AMERICAN CIVIL LIBERTIES UNION FOUNDATION

July 3, 2025

SUBMITTED VIA REGULATIONS.GOV

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

Re: Department of Housing and Urban Development's Notice of Proposed Rulemaking: Rescission of Affirmative Fair Housing Marketing Regulations, Docket No. FR-6533-P-01 (RIN 2501-AE13)

To Whom It May Concern:

We write to you on behalf of the American Civil Liberties Union Foundation ("ACLU") to submit this comment in opposition to the U.S. Department of Housing and Urban Development's ("HUD"'s) Notice of Proposed Rulemaking: Rescission of Affirmative Fair Housing Marketing Regulations, Docket No. FR-6533-P-01 (RIN 2501-AE13) (the "NPRM"), which was published in the Federal Register on June 3, 2025. ACLU requests that HUD withdraw the NPRM and retain the Affirmative Fair Housing Marketing ("AFHM") Regulations in full.

For over 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the law of the United States guarantee to everyone in the country. With more than three million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all fifty states, Puerto Rico, and Washington D.C. for the right of every individual to access opportunity free of discrimination on the basis of race, color, religion, gender, sexual orientation, gender identity or expression, national origin, familial or marital status, status as a recipient of public assistance, or record of arrest or conviction. We have advocated at the local, state, and federal levels for increased enforcement of civil rights in the housing context, the elimination of housing barriers for survivors of domestic violence and sexual assault, greater choice in housing options for those who receive public assistance, the development of housing programs that promote integration, including among those with a disability that necessitates a reasonable accommodation, and for the removal of housing restrictions on people with past arrest or conviction records. Through litigation, the ACLU also

has challenged violations of the Fair Housing Act by private and government actors and brought challenges to discriminatory government policies on site selection, tenant selection and relocation, Section 8 voucher administration, and exclusionary housing and zoning policies.

The NPRM eliminates decades-old regulations designed to ensure that agents, developers, and owners (collectively, housing providers) of federally assisted housing identify members of protected groups that may otherwise not have heard about the opportunity to live in their properties, and develop and execute plans to attempt to reach these communities. HUD's wholesale failure to explain its abandonment of longstanding AFHM regulations violates the Administrative Procedure Act of 1946 ("APA").[1] Elimination of these obligations—themselves the product of robust notice and comment rulemaking over fifty years ago—upends funding recipients' and the public's settled expectations and hinders the ability of scores of Americans to learn about housing opportunities. As detailed herein, the AFHM Regulations are not only permissible under the Constitution and the Fair Housing Act of 1968 ("FHA"),[2] but necessary for countless individuals in ensuring equal opportunity, and in ensuring that HUD fulfills its statutory obligation to affirmatively further fair housing ("AFFH"). Eliminating these Regulations will create harm to and confusion among regulated entities and the public.

The importance of these Regulations and the harms that would remain unaddressed in their absence also preclude HUD's ability to gut them on a truncated timeframe for the public to comment. Under no plausible interpretation is expedited elimination of these Regulations in the public interest—the basis which HUD invokes in shortening the comment period from sixty days to thirty days here. We thus urge HUD to withdraw the NPRM in its entirety and leave the AFHM Regulations fully intact.[3]

I. The NPRM Guts Key and Longstanding Regulations To Further Fair Housing and Address The Effects of Discrimination.

In promulgating the NPRM, HUD failed to explain its dramatic departure from settled law, regulations, and guidance, despite decades of reliance from regulated entities and the public.

When an agency changes an existing policy, it must "display awareness that it is changing [its] position[,]"[4] and "be cognizant that longstanding policies may have 'engendered

[1] 5 U.S.C. §§ 551–559, 701–706.
[2] 42 U.S.C. §§ 3601–3619.
[3] This comment raises some of the reasons that HUD should rescind the NPRM. The ACLU believes that the NPRM should be rescinded in its entirety and that the AFHM Regulations should remain fully intact. The fact that particular statements, proposals, or reasoning by HUD are not addressed herein does not indicate that the ACLU agrees with these aspects of the NPRM.
[4] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

serious reliance interests that must be taken into account.'"[5] This is especially true where, as here, HUD's Regulations have been consistent throughout the decades.[6]

HUD initially proposed the AFHM Regulations in 1971 as part of President Nixon's Equal Housing Opportunity policies.[7] President Nixon stated that AFHM Regulations were intended to counteract historical discriminatory federal housing policies, including racially restrictive covenants and the urban renewal program (also known as slum clearance) created by the Housing Act of 1949, which destroyed housing in impoverished neighborhoods and disproportionately displaced people of color while barring them from purchasing new housing.[8] Against this background of racial inequity in housing opportunity, HUD enacted a final rule implementing the AFHM requirements in 1972.[9] The AFHM Regulations implemented the following policy:

> It is the policy of the Department to administer its FHA housing programs affirmatively, so as to achieve a condition in which individuals of similar income levels in the same housing market area have a like range of housing choices available to them regardless of their race, color, religion, or national origin. Each applicant for participation in FHA subsidized and unsubsidized housing programs shall pursue affirmative fair housing marketing policies in soliciting buyers and tenants, in determining their eligibility, and in concluding sales and rental transactions.[10]

Later rules amended the Regulations to include protections against sex discrimination, specify procedures for compliance, and include protections against disability and familial status discrimination.[11]

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[5] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (citation omitted).
[6] *See Off. of Commc'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1439 (D.C. Cir. 1983) (agency's "elimination" of a policy that governed "for almost [fifty] years" required the court "to scrutinize more closely the [agency's] proffered explanations for its actions.").
[7] Presidential Statement on Federal Policies Relative to Equal Housing Opportunity, 7 Wkly. Comp. Pres. Doc. 901 (June 14, 1971), https://www.presidency.ucsb.edu/documents/statement-about-federal-policies-relative-equal-housing-opportunity [https://perma.cc/ZN95-D5LP]; *see also* Ann Pfau, David Hochfelder & Stacy Sewell, *The History and Harm of Federal Urban Renewal Policy in New York State*, Rockefeller Inst. of Gov't (Dec. 19, 2023), https://rockinst.org/blog/the-history-and-harm-of-federal-urban-renewal-policy-in-new-york-state/ [https://perma.cc/9QM3-GU76].
[8] Presidential Statement on Federal Policies Relative to Equal Housing Opportunity, *supra* note 7.
[9] Affirmative Fair Housing Marketing Regulations, 37 Fed. Reg. 75 (Jan. 5, 1972); 24 C.F.R. §§ 200.600–200.640.
[10] 37 Fed. Reg. at 75.
[11] Affirmative Fair Housing Market Regulations Amended, 40 Fed. Reg. 20,080 (May 8, 1975); 24 C.F.R. § 200.610 (2025) (sex discrimination protections); Compliance Procedures for Affirmative Fair Housing Marketing, 44 Fed. Reg. 47,013 (Aug. 9, 1979); 24 C.F.R. § 108.1 (2025) (compliance procedures); Affirmative Fair Housing Marketing Regulations, 58 Fed. Reg. 41,337 (Aug. 3, 1993); 24 C.F.R. § 200.610 (2025) (disability and familial status protections).

