IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MASSACHUSETTS FAIR HOUSING CENTER and HOUSING WORKS, INC.,	)	
Plaintiffs,	)	
v.	)	**3:20-CV-11765-MGM**
UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and BEN CARSON, Secretary of the Department of Housing and Urban Development,	)	
Defendants.	)	

BRIEF OF AMICUS CURIAE

Discriminatory effects lability – including *both* disparate impact *and* perpetuation of segregation – has existed under the Fair Housing Act for decades. The U.S. Department of Housing and Urban Development's ("HUD") 2013 Rule on discriminatory effects liability ("2013 Rule") did not create this form of Fair Housing Act liability; rather the 2013 Rule formalized and harmonized decades of jurisprudence and reflected HUD's own longstanding interpretation of the Fair Housing Act. *See generally* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,460-63 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100). On the other hand, the agency's latest rulemaking, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60,288 (Sept. 24, 2020) (to be codified at 24 C.F.R. pt. 100) ("Final Rule"), is a drastic retreat by HUD from the mandates of the Fair Housing Act. In its promulgation of the Final Rule, HUD does not cite to any case – because it cannot - where an unmeritorious disparate impact claim resulted in Fair Housing Act liability on a defendant based on the 2013 Rule standards. In short, HUD's Final Rule is a

"solution" in search of a problem and an attempt to evade any attempt to uncover those policies and practices that lead to discrimination. HUD's Final Rule would catastrophically undermine the central aim of the Fair Housing Act to bring about "'truly balanced and integrated living patterns'" throughout this country, and would deprive protected classes of the benefits they were guaranteed more than 50 years ago. *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973) (*quoting* 114 CONG. REC. 3422 (Sen. Mondale)).

INTEREST OF THE AMICUS CURIAE

From firsthand experiences representing victims of housing discrimination and as conveners of legal aid attorneys across the country who work on behalf of protected classes to challenge those policies that perpetuate systemic discrimination, Amici have a strong and unique interest in this case as HUD's Final Rule will make it virtually impossible for them to confront those discriminatory practices and policies without evidence of discriminatory intent.

CORPORATE DISCLOSURE STATEMENTS

All of the Amici are nonprofit organizations and have no parent corporation or any publicly held corporation that owns 10% or more of their stock. None of the Amici are aware of any publicly traded corporation that has an interest in the outcome of this case.

CERTIFICATION

Amici make the following certification based on Federal Rule of Appellate Procedure 29(a)(4): No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than the amici curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

I. HUD'S FINAL RULE IS A DRASTIC AND ILLEGAL RETREAT FROM THE MANDATES OF THE FAIR HOUSING ACT, NOT NECESSITATED BY THE SUPREME COURT'S OPINION IN *INCLUSIVE COMMUNITIES*.

The U.S. Supreme Court affirmed disparate impact liability under the Fair Housing Act in *Texas Department of Housing & Community Affairs v. The Inclusive Communities Project*, 135 S. Ct. 2507 (2015). In that decision, the Court recognized that the Fair Housing Act has a "continuing role in moving the Nation toward a more integrated society." *Id.* at 2526. Furthermore, the Court referenced HUD's 2013 disparate impact rule several times throughout the opinion, not once mentioning that the 2013 Rule ran afoul of any of the constitutional limitations the Court discussed. *See id*. at 2514-2515, 2522, 2523. The Court did not state any reservations about the 2013 Rule's burden-shifting framework, nor indicate any significant differences between the 2013 Rule and what the Court viewed as the contours of disparate impact liability.

Furthermore, a number of federal courts post-*Inclusive Communities* have not found that the HUD 2013 Rule and the Supreme Court decision are inherently at odds. In fact, HUD has not demonstrated that there is overwhelming consensus from lower courts that *Inclusive Communities* would necessitate the Final Rule's sweeping changes to its existing discriminatory effects regulations. As a federal district court concluded in 2017, the Court in *Inclusive Communities* "expressly approved of disparate-impact liability under the FHA and did not identify any aspect of HUD's burden-shifting approach that required correction." *Prop. Cas. Insurers Ass'n of Am. v. Carson*, No. 13-CV-8564, 2017 WL 2653069, at *9 (N.D. Ill. June 20, 2017). That same court also noted that the Supreme Court did not indicate that the HUD 2013 Rule violated limitations regarding disparate impact liability with respect to the consideration of

race. *Id.* at *8. Other courts have simultaneously cited both *Inclusive Communities* and the 2013 Rule without identifying any irreconcilable conflict between the two authorities.[1]

