

April 24, 2023

SUBMITTED VIA REGULATIONS.GOV

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

Re: HUD’s Proposed Rule on Affirmatively Furthering Fair Housing, Docket No. FR-6250-P-01 (RIN 2529-AB05)

To Whom It May Concern:

We write to you on behalf of the American Civil Liberties Union Foundation (“ACLU”) and the New York Civil Liberties Union (“NYCLU”) in response to the U.S. Department of Housing and Urban Development’s (“HUD’s”) Proposed Rulemaking: Affirmatively Furthering Fair Housing (hereinafter, the “Proposed AFFH Rule”), which was published in the Federal Register on February 9, 2023 (HUD Docket No. FR-6250-P-01; RIN 2529-AB05).

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 50 states, Puerto Rico, and Washington D.C. for the right of every individual to access housing 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 (“FHA”) and the Equal Credit Opportunity Act (“ECOA”) 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. These comments are also joined by the NYCLU, the New York affiliate of the ACLU, which contributed its insights from experiences with addressing fair housing barriers in New York state.¹

¹ The NYCLU, founded in 1951 as the New York affiliate of the ACLU, is a not-for-profit, nonpartisan organization with eight chapters and regional offices, and more than 160,000 members across New York State. Its mission is to defend and promote the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and

The ACLU strongly supports the adoption of HUD’s Proposed AFFH Rule, which would implement HUD’s obligation to affirmatively further fair housing (“AFFH”) in accordance with the text of the FHA. We applaud HUD for building on the steps previously taken in HUD’s 2015 Affirmatively Furthering Fair Housing Final Rule (hereinafter, the “2015 AFFH Rule”) to retain much of that rule while proposing critical improvements to requirements for community engagement, transparency, goal-setting, ways in which to measure progress, and accountability. In addition to these improvements, we recommend the following and urge HUD to finalize a new rule expeditiously to ensure that program participants meet their obligation to affirmatively further fair housing.

Summary of recommendations:

1. Ensure that the Final Rule include robust provisions that require states, local jurisdictions, public housing authorities (“PHAs”), and other recipients of federal financial assistance (collectively, “program participants”) to take a balanced approach to affirmatively furthering fair housing, including by requiring them to evaluate access to critical community assets like high-quality schools, and assess barriers to affordable housing opportunities imposed by source of income discrimination. *See infra* [Section II](#).
2. Require program participants to identify, analyze, and reform criminal and eviction record screening policies and practices that impose barriers to housing opportunities, especially for families of color. *See infra* [Section III](#).
3. Ensure availability of the data and tools program participants need to meaningfully analyze their zoning policies. *See infra* [Section IV](#).
4. Provide stronger and clearer requirements for community engagement and enforcement. *See infra* [Section V](#) and [Section VI](#).
5. Harmonize the reference to sex as a protected characteristic with how sex discrimination is treated in other federal civil rights regulations. *See infra* [Section VII](#).

I. The Proposed Rule Comports with the Statutory Text of the Fair Housing Act and Decades of Case Law.

The adoption of the Proposed AFFH Rule is a critical step in ensuring that HUD and program participants affirmatively further fair housing in accordance with the FHA’s mandate.

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

the New York Constitution, including freedom of speech and religion, and the right to privacy, equality, and due process of law, with particular attention to the pervasive and persistent harms of racism.

poverty, and perversely inflated the prices of the limited housing available to those groups.² 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.”³

The FHA prohibits discrimination in housing because of an individual’s race, color, national origin, religion, sex, familial status, or disability.⁴ But Congress went even further by seeking to replace segregation in America with “truly integrated and balanced living patterns”⁵ and by requiring recipients of HUD funding to affirmatively further fair housing in all programs and activities related to housing.⁶ Fair housing, as understood by Congress, meant integrated housing and communities, and it explicitly gave HUD a mandate to affirmatively pursue it.⁷

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. U.S. Department of Housing and 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.⁸ 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 as respect [to] 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

² See Nat’l Advisory Comm’n on Civil Disorders, *Report of the National Advisory Commission on Civil Disorders: Summary* (1968), <https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf>; 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. (Sept. 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/>.

³ 114 CONG. REC. 2276-2707 (1968).

⁴ 42 U.S.C. § 3601 et seq.

⁵ *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting the Fair Housing Act’s co-sponsor Senator Walter Mondale).

⁶ 42 U.S.C. § 3608(e)(5).

⁷ 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/>.

⁸ 436 F.2d 809, 816 (3d Cir. 1970).

a given neighborhood.⁹

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.*¹⁰

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.¹¹

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.”¹² 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.”¹³

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[.]”¹⁴ 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 others.”¹⁵ 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.”¹⁶

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.¹⁷ HUD

⁹ *Id.* at 820 (quoting 24 C.F.R. § 1.4(b)(2)(i)).

¹⁰ *Id.* at 820–21 (emphasis added).

¹¹ *Id.* at 821.

¹² *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1133 (2d Cir. 1973).

¹³ *Id.* at 1134.

¹⁴ *N.A.A.C.P., Boston Chapter v. Sec’y of Hous. & Urb. Dev.*, 817 F.2d 149, 154 (1st Cir. 1987).

¹⁵ *Id.*

¹⁶ *Id.* at 156.

¹⁷ 335 F. Supp. 16, 27 (E.D. Mich. 1971), *supplemented*, 357 F. Supp. 925 (E.D. Mich. 1973), *rev’d on*

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.¹⁸

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. 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[.]”¹⁹

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 its grantees, to “eradicate practices . . . that are contrary to the advancement of . . . ‘fair housing.’”²⁰ In *Thompson v. U.S. 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[.]”²¹ 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.”²² 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.”²³ HUD’s funding pattern in the Baltimore region failed to achieve significant desegregation, in violation of its section 3608 mandate.²⁴ Similarly, in *County of Westchester v. U.S. Department of Housing and 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.²⁵

Consistent with this case law and the FHA’s statutory text, HUD issued the 2015 AFFH Rule, which required program participants to complete an analysis of segregation and fair housing disparities in their communities as a condition of ongoing receipt of HUD funding.²⁶ In

other grounds, 503 F.2d 1236 (6th Cir. 1974).

¹⁸ *Id.*

¹⁹ *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (citations omitted).

²⁰ *County of Westchester v. U.S. Dep’t of Hous. & Urban Dev.*, 802 F.3d 413, 434–35 (2d Cir. 2015).

²¹ 348 F. Supp. 2d 398, 408 (D. Md. 2005).

²² *Id.* at 409.

²³ *Id.* at 417.

²⁴ *Id.* at 461.

²⁵ *County of Westchester*, 802 F.3d at 434–35.

²⁶ Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42271 (July 16, 2015).

2018, under the Trump Administration, HUD suspended the 2015 AFFH Rule,²⁷ and in 2020 issued a new “Preserving Community and Neighborhood Choice” rule, which repealed the 2015 AFFH Rule.²⁸ The suspension and eventual repeal of the 2015 AFFH Rule undermined critical fair housing advancements and substantially weakened HUD’s authority and ability to meet its AFFH obligation.²⁹

The Proposed AFFH Rule is a crucial measure toward restoring HUD’s authority and role in ensuring that it and its grantees are affirmatively furthering fair housing consistent with the text of the FHA and the case law interpreting the FHA’s mandate.

II. The Proposed AFFH Rule is a Critical Step in Ensuring Access to Housing and Community Assets for Members of Protected Class Groups and Underserved Communities.

We applaud HUD for providing a framework under which program participants must set and implement meaningful fair housing goals to “affirmatively further fair housing, promote equity in their communities, decrease segregation, and increase access to opportunity and community assets for people of color and other underserved communities.”³⁰

Given the long-standing history of government-sponsored segregation and the barriers that members of protected class groups and underserved communities continue to face in accessing safe and affordable housing, only a proactive approach like the one prescribed in the Proposed AFFH Rule will suffice to fulfill the FHA’s fair housing mandate. We strongly support the following provisions in the Proposed AFFH Rule, and make some suggestions for their improvement in the Final Rule.

²⁷ See Affirmatively Furthering Fair Housing (AFFH): Responsibility to Conduct Analysis of Impediments, 83 Fed. Reg. 23927 (May 23, 2018). The ACLU was among the counsel for the National Fair Housing Alliance and other plaintiffs that challenged the suspension of the 2015 AFFH Rule. See *Nat’l Fair Hous. All. v. Carson*, No. 18-cv-01076 (D.D.C. May 8, 2018).

²⁸ Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47899 (Aug. 7, 2020).

²⁹ See, e.g., Justin P. Steil & Nicholas Kelly, *Survival of the Fairest: Examining HUD Reviews of Assessments of Fair Housing*, 29 HOUS. POL’Y DEBATE 736, 747–49 (explaining how HUD’s review and initial nonacceptances of the required Assessments of Fair Housing (“AFHs”) “represent a strength of the [2015 AFFH] Rule and HUD’s implementation of it” and the benefit of the 2015 AFFH Rule in, among other things, helping municipalities to set meaningful goals and analyze fair housing issues); Decl. of Madison Sloan ¶¶ 13-17, *Carson*, ECF No. 2-5 (explaining how the 2015 AFFH Rule’s regulatory requirements prompted jurisdictions in Texas to improve AFHs, and how HUD’s notice of suspension stopped progress for such jurisdictions); Decl. of Deborah Goldberg ¶ 9, *Carson*, ECF No. 2-6 (“When HUD suspended the AFFH rule in January 2018, HUD removed all of the benefits of efficiency and thought that had gone into the AFH process and returned to the previous [Analysis of Impediments] process which is deeply flawed and lacks the AFH’s organized process, consistent template, and common data sources and maps.”); Decl. of RuthAnne Visnauskas, *Carson*, ECF No. 26-1 (explaining how the suspension of the 2015 AFFH Rule’s requirements would frustrate New York’s ability to identify barriers to housing and affirmatively further fair housing statewide).

³⁰ Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8517 (Feb. 9, 2023).

a. The Proposed AFFH Rule Appropriately Defines “Affirmatively furthering fair housing.”

