UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR A PRELIMINARY INJUNCTION AND FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

Regulations **Page(s)**

Other Authorities **Page(s)**

INTRODUCTION

Defendants, the U.S. Department of Housing and Urban Development (HUD) and Secretary Ben Carson, withdrew—without notice-and-comment procedures—a HUD-developed planning tool that local jurisdictions must use to follow the requirements of the Affirmatively Furthering Fair Housing (AFFH) Rule. By making compliance with the Rule impossible, HUD suspended the duties the Rule imposes on the jurisdictions, effectively suspending the Rule itself. Indeed, HUD took this step only after being sued for directly suspending the Rule's requirements. Its new action accomplishes the same thing as the first one, and is no more lawful.

Promulgated in 2015, the AFFH Rule implements a key provision of the Fair Housing Act, which not only bars housing discrimination, but also requires recipients of federal funds to take affirmative steps to combat racial segregation and otherwise affirmatively further fair housing. Although this "affirmatively furthering fair housing" provision, 42 U.S.C. § 3608(e)(5), has been part of the Fair Housing Act for 50 years, HUD has permitted local jurisdictions to largely ignore that duty even as they collect billions of dollars in federal grants annually for housing and community development. Issued in response to extensive evidence that HUD's prior practices violated its statutory duties, the AFFH Rule changes that.

The Rule requires jurisdictions to undertake a rigorous process of assessing local fair housing needs and making concrete plans to address them, including by soliciting community participation and explaining why comments from stakeholders were or were not incorporated. A jurisdiction must memorialize its work in a detailed document called an Assessment of Fair Housing (AFH), which HUD must review for compliance with criteria specified by regulation. If the AFH does not meet the Rule's requirements, HUD must reject it, explain its reasons, and then work with the jurisdiction to fashion a compliant AFH. Jurisdictions that do not emerge

from this process with HUD-accepted AFHs are not eligible for federal housing and community development funds. Jurisdictions must create their AFHs using a HUD-created Assessment Tool.

In January 2018, HUD suspended the requirement that jurisdictions submit AFHs and its own duty to review AFHs, effectively suspending the Rule. Plaintiffs National Fair Housing Alliance (NFHA), Texas Low Income Housing Information Service (Texas Housers), and Texas Appleseed filed this action, challenging HUD's action under the Administrative Procedure Act (APA). In May 2018, HUD withdrew the January notice and suspension, but issued two additional notices that had the same effect. HUD withdrew the Assessment Tool—making it impossible for local governments to prepare and submit AFHs—and then told them to revert to the approach in effect before the AFFH Rule, exactly as it had done in its January notice.

HUD's May action, like its January notice, suspends the requirements of a final regulation, without notice-and-comment procedures. HUD's action also is arbitrary and capricious. HUD contends that the AFH process has proven to be "unworkable" and that deficiencies in the Assessment Tool are to blame. It fails to adequately substantiate either assertion or to justify its decision to take the drastic step of withdrawing the Assessment Tool altogether rather than considering alternative, less disruptive ways of furthering its purported goals. HUD similarly fails to consider the benefits that the AFFH Rule already has provided or explain how its actions satisfy its statutory duty to ensure that jurisdictions receiving federal housing funds affirmatively further fair housing.

Plaintiffs are suffering irreparable harm that warrants preliminary injunctive relief. Plaintiffs are organizations dedicated to promoting fair housing. They benefit from the Rule, and their work is made immeasurably more difficult—and their missions frustrated—by HUD's withdrawal of the Assessment Tool, which results in the Rule's effective suspension. Plaintiffs

ask this Court for a preliminary injunction requiring HUD immediately to reinstate the Assessment Tool and take all other steps necessary to properly implement the AFFH Rule. They also move for expedited summary judgment to secure this relief permanently.

STATEMENT OF FACTS

I. The Fair Housing Act and the "Analysis of Impediments" Process

Since its enactment in 1968, the Fair Housing Act has required more of HUD and of its grantees than the mere avoidance of housing discrimination. It also requires the federal government and its grantees to take affirmative steps to promote residential integration, undo the legacy of racial segregation, and otherwise further fair housing. Specifically, the Act requires HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [the Fair Housing Act]," 42 U.S.C. § 3608(e)(5). This "affirmatively furthering fair housing" provision ensures that the Fair Housing Act constitutes "an obligation to do more than simply refrain from discriminating," *NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149, 155 (1st Cir. 1987), and also requires affirmative movement towards integration in communities across the country, as Congress intended. *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2525-26 (2015).

This AFFH provision imposes obligations on HUD and its grantees. As HUD articulated in the proposed AFFH Rule's preamble, grantees must "take proactive steps to address segregation and related barriers for those protected by the Act, particularly as reflected in racially and ethnically concentrated areas of poverty." 78 Fed. Reg. 43,710, 43,712 (July 19, 2013). In other words, HUD is required to wield its immense financial and regulatory leverage to ensure

that its grantees comply with this affirmative obligation. *NAACP*, 817 F.2d at 155; *Shannon v. U.S. Dep't of Hous. and Urban Dev.*, 436 F.2d 809, 819-21 (3d Cir. 1970).

That leverage is potentially enormous. HUD is slated to distribute almost $5.5 billion in Fiscal Year 2018 through housing block grant programs alone. By far the largest such program—accounting for almost two-thirds of the total, and reaching every corner of the United States—is the Community Development Block Grant (CDBG) program, which provides annual funding to approximately 1,210 grantees, mostly units of state and local government.[1] Eligible local governments, known as "entitlement communities," include principal cities of Metropolitan Statistical Areas (MSA)s; other cities with populations of at least 50,000 persons; and qualified urban counties with populations of at least 200,000 persons. 42 U.S.C. §§ 5302, 5306.

The CDBG program includes requirements for how these funds are used, and HUD has a long-standing process to monitor how these jurisdictions use their money. Each CDBG recipient must develop a document called a Consolidated Plan every three to five years and submit it to HUD for review and approval. *See* 24 C.F.R. §§ 570.302, 91.200-91.230. The Consolidated Plan sets out community development priorities and multi-year goals based on housing and community development needs, housing and economic market conditions, and available resources. Most local government participants are on a five-year Consolidated Plan cycle under which they are next due to submit plans on various dates in 2018 through 2020. As set forth below, this time frame also controls their first submission deadlines under the AFFH Rule.

CDBG recipients must certify, *inter alia*, that they will affirmatively further fair housing. 42 U.S.C. § 5304(b)(2). However, until the AFFH Rule's promulgation, recipients were not

[1] See *Advocates and Congressional Champions Secure Increased Funding for Affordable Housing in 2018*, National Low Income Housing Coalition (Mar. 22, 2018), http://nlihc.org/article/advocates-and-congressional-champions-secure-increased-funding-affordable-housing-2018.

required to submit to HUD any fair housing equivalent of the Consolidated Plan, *i.e.*, a detailed explanation of planned activities and how they will conform to the statutory requirement. Accordingly, jurisdictions could obtain these annual grants while doing very little to affirmatively further fair housing, despite HUD's legislative mandate to ensure their compliance.

In the years immediately prior to the AFFH Rule's adoption, HUD told participating jurisdictions to conduct a written "Analysis of Impediments to Fair Housing Choice" (AI). HUD instructed grantees to identify impediments to fair housing choice, take appropriate actions to overcome the effects of such impediments, and maintain records of the analysis and actions taken. Grantees had to certify that they conducted an AI and were taking appropriate actions. *See* Former 24 C.F.R. § 91.225(a)(1) (replaced in 2015 by the AFFH Rule).

HUD, however, conducted almost no oversight of this process. It did not require grantees to submit their AIs to HUD for review or approval. HUD did not require that the impediments identified be meaningful, employed only weak community participation requirements, did not provide adequate guidance as to what would be "appropriate actions" to overcome impediments, and did not implement a system for compliance review. In short, HUD imposed no consequences when a grantee failed to produce or update an AI or to take the actions described in an AI. With HUD failing to meaningfully oversee its grantees, jurisdictions around the country routinely skirted their obligations to affirmatively further fair housing and falsely certified their compliance with even the weak requirements that HUD imposed.

In 2008, the National Commission on Fair Housing and Equal Opportunity concluded: "The current federal system for ensuring fair housing compliance by state and local recipients of housing assistance has failed. . . . HUD requires no evidence that anything is actually being done as a condition of funding and it does not take adverse action if jurisdictions are directly involved

in discriminatory actions or fail to affirmatively further fair housing." National Commission on Fair Housing and Equal Opportunity, *The Future of Fair Housing: Report of the National Commission on Fair Housing and Equal Opportunity* 44 (2008), *available at* http://www.naacpldf.org/files/publications/Future%20of%20Fair%20Housing.pdf.[2]

HUD's inadequate enforcement of the AFFH mandate came to a head in a False Claims Act case brought against Westchester County, New York. In that case, a whistleblower organization alleged that the County had defrauded the United States for years by continually certifying to HUD its compliance with the Fair Housing Act, even as it was deliberately concentrating affordable housing for families in a small number of heavily African-American and Latino cities and distributing CDBG funds to overwhelmingly white suburbs that refused to allow the development of affordable housing. *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc., v. Westchester Cty.*, 495 F. Supp. 2d 375 (S.D.N.Y. 2007); *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc., v. Westchester Cty.*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009). The district court found that the County could produce no evidence that it even evaluated race-based impediments to fair housing, let alone did anything about them, while accepting more than $50 million in federal housing funds during the relevant years. 668 F. Supp. 2d at 562.