The AFHM Regulations are thus rooted in the goal of providing equal opportunity and access to housing regardless of race or other characteristics, and achieve this by better ensuring that all individuals hear about housing opportunities through various marketing channels. The Regulations are not, as HUD suggests, designed to "sort individuals by race[,]" "perpetuate[] . . . racial stereotype[s][,]" or "equalize [housing] outcomes[,]" as explained further below.[12]

In failing to grapple with or even recognize the NPRM's inconsistencies with this history and the reliance interests these longstanding regulations have engendered, HUD runs afoul of the APA's prohibition against arbitrary and capricious agency action.[13] In fact, HUD does not acknowledge or describe any reliance interests at all, and instead, summarily finds that "there is no reliance interest in an unlawful regulation."[14] As explained below, the AFHM Regulations are not unlawful. HUD's unsupported conclusion also misstates an agency's requirements under the APA. The case HUD cites in support of this argument, *Department of Homeland Security v. Regents of the University of California*,[15] did not hold that there are no reliance interests in an unlawful regulation, as HUD suggests. Rather, the Court was hypothesizing potential "interests and policy concerns" that might *outweigh* reliance interests but stressed that agencies are still responsible for "assess[ing] whether there were reliance interests, determin[ing] whether they were significant, and weigh[ing] any such interests against competing policy concerns."[16] HUD has not satisfied this burden.

HUD further mischaracterizes its responsibilities by finding that "HUD has no interest in maintaining" the AFHM Regulations due to their purported faults, and "[t]hose interests . . . outweigh any reliance interests that may exist."[17] But again, HUD has failed to acknowledge any reliance interests other than its own. As the Supreme Court has recognized, "[w]hen an agency changes course . . . it must 'be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'"[18] "It would be arbitrary and capricious to ignore such matters."[19]

The reliance interests on and benefits of the AFHM Regulations that HUD fails to acknowledge here are substantial. Individuals, including people with disabilities, and families with children all benefit from the AFHM Regulations, which equalize informational opportunity

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[12] 90 Fed. Reg. at 23,492 (Section II.A.–B.; Section II.F.) (internal quotation marks omitted).
[13] *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1 (2020) (holding that agency action rescinding Deferred Action for Childhood Arrivals program was arbitrary and capricious for failure to consider reliance interests); *see also California v. U.S. Dep't of Educ.*, 132 F.4th 92, 99 (1st Cir. 2025) (explaining that "it does not appear that [the agency] properly considered the reliance interests of" the affected stakeholders or that it "accounted for all relevant impacts of" the agency action (citing *Regents of the Univ. of Cal.*, 591 U.S. at 30–31)).
[14] 90 Fed. Reg. at 23,492 (citing *Regents of the Univ. of Cal.*, 591 U.S. at 32).
[15] 591 U.S. at 32.
[16] *Id*. at 32–33.
[17] 90 Fed. Reg. at 23,492–93.
[18] *Regents of the Univ. of Cal.*, 591 U.S. at 30 (quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009))).
[19] *Id.* (internal quotation marks omitted).

to ensure people of all backgrounds have a chance to apply for housing. The AFHM Regulations have promoted integration and reduced barriers to access, including with respect to a lack of information in federally subsidized housing to the benefit of tenants and other beneficiaries of HUD programs, and in furtherance of the FHA's purpose.[20] As just one example, according to a report by the Fair Housing Justice Center, the La Costa Paloma Apartments in San Diego, which implemented an AFHM Plan, was able to attract a diversity of tenants despite being in a location that had 90% White residents.[21] The AFHM Regulations thus hew to the benefit of underrepresented groups in the area and to furthering integration in housing, interests that HUD ignores.

People with disabilities also rely on and benefit from these Regulations. The plans required by the AFHM Regulations often require marketing to tenants with disabilities, for example by marketing to service providers and hospitals.[22] In some instances, developers who were required to market to people with disabilities actually added accessibility features to the housing beyond those required by the FHA or other laws to make the housing more attractive to the groups receiving the marketing.[23] HUD ignores entirely the reliance interests of individuals with disabilities on the Regulations, and fails to consider the harm to these individuals in locating accessible housing absent their effect.

Fair housing organizations, housing-related businesses, and states and local municipalities also rely on the AFHM Regulations, and many have developed partnerships or offer services, trainings, and educational materials focused on facilitating implementation of the AFHM requirements in furtherance of their organizational missions or state and local laws or other priorities.[24] For example, the National Fair Housing Alliance and Metro Fair Housing Services have partnered with United Bank to provide affirmative marketing and outreach efforts with the goal of increasing homeownership in communities of color in middle Georgia.[25] States

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[20] Diane L. Houk, Erica Blake & Fred Freiberg, *Increasing Access to Low-Poverty Areas by Creating Mixed-Income Housing,* Fair Hous. Just. Ctr., 66 (2007), https://www.fairhousingjustice.org/wp-content/uploads/2012/11/FHJC_Mixed_-_Income_Housing_Report.pdf [https://perma.cc/Z85Z-MTPK].
[21] *Id.* at 74.
[22] *Id.*; *see also* The Affirmative Fair Housing Marketing Plan and Procedures, 8025.1 Rev-2, ch. 2, § 2-8(E), 2-9(D)(1)(e), https://www.hud.gov/sites/documents/80251c2fheh.pdf [https://perma.cc/5YCN-VNM6].
[23] *Id.* at 73.
[24] *See, e.g.*, *AFHMP Instructions*, Mo. Hous. Dev. Comm'n (Aug. 27, 2024), https://mhdc.com/media/aqzpy5zb/afhmp-instructions.pdf [https://perma.cc/4BJH-7K6J]; *Updating Your Affirmative Fair Housing Marketing Plan*, PMCS, Inc., https://www.pmcsinc.com/updating-your-affirmative-fair-housing-marketing-plan/ [https://perma.cc/RAF6-FFD5] (last visited June 28, 2025) (company providing AFHM update and review services); *Affirmative Fair Housing Marketing (AFHM) and Lottery Training Materials*, Hous. Toolbox (Dec. 26, 2017), https://www.housingtoolbox.org/resources/affirmative-fair-housing-marketing-afhm-and-lottery-training-materials [https://perma.cc/WUF2-7MEY] [https://perma.cc/XT4T-PP42] (developed by Massachusetts Housing Partnership and the Citizen's Housing and Planning Association).
[25] *NFHA and Metro Fair Housing Services Announce Major Partnership with United Bank to Expand Lending Opportunities for Communities of Color in Middle Georgia*, Nat'l Fair Hous. All. (Sep. 19, 2024), https://nationalfairhousing.org/nfha-and-metro-fair-housing-services-announce-major-partnership-with-united-bank-to-expand-lending-opportunities-for-communities-of-color-in-middle-georgia/ [https://perma.cc/2TY4-7X9G].