The Final Rule fails to properly explain why the 2013 Rule standard is insufficient to adequately protect potential defendants from unwarranted or unconstitutional liability. Other than citing to *Gallagher v. Magner*, 619 F. 3d 823 (8th Cir. 2010), as a case noted in *Inclusive Communities*, 135 S. Ct. at 2524, as one "decided without the cautionary standards in this opinion," HUD cites no specific cases in which an entity covered by the FHA was not afforded adequate opportunity to present a valid interest, or even a case where HUD believes a plaintiff unjustifiably survived a motion to dismiss based upon an interpretation of the standards in 2013 Rule since it went into effect. This telling omission speaks to the arbitrary nature of the rule.

In fact, Step 2 of the 2013 Rule's burden-shifting framework already addresses the Supreme Court's concern that defendants need "leeway to state and explain the valid interest served by their policies." *Inclusive Communities*, 135 S. Ct. at 1122. HUD's 2013 Rule provides defendants the opportunity to prove that the challenged practice "is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." 24 C.F.R. § 100.500(c)(2).

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[1] *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 510-13 (9th Cir. 2016) (citing both existing (pre-2020) 24 C.F.R § 100.500(c) and *Inclusive Communities* to support the court's reasoning); *see also Ave. 6E Invs., LLC v. City of Yuma*, 2018 WL 582314, at *7 n.49 ("In its reply, the City argues that even if the regulations support Plaintiffs' position, the court must then reject HUD's interpretation of the FHA given the Supreme Court's inconsistent interpretation of disparate impact liability in *Inclusive Communities*. ... However, as noted above, the court concludes that *Inclusive Communities* does not in fact hold that disparate impact claims cannot be based on a city's individual zoning decision. Therefore, HUD's regulations are consistent with that opinion and entitled to deference."); *Burbank Apartments Tenant Ass'n v. Kargman*, 48 N.E.3d 394, 411 (Mass. 2016) ("[W]e will follow the burden-shifting framework laid out by HUD and adopted by the Supreme Court in Inclusive Communities."). Even a case that references a "more stringent pleading standard" under *Inclusive Communities* does not say that the HUD Rule is inconsistent with *Inclusive Communities*, and even goes on to cite § 100.500(c) in the opinion. *National Fair Housing Alliance v. Travelers Indemnity Co*., 261 F. Supp. 3d 20, 22, 29 (D.D.C. 2017); *see also Burbank*, 48 N.E.3d at 411 (referencing a "rigorous examination on the merits at the pleading stage" being required by *Inclusive Communities*, and quoting the Supreme Court's reference to 24 C.F.R. § 100.500(c)(1) in the prior sentence, and also never stating the Rule is inconsistent with *Inclusive Communities*).

Furthermore, HUD's 2013 burden-shifting framework places the burden upon plaintiffs of proving the existence of a less discriminatory alternative that serves the defendant's substantial, legitimate, nondiscriminatory interests – a feature that inherently favors the defendants in fair housing cases. *Id.* § 100.500(c)(3). HUD's failure to provide any examples of how disparate impact theory has unjustifiably imposed fair housing liability on particular parties is telling and supports a conclusion that HUD's revision to the 2013 Rule is arbitrary and capricious.

A. Under the "Direct Cause" Requirement, the Final Rule Would Establish an Essentially Impossible Causal Standard for Plaintiffs to Meet in Fair Housing Cases, Despite the Supreme Court's Endorsement of Disparate Impact Liability

The Final Rule makes changes that are far beyond anything that could be countenanced from a reasonable reading of *Inclusive Communities* and the Fair Housing Act. The Final Rule's five-part pleading requirement alone renders disparate impact a dead letter by imposing a standard of causation of "robust causality" and "direct cause" that is so high that it will create a virtually impossible burden on plaintiffs.

Inclusive Communities Project v. Lincoln Properties Company, is as an example of just how high causality will now become under the Final Rule. 920 F. 3d 890 (5th Cir. 2019). In that case – which involved a disparate impact challenge to a housing provider's refusal to accept Vouchers in low-poverty areas – the court stated:

> Neither the aforementioned "city-level data" nor the "census-level data" cited by ICP supports an inference that the implementation of Defendants-Appellees' blanket "no vouchers" policy, or any change therein, *caused black persons to be the dominant group of voucher holders in the Dallas metro area* (or any of the other census areas discussed by ICP). Similarly, ICP alleges no facts supporting a reasonable inference that Defendants-Appellees *bear any responsibility for the geographic distribution of minorities throughout the Dallas area prior to the implementation of the "no vouchers" policy*. Indeed, ICP pleads no facts showing Dallas's racial composition before the Defendants-Appellees implemented their "no vouchers" policy or how that composition has changed, if at all, since the policy was implemented.

