UNITED STATES DISTRICT COURT
DISTRICT OF THE DISTRICT OF COLUMBIA

OPEN COMMUNITIES ALLIANCE, *et al.*, Plaintiffs, v. BEN CARSON, *et al.*, Defendants.	Civ. Action No. 1:17-cv-02192 (BAH) Chief Judge Beryl A. Howell

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

A final regulation issued by the Department of Housing and Urban Development (HUD) provides for tens of thousands of low-income families who participate in the Housing Choice Voucher (HCV) program to receive real housing choice starting on January 1, 2018. But now HUD and its Secretary, Ben Carson, have abruptly suspended that regulation, the Small Area Fair Market Rent Rule (Small Area FMR Rule), 24 C.F.R. § 888.113(c), without undertaking notice-and-comment procedures and without reasoned explanation. Plaintiffs Crystal Carter and Tiara Moore intend to use the enhanced purchasing power their vouchers will have under the Small Area FMR Rule to move their families from high-poverty, racially segregated neighborhoods to lower-poverty areas that provide greater opportunity. HUD's suspension of the rule denies them (and thousands of other families) that choice, irreparably harming them and Plaintiff Open Communities Alliance, an organization that helps people living in low-resource areas find better opportunities. Plaintiffs ask this Court to preliminarily enjoin HUD's suspension of the Small Area FMR Rule.

The HCV program, formerly known as the Section 8 voucher program, is the federal government's primary program for helping low-income families afford housing in the private market. It provides individuals and families with vouchers to subsidize housing costs up to what HUD terms the "fair market rent," or FMR. HUD has calculated FMRs based on the prevailing rent for broad metropolitan areas, even though actual market rents within those areas vary widely from neighborhood to neighborhood. The FMRs that result are too low for vouchers to be useful outside of low-rent, high-poverty neighborhoods, thus effectively concentrating voucher holders—who, in many areas, are disproportionately non-white—in those neighborhoods and excluding them from higher-rent, low-poverty areas where they would have better opportunities.

HUD promulgated the Small Area FMR Rule to fix this problem. That rule provides that, beginning on January 1, 2018, 175 local public housing agencies (PHAs) in 23 select areas (in addition to Dallas-area PHAs, which already were doing so under a lawsuit settlement) must start using FMRs calculated more locally and accurately, based on prevailing market rents for each zip code. The result is to increase vouchers' purchasing power in higher-rent neighborhoods, giving Ms. Carter, Ms. Moore, and thousands of other voucher holders the choice to pursue housing wherever rental housing exists in their metropolitan areas, including in low-poverty, high-opportunity neighborhoods. The rule also brings the HCV program, which historically has perpetuated racial segregation and concentrations of poverty rather than alleviating them, into compliance with HUD's authorizing statutes.

HUD now has informed these 175 PHAs that they need not abide by the January 2018 date, because HUD is suspending this requirement for two years. The agency purports to permit PHAs to use small area FMRs "voluntarily" but will not offer them the assistance it promised when promulgating the rule. In practice, few PHAs will do so voluntarily under such conditions, and HUD itself has found that the rule's success depends on *all* PHAs in an affected area using small area FMRs. HUD's action thus amounts to a suspension of a promulgated regulation. The agency has neither followed required notice-and-comment procedures nor provided a reasoned explanation for its suspension of this vital rule, and it thus violates the Administrative Procedure Act in multiple ways.

HUD's action is causing irreparable harm to vulnerable voucher holders such as Ms. Carter and Ms. Moore, who are being deprived of the choice to move their families to areas that can provide greater opportunity. It also is causing irreparable harm to organizations such as Plaintiff Open Communities Alliance, which has invested considerable resources in preparing for

implementation of the Small Area FMR Rule and now is seeing its mission frustrated and resources diverted to tasks that would be entirely unnecessary if HUD followed the law.

For these reasons and those described below, this Court should issue a preliminary injunction requiring HUD to rescind its notices that it will not enforce the Small Area FMR Rule's requirements and to take all other necessary steps to implement the rule immediately.

STATEMENT OF FACTS

I. Overview of the HCV Program and Fair Market Rents

The HCV program, part of the regulatory scheme colloquially known as "Section 8," is the federal government's primary program to assist indigent families, the elderly, and individuals with disabilities to afford decent, safe, and sanitary housing in the private rental market. Section 8 has two statutory purposes: (1) "aiding low-income families in obtaining a decent place to live" and (2) "promoting economically mixed housing." 42 U.S.C. § 1437f(a).

HUD oversees, implements, and regulates the HCV program. Among other things, it provides federal funding to PHAs, which, in turn, administer the program locally by issuing vouchers to qualified individuals and families. Households participating in the HCV program use vouchers to secure housing in the private rental market. Vouchers can be used for any housing that meets the program's requirements, subject to a PHA's approval. 24 C.F.R. § 982.1.

The voucher's value is based largely on HUD's determination of the "fair market rent" for the size and type of dwelling in question (*e.g.*, two-bedroom home). 24 C.F.R. § 982.503(a)(1). The FMR represents the amount of money that is required "to rent standard quality housing throughout the geographic area in which rental housing units are in competition," including "the cost of utilities, except telephone." 24 C.F.R. § 888.113(a). HUD is required to annually calculate and publish fair market rents for different unit sizes in each market area. 42

U.S.C. § 1437f(c)(1)(B); 24 C.F.R. § 982.503(a)(1). Any changes HUD proposes to make to the fair market rent calculation procedures must be published in the Federal Register. 42 U.S.C. § 1437f(c)(1)(B).

PHAs must, in turn, use those fair market rents to establish "payment standards" for each unit type. 24 C.F.R. § 982.503(a)(1). Those payment standards generally are set between 90 percent and 110 percent of the HUD-calculated fair market rents. 24 C.F.R. § 982.503(b).

So long as a dwelling's actual gross rent is at or below the relevant payment standard, the participating household usually pays the landlord 30 percent of its monthly income toward the rent, while the PHA pays the balance directly to the landlord. If, however, the actual rent for the apartment exceeds the payment standard, the participating household is usually responsible for the balance. *See* 24 C.F.R. § 982.1(a)(3). Participation in the HCV program is limited to low-income households, most of whom cannot readily make such additional payments.[1] Accordingly, HCV users generally cannot afford to rent dwellings where the actual rent substantially exceeds the payment standard. *See, e.g.*, Declaration of Tiara Moore ¶ 3.

II. Problems with Fair Market Rents Based on Broad Metropolitan Areas

In practice, HUD's FMRs have not accurately reflected the actual rents charged in many neighborhoods within large metropolitan areas. 81 Fed. Reg. 80,567 (Nov. 16, 2016). This is because rents tend to vary widely within such regions—particularly those that are highly segregated by race, such as Chicago, Hartford, or Baltimore. *Id.* Rents in more desirable, lower poverty (and, typically, whiter) communities far exceed the regional average, while rents in poorer neighborhoods are much lower. *Id*. Without FMRs that account for these neighborhood

[1] *Housing Choice Vouchers Fact Sheet*, HUD.gov, https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/about/fact_sheet (last visited November 7, 2017).

differences, the practical result is that HCV families are relegated to poor, racially segregated neighborhoods, and are unable to use their vouchers to secure housing in higher-opportunity areas. 81 Fed. Reg. 80,568; Declaration of Crystal Carter ¶¶ 6-7; Declaration of Tiara Moore ¶¶ 5-7. By contrast, calculating FMRs more locally—as is required under the Small Area FMR Rule that HUD has unlawfully suspended—provides much greater choice for voucher families. *Id.* Locally calculated FMRs also result in more efficient government spending, since crudely calculated large-area FMRs give undeserved windfalls to landlords in neighborhoods where actual rents are lower than those FMRs. 81 Fed. Reg. 80,569.

The benefit that the Small Area FMR Rule provides—and that HUD now is unlawfully denying to voucher families—is illustrated by the experiences of Plaintiffs Crystal Carter and Tiara Moore, both African-American women. Ms. Carter and Ms. Moore are HCV voucher holders who would like to move from Hartford and Chicago, respectively, to surrounding areas that offer their families greater opportunity. Declaration of Crystal Carter ¶ 6; Declaration of Tiara Moore ¶¶ 5-6. They have been prevented from doing so by FMRs that are too low for them to participate in their target rental markets. Declaration of Crystal Carter ¶ 7; Declaration of Tiara Moore ¶ 7. Both live in markets where this problem will be addressed by the Small Area FMR Rule going into effect on January 1, 2018. Thus, they are directly harmed by HUD's unlawful suspension of the rule. Declaration of Crystal Carter ¶ 7; Declaration of Tiara Moore ¶ 9.

