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Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, SW
Room 10276
Washington, DC 20410-0001

RE: Docket No. FR-5173-P-01, Affirmatively Furthering Fair Housing

On behalf of the NAACP Legal Defense & Educational Fund, Inc. (LDF), we submit the following comments on the proposed affirmatively furthering fair housing regulations.

Founded by Thurgood Marshall in 1940, LDF is the nation's oldest civil rights legal organization. Since its inception, LDF has worked to combat racial segregation and promote racial integration in housing. One of Thurgood Marshall's early victories in the Supreme Court came in *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *McGhee v. Sipes*, 334 U.S. 1 (1948), which held that state enforcement of racially restrictive covenants violated the Equal Protection Clause. In a companion case, Charles Hamilton Houston, Marshall's mentor and LDF co-founder, condemned racially restrictive covenants with language that still resonates and is equally applicable to the discriminatory housing practices and entrenched patterns of housing segregation that persist today:

[Racially restrictive covenants] have been a direct and major cause of enormous overcrowding into slums, with consequent substantial disorganization of family and community life. These effects have not been, and cannot be, in our fluid society, confined to the intended victims of the restrictions; they permeate the community and exert a baneful influence upon the economic, social, moral, and physical well-being of all persons, white and black, young and old, rich and poor. They are incompatible with the foundations of our republic and their judicial approbation may well imperil our form of government and our unity and strength as a nation.

Consolidated Brief for Petitioners at 8, *Hurd v. Hodge*, 334 U.S. 24 (1948) (Nos. 290, 291).

In the six decades since Marshall and Houston combated racially restrictive covenants, LDF has continued to challenge public and private policies and practices that deny African Americans housing opportunity and isolate African-American communities.

We have litigated fair housing cases in virtually every area of the housing market, including: *Cent. Ala. Fair Hous. Ctr. v. Lowder Realty*, 236 F.3d 629 (11th Cir. 2002) (sales); *Price v. Gadsden Corp.*, No. 93-CV-1784 (N.D. Ala. filed Aug. 30, 1993) (lending); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) (insurance); *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994) (public housing and assistance programs); *Brown v. Artery Org., Inc.*, 654 F. Supp. 1106 (D.D.C. 1987) (redevelopment); *Kennedy Park Homes Ass'n. Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (exclusionary zoning); and *Ragin v. New York Times Co.*, 923 F.2d 995 (2d Cir. 1991) (advertising). Most recently, we settled two cases challenging discriminatory practices of the U.S. Department of Housing and Urban Development. In *Thompson v. HUD*, we negotiated a settlement to remedy a court finding that HUD had unfairly concentrated African-American public housing residents in the most impoverished, segregated areas of Baltimore City and failed to take affirmative steps to implement an effective regional strategy for promoting fair housing opportunities throughout the Baltimore region. *Thompson v. HUD*, 348 F. Supp. 2d 398 (D. Md. 2005) (liability finding); Doc. 1249 (D. Md. Nov. 21, 2012) (order approving settlement). In *Greater New Orleans Fair Housing Action Center et al. v. HUD*, we settled claims that HUD's "Road Home" program, which sought to help homeowners recover after Hurricane Katrina, discriminated against African-American homeowners by awarding grants based on the lesser of the pre-storm value of the home or the cost of rebuilding. Because property values were lower in African-American communities, African-American homeowners were awarded smaller grants for rebuilding than white homeowners, even when the homes were comparable. See *Greater New Orleans Fair Hous. Action Ctr., et al. v. HUD, et al.*, No. 1:08-1938, Settlement (D.D.C. July 7, 2011).