Id. at 907 (emphasis added).

This reading of causation closely aligns with HUD's Final Rule's direct cause requirement. While HUD says it does not intend to endorse the *Lincoln Properties* decision, 85 Fed. Reg. at 60,313, it is inescapable that the Final Rule will make a plaintiffs' burden functionally impossible to meet. Essentially, unless a plaintiff can show that a particular defendant *caused* the complex dynamics resulting from decades of discriminatory housing policies, that plaintiff could not prevail in challenging a policy that disproportionately and unjustifiably impacts a protected class. This standard ignores how multiple levels of structural racism, including redlining, the siting of assisted housing, disinvestment and investment, have coalesced to determine where protected classes, particularly Black and Latinx communities, can live and the benefits those communities may have. *See generally*, Nat'l Cmty. Reinvestment Coal., *HOLC "Redlining" Maps: The Persistent Structure of Segregation and Economic Inequality* (Mar. 20, 2018), https://ncrc.org/holc/.

The policy of refusing to accept Vouchers, or other policies with a disproportionate impact, operate in this larger historic and societal context of systemic racism – something the Fifth Circuit and the Final Rule disregard by demanding this high bar to show causation. This standard will allow a whole range of discriminatory behavior to occur and flourish. As the dissent in *Lincoln Properties* noted, "the majority's interpretation of [']robust causation['] threatens to eviscerate disparate-impact claims under the FHA altogether" and would "turn[] 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." 920 F.3d at 913, 922 (Judge W. Eugene Davis, dissenting). So too does the Final Rule.

1. *The Burden Shifting Framework Within the Final Rule Would Create an Impossibly High Standard That Even the "Heartland" Cases in* Inclusive Communities *Could Not Meet.*

Within the Final Rule's five-part pleading requirement, HUD would require "[t]hat 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." 85 Fed. Reg. at 60,332 (to be codified at 24 C.F.R. § 100.500(b)(3)). To demonstrate how such a "direct cause" requirement is inconsistent with the Supreme Court's *Inclusive Communities* decision, consider the case of *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish*, 641 F. Supp. 2d 563 (E.D. La. 2009). The Supreme Court specifically cited *St. Bernard Parish* as the type of lawsuit that "reside[s] at the heartland of disparate-impact liability." *Inclusive* Communities, 135 S. Ct. at 2522. The Supreme Court took note of the fact that the *St. Bernard Parish* decision invalided a "post-Hurricane Katrina ordinance restricting the rental of housing units to only "'blood relative[s]'" in an area of the city that was 88.3% white and 7.6% black." *Id.*

With the Final Rule's causation requirement, a defendant in a case with a fact pattern similar to that in *St. Bernard Parish* could argue that the plaintiff must plead that the ordinance somehow was the "direct cause" of the *existing distribution of white and African-American residents in the jurisdiction*. In practice, this would create an impossible standard, given the history of discriminatory housing practices that still have impacts today. If a court applied HUD's Final Rule in a *St. Bernard Parish*-type case, that court would likely dismiss the case on grounds that the plaintiffs could not meet the "robust causality" standard because the challenged policy did not directly cause existing segregation patterns. In short, HUD's impossible causation standard would leave discriminatory policies on the books, essentially validating discriminatory policies and residential segregation throughout the United States.

II. HUD'S FINAL RULE DEPARTS FROM THE MANDATES OF THE FAIR HOUSING ACT AND DECADES OF EXISTING CASELAW WITHOUT ADEQUATE EXPLANATION

Discriminatory effects liability under the Fair Housing Act has for decades included two distinct claims: disparate impact and perpetuation of segregation (also known as "segregative effect") claims. *See* Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. Legis. & Pub. Pol'y 709, 710 (2017) ("Both the disparate-impact and segregative-effect theories date back to appellate decisions from the 1970s[]" (citation to footnote omitted)).[2] While disparate impact claims focus on the harm done to people of color or members of other protected classes, perpetuation of segregation claims "focus on the harm done to the local community" and often involve challenges to municipalities "accused of using their land-use powers to block integrated housing developments in predominantly white areas []." *Id.* at 713. However, in the Final Rule, HUD removes the reference to perpetuation of segregation from the 2013 Rule text of 24 C.F.R. § 100.500.[3] In the Final Rule Preamble, HUD explains that the removal of the perpetuation of segregation reference "was part of HUD's streamlining of the regulation and is not meant to imply that perpetuation of segregation could never be a harm prohibited by disparate impact liability," and later states that even though HUD's reference to perpetuation of segregation "was removed from explicit mention, it was not excluded from the definition altogether." 85 Fed. Reg. at 60,306, 60,313. However, this change represents a shift

