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August 23, 2021

Submitted Electronically via Regulations.gov
Kathleen M. Pennington
Acting Associate General Counsel for Fair Housing
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW
Washington, DC 20410

Re: Docket No. FR–6251–P–01
RIN 2529–AB02
Reinstatement of HUD's Discriminatory Effects Standard

Dear Ms. Pennington:

We write on behalf of the NAACP Legal Defense and Education Fund, Inc. (LDF) in response to the U.S. Department for Housing and Urban Development's (HUD's) request for comments on its proposed rule reinstating the discriminatory effects standard. We strongly support the restoration of this important rule, which took a critical step forward in providing a clear and workable standard for the evaluation of discriminatory effects claims under the Fair Housing Act. The standard in the restored rule appropriately reflects decades of experience in evaluating fair housing claims, the history and purpose of the Fair Housing Act, and federal court interpretations, including that of the U.S. Supreme Court in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015).[1] The withdrawal of HUD's 2020 discriminatory effects regulation (which stood in the way of complainants' ability to vindicate their rights under the Fair Housing Act) and the reinstatement of the 2013 standard (which re-establishes a viable route to assess claims and therefore to redress discrimination and segregation) aligns with HUD's obligation to implement and enforce the Fair Housing Act.[2] It is a much-needed step in addressing the discrimination and segregation that still characterize our country's housing markets and policies, in both the public and private sectors.

LDF is a non-profit legal organization that, for more than 80 years, has helped African Americans secure their civil and constitutional rights. Throughout its history, LDF has challenged public and private policies and practices that deny African Americans opportunities and choices

[1] *Tex. Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 576 U.S. 519 (2015).
[2] 42 U.S.C. § 3608(a) (1988)(charging HUD with the "authority and responsibility" of implementing the Fair Housing Act).

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in housing and further isolate African American communities.[3] LDF has always been a pioneering force in our nation's quest for greater equality and will continue to advocate on behalf of African Americans, both in and outside of the courts, until equal justice for all Americans is attained. For decades, LDF has relied on the Constitution and federal and state civil rights laws to pursue equality and justice for African Americans and other people of color.

Since its inception and founding by legendary civil rights lawyer and later Supreme Court Justice Thurgood Marshall, LDF has worked to combat racial segregation and promote racial integration in housing. One of Justice Marshall's early victories in the Supreme Court came in *Shelley v. Kramer*, 334 U.S. 1 (1948), in which the Court held that state enforcement of racially restricted covenants violated the Equal Protection Clause of the Fourteenth Amendment. Through our economic justice practice, LDF continues to fight for increased fairness and equal opportunity for African Americans in all aspects of the economy. The Fair Housing Act's discriminatory effects (or "disparate impact") standard has been and remains a vital tool in this endeavor.

1. Disparate impact is critical to preventing discrimination and advancing equality

Much of our body of civil rights protections – including Title VIII and other laws – came into being three centuries after our nation's formal founding, into a society deeply shaped by racial discrimination. These laws were among the crowning achievements of the Civil Rights Movement, in which extensive protests, civil disobedience, and other forms of political pressure brought to fruition the demands for equality voiced by the Black community and others. In part, these laws reinforced the requirements of the 14th Amendment, which prevents discrimination by the government, but had been an inadequate tool for that end.[4] They also responded to the need for broader measures to redress and prevent discrimination, in light of its extensive social harms.[5]

[3] See, e.g., *McGhee v. Sipes*, 334 U.S. 1 (1948) (companion case to *Shelley v. Kraemer*, 334 U.S. 1 (1948)) (racially restrictive covenants); *Cent. Ala. Fair Hous. Ctr. v. Lowder Realty Co*., 236 F.3d 629 (11th Cir. 2000) (racial steering); *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994) (racial discrimination in public housing and assistance programs); *NAACP v. Am. Family Mut. Ins. Co*., 978 F.2d 287 (7th Cir. 1992) (redlining); *Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (exclusionary zoning); *Thompson v. U.S. Dep't of Hous. & Urb. Dev*., No. 95309, 2006 WL 581260 (D. Md. Jan. 10, 2006) (federal government's obligation to further fair housing affirmatively); *Consent Decree, Byrd v. First Real Estate Corp. of Ala*., No. 95-CV-3087 (N.D. Ala. May 14, 1998) (racial steering); *Brown v. Artery Org., Inc*., 654 F. Supp. 1106 (D.D.C. 1987) (redevelopment plans that unfairly eliminate affordable housing).

[4] See Alan Jenkins, Title VI of the Civil Rights Act of 1964: Racial Discrimination in Federally Funded Programs, in 10 NAT'L LAWYERS GUILD, CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 173, 193 (Steven Saltzman & Barbara M. Wolvovitz eds., 1995).

