IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL FAIR HOUSING ALLIANCE, TEXAS LOW INCOME HOUSING INFORMATION SERVICE, and TEXAS APPLESEED Plaintiffs, 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.	No. 1:18-cv-01076-BAH Hon. Beryl A. Howell

BRIEF OF HOUSING, CONSUMER, ANTI-HOMELESSNESS, AND ANTI-POVERTY ADVOCATES AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND SUMMARY JUDGMENT

Amicus National Housing Law Project and other housing, consumer, anti-homelessness, and anti-poverty advocates submit this Brief of Amici Curiae in support of the Plaintiffs' Motion for Preliminary Injunction and Summary Judgment under Local CR 7(o).

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I. IDENTITY & INTERESTS OF AMICI CURIAE

Amici are national, state, and local organizations, and one distinguished law professor, with expertise on the laws, policies, and history relating to issues of housing, consumers, homelessness, and poverty in the United States, as well as extensive experience advocating for the interests of tenants, homeowners, consumers, and people experiencing poverty and homelessness. Many of these organizations and their staffs have taken part in planning or analysis, given comments or other input, or participated in other ways related to implementation of the Fair Housing Act's affirmatively furthering fair housing (AFFH) requirements, under the "Assessment of Fair Housing" process created by the AFFH Rule, and the preceding "Analysis of Impediments." The outcome of this action will have tremendous implications on the missions and activities of these amici, as the Court is asked to decide whether the U.S. Department of Housing & Urban Development may substantially defer compliance with the duty to affirmatively further fair housing by suspending implementation of a key aspect of the AFFH Rule – a delay amici believe will allow established patterns of residential segregation and racial inequality to harden and replicate in subsequent generations. *See* Appendix A for a list of amici and brief statement of interest for each.

This brief was principally authored by staff of amicus National Housing Law Project, along with Anne Bellows, counsel for amici. No party's counsel participated in writing this brief. Neither any party nor any party's counsel contributed money related to the preparation or submission of this brief. No person other than amici curiae, their members, and their counsel contributed money related to the preparation or submission of this brief. *See* Appendix A for a FRAP 29(a)(4)(A) statement as to each amicus.

II. SUMMARY OF ARGUMENT

The actions of the U.S. Department of Housing and Urban Development ("HUD") to avoid full implementation of the 2015 Affirmatively Furthering Fair Housing Rule are contrary to law and should be enjoined for the reasons set forth in the Plaintiffs' Renewed Motion for a Preliminary Injunction and Summary Judgment. Amici curiae write separately to highlight three distinct points. First, the continuing legacy of residential segregation in this country grew largely from discriminatory federal policies, and can be counteracted only through determined and sustained action. Second, returning to the failed Analysis of Impediments process effectively invites HUD grantees not to administer their programs in ways that advance desegregation and promote inclusive communities. Third, the pretextual reasons HUD has given for holding up the AFFH Rule are a perfunctory disguise for an unlawful policy—one of deliberate inaction, contrary to the agency's duty to affirmatively further the policies of the Fair Housing Act.

III. ARGUMENT

A. America's history of explicitly racist housing policy has left an enduring legacy of segregation that requires purposeful and sustained efforts to overcome.

Residential racial segregation is commonplace in the United States today, just as it has been for much of our nation's modern history. "The average white person in metropolitan America[ ] lives in a neighborhood that is 75% white…[while] a typical African American lives in a neighborhood that is only 35% white … and as much as 45% black."[1] Much of this segregated residential landscape derives from past discriminatory federal housing policies that continue to have profound and lasting effects on American society. *See* Douglas S. Massey, *The*

[1] John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census* 2 (Mar. 24, 2011), https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf.

Legacy of the 1968 Fair Housing Act, 30 Soc. F. 571, 572 (2015) ("The black urban ghetto was created in the late nineteenth and early twentieth centuries through deliberate actions taken by white Americans to isolate African Americans spatially, and thus marginalize them socially, economically, and politically."). Implementation of the landmark Affirmatively Furthering Fair Housing Rule (AFFH Rule)[2] is crucial to addressing and ultimately eradicating this legacy of segregation, consistent with HUD's mandate to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [the Fair Housing Act]." 42 U.S.C. § 3608(e)(5).

1. Federal housing policy bears heavy responsibility for residential segregation.

The deep racial segregation that has taken hold in America throughout the past century resulted in no small part from intentional federal policies, one of the most important of which was "redlining," an overtly racist method multiple federal agencies used to determine which homes could qualify for residential mortgage insurance. Redlining originated in the 1930s with the federal Home Owners' Loan Corporation, which created maps that marked certain neighborhoods in red to denote their "hazardous" nature.[3] HOLC considered the socioeconomic characteristics of a neighborhood "much more important at that time in determining the value of dwelling than structural characteristics,"[4] with areas occupied by "English, Germans, Scotch, Irish, [and] Scandinavians" rated highest while communities with "Negroes" and "Mexicans"

[2] *See generally* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (codified at 24 C.F.R. pt. 5, et al.).

[3] Jennifer S. Light, *Nationality and Neighborhood Risk at the Origins of FHA Underwriting*, 36 J. of Urb. Hist. 634, 671 n.85 (2010); *see also* Kenneth T. Jackson, *Race, Ethnicity, and Real Estate Appraisal: The Home Owners Loan Corporation and the Federal Housing Administration*, 6 J. of Urb. Hist. 371, 419-52 (Aug. 1980).

[4] Charles L. Nier, III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. Marshall L. Rev. 617, 623 (1999).

were assigned the lowest ratings.[5] HOLC, an agency that helped troubled urban homeowners to refinance or buy back their homes from foreclosure, made relatively few loans.[6] But its system of redlining served as a model that both private banks and other federal agencies—especially the Federal Housing Administration (FHA) and Veterans Administration (VA) —adopted for administering their own mortgage insurance programs.[7]

FHA-insured loans enabled borrowers to finance up to 80% of a home purchase over 20 years, making home ownership more attainable.[8] Yet those loans were generally only available in "stabl[e]" white communities, especially those insulated from what it called "'inharmonious racial groups'" by highways or other barriers.[9] The FHA deemed neighborhoods with non-white

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[5] *Id*. at 622n.35 (1999).

