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

RE: FR-6250-P-01 Affirmatively Furthering Fair Housing (HUD-2023-0009)

To Whom It May Concern,

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (LDF), we submit the following comments in response to the U.S. Department of Housing and Urban Development's (HUD) notice of proposed rulemaking on Affirmatively Furthering Fair Housing (AFFH).¹ When it enacted the Fair Housing Act (FHA)² in 1968, seven days after the assassination of Martin Luther King Jr.,³ Congress recognized that "where a family lives, where it is allowed to live, is inextricably bound up with better education, better jobs, economic motivation, and good living conditions."⁴ The FHA thus not only prohibits discrimination, but seeks to address structural inequality resulting from decades of government-sponsored residential segregation that systematically deprived Black people and other people of color of opportunity.⁵ It requires all federal executive agencies and departments responsible for housing and urban development, as well as recipients of federal housing funds (hereinafter program participants) to affirmatively further fair housing.⁶ Unfortunately, as the U.S. Supreme Court recognized in 2015, "Much progress remains to be made in our Nation's continuing struggle against racial isolation."⁷ Because the federal government has failed to consistently and effectively enforce the Fair Housing Act's

¹ See Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516 (Feb. 9, 2023) (hereinafter AFFH NPRM).

² Fair Housing Act, Pub. L. No. 90-285, 82 Stat. 81 (1968) (codified at 42 U.S.C. 3601 *et seq.*).

³ U.S. House of Representatives, History, Art & Archives, Historical Highlights: The Fair Housing Act of 1968, https://history.house.gov/Historical-Highlights/1951-2000/hh_1968_04_10/ (last visited Jan. 27, 2023).

⁴ 114 Cong. Rec. 2276-2707 (1968).

⁵ RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (describing the ways government and courts upheld racist policies to maintain the separation of white and Black people and the devastating impact for generations of Black people who faced housing segregation and were denied other economic rights).

⁶ 42 U.S.C. §§ 3608(d), (e)(5).

⁷ *Tex. Dep't of Hous. Cmty. Affs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 546-47 (2015).

AFFH mandate, Black communities continue to struggle to access opportunity and live where they choose.

We applaud HUD for proposing this rule, which will help program participants work with residents to develop more effective plans to address fair housing issues in their communities and provide them with the necessary incentives to make meaningful progress on their fair housing goals. We write to suggest that HUD further strengthen the rule by clarifying several definitions, requiring program participants to engage in additional analysis and community engagement as they prepare their Equity Plans, and enhance its enforcement mechanisms. We urge HUD to move forward with a strong final rule as soon as possible.

Founded by Thurgood Marshall in 1940, LDF is the nation’s oldest civil rights legal organization.⁸ For more than 80 years, LDF has helped Black people secure their civil and constitutional rights. Throughout its history, LDF has challenged public and private policies and practices that deny Black people opportunities and choices in housing and further isolate Black communities. 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. Over the course of several administrations, LDF has urged HUD to take meaningful steps to ensure its full compliance with the FHA’s AFFH mandate, as well as the compliance of its grantees.

I. **The Fair Housing Act Requires Program Participants to Affirmatively Further Fair Housing in Order to Increase Opportunity and Housing Choice for Black People.**

Decades of government-sponsored discriminatory policies and practices have resulted in neglected neighborhoods of concentrated poverty with poor housing stock, toxic environmental conditions, underfunded schools, poorly maintained parks, dilapidated infrastructure, and other problems.⁹ In order to address these issues, the FHA not only prohibits housing discrimination on the basis of race and other protected characteristics, but requires all federal agencies with programs relating to housing and urban development and federal recipients of those funds to take proactive steps to address longstanding patterns of segregation, discrimination, and disinvestment.¹⁰

⁸ LDF has been fully separate from the National Association for the Advancement of Colored People (NAACP) since 1957.

⁹ RICHARD ROTHSTEIN, *THE RACIAL ACHIEVEMENT GAP, SEGREGATED SCHOOLS, AND SEGREGATED NEIGHBORHOODS – A CONSTITUTIONAL INSULT*, *ECON. POL’Y INST.* (Nov. 12, 2014), <https://www.epi.org/publication/the-racial-achievement-gap-segregated-schools-and-segregated-neighborhoods-a-constitutional-insult/>

¹⁰ 42 U.S.C. § 3608(d). Congress also included the AFFH obligation into later laws, including the Housing and Community Development Act of 1974, the Cranston-Gonzalez National Affordable Housing Act, and the Quality Housing and Work Responsibility Act of 1998; Nat’l Fair Hous. All., AFFH Fact Sheet: What “Affirmatively

A. *The Fair Housing Act Recognizes Federal Agencies and Funding Recipients Must Take Material Action to Increase Equal Access to Opportunity and Housing Choice for Black People Caused by Address Decades of Government-Sponsored Racial Segregation .*

For decades, the federal government encouraged housing discrimination against communities of color through its policies and practices. In the 1930s the Federal Home Owners Loan Corporation (HOLC) created maps to assess the risk of mortgage refinancing and set new standards for federal underwriting.¹¹ These maps assessed risk in part based on a neighborhood’s racial composition, designating predominantly Black neighborhoods, and other neighborhoods of color, as hazardous.¹² The Federal Housing Administration, which covered the insurance of over one-third of the U.S. mortgage market by the middle of the century,¹³ later developed similar maps.¹⁴ This process, known as redlining, denied people of color—especially Black people—access to mortgage refinancing and federal underwriting opportunities while perpetuating the notion that residents of color were financially risky and a threat to local property values.¹⁵ As a result, just two percent of the \$120 billion in Federal Housing Administration loans distributed between 1934 and 1962 were given to nonwhite families.¹⁶

The federal government also took additional steps to discourage lending to borrowers and communities of color.¹⁷ For example, the Federal Housing Administration’s 1939 Underwriting Manual explicitly prohibited lending in neighborhoods that were changing in racial composition.¹⁸

Furthering Fair Housing” Means (Feb. 2020), <https://nationalfairhousing.org/wp-content/uploads/2020/02/AFFH-Talking-Points-What-AFFH-Means-003-converted.pdf>. Each of these laws requires cities, counties, states, and public housing authorities that receive HUD funding to certify that they are affirmatively furthering fair housing in order to be eligible to receive those funds. *Id.*

¹¹ Danyelle Solomon, et al., *Systematic Inequality: Displacement, Exclusion, and Segregation How America’s Housing System Undermines Wealth Building in Communities of Color*, CTR. FOR AM. PROGRESS (Aug. 2019), <https://www.americanprogress.org/wp-content/uploads/sites/2/2019/08/StructuralRacismHousing.pdf>; Testimony of Richard Rothstein, Distinguished Fellow of the Economic Policy Institute and Senior Fellow, Emeritus, NAACP Legal Defense and Educational Fund, Inc. on behalf of himself and Sherrilyn Ifill President and Director-Counsel NAACP Legal Defense and Educational Fund, Inc. Before the U.S. Senate Committee on Banking, Housing & Urb. Affairs, *Separate and Unequal: The Legacy of Racial Discrimination in Housing* 6 (Apr. 13, 2021), https://www.naacpldf.org/wp-content/uploads/LDF-Testimony-Senate-Banking-Racial-Discrimination-in-Housing_FINAL.pdf.

¹² BRUCE MITCHELL & JUAN FRANCO, NAT’L CMTY. REINVESTMENT COAL., HOLC “REDLINING” MAPS: THE PERSISTENT STRUCTURE OF SEGREGATION AND ECONOMIC INEQUALITY (Mar. 20, 2018), <https://ncrc.org/holc/>.

¹³ KRISTEN BROADY, ET AL., BROOKING INST., AN ANALYSIS OF FINANCIAL INSTITUTIONS IN BLACK-MAJORITY COMMUNITIES: BLACK BORROWERS AND DEPOSITORS FACE CONSIDERABLE CHALLENGES IN ACCESSING BANK SERVICES (2021), <https://www.brookings.edu/research/an-analysis-of-financial-institutions-in-black-majority-communities-black-borrowers-and-depositors-face-considerable-challenges-in-accessing-banking-services/>.

¹⁴ ROTHSTEIN, *supra* note 11.

¹⁵ *Id.*

¹⁶ *Id.* at 7.

¹⁷ *Id.* at 8-10.

¹⁸ See DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA 37 (2010); see also DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 54 (1993).

In a 1941 memorandum concerning St. Louis, the FHA similarly warned that “the rapidly rising Negro population ha[d] produced a problem in the maintenance of real estate values.”¹⁹ Finally, the Federal Housing Administration refused to guarantee mortgages for developers who were building subdivisions unless the deeds included racially-restrictive covenants, effectively stopping development of integrated suburban communities.²⁰

The federal government established several programs in the 20th Century that were designed to promote homeownership and provide a pathway to the middle class.²¹ However, these programs largely benefited white households while excluding Black people.²² For example, in 1940, President Roosevelt signed the Servicemen’s Readjustment Act—commonly referred to as the GI Bill—which provided a range of benefits, such as guaranteed mortgages, to veterans of World War II.²³ The law was deliberately designed to accommodate Jim Crow.²⁴ For instance, the GI Bill allowed local banks to discriminate against Black veterans and deny them home loans even though the federal government would guarantee their mortgages.²⁵ In Mississippi, just two of the 3,000 mortgages that the Veteran’s Administration guaranteed in 1947 went to African Americans, despite the fact that African Americans constituted half of the state’s population.²⁶

This institutionalized discrimination persisted for decades, compounding and legitimizing private bias. In its 1961 report, the U.S. Commission on Civil Rights documented numerous discriminatory housing and lending practices, from requiring Black borrowers to make higher down payments and adopt faster repayment schedules, to refusing to loan money on the basis of race.²⁷

Ultimately, as a result of the civil rights movement, Congress passed the FHA.²⁸ 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 FHA as a vehicle to address the structural inequality resulting from that discrimination. Senator Walter Mondale noted: “An important factor contributing to exclusion of Negroes from [suburban communities and other

¹⁹ Conley, *supra* note 18, at 37.

²⁰ HEATHER MCGEE, *THE SUM OF US* 80 (2022).

²¹ Michela Zonta, *Racial Disparities in Home Appreciation: Implications of the Racially Segmented Housing Market for African Americans’ Equity Building and the Enforcement of Fair Housing Policies*, CTR. FOR AM. PROGRESS (July 15, 2019), available at <https://www.americanprogress.org/issues/economy/reports/2019/07/15/469838/racial-disparities-home-appreciation/>

²² *Id.*

²³ Nick Kotz, *When Affirmative Action Was White: Uncivil Rights*, N.Y. TIMES (Aug. 28, 2005), <https://www.nytimes.com/2005/08/28/books/review/when-affirmative-action-was-white-uncivil-rights.html>

²⁴ *Id.*

²⁵ Edward Humes, *How the GI Bill Shunted Blacks into Vocational Training*, 53 J. BLACKS HIGHER ED. 92–104 (Autumn 2006), <https://www.proquest.com/openview/affbc738fa07fd2f62baf199983553e1/1?pq-origsite=gscholar&cbl=26506>.

²⁶ *Id.*

²⁷ U.S. COMM’N ON CIV. RTS., BOOK 4: HOUSING (1961), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr11961bk4.pdf>.

