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Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0001

Re: HUD's Implementation of the Fair Housing Act's Disparate Impact Standard
Docket Number: FR-6111-P-02, RIN 2529-AA98

Sir or Madam:

We write on behalf of Western Center on Law and Poverty, California's largest and oldest legal services support center, in strong opposition to HUD's 2019 proposed rule "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard." Western Center is committed to serving the needs of our state's poorest residents, including advocating for the development and preservation of affordable housing in *all* communities, protecting the rights of low income tenants, and combatting discrimination against people of color, people with disabilities, families with children, LGBTQ people, women, and other protected groups. In the past HUD has played an important leadership role in advancing fair housing goals; as it is charged with doing under the Fair Housing Act. However, with this proposed Rule HUD seeks to roll back the interpretation of this critical civil rights law and take us back more than 50 years.

The Fair Housing Act was passed in the wake of Martin Luther King Junior's assassination with the goal of moving closer to some of the ideals he gave his life to pursue – ending segregation and ensuring that all people could live in the community of their choice regardless of the color of their skin. This landmark civil rights law has been a critical tool in moving towards a more integrated nation where everyone can live in the community of their choice; but we have a long way to go before realizing its goals.

HUD's proposed rule profoundly undermines the Fair Housing Act (FHA). If finalized, the rule will make enforcement of the FHA's protections impossible except in cases where the perpetrator of discriminatory conduct announces their ill intent. Corporate interests, including the insurance companies that this Rule appears intended to benefit, are too sophisticated to state their intent to discriminate.

Courts have recognized for the past half-century that the Fair Housing Act should be interpreted to reach conduct where a protected group is disproportionately harmed even through no intent to discriminate can be clearly shown. As the Supreme Court recognized in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.,*135 S.Ct. 2507, 2511 (2015) (hereinafter *ICP*), disparate impact liability is critical to address those issues at the "heartland" of the Fair Housing Act. While HUD professes to be implementing the Supreme Court's decision with this proposal, it is in fact undermining and eviscerating the concept of disparate impact liability and the *ICP* decision. If this Rule is finalized, the Fair Housing Act will be much more difficult to enforce. With this proposal, HUD is abdicating its duty to further enforcement of the Fair Housing Act.

A. By failing to state the actual purpose of the Rule, HUD is depriving the public of a meaningful opportunity to comment

HUD's stated reason for issuing the proposed rule is obviously false. The *ICP* decision acknowledged HUD's original 2013 disparate impact rule, and did not indicate that the rule was inconsistent with its ruling, or suggest in any way that HUD should change the balancing test. To the contrary, the Court twice cited the 2013 Rule in support of its analysis in *ICP*.[1] Therefore, it is clear that HUD is not actually attempting to "better reflect" the *ICP* decision as it states in its summary of the proposed Rule.[2]

HUD's 2013 disparate impact rule accurately reflected the majority of the circuit courts' approach to disparate impact analysis with its three-part balancing test. The courts developed this balancing test through examination of specific factual scenarios that came before them, complete with evidentiary records and testimony.[3] Through exhaustive analysis, courts came to the conclusion that the three part test was the most effective way to analyze disparate impact liability as contemplated by the drafters of the Fair Housing Act. In 2013 HUD harmonized the three-part balancing test and applied its own expertise to make choices between the slight variations in the court's tests. With *ICP,* the Supreme Court affirmed that HUD's 2013 Rule was a correct reflection of the disparate impact standard.[4]

In contrast, HUD's 2019 Rule totally ignores the collective analysis completed by circuit courts over the last 5 decades, profoundly undermines the Supreme Court's *ICP* decision, and attempts to erase a key aspect of disparate impact liability.

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[1] *ICP* at 2522-23.
[2] 84 Fed. Reg. 42,854 (August 19, 2019).
[3] *See e.g. Huntington Branch, N.A.A.C.P. v. Town of Huntington* (2d Cir. 1988) 844 F.2d 926, 936, *aff'd in part sub nom. Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P.* (1988) 488 U.S. 15.
[4] *ICP* at 2522-23.

By refusing to disclose the actual purpose of the Rule, HUD is depriving the public of meaningful comment opportunity. If this is HUD's attempt to cater to the insurance industry, this is problematic because courts have consistently found that the insurance industry should be covered by the Fair Housing Act's general provisions like any other party that plays a role in access to housing.[5] It is also improper for HUD to so blatantly weigh its Rule against those seeking to enforce the Fair Housing Act in favor of industry. HUD is supposed to further fair housing goals, not impede them.

If this is HUD's attempt to generally roll back civil rights in accordance with the Trump administration's broad policy agenda, then it must be withdrawn as HUD is specifically charged with "affirmatively furthering fair housing" – the opposite of what this proposed rule is doing.[6]

If the Rule is actually intended to promote further segregation and marginalize people of color, it must be withdrawn because that the exact opposite of what the Fair Housing Act is supposed to do. HUD has not informed the public of the true reasons for this rulemaking operation and thus deprives the public of a meaningful opportunity to engage the agency through the commenting process.[7] This Rule should be withdrawn, and if HUD wishes to issue a new Rule, it must explain the real reasons for the rulemaking action so that the public can address those reasons.

