July 3, 2025

Via Federal eRulemaking Portal (Regulations.gov)
Brian Miller
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U.S. Department of Housing and Urban Development
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RE: Comment on Rescission of Affirmative Fair Housing Marketing Regulations, Docket No. FR–6533–P–01, RIN 2501–AE13, Document No. 2025-09991, 90, Fed. Reg. 23494 (June 3, 2025)

Dear Acting General Counsel Miller:

This comment letter is submitted by the Attorneys General of New York, California, Maryland, Arizona, Colorado, Connecticut, District of Columbia, Hawai'i, Illinois, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, and Washington in response to the above-referenced notice of rule rescission (the Rescission)[1] issued by the United States Department of Housing and Urban Development (HUD). The Rescission repeals the agency's Affirmative Fair Housing Marketing Regulations (collectively, AFHM Regulations).[2] As part of the implementing regulations of the Fair Housing Act of 1968 (FHA of 1968), the AFHM Regulations play a critical role in furthering HUD's obligation under the FHA of 1968 to affirmatively further fair housing by eradicating discriminatory housing practices and segregation in the United States' housing market.[3]

As the chief law enforcement officials of our States, we have a vested interest in ensuring equal access to housing and eradicating the harmful effects of segregation and discrimination in our communities. The AFHM Regulations require participants receiving federal funding through Federal Housing Administration (FHA) housing programs to pursue affirmative fair housing marketing policies in soliciting buyers and tenants, in determining their eligibility, and in concluding sales and rental transactions.[4] The AFHM Regulations were enacted after decades of housing discrimination and segregation by public and private actors. The AFHM Regulations have been in place since 1972 and have never been directly challenged. Yet now, HUD seeks wholesale repeal of these longstanding regulations without any replacement rule; any explanation of how HUD will affirmatively ensure that covered program participants are not engaging in discriminatory and unlawful housing marketing practices in violation of federal law; nor anywhere

[1] Rescission of Affirmative Fair Housing Marketing Regulations, 90 Fed. Reg. 23491 (June 3, 2025).
[2] Affirmative Fair Housing Marketing Regulations, 37 Fed. Reg. 75 (Jan. 5, 1972) (codified as amended at 24 C.F.R. pt. 200, subpt. M); Compliance Procedures for Affirmative Fair Housing Marketing, 44 Fed. Reg. 47,012 (Aug. 9, 1979) (codified as amended at 24 C.F.R. pt. 108).
[3] *See Texas Dep't. of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc. (Inclusive Communities)*, 576 U.S. 519, 539 (2015).
[4] 24 C.F.R. § 200.610.

close to legally sufficient or factually evinced explanations of its asserted justifications for this stunning reversal of over 50 years of federal housing policy and law. Accordingly, the undersigned Attorneys General strongly oppose the Rescission and for the reasons set out below, urge HUD to withdraw the Rescission in its entirety.

This comment sets forth:

I. Background on the Affirmative Fair Housing Marketing Regulations;
II. How the Rescission violates the Administrative Procedure Act, addressing each of HUD's justifications for the Rescission;
III. The continued importance of regulatory measures to affirmatively further fair housing, including affirmative marketing requirements, in the experience of the States; and
IV. Objections to HUD's shortened time period for submitting comments to the Rescission.

We have included numerous citations to supporting research in footnotes to this letter, including direct links to the research. Where the material cited is not publicly accessible, that material is attached to this comment. We direct HUD to review each of the materials cited, and request that the full text of each of the cited materials, along with the full text of our comment, be considered part of the formal administrative record for purposes of the Administrative Procedure Act (APA). If HUD will not consider these materials as part of the record in its current form, we ask that HUD notify us and provide us an opportunity to submit copies of the materials for the formal administrative record.

I. BACKGROUND ON THE AFFIRMATIVE FAIR HOUSING MARKETING REGULATIONS.

To understand the substantive and procedural defects that permeate the Rescission, it is critical to accurately understand the historical backdrop framing the FHA of 1968, HUD's statutory duty to affirmatively further fair housing and prevent discrimination and eliminate segregation through enforcement of affirmative marketing requirements, and HUD's previous regulatory efforts to satisfy that duty.

A. Executive Order 11063–Equal Opportunity in Housing: The Precursor to the Fair Housing Act of 1968 and HUD's Affirmative Obligations.

On November 20, 1962, President John F. Kennedy issued Executive Order 11063–Equal Opportunity in Housing.[5] Executive Order 11063 was a precursor to the FHA of 1968 and its subsequent implementing regulations, including the AFHM regulations now subject to HUD's Rescission. Executive Order 11063 expressly requires all federal agencies carrying out any federal financially assisted housing functions to "take all action necessary and appropriate to prevent discrimination because of race, color, creed, or national origin."[6] Executive Order 11063 marked the federal government's first formal action to address systemic housing discrimination and

[5] Exec. Order No. 11063, 27 Fed. Reg. 11,527 (Nov. 20, 1962).
[6] Exec. Order No. 11063, 27 Fed. Reg. 11,527 (Nov. 20, 1962).

segregation in the United States' housing market through affirmative anti-discrimination policies. Executive Order 11063, originally and as amended in 1994,[7] embodies the proposition that hundreds of years of systemic housing discrimination, segregation, and inequality will not dissipate without deliberate and affirmative intervention. This proposition, which informed the enactment of the FHA of 1968, was true then and remains true, despite the Rescission's baseless assertions to the contrary.

Executive Order 11063 and its implementing regulations are codified at 24 C.F.R. §§ 107, *et seq*. Executive Order 11063's implementing regulations expressly recognize both the longstanding policy of the federal government, as well as HUD's duty, to address and prevent housing discrimination by "administer[ing] its housing programs *affirmatively*, so as to achieve a condition in which individuals of similar income levels in the same housing market area have a like range of housing choices available to them regardless of their race, color, religion (creed), sex or national origin."[8]

B. The Fair Housing Act of 1968: the Statutory Foundation for HUD's Affirmative Housing Policies and Duties.

The FHA of 1968 codified and significantly expanded the federal government's role and responsibilities in remedying and affirmatively preventing unlawful housing discrimination. Building upon Executive Order 11063, the FHA extended anti-discrimination housing protections to nearly all public and private housing transactions.[9] The FHA of 1968 established a robust statutory and administrative enforcement framework, and a private right of action. Crucially, the FHA of 1968 imposes an affirmative obligation on "[a]ll executive departments and agencies [to] administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of [the FHA of 1968]"[10] and specifically requires HUD to "administer [its] programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [the FHA of 1968],"[11] mirroring the governmental policy and mandates to affirmatively further fair housing initially established under Executive Order 11063. The FHA of 1968 expressly enumerates certain proscribed discriminatory housing practices.[12]

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[7] Executive Order 11063 was partially amended by the issuance of Executive Order 12892–Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair housing, on January 17, 1994 by President William Clinton. Exec. Order No. 12892, 59 Fed. Reg. 2939 (Jan. 17, 1994). Executive Order 12892 expanded the definition of discrimination to cover "sex, disability, [and] familial status," provided HUD with enforcement powers, and established the President's Fair Housing Council to coordinate fair housing efforts through interagency monitoring and data sharing *Id.* § 606 (b), §§ 4-401-4, §§ 3-301-4. Additionally, Executive Order 12892 reaffirmed the precedent for affirmative agency action established by Executive Order 11063, directing all federal agencies to "administer their programs and activities…in a manner affirmatively to further the purposes of the [Fair Housing] Act." *Id.* § 1-101.

[8] 24 C.F.R. § 107.10 (emphasis added).

[9] 42 U.S.C. § 3608(f)(11).

[10] 42 U.S.C. § 3608(d).

[11] 42 U.S.C. § 3608(e)(5).

[12] 42 U.S.C. §§ 3604, *et seq.*

Critically, the FHA of 1968 expressly proscribes the "mak[ing], print[ing], or publish[ing], or caus[ing] to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination."[13] The inclusion of a textual prohibition of discriminatory marketing and advertising practices is both a recognition of the inherent importance of marketing in the housing industry and the role that discriminatory marketing, historically and contemporarily, plays in creating entrenched systemic housing discrimination and segregation. Thus, the FHA of 1968 transformed narrower executive directives into comprehensive and specific statutory and regulatory schemes to affirmatively further fair housing and dismantle systemic housing discrimination and segregation.

(i) The Fair Housing Act of 1968's Legislative History and Affirmative Mandate.

In addition to the FHA of 1968's plain text, its legislative history confirms Congress's intent for the federal government to take affirmative action to combat housing discrimination and segregation to further fair housing. Floor statements by the lead-democratic sponsor of the FHA of 1968, Senator Walter Mondale, and committee reports demonstrate that Congress sought to "promot[e] racially integrated neighborhoods" and achieve "truly integrated and balanced living patterns."[14] Senator Mondale condemned federal complicity in segregation and urged Congress to reverse that legacy through proactive housing policy.[15] The FHA of 1968 was a direct response to evidence of federal complicity in segregation in a report by the National Advisory Commission on Civil Disorders (Kerner Commission), warning that "[F]ederal housing programs must be given a new thrust aimed at overcoming the prevailing patterns of racial segregation."[16] The Kerner Commission found that both open and covert racial discrimination prevented African American families from obtaining better housing and moving to integrated communities.[17] Thus, in enacting the FHA of 1968, Congress recognized that government, at all levels, sanctioned housing segregation based on race and ethnicity.[18] That vision of affirmative, results-oriented intervention remains embedded in both the text and purpose of the FHA of 1968, underscoring the longstanding federal commitment to dismantling residential segregation through affirmative housing policies.