²⁸ Fair Housing Act, *supra* note 2.

exclusively white areas], moreover, has been the policies and practices of agencies of government at all levels.”²⁹ The Supreme Court has thus acknowledged that broad reach of the Fair Housing Act is to create opportunities for “truly integrated and balanced living patterns.”³⁰

The AFFH requirement is central to this mandate. This duty requires all executive branch departments and agencies administering housing and urban development programs and activities to administer these programs in a manner that affirmatively furthers fair housing³¹ by working to remediate the lack of opportunity and housing choice that federal housing policy created through redlining and other government policies. As then-Judge Breyer explained in *NAACP v. Secretary of Housing and Urban Development*, the AFFH mandate “reflects the desire to have HUD use its grant programs to assist.”³²

B. Due to the Lack of an Effective AFFH Process and Enforcement, The Economic, Social, and Environmental Harms of Redlining Persist Today.

Unfortunately, nearly six decades after the passage of the FHA, the Act has yet to achieve its purpose. This lack of progress is, in part, due to the federal government’s failure to give life to and enforce the FHA’s AFFH mandate.

Racial discrimination in housing remains a persistent problem in America. Lenders continue to engage in redlining by refusing to provide credit services to individuals living in communities of color.³³ Appraisers continue to systematically undervalue the homes of Black and Brown homeowners compared to comparable white homes,³⁴ limiting their ability to move to high opportunity areas and driving an increasing Black-white racial wealth gap.³⁵ And housing

²⁹ 114 Cong. Rec. 2277 (1968)

³⁰ *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972).

³¹ 42 U.S.C. § 3608; 42 U.S.C. § 3608(e)(5).

³² 817 F.2d 149, 156 (1st Cir. 1987).

³³ *E.g.*, Press Release, U.S. Dep’t of Just., *Justice Department Secures Over \$31 Million from City National Bank to Address Lending Discrimination Allegations* (Jan. 23, 2023), <https://www.justice.gov/opa/pr/justice-department-secures-over-31-million-city-national-bank-address-lending-discrimination>.

³⁴ JUNIA HOWELL & ELIZABETH KORVER-GLENN, WEIDENBAUM CTR. ON ECON., GOV’T. AND PUB. POL’Y., *APPRAISED: THE PERSISTENT EVALUATION OF WHITE NEIGHBORHOODS AS MORE VALUABLE THAN COMMUNITIES OF COLOR* (2022), https://static1.squarespace.com/static/62e84d924d2d8e5dff96ae2f/t/6364707034ee737d19dc76da/1667526772835/Howell+and+Korver-Glenn+Appraised_11_03_22.pdf.

³⁵ *See* TOM SHAPIRO ET AL., LDF THURGOOD MARSHALL INST. & INST. ON ASSETS & SOC. POL’Y AT BRANDEIS UNIV., *THE BLACK-WHITE RACIAL WEALTH GAP* (2019), <https://tminstituteldf.org/wp-content/uploads/2019/11/FINAL-RWG-Brief-v1.pdf>.

providers continue to discriminate against potential tenants on the basis of race,³⁶ and to steer Black applicants away from white communities to predominantly Black communities.³⁷

Since the passage of the FHA, the federal government has not consistently and effectively complied with its obligations to affirmatively further fair housing or ensured that program participants do so. Immediately after it became law, HUD Secretary George Romney tried to use the FHA's AFFH language to reduce residential segregation, but President Nixon quickly shut down the initiative.³⁸ Between 1974 and 1983, HUD did not withhold a block grant from a single non-compliant community, and only did so twice between 1983 and 1988.³⁹

In 1988⁴⁰ and again in 1995,⁴¹ HUD introduced a very modest provision in the consolidated plan regulations requiring jurisdictions receiving Community Development Block Grant (CDBG) funds and other HUD formula grants to certify they were affirmatively furthering fair housing, conduct an analysis of impediments (AI), identify barriers to fair housing, and take actions to overcome the obstacles. However, this process was insufficient to ensure that program participants complied with their AFFH obligations. HUD rarely reviewed AIs, and there were essentially no consequences for incomplete, inadequate, or nonexistent analyses.⁴² In one of the few cases to challenge a program participants' certification that it was AFFH, a federal district court found that Westchester County, New York had "utterly failed" to meet its obligations under the affirmatively furthering provisions of the Fair Housing Act and that each of its certifications had been "false or fraudulent."⁴³ A 2010 Government Accountability Office (GAO) review of AFFH planning documents similarly found that the documents were not effective tool for program participants to identify and address impediments to fair housing.⁴⁴

³⁶ NAACP LDF THURGOOD MARSHALL INST. & NAT'L FAIR HOUS. ALL., *THE BAD HOUSING BLUES: DISCRIMINATION IN THE HOUSING CHOICE VOUCHER PROGRAM IN MEMPHIS, TN* (2023), <https://www.naacpldf.org/wp-content/uploads/2022-11-14-Fair-Housing-2-web-1.pdf>.

³⁷ *E.g.*, Press Release, U.S. Dep't of Justice, Justice Department Secures Settlement in Race Discrimination Lawsuit Against Public Housing Authority and Property Owners in Alabama (Dec. 15, 2022), <https://www.justice.gov/opa/pr/justice-department-secures-settlement-race-discrimination-lawsuit-against-public-housing>.

³⁸ Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law>.

³⁹ *Id.*

⁴⁰ Community Development Block Grants: Updates and Amendments, 53 Fed. Reg. 34,416 (Sept. 6, 1988).

⁴¹ Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. 1878 (Jan. 5, 1995); 24 C.F.R. §§ 91.225(a)(1) and 91.325(a)(1).

⁴² Justin P. Steil & Nicholas Kelly, *Survival of the Fairest: Examining HUD Reviews of Assessments of Fair Housing*, 29 HOUS. POL'Y DEBATE 736-751 (2019), https://furtheringfairhousing.mit.edu/sites/default/files/documents/Steil%20Kelly%202019%20Survival%20of%20the%20Fairest%20Examining%20HUD%20AFFH%20Reviews_0.pdf (hereinafter "Survival of the Fairest").

⁴³ *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, 668 F.Supp.2d 548, 561-63 (S.D.N.Y. 2009)

⁴⁴ GOV'T ACCOUNTABILITY OFF., *HOUSING & COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS* (2010), <https://www.gao.gov/assets/gao-10-905.pdf>.

After years of work, the Obama administration published its 2015 AFFH rule, which required program participants to develop more robust fair housing plans called Analyses of Fair Housing (AFHs) and submit those plans to HUD for approval.⁴⁵ Unfortunately, in May 2018, HUD, under then-Secretary Ben Carson suspended the use of the 2015 AFFH rule for all but 32 jurisdictions⁴⁶ and ultimately repealed the rule entirely.⁴⁷

Without consistent federal leadership to implement the FHA’s AFFH requirement, and in the face of ongoing discrimination, America remains residentially segregated, with opportunity distributed unequally according to race.⁴⁸ Nationally, 74 percent of the areas classified as “hazardous” by HOLC (and thus redlined) in the 1930s are low- and moderate income today, and 63 percent of the “hazardous” areas from the 1930s are areas where the majority of the residents are people of color.⁴⁹ The concentration of Black people in low-opportunity areas is driven by ongoing discrimination and exclusionary practices.⁵⁰

Ongoing lack of opportunity and housing choice continues to harm Black people’s health, education, and access to opportunity.

- Numerous studies have found associations between residential segregation and serious health conditions, including asthma, diabetes, and kidney disease.⁵¹ Predominantly Black, racially-isolated neighborhoods are more likely to be in primary care deserts and “offer fewer ambulatory facilities, more limited access to physicians, and a lower supply of surgeons.”⁵² As a result, on average, life expectancy in redlined communities was 3.6 years lower compared to the communities that existed at the same time but were high-graded by the HOLC.⁵³

⁴⁵ Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272 (July 16, 2015) (hereinafter “2015 Rule”).

⁴⁶ Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments, 83 Fed. Reg. 23922 (May 23, 2018).

⁴⁷ Preserving Community and Housing Choice, 85 Fed. Reg. 47899 (Aug. 7, 2020)

⁴⁸ Justin Steil & Nicholas Kelly, *The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance*, 29 HOUS. POL’Y DEBATE 1, 85-105 (2018), <https://dspace.mit.edu/bitstream/handle/1721.1/126827/Steil%20Kelly%20Fairest%20of%20them%20All%202018%2005%2008.pdf?sequence=2&isAllowed=y> (hereinafter “Fairest of Them All”); Heather R. Abraham, *Segregation Autopilot: How the Government Perpetuates Segregation and How to Stop It*, 107 IOWA L. REV. 1963, 1969 (2022), [https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2022-11/Segregation Autopilot How the Government Perpetuates Segregation and How to Stop It.pdf](https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2022-11/Segregation%20Autopilot%20How%20the%20Government%20Perpetuates%20Segregation%20and%20How%20to%20Stop%20It.pdf).

⁴⁹ MITCHELL & FRANCO, *supra* note 12.

⁵⁰ *E.g.*, RAJ CHETTY, ET AL., CREATING MOVES TO OPPORTUNITY: EXPERIMENTAL EVIDENCE ON BARRIERS TO NEIGHBORHOOD CHOICE, NBER Working Paper No. 26164 (Aug. 2019), <https://opportunityinsights.org/paper/cmto/>.

⁵¹ Darrell J. Gaskin, et al., *Residential Segregation and the Availability of Primary Care Physicians*, 47 HEALTH SERVS. RSCH. 2353, 2353 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3416972/pdf/hesr0047-2353.pdf>.

⁵² MARIANA C. ARAYA & ALINA SCHNAKE-MAHL, HEALTH IN THE SEGREGATED CITY, NYU FURMAN CTR. (Oct. 2017), <https://furmancenter.org/research/iri/essay/health-in-the-segregated-city>.

⁵³ JASON RICHARDSON ET AL., NAT’L CMTY. REINVESTMENT COAL., REDLINING AND NEIGHBORHOOD HEALTH (2020), <https://www.ncrc.org/holc-health/>; SHAPIRO ET AL., *supra* note 35, at 11 (“In some neighborhoods [in New Orleans]

- One out of every five Black households is situated in a food desert,⁵⁴ and communities of color have fewer large supermarkets than predominantly white neighborhoods, even when controlling for income.⁵⁵
- Schools and districts in formerly redlined neighborhoods remain segregated, with “larger shares of Black and non-White student bodies . . . and worse average test scores.”⁵⁶ Relatedly, schools with higher concentrations of students of color—many of which are in formerly redlined neighborhoods—have more inexperienced teachers, fewer counselors and health workers, more school security guards, and fewer advanced educational classes, like AP classes.⁵⁷ Perhaps a result, a 2017 study by the Urban Institute found that areas that have high levels of Black-white residential segregation have are associated with lower levels of four-year college degree attainment.⁵⁸
- Children born in a redlined neighborhood earn \$15,000 less near age 30 compared with children born in a non-redlined neighborhood, even when their parents’ income remained constant.⁵⁹
- Finally, as a result of redlining, people of color are more likely to live in polluted areas and near environmental hazards.⁶⁰

originally appraised as ‘best’ or ‘still desirable’ by HOLC, residents gain 10 years of life (over Louisiana’s median life expectancy of 76 years), while residents in other neighborhoods originally deemed ‘hazardous’ by HOLC lose over 10 years of life.”).

⁵⁴ Michael Chui, et al., *A \$300 Billion Opportunity: Serving the Emerging Black Consumer*, MCKINSEY QUARTERLY (Aug. 6, 2021), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/a-300-billion-dollar-opportunity-serving-the-emerging-black-american-consumer>.

⁵⁵ Kelly Brooks, *Research Shows Food Deserts More Abundant in Minority Neighborhoods*, JOHNS HOPKINS UNIV. MAG. (Spring 2014), <https://hub.jhu.edu/magazine/2014/spring/racial-food-deserts/>.

