

September 17, 2013

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

Via regulations.gov [<http://www.regulations.gov/#!submitComment;D=HUD-2013-0066-0001>]

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

The undersigned organizations write to support HUD's proposed rule regarding the duty to Affirmatively Further Fair Housing (AFFH) and to provide comments on how the rule should be strengthened to ensure that states make meaningful steps toward furthering fair housing. The proposed rule is an important step in combating segregation and providing opportunities for all residents, regardless of race, color, national origin, religion, sex, familial status or disability. We applaud the proposed rule's emphasis on promoting regional collaboration, providing uniform national data, and clearly defining the components of an Assessment of Fair Housing (AFH). We also support the premise that to combat segregation, communities must both invest in areas of high racial and ethnic concentration *and* provide opportunities for members of historical racial minorities and ethnic groups to move to diverse, resource-rich neighborhoods. We also believe that the proposed rule must be strengthened in order to ensure program participants develop appropriate actions to combat segregation and increase opportunity for all communities.

Our organizations advocate for the housing rights of low-income families, individuals with disabilities, communities of color, and immigrants in the state of California.<sup>1</sup> Many were actively involved in the process by which the state of California developed its first Analysis of Impediments to fair housing (AI).<sup>2</sup> We draw upon that experience to inform our comments here – comments which focus on states' duties under the proposed rule.<sup>3</sup>

The rule should be strengthened to: 1) explicitly state that the scope of the state AFH includes the entire state – both entitlement and non-entitlement jurisdictions; 2) require coordination among key stakeholders; 3) mandate analysis of relevant local data;

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<sup>1</sup> See attached description of undersigned organizations.

<sup>2</sup> See attached Letter from California housing advocates to Department of Housing and Community Development, August 13, 2012.

<sup>3</sup> As this comment focuses primarily on states' obligations to affirmatively further fair housing, a number of the signatories have additionally submitted individual comments and/or signed onto the comments of national organizations.

4) enumerate specific factors that should be included in a state AFH; and 5) include stronger requirements for actions to affirmatively further fair housing.

### **1. The Rule Should Clarify the Scope of the State AFH.**

The proposed rule contains provisions that are specific to states, but does little to describe the scope of a state's AFH. The rule should clarify that a state's AFH is not just for the state agency that administers its federal housing funds. Instead, it is an AFH that analyzes the state's subrecipient jurisdictions (which are, in California, small rural cities and counties) as well as the state as a whole, non-entitlement and entitlement jurisdictions combined, regardless of whether they receive program funding. HUD's Fair Housing Planning Guide recognized this "dual responsibility when it comes to fair housing—a responsibility that pertains to the State as well as to State-funded jurisdictions that receive Community Development Block Grant (CDBG) program funding."<sup>4</sup> This dual responsibility is consistent with the proposed rule's focus on fostering analysis and collaboration that cross geographic and political boundaries. The regulation's background materials note that, "[m]any fair housing issues transcend local jurisdictional boundaries. Solutions to such issues often involve coordinated actions by multiple jurisdictions, and require creative collaboration across traditionally disconnected policy domains."<sup>5</sup>

### **2. HUD should implement more explicit requirements for consultation with all stakeholders – advocates, other state agencies, and sub-recipient jurisdictions to develop an AFH.**

Developing a statewide AFH will present unique challenges for obtaining input from stakeholders. Holding a public hearing in every affected area might not be possible; therefore, the importance of collaboration with stakeholders, at the outset of the AFH process, is vital. California's regular meetings with advocates throughout the development of its AI proved to be a positive collaboration that ensured that a number of barriers to fair housing were analyzed when they otherwise might not have been. Local jurisdictions are urged in the regulations to have some type of Fair Housing Advisory Council, and states should be required to do so. We have identified *at least* three crucial groups that must be involved throughout a state's AFH planning process: other state agencies directly overseeing fair housing or housing and community development activities; non-profit housing providers, affordable housing and fair housing advocates and affected residents; local non-entitlement jurisdictions.

#### *A State Must Coordinate Among all Relevant Agencies*

The rule should explicitly require that a state's AFH must be developed in collaboration with other state agencies directly responsible for administering funds or activities related to housing (whether federal or state). At the time California developed its AI, there were at least four statewide entities apart from the administering agency (the Department of Housing and Community Development), with significant control over housing activities – the Department of Fair Employment and Housing, the Tax Credit Allocation Committee, the California Housing Finance Agency, and the California Debt Limit Allocation Committee. There also are federal and state agencies that govern or fund schools and educational services, transportation, environmental programs, infrastructure,

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<sup>2</sup> <sup>4</sup> HUD, *Fair Housing Planning Guide*, 3-3 (March 1996).

<sup>5</sup> HUD, Proposed Rule: Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43716 (July 19, 2013).

and other programs related to housing and community development. These agencies are integral for fair housing enforcement and housing and neighborhood financing. Some agencies will be responsible for other plans that implicate fair housing, such as the state Olmstead Plan or the tax credit Qualified Allocation Plan. In addition, state Health and Welfare and Mental Health departments are often involved in linking, funding, or otherwise providing the services and supports that facilitated supported housing and are key to Olmstead implementation, and need to be consulted for better linkage and community integration of people with disabilities. These agencies also are repositories of important state-specific data and analysis of need in areas of poverty and traditional minority concentration. Yet, these agencies were not actively involved in the development of California's AI. The regular participation of these types of entities is necessary to analyze barriers and coordinate and execute action steps.

### *Subrecipients Must be Involved in Planning and Acting to Affirmatively Further Fair Housing*

The proposed regulations regarding the participation of and monitoring of subrecipient local jurisdictions need greater depth. Currently, the proposed regulation requires a State to “(3) [a]ssur[e] that units of local government funded by the State comply with their certifications to affirmatively further fair housing . . .”<sup>6</sup> Little guidance is given on how to achieve this – beyond requiring that local jurisdictions keep on file documents required for an audit. When California developed its AI, it distributed a survey to subrecipients – many of which filled it out. The survey did not require any documentation or reporting of policies. The state looked only at one anonymous “model county” for the purposes of analyzing a subrecipient's policies and actions with regard to affirmatively furthering fair housing. Given the enormous diversity and number of subrecipients in California, such an analysis only provided information of limited use. Subrecipients should be tasked with creating their own plans to affirmatively further fair housing. States should be required to request AFFH forms from these subrecipients that provide fundamental information about their AFFH activities – which could, at minimum, include information such as that found in the Fair Housing Activities Statement developed in Texas.<sup>7</sup> The state should use such forms, as well as complaints from residents and advocates, to trigger focused reviews/audits of subrecipients that appear to be in noncompliance with the duty to AFFH. Regional and local level data collection and analysis, forming the basis for specific actions, similarly are critical to competent analysis.

Subrecipient accountability is equally important at other levels, such as the Urban County consortium. While it is the responsibility of the direct recipient of federal funds to monitor its subrecipients' compliance with AFFH and Title VI obligations, the final rule should also provide – as U.S. DOT guidance does – that subrecipients are directly accountable to HUD for their failures to comply with their obligations. When a local government fails to take actions necessary to address factors that contribute to, e.g., the exclusion of protected class members from residing in its jurisdiction, HUD has made insufficient use of its power and obligation to ensure compliance. While the direct recipient should, of course, be responsible in the first instance for making all efforts within its power to do so, it is often the case that those powers are not sufficient to the

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<sup>6</sup> 78 Fed. Reg. 43741.

<sup>7</sup> The Fair Housing Activities Statement of Texas Form is available at <http://www.glo.texas.gov/GLO/disaster-recovery/fair-housing-issues/fhast.html>.

task, as has been demonstrated in Westchester and Marin Counties.<sup>8</sup> These and other mechanisms to ensure subrecipient compliance are essential to effectuate the purpose of the Fair Housing Act's AFFH requirement.

### *States Should Hold More than One Public Hearing*

Finally, the regulations as written only require one public hearing before adoption of the AFH. This requirement is inadequate to truly provide an opportunity for public input in some states. California has over 38 million people spread over 155,779.22 square miles. HUD should require that States hold at least one public hearing in each region of the state. Such participation is necessary to help jurisdictions understand how barriers to fair housing play out on the ground and in communities.

The public hearings *must ensure* language access, including interpretation, translation of key documents, preceded by effective education and outreach in English and in every other language spoken by a significant number of persons in each region. Literacy also must be addressed in order to ensure that education, outreach and public hearings provide meaningful access to the information presented and advise interested persons about how the AFH and related documents affect their rights. Public hearings and notices, as well as all materials, need to be available in alternative formats for people with disabilities, there need to be clear procedures for obtaining reasonable accommodations, and any web-based information must be accessible to people who use screen readers, with appropriate captioning, and other accommodations as needed.

### **3. The Rule Should Require Program Participants, Including States, to Consider Additional Data Sources Relevant to Their Local, Regional, or State Populations.**

The proposed rule requires program participants to utilize “nationally uniform local and regional data” provided by HUD in constructing their AFHs.<sup>9</sup> The rule further states that “[p]rogram participants shall use this information, in addition to any available local or regional information and information gained through community participation and consultation. . . .”<sup>10</sup> The provision of data by HUD will likely be helpful to participants in crafting their AFHs, and we support the explicit requirement that participants consider racially and ethnically concentrated areas of poverty, access to education and other indicia of opportunity, geographic exposure to health risks, and the distribution of Section 8 Housing Choice Vouchers. We also have specific recommendations for improving data access and availability.

### *Types of Data*

Local data will significantly inform AFHs and the rule should more explicitly require program participants to seek out and analyze relevant data which may not be readily available from the U.S. Census or other traditional sources. It is well understood that Census data suffer from a differential undercount of traditional minorities, language minorities, lower income households, renters, children and special populations including

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<sup>8</sup> See *United States ex rel. Anti-Discrimination Center v. Westchester County*, 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009)(finding county falsely certified to affirmatively furthering fair housing); Aaron Glantz, HUD Scolds Marin on Fair Housing Record, Bay Citizen (Jan. 6, 2011), at <https://www.baycitizen.org/news/housing/hud-scolds-marin-fair-housing-record/>.

<sup>9</sup> 78 Fed. Reg. 43730 (amending 24 C.F.R. § 5.514 (c)).