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[13] 42 U.S.C. § 3604(c).
[14] 114 Cong. Rec. 2275-76 (1968); S. Rep. No. 90-721, at 1838-39(1967).
[15] 114 Cong. Rec. 2278 (1968).
[16] Nat'l Advisory Comm'n on Civil Disorders, Report of The National Advisory Commission on Civil Disorders, 13 (1968).
[17] *Inclusive Communities*, 576 U.S. at 529-30.
[18] *See* 114 Cong. Rec. 2278 (1968) ("Statement of Sen. Mondale") ("A sordid story of which all Americans should be ashamed developed by this country in the immediate post-World War II era, during which the FHA, the VA, and other Federal agencies encouraged, assisted, and made easy the flight of white people from the central cities of white America, leaving behind only [African Americans] and others unable to take advantage of these liberalized extensions of credits and credit guarantees. Traditionally the American Government has been more than neutral on this issue. The record of the U.S. Government in that period is one, at best, of covert collaborator in policies which established the present outrageous and heartbreaking racial living patterns which lie at the core of the tragedy of the American city and the alienation of good people from good people because of the utter irrelevancy [sic] of color."); *see also* Amy E. Hillier, *Redlining and the Homeowners' Loan Corporation*, 29 JOURNAL OF URBAN HISTORY 394, 395 (2003).

These statutory provisions expressly require both HUD and all executive agencies to administer housing and urban development programs affirmatively and impose a proactive obligation on HUD to remedy segregation and expand fair housing opportunities consistent with the FHA of 1968 and the authority it confers. As a 1972 HUD opinion notes, the FHA of 1968's mandate to affirmatively further fair housing "is not a mere charter of authority…[but] imposes an affirmative duty."[19] Courts interpret the term "affirmatively furthering fair housing" to mean that HUD and its grantees must "fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation."[20] Furthermore, courts have consistently held that HUD and its grantees must take specific, result-oriented actions to "prevent the increase of segregation . . . of racial groups whose lack of opportunities the [FHA of 1968] was designed to combat," and have found HUD liable for passivity that perpetuates segregation.[21]

(ii) HUD's Obligations Extend Beyond Refraining from Discrimination.

HUD's obligation under 42 U.S.C. § 3608(e)(5) to administer its programs "in a manner affirmatively to further" fair housing imposes a proactive legal duty that goes well beyond simply avoiding discrimination. Courts and HUD regulations have consistently affirmed that this language requires HUD to take "meaningful actions" to dismantle segregation and expand access to housing opportunity.[22] As the First Circuit held in *N.A.A.C.P. v. HUD*, HUD has "an obligation to do more than simply not discriminate itself."[23] The Second Circuit likewise emphasized in *Otero* that agencies must "fulfill, as much as possible, the goal of open, integrated residential housing patterns."[24] The Third Circuit, in *Shannon v. HUD*, similarly required HUD to "utilize some institutionalized method" to assess racial impact during site selection.[25] Thus, failure to monitor or assess policies that may impede integration has been found to violate HUD's "affirmative furtherance obligations" under the FHA of 1968.[26]

HUD's own regulations and decades of guidance have uniformly implemented this mandate by requiring grantees to analyze patterns of segregation, identify barriers to fair housing,

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[19] *Civil Rights Authority and Responsibility of the Board*, 1972 WL 125725, at *34 (O.T.S. June 30, 1972).
[20] *N.A.A.C.P. v. Sec'y of Hous. & Urban Dev.* ("N.A.A.C.P. v. HUD"), 817 F.2d 149, 155 (1st Cir. 1987) (internal quotation marks and citations omitted); *see also Otero v. N.Y. City Hous. Auth*., 484 F.2d 1122, 1133-1134 (2d Cir. 1973) (holding that the FHA AFFH mandate imposes an "an obligation to act affirmatively to achieve integration in housing"); *Thompson v. U.S. Dep't of Hous. and Urban Dev.*, 348 F. Supp. 2d 398, 457 (D. Md. 2005).
[21] *Thompson v. HUD*, 348 F. Supp. 2d 398, 457 (D. Md. 2005) (HUD violated FHA "by failing to adequately consider regional approaches to ameliorate racial segregation in public housing in the Baltimore region"); *Otero*, 484 F.2d at 1134; *see also Alschuler v. HUD*, 686 F.2d 472, 481 (7th Cir. 1982); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 78 (D. Mass. 2002) (holding that failing to monitor and assess the impact of new policies on impediments to fair housing violates the AFFH).
[22] Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,272 (July 16, 2015).
[23] *N.A.A.C.P. v. HUD*, 817 F.2d 149, 154 (1st Cir. 1987).
[24] *Otero*, 484 F.2d at 1134.
[25] *Shannon v. HUD*, 436 F.2d 809, 821 (3d Cir. 1970).
[26] *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 77 (D. Mass. 2002).

set concrete goals, and take measurable actions to overcome the barriers.[27] HUD's long-standing view is that these affirmative obligations are not optional policy preferences but necessary to fulfill both the letter and the purpose of the FHA of 1968. The Rescission stands in stark, unexplained contrast.

(iii) The Affirmative Fair Housing Marketing Regulations.

The FHA of 1968 authorizes HUD to make rules to carry out its provisions, subject to notice and comment.[28] The AFHM Regulations are codified at 24 CFR parts 108 and 200, subpart M. The AFHM Regulations incorporate the affirmative policies of Executive Order 11063 and the FHA of 1968.[29] The AFHM Regulations require that "[e]ach applicant for participation in FHA subsidized and unsubsidized housing programs shall pursue affirmative fair housing marketing policies in soliciting buyers and tenants, in determining their eligibility, and in concluding sales and rental transactions."[30] The AFHM Regulations' primary requirements are codified at 24 C.F.R. § 200.620, and program participants are required to submit an Affirmative Fair Housing Marketing Plan (AFHMP) pursuant to 24 C.F.R. § 200.625.

The AFHMP requirement is rooted in the FHA of 1968's text and Executive Orders 11063 and 12892, and is designed to assist in fulfilling HUD's affirmative administration mandates by requiring participants in FHA subsidized housing programs to identify relevant market area population demographics, using a HUD provided template plan and worksheets, and develop a marketing plan that includes targeted outreach to identified minority groups belonging to protected classes that are least likely to know about and apply for housing opportunities.[31] HUD issued guidance clarifying that these marketing efforts are not quotas, but tools designed to overcome institutional and informational barriers.[32] HUD stated it "does not believe that the proposed rule could be interpreted to make affirmative marketing programs, designed to make available information which broadens housing choices for persons, a violation of the Fair Housing Act."[33] HUD further noted that "[n]othing in the amendments to the Fair Housing Act…would support a conclusion that Congress sought to make choice-broadening activities…unlawful."[34] Instead, these longstanding regulations operationalize the FHA of 1968's core purpose of expanding access to integrated housing and combatting proscribed marketing discrimination in the United States' housing market.

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[27] Community Development Block Grants, 53 Fed. Reg. 34,416, 34,468–69 (Sep. 6, 1988); Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. 1878, 1905–1916 (Jan. 5, 1995); Affirmatively Furthering Fair Housing, 80 Fed. Reg 42272-01, 42,355–56 (July 16, 2015); 2023 Proposed AFFH Rule, 24 C.F.R. § 5.150 (Apr. 2, 2025).
[28] Administration, 42 U.S.C. § 3608.
[29] 24 C.F.R. § 200.610 ("It is the policy of [HUD] to administer its FHA housing programs affirmatively, as to achieve a condition in which individuals of similar income levels in the same housing market area have a like range of housing choices available to them regardless of their race, color, religion, sex, handicap, familial status or national origin.").
[30] *Id.*
[31] 24 C.F.R. § 200.610; Rules and Regulations, 54 Fed. Reg. 3232-01 (Jan. 23, 1989); 24 C.F.R. § 200.600.
[32] *Alschuler v. Dep't. of Hous. Auth.* 515 F. Supp. 1212, 1234 (N.D. Ill. 1981).
[33] Rules and Regulations, 54 Fed. Reg. 3232-01 (Jan. 23, 1989).
[34] *Id.*

(iv) The AFHM Regulations Have Remained Unchallenged for Over Fifty Years.

Since their promulgation in 1972, HUD's AFHM regulations have remained in continuous force without being directly judicially challenged, reflecting their enduring legality, need, and widespread industry acceptance. The original rulemaking record reveals no disputes over legal authority, and subsequent HUD regulations have consistently reaffirmed AFHM as an uncontested element of HUD's fair housing framework.[35] Executive orders across multiple administrations explicitly endorsed HUD's affirmative obligations, reinforcing the AFHM regulations' role in achieving integrated housing.[36] When Congress amended the FHA of 1968 in 1988, it left the AFHM regulations intact, signaling legislative ratification of HUD's interpretation and regulatory implementation under the canon articulated in *Lorillard v. Pons*.[37] Rescinding the AFHM Regulations contradicts this long history of settled law and policy.

II. THE RESCISSION VIOLATES THE ADMINISTRATIVE PROCEDURE ACT.

The Rescission is a categorical abandonment of HUD's statutory obligation to prevent discriminatory housing marketing practices and upends decades of standard industry preventative anti-discrimination practices in housing programs receiving federal financial assistance. The Rescission ignores the plain text and legislative history of the FHA of 1968 and the AFHM Regulations, and it shirks HUD's obligation under the APA to provide rational, logical, and factual bases supported by reasoned analysis for its abrupt reversal of over 65 years of federal government housing policy. Instead of affirmatively furthering fair housing as statutorily required, HUD seeks to set aside a critical mandate of the FHA of 1968 under the cover of erroneous legal interpretations and assertions of "policies" designed to block HUD from monitoring and preventing discriminatory marketing practices.