[2] *See also Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (outlining "two kinds of racially discriminatory effects," including perpetuating segregation); *Nat'l Fair Hous. All. v. Bank of Am*., 401 F. Supp. 3d 619, 641 (D. Md. July 18, 2019) ("Perpetuation of segregation is, in effect, an alternate avenue of pleading disparate impact under the FHA.") (citing *Graoch Assocs. # 33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n*, 508 F.3d 366, 378 (6th Cir. 2007)).

[3] *Compare* 24 C.F.R. § 100.500(a) (2013) ("A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons *or creates, increases, reinforces, or perpetuates segregated housing patterns* because of race, color, religion, sex, handicap, familial status, or national origin.") (emphasis added) *with* 24 C.F.R. § 100.500(a) (effective Oct. 26, 2020) ("Liability may be established under the Fair Housing Act based on a specific policy's or practice's discriminatory effect on members of a protected class under the Fair Housing Act even if the specific practice was not motivated by a discriminatory intent.").

away from considering perpetuation of segregation a distinct form of discriminatory effects liability.[4] HUD failed to adequately explain this elimination of this distinct second claim.

III. HUD'S DEFENSE OF POLICIES THAT PREDICT OUTCOMES IGNORES THE ROLE OF DISPARATE IMPACT LIABILITY IN UNCOVERING IMPLICIT BIAS.

HUD has proposed an entirely novel "outcome prediction" defense in its Final Rule. *See* Final Rule, 85 Fed. Reg. 60,319, 60,333. This change substantially alters the defenses outlined in the Proposed Rule, which would have functionally created "safe harbors" for defendants when the alleged cause of the discriminatory effect is a defendant's algorithmic model. The Final Rule's novel defense regarding predicting outcomes could reasonably be read to apply even *more broadly* than a specific defense focused on algorithms, by applying to "practices that predict outcomes" such as "risk analysis." 85 Fed. Reg. at 60,290. Accordingly, under the 2020 Rule, users of algorithms and other methods of predicting risk would still enjoy a defense, although the public was not provided the opportunity to evaluate this particular new iteration of the defense before the Rule was finalized. This change remains inconsistent with *Inclusive Communities*' observation 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." 135 S.

[4] Final Rule, 85 Fed. Reg. at 60,306 ("A plaintiff need only prove in a case brought under disparate impact theory that a policy or practice has led to the perpetuation of segregation, which has a discriminatory effect on members of a protected class, in order for that policy or practice to be prohibited under this rule. More generally, HUD views [']perpetuation of segregation['] as a possible harmful result of unlawful behavior under the disparate impact standard.[]") (citing *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2522 (2015)). In *Inclusive Communities*, the Court states, "The FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation." 135 S. Ct. at 2522. HUD cites to the *Inclusive Communities* decision in reference to this change, but HUD does not offer adequate explanation for this different approach. As one commentator points out, "The Supreme Court's 2015 decision in Inclusive Communities endorsed FHA disparate-impact claims, but did not deal with—indeed, barely mentioned—the segregative-effect theory []." Schwemm, *Segregative-Effect Claims*, *supra*, at 714.

Ct. at 2522. Instead, this new defense will likely insulate risk-assessment policies, such as those used to conduct tenant applicant screening, from discriminatory effects liability even though they often validate discriminatory bias. Indeed, the discriminatory potential inherent in the use of tenant screening tools is at issue in an ongoing lawsuit filed by NHLP against CoreLogic, a major tenant screening company. *Conn. Fair Hous. Ctr. vs. Corelogic Rental Prop. Sols*., 369 F. Supp. 3d 362, 372-75 (D. Conn. 2019) (finding that tenant screening companies can be held liable under a Fair Housing Act disparate impact theory).