In many of these cases, the key enforcement mechanism was the Fair Housing Act of 1968. Enacted in the wake of Dr. Martin Luther King, Jr.'s tragic assassination, the Fair Housing Act — and especially its mandate that HUD and its grantees affirmatively further fair housing — is a powerful tool for combating the structural inequality resulting from decades of public and private segregative practices. Section 3608 of the Act requires that HUD programs and activities be administered in a manner that affirmatively furthers the goals of the Fair Housing Act. 42 U.S.C. § 3608. In adopting this provision, Congress was keenly aware of the federal government's extensive role in perpetuating residential segregation, through siting and admissions policies of public housing, redlining and underwriting. During the debate, Senator Brooke commented that "an overwhelming proportion of public housing . . . in the United States directly built, financed and supervised by the Federal Government — is racially segregated." 114 Cong. Rec. 2528. Similarly, Senator Mondale noted: "An important factor contributing to exclusion of Negroes from [suburban communities and other exclusively white areas], moreover, has been the policies and practices of agencies of government at all levels." 114 Cong. Rec. 2277. In order to undo these harmful effects, Congress decided that additional steps were necessary beyond prohibiting discriminatory actions. In *NAACP v. Secretary of Housing & Urban Development*, then-Judge, now-Justice Breyer stressed that the affirmatively furthering mandate "reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases." 817 F.2d 149, 155 (1st Cir. 1987).

Since the Fair Housing Act was enacted, our nation has made progress toward eliminating racial segregation and discrimination in housing. Nevertheless, housing segregation remains entrenched in scores of communities across the country, large and small, urban and rural. *See, e.g.,* John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis; New Findings From the 2010 Census* at 2-3 (2011) available at <http://www.s4.brown.edu/us2010/Data/Report/report2.pdf>. The recent economic recession has only contributed to further racial and economic isolation of low-income African Americans. Between 2007 and 2010, real home values for African-American and Hispanic homeowners dropped 31 and 35 percent, respectively, while only dropping 15 percent for white homeowners. Additionally, the median net wealth of white households (owners and renters combined) in 2010 was more than 7.9 times that of African-American households, 8.2 times that of Hispanic households, and 6.8 times that of all minority households combined. Joint Center for Housing Studies, *State of the Nation's Housing 2013* at 14 (2013), available at <http://www.jchs.harvard.edu/research/publications/state-nations-housing-2013>. The median income for African-American families in 2011 was at its lowest level since 1994. *Id.* at 15.

Notwithstanding the victories of LDF and others in the courts, we recognize that these persistent structural inequalities in the housing market cannot be overcome through lawsuits on a case-by-case basis or the implementation of isolated social policies. Instead, public and private actors in the housing arena must assume responsibility for their roles in perpetuating housing segregation and participate in coordinated and effective plans to eliminate that segregation. It is only through a collaborative, structural approach that our nation finally will be able to realize the dream of equal housing opportunity for all.

For these reasons, LDF welcomes this opportunity to comment on the proposed regulations. Over the course of several administrations, we have urged HUD to take meaningful steps to ensure full compliance with its own obligations to affirmatively further fair housing, as well as those of its grantees. In 1998, we applauded HUD's proposed rule to provide performance standards for measuring HUD grantees' compliance with the affirmatively furthering requirement. 63 Fed. Reg. 57,881 (Oct. 28, 1998). We were extremely disappointed when HUD withdrew the proposed rule in 1999; at the time, the Washington Post Editorial Board noted that the "AFFH requirement has never been much enforced and has been honored mainly in the breach." Masthead Editorial, *Unfair Housing*, Wash. Post., Apr. 30, 1999, at A34.

On the fortieth anniversary of the Fair Housing Act, LDF and other national civil rights organizations convened a National Commission on Fair Housing and Equal Opportunity, which conducted hearings around the country on housing discrimination and concluded that residential segregation remains pervasive and "discrimination continues to be endemic, intertwined into the very fabric of our lives." *The Future of Fair Housing: Report of the National Commission on Fair Housing and Equal Opportunity* (Dec. 2008). The Commission recommended that HUD strengthen its

enforcement of the affirmatively furthering obligation by establishing a regulatory structure to ensure that programs receiving federal funds advance fair housing. The Commission suggested that HUD undertake compliance reviews of grantees and impose sanctions on grantees out of compliance with affirmatively furthering requirements.