B. HUD's proposed Rule violates the separation of powers

HUD's proposed Rule violates the Constitutional separation of powers doctrine because HUD oversteps its role as an administrative agency and improperly attempts to dictate how federal judges should approach specific motions in court. HUD's proposed rule specifies how it should apply in motions to dismiss and motions for summary judgment, making it clear that the rule was drafted not by agency staff with fair housing expertise, but by political actors seeking to ensure that insurance companies and other corporate interests are protected from liability.[8]

HUD's rule is interspersed with pleading and evidentiary standards that are not within HUD's authority to define. For example, HUD says that plaintiffs must produce evidence that is not remote or speculative.[9] Without facts before the agency as a court would have, it

[5] *See e.g. Nat'l Fair Hous. All. V. Prudential Ins. Co. of Am.,* 208 F.Supp.2d 46, 60 (D.D.C. 2002)
[6] 42 U.S.C. § 3608(e)(5)
[7] 5 U.S.C. § 553(c).
[8] 84 Fed. Reg. 42,859 (August 19, 2019).
[9] 84 Fed. Reg. 42,860 (August 19, 2019).

is unclear what this means, and HUD doesn't have the authority to establish an evidentiary standard.[10] HUD's Rule must be withdrawn because it impermissibly oversteps into pleading and evidentiary standards that must be left to the courts to define.

C. The proposed rule affirmatively *hinders* fair housing goals rather than furthering them

HUD is charged with affirmatively furthering fair housing goals under the Fair Housing Act.[11] Promoting fair housing and housing choice is at the very core of HUD's mission, yet with its proposed disparate impact rule, HUD takes the lead in blocking enforcement of the Act and attempts to pave the way for corporate interests to discriminate without accountability. The Rule must be withdrawn. HUD is abdicating its duty to enforce fair housing laws and instead acting as an agent of insurance companies and other corporate interests which profit off of discriminatory conduct.

D. California will be particularly harmed by HUD's proposed rule

The proposed weakening of the disparate impact rule will have significant impacts on the State of California, which is already suffering from a severe housing crisis. California is the most diverse state by many measures, meaning that many of our millions of residents identify as a member of a protected class.[12] However, California is also home to significant income inequality,[13] leaving many residents vulnerable. The high cost of living coupled with stagnating wages means that California residents have to set aside a significant portion of whatever income they make simply to remain in their homes. This makes income inequality more prominent in our daily lives. The crunch of these economic pressures has significant impacts on how Californians find, secure, and maintain housing, and where there is a greater opportunity for landlords or other entities to adopt practices that have disproportionate effects on protected classes (as would occur under the proposed rule), Californians will lack recourse to protect the housing rights they need so direly.

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[10] *See Nixon v. Sirica* (D.C. Cir. 1973) 487 F.2d 700, 715 ("A breach in the separation of powers must be explicitly authorized by the Constitution").
[11] 42 U.S.C. § 3608(e)(5).
[12] Chris Jennewein, "California Ranked as America's Most Diverse State," Times of San Diego. (September 19, 2017.) https://timesofsandiego.com/politics/2017/09/19/california-ranked-as-americas-most-diverse-state/.
[13] Public Policy Institute of California, "Income Inequality and the Safety Net in California." (May 2016) https://www.ppic.org/content/pubs/report/R_516SBR.pdf.

Racial minorities feel the pain of the increase in housing costs most acutely as they are forced to leave their long-term communities for newly concentrated areas of poverty.[14] By increasing the standards to bring disparate impact claims to court, HUD is directly contributing to new concentrations of segregation and poverty in the state, contrary to its statutory mandate to affirmatively further fair housing.

E. HUD's Rule will harm members of protected classes in myriad ways

The disparate impact theory has been hugely important for combatting discrimination in a wide range of contexts. Examples of groups vindicating their rights under the disparate impact theory include domestic violence survivors, families with children, and persons with criminal histories.

Domestic violence survivors are not a protected class under the text of the FHA, but they often look to the disparate impact theory to protect their rights to housing. The Violence Against Women Act is an important advocacy tool for survivors of domestic violence, but given its limited direct applicability (to federally-subsidized housing), it simply cannot be relied upon in the same way as disparate impact liability. [15]Domestic violence survivors are disproportionately women, and disparate impact theory is one of the few legal tools available for challenging practices, policies, or even municipal laws that target domestic violence survivors and make it more difficult to secure and remain in housing.

