Comments of the Washington Lawyers' Committee for Civil Rights and Urban Affairs and The Legal Aid Society of the District of Columbia to Proposed Rule, FR 6123-P-02 "Affirmatively Furthering Fair Housing"

I. Introduction

The Washington Lawyers' Committee for Civil Rights and Urban Affairs (the "Washington Lawyers' Committee" or the "Committee") and The Legal Aid Society of the District of Columbia ("Legal Aid") submit these comments in response to HUD's Federal Register Advanced Notice of Proposed Rulemaking (the "Proposed Rule"), "Affirmatively Furthering Fair Housing ("AFFH")." The Washington Lawyers' Committee is a non-profit 501(c)(3) organization that was established in 1968 to provide pro bono legal services to address discrimination and entrenched poverty in the Washington, DC metro area. Legal Aid is a non-profit 501(c)(3) organization that was established in 1932 to provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs. We write to express our emphatic opposition to HUD's Proposed Rule for the reasons discussed below.

The AFFH Rule—the implementing regulation of HUD's statutory duty to affirmatively further fair housing—is supposed to implement the mandate of the Fair Housing Act ("FHA") to overcome residential racial segregation and alleviate its attendant harms. The duty to affirmatively further fair housing is explicitly set forth in the FHA, 42 U.S.C. §§ 3608(d) & 3608(e)(5), and arises from the recognition that housing segregation across the country has been fostered and maintained through decades of exclusionary policies at the federal, state, and local levels. Those intentional exclusionary practices and policies, as well as their perhaps less intentional but fully predictable consequences, have entrenched segregation, seriously limited housing choice, and deprived African Americans of a critical foothold to economic and social mobility, as well as access to a wide range of services and benefits.[1]

Remediation of the consequences of this pervasively harmful legacy requires active and equally intentional efforts to secure meaningful housing choice. The continued patterns of segregated housing in our communities confirm that this work is far from done. The Committee and Legal Aid strongly oppose efforts to eviscerate the duty to AFFH through implementation of the Proposed Rule.

The Proposed Rule fails to implement or contribute to the FHA's mandate that HUD and its grant recipients take affirmative steps to overcome residential segregation and

[1] Rothstein, Richard, The Color of Law: A Forgotten History of How our Government Segregated America, Liveright Publishing Corporation, 2017.

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replace segregated ghettos with integrated communities. This is so because the Propose [1]Rule entirely removes the anti-segregation mandate that was a central purpose of the Act.

II. The Duty to Affirmatively Further Fair Housing Was Included in the Fair Housing Act to Go Beyond Preventing Discrimination and Undo Segregation

When it enacted the FHA, Congress declared it to be "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States".[2] This was to be accomplished, in part, by replacing racial ghettos with "truly integrated and balanced living patterns."[2] Sections 3608(d) and (e)(5) of the FHA require HUD and its program participants to *affirmatively* further fair housing. The legislative history demonstrates that the use of the word "affirmative" was intended to ensure that implementation was not limited to simply preventing discrimination. Senator Edward Brooke stated that one of the FHA's purposes was to "remedy weak intentions that have led to the federal government's sanctioning of discrimination in housing throughout this Nation."[4] Courts that have considered Section 3608 have interpreted it to require HUD and program participants to examine the racial concentration of communities affected by housing projects and reject proposals that would reinforce existing patterns of segregation.[3] Thus, it is clear that the purpose of the duty to AFFH is not simply to ensure that jurisdictions are preventing discrimination, but to ensure that they are affirmatively seeking to replace racial ghettos with integrated communities.

[1] U.S.C. § 3601.

[2] *See* 114 Cong. Rec. 3422 (1968) (remarks of Sen. Walter Mondale, one of the FHA's sponsors). Similarly, Senator Edward Brooke stated that one of the FHA's purposes was to "remedy weak intentions that have led to the federal government's sanctioning of discrimination in housing throughout this Nation." [4] *See* 114 Cong. Rec. 3422 (1968) (remarks of Sen. Walter Mondale, one of the FHA's sponsors). Similarly, Senator Edward Brooke stated that one of the FHA's purposes was to "remedy weak intentions that have led to the federal government's sanctioning of discrimination in housing throughout this Nation."