With respect to Ms. Carter, an FMR calculated for the entire metropolitan Hartford area is $1,620 for a four-bedroom apartment or house. Exhibit E to Declaration of Sasha Samberg-Champion ¶ 7 (printout of 2018 Hartford FMRs from HUD website) ("2018 Hartford FMRs"). That amount covers the rent of her current dwelling in Hartford, but it is too little to rent a

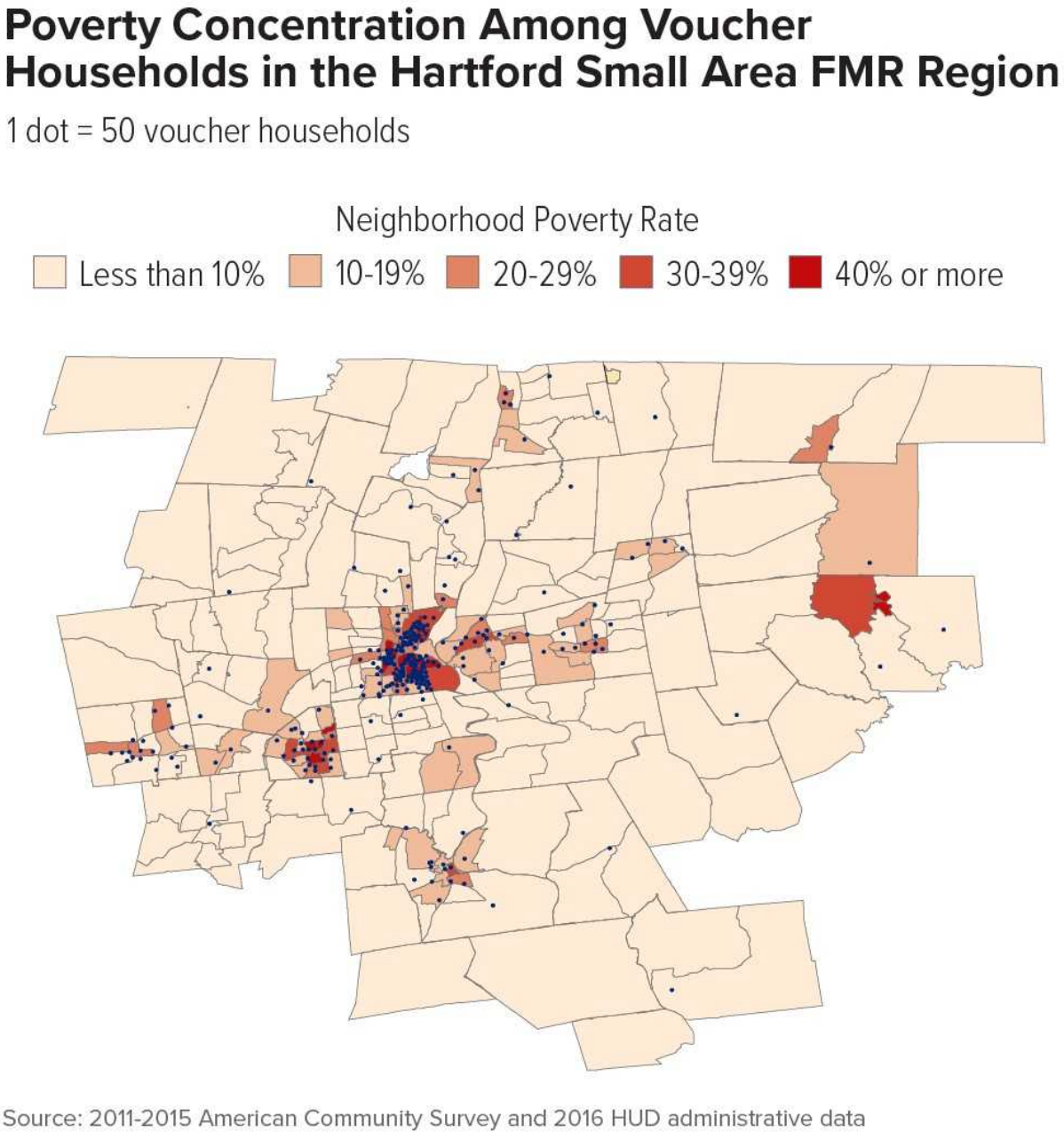
comparable dwelling in more expensive Simsbury, Connecticut, where she would like to move to be near her kids' schools and to provide a safer home for them with better opportunities. Declaration of Crystal Carter ¶¶ 6-7. FMRs calculated for each zip code in Simsbury would be as high as $1,940. Exhibit F to Declaration of Sasha Samberg-Champion ¶ 8 (printout of 2018 Hartford small area FMRs from HUD website) ("2018 Hartford SAFMRs"). Ms. Carter has been unable to find appropriate housing in Simsbury for $1,620 but could do so for $1,940. Declaration of Crystal Carter ¶ 7.

Similarly, the FMR for a two-bedroom apartment in the broad Chicago area is $1,180—too little to enable Plaintiff Tiara Moore to rent an apartment in high-opportunity DuPage County, where she wants to live. Exhibit C to Declaration of Sasha Samberg-Champion ¶ 5 (printout of 2018 Chicago FMRs from HUD website) ("2018 Chicago FMRs"); Declaration of Tiara Moore ¶ 7. By contrast, the comparable FMRs for most zip codes in DuPage County would be above $1,300, with some as high as $1,770 per month—enough for Ms. Moore to find the housing she desires. Exhibit D to Declaration of Sasha Samberg-Champion ¶ 6 (printout of 2018 Chicago small area FMRs from HUD website) ("2018 Chicago SAFMRs").

Thus, suspension of the Small Area FMR Rule will constrain the housing choices of HCV voucher families to poorer areas, contributing to the concentration of poverty in those places. In areas where HCV voucher holders disproportionately are racial minorities—such as Chicago and Hartford—this concentration of voucher holders in high-poverty neighborhoods also contributes to racial segregation. Declaration of Will Fischer ¶ 11 (attesting to correctness of statistical analysis and maps in paragraph 45 of the Complaint). In such areas, African-American and Latino voucher holders are particularly likely to live in neighborhoods that are poor as well as racially segregated. *See id.*

The greater Hartford area, home to plaintiffs OCA and Crystal Carter, illustrates this point. There, 80 percent of HCV voucher holders are non-white (50 percent Latino, 30 percent African-American), compared with only 31 percent of the overall population. Declaration of Will Fischer ¶ 11 (attesting to correctness of paragraph 46 of the Complaint). This predominantly non-white population has been concentrated in poor, racially segregated neighborhoods. *Id.* As of 2016, 41 percent of voucher households in the greater Hartford area (the Hartford-West Hartford-East Hartford HUD Metro FMR Area) live in high-poverty neighborhoods (census tracts with a poverty rate above 30 percent). Declaration of Will Fischer ¶ 11 (attesting to correctness of paragraph 47 of the Complaint). By contrast, only 18 percent of voucher households in the area live in low-poverty neighborhoods (census tracts with a poverty rate below 10 percent). *Id.* Sixty-seven percent of HCV households in the region live in majority-minority neighborhoods. *Id.*

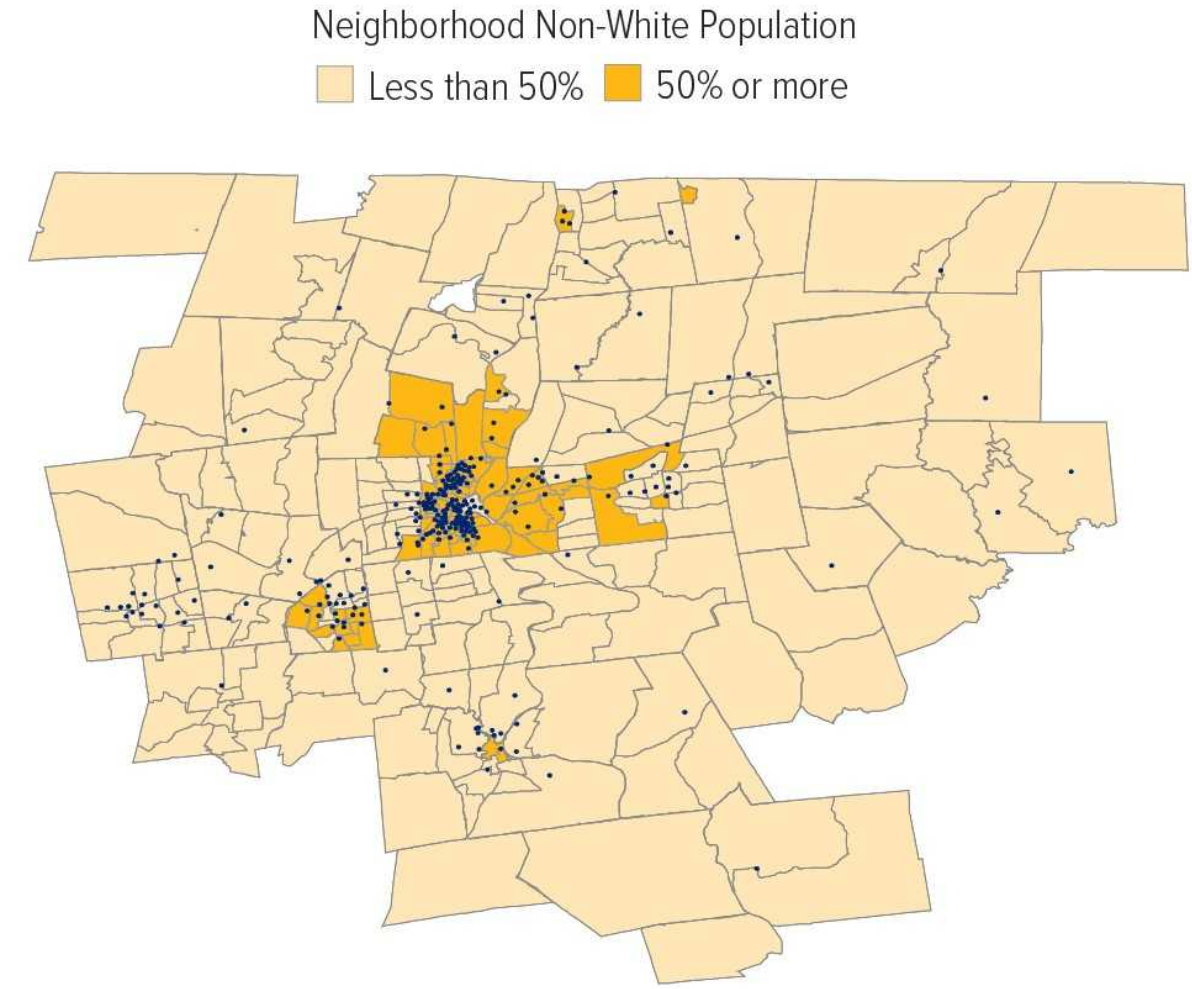
This concentration of voucher holders in the greater Hartford area in a few very poor areas—with many fewer voucher holders living in surrounding, low-poverty areas—is depicted in the map below:



Similarly, the racial concentration map below illustrates the concentration of Hartford-area voucher holders—who are themselves almost all non-white—in the small number of neighborhoods in the region that are predominantly non-white:

Racial Concentration Among Voucher Households in the Hartford Small Area FMR Region

1 dot = 50 voucher households



Source: 2011-2015 American Community Survey and 2016 HUD administrative data

The Hartford area is representative of how HCV voucher holders in the areas affected by the Small Area FMR Rule are concentrated in poor, racially segregated neighborhoods.

