



March 16, 2020

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

Via regulations.gov

**RE: FR-6123-P-02 Affirmatively Furthering Fair Housing (January 14, 2020)**

Dear Secretary Carson:

Texas Appleseed (Appleseed) is a non-partisan, non-profit, 501(c)(3) organization and part of a national network of public interest law centers. Our mission is to promote justice for all Texans by leveraging the volunteered skills and resources of lawyers and other professionals to identify practical solutions that create systemic change on broad-based issues of racial and social equity, including disaster recovery and fair housing. Our goal is to ensure that all families have the opportunity to live in safe, decent neighborhoods with equal access to educational and economic opportunity.

Texas Appleseed interacts with AFFH issues every day, because all of our issues are rooted in segregation and concentrated disadvantage. Texas Appleseed has mapped data from multiple Appleseed projects, including Criminal and Juvenile Justice, Fair Financial Services, School-to-Prison Pipeline, and Fair Housing for the largest cities in Texas and compared them to the 1934 HOLC redlining maps for those same cities. Neighborhoods that were redlined as unsuitable for investment because their residents were Black were still racially segregated and higher-poverty over 80 years later, and they were also the neighborhoods with the highest concentrations of payday lenders, highest levels of arrest for juvenile curfew violations, highest concentrations of

subsidized housing, where environmentally hazardous uses were located, where school discipline disproportionately affected children of color and children with disabilities, and where the police were more likely to use their discretion to arrest and jail residents instead of ticketing them. There's an overwhelming body of research showing that where you live determines your life outcomes, from educational achievement to life expectancy.

HUD's proposed AFFH Rule (Proposed Rule) is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the Administrative Procedures Act, the Fair Housing Act, Title VI of the Civil Rights Act of 1964 the Americans with Disabilities Act and other civil rights laws and requirements. It ignores facts, including the long and deep history of government action at the federal, state, and local level to impose and perpetuate segregation and racial inequality, and the ongoing impact of segregation on the lives and access to opportunity of millions of Americans based solely on their race, color, national origin, sex, religion, familial status, and whether they have a disability. The Proposed Rule is an attempt to subvert both the plain language of the Fair Housing Act and the clear and documented intent of Congress to dismantle segregation and inequality and would perpetuate a separate and unequal society rank with discrimination and exclusion.

HUD should withdraw the proposed rule and reinstate the 2015 AFFH rule and AFH process.

## I. Introduction

Residential segregation itself is not a result of individual choice, it is the product of deliberate government policy decisions at the federal, state, and local government level.<sup>1</sup> Included in these policies are racially explicit zoning; segregated public housing developments; housing subsidies under the GI Bill that went almost exclusively to whites,<sup>2</sup> guaranteeing bank loans to mass-production suburban builders conditioned on imposing racially restrictive covenants; "redlining" maps that identified neighborhood risk for lending solely according to the race of its residents; discriminatory zoning that placed undesirable land uses into communities of color; denial of equal public services; urban renewal programs that displaced and isolated African-American communities or isolated them from other neighborhoods; and lending discrimination.<sup>3</sup> The continuing effect of these policies and the disproportionate investment of

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<sup>1</sup> See, e.g. Massey, Douglas and Denton, Nancy, *American Apartheid: Segregation and the Making of the Underclass*, Boston: Harvard University Press, 1998; Rothstein, Richard, *The Color of Law*. New York: Liveright Publishing Corporation, 2017; Katznelson, Ira, *When Affirmative Action Was White*. New York: W.W. Norton & Company, 2005; Loewen, James, *Sundown Towns: A Hidden Dimension of American Racism*, New York: Simon & Schuster, 2005; Sharkey, Patrick, *Stuck in Place; Urban Neighborhoods and the End of Progress toward Racial Equality*, Chicago: University of Chicago Press, 2013.

<sup>2</sup> Michael Bennett, "The Law that Worked," *Educational Record*, 75 (Fall 1994) pp 6.12.

<sup>3</sup> See, e.g. Rothstein, Richard, *The Color of Law*. New York: Liveright Publishing Corporation, 2017. Katznelson, Ira,

public resources in white homeownership and white communities can be seen clearly not only in continued residential segregation, but in the concentration of poverty and other kinds of disadvantage in historically segregated Black and Latinx neighborhoods.<sup>4</sup>

As the drafters of the Fair Housing Act recognized, “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>5</sup> Residential segregation has a significant impact on children’s life outcomes including life expectancy, adult economic mobility, and educational achievement.<sup>6</sup> Children’s race and ethnicity strongly predict whether they live in a neighborhood with access to opportunity; access to quality early childhood education, safety, environmental health, parks and playgrounds, healthy food, good jobs and adequate income for their parents and other adults in their lives. Black children are 7.6 times more likely than white children, and Hispanic children are 5.3 times more likely than white children, to live in neighborhoods with very low opportunity to grow up healthy.<sup>7</sup>

Government created segregation, and it is responsible for dismantling it and alleviating its impacts on protected classes under the Fair Housing Act. The 2015 AFFH Rule was a critical tool to help governments and PHAs understand both the causes and impacts of segregation, select ways to remedy the inequities they created, and take meaningful steps to do so; HUD’s proposed rule undermines not only this process, but the Fair Housing Act itself.

II. The Proposed Rule is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the Administrative Procedures Act

The 2015 AFFH Rule (2015 Rule) represented an extremely important and long overdue effort by HUD to take meaningful steps to implement the affirmatively furthering fair housing (AFFH) provisions of the 1968 Fair Housing Act. The rule drafting process included several years of consultation with many different stakeholders, including program participants, fair housing organizations, and others. The rule went through the required public comment process, during which HUD received over 1,000 comments. (See Regulations.gov at

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*When Affirmative Action Was White*. New York: W.W. Norton & Company, 2005.

<sup>4</sup> See, e.g. Sharkey, Patrick, *Stuck in Place*, Chicago: University of Chicago Press, 2013.

<sup>5</sup> 114 Cong. Rec. 2276–2707 (1968)

<sup>6</sup> Raj Chetty and Nathaniel Hendren, “The Impacts of Neighborhoods on Intergenerational Mobility”, April 2015. Available: [http://www.equality-of-opportunity.org/images/nbhds\\_exec\\_summary.pdf](http://www.equality-of-opportunity.org/images/nbhds_exec_summary.pdf); Raj Chetty, Nathaniel Hendren, and Lawrence Katz, “The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment”, Harvard University and NBER, August 2015. Available at: [https://opportunityinsights.org/wp-content/uploads/2018/03/mto\\_paper.pdf](https://opportunityinsights.org/wp-content/uploads/2018/03/mto_paper.pdf)

<sup>7</sup> Dolores Acevedo-Garcia, Clemens Nolke, and Nancy McArdle. *The Geography of Childhood Opportunity: Why Neighborhoods Matter for Equity, Findings from Child Opportunity Index 2.0*, January 2020. diversitydatakids.org

<https://www.regulations.gov/document?D=HUD-2013-0066-0001.>) In addition to the public comment process, the 2015 rule was extensively vetted internally at HUD and was field-tested in 74 jurisdictions through the Sustainable Communities Initiative. HUD's process to draft and finalize the 2015 rule was careful, inclusive and deliberative.