Following *Westchester*, HUD looked at the actions grantees took in exchange for billions of dollars of federal funds every year. As part of an internal study, HUD asked participating jurisdictions to produce their AIs for review. More than a third of jurisdictions could not or would not produce any AI at all. Of those that did produce an AI, HUD rated 49 percent as

[2] *See also* The Opportunity Agenda, *Reforming HUD's Regulations to Affirmatively Further Fair Housing* 7 (2010), *available at* https://opportunityagenda.org/sites/default/files/2017-03/2010.03ReformingHUDRegulations.pdf (stating that "[a] range of housing experts, civil rights groups, and former HUD officials have documented the inadequacy of the current AI process," and detailing that testimony).

"needs improvement" or "poor." HUD found that only 20 percent of AIs committed jurisdictions to doing *anything* on a set timeframe. *See* U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *Analysis of Impediments Study* (2009).

At the same time, the Government Accountability Office (GAO) undertook a detailed review of the AI process. It released its conclusions in a 2010 report to Congress, GAO-10-905, *Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans* (2010), *available at* https://www.gao.gov/assets/320/311065.pdf. The GAO report found that many jurisdictions, lacking oversight or accountability, failed to make even minimal efforts to comply with the AI system. For example, it found that 29 percent of jurisdictions had not completed an AI within five years, as recommended by HUD's *Fair Housing Planning Guide*, while 11 percent had not done so within 10 years; for another 6 percent, date of completion was unclear. These jurisdictions effectively had no operative AI at all. Many jurisdictions could not even produce a document labeled an AI, and others produced perfunctory documents—or, in one case, an e-mail.

Even for those jurisdictions with operative AIs, the GAO found little evidence that the AIs made any difference in the actual operation or priorities of local housing agencies. The GAO reviewed many of the grantees' AIs that formed the basis of AFFH certifications, and found most of them contained little more than aspirational statements of vague goals. It found, for example, that most AIs reviewed "lack time frames for implementing identified recommendations," making it impossible "to establish clear accountability." GAO Report at 31.

II. The AFFH Rule and the Assessment of Fair Housing (AFH)

In 2009, in response to the growing evidence that it was failing in its statutory duty to ensure that recipients of federal funds affirmatively furthered fair housing, HUD began a years-

long process of formulating a better system. That process included outreach to local government officials throughout the country, publication of a proposed rule in 2013, and consideration of more than one thousand responsive comments. It culminated in the 2015 promulgation of the AFFH Rule. *See* Hostetler Decl. (describing HUD development of the AFFH rule).

As HUD explained in proposing the Rule in 2013, it did not seek to "mandate specific outcomes." 78 Fed. Reg. 43,711. Rather, the AFFH Rule structures decision-making in ways that ensure that local fair housing concerns are heard, considered, and acted upon on a regular basis, with HUD review of the result providing accountability. Under the Rule, jurisdictions can no longer fail to produce an AI altogether, nor can they produce one like Westchester's that entirely ignores obvious racial segregation. At the AFFH Rule's core is the requirement that jurisdictions produce an Assessment of Fair Housing. They must use a HUD-created template—called an Assessment Tool—that ensures a standardized, effective process that is responsive to local conditions. 24 C.F.R. § 5.154(d). HUD must subject the Assessment Tool to periodic notice-and-comment procedures under the Paperwork Reduction Act to ensure that it maintains approval by the Office of Management and Budget. 24 C.F.R. § 5.152.

To complete an AFH, a jurisdiction first must identify local fair housing issues by answering a series of questions regarding, for example, residential racial segregation, racially or ethnically concentrated areas of poverty, and the housing needs of persons with disabilities. It must provide narrative description and analysis of local conditions (including by reference to HUD-provided maps) and describe policies and practices that influence those conditions. 24 C.F.R. §§ 5.154(d)(2), (d)(3). The jurisdiction then must make concrete plans to address these issues, adopting metrics to assess whether it is successfully achieving its goals. While a jurisdiction's initial AFH is an exercise in goal-setting, subsequent AFHs must review progress

toward these goals, providing a cycle of accountability. 24 C.F.R. § 5.154(d)(7). The bottom line is that the AFH must articulate a plan by which the jurisdiction will take "meaningful actions to further the goals identified in the AFH," 24 C.F.R. § 91.225(a)(1), *i.e.*, "significant actions that are designed and can be reasonably expected to achieve a material positive change that affirmatively furthers fair housing." 24 C.F.R. § 5.152. These steps may vary from jurisdiction to jurisdiction, depending on local conditions and needs, but every jurisdiction must commit to taking meaningful steps towards addressing its own, localized barriers to fair housing.

Through the process, a jurisdiction must provide for "meaningful community participation," including through public hearings that are publicized "to reach the broadest audience." 24 C.F.R. § 5.158(a). It also must permit public review of, and comment on, an initial AFH draft. *Id.* It must consult with a number of designated community organizations, including but not limited to fair housing organizations. 24 C.F.R. §§ 91.100(a), (e)(1). This consultation "must occur at various points in the fair housing planning process." 24 C.F.R. § 91.100(e)(3).

A jurisdiction then must submit its completed AFH to HUD for review. A submitted AFH must include a summary of comments received and explanations for why it did not accept any commenter-recommended changes. 24 C.F.R. § 5.154(d)(6). HUD must then review the AFH, which it "will not accept" if it "finds that the AFH or a portion of the AFH is inconsistent with fair housing or civil rights requirements or is substantially incomplete," 24 C.F.R. § 5.162(b)(1). "Substantially incomplete" includes, among other things, failure to meet required community participation and consultation requirements. 24 C.F.R. § 5.162(b)(1)(ii)(A). If HUD does not accept an Assessment, it must specify the reasons for non-acceptance and "provide guidance on how the AFH should be revised in order to be accepted." 24 C.F.R. § 5.162(b)(2).

The AFFH Rule links this required AFH submission and review to a jurisdiction's Consolidated Plan schedule. A jurisdiction must submit its AFH months before its Consolidated Plan, to permit review and, if necessary, revision without delaying acceptance of the Consolidated Plan and the flow of federal funds. 24 C.F.R. § 5.160; *see* 80 Fed. Reg. 42,311 (AFH submission is in advance of Consolidated Plan to permit rigorous review and revision without delaying federal funding). But if the jurisdiction ultimately submits a Consolidated Plan without an approved AFH, that "will *automatically* result in the loss of CDBG funds to which the jurisdiction would otherwise be entitled." 24 C.F.R. § 5.162(d)(1) (emphasis added). HUD thus has no discretion to continue funding jurisdictions for which it has not approved an AFH.

Since the AFFH Rule's promulgation in 2015, the new process has greatly improved jurisdictions' commitments to furthering fair housing. One study comparing the 28 AFHs submitted to HUD between October 2016 and July 2017 with the AIs previously prepared by the same participants found striking improvements. Whereas the AIs had contained nebulous goals, the AFHs contained concrete ones with quantifiable metrics of success, concrete policies to be enacted, and projected timelines to hold them accountable. *See generally* Steil Decl.

For example, Paramount, CA committed to making amendments to its zoning ordinance (by specific deadlines) to make its housing more inclusive, such as allowing group homes for people with disabilities. *See* Steil Decl. ¶ 20. New Orleans, LA promised to create 140 affordable rental units in high opportunity areas by 2021. *See* Ciardullo Decl. ¶ 10. Chester County, PA similarly committed to creating 200 new affordable units in high opportunity neighborhoods across the county by 2021. *See* Steil Decl. ¶ 20.

Philadelphia's AFH identified widespread evictions in predominantly minority neighborhoods as a barrier to fair housing. The city committed to taking concrete steps in

response, including creating an "Eviction Prevention Project" pursuant to which lawyers and advocates will represent those facing unjust eviction. *See* Urevick-Ackelsberg Decl. ¶ 10. The Philadelphia AFH also highlighted the inability of low-income homeowners, who are disproportionately African American and Latino, to secure capital to repair their homes and committed the City to funding a program to help low-income homeowners make basic repairs and to help persons with disabilities adapt their homes for their needs. *Id.* ¶ 11.

Not only has the AFH process spurred jurisdictions to make these concrete commitments, it also has guaranteed a far greater level of public engagement than jurisdictions provided under the AI process. *See* Letter from Katherine O'Regan, Faculty Director, NYU Furman Center (Mar. 6, 2018), https://www.regulations.gov/document?D=HUD-2018-0001-0036 (Furman Center Letter). To fulfil the AFFH Rule's public-participation requirement, jurisdictions have held more public meetings and taken greater steps to ensure that more members of the public were aware of the process and had the opportunity to participate. *See also* Urevick-Ackelsberg Decl. ¶¶ 5-6; Ciardullo Decl. ¶¶ 7-8. Their AFHs contain greater acknowledgment and consideration of the public's input. For example, Nashville, TN's AFH spent 107 pages detailing public comments received and its response to them; by contrast, it had devoted nine pages of its AI to such topics. Furman Center Letter at 8.

III. HUD's January Suspension of the Requirement to Prepare an AFH and its May Suspension of the Assessment Tool

On January 5, 2018, without providing advanced notice or opportunity for comment, HUD published a three-page notice in the Federal Register abruptly suspending key requirements of the AFFH Rule. *See* Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, 83 Fed. Reg. 683 (Jan. 5, 2018) (Notice) (Attached to Complaint as Ex. A).

In its January 5 notice, HUD announced that local governments would not be required to submit AFHs until their next scheduled submission date after October 31, 2020. 83 Fed. Reg. 684. In practice, given the schedule on which AFHs are due, this delay meant that most program participants would not have to complete an AFH until 2024 or 2025.[3] This delay applied not only to program participants whose AFHs were coming due, but also to participants to which HUD had granted extensions of time to submit previously due AFHs. Additionally, HUD immediately discontinued its review of AFHs, including those submitted already. Under the terms of the January notice, only the small number of participants whose AFHs HUD already had approved were required to comply with their HUD-approved commitments.

