

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL FAIR HOUSING ALLIANCE,
TEXAS LOW INCOME HOUSING
INFORMATION SERVICE, and TEXAS
APPLESEED,

Plaintiffs,

STATE OF NEW YORK,

Proposed Intervenor-Plaintiff,

v.

BEN CARSON, Secretary of the U.S.
Department of Housing and Urban
Development, in his official capacity,

- and -

U.S. DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT,

Defendants.

Civ. Action No. 1:18-cv-01076-BAH

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

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PRELIMINARY STATEMENT

Proposed intervenor-plaintiff the State of New York receives funding from the United States Department of Housing and Urban Development (HUD) and thus shares HUD's obligation under the Fair Housing Act to affirmatively further fair housing. For decades, HUD had largely failed to give its state and local grantees sufficient support to satisfy their responsibility to affirmatively further fair housing. In 2015, HUD issued the Affirmatively Furthering Fair Housing Rule ("AFFH Rule") to provide such guidance and establish a new fair-housing planning process.

But in January 2018, more than two years after the AFFH Rule became effective, HUD unlawfully suspended key portions of the AFFH Rule without conducting any public notice-and-comment procedures. Several nonprofit organizations filed this lawsuit to challenge the suspension. Two weeks later, again without engaging in any public notice and comment, HUD withdrew its January suspension; withdrew an informational tool—known as an Assessment Tool—that local jurisdictions had already been using to implement the AFFH Rule's requirements; and announced that it was again suspending the deadlines by which local jurisdictions must comply with the AFFH Rule. HUD's renewed suspension of the AFFH Rule required local jurisdictions to return to the former "Analysis of Impediments" or "AI" process, which has proven to be inadequate to ensure that jurisdictions meaningfully comply with the statutory AFFH mandate.

HUD's renewed suspension of the AFFH Rule is harming New York's ability to rely on its local jurisdictions in conducting its own statewide fair-housing analyses or in affirmatively furthering fair housing throughout the State. And the suspension is further injuring New York by delaying for many years the fair-housing reforms that the AFFH Rule was designed to implement. Such delays will directly injure New York communities and residents by allowing the perpetuation of housing segregation and the harms that result from such segregation.

New York files this memorandum of law in support of plaintiffs' renewed motion for a preliminary injunction, and for summary judgment. Plaintiffs are likely to succeed on the merits. HUD violated the Administrative Procedure Act (APA) by failing to follow notice-and-comment procedures before it withdrew the Assessment Tool and suspended the AFFH Rule. There is no merit to either of the two reasons that HUD provided for failing to conduct notice and comment. First, the Paperwork Reduction Act (PRA) does not justify HUD's failure because the APA's procedural requirements apply to all substantive actions by agencies, including delays or suspensions of final rules, irrespective of whether the PRA's separate requirements for information collections might also apply. Second, the AFFH Rule does not already provide for HUD's delay of local jurisdictions' AFH compliance deadlines. To the contrary, the AFFH Rule makes clear that local jurisdictions' compliance deadlines were set when HUD first announced the availability of the Assessment Tool more than two years ago. HUD's attempt to alter those deadlines now is a substantive rule that triggers the APA's public notice-and-comment requirements.

HUD's withdrawal of the Assessment Tool and suspension of the AFFH Rule is also arbitrary and capricious. HUD failed to support its assertion that the Assessment Tool is to blame for a few jurisdictions' purported difficulties in complying with the AFFH Rule—an assertion that is flatly contradicted by jurisdictions' successful efforts to follow the AFFH Rule. Indeed, HUD arbitrarily failed to consider the many jurisdictions that had already engaged in the public engagement, data analyses, and planning processes contemplated by the AFFH Rule, without experiencing significant difficulty. Moreover, HUD also failed to explain why jurisdictions could not continue using the Assessment Tool and complying with the AFFH Rule while HUD implemented any incremental improvements to the tool. And HUD further failed to explain why its initial costs for technical assistance would justify suspending the AFFH Rule. As the experience

of state and local jurisdictions makes clear, HUD's initial assistance has created a strong foundation that other jurisdictions can use to implement the AFFH Rule successfully, without HUD needing to provide the same level of technical assistance going forward.

The Court should thus grant plaintiffs' motion for a preliminary injunction and summary judgment.

STATEMENT OF FACTS

The State of New York and many of its local jurisdictions are federal grantees that share with HUD the responsibility to affirmatively further fair housing under the Fair Housing Act. Because of New York's direct role in implementing housing policies, the State has a unique perspective on the history, importance, and practical effect of both the AFFH Rule and HUD's recent unlawful suspension of that Rule. The following statement of facts provides that perspective and is intended to supplement the plaintiffs' filings.

A. Statutory and Regulatory Background

1. The statutory mandate to affirmatively further fair housing

Under the Fair Housing Act, HUD is required to administer its programs and activities related to housing and urban development in a manner that affirmatively furthers fair housing. 42 U.S.C. §§ 3601, 3608(d), 3608(e)(5). This mandate means that HUD not only must refrain from discriminating, but also must use its federal grants and programs to promote residential integration and undo the harms caused by persistent housing discrimination based on race, color, religion, sex, family status, national origin, or disability. *See NAACP v. Secretary of Hous. & Urban Dev.*, 817 F.2d 149, 155 (1st Cir. 1987) (explaining that HUD must "use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing

increases”); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973) (“Action 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.”); *see also Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) (Congress’s intent was to promote “truly integrated and balanced living patterns” (quoting 114 Cong. Rec. 3422 (1968) (statement of Sen. Mondale))).

HUD administers several different programs that provide federal funds to state and local government entities. New York State receives grants from HUD through several such programs. Forty-nine large counties and municipalities located within New York—including New Rochelle and New York City—also receive funding directly from HUD. (Intervenor Compl. ¶ 18.) These local jurisdictions, as well as New York, are required to certify as a condition of receiving federal funds that they will affirmatively further fair housing. (*Id.* ¶ 19.) They are also required to submit a Consolidated Plan every three to five years that summarizes, among other things, the specific actions that the jurisdiction will undertake each year to address its housing needs. (*Id.*)

New York is fully committed to taking meaningful steps to foster inclusive communities, promote housing opportunity, and end residential segregation. (Ex. A, Decl. of RuthAnne Visnauskas (“Visnauskas Decl.”) ¶¶ 6-7, 24, 29-30.) But the State cannot accomplish these goals unless HUD faithfully fulfills its statutory obligation to administer its programs in a way that meaningfully furthers fair housing. (*See id.* ¶¶ 8-20.) For example, HUD is responsible for defining the scope of the statutory obligation to further fair housing affirmatively. *See* Proposed AFFH Rule, 78 Fed. Reg. 43,710, 43,712-13 (July 19, 2013) (“The Act leaves it to the Secretary to define the precise scope of the AFFH obligation for HUD’s program participants.”). New York also relies on HUD to set regulatory requirements to ensure that local jurisdictions are affirmatively

furthering fair housing. (*See* Visnauskas Decl. ¶¶ 12, 14-20.) And New York further relies on HUD to provide the State and its local jurisdictions with regulatory guidance, informational tools, and technical assistance to help undertake the complex task of evaluating how to address the factors that contribute to housing segregation. (*Id.* ¶¶ 12, 20.)

2. Analysis of impediments to fair housing choice

Before the promulgation of the AFFH Rule in 2015, HUD had largely failed to give state and local jurisdictions support to satisfy their obligations to affirmatively further fair housing. For several decades after the Fair Housing Act’s enactment, HUD did not provide *any* meaningful regulatory guidance about how to further fair housing affirmatively. *See* Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law* 11-21, ProPublica (June 25, 2015).

Starting in 1996, to receive block grant funding, HUD required grantees to certify to HUD in a Consolidated Plan that they had conducted an analysis to identify impediments to fair housing within their jurisdiction, and had prepared a planning document—known as an Analysis of Impediments to Fair Housing Choice (AI)—reflecting that analysis. *See* 60 Fed. Reg. 1,878, 1,890-91, 1,895 (Jan. 5, 1995). Grantees were also required to certify that they would take appropriate actions to overcome the impediments identified in the AI. *See id.* at 1912.

The AI process suffered from multiple, significant flaws that undermined state and local jurisdictions’ ability to identify and overcome obstacles to fair housing. For example, HUD failed to define the scope of grantees’ obligation to “further fair housing affirmatively”—leaving state and local jurisdictions without sufficient guidance on how to achieve that goal. HUD also failed to provide state and local jurisdictions with any specifics about the substantive components that they should include in an AI plan. *See* U.S. Government Accountability Office (GAO), *Housing*

and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans (GAO Report) 6 (2010). Although HUD issued informal recommendations about the content of an AI, these suggestions lacked the force, clarity, and binding effect of duly promulgated regulations. *See id.* Moreover, the AI regime did not provide jurisdictions with demographic data or informational tools to help them analyze impediments to fair housing. *See* AFFH Rule, 80 Fed. Reg. 42,272, 42,275 (July 16, 2015). And HUD also did not review the AI planning reports to provide feedback on whether jurisdictions had successfully identified impediments to fair housing and meaningful steps to address such impediments. *Id.*; *see also* GAO Report at 6.

As HUD itself concluded in 2009, these and other shortcomings rendered the AI process largely ineffective. *See* GAO Report at 1-2 (describing HUD evaluation). In 2010, the United States Government Accountability Office reached a similar conclusion. Based in large part on HUD's lack of regulatory guidance and oversight, GAO concluded that many AIs were "not likely [to] serve as effective planning documents to identify and address current potential impediments to fair housing choice." *Id.* at 31; *see also id.* at 6, 22-32; AFFH Rule, 80 Fed. Reg. at 42,275. And GAO concluded that if HUD did not implement changes, jurisdictions' fair-housing planning documents would "likely continue to add limited value going forward in terms of eliminating potential impediments to fair housing that may exist across the country." GAO Report at 31.

