



For economic and racial justice

67 E. Madison St., Suite 2000, Chicago, IL 60603
312.263.3830 | povertylaw.org

August 24, 2021

Via www.regulations.gov

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410

Re: Docket No. FR-6251-P-01: Notice of Proposed Rulemaking: Reinstatement of HUD's Discriminatory Effects Standard

To Whom It May Concern:

Thank you for the opportunity to comment in support of HUD's proposed rule [Restoring HUD's Discriminatory Effects Standard](#) ("rule" or "proposed rule"), which is consistent with existing jurisprudence and restores the 2013 Rule's¹ robust approach to Fair Housing Act enforcement. These comments, filed on behalf of the Shriver Center on Poverty Law and the undersigned organizations and individuals, fully support the proposed rule with particular focus on how the proposed rule serves as an essential check against criminal records screening policies which have unjustified disparate effects upon protected classes under the Fair Housing Act. As such, these comments also discuss specific ways in which the proposed rule sets the stage for HUD to utilize disparate impact theory to target discriminatory screening policies and build upon its essential 2016 [Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions](#) ("Criminal Records Guidance" or "2016 Guidance").

The Shriver Center on Poverty Law has long advocated to ensure that all people have access to vital resources and programs that provide for their basic needs and that advance their long-term well-being and opportunity. Through our decades of work on behalf of and in partnership with families and people living with low incomes in Illinois, we have developed deep expertise in fair housing law and the role that it plays in securing safe, decent, affordable, and accessible housing for all.

Importantly, this letter was drafted in conjunction with organizations led by and comprised of individuals with direct contact with the criminal justice system, who are thus able to provide unique expertise, including:

¹ "2013 Rule" and "2020 Rule" will be used here as they are used in the preamble to the proposed rule.

- The Formerly Incarcerated, Convicted People and Families Movement: A broad coalition of justice-involved individuals and organizations lead by justice-involved individuals dedicated to achieving holistic and radical change to the criminal justice system;
- Voice of the Experienced (VOTE) - Louisiana: A grassroots organization founded and run by formerly incarcerated people, dedicated to restoring full human and civil rights to people impacted by the criminal legal system;
- A New Way of Life: a California-based organization dedicated to promoting healing, power and opportunity for formerly incarcerated people by taking a multifaceted approach to mitigating the effects of, and ultimately eliminating, mass incarceration;
- Operation Restoration: Headquartered in New Orleans, LA, Operation Restoration (OR) was formed in 2016 and is led by formerly incarcerated women. OR's mission is to support women and girls impacted by incarceration to recognize their full potential, restore their lives, and discover new possibilities. OR's goal is to end the incarceration of women and girls.

1. The Proposed Rule is Consistent with Existing Jurisprudence and the Purpose of the Fair Housing Act

First and foremost, these comments serve to fully support the proposed rule. The proposed rule restores a robust and workable disparate impact standard consistent with existing case law. Similarly, the proposed rule replaces and avoids the harms of the [2020 Disparate Impact regulation](#) (“2020 Rule”) enacted by the previous Administration. To illustrate how the 2020 Rule was inconsistent with relevant jurisprudence and served as an impediment to proper fair housing enforcement, and thus to also illustrate the corresponding advantages of the proposed rule, these comments incorporate the Shriver Center’s comments opposing the 2020 Rule, attached here as Exhibit 1.

2. The Proposed Rule is an Essential Check against Discriminatory Screening Policies

The proposed rule restores an essential check against criminal records screening policies and practices which have an unjustified disparate impact against Black and Brown people and other protected classes. “Criminal records screening policies and practices” and the like refer both to the publication of reports by tenant screening companies and the use of those reports by housing providers and public housing authorities. Disparate impact liability under the Fair Housing Act serves to fulfill the FHA’s purpose of, not only prohibiting intentional discrimination, but also addressing policies which perpetuate systemic inequity and entrench segregation.²

Racial segregation and housing discrimination cannot be meaningfully addressed without specific attention being paid to criminal records screening practices which disproportionately

² See *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 539-40 (2015).

exclude Black and Brown people from housing. In her groundbreaking work *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michelle Alexander observes as follows:

[I]t is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So we don't. Rather than rely on race, we use our criminal justice system to label people of color "criminals" and then engage in all the practices we supposedly left behind.³

Despite often being facially neutral, it is largely these criminal screening policies which perpetuate "the new Jim Crow" in housing.⁴

Similarly, persons with disabilities [are far more likely than those without disabilities to face arrest or incarceration](#) and thus face exclusion from housing based upon a criminal record.⁵ Currently, the 2016 Criminal Records Guidance does not address the disparate effects of criminal records screening on those with disabilities.

Curtailing the discriminatory effects of criminal records screening is thus not merely within the penumbra of appropriate Fair Housing enforcement but at its core. Fortunately, the disparate impact theory of liability is well-suited to address these systemic inequities, as illustrated by both the 2016 Criminal Records Guidance and case law applying disparate impact analysis to criminal records screening policies.⁶

By providing an erroneous interpretation of the Fair Housing Act's disparate impact standard, the 2020 Rule erected obstacles to its proper application to criminal records screening. For example, as discussed in the comments attached as Exhibit 1, the 2020 Rule broadly shields the use of algorithms from disparate impact liability, thus protecting conduct which should fall squarely within the FHA's prohibitions. The 2020 Rule's requirement that plaintiff must, at the initial pleading stage, sufficiently allege that the criminal records screening policy is "arbitrary, artificial, and unnecessary to achieve any valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law" both requires plaintiff to have extensive evidence generally not available before discovery and broadly defers to "bald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record."⁷ The 2020 Rule was in obvious tension with the 2016 Guidance, though the Trump Administration never rescinded such Guidance.

³ Alexander, Michelle. *The New Jim Crow : Mass Incarceration in the Age of Colorblindness*. New York: [Jackson, Tenn.]: New Press; Distributed by Perseus Distribution, 2010.

⁴ See Tex Pasley et al., *Screened Out, SHRIVER CNTR. ON POVERTY LAW* (Jan. 2021), www.povertylaw.org/report/tenant-screening-report/.

⁵ Rebecca Vallas, "Disabled Behind Bars," Center for American Progress, Jul. 18, 2016, <https://www.americanprogress.org/issues/criminal-justice/reports/2016/07/18/141447/disabled-behind-bars/>; Harvard Law School Tenant Advocacy Project, comments to 2020 Rule

⁶ See, e.g., *Connecticut Fair Housing Center v. CoreLogic Rental Property Solutions*, 478 F.Supp.3d 259 (D. Conn. 2020); *Jackson v. Tryon Park Apartments, Inc.*, No. 6:2018-cv-06238 (W.D.N.Y. 2019), available at <https://law.justia.com/cases/federal/district-courts/new-york/nywdce/6:2018cv06238/116525/17/>; *Sams v. Ga West Gate, LLC*, 2017 WL 436281 (S.D. Ga., Jan. 30, 2017).

⁷ Criminal Records Guidance, p. 5.

On the other hand, again as illustrated by the 2016 Guidance and cited case law,⁸ by properly interpreting the Fair Housing Act, the proposed rule lays the groundwork for HUD to utilize the disparate impact standard to target criminal records screening practices which create unjustified adverse effects on members of protected classes. As such, the proposed rule sets the stage for HUD to continue to build off of the 2016 Guidance to address this essential civil rights issue.

3. The Proposed Rule Empowers HUD to Take Additional Steps against Discriminatory Criminal Records Screening

The proposed rule, once enacted, thus sets the stage for HUD to further fulfill the purpose of the Fair Housing Act and its statutory obligation to “affirmatively further fair housing”⁹ by taking additional steps to reign in the discriminatory use of criminal background checks. HUD should do so in a number of ways, including but not limited to the following:

a. Improving Criminal Records Guidance

The 2016 Guidance was an essential step which HUD should continue to build upon. For one, in addition to race, the 2016 Guidance should be amended to analyze the disparate effects of criminal records screening on persons with disabilities.¹⁰

Most importantly, so that it cannot be easily rescinded and to ensure it gets adequate deference from the courts, HUD should enact regulation applying the disparate impact standard to criminal records screening practices. This can be done in a number of ways. Ideally, the 2016 Guidance, or an enhanced version of this Guidance, would be codified.¹¹ While the 2016 Guidance simply provides a framework through which to analyze a diverse array of fact-specific scenarios, this should not preclude its codification into regulation. Indeed, Fair Housing regulations are often structured as such.¹²

⁸ See fn. 6, at *supra*.

⁹ 42 U.S.C. § 3608(e)(5).

¹⁰ Harvard Law School Tenant Advocacy Project, Comments on HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard Docket Number: FR-6111-P-02, RIN 2529-AA98, Oct. 17, 2019, *available at* <http://clinics.law.harvard.edu/tap/files/2020/01/Tenant-Advocacy-Project-Disparate-Impact-Comment-October-2019.pdf>.

¹¹ See, e.g., 2 CA ADC § 12269 & see, e.g., generally 2 CA ADC § § 12264 - 12270 (regulations under California fair housing law effectively codifying the 2016 Criminal Records Guidance).