[6] *See* Nier, *supra,* at 623.

[7] *See* Light, *supra*, at 671 n.85 (a Federal Home Loan Bank official commented at the time that the FHA "'was fortunate in being able to avail itself of much of the … experience in appraisal and the development of appraisal data by Home Owners Loan Corporation'"; *see also* Nier, *supra*, at 624 (noting that "private banks adopted the HOLC's racially discriminatory polices thereby institutionalizing and disseminating the practice of racial redlining," and that the "greatest effect of the HOLC rating system was its influence on the underwriting practices of the FHA and the VA") (footnote omitted).

[8] *See* Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* 64 (2017); *see also* U.S. Dep't. of Housing & Urban Dev., *The Federal Housing Administration (FHA),* https://www.hud.gov/program_offices/housing/fhahistory (last visited June 3, 2018) (explaining that home loans prior to FHA mortgage insurance typically limited borrowers to "50 percent of the property's market value, with a repayment schedule spread over three to five years and ending with a balloon payment.").

[9] *See* Rothstein, *Color of Law*, *supra,* at 65-66 (FHA removed words like "inharmonious racial groups" from its manual in 1947, "but barely pretended that this represented a policy change."); *see* Nier, *supra*, at 622, n.35 ("A widely reproduced list gives a ranking of ethnic groups in order of most desirable to those which had the most adverse effect on property values …: (1) English, Germans, Scotch, Irish, Scandinavians (2) North Italians (3) Bohemians or Czechs (4) Poles (5) Lithuanians (6) Greeks (7) Russians, Jews (lower class) (8) South Italians (9) Negroes (10) Mexicans," citing Homer Hoyt, *One Hundred Years of Land Values in Chicago* 316 (1933); Calvin Bradford, *Financing Home Ownership: The Federal Role in Neighborhood Decline*, 14 Urb. Aff. Q. 313, 323 (1979).

residents too risky to insure, as well as some "white neighborhoods near black ones that might possibly integrate in the future."[10] The FHA also discouraged lending in older urban neighborhoods, favoring instead new homes built in suburban communities that generally denied admission to non-whites.[11] Altogether, the FHA and VA mortgage insurance programs "helped nearly eleven million families to own houses and another twenty-two million families to improve their properties" by 1972, with at least 98 percent of those loans going to white borrowers.[12] While steering white families to suburbs, where they could obtain the favorable FHA and VA loans, redlining limited families of color to older, usually urban neighborhoods where housing was generally of lower quality and available only at higher prices and often on predatory terms.[13]

Redlining was hardly the only federal policy behind the segregation of American cities in the 20th century. Federal interstate highway construction decimated neighborhoods of color nationwide.[14] Public housing development resulted in "segregated projects even where there was no previous pattern of segregation" as projects built in previously integrated neighborhoods

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[10] *See* Rothstein, *Color of Law*, *supra*, at 65.

[11] *See* Rothstein, *Color of Law*, *supra*, at 65, 72-73.

[12] *See* George Lipsitz, *The Possessive Investment in Whiteness: How White People Profit From Identity Politics*, 107 (2006) (citation omitted).; *see* Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States*, 205 (1985).

[13] *See, e.g.*, Beryl Satter, Chapter 2: "The Noose Around Black Chicago," 36-40, *Family Properties: Race, Real Estate, and the Exploitation of Black Urban America* (2010).

[14] *See* Alan Pyke, *Top infrastructure official explains how America used highways to destroy black neighborhoods*, ThinkProgress (Mar. 31, 2016), https://thinkprogress.org/top-infrastructure-official-explains-how-america-used-highways-to-destroy-black-neighborhoods-96c1460d1962/ ("In the first 20 years of the federal interstate system alone … highway construction displaced 475,000 families and over a million Americans. Most of them were low-income people of color in urban cores."); *see also* Alana Semuels, *The Role of Highways in American Poverty*, The Atlantic (Mar. 18, 2016), https://www.theatlantic.com/business/archive/2016/03/role-of-highways-in-american-poverty/474282/.

were designated as "white" or "black" only.[15] The Federal Housing Administration supported racially restrictive covenants, which usually blocked homeowners from selling to non-white buyers. The U.S. Supreme Court held state enforcement of the practice unconstitutional in 1948.[16] The cumulative impact of these and other federal, state, and local policies, together with private acts of discrimination, was profound: by 1960 segregation levels in U.S. cities approached those of apartheid South Africa.[17]

2. The Fair Housing Act dramatically shifted official federal housing policy.

The Fair Housing Act, passed in 1968, prohibited both public and private discrimination in housing and housing-related transactions based on race, color, religion, or national origin. *See generally* 42 U.S.C. § 3601 *et seq*. (including additional protected classes subsequently added by amendment). This alone would already have represented a major shift in federal housing law, as longstanding abuses like mortgage insurance redlining or whites-only suburbs became instantly unlawful. But Congress did not stop there. Recognizing that entrenched patterns of segregation and housing inequality could only be dismantled through broad and resolute efforts, Congress also required that all federal executive departments and agencies work to undo the harms that decades of segregationist housing policies had caused. Specifically, the Act directed them to

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[15] Rothstein, *Color of Law*, *supra*, at 21.

[16] *See Shelley v. Kraemer*, 334 U.S. 1 (1948).