We are pleased that HUD has restored and strengthened the definition of “Affirmatively furthering fair housing,” such that the duty “requires a program participant to take actions, make investments, and achieve outcomes that remedy the segregation, inequities, and discrimination the Fair Housing Act was designed to redress.”³¹ This important language makes clear that program participants must take meaningful actions that lead to actual outcomes to meet their obligations under the FHA, and should be included in the Final Rule.

b. The Proposed AFFH Rule Rightly Recognizes that Program Participants Must Take a “Balanced Approach” to AFFH.

We applaud the inclusion of the definition of “Balanced Approach” that makes clear that program participants must include a combination of actions designed to address particular disparities, including place-based strategies and mobility strategies.³² As we emphasized in our comments to the notice of proposed rulemaking for the 2015 AFFH Rule, program participants need to employ targeted investments to enhance neighborhood assets *and* promote greater mobility and integration to meet their full statutory obligation to affirmatively further fair housing.³³ Program participants should never be permitted to ignore or set a lower priority on strategies designed to promote greater mobility and access to areas of opportunity, particularly where there is a history of residential segregation in the area or the program participant has engaged in discriminatory practices. To do so would contravene the very purpose of the FHA, as well as HUD’s regulatory authority under the statute. Moreover, as discussed below, program participants must ensure that targeted investments to enhance neighborhood assets do not result in displacement.

c. The Final Rule Should Include a Robust, Non-Exhaustive List of Community Assets that Program Participants Must Consider.

The Proposed AFFH Rule’s emphasis on community assets—including the definition of the term and the requirement that program participants consider access to such assets in their Equity Plans—is imperative.³⁴

In particular, we applaud the inclusion of high-quality schools in the definition of community assets,³⁵ and the acknowledgement that “students of color across the Nation are . . . disproportionately confined to racially and economically segregated, underfunded schools.”³⁶ Program participants must take sufficient steps to address segregation among schools to ensure equal access to educational opportunities. Such steps are necessary to affirm the goals of the

³¹ *Id.* at 8557 (§ 5.152 Definitions).

³² *Id.* at 8558.

³³ *Comment from ACLU to Ms. Camille Acevedo, Associate General Counsel for Legislation and Regulations, ACLU* (Sept. 17, 2013), https://www.aclu.org/sites/default/files/field_document/affh_comments_final_9-17-13.pdf.

³⁴ *Affirmatively Furthering Fair Housing*, 88 Fed. Reg. at 8558 (§ 5.152); *id.* at 8563 (§ 5.154(d)(4)); *id.* at 8565 (§ 5.154(e)(4)).

³⁵ *Id.* at 8531.

³⁶ *Id.* at 8551.

FHA to “undo historic patterns of segregation and other types of discrimination and afford access to opportunity[.]”³⁷

Access to housing and education are largely dependent on each other, as acknowledged by the Proposed AFFH Rule.³⁸ In a society where neighborhoods are still deeply segregated, and where the racial wealth gap has been widening,³⁹ racial patterns of housing often echo racial and economic patterns of school enrollment and school funding.⁴⁰ Further, actions taken by federal housing officials in the past have directly contributed to the segregation of schools. For example, Federal Housing Administration manuals in the 1950s advised that a neighborhood “will prove far less stable and desirable . . . if the children of people living in such an area are compelled to attend a school where the majority or a goodly number of pupils represent a far lower level of society, or an incompatible racial element.”⁴¹

New York State passed a law in 1873 prohibiting school officials from denying children access to any public school “on account of race or color,”⁴² long before the 1954 *Brown v. Board of Education* decision that triggered a massive desegregation effort in Southern states. However, despite this significant head start, New York failed to contend with de facto housing segregation and school placement.⁴³ In fact, schools in New York are more segregated today than after *Brown v. Board of Education* forced integration policies.⁴⁴

School district efforts to desegregate schools often are met with significant barriers created by residential segregation and school placement. A clear example of this relationship can be seen in *United States v. Yonkers Board of Education*.⁴⁵ In *Yonkers*, students and families challenged both the city’s policy of intentionally placing housing projects in high minority areas, and the school board’s neighborhood school assignment policy, which placed schools in close proximity to PHAs.⁴⁶ The Southern District of New York found that the decisions made by the city and school board amounted to a “failure to implement measures to alleviate school

³⁷ *Id.* at 8522.

³⁸ *Id.* at 8551 (stating that the proposed rule “acknowledges the direct link between housing opportunities and access to equal educational opportunity”).

³⁹ Aditya Aladangady & Akila Forde, *Wealth Inequality and the Racial Wealth Gap* (Oct. 22, 2021), [https://www.federalreserve.gov/econres/notes/feds-notes/wealth-inequality-and-the-racial-wealth-gap-20211022.html#:~:text=In%20the%20United%20States%2C%20the,few%20decades%20\(left%20panel\)](https://www.federalreserve.gov/econres/notes/feds-notes/wealth-inequality-and-the-racial-wealth-gap-20211022.html#:~:text=In%20the%20United%20States%2C%20the,few%20decades%20(left%20panel)).

⁴⁰ Anurima Bhargava, *The Interdependence of Housing and School Segregation*, HARV. JOINT CTR. FOR HOUS. STUD. (2017),

https://www.jchs.harvard.edu/sites/default/files/media/imp/a_shared_future_interdependence_of_housing_and_school_segregation.pdf (noting that, because school funding is often tied to property taxes, “the funding available for and quality of schooling is closely related to the value of the property within the residential area being served”).

⁴¹ *Oliver v. Kalamazoo Bd. of Ed.*, 368 F. Supp. 143, 183 (W.D. Mich. 1973), *aff’d sub nom. Oliver v. Michigan State Bd. of Ed.*, 508 F.2d 178 (6th Cir. 1974).

⁴² John Freeman Gill, *The Push to Landmark the Last-Known ‘Colored’ School in Manhattan*, N.Y. TIMES (Oct. 7, 2022), <https://www.nytimes.com/2022/10/07/realestate/segregated-school-landmark-manhattan.html>.

⁴³ Rachel Silberstein, *Nearly 70 Years After the Brown Decision, New York Schools Still Separate and Unequal*, TIMES UNION (Feb. 22, 2022, 6:32 PM), <https://www.timesunion.com/news/article/Nearly-70-years-after-Brown-decision-New-York-16828901.php>.

⁴⁴ *Id.*

⁴⁵ 837 F.2d 1181, 1235 (2d Cir. 1987).

⁴⁶ *Id.*

segregation, [and] constituted intentional racial segregation of the Yonkers public schools[.]”⁴⁷ As a remedy, the court ordered the entities to construct housing in non-minority areas and implement a magnet school program.⁴⁸ On appeal, the Second Circuit clearly described the relationship between housing and educational segregation:

“It is . . . plain that housing patterns have an impact upon school populations and that when a school board adopts a policy of requiring children to attend schools in their own neighborhoods, the racial makeup of a school’s population will normally be reflective of the makeup of its neighborhood. The neighborhood-school policy itself, however, has an effect on residential patterns, for parents of school-age children are often influenced by the quality of the nearby public schools in deciding where to reside.”⁴⁹

Patterns of residential and housing segregation lead to alternative undesirable outcomes: Students of color are (a) placed in schools which are ill-equipped to support them, or (b) forced to travel long distances to attend schools that have more resources to find themselves displaced from their home communities and exposed to discrimination. Efforts to eliminate housing and educational segregation independently of each other are likely to continue to fail just as they have over the last 60 years.⁵⁰ This is evident by New York’s place as the most segregated state for Black students, and second most segregated for Latino/a students, trailing only California.⁵¹ In 2019, 45 percent of Black students, 43 percent of Latino/a students, and 37 percent of Native American students attended high-poverty⁵² schools while only 8 percent of their white peers did.⁵³ It is clear that housing segregation and school segregation are inextricably intertwined.

As the Proposed AFFH Rule recognizes, “affordable housing opportunities” includes “the location of . . . housing, including proximity to community assets[.]”⁵⁴ Program participants must prioritize identifying and addressing access to high-quality schools. Moreover, in addition to the non-exhaustive list of examples included in the definition of community assets, we recommend including consideration of access to child and adult dependent care services because

⁴⁷ *Id.* at 1184.

⁴⁸ *Id.* at 1194-95, 1215-16.

⁴⁹ *Id.* at 1228.

⁵⁰ See, e.g., Sean P. Corcoran, *School Choice and Commuting – How Far New York City Students Travel to School*, URB. INST. (Oct. 2018), https://www.urban.org/sites/default/files/publication/99205/school_choice_and_commuting.pdf.

⁵¹ Danielle Cohen, *NYC School Segregation: A Report Card from the UCLA Civil Rights Project*, UCLA C.R. PROJECT (Jun. 2021), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/nyc-school-segregation-report-card-still-last-action-needed-now/NYC_6-09-final-for-post.pdf.

⁵² *Concentration of Public School Students Eligible for Free or Reduced-Price Lunch*, U.S. DEP’T. OF EDUC. (2020), https://nces.ed.gov/programs/coe/pdf/coe_clb.pdf (“High-poverty schools are defined as public schools where more than 75.0 percent of the students are eligible for free or reduced-price lunch (FRPL).”).

⁵³ *Concentration of Public School Students Eligible for Free or Reduced-Price Lunch*, U.S. DEP’T. OF EDUC. (2022), <https://nces.ed.gov/programs/coe/indicator/clb/free-or-reduced-price-lunch>.

⁵⁴ *Affirmatively Furthering Fair Housing*, 88 Fed. Reg. 8516, 8558 (Feb. 9, 2023).

lack of access to these community assets disproportionately affects members of protected groups, including Black and Latino families and women.⁵⁵

d. The Proposed AFFH Rule Rightly Considers Source of Income Discrimination.