The regulations now proposed by HUD present a tremendous first step toward ensuring more rigorous compliance by HUD program participants with their obligations under the Fair Housing Act. We welcome HUD's intent to clarify the affirmatively furthering obligations of program participants and to provide a more effective means of complying with this vital provision of the Fair Housing Act. We are aware of the extensive outreach which HUD has conducted with program participants, stakeholders, and affected communities to identify the best practices for implementing the new requirements. We appreciate the opportunity to participate in some of those discussions.

There are a number of features in the proposed rule that should be applauded at the outset:

- (a) We welcome the replacement of the Analysis of Impediments (AI) with a more rigorous review of a participant's affirmatively furthering plan in the form of the Assessment of Fair Housing (AFH).
- (b) We are pleased that HUD attempts to follow recommendations made by the Government Accounting Office (GAO) in its 2010 report to establish assessment standards for participants and to improve HUD's monitoring of their performance. *See* U.S. Gov't Accountability Office, *Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdiction's Fair Housing Plans* (Sept. 2010).
- (c) Certainly, the provision of detailed and comprehensive data by HUD will go a long way toward assisting participants in developing more effective and individualized fair housing plans, as will the additional technical assistance, guidance, and increased interaction with HUD which is contemplated. We note that HUD will provide "a separate upcoming public comment process" for the specific data metrics, and thus defer our analysis of those metrics. *See* 78 Fed. Reg. at 43718.
- (d) We support the formal role envisioned for community participation and consultation. *See, e.g.*, Proposed Rule §§ 5.158, 5.164(b). It is our experience that community leaders and fair housing organizations have valuable insight into local barriers to fair housing, and they should be fully engaged in developing the solutions for overcoming such barriers.
- (e) We also welcome the structural modification contained in the rule which will incorporate a participant's fair housing responsibilities into its comprehensive housing and community development planning and allow fair housing

principles to inform all subsequent decision-making and action. *See* 78 Fed. Reg. at 43714.

- (f) We are particularly pleased that the proposed rule recognizes that “[m]any fair housing issues transcend local jurisdictional boundaries,” 78 Fed. Reg. at 43716, and reflects HUD’s attempts to encourage and facilitate a regional approach to fair housing planning, including encouraging the development of regional AFHs “to achieve the sharing of resources and the development of regional strategies, goals, and outcomes to improve fair housing choice for individuals within regional areas.” *See* Proposed Rule § 5.516; 78 Fed. Reg. at 43718-43719. Because our experience has taught us that implementing a regional approach to fair housing can be difficult, in response to HUD’s specific question, *see* 78 Fed. Reg. at 43724, we also believe that both financial and non-financial incentives, such as bonus points in grant programs, should be available “to encourage regional collaboration among local governments and states and greater engagement with public housing planning.” *Id.*

Although the proposed rule contains several positive elements, we believe that it is deficient in other respects. To fully accomplish the objectives set forth in the preamble of the rule and fulfill the mandate of the Fair Housing Act, we recommend that HUD should make a number of important clarifications and modifications when it promulgates a final rule:

- 1) **HUD should clarify that the central purpose of the Fair Housing Act’s affirmatively furthering fair housing mandate is to promote integration.**

We commend HUD for adopting a two-pronged definition of *affirmatively furthering fair housing* that includes “taking proactive steps beyond simply combating discrimination to foster [(a)] more inclusive communities *and* [(b)] access to community assets for all persons protected by the Fair Housing Act.” Proposed Regulation § 5.150 (definition of “affirmatively furthering fair housing”) (emphasis added).

Nevertheless, we think it is critical for HUD to clarify that efforts to combat the perpetuation of segregation and promote racially diverse and inclusive communities must remain the primary objective of this regulation, just as they have always been the central purpose of the Fair Housing Act, as well as its mandate for HUD and its grantees to affirmatively further fair housing. The primacy of this objective is reflected in the Act’s legislative history, and in several decades of case law implementing the requirement. Research and experience make clear that the vast majority of people affected by HUD programs desire integrated communities and, as HUD acknowledges in the preamble to the proposed rule, that there is a broad consensus among social scientists, policy-makers, and advocates that such segregation has significant social costs for communities, families, and especially their children. *See* 78 Fed. Reg. at 43713-43714. Moreover, communities in which Americans live, work, learn, and play together across lines of

difference are crucial to the future of our country, and to our success in an increasingly global economy.