The disparate impact theory, in its current form, has been important for expanding housing opportunity for families with children. For example, multiple courts have viewed overly-restrictive occupancy standards as unfair barriers to housing choice. One district court explained its disparate impact reasoning against an occupancy standard in the following way:

> Although defendant's occupancy restriction is facially neutral because it treats adults and children similarly, and children do reside at [defendant's property], the restriction has a disparate impact on intact families with children, i.e., two parents and child. By refusing to rent to families composed

[14] *Rising Housing Costs and Re-Segregation in the San Francisco Bay Area*, UC Berkeley's Urban Displacement Project and the California Housing Partnership, Philip Verma, Dan Rinzler, Eli Kaplan, and Miriam Zuk. Available at: https://www.urbandisplacement.org/sites/default/files/images/bay_area_re-segregation_rising_housing_costs_report_2019.pdf.

[15] *See, e.g.*, Kofman and Ng, *Community-Based Advocates Toolkit: How to make sure your clients have safe housing*. National Alliance for Safe Housing and the National Housing Law Project. (2019) https://www.nhlp.org/wp-content/uploads/Survivor-Housing-Protections_NonLegalAdvocateToolkit-Final-5-14-19.pdf.

> of three or more persons, defendant excludes a large percent of families with children from renting apartments at [defendant's property]. Thus, the policy has a disparate impact on plaintiffs.[16]

Additionally, securing housing has been identified as one of the most difficult, yet most important, hurdles for formerly incarcerated persons to overcome. While having a criminal record is not a protected characteristic under the FHA, criminal record barriers to housing have a disproportionate effect on racial minorities.[17] The Bureau of Prisons reports that Black inmates make up 37.5 percent of the federal prison population, despite making up only about 13 percent of the national population.[18] This is just one statistic among many showing that people of color are involved with the criminal legal system at much higher rates than whites,[19] illuminating the fact that any policy, practice, or rule that restricts access to housing for persons with criminal records has a disproportionate impact on those same racial minorities. HUD's own guidance on this subject relies heavily on a legal analysis under the disparate impact theory that would be dramatically restricted by the proposed rule.[20] These changes would further limit housing opportunity for the nearly one-third of persons with a criminal history in the population, including an average of 650,000 of people who have been released each year since 2004.[21]

F. HUD improperly questions the availability of punitive and exemplary damages under the Fair Housing Act

The proposed Rule ignores the plain language of the Fair Housing Act, 42 U.S.C.A. § 3613(c), which provides for punitive damages and says that that it seeks feedback on

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[16] *Fair Hous. Council of Orange Cty., Inc. v. Ayres*, 855 F. Supp. 315, 318 (C.D. Cal. 1994).
[17] See U.S. DEP'T OF HOUS. & URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 1 (Apr. 4, 2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.
[18] Federal Bureau of Prisons, Statistics: Inmate Race (last updated October 5, 2019), https://www.bop.gov/about/statistics/statistics_inmate_race.jsp; United States Census, Quick Facts: United States (2018), https://www.census.gov/quickfacts/fact/table/US/IPE120218.
[19] *See also* National Association for the Advancement of Colored People (NAACP), "Criminal Justice Fact Sheet," https://www.naacp.org/criminal-justice-fact-sheet/.
[20] *See* U.S. DEP'T OF HOUS. & URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 1 (Apr. 4, 2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.
[21] *Id.*

whether punitive damages should be available for disparate impact cases.[22] There is no reason for HUD to "seek feedback" on this issue because it is not open to question. HUD is not free to restrict access to punitive and exemplary damages under the Fair Housing Act because they are in the statute. HUD cannot simply ignore statutory language in its rulemaking. Punitive damages are available to plaintiffs bringing Fair Housing claims regardless of any administrative guidance, and HUD's question creates needless confusion.[23]

G. HUD's Rule contains numerous undefined terms that create needless uncertainty

HUD's proposed Rule contains numerous undefined terms. Making up new undefined terms instead of using terms already established in case law will cause needless confusion. For example, what is "pecuniary damage" referred to in proposed section 100.7? This proposed language says that compensatory damages or restitution is only available where "pecuniary damage" is shown. This limitation does not appear in the statute, and the term in undefined.[24] In addition, HUD says that defendants may defeat a claim where the proposed nondiscriminatory practice would not impose "materially greater" costs.[25] What is a materially greater cost? These undefined terms will cause additional confusion and delay for plaintiffs seeking to bring claims under an already convoluted and burdensome standard.

H. Every aspect of HUD's test is heavily weighted against plaintiffs

HUD's convoluted version of the balancing test is confusing, uses multiple undefined terms, does not uniformly apply a burden of proof, and imposes an impossibly high standard on people bringing disparate impact claims.

1. 100.500(a)(1) - Plaintiffs do not have enough information to know if a policy is arbitrary, artificial or unnecessary at the pleading stage.

First, as HUD acknowledges, plaintiffs will not have the information to meet the very first prong of this new pleading standard – the showing that the policy is "arbitrary or artificial or unnecessary." 84 Fed. Reg. 42,858 (August 19, 2019). The defending party can simply assert facially neutral reason for the policy, and it is unclear how, before any discovery, a plaintiff could establish that a policy is "unnecessary' with nonspeculative evidence.