[3] *Shannon v. Department of Housing and Urban Development*, 436 F.2d 809 (3d Cir. 1970) (remanding HUD's approval of a change in nature of an urban renewal project so that HUD could consider whether this change would lead to increased minority concentration in the inner city); *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973) (holding that under Title VIII "action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase in segregation"); *Clients' Council v. Pierce*, 711 F.2d 1406, 1409-23 (8th Cir. 1983) (holding that even if facts do not establish a constitutional violation by HUD, they still establish a violation of affirmative duty under Title VIII);. *N.A.A.C.P. v. Secretary of HUD*, 817 F.2d 149 (1st Cir. 1987) (holding that to affirmatively further the Act's fair housing policy requires more of HUD than simply to refrain from discriminating itself or purposely aiding the discrimination of others); *c.f. Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972) *(*identifying the goal of Title VIII as replacing ghettos with truly integrated and balanced living patterns).

The Proposed Rule entirely eliminates the anti-segregative mandate set forth under the duty to AFFH. Viewed in its best light, the Proposed Rule is simply inadequate to implement the AFFH mandate, and coupled with other HUD rulemakings, it is contrary to the spirit of the FHA's AFFH statutory mandate.

In place of requiring recipients of HUD funding to complete assessments of fair housing, as set forth under the current (2015) AFFH Rule, funding recipients would need to submit newly designed "AFFH certifications."[4] Jurisdictions would be required to identify three goals in their "certifications" and describe how addressing those goals would address fair housing.[5] If the jurisdiction chooses its goals from a list of 16 "obstacles" that HUD considers inherent barriers to fair housing choice, it could bypass providing descriptions of how addressing the obstacles chosen would further fair housing in the particular community.[6] Most of the "obstacles" are factors that might affect the cost of building housing and as a result, focus solely on the enumerated obstacles that could inhibit growth of the supply of affordable housing and thereby limit housing choice; they have little to do with achieving fair housing.

Upon receiving a jurisdiction's "certification," under the proposed rule, HUD would evaluate the jurisdiction's compliance with the duty to AFFH by assessing its progress based on nine factors, only two of which relate to fair housing choice.[7] The remaining factors relate to housing supply, affordability, and quality.[8] Further, HUD would have the ability to rank and compare jurisdictions based on these nine factors rather than individually consider the circumstances of each jurisdiction. Those jurisdictions ranked "outstanding" would be eligible for preference points when competing for grants through Notices of Funding Availability ("NOFA")[9]—an attempt to incentivize jurisdictions to comply with their AFFH obligations even though few HUD programs operate via NOFAs. There are no other requirements that localities would have to meet in order to satisfy the duty to affirmatively further fair housing. In sum, the reworked framework of the Proposed Rule does not meaningfully advance or contribute to enforcement of HUD's statutory mandate. Unlike the 2015 Rule, these provisions are not based on or thoughtful that in order about strategies to remedy decades of government policy that sanctioned and solidified segregation, steps that directly dealt with issues causing racial segregation and inhibiting integration. In sum, the Proposed Rule essentially abandons any affirmative attempt to address ongoing, rampant racial segregation.

III. Segregation and Its Attendant Ills Persist Despite the Fair Housing Act's Duty to Affirmatively Further Fair Housing

Today's segregated housing patterns are the product of deliberate and comprehensive governmental policies regarding both rental housing and home ownership opportunities

[4] Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2041, 2044-2045 (proposed January 14, 2020).
[5] *Id.* at 2045.
[6] *Id.* at 2046.
[7] *Id.* at 2047-2048.
[8] *Id.*
[9] *Id.* at 2048-2049.

that profoundly constrained economic and social mobility for African Americans. These policies trapped African Americans in segregated, public rental housing and excluded them from government programs both pre and post-WWII to promote homeownership.[10] Excluding African Americans created a wealth gap that, to this day, prevents African Americans from leaving the inner-city ghetto in significant numbers, despite the passage of the FHA to prohibit discrimination.[11] And, in the growing, virtually all-white suburbs, residents resisted, and continue to resist, affordable housing in their communities that predominantly houses people of color.