This focus on promoting integration and combatting segregation is not inconsistent with expanding — and reducing disparities in — access to the sort of community assets that create an infrastructure of opportunity — quality schools, employment, health care services, transportation, and environmental protection. This is also an important ongoing mission of HUD, which we strongly support as part of a multi-pronged approach to affirmatively furthering fair housing. Yet even as we appreciate that access to these community assets is inextricably connected to housing opportunities, we urge HUD not to repeat old patterns of focusing primarily on housing redevelopment in racially concentrated, high-poverty neighborhoods without an equally robust strategy for expanding housing opportunities for racial and ethnic minorities in non-minority and non-poor neighborhoods, and for otherwise addressing exclusion and entrenched racial and economic segregation in communities, neighborhoods, and schools.

For these reasons, we urge four clarifications to the proposed rule:

- (a) The definition of “affirmatively furthering fair housing” should clarify that a jurisdiction’s efforts to address the levels of access to community assets should never be treated as a substitute for a meaningful analysis of a jurisdiction’s racial demographics and its levels of segregation, and the adoption of concrete, proactive steps to promote racial integration.
- (b) The “purpose” section of the rule also needs to be tweaked for similar reasons. Section 5.150 of the proposed rule currently provides:

A program participant’s strategies and actions may include strategically enhancing neighborhood assets (e.g., through targeted investments in neighborhood revitalization or stabilization) *or* promoting greater mobility and access to areas offering vital assets such as quality schools, employment, and transportation, consistent with fair housing goals.

See Proposed Rule § 5.150 (emphasis added); *see also* 78 Fed. Reg. at 43716. The current language may be misinterpreted to permit jurisdictions and public housing authorities (PHAs) to choose which of these approaches to pursue. To this end, the word “and” should be substituted for “or.” Moreover, while we would be concerned about an interpretation of the Fair Housing Act’s affirmatively furthering mandate that discourages any investment of resources or development of assets in low-income communities of color, the final rule should clarify that a jurisdiction’s AFFH obligation will not be satisfied if it ignores strategies for “promoting greater mobility and access to areas offering vital assets such as quality schools, employment, and transportation,” which we will

call “communities of opportunity.” This is especially true for program participants located in regions with a history of residential segregation or that have engaged in discriminatory practices, but we believe it is essential for HUD to stress its expectation that every program participant should make tangible progress, over time, toward reduction of segregation and expanded fair housing choice.

- (c) The proposed rule should provide greater clarity as to what constitutes “strategically enhancing neighborhood assets” and “targeted investments in neighborhood revitalization or stabilization.” HUD should make it clear that the primary purpose of this revitalization/stabilization prong of the *affirmatively furthering fair housing* definition is to enhance *non-housing* community assets — such as school improvements, transit investments, access to full service grocery stores and other retail activities, health care facilities, improved parks, economic development, and job training — for high-poverty segregated neighborhoods, with the ultimate goal of transforming them into inclusive, high-opportunity communities. HUD should further clarify that, to the extent that a program participant is investing housing resources in high-poverty segregated neighborhoods, it is likely not fulfilling its obligation to affirmatively further fair housing *unless*: (i) there is clear evidence that such investments are necessary to ameliorate the pressures of gentrification and preserve housing opportunities for low-income residents in a community that is rapidly becoming an inclusive, higher-opportunity community; or (ii) those investments are part of a comprehensive, market-driven community revitalization process, as demonstrated by supporting data that shows that the project is demonstrably improving the economic character of the area and is coordinated with public and private investments in non-housing community assets, such as those listed above.
- (d) Consistent with HUD’s recognition that that “[m]any fair housing issues transcend local jurisdictional boundaries,” 78 Fed. Reg. at 43716, the definition of affirmatively furthering fair housing in the final regulation should be modified to make clear that the scope of strategies and actions to promote greater mobility and access to communities of opportunity should extend “throughout the applicable jurisdiction as well as the surrounding regional housing market.” As we learned from cases such as *Thompson v. HUD*, 348 F. Supp. 2d at 463, and *Hills v. Gautreaux*, 425 U.S. 284 (1976), an exclusive focus on affordable housing needs within specific jurisdictions often does little to address broader patterns of segregation. Where housing markets are regional, the final rule should state, consistent with well-established case law, that a program participant’s obligation to affirmatively further fair housing is similarly regional in scope and requires the program participant to take proactive steps towards combating persistent segregation and promoting integration throughout the regional housing market.