also rely on AFHM Regulations or similar state or local requirements to further state or local mandated fair housing initiatives. For example, California, Connecticut, and Massachusetts all have state laws which incorporate or mandate AFHM plans for localities,[26] and Boston requires large developers to include an initial AFHM plan in their proposals for development.[27] Additionally, a number of states incorporate AFHM regulations or otherwise require AFHM commitments through their Qualified Allocation Plans, which state housing finance agencies are required to create and outline their criteria and procedures for allocating housing tax credits.[28] HUD fails to acknowledge the impact its elimination of federal AFHM requirements will have on these entities and their programs.

Additionally, HUD has often included oversight of AFHM requirements as a condition of settlement in desegregation cases.[29] A report by the Poverty and Race Research Action Council found that AFHM requirements helped to overcome "racial blind spots," a documented phenomenon in which people from a specific racial group tend to lack knowledge about neighborhoods primarily inhabited by people of other races.[30] A separate report by the Furman Center for Real Estate & Urban Policy's Institute for Affordable Housing Policy found that AFHM requirements help combat the fact that marginalized individuals often assume they are not welcome in communities with a history of housing discrimination.[31] And evidence supports the effectiveness of these efforts—a desegregation settlement in Baltimore City which included AFHM requirements resulted in 88% of participating families moving out of segregated public housing and into integrated suburban counties, drastically decreasing segregation in the city's subsidized housing system.[32] HUD's elimination of the AFHM Regulations ignores these documented benefits and interests entirely.

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[26] Cal. Gov't Code § 65583; Conn. Gen. Stat. Ann. § 8-37ee(b); Mass. Gen. Laws ch. 40B; Mass. Dep't of Hous. and Cmty. Dev., *Guidelines*, Mass.gov, https://www.mass.gov/doc/guidelines-gl-c40b-comprehensive-permit-projects-and-subsidized-housing-inventory/download [https://perma.cc/43YX-2LYN] (last updated Dec. 2014).
[27] Bos., Mass., Boston Zoning Code § 80-1; Bos., Mass., Boston Zoning Code § 2-1.
[28] *Accessing Opportunity: Affirmative Marketing and Tenant Selection in the LIHTC and Other Housing Programs*, Poverty & Race Rsch. Action Council, 8 n.9 (2012), https://www.prrac.org/pdf/affirmativemarketing.pdf [https://perma.cc/WPY9-4BKP] ("On the state level, a number of state housing finance agencies also require or incentivize some level of affirmative marketing . . . . See Appendix B."); *id*. at Appendix B, https://www.prrac.org/pdf/AffirmativeMarketingAppendixB.pdf [https://perma.cc/6WG6-852W].
[29] *See, e.g.*, Settlement Agreement, *Thompson v. U.S. Dep't of Hous. and Urb. Dev.*, No. MJG 95-309 (D. Md. Aug. 24, 2012), https://www.hud.gov/sites/documents/thom_v_hudsetagr82412.pdf [https://perma.cc/2JFJ-VZVC].
[30] *Accessing Opportunity: Affirmative Marketing and Tenant Selection in the LIHTC and Other Housing Programs*, *supra* note 28, at 10.
[31] *An Overview of Affirmative Marketing and Implications for the Westchester Fair Housing Settlement*, Furman Ctr. For Real Est. & Urb. Pol'y Inst. for Afford. Hous. Pol'y, 16–18 (Apr. 12, 2011), https://furmancenter.org/files/publications/Furman_Center_Review_of_Affirmative_Marketing.pdf [https://perma.cc/DY5X-3ZY3].
[32] *Id.* at 21 n.35.

II. The AFHM Regulations Are Consistent With the FHA, the Constitution, and Decades of Case Law.

The AFHM Regulations are consistent with the statutory text and purpose of the FHA, the Equal Protection Clause of the U.S. Constitution,[33] and decades of case law interpreting both.

a. The FHA Authorizes the AFHM Regulations.

Contrary to HUD's reasoning otherwise,[34] the AFHM regulations are not only consistent with the FHA and Executive Order ("E.O.") 11063[35] but also necessary to fulfill HUD's statutory obligations under the Act.

The NPRM's reasoning is based entirely on the flawed premise that the AFHM Regulations are pursuant to HUD's statutory authority under Section 3604 of the FHA, which prohibits discrimination in housing because of "'race, color, religion, sex, familial status, or national origin.'"[36] This is incorrect. Although the Regulations are no doubt consistent with the nondiscrimination provisions of the FHA, HUD fails entirely to address the fact that the Regulations were issued pursuant to Section 3608 of the Act, which establishes HUD's affirmative obligation to further fair housing,[37] as well as Title VI of the Civil Rights Act of 1964,[38] ("Title VI") and E.O. 11063.

Passed less than a week after a white supremacist assassinated Martin Luther King, Jr., the FHA was intended to redress the decades of discrimination that led to deeply entrenched and ongoing residential segregation across the United States. This intent is revealed not only by the FHA's statutory text and legislative history, but also by the context in which it was passed. During the summer of 1967, nearly 160 riots erupted across the United States, prompted in part by government policies that created and maintained segregated housing—policies that artificially limited housing choices for Black people and other minority groups, concentrated areas of poverty, and perversely inflated the prices of the limited housing available to those groups.[39]