¹² See, e.g., 24 CFR §§ 100.200– 100.205. These regulations provide a general framework to analyze reasonable accommodation, modification, and construction requirements, which must then be applied to a diverse array of fact-specific permutations to determine in a specific situation, for example, whether one’s impairment impedes “Major life activities . . . such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working,” § 100.201(b), when it is necessary for the landlord to establish a tenant escrow account “in order to ensure with reasonable certainty that funds will be available to pay for the restorations at the end of the tenancy,” § 100.203, and when “it is impractical to [to have at least one building entrance on an accessible route] because of the terrain or unusual characteristics of the site,” § 200.105(a).

Enacting regulation focused upon illustrative examples of how the disparate impact standard applies to criminal records screening would also go a long way in furthering housing equity.¹³

Similarly, despite the consistency between *Inclusive Communities* and HUD’s 2013 Rule, we urge HUD to, in the preamble of the proposed rule, discuss criminal records screening practices as examples of policies that may have an unjustified disparate impact on protected classes. A number of federal court decisions cited herein provide useful illustrations of this approach.¹⁴

Each of these approaches necessitates significant input from directly impacted individuals and advocates whose analysis and illustrations are informed by their own unique experience.

b. Enforcement Action

HUD can also further actualize the protections embodied in the proposed rule and 2016 Criminal Records Guidance by taking aggressive enforcement action within this context. Doing so would not only send a necessary signal to tenant screening companies and the housing providers who employ their services but would also help generate positive case law in this area. While advocates will continue to file complaints, the duty to “affirmatively further fair housing”¹⁵ also obligates HUD to independently initiate and pursue such enforcement action.

c. Application to Subsidized Housing

It is imperative that HUD apply the proposed rule to make its own housing programs more equitable and FHA-compliant. Unlike the preamble to the 2020 Rule, the proposed rule does not suggest that a more difficult standard of proof may apply when the disparate impact theory is used to target housing authorities.¹⁶ This correction, and the proposed rule’s consistency with the FHA’s purpose generally, enables HUD to take action to ensure that subsidized housing providers are not using criminal background checks in a way that creates unjustified adverse effects for People of Color and persons with disabilities. For purposes of this comment, housing choice voucher, public housing, subsidized housing and other HUD-assisted housing programs will be referred to as “subsidized housing” programs. Housing providers participating in these programs, including housing authorities, will be referred to as “subsidized housing providers” or the like.

The proposed rule, in conjunction with the 2016 Criminal Record Guidance and HUD Notice H 2015-10, can thus assist HUD in clarifying the scope of subsidized housing providers’ discretion to deny residents and applicants housing due to their criminal records. For example:

- Housing providers’ use of one strike policies and use of arrest records in housing decisions cannot be squared with the proposed rule. HUD should thus issue regulations explicitly prohibiting subsidized housing providers from engaging in these practices.

¹³ See, e.g., the following which, in part, regulate through illustration: 24 CFR §§ 100.203(c), 100.204(b), 100.205(b); 2 CA ADC § § 12176, 12180.

¹⁴ See fn. 6, at *supra*.

¹⁵ 42 U.S.C. § 3608(e)(5).

¹⁶ See Preamble to 202 Rule, Docket No. FR-6111-P-02.

- The proposed rule and 2016 Guidance should explicitly inform subsidized housing provider discretion to deny admission to a household because a household member is “engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents,” 42 USCA § 13661. In light of the proposed rule and 2016 Guidance, terms such as “drug-related,” “violent criminal activity” and “other criminal activity . . .” must be read as being meaningfully limited in scope to guard against subsidized housing providers abusing their discretion in a way that has unjustified disparate effects on protected classes;
- The proposed rule and 2016 Guidance should also prompt HUD to clarify what constitutes a “reasonable” look-back period for criminal background checks per 42 U.S.C. § 13661(c) to ensure that subsidized housing providers and housing authorities do not utilize look-back periods which result in unnecessary adverse effects upon members of a protected class. This analysis again must be formulated in consultation with directly impacted experts;
- HUD should ensure, both in policy and in practice, that emergency housing vouchers are widely available to those with records and that the HUD definition of “homelessness” is adjusted to widely encompass those reentering from incarceration;
- HUD should take further steps to ensure subsidized housing providers are properly monitored for compliance with the 2016 Criminal Records Guidance and the proposed rule as applied to criminal record screening practices.

Further, to better ensure its housing programs are FHA-complaint, HUD should integrate HUD Notice H 2015-10 and the 2016 Criminal Records Guidance into its subsidized housing guidebooks. As stated by the GAO, “updating its HCV and public housing guidebooks to reflect newer criminal history guidance [is necessary for HUD to] ensure that these guidebooks serve as consolidated and up-to-date references for PHAs that accurately communicate HUD’s current guidance on criminal history policies.”¹⁷ Further, integration of this guidance into the guidebooks is subject to notice and comment and thus entitles such guidance to a higher level of deference.

Conclusion

Thank you for providing the opportunity to comment. We again want to express our unambiguous support of the proposed rule. As supported by the attached comments, the proposed rule provides an interpretation of disparate impact liability which is consistent with the purpose of and jurisprudence surrounding the Fair Housing Act. In particular, as highlighted here, the proposed rule fulfills the central purpose of the Fair Housing Act by setting the stage for HUD to further target practices which serve as a primary driver of systemic housing inequity, such as criminal records screening practices which adversely affect protected classes.

¹⁷ GAO-18-429, Rental Housing Assistance: Actions Needed to Improve Oversight of Criminal History Policies and Implementation of Fugitive Felon Initiative (Sept. 20, 2018), p. 23, <https://www.gao.gov/assets/700/693855.pdf>.

Best Regards,

/s/

A New Way of Life Reentry Project
Communities United for Restorative Youth Justice
Formerly Incarcerated Convicted People and Families Movement
Operation Restoration
Voice of the Experienced

American Youth Works
Building Promise USA
Chicago Area Fair Housing Alliance
Florida Rights Restoration Coalition
JustLeadership USA
Legal Services for Prisoners with Children
National Alliance to End Homelessness
National Housing Law Project
Shriver Center on Poverty Law
Sponsors, Inc.
Uptown People's Law Center
Voters Organized to Educate
Washington Lawyers' Committee for Civil Rights and Urban Affairs

Helen Gaebler, Senior Research Attorney
Kathryn A. Sabbeth, Associate Professor of Law



For economic and racial justice

67 E. Madison St., Suite 2000, Chicago, IL 60603
312.263.3830 | povertylaw.org

October 18, 2019

Submitted via www.regulations.gov
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

Dear Sir or Madam:

On behalf of the Shriver Center on Poverty Law, we are writing to oppose HUD's 2019 proposed rule "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard" ("Proposed Rule"). HUD's proposed rule would create unnecessarily high barriers for people to protect themselves from housing discrimination under the disparate impact theory. As the U.S. Supreme Court recognized in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, the Fair Housing Act "was enacted to eradicate discriminatory practices within a sector of our Nation's economy."¹ And yet, HUD's proposal would subvert civil rights laws established more than fifty years ago by allowing discriminatory practices to go unchecked as long as the business, housing provider, or government actor did not manifest an intent to discriminate. To uphold long-established jurisprudence under the Fair Housing Act, we strongly urge HUD to withdraw this proposed Rule.

The Shriver Center on Poverty Law has long advocated to ensure that all people have access to vital resources and programs that provide for their basic needs and that advance their long-term well-being and opportunity. Through our decades of work on behalf of and in partnership with families and people living with low incomes in Illinois, we have developed deep expertise in fair housing law and the role that it plays in securing safe, decent, affordable, and accessible housing for all. Through our advocacy and litigation, we understand particularly how vital the disparate impact theory is to securing housing justice for families and communities harmed by discriminatory housing policies where proof of intent is lacking. In addition to our housing justice work, we convene three multi-state networks, all of which informs our support of

¹ 135 S.Ct. 2507, 2521 (2015).

the disparate impact theory as it is codified in HUD's 2013 Final Rule "Implementation of the Fair Housing Act's Discriminatory Effects Standard" ("Current Rule").²

- *Legal Impact Network* -- This multi-state network brings together strong legal and policy advocates from throughout the country who are using innovative, coordinated strategies to address poverty and advance racial justice. Our advocacy helps people meet their basic human needs, supports working families, promotes the well-being of children, and advances opportunity and justice for all. The network currently reaches 33 states and the District of Columbia, and it currently convenes a housing working group.
- *Racial Justice Institute* -- This national leadership program grounds legal aid attorneys in a commitment to race equity as an integral and essential part of anti-poverty advocacy. Through the Racial Justice Institute, we're developing a national network of advocates for race equity committed to advancing a coordinated racial justice advocacy agenda that, among other things, seeks to challenge the types of structural discrimination that the disparate impact theory was designed to address.
- *Partnership for Just Housing* -- This multi-state collaborative of advocates works to reduce the discriminatory impact of the criminal legal system on equitable access to housing, focusing on issues such as tenant screening on the basis of arrest and conviction records and the use of crime free and nuisance ordinances to segregate communities.