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[22] 84 Fed. Reg. 42,857 (August 19, 2019).
[23] *Quigley v. Winter*, 598 F.3d 938, 952 (8th Cir. 2010).
[24] 84 Fed. Reg. 42,857 (August 19, 2019).
[25] 84 Fed. Reg. 42,860 (August 19, 2019).

HUD previously noted in its 2013 rule that no one should be saddled with the need to prove a negative, recognizing the obvious impossibility of this task. In 2019, plaintiffs are saddled with this burden immediately- the first prong requires showing no legitimate purpose.

2. **100.500(a)(2) - Adopting the Fifth Circuit's definition of robust causality from *Lincoln Properties* will render disparate impact a dead letter**

HUD's "robust causality" standard appears to adopt the wrongheaded approach taken by the Fifth Circuit in the *Lincoln Properties*[26] case, which requires plaintiffs to prove that the defendant caused the underlying disparity in the population – a showing that, as a practical matter, will be impossible to make. The Fair Housing Act is intended to reach the broadest range of discriminatory conduct – it is farcical to think that the legislature to only intend to reach conduct where the perpetrator *also* caused the underlying disparate representation in the population. For example, how many landlords can be said to be responsible for *causing* the fact that more housing voucher holders in Dallas are black? How many landlords can be held individually responsible for the fact that people of color are more likely to be able to afford to rent apartments in multifamily buildings than single family homes? This is an impossible standard that alone could render disparate impact liability a dead letter, as recognized by the dissent in the *Lincoln Properties* case.

3. **100.500(a)(3)–(4) Judges in individual cases are best situated to determine the significance of a disparity and harm to a protected class**

Obviously the disparity in a specific fair housing case should be "significant" with respect to that specific factual scenario, but determination of what is significant is best left to the finder of fact in a case, not to HUD in this broad rule. HUD's prior rule and judges have appropriately rejected the idea that there should be one test for determining significance. The "significance" of the disparity is a factual question properly before the court considering the specific facts of a case, and it is not helpful or proper for HUD to attempt to define this in a vacuum.

4. **100.500(a)(5) Proximate cause, or the "directness" of the link between the conduct and the injury, is the subject of active litigation in several circuits and should be left to the courts**

As with many other aspects of this Rule, HUD attempts to improperly interfere with the court's role in applying the Fair Housing Act to specific factual scenarios. The issue of

[26] *Inclusive Communities Project, Incorporated v. Lincoln Property Company* (5th Cir. 2019) 920 F.3d 890.

proximate cause is a particularly factually intensive question which is currently being litigated in several circuits.[27] HUD should leave the courts' work to the courts.

I. Suits targeting single land use decisions are the heartland of disparate impact liability under the Fair Housing Act, and this Rule would exclude them

In *Inclusive Communities Project,* the Supreme Court recognized that "suits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification are at the heartland of disparate-impact liability."[28] HUD's proposal ignores the Supreme Court's guidance by proposing that most zoning decisions will not be actionable under disparate impact theory: "Plaintiffs will likely not meet the standard, and HUD will not bring a disparate impact claim, alleging that a single event—such as a local government's zoning decision or a developer's decision to construct a new building in one location instead of another—is the cause of a disparate impact, unless the plaintiff can show that the single decision is the equivalent of a policy or practice."[29] This provides yet more evidence that instead of implementing *ICP,* HUD is fundamentally undermining it. HUD goes on to cite an unpublished district court case currently on appeal in support of its faulty reasoning,[30] ignoring numerous court decisions holding that individual zoning decisions are a proper target for disparate impact liability.[31]

J. HUD does not have the authority to remove "perpetuation of segregation" from the Fair Housing Act

As reflected in HUD's 2013 disparate impact rule, and in court decisions that have considered the question,[32] discriminatory effects liability may be established where a policy "perpetuates segregated housing patterns because of race, color, religion, sex, handicap,

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[27] *See e.g. City of Oakland v. Wells Fargo Bank, N.A.* (N.D. Cal., Sept. 5, 2018, No. 15-CV-04321-EMC) 2018 WL 7575537, at *1 (certifying appeal to Ninth Circuit on proximate cause issue).

[28] *See, e.g., Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 16–18, 109 S.Ct. 276.

[29] *HUD's Implementation of the Fair Housing Act's Disparate Impact Standard,* (Aug. 19, 2019) FR-6111-P-02, RIN 2529-AA98 at 42858.

[30] *Barrow v. Barrow* (D. Mass., July 5, 2017, No. CV 16-11493-FDS) 2017 WL 2872820, at *3.

[31] *Mhany Management, Inc. v. County of Nassau*, 819 F.3d 581, 619 (2d Cir. 2016).