The Proposed AFFH Rule importantly ensures that program participants identify and analyze source of income discrimination and work to eradicate it.⁵⁶ As a result of a combination of factors, including decades of racial and gender discrimination in housing and lending practices, Black households are much more likely than white households to rent with incomes at or below the poverty level. Accordingly, forms of housing assistance, particularly housing vouchers, are critical in advancing equity for families of color. Based on recent data collected in 2019, housing assistance helped lift about 3 million people out of poverty.⁵⁷ The Housing Choice Voucher (“HCV”) program, the largest federal housing assistance program, expands access to affordable housing to more than 2 million households, more than two-thirds of which have a head of household who identifies as a person of color, and nearly four-fifths of which are headed by women.⁵⁸ When people in poverty receive housing subsidies, it expands the quality of their housing options. That opportunity, in turn, increases access to more resourced communities, which is particularly impactful for Black families, who disproportionately live in low-resource neighborhoods.

The HCV program can only be effective and provide rental assistance to more families if landlords and private rental agencies accept income subsidies and rent to voucher holders. Rental discrimination against voucher holders perpetuates systemic racism and denies equal opportunity in the housing market to renters of color, particularly Black women and their families. Currently, federal law does not explicitly protect voucher holders from rejection based on source of income discrimination. Accordingly, such discrimination continues to serve as a highly problematic barrier to housing stability for Black people, women, people with disabilities, and cost-burdened households, especially in jurisdictions without source of income discrimination protections.

⁵⁵ See, e.g., Rasheed Malik et al., *The Coronavirus Will Make Child Care Deserts Worse and Exacerbate Inequality*, CTR. FOR AM. PROGRESS (June 22, 2020), <https://www.americanprogress.org/article/coronavirus-will-make-child-care-deserts-worse-exacerbate-inequality/>.

⁵⁶ See, e.g., *Affirmatively Furthering Fair Housing*, 88 Fed. Reg. at 8558 (§ 5.152); *id.* at 8563 (§ 5.154(d)(5)(iv)); *id.* at 8564 (§ 5.154(d)(7)(iii)); *id.* at 8564 (§ 5.154(e)(3)(ii)(B)); *id.* at 8565 (§ 5.154(e)(5)(i)); *id.* at 8566 (§ 5.154(g)(3)(iii)); *id.* at 8566 (§ 5.154(g)(3)(viii)).

⁵⁷ See Danilo Trisi, *Programs Targeted for Cuts Keep Millions From Poverty, New Census Data Show*, CTR. ON BUDGET & POL’Y PRIORITIES (Sept. 10, 2019, 11:30 AM), <https://www.cbpp.org/blog/programs-targeted-for-cuts-keep-millions-from-poverty-new-census-data-showPriorities> (cbpp.org).

⁵⁸ See Will Fischer, Sonya Acosta & Erik Gartland, *More Housing Vouchers: Most Important Step to Help More People Afford Stable Homes*, CTR. ON BUDGET & POL’Y PRIORITIES, <https://www.cbpp.org/research/housing/more-housing-vouchers-most-important-step-to-help-more-people-afford-stable-homes> (last updated May 13, 2021); Laurie Goodman, Karan Kaul & Michael Stegman, *Leveraging Financing to Encourage Landlords to Accept Housing Choice Vouchers*, URB. INST. (Sept. 2022), available at <https://www.urban.org/sites/default/files/2022-09/Leveraging%20Financing%20to%20Encourage%20Landlords%20to%20Accept%20Housing%20Choice%20Vouchers.pdf>.

Source of income anti-discrimination laws exist in 19 states, the District of Columbia, and several localities.⁵⁹ These laws are critical in increasing the success and utilization rates of HCVs, supporting geographic mobility for families with vouchers, and reducing the concentration of vouchers in under-resourced neighborhoods. In particular, “[p]ublic housing agencies in jurisdictions with laws banning source of income discrimination had voucher utilization rates five to 12 percentage points higher than those without the laws[.]”⁶⁰

More states and municipalities should enact source of income anti-discrimination laws. Indeed, source of income anti-discrimination laws at the state or local level only protect an estimated 57% of voucher holders.⁶¹ Additionally, even though these laws have been increasingly adopted throughout the country, inconsistent or lax enforcement dampens their impact. The Proposed AFFH Rule rightly provides a framework and examples for program participants to identify, analyze, and reform or otherwise strengthen their practices with respect to redressing source of income discrimination. In addition to these provisions, we encourage HUD to provide more specific examples or other guidance to program participants regarding the ways in which PHAs have made efforts to combat source of income discrimination, and how jurisdictions have effectively enforced source of income anti-discrimination laws.

III. The Final AFFH Rule Should Be Strengthened to Ensure that Program Participants Identify, Analyze, and Remove Unnecessary Barriers Imposed by Tenant Screening Practices and Policies that Impede Access to Housing for Members of Protected Groups.

The ACLU strongly supports the Proposed AFFH Rule’s inclusion of “[l]aws, ordinances, policies, practices, and procedures that impede the provision of affordable housing in well-resourced areas of opportunity, including housing that is accessible for individuals with disabilities[.]”⁶² as a fair housing goal category, and the requirement that program participants answer how such laws and policies “impede the provision of affordable housing in well-resourced neighborhoods[.]”⁶³ The Final Rule should maintain these and related provisions, and explicitly address tenant screening requirements, policies, and practices that impede access to housing for people of color, especially women of color.

⁵⁹ See Source of Income Laws, LOCAL HOUS. SOLUTIONS, <https://localhousingsolutions.org/housing-policy-library/source-of-income-laws/> (last visited Apr. 3, 2023).

⁶⁰ Alison Bell, Barbara Sard & Becky Koepnick, *Prohibiting Discrimination Against Renters Using Housing Vouchers Improves Results*, CTR. ON BUDGET & POL’Y PRIORITIES, <https://www.cbpp.org/research/housing/prohibiting-discrimination-against-renters-using-housing-vouchers-improves-results#:~:text=Voucher%20non-discrimination%20laws%20appear%20to%20be%20associated%20with,%28HUD%29%20study%20has%20found%2C%20consistent%20with%20earlier%20analyses.org> (last updated Dec. 20, 2018).

⁶¹ See *Expanding Choice: Practical Strategies for Building a Successful Housing Mobility Program*, POVERTY & RACE RSCH. ACTION COUNCIL 1 n.1, <https://www.prrac.org/pdf/AppendixB.pdf> (last updated Mar. 2023).

⁶² *Affirmatively Furthering Fair Housing*, 88 Fed. Reg. 8516, 8559 (§ 5.152) (Feb. 9, 2023).

⁶³ *Id.* at 8564 (§ 5.154(d)(7)); see also *id.* at 8565 (§ 5.154(e)(5)(i)).

a. The Proposed AFFH Rule Rightly Recognizes that Nuisance or Crime-Free Ordinances Limit Access to Affordable Housing.

The Proposed AFFH Rule importantly recognizes that a fair housing goal “may include the removal of barriers that exist in local laws such as nuisance or crime free ordinances, which may limit access to affordable housing because of protected characteristics.”⁶⁴

Across the country, municipalities have enacted local so-called “crime-free” or nuisance ordinances that often encourage or require landlords to evict tenants and their families based on the mere suspicion of criminal activity, encourage or require landlords to bar housing applicants with any criminal record, and impose a fine or other penalty against a landlord after a rental unit exceeds a threshold number of calls to the police as specified by the ordinance. These ordinances often intentionally target and displace people of color.⁶⁵ Moreover, they disproportionately harm Black and Latino individuals because of the stark racial disparities that exist in the United States criminal legal system due to over-policing and systemic bias. For example, “Black people represent roughly 13 percent of the US population but account for roughly 27 percent of arrests.”⁶⁶ Black people are arrested more often than white people for the same conduct, including for low level offenses like trespassing, disorderly conduct, consuming in public, lurking, and marijuana use.⁶⁷

Crime-free housing and nuisance ordinances also target and disproportionately harm survivors of gender-based violence. Because these ordinances frequently penalize households for calls for police service or for criminal activity allegedly occurring in the home, cities have been able to use them to punish and cause the eviction of survivors of domestic violence.⁶⁸ The harmful effects of housing instability are compounded for Black women, Native American women, and other women of color, who face both increased barriers to housing and

⁶⁴ *Id.* at 8566 (§ 5.154(g)(vi)).

⁶⁵ See e.g., *Jones v. City of Faribault*, No. 18-1643, 2021 WL 1192466, at *14 (D. Minn. Feb. 18, 2021) (“The Court finds that the confluence of racialized complaints leading up to the [crime-free ordinance’s] enactment, the City’s knowledge that the [o]rdinance would have negative effects on the Somali community, and the City’s desire to eliminate low-rent housing downtown, create an inference that the City implemented the [o]rdinance because of its potential displacement of Black residents, not merely in spite of such effect.”).

⁶⁶ Susan Nembhard & Lily Robin, *Racial and Ethnic Disparities Throughout the Criminal Legal System: A Result of Racist Policies and Discretionary Practices*, URB. INST. 4 (Aug. 2021), <https://www.urban.org/sites/default/files/publication/104687/racial-and-ethnic-disparities-throughout-the-criminal-legal-system.pdf>.

⁶⁷ See, e.g., *Picking Up the Pieces: A Minneapolis Case Study*, ACLU, <https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/picking-pieces> (last visited Apr. 20, 2023); Ezekiel Edwards, et al., *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, ACLU (2020), https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf.

