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**SUBMITTED VIA REGULATIONS.GOV**

Office of the General Counsel  
Rules Docket Clerk  
Department of Housing and Urban Development  
451 Seventh Street SW, Room 10276  
Washington, DC 20410-0001

**Re: HUD’s Proposed Rule on Affirmatively Furthering Fair Housing,  
Docket No. FR-6123-P-02 (RIN 2577-AA97)**

To Whom It May Concern:

We write to you on behalf of the American Civil Liberties Union Foundation (“ACLU”) in response to the U.S. Department of Housing and Urban Development’s (“HUD’s”) Proposed Rulemaking: Affirmatively Furthering Fair Housing (hereinafter “Proposed AFFH Rule”), which was published in the Federal Register on January 14, 2020 (RIN 2577-AA97; HUD Docket No. FR-6123-P-02). We urge HUD to withdraw the Proposed AFFH Rule in its entirety, and to leave intact its existing “Affirmatively Furthering Fair Housing: Final Rule,” 82 Fed. Reg. 42272 (July 16, 2015) (hereinafter “Current AFFH Rule”).

For nearly 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the law of the United States guarantee to everyone in the country. With more than three million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the right of every individual to access housing and housing financing free of discrimination on the basis of race, color, religion, gender, sexual orientation, gender identity or expression, age, disability, national origin, familial or marital status, status as a recipient of public assistance, or record of arrest or conviction. In our work, we have advocated at the state and federal level for increased enforcement of civil rights in the housing context, the elimination of housing barriers for survivors of domestic violence and sexual assault, greater choice in housing options for those who receive public assistance, the development of housing programs that promote integration, including among those with a disability that necessitates a reasonable accommodation, and for the removal of housing restrictions on people with past arrest or conviction records. Through litigation, the ACLU has also challenged violations of the Fair Housing Act (“FHA”) and the Equal Credit Opportunity Act (“ECOA”) by private and government actors, and brought challenges to discriminatory government policies on site selection, tenant selection and relocation, Section 8 Voucher administration, and exclusionary suburban housing and zoning policies.

The ACLU strongly opposes the adoption of HUD’s Proposed AFFH Rule, which would not promote integration or decrease segregation in this country. These core fair housing considerations are only mentioned in passing—three and four times, respectively. Whereas the

continued implementation of the Current AFFH Rule establishes a fair housing planning framework that emphasizes meaningful community participation, requires HUD review, and provides resources to ensure that HUD’s grantees complete adequate fair housing analyses, the Proposed AFFH Rule would make changes that are inconsistent with HUD’s statutory obligation to affirmatively further fair housing, codified at 42 U.S.C. § 3608(e)(5), and increase the exclusion of and housing disadvantage for vulnerable and marginalized groups. HUD must withdraw the Proposed AFFH Rule and instead fully implement the Current AFFH Rule.

## **I. The Current AFFH Rule Comports with the Statutory Text of the Fair Housing Act and Decades of Case Law**

Passed less than a week after a white supremacist assassinated Martin Luther King, Jr., the FHA was intended to redress the decades of discrimination that led to deeply entrenched and ongoing residential segregation across the United States. This intent is revealed not only by the FHA’s statutory text and legislative history, but also by the context in which it was passed. During the summer of 1967, nearly 160 riots erupted across the United States, prompted in part by government policies that created and maintained segregated housing—policies that artificially limited housing choices for Black people and other minority groups, concentrated areas of poverty, and perversely inflated the prices of the limited housing available to those groups.<sup>1</sup> The negative consequences of residential segregation extended far beyond the housing sphere, and imposed significant impediments to economic mobility, access to education and employment, and access to community resources. In enacting the FHA, Congress recognized that “where a family lives, where it is allowed to live, is inextricably bound up with better education, better jobs, economic motivation, and good living conditions.”<sup>2</sup>

The FHA prohibits discrimination in housing because of an individual’s race, color, national origin, religion, sex, familial status, or disability. But Congress went even further by seeking to replace segregation in America with “truly integrated and balanced living patterns”<sup>3</sup> and by requiring recipients of HUD funding to affirmatively further fair housing in all programs and activities related to housing.<sup>4</sup> Fair housing, as understood by Congress, meant integrated housing and communities, and it explicitly gave HUD a mandate to affirmatively pursue it.<sup>5</sup>

Federal courts across the country have recognized HUD’s statutory duty under the FHA to undo historic patterns of segregation and to afford access to housing opportunities to

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<sup>1</sup> See Nat’l Advisory Comm’n on Civil Disorders, *Report of the National Advisory Commission on Civil Disorders: Summary of Report* (1968), <https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf>; see also Marcus Casey & Bradley Hardy, *50 years after the Kerner Commission report, the nation is still grappling with many of the same issues*, BROOKINGS (Sept. 25, 2018), <https://www.brookings.edu/blog/up-front/2018/09/25/50-years-after-the-kerter-commission-report-the-nation-is-still-grappling-with-many-of-the-same-issues/>.

<sup>2</sup> 114 Cong. Rec. 2276-2707 (Oct. 14, 1968).

<sup>3</sup> *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting the Fair Housing Act’s co-sponsor, Senator Walter Mondale).

<sup>4</sup> 42 U.S.C. § 3608(e)(5) (previously codified at 42 U.S.C. § 3608(d)(5)).

