THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL FAIR HOUSING ALLIANCE, *et al.*, Plaintiffs, v. BEN CARSON, *et al.*, Defendants.	Civ. Action No. 1:18-cv-1076-BAH

PLAINTIFFS' MOTION TO AMEND THE JUDGMENT
AND FOR LEAVE TO AMEND THE COMPLAINT

Plaintiffs hereby move pursuant to Federal Rules of Civil Procedure 59(e) and 15(a)(2) to set aside the judgment and for leave to amend the complaint. In support of this motion, Plaintiffs submit the accompanying memorandum of points and authorities, proposed second amended complaint, and proposed order.

Plaintiffs have conferred with Counsel for Defendants, who represents that Defendants will take a position after seeing these motion papers.

Date: September 14, 2018

Respectfully submitted,

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NATIONAL FAIR HOUSING ALLIANCE, *et al.*, Plaintiffs, v. BEN CARSON, *et al.*, Defendants.	Civ. Action No. 1:18-cv-1076-BAH

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFFS' MOTION TO AMEND THE JUDGMENT AND FOR LEAVE TO AMEND THE COMPLAINT

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INTRODUCTION

On August 17, 2018, this Court granted the motion of defendants Department of Housing and Urban Development and Ben Carson (collectively, HUD) to dismiss the complaint, finding that Plaintiffs had failed to establish standing. Plaintiffs now move the Court pursuant to Federal Rule of Civil Procedure 59(e) and Rule 15(a)(2) to set aside its judgment, reopen the case and allow Plaintiffs to amend their complaint. Plaintiffs respectfully submit that, in deciding HUD's motion to dismiss alongside Plaintiffs' motions that required greater evidentiary consideration, this Court improperly resolved factual issues rather than treating Plaintiffs' allegations as true and granting Plaintiffs all available inferences, as required at the pleading stage.[1]

Much of the Court's decision on the motion to dismiss rests on its factual conclusions that certain portions of HUD's Affirmatively Furthering Fair Housing (AFFH) Rule "remain active," Doc. 47 at 42, notwithstanding HUD's suspension of the Assessment of Fair Housing (AFH) process, and that these still-active provisions confer sufficient benefit that Plaintiffs are not perceptibly harmed by HUD's action. Plaintiffs believe that the Court erred in drawing what amount to factual conclusions inconsistent with the existing complaint and submit that, in any event, the fuller pleading they now proffer will make clearer that these are disputed questions of fact. This Court also construed certain binding D.C. Circuit precedents regarding organizational standing in a manner that is incorrect and was not suggested by HUD. Because HUD did not advocate for these factual and legal conclusions, Plaintiffs have had no prior opportunity to brief these issues.

[1] This motion pertains only to this Court's dismissal of Plaintiffs' complaint for lack of standing. It does not challenge this Court's denial of Plaintiffs' motion for a preliminary injunction or expedited summary judgment.

BACKGROUND

I. Summary of relevant facts and procedural background

Because this Court is aware of the facts of this case, Plaintiffs provide only a brief summary of facts essential to this motion.

This action challenges two HUD actions accomplished by Federal Register notices on May 23, 2018. The first withdrew the Assessment Tool that local jurisdictions need to complete the AFH process. The second instructed those jurisdictions to revert to a regulatory scheme that was in place prior to HUD's adoption of the AFFH Rule, effective August 17, 2015. Together, these actions had the effect and purpose of suspending the AFH process and all its associated obligations for local jurisdictions and for HUD, thereby reverting to the old Analysis of Impediments (AI) regime which HUD (and the Government Accountability Office) recently found to be entirely ineffective in ensuring that local jurisdictions meet their AFFH obligations. That is to say, they carried forward the same effects as the Notice explicitly suspending the AFH process that HUD issued in January 2018 and replaced with the May 2018 Notices, but now for an indefinite period of time.

In their first amended complaint and in accompanying affidavits, Plaintiffs alleged that HUD's action harmed then by depriving them of the benefits to them that flow from jurisdictions going through the AFH process under HUD oversight. *See, e.g.*, FAC ¶ 129 (alleging that Plaintiffs "have lost the benefit of the AFFH Rule's requirements, pursuant to which municipalities must consult with them at regular intervals, must review and engage with their comments and concerns, [and] must reach out to community members"). They alleged that, as a direct and necessary result of HUD's action, local jurisdictions no longer would take actions required by the AFFH Rule that greatly benefitted Plaintiffs' ability to accomplish mission-

related activities, while Plaintiffs would be deprived of both information generated by the process and multiple effective fora for their views to be heard and for redress of disputes with jurisdictions regarding AFFH compliance.