[5] See, e.g., *N.A.A.C.P. v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 154 (1st Cir. 1987)(citing 114 Cong. Rec. 2281 (1968) (statement of Sen. Brooke) (a purpose of Title VIII is to remedy the "weak intentions" that have led to the federal government's "sanctioning discrimination in housing throughout this Nation"); id. at 2526-28 (statement of Sen. Brooke) (reviewing history of federal fair housing efforts); id. at 9577 (statement of Rep. Cohelan) (decrying historical "neglect" of minorities); id. at 9595 (statement of Rep. Pepper) (lamenting government's slowness in establishing truly "equal" rights)).

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Private and public actors and a myriad of discriminatory policies and practices all contributed to racial (and other forms of) inequality, and had been doing so for generations. These facts regarding the breadth and depth of such discrimination animated Congressional deliberations around legislation such as the Fair Housing Act and informed the statute's ultimate scope.[6] The need for nondiscrimination law to reach and respond to the realities of discrimination – including the broad scope of practices and actors at issue – has resonated since the time of legislative passage, in deliberation by the courts over the subsequent decades, and in the policy assessments and reasoning of administrative agencies into the present day. As that reasoning and body of evidence shows, nondiscrimination law must redress institutional racism, and must invoke accountability for actors (public and private) whose policies and decisions serve to ingrain and perpetuate inequality. This is clear in the language and intent of the Fair Housing Act and other statutes, and the discriminatory effects standard serves to assess and root out such discrimination.

A foundational step in setting forth the disparate impact standard was taken with the Supreme Court's 1971 ruling in *Griggs v. Duke Power*,[7] a case addressing employment discrimination under Title VII. In *Griggs*, the Court embraced a powerful legal tool – now known as "disparate impact" – that has proved essential in the fight to eradicate arbitrary and artificial barriers to equal employment opportunity for all individuals, regardless of race. LDF represented the plaintiffs in *Griggs*, a group of thirteen African American employees who worked at the Duke Power Company's Dan River Steam Station, a power-generating facility located in Draper, North Carolina. Duke Power had a long history of segregating employees by race. At the Steam Station, the best jobs were reserved for whites. Shortly after Congress passed Title VII of the Civil Rights Act of 1964, which made it illegal for employers to discriminate on the basis of race, Duke Power stopped expressly restricting African-Americans and instead announced new standards for hiring, promotion, and transfer that bore little connection to an individual's ability to perform a job, but that disproportionately excluded African Americans. In ruling against Duke Power, the Supreme Court held that Title VII "proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation."[8] As it further explained, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to freeze the status quo of prior discriminatory practices."[9]

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[6] See, e.g., Kerner Commission, Report of the National Advisory Commission on Civil Disorders 467-82 (Washington: U.S. Government Printing Office 1968) (noting the role of intentional discrimination and segregation, but also unequal code enforcement, land use, lack of maintenance and investment, and other factors in constructing and perpetuating African-American ghettos); Douglas S. Massey & Nancy A. Denton, American Apartheid 58 (1993) (describing the combined effects of real estate industry discrimination, individual prejudice, federally sponsored financial discrimination, disparate "urban renewal" efforts, and public housing authority policies contributing to segregation).

[7] *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

[8] Id. at 431.

[9] Id. at 430.

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The conceptual power and practical sense of the *Griggs* decision, in combination with the Fair Housing Act's history and language and the manifest continuing "status quo" of residential segregation and discrimination, quickly traveled into fair housing jurisprudence, and has shaped fair housing law ever since. Thus, in *United States v. City of Black Jack*,[10] the United States Court of Appeals for the Eighth Circuit relied on *Griggs (*three years after the *Griggs decision)* in finding illegal a city council ordinance that prohibited the construction of multi-family dwellings within the city. Statistical evidence submitted showed that the City of Black Jack, where the dwellings would have been constructed, was virtually all-white. Many African American families in the area were unable to afford single-family units. The ultimate effect of the ordinance was to foreclose 85 percent of African Americans living in the metropolitan area from obtaining housing in Black Jack, and to foreclose them at a time when 40 percent of them were living in substandard or overcrowded units.[11] The court explained that the Fair Housing Act, like Title VII, prohibits policies, such as the one at issue, which disproportionately and unnecessarily harm African Americans. As the court stated: "a facially neutral zoning law "must be curbed where the clear result . . . is the segregation of low-income Blacks from all White neighborhoods."[12] And as the court in *Huntington Branch, NAACP v. Town of Huntington,* underscored in 1988: "the Act's stated purpose to end discrimination requires a discriminatory effect standard; an intent requirement would strip the statute of all impact on de facto segregation."[13] In that case, plaintiffs had challenged an ordinance restricting multifamily housing to the town's designated "urban renewal area," a segregated area of the town.[14]

