



March 16, 2020

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

Re: Docket No. FR-6123-P-02: Affirmatively Furthering Fair Housing

To Whom It May Concern:

The NYU Furman Center and Professor Justin Steil appreciate the opportunity to submit comments on the Department of Housing and Urban Development’s (HUD’s) Notice of Proposed Rulemaking, Affirmatively Furthering Fair Housing (“the Proposed Rule”).¹ The NYU Furman Center advances research and debate on housing, neighborhoods, and urban policy by providing academic and empirical research, promoting frank and productive discussions among stakeholders, and providing essential data and analysis to practitioners and policymakers.² Justin Steil is an Associate Professor of Law and Urban Planning at the Massachusetts Institute of Technology. His research examines urban inequality and policy responses to place-based disparities in access to opportunity.³

We base these comments on the extensive research we have conducted, for decades, on residential segregation, neighborhood conditions and access to opportunity, and housing and land use policy.⁴ Our comments focus on the omission of race and segregation from the Proposed Rule; on research not considered in the Proposed Rule that shows the usefulness and effectiveness of HUD’s 2015 AFFH rule; and on conceptual and methodological issues in the Proposed Rule’s scoring and ranking system.

The 2015 AFFH rule resulted from HUD’s decades-long efforts to develop a mechanism that would ensure that recipients of HUD assistance fulfilled their obligation to affirmatively further fair housing.⁵ Evidence demonstrates that the 2015 rule—unlike its predecessors—enabled many jurisdictions to critically engage with data on segregation and concentrated poverty within

¹ Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2041 (proposed Jan. 14, 2020) [hereinafter “Proposed Rule”].

² These comments do not represent the institutional views (if any) of NYU, NYU’s School of Law, or NYU’s Wagner Graduate School of Public Service. The Furman Center is grateful for the primary authorship of these comments by Sophia House and Noah Kazis, along with the conscientious research assistance provided by Andrés Rivero.

³ These comments do not represent the institutional views of the Massachusetts Institute of Technology or the MIT Department of Urban Studies and Planning.

⁴ For a summary of relevant Furman Center scholarship, *see* Appendix A.

⁵ The Furman Center discusses the history of HUD’s search for a meaningful AFFH mechanism in public comments previously submitted to the agency. *See* Appendix B. We incorporate the analysis contained in those comments by reference. The Furman Center also addressed many issues related to the harms of segregation and the importance of robust fair housing enforcement in recent comments on HUD’s proposed disparate impact rule; the research cited therein is relevant in this context as well. *See* Appendix C.

their borders; expand public engagement in advancing fair housing; and develop concrete steps to further fair housing. Yet the Proposed Rule would eliminate many of the 2015 rule’s most crucial features, and in many ways, mark a step backwards even from the much-criticized process in place before 2015. The Proposed Rule decenters the spatial and distributional aspects of fair housing, as well as the experiences of protected classes, when they should be at the heart of any effort to further fair housing.

Instead, the Proposed Rule emphasizes increasing the supply of affordable and habitable housing. While both are worthy goals, neither is equivalent to affirmatively furthering fair housing. Focusing only on the cost and quality of housing while ignoring *where* that housing is located, the *quality* of neighborhoods that comes with that housing, *who* gets access to that housing, or the disparate burdens borne by protected classes, is incompatible with the fulfilment of the Fair Housing Act’s mandate to affirmatively further fair housing. These flaws require the withdrawal of the Proposed Rule and a thorough reconsideration of its approach.

I. The Fair Housing Act’s Affirmatively Furthering Fair Housing Provision Must Advance Fair Housing, Not Just Affordable Housing

The intertwined issues of fairness in housing and equality of access to opportunity have long been a subject of federal policymaking, from the Reconstruction Amendments and Civil Rights Act of 1866 to the present, and HUD’s programs aim to promote access to opportunity through a variety of mechanisms. The Fair Housing Act, specifically, has always emphasized the prohibition and prevention of discrimination against all protected classes and an affirmative mandate to address the stubborn racial inequalities that have characterized metropolitan areas in the United States for more than a century. Today, just as when Congress enacted the Fair Housing Act, segregation, discrimination, and unequal access to opportunity continue to threaten to create in the United States “two societies, one black, one white—separate and unequal.”⁶

The 2015 Affirmatively Furthering Fair Housing Rule incorporates essential strategies to address the same racial disparities in housing and neighborhoods that Congress sought to address by enacting the Fair Housing Act. Like the Fair Housing Act, it placed integration and access to opportunity at its center, defining affirmatively furthering fair housing as “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.”⁷ In contrast, the Proposed Rule downplays the importance of segregation and housing discrimination against protected classes. Indeed, the Proposed Rule would remove any mention of segregation or integration from the very definition of affirmatively furthering fair housing.⁸ Moreover, as will be discussed in Part III of these comments, the Proposed Rule would measure jurisdictions’

⁶ National Advisory Commission on Civil Disorders, Report of the National Advisory Commission on Civil Disorders, 1968, 1.

⁷ 24 C.F.R. § 5.152.

⁸ Proposed Rule, 85 Fed. Reg. at 2053 (defining “affirmatively furthering fair housing” as reducing obstacles to “fair housing choice,” which itself is defined without reference to segregation or integration).

compliance with the statute’s AFFH mandate without reference to disparities by protected class or to segregation. This contravenes the text and purpose of the Act, which was intended to address these important fair housing issues that remain critical obstacles to equality of opportunity today.

The Fair Housing Act Was Enacted to Combat Housing Discrimination and Segregation

Congress passed the Fair Housing Act “to provide, within constitutional limitations, for fair housing throughout the United States.”⁹ Given the ambitious goals of the Fair Housing Act, the Supreme Court has instructed courts to give the “broad and inclusive” language of the Act a “generous construction” to effectuate its remedial purpose.¹⁰ This clear statutory mandate—to provide for *fair* housing—is further informed by the history of the statute and the Congressional intent to dismantle segregation.

Throughout the 1960s, conditions in cities across the United States gave rise to protests against discriminatory housing policies and urban inequality. During the summer of 1967, more than 150 uprisings erupted in cities across the country. In response, President Johnson convened the National Advisory Commission on Civil Disorders, commonly known as the Kerner Commission, after its Chair, Otto Kerner, the Governor of Illinois.¹¹ The Kerner Commission’s report, released in February of 1968, determined that housing discrimination, residential segregation, and economic inequality were causing increasing societal division, and recommended that Congress “enact a comprehensive and enforceable open housing law.”¹²

On April 4, 1968, Martin Luther King, Jr. was assassinated, and the threat of widespread civil unrest loomed in cities across the country. One week later, Congress passed the Fair Housing Act, setting out a sweeping goal of providing for fair housing throughout the nation. Senator Jacob Javits, speaking in support of the Act, warned that “the crisis of the cities . . . is equal to the crisis which we face in Vietnam.”¹³ Senator Walter Mondale, the primary drafter of the Fair Housing Act, cautioned that “our failure to abolish the ghetto will reinforce the growing alienation of white and black America. It will ensure two separate Americas constantly at war with one another.”¹⁴

The legislative record makes clear that Congress had a broad understanding of the harms caused by housing discrimination and by residential segregation by race. Senator Mondale emphasized that citywide problems are “directly traceable to the existing patterns of racially segregated housing.”¹⁵ The scope of the remedy Congress created in the Fair Housing Act matched the scale of the problem. The Fair Housing Act aimed to replace segregated ghettos with “truly integrated neighborhoods.”¹⁶

Congress intended the Fair Housing Act to address place-based inequalities through the affirmatively furthering fair housing provision. The sponsors of the Fair Housing Act pointed out

⁹ 42 U.S.C. § 3601 (2018).