Declaration of Will Fischer ¶¶ 3, 5, 11 (attesting to correctness of paragraph 50 of the Complaint). Indeed, in 21 of the 24 metropolitan areas covered by the rule, at least two-thirds of HCV users are non-white. *Id.* ¶ 11 (attesting to correctness of paragraph 45 of the Complaint).

Studies have found that this concentration of minority voucher holders in low-income neighborhoods has lifelong negative consequences for voucher families. *See, e.g.*, Raj Chetty, et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106(4) American Economic Review 855 (2016). Conversely, providing voucher users with the opportunity to move to high-opportunity neighborhoods has had demonstrated positive effects on both adults and children. *Id.*

III. HUD's Experience With Small Area FMRs and Their Alternatives

HUD has known for decades that the use of large-area FMRs creates these problems but, until recently, has not taken effective action to address them. *See* Comptroller Gen. of the U.S., CED-77-19, Major Changes Are Needed in the New Leased-Housing Program, at 16, 21 (1977), http://www.gao.gov/assets/120/113728.pdf. The agency has tried alternatives to the use of small area FMRs and determined that they are inadequate. 65 Fed. Reg. 58,870 (Oct. 2, 2000); 66 Fed. Reg. 50,024 (Oct. 1, 2001); 80 Fed. Reg. 31,332-35 (Jun. 2, 2015); 81 Fed. Reg. 80,570.

In 2007, the Inclusive Communities Project (ICP) sued HUD for using a single FMR for the entire Dallas metropolitan region. It alleged that HUD violated the Fair Housing Act and the Housing and Community Development Act by effectively steering voucher holders—who, in the Dallas area, are predominantly African-American—away from predominantly white areas and into predominantly non-white areas. *Inclusive Cmtys Project, Inc. v. U.S. Dep't of Hous. and Urban Dev.*, No. 3:07-cv-00945-O, Doc. 1 (N.D. Tex. May 29, 2007). HUD settled this lawsuit in 2010 by agreeing to institute small area FMRs in the Dallas region. *Id.*, Doc. 52 (June 7,

2010). Soon thereafter, HUD announced plans for a demonstration project testing the viability of small area FMRs in other areas. 81 Fed. Reg. 80,570. By 2012, five PHAs in five different states were using small area FMRs pursuant to this project, while PHAs in Dallas were doing the same pursuant to the ICP settlement. *Id.*

These pilot projects have proven that small area FMRs are both administratively feasible to implement and effective at accomplishing their goals. For example, one independent study determined that the use of small area FMRs in the Dallas area pursuant to the ICP settlement resulted in many voucher recipients exiting that region's lowest-rent neighborhoods and moving to higher-rent neighborhoods—at no net cost to the government.[2] Meanwhile, HUD found comparable results in the first years of its demonstration project.[3]

IV. The Small Area FMR Rulemaking

Having laid the groundwork for a larger roll-out of small area FMRs, HUD engaged in an eighteen-month-long rulemaking process, with multiple opportunities for public comment, culminating in the promulgation of the Small Area FMR Rule at issue here. 81 Fed. Reg. 80,570-71. That rule, which was promulgated on November 16, 2016, and became effective on January 17, 2017, requires PHAs in 24 select metropolitan areas (including Dallas) to use small area FMRs beginning on January 1, 2018. 81 Fed. Reg. 80,567.

HUD explained that the Small Area FMR Rule will reduce "the number of voucher families that reside in areas of high poverty concentration." 81 Fed. Reg. 80,567. It found that its

[2] Collinson & Ganong, *The Incidence of Housing Voucher Generosity*, at 15-16 (Apr. 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2255799.

[3] Regulatory Impact Analysis: Establishing a More Effective Fair Market Rent System; Using Small Area Fair Market Rents in Housing Choice Voucher Program Instead of the Current 50th Percentile FMRs, at 19-21 (Nov. 11, 2016), https://www.regulations.gov/document?D=HUD-2016-0063-0117.

former policies had "not proven effective in addressing the problem of concentrated poverty and economic and racial segregation in neighborhoods." *Id.* The Small Area FMR Rule, HUD found, was necessary to give voucher users "a subsidy that is adequate to cover rents" in "areas of high opportunity." *Id.* HUD limited the rule's application to metropolitan areas where, based on local housing conditions, it would be particularly effective. It determined that the rule should apply, for now, to areas that have at least 2,500 vouchers in use and have both (1) "significant voucher concentration challenges" and (2) specific rental market conditions, such as a sufficiently high vacancy rate, making it likely that more valuable vouchers could be used effectively in high-opportunity areas. *Id.* at 80568-69.

HUD set objective criteria for determining which areas qualify, with the coverage determination to be made at the beginning of each federal fiscal year. 81 Fed. Reg. 80,567. HUD ultimately selected 23 qualifying markets in addition to Dallas (where small area FMRs already were in use), extending small area FMRs to an additional 219,000 voucher households. *Id.* at 80586. In 21 of the 24 areas now subject to the Small Area FMR Rule, at least 70 percent of HCV users are non-white. Declaration of Will Fischer ¶ 11 (attesting to correctness of paragraph 45 of the Complaint). The rule includes a provision, 24 C.F.R. § 888.113(c)(4), that authorizes the Secretary to suspend use of small area FMRs for a designated area in case of a "Presidentially declared disaster," a "sudden influx of displaced households needing permanent housing," or other "events as determined by the Secretary"; 81 Fed. Reg. 80,569 (stating that such events involve "adverse rental market conditions").

For areas covered by the Small Area FMR Rule, HUD determined, fair market rents would be determined for each zip code, which "are small enough to reflect neighborhood differences" and provide for easy and objective administration. 81 Fed. Reg. 80,568. The rule

provides that covered PHAs must update their payment standards to be based on zip-code-level FMRs by January 1, 2018. *Id.* at 80,569.

During the rulemaking, HUD twice considered and rejected the suggestion that it wait for full results from the demonstration project before requiring the use of small area FMRs beyond Dallas. 81 Fed. Reg. 39,223 (Jun. 16, 2016) (proposed rule); 81 Fed. Reg. 80,579 (final rule). The agency instead decided that it was "not premature" to require the use of small area FMRs on a "limited basis in those areas where it has the potential to address significant voucher concentration concerns." 81 Fed. Reg. 80,579. Immediate implementation in those areas was fully consistent with further study prior to nationwide use of small area FMRs; HUD committed to closely study implementation results and outlined research it intended to facilitate over the next five years. 81 Fed. Reg. 39,226.

HUD also considered and rejected a proposal to make implementation of small area FMRs voluntary, rather than mandatory, for PHAs within the designated areas. 81 Fed. Reg. 39,224. It reasoned that the point of small area FMRs is to provide voucher users the effective ability to choose housing throughout the larger area, and allowing some PHAs within an area to opt out of the rule would hamper achievement of that goal. *Id.*

HUD made other changes to ameliorate concerns expressed in comments. For example, in response to concerns that some voucher users in lower-rent neighborhoods would be hurt by lower FMRs in those areas, HUD authorized PHAs to "hold harmless" for an extended time those families remaining in place. 81 Fed. Reg. 80,572. It also took steps to reduce the administrative burden on PHAs, including relaxing the requirement that PHAs conduct a new "rent reasonableness review" for voucher-supported leases when the relevant FMRs decline. *Id.* at 80575. HUD acknowledged that there still could be one-time "administrative expenses

associated with implementation on the part of PHAs," but determined that this cost was outweighed by the benefits of going forward with the rule. *Id.* at 80569.

HUD also promised that it would take a variety of preliminary steps to facilitate implementation. *See* Key Aspects of HUD's Final Rule on Small Area Fair Market Rents, https://www.huduser.gov/portal/datasets/fmr/fmr2016f/SAFMR-Key-Aspects-of-Final-Rule.pdf. These steps included providing guidance and support to PHAs implementing small area FMRs; webinars to share lessons learned and best practices from PHAs already implementing small area FMRs; and creation of a mobile application to enable tenants to confirm any unit's payment standard by entering its address. *Id.*

V. The Interim Evaluation

HUD commissioned an extensive report regarding the small area FMR demonstration projects, termed the Interim Evaluation, and released it publicly on August 15, 2017. *See* Small Area Fair Market Rent Demonstration Evaluation: Interim Report (Aug. 2017), https://www.huduser.gov/portal/sites/default/files/pdf/SAFMR-Interim-Report.pdf. The Interim Evaluation examines changes in the demonstration areas between 2010 and 2015, and thus compares their trends pre- and post-use of small area FMRs. *Id.* at 21. It also compares findings in the demonstration sites against those for a group of 138 agencies not using small area FMRs. *Id.* The Interim Evaluation confirms the viability and importance of small area FMRs.

