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Via Federal eRulemaking Portal (Regulations.gov)
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RE: Comment on Interim Final Rule Regarding Affirmatively Furthering Fair Housing Revisions, Docket No. FR-6519-I-01, RIN 2529-AB08, Document No. 2025-03360, 90 Fed. Reg. 11020 (Mar. 3, 2025)

Dear Acting General Counsel Miller:

This letter is submitted by the Attorneys General of California, Massachusetts, New York, Arizona, Connecticut, District of Columbia, Hawai'i, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington in response to the above-referenced interim final rule (the IFR)[1] issued by the Department of Housing and Urban Development (HUD). The IFR repeals the agency's 2021 Interim Final Rule,[2] which incorporated sections of the 2015 Affirmatively Furthering Fair Housing Rule (the 2015 Rule).[3] With these rules, HUD took significant and positive steps toward fulfilling its duty under the Fair Housing Act (FHA) to affirmatively further fair housing (AFFH). In stark contrast, the IFR rolls back HUD's progress to a time when HUD virtually ignored its duty to affirmatively further fair housing. The IFR replaces these robust rules with a weak AFFH certification requirement that does not effectuate the FHA's mandate to "provid[e] fair housing throughout the United States."[4] Worse yet, the IFR seeks to dismantle HUD's prior AFFH rulemaking efforts despite the nationwide persistence of segregation and its harmful effects. The

[1] Affirmatively Furthering Fair Housing Revisions, 90 Fed. Reg. 11,020 (Mar. 3, 2025).
[2] Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779 (Jun. 10, 2021).
[3] Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015).
[4] 42 U.S.C. § 3601.

undersigned Attorneys General strongly oppose the IFR and urge HUD to withdraw the IFR in its entirety.

As chief state law enforcement officials, we have a vested interest in ensuring equal access to housing and eradicating the harmful effects of segregation in our communities. The FHA's AFFH mandate is an essential tool in reaching these goals. The IFR eliminates key aspects of prior rules, undermining HUD's ability to carry out its AFFH obligations.

First, the IFR's revised definitions of "fair housing" and "affirmatively furthering," and its bare AFFH certification requirement do not require grantees to meaningfully evaluate whether their actions will reduce segregation and promote integration. The IFR also does not mandate any specific fair housing planning processes, which are critical to further fair housing and required under the FHA. These failures contravene both the text and judicial interpretations of the FHA, and erode its core purpose to remedy the continuing effects of historical segregation and ensure equal access to housing opportunities.

Second, the IFR does not acknowledge the pervasiveness of segregation and its effects. Thus, HUD fails to consider the problem giving rise to the AFFH mandate and the need for a strong AFFH rule to effectuate this mandate.

Third, the IFR lacks any reasoned justification or factual basis for its drastic policy changes. Practically, the IFR depletes HUD's oversight to identify and address barriers to fair housing and redirects resources to non-fair housing issues. Because the IFR would undermine efforts to promote fair housing in our communities and ignore HUD's statutory mandate to affirmatively further fair housing, its adoption would be both contrary to the text and purpose of the FHA as well as arbitrary and capricious.

We have included numerous citations to supporting research in footnotes to this letter, including direct links to the research. Where the material cited is not publicly accessible, that material is attached to this comment. We direct HUD to review each of the materials cited, and request that the full text of each of the cited materials, along with the full text of our comment, be considered part of the formal administrative record for purposes of the Administrative Procedure Act. If HUD will not consider these materials as part of the record in its current form, we ask that you notify us and provide us an opportunity to submit copies of the materials for the record.

I. Background

To understand the numerous substantive defects of the Interim Final Rule, it is critical first to understand the historical need for HUD's statutory duty to affirmatively further fair housing, and HUD's prior efforts to satisfy that duty.

A. HUD has a duty to affirmatively further fair housing.

The FHA provides that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[5] The FHA prohibits discrimination in home sales or rentals and other housing-related transactions based on race, color, religion, sex, familial status, national origin, or disability. In a separate provision, the FHA mandates that HUD take affirmative steps eliminate segregation and promote integration. Under the mandate, HUD and other federal agencies must "administer programs and activities relating to housing and urban development in a manner affirmatively to further the policies and purposes of the FHA ("AFFH mandate")."[6] Participants in HUD programs (grantees), including local governments, states, and public housing authorities (PHAs), likewise have a statutory duty to affirmatively further fair housing. Taken together, HUD must ensure that its program participants take affirmative steps to further fair housing. The FHA further requires that HUD create tools and provide technical assistance to program participants to help ensure that they fulfill their AFFH obligations.[7]

The AFFH mandate is distinct from the FHA's prohibition of discrimination in housing and housing-related transactions.[8] The FHA's housing discrimination provisions of the FHA are proscriptive, prohibiting all covered persons and entities from engaging in housing discrimination based on certain protected characteristics. By comparison, the AFFH mandate's language is affirmative and proactive—it requires HUD, its grantees, and other federal agencies to take affirmative steps to achieve the FHA's purposes, which include undoing the effects of past housing segregation.[9]

The AFFH mandate has been integrated into the federal statutes governing federal housing programs and grants for decades. The Housing and Community Development Act of 1974, Cranston-Gonzalez National Affordable Housing Act, and Quality Housing and Work Responsibility Act of 1998 all require covered HUD grantees to certify as a condition of receiving federal funds that they will affirmatively further fair housing.[10] Under the United

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[5] *Id*.
[6] 42 U.S.C. §§ 3608(d), (e)(5) (emphasis added).
[7] *See* 42 U.S.C. §§ 3608(e)(1)(HUD must "make studies with respect to the nature and extent of discriminatory housing practices in representative communities, urban, suburban, and rural, throughout the United States"); 3608(e)(2)(HUD must "publish and disseminate reports, recommendations, and information derived from such studies"); 42 U.S.C. §3608(e)(3)(HUD must "cooperate with and render technical assistance to Federal, State, local, and other public or private agencies, organizations, and institutions which are formulating or carrying on programs to prevent or eliminate discriminatory housing practices.").
[8] *Compare* 42 U.S.C. §§ 3604 (prohibition of discrimination in rental and sale of housing); 3605 (prohibition of discrimination in residential real estate related transactions, 3606 (prohibition of discrimination in provision of brokerage services) *with* 42 U.S.C. §§ 3608(d), (e)(5) (requiring federal agencies, HUD, and HUD's grantees to affirmatively further fair housing).
[9] *See* discussion in Sections I.B-I.E, *infra*.
[10] *See* 42 U.S.C. § 5304(b)(2); 42 U.S.C. § 5306(d)(7)(B); 12705(b)(15); 1437C-1(d)(16).

States Housing Act of 1937, PHAs must also include a certification that they will affirmatively further fair housing as part of their annual plan.[11]

B. Congress intended for the AFFH mandate to proactively counteract the effects of housing segregation.

Congress enacted the FHA in 1968 to eradicate housing segregation and promote integration, thus "replac[ing] the ghettos by truly integrated and balanced living patterns."[12] The ultimate impetus for the FHA's passage were the findings of the National Advisory Commission on Civil Disorders (Kerner Commission).[13] The Kerner Commission report identified residential segregation, unequal housing, and economic conditions in the inner cities as significant underlying causes of the racial unrest in that decade.[14] The Kerner Commission also found that both open and covert racial discrimination prevented African-American families from obtaining better housing and moving to integrated communities.[15] Thus, when enacting the FHA, Congress recognized that government, at all levels, sanctioned housing segregation based on race and ethnicity.[16]

For example, local governments misused their zoning and land-use powers to intentionally create zoning restrictions that excluded minority and low-income residents from white communities and expanded housing opportunities for white families.[17] Federal and state courts enabled such discrimination in cases like *Village of Euclid v. Amber Realty,*[18] where the U.S. Supreme Court approved of municipalities' practice of zoning as a reasonable exercise of state police power.

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[11] 42 U.S.C. § 1437c-1(d)(16) (stating that public agency plans must include "[a] certification by the public housing agency that the public housing agency will carry out the public housing agency plan in conformity with title VI of the Civil Rights Act of 1964, the Fair Housing Act, section 504 of the Rehabilitation Act of 1973, and title II of the Americans with Disabilities Act of 1990, and will affirmatively further fair housing.").
[12] *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972).
[13] *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.* ("*Inclusive Communities*"), 576 U.S. 519, 529-530 (2015).
[14] *Id.* at 529.
[15] *Id.* at 529-530.
[16] *See* 114 CONG. REC. 2278 (Feb. 6, 1968) ("Statement of Sen. Mondale") ("A sordid story of which all Americans should be ashamed developed by this country in the immediate post-World War II era, during which the FHA, the VA, and other Federal agencies encouraged, assisted, and made easy the flight of white people from the central cities of white America, leaving behind only [African Americans] and others unable to take advantage of these liberalized extensions of credits and credit guarantees. Traditionally the American Government has been more than neutral on this issue. The record of the U.S. Government in that period is one, at best, of covert collaborator in policies which established the present outrageous and heartbreaking racial living patterns which lie at the core of the tragedy of the American city and the alienation of good people from good people because of the utter irrelevancy [sic] of color."); *see also* Amy E. Hillier, *Redlining and the Homeowners' Loan Corporation*, 29 JOURNAL OF URBAN HISTORY 394, 395 (2003).
[17] Kimberly Quick & Richard D. Kahlenberg, *Attacking the Black-White Opportunity Gap That Comes from Residential Segregation,* THE CENTURY FOUND. (June 25, 2019), *available at* https://tcf.org/content/report/attacking-black-white-opportunity-gap-comes- residential-segregation/?agreed=1.
[18] 272 U.S. 365 (1926).

Local governments also encouraged the use of racially restrictive covenants designed to create and maintain all-white communities. Deeds recorded on homes included covenants prohibiting future owners from selling the property to Black people.[19] The covenants also permitted white neighbors to sue each other for selling homes to Black people, increasing the likelihood that these covenants would be enforced.[20] After the Supreme Court upheld the use of racially-restrictive covenants in 1921,[21] builders and developers routinely included these covenants in their deeds when constructing new homes, resulting in new all-white communities throughout the country.[22] This practice was legally permissible until the Supreme Court's 1948 ruling in *Shelley v. Kraemer*,[23] but the vestiges of these racially restrictive covenants persist.

The Federal Government also actively created segregated communities through its mortgage lending and home insurance underwriting policies. In the 1930s, the federal Home Owners' Loan Corporation (HOLC) created maps that detailed which neighborhoods it deemed were safe or unsafe credit risks for mortgage lenders, with the best areas marked in green, the worst as red, and in between areas as orange and yellow.[24] While most Black people lived in areas that HOLC redlined, only a third of whites did.[25] Moreover, the main difference between red areas and yellow areas on the HOLC maps was that red areas had higher numbers of Black residents.[26]

Similarly, the Federal Housing Administration, made it a policy to not insure mortgage loans unless the properties were located in all-white neighborhoods, as demarcated in HOLC maps, even if there were only a handful of Black families.[27] In turn, mortgage lenders that relied on FHA insurance used HOLC maps to make financing decisions.[28] Because these maps significantly influenced lenders' decisions, Black families were particularly unlikely to qualify for favorable home loan terms and enjoy homeownership.[29] Resultingly, these Federal Housing Administration policies and practices created segregated white-only communities throughout the United States.[30]

To address the housing segregation that resulted from such practices, the Kerner Commission recommended that "[f]ederal housing programs must be given a new thrust aimed at

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[19] Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* 78-81 (2017).
[20] *Id.*
[21] *Corrigan v. Buckley*, 271 U.S. 323 (1926)
[22] Rothstein, *supra* note 19 at 79-80.
[23] *Id*. at 78–81.
[24] Amy E. Hillier, Redlining and the Homeowners' Loan Corporation, 29 JOURNAL OF URBAN HISTORY 394, 395 (2003).
[25] Jacob Krimmel, *Persistence of Prejudice: Estimating the Long Term Effects of Redlining* 12 (Working Paper, Dec. 21, 2018), available at https://faculty.wharton.upenn.edu/wp-content/uploads/2017/11/Krimmel-Redlining-DRAFT_Nov2017_v2.pdf (using population data from 1940).
[26] *See id*. at 13.
[27] Rothstein, *supra* note 19 at 64–65.
[28] *Id.* at 403–07; Krimmel, *supra* note 25 at 8.
[29] *See* Krimmel, *supra* note 25 at 11-24; Rothstein, *supra* note 19 at 63–64.
[30] *Id.* at 70–73.

overcoming the prevailing patterns of racial segregation."[31] Congress agreed with this assessment, and the congressional debates on the FHA made it clear that Congress' intention was for the federal government to have a role in combatting housing segregation, which became the mandate to affirmatively further fair housing. During the debates, Senator Mondale, one of the bill's chief sponsors, repeatedly outlined the harms of segregation writ-large and not just individual acts of housing discrimination.[32] For example, Senator Mondale stated that "fair housing legislation is a basic keystone to any solution of our present urban crisis. Forced ghetto housing, which amounts to the confinement of minority group Americans to 'ghetto jails' condemns to failure every single program designed to relieve the fantastic pressures on our cities."[33] Thus, Congress explicitly envisioned the FHA as a way to remedy both individual acts of discrimination and systemic housing segregation.[34]

C. Courts have held that HUD's duty to affirmatively further fair housing requires taking meaningful actions to promote desegregation and integrated housing.

Citing the broad, remedial purposes[35] of the FHA, courts have long recognized that the term "affirmatively furthering fair housing" means that HUD and its grantees must "do something more than simply refrain from discriminating (and from purposely aiding

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[31] Nat'l Advisory Comm'n on Civil Disorders ("Kerner Commission"), Report of The National Advisory Commission on Civil Disorders, 13 (1968).

[32] *E.g.* 114 CONG. REC. 2273 (1968) ("That the benefits of government are less available in ghettoes can be amply documented. The ghetto child is more likely to go to an inferior school. His parents are more likely to lack adequate public transportation facilities to commute to and from places of work, and so will miss employment opportunities. *Local building and housing laws are not, or cannot be, effectively enforced in ghettoes.* Federal subsidies for private housing bypass the ghetto and flow instead to the suburbs. Freeways are typically routed through ghettoes, because land there is cheaper and their inhabitants less able to organize politically to oppose them.").

[33] *Id.* at 2274.

[34] *See* 114 CONG. REC. 2275–76 (Feb. 6, 1968) (Senator Mondale discussing the purpose of the FHA, including Congress's commitment "to the principle of living together" and to promoting racially integrated neighborhoods).

[35] The Supreme Court has long recognized that the purpose of the FHA is "to replace the ghettos 'by truly integrated and balanced living patterns.'" *Trafficante*, 409 U.S. at 211. Further, in *Linmark Assocs., Inc. v. Willingboro Township*, the Supreme Court held that "substantial benefits flow to both whites and blacks from interracial association and that Congress has made a strong national commitment [in the FHA] to promote integrated housing." 431 U.S. 85, 94–95 (1977). As anticipated by Congress and recognized by the Supreme Court in *Linmark Assocs.*, individuals and communities continue to benefit greatly from living in integrated communities. *See*, *e.g.* Poverty & Race Research Action Council, *Linking Housing and School Integration Policy: What Federal, State And Local Governments Can Do* 1 (Mar. 2015), available at Microsoft Word - linking housing and school integration-policy brief March 2015.doc ("Housing and school integration can have a strong mutually reinforcing effect – research indicates that children who attend economically and racially integrated schools have improved achievement and long term education outcomes, and are more likely to grow up and live in integrated communities and neighborhoods, and send their own children to integrated schools. Similarly, regional school integration programs have been linked to declines in patterns of housing segregation.") (internal citations omitted); Margery Austin Turner and Lynette Rawlings, Urban Institute, *Promoting Neighborhood Diversity: Benefits, Barriers, and Strategies* 4 (Aug. 2009), available at https://www.urban.org/sites/default/files/publication/30631/411955-Promoting-Neighborhood-Diversity-Benefits-Barriers-and-Strategies.PDF (collecting studies demonstrating that families that move to integrated suburban communities achieved significant employment and education gains and noting studies showing that "white and minority students benefit both academically and socially from a racially and ethnically diverse university community.").

discrimination by others).”[36] Instead, courts interpret the term “affirmatively furthering fair housing” to mean that HUD and its grantees must take actions “to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation[.]”[37]

Furthermore, to comply with the AFFH mandate, courts have consistently held that HUD and its grantees must take specific actions to “prevent the increase of segregation . . . of racial groups whose lack of opportunities the Act was designed to combat.”[38] Specifically, courts have held that carrying out the duty to AFFH requires HUD to “utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties” under the FHA.[39] For example, in *Langlois v. Abington Housing Authority*, the court found that the defendant PHA failed to comply with the AFFH mandate because it failed to investigate and analyze the impact of their proposed residency preferences and application processes on racial minorities.[40] Further, the court found that the defendant further violated the FHA‘s AFFH provisions by failing to keep records that would have enabled it to identify any potential impediments to fair housing.

Similarly, in *Thompson v. HUD*, the court found that HUD violated the AFFH mandate when it allowed a grantee to concentrate public housing within a predominantly Black part of the Baltimore region.[41] The *Thompson* court found that HUD failed to meet its AFFH obligations when it “failed to consider regionally-oriented desegregation and integration policies, despite the fact that Baltimore City is contiguous to, and linked by public transportation and roads to, Baltimore and Anne Arundel Counties and in close proximity to the other counties in the Baltimore Region.”[42]

Moreover, Congress accepted and ratified judicial interpretations of the AFFH mandate when it enacted the Fair Housing Amendments Act without substantive changes to the AFFH mandate in 1988. “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without

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[36] *N.A.A.C.P. v. Sec’y of Hous. & Urban Dev.* (“*N.A.A.C.P. v. HUD*”), 817 F.2d 149, 155 (1st Cir. 1987).
[37] *N.A.A.C.P. v. HUD*, 817 F.2d at 155 (internal quotation marks and citations omitted); *see also Otero v. N.Y. City Hous. Auth*., 484 F.2d 1122, 1133-1134 (2d Cir. 1973) (holding that the FHA AFFH mandate imposes an “an obligation to act affirmatively to achieve integration in housing”); *Thompson v. U.S. Dep’t of Hous. and Urban Dev.*, 348 F.Supp.2d 398, 457 (D. Md. 2005).
[38] *Otero*, 484 F.2d at 1134; *see also Alschuler v. HUD*, 686 F.2d 472, 481 (7th Cir. 1982).
[39] *Shannon v. HUD*, 436 F.2d 809, 821 (3d Cir. 1970).
[40] *Langlois v. Abington Hous. Auth.*, 234 F.Supp.2d 33, 78 (D.Mass. 2002) (“Whatever ‘affirmative furtherance’ may mean in other settings, in this setting it is clear. It should have occurred to the PHAs, prior to their adoption of the 1998 plans, to, at the very least, investigate the potential implications for fair housing of the proposed residency preferences and application processes. They did not. Indeed, they could not. They did not bother to keep the kinds of records that would enable them to determine the impact of their new processes. They did not bother to identify potential impediments to fair housing that their application procedures might present. As such, they could not even begin to monitor their compliance with the civil rights laws.”).
[41] 348 F.Supp.2d 398 (D. Md. 2005)
[42] *Id.* at 309.

change."[43] Thus, when Congress amended the FHA, it is presumed Congress was aware of existing AFFH case law and how courts had interpreted the FHA's AFFH language. Consequently, pre-FHAA enactment AFFH case law must be afforded significant deference when interpreting the AFFH mandate.