<sup>10</sup> 78 Fed. Reg. 43730 (amending 24 C.F.R. § 5.514 (c)).

farmworkers and recent immigrants. These data must be supplemented by other national, state and local level studies and data. California has an extremely large farmworker population that consists of both migrant and permanent agricultural workers. Data on farmworkers is difficult to collect, and farmworker populations tend to be underrepresented in Census counts. California found in its Analysis of Impediments to Fair Housing Choice that farmworker households:

- tend to have high rates of poverty;
- live disproportionately in housing which is in the poorest condition;
- have very high rates of overcrowding;
- have low homeownership rates; and
- are predominately members of minority groups.<sup>11</sup>

An estimated 75% of California farmworkers are foreign-born and are largely from Mexico, and many are from indigenous Mexican and Central American groups.<sup>12</sup> There is significant overlap between the farmworker population and the protected categories of race and national origin. Advocates pressed California to review other sources of data for farmworkers such as the National Agricultural Workers Survey (NAWS), the California Agricultural Workers Survey (CAWS), the Census of Agriculture, the Farm Labor Study, data from the Employment Development Department, from migrant health centers, migrant child education, university studies and reports and from other sources. These and local data provide the essential information to determine the extent of need, housing conditions, neighborhood conditions, patterns of segregation in farmworker populations. This is equally true for other populations. Therefore, for states like California, and for local jurisdictions with significant agricultural land, accurate data regarding farmworkers and thorough analysis of impediments to housing choice for that group will be indispensable to the AFH.

A similar analysis applies to individuals with disabilities. California already, through its Housing Element process, requires local governments to analyze the needs of people with disabilities and to address such constraints. Data sources available to the state for this process should be included. This is an area where more detailed and specific information is highly needed for effectively furthering fair housing for people with a range of disabilities.

The rule should specifically require states and sub-recipient program participants to seek out relevant data on populations with special needs—including farmworkers, people with disabilities, immigrants, and survivors of domestic violence—within their jurisdictions and to analyze fair housing issues that are particularly acute for those populations. Such data may not be readily available from obvious sources, and collaboration with community groups and other stakeholders can be extremely valuable in identifying and analyzing data sources. In our own advocacy effort regarding California's AI, California Rural Legal Assistance, Inc., which serves rural areas throughout the state, assisted the state in locating data and understanding the fair housing concerns of farmworker populations. Gathering such data is necessary for creating a full picture of the fair housing issues in a state.

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<sup>11</sup> California Department of Housing and Community Development, *Analysis of Impediments to Fair Housing*, p. 2-54 to 2-55 at [http://www.hcd.ca.gov/hpd/hrc/rep/fed/ai\\_web.html](http://www.hcd.ca.gov/hpd/hrc/rep/fed/ai_web.html).

5 <sup>12</sup> American Farmland Trust, *California Agricultural Vision: From Strategies to Results*, Spring 2012 Progress Report at 11, available at <http://www.cdfa.ca.gov/agvision/>.

## *Scope of Data*

Finally, this data must be provided for small enough areas that it can be used to accurately assess demographic trends. In a state as large as California, census or other data provided for large swaths of land lends little probative value for understanding whether barriers to fair housing exist. In some cases, segregation occurs at the neighborhood level, with severe impacts on opportunity.<sup>13</sup> Therefore, the state AFH should require that states assess both macro-level data, as well as the most micro-level data available. Collecting and analyzing adequate and relevant data provides an important foundation for creating an effective AFH.

### **4. The Rule Should Enumerate Additional Factors that Should be Assessed in an AFH**

#### *The Effects of the Displacement of Historically Minority Communities by New Development*

Program participants must assess barriers to fair housing caused by non-HUD sources of funding. While the proposed rule requires PHAs to analyze the impacts of the demolition and disposition of public housing, it does not impose a parallel requirement on non-PHA program participants. New development in states and local communities has an immense fair housing impact. Such impact includes the loss of affordable unsubsidized housing and the economic displacement of low-income and historically minority communities.<sup>14</sup> Our experience demonstrates that the displacement of low-income and minority households, as well as families, by new development or changing uses is widespread throughout California, in particular in California's more expensive cities and regions. The causes of such displacement range from the closure of mobile home parks to skyrocketing rents in the areas surrounding major tech industry campuses to the redevelopment of "blighted" areas in urban centers, as well as the foreclosure crisis. Additionally, the trend toward transportation-oriented development may lead to significant displacement of communities of color precisely when local, state, and federal governments are investing in those communities. Therefore, the rule should require program participants to assess how economic displacement, whether through private or public money, impacts fair housing and create action plans designed to insure historically minority communities can remain in place as neighborhoods change economically.

#### *Housing and Building Codes and Uniform Federal Accessibility Standards (UFAS)*

We know that lack of physically accessible housing is a major barrier to implementation of Olmstead and community integration goals. California, like most other

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<sup>13</sup> This was recognized in the *CCCI v. City of Modesto*, 583 F.3d 690 (9th Cir. 2009) litigation, a precedent setting fair housing case in which experts analyzed the differences among un-annexed predominantly minority populations in unincorporated neighborhoods just outside, but otherwise indistinguishable from the city, that did not receive basic municipal services such as sewer, as compared to the predominantly white city neighborhoods.

<sup>14</sup> See e.g. KQED, Palo Alto's Last Mobile Home Park Faces Shutdown: Where Will Residents Go?, at [blogs.kqed.org/newsfix/2013/07/29/palo-alto-mobile-homes](http://blogs.kqed.org/newsfix/2013/07/29/palo-alto-mobile-homes) (July 30, 2013)(discussing possible displacement of low-income Latino families from high opportunity Palo Alto); Urban Strategies Council, *Who Owns Your Neighborhood: The Role of Investors in Post-Foreclosure Oakland* at [http://www.infoalamedacounty.org/images/stories/Reports/WhoOwnsYourNeighborhood\\_Report.pdf](http://www.infoalamedacounty.org/images/stories/Reports/WhoOwnsYourNeighborhood_Report.pdf) (June 2012).

states, establishes statewide building and housing accessibility standards that should incorporate appropriate accessibility provisions for people with disabilities. Furthermore, where there is federal funding, UFAS standards should apply. States should be required to address, in collaboration with local governments, a) the extent of available accessible housing (data from HUD would be helpful here); b) how well state and local codes comply with and implement accessibility standards; c) whether and how the state and local governments apply required UFAS or Americans with Disabilities Act standards in publicly subsidized housing, and d) how the states monitor, or require local governments to monitor, implementation and policies to ensure linkages between people who need accessible units and available accessible units as required by HUD regulations. This area is often overlooked or inadequately addressed in both the state and local AFFH plans.

### *Analysis of Practices Must Include Law and Policy Implementation*

The introductory materials to the proposed rule note that it will require program participants to “assess whether laws, policies, or practices limit fair housing choice.”<sup>15</sup> However, the rule should more explicitly require the AFH’s analysis to move beyond the jurisdiction’s laws and policies as written to analyze how the implementation of those laws and policies impacts fair housing choice. For example, in California advocates identified the implementation of state Housing Element law, the operation of the unlawful detainer (eviction) system in the courts, and the practice of non-judicial foreclosure as significant impediments to fair housing choice.<sup>16</sup> These impediments do not arise from the laws as written but, instead, in their practical application. Therefore “practices” should be defined to include the on-ground implementation of laws and policies. Program participants should be required to reflect on how the implementation of their policies impacts fair housing choice and should provide guidance for soliciting this information from advocates and stakeholders who will have direct knowledge of how policies play out on the ground.

### **5. The Rule Should Clearly Require Concrete Actions to Remove Impediments to Fair Housing Choice.**

As documented in the attached letter, advocates’ most significant criticisms of California’s AI pertained to the inadequacy—or outright absence—of identified actions to remove barriers to fair housing choice for members of protected categories. Throughout the process of preparing and reviewing the California AI, advocates and the Department of Housing and Community Development staff disagreed about the extent to which the state was required to set forth actions to address the impediments that it had identified. We can expect such disagreements to continue without clear guidance. Specific actions, with identified time frames and responsible officials are critical if states, PHAs, regions, local governments and other program recipients are to remove impediments to fair housing or to overcome fair housing determinants.

This new rule creates a unique opportunity for HUD to clarify for program participants, for advocates, and for the public that program participants’ duty to affirmatively further fair housing is just that—a duty to propose and to undertake specific activities to combat segregation and increase fair housing choice. Program participants should not simply be able to certify that their chosen activities are consistent with their fair housing goals. Program participants will only be successful in “overcoming historic

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7 <sup>15</sup> 78 Fed. Reg. 43715.

<sup>16</sup> Letter, pp. 7-8, 16-17.



## 6. Conclusion

The proposed rule on Affirmatively Furthering Fair Housing represents an important and necessary step to meeting the promise of the Fair Housing Act. We wholeheartedly support the goals of the rule and many of its provisions. HUD should use this unique opportunity to strengthen the rule and ensure that program participants collaborate with all necessary community members and stakeholders to develop real plans, based on relevant data, that lead to concrete, meaningful action. Thank you for your consideration of these comments.

Sincerely,



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Executive Director Housing and  
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Richard Marcantonio  
Managing Attorney  
Public Advocates

Michael Rawson  
Director  
Public Interest Law Project

## **Attachment 1:**

### **Description of Signatories**

**Western Center on Law and Poverty** leads the fight in the courts, counties and capital to secure housing, health care and a strong safety net for low-income Californians. Founded in 1967, it is California's oldest and largest legal services support center. Our attorneys, advocates, legal services co-counsel and pro bono partners attain real-world, system-wide solutions on behalf of 8.2 million low-income Californians through class action and other impact litigation, legislative and policy advocacy, negotiations and collaborations with state and local governments and support for frontline legal aid programs.

**Fair Housing Law Project (FHLP)** is a project of the Law Foundation of Silicon Valley, a non-profit legal services agency based in San José, California. The Law Foundation's mission is to advance the rights of under-represented individuals and families in our diverse community through legal services, strategic advocacy, and educational outreach. FHLP was founded in 1998 as a program of the Law Foundation in response to the need for increased enforcement of fair housing laws in Santa Clara County. In the course of its representation of individual clients, FHLP has seen first-hand the devastating consequences of discrimination, segregation, the lack of affordable housing, and other actions and inactions that have restricted our clients' housing choices. Faced with these systemic problems, FHLP has made extensive comments regarding local jurisdictions' Analyses of Impediments to Fair Housing Choice, including the cities of San José and Mountain View and the County of Santa Clara; FHLP was also one of the lead agencies in comments regarding the State of California's AI.

The **California Reinvestment Coalition (CRC)** advocates for the right of low-income communities and communities of color to have fair and equal access to banking and other financial services. CRC has a membership of over 300 nonprofit organizations and public agencies across the state of California.

