THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL FAIR HOUSING ALLIANCE, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 1:18-cv-1076-BAH
BENJAMIN S. CARSON, SR., M.D., in his official capacity as Secretary of Housing and Urban Development, *et al.*,	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs, three nonprofit housing organizations, challenge a decision by the Department of Housing and Urban Development (HUD) about how to administer its block-grant programs for local governments, but they lack standing to bring their claims. Plaintiffs are not HUD grantees, nor do HUD's requirements for its grantees require anything of Plaintiffs. Rather, these organizations disagree with HUD's choices about how best to administer its grant programs and would allocate the agency's resources differently. As the Amended Complaint makes clear, the central premise of Plaintiffs' lawsuit is that local governments are not doing enough to provide for fair housing and that HUD could better use its grant programs as a carrot (or stick) to influence local governments to address this problem. But this kind of third-party dispute over HUD's grant programs is not a proper subject of judicial resolution.

Plaintiffs' principal claim of an entitlement to sue is that they, like HUD, work to further fair housing and expend resources in pursuit of that mission. Because Plaintiffs' efforts inevitably reflect (or even complement) HUD's policies, Plaintiffs suggest that they have standing to sue HUD whenever the agency takes an action that affects how Plaintiffs pursue their own advocacy programs. When HUD takes action that affects grant eligibility requirements, for example, Plaintiffs suggest that any expenditures they make on education or counseling about HUD's decision, or any resources they devote to advocacy that reflects those changed circumstances, gives Plaintiffs standing to sue. That cannot be the case, as Plaintiffs would then have standing to sue HUD for every agency action it might take or policy it might adopt, allowing for governance-by-lawsuit at the behest of an organizational plaintiff. Accordingly, Plaintiffs' decisions about how to organize their advocacy budgets around whatever public policy is in effect are an insufficient basis to establish organizational standing.

At bottom, Plaintiffs are seeking to superintend the federal government's choices about how to administer its grant programs, but they are third parties to those programs and lack standing to sue. This action should be dismissed for lack of jurisdiction.

BACKGROUND

I. Statutory and Regulatory Background.[1]

HUD is charged with administering "the principal programs of the Federal Government which provide assistance for housing and for the development of the Nation's communities." 42 U.S.C. § 3531. To that end, HUD provides assistance to state and local governments through several block-grant programs for housing and community development. *See, e.g.*, *id.* §§ 3501 *et seq.*, 11371 *et seq.*, 12741 *et seq.*, 12901 *et seq*. These block-grant programs require state and local governments to conduct annual and longer-term strategic planning of their objectives and projected use of funds for housing, housing affordability, and community activities. *See, e.g.*, *id.* §§ 5304(a)(1), 12705. HUD refers to this as the Consolidated Plan process, which involves the submission to HUD of planning documents as a precondition for annual federal funds. *See generally* 24 C.F.R. pt. 91. As part of this process, program participants must certify compliance with applicable statutory and regulatory requirements.

Among these requirements is a certification that the grantee will affirmatively further fair housing. Under the Fair Housing Act, it is "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States," and HUD administers

[1] The statutory and regulatory background of this matter is set forth more fully in Defendants' opposition to Plaintiffs' motion for a preliminary injunction and for expedited summary judgment. Defs.' Mem. 3-14, ECF No. 33.

its block-grant programs "in a manner affirmatively to further" fair housing. 42 U.S.C. §§ 3601, 3608(e)(5). In line with this policy, the statutes governing HUD's block-grant programs require funding recipients to certify that they "will affirmatively further fair housing," or "AFFH." *See, e.g.*, *id.* §§ 5304(b)(2), 5306(d)(7)(B), 12705(b)(15).[2] But in administering the block-grant programs, HUD has required its program participants to do more than provide a certification; to receive federal funds, grantees must conduct independent fair housing planning, beyond general planning requirements otherwise imposed by statute. Specifically, HUD has required program participants to conduct an "analysis to identify impediments to fair housing choice" to guide their planning. *See, e.g.*, 24 C.F.R. §§ 91.225(a)(1), 91.325(a)(1) (2012). This process—the analysis of impediments—is known as an AI.

In 2015, HUD promulgated the AFFH Rule, which adopted a new planning process to assist program participants in certifying that they will affirmatively further fair housing. 80 Fed. Reg. 42,272 (July 16, 2015). Importantly, the AFFH Rule did not purport to alter the substantive statutory AFFH requirement for grantees. Rather, HUD adopted a new procedural mechanism—the Assessment of Fair Housing (AFH)—that would, over time, replace the AI as the required procedure[3] for grantees seeking to meet their substantive obligation to certify that they will affirmatively further fair housing. 24 C.F.R. § 5.150. The AFH consists of "an analysis of fair housing data, an assessment of fair housing issues and contributing factors, and an identification

[2] These statutory requirements are distinct from the Fair Housing Act itself. The Fair Housing Act imposes AFFH obligations on the Executive Branch; grantees' AFFH requirements are rooted in the statutes establishing the block-grant programs and HUD regulations.