HUD stated that delay of the AFFH Rule was necessary because, "[b]ased on initial reviews," the agency concluded that "program participants need additional time and technical assistance to adjust to the new AFFH process and complete AFH submissions that can be accepted by HUD." 83 Fed. Reg. 684. This conclusion, it stated, was "informed" by the fact that HUD had not initially accepted 17 of the first 49 AFH submissions. *Id.* HUD stated that many program participants were struggling to meet the requirements of the AFFH rule, "such as developing goals that could be reasonably expected to result in meaningful actions[.]" 83 Fed. Reg. 684-85. Further, HUD said, "program participants struggled to develop metrics and milestones that would measure their progress as they affirmatively further[] fair housing." *Id*. at 685. The result of "program participants' frequent misunderstanding of how to set clear goals, metrics, and milestones," HUD stated, was often "non-accepted AFHs." *Id*.

[3] As described above, AFH submission dates are tied to Consolidated Plan dates. *See* 24 C.F.R. §§ 570.302, 91.200.230; *see also* 24 C.F.R. 5.160. Most CDBG grantees' Consolidated Plans are renewed on a five-year cycle that, in turn, results in their next AFH submission dates falling between January 2018 and October 2020. Because these dates are before October 31, 2020, the jurisdictions will not have to submit AFHs until their next scheduled submission five years later.

HUD stated that "additional technical assistance may result in program participants better understanding their obligations under the AFFH Rule." 83 Fed. Reg. 685. It opined that such enhanced technical assistance would result in fewer resources expended by program participants "because they are more likely to submit an initial AFH that can be accepted by HUD." *Id.* HUD further stated that "significant staff resources were required" to decide that an AFH does not comply with the AFFH Rule's requirements. *Id.*

In lieu of the suspended AFFH process, HUD instructed jurisdictions to revert to the previous AI process, *i.e.*, prepare an Analysis of Impediments without HUD assistance, "take appropriate actions," and then "maintain records reflecting the analysis and actions," without submitting anything for HUD review. 83 Fed. Reg. 685. Although it failed to take comments *before* acting, HUD solicited comment on its already-taken action. *Id*.

On May 8, 2018, Plaintiffs filed this action and moved for a preliminary injunction and for expedited summary judgment, arguing among other things that HUD had no authority to suspend the AFFH Rule's requirements without following notice-and-comment procedures. Rather than defending its January notice, on May 23, 2018, HUD issued a notice withdrawing it, stating that "[i]f HUD later finds it prudent to revise the regulations, including by revising the submission schedule, HUD will publish a notice of proposed rulemaking to that effect for public comment." *Affirmatively Furthering Fair Housing: Withdrawal of Notice Extending the Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants Withdrawal*, 83 Fed. Reg. 23,928 (May 23, 2018).

Simultaneously, HUD issued a notice withdrawing the Assessment Tool that local jurisdictions must use to prepare AFHs, *see Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments*, 83 Fed. Reg. 23,922 (May 23, 2018). It issued a

third notice that makes clear that the withdrawal of the Assessment Tool has the same effect as the January notice, instructing local jurisdictions not to follow the AFFH Rule's requirements and to revert to the AI process instead. *See Affirmatively Furthering Fair Housing (AFFH): Responsibility to Conduct Analysis of Impediments*, 83 Fed. Reg. 23,927 (May 23, 2018).

HUD stated that the Assessment Tool had proven to be "unworkable." 83 Fed. Reg. 23922. It said it reached this conclusion based on (1) "the high failure rate" in the first 49 AFH submissions reviewed and (2) "the level of technical assistance" HUD provided for that round of AFHs, leading to expenses "which cannot be scaled up" to a larger number of submissions. *Id.* at 23,923. HUD did not discuss alternatives other than withdrawing the Assessment Tool, it did not discuss the benefits that the AFFH Rule already is providing, and it failed to acknowledge its own prior conclusion that the AI process failed to ensure that local jurisdictions affirmatively further fair housing as the Fair Housing Act requires.

ARGUMENT

A preliminary injunction is warranted where plaintiffs show "that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of equities in [their] favor, and accord with the public interest." *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016). Here, each of those factors weighs strongly in favor of issuing the requested preliminary injunction.

First, Plaintiffs are likely to prevail on the merits. Once a rule is finalized, an agency "is itself bound by [it] until that rule is amended or revoked." *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017). Yet HUD—without notice-and-comment procedures—has, by withdrawing the Assessment Tool that makes the AFH process possible, effectively suspended the obligations of more than 1,100 jurisdictions to prepare and submit an AFH. This action

effectively suspends the AFFH Rule indefinitely, because jurisdictions' obligations are tied to the AFH process. HUD acted unlawfully in January by excusing jurisdictions from their regulatory obligations without undertaking notice-and-comment rulemaking. The agency's May notice has precisely the same effect, and so it is similarly unlawful; it is immaterial that the agency is using a different tactic to achieve the same ends.

Further, HUD's actions were arbitrary and capricious. HUD's statement that 17 of the 49 initial AFH submissions it reviewed were inadequate does not justify its action. The Rule anticipates that HUD will review AFHs, initially deny those not meeting the Rule's requirements, and work with jurisdictions to formulate acceptable AFHs. HUD contends that the AFH process imposed costs that could not scale up to the greater number of submissions due in the next few years, but it did not establish that the costs it has incurred so far will, in fact, increase proportional to submissions. And whatever the merits of HUD's concerns about the process, it failed to explain why they are attributable to deficiencies in the Assessment Tool, and it did not explain why it could not address its concerns through actions short of suspending the Rule, such as providing additional guidance for smaller jurisdictions or posting successfully completed AFHs. Indeed, HUD's notice does not evince consideration of *any* alternatives.

Moreover, HUD failed to consider the benefits that the AFFH Rule already has conferred, in that it has led many jurisdictions to take substantially more effective actions to further fair housing. For similar reasons, HUD's action was not in accordance with law because it represents an abdication of the Secretary's statutory duty to affirmatively further fair housing pursuant to 42 U.S.C. § 3608(e)(5). HUD has already concluded that the AI process was inadequate to ensure

that recipients of federal funding satisfy their statutory obligations. Nonetheless, HUD returned to that failed process.

Second, Plaintiffs will suffer irreparable harm absent a preliminary injunction. Plaintiffs' missions include educating governmental entities—and the communities they serve—about barriers to fair housing and advancing the implementation of policies that meaningfully address them. The AFFH Rule established processes that assure that Plaintiffs' views (and evidence of local conditions) are considered, ensure community participation in governmental decision-making, and otherwise advance Plaintiffs' fair housing missions. Plaintiffs have invested heavily in using the Rule's procedural requirements, including the requirement that jurisdictions use the Assessment Tool to formulate AFHs, to drive meaningful action at the local level to address deep-rooted patterns of racial segregation and other fair housing problems. HUD's abrupt suspension of the Rule's requirements has impaired Plaintiffs' current programs and makes it far harder for Plaintiffs to advance their missions. Additionally, Plaintiffs must divert significant time and resources from previously planned activities to counteract the effects of HUD's suspension of the AFFH Rule's requirements.

Third, HUD will suffer no cognizable harm if forced to follow the law, and the public interest otherwise favors an injunction. "There is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters*, 838 F.3d at 12 (D.C. Cir. 2016). And whatever weight HUD's stated concerns might otherwise bear, here "there is precious little record evidence" documenting them. *Id.* at 13.

This Court should grant a preliminary injunction requiring HUD to immediately rescind the withdrawal of the Assessment Tool and directing HUD to implement the AFFH Rule. The Court should also should grant summary judgment to Plaintiffs.

I. Plaintiffs Are Likely to Prevail on the Merits.

A. HUD Failed to Follow Required Notice-and-Comment Procedures.

By suspending the requirement that jurisdictions receiving federal housing funds complete and submit an AFH for HUD review—first directly in January, and then in May by withdrawing the Assessment Tool that makes completion of an AFH possible—HUD effectively suspended the AFFH Rule without observing the notice-and-comment procedures that the APA requires. Before an agency issues a substantive rule, the APA requires that it must publish a "notice of proposed rule making" in the Federal Register, 5 U.S.C. § 553(b), and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." *Id.* § 553(c). These requirements apply to "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *Id*. § 551(4). Once a rule is final, the agency "is itself bound by [it] until that rule is amended or revoked," and it "may not alter such a rule without notice and comment." *Clean Air Council*, 862 F.3d at 9 (internal brackets omitted).

The AFFH Rule is a substantive regulation that could be promulgated only by notice-and-comment rulemaking and can be altered only by notice-and-comment rulemaking. The Rule requires, among other things, that (a) participants comply with the Assessment process—including following procedures such as soliciting community input—and submit AFHs according to an explicit timeline, 24 C.F.R. § 5.150 *et seq.*; (b) HUD undertake review of every submitted AFH, determine whether it meets certain specified requirements, 24 C.F.R. § 5.162(a), not accept those which do not meet those requirements, and work with those jurisdictions to craft acceptable AFHs, 24 C.F.R. §§ 5.162(b), (c); and (c) HUD disapprove a Consolidated Plan (and

thereby deny federal housing money) for those jurisdictions that, after that process is followed, still lack an accepted AFH, 24 C.F.R. § 5.162(d). The Rule sets out specific requirements for participating jurisdictions and HUD alike. Because the AFFH Rule changes grantees' and HUD's own obligations, HUD used notice-and-comment rulemaking for its promulgation.