B. The Affirmatively Furthering Fair Housing Rule

After an extensive six-year planning process, HUD issued the AFFH Rule in July 2015 to remedy the problems with the prior AI process. The AFFH Rule sets forth a detailed regulatory system under which HUD grantees will prepare an Assessment of Fair Housing (AFH)—a more fulsome and data-driven fair housing planning document than was required under the former AI

process. *See* AFFH Rule, 80 Fed. Reg. at 42,272-73. As HUD explained, the AFFH Rule would replace the AI process “with a more effective and standardized” assessment of fair-housing issues “designed to empower program participants” to overcome historic patterns of segregation, reduce racial or ethnic concentrations of poverty, and respond to disproportionate housing needs. *Id.* at 42,273.

To achieve these goals, the Rule sets forth many detailed provisions about the AFFH planning process. For example, for the first time, HUD provided an express definition of the statutory obligation to affirmatively further fair housing, interpreting that obligation to mean:

[T]aking 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 or ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.

Id. at 42,316.

The AFFH Rule also specifies in far greater detail the substantive elements that all jurisdictions must include in an AFH—including an assessment of data to evaluate fair-housing issues, an identification of factors that contribute to such issues, and a list of goals for overcoming the detrimental effects of contributing factors. *Id.* at 42,355-56. The Rule further details the public-participation process that jurisdictions must follow to assist them in gathering information and identifying the factors that contribute to fair-housing problems. *See id.* at 42,290, 42,360-62. The AFFH Rule also establishes a system for program participants to submit their AFHs to HUD for acceptance, and for HUD to review each AFH and provide feedback about any improvements needed for HUD to accept the AFH. *Id.* at 42,272, 42,275, 42,285-86; *see also* HUD, *Guidance on HUD’s Review of Assessments of Fair Housing* (“HUD Review Guide”) (2016).

To assist jurisdictions in preparing a robust and effective AFH, the AFFH Rule committed HUD to providing grantees with informational tools, demographic data, and technical guidance. AFFH Rule, 80 Fed. Reg. at 42,272. For example, the AFFH Rule required HUD to create—and required grantees to use—an Assessment Tool that aids jurisdictions in conducting the required fair-housing assessment. *Id.* The Assessment Tool does so by asking a “series of questions that program participants must respond to in carrying out an assessment of fair housing issues and contributing factors, and setting meaningful fair housing goals.” 81 Fed. Reg. 15,546, 15,547 (Mar. 23, 2016). Recognizing that different types of grantees face different fair-housing considerations, HUD committed to creating separate Assessment Tools for local jurisdictions (such as cities and counties), States, and Public Housing Authorities. *See* AFFH Rule, 80 Fed. Reg. at 42,276. The AFFH Rule also requires HUD to provide jurisdictions with demographic data about, among other things, housing patterns, racially or ethnically concentrated areas of poverty, and disproportionate housing needs. *Id.* at 42,272-73. And the AFFH Rule further committed HUD to work with jurisdictions and provide them with substantive and technical assistance in using the Assessment Tools, analyzing data, and preparing a successful AFH. *Id.* at 42,272-73, 42,287-90.

HUD required jurisdictions to begin complying with the AFFH Rule and submit their first AFHs on a staggered schedule linked to the preexisting deadline by which a jurisdiction must submit its Consolidated Plan. Under the schedule, a small number of jurisdictions are required to submit their first AFH by 2018, with increasing numbers of jurisdictions slated to file their initial AFHs between 2019 and October 2020.

Because HUD was still finalizing the Assessment Tools when it issued the AFFH Rule, the Rule also linked jurisdictions’ initial AFH submission deadline to the date on which HUD first announces the availability of the Assessment Tool applicable to a particular jurisdiction.

Specifically, the AFFH Rule provides that a jurisdiction's first AFH submission deadline will be no less than nine months after the date that HUD publishes the Assessment Tool for that jurisdiction. *Id.* at 42,357. As HUD explained, a program participant's compliance obligations and deadline become effective when HUD announces in the Federal Register that the Assessment Tool applicable to that participant has been approved by the Office of Management and Budget (OMB) and is available for use. *Id.* at 42,277; *see* 80 Fed. Reg. 81,840, 81,841 (Dec. 31, 2015) ("The action that commences the [compliance deadline] is issuance of an approved Final Assessment Tool for the specific category of program participants.").

In December 2015, HUD published a notice in the Federal Register announcing that the Assessment Tool for local jurisdictions had been approved by OMB and was available for use—thus triggering local jurisdictions' obligation to comply with the AFFH Rule and submit their first AFHs under the staggered compliance schedule. 80 Fed. Reg. at 81,840-41. HUD explained that the Assessment Tool had undergone the procedures required by the Paperwork Reduction Act for an information-collection tool to obtain OMB's approval. Those procedures included HUD submitting the Assessment Tool to OMB, engaging in two rounds of public notice and comment about the Assessment Tool, and obtaining OMB's approval. *See id.* at 81,841-42. HUD also explained that it had considered all of the public comments and made various clarifications and adjustments to the Assessment Tool to ensure that the tool would assist local jurisdictions in "assessing fair housing issues, identifying contributing factors, formulating realistic goals, and ultimately meeting their obligation to affirmatively further fair housing," without being unduly burdensome. *Id.* at 81,843; *see id.* at 81,856.

Because the initial PRA approval of the Assessment Tool lasted for one year, OMB subsequently renewed its PRA approval for a three-year period, beginning in January 2017. *See*

82 Fed. Reg. 4,388, 4,388 (Jan.13, 2017). This approval process again involved two public notice and comment periods. In response to the comments it had received, HUD made further clarifications and modifications to the Assessment Tool and its instructions. *See id.* at 4,390-4,440. HUD also determined that the Assessment Tool successfully empowers jurisdictions to perform a meaningful fair-housing assessment, “clearly conveys the analysis of fair housing issues and contributing factors that program participants must undertake,” and “better implements” the Fair Housing Act’s mandate to affirmatively further fair housing. *Id.* at 4,390.

C. State and Local Jurisdictions’ Implementation of the AFFH Rule

After the AFFH Rule went into effect and the local jurisdiction Assessment Tool received OMB approval, many state and local jurisdictions began to undertake the AFH process. For example, the State of New York—through New York State Homes and Community Renewal (NYSHCR)—followed parts of the AFFH Rule in preparing a 262-page fair-housing planning document that was completed in January 2016. (Intervenor Compl. ¶ 42; Visnauskas Decl. ¶¶ 25-28.) *See generally* NYSHCR, *New York State Entitlement Jurisdiction Analysis of Impediments to Fair Housing Choice* (Jan. 29, 2016) (*New York AI*). Although not formally required to follow the AFFH Rule then, New York nonetheless did so as much as feasible to take advantage of the Rule’s improved processes. (Intervenor Compl. ¶ 42; Visnauskas Decl. ¶¶ 25-27.)

Some local jurisdictions, including the City of New Rochelle, completed an AFH using the Assessment Tool, submitted the AFH to HUD by the required deadline, and received an acceptance decision from HUD. (Intervenor Compl. ¶ 45; Ex. B, Decl. of Adam Salgado (“Salgado Decl.”) ¶¶ 6, 13.) And other local jurisdictions with AFH compliance deadlines that are not until 2018 or later, began the extensive fair-housing planning process—including updating their fair-housing planning processes to adapt to the guidance and instructions laid out in the AFFH Rule and the

Assessment Tool—because this process can take a significant amount of time to complete. (*See* Ex. C, Decl. of Matt Murphy (“Murphy Decl.”) ¶¶ 12-14.) These jurisdictions, such as New York City, had thus begun to shift their operations to comply with the AFFH Rule. (*Id.* ¶ 14)

D. HUD’s Suspension of the AFFH Rule

1. The January Suspension Rule

Despite the extensive efforts by state and local jurisdictions to comply with the AFFH Rule, HUD abruptly suspended key provisions of the AFFH Rule on January 5, 2018. *See* 83 Fed. Reg. 683 (Jan. 5, 2018) (“January Suspension Rule”). The January Suspension Rule declared that local jurisdictions would no longer need to submit an AFH until their next compliance deadline that falls after October 31, 2010, which resulted in most local jurisdictions not being required to submit an AFH until 2024. *Id.* at 684. HUD also stated that it would no longer review AFHs, and that jurisdictions should return to the former AI process—a regime that HUD had determined was less effective than the AFH process. *Id.* at 685. HUD did not conduct any public notice-and-comment procedures before issuing the January Suspension Rule.

HUD gave two reasons for suspending the AFFH Rule. First, HUD made the conclusory assertion that jurisdictions had experienced confusion during the AFH process and had thus “struggled to meet” the Rule’s requirements. *Id.* at 684-85. HUD based this assertion on its decision to require a few jurisdictions to improve their initial AFHs. *Id.* Second, HUD asserted that it needed more time to supply jurisdictions with enhanced technical assistance. *Id.* at 685.

In May 2018, several nonprofit organizations filed this lawsuit and moved for a preliminary injunction and for expedited summary judgment. Plaintiffs alleged that the January Suspension Rule violated the APA and the Fair Housing Act.

2. The May Suspension Rule

Approximately two weeks after plaintiffs filed their lawsuit, HUD abruptly issued three notices, without having conducting any public notice and comment, that again suspended key provisions of the AFFH Rule (the “May Suspension Rule”). First, HUD issued a notice withdrawing the January Suspension Rule. 83 Fed. Reg. 23,928 (May 23, 2018). In this notice, HUD stated that it would publish a notice of proposed rulemaking and engage in public notice and comment procedures if it were to conclude in the future that it should revise the AFFH Rule, including by altering the AFH compliance deadlines for jurisdictions. *Id.*

Second, HUD simultaneously issued another notice withdrawing the already-approved Assessment Tool for local jurisdictions. 83 Fed. Reg. 23,922 (May 23, 2018). HUD declared in its notice that the withdrawal of the Assessment Tool indefinitely suspended implementation of the AFFH Rule for local jurisdictions by extending the deadlines by which local jurisdictions must submit their initial AFHs until at least nine months after HUD issues a “future publication of a revised and approved” Assessment Tool. *Id.* at 23,926.