[3] The AFFH Rule makes clear that submission of the AFH is a procedural requirement; HUD determines whether to accept the AFH but does not evaluate whether the grantee will meet any substantive obligations. That is, HUD's "[a]cceptance does not mean that the program participant has complied with its obligation to affirmatively further fair housing" or has otherwise complied with the Fair Housing Act and other civil rights laws. 24 C.F.R. § 5.162(a)(2).

of fair housing priorities and goals," and includes specific community participation standards. *Id.* §§ 5.152, 5.158(a). HUD decided to adopt staggered start dates and built-in contingencies as the new requirement was gradually rolled out. *See, e.g.*, *id.* § 5.160(a)(1)(i). As relevant here, HUD made the AFH submission requirement contingent on the publication of an Assessment Tool, a template that program participants are required to use when conducting an AFH, and relevant data from HUD. *Id.* §§ 5.154(c), 5.160(a)(1)(ii). Under the terms of the AFFH Rule, until a tool is published for a given category of program participant, grantees must continue to conduct an AI in support of their certification that they will affirmatively further fair housing. *Id.* § 5.151.

The AFFH Rule does not impose any particular schedule for the publication of Assessment Tools, leaving that task to HUD's discretion. HUD thus far has published an operative tool for only one category of grantees: local governments. The publication of this tool triggered AFH requirements for covered grantees. The most recent iteration of the Local Government Assessment Tool, known as LG2017, was published in January 2017 after two rounds of notice and comment pursuant to the Paperwork Reduction Act. 82 Fed. Reg. 4373 (Jan. 13, 2017). After receiving an initial round of submissions from local governments using the tool, HUD determined that the tool was defective and created unexpected burdens. Accordingly, HUD requested approval from the Office of Management and Budget (OMB) to withdraw LG2017, and OMB granted approval in May 2018. 83 Fed. Reg. 23,922 (May 23, 2018). Accordingly, under the terms of the AFFH Rule, an AFH is not due pending republication of the tool. 24 C.F.R. § 5.160(a)(1)(ii). Further, consistent with the AFFH Rule, local governments that had not yet submitted an accepted AFH were instructed to conduct an AI. *See* 83 Fed. Reg. 23,927, 23,927-28 (May 23, 2018) (explaining that program participants must

"nonetheless continue to comply with existing, ongoing legal obligations to affirmatively further fair housing" and "conduct an analysis of impediments (AI) to fair housing choice" in accordance with "the requirements that existed prior to August 17, 2015").

II. This Litigation.

On May 8, 2018, Plaintiffs—the National Fair Housing Alliance, Texas Low Income Housing Information Service, and Texas Appleseed—filed a complaint challenging a since-withdrawn HUD notice from January 2018. Compl., ECF No. 1. On May 29, 2018, Plaintiffs amended their complaint to challenge the May 23 withdrawal of LG2017, raising claims under the Administrative Procedure Act (APA), 5 U.S.C. § 706. Am. Compl., ECF No. 18. Specifically, the Amended Complaint challenges the withdrawal of LG2017 on three grounds: (1) that the withdrawal was procedurally improper, (2) that the withdrawal was arbitrary and capricious, and (3) that the withdrawal violated the Fair Housing Act. *Id.* ¶¶ 154-73.

As alleged in the Amended Complaint, Plaintiff National Fair Housing Alliance (NFHA) is a national nonprofit housing organization. Am. Compl. ¶16. Plaintiffs allege that NFHA is harmed by HUD's withdrawal of LG2017, and the resulting extension of AFH submission requirements for local governments, because the AFH process "make[s] NFHA's efforts more efficient and effective" by "provid[ing] NFHA and its members greater ability to ensure that fair housing considerations are included in municipal planning decisions" and "mak[ing] it much simpler for NFHA to advise and assist its members in effectively engaging at the local level." *Id.* ¶ 145. Further, Plaintiffs allege that HUD's decision "has required NFHA to divert resources to educating and counseling its members, civil rights organizations, and affordable housing stakeholders about HUD's actions." *Id.* ¶ 146; *see also id.* ¶ 147. Specifically, Plaintiffs allege (1) that "NFHA staff gave presentations" to groups "of NFHA's members," (2) that NFHA staff

members are developing a "side-by-side analysis of the differences between the AFH and AI processes" for use in education and counseling, (3) that NFHA "will need to continue to engage in individualized counseling regarding HUD's action with its members," and (4) that "[t]he amount of resources that NFHA must divert to such activities will increase in the coming months." *Id.* ¶¶ 148-51.