The 2015 Rule was also based on documented factual information and research. In 1996, the introduction to HUD's Fair Housing Planning Guide asked, "[w]ill devolution work? Will it be effective in addressing the fair housing problems in a community?"<sup>8</sup> The Government Accountability Office's (GAO) September 2010 report, *HUD Needs to Enhance its Requirements and Oversight of Jurisdictions' Fair Housing Plans* provided extensive documentation that the current AFFH process had failed and was ineffective in addressing fair housing problems in a community.<sup>9</sup> The GAO found that 29% of Analyses of Impediments (AI) had not been updated within five years (11% in over 10 years) and for 6% of AIs the date of completion could not be determined, that the majority of AIs reviewed did not include time frames for implementation of recommendations or signatures of elected officials, and that some jurisdictions could not produce an AI with relevant content,<sup>10</sup> or any document identified as an AI at all, in violation of the requirements of 24 C.F.R. § 570.601(a)(2) and 24 CFR § 91.225(a) that they conduct and maintain this analysis.

In sum, [GAO's] review found limited assurances that grantees are placing needed emphasis on preparing AIs as effective planning tools to identify and address potential impediments to fair housing as required by statutes governing the CDBG and HOME programs and HUD regulations and guidance.<sup>11</sup>

Any jurisdiction that is not meeting the requirements to truthfully certify that they are affirmatively furthering fair housing by conducting an analysis of impediments to fair housing/Assessment of Fair Housing, taking meaningful action to overcome those impediments, and maintaining records of their assessment and actions is in violation of the Fair Housing Act, Section 104(b)(2) of the Housing and Community Development Act of 194 (as amended), Section 105 of the Cranston-Gonzalez National Affordable Housing Act, and is ineligible for federal housing and community development funds. Under the HCDA, the Secretary has authority to make grants "only if" grantees make certain submissions and certifications.<sup>12</sup> The

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<sup>8</sup> HUD, *Fair Housing Planning Guide*, March 1996, HUD-1582B-FHEO Available at: <https://www.hud.gov/sites/documents/FHPG.PDF>

<sup>9</sup> GAO, *Housing and Community Grants: HUD Needs to Enhance its Requirements and Oversight of Jurisdictions' Fair Housing Plans*, September 2010, GAO-10-905. Available at: <https://www.gao.gov/assets/320/311065.pdf>

<sup>10</sup> Five of the AIs submitted to GAO were two to four pages, and one was an email. Ibid at 14-15.

<sup>11</sup> Ibid at 10

<sup>12</sup> See, e.g. 42 U.S.C. §5302 ("The Secretary is authorized to make grants to States, units of general local government, and Indian tribes to carry out activities in accordance with the provisions of this chapter."); 42 U.S.C.

Secretary cannot obligate funds when a grantee has failed to make a certification that is material to its eligibility to receive CDBG and other federal housing and community development funds.

Federal housing and community development grant funds are expressly conditioned on a jurisdiction's certification that it will affirmatively further fair housing. "The AFFH certification [is] not mere boilerplate formality, but rather a substantive requirement, rooted in the history and purpose of the fair housing laws and regulations, requiring the [jurisdiction] to conduct an AI, take appropriate actions in response, and to document its analysis and actions." *United States of America ex rel. Anti-Discrimination Center of Metro New York, Inc., v. Westchester County*, Case 1:06-CV-02860-DLC, Document 118 at 50-51, (S.D.N.Y, February 24, 2009). In addition to the prohibition on using public funds to discriminate, because governments at the federal, state, and local level had socially engineered segregation and concentrated disadvantage, they are also responsible for dismantling it.

HUD's proposed rule does not address the issues raised by the GAO or HUD's own report and its "Justification for Change" provides no such justification. HUD contradicts itself repeatedly and presents only a few comments from jurisdictions as to justify its determination that "current regulations are overly burdensome."

- A. The proposed rule does not address issues with the AFFH process identified by a long-term, data-driven, participatory process.

GAO's 2010 report identified two major issues that contributed to the failures of the AI process; HUD's regulations did not "establis[h] standards for updating AIs or the format that they must follow," and "grantees are not required to submit their AIs to the department for review" and

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§5304 (a)(1) "Prior to the receipt in any fiscal year of a grant . . . the grantee shall have . . . provided the Secretary with the certifications required in subsection (b) of this section and, where appropriate, subsection (c) of this section."; 42 U.S.C. §5304(b). These statutory requirements have been codified, see 24 C.F.R. § 91.325(a) and 24 C.F.R. § 91.325(b)(4)(ii) (applicants must certify that they are affirmatively furthering fair housing); 24 C.F.R. § 91.5 (certifications must be assertions based on "supporting evidence"); 24 C.F.R. § 91.500(a) and 24 C.F.R. §91.5 (HUD "will review" the plan in which certifications must appear, and has the authority to inspect the evidence on which certifications are based); 24 C.F.R. §570.485(c) (HUD may determine that a certification is not "satisfactory to the Secretary" based on evidence); 24 C.F.R. § 91.500(b) (HUD may "disapprove" any plan or portion thereof that is substantially incomplete, contains a certification that is not satisfactory to the Secretary within the meaning of 24 CFR 570.485(c), or is "inconsistent with the purposes of the Cranston-Gonzalez National Affordable Housing Act, 42 USC §12703); 24 C.F.R. §570.485(c) (HUD may require a state to submit further assurances as the Secretary deems necessary to find the grantee's certification satisfactory.) The purpose of the Cranston-Gonzalez National Affordable Housing Act is "to expand the supply of decent, safe, sanitary, and affordable housing, with primary attention to rental housing, for very low-income and low-income Americans;" and "to mobilize and strengthen the abilities of the States and units of general local government throughout the United States to design and implement strategies for achieving an adequate supply of decent, safe, sanitary, and affordable housing." (42 U.S.C. §12722)

noted that HUD had initiated a process (which culminated in the AFFH Rule) in 2009 because it “[r]ecognize[ed] the limitations in its AI requirements and oversight and enforcement approaches.”<sup>13</sup> The Report also made the following recommendations for executive action:

- HUD should complete the new AFFH regulation expeditiously.
- HUD should establish standards for grantees to follow in updating their AIs and provide a format for doing so.
- HUD should require grantees to include time frames for implementing the recommendations in the AI and signatures of responsible officials.
- HUD should require routine submission of the AI to HUD for review.