Third, HUD issued a further notice making clear that the withdrawal of the Assessment Tool would have the same substantive effects as the prior January Suspension Rule, i.e., local jurisdictions would no longer be required to comply with the AFFH Rule and would instead return to the prior AI process that GAO and HUD had found to be ineffective. 83 Fed. Reg. 23,927, 23,927-28 (May 23, 2018); *see also* 83 Fed. Reg. at 23,926.

HUD asserted that it was withdrawing the Assessment Tool and suspending compliance with the AFFH Rule because the Assessment Tool was “unworkable” and “unduly burdensome.” 83 Fed. Reg. at 23,923. HUD provided two reasons for this assertion. First, HUD claimed that the Assessment Tool was to blame for HUD’s decision to decline to approve a few jurisdictions’ initial

AFHs. *Id.* at 23,923. Second, HUD claimed that the level of technical assistance that it had provided to early AFH submitters could not “be scaled up to accommodate” the increased number of local jurisdictions with AFH submission deadlines in 2018 and 2019. *Id.*

ARGUMENT

New York supports plaintiffs’ Renewed Motion for a Preliminary Injunction and for Summary Judgment (“Renewed PI Mem.”), and provides the following additional arguments to supplement plaintiffs’ arguments.

A. Plaintiffs Are Likely to Prevail on the Merits.

1. HUD violated the APA’s mandate that it provide advance notice and an opportunity to comment before suspending a final rule.

New York agrees that HUD’s most recent suspension of the AFFH Rule violated the APA by failing to follow required notice-and-comment procedures. (Renewed PI Mem. 17-21.) An agency must engage in notice and comment under the APA before it delays or suspends regulated entities’ obligations to comply with a final agency rule. *See, e.g., Environmental Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 815-16 (D.C. Cir. 1983). Indeed, HUD effectively admitted as much here when it withdrew the January 2018 Suspension Rule and acknowledged that it would issue a proposed rulemaking for public comment before making future changes to the AFFH Rule, including changes to jurisdiction’s AFH compliance deadlines. 83 Fed. Reg. at 23,928. HUD’s May Suspension Rule has precisely the same delay effects as the January 2018 Suspension Rule—i.e., both rules delayed the deadlines by which local jurisdictions must submit an initial AFH and directed local jurisdictions to revert to the AI process. (*See* Renewed PI Mem. 17-20.) Just like the January Suspension Rule, the May Suspension Rule thus violated the APA’s procedural requirements. (*Id.*)

HUD nonetheless attempts to justify its failure to engage in notice and comment by asserting that the Paperwork Reduction Act does not apply to HUD's withdrawal of the Assessment Tool. *See* 83 Fed. Reg. at 23,923 ("withdrawal is effective immediately" because PRA does not apply). But HUD's reliance on the PRA is fundamentally misplaced because the PRA does not supplant the APA's requirement to engage in public notice and comment before an agency may take action that has "palpable effects upon the regulated industry and the public in general." *Environmental Def. Fund*, 713 F.2d at 815-16 (quotation marks omitted). Rather, the PRA imposes a distinct requirement, in addition to the APA's requirements, that an agency must obtain OMB's approval before collecting information. *See* 44 U.S.C. §§ 3506-3507; 5 C.F.R. §§ 1320.1-1320.12. Although this OMB-approval process involves its own notice-and-comment requirements,¹ it does not exempt agencies from the APA's procedural mandates—even when *both* statutes apply to a particular agency action. *See* 44 U.S.C. § 3506(c)(2)(B) (providing that agency should perform its PRA notice-and-comment obligations through the APA notice-and-comment process when a proposed rule also contains a proposed information collection); 5 C.F.R. § 1320.8(3).

Here, HUD insists that the PRA did not apply to its withdrawal of the Assessment Tool. Even assuming that HUD is correct, the inapplicability of the PRA simply has no bearing on whether HUD must comply with the APA's procedural rules before withdrawing the Assessment Tool and, as a result, delaying indefinitely the deadlines by which local jurisdictions must comply with the AFFH Rule. *See, e.g., Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 616 (5th Cir. 1994) (agency violated APA by issuing substantive rule without notice and comment, where agency was

¹ The PRA requires an agency to solicit public comment for specific statutorily enumerated purposes, such as to evaluate the agency's estimate of the burden of the proposed collection of information. 44 U.S.C. § 3506(c)(2)(A).

also alleged to have violated PRA); *Alegent Health-Immanuel Med. Ctr. v. Sebelius*, 34 F. Supp. 3d 160, 169-71 (D.D.C. 2014) (analyzing whether agency violated APA notice-and-comment procedures, despite rejecting claim that agency violated the PRA).

Indeed, even if the PRA somehow negated HUD's obligation to engage in public notice and comment before withdrawing the Assessment Tool (which it did not), HUD would still have been required to engage in notice and comment before it suspended the deadlines by which local jurisdictions must comply with the AFFH Rule—an unquestionably substantive action that falls under the APA's procedural mandates. Put simply, HUD's suspension of local jurisdictions' AFH compliance deadlines requires public notice and comment under the APA, irrespective of whether or not the PRA separately applies to HUD's withdrawal of the Assessment Tool.² As this Court and other courts have made clear, “[t]he suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under APA § 553” and is “subject to APA notice and comment provisions.” *Environmental Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983); *see also NRDC v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004) (“[A]ltering the effective date of a duly promulgated standard could be, in substance, tantamount to an amendment or rescission of the standard[].”); *NRDC v. EPA*, 683 F.2d 752, 761-62 (3rd Cir. 1982) (effective date is “an essential part of any rule” and “material alterations” are subject to APA's notice and comment requirements).

² HUD did not rely on the APA's exception to notice and comment for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice,” 5 U.S.C. § 553(b)(A), and can no longer do so now at this late stage, *see Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (“It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.”). That exception is inapplicable here in any event, for the reasons stated above.

HUD is also incorrect in suggesting that the AFFH Rule provides for the suspension by stating that a jurisdiction's first AFH submission deadline must be at least nine months after HUD announces that the Assessment Tool for that jurisdiction is available for use. *See* 83 Fed. Reg. at 23,926. Nothing in this provision allows HUD to suspend the compliance deadlines for a category of jurisdictions *after* HUD has already announced the availability of an Assessment Tool for that category. To the contrary, the AFFH Rule makes clear that "implementation of the new AFH process commences for a program participant when the Assessment Tool designated for use by the program participant has been approved by OMB" and announced in the Federal Register. AFFH Rule, 80 Fed. Reg. at 42,277. In other words, as HUD has repeatedly explained, the deadline for a jurisdiction to submit its first AFH begins to run as soon as HUD first issues the Assessment Tool for that jurisdiction. 80 Fed. Reg. at 81,841 ("[t]he action that commences" the calculation of a jurisdiction's deadline "is issuance of an approved Final Assessment Tool"). The May Suspension Rule modifies the AFFH Rule substantively by suspending local jurisdictions' compliance obligations more than two years after HUD triggered implementation of the AFFH Rule for local jurisdictions by first announcing the availability of the Assessment Tool. Such a substantive change requires public notice and comment. *See Environmental Def. Fund*, 713 F.2d at 814-17 (invalidating EPA's unilateral suspension of permit process when suspension relieved regulated entities' of responsibility to comply with regulatory environmental standards).

HUD is only the most recent agency under the current administration to attempt such an unlawful delay to undercut important programs. Courts have consistently invalidated these delay actions, holding that this tactic violates the APA's procedural requirements. Most recently, on April 23, 2018, the Second Circuit invalidated the National Highway Traffic Safety Administration's delay of a penalty increase for vehicle manufacturers that violate federal fuel

efficiency standards. *See NRDC v. National Highway Traffic Safety Admin.*, Nos. 17-2780, 17-2806, Dkt. 194 (2d Cir. Apr. 23, 2018) (Ex. D). The D.C. Circuit also recently vacated EPA's ninety-day delay of a methane-emissions rule, rejecting the agency's claim of "inherent authority . . . not to enforce a lawfully issued final rule." *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017). And both this Court and other district courts have similarly invalidated unilateral agency delays of previously finalized rules for failing to provide the notice and comment required by the APA. *See Open Cmty. All. v. Carson*, 286 F. Supp. 3d 148, 162-63 (D.D.C. 2017) (preliminarily enjoining delay in implementation of rule regarding value of housing vouchers).³ The Court should likewise invalidate HUD's May Suspension Rule.

2. The May Suspension Rule is arbitrary, capricious, and contrary to law.

New York also agrees that HUD's May Suspension Rule violates the APA because it is arbitrary and capricious. (Renewed PI Mem. 21-32.) HUD justified the suspension based on the Assessment Tool's purported flaws and on costs to HUD to provide technical assistance to jurisdictions completing the AFH process. But these conclusory assertions are nowhere close to sufficient to justify HUD's extraordinary steps of unilaterally withdrawing an Assessment Tool

³ *See also Pineros y Campesinos Unidos del Noroeste v. Pruitt*, 293 F. Supp. 3d 1062, 1066-67 (N.D. Cal. 2018) (vacating delay of a rule regarding pesticides); *California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1071-72 (N.D. Cal. 2018) (preliminarily enjoining delay of effectiveness of methane waste reduction rule); *National Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 17-19 (D.D.C. 2017) (invalidating delay of effective date of rule regarding immigration parole for foreign entrepreneurs); *California v. United States Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1120-21 (N.D. Cal. 2017) (vacating postponement of compliance dates for methane waste reduction rule); *Becerra v. United States Dep't of Interior*, 276 F. Supp. 3d 953, 965-66 (N.D. Cal. 2017) (finding that postponement of rule governing royalties for oil and gas production on federal and tribal land violated the APA).

that jurisdictions had been using successfully, and suspending key provisions of a final rule that had already been in effect for several years.

a. HUD failed to consider jurisdictions’ successful use of the Assessment Tool and Assessment of Fair Housing process.