The "racial ghettos," and their consequent ills, that the FHA sought to replace with integrated communities, persist to this day. Most urban areas remain highly segregated by race. In 1960, the average "segregation index" for cities in the United States was 86.2. That means that 86.2% of African Americans would have had to change their place of residence to achieve total integration.[12][13] A study by the Brookings Institute that examined 2015 Census data determined that Milwaukee, New York, Chicago, and Detroit all have segregation indices that are higher than 75. Only seven urban areas had an index below 50, and none was below 40.[15] While many cities are integrated when viewed from a regional basis, they are extremely segregated when viewed at the neighborhood level.[14]

In many cities, decades-old patterns of segregation have not substantially changed. The Washington DC area is illustrative. In 1980, the population of most of the city's eastern census tracts and those in the near eastern suburbs was greater than 60% African American, while the western part of the region had African American populations under 20%.[15] Forty years later, those proportions remain substantially the same in the city and eastern suburbs. Indeed, even as more African Americans are being pushed to suburbs as housing in DC becomes unaffordable, and some young whites are moving back to the city,[16] African

[10] *See The Color of Law* at 18-24; *see also* Baradaran, Mehrsa, *The Color of Money: Black Banks and the Racial Wealth Gap*, Chapter 4 ("The New Deal for White America"), 2017 [hereinafter "*The Color of Money*"]; Thompson, Brian, *The Racial Wealth Gap: Addressing America's Most Pressing Epidemic*, Forbes, Feb. 18, 2018.

[11] Between the end of World War II and the passage of the FHA, the United States experienced the largest sustained growth in real estate values ever before or since, from which African Americans were largely excluded. Levittown, NJ is an example: In the early 1950s, homes in this subdivision sold for approximately $75,000 in today's dollars – affordable to persons with working class incomes, but only if they were white. By the time the FHA was passed, homes in Levittown were selling for the equivalent of over $200,000 in today's dollars, and thus out of reach for many African Americans in 1968. Today, homes in Levittown sell for nearly $400,000 and continue to exceed the resources of most African Americans. *See The Color of Law* at pages 18-24; *see also The Color of Money* at Chapter 4.

[12] Report of the National Advisory Commission on Civil Disorders, Chapter 6 The Formation of Racial Ghettos ("In other words, to create an unsegregated population distribution, an average of over 86 percent of all Negroes would have to change their place of residence within the city." Perfect integration exists where the percentage of African Americans living in a particular neighborhood is consistent with their percentage of the population in a larger geography, like the city or state).

[13] Census Shows Modest Declines, Excel Table.

[14] *See* https://fivethirtyeight.com/features/the-most-diverse-cities-are-often-the-most-segregated/.

[15] Shuetz, Jenny, *Metropolitan Areas are Still Segregated, but its More Complicated than "chocolate city, vanilla suburbs,"* The Avenue, Brookings Institution, December 8, 2017 [hereinafter "Metropolitan Areas Are Still Segregated"].

[16] Census Shows Modest Declines

Americans continue to be segregated, in the city and in new suburban communities.[17] In sum, people of color remain confined to specific, racially concentrated neighborhoods. Many of these same racially concentrated neighborhoods overlap with concentrated areas of poverty, which is part of why segregation has such a great social cost.

Segregation harms communities of color. The neighborhood where a person lives plays a critical role in determining the types of opportunities to which that individual is exposed.[20] Higher levels of Black/White segregation correlate with lower incomes and lower educational attainment, as well as higher rates of homicide for African Americans.[21]

Thus, the national mission to "provide fair housing throughout the United States" by replacing "racial ghettos" with "integrated communities," for which the FHA was created to be a tool, remains unfulfilled. Intentional government policy restricted fair housing choice for African Americans; similar intentionality must underlie government planning and engagement to ensure fair housing choice going forward. That is what makes the current 2015 AFFH Rule, which this proposal would completely undo, so important.

IV. The New Rule Is Inadequate to Implement the Fair Housing Act's Mandate Because It Limits the Scope of the AFFH Obligation to Preventing Discrimination and Does Not Require Program Participants to Consider How to Undo Segregation