⁶⁸ See, e.g., Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOCIO. REV. 117 (2012), https://scholar.harvard.edu/files/mdesmond/files/desmond.valdez.unpolicing.asr_0.pdf; Gretchen W. Arnold, *From Victim to Offender: How Nuisance Property Laws Affect Battered Women*, 34 J. OF INTERPERSONAL VIOLENCE 1103 (2016); ACLU Women’s Rights Project & Social Science Research Council, *Silenced: How Nuisance Ordinances Punish Crime Victims in New York*, ACLU (June 2015), https://www.aclu.org/sites/default/files/field_document/equ15-report-nuisanceord-rel3.pdf; Joseph Mead et al., *Who is a Nuisance? Criminal Activity Nuisance Ordinances in Ohio*, CLEVELAND STATE UNIV. (Nov. 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3067028.

disproportionate rates of violence.⁶⁹ HUD has repeatedly named housing discrimination against domestic violence survivors, and specifically the use of ordinances and programs to punish and threaten their housing, to be a significant fair housing issue,⁷⁰ as women account for the vast majority of domestic violence survivors.⁷¹ Indeed, HUD previously identified repeal of these ordinances as a step jurisdictions could take to affirmatively further fair housing.⁷²

Because of the discriminatory nature and impact of these ordinances and programs on people of color and survivors of gender-based violence, the ACLU has challenged them across the country, including in Faribault, Minnesota,⁷³ Bedford, Ohio,⁷⁴ Norristown, PA,⁷⁵ Surprise, Arizona,⁷⁶ Maplewood, Missouri,⁷⁷ and Savannah, Georgia.⁷⁸ These cases have ended with the

⁶⁹ See Monica McLaughlin & Debbie Fox, *Housing Needs of Victims of Domestic Violence, Sexual Assault, Dating Violence, and Stalking*, Nat'l Network to End Domestic Violence 6-6 (2019), https://nlihc.org/sites/default/files/AG-2019/06-02_Housing-Needs-Domestic-Violence.pdf; see also Carolyn M. West & Kalimah Johnson, *Sexual Violence in the Lives of African American Women*, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN (Mar. 2013), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_SVAAWomenRevised.pdf; Sharon G. Smith et al., *National Intimate Partner and Sexual Violence Survey (NISVS): 2010-2012 State Report*, NAT'L CTR. FOR INJ. PREVENTION AND CONTROL & CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 2017), <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf>.

⁷⁰ See, e.g., Helen R. Kanovsky, *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services*, HUD (Sept. 13, 2016), <https://www.hud.gov/sites/documents/FINALNUISANCEORDGNCE.PDF> [hereinafter HUD Local Nuisance Guidance];

Mem. from Sara K. Pratt, Deputy Assistant Sec'y for Enf't and Programs to FHEO Off. Directors & FHEO Regional Directors, *Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act (FHAct) and the Violence Against Women Act (VAWA)*, HUD (Feb. 9, 2011), <https://www.hud.gov/sites/documents/FHEODOMESTICVIOLGUIDENG.PDF>.

⁷¹ Sharon G. Smith et al., *The National Inmate Partner & Sexual Violence Survey: 2015 Data Brief – Updated Release*, NAT'L CTR. FOR INJ. PREVENTION AND CONTROL & CENTERS FOR DISEASE CONTROL AND PREVENTION 7 (Nov. 2018), available at <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf>; see also Melissa Jeltsen & Alissa Scheller, *At Least a Third of All Women Murdered in the U.S. Are Killed by Male Partners*, HUFFINGTON POST, https://www.huffpost.com/entry/men-killing-women-domesti_n_5927140 (last updated Dec. 6, 2017).

⁷² See HUD Local Nuisance Guidance, *supra* note 70, at 12-13.

⁷³ See *Faribault*, 2021 WL 1192466, at *24 (denying in part defendants' motion for summary judgment in an action challenging the city's crime-free ordinance); *ACLU Wins Settlement to End Housing Discrimination Case*, ACLU (June 15, 2022, 1:15 PM), <https://www.aclu.org/press-releases/aclu-wins-settlement-end-housing-discrimination-case>.

⁷⁴ *Somai v. City of Bedford*, No. 19-cv-00373 (N.D. Ohio 2020), <https://www.aclu.org/cases/somai-v-city-bedford-oh> (repealing the city's criminal activity nuisance ordinance and preventing reenactment).

⁷⁵ *Briggs v. Borough of Norristown*, No. 13-cv-02191 (E.D. Pa. 2013), <https://www.aclupa.org/en/cases/briggs-v-borough-norristown-et-al> (repealing the city's nuisance ordinance and preventing reenactment).

⁷⁶ *Markham v. City of Surprise*, No. 15-cv-01696 (D. Ariz. 2015), <https://www.aclu.org/cases/nancy-markham-v-city-surprise> (repealing the city's nuisance ordinance and preventing reenactment).

⁷⁷ *Watson v. City of Maplewood*, Missouri, No. 17-cv-01268, 2017 WL 4758960 (E.D. Mo. Oct. 20, 2017), <https://www.aclu.org/cases/rosetta-watson-v-maplewood> (denying in part Maplewood's motion to dismiss an action challenging the city's nuisance policy, which authorized officials to revoke residents' occupancy permits for criminal activity and police calls).

⁷⁸ See Rachel Goodman, *Savannah Police Suspend Its Discriminatory 'Crime Free Housing Program'*, ACLU (Feb. 1, 2018), <https://www.aclu.org/news/racial-justice/savannah-police-suspend-its-discriminatory-crime-free>.

repeal or substantial reform of the ordinances at issue given the real harms that they impose. In addition, the Justice Department secured an agreement with the City of Hesperia and the San Bernardino County Sheriff's Department to end its discriminatory "crime-free" rental housing program,⁷⁹ and HUD likewise negotiated a conciliation agreement (in partnership with the ACLU) ending with the repeal of the ordinance in Norristown, Pennsylvania.⁸⁰

Despite the harms that these ordinances pose to people of color and survivors of gender-based violence, many jurisdictions throughout the country continue to pass and maintain them and related programs.⁸¹ The Proposed AFFH Rule's example that a fair housing goal may include the removal of barriers in such laws is a critical step in acknowledging and redressing these harms, and should be included in the Final Rule.

b. The Final AFFH Rule Should Ensure that Program Participants Identify, Analyze, and Remove Unnecessary Barriers to Affordable Housing Imposed by Criminal and Eviction Records Screening Practices.

The Final AFFH Rule should be strengthened to ensure that program participants familiarize themselves with any applicable laws, ordinances, policies, and practices providing for the use of criminal and eviction records in tenant screening because of their disproportionate effect on people of color, especially women of color, and remove the unnecessary barriers to housing imposed by these practices.

As HUD has importantly recognized in guidance regarding multifamily properties, "[a]pplicant screening and waitlist management practices . . . may create unnecessary barriers to housing opportunity or be inconsistently applied in practice, in a way that disproportionately excludes individuals based on their race, color or national origin."⁸² Indeed, "[s]creening criteria, such as those related to criminal records, credit, and rental history may operate unjustifiably to exclude individuals based on their race, color, or national origin."⁸³

With respect to criminal records screening, HUD has explained that "[h]ousing providers frequently employ policies or practices that exclude individuals with criminal involvement from housing," which often result in discrimination against protected class groups, including Black communities, Latino communities, and individuals with disabilities because of persistent

⁷⁹ *Justice Department Secures Landmark Agreement with Hesperia and Sheriff's Department to End 'Crime Free' Rental Housing Program*, U.S. ATT'Y'S OFF.: CENT. DIST. OF CAL. (Dec. 14, 2022), <https://www.justice.gov/usao-cdca/pr/justice-department-secures-landmark-agreement-hesperia-and-sheriff-s-department-end>.

⁸⁰ *HUD & Philadelphia-Area Borough Settle Allegations of Housing Discrimination Against Victims of Domestic Violence*, HUD ARCHIVES (Oct. 2, 2014), <https://archives.hud.gov/news/2014/pr14-121.cfm>.

⁸¹ See, e.g., Liam Dillon, *Mandatory Evictions for Arrested Tenants Would Be Banned Under New State Bill*, L.A. TIMES (Feb. 18, 2023, 5:00 AM), <https://www.latimes.com/homeless-housing/story/2023-02-18/mandatory-evictions-for-arrested-tenants-would-be-banned-under-new-state-bill> (estimating "at least 147 cities and counties in California have enacted a crime-free housing law or advertise crime-free housing training for landlords").

⁸² *Office of Fair Housing and Equal Opportunity (FHEO) Guidance on Compliance with Title VI of the Civil Rights Act in Marketing and Application Processing at Subsidized Multifamily Properties*, HUD 6 (Apr. 21, 2022), available at <https://www.hud.gov/sites/dfiles/FHEO/documents/HUD%20Title%20VI%20Guidance%20Multifamily%20Marketing%20and%20Application%20Processing.pdf> [hereinafter HUD Multifamily Guidance].

⁸³ *Id.*

disparities throughout the United States' criminal justice system.⁸⁴ Accordingly, “[u]sing criminal history to screen, deny lease renewal, evict or otherwise exclude individuals from housing” may be illegal under the FHA.⁸⁵ In particular, HUD’s guidance on criminal records screening makes clear that “where a policy or practice that restricts access to housing on the basis of criminal history has a disparate impact on individuals of a particular race, national origin, or other protected class,” such policy is “unlawful under the [FHA] if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest. . . .”⁸⁶ A policy or practice of exclusion based on prior arrests, or “a blanket prohibition on any person with any conviction record” without accounting for “when the conviction occurred, what the underlying conduct entailed,” or what the person has since done can never be necessary to serve such an interest.⁸⁷ Instead, HUD instructs that any policy or practice with respect to criminal records screening should at the very least consider the nature, severity, and recency of a conviction, and provide for an individualized assessment of relevant mitigating information.⁸⁸ Many jurisdictions require, however, that landlords screen prospective tenants for criminal history, including as part of the so-called “crime-free” housing ordinances and programs discussed above. PHAs also screen potential tenants based on criminal history.⁸⁹ At minimum, these jurisdictions and PHAs should be required to identify such policies and practices and analyze how they restrict access to affordable housing opportunities, particularly for people of color.

With respect to eviction record screening, HUD has acknowledged that “non-white households may be more likely to face eviction actions, even for the same housing history as white counterparts.”⁹⁰ Indeed, Black and Latino households are more likely than white households to rent their homes,⁹¹ and they are consistently over-represented in households facing eviction.⁹² The Eviction Lab, a team of researchers committed to understanding the racial and

⁸⁴ Mem. from Demetria L. McCain, Principal Deputy Assistant Sec’y for Fair Hous. and Equal Opportunity to Off. of Fair Hous. & Equal Opportunity et al., *Implementation of the Office of General Counsel’s Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, HUD 2-3 (June 10, 2022), available at <https://www.hud.gov/sites/dfiles/FHEO/documents/Implementation%20of%20OGC%20Guidance%20on%20Application%20of%20FHA%20Standards%20to%20the%20Use%20of%20Criminal%20Records%20-%20June%2010%202022.pdf> [hereinafter HUD June 10, 2022 Memo]; Helen R. Kanovsky, *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, HUD 3-4, 10 (Apr. 4, 2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF [hereinafter HUD Criminal Record Screening Guidance].