The procedural requirements imposed by the APA ensure federal agencies remain accountable to the public and the courts for their actions.[38] The APA's procedural requirements apply in equal force to agency rulemaking and rule rescissions.[39] The APA requires agencies to engage in reasoned decision making by providing adequate reasons for its decisions and adequate justifications supported by relevant data and facts.[40]

Where an agency engages in a significant reversal of a prior policy through rulemaking, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[41] In this context, the Supreme Court has held that a reasoned

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[35] Regional Administrators et al., 37 Fed. Reg. 12, 420 (Jun. 23, 1972); 24 C.F.R. § 5.150.
[36] Exec. Order No. 11063, 27 Fed. Reg. 11527 (Nov. 20, 1962); Exec. Order No. 12892, 59 Fed. Reg. 2939 (Jan. 17, 1994).
[37] *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change").
[38] *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).
[39] 5 U.S.C. § 551(5); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983).
[40] *Michigan v. EPA*., 576 U.S. 743, 750 (2015); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).
[41] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

explanation sufficiently demonstrates that that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates."[42] Where an agency fails to adequately explain its rationale for reversing a previous policy, it has acted arbitrarily and capriciously in violation of the APA.[43] When engaged in rulemaking, including the rescission of rules, an agency acts arbitrarily and capriciously when it relies on factors which Congress did not intend it to consider, fails to consider an important aspect of the problem Congress sought to address, offers an explanation for its decision that runs counter to the evidence before the agency, or acts in a manner so implausible it could not be ascribed to a difference in view or the product of agency expertise.[44]

Agency actions, findings, or conclusions that are arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law are unlawful and must be set aside by a reviewing court.[45] The same result must follow where agency actions, findings, or conclusions are done without observance of procedures required by applicable law.[46] Under these standards, the Rescission violates the APA for several reasons, outlined here and addressed in turn below.

First, HUD erroneously asserts that the AFHM Regulations are inconsistent with HUD's authority under the FHA of 1968 and Executive Order 11063. The FHA of 1968 expressly proscribes discriminatory housing marketing practices. Both the FHA of 1968 and Executive Order 11063 plainly require HUD to affirmatively further fair housing by combatting and preventing discrimination, which the AFHM Regulations do by ensuring federally-subsidized housing program participants are marketing in a non-discriminatory manner and ensuring equal outreach efforts to groups historically discriminated against and least likely to know about and apply for federally subsidized housing. Thus, the Rescission's assertion is arbitrary and capricious and not in accordance with law under 5 U.S.C. § 706(2)(A).

Second, HUD erroneously concludes that the AFHM Regulations violate the Equal Protection Clause of the U.S. Constitution. The affirmative marketing practices required by the AFHM Regulations are entirely consistent with the Equal Protection Clause. The regulations require housing providers participating in certain federally funded housing programs, after appropriate market analysis, to engage in outreach to statutorily protected classes to ensure equal opportunity. The AFHM Regulations expand the pool of applicants, without creating disparities or excluding any other applicants, thereby addressing the history of discriminatory and exclusionary barriers and practices recognized by Congress in its enactment of the FHA of 1968. Contrary to the Rescission's mischaracterizations, the AFHM Regulations do not impose housing acceptance quotas based on protected class status.

Third, HUD ignores the mandates set out by Congress in the FHA of 1968 and erroneously asserts that the original rule would have been born of an unconstitutional delegation. In fact, the long-standing original rule is wholly within the scope of the delegation, as described below. Any

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[42] *Id.* at 515.
[43] *Id.* (quoting *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005)).
[44] Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43 (1983).
[45] 5 U.S.C. § 706(2)(A).
[46] 5 U.S.C. § 706(2)(D).

rescission of the rule, without an examination of how HUD will otherwise meet its statutory mandates to affirmatively further fair housing, including through the affirmative prevention of unlawful discriminatory marketing practices, departs from what Congress plainly stated HUD must do.

Fourth, HUD asserts a new "Color-Blind Policy" and "moral considerations" as bases for the Rescission. This is a platitude with no nexus to law or fact, as the AFHM Regulations neither disfavor any protected group nor sanction any racial preferences. The AFHM Regulations merely attempt to root out and prevent unlawful discriminatory advertising practices, consistent with HUD's obligations under the FHA of 1968.

Fifth, HUD argues that AFHM Regulations impose an economic burden on recipients, without engaging in any actual examination of whether they increase the costs of recipients' marketing practices or prevent the economic burden incurred from discrimination and discrimination liability. HUD's stated desire to deregulate wherever possible does not come close to satisfying the reasoned analysis standard required under the APA to avoid unlawful arbitrary and capricious agency action.

Sixth, HUD asserts that the AFHM Regulations seek particular statistical outcomes in the distribution of housing. This is inaccurate. The AFHM Regulations do not seek or require particular statistical outcomes. The AFHM Regulations ensure that FHA program participants are reaching populations historically discriminated against and least likely to know about and apply for housing opportunities. The AFHM Regulations ensure HUD is carrying out its obligations under the FHA of 1968, prevent unlawful discrimination before it occurs, and are beneficial measures that further the FHA of 1968's fair housing goals by ensuring a wider pool of applicants without artificial limitations based on protected characteristics.

Finally, in rescinding the AFHM Regulations, HUD improperly fails to address the negative impact on reliance interests engendered by over 50 years of consistent federal law and policy.

For these reasons, the Rescission must be withdrawn and the longstanding AFHM Regulations should be left in place.

A. The Longstanding AFHM Regulations are Consistent with Executive Order 11063 and the Fair Housing Act of 1968's Text, Legislative History, and Case Law.

HUD's first asserted basis for the Rescission is that the AFHM Regulations are inconsistent with HUD's legal authority under Executive Order 11063 and the FHA of 1968. HUD's Rescission of the AFFM regulations is arbitrary and capricious because its assertion rests on a mischaracterization of the text of the FHA of 1968, the AFHM Regulations, and what the law and regulations require. The Rescission asserts that the AFHM Regulations "are not about preventing discrimination; rather, they require applicants to affirmatively attract minority persons and to do so through minority publications or other minority outlets."[47] HUD asserts that "requir[ing] private

[47] *See* Rescission of Affirmative Fair Housing Marketing Regulations, 90 Fed. Reg. 23491 (June 3, 2025).

parties to sort individuals by race and engage in outreach based on race" runs contrary to the "race-neutral and purely prohibitory requirements of the [FHA of 1968]."[48] HUD also weakly asserts that for these same reasons, the AFHM Regulations are inconsistent with Executive Order 11063.[49] Agency action premised on legal analysis that is at odds with the plain text of applicable law is owed no deference, necessarily fails the reasoned analysis standard required under the APA and is subject to being set aside as arbitrary and capricious and not in accordance with law.[50]

As discussed above, Executive Order 11063, as amended by Executive Order 12892,[51] was the predecessor to the FHA of 1968. Congress enacted the FHA of 1968, enumerating, codifying, and expanding upon the affirmative provisions against discrimination in housing, first enunciated in Executive Order 11063. The FHA of 1968 requires that "[T]he Secretary of Housing and Urban Development shall . . . administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter."[52] Thus, both Executive Order 11063 (as amended) and the FHA of 1968 are conferrals of authority and contain express language requiring HUD to administer its programs in a manner to affirmatively further fair housing policies through the elimination and prevention of proscribed discrimination.[53] Even prior to Executive Order 11063's amendment, it required HUD's predecessor, the Housing and Home Finance Agency, and "all other executive departments and agencies use their good offices and to take other appropriate action permitted by law, including the institution of appropriate litigation, if required, to promote the abandonment of discriminatory practices."[54]

Courts have long recognized that the term "affirmatively furthering fair housing" means that HUD and its grantees must "do more than simply refrain from discriminating (and from purposely aiding discrimination by others)."[55] Courts interpret the term "affirmatively furthering fair housing" to mean that HUD and its grantees must take actions "to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation[.]"[56] The subsequent codification of Executive Order 11063 states that the purpose of the regulations is "also intended to assure compliance with the policy of this Department to administer its housing programs *affirmatively*, so as to achieve a condition in which individuals of

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[48] *Id.*
[49] *Id.*
[50] *Union of Concerned Scientists v. Wheeler*,954 F.3d 11, 21-22 (1st Cir. 2020) (citing *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985)).
[51] Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing, 59 Fed. Reg. 2939 (Jan. 17, 1994).
[52] 42 U.S.C. § 3608(d) and (e)(5).
[53] *See* 42 U.S.C. §§ 3608(d); (e)(5) ("The Secretary of Housing and Urban Development shall . . . administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter"); Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing, 59 Fed. Reg. at Section 2-201("The primary authority and responsibility for administering the programs and activities relating to housing and urban development affirmatively to further fair housing is vested in the Secretary of Housing and Urban Development.").
[54] Equal Opportunity in Housing, 27 Fed. Reg. 11527, 11528 (Nov. 24, 1962).
[55] *N.A.A.C.P. v. Sec'y of Hous. & Urban Dev.* ("*N.A.A.C.P. v. HUD*"), 817 F.2d 149, 155 (1st Cir. 1987).
[56] *Id.*; *see also Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1133-1134 (2d. Cir. 1973) (holding that the FHA AFFH mandate imposes an "an obligation to act affirmatively to achieve integration in housing"); *Thompson v. HUD.*, 348 F.Supp.2d 398, 457 (D. Md. 2005).

similar income levels in the same housing market area have a like range of housing choices available to them regardless of their race, color, religion (creed), sex or national origin."[57] Accordingly, it is inaccurate to characterize the affirmative requirements of either the FHA of 1968 or Executive Order 11603 as "purely prohibitory" when their text, legislative intent, and case law recognize and define HUD's duty as doing more than just passively preventing discrimination. HUD's functions are not just reactionary, they are also affirmatively to prevent, reduce, and eliminate discrimination.