[17] Otto Kerner, et al., *Report of the National Advisory Commission on Civil Disorders*, 6 (1968), https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf ("the average segregation index for 207 of the largest U.S. cities was 86.2" meaning that *86 percent* of African Americans would have needed to move to create an "unsegregated population distribution"); by comparison, the median segregation index for South African metropolitan areas in 1991 was 94.9. *See* A.J. Christopher, *Urban Segregation in Post-Apartheid South Africa*, 38 Urb. Stud. 449, 452 (2001), available at: http://www.urbanlab.org/articles/Doc_Seminars/S03_Segregation/Christopher,%20A.J.%20-%20Urban%20Segregation.pdf.

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"administer their programs and activities relating to housing and urban development...in a manner affirmatively to further the purposes of this [Act]," 42 U.S.C. § 3608(d), and separately mandated that the HUD Secretary affirmatively further fair housing. *See* 42 U.S.C. § 3608(e)(5); *see also NAACP v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 154-55 (1st Cir. 1987).

The duty to affirmatively further fair housing monumentally transformed federal housing policy, obligating HUD to "do more than simply not discriminate itself ... [and] use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases." *NAACP*, 817 F.2d at 155 (outlining legislative history and subsequently collecting cases). HUD must take proactive steps to overcome patterns of segregation and discrimination and promote "'truly integrated and balanced living patterns.'" Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,274 (AFFH Rule preamble quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972)). The duty to affirmatively further fair housing extends both to HUD's direct decision-making, *see, e.g.*, *Shannon v. U.S. Dep't of Hous. & Urban Dev.*, 436 F.2d 809, 820-21 (3d Cir. 1970); *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 457-58, 462-64 (D. Md. 2005), and to HUD's oversight of state and local governments and public housing agencies in the administration of its programs, *see, e.g., Cty. of Westchester v. U.S. Dep't of Hous. & Urban Dev.*, 802 F.3d 413, 434-36 (2d Cir. 2015); *NAACP*, 817 F.2d at 156-57.

3. Previous attempts to implement the affirmatively furthering fair housing mandate have failed to overcome the legacy of segregation.

The first serious effort to carry forward the Act's affirmatively furthering mandate was HUD Secretary George Romney's "Open Communities" initiative in the early 1970s, a proposal

that would have conditioned HUD funding on communities allowing subsidized housing.[18] But Romney's efforts were undermined by his own administration and ultimately abandoned.[19]

Congress reaffirmed the duty to affirmatively further fair housing within the Community Development Block Grant (CDBG) program, which required grantees to certify they would affirmatively further fair housing. *See* Pub. L. No. 98-181, § 104, 97 Stat. 1153, 1162 (1983) (codified as amended at 42 U.S.C. § 5304(b)(2)). In 1988, HUD incorporated this obligation into implementing regulations for the CDBG program.[20] Still, affirmatively furthering continued to "lay largely dormant as a regulatory tool" until 1994, when Executive Order 12,892 directed HUD to promulgate regulations regarding the duty to affirmatively further fair housing, including a method to identify impediments within HUD programs and activities that restrict fair housing choice, and "incentives" to maximize inclusive practices.[21] HUD issued regulations in 1995 requiring CDBG and other HUD grantees to complete an "Analysis of Impediments to Fair Housing Choice" (or "AI").[22]

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[18] *See* Florence Wagman Roisman, *George Romney, Richard Nixon, and the Fair Housing Act of 1968*, Poverty & Race Research Action Council, http://www.prrac.org/pdf/RoismanHistoryExcerpt.pdf (last visited June 3, 2018).

[19] *See* Mark Bergen, *George Romney and the Last Gasps of National Urban Policy*, Forbes (Feb. 28, 2012, 12:31 PM), https://www.forbes.com/sites/markbergen/2012/02/28/george-romney-and-the-last-gasps-of-national-urban-policy/2/#656f713f56a6.

[20] The 1988 CDBG regulations included the affirmatively furthering fair housing certification requirement, and included both an "analysis to determine the impediments to fair housing choice" and the "lawful steps" taken to overcome identified effects of conditions limiting fair housing choice within HUD's fair housing review criteria. Community Development Block Grants, 53 Fed. Reg. 34,416, 34,457, 34,468-69 (Sept. 6, 1988) (featuring an AFFH certification requirement at § 570.601(b), and review criteria at § 570.904(c)(1), (2)).

[21] Austin W. King, Note, *Affirmatively Further: Reviving the Fair Housing Act's Integrationist Purpose*, 88 N.Y.U. L. Rev. 2182, 2190 (2013); *see* Exec. Order No. 12,892, 59 Fed. Reg. 2939, 2940-41 (Jan. 17, 1994)).

[22] Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. 1878, 1890 (Jan. 5, 1995) (preamble discussion announcing analysis of impediments requirement); *see also* 24 C.F.R. § 91.225(a)(1) (1995); 24 C.F.R. § 570.601(b) (1995)). This

The AI process required local government recipients of CDBG funding and certain other HUD funds[23] to identify impediments to "fair housing choice" in their jurisdictions, take "appropriate actions to overcome the effects" of identified impediments, and maintain records regarding the analysis and actions. 24 C.F.R. § 91.225(a)(1) (2015) (pre-AFFH Rule local government Consolidated Plan regulation). Although grantees had to certify compliance with these requirements, the AI "was generally not submitted to or reviewed by HUD." Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,272.

As the Government Accountability Office ("GAO") found in 2010, however, AIs varied greatly in quality and depth of analysis, with many grantees producing documents that reflected an insufficient commitment to fair housing.[24] Documents submitted to GAO included, for example, a "four-page description of the community itself, and it did not identify impediments to fair housing," and "a two-page e-mail that identified one impediment to fair housing choice, and in follow up conversations [sic] an official from this grantee, confirmed that the document constituted its AI." GAO Report at 14-15. These documents were so deficient, that GAO was unsure if they even could be considered AIs. *Id.* at 15. Grantees also failed to consistently update

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more recent framework contrasted with the 1988 regulations, where analyzing impediments to fair housing choice and taking steps based on that analysis were merely "'performance standards'" rather than requirements. Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate,* 100 Ky. L. J. 125, 150 (2011-2012). Still, these post-Executive Order regulations were "more procedural than substantive." King, *supra*, at 2191.

