

Congress of the United States
House of Representatives
Washington, D.C. 20515

March 20, 2020

The Honorable Dr. Benjamin S. Carson
Secretary
U.S. Department of Housing and Urban Development
451 7th Street S.W.
Washington, DC 20410-0001

Dear Secretary Carson:

In November 2019, we wrote to you to raise serious concerns regarding HUD’s proposed rule to change the Disparate Impact standard under the Fair Housing Act (FHAct).¹ Today, we write to raise serious concerns with yet another proposal that threatens to undermine fair housing protections in this country. Specifically, we urge you to immediately withdraw HUD’s proposed revision of the Affirmatively Furthering Fair Housing (AFFH) Rule.² This proposal would radically shift the focus of the rule to a general lack of housing supply rather than the specific lack of housing opportunities for protected classes of people and would dilute accountability and enforcement of this key mandate under the FHAct.

In 1968, Congress passed the FHAct to make housing discrimination illegal based on protected classes that include race, color, sex, religion, national origin, familial status, and disability. At the time, federal legislators understood that this prohibition alone would not undo centuries of *de jure* and *de facto*³ discrimination and resulting residential segregation that has shaped America’s sociospatial landscape. That is why the FHAct goes beyond a prohibition on housing discrimination and requires recipients of federal housing funds to take steps to “affirmatively further fair housing.” Unfortunately, this proactive mandate under the FHAct went largely unenforced due to HUD’s weak framework for implementing AFFH that was criticized by the Government Accountability Office (GAO) as being ineffective.⁴ The Obama Administration released a revised AFFH rule in 2015⁵ that was designed to address the weaknesses identified by the GAO and was formulated with the input of a wide range of stakeholders. Unfortunately, the implementation of this rule was abruptly halted by the Trump Administration, a decision that was widely criticized by civil rights and affordable housing advocates.⁶

The proposed rule shifts the focus of compliance and enforcement almost entirely to increasing housing supply, which can be part of a solution to affordable housing, but cannot be expected to address fair housing concerns without consideration to the cost, location, availability, and accessibility of the housing supply that is created. Specifically, the rule provides a list of sixteen “inherent barriers to fair housing,” but the majority of these factors “have nothing substantively to do with fair housing; rather, they address factors that might affect the cost of building new housing and perhaps inhibit growth of the supply of housing generally.”⁷ These factors are not even specifically barriers to increasing *affordable* housing supply and could very well result in jurisdictions claiming to be reducing “inherent barriers to fair housing” when what they are really doing is promoting more luxury condominium development in areas of opportunity that are already highly segregated. According to a GAO report on the pre-2015 AFFH framework, the most common barriers to fair housing as identified by jurisdictions themselves did not include a general lack of housing supply, and instead included: restrictive zoning, inadequate public services in low- and moderate-income areas, lending discrimination, and lack of fair housing rights awareness.⁸ This illustrates how HUD’s reinvention of what would be considered “inherent barriers to fair housing” under its proposed rule is entirely out of sync with what jurisdictions themselves have historically identified as barriers to fair housing. The 2020 rule also lays out nine examples of possible data points that HUD may consider in its enforcement

¹ U.S. House Financial Services Committee, “[Committee Majority Slams Carson’s Proposal to Gut the Fair housing Act](#),” November 2019.

² [85 FR 2041](#)

³ *De jure* discrimination refers to discrimination that is sanctioned by government policies while *de facto* discrimination refers to private.

⁴ GAO, “[HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans](#),” September 2010.

⁵ [24 CFR Parts 5, 91, 92, et al.](#)

⁶ National Fair Housing Alliance, “[Civil Rights Groups Sur HUD over Suspended Implementation of Affirmatively Furthering Fair Housing Rule](#),” May 2018.

⁷ National Low Income Housing Coalition, “[Summary and Assessment: HUD’s Proposed AFFH Rule](#),” January 2020.

⁸ GAO, “[HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans](#),” September 2010.

of AFFH requirements, and again, these data points are mostly looking at barriers to housing supply generally, not barriers to fair housing specifically or even *affordable* housing supply specifically. In fact, the proposed rule never bothers to define the term “affordable housing” and so any references to the term are ambiguous. History has shown that an ample housing supply does not necessarily result in equal housing opportunities for protected classes.⁹ The creation of new homes is not helpful for persons with disabilities if none of them are accessible and they are not helpful for families with children hoping to move into a neighborhood with a better school district if the new homes are too small, unaffordable, and are not located in areas of opportunity.

The proposed rule would also weaken enforcement and accountability by reducing the requirements for jurisdictions to analyze and report barriers to fair housing and by exempting public housing authorities (PHAs) from all responsibilities under AFFH as long as they self-certify their compliance. Under the proposed rule, jurisdictions would not be required to justify or report analyses of fair housing barriers as long as they set out to address three of the aforementioned sixteen “inherent barriers to fair housing” that have been predetermined by HUD. These reporting requirements would be more lax compared to the pre-2015 AFFH approach, which the GAO determined “did not likely serve as effective planning documents to...address...impediments to fair housing choice”.¹⁰ Specifically, HUD’s new proposal does not require jurisdictions to identify, discuss, or report on current or historic housing discrimination. Industry stakeholders have criticized these shortcomings and recommended that jurisdictions conduct more robust analyses of fair housing that “must include discussions on the history of zoning, neighborhood classification, redlining, and other government infrastructure decisions as well as private actions in the real estate market.”¹¹ Additionally, under the proposed rule, PHAs would only be required to self-certify their AFFH compliance through the Consolidated Plan process and would otherwise be exempt from establishing AFFH goals and demonstrating progress toward meeting those goals. It is worth noting that the GAO previously found HUD grantees most commonly cited “tenant selection procedures used by public housing agencies” as an impediment to fair housing.¹² Jurisdictions receiving federal funding have a responsibility under the FHAct to affirmatively further fair housing, but instead of responding to concerns that the pre-2015 framework was ineffective, HUD has proposed to further weaken enforcement and accountability.