Plaintiffs Texas Appleseed and the Texas Low Income Housing Information Service ("Texas Plaintiffs") also are nonprofits engaged in fair housing-related advocacy. Am Compl. ¶¶ 17-18. As alleged, the Texas Plaintiffs are harmed by HUD's withdrawal of LG2017 because they will expend resources on fair housing issues in Hidalgo County, Corpus Christi, and Fort Worth, including monitoring federal disaster relief money in Corpus Christi and working "to sustain or recreate a climate and process in which community members and city officials are able to air their significant concerns about segregation and unequal access to opportunity for families of color" in Fort Worth. *Id.* ¶¶ 126-28. Further, the Texas Plaintiffs allegedly (1) "have taken or will take many specific actions," including producing an educational video, developing a fact sheet, responding to requests for information, engaging in ongoing public education, and writing letters to local governments, (2) "continue[] to meet on a regular basis with community groups in Hidalgo County," and (3) "invest resources in educating grassroots groups in Hidalgo County." *Id.* ¶¶ 130-31. The Texas Plaintiffs allege that as a consequence they have "curtail[ed] their grassroots outreach, education, and policy and legal support in Houston and surrounding areas recovering from the effects of Hurricane Harvey," limited their "outreach and education for low-income families in places like Beaumont and Port Arthur," and "divert[ed] the time of the head of [Texas Appleseed's] Disaster Recovery and Fair Housing Project away from developing a project to protect land rights of African Americans who own 'heir property.'" ¶¶ 133-35.

Concurrent with the Amended Complaint, Plaintiffs moved for a preliminary injunction and provided declarations in further support of their claims of harm from the withdrawal of LG2017. *See* Pls.' Mot. for Prelim. Inj. & Exp. Summ. J., ECF No. 19. That motion is fully briefed and set for argument July 18. Minute Order (June 15, 2018).

STANDARD OF REVIEW

Defendants move to dismiss Plaintiffs' complaint for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). "Federal courts are courts of limited jurisdiction," and "possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). "It is to be presumed that a cause lies outside this limited jurisdiction," and "the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* Consequently, courts "have 'an affirmative obligation to consider whether the constitutional and statutory authority exists for [them] to hear each dispute.'" *Bell v. U.S. Dep't of Health & Human Servs.*, 67 F. Supp. 3d 320, 322 (D.D.C. 2014) (quoting *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1092 (D.C. Cir. 1996)). "Absent subject matter jurisdiction over a case, the court must dismiss it." *Id.*

"It is well established that, in assessing subject matter jurisdiction, a court must construe the allegations in the Complaint liberally but 'need not accept factual inferences drawn by plaintiffs if those inferences are not supported by facts alleged in the complaint, nor must the Court accept plaintiffs' legal conclusions.'" *Masoud v. Suliman*, 816 F. Supp. 2d 77, 79 (D.D.C. 2011) (quoting *Speelman v. United States*, 461 F. Supp. 2d 71, 73 (D.D.C. 2006)). Further, the Court "must give the plaintiffs' factual allegations closer scrutiny in assessing subject matter jurisdiction than would be required for a Rule 12(b)(6) motion for failure to state a claim." *Id.* "In evaluating subject matter jurisdiction, the Court, when necessary, may look outside the

Complaint to 'undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.'" *Id.* (quoting *Herbert v. Nat'l Acad. of Sci.*, 974 F. 2d 192, 197 (D.C. Cir. 1992)).

ARGUMENT

The Court should dismiss this case because Plaintiffs lack Article III standing to sue HUD. "Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies,'" and "[t]he doctrine of standing gives meaning to these constitutional limits by 'identify[ing] those disputes which are appropriately resolved through the judicial process.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). "[T]he 'irreducible constitutional minimum' of standing consists of three elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016) (quoting *Lujan*, 504 U.S. at 560). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* Plaintiffs fail to meet their burden on all three elements.

I. Plaintiffs Fail to Plausibly Allege a Cognizable Article III Injury.

Plaintiffs lack standing because they fail to plausibly allege a cognizable injury-in-fact. To establish injury-in-fact, a plaintiff must have "suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc.*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). Organizational plaintiffs are no different. Courts do not entertain claims of "organizations 'who

seek to do no more than vindicate their own value preferences,'" and "an organization's abstract interest in a problem is insufficient to establish standing, 'no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem.'" *ASPCA v. Feld Entm't, Inc.*, 659 F.3d 13, 24-25 (D.C. Cir. 2011) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)). Rather, an organization must demonstrate a "'concrete and demonstrable injury to the organization's activities—with [a] consequent drain on the organization's resources—constituting . . . more than simply a setback to the organization's abstract social interests.'" *Nat'l Taxpayers Union, Inc. v. United States* ("*NTU*"), 68 F.3d 1428, 1433 (D.C. Cir. 1995) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)).