Based on our deep expertise in housing generally and disparate impact claims specifically, we strongly urge HUD to withdraw the Proposed Rule and instead increase enforcement of the Current Rule for the reasons set out below:

I. HUD's Proposed Rule contradicts the central purpose of the Fair Housing Act.

In passing the Fair Housing Act, Congress sought to eradicate discriminatory housing practices in the strongest possible terms. Congress intended the Act to provide "a clear national policy against discrimination in housing."³ With *Inclusive Communities Project*, the Supreme Court realized that intent by confirming that disparate impact is a cognizable theory under the Act, and is in fact essential to realizing Congress's stated goals. The Proposed Rule does not reflect the Supreme Court's interpretation of disparate impact; it renders disparate impact an unusable theory by holding plaintiffs to an impossible pleading standard and allowing defendants to evade liability.

The Proposed Rule is especially problematic in light of HUD's obligation to affirmatively further fair housing through its actions.⁴ Instead of furthering fair housing goals, this proposed Rule would impede enforcement of the Act by requiring plaintiffs to prove facts and intentions that are impossible to discern without discovery and by establishing an unrealistic causation standard. If finalized in its current form, the proposed Rule will cause a significant setback for civil rights protections in the housing sphere, which could then lead to a similar rollback of protections in other civil rights contexts, such as employment, education, and public

² 78 Fed. Reg. 11460 (Feb. 15, 2013).

³ H.R. Rep. No. 100-711, p. 15 (1988).

⁴ 42 U.S.C. § 3608(e)(5).

accommodations. The proposal presents yet another politically motivated attack on communities of color and must be withdrawn.

II. In eliminating “perpetuation of segregation” without justification, HUD’s Proposed Rule improperly ignores decades of judicial precedent recognizing this method for proving discriminatory effect.

The Proposed Rule attempts to erase liability under the perpetuation of segregation theory, which encompasses the very core of what the Fair Housing Act is about: ending segregation. The Fair Housing Act was passed to combat racial segregation in the United States, yet our communities remain segregated to this day.⁵ HUD’s proposal will take away a critical tool for tackling this fundamental civil rights issue.

As codified in HUD’s 2013 disparate impact rule, reflecting court decisions that have considered the question,⁶ discriminatory effects liability may be established where a policy “perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.”⁷ This variety of discriminatory effect is also known as a “segregative-effect” claim.⁸ These claims, which achieve the Fair Housing Act’s purpose of fostering integration, are built on a “strong foundation,”⁹ and HUD’s proposal to eliminate language explicitly allowing for such claims is arbitrary and capricious.

A. *The historical context of the Fair Housing Act shows that ending “perpetuation of segregation” is one of its core functions, which courts have long recognized.*

To understand the centrality of “perpetuation of segregation claims,” it is necessary to visit the history of the Fair Housing Act, which was signed into law on April 11, 1968.¹⁰ One month earlier, a commission chaired by Illinois Governor Otto Kerner, Jr. (known as the “Kerner Commission”) released a report (the “Kerner Report”) documenting the cause of urban riots that had swept the country in the summer of 1967.¹¹ The report indicated that America was moving toward two “separate and unequal societies”—one black and one white, and found that white

⁵ Chicago Area Fair Housing Alliance, *A CITY FRAGMENTED: HOW RACE, POWER, AND ALDERMANIC PEROGATIVE SHAPE CHICAGO’S NEIGHBORHOODS* (2018), [http://povertylaw.org/files/docs/CityFragmentedLowRes%20\(1\).pdf](http://povertylaw.org/files/docs/CityFragmentedLowRes%20(1).pdf) (see Attachment A); see also Metropolitan Planning Council, *THE COST OF SEGREGATION* (2018) (detailing the financial impact of racial housing segregation in the city of Chicago), <https://www.metroplanning.org/work/project/33> (see Attachment B).

⁶ See e.g. *Metropolitan Housing Development Corp. v. Village of Arlington Heights* (7th Cir. 1977) 558 F.2d 1283, 1290 (“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”).

⁷ 24 C.F.R. 100.500(a).

⁸ See generally Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 LEG. & PUB. POL’Y 709 (2017) (see Attachment D).

⁹ *Id.*

¹⁰ Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73.

¹¹ NAT’L ADVISORY COMM’N OF CIVIL DISORDERS, REPORT OF THE U.S. NAT’L ADVISORY COMMISSION ON CIVIL DISORDERS (1968), <https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf>.

racism was “essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II.”¹² The “ingredients of this mixture” included “pervasive discrimination and segregation” in housing, which the report found had “resulted in the continuing exclusion of great numbers of Negroes from the benefits of economic progress.”¹³ In a chapter entitled “Recommendations for National Action,” the Commission recommended the passage of a “comprehensive and enforceable open housing law” to address the problem.¹⁴ The release of the Kerner Report a Senate filibuster against a proposed fair housing law, and it passed the upper chamber on March 11.¹⁵

The House of Representatives was unmoved until Martin Luther King, Jr. was assassinated on April 4. His death forced the House to act. Just one week later, President Lyndon Johnson signed the Fair Housing Act into law on April 11.¹⁶

The Act was a fitting tribute to Dr. King. While he is most often associated with the efforts to pass the Civil Rights Act of 1964 (outlawing discrimination in schools, public accommodations, and employment), and the Voting Rights Act of 1965, he devoted the final years of his life to ending segregation in housing. When he gave his speech on the steps of the Alabama State Capitol at the end of the march from Selma in March 1965, to advocate for what became the Voting Rights Act, he acknowledged that “[w]e are moving to the land of freedom.”¹⁷ But rather than stopping with voting rights, he urged the crowd to “continue our triumphant march to the realization of the American dream.”¹⁸ At the top of the agenda came a call to “march on segregated housing until every ghetto or social and economic depression dissolves, and Negroes and whites live side by side in decent, safe, and sanitary housing.”¹⁹

Dr. King soon put his words into action. Less than a year after marching on Montgomery, he moved into Chicago’s North Lawndale neighborhood to launch the “Chicago Freedom Movement” to confront discriminatory real estate practices in the city and advocated for an “open housing” law.²⁰ As one court recently described, the “[Act] was, in large part, a response to the heightened racial tensions and riots erupting in the United States throughout the 1960s, and the FHA’s passage reflected an understanding that ‘fair housing legislation’ was ‘the best way for Congress’ at that time ‘to start on the true road to integration.’”²¹

¹² *Id.* at 5.

¹³ *Id.*

¹⁴ *Id.* at 13; Valerie Schneider, *In Defense of Disparate Impact: Urban Redevelopment and the Supreme Court’s Recent Interest in the Fair Housing Act*, 79 MO. L. REV. 539, 552-53 (2014).

¹⁵ Schneider, *supra* note 13 at 553..

¹⁶ *Id.*

¹⁷ Dr. Martin Luther King, Jr., Address at the Conclusion of the Selma to Montgomery March (Mar. 25, 1965), <https://kinginstitute.stanford.edu/king-papers/documents/address-conclusion-selma-montgomery-march>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ David Bernstein, *The Longest March*, CHICAGO MAG., July 25, 2016, per <https://www.chicagomag.com/Chicago-Magazine/August-2016/Martin-Luther-King-Chicago-Freedom-Movement/>.

²¹ *Nat’l Fair Housing All. v. Carson*, 330 F. Supp. 3d 14, 24 (D.D.C. 2018) (citing 114 CONG. REC. at 3422 (statement of Sen. Walter F. Mondale)). The majority opinion in *Inclusive Communities* contains an extensive discussion of the Fair Housing Act’s historical context and the important role of the Kerner Commission report. 135 S. Ct. at 2515-16.

These goals are not merely aspirational--they are written into the text of the Fair Housing Act. To achieve integration, the Secretary of HUD must administer the Fair Housing Act's provisions "affirmatively."²² Courts have broadly construed this mandate. For instance, in *Trafficante v. Metropolitan Life Insurance Co.*²³, the Supreme Court held that a white tenant had standing to sue a housing complex for its failure to integrate non-white tenants. The Act's "broad and inclusive" language allowed for a tenant to allege an injury because of the loss of "important benefits" that result from interracial associations.²⁴ In another case, *Otero v. New York City Housing Authority*,²⁵ the Second Circuit allowed a defendant housing authority to ignore its rules giving first priority of an urban renewal site to prior tenants (who were almost entirely black) in order to integrate the renewed site. The court, relying on decisions in other cases decided around the same time,²⁶ held that "[a]ction must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation...of racial groups whose lack of opportunities the [FHA] was designed to combat."²⁷

In conjunction with these policies, courts recognized segregative-effect claims in the context of "exclusionary zoning," wherein suburban municipalities enacted pretextual zoning ordinances to bar the development of subsidized housing developments to preserve the suburb's racially segregated character.²⁸ Subsidized housing developers would bring suit under the Fair Housing Act to challenge these ordinances, and during the 1970s and 80s, three pivotal appellate decisions, *United States v. City of Black Jack*²⁹, *Metropolitan Housing Development Corp. v. Village of Arlington Heights ("Arlington Heights II")*³⁰, and *Huntington Branch, NAACP v. Town of Huntington*³¹, endorsed segregative-effect liability under the Fair Housing Act.³² Other

²² 42 U.S.C. § 3608(d), (e)(5).

²³ 409 U.S. 205 (1972).

²⁴ *Id.* at 209-10.

²⁵ 484 F.2d 1122 (2d. Cir. 1973).