HUD has effectively suspended the AFFH Rule's requirements indefinitely. It first did so directly, by announcing that jurisdictions were not required to complete and submit AFHs. After being sued, it withdrew that action, but simultaneously accomplished the same result by withdrawing the existing Assessment Tool and informing jurisdictions that they should not submit (and HUD will not review) AFHs until at least nine months after HUD publishes a revised Assessment Tool. HUD's withdrawal of the local government Assessment Tool and instruction to jurisdictions not to follow the AFH process changes multiple substantive provisions of a final rule for the 1,100-plus jurisdictions that have not yet submitted AFHs and now are not required to submit AFHs on the schedule that HUD established by regulation. *See* 24 C.F.R. §§ 5.160(a)(1) (setting out deadlines for first AFH submissions), 5.160(b) (establishing deadlines for subsequent AFHs).

HUD's action indefinitely suspends not only jurisdictions' obligation to submit AFHs for review, but also the associated obligations that jurisdictions solicit and consider community input, analyze HUD-provided data related to fair housing issues, identify a variety of potential fair housing issues, and proactively address factors that contribute to fair housing issues. Meanwhile, HUD is suspending its own legal obligations to review AFHs, require certifications that satisfy the AFFH Rule, and condition federal funding on compliance with the AFFH Rule. In short, HUD is excusing itself and funding recipients from carrying out non-discretionary

requirements of the Rule that have the "force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) (internal quotation marks and citation omitted).

As the D.C. Circuit has explained, suspending a final rule's effective date is "tantamount to amending or revoking a rule." *Clean Air Council*, 862 F.3d at 6. Because the "suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under [the] APA," such action requires compliance with the APA's procedural requirements. *Envtl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983); *see Open Cmtys. All. v. Carson*, No. 17-2192 (BAH), 2017 WL 6558502, at *10 (D.D.C. Dec. 23, 2017) (agency's two-year suspension of rule "ordinarily would require notice and comment").[4] Otherwise, "an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date." *Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 762 (3d Cir. 1982). That is essentially what HUD does here.

These principles apply to HUD's withdrawal of the Assessment Tool, without which jurisdictions cannot comply with the Rule's requirements, just as they do to HUD's January 2018 notice excusing jurisdictions from compliance. Withdrawing the Tool is another way of achieving the same end—stopping the AFFH Rule in its tracks. As the D.C. Circuit has stated, "an agency action which has the effect of suspending a duly promulgated regulation is normally

[4] *See also Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (agency's suspension of rule was "paradigm of a revocation," constituting "180-degree reversal of [the agency's] former views as to the proper course") (internal quotation marks and citation omitted); *Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 813 (D.C. Cir. 1983) ("[S]uspension of the permit process … amounts to a suspension of the effective date of regulation … and may be reviewed in the court of appeals as the promulgation of a regulation."); *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 n.28 (D.C. Cir. 1981) ("[T]he December 5 order was a substantive rule since, by deferring the requirement that coal operators supply life-saving equipment to miners, it had 'palpable effects' upon the regulated industry and the public in general") (citation omitted); *see Nat. Res. Def. Council, Inc., v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004) (stating that "altering the effective date of a duly promulgated standard could be, in substance, tantamount to an amendment or rescission"); *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 17 (D.D.C. 2012).

subject to APA rulemaking requirements." *Environmental Defense Fund v. Gorsuch*, 713 F. 2d at 816; *cf. Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1207 (D.C. Cir. 1996) (withdrawal of document did not trigger notice-and-comment duty because it "did not alter substantive legal obligations under previously published regulations"). Thus here, HUD cannot evade its notice-and-comment obligation by withdrawing the Assessment Tool, on which the AFFH Rule depends. Indeed, in the May notices, HUD's direction to local governments is the same as in the January 5 notice: Both the May notices and the January notice instruct participants not to follow the process of the AFFH Rule and, instead, to revert to the AI process that the AFFH Rule replaced. *Compare* 83 Fed. Reg. 23,927 *with* 83 Fed. Reg. 683, 685. As was true of its January notice, HUD's two May notices alter the substantive requirements imposed by regulation, without undertaking notice-and-comment rulemaking.

Nothing in the Rule allows HUD to withdraw an Assessment Tool without replacing it. To the contrary, the Rule provides that the Assessment Tool "will be subject to periodic notice and opportunity to comment in order *to maintain the approval* of the Assessment Tool as granted by the Office of Management and Budget (OMB) under the [Paperwork Reduction Act]." 24 C.F.R. § 5.152 (emphasis added). HUD may put the existing Assessment Tool out for notice and comment, to revise it and obtain renewed OMB approval, but nothing in the Rule authorizes it to withdraw an OMB-approved Assessment Tool, thus rendering the Rule inoperative. HUD already updated the Assessment Tool for entitlement jurisdictions once, through notice-and-comment procedures, without withdrawing the existing Assessment Tool while doing so. *See Affirmatively Furthering Fair Housing Local Government Assessment Tool—Information Collection Renewal: Solicitation of Comment—60-Day Notice Under Paperwork Reduction Act of 1995*, 81 Fed. Reg. 15,546 (Mar. 23, 2016); *Affirmatively Furthering Fair Housing Local*

Government Assessment Tool—Information Collection Renewal: Solicitation of Comment—30-Day Notice Under Paperwork Reduction Act of 1995, 81 Fed. Reg. 57,601 (Aug. 23, 2016). Moreover, the AFFH Rule has an explicit exception to the first-submission deadline for certain entitlement jurisdictions. 24 C.F.R. § 5.160(a)(2). If HUD wanted to create other exceptions for entitlement jurisdictions' first AFH submissions, it knew how to do so.

Because HUD effectively suspended the AFFH Rule's requirements for jurisdictions—thus substantively revising the Rule without undertaking notice-and-comment procedures—it failed to observe procedures required by law. The Court should therefore hold unlawful and set aside HUD's withdrawal of the Assessment Tool; its instruction that participants revert to the AI process; and its suspension of the AFFH Rule. *See* 5 U.S.C. § 706(2)(D).

B. HUD's Withdrawal of the Assessment Tool and Reversion to the AI Process Was Arbitrary, Capricious, and Contrary to Law.

Plaintiffs are also likely to prevail on the merits because HUD's withdrawal of the Assessment Tool—an action that renders the AFFH Rule inoperative for local jurisdictions—was arbitrary and capricious. HUD (1) did not adequately document the professed concerns underlying the decision or explain why they required the drastic step of effectively suspending the Rule altogether; (2) ignored the AFFH Rule's benefits altogether rather than explaining why they were outweighed by HUD's concerns; and (3) failed to adequately explain how it could, consistent with its statutory obligation to ensure that funding recipients affirmatively further fair housing, reinstate a process which it previously rejected as insufficient to do so.

Agency action is "arbitrary and capricious" if not based on a "reasoned analysis" that indicates the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983)

(internal quotation marks omitted); *see also Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 407 (D.C. Cir. 1996). Agency action is also arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [made a decision that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. A court cannot "supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* (quotation marks and citation omitted); *accord S. Co. Servs., Inc. v. Fed. Energy Regulatory Comm'n*, 416 F.3d 39, 47 (D.C. Cir. 2015). In conducting its review, the Court should not "rubber-stamp the agency decision"; instead, it must "engage in a 'substantial inquiry' into the facts, one that is 'searching and careful.'" *Mingo Logan Coal Co., Inc. v. EPA*, 70 F. Supp. 3d 151, 161 (D.D.C. 2014) (internal quotation marks and citations omitted).

1. HUD Failed to Adequately Explain Why Its Professed Concerns Justified Its Decision to Withdraw the AFH Assessment Tool.

In withdrawing the Assessment Tool, HUD failed to explain why the evidence on which it relies supports its conclusion that the Tool is so "unworkable" as to justify withdrawing it. 83 Fed. Reg. 23,923. Specifically, HUD failed to justify reaching this conclusion based on (1) "the high failure rate" in the first 49 AFH submissions reviewed and (2) "the level of technical assistance" HUD provided for that round of AFHs, which (according to HUD) "cannot be scaled up" to a larger number of submissions. *Id.* at 23,922. HUD failed to substantiate either finding. It also failed to explain why either finding warranted the drastic step of withdrawing the Assessment Tool. It did not consider at all other alternatives that would not disrupt the workings of a promulgated regulation and frustrate the Fair Housing Act's objectives.

First, HUD did not explain why it is problematic or unexpected—let alone sufficiently so to warrant a dramatic change of course—that 17 of the first 49 AFH submissions were not

initially accepted and that HUD requested additional information from 14 other submitters before proceeding. 83 Fed. Reg. 23,923. In fact, the AFFH Rule *anticipates* that HUD will initially not accept some AFHs, but instead will provide feedback for use in revising the AFHs. *See* 24 CFR §§ 5.162(a) and (b). The AFFH Rule provides requirements and time frames governing this iterative process, ensuring that initial non-acceptance does not endanger receipt of federal funding and is otherwise routine and indeed beneficial. *See, e.g.*, 24 C.F.R. §§ 5.162(b)-(c) (when AFH is rejected, HUD must identify reasons AFH was not accepted, provide guidance on how AFH should be revised, and allow the program participant at least 45 days to revise and resubmit AFH). In promulgating the Rule, HUD required that AFHs be submitted months in advance of Consolidated Plans and rejected a proposal that the documents be submitted and reviewed concurrently, precisely so that it could initially reject AFHs—and then work with jurisdictions to improve them—as a routine part of the process. 80 Fed. Reg. 42,311.

Most of the submissions HUD initially rejected were improved through the collaborative process, and all but a few were accepted after revision. *See* Steil Decl. ¶ 36. Accordingly, what HUD characterizes as a problem—that 17 submissions were initially rejected—made the Rule more successful, because nearly all of those jurisdictions improved their AFHs sufficiently to be accepted. Moreover, knowing that HUD has initially rejected some submissions has put other jurisdictions on notice of that possibility, encouraging them to do a better job in their initial submissions to avoid such outcomes. *See* Urevick-Ackelsberg Decl. ¶¶ 10-13 (describing the importance in Philadelphia's process of the prospect of HUD's searching review of the AFH). HUD thus acted arbitrarily and capriciously by effectively suspending the AFFH Rule based on events that were anticipated and built into the Rule.