HUD contended that it withdrew the Assessment Tool and suspended the AFFH Rule because the Assessment Tool was purportedly “unworkable.” 83 Fed. Reg. at 23,923. HUD based this conclusion on its own decision to require a few jurisdictions to improve deficiencies in their AFHs before HUD would approve their submissions. *Id.* at 23,923-25. But HUD provided no details or other evidence to support its conclusory assertion that the Assessment Tool was to blame for any gaps in the early AFH filings. To the contrary, HUD’s conclusion “runs counter to the evidence before the agency” and the practical experience of state and local jurisdictions. *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). HUD failed to reference, let alone discuss, the many jurisdictions that had successfully implemented the AFH process using the Assessment Tool, the requirements set forth in the AFFH Rule, and other guidance and instructions provided by HUD. Indeed, HUD failed to provide a reasoned explanation for why any of the problems it identified were caused by the Assessment Tool rather than a particular jurisdiction’s failure to follow the plain requirements of the AFFH Rule. (Renewed PI Mem. 26-27.)

For example, HUD relied in the May Suspension Rule on a single jurisdiction’s failure to conduct sufficient community engagement as part of its AFH process. 83 Fed. Reg. at 23,924. But as HUD was well aware from reviewing all of the AFHs submitted by program participants, the vast majority of jurisdictions were able to engage successfully in a robust public participation process to identify factors that contribute to housing segregation and set goals for addressing those

factors. As envisioned by the AFFH Rule, these jurisdictions held public meetings, collaborated with fair-housing advocates, and considered public comments in creating a fair-housing plan.

- New York, for example, followed the AFFH Rule in holding 13 regional public meetings across the State as part of its fair-housing assessment process. New York also conducted 17 interviews with stakeholders in fair-housing issues—including fair-housing advocates, faith-based organizations, and housing developments.⁴ And the State further created a project website and conducted surveys over the internet to assess the experiences of state residents, local units of government, and other fair housing stakeholders.⁵
- Through its public-engagement process, New York was able to identify and consider several factors that were highlighted by the public and stakeholders as having a significant effect on the affordability, availability, and accessibility of housing in the State. These factors included: difficulties finding cost-effective sites to develop affordable housing; community resistance to supportive housing developments for individuals with mental disabilities; disproportionate siting of affordable housing in low-income neighborhoods; and fair-housing barriers raised by the private residential market, such as steering tactics and loan denials.⁶
- New Rochelle also successfully engaged in robust public engagement as part of its AFH process. For example, New Rochelle held a series of stakeholder interviews; consulted with fair-housing advocates, housing developers, non-profit organizations, and government agencies; conducted two web-based surveys; and held public hearings at community centers throughout the City.⁷
- New Rochelle’s public engagement allowed the City to gather useful information about the public’s view of local housing conditions and gain a deeper understanding of both the fair-housing issues facing the City and the interventions necessary to address those issues.⁸

⁴ Visnauskas Decl. ¶ 27; *New York AI* at 23-33 (Jan. 29, 2016).

⁵ *New York AI* at 33-41.

⁶ *Id.* at 39-40.

⁷ City of New Rochelle Department of Development, *2017 Assessment of Fair Housing* (“New Rochelle AFH”) 12-14 (Oct. 27, 2017).

⁸ *Id.* at 17; Salgado Decl. ¶ 14.

The practical experience of state and local jurisdictions also belie HUD's assertion that the Assessment Tool is causing jurisdictions to have trouble using local data or conducting a regional analysis of fair-housing issues. *See* 83 Fed. Reg. at 23,924. Many jurisdictions were able to use both HUD-provided data and local data and knowledge to produce detailed analyses of fair-housing trends, including regional issues. For example:

- The City of New Rochelle, which submitted an AFH that HUD has already accepted, successfully utilized the HUD-provided data as well as local data and knowledge that the City had compiled in the course of administering its programs.⁹ New Rochelle used these data and the Assessment Tool to identify several isolated pockets of low-income areas that contained a high percentage of non-white and disabled residents, and to conclude that larger families with more than five members as well as single-person households were experiencing more problems than small families with overcrowded housing and high costs for housing.¹⁰
- New Rochelle also did not have any trouble conducting a regional analysis of fair-housing issues using the Assessment Tool and local data. Throughout its AFH, New Rochelle included regional data about numerous fair housing issues, including segregation, disproportionate housing needs of protected classes, availability of publicly supported housing, and disability access. New Rochelle's AFH also described regional issues raised during its public-engagement process, such as increased competition for affordable housing in the City caused by other Westchester communities' provision of housing-assistance vouchers.¹¹
- Five jurisdictions in the Kansas City area also relied on the AFFH Rule and the Assessment Tool to collaborate and submit an AFH that incorporated both local knowledge and regional analysis. For example, the Kansas City regional AFH relied on local knowledge to analyze racially and ethnically concentrated areas of poverty. And the Kansas City regional AFH also reflected a regional fair-housing assessment to reflect that housing markets operate at a metropolitan scale and often require coordinated policy to address fair-housing issues.¹²

⁹ Salgado Decl. ¶ 14.

¹⁰ New Rochelle AFH at 39, 50, 67, 74-76

¹¹ Salgado Decl. ¶ 14.

¹² Decl. of Franklin A. Lenk ¶¶ 3-4.

In light of these successful AFHs, HUD failed to explain or support its conclusion that the Assessment Tool was to blame for any jurisdictions' failure to use available local data or conduct a regional analysis—as the AFFH Rule, Assessment Tool, and HUD guidance all plainly require. *See* AFFH Rule, 80 Fed. Reg. at 42,353, 42,355; *AFFH Guidebook*, *supra*, at 41-50.

Contrary to HUD's contention in the May Suspension Rule, state and local jurisdictions also successfully followed the AFH process to identify factors that contribute to fair-housing issues and set fair-housing goals that would result in meaningful action to address those factors, including by identifying “metrics and milestones” to measure progress. 83 Fed. Reg. at 23,925. For example:

- New York identified several meaningful actions that it may undertake to achieve its fair-housing goals, including incentivizing mixed income family housing as a means of promoting neighborhood integration and providing incentives to create affordable housing for families in higher opportunity areas.¹³
- In its AFH, New Rochelle set a fair-housing goal to preserve and increase housing affordability. And New Rochelle established clear metrics for achieving this goal, including annually providing rental assistance to help a targeted number of households afford housing, and using certain HUD funds in the establishment of a targeted number of affordable housing units within 5 years.¹⁴
- New Rochelle set its clear, measurable goals after engaging in an iterative process with HUD. HUD reviewed New Rochelle's draft AFH, discussed the viability of certain goals in light of New Rochelle's high building costs, and helped the City improve its metrics for measuring goals. This cooperative process ultimately improved New Rochelle's AFH and provided HUD with a greater understanding of what the City can accomplish with its funding.¹⁵

These and other successful efforts to set measurable goals undermine HUD's conclusory reasoning in the May Suspension Rule. Even if some jurisdictions initially submitted AFHs with “highly problematic” goals, *see* 83 Fed. Reg. at 23,925, HUD did not provide any evidence to suggest that

¹³ *New York AI* at 251-52.

¹⁴ *New Rochelle AFH* at 6.

¹⁵ *Salgado Decl.* ¶ 14.

such problems arose from the Assessment Tool—rather than a specific jurisdiction’s misunderstanding or refusal to complete the AFH process properly. Nor did HUD explain why deficiencies in a jurisdiction’s goals could not have been cured with feedback from HUD, rather than the drastic step of withdrawing the entire Assessment Tool and suspending the AFFH Rule.

In sum, HUD’s failure to address the significant strides that state and local jurisdictions have made using the Assessment Tool and implementing the AFH process renders the May Suspension Rule arbitrary and capricious. *See Sorenson Commc’ns Inc. v. FCC*, 755 F.3d 702, 709-710 (D.C. Cir. 2014). Indeed, HUD’s reliance on a few cherry-picked examples of jurisdictions that did not have their AFHs accepted on the first try simply ignores the broader success that many jurisdictions have experienced so far in implementing the AFH process. Accordingly, the May Suspension Rule violates the APA. *See id.* at 709-10 (agency action was arbitrary and capricious where it failed to place cited research “into context”); *see also Humane Society of the U.S. v. Zinke*, 865 F.3d 585, 606 (D.C. Cir. 2017) (agency decision violated APA where it failed to consider broader context of problem).

3. HUD failed to consider obvious and reasonable alternatives to withdrawing the Assessment Tool and suspending jurisdictions’ compliance deadlines.

Even if some jurisdictions might benefit from improvements to the Assessment Tool, HUD has provided no reason that local jurisdictions could not continue using the current version of the Assessment Tool and complying with the AFFH Rule while HUD implements any such improvements. Indeed, HUD has previously made such incremental improvements to the Assessment Tool without withdrawing the tool or suspending the AFFH Rule. Over the course of approximately eight months in 2016 and 2017, HUD sought to renew OMB’s approval of the Assessment Tool by, among other things, unveiling modifications to the tool, seeking public

comment about the tool, and making additional changes to the tool in response to such comments. *See* 81 Fed. Reg. 15,546 (Mar. 23, 2016); 81 Fed. Reg. 57,601 (Aug. 23, 2016); 82 Fed. Reg. 4,388 (Jan. 13, 2017). During this process, HUD successfully implemented many changes to the Assessment Tool—such as adding questions, clarifying the wording of certain questions, and providing further instructions to jurisdictions—without withdrawing the Tool or suspending the AFFH Rule. *See, e.g.*, 82 Fed. Reg. at 4,388-95 (explaining key changes to Assessment Tool and instructions for using the tool). And HUD made clear that it would continue to evaluate and improve the Assessment Tool on an ongoing basis—without ever suggesting that the Assessment Tool would be withdrawn or that the AFFH Rule would be suspended. *See id.* at 4,392-94. To the contrary, HUD reiterated its determination that the Assessment Tool “enables program participants to perform a meaningful assessment” of fair housing issues and “better implements the AFFH mandate.” *Id.* at 4,390. HUD’s failure even to consider making incremental improvements to a tool that it had repeatedly found to be successful is arbitrary and capricious.