<sup>5</sup> See Richard Rothstein, *Fair Housing Act Bars Policies that Segregate, even if Segregation is not Intentional*, WORKING ECONS. BLOG (July 6, 2015), <https://www.epi.org/blog/supreme-court-fair-housing-act-bars-policies-that-segregate-even-if-segregation-is-not-intentional/>.

marginalized communities. In *Shannon v. U.S. Department of Housing and Urban Development*, the first appellate decision to address the FHA’s AFFH provision, the U.S. Court of Appeals for the Third Circuit interpreted § 3608 as imposing a mandate on HUD to affirmatively promote fair housing.<sup>6</sup> In upholding the plaintiffs’ challenge to HUD’s decision to approve a rent-supplement contract and issue mortgage insurance for a housing development that was likely to increase de facto racial segregation in the project location, the Third Circuit emphasized that Congress required HUD to pursue the national fair housing policy of eradicating housing discrimination and segregation in all of its actions:

At least under [the FHA], more is required of HUD than a determination that some rent supplement housing is located outside ghetto areas. Even though previously located rent supplement projects were located in non-ghetto areas[,] the choice of location of a given project could have the ‘effect of subjecting persons to discrimination because of their race \* \* \* or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity as respect [to] persons of a particular race.’ That effect could arise by virtue of the undue concentration of persons of a given race, or socio-economic group, in a given neighborhood.<sup>7</sup>

The Third Circuit continued by commenting that:

[Prior to the enactment of the FHA,] the administrators of the federal housing programs could, by concentrating on land use controls, building code enforcement, and physical conditions of buildings, remain blind to the very real effect that racial concentration has had in the development of urban blight. *Today such color blindness is impermissible. Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy.*<sup>8</sup>

Accordingly, HUD is required to consider “the relevant racial and socio-economic information necessary for compliance with its [FHA] duties” in deciding whether to approve the site selection for a low-income housing development.<sup>9</sup>

Consistent with the Third Circuit’s holding in *Shannon*, the U.S. Court of Appeals for the Second Circuit held that HUD “is under an obligation to act affirmatively to achieve integration in housing,” and that the source of its duty to affirmatively further fair housing “is both constitutional and statutory.”<sup>10</sup> The Second Circuit emphasized that § 3608 placed an affirmative duty on the HUD Secretary to always consider “the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built” and to take

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<sup>6</sup> 436 F.2d 809, 816 (3d Cir. 1970).

<sup>7</sup> *Id.* at 820 (quoting 24 C.F.R. § 1.4(b)(2)(i)).

<sup>8</sup> *Id.* at 820–21 (emphasis added).

<sup>9</sup> *Id.*

<sup>10</sup> *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1133 (2d Cir. 1973) (citing *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969) & 42 U.S.C. § 3608).

all possible steps to pursue “the goal of open, integrated residential housing patterns and to prevent the increase of segregation . . . of racial groups whose lack of opportunities the [FHA] was designed to combat.”<sup>11</sup>

The U.S. Court of Appeals for the First Circuit similarly interpreted the text of § 3608 as requiring HUD to do more than “simply not discriminate.”<sup>12</sup> Specifically, the First Circuit found that “many private persons and local governments have practiced discrimination for many years and . . . at least some of them might be tempted to continue to discriminate even though forbidden to do so by law.”<sup>13</sup> The First Circuit concluded that HUD’s nondiscrimination, on its own, could not “significantly ‘further’ the ending of such discrimination by others.”<sup>14</sup> Instead, HUD was required to consider the effect of awarding HUD funding to particular projects “on the racial and socio-economic composition of the surrounding area.”<sup>15</sup>

Likewise, in *Garrett v. City of Hamtramck*, the federal district court interpreted the AFFH mandate to require that HUD “analyze, consider, [and] affirmatively utilize opportunities to further the ends of fair housing in its approving and funding” of a housing development.<sup>16</sup> HUD failed to meet its AFFH obligations when it approved a development plan that had no provisions for providing housing opportunities within the income ranges of a majority of Black residents and no plans for housing those residents who would be displaced. HUD’s obligation to affirmatively further fair housing required that the agency reject plans that would reinforce segregated housing patterns and deny the rights of the Black residents in Hamtramck.<sup>17</sup>

Faced with these and other similar federal court decisions construing § 3608, Congress left the text of that section’s AFFH mandate intact when it amended other portions of the FHA in 1988. In doing so, Congress accepted and agreed with existing judicial precedent concerning the obligations of HUD and its grantees to proactively pursue integration and address segregation in all aspects of agency action. Indeed, “Congress is presumed to be aware of a[] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.”<sup>18</sup>

Following the 1988 Fair Housing Amendments Act and through the present day, courts have continued to interpret and apply § 3608 to require HUD, as well as its grantees, to “eradicate practices . . . that are contrary to the advancement of . . . ‘fair housing.’”<sup>19</sup> In *Thompson v. U.S. Department of Housing & Urban Development*, the federal district court held that HUD’s obligations under § 3608(e)(5) required the agency to apply “an approach of regionalization”—defined as “policies whereby the effects of past segregation in Baltimore City

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<sup>11</sup> *Id.* at 1134.

<sup>12</sup> *N.A.A.C.P., Boston Chapter v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 154 (1st Cir. 1987).

<sup>13</sup> *Id.* at 154.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 157 (internal quotation marks omitted).

<sup>16</sup> 335 F. Supp. 16, 27 (E.D. Mich. 1971), *supplemented*, 357 F. Supp. 925 (E.D. Mich. 1973), *rev’d on other grounds*, 503 F.2d 1236 (6th Cir. 1974),

<sup>17</sup> *Id.*

<sup>18</sup> *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (citations omitted).