D. The Executive has long supported a robust AFFH mandate.

The Executive branch has consistently—for decades and despite party affiliation—understood the FHA's AFFH mandate as a command to engage in specific and meaningful actions to address housing segregation and promote integration.

In June 1971, just three years after the enactment of the FHA, President Richard Nixon issued a public statement explaining his administration's understanding of the FHA and its obligation to affirmatively further fair housing.[44] Acknowledging the persistence of housing segregation in both the private market and in federally-subsidized housing programs and the role of the federal government in creating and perpetuating this segregation, President Nixon explained that the AFFH requirement was a mandate separate from and in addition to the FHA's prohibition on discrimination.[45] Specifically, President Nixon understood the AFFH mandate "to mean that the administrator of a housing program should include, among the various criteria by which applications for assistance are judged, the extent to which a proposed project, or the overall development plan of which it is a part, will in fact open up new, nonsegregated housing opportunities that will contribute to decreasing the effects of past housing discrimination," stating explicitly that "[i]t does mean that in choosing among the various applications for Federal aid, consideration should be given to their impact on patterns of racial concentration."[46]

President Jimmy Carter similarly understood the AFFH mandate to mean that HUD and federal agencies must take specific steps to eradicate housing segregation. In December 1980, he issued Executive Order 12259, Leadership and Coordination of Fair Housing in Federal Programs, which directed HUD, for the first time, to promulgate regulations to implement the FHA's AFFH mandate.[47] Pursuant to this Executive Order, President Carter instructed HUD to draft regulations that would describe: (1) "an institutionalized method for analyzing the impact of housing and urban development programs and activities in promoting the goal of fair housing"; (2) "the responsibilities and obligations in assuring that programs and activities are

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[43] *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (citations omitted). The Supreme Court has adopted this approach when interpreting the FHA. *Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 198 (2017); *see also Inclusive Cmtys. Project, Inc.*, 576 U.S. at 536.

[44] The American Presidency Project, Richard Nixon, Statement About Federal Policies Relative to Equal Housing Opportunity, June 11, 1971, https://www.presidency.ucsb.edu/documents/statement-about-federal-policies-relative-equal-housing-opportunity.

[45] *Id.* ("Title VIII of the 1968 act goes beyond the previous statutes . . . to prohibit discrimination on account of race, color, religion, or national origin in most private real estate actions, whether sale or rental and regardless of whether Federal assistance is involved or not. *In addition*, this title also makes it the responsibility of 'all executive departments and agencies' and the specific responsibility of the Secretary of Housing and Urban Development to 'administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this title.'") (emphasis added).

[46] *Id.*

[47] Exec. Order No. 12259, § 1-301(b), 46 Fed. Reg. 1253, 1253-1254 (Jan. 6, 1981), https://www.govinfo.gov/content/pkg/FR-1981-01-06/pdf/FR-1981-01-06.pdf.

administered and executed in a manner affirmatively to further fair housing"; and (3) "the responsibilities and obligations of applicants, participants and other persons and entities involved in housing and urban development programs and activities affirmatively to further the goal of fair housing."[48] Executive Order 12259 remained in force throughout the Ronald Reagan and George H.W. Bush presidencies and was not repealed until the Clinton Administration, in an effort to strengthen the requirements of AFFH mandate.[49]

In January 1994, after decades of non-compliance with the FHA's AFFH mandate, President Bill Clinton issued Executive Order 12892 to address this issue.[50] Citing housing segregation in both "the private housing market and in public and assisted housing," Executive Order 12892 directed HUD to "take stronger measures to provide leadership and coordination in affirmatively furthering fair housing in Federal programs."[51] Like his predecessors, President Clinton understood the AFFH mandate as separate and distinct from HUD's mandate to eliminate housing discrimination.[52] At the core of this Executive Order was a firm understanding that the AFFH mandate required HUD to engage in meaningful actions "to eliminate barriers to free choice where they continue[d] to exist."[53] Thus, the Executive Order instructed HUD to promulgate regulations that would, among other objectives, describe: (1) "the responsibilities and obligations of applicants, participants, and other persons and entities involved in housing and urban development programs and activities affirmatively to further the goal of fair housing;"[54] and (2) "a method to identify impediments in programs or activities that restrict fair housing choice and implement incentives that will maximize the achievement of practices that affirmatively further fair housing."[55] Executive Order 12892 remains in force today.

E. HUD's AFFH rulemaking after 1988 consistently supports a mandate that requires taking specific and meaningful actions to further fair housing.

Over a span of nearly 40 years, in a near unbroken line of agency interpretations, HUD has also made clear that the AFFH mandate requires HUD grantees to take specific and meaningful steps to eradicate segregation, assess barriers to fair housing choice, and develop strategies to address these barriers.

In 1988, HUD promulgated a "Fair Housing Review Criteria" rule to help Community Development Block Grant (CDBG) grantees better understand their AFFH obligations under both the FHA and CDBG statute.[56] Under this rule, HUD stated that it would presume AFFH compliance if the grantee conducted an analysis of impediments to fair housing choice and took active steps to address these impediments.[57] The rule required CDBG grantees seeking this presumption of AFFH compliance to analyze impediments to fair housing choice in several

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[48] *Id*.
[49] Exec. Order No. 12982, § 6-607, 59 Fed. Reg. 2939, 2943 (Jan. 20, 1994).
[50] *Id.*; *see also* Memorandum on Fair Housing, 59 Fed. Reg. 8513 (Feb. 22, 1994).
[51] Memorandum on Fair Housing, 59 Fed. Reg. at 8513.
[52] *Id*.
[53] *Id.*
[54] Exec. Order No. 12982, § 4-401(a)(4), 59 Fed. Reg. 2939, 2942 (Jan. 20, 1994).
[55] *Id*. at § 4-401(a)(5).
[56] Community Development Block Grants, 53 Fed. Reg. 34,416, 34,468 (Sep. 6, 1988).
[57] *Id.* at 34,468-34,469.

categories including: "(i) [t]he sale or rental of dwellings; (ii) [t]he provision of housing brokerage services; (iii) [t]he provision of financing assistance for dwellings; (iv) [p]ublic policies and actions affecting the approval of sites and other building requirements used in the approval process for the construction of publicly assisted housing; (v) [t]he administrative policies concerning community development and housing activities, such as . . . activities causing displacement, which affect opportunities of minority households to select housing inside or outside areas of minority concentration."[58] Further, CDBG grantees had to take "lawful steps. . . to overcome the effects of [the] conditions [it had identified] that limit fair housing choice within the recipient's jurisdiction."[59]

HUD continued to view the AFFH requirement as a commitment to taking specific action to eliminate housing segregation when it promulgated its first comprehensive AFFH regulations in August 1994.[60] Like the 1988 CDBG regulations, the 1995[61] AFFH regulation (1995 AI Rule) directed HUD Community Planning and Development (CPD) grant recipients to certify AFFH compliance annually as part of their consolidated plan submissions.[62] Specifically, the regulations required grant recipients to "conduct an analysis to identify impediments to fair housing choice within the jurisdiction, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard."[63]

HUD further directed grantees to engage in specific fair housing planning processes in its 1996 Fair Housing Planning Guide, which implemented the 1995 AFFH regulations. In this Guide, HUD interpreted the 1995 AI Rule to require grantees to engage in a fair housing planning process that would: "(1) [a]nalyze and eliminate housing discrimination in the jurisdiction; (2) [p]romote fair housing choice for all persons; (3) [p]rovide opportunities for inclusive patterns of housing occupancy regardless of race, color, religion, sex, familial status, disability and national origin; (4) [p]romote housing that is structurally accessible to, and usable by, all persons, particularly persons with disabilities; and (5) [f]oster compliance with the nondiscrimination provisions of the Fair Housing Act."[64] HUD explained that such analysis and planning was both required under the FHA and necessary to achieving the FHA's goal of eliminating housing segregation and its effects.[65]

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[58] *Id*.
[59] *Id*.
[60] Consolidated Submission for Community Planning and Development, 59 Fed. Reg. 40,148, 40,156 (local government grantees), 40,159 (state government grantees), 40,161 (consortia grantees) (proposed Aug. 5, 1994).
[61] Although HUD proposed these regulations in August 1994, HUD did not finalize these regulations until January 1995. *See* Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. 1878 (Jan. 5, 1995).
[62] Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. at 1905, 1910, 1912, 1916.
[63] *Id*.
[64] U.S. Dep't of Hous. and Urban Development, Fair Housing Planning Guide Vol. 1 at 1-3 (1996) (HUD Fair Housing Planning Guide).
[65] *Id.* at i ("The Department believes that the principles embodied in the concept of 'fair housing' are fundamental to healthy communities, and that communities must be encouraged and supported to include real, effective, fair housing strategies in their overall planning and development process, not only because it is the law, but because it is the right thing to do."); 1-1 ("The Department of Housing and Urban Development is committed to eliminating

HUD continued to adhere to this fair housing planning-based understanding of the AFFH mandate when it replaced the 1995 AI Rule in 2015.[66] Like the 1995 AI Rule and the 1988 CDBG AFFH rule before that, the 2015 Rule interpreted the FHA's AFFH requirement as a directive to HUD grantees "to take significant actions to overcome historic patterns of segregation, achieve truly balanced and integrated living patterns, promote fair housing choice, and foster inclusive communities that are free from discrimination."[67] In line with this process-oriented approach, the 2015 Rule required grantees to conduct an Assessment of Fair Housing (AFH)[68] that would: (1) meaningfully evaluate fair housing issues in their geographic area such as segregation, conditions that restrict fair housing choice, and disparities in access to housing, (2) identify factors that primarily contribute to the creation or perpetuation of fair housing issues, and (3) establish fair housing priorities and goals.[69] Relatedly, the 2015 AFFH rule required that HUD "accept" a grantee's AFH before HUD released funding to the grantee or approved the grantee's consolidated plan.[70] Thus, the rule held grantees accountable for failing to meaningfully address how their housing development plans would reduce patterns of segregation specific to their communities and expand access to opportunity.[71]

Similarly, HUD also took a fair housing planning-based approach to the AFFH mandate when it promulgated its 2021 Interim Final Rule despite a brief departure from this approach during the first Trump administration. Although the 2021 Interim Final Rule did not mandate that HUD grantees follow a specific fair housing planning process, it restored the 2015 Rule's definition of "affirmatively furthering fair housing" and required that grantees certify AFFH compliance in line with this definition.[72] Thus, the 2021 Interim Final Rule still required that grantees take meaningful actions to "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."[73]

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racial and ethnic segregation . . . in housing. . . . The fundamental goal of HUD's fair housing policy is to make housing choice a reality through Fair Housing Planning (FHP)."

[66] Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,272 (Jul. 16, 2015) ("This rule refines the prior approach by replacing the analysis of impediments with a fair housing assessment that should better inform program participants' planning processes with a view toward better aiding HUD program participants to fulfill this statutory obligation.").

[67] *Id*.

[68] *Id.* at 42,355.

[69] *Id.* at 42,355-42,356.

[70] *Id.* at 42,358.

[71] *See id.* at 42,312 ("With respect to funding, the current process for distribution of funding under the programs covered by this rule is that a program participant does not receive funding until its consolidated plan or PHA Plan, as applicable, is accepted by HUD. This final rule does not alter that process. The rule, however, does make an accepted AFH a required element of a consolidated plan or PHA Plan.").

[72] Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779, 30,783-30,784 (Jun. 10, 2021).

[73] *Id*.

II. The IFR violates the Administrative Procedure Act because it is contrary to law.

The IFR violates the Administrative Procedure Act (APA) because its core provisions and omissions violate the FHA's purpose, case law, and longstanding HUD interpretations of the AFFH requirement. Federal agencies only have the authority to adopt regulations that are based on a permissible and reasonable construction of the governing statute.[74] Regulations that are "manifestly contrary to the statute" are beyond the agency's authority to adopt, are "in excess of statutory jurisdiction, authority," and are "not in accordance with law," in violation of the APA.[75]

Several provisions of or omissions in the IFR are either inconsistent with FHA's AFFH requirement or its purpose, including the IFR's:

1. Definitions of "AFFH" and "fair housing";

2. Elimination of a race or ethnicity needs assessment requirement;

3. Failure to require any specific fair housing planning process; and

4. Failure to require community input as part of the AFFH certification process.

A. The IFR's "AFFH" and "fair housing" definitions conflict with the FHA's language, congressional intent, case law, and previous HUD interpretation of FHA.

The IFR's definition of AFFH conflicts with the FHA's language, legislative history, congressional intent, judicial interpretation, Executive Branch interpretation, and agency interpretation, which all mandate that HUD and its grantees take meaningful and specific steps toward desegregation and integrated housing.[76] These authorities also make clear that HUD and its grantees must do "more than simply refrain[ing] from discriminating themselves or from purposely aiding discrimination by others."[77]

By contrast, the IFR's definition of AFFH only requires that a program participant take some "action rationally related to promoting any attribute or attributes of fair housing."[78] It also redefines "fair housing" to mean "housing that among other attributes, is affordable, safe, decent, free of unlawful discrimination, and accessible as required under civil rights laws."[79] Under the

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[74] *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984) *overruled on other grounds in Loper Bright Enters v. Raimondo*, 603 U.S. 369 (2024).
[75] *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. at 844; *see also*, *e.g. City and Cnty. of San Francisco v. U.S. Citizenship and Immigr. Servs.*, 981 F.3d 742, 758 (9th Cir. 2020); *Union of Concerned Scientists v. Wheeler*, 954 F.3d 11, 21-22 (1st Cir. 2020) (agency action undermining governing statute or otherwise inconsistent with motivating congressional intent is not in accordance with law) (citing *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985).
[76] *See supra*, Section I.
[77] *Id*.
[78] Affirmatively Furthering Fair Housing Revisions, 90 Fed. Reg. at 11,023.
[79] *Id*. at 11,023.

IFR, HUD will deem an AFFH certification sufficient if the grantee has taken "any action during the relevant period rationally related to promoting fair housing, such as helping to eliminate housing discrimination."[80] The IFR provides no additional guidance as to what it means for a purported action to be "rationally related" to "promoting fair housing." Further, the IFR's does not mention segregation or integration, nor does it direct grantees to take specific steps to reduce housing segregation and promote integration.

Functionally, the IFR effectively erases the affirmative and proscriptive language of the FHA statute and renders it a nullity, which violates the longstanding cannon against surplusage.[81] In doing so, the IFR seeks to transform the AFFH requirement into another iteration of the FHA's general bar on housing discrimination, which directly contravenes well-established AFFH case law.

The IFR's lax definitions of AFFH and fair housing would also render HUD nearly powerless to hold program participants accountable for failing to comply with the duty to affirmatively further fair housing. Without any meaningful standards or guidance, insidious and covert housing discrimination will proliferate so long as a program participant can demonstrate some arbitrary effort to promote fair housing. This is completely inconsistent with HUD's statutory duty to affirmatively further fair housing.

Even more problematic, this definition is a 180-degree turn from HUD's previous interpretation of the AFFH requirement. HUD's 2021 Interim Final Rule reinstated the definition of AFFH from HUD's 2015 Rule which recognized the "substantial difference between a statute that merely exhorts officials not to discriminate in effect (a negative obligation) and one that exhorts them to take steps to promote fair housing (an affirmative obligation)."[82] To that end, the 2021 Interim Final Rule defined AFFH as:

> "Affirmatively furthering fair housing means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially or ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws."[83]

Unlike the current IFR, the 2021 Interim Final Rule provided definitions of the terms "meaningful actions," "segregation," and "integration." HUD recognized that "these definitions

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[80] *Id*. at 11,021.
[81] *E.g. Setser v. United States*, 566 U.S. 231, 239 (2012) (highlighting federal courts longstanding interpretive rule that courts must "give effect . . . to every clause and word" of a statute") (quoting *United States v. Menasche,* 348 U.S. 528, 538–539 (1955)).
[82] *Langlois v. Abington Hous. Auth*., 234 F. Supp.2d at 72.
[83] Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. at 30,790.

correspond with the AFFH statutory mandates, HUD's long-standing interpretations, and judicial precedent."[84]

The IFR's lax definition of the term "AFFH" will also undermine the FHA's goal of reducing segregation and promoting integrated living patterns. HUD's lack of rules in this area pre-1988 and relatively lax 1995 AI Rule did not achieve these goals.[85] Further, this lack of rules and lax rulemaking resulted in significant non-compliance with the FHA's AFFH mandate.[86] Even more problematic, housing segregation and its effects continued to persist during this same time period. The IFR's interpretation of AFFH guts the definition of AFFH, rendering it devoid of any utility to address desegregation and integrated housing. Thus, it is similarly unlikely to achieve the broad, remedial goals of the AFFH mandate, and is contrary to law for this reason.

B. The IFR does not require program participants to meaningfully examine ways to desegregate and provide fair housing for protected classes and removes race/ethnicity needs assessments.

The IFR is also contrary to law because it rescinds the longstanding consolidated plan regulation requiring grantees to assess the extent to which any racial or ethnic group has disproportionally greater needs in comparison to the needs of any income category as a whole.[87] Although HUD has required grantees to engage in such assessments since 1995, HUD fails to provide any legal or administrative precedent for this policy change. Instead, HUD states that "removing these requirements is consistent with the administration's view that under the Fair Housing Act HUD should ensure against housing discrimination based on all protected classes and not provide preferences based on racial or ethnic characteristics."[88]

These omissions are wholly inconsistent with the AFFH mandate, and more generally the FHA's clearly-articulated policy to "provide, within constitutional limitations, for fair housing throughout the United States."[89] As stated previously, the FHA requires that HUD and its grantees consider the potential segregative effects of their actions to help reduce the racially disproportionate housing needs caused by segregation.[90] The race- and ethnicity-based needs assessment requirement helped grantees to fulfill this obligation by specifically directing grantees to examine whether housing needs differ in their community based on race and/or ethnicity. Because the IFR eliminates the requirement that grantees conduct race- and ethnicity-based housing needs assessments, grantees are unlikely to meaningfully examine the segregative effect of their actions and racially and ethnically disparate housing needs that result from past segregation. For this same reason, grantees are also unlikely to desegregate their communities, promote integration, and address other fair housing issues.