It is plainly within HUD's purview to regulate advertising. The FHA of 1968 makes it unlawful "[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination."[58] Selective marketing practices, such as a deliberate failure to market to members of a protected class, are a form of discrimination intended to promote segregation. Further, "noncompliance with relevant affirmative fair housing marketing requirements contained in Department programs and regulations"[59] is also discrimination. Characterizing the purpose of the AFHM Regulations as regulations that address "informational disparities" versus race discrimination, is a false distinction. This more insidious form of discrimination was pervasive enough that Congress expressly proscribed it and HUD found it necessary to promulgate regulations providing that the failure to comply with AFHM Regulations constitutes unlawful discrimination.[60] By refusing to regulate and monitor the marketing plans of participants in federally-subsidized housing programs to ensure compliance with the FHA of 1968, HUD unlawfully abdicates its duties under the FHA of 1968 and would, in effect, allow discriminatory advertising to proliferate.

The Rescission asserts that the sanctions for violating the AFHM Regulations are not authorized under the FHA of 1968. While the Rescission cites to *U.S. v. Mid-America Apartment Communities, Inc*. ("*Mid-America*")[61] to support its assertion that "HUD's rulemaking authority is cabined to those rules necessary to prevent discrimination," HUD takes the court's findings out of context. In *Mid-America*, the federal government, in a civil action under the FHA of 1968 against an apartment owner, argued that the court must apply a burden-shifting framework that HUD uses in administrative enforcement actions for determining inaccessibility of buildings in violation of the FHA of 1968.[62] While the court found that it was not bound to apply the burden-shifting framework as HUD argued, it also found that the HUD guidelines still played a limited role in proving housing discrimination on the basis of a physical disability.[63] The court stated that "in a civil action that is completely independent of the agency's enforcement apparatus[,]" it is "the Court's job, not HUD's, to interpret the accessibility requirements of the [FHA of 1968]. Of course,

[57] 24 C.F.R. § 107.10 (emphasis added).
[58] 42 U.S.C. § 3604(c).
[59] 24 C.F.R. § 107.15(3).
[60] *Id.*
[61] 247 F.Supp.3d 30, 35 (D.D.C. 2017).
[62] *Id.* at 34.
[63] *Id.* at 35.

in so doing, the Court may find it instructive to hear what design features have tended to make dwellings accessible in HUD's experience enforcing the statute."[64]

Mid-America does not overrule established precedent interpreting HUD's obligations to affirmatively further fair housing in its policies and programs, nor did it invalidate the burden-shifting guidelines at issue in the case. Instead, it simply stated that it had no obligation to follow those guidelines where the court is not reviewing an agency action.[65] As such, *Mid-America* is inapplicable to the AFHM Regulations. Further, the AFHM Regulations ensure that those participating in federally subsidized housing programs are not using marketing practices that discriminate by failing to disseminate information to all potential buyers or tenants, including those in traditionally marginalized groups the FHA of 1968 was enacted to protect.

Contrary to the Rescission's assertion, the AFHM Regulations in no way require favoring one racial group over another, but rather require that an applicant must "[c]arry out an affirmative program to attract buyers or tenants, *regardless* of sex, handicap or familial status, *of all minority and majority groups* to the housing for initial sale or rental."[66] The AFHM Regulations do not require disparities in advertising to any other group. Rather, they create an affirmative obligation, consistent with the FHA of 1968's prohibition on discriminatory advertising and HUD's affirmative duty, to ensure that federally subsidized housing program participants are not solely marketing to certain groups to the exclusion of all others, thereby addressing a well-documented, historical discriminatory housing industry practice that the FHA of 1968 was enacted to redress and prevent. There is no advantage or disadvantage on account of race as claimed by the Rescission. The AFHM Regulations operate well within HUD's statutory authority and duty, corroborated by the legislative history and established case law.

In HUD's rushed attempt to mischaracterize and overstate the sanction provisions of the AFHM Regulations, the Rescission fails to address the fact that the AFHM Regulations' regulatory enforcement scheme at 24 C.F.R. § 108, *et seq.*, emphasize prevention through preclearance, compliance, and procedural safeguards that are designed to avoid discrimination and compliance issues in the first instance and provide program participants with opportunities, as well as HUD technical assistance, to cure compliance issues prior to sanctions ever becoming a threat. In line with the longstanding policies of affirmatively preventing housing discrimination imbued in the FHA of 1968, and the AFHM Regulations, program participants are required to submit an AFHMP, supplied by HUD, with their initial application and both new and existing program participants must provide a "Notification of Intent to Begin Marketing" no later than ninety (90) days prior to engaging in any sales or rental marketing activities, for review and approval by HUD.[67] If HUD's pre-review determines that the submitted AFHMP or a previously approved AFHMP requires modification to satisfy any of the requirements and/or objectives of the FHA of 1968 or AFHM Regulations, HUD may initiate a pre-occupancy conference to proactively meet with the program participant to provide technical assistance and effectuate any needed compliance modifications.[68]

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[64] *Id*.
[65] *Id.*
[66] 24 C.F.R. § 200.620(a) (emphasis added).
[67] Affirmative Fair Housing Marketing Plan, 24 C.F.R. § 200.625; Pre-Conference Conference, 24 C.F.R. § 108.15; Monitoring Office Responsibility for Monitoring Plans and Reports, 24 C.F.R. § 108.20.
[68] 24 C.F.R. § 108.15.

Further, for later compliance issues, the regulatory framework provides for continued monitoring, notice and opportunity to cure compliance issues, ongoing compliance reviews, and HUD technical assistance for program participants facing compliance issues.[69]

The Rescission neither address the preventive regulatory framework nor provides any evidence or argument as to why sanctions are inappropriate, where voluntary compliance cannot be secured, other than a throwaway citation to *Whitman v. American Trucking Associations, Inc.*[70] Based on the language of *Whitman* cited, HUD appears to argue that failure to comply with an AFHMP should not be considered discrimination or subject to HUD's enforcement authority. HUD's reliance on *Whitman* is misplaced. The alleged elephant hiding in "the mousehole" at issue in *Whitman* concerned whether the United States Environmental Protection Agency (EPA) could consider costs in setting national ambient air quality standards pursuant to its authority under the Clean Air Act ("CAA").[71] In finding that the CAA provision in question did not permit the EPA to consider implementation costs, the Court found that the EPA could not show a "textual commitment" that implementation costs should be included after considering amendments to the CAA and other provisions and the Court "refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted."[72] Unlike in *Whitman*, the text of the FHA of 1968 expressly proscribes discriminatory marketing practices, and Executive Order 11603 very clearly and consistently states that HUD must act affirmatively to further fair housing and "take other appropriate action permitted by law . . . to promote the abandonment of discriminatory practices."[73] This is in line with the broad authority granted to the HUD Secretary to "make such rules and regulations as may be necessary to carry out his functions, powers, and duties."[74] As stated above, courts have held that these duties include "to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation[.]"[75] Therefore, HUD has ample authority construing the FHA of 1968, Executive Order 11603, and its implementing regulations as requiring and providing HUD with ample authority to create enforcement mechanisms and penalties for unlawful discriminatory practices subject to and proscribed by the FHA of 1968.

B. The AFHM Regulations are Consistent with the Broad Principles of Equal Protection Jurisprudence.

HUD's Rescission of the AFFM regulation is arbitrary and capricious because its rests on a misreading of equal protection jurisprudence. The Supreme Court's holding in *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll. (SFFA)*[76] has no bearing on the AFHM

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[69] 24 C.F.R. § 108.20; Civil Rights/Compliance Reviewing Office Compliance Responsibility, 24 C.F.R. 108.21; Compliance Reviews, 24 C.F.R. § 108.40.
[70] 531 U.S. 457 (2001).
[71] *Id.* at 462.
[72] *Id.* at 467-68.
[73] Executive Order 11063, 27 Fed. Reg. 11527 §102 (Nov. 24, 1962).
[74] 42 U.S.C. § 3535(d).
[75] *N.A.A.C.P. v. HUD*, 817 F.2d at 155 (internal quotation marks and citations omitted); *see also Otero*, 484 F.2d at 1133 (holding that the FHA AFFH mandate imposes an "an obligation to act affirmatively to achieve integration in housing"); *Thompson*, 348 F. Supp. 2d at 457.
[76] 600 U.S. 181 (2023).

regulations. The Rescission will undermine what limited progress has been made, and prevent the further progress required to remediate the entrenched legacy of racial discrimination and segregation across broad swaths of society and industries, including housing, and for that reason HUD's Rescission of the AFFM Regulations is arbitrary and capricious.

SFFA concerned university admission practices that used race as a "determinative tip" in favor of certain applicants.[77] The most important fact that distinguishes *SFFA* is that the AFHM Regulations do not impose race-based preferences or advantages on who can apply to federally subsidized housing, do not require that marketing *only* be targeted to members of a protected class, and do not impose any sort of quotas related to marketing practices or who will receive housing after applying. The marketing practices required by the AFHM Regulations are entirely consistent with the text and purpose of the FHA of 1968 and with the Equal Protection Clause. In *South-Suburban Hous. Ctr. v. Greater South Suburban Bd. of Realtors*, which involved a direct challenge to an affirmative marketing plan as violating the FHA of 1968, the Court found that in "addition to furthering the Fair Housing Act's goal of integration, we are of the opinion that the A[ffirmative] M[arketing] P[lan] also advances the purpose of the Act through making housing equally available to all by stimulating interest among a broader range of buyers."[78] The Court also found that the affirmative marketing plan in question was not an improper statement of racial preferences because it "merely directs additional promotional and advertising toward a racial group that would normally have little interest in the respective homes. It contains no racial quota or other provision purporting to make race a factor in a decision concerning who would be permitted to see or purchase the Apache Street homes."[79] This singular case is especially significant precedent, because the AFHMP at issue was created by South-Suburban Housing Center, a non-profit that purchased and sold homes in a predominantly black community in order to "promote and encourage multiracial communities in the South Suburbs' of Chicago."[80] Their affirmative marketing plan was attached as an appendix to their real estate contracts with realtors and required that realtors engage in specific "outreach activities to attract white home seekers" given that "white home seekers are not likely without special outreach efforts to be attracted to the Apache St. home."[81]

Unlike the admissions policies in *SFFA*, the plain text of the AFHM Regulations only requires a marketing plan designed to attract buyers and renters from all minority and majority groups in the relevant market area and provides guidance for how to reach minority groups through advertising. *SFFA* did not hold such race-neutral policies unlawful, including race-neutral policies that are designed in part, to achieve diversity.[82] The AFHM Regulations are responsive to statutory obligations and designed to ensure that program participants in a federally-subsidized housing programs offer equal housing opportunities regardless of race, color, national origin, religion, sex,

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[77] *SFFA*, 600 U.S. at 195.
[78] 935 F.2d 868, 884 (7th Cir. 1991).
[79] *Id.* at 884-85.
[80] *Id.* at 872-73.
[81] *Id.* at 873.
[82] In fact, the Supreme Court has encouraged "draw[ing] on the most promising aspects of . . . race-neutral alternatives" to achieve "the diversity the [institution] seeks." *Grutter v. Bollinger*, 539 U.S. 306, 339(2003). *SFFA* did not overrule *Grutte*r, nor did it call into question that decision's approval of race-neutral measures to increase student body diversity.

familial status, or disability through non-discriminatory marketing of available housing opportunities to minority and non-minority groups that are least likely to apply for occupancy.