⁸⁵ HUD June 10, 2022 Memo, *supra* note 84, at 3; HUD Criminal Record Screening Guidance, *supra* note 84, at 10.

⁸⁶ HUD Criminal Record Screening Guidance, *supra* note 84, at 2.

⁸⁷ *Id.* at 5-6.

⁸⁸ *See id.* at 6-7.

⁸⁹ *See, e.g., Public Housing Bans*, NAT’L LOW INCOME HOUS. COAL. (Feb. 26, 2020), <https://nlihc.org/resource/public-housing-bans>.

⁹⁰ HUD Multifamily Guidance, *supra* note 82, at 7.

⁹¹ *See* Anthony Cilluffo, A.W. Geiger & Richard Fry, *More U.S. Households Are Renting Than at Any Point in 50 Years*, PEW RES. CTR. (July 19, 2017), <https://www.pewresearch.org/fact-tank/2017/07/19/more-u-s-households-are-renting-than-at-any-point-in-50-years/>.

⁹² *See* Jaboa Lake, *The Pandemic Has Exacerbated Housing Instability for Renters of Color*, CTR. FOR AM. PROGRESS (Oct. 30, 2020), <https://www.americanprogress.org/article/pandemic-exacerbated-housing-instability-renters-color/>; Timothy A. Thomas et al., *The State of Evictions: Results from the University of Washington*

gender disparities among evicted Americans, found that “[n]early one in four black renters lived in a county in which the black eviction rate was more than double the white eviction rate.”⁹³ They also found that, among renters, women—especially Black and Latino women—faced higher eviction rates than men. The ACLU Data Analytics team analyzed the Eviction Lab’s national eviction data from 2012 to 2016 and found that, on average, Black women renters had evictions filed against them by landlords at double the rate of white renters (or higher) in 17 of 36 states, and they were more likely to have cases filed against them that are later dismissed.⁹⁴ Other research has shown that having children is the single greatest predictor of whether someone will face eviction.⁹⁵ Data released by the Urban Displacement Project at UC Berkeley—a group aiming to identify neighborhoods with the highest risk of displacement and eviction across 53 metropolitan areas with populations larger than one million people—reveals that 73% of Black renters live in neighborhoods with a high risk of eviction.⁹⁶

Across the country, landlords routinely use screening policies that deny housing whenever an applicant was named in an eviction case—even when a court never ordered the eviction. A recent study established that landlords assess harshly applicants with any sort of eviction record, failing to distinguish between those with prior eviction filings and those whose cases resulted in judgments.⁹⁷ Tenant screening companies play a key role in tenant exclusion: they may provide court data to landlords, or they may deploy algorithms that result in negative housing decisions or recommendations that fail to give applicants any opportunity to address their record. Black women are the group most likely to be harmed by the eviction screenings,⁹⁸ and are also more likely to have a case filed against them that was later dismissed.⁹⁹ Thus, it is especially unfair that these tenants are marked with the scarlet “E.” Eviction records follow people for years, stigmatizing already marginalized groups and blocking them from housing opportunities. And “[w]hen the mere filing of an eviction case means that a family’s future

Evictions Project, U.C. BERKELEY EVICTION RSCH. NETWORK, <https://evictionresearch.net/washington/> (last updated Jan. 6, 2020); *Evictions in Philadelphia: A Data & Policy Update*, REINVESTMENT FUND (Oct. 2019), <https://www.reinvestment.com/insights/evictions-in-philadelphia-a-data-policy-update/>.

⁹³ Peter Hepburn, Renee Louis & Matthew Desmond, *Racial and Gender Disparities Among Evicted Americans*, EVICTION LAB (Dec. 16, 2020), <https://evictionlab.org/demographics-of-eviction/>.

⁹⁴ Sophie Beiers, Linda Morris & Sandra Park, *Clearing the Record: How Eviction Sealing Laws Can Advance Housing Access for Women of Color*, ACLU (Jan. 10, 2020), <https://www.aclu.org/news/racial-justice/clearing-the-record-how-eviction-sealing-laws-can-advance-housing-access-for-women-of-color>.

⁹⁵ See Bryce Covert, *Why Landlords Target Mothers for Eviction*, NEW REPUBLIC (Mar. 16, 2021), <https://newrepublic.com/article/161578/landlords-target-mothers-eviction-crisis-covid>.

⁹⁶ See *Housing Precarity Risk Model*, U.C. BERKELEY URB. DISPLACEMENT PROJECT, <https://www.urbandisplacement.org/maps/housing-precarity-risk-model/> (last updated July 13, 2021).

⁹⁷ Wonyoung So, *Which Information Matters? Measuring Landlord Assessment of Tenant Screening Reports*, HOUS. POL’Y DEBATE (Aug. 30, 2022), available at <https://www.tandfonline.com/doi/full/10.1080/10511482.2022.2113815>.

⁹⁸ See Sandra Park, *Unfair Eviction Screening Policies Are Disproportionately Blacklisting Black Women*, ACLU (Mar. 30, 2017), <https://www.aclu.org/news/womens-rights/unfair-eviction-screening-policies-are-disproportionately>. See also Matthew Desmond, *Poor Black Women Are Evicted at Alarming Rates, Setting Off a Chain of Hardship*, MACARTHUR FOUND. (Mar. 2014), https://www.macfound.org/media/files/hhm_-_poor_black_women_are_evicted_at_alarming_rates.pdf.

⁹⁹ Beiers et al., *supra* note 94.

housing applications will be rejected, many tenants will avoid a case at all costs.”¹⁰⁰ They may choose to leave their home, rather than have an eviction filed against them, even when they have legal defenses or counterclaims they could bring. In light of stark race and gender disparities, blanket policies that categorically deny any applicant with a prior eviction filing disproportionately harm Black tenants, and particularly Black women, in violation of the FHA.¹⁰¹ Because of these harms, HUD has instructed that “in evaluating rental history, housing providers should consider the accuracy, nature, relevance, and recency of negative information rather than having any negative information trigger an automatic denial[.]” as well as extenuating or mitigating circumstances like whether “an eviction was due to unexpected medical or emergency expenses, or a negative reference reflected bias[.]”¹⁰²

The Proposed AFFH Rule rightly includes examples that may prompt program participants to set fair housing goals related to removing the barriers to access caused by unnecessary and harmful tenant screening policies. As explained above, the Proposed AFFH Rule’s inclusion of the removal of barriers imposed by so-called “crime free” housing or nuisance ordinances as an example fair housing goal is an important first step in recognizing the harms that these ordinances impose, including with respect to criminal history screening.¹⁰³ Moreover, the Proposed AFFH Rule’s inclusion of an example fair housing goal that may consist of a PHA’s revision of its own policies to provide more flexibility in admission criteria, including with respect to individuals who have been denied access to housing due to prior involvement in the criminal legal system,¹⁰⁴ may encourage PHAs to identify and analyze how criminal records screening inhibits access to these individuals.

In addition to maintaining these example fair housing goals related to tenant screening, we recommend explicitly including tenant screening policies and practices in the list of fair housing issues that program participants must identify and analyze as impeding access to affordable housing opportunities. For example, although the Proposed AFFH Rule rightly recognizes that it is critical that program participants identify and analyze zoning and land use policies or ordinances, the presence or lack of source-of-income anti-discrimination laws, eviction policies or practices, and other State and local policies or practices that contribute to patterns of segregation, integration, R/ECAPs, as well as access to affordable housing opportunities in well-resourced areas for protected groups,¹⁰⁵ tenant screening policies and practices are absent from this list. Likewise, although PHAs must analyze how local policies and practices impact fair housing, including their own, the PHAs’ own tenant screening policies and practices and any government requirements to screen are not mentioned.¹⁰⁶ Without explicit inclusion of tenant screening policies and practices, program participants may not identify them

¹⁰⁰ Park, *supra* note 98.

¹⁰¹ *Id.*

¹⁰² HUD Multifamily Guidance, *supra* note 82, at 6.

¹⁰³ *See supra* Section III.a.

¹⁰⁴ Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8566 (§ 5.154(g)(3)(iii)) (Feb. 9, 2023).

¹⁰⁵ *Id.* at 8564 (§ 5.154(d)(7)).

¹⁰⁶ *Id.* at 8565 (§ 5.154(e)(5)(i)).

as a fair housing issue, and therefore, may be unlikely to remove the barriers to access that these practices erect.

In order to ensure that program participants examine tenant screening policies and practices that impede the provision of affordable housing opportunities, the ACLU recommends the following wording changes (indicated in *bold and italics*):

- § 5.154(d)(7) Local and State policies and practices impacting fair housing.

(iii) How have existing zoning and land use policies or ordinances, the presence or lack of source of income anti-discrimination laws, eviction policies and practices, ***tenant screening policies and practices***, and other State and local policies or practices contributed to the patterns of segregation, integration, and R/ECAPs identified in paragraphs (d)(2) and (3) of this section, as well as access to affordable housing opportunities in well-resourced areas throughout the geographic area of analysis for protected class groups?
- § 5.154(e)(5) Local policies and practices impacting fair housing.

(i) How do local laws, policies, ordinances, and other practices impede or promote the siting of affordable housing and use of Housing Choice Vouchers in well-resourced areas of opportunity? This analysis shall include both policies of the kind that are under the PHA’s direct control (for example, preferences, ***tenant screening policies and practices***, types of housing designations, creation and retention of units for large families), and municipal or State policies, such as zoning and land use policies, ordinances, or regulations, eviction policies and procedures, ***tenant screening policies and practices***, or the lack of laws banning source of income discrimination, that are known to the PHA that impact the siting of affordable housing and voucher mobility.