¹⁰ *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972).

¹¹ Establishing a National Advisory Commission on Civil Disorders, Exec. Order No. 11365, 32 Fed. Reg. 11,111 (Aug. 1, 1967).

¹² *Id.* at 13.

¹³ 114 CONG. REC. 2703 (1968).

¹⁴ *Id.* at 2274.

¹⁵ *Id.* at 2276.

¹⁶ *Id.* at 3422.

that cities were overburdened and underfinanced as a result of discrimination in housing. For instance, Senator Mondale stated that the Fair Housing Act was necessary to address the “[d]eclining tax base, poor sanitation, loss of jobs, inadequate education opportunity, and urban squalor” that central cities faced.¹⁷ Senator Edward Brooke emphasized that the “tax base on which adequate public services, and especially adequate public education, subsists has fled the city,” and noted that the objective of the Fair Housing Act “must [be to] move toward [the] goal” of recreating “adequate services in the central city” by rooting out systemic discrimination.¹⁸

Congress further recognized that housing discrimination perpetuates racial segregation and that racial segregation leads to substantial economic disparities between neighborhoods. Senator Philip Hart read into the record a letter from President Johnson stating that “[m]inorities have been artificially compressed into ghettos where . . . city administrations are burdened with rising social costs and falling tax revenues.”¹⁹ The President’s letter urged Congress to act: “Fair housing practices . . . are essential if we are to relieve the crisis in our cities.”²⁰ In short, the President and Congress recognized and sought to address the direct relationship between discrimination, metropolitan segregation, and inequality across cities and neighborhoods.

Any rule meant to affirmatively further the policies of the Fair Housing Act must advance these statutory goals, especially promoting integration and access to opportunity. By downplaying the continued importance of combating segregation and racially and ethnically concentrated poverty, however, the Proposed Rule would depart from the Congressional intent behind the Act and its statutory mandate.

Combating Segregation and Unequal Access to Opportunity Remains Central to Furthering Fair Housing

The types of housing disparities targeted by the drafters of the Fair Housing Act continue into the present. As the Supreme Court has recently noted, the continuing consequences of housing discrimination “remain today, intertwined with the country’s economic and social life.”²¹ The Proposed Rule, however, moves away from addressing residential segregation, the concentration of poverty, and unequal access to opportunity in its definition of AFFH and in the broader approach it espouses. This renders the Proposed Rule unresponsive both to the FHA’s mandate to further fair housing and to the real and substantial harms that segregation continues to perpetuate in communities across the United States.

Although levels of Black-white segregation have declined somewhat since the Fair Housing Act’s passage, they remain high, and levels of Latinx-white segregation are largely unchanged over the past half-century.²² By some measures, Latinx-white segregation may even be

¹⁷ 114 CONG. REC. 2274 (1968).

¹⁸ *Id.* at 2280.

¹⁹ *Id.* at 3358.

²⁰ *Id.*

²¹ *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2515 (2015).

²² Jorge De La Roca, Ingrid Gould Ellen & Katherine M. O’Regan, *Race and Neighborhoods in the 21st Century: What Does Segregation Mean Today?*, 47 REGIONAL SCI. & URB. ECON. 138, 140 (2014).

increasing.²³ In 2010, the average American state had a black-white dissimilarity index of 73, an Asian-white dissimilarity index of 66, and a Latinx-white dissimilarity index of 61.²⁴ At the same time, white people continue to live primarily among other white people. Between 2011 and 2015, the average white resident of a metropolitan area lived in a neighborhood that was 72 percent white, and 16 percent more white than the metropolitan area overall.²⁵ Even in relatively integrated cities, people's day-to-day lives remain highly segregated.²⁶ Edward Goetz has documented the "extreme segregation of whites and of the affluent," and with it the emergence of white "racially concentrated areas of affluence."²⁷ In Goetz's study of fifteen metro areas, areas of concentrated affluence averaged 93 percent white.²⁸

Research has consistently found that higher levels of metropolitan area segregation are associated with lower levels of socio-economic mobility for all residents and also with negative impacts on the life chances of African-American and Latinx children and young adults, including wider gaps in educational attainment, employment, and earnings, and negative health outcomes.²⁹ Deindustrialization, suburbanization, and widening income polarization have interacted with continuing racial residential segregation to contribute to the creation and intergenerational transmission of neighborhood contexts characterized by concentrated, racialized poverty.³⁰

Over the past half-century, socio-economic mobility in the United States has declined dramatically. Ninety percent of children born in the 1940s grew up to earn more than their parents, compared to only fifty percent of children born in the 1980s.³¹ Declining socio-economic mobility has particularly affected communities of color: the majority of African-American households

²³ *Id.*

²⁴ Daniel T. Lichter, Domenico Parisi & Michael C. Taquino, *Spatial Segregation*, PATHWAYS: STATE OF THE STATES 30 (2015).

²⁵ Joe Cortright, *How Diverse Are the Neighborhoods White People Live In?*, CITYOBSERVATORY: CITYCOMMENTARY (Sep. 1, 2017), <http://cityobservatory.org/how-diverse-are-the-neighborhoods-white-people-live-in/>.

²⁶ Qi Wang, Nolan Edward Phillips, Mario L. Small & Robert J. Sampson, *Urban Mobility and Neighborhood Isolation in America's 50 Largest Cities*, 115 PROC. NAT'L ACADEMY OF SCI. OF THE UNITED STATES OF AMERICA 7735 (2018).

²⁷ Edward G. Goetz, Tony Damiano & Jason Hicks, *Racially Concentrated Areas of Affluence: A Preliminary Investigation* 11, 16, Univ. of Minn. Humphrey Sch. of Pub. Aff., Working Paper (2017), <https://conservancy.umn.edu/bitstream/handle/11299/192356/RCAA-Goetz.pdf?sequence=1&isAllowed=y>.

²⁸ *Id.*

²⁹ Raj Chetty et al., *Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, (Nat'l Bureau of Econ. Research, Working Paper No. 19843, 2014); David M. Cutler & Edward L. Glaeser, *Are Ghettos Good or Bad?*, 112 Quarterly J. Econ. 827 (1997); Jorge De la Roca, Ingrid Gould Ellen & Justin P. Steil, *Does Segregation Matter for Latinos?*, 40 J. HOUS. ECON 129 (2018); Ingrid Gould Ellen, *Is Segregation Bad for Your Health? The Case of Low Birth Weight*, BROOKINGS-WHARTON PAPERS ON URB. AFF. 203 (2000).

³⁰ DOUGLAS S. MASSEY AND NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 10 (1993); Lincoln Quillian, *Segregation and Poverty Concentration: The Role of Three Segregations*, 77 Am. Sociological Rev. 354 (2012); PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* (2013); Paul Jargowsky, *The Architecture of Segregation*, CENTURY FOUNDATION (August 7, 2015), <https://tcf.org/content/report/architecture-of-segregation/>.