⁵⁶ DYLAN LUKES & CHRISTOPHER CLEVELAND, *THE LINGERING LEGACY OF REDLINING ON SCHOOL FUNDING, DIVERSITY, AND PERFORMANCE* (EdWorkingPaper No. 21-363), ANNENBERG INST. AT BROWN UNIV. (Nov. 2021), <https://www.edworkingpapers.com/sites/default/files/ai21-363.pdf>.

⁵⁷ TOMAS MONARREZ & CARINA CHIEN, URB. INST., *DIVIDING LINES: RACIALLY UNEQUAL SCHOOL BOUNDARIES IN U.S. PUBLIC SCHOOL SYSTEMS* (SEPT. 2021), <https://www.urban.org/sites/default/files/2022-03/dividing-lines-racially-unequal-school-boundaries-in-us-public-school-systems.pdf>.

⁵⁸ GREGORY ACS, ET AL., URB. INST., *THE COST OF SEGREGATION: NATIONAL TRENDS AND THE CASE OF CHICAGO, 1990–2010* (2017), <https://www.urban.org/research/publication/cost-segregation>.

⁵⁹ Jeramy Townsley et al., *The Lasting Impacts of Segregation and Redlining*, SAVI (June 24, 2021), <https://www.savi.org/2021/06/24/lasting-impacts-of-segregation/>.

⁶⁰ Laura Wamsley, *Even Many Decades Later, Redlined Areas See Higher Levels of Air Pollution*, NPR (Mar. 10, 2022), <https://www.npr.org/2022/03/10/1085882933/redlining-pollution-racism>; Daniel Cusick, *Past Racist “Redlining” Practices Increased Climate Burden on Minority Neighborhoods*, SCI. AM. (Jan. 21, 2020), <https://www.scientificamerican.com/article/past-racist-redlining-practices-increased-climate-burden-on-minority-neighborhoods/>; SHAPIRO ET AL., *supra* note 35, at 13.

As LDF’s Thurgood Marshall Institute (TMI) outlined in its report, *The Black-White Racial Wealth Gap*, these disparities also translate into adverse financial consequences for Black families.⁶¹ Relative to white homeowners, Black homeowners will pay on average \$13,464 more for their homes because they pay higher relative mortgage rates, mortgage insurance premiums, and property taxes.⁶² Today, the Black homeownership rate has declined to a level lower than what existed prior to the passage of the FHA.⁶³ And with higher costs and lower home equity, the racial wealth gap has grown, and Black households have about seven cents on the dollar in net worth relative to white households.⁶⁴

While the lack of opportunity and housing choice harms Black people the most, it also harms society as a whole. According to a 2017 report by the Urban Institute and the Metropolitan Planning Council, reducing Black-white segregation in the Chicago region would cause the incomes of Black people to rise \$2,982 per person per year—and the entire region would earn an additional \$4.4 billion in income and increase its gross domestic product by \$8 billion.⁶⁵ Chicago’s homicide rate would also decrease 30 percent, and educational attainment for both Black and white students would increase, leading 83,000 more adults to complete a college degree.⁶⁶

C. A Robust AFFH Planning Process Can Help Program Participants Increase Opportunity and Housing Choice in Their Communities.

As the Supreme Court acknowledged in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities*, the FHA has a “continuing role in moving the nation toward a more integrated society,” and its broad remedial purposes cannot be accomplished simply by formally banning current discrimination.⁶⁷ Research and past experience has shown that a robust AFFH planning process, such as the process proposed by this rule, can help program participants increase opportunity in their communities and realize the goals of the FHA.

According to a 2018 study of AFFH plans by Justin Steil, a Professor of Law and Urban Planning at the Massachusetts Institute of Technology, the 2015 AFFH rule led to better AFFH planning at the municipal level, causing them to “create innovative strategies to address disparities in access to opportunity and to make more meaningful commitments to reduce those disparities.”⁶⁸

⁶¹ SHAPIRO ET AL., *supra* note 35.

⁶² MICHELLE ARONOWITZ, ET AL., MIT GOLUB CTR. FOR FIN. & POL’Y, THE UNEQUAL COSTS OF BLACK HOMEOWNERSHIP (OCT. 1, 2020), <https://gcfp.mit.edu/wp-content/uploads/2020/10/Mortgage-Cost-for-Black-Homeowners-10.1.pdf>.

⁶³ John Wake, *Why Isn’t the Black Homeownership Rate Higher Today Than When the 1968 Fair Housing Act Became Law*, FORBES, May 16, 2019, <https://www.forbes.com/sites/johnwake/2019/05/16/heres-whythe-black-homeownership-rate-is-the-same-50-years-after-1968-fair-housing-act/#28c57a2130cd>

⁶⁴ SHAPIRO ET AL., *supra* note 35, at 5.

⁶⁵ METRO. PLAN. COUNCIL, THE COSTS OF SEGREGATION 4–5, 19 n.1 (2017), www.metroplanning.org/uploads/cms/documents/cost-of-segregation.pdf.

⁶⁶ ACS, ET AL., *supra* note 58.

⁶⁷ 576 U.S. 519, 546–47 (2015).

⁶⁸ *Fairest of Them All*, *supra* note 48, at 23, 36.

The study found that program participants that created AFHs were more likely to create concrete, measurable goals for fair housing.⁶⁹ In particular, “Forty percent or more of goals that focused on zoning, affordable housing, place-based investments, and mobility programs also had a measurable objective or included a new policy, indicating that these were areas in which municipalities are particularly likely to make public commitments to implementation.”⁷⁰

Many program participants benefited from the robust data and community engagement required by the 2015 rule, particularly the participation of fair housing organizations, as well as technical assistance provided by HUD and others.⁷¹ For example, according to research by Justin Steil, “active community advocacy was reportedly a key factor in creating more specific and ambitious goals in places such as New Orleans . . . or Los Angeles.”⁷² Similarly, Boston’s AFFH process included community meetings, public testimony, and a citywide survey that generated thousands of resident responses that ultimately led the Boston Zoning Committee to amend the zoning code to identify and address displacement caused by new development.⁷³ LDF Thurgood Marshall Institute Fellow and former HUD Secretary Julian Castro’s case study of Los Angeles’ AFFH process echoed these results, finding that the city used socioeconomic data, access to transportation data, environmental justice data, and other variables to try to set holistic and comprehensive fair housing goals.⁷⁴

The 2015 rule also allowed HUD to play an effective role in ensuring that program participants were meeting their AFFH obligations. Research on the relationship between federal planning mandates and local plan quality found that the existence of tools for enforcement is an important factor in shaping the quality of local plans.⁷⁵ Because the AFFH Rule depends on most localities genuinely embracing the spirit of the rule and following its stipulations, “effective enforcement requires either substantial penalties or intensive enforcement, potentially with escalating enforcement measures.”⁷⁶ The GAO’s 2010 report thus recommended, among other changes, that HUD require program participants to submit their AFFH plans to the department on a routine basis and that “HUD staff verify the timeliness of the documents, determine whether they adhere to established format requirements, assess the progress that grantees are achieving in addressing identified impediments” to fair housing.⁷⁷ In response, the 2015 Rule required that HUD review and approve program participants’ AFFH plans.⁷⁸ The 2015 rule also conditioned

⁶⁹ *Id.* at 23

⁷⁰ *Id.* at 24

⁷¹ *Survival of the Fairest*, *supra* note 42, at 748.

⁷² *Fairest of Them All*, *supra* note 48, at 35.

⁷³ Tram Hoang, *Three Ways AFFH Has Advanced Housing Justice*, SHELTERFORCE (Mar. 21, 2023), <https://shelterforce.org/2023/03/21/three-ways-affh-has-advanced-housing-justice/>.

⁷⁴ JULIAN CASTRO, NAACP LDF, *THE LOS ANGELES COUNTY EXPERIENCE: AFFIRMATIVELY FURTHERING FAIR HOUSING IN AMERICA’S LARGEST COUNTY* (Dec. 16, 2022), <https://www.naacpldf.org/fair-housing-inclusive-communities/>.

⁷⁵ *Fairest of Them All*, *supra* note 48, at 6.

⁷⁶ *Survival of the Fairest*, *supra* note 42, at 744.

⁷⁷ GAO Report, *supra* note 44.

⁷⁸ 2015 Rule § 5.162.

acceptance of participants’ consolidated plans and/or public housing agency (PHA) plans on the existence of an accepted AFFH plan.⁷⁹ A 2019 study of HUD’s review of AFFH plans under the 2015 rule found that, in every plan that HUD rejected, program participants failed to set out “meaningful goals with concrete metrics that were reasonably likely to address the factors that they identified as perpetuating segregation and disparities in access to opportunity,” either alone or in addition to other deficiencies.⁸⁰ The study found that HUD provided constructive feedback to these program participants, and that they promptly revised plans their plans to make their goals more concrete and measurable, among other changes.⁸¹ In short, HUD was able to identify plans where program participants failed their core duty to affirmatively further fair housing and to ensure participants made improvements.

At the same time, HUD had a limited ability to push program participants to create even stronger AFHs. Under the 2015 rule, HUD could only accept or reject an Equity Plan.⁸² If HUD did not explicitly reject an Equity Plan, it was deemed accepted.⁸³ If HUD rejected an AFFH plan, program participants had a limited amount of time to revise and resubmit their applications.⁸⁴ If they did not have an approved AFFH plan at the time their consolidated plan or PHA plan was due, they risked losing their CDBG or other federal funding.⁸⁵ In practice, this meant that HUD “ultimately accepted every plan even though many of the plans that HUD accepted could still have benefited from improvements if there had been additional time for HUD to work with the program participants.”⁸⁶

II. The Proposed AFFH Rule Would Provide Program Participants with Needed Guidance to Help Them Meet Their AFFH Obligations.

The proposed rule is a necessary step to help HUD and its grantees meet their AFFH obligations. HUD itself admits that “current regime . . . lacks a standardized mechanism to promote compliance with the statutory obligation” and “HUD . . . lacks the ability to engage in effective oversight and enforcement of program participants’ fair housing planning.”⁸⁷ By contrast, as explained above, a robust AFFH rule can assist program participants in developing innovative solutions to longstanding lack of opportunity in communities of color and lack of housing choice, and can help program participants and HUD to comply with their obligations under the FHA. The

⁷⁹ *Id.* § 5.162(d).

⁸⁰ *Survival of the Fairest*, *supra* note 42, at 743.

⁸¹ *Id.*

⁸² 2015 Rule § 5.162.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* § 5.162(d).

⁸⁶ AFFH NPRM at 8519, 8549.

⁸⁷ *Id.* at 8553.

proposed rule is a significant step forward, incorporating many positive provisions from the 2015 rule and addressing some of its gaps.

A. The Proposed AFFH Rule Makes Clear That Program Participants Must Take Action to Affirmatively Further Fair Housing.

The proposed rule, like the 2015 rule, emphasizes that program participants must take meaningful actions with specific, measurable steps to fulfill their AFFH mandate, both in its definition of “affirmatively furthering fair housing”⁸⁸ and other terms (e.g., “fair housing goals”).⁸⁹ The rule also adds new language specifying that the duty to affirmatively further fair housing requires program participants to do more than comply with the prohibitions on specific forms of discrimination in federal civil rights laws, but also to “take actions, make investments, and achieve outcomes that remedy the segregation, inequities, and discrimination the Fair Housing Act was designed to redress.”⁹⁰ This language emphasizes that AFFH is not just a planning rule, and program participants cannot satisfy their obligations without taking action. Consistent with prior case law,⁹¹ the rule also requires program participants to refrain from taking actions that are materially inconsistent with their AFFH obligation.⁹² The materially inconsistent clause was absent when HUD restored several key definitions from the 2015 AFFH Rule in 2021, and we applaud HUD for restoring this language. In addition, the proposed rule makes it clear that equity requires program participants to not only treat all individuals in “a consistent and systematic fair, just, and nondiscriminatory” manner, but also to take “concerted actions to overcome past discrimination.”⁹³

In addition, the proposed rule continues and strengthens the 2015 rule’s requirement that program participants adopt a “balanced approach” to affirmatively further fair housing that incorporates both strategies that increase mobility to well-resourced areas of opportunity and place-based strategies that invest in under-resourced neighborhoods.⁹⁴ The proposed rule adds a definition of the term “balanced approach” and makes it clear that almost all program participants should not rely solely on a place-based approach and sets expectation that they will use both place-

⁸⁸ AFFH NPRM § 5.152 (“Affirmatively furthering fair housing means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation, eliminate inequities in housing and related community assets, and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.”).