Moreover, HUD's assertion that there is no compelling governmental interest for the AFHM Regulations is also inconsistent with *SFFA*. First, a compelling governmental interest must be demonstrated where the government imposes a race-based preference as a means to achieve its asserted objective. As just described above and throughout this comment letter, the AFHM Regulations do not impose a race-based preference of the kind that the Supreme Court confronted in *SFFA*. Setting this critical distinction aside, the *SFFA* Court maintained its recognition that where race-based government action must be justified by a compelling interest, that requirement is met where the action is intended to remediate "specific, identified instances of past discrimination that violated the Constitution or a statute."[83] Although the FHA of 1968 abolished the most pernicious forms of housing discrimination over 50 years ago, housing discrimination and segregation remains entrenched throughout the United States.[84] Just ten years ago, the Supreme Court reiterated the FHA of 1968's importance and continued role in moving our nation toward a more integrated society.[85] Historically, discriminatory practices included explicit and overt discrimination in housing marketing and advertising, such as advertising that expressly prohibited members of protected classes or marketing that targeted certain members of protected classes. It is because of this form of discrimination that the AFHM Regulations are necessary as a lawful remedial and preventative measure to eliminate housing discrimination and segregation as required by the FHA of 1968, which meets the compelling interest requirement articulated in *SFFA*.[86]

Finally, although *South Suburban Hous. Ctr.* involved a challenge to an affirmative marketing plan, the AFHM Regulations themselves were not at issue. There have been no legal challenges to the AFHM Regulations since they were enacted over 50 years ago, further evincing their race-neutrality and consistency with the broad principles of equal protection, contrary to the Rescission's erroneous assertions.

C. The FHA and AFHM Regulations Are Not an Unconstitutional Delegation of Legislative Authority.

HUD's justification for the Rescission is arbitrary and capricious because it is predicated on a speculative argument that the AFHM regulations are not permitted by the FHA of 1968 because they are too broad and create burdensome affirmative obligations not supported by the text of the FHA of 1968.[87] HUD argues that if the FHA of 1968 is read to permit the AFHM Regulations then it would constitute an unlawful delegation of congressional legislative authority in violation of the U.S. Constitution.[88] To support these conclusory assertions, HUD cites to *Gundy*

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[83] *SFFA*, 600 U.S. at 207.
[84] Stephen Menendian, Samir Gambhir & Arthur Gailes, *Twenty-First Century Racial Residential Segregation in the United States*, OTHERING AND BELONGING INSTITUTE (June 21, 2021), available at https://belonging.berkeley.edu/roots-structural-racism.
[85] *Inclusive Communities*, 576 U.S. at 547.
[86] HUD itself has defined failing to affirmatively market as a form of discrimination. *See* 24 C.F.R. § 107.15(3).
[87] *See* Rescission of Affirmative Fair Housing Marketing Regulations, 90 Fed. Reg. 23491 (June 3, 2025).
[88] *Id.*

v. U.S.[89] and *Wayman v. Southard.*[90] HUD again fails to engage in any reasoned analysis sufficient to explain or connect these decisions to its asserted justification that the AFHM Regulations are an unconstitutional delegation of congressional authority. HUD's argument is unsupported by law and inconsistent with more than five decades of unchallenged agency regulatory policy.

Article I, Section 1 of the United States Constitution provides that "[a]ll legislative Powers herein granted shall be vested in [] [the] Congress of the United States.[91] However, it is well settled that Congress may legislatively authorize executive agencies to implement and administer federal law, so long as the enabling legislation provides "an intelligible principle to which the person or body authorized to [act] is directed to conform."[92] Congress has provided HUD with express rulemaking authority and an intelligible principle to guide that rulemaking under the FHA of 1968. Under 42 U.S.C. §§ 3608(e)(5) Congress has directed HUD to "administer programs and activities relating to housing and urban development in a manner affirmatively to further these policies" of the FHA of 1968. Further, the FHA of 1968 expressly enumerates and proscribes discrimination in housing marketing practices.[93] Together, these provisions of law constitute a clear and constitutionally sufficient intelligible principle and delegation of authority to HUD to implement and enforce the FHA of 1968.

The AFHM Regulations, first issued in 1972, implements these congressional directives. They require participants of covered federal housing programs under the FHA of 1968 to analyze relevant market areas and conduct housing opportunity marketing in a manner to prevent unlawful marketing discrimination and ensure equal housing opportunity, particularly for groups historically excluded from and least likely to apply for housing opportunities. The AFHM Regulations are specified in scope, application procedures, required documentation, and compliance standards. The AFHM Regulations do not expand or go beyond HUD's statutory authority and obligations under the FHA of 1968; they are in fact responsive to the affirmative mandates and obligations the FHA of 1968 places on HUD to implement and enforce the law.

The Rescission appears to proffer *Gundy* in support of its legal conclusion that the AFHM regulations lack an intelligible principle. In fact, *Gundy* reaffirmed the principle that Congress may delegate regulatory power where it articulates a general policy and directs the agency to act accordingly.[94] The FHA of 1968's text and over 50 years of consistent administrative implementation confirm that the AFHM Regulations fall well within this standard and are a constitutional delegation of authority on HUD to implement and enforce federal law. HUD's reliance on the Supreme Court's 1825 decision in *Wayman v. Southard* to support its assertion that AFHM regulations exceed permissible delegation is also misplaced.[95] The nondelegation doctrine, as articulated in *J.W. Hampton* and *Gundy*, makes clear that Congress may delegate regulatory authority to implement and enforce federal law so long as it provides guidance and is not delegating

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[89] 588 U.S. 128, 135 (2019).
[90] 23 U.S. 1, 6 (1825).
[91] U.S. Const. Art. 1, §1.
[92] *Whitman v. American Trucking Assoc.*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co. v. U.S.*, 276 U.S. 394, 409 (1928).
[93] 42 U.S.C. § 3604(c).
[94] *Gundy,* 588 U.S. 129*,* at 145.
[95] *Wayman,* 23 U.S. at 1.

legislative authority. That standard is met here. The AFHM Regulations comport with and further the express statutory objectives and directives of the FHA of 1968 by ensuring that entities receiving federal financial assistance in government housing programs are not discriminating on the basis of race, color, religion, sex, disability, familial statue, or national origin.

D. HUD's "Colorblind Policy" Is Not a Relevant Factor Under the APA and Inconsistent with HUD's Statutory Obligations Under the Fair Housing Act of 1968.

The Rescission's announcement and adoption of what HUD characterizes as a "color-blind" approach to policy implementation is also arbitrary and capricious. According to HUD, its obligation under FHA of 1968 is limited to preventing intentional discrimination, and race-conscious outreach or monitoring efforts are improper. HUD's interpretation, however, is inconsistent with statutory text, legislative history, and longstanding judicial precedent interpreting the FHA of 1968.

Congress enacted the FHA of 1968 to eradicate housing segregation and promote integration, thus "replac[ing] the ghettos by truly integrated and balanced living patterns."[96] Aside from hundreds of years of documented *de jure* and *de facto* race-based housing discrimination, one of the primary catalysts that drove Congress's enactment of the FHA of 1968 was a report by the Kerner Commission, which identified residential segregation and unequal housing conditions as a "significant, underlying causes" of racial unrest.[97] The Kerner Commission found both overt and covert discrimination prevented African American families from obtaining better housing and moving to integrated communities.[98] Congress recognized the federal government's historic legacy and role in the sanctioning and proliferation of racial segregation, empowering and mandating HUD to take affirmative steps to dismantle and prevent it.[99]

The FHA of 1968 does not merely prohibit intentional discrimination. Rather, it also imposes affirmative obligations on HUD to take meaningful action to address the legacy of government-sanctioned segregation and to expand access to integrated housing. Courts have consistently recognized that race-conscious measures may be lawfully employed to address historical and ongoing disparities, provided they are narrowly tailored to achieve a compelling interest.[100] The AFHM Regulations satisfy this standard. They require outreach, marketing, and leasing strategies targeted towards populations historically excluded from federally assisted housing programs, without relying on quotas or racial classifications.