For example, Plaintiffs have lost a centralized forum for articulating a range of local concerns, greatly hindering their ability to mobilize community participation in the process. *Id.* ¶ 131. Jurisdictions no longer will generate AFHs that provide organizing and educational opportunities during their creation and contain troves of important local fair housing information and concrete fair housing policy commitments. *Id.* ¶ 128 (Fort Worth will not voluntarily complete an AFH now that it is not required to do so, depriving Texas Plaintiffs of information about how municipality is using federal funds and requiring Texas Housers to recreate that information more laboriously). Meanwhile, HUD no longer conducts meaningful review of AFFH compliance in the absence of the AFH process, leaving Plaintiffs with no agency forum to effectively present their concerns and local jurisdictions with no incentive to comply. *Id.* ¶ 123 (AFH procedures "provide a mechanism for the Texas Plaintiffs to force the county to consider [colonias residents'] needs"); *id.* ¶ 124 (HUD review of Hidalgo County consortium's AFH provided Texas Plaintiffs procedure for redress of dispute about compliance); *id.* ¶ 127 (HUD's action deprived Texas Housers of forum to remedy Corpus Christi's failure to meet its AFFH obligations). Jurisdictions immediately changed their behavior to Plaintiffs' detriment in response to HUD's action. *Id.* ¶¶ 125-126 (after HUD suspension of the AFH process, Hidalgo County decided not to voluntary remedy deficiencies in its AFH).

All of these changes and more seriously hinder Plaintiffs' ability to carry out mission-related activities. Accordingly, Plaintiffs have had to divert additional resources from other planned projects to try to accomplish the same results with respect to AFFH compliance. *See,*

e.g., *id.* ¶ 127 (Texas Plaintiffs now must laboriously monitor use of federal disaster relief money rather than having that information generated for them); *id.* ¶ 131 (Texas Housers must meet regularly with Hidalgo County community groups to maintain engagement in the absence of a process that permits immediate action).

Plaintiffs moved for a preliminary injunction and expedited summary judgment—motions that required examination of record evidence and a determination of whether Plaintiffs were likely to prove their allegations. Meanwhile, HUD moved to dismiss the complaint for lack of standing. The State of New York moved to intervene.

II. This Court's decision

On August 17, 2018, the Court issued a decision granting HUD's motion to dismiss. In what it called "a close case," the Court held that Plaintiffs had failed to demonstrate standing. Doc. 47 at 38 ("Opinion").[2]

The Court's opinion acknowledges that HUD's action effectively eliminated the AFH process for local jurisdictions and reverted those jurisdictions to the AI process, and that this reversion to "a less effective process may frustrate the plaintiffs' overarching missions." *Id.* at 38. Nonetheless, it found that HUD's action did not "'perceptibly impair' the plaintiffs' abilities to carry out their missions" or "'directly conflict'" with those missions. *Id.* at 40-41 (quoting *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016) and *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996)). In so holding, the Court made factual findings about the practical workings of the regulatory scheme remaining in place following HUD's action that do not appear in the complaint and are not compelled by the current, incomplete record.

[2] In the same opinion, the Court denied other motions that are not at issue here.

First, the Court stated that certain provisions of the AFFH Rule, as well as other HUD procedures that might help ensure compliance with the AFFH obligation, remained active notwithstanding HUD's action and that, "in light of these active provisions," the suspension of the AFH process did not sufficiently harm Plaintiffs. *Id.* at 40. Specifically, the Court pointed to:

- The regulatory definition of "affirmatively furthering fair housing," which the Court concluded would meaningfully impact local jurisdictions' conduct when preparing AIs and certifying AFFH compliance, *id.* at 41; the requirement that program participants certify that they will take no action materially inconsistent with the AFFH obligation, *id.* at 16, which the Court characterized as an "enhanced certification requirement," *id.* at 22; and the Rule's recordkeeping requirements, *id.* at 17. The Court found these provisions would collectively make the AI process "more robust" than it had been in the past, *id.* at 43; *see id.* at 23 (finding that "the revived AI process is not the same process operating prior to the AFFH Rule").
- The community participation requirements of the Consolidated Plan process, which the Court found negated Plaintiffs' claim that the loss of the AFH process deprived them of the benefits of that process's community participation requirements, *id.* at 41; *see id.* at 22.
- HUD's continued review of Consolidated Plans, which the Court found would substitute in significant part for the suspension of HUD's review of AFHs as a means for HUD to ensure compliance with AFFH obligations. *See id.* at 44 ("HUD therefore remains engaged in reviewing program participants' certification efforts.").

- The ability of Plaintiffs and others to file complaints with HUD regarding local governments' conduct, which the Court found ameliorated the harm done to Plaintiffs by the suspension of the AFH process. *Id.* at 46.

The Court acknowledged that Plaintiffs were fully deprived of the benefits of many aspects of the Rule, such as the AFH comment process and HUD review of AFHs, and suffered "a concomitant loss in the effectiveness of HUD's enforcement of the AFFH statutory requirement." *Id.* at 42. But, relying on the premise that "significant requirements of the AFFH Rule remain intact," it found that Plaintiffs had "continuing opportunities . . . to participate in the now somewhat more robust AI process," such that it was "difficult to measure" the extent to which HUD's actions "directly conflict or perceptibly impede the plaintiffs' mission-oriented activities." *Id.* at 42-43.