The Interim Evaluation found, in demonstration sites where PHAs used small area FMRs, that significantly more voucher holders moved to high-opportunity neighborhoods, even as overall housing subsidy costs fell. Interim Evaluation at viii-x. By contrast, the same beneficial effects were not seen for comparable PHAs not subject to the demonstration project. *Id.*

Although the Interim Evaluation found some adverse impacts for tenants at some of the PHAs studied, the Small Area FMR Rule anticipated and addressed these problems. For example, the Interim Evaluation found that some voucher holders in the demonstration sites paid somewhat more in out-of-pocket rent (Interim Evaluation at x; 94-96), but the Small Area FMR Rule contains several provisions to protect tenants from such increases. 81 Fed. Reg. 80,572; Declaration of Will Fischer ¶ 4.

Similarly, the Interim Evaluation found that when only *some* of the PHAs within a metropolitan area switch to small area FMRs, the result within those jurisdictions can be a reduction in the total units that are offered for rent at or below the revised FMRs (Interim Evaluation at vii-viii; 32-36). The Small Area FMR Rule addresses this problem by making small area FMRs mandatory for *all* PHAs within specified regions, such that if fewer units are available in some places, such losses will be offset by gains elsewhere. Declaration of Will Fischer ¶ 7. Additionally, the Small Area FMR Rule, unlike the demonstration project, targets metropolitan areas where use of small area FMRs will be particularly likely to make additional units available in lower poverty areas. 81 Fed. Reg. 80,579.

The Interim Evaluation found modest increases in administrative costs for PHAs, most of them of a one-time nature. For example, PHAs implementing small area FMRs for the first time had to adjust computer software systems and amend client briefing materials. Interim Evaluation at x-xi; 68-85. However, these costs largely were not recurring, and they were more than offset by cost savings from implementing small area FMRs. *Id.*; Declaration of Will Fischer ¶ 8.

VI. HUD's Sudden Suspension of the Small Area FMR Rule

To date, HUD has not taken any of the steps that it publicly stated would help PHAs implement the rule. For example, it has not provided affected PHAs with any guidance as to implementation. Declaration of MaryAnn Russ ¶¶ 8-9.

On May 15, 2017, HUD published a notice in the Federal Register soliciting comments on existing HUD regulations it should consider repealing, replacing, or modifying. *See* 82 Fed. Reg. 22,344-45 (May 15, 2017). This document did not mention the Small Area FMR Rule; nor did most comments HUD received in response. *Id.* HUD did get a request to suspend the Small Area FMR Rule's requirements for PHAs from the National Association of Housing and Redevelopment Officials (NAHRO), a group that characterizes itself as "a leader in the deregulation of programs and the design of programs which provide the maximum flexibility at the local level." *History*, NAHRO.org http://www.nahro.org/nahro-history (last visited Nov. 7, 2017). NAHRO asserted that HUD, by filing a notice in the Federal Register invoking 24 C.F.R. § 888.113(c)(4)(iii), could make compliance with the rule voluntary for all affected PHAs. *See* NAHRO Comment Letter, https://www.regulations.gov/document?D=HUD-2017-0029-0225 (last visited Nov. 6, 2017). NAHRO did not offer any reason that HUD should take this action other than to repeat (and incorporate by reference) its comments opposing the rule, which HUD had considered and rejected during the rulemaking. *Id.*

On August 11, 2017—before the Interim Evaluation was publicly released—HUD announced it was suspending the requirement that PHAs implement payment standards based on small area FMRs. It did so by sending identical letters to each of the 175 PHAs in 23 of the 24 areas governed by the rule. Each letter stated that HUD "has suspended the Small Area FMR designation for the metropolitan area(s)" of each PHA "for a period of two years, until October

12, 2019," and that the PHAs therefore need not begin using payment standards based on small area FMRs until January 1, 2020. *See* Exhibit A to Declaration of Sasha Samberg-Champion ¶ 3 ("August HUD Letter"). The only affected PHAs not to receive such a letter were the ones serving Dallas-Plano-Irving, Texas, which already were using small area FMRs pursuant to settlement of the ICP case.

In its letter to PHAs, HUD stated that its action should not be treated as "a suspension of the Small Area Final Rule or a regulatory waiver" of the rule's requirements. Exhibit A, August HUD Letter at 3. Rather, as NAHRO had suggested, HUD relied solely on its purported authority under 24 C.F.R. § 888.113(c)(4) to suspend the rule's application for each affected area. *Id.* HUD did not point to any area-specific event to justify its action with respect to *any* of the affected areas. *Id.*

HUD stated that its action was based on three considerations. First, HUD pointed to its internal review of the Interim Evaluation's findings from the small area FMR demonstration project—findings that were not yet available to the public. Exhibit A, August HUD Letter at 1. These interim findings, HUD stated, "suggest the need for further analysis of the benefits and costs of Small Area FMR, particularly with respect to the impact on rent burdens on participating families and the availability of units in the metropolitan area." *Id*. HUD did not explain which data from the Interim Evaluation supported this conclusion or how the Interim Evaluation's findings were inconsistent with information available during the Small Area FMR Rule's promulgation. *Id*. HUD further stated, without elaboration, that "a policy change of this magnitude should be fully informed by the final report on the completed demonstration," expected in July 2018. *Id.* It did not attempt to reconcile this statement with its express rejection of the same argument in the published Small Area FMR Rule. *Id*.

Second, HUD stated that, in response to its May 15 invitation for comments on regulatory change, "several PHA industry groups" had expressed "concerns about the Small Area FMR final rule and the timeline for implementation." Exhibit A, August HUD Letter at 2. It did not identify the groups in question or elaborate on the "concerns." HUD stated that its action would allow it "to be informed by the public comments on reducing regulatory burden for the HCV program" as well as its own decision as to whether to "implement changes to reduce the regulatory burden on the HCV program." *Id.*

Finally, HUD pointed to its own failure to take preliminary steps to assist PHAs in complying with their obligations under the Small Area FMR Rule. Exhibit A, August HUD Letter at 2. It admitted that, as promised, it had begun "developing guidance and planning to provide technical assistance to assist PHAs that must implement the use of the Small Area FMRs as a result of the final rule," but then decided not to finish. *Id.* Instead of meeting its obligations under law, HUD stated, it chose to "focus[] on soliciting input and feedback from PHAs and other stakeholders on a variety of regulations and policies, including the Small Area FMR Final Rule." *Id.* As justification for its deliberate choice not to take preliminary steps to best implement the rule, HUD repeated that (1) it was waiting for the 2018 final report on the small area demonstration project and (2) it might decide to alter the rule. *Id.*

After advising PHAs that it would be unwise to proceed with small area FMRs, and suspending the requirement that they do so by January 1, 2018, HUD said it would entertain applications from PHAs that nonetheless wished to use small area FMRs voluntarily. Exhibit A, August HUD Letter at 3.

On August 15, 2017, HUD published its Interim Evaluation. It still did not, however, explain how that document supported its decision to suspend PHAs' requirements under the Small Area FMR Rule.

On August 25, 2017, Todd M. Richardson, HUD's Acting General Deputy Assistant Secretary for Policy Development and Research, made a public statement, posted on HUD's website. Exhibit B to Declaration of Sasha Samberg-Champion ¶ 4 ("HUD Blog Post"). Mr. Richardson stated that the decision to delay PHAs' obligations was for the benefit of the affected PHAs. *Id.* Citing no evidence, he asserted that PHAs were not ready to proceed and "needed more time to integrate this big change into their voucher programs." *Id.* He further stated that the delay would allow PHAs to review the findings of the demonstration project and "make sure their programs are informed by the lessons learned by these early adopters." *Id.*

Mr. Richardson cited the Interim Evaluation as influencing these conclusions, but did not explain what in the report justified that assertion. Exhibit B, HUD Blog Post. And he stated that the Interim Evaluation "confirms that Small Area FMRs do open up previously inaccessible neighborhoods for voucher tenants" and that "with good planning, it is possible to have a successful program that does not break the bank." *Id.*

HUD has not published notice of its decision to suspend the effective date of PHAs' requirement to use small area FMRs in the Federal Register and has not solicited comment on it.

ARGUMENT

To secure a preliminary injunction, plaintiffs must show "that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of equities in [their] favor, and accord with the public interest."

League of Women Voters of the U.S. v. Newby, 838 F.3d 1, 6 (D.C. Cir. 2016). Here, each of those factors weighs strongly in favor of issuing the requested preliminary injunction.

To begin with, Plaintiffs are likely to prevail on the merits. Once a rule is finalized, an agency "is itself bound by [it] until that rule is amended or revoked." *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017). Yet HUD—without complying with the notice-and-comment procedures of the Administrative Procedure Act—is suspending for two years the requirement that PHAs in affected areas use small area FMRs. HUD purports to do so through repeated invocations of 24 C.F.R. § 888.113(c)(4), which authorizes the Secretary to suspend temporarily the small area designation for a particular area or PHA based on certain "events" such as a "Presidentially declared disaster" or a "sudden influx of displaced households." This regulation, however, does not authorize HUD's wholesale suspension of the effective date of the rule's requirements. *See infra* Point I.A.