HUD’s own 2009 *Analysis of Impediments Study* also recommended increased guidance and assistance to grantees, a submission requirement, and guidelines for staff review of AIs.<sup>14</sup>

The Affirmatively Furthering Fair Housing Rule that HUD issued on July 16, 2015 incorporated these recommendations, creating a set of standards including metrics and milestones for implementation, a standardized format (the AFH Assessment Tool) including HUD-provided data, and a submission and review process that incorporated HUD guidance and technical assistance. The proposed rule provides none of the guidance grantees had asked for and withdraws the oversight GAO and HUD had determined was necessary to both assist grantees and ensure compliance with the Fair Housing Act.

In its “Justification for Change” HUD argues both that the 2015 rule was not tailored to specific program participants, but also that jurisdictions were left “without the flexibility to identify their locality’s most relevant issues or adapt their process to the unique conditions of the jurisdiction”. HUD then curiously argues that this “uniform process-based approach” made it difficult to compare jurisdictions over time. Instead of the 2015 process, which provided jurisdictions with data and asked them to determine how broad categories of factors were present in their specific jurisdictions and choose their goals and activities in the context of their specific jurisdiction, the propose rule sets out a list of 17 obstacles to fair housing choice (91.225(a)(1(i))) and states that it will be directly comparing jurisdictions over time. In other words, it is the proposed rule that prescribes certain goals and evaluates jurisdictions comparatively regardless of jurisdictional context. Promulgating a new regulation that does exactly what it puports needed to change from the past regulation is entirely arbitrary and capricious, and an abuse of discretion.

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<sup>13</sup> GAO Report at 22

<sup>14</sup> HUD Office of Policy Development and Research, Policy Development Division, *Analysis of Impediments Study*, January 27, 2009.

- B. HUD's assertion that AFHs conducted under the 2015 rule had a high failure rate is factually incorrect.

HUD points to the fact that 35% of the first AFHs submitted were initially non-accepted.<sup>15</sup> In other words, well over half (65%) of grantees were able to successfully submit an AFH acceptable to HUD using a new and more rigorous process.<sup>16</sup>

The citation of initial non-acceptance rates as justification for the proposed rule is not rationally related to the contents of the proposed rule. Under the pre-2015 compliance process, the GAO found that 29% of Analyses of Impediments (AI) had not been updated within five years (11% in over 10 years) and for 6% of AIs the date of completion could not be determined, that the majority of AIs reviewed did not include time frames for implementation of recommendations or signatures of elected officials, and that some jurisdictions could not produce an AI with relevant content,<sup>17</sup> or any document identified as an AI at all, in violation of the requirements of 24 C.F.R. § 570.601(a)(2) and 24 CFR § 91.225(a) that they conduct and maintain this analysis. HUD's 2009 study found that 35% of jurisdictions could not or did not produce an AI in response to HUD's request. In other words, over a third of jurisdictions did not have an AI at all, versus the current 35% of grantees who had an AFH, but one that was initially non-accepted. The HUD study's review of the completeness and quality of the AIs also found that 49% of AIs were rated "needs improvement" or "poor", a rate far higher than 35% HUD cites as a reason for the proposed rule.<sup>18</sup>

In addition to the statistics cited above, an analysis comparing AFH submissions with prior AIs by the same jurisdictions conducted by the Massachusetts Institute of Technology (MIT) found substantial improvements in the robustness of municipal goals (defined as goals that set out a quantifiable metric or commit to a new policy) between the AI and the AFH.<sup>19</sup> The researchers found that only 5% of the AI goals contained a quantifiable metric or new policy, but 33% of AFH goals included such metrics or policies, and that these goals represented a five-fold increase in goals that aimed to "overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics" as required by the AFFH rule and Fair Housing Act obligation to AFFH.

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<sup>15</sup> HUD does not include information on how many AFHs were accepted after revision. As the revision process was part of the AFH process under the 2015 rule, the number of compliant AFHs is potentially substantially higher.

<sup>16</sup> We note that we considered the non-acceptance rate a positive outcome of the AFFH process, demonstrating that HUD was taking its enforcement responsibilities seriously and holding grantees to a higher standard.

<sup>17</sup> Five of the AIs submitted to GAO were two to four pages, and one was an email. Ibid at 14-15.

<sup>18</sup> HUD Study at 6-8.

<sup>19</sup> Justin Steil and Nicholas Kelly, "Snatching Defeat from the Jaws of Victory: HUD Suspends AFFH Rule that was Delivering Meaningful Civil Rights Progress", *PRRAC: Poverty & Race*, Vol. 26: No. 4 (October-December 2017)

HUD's proposed rule replaces a process with a higher grantee success rate with one that has fewer requirements and guidance that the massively unsuccessful pre-2015 process is not a rational choice.

C. Burdens on grantee jurisdictions and HUD were not "overly burdensome."

"Complying with the law is harder than not complying with the law" is not a legitimate argument for the proposed rule. The AFFH obligation has been in federal law for over 50 years; the fact that HUD and many of its grantees have failed to comply with that obligation<sup>20</sup> does not relieve them of the obligation to comply now, nor do the additional burdens they have created for themselves by their failure to comply with civil rights laws justify the proposed rule.

The 2015 AFFH regulation was designed to address burdens identified by both process reviews and grantees themselves, in particular the lack of guidance and standardized format for AIs, and the cost of obtaining and analyzing data. HUD's 2009 Study found that jurisdictions were not "systematically and consistently improving the content and quality of AIs as they bring them up to date."<sup>21</sup> This is reflected by our experience in Texas, which includes challenges to the AIs and certifications of several jurisdictions, including the State of Texas itself.