Algorithmic prediction models are used for all types of housing-related decision-making, including for rental admission screening, insurance underwriting, mortgage lending, and more. These models are often provided by third-party consumer reporting agencies, such as tenant screening companies, credit bureaus, and criminal background check providers. In the midst of the COVID-19 pandemic, which could place over 30 million households at risk of eviction,[5] the use of predictive algorithms in tenant screening serves as a timely example of the discriminatory harms that can result from the unregulated use of "outcome prediction" tools.[6] Many housing providers now subscribe to automated decision-making services[7], which use a series of computer programs to determine whether the applicant should be admitted or rejected based on the client-

[5] Annie Nova, *Millions of Americans may not be able to pay their rent in October. What to do if you're one of them*, CNBC (Oct. 2, 2020), https://www.cnbc.com/2020/10/02/millions-of-americans-may-not-be-able-to-pay-rent-in-october.html

[6] *Amici* are aware that the Centers for Disease Control has issued a nationwide eviction moratorium, and many states have issued even stronger moratoria. However, even assuming these moratoria remain in effect until the pandemic is over and that landlords and courts comply with their requirements, there is no guarantee that tenants unable to pay rent due to the pandemic will avoid the stigma that comes with an eviction record. In Massachusetts, for example, tenants must certify to their landlord in writing that they are experiencing a COVID-19 related hardship to avoid late fees or a negative credit report. *See* 400 CMR 5.0: COVID-19 Emergency Regulations, https://www.mass.gov/regulations/400-CMR-50-covid-19-emergency-regulations. And in many states, landlords may still sue the tenant for eviction—producing a court record that may appear in a later tenant screening report—even the moratorium prohibits actual enforcement of the eviction order.

[7] One industry-backed survey from 2017 found that 9 out of 10 landlords now run tenant screening checks. *See* TransUnion SmartMove, *TransUnion Independent Landlord Survey Insights* (Aug. 7, 2017), https://www.mysmartmove.com/SmartMove/blog/landlord-rental-market-survey-insights-infographic.page

landlord's policies and publicly retrievable data, such as eviction records. These "actuarial" systems have replaced the traditional practice of using social networks and personal knowledge to decide whether an applicant should be admitted or rejected. David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33(1) Law & Soc. Inquiry 5-30 (2008).

Data suggests that using past evictions to recommend whether an applicant should be accepted or denied will likely lead to a discriminatory effect. For example, a study in Washington state found that African Americans are sued for eviction about five-times more than whites and that Black women are sued for eviction almost seven times more often. Timothy A. Thomas et al., *The State of Evictions: Results from the University of Washington's Evictions Project* (Feb. 2, 2019), https://evictions.study/washington/. Comprehensive data on evictions in Milwaukee showed that Black women were disproportionately targeted by nuisance citations – including for making 911 calls to report incidents of domestic violence – and that families with children are disproportionately susceptible to eviction. Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor*, 78 Am. Soc. Rev. 117 (2012); Matthew Desmond et al., *Evicting Children*, 92(1) Soc. Forces 303-327 (2013). Studies in other cities have similarly shown significantly disproportionate eviction rates among Black individuals and Black women in particular. Deena Greenberg et al., *Discrimination in Evictions: Empirical Evidence and Legal Challenges*, 51 Harv. C.R.-C.L. L. Rev. 115, 120 (2016).

Tenant screening companies attempt to justify these models on the presumption that a potential tenant who was sued for eviction previously is likely to perform poorly. Even if that presumption were true, a prediction model has no value if the underlying data it is built upon is inaccurate or incomplete. Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 Cal. L. Rev. 671, 683 (2016). Yet tenant screening companies have built a predictive model

using inaccurate eviction records and data that may not distinguish between (for example) a case where the renter was sued for eviction and one where the court actually entered a judgment against the tenant. Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 Yale L.J. 1344, 1358-61 (2007).

Further, predictive models and their inputs are often proprietary, thus preventing consumers and advocates from evaluating the potential discriminatory effects of an outcome prediction model or algorithm. Joshua A. Kroll et al., *Accountable Algorithms*, 165 Penn. L. Rev. 633, 658 (2017). The adoption of this predictive outcome defense in HUD's Final Rule will disincentivize individual housing providers from proactively evaluating their admissions policies for discriminatory effect and will instead encourage housing providers to increase automation of their rental admissions decisions.