<sup>19</sup> *County of Westchester v. U.S. Dep’t of Hous. & Urban Dev.*, 802 F.3d 413, 434–35 (2d Cir. 2015).

public housing may be ameliorated by providing housing opportunities . . . beyond the boundaries of Baltimore City”—as “integral to desegregation in the Baltimore Region.”<sup>20</sup> By limiting its focus to inside the boundaries of Baltimore City, HUD had “failed to meet [its] obligations under the Fair Housing Act to promote fair housing affirmatively.”<sup>21</sup> The district court further held that § 3608 is intended to hold HUD “to a high standard, in this case to have a commitment to desegregation.”<sup>22</sup> HUD’s funding pattern in the Baltimore region failed to achieve significant desegregation, in violation of its § 3608 mandate.<sup>23</sup> Similarly, in *County of Westchester v. U.S. Department of Housing and Urban Development*, the Second Circuit held that HUD’s own obligations to affirmatively further fair housing justified HUD’s insistence that Westchester County analyze exclusionary zoning within the county as part of a fair housing assessment in order to receive federal funding from HUD.<sup>24</sup>

Consistent with this case law and the FHA’s statutory text, HUD issued the Current AFFH Rule, which requires states, local governments, and public housing authorities that receive HUD grants to complete a robust analysis of segregation and fair housing disparities in their communities as a condition of ongoing receipt of HUD funding. As discussed in more detail below, the Current AFFH Rule is faithful to HUD’s statutory obligation, as it had been long interpreted and construed by federal courts across the country.

## **II. The Proposed AFFH Rule Deviates Sharply from the Current AFFH Rule and Would Abdicate HUD’s Responsibility to Insist on the Pursuit of Integration and Other Fair Housing Goals**

The Proposed AFFH Rule would eviscerate the critical fair housing advancements that the Current AFFH Rule is designed to achieve and will substantially weaken HUD’s authority and ability to meet its affirmatively furthering fair housing obligations under the FHA.

The Current AFFH Rule has been critical in fulfilling the intended goals of the FHA to promote “open, integrated residential housing patterns and to prevent the increase of segregation” of marginalized communities.<sup>25</sup> It requires that jurisdictions and housing authorities that receive HUD funding identify the policies, practices, or conditions that shape disparities in access to housing and broader opportunities for communities of color, persons with disabilities, and other groups protected by the FHA. These entities must also identify meaningful goals to address issues such as residential segregation and housing cost burdens. With its promulgation in 2015, the Current AFFH Rule established effective mechanisms for ensuring that recipients of federal housing funds identify local fair housing problems and commit to taking concrete steps to correct them under HUD’s supervision and with meaningful community input.<sup>26</sup>

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<sup>20</sup> *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 408 (D. Md. 2005). ,

<sup>21</sup> *Id.* at 409.

<sup>22</sup> *Id.* at 417.

<sup>23</sup> *Id.* at 461.

<sup>24</sup> *Westchester*, 802 F.3d at 434–35.

<sup>25</sup> *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977).

<sup>26</sup> 24 C.F.R. § 5.154(d).

Notably, the Current AFFH Rule requires that jurisdictions prepare and submit an Assessment of Fair Housing (“AFH”) detailing the jurisdiction’s diagnosis of fair housing impediments and a plan to overcome them.<sup>27</sup> The Current AFFH Rule also requires jurisdictions to provide a comprehensive analysis of, among other things, residential racial segregation, racially or ethnically concentrated areas of poverty, disparities in access to opportunity, and housing needs of people with disabilities.<sup>28</sup> Through the AFH process, jurisdictions garner considerable input from their communities, accept guidance and feedback from fair housing organizations and other stakeholders, and review their recommendations with HUD.

In the years since it went into effect, the Current AFFH Rule has led jurisdictions to commit to concrete reforms that will improve the lives of their most vulnerable residents and create truly integrated and inclusive communities, in accordance with the FHA’s goals. One study, for example, revealed that the majority of AFHs submitted by jurisdictions contained more concrete goals with a quantifiable metric of success as a result of the Current AFFH Rule.<sup>29</sup> Moreover, through the Current AFFH Rule’s more thorough AFH analysis, the City of Philadelphia found that it had a serious eviction crisis that the City had not adequately addressed due to its failure to fully recognize the scope of the problem, and that the eviction crisis was driving family instability.<sup>30</sup> The City’s AFH also revealed that the lack of affordable housing in Philadelphia was increasing rates of eviction.<sup>31</sup> Through the more robust AFH process required by the Current AFFH Rule, the City was able to identify that these issues were heightening housing instability and to formulate a proactive response to ensure better assistance and access to housing opportunities for residents.<sup>32</sup>

When a group of fair housing advocates challenged the 2018 suspension of the Current AFFH Rule,<sup>33</sup> New York State moved to join, calling HUD’s suspension of the Current AFFH Rule “unconscionable.”<sup>34</sup> A coalition of six states and six cities submitted an amicus brief in support of the fair housing advocates’ challenge, asserting that suspension of the Current AFFH Rule would undo “a carefully tailored regulator scheme” that took years to develop and reflected the interests of local and state government stakeholders.<sup>35</sup> In its amicus brief, the coalition

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* §§ 5.154(d)(2)-(3).

<sup>29</sup> Justin Steil & Nicholas Kelly, *Survival of the Fairest: Examining HUD Reviews of Assessments of Fair Housing*, 29.5 Housing Policy Debate 736, 736–51 (2019), <https://furtheringfairhousing.mit.edu/sites/default/files/documents/Survival%20of%20Fairest%20DRAFT%20Aug%2013.pdf>.

<sup>30</sup> Nat’l Fair Hous. Alliance, *Furthering Fair Housing*, <https://nationalfairhousing.org/affirmatively-furthering-fair-housing/>.

<sup>31</sup> *Id.*

<sup>32</sup> Nat’l Fair Hous. Alliance, *Furthering Fair Housing*, <https://nationalfairhousing.org/affirmatively-furthering-fair-housing/>.

<sup>33</sup> *Nat’l Fair Hous. Alliance, Inc. v. Carson*, Civ. Action No. 1:18-cv-01076 (D.D.C. filed May 8, 2018).