In 2009, our organizations filed a Fair Housing Complaint against the State of Texas which included allegations that the State's AI was substantially incomplete for reasons including the State's failure to analyze race-based impediments to fair housing choice, failure to address segregation, and failure to ensure the AFFH compliance of its subrecipients.<sup>22</sup> That Complaint resulted in a Conciliation Agreement, which required Texas to conduct a new AI and submit it to HUD for approval.<sup>23</sup> In 2011, at the request of Texas Housers, HUD reviewed the City of Houston's AI and found it incomplete and unacceptable for reasons including the failure to identify and address patterns of segregation based on race and national origins, failure to address access to housing and opportunity for persons with disabilities, and failure to contain actions to address the impediments that were identified or maintain documents and records.<sup>24</sup> In 2014, HUD signed a Voluntary Compliance Agreement with the City of Dallas that included specific requirements for updating the City's AI. In all three cases, HUD review, guidance, and enforcement resulted in substantially improved AIs, but in all three cases, a complaint from an

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<sup>20</sup> See, Nikole Hannah-Jones, "Living Apart: How the Government Betrayed a Landmark Civil Rights Law, *Pro Publica*, June 25, 2015. Available at: <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law>

<sup>21</sup> HUD Study at 10

<sup>22</sup> See Fair Housing Complaint, Texas Appleseed and TxLHIS v. State of Texas, Available at: <https://www.texasappleseed.org/sites/default/files/24-FairHousingComplaint.pdf>

<sup>23</sup> Available at: <https://www.texasappleseed.org/sites/default/files/ApprovedConciliationAgreement.pdf>

<sup>24</sup> FHEO Letter to the City of Houston, November 30, 2011



outside advocacy group was required to trigger review, resulting in delays substantially longer than the timeline for revision of an AFH under the rule.

The 2015 rule process in fact relieved grantees of the burden of providing data, mapping data, and creating an evaluation process that might or might not comply with federal regulations, while providing them with the flexibility to use local data and information.

Repeated assertions that the 2015 rule was a “mandate from HUD on exactly what steps to take” are also untrue. The 2015 rule gave jurisdictions tremendous deference and flexibility. While it required jurisdictions to set goals to overcome the contributing factors they identified in their own analysis, as well as metrics and milestones by which to measure progress toward achieving those goals, it did not dictate what those goals should be, how many goals must be identified, or what metrics and milestones must be used.

HUD believes that the final rule achieves the appropriate balance of interests by requiring program participants to submit AFHs to HUD for review and acceptance rather than requiring AFHs to be approved by HUD. Program participants have asked for flexibility in determining their goals, priorities, strategies, and actions to affirmatively further fair housing at the local level, and the rule provides this flexibility. (80 F.R. 42315)

Given the wide variations in program participants in terms of size, local conditions, priorities and resources, it is difficult to see how HUD could determine the range of activities or level of effort that would be appropriate for each jurisdiction, as it attempts to do in the proposed rule. Further, even if it were possible to say that a particular jurisdiction had fulfilled its AFFH obligations at a particular moment in time, local circumstances are dynamic and change over time. This means that jurisdictions must continually assess the extent to which fair housing problems may exist, the nature of those problems and the solutions needed to address them. Just as the need for other forms of planning and the implementation of those plans must be on-going, so the obligation to affirmatively further fair housing, which is rooted in statute, must be on-going, as well. A “one size fits all” standard, as contained in the proposed rule, would strip program participants of their ability to set goals appropriate to addressing the impediments to fair housing in their jurisdictions.

Overall, HUD appears to be reacting to a version of the 2015 rule that does not exist. Nothing in the 2015 rule proscribed which actions jurisdictions should take to address impediments to fair housing, required jurisdictions to take actions that they did not have the legal power to take, or prohibited jurisdictions from conducting an analysis and choosing goals specific to their local or regional context. The fact that it is necessary to egregiously misrepresent the 2015 rule in order

to attempt to justify the proposed rule is itself an indication that the proposed rule should not be finalized and that HUD should reinstate the 2015 rule.

III. The proposed rule violates the Fair Housing Act, Title VI of the Civil Rights Act of 1964, the Americans with Disabilities Act, and other civil rights laws.

The language of the proposed rule contradicts the plan language and congressional intent of the Fair Housing Act of 1968, the Civil Rights Act of 1964, and other civil rights laws. The proposed rule attempts to redefine fair housing itself and erase governmental responsibility for redressing past discrimination and segregation. The proposed rule in fact violates the Fair Housing Act, encourages grantees to violate the Fair Housing Act, and allows federal funding to be used to discriminate on the basis of race, color, and national origin in violation of Title VI of the Civil Rights Act of 1964 and on the basis of disability in violation of the Americans with Disabilities Act.

“Affirmatively furthering fair housing” means more than refraining from taking intentional actions to segregate certain racial groups. *NAACP v. HUD*, 817 F.2d 149, 154 (1987). This obligation instead requires jurisdictions to take affirmative actions to erase the effects of past discrimination in order to replace ghettos with “truly integrated and balanced living patterns.” *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972). Because our current housing patterns are segregated by design and government policy, jurisdictions must do more than refrain from discrimination in order to achieve integration.

Segregated housing patterns affect all facts of a person’s life. If protected classes are able to find housing only in segregated and economically disadvantaged areas, that concentrated disadvantage results in inequities in all aspects of social and civic life.<sup>25</sup> Racial segregation often corresponds with neighborhood inequities, even after accounting for differences in economic status.<sup>26</sup> Segregation makes other forms of discrimination easier as well; from zoning that concentrates environmental hazards in communities of color to failures to invest in basic infrastructure in those communities that cities are providing in higher-income and whiter areas.

The proposed rule defines the grantees obligation to AFFH as “acting in a manner consistent with reducing obstacles within the participant’s sphere of influence to providing fair housing choice.” The Fair Housing Act imposes a specific obligation to take affirmative action to remove these obstacles, not “to act in a manner consistent with”, but to directly act to reduce segregation and the impact of discrimination. The language about “within a participant’s sphere

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<sup>25</sup> See Patrick Sharkey, *Stuck in Place: Urban Neighborhoods and the End of Progress Toward Racial Equality* 14-17 (2013).

<sup>26</sup> *Id.* at 14-15.

of influence” is also unnecessary and confusing. At no point has there been a requirement or even suggestion that jurisdictions are required to take actions that they do not have the power to take.

It is the proposed rule’s definition of “fair housing choice”, however, that is the most egregious. While the Agency’s justification for the proposed rule leads one to wonder whether the drafters of the proposed rule have actually read the 2015 rule, the language in the proposed 24 CFR 5.150(a)(2) leads one to wonder whether the drafters have ever read the Fair Housing Act itself.

The proposed rule states that “fair housing choice means, within a HUD program participant’s sphere of influence, that individuals and families have the opportunity and options to live where they choose, within their means, without unlawful discrimination.” This is emphatically not what fair housing choice means. While the availability and condition of affordable housing may be fair housing issues, for example, when affordable housing is excluded from higher-income majority white areas, or when landlords allow affordable housing occupied primarily by families of color to deteriorate while investing in maintenance and upkeep at developments primarily occupied by white tenants, but neither is inherently a fair housing issue.<sup>27</sup> An analysis of affordable housing cannot be substituted for a fair housing analysis.