2) **HUD should adopt enforcement mechanisms that are far more robust.**

We are deeply concerned about the lack of robust enforcement mechanisms contained in the rule. We appreciate that the proposed rule requires participants to submit an AFH to HUD and that HUD will review that plan and determine whether to reject or accept it. This is a shift from current practice, which requires participants only to certify that they are meeting affirmatively furthering obligations without ever submitting the plan to HUD for review. Without significant enhancement, however, we fear that HUD review will not improve upon the prior fair housing planning processes, which amount to mere exercises in paper submission, reviewed by HUD staff in a perfunctory manner, simply using a checklist to ensure that the required content is present and procedures followed. To enhance compliance by participants with their legal obligations under the Fair Housing Act, we propose the following enhanced enforcement mechanisms:

- (a) Under the proposed rule, participants would be required to submit an AFH only once every five years. Given that the AFH will be in effect for five years, it is critical that mechanisms are in place by which substantive progress on meeting the goals of the AFH can be measured over time.
- (b) Under the proposed rule, HUD's rejection of a plan is based on a participant's failure to follow the processes required by the regulation. This is insufficient. HUD review should address whether the plan is substantively adequate to further fair housing under a better-articulated standard as described in more detail below. At a minimum, HUD should examine whether the participant is indeed complying with its own priorities and goals identified in the proposed AFH and prior AFHs.
- (c) Complete acceptance of an AFH should be a prerequisite in order for HUD to approve a Consolidated or PHA Plan; partial acceptance should be insufficient to generate federal funding.
- (d) It is imperative that external avenues for enforcement be available. We recommend the inclusion of complaint and appeal processes under which citizens and/or fair housing and civil rights advocates could: (i) urge HUD to reject a AFH; or (ii) ask HUD to initiate further review of a previously accepted AFH before the end of the five-year cycle if evidence suggests the AFH should not have been accepted originally or that the program participant has failed to take action to address the fair housing goals identified in the AFH.
- (e) We also support the inclusion of random audits of program participants to determine compliance with the affirmatively furthering obligations in order to provide additional quality control.

- (f) Additionally, HUD should explicitly set forth sanctions it may impose for failure to AFFH, including the ability to request that DOJ initiate a False Claims Act claim against jurisdictions that make false or fraudulent representations with respect to required certifications.
- (g) The formalized role for community and citizen participation in the proposed regulations is somewhat limited and therefore cannot fill the important function held by advocacy organizations and private individuals in helping to enforce the affirmatively furthering obligations of HUD program participants. HUD should provide to these parties all tools available to ensure that participants are held accountable for living up to the promises set forth in the AFH.
- (h) The final rule should acknowledge that enforcement actions, including litigation, have always been and will continue to be a critical tool for citizens and communities to hold their jurisdiction accountable for failing to fulfill their obligation under the Fair Housing Act to affirmatively further fair housing. While we share HUD's aspiration that the new rule will "hopefully result[] in increased compliance and fewer instances of litigation," 78 Fed. Reg. at 43712, HUD should expressly state that the rule is not intended to foreclose litigation by so-called private attorneys general. We recognize that the proposed rule does acknowledge that HUD's acceptance of an AFH plan "does not mean that HUD has determined that a jurisdiction has complied with its obligation to affirmatively further fair housing under the Fair Housing Act; has complied with other provisions of the Act; or has complied with other civil rights laws, regulations or guidance." Proposed Rule § 5.162(a)(2). But the final rule should go further and expressly state that a jurisdiction will not have met its affirmatively furthering obligations if, following HUD's acceptance of the jurisdiction's AFH, the jurisdiction does not (1) take actions to address the barriers to fair housing identified in that AFH and (2) those actions do not have the effect of increasing the availability of open, integrated housing over time. *See infra* Section 3. The rule should further state that HUD's acceptance of an AFH plan does not constitute a "safe harbor" for a subsequent enforcement action by HUD or any other party; nor should HUD's acceptance trigger a more deferential standard of review for such litigation.
- (i) We also raise a concern about the capacity of HUD's main and regional offices to properly review the AFH it requires from each program participant. This is particularly true given the timetable contemplated by the regulations which requires a large number of submissions at the same time. The regulation proposes that the AFH will be deemed accepted 60 calendar days after submission if notice is not provided prior to that time that it is not accepted. Accordingly, within 60 days of receiving the AFH, HUD must not only review the AFH and decide whether to accept it, but it