<sup>34</sup> Ben Lane, *New York suiting HUD, Ben Carson to enforce Obama fair housing rule*, HOUSINGWIRE (May 14, 2018), <https://www.housingwire.com/articles/43362-new-york-suing-hud-ben-carson-to-enforce-obama-fair-housing-rule/>.

<sup>35</sup> Amicus Br. of the States of Maryland, California, Massachusetts, Virginia, and Washington; the District of Columbia; and the Cities of Austin, Texas; New Orleans, Louisiana; Oakland, California; Portland, Oregon; Seattle, Washington; and Toledo, Ohio as *Amici Curiae* in Support of Pls.’ Renewed Mot. for Prelim. Inj. & Summ. J., *Nat’l Fair Hous. Alliance v. Carson*, No. 18-cv-01076 (D.D.C. filed June 5, 2018) (internal citations omitted).

emphasized that the Current AFFH Rule is invaluable in assisting HUD grantees to meet their obligation to promote fair housing opportunities, explaining that the Current AFFH Rule:

provides clarity about what *amici* must do in order to affirmatively further fair housing in their jurisdictions. The Rule establishes, for the first time, a definition for the term “affirmatively further fair housing,” which includes “taking meaningful actions” to, in addition to complying with civil rights and fair housing laws, “address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, [and] transforming racially and ethnically concentrated areas of poverty into areas of opportunity.” Critically, the Rule replaced the Analysis of Impediments model and required, instead, that program participants create an Assessment of Fair Housing using the Local Assessment Tool. The Local Assessment Tool, developed through regular notice and comment rulemaking, requires local governments to answer a series of standardized questions designed to properly identify and assess fair housing issues in developing their housing development goals. Consequently, under the Rule, there is now a standardized reporting process that provides jurisdictions with the data and guidance necessary to properly evaluate and assess whether they are meeting their obligations. And, crucially, whereas the Analysis of Impediments process left grantees shouldering all responsibility with no guarantee of feedback from HUD, the Affirmatively Furthering Fair Housing Rule represents a commitment of resources and support by HUD to substantively assist grantees in meeting their obligations under the law. HUD’s May 23, 2018 notice upends all these improvements for local governments.<sup>36</sup>

The coalition further highlighted that the short period of the Current AFFH Rule’s implementation already resulted in many positive outcomes due to the “high-quality data and assessment tools provided by HUD . . . , the Rule’s focus on community engagement, and the Rule’s requirement to form goals to address barriers to fair housing.”<sup>37</sup>

The State of California also took legislative steps to respond to HUD’s suspension of the Current AFFH Rule, recognizing that a robust AFFH analysis is critical to addressing the deeply entrenched patterns of segregation and other obstacles to fair housing choice for all residents, despite HUD’s sudden refusal to lead. In response to the suspension of the Current AFFH Rule, the California legislature passed Assembly Bill 686 (“AB-686”), which Governor Brown signed into law at the end of 2018. AB-686 introduced an AFFH obligation into state law; defined “affirmatively furthering fair housing” to include taking meaningful actions that “overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity” for communities of color, persons with disabilities, and others protected by California law; required California State, cities, counties, and public housing authorities to administer their programs and activities related to housing and community development in a way that affirmatively furthers fair housing; prohibited California State, cities, counties, and public

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<sup>36</sup> *Id.* at 5–6.

<sup>37</sup> *Id.* at 6–8.

housing authorities from taking actions materially inconsistent with their AFFH obligation; required that the AFFH obligation be interpreted consistent with HUD's 2015 regulation, regardless of federal action regarding the regulation; added an AFFH analysis to the Housing Element (an existing planning process that California cities and counties must complete) for plans that are due beginning in 2021; and required jurisdictions to examine fair housing issues, such as segregation and resident displacement, and identify fair housing goals, in the Housing Element's AFFH analysis.<sup>38</sup> Accordingly, the AFH component of the Current AFFH Rule has been a critical tool in addressing fair housing issues and fulfilling Congress's clear commitment to desegregation in passing the FHA.

By contrast, the Proposed AFFH Rule would weaken fair housing advancements throughout the country. To provide a few examples, the Proposed AFFH Rule:

- Does not require jurisdictions and housing authorities to directly examine or address the legacy of unequal housing opportunities in our communities. Instead, it makes fair housing an afterthought, rather than the starting point of a discussion about a systemic lack of equal housing opportunities.
- Minimizes oversight and accountability for entities that receive federal housing dollars. Communities would not be required to consider whether their policies advance housing opportunities for groups that have historically experienced housing discrimination. Often, communities would not even be required to explain their reasoning when identifying fair housing barriers.
- Discounts the importance of public housing authorities' policies. Housing authorities can greatly impact fair housing opportunities within programs such as public housing or the Section 8 Voucher program. Despite this, HUD's proposal would excuse public housing authorities from conducting any meaningful fair housing analysis.
- Attacks protections for tenants, workers, and the environment. While the Proposed AFFH Rule specifically identifies rent control as a potential obstacle to fair housing choice, it omits critical issues such as displacement of communities of color in tight rental markets. Furthermore, the proposal tries to use this rule to disparage important labor and environmental standards, under the guise of making housing affordable.
- Eliminates a key opportunity for local resident input. The Current AFFH Rule requires communities and housing authorities to have a robust public hearing and comment opportunity specifically focused on fair housing issues. The Proposed AFFH Rule would eliminate the separate hearing and comment requirement, meaning that fair housing issues will not receive the individualized attention they deserve.

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<sup>38</sup> Nat'l Hous. Law Project, *Affirmatively Furthering Fair Housing: California's New Law (Assembly Bill 686)*, <https://www.nhlp.org/wp-content/uploads/AB-686-Fact-Sheet-Feb.-2019.pdf>.