⁸⁹ *Id.* (“Fair housing goals include a description of progress-oriented, specific measurable steps, including timeframes for achievement, and a description of the amount of and potential sources of funds (if any) needed to implement the goal.”)

⁹⁰ *Id.*

⁹¹ *NAACP, Boston Chapter*, 817 F.2d at 156 (stating that program participants have “an obligation to assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess those aspects of a proposed course of action that would increase that supply. If HUD is doing so in any meaningful way, 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.”).

⁹² AFFH NPRM § 5.166(a).

⁹³ *Id.* § 5.152 (definition of “equity or equitable”).

⁹⁴ *Id.*

based and mobility-based strategies to affirmatively further fair housing.⁹⁵ This clarification will encourage program participants not to repeat old patterns of focusing primarily on housing redevelopment in racially segregated, high-poverty neighborhoods without an equally robust strategy for ensuring that high-opportunity neighborhoods are open to all,⁹⁶ or investing in community assets. As such, the proposed rule will help increase housing choice.

B. The Proposed AFFH Rule Requires Program Participants to Set Fair Housing Goals to Address Fair Housing Issues in their Communities.

The proposed rule requires program participants to engage in a structured planning process to develop AFFH plans (called Equity Plans). Through this process, program participants must holistically examine patterns of segregation and opportunity that are affected by where people live. For example, program participants must consider transportation, education, and other planning that affects access to community assets when developing fair housing strategies and goals.⁹⁷ The proposed rule would require program participants to look at fair housing issues at the regional as well as the local level,⁹⁸ and would allow program participants to collaborate on joint Equity Plans.⁹⁹ An exclusive focus on fair housing needs within specific jurisdictions does little to address broader patterns that limit opportunity and housing choice. The District Court of Maryland thus acknowledged in *Thompson v. HUD* that a focus narrowly on the jurisdiction of particular program participants may prevent HUD from living up “to its statutory mandate to consider the effect of its policies on the racial and socioeconomic composition of the surrounding area.”¹⁰⁰

The proposed rule requires grantees to set goals to address the priority fair housing issues in each goal category and to include “a description of progress oriented, specific measurable steps, including timeframes for achievement, and a description of the amount of and potential sources of funds (if any) needed to implement the goal.”¹⁰¹

C. The Proposed AFFH Rule Strengthens Public Participation Requirements, Which Will Help Program Participants Develop Better Equity Plans.

⁹⁵ *Id.*

⁹⁶ Letter from the NAACP Legal Defense & Educational Fund to the U.S. Dep’t of Hous. & Urb. Dev., RE: Docket No. 5171-P-01, Affirmatively Furthering Fair Housing (Sept. 17, 2013), at 6 (on file with author).

⁹⁷ AFFH NPRM § 5.152 (defining fair housing goal categories to include “significant disparities in access to opportunity,” which “means substantial and measurable differences in access to and quality of housing, education, transportation, economic, and other important opportunities in a community, including community assets”).

⁹⁸ *Id.* (defining fair housing issues to include such conditions as “ongoing local or regional segregation or lack of integration”); *Id.* at 8517 (“The proposed rule is intended to foster local commitment to addressing local and regional fair housing issues, both requiring and enabling communities to leverage and align HUD funding with other Federal, State, or local resources to develop innovative solutions to inequities that have plagued our society for far too long.”).

⁹⁹ *Id.* § 5.160(a).

¹⁰⁰ *Thompson v. HUD*, 348 F. Supp. 2d 398, 409 (D. Md. 2005).

¹⁰¹ AFFH NPRM § 5.152.

The proposed rule would help facilitate robust community participation in AFFH planning, which can lead to better fair housing goals and outcomes. Developing fair housing goals in conjunction with the community also ensures that program participants accurately identify fair housing issues and build the support they need to translate plans into action. When developing an Equity Plan, program participants must conduct at least three public meetings held at different times of day, at least one of which must occur in an underserved community,¹⁰² and must hold at least two public meetings in order to prepare annual progress reports.¹⁰³ Finally, they must submit information and documentation regarding their community engagement process to HUD.¹⁰⁴

D. The Proposed AFFH Rule Would Increase Transparency and Oversight of Program Participants' AFFH Plans and Strengthen HUD Enforcement.

Most importantly, the proposed AFFH rule would increase transparency, oversight, and enforcement of program participants' fair housing plans and obligations. The proposed rule reinstates program participants' obligation to submit an Equity Plan for HUD review and approval, and requires them to have an accepted Equity Plan as part of their consolidated and PHA plan—critical elements of the 2015 Rule.¹⁰⁵ The proposed rule also improves HUD enforcement of AFFH in significant ways.

- The proposed rule facilitates more effective HUD review of program participants' Equity Plans by allowing the public to comment on those plans for 60 days after the plan is published on HUD's website.¹⁰⁶ These public comments will help HUD better identify deficiencies in program participants' fair housing issues and fair housing goals, and pinpoint other issues with their Equity Plans.
- The rule creates additional opportunities for HUD to work with program participants to bring them into compliance with their AFFH obligations. The proposed rule gives HUD additional time to work with program participants to strengthen their Equity Plans by allowing the agency to approve a consolidated plan or PHA Plan even if the program participant does not have an accepted Equity Plan if the program participant furnishes special assurances that they will submit a satisfactory Equity Plan within 180 days of the end of HUD's review period for the consolidated plan or PHA Plan.¹⁰⁷ The purpose of the AFFH rule is to incentivize participants to make material positive change that increases opportunity and housing choice. This new procedure balances the need to secure compliance with the rule by maintaining significant sanctions without disincentivizing HUD enforcement.

¹⁰² *Id.* § 5.158(d).

¹⁰³ *Id.*

¹⁰⁴ *Id.*; *Id.* § 5.168(2).

¹⁰⁵ *See id.* at 8519.

¹⁰⁶ *Id.* § 5.162(a).

¹⁰⁷ *Id.* at 8528.

- The proposed rule requires program participants to submit annual progress evaluations describing the progress made on each goal to HUD, which HUD will publish.¹⁰⁸ As noted above, program participants must engage with the community in order to prepare these evaluations.¹⁰⁹ These annual reports would require program participants and members of the public to assess whether grantees are meeting their fair housing goals over time.
- Finally, the proposed rule outlines additional compliance measures that HUD can pursue in addition to accepting or rejecting a program participant’s Equity Plan.¹¹⁰ The primary enforcement tools in the 2015 rule were HUD’s ability to reject a submitted AFFH plan or challenge a program participant’s certification that it would affirmatively further fair housing; the rule did not include any explicit mechanism for members of the public to file complaints.¹¹¹ As HUD itself admits, “these tools alone proved to be insufficient.”¹¹² At the same time, fair housing advocates have successfully used the existing FHA administrative complaint process to report—and ultimately resolve—a handful of AFFH cases. For example, in 2010 HUD helped negotiate a conciliation agreement between the Texas Low Income Housing Information Service and Texas Appleseed and the State of Texas regarding the state’s use of \$3.1 billion in disaster relief funding after Hurricane Ike.¹¹³ As a result of this conciliation, Texas agreed, among other measures, to update its AFFH plan and to allocate disaster and annual block grant funds in a manner consistent with its AFFH obligations.¹¹⁴ We are pleased that HUD has now included a clear compliance process that allows members of the public to file complaints, which the proposed rule models after HUD’s Title VI complaint process.¹¹⁵

Taken together, these measures make it clear that program participants must take meaningful action to affirmatively further fair housing, and strengthen HUD’s ability to monitor and enforce these obligations. In doing so, the proposed rule will help achieve the purpose of the FHA.

¹⁰⁸ *Id.* § 5.160(f).

¹⁰⁹ *Id.* § 5.158(d).

¹¹⁰ *Id.* § 5.154(f).

¹¹¹ We are pleased that the proposed rule also requires program participants to certify that they will both AFFH and take no action that is material inconsistent with AFFH and fair housing and civil rights requirements, and outlines clear procedures for HUD to resolve inaccuracies or noncompliance with these certifications. *Id.* § 5.166.

¹¹² *Id.* at 8529.

¹¹³ LAWYERS’ COMM. FOR CIV. RTS. UNDER L., ET AL., AFFIRMATIVELY FURTHERING FAIR HOUSING AT HUD: A FIRST TERM REPORT CARD, PART II (March 2013), <https://lawyerscommittee.org/wp-content/uploads/2015/06/HUD-Report-Card-Part-II-.pdf>.

¹¹⁴ *Id.*

¹¹⁵ 24 CFR part 1.

III. The Proposed AFFH Rule Should Be Strengthened to Ensure That Program Participants Can Effectively Identify and Achieve Their Fair Housing Goals.

While we believe that the proposed rule is a significant improvement over the current AFFH process, HUD should further clarify and strengthen the rule, including by:

- Strengthening and expanding the definitions of “affordable housing opportunities,” “fair housing issue,” and “fair housing goal categories,” and to incorporate “funding decisions” into the definitions of “affirmatively further fair housing” and “balanced approach;”
- Clarifying that program participants must set fair housing goals that address the needs of communities of color and other protected classes, not just underserved communities;
- Providing program participants with additional guidance and data, including on how to align their Equity Plans and CDBG-DR plans;
- Requiring program participants to address displacement in their Equity Plans;
- Strengthening the community engagement requirements;
- Strengthening and clarifying the enforcement provisions;
- Accelerating the implementation of the proposed rule; and
- Making it clear that the rule does not reflect the full scope of the AFFH obligation.

We believe that these changes will ensure that both program participants and HUD can meet their obligations to affirmatively further fair housing, and urge HUD to swiftly finalize a strong final rule.

A. The Final Rule Should Strengthen and Expand Several Key Definitions.

The proposed rule maintains and expands upon many of the definitions in the 2015 rule, and includes many salutary additions, such as the definition of a “balanced approach” discussed above. However, some definitions in the proposed rule remain unclear or leave out critical elements and should be improved in the final rule. The final rule should modify the following definitions:

- Affordable housing opportunities: In 2022, only 36 affordable and available rental homes existed for every 100 extremely low-income renter households.¹¹⁶ The loss of low-income housing disproportionately affects people of color: 20 percent of Black households and 15 percent of Latino households are extremely low-income renters, compared to only 6 percent of white non-Latino households.¹¹⁷ However, the current definition of “affordable housing opportunities” does not specify what “affordable” means.¹¹⁸ It also conflates affordability for a variety of income levels, stating that affordable housing opportunities

¹¹⁶ NAT’L LOW-INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES (Apr. 2022), https://nlihc.org/sites/default/files/gap/Gap-Report_2022.pdf

¹¹⁷ *Id.*

¹¹⁸ AFFH NPRM § 5.152.

means “housing that . . . is affordable to low- and moderate-income households,”¹¹⁹ and fails to specify that a meaningful proportion of housing be affordable to the lowest-income households. Finally, while the definition of affordable includes factors such as habitability and location, it does not include other fair housing criteria impacting access, such as tenant selection criteria (for example, criminal history exclusions). The final rule should address these gaps, including by spelling out more clearly the income levels that qualify as affordable (extremely low income: 0-30 percent area median income (AMI); 30-50 percent AMI: low income; 50-80 percent AMI: low/moderate income).