Moreover, the practical ongoing experience of state and local jurisdictions would provide valuable evidence to guide HUD’s improvements to the Assessment Tool. HUD relied on precisely such ongoing experience by considering the comments of state and local jurisdictions to improve the Assessment Tool periodically. *See id.* at 4,388, 4,391 (discussing jurisdictions’ views regarding amount of time needed to complete AFH process through the Assessment Tool, and ways to enhance the Tool). As with prior improvements to the Assessment Tool, evaluation and resolution of any problems should be resolved by integrating lessons learned from more experience with an ongoing AFH process—not by refusing to engage in the AFH process altogether. Indeed, HUD’s decision to suspend the AFFH Rule has disrupted rather than enhanced HUD’s ability to improve the Tool and empower its grantees to affirmatively further fair housing.

a. HUD’s provision of technical guidance to jurisdictions further contradicts the reasoning underlying the May Suspension Rule.

HUD also failed to provide a rational explanation for withdrawing the Assessment Tool and suspending the AFFH Rule based on the costs HUD incurred to provide technical assistance to the first jurisdictions that submitted AFHs. *See* 83 Fed. Reg. at 23,925-26. The experience of New York demonstrates that the assistance already provided by HUD has created a substantial and helpful foundation that HUD need not replicate in full for each jurisdiction scheduled to file an AFH in 2018 and 2019. For example:

- State and local jurisdictions already have access to multiple guidance documents issued by HUD. These documents included a 225-page AFFH Rule Guidebook containing details on the required content for an AFH; a manual with instructions for using the HUD-provided data and mapping tools; and a guidance document explaining the factors that HUD would consider in deciding whether to accept an AFH.¹⁶
- Staff members from NYSHCR, New Rochelle, and New York City attended AFH-related training sessions held by HUD, which addressed such topics as the community participation process, analysis of HUD maps and data, and use of the Assessment Tool. Many of these sessions are available on the internet for other jurisdictions to use going forward.¹⁷
- New Rochelle’s staff worked closely and collaboratively with HUD’s staff in preparing its AFH. HUD informed New Rochelle that HUD was providing this high level of hands-on technical assistance because New Rochelle was one of the early submitters under the new AFFH Rule, and its AFH would be a “flagship” report.¹⁸

¹⁶ *See* HUD, *AFFH Rule Guidebook* (2015); HUD, *AFFH-T User Guide: Affirmatively Furthering Fair Housing Data and Mapping Tool* (2017); HUD Review Guide at 1-5.

¹⁷ (Visnaukas Decl. ¶ 28; Salgado Decl. ¶ 12; Murphy Decl. ¶ 14.) *See, e.g.*, Webinar, Introduction to Affirmatively Furthering Fair Housing and the New Rule (Oct. 2015); Webinar, The Fair Housing Planning Process Under the AFFH Rule (Jan. 2016); Webinar, AFFH Community Participation Requirements for Consolidated Plan Program Participants (2015); *see also* HUD, Sample Agenda and Schedule for Creating Opportunity in Every Community: A Practical Guide to Affirmatively Furthering Fair Housing.

¹⁸ Salgado Decl. ¶ 12.

- As New Rochelle worked with HUD, it was clear that HUD's staff was still learning how the AFH process would work and figuring out which HUD employees would be responsible for reviewing which portions of the AFH.¹⁹
- New Rochelle's staff members also gained significant knowledge and experience during the City's AFH process. As a result, the City's Operation Manager for the Department of Development expects that the City will be able to complete its next AFH with greater ease and less assistance from HUD.²⁰

These experiences belie HUD's assertion that its early technical assistance costs must scale up as more jurisdictions prepare their AFHs. Because HUD has already created lengthy guidance documents, training curricula, and instructions for using the Assessment Tool, there is no reasonable reason for HUD to expect that it will spend as much on periodic updates to these materials as it spent to design and create the guidance at the outset. Nor has HUD provided any reasoned explanation for its conclusion that it will not be able to reduce its per-AFH costs going forward by leveraging the extensive knowledge and experience gained from the early AFH submissions. Indeed, in issuing the AFFH Rule, HUD contemplated that the first AFH submissions would provide a learning experience for both HUD and its grantees. *See* AFFH Rule, 80 Fed. Reg. at 42,276, 42,318. HUD thus already concluded that later submitters would likely not require as much technical guidance from HUD because they would be able to use the experiences and successful AFHs of early filers to complete their own AFH processes. *See id.* at 42,273, 42,347, 42,349. HUD has provided no explanation, let alone a reasoned one, for reaching the opposite conclusion now. These failures render the May Suspension Rule arbitrary and capricious. *See State Farm*, 463 U.S. at 42-43.

¹⁹ *Id.*

²⁰ *Id.* ¶ 13.

In any event, even if HUD might need to provide significant levels of technical guidance going forward, the costs for such guidance would not support HUD's decision to suspend the AFFH Rule. In relying exclusively on its own costs, HUD entirely failed to consider whether the substantial benefits of the AFFH Rule outweigh any such costs. (*See* Renewed PI Mem. 30-32.) Indeed, HUD's failure to consider the benefits of the AFFH Rule is particularly arbitrary and capricious because HUD already compared the costs and benefits of the old AI process, which GAO and HUD determined was ineffective, with the costs and benefits of the new AFH process. And HUD already decided that, on balance, the AFFH Rule was needed to correct the deficiencies in the AI process and ensure that jurisdictions are affirmatively furthering fair housing. HUD cannot reasonably change direction now without considering the benefits of the AFFH Rule and the costs of reverting back to the AI process.

B. The May Suspension Rule Is Irreparably Harming New York State.

1. The May Suspension Rule is harming New York State in multiple ways.

HUD's withdrawal of the Assessment Tool and unlawful suspension of the AFFH Rule causes several different injuries to New York State.

First, the suspension undermines NYSHCR's own ability to comply with the AFFH Rule by preventing NYSHCR from being able to rely on the data and analyses that local jurisdictions collect in preparing their AFHs. For example, NYSCHR relies on fair-housing assessments generated by local jurisdictions in setting and achieving statewide fair-housing goals. (*Visnauskas Decl.* ¶¶ 8-13.) The AFFH Rule's standardized process and formalized requirements had already vastly improved the quality and detail of local plans, considerably simplifying NYSCHR's own analyses. (*See id.* ¶¶ 6-9, 12.) HUD's abrupt decision to return to the old AI process, which both HUD and GAO previously found to be ineffective, will reduce the quality and detail of local

jurisdictions’ plans—to the detriment of the State.²¹ (*Id.* ¶¶ 16-20.)

Second, the May Suspension Rule delays by many years the meaningful and targeted fair-housing reforms that would have been accomplished by timely implementation of the AFFH Rule. Local jurisdictions will again draft AI reports, as the May Suspension Rule directs, even though HUD has acknowledged that those reports are inadequate. Even if some jurisdictions want to follow the AFFH Rule in conducting the AI process, they may not be able to complete the robust AFH process without the Assessment Tool and HUD’s assistance. And some jurisdictions will simply not prepare AI plans at all in the absence of meaningful HUD oversight.

These delays in fully and comprehensively addressing the obstacles to fair housing will directly injure New York communities and residents by allowing the perpetuation of segregated housing patterns and lack of housing opportunity—thereby harming the State’s *parens patriae* interests. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607-08 (1982) (State has quasi-sovereign interest in “health and well-being—both physical and economic—of its residents”); *People v. Peter & John’s Pump House, Inc.*, 914 F. Supp. 809, 814 (N.D.N.Y. 1996) (State has quasi-sovereign interest in protecting its residents from “the harmful effects of discrimination” (quotation marks omitted)); *cf. Trafficante*, 409 U.S. at 211 (“The person on the landlord’s blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the bill, ‘the whole community.’” (quoting 114 Cong. Rec.

²¹ For example, in withdrawing the Assessment Tool and suspending the AFFH Rule, HUD directed grantees to prepare their AIs “in accordance with the HUD Fair Housing Planning Guide,” 83 Fed. Reg. at 23,926, despite previously concluding that the 1996 Planning Guide is insufficient to facilitate compliance with the Fair Housing Act, *see* Proposed AFFH Rule, 78 Fed. Reg. at 43,713 (“HUD’s Fair Housing Planning Guide . . . provides extensive suggestions but does not fully articulate the goals that AFFH must advance.”).

2706)). The discriminatory barriers that the AFFH Rule was designed to address not only prevent people from having a fair choice of where to live, but also impede their ability to access educational opportunities, employment prospects, neighborhood infrastructure, health care, and more.²² Such inequality effectively forces certain groups of people to live in segregated areas of concentrated poverty, imposing severe social and economic disadvantages on them and straining precious state resources for individuals and families in need of support. For example, poor-performing schools leave students unprepared for the labor force and undercut New York's economic competitiveness.²³ Health problems from exposure to housing-related hazards or a lack of access to basic services harm individuals, overburden medical resources, and raise healthcare costs.²⁴ And depressed home values lower tax bases and limit the State's ability to invest in building affordable housing options.²⁵ By failing to ensure that every local entitlement jurisdiction takes affirmative steps to ameliorate these harms, the May Suspension Rule is irreparably harming New York.

Finally, the May Suspension Rule harms New York by violating HUD's obligation under the Fair Housing Act to ensure that its grantees affirmatively further fair housing. (*See* Renewed PI Mem. 32-35.) HUD has already determined that the prior AI process failed to ensure that jurisdictions took meaningful steps to combat housing segregation—a conclusion supported by the

²² (Visnauskas Decl. ¶¶ 22-23.) *See, e.g.,* Gary Orfield et al., The Civil Rights Project, *E Pluribus . . . Separation: Deepening Double Segregation for More Students* 7-9 (Sept. 19, 2012); David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 Pub. Health Reports 404, 406-09 (2001).