To that end, "'the organization must allege that discrete programmatic concerns are being directly and adversely affected'" by the challenged action. *NTU*, 68 F.3d at 1433 (quoting *Am. Legal Found. v. FCC*, 808 F.2d 84, 92 (D.C. Cir. 1987)). Specifically, an organization must "allege that the defendant's conduct 'perceptibly impaired' the organization's ability to provide services." *Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015) (quoting *Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011)); *see also League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016) (noting that the "question is whether 'a defendant's conduct has made the organization's *activities* more difficult'" (quoting *Nat'l Treas. Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996)). Put another way, an organization must point to some "'inhibition of [the organization's] daily operations' in order to establish injury in fact." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015). Consequently, an organization may not rest on "a 'self-inflicted' budgetary choice" to maintain standing. *ASPCA*, 659 F.3d at 25 (quoting *Equal Rights Ctr.*, 633 F.3d at 1139-40)).

Plaintiffs' various allegations of harm all fall short of these standards.

A. Plaintiffs cannot rely on their past work on fair-housing issues in a suit seeking prospective equitable relief.

As an initial matter, Plaintiffs may not rely on allegations of past harm to sustain this Court's jurisdiction in a suit for prospective relief. In setting out the alleged harms to Plaintiffs, the Amended Complaint describes at length their past work on fair-housing issues. *See, e.g.*, Am. Compl. ¶¶ 119-25, 138-44. But Plaintiffs' past conduct is beside the point in a suit seeking prospective relief. "Where as here plaintiffs seek 'forward-looking injunctive . . . relief, past injuries alone are insufficient to establish standing.'" *In re Navy Chaplaincy*, 697 F.3d 1171, 1175 (D.C. Cir. 2012) (quoting *NB ex rel. Peacock v. District of Columbia*, 682 F.3d 77, 82 (D.C. Cir. 2012)); s*ee also, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 495 (1974). Rather, "where the plaintiffs seek declaratory and injunctive relief," they must show that they are "suffering an ongoing injury or face[] an immediate threat of injury." *Dearth v. Holder*, 641 F.3d 499, 501 (D.C. Cir. 2011); *see also, e.g.*, *Nat'l Ass'n of Home Builders v. EPA*, 786 F.3d 34, 40 (D.C. Cir. 2015). Thus, Plaintiffs' involvement in past rulemaking, past participation in the AI and AFH process, and past expenditures of resources that do not support a claim of ongoing or imminent injury are irrelevant to the jurisdictional question before the Court.

B. Plaintiffs' expenditures on fair-housing advocacy are not a cognizable harm.

Plaintiffs similarly fail to plausibly allege a current or future injury-in-fact that could give rise to Article III standing. HUD's decision to withdraw LG2017 is a question of how best to administer its grant programs in line with HUD's obligations under the Fair Housing Act, but Plaintiffs are not party to HUD's grant programs. Plaintiffs are not HUD grant recipients, nor are Plaintiffs required to prepare an AFH or use LG2017. Instead, Plaintiffs seek to cast their dissatisfaction with HUD's administration of its grant programs for third parties as an issue of

Plaintiffs' own expenditures on promoting fair housing. Plaintiffs allege, for example, that NFHA is injured by the AI process because the AFH process makes NFHA's efforts "more efficient and effective" by providing opportunities to lobby local governments. Am. Compl. ¶ 145. Texas Plaintiffs similarly allege that absent the AFH process, they will expend resources to "recreate a climate and process" in which communities can present their concerns to local governments and to directly lobby local governments through writing letters about the obligation to affirmatively further fair housing. *Id.* ¶¶ 128, 130.

But these expenditures are not cognizable injuries. Plaintiffs are advocacy organizations that pursue these activities regardless, and they have pointed to no "'operational costs beyond those normally expended' to carry out [their] advocacy mission." *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011) (quoting *NTU*, 67 F.3d at 1434). It is well established that "a plaintiff 'cannot convert its ordinary program costs into an injury in fact,' unless the government's actions have required the organization to expend resources to pursue its mission." *Chesapeake Climate Action Network v. Ex.-Im. Bank of the U.S.*, 78 F. Supp. 3d 208, 231 (D.D.C. 2015). Plaintiffs set forth no facts to establish that withdrawal of LG2017 has "forced [them] to expend resources in a manner that keeps [them] from pursuing [their] true purpose" of advocating for fair housing. *NTU*, 68 F.3d at 1434. Plaintiffs allege that they pursue the same goal that HUD pursues in administering its block-grant programs—promoting fair housing—but that allegation does not convert any expenditures Plaintiffs might make in service of that mission into an "injury" for purposes of standing, regardless whether Plaintiffs view their budgetary choices as "counter[ing] the effects of HUD's suspension of the AFH submission requirement." Am. Compl. ¶ 130. Expending resources on the same goals as HUD is not an injury.