The final rule should also make it clear that increasing the quantity of affordable housing alone without increasing access to housing choice and opportunity for protected classes is insufficient to affirmatively further fair housing.¹²⁰ Courts have found that program participants that merely increase access to affordable housing but do not address racial segregation fail to meet their obligation to affirmatively further fair housing.¹²¹ As such, program participants cannot satisfy their obligations to affirmatively further fair housing merely by building new public or subsidized housing in a racially and ethnically concentrated area of poverty.

- Fair housing issue: The proposed rule defines a “fair housing issue” as a “condition in a program participant’s geographic area of analysis that restricts fair housing choice or access to opportunity and community assets,” and gives a long list of examples including “inequitable distribution of local resources.”¹²² However, communities of color are frequently not only deprived of access to community assets, but also disproportionately exposed to environmental harms. For example, according to data from the U.S. Environmental Protection Agency obtained by The Intercept, 9,000 federally subsidized housing properties—whose residents are largely people of color—sit within a mile of a Superfund site.¹²³ Similarly, a June 2022 study in *Nature* found that air pollution exposure disparately affects those residing in federally subsidized housing.¹²⁴ That same year, following a two year investigation prompted by a complaint by environmental justice organizations, HUD sent a letter to the city of Chicago concluding that it had engaged in a pattern of shifting polluting facilities from white neighborhoods to neighborhoods of color,¹²⁵ and required the city to adopt an enhanced fair housing planning process that

¹¹⁹ *Id.*

¹²⁰ *United States ex rel. Anti-Discrimination Ctr.*, *supra* note 43.

¹²¹ *Id.* As noted above, the final rule should further specify what it means for housing to be truly affordable.

¹²² AFFH NPRM § 5.152.

¹²³ ANGELA CAPUTO & SHARON LERNER, *HOUSE POOR, POLLUTION RICH*, APR REPORTS (Jan. 13, 2021), <https://www.apmreports.org/story/2021/01/13/public-housing-near-polluted-superfund-sites#:~:text=An%20investigation%20reveals%20that%20more,government%20inaction%20with%20their%20health>.

¹²⁴ Jayajit Chakraborty, et al., *Air Pollution Exposure Disparities in US Public Housing Developments*, 12 SCI. REP. 9887 (2022), <https://www.nature.com/articles/s41598-022-13942-3>.

¹²⁵ Meir Rinde, *AFFH’s Bumpy Road to Overcoming Segregation*, SHELTERFORCE (Mar. 14, 2023), <https://shelterforce.org/2023/03/14/affhs-bumpy-road-to-overcoming-segregation/>.

includes planning for overcoming disparities in environmental impacts.¹²⁶ The definition of a “fair housing issue” should thus include not only inequitable distribution of resources, but also inequitable exposure to harms, such as environmental harms and harms from climate-related disasters.¹²⁷

The final rule should also make clear that the use of biased technology to decide who can access housing opportunities is a “fair housing issue.” Governments and private actors increasingly rely automated decision-making systems—whether simple algorithms or more complicated systems relying on machine learning or artificial intelligence—in housing decisions. For example, a recent investigation by The Markup found that Los Angeles uses a scoring system to help decide who receives subsidized housing.¹²⁸ This scoring system, however, consistently gives Black people lower scores than white people.¹²⁹ Similarly, housing providers frequently rely on tenant screening algorithms to determine who to rent to,¹³⁰ yet these algorithms can perpetuate and exacerbate bias that excludes Black people and other people of color from housing opportunities.¹³¹ These policies include exclusions based on criminal history and prior evictions that disproportionately impact people of color.¹³²

¹²⁶ Brett Chase, *HUD Accuses City of Chicago of Environmental Racism by Moving Polluters to Black, Latino Neighborhoods*, CHICAGO SUN TIMES (JULY 19, 2022), <https://chicago.suntimes.com/2022/7/19/23270084/hud-civil-rights-general-iron-polluters-black-latino-neighborhoods-lightfoot>.

¹²⁷ A 2021 report by the Environmental Protection Agency found that communities of color will disproportionately suffer many of the effects of climate change, including coastal flooding, extreme temperatures, and poor air quality. U.S. Env’t Prot. Agency, *Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts* (2021), https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf. For example, the report found that Black people are 40% more likely than other people to live in areas with the highest projected increases in mortality rates due to climate-driven changes in extreme temperatures. *Id.* at 6.

¹²⁸ Colin Lecher & Maddy Varner, *L.A.’s Scoring System for Subsidized Housing Gives Black and Latino People Experiencing Homelessness Lower Priority Scores*, THE MARKUP (Feb. 28, 2023, 08:00 ET), <https://themarkup.org/investigation/2023/02/28/l-a-s-scoring-system-for-subsidized-housing-gives-black-and-latino-people-experiencing-homelessness-lower-priority-scores>.

¹²⁹ *Id.*

¹³⁰ Press Release, TransUnion, *Low Turnover and Higher Rental Prices in 2017 Driving Profitable and Attractive Market for Landlords* (Apr. 19, 2017 06:00 ET), <https://www.globenewswire.com/news-release/2017/04/19/963170/0/en/Low-Turnover-and-Higher-Rental-Prices-in-2017-Driving-Profitable-and-Attractive-Market-for-Housing-providers.html>.

¹³¹ Letter from the NAACP LDF. to the Fed. Trade Comm’n, RE: Commercial Surveillance ANPR, R111004 (Nov. 21, 2022), available at <https://www.naacpldf.org/news/ldf-submits-comments-on-algorithmic-bias-in-economic-justice-and-law-enforcement-technologies-to-the-federal-trade-commission/>.

¹³² U.S. DEP’T OF HOUS. & URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 6 (Apr. 4, 2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF (hereinafter “2016 Guidance”); Memo from Principal Deputy Assistant Secretary for Fair Housing and Equal Opportunity Demetria McCain to Office of Fair Housing & Equal Opportunity, Fair Housing Assistance Program Agencies, & Fair Housing Initiatives Program Grantees Implementation of the Office of General Counsel’s Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions 8 (Jun. 10, 2022), <https://www.hud.gov/sites/dfiles/FHEO/documents/Implementation%20of%20OGC%20Guidance%20on%20Application%20of%20FHA%20Standards%20to%20the%20Use%20of%20Criminal%20Records%20-%20June%2010%202022.pdf>.

- Fair housing goal categories: The definition of fair housing goal categories includes: 1) laws, policies, and practices at the local level that affect the provision of fair housing; and 2) discrimination or violations of civil rights laws that impede equitable access to community assets.¹³³ However, the definition of fair housing goal categories does not require an assessment of the jurisdiction’s fair housing enforcement and fair housing outreach capacity, which was included in the 2015 rule and is an essential component of the jurisdiction’s ability to promote fair housing.¹³⁴ The final rule should require program participants to assess that capacity as part of their analysis of fair housing regulations.

- Funding decisions: We are pleased that the proposed rule defines funding decisions to include “the administration, utilization, and allocation of low-income housing tax credits [LIHTC] by States, local governments, public housing agencies (as applicable), or other entities.”¹³⁵ LIHTC subsidizes the acquisition, construction, and rehabilitation of affordable rental housing for low- and moderate-income tenants and is responsible for creating more affordable rental units than any other source of federal funding.¹³⁶ LIHTC developments have historically been located in racially and ethnically concentrated areas of poverty,¹³⁷ driving further racial segregation.¹³⁸ There is a clear need for program participants to include LIHTC placement and rehabilitation decisions in their AFFH planning. However, the term “funding decisions” only appears twice in the rule itself,¹³⁹ and is not incorporated into the definitions of other key terms. As discussed further below, the final definition should state clearly that program participants must consider how their funding decisions—including their decisions where to site LIHTC developments—AAFH. HUD should also incorporate the term “funding decisions” into its definitions of “AFFH” and “Balanced Approach,” as follows (new text in bold):
 - “AFFH”: “The duty to affirmatively further fair housing extends to all of a program participant’s activities, services, **funding decisions**, and programs relating to housing and community development; it extends beyond a program participant’s duty to comply

¹³³ AFFH NPRM § 5.152 (“Fair housing goal categories means the following categories for which program participants must establish fair housing goals to overcome identified fair housing issues: . . . (5) laws, ordinances, policies, practices, and procedures impede the provision of affordable housing in well-resources areas of opportunity . . . and (7) discrimination or violations of civil rights law or regulations related to housing and access to community assets.”).

¹³⁴ 2015 Rule § 5.154(d).

¹³⁵ AFFH NPRM § 5.152.

¹³⁶ Tax Pol’y Ctr., Briefing Book, *What Is the Low-Income Housing Tax Credit and How Does It Work?* May, 2020, <https://www.taxpolicycenter.org/briefing-book/what-low-income-housing-tax-credit-and-how-does-it-work>

¹³⁷ Jongho Won, *Exploring Spatial Clustering Over Time and Spillover Effects of the Low-Income Housing Tax Credit on Neighborhood-Level Income Segregation*, 58 Urb. Affairs Rev. 79 (2020).

¹³⁸ Natalie Moore, *Chicago Tax Credit Program Mostly Produces Affordable Housing in Poor, Black Areas*, WBEZ (Mar 15, 2021, 6:35am CT), <https://www.wbez.org/stories/chicago-tax-credit-program-mostly-produces-affordable-housing-in-poor-black-areas/a5012638-c6b3-41c3-9632-9522bb5cbb98>.

¹³⁹ AFFH NPRM §§ 5.154(c), (e)(4)(iii)(c).

with Federal civil rights laws and requires a program participant to take actions, make investments **and funding decisions**, and achieve outcomes that remedy the segregation, inequities, and discrimination the Fair Housing Act was designed to redress.”

- “Balanced Approach”: “Balanced Approach means and refers to an approach to community planning, **funding decisions**, and investment that balances a variety of actions to eliminate the housing-related disparities that result from segregation, racially or ethnically concentrated areas of poverty (R/ECAPs), the lack of affordable housing in well-resourced areas of opportunity, the lack of investment in community assets in R/ECAPs and other high-poverty areas, and the loss of affordable housing to meet the needs of underserved communities.”

Clarifying and updating these key definitions will make the rule as a whole more effective.

B. The Final Rule Should Make It Clear That Program Participants Must Set Fair Housing Goals that Specifically Address the Needs of Communities of Color and Other Protected Classes.

We are concerned that the proposed rule would allow program participants to circumvent their obligation to affirmatively further fair housing for communities of color by requiring program participants only to address the needs of “underserved communities,” a term that includes groups that are not protected classes, without requiring a specific focus on the needs of communities of color and other protected classes. The proposed rule requires program participants to advance equity for and prioritize “fair housing issues that will result in the most effective fair housing goals for achieving material positive change for *underserved communities*” (emphasis added).¹⁴⁰ “Underserved communities” include communities of color, individuals experiencing homelessness, LGBTQ+ individuals, low-income communities or neighborhoods, survivors of domestic violence, persons with criminal records, and rural communities.¹⁴¹ While this term thus encompasses groups that are or disproportionately include members of protected classes,¹⁴² it also

¹⁴⁰ *Id.* § 5.154(f)(2).

¹⁴¹ *Id.* § 5.152. This term is derived from and consistent with Executive Order 13985.