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[84] *Id.* at 30,787.
[85] *See infra*, Section III.C.1.
[86] *Id*.
[87] Affirmatively Furthering Fair Housing Revisions, 90 Fed. Reg. at 11,023.
[88] *Id.* at 11,021-11,022.
[89] 42 U.S.C. §§ 3601, 3608(d), 3608(e)(5).
[90] *N.A.A.C.P. v. HUD*, 817 F.2d at 156; *Otero*, 484 F.2d at 1133-1134; *Thompson*, 348 F.Supp.2d at 408-409.

Relatedly, HUD's elimination of the race- and ethnicity-based housing needs assessment requirement directly conflicts with the purpose of the housing and community development programs covered by its consolidated plan rules.[91] As stated by HUD, the goal of these programs is to "develop viable urban communities by providing decent housing.[92] Among other things, HUD defines the provision of decent housing to mean "increasing the availability of permanent housing in standard condition and affordable cost to low-income and moderate-income families, particularly to members of disadvantaged minorities, without discrimination on the basis of race, color, religion, sex, national origin, familial status, or disability."[93] Thus, the race- and ethnicity-based housing needs assessment requirement helped grantees to provide decent housing for all persons by helping grantees to determine the existence of[94] race- or ethnicity-based barriers (including housing discrimination) to the HUD programs they administered. Consequently, without this requirement, grantees are unlikely to meaningfully examine whether their activities actually result in decent housing free of discrimination. Resultingly, in jurisdictions where racially and ethnically disparate housing needs exist, grantees are unlikely to devise plans that actually address these disparate needs, which will likely exacerbate existing patterns of segregation. Therefore, the elimination of the race- and ethnicity-based housing needs assessment requirement works against HUD's goal of providing decent housing free of discrimination.

Furthermore, HUD's proffered justification is insufficient to explain this change in longstanding policy. Although HUD's consolidated plan regulations required grantees to assess whether housing needs differed by race and/or ethnicity in their states or localities, the regulation did not mandate that grantees adopt any race- and/or ethnicity-based preference when devising plans to address these disparities.[95] Rather, these regulations left it up to grantees to determine how to best to address these disproportionate needs while simultaneously requiring that grantees comply with the FHA and other civil rights laws when developing and implementing solutions to address such needs. In sum, the elimination of this requirement renders the AFFH mandate impotent and places the IFR in direct conflict with FHA's purpose and case law, which has made clear that HUD and its grantees must assess the fair housing implications of their planned actions on the communities they serve and whether these actions will reinforce existing patterns of segregation.[96] Accordingly, the IFR is contrary to the FHA for its elimination of this requirement.

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[91] These include Community Development Block Grant program, Emergency Solutions Grants program, HOME Investment Partnerships (HOME) program, Housing Opportunities for Persons with AIDS (HOPWA) program, and the Housing Trust Fund (HTF) program. 24 C.F.R. § 91.2(a).
[92] 24 C.F.R. § 91.1(a)(1).
[93] 24 C.F.R. § 91.1(a)(1)(i).
[94] *Cf.* Consolidated Submission for Community Planning and Development Programs, 60 Fed Reg. 1878, 1878 (stating that the purpose of consolidate plan submissions "is to enable States and localities to examine their needs and design ways to address those needs that are appropriate to their circumstances."
[95] 24 C.F.R. §§ 91.205(b)(2), 91.305(b)(2) (2020) (repealed 2025).
[96] *N.A.A.C.P. v. HUD*, 817 F.2d at 156; *Otero*, 484 F.2d at 1133-1134; *Thompson*, 348 F.Supp.2d at 408-409.

C. The IFR fails to mandate any fair housing planning processes.

The IFR is contrary to law and violates the APA because it fails to require that grantees conduct any specific fair housing planning processes, which directly conflicts with AFFH case law and the AFFH requirement's legislative purpose. The Supreme Court has repeatedly held that the FHA was enacted to eliminate housing segregation and promote integration.[97] As interpreted by the courts, the FHA's AFFH mandate requires that HUD and its grantees engage in fair housing planning processes that are data-informed and that consider whether planned actions will reduce segregation and promote integrated living patterns.[98] HUD has interpreted the AFFH requirement in the same manner since 1988—first by requiring that grantees conduct AIs and then later Assessments of Fair Housing (AFHs) and most recently by defining the term AFFH in a manner that requires grantees "to take significant actions to overcome historic patterns of segregation" to certify AFFH compliance.[99] In line with both judicial and HUD interpretations of the AFFH mandate, several presidential administrations have understood the AFFH mandate to have the same meaning—HUD and its grantees must engage in a dedicated fair housing planning process that analyzes fair housing impediments and considers whether a grantee's planned actions will achieve the goals of the AFFH mandate.[100]

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[97] *Linmark Assocs.*, 431 U.S. at 94-95; *Trafficante*, 409 U.S. at 211.

[98] *N.A.A.C.P. v. HUD*, 817 F.2d at 156 (holding that the AFFH mandate requires that HUD "assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of action that would increase that supply"); *Alschuler*, 686 F.2d at 482 (interpreting the AFFH requirement to mean that HUD must "adopt some adequate institutional means for marshalling the appropriate legislative facts necessary to make an informed decision on the effects of site selection on the area," "based on the most current available demographic information pertaining to the relevant area.) (internal citations and quotations omitted); *Otero*, 484 F.2d at 1133-1134 ("However, we are satisfied that the affirmative duty placed on the Secretary of HUD by § 3608(d)(5) and through him on other agencies administering federally-assisted housing programs also requires that consideration be given to the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built. 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 . . . of racial groups whose lack of opportunities the Act was designed to combat."); *Shannon,* 436 F.2d at 821; *Thompson*, 348 F.Supp.2d at 408-409 (finding that HUD violated AFFH mandate by failing to "consider the effect of its policies on the racial and socioeconomic composition of the surrounding area and thus consider regional approaches to promoting fair housing opportunities for African-American public housing residents in the Baltimore Region"); *Blackshear Res. Org.* v. *Hous. Auth. of City of Austin,* 347 F. Supp. 1138, 1148 (W.D. Tex. 1971) (holding that both the PHA and HUD were charged with the obligation to AFFH and their decision "failed to consider that policy" and must be set aside because HUD had not considered "hard, reliable data showing the racial demography of any of these areas" despite readily available data that could have been consulted.).

[99] *See generally*, Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg 30,779, *et seq.*; Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, *et seq.*; Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. 1878, *et seq.*; Community Development Block Grants, 53 Fed. Reg. 34,116, *et seq.*

[100] *See generally*, Exec. Order No. 12892, 59 Fed. Reg. 1939 (Jan. 17, 2994); Exec. Order No. 12259, 46 Fed. Reg. 1253 (Dec. 31, 1980); Richard Nixon, Statement About Federal Policies Relative to Equal Housing Opportunity (June 11, 1971), The American Presidency Project, available at https://www.presidency.ucsb.edu/documents/statement-about-federal-policies-relative-equal-housing-opportunity.

By its own admission, the IFR does not "reinstate the obligation to conduct an Analysis of Impediments or mandate any specific fair housing planning mechanism."[101] As stated previously, unlike the 2015 Rule, and 2021 Interim Final Rule, the current IFR's AFFH definition does not similarly require grantees to engage in any meaningful actions to undo segregation.[102] Even more problematic, the IFR entirely omits any reference to addressing segregation or promoting integration and does not require program participants to consider whether their actions redress, or contribute to, residential segregation. Indeed, the IFR removes the "purpose" section of the 2021 Interim Final Rule, which directed grantees to take "meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination."[103]

Furthermore, the IFR's failure to require fair housing planning processes undermines the legislative purpose of the AFFH mandate. As exemplified by HUD's history of AFFH rulemaking (or lack thereof), housing segregation has continued to persist in significant part due to HUD's failure to require its grantees to engage in robust fair housing planning processes.[104] The IFR's failure to include such processes will likely have the same result—retrenching segregation and its effects, which directly conflicts with both the text and legislative purpose of the AFFH requirement. Consequently, the IFR's omission of any fair housing planning requirement contravenes the AFFH mandate, as interpreted by the courts, HUD, and Executive Branch.

D. The IFR fails to provide opportunities for public or community participation in the AFFH certification process.

The IFR is also contrary to law because it does not provide any opportunities for public or community participation during the AFFH certification process, which undermines the legislative purpose of the FHA. Understanding that such participation is an integral part of the informed decision-making required by the AFFH mandate, HUD previously interpreted the FHA to require such feedback during the AFFH certification process when it promulgated its 2015 Rule.[105] Even before the 2015 Rule, since 1996, HUD has encouraged grantees to "seek input and cooperation from other governmental agencies, community and business organizations," because "the involvement of these agencies can greatly assist the elimination of fair housing impediments in areas such as sales and rental of housing, lending, employment, education, social services, transportation, law enforcement, and land use laws."[106] Similarly, courts have long recognized that HUD and its grantees should seek and incorporate community feedback as part of the fair housing planning process.[107]

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[101] Affirmatively Furthering Fair Housing Revisions, 90 Fed. Reg. at 11,020.
[102] *Id.* at 11,023 (stating that "A HUD program participant's certification that it will affirmatively further fair housing is sufficient if the participant takes, in the relevant period, any action that is rationally related to promoting one or more attributes of fair housing" and defining "fair housing" as housing "affordable, safe, decent, free of unlawful discrimination, and accessible").
[103] *See* Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. at 30,790.
[104] *See infra,* Section III.C.1.
[105] Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,355-42,357.
[106] HUD Fair Housing Planning Guide at 1-3.
[107] *Shannon*, 436 F.2d at 821.

Despite the importance of community participation to achieving the legislative purpose of the AFFH mandate, the IFR does not provide for any opportunities for public or community feedback during the AFFH certification process. Thus, the IFR's omission of any fair housing-related community participation requirement directly contravenes HUD's previous interpretation of the AFFH mandate and undercuts the legislative purpose of the mandate. Because the FHA likely requires that grantees solicit community feedback as part of the AFFH certification process, HUD's failure to require such feedback solicitation exposes grantees to substantial litigation risk.

Moreover, while HUD regulations require grantees to solicit community feedback as part of the consolidated plan development process,[108] these regulations do not adequately address the need for specific community feedback regarding impediments to fair housing. The consolidated plan and its drafting requirements are focused on the *affordable housing planning process* as opposed to the *fair housing planning process*.[109] Thus, these regulations do not require grantees to engage in fair housing planning processes as part of the consolidated plan development process, nor do these regulations require grantees to specifically solicit community feedback regarding fair housing impediments.[110] Indeed, both HUD and the courts have recognized that the affordable housing planning process is not a proxy for fair housing planning.[111] Therefore, HUD cannot point to its consolidated plan community participation requirements to cure the IFR's lack of community participation requirements.

III. The IFR fails to consider that a robust AFFH rule is needed in order to fulfill HUD's responsibility to affirmatively further fair housing and address the persistent harms of housing segregation.

The IFR further violates the APA because it completely ignores the history of legal segregation in our country and continuing effects of this segregation nationwide, which the FHA, and specifically the AFFH mandate, was designed to address. Under the APA, courts must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[112] A rule is

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[108] 24 C.F.R. §§ 91.100-91.115.

[109] *See generally* 24 C.F.R. § 91.1 (defining the consolidated plan as a planning document for the grantee to allow it to "develop viable urban communities by providing decent housing and a suitable living environment and expanding economic opportunities principally for low- and moderate-income persons.").

[110] *See generally* 24 C.F.R. §§ 91.100 – 91.115.

[111] *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y. v. Westchester Cnty.*, 668 F.Supp.2d 548, 564-565 (stating that the "statutory and regulatory framework behind the obligation to AFFH . . . is concerned with addressing whether there are independent barriers to protected classes exercising fair housing choice. As a matter of logic, providing more affordable housing for a low income racial minority will improve its housing stock but may do little to change any pattern of discrimination or segregation. Addressing that pattern would at a minimum necessitate an analysis of where the additional housing is placed."); HUD Fair Housing Planning Guide at 5-4 ("When a jurisdiction undertakes to build or rehabilitate housing for low- and moderate-income families, for example, this action is not in and of itself sufficient to affirmatively further fair housing. . . . When steps are taken to assure that the housing is fully available to all residents of the community, regardless of race, color, national origin, gender, handicap, or familial status, those are the actions that affirmatively further fair housing.").

[112] 5 U.S.C. § 706(2)(a); *see also United States v. Mead Corp.*, 533 U.S. 218, 227, 229 (2001).

"arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem."[113] The IFR fails to recognize how HUD's past AFFH-related rulemaking efforts demonstrate the critical need for robust AFFH rules to eliminate segregation and achieve the FHA's broad remedial goals. In doing so, the IFR also disregards the continuing need for such a robust rule to address contemporary policies and practices, by both governmental and private entities, which build off historical policies and practices to promote segregation and stymie integration. Individual states' experiences with the persistent harms of segregation and its effects are a stark illustration of this.

A. HUD's history of AFFH rulemaking demonstrates the need for, and efficacy of, forceful rules to comply with the AFFH mandate.

1. HUD's history of AFFH rulemaking counsels against the IFR's "general commitment" approach to the AFFH mandate.

HUD's history of AFFH rulemaking before 2015 demonstrates that the IFR's "general commitment approach" is unlikely to achieve the broad, remedial purposes of the AFFH requirement. Through the IFR, HUD seeks to return to the AFFH regulatory regime that existed before HUD promulgated its first regulations in this area in 1988. However, this regulatory regime failed tremendously: for the first two decades of the FHA's existence, HUD failed to promulgate AFFH regulations or even provide guidance that implemented this mandate. As a result, HUD rarely enforced this AFFH mandate against its grantees and housing segregation and its effects continued to persist.[114]

Similarly, HUD's experience with the 1995 AI Rule shows how AFFH rules with minimal fair housing planning processes, oversight, or accountability fail to achieve grantee compliance with the AFFH mandate. Although the 1995 AI Rule required grantees to follow certain steps to certify AFFH compliance, it only required a minimal planning process. The 1995 AI Rule did not require grantees to submit their AIs to HUD for review and feedback.[115] Instead, HUD could only request submission of the AI in the event of a HUD complaint or as part of routine monitoring.[116] HUD also recommended that grantees update their AI only once every three to five years.[117] Further, because the rule mandated minimal planning processes, HUD could only recommend, but not require, that grantees engage in additional planning processes like the solicitation of community input as part of the AI process and the inclusion of milestones, timetables, and measurable results in its action plans.[118]

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[113] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[114] Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (Jun. 25, 2015), available at https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law; *see also* Memorandum on Fair Housing, *supra* note 50.
[115] *See* Consolidated Submission for Community Planning and Development Programs, *supra* note 61, at 1905-1906, 1910-1911, 1912.
[116] HUD Fair Housing Planning Guide, *supra* note 64, at 2-7.
[117] *Id.* at 2-6.
[118] *See id.* ("HUD suggests…").

Even worse, during the AI-rule regime, jurisdictions continued to receive federal housing grant funding despite failing to meaningfully examine ways to desegregate their local communities and provide underserved communities with access to fair housing choice. In several instances, records show, HUD sent grants to communities even after they had been found by courts to have promoted segregated housing or been sued by the U.S. Department of Justice for alleged fair housing violations. New Orleans, for example, continued to receive grants after the Justice Department sued it for violating that Fair Housing Act by blocking a low-income housing project in a wealthy historic neighborhood.[119] Over two decades, HUD sent $400 million in HUD block grants to Milwaukee, to no discernible effect. Prior to the 2015 Rule, Milwaukee remained locked in a tie with Detroit for the title of America's most segregated metropolitan area for Black residents. New York City has received $4 billion in block grants since 1993. Yet in that same time period, demographers say, racial segregation eased by just 3 percent. Prior to the 2015 Rule, 80 percent of Black residents still lived in segregated neighborhoods.[120]

As a result of these deficiencies, the AI process was widely criticized as an ineffective paper exercise. Litigation, reports, testimonies, and government studies called into question the AI requirements and the effectiveness of HUD's oversight and enforcement.[121] Most notably, in 2010, the U.S. Government Accountability Office (GAO) published a study identifying critical deficiencies in the AI process.[122] The GAO study found that HUD's lack of oversight and accountability contributed to serious compliance issues. First, the study found that a substantial number of AIs were outdated or nonexistent: GAO estimated that 29 percent of all AIs were at least six years old, and that at least 11 percent were created in the 1990s.[123] Second, the GAO did not receive any AIs from 25 grantees and several grantees provided documents that did not appear to be AIs, suggesting that some grantees may not have maintained the required AI documents.[124] Third, the content of many AIs was lacking. Among the AIs the study reviewed, the "vast majority" did not include timeframes for implementing recommendations.[125]

Most damning, the GAO Report highlighted a key example of the failures of the 1995 AI Rule, pointing to the DOJ's 2009 False Claims Act enforcement action against Westchester County for certifying AFFH compliance while knowingly failing to comply with its AFFH obligations.[126] Westchester County, a CDBG grantee, was aware that racial and ethnic segregation persisted in its municipalities, but the county did not mention this segregation in the AIs it conducted between 2000 and 2008, nor did the county make any plans to address this

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[119] Nikole Hannah-Jones, *supra* note 114.
[120] *Id*.
[121] *See*, *e.g.* Nat'l Comm'n on Fair Hous. & Equal Opportunity, The Future of Fair Housing, 44-45 (Dec. 2008), *available at* https://nationalfairhousing.org/wp-content/uploads/2021/10/Future_of_Fair_Housing.pdf ("HUD requires no evidence that anything is actually being done [to affirmatively further fair housing] as a condition of funding and it does not take adverse action if jurisdictions . . . fail to [do so]").

[122] U.S. Gov't Accountability Office, Housing & Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans (Sep. 2010), (GAO study), *available at* https://www.gao.gov/assets/gao-10-905.pdf.
[123] *Id.* at 9.
[124] *Id.*
[125] *Id*. at 9, 31.
[126] *Id.* at 2.

segregation or its effects.[127] Nonetheless, Westchester County certified AFFH compliance during this same time period.[128]

Furthermore, HUD concedes that the former AI rule did not meaningfully fulfill the agency's mandate to affirmatively further fair housing.[129] Despite this concession, HUD ignores the clear failures of the pre-1988 no-rule and AI-Rule-regimes concession as the IFR imposes even fewer AFFH certification requirements on grantees than the 1995 AI Rule, and explicitly does not "reinstate the obligation to conduct an Analysis of Impediments or mandate any specific fair housing planning mechanism."[130] Further, HUD fails to put in place any meaningful oversight or enforcement procedures to ensure compliance with the AFFH mandate or achieve its goal of eliminating housing segregation and promoting integrated living patterns. Individually and collectively, these failures strongly demonstrate that HUD fails to understand the "problem" to be addressed by the FHA's AFFH provisions.