Civil rights are not restricted by the economic status of the persons who assert them, nor are discrimination and segregation issues that affect only lower-income individuals and families. HUD’s proposed jurisdictional risk analysis, which focuses exclusively on “the extent to which there is an adequate supply of affordable and available quality housing for rent and for sale”, however, reinforces that HUD’s proposed rule does not comply with the Fair Housing Act or other civil rights requirement. It is a fundamental misunderstanding of what fair housing is.

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<sup>27</sup> While we appreciate HUD’s recognition that changes to local zoning codes may be required in order for a jurisdiction to truthfully certify that it is AFFH, we are concerned that HUD is regarding zoning restrictions largely as a barrier to the production of housing and not as a barrier to housing choice for protected classes or means to discriminate against communities of color. Zoning is a critical impediment to fair housing choice, *see, e.g.*: Rolf Pendall, “Local Land Use Regulation and the Chain of Exclusion” *Journal of the American Planning Association* 66 (2) (2000):125-142; Douglas S. Massey, Jonathan Rothwell, and Thurston Domina, “The Changing Bases of Segregation in the United States” *The Annals of the American Academy of Political and Social Science* 629 (1) (2009): 74-90; Jonathan Rothwell and Douglass S. Massey, “The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas,” *Urban Affairs Review* 44 (6) (2009): 779-806; Jonathan Rothwell “Racial Enclaves and Density Zoning: The Institutionalized Segregation of Racial Minorities in the United States,” *American Law and Economics Review* 13 (1) (2011): 290-358; Jonathan Rothwell and Douglas Massey, “Density Zoning and Class Segregation in U.S. Metropolitan Areas” *Social Science Quarterly* 91 (5) (2010): 1123-1143

Simply increasing the production of affordable housing (while necessary, as the supply is only adequate for only one in four households who qualify for assisted housing)<sup>28</sup> has no effect on segregation, discrimination, and access to opportunity. The production of affordable housing must be accompanied by deliberate strategies to ensure balance and housing choice in areas outside of racial/ethnic concentrations of poverty (RECAPs), and to ensure that areas of concentrated poverty receive the infrastructure and other investment they need to increase their residents' access to opportunity. Westchester County, for example, asserted in a federal False Claims Act case alleging that it had not truthfully certified that it was affirmatively furthering fair housing, that discrimination was an income problem, and not a race problem. The Court forcefully rejected this argument:

Given [the] statutory and regulatory framework, Westchester's argument that it had no duty to consider race or race discrimination when identifying impediments to fair housing choice must fail. **At a minimum, when a grantee certifies that the grant will be "conducted and administered" in conformity with the Civil Rights Act of 1964 and the Fair Housing Act, and certifies that it "will affirmatively further fair housing," the grantee must consider the existence and impact of race discrimination on housing opportunities and choice in its jurisdiction.** In identifying impediments to fair housing choice, it must consider impediments erected by race discrimination, and if such impediments exist, it must take appropriate action to overcome the effects of those impediments. (emphasis added)<sup>29</sup>

The statutory obligation imposed by the Fair Housing Act and regulatory framework are clear that HUD and its program participants must address impediments to free housing choice for all protected classes at all income levels. An AFFH process that does not do so cannot support an AFFH certification.

For these and other reasons, the AFH process laid out in the 2015 AFFH regulation is far better than proposed rule as a means for HUD to ensure that its program participants are fulfilling their AFFH obligations and taking meaningful steps, designed by the program participants and tailored to local conditions, to address the fair housing problems identified by local stakeholders. HUD acted on an extensive record when instituting the AFFH regulation, including prior case law on the scope of its mandate under the Fair Housing Act and an extensive

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<sup>28</sup> We suggest that HUD's concern for increasing the supply and quality of affordable housing could be partially addressed if HUD were not supporting a budget that cuts \$9.7 billion from its affordable housing and community development programs.

<sup>29</sup> *UNITED STATES OF AMERICAN ex rel. ANTI- DISCRIMINATION CENTER OF METRO NEW YORK, INC., v. WESTCHESTER COUNTY, NEW YORK*, 495 F.Supp.2d 375 (S.D.N.Y 2007) at 28

administrative record.

#### IV. Definition of AFFH and the obligation to dismantle segregation.

One of the critical aspects of the 2015 rule was its clarification of the statutory term “affirmatively furthering fair housing.” That definition was as follows:

Affirmatively furthering fair housing means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant’s activities and programs relating to housing and urban development. (24 CFR §5.152)<sup>30</sup>

This definition clarified that AFFH compliance requires program participants to go beyond just making plans; they must take meaningful steps to implement those plans. Critically, it clarifies that Affirmatively Furthering Fair Housing requires both increasing housing choice in all areas for members of protected classes and remedying disinvestment in historically segregated and disinvested areas to create inclusive communities with equitable access to opportunity. The definition also clarifies that the AFFH obligation is not limited to the expenditure of federal funds, a point that is underscored in the section of the regulations that addresses certification requirements.<sup>31</sup>

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<sup>30</sup> See, also, 24 CFR §5.150 (“A program participant’s strategies and actions must affirmatively further fair housing and may include various activities, such as developing affordable housing, and removing barriers to the development of such housing, in areas of high opportunity; strategically enhancing access to opportunity, including through: targeted investment in neighborhood revitalization or stabilization; preservation or rehabilitation of existing affordable housing; promoting greater housing choice within or outside of areas of concentrated poverty and greater access to areas of high opportunity; and improving community assets such as quality schools, employment, and transportation.”)

<sup>31</sup> See 24 CFR 570.602(a)(2); 570.506(g)(1) (Documentation of the analysis of impediments and the actions the recipient has carried out with its housing and community development **and other resources** to remedy or ameliorate any impediments to fair housing choice in the recipient's community.) (emphasis added). “Although the grantee’s AFFH obligation arises in connection with the receipt of Federal funding, its AFFH obligation is not restricted to the design and operation of HUD-funded programs at the State or local level. The AFFH obligation extends to all housing and housing-related activities in the grantee’s jurisdictional area whether publicly or privately funded.” HUD, *Fair Housing Planning Guide*, March 1996, HUD-1582B-FHEO Available at:

The proposed rule eliminates this clarified definition (although cannot, of course, eliminate program participants' obligations to comply with the requirements set out in that definition.) The proposed rule also eliminates 24 CFR 5.154, which set out standards for a meaningful assessment of fair housing, including the analysis of segregation and disparities in access to opportunity for protected classes.