¹⁴² For example, Black men are more likely to have prior contact with the criminal legal system. THE SENT’G PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (Apr. 19, 2018), <https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/>; Robert Brame et al., Demographic Patterns of Cumulative Arrest Prevalence By Ages 18 and 23, 60 *Crime & Delinquency* 471-486 (2014), <https://pubmed.ncbi.nlm.nih.gov/26023241/> (finding that nearly half of Black men will be arrested by age 23); Sarah K.S. Shannon, et al., *The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948–2010*, 54 *DEMOGRAPHY* 1795, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5996985/#:~:text=We%20estimate%20that%203%20%25%20of,African%20American%20adult%20male%20population> (finding that 33 percent of Black men have a felony conviction, compared to 8 percent of all adults); PRISON POL’Y INITIATIVE, RACE AND ETHNICITY, https://www.prisonpolicy.org/research/race_and_ethnicity/ (last visited Dec. 20, 2022) (Black people make up 13

includes groups that are significantly broader than the protected classes the FHA is designed to assist. The proposed rule also uses the term “underserved communities” as an addition to protected classes in numerous places, implying that these groups are different than the classes protected under the FHA.¹⁴³

While the definition and focus on underserved communities would allow program participants to address policies that disparately impact protected classes, program participants could rely on this definition to tailor their fair housing goals to narrow fair housing issues that fail to adequately address broader patterns of lack of opportunity and housing choice for protected classes. For example, program participants could set fair housing goals that address the lack of affordable housing in rural areas, without address fair housing issues that impact people of color specifically. Consistent with the purpose of the Fair Housing Act and case law, HUD should clarify that program participants cannot satisfy their AFFH obligations by only addressing the needs of underserved communities generally without specifically addressing lack of opportunity and housing choice for communities of color.

C. HUD Should Provide Program Participants with Additional Guidance on Both Planning Processes and Implementation Strategies That Can Effectively AFFH.

The proposed rule attempts to substantially simplify the AFFH planning process compared to the process in the 2015 Rule.¹⁴⁴ For example, the proposed rule removes the obligation that

percent of the U.S. population, but 30 percent of the people on probation or parole and 38% of the incarcerated population). This overrepresentation of Black people in the criminal legal system is not explained by racial differences in participation in criminalized behavior, but rather by structural discrimination at the root of the criminal legal system. *See, e.g.,* Emma Pierson, et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736-745 (July 2020), <https://www.nature.com/articles/s41562-020-0858-1> (analyzing data showing that police search Black and Hispanic drivers more often than White drivers, but are less likely to turn up contraband during searches of Black and Hispanic drivers compared to searches of White drivers, and are more likely to); SUSAN NEMBARO & LILY ROBIN, URB. INST., RACIAL AND ETHNIC DISPARITIES THROUGHOUT THE CRIMINAL LEGAL SYSTEM: A RESULT OF RACIST POLICIES AND DISCRETIONARY PRACTICES (Aug. 18, 2021), <https://www.urban.org/research/publication/racial-and-ethnic-disparities-throughout-criminal-legal-system> (citing multiple studies also showing the racial disparities in the criminal justice system cannot be explained by differences in criminality between racial groups, but instead can be explained by racial bias); AM. CIV. LIBERTIES UNION RSCH. REP., A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM (2020), https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf (citing data showing that Black people are 3.6 times as likely to get arrested for marijuana possession than White people, despite similar usage rates).

¹⁴³ *E.g.* AFFH NPRM § 5.154(g)(3)(v) (“A fair housing goal to increase housing and neighborhood access could consist of reducing land use and zoning restrictions that limit housing supply and increase housing costs in order to ensure that members of historically underserved communities and protected class groups have equitable access to affordable housing opportunities in well-resourced areas throughout the jurisdiction.”) (emphasis added); *id.* at § 5.154(i)(4)(v) (“An explanation of the outcomes based on the achievement of the goal. For example, this explanation may include any results with respect to the reduction of segregation in a particular geographic area, increased access to opportunity by protected class groups, or other material positive change observed, including how the program participant advanced equity for members of protected class groups and underserved communities since the goal was implemented.”) (emphasis added).

¹⁴⁴ *Id.* at 8517

program participants identify and rank “contributing factors” to fair housing issues¹⁴⁵ and reduces the number of questions program participants have to answer to help them identify fair housing issues and causes from approximately 100 questions to 5-7 questions with several sub-parts.¹⁴⁶ Moreover, unlike the 2015 rule, the proposed rule does not contemplate a separate form for grantees to use to develop and document their Equity Plan, nor does the proposed rule also prescribe a particular format for the written analysis in the Equity Plan.¹⁴⁷

While we appreciate the desire to streamline the AFFH planning process, HUD should not reduce requirements at the expense of the effectiveness of the rule. Indeed, the lack of guidance can itself create additional burdens on program participants: Program participants who are confused about how to satisfy their obligations may struggle and take longer to put together effective Equity Plans. HUD may also reject more plans, causing both program participants and the agency to spend more time on the revision and resubmission process. A more structured process with additional guidance up front could benefit program participants by setting clear expectations for how they can demonstrate compliance.

Program participants would benefit from additional guidance so that they account for all factors that create fair housing issues in their communities, and can learn from other program participants’ experiences.

- HUD should add additional questions requiring program participants to explain in their Equity Plans how their funding decisions have created fair housing issues and how they will use their funding decisions to further their fair housing goals. As noted above, decisions regarding where to support LIHTC developments have exacerbated residential segregation. HUD should require program participants to explicitly address these issues in their Equity Plans.
- HUD should require program participants to provide specific information in their Equity Plans regarding how they will measure progress towards their AFFH goals and identify the parties responsible for implementation, either in the final rule or in subsequent guidance. These characteristics have been shown in other contexts to lead to more effective plan implementation,¹⁴⁸ and will ensure that program participants can “point to the changes that have resulted from implementation of the goal established in their Equity Plan” as HUD contemplates.¹⁴⁹

¹⁴⁵ *Id.* at 8518.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 8520.

¹⁴⁸ *Fairest of Them All*, *supra* note 48, at 7.

¹⁴⁹ AFFH NPRM at 8536.

- HUD should provide additional guidance to program participants on how to design fair housing goals that include “progress-oriented, specific measurable steps,”¹⁵⁰ as required by the rule. According to Justin Steil’s analysis of AFHs, program participants struggled with developing such steps while the 2015 rule was in effect.¹⁵¹
- HUD should provide program participants with guidance documents synthesizing the best practices and experiences of multiple jurisdictions will be more useful. Currently, the proposed rule would require HUD to publicly post program participants’ Equity Plans, and we agree that this transparency is helpful.¹⁵² However, program participants may not have the time to cull through all of these action plans in order to find actionable guidance. In order to ensure that “local officials [will] be able to learn from other jurisdictions’ Equity Plans,” HUD should commit to sharing best practices through written documents, webinars, and other means.¹⁵³
- HUD should require program participants to state in their Equity Plan what steps they have taken to bring together stakeholders to address regional fair housing issues, and to address access to community assets that are controlled by other government agencies, such as education and transportation assets. Implementing an approach to fair housing that implicates multiple government agencies or entities can be difficult in practice. A 2021 review of the initial implementation of the AFFH rule in 2015-16 found that the rule’s requirement to assess the connection between housing and education was less than effective, and few program participants meaningfully addressed access to high performing schools or engaged in substantive consultation between state or local housing and education agencies in the jurisdictions. Similarly, HUD rejected several AFHs when the 2015 rule was in effect because they lacked a regional analysis.¹⁵⁴ To encourage program participants to tackle these challenges, HUD should require program participants to explain their efforts to do so. Moreover, HUD should share additional best practices and guidance with program participants on how to address these challenges, and incentivizing program participants that adopt such strategies, including through grant preferences or assisting them in securing additional resources.¹⁵⁵ Finally, we urge the Secretaries of Housing, Education, and Transportation reissue the 2016 guidance letter urging state and local housing, education, and transportation agencies to collaborate in support of housing and school integration and in the AFFH process.
- HUD should provide guidance with more specific examples of when it would reject an Equity Plan, and as well as when it will proceed from voluntary compliance to

¹⁵⁰ *Id.* § 5.152

¹⁵¹ *Survival of the Fairest*, *supra* note 42, at 745.

¹⁵² AFFH NPRM at 8520-21.

¹⁵³ *Id.*

¹⁵⁴ *Survival of the Fairest*, *supra* note 42, at 743.

¹⁵⁵ *See* AFFH NPRM § 5.162(d).

enforcement. HUD should also post publicly the reasons an Equity Plan is not accepted and what a program participant can do to gain acceptance. We also look forward to HUD providing further guidance on what conduct will trigger a HUD investigation, as promised in the preamble to the proposed rule.¹⁵⁶

These additional questions and guidance documents will help program participants develop more effective Equity Plans without unduly increasing the burden on them.

D. HUD Should Provide Program Participants with Additional Data, Particularly on Displacement, and Should Require Program Participants to Consider Displacement as Part of Their Equity Plans.

We appreciate HUD’s commitment to providing program participants with detailed and comprehensive data, and to assisting them with the analysis of that data to identify fair housing issues and set fair housing goals.¹⁵⁷ The provision of such data and technical assistance will help program participants develop more effective and individualized AFFH plans. We are also pleased that the proposed rule encourages program participants to seek out and use local data, as such data is critical for understanding, and effectively addressing, the barriers to housing access.¹⁵⁸ HUD can provide examples of such data, such as studies conducted by local universities, planning entities, and service providers, in sub-regulatory guidance, and could consider supporting capacity-building grants that would allow local fair housing and other community-based organizations collect this data. Other commenters have suggested ways in which HUD could provide more robust data in a more useable format, as well as the kinds of local data that it should encourage program participants to seek out. For example, in addition to the data already incorporated into HUD’s AFFH-T, HUD should provide Home Mortgage Disclosure Act data, Uniform Appraisal Dataset data, and more granular information on access to transportation and other community assets and exposure to harms, such as are included in the current tools provided by the U.S. Department of Transportation¹⁵⁹ and the U.S. Department of Environmental Protection.¹⁶⁰

Additionally, HUD should provide data to help program participants identify whether their policies are driving gentrification and displacement, and should explicitly require program participants to analyze whether place-based strategies will create those harms and proactively address them in their Equity Plans. We believe that program participants have an obligation to

¹⁵⁶ *Id.* at 8530

¹⁵⁷ *Id.* at 8534; *id.* at § 5.154 (“(b) Development of the Equity Plan. Aided by training, technical assistance, and HUD-provided data as well as local knowledge, local data, and information from engaging with their communities and other agencies or government entities in their geographic area of analysis, program participants will develop the Equity Plan and submit to HUD for review.”)

¹⁵⁸ Castro, *supra* note 74.

¹⁵⁹ U.S. Dep’t of Transp., Equitable Transportation Community Explorer, <https://experience.arcgis.com/experience/0920984aa80a4362b8778d779b090723/page/Applicant-Explorer/> (last visited Mar. 26, 2023).

¹⁶⁰ U.S. Env’t Prot. Agency, EJScreen: Environmental Justice Screening and Mapping Tool <https://www.epa.gov/ejscreen> (last visited Mar. 26, 2023).

increase opportunity in communities of color as they increase housing choice—for example, by expanding access to high-performing schools, public transportation, and other community assets. However, place-based strategies focused can often lead to gentrification and the displacement of long-term residents by enticing new residents who increase demand for housing and drive up rents and the cost of living.¹⁶¹ As the U.S. Court of Appeals for the First Circuit noted when discussing HUD’s obligation, the AFFH mandate “implies, at a minimum, an obligation to assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing.”¹⁶² As such, place-based strategies can only AFFH if they increase opportunities for the people of color who live and wish to remain there. Strategies that that lead to the displacement of those communities is materially inconsistent with AFFH.