- Eliminates the Current AFFH Rule’s AFH tool, developed in response to jurisdictions’ requests for uniform guidance regarding how to meet their AFFH obligations.
- Equates an increased supply of housing with fair housing choice through its modified AFFH certification. But simply increasing the supply of housing will not necessarily result in housing that is affordable to low-income (much less extremely low-income) people, and it is even less likely to reduce or eliminate discriminatory attitudes, policies, practices, or entrenched segregation.

### **III. The Proposed AFFH Rule Will Undermine Access to Housing and Community Assets for Marginalized and Vulnerable Groups**

Under the Current AFFH Rule, jurisdictions across the country have identified local fair housing issues and committed to concrete measures to eradicate barriers for communities of color, people with disabilities, survivors of gender-based violence, and other marginalized and vulnerable communities. The Proposed AFFH Rule will undo these efforts and undermine access to fair housing and community assets for people in all of the statutorily protected classifications. In this Comment, we focus on how the Current AFFH Rule supports access to fair housing and community assets for survivors of gender-based violence (the vast majority of whom are women), people of color, and people with disabilities, and how devastating the Proposed AFFH Rule’s rollback would be to these groups.

#### **A. Survivors of Gender-Based Violence**

The Current AFFH Rule has served as a powerful tool for ensuring that jurisdictions and program participants consider goals for mitigating fair housing issues and disparities faced by survivors of gender-based violence—the vast majority of whom are women. Domestic violence is a primary cause of homelessness for women and children in the United States.<sup>39</sup> Over 90% of homeless women report having experienced domestic abuse or sexual violence in their lives, while over 50% of homeless women report that domestic violence was the immediate cause of their homelessness.<sup>40</sup> Access to housing is absolutely critical for survivors,<sup>41</sup> as lack of safe and

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<sup>39</sup> See ACLU Women’s Rights Project, *Domestic Violence and Homelessness* (2006), <http://www.aclu.org/pdfs/dvhomelessness032106.pdf>; see also U.S. Conference of Mayors, *A Status Report on Hunger and Homelessness in America’s Cities: A 25-City Survey* (Dec. 2014), <https://www2.cortland.edu/dotAsset/655b9350-995e-4aae-acd3-298325093c34.pdf>.

<sup>40</sup> Monica McLaughlin & Debbie Fox, National Network to End Domestic Violence, *Housing Needs of Victims of Domestic Violence, Sexual Assault, Dating Violence, and Stalking* (2019), [https://nlihc.org/sites/default/files/AG-2019/06-02\\_Housing-Needs-Domestic-Violence.pdf](https://nlihc.org/sites/default/files/AG-2019/06-02_Housing-Needs-Domestic-Violence.pdf).

<sup>41</sup> See U.S. Dep’t of Hous. & Urban Dev., *Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act and the Violence Against Women Act* (Feb. 9, 2011), <https://www.hud.gov/sites/documents/FHEODOMESTICVIOLGUIDENG.PDF>; see also U.S. Dep’t of Hous. & Urban Dev., *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police and Emergency Services* (Sept. 13, 2016), <https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF>.

affordable housing options is regularly reported as a primary barrier to escaping abuse.<sup>42</sup> Homelessness can also be a precursor to additional violence, because a survivor is at the greatest risk of violence when separating from an abusive partner.<sup>43</sup>

HUD has repeatedly recognized housing discrimination against domestic violence survivors as a significant fair housing issue,<sup>44</sup> as women account for the vast majority of domestic violence survivors.<sup>45</sup> Indeed, the ACLU has litigated repeatedly on behalf of domestic violence survivors across the country facing eviction or threats of eviction as a result of the abuse they have suffered.<sup>46</sup> The harmful effects of housing instability are compounded for Native American women and women of color, who face both increased barriers to housing and disproportionate rates of violence.<sup>47</sup> Housing discrimination against domestic violence survivors also implicates other protected classes. More than half of female domestic violence survivors live in households with children under the age of 10.<sup>48</sup> Access to safe and affordable housing options is critical to prevent homelessness for survivors and their children as they try to escape abusive relationships.<sup>49</sup> Moreover, the rate of violence against women with disabilities is three times higher than the rate of violence against women without disabilities.<sup>50</sup> Additionally, LGBTQ+ individuals experience high rates of domestic violence, while 71% of survivors reported that they were denied shelter because of barriers related to gender identity.<sup>51</sup>

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<sup>42</sup> See Charlene K. Baker et al., *Domestic violence, housing instability, and homelessness: A review of housing policies and program practices for meeting the needs of survivors*, 15 *Aggression & Violent Behavior* 430, 430–39 (2010), [https://b.3cdn.net/naeh/416990124d53c2f67d\\_72m6b5uib.pdf](https://b.3cdn.net/naeh/416990124d53c2f67d_72m6b5uib.pdf).

<sup>43</sup> See *id.* at 431.

<sup>44</sup> See, e.g., U.S. Dep't of Hous. & Urban Dev., *Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act (FHA) and the Violence Against Women Act (VAWA)* (Feb. 9, 2011), <https://www.hud.gov/sites/documents/FHEODOMESTICVIOLGUIDENG.PDF>.

<sup>45</sup> U.S. Dep't of Justice, Office of Justice Programs, *Bureau of Justice Statistics Crime Data Brief: Intimate Partner Violence, 1993-2001* (Feb. 2003); see also Alissa Scheller, *At Least A Third of All Women Murdered in the U.S. Are Killed by Male Partners*, HUFFINGTON POST (Dec. 6, 2017), [https://www.huffpost.com/entry/men-killing-women-domesti\\_n\\_5927140](https://www.huffpost.com/entry/men-killing-women-domesti_n_5927140).

<sup>46</sup> ACLU Women's Rights Project, *Safe at Home: Fair Housing for Survivors of Domestic Violence*, <https://www.aclu.org/other/safe-home?redirect=credirect/33417>; Sandra S. Park, *Achieving Fair Housing for Survivors through Domestic Violence Housing Policies: Lewis v. North End Village* (Oct. 2010), <https://www.aclu.org/other/achieving-fair-housing-survivors-through-domestic-violence-housing-policies-lewis-v-north-end>.