If Plaintiffs' alleged expenditures on advocating for local governments to affirmatively further fair housing were enough to create standing, advocacy organizations like Plaintiffs could always choose to expend resources "counteracting" policy choices they disagree with and thereby create an entitlement to sue. *See, e.g.*, Am. Compl. ¶ 138 ("When HUD has been unwilling to effectively enforce the AFFH requirement, NFHA has had to expend resources in its stead."). An organization's normal budgetary expenditures on their preferred policy outcomes would transform into "harm" from any government decision to implement a policy in a way not to the organization's liking. Such a rule would render every government enforcement decision amenable to suit by organizational plaintiffs and create *carte blanche* for nonprofits to superintend government policy decisions. For that reason, courts have found that organizations lack standing to sue when "the only 'service' impaired is pure issue-advocacy." *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1161-62 (D.C. Cir. 2005). Indeed, the Court of Appeals "has not found standing when the only 'injury' arises from the effect of the regulations on the organizations' lobbying activities." *Id.* Even where Plaintiffs choose to forgo advocacy on different issues—such as hurricane-related issues, heir property, or zoning codes in Austin, Am. Compl. ¶¶ 133-35—"this particular harm is self-inflicted; it results not from any actions taken by [the defendant], but rather from the [plaintiff's] own budgetary choices." *EPIC v. U.S. Dep't of Educ.*, 48 F. Supp. 3d 1, 24 (D.D.C. 2014).

The cases are clear: Plaintiffs must "allege that the defendant's conduct 'perceptibly impaired' the organization's ability to provide services," *Turlock Irrigation Dist.*, 786 F.3d at 24 (quoting *Equal Rights Ctr.*, 633 F.3d at 1138), and the "question is whether 'a defendant's conduct has made the organization's *activities* more difficult.'" *League of Women Voters of U.S.*, 838 F.3d at 8 (quoting *NTEU*, 101 F.3d at 1430). An agency's decision about how to administer

its grant requirements for third parties is not *de facto* an impairment of Plaintiffs' ability to provide services simply because Plaintiffs choose to expend their own resources in a way that reflects the current grant requirements. HUD's decision must actually impede a specific activity, and Plaintiffs have not met their burden to allege a plausible impediment to their services. This is not a case where HUD is requiring Plaintiffs to take burdensome steps or incur costs in order to lobby for fair-housing outcomes; HUD has required nothing of Plaintiffs whatsoever. Plaintiffs are making their own choices about how to expend their own funds on advocacy.

The closest Plaintiffs come to alleging a specific impediment to their advocacy efforts is the contention that the AFH process and its community participation requirements make it easier for Plaintiffs to lobby local governments. *See, e.g.*, Am. Compl. ¶ 129 (alleging that Texas 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, must reach out to community members, and more"). Yet Plaintiffs engage in this kind of lobbying of local governments regardless of the contours of HUD's AFFH requirements for grant recipients. *See, e.g.*, *id.* ¶ 123. There can be no cognizable harm from expenditures on lobbying local governments to pursue fair-housing goals if Plaintiffs engage in these activities regardless. Further, citizen participation is a requirement for local governments' Consolidated Plans more generally, independent of the AFH, *see, e.g.*, 24 C.F.R. § 91.105, so grantees already are required to provide opportunities for Plaintiffs to submit feedback. In other words, if Plaintiffs' claim of standing is rooted in a purported denial of a government-incentivized opportunity for local communities to participate, that assertion is belied by existing and independent HUD requirements for grantees. The AFFH Rule's separate community-participation requirements ensure that local communities participate in the development of the

AFH when the AFH submission requirement is in place; grantees are required to engage the public regardless. *See, e.g.*, *id.* § 91.105(e) (hearing requirements).

Further, to the extent Plaintiffs rest their standing on allegations that local governments will not provide opportunities for public input absent the AFH submission requirement, Plaintiffs cannot rest on procedural deprivations absent a concrete and actual injury. As the Supreme Court recently explained, a plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III," even where the procedural violation is particularized to the plaintiff. *Spokeo, Inc.*, 136 S. Ct. at 1549; *see also, e.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing."); *Lujan*, 504 U.S. at 572; *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 514 (D.C. Cir. 2016). Plaintiffs cannot challenge the speculative deprivation of an opportunity to present their concerns to local government absent "a procedural right to protect [their] concrete interests," *Lujan*, 504 U.S. at 572 n.7, and Plaintiffs have pointed to no concrete interest beyond their own self-imposed budgetary choices rooted in their beliefs about actions that third parties—local governments—will take. If the AFFH Rule's community-participation requirement for grantees creates any procedural right to protect a concrete interest, it is the interests of the members of local communities—not Plaintiffs' budgets.