**California Rural Legal Assistance, Inc. (CRLA)** serves low-income individuals residing in over 22 California counties. CRLA serves a wide array of clients, maintaining specialized programs that focus on services for farmworker populations. CRLA clients also include individuals with disabilities, immigrant populations, school children, lesbian/gay/bisexual and transgender populations, seniors and individuals with limited English proficiency. CRLA legal services are shaped by the needs of our diverse client community. Through a state-wide network of 22 offices, its staff conducts litigation, outreach and legal education on the most pressing issues facing low-income communities: housing, employment, education, workplace safety, discrimination, income maintenance and healthcare access. CRLA provides legal services in conjunction with a series of innovative programs and special initiatives to address recurring, wide-spread problems that face its clients. CRLA's current initiatives include: protecting the health and safety of farmworkers, guaranteeing that workers receive proper wages, protecting individuals from predatory lending, fighting for communities that lack basic infrastructure, advocating for Indigenous Mexican farmworkers, providing education and training to prevent sexual harassment in the workplace, enforcing fair housing practices, supporting victims of domestic violence, protecting the health and safety of rural LGBT communities, and guaranteeing the rights of children from low-income families to a quality education.

**Disability Rights California** is a state-wide non-profit agency established under federal law to protect, advocate for and advance the human, legal and service rights of Californians with disabilities, and the largest provider of legal services in California. Disability Rights California works in partnership with people with disabilities, striving towards a society that values all people and supports their rights to dignity, freedom, choice and quality of life. Since 1978, Disability Rights California has provided essential legal services to people with disabilities. Disability Rights California provided legal assistance on more than 24,000 matters annually to individuals with disabilities, many of whom were requesting assistance because they were experiencing accessibility barriers in housing, and particularly subsidized housing, despite longstanding federal and state accessibility requirements. We have actively been involved with the state's Olmstead Plan and work extensively on community integration and Olmstead issues where access to integrated housing is a major issue. We have successfully litigated a number cases involving rights to integrated housing for people with disabilities, and see housing barriers and policies as critical in facilitating fair housing for people with a wide range of disabilities.

Disability Rights California is California's designated Protection & Advocacy Agency and provides services pursuant to the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15001, PL 106-402; the Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. § 10801, PL 106-310; the Rehabilitation Act, 29 U.S.C. § 794e, PL 106-402; the Assistive Technology Act, 29 U.S.C. § 3011,3012, PL 105-394; the Ticket to Work and Work Incentives Improvement Act, 42 U.S.C. § 1320b-20, PL 106-170; the Children's Health Act of 2000, 42 U.S.C. § 300d-53, PL 106-310; and the Help America Vote Act of 2002, 42 U.S.C. § 15461-62, PL 107-252; as well as under California Welfare and Institutions Code §§ 4900 et seq.

**Housing and Economic Rights Advocates (HERA)** is the only California statewide, nonprofit legal service and advocacy organization with the mission of ensuring that all people are protected from discrimination and economic abuses. Its primary areas of focus at this time are predatory lending, wrongful debt collection and credit reporting abuses. HERA serves over 2000 low and moderate income California residents annually, particularly people of color, immigrants, seniors, people with disabilities and women.

The **Legal Aid Foundation of Los Angeles (LAFLA)** has been the frontline law firm for low-income people throughout Los Angeles County for 80 years, serving almost 50,000 people through five neighborhood offices, three domestic violence clinics and four Self Help Legal Access Centers. LAFLA seeks to achieve equal justice through direct representation, systems change and community education. A great deal of LAFLA's work is devoted to housing and eviction defense. LAFLA's attorneys advocate for the creation and preservation of safe and affordable housing, and fair housing choice for poor families and individuals, most of whom are minorities, elderly, families with children, immigrants, and disabled.

The **National Housing Law Project** is a legal advocacy center focused on increasing, preserving, and improving affordable housing; expanding and enforcing rights of low-income tenants and homeowners; and increasing housing opportunities for racial and ethnic minorities. Our organization provides technical assistance and policy support on a range of housing issues to legal services and other advocates nationwide. Established in

1968, NHLP has been dedicated to advancing housing justice for low-income individuals and families for 45 years.

**PolicyLink** is a national research and action institute advancing economic and social equity by Lifting Up What Works®.

Founded in 1999, PolicyLink connects the work of people on the ground to the creation of sustainable communities of opportunity that allow everyone to participate and prosper. Such communities offer access to quality jobs, affordable housing, good schools, transportation, and the benefits of healthy food and physical activity.

Guided by the belief that those closest to the nation's challenges are central to finding solutions, PolicyLink relies on the wisdom, voice, and experience of local residents and organizations. Lifting Up What Works is our way of focusing attention on how people are working successfully to use local, state, and federal policy to create conditions that benefit everyone, especially people in low-income communities and communities of color. We share our findings and analysis through our publications, website and online tools, convenings, national summits, and in briefings with national and local policymakers.

Its work is grounded in the conviction that equity—just, fair, and green inclusion—must drive all policy decisions.

**Public Advocates Inc.** is a nonprofit law firm and advocacy organization that challenges the systemic causes of poverty and racial discrimination by strengthening community voices in public policy and achieving tangible legal victories advancing education, housing and transit equity, including efforts (a) to support compliance with HUD's voluntary compliance agreement in Marin County, (b) to work with others to guide the state of California to adopt an Analysis of Impediments, and (c) in the context of metropolitan efforts to integrate equity and sustainability into regional planning and implementation under HUD's Sustainable Communities Initiative grant program.

**Public Interest Law Project** is a California non-profit law firm established in 1996 to provide statewide support, including impact litigation, policy advocacy, consultation and training for local legal services and other public interest law programs in the areas of housing, public benefits health, civil rights, redevelopment and community reinvestment. It sponsors the California Affordable Housing Law Project (CAHLP) which provides co-counseling and advocacy in housing matters throughout the state, focusing primarily on housing element, community redevelopment, fair housing, and anti-displacement laws.

**ATTACHMENT 2: Letter From Advocates to California Department of Housing  
and Community Development Re: State Analysis of Impediments 2012**

**LAW FOUNDATION OF SILICON VALLEY**

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August 13, 2012

**SENT VIA E-MAIL ONLY: [jseeger@hcd.ca.gov](mailto:jseeger@hcd.ca.gov), [cahouse@hcd.ca.gov](mailto:cahouse@hcd.ca.gov).**

Division of Housing Policy Development  
California Department of Housing and Community Development  
1800 3rd Street  
P.O. Box 952053  
SacramentoCA94252-2053  
Attention: Jennifer Seeger

**Re: Public Comments on Draft Analysis of Impediments to Fair Housing Choice**

Dear Ms. Seeger:

The Law Foundation of Silicon Valley, Western Center on Law and Poverty, California Rural Legal Assistance, Legal Aid Foundation of Los Angeles, Public Counsel, Public Advocates Inc., the Public Interest Law Project, Housing Equality Law Project, and Bet Tzedek submit these comments regarding California's draft Analysis of Impediments to Fair Housing Choice (AI).<sup>1</sup> We are legal services and fair housing advocacy organizations who represent the fair housing rights of people throughout California. For the past two years, our groups have worked with HCD to provide feedback during the AI drafting process. We truly appreciate HCD's and Professor Ong's receptiveness to our participation and the work they have done to identify and address the impediments to fair housing choice in our State.

The AI identifies many of the State's most significant impediments to fair housing choice, both at the state-level and in the jurisdictions that are State sub-grantees. These include the elimination of redevelopment agencies, court rulings related to inclusionary zoning, the lack of affordable housing, and the over-representation of Section 8 vouchers in areas of high minority concentration. Recognizing these key impediments is an important first step to addressing them.

However, the AI falls short in two respects: 1) it fails to identify specific and appropriate actions for addressing the identified impediments to fair housing choice; and 2) it fails to sufficiently identify and analyze a number of other significant impediments to fair housing choice.

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<sup>1</sup> All references to the AI refer to the draft version available on HCD's web page soliciting public comments, available at [http://www.hcd.ca.gov/hpd/hrc/rep/fed/ai\\_web.html](http://www.hcd.ca.gov/hpd/hrc/rep/fed/ai_web.html).

**I. The AI Fails to Propose Concrete Actions Sufficient to Address Impediments to Fair Housing Choice.**

The State’s fair housing planning obligations include not only a duty to identify impediments to fair housing choice, but also a duty to plan for and take appropriate and specific actions to address those impediments.<sup>2</sup> While the AI sets forth some actions in its Executive Summary, many of those actions are not adequate to address the identified impediments. The actions should have measurable results and contain specific milestones and timetables.<sup>3</sup>

Further, the actions identified in the Executive Summary are limited to actions that HCD can take (or, in many cases, is already taking). HUD’s Fair Housing Planning Guide (FHPG) makes clear, that *States*—not just the State agencies responsible for administering CDBG and other federal housing funds—must take action to respond to impediments to fair housing choice.<sup>4</sup> In addition, the State should “require all State-funded jurisdictions to take actions that promote fair housing choice at the local level and that have measurable results.”<sup>5</sup>

The following are areas where the AI’s proposed actions fall short in content, scope, or both, and examples of the types of actions we believe that California’s 2012 AI must include. While the AI should include actions beyond the scope of HCD’s programs, our recommendations give special attention to those actions that would be within HCD’s power.

**A. Actions to Ensure That Sub-Recipient Jurisdictions Affirmatively Further Fair Housing.**

**1. CDBG Regulations and Award Requirements**

HCD’s regulations governing allocation of CDBG funds to local non-entitlement jurisdictions,<sup>6</sup> even with the proposed July 19, 2012, modifications,<sup>7</sup> do not account for or address impediments to fair housing choice. Correcting this omission is critical to ensuring State and sub-recipient compliance with the obligation that all recipients of federal funding affirmatively further fair housing. Accordingly, the AI should recommend that HCD amend its CDBG regulations and revise its criteria for awarding CDBG funds to overcome impediments to fair housing choice and further fair housing. The action should further provide that, even before HCD amends its regulations, it should immediately begin conditioning awards on compliance with federal fair housing and civil rights requirements.

**a. State CDBG regulations (25 CCR § 7054 *et seq.*)**

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<sup>2</sup>24 C.F.R. § 91.225 (a) (1); U.S. Department of Housing and Urban Development Office of Fair Housing and Equal Opportunity, FAIR HOUSING PLANNING GUIDE (FHPG), 2-6, 3-4, *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=fhpg.pdf>.