Finally, the Proposed AFFH Rule rightly recognizes that a fair housing goal “may include amending local laws to include additional protections for certain underserved populations, such as LGBTQ+ persons or survivors of domestic violence[.]”¹⁰⁷ In addition to the critical populations identified in this goal, we recommend explicitly including individuals who have been denied access to housing due to prior involvement in the criminal legal system. Such additional protections are necessary to ensure that individuals with prior involvement in the criminal legal system are afforded fair housing opportunities. For example, New Jersey passed the Fair Chance in Housing Act, which prevents landlords from asking about criminal history on housing applications in most instances and is intended to ensure that people with past criminal histories have access to affordable housing.¹⁰⁸ The New Jersey Attorney General recently issued 59 notices of violation of the law to housing providers in New Jersey for, among other things, asking prohibited criminal-history related questions on housing applications.¹⁰⁹ In 2019, Cook

¹⁰⁷ *Id.* at 8566 (§ 5.154(g)(vi)).

¹⁰⁸ N.J.S.A. § 46:8-52 (effective Jan. 1, 2022).

¹⁰⁹ See *Division on Civil Rights Takes Enforcement Action Against Housing Providers for Non-Compliance with the Fair Chance in Housing Act*, STATE OF N.J., DEP’T OF L. & PUB. SAFETY (OFF. OF ATT’Y GEN.),

County, Illinois passed the Just Housing Amendment to the Cook County Human Rights Ordinance to prohibit housing discrimination based on an individual’s criminal history. The law requires landlords who consider an individual’s criminal history to perform an individualized assessment of that history.¹¹⁰ Jurisdictions should consider including additional or more explicit protections for individuals with prior involvement in the criminal legal system.

We also recommend adding survivors of sexual assault, modifying the reference to LGBTQI+ persons, and making clear that more explicit protections for these groups may be necessary in jurisdictions with some protections already in place. Accordingly, we recommend the following wording changes (indicated in *bold and italics*):

5.154(g)(3)(vi): A fair housing goal to ensure that underserved communities have equitable access to affordable housing opportunities, homeownership, and community assets may include amending local laws to include additional *or more explicit* protections for certain underserved populations, such as *LGBTQI+* persons, survivors of domestic violence *or sexual assault, or individuals who have been denied access to housing due to prior involvement in the criminal legal system, . . .*

IV. The Proposed AFFH Rule Rightly Requires Program Participants to Consider and Analyze Zoning Policies and Ordinances, and HUD Should Provide Participants with the Data and Tools to Meaningfully Analyze Such Policies.

We strongly support that program participants should “give serious consideration to the specific local conditions [such as zoning] that are likely to implicate fair housing issues faced by different protected class groups.”¹¹¹ This reinforces the critical role zoning laws play in addressing the harms of redlining and segregation.

Zoning enactments have long been recognized as vehicles for racially discriminatory housing practices and for perpetuating patterns of residential segregation.¹¹² One of the early examples under the FHA involved a 1969 effort to construct a federally subsidized, racially integrated housing development in an unincorporated area of suburban St. Louis. The effort was met with resistance on the part of the overwhelmingly white community in the area. Opponents of the housing proposal decided to incorporate their community as a municipality and, in its first enactment as a governmental entity, the municipality adopted a zoning measure that rendered the proposed housing development incompatible with the local zoning law. The enactment of this zoning law disabled the federal government from moving forward with the racially integrated housing development because one of the criteria for federal funding at the time required that the proposed housing must be consistent with local zoning. In *U.S. v. City of Black Jack, Missouri*, the ACLU and the U.S. Department of Justice challenged the zoning enactment as racially

<https://www.njoag.gov/division-on-civil-rights-takes-enforcement-action-against-housing-providers-for-non-compliance-with-the-fair-chance-in-housing-act/> (last visited Apr. 2, 2023).

¹¹⁰ COOK COUNTY CODE § 42-38(a) (effective Dec. 31, 2019).

¹¹¹ Affirmatively Furthering Fair Housing, 88 Fed. Reg. at 8518.

¹¹² See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 44-54 (2017).

discriminatory and, ultimately, the federal courts held that the local exclusionary measure violated the FHA.¹¹³

Exclusionary zoning—which occurs when “land use control regulations . . . singly or in concert tend to exclude persons of low or moderate income from the zoning municipality”¹¹⁴—is another common practice that municipalities use to maintain segregation.¹¹⁵ In 2021, the White House declared that the AFFH provision in the FHA, “is not only a mandate to refrain from discrimination but a mandate to take actions that undo historic patterns of segregation and other types of discrimination and that afford access to long-denied opportunities.”¹¹⁶ Exclusionary zoning does just that: it prevents racial minorities’ access to wealthy and middle-class white neighborhoods, blocking opportunities typically found in wealthier neighborhoods and perpetuating concentrations of residential poverty and segregation.¹¹⁷ Thus, to prevent the White House’s 2021 statement from being merely aspirational, it is critical that program participants end and otherwise reform their exclusionary zoning practices.

The Proposed AFFH Rule appropriately recognizes that a fair housing issue includes “ongoing local or regional segregation or lack of integration,”¹¹⁸ and requires that program participants consider how zoning policies or ordinances have contributed to patterns of segregation and integration.¹¹⁹ As part of this analysis, program participants must closely scrutinize zoning plans that double down on exclusionary single-family use zoning. Moreover, program participants must examine existing patterns of segregated residential placement,

¹¹³ 508 F.2d 1179 (8th Cir. 1974).

¹¹⁴ See, e.g., § 20:02. Exclusionary zoning defined, 2 N.Y. Zoning Law & Prac. § 20:02.

¹¹⁵ Exclusionary zoning laws place restrictions on the types of homes that can be built in a particular neighborhood. Common examples include minimum lot size requirements, minimum square footage requirements, prohibitions on multi-family homes, and limits on the height of buildings. The origins of such laws date back to the nineteenth century, as many cities were concerned about fire hazards as well as light-and-air regulations. See William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, 42 URB. STUDIES 317 (2004), <https://journals.sagepub.com/doi/abs/10.1080/0042098032000165271>. In the subsequent decades, some zoning laws have been used to discriminate against people of color and to maintain property prices in suburban and, more recently, urban neighborhoods. See Elliott Anne Rigsby, *Understanding Exclusionary Zoning and Its Impact on Concentrated Poverty*, CENTURY FOUND. (June 23, 2016), <https://tcf.org/content/facts/understanding-exclusionary-zoning-impact-concentrated-poverty/?agreed=1>; John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL’Y REV. 91 (2014), https://law.stanford.edu/wp-content/uploads/2018/03/mangin_25_stan._l._poly_rev_91.pdf; Cecilia Rouse et al., *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, THE WHITE HOUSE (June 17, 2021), <https://www.whitehouse.gov/cea/written-materials/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market/>.

¹¹⁶ Mem. from the White House on Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies, THE WHITE HOUSE (Jan. 26, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/>.

¹¹⁷ Paul A. Jargowsky, *The Architecture of Segregation: Civil Unrest, the Concentration of Poverty and Public Policy*, CENTURY FOUND. (Aug. 7, 2015), https://production-tcf.imgix.net/app/uploads/2015/08/07182514/Jargowsky_ArchitectureofSegregation-11.pdf.

¹¹⁸ Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8533 (Feb. 9, 2023).

¹¹⁹ *Id.* at 8564.

relational patterns to redlining, and limited access to high-resourced neighborhood community assets that result from these exclusionary zoning land use practices.

Program participants must also consider zoning regulations that may lead to the displacement of protected groups. Displacement may occur in a variety of contexts, including from zoning decisions and when a sudden burst of resources is poured into previously under-resourced neighborhoods—typically under the guise of community revitalization—resulting in families being priced out of their neighborhood, a practice commonly known as gentrification.¹²⁰ Displacement from one’s home diminishes one’s sense of community and can lead to people living in substandard housing conditions or ending up homeless due to a lack of affordable housing options. And, even if they find affordable housing, displaced individuals are often moved away from family, support systems, and community assets such as health, education, food, and other basic services. Moreover, when displacement occurs broadly within a neighborhood, it can result in the destruction of a community.

Harms that can result from displacement are plain to see when one looks at the City of Syracuse. In the 1960s, approximately 11,000 Black people lived in Syracuse, with as many as 90 percent living in the redlined 15th Ward.¹²¹ That neighborhood became the focus of a federal urban renewal project¹²² that included the construction of the I-81 highway. The construction of I-81 ripped through the heart of the 15th Ward.¹²³ The result was the displacement of 1,300 residents and 500 homes and businesses,¹²⁴ and “the destruction of what had been an under-resourced, working-class, but still vibrant neighborhood.”¹²⁵ The construction of I-81 resulted in the poorest and wealthiest parts of Syracuse being physically divided. Syracuse remains one of the most segregated cities in the country and it has the nation’s highest concentration of poverty among Black and Latino/a communities.¹²⁶

Many municipalities view high-density development as the “cure” for under-resourced neighborhoods. Program participants that seek to implement an influx of high-density zoning laws, which are often touted as integrated housing but lack meaningful protections to prevent displacement, need to critically examine their zoning plans as part of their AFFH obligation.

¹²⁰ Peter Marcuse, *To Control Gentrification: Anti-Displacement Zoning and Planning for Stable Residential Districts*, 13 N.Y.U. REV. L. SOC. CHANGE 931 (1984), <https://socialchangenyu.com/review/to-control-gentrification-anti-displacement-zoning-and-planning-for-stable-residential-districts/>.

¹²¹ Lanessa Owens-Chaplin et al., *Building a Better Future: The Structural Racism Built Into I-81, and How to Tear it Down*, NYCLU 4 (Dec. 2020), https://www.nyclu.org/sites/default/files/field_documents/202012_nyclu_i-81report.pdf.

¹²² Urban renewal projects changed the landscape of American cities in the 1950s and ‘60s. The federal government gave cities billions of dollars to tear down blighted areas and replace them with affordable housing—or at least, that’s what was supposed to happen. See Greg Miller, *Maps Show How Tearing Down City Slums Displaced Thousands*, NAT’L GEOGRAPHIC (Dec. 15, 2017), <https://www.nationalgeographic.com/history/article/urban-renewal-projects-maps-united-states>.