Across America today, housing discrimination and segregation persist at alarming rates. In 2018 alone, there were over 31,000 housing discrimination complaints filed in the United States, the highest level ever reported by the National Fair Housing Alliance since it began compiling national complaint data 25 years ago.¹³ The majority of these complaints were on the basis of disability discrimination.¹⁴ In fact, according to HUD’s most recent analysis, less than two percent of the U.S. housing stock is accessible to people with disabilities.¹⁵ Additionally, discrimination on the basis of race continues to pervade the housing market¹⁶ creating a persistent racial wealth gap between White households and households of color.¹⁷ Discrimination and segregation have compounding ripple effects across communities and our entire economy. Today, a family’s access to housing can dictate their life outcomes as much as it would have in 1968 when the FHAct was passed.¹⁸ A child’s zip code can determine the quality of their education¹⁹ and put them at higher risk of asthma²⁰ and other negative health outcomes.²¹ Data also show that Black and Latina mothers experience evictions at disproportionate rates compared to White renters, putting a disproportionate strain on their mental health.²²

⁹ MotherJones, “[For Black America, It’s Not a Housing Crisis. It’s a Chronic Condition](#),” January 2020.

¹⁰ GAO, “[HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans](#),” September 2010.

¹¹ National Association of Realtors, “[FR-6123-A-01 Affirmatively Furthering Fair Housing: Streamlining and Enhancements](#),” October 2018.

¹² GAO, “[HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans](#),” September 2010.

¹³ National Fair Housing Alliance, “[Fair Housing Trends Report](#),” 2019.

¹⁴ *Id.*

¹⁵ HUD, “[Accessibility of America’s Housing Stock](#),” March 2015.

¹⁶ Newsday, “[Long Island Divided](#),” November 2019.

¹⁷ In 2019, Black homeownership rates reached an all-time low since before the passage of the FHAct and Latino homeownership rates remain below pre-2008 housing crisis levels. HousingWire, “[Homeownership rate for black Americans drops to record low](#),” July 2019. UnidosUS, “[Latino Homeownership 2007-2017: A Decade of Decline for Latinos](#),” June 2019.

¹⁸ New York Times, “[The Unmet Promise of Equality](#),” February 2018.

¹⁹ Associated Press, “[How ZIP codes determine the quality of a child’s education](#),” November 2019.

²⁰ Urban Institute, “[The Relationship between Housing an Asthma among School-Age Children](#),” October 2017.

²¹ Imari Z. Smith et al., “[Inequity in Place: Obesity Disparities and the Legacy of Racial Residential Segregation and Social Immobility](#),” 2019.

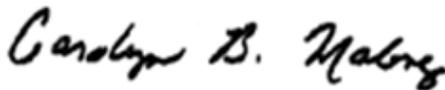
²² Matthew Desmond and Rachel Tolbert Kimbro, “[Eviction’s Fallout: Housing, Hardship, and Health](#),” February 2015.

Given what is at stake for families across the country, HUD should be taking steps to strengthen fair housing protections. Yet with this proposed rule, the Trump Administration has chosen to upend the collaborative, participatory, data-driven framework under the 2015 rule that would have enhanced accountability under the AFFH mandate in favor of a framework that fails at the most basic level to focus on fair housing.²³ In fact, under your direction, HUD has continued to take steps that undermine the Fair Housing Act, including: making housing less accessible for people with disabilities,²⁴ forcing immigrant families with mixed-status into unstable living conditions,²⁵ locking DACA recipients out of the American dream of homeownership,²⁶ making it harder for victims of housing discrimination to obtain justice,²⁷ forcing transgender individuals into unsheltered homelessness,²⁸ and undermining the religious freedoms of individuals seeking housing assistance.²⁹ These proposals align with similar efforts across other federal agencies, including a recent proposal to weaken banks' obligations to lend and invest in all of the communities in which they do business.³⁰ HUD's 2020 AFFH proposal would be a continuation of this Administration's deplorable track record on fair housing. We ask that you give our request full and fair consideration in accordance with all applicable laws and regulations, and strongly urge you to withdraw this rule. If you have any questions about this letter, please contact Alia Fierro with Chairwoman Waters' staff at (202) 225-4247.

Sincerely,



MAXINE WATERS
Chairwoman



²³ Washington Post, "[Ben Carson's disturbing retreat on fair housing](#)," January 2020.

²⁴ [85 FR 2354](#)

²⁵ [84 FR 20589](#)

²⁶ HousingWire, "[HUD declares FHA is no longer backing DACA mortgages](#)," June 2019.

²⁷ [84 FR 42854](#)

²⁸ HUD, "[Revised Requirements Under Community Planning and Development Housing Programs \(FR-6152\)](#)," Unified Regulatory Agenda, Spring 2019.

²⁹ [85 FR 8215](#)

³⁰ [85 FR 10996](#)

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