[23] The AI requirement applies to certain HUD grantees required to complete a planning document called the "Consolidated Plan." Other formula grant programs covered by the Consolidated Plan are listed at 24 C.F.R. § 91.2(a).

[24] S*ee generally* U.S. Gov't Accountability Off., GAO-10-905, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS (2010), available at: https://www.gao.gov/assets/320/311065.pdf.

AIs in a timely manner. The 2010 report estimated that 29% of AIs were written in 2004 or earlier, and 11% were written in the 1990s. GAO Report at 9.

Even preparing a detailed AI and updating it at appropriate intervals did not ensure that a grantee would affirmatively further fair housing. A 2007 lawsuit alleged that a county in New York had falsely certified compliance with its affirmatively furthering fair housing obligations—and received over $50 million in HUD funds—without conducting an adequate Analysis of Impediments. *United States ex. rel. Anti-Discrimination Ctr. v. Westchester Cty.*, 668 F.Supp.2d 548, 550-51 (S.D.N.Y. 2009). The County had consistently prepared and updated AIs, but those AIs did not analyze "race as it pertain[ed] to impediments to fair housing choice"—a stunning omission in a county where racial concentration was "extreme."[25] *Id.* at 564.[26]

In all, the AI approach proved largely ineffective for ensuring grantees affirmatively furthered fair housing.[27] One shortcoming was its lack of HUD-supplied information,[28] with (what at least one observer called) "threadbare" regulations and "detailed but voluntary

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[25] Schwemm, *Structural Barriers, supra,* at 154 (noting Westchester County's northern areas are "virtually all white, while in the south, a few communities have substantial black populations (as high as 59%) but many others are less than 1% black") (footnote omitted). *See also United States ex rel. Anti-Discrimination Ctr. of Metro N.Y. v. Westchester Cty.*, 495 F.Supp.2d 375, 377 (S.D.N.Y. 2007) (the County "explained that it [saw] discrimination as a problem of income discrimination, not racial discrimination.").

[26] The *Westchester* litigation produced "an historic $62.5 million settlement" requiring the County "to develop at least 750 affordable housing units in Westchester neighborhoods with very small African-American and Latino populations" subject to federal monitor oversight. *United States ex rel. Anti-Discrimination Center v. Westchester County*, Relman, Dane & Colfax, http://www.relmanlaw.com/civil-rights-litigation/cases/westchester.php, (last visited June 4, 2018).

[27] Schwemm, *Structural Barriers, supra,* at 153 (noting that CDBG grantees' compliance with AI requirements after 1995 was "mixed at best").

[28] *See* Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,348 ("Under the AI planning process, HUD did not specify or provide grantees relevant information, and did not clearly link grantees' AIs to community planning efforts.").

recommendations on how to conduct an AI."[29] The *Westchester* case demonstrated another key shortcoming—an absence of meaningful oversight or review, which could enable grantees to persistently fail to affirmatively further fair housing despite superficial compliance with the regulatory scheme. *See generally Westchester*, 495 F.Supp.2d at 377-78.

4. Segregation and racial disparities in housing remain entrenched and reproduce through structural and economic dynamics.

As the mandate to affirmatively further fair housing has remained largely unfulfilled, the lasting harms from our national legacy of segregation have continued to perpetuate patterns of inequality in American communities of to this day.[30] "[R]ace–based residential segregation remains high, with only modest declines shown in each decanal census from 1970 through 2010."[31] The segregation indices for the largest 52 metropolitan areas with at least 20,000 African-American residents currently range from 50-70 (out of 100, with 100 indicating complete segregation), rates "far below the nearly apartheid racial separation that existed for much of the nation's history, [but] still high measures—more than half of blacks would need to move to achieve complete integration."[32] This high degree of segregation remains despite a marked lessening of overt racial prejudice; whereas in 1978, 70% of white Southerners believed

[29] King, *supra*, at 2191.

[30] *See* Schwemm, *Structural Barriers*, *supra*, at 175 ("For decades, however, § 3608's commands have been ignored. Local governments regularly failed to act according to the AFFH mandate, and HUD rarely responded with disapproval, much less forceful action.").

[31] *Id*. at 131 (footnote omitted).

[32] William H. Frey, *Census shows modest declines in black-white segregation*, The Brookings Institution (Dec. 8, 2015), https://www.brookings.edu/blog/the-avenue/2015/12/08/census-shows-modest-declines-in-black-white-segregation/.

a home seller should be allowed to engage in race discrimination, a much lower (yet still troubling) 28% held that belief in 2014.[33]

Much of this decline in racial prejudice may be illusory, for "[a]bundant evidence suggests that racial discrimination did not end with civil rights legislation so much as go underground to become clandestine and less visible."[34] But malign racial prejudice is not necessary to sustain the segregation of American communities. Rather, its persistence decades after the Fair Housing Act's passage speaks to the tendency of historical housing discrimination to reproduce inequality in subsequent generations—especially when modern policies that sustain or contribute to segregation manifest in economic terms.[35]

In 2016, the median African-American family had about one-tenth as much wealth ($17,600) as the median white family ($171,000), a "wealth gap [that] persists regardless of households' education, marital status, age, or income."[36] Much of this wealth gap can be attributed to historical discrimination, including in fields such as employment and education as well as housing.[37] But the primary cause is a disparity in home ownership rates—currently

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[33] *See* Anna Maria Barry-Jester, *Attitudes Toward Racism And Inequality Are Shifting*, Fivethirtyeight (Jun. 23, 2015, 9:52 AM), https://fivethirtyeight.com/features/attitudes-toward-racism-and-inequality-are-shifting/.

[34] Massey, *supra*, at 582.

[35] john a. powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 Law & Ineq. 355, 393-94 (2007); Richard T. Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 Harv. L. Rev. 1841, 1849-56 (1993-94).