In 2015, in *Inclusive Communities*, the Supreme Court affirmed the continuing viability of the disparate impact standard, and its importance in confronting and remedying discrimination and segregation. As the Court held, "[r]ecognition of disparate-impact claims is consistent with the FHA's central purpose."[15] The Court also stated that "antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose."[16] The opinion further pointed out that "[d]e jure residential segregation by race was declared unconstitutional almost a century ago, but its vestiges remain today, intertwined with the country's economic and social life."[17]

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[10] *United States v. City of Black Jack, Missouri*, 508 F.2d 1179, 1184 (8th Cir. 1974).
[11] Id.
[12] Id. at 1184.
[13] *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 928 (2d Cir.), aff'd in part per curiam, 488 U.S. 15 (1988).
[14] Id. at 928.
[15] *Tex. Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 576 U.S. 519 (2015).
[16] Id. at 534.
[17] Id. at 520.

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In making its ruling in *Inclusive Communities Project*, the Court looked to the Fair Housing Act's text and structure, reading this in concert with similar provisions such as that of Title VII (looking to the precedent of *Griggs*). As the Court noted, the Fair Housing Act was designed to remedy discrimination in housing and related services, and its language (to "otherwise make unavailable or deny") parallels that of Title VI. The Court further drew from the Act's broad remedial purpose, that of ''eradicat[ing] discriminatory practices within a sector of our [n]ation's economy," and recognized the importance – both at the Act's passage and today – of redressing segregation. As the Court in said: "The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that our Nation is moving toward two societies, one black, one white—separate and unequal. Thus, the Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society.''[18]

Courts had consistently held, for over forty years in between the Act's passage and the *Inclusive Communities* decision, that liability under Title VIII may be established based on a showing that a neutral policy or practice either has a disparate impact on a protected group or creates, perpetuates, or increases segregation. The disparate impact framework has been used to protect against discrimination and challenge segregation in the broad variety of circumstances in which those problems arise. Such cases include, for example, *Langlois v. Abington Hous. Auth.* (1st Cir. 2000) (residency requirements by local housing authorities that prevent households from accessing housing across municipal bounds);[19] *Keith v. Volpe* (9th Cir. 1988) (failure to construct nondiscriminatory replacement housing for residents displaced by freeway construction);[20] *Jackson v. Okaloosa Cnty.* (11th Cir. 1994) (discriminatory public housing siting and redevelopment);[21] *Huntington Branch, N.A.A.C.P. v. Town of Huntington* (2d Cir. 1988) (zoning ordinance confining multifamily housing to a narrow urban renewal area);[22] *Smith v. Town of Clarkton, N.C.* (4th Cir. 1982) (town's withdrawal from a multi-municipality housing authority effectively blocking construction of public housing units);[23] *Dews v. Town of Sunnyvale, Tex.* (N.D. Tex. 2000) (exclusionary zoning);[24] *Greater New Orleans Fair Hours. Action Ctr. v. St. Bernard Par.* (E.D. La. 2009) (residency preferences and "blood relative" rental limitations);[25] *Comer v. Cisneros* (2d Cir. 1994) (public housing administration);[26] *Gilligan v. Jamco Dev. Corp.* (9th Cir. 1997) (unjustified refusal to rent to recipients of public assistance);[27] *Nat'l Fair Hous.*

[18] *Inclusive Cmtys. Project, Inc.*, 573 U.S. at 546–47 (2015)
[19] 207 F.3d 43.
[20] 858 F.2d 467.
[21] 21 F.3d 1531, 1543.
[22] 844 F.2d 926, aff'd in part per curiam, 488 U.S. 15 (1988).
[23] 682 F. 2d 1055.
[24] 109 F. Supp. 2d 526.
[25] 648 F. Supp. 2d 805.
[26] 37 F.3d 775.
[27] 108 F.3d 246.

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All., Inc. v. Prudential Ins. Co. of Am. (D.D.C. 2002) (homeowners insurance redlining);[28] *Nat'l Cmty. Reinvestment Coal. v. Accredited Home Lenders Holding Co.* (D.D.C. 2008) (exclusionary mortgage lending policies);[29] *Oxford House, Inc. v. Town of Babylon* (E.D.N.Y. 1993) (zoning restrictions on supportive living facilities);[30] as well as in numerous other situations.