<sup>3</sup>FHPG, *supra* note 2 at 3-4.

<sup>4</sup>*Id.* at 3-6.

<sup>5</sup>*Id.* at 3-3.

<sup>6</sup>CAL. CODE REGS., tit. 25, § 7054

<sup>7</sup>[http://www.hcd.ca.gov/fa/cdbg/2012\\_Proposed\\_Title\\_25\\_Regulation\\_Text\\_Changes\\_as\\_Further\\_Modified.pdf](http://www.hcd.ca.gov/fa/cdbg/2012_Proposed_Title_25_Regulation_Text_Changes_as_Further_Modified.pdf)

The regulations provide for prioritization of applications for CDBG funds submitted pursuant to the NOFA based on a 1000 point system.<sup>8</sup> The points generally are awarded as follows: 400 for need and benefit, 300 for local jurisdiction capacity, 200 for local jurisdiction readiness, and only 100 for achieving State objectives.<sup>9</sup> This point system presents significant problems and impediments to fair housing choice.

While ensuring that CDBG funds are directed to jurisdictions with substantial needs and the capacity to utilize the funds is necessary, *no priority* is given to jurisdictions proposing projects that will affirmatively further fair housing and remove impediments to fair housing choice. The “needs (and benefits)” category could encompass fair housing concerns, but the regulations limit needs and benefits factors to economic indicators such as housing costs, overcrowding and number of households in poverty.<sup>10</sup>

The “state objectives” category in the point allocation could also address fair housing concerns, but it is only allocated 100 points and does not expressly include fair housing.<sup>11</sup> Fair housing should be added to either the “needs and benefits assessment” category or the “state objectives” category. If it is added to the “state objectives” category, the proportionate weight given to that category should be substantially increased.

A factor for fair housing objectives in either category could be framed similar to that of the “population imbalance” factor in the current “state objectives” category.<sup>12</sup> The fair housing factor would consider the disparity in housing needs by race, national origin, persons with disability, families with children, etc.; the possible effects on segregation; and other discriminatory effects on populations protected by fair housing laws.

#### **b. Condition Awards on Compliance with Fair Housing & Civil Rights Laws.**

The current and proposed amended regulations contain authority for HCD to condition award of CDBG funds in ways that will achieve the purposes of federal law.<sup>13</sup> Pursuant to this authority, the AI should include a recommended action to condition the award funds based on compliance with state and federal fair housing and civil rights laws. Many local jurisdictions are not in compliance with federal fair housing and civil rights requirements.

One example, addressed at Section I. D., *infra*, are the obligations of recipients of HUD funds to provide effective access to persons with Limited English Proficiency (LEP) to housing services and benefits. Another example is the requirement for local governments to provide

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<sup>8</sup>CAL. CODE REGS., tit. 25, § 7078.

<sup>9</sup>*See, generally*, CAL. CODE REGS., tit. 25, § 7078(d).

<sup>10</sup>*See, e.g.*, CAL. CODE REGS., tit. 25, § 7078(d)(2) [multifamily housing acquisition] and (d)(3) [public facilities].

<sup>11</sup>*See, e.g.*, CAL. CODE REGS., tit. 25, § 7078(d)(2)(A)(2).

<sup>12</sup>*See, e.g.*, CAL. CODE REGS., tit. 25, § 7078(d)(2)(A)(2)(iv).

<sup>13</sup>*See* CAL. CODE REGS., tit. 25, § 7076(g). Subdivision (g) provides: “The department may condition its award of funds in order to achieve the purposes of this subchapter and to ensure compliance with applicable State and federal law.”

reasonable accommodations for persons with disabilities in their land use, zoning laws and procedures.<sup>14</sup>

## **2. Minorities and Other Groups Underserved by CDBG Funds.**

Commendably, the AI includes a proposal to contact jurisdictions not applying for funds to determine the bases for their decisions. However, it must also include an analysis of the effect of the decision not to apply for CDBG funds on minorities and other protected classes. Qualified jurisdictions electing not to comply could be disproportionately comprised of lower income minority households in substantial need of affordable housing.

### **B. Actions to Address Court Decisions Limiting Local Jurisdictions' Ability to Promote Affordable Housing Development.**

Over 170 jurisdictions in California have adopted inclusionary zoning policies in order to encourage the development of affordable housing and to ensure that affordable units are integrated with market rate housing.<sup>15</sup> Recent lawsuits and resulting court decisions have impacted cities' ability to use this important tool to promote fair housing choice. Most significantly, *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles*, 175 Cal.App.4th 1396 (2009) ("*Palmer*") invalidated inclusionary requirements for rental housing, finding that such requirements violated the Costa-Hawkins Act. Individual developers and/or the California Building Industry Association have also sued the cities of Patterson, Palo Alto, Sunnyvale, and San José regarding those cities' inclusionary zoning ordinances; and other cities have amended their inclusionary housing ordinances out of fear of litigation. The AI properly identifies court decisions limiting cities' ability to enact and enforce inclusionary zoning policies as an impediment to fair housing choice.<sup>16</sup>

However, the AI fails to explore any possible actions to address *Palmer* and its effects on local inclusionary housing policies. The most obvious action that the State could take to address this impediment is legislative action: the legislature could amend the Costa-Hawkins Act specifically to permit inclusionary zoning policies for rental housing. While such an action would be outside the scope of HCD's power, the AI should mention legislative action as a potential solution by the State to this very serious impediment.

### **C. Actions to Address Discrimination Against Section 8 Voucher-Holders**

The AI identifies discrimination against Section 8 voucher-holders as contributing to the inability of minority households to access housing outside of areas of minority concentration.<sup>17</sup>

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<sup>14</sup>See CAL. GOV'T. CODE § 65583(a)(5).

<sup>15</sup> Non-Profit Housing Association of Northern California, et al., *Affordable by Choice: Trends in California Affordable Housing Programs* at 5 (2007), available at [http://www.nonprofithousing.org/pdf\\_attachments/IHIREport.pdf](http://www.nonprofithousing.org/pdf_attachments/IHIREport.pdf).

<sup>16</sup> AI at 4-3 to 4-4.

<sup>17</sup> AI at 5-7.

Sixty-seven percent of Section 8 voucher-holders live in areas where minorities were over-represented as compared to 57% of all minority households.<sup>18</sup>

The recommended action to address this impediment is to coordinate with PHAs and CDBG eligible jurisdictions on best practices to increase utilization rates outside areas of minority concentration.<sup>19</sup> This recommendation should be stronger. We suggest including the following additional recommendations:

First, the State could work with the federal government to increase payment standards for more costly “high opportunity” areas where Section 8 voucher-holders and/or minority households are underrepresented to enable voucher-holders to afford to rent in these areas. Studies in major metropolitan areas found that available housing units within Section 8 guidelines have been extremely limited. Low-income families particularly suffer from the housing shortage, as do people with disabilities and seniors, who are over-represented among Section 8 participants.<sup>20</sup> Further, not all units that meet Section 8 guidelines are actually available to Section 8 voucher-holders.<sup>21</sup> According to a 2001 HUD study, the greater Los Angeles area and four other municipalities in California were considered “tight” or “extremely tight” housing markets.<sup>22</sup> This study reflects a consistent pattern of limited affordable housing faced by Section 8 voucher-holders throughout California.

Second, the Legislature could amend the California Fair Employment and Housing Act (FEHA) to include specific protections for Section 8 participants.<sup>23</sup> Other states have such protections, as do an increasing number of local jurisdictions in California.<sup>24</sup> When discrimination against Section 8 voucher-holders is permitted, studies have suggested that landlords use their right to refuse to rent to Section 8 voucher-holders as a pretext for

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<sup>18</sup> *Id.* at 11-23.

<sup>19</sup> Recommendation 8-6, AI at Exec.-14.

<sup>20</sup> A 2003 HUD study found that only one quarter of all occupied housing in the 50 largest metropolitan areas are within the Section 8 guidelines, which means that three-quarters of all housing units are unaffordable to low income families, even with the assistance of Section 8. See U.S. Department of Housing and Urban Development Office of Policy Development and Research, *Housing Choice Voucher Location Patterns: Implications for Participants and Neighborhood Welfare* at 8 (Jan. 2003), available at <http://www.huduser.org/publications/hsgfin/location/paper.html>

<sup>21</sup> See U.S. Department of Housing and Urban Development, *Study on Section 8 Voucher Success Rates, Volume I, Quantitative Study of Success Rates in Metropolitan Areas* at ¶¶ 1-13 (Nov. 2001), available at <http://www.huduser.org/publications/pubasst/sec8success.html> (hereinafter “Utilization Rate”).

<sup>22</sup> *Id.*, Exhibit C-1 (Los Angeles County, the greater Los Angeles area, and Sacramento county are considered to be “tight” housing markets, and San Buenaventura, San Diego, and Alameda counties are considered to be “extremely tight” housing markets.).

<sup>23</sup> FEHA was amended in 2000 to include a provision which prohibits discrimination in housing on the basis of “source of income.” However, this provision does not cover discrimination against voucher-holders. *Sabi v. Sterling*, 183 Cal.App.4th 916 (2010).