The continuing effects of historical housing discrimination, including redlining, racial steering, and other discriminatory practices recognized and expressly prohibited by the FHA of 1968, underscore the continued necessity of proactive anti-discrimination measures like those required by the AFHM Regulations. Although redlining has been prohibited for decades, its legacy

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[96] *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 3422 (1968)).
[97] *Inclusive Communities*, 576 U.S. at 529-30.
[98] *Id.*
[99] *See* 114 Cong. Rec. 2278 (1968).
[100] *See Grutter v. Bollinger*, 539 U.S. 306 (2003).

persists in the form of housing instability and disinvestment in majority-Black neighborhoods.[101] Studies confirm that people of color remain disproportionately affected by housing insecurity, while majority-white neighborhoods continue to receive a greater share of private and public investment.[102] These disparities are precisely the types of systemic conditions that the FHA of 1968 was enacted to address. Rescinding the AFHM Regulations would eliminate a critical mechanism for confronting these enduring inequities.

HUD's statutory duty to affirmatively further fair housing requires more than passive enforcement post-discrimination; it mandates intentional and ongoing efforts to expand fair housing opportunities and promote integration in line with the FHA of 1968. As the First Circuit explained, the affirmatively furthering fair housing mandate compels HUD and its grantees to "do something more than simply refrain from discriminating (and from purposely aiding discrimination by others)."[103] The duty includes taking steps "to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation."[104]

Federal courts have repeatedly reaffirmed that this obligation is both affirmative and ongoing. In *Shannon v. HUD,* the Third Circuit held that HUD must "utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties" under the FHA of 1968.[105] In *Langlois v. Abington Hous. Auth.*, the District of Massachusetts found a public housing authority in violation of the affirmatively furthering fair housing requirement for failing to assess how its policies affected racial minorities.[106] Similarly, in *Thompson v. HUD*, the court found that HUD had failed to meet its affirmatively furthering fair housing obligations by allowing the continued concentration of public housing in racially segregated areas, despite the availability of regional alternatives.[107]

In asserting a "color-blind" policy as justification for the Rescission, HUD willfully ignores the significant and persistent issues that informed the FHA of 1968 and eliminates the very tools necessary to fulfill its statutory mandate. Systemic demographic-based housing disparities remain widespread, and removing structured compliance mechanism grounded in a valid exercise of Congressional authority undermines HUD's responsibilities and ability to identify and address the discrimination the agency is required to eliminate.

E. HUD Has Provided No Evidence to Support its Asserted Justifications Concerning Economic Burden.

The fifth justification asserted in the Rescission for the purpose of "decreasing burden" on program applicants and participants is also arbitrary and capricious. HUD states that "it is the

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[101] *See* Emily Peiffer, Urban Institute, *The Ghosts of Housing Discrimination Reach Beyond Redlining,* (Mar. 15, 2023), https://www.urban.org/stories/ghosts-housing-discrimination-reach-beyond-redlining.
[102] *Id.*
[103] *N.A.A.C.P. v. HUD*, 817 F.2d at 155.
[104] *Id.*; *see also Otero*, 484 F.2d at 1133-34; *Thompson*, 348 F.Supp.2d at 457.
[105] 436 F.2d 809, 821 (3d Cir. 1970).
[106] 234 F.Supp.2d 33, 78 (D.Mass. 2002).
[107] 348 F.Supp.2d 398 (D. Md. 2005).

policy of the Department not to burden applicants unless they have engaged in discrimination," and that "[e]ven if there are benefits associated with the affirmative outreach in the AFHM regulations, the Department's policy is that it is wrong to put the economic burden on innocent private actors to achieve those benefits."[108] "[A]n agency rule [is] arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[109] HUD's justification is arbitrary and capricious for three distinct reasons.

First, HUD has failed to provide any data to demonstrate or prove the alleged economic burdens it asserts the Rescission will offset. Second, and relatedly, HUD has failed to consider the reality that marketing is an expense covered program participants will always incur, regardless of the AFHM Regulations. All marketing is necessarily "affirmative outreach" in nature, and as such, HUD has failed to demonstrate that rescinding the AFHM Regulations will result in the reduction of economic costs associated with affirmative marketing, let alone demonstrated that the cost of affirmative marketing outweighs the benefits it produces in combatting and preventing discrimination and segregation. Finally, the Rescission fails to consider an important aspect of the problem the FHA of 1968 and the AFHM Regulations were implemented to address: the economic burden of systemic housing discrimination and segregation on individuals, communities, and the broader economy, as well as troves of evidence that substantiate these burdens.

HUD fails to provide any meaningful data on the economic burdens it asserts the Rescission will reduce. Under the AFHM Regulations' regulatory framework, HUD receives and approves the AFHMPs that it now takes issue with on purported economic grounds. HUD thus presumedly has access to data and/or information concerning the economic costs on federally funded program participants associated with AFHMP-related activities. But the text of this justification only references economic costs associated with "affirmative outreach." Later in the Rescission, HUD provides an estimate of regulatory costs, stating that the AFHMP requirements require 12,102 hours of effort annually for approximately 5,733 respondents.[110] Yet HUD has not provided any factual data to support its contention that these hours, amounting to about two hours per year per respondent, or any alleged economic burdens associated with AFHMP-related activities, outweigh the benefits of the AFHMP requirements, which HUD uses to fulfill its statutory obligations to affirmatively administer its programs and prevent discriminatory unlawful marketing practices expressly proscribed by the FHA of 1968.

HUD fails to address the fact that in the housing industry, like most industries, marketing costs will always be incurred. HUD has been administering the AFHMP requirement for decades now. HUD has provided no data demonstrating that the AFHMP Regulations increase that pre-existing economic burden, by how much, or any other relevant data points to demonstrate that the Rescission will meaningfully reduce economic costs associated with affirmative marketing. HUD simply asserts that "its commitment to that value judgment outweighs the potential downsides of

[108] *See* Rescission of Affirmative Fair Housing Marketing Regulations, 90 Fed. Reg. 23491 (June 3, 2025).
[109] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.
[110] *See* Recission of Affirmative Fair Housing Marketing Regulations, 90 Fed. Reg. 23491 (June 3, 2025).

eliminating the AFHM requirements, including the possibility that some racial groups will receive more information about housing opportunities than others."[111]

Finally, HUD's assertion of economic burden on program participants as a justification for the Rescission, coupled with its failure to identify and/or produce even the barest level of evidentiary support and analysis to support its contention, is both gravely troubling and so deeply ironic it risks absurdity. Aside from the affirmative anti-discrimination statutory mandates that HUD's Rescission ignores, outlined exhaustively throughout this comment letter, HUD also has mandatory obligations under the FHA of 1968 to "make studies with respect to the nature and extent of discriminatory housing practices in representative communities, urban, suburban, and rural, throughout the United States,"[112] and to "publish and disseminate reports, recommendations, and information derived from such studies, including an annual report to the Congress. . . specifying the nature and extent of progress made nationally in eliminating discriminatory housing practices and furthering the purposes of this subchapter, obstacles remaining to achieving equal housing opportunity, and recommendations for further legislative or executive action[.]"[113] HUD carries out these study and reporting obligations through its Office of Policy Development and Research (PD&R), as well as through partnerships with other federal agencies and private-sector organizations.[114]

Critical data points come from HUD's own research and data. Since the late 1970s, the Urban Institute has conducted numerous housing discrimination studies funded by HUD, including studies in 1977,[115] 1989,[116] 2000,[117] and 2012[118] on racial and ethnic discrimination in rental and sales markets nationwide. The most recent HUD-issued study in 2012 notes that "[a]lthough the most blatant forms of housing discrimination (refusing to meet with a minority home seeker or provide information about any available units) have declined since the first national paired-testing study in 1977, the forms of discrimination that persist (providing information about fewer units) raise the costs of housing search for minorities and restrict their housing options. Looking forward, national fair housing policies must continue to adapt to address the patterns of discrimination and disparity that persist today."[119]

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[111] *Id.*
[112] 42 U.S.C. § 3608(e)(1).
[113] 42 U.S.C. § 3608(e)(2)(A).
[114] U.S. Dep't of Hous. & Urban Dev., Office of Policy Dev. & Research, *PD & R Research*, https://www.huduser.gov/portal/research/home.html.
[115] Ronald E. Wienk, et al., U.S. Dep't of Hous. & Urban Dev., Office of Policy Dev. & Research, *Measuring Racial Discrimination in American Housing Markets: The Housing Market Practices Survey* (1979), https://www.huduser.gov/portal/sites/default/files/pdf/Measuring-Racial-Discrimination-AHM.pdf.
[116] Margery Austin Turner, et al., U.S. Dep't of Hous. & Urban Dev., Office of Policy Dev. & Research, *Housing Discrimination Study: Analyzing Racial and Ethnic Steering (HUD-5906)* (1991), https://www.huduser.gov/portal/sites/default/files/pdf/HDSAnalyzing-Racial-and-Ethnic-Steering.pdf.
[117] Margery Austin Turner, et al., Dep't of Hous. & Urban Dev., Office of Policy Dev. & Research, *Discrimination in Metropolitan Housing Markets: National Results from Phase I (HDS 2000)* (2002), https://www.huduser.gov/portal/Publications/pdf/Phase1_Report.pdf.
[118] Margery Austin Turner, et al., U.S. Dep't of Hous. & Urban Dev., Office of Policy Dev. & Research, *Housing Discrimination Against Racial and Ethnic Minorities 2012* (2013), https://www.huduser.gov/portal//Publications/pdf/HUD-514_HDS2012.pdf.
[119] *Id.* at xi.