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[33] U.S. Const. amend. XIV, § 1.
[34] *See* 90 Fed. Reg. at 23,492 (Section II.A.).
[35] Equal Opportunity in Housing, 27 Fed. Reg. 11,527 (Nov. 24, 1962).
[36] *See* 90 Fed. Reg. at 23,492 (Section II.A.) (quoting 42 U.S.C. § 3604(a)).
[37] *See* 24 C.F.R. § 200.605; *see also* Affirmative Marketing Guidelines, 36 Fed. Reg. 11,869, 11,869 (June 22, 1971) ("This proposed subpart, issued pursuant to [Title VI], 42 U.S.C. 2000d-1; [T]itle VIII of the Civil Rights Act of 1968, 42 U.S.C. 3608; and Executive Order 11063, 27 F.R. 11527, is intended to promote a condition in which individuals of similar income levels in the same housing market area have available to them a similar range of choices in housing, regardless of the individuals' race, color, religion, or national origin."). E.O. 11063, among other things, furthers HUD's duty to affirmatively further fair housing. *See, e.g.*, *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 76 (D. Mass. 2002).
[38] 42 U.S.C. §§ 2000d-2000d-7.
[39] *See* Nat'l Advisory Comm'n on Civ. Disorders, *Report of the National Advisory Commission on Civil Disorders* (1967), https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf [https://perma.cc/TM2C-842F]

The negative consequences of residential segregation extended far beyond the housing sphere, and imposed significant impediments to economic mobility, access to education and employment, and access to community resources. In enacting the FHA, Congress recognized that "where a family lives, where it is allowed to live, is inextricably bound up with better education, better jobs, economic motivation, and good living conditions."[40]

The FHA prohibits discrimination in housing because of an individual's race, color, national origin, religion, sex, familial status, or disability.[41] But Congress went even further by seeking to replace segregation in America with "truly integrated and balanced living patterns"[42] and by requiring recipients of HUD funding to affirmatively further fair housing in all programs and activities related to housing.[43] Fair housing, as understood by Congress, meant integrated housing and communities, and it explicitly gave HUD a mandate to affirmatively pursue it.[44]

Federal courts across the country have recognized HUD's statutory duty under the FHA to undo historic patterns of segregation and to afford access to housing opportunities to marginalized communities. In *Shannon v. United States Department of Housing & Urban Development*, the first appellate decision to address the FHA's AFFH provision, the U.S. Court of Appeals for the Third Circuit interpreted Section 3608 as imposing a mandate on HUD to affirmatively promote fair housing.[45] In upholding the plaintiffs' challenge to HUD's decision to approve a rent-supplement contract and issue mortgage insurance for a housing development that was likely to increase de facto racial segregation in the project location, the Third Circuit emphasized that Congress required HUD to pursue the national fair housing policy of eradicating housing discrimination and segregation in all of its actions:

> At least under [the FHA] . . . , more is required of HUD than a determination that some rent supplement housing is located outside ghetto areas. Even though previously located rent supplement projects were located in non-ghetto areas[,] the choice of location of a given project could have the 'effect of subjecting persons to discrimination because of their race * * * or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity

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[https://perma.cc/5MYU-AHYL]; *see also* Marcus Casey & Bradley Hardy, *50 Years After the Kerner Commission Report, the Nation is Still Grappling with Many of the Same Issues*, Brookings Inst. (Sep. 25, 2018), https://www.brookings.edu/blog/up-front-2018/09/25/50-years-after-the-kerner-commission-report-the-nation-is-still-grappling-with-many-of-the-same-issues\ [https://perma.cc/FE2B-XFRH].

[40] 114 Cong. Rec. 2276-2707 (1968).

[41] 42 U.S.C. §§ 3601–3619.

[42] *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (internal quotation marks omitted) (quoting the FHA's co-sponsor Senator Walter Mondale).

[43] 42 U.S.C. § 3608(e)(5).

[44] *See* Richard Rothstein, *Fair Housing Act Bars Policies that Segregate, Even if Segregation is Not Intentional*, Econ. Pol'y Inst.: Working Econ. Blog (July 6, 2015, 11:52 AM), https://www.epi.org/blog/supreme-court-fair-housing-act-bars-policies-that-segregate-even-if-segregation-is-not-intentional/ [https://perma.cc/MH42-GEA4].

[45] 436 F.2d 809, 816 (3d Cir. 1970).

> as respect persons of a particular race. * * *' That effect could arise by virtue of the undue concentration of persons of a given race, or socio-economic group, in a given neighborhood.[46]

The Third Circuit continued by commenting that:

> [Prior to the enactment of the FHA,] the administrators of the federal housing programs could, by concentrating on land use controls, building code enforcement, and physical conditions of buildings, remain blind to the very real effect that racial concentration has had in the development of urban blight. *Today such color blindness is impermissible. Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy*.[47]

Accordingly, HUD was required to consider "the relevant racial and socio-economic information necessary for compliance with its [FHA] duties" in deciding whether to approve the site selection for a low-income housing development.[48]

Consistent with the Third Circuit's holding in *Shannon*, the U.S. Court of Appeals for the Second Circuit held that HUD "is under an obligation to act affirmatively to achieve integration in housing[,]" and that the source of its duty to affirmatively further fair housing "is both constitutional and statutory."[49] The Second Circuit emphasized that Section 3608 placed an affirmative duty on the HUD Secretary to always consider "the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built" and to take all possible steps to pursue "the goal of open, integrated residential housing patterns and to prevent the increase of segregation . . . of racial groups whose lack of opportunities the [FHA] was designed to combat."[50]

The U.S. Court of Appeals for the First Circuit similarly interpreted the text of Section 3608 as requiring HUD to do more than "simply not discriminate[.]"[51] Specifically, the First Circuit explained that "[i]f one assumes that many private persons and local governments have practiced discrimination for many years and . . . at least some of them might be tempted to continue to discriminate even though forbidden to do so by law, it is difficult to see how HUD's own nondiscrimination by itself could significantly 'further' the ending of such discrimination by

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[46] *Id.* at 820 (quoting 24 C.F.R. § 1.4(b)(2)(i)).
[47] *Id.* at 820–21 (emphasis added).
[48] *Id.* at 821.
[49] *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1133 (2d Cir. 1973).
[50] *Id.* at 1134.
[51] *NAACP v. Sec'y of Hous. & Urb. Dev.*, 817 F.2d 149, 154 (1st Cir. 1987).

others."[52] Instead, HUD was required to consider the effect of awarding HUD funding to particular projects "on the racial and socio-economic composition of the surrounding area."[53]

Likewise, in *Garrett v. City of Hamtramck*, the federal district court interpreted the AFFH mandate to require that HUD "analyze, consider, [and] affirmatively utilize opportunities to further the ends of fair housing in its approving and funding" of a housing development.[54] HUD failed to meet its AFFH obligation when it approved a development plan that had no provisions for providing housing opportunities within the income ranges of a majority of Black residents and no plans for housing those residents who would be displaced. HUD's obligation to affirmatively further fair housing required that the agency reject plans that would reinforce segregated housing patterns and deny the rights of the Black residents in Hamtramck.[55]