²⁶ *See, e.g., Banks v. Perk*, 341 F. Supp. 1175, 1182 (N.D. Ohio 1972) (finding housing authority had an "affirmative duty to integrate its housing projects and be instrumental in dispersing urban housing patterns"); *Shannon v. HUD*, 436 F.2d 809, 820-21 (3d. Cir. 1970) ("color blindness is impermissible" under the FHA); *Blackshear Residents Org. v. Housing Auth. of Austin*, 347 F. Supp. 1138, 1145-47 (W.D. Tex. 1971) (requiring housing authority to use more specific racial criteria in site selection in order to fulfill HUD's statutory mandate of affirmatively furthering the open housing policy declared by the FHA) (citing 42 U.S.C. § 3608(d)(5)).

²⁷ *Otero*, 484 F.2d at 1134.

²⁸ Schwemm, *supra* note 7 at 715; *see also* Richard Rothstein, *The Color of Law* 39-57 (2017) (describing how municipalities enacted facially neutral zoning ordinances in order to maintain segregation).

²⁹ 508 F.2d 1179, 1184-86 (8th Cir. 1974) (finding the discriminatory effect of the challenged ordinance was "more onerous" when assessed in light of the fact that segregated housing in the St. Louis metropolitan area was "in large measure the result of deliberate racial discrimination") (quoting *U.S. v. City of Black Jack*, 372 F. Supp. 319, 326 (E.D. Mo. 1974)).

³⁰ 558 F.2d 1283, 1290 (7th Cir. 1977) (holding that a decision which "perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups") (citing *Trafficante*, 409 U.S. at 209-10).

³¹ 844 F.2d 926, 937-38 (2d. Cir. 1988) (recognizing a segregative-effects claim "advances the principal purpose of [the FHA] to promote 'open, integrated residential housing patterns'" (quoting *Otero*, 484 F.2d at 1134), *aff'd* 488 U.S. 15 (1988)).

³² *See Schwemm, supra* note 7 at 715-23 (discussing in detail the three "foundation" cases recognizing segregative-effect liability)

courts have recognized the general validity of discriminatory effect claims under a segregative-effect theory even when ruling in a defendant's favor.³³

The *Inclusive Communities* majority opinion used both *Black Jack* and *Huntington* as examples of cases that “reside at the heartland of disparate-impact liability.”³⁴ And courts evaluating disparate impact claims after *Inclusive Communities* continue to recognize segregative-effects claims.³⁵ In sum, every court to evaluate disparate impact has allowed for a plaintiff to bring a claim upon a showing that the challenged policy or practice perpetuates segregated housing patterns.

B. HUD's brazen attempt to eliminate “perpetuation of segregation” without explanation is impermissible and unreasonable.

An agency's interpretation of a statute will not be upheld by a court if the construction does not fall within the range of “reasonable policy choice[s] for the agency to make.”³⁶ By eliminating any mention of segregative-effects theory, HUD has impermissibly and unreasonably construed the Fair Housing Act in violation of law.

First, HUD argues that the explicit reference to segregative-effects liability was “unnecessary,” because the definition “simply reiterated the elements of a disparate impact claim.”³⁷ HUD's justification for this change is nonsensical. The definition of discriminatory effects in the Current Rule, which allows a plaintiff to prove an effect is discriminatory under a theory of segregative effects—that is, where a practice “creates, increases, reinforces, or perpetuates segregated housing patterns”³⁸—only applies to *step one* of the plaintiff's claim. If the plaintiff meets this burden, the defendant may respond by showing the challenged practice is necessary to achieve a legitimate, nondiscriminatory interest.³⁹

HUD argues its proposed rule “now adequately define[s]” the meaning of discriminatory effects in more detail in an unspecified later section.⁴⁰ But the proposed rule provides no definition of “discriminatory effects,” even though it uses the term regularly as part of its new

³³ *Edwards v. Johnston Cty. Health Dep't*, 885 F.2d 1215, 1223 (4th Cir. 1989); *Hallmark Developers, Inc. v. Fulton Cty.*, 466 F.3d 1276, 1286 (11th Cir. 2006); *Graoch Associates #33, L.P. v. Louisville/Jefferson Cty. Met. Human Relations Comm'n*, 508 F.3d 366, 377-78 (6th Cir. 2007).

³⁴ *Inclusive Cmty.*, 135 S.Ct. at 2521-22.

³⁵ *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 503 (9th Cir. 2016) (“[A]s the Supreme Court recently reaffirmed, the FHA also encompasses a second claim of discrimination, disparate impact, that forbids actions by private or governmental bodies that create a discriminatory effect upon a protected class or *perpetuate housing segregation* without any concomitant legitimate reason”) (emphasis added) (citing *Inclusive Cmty.*, 135 S. Ct. at 2522); *Mhany Mgmt. v. Cty. of Nassau*, 819 F.3d 581, 619-20 (2d Cir. 2016) (“[T]here are two methods of proving the discriminatory effect of a zoning ordinance: (1) ‘adverse impact on a particular minority group,’ and (2) ‘harm to the community generally by the *perpetuation of segregation*’”) (emphasis added) (quoting *Huntington Branch*, 844 F.2d at 937).

³⁶ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (quoting *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 845 (1984)).

³⁷ 84 Fed. Reg. 42858.

³⁸ 24 C.F.R. § 100.500(a).

³⁹ *Id.* § 100.500(c)(2).

⁴⁰ 84 Fed. Reg. 42858.

burden-shifting framework.⁴¹ Thus, both HUD’s premise (that the previous definition reiterated the elements of a disparate impact claim) and its justification for the change (that “discriminatory effects” are now more adequately defined in a later section) are patently false.

“One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.”⁴² Even though the standard of review for rulemaking is “narrow,” courts must still examine the “reasons for agency decisions—or, as the case may be, the absence of such reasons.”⁴³ As demonstrated, HUD’s reason for changing its definition is completely inadequate, and for that reason allow, its removal of segregative-effects liability from the definition of discriminatory effects is arbitrary and capricious.

Further, because the proposed rule seeks to amend a previously enacted policy, HUD is not working from a blank slate. In addition to providing adequate justification for its proposed rule, therefore, HUD must adequately account for its change in position.⁴⁴ Here, HUD has not even addressed the unanimous court precedent—before and after *Inclusive Communities*—that provided for segregative-effects liability under the Fair Housing Act. Only six years ago, in comments on its proposed rule (which is now the final rule HUD seeks to amend), HUD justified its inclusion of segregative-effects liability because “the elimination of segregation is central to why the Fair Housing Act was enacted.”⁴⁵ And in doing so, it noted that “every federal court of appeals to have addressed the issue has agreed with HUD’s interpretation that the Act prohibits practices with the unjustified effect of perpetuating segregation.”⁴⁶ Indirectly, HUD argues the *Inclusive Communities* decision justifies the change in rulemaking, but as already noted, the Supreme Court found two of the three foundational segregative-effects cases fell within the “heartland” of disparate impact doctrine.⁴⁷ The failure to address, much less explain, the sudden lack of reliance on these cases violates the APA.

C. *In attempting to erase “perpetuation of segregation” from the Fair Housing Act, HUD shuns its duty to affirmatively further fair housing.*

By eliminating segregative-effects liability, HUD has also ignored its important statutory obligation to act affirmatively to achieve the FHA’s goal of desegregation.⁴⁸ This strong statutory

⁴¹ *Id.* at 42862-63.

⁴² *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016).

⁴³ *Judulang v. Holder*, 565 U.S. 42, 52-53 (2011) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); see also William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1364 (2018) (courts do not embrace “untethered, erratic, or unjustified reversals or abandonment of statutory missions”).

⁴⁴ *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 516 (2009) (“[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (“Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation may be arbitrary, capricious, or an abuse of discretion [under the APA]”) (citations omitted) (quotation marks omitted); *Cal. v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1123 (N.D. Cal. 2017) (“New presidential administrations are entitled to change policy decisions, but to meet the requirements of the APA they must give reasoned explanations for these changes and ‘address [the] prior factual findings’ underpinning a prior regulatory regime”) (quoting *Organized Vill. Of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015)).

⁴⁵ 78 Fed. Reg. 11469.

⁴⁶ *Id.*

⁴⁷ 135 S.Ct. at 2521-22.

⁴⁸ 42 U.S.C. § 3608(d), (e)(5).

language means that “HUD’s position is not passive.”⁴⁹ Rather, the Fair Housing Act imposes upon HUD an obligation to do “*something more than simply refrain from discriminating.*”⁵⁰ This language means that “[a]ction must be taken to fulfill, *as much as possible*, the goal of open, integrated residential housing patterns and to prevent the increase of segregation[.]”⁵¹

Accordingly, when it comes to the Fair Housing Act, HUD must go above and beyond the requirements of the APA, which it has not even met in this case. It must act affirmatively to promote integrated housing and prevent the increase of segregated housing. By failing to provide any adequate reason for its decision to no longer allow plaintiffs to argue that a defendant is liable because of a policy or practice that creates, increases, reinforces, or perpetuates segregated housing patterns, HUD has fallen far short of its mandate. For these reasons, the proposed rule, if enacted, would violate the APA based on this change to the definition of discriminatory effects.

D. In Chicago, policies such as aldermanic prerogative increase segregation, making the “perpetuation of segregation” claim more important to realizing the Fair Housing Act’s goals than ever.