We appreciate that the proposed rule requires program participants to identify changes in demographics and economic trends that indicate that gentrification has occurred in their communities.¹⁶³ We also acknowledge that the proposed rule requires program participants to address inequitable access to affordable housing opportunities as a fair housing issue,¹⁶⁴ and that affordable housing opportunities by definition includes housing stability that can be adversely impacted by “rising rents” and “displacement due to economic pressures.”¹⁶⁵ However, the final rule should explicitly require program participants to assess in their Equity Plans whether their proposed place-based strategies will lead to displacement, and to account for that displacement in their Equity Plans—for example, by ensuring that there is one-for-one replacement of affordable housing, particularly for very low-income residents. To assist with this, HUD should also provide program participants with additional data in order to allow them to identify displacement, such as data that illustrates trends in the number of voucher holders who are able to remain in the neighborhood and other measures over time.

E. The Final Rule Should Provide More Guidance on How Program Participants Must Align Their Equity Plans and CDBG-DR Plans.

The final rule should include additional measures to ensure that program participants’ use of HUD disaster relief funding affirmatively furthers fair housing. Black Americans have long

¹⁶¹ Castro, *supra* note 74 (“During my time as mayor of San Antonio and Secretary of HUD, I visited more than 100 cities throughout the nation. I would not have graded a single community with an “A” for their efforts to manage gentrification and the displacement that often comes with it.”).

¹⁶² NAACP, *Boston Chapter*, 817 F.2d at 156.

¹⁶³ AFFH NPRM at 8535; *e.g.*, *id.* § 5.154(d)(2)(B)(ii) (requiring program participants, as part of their Equity Plans, to assess “[h]ow have patterns of segregation and integration in particular geographic areas, as defined in § 5.152, changed over time in the jurisdiction and region”)

¹⁶⁴ *Id.* § 5.162 (definition of fair housing issue).

¹⁶⁵ *Id.* (“Affordable housing opportunities also includes housing stability for protected class groups, which may be adversely affected by factors such as, but not limited to, rising rents, loss of existing affordable housing, and displacement due to economic pressures, evictions, source of income discrimination, or code enforcement.”).

faced racial discrimination in federal disaster recovery programs.¹⁶⁶ A 2022 study published in the *International Journal of Disaster Risk Reduction* found that Black disaster survivors receive less government support than their white counterparts even when the amount of damage and loss are the same.¹⁶⁷ Not only do individual white Americans often receive more aid during disaster recovery, so do the communities in which they live.¹⁶⁸ Research shows that after a disaster the federal government awards applicants in majority Black neighborhoods on average between 5 and 10 percent less money, than applicants in white neighborhoods.¹⁶⁹ This inequitable response leads to disparate outcomes, including exacerbated wealth inequality. Black disaster recovery survivors see their wealth decrease by \$27,000 on average while white survivors see their wealth increase by \$126,000 on average.¹⁷⁰

These inequitable outcomes are driven, in part, by the history of how local and state jurisdictions use their CDBG-DR and CDBG-MIT plans. For example, after Hurricane Katrina, Louisiana state officials set up their disaster recovery program to award grants based on the lower of two values: the pre-storm value of the home, or the cost of damage. Homes in predominantly Black neighborhoods were valued at lower amounts than homes in white neighborhoods.¹⁷¹ As a result, the grants for Black homeowners were more likely to be based upon the pre-storm value of their homes, leaving them without enough money to rebuild.¹⁷² In contrast, white homeowners were more likely to receive grants based on the actual cost of repairs.¹⁷³ In Texas, HUD issued a historic determination that the state discriminated based on race and national origin in the allocation of more than \$4 billion in CDBG-MIT funds designed to mitigate the effects of disaster recovery.¹⁷⁴ HUD found that CDBG-MIT funds were steered toward whiter communities that were

¹⁶⁶ Christopher T. Emrich, et al., *Assessing Distributive Inequities in FEMA's Disaster Recovery Assistance Fund Allocation*, 74 INT'L J. DISASTER RISK REDUCTION 102855 (2022), <https://www.sciencedirect.com/science/article/pii/S2212420922000747#bib7>.

¹⁶⁷ *Id.*

¹⁶⁸ Christopher Flavelle, *Why Does Disaster Aid Often Favor White People*, N.Y. TIMES (June 7, 2021), <https://www.nytimes.com/2021/06/07/climate/FEMA-race-climate.html>

¹⁶⁹ *Id.*

¹⁷⁰ Stephen B. Billings, et al., *Let the Rich Be Flooded: The Distribution of Financial Aid and Distress After Hurricane Harvey*, 146 J. FIN. ECON. 787-819 (2022), <https://www.sciencedirect.com/science/article/abs/pii/S0304405X21005067>.

¹⁷¹ Case Update, NAACP Legal Defense & Educ. Fund, Inc., *Civil Rights Organizations Settle Hurricane Katrina Housing Discrimination Case Against HUD And Louisiana* (June 6, 2011), <https://www.naacpldf.org/update/civil-rights-organizations-settle-hurricane-katrina-housing-discrimination-case-hud-louisiana/>.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Nat'l Low-Income Hous. Coal., *HUD Upholds Finding of Discrimination by Texas in CDBG-DR MIT Funding; NLIHC and other Housing and Civil Rights Organizations Urge HUD to Reach Consent Agreement or Withhold Funds* (May 23, 2022), <https://nlihc.org/resource/hud-upholds-finding-discrimination-texas-cdbg-dr-mit-funding-nlihc-and-other-housing-and>.

far less severely impacted by hurricanes and used to fund routine infrastructure projects in affluent white communities.¹⁷⁵

To address these disparities, HUD should make clear that the AFFH requirements apply to CDBG-DR and CDBG-MIT plans, and that plans that do not AFFH or are materially inconsistent with AFFH are subject to the compliance measures outlined in this rule—including the loss of funding. HUD should also require program participants to coordinate their disaster recovery and AFFH planning processes so that their disaster recovery plan is drafted with the lessons learned from the Equity Plan in mind.

To align program participants Equity Plans and their CDBG-DR and MIT plans, HUD should also provide clearer guidance on how program participants should align their Equity Plans and their CDBG-DR and CDBG-MIT plans. This guidance should require that:

- Program participants prioritize 1 for 1 replacement of any lost federal or state-assisted housing and increase the total affordable units available in their disaster recovery plans. After past disasters, affordable housing stock is often lost and never rebuilt, exacerbating the affordable rental housing crisis and displacing low-income families.¹⁷⁶
- Program participants use their MIT plans to prioritize infrastructure projects for the areas with the greatest need and should structure the projects to improve and protect lower-income communities and communities of color from future disasters and to correct the historic lack of investment in infrastructure. Prioritizing these projects is consistent with HUD’s obligation to affirmatively further fair housing.
- Program participants ensure that their disaster recovery plans prioritize extremely low-income housing that targets renters whose household incomes that are 30-60 percent of the area median income. Research has shown consistently that lower-income households are not only more likely to suffer damage in a natural disaster, but they are also more likely to take much longer—two to three times longer—to recover.¹⁷⁷ Affordable and accessible

¹⁷⁵ Tracy Jan, *Black Communities are Last in Line for Disaster Planning in Texas*, WASH. POST (May 12, 2022), <https://www.washingtonpost.com/business/interactive/2022/hud-texas-disaster-discrimination/> (These projects included “\$10.8 million to install a sewage system in the 379-person town of Iola; \$6 million for a new sheriff’s department radio tower and radios for Gonzales County; and \$4.2 million for a 2,000-foot-long road in Bastrop County to connect a Walmart parking lot and a Home Depot, justified as an alternate path for emergency vehicles in case the adjacent freeway is clogged with hurricane evacuees from the Gulf Coast 161 miles away.”)

¹⁷⁶ NAT’L LOW INCOME HOUS. COALITION, *LONG TERM RECOVERY OF RENTAL HOUSING: A CASE STUDY OF HIGHLY IMPACTED COMMUNITIES IN NEW JERSEY AFTER SUPERSTORM SANDY* (Dec. 2019), <https://nlihc.org/sites/default/files/Sandy-Rental-Recovery-Report.pdf>.

¹⁷⁷ Walter Gillis Peacock, et al, *Inequities in Long-Term Housing Recovery After Disasters*, 80 J. AM. PLAN. ASSOC., 356-371 (Feb. 9, 2015), <https://www.tandfonline.com/doi/abs/10.1080/01944363.2014.980440>.

homes are often the most vulnerable to disasters, they are also less likely to be rebuilt after a disaster strikes.¹⁷⁸

Ensuring that program participants' disaster recovery plans AFFH, and are not materially inconsistent with AFFH, will help both HUD and program participants meet their obligations under the FHA.

F. The Final Rule Should Further Strengthen the Community Engagement Requirements.

While we are pleased that the rule lays out clear community participation requirements, we believe that there are several ways in which the final rule should strengthen these requirements. As former HUD Secretary Castro found in his examination of Los Angeles County's AFFH planning process, "community groups play critical roles in ensuring that [fair housing] data is truthful and that the full story behind community housing decisions and perspectives is being told," as these groups may be aware of trends on the ground that may not yet be reflected in federal statistics or research.¹⁷⁹ Strengthening the community engagement process thus leads to better identification of fair housing issues and goals. We suggest that the final rule:

- Increase the number of community engagement opportunities required for large program participants. The rule requires that program participants hold at least three public meetings during the development of the Equity Plan,¹⁸⁰ and two public meetings to prepare their annual progress reports.¹⁸¹ In jurisdictions that cover large geographic areas or with large populations, such as New York City, that may not be enough to enable meaningful participation by sufficient stakeholders. Increasing the minimum number of meetings for such large grantees would ensure that they collect representative feedback that can accurately inform their Equity Plans.
- Further specify the kinds of people and organizations program participants should engage with and the methods for reaching out to them. In the preamble to the proposed rule, HUD explains that program participants must engage with a "broad cross-section of the community, which could include advocates, community organizations, resident advisory boards, healthcare professionals and other service providers, and fair housing groups."¹⁸² However, the proposed rule itself does not include similar language. The final rule should specify that program participants should solicit input from organizations that represent

¹⁷⁸ Shannon Van Zandt, *Disasters Can Wipe Out Affordable Housing For Years Unless Communities Plan Ahead – the Loss Hurts the Entire Local Economy*, THE CONVERSATION, (Feb. 9, 2022), <https://theconversation.com/disasters-can-wipe-out-affordable-housing-for-years-unless-communities-plan-ahead-the-loss-hurts-the-entire-local-economy-174880>

¹⁷⁹ Castro, *supra* note 74.

¹⁸⁰ AFFH NPRM § 5.158(d)(1).

¹⁸¹ *Id.* § 5.158(d)(2).

¹⁸² *Id.* at 8518.

members of protected classes (which may include tenants' groups, community-based organizations, civil rights organizations; fair housing and legal services organizations and others engaged in fair housing enforcement; and organizations that provide health, education, housing and social services to members of protected classes, among others). The proposed rule should also specify that program participants can also use focus groups, smaller community meetings, and virtual meetings.

- Require program participants to offer virtual participation options, and offer transportation assistance, childcare, translation services, and other forms of assistance. Participation in community meetings can be most challenging for the people most impacted by fair housing issues, who may not have the resources to participate in such engagement or schedules that allow them to do so. Program participants that are able to reduce these barriers can increase the quality of their community engagement and the resulting Equity Plans.
- Specify that program participants should use the community engagement process to not only identify fair housing issues and set fair housing goals,¹⁸³ but also to prioritize fair housing issues. Program participants should be guided by what the people most directly impacted by fair housing issues feel is most important to address.
- Make clear that, if program participants use the same community consultation processes to inform their PHA or consolidated plans and their Equity Plans,¹⁸⁴ they must ensure there is not only “sufficient opportunity for the community to have discussions about fair housing issues,”¹⁸⁵ but also to prioritize those issues and set fair housing goals.
- Require program participants to solicit public comment on draft Equity Plans before they are submitted to HUD. Incorporating this step would allow program participants to address any community concerns at an earlier stage and could lead to the development of better plans that are more responsive to community needs, potentially reducing the number of comments filed after Equity Plans are submitted to HUD.
- Clarify that the public has 60 days after HUD posts the Equity Plan on its website to submit comments on a program participants' plan.