Recent disparate impact cases brought by LDF further illustrate the ways the standard is needed to reach a variety of discriminatory policies impacting Black Americans. In 2008, LDF represented New Orleans homeowners in a suit against HUD and the Louisiana Recovery Authority for discriminating against Black homeowners in the aftermath of Hurricane Katrina, *Greater New Orleans Action Center v. HUD*.[31] The suit concerned the Road Home program, which provided storm victims with funding to rebuild their homes; the program calculated compensation based on the original value of the lost homes rather than the cost of damage. As a result, homes in black neighborhoods identical to homes in white neighborhoods were given far less money to rebuild. In a 2011 settlement, HUD agreed to pay approximately $62 million under a new Blight Reduction Grant Adjustment program.[32]

LDF has also used disparate impact claims in challenges since *Inclusive Communities Project*, such as one against tax assessment and foreclosure policies with a disparate impact on Black homeowners. In *MorningSide v. Sabree*,[33] plaintiffs alleged that the county foreclosed on properties for unpaid property tax bills, even though municipalities in the county, like Detroit, had failed to comply with their duty to annually assess properties, particularly during and after the 2008 financial crisis. The judge in *Morningside* ruled that plaintiffs had properly stated a claim for race discrimination under the FHA. While the court ultimately determined that the Michigan Tax Tribunal had exclusive jurisdiction over plaintiffs' claim, the case demonstrated the broad applicability of the FHA's disparate impact provisions and how a variety of discriminatory practices can harm African Americans. LDF also used the Fair Housing Act's disparate impact standard to challenge discrimination in municipal water services, in *Pickett v. City of Cleveland*,[34] where LDF argued that the city's water billing, shutoff, and lien policies had a discriminatory impact on Black residents.

As such cases demonstrate, the disparate impact standard is a vital part of the Fair Housing Act, needed to reach many of the forms of discrimination that impede equality and choice in

[28] 208 F. Supp. 2d 46.
[29] 573 F. Supp. 2d 70.
[30] 819 F. Supp. 1179.
[31] See Road Home Fact Sheet (2008), https://www.naacpldf.org/wp-content/uploads/road_home_factsheet.pdf.
[32] "HUD to pay $62 million to La. homeowners to settle Road Home lawsuit,"The Washington Post, www.washingtonpost.com/business/economy/hud-to-pay-62-million-to-la-homeowners-to-settle-road-home-lawsuit/2011/07/06/gIQAtsFN1H_story.html.
[33] *MorningSide v. Sabree*, No. 16-008807-CH (Wayne Cnty. Cir. Ct. Oct. 17, 2016).
[34] *Pickett v. City of Cleveland*, 1:19-cv-02911, N.D. Ohio (filed 12/18/2019).

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housing. As our nation embarks on an extensive expansion of our infrastructure – one that LDF hopes will include significant resources for housing construction, voucher subsidies, municipal service infrastructure, and other housing-related purposes – such applications of the disparate impact standard will be critically needed to protect and expand racial equity and to ward off further segregation.

2. Housing discrimination and segregation persist and impact life opportunities for Black Americans

Discrimination in the housing sector is, unfortunately, persistent and multi-faceted. It still shapes communities and individual lives, such that strong civil rights tools are critical to vindicate rights and to pursue a more equal and less segregated society. The Fair Housing Act's Congressional record and the work of scholars since have richly documented the extent and impacts of housing discrimination in shaping our country, at the time of the Act's passage and since.[35]

Today, housing discrimination remains prevalent, and anti-discrimination measures are critically needed. According to data compiled in the National Fair Housing Alliance's recent Fair Housing Trends report, there were 28,712 officially reported complaints of housing discrimination in the U.S. in 2020.[36] Residential racial segregation is still widespread. As a recent report from the Othering & Belonging Institute at University of California at Berkeley documents, 81% of metropolitan regions were more segregated in 2019 than in 1990.[37] As the report further found, neighborhood poverty rates are highest in segregated communities of color (21 percent), and relatively low in segregated white neighborhoods (7 percent); household incomes and home values in white neighborhoods are nearly twice as high as those in segregated communities of color; and homeownership is 77 percent in highly segregated white neighborhoods, 59 percent in well-integrated neighborhoods, but just 46 percent in highly segregated communities of color.[38] Strikingly, the Othering & Belonging report also found that 83 percent of neighborhoods that were given poor ratings (or "redlined") in the 1930s by a federal mortgage policy were as of 2010 highly segregated communities of color.[39]

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[35] See Kerner Commission Report and Massey and Denton, supra footnote 3; see also, e.g., Richard Rothstein, The Color of Law, (Liveright 2017) (describing the complex causative factors of segregation and housing discrimination.)

