

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

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

*Plaintiffs,*

STATE OF NEW YORK,

*Proposed Intervenor-Plaintiff,*

v.

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

- and -

U.S. DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENT,

*Defendants.*

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

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

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## **PRELIMINARY STATEMENT**

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

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

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



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

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

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

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

### **STATEMENT OF FACTS**

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

#### **A. Statutory and Regulatory Background**

##### **1. The statutory mandate to affirmatively further fair housing**

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

increases”); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973) (“Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.”); *see also Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) (Congress’s intent was to promote “truly integrated and balanced living patterns” (quoting 114 Cong. Rec. 3422 (1968) (statement of Sen. Mondale))).

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

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

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

## **2. Analysis of impediments to fair housing choice**

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

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

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

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

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

## **B. The Affirmatively Furthering Fair Housing Rule**

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

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

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

[T]aking actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially or ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.

*Id.* at 42,316.

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

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

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

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

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

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

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



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

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

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

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

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

#### **D. HUD’s Suspension of the AFFH Rule**

##### **1. The January Suspension Rule**

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

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

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

## **2. The May Suspension Rule**

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

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

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

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

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

## **ARGUMENT**

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

### **A. Plaintiffs Are Likely to Prevail on the Merits.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

<sup>5</sup> *New York AI* at 33-41.

<sup>6</sup> *Id.* at 39-40.

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

<sup>8</sup> *Id.* at 17; Salgado Decl. ¶ 14.

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

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

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<sup>9</sup> Salgado Decl. ¶ 14.

<sup>10</sup> New Rochelle AFH at 39, 50, 67, 74-76

<sup>11</sup> Salgado Decl. ¶ 14.

<sup>12</sup> Decl. of Franklin A. Lenk ¶¶ 3-4.

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

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

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

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

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<sup>13</sup> *New York AI* at 251-52.

<sup>14</sup> *New Rochelle AFH* at 6.

<sup>15</sup> *Salgado Decl.* ¶ 14.

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

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

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

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

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

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

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

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

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

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

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

<sup>18</sup> Salgado Decl. ¶ 12.

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

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

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* ¶ 13.



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**CONCLUSION**

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

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