These changes will help program participants have more robust community engagement and develop better Equity Plans.

¹⁸³ *Id.* §5.158(a).

¹⁸⁴ *Id.* § 5.158(a)(3), (8).

¹⁸⁵ *Id.* § 5.158(8)(i), (ii).

G. The Final Rule Should Further Strengthen and Clarify the Enforcement Provisions.

As noted in Part III above, to date, existing mechanisms to enforce the FHA's AFFH mandate have failed to bring about meaningful change in the level of residential segregation in America or to increase opportunity and housing choice for communities of color. Strong enforcement mechanisms are necessary to "truly open[. . .] the nation's housing stock to persons of every race and creed" as envisioned by the law's supporters.¹⁸⁶ As explained, the proposed rule includes two primary mechanisms for HUD enforcement of program participants' AFFH obligations: 1) HUD's obligation to review Equity Plans, reject those plans which are "inconsistent with fair housing or civil rights requirements," and to ultimately reject program participants' consolidated plans and PHA plans if they do not have an accepted Equity Plan;¹⁸⁷ and 2) HUD's ability to conduct compliance reviews and investigate and resolve complaints filed against program participants, as laid out in new compliance procedures.¹⁸⁸ We believe that each of these mechanisms can be further clarified and strengthened. The final rule should:

- Specify what relief is available to complainants through the complaint process. This should include the full array of relief authorized for administrative complaints under the FHA, including injunctive relief, policy changes, money damages, and attorney's fees.¹⁸⁹ The proposed rule should also ensure that HUD communicate and consult with complainants as they craft resolutions to complaints.
- Provide specific timelines for accepting, investigating and resolving complaints. HUD should commit to accepting complaints within 30 days and investigating complaints within 180 days.
- Require program participants to submit an Equity Plan within 24 months of the effective date of the final rule. The proposed rule requires program participants that have not conducted or updated their fair housing plans for more than three years prior to the effective date of the final rule, and who are not required to submit an Equity Plan within 24 months of that effective date, to conduct or update their AI, AFH, or other fair housing plan and submit such plan to HUD for publication and potential review.¹⁹⁰ However, it is unclear why program participants should be encouraged to create a new AI or AFH only to have to produce an Equity Plan thereafter. HUD should also commit to reviewing all of these plans.

¹⁸⁶ *NAACP, Boston Chapter*, 817 F.2d at 155.

¹⁸⁷ AFFH NPRM §5.162.

¹⁸⁸ *Id.* § 5.170.

¹⁸⁹ 24 CFR § 180.670(b)(3).

¹⁹⁰ AFFH NPRM § 5.160(d).

- Clarify that HUD will evaluate program participants’ progress toward achieving their fair housing goals when reviewing their annual progress evaluations.¹⁹¹ We are pleased that the proposed rule would require program participants to submit annual progress evaluations assessing the status of implementing their fair housing goals.¹⁹² After an initial phase-in process, grantees will be required to submit their Equity Plans once every three to five years (depending on their consolidated or PHA plan schedule), 365 days in advance of the date on which their next plan is due. Program participants must revise their Plans within two years following a federal disaster declaration and one year following any other material change.¹⁹³ As then-Judge Breyer explained in *NAACP v. Secretary of Housing and Urban Development* about HUD’s own AFFH obligation, if agencies are meeting this mandate, “one would expect to see, over time, if not in any individual case, . . . activity that tends to increase, or at least, that does not significantly diminish, the supply of open housing.”¹⁹⁴ Similarly, as HUD acknowledges, program participants who are meeting their AFFH obligations should be able to demonstrate material positive change over time in the fair housing issue areas they have identified.¹⁹⁵

The proposed rule, however, does not provide sufficient mechanisms for assessing and assisting with program participants’ progress. We appreciate that the proposed rule requires program participants to publish their annual progress evaluations and agree that it “will allow for public awareness that a goal is not being met before it is too late to change course to meet it.”¹⁹⁶ However, public awareness alone, without HUD intervention, may not translate into action. HUD should clarify that, when reviewing program participants’ annual progress evaluations, that it will not only examine program participants’ “proposed adjustments to fair housing goal(s),” but whether program participants have actually taken meaningful actions to further the achievement of their existing goals.¹⁹⁷ Reviewing program participants’ actions and progress would allow HUD to identify areas in which additional technical assistance or guidance would be useful, and to intervene if necessary in specific cases.

- Specify when HUD can extend the amount of time it has to accept or reject Equity Plans for good cause. We appreciate that the proposed rule increases the amount of time HUD has to review AFFH plans from 60 days under to 2015 rule to 100 days, and allows HUD to further extend the review period upon good cause.¹⁹⁸ These changes will ensure that HUD has sufficient time to conduct a thorough review before making an affirmative decision to accept or reject a program participant’s Equity Plan. At the same time, however,

¹⁹¹ *Id.* § 5.154(a)(6)-(7).

¹⁹² *Id.* § 5.154(i).

¹⁹³ *Id.* § 5.164.

¹⁹⁴ 817 F.2d at 156.

¹⁹⁵ AFFH NPRM at 8536.

¹⁹⁶ *Id.* at 8519-20.

¹⁹⁷ *Id.* § 5.154(a)(6).

¹⁹⁸ *Id.* at 8519.

we want to ensure that HUD is able to complete reviews in a timely manner so that program participants can begin implementing their plans. Therefore, we recommend that HUD limit the circumstances under which the review period can be extended for good cause—for example, to cases where HUD and program participants are actively engaged in productive, good faith discussions to resolve outstanding questions about the Equity Plan.

- Further clarify that HUD acceptance of a program participant’s Equity Plan alone does not mean that the program participant has satisfied their AFFH obligations. We appreciate that the proposed rule states that “HUD does not mean that the program participant has complied with the incorporation requirements set forth in this section § 5.156 or has otherwise complied with its obligation to affirmatively further fair housing or any other Federal fair housing and civil rights requirements.”¹⁹⁹ HUD should further specify that, consistent with the proposed rule’s definition of AFFH,²⁰⁰ program participants must actually take meaningful actions in order to fulfill their obligation to affirmatively further fair housing. HUD should also state that its acceptance of an Equity Plan does not foreclose AFFH litigation and administrative enforcement.

These measures will help ensure that HUD has the information and authority it needs to engage in effective enforcement of the rule.

H. HUD Should Accelerate the Implementation of the New AFFH Rule.

HUD should accelerate the implementation of the proposed AFFH rule. The proposed rule requires program participants to develop Equity Plans on a rolling basis depending on the size of the federal grants they receive.²⁰¹ The first round of Equity Plans for the largest program participants will be due 24 months after the effective date of final rule, or 365 calendar days prior to the date for which next consolidated plan or 5-year PHA plan is due after January 1, 2024, whichever is earlier.²⁰² The smallest program participants are not required to develop Equity Plans until 365 calendar days prior to the date for which next consolidated plan or 5-year PHA plan is due after January 1, 2027.²⁰³ However, some program participants may not have Equity Plans due until years later if they submit a consolidated plan or PHA plan shortly before the trigger date for compliance. HUD stated the reason for this was because HUD anticipates larger program participants are better positioned to begin implementation, and the experiences of this first cohort will allow for program participants of different sizes to benefit from technical assistance from HUD during the course of implementation of this proposed rule.²⁰⁴

¹⁹⁹ *Id.* § 5.156(d).

²⁰⁰ *Id.* § 5.152.

²⁰¹ *Id.* § 5.160.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

HUD should simplify and advance the due dates for Equity Plans. Because of the issues that HUD encountered with the 2015 rule, many jurisdictions have never submitted an AFH or other robust AFFH plan or had their AI or AFH reviewed by HUD.²⁰⁵ Given the efforts that HUD has undertaken to simplify the Equity Plan process, program participants should not require years to formulate their AIs. HUD should make all larger program participants have their Equity Plans due one year after the HUD issues its final rule. HUD should then stagger the Equity Plan due dates for all other program participants so that every program participant submits an Equity Plans on or before January 1, 2027. This will ensure that program participants engage in a robust fair housing planning process in a timely manner, while giving HUD a chance to fully review larger program participants Equity Plans and make any enforcement decisions based on those Equity Plans. This timeline will still allow smaller jurisdictions benefit from technical assistance from HUD and to learn from large program participants.

I. *HUD Should Make Clear that this Rule Does Not Represent the Full Scope of the Federal Government’s AFFH Obligation.*

HUD should make clear that the proposed rule does not represent the full scope of its own AFFH obligation, and should ensure that other federal agencies AFFH. The FHA requires both the HUD Secretary²⁰⁶ and all federal executive agencies and departments “to administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further” fair housing.²⁰⁷ The proposed rule makes it clear that AFFH requirements apply to all of HUD’s programs and activities.²⁰⁸ However, the proposed rule only implements HUD’s AFFH obligation with respect to certain specified programs and activities. Moving forward, HUD must ensure that it incorporates AFFH into all of its policies, programs and activities. Moreover, while HUD leads federal enforcement of the Fair Housing Act, virtually all federal agencies engage in housing-related activities, and each agency must fulfill its obligation to affirmatively further fair housing by engaging in activities that increase opportunity and housing choice.²⁰⁹ These federal agencies must also ensure that its grantees that also receive federal housing funds also comply with their obligations to affirmatively further fair housing. HUD should play a leadership role to play in coordinating with other federal agencies to ensure that all federal programs and activities related to housing and urban development AFFH.

²⁰⁵ Emily Badger & John Eligon, *Trump Administration Postpones an Obama Fair-Housing Rule*, NEW YORK TIMES (January 4th, 2018), <https://www.nytimes.com/2018/01/04/upshot/trump-delays-hud-fair-housing-obama-rule.html>.

²⁰⁶ 42 U.S.C. § 3608(e)(5) (requiring the HUD Secretary to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further” the policies of the FHA).

²⁰⁷ 42 U.S.C. § 3608(d)

²⁰⁸ AFFH NPRM § 5.151.

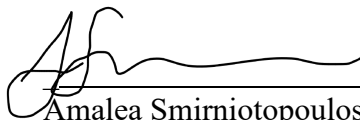
²⁰⁹ Abraham, *supra* note 48.

IV. Conclusion

Everyone deserves a home in a safe community with the resources necessary to thrive. Yet where people live still exerts unfair influence over every aspect of our lives, affecting whether we can access good jobs, high-performing schools, public transportation, safe streets, and more. Nearly 60 years after the passage of the FHA, Black people in our country still pay a higher proportion of their income for lower quality housing in neighborhoods with diminished access to goods, services, and economic opportunities—and this disadvantage costs society as a whole. We applaud HUD for issuing a proposed AFFH rule that would empower program participants to develop innovative solutions to these longstanding problems, and ensure that HUD has more tools to enforce these mandates. We urge HUD to move expeditiously to issue a strong final rule.

Thank you for the opportunity to comment. If you have any questions, please contact Amalea Smirniotopoulos, Senior Policy Counsel, at asmirniotopoulos@naacpldf.org, and David Wheaton, Economic Policy Fellow, at dwheaton@naacpldf.org.

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