¹²³ Owens-Chaplin, *supra* note 121.

¹²⁴ See Robert Samuels, *In Syracuse, A Road and Reparations*, THE WASHINGTON POST, Oct. 20, 2019, <https://www.washingtonpost.com/nation/2019/10/20/how-crumbling-bridge-syracuse-is-sparking-conversation-about-reparations/>.

¹²⁵ See Owens-Chaplin, *supra* note 121.

¹²⁶ *Id.*

Moreover, program participants should create comprehensive zoning plans that include anti-displacement strategies—such as “inclusionary zoning”¹²⁷ and tax abatements¹²⁸—that further the availability of affordable housing. This type of analysis will ensure that program participants are furthering desegregation efforts as required as part of their AFFH obligation, and not inadvertently implementing tactics that will cause harm.

To properly identify, assess, and meaningfully address zoning policies and ordinances and the consequences they may entail, HUD needs to provide program participants with necessary data and tools. For example, program participants should examine the risks of displacement disaggregated by race, ethnic group, income, and other protected class status. The analyses must also take into consideration how the anticipated demographic composition of new zoning allocations would influence existing residential segregation patterns. While some localities—like New York City¹²⁹ and the City of Seattle¹³⁰—require an analysis to determine the racial impacts of their zoning plans,¹³¹ very few municipalities have the capital, resources, or political will to independently require and conduct such analysis.

Conducting a meaningful Equity Plan analysis requires a detailed knowledge of how complex zoning maps overlap with local demographic and school data—a level of analysis that, as noted above, program participants are not equipped to take on. For example, the 2015 AFFH Rule required program participants to conduct and submit to HUD an assessment of fair housing.¹³² HUD’s Guidebook, published later that same year, states that “seeking the amendment of local zoning and land use laws” is one way that program participants “may. . . remove barriers to the development of affordable housing in areas with low poverty and proficient schools[.]”¹³³ In practice, however, this data cannot be compiled without access to and extensive work in software that allows

¹²⁷ Inclusionary zoning regulations are intentional housing policies incorporated into zoning laws to ensure uniformity and equity and to protect the most vulnerable populations. For example, inclusionary zoning has been used to (a) require developers to sell or rent 10 to 30 percent of new residential units to lower-income residents, and (b) provide tax abatements and rent regulations to residents in threat of displacement in the same way that tax breaks and incentives are often given to developers. *Racial Equity in Inclusionary Housing*, INCLUSIONARY HOUS. (2019), <https://inclusionaryhousing.org/inclusionary-housing-explained/racial-equity/>.

¹²⁸ Adian Davis, *Property Tax Circuit Breakers in 2018*, INST. ON TAX’N & ECON. POL’Y (Sep. 17, 2018), <https://itep.org/property-tax-circuit-breakers-in-2018/>.

¹²⁹ A New York City law requires a racial equity report be submitted for all large-scale housing projects that require city approval. N.Y.C. Int. No. 1572-B (2021), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3963886&GUID=D2C9A25B-0036-416E-87CD-C3AED208AE1B&Options=ID%7cText%7c&Search=1572> (“[r]equiring a citywide equitable development data tool and racial equity reports on housing and opportunity”).

¹³⁰ The City of Seattle’s comprehensive planning efforts include a “Growth and Equity Analysis” as part of its decision-making process for zoning plans that considers factors such as displacement risk and access to opportunity. *See, e.g., Seattle 2035 Equity Analysis*, CITY OF SEATTLE (May 2016), <https://www.seattle.gov/Documents/Departments/OPCD/OngoingInitiatives/SeattlesComprehensivePlan/2035EquityAnalysisSummary.pdf>.

¹³¹ *See* Lance Freeman, *Build Race Equity into Rezoning Decisions*, BROOKINGS INST. (July 13, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/07/13/build-race-equity-into-rezoning-decisions/>.

¹³² *Affirmatively Furthering Fair Housing*, 88 Fed. Reg. 8516, 8523 (Feb. 9, 2023).

¹³³ *Affirmatively Furthering Fair Housing Rule Guidebook*, HUD 11 (Dec. 31, 2015), <https://www.hud.gov/sites/dfiles/FHEO/documents/AFFH-Rule-Guidebook.pdf>.

users to produce maps and other graphic displays of geographic information, relying on geographical information systems (“GIS”). Accordingly, such analysis is often unavailable to or otherwise unusable for program participants and their communities. For example, when the NYCLU wanted to better understand the racial, ethnic, and income demographics of populations that would be impacted by the City of Syracuse’s proposed comprehensive land use plan, the HUD tool did not have this data readily available for public use. As a result, the NYCLU had to rely on in-house GIS software and capacity to understand how Syracuse’s zoning code—both proposed and current—impacted marginalized populations.

We appreciate HUD’s candor in recognizing the 2015 AFFH Rule “was not perfect,” including HUD’s data and mapping tool (“AFFH-T”), and HUD’s recognition that the tool can be improved.¹³⁴ HUD is best equipped to provide municipalities with the information needed to create Equity Plans that include robust racial equity impact analyses informed by data on segregation patterns, the potential for displacement, and how to integrate communities, while also providing anti-displacement tools to encourage restorative practices and ameliorate past harms. HUD should make this data accessible. We urge that HUD shoulder the burden of conducting the analysis of the intersection between zoning codes and local demographics. HUD should include up-to-date zoning map overlaps within its AFFH-T and proactively offer to link zoning maps with demographic information.

V. HUD Should Strengthen and Clarify the Community Engagement Requirements in the Proposed AFFH Rule.

The Proposed AFFH Rule rightly recognizes the importance of actively encouraging and facilitating community engagement in the development and implementation of the required Equity Plan.¹³⁵ Indeed, similar plans developed under the 2015 AFFH Regulation show that meaningful community engagement requirements are essential for program participants to identify and prioritize fair housing issues, set fair housing goals, and strengthen draft plans.¹³⁶ The ACLU applauds HUD’s efforts in the Proposed AFFH Rule to make the community engagement process more inclusive and robust, including “by requiring program participants to consult with a broad range of community members, to hold meetings in diverse settings,” to ensure equal access to individuals with disabilities to those meetings, and to “partner with local community-based organizations and stakeholders to engage with protected class groups and underserved communities.”¹³⁷ Moreover, HUD’s commitment to make all the data it provides to program participants publicly available, and the process for allowing the public to submit information directly to HUD are essential to empower the public to meaningfully contribute to

¹³⁴ Affirmatively Furthering Fair Housing, 88 Fed. Reg. at 8523–24.

¹³⁵ *Id.* at 8517.

¹³⁶ See, e.g., Decl. of Urevick-Ackelsberg ¶ 5, *Carson*, ECF No. 2-9; Decl. of Maxwell Ciardullo ¶¶ 6-10, *Carson*, ECF No. 2-2.

¹³⁷ Affirmatively Furthering Fair Housing, 88 Fed. Reg. at 8517.

the development of Equity Plans, and to ensure that program participants are held accountable to affirmatively furthering fair housing.¹³⁸

Given the vital importance of meaningful community engagement, HUD should clarify and strengthen the community engagement requirements in the Final Rule in a number of ways. First, the Final Rule should make clear that program participants must engage with the community prior to and during the development of an Equity Plan. Community engagement should, at minimum, be required (1) prior to the development of the Equity Plan; (2) in identifying fair housing issues; (3) in establishing which fair housing issues to prioritize; (4) in establishing fair housing strategies, meaningful actions, and goals; and (5) in commenting on a draft Equity Plan before its submission to HUD. To be meaningful, community engagement is critical at each of these stages. It is particularly important that program participants empower historically marginalized groups by allowing members of these groups to elevate their priorities and solutions, including at early stages in the process.¹³⁹

Second, HUD should include more details in the Final Rule about who program participants should engage with, including people who are and have been directly impacted by fair housing issues, as well as grassroots and fair housing and tenant rights groups that represent members of protected classes. Program participants should also engage with organizations that provide housing, health, child and adult dependent care services, services for survivors of gender-based violence, services for individuals who were involved in the criminal legal system, and other services to members of protected classes. Moreover, program participants should engage with community groups focused on issues with respect to educational equity.

Third, proposed section 5.158(a)(7) should more clearly identify and explain what program participants must do to “ensure that all aspects of community engagement are conducted in accordance with fair housing and civil rights requirements,” including, among other things, by explicitly specifying that they must conduct their activities to meet the needs of individuals with disabilities and limited English-proficient residents.¹⁴⁰ Clear and specific requirements are critical to ensuring that all individuals, particularly individuals with disabilities and individuals with limited English proficiency are able to participate in the process.¹⁴¹ Relatedly, proposed section 5.154(h)(i) should explicitly require program participants to describe their efforts to meet the needs of individuals with disabilities and limited English-proficient

¹³⁸ *Id.* at 8516.

¹³⁹ See, e.g., Sonia Torres Rodríguez et al., *Changing Power Dynamics Among Researchers, Local Governments, and Community Members*, URB. INST. (June 2022), <https://www.urban.org/sites/default/files/2022-06/Changing%20Power%20Dynamics%20among%20Researchers%2C%20Local%20Governments%2C%20and%20Community%20Members.pdf>; Kimberly Burrowes, *How to Put Racial Equity at the Center of Neighborhood Investment*, URB. INST. (Feb. 13, 2020), <https://www.urban.org/urban-wire/how-put-racial-equity-center-neighborhood-investment>.

¹⁴⁰ Affirmatively Furthering Fair Housing, 88 Fed. Reg. at 8569 (§ 5.158(a)(7)).