Plaintiffs are likely to prevail for the additional reason that HUD's action is arbitrary and capricious. HUD's conclusory explanations fail to articulate "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Although HUD pointed to three factors—the Interim Evaluation, comments received in its "Reducing Regulatory Burden" docket, and the notion that PHAs need more time to comply—it did not point to specific evidence that would make any of those factors relevant, let alone explain how that evidence justified its abrupt suspension of a regulatory requirement. Moreover, HUD now is taking positions that the agency specifically considered and rejected in promulgating the rule, without acknowledging these position changes, much less justifying them. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). *See infra* Point I.B.

Plaintiffs will suffer irreparable harm absent a preliminary injunction. Plaintiffs Crystal Carter and Tiara Moore, both African-American women, want to move their families out of Hartford and Chicago, respectively, to areas outside those cities that would provide better opportunities but have higher average rents. The Small Area FMR Rule empowers them to make such moves, but HUD's suspension of the rule's requirements is depriving them (as well as thousands of other voucher families) of that choice and forcing them to remain in high-poverty, racially segregated areas where they do not wish to be. *See infra* Point II.A. Meanwhile, Plaintiff Open Communities Alliance has invested considerable resources into preparing for the rule's implementation. HUD's action is frustrating its mission and forcing it to divert its resources into activities that should be wholly unnecessary, such as trying to convince individual PHAs to implement small area FMRs notwithstanding HUD's action. *See infra* Point II.B.

In contrast, HUD will suffer no cognizable harm by being forced to follow the law, and the public interest weighs in favor of an injunction. "There is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters*, 838 F.3d at 12 (D.C. Cir. 2016). And whatever weight HUD's expressed concerns might otherwise bear, here "there is precious little record evidence" documenting them. *Id.* at 13. *See infra* Point III.

This Court should grant a preliminary injunction barring HUD from suspending the effective date of the Small Area FMR Rule's requirements for PHAs and requiring HUD to otherwise ensure that HCV voucher holders get the benefits of the Small Area FMR Rule on time, beginning on January 1, 2018.

I. Plaintiffs Are Likely to Prevail on the Merits.

HUD suspended the effective date of the Small Area FMR Rule's requirements for PHAs for two years without observing the proper notice-and-comment procedures pursuant to the APA, 5 U.S.C. § 706(2)(E). Further, HUD's actions were arbitrary and capricious in violation of 5

U.S.C. § 706(2)(A). For the reasons described below, Plaintiffs are likely to prevail on the merits of these APA claims.

A. HUD Failed to Follow Required Notice-and-Comment Procedures.

The APA sets forth the notice-and-comment procedures that a federal agency must follow before engaging in substantive rulemaking:

> (b) General notice of proposed rule making shall be published in the Federal Register …
>
> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

5 U.S.C. § 553. Once a rule is finalized, the agency "is itself bound by [it] until that rule is amended or revoked," and it "may not alter such a rule without notice and comment." *Clean Air Council*, 862 F.3d at 9 (internal brackets omitted). Indeed, if it were otherwise—if an agency could alter the terms of a rule whenever it liked—that would call into question the existence of a "final rule [] for purposes of judicial review." *Nat. Res. Def. Council, Inc. v. Abraham,* 355 F.3d 179, 203 (2d Cir. 2004). The APA applies to "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4).

Here, there can be no question that the Small Area FMR Rule is a substantive regulation that required notice-and-comment rulemaking. The rule provides that, as of January 1, 2018, all PHAs administering HCV programs in selected metropolitan areas will be required to use small

area FMRs. 24 C.F.R. § 888.113(c)(3). As required under the APA, HUD used notice-and-comment rulemaking to promulgate the Small Area FMR Rule.

The date on which a rule's requirements become effective is a substantive provision of a final rule, because "altering the effective date of a duly promulgated standard could be, in substance, tantamount to an amendment or rescission of the [rule.]" *Abraham*, 355 F.3d at 194. Accordingly, the "suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under [the] APA" that requires compliance with the APA's procedural requirements. *Envtl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983). Otherwise, "an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date." *Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 762 (3d Cir. 1982). By now it is well established that an agency may not do that. *See Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (holding that an agency's suspension of a rule was "a paradigm of a revocation," constituting "a 180-degree reversal of [the agency's] former views as to the proper course"); *Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 813 (D.C. Cir. 1983) ("[S]uspension of the permit process … amounts to a suspension of the effective date of regulation … and may be reviewed in the court of appeals as the promulgation of a regulation."); *Council of the S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 583 n.28 (D.C. Cir. 1981) ("[T]he December 5 order was a substantive rule since, by deferring the requirement that coal operators supply life-saving equipment to miners, it had 'palpable effects' upon the regulated industry and the public in general."); *California v. U.S. Bureau of Land Mgmt.*, __ F. Supp. 3d __, 2017 WL 4416409, at *10 (N.D. Cal. 2017).

Accordingly, an agency's action to delay or suspend an effective date constitutes "substantive rulemaking," triggering the APA's notice-and-comment procedures. *See Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 17 (D.D.C. 2012) (citing cases). The D.C. Circuit applied this well-established principle earlier this year in *Clean Air Council*, which held unlawful a decision of the Environmental Protection Agency to stay portions of a final rule. The court reasoned that such a stay "is essentially an order delaying the rule's effective date," and "such orders are tantamount to amending or revoking a rule." *Clean Air Council*, 862 F.3d at 6.

That reasoning directly applies here. HUD's suspension of the effective date of the Small Area FMR Rule effectively amends or rescinds the rule for two years. It modifies the relevant standard PHAs will apply—and thus the terms of the vouchers that participating families will receive—during that period. Those effects will be felt immediately, beginning with the payment standards that PHAs use on January 1, 2018. Because HUD substantively revised the rule without undertaking notice-and-comment procedures, it failed to observe procedures required by law, and the action should be set aside. *See* 5 U.S.C. § 706(2)(D).

HUD has not claimed the authority to suspend the Small Area FMR Rule without notice and comment; to the contrary, it has stated that its actions should not be treated as "a suspension of the Small Area Final Rule or a regulatory waiver." Exhibit A, August HUD Letter at 3. Although the agency's characterization of its action may provide "some indication of the nature of the announcement," *Regular Common Carrier Conference of American Trucking Ass'ns, Inc. v. United States*, 628 F.2d 248, 251 (D.C. Cir. 1980) (quoting *Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33, 39 (D.C. Cir. 1974)), the label the agency puts on its action is not binding on this Court. *See Chamber of Commerce of U.S. v. Occupational Safety and Health Admin.*, 636 F.2d 464, 468 (D.C. Cir. 1980) ("[I]t is the substance of what the

[agency] has purported to do and has done which is decisive" (quoting *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 416 (1942))). Here, there can be no question that the action's purpose and effect was to suspend the Small Area FMR Rule's requirements for PHAs. Indeed, HUD Assistant Secretary Richardson described the agency's action as "delaying the mandatory implementation of Small Area Fair Market Rents by 2 years." Exhibit B, HUD Blog Post.

HUD nonetheless claims that it is merely invoking—23 separate times—a provision of the Small Area FMR Rule, 24 C.F.R. § 888.113(c)(4), that permits temporary suspension of a region's small area designation under certain circumstances. That provision does not, however, authorize a wholesale suspension of the Small Area FMR Rule's requirements throughout the country. Rather, the provision, after calling on HUD to designate specific metropolitan areas covered by the rule's requirements, authorizes HUD to suspend such designation for a specific area because of an area-specific "event" that results in a change in local housing conditions. In full, it provides:

> HUD will designate Small Area FMR areas at the beginning of a Federal fiscal year, such designations will be permanent, and will make new area designations every 5 years thereafter as new data becomes available. HUD may suspend a Small Area FMR designation from a metropolitan area, or may temporarily exempt a PHA in a Small Area FMR metropolitan area from use of the Small Area FMRs, when HUD by notice makes a documented determination that such action is warranted. Actions that may serve as the basis of a suspension of Small Area FMRs are:
>
> (i) A Presidentially declared disaster area that results in the loss of a substantial number of housing units;
> (ii) A sudden influx of displaced households needing permanent housing; or
> (iii) Other events as determined by the Secretary.

24 C.F.R. § 888.113(c)(4).

By its plain terms, this provision authorizes HUD to suspend a small area designation only in response to specific "actions" or "events." The provision does not use those terms in an open-ended way. Rather, it cabins their scope by offering two "events" illustrative of those that can justify suspension of a small area designation: a disaster resulting in the loss of housing units and an influx of displaced households needing housing. Under the interpretive principle of ejusdem generis, "where specific words precede or follow general words in an enumeration describing a particular subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the specific words." *Trinity Servs., Inc. v. Marshall*, 593 F.2d 1250, 1258 (D.C. Cir. 1978); *see, e.g.*, *Chestnut Hill Benevolent Ass'n v. Burwell*, 142 F. Supp. 3d 91, 103 (D.D.C. 2015) (applying the principle of ejusdem generis to regulatory term and collecting cases). Thus, the general terms "actions" and "events" include only those "similar in nature" to those the regulatory provision specifies, both of which are unexpected events resulting in a sudden change in localized rental market conditions. Otherwise, the inclusion of those exemplar events in the rule's text would be entirely superfluous.

