene Crowell, *Federal lawsuit challenges HUD to enforce Fair Housing rule*, THE LA. WEEKLY, May 21, 2018.

<sup>23</sup> Charlene Crowell, *Federal Lawsuit Challenges HUD to Enforce Fair Housing Rule: Civil Rights and Housing Advocates Join Forces*, THE L.A. SENTINEL, May 25, 2018 (discussing Paramount, California’s consolidated plan which may be accessed at <http://www.paramountcity.com/home/showdocument?id=2717>).

<sup>24</sup> <https://docs.house.gov/meetings/GO/GO02/20200205/110452/HHRG-116-GO02-Wstate-LeeE-20200205.pdf>

*Proposed rule redefines AFFH to have no focus on fair housing and shifts to focus on expanding housing choice and deregulation*

The proposed rule's definition of affirmatively furthering fair housing eliminates language requiring localities to address discrimination, segregation and access to opportunity rather it defines AFFH as "advancing fair housing choice within the program participant's control or influence."<sup>25</sup> It goes on to define fair housing choice as "allowing individuals and families [to] have the opportunity and options to live where they choose, within their means, without unlawful discrimination related to race, color, religion, sex, familial status, national origin, or disability."<sup>26</sup>

The case law addressing the duty to affirmatively further fair housing makes clear that the AFFH mandate was intended to combat discrimination and to promote integrated residential housing patterns and to prevent the increase of segregation<sup>27</sup>. Specifically, the court in *Shannon v. HUD*, held that section 3608 of the Fair Housing Act is intended to promote not just nondiscrimination against individual minorities, but racial integration for the benefit of entire communities.<sup>28</sup> Similarly, in *Otero v. New York City Housing Authority*, the court held that "action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat."<sup>29</sup> In *NAACP Boston Chapter v. HUD*, the court held that section 3608 requires HUD to "consider [the] effect [of a HUD grant] on the racial and socio-economic composition of the surrounding area."<sup>30</sup> And lastly, in *Anti-Discrimination Center v. Westchester County*, the court held that "an interpretation of 'affirmatively further fair housing' that excludes consideration of race would be an absurd result."<sup>31</sup>

The current HUD proposal conflates increasing housing choice with the goals of fair housing and the corresponding obligation to remedy the effects of decades of discrimination and segregation. The proposal requires no examination of any local fair housing issues, such as segregated living patterns, lack of access to safe and reliable public transit, quality education, employment opportunities or other barriers to opportunity.

The proposed rule is cloaked in language to mislead stakeholders to believe it will further fair housing, housing choice and affordable housing; however, without explicit guardrails and

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<sup>25</sup> Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2045, 2053 (proposed Jan. 14, 2020).

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

<sup>27</sup> ROBERT G. SCHWEMM, OVERCOMING STRUCTURAL BARRIERS TO INTEGRATED HOUSING: A BACK-TO-THE-FUTURE REFLECTION ON THE FAIR HOUSING ACT'S "AFFIRMATIVELY FURTHER" MANDATE (2012).

<sup>28</sup> *Shannon v. U.S. Dep't of Hous. & Urban Dev.*, 436 F. 2d 809 (3d Cir. 1970).

<sup>29</sup> *Otero v. New York City Housing Authority*, 354 F. Supp. 941 (S.D.N.Y. 1973).

<sup>30</sup> *NAACP Boston Chapter v. HUD*, 817 149 (1st Cir 1987).

<sup>31</sup> *U.S. ex rel. Anti-Discrimination Center v. Westchester County*, 668 F.Supp. 2d 548, 563 (S.D.N.Y. 2009).

oversight, simply increasing housing supply is not a means of addressing housing affordability, segregation, or fair housing.

Ultimately, the proposed rule is a housing choice rule disguised as a fair housing rule. The proposed rule will not only fail to assist communities and HUD in meeting the duty/mandate to AFFH, but it will likely return the American housing system to a time where the federal government was complicit in the denial of basic human and civil rights to the African American community and other people of color, violating the broader mandates of the Fair Housing Act

*The proposed rule contains no meaningful enforcement of the AFFH obligation and would allow jurisdictions to continue ignoring their legal obligation without consequence*

In addition to removing references to racial integration and the need to address the impact of segregation in the definition, the proposed rule's approach to identifying barriers to equal opportunity is inadequate and disregards various forms of racial discrimination in housing and lending.