HUD's proposed rule, with its insistence that the availability of decent affordable housing is the only relevant fair housing issue recipients of public money must address, erases and denies the history and impact of segregation, and its imposition by deliberate government policy using public resources. The impact of segregation has negative and far reaching effects beyond housing choice. Where you are born and live in the United States is predictive of your entire future, from educational achievement to life expectancy.<sup>32</sup>

The negative impact of segregation and discrimination include the racial wealth gap; the median white family had more than ten times the wealth of the median black family in 2016.<sup>33</sup> Pretending the racial wealth gap is not systemic and a product of segregation and discrimination that does not need to be addressed as a fair housing issue does not just disadvantage individual families and communities, it also constrains the US economy as a whole. The August 2019 report "The economic impact of closing the racial wealth gap" estimated that the racial wealth gap's dampening effect on consumption and investment will cost the US economy between \$1 trillion and \$1.5 trillion between 2019 and 2028—4 to 6 percent of the projected GDP in 2028.<sup>34</sup> Assuming that families' "means" are not a product of segregation and disadvantage perpetuates that segregation and discrimination; failing to conduct a fair housing assessment that includes this history and how segregation has impacted access to opportunity does not comply with the Fair Housing Act.

Segregation has not only created and perpetuated the racial wealth gap, it is deeply intertwined with school segregation and educational opportunity. By and large, schools look like their neighborhoods; school segregation reflects residential segregation. The average U.S. public school is 2.6 percent less white, 1.8 percent more black, and 0.9 per-cent more Hispanic than its surrounding neighborhood within the same school district.<sup>35</sup> This is also true in Texas. As part of

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<https://www.hud.gov/sites/documents/FHPG.PDF>

<sup>32</sup>See, Junia Howell and James R. Elliot, "Damages Done: The Longitudinal Impacts of Natural Hazards on Wealth Inequality in the United States", *Social Problems*, 072018, 0, 1–20 (2018).

<sup>33</sup>"2016 Survey of Consumer Finances" Federal Reserve Board, September 2017. [www.federalreserve.gov](http://www.federalreserve.gov)

<sup>34</sup><https://www.mckinsey.com/industries/public-sector/our-insights/the-economic-impact-of-closing-the-racial-wealth-gap>

<sup>35</sup>Id.

our data analysis, Texas Appleseed mapped schools in Houston and Dallas ISDs.<sup>36</sup> The maps showed that the segregated schools in those districts existed, for the most part, within segregated neighborhoods. Where school district boundaries follow the lines of residential segregation, school segregation is even more pronounced.<sup>37</sup> This segregation then translates into lower educational outcomes as school segregation and residential segregation are linked to lower test scores for students of color<sup>38</sup>, and lower graduation rates,<sup>39</sup> which can have cascading implications for a student's employment opportunity and economic security. School segregation is also linked to disparities in school discipline on the basis of race.<sup>40</sup> Any analysis of impediments to fair housing choice must include the full breadth of segregation's impact, or it is not a fair housing analysis.

Jurisdictions should be required to provide a detailed report of the analysis performed (as they are under the 2015 rule). Without this report, there is no context in which either the public or HUD can evaluate the chosen goals. Jurisdictions with high levels of racial segregation and inaccessible public facilities, for example, cannot propose (as they have often done in the past) goals like "build more affordable housing" and "declare April is Fair Housing Month" and be in compliance with the statutory or regulatory obligation to AFFH. We saw this in HUD's return of the Hidalgo County AFH for revision in December 2016 for vague and insufficient goals that were not connected to contributing factors, and a lack of metrics and milestones for achieving those goals. (December 12, 2017 Letter from Krista Mills, Deputy Assistance Secretary)

Nor should jurisdictions be permitted to rely solely on their own qualitative experiences.<sup>41</sup>

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<sup>36</sup> Texas Appleseed used census tract data overlaid with the segregated school campuses in each district.

<sup>37</sup> Grover J. Whitehurst, Richard V. Reeves, Nathan Joo, and Edward Rodrigue, "Balancing Act: Schools, Neighborhoods and Racial Imbalance" The Brookings Institution, November 2017. Page 16. Available at: [https://www.brookings.edu/wp-content/uploads/2017/11/es\\_20171120\\_schoolsegregation.pdf](https://www.brookings.edu/wp-content/uploads/2017/11/es_20171120_schoolsegregation.pdf)

<sup>38</sup> [David Card & Jesse Rothstein, Racial Segregation and the Black-White Test Score Gap, National Bureau of Economic Research, Working Paper 12078 \(2006\), https://www.nber.org/papers/w12078.pdf](https://www.nber.org/papers/w12078.pdf)

<sup>39</sup> See Robert Balfanz & Nettie Legters, Locating the Dropout Crisis: Which High Schools Produce the Nation's Dropouts? Where are They Located? Who Attends Them? (2004), <https://files.eric.ed.gov/fulltext/ED484525.pdf>

<sup>40</sup> MAKING THE CASE FOR A SCHOOL-AND-NEIGHBORHOOD DESEGREGATION APPROACH TO DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE, DEBORAH FOLWER, MADISON SLOAN AND ELLEN STONE. (FORTHCOMING, 2020, RESEARCH ON FILE WITH THE AUTHOR.)

<sup>41</sup> Again, HUD has been clear that qualitative analysis is part of the AFH process, but only as part of a larger analysis that includes data and community input. We note that the experience and local knowledge of protected classes is particularly important to obtain and include. Under the 2015 rule, HUD's provision of uniform data removed a substantial burden from program participants, who had previously been required to carry the entire burden and cost of data collection and analysis. However, HUD was also clear that "[t]he data are not intended to be exhaustive but are intended to provide a baseline for program participants to use and HUD encourage program participants to supplement with local data and knowledge." (80 F.R. 42338) The rule reflects the need for both uniform baseline data and local data and knowledge that reflects the particular history and conditions of that particular jurisdiction. HUD has been clear that "the rule affords program participants the flexibility to supplement

Allowing government entities that have put in place policies and procedures that created and continue to perpetuate segregation (regardless of their current intent) to identify and assess those policies and procedures and recognize their effects based solely on the subjective experience of staff and elected officials is completely unrealistic and will allow jurisdictions to continue perpetuating segregation, concentrating poverty, and discriminating against protected classes. Our organizations have reviewed multiple Texas AIs conducted before the 2015 rule. Almost uniformly, jurisdictions did not use the appropriate data, failed to identify and analyze barriers to fair housing choice, and neither proposed nor took any meaningful action to overcome these barriers and AFFH. In order to assess a qualitative approach, HUD would have to obtain and analyze data, essentially conducting a second assessment of fair housing, and evaluate whether the jurisdiction's assessment was consistent with data. This would not be a more efficient use of HUD's resources. We have also been involved in AFH and AI processes under both the 2015 rule and after HUD withdrew the rule. When the 2015 rule was withdrawn, several jurisdictions continued to use the AFH process and tools to analyze obstacles and select and prioritize goals, but several other jurisdictions immediately stopped working to improve their analyses, withdrew from conversations with community members, and continued to perpetuate segregation and engage in discrimination.