<sup>24</sup> Approximately 12 states have passed such laws, as have numerous counties and cities. States include: Connecticut, Maine, Massachusetts, Minnesota, New Jersey, Utah, Vermont, and Wisconsin. California cities include: San Francisco, East Palo Alto, and Corte Madera.

discriminating against minorities.<sup>25</sup> As a result, “Housing Choice Voucher holders face multi-level barriers of discrimination based on source of income, race, and ethnicity.”<sup>26</sup>

#### **D. Actions to Ensure Fair Housing Choice for California Residents with Limited English Proficiency.**

California is home to the country’s largest immigrant population, and therefore, millions of people with limited English proficiency (LEP) who speak many diverse languages.<sup>27</sup> The AI sets forth data describing the large LEP population and the high rate of linguistic isolation (11%).<sup>28</sup> Respondents to the State’s survey of eligible grantees cited barriers to housing for people with limited English proficiency (LEP) as a severe impediment to fair housing.<sup>29</sup> The AI, however, only analyzes whether impediments exist for this population in its model county analysis, where it found that 45% of linguistically isolated households were located in unincorporated parts of the model county.<sup>30</sup> LEP tenants often face unnecessary evictions, discussed in greater detail in section II.J., below. Language barriers also cause inability to find housing in areas of low minority concentration, and other homeowner and rental housing problems that steer people into particular neighborhoods—often with substandard housing—because of their national origin or farmworker status. However, the AI fails to identify sufficient actions to overcome these barriers. The only actions addressing this problem are the creation of an anti-NIMBY webpage translated into Spanish and the provision of trainings to sub-recipients regarding their duties to serve LEP persons.<sup>31</sup> Training is important, but the State is obligated both to analyze and to have an action plan that does more.<sup>32</sup>

The State must develop a Language Access Plan (LAP) as a first step.<sup>33</sup> Despite this federal requirement, HCD and other state housing agencies that receive federal funding have failed to create such a plan. HCD, DFEH, CTCAC, CalHFA and other agencies must assess the language needs of the State and, accordingly, create an appropriate plan to address those needs. The State has begun this process by reviewing the demographic data regarding LEP persons but has not looked at what resources are available and what services the State can provide, among other things. The State can take actions, such as translating forms that are common to numerous types of housing projects and programs so as to reduce the cost of multiple translations. HUD has provided such translated documents on its website.<sup>34</sup> HCD should require that sub-recipients

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<sup>25</sup> Lawyer’s Committee for Better Housing, Inc., *Locked Out: Barriers to Choice for Housing Voucher Holders* at 8-9 (Apr. 2002), available at <http://lcbh.org/images/2008/10/housing-voucher-barriers.pdf> (Even without physical encounters with the landlords, minority callers posing as Section 8 tenants received significantly higher rejection rates than white callers. The study also found that nearly half of all landlords explicitly refused to accept Section 8 housing vouchers from investigators posing as prospective tenants.)

<sup>26</sup> See Utilization Rate, Chapter 1 at 1.

<sup>27</sup> AI at 2-21.

<sup>28</sup> *Id.* at 2-21.

<sup>29</sup> *Id.* at 13-2.

<sup>30</sup> *Id.* at 14-12.

<sup>31</sup> *Id.* at Exec-8.

<sup>32</sup> 42 U.S.C. § 2000 (d); Exec. Order No. 13166y, 65 Fed. Reg. 50121 (Aug. 16, 2000); CAL. GOV’T. CODE § 11135.

<sup>33</sup> *Id.*

<sup>34</sup> See [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/promotingfh/lep](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/promotingfh/lep)

create LAPs and comply with requirements to provide meaningful language access as well.<sup>35</sup> The State should also increase efforts to ensure compliance with Title VI of the Civil Rights Act and Government Code section 11135, which require that recipient of federal and State funds, respectively, provide meaningful language access. Greater efforts are needed to ensure that families are not steered to substandard housing in segregated communities because of their language ability.

## **II. The AI Fails to Sufficiently Analyze and Identify Significant Impediments to Fair Housing Choice.**

An AI must analyze all conditions that have “the *effect* of restricting housing opportunities.”<sup>36</sup> According to HUD guidance, this endeavor involves “[a] comprehensive review of a State or Entitlement jurisdiction’s laws, regulations, and administrative policies, procedures, and practices; [a]n assessment of how those laws, etc. affect the location, availability, and accessibility of housing; [a]n assessment of conditions, both public and private, affecting fair housing choice for all protected classes; and [a]n assessment of the availability of affordable, accessible housing in a range of unit sizes.”<sup>37</sup> To fulfill this requirement, the AI’s analysis of state and local policy must do more than look at the letter of the law. It must analyze how those laws are implemented to understand the effect of State housing policies on fair housing choice. In addition, the analysis cannot ignore key conditions occurring at the local level that have a disproportionate impact. In this section, we identify a number of issues areas in which the AI’s analysis falls short.

### **A. Impediments Caused By the Inadequate Implementation of California Housing Element Law**

The AI discusses the State Housing Element, but fails to consider how the Housing Element Law, as it is actually implemented, affects fair housing goals. Such an analysis is especially important given the weight that the AI currently places on the aspirations of the Housing Element Law as a tool for furthering fair housing.<sup>38</sup> Moving beyond the basic discussion of the law on the books included in the current draft, the AI should conduct an analysis of the effects of Housing Element Law implementation at the local, regional and state level. The AI should not, as it does now, merely recite the goals and requirements of Housing Element Law.

In some cases, the regional allocation of the housing needs by the Councils of Governments (COGs) impedes rather than furthers fair housing. For example, in the Bay Area, 70% of new housing developments are to be concentrated in priority development areas (PDAs)

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<sup>35</sup>Department of Housing and Urban Development, *Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, 72 Fed. Reg. 2732 (Jan. 22, 2007).

<sup>36</sup>FHPG, *supra* note 3 at 3-6 (emphasis added).

<sup>37</sup>*Id.* at 2-7.

<sup>38</sup>*See, e.g.*, AI at 3-17, 3-18, 3-21.

volunteered by local governments.<sup>39</sup> Advocates have pointed out that such a distribution methodology aids jurisdictions that seek to exclude lower-income residents of color.<sup>40</sup> Indeed, an analysis of the relevant racial demographics reveals that jurisdictions that have not volunteered PDAs have 23% fewer minority residents. As a result, this regional allocation methodology that has allowed high-opportunity jurisdictions to close their doors to their fair share of affordable housing impedes fair housing choice. The AI must explore the inadequacies in the implementation, enforcement and interpretation of the Housing Element Law that have allowed such an outcome.

Second, even when the regional allocation is appropriate, there is widespread Housing Element non-compliance at the local level. For example, according to HCD, only 49% of SCAG jurisdictions, 48% of ABAG jurisdictions, and 44% of AMBAG jurisdictions are in compliance with the Housing Element Law. Worse yet, there are jurisdictions that have been found to be compliant, but have failed to address key fair housing issues. Other jurisdictions adopt noncompliant elements that fail to sufficiently analyze the needs of special needs populations as well as infrastructure needs and patterns of annexation that particularly impact underserved minority communities.

After a sufficient analysis of implementation at the local and regional level, the AI must include actions that include increasing HCD enforcement resources, improving administrative procedures to review regional allocation by COGs, and legislative reform. HCD has appropriately continued to seek additional funds from the Administration and the Legislature for staff to review and enforce the Housing Element Law. Those efforts should be acknowledged in the recommended actions.

## **B. Impediments Resulting from the Loss of Redevelopment Funds**

The AI acknowledges, appropriately, that the dissolution of redevelopment—specifically, the loss of low- and moderate-income housing funds—impacts fair housing choice. However, the AI should provide a more meaningful analysis of how the loss of affordable housing financing presents such an impediment. The draft analysis clearly asserts the importance of affordable housing to fair housing choice, listing two impediments that relate directly to the State’s lack of affordable housing (Impediment #1: Inadequate supply of affordable housing available to lower-income and minority households; Impediment #3: Shortage of subsidies and strategies to promote affordable, accessible housing for low, very low, and extremely low-income households, including protected classes).

We understand that as a state agency HCD is limited in the degree to which it can impact legislative decisions. But by analyzing more fully the impact of redevelopment’s loss on access to fair housing choice, the AI could at least ensure that policymakers appreciate this aspect of the

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<sup>39</sup>Association of Bay Area Governments, Draft Regional Housing Need Allocation (2014-2022), Exec. Bd. Meeting of July 19, 2012, agenda Item 6, at 17-20, *available at* [http://apps.mtc.ca.gov/meeting\\_packet\\_documents/agenda\\_1882/EB\\_071912\\_Item\\_06\\_RHNA\\_Methodology\\_Combined.pdf](http://apps.mtc.ca.gov/meeting_packet_documents/agenda_1882/EB_071912_Item_06_RHNA_Methodology_Combined.pdf).

<sup>40</sup>See Letter to Ezra Rappaport, Executive Director, ABAG, July 16, 2012, *available at* [http://www.publicadvocates.org/sites/default/files/library/abag\\_rhna\\_comment\\_letter\\_7-16-12.pdf](http://www.publicadvocates.org/sites/default/files/library/abag_rhna_comment_letter_7-16-12.pdf).

loss. Without this analysis, policymakers may not fully grasp the implications, making it more difficult to mitigate these barriers to fair housing. Moreover, HCD should present options for mitigating this loss.

### C. LIHTC Placement Criteria

The Low Income Housing Tax Credit (LIHTC) program provides the largest stream of funding for new production of affordable housing in the State, creating at least 204,000 units to date.<sup>41</sup> The AI recognizes the lack of affordable housing as the primary impediment to fair housing.<sup>42</sup> Indeed, tax credits are vital for the production of new affordable housing, and the LIHTC program, therefore, plays an important role in ensuring fair housing choice. However, the draft AI does not engage in a meaningful analysis of the program. It should assess where units are located, why they are located there, and whether California Tax Credit Allocation Committee (CTCAC) policies can ensure that new projects provide families with fair housing opportunities regardless of their membership in a protected class.

A cursory look at just one geographic area shows that LIHTC projects located in the Imperial Valley are concentrated in low- and moderate-income census tracts where over 75% of families are of Hispanic origin.<sup>43</sup> The State must engage in a comprehensive analysis to determine where these projects are located statewide. If an analysis reveals that LIHTC units are sited in areas of high minority concentration, the State must consider what led to that allocation – CTCAC’s selection criteria, developer proposals, NIMBYism, or other factors.<sup>44</sup> Further, as data required by the Housing and Economic Reform Act of 2008 becomes available, the State should assess the demographics of tenants actually living in LIHTC properties.<sup>45</sup> Such analyses are especially timely as CTCAC moves forward with its cost containment project, the results of which could have significant consequences for fair housing choice.<sup>46</sup> Finally, the State should consider actions that will ensure that LIHTC units are located in high opportunity areas and accessible to people in protected classes. One vehicle for affirmatively furthering fair housing is the development of a Qualified Allocation Plan that incentivizes projects that serve low-income minority families in high opportunity areas.<sup>47</sup> The LIHTC program presents an opportunity for the State to strengthen compliance with the duty to affirmatively further fair housing by ensuring that a fair number of projects are sited in high opportunity areas and marketed to

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<sup>41</sup> AI at 4-5.

<sup>42</sup> *Id.* at Exec-2.

<sup>43</sup> See Appendix 1: Map of LIHTC Distribution.

<sup>44</sup> *Inclusive Communities Project v. Texas Dep’t. of Hous. and Cmty. Affairs*, No. 3:08-CV-0546-D, 2008 WL 5191935 (N.D. Tex.).

<sup>45</sup> Section 2835(d) of the Housing and Economic Reform Act of 2008, Pub. L. 110–289, 122 Stat. 2810 (July 30, 2008).