The description of this provision in the Small Area FMR Rule's preamble confirms what is apparent from the provision's text: "event" has a circumscribed meaning that cannot support HUD's action. The preamble states that this provision:

> Provides HUD may suspend a Small Area FMR designation for a metropolitan area, including at the request of a PHA, where HUD determines such action is warranted based on a documented finding of adverse rental housing market conditions that will be set out by notice (for example, the metropolitan area experiences a significant loss of housing units as a result of a natural disaster).

81 Fed. Reg. 80,569. Thus, consistent with the illustrative events in the regulatory text, an "event" that may warrant suspension of a small area designation is one that involves "adverse rental housing market conditions." HUD points to no such event here. *See Shieldalloy*

Metallurgical Corp. v. Nuclear Regulatory Comm'n, 768 F.3d 1205, 1209 (D.C. Cir. 2014) (stating that an agency's interpretation of its own regulation is not entitled to deference where it "conflicts with prior interpretations or amounts to 'nothing more than a convenient litigating position'" (quoting *Christopher v. SmithKline Beecham Corp*., 567 U.S. 142, 155 (2012))).

Section 888.113(c)(4)'s place in the larger regulatory scheme likewise confirms that the provision only authorizes targeted suspensions based on area-specific, unforeseen events. In promulgating the Small Area FMR Rule, HUD set a fixed timetable for the immediate implementation of small area FMRs and an objective methodology for determining the locales for immediate implementation. It would make no sense for HUD, at the same time, to retain authority to effect wholesale suspension of the required use of small area FMRs in those locales, for any reason and any length of time. Certainly, if HUD had intended to claim such authority it would have done so more overtly, because agencies, like Congress, do not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001); *see, e.g.*, *Arcoren v. U.S.*, 929 F.2d 1235, 1248 (8th Cir. 1991) (stating that if the agency intended to create an exception to an otherwise straightforward rule "it presumably would have specifically so provided."); *cf.* 42 U.S.C. § 7607(d)(7)(b) (authorizing EPA to stay promulgated rule to consider relevant new information that could not have been considered during rulemaking—the sort of authorization HUD claims, without textual support, to have in this instance).

* * * * *

Because HUD did not undertake notice-and-comment rulemaking to change the date by which PHAs must use small area FMRs, and because it did not properly invoke 24 C.F.R. § 888.113(c)(4), its suspension of the Small Area FMR Rule's requirements for PHAs was without observance of procedures required by law.

B. HUD's Delay of the Small Area FMR Rule Was Arbitrary and Capricious.

Plaintiffs are also likely to prevail on their second cause of action because HUD's suspension of the Small Area FMR Rule was arbitrary and capricious. HUD has provided no reasoning, and pointed to no evidence, that adequately supports its effective suspension of the Small Area FMR Rule.

The APA empowers this Court to "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency action is "arbitrary and capricious" if the action was not based on a "reasoned analysis" that indicates the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43, 57 (1983) (internal quotation marks omitted); *see also Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 407 (D.C. Cir. 1996). In conducting its review, the Court should not "rubber-stamp the agency decision"; instead, it must "engage in a 'substantial inquiry' into the facts, one that is 'searching and careful.'" *Mingo Logan Coal Company, Inc. v. EPA*, 70 F. Supp. 3d 151, 161 (D.D.C. 2014).

A reviewing court must set aside an agency action if the record indicates that the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [made a decision that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. A court cannot "supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* (internal quotation marks omitted). "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Id.* at 50 (citations

omitted); *accord S. Co. Servs., Inc. v. Fed. Energy Regulatory Comm'n*, 416 F.3d 39, 47 (D.C. Cir. 2015).

Like all other substantive provisions of rules, effective dates—and agency action altering or suspending an effective date—must withstand scrutiny under the APA's prohibition on rules that are "arbitrary and capricious." *See* cases cited *supra* Point I.A. Thus, agency action setting the effective date of a regulatory requirement—and then agency action changing that date—must be based on a rational consideration of the same factors that guide the agency's rulemaking under the statute authorizing the rule. To the extent that an agency has concluded that a regulation is justified by permissible considerations under a statute, it would be arbitrary and capricious for the agency to set an effective date that frustrated the achievement of the regulation's benefits or was not rationally calculated to serve the authorizing statute's objectives. *Cf. Chem. Mfrs. Ass'n v. EPA*, 217 F.3d 861, 865–67 (D.C. Cir. 2000) (finding an agency compliance date that frustrated statutory objectives to be arbitrary and capricious).

As an initial matter, HUD's decision was arbitrary and capricious based on what it did *not* consider. HUD failed to acknowledge the benefits of immediate use of small area FMRs in the areas most amenable to their use—that is, the reasons why it thought the rule appropriate in the first place—let alone explain why it now assigned those interests less weight. It did not, for example, acknowledge its own findings that FMRs based on large areas perpetuate concentrated poverty and racial segregation and constrain the housing choices of thousands of families. Put simply, HUD "entirely failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, in considering only what it believed to be the costs of immediate implementation and not the benefits. *U.S. Bureau of Land Mgmt.*, 2017 WL 4416409, at *10.

While HUD's action is arbitrary and capricious for that reason alone, its stated reasoning fares no better. HUD has articulated three purported justifications for the delay of the Small Area FMR Rule. These reasons are insufficient, individually and collectively, to satisfy arbitrary-and-capricious review.

The Interim Evaluation — In its August 11 letter to the PHAs, HUD alluded to the (then-still-unreleased) Interim Evaluation's analysis of the demonstration project and asserted in conclusory fashion: "The interim findings suggest the need for further analysis of the benefits and costs of Small Area FMR, particularly with respect to the impact of rent burdens on participating families and the availability of units in the metropolitan area." *See* Exhibit A, August HUD Letter at 1. HUD then asserted that, "[a]fter reviewing the interim findings," it "believes a policy change of this magnitude should be fully informed by the final report on the completed demonstration before HUD requires the use of Small Area FMRs." *Id.* As explained above, the Small Area FMR Rule already made the relevant "policy change" law, and HUD was not free to alter it without notice-and-comment rulemaking. In any event, HUD did not explain what in the Interim Evaluation suggested the need for further analysis, let alone how that need in turn justified freezing implementation of a final rule.

HUD's failure to explain how the Interim Evaluation justified its suspension of the Small Area FMR Rule is particularly problematic because the agency's conclusion—that further research is required before PHAs can be required to use small area FMRs—directly contradicts the agency's findings during promulgation of the rule. In issuing the rule, HUD considered and rejected the suggestion that it wait for the full results of the demonstration project before requiring additional PHAs to use small area FMRs. 81 Fed. Reg. 80,579.

In suspending the rule, HUD did not even acknowledge that it was changing its position. When an agency changes position, however, it must at the very least demonstrate "awareness that it *is* changing position," *see Encino Motorcars, LLC*, 136 S. Ct. at 2127 (quoting *Fox Television Stations, Inc.*, 556 U.S. at 515); *accord U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 706 (D.C. Cir. 2016) (agency "may not, for example, depart from a prior policy *sub silentio*"). It then must explain either (1) how circumstances have changed such that the new position is consistent with its original reasoning, *id.* at 515, or (2) why it is now choosing to "disregard[] facts and circumstances that underlay or were engendered by the prior policy," *id.* at 516; *see, e.g., U.S. Bureau of Land Mgmt.*, 2017 WL 4416409, at *19 ("New presidential administrations are entitled to change policy positions, but to meet the requirements of the APA they must give reasoned explanations for those changes and 'address [the] prior factual findings' underpinning a prior regulatory regime."). HUD failed to offer any such explanation. That failure alone makes its action arbitrary and capricious. As the D.C. Circuit has put it, "[b]linders may work for horses, but they are no good for administrative agencies." *Am. Wild Horse Pres. Camp. v. Perdue*, __ F.3d __, 2017 WL 4385259, at *6 (D.C. Cir. Sept. 29, 2017).

In any event, contrary to HUD's assertion, the Interim Evaluation in fact supports implementation of the Small Area FMR Rule according to the schedule set forth in the final rule. The Interim Evaluation found, for example, that small area FMRs accomplish their intended goal of permitting more voucher holders to move to high-opportunity neighborhoods. *See* Interim Evaluation at viii-ix (overall share of voucher holders living in high-opportunity neighborhoods rose from 11 percent to 13 percent; 15 percent of voucher families moving to new zip code moved to high-opportunity neighborhood, up from 9 percent). It also found that use of small area FMRs reduces costs: for PHAs using small area FMRs, the average voucher subsidy cost fell by

13 percent in inflation-adjusted terms between 2010 and 2015, compared to a 5 percent inflation-adjusted drop at comparison agencies. *Id.*, at x. And while demonstration project PHAs encountered some issues with implementing small area FMRs, these issues were anticipated and addressed in the Small Area FMR Rule such that they raise no concern regarding the Small Area FMR Rule's implementation. Declaration of Will Fischer ¶ 4.

Comments received in the "Reducing Regulatory Burden" docket — Equally insufficient is HUD's reference to unspecified "concerns" industry groups expressed in response to HUD's "Reducing Regulatory Burden" notice, which did not refer to the Small Area FMR Rule or ask for guidance as to how to apply it or any other regulations. Exhibit A, August HUD Letter at 2. HUD did not even bother to articulate these "concerns," let alone explain why they justified its action. Once again, HUD's failure to adequately explain itself is sufficient to make its reasoning arbitrary and capricious, and any fuller explanation based on comments from this docket would be invalid in any event.