Across almost every racial and social justice issue, segregation is at the core of disparities and discrimination. Given the complex causes and effects of segregation, there needs to be a robust framework for federal grantees to analyze and address systemic barriers to fair housing and to take the necessary steps towards achieving true integration.<sup>42</sup> The 2015 AFFH rule provided this framework. In contrast, the proposed rule utterly ignores both the plain language of the Fair Housing Act and the express intent of Congress to end segregation and instead invites jurisdictions to ignore their fair housing obligations. Given this contradiction of congressional

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the HUD-provided data with relevant, statistically valid State and local data, qualitative analysis and explanation, and information received during the public participation and outreach process." (80 F.R. 42339) The 2015 rule defines "local data" as "metrics, statistics, and other quantified information, subject to a determination of statistical validity by HUD, relevant to the program participant's geographic areas of analysis, that can be found through a reasonable amount of search, are readily available at little or no cost, and are necessary for the completion of the AFH using the Assessment Tool." (24 C.F.R §5.152) The preamble to the 2015 rule is clear that this definition was included as a response to public comments and consultation. Once again, the balance between HUD-provided data, local data that did not impose a high cost on local jurisdictions, and other local knowledge and input was a part of a long and careful rule drafting process that included input from stakeholders including program participants.

<sup>42</sup> Affirmatively furthering fair housing is a specific requirement of the Fair Housing Act, and not "an effort in addition to" compliance with the specific requirements of the Fair Housing Act.



intent, HUD should withdraw the Proposed Rule.

### III. Fair Housing Assessments in Texas

While we commend a number of jurisdictions in Texas who conducted regional AFHs and continued to do so when HUD withdrew the 2015 rule, our experience with other jurisdictions illustrates the importance of the 2015 rule and the message that HUD's withdrawal of the 2015 rule and new proposed rule have sent to grantees that they are no longer required to comply with fair housing requirements.

#### A. Hidalgo Regional Assessment of Fair Housing

The 2015 AFFH rule is so important to low and moderate income communities because it reaffirms that AFFH is not just about affordable housing or what a city is doing with its CDBG funds, it's about remedying historical disinvestment that resulted in racially concentrated areas of poverty, and making sure all communities are inclusive and have equitable access to opportunity.

Appleseed and Texas Housers worked with organizing groups in the Rio Grande Valley on one of the first regional AFHs under the 2015 AFFH rule. The organizing groups were active in public participation processes, including holding their own public meeting to present elected officials and local staff with data and describe their experience of segregation and discrimination, particularly between the colonias and incorporated areas based on race and national origin. The resulting AFH was not fully responsive, and HUD sent a letter of non-acceptance in December 2017, explaining how the AFH could be brought into compliance. Community leaders were in discussions with local officials about meaningful goals and metrics for the re-submission of the AFH when HUD's January 5, 2018 FR Notice extending the deadline for AFHs and ending review of AFHs was published. Elected officials immediately cut off discussions with the community and have never released a final AI. Colonia organizing groups have continued to fight for, and win, victories like the first ever allocation of colonia drainage funds from a County drainage bond, but HUD's pullback from the 2015 rule was seen by jurisdictions as a green light to continue ignoring protected classes of people and fair housing requirements.

### V. Public Participation

The 2015 rule required much more robust community engagement process, one that should be reinstated. It directed program participants to give the public opportunities for involvement in

the development of the AFH and its incorporation into the Consolidated Plan or PHA plan, and to use communications designed to reach the broadest possible audience to inform the public of those opportunities. (See §5.158(a)). It also requires program participants to consult with a wide range of stakeholders, including not only fair housing groups, but also organizations that represent members of protected classes, and public and private agencies that provide assisted housing, health services, and social services. (See, for example, §91.100). One of the goals of the 2015 rule was to “[p]rovide an opportunity for the public, including individuals historically excluded because of characteristics protected by the Fair Housing Act, to provide input about fair housing issues, goals, priorities, and the most appropriate uses of HUD funds and other investments.” (See 80 F.R. 42272, 42273, Thursday July 16, 2015) One of the legacies of segregation and discrimination is that persons in protected classes under the Fair Housing Act are often disenfranchised and deprived of political power or even access to government entities; a robust and inclusive community participation process is critical to ensuring that these communities have a say in what happens in their communities, and in how resources are distributed.

The 2015 rule established a floor (with additional recommendations in guidance) that can be improved upon in practice, but successfully increased participation in the AFH process in Texas. For example, there was an unprecedented level of community participation in the Hidalgo County AFH. Colonia residents, whose communities are legally defined by their lack of infrastructure like drainage and running water, organized a public meeting to bring their concerns about disinvestment and discrimination to the attention of the County and elected officials, attended by 100 people. Community organizing groups presented video testimony of residents, had a professor talk about the origins of racial segregation in the Rio Grande Valley, and residents presented data and a request for specific meaningful actions to address identified fair housing issues. In Denver, community engagement identified a discriminatory practice – charging Latinx renters an extra “per person” fee for each child – that decades of AIs had failed to uncover.

The issues under consideration in affirmatively furthering fair housing and the AFH do merit separate and additional public participation and consultation procedures beyond those already required of program participants in preparing their annual plans for housing and community development. These are separate planning processes, and while Consolidated Plan must incorporate fair housing consideration and the provisions of the AFH, the individual processes have different goals and purposes. The content of the Consolidated Plan, for example, the local government’s housing and homeless needs assessment, does not focus on discrimination against members of protected classes under the Fair Housing Act: race, disability status, and familial status are considered along with many other factors, including ones that primarily

relate to income or economic status. 24 C.F.R. § 91.205(b).<sup>43</sup> Other than consultation and certification requirements, federal regulations do not separately require a Consolidated Plan to address fair housing concerns, and HUD does not explicitly require jurisdictions to examine such concerns as part of the content of the Consolidated Plan process except in connection with the 2015 AFFH rule. Similarly, HUD regulations do not separately require the content of Annual Action Plans to address fair housing concerns (other than in reference to the AFH, as per the 2015 AFFH rule). The 2015 rule in fact requires the submission of an AFH well in advance of the Consolidated Plan so that the process of developing the Consolidated Plan and the Plan's substance reflect various components of the AFH. *See* 24 C.F.R. § 5.160(a)(1)(i); 80 Fed. Reg. at 42,287; *see also* 24 C.F.R. § 91.105(e)(1)(i) (requiring that Consolidated Plan hearings include presentation of "proposed strategies and actions for affirmatively furthering fair housing consistent with the AFH"); 24 C.F.R. § 91.215(a)(5)(i) (CDBG participant must "[d]escribe how the priorities and specific objectives of the jurisdiction...will affirmatively further fair housing by setting forth strategies and actions consistent with the goals and other elements identified in an AFH").