The “perpetuation of segregation” claim is necessary to address policies and practices, such as the use of aldermanic prerogative in the city of Chicago and the long-standing segregating impact that it has on the entire city. Aldermanic prerogative is the power of Chicago City Council members to maintain control over their wards, primarily by initiating or blocking City Council or city government actions concerning their own wards. The power is not legislatively granted, but is overwhelmingly assented to among the city’s aldermen, the Mayor’s Office, and the Department of Planning and Development. This power gives aldermen the power to treat their wards as “fiefdoms.”⁵²

Aldermen use aldermanic prerogative to shape their neighborhoods, often to block affordable housing and preserve racial demographics, through a variety of tools: (i) unfettered zoning power that gives aldermen the discretion to determine allowable land-uses and development within their wards (especially downzoning, to limit the density of housing); (ii) control of city resources, such as city funds and city-owned lots, that can make or break deals to develop affordable housing within wards; (ii) use of parliamentary and extra-parliamentary power to control what does and does not get introduced and voted upon before the city council. Aldermanic prerogative is the legacy of the city of Chicago’s history of *de jure* segregation, where city leaders in the past purposely divvied up the city into white and Black neighborhoods, many of which maintain the same racial demographics decades later.⁵³

Although not all use of aldermanic prerogative is the result of intentional discrimination on the part of the aldermen, the segregating consequence is clear. Because of aldermanic prerogative, only 20% of land in Chicago is available for multifamily development, and family affordable housing is primarily concentrated outside of predominantly white and low-poverty areas. The result is the segregation of families with low-incomes, particularly Black and Latinx

⁴⁹ *Thompson v. HUD*, 348 F. Supp. 2d 398, 422 (D. Md. 2005).

⁵⁰ *Id.* at 457 (quoting *NAACP v. HUD*, 817 F.2d 149, 155 (1st Cir. 1987) (emphasis in original)).

⁵¹ *Otero*, 484 F.2d at 1134 (emphasis added).

⁵² Chicago Area Fair Housing Alliance, *A City Fragmented: How Race, Power, and Aldermanic Prerogative Shape Chicago’s Neighborhoods* (2018), [http://povertylaw.org/files/docs/CityFragmentedLowRes%20\(1\).pdf](http://povertylaw.org/files/docs/CityFragmentedLowRes%20(1).pdf).

⁵³ *Id.*

households. Even more striking is the fact that even though the city owns and controls “over 56 acres of land in majority white, low poverty areas..., no city-owned parcel of land in these areas has been used to build a single affordable dwelling unit.”⁵⁴

Community groups seeking to challenge the City of Chicago’s long-standing policy and practice of “aldermanic prerogative” have made “perpetuation of segregation” claims in a complaint to HUD.⁵⁵ “Perpetuation of segregation” claims remain relevant and necessary to the fight against segregation in cities like Chicago all over the country; therefore, HUD should not take away this important tool, especially in the noticeable absence of a legitimate reason for doing so.

III. Replacing the Current Rule’s three-part burden-shifting test for proving disparate impact is an unnecessary maneuver outside the scope of HUD’s authority and would severely undermine enforcement of the Fair Housing Act.

Nothing indicates that HUD should abandon the three-step burden shifting test that has been used for decades under Title VIII jurisprudence, as well as other areas of civil rights laws. It provides an appropriate balance for protecting plaintiffs against discriminatory acts that fall short of intentional discrimination and protecting landlords, lenders, and other potential defendants from overbroad liability. Indeed, since *Inclusive Communities* was decided in 2015, courts have affirmatively held that the Current Rule -- which codifies the three-part test -- is consistent with the Supreme Court’s decision upholding disparate impact in that case.⁵⁶ As one court explained, “While *Inclusive Communities* cautions courts about imposing disparate-impact liability under certain circumstances, ... these concerns are best left for analysis in specific cases.”⁵⁷

Since courts have consistently upheld the Current Rule, HUD should abandon the proposed five-part test that it proposes. Otherwise, if it goes into effect, HUD’s proposed rule will frustrate the purpose of the Fair Housing Act by, among other things, requiring plaintiffs to prove facts and intentions that are impossible to discern without discovery and by establishing an unrealistic causation standard. The new five-part test practically dispenses with disparate impact theory as a way of proving claims, introducing a standard that is essentially calls for a smoking

⁵⁴ *Id.* at 5.

⁵⁵ Housing Discrimination Complaint, *Chicago Area Fair Housing Alliance, et al. v. City of Chicago*, (Nov. 11, 2018),

<https://www.povertylaw.org/files/advocacy/CAFHA%20et.%20al%20v.%20City%20of%20Chicago%20HUD%20Administrative%20Complaint.pdf>

⁵⁶ See *6E Invs., LLC v. City of Yuma*, 818 F.2d 493, 512-13 (9th Cir. 2016) (citing the Current Rule in describing the three-step test); *MHANY Mgmt. Inc. v. County of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016) (holding that the “Supreme Court implicitly adopted HUD’s approach, see *Inclusive Communities Project*, 135 S. Ct. at 2518”); *Prop. Cas. Insurers Ass’n of Am. v. Carson*, 2017 WL 2653069, at *8-9 (N.D. Ill. June 20, 2017) (“the Supreme 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”); *Burbank Apartments Tenant Ass’n v. Kargman*, 474 Mass. 107, 126-27 (Mass. 2016) (Massachusetts Supreme Judicial Court following “the burden-shifting framework laid out by HUD and adopted by the Supreme Court in ICP”).

⁵⁷ *Prop. Cas. Insurers Ass’n of Am. v. Carson*, 2017 WL 2653069, at *9 (N.D. Ill. June 20, 2017).

gun as proof of intentional discrimination. Such subversion of the Fair Housing Act conflicts with HUD's statutory obligation to affirmatively further fair housing through its actions.⁵⁸

A. By requiring a showing that a policy is “arbitrary, artificial, and unnecessary,” HUD’s Proposed Rule imposes a heightened standard that essentially calls for proof of intentional discrimination, thereby eliminating most disparate impact claims.

Under the first prong of the Proposed Rule’s five-part test, plaintiffs must plead that the challenged policy or practice is “arbitrary, artificial and unnecessary” to achieve a valid interest or legitimate objective. In imposing an unrealistically high hurdle for plaintiffs to overcome at the initial pleading stage, HUD all but guarantees that disparate impact claims will fail for several reasons.

First, by requiring plaintiffs to prove that policies are “arbitrary, artificial, and unnecessary,” HUD is essentially asking for proof of intentional discrimination and foreclosing the ability to bring claims of disparate impact. HUD justifies the inclusion of this standard by distorting the *Inclusive Communities* Court’s reference to *Griggs v. Duke Power*, which called for the “removal of artificial, arbitrary, and unnecessary barriers.”⁵⁹ A proper reading of *Inclusive Communities* supports the proposition that disparate impact liability helps to remove artificial barriers, arbitrary barriers, and unnecessary barriers. Furthermore, the three-prong burden-shifting test (used in *Griggs*, endorsed by *Inclusive Communities*, and adopted by the Current Rule) serves to protect against precisely these types of barriers because the second prong gives housing providers and servicers accused of discrimination the opportunity to defend their practices by identifying a valid business justification or public policy purpose.⁶⁰ Furthermore, the third prong of the Current Rule helps to limit liability to artificial, arbitrary or unnecessary barriers. In order to prevail in the event that a defendant is able to meet its burden of proving the challenged policy serves a legitimate interest, the plaintiff has the burden of proving that the “substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.”⁶¹ To meet this burden, plaintiff must produce proof “supported by evidence, and may not be hypothetical or speculative.”⁶² Rather than rely on the three-step test that has been effectively deciding disparate impact claims for decades, however, HUD is attempting to stitch together the Court’s words into a newfangled

⁵⁸ 42 U.S.C. § 3608(e)(5).

⁵⁹ 401 U.S. 424, 431 (1971).

⁶⁰ See *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 936 (2d Cir. 1988) (“the defendant must prove that its actions furthered, in theory or in practice, a legitimate, bona fide governmental interest”); see also *MHANY Mgmt. Inc. v. County of Nassau*, 819 F.3d 581, 617 (2d Cir. 2016) (“the defendant or respondent may rebut the prima facie case by proving that the ‘challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.’”); *6E Invs., LLC v. City of Yuma*, 818 F.2d 493, 512 (9th Cir. 2016) (“as the Supreme Court made clear in *ICP*, [the second prong of the burden-shifting analysis] merely requires the city to demonstrate that the action creates an adverse effect on minorities is supported by adequate justification”).

⁶¹ 24 C.F.R. § 100.500(c)(3).

⁶² 78 Fed. Reg. 11,460, 11,473.

– and ultimately toothless – disparate impact standard so that that only recourse left for plaintiffs is to lean on disparate treatment claims.

The fact that HUD is requiring that plaintiffs meet this standard of “arbitrary, artificial, and unnecessary” at the pleading stage, and before any meaningful exchange of relevant information between the parties, further demonstrates its hostility to the disparate impact standard. HUD concedes that the first proposed prong of its prima facie standard may require an impossible showing. The Proposed Rule’s preamble states:

HUD recognizes that plaintiffs will not always know what legitimate objective the defendant will assert in response to the plaintiff’s claim or how the policy advances that interest, and, in such cases, will not be able to plead specific facts showing why the policy or practice is arbitrary, artificial, and unnecessary.