In this way, Plaintiffs are situated differently from organizational plaintiffs that have established standing to challenge HUD policies in this district. In *Open Communities Alliance v. Carson*, 286 F. Supp. 3d 148 (D.D.C. 2017), for example, the organizational plaintiff worked "to assist [housing] voucher holders [to] gain access to greater opportunity" and challenged the delay of a HUD rule addressing how a voucher's value is calculated. *Id.* at 152-53, 178. The Court

concluded that the delay of the HUD rule impeded the organization's ability to provide that direct *service* to voucher holders—assistance in gaining access to housing—as the organization could not as successfully engage developers to acquire and construct affordable housing given that the anticipated income from voucher holders under the existing calculation would not support financing for that kind of development. *Id.* at 173. In light of this delay in the implementation of a *substantive* regulation, the organization was required to expend additional resources on providing this service to voucher holders. *See id.* Here, in contrast, there has been no change in the substantive requirement for local governments—to affirmatively further fair housing—only in *procedural* requirements to receive grants, and Plaintiffs do not plausibly allege that their ability to provide any direct services have been impeded by the requirement of an AI rather than an AFH. Plaintiffs allege only that they lack the benefit of a procedural participation requirement, which is not a plausible injury given that HUD grantees are still required to allow for public participation and Plaintiffs make expenditures on lobbying these governments regardless of the participation requirements in effect.

In any event, these allegations all rest on speculation about what actions third-party local governments might take absent an AFH submission requirement, as local governments are free to actively engage their communities regardless of HUD's grant requirements. Thus, any such injury is based on a chain of hypotheticals not properly traced to HUD, as discussed further *infra*, and the Court "may reject as overly speculative those links which are predictions of future events (especially future actions to be taken by third parties)." *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015) (quoting *United Transp. Union v. ICC*, 891 F.2d 908, 912-13 (D.C. Cir. 1989)).

C. Plaintiffs' expenditures on education and counseling are not cognizable harm.

Beyond Plaintiffs' general advocacy costs, Plaintiffs cite to expenses incurred in outreach and public education about the applicable AFFH policies in place, particularly surrounding the AFFH Rule. *E.g.*, Am. Compl. ¶ 146 (alleging that NFHA has "divert[ed] resources to educating and counseling its members, civil rights organizations, and affordable housing stakeholders about HUD's actions"); *see also id.* ¶¶ 130-31, 145, 148-51. But the Court of Appeals has made clear that "an organization does not suffer an injury in fact where it 'expend[s] resources to educate its members and others' unless doing so subjects the organization to 'operational costs beyond those normally expended.'" *Food & Water Watch, Inc.*, 808 F.3d at 920. Plaintiffs do not allege, for example, that Defendants have impeded Plaintiffs' efforts to engage in public education, causing the organization to incur additional educational costs. *Cf. PETA v. USDA*, 797 F.3d 1087, 1097 (D.C. Cir. 2015). Rather, Plaintiffs assert that they must educate the public *about* Defendants' action, but that course of conduct is a normal expense for an organization that undertakes to educate the public about the current regulatory environment. These costs are "expended by choice because such activities are at the core of [Plaintiffs'] mission[s]," and the "diversion of [Plaintiffs'] resources to educate the public about [the LG2017 withdrawal] is not a sufficient injury in fact." *EPIC*, 48 F. Supp. 3d at 24. A conscientious advocacy organization will of course take steps like developing a "side-by-side analysis" of different policies; merely marking a change in policy is untenable as a source of supposed injury. *See, e.g.*, Am. Compl. ¶ 149. An organizational plaintiff cannot create standing simply by educating the public about an agency action that they seek to challenge.

Plaintiffs also suggest that they are required to counsel members and communities about their legal rights vis-à-vis local governments participating in HUD programs. *See, e.g.*, Am.