Second, the Court found that Plaintiffs remained able to educate and organize community members and develop and submit public comments to local governments notwithstanding the suspension of the AFH process. *Id.* at 43. In particular, it found that Plaintiffs' ability to encourage local jurisdictions to use the AFH tool *voluntarily* negated the harm they suffered from HUD's action eliminating the *requirement* that jurisdictions do so. *Id.*

Based on these factual premises, the Court distinguished Plaintiffs' allegations of perceptible impairment of their mission-related activities from those of *Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler*, 789 F.2d 931 (D.C. Cir. 1986), and *PETA v. USDA* 797 F.3d 1087 (D.C. Cir. 2015). This case was different from *Action Alliance*, the Court determined, because the Plaintiffs did not "establish[] that their daily operations were inhibited" by HUD's action or that their daily operations were "tangibly different in kind" before and after HUD's action. *Id.* at 45-46. It was different from *PETA*, the Court found, because Plaintiffs

could still file complaints with HUD, *id.* at 46, and could still get information directly from local governments, *id.* Thus, the Court reasoned, "the plaintiffs remain able to bring an entity's failure to meet its AFFH obligations to HUD and to educate the public regarding AFFH obligations." *Id.* at 47.

Based on similar factual premises, the Court found that Plaintiffs had failed to establish the required diversion of resources. It found that Plaintiffs "are largely engaged in the same kinds of activities now that they were undertaking before . . . namely, education, research, advocacy, and counseling." *Id.* at 47. It also found that Plaintiffs should have pleaded a "dollar figure" as to how much more they spent in service of the same specific objectives—for example, to ensure that Hidalgo County complies with its AFFH obligations—with and without the AFH process in place. *Id.* at 48. Without that, the Court found, a "shift in the plaintiffs' focus" was insufficient. *Id.* at 49.

The Court also found that Plaintiffs failed to plead allegations showing that HUD's action caused their injuries or could be redressed by a favorable decision. That was so, it reasoned, because the AFH process was failing to meaningfully change local government behavior, such that whether its reinstatement "would result in any greater efforts of HUD grantees to comply with their statutory obligations under the AFFH requirement is too speculative." *Id.* at 52. For support, the Court relied in particular on HUD's statement that 63 percent of AFHs were not acceptable as originally submitted. *Id.* It concluded that, even with the AFH process operative, many jurisdictions in Texas and elsewhere "fell short of complying with HUD guidance and requirements," and thus that the evidence does not establish that program participants would follow the AFFH Rule's requirements even if the AFH process were reinstated. *Id.* at 54.

Accordingly, the Court held that Plaintiffs lacked standing because the effect of suspending the AFH process on the conduct of third parties (local jurisdictions) was speculative. *Id.* at 52-53.

ARGUMENT

Plaintiffs move the Court to set aside the judgment under Rule 59(e) because they believe that the Court's decision was based on several erroneous factual and legal conclusions that led to an erroneous decision that Plaintiffs have failed to establish standing at the pleading stage to challenge HUD's action. To augment the facts on which Plaintiffs' claim is based and present fuller factual allegations to the Court, Plaintiffs also seek leave to amend their complaint.

I. The Court Should Set Aside The Judgment Pursuant To Rule 59.

Federal Rule of Civil Procedure 15(a)(2) provides that "the court should freely give leave [to amend a pleading] when justice so requires." "[O]nce a final judgment has been entered, a court cannot permit an amendment unless the plaintiff first satisfies Rule 59(e)'s more stringent standard for setting aside that judgment." *Ciralsky v. CIA*, 355 F.3d 661, 673 (D.C. Cir. 2004) (internal quotation marks omitted). "A Rule 59(e) motion is discretionary and need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (internal quotation marks omitted); *accord Anyanwutaku v. Moore*, 151 F.3d 1053, 1057–58 (D.C. Cir. 1998).

For the reasons stated below, this Court erred in granting HUD's motion to dismiss for lack of standing. Moreover, the Court did so in part based on factual inferences and interpretations of cases that HUD did not advance at briefing or argument, to which Plaintiffs had no opportunity to respond. To correct these errors and prevent manifest injustice, the case should be reopened and Plaintiffs should be permitted to amend their complaint.

A. This Court Should Have Accepted Plaintiffs' Well-Pleaded Allegations Regarding the Effects of HUD's Action on Plaintiffs.

On a motion to dismiss, a court must accept as true all well-pleaded factual allegations set forth in the complaint. *Scandinavian Satellite Sys. v. Prime TV Ltd.*, 291 F.3d 839, 844 (D.C. Cir. 2002); *Hedgeye Risk Mgmt., LLC v. Heldman*, 271 F. Supp. 3d 181, 189 (D.D.C. 2017) (stating "the Court may not make factual findings on a motion to dismiss"). Here, however, the Court reached factual conclusions that are inconsistent with the complaint.

In particular, with regard to the effects of HUD's action on the AFFH Rule's continued effectiveness, the opinion attached great importance to the AFFH Rule's modified definition of AFFH statutory compliance, notwithstanding that HUD's May 23, 2018, notice explicitly directed jurisdictions to comply with a regulatory scheme that does not incorporate that definition (and instead provides its own). Nothing in the complaint or in the record before the Court compels the conclusion that this definition has any binding real-world effect on local jurisdictions' conduct following HUD's suspension of the AFH process. Even if HUD had instructed local jurisdictions to consult that definition—and its notice is best read to do the opposite—without the AFH process, the modified definition compels no specific action by any jurisdiction, and HUD does not claim to apply the standards in that definition as it reviews jurisdiction's annual (conclusory) certifications of compliance.