Importantly, the 2012 study noted that marketing and advertising discrimination is harder to capture via the paired-testing methodology utilized in these studies and, because of this and other limitations in HUD's methodologies, the reported results likely understate the total level of discrimination that occurs in the marketplace.[120] A further series of HUD-funded research published in 2015[121] addressed these methodology concerns and led to HUD launching the Housing Discrimination Study Innovative Methodology Project in 2021 to identify and test new methodologies that could augment and enhance housing discrimination research.[122]

HUD's Housing Discrimination Study Innovative Methodology Project Final Comprehensive Report was released on November 29, 2024.[123] The report's foreword notes that the body of evidence established over the past decades on housing discrimination prevalence: "underscore that while overt discrimination on the basis of race and ethnicity of home seekers in both rental and sales markets has declined over time, subtle forms of discrimination are becoming more prevalent."[124] One of the case studies designed methodologies to examine the impact of selective advertising, based on electronic advertising data, in the rental housing market on racial minorities that likely goes undetected in standard and historical testing methodologies.[125] The results evinced discrimination against Black and Hispanic renters through selective advertising that is both significant in magnitude and especially pronounced in neighborhoods with superior amenities, demonstrating that Black renters' overall housing options are not only being more restricted by discriminatory selective advertising practices but Black renter's access to better amenities is also being restricted by these same practices.[126] The results also evinced that White and Asian renters were more likely to occupy "unlisted" rental housing compared to Black and Hispanic renters, suggesting that the practice of not listing, a practice by which landlords use direct referrals and other selective advertising practices to target renters based on race and other preferred factors, is a form of racial steering more likely to occur in neighborhoods with lower poverty rates, improved air quality, and more college graduates.[127]

In 2024, HUD also released "Guidance on Application of the Fair Housing Act to the Advertising of Housing, Credit, and Other Real Estate-Related Transactions through Digital Platforms."[128] HUD's guidance highlighted that "[n]ew technologies can be used to target

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[120] *Id.* at xxiv.
[121] U.S. Dep't of Hous. & Urban Dev., Office of Policy Dev. & Research, A Journal of Policy Development and Research, 17 Hous. Discrim. Today (2015), available at https://www.huduser.gov/portal/periodicals/cityscpe/vol17num3/index.html.
[122] U.S. Dep't of Hous. & Urban Dev., Office of Policy Dev. & Research, *Housing Discrimination Study Innovative Methodology Project: Final Comprehensive Report* (2024), available at https://www.huduser.gov/portal//portal/sites/default/files/pdf/HDS-Innovative-Methods-Final-Report.pdf.
[123] *Id.*
[124] *Id.* at ii.
[125] *Id.* at 32-64.
[126] *Id.* at 52-64.
[127] *Id.*
[128] U.S. Dep't of Hous. & Urban Dev. Office of Fair Hous. & Equal Opportunity, *Guidance on Application of the Fair Housing Act to the Advertising of Housing, Credit, and Other Real Estate-Related Transactions through Digital Platforms* (2024), available at

advertising toward some consumers and away from others,"[129] and that this targeted advertising can discriminate on the basis of protected characteristics in violation of the FHA of 1968 by "denying consumers information about housing opportunities; targeting vulnerable consumers for predatory products or services; discouraging or deterring potential consumers; advertising different prices or conditions to consumers; steering home-seekers to particular neighborhoods; or charging advertisers higher amounts to show ads to some consumers."[130]

The legacy and continued persistence of housing discrimination and segregation are directly linked and correlated with persistent and pervasive race-based disparities that begin in childhood and extend an individuals' lifetime, including disparities in educational opportunities and attainment, employment and economic opportunity, wealth accumulation, health outcomes, access to transportations systems, exposure to pollution and other environmental hazards, and exposure to crime.[131]

HUD's economic burden justification is belied by its own research demonstrating the persistence of the discriminatory advertising practices fueled by technology; that advertising's continued impact on housing discrimination and segregation; and HUD's own recognition of the need to develop better tools to detect and prevent discriminatory advertising practices. Housing discrimination and segregation has real and significant economic costs on individuals, communities, and ultimately society, that have persisted and are worsening. In the context of HUD's asserted justification for the Rescission, HUD's failure to consider these economic costs and burdens demonstrates HUD's failure to consider an important aspect of the problem the FHA of 1968 and the AFHM Regulations were enacted and implemented to address. Further, they starkly contradict HUD's asserted justification and singular paragraph of "explanation." These are not only failures on HUD's part, but demonstrative of the completely arbitrary and capricious nature of this Rescission.

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https://www.hud.gov/sites/dfiles/FHEO/documents/FHEO_Guidance_on_Advertising_through_Digital_Platforms.pdf.

[129] *Id.* at 1.

[130] *Id.* at 2.

[131] Margery Austin Turner & Solomon Greene, *Causes and Consequences of Separate and Unequal Neighborhoods*, Structural Racism Explainer Collection, https://www.urban.org/racial-equity-analytics-lab/structural-racism-explainer-collection/causes-and-consequences-separate-and-unequal-neighborhoods#:~:text=Children%20who%20grow%20up%20in,attainment%20and%20higher%20homicide%20rates; JP Julien & Shelley Stewart III, Investing in housing: Unlocking economic mobility for Black families and all Americans, McKinsey Institute for Economic Mobility (Feb. 11, 2025), https://www.mckinsey.com/institute-for-economic-mobility/our-insights/investing-in-housing-unlocking-economic-mobility-for-black-families-and-all-americans#/; Anneliese Lederer & Tracy McCracken, The Many Effects of Housing Discrimination On African Americans, *National Community Reinvestment Coalition* (April 28, 2021), https://ncrc.org/the-many-effects-of-housing-discrimination-on-african-americans/; Dayna Bowen Matthew et al., *Time for justice: Tackling race inequalities in health and housing*, Brookings (Oct. 19, 2016), https://www.brookings.edu/articles/time-for-justice-tackling-race-inequalities-in-health-and-housing/; Gregory Acs et al., The Cost of Segregation: National Trends and the Case of Chicago, 1990-2010, Urban Institute (March 2017), https://www.urban.org/sites/default/files/publication/89201/the_cost_of_segregation_final_0.pdf.

F. HUD Erroneously Asserts that the AFHM Regulations Equalize Statistical Outcomes Rather Than Prevent Discrimination.

The Rescission's erroneous assertion that the AFHM Regulations "equalize statistical outcomes" rather than prevent discrimination is also arbitrary and capricious.[132] HUD offers no evidence or explanation of how the AFHM Regulations "equalize statistical outcomes." That is unsurprising, because as discussed above, the AFHM Regulations only concern affirmative marketing and do not dictate who is approved for housing. HUD also offers no analysis for how, despite their purpose and longstanding implementation, the AFHM Regulations no longer prevent discrimination. HUD's purported justification illustrates how the Rescission violates the APA because it is arbitrary, capricious, and contrary to law. Further, by hypothesizing that the AFHM Regulations "equalize statistical outcomes," while failing to assess the AFHM Regulations' role in preventing discrimination, HUD has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [and] offered an explanation for its decision that runs counter to the evidence before the agency."[133]

G. HUD Improperly Failed to Consider Reliance Interests.

HUD asserts that because it "concluded" the AFHM Regulations are "unlawful," no analysis of reliance interests is required.[134] Abdicating the analysis of reliance interests in a Rescission which is an "about-face" on decades of agency policy and practice is arbitrary and capricious in violation of the APA.[135] As set out at length above, HUD's asserted legal conclusions to support its determination that the AFHM Regulations are unlawful are erroneous and not in accordance with law. HUD's legal conclusions are not rooted in and/or ignore relevant and applicable statutory provisions, their legislative histories, apposite case law, and utilize misstatements and misapplication of constitutional doctrines. Further, much of HUD's legal analysis is deficient and underdeveloped to the point of rendering much of it meaningless, as evidenced by the brevity of the overall Rescission and HUD's shallow level of treatment of the authorities it does proffer.

Controlling substantive and procedural law prevent HUD from ignoring and refusing to properly and sufficiently address decades of reliance interests in the housing industry; in State law enforcement authorities that utilize HUD's AFHM tools and materials in their analogous fair housing enforcement and policy infrastructures; in State law enforcement authorities that may now have to fill the enforcement vacuum this Rescission further exacerbates; and the reliance interests that HUD's historical and statutory obligations to affirmatively enforce the FHA of 1968 have created. HUD's omission of analyses of these engendered reliance interests is a blatant violation of the APA.

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[132] *See* Rescission of Affirmative Fair Housing Marketing Regulations, 90 Fed. Reg. 23491 (June 3, 2025).
[133] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[134] *See* Rescission of Affirmative Fair Housing Marketing Regulations, 90 Fed. Reg. 23491 (June 3, 2025).
[135] *FDA v. Wages & White Lion Invs., LLC*, 145 S. Ct. 898, 917 (2025) (explaining that the change-in-position doctrine requires more than a knowing articulation of the change but also requires a reasoned analysis of reliance interests).

III. IN THE STATES' EXPERIENCE, HOUSING DISCRIMINATION REMAINS A SERIOUS ISSUE THAT REQUIRES MEASURES TO AFFIRMATIVELY FURTHER FAIR HOUSING, INCLUDING AFFIRMATIVE MARKETING.