The proposed rule uses an analysis of "material civil rights violations" as a means of determining whether a jurisdiction has met its AFFH obligations. This analysis requires a determination as to whether a jurisdiction is "free of adjudicated fair housing claims". The suggested use of the measure of "adjudicated" claims ignores the fact that public and private fair housing enforcement often result in settlements. Accordingly, the absence of a ruling against a jurisdiction does not equate to an absence of racially discriminatory or disparate policy or practices.

Furthermore, under the proposed rule, not only would settlements not be considered, but complaints pursued by private parties which resulted in findings of guilt also would not be considered. The proposed rule would only strip funding from those localities that have received adverse adjudications over the last five years in cases brought by federal agencies, namely HUD or DOJ. The limitation of the consideration to cases brought by HUD or DOJ ignores that fact that approximately 75 percent of fair housing complaints are processed by private fair housing groups, not HUD or DOJ.<sup>32</sup> In 2018, the National Fair Housing Alliance identified 31,202 complaints of housing discrimination, the highest number since 1995 and an eight percent increase from the year prior. The second most reported type of discrimination was racial discrimination, comprising nearly 19 percent of all cases.<sup>33</sup> Thus, utilizing the analysis of "material civil rights violations" as defined in the proposed rule to assess whether a locality has met its AFFH obligation would undoubtedly allow a large percentage of fair housing violations, and practices which perpetuate discrimination and segregation, to remain unaddressed.

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<sup>32</sup> NAT'L FAIR HOUS. ALLIANCE, DEFENDING AGAINST UNPRECEDENTED ATTACKS ON FAIR HOUSING: 2019 FAIR HOUSING TRENDS REPORT 8-9 (2019).

<sup>33</sup> *Id.* at 16.

The proposed rule also purports to allow jurisdictions/HUD grantees to satisfy the AFFH certification requirement, by merely identifying three goals it will fulfill over the next five years that further “housing choice.”<sup>34</sup> The goals are not required to be based on any specific data; consequently, a locality could choose to rely on irrelevant data or ignore the most salient problems in the community. The rule initially requires grantees to describe how each goal or objective would AFFH. However, HUD provides a list of 16 obstacles that are deemed “inherent” barriers to fair housing choice. If jurisdictions select goals from this list, they need not provide any narrative or explanation of how the listed goal will further fair housing, rather they will automatically be deemed to do so. Of the 16 factors listed, only three can be construed to further fair housing in any respect<sup>35</sup>. This process incentivizes the selection of goals from the pre-determined list of barriers—which in addition to lacking a substantial focus on fair housing issues, excludes any mention of race. In fact, only one of the pre-determined barriers listed relates to any of the protected classes in the Fair Housing Act. And that one only addresses disability.

These provisions outlined in the proposed rule create a scenario where a jurisdiction/HUD grantee could easily be deemed to have met its obligation to further fair housing without addressing a single fair housing issue.

*Proposed rule removes specific elements important to effectively fulfill the duty/mandate to affirmatively further fair housing*

The proposed rule’s changes to the requirements for the AFH annual performance report severely weaken the ability to fulfill the AFFH mandate. In alignment with the GAO recommendations, the AFH required by the 2015 AFFH Rule improved transparency and accountability by requiring the development and submission of clear milestones, timetables and desired outcomes. If HUD is committed to AFFH, it would move to strengthen submissions of localities. Instead, it oversimplifies how a jurisdiction identifies goals and reports progress, thereby weakening enforcement. Under the proposed rule, consideration for severity and prioritization is no longer incorporated, and HUD will not require the goals to cover specific areas or meet certain standards, in terms of the measuring progress. Annual performance reports will be deemed satisfactory, so long as the actions taken are “rationally related” to the goals identified. The preamble to the proposed rule essentially argues that so long as the annual progress reports are not “wholly irrelevant” to the goals set out in the AFFH certification, it will be presumed to fulfill the statutory duty.<sup>36</sup>

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<sup>34</sup> *Supra* note 22, at 2056.

<sup>35</sup> *Id.* (The few barriers enumerated in the Proposed Rule that could support the duty to AFFH are the lack of affordable housing, concentration of substandard housing, and the source of income restrictions on rental housing)

<sup>36</sup> *Supra* note 22, at 2050.