³¹ Chetty, Raj, Nathaniel Hendren, Patrick Kline, Emmanuel Saez, and Nicholas Turner, *Is the United States Still a Land of Opportunity? Recent Trends in Intergenerational Mobility*, 104 AM. ECON. REV. 141 (2014).

whose parents were in the middle class in the post-Civil Rights era have experienced downward mobility since, moving below their parents' generation in the income distribution.³²

These trends are even more dramatic when considering the power of place to shape the opportunities of children to move up the socio-economic ladder. Where children grow up strongly predicts their socio-economic mobility, especially for those starting out in the lower half of the income distribution.³³ This is particularly true with respect to segregation by race and income. The socio-economic characteristics of neighborhoods are especially powerful predictors of the educational and economic attainment of African-American and Latinx young adults, whose neighborhoods are, by and large, physically separate and materially unequal from the neighborhoods in which white young adults grow up.³⁴ Unfortunately, residential segregation by race nationwide remains high, and income segregation is increasing, exacerbating gaps in inter-generational mobility by race.³⁵

These trends are intertwined with a widening wealth gap that further reinforces economic inequality, particularly by race. Housing and neighborhood policies lie at the intersection of concerns over widening wealth inequality overall and widening racial disparities in wealth, in particular. For the majority of U.S. homeowners, that home is their most valuable asset. Thus, one reason for the substantial racial and ethnic disparities in wealth are disparities in rates of homeownership and in financial returns to homeownership. Homeownership rates in the United States reached record highs in 2004 and 2005, when more than three out of every four (76 percent) white non-Hispanic households were homeowners, but even at that peak only half of Black households (49 percent) and Latinx households (50 percent) owned their own home.³⁶

Both the economic growth in the first decade of the 2000s and the devastating recession beginning in 2008 were caused in part by the increased global investment in U.S. homes, facilitated through the packaging of home mortgage loans into securities. The precipitous decline in home values and the increased rate of foreclosures after 2008 contributed to a widening of the racial wealth gap between white and non-white households. In 2016, the median white household had a net worth of \$171,000, nearly ten times the median Black household's net worth of \$17,600 and roughly eight times the median Latinx household's net worth of \$20,700.³⁷ By 2019, the white homeownership rate had fallen to 73 percent, while the Black home ownership rate had fallen to 41 percent and the Latinx rate to 47 percent—leaving a 26 to 32 percentage point gap in

³² SHARKEY, SUPRA NOTE 30.

³³ Raj Chetty et al., "Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States" (Cambridge, MA: National Bureau of Economic Research, January 2014).

³⁴ Jorge De la Roca, Ingrid Gould Ellen & Justin P. Steil, *Does Segregation Matter for Latinos?*, 40 J. HOUS. ECON 129 (2018); Ingrid Gould Ellen, Justin P. Steil & Jorge De la Roca, *The Significance of Segregation in the 21st Century*, 15 CITY & CMTY. 8 (2016); SHARKEY, SUPRA NOTE 30.

³⁵ De La Roca, Ellen & O'Regan, *supra* note 22 at 140; Sean F. Reardon and Kendra Bischoff, 116 *Income Inequality and Income Segregation*, AM. J. SOC. 1092 (2011).

³⁶ U.S. Department of Commerce, Bureau of the Census. Housing Vacancies and Homeownership. Table 16: Quarterly Homeownership Rates by Race and Ethnicity of Householder: 1994 to Present (2019), *available at* <https://www.census.gov/housing/hvs/data/histtabs.html>

³⁷ Jesse Bricker et al., *Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances*, 103 FED. RESERVE BULLETIN 1 (2017).

homeownership rates by race and ethnicity.³⁸ Even looking solely at those who do own their homes, white homeowners have substantially more net housing wealth, or home equity, than non-white homeowners.³⁹ As homeownership rates have declined over the past decade, housing costs for renters have risen— in many cities faster than renters’ incomes—also in racially disparate patterns.

These types of disparity—including residential segregation and place-based inequalities—are what Congress intended to address in enacting the Fair Housing Act and its affirmatively furthering fair housing provision. Moreover, the dramatic racial disparities in access to opportunity that continue to characterize cities in the United States, are increasingly well-documented and well-understood, heightening HUD’s obligation to address them under the Fair Housing Act. The Proposed Rule, by failing to directly measure or focus on living patterns or disparities by race or other protected characteristics does not comply with the Fair Housing Act’s mandate.

II. The 2015 Affirmatively Furthering Fair Housing Rule Was Working

The AFH Process Generated Clear, Specific, and Measurable Fair Housing Goals

The 2015 Affirmatively Furthering Fair Housing Rule sought to implement the Fair Housing Act’s mandate to further fair housing in response to the mounting evidence, discussed above, of the connections between segregation, high-poverty neighborhoods, and negative outcomes for social mobility and socio-economic opportunity. Early evidence indicates that the Assessment of Fair Housing (AFH) process substantially improved upon the prior Analysis of Impediments (AI) process. Comparing twenty-eight of the first AFHs (as modified in response to HUD’s comments on initial submission) with those municipalities’ previous AIs found dramatic improvement over the prior AI regime in several key areas.⁴⁰ And contrary to the Proposed Rule’s claim that the 2015 Rule deprived jurisdictions of flexibility, the Rule provided substantial discretion to municipalities to identify issues specific to their jurisdictions and create locally-tailored strategies to advance fair housing, as revealed by their varied approaches to advancing fair housing.

The first twenty-eight municipalities to submit AFHs represented a wide cross section of the country, from Fort Pierce, Florida (population 43,000) to Philadelphia, Pennsylvania (population 1.6 million). Median household incomes ranged from \$26,000 in Fort Pierce to \$86,000 in Chester County, Pennsylvania. Demographic composition varied widely, from Lake County, Ohio, which is ninety percent white non-Hispanic, to cities such as Paramount, California, where eighty percent of the population identify as Latinx, and New Orleans, Louisiana, where fifty-nine percent identify as Black. Levels of Black-white and Latinx-white segregation, as

³⁸ U.S. Department of Commerce, Bureau of the Census. Housing Vacancies and Homeownership. Table 16: Quarterly Homeownership Rates by Race and Ethnicity of Householder: 1994 to Present (2019), *available at* <https://www.census.gov/housing/hvs/data/histtabs.html>.

³⁹ Jesse Bricker et al., *supra* note 37.

⁴⁰ Justin Steil & Nicholas Kelly, *The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance*, 29.1 HOUS. POL’Y DEBATE 85 (2019).

measured by the dissimilarity index, also varied widely: from lows in Victorville, California (0.18 and 0.15, respectively) to highs in Philadelphia (0.76 and 0.63, respectively).⁴¹

Of all goals in these jurisdictions' AIs, only five percent contained a measurable objective or included a new policy. By contrast, thirty-three percent of all goals in their AFHs contained a measurable objective or new policy, an increase of twenty-eight percentage points. From the AIs to the AFHs, goals describing place-based investments increased by eleven percentage points and mobility investments increased by nine percentage points. Overall, these findings suggest that municipalities in their AFHs proposed substantially more new policies with more measurable objectives that focus on the stated goals of the AFFH Rule when compared to their prior AIs.⁴²

An illustrative example of change in goals in one city from the AI to the AFH can be seen in El Paso County, Colorado. The county's 2009 AI identified as a goal to "[e]mpower people through educational materials to help them avoid becoming a victim [of predatory and unfair lending practices]" by "[p]rovid[ing] online information and training to increase knowledge of existing and potential homeownership and lending practices."⁴³ The county did not give any metrics to measure progress in empowering people to avoid unfair lending or ensure the information was readily accessible. In El Paso County's 2016 AFH, by contrast, the county committed to "assist[ing] with the development of 100 publicly supported affordable housing units in areas of opportunity."⁴⁴ Unlike the AI goal, this AFH goal includes at least some metric for evaluating progress: the construction of one hundred publicly subsidized affordable housing units by 2021 in parts of the county with higher levels of access to opportunity. Notably, while focusing on fair housing and access to opportunity, this goal also advances housing affordability.