[36] NFHA, Fair Housing Trends 2021, available at https://drive.google.com/file/d/1-qkD1FQj8GjOT2UdF4buBaJ74or56_qn/view.

[37] Stephen Menendian**,** Arthur Gailes, and Samir Gambhir**,** The Roots of Structural Racism Project: Twenty-First Century Racial Residential Segregation in the United States. Othering & Belonging Institute. June 2021. Available at https://belonging.berkeley.edu/roots-structural-racism.

[38] Id.

[39] Id.

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Discrimination can be found in a variety of policies and areas of life, pointing to the need for a broad and flexible disparate impact standard. For example, Black applicants face barriers at multiple stages of the home buying and mortgage lending process.[40] Discrimination also remains in evidence in subsidized and other affordable housing policies, including siting, redevelopment, and housing administration.[41] Racial disparities (disadvantaging Black households) have been shown in property maintenance and conditions within subsidized housing.[42] Poverty exposure (that is, location in areas of concentrated poverty) is higher among subsidized Black households in comparison to subsidized white households.[43] In addition, Black and other communities of color also often face inequitable municipal services provision, because of discrimination in land use planning and service delivery, arising from past and current segregation, and its connection to political and economic disempowerment.[44]

Such discrimination has severe, intergenerational impacts on quality of life for Black communities. Residential segregation, because it serves as a vehicle for geographically concentrated discrimination, is closely linked to adverse outcomes for Black Americans in access

[40] See, e.g., Alanna McCargo, Jung Hyun Choi, and Edward Golding, Building Black Homeownership Bridges: A Five Point Framework for Reducing the Racial Homeownership Gap, Urban Institute, at p. 1 (May 2019), https://www.urban.org/sites/default/files/publication/100204/building_black_ownership_bridges_1.pdf; Debbie Gruenstein Bocian, Keith S. Ernst, and Wei Li Center, Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages, Center for Responsible Lending, https://www.responsiblelending.org/mortgagelending/research-analysis/rr011-Unfair_Lending-0506.pdf; R.B. Avery, K.P. Brevoort, and G.B. Canner, Higher-Priced Home Lending and the 2005 HMDA Data, Federal Reserve Bulletin (September 2006), http://www.federalreserve.gov/pubs/bulletin/2006/hmda/bull06hmda.pdf (noting that in 2006, among consumers who received conventional mortgages for single-family homes, roughly half of African American (53.7 percent) and Hispanic borrowers (46.5 percent) received a higher-rate mortgage compared to about one-fifth of non-Hispanic white borrowers (17.7 percent)).

[41] See, e.g., Stacy E. Seicshnaydre, *How Government Housing Perpetuates Racial Segregation: Lessons from Post-Katrina New Orleans*, 60 CATH. U. L. REV. 661 (2011).

[42] TEXAS HOUSERS, PROJECT-BASED SECTION 8 HOUSING ACROSS HOUSTON AND THE WOODLANDS 2 (2019), *available at* https://texashousers.org/wp-content/uploads/2019/08/PB8_Public_Report_10_23.pdf (regarding racial disparities in property conditions).

[43] *See, e.g.*, Center on Budget and Policy Priorities, Table: Where Assisted Families with Children Live, by Poverty Concentration, noting a median poverty concentration of 22.8% across three main assisted programs of Housing Choice Vouchers, Project Based Rental Assistance, and Public Housing, with 35.1% of such public housing families and 22% of project-based rental assistance families living in extreme poverty areas of over 40% poverty (and that 66.5% and 63.4%, respectively, of families in those programs in extreme poverty areas are Black households), https://www.cbpp.org/research/creating-opportunity-for-children#_apptable1.

[44] See, e.g., *Committee Concerning Community Improvement v. City of Modesto*, 583 F.3d 690 (9th Cir. 2009); *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456 (S.D. Ohio 2007); see also resources compiled in PRRAC, The Call for Environmental Justice Legislation: An Annotated Bibliography (2018).

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to educational resources,[45] neighborhood health burdens and benefits,[46] economic security and attainment,[47] and other areas of life. Housing segregation and educational segregation, for example, are closely linked, a nexus acknowledged at the time of the Act's passage. See, e.g., 114 Cong. Rec. 2276 (1968) (statement of Sen. Mondale) (noting earlier testimony that "open housing is absolutely essential to the realistic achievement of such accepted goals and desegregated schools and equal opportunity," and that "the soundest way to attack segregated education is to attack the segregated neighborhood"); 134 Cong. Rec. 19711 (1988) (statement of Sen. Kennedy) ("Residential segregation is the primary obstacle to meaningful school integration."). Courts have also made note of this connection, as in *Swann v. Charlotte Mecklenburg Board of Education*, where the Court acknowledged how "segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races."[48]

3. The reinstated 2013 standard appropriately reflects the Fair Housing Act's history and intent and aligns with judicial interpretation

The standard in this proposed rulemaking, reinstating that issued by HUD in 2013,[49] restores a workable disparate impact framework. This standard appropriately implements the Fair Housing Act: it is grounded in the statutory purpose and text, and in the body of caselaw developed by courts assessing fair housing claims over the decades, as well as HUD's expertise in enforcing the act.