HUD then tries to soften the blow of this harsh standard by offering plaintiffs an alternative way to meet this pleading standard: by “plausibly alleging that a policy or practice advances no obvious legitimate objective.” But plaintiffs will be hard-pressed to plausibly allege the absence of a legitimate objective. This shows again how this first prong is meant to eliminate all disparate impact cases, especially since HUD later allows defendants to rebut the claim by “identifying” a valid interest – with no standard of proof.

Because this prong improperly conflates disparate impact cases with disparate treatment cases and erects an impossibly high standard for plaintiffs to even make it past the pleading stage, HUD should remove this requirement from the Proposed Rule.

B. HUD’s Proposed Rule should not equate its requirement of a “robust causality link” with proof of actual causation.

The second prong of the proposed prima facie case introduces the requirement of a “robust causality link” that, if adopted, will replace the courts’ current practice of determining causation on a case-by-case basis with an unworkable standard that plaintiffs will be hard-pressed to meet. The Proposed Rule offers no definition of the term “robust causal link,” making it difficult for individuals to understand specifically what this prong requires. The rule suggests that plaintiffs will be required to show “how the statistical analysis used supports claim of disparate impact by providing an appropriate comparison that shows that the policy is the actual cause of the disparity,” but this statement still does not sufficiently define the term “robust causal link.”

In *Inclusive Communities*, the Supreme Court explained that plaintiffs must be able to “allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection [to establish] a prima facie case of disparate impact.”⁶³ In reviewing such cases, however, “courts [need not] abandon common sense or necessary logical inferences that follow from the facts alleged.”⁶⁴ HUD has not indicated whether and how its proposed requirement of a “robust causality link” differs from the standard put forth in the Current Rule or the standard that courts have been applying since *Inclusive Communities* was decided.

⁶³*Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015).

⁶⁴*Nat’l Fair Hous. All. v. Travelers Indem. Co.*, 261 F. Supp. 3d 20, 30 (D.D.C. 2017).

If HUD is proposing that proof of actual causation is necessary to establish the “robust causality link,” this proposal should be abandoned since this heightened standard is at odds with the Court’s decision in *Inclusive Communities* and the way that federal courts routinely resolve issues of causation in disparate impact cases today. The district court in *de Reyes v. Waples Mobile Home Park, L.P.* demonstrates the problems that result when “robust causality” is equated with proof of actual causation.⁶⁵ In that case, Latinx tenants challenged a policy that conditioned lease renewal on proof of legal status, relying on the disparate impact theory to argue that such a policy had an unjustified impact on their housing because of the disproportionate number of Latinx individuals who have undocumented status. The district court rejected the tenants claim based on a lack of “robust causality.” According to the district court, the primary cause of the disparate impact was the fact that “Latinos have chosen in greater number than any other group to enter the United States illegally,” not simply that they were Latino. Therefore, the court explained, any “disparate impact on plaintiffs *as Latinos* is incidental to the Policy’s effect on all illegal aliens.”⁶⁶

In rejecting the district court’s overly narrow interpretation of “robust causality,” the Fourth Circuit recognized how such an interpretation would severely undermine the disparate impact standard. The Court explained:

The district court’s view threatens to eviscerate disparate-impact claims altogether, as this view would permit any facially neutral rationale to be considered the primary cause for the disparate impact on the protected class and break the robust link between the challenged policy and the disparate impact. Thus, the district court’s view of causation would seem to require an intent to disparately impact a protected class in order to show robust causality, thereby collapsing the disparate-impact analysis into the disparate treatment analysis. This goes far beyond the “robust causality” requirement the Supreme Court described.

To avoid departing from Supreme Court precedent, HUD should avoid any definition of “robust causality link” that requires proof of actual or primary causation or that mandates a one-size-fits-all standard of causation. Instead, HUD should affirm the current practice of allowing plaintiffs to establish statistical disparities as part of their prima facie case and to make arguments about causation based on logical inferences from those statistical disparities. Then, given the wide range of situations that may be adjudicated under the disparate impact theory, courts should continue to determine causality on a case-by-case basis to give them the widest latitude to reach the correct result in each case.⁶⁸ Courts have successfully used the Current Rule to dismiss post-*Inclusive Communities* disparate impact claims that fail to make sufficient

⁶⁵ 903 F.3d 415 (4th Cir. 2018).

⁶⁶ *de Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415, 430 (4th Cir. 2018)

⁶⁷ *Id.* at 430. The Court further explains: “This interpretation of the causation requirement would undermine the very purpose of disparate-impact claims to ‘permit plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment’ and ‘prevent segregated housing patterns that might otherwise result from covert or illicit stereotyping.’” *Id.*

⁶⁸ Joseph Rich, *The Robust Casualty Requirement in Disparate Impact Claims Under the Fair Housing Act*, Civil Rights Insider 7-8 (Winter 2018),

https://nationalfairhousing.org/wp-content/uploads/2018/07/Robust-Causality-Requirement.Jan_.2018.pdf.

allegations of causation,⁶⁹ and they should continue to do so rather than adhere to a potentially new standard of causation under the Proposed Rule.

C. HUD should delete the Proposed Rule’s requirement of “significant disparity” and instead allow courts to determine this disparity under the model in the Current Rule.

Under the fourth prong, the Proposed Rule would require that plaintiffs allege that the alleged disparity is “significant,” though HUD has not defined the term “significant.” HUD suggests that “significant” connotes “material,” not a “negligible disparity,” and not “attributable to chance”; but these descriptors offer no meaningful standard for plaintiffs to assess the strength of their pleadings or their evidence. We also note that the term “material” has not been used by federal courts in the civil rights context, housing or otherwise; therefore, a clear definition of the meaning of this term is especially necessary to provide adequate direction to plaintiffs and defendants alike.

Neither the Current Rule nor federal jurisprudence has adopted a single test for evaluating statistical evidence in housing, and for good reason. The disparate impact theory covers an expansive range of potential housing practices, and a one-size-fits-all standard would inevitably fall short in addressing the different types of practices that could constitute housing discrimination under the Fair Housing Act.⁷⁰ Courts have nevertheless been well-equipped to dismiss cases where the statistical disparity is not significant enough under the Current Rule.⁷¹ We urge HUD, therefore, to maintain the Current Rule as is regarding the issue of significant statistical disparity.

D. By stating that a “single act” cannot constitute a policy or practice under disparate impact theory, HUD’s Proposed Rule ignores the “heartland” cases put forth by the Court in *Inclusive Communities*.

In *Inclusive Communities*, the Supreme Court explained that “zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification ... reside at the heartland of disparate-impact liability.” Since then, plaintiffs have consistently been able to establish their prima facie case in these types of “heartland” cases, including in recent cases challenging exclusionary zoning decisions whose impact would fall most heavily on racial minorities.⁷²

⁶⁹ See *Burbank Apartments Tenant Ass'n v. Kargman*, 48 N.E.3d 394, 412 (Mass. 2016); *Ellis v. City of Minneapolis*, No. 14- CV-3045 SRN/JJK, 2015 WL 5009341, at 10 (D. Minn. Aug. 24, 2015); *Ellis v. City of Minneapolis*, No. 14- CV-3045 (SRN/SER), 2016 WL 1222227, at 6-7 (D. Minn. Mar. 28, 2016).

⁷⁰ For further discussion of the use of selection rates versus rejection rates to establish a significant disparity, see Robert Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After Inclusive Communities*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 685, 706-08 (2016) (see Attachment C).

⁷¹ See, e.g., *Ungar v. N.Y.C. Hous. Auth.*, 363 F. App’x. 53, 55-56 (2d Cir. 2010); *Bonasera v. City of Norcross*, 342 F. App’x. 581, 585 (11th Cir. 2009); *Bonvillian v. Lawler-Wood Hous., LLC*, 242 F. App’x. 159, 160 (5th Cir. 2007); *Arthur v. City of Toledo*, 782 F.2d 565, 576 (6th Cir. 1986).

⁷² See, e.g., *Ave. 6E Invs., LLC v. City of Yuma*, 217 F. Supp. 3d 1040 (D. Ariz. 2017) (prima facie case for disparate impact established to challenge municipality’s denial of a developer’s rezoning application that disproportionately impacted Hispanic home purchasers); *Mhany Management Co. vs. County of Nassau*, 819 F.3d 581 (2nd Cir. 2016)

HUD, however, ignores this analysis by stating in the preamble to the Proposed Rule that “[p]laintiffs 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.”⁷³ By stating that disparate impact liability cannot arise from “heartland” cases that involve single zoning decision, HUD’s proposed rule is inconsistent with the Court’s standard in *Inclusive Communities* as well as recent lower federal court decisions applying this standard. To avoid unnecessary inconsistencies under the FHA, HUD should abandon this prohibition on single events as constituting a policy or practice.

E. HUD’s Proposed Rule improperly imposes a pleading standard when describing the new five-part test, which falls outside of the agency’s scope of authority and encroaches upon the judiciary’s function.