The proposed Rule is not in accordance with Sections 3608(d) and (e)(5) or the overall intent of the FHA that, as set forth above, and is therefore inadequate to implement the mandate required by the duty to AFFH. Sections 3608(d) and (e)(5) require HUD and program participants to examine the impact of housing projects on the racial concentration of communities affected to ensure that existing patterns of segregation are not reinforced. The current (2015) AFFH Rule is an effective and well-balanced tool to implement the mandate of the Fair Housing Act ("FHA"). Based as it is on extensive research, public comment, and deliberation, HUD's 2015 AFFH Rule provided a balanced framework for developing and evaluating strategies to achieve fair housing choice, while recognizing the need to tailor solutions to local conditions. By contrast, the Proposed Rule is not only inadequate to implement the duty to AFFH; it is contrary to the statutory intent of the FHA. The proposed Rule only requires a jurisdiction 1) to be free of adjudicated fair housing claims; 2) have an adequate supply of affordable housing throughout the jurisdiction; and 3) have an adequate supply of affordable housing.[22] The proposed Rule only requires jurisdictions to address discrimination and does not require consideration of segregation or how housing projects and other land use planning decisions will affect existing patterns of segregation.

[17] Diep, Francie, *The New Housing Segregation in America: An Analysis of United States Census Data Since 1990 Uncovers how Infrequently Black and White Americans Live Together Today*, Pacific Standard, Aug. 4, 2015. (In the metropolitan Washington, DC area, for example, large sections of Prince Georges County, just east of DC's city limits, have become segregated African-American communities over the last generation.) The fact that Prince Georges County, Maryland is contiguous to low-income, primarily African

American areas of DC underscores the importance of including regional perspectives and strategies into efforts to affirmatively further fair housing.

[20] *Metropolitan Areas are still Segregated.*

[21] Gregory Acs, Rolf Pendall, Mark Trekson, Amy Khare, *The Cost of Segregation, National Trends and the Case of Chicago 1990-2010*, Metropolitan Housing and Communities Policy Center, Urban Institute, March 2017.

[22] Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2041, 2044, 2047-2048 (proposed January 14, 2020).

Therefore, the Proposed Rule fails to mandate consideration of the requirements set forth by Congress and the Courts to affirmatively further fair housing.

V. HUD's Approach to Rewriting the AFFH Rule and Disparate Impact Rule Represents a Pattern of Conduct Aimed at Undermining the Purpose of the Fair Housing Act

Ceasing to require program participants to consider how their housing projects and planning decisions impact existing patterns of segregation is not the only example of rulemaking by HUD that contradicts decades of case law and the intent of Congress. As many, including the Committee pointed out in prior Comments, HUD's Proposed Disparate Impact Rule would gut another critical protection afforded under the FHA and flies in the face of the intentionally broad and remedial purposes of the Act and upending longstanding case law.[18] As many have explained, the Proposed Disparate Impact Rule would eviscerate a plaintiff's ability to protect against practices that have a discriminatory and segregative impact by upending decades of judicial precedent with an entirely new and extraordinarily difficult gauntlet of hurdles to pleading and proving a discrimination claim. HUD's Proposed AFFH and Disparate Impact Rules represent a pattern of decision-making that will undermine the intended purposes of the FHA. The Proposed Disparate Impact Rule insulates exclusionary and segregative practices from effective challenges while the Proposed AFFH Rule relieves program participants of the requirements to consider how their housing policies affect segregation and reject policies that further patterns of segregation. These proposed rules will lead to further entrenched racial segregation, which is the opposite of Congress' intent, as repeatedly reaffirmed in judicial interpretations of the FHA.

VI. Conclusion

For the reasons described above, we urge HUD to abandon its attempts to revise the 2015 AFFH Rule. If implemented, the Proposed Rule will contravene decades of FHA case law,[24] subvert legislative intent, improperly substitute HUD's judgment for that of the courts, and result in bad policy. The 2015 Rule already provides balanced requirements and clear standards for program participants. There is no legitimate reason to disturb that framework.

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[18] *Trafficante v. Metro Life Ins. Co.*, 409 U.S. 205, 212 (1972) (holding that individual complainants who are aggrieved by a prohibited practice covered by the FHA have the right to sue); *see also id.* at 209 (noting broad and inclusive language of statute); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372-74 (1981); *Huntington Branch, NAACP v. Huntington*, 844 F.2d 926, 935-36 (2d. Cir. 1988); *Cmty. Hous. Tr. v. Dep't of Consumer & Regulatory Affairs*, 257 F. Supp. 2d 208, 220 (D.D.C. 2003) ("Traditionally, courts have broadly interpreted the FHA, so as to fully effectuate Congress' remedial purpose.") (citing *Trafficante*)).

[24] *See supra* at note 3.