Second, HUD failed to support its assertion that having to work with jurisdictions in this manner made implementation of the AFFH Rule so unexpectedly costly as to make the Rule "unworkable." HUD did not acknowledge that the Rule *anticipates* substantial expenditure of compliance resources, particularly initially with respect to the many jurisdictions that had not taken the AI process seriously. *See* 80 Fed. Reg. 42,273 (estimating that jurisdictions would incur compliance costs of $25 million, with variance depending on their prior conduct, while HUD would incur costs of $9 million). And it did not contend that compliance costs were proving greater than expected, let alone marshal facts that would support such a conclusion. It did not, for example, offer any assessment of the number of hours that it or program participants have devoted to AFH production and review. Although it pointed to some program participants' decision to hire consultants, it offered no assessment of how costly such consultants are. Indeed, HUD did not even contend that jurisdictions are significantly likelier to hire consultants to complete AFHs than for completion of AIs, nor would such an assertion have merit. *See* Steil Decl. ¶ 29. Thus, to the extent HUD points to the use of consultants as a reason for reverting back to the AI process, it fails to establish that its action would "cure" the supposed "problem."

Without providing any details, HUD said it "estimates that it has spent over $3.5 million on technical assistance for the initial round of 49 AFH submissions." 83 Fed. Reg. 23,925. Even taken at face value, this estimate is misleading, suggesting a per-submission technical-assistance cost that remains constant as the number of submissions increases, thus driving total costs to what HUD contends will be an unsustainable level. *See, e.g.*, 83 Fed. Reg. 23,923 ("The level of technical assistance provided to the initial 49 participants could not be extended to these numbers of AFHs due in 2018 and 2019"). But HUD does not establish, or even state, that the $3.5 million was spent addressing individual AFH submissions. In fact, a substantial amount has gone

to producing a training curriculum (which remains in use) and then delivering regional trainings based on that curriculum to staff from both program participants that have yet to submit AFHs and staff from the 49 initial participants. *See* Hostetler Decl. ¶ 17. HUD has also produced written materials and videos. Without a showing that such front-loaded investments do not comprise a significant portion of its $3.5 million figure, there is no basis for HUD's claim that this amount will scale up proportional to the number of AFH submissions.

HUD dismissed, in a conclusory assertion, the prospect that per-submission costs will decline due to experience with the AFH process and the development of "model" AFH content that will not be nearly as difficult to recreate as they were to create initially. In the Final Rule, HUD found that the AFH process was likely to gain efficiency as it moves forward, as later-submitting jurisdictions get "the benefit of the experience of those program participants that were the first to submit their AFHs." 80 Fed. Reg. 42,272, 42,351 (July 16, 2015). HUD did not acknowledge this finding or explain why it no longer anticipated this occurring.

In fact, by investing in intensive pre-submission technical assistance for the Kansas City Regional AFH and the Philadelphia Joint AFH, HUD facilitated the development of replicable models for effective fair housing planning. Future submitters can incorporate Philadelphia's community engagement solutions or Kansas City's use of local data on disparities in access to proficient schools.[5] *See* Lenk Decl. ¶ 5. Similarly, HUD's technical assistance to help jurisdictions remedy defects in initially non-accepted AFHs will make such assistance more efficient and cost-effective in the future. A technical assistance provider confronting recurring

[5] Both AFHs are now publicly available online. For Kansas City, see *Affirmatively furthering Fair Housing Plan*, Mid-America Regional Council, http://www.marc.org/Regional-Planning/Housing/Related-Projects/Affirmatively-Furthering-Fair-Housing-Assessment. For Philadelphia, see City of Philadelphia and Philadelphia Housing Authority, *Assessment of Fair Housing* (Dec. 23, 2016), *available at* http://www.phila.gov/dhcd/wp-content/uploads/2017/01/afh-2016-for-web.pdf.

problems can solve those problems more quickly each successive time—or avoid recurrences altogether by providing targeted preemptive guidance. *See* Hostetler Decl. ¶ 17.

In short, contrary to HUD's suggestion, there is no reason to think that HUD's required technical assistance spending will scale up proportionally to the number of AFHs that come due. HUD's reliance on the flawed and unsupported assumption that it will have to dramatically scale up its technical assistance expenditures makes its action arbitrary and capricious.

Third, HUD did not adequately explain how purported deficiencies in the current Assessment Tool caused any of these purported "problems." HUD did not say what is wrong with its current Tool that, if changed, would result in fewer initial non-acceptances or lower costs. Instead, it described shortcomings in those AFHs that received initial non-acceptances, along with conclusory statements attributing them to failures of the Assessment Tool. As HUD's own description of these shortcomings suggests, initial rejections of AFHs have generally been because jurisdictions failed to include basic components of a functional AFH, not because anything is fundamentally deficient in HUD's current Assessment Tool.

For example, some jurisdictions violated community participation requirements that are clear from the Rule's face. One gave the public three days to comment on a draft AFH when the Rule requires 30. 83 Fed. Reg. 23,924 (citing 24 C.F.R. § 91.105(b)(4)). HUD did not explain why it blamed the Tool for blatant failure to follow the Rule. HUD observed that the Assessment Tool *already* requires jurisdictions to use local data and knowledge to supplement HUD-provided data, but some jurisdictions chose not to do so. 83 Fed. Reg. 23,924. HUD did not explain why this is a failing of the Assessment Tool, rather than a failing of the submitting jurisdiction. And HUD stated that several jurisdictions' "goals" section "lacked metrics and milestones." *Id*. at 23,925. Yet, as HUD then acknowledged, the Tool contains a chart with a box

for jurisdictions to list "Metrics, milestones, and timeframe for achievement." *Id*. It is not apparent why the Tool is to blame for some jurisdictions failing to provide information that the Tool explicitly solicits. Indeed, it is clear from HUD's own Notice that each of the Tool's required elements was correctly completed by the vast majority of the 49 jurisdictions, *see* Steil Decl. ¶ 32, suggesting that jurisdictions' failures were idiosyncratic rather than systemic. Many jurisdictions did not find any of the Tool's elements problematic, *see* Lenk Decl. ¶ 5.

HUD's own description of those deficiencies suggests that certain jurisdictions simply chose not to follow requirements that already were very clearly stated—in the Rule, the Assessment Tool, and HUD guidance—or take advantage of resources already at their disposal. Moreover, an analysis of non-accepted AFHs confirms that they resulted not from fundamental inadequacies in the Assessment Tool but from municipalities making obvious errors such as ignoring segregation in an entire section of their jurisdiction; failing to include any metrics or milestones to measure improvements in fair housing; failing to analyze the data HUD provided to the jurisdiction; and/or failing to consider housing barriers for key constituents, such as persons residing in public housing. *See* Steil Decl. ¶¶ 21-26. None of this is obviously connected with major deficiencies in the Assessment Tool. Similarly, HUD did not accept the AFH submitted by a consortium of jurisdictions in the area of Hidalgo County, Texas, as explained in greater detail in Section II.A, *infra*. It is not obvious, and HUD does not explain, how deficiencies in the Assessment Tool were the cause of the deficiencies in that AFH.

Fourth, and relatedly, HUD did not explain why the problems it identified could not be addressed by measures short of withdrawing the Assessment Tool without replacing it, thereby rendering the final AFFH rule inert. HUD failed to consider *any* alternatives, let alone adequately explain why they were insufficient. That alone makes its action arbitrary and capricious. *See Int'l*

Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795, 825-26 (D.C. Cir. 1983) (rescission of ban on work within another's home was arbitrary and capricious, because Department failed to consider alternatives to complete elimination of restriction); *Heartland Hospital v. Shalala*, No. 95–951, slip op. (D.D.C. Jun. 15, 1998) (failure to consider alternatives "render[ed] the adoption of the regulations arbitrary and capricious."); *Forelaws on Bd. v. Johnson*, 643 F.2d 677, 685 (9th Cir. 1984) ("This requirement that an agency examine alternative courses of action has long been a part of the APA's standard of review[.]").

Although HUD was not required to weigh every possible alternative, it was required to consider those readily available, such as those the agency already has considered in other contexts. *See State Farm*, 463 U.S. at 51 (agency was required to consider mandatory airbag alternative given its prior conclusion that airbags were effective). Here, HUD has not explained, for example, why any legitimate concerns could not be addressed by the step—one it has taken before—of providing additional guidance for jurisdictions regarding specific areas of confusion while leaving the Assessment Tool in place. *See* Hostetler Decl. ¶ 17. Indeed, providing guidance to program participants through other means is likely to be a far more effective and nimble method of clearing up the specific points of confusion that purportedly motivate this action than is revising the Assessment Tool, a bureaucratically complex (and lengthy) process that requires the approval of multiple units of government as well as public notice and comment. *See* Hostetler Decl. ¶ 16 (discussing alternatives). HUD's failure to consider alternatives is particularly troubling given the drastic option HUD chose: directing participating jurisdictions to revert to the AI process that the agency has itself found does not ensure compliance with the Fair Housing Act's requirement to affirmatively further fair housing. 80 Fed. Reg. 42,275.

HUD has not even provided facts that would permit an evaluation of how reasonable its action is in relation to possible alternatives. It has not, for example, explained the specific changes it will make to the Tool in response to its supposed concerns or committed to releasing a revised Tool on any schedule, making it difficult to evaluate whether its supposed concerns could be addressed through a less drastic approach. For example, HUD states that "specific Superfund locations are not located on the maps." 83 Fed. Reg. 23,924. It does not explain why this data could not be included in HUD maps going forward without rescinding the Tool.