The proposal manipulates the Supreme Court's ruling in the *Inclusive Communities*<sup>37</sup> case to justify diminishing the level of scrutiny so drastically that it renders the rule ineffectual. Such a low bar contradicts decades of case law precedent which demanded more pertaining to measuring whether a jurisdiction is meeting its plan's goals.<sup>38</sup> In fact, in *Texas Dept. of Housing & Community Affairs v. Inclusive Communities Project*<sup>39</sup>, Justice Anthony Kennedy wrote "the Fair Housing Act must play an important part in avoiding the Kerner Commission's grim prophecy that '[o]ur Nation is moving toward two societies, one black, one white –separate and unequal.' The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society."<sup>40</sup>

The message from the Justice Kennedy was clear four years ago and remains clear today: all Americans should continue to be protected from housing discrimination and the Fair Housing Act plays a critical role in achieving this goal. Accordingly, although HUD is reluctant to mandate specific outcomes for the planning process, it is essential that HUD articulate a more concrete definition for success in affirmatively furthering fair housing beyond requiring goals to be set. As we stated in our 2013 Comment Letter regarding AFFH, "Goal-setting without accompanying strategy formulations does not necessarily translate into more integrated living patterns. It is critical that participants be asked to identify the strategies by which their fair housing compliance will be measured."<sup>41</sup> Accordingly, the goals and strategies should be accompanied by specific time frames. Without clarity in each of those areas, robust enforcement is not feasible.

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<sup>37</sup> Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015).

<sup>38</sup> See, e.g., *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973) ("Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose Jack of opportunities the Act was designed to combat."). Notably, in his landmark opinion for the First Circuit in *NAACP v. Secretary of Housing & Urban Development*, then-Judge, now-Justice Breyer explained that, as a measure of compliance with HUD's own obligation to affirmatively further fair housing, 42 U.S.C. § 3608(e)(5), "one would expect to see, over time, if not in any individual case, HUD activity that tends to increase, or at least, that does not significantly diminish, the supply of open housing." 817 F.2d at 156; see also *Thompson*, 348 F. Supp. 2d at 460 (relying on *NAACP v. HUD*, 817 F.2d at 155, to hold that "if HUD had, in fact, fulfilled its duty [to affirmatively further fair housing], HUD's actions would have tended to increase, or at least not significantly decrease, the supply of open housing"); *Jaimes v. Toledo Metro. Rous. Auth.*, 715 F. Supp. 835, 842 (N.D. Ohio 1989) ("If HUD is properly fulfilling its duties, over time one would expect to find HUD's activity increasing the supply of open, integrated housing. In this case, however, one finds that segregation in housing continued and the supply of open, integrated housing did not increase.").

<sup>39</sup> Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015)

<sup>40</sup> *Id.*

<sup>41</sup> NAACP LEG. DEF. & EDUC. FUND, Affirmatively Furthering Fair Housing Comment Letter (Sept. 17, 2013), available at <https://www.naacpldf.org/wp-content/uploads/Fair-Housing.pdf>.

Furthermore, the proposed rule permanently removes the Assessment Tool which is used by program participants in conducting an AFH. The Tool went through a rigorous process before adoption, including a significant public comment period and is integral to the efforts encouraging community participation in the process and to the fair housing assessment.

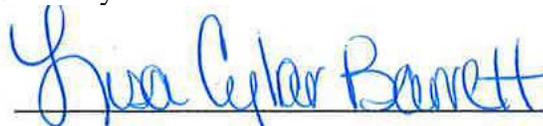
The community participation process is the mechanism by which local data and knowledge are gathered and incorporated in the assessment of fair housing. HUD purports to prioritize the importance of community participation yet, it has removed a crucial mechanism which facilitated the involvement of local residents, and organizations, allowing them to contribute meaningfully and effectively to drive transformational change in their communities. In addition to the substantive value of the Assessment Tool, it is also essential to creating a system of evaluation that includes standards for reporting, support with formatting and overall consistency.

## CONCLUSION

For generations, African American communities have been devastated by both private, and government sanctioned, discrimination. Federal agencies were the architects of the systemic oppression and housing segregation that has led to today's segregated housing patterns, lack of access to opportunity and the resulting racial wealth gap. The duty to affirmatively further fair housing mandate embedded in the Fair Housing Act of 1968, requires that HUD and its grantees work proactively to remedy said harms. The proposed rule drastically fails to meet the legal standards of the AFFH mandate.

HUD's proposal to redefine AFFH in a way that solely focuses on housing choice – and not at all on addressing racial disparities in housing – is a blatant and egregious attempt to undermine the premise of the Fair Housing Act. This rule change represents an absolute regression in fair housing practices. The proposed rule would return the fair housing system in the United States to one similar to or worse than that which was determined by the Government Accountability Office to be ineffective as a mechanism. For all the stated reasons, we strongly oppose the proposed rule and encourage HUD to immediately reinstate the 2015 AFFH Rule.

Sincerely



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