²³ *See* Judith K. Hellerstein & David Neumark, *Employment of Black Urban Labor Markets: Problems and Solutions* 8-14, Nat'l Bureau of Econ. Research, Working Paper No. 16986 (2011).

²⁴ *See* Hope Landrine & Irma Corral, *Separate and Unequal: Residential Segregation and Black Health Disparities*, 19 Ethnicity & Disease 179, 180-82 (2009).

²⁵ Alan Berube & Bruce Katz, Brookings Institution, *Katrina's Window: Confronting Concentrated Poverty Across America* 6 (2005).

experience of NYSHCR (*see* Visnauskas Decl. ¶¶ 16-18) and the GAO. HUD’s decision to return to its prior, noncompliant AI regime violates HUD’s obligations under the Fair Housing Act to the detriment of New York and its local jurisdictions. *See Otero*, 484 F.2d at 1133-34 (HUD has affirmative duty to “fulfill, as much as possible, the goal of open, integrated residential housing patterns”); *see also NAACP*, 817 F.2d at 158 (explaining HUD’s obligations under FHA).

2. The balance of the equities and the public interest support a preliminary injunction.

No countervailing interest outweighs the serious harms faced by New York from HUD’s abrupt and unlawful withdrawal of the Assessment Tool and suspension of the AFFH Rule. HUD has identified no injury that it would suffer if it is required to implement its own carefully considered regulation. To the extent that restoration of the Rule would require HUD to move more quickly to identify and implement improvements to the Assessment Tool, such expedition would only further advance the substantial benefits provided by the Rule.

The balance of the equities further supports a preliminary injunction here because the May Suspension Rule—far from alleviating burdens on state and local jurisdictions—in fact interferes with jurisdictions’ ability to analyze and address fair-housing issues. As HUD acknowledges, state and local jurisdictions remain subject to a statutory obligation to affirmatively further fair housing. *See* 83 Fed. Reg. at 23,927. HUD’s suspension of the AFFH Rule does not (and cannot) excuse New York or its localities from these ongoing obligations. Instead, the principal effect of the suspension is to make it more difficult for New York and other state and local jurisdictions to comply with their duty and desire to affirmatively further fair housing. *See supra* at 26-29. The equities thus weigh strongly in favor of vacating HUD’s unlawful suspension and restoring both the Assessment Tool and the AFFH Rule.

CONCLUSION

The Court should issue a preliminary injunction requiring HUD to rescind the withdrawal of the Assessment Tool and delay of the AFFH Rule, and to take all other necessary steps to ensure implementation of the AFFH Rule on the schedule that was in place before those actions. The Court should also grant summary judgment to plaintiffs.

Dated: June 5, 2018

Respectfully submitted,

STEVEN C. WU
Deputy Solicitor General
JUDITH N. VALE
Senior Assistant Solicitor General

BARBARA D. UNDERWOOD
Attorney General
State of New York

By: /s/ Matthew Colangelo
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Of Counsel

EXHIBIT A

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL FAIR HOUSING ALLIANCE,
TEXAS LOW INCOME HOUSING
INFORMATION SERVICE, and TEXAS
APPLESEED,

Plaintiffs,

STATE OF NEW YORK,

Proposed Intervenor-Plaintiff,

v.

BEN CARSON, Secretary of the U.S.
Department of Housing and Urban
Development, in his official capacity,

And

U.S. DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT,

Defendants.

Civ. Action No. 1:18-cv-01076-BAH

Pursuant to 28 U.S.C. § 1746(2), I, RuthAnne Visnauskas, hereby declare as follows:

1. I am the Commissioner/Chief Executive Officer of New York State Homes and Community Renewal (NYSHCR).
2. NYSHCR is a consolidated leadership platform of associated New York State executive agencies and public benefit corporations, all created by state legislation, with the shared mission to build, preserve and protect affordable housing and increase home ownership across New York State.
3. NYSHCR is comprised of five agencies, which are the Division of Housing and Community Renewal (DHCR), the Housing Trust Fund Corporation (HTFC), the Housing Finance

Agency (HFA), the State of New York Mortgage Agency (SONYMA), and the Affordable Housing Corporation (AHC).

4. New York State receives funding from the U.S. Department of Housing and Urban Development (HUD) through several grant programs, including the Community Development Block Grant (CDBG) program, the HOME Investment Partnerships (HOME) program, the Emergency Solutions Grant (ESG) program, and the Housing Opportunities for People with AIDS (HOPWA) program.

- a. The primary goal of the CDBG program is to develop viable communities by providing decent housing, a suitable living environment and expanding economic opportunities, principally for persons with low and moderate incomes. In addition to facilitating housing-related activities that support the State's affordable housing goals and objectives, the New York State CDBG Program also provides non-housing assistance to communities and local units of government for economic development and public facilities. In 2017, New York State received \$45,611,334 from the CDBG program.
- b. New York State uses funds from the HOME program to fund the NYS HOME Local Program, which funds a variety of residential housing activities to expand the supply of decent, safe, and affordable housing throughout the State of New York. In 2017, New York State received \$18,592,698 from the HOME program.
- c. New York State uses funds from the ESG program to coordinate activities to enhance the quality and quantity of homeless facilities, services for homeless persons, including rapid re-housing, and services to those at risk of homelessness. In 2017, New York State received \$6,562,502 from the ESG program.

d. New York State uses funds from the HOPWA program to support housing assistance and connected supportive services for persons with AIDS. The State also uses HOPWA funds to pay for short-term rent and mortgage and utility payments for persons with HIV/AIDS who are at risk of becoming homeless and to provide similar funding for persons with HIV/AIDS who are at risk of homelessness to not-for-profit agencies. In 2017, New York State received \$2,482,680 from the HOPWA program.

5. New York State distributes funding that it receives from HUD to local counties, municipalities and for HOPWA, to non-for-profit organizations, that do not receive funding directly from HUD. Forty-nine large counties and municipalities in New York State receive funding directly from HUD and manage their HUD programs independently of New York State. These communities are known as HUD “Entitlement Jurisdictions.” New York State and each of the Entitlement Jurisdictions must conduct and submit various planning and reporting documents to HUD, including a Consolidated Plan.

6. New York State welcomed the Affirmatively Furthering Fair Housing (AFFH) Rule issued and made final by HUD in 2015 (80 Fed. Reg. 42,272 (July 16, 2015)). Under the AFFH Rule, states and Entitlement Jurisdictions that are required to submit a Consolidated Plan must also complete a detailed Assessment of Fair Housing (AFH), a planning document that includes a diagnosis of local fair housing impediments and actionable plans to address them. HUD outlined a process, provided data sets, and formulated a Local Government Assessment Tool in order for local governments, like the Entitlement Jurisdictions within New York State, to complete the AFH.

7. New York State takes seriously its statutory obligation, found in the Fair Housing Act of 1968 and triggered by the State’s receipt of HUD funds, to affirmatively further fair housing

throughout the State. To fulfill this commitment, the State depends on both HUD and local jurisdictions contributing to the State's efforts to promote integration and genuine housing choice.

8. NYSHCR is concerned about the suspension of the AFFH Rule through the withdrawal of the Assessment Tool, the reinstatement of the "Analysis of Impediments to Fair Housing Choice," and the harm that results to the State and its residents. These decisions mean that localities that are Entitlement Jurisdictions are suspended from the requirement that they submit an AFH. As such, the State will not be able to include the data and analysis resulting from those AFHs in its own analysis, and further, will not be able to rely on the actionable items from the AFHs to further promulgate regional and/or coordinated plans that combine approaches and strategies from each Entitlement Jurisdiction's localities.

9. The AFH process is necessary for localities to analyze and address impediments to fair housing choice and historical patterns of residential segregation. Using the Assessment Tool and HUD-provided data, localities' AFHs would have identified the contributing factors for segregation, racially or ethnically concentrated areas of poverty, disparities in access to opportunity, and disproportionate housing needs. The AFFH Rule's standardized process and formalized rules optimize NYSHCR's ability to analyze local government plans, improving NYSHCR's operations and making them less resource-intensive.

10. For its AFH plan due in 2021, NYSHCR would have sought (and if available will use) the AFH plans of other New York Entitlement Jurisdictions. The AFH plans from these cities and communities are critical to NYSHCR's ability to complete its own fair housing analysis. Due to the suspension of the Rule, NYSHCR can no longer rely on the availability of that data and analysis from the Entitlement Jurisdictions, and will be required to engage consultants to ensure the data obtained from the Entitlement Jurisdictions is available to the extent possible during its lengthy

planning process. Even so, it is implausible at the State-level to get the granularity of analysis that would be enabled by a local jurisdiction's conducting its own AFH and sharing its findings with the State.

11. Not only does NYSHCR rely on data and analysis provided by Entitlement Jurisdictions, NYSHCR also relies on their local responses and action plans to fair housing challenges as part of its own planning process on addressing housing barriers. These HUD Entitlement Jurisdictions, which include the most populated cities and counties in New York State, manage their fair housing planning and housing programs independently of NYSHCR and are in the best positions to identify local impediments to fair housing choice and take meaningful actions to address these barriers. Information about how these jurisdictions intend to fulfill their obligation to affirmatively further fair housing informs New York State in how it will do the same.

12. New York State needs all its localities to identify and analyze barriers to fair housing and take steps to increase access to affordable housing – regardless of an individual's race, ethnicity, family status or disability. Local solutions, identified by and carried out by local governments and their constituents, are needed to address those local policies or practices that deny access to fair housing choice and may perpetuate residential segregation within these HUD Entitlement Jurisdictions. The AFH Rule and the Assessment Tool do exactly that.