Moreover, the issues HUD identified in May—agency costs and the number of jurisdictions asked to improve their submissions—were the same problems it identified in its January notice suspending the AFFH Rule's obligations. Yet HUD's May notice identifies no steps HUD has taken to cure these problems in the almost five months it already has had to act. An agency cannot rely on its own decision not to act to create the circumstances justifying its decision. *See Bellevue Hosp. Ctr. v. Leavitt*, 443 F.3d 163, 179 (2d Cir. 2006) (rejecting argument that, because "agency failed to complete the predicate task" on schedule, it could "cite [] that very failure as an excuse for less than full compliance with its second task"); *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009) ("DHS should not now expect to excuse its violation of the APA by pointing to the problems created by its own delay."); *see also League of Women Voters*, 838 F.3d at 14 (agency could not rely on "the confusion resulting from its own improper action" to oppose "an injunction against that action").

In sum, the agency set forth its "facts found" and its "choice made" but did not draw "a rational connection" between the two. *State Farm*, 463 U.S. at 43. The withdrawal of the Tool and instruction that jurisdictions revert to the AI process thus was arbitrary and capricious.

2. HUD Ignored the Benefits of Ongoing Implementation of the AFFH Rule.

HUD also acted arbitrarily and capriciously because, while focusing on the purported costs of compliance, it ignored the benefits already accruing from the AFH process—including benefits arising from the non-acceptance and revision of some initial AFHs. In promulgating the Rule, HUD acknowledged that compliance with the Rule's requirements would impose some burden on itself and program participants, but it found those costs outweighed by the Rule's "positive impacts" that "entail changes in equity, human dignity, and fairness." 80 Fed. Reg. 42,349. In suspending those requirements, HUD did not acknowledge its previous finding, let alone explain why it now weighed costs and benefits differently.

Such an unexplained "180 degree turn away from [precedent is] arbitrary and capricious," as is an agency's decision "to reverse its position in the face of a precedent it has not persuasively distinguished." *La. Pub. Serv. Comm'n v. Fed. Energy Regulatory Comm'n*, 184 F.3d 892, 897 (D.C. Cir. 1999) (citation omitted). "The agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016), *citing FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Encino Motorcars*, 136 S. Ct. at 2126, *citing Fox Television Stations, Inc.*, 556 U.S. at 515-16.

Here, HUD suspended the AFFH Rule's requirements based largely on supposed compliance burden, a cost it earlier considered and found to be outweighed by the Rule's benefits, without even acknowledging—let alone explaining—its change in course. Not only did HUD reverse its own weighing of costs and benefits without acknowledging that it was doing so,

it also "entirely failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, in considering only what it believed to be the costs of immediate implementation and not the benefits. *California v. U.S. Bureau of Land Mgmt.*, 227 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017).

In addition, had HUD considered the benefits of the Rule so far, it would have found no reason to change course, because the Rule has conferred the benefits HUD expected. One study of the twenty-eight AFHs submitted to HUD between October 2016 and July 2017—that is, the majority of the 49 on which HUD based its decision—compared those submissions to the AIs previously prepared by the same participants and found striking improvements. Whereas the AIs contained "nebulous goals," the AFHs contained "more concrete ones." *See* Steil Decl. ¶¶ 17, 9-20 (giving examples). In the past, most municipalities' AIs did not set even a single goal that included a quantifiable metric of success or concrete policy to be enacted. Now, almost all included in their AFHs promises specific enough that HUD and local advocates can hold municipalities responsible for keeping them. *See* Steil Decl. ¶¶ 9-20.

These are exactly the concrete fair housing commitments that jurisdictions accepting federal funds should make to comply with their Fair Housing Act obligations, but did not do so in the absence of HUD oversight. The Rule's accountability standards, required goals and timetables, enhanced community participation requirements, required HUD review, and the potential pass-back process for rejected AFH submissions were beginning to drive substantial change on the ground. *See* Urevick-Ackelsberg Decl., (describing the AFH process in Philadelphia); Ciardullo Decl. (describing the AFH process in New Orleans).

By contrast, as HUD found in promulgating the Rule—but did not acknowledge in suspending it—left to their own devices, localities do not effectively address segregation, concentrated poverty, and other disparities. In promulgating the Rule, HUD found it needed a

new and robust planning approach to ensure that local governments and other grantees take actions that are consistent with the Act. 80 Fed. Reg. 42,275. Relying upon, among other things, the GAO Report and its own experience, HUD concluded that the AI process was inadequate and resulted in program participants giving little priority to fair housing because of HUD's lack of oversight. *Id.* at 42,275; *see id.* at 42,438 (acknowledging that AI process had been "highly criticized as not an effective AFFH tool"). In suspending the Rule's requirements, HUD failed to adequately explain why it was reverting to the same process—leaving local government program participants without guidance or oversight—which it previously found to be inadequate at fulfilling the agency's obligations under the Fair Housing Act.

3. HUD's Action Is Contrary to the Fair Housing Act.

By reverting to a failed regulatory system that HUD has already found to be inadequate, HUD is failing to carry out its affirmative duties under the Fair Housing Act, 42 U.S.C. § 3608(e)(5). HUD concluded in promulgating the AFFH Rule that, in the absence of HUD oversight and guidance, federal funds were flowing to jurisdictions that did not, in turn, take the necessary steps to affirmatively further fair housing. *See* 78 Fed. Reg. 43,710 (jurisdictions' actions under the AI regime "do not sufficiently promote the effective use of limited public resources to affirmatively further fair housing"); *see also* Hostetler Decl. ¶¶ 3-7 (describing HUD process). HUD found that it had to exercise additional oversight to fulfill its own statutory responsibilities and ensure that federal funding recipients fulfilled their own.

HUD was correct. As courts have consistently found, the Fair Housing Act imposes on HUD a duty to provide a strong system of oversight and accountability that ensures recipients of federal funds actually take meaningful steps to affirmatively further fair housing. *See Shannon*, 436 F.2d at 819-21; *NAACP*, 817 F.2d at 158. That duty was not satisfied when HUD required

only a bare certification of compliance from its funding recipients, based on the overwhelming and undisputed evidence of rampant non-compliance. HUD's affirmative obligation to ensure that federal funds are spent in a way that furthers fair housing carries with it the responsibility to gather information necessary to enforce this statutory duty, and then to institute procedures by which it can review that information carefully and in accordance with set standards.

For example, in *Shannon*, the Second Circuit held that, in order to select sites for federally funded housing projects without improperly causing increased racial segregation, HUD "must utilize some institutionalized method" that ensures that "it has before it the relevant racial and socio-economic information necessary for compliance with its duties." 436 F.2d at 821. It was not permitted to claim that it did not know it was spending federal money in a manner that contributed to racial segregation when it did not make reasonable efforts to know. *See also Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1133-34 (2d Cir. 1973) (finding that "affirmative duty placed on the Secretary of HUD" requires HUD to take account of racial impact of proposed actions; "[a]ction must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat").

Likewise, in *NAACP*, 817 F.2d at 158, the First Circuit held that "HUD's practice over time" of failing to provide standards by which to measure compliance with the statutory requirement that it affirmatively further fair housing and failing to oversee the city's fair housing performance could constitute a violation of 42 U.S.C. § 3608. The court added that HUD's duties include, "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 and to assess positively those aspects of a proposed course of action that would increase that supply." *Id.* at 156.

Finally, in *Thompson v. United States Department of Housing and Urban Development*, 348 F. Supp. 2d 398 (D. Md. 2005), the court found that HUD violated 42 U.S.C. § 3608 by permitting Baltimore and its housing authority to distribute federal housing assistance in a manner that limited the opportunities for predominantly African-American public housing residents and Housing Choice Voucher users to reside outside the City proper. It found that HUD failed to "seriously and thoroughly consider" the effects of these policies on long-standing racial segregation or possible alternatives that, by regionalizing the voucher system, would permit voucher holders to seek housing more broadly and thus promote desegregation. *Id.* at 464. Ultimately, it concluded:

> HUD has had, and continues to have, a duty to forward the goal of open, integrated residential housing, which can only be achieved by ameliorating the effects of past discriminatory segregation. Federal Defendants' abdication of their statutory responsibilities stems from their failure *to even consider,* in any adequate way, regionalization policies.

Id. at 465.

HUD thus must have a meaningful process ensuring that federally funded jurisdictions affirmatively further fair housing. HUD violated that duty by reverting to the AI process. As the case law and record of the AFFH rulemaking establish, the AI process—under which jurisdictions provide HUD no meaningful information about local fair housing conditions or the manner in which they plan to address them—neither provides HUD with the information necessary to fulfill its duty nor provides meaningful standards by which to measure whether jurisdictions are "complying" with their certifications. As HUD itself acknowledged, the AI process was ineffective at ensuring that jurisdictions take seriously their obligation to affirmatively furthering fair housing. *See* 78 Fed. Reg. 43,710 (AI process did not "sufficiently promote the effective use of limited public resources to affirmatively further fair housing").

In the two May notices, HUD does not explain why this process will work any better now than it did in the past. It does not, and could not, claim that its suspension of the AFFH Rule's core requirements leaves it in compliance with its own affirmative duties under 42 U.S.C. § 3608. For this reason as well, HUD's action is both arbitrary and capricious and contrary to the Fair Housing Act. *Cf. Chem. Mfrs. Ass'n v. EPA*, 217 F.3d 861, 865–67 (D.C. Cir. 2000) (finding an agency compliance date that frustrated statutory objectives to be arbitrary and capricious).