Compl ¶¶ 146, 148-51. For the same reasons that expenditures on pure-issue advocacy and education do not confer standing, nor does counseling. Plaintiffs seem to suggest that any legal development on which they provide counseling is inherently injurious to the organization. But HUD has not perceptibly impaired Plaintiffs' efforts at counseling clients because nothing about the withdrawal has impeded Plaintiffs from providing legal counseling. That holds true regardless whether Plaintiffs choose to redirect some of their resources from counseling on one subject to another. *NTU*, 68 F.3d at 1434 ("The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization."). Plaintiffs assert an entitlement to sue the federal government over a disagreement with a policy choice whenever they choose to provide counseling *about* that policy choice, but that vision of standing would again allow Plaintiffs to sue federal agencies at will over policy, contrary to the purposes of standing doctrine. *See, e.g.*, *Clapper*, 133 S. Ct. at 1146.

D. Plaintiffs' interest in local governments' compliance with the law does not support Article III standing.

Lastly, Plaintiffs appear to allege that they have been injured because the suspension of AFH obligations for local governments resulting from the withdrawal of LG2017 deprives them of information on program participants' compliance with the law. Plaintiffs allege, for example, that HUD's action has made it more difficult for Plaintiffs to "monitor" local governments' compliance with the law. *See, e.g.*, Am. Compl. ¶ 127. But "[t]o hold that a plaintiff can establish injury in fact merely by alleging that he has been deprived of the knowledge as to whether a violation of the law has occurred would be tantamount to recognizing a justiciable interest in the enforcement of the law." *Common Cause v. Fed. Election Comm'n*, 108 F.3d 413, 418 (D.C. Cir. 1997); *see also Judicial Watch, Inc. v. Fed. Election Comm'n*, 180 F.3d 277, 278

(D.C. Cir. 1999) (explaining that such an "'injury' is no more than a generalized 'interest in enforcement of the law,' and does not support standing"). Indeed, courts have made clear that organizational standing "requires 'more than allegations of damage to an interest in "seeing" the law obeyed or a social goal furthered.'" *NTU*, 68 F.3d at 1433. Plaintiffs' interest in seeing third-party local governments comply with their independent statutory obligation to affirmatively further fair housing can be no basis for a suit against HUD over its administration of its grant programs.

II. Plaintiffs Fail to Plausibly Allege Causation or Redressability.

Even if Plaintiffs had established injury, Plaintiffs have not plausibly alleged a "fairly traceable connection between the plaintiff's [alleged] injury and the complained-of conduct of the defendant." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). Plaintiffs do not plausibly allege any direct injury from HUD's withdrawal of LG2017; again, Plaintiffs are not HUD grant recipients, and HUD's action directly affects only its local-government grantees. Plaintiffs instead present a theory of indirect injury, specifically that they will expend resources on pursuing their fair-housing goals "without HUD's assistance." Am. Compl. ¶ 126. But even this conception of indirect injury rests on speculative assumptions about the conduct of third parties to this litigation—the local governments that are the subject both of HUD's block-grant submission requirements and Plaintiffs' efforts. It is the hypothetical conduct of these third parties that would determine many of the facts relevant to Plaintiffs' claims of injury. These local governments are the direct cause of Plaintiffs' alleged need to expend resources on encouraging these local governments to pursue fair housing to Plaintiffs' satisfaction; if these local governments already did so, Plaintiffs apparently would spend their budgets elsewhere.

But to establish standing, an injury-in-fact must be properly attributable to the defendant, and "not the result of the independent action of some third party not before the court." *Arpaio*, 797 F.3d at 19 (quoting *Lujan*, 504 U.S. at 561). This limitation is particularly salient where, as here, "an agency's action relates to one party but a third party alleges harm." *Save Jobs USA v. DHS*, 210 F. Supp. 3d 1, 7 (D.D.C. 2016). When a plaintiff is "not 'the object of the government action or inaction [it] challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish.'" *Morgan Drexen, Inc. v. CFPB*, 785 F. 3d 684, 689-90 (D.C. Cir. 2015) (quoting *Lujan*, 504 U.S. at 562). For a plaintiff bringing such a claim, it becomes "substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions." *Warth v. Seldin*, 422 U.S. 490, 505 (1975). Although a plaintiff may have standing "in a case that turns on third-party conduct," this Circuit has required "substantial evidence of a causal relationship between the government [action] and the third-party conduct, leaving little doubt as to causation." *Arpaio*, 797 F.3d at 20.

On this front, traceability and redressability are closely related. To establish redressability, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561. Because Plaintiffs assert indirect injury, they must establish facts "sufficient to demonstrate a substantial likelihood that the third party directly injuring the plaintiff would cease doing so as a result of the relief the plaintiff [seeks]." *Renal Physicians Ass'n v. HHS*, 489 F.3d 1267, 1275 (D.C. Cir. 2007). If Plaintiffs rely on a "chain of allegations," the court "may reject as overly speculative those links which are predictions of future events (especially future actions to be taken by third parties)." *Arpaio*, 797 F.3d at 21 (quoting *United Transp. Union v. ICC*, 891 F.2d 908, 912-13 (D.C. Cir. 1989)).