HUD received 299 comments in response to its May 15 notice. The vast majority did not mention the Small Area FMR Rule. While HUD did not identify the comments it found relevant, it may have been referring to comments filed by the National Association of Housing and Redevelopment Officers (NAHRO), which called for HUD to take the action at issue here. NAHRO's comment contained no new information, but rather incorporated by reference comments that it submitted during the 2015 rulemaking, which HUD had considered and rejected at that time. *See* NAHRO Comment Letter. NAHRO did assert that HUD could use 24 C.F.R. § 888.113(c)(4) multiple times to effectively suspend the Small Area FMR Rule's effective date—an argument that is incorrect, *see supra* I.A at pp. 25-27, and in any event does not justify HUD's use of such imagined authority.

The bottom line is that HUD failed to adequately explain how the comments it received justified suspension of the rule, and any such explanation would fail.

The contention that PHAs need more time to comply — Finally, HUD has claimed—both in its letter to PHAs and in Mr. Richardson's post on its website—that the Small Area FMR Rule should be delayed because the impacted PHAs would not be ready to comply on January 1, 2018. HUD pointed to no evidence, however, that PHAs lacked the ability to implement the rule on time. And although "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy," *Encino Motorcars, LLC*, 136 S. Ct. at 2126 (quoting *Fox Television Stations, Inc*., 556 U.S. at 515-16), HUD did not explain why it changed its previous determination that the PHAs could be ready.

What HUD pointed to, instead, was its *own* failure to take certain steps to help the PHAs prepare for the rule's implementation, such as developing guidance and technical assistance. It acknowledged that this failure was by choice, because the agency instead (1) had "focused on soliciting input and feedback from PHAs and other stakeholders on a variety of regulations and policies, including the Small Area FMR Final Rule"; (2) had decided (for reasons that are themselves arbitrary and capricious, as explained above) not to proceed with small area FMRs until it received final data from the demonstration project; and (3) was contemplating changing the rule through proper means, making it "problematic" to develop guidance that "may become quickly outdated as the result of related regulatory burden reduction and reform efforts." Exhibit A, August HUD Letter at 2.

None of these was a legitimate reason, let alone a sufficient reason, for the agency to suspend PHAs' obligation to comply with the final rule. The possibility that an agency may change a rule in the future does not empower it to exempt actors from compliance before a

change is even proposed, let alone completed. *See Clean Air Council v. Pruitt*, 862 F.3d at *9 (rejecting argument that agency has "inherent authority" to decline to enforce properly promulgated final rule while it reconsiders it). Furthermore, an agency cannot rely on its own decision not to take steps to implement a final rule as a reason why it cannot do so going forward. *See Bellevue Hosp. Ctr. v. Leavitt*, 443 F.3d 163, 179 (2d Cir. 2006) (rejecting argument that, because "agency failed to complete the predicate task" on schedule, it could "cite [] that very failure as an excuse for less than full compliance with its second task"); *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009) ("DHS should not now expect to excuse its violation of the APA by pointing to the problems created by its own delay."); *see also League of Women Voters*, 838 F.3d at 14 (for purposes of analyzing equities, finding that agency could not rely on "the confusion resulting from its own improper action" to oppose "an injunction against that action"). Even if HUD failed to meet internal deadlines for assisting PHAs with on-time implementation of small area FMRs—and it has not said so explicitly—that does not mean PHAs cannot comply with the rule on time, let alone provide adequate grounds for halting all efforts at implementation. And although HUD's failure to offer an explanation or evidence makes this justification improper no matter what the reality might be, in fact PHAs are quite capable of implementing the rule without significant issue. *See* Declaration of Alison Bell ¶ 8; Declaration of Sheryl Seiling ¶ 6.

In short, HUD's decision to suspend the final rule delay lacks a reasonable justification and is arbitrary and capricious.

II. HUD's Delay of the Small Area FMR Rule Will Irreparably Harm Plaintiffs.

HUD's violation of the APA will cause irreparable harm to Plaintiffs Crystal Carter and Tiara Moore (as well as many other similarly situated voucher holders) and to Plaintiff Open

Communities Alliance absent preliminary relief. The likely harm to each plaintiff is "certain and great"; it is "actual and not theoretical"; and it is "of such *immine*nce that there is a clear and present need for equitable relief to prevent [it]." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (internal quotations omitted) (citing *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)) (internal quotations omitted); *see also League of Women Voters of U.S.*, 838 F.3d at 7-8. Additionally, the injury will be "beyond remediation" in the absence of preliminary relief. *Chaplaincy*, 454 F.3d at 297.

A. Plaintiffs Crystal Carter and Tiara Moore Will Suffer Irreparable Harm If HUD's Violation of the APA Is Not Enjoined.

Plaintiffs Crystal Carter and Tiara Moore are likely to suffer irreparable harm if HUD's unlawful suspension of the Small Area FMR Rule is not preliminarily enjoined. Both Ms. Carter and Ms. Moore are Housing Choice Voucher holders in areas covered by the Small Area FMR Rule. Both reside in high-poverty neighborhoods now, but wish to move their families to areas that provide greater opportunity. Declaration of Crystal Carter ¶ 6; Declaration of Tiara Moore ¶¶ 5-6; Exhibit G to Declaration of Sasha Samberg-Champion ¶ 9 ("Poverty Data for 06114 Zip Code in Hartford"); Exhibit H to Declaration of Sasha Samberg-Champion ¶ 10 ("Poverty Data for 60644 Zip Code in Chicago"). Both have been stymied in securing the housing they want because their vouchers will not cover the rent in high-opportunity neighborhoods, but both would be able to secure that desired housing under the Small Area FMR Rule. Declaration of Crystal Carter ¶ 7; Declaration of Tiara Moore ¶¶ 7-9. In short, HUD's illegal suspension of the Small Area FMR Rule will deprive both Ms. Carter and Ms. Moore of the ability to move to housing that better suits their families beginning on January 1, 2018.

Ms. Carter and her five minor children utilize a Housing Choice Voucher to rent a four-bedroom house in the City of Hartford, Connecticut. Declaration of Crystal Carter ¶ 1. Three of

Ms. Carter's children currently attend high-performing schools in the Simsbury School District through Hartford's Open Choice school integration program. *Id.* ¶ 4. Ms. Carter wants to use her voucher to move to the town of Simsbury, located in Hartford County, to be closer to those schools. *Id.* ¶ 6. The town of Simsbury also offers greater employment opportunities, higher quality education, and a safer living environment for her entire family. *Id.*

The Small Area FMR Rule empowers Ms. Carter to move from the City of Hartford to the Town of Simsbury, but HUD's suspension of the rule deprives her of its benefits. Absent an injunction, for fiscal year 2018, the FMR for a four-bedroom dwelling for the broad Hartford metropolitan area—applicable in Simsbury as well as Hartford—will be $1,620 per month. Exhibit E, 2018 Hartford FMRs. By contrast, under the Small Area FMR Rule, the FMR for a four-bedroom unit in much of Simsbury is $1,940 per month. Exhibit F, 2018 Hartford SAFMRs. These figures accord with Ms. Carter's own experience; she has attempted to find an appropriate dwelling in Simsbury for $1,620 per month but has been unable to do so. Declaration of Crystal Carter ¶ 7.

HUD thus is directly depriving Ms. Carter of her preferred choice in housing, to which she is entitled under the duly promulgated Small Area FMR Rule. This loss of a housing opportunity is a clear, certain, and irreparable harm. Ms. Carter will need to either remain in her current home or secure housing in another racially-segregated, low-opportunity location if a preliminary injunction is not granted. *See Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir. 1984) (holding that the necessity of finding alternative housing supported a presumption that violations of the Fair Housing Act result in irreparable harm).

Tiara Moore and her minor child live in a shared apartment in the City of Chicago, Illinois. Declaration of Tiara Moore ¶ 1. The Chicago Housing Authority has issued Ms. Moore a

Housing Choice Voucher for $1,207 for a two-bedroom unit. *Id.* ¶¶ 4, 7. Ms. Moore wishes to use that voucher to move to DuPage County, Illinois to be close to her mother (who provides child care so that Ms. Moore can work), and to be in a neighborhood that affords greater employment opportunities, higher quality education, and a safer living environment for her and her child. *Id.* ¶¶ 5-6. However, she has not been able to find any two-bedroom rental units in DuPage County—which is part of the same broad FMR area as Chicago but is a more expensive rental market—for $1,207 per month. *Id.* ¶ 7.

The Small Area FMR Rule changes that, permitting Ms. Moore to move her family from the City of Chicago to DuPage County. For fiscal year 2018, the FMR for a two-bedroom unit in the broad Chicago metropolitan area is $1,180 per month.[4] Exhibit C, 2018 Chicago FMRs. By contrast, under the Small Area FMR Rule, 41 of the 48 zip codes in DuPage County have FMRs exceeding $1,180 per month, with FMRs in the highest cost zip codes reaching $1,770 per month. Exhibit D, 2018 Chicago SAFMRs. That difference in her voucher's purchasing power in much of DuPage County dramatically improves Ms. Moore's ability to find a suitable housing unit there. HUD's unlawful suspension of mandatory implementation of the Small Area FMR Rule, if not enjoined, locks her out of this housing opportunity to which she is currently entitled by regulation, irreparably harming her.