Faced with these and other similar federal court decisions construing Section 3608, Congress left the text of that section's AFFH mandate intact when it amended other portions of the FHA in 1988.[56] In doing so, Congress accepted and agreed with existing judicial precedent concerning the obligations of HUD and its grantees to proactively pursue integration and address segregation in all aspects of agency action. Indeed, "Congress is presumed to be aware of a[] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change[.]"[57]

Following the 1988 Fair Housing Amendments Act and through the present day, courts have continued to interpret and apply Section 3608 to require HUD, as well as recipients of its funds, to "eradicate practices . . . that are contrary to the advancement of . . . 'fair housing.'"[58] In *Thompson v. United States Department of Housing & Urban Development*, the federal district court held that HUD's obligations under Section 3608(e)(5) required the agency to apply "an approach of regionalization"—defined as "policies whereby the effects of past segregation in Baltimore City public housing may be ameliorated by providing housing opportunities . . . beyond the boundaries of Baltimore City"—as "integral to desegregation in the Baltimore Region[.]"[59] By limiting its focus to inside the boundaries of Baltimore City, HUD had "failed to meet [its] obligations under the [FHA] to promote fair housing affirmatively."[60] The district court further held that Section 3608 is intended to hold HUD "to a high standard, in this case to have a commitment to desegregation."[61] HUD's funding pattern in the Baltimore region failed to

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[52] *Id*.
[53] *Id.* at 156.
[54] 335 F. Supp. 16, 27 (E.D. Mich. 1971), *supplemented*, 357 F. Supp. 925 (E.D. Mich. 1973), *rev'd on other grounds*, 503 F.2d 1236 (6th Cir. 1974).
[55] *Id.*
[56] Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604.
[57] *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (citations omitted).
[58] *County of Westchester v. U.S. Dep't of Hous. & Urban Dev.*, 802 F.3d 413, 434–35 (2d Cir. 2015).
[59] 348 F. Supp. 2d 398, 408 (D. Md. 2005).
[60] *Id.* at 409.
[61] *Id.* at 417.

achieve significant desegregation, in violation of its Section 3608 mandate.[62] Similarly, in *County of Westchester v. United States Department of Housing & Urban Development*, the Second Circuit held that HUD's own obligations to affirmatively further fair housing justified HUD's insistence that Westchester County analyze exclusionary zoning within the county as part of a fair housing assessment in order to receive federal funding from HUD.[63]

Consistent with this case law and the FHA's statutory text, HUD issued the AFHM Regulations, which require federally-assisted housing providers to identify communities that may not have learned of opportunities to live in their properties, and to target advertising and outreach about their properties to those communities.[64] The AFHM Regulations are crucial to furthering HUD's authority and role in ensuring that its programs are affirmatively furthering fair housing consistent with the text of the FHA and the case law interpreting the FHA's mandate.

HUD is also wrong that the AFHM Regulations are inconsistent with the nondiscrimination mandate of the FHA.[65] As an initial matter, in the NPRM, HUD conspicuously focuses only on the FHA insofar as it prohibits intentional discrimination; it omits entirely that the Supreme Court has held that the FHA prohibits practices that have a discriminatory effect on protected groups.[66] In any event, the AFHM Regulations are entirely consistent with both forms of discrimination prohibited by the Act. Indeed, marketing policies are often discriminatory in intent or effect on protected groups.[67] HUD itself has mandated affirmative marketing to address discrimination under the FHA.[68]

Moreover, contrary to the NPRM's assertions otherwise,[69] the statutory text of the FHA and case law interpreting it make clear that HUD has the authority to "make rules, after notice and comment, to carry out the goals of the FHA."[70] These goals include not only that HUD

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[62] *Id.* at 461.
[63] 802 F.3d at 434–35.
[64] 24 C.F.R. pts. 108, 200 subpt. M.
[65] *See* 90 Fed. Reg. at 23,492 (Section II.A.).
[66] *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Proj., Inc.*, 576 U.S. 519, 545–46 (2015) ("The Court holds that disparate-impact claims are cognizable under the [FHA] upon considering its results-oriented language, the Court's interpretation of similar language in Title VII [of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17] and the [Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–633a], Congress' ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.").
[67] *See, e.g.*, *Cnty. of Cook v. HSBC N. Am. Holdings, Inc.*, 314 F. Supp. 3d 950, 967 (N.D. Ill. 2018) (noting allegations of policies that resulted in a disparate impact under the FHA, including marketing policies).
[68] *See supra* nn.29, 31–32 and accompanying text.
[69] *See* 90 Fed. Reg. at 23,492 (Section II.A.).
[70] *Nat'l Ass'n of Mut. Ins. Co. v. U.S. Dep't of Hous. & Urb. Dev.*, 693 F. Supp. 3d 20, 27 n.2 (D.D.C. 2023) (citing 42 U.S.C. § 3614a). *United States v. Mid-Am. Apartment Cmtys., Inc.*, 247 F. Supp. 3d 30, 35 (D.D.C. 2017) is not to the contrary. *Compare* 90 Fed. Reg. at 23,492. In *Mid-America*, the District Court for the District of Columbia merely noted that the Court was not bound in a civil action by HUD's interpretation of the accessibility requirements of the FHA where HUD's enforcement authority was not at issue. *See Mid-America*, 247 F. Supp. 3d at 35.

enforce the FHA's nondiscrimination mandate but also that it affirmatively further fair housing, as discussed above.

Relatedly, HUD is wrong that the AFHM Regulations constitute an unconstitutional delegation of legislative power.[71] A delegation is sufficient if it contains an intelligible principle that allows a court to determine upon review whether an agency's actions comport with the will of Congress.[72] As the very case that HUD relies on makes clear, these requirements are not stringent, and even broad delegations of power are acceptable.[73] All that is required is that the principle contain a general policy and boundaries on its use.[74] To determine the sufficiency of the delegation, courts rely on the purpose, text, and history of the relevant act.[75] A provision allowing an agency to create regulations as necessary to carry out the purpose of a statute is an intelligible principle as long as that purpose is clearly defined in the statute.[76]

Here, the FHA does not "permit *any* regulation to carry out the broad purposes of the Act," as HUD argues,[77] but instead sufficiently limits HUD to promulgating regulations consistent with the FHA's purpose, text, and background.[78] HUD's rulemaking authority is guided by the principle that HUD administer its programs in a manner that affirmatively furthers fair housing,[79] as well as from other provisions of the Act that prohibit discrimination in housing and authorize HUD to take measures to eliminate such discrimination.[80] Nothing more is required.