<sup>46</sup> Information regarding CTCAC’s cost containment project is available at <http://www.treasurer.ca.gov/ctcac/tax.asp>. High opportunity areas often incur higher development costs by necessity. Any proposals should ensure that CTCAC is affirmatively furthering fair housing by increasing incentives to develop in such areas, rather than hindering it.

<sup>47</sup> Poverty & Race Research Action Council and Lawyers’ Committee for Civil Rights Under Law, *Building Opportunity: Civil Rights Best Practices in the Low Income Housing Tax Credit Program* (December 2008) <http://www.prrac.org/pdf/2008-Best-Practices-final.pdf>.

underrepresented families. To take advantage of this opportunity, more analysis must be done and concrete actions taken.

#### **D. Municipal Bankruptcies**

California is facing an unprecedented series of municipal bankruptcies. Three such bankruptcies have been filed in 2012 to date, by the cities of Stockton, San Bernardino, and Mammoth Lakes. Because municipalities play a vital role in providing housing, the State should analyze the impact that these bankruptcies have on fair housing choice. Bankruptcies could foreseeably lead to a broad range of impediments to fair housing—lack of funding for infrastructure, an understaffed police force leading to unsafe neighborhoods, or the inability to plan for or fund new affordable housing. Further, municipalities in bankruptcy may seek protection from complying with existing affordable housing obligations, such as those imposed through a court judgment. Indeed, California cities have seen a number of these issues arise through the bankruptcy process. The State should consider these issues in its analysis and assess what State policies may support a stable fiscal environment for cities that would allow them to avoid bankruptcy and its resulting impediments to fair housing choice.

#### **E. Inequitable Provision of Municipal Services and Infrastructure**

The lack of adequate infrastructure, particularly in unincorporated areas is a severe impediment to fair housing choice. The AI does not adequately analyze this impediment or describe specific actions to overcome it. The failure to analyze infrastructure needs (e.g., potable, safe and adequate water supply, sufficient sewer and waste treatment services, streetlights, drainage, roads, public transportation, discriminatory code enforcement and other inequitable fundamental municipal services) for existing lower-income, predominantly minority communities and neighborhoods and the patterns of annexation around unincorporated, underserved communities, must be addressed in the AI. We have observed this problem in communities that receive or are eligible to receive state CDBG funds and in adjacent jurisdictions in which these neighborhoods and communities often are within the sphere of influence.

Nonexistent and inadequate infrastructure creates a significant impediment to the development and sustainability of affordable housing. Throughout California hundreds of thousands of people, predominantly in unincorporated communities, do not have the most basic of infrastructure, including adequate drinking water infrastructure and wastewater infrastructure.<sup>48</sup> For example, in Lenare in Fresno County, many residents pay 7% of their income for drinking water, and, even then, some of that water is not potable.<sup>49</sup> Similarly,

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<sup>48</sup> Bernice Yeung, *Unincorporated Communities Lack Basic Services*, SAN FRANCISCO CHRONICLE, Apr. 27, 2012, available at <http://www.sfgate.com/news/article/Unincorporated-communities-lack-basic-services-3465042.php>. See also Jonathan Landon, PhD, et al., *Land of Risk, Land of Opportunity: Cumulative Environmental Vulnerabilities in California's San Joaquin Valley* 6 (Nov. 2011), available at [http://www.crla.org/sites/all/files/content/uploads/Resources/Report\\_Land\\_of\\_Risk\\_Land\\_of\\_Opportunity.pdf](http://www.crla.org/sites/all/files/content/uploads/Resources/Report_Land_of_Risk_Land_of_Opportunity.pdf) (describing drinking water contamination in Monterey Park, an unincorporated community in Stanislaus County).

<sup>49</sup> Policylink, *Why Place and Race Matter* 84 (2011), available at <http://www.policylink.org/atf/cf/%7B97c6d565-bb43-406d-a6d5-eca3bbf35af0%7D/WPRM%20FULL%20REPORT%20%28LORES%29.PDF>.

hundreds of communities have no access to a public wastewater system and their homes, and septic systems are aging or inadequate.<sup>50</sup> Lack of wastewater systems lead to moratoria on new homes, structural damage to existing homes, and public health hazards.<sup>51</sup>

HCD could address these issues in its review of jurisdictions' Housing Elements, enforcing cities' obligations to set forth concrete programs to address infrastructure deficits. The State could also work to ensure that funding for drinking water and wastewater projects reaches communities most in need of such funding is critical.

## **F. Impediments to Fair Housing Choice for Farmworkers**

Farmworkers, though not a protected category enumerated by the Fair Housing Act, are members of certain protected categories at higher numbers than the general population. Migrant and seasonal farmworkers are predominantly members of racial and ethnic minorities. An estimated 75% of California farmworkers are foreign-born and are largely from Mexico, and many are from indigenous Mexican and Central American groups.<sup>52</sup> Further, significantly more farmworkers are male than the general population.<sup>53</sup> They are also a protected category under Government Code section 65008 because of their occupation and are also given special attention in Housing Element Law, which requires specialized farmworker housing site identification, needs analysis, and program development.<sup>54</sup>

The AI briefly mentions some of the most serious housing challenges facing California's farmworker population, including high rates of poverty, insufficient farmworker housing, and low homeownership rates among farmworkers.<sup>55</sup> Farmworkers indeed face severe impediments to fair housing choice. The data cited in the AI indicates that, while California has nearly half a million farmworkers, it only has licensed employee housing for less than 17,000 workers.<sup>56</sup> The paucity of housing that is available to farmworkers most often is substandard. Many of these dwellings are irregular structures not intended for human habitation, and one-sixth (17%) lack either plumbing or food preparation facilities, or both.<sup>57</sup>

The AI fails to identify discrimination on the basis of race, national origin, familial status, occupation, language, or immigration status among the housing challenges faced by farmworkers and, more significantly, the AI does not specifically characterize farmworker housing issues as impediments to fair housing choice. Given the significant percentage of California residents who are farmworkers, and given the substantial overlap between the farmworker population and the protected categories of race, national origin, and sex, the relative unavailability of safe, habitable,

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<sup>50</sup> Yeung, *supra* note 48.

<sup>51</sup> Policylink, *supra* note 49 at 84.

<sup>52</sup> American Farmland Trust, *California Agricultural Vision: From Strategies to Results*, Spring 2012 Progress Report at 11, available at <http://www.cdfa.ca.gov/agvision/>.

<sup>53</sup> AI at 2-5, 2-55.

<sup>54</sup> CAL. GOV'T. CODE § 65583 (a)(7).

<sup>55</sup> AI. at 2-54 to 2-55.

<sup>56</sup> *Id.* at 2-55.

<sup>57</sup> Don Villarejo, & Marc Schenker, *Environmental Health Policy and California's Farm Labor Housing*, Oct. 1, 2006, 2, available at [http://agcenter.ucdavis.edu/Announce/Documents/Env\\_Health\\_Pol.pdf](http://agcenter.ucdavis.edu/Announce/Documents/Env_Health_Pol.pdf).

affordable housing for farmworkers should be affirmatively identified as a state-wide impediment to fair housing choice.

With adequate analysis and identification as impediment of the insufficient housing and discrimination against farmworkers, the AI should set forth actions that the State will take. The actions should include ensuring that a sufficient supply of funding for farmworker housing and various types of farmworker housing are available to accommodate families and unaccompanied workers; that Housing Element Law is enforced and implemented to ensure that COGs include the need for farmworker housing in their RHNA methodology; and that Housing Elements provide adequate sites for farmworker housing, analyze the need for farmworker housing, and establish programs to ensure the provision of farmworker housing suitable to meet the needs of farmworkers, their families, complex households, and unaccompanied workers. A statewide comprehensive study of the need for farmworker housing and the conditions of farmworker housing must be conducted, and the lack of adequate infrastructure in farmworker communities must be a part of the analysis and plan for action.

### **G. Discrimination on the Basis of Immigration Status**

Similarly, the AI does not discuss a significant component of discrimination based on national origin: discrimination against immigrants or discrimination on the basis of immigration status. Immigrants comprise over a quarter of California's population.<sup>58</sup> Discrimination against and harassment of immigrants—including undocumented immigrants—is extremely common and is often related to the race or national origin of the particular immigrants. Examples of discriminatory actions by private housing providers include: calling or threatening to call ICE in retaliation for requesting repairs, requesting Social Security numbers of in-place tenants (i.e., not for verification of creditworthiness), charging higher deposits to immigrants, and “English-only” rules. Many of our immigrant clients, in particular those from Mexico and other Latin American countries, live in uninhabitable conditions. They may be afraid to request repairs or call code enforcement for fear of retaliation, or the landlord may simply refuse to make repairs. In many cases our clients have been told things like “you should be happy that you have a place to live at all,” and “you should be used to living with cockroaches because Mexicans are all dirty.”

The AI should analyze discrimination based on immigration status as an impediment to fair housing choice. It should also propose actions to address this pervasive form of discrimination. Although immigration policy is controlled by federal law, California can enact—and has enacted—policies that make communities more accessible to immigrant families. For example, Civil Code section 1940.3 already prohibits landlords from inquiring about tenants' and prospective tenants' immigration status and prohibits cities from passing ordinances that forbid landlords from renting to undocumented immigrants. And last year A.B. 1236<sup>59</sup> prohibited local jurisdictions from requiring employers to use E-Verify to verify employees' and prospective employees' immigration status. The AI should explore further policy options available to the

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<sup>58</sup> Public Policy Institute of California, *Immigrants in California* (April 2011) available at [http://www.ppic.org/main/publication\\_show.asp?i=258](http://www.ppic.org/main/publication_show.asp?i=258)

<sup>59</sup>The Employment Acceleration Act of 2011, codified at CAL. LAB. CODE §§ 2811-2813.

State and/or sub-recipient jurisdictions to prevent discrimination on the basis of immigration status. Such policies might include local code enforcement policies that affirmatively state that tenants' immigration status is immaterial to their right to habitable housing or state or local policies that impose penalties for landlords who attempt to use tenants' immigration status (or perceived immigration status) against them in retaliation for filing complaints.

## **H. Impediments Related to Displacement**

That AI identifies as Impediment #7 that “Low-income households may be at risk of displacement in areas subject to strong new development pressure or activity.”<sup>60</sup> This analysis should also address displacement risks caused by mobilehome park closures and the loss of federally subsidized units.