This reinstated standard provides for a careful assessment of the policy or practice at issue to determine whether discrimination exists and whether discriminatory effects are unnecessary or unjustified, such that the policy should be revisited to ward off the discriminatory harms. Thus, it provides for a balancing framework that protects the interests of both plaintiff and defendant and ascertains whether a policy change is needed. As set forth in the proposed rule, HUD again codifies

[45] Roslyn Arlin Mickelson, School Integration and K-12 Educational Outcomes: A Quick Synthesis of Social Science Evidence, National Coalition on School Diversity (2016).
[46] See generally, e.g., David R. Williams & Chiquita Collins, Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health, 116 Pub. Health Reps. 404, 409 (2001), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC1497358/pdf/12042604.pdf 19 B.K. Finch, D.P. Do, R. Basurto-Davila, C. Bird, J. Escarce, & N. Lurie, Does Place Explain Racial Health Disparities? Quantifying the Contribution of Residential Context to the Black/White Health Gap in the United States, Social Science & Medicine (2008), 67(8): 1258-1268.
[47] See, e.g., Gregory Acs, Rolf Pendall, Mark Treskon & Amy Khare, The Cost of Segregation: National Trends and the Case of Chicago 1990-2010 (The Urban Institute, 2017).
[48] 402 U.S. 1 at 20 (1971); see also *Keyes v. Sch. Dist. No. 1, Denver, Colo*., 413 U.S. 189, 201 (1973); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 455 n.4 (1979); *United States v. Yonkers Bd. of Educ*., 837 F.2d 1181, 1233-35 (2d Cir. 1987) (discussing the relationship between school segregation and housing segregation), cert. denied, 486 U.S. 1055 (1988).
[49] See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013).

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a three-step balancing test that the agency long used to assess discriminatory effects complaints (as did many of the federal courts, with some degree of variation).[50] Under this framework, the plaintiff/complainant must develop a prima facie case in which they identify a policy that has, or predictably will have, a discriminatory effect; the burden then shifts to the defendant/respondent to prove that the challenged practice is "necessary to achieve a substantial, legitimate, nondiscriminatory interest"; and the plaintiff/complainant may then rebut this showing by proving that this interest could be met through an alternative practice with a less discriminatory effect.[51] While exacting on the complainant, this standard enables them to use the Fair Housing Act as it was intended – to identify and remedy discrimination, including where intent is not shown, but where there is an unlawful disparate impact. This standard still provides for the appropriate use of discretion (by localities, housing authorities, or other actors) but within the bounds of nondiscrimination, protecting broader societal interests.[52]

The restored standard aligns with the Supreme Court decision in *Inclusive Communities Project*. There, as noted above, the Court affirmed the viability of the disparate impact standard within the Fair Housing Act. The Court declined to answer the second question that it had been asked to weigh: what the appropriate burden-shifting standard for evaluating disparate impact claims should be. As the Court described, however, "disparate-impact liability has always been properly limited in key respects.'' To support this point, the Court expounded on a number of the ways that lower courts had delimited the doctrine, including by application of burden shifting frameworks and the Fair Housing Act's causality requirements. The Court also pointed to HUD's existing 2013 regulatory discriminatory effects framework a number of times, without at any point calling this framework into question. As HUD documents in support of its reasoning in this (2021) proposed rulemaking, a number of courts since the 2015 *ICP* decision have read that case to support the 2013 rule's framework.[53] For example, in *Property Casualty Insurance Association of America v. Carson*, the U.S. District Court in the Seventh Circuit rejected the argument that the Rule is inconsistent with *Inclusive Communities Project*, stating that the Supreme Court "affirmed the Fifth Circuit's adoption of HUD's burden-shifting approach and held that disparate-impact claims are cognizable under the FHA."[54] The court then explicitly stated that the *ICP* decision "expressly approved of disparate-impact liability under the FHA and did not identify any aspect of HUD's burden-shifting approach that required correction."[55] Contrary to HUD's stated reasoning in withdrawing this framework in 2020, the Court in Inclusive Communities Project did not in fact supersede the 2013 rule or render it in any way infirm or in need of revision. That rule is appropriately reinstated and aligns with existing law.