Here, Plaintiffs' entire action is premised on an assumption that local governments will fail to meet their obligations to affirmatively further fair housing unless incentivized to do so by completing an AFH to maintain eligibility for federal funds. *See, e.g.*, Am. Compl. ¶ 130 (alleging that Texas Plaintiffs will have to "convince local government program participants to nonetheless take their fair housing obligations seriously"). Plaintiffs point to local governments in Texas—Hidalgo County and Corpus Christi, *id.* ¶¶ 123-27—where Plaintiffs claim they expend resources to address fair-housing issues. By Plaintiffs' own account, they choose to expend these resources because they believe *these local governments* are not affirmatively furthering fair housing. *See, e.g.*, *id.* ¶¶ 123-24 (alleging that Hidalgo County has "ignored the needs of the people living there" and "failed . . . to grapple with the publicly stated needs of colonias residents"). Plaintiffs present a litany of complaints about these local governments, all of which "hinge on the independent choices" of third parties not before the Court. *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004). This lawsuit presents a classic case of a suit against the government to police the conduct of a third party.

Plaintiffs cannot satisfy the "more exacting scrutiny" required to establish traceability and redressability under these circumstances. *Freedom Republicans, Inc. v. FEC*, 13 F.3d 412, 419 (D.C. Cir. 1994). Plaintiffs contend that their injuries are caused by the withdrawal of LG2017. But program participants are required to certify that they will fulfill their obligation to affirmatively further fair housing as a condition for their receipt of public funds *regardless* whether the AI policy or the AFH policy applies. *See, e.g.*, 83 Fed. Reg. at 23,927. Plaintiffs allege that they must remind local governments of "their continued obligation to affirmatively further fair housing," Am. Comp. ¶ 130, but not only has HUD already made clear that local governments must still perform an AI and affirmatively further fair housing, local governments'

choices about how to meet their obligations are theirs alone. If a local government does not meet its statutory obligation, it is "hard to imagine how any of the defendants [bear] responsibility for that outcome," *Common Cause v. Biden*, 748 F.3d 1280, 1285 (D.C. Cir. 2014), except perhaps if Plaintiffs are impermissibly seeking to challenge HUD's decisions on how to enforce federal law against a third party. *See, e.g.*, Am. Compl. ¶ 138.

In any event, the AFH approach does not guarantee outcomes different from the AI approach. Although HUD adopted the Rule because it believed that the AFH process was "likely to lead to a more effective fair housing planning process," 80 Fed. Reg. at 42,312, the AFH submission requirement does not obligate grantees to take any particular course of action, nor does HUD's acceptance of the AFH indicate fulfillment of AFFH obligations. 24 C.F.R. § 5.162(a)(2). Plaintiffs' complaint is premised on the notion that the AFH is indispensable to ensuring fair-housing outcomes in communities where local governments accept federal funding through HUD's block-grant programs, but that premise rests on assumptions not made by the AFFH Rule—that is, that the new process guarantees different AFFH outcomes. Local governments' compliance with their AFFH obligations depends "on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *US Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000).

To wit, Plaintiffs must assume (1) that a covered HUD program participant is not meeting, or will not meet, its AFFH obligations; (2) that this program participant is a local government that would have conducted an AFH but for the withdrawal of LG2017; (3) that this program participant would have successfully conducted an AFH regardless of defects with LG2017; (4) that conducting an AFH instead of an AI definitively would have led the program

participant to reach different conclusions in its fair housing planning process; (5) that any such steps taken in the planning process definitively would have led the participant to take concrete actions solely traceable to the AFH mechanism; (6) that taking these steps would lead to fair-housing outcomes clearly traceable to the AFH process; and (7) that any such achievements in addressing fair-housing issues would leave Plaintiffs satisfied such that they no longer choose to spend resources on advocacy, education, or counseling in that community.

This chain of events is highly speculative, and "[t]he greater number of uncertain links in a causal chain, the less likely it is that the entire chain will hold true." *Am. Freedom Law Ctr. v. Obama*, 821 F.3d 44, 49 (D.C. Cir. 2016). Plaintiffs' expenditures are rooted in assumptions about actions local governments will take in response to the withdrawal of LG2017, and Plaintiffs assume that an order directing HUD to reinstitute LG2017 would lead to different outcomes. Plaintiffs can only speculate, and "a plaintiff's standing fails where it is merely speculative that a requested change in government policy will alter the behavior of regulated third parties that are the direct cause of the plaintiff's injuries." *Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 938.

CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court dismiss Plaintiffs' Amended Complaint for lack of subject-matter jurisdiction.

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Respectfully submitted,

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