<sup>47</sup> See McLaughlin & Fox, *supra* note 31, at 1; see also Carolyn M. West & Kalimah Johnson, National Online Resource Ctr. on Violence Against Women, *Sexual Violence in the Lives of African American Women* (Mar. 2013), [https://vawnet.org/sites/default/files/materials/files/2016-09/AR\\_SVAAWomenRevised.pdf](https://vawnet.org/sites/default/files/materials/files/2016-09/AR_SVAAWomenRevised.pdf); Smith, S.G., et al., *National Intimate Partner and Sexual Violence Survey (NISVS): 2010-2012 state report* (Apr. 2017), <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf>.

<sup>48</sup> Marielsa Bernard, *Domestic Violence's Impact on Children*, 36-JUN Md. B.J. 10, 12 (May/June 2003).

<sup>49</sup> Meris L. Bergquist, Esq., *After the Violence: Using Fair Housing Laws to Keep Women and Children Safe at Home*, 34-SPG Vt. B.J. 46, 46–47 (Spring 2008).

<sup>50</sup> ACLU et al., *Domestic Violence & Sexual Assault in the United States: A Human Rights Based Approach & Practice Guide* (Aug. 2014), [https://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/dv\\_sa\\_hr\\_guide\\_reduce.pdf](https://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/dv_sa_hr_guide_reduce.pdf).

<sup>51</sup> Nat'l Coal. of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Intimate Partner Violence in 2015* (2016), [http://avp.org/wp-content/uploads/2017/04/2015\\_ncavp\\_lgbtqipvreport.pdf](http://avp.org/wp-content/uploads/2017/04/2015_ncavp_lgbtqipvreport.pdf).

Before the suspension of the Current AFFH Rule’s implementation, the Assessment Tool for Local Governments (LG2017), developed under the 2015 AFFH Rule, listed “[d]isplacement of and/or lack of housing support for victims of domestic violence, dating violence, sexual assault, and stalking” as a possible contributing factor that jurisdictions had to at least consider when crafting their AFHs.<sup>52</sup> Similarly, HUD’s PHA Assessment Tool listed a contributing factor related to the displacement and lack of housing support for survivors.<sup>53</sup> These mechanisms ensured that jurisdictions were accounting for and actively working to eradicate the significant housing barriers faced by survivors of gender-based violence.

Advocates have relied on HUD’s existing AFFH Rule to protect survivors and other protected class members against unjust policies and practices, and to identify barriers to accessing stable housing and other services for survivors:

- **Nuisance Ordinances.** The existing AFFH Rule has been critical in identifying and tackling policies and practices that displace or otherwise result in the lack of housing support for survivors of domestic violence, sexual assault, and stalking.<sup>54</sup> Across the country, municipalities have enacted local ordinances that penalize tenants for seeking police or emergency assistance—often known as “crime-free” or nuisance ordinances. These ordinances often impose a fine or other penalty against a landlord after a rental unit exceeds the threshold number of calls to the police specified by the ordinance. To avoid these penalties, many landlords attempt to abate the so-called nuisance by evicting or threatening to evict the unit’s tenants. In practice, these ordinances disproportionately harm members of protected groups, including people of color, people with disabilities, and survivors of domestic violence. Specifically, survivors seeking police or emergency assistance in response to domestic violence may face eviction for “too many” calls to 911. For several years, the ACLU Women’s Rights Project has challenged these laws on behalf of survivors of domestic violence through federal and state litigation and policy advocacy.<sup>55</sup> HUD’s implementation of its Current AFFH Rule, however, is necessary to ensure that jurisdictions are taking proactive measures against these unjust and discriminatory ordinances to protect housing access for survivors and other marginalized communities.
- **Need for Safe Housing and Access to Community Resources.** The framework provided by the Current AFFH Rule has compelled jurisdictions to recognize, analyze, and address barriers to community resources for domestic violence survivors and their

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<sup>52</sup> U.S. Dep’t of Hous. & Urban Dev., *Assessment of Fair Housing Tool for Local Governments (LG 2017)* (currently not in use), <http://web.mit.edu/afs/athena.mit.edu/org/f/fairhousing/background/Assessment-of-Fair-Housing-Tool-For-Local-Governments-2017-01.pdf>.

<sup>53</sup> U.S. Dep’t of Hous. & Urban Dev., *Assessment of Fair Housing Tool for Public Housing Agencies (PHA2017)* (currently not in use), <http://web.mit.edu/afs/athena.mit.edu/org/f/fairhousing/background/Assessment-of-Fair-Housing-Tool-For-Public-Housing-Agencies-2017-01.pdf>.

<sup>54</sup> City of Ithaca, NY, *Goal Summary: Assessment of Fair Housing 2017*, <http://www.cityofithaca.org/DocumentCenter/View/7134/Ithaca-Assessment-of-Fair-Housing-AFH-Goal-Summary-Table-32918?bidId=>.

<sup>55</sup> ACLU, *Safe at Home: Fair Housing for Survivors of Domestic Violence*, <https://www.aclu.org/other/safe-home?redirect=cpreirect/33417>.

families.<sup>56</sup> In particular, the Current AFFH Rule encourages jurisdictions to consider substantial challenges that marginalized and vulnerable communities face in accessing community resources and assets—such as proximity to public schools, transportation, public transit, employment, and other services. Because it requires no such analysis of disparities, the Proposed AFFH Rule would undermine the Fair Housing Act’s mission to combat housing discrimination and promote truly integrated communities, to the detriment of survivors of gender-based violence and other marginalized groups. Survivors of gender-based violence should feel protected under the Fair Housing Act.