[50] 86 Fed Reg at 33591 (June 25, 2021).
[51] Id. at 33592.
[52] See Stacy Seicshnaydre, *Disparate Impact and the Limits of Local Discretion after Inclusive Communities*, 24 George Mason Law Review 663 (2017).
[53] See 86 Fed Reg at 33591 (June 25, 2021) (citations omitted).
[54] *Property Casualty Insurers Association of America v. Carson*, 2017 WL 2653069 (N.D. Ill. June 20, 2017).
[55] Id.

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Further, the restoration of the rule's "perpetuation of segregation" language revives a critical element of the standard, returning its clarity and force. The 2020 rule erased this part of the standard, despite its centrality to the Act's purpose and to Fair Housing caselaw across the decades – as well as its ongoing vitality in remedying policies that serve in practice to replicate the redlining, racial covenants, and other segregative practices of the past.[56]

4. The 2020 Discriminatory Effects Regulation was contrary to law and to HUD's responsibility to effectuate the Fair Housing Act

In reinstating a workable standard – one that will be effective in implementing the Fair Housing Act and enabling plaintiffs and complainants to vindicate their rights and pursue appropriate remedies – HUD is acting in keeping with the directives and responsibilities that the Act places upon the agency. HUD is charged with implementing the Act,[57] and the issuance of this rule – as in 2013 – is an important measure in effectuating that responsibility, as charged by Congress. In contrast, the 2020 discriminatory effects standard (currently under an injunction staying its operation)[58] lacked grounding in the statute or the relevant body of law interpreting the Fair Housing Act. It set forth a standard that was unworkable in practice, layering a multiplicity of vague and redundant requirements upon the complainant so as to in effect bar the ability to obtain recourse. This was far from a reasonable interpretation of the Fair Housing Act, and in fact contrary to established law and to HUD's statutory obligations under the Act.

The 2020 standard set forth an unjustified and impossible burden-shifting framework for victims of discrimination. It imposed heightened new requirements for the plaintiff's prima facie case, requiring them to prove all of the following by a preponderance of the evidence:[59]

> (1) That the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law;
> (2) That the challenged policy or practice has a disproportionately adverse effect on members of a protected class;

[56] See, e.g., *Robert Schwemm, Segregative-Effect Claims Under the Fair Housing Act* (2017), Law Faculty Scholarly Articles, available at https://uknowledge.uky.edu/law_facpub/618.
[57] See 42 U.S.C. 3608.
[58] The 2020 rule was challenged in three lawsuits - *Massachusetts Fair Housing Ctr., et al.* v. *HUD,* No. 3:20–cv–11765 (D. Mass.); *National Fair Housing Alliance, et al.* v. *HUD,* No.3:20-cv-07388 (N.D. Cal.); and *Open Communities, et al.* v. *HUD,* No. 3:20–cv–01587 (D. Conn.) – and an injunction freezing its operation and delaying its effective date was passed down in *Massachusetts Fair Housing Ctr., et al.* v. *HUD.*
[59] 85 Fed. Reg. 60288 at 60332 (Sept. 24, 2020).

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> (3) That there is a robust causal link between the challenged policy or practice and the adverse effect on members of a protected class, meaning that the specific policy or practice is the direct cause of the discriminatory effect;
> (4) That the alleged disparity caused by the policy or practice is significant; and
> (5) That there is a direct relation between the injury asserted and the injurious conduct alleged.

As found by the court in M*assachusetts Fair Housing Ctr., et al.* v. *HUD*, this framework introduced requirements that lacked precedent or explanation in the body of existing caselaw interpreting the Fair Housing Act.[60] The 2020 rule, further, itself failed to explain what many of these requirements meant or to provide reasoning as to how they constituted a workable framework implementing the Act.[61] In its assessment of the 2020 rule, the district court found that its "use of ''new and undefined terminology, altered burden-shifting framework, and perplexing defenses'' accomplished ''the opposite of clarity'' and was likely ''arbitrary and capricious.''[62]

In contrast to the impossibly high requirements imposed on plaintiffs, the 2020 standard supplied a number of easily-met defenses, making it even more improbable that discrimination could be successfully challenged. These defenses lacked support in law or valid reasoning. For example, the rule provided that even if the plaintiff could meet the stringent requirements to prove a prima facie case of disparate impact, a defendant would be shielded from liability by showing that an alternative policy or practice would result in a greater economic burden or produce less profit. The 2020 Rule would have exempted many business entities from liability, regardless of whether they could use alternate business approaches that are less discriminatory. This would have discharged housing officials and lenders of their responsibility under the law to operate in a non-discriminatory fashion, as long as the interest is profit.