### **1. Mobilehome Park Closure**

The economic downturn, land pressure, disinvestment, discriminatory redevelopment, discriminatory code enforcement and new development have all resulted in closures of mobilehome parks throughout the State. Mobilehome parks often provide the only affordable homeownership (and in some cases rentals) to low- and moderate-income farmworkers, racial and ethnic minorities, indigenous groups, persons with disabilities and other protected classes.<sup>61</sup> State law does not sufficiently protect residents of mobilehome parks from discriminatory or forced displacement, does not require a sufficient analysis of the impact of forced displacement, and fails to provide a guarantee of adequate replacement housing and relocation assistance for dislocated residents, worsening the disproportionate effect on members of protected classes.

As a condition of closure of a mobilehome park, state law permits a local agency to require mitigation of “any adverse impact of the conversion, closure or cessation of use on the ability of the mobilehome park residents to find adequate housing in a mobilehome park.”<sup>62</sup> The law further provides that “[t]he steps required [by a local agency] to mitigate shall not exceed the reasonable costs of relocation.”<sup>63</sup> Local governments frequently struggle in their attempt to determine what might be appropriate compensation for homeowners displaced by closure and/or conversion of mobilehome parks for other uses.<sup>64</sup>

When mobilehome parks are closed the individual families do not recover the value of their homes and the affordable housing inventory is lost forever.<sup>65</sup> As a result, the private costs

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<sup>60</sup> AI at Exec-12

<sup>61</sup> See *Facts About Manufactured Housing Getting the Facts: A Closer Look at Manufactured Housing*, available at [http://cfed.org/programs/manufactured\\_housing\\_initiative/about\\_manufactured\\_housing/facts\\_about\\_manufactured\\_housing/](http://cfed.org/programs/manufactured_housing_initiative/about_manufactured_housing/facts_about_manufactured_housing/)

<sup>62</sup> CAL. GOV'T. CODE § 65893.7(e).

<sup>63</sup> *Id.*

<sup>64</sup> This difficulty is due, in part, to the fact that the terms “adverse impact” and “reasonable costs of relocation” are not well-defined.

<sup>65</sup> California law entitles a mobilehome owner (i.e. space renter) to the reasonable cost of physically moving her mobilehome to a different park, but there are seldom other parks within a reasonable distance that will take a

imposed on displaced park residents and their families are severe. The public costs include increased utilization of tax-supported federal, state and local housing assistance, relocation assistance<sup>66</sup> and costs for welfare, medical and social services. With minorities and elderly and disabled individuals disproportionately affected, the closures also are impediments to fair housing.

To address this impediment, the State law should require anti-displacement measures, provide for meaningful tenant impact reports that include anti-displacement provisions, demand an analysis of differential effect on protected classes, require payment of “in place” value of the loss of the existing space, and ensure adequate replacement housing and relocation assistance regardless of whether displacement is private, caused by code enforcement or caused by other related government funding or action.<sup>67</sup> California law should ensure that our most vulnerable residents receive meaningful relocation mitigation when an owner closes a park or converts it to another use.

## **2. Loss of Subsidized Housing**

With respect to loss of subsidized units, the AI acknowledges, appropriately, that the State will likely suffer a loss of its current stock of subsidized housing and provides data for the number of properties that may be “at risk” in the future.<sup>68</sup> However, the draft analysis should provide a more detailed analysis of which federal subsidies it considers to be at risk. The analysis must explore how the projected loss of the State’s subsidized housing stock will impact fair housing choice. Moreover, as some of the projected losses will impact specific areas of the state more than others, an analysis of the regional impact of the projected losses on fair housing should be performed.<sup>69</sup>

### **I. Impediments Related to Foreclosure**

The AI acknowledges the disproportionate impact of the foreclosure crisis on communities of color: “[t]he enormous costs of foreclosures--to families who lose their homes as well as to cities and towns losing tax resources--have been greatest for communities of color.”<sup>70</sup> However, the AI does not specifically identify foreclosure-related practices or policies as impediments to fair housing choice. Nor does the draft discuss the actions which have been taken and should be taken to ameliorate the impediments. For example, the AI should address the diversion of funds that California received in the National Mortgage Settlement to help close the 2012-13 budget deficit. Through the National Mortgage Settlement, California received \$410.6 million to be distributed by the Attorney General “to foreclosure relief and housing programs,

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mobilehome. Mobilehome parks are disappearing and remaining parks usually do not accommodate older homes, making it difficult for residents to relocate.

<sup>66</sup>CAL. GOV’T. CODE § 65893.7(e).

<sup>67</sup> See CAL. GOV’T. CODE §§ 7260 et seq.

<sup>68</sup> AI at 4-5 to 4-6.

<sup>69</sup> *Id.* at 4-5 to 4-6. This section also mentions the expected “looming cuts” to federal subsidies. Here the AI should mention the Budget Control Act, which will necessitate an 8 to 9% cut across all federal subsidies unless repealed, and the potential impacts of that Act on California’s housing stock.

<sup>70</sup> AI at 4-39. See also, AI at 11-14.

including housing counseling, legal assistance, foreclosure prevention hotlines, foreclosure mediation, and community blight remediation.”<sup>71</sup> However, the 2012-13 State budget allocates \$298 million of the State’s National Mortgage Settlement funds “to offset existing General Fund costs for assisting homeowners and protecting consumers.”<sup>72</sup> The budget also allocates \$41.1 million to “the Unfair Competition Law Fund to offset the costs of various DOJ programs,” and \$44.9 million for “the DOJ’s Public Rights and Law Enforcement programs relating to public protection and consumer fraud enforcement and litigation.” *Id.* These funds should instead be used—as intended—for the benefit of California homeowners affected by the mortgage foreclosure crisis.

Moreover, redirecting the settlement funds likely will have a racially discriminatory effect. Because African-Americans and Latinos disproportionately lost their homes in foreclosure relative to their share of mortgage originations, diverting settlement funds to the General Fund dilutes the benefit of the National Mortgage Settlement for these communities because they represent a smaller percentage of the State population.<sup>73</sup> As such, HCD should identify this diversion of funds as an impediment to fair housing choice.

In addition, although the draft analysis acknowledges that foreclosures have resulted in the disproportionate eviction of minority rental households, the AI stops short of identifying any related actions to remove impediments to fair housing choice related to foreclosure-driven evictions. Given the widespread and disproportionate displacement of minority households due to foreclosures of rental properties, it is crucial that the AI identify related impediments to fair housing choice and responsive actions.<sup>74</sup> For example, HCD could recommend increased enforcement of existing legal protections for tenants at foreclosure. More significantly, the draft analysis should recommend the passage of Senate Bill 1473 and Assembly Bill 2610, currently pending in the California legislature, which would permanently incorporate key protections of the Protecting Tenants at Foreclosure Act into California law and adopt additional tenant protections.<sup>75</sup>

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<sup>71</sup> *National Mortgage Settlement Executive Summary*, at 4 (July 23, 2012), available at [https://d9klfgibkccquc.cloudfront.net/NMS\\_Executive\\_Summary-7-23-2012.pdf](https://d9klfgibkccquc.cloudfront.net/NMS_Executive_Summary-7-23-2012.pdf).

<sup>72</sup> Governor’s Budget May Revision, 2012-13, at 7 (May 14, 2012), available at [http://www.dof.ca.gov/budget/historical/2012-13/governors/documents/2012-13\\_May\\_Revision\\_secured.pdf](http://www.dof.ca.gov/budget/historical/2012-13/governors/documents/2012-13_May_Revision_secured.pdf); California State Budget 2012-13, at 53, available at <http://www.ebudget.ca.gov/Enacted/BudgetSummary/BSS/BSS.html>.

<sup>73</sup> Center for Responsible Lending, *Foreclosures by Race and Ethnicity: The Demographics of a Crisis* (June 18, 2010), at 2, available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf>; U.S. Census Bureau, California People QuickFacts, available at <http://quickfacts.census.gov/qfd/states/06000.html> (In 2011, Black persons constituted 6.6% of state population, and persons of Hispanic or Latino origin constituted 38.1% of California population); Shaila Dewan, *Needy States Use Housing Aid Cash to Plug Budgets*, NEW YORK TIMES (May 15, 2012) (quoting Alan Jenkins, Executive Director of the Opportunity Agenda, which supports homeownership).

<sup>74</sup> Recent estimates suggest that more than one million California renters have been directly impacted by foreclosure since the crisis began in 2007. Tenants Together, *Fourth Annual Report on California Renters in the Foreclosure Crisis* at 3 (Jul. 2012), available at <http://tenantstogether.org/article.php?id=2448>. As many as 40% of the families nationwide that face eviction due to foreclosure are renters. National Housing Law Project, *The Foreclosure Crisis and Its Impact on Tenants*, available at <http://nhlp.org/foreclosureandtenants/>.

<sup>75</sup> The Protecting Tenants at Foreclosure Act, 12 U.S.C. §§ 5201-5220, currently is scheduled to expire in 2014.

The AI also should analyze the ways in which California's non-judicial foreclosure statute serves as an impediment to fair housing choice. The predominant method of foreclosure in California is the non-judicial or power-of-sale foreclosure, which enables the lender to foreclose without filing a lawsuit.<sup>76</sup> Many states' statutes authorizing non-judicial foreclosures have been found to "violate the notice and hearing requirements contained in the Due Process clauses of the Fifth and Fourteenth Amendments."<sup>77</sup> Because many foreclosures are initiated and conducted improperly,<sup>78</sup> executing foreclosures without court oversight places California homeowners at great risk of losing their homes when they should not be. Further, the additional time required by the judicial foreclosure process gives borrowers more time to seek assistance and may incentivize lenders to promote foreclosure alternatives.<sup>79</sup> The disadvantages of the non-judicial foreclosure process fall disproportionately on minority homeowners, who have disproportionately lost their homes in foreclosure.<sup>80</sup>

### **J. Impediments Facing Low-Income Tenants in the Eviction Process**

The AI fails to analyze how limitations in tenants' access to the California justice system places their housing at risk due to eviction. Low-income renters are more often members of protected classes.<sup>81</sup> After tenants are unnecessarily and unfairly evicted, they have difficulty locating safe and affordable housing and are at increased risk of homelessness.<sup>82</sup>

The first problem which should be identified in the AI is that currently California does not provide interpreters in civil courts for self-represented and/or indigent litigants. The need for qualified interpreters in civil courts was documented in a September 2005 report of the California Commission on Access to Justice entitled "Language Barriers to Justice in

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<sup>76</sup> See CAL. CIV. CODE § 2923.5, *et seq.*

<sup>77</sup> Grant S. Nelson, *Confronting the Mortgage Meltdown: A Brief for the Federalization of State Mortgage Foreclosure Law*, 37 PEPP. L. REV. 583, 610-612 (2010) (review of cases holding power of sale statutes unconstitutional).