[36] Angela Hanks, et al., *Systematic Inequality: How America's Structural Racism Helped Create the Black-White Wealth Gap*, Center for American Progress (Feb. 21, 2018, 9:03 AM), https://www.americanprogress.org/issues/race/reports/2018/02/21/447051/systematic-inequality/

[37] *See* Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods – A Constitutional Insult*, Economic Policy Institute: Race and Social Problems (Nov. 12, 2014), https://www.epi.org/publication/the-racial-achievement-gap-segregated-schools-and-segregated-neighborhoods-a-constitutional-insult/.

72.4% for non-Hispanic whites and just 42.2% for African Americans.[38] This is because home equity represents about two-thirds of a typical U.S. family's wealth.[39]

This stark racial difference in home ownership rates originated when "[d]uring the foundational period of the 1930s and 1940s, these federally backed [mortgage lenders] used redlining, local control, and overt discrimination to make it very difficult, often impossible, for blacks to qualify for mortgages."[40] Since then, as Professor Matthew Desmond explains, "[t]his legacy has been passed down to subsequent generations. Today a majority of first-time home buyers get down-payment help from their parents; many of those parents pitch in by refinancing their own homes."[41] For families of color who were denied access to federally insured loans and the benefits of home ownership, the harms "were profound and long-lasting," because, as one commentator has explained: "[m]issed chances at homeownership obviously compound over time. Renters accumulate no equity, while homeowners almost always secure financial gains that exceed inflation."[42]

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[38] U.S. Census Bureau, *Quarterly Residential Vacancies and Homeownership, First Quarter 2018* (Apr. 26, 2018), https://www.census.gov/housing/hvs/files/currenthvspress.pdf,

[39] Lawrence Mishel, et al., Chapter 6: "Wealth: Unrelenting Disparities," *The State of Working America*, Economic Policy Institute 393 (12th ed. 2012), available at: http://stateofworkingamerica.org/files/book/Chapter6-Wealth.pdf ("In 2010, households in the middle fifth of the wealth distribution had an average net worth of $61,000..., and $39,000 of that was in home equity..." This means that home equity comprised nearly two-thirds (64.5 percent) of the wealth of households with "typical" wealth levels.).

[40]Ira Katznelson, *When Affirmative Action Was White*: *An Untold History of Racial Inequality in Twentieth-Century America*, 163 (2005).

[41] Matthew Desmond, *How Homeownership Became the Engine of American Inequality*, N.Y. Times Magazine (May 9, 2017), https://www.nytimes.com/2017/05/09/magazine/how-homeownership-became-the-engine-of-american-inequality.html; *see also* Thomas Shapiro, et al., *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*, Institute on Assets and Social Policy, 3 (Feb. 2013), https://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf.

[42] Katznelson, *supra*, at 163-64 ("By 1984, when GI Bill mortgages had mainly matured, the median white household had a net worth of $39,135; the comparable figure for black households

The relative inability to make such intergenerational wealth transfers is only one reason home ownership has been less attainable for people of color;[43] other key contributors include "differences in access to credit, typically lower incomes, and … residential segregation" which "artificially lowers demand, placing a forced ceiling on home equity for African-Americans who own homes in non-white neighborhoods."[44] Additionally, the legacy of segregationist housing policy has also made minority homeownership much more tenuous for those able to achieve it. An estimated 8% of African-American and Latino families with recent loan originations lost their homes to foreclosure during the 2007-2009 crisis, compared with 4.5% of non-Hispanic whites.[45] "[H]alf the collective wealth of African-American families was stripped away during the Great Recession due to the dominant role of home equity in their wealth portfolios and the prevalence of predatory high-risk loans in communities of color. The Latino community lost an astounding 67% of its total wealth during the housing collapse[]."[46]

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was only $3,397, or just 9 percent of white holdings. Most of this difference was accounted for by the absence of homeownership. Nearly seven in ten whites owned homes worth an average of $52,000. By comparison, only four in ten blacks were homeowners, and their houses had an average value of less than $30,000. African Americans who were not homeowners possessed virtually no wealth at all.").

[43] *See* Emily Badger, *How Redlining's Racist Effects Lasted for Decades*, N.Y. Times (Aug. 24, 2017), https://www.nytimes.com/2017/08/24/upshot/how-redlinings-racist-effects-lasted-for-decades.html; *see generally*, Dedrick Asante-Muhammad, et al., *The Road to Zero Wealth: How the Racial Wealth Divide Is Hollowing Out America's Middle Class,* Institute for Policy Studies & Prosperity Now (Sept. 2017), https://prosperitynow.org/files/PDFs/road_to_zero_wealth.pdf.

[44] Shapiro, *supra*, at 3 (footnote omitted).

[45] *See* Aleatra P. Williams, *Lending Discrimination, the Foreclosure Crisis and the Perpetuation of Racial and Ethnic Disparities in Homeownership in the U.S.*, 6 Wm & Mary Bus. L. Rev. 601, 629 (2015) (describing estimates regarding loans originating between 2005 and 2008).

[46] Shapiro, *supra*, at 4 (footnote omitted).

Historical discrimination has also "generally segregated [African Americans] from opportunity through use of space."[47] A community "with a solid tax base and good amenities produces a favorable opportunity structure; the life chances of you and your family will be enhanced—even if you are low-income."[48] "Affluent neighborhoods boost academic outcomes, largely because of [school effects] but also because other youth-serving institutions, like quality child care, libraries, parks, athletic leagues, and youth organizations are more common there[.]"[49] But the opposite is true in areas of concentrated poverty, where "[f]actors such as poor schools, crime, a low fiscal base, a weak job market, and an inadequate social network tend to reinforce each other."[50] "[T]o live in a neighborhood of high-concentrated poverty … means that life chances for you and your family will be greatly constrained—even if you yourself are not poor," Professor john powell observes, noting "[t]here is a strong correlation among location, weak economic opportunity, and race."[51]

Closing the racial wealth and home ownership gaps and achieving inclusive communities entail improving access to areas of higher opportunity for people and families of color. Yet home ownership has become financially unrealistic for many families of color, and policies that discourage or prevent construction of more affordable rental housing in high-opportunity areas

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[47] john a. powell, *Race, Place, and Opportunity,* The American Prospect (Sept. 21, 2008), http://prospect.org/article/race-place-and-opportunity.