As HUD stated in the preamble to the Final 2015 AFFH Rule, the AFH and the Consolidated Plan are distinct documents with unique purposes, and part of two separate processes: [t]he AFH is a distinct document with data, analysis, and priority and goal setting that feeds into the consolidated plan . . . . **An analysis of barriers to fair housing choice has always been an analysis separate from the consolidated planning or PHA planning processes. The purpose of the separate analysis is to inform the broader scope in planning undertaken for the consolidated plan and PHA Plan.** . . . The disproportionate housing needs analysis required in the AFH is a broader analysis than must be done in connection with the consolidated plan since, for AFH purposes, the analysis must include groups with protected characteristics beyond race and ethnicity." (80 Fed. Reg. 42,272, 42,300) (emphasis added)

The AFH provided both an extensive process and new substantive content requirements that jurisdictions must engage in prior to the adoption of the Consolidated Plan and related housing plans. Again, these are separate processes with separate purposes, and the existing Consolidated Plan and other planning process cannot be substituted for the fair housing analysis process.

Public input on AFFH should, and in fact must be, included as part of the Consolidated Plan/PHA Plan community participation process. As noted above, the 2015 rule in fact required incorporation of the AFH and fair housing issues

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<sup>43</sup> The conflation of protected class status with economic status is erroneous, and an ongoing misinterpretation of the Fair Housing Act and obligation to AFFH.

into the Consolidated Plan. *See* 24 C.F.R. § 5.160(a)(1)(i); 80 Fed. Reg. at 42,287; *see also* 24 C.F.R. § 91.105(e)(1)(i); and 24 C.F.R. § 91.215(a)(5)(i). Resource allocation decisions, for example, must be consistent with a jurisdiction’s statutory duty to AFFH, and affected communities may have fair housing related feedback on specific funding allocation proposals in addition to their input on the AFH.

These additional requirements are necessary. When the 2015 rule was withdrawn, the City of Lubbock did not release its 2018 AI until after it had released its Consolidated Plan, initially refused to accept comments that were not sent by mail, and repeatedly blocked the Lubbock NAACP and neighborhoods affected by the City's history of discriminatory zoning that forced industrial uses into Black and Latinx neighborhoods from submitting comments on that issue. This is part of the Administrative Fair Housing Complaint that the Lubbock NAACP filed against the City in December 2019.<sup>44</sup>

## V. Conclusion

The Fair Housing Act was passed over 50 years ago, but we can still see, in stark relief, the “two societies – one black, one white – separate and unequal” that the Kerner Commission’s 1968 report warned us about. The Black homeownership rate was just over 40% in 2015, almost unchanged since 1968, and the median White family has almost 10 times as much wealth as the median Black family. Black families are 2.5 times as likely to be in poverty as Whites, and infant mortality for Black infants as compared to white infants is even higher than it was in 1968.<sup>45</sup> School segregation is actually worse than it was in 1968.<sup>46</sup> Not only do one in six African American students and one in nine Hispanic/Latinx students attend schools that are at least 99% children of color, 71% of all African American public school students and 73% of all Hispanic/Latinx public school students attended high-poverty schools during the same period. Only 28% of all White public school students attended high-poverty schools.<sup>47</sup> Residential patterns in Austin and other Texas cities replicate the racial distribution mandated by 1934 Federal Housing Administration maps that redlined minority communities. African Americans and Hispanic/Latinx households have much greater exposure to environmental and health risks like air pollution, toxic waste, and industrial land uses.<sup>48</sup>

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<sup>44</sup> Complaint issued by HUD on February 10, 2020.

<sup>45</sup> <http://www.epi.org/publication/50-years-after-the-kenner-commission/>

<sup>46</sup> <https://thinkprogress.org/american-schools-are-more-segregated-now-than-they-were-in-1968-and-the-supreme-court-doesnt-care-cc7ab6651c/>

<sup>47</sup> GARY ORFIELD & CHUNGMEI LEE, *CIVIL RIGHTS PROJECT, WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY* 19, tbl.7 (2005).

<sup>48</sup> Lara Cushing MPH, MA, John Faust PhD, Laura Meehan August MPH, Rose Cendak MS, Walker Wieland BA, and

This lack of progress on civil rights and equal access to opportunity is shameful. Given that it has taken over a century of concerted government action and a massive investment of public resources to create the current level of segregation and its far-reaching and negative effects, HUD's proposed rule, which would reverse the progress made under the 2015 rule, is itself a violation of its duty to AFFH.

Governments and PHAs have deliberately segregated families into unsafe, high-poverty neighborhoods, artificially depressed their home values, destroyed their infrastructure through neglect, and forced communities of color into geographically vulnerable and environmentally high-risk areas with discriminatory zoning. If those governments and PHAs find doing conducting a meaningful planning process "burdensome", perhaps they should talk to some of the families in the 5th Ward of Houston whose loved ones are dying of cancer cause by exposure to creosote, or some of the children who go to mold-infested schools or schools with no heat, or some of the families who lost everything in the 2008 financial crises when their neighborhoods were targeted for predatory lending because they were Black or Latinx about the burdens they've been forced to carry by segregation. The 2015 rules should be reinstated.

Madison Sloan  
Director, Disaster Recovery and Fair Housing Project  
Texas Appleseed

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George Alexeeff PhD, "Racial/Ethnic Disparities in Cumulative Environmental Health Impacts in California: Evidence From a Statewide Environmental Justice Screening Tool", *American Journal of Public Health*, October 9, 2015. Available at: <http://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2015.302643>

1609 Shoal Creek Blvd., STE 201, Austin, TX 78701  
Phone 512.473.2800 Fax 512.473.2813 [www.texasappleseed.org](http://www.texasappleseed.org)  
[info@texasappleseed.net](mailto:info@texasappleseed.net)