[32] *See e.g. Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) ("There are two kinds of racially discriminatory effects which a facially neutral decision about housing can produce. The first occurs when that decision has a greater adverse impact on one racial group than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act").

familial status, or national origin."[33] In many areas of the United States, segregation is increasing rather than decreasing; this theory is more important to realizing the Fair Housing Act's goals than ever.[34]

HUD goes far beyond its authority as an administrative agency by simply removing perpetuation of segregation from the Rule, in an apparent attempt to erase this entire concept from the Rule. Perpetuation of segregation goes to the heart of what the Fair Housing Act is about; the Act was intended to get to the roots of the nation's housing problems, targeting the segregation that began as de jure and continues as de facto to this day.[35] Furthermore, HUD provides no explanation whatsoever for removing perpetuation of segregation from the Rule, and its only reference to this choice is to say that it is removing a "definition" as if this is a mere semantic decision as opposed to an entire theory of liability that goes to the heart of the Act.

K. Disparate impact is critical to address implicit bias

In *ICP* the Supreme Court acknowledged that "[r]ecognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping."[36] Under this proposed Rule, implicit bias and its harmful effects would never be addressed. By setting an impossibly high standard of proof for disparate impact liability, HUD seeks to foreclose use of disparate impact theory that works to counteract the toxic impacts of implicit bias in housing decisions. HUD's proposal will ensure that people of color will continue to be excluded from housing and communities of their choice.

L. HUD appears to have relied on a de facto advisory committee in writing the rule

It appears that the Trump administration relied on a de facto advisory committee in crafting this rule including representatives from the insurance industry, and likely other corporate

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[33] *HUD's Implementation of the Fair Housing Act's Disparate Impact Standard,* (Aug. 19, 2019) FR-6111-P-02, RIN 2529-AA98.

[34] *See e.g.*, *Rising Housing Costs and Re-Segregation in the San Francisco Bay Area*, UC Berkeley's Urban Displacement Project and the California Housing Partnership, Philip Verma, Dan Rinzler, Eli Kaplan, and Miriam Zuk. Available at: https://www.urbandisplacement.org/sites/default/files/images/bay_area_re-segregation_rising_housing_costs_report_2019.pdf.

[35] *Wallace v. Chicago Housing Authority*, 321 F.Supp.2d 968, 974 (N.D. Ill. 2004).

[36] *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015) 135 S.Ct. 2507, 2522.

interests that use algorithms. The reasoning stated in the Rule appears to be lifted directly from legal briefs submitted by the insurance industry when they challenged HUD's 2013 Rule. By engaging in discussions with industry groups that functioned as a de facto secret advisory committee, this Rule violates the Federal Advisory Committee Act (FACA).[37]

M. The Rule is part of a politically motivated campaign to undermine Civil Rights

With this proposal, HUD is not trying to reflect the current state of the law under *ICP,* but is playing its part in a politically motivated campaign to undermine civil rights across all areas of American life. It was widely reported[38] that the Justice Department circulated a memo regarding how to dismantle disparate impact liability not just in housing, but with regard to schools, employment, and just about every area. HUD is not seeking to bring its regulations into line with Supreme Court jurisprudence, but instead is trying to undermine decades of caselaw that struck a reasonable balancing test reflecting the intent of the Fair Housing Act.

N. The Rule will be harmful to all aspects of Fair Housing enforcement

This Rule will be harmful in every area of fair housing law; when individuals challenge individual denials of housing, when groups challenge cities' refusal to build housing, or discriminatory siting of housing, when insurance companies use discriminatory schemes in pricing decisions.

For example, by stating that a plaintiff can only suggest an alternative practice if it does not create "materially greater costs or other material burdens" on a defendant, 84 Fed. Reg. 42,860 (August 19, 2019), the Rule simultaneously demands that plaintiffs obtain access to defendant's profit information while also assuming that any profit gained is more important than preventing harmful discriminatory impacts.

How are plaintiffs supposed to determine the cost of defendant's business? HUD is silent on this, and also fails to define these extremely vague terms. For example, in the case of a

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[37] 5 U.S.C.A. § APP. 2 § 1 *et seq.* (2019).

[38] *See* Laura Meckler and Devlin Barrett, *Trump administration considers rollback of anti-discrimination rules*, WASHINGTON POST, Jan. 3, 2019, https://www.washingtonpost.com/local/education/trump-administration-considers-rollback-of-anti-discrimination-rules/2019/01/02/f96347ea-046d-11e9-b5df-5d3874f1ac36_story.html; Paul Sperry, *Trump Looks to Uproot Numbers-Only Bias Test Widely Used in U.S.*, REALCLEARINVESTIGATIONS, Feb 14, 2019. https://www.realclearinvestigations.com/articles/2019/02/14/trump_looks_to_end_numbers-only_bias_theory_governing_american_life.html.

city defendant which failed to zone a property to allow for multifamily housing, and instead only allowed single family homes to be built, thereby causing a disparate impact on people of color who disproportionately could not afford single family homes, could the city assert that the cost of the zoning change would be "material" such that liability would not exist? What if the only cost was one hour of an employee's time? Is that material? Or the cost of copying plans and permitting documents? Is that material? Or could the city claim that costs of municipal services like garbage and fire protection would be "materially greater" for multifamily housing to avoid liability? The rule invites speculative justifications by defendants. Courts are much better suited to make these determinations because they have actual facts before them, and by simply stating terms with no context, HUD creates needless confusion.