Examining a second example, Temecula, California's AI stated that the "city should invest in community projects in low-income areas," without any further detail as to the level, form, or location of such investments. The AI also stated that the city should "add fair housing information on its website" without setting an objective for how to evaluate the translation of that additional information into better outcomes for residents.⁴⁵ Temecula's 2016 AFH, by contrast, included goals such as "amend Title 17 of the Municipal Code to . . . establish an Affordable Housing Overlay on at least 100 acres" allowing multi-family uses by right, without a conditional use permit, by June 30, 2018 and "[e]nter into an exclusive negotiating agreement with a developer to allocate \$12.4 million in remaining affordable housing Tax Allocation Bond proceeds to create or rehabilitate an estimated 100 affordable housing units" in census tracts that do not have high poverty rates.⁴⁶ Once more, the fair housing goals created through the AFH process simultaneously advanced access to opportunity while reducing regulatory burdens and seeking to expand affordable housing.

Within the AFH process, forty percent or more of goals that focused on zoning, affordable housing, place-based investments, and mobility programs also included a measurable objective or

⁴¹ *Id.*

⁴² *Id.*

⁴³ El Paso County, *El Paso County Analysis of Impediments to Fair Housing Choice: A Fair Housing Plan* (2009).

⁴⁴ El Paso County, *Assessment of Fair Housing Plan* (2016).

⁴⁵ City of Temecula, *Five-Year Consolidated Plan and Analysis of Impediments to Fair Housing Choice* 5, 33 (2012).

⁴⁶ City of Temecula, *City of Temecula: Final Assessment of Fair Housing* (2016).

a new policy, indicating that these were areas in which municipalities are particularly likely to make public commitments to implementation. As the El Paso County and Temecula examples suggest, numerical metrics for the creation of new affordable housing units in high-opportunity neighborhoods or the rehabilitation of existing units in underinvested neighborhoods were relatively common, and zoning changes often proposed specific new policies. Thus, while HUD claims its proposed changes are necessary to “empower[] individual jurisdictions to develop new approaches to AFFH” and allow local actors to “take steps to further their particularized goals,”⁴⁷ the AFH process had already demonstrated its ability to do so.

Seattle offers a particularly successful example of an AFH. Seattle’s AFH identifies three primary fair housing goals: “to create opportunities for housing mobility for those who may wish to leave a R/ECAP [Racially or Ethnically Concentrated Area of Poverty], protect those who wish to stay in Seattle from further risk of displacement, and finally to correct inequities in access to community infrastructure and assets.”⁴⁸ The AFH draws on Seattle’s preexisting Race and Social Justice Initiative and focuses extensively on increasing the affordability of housing and preventing displacement. Some of the goals propose new policies to expand the supply of affordable housing in neighborhoods where residents are at high risk of displacement, such as piloting city bond financing for affordable housing or advocating for a state preservation tax exemption to incentive landlords to preserve affordable housing. Other goals include promoting equitable development by rehabilitating existing public housing and expanding the subsidized housing stock, such as the goal of replacing 561 existing public housing units at the Yesler Terrace development and creating 100 new units serving those with incomes below 30 percent of the Area Median Income (AMI); 290 new homes serving those between 30 and 50 percent of AMI; 850 new homes serving those between 50 and 80 percent of AMI; and 1,200 to 3,200 market rate homes.⁴⁹ Contrary to HUD’s claim that the 2015 Rule did not allow the “flexibility to identify their locality’s most relevant issues or to adapt their process to the unique conditions of the jurisdiction”⁵⁰ Seattle was able to tailor its goals to its particular fiscal needs and even to the level of individual housing developments, simultaneously addressing racial equity, housing quality, and housing affordability.

The Kansas City region submitted the first AFH written at a regional level.⁵¹ The five participating cities collaborated on a regional analysis and together identified fifteen shared regional goals, as well as fifty-nine additional municipal goals. Regional goals included developing a model zoning code to facilitate the construction of smaller homes on smaller lots as well as four- to twelve-unit multifamily buildings across the region; bringing housing authorities together to expand housing choice for members of protected classes through a shared approach to voucher use; and developing a regional housing locator service to enable voucher holders to access

⁴⁷ Proposed Rule, 85 Fed. Reg. at 2044.

⁴⁸ City of Seattle and Seattle Housing Authority, *2017 City of Seattle and Seattle Housing Authority Joint Assessment of Fair Housing*, 6 (2017).

⁴⁹ *Id.* at 376.

⁵⁰ Proposed Rule, 85 Fed. Reg. at 2043.

⁵¹ The AFH for the Mid-America Regional Council covered Kansas City, Missouri and Kansas City, Kansas, together with Blue Springs, Missouri; Independence, Missouri; and Leavenworth, Kansas.

a wider range of units in a broader set of neighborhoods.⁵² These regional and mobility goals highlight some of the ways in which the AFH process encouraged collaboration among cities in a region to improve access to opportunity. While the preamble to the Proposed Rule asserts that jurisdictions' geographic limitations hindered even regional partnership's capacity to comply with the 2015 Rule,⁵³ the Kansas City AFH demonstrates the immense potential of a regional approach, including through voucher programs and through rewriting land use regulations to encourage more housing production.⁵⁴

Chester County, Pennsylvania is a high-income suburban county where more than eighty percent of residents identify as white non-Hispanic. The county, which was among the first twenty-eight AFH filers, had the second highest number of goals with measurable objectives or new policies. One was to "provide more diverse housing opportunities and encourage mobility among low-income residents living in areas of poverty."⁵⁵ Chester County proposed several ways of achieving this goal: by creating a Small Area Fair Market Rent program to enable Housing Choice Voucher holders to access units in lower-poverty neighborhoods with higher rents; by developing a new educational protocol for housing agency staff to use when processing new voucher holders to ensure they are aware of neighborhood options; by providing a minimum of two allocations of project based vouchers for a total commitment of thirty-five units of affordable housing in areas of high opportunity; and by decreasing the share of the county's voucher holders living in high-poverty tracts from 43.9 percent to 39 percent of the total vouchers under issuance and lease in Chester County.⁵⁶ These case studies illustrate only a portion of the variety of strategies employed by jurisdictions under the AFH process, demonstrating the substantial flexibility and discretion they were granted under the 2015 Rule.

The revisions that many grant recipients undertook in response to HUD comments on their original AFH submissions also substantially improved their AFHs. While HUD describes this process as burdensome, the collaborative approach that HUD undertook in its reviews helped grant recipients clarify and strengthen their goals and metrics related to fair housing.⁵⁷ The Proposed Rule overlooks the benefits of this increased oversight and the corresponding increase in communication between HUD and jurisdictions pursuing the AFH process. Extensive community engagement and partnerships between grant recipients, fair housing organizations, and community-based organizations also helped grant recipients identify innovative and meaningful goals.

To be sure, some jurisdictions have found the extent of the analysis and level of detail required by the AFH process daunting, and many of the first jurisdictions to file AFHs relied on

⁵² Mid-America Regional Council, *Plan for Affirmatively Furthering Fair Housing* (2016).

⁵³ Proposed Rule, 85 Fed Reg. at 2042.