13. Local governments' AFH plans inform New York State in how it will work to address barriers to housing, as well as its overall housing policy. For example, barriers to fair housing identified by localities help NYSHCR prioritize its actions to affirmatively further fair housing on the state level and identify programmatic and policy needs. NYSHCR also anticipated using local government AFH plans to determine gaps in responses to issues plaguing different areas and

geographies and how to address these issues on a macro level with the full force of New York State.

14. While statewide policies and legislation are critical to reducing discrimination and segregation statewide, certain other policies and legislative changes can only be affected at the local level. Exclusionary zoning practices, for example, have long been recognized as a contributing factor to residential segregation. These ordinances, even if identified as an impediment to housing at the State level, cannot currently be changed at the State level. They are largely within the purview of local municipalities. If these jurisdictions are not required to take actions to identify and address such practices through a meaningful AFH process, there is little that the State can do in their stead.

15. The suspension of the AFFH Rule's requirements frustrates New York State's own ability to identify barriers to housing and affirmatively further fair housing statewide. New York State is reliant on the work done by local municipalities in actively identifying and addressing impediments to housing and contributing factors to residential segregation. Without a sufficient commitment by local jurisdictions to do their part, there will be areas of entrenched policy and practice that cannot be reached by NYSHCR desegregation efforts.

16. HUD's decision to reinstate the Analysis of Impediments process – in which Entitlement Jurisdictions certify to the completion, but do not have to submit to HUD, an Analysis of Impediments to Fair Housing Choice (AI) – is inadequate. The AIs completed by the 48 Entitlement Jurisdictions (exclusive of New York City) and evaluated by New York State in preparation of its own 2016 AI demonstrate that the current AI process largely does not result in meaningful evaluations of fair housing barriers and action items on local levels, and thus does not fill the gap left by the delay of the AFFH Rule.

17. NYSHCR found that many localities needed to undertake a more rigorous process of assessing local fair housing issues and creating a plan to address them. For example, the localities' AIs did not: adequately analyze local impediments to fair housing choice and identify meaningful actions to address these barriers; reflect sufficient outreach to minorities and members of the protected classes in the development of the AI; demonstrate an understanding of fair housing issues and laws; contain an adequate level of data analysis to fully assess the existence of demographic and housing trends and conditions that disproportionately impact members of protected classes; or include an adequate level of policy analysis and its impact on the protected classes.

18. Most jurisdictions did not review their previous AIs and the progress achieved (or lack thereof) as part of the development of new and continuing strategies to affirmatively further fair housing. For example, most jurisdictions did not review how their zoning ordinances affected developers' ability to construct new multi-family housing without a special permit or public hearing, which may directly impact NYSHCR's ability to fund the development of affordable housing in low-poverty areas that may be segregated. Additionally, some jurisdictions failed to include a clearly stated list of impediments in their AIs.

19. NYSHCR's work to increase access to affordable housing, decrease racially concentrated areas of poverty, and develop multifamily housing in historically segregated, low-poverty areas with well performing schools, is frustrated by the inadequate AI system, which lacks a structured decision-making process. The lacking oversight by HUD and the suspension of the Assessment Tool for Local Governments only compounds this problem.

20. Regressing to the AI process, which did not include the HUD assistance necessary for many jurisdictions to complete fulsome and actionable fair housing plans, increases the risk that

jurisdictions will not be able adequately address fair housing issues, including segregation and the resulting harms.

21. Based on NYSHCR's experience, smaller jurisdictions that have fewer resources to commit to gathering the information and conducting the demographic analyses that are required to evaluate fair-housing issues, goals, and priorities may have difficulty being able to complete the robust AFH process without the HUD assistance contemplated in the AFFH Rule. Absent the AFFH Rule, and the standardization, data and technical assistance that it affords, these jurisdictions and others may decline to engage in the AFH process.

22. Inadequate local responses to segregation harm New York State as a whole because of their impact on State planning and State residents, in addition to other State goals. For example, depressed home values in segregated areas of concentrated poverty lower the State's tax base and limit its ability to invest in building affordable housing.

23. The perpetuation of segregation is also detrimental to New York families and to the State, because residential segregation worsens outcomes for individuals and families. Young children that move from high-poverty, highly-segregated areas to lower-poverty neighborhoods improve their social outcomes. These children see a drastic increase in total lifetime earnings, employment rates, mental and physical health and subjective well-being compared to those children who remain in high-poverty areas.

24. NYSHCR acknowledges that the AFFH Rule requires investments of time and money, among other things, but we believe that the process is worth the expenditures because of the tangible benefits it can produce for the State and its residents.

25. In anticipation of the Rule's requirements, and because the AFH plan framework provided more precise standards and a fair housing planning model, NYSHCR devoted time and resources

to adopt and implement the AFH framework of the AFFH Rule in its 2016 Analysis of Impediments to Fair Housing Choice. NYSHCR relied on the clear guidance in the AFFH Rule and modeled its analysis on the AFFH Rule's Assessment Tool published by HUD.

26. The AI analyzed various categories directly set forth in the Assessment Tool, as follows:

(a) segregation levels in the jurisdiction; (b) racially and ethnically concentrated areas of poverty in the New York State Entitlement Jurisdiction; (c) disparities in access to community assets or opportunity; (d) disproportionate housing needs; and (e) fair housing enforcement and outreach capacity.

27. NYSHCR's public engagement process, how it was documented in the AI and how it informed the findings and recommendations of the AI, were modeled after the AFFH Rule. A central component of the AI consisted of a statewide dialogue on policies, regulations, and practices relating to housing that was intended to establish communication with communities across New York State. The community participation plan for NYSHCR's AI involved outreach to those populations who have historically experienced exclusion, including racial and ethnic minorities, limited English proficient (LEP) persons, and persons with disabilities.

28. Additionally, NYSHCR employees attended HUD trainings on the AFH process, which they found to contain useful feedback from those who had completed the AFH process previously. Voluminous and well laid-out resources and materials were provided at these trainings on how to complete the AFH. One of these employees also had the opportunity to ask questions of HUD staff and was confident that one could complete an AFH after the training.

29. New York State believes that a detailed, fact-driven evaluation is important for identifying the different fair-housing issues that a particular jurisdiction may face, and that most of the time,

effort, and expense required to complete such an evaluation is not necessarily a function of the AFFH Rule itself but rather the complexity of analyzing and addressing fair housing issues.

30. For the foregoing reasons, it is NYSHCR's hope that the AFFH Rule be fully implemented not only across local governments, but across the full range of HUD recipients, including New York State, as soon as possible.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 5th day of June, 2018



RuthAnne Visnauskas

EXHIBIT B

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL FAIR HOUSING
ALLIANCE, TEXAS LOW INCOME
HOUSING INFORMATION SERVICE,
and TEXAS APPLESEED,

Plaintiffs,

STATE OF NEW YORK,

Intervenor-Plaintiff,

v.

BEN CARSON, Secretary of the U.S.
Department of Housing and Urban
Development, in his official capacity,

And

U.S. DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT,

Defendants.

Civ. Action No. 1:18-cv-01076-BAH

DECLARATION OF ADAM SALGADO

Pursuant to 28 U.S.C. § 1746(2), I, Adam Salgado, hereby declare as follows:

1. I am the Operations Manager at the Department of Development of the City of New Rochelle, NY.
2. The Department of Development plans and guides the physical advancement of the City by proposing and managing projects that enhance the built

environment and improve the City's quality-of-life. The Department's priorities include community and economic development and affordable housing.

3. The Department of Development also coordinates the administration of the Community Development Block Grant (CDBG) Program and the HOME Investment Partnership Program.

4. In 2017, the U.S. Department of Housing and Urban Development (HUD) awarded the City \$1,295,836 in CDBG funds and \$304,806 in HOME funds. In 2018, New Rochelle will receive \$1,441,129 in CDBG funds and \$417,212 in HOME funds.

5. As a condition of receiving these funds, New Rochelle has a statutory obligation to affirmatively further fair housing.

6. In 2017, the City of New Rochelle submitted an Assessment of Fair Housing (AFH) in compliance with the Affirmatively Furthering Fair Housing (AFFH) final rule issued in 2015.

7. As Operations Manager, I oversaw the process of preparing the City's AFH.

8. The City began working on the AFH in late 2016 and submitted it to HUD about one year later, on October 17, 2017. HUD subsequently accepted the City's AFH.

9. In order to prepare our AFH plan, we hired a consultant, whom we paid with administrative funds that were cost-distributed among our HUD grants. Based on input that we provided, the consultant helped us analyze HUD data and formulate

metrics. The consultant was also tasked with other elements of the AFH, including assisting with the citizen participation process, analyzing the housing market, and conducting a housing-needs assessment.

10. Our decision to hire a consultant was not based on any deficiencies with the Assessment Tool. Rather, we hired a consultant because we have a small staff, none of whom are experts at analyzing demographic data. Moreover, because the AFH process only occurs once every five years, it is more cost effective for us to hire a consultant to help with the AFH than to hire a full-time employee.

11. Indeed, similar considerations led us to hire a consultant to help prepare our 2012 Analysis of Impediments, 2018-2022 Consolidated Plan, and 2018 Action Plan.

12. As part of the AFH process, we attended two trainings provided by HUD. We also received hands-on assistance from HUD's staff. For example, on December 13, 2016, a group of HUD staff members came to our office to work with us. They told us that because New Rochelle was one of the early submitters under the new AFFH Rule, our AFH would be a "flagship" report. As they worked with us on our AFH, it was clear that they were still learning how the process would work and trying to figure out which HUD employees would be responsible for reviewing which portions of the report.

13. Now that New Rochelle has completed its first AFH, I expect that we will be able to complete our next AFH with greater ease and with less assistance from HUD. Although the AFH process—and particularly the community-participation

component—will always require significant time and work, we will have the benefit of our prior experience and knowledge of the process.