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[71] 90 Fed. Reg. 23,492 (Section II.C.).
[72] *Yakus v. United States*, 321 U.S. 414, 426 (1944).
[73] *Gundy v. United States*, 588 U.S. 128, 146 (2019) ("Those standards, the Court has made clear, are not demanding. . . . By contrast, we have over and over upheld even very broad delegations."); *see also FCC v. Consumers' Rsch.*, No. 24-354,2025 WL 1773630, at *13 (U.S. June 27, 2025) ("[W]e have found intelligible principles in a host of statutes giving agencies significant discretion.") (collecting cases). Significant deference is given to Congress' determination of whether a delegation is appropriate. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001) ("[The Court has] 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'") (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).
[74] *Consumers' Rsch.*, No. 24-354, at *16 (upholding FCC actions guided by "clear and limiting" congressional delegation); *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 219 (1989) ("It is 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'") (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).
[75] *See N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24 (1932) (holding that "public interest" was a sufficiently intelligible principle for the Transportation Act of 1920 because context showed it referred to the adequacy of transportation service).
[76] *See Nat'l Broad. Co. v. United States*, 319 U.S. 190, 217 (1943).
[77] 90 Fed. Reg. 23,492 (Section II.C.).
[78] *See, e.g.*, *Am. Power & Light Co.*, 329 U.S. at 104.
[79] 42 U.S.C. 3608(e)(5).
[80] *See, e.g.*, 42 U.S.C. §§ 3604, 3608(e), 3612.

b. The AFHM Regulations Are Consistent with the Equal Protection Clause.

To the extent that HUD offers any rationale for its elimination of the AFHM Regulations, it principally relies on the Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* ("*SFFA*").[81] But the NPRM misconstrues and misapplies the Supreme Court's decision.[82]

While the Court in *SFFA* held that the benefits of diversity did not provide a compelling interest justifying the consideration of race in college admissions, its holding was limited to such admission decisions.[83] Yet HUD applies the Supreme Court's holding much more broadly to the AFHM Regulations and announces them unconstitutional based on *SFFA*'s warning in its limited context against "'impermissible racial stereotype[s].'"[84] HUD also notes its unsupported view that the AFHM Regulations "require applicants to favor some racial groups over others . . . ."[85]

The AFHM Regulations do not depend on impermissible racial stereotypes, and HUD fails to explain how in its view they do. In any event, HUD is incorrect in stating that the AFHM Regulations favor some racial groups over others.[86] The Regulations require just the opposite: the purpose of the Regulations is to ensure that "individuals of similar income levels in the same housing market area have a like range of housing choices available to them *regardless of their race*, color, religion, sex, handicap, familial status or national origin."[87] HUD's AFHM Regulations have never favored racial groups over others—rather their goal is to ensure that everyone has an equal opportunity to hear about and apply for housing. Indeed, in the initial final rule promulgating the AFHM Regulations, the requirements are described as "an affirmative program to attract buyers or tenants *of all minority and majority groups* to the housing[.]"[88] While HUD recognized that "[s]uch a program shall *typically* involve publicizing to minority persons[,]"[89] in issuing the NPRM,[90] HUD misleadingly omits the beginning of this quote; nothing in the regulation *requires* publicizing solely to minority groups. Similarly, the AFHM Regulations have consistently noted that HUD's compliance review covers "[p]rograms to attract *minority and majority buyers and renters*[.]"[91] It is clear that the purpose and effect of the

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[81] 600 U.S. 181 (2023); *see* 90 Fed. Reg. 23,492 (Section II.B.).
[82] *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (agency action must be logical and rational).
[83] 600 U.S. at 213 n.4 (declining to reach the question of whether U.S. military academies had distinct compelling interests that would justify the consideration of race in admissions).
[84] 90 Fed. Reg. at 23,492 (Section II.B.) (quoting *SFFA*, 600 U.S. at 220).
[85] *Id.*
[86] *Id.*
[87] 24 C.F.R. § 200.610 (emphasis added).
[88] 37 Fed. Reg. at 75 (emphasis added).
[89] *Id.* at 76 (emphasis added).
[90] 90 Fed. Reg. at 23,492 (Section II.B.).
[91] 44 Fed. Reg. 47,013, 47,015 (Aug. 9, 1979) (emphasis added).

AFHM Regulations always has been to ensure all renters, regardless of majority or minority status, or racial identity, are made aware of housing opportunities.

In practice, this is clear. For example, HUD's AFHM Handbook describes the required Affirmative Fair Housing Marketing Plan ("AFHM Plan") as "a marketing strategy designed to attract buyers and renters of *all majority and minority groups*[.]"[92] The Handbook discusses that the marketing requirements target the "groups that are least likely to apply for housing[,]" which the Handbook notes typically includes "disabled persons," a non-racial group.[93] The Handbook provides examples of groups that might be least likely to apply, and the first example listed is "[n]on-minority persons for a project located in a predominantly minority area[,]"[94] indicating that individuals of any race may be the target of AFHM's outreach. Further, the AFHM Plan forms that HUD provides and requires applicants to submit require applicants to identify the demographic groups "least likely to apply" for the available housing based on the project's census tract data, which includes "white" applicants, demonstrating the race-neutrality of the AFHM requirement.[95] These marketing efforts to increase the opportunity for information for those "least likely to apply" are thus far from "impermissible racial stereotypes," and they do not require applicants to favor some racial groups over others.

When the Supreme Court has spoken on issues related to furthering diversity and undoing the historical effects of discrimination it has distinguished them. In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, for example, the Supreme Court stated that "mere awareness of race in attempting to solve [ ] problems" the FHA was designed to address "does not doom that endeavor . . . ."[96] In *SFFA*, Justice Kavanaugh, concurring, expressly states that "governments and universities still 'can, of course, act to undo the effects of past discrimination in many permissible ways[.]'"[97] Justice Kavanaugh cites back

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[92] The Affirmative Fair Housing Marketing Plan and Procedures, *supra* note 22, ch. 2, § 2-2 (emphasis added). The Handbook does define "Minority," 8025.1 Rev-2, ch. 1, § 1-7(H), https://www.hud.gov/sites/documents/80251c1fheh.pdf [https://perma.cc/5PLT-KGBS], but as explained, AFHM requirements are not limited to the benefit of these minority groups.

[93] The Affirmative Fair Housing Marketing Plan and Procedures, *supra* note 22, ch. 2, §§2-8, 2-8(E).

[94] Processing of Affirmative Fair Housing Marketing Plans and Related Documents, 8025.1 Rev-2, ch. 3, § 3-8(A)(1), https://www.hud.gov/sites/documents/80251c3fheh.pdf [https://perma.cc/37B7-Z4BW].