HUD's illegal suspension of the Small Area FMR Rule thus consigns Ms. Carter and Ms. Moore to impoverished, racially-segregated, comparatively high-crime neighborhoods and prevents them from moving to areas that would provide them and their families with greater opportunity. In the Hartford zip code where Ms. Carter lives, 32.2 percent of households live in

[4] Ms. Moore's current voucher is slightly above this amount because the Chicago Housing Authority sets her payment standard above 100 percent of the FMR.

poverty. *See* Exhibit G, Poverty Data for 06114 Zip Code in Hartford. Meanwhile, Ms. Moore lives in a Chicago zip code with a 33.8 percent poverty rate. *See* Exhibit H, Poverty Data for 60644 Zip Code in Chicago. Simsbury and DuPage County have much lower poverty rates, lower crime, and other superior opportunities. *See* Exhibit I to Declaration of Sasha Samberg-Champion ¶ 11("Poverty Data for Simsbury Town, CT"), Exhibit J to Declaration of Sasha Samberg-Champion ¶ 12 ("Poverty Data for DuPage County, IL"). This constitutes irreparable harm by itself. *See Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148, 153 (S.D.N.Y. 1989) (granting preliminary injunction in Fair Housing Act challenge to tenant selection practices of landlord in low-crime area). And the harm runs deeper.

According to one study, children whose families used a Housing Choice Voucher to move to lower-poverty areas have an annual income by their mid-twenties that is, on average, 31 percent higher than those who remain within high-poverty areas. Chetty, et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*. This increase in future earnings was cumulative—the longer children lived in areas with lower rates of poverty, the greater the increase in future earnings. *Id*. at 858. Thus, every day that Ms. Carter and Ms. Moore cannot move their children out of poverty risks additional harm. A delay of two years—assuming HUD will let the rule go into effect even then—can make all the difference.

Both individual Plaintiffs also are likely to suffer other concrete injuries from being deprived of their preferred housing. For example, Ms. Moore will continue to incur opportunity and transportation costs arising from daily trips to bring her child to and from her mother's home in DuPage County for child care. Declaration of Tiara Moore ¶ 6. Moving to DuPage County would allow her to avail herself of her mother's child care services without that added time and

expense. *Id*. Similarly, Ms. Carter would like to move to Simsbury because that is where three of her children attend school. Declaration of Crystal Carter ¶¶ 4-6. Living close to her children's schools has obvious benefits for any parent, including reducing the children's commute times, giving them more opportunity to engage with their classmates out of school, and allowing the parent to be more involved with her children's schools.

B. Plaintiff Open Communities Alliance Will Suffer Irreparable Harm If HUD's Violation of the APA Is Not Enjoined.

Plaintiff Open Communities Alliance similarly will suffer irreparable harm if HUD's violation of the law is not enjoined. HUD's unlawful suspension of the requirement that PHAs use small area FMRs frustrates OCA's mission and requires it to divert significant resources to counteract the effect of HUD's action. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011); *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990); *see, e.g., Nat'l Fair Hous. All. v. Travelers Indem. Co.*, __ F. Supp. 3d __, 2017 WL 3608232, at *3-*4 (D.D.C. 2017).

OCA's mission includes providing greater opportunities and more choices for people living in low-opportunity areas in Connecticut, including by furthering the ability of HCV voucher holders and others to move to higher-opportunity areas should they wish to do so. In so doing, OCA works to address the disproportionate isolation from opportunities—in education, employment, housing, and otherwise—that the State's African-American and Latino families face as a result. Declaration of Erin Boggs ¶ 2. Much of its work pertains to enabling families using HCV vouchers to move to areas of higher opportunity, and otherwise addressing the concentration of voucher householders (which, in the Hartford area, are predominantly non-white) in high-poverty, segregated areas. *Id.* ¶ 5; *see id.* ¶¶ 4-9 (giving examples of OCA's work). For example, OCA works to improve housing mobility programs for voucher users and to

increase the supply of rental housing suitable for voucher users in high-opportunity neighborhoods. *Id.* ¶¶ 4-9.

HUD's unlawful suspension of the requirement that Hartford-area PHAs use small area FMRs is "at loggerheads" with OCA's mission, *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1429 (D.C. Cir. 1996) (internal quotations and citation omitted), and "has made the organization's activities more difficult," *id.* (emphasis omitted). Even as OCA tries to help HCV voucher users gain access to greater opportunity, HUD is frustrating OCA's ability to help them secure housing in neighborhoods that provide such opportunity. Declaration of Erin Boggs ¶ 10. Not only does HUD's action make it harder for OCA to help voucher holders secure existing housing, it is more difficult for OCA to encourage the construction of housing developments suitable for voucher users in high-opportunity neighborhoods if vouchers will not cover the actual market rent there. *Id.* ¶ 8.

In response, OCA has begun diverting its scarce resources away from previously planned projects to remedying the harm HUD's action is causing, and it will have to continue doing so. Declaration of Erin Boggs ¶¶ 10-12. For example, OCA now must plan to spend considerable time and resources on a sustained effort to attempt to convince each individual Hartford-area PHA to implement small area FMRs voluntarily. *Id*. ¶ 10. This project—which may end up being largely or entirely futile—now is critical to achievement of OCA's mission but would be entirely unnecessary if not for HUD's unlawful decision to suspend the requirement that Hartford-area PHAs use small area FMRs. *Id.* Similarly, whereas OCA previously planned to produce a small area FMR web portal that would have matched up voucher holders with newly available units, now it must instead use the data it compiled for that project to educate people about the housing opportunities HUD has eliminated. *Id.* ¶¶ 11-12.

All of this is to say that OCA is suffering "diversion of resources to programs designed to counteract the injury" to its mission, which is sufficient harm to establish standing. *Equal Rights Ctr.*, 633 F.3d at 1140-41.

This harm to OCA's mission and diversion of its resources (financial and otherwise) is occurring every day and is irreparable. Damages would not remedy this injury and, in any event, are unavailable. *See Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 242 (D.D.C. 2014) ("[I]f a movant seeking a preliminary injunction will be unable to sue to recover any monetary damages against a government agency in the future . . . financial loss can constitute irreparable injury.") (quotation and citation omitted); *id.* at 243 (finding requisite irreparable harm where plaintiffs "are non-profits for whom lost funds would mean reducing hospital services to children").

III. The Balance of Equities and the Public Interest Support Plaintiffs' Request for Preliminary Relief.

Finally, a preliminary injunction is in the public interest where, as here, the equities for granting one easily outweigh those against. In evaluating whether to issue a preliminary injunction, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (internal citation and quotation marks omitted). In addition to evaluating the relative effect of the injunction on each party, the Court must also consider whether the requested relief would serve the public interest.

As discussed, without an injunction, Plaintiffs would suffer serious and immediate harms that could not be sufficiently remedied later. The individual Plaintiffs would be unable to access jobs in or near the high-opportunity neighborhoods to which they seek to move. Additionally, their children would be deprived of a variety of opportunities that, studies show, would have a

life-long effect on their earnings' ability and their future families' quality of life. As this Court has recognized, these are the types of harm that are frequently determinative as to whether to grant preliminary relief. *See Hispanic Affairs Project v. Perez*, 141 F. Supp. 3d 60, 74 (D.D.C. 2015) (finding equities favored the result that would not deprive immigrant workers who relied on government visas of employment). The Open Communities Alliance's injuries, too, are the type that warrant injunctive relief. *See League of Women Voters*, 838 F.3d at 9 (enjoining agency action that interfered with non-profit organization's ability to further its mission).

By contrast, a preliminary injunction would cause little or no cognizable harm to anyone. HUD would not be harmed by being ordered to follow its own regulation. The PHAs would not be harmed in any legally cognizable way by being required to follow a legal obligation they have been aware of since late 2016—and in any event, implementation of small area FMRs will not impose a significant hardship on them. *See* Declaration of Alison Bell ¶¶ 4-8; Declaration of Sheryl Seiling ¶ 6. And HCV voucher holders will not be hurt by immediate implementation of a regulation that is carefully calibrated to provide them additional housing choice while protecting them from any immediate harm.

Moreover, HUD's purported concerns, even if documented, could not outweigh the harm to the public interest from permitting an agency to disregard a promulgated rule. It is well-established, for purposes of preliminary injunction analysis, that the "[p]ublic interest is served when administrative agencies comply with their obligations under the APA." *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015); *Patriot, Inc. v. U.S. Dep't of Hous. and Urban Dev.*, 963 F. Supp. 1, 6 (D.D.C. 1997) ("[T]he public interest is best served by having federal agencies comply with the requirements of federal law, particularly the notice and comment requirements of the APA."); *Gulf Coast Mar. Supply, Inc. v. United States*, 218 F. Supp. 3d 92, 101 (D.D.C.

2016) (same); *Central United Life, Inc. v. Burwell*, 128 F. Supp. 3d 321, 330 (D.D.C. 2015) ("Forcing federal agencies to comply with the law is undoubtedly in the public interest[.]"); *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009) (same); *see also Cresote Council v. Johnson*, 555 F. Supp. 2d 36, 40 (D.D.C. 2008) (there is a "general public interest in open and accountable agency decision-making"). By contrast, "[t]here is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters*, 838 F.3d at 12 (D.C. Cir. 2016) (citing *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511–12 (D.D.C. 2016); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)).

CONCLUSION

This Court should grant Plaintiffs a preliminary injunction requiring HUD to rescind its notices that it will not enforce the Small Area FMR Rule's requirements for affected PHAs and to take all other necessary steps to ensure that the affected PHAs use payment standards based on small area FMRs beginning on January 1, 2018, as HUD's regulation requires.

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Respectfully submitted,

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