¹⁴¹ See, e.g., Sloan Decl. ¶ 13, *supra* note 29 (explaining that based on the 2015 AFFH Rule, Texas Appleaseed “authored a letter to Hidalgo County . . . of specific requirements relating to use of broad-based communication techniques for outreach and the need to provide materials and outreach in Spanish because of a high population of Spanish speakers in the county . . .”).

residents as part of the required summaries of community engagement activities in the Equity Plans.¹⁴²

Finally, with respect to the method of meetings required, HUD should make clear that community engagement may take many different forms, including formal public hearings, smaller, more focused discussions with targeted groups, and virtual or hybrid meetings. Many individuals—especially those from protected class groups and other underserved communities—may have childcare or eldercare responsibilities, lack affordable or reliable transportation, or have other barriers to in-person participation, and therefore may benefit from virtual participation.

VI. The Final Rule Must Provide for Transparency and Enforcement.

We strongly support the compliance and enforcement mechanisms in the Proposed AFFH Rule, and offer suggestions to clarify and strengthen HUD’s role in ensuring that program participants faithfully comply with their obligations under the FHA.

The FHA and case law interpreting its provisions require that program participants ensure that they are affirmatively furthering fair housing. However, in the absence of any meaningful enforcement of this obligation, both the Government Accountability Office and HUD have found that a significant number of entities failed to comply with even the basic pretense of fulfilling their AFFH obligation—having a current document that described their plan to affirmatively further fair housing with specific benchmarks and timeframes for completion.¹⁴³

Accordingly, the ACLU strongly urges that the Final Rule include concrete enforcement mechanisms like those in the Proposed AFFH Rule, and provide ways for the community and the public to participate in and monitor the progress of program participants’ obligation to affirmatively further fair housing. In particular, the inclusion of a public comment period on program participants’ Equity Plans,¹⁴⁴ and a specific complaint process are critical for ensuring that members of the community are empowered in the planning process and that program participants are held to account for developing and executing meaningful fair housing goals.¹⁴⁵

We also urge HUD to consider providing the following clarifications in the Final Rule:

¹⁴² Affirmatively Furthering Fair Housing, 88 Fed. Reg. at 8567 (§ 5.154(h)(i)).

¹⁴³ *Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans*, U.S. GOV’T ACCOUNTABILITY OFF. 21 (Sept. 2010), <https://www.gao.gov/assets/gao-10-905.pdf> [hereinafter GAO Study] (“In sum, our findings that many AIs are outdated, may not be prepared as required, or lack time frames and signatures, together with the findings of HUD’s study, raise significant questions as to whether the AI is effectively serving as a tool to help ensure that all grantees are committed to identifying and overcoming potential impediments to fair housing choice as required by statutes governing the CDBG and HOME programs and HUD regulations.”); *Analysis of Impediments Study*, U.S. DEP’T OF HOUS. & URB. DEV., POL’Y DEV. DIV., OFF. OF POL’Y DEV. & RES. (2009), <https://ia803008.us.archive.org/12/items/365748-hud-reporting-compliance-report/365748-hud-reporting-compliance-report.pdf>.

¹⁴⁴ Affirmatively Furthering Fair Housing, 88 Fed. Reg. at 8571 (§ 5.162(a)).

¹⁴⁵ *Id.* at 8575 (§ 5.170); see also Sloan Decl., *supra* note 29 (documenting and highlighting the necessary involvement of community-based organizations in ensuring jurisdictions comply with their AFFH obligation).

- The Proposed AFFH Rule provides that “[w]ithin 100 calendar days after the date HUD receives the Equity Plan, HUD will accept the Equity Plan unless on or before that date the Responsible Civil Rights Official provides the program participant notification that the date is extended for good cause or that HUD does not accept the Equity Plan.”¹⁴⁶ The ACLU supports the extension of HUD’s review period insofar as it provides HUD with more time to work with a program participant on improving an Equity Plan.¹⁴⁷ We encourage HUD to provide a non-exhaustive list of what may constitute “good cause” for extending HUD’s review of the Equity Plan to better ensure a transparent and expeditious review process.
- The Proposed AFFH Rule specifies that complaints “shall be filed within 365 days of date of the last incident of the alleged violation, unless the Responsible Civil Rights Official extends the time limit for good cause shown.”¹⁴⁸ We urge HUD to explain more clearly how the statute of limitations will be calculated given that issues with respect to program participants’ AFFH obligation may often take many years to become apparent, like, for example, actions that lead to the displacement of marginalized or vulnerable groups.

Moreover, we agree that the requirement that program participants submit to HUD annual progress evaluations that summarize the status of the implementation of their fair housing goals is “necessary to ensure that the community and members of the public are aware of the progress being made, including whether there are obstacles preventing progress from occurring.”¹⁴⁹ The Proposed AFFH Rule provides important information that program participants must include in such evaluations, and is a step forward in ensuring that program participants are actively working towards their fair housing goals. We urge HUD to provide more information about whether and how it intends to review the progress evaluations to ensure that program participants are meaningfully fulfilling their obligation to monitor progress towards and ultimately achieve their goals. We recommend, for example, including an audit process for HUD review of annual progress evaluations.

VII. The Final Rule Should Harmonize the Reference to Sex as a Protected Characteristic with How Sex Discrimination is Treated in Other Federal Civil Rights Regulations.

The Proposed AFFH Rule appropriately recognizes that the AFFH obligation encompasses eliminating discrimination based on sex, which includes discrimination based on sexual orientation, gender identity, and nonconformance with gender stereotypes. For example, it states: “Protected characteristics are race, color, religion, sex (including sexual orientation,

¹⁴⁶ Affirmatively Furthering Fair Housing, 88 Fed. Reg. at 8571 (§5.162(a)(2)).

¹⁴⁷ *See id.* at 8519, 8528.

¹⁴⁸ *Id.* at 8575 (§ 5.170(a)(3)).

¹⁴⁹ *Id.* at 8529; *id.* at 8562 (§ 5.154(a)(6)).

gender identity, and nonconformance with gender stereotypes), familial status, national origin, having a disability, and having a type of disability.”¹⁵⁰

The ACLU encourages HUD to harmonize what is encompassed in discrimination because of sex in the Final Rule with other federal regulations enforcing civil rights laws that also prohibit discrimination based on sex. *See* Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824 (Aug. 4, 2022) (to be codified at 42 C.F.R. pt. 438); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

We support making explicit that discrimination on the basis of sex “includes, but is not limited to, discrimination on the basis of sex stereotypes; sex characteristics, including intersex traits; pregnancy or related conditions, including termination of pregnancy; sexual orientation; transgender status; and gender identity.” Supreme Court case law, including *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), makes clear that federal sex discrimination law encompasses discrimination based on sex stereotypes, sexual orientation, transgender status, and gender identity. What is more, longstanding federal regulations and case law make clear that federal sex discrimination law also encompasses discrimination based on pregnancy or related conditions, including termination of pregnancy.¹⁵¹

In light of the recent Supreme Court decision in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022), it is vital for the federal government to expressly recognize that prohibited sex discrimination can take many forms. Moreover, while current law already makes explicit that discrimination on the basis of familial status includes discrimination against pregnant people,¹⁵² we urge HUD to also make clear that discrimination based on pregnancy or related conditions is also unlawful under the FHA’s prohibition against sex discrimination.¹⁵³

VIII. Conclusion

America remains a deeply residentially segregated society with significant disparities in access to basic resources by neighborhood, and the perpetuation of these patterns of segregation

¹⁵⁰ *Id.* at 8560.

¹⁵¹ *See, e.g.*, 45 C.F.R. §§ 86.21(c)(2)-(3), 86.40(b)(1); *see also Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 784 (3d Cir. 1990), *abrogated on other grounds by Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009); *Hogan v. Ogden*, No. 06-cv-5078, 2008 WL 2954245, at *13 (E.D. Wash. July 30, 2008); *Chipman v. Grant Cnty. Sch. Dist.*, 30 F. Supp. 2d 975, 977–78 (E.D. Ky. 1998); *Hall v. Lee Coll.*, 932 F. Supp. 1027, 1033 n.1 (E.D. Tenn. 1996); *Cazares v. Barber*, No. 90-cv-0128, slip op. (D. Ariz. May 31, 1990); *Wort v. Vierling*, No. 82-3169, slip op. (C.D. Ill. Sept. 4, 1984), *aff’d*, 778 F.2d 1233 (7th Cir. 1985). The addition of “sex characteristics” is consistent with Executive Order 14075 of June 15, 2022 (Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals), and with rules and guidance regarding sex discrimination from other federal agencies, including DOJ, ED, and HHS.

¹⁵² 42 U.S.C. § 3602(k)(2); 24 C.F.R. § 100.20 (2022).

¹⁵³ *HUD Acts Against Pregnancy Discrimination in Home Mortgages: Actions Involve Settlement with Compensation for Victims, and Enforcement Action*, HUD ARCHIVES (June 1, 2011), <https://archives.hud.gov/news/2011/pr11-108.cfm> (HUD argued that pregnancy discrimination can fall under sex discrimination as well as familial status); *Title VIII Conciliation Agreement Between (Complainant) and Citizens Bank, N.A./Citizens Bank of Pennsylvania (Respondent)*, FHEO CASE NUMBER: 03-15-0471-8, HUD (2016) https://www.hud.gov/sites/documents/CA_FHEOCASE03-15-0471-8.PDF.

in our schools and workplaces. A stronger final rule on Affirmatively Furthering Fair Housing advances the U.S. toward the integrated society that Congress envisioned many decades ago. We urge HUD to address barriers to affordable housing and housing opportunities for members of protected groups and underserved communities in the Final Rule, and to clarify and strengthen community engagement requirements and enforcement mechanisms, thus fulfilling its obligation to affirmatively further fair housing.

The ACLU appreciates the opportunity to submit comments for this proposed rule on Affirmatively Furthering Fair Housing. Please feel free to contact Sandra S. Park, Senior Staff Attorney for the ACLU Women's Rights Project at spark@aclu.org, Amanda M. Meyer, Staff Attorney for the ACLU's Racial Justice Program at amandam@aclu.org, Lanessa Owens-Chaplin, Director of NYCLU's Environmental Justice Project at Lchaplin@nyclu.org, or Camara Hudson, Education Counsel of NYCLU's Education Policy Center at chudson@nyclu.org with any questions.