14. I understand that HUD has withdrawn the local Assessment Tool based on certain deficiencies that it identified with the Tool. The reasons that HUD has given for withdrawing the Assessment Tool are inconsistent with New Rochelle's experience.

a. Community Participation: We had a clear understanding of our community-participation obligations and undertook what I believe was a robust public-engagement process, which included interviews and consultations with fair housing advocates, housing developers, non-profit organizations, and government agencies; two web-based surveys, one for the general public and one for other interested stakeholders; and public hearings at community centers throughout the City. Although the process was time-consuming, it gave us a deeper understanding of fair-housing issues in New Rochelle and the interventions necessary to address those issues, especially when we combined feedback from the public with the results of our data analysis.

b. Local Data and Knowledge: We used local data and knowledge that we compiled in the course of administering our HUD programs. To cite just a few examples, our AFH described (1) the housing pressures that result from having three colleges located in the City; (2) the level of community opposition to affordable-housing development in New Rochelle; and (3) the lack

of private investments in specific neighborhoods.

c. Regional Analysis: We did not have any trouble conducting a regional analysis of fair-housing issues in our AFH. Because we are located in Westchester County, which has been sued several times for failing to comply with the Fair Housing Act, there is an abundance of available data about fair-housing issues in our region. Throughout the Fair Housing Analysis section of our AFH plan, we included regional data about a number of fair housing issues, including segregation, disproportionate housing needs of protected classes, availability of publicly supported housing, and disability access. We also described regional issues that came to our attention through the public-engagement process. For example, at meetings with stakeholders, we learned that although New Rochelle has a considerable amount of senior housing and affordable housing for a community of its size, households from other parts of Westchester County often move into New Rochelle when housing is unavailable in their towns, increasing competition for housing in our City. Similarly, we learned that some of the more affluent communities in Westchester County have their own Housing Choice Voucher (HCV) programs with higher rent limits than New Rochelle. Many of these voucher holders are able to attain housing in New Rochelle because their assistance amount is greater, again creating competition for New Rochelle residents.

d. Goals Section and Identification of Contributing Factors: after reviewing our draft report, HUD helped us improve our metrics for measuring

our goals and encouraged us to identify additional contributing factors. At the same time, we also had to give feedback to HUD. For example, we explained that some of the metrics that HUD thought appropriate—such as building a certain number of units of affordable housing—were not achievable in New Rochelle, given our high building and development costs. This iterative process between the City and HUD ultimately resulted in an improved AFH, and I believe gave HUD a greater understanding of what we can accomplish with our funding. Our AFH plan now sets forth clear and measurable metrics for achieving our goals. For example, to achieve our goal of achieving housing affordability goal, we indicated that we would annually provide rental assistance to help 10-12 households afford housing; use HUD funds to assist a developer in establishing 3-5 affordable housing units within 5 years through the City's inclusionary housing policy; and create a resource guide for affordable housing developers to help them navigate the City's processes and reduce barriers to developing affordable housing.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 4 day of June, 2018

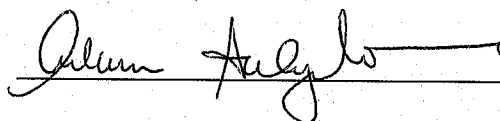

Adam Salgado

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL FAIR HOUSING ALLIANCE,
TEXAS LOW INCOME HOUSING
INFORMATION SERVICE, and TEXAS
APPLESEED,

Plaintiffs,

PEOPLE OF THE STATE OF NEW YORK,
by BARBARA D. UNDERWOOD,
ATTORNEY GENERAL OF THE STATE
OF NEW YORK,

Intervenor-Plaintiff,

v.

BEN CARSON, Secretary of the U.S.
Department of Housing and Urban
Development, in his official capacity,

And

U.S. DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT,

Defendants.

Civ. Action No. 1:18-cv-01076-BAH

Pursuant to 28 U.S.C. § 1746(2), I, Matt Murphy, hereby declare as follows:

1. I am the Deputy Commissioner for the Office of Policy and Strategy for the New York City Department of Housing Preservation and Development (HPD).
2. HPD is the largest municipal housing preservation and development agency in the nation. Its mission is to promote the quality and affordability of New York City's housing and the strength and diversity of its many neighborhoods.

3. HPD receives funding from the U.S. Department of Housing and Urban Development (HUD) through several grant programs, including the Community Development Block Grant (CDBG) and HOME Investment Partnerships (HOME) programs.
 - a. HPD uses funds from the CDBG program to help the City enforce housing quality standards for all New Yorkers, among other things. For the 2017 Program Year, the City was allocated \$150,294,862 from the CDBG program.
 - b. HPD uses funds from the HOME program to fund the construction of supportive housing, offer down payment assistance for low-income homebuyers, and offer rental assistance for homeless families, among other things. For the 2017 Program Year, the City was allocated \$53,258,298 from the HOME program.
4. New York City receives additional funding from HUD through other grant programs that HPD does not administer, including the Emergency Solutions Grant (ESG) program and the Housing Opportunities for People with AIDS (HOPWA) program.
 - a. HPD does not use funds from the Emergency Solutions Grant (ESG) program, but I am aware that the City uses funds from that program to: prevent families and individuals from becoming homeless; rapidly re-house homeless individuals and families; engage homeless individuals and families living on the street; and help operate these shelters and provide essential services to shelter residents. For the 2016 Program Year, New York City received an allocation of \$13,625,907 in ESG funding.
 - b. HPD does not use funds from the Housing Opportunities for Persons with AIDS (HOPWA) program, but I am aware that the City uses funds from that program to provide long-term housing assistance and support services to low-income people

living with HIV/AIDS and their families. For the HOPWA 26 Program Year (SFY 2017-18), the City was allocated \$44,197,111 from the HOPWA program.

5. New York City has a statutory obligation to affirmatively further fair housing, in part as a condition of its federal funding.
6. As part of my duties at HPD, I am aware of the Analysis of Impediments (AI) that HUD previously required for recipients of certain funds that were subject to the statutory obligation to affirmatively further fair housing.
7. The only published guidance that I am aware that HUD offered regarding the AI process was a Fair Housing Planning Guide published in 1996 (the 1996 guidance).
8. While the 1996 guidance contained topics to address in the AI, it lacked guidance on HUD's exact expectations of how to undertake the actual analysis.
9. New York City appreciated the clear guidance provided in the Affirmatively Furthering Fair Housing (AFFH) Rule HUD issued in 2015.
10. The AFFH Rule required that jurisdictions required to submit consolidated plans for the CDBG, HOME, ESG, and HOPWA programs also complete a detailed Assessment of Fair Housing (AFH), which would replace the AI.
11. The AFH process requires the use of the Assessment Tool to compile the AFH.
12. New York City appreciated the training resources HUD made available to accompany the AFFH Rule and AFH process. HUD and its agents conducted multi-day regional trainings for participating jurisdictions, including New York City.
13. Even though New York City's deadline to complete the AFH required by the AFFH Rule was not until 2019, we had to begin the extensive fair-housing planning process—which

requires conducting data analyses, holding public meetings, consulting with stakeholders, and drafting an AFH—well before the submission deadline.

14. In light of that, before the delay of the AFFH Rule, HPD began to devote considerable resources to laying the groundwork for the development and then implementation of an AFH starting in 2016. For example:

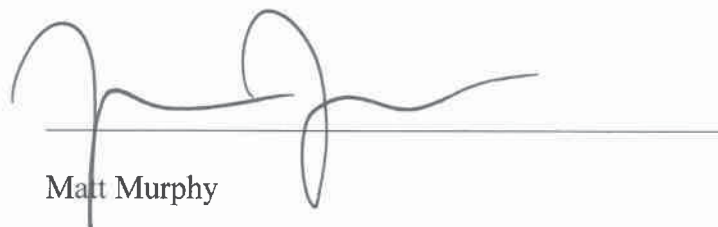
- a. We devised a plan to partner with the New York City Housing Authority to lead the AFH process;
- b. We participated in a two-day HUD training on the AFH process, which we found to be useful;
- c. We reviewed the Assessment Tool;
- d. We asked HUD representatives questions and received answers both about HUD data and about the substantive requirements of the Rule;
- e. We started the procurement process to hire a consultant to assist us with the community engagement required under the Assessment of Fair Housing (AFH);
- f. We spoke with at least 10 other City agencies, including the Department of City Planning, Department of Transportation, Department of Education, Department of Health and Mental Hygiene, Department of Social Services, and the NYC Commission on Human Rights, among others, to coordinate the gathering of the information required for the AFH;
- g. We hired a full-time staff member to oversee our community engagement process; and
- h. We began planning for the completion of an AFH by the regulatory deadline.

15. I found it helpful to have HUD employees with whom to discuss the AFH process available at other times as well.
16. Additionally, New York City has reviewed the AFH plans submitted by other jurisdictions and adopted lessons from both those accepted and rejected into our planning processes.
17. New York City acknowledges that the AFFH Rule requires investments of time and money, among other things, but we believe that the process is worth the expenditures because of the tangible benefits it can produce for the City and its residents.
18. New York City also believes that a detailed, fact-driven evaluation is important for identifying the different fair-housing issues that a particular jurisdiction may face, and that most of the time and effort required to complete such an evaluation is not a function of the AFFH Rule itself but rather of the complexity of the fair housing issues.
19. Moreover, New York City has reviewed and understands the Assessment Tool and believes likewise that the work involved in using it is attributable more to the difficulty of the fair housing issues than the tool itself.
20. In fact, despite HUD's delay of the AFFH Rule, the City intends to use the same framing and cover the same content as an AFH would require in a comprehensive fair housing planning process called "Where We Live NYC."
21. New York City intends to base "Where We Live NYC" on the Assessment Tool template.
22. Based on the delay of the AFFH Rule, however, the City is moving forward with no expectation of HUD assistance in completing the "Where We Live NYC" planning process.

23. Although we plan to submit “Where We Live NYC” to HUD, given the delay of the AFFH Rule, we do not expect to receive comments and feedback from HUD.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 5th day of June, 2018

A handwritten signature in dark ink, appearing to read "Matt Murphy", is written over a horizontal line. The signature is stylized with loops and a long horizontal stroke.