[95] *See, e.g.*, Form HUD-935.2D-ORCF (Jan. 2023), https://www.hud.gov/sites/dfiles/OCHCO/documents/935.2D_orcf.docx [https://perma.cc/8M7G-JTZB] (residential care facilities). Consistent with the Regulations and underlying statutory requirements, past HUD forms also include "Persons with Disabilities" and "Families with Children" as target demographic groups. *See* Form HUD-935.2A (Dec. 2011), https://www.hud.gov/sites/dfiles/OCHCO/documents/935-2A.pdf [https://perma.cc/4UMA-9MLK] (multifamily housing); Form HUD-935.2B (July 2008), https://www.hud.gov/sites/dfiles/OCHCO/documents/935-2B.pdf [https://perma.cc/E6WY-5FMS] (single family housing); Form HUD-935.2C (July 2008), https://www.hud.gov/sites/dfiles/OCHCO/documents/935-2C.pdf [https://perma.cc/UXX5-WLNQ] (condominiums and cooperatives).

[96] 576 U.S. at 545.

[97] 600 U.S. at 317 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 526 (1989)); *see also id.* (citing *Croson*, 488 U.S. at 509 (plurality opinion of O'Connor, J.) ("[T]he city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races[.]")).

to SFFA's own briefing,[98] which highlights examples of permissible means of eliminating barriers to access, including: increasing recruitment efforts and developing partnerships with disadvantaged high schools.[99] In addition, there is no guidance in *SFFA* whatsoever for any analysis relevant to "sex," disability, and familial status, which the AFHM Regulations also take into account.[100]

HUD relies on its flawed application of *SFFA* to justify its conclusion that the AFHM Regulations are unconstitutional. This is incorrect and renders HUD's reasoning arbitrary and capricious.[101]

III. HUD's Remaining Reasons For Issuing the NPRM Are Wrong.

In addition to the arguments addressed above, HUD relies on various policies to explain its elimination of the Regulations, including its purported "color-blind policy" and "policy of the Department not to burden applicants unless they have engaged in discrimination."[102] Any purported policy, however, cannot override HUD's statutory obligations to further the goals of the FHA, including with respect to its statutory duty to affirmatively further fair housing.

HUD additionally explains that "[r]egardless of the constitutionality of the regulations, it is the policy of the Department not to require applicants to engage in racial sorting."[103] As explained above, however, that is not what the AFHM Regulations require. Instead, the Regulations require housing providers to identify demographic groups that are least likely to apply to properties for which they are otherwise qualified based on income and to develop plans to better inform them of the opportunity to do so.

Similarly, HUD is wrong that the AFHM Regulations "are based on an assumption that equal outcomes are what matter."[104] The goal of the AFHM Regulations is to overcome informational barriers to provide equal *opportunity* to such information about a particular

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[98] *Id.* (citing Brief for Petitioner at 80–86, *SFFA*, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 2918946).
[99] *Id.* (citing Brief for Petitioner at 85–86, *SFFA*, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707)); *see also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788–89 (2007) (Kennedy, J., concurring) ("In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. . . . School boards may pursue the goal of bringing together students of diverse backgrounds and races through [ ] means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.") (citation omitted).
[100] 24 C.F.R. § 200.620(a).
[101] *See Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 588 (4th Cir. 2012) ("A material misapprehension of the baseline conditions existing in advance of an agency action can lay the groundwork for an arbitrary and capricious decision.").
[102] *See* 90 Fed. Reg. at 23,492 (Section II.D.–II.E.).
[103] *Id.* (Section II.D.).
[104] *Id.* (Section II.F.).

property to those who may not otherwise be aware of such opportunity; the AFHM Regulations do not require that a housing provider select particular groups or individuals for housing, or otherwise mandate any outcomes.

IV. HUD Failed to Consider Important Aspects of the Problem and the Costs of Eliminating the AFHM Regulations.

HUD should withdraw the NPRM because it "entirely failed to consider . . . important aspect[s] of the problem" that elimination of the Regulations will create.[105]

First, HUD failed to consider the NPRM's interference with its own statutory obligations—including its duty to affirmatively further fair housing and enforce nondiscrimination mandates. For example, elimination of the Regulations will undermine recipients' ability to ensure that their practices and policies do not have a discriminatory impact on protected groups, as is necessary for compliance with the FHA, as well as HUD's regulations under Title VI.[106] It is well-settled that consistent self-auditing and analysis of policies and programming is vital to assuring that discriminatory barriers do not exist[107]; for instance, compliance with AFHM plans may help applicants identify and address language barriers in their advertising that may have a discriminatory impact on people with Limited English Proficiency. Recipients that fail to engage in such measures risk potential claims of discrimination by participants, or other state and federal entities. "[W]hen an agency ignores a mandatory factor it defies a statutory limitation on its authority[,]" and "[s]uch an act is necessarily arbitrary and capricious."[108]

Second, HUD fails to consider how its elimination of the Regulations will undermine or otherwise frustrate state and local laws related to preventing discrimination and furthering integration in housing. For example, several states have separate or overlapping requirements for affirmatively furthering housing, including in marketing.[109] Moreover, as of January 2025, source of income anti-discrimination laws exist in nineteen states, the District of Columbia, and numerous localities[110] to, among other things, further fair housing, increase integration, and support the geographic mobility of families with government housing assistance.[111] HUD's

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[105] *State Farm*, 463 U.S. at 43.
[106] 24 C.F.R. § 1.4(b)(2)(i)–(3).
[107] *See, e.g.*, *Connecticut v. Teal*, 457 U.S. 440, 449 (1982) (describing disparate impact as a "prophylactic" measure).
[108] *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 656 F.3d 580, 587 (7th Cir. 2011) (cleaned up); *see also Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d1209, 1216 (D.C. Cir. 2004).
[109] *See supra* nn.26–28.
[110] *See Appendix B: State, Local, and Federal Laws Barring Source-of-Income Discrimination*, Poverty & Race Rsch. Action Council, https://www.prrac.org/pdf/AppendixB.pdf [https://perma.cc/TW9Z-CC6S] (last updated Jan. 2025).
[111] *See, e.g.*, *Fair Housing Matters NY: An Assessment of Fair Housing in New York State*, N.Y. State Homes & Cmty. Renewal,7, 202 (Apr. 2024), https://hcr.ny.gov/system/files/documents/2024/04/2024-final-fair-housing-matters-ny.pdf [https://perma.cc/J3U9-6QZ5].