II. Plaintiffs Will Suffer Irreparable Harm in the Absence of a Preliminary Injunction.

HUD's unlawful withdrawal of the Assessment Tool, suspension of the AFH process, and reversion to the AI process is causing, and absent an injunction will continue to cause, irreparable harm to Plaintiffs Texas Housers, Texas Appleseed, and NFHA. HUD's action has "perceptibly impaired the organization[s'] programs" and makes accomplishment of the organizations' missions more difficult. *League of Women Voters*, 838 F.3d at 8-9; *Open Communities Alliance*, 286 F. Supp. 3d at 178 (D.D.C. 2017). Accordingly, injunctive relief is warranted. *See League of Women Voters*, 838 F.3d at 9 (enjoining agency action that interfered with organizational plaintiff's ability to further its mission).

A. HUD's Action Is Harming the Texas Plaintiffs.

HUD's withdrawal of the Assessment Tool and suspension of the AFFH Rule's requirements has impaired Plaintiffs Texas Housers' and Texas Appleseed's (collectively, the "Texas Plaintiffs") ability to carry out their missions. Texas Housers focuses on expanding housing opportunities for low-income Texas residents, *see* Henneberger Decl. ¶ 2, while Texas Appleseed's mission is to promote social and economic justice for all Texans and ensure that all families can live in safe, decent neighborhoods with access to educational and economic opportunity. Sloan Decl. ¶ 2. Both organizations have long-standing projects to ensure that

federal funds, including disaster relief money following recent hurricanes, are spent consistent with civil rights obligations. *See* Henneberger Decl. ¶ 3, Sloan Decl. ¶ 3.

The AFFH Rule, made operative through the AFH Assessment Tool, allowed Texas Plaintiffs to hold local governments in Texas responsible for addressing long-standing racial segregation and other fair housing issues. In reliance on the Rule's requirements and procedures, Texas Plaintiffs have invested thousands of dollars in staff time and out-of-pocket resources to ensure that local jurisdictions throughout Texas take fair housing seriously through the AFH process. *See* Henneberger Decl. ¶¶ 7, 9. HUD suspended the AFFH Rule's core requirements just as those efforts were beginning to bear fruit. Texas Plaintiffs now will have to devote considerably more resources attempting to ensure that the communities they serve win fair housing commitments from localities like the ones that the AFH process would have provided.

For example, backed by the Rule's requirements—none of which the AI process covers—Texas Plaintiffs invested heavily to promote robust community participation when a consortium of jurisdictions led by Hidalgo County ("Consortium") prepared a regional AFH. Henneberger Decl. ¶¶ 8, 9; Sloan Decl. ¶¶ 13-14. Consortium members have long ignored the fair housing needs of many residents, including those living in "*colonias*," *i.e.*, plots of land outside incorporated cities that often lack infrastructure such as water, sewage, electricity, and paved roads. Both Texas Plaintiffs worked extensively to ensure that the Consortium considered the needs of *colonias* residents and others. Among other things, they prepared a lengthy comment letter advising Consortium officials that the AFFH Rule required them to provide multiple forums for interested residents to participate; ensure that materials were prepared in Spanish; and provide notice and opportunity to participate to *colonias* residents. Because Texas

Plaintiffs could point to specific requirements of the AFFH Rule, Consortium members complied, and many more community views were heard as a result. Henneberger Decl. ¶ 8.

The Consortium nevertheless submitted an AFH to HUD that failed to grapple with the publicly stated needs of *colonias* residents or to react to the comments Texas Plaintiffs and others provided. Texas Plaintiffs sent HUD a letter alerting the agency to these problems and suggesting that their substantive and procedural concerns would justify a decision by HUD not to accept the AFH. Henneberger Decl. ¶ 10. On December 12, 2017—just before it issued the January 5, 2018 notice that first suspended the Rule—HUD notified Consortium members that it would not accept the submitted AFH, and required the Consortium to submit revisions by March 12, 2018. Henneberger Decl. ¶ 11; Sloan Decl. ¶ 17. The Consortium's AFH thus is one of the 17 initially non-accepted submissions upon which HUD relies to suspend the rule.

Prior to HUD's January 2018 and May 2018 notices, Texas Plaintiffs were achieving a victory going to the core of their missions. The Hidalgo Consortium was required to fully assess the housing needs of all its residents, including those in the *colonias*, and to consider input from the community, including Texas Plaintiffs, as to how to address those needs. Moreover, it was required to make changes to its AFH on a tight and fixed schedule, with direction and oversight from HUD. After HUD's unlawful action, the Consortium now has no obligation to do any of these things, and it has made clear that it has no intention of doing so. It will not submit an Assessment, it will not make the HUD-directed changes, and members of the Consortium will instead likely conduct multiple Analyses of Impediments on divergent timelines. Henneberger Decl. ¶¶ 12-14; Sloan Decl. ¶ 19. As a result of HUD's actions, Texas Plaintiffs will have to work in multiple jurisdictions, conduct their own analyses of multiple fair housing issues, and attend multiple hearings without any HUD-required organizing structure and without any of the

AFFH rule's requirements for community participation or consideration of HUD-provided data. Henneberger Decl. ¶ 14. HUD's action "unquestionably make[s] it more difficult for the [Texas Plaintiffs] to accomplish their primary mission," which constitutes "injury for purposes both of standing and irreparable harm." *League of Women Voters*, 838 F.3d at 9.

Texas Plaintiffs' experience demonstrates that HUD's willingness to oversee recipients of federal funds dramatically alters Texas Plaintiffs' ability to advocate for fair housing in Texas. *See* Henneberger Decl. ¶¶ 4-5 (Texas failed to address civil rights concerns in distribution of disaster relief money until Texas Housers filed HUD complaint and HUD required action); Sloan Decl. ¶ 4 (same). Many Texas communities are deeply resistant to acknowledging or correcting their own histories of segregation and lack of fair housing. Without the AFH process's mandatory structure, it is more difficult for Texas Plaintiffs to coax meaningful change from them. *See* Henneberger Decl. ¶ 24 (without AFH process to require engagement it is difficult to "secure a forum for a substantive conversation with a jurisdiction" about these issues). Since HUD first suspended their obligations under the AFFH Rule, jurisdictions already are slowing their work on fair housing and are abandoning the careful examinations into their own responsibility for racial and ethnic disparities that the Rule requires. Henneberger Decl. ¶ 14.

An action that directly reduces an organization's ability to realize results on a project core to its mission irreparably harms that organization. *See League of Women Voters*, 838 F.3d at 8-9 (policy that directly reduced voting rights organization's ability to register voters irreparably harmed organization). HUD's suspension of the Rule's requirements is doing exactly that to Texas Plaintiffs. Moreover, HUD's action forces Texas Plaintiffs to expend more resources to bring fair housing to the Hidalgo County area. For example, Texas Housers must meet regularly with community groups in Hidalgo County to keep them engaged in long-term efforts to secure

fair housing, rather than being able to mobilize less frequently for a comprehensive effort. Texas Housers must appear regularly at public hearings and otherwise press local government officials to address discrete fair housing issues. Henneberger Decl. ¶¶ 13, 23-24. Without the focused AFH process, these efforts necessarily will be both less effective and less efficient, requiring more resource expenditure for less mission advancement.

Similarly, in Corpus Christi, Texas Plaintiffs consulted extensively with local advocates and submitted comments regarding policies necessary to equitably address the devastating impact of Hurricane Harvey on the City of Corpus Christi and surrounding region. Henneberger Decl. ¶ 16; Sloan Decl. ¶ 21. The City barely acknowledged these issues in the AFH it submitted to HUD on January 4, 2018, a day before HUD suspended the AFH process. Under the AFFH Rule's procedures, Texas Plaintiffs would be able to comment to HUD regarding this failure to meaningfully address important fair housing issues. After an initial non-acceptance of the defective AFH, Texas Plaintiffs would be able to work with Corpus Christi to grapple seriously with these concerns in a revised AFH, then hold the City accountable for executing the actions it promised in that AFH. Now, Texas Plaintiffs have no such centralized process for requiring the City to conduct disaster recovery equitably, even as hundreds of millions of dollars in federal disaster relief money flow to the region. In order to ensure equitable disaster recovery, they will have to expend resources laboriously monitoring the use of this federal money on a project-by-project basis across the state. Henneberger Decl. ¶ 15.

The Texas Plaintiffs will continue to promote fair housing, but they have lost the benefit of the Rule's substantive and procedural requirements, pursuant to which municipalities must consult with them at regular intervals; review and engage with their comments and concerns; reach out to community members; and proactively consider and respond to specific fair housing

issues. Jurisdictions such as Hidalgo County and the cities participating in its Consortium that should be implementing fair housing initiatives right now are not doing so because of HUD's action. Other jurisdictions that have AFHs due relatively soon are failing to engage in the process because of HUD's suspension of the Rule's requirements and the uncertainty that creates. See Henneberger Decl. ¶ 17. Texas Plaintiffs also have lost the benefit of HUD's review of submitted AFHs (alongside Texas Plaintiffs' comments on them), along with the prospect of HUD's non-acceptance of AFHs that inadequately assess barriers to fair housing or fail to make concrete promises to correct them. For all these reasons, HUD's suspension of local government program participants' obligations under the AFFH Rule and its own requirement to supervise those local governments is "at loggerheads" with Texas Plaintiffs' mission and "has made the organization[s'] activities more difficult," *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1429-30 (D.C. Cir. 1996) (internal quotation marks, citation, and emphasis omitted).

In addition, due to HUD's action, Texas Plaintiffs have had to divert resources to activities that would be unnecessary with the AFFH Rule effective. Those include writing letters, seeking meetings, and otherwise educating a host of jurisdictions about how to fulfill their obligations to affirmatively further fair housing in the absence of the AFH process. Sloan Decl. ¶¶ 26-31; Henneberger Decl. ¶¶ 17, 19. They have to expend resources convincing jurisdictions to take steps that would have been mandatory under the AFFH Rule. *See Open Communities Alliance*, 286 F. Supp. 3d at 178 (finding irreparable harm caused by need for similar diversion of resources to advocating for entities to do voluntarily what they would have been required to do under suspended rule). They also will have to address discrete fair housing issues one by one, rather than having one process in which a jurisdiction resolves how it will handle multiple fair housing issues. *See, e.g.*, Sloan Decl. ¶¶ 25-26, 31; Henneberger Decl. ¶¶ 17, 19, 22.