2. HUD's experience with the 2015 AFFH Rule demonstrates that a robust AFFH rule is critical to achieve the goals of the AFFH mandate.

Unlike the 1995 AI Rule, the 2015 Rule helped grantees to better understand and comply with the AFFH mandate by helping local authorities to learn about barriers to fair housing choice in local communities and how to address them.[131] A closer examination of the substance of the AFHs reviewed by HUD confirm the success of the 2015 Rule. One study of the 28 AFHs submitted to HUD between October 2016 and July 2017 compared those submissions to the AIs previously prepared by the same participants and found striking improvements. Whereas the AIs contained nebulous goals, the AFHs contained more concrete ones:

- Paramount, California, committed to making (by explicit deadlines) specific amendments to its zoning ordinance to make its housing more inclusive, such as allowing group homes for people with disabilities in residential zones;
- Temecula, California, committed to the goal of amending its zoning codes to allow for 100 affordable housing units in census tracts that do not have high poverty rates;
- New Orleans, Louisiana, promised to increase homeownership by Section 8 voucher recipients by 10 percent annually;

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[127] *Id.*; *see also* U.S. Atty. Office for S.D.N.Y., Dep't of Just., Press Release: Westchester County Agrees to Develop Hundreds of Units of Fair and Affordable Housing in Settlement of Federal Lawsuit 1-2 (Aug. 10, 2010), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/westchester_pr.pdf.
[128] *Id*.
[129] Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 43,713-43,714.
[130] Affirmatively Furthering Fair Housing Revisions, 90 Fed. Reg. 11020 (Mar. 3, 2025).

[131] Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,292; *see also* Commented submitted by Lisa C. Barrett, Director of Federal Policy, PolicyLink (Mar. 6, 2018), https://www.regulations.gov/document?D=HUD-2018-0001-0058 (detailing efforts in New Orleans, Louisiana); Comment submitted by Caroline Peattie, Executive Director, Fair Housing Advocates of Northern California (Mar. 5, 2018), https://www.regulations.gov/document?D=HUD-2018-0001-0037 (detailing efforts in Marin County, California); Comment submitted by Kathy Brown, Boston Tenant Corporation (Mar. 8, 2018), https://www.regulations.gov/document?D=HUD-2018-0001-0039 (detailing efforts in Boston, Massachusetts).

- Chester County, Pennsylvania, committed to creating 35 new affordable rental units in high opportunity neighborhoods;
- El Paso County, Colorado, similarly promised to assist in the development of 100 publicly supported affordable housing units in areas of opportunity.[132]

The 2015 Rule enabled HUD and program participants to meet their duty to affirmatively further fair housing. The 2015 Rule required program participants to use data-driven analyses, identify locality-specific patterns of historic segregation, and react to input from community stakeholders. And crucially, whereas the AI process left grantees shouldering all responsibility with no guarantee of feedback from HUD, the 2015 Rule committed HUD's resources and support to substantively assist grantees in meeting their obligations under the law. Indeed, HUD acknowledged that the AFH process was superior to the prior AI process in aiding program participants in meeting their duty to affirmatively further fair housing.

Despite the success of the 2015 AFFH rule, the IFR eliminates that regulatory framework. IFR leaves HUD program participants without any obligation to undertake any type of fair housing planning (whether an AFH, an AI, or any other) and leaves HUD without any mechanism to assist jurisdictions that wish to continue such activity. Thus, the IFR will completely halt program participants' successful efforts to examine ways to desegregate their local communities and provide underserved communities with access to fair housing choice. Further, HUD's conscious decision to repeal this framework despite its documented successes in achieving the goals of the AFFH mandate strongly suggests that HUD fails to understand the purpose of AFFH mandate and what is necessary to achieve this purpose. Consequently, the IFR is arbitrary and capricious for this reason.

B. Because segregation remains entrenched, there is an urgent need to affirmatively further fair housing.

Although the FHA abolished the most pernicious forms of housing discrimination over fifty years ago, and despite the early successes of the 2015 Rule, which were reinforced by the 2021 Interim Final Rule,[133] segregation remains entrenched in the United States nationwide. A 2021 study found that 81 percent of all metropolitan regions in the United States with more than 200,000 residents were more segregated in 2019 than they were in 1990.[134] Segregation remains entrenched due to both historical and contemporary policies and practices.[135] For example, because lenders' policies under the Federal Housing Administration maps prevented racial and ethnic minorities from receiving loans on the favorable terms offered to white families, lenders saw an opportunity to market riskier loan products to minority families who wanted to own

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[132] *See* Justin Steil & Nicholas Kelly, *The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance*, 29 HOUS. POLICY DEBATE 1 (Sep. 15, 2017) (working paper) at 14, 20-24,32-33, available at https://tinyurl.com/53cfbb4m.

[133] *See supra,* Section II.A (describing portions of the 2015 Rule that were incorporated in the 2021 Interim Final Rule).

[134] Stephen Menendian, et. al., *Twenty-First Century Racial Residential Segregation in the United States*, OTHERING AND BELONGING INSTITUTE (June 21, 2021), available at https://belonging.berkeley.edu/roots-structural-racism.

[135] *Id*.

homes. To the extent racial and ethnic minorities were offered mortgage loans, they were more likely to be marketed subprime loans, due to the unavailability of traditional banking in neighborhoods with a high proportion of minority households.[136] The extension of subprime loans to racial and ethnic minorities led to further disparities between Black and white neighborhoods. Studies of subprime loans show that those loans are concentrated in neighborhoods with a high proportion of minority households, and minority households are overall more likely than white households to receive subprime loans.[137] This pattern is consistent even when controlling for neighborhood characteristics other than race.[138] The prevalence of subprime loans in these communities also led to higher rates of foreclosure during the financial crisis of 2008, further perpetuating inequality between white neighborhoods and majority-minority neighborhoods.[139] Making matters worse, for the vast majority of the FHA's existence, the federal government has failed to require that its grantees take specific and affirmative steps to address housing segregation in the communities, which has further allowed such segregation and its effects to persist for almost a century.

Segregation harms individuals not only by denying them housing choice, but it also affects the quality of life for people in segregated communities in other, significant ways. Research shows that throughout the nation there are stark differences in quality of life between residents of white communities and those in Black and Latinx[140] communities. In the decades since HOLC created its color-coded maps, redlined neighborhoods have been more likely to have decreased housing supply and population density than yellow-lined neighborhoods, suggesting that redlined neighborhoods are still viewed as less desirable and attract less economic investment.[141] Residents of census tracts that HOLC designated as "red" were found to be 2.4 times more likely than residents of "green" neighborhoods to have visited the emergency room for asthma, and red tracts have higher measures of diesel particulate matter, a risk factor for asthma.[142] Homes located in areas assigned lower ratings under the HOLC program still had lower average home values, decades later.[143]

These disparities between redlined and other neighborhoods are consistent with differences in the health and access to resources between whites and racial and ethnic minorities

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[136] Jacob S. Rugh & Douglas S. Massey*, Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOCIOLOGICAL REV. 629, 630–33 (2010).
[137] Paul S. Calem, et al., *The Neighborhood Distribution of Subprime Mortgage Lending*, U. PENN. L. SCHOOL INST. FOR LAW AND ECON.12–13 (2003) , available at http://ssrn.com/abstract_id=478581.
[138] *Id*. (analyzing household data in Chicago and Philadelphia, although some of the disparity is explained by individual credit ratings).
[139] Rugh & Massey, *supra note* 136 at 641.
[140] The terms "Latinx," "Hispanic," and "Latino" are used interchangeably throughout this document to refer to people of Mexican, Puerto Rican, Cuban, Central American, South American, Dominican, Spanish and other Hispanic descent; they may be of any race, gender, or sex.
[141] Krimmel, *supra* note 25 at 20-28.
[142] Anthony Nardone, et. al., *Associations between historical residential redlining and current age-adjusted rates of emergency department visits due to asthma across eight cities in California: an ecological study* 4 THE LANCET PLANETARY HEALTH e24, e26-e28 (2020), available at https://pubmed.ncbi.nlm.nih.gov/31999951/ (Using data from eight California cities).
[143] Ian Appel & Jordan Nickerson, *Pockets of Poverty: The Long-Term Effects of Redlining* (2016), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2852856, at 24 (using 1990 home values).

generally. For example, on a nationwide level, predominantly Black neighborhoods have half as many chain supermarkets compared to predominantly white neighborhoods, and Hispanic communities have one-third as many.[144] Research shows that neighborhood characteristics such as walkability, crime, social cohesion, and proximity to the healthy food and community assets, like green space, contribute to health outcomes.[145] Living in neighborhoods of low socioeconomic status is linked to increased likelihood of diseases including obesity, cardiovascular disease and mental illness.[146] Racial and ethnic minorities are more likely to live close to hazardous waste sites, landfills, and other hazards,[147] which leads to increased risk of asthma, cancer, obesity, infant mortality, and babies born with low birth weight.[148]

Likewise, segregation is a significant cause of health disparities between racial and ethnic groups, even when controlling for the individual characteristics of people living in segregated areas.[149] For example, people living in segregated neighborhoods are more likely to be underserved by health care providers, as health care facilities in those areas are less likely to be able to attract providers, because these facilities cannot sufficiently compensate them for their services.[150] Neighborhood segregation is also linked to the likelihood of hospital closings, leaving only safety-net hospitals in segregated neighborhoods that are financially strained and linked to poor health outcomes.[151] These negative health outcomes then further strain states' healthcare systems.

School segregation also generally follows housing segregation.[152] Funding for schools is often tied to property taxes.[153] Where surrounding property values are low, as in segregated neighborhoods, schools often have "fewer resources, higher teacher turnover and a lower quality of education."[154] Children from racial and ethnic minority groups are more likely to attend segregated schools with fewer resources, whereas white children of any income level are likely

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[144] Sarah Treuhaft & Allison Karpyn, *The Grocery Gap: Who Has Access to Healthy Food and Why It Matters*, POLICYLINK & THE FOOD TRUST 13 (2010), available at https://www.policylink.org/sites/default/files/FINALGroceryGap.pdf.
[145] Sacoby Wilson, et al., *How Planning and Zoning Contribute to Inequitable Development, Neighborhood Health, and Environmental Injustice*, 1 ENVT'L JUSTICE 211, 213 (2008), available at https://tinyurl.com/sw73d59w.
[146] *Id.*; Treuhaft & Karpyn, *supra* note 144 at 8.
[147] *Id*.
[148] *Id*.
[149] Kellee White, et. al., *Elucidating the Role of Place in Health Care Disparities: The Example of Racial/Ethnic Residential Segregation*, 47 HEALTH SERVS. RES. 1278, 1280–85 (2012), available at https://pmc.ncbi.nlm.nih.gov/articles/PMC3417310/.
[150] *Id.* at 1280–82.
[151] Vann R. Newkirk II, *America's Health Segregation Problem*, THE ATLANTIC (May 18, 2016), https://www.theatlantic.com/politics/archive/2016/05/americas-health-segregation- problem/483219/ (citing M. Ko, et al., *Residential Segregation and the Survival of U.S. Urban Public Hospitals*, MED. CARE RES. REV. 243-60 (2014)).
[152] Anurima Bhargava, *The Interdependence of Housing and School Segregation*, JOINT CTR. FOR HOUSING STUDIES AT HARV. UNIV. 1 (2017), available at https://www.jchs.harvard.edu/sites/default/files/a_shared_future_interdependence_of_housing_and_school_segregation.pdf.; *see also Segregated Neighborhoods, Segregated Schools?*, URBAN INST. (Nov. 28, 2018), available at https://www.urban.org/data-tools/segregated-neighborhoods-segregated-schools.
[153] Bhargava, *supra* note 152 at 1.
[154] *Id*.

to attend well-funded schools with higher-income student families.[155] Residential insecurity and mobility also adversely impact student engagement and educational attainment.[156] Children in poor Black and Latinx households are most acutely affected, living near schools with median math and reading scores in the 17th and 27th percentiles, respectively, while the median test scores for schools closest to poor white families are in the 47th percentile.[157] These disparities echo in graduation rates.[158] In the 2021-2022 school year, students who are Black, Latinx, low-income, or have a disability were at least 9 percent less likely to graduate high school than white students.[159]

Similarly, Black people living in less segregated neighborhoods have better employment levels and earnings compared to those in highly segregated areas.[160] Black children who attended segregated schools have lower academic achievement and earnings as adults, while the opposite is true for Black children who attended integrated schools.[161] Low employment rates may also be due to poor access to transportation in segregated areas. People of color are four times more likely than white individuals to rely on public transportation to get to and from work, yet they often live in neighborhoods that are underserved by public transportation.[162] Racial and economic segregation, which slows local economic growth, further interferes with low-income adults' employment prospects, especially for Black adults with low incomes.[163]

Segregated homes in areas of concentrated poverty will lower the tax base, thus limiting the State's ability to invest in building affordable housing.[164] Similarly, as noted above, concentrations of poverty will reduce the property-tax funds available to schools, and poor schools may lead to even lower property values. Because the harms of segregation are widespread and entrenched, the States need a strong rule on the statutory mandate to affirmatively further fair housing to help their communities eradicate segregation.

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[155] Emma Garcia & Elaine Weiss, *Segregation and Peers' Characteristics in The 2010- 2011 Kindergarten Class 60 years after Brown v. Board*, ECON. POLICY INST. 6–8, (2014), available at https://www.epi.org/files/2014/epi-segregation-and- peers-characteristics.pdf; Erica Frankenberg, et al., *Harming our Common Future: America's Segregated Schools 65 Years after Brown*, THE CIVIL RIGHTS PROJ. AND CTR. FOR EDU. & CIVIL RIGHTS 25 (2019), available at https://escholarship.org/uc/item/23j1b9nv.

[156] Bhargava, *supra* note 152 at 1.

[157] Debby Goldberg, Comment to FR-6123-A-01, NAT'L FAIR HOUS. ALLIANCE 7 (Oct. 15, 2018), available at https://www.regulations.gov/document?D=HUD-2018-0060-0600 (citing Ellen, Ingrid Gould and Keren Mertens Horn, *Do Federally Assisted Households Have Access to High Performing Public Schools?*, POVERTY & RACE RES. ACTION COUNCIL (2012)).

[158] *Id.* (citing https://www.ed.gov/news/press-releases/us-higji-schoolgraduation-rate-hits- new-record-high-0).

[159] National Center for Education Statistics. (2024). High School Graduation Rates. *Condition of Education*. U.S. Department of Education, Institute of Education Sciences. Retrieved Apr. 15, 2025, from https://nces.ed.gov/programs/coe/indicator/coi.

[160] Quick & Kahlenberg, *supra* note 17.

[161] Stephen Menendian et. al., Racial Segregation in the San Francisco Bay Area, Part 4: The Harmful Effects of Segregation, OTHERING & BELONGING INST. AT UC BERKELEY (Oct. 31, 2019), available at https://belonging.berkeley.edu/racial-segregation-san-francisco-bay-area-part-4.

[162] LEADERSHIP CONF. EDUC. FUND, Where We Need to Go: A Civil Rights Roadmap for Transportation Equity (March 2011), available at http://www.protectcivilrights.org/pdf/docs/transportation/52846576-Where-We-Need-to-Go-A-Civil-Rights-Roadmap-for-Transportation-Equity.pdf, at 3.

[163] Vicki Been & Sophie House, Comment to FR-6123-A-01, N.Y. UNIV. FURMAN CTR. 6-7 (Oct. 15, 2018), available at https://www.regulations.gov/document?D=HUD-2018-0060-0405.

[164] *See, e.g.,* Decl. of RuthAnne Visnauskas ("Visnauskas Decl.") ¶¶ 22, *Nat'l Fair Housing Alliance*, No. 18-cv-1076, Doc. No. 26-1 (June 5, 2018).

Racial segregation of our communities is a troubling and visible reflection of the racial and economic inequality in our country. For too long, communities across the country have been made up of separate and unequal societies divided along racial and ethnic lines. This continuing dynamic creates segregated communities of concentrated poverty that lack the educational and economic opportunities available in other communities, and results in severe intergenerational consequences for the most disadvantaged members of society. As state attorneys general, we are committed to providing access to opportunity for all of our States' residents, and we believe one of the most powerful and effective mechanisms for doing so is to promote racial integration in our cities, towns, and neighborhoods. The IFR does nothing to help entities identify segregation and detect barriers to fair housing that may be contributing to it.

C. The harms of segregation to individual states exemplify the need for a strong AFFH rule.

Glaringly absent from the IFR is any discussion of the harm that it would cause states, protected classes, and local services, among others. By excising considerations of concentration of poverty, racial and ethnic segregation, and access to opportunity, the IFR would stunt the progress made by states and local governments towards ensuring fair housing. The experiences of the states below illustrate the wide range of harms stemming from segregation and the resulting need for a strong AFFH rule that will enable HUD to carry out and vigorously enforce the FHA's mandate to affirmatively further fair housing.

1. California

California continues to experience high rates of housing segregation throughout the state, despite decreases in segregation in large cities like Los Angeles, Oakland, and Riverside since 1980.[165] Housing segregation causes myriad harms to Californians. For example, California census tracts with higher percentages of Black and Latinx populations are the most likely in the state to be burdened with high levels of air pollution.[166] Tracts with high percentages of Black residents have higher rates of asthma and low birth weight.[167] In the San Francisco Bay Area, children from segregated neighborhoods are more likely to live in poverty as adults compared to children from families with similar incomes, but who lived in less segregated neighborhoods.[168] As previously observed by HUD, housing segregation negatively impacts the educational

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[165] Cal. Task Force to Study and Develop Reparation Proposals for African Americans ("Cal. Reparations Task Force"), Chapter 5-Housing Segregation 223 (2023), available at https://oag.ca.gov/system/files/media/ch5-ca-reparations.pdf; *see also* Cal. Dep't of Hous. and Cmty. Dev., Affirmatively Furthering Fair Housing Guidance for All Public Entities and for Housing Elements ("HCD AFFH Guidebook") 6 (Apr. 2021), available at https://www.hcd.ca.gov/community-development/affh/docs/AFFH_Document_Final_4-27-2021.pdf#page=7.
[166] Raoul S. Liévanos, Racialized Structural Vulnerability: Neighborhood Racial Composition, Concentrated Disadvantage, and Fine Particulate Matter in California, 16 Int'l J. of Envtl. Research & Public Health 14–15 (2019), available at https://pmc.ncbi.nlm.nih.gov/articles/PMC6747230/pdf/ijerph-16-03196.pdf.
[167] *Id*. at 15.
[168] Stephen Menendian et. al., *supra* note 161.

attainment of people of color.[169] As in the rest of the nation,[170] housing segregation has reinforced segregation in California's schools.[171] Thus, over half of Latinx students attend schools that have between a 90 and 100 percent Latinx student body.[172] Likewise, almost as many Black students in California schools attend schools that have almost entirely non-white student bodies, despite California having a low proportion of Black students overall.[173]

The IFR thwarts California's efforts to address harmful housing segregation in the State. In 2018, California enacted its own Affirmatively Furthering Fair Housing statute to address housing segregation and its effects in California and to ensure that public agencies in California are fulfilling their obligations under federal and state fair housing laws.[174] California's AFFH law also requires that public agencies incorporate an Assessment of Fair Housing (AFH), as part of the California's state mandated housing planning ("housing element") process.[175] Public agencies must outline housing-related goals and obstacles in their housing elements as well as include plans for addressing the local population's housing needs. Further, housing elements must include significant provisions for outreach, identify contributing factors to key AFFH issues, and outline AFFH goals, quantified objectives, and action plans.[176] Housing elements must include an inventory of sites suitable for housing development including an analysis of the relationship of the sites to the jurisdiction's AFFH duty.[177] California's AFFH law applies to all California public agencies,[178] and California public agencies that receive HUD funding (i.e. the State of California, public housing authorities, municipalities) are subject to both the FHA's AFFH requirement and California's AFFH law.