HUD’s Proposed AFFH Rule directly contradicts HUD’s mission to affirmatively further fair housing and prevent discrimination against women and other protected groups. The ACLU urges HUD to immediately withdraw the Proposed Rule and instead advance housing policies that proactively address segregation and promote housing access for all.

### B. Groups Defined by Race and National Origin

Much of the United States remains segregated along racial and ethnic lines. This is no historical accident; it is a product of design. Jim Crow laws, discriminatory lending practices, and intentional policy choices at the federal, state, and local level—most enacted within the last 80 years—helped make present-day housing segregation so.<sup>57</sup>

Unfortunately, after the FHA’s enactment, successive presidential administrations largely ignored their affirmative obligations to advance fair housing, disgracefully allowing federal government dollars to flow uninterrupted to cities and towns with policies that maintain segregation. That changed when HUD honored its fair housing obligations by issuing the Current AFFH Rule in 2015. The Current AFFH Rule helps enforce the FHA’s integration mandate by, among other things, requiring that cities and towns receiving federal funding take the following actions:

- Create a plan to address residential segregation and discrimination, including concrete goals for bringing fair housing and opportunities to members of all the protected groups before receiving federal funding. Examples of such goals include prohibiting landlords from discriminating against people who rely on HUD rental assistance, who are disproportionately people of color.<sup>58</sup>

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<sup>56</sup> See, e.g., City of Baton Rouge & Parish of East Baton Rouge, *Assessment of Fair Housing: Public Draft* (Feb. 5, 2020), <https://www.brla.gov/DocumentCenter/View/8730/Fair-Housing-Assessment-Draft-2-5-20> (identifying displacement and lack of housing support for survivors as significant contributing factor for disproportionate housing needs for women, and noting the lack of housing for survivors of sexual assault but the availability of other resources such as supportive services for sexual assault survivors); City of Philadelphia & the Philadelphia Housing Authority, *Assessment of Fair Housing* (Dec. 23, 2016), <http://fairhousingrights.org/wp-content/uploads/2017/12/afh-2016-for-web.pdf> (outlining large demand for services, including emergency shelter, for survivors).

<sup>57</sup> Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017).

<sup>58</sup> Alicia Mazzara, Ctr. on Budget & Policy Priorities, *Demographic Data Highlight Potential Harm of New Trump Proposal to Restrict Housing Assistance* (July 1, 2019),

- Complete a regularly scheduled AFH, an in-depth, holistic planning process that uses HUD-provided data and mapping tools and robust community participation to create measures to promote housing opportunity and residential integration. The assessments are designed to recognize and redress the government’s longstanding role in discriminating against communities of color and other protected groups. This is crucial for understanding the origins of de jure segregation and for ensuring that later decision-makers avoid slipping into similar segregation-promoting policies.

Despite these requirements, the Current AFFH Rule defers to local authorities on setting fair housing goals and executing AFFH plans to achieve them, giving those authorities wide latitude to create locally appropriate solutions to housing issues that affect communities of color. This structure is evident in the Current AFFH Rule’s preamble, where HUD stresses that it does not mandate specific outcomes; instead, it provides basic parameters to help guide public sector housing and community development planning and investment decisions. However, by establishing a standardized fair housing assessment and planning process, the Current AFFH Rule gives jurisdictions—and the communities of color they serve—a more effective means to affirmatively further the FHA’s integration mandate.

Given the long-standing history of government-sponsored segregation and the still-persistent ills from that era, only a proactive approach like the one prescribed in the Current AFFH Rule will suffice to fulfill the FHA’s fair housing goals. The Proposed AFFH Rule’s hands-off approach, by contrast, pays lip service to the FHA’s integration mandate while removing the comprehensive process that holds grantees accountable. By moving forward with the Proposed AFFH Rule, HUD risks weakening the very law it is charged with enforcing.

### C. Groups Defined by Disability

Fair housing opportunities, including affordable accessible housing, remain out of reach to many people with disabilities. A 2017 report entitled *Priced Out: The Housing Crisis for People with Disabilities*, co-authored by the Technical Assistance Collaborative, a policy group focused on affordable and permanent supportive housing for very low-income people with disabilities, and the Consortium for Citizens with Disabilities Housing Task Force, found that:

In 2016, millions of adults with disabilities living solely on Supplemental Security Income (SSI) found that renting even a modest unit in their community would require nearly all of their monthly income. In hundreds of higher-cost housing markets, the average rent for such basic units is actually much greater than the entirety of an SSI monthly payment.<sup>59</sup>

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<https://www.cbpp.org/research/housing/demographic-data-highlight-potential-harm-of-new-trump-proposal-to-restrict-housing>.

<sup>59</sup> Technical Assistance Collaborative, *Priced Out in the United States* (2017), <http://www.tacinc.org/knowledge-resources/priced-out-v2/>.

As a result, “non-elderly adults with significant disabilities in our nation are often forced into homelessness or segregated, restrictive, and costly institutional settings such as psychiatric hospitals, adult care homes, nursing homes, or jails.”<sup>60</sup> Compounding this concern, people with many types of disabilities, including people with mobility impairments, people who are blind, and people who are deaf or hard of hearing, face additional barriers securing affordable housing that is also accessible.

These concerns make it critical to ensure that protections against disability-based discrimination in housing are not weakened. Complaints of disability discrimination already comprise the largest percentage of housing discrimination complaints received by both public and private fair housing enforcement organizations since the early 2000s.<sup>61</sup> The inability to preserve housing will not only put people with disabilities at risk of homelessness and institutionalization, but will likely increase costs to state and local governments, which will incur the costs of institutionalization, shelter placements, and emergency department visits.