must also notify the participant in writing if it not accepted, and include the reasons it was not acceptable and the actions needed to be taken in order to gain acceptance. We are concerned that there is insufficient time in which to conduct a thorough review of each AFH and adequately respond to the participant if the AFH is deficient. The consequences are significant – if HUD is not able to review the AFH during this time period, the default position is acceptance of the AFH even though it may be extremely lacking in content. We recommend that HUD adopt a longer time period for conducting its AFH reviews — at least 90 days.

- (j) We recommend that HUD phase-in the regulation so HUD staff resources can be utilized more effectively. This phase-in plan should result in AFH submission dates that are spread out more evenly over the course of the year, and more evenly over a number of years. At the same time, the plan should ensure that most AFHs will come up for review within two years after the effective date of the AFFH regulation.

3) **Measurable performance standards are critical to ensure that program participants make meaningful progress towards fulfilling their mandate to affirmatively further fair housing.**

The need for enforcement mechanisms is all the more important given the lack of measurable performance standards for program participants. We recognize that each participant will develop an AFH based on local housing conditions, the extent of community assets, and other circumstances particular to that jurisdiction, and that one standard for performance could not possibly apply to all participants. We also recognize that HUD is reluctant to mandate specific outcomes for the planning process. But it is essential for HUD to articulate a more concrete definition for success in affirmatively furthering fair housing beyond requiring goals to be set out and prioritized. Goal-setting without accompanying strategy formulations does not necessarily translate into more integrated living patterns. It is critical that participants be asked to identify the strategies by which their fair housing compliance will be measured.

In a similar vein, we are disappointed by the lack of any benchmarks or timeframes for assessing the performance of a participant in meeting the goals which it identifies in the AFH. This is a step backwards from the current expectations of HUD contained in the Fair Housing Planning Guide. Performance metrics can help clarify goals established during the AFH process, ensure that compliance with the AFH process achieves the intended goals, and provide a means to hold participants accountable by creating a framework for monitoring their success in furthering fair housing.

To help establish clear and robust performance standards, we propose the following modifications. In the preamble to the proposed rule, HUD explains that the definition of “affirmatively furthering fair housing” is intended to clarify that AFFH “requires *proactive steps* to foster more inclusive communities and access to community assets for all those protected by the Housing Act.” 78 Fed. Reg. at 43716 (emphasis

added); *see also* § 5.152 (definition of “affirmatively furthering fair housing”). Also, the various amended certification requirements require that program recipients “will take *meaningful actions* to further the goals identified in the AFH . . . and that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing.” *See, e.g.*, Proposed §§ 91.225, 91.325, 91.425 (emphasis added). Yet there is virtually no mechanism by which to measure program participants’ steps or action, and to determine whether they are indeed “proactive” and “meaningful.” It is critical that both HUD and the public, who are provided a more active role in this process, have benchmarks by which to measure annual progress in meeting fair housing goals.