Although HUD properly recognizes the important role that states and localities play in the fair housing planning process, the IFR will negatively impact the efficacy of California's AFFH law. In 2024, at least 186 California municipalities and the State of California directly received HUD funding awards.[179] The IFR and California's AFFH Law impose different sets of

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[169] Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43714 (proposed Jul. 19, 2013).
[170] *Accord*, Bhargava, *supra*, note 152 at 1 ("Housing and education in America have long been inextricably and intricately linked. First, due to the nation's history and widespread practice of assigning students to their neighborhood school, where housing is segregated, so are schools. Indeed, despite concerted efforts to desegregate schools in hundreds of jurisdictions across the country, school segregation has generally progressed in lockstep with residential segregation, and school and residential segregation have been mutually reinforcing.").
[171] Cal. Reparations Task Force, Chapter 6-Separate and Unequal Education 256-257 (2023), available at https://oag.ca.gov/system/files/media/ch6-ca-reparations.pdf.
[172] Erica Frankenberg et al., Harming Our Common Future: America's Segregated Schools 65 Years after *Brown*, The Civil Rights Project and Ctr. for Educ. & Civil Rights 30 (May 10, 2019), available at https://escholarship.org/uc/item/23j1b9nv.
[173] *Id*. at 28.
[174] HCD AFFH Guidebook, *supra* note 165 at 6-7.
[175] Cal. Gov't Code § 65583(b)(1). Public agencies must outline housing-related goals and obstacles in their housing elements as well as include plans for addressing the local population's housing needs. *See generally* Cal. Gov't Code § 65583.
[176] Cal. Gov't Code § 65583(b)-(c).
[177] Cal. Gov't Code § 65583(a)(3).
[178] Cal. Gov't Code §§ 8899.50(a)(2), (b)(1).
[179] HUD Exchange, HUD Awards and Allocations, https://www.hudexchange.info/GRANTEES/ALLOCATIONS-AWARDS/ (filter by state-California and year-2024) (last visited Apr. 28, 2025).

obligations on California's HUD grantees. California anticipates that these two sets of obligations will cause significant confusion for California HUD grantees, which may result in non-compliance with California's AFFH statute.

Resultingly, this confusion will lead to increased administrative and enforcement burdens for California. California anticipates that California cities' and counties' confusion regarding the relationship between the IFR and the California AFFH Rule will likely lead to increased requests for technical assistance from California's Department of Housing and Community Development (HCD), which oversees compliance with the California AFFH and housing element laws. These requests will divert staff resources and time and may require the HCD to hire additional staff to provide technical assistance to address this confusion, and enforcement staff to ensure local governments are complying with state law. Consequently, California's HUD grantees will face significantly increased compliance costs because of the IFR.

2. New York

New York continues to suffer the impacts of historical redlining and other discriminatory housing policies and practices. As explained in a prior comment, the New York-specific section of which is incorporated herein,[180] segregation persists in New York, particularly for racial and ethnic minorities living in poverty.[181] According to a 2025 report about New York City: "In 2023, disadvantage was significantly more common among Asian, Black, and Latino New Yorkers than among white New Yorkers, pointing to structures of inequity that reproduce disadvantage along racial and ethnic lines."[182] Segregation in metropolitan areas with large Black populations also remains at moderate to high levels, as demonstrated by the dissimilarity index—one measure of racial segregation.[183] In 2023, the dissimilarity index for Bronx County was 62 percent, for

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[180] *See* State Attorneys General, Comment to FR 6123-P-02, at 27–29, available at https://www.regulations.gov/comment/HUD-2020-0011-1474.

[181] For the 2018–22 time period, 5.7 percent of White families lived below the poverty line, compared to 17.1 percent of Hispanic families, 16.5 percent of Black families, and 11.1 percent of Asian/Pacific Islander families. *See* N.Y. Dep't of Health, *New York State Health Indicators by Race and Ethnicity, 2020-2022* (revised Nov. 2024), https://www.health.ny.gov/community/health_equity/reports/county/newyorkstate.htm. In New York City, for the 2018–22 time period, poverty disparities are also stark: 6.9 percent of White families live below the poverty line, compared to 19.7 percent of Hispanic families, 16.8 percent of Black families, and 12.5 percent of Asian/Pacific Islander families. *See* N.Y. Dep't of Health, *New York City Health Indicators by Race and Ethnicity, 2020-2022* (revised Nov. 2024), https://www.health.ny.gov/community/health_equity/reports/county/newyorkcity.htm.

[182] Poverty Tracker Research Group at Columbia Univ., The State of Poverty and Disadvantage in New York City, Vol. 7, Robin Hood, 23 (2025), available at https://robinhood.org/wp-content/uploads/2025/02/PT_Annual24_final_digital.pdf (summarizing inequities in poverty, material hardship, and health problems).

[183] *See* U.S. Census Bureau, *Housing Patterns: Appendix B: Measures of Residential Segregation* (last revised Nov. 21, 2021), https://www.census.gov/topics/housing/housing-patterns/guidance/appendix-b.html ("Segregation is smallest when majority and minority populations are evenly distributed. The most widely used measure of evenness is the dissimilarity index. Conceptually, dissimilarity measures the percentage of a group's population that would have to change residence for each neighborhood to have the same percentage of that group as the metropolitan area overall. The index ranges from 0.0 (complete integration) to 1.0 (complete segregation).").

Kings County was 55 percent, and for New York County was 51 percent.[184] For other major metropolitan areas, the dissimilarity index for Erie County (Buffalo) was 58 percent, for Monroe County (Rochester) was 52 percent, for Onondaga County (Syracuse) was 51 percent.[185] School segregation continues to be a problem as well: a 2021 report scores New York State as the most segregated state for Black students and the second most segregated state for Latino students.[186]

Segregation permeates homeownership in New York State as well. As recent analysis shows, for Black and Latino households at all income levels, there remain significant and persistent racial disparities in homeownership across New York State.[187] Specifically, 67 percent of white households own their homes, compared to only 34 percent of households of color.[188] Homeownership rates are particularly low among Black households (32 percent) and Latino households (27 percent).[189] The analysis demonstrates there are disparities between New Yorkers of color and their White counterparts in accessing credit at all stages of home buying and ownership, including the percentage of submitted applications for purchase mortgage; the likelihood that applications were denied; the terms, rates, and fees for loans; and in homeowners' applications for refinancing.[190] For denials of loans of purchase mortgages, "these disparities remained even when controlling for various underwriting considerations, such as credit score and debt-to-income ratio."[191]

New York State and program participants within it need a strong AFFH rule to ensure continued progress to further fair housing. As New York City explained, its "inclusive, comprehensive, and collaborative process" titled *Where We Live NYC*[192] was inspired by the 2015 AFFH rule.[193] For example, the City relied in part on HUD guidance regarding the 2015

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[184] Federal Reserve Bank of St. Louis, *Racial Dissimilarity Index: New York*, https://fred.stlouisfed.org/release/tables?rid=419&eid=354053&od=# (last accessed Apr. 28, 2025) (rounded to the nearest whole number).
[185] *Id.*
[186] Danielle Cohen & Gary Orfield, *NYC School Segregation: Report Card Still Last, Action Needed Now*, UCLA THE CIVIL RIGHTS PROJECT 9 & note 3 (June 2021), available at https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/nyc-school-segregation-report-card-still-last-action-needed-now/NYC_6-09-final-for-post.pdf (explaining this finding is "[b]ased on highest shares of segregated schools and lowest exposure to White students"); *see also* John Kucsera & Gary Orfield, *New York State's Extreme School Segregation: Inequality, Inaction and a Damaged Future*, UCLA THE CIVIL RIGHTS PROJECT vi (Mar. 2014), available at https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/ny-norflet-report-placeholder/Kucsera-New-York-Extreme-Segregation-2014.pdf ("New York has the most segregated schools in the country: in 2009, black and Latino students in the state had the highest concentration in intensely-segregated public schools (less than 10% white enrollment), the lowest exposure to white students, and the most uneven distribution with white students across schools."); *id.* at vii– ix (summarizing statewide, New York City metropolitan area, New York City, and upstate metropolitan area findings).
[187] N.Y. OFFICE OF THE ATTORNEY GENERAL, RACIAL DISPARITIES IN HOMEOWNERSHIP 2-3 (Oct. 31, 2023), available at https://ag.ny.gov/sites/default/files/reports/oag-report-racial-disparities-in-homeownership.pdf.
[187] *Id.* at 13 (citing the U.S. Census's American Community Survey).
[188] *Id.*
[189] *Id.*
[190] *Id.* at 15.
[191] *Id.* at 2.
[192] CITY OF NEW YORK, WHERE WE LIVE NYC (2020) 35, available at https://www.nyc.gov/assets/hpd/downloads/pdfs/wwl-plan.pdf.
[193] *Id.*; *see also* CITY OF NEW YORK, WHERE WE LIVE NYC: PROGRESS REPORT 2024 (2025), available at https://wherewelive.cityofnewyork.us/wp-content/uploads/2025/01/WWL-24-Progress-Report.pdf.

AFFH rule to develop the plan.[194] The IFR thus threatens to deprive New York program participants of the tools and oversight necessary to meet their AFFH obligation.

3. Massachusetts

Cities and towns across Massachusetts remain racially segregated. Boston, Massachusetts' largest city and capital, was ranked the 20th most segregated metropolitan area in the country according to 2020 census data[195] and had the ninth greatest increase in segregation between the years of 1990 to 2019.[196] In 2024, more than 60 percent of the state's population of Black residents lived in just 10 cities, and just 10 cities across the state are home to over half of the state's Latinx residents.[197] Zoning laws in Massachusetts communities, including widespread single-family zoning policies and rejection of income-based housing, have led to a scarcity of affordable housing options across the state. Housing costs continue to rise across Massachusetts, and Black and Latinx residents are continually the most rent-burdened and have the fewest pathways to move to suburban communities as either renters or homeowners.[198]

A 2024 report by a state education advisory board showed that 63 percent of public schools in Massachusetts are segregated.[199] The impact on our students is stark; the same report found that the more than 225,000 students at segregated nonwhite schools in Massachusetts—90 percent of whom are Latinx or Black—attend schools with the worst education outcomes according to state accountability data.[200] It is therefore Latinx and Black students who are disproportionately suffering from systemic education failures in Massachusetts.[201]

4. New Jersey

Despite the State's vigorous enforcement efforts over the 80-year history of the New Jersey Law Against Discrimination ("LAD"),[202] housing segregation and discrimination remain pressing challenges for New Jersey residents. For background, New Jersey has taken affirmative steps to further fair housing at all levels of state and local government. In 2021, recognizing the overlap between discriminatory policies within the criminal legal system and racial disparities in

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[194] *See, e.g.*, WHERE WE LIVE NYC, *supra* note 192 at 81, 90, 100 (citing U.S. Dep't of Housing and Urban Dev., *AFFH Rule Guidebook* (Dec. 31, 2015), available at https://www.nhlp.org/wp-content/uploads/HUD-AFFH-Rule-Guidebook-Dec.-2015.pdf).
[195] Othering & Belonging Instit., *Most to Least Segregated Cities in 2020: According to 2020 Census Data*, available at https://belonging.berkeley.edu/most-least-segregated-cities-in-2020.
[196] Stephen Menendian et al., *supra* note 161 at Table 1.
[197] THE BOSTON FOUNDATION, *The Greater Boston Housing Report Card 2023*, 17 (2023), available at https://www.tbf.org/-/media/tbf/reports-and-covers/2023/gbhrc2023-full-report.pdf.
[198] RACIAL IMBALANCE ADVISORY COUNCIL, *Racial Segregation in Massachusetts Schools*, 15 (2024), available at https://www.canva.com/design/DAGGUi-BWoY/bUgD9sILXWnkcmbmoepa1Q/view?utm_content=DAGGUi-BWoY&utm_campaign=designshare&utm_medium=link&utm_source=editor#6.
[199] *Id*. at 23.
[200] *Id*. at 26. The report highlights 10 student outcome measures that evidence such gaps, including high school graduation rate, college matriculation rate, and proficiency rate on standardized state exams. *Id*. at 30. The report further found that students of *all races* achieved far worse outcomes based on these measures across all segregated nonwhite schools. *Id*. at 35.
[201] *Id*. at 26.
[202] N.J. Stat. Ann. 10:5-1 to 50.

housing, New Jersey became the first state in the country to enact a law to address discrimination against persons with prior criminal histories. That law, called the Fair Chance in Housing Act ("FCHA"), generally prohibits the consideration of an applicant's criminal history before a housing provider extends a conditional offer to an applicant, and carefully limits the circumstances in which an individual can be denied housing based on a prior criminal history.[203] Since the law's inception, the New Jersey Office of the Attorney General and Division on Civil Rights have taken enforcement action against over 200 housing providers across the state for violating the FCHA. Many of those enforcement actions have resulted in settlements that require housing providers ensure they do not deny housing opportunities to people based on prior criminal history, and that require ongoing monitoring of their practices by the Division on Civil Rights. The Division on Civil Rights has also issued regulations to implement the FCHA,[204] and has conducted dozens of trainings to educate housing providers and reentering persons across the state about the law's requirements and protections.[205]

Those efforts are part of New Jersey's comprehensive approach to tackling discrimination in the housing market and expand access to affordable housing. New Jersey has also launched a home appraisal discrimination initiative to combat discrimination in the home-buying and home mortgage refinance process.[206] It has entered into agreements with major online real estate and rental platforms to prevent New Jersey housing providers from discriminating against prospective tenants seeking to pay rent with federal, state or local rental assistance, or to address discrimination against prospective tenants with criminal histories. It has taken dozens of enforcement actions against housing providers for discriminating on the basis of source of lawful income.[207] As part of New Jersey's efforts to increase affordable housing and establish integrated communities, the State enacted landmark legislation in March 2024 supporting local townships in complying with affordable housing obligations.[208]

Despite these efforts, the inter-generational impact of redlining continues to shape segregated patterns of housing throughout the State and reinforce existing racial wealth

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[203] N.J. Stat. Ann. §§ 46:8-25 to -64.

[204] N.J. Admin. Code §§ 13:5-1.1 to -2.7.

[205] *See, e.g.*, 54 N.J.R. 76-83, available at https://www.njoag.gov/wp-content/uploads/2022/01/R.2021-d.150-54-N.J.R.-76a.pdf.

[206] *See* New Jersey Office of the Attorney General, *AG Platkin Announces Initiative to Address Discrimination in Home Appraisals* (Jan. 12, 2024), available at https://tinyurl.com/3a7cu4wt. This initiative provides enforcement guidance on how the NJLAD applies to discrimination in home appraisals and creates a subcommittee dedicated to reducing barriers to entry in to the appraisal profession and encourage a diverse workforce.

[207] *See, e.g.*, New Jersey Office of the Attorney General, *AG Platkin, Division on Civil Rights Announce Enforcement Actions to Combat Housing Discrimination* (Jan. 16, 2024), https://shorturl.at/ybPC8. *See also* New Jersey Office of the Attorney General, *Attorney General Platkin and Division on Civil Rights Announce Finding of Probable Cause Against Housing Provider for Discriminatory Minimum-Income Requirements* (Nov. 1, 2024), available at https://tinyurl.com/apdnauhh; N.J. Division on Civil Rights, *Investigation of Republic First Bank: Public Report and Summary of Findings* (October 2024), https://tinyurl.com/59m4xf9u; New Jersey Office of the Attorney General, *Acting AG Platkin Announces Major Settlement with Trident Mortgage Company LP and Fox & Roach LO over Allegations of Race-Based 'Redlining' in Lending Practices in the Camden Area* (July 27, 2022), available at https://tinyurl.com/ymxkp7vw.

[208] New Jersey townships are bound by the "Mount Laurel Doctrine," a half-century old judicial mandate requiring municipalities to affirmatively use their zoning powers to develop affordable housing for low-income residents within their towns.

disparities.[209] While twentieth-century housing discrimination policies and practices like restrictive covenants are now unenforceable, their impact is still felt.[210] Moreover, White flight in response to mid-century shifts in housing patterns has "intensified housing segregation," "especially . . . in cities like Newark and Camden." [211] This segregation impacts homeownership rates in New Jersey as well. According to a 2025 report about racial disparities in New Jersey, "[t]he statewide homeownership rate for white New Jersey households is 76.6%, nearly double the homeownership rates for Black and Latino/a New Jersey households who have homeownership rates of 41.3% and 40.4% percent, respectively."[212] This report indicates that "[e]ven when Black and Latina/o families are able to buy homes, they tend to benefit less financially from the investment due to ongoing barriers to fair lending, segregation, appraisal discrimination and disproportionate vulnerability to foreclosure."[213] The data also shows that "[a]s housing prices have skyrocketed, those who are already homeowners have seen their wealth grow while those who rent are racing a growing affordability crisis."[214] New Jersey relies on a strong AFFH rule that works in partnership with the State's rigorous laws to protect residents from housing discrimination. The IFR threatens to remove an important part of the framework for combatting disparities in housing.