The Current AFFH Rule contains provisions specifically focused on fair housing access for people with disabilities. Among other things, it defines the term “enabled choice” for persons with disabilities as inclusive of “access to accessible housing and housing in the most integrated setting appropriate to an individual’s needs as required under Federal civil rights law, including disability-related services that an individual needs to live in such housing.”<sup>62</sup> It furthermore defines integration for people with disabilities to “mean that such individuals are able to access housing and services in the most integrated setting appropriate to the individual’s needs. The most integrated setting is one that enables individuals with disabilities to interact with persons without disabilities to the fullest extent possible, consistent with the requirements of the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*) and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). See 28 CFR part 35, appendix B (addressing 28 CFR 35.130 and providing guidance on the American with Disabilities Act regulation on nondiscrimination on the basis of disability in State and local government services).”<sup>63</sup>

Relatedly, the Current AFFH Rule defines segregation based on disability as “a condition in which the housing or services are not in the most integrated setting appropriate to an individual’s needs in accordance with the requirements of the Americans with Disabilities Act . . . and section 504 of the Rehabilitation Act” and clarifies that “[p]articipation in ‘housing programs serving specified populations’ . . . does not present a fair housing issue of segregation, provided that such programs are administered to comply with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-2000d-4) (Nondiscrimination in Federally Assisted Programs): The Fair Housing Act (42 U.S.C. 3601-19), including the duty to affirmatively further fair housing:

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<sup>60</sup> Gina Schaak, et al., *Priced Out: The Housing Crisis for People with Disabilities* (Technical Assistance Collaborative and Consortium for Citizens with Disabilities Housing Task Force, Dec. 2017), at 8, <http://www.tacinc.org/media/59493/priced-out-in-2016.pdf>.

<sup>61</sup> Nat’l Fair Hous. Alliance, *The Case for Fair Housing, 2017 Fair Housing Trends Report* (Apr. 2017), at 27, <https://nationalfairhousing.org/wp-content/uploads/2017/04/TRENDS-REPORT-4-19-17-FINAL-2.pdf>.

<sup>62</sup> 24 C.F.R. § 5.152.

<sup>63</sup> *Id.*

section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); the Americans with Disabilities Act (42 U.S.C. 12101, *et seq.*); and other Federal civil rights statutes and regulations.”<sup>64</sup>

The Proposed AFFH Rule omits these elaborations of rights and needs specific to the particular housing circumstances of people with disabilities, and jurisdictions will no longer be required to engage in the specific integration and segregation analyses unique to the housing needs of people with disabilities.

By giving its grantees a pass on existing obligations to analyze and dismantle segregated living patterns, the Proposed AFFH Rule will fail to ensure the availability of affordable and accessible housing for people with disabilities, in contravention of the Americans with Disabilities Act’s integration mandate and the Supreme Court’s *Olmstead* decision. The ADA requires public entities to administer services to people with disabilities in the most integrated setting appropriate. The proposed rule would undermine the implementation of the *Olmstead* integration mandate. Under the Americans with Disabilities Act, individuals with disabilities have the right to live in the community with supports, rather than in institutions or homeless shelters. But many rules and policies—such as requirements to “live independently” or to have employment income, or rules against “group homes” or penalizing housing subsidies<sup>65</sup>—function to bar disabled individuals from housing in the community.

#### IV. Conclusion

The promise of integration and fair housing access is still unfulfilled in the United States. The Current AFFH Rule effectively discharges HUD’s statutory duty to affirmatively further fair housing and to eradicate housing discrimination that persists in our communities. The Proposed AFFH Rule inappropriately diminishes the obligation of HUD grantees to accurately and honestly assess fair housing obstacles to a meaningless exercise that is unlikely to prompt any proactive anti-segregation work, leaving vulnerable communities at risk.

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<sup>64</sup> *Id.*

<sup>65</sup> For example, the ACLU of Indiana brought and settled litigation under the FHA challenging a restrictive covenant limiting occupancy to “single families” that interfered with the sale of property to an organization that planned to establish a group home for disabled adults. See *Fair Hous. Ctr. of Cent. Indiana, Inc. v. Brookfield Farms Homeowners’ Ass’n*, No. 4:14-cv-00058-PPS-JEM, 2016 WL 481983 (N.D. Ind. Feb. 8, 2016). See also *Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002, 1007–09 (W.D.N.Y. 1990) (finding that requirement that housing applicants with disabilities be able to “live independently” violated the Fair Housing Act and its regulations by having the effect of disability discrimination); *Sharpvisions, Inc. v. Borough of Plum*, 475 F. Supp. 2d 514, 525–26 (W.D. Pa. 2007) (finding that zoning ordinance and policies defining “family” to exclude disabled individual who lived with support had an unlawful disparate impact on individuals with disabilities); *Connecticut Fair Hous. Ctr., Inc. v. Rosow*, No. 3:10-cv-01987 (D. Conn. filed Dec. 17, 2010) (challenge to policy of refusing to rent to applicants who receive income from sources other than employment as having a disparate impact on individuals with disabilities, which settled on May 1, 2013); *L.C. v. LeFrak Org., Inc.*, 987 F. Supp. 2d 391, 402 (S.D.N.Y. 2013) (finding that plaintiffs sufficiently alleged that policy requiring more burdensome rental process for people who are recipients of housing subsidies has a disproportionate effect on people with HIV); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (finding that zoning ordinance blocking home for people with intellectual disabilities was based on irrational prejudice).

Before finalizing the Current AFFH Rule in 2015, HUD engaged in a thoughtful and thorough process, considering decades of federal court jurisprudence. HUD must preserve the Current Rule and support its grantees' achieve the shared goal of achieving fair housing throughout the United States.

Thank you for the opportunity to comment. Please contact Jennifer Bellamy at [jbellamy@aclu.org](mailto:jbellamy@aclu.org) regarding these comments.

Sincerely,

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