⁵⁴ This further raises concerns with HUD's proposal to limit the AFFH obligation to obstacles within a jurisdiction's (undefined) "sphere of influence." Regional approaches should be encouraged where fair housing issues cross jurisdictional lines, as is the case in many housing markets.

⁵⁵ Chester County, Pennsylvania, *Assessment of Fair Housing 2018-2022: Chester County, Pennsylvania*, 56 (2017).

⁵⁶ *Id.*

⁵⁷ Justin Steil & Nicholas Kelly, *Survival of the Fairest: Examining HUD Reviews of Assessments of Fair Housing*, 29.5 HOUS. POL'Y DEBATE 736 (2019).

technical assistance that will be difficult to scale up for all jurisdictions. While the HUD review of initial AFHs may have been resource intensive, it is likely that future grant recipients would learn from these first submissions. Such challenges arise with any new system, and HUD should draw from the lessons learned from early AFH filers to help jurisdictions address the complex challenges of furthering fair housing—not, as the Proposed Rule would do, divert resources and oversight from the Fair Housing Act’s core mandate.

The AFH Process Facilitated Robust Public Engagement

The Furman Center studied the public engagement processes jurisdictions used in the AI and AFH processes and found substantially more robust engagement under the latter. We presented these results in response to HUD’s proposed delay of the AFFH rule in March 2018; they are included in full in Appendix B.⁵⁸ We compared nineteen of the twenty-eight submitted AFHs with the most recent AI each of those jurisdictions had filed before the AFFH rule came into effect.⁵⁹

We observed that engagement processes were stronger in the AFH process with respect to the number of opportunities for public engagement; the inclusiveness of those opportunities; the provision of data allowing HUD to assess public engagement; documentation and consideration of public input; and cross-jurisdictional or cross-sector engagement.⁶⁰ Under the AFH process, jurisdictions used a wider range of communication strategies to solicit public participation and created more meaningful opportunities for participation than they had in preparing their AIs.⁶¹ Final AFHs also consistently documented the engagement process and quantified the extent of community participation, making the extent of public engagement more transparent than under the AI process. We noted that a likely source of these improvements is the inclusion of greater guidance about what kinds of public engagement should be used under the AFH process, as well as clarity that jurisdictions will be held accountable for public engagement. By contrast, the public engagement required of jurisdictions completing AIs was poorly understood,⁶² and grantees rarely provided enough detail about the scope of their public engagement processes to permit HUD to evaluate their efforts.⁶³

We also interviewed numerous jurisdictions that were the first to file AFHs in order to put together a roundtable about lessons learned from their experiences. Many jurisdictions reported

⁵⁸ NYU Furman Center for Real Estate and Urban Policy, Comment Letter on Proposed Rule Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants 3 (Mar. 6, 2018), http://furmancenter.org/files/NYUFurmanCenter_CommentsAFHDelay_6MAR2018.pdf.

⁵⁹ We studied AFHs filed between October 2016 (the first submission date) and July of 2017 filed by jurisdictions for which we could locate both an AFH and an AI.

⁶⁰ NYU Furman Center, *supra* note 58, at 2.

⁶¹ *Id.* at 5-6.

⁶² For example, the *Fair Housing Planning Guide*—HUD’s primary resource for jurisdictions compiling an AI—notes that “HUD does not expect the jurisdiction to follow the strict citizen participation requirements for their *first* [AI],” but that “HUD does expect the jurisdiction to develop an AI that involves and addresses concerns of the entire community.” See U.S. DEP’T OF HOUS. & URB. DEV., 1 FAIR HOUSING PLANNING GUIDE 2-5 (1996).

⁶³ NYU Furman Center, *supra* note 58 at 7.

that they found the AFH process both extremely helpful and more meaningful than the AI process.⁶⁴

The Proposed Rule, however, does not engage with the research documenting the successes of the AFH process in improving the clarity and specificity with which jurisdictions outlined their goals or the extent to which they engaged with communities in doing so. Instead, it inaccurately deems the participation requirements duplicative with the pre-existing participation requirements built into the consolidated plan process.⁶⁵ The Proposed Rule would therefore revert to the form of public participation underlying the AI process by merging public engagement with the AFFH process into the larger consolidated plan participation regime.⁶⁶ As the Furman Center's research demonstrates, however, the quality and content of public participation under the two systems is not identical, and fair housing-specific public engagement is not redundant. Rather, participation in the AFH process provided an opportunity for the fuller discussion and development of a distinct set of fair housing issues. The Proposed Rule should acknowledge, not abandon, the value of that public engagement.

III. HUD's Proposed Ranking Tool Will Not Accurately Measure Fair Housing Outcomes

One of the central administrative mechanisms created by the Proposed Rule is its proposed ranking score. Based on this scoring system, HUD would allocate rewards to “outstanding” jurisdictions, including the most-improved performers, or, alternatively, scrutinize and possibly reject a low-performing jurisdiction's certification.⁶⁷ However, fundamental aspects of HUD's proposed scoring system raise concerns warranting comment. As outlined, it would fail to accurately capture fair housing conditions and would not provide a meaningful measure on which to compare jurisdictions. The Proposed Rule employs the wrong metrics—and more importantly,

⁶⁴ For example, representatives from New Orleans and Los Angeles—both early adopters of the AFH process—participated in the roundtable and lauded many aspects of the process. NYU Furman Center for Real Estate and Urban Policy, *New York City's Upcoming Assessment Of Fair Housing: Lessons From Other Cities* (2017), <http://furmancenter.org/thestoop/entry/watch-live-new-york-citys-upcoming-assessment-of-fair-housing-lessons-from>.

⁶⁵ Proposed Rule, 85 Fed. Reg. at 2042.

⁶⁶ As one example of the inadequacy of using the consolidated plan process for public engagement, during the development of New York City's 2015 consolidated plan, the City solicited public comment and held two public hearings. It received no written comments and no public testimony. NEW YORK CITY DEP'T OF CITY PLANNING, CONSOLIDATED PLAN, 2015 APPENDICES Appx. 4-1 (2015), <https://www1.nyc.gov/assets/planning/download/pdf/about/consolidated-plan/2015-conplan-appendices.pdf?r=122116>.

⁶⁷ The Proposed Rule creates an asymmetry, granting incentives to either high-performers or improved performers, while scrutinizing low-performers but not jurisdictions that failed to improve or went backwards. This asymmetry is in tension with the duty of all jurisdictions to *further* fair housing and may reflect an undue deference toward jurisdictions' AFFH certifications. A jurisdiction moving backwards should not be deemed to be successfully furthering fair housing, especially if the Proposed Rule would reward forward progress. Certainly, the Proposed Rule has not explained why it would use either absolute rankings or improvement to grant rewards but only absolute rankings for potential sanctions.

the wrong *types* of metric—and fails to demonstrate how those metrics can usefully be aggregated into a single measurement.

Recognizing that HUD has proposed additional notice-and-comment rulemaking to finalize the details of its ranking tool, the flaws with HUD’s initial proposal are not readily fixable in subsequent elaboration.⁶⁸ Rather, the Proposed Rule pursues a mistaken conception of what it means to affirmatively further fair housing, such that a rule based upon any metrics similar to those proposed will not discharge HUD’s statutory obligations under the Fair Housing Act and will generate arbitrary and irrational results.