As the chief law enforcement officials of our respective States, the undersigned have a vested interest in ensuring equal access to housing and eradicating the harmful effects of housing discrimination and segregation in our communities. The FHA of 1968 was part of a series of landmark legislative acts by Congress in the 1960s, in response to the African American Civil Rights Movement, to meaningfully eradicate the violent and tragic history and historical practices of race discrimination and segregation that have infected this country since its inception. We understand the obligations and responsibilities that the law places on those tasked with its vigorous and affirmative enforcement to ensure justice, guarantee equality, and eradicate a legacy of social and societal evil. The shadow of that legacy still lingers across this entire country and in our respective jurisdictions. Our States therefore object to HUD's ongoing dismantling of measures that implement affirmatively furthering fair housing and abdication of its statutory obligations.[136]

The national housing crisis is driven by a shortage of housing supply and skyrocketing unaffordability that disproportionately affects communities of color.[137] As the United States Chamber of Commerce notes, the housing crisis "impacts the broader economy by reducing consumer spending, increasing employee turnover, and hindering businesses' ability to attract and retain talent," and "has cost states billions in economic output, personal income, and jobs."[138] The housing crisis has a disproportionate impact on households of color and the disparate impact on Black households is amongst the highest disparities.[139] The disparities and disparate impact on Black households "are byproducts of systemic racism, including the legacies of slavery, Jim Crow segregation, redlining, and other anti-Black policies that targeted Black people and predominately Black neighborhoods."[140] Some of our States extensively documented the legacy and ongoing harms of segregation, including specific data on the persistence and harms in the states of

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[136] Many of our states filed comments opposing HUD's March 3, 2025 Interim Final Rule regarding revisions of the Affirmatively Furthering Fair Housing regulations (AFFH IFR). Affirmatively Furthering Fair Housing Revisions, 90 Fed. Reg. 11,020-02 (Mar. 3, 2025), https://ag.ny.gov/sites/default/files/letters/multistate-comment-letter-to-u.s-department-of-housing-and-urban-development-letters-2025.pdf

[137] Makinizi Hoover & Isabella Lucy, *The State of Housing in America*, U.S. Chamber of Commerce (Mar. 17, 2025), https://www.uschamber.com/economy/the-state-of-housing-in-america.

[138] *Id.*

[139] Tushar Kansal et al., Majorities Across *Race and Ethnicity Support Policies to Allow More Housing*, Pew Research Center (2025), https://www.pew.org/en/research-and-analysis/articles/2025/01/07/majorities-across-race-and-ethnicity-support-policies-to-allow-more-housing; Rashawn Ray et al., *Homeownership, racial segregation, and policy solutions to racial wealth equity*, Brookings Institute (2021), https://www.brookings.edu/articles/homeownership-racial-segregation-and-policies-for-racial-wealth-equity/; National Fair Housing Alliance, The State of Equitable Homeownership 2025 Report (2025).

[140] *Id.*

California, New York, Massachusetts, New Jersey, Arizona, Washington, Illinois, Maryland, and Connecticut, and adopt by reference that documentation and the supporting data here.[141]

Data on fair housing complaints confirm that proactive fair housing anti-discrimination measures, including in advertising, are as vital as ever. The National Fair Housing Alliance's (NFHA) 2024 Fair Housing Trend Report reported record high levels of fair housing complaints submitted to HUD, DOJ, and other fair housing organizations, with the annual number of complaints rising consistently.[142] Notably, the NFHA 2023 Fair Housing Trend Report[143] highlighted the issue of housing discrimination fueled by technology, specifically through a case highlight of DOJ's 2022 landmark settlement in *U.S. v. Meta Platforms, Inc.*,[144] concerning allegations of discriminatory advertising in violation of the FHA of 1968. Use of technology to engage in discriminatory advertising, including algorithmic bias in internet-based housing marketing, is a significant civil rights issue that stakeholders are just beginning to address.[145] Eliminating affirmative marketing measures takes away a vital tool to counteract this discrimination.

To address these barriers to fair housing, many of our jurisdictions have adopted state and local laws and policies that mirror and supplement the affirmative mandates of the FHA of 1968 and its implementing regulations. Our local laws and policies expressly adopt affirmative requirements in line with those imposed by the FHA of 1968, including those that combat advertising discrimination in the housing market. Moreover, our state and local housing anti-discrimination policies and implementation have not only been deeply informed by the FHA of 1968 but have been carried out in cooperation with our federal counterparts at HUD and other federal agencies. Indeed, the FHA of 1968 expressly provides that HUD shall "cooperate with and render technical assistance to. . . State, local, and other public or private agencies, organizations, and institutions which are formulating or carrying on programs to prevent or eliminate discriminatory housing practices[.]"[146] The Rescission both undermines our States' efforts to end discriminatory housing practices and weakens any partnership with HUD to do so.

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[141] Comment on Interim Final Rule Regarding Affirmatively Furthering Fair Housing Revisions, Docket No. FR-6519-I-01, RIN 2529-AB08, Document No. 2025-03360, 90 Fed. Reg. 11020 (Mar. 3, 2025) https://ag.ny.gov/sites/default/files/letters/multistate-comment-letter-to-u.s-department-of-housing-and-urban-development-letters-2025.pdf

[142] Lindsay Augustine et al., National Fair Housing Alliance, *2024 Fair Housing Trends Report* (2024) https://nationalfairhousing.org/wp-content/uploads/2023/04/2024-Fair-Housing-Trends-Report-FINAL_07.2024.pdf.

[143] Lindsay Augustine et al., National Fair Housing Alliance, *2023 Fair Housing Trends Report: Advancing a Blueprint for Equity* (2023) https://nationalfairhousing.org/wp-content/uploads/2023/08/2023-Trends-Report-Final.pdf.

[144] No. 1:22-cv-05187 (S.D.N.Y. June 21, 2022) (complaint and settlement filed).

[145] Lindsay Augustine et al., National Fair Housing Alliance, *2024 Fair Housing Trends Report* (2024) https://nationalfairhousing.org/wp-content/uploads/2023/04/2024-Fair-Housing-Trends-Report-FINAL_07.2024.pdf.

[146] 42 U.S.C. § 3608(e)(3); *see also* 42 U.S.C. § 3616 ("The Secretary may cooperate with State and local agencies charged with the administration of State and local fair housing laws and, with the consent of such agencies, utilize the services of such agencies and their employees and, notwithstanding any other provision of law, may reimburse such agencies and their employees for services rendered to assist him in carrying out this subchapter.").

IV. HUD HAS PROVIDED INSUFFICIENT JUSTIFICATION FOR A SHORTENED COMMENT PERIOD IN ACCORDANCE WITH ITS OWN RULES.

The APA sets forth the requirements federal agencies must follow in promulgating agency rules, including a notice and comment period where interested parties may submit for agency consideration written data, views, and arguments.[147] HUD sets out its own rulemaking policy and procedural requirements in 24 C.F.R. § 10, generally providing interested parties with 60 days to submit comments.[148] HUD has not done so here, only permitting 30 days and improperly asserting "good cause" to ignore the rule.

Neither the APA nor the HUD rule allow for the shortening of time for public comment. The two narrow "good cause" exceptions for deviating from the APA are found in 5 U.S.C. § 553(b)(B), which allows for dispensing with notice and comment *altogether* where an agency finds it impracticable, unnecessary, or contrary to the public interest, and in 5 U.S.C. § 553(d)(3) which allows for effective dates to be shorter than 30 days after final publication for good cause. The HUD rule similarly allows for dispensing with public comment when the agency determines and articulates why it is impracticable, unnecessary, or contrary to the public interest, and contains no reasons why a comment period could be shortened.[149] Legislative history indicates that these exceptions are meant to be narrowly construed and scrupulously adhered to.[150] HUD's desire to move expeditiously, or its assumption that interested parties do not need the time, are not good cause. Courts are reluctant to cast aside the stringent requirements of the APA based on an agency's desire to act quickly unless Congress has forced the agency to take a shorter schedule.[151]

In the Rescission, HUD has merely claimed that "[b]ased on the justification for this rulemaking stated above, HUD has determined that it is in the public interest to rescind the AFHM regulations as expeditiously as possible. As such, while HUD seeks and values input in the form of public comments, HUD has determined that a shortened public comment period is justified. In this regard, HUD notes that interested members of the public are familiar with these regulations and should be able to respond effectively within the 30-day period." None of these stated reasons, a desire to move expeditiously, nor the purported "familiarity" the interested parties have with the regulations, are sufficient justifications under the APA or HUD rules. Indeed, here, where interested parties have requested more time to respond and HUD has failed to engage in the requisite level of analytical rigor and provided little to no evidentiary support for nearly all its asserted justifications, demonstrate that more time and advance notice are justified under 24 C.F.R. §§ 10.1 and 10.7.

V. CONCLUSION

The Rescission contravenes the very text and purpose of the FHA of 1968, requiring HUD to affirmatively administer its programs to eliminate entrenched patterns of segregation, promote integration, and prevent discrimination in the United States' housing market. The Rescission renders HUD unable to meaningfully fulfill its mandates under the FHA of 1968 to affirmatively

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[147] 5 U.S.C. § 553.
[148] 24 C.F.R. § 10.1.
[149] *Id.*
[150] *See Nat'l Nutritional Foods Ass'n v. Kennedy*, 572 F.2d 377, 385 (2d Cir. 1978).
[151] *See U.S. Steel Corp. v. U.S. Env't Prot. Agency*, 605 F.2d 283, 287 (7th Cir. 1979).

further fair housing through ensuring non-discriminatory marketing practices, a critical housing industry practice. For all these reasons, the undersigned Attorneys General strongly oppose the Rescission and urge that it be withdrawn in its entirety.

Sincerely,

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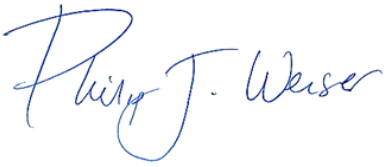
ROB BONTA
California Attorney General

WILLIAM TONG
Connecticut Attorney General



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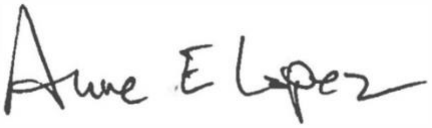

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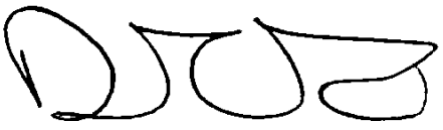

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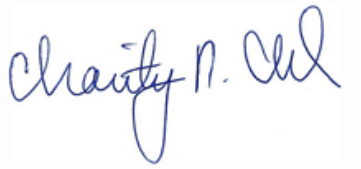

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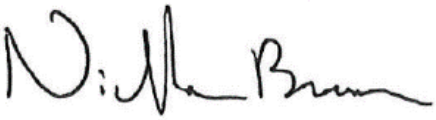

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