If a landlord's occupancy policy only allows two people per bedroom, a policy that has uniformly been found to have a disparate impact based on familial status, but the landlord asserts that it would impose "materially greater" costs to allow more people per bedroom because of utility costs, would that defeat the claim under this Rule? In essence, the "material cost" defense eviscerates any chance plaintiffs have of prevailing under the Rule. A defendant could always find some cost to assign to changing its policy, especially where the Rule has no burden of proof. This is what happens when HUD ignores its own prior rulemaking and 50 years of case law and makes up a standard out of thin air.

If the landlord has a policy of only allowing housing applications to be submitted online through a non-accessible website, this could have a disparate impact on people with certain types of disabilities. Yet the landlord could simply assert that it would impose a material cost to accept applications in person, through the mail, or in an accessible online format to defeat these claims. Again, this swallows the entire Rule.

Further, HUD's test appears to require that the plaintiff ascertain the costs to defendant of changing their practices. This is impossible for plaintiffs to know; plaintiffs are not privy to defendant's operating costs. How can a plaintiff at the initial pleading stage learn this information?

O. HUD's rule improperly attempts to exempt insurance

HUD asserts that it is amending the disparate impact rule to be consistent with *ICP*.[39] But, contrary to this stated purpose, *ICP* says nothing about creating a special carve out for the insurance agency, even though the insurance industry submitted an amicus brief requesting just such a safe harbor.

[39] 84 Fed. Reg. 42,860 (August 19, 2019).

It is well established that the Fair Housing Act prohibits discrimination in the provision of insurance. In 1978 HUD specifically explained that the inability to obtain homeowner's insurance would make housing "unavailable" within the meaning of the Act.[40] In 1989, HUD issued regulations specifically addressing insurance discrimination.[41] This interpretation has also been upheld in the courts. The insurance industry nevertheless complained about HUD's 2013 Rule, and now HUD responds by reversing course and giving the insurance industry a free pass to discriminate. HUD states no basis for this abrupt change.

HUD specifically raised concerns about neutral policies, such as refusing to offer insurance in urban neighborhoods, which had a discriminatory effect, in testimony before Congress several decades ago.[42] In refusing to provide a safe harbor in 2013, HUD also reflected the court's conclusion that disparate impact liability should apply to insurance companies just as it does with other industries. In issuing the 2013 Rule, HUD adequately responded to all of the insurance industry's concerns. By reversing course now and giving the insurance industry everything they asked for in 2013, HUD is acting arbitrarily and with apparent purpose that is not stated in the proposed Rule.

For example, in 2013, in responding to the insurance complaints about its then proposed Rule, HUD correctly explained that its balancing test would not render differential effects on protected classes *per se* illegal, rather the test provided a mechanism for defendants to identify valid policies crafted to advance legitimate interests.[43] HUD also explained that the rule did not alter the construction of the McCarran Ferguson Act, and noted that its application depends on the specific facts of the case.[44] Again, there is no basis for insurance companies to receive special protection from liability.

Here with the 2019 proposed rule, HUD attempts to take this factually-tailored approach away from the courts and simply says that the rule does not supersede the business of insurance.[45] This is overly broad and ignores the need to address specific factual scenarios where particular insurance practices harm members of protected classes.

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[40] Mem. Of Rith T Prokop, Gen Counsel of HUD to Chester McGuire, Aug 25, 1978. Quoted in *NAACP v. Am. Family* 978 2.d 287, 300 (7th Cir. 1992).
[41] 54 Fed Reg 3232, 3285. 24 CFR 100.70(d)(4).
[42] Homeowners insurance discrimination: hearing before the S. Comm. on Banking, Hous. And Urban Affairs, 103d Cong. 49-51 (1994) (stmt. Of Roberta Achtenberg, Ass't Sec'y for Fair Housing and Equal Opportunity.)
[43] 78 Fed. Reg. at 11, 474-75.
[44] *Id.*
[45] 84 Fed. Reg. 42,863 (August 19, 2019).

P. HUD's provision on data undermines the FHA and is a giveaway to insurance

Like the rest of the Rule, HUD's provision stating that disparate impact analysis does not require the collection of data appears to be designed to undermine enforcement of the Fair Housing Act. Data collection is already required by other laws,[46] and while the Fair Housing Act does not specifically require data collection, discouraging its collection does not further the purposes of the Act. For example, if a corporate actor involved in the housing industry collects demographic data about people that use its services, and then is sued under the Fair Housing Act on a disparate impact theory, and thereafter stops collecting data, that action could indicate an attempt to avoid liability by hiding the discriminatory impacts of its policies. HUD should not be encouraging housing providers to engage in this conduct, and instead should encourage the collection of data.