Given the substantial risk of discrimination and complexity of the subject matter, Plaintiffs, advocates, such as *Amici*, and those they represent will be irreparably harmed until they are given the opportunity to provide notice and comment on the "outcome prediction" defense and there can be a determination of the legal sufficiency of HUD's rulemaking process. Conversely, the current discriminatory effects framework in 24 C.F.R. § 100.500(c)(2) adopted in 2013 allows a defendant to show that a challenged policy is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant" and has not collapsed industries under the burden of non-stop litigation. Indeed, under the current framework, defendants already have an opportunity to demonstrate that their policy or practice is valid. In fact, HUD admits that historically the insurance industry has not been overly burdened by disparate impact liability, despite the industry's use of risk-based pricing: "HUD does not believe that the possibility of disparate impact standards within the prudential safeguards set

forth in this Final Rule will unreasonably affect the ability to price risk in the insurance business. *It does not appear that this has been the case over a large number of years where disparate impact liability was potentially applicable in a broader way to insurance*." 85 Fed. Reg. at 60,326 (emphasis added).

IV. DISPARATE IMPACT LIABILITY IS VITAL WHEN DISASTERS STRIKE.

Robust protection against disparate impact discrimination is especially essential during natural disasters, including the current health pandemic. The Final Rule however makes it fundamentally easier for housing providers to use facially neutral policies to deny and oust members of protected classes from housing. *See, e.g., United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974). Without access to stable housing, more individuals will be forced to live in unsafe close-contact environments, such as shelters.

The Final Rule also frustrates the ability of public health agencies to provide quarantine housing, as local governments will more readily be able to invoke building and zoning ordinances to block group homes and facilities. *See*, *e.g.*, *Conn. Hosp. v. City of New London*, 129 F. Supp. 2d 123 (D. Conn. 2001). Such protections are especially vital during the pandemic. For example, a local government is accused of interpreting their housing and zoning codes to prohibit a non-profit from establishing quarantine housing for exposed foster youth. *See Aunt Martha's v. Vill. of Midlothian*, 1:20-cv-02861 (filed May 12, 2020, N.D. Ill.) The Final Rule however greenlights zoning boards, community associations, and housing providers to invoke administrative guidance to justify policies which disadvantage protected groups. *See* Final Rule, 85 Fed. Reg. at 60,333 (citing new § 100.500 (d)(1)(ii), (iii)).

Finally, the Final Rule eliminates any meaningful query into whether COVID-19 relief funds will be equitably applied by state and local governments, despite a long history of those

funds being diverted away from communities of color.[8] As Black and Latinx communities are disproportionately harmed by COVID and desperately in need of federal relief funds, the law must provide a path towards justice.

V. PLAINTIFFS HAVE CLEARLY ESTABLISHED IRREPARABLE HARM

Plaintiffs have clearly established irreparable harm if the Final Rule is not stayed. While Defendants will simply face the status quo (the 2013 Rule), Plaintiffs will suffer the consequences of having their missions frustrated and resources diverted, and discrimination victims will find it nearly impossible to seek relief for housing discrimination they have suffered and the attendant effects. *See Dist. of Columbia v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1, 40-41 (D.D.C. 2020) (finding irreparable harm for non-profit organization because letting rule go into effect would divert resources from other activities to serve individuals who no longer had SNAP benefits) (appeal filed); *League of Women Voters of the United States. v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016) (finding that an organization is harmed irreparably if the actions taken by the defendant have "perceptibly impaired" the organization's programs; the defendant's actions "directly conflict" with the organization's mission; and the harm is "beyond remediation"); *Donohue v. City of Mutheun*, Civ. Act. No. 18-107, 2018 U.S. Dist. LEXIS 198597, at *11 (D. Mass. Nov. 21, 2018) (preliminary injunction granted for alleged discriminatory application of city building code to sober house, because failure to enjoin could lead to homelessness, which would constitute irreparable harm).

[8] For example, the Latino Action Network, New Jersey NAACP, and Fair Share Housing Center filed a HUD complaint against the State of New Jersey. The complaint alleged that the State had distributed disaster relief funds in a discriminatory way that disfavored Spanish-speakers and renters – two groups that disproportionately include people of color. The parties eventually reached a settlement agreement on these claims. *See* Latino Action Network v. State of N.J., Title VI No. 02-13-0048-6, Title VIII No. 02-13-0303-8 (May 30, 2014) (HUD Voluntary Compliance Agreement and Conciliation Agreement), https://fairsharehousing.org/images/uploads/sandyagreementsigned.pdf.

CONCLUSION

For these reasons, *Amici* urge this Court to find in favor of Plaintiffs and grant a stay of the Final Rule pursuant to 7 U.S.C. § 705.

DATED: October 13, 2020

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*Motion for admission *pro hac vice* pending.

CERTIFICATE OF SERVICE

I certify that on October 13, 2020, I electronically filed this brief by Amicus Curiae by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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