HUD’s Ranking Tool Fails to Further Fair Housing by Excluding Spatial Analysis and Measures of Segregation

As already discussed in these comments, furthering fair housing, at its heart, requires the dismantling of segregation and “moving the Nation toward a more integrated society.”⁶⁹ While the Fair Housing Act prohibits many forms of housing discrimination, it manifests a special concern for ending residential segregation.⁷⁰ This aim of moving the United States towards a more integrated society is the essence of the statutory obligation to affirmatively further fair housing. As the Second Circuit has explained, this provision requires that “[a]ction must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.”⁷¹

Segregation is a spatial phenomenon: it is the separation or setting apart of one group of people from others within particular physical and social geographies.⁷² HUD cannot assess whether jurisdictions are furthering fair housing without including spatial metrics that capture segregation. To that end, under the 2015 Rule, HUD provided substantial data concerning segregation, the concentration of particular protected classes (including racial and ethnic groups and people with disabilities), and disparities in access to place-based resources.⁷³

⁶⁸ In addition, the ranking tool is so central to the Proposed Rule that if the exemplary metrics are not closely indicative of the ultimate metrics to be examined, the public will not have had a chance to meaningfully comment on the Proposed Rule. *Conn. Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 528-30 (D.C. Cir. 1982).

⁶⁹ *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2526 (2015).

⁷⁰ *See, e.g., Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977); *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 503 (9th Cir. 2016).

⁷¹ *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973).

⁷² Courts have consistently looked at these questions of spatial segregation in analyzing AFFH obligations. *See, e.g., N.A.A.C.P. v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 151 (1st Cir. 1987) (noting that “Boston’s neighborhoods are racially separate”); *Shannon v. U.S. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809, 820 (3d Cir. 1970) (discussing “undue concentration of persons of a given race, or socio-economic group, in a given neighborhood”); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 77 (D. Mass. 2002) (describing “affirmative furtherance principle” that jurisdictions may not “fortify predominantly white communities against minority entry”); *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 458 (D. Md. 2005) (examining assisted housing location data at level of Census tract).

⁷³ *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42,272, 42,273 (July 16, 2015).

HUD’s proposed ranking score, however, does not include any measurement of segregation.⁷⁴ Nor does it include any spatial metrics that might allow HUD to conduct its own analysis of segregation or disparities across geography. For example, it does not include measures of housing affordability and quality that vary across neighborhoods within a city. HUD’s approach to measuring fair housing thus ignores segregation specifically and spatial inequalities more generally.

Nor can measures of affordability substitute for measures of segregation or place-based inequality. Many of the most segregated and unequal cities in America would be considered affordable—and correspondingly rewarded—under the framework of the Proposed Rule,⁷⁵ despite plainly failing to meet their obligations to affirmatively further fair housing. The Proposed Rule thus would not hold cities to account for entrenched segregation or widespread discriminatory housing practices within their borders, provided that housing is available that meets minimal affordability and habitability standards.⁷⁶

HUD appears to acknowledge the importance of spatial metrics at one point in the Proposed Rule by including in its proposed ranking score metrics on the availability of housing accepting housing choice vouchers “throughout the jurisdiction.”⁷⁷ By including this metric, HUD seems to recognize that while a household using a voucher is, by definition, living in housing that is affordable and of a minimum quality, fair housing demands more. If all voucher holders must live in the same subarea of a jurisdiction—concentrating the voucher-holding population in one

⁷⁴ HUD has failed to offer a reasoned explanation of this change in position. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). HUD’s only explanation for eliminating an analysis of segregation is that public housing authorities lack the expertise to analyze spatial metrics, and a claim, without evidence, that the “same is likely true for many smaller jurisdictions.” Proposed Rule, 85 Fed. Reg. at 2042. Putting aside the merits of HUD’s claim with respect to PHAs, this provides no explanation as to why local governments—which routinely consider spatial information through the zoning and planning process—and states should not have to consider segregation.

⁷⁵ Comments submitted on this docket by Claudia Solari, et al., quantify the poor correlation between measures of affordability and measures of segregation, as well as measures of affordability disaggregated by race and ethnicity. Letter from Claudia Solari, Senior Research Assoc., Urban Inst., et al. (Mar. 9, 2020), https://www.urban.org/sites/default/files/publication/101807/public20comment20on20the20u.s.20department20of20housing20and20urban20developmente28099s20proposed20rule20on20affirmatively20furthering20fair20housing_2.pdf. For additional data showing that many affordable cities are highly segregated cities, see *The Cost of Segregation*, URBAN INST., <https://www.urban.org/policy-centers/metropolitan-housing-and-communities-policy-center/projects/cost-segregation> (last updated Mar. 19, 2018); William H. Frey, *Black-White Segregation Edges Downward Since 2000, Census Shows*, BROOKINGS: THE AVENUE (Dec. 17, 2018), <https://www.brookings.edu/blog/the-avenue/2018/12/17/black-white-segregation-edges-downward-since-2000-census-shows/>.

⁷⁶ This problem is compounded by HUD’s decision to include only adjudicated fair housing claims brought against jurisdictions by HUD or DOJ. This approach would exclude from consideration not only the substantial body of cases resolved by settlement but also all discrimination by private actors, such as the rampant racial steering practices by Long Island real estate agents recently uncovered by Newsday. Ann Choi et al., *Long Island Divided*, NEWSDAY (Nov. 17, 2019), <https://projects.newsday.com/long-island/real-estate-agents-investigation/>.

⁷⁷ Proposed Rule, 85 Fed. Reg. at 2053; see also Proposed Rule, 85 Fed. Reg. at 2044 (proposing to assess whether jurisdictions have “an adequate supply of affordable housing throughout the jurisdiction”); Proposed Rule, 85 Fed. Reg. at 2048 (suggesting goal of Proposed Rule is to “help members of protected classes maximize their ability to live where they choose”).

place—that jurisdiction is not furthering fair housing. But the same logic extends to other forms of assisted housing: if voucher holders should not be concentrated in one part of a jurisdiction, neither should individuals living in public housing or in LIHTC-financed developments. For that matter, neither should low-income households *not* receiving federal housing assistance, who rely on lower-rent housing provided by the market (including rental units, multi-family buildings, and manufactured homes, among others). This logic cannot be cabined: fair housing requires ensuring that voucher holders can find housing “throughout the jurisdiction,” and it also requires that all protected classes be able to find housing “throughout the jurisdiction.” Any attempt to measure fair housing must include a thorough analysis of the spatial distribution of housing opportunities.

To illustrate how potentially effective strategies to affirmatively further fair housing would be missed or discouraged by the proposed rule’s narrow focus on affordability and associated metrics, consider several goals articulated in the early AFHs. Chester County, Pennsylvania committed to allocating project-based vouchers for a minimum of 35 units in areas of opportunity. Since this would change the location of subsidized units but not the number, this strategy would not be consistent with the definition of AFFH in the proposed rule and would no longer be incentivized as part of meeting AFFH obligations. Similarly, to the extent that El Paso County, Colorado’s goal of creating 100 units in areas of opportunity and Temecula, California’s goal of 100 new or rehabbed units outside of areas of high poverty are each about the location of affordable housing rather than net new units, these too would no longer be deemed to contribute to affirmatively furthering fair housing.