In any event, rather than instructing jurisdictions to conform to this definition and emphasizing how it changed the AI process, HUD specifically told jurisdictions to complete AIs "in accordance with the requirements that existed *prior* to August 17, 2015"—the date on which the AFFH Rule was issued (emphasis added). *Affirmatively Furthering Fair Housing (AFFH): Responsibility to Conduct Analysis of Impediments*, 83 Fed. Reg. 23927 (May 23, 2018). That is, this Court's finding that the AI process now is materially different from the one followed prior to

August 17, 2015 is inconsistent with the agency action under review and unsupported by the record currently before the Court.

Similarly, the Court found that the community participation requirements of the Consolidated Plan process could make up for the loss of such requirements in the now-suspended AFH process. This finding is not supported by the complaint or the record. Indeed, while Plaintiffs made robust allegations and offered supporting declarations regarding how the AFH process's community participation requirements have changed local jurisdictions' conduct, the record is silent as to how local jurisdictions have implemented the Consolidated Plan process's community participation requirements.

Nor is it self-evident from the Rule's text that community participation in the Consolidated Plan process can make up for the failure to have an AFH process at all, let alone one with community participation. To the contrary, the text makes clear that, because these processes are meant to serve different purposes,[3] participation in the Consolidated Plan process cannot effectively advance fair housing goals in the absence of the AFH process. For example, jurisdictions must consult with fair housing organizations in both processes (and at other times as

[3] The preamble to the AFFH Rule explicitly provides that the Consolidated Plan is a distinct document, part of a separate process, with its own unique purpose:

> [t]he AFH is a distinct document with data, analysis, and priority and goal setting that feeds into the consolidated plan. . . . An analysis of barriers to fair housing choice has always been an analysis separate from the consolidated planning or PHA planning processes. The purpose of the separate analysis is to inform the broader scope in planning undertaken for the consolidated plan and PHA Plan. . . . The disproportionate housing needs analysis required in the AFH is a broader analysis than must be done in connection with the consolidated plan since, for AFH purposes, the analysis must include groups with protected characteristics beyond race and ethnicity." *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42300, 42343-44 (July 16, 2015).

well), 24 C.F.R. § 91.100(e), but "[c]onsultation on the consolidated plan shall specifically seek input into how the goals identified in an accepted AFH inform the priorities and objectives of the consolidated plan," 24 C.F.R. § 91.100(e)(3). In the absence of an accepted AFH, there are no identified fair housing goals to inform the Consolidated Plan, so the requirement to seek input on such goals has no obvious meaning. At the motion to dismiss stage, Plaintiffs have plausibly alleged that losing the AFH process's community participation requirements perceptibly impairs their daily activities, which are largely focused on educating their own members, members of the community and local governments.

Plaintiffs did not previously brief these factual points because HUD never took the position that a "somewhat more robust AI process" flowed from HUD's actions, Opinion at 43, or that the Consolidated Plan process provides an adequate forum for considering fair housing concerns. At no point did HUD mention the AFFH definition in its briefing papers, let alone argue that it would affect the Analysis of Impediments process to which HUD reverted local governments. Nor did HUD argue that community participation in the Consolidated Plan process could effectively further the same fair housing objectives without a preceding AFH process; rather, it argued that, to the extent Plaintiffs were arguing for an interest in local jurisdictions' fostering community engagement, abstracted from the topic of discussion or data analysis, the Consolidated Plan still provided that opportunity. *See* HUD Br. at 13-14. But Plaintiffs had not made the argument that HUD addressed.

Also unsupported by the complaint or the record is this Court's finding that HUD "remains engaged in reviewing program participants' certification efforts" through the Consolidated Plan process, and therefore HUD's discontinuing its review of AFHs was not in "direct conflict" with Plaintiffs' mission. Opinion at 45 (quoting *Abigail Alliance for Better*

Access to Developmental Drugs v. Eschenbach, 469 F.3d 129, 133 (D.C. Cir. 2006)). If HUD wishes to argue this point—and so far it has not—it must produce the relevant administrative record to permit adjudication of the factual question of whether the Consolidated Plan process in fact involves such meaningful review of compliance with AFFH obligations.

B. The Court Erred in Finding That Plaintiffs Failed Adequately to Allege That HUD's Action Perceptibly Impaired Their Mission-Driven Operations.