In using the rule to impose a pleading standard, HUD encroaches on the role of the judiciary and thus acting outside of the scope of its authority within the executive branch. The proposed Rule provides that a “plaintiff must prove by a preponderance of the evidence, through evidence that is not remote or speculative” all the elements of its new five-part test, each of which are discussed individually and in further detail below. HUD seems to suggest that “evidence that is not remote or speculative” is something more than “statistical imbalances or disparities alone,” but ultimately, the lack of a precise definition makes the term difficult to understand and apply. Moreover, in setting pleading standards that may be inconsistent with the standards established by the Federal Rules of Civil Procedure and case law, HUD is exceeding the scope of its authority as an administrative agency. Setting pleading standards should stay within the domain of the federal judiciary.

IV. Subject to hardly any constraints, the proposed “materially limited” defense would allow defendants to evade liability by pointing elsewhere and therefore is overly broad.

In shielding defendants where their discretion is “materially limited by a third party,” the Proposed Rule seeks to allow defendants to escape responsibility for their discriminatory actions by pointing the finger to someone else. (Although the Proposed Rule refers to State insurance law, it does not actually limit the defense to that specific industry.) The Proposed Rule does not offer definitions for “materially limited” or “third party,” so it is difficult to assess the exact contours of this defense. However, it does provide the following examples: (i) federal, state or local law; or (ii) a binding or controlling court, arbitral, regulatory, administrative order, or administrative requirement. The scope of such a defense would be far reaching and fatal to the otherwise legitimate claims of protected classes.

(prima facie case for disparate impact established to challenge municipality’s rezoning decision that disproportionately impacted African American and Latino residents).

⁷³ U.S. Department of Housing & Urban Development, HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,858 (Aug. 19, 2019).

The “materially limited” defense would be especially problematic in cases involving crime-free and nuisance ordinances. With the use of crime free and nuisance ordinances, a growing number of municipalities coerce landlords to evict or threaten to evict households based on calls for police assistance or emergency services, disproportionately harming survivors of domestic violence. Research has demonstrated that nuisance and crime-free ordinances also disproportionately impact communities of color, low-income households, and people with disabilities.⁷⁴ In 2016, HUD issued guidance on challenging the devastating consequences of nuisance ordinances on domestic violence survivors and other vulnerable and marginalized communities; using disparate impact to challenge such harmful ordinances was an important part of that guidance.⁷⁵

In some jurisdictions, compliance with these ordinances is voluntary and can give landlords and housing providers cover to evict or threaten to evict domestic violence survivors based on “one-strike” or “crime-free” policies that punish survivors when they experienced abuse in their home.⁷⁶ Landlords could then use the “materially limited” defense to shield them from disparate impact liability, even if they fully understand the discriminatory impact that their actions will have on members of protected classes. This lack of liability would also disincentivize landlords from challenging municipalities that use crime free and nuisance ordinances to segregate their communities, allowing these policies therefore to flourish.⁷⁷

The “materially limited” defense is also deficient because even though HUD’s examples are legislative or regulatory in nature, this rule can nevertheless apply to the actions of non-governmental third parties, thus giving defendants a way to work around their fair housing obligations. In a recent federal case, for example, a tenant screening company marketed a screening product that collected information, such as past arrests and convictions, on an applicant and make a recommendation on whether to accept or deny based on that information.⁷⁸ This product was especially designed to give landlords some plausible deniability when making rental decisions that would otherwise raise fair housing implications. The landlord had been found liable under the Fair Housing Act for taking advantage of this screening product; had the “materially limited” defense been in place, the landlord may have escaped liability and would likely lack any real incentive to stop doing business with the tenant screening company and to find a company with less evasive screening practices. What this defense does, therefore, is create

⁷⁴ American Civil Liberties Union & New York Civil Liberties Union, *More Than a Nuisance: The Outsized Consequences of New York’s Nuisance Ordinances* (2018), https://www.nyclu.org/sites/default/files/field_documents/nyclu_nuisancereport_20180809.pdf.

⁷⁵ U.S. Dep’t of Housing & Urban Development, *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services* (2016), available at <https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF>.

⁷⁶ See, generally, *Warren v. Ypsilanti Hous. Auth.*, Case No. 4:02-cv-40034 (E.D. Mich. 2003) (defendant agreed to cease evicting survivors of domestic violence under its “one-strike policy”).

⁷⁷ Michelle Aronowitz & Edward Golding, HUD’S PROPOSAL TO REVISE THE DISPARATE IMPACT STANDARD WILL IMPEDE EFFORTS TO CLOSE THE HOMEOWNERSHIP GAP 5-6 (2019), https://www.urban.org/sites/default/files/publication/101015/huds_proposal_to_revise_the_disparate_impact_standard.pdf.

⁷⁸ *Conn. Fair Housing Ctr. v. Corelogic Rental Prop. Solutions, LLC*, 369 F. Supp. 3d 362 (D. Conn. 2019).

a system that allows defendants to evade liability when another party might plausibly be to blame, leaving plaintiffs with little recourse to challenge discriminatory policies and undermining the overall purpose of the Fair Housing Act to end housing discrimination.

V. The proposed defense based on algorithms would provide an overly broad shield for tenant screening companies and their users to rely on screening criteria that would otherwise be suspect under the Fair Housing Act.

Even assuming that a plaintiff is able to make a prima facie claim, the proposed rule would allow defendants to defeat a satisfactory claim when the challenged policy or practice relies on an algorithmic model.⁷⁹ The defendant may win simply by showing that i) the material factors that make up the inputs used in the challenged model do not rely in “material part” on factors that are substitutes or close proxies for a protected class; ii) the defendant does not determine the methods and inputs used within the model, and that the model is instead used produced, maintained, or distributed by a “recognized third party that determines industry standards,” or iii) where a neutral third party determines the model has been “empirically derived and is a demonstrably and statistically sound algorithm that accurately predicts risk or other valid objectives.”⁸⁰

The Shriver Center fights to ensure that people with arrest and conviction records are given a fair chance at housing, and is opposed to any rule that jeopardizes a fair chance at housing for people with arrest, conviction, and eviction records, which serve as the basis for denying a tenant’s application. Blanket housing bans on anyone with a record exacerbate existing inequities in our criminal legal system by making it harder for justice-involved individuals to obtain safe, affordable, and stable housing.⁸¹ In the past, HUD has taken the lead on this issue by providing guidance for housing providers that illustrates how, for example, denying housing on the basis of arrests without a subsequent conviction can raise serious fair housing implications.⁸²

Many housing providers rely on black-box algorithmic models that use arrest and conviction information as input, along with other records such as eviction histories and credit reports to deny an application. The broad and unprecedented algorithmic model defenses proposed by HUD would categorically insulate landlords and tenant screening companies from disparate impact liability, contradicting HUD’s own determination that disparate impact should be “ultimately a fact-specific and case-specific inquiry.”⁸³

⁷⁹ The proposed rule would be codified at 24 C.F.R. § 100.500 (c)(2)(1)-(3). See 84 Fed. Reg. 42862.

⁸⁰ *Id.*

⁸¹ See Marie Claire Tran-Leung, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, Feb. 2015, <http://www.povertylaw.org/files/docs/WDMD-final.pdf>.

⁸² U.S. Dep’t of Hous. & Urban 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* at 4 (Apr. 4, 2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF [hereinafter “2016 Criminal Records Guidance”]; U.S. Dep’t of Hous. & Urban Dev., *PIH-Notice 2015-19: Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions* (2015), <https://www.hud.gov/sites/documents/PIH2015-19.PDF>.

⁸³ U.S. Dep’t of Hous. & Urban 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* at 4 (Apr. 4, 2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF [hereinafter “2016 Criminal Records Guidance”].

Background check algorithms in particular are highly susceptible to bias and rely on data that is notoriously inaccurate and incomplete. By contradicting its own prior guidance and providing little or no reason for the change in policy, HUD’s proposed algorithm defense likely violates the Administrative Procedures Act.

A. *The Underlying Data in Tenant-Screening Algorithms is Often Inaccurate and Incomplete.*

The tenant screening industry is not new, and landlords have long relied on third parties to conduct background checks on rental applicants.⁸⁴ Since the 1970s, these businesses have sold literal “reports”—that is, a copy of the records the tenant screening company had accessed—which the landlord uses to make a decision on whether to accept a tenant.⁸⁵ Typically, the report will include a residential history, credit report, criminal background check, and civil litigation record (including evictions).⁸⁶ These reports include police records, as well as civil and criminal court records.⁸⁷ To provide this information to landlords on demand, screening companies will maintain the records in large private databases that are not necessarily updated on a regular basis.⁸⁸

With modern technology, screening companies today can and will often provide landlords more than a simple report. Using parameters set by the landlord, companies now offer products that compare the retrieved records against the landlord’s stated admission policy and use an algorithm to determine whether the applicant should be admitted to that property.⁸⁹ For

⁸⁴ Rudy Kleystuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 Yale L.J. 1344, 1346 (2007) (discussing “trend of gathering information about tenants, which began to raise eyebrows almost thirty years ago”); Paula A. Franzese, *A Place to Call Home: Tenant Blacklisting and the Denial of Opportunity*, 45 Fordham Urb. L.J. 661, 667 n. 38 (2018) (noting that tenant blacklists have existed since the 1970s, but that they “have grown exponentially in the past several decades, due in large part to the advent of quicker and more accessible technologies”).