<sup>78</sup> See, e.g., Elizabeth Renuart, *Toward a More Equitable Balance: Homeowner and Purchaser Tensions in Non-Judicial Foreclosure States*, 24 LOYOLA CONSUMER L. REV. 562, 562, 564-7 (2012) (discussing "careless and, at times, fraudulent" conduct of foreclosures).

<sup>79</sup> J. Michael Collins, *et al.*, *State Mortgage Foreclosure Policies & Lender Interventions: Impacts on Borrower Behavior in Default*, 30 J. OF POLICY ANALYSIS & MANAGEMENT 216, 218, 230 (2011) (concluding that "[j]udicial procedures are associated with a 3% marginal increase in loan modifications").

<sup>80</sup> Center for Responsible Lending, *Foreclosures by Race and Ethnicity: The Demographics of a Crisis* at 2 (June 18, 2010) available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf>.

<sup>81</sup> According to the AI, "Compared to Non-Hispanic Whites, Minorities generally had higher proportions of renters. This is particularly true for Black or African American and Hispanic or Latino households." AI at 11-26. "In California, about 70% of very low-income families were Minority and they accounted for 77% of families living in poverty." AI at 11-23.

<sup>82</sup> Once a tenant is evicted, tenants with unlawful detainer lawsuits on their records have real difficulties finding new housing. They are effectively blacklisted by special eviction credit reports that even show evictions filed against tenants who are without fault.

California.”<sup>83</sup> According to the report, “[n]early seven million Californians cannot access the courts without significant language assistance, cannot understand pleadings, forms or other legal documents, and cannot participate meaningfully in court proceedings without a qualified interpreter.”<sup>84</sup> As a result, people are losing access to housing because of their national origin. The report called for trained interpreters and other services that can help tenants understand and present their cases. It also suggested that courts have the ability to provide adequate certified interpreters. California should explicitly recognize a right to equal access to the courts without regard to language proficiency.

The second problem facing low-income California tenants, especially underserved groups such as elderly, disabled, children, and non-English-speaking persons, is representation in unlawful detainer cases.<sup>85</sup> As of 2009 there were over 4.3 million Californians who were unrepresented in civil court proceedings because they could not afford representation. They are almost certain to be evicted even when they have meritorious defenses. Recognizing the severity of this problem, the Legislature, via the Sargent Shriver Civil Counsel Act, A.B. 590, has funded seven pilot projects which are providing legal representation to a selected number of low-income Californians beginning July 1, 2011.<sup>86</sup> This program is designed to ensure that unrepresented parties obtain meaningful access to justice in unlawful detainers. However, the need for services outpaces the available funding, and it is not possible to provide all eligible low-income tenants facing eviction with attorneys.<sup>87</sup> The AI should applaud the Shriver program and recommend that it be expanded.

In addition to insufficient legal representation and language access, discussed above, indigent minorities, the elderly and the disabled face additional barriers to genuine access to justice in their unlawful detainer cases due to budget cuts to the court system in the California, including courtroom closures, lack of court reporters, and expensive jury fees.<sup>88</sup>

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<sup>83</sup> *Language Barriers to Justice in California: A Report of the California Commission on Access to Justice*, Exec. Sum. at 1 (September 2005), available at <http://calbar.ca.gov/LinkClick.aspx?fileticket=GQz0dj7TeEg%3D&tabid=216>.

<sup>84</sup> Approximately 7 million or 20% of Californians speak English less than “very well,” precluding participation in a judicial proceeding without substantial language assistance. *Id.* at 1, n. 2.

<sup>85</sup> A.B. 590, 2009 Leg. Reg. Session (Cal. 2009), §1(a).

<sup>86</sup> The state now recognizes that “Equal access to justice without regard to income is a fundamental right in a democratic society. It is essential to the enforcement of all other rights and responsibilities in any society governed by the rule of law. It also is essential to the public's confidence in the legal system and its ability to reach just decisions.” AB 950, §1(g).

<sup>87</sup> To make matters even worse for those who do not qualify for a fee waiver, it costs \$225 for each adult defendant to file an answer to an unlawful detainer complaint. This can be more than the rent the landlord is seeking.

<sup>88</sup> Last year alone, courts were hit with \$1.1 billion in cuts. This year, the state budget delivered another \$544 million blow to the judiciary. Certain counties have eliminated court reporters for most civil cases and are now requiring that even tenants with fee waivers post jury fees.

## K. Impediments to Fair Housing Choice for People with Disabilities

The AI should do a more thorough job of analyzing impediments to housing choice for people with disabilities and should set forth more concrete actions for addressing those impediments. As the AI notes, the most common type of discrimination complaints in California are for discrimination on the basis of disability.<sup>89</sup> The high percentage of disability discrimination complaints comports with our experience: discrimination against people with disabilities is extremely common. Housing providers—including private landlords, subsidized housing, homeless shelters, assisted living facilities, and others—frequently turn away or evict people with disabilities or fail to provide reasonable accommodations.

The housing choices of people with disabilities are limited, not only by overt discrimination by housing providers, but also by a shortage of accessible, affordable housing. People with disabilities are statistically more likely than the general population to be living in poverty,<sup>90</sup> meaning that their housing choices are already limited by income. Further, many people with disabilities need housing with accessible features, housing that is near public transportation or services, or housing that is coupled with supportive services. However, many older housing options—and some newer developments as well—are not accessible to people with physical disabilities. People with disabilities, moreover, are often placed in nursing care or other restrictive settings due to the paucity of in-home supportive services, community supports, and assisted living options.<sup>91</sup> People with disabilities accordingly face systemic and protracted barriers to living in the communities and the housing of their choice.

Government agencies are often complicit in limiting housing choice for people with disabilities. Many jurisdictions have zoning that limits the placement of group homes and other licensed care facilities that serve people with disabilities or have planning practices that allow community opposition to block the development of housing for people with disabilities. Some jurisdictions still lack reasonable accommodation policies with respect to their zoning.<sup>92</sup> In other jurisdictions, the reasonable accommodation policies that they have in place require people with disabilities to pay fees to obtain reasonable accommodations or reveal personal disability-related information to their neighbors and/or the public as part of the reasonable accommodation process.

The AI does propose to “[p]romote housing for people with disabilities” among its recommendations.<sup>93</sup> However, this recommendation is not a concrete action. For example, HCD

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<sup>89</sup> AI at 6-20.

<sup>90</sup> See, e.g., U.S. Census Bureau, *Americans with Disabilities: 2002*, available at <http://www.census.gov/hhes/www/disability/sipp/disab02/awd02.html> (finding that, “[o]f those aged 25 to 64, about 7.7% of people with no disability were in poverty, compared with 11.2% with a nonsevere disability and 25.9% with a severe disability”).

<sup>91</sup> See Eliot Z. Fishman, *et al.*, *The Olmstead Decision and Long-Term Care in California* (Dec. 2003), available at <http://www.chcf.org/~media/MEDIA%20LIBRARY%20Files/PDF/O/PDF%20OlmsteadLessonsForCalif.pdf>.

<sup>92</sup> See, e.g., AI at 14-65 to 14-66 (noting that the Model County never adopted a formal reasonable accommodation process).

<sup>93</sup> AI at Exec.-6.

could commit to increased enforcement of the provisions of Housing Element Law that require jurisdictions to remove constraints to the development of housing for people with disabilities. The AI could also propose legislative reform.

### **L. Impediments to Fair Housing Choice for Seniors**

Along the same lines, the AI should engage in a deeper analysis of the housing challenges facing California's elderly population. As the AI notes, the elderly population in California includes 2.3 million households and is growing rapidly.<sup>94</sup> As with people with disabilities, ensuring housing choice for seniors means having a wide range of housing types available, including independent living, assisted living, and nursing care. Further, in order for seniors to remain integrated among people of other ages, communities must have viable public transportation and other community supports. Such supports are especially important for seniors who want to "age in place" but may need in-home care or design modifications to their homes in order to do so. The AI should analyze whether existing housing options and supportive services are sufficient to ensure fair housing choice for California's seniors and should set forth specific actions to meet the housing needs of the elderly population as it continues to grow.

### **M. Prior and Current Private Actions to Affirmatively Further Fair Housing**

Finally, the AI should analyze recent private sector lawsuits that sought to further fair housing choice.<sup>95</sup> According to the Fair Housing Planning Guide, "chief executive and administrative staff" should not only know the strengths and weaknesses of activities that the State itself has initiated or directly supported, but the analysis "should extend well beyond this arena to actions taken by housing industry members, private organizations and foundations, the public housing agency (PHA), neighborhood groups, regional organizations, and others to further fair housing objectives."<sup>96</sup> Accordingly, the AI should include the "number and types of complaints that have been filed alleging housing discrimination, including complaints in which . . . suit has been filed by . . . private plaintiffs."<sup>97</sup> "Details of specific accomplishments, actual or anticipated, that have promoted or will promote fair housing should be included together with any problems related to these actions."<sup>98</sup> We have included, as an appendix, summaries of recent and significant California fair housing litigation filed by the Department of Justice, the private sector, and/or FHIP-funded organizations. The State should use these cases to identify and analyze the impediments they address.

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<sup>94</sup> AI at 2-45.

<sup>95</sup> See FHPG, *supra* note 2 at 2-18.

<sup>96</sup> *Id.* at 2-19.

<sup>97</sup> *Id.* at 2-18

<sup>98</sup> *Id.* at 2-20.

### **III. Conclusion**

Thank you very much for your consideration of our comments. We look forward to continued cooperation with HCD as it finalizes the State's AI, as well as on future efforts to affirmatively further fair housing.

Many thanks,

/s/

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Director, Public Interest Law Project/California Affordable Housing Law Project

Mary Prem  
Executive Director, Housing Equality Law Project

Julius C. Thompson  
Sydney Irmas Housing Conditions Project Director, Bet Tzedek

Encl: Appendix 1: Map of LIHTC Distribution  
Appendix 2: Recent Fair Housing Decisions and Settlements

**END OF ATTACHMENT #2**

Letter from Advocates to California Department of Housing and Community  
Development Re: Analysis of Impediments 2012