For the reasons stated above, the opinion erred in its factual findings and inferences to conclude that Plaintiffs have not been sufficiently injured by HUD's actions. Reaching these conclusions based solely on the complaint and record here was clear error that warrants Rule 59 relief. Whether a party is injured by agency action "is a question of fact," *Midcoast Interstate Transmission, Inc. v. F.E.R.C.*, 198 F.3d 960, 969 (D.C. Cir. 2000), and "[c]ourts do not ordinarily make factual findings at the motion-to-dismiss stage[.]" *Nine Iraqi Allies Under Serious Threat Because of Their Faithful Service to the United States v. Kerry*, 168 F. Supp. 3d 268, 283 n.9 (D.D.C. 2016); *see also Wu v. Stomber*, 883 F. Supp. 2d 233, 261 (D.D.C. 2012) ("It is true that the Court cannot make findings of fact at this stage[.]"); *Phelps v. Stomber*, 883 F. Supp. 2d 188, 217 (D.D.C. 2012) (same); *D.C. Nurses Ass'n v. Brown*, 160 F. Supp. 3d 13, 15 (D.D.C. 2016) (the "Court cannot resolve these fundamental questions of fact on a motion to dismiss."). Even then, the Court acknowledged that "the plaintiffs' mission has been compromised by HUD's actions," Opinion at 42, though not enough to have standing. This finding that Plaintiffs have lost *some* benefits of the AFFH Rule but retain enough that their activities are not "perceptibly affected" by the suspension of the AFH process constitutes a weighing of the evidence that is inappropriate on a motion to dismiss.

Based on erroneous factual findings, the Court distinguished Plaintiffs' allegations from two binding D.C. Circuit precedents that should have compelled a finding that Plaintiffs

adequately alleged harm, *Action Alliance* and *PETA.* In those cases, the D.C. Circuit found that organizations had standing to challenge agency action that, they pleaded, cost them the benefits of agency processes that generated information for plaintiffs and provided plaintiffs with an effective remedial scheme against third parties. Because they were denied "access to information and avenues of redress," *Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler*, 789 F.2d 931, 937-38 (D.C. Cir. 1986), those plaintiffs pleaded, they had to divert resources to obtain by other, less efficient and less effective means the benefits they would have derived from those agency processes. The Court did not dispute that Plaintiffs similarly pleaded that they are being denied "access to information and avenues of redress," but nonetheless determined that Plaintiffs' mission-related activities are not perceptibly impaired. The Court's reasoning was erroneous.

First, the Court found that Plaintiffs are not perceptibly harmed by their loss of "access to information and avenues of redress," *Action Alliance*, 789 F.2d at 937-38, because they retain the ability to use *other* means to (much less effectively or efficiently) access some of the same information and remedy the same harms. Opinion at 46-47. For example, the Court suggested that Plaintiffs may continue to "analyze public records related to governmental expenditures, practices, and policies." *Id.* at 45-46. But at the motion to dismiss stage, it is at least a plausible inference from the complaint and declarations that Plaintiffs do not retain the ability to access much of the information they otherwise would get or have any remaining avenue of redress for many of the issues for which they would have a forum in the AFH process.

Moreover, in neither *Action Alliance* nor *PETA* did the plaintiff organization allege complete inability to accomplish the relevant mission-related goals. Rather, they alleged—like Plaintiffs here—that they could accomplish them only by diverting additional resources that

otherwise would not be expended on that effort. As *Action Alliance* and *PETA* held, that showing that diversion of resources is necessary to ameliorate the effects of an agency action demonstrates the harm of the agency action rather than nullifying it. Indeed, in both those cases, the plaintiffs specifically pointed to other, less effective alternatives for redress of grievances or collection of information to which the agency action forced them to resort.

For example, in *PETA*, the organization alleged that, because of the loss of the focused agency complaint process it was being denied, it was "forced to expend time and resources preparing and submitting complaints to the pertinent local, state, and/or federal agencies." *PETA v. USDA* 797 F.3d 1087, 1096 (D.C. Cir. 2015). Meanwhile, because the agency was not producing the information it wanted, it obtained as much of that information as it could through other means, "including through investigations, research, and state and local public records requests." *Id.* at 1096. Similarly, in *Action Alliance*, the organization alleged that the loss of agency process left it "with only one viable option: time-consuming and expensive resort to the courts." 789 F.2d at 937. This case presents precisely the same situation: Plaintiffs have lost access to information that otherwise would be provided to them as a matter of law and a more effective, efficient process for seeking redress. That they can attempt to replicate some of those benefits through other means does not distinguish this case from *PETA* and *Action Alliance*.

Second, the Court erred in requiring that Plaintiffs demonstrate that their daily operations have been rendered different "in kind" by HUD's action to show the same "inhibition of their daily operations" that the D.C. Circuit found sufficient to confer standing in *Action Alliance*. Opinion at 45 (quoting 789 F.2d at 938). This Court's sole basis for distinguishing *Action Alliance* was its finding, after reviewing one of the Plaintiffs' declarations, that "plaintiffs' daily operations[] do not appear to be tangibly different in kind" from those they were conducting

prior to HUD's action. *Id.* at 45-46. Once again, this imposed a burden of providing evidentiary proof that is improper on a motion to dismiss. More fundamentally, it imposed a requirement for Plaintiffs' operations to be "perceptibly impaired" by the agency action—that Plaintiffs' operations be "different in kind" as a result—that appears nowhere in *Action Alliance*.