This provision is also problematic when applied to government actors who are required by other provisions of the fair housing act to collect data. For example, in order to meet their obligations to affirmatively further fair housing, jurisdictions must assess how segregated their communities are, and what barriers exist to housing choice.[47] Without data, this analysis would be impossible to undertake.

Q. HUD's proposed regulation disincentivizes housing providers, insurance companies, and others covered by the Fair Housing Act to engage in proactive steps to comply with fair housing law.

The Proposed Rule's preamble states that with HUD's proposed changes, "[d]efendants will be more proactive in ensuring that their policies and practices comply with the defenses that are provided." Exactly. Housing providers and other corporate actors that control access to housing, like insurers and credit reporting companies, can tailor their actions very easily to avoid liability under this proposed Rule while continuing to discriminate. They can stop collecting data so there is no evidence of the discriminatory effects of their conduct. They can hide behind algorithms to exclude people from protected classes from housing with no risk of accountability. They can point to any cost that might be associated with stopping a discriminatory practice and call it material- because the defendant bears no actual burden of proof.

[46] 12 USC § 2803(b)(4) (which requires lenders to collect race and sex information about borrowers)
[47] *See generally* 24 CFR 903.7(o), 903.15.

R. HUD's Proposed Rule creates confusion by removing language about defenses to intentional discrimination claims

HUD's 2013 disparate impact rule states, "A demonstration that a practice is supported by a legally sufficient justification, as defined in paragraph (b) of this section, may not be used as a defense against a claim of intentional discrimination."[48] This clarifying language does not appear in the 2019 proposed rule, and HUD offers no explanation or acknowledgement of this removal. There is no reason for HUD to remove this language, and it is important for the Rule to be clear that these defenses do not apply to intentional discrimination. This removal will create confusion and some defendants may argue that it is intended to change existing law providing that this is not a defense.

S. HUD's question about "housing authorities" provides further evidence that the drafters of this proposal are not housing experts, and deprives the public of meaningful opportunity to comment due to lack of clarity

HUD asks commenters to respond about whether "it would be consistent with *Inclusive Communities* to provide a defense for housing authorities who can show that the policy being challenged is a reasonable approach and in the housing authority's sound discretion."[49] It appears that this question is actually about state housing finance agencies, not public housing authorities, but the drafters of this proposal apparently do not know the difference. Without this clarification members of the public have no way to understand how this additional defense to disparate impact liability would operate. The defense would operate differently if applied to state housing finance agencies (as to allocation of tax credits), or public housing authorities (which could include a wide array of policies related to running housing owned by the housing authority, or vouchers administered by the housing authority).

In *ICP* the Supreme Court was referring to state housing finance agencies, because that case was about tax credit housing, which is in most cases not owned or operated by local housing authorities. The Court opines that "[t]his case, on remand, may be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in the sound exercise of its discretion in *allocating tax credits for low-income housing*."[50] In most states, local housing authorities do not allocate tax credits for low-income housing. Instead, tax credits are allocated by state housing finance agencies through the Qualified Allocation Plan process.[51] However, in other HUD guidance, regulations, and just about everywhere else, the term "housing authority" normally refers to local housing

[48] 78 Fed. Reg. at 11482 (Feb. 15, 2013).
[49] Proposed Rule at 42,860.
[50] *Inclusive Communities Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 919 (5th Cir. 2019).
[51] *See generally* 26 U.S.C. § 42.

authorities, or public housing authorities, so this question in the preamble is completely unclear, and HUD offers no clarification and seems unaware of the difference.

T. Answers to HUD's "Additional Questions for Public Comment"

HUD's questions appear to be intended to gather information for further undermining the Fair Housing Act, rather than assisting the agency in enforcing it. As explained above, the effect of the proposed rule would be to make it nearly impossible to establish liability using disparate impact theory – the exact opposite of what the high court held in *ICP*.

1. HUD's proposed changes to its disparate impact standard DO NOT align with the decision and analysis in *Inclusive Communities*

Neither the needlessly complicated and anti-Plaintiff five element prima facie standard nor the three defenses align with *ICP.* The entire standard set out in the proposed Rule is weighted heavily against plaintiffs and will make it nearly impossible to bring a disparate impact claim. Plaintiffs should not be charged for example with knowing the internal workings of defendant's profits and financials, or what defendants' reasons were for passing any particular policy. Defendants should bear a burden of proof.

2. The proposed Rule, if finalized, will ensure that disparate impact cases brought in the future will fail

Since *ICP* essentially just approved the existing balancing test for adjudicating disparate impact claims as reflected in half a century of caselaw and in the 2013 HUD rule, that decision did not change the outcome of cases that came after it. One notable outlier which this proposed Rule appears to embrace is the problematic and wrongly decided *Lincoln Properties*[52] case from the Fifth Circuit. In that decision, the court twisted the Supreme Court's causation requirement into an impossible-to-meet standard – instead of requiring the defendant to have caused the disparate impact with a policy, the *Lincoln Properties* decision said the plaintiff would only prevail if the defendant caused the disparate representation of protected classes in the underlying population. As the dissent points out, this is a nonsensical standard that could never be met; "Such a requirement turns disparate-impact liability on its head because it would compel the plaintiff to establish that the offending policy not only had a disparate impact on a protected group, but that somehow the policy also created the characteristics making the protected group susceptible to the disparate impact."[53] Aside from all the other problematic and confusing language in the

[52] *Inclusive Communities Project, Incorporated v. Lincoln Property Company*, 920 F.3d 890 (5th Cir. 2019).
[53] *Id.* at 922.