5. Arizona

Arizona cities and towns continue to be plagued by segregated communities resulting from restrictive covenants and redlining. As early as 1913, restrictive covenants prevented qualified individuals from residing in certain Arizona neighborhoods because of race or national origin. "Some restrictive covenants went as far as explicitly identifying the race and ethnicity of people who could not be purchasers. For instance, a deed in Maricopa County said that 'exclusion shall include persons having perceptible strains of the Asiatic, Mexican, American Indian, Negro, Filipino, or Hindu races.'"[215] Similarly, the 1927 CC&Rs for The Old World Addition subdivision in Tucson reads "No part of said property shall be sold, conveyed, rented or leased, in whole or in part, to any person of Negro or Mongolian descent or to any person not of the White or Caucasian race, except such as are employed thereon as domestic servants by the owner or tenant of any lot in said property."[216] Although the use of racially-restrictive covenants was deemed unlawful in 1948, they nonetheless persisted until 1968, when the Fair Housing Act was passed. Arizona

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[209] *See* N.J. Wealth Disparity Task Force, *New Jersey – Building A State of Opportunity, A Report of the Wealth Disparity Task Force to Close Opportunity Gaps and Repair Structural Disparities* (February 2025), 50, 90-96, available at https://tinyurl.com/3eex7642.
[210] *Id.* at 43-44.
[211] *Id.* at 44.
[212] N.J. Institute for Social Justice, *The Two New Jerseys: A Deepening Divide* (April 2025) 4, available at https://tinyurl.com/3r33wxve. *See also* N.J. Wealth Disparity Task Force, *supra* note 209 at 90 (table pulling data from the 2023 U.S. Census Bureau on homeownership rates by race and county for 2023 in New Jersey).
[213] N.J. Institute for Social Justice, *supra* note 212 at 4-5 ("New Jersey has consistently had some of the highest foreclosure rates in the nation, disproportionately impacting owners of color and stripping wealth from families who are working to build it.").
[214] *Id.* at 5.
[215] Katie Gentry, *A Brief History of Housing Policy and Discrimination in Arizona,* MORRISON INST. FOR PUBLIC POLICY (November 2021), available at https://morrisoninstitute.asu.edu/sites/default/files/a-brief-history-of-housing-policy-and-discrimination-in-arizona-nov-2021.pdf.
[216]Jason R. Jurjevich, et. al., *Mapping Racist Covenants in Tucson, AZ*, The MRC Project (2023), available at https://experience.arcgis.com/experience/3f1be29534d14349baadf7e2e1bad968/page/Page/ .

passed the Arizona Fair Housing Act (AFHA) in 1988 to prohibit racist covenants at the state level.[217] Despite these laws, the restrictive covenants remained on housing deeds in Arizona, even up until last year.

Starting in 2022, just three years ago, researchers from the University of Arizona started the Mapping Racist Covenants Project to review racist covenants within Pima County.[218] The Project found that of the 750 subdivisions surveyed, more than one quarter contained neighborhoods with racist covenants, which accounts for 35% of Tucson's total population.[219] Just last year, Arizona passed SB1432, a law permitting a property owner to remove an unlawful restriction on their deed by submitting an amendment. Restrictive covenants are not a thing of the past; Arizona is still tackling the remnants of housing discrimination into the 2000s.

6. Washington

Washington, like other states, continues to experience the impacts of historical redlining and other discriminatory housing policies and practices.[220] In particular, segregation permeates homeownership and access to affordable housing in Washington. According to a recent analysis from the University of Washington and Eastern Washington University, for example, more than two-thirds of white families in Washington own homes, but most Black families do not; 69 percent of White families are homeowners compared to only 34 percent of Black families.[221] That disparity has worsened over time—in 1970, 48 percent of Black families owned homes.[222] The disparity rate of homeownership is compounded by the fact that the homes owned by Black, Indigenous, and Latino households "tend to be worth less than those owned by Whites, especially in the high-price metro areas" like the Seattle-Tacoma metropolitan area.[223] Certain counties, including the Washington's most populous, King County, reflected even larger disparities. In Seattle/King County, for example, only 28 percent of Black families own homes, nearly the lowest rate among large U.S. cities.[224] The continuing impacts of discrimination in Washington's housing sector include these impacts, as well as persistent patterns of segregation, housing price and appraisal disparities, racial wealth disparities, and disparities in access to credit and housing.[225] In light of these impacts, Washington State and program participants within it need a strong AFFH rule to ensure continued progress to further fair housing.

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[217] *See* "Fair Housing—Regulation and Enforcement," 1988 Ariz. Legis. Serv. Ch. 339 (2d Reg. Sess.).
[218] Jason R. Jurievich, *supra* note 216.
[219] Henry Brean, *Researchers map Tucson's history of race-restricted neighborhoods*, Tucson.com (Sep. 30, 2024), available at https://tucson.com/news/local/subscriber/racist-rules-in-tucson-neighborhoods/article_d3d1c160-36df-11ee-a63a-df136bba497c.html#tracking-source=article-related-bottom.
[220] *See* NATIONAL FAIR HOUSING ALLIANCE, *Washington State Covenant Homeownership Program Study*, 5-6 (March 22, 2024), available at https://wshfc.org/covenant/WSHFCWACHPFULLSTUDY32024.pdf.
[221] Racial Restrictive Covenants Project Washington State, *Homeownership by race 1970-2022 – Washington state*, available at https://depts.washington.edu/covenants/homeownership_washington.shtml.
[222] *Id.*
[223] *Id*.
[224] *Id*.
[225] *See* NAT'L FAIR HOUS. ALLIANCE, *supra* note 220 at 5-6.

7. Illinois

While Chicago is infamous for being among the most racially segregated cities in America, residential segregation throughout the rest of Illinois is perhaps less well-known. Among metropolitan areas in the U.S. with over 10,000 Black residents, the metro areas of Decatur, Carbondale, Springfield, Rockford, Kankakee, Danville, and Peoria, Illinois are all more racially segregated than the national median.[226] In fact, throughout the state of Illinois, residential segregation between White and Black residents is among the highest in the nation.[227]

Corresponding with residential segregation, racial segregation in Illinois' schools remains a stark problem. Among Black students in Illinois, 62% attend highly segregated schools, in which 90-100% of the students are African American.[228] This makes Illinois the second most segregated state for Black students.[229] Racially segregated schools in Illinois have higher numbers of low-income students and fewer resources, resulting in a host of deficiencies, including a more punitive environment for students, a smaller range of course offerings, lower teacher retention rates, fewer enrichment and extracurricular options, and significant achievement gaps.[230] But segregation in Illinois' schools will be impossible to address without addressing residential segregation—as the Chicago Urban League put it in 2017, "where you live is overwhelmingly determined by the color of your skin and the amount of your income, and the school you are most likely to attend is overwhelmingly determined by where you live."[231] In short, ameliorating residential segregation is of utmost importance for Illinois' children.

Addressing residential segregation in Illinois, however, will be difficult without a robust federal AFFH rule. Rescinding the requirement that jurisdictions complete AFHs will likely result in a patchwork of differing levels of commitment to fair housing planning across the state.[232] Indeed, whereas the City of Chicago and the county of which it is a part, Cook County, began a robust regional fair housing planning process in 2018, which it elected to continue even after the shift at the federal level in 2018 away from AFHs,[233] other municipalities in the state regularly use

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[226] *See* Mike Maciag, *Illinois Residential Segregation Data*, GOVERNING (Jan. 8, 2019), available at https://www.governing.com/archive/illinois-residential-segregation-data-trends-for-metro-areas.html.

[227] Illinois, with an index of dissimilarity between White and Black residents of 72 on a scale from 1 to 100, 100 reflecting complete segregation, is the seventh most racially segregated State, considering data from 2018-2022. *See Residential Segregation (Black/White) by State*, NAT'L INST. ON MINORITY HEALTH AND HEALTH DISPARITIES, available at https://hdpulse.nimhd.nih.gov/data-portal/physical/table (choose "Residential Segregation" from "Topic" dropdown) (last accessed Apr. 23, 2025). The country's index of dissimilarity as a whole is 63. *Id.*

[228] THE CHI. URB. LEAGUE, *The Impact of Segregation on Education in a "No Excuses" Environment*, 32 (Feb. 2017), available at https://chiul.org/wp-content/uploads/2019/01/CULtivate-Part-2_Education_FINAL.pdf.

[229] *Id.*

[230] *See id.* at 17-18.

[231] *Id.* at 41.

[232] *See* CITY OF CHI., *Chicago Blueprint for Fair Housing*, 12 (Oct. 2021), available at https://www.chicago.gov/content/dam/city/sites/chicagos-blueprint-for-fair-housing/pdfs/ChicagoBlueprintforFairHousing-Full%20Report.pdf ("Cook County municipalities exhibit vastly different capacity, resources, and political will to advance fair housing, challenging comprehensive, countywide fair and affordable housing efforts.").

[233] *Background*, *Chicago Blueprint for Fair Housing,* CITY OF CHI., available at https://www.chicago.gov/city/en/sites/blueprint-for-fair-housing/home/background.html (last visited Apr. 23, 2025).

their Home Rule status to avoid or opt out of statewide fair and affordable housing efforts.[234] Moreover, without the federal AFH requirement, the resources previously provided by HUD to facilitate jurisdictions' planning, including the Assessment Tools and data and mapping tool, may no longer be available, making it that much more challenging for municipalities and counties with fewer resources to work to combat racial segregation, even if they wish to.

8. Maryland

Maryland's Baltimore Region is highly segregated.[235] The segregation is a direct result of local and state policies that have encouraged residential housing segregation by impeding the creation of affordable and accessible housing opportunities in areas of economic opportunity, with Baltimore City itself serving as a "island reservation for use as a container for all the poor of a contiguous region."[236] The Racially/Ethnically Concentrated Areas of Poverty in the region persisted intergenerationally because of the artificial impediments to integrated housing at the local and State level during the period in which the duty to affirmatively further fair housing was considered mere surplusage to the Fair Housing Act.[237]

However, significant legal developments predicated on dismantling these artificial impediments have contributed to increasingly racially integrated housing in the Baltimore Region. First, the finalization of the Consent Decree in *Thompson v. HUD*[238] allowed low-income African-American families residing in public housing in Baltimore to move to areas of opportunities in the Baltimore Region where jobs, transportation, and quality schools were accessible to these families.[239] Indeed, the mobility program created under the Consent Decree was recently noted for its success in moving low-income non-White families to areas of economic opportunity.[240] Moreover, in 2016, HUD successfully conciliated a Fair Housing Complaint against Baltimore County, MD, alleging that the County's obstruction of affordable housing development resulted in hyper-segregated housing patterns.[241] Since the finalization of the agreement, Baltimore County has approved the development of 908 affordable housing units

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[234] CITY OF CHI., *Chicago Blueprint for Fair Housing*, 12-13 (Oct. 2021), available at https://www.chicago.gov/content/dam/city/sites/chicagos-blueprint-for-fair-housing/pdfs/ChicagoBlueprintforFairHousing-Full%20Report.pdf.

[235] Root Policy Research, *Analysis of Impediments to Fair Housing Choice in the Baltimore Region – 2025 Update*, Section III.1 (2025), available at https://baltometro.org/sites/default/files/bmc_documents/general/community/fair-housing/Baltimore-Regional-AI--fullplan.pdf (last accessed April 25, 2025).

[236] *Thompson v. HUD,* 348 F. Supp 2d, 398, 408 (2005).

[237] Root Policy Research, *supra* note 235.

[238] *Thompson v. HUD*, Case 1:95-cv-00309-MJG (D. Md.), Settlement Agreement, ECF Doc. 876 (8/24/2012).

[239] Root Policy Research, *supra* note 235 at Section IV.C.

[240] Stefanie DeLuca, et al., *Increasing Residential Opportunity for Housing Choice Voucher Holders: The Importance of Supportive Staff for Families and Landlords*, 26 CITYSCAPE 123 (2024), available at https://www.huduser.gov/portal/periodicals/cityscape/vol26num2/ch6.pdf.

[241] Conciliation Agreement and Voluntary Compliance Agreement Between the United States Department of Housing and Urban Development, Myesh Allender-Hardison, et al, and Baltimore County, March 9, 2016, available at https://www.baltimorecountymd.gov/files/Documents/Planning/hudconciliationagreement.pdf. While HUD contends it has never taken enforcement action on the duty to Affirmatively Further Fair Housing, HUD has received complaints and successfully conciliated allegations of state and local jurisdictions' failures to affirmatively further fair housing.

in census tracts designated as areas of opportunity.[242] Also, the successful conciliation of a HUD complaint against the State of Maryland has revised how affordable housing is sited in Maryland to emphasize families' access to economic opportunity.[243] Because of the systemic changes deliberately targeted to increase housing choice for protected classes, the Baltimore metropolitan region's White/Non-White dissimilarity index has decreased from 64.7 to 48.6 percent from 1990 to 2022.[244] In short, the integrated housing opportunities developed through these policies have relieved intergenerational poverty created by housing segregation in Maryland and moved families to greater economic mobility.[245] Increased housing integration has a transformative effect on families. The words of impacted families speak for themselves. In commemorating the 25th year of the *Thompson v. HUD* lawsuit, a participant in the Baltimore Regional Housing Program stated, "The program alleviated so much stress off of my life…It made what was unobtainable to me, obtainable."[246]

The policies that reduce housing segregation are possible because of information compiled under the 1995, 2015, and 2020 Affirmatively Furthering Fair Housing Rules.[247] While the Maryland General Assembly passed legislation in 2021 enshrining the 2016 AFFH rule into State law, it is federal fair housing initiatives that provided the catalyst for the remedies, enforcement, and technical assistance to greater integrated housing in the Baltimore Region and it is the United States that is the largest funder of affordable housing programs in Maryland. While the Baltimore Region local governments have demonstrated a commitment to robust assessment of fair housing impediments, housing segregation persists in other parts of Maryland that must be addressed. Other counties have seen increasing dissimilarity indices while the Baltimore region saw decreasing dissimilarity indices.[248]

Moreover, certifications have proven inadequate to ensure Maryland jurisdictions comply with their duty to affirmatively further fair housing, thereby catching them unaware when meritorious fair housing claims finally bring to light the segregation local policies perpetuate. For example, Baltimore County routinely certified it complied with its duty to Affirmatively Further Fair Housing, yet that did not prevent a Fair Housing Complaint against Baltimore County alleging systemic failures to perpetuate housing segregation. Similarly, the Housing Authority of Prince George's County certified that it complied with fair housing and civil rights statutes for persons with disabilities applicable to their program, but a HUD conducted

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[242] Olszewski Issues Executive Order to Support Efforts to Address Attainable Housing Shortage In Baltimore County, Dec. 3, 2024, available at https://www.baltimorecountymd.gov/departments/county-executive/news/olszewski-issues-executive-order-support-efforts-address (last accessed April 25, 2025).
[243] Conciliation Agreement and Voluntary Compliance Agreement Between the United States Department of Housing and Urban Development, The Baltimore Regional Housing Campaign, and the State of Maryland, September 22, 2017, available at https://dhcd.maryland.gov/HousingDevelopment/Documents/rhf/DHCD-HUD-BRHCConciliationAgreement.pdf.
[244] Root Policy Research, *supra* note 235 at Section III, p. 34.
[245] *Id.*
[246] Adria Crutchfield, *25 Years of Creating Better Futures with Housing and Community*, Medium (Feb. 28, 2020), available at https://medium.com/brhp/25-years-of-creating-better-futures-with-housing-and-community-ed468afa5194 (last accessed April 25, 2025).
[247] *See, e.g.*, HUD Complaint, Baltimore Regional Housing Campaign v. State of Maryland, et al., available at https://www.prrac.org/pdf/BRHC_Complaint_2011.pdf (last accessed April 25, 2025).
[248] Racial Dissimilarity Index: Maryland, Federal Reserve Bank of St. Louis, available at https://fred.stlouisfed.org/release/tables?eid=353406&rid=419 (last accessed April 25, 2025).

compliance review resulted in a Voluntary Compliance Agreement to ensure compliance with those laws.[249]

The IFR threatens to undo the progress Maryland has made in identifying to redressing housing segregation and exposes local jurisdictions to allegations of perpetuating housing segregation.

9. Connecticut

Connecticut and its cities also remain among the most segregated in the nation in terms of both racial and economic segregation and therefore will be significantly harmed by the IFR.[250] Bridgeport and Hartford, two of Connecticut's largest cities, are among the most segregated in the nation as measured by the dissimilarity index and among the highest in income inequality as measured by the Gini index, even though levels of segregation and income inequality have decreased over the past 30 years. A 2024 study showed high levels of racial segregation in both Connecticut cities and suburbs, despite consistent efforts to address such segregation.[251] Such segregation perpetuates inequitable access to resources and undermines the well-being and quality of life for those who are predominantly affected by it, and harms the entire community through exposure to less diversity. Connecticut and HUD participants within it need a strong AFFH rule to ensure continued progress to further fair housing.

In sum, states like California, District of Columbia, Massachusetts, New York, New Jersey, Maryland, Maine, Illinois, Connecticut, Washington, Vermont, Rhode Island, Arizona, Michigan, Oregon, Hawai'i, and Minnesota and program participants within them need a strong federal AFFH rule that adheres to the definition of "affirmatively furthering fair housing" as Congress intended in its passage of the FHA and as it has been consistently interpreted by courts.[252] This entails, rather than a general commitment that program participants will take active steps to promote fair housing, which will do nothing to address the pervasive problems caused by historical segregation practices, a requirement that participants (1) meaningfully evaluate fair housing issues in their geographic area such as segregation, conditions that restrict fair housing choice, and disparities in access to housing, (2) identify factors that primarily contribute to the creation or perpetuation of fair housing issues, and (3) establish fair housing priorities and goals. Additionally, HUD needs to continue to hold program participants accountable for failing to meaningfully address how their housing development plans will reduce patterns of segregation specific to their communities and expand access to opportunity.

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[249] Voluntary Compliance Agreement between the United States Department of Housing and Urban Development and the Housing Authority of Prince George's County, May 15, 2020, available at https://www.hud.gov/sites/dfiles/FHEO/documents/HAPGC%20VCA%205.18.20.pdf (last accessed April 25, 2025).

[250] Based on findings from Brown University's Diversity and Disparities Project, US metropolitan area rankings of the White to Black Dissimilarity Index, the Bridgeport metro ranks 20th highest while the Hartford metro ranks 33rd. *Diversity and Disparities*, American Communities Project, available at https://s4.ad.brown.edu/projects/diversity/SegSorting2020/Default.aspx (select "White-Black/Black-White" as variable to view the sorting table) (last visited Apr. 28, 2025).

[251] URBANOMICS, *Connecticut Housing and Segregation Study Final Report*, iv, (Jan. 2024) available at https://portal.ct.gov/datapolicy/-/media/datapolicy/general/final-ct-housing-and-segregation-study-2024.pdf

[252] *See supra*, Section II.