The need for spatial disaggregation of data and analyses is particularly acute when, as the Proposed Rule requires, metrics are analyzed at the state level. States contain immense diversity in their housing markets and averaging across those housing markets will produce metrics with little relevance to fair housing outcomes.⁷⁸ In New York state, for example, the New York City metro area boasts one of the lowest rental vacancy rates among the 75 largest metropolitan area (4.5 percent in 2018), while the Albany metro area has one of the highest (10.8 percent).⁷⁹ Within each region, there is variation at the city or neighborhood level. Assessing New York state based on its average vacancy rate would obscure the fact that the very low vacancy rate downstate threatens housing affordability while the very high vacancy rate upstate risks disinvestment and poor housing quality. Neither potential fair housing concern would necessarily be visible. Similarly, blending metrics from urban, suburban and rural areas (with each state having different shares of each) will lead to aggregates that do not allow for meaningful comparisons—even of the metrics HUD has chosen to look at. Without close spatial analysis, these metrics will not meaningfully illustrate anything about fair housing at the level of the entire jurisdiction.

⁷⁸ HUD may recognize this shortcoming. While HUD proposes using separate rankings for non-state jurisdictions with tight and loose housing markets, HUD does not propose subdividing state jurisdictions into those with tight and loose housing markets. This may be because states do not have uniformly categorizable housing markets. This concern, though, leaves all of HUD’s metrics potentially unreliable when aggregated to the state level.

⁷⁹ *Housing Vacancies and Homeownership, Annual Statistics: 2018*, U.S. CENSUS BUREAU, tbl. 6, <https://www.census.gov/housing/hvs/data/ann18ind.html> (last visited Mar. 12, 2020).

Efforts to Measure Fair Housing Cannot Be Limited to Housing Affordability and Physical Quality

HUD’s proposed metrics employ an overly narrow understanding of what constitutes fair housing. The Proposed Rule emphasizes housing affordability and housing quality, which, while important, are distinct from fair housing.⁸⁰ By ranking jurisdictions only on affordability and physical quality, HUD would create an artificial and inaccurate measure of fair housing outcomes as recognized by past HUD practice and case law. Indeed, HUD’s *Fair Housing Planning Guide* recognizes that building and preserving affordable housing is “not in and of itself sufficient to affirmatively further fair housing.”⁸¹ Housing affects much more than a household’s budget, and housing quality encompasses more than the presence of plumbing or the absence of lead paint. Housing provides, or forecloses, access to opportunity. When people of color and other members of protected classes are concentrated in neighborhoods with unequal access to schools, jobs, and services—even if they can afford their housing—the commitments of the Fair Housing Act are not satisfied.⁸² Research has repeatedly shown that access to opportunity remains tied to race, and that segregation can profoundly affect the education, employment, and health outcomes of people of color.⁸³ In purporting to measure quality, HUD errs by disregarding these aspects of housing. The Proposed Rule’s metrics would potentially treat housing in the most isolated or unsafe neighborhoods as high-quality, when few families would agree.

Disproportionate rates of eviction among women and people of color also represent failures of fair housing, as HUD has recognized.⁸⁴ But under the Proposed Rule’s approach to measuring fair housing outcomes, HUD would not hold jurisdictions to account for these disparities. A city with relatively low median contract rents and household cost burdens would score highly under the Proposed Rule’s framework—even if the city’s landlords file eviction notices against 100 percent of Black tenants and zero percent of white tenants following similar patterns of rent delinquency. Ignoring access to opportunity and housing stability, even outside of such extreme cases, is conceptually incompatible with the Fair Housing Act.

⁸⁰ See *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty.*, 668 F. Supp. 2d 548, 562 (S.D.N.Y. 2009) (finding inadequate under the Fair Housing Act an Analysis of Impediments to Fair Housing “conducted through the lens of affordable housing, rather than *fair* housing and its focus on protected classes such as race”); cf. *U.S. ex rel. Washington v. City of New Orleans*, No. 09-7244, 2012 WL 956497, at *4 (E.D. La. Mar. 19, 2012) (upholding Analysis of Impediments which included analysis of patterns of segregation, operation of Section 8 program, and racial discrimination in rental housing market and advertising).

⁸¹ U.S. DEPT. OF HOUS. & URBAN DEV., FAIR HOUSING PLANNING GUIDE (1996), <https://www.hud.gov/sites/documents/FHPG.PDF>.

⁸² Cf. *Darst-Webbe Tenant Ass’n Bd. v. St. Louis Hous. Auth.*, 299 F. Supp. 2d 952, 966 (E.D. Mo. 2004), *aff’d*, 417 F.3d 898 (8th Cir. 2005) (holding that PHA met its AFFH obligations, because, among other things, it provided “a physical and social service infrastructure designed to provide its low-income residents with opportunities”).

⁸³ See Appendix A.

⁸⁴ See Timothy A. Thomas et al., *The State of Evictions*, <http://evictions.study/washington> (last updated Feb. 17, 2019); MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2017). See also U.S. DEPT. OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS (Sept. 13, 2016), <https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF>.

Many other forms of housing discrimination also contribute to unfair housing outcomes. Access to fair home financing and other financial services affects the amount that a household actually pays for its housing, which is why the Fair Housing Act—and HUD’s own enforcement efforts—target discriminatory lending practices.⁸⁵ Discriminatory advertising by landlords and “steering” by real estate agents, both repeated targets of HUD fair housing enforcement,⁸⁶ keep members of protected classes locked out of housing that, on paper, they can afford. HUD’s proposed metrics do not account for these forms of discrimination, and its approach—which is limited to narrow measures of housing affordability and quality—leaves no room for including them.

The Proposed Rule’s metrics would deem a jurisdiction to have successfully furthered fair housing so long as enough housing met minimum standards of physical quality and affordability. But fair housing is far broader than these minimum standards: households must be able to gain information about housing choices and financing to access them, those choices must include fair access to economic and social resources, and residents must be able to remain in their homes on equal terms, among other things. The measure of fair housing is, and must be, as expansive as people’s capacity to discriminate. Because the Proposed Rule fails to include so many critical aspects of fair housing, any resulting score ultimately cannot rank jurisdictions’ fair housing outcomes accurately or consistently with the Fair Housing Act.

HUD’s Proposed Metrics Will Not Identify Disparities and Discrimination, Including Discrimination Against Protected Classes

Regardless of what metrics are included in a potential ranking tool, any attempt to measure fair housing outcomes requires disaggregating those metrics to show how access to housing and to place-based resources or hazards are distributed across the population, particularly to classes protected by the Fair Housing Act. The purpose of the FHA is “to eradicate discriminatory practices” in housing.⁸⁷ Measuring, and therefore addressing, discrimination necessarily requires comparisons across relevant groups.⁸⁸ The Proposed Rule, however, departs from the text, structure and purpose of the Fair Housing Act because it does not incorporate any metrics disaggregated by race, national origin, or other protected classes.

⁸⁵ Press Release, U.S. Dept. of Hous. & Urban Dev., HUD and Northern Illinois Lender Reach Fair Lending Settlement (Mar. 10, 2017), <https://archives.hud.gov/news/2017/pr17-022.cfm>.

⁸⁶ Sec’y of Hous. & Urban Dev. v. Facebook, Inc., FHEO No. 01-18-0323-8 (Charge of Discrimination, Mar. 28, 2019), available at https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf; Sec’y of Hous. & Urban Dev. v. Loecher, FHEO No. 08-14-0112-8 (Charge of Discrimination, Sept. 24, 2015), available at https://archives.hud.gov/news/2015/pr15-125-CHARGE_LOECHER.pdf; Sec’y of Hous. & Urban Dev. v. Welch, FHEO No. 08-19-9091-8 (Charge of Discrimination, Aug. 15, 2019), available at <https://www.hud.gov/sites/dfiles/FHEO/documents/19WelchCharge08-9-9091-8.pdf>; Press Release, U.S. Dept. of Hous. & Urban Dev., HUD Charges Atlanta-Area Real Estate Agent and Company with Racial Steering in the Sale of Homes (Sept. 23, 2008), <https://archives.hud.gov/news/2008/pr08-140.cfm>.