Action Alliance did not describe, let alone find dispositive, how plaintiffs' daily operations already had changed. Rather, it found that plaintiffs' pre-existing operations were "inhibited" because the agency action made them harder to accomplish. *See* 789 F.2d at 937 (information that was denied "would enhance the capacity of AASC to refer members to appropriate services and to counsel members when unlawful age discrimination may have figured in a benefit denial"); *id.* (agency action "may raise the cost and difficulty of contesting a denial of services based on age distinctions"); *id.* (agency action "may make administrative review a meaningless process and leave AASC and its constituency with only one viable option: time-consuming and expensive resort to the courts").

Thus, *Action Alliance* found it sufficient at the pleading stage that the agency actions "may" have these effects. And it found it sufficient that the organizations were denied "access to information and avenues of redress they wish to use in their routine information-dispensing, counseling, and referral activities." *Id.* at 937-38. There is no meaningful difference between that alleged injury and the one alleged by Plaintiffs here. Similarly, while *PETA* did discuss how the plaintiff organization reacted to the challenged agency action, it did so in analyzing the distinct question of whether the organization had alleged the necessary diversion of resources, as described above. Neither case requires Plaintiffs to demonstrate that their activities are "tangibly different in kind" as a result of HUD's action to establish perceptible impairment of those activities.

C. The Court Erred In Finding That Plaintiffs Failed To Allege The Necessary Diversion of Resources.

For largely the same reasons, this Court clearly erred in finding that Plaintiffs failed to allege the sort of diversion of resources to counteracting HUD's action that contribute to standing. Opinion at 47-50. Having found that Plaintiffs' activities have not been perceptibly impaired by HUD's action, the Court found it immaterial that Plaintiffs diverted resources to counteract the effects of HUD's action because "diversion of resources to counteract that unestablished harm . . . cannot, on its own, satisfy the standing requirements." *Id.* at 49, 50. But as explained above, Plaintiffs *have* plausibly alleged a perceptible injury. Accordingly, their diversion of resources to counteracting the effects of HUD's action—along with the underlying injury—establish their standing. *See PETA*, 797 F.3d at 1096. That Plaintiffs diverted these resources voluntarily is immaterial. *See Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1139-40 (D.C. Cir. 2011).

This Court similarly erred in finding that Plaintiffs are not sufficiently harmed by having to spend more money on some projects, at the expense of others, as a result of HUD's action. *See* Opinion at 49 ("Any shift in the plaintiffs' focus simply does not amount to the expenditure of 'operational costs beyond those normally expended.'") (quoting *Nat'l Taxpayers Union, Inc. v. United States* 68 F.3d 1428, 1434 (D.C. Cir. 1995)). In *National Taxpayers Union*, the plaintiff had not been harmed by the agency action, and so it could not be said that the agency action "forced NTU to expend resources" other than as it desired to do. 68 F.3d at 1434. But *Equal Rights Center*, *PETA*, and other cases make clear that such diversion of resources is treated very differently when taken in response to agency action that *does* harm the organizational plaintiff.

This Court also noted that Plaintiffs did not put a dollar figure on the amount of resources diverted. Opinion at 48-49. Plaintiffs respectfully submit that such detail is not required at the pleading stage.

D. This Court Erred In Finding That Plaintiffs Failed To Establish Causation and Redressability.

The Court's erroneous factual findings also affected its analysis with respect to causation and redressability, and constituted clear error. Opinion at 50-55. "When performing that inherently imprecise task of predicting or speculating about causal effects, common sense can be a useful tool." *Carpenters Industrial Council v. Zinke,* 854 F.3d 1, 6 (D.C. Cir. 2017) (Kavanaugh, J.). And Plaintiffs plausibly alleged those elements and supported them with declarations. It is not speculation to draw obvious inferences regarding causation: "Common sense and basic economics tells us that a business will be harmed by a government action when (i) the government action decreases the supply of a raw material from a source that the business relies on and (ii) the business cannot find a replacement without incurring an additional cost." *Id*. Similarly, Plaintiffs here clearly alleged in the complaint (and supported through declarations) that HUD's action halted the production and distribution of material vital to Plaintiffs' operations (information about local fair housing conditions in jurisdictions throughout the country) from a source Plaintiffs relied upon (the process established by the AFFH Rule) and that they have had to incur additional costs in finding a replacement.

The Court also overlooked that "a party has standing to challenge government action that permits or authorizes third-party conduct that would otherwise be illegal in the absence of the Government's action." *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 940 (D.C. Cir. 2004) (citing cases). In such cases, "the intervening choices of third parties are not truly independent of government policy." *Id.* at 941. That is because the third parties' actions

directly flow from the government policy unless "those third parties took the extraordinary measure of continuing their injurious conduct in violation of the law." *Id.*

Here, had HUD not suspended the AFH process, the failure by local governments to comply with the AFFH Rule's requirements would be unlawful and, ultimately, would render them ineligible to receive HUD funds. As the D.C. Circuit has recognized, it can be presumed that federal funding recipients will comply with funding conditions. *See Action Alliance*, 789 F.2d at 938-39 (finding it "beyond rational limits to argue that, were beneficiaries of HHS largesse required to file a self-evaluation or a compliance report, a significant number would so resist the paperwork that they would choose to give up the federal assistance needed to discharge their functions"). Thus, at least at the pleading stage, it was error to find that jurisdictions will *not* comply, such that Plaintiffs would not benefit from the reinstatement of the AFH process.