IV. In abdicating its responsibility to affirmatively further fair housing, HUD has failed to provide any reasoned explanation.

The IFR is also arbitrary and capricious because HUD fails to provide any reasoned explanation for the rule. Under the APA, an "agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made."[253] When an agency action changes course, the agency must "provide reasoned explanation for its action," which "would ordinarily demand that it display awareness that it is changing position."[254]

HUD offers three generalized claims about its previous AFFH regulations to support the IFR. HUD states that these previous regulations: (1) constituted regulatory overreach; (2) were costly, confusing, overly burdensome, and inflexible; and (3) were ineffective.[255] Additionally, HUD incorporates by reference the justifications underlying its 2020 "Preserving Community and Neighborhood Choice" Final Rule (2020 PCNC Rule). There, HUD justified the 2020 PCNC Rule by arguing that its "narrower view of the extent of the obligations surrounding the AFFH certification" "protect[ed] local decision making."[256]

However, these justifications for the interim final rule are wholly insufficient to support HUD's repeal and replacement of the 2021 Interim Final Rule. As a general matter, HUD does not explain how weakening the AFFH definition and certification process and eliminating race-based needs analysis addresses HUD's stated concerns about HUD's role, let alone achieves the FHA's AFFH mandate. Nor does HUD address its elimination of information-sharing and technical-assistance provisions of the 2021 Interim Final Rule. Specifically, HUD's stated justifications for the IFR are unreasonable because:

1. HUD fails to provide any justification for the IFR's AFFH definition or its certification process. To the extent HUD relies on justifications from its notice for the 2020 PCNC Rule, HUD cannot rely on those justifications because those justifications focused on the outdated, inapplicable parts of 2015 AFFH Rule;
2. HUD does not provide any evidence or data in support of the IFR. Inexplicably, the IFR is silent on combatting segregation and promoting integration;
3. HUD relies on misguided criticisms of the prior AFH process and invokes broad critique of prior AFFH regulations to justify the IFR;
4. HUD does not consider the impacts of or adequately consider alternatives to the IFR; and
5. HUD's stated justifications for the IFR are pretextual, and part of a pre-established, political agenda, rather than the result of fact-based, reasoned decision-making.

Because the IFR lacks any indicia of reasoned decision-making, it is arbitrary and capricious and would violate the APA.

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[253] *State Farm*, 463 U.S. at 43 (internal quotation marks omitted).
[254] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[255] Affirmatively Furthering Fair Housing Revisions, 90 Fed. Reg. at 11021.
[256] Preserving Community and Neighborhood Choice, 85 Fed. Reg. at 47902–03.

A. HUD fails to provide any meaningful justification for the changes made by the 2025 Interim Final Rule.

HUD has failed to engage in even minimal analysis to support its rule and does not provide any meaningful justification for the IFR's revised AFFH definition and certification process. "It is axiomatic that the APA requires an agency to explain its basis for a decision."[257] An "agency 'must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'"[258] "[W]here the agency has failed to provide even a minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law."[259]

Unlike with prior AFFH regulations, which included some evidence or facts in support of the proposed change, the IFR does not provide any facts or other evidence demonstrating current need for the specific changes proposed by the IFR. Indeed, HUD dedicates fewer than ten sentences to justifying this interim final rule.[260] Instead, HUD relies primarily on conclusory statements that are unsupported by evidence or data and which do not engage with the FHA's AFFH mandate.[261] For example, HUD justifies the IFR by arguing that "[l]ess effort and money spent across thousands of state and local jurisdictions attempting to validate community planning theories can mean more affordable and better housing for Americans," without any evidence or data in support and without any reference to "fair housing." [262] HUD further justifies the IFR by citing the lack of "notable enforcement action by HUD" in the past thirty years that "has been based solely upon the failure of a local jurisdiction to meet AFFH obligations."[263] But in doing so, HUD relies on outdated criticisms of the AFH process and sidesteps any meaningful discussion of its AFFH mandate.

And insofar as HUD relies on justifications provided in the notice for the 2020 PCNC Rule, these justifications cannot explain the content of the IFR, including, among other deficiencies, the lack of reference to the phrases "segregation" "discrimination" and "fair housing choice" from the definitions of "fair housing" and "affirmatively further." The PCNC rule focused on deficiencies in the 2015 Rule and related to the AFH process. The 2021 Interim Final Rule *did not* restore the parts of the 2015 Rule related to the creation and submission of AFHs, which were the focus of the notice for the 2020 PCNC Rule on which HUD now relies.

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[257] *Physicians for Soc. Resp. v. Wheeler*, 956 F.3d 634, 644 (D.C. Cir. 2020); *see also Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) ("One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.").
[258] *Encino Motorcars*, 579 U.S. at 221 (quoting *State Farm*, 463 U.S. at 43).
[259] *Id.*
[260] *See* Affirmatively Furthering Fair Housing Revisions, 90 Fed. Reg. at 11,021 (section titled "Justification for this Interim Final Rule").
[261] *Id.; see also Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 153–54 (D.D.C. 1993) (rejecting as arbitrary rule change that was based on "conclusory" justification); *Int'l Ladies' Garment Workers' Union, AFL-CIO v. Dole*, 729 F. Supp. 877, 879–80 (D.D.C. 1989) ("[T]he Secretary's conclusory assurances" that a new rule will ensure effective enforcement of the enabling statute were "unsupported by the record" and thus arbitrary and capricious).
[262] Affirmatively Furthering Fair Housing Revisions, 90 Fed. Reg. at 11,021.
[263] *Id.*

The 2021 Interim Final Rule pared back certain aspects of the 2015 Rule, reducing requirements for program participants while introducing opportunities for those participants to use HUD resources to develop fair housing plans on a voluntary basis. While the 2021 Interim Final Rule more or less restored the 2015 Rule's AFFH definition and certification process, the 2021 Interim Final Rule did not require program participants to complete any fair housing plan. HUD's argument that repeal and replacement of the 2021 Interim Final Rule would better protect state and local decision-making[264] is therefore unsatisfactory because it fails to engage with differences between the 2015 Rule and the 2021 Interim Final Rule.[265]

HUD's rationale for the IFR thus does not provide an explanation, let alone a reasoned explanation, for how its definition and certification process affirmatively further fair housing. Instead, it focuses on critiques of past AFFH regulations, without offering meaningful justification for the drastic changes made by the rule.

B. HUD fails to provide any evidence or data to show that reducing regulatory requirements and eliminating needs analysis will achieve the FHA's AFFH mandate.

Beyond failing to justify the new AFFH definition and certification process, HUD proffers generalized justifications that do not explain how the IFR achieves the statutory AFFH mandate.

First, HUD grounds its repeal of the 2021 Interim Final Rule and 1995 AI Rule in a generalized opposition to "regulatory overreach." This opposition, however, is untethered from any analysis of the FHA's AFFH mandate.[266] HUD does not attempt to explain how the substance of the now-repealed 2021 Interim Final Rule constituted "regulatory overreach," stating only that there have been three decades of "expansive back and forth rulemaking over vague statutory directives."[267] Here, HUD conflates the substance of prior AFFH regulations with the process by which those regulations were developed over time—sidestepping meaningful discussion of the FHA's AFFH mandate and the substance of the IFR.

Second, HUD claims that the 2021 Interim Final Rule was confusing and costly, and that repeal of the 2021 Interim Final Rule will result in "more affordable and better housing for Americans," as "the tangle of rulemaking concerning AFFH . . . promotes confusion and creates

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[264] *See, e.g.*, Affirmatively Furthering Fair Housing Revisions, 90 Fed. Reg. at 11,021 (arguing "the tangle of rulemaking concerning AFFH . . . detract[s] from the ability of thousands of state and local jurisdictions to provide decent, safe and affordable housing").

[265] There are three main differences between the 2015 Final Rule and 2021 Interim Final Rule. First, the 2021 Interim Final Rule reinstated the AFFH definition and corresponding certification process from the 2015 Final Rule, with a few technical changes. Second, the 2021 Final Interim Rule did not reinstate the AFH or impose a requirement that a program participants undertake any specific type of fair housing plan—AFH or AI—to support their certifications. Third, the 2021 Interim Final provided notice that HUD would resume providing technical support and other assistance for jurisdictions that wanted to complete AFHs, AIs, or other forms of fair housing planning.

[266] *See* Affirmatively Furthering Fair Housing Revisions, 90 Fed. Reg. at 11,021; *see also id.* ("This interim final rule follows the directive of, and is consistent with, Executive Order 14192 (Unleashing Prosperity Through Deregulation).").

[267] *Id*.

enormous costs that detract from the ability of thousands of state and local jurisdictions to provide decent, safe, and affordable housing."[268] Relatedly, in the announcement of the IFR, Secretary Turner referred to the "onerous paperwork" and "onerous compliance requirements" of AFFH regulations that "drain[ed]" local budgets and stated that HUD was "aware of communities that have been neglected or negatively impacted due to the demands of recent AFFH rules," but did not identify these communities or otherwise provide evidence to support this claim.[269]

In both the text and announcement of the IFR, HUD conflates "affordable housing" with "fair housing."[270] This approach fails to consider research that the two are not the same. An increase in affordable housing development does not on its own promote integration.[271] By not promoting more equitable distribution of affordable housing opportunities, the IFR fails to further fair housing as HUD is required to do.

Despite references to the costs and confusion program participants faced, HUD does not provide any evidence for how the 2021 Interim Final Rule, with different requirements from the 2015 Rule, imposed such impacts. Though HUD expresses concern for "overburdened" program participants, the IFR does not engage with HUD's earlier efforts to reduce complexity for program participants, including the 2021 Interim Final Rule's "provision on a voluntary basis of a variety of familiar tools [which] [wa]s intended to *reduce the burden* on recipients while ensuring that they ha[d] tools for fair housing planning in order to [affirmatively further fair housing] . . . ."[272]

Third, with respect to eliminating race-specific analysis from housing and homeless needs assessment,[273] HUD claims that "removing these requirements gives local communities maximum flexibility in designing and implementing sound policies responsive to unique local needs, and eliminates overly burdensome, intrusive and inconsistent reporting and monitoring requirements."[274] HUD cites no evidence for this claim. It does not explain how a localized,

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[268] *Id*.
[269] HUD, Press Release, *Secretary Scott Turner Cuts Red Tape by Terminating AFFH Rule* (Mar. 4, 2025), *available at* https://www.hud.gov/news/hud–no–25–034 [hereinafter "HUD Press Release"] ("By terminating the AFFH rule, localities will no longer be required to complete onerous paperwork and drain their budgets to comply with the extreme and restrictive demands made up by the federal government.").
[270] HUD also assumes, without evidence, that reducing regulations will lead jurisdictions to provide more affordable housing. It is possible, however, that jurisdictions will direct resources to other issue areas.
[271] Matthew Murphy *et al.*, Comment to FR 6123-P-02, NYU FURMAN CTR. 2 (Mar. 16, 2020), *available at* https://furmancenter.org/files/Comments/Furman_Center_Steil_Comments_Final_3-16-2020.pdf https://www.regulations.gov/comment/HUD-2023-0009-0519("Focusing only on the cost and quality of housing while ignoring *where* that housing is located, the *quality* of neighborhoods that comes with that housing, *who* gets access to that housing, or the disparate burdens borne by protected classes, is incompatible with the fulfilment of the Fair Housing Act's mandate to affirmatively further fair housing.").
[272] Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. at 30,789 (emphasis added).
[273] *See* 24 C.F.R. §§ 91.205(b)(2) (effective Sept. 8, 2020) (requiring local governments to assess the specific need of "any racial or ethnic group [that] has disproportionately greater need in comparison to the needs of the income category as a whole" as part of consolidated plans) and 91.305(b)(2) (effective Sept. 8, 2020) (same as applied to state governments).
[274] Affirmatively Furthering Fair Housing Revisions, 90 Fed. Reg. at 11,021–22.

race-specific needs assessment hamstrings local policymaking, nor does it explain how including race-specific analysis as part of an otherwise required needs assessment is "overly burdensome." Finally, it fails to justify departure from past practice or explain how eliminating race-specific analysis affirmatively furthers fair housing.

C. HUD relies on misguided criticisms of the prior AFH process to support repeal of the 2021 Interim Final Rule.

HUD cites only one statistic in support of the IFR—that "in the past 30 years, no notable enforcement action by HUD has been based solely upon the failure of a local jurisdiction to meet AFFH obligations."[275] But in relying on this broad critique of prior AFFH regulations, HUD mischaracterizes the prior AFH process, diminishes its benefits, and fails to consider evidence of its success.

First, the AFH process was designed to be iterative and collaborative. Under this process, HUD reviewed and provided feedback on fair housing plans to enable program participants to update those plans, as needed. It did not focus on guaranteeing specific outcomes; nor could it have given the diversity of covered jurisdictions.[276] Rather, the AFFH regulation was a planning rule that aimed to help participants develop robust fair housing plans, "with a view toward better aiding HUD program participants to fulfill th[eir] statutory obligation."[277] Thus, the lack of "notable enforcement action[s]" by HUD does not support the conclusion that prior AFFH regulations were ineffective.[278]

Second, HUD does not consider if and how the lack of "notable enforcement action[s]" by HUD in the last three decades, or since around 1994 when HUD issued the AI requirement, can be explained by aspects of prior HUD enforcement of AFFH obligations. Many agree that the 1995 AI Rule was inadequate in several respects, and that these deficiencies led HUD to develop and start implementing the AFH process in 2015. This AFH process was halted in 2018, when the then-administration withdrew implementation of the requirement.[279] In this sense, the relevant time frame to evaluate meaningful enforcement of AFFH obligations is three years, not

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[275] *Id.* at 11,021.

[276] *See* Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,272 ("While the statutory duty to affirmatively further fair housing requires program participants to take actions to affirmatively further fair housing, this final rule (as was the case in the proposed rule) does not mandate specific outcomes for the planning process. Instead, recognizing the importance of local decision-making, the new approach establishes basic parameters to help guide public sector housing and community development planning and investment decisions in being better informed about fair housing concerns and consequently help program participants to be better positioned to fulfill their obligation to affirmatively further fair housing.").

[277] *Id.*

[278] *See, e.g.*, Justin P. Steil & Nicholas Kelly, *Survival of the Fairest: Examining HUD Reviews of Assessments of Fair Housing*, 29 HOUS. POL'Y DEBATE 736, 747–49 (2019), available at https://bpb-us-e1.wpmucdn.com/sites.mit.edu/dist/d/1179/files/2024/12/Steil-Kelly-2019-Survival-of-the-Fairest-Examining-HUD-AFFH-Reviews.pdf (explaining how HUD's review and initial nonacceptances of the required AFHs "represent a strength of the [2015 AFFH] Rule and HUD's implementation of it" and the benefit of the 2015 AFFH Rule in, among other things, helping municipalities to set meaningful goals and analyze fair housing issues).

[279] *See* 83 Fed. Reg. 23,922 (withdrawing Assessment Tool for Local Governments); *id.* at 23927 (directing all program participants who had not yet completed an AFH that they would continue to be required to conduct an AI); *id.* at 23,928 (withdrawing prior notice extending submission deadline for AFHs by local government consolidated plan program participants).

three decades. But even within that three-year time frame, not all program participants were required to submit AFHs—because the AFH submission timeline was staggered, and in 2018, the deadline for local governments to submit was extended until 2020, soon after which the AFH requirement was withdrawn.[280] This means that, separate and apart from the substance of the AFH requirement, there was a limited pool of data from which HUD could take enforcement action. In short, a documented history of limited enforcement of the AFFH mandate, which the 2015 Final Rule was created to remedy, not the rule itself, precluded the enforcement results HUD claims to seek.[281]

Third, HUD diminishes—or outright ignores—the preliminary, positive results of the 2015 Rule's brief implementation. Specifically, HUD does not meaningfully engage with state and early-level federal data that demonstrates the effectiveness of the AFH process. Evidence shows that the AFH process was more effective than the AI process,[282] and that AFHs reviewed by HUD were more effective than their initial submissions,[283] with effectiveness measured by whether the fair housing plan included a measurable objective or a new policy. According to one study, "[e]vidence demonstrates that the 2015 rule . . . enabled many jurisdictions to critically engage with data on segregation and concentrated poverty within their borders; expand public engagement in advancing fair housing; and develop concrete steps to further fair housing."[284]

D. HUD does not consider the impacts of or adequately consider alternatives to the IFR.

By zeroing in on claimed deficiencies in the AFH process that did not exist 2018 onwards, HUD does not even attempt to justify changes from the 2021 Interim Final Rule. "Reasoned decision-making requires that when departing from precedents or practices, an

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[280] Under the 2015 AFFH Final Rule, program participants were required to submit their AFHs on a staggered timeline depending on the type of program participant. *See* 24 C.F.R. §§ 5.160(a)(1)(i), 5.151. HUD's January 5, 2018, notice extended the deadline for local governments to submit their AFH's "until their next AFH submission deadline that falls after October 31, 2020." 83 Fed. Reg. at 683–84.

[281] *See, e.g.*, Decl. of Deborah Goldberg ¶ 9, *Nat'l Fair Hous. All. v. Carson*, No. 18-1076 (D.D.C. 2018), ECF No. 2–6 ("When HUD suspended the AFFH rule in January 2018, HUD removed all of the benefits of efficiency and thought that had gone into the AFH process and returned to the previous AI process which is deeply flawed and lacks the AFH's organized process, consistent template, and common data sources and maps."). The declaration is attached.

[282] Matthew Murphy *et al.*, *supra* note 271 at 8 ("Of all goals in these jurisdictions' AIs, only five percent contained a measurable objective or included a new policy. By contrast, thirty-three percent of all goals in their AFHs contained a measurable objective or new policy, an increase of twenty-eight percentage points."); *see also id.* ("[T]hese findings suggest that municipalities in their AFHs proposed substantially more new policies with more measurable objectives that focus on the stated goals of the AFFH Rule when compared to their prior AIs." (citing Justin Steil & Nicholas Kelly, *The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance*, 29.1 HOUS. POL'Y DEBATE 85 (2019)).

[283] *Id.* at 8–9 ("Within the AFH process, forty percent or more of goals that focused on zoning, affordable housing, place-based investments, and mobility programs also included a measurable objective or a new policy, indicating that these were areas in which municipalities are particularly likely to make public commitments to implementation."); *id.* at 10 ("The revisions that many grant recipients undertook in response to HUD comments on their original AFH submissions also substantially improved their AFHs. While HUD describes this process as burdensome, the collaborative approach that HUD undertook in its reviews helped grant recipients clarify and strengthen their goals and metrics related to fair housing." (citing Steil & Kelly, *supra* note 278)).