⁸⁷ *Texas Dep’t of Hous. & Cmty. Affairs*, 135 S. Ct. at 2521.

⁸⁸ See, e.g., *Tsombanidis v. W. Haven Fire Dep’t*, 352 F.3d 565, 576 (2d Cir. 2003) (“Whether using statistics or some other analytical method, plaintiffs must also utilize the appropriate comparison groups.”).

To offer a simple example based on HUD’s proposed metrics, imagine a hypothetical city in which only a small fraction of the population suffered from lead-based paint poisoning (even relative to other jurisdictions with similar housing markets). Imagine further that this hypothetical city had an equally small Black population, and that the two populations overlapped perfectly: every Black person in the city had lead-based paint poisoning and every person with lead-based paint poisoning was Black. This city would score well on HUD’s proposed metrics, given its low overall rate of lead poisoning, despite having the starkest possible disparities and an obvious fair housing issue. While extreme, this hypothetical illustrates the conceptual flaw with HUD’s approach. By failing to disaggregate metrics based on protected classes, the Proposed Rule would completely ignore the Fair Housing Act’s core concerns of discrimination and disparities.

Importantly, this is a change from the 2015 Rule, under which HUD provided jurisdictions with disaggregated metrics and required analysis of fair housing outcomes for specific protected classes and sub-groups. The Proposed Rule does not provide a reasoned explanation of why the agency has changed its position and no longer considers disaggregated data and an analysis of disparities relevant to affirmatively furthering fair housing.⁸⁹

Accurately measuring fair housing outcomes requires disaggregating metrics in many additional ways as well. For many jurisdictions, improving housing affordability may be an important step towards realizing fair housing. But even for these jurisdictions, the Proposed Rule’s emphasis on aggregate measurements, like median home values, median contract rents, and household cost burdens, paints housing affordability with too broad a brush to capture the aspects of housing affordability most relevant to fair housing. For example, not all cities with high median rents fail to provide housing affordable to middle- or low-income residents.⁹⁰ Two jurisdictions with equally high median rents might nevertheless have very different housing affordability outcomes if one includes a substantial amount of very affordable (perhaps subsidized) housing while in another, rents are clustered near the median. In the first city, the lowest-income households can still find affordable homes; in the second city, they cannot. Disaggregating by income is necessary for understanding the distribution and actual availability of housing. And low cost burdens may reflect high incomes within a jurisdiction—particularly in smaller, suburban jurisdictions—rather than actual affordability.

Likewise, HUD proposes measuring the availability of housing accessible to persons with disabilities. But in some jurisdictions, new construction (which is more likely to be accessible) or elevator buildings may be concentrated at the high end of the market, and not necessarily affordable to people with disabilities.⁹¹ Even for this measure, HUD may need to disaggregate metrics further based on type of housing: different disabilities require different forms of accessibility, and a housing stock that is accessible in one respect may not actually serve the relevant population of people with disabilities in a jurisdiction. To discern whether all sub-

⁸⁹ *F.C.C.*, 556 U.S. at 515-16.

⁹⁰ JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., AMERICA’S RENTAL HOUSING (2015), https://www.jchs.harvard.edu/sites/default/files/America%27s%20Rental%20Housing%202015_WEB.pdf.

⁹¹ In New York City, for example, the Furman Center has shown that newly constructed units are increasingly more expensive than older units. FURMAN CTR., STATE OF NEW YORK CITY’S HOUSING & NEIGHBORHOODS, 2017 REPORT, <https://furmancenter.org/research/sonychan/2017-report>.

populations have access to affordable and quality housing, as HUD sets out to do, there must be data disaggregated at the level of those sub-populations. Focusing on aggregate rates and medians will mask important inequities and distributional concerns.

The need for disaggregated metrics is not simply a demand for more data—we acknowledge that HUD has only provided a non-exclusive list of examples of data sets it hopes to consider. Rather, HUD has suggested an overall approach to measuring and ranking jurisdictions that is incompatible with the workings of housing markets and the definition of fair housing. Jurisdiction-wide metrics cannot measure disparities, and they can only rarely identify issues that are concentrated in one subset of the population. The Proposed Rule’s scoring system thus is not equipped to measure the central features of fair housing.

Fair Housing Outcomes Cannot Be Accurately Captured in a Single Score

HUD proposes aggregating its metrics into a single score to allow jurisdictions to be comprehensively ranked. Condensing fair housing metrics into a single measure, however, is likely to obscure actual fair housing outcomes. The weighting process will necessarily require artificial comparisons of incommensurable factors. While HUD has not provided sufficient information to allow for meaningful comment on all aspects of its ranking system, HUD’s efforts to comprehensively score jurisdictions with a single indicator cannot accurately represent issues of fair housing concern.

The Proposed Rule provides little information on how the ranking tool will convert metrics into scores. The Proposed Rule does not make clear, for example, whether a metric like a high vacancy rate is considered good for fair housing (because it is associated with lower housing costs) or bad (because it is associated with decreased housing and neighborhood quality). Second, and more importantly, the Proposed Rule does not provide information about how those scores, once calculated, will be weighted. This is essential because the weighting does much of the work in determining a jurisdiction’s ultimate ranking. If median housing prices are weighted too high, the ranking system will overly penalize high-cost housing markets—even those that are relatively integrated, provide access to opportunity, and have substantial stocks of assisted housing. If public housing conditions are weighted too highly, the system could penalize those jurisdictions that have public housing as compared to those that do not, even if those without public housing have a poor-quality private housing stock. Importantly, such a composite may bear no connection to the goals and priorities selected by jurisdictions. A well-intentioned jurisdiction that correctly targets its most pressing fair housing issues may make little visible improvement on such a composite measure.

Finally, this weighting exercise becomes more conceptually unsound to the extent that HUD integrates additional metrics needed to fully measure fair housing outcomes. How should a jurisdiction’s generally low housing cost burdens be weighted if one protected class is severely cost-burdened? If a protected class is small in number, but uniformly suffers from serious disparities, should that outcome be discounted based on population or weighted more heavily given the breadth of the disparate effect? How can the non-pecuniary harms of segregation (including dignitary harms) or the long-term benefits of access to opportunity be meaningfully and quantitatively compared to other metrics? Ultimately, aggregating all fair housing outcomes into



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a single score requires HUD to compare apples and oranges—and worse, to quantify trade-offs between fair housing outcomes for one protected class and another. This will ultimately produce a flattened number that may prove arbitrary and disconnected from fair housing outcomes. It may also allow jurisdictions to be deemed “outstanding” even when particular subgroups suffer serious fair housing issues. Fair housing encompasses too many outcomes, affecting too many groups, and across too many geographies, to be reduced to a single figure.

Because the Proposed Rule fails to address these complexities, HUD should reconsider and withdraw its Proposed Rule.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew Murphy".

Matthew Murphy
Executive Director
NYU Furman Center

A handwritten signature in black ink, appearing to read "Noah Kazis".

Noah Kazis
Legal Fellow
NYU Furman Center

A handwritten signature in blue ink, appearing to read "Justin Steil".

Justin Steil
Associate Professor
Massachusetts Institute of Technology

A handwritten signature in black ink, appearing to read "Sophia House".

Sophia House
Legal Fellow
NYU Furman Center