[48] *Id., supra*. Indeed, a 2015 study found that every year spent in a low-poverty area during childhood increases college attendance rates and earnings in adulthood. Raj Chetty, et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment* 1 (Aug. 2015), http://www.equality-of-opportunity.org/images/mto_paper.pdf.

[49] Robert D. Putnam, *Our Kids: The American Dream in Crisis* 218 (2015).

[50] *powell,* Race, Place, and Opportunity, *supra*.

[51] *Id., supra*. (also noting that while "the majority of the poor are white, most of those living in concentrated poverty are black").

tend to exclude persons of color almost as effectively as "whites only" signs once did. Already in many communities "[s]egregation is now locked in place by exclusionary zoning laws in suburbs where black families once could have afforded to move in the absence of official segregation, but can afford to do so no longer with property values appreciated."[52] The longer jurisdictions defer their obligations to affirmatively further fair housing, the more impenetrable these economic barriers to integration will become.

5. The AFFH Rule is a necessary response to ongoing residential segregation and failed past efforts at fulfilling its Fair Housing Act mandate.

Recognizing the AI approach had been ineffective, HUD adopted its final AFFH Rule in 2015, which replaces the AI with an "Assessment of Fair Housing" (AFH) planning process. *See* 80 Fed. Reg. at 42,275 (replacement of AI with AFH intended "[t]o more effectively carry out its affirmatively furthering fair housing obligation"). The final AFFH Rule provides for enhanced guidance in the form of an "Assessment Tool," which gives grantees specific questions and instructions to follow in preparing their AFHs. *See* 24 C.F.R. § 5.154(d) (content requirements for the AFH). HUD also supplies extensive data to inform these assessments through open access to an AFFH Data and Mapping Tool.[53] Robust community participation is required. *See* 24 C.F.R. §§ 5.154(d)(6), § 5.158(a). Perhaps most importantly, grantees must submit their assessments to HUD for review, and failure to secure HUD acceptance may result in a loss of funding. *See* 24 C.F.R. § 5.162.

With a guided procedure, extensive data, technical assistance, and meaningful HUD oversight, the AFFH Rule offers true promise in fulfilling the mandate to eradicate practices

[52] Richard Rothstein, *Modern Segregation*, Economic Policy Institute (Mar. 6, 2014), https://www.epi.org/publication/modern-segregation/.

[53] The HUD AFFH Data and Mapping Tool can be found at: https://egis.hud.gov/affht/.

contrary to the advancement of fair housing. Yet HUD has now twice sought to frustrate the Rule's full implementation—first through a long-term suspension of the AFH submission deadlines for local government grantees, then by an abrupt withdrawal of the crucial Assessment Tool for local governments. *See generally* Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, 83 Fed. Reg. 683 (Jan. 5, 2018) ("Suspension Notice"); Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments, 83 Fed. Reg. 23,922 (May 23, 2018) ("Assmt. Tool Notice"). In both instances, HUD took these actions for transparently pretextual reasons. The true motive instead appears to be fundamental disagreement at the highest levels of HUD leadership with the concept of affirmatively furthering fair housing, with intent both to neglect the obligation within HUD and to allow grantees to do the same.

B. HUD's recent efforts to undermine the AFFH Rule's implementation reflect a policy of purposeful disregard for the duty to affirmatively further fair housing.

The first Assessments of Fair Housing under the AFFH Rule were submitted in October 2016. HUD abruptly suspended the rule in January 2018. *See* Suspension Notice, 83 Fed. Reg. at 684-85. The suspension delayed the first AFH due dates for the substantial majority of HUD's local government recipients until 2024[54] or even 2025. After Plaintiffs filed the instant lawsuit, HUD withdrew the Suspension Notice. Affirmatively Furthering Fair Housing: Withdrawal of Notice Extending the Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, 83 Fed. Reg. 23,928 (May 23, 2018) ("Suspension Withdrawal"). But HUD

[54] *See* Nat'l Low Income Hous. Coalition, *NLIHC Submits Comments on HUD Suspension of AFFH Rule* (Mar. 12, 2018), http://nlihc.org/article/nlihc-submits-comments-hud-suspension-affh-rule ("The suspension effectively postpones full implementation of the AFFH rule until 2024 for a large majority of jurisdictions.").

also issued two additional notices that effectively both maintain the suspension and further undercut the AFFH Rule by withdrawing its core planning component. One additional notice withdrew the Assessment Tool for Local Governments. *See generally* Assmt. Tool Notice, 83 Fed. Reg. 23,922. As the Assessment Tool provides grantees with the questions and instructions necessary to complete the Assessment of Fair Housing, the AFFH Rule is largely inoperable without it. The other new notice asserts that local government grantees may fulfill their affirmatively furthering fair housing obligations by conducting Analyses of Impediments. *See generally* Affirmatively Furthering Fair Housing (AFFH): Responsibility to Conduct Analysis of Impediments, 83 Fed. Reg. 23,927 (May 23, 2018) ("AI Notice").