[284] *Id.* at 1–2.

agency must 'offer a reason to distinguish them or explain its apparent rejection of their approach.'"[285] "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change,"[286] but they "may not . . . gloss over or swerve from prior precedents without discussion."[287]

The "core principles of administrative law dictate that 'an agency changing its course must supply a *reasoned* analysis indicating that prior policies and standards are being deliberately changed, not casually ignored[.]'"[288] But, as described above, HUD engages in no analysis to explain the change, let alone a reasoned one.

Equally concerning, HUD appears to not "display awareness that it *is* changing position. An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."[289] HUD does not mention, let alone explain, its elimination of information-sharing and technical-assistance provisions of the 2021 Interim Final Rule. Specifically, HUD does not mention whether HUD will continue to provide technical assistance to program participants that want to voluntarily engage in a AFH or AI planning process; presumably because HUD will not. Nor does HUD explain whether it will continue to make publicly available various tools used to develop fair housing plans, such as the Assessment Tool for Local Governments, Assessment Tool for Public Housing Agencies, Fair Housing Guiding Plan, AFFH Rule Guidebook, and AFFH Data and Mapping Tool.

Some program participants relied on these tools and assistance. For example, the New Rochelle Development Department, as part of the AFH process, benefitted from two trainings, hands-on assistance, and data sets that HUD provided.[290] HUD does not engage with how weakening AFFH regulations would impact program participants with these demonstrated reliance interests.

By completely ignoring these aspects of the 2021 Interim Final Rule, HUD fails to undergo a thoughtful analysis of the IFR's impacts or adequately consider alternatives.

E. HUD's justifications for the Interim Final Rule are pretextual.

To the extent HUD provides any justifications for the IFR, these justifications appear to be pretextual. Agencies must provide genuine justifications for their actions. The "reasoned explanation requirement of administrative law . . . is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public."[291] While a reviewing "court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons," "[a]ccepting contrived reasons

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[285] *Physicians for Soc. Resp.*, 956 F.3d at 644 (quoting *Southwest Airlines Co. v. FERC*, 926 F.3d 851, 856 (D.C. Cir. 2019)).
[286] *Encino Motocars*, 579 U.S. at 221.
[287] *Physicians for Soc. Resp.*, 956 F.3d at 644 (quoting *Southwest Airlines*, 926 F.3d at 856) (cleaned up).
[288] *Id.* at 647 (quoting *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013)).
[289] *F.C.C.*, 556 U.S. at 515.
[290] Decl. of Adam Salgado ¶¶ 12, 14, *Nat'l Fair Hous. All.*, No. 18-cv-1076, Doc. 26-2 (June 4, 2018). The declaration is attached.
[291] *Dep't of Com. v. New York*, 588 U.S. 752, 756 (2019).

would defeat the purpose of" judicial review.[292] In other words, an agency's decision may be motivated several reasons, but the stated reasons for such decision cannot be a pretext for other, unstated reasons.

Put in context with prior statements from Project 2025, then-candidate Donald Trump, and other conservative leaders, it is clear that the IFR is motivated by a pre-determined political mandate, rather than by any reasoned decision-making related to the FHA and its AFFH mandate.

Published in 2023, the Heritage Foundation's Project 2025 agenda, developed by several conservative groups, urged a "new conservative Administration" to "[r]epeal the [AFFH] regulation reinstituted under the Biden Administration and any other uses of special-purpose credit authorities to further equity."[293]

That same year, then-candidate Trump gave a video statement on his proposed housing policy, titled "Agenda47: Ending Biden's War on the Suburbs That Pushes the American Dream Further from Reach." Trump described then-President Biden's 2023 Interim Final Rule as part of the "Left's Marxist housing agenda," a "Marxist crusade . . . coming for your neighborhood," and a "radical left attack on the suburban lifestyle."[294] He claimed that the "woke left is waging full scale war on the suburbs" and that the 2023 Interim Final Rule would place "radical and racist left-wing bureaucrats in charge of micromanaging the housing where you live."[295] Trump's statement also incorporated an article describing opposition to AFFH regulations as politically advantageous to Republicans.[296]

Repealing the 2021 Interim Final Rule is therefore consistent with a broader political agenda that aims to, among other things, gut the federal bureaucracy and rollback efforts at racial integration across society.

First, the current federal administration aims to drastically reduce the size of the federal government, including the budgets and workforces of federal agencies. The IFR, by ending any meaningful HUD role in enforcing AFFH, advances these aims. Project 2025 explained that: "HUD programs tend to perpetuate the notion of bureaucratically provided housing as a basic life need and . . . fail to acknowledge that these public benefits too often have led to intergenerational poverty traps, have implicitly penalized family formation in traditional two-parent marriages,

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[292] *Id.* at 781, 785.
[293] Benjamin S. Carson, *Department of Housing and Urban Development, in* Mandate for Leadership: The Conservative Promise 503, 508–09 (Paul Dans & Steven Groves eds., 2023) [hereinafter "Project 2025"], *available at* https://static.project2025.org/2025_MandateForLeadership_CHAPTER-15.pdf.
[294] Donald J. Trump, Statement, *Agenda47: Ending Biden's War on the Suburbs That Pushes the American Dream Further from Reach* (Mar. 20, 2023), *available at* https://www.donaldjtrump.com/agenda47/agenda47-ending-bidens-war-on-the-suburbs-that-pushes-the-american-dream-further-from-reach [hereinafter "Trump Housing Statement"].
[295] *Id*.
[296] *See* Stanley Kurtz, *Massive Government Overreach: Obama's AFFH Rule is Out*, NAT'L REVIEW (July 8, 2015, 2:47 PM), *available at* https://www.nationalreview.com/corner/massive-government-overreach-obamas-affh-rule-out-stanley-kurtz/ ("At the local level, the Obama administration drove Westchester into the arms of the Republicans. The same thing could happen nationally, at every political level."); *see also id.* ("Not only the policy but the political implications are immense — at the presidential, congressional, state, and local levels.").

and have discouraged work and income growth . . . ."[297] To this end, Project 2025 called for the "immediate redelegation of authority [in HUD] to a cadre of political appointees" and recommended that Congress "consider a wholesale overhaul of HUD that contemplates devolving many HUD functions to states and localities with any remaining federal functions consolidated to other federal agencies."[298] Echoing these concerns, the article cited in Trump's 2023 housing statement warned that, under AFFH regulations, "[z]oning, transportation, [and] education . . . risk[] slipping into the control of the federal government and the new, unelected regional bodies the feds will empower."[299] The current HUD Secretary similarly described AFFH regulations as a "zoning tax" and claimed that terminating the 2021 Interim Final Rule "returns decisions on zoning, home building, transportation, and more to local leaders."[300]

Second, the current federal administration has characterized attempts to address racial discrimination and advance equity and inclusion as illegal. To this end, the administration has already taken several actions targeting diversity initiatives, with the misunderstanding that these initiatives advance unlawful racial preferences.[301] In a similar manner, the article cited in Trump's 2023 housing statement mischaracterized the AFFH as "giv[ing] the federal government a lever to re-engineer nearly every American neighborhood — imposing a preferred racial and ethnic composition," among other consequences.[302] To justify eliminating race-specific analysis from the AFFH regulation's housing and homeless needs assessment,[303] HUD states that removing this requirement is "consistent with the administration's view that . . . HUD should ensure against housing discrimination based on all protected classes and not provide preferences based on racial or ethnic characteristics."[304] However, the FHA mandates ending housing discrimination and addressing segregation, which necessarily involves the analysis of policies and practices on protected classes.

Further, the IFR's abdication of HUD's statutory mandate to affirmatively further fair housing is also consistent with the current administration's goal to drastically reduce the federal government's enforcement of anti-discrimination law. Here, Project 2025 recommended that an incoming conservative administration reject a disparate-impact theory of discrimination and decline to use consent decrees, which are used to address discrimination.[305] Project 2025 also

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[297] Project 2025 at 503.
[298] *Id.* at 503, 512.
[299] Kurtz, *supra* note 296.
[300] HUD Press Release, *supra* note 269 ("The Biden–era AFFH rule was, in effect a 'zoning tax,' which fueled an increase in the cost and a decrease in the supply of affordable housing due to restrictions on local land.").
[301] *See, e.g.*, Exec. Order No. 14173, Ending Illegal Discrimination and Restoring Merit–Based Opportunity, 90 Fed Reg. 8633 (Jan. 21, 2025), *available at* https://www.federalregister.gov/documents/2025/01/31/2025-02097/ending-illegal-discrimination-and-restoring-merit-based-opportunity, *and* Exec. Order No. 14151, Ending Radical and Wasteful DEI Programs and Preferencing, 90 Fed. Reg. 8339 (Jan. 20, 2025), available at https://www.federalregister.gov/documents/2025/01/29/2025-01953/ending-radical-and-wasteful-government-dei-programs-and-preferencing.
[302] Kurtz, *supra* note 296.
[303] *See* 24 C.F.R. §§ 91.205(b)(2) and 91.305(b)(2) (effective Sept. 8, 2020).
[304] Affirmatively Furthering Fair Housing Revisions, 90 Fed. Reg. at 11,021–22.
[305] Gene Hamilton, *Department of Justice*, *in* Mandate for Leadership: The Conservative Promise 545, 558 (Paul Dans & Steven Groves eds., 2023), available at https://static.project2025.org/2025_MandateForLeadership_CHAPTER-17.pdf (recommending DOJ "[s]eek to

specifically recommended "[i]mmediately end[ing] the Biden Administration's Property Appraisal and Valuation Equity . . . policies," which addressed residential appraisal bias.[306]

In the absence of any reasoned explanation, the IFR appears to be the product of these pre-established political goals, rather than of any decision-making tied to the FHA's AFFH mandate. While "a court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities," here, "[s]everal points, considered together, reveal a significant mismatch between the decision . . . made and the rationale . . . provided."[307] For this reason, the 2025 Interim Final Rule lacks genuine justification.

V. The IFR is inconsistent with the recent Supreme Court decision in *Loper Bright* and *Students for Fair Admissions* is inapplicable to the AFFH mandate.

HUD invited commentary on whether the IFR complies with recent Supreme Court precedent. In short, the IFR is unlikely to pass scrutiny under the standard set out in *Loper Bright* and *Students for Fair Admissions (SFFA)* is inapplicable to the AFFH mandate since the Supreme Court's analysis was specifically tailored to whether race-based college admissions violated the Equal Protection Clause.

A. Under *Loper Bright*, courts will likely find the IFR's interpretation of the AFFH mandate impermissible under the FHA.

HUD cannot justify the IFR by citing to Supreme Court's decision in *Loper Bright Enters. v. Raimondo*.[308] In *Loper Bright*, the Supreme Court held that "agency interpretations of statutes—like agency interpretations of the Constitution—are not entitled to deference" and that it is "the responsibility of the court to decide whether the law means what the agency says."[309] *Loper Bright* makes clear that HUD's current interpretation of the AFFH mandate is not entitled deference simply because HUD is primarily responsible for enforcing the FHA. Further, *Loper Bright* cannot cure the IFR's failure to comply with FHA and its case law.

Loper Bright obligates Federal courts to "use every tool at their disposal to determine the best reading of the statute," even if that means second-guessing officials with presumably greater subject matter expertise. Congress clearly and explicitly provided HUD with the authority and duty to follow the AFFH requirement in multiple statutes.[310] HUD's current interpretation of the AFFH requirement as reflected in the IFR is particularly suspect because it directly conflicts with

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terminate any unnecessary or outdated consent decrees to which the United States is a party"); Jonathan Berry, *Department of Labor and Related Agencies*, *in* Mandate for Leadership: The Conservative Promise 581, 582–83 (Paul Dans & Steven Groves eds., 2023), available at https://static.project2025.org/2025_MandateForLeadership_CHAPTER-18.pdf (calling for the President to "[e]liminate disparate impact liability" and for Congress to "[e]liminate disparate impact as a valid theory of discrimination for race and other bases under Title VII and other laws").

[306] Project 2025 at 508.

[307] *Dep't of Com.*, 588 U.S. at 781, 783.

[308] 603 U.S. 369 (2024).

[309] *Id.* at 392.

[310] *See* 42 U.S.C. §§ 3601–19.

FHA's legislative text, purpose, history, and case law and as well as HUD's past interpretations of the AFFH mandate, which have remained the same since 1988[311] thus suggesting that the IFR does not represent the "best reading" of the statutory provisions.

To demonstrate the best reading of the statute, decades of judicial interpretation show that courts have consistently held that Congress intended that "HUD do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases."[312] Stated simply, the AFFH mandate requires more than simple compliance with the FHA's anti-discrimination provisions, as the IFR suggests.[313]

This interpretation is decades-old, and is consistent across many courts, which demonstrates that the IFR is a clear deviation from the best reading of HUD's obligations under the FHA. In the first appellate decision interpreting section 3608, for example, the Third Circuit emphasized the importance of using racial and socioeconomic data to ensure that "the agency's judgment was an informed one" using an institutionalized method to assess site selection and other related issues.[314] Nothing in the IFR suggests that HUD or its program participants will be required to undertake efforts to actually improve equitable access to housing in any informed way, especially when it eliminates any requirements to assess existing barriers to fair housing.[315] The IFR's passive approach to affirmatively furthering fair housing and lack of specific guidance do not meet the standard outlined by the best and consistent reading of the FHA. Through this IFR, HUD has abrogated its responsibility to ensure that the goal of open, integrated housing in our communities is achieved, and housing segregation is eliminated.

B. The AFFH mandate in the FHA, as well as the prior implementing regulations, including the 1995 AI Rule, the 2015 Rule, and the 2021 Interim Final Rule, are consistent with the broad principles of equal protection.

The Supreme Court's holding in *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll. (SFFA)*,[316] does not apply to the AFFH mandate. SFFA concerned university admission policies that explicitly used race as a "determinative tip" in favor of certain

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[311] *Id.* at 394 ("The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions. In exercising such judgment, though, courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" consistent with the APA. And interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning.").

[312] *N.A.A.C.P. v. HUD*, 817 F.2d at 154 (emphasis added); *see also Otero*, 484 F.2d at 1134 (section 3608(d) requires that "[a]ction must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunity the Act was designed to combat") (emphasis added).

[313] *See N.A.A.C.P v. HUD*, 817 F.2d at 155.

[314] *Shannon*, 436 F.2d at 821-22.

[315] *See e.g., N.A.A.C.P. v. HUD*, 817 F.2d at 156 ("a failure to consider the effect of a HUD grant on the racial and socio-economic composition of the surrounding area" would be inconsistent with the FHA's mandate).

[316] 600 U.S. 181 (2023).

applicants.[317] Neither the 2021 Interim Final Rule nor the 2015 Rule include anything comparable to this. Even if *SFFA* were directly applicable here, to the extent that the IFR suggests that any regulatory requirements associated with the AFFH mandate in the FHA would be inconsistent with the Supreme Court's holding, HUD is incorrect. Implementation of the AFFH mandate is consistent with the general equal protection principles articulated in *SFFA* and other recent precedent.

The most important fact that distinguishes *SFFA* is that none of the prior formulations of the AFFH regulations made racial classifications or required race-based government action.[318] For example, although HUD's consolidated plan regulations, which were in place since 1995, required grantees to assess whether housing needs differed by race or ethnicity in their states or localities, these regulations did not mandate that grantees adopt any race or ethnicity-based preferences when devising plans to address these disparities.[319] Rather, these regulations left it up to grantees to determine how best to address their community's needs while simultaneously requiring that grantees comply with the FHA and other civil rights laws when developing and implementing solutions to address such needs. *SFFA* did not hold such race-neutral policies unlawful, including race-neutral policies that are designed, at least in part, to [320] achieve diversity. Even the most strident AFFH regulatory mandate simply required HUD grantees to conduct an AFH[321] that would: (1) meaningfully evaluate fair housing issues in their geographic area such as segregation, conditions that restrict fair housing choice, and disparities in access to housing, (2) identify factors that primarily contribute to the creation or perpetuation of fair housing issues, and (3) establish fair housing priorities and goals.[322]

The AFFH mandate that the FHA imposes on HUD and its program participants is both consistent with recent Supreme Court precedent and greater than the one suggested by the IFR.[323] Indeed, in 2015, the Supreme Court explained that "[m]uch progress remains to be made in our Nation's continuing struggle against racial isolation . . . The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society."[324] And,

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[317] *Id.* at 195.
[318] *SFFA* concerned higher education admissions practices that permitted an applicant's race to be considered as a "plus" factor in evaluating an applicant for admission. *Id*. at 196.
[319] 24 C.F.R. §§ 91.205(b)(2), 91.305(b)(2) (2020) (repealed 2025).
[320] In fact, the Supreme Court has encouraged "draw[ing] on the most promising aspects of . . . race-neutral alternatives" to achieve "the diversity the [institution] seeks." *Grutter v. Bollinger*, 539 U.S. 306, 339, 342 (2003). *SFFA* did not overrule *Grutter*, nor did it call into question that decision's approval of race-neutral measures to increase student body diversity.
[321] Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,355.
[322] *Id.* at 42,355-42,356.
[323] In any event, even if there were a HUD program participant that elected to provide race-based preferences in its efforts to affirmatively further fair housing in a manner that implicated heighted scrutiny, it would meet a compelling interest that has continued to be recognized by the Court. Indeed, the *SFFA* Court maintained its recognition that, where race-based government action must be justified by a compelling interest, that requirement is met where the action is intended to remediate "specific, identified instances of past discrimination that violated the Constitution or a statute." *SFFA*, 600 U.S. at 207. As discussed above, the Fair Housing Act and the AFFH mandate within it were passed with the explicit recognition of historical government-sponsored segregation and redlining practices and were designed to remedy the continuing effects of such practices. *See supra*, Section I.B.
[324] *Inclusive Communities*, 576 U.S. at 546-47.

in *Inclusive Communities*, the Supreme Court held that the FHA's broad remedial purposes cannot be accomplished simply by passively suggesting that intentional discrimination is not permitted.[325]

VI. Conclusion

As detailed above, the IFR contravenes the very purpose of the FHA to address entrenched patterns of segregation and to promote integration. The IFR renders HUD completely unable to meaningfully fulfill its mandate under the FHA to affirmatively further fair housing. For all these reasons, the States strongly oppose the IFR and respectfully urge that it be rescinded.

Sincerely,

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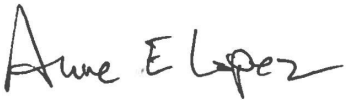

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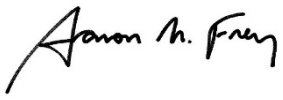

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[325] *Id.*

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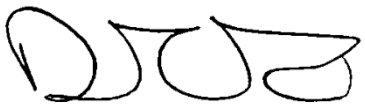

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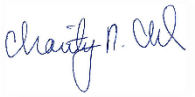

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