sudden elimination of longstanding regulations that require covered housing providers to affirmatively market to communities who are least likely to otherwise hear about housing opportunities in particular communities will undermine these state and local regimes and their goals.[112] Similarly, as discussed above, a number of states incorporate AFHM regulations or otherwise require AFHM commitments through their Qualified Allocation Plans for low income housing tax credit programs, the most common form of subsidized housing.[113] "[W]hen an agency ignores factual matters[,]" as HUD clearly has in attempting to eliminate the AFHM Regulations, courts "ha[ve] not hesitated" to vacate agency decisions.[114]

Third, HUD failed to consider the costs of eliminating the Regulations. "As a general rule, the costs of an agency's action are a relevant factor that the agency must consider before deciding whether to act."[115] HUD mentions only that eliminating the Regulations may have the unsupported and vague benefit of reducing the "burdens" of the Regulations on applicants.[116] Yet HUD entirely fails to identify, much less quantify, the cost of eliminating the Regulations. The elimination of the AFHM Regulations will impose harm and increase burdens on individuals who benefit from the regulations—including historically marginalized groups and people with disabilities, as well as organizations and states and local governments that rely on the regulations to further their organizational and governmental priorities,[117] HUD funding recipients, and the beneficiaries of their programs. HUD's refusal to acknowledge much less quantify or explain these costs is arbitrary and capricious.[118]

V. The NPRM is Procedurally Flawed and Must Be Withdrawn.

An agency must take action in accordance with the "procedure required by law[.]"[119] For this reason alone, HUD must withdraw the NPRM, or at minimum allow the public sixty days to

[112] Relatedly and in addition, regulations governing the Section 8 Housing Choice Voucher Program—which these anti-discrimination laws typically cover—include AFHM requirements that will at the very least be undermined by HUD's elimination of the AFHM Regulations. *See, e.g.*, 24 C.F.R. §§ 886.313, 886.321, 880.601, 881.601, 5.655 (incorporating AFHM requirements to Section 8 programs).
[113] *See supra* Section I; *see supra* n.28; Pub. and Affordable Hous. Rsch. Corp. & Nat'l Low Income Hous. Coal., *Picture of Preservation*, 6 (Dec. 2024), https://resources.haigroup.com/hubfs/Picture%20of%20Preservation%202024.pdf (Low-Income Housing Tax Credits housing made up 52% of the federally assisted housing stock as of December 2024).
[114] *Water Quality Ins. Syndicate v. United States*, 225 F. Supp. 3d 41, 68 (D.D.C. 2016).
[115] *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 732 (D.C. Cir. 2016) (Kavanaugh, J., dissenting); *see also Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017).
[116] *See* 90 Fed. Reg. at 23,492 (Section II.E.).
[117] *See supra* Section I; *see supra* nn.20–32.
[118] *See Perdue*, 873 F.3d at 932 (agencies must "adequately analyze the . . . consequences" of their actions).
[119] 5 U.S.C. § 706(2)(D).

comment on this significant proposal to remove regulations that have been in place for over fifty years.

As HUD acknowledges,[120] its own regulations require a sixty-day notice and comment period.[121] This sixty-day period can only be avoided if "the Department determines in a particular case . . . that notice and public procedure are impracticable, unnecessary or contrary to the public interest."[122] This language is identical to the "good cause" exception to the APA's notice and comment requirements,[123] and should be interpreted in the same way.

HUD claims that its justifications for elimination of the AFHM Regulations demonstrate "that it is in the public interest to rescind the AFHM regulations as expeditiously as possible."[124] As discussed above, each of HUD's justifications for the rescission are flawed. Further, none of HUD's purported justifications requires such immediate action as to justify such a significant abbreviation of the required notice and comment period. HUD is not entitled to make significant changes to longstanding AFHM Regulations by invoking the good cause exception.

The D.C. Circuit warns, "[w]e have repeatedly made clear that the good cause exception 'is to be narrowly construed and only reluctantly countenanced.'"[125] Significantly, a federal court has previously enjoined HUD from abbreviating a comment period to thirty days. In *Housing Study Group v. Kemp*, a court granted a temporary restraining order against a thirty-day comment period for a HUD notice of proposed rulemaking after holding that HUD's justifications for an abbreviated period were insufficient to "stifle the public's entitlement to full illumination and vigorous discourse provided through the normal notice and comment period required for all substantive rules of an agency."[126] The court reached this holding despite the

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[120] 90 Fed. Reg. at 23,493 (Section III).
[121] 24 CFR § 10.1.
[122] *Id.*
[123] 5 U.S.C. § 553(b)(4)(B) (permitting departure from standard notice and comment requirements "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.").
[124] 90 Fed. Reg. at 23,493 (Section III).
[125] *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001)) (rejecting EPA's argument that good cause exception was warranted because agency failed to satisfy the "impracticable" and "contrary to public interest" prongs of the good cause exception and the disputed rule was one "about which these members of the public [the petitioners] were greatly interested" (collecting cases); *see also N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 767 (4th Cir. 2012) ("[T]he circumstances justifying reliance on the good cause exception are 'rare,' and will be accepted only after a reviewing court 'examine[s] closely' the proffered reason for an agency's deviation from public notice and comment.") (quoting *Council of the S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 (D.C. Cir. 1981) (citation omitted)); *Util. Solid Waste Activities Grp.*, 236 F.3d at 755 (EPA could not satisfy "unnecessary" prong where new rule lowered threshold for cleanup and contamination standards for porous materials, like wood and concrete, because "the rule greatly expanded the regulated community and increased the regulatory burden[,]" which was, "without doubt, something about which these members of the public were greatly interested.").
[126] 736 F. Supp. 321, 335 (D.D.C.), *order clarified*, 739 F. Supp. 633 (D.D.C. 1990).

fact that HUD claimed delaying the rule would result in significant financial losses.[127] Of importance to the court was the fact that HUD had been studying the underlying problem for one and a half years without acting, negating any sense of urgency.[128] Comparatively, here, HUD has not offered any explanation for why urgency is needed in eliminating the AFHM Regulations when the Regulations have been in place for decades. HUD thus cannot justify an abbreviated notice and comment period.

As explained, because countless Americans, organizations, states, and regulated entities themselves rely on these longstanding and uncontroversial AFHM Regulations, HUD must withdraw the NPRM or, at a minimum, afford the full sixty-day notice and comment period required by its regulation.

VI. Conclusion

The ACLU appreciates the opportunity to submit this comment opposing the NPRM and requests that HUD withdraw it in its entirety. Please feel free to contact Amanda M. Meyer, Senior Staff Attorney at amandam@aclu.org and Alexis Alvarez, Staff Attorney at alexisa@aclu.org for the ACLU's Racial Justice Program with any questions.

[127] *Id.*
[128] *Id.*