1. HUD offered no credible rationale for suspending the AFFH Rule.

The justification HUD gave for initially suspending the AFFH Rule was that grantees needed more time and more technical assistance to properly conduct their Assessments of Fair Housing. *See* Suspension Notice, 83 Fed. Reg. at 684-85. This rationale was demonstrably specious, with HUD taking contradictory positions even within the very same documents. For instance, the Suspension Notice made clear HUD would not finish reviewing AFHs that had been submitted before the suspension, and directed grantees "prepared to submit their first AFH" not to submit them and grantees revising AFHs (that HUD had previously declined to accept) not to re-submit them. 83 Fed. Reg. at 685. HUD's refusal to review AFHs that had already been completed bypassed critical opportunities to provide feedback and assistance to grantees, and cannot be reconciled with a claim that the delay is intended to expand opportunities for technical assistance. HUD has now superficially reversed the suspension. *See generally,* Suspension Withdrawal Notice, 83 Fed. Reg. 23,928. Yet the suspension remains effectively in place, as HUD has reiterated that it "will discontinue the review of AFHs … that are currently under

review" and again directing grantees not to submit (or re-submit) newly completed or revised AFHs. Assmt. Tool Notice, 83 Fed. Reg. at 23,926.

2. HUD offers no credible rationale for withdrawing the Assessment Tool.

HUD's initial Suspension Notice did not assert that the Assessment Tool was responsible for the deficiencies HUD had observed in reviewing early AFHs; in fact, the Suspension Notice actually encouraged grantees to use the Tool as a resource in updating their AIs. 83 Fed. Reg. at 685. In a reversal, HUD now asserts that inadequacies in the Assessment Tool require it be immediately withdrawn. Assmt. Tool Notice, 83 Fed. Reg. at 23,923-26.

For evidence of the supposed deficiencies, HUD points to shortcomings in AFHs that grantees had submitted. *See* Assmt. Tool Notice, 83 Fed. Reg. at 23,923-25. For instance, HUD describes an assessment that was made available for only three days of public comment, despite a requirement for a 30-day minimum comment period under 24 C.F.R. § 91.105(b)(4). *Id*. at 23,924. But this example shows only an incidence of noncompliance by a grantee jurisdiction—not any problem with the Assessment Tool, which directs local governments to comply with public participation procedures at 24 C.F.R. part 91.[55] HUD also states that "many of the 49 AFH submissions identified contributing factors which did not logically connect to the analysis of fair housing issues undertaken." Assmt. Tool Notice, 83 Fed. Reg. at 23,924. Again, these deficiencies occurred in spite of the Assessment Tool, not because of it; the Tool extensively discusses potential contributing factors and instructs grantees to "[i]dentify factors that

[55] Assessment of Fair Housing Tool for Local Governments, Instructions, Appx A at 6 (LG2017), archived version available at: https://web.archive.org/web/20170629235427/https://www.hudexchange.info/resources/documents/Assessment-of-Fair-Housing-Tool-for-Local-Governments-2017-01.pdf, last visited June 4, 2018.

significantly create, contribute to, perpetuate, or increase the severity" of each fair housing issue the grantees are directed to analyze.[56]. Withdrawing the Assessment Tool removes this guidance, making compliance more challenging—and discontinuing review of completed AFHs prevents HUD from detecting such deficiencies and helping grantees correct them.

HUD also claims reviewing AFH submissions will overwhelm its own resources.[57] *See* Assmt. Tool Notice, 83 Fed. Reg. at 23,925-26. If so, withdrawing the Assessment Tool does not ameliorate this concern, as the Tool is not responsible for any time-consuming deficiencies.

Finally, even if improvements to the Tool are needed, the drastic step of withdrawal is not necessary. HUD solicited comments on the Assessment Tool without withdrawing it in 2016, so keeping the Tool in effect now would not prevent HUD from receiving comments on potential new improvements. *See* Affirmatively Furthering Fair Housing: Local Government Assessment Tool— Information Collection Renewal: Solicitation of Comment 30-Day Notice Under Paperwork Reduction Act of 1995, 81 Fed. Reg. 57,601 (Aug. 23, 2016). HUD cannot rationally contend that the Tool's ongoing use actually *harms* local governments' analysis in any way, or detracts from their ability to affirmatively further fair housing.

3. Returning to the AI process solves none of the problems HUD describes.

Suspending and withdrawing key components of the AFFH Rule does not even ameliorate any of the concerns HUD has articulated. The Suspension Notice cited grantees' difficulty with developing metrics and milestones that would measure progress with respect to

[56] *See e.g*, *id*., Assessment Tool (Main Body), Questions V.B.i.3; V.B.ii.3; V.B.iii.3, V.B.iv.3, etc.

[57] HUD leadership has recently engaged in well-publicized efforts to reduce the resources allocated to HUD. *See, e.g.*, Linda Couch, "HUD Asks Congress for Deep Cuts," *Leading Age* (Feb. 12, 2018), http://www.leadingage.org/legislation/hud-asks-congress-deep-cuts.

affirmatively furthering fair housing, and grantees' "frequent misunderstanding" of setting clear goals, metrics, and milestones that resulted in their AFHs being sent back. 83 Fed. Reg. at 685. But HUD grantees demonstrated similar failures when completing Analyses of Impediments, so returning to the AI process is no solution. *See* GAO Report at 19 (describing how 48 of a subset of 60 AIs lacked timeframes for implementing proposed actions to overcome fair housing impediments). Withdrawing the Assessment Tool makes setting such goals and metrics more difficult, and without meaningful HUD review some grantees will almost assuredly neglect their obligations to analyze and address fair housing barriers, just as they did before the AFFH Rule was promulgated. *See* GAO Report at 32 (not requiring grantees to submit Analyses of Impediments "on a regular basis will likely continue to result in many grantees not updating the documents in a timely manner or adhering to any guidance or requirements").

4. The actual reason for suspending the AFFH Rule, and now for withdrawing the Assessment Tool, is likely to advance an unlawful policy of indifference to residential segregation the lack of equal opportunity.