The 2020 rule also shielded defendants' use of algorithms from liability through its "outcome prediction" defense, in which it provided that:

> (2) After the pleading stage. The defendant may establish that the plaintiff has failed to meet the burden of proof to establish a discriminatory effects claim under paragraph (c) of this section, by demonstrating any of the following:
> (i) The policy or practice is intended to predict an occurrence of an outcome, the prediction represents a valid interest, and the outcome predicted by the policy or practice does not or would not have a disparate impact on protected classes compared to similarly situated individuals not part of the protected class…This is not an adequate defense, however, if the plaintiff demonstrates that an alternative, less discriminatory policy or practice would

[60] See 86 Fed Reg at 33591 at 33594 (June 25, 2021)(citing *Massachusetts Fair Housing Ctr., et al.* v. *HUD).*
[61] Id.
[62] Id.

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result in the same outcome of the policy or practice, without imposing materially greater costs on, or creating other material burdens for the defendant.[63]

This provision allows for additional protection from liability in situations where defendants are using an algorithmic tool, a common practice in the insurance, lending, and other housing-related industries. Yet algorithms are subject to human bias and data (even if supposedly objective) can reflect past discrimination, including intentional discrimination. Algorithms have been shown to yield discriminatory results in a number of contexts, including housing. For example, in 2019, Facebook settled a lawsuit involving algorithms. Its housing advertising platform enabled real estate brokers and landlords to restrict which users could view or receive rental or sale ads by using pre-populated lists created by Facebook which excluded home seekers based on protected characteristics, including race, family status and sex.[64] In another case, *Connecticut Fair Housing Center and Carmen Arroyo v. CoreLogic Rental Property Solutions, LLC*, the plaintiff argued that the algorithm embedded in its CrimSAFE tenant screening service disproportionately disqualified African Americans and Latinos; algorithms such as the one at issue in that case, that rely on criminal background checks, reflect the same discriminatory impacts as overly-broad criminal records policies used elsewhere.

The 2020 rule's defenses, along with its overall framework, were unsupportable and operated simply to enable ongoing discrimination without recourse. The Fair Housing Act provides for no such exemptions,[65] and instead was intended to have a broad and variable reach.[66] The 2020 standard ran counter to this intent and to a reasonable interpretation of the law. As stated by the court in *Massachusetts v. HUD*: "the 2020 Rule arms defendants with broad new defenses which appear to make it easier for offending defendants to dodge liability and more difficult for plaintiffs to succeed. In short, these changes constitute a massive overhaul of HUD's disparate impact standards, to the benefit of putative defendants and to the detriment of putative plaintiffs."[67]

For all of the foregoing reasons, the 2020 rule failed to provide a standard supportable by the Fair Housing Act, and in fact ran contrary to the Act's purpose and to HUD's obligation to implement the law. In its current rulemaking, HUD is appropriately reinstating a disparate impact

[63] 85 Fed. Reg. 60255 (2020).
[64] *See* Compl., *U.S. Dep't of Hous. and Urban Dev. v. Facebook, Inc*., No. 01-18-0323-8 (Aug. 13, 2018); *See also Nat'l Fair Hous. All. v. Facebook, Inc.,* No. 18 Civ. 2689 (S.D.N.Y. filed Mar. 27, 2018).*; See* Kriston Capps, *Behind HUD's Housing Discrimination Charges Against Facebook,* CITYLAB, (Mar. 28, 2019), https://www.citylab.com/equity/2019/03/facebook-discrimination-policy-housing-ads-hud-charges/585931/
[65] See 134 Cong. Rec. H4604 (daily ed. June 22, 1988) (statement of Rep. Rodino). In the 1988 Amendments, Congress specified several limited exceptions to the Act's reach, otherwise reaffirming the disparate impact standard that had then been recognized by nine courts of appeal (and rejected an amendment that would have required proof of intentional discrimination in disparate impact challenges to zoning decisions). See H.R. Rep. No. 100-711, at 89 (dissenting view of Rep. Swindall).
[66] *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982).
[67] See 86 Fed Reg at 33591 at 33594 (June 25, 2021)(citing *Massachusetts Fair Housing Ctr., et al.* v. *HUD* at *10).

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standard that provides a workable framework for assessing claims and that is grounded by the underlying statute.

Conclusion

We thank HUD for its reinstatement of this important fair housing rule. The Fair Housing Act and its discriminatory effects standard are critical tools in remedying segregation and racial inequity. We also urge HUD to undertake vigorous steps to enforce this rule, in lending, municipal services discrimination, subsidized housing administration, access to housing for people with criminal records, and in all other areas where the discriminatory effects standard comes to bear.

Best regards,

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