Moreover, the Court rejected Plaintiffs' causation allegations based on HUD's account of the number of jurisdictions that initially submitted AFHs that did not meet the Rule's requirements. Opinion at 54-55 (pointing to Texas jurisdictions' "deficient AFHs" and HUD's claim that 63 percent of initial AFH submissions were deficient). But Plaintiffs' injury stems not just from the loss of *initial* submissions, but from the loss of the *ultimate* results of the AFH process, which was nearly-universal course correction by jurisdictions, with assistance from HUD and review of a resubmitted AFH. Plaintiffs not only have alleged but have submitted evidence to document that the resulting AFHs generated the sort of concrete information and commitments that help Plaintiffs carry out their mission-related activities, *see* Steil Decl. (Doc. 37-1) ¶¶ 19, 20, and that jurisdictions that went all the way through the process greatly improved public participation and were more responsive to organizations such as Plaintiffs, *see* Pls.' Mem. in Supp. of Preliminary Injunction (Doc. 19-11) at 11 (summarizing evidence); *see also* Sloan

Decl. (Doc. 19-7) ¶ 19; Hennenberger Decl. (Doc. 19-6) ¶ 12 (once AFH process was ended, participating jurisdictions canceled meetings they otherwise would have taken with Texas Plaintiffs). HUD's contention on the merits that the process of getting there is burdensome is irrelevant to Plaintiffs' standing.

Furthermore, for standing purposes, the question is not whether jurisdictions would fully comply with the AFFH Rule's requirements if the AFH process were reinstated (though both case law and the record require a presumption of compliance), but whether the difference between their conduct with and without the AFH process harms Plaintiffs. Plaintiffs plausibly alleged that it does and provided declarations in support of those allegations. For example, the undisputed evidence is that even the deficient AFH submitted by the Hidalgo County consortium, and the process by which it was created, were an improvement on the AI process that came before—and to which HUD has instructed those actors to revert. *See* Sloan Decl. at ¶ 35. Additionally, this Court erred in accepting for purposes of evaluating Plaintiffs' standing on a motion to dismiss HUD's disputed claim that 63 percent of originally submitted AFHs were not acceptable. *See* Pls.' Reply Br. in Further Supp. of Preliminary Injunction (Doc. 37) at 7 (HUD includes in that group AFHs that were never found not to be acceptable simply because HUD informally requested that the submitting jurisdiction provide further information). On a motion to dismiss for lack of standing, the Court should have assumed that Plaintiffs could make out their allegations on the merits.

The bottom line is that this Court clearly erred in finding it speculative that Plaintiffs' alleged injuries are caused by HUD's actions or could be remedied by judicial relief. Moreover,

because HUD did not make this argument, Plaintiffs have had no opportunity to address it, making Rule 59 relief appropriate.[4]

II. The Court Should Permit Plaintiffs to Amend Their Complaint.

The Court should permit Plaintiffs to amend the complaint. Under Rule 15(a)(2) of the Federal Rules of Civil Procedure, "[t]he court should freely give leave [to amend] when justice so requires." In other words, "leave to amend should be freely given unless there is a good reason … to the contrary." *Willoughby v. Potomac Elec. Power Co.*, 100 F.3d 999, 1003 (D.C. Cir. 1996). Denial of leave to amend is an abuse of discretion absent a sufficiently compelling reason, such as "undue delay, bad faith or dilatory motive ... repeated failure to cure deficiencies by [previous] amendments … [or] futility of amendment," *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (ellipsis in original; quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)), or undue prejudice to the opposing party, see *Foman*, 371 U.S. at 182.

No ground for denying leave to amend exists here: As the docket in this case reflects, Plaintiffs have diligently pursued this case, moving promptly for a preliminary injunction and for summary judgment. Any suggestion of bad faith or dilatory motive would thus be wholly unsupported. While Plaintiffs have amended their complaint once already, they did so in response to HUD's altering the agency action at issue here, and they did so swiftly. Moreover, Defendants would suffer no undue prejudice from the proposed amendment, because the actions challenged by Plaintiffs continue in effect throughout this litigation and their legality has not been finally adjudicated. Finally, because the Court's decision on the motion to dismiss is

[4] HUD did not argue that it was speculative that jurisdictions would comply with the AFFH Rule's requirements. Rather, it made the conceptually distinct argument that it was speculative whether jurisdictions' compliance with the AFFH Rule's requirements would lead to superior fair housing results. Mem. in Supp. of Mot. to Dismiss (Doc. 38-1) at 20-21. This Court did not dismiss on that basis, and it correctly summarized Plaintiffs' response, which is that Plaintiffs' claimed harm does not require a showing of superior fair housing outcomes, only that Plaintiffs are benefitted by the procedures required by the AFH process. Opinion at 37-38.

premised on arguments not advanced by Defendants, Plaintiffs had no opportunity to respond to them.