HUD is well aware of the continuing impact of residential segregation and the systemic forces that perpetuate those patterns of inequality.[58] HUD is also manifestly familiar with the failures of the AI framework, having issued the Rule to address many of those very inadequacies. *See* 80 Fed. Reg. at 42,348. The sudden withdrawal of the Assessment Tool, suspension of AFH reviews, and revival of the failed AI process can thus only be understood as a deliberate policy of noncompliance with the Fair Housing Act's affirmatively furthering fair housing requirement.

[58] "Despite genuine progress and a landscape of communities transformed in the more than 40 years since the Fair Housing Act was enacted, the ZIP code in which a child grows up all too often remains a strong predictor of that child's life course. There are communities that remain segregated by classes protected by the Fair Housing Act. Racially-concentrated areas of poverty exist in virtually every metropolitan area. Disparities in access to important community assets prevail in many instances." 80 Fed. Reg. at 42,348.

HUD's fluid and contradictory justifications for stalling full implementation of the AFFH Rule are some evidence of pretext. *See, e.g.*, *E.E.O.C. v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994) (shifting and inconsistent explanations over time are evidence of pretext). But the current HUD Secretary made no secret of his contempt for what he called "government-engineered attempts to legislate racial equality" during his 2015 Presidential campaign.[59] "There are reasonable ways to use housing policy to enhance the opportunities available to lower-income citizens," he wrote, "but based on the history of failed socialist experiments in this country, entrusting the government to get it right can prove downright dangerous."[60]

The Secretary has taken several additional steps since arriving at HUD that call into question his commitment not only to affirmatively furthering fair housing—but to fair housing altogether. This includes freezing high-priority fair housing investigations and enforcement actions[61] and calling HUD's 2013 discriminatory effects rule, 24 C.F.R. § 100.500,[62] into question.[63] The Secretary previously announced a desire to "reinterpret" the AFFH Rule to

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[59] *See* Ben S. Carson, *Experimenting with failed socialism again*, Washington Times (July 23, 2015), https://www.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish-/.

[60] *Id.*, *supra*.

[61] *See* Glenn Thrush, *Under Ben Carson, HUD Scales Back Fair Housing Enforcement*, NY Times (Mar. 28, 2018), https://www.nytimes.com/2018/03/28/us/ben-carson-hud-fair-housing-discrimination.html.

[62] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500).

[63] *See* HUD No. 18-035, HUD to seek public comment on 'disparate impact' regulation (May 10, 2018), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_035.

temper its effects.[64] He even floated the idea of removing the words "free from discrimination" from HUD's mission statement.[65]

It may be the Secretary's personal view that taking purposeful government actions to ameliorate the effects of past segregation and foster equal opportunity is inappropriate or even "dangerous." But Congress decided otherwise when it made affirmatively furthering fair housing the legal obligation of the Secretary in the Fair Housing Act. *See* 42 U.S.C. § 3608(e)(5); *see also* 114 Cong. Rec. 2527 (1968) (statement of Sen. Brooke) (noting the inadequate progress under pre-existing law, as "no great changes [were] being wrought in the housing patterns of American neighborhoods," with few instances of enforcement and "minimal" results); *id*. at 9595 (statement of Rep. Pepper) ("The tragedy has been in the slowness of pace, at least until late years, which has characterized th[e] struggle [for racial equality]."); *see also NAACP*, 817 F.2d at 154 (discussing legislative history). The duty to affirmatively further fair housing is no mere rhetorical prerogative that new leadership is free to reject or weaken, it is a statutory obligation that HUD is bound to carry out. In failing to implement—and actively undermining—the AFFH Rule, the Secretary thwarts the will of Congress; this Court should not allow the Secretary also to thwart the rule of law.

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[64] *See* Joseph Lawler and Al Weaver, *Ben Carson: HUD will 'reinterpret' Obama housing discrimination rule*, Washington Examiner (Jul. 20, 2017), https://www.washingtonexaminer.com/ben-carson-hud-will-reinterpret-obama-housing-discrimination-rule.

[65] *See* Tracy Jan, *Ben Carson's mission statement for HUD may no longer include anti-discrimination language*, Washington Post (Mar. 7, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/03/07/ben-carsons-mission-statement-for-hud-may-no-longer-include-anti-discrimination-language/?noredirect=on&utm_term=.4fd1387855b3.

HUD disburses several billion dollars in block grant funds to state and local governments each year.[66] Unless and until HUD fully implements the AFFH Rule, those funds will be allocated and spent with no assurance that recipient jurisdiction will affirmatively further fair housing. Such delay will thus have long-lasting, enduring impacts on American communities, as policies and practices such as those outlined above continue to drive inequality and perpetuate the legacy of segregation in still more generations. Requiring HUD to fulfill its statutory mandate through implementation of the AFFH Rule is thus in the public interest—a key consideration that should lead the Court to grant the Plaintiffs' motion for injunctive relief. *See League of Women Voters of United States v. Newby*, 838 F.3d 1, 6, 12 (D.C. Cir. 2016) (Preliminary injunction must be in the public interest.); *see also Open Communities Alliance v. Carson,* 286 F.Supp.3d 148, 179 (D.C. Cir. 2017) ("There is generally no public interest in the perpetuation of unlawful agency action.") (quoting *League of Women Voters*). Further delaying efforts to eradicate residential segregation will only stiffen the challenge future administrations will face in fostering inclusion and equal opportunity in neighborhoods. Inequality and harmful policies will be that much more entrenched. Only purposeful and sustained efforts to dismantle residential segregation and unequal housing opportunity, as Congress has required of HUD in the Fair Housing Act, can hope to succeed in fostering more equitable and inclusive communities.

IV. CONCLUSION

For the foregoing reasons, the Court should grant the plaintiffs' renewed motion for a preliminary injunction and summary judgment.

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[66] The HUD appropriation for CDBG in Fiscal Year 2018 is $3.365 billion. U.S. Dep't of Hous. & Urban Dev., *CPD Appropriations Budget*, https://www.hud.gov/program_offices/comm_planning/about/budget (last accessed June 4, 2018).

Respectfully submitted,

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