⁸⁵ Nat’l Housing Law Proj., *An Affordable Home on Re-entry: Federally Assisted Housing and Previously Incarcerated Individuals* 34 (2018), <https://www.nhlp.org/wp-content/uploads/2018/08/Rentry-Manual-2018-FINALne.pdf>.

⁸⁶ Eric Dunn & Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 SEATTLE J. FOR SOC. JUST. 319, 323 (2010). Although this comment focuses on arrest and conviction records, it should be noted that eviction records suffer from many of the same flaws. See Kleystuber, *supra* note 81 at 1358-61 (documenting how eviction reports are often error-prone and omit or contain misleading information). Researchers have found that certain protected classes, such as families, are more susceptible to eviction. See Matthew Desmond et al., *Evicting Children*, Social Forces 92(1) 303-327 (Sept. 2013) (quantitative study finding that neighborhoods with higher percentages of children have more evictions, even after controlling for factors such as racial composition, poverty, female-headed households, and vacancy rates).

⁸⁷ See Dunn & Grabchuk, *supra* note 83 at 320 (“In today’s age of online public records and digital transmission, a rental applicant’s complete residential history, credit report, criminal record, civil litigation background, and other information are available within hours or even minutes[.]”); Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1318 (2017) (“The U.S. criminal history database holds over 100 million records. And with today’s technology, criminal records have become accessible to anyone willing to pay for them, through state public records searches or thousands of online private databases.”).

⁸⁸ See HousingLink, *Tenant Screening Agencies in the Twin Cities: An Overview of Tenant Screening Practices and Their Impact on Renters* 9-10 (2004), https://www.housinglink.org/Files/Tenant_Screening.pdf (discussing historical background of tenant screening).

⁸⁹ Nat’l Housing Law Proj., *supra* note 82 at 35.

example, the landlord may designate an acceptable tenant “risk score.”⁹⁰ If the algorithm spits out a score that falls outside the acceptable range, the landlord may deny the applicant housing for that reason alone.⁹¹ And in practice, landlords will simply rely on the screening company’s algorithmic determination and not scrutinize the underlying records to make an independent determination about whether the applicant should be admitted.⁹²

To market themselves, companies tout their data as exceptionally comprehensive and accurate.⁹³ But regardless of how diligent the company is, it is practically impossible to regularly conduct criminal background checks and retrieve consistently comprehensive and accurate data.

The issues begin with the foundation of a person’s criminal record, the “rap sheet”⁹⁴ --a lifetime record of an individual’s arrests in a given jurisdiction.⁹⁵ Developed in the early 20th century, the rap sheet was “created by police for police use.”⁹⁶ In other words, it is designed to catalog arrests and information about the arrest; while the rap sheet should ideally contain information about the disposition of the case after an arrest, prosecutors and judges do not have a strong incentive to update information into the rap sheet system.⁹⁷ Thus, a rap sheet rarely will give a complete picture of someone’s criminal history.

When users outside the criminal legal system—such as landlords or tenant screening companies—attempt to interpret rap sheets, they often interpret them incorrectly.⁹⁸ The rap sheet itself was not meant to be read by a layperson, and someone outside the criminal legal system

⁹⁰ See CoreLogic Rental Property Solutions, *Decision Science: Grow Revenue With Better Applicant Lease Screening* 5,

<https://info.myrental.com/decision-science-ebook?hsCtaTracking=67678d0b-63e3-4487-985b-85c01ae22e5b%7C20eb37df-b1ae-4833-af9b-3bf169e5a02f> (describing a company’s proprietary “RegistryScorePLUS” algorithm).

⁹¹ The landlord may override that decision, but when the landlord sees that the applicant has “failed,” there is little reason to believe that he or she will take other factors into account. See Colin Lecher, *Automated Background Checks Are Deciding Who’s Fit For a Home*, The Verge, Feb. 1, 2019, <https://www.theverge.com/2019/2/1/18205174/automation-background-check-criminal-records-corelogic> (quoting housing advocate who argues “there’s little other basis for a landlord to come to a different conclusion, especially if the landlord isn’t provided the complete history”).

⁹² *Id.*

⁹³ See, e.g. Andrea Collatz, *SmartMove’s ResidentScore vs. A Typical Credit Score: Which is Better?*, Apr. 24, 2019 <https://www.mysmartmove.com/SmartMove/blog/residentscore-tailored-tenant-screening.page> (tenant screening company blog post claiming to use “advanced filters and industry best practices” to search various criminal record databases).

⁹⁴ James B. Jacobs, *The Eternal Criminal Record* 32 (2015) (“Anyone interested in criminal records policy or, for that matter, in the administration of criminal justice needs to understand what a rap sheet is, who has access to it, and what it is used for.”).

⁹⁵ *Id.* at 33.

⁹⁶ *Id.*

⁹⁷ *Id.*; U.S. Dep’t of Justice, *The Attorney General’s Report on Criminal Background Checks* at 17 (June 2006) (revealing that only 50 percent of FBI arrest records have final dispositions); Madeline Neighly & Maurice Emsellem, *Wanted: Accurate FBI Background Checks for Employment* (July 2013), <https://www.nelp.org/wp-content/uploads/2015/03/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf> (finding that more than half the states providing data report that 30 percent or more of the arrests in their systems do not include final disposition information).

⁹⁸ *Id.* at 47 (“The rap sheet was created by and for police use, not as an all-purpose negative resume for use by employers, landlords, volunteer organizations, and others.”); see also Dunn & Grabchuk, *supra* note 83 at 329 (noting that on a rap sheet “true information may be presented in misleading ways,” such as when multiple charges are presented all stemming from one arrest).

likely will not have the inclination or the resources to track down information that is missing from the rap sheet.⁹⁹ And since the rap sheet only precisely tracks arrests, the overall picture of an applicant's criminal history will heavily feature arrests without any information on the underlying conduct or the ultimate disposition. This is problematic because, as the Supreme Court has long recognized, arrests have very little probative value,¹⁰⁰ and the rate of arrest for racial minorities is disproportionately high compared to the overall population.¹⁰¹ For these reasons, HUD has acknowledged that screening practices that rely on a person's arrest history may violate the Fair Housing Act.¹⁰²

Even when criminal records besides rap sheets are available--such as public court records--they provide little information about a person's conduct beyond the name of the case and its disposition.¹⁰³ When ninety-seven percent of criminal convictions are the product of plea bargaining,¹⁰⁴ and defendants often plead guilty even when they have a chance of being acquitted by a jury,¹⁰⁴ the mere fact that a defendant pled guilty often says little about their involvement in a crime or their propensity to commit a future crime.¹⁰⁵

Privately conducted background screenings are also notoriously inaccurate.¹⁰⁶ Screening companies generally conduct name-based checks, which can decrease the accuracy of the information that the check produces.¹⁰⁷ In addition, even if the search is accurate, private screening companies will often include records in their background checks that they should legally not have access to, such as expunged records and juvenile records.¹⁰⁸

⁹⁹ *Id.* at 47-48.

¹⁰⁰ See *Schwartz v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 241 (1957) ("An arrest shows nothing more than that someone probably suspected the person apprehended of an offense. When formal charges are not filed against a person and he is released without trial, whatever probative force the arrest may have had is normally dissipated.")

¹⁰¹ Tran-Leung, *supra* note 78 at 17 (Though facially neutral, arrest record screening disparately impacts racial minorities because their rate of arrest is disproportionate to the arrest rate of the general population.").

¹⁰² HUD Notice PIH 2015-19, at 4-5 (Nov. 2, 2015), <https://www.hud.gov/sites/documents/PIH2015-19.PDF> (instructing public housing authorities and other owners of government-subsidized properties that they "may not base a determination that an applicant or household engaged in criminal activity warranting denial of admission, termination of assistance, or eviction on a record of arrest(s)").

¹⁰³ Jacobs, *supra* note 91 at 47-48.

¹⁰⁴ Nat'l Ass'n of Crim. Defense Lawyers, *The Sixth Amendment Right to Trial on the Verge of Extinction, and How to Save It 5* (2018),

<https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf>. Even if the defendant is acquitted or the case is dismissed, some states may not automatically seal the record; Jacobs, *supra* note 91 at 67.

¹⁰⁵ Matthew D. Callanan, *Protecting the Unconvicted: Limiting Iowa's Right to Public Access in Search of Greater Protection for Criminal Defendants Whose Charges Do Not End in Convictions*, 98 Iowa L. Rev. 1275, 1280 (2013) ("[T]he criminal justice system provides no way of distinguishing between the factually innocent and the factually guilty. Accordingly, society has no way of distinguishing between the two either.").

¹⁰⁶ Jacobs, *supra* note 91 at 150-51.

¹⁰⁷ Gov't Accountability Office, *Criminal History Records: Additional Actions Could Enhance the Completeness of Records Used for Employment-Related Background Checks* at 38 (Feb. 2015), <https://www.gao.gov/assets/670/668505.pdf>.

¹⁰⁸ Logan Danielle Wayne, *The Data-Broker Threat: Proposing Federal Legislation to Protect Post-Expungement Privacy*, 102 