Plaintiffs' proposed amendment would not be futile. For the reasons stated above, Plaintiffs respectfully submit that this Court erroneously made factual findings in resolving a motion to dismiss that contradict Plaintiffs' well-pleaded allegations and failed to give Plaintiffs the benefit of inferences to which they are entitled at this stage of the case.[5] Any factual disputes about those allegations cannot be resolved until after the production of the administrative record and other opportunities for Plaintiffs to make a record supporting their allegations. Even if this Court finds otherwise, Plaintiffs amendment cures the problems this Court found in the complaint.

For example, the amended complaint describes the Consolidated Plan process in greater detail and contains allegations that make clear that this process is not designed to address the same concerns as the AFH process and cannot substitute for the AFH process. *See* Proposed Second Amended Complaint ¶ 74 ("In the absence of an AFH process that could result in an accepted AFH, there is no regulatory mechanism for ensuring the robust consideration of fair housing in, or prior to, the Consolidated Plan . . . .")' *id.* ¶¶ 79-85 (describing how Consolidated Plan process differs from AFH process). Similarly, the amended complaint now alleges explicitly that provisions of the AFFH Rule that this Court found to be still "active," such as the definition of affirmatively furthering fair housing, do not meaningfully impact local jurisdictions' conduct given HUD's explicit instruction that jurisdictions instead follow pre-AFFH Rule procedures and guidance that are inconsistent with them. *Id.* ¶ 104. It alleges that jurisdictions *cannot* follow both the pre-AFFH Rule requirements for AIs and the new definition, as they are inconsistent. *Id.*

[5] To be sure, the procedural posture permitted this Court to do so for purposes of Plaintiffs' preliminary injunction motion. That motion is not at issue here.

¶ 114. The proposed amended complaint more explicitly alleges that HUD instructed jurisdictions to revert to pre-AFFH Rule procedures, and not to a hybrid combining elements of both. Moreover, the amended complaint alleges that HUD's Notices do not impose any AI *requirement* at all, let alone one that is comparable to the AFH process, because they state only that jurisdictions *should* conduct AIs, not that they must. *Id.* ¶ 113.

The amended complaint also alleges in detail various other benefits of the AFH process that now are denied Plaintiffs. For example, it describes how local jurisdictions had been—but now are not—required to publicly post draft AFHs, both for comment and so parties such as Plaintiffs could have access to the information within them. *Id.* ¶¶ 118-119. Local jurisdictions had been—but now are not—required to publish supplemental local data (in their possession, not provided by HUD) that informed those AFHs, providing Plaintiffs with a trove of internal information that otherwise would not be readily available, such as analyses of building permits, code enforcement, infrastructure investments, and zoning applications. *Id.* ¶ 120. Local governments were required to accept and respond to complaints from community stakeholders regarding the AFH process, but now are no longer required to do so, and there is no parallel requirement for the AI process. As a result, there is no administrative complaint process that community stakeholders can utilize to object to a local government's compliance with the duty to affirmatively further fair housing, whether by complaining to HUD[6] or to the jurisdiction itself. *Id.* ¶ 123.

The proposed amended complaint also provides additional allegations regarding the manner in which the effectiveness of Plaintiffs' activities were enhanced by the fully effective

[6] This Court misunderstood references in Plaintiffs' declarations to filing HUD complaints prior to the AFFH Rule's promulgation. The basis for HUD's jurisdiction over those complaints was allegations of noncompliance with other civil rights requirements, not with the duty to affirmatively further fair housing.

AFFH Rule and have been perceptibly impaired by the suspension of much of the Rule. It alleges, for example, that the fully effective AFFH Rule enhanced Plaintiffs' ability to educate and counsel the people they serve, *e,g., id.* at ¶¶ 148, 153. It alleges that Texas Plaintiffs have been deprived of an effective forum for redress of their complaints that local jurisdictions do not comply with their AFFH obligations, and they have no comparable process. *Id.* ¶ 153. It alleges that Texas Appleseed now has difficulty engaging community members in the fair housing process absent any requirement that jurisdictions listen to those members, *id.* ¶ 158. It alleges that, in the absence of a centralized, comprehensive planning process, Texas Plaintiffs must expend considerably more resources handling individual issues seriatim, *id.* ¶ 163. It alleges that, in order to assemble some of the information they would have gained by right under the AFH process, Texas Plaintiffs will have to make time- and labor-intensive requests under the state public records act (and litigate denials), *id.* ¶ 163.

The amended complaint also alleges that the AFH process, when effective, provided NFHA with a wealth of information it could use to educate and advise its members. It alleges specifically how NFHA drew upon the information provided by the Philadelphia and New Orleans AFHs to train its members, but now it will not receive the benefits of such model AFHs. *Id.* ¶¶ 181-182. It alleges that, with the AFH process in effect, it was relatively inexpensive for NFHA to advise and assist individual members in participating in the fair housing planning process, because of the requirement that local jurisdictions proactively work with such members, but now NFHA must devote considerably more resources to such assistance. *Id.* at ¶¶ 183-184. For example, NFHA has had to travel on-site to provide intensive education and counseling to a member in Memphis that NFHA previously could have assisted remotely and with modest effort. *Id.* at ¶¶ 192-195.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion to set aside the judgment and to allow Plaintiffs to file the accompanying Second Amended Complaint.

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Respectfully submitted,

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