Moreover, Texas Plaintiffs have had to forego other planned activities as a result, including research, data analysis, legal support, and public education in response to issues created by Hurricane Harvey. Henneberger Decl. ¶¶ 20-21. They also planned, but have been forced to delay, projects to protect the land rights of African Americans who own "heir property" (land passed down informally from generation to generation without recorded transactions) and to provide input on the revision of Austin's zoning code. Sloan Decl. ¶ 32. *See Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1140-41 (D.C. Cir. 2011) ("diversion of resources to programs designed to counteract the injury" to an organization's mission constitutes injury).

B. HUD's Action Is Harming NFHA.

The irreparable harm that Texas Plaintiffs are suffering in one region exemplifies the harm that NFHA and its members are suffering around the country. NFHA is a nationwide alliance of private, non-profit fair housing organizations. Its mission is to promote residential integration and combat discrimination in housing based on race, national origin, disability, and other protected classes covered by federal, state, and local fair housing laws. It accomplishes this mission through, among other things, public policy initiatives, member education, advocacy, community development, investigations, and enforcement. Rice Decl. ¶¶ 1-2.

Because it is so critical to NFHA's mission that local jurisdictions comply with their statutory obligation to affirmatively further fair housing, NFHA has worked for many years to encourage HUD to do more to enforce that requirement. When HUD has been unwilling to do so, NFHA has had to expend resources in an effort to secure the outcomes that the Fair Housing Act requires. For example, when HUD's *Fair Housing Planning Guide* proved inadequate as a template for developing AIs, NFHA developed and disseminated its own template, which was widely distributed and used nationally. Rice Decl. ¶ 5. Because of its experience with the failed

AI process, and its commitment to addressing segregation in America, NFHA was among the leading advocates involved in educating the fair housing community and policymakers about the AI process's failures and pushing for the creation of the AFFH Rule. Rice Decl. ¶¶ 7, 9-13. NFHA was among the groups that created and supported the National Commission on Fair Housing and Equal Opportunity, a bi-partisan group headed by two former HUD Secretaries that concluded in 2008 that the AI process had failed and recommended specific changes that were part of the impetus for the AFFH Rule. Rice Decl. ¶ 8.

HUD's withdrawal of the Assessment Tool and suspension of the AFFH Rule's requirements—requirements that NFHA helped shape and that facilitate NFHA's ability, directly and through its members, to successfully advocate for the advancement of fair housing priorities around the country—"unquestionably make[s] it more difficult" for NFHA "to accomplish [its] primary mission." *League of Women Voters*, 838 F.3d at 9. NFHA engages in a variety of activities aimed at advancing fair housing priorities around the country. The AFFH Rule's requirements, when in effect, make NFHA's efforts more efficient and effective. *See* Goldberg Decl. ¶¶ 6, 13. Not only do the Rule and the Assessment Tool provide NFHA and its members with a greater ability to ensure that fair housing considerations are included in municipal planning decisions, but their standardized process and formalized rules make it much simpler for NFHA to advise and assist its members in effectively engaging at the local level. HUD now has removed those regulatory benefits, directly harming NFHA's ability to achieve fair housing and help its members do the same. Rice Decl. ¶ 27; Goldberg Decl. ¶¶ 6-7, 9, 13.

In response to HUD's unlawful action, NFHA has had to redirect considerable financial and human resources to educating and counseling its members, civil rights organizations, and other stakeholders about HUD's action and how to achieve fair housing locally under more

challenging circumstances. Rice Decl. ¶¶ 22-25; Goldberg Decl. ¶¶ 9-11. NFHA has begun giving presentations on those subjects, including to its members, the members of the Americans for Financial Reform Housing and Foreclosure Working Group, and the Leadership Conference on Civil and Human Rights Fair Housing and Fair Lending Task Force, *see* Goldberg Decl. ¶ 11 (describing three such presentations on HUD's action and how to combat its effects). It is developing written materials to help members, as well as providing technical support to individual members, many of which were working with localities in the AFH process at the time that HUD initially suspended the Rule on January 5 and, accordingly, face challenges like those described above with respect to the Texas Plaintiffs. *See* Goldberg Decl. ¶ 13. NFHA has individually educated and counseled at least 16 of its members on the ramifications of HUD's actions on efforts to ensure robust fair housing planning. *See* Goldberg Decl. ¶ 12.

The resources NFHA must spend on such activities will only increase, as more local governments begin preparing their Consolidated Plans. Without HUD oversight, NFHA is preparing to devote substantial resources to outreach, public education, and advocacy to assist its members and others working to ensure that jurisdictions formulate AIs that are robust as possible (given the circumstances) and then monitoring compliance. Through this work, NFHA plans to blunt, as best it can, the negative impact of HUD's action. Goldberg Decl. ¶ 13. This work would be entirely unnecessary if participation in the AFH process remained mandatory, as it was before HUD's action. *See Open Communities Alliance*, 286 F. Supp. 3d at 178 (finding irreparable harm where plaintiff, to accomplish its mission as effectively, would have to convince entities to do voluntarily what they would have been required to do under suspended rule).

III. The Balance of Equities and the Public Interest Support Plaintiffs' Request for Preliminary Relief.

In evaluating whether to issue a preliminary injunction, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (internal quotation marks and citation omitted). In addition to evaluating the relative effect of the injunction on each party, a court must also consider whether the requested relief would serve the public interest, and these inquiries are often intertwined. *See League of Women Voters*, 838 F.3d at 12. As described above, Plaintiffs are experiencing serious and irreparable harm that warrants immediate injunctive relief. No countervailing consideration makes such an injunction improper.

A preliminary injunction would not harm HUD. HUD would not be harmed by being ordered to follow the AFFH regulation, which was based on a lengthy administrative record and notice-and-comment rulemaking, and HUD's grantees would not be harmed by being required to follow a process that is part of a properly promulgated regulation and ensures that they carry out their statutory duty to affirmatively further fair housing. HUD did not find that either it or its grantees were experiencing harm beyond the burdens specifically contemplated.

Moreover, "[t]here is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters*, 838 F.3d at 12 (citing *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511–12 (D.C. Cir. 2016); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)). It is well-established, for the preliminary injunction analysis, that the "[p]ublic interest is served when administrative agencies comply with their obligations under the APA." *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (internal quotation marks and citation omitted); *Open Communities Alliance*, 268 F. Supp. 3d at 179 (noting "substantial public interest" in having agencies abide by the APA); *Patriot, Inc. v. U.S. Dep't of Hous. and Urban Dev.*, 963 F. Supp. 1,

6 (D.D.C. 1997) ("[T]he public interest is best served by having federal agencies comply with the requirements of federal law, particularly the notice and comment requirements of the APA") (internal citations omitted); *Gulf Coast Mar. Supply, Inc. v. United States*, 218 F. Supp. 3d 92, 101 (D.D.C. 2016) (same); *see also Cresote Council v. Johnson*, 555 F. Supp. 2d 36, 40 (D.D.C. 2008) (there is a "general public interest in open and accountable agency decision-making").

That is particularly true with respect to the AFFH Rule, which was intended to provide—and already has provided—"substantial benefit not only for program participants but also for the communities they serve and the United States as a whole." 80 Fed. Reg. 42,273. The Rule promotes residential integration and equal access to opportunity. It also promotes government planning that is accountable and responsive to local needs. In promulgating the rule, HUD found that any burdens the Rule might impose on itself and on local jurisdictions were outweighed by the Rule's benefits to the country. Nothing has changed that would upset that balance.

CONCLUSION

This Court should grant Plaintiffs a preliminary injunction requiring HUD to rescind its notice withdrawing the Assessment Tool, reinstate the Assessment Tool, and take all other necessary steps to ensure implementation of the AFFH Rule. This Court also should grant summary judgment to Plaintiffs and enter final judgment in Plaintiffs' favor.

Dated: May 29, 2018

Respectfully submitted,

/s/ Sasha Samberg-Champion

Sasha Samberg-Champion (DC Bar No. 981553)
Sara Pratt (DC bar admission pending, admitted *pro hac vice*)
Michael G. Allen (DC Bar No. 409068)
RELMAN, DANE & COLFAX PLLC
1225 19th Street, NW, Suite 600
Washington, DC 20036
(202) 728-1888

ssamberg-champion@relmanlaw.com
spratt@relmanlaw.com
mallen@relmanlaw.com

Jon Greenbaum (DC Bar No. 489887)
Joseph D. Rich (DC Bar No. 463885)
Thomas Silverstein (DC Bar No. 1552406)
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave., NW
Washington, DC 20005
(202) 662-8331
jrich@lawyerscommittee.org

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

Rachel Goodman
Sandra Park
AMERICAN CIVIL LIBERTIES UNION
125 Broad St., 18th Floor
New York, NY 10004
(212) 549-2500
rgoodman@aclu.org
spark@aclu.org

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

Ajmel Quereshi (DC Bar No. 1012205)
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
1444 I Street NW
Washington, DC 20005

(202) 682-1300
aquereshi@naacpldf.org

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

Allison M. Zieve (DC Bar No. 424786)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for all Plaintiffs

Morgan Williams (*pro hac vice* application forthcoming)
NATIONAL FAIR HOUSING ALLIANCE
1101 Vermont Ave. NW, Suite 710
Washington, DC 20005
(202) 898-1661
mwilliams@nationalfairhousing.org

Attorney for Plaintiff National Fair Housing Alliance

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

Attorney for Plaintiff Texas Appleseed