To this end, it would be helpful for HUD to state that these requirements to take *proactive steps* and *meaningful actions* will be interpreted consistently with established case law elaborating the contours of the affirmatively furthering fair housing mandate in the Fair Housing Act. *See, e.g., Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973) (“Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.”). Notably, in his landmark opinion for the First Circuit in *NAACP v. Secretary of Housing & Urban Development*, then-Judge, now-Justice Breyer explained that, as a measure of compliance with HUD’s own obligation to affirmatively further fair housing, 42 U.S.C. § 3608(e)(5), “one would expect to see, over time, if not in any individual case, HUD activity that tends to increase, or at least, that does not significantly diminish, the supply of open housing.” 817 F.2d at 156; *see also Thompson*, 348 F. Supp. 2d at 460 (relying on *NAACP v. HUD*, 817 F.2d at 155, to hold that ““if HUD had, in fact, fulfilled its duty [to affirmatively further fair housing], HUD’s actions would have tended to increase, or at least not significantly decrease, the supply of open housing”); *Jaimes v. Toledo Metro. Hous. Auth.*, 715 F. Supp. 835, 842 (N.D. Ohio 1989) (“If HUD is properly fulfilling its duties, over time one would expect to find HUD’s activity increasing the supply of open, integrated housing. In this case, however, one finds that segregation in housing continued and the supply of open, integrated housing did not increase.”).

We are, therefore, concerned by HUD’s failure to cite *NAACP v. HUD* in the “legal authority” section of the preamble to the proposed rule, 78 Fed. Reg. at 43712-43713, because the case provides a baseline performance standard for HUD to evaluate jurisdictions and program participants. Consistent with *NAACP v. HUD*, *proactive steps* and *meaningful actions* to affirmatively further fair housing should be defined as actions that over time tend to increase, or at least, do not significantly diminish, the supply of open housing.

This standard is also responsive to HUD’s question: “Are there appropriate indicators of effectiveness that should be used to assess how program participants have acted with regard to the goals that are set out?” 78 Fed. Reg. at 43724. Ultimately, the most meaningful measure of a program participants’ performance in promoting integration is a net increase in the number of desegregative housing opportunities in the regional housing market.

4) **HUD should more expressly weave affirmatively furthering requirements in Consolidated Plan, PHA Annual Plan, and other planning processes.**

As stated above, we are encouraged that the proposed regulations attempt to incorporate fair housing components into existing housing planning programs, such as the Consolidated Plan and PHA Annual Plan. Fair housing principles and policies cannot be viewed as an isolated element of community or region planning, but must be wholly integrated into planning and operations. In our view, however, the proposal does not fully embrace the considerations of affirmatively furthering requirements. For example, the performance report requirement for the Consolidated Plan and the PHA Plan has not been modified to include a reference to affirmatively furthering. *See, e.g.*, Proposed § 91.520. In the final rule, HUD should clarify that annual performance reports should specify actions undertaken to address the goals of the AFH, and an accompanying analysis about how those actions impacted the fair housing issues set out in the AFH. HUD, and external parties, could then review these performance reports to determine whether the strategies are being implemented in pursuant of the goals identified in the AFH.

In response to another specific question, *see* 78 Fed. Reg. at 43724, we believe that other planning efforts and other federal programs should be coordinated with the planning effort contemplated by this rule—and especially the low income housing tax credit (LIHTC) program, which is now the largest source of government assistance for affordable housing. Given the size of the LIHTC program and studies indicating LIHTC-financed projects are often located in areas of concentrated racial and ethnic poverty, the LIHTC program and its Qualified Allocation Plan (QAP) process should be expressly included in the AFH analysis and AFFH certification consideration. Additionally, State and local education planning has a direct impact on residential patterns of segregation and opportunity, and the AFH rule should encourage cross-sector discussions on the state agency level and within county and municipal housing and school departments. There are also Department of Transportation programs that should be coordinated with fair housing planning efforts so that development and other planning related to transit-oriented development, environmental justice concerns, the siting of transit lines and transit stops, bus routes and frequency, and ensuring new roads do not cause or increase segregation.