Rule, this approach standing on its own will "render disparate-impact liability under the FHA a dead letter."[54] That appears to be exactly what HUD is trying to do with this Rule.

3. ***Inclusive Communities*, and the cases brought since *Inclusive Communities*, were consistent with HUD's 2013 proposed rule**

With a few notable exceptions like *Lincoln Properties,* discussed above, cases brought since *ICP* have been consistent with HUD's 2013 rule because *ICP* ratified the Rule.

4. **The proposed rule will place even more economic burden on members of protected classes and on society as a whole, while allowing corporate interests to profit off of discriminatory conduct.**

If finalized, this Rule will assist banks, lenders, insurance companies, and other housing providers and industry groups in profiting from discriminatory conduct with zero accountability. People in protected classes will pay the price, and so will society at large. Everyone is harmed when segregation is increased. For example, there is broad awareness that algorithms have the potential to amplify discrimination rather than avoiding it, and responsible companies are seeking to increase transparency and actively working to reduce discrimination in algorithms. If this Rule is finalized, those working to make better, non-discriminatory algorithms will be disincentivized to do this work, and less responsible actors will continue harmful practices.

Algorithms determine our access to a wide variety of basic life necessities – home mortgages, rentals, lines of credit, and employment, among others. Discrimination within these algorithms will continue to exclude people of color from access to these basic and fundamental aspects of life, harming those excluded individuals and society as a whole.

5. **A decision *not* to amend HUD's 2013 final disparate impact rule would leave the status quo in place because *Inclusive Communities* ratified the 2013 rule and no change is appropriate**

HUD should not amend the 2013 rule. The 2013 rule was consistent with case law established in nearly all of the circuit courts and appropriately interprets the Fair Housing Act. *ICP* mentioned the 2013 Rule twice and made no indication that any change should be required. HUD's proposal is clearly politically motivated and part of the administration's general strategy to roll back civil rights in every area of American life.

[54] *Id.* at 924.

6. The addition of paragraph (e) of § 100.500 will help insurance companies avoid liability of discriminatory conduct and shift all of the costs of discrimination onto members of protected classes while allowing corporate interests to profit more.

In 2013, HUD responded to insurer concerns about its disparate impact rule adequately by explaining that the general disparate impact analysis appropriately placed the burdens on each party. There is a large body of case law holding that insurers—including insurers who sell products to landlords—can be held liable under the FHA. *ICP* did not call those cases into question, and there is no legitimate reason for HUD to change its approach and add 100.500.[55] All of HUD's prior guidance and courts' well-reasoned decisions explain that insurance activities are properly included within the Fair Housing Act's reach because, as the Seventh Circuit explained the clear, consequences that follow from a lack of insurance: "No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable."[56]

7. All available data will demonstrate that HUD's proposed rule will result in more discriminatory conduct going unchecked, resulting in harm to protected classes.

Discrimination is harmful to individuals and communities, but also harmful to the economy. By reducing the ability to enforce the Fair Housing Act by eviscerating disparate impact liability, HUD's proposal will result in more discriminatory conduct continuing, and will incentivize corporate actors to engage in discriminationy whenever it is convenient or profitable. Harms to society are difficult to measure however, even unintentional discrimination has measurable negative impacts on health in all aspects of life. [57] In addition to the concrete harms suffered when someone is denied housing opportunity, shut out from the community of their choice, or denied the privileges associated with existing housing, discrimination also results in lasting emotional harms.[58]

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[55] See *National Fair Housing Alliance v. Travelers Indemnity Company* (D.D.C. 2017) 261 F.Supp.3d 20, 29.

[56] *NAACP*, 978 F.2d at 297; *National Fair Housing Alliance v. Travelers Indemnity Company* (D.D.C. 2017) 261 F.Supp.3d 20, 30.

[57] Cooper LA, Roter DL, Carson KA, et al. *The associations of clinicians' implicit attitudes about race with medical visit communication and patient ratings of interpersonal care*. AM J PUBLIC HEALTH. 102(5):979–987 (2012). Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3483913/.

[58] Victor M. Goode, *Emotional Harm in Housing Discrimination Cases: A New Look at a Lingering Problem*, 30 FORDHAM URB. L. J. 1143 (2003). Available at: https://scholarship.law.columbia.edu/faculty_scholarship/968.

Conclusion

HUD must withdraw the proposed Rule. It is fundamentally at odds with HUD's mission to attempt to impede enforcement of the Fair Housing Act with this unlawful and misguided Rule.

Sincerely,

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