5) **HUD should clarify the requirements for affirmatively furthering fair housing in disaster recovery efforts.**

We applaud the requirement that participants update their AFHs if significant changes take place in their communities, such as natural disasters, major demographic changes, substantial policy changes or significant civil rights findings. However, the rule is not specific enough about the process and timeframe for that update. We understand that after a major disaster, affected communities may desperately need assistance quickly, and it is the inherent urgency of providing disaster aid that makes it necessary for HUD to provide jurisdictions with guidelines for preparing both Action Plans and revised AFHs as required in § 5.164(a)(1)(i) that meet AFFH requirements. The guidelines should

address both process, *e.g.*, timetables for public comment period and means of public notice of proposed Action Plans, and substance, *e.g.*, impact of a disaster on existing AFH and specific modifications to AFH in light of any impact. HUD should include language stating that the AFFH rule should not be read to prohibit the targeting of resources to address the impact of disasters on segregated communities, but jurisdictions must demonstrate how they will increase opportunity and foster integration, as well.

As noted above, LDF was part of a legal challenge to the post-Katrina Road Home program in which we alleged that by incorporating market home values into the calculation of homeowner recovery awards the program perpetuated long-standing discrimination in the New Orleans housing markets. In addition, in the wake of Hurricane Sandy, LDF, jointly with other fair housing organizations and on our own, submitted comments on HUD's Notice and the Action Plans of New York State and New Jersey to ensure that fair housing objectives were an integral part of each jurisdiction's recovery plan. *See* ReNika Moore, *Don't Let Sandy Become Another Katrina*, *Star-Ledger*, Feb. 17, 2013, available at http://blog.nj.com/njv_guest_blog/2013/02/dont_let_sandy_become_another.html. The importance of applying AFFH requirements to disaster aid cannot be overstated — indeed with \$11 billion in Community Development Block Grant-Disaster Recovery (CDBG-DR) funds, the Road Home program was the *largest* rebuilding program in the nation's history. Thus, we hope to see HUD provide a clearer framework for jurisdictions seeking federal funds to recover after a major disaster.

6) **HUD should clarify that the affirmatively furthering obligations apply to all aspects of public housing authorities' activities including voucher programs.**

We commend HUD for making the AFH process applicable to all PHAs that administer Housing Choice Vouchers and/or public housing in addition to jurisdictions that receive funds subject to Consolidated Plan requirements. We also endorse the recommendations submitted by the Center on Budget & Policy Priorities for improving and clarifying the provisions relevant to PHAs. In particular, it will be important for HUD to clarify in the final rule that the affirmatively furthering obligations and certifications apply to all PHA planning documents, including the Housing Choice Voucher Administrative Plan and Moving to Work Plans for those PHAs that have been selected for the Moving to Work program. These documents specify key PHA policies that affect efforts to expand housing choice within their jurisdiction and throughout the regional housing market in which they are located.

It is especially critical that PHAs and other entities that administer Housing Choice Vouchers be required to demonstrate that they are making efforts to assist those voucher holders who seek to move to communities of higher opportunity and to remove barriers, such as onerous portability requirements, that impede use of vouchers to obtain housing opportunities outside of the jurisdictional boundaries of the PHA. Otherwise, the Housing Choice Voucher program will not live up to its objective of promoting integration and mobility and, instead, reinforce prevailing patterns of racial segregation, as it unfortunately has done all too often in many regions of the country. To this end,

collaboration among administrators of Housing Choice Vouchers in particular regions should be expressly encouraged. And HUD could collect and disseminate materials on “best practices” such as the innovative housing choice voucher programs that have increased access to communities of opportunity in Baltimore, Dallas, Chicago, and elsewhere.

LDF appreciates HUD’s substantial efforts to strengthen compliance by all entities subject to the affirmatively furthering requirement. We hope that the final rule adopts our recommendations so that the goals of this core provision of the Fair Housing Act can finally be realized.

Sincerely,

A handwritten signature in black ink, appearing to read "Leslie Proll". The signature is written in a cursive, flowing style.

Leslie Proll, Director, Washington Office
ReNika Moore, Director, Economic Justice Practice
Joshua Civin, Counsel to the Director of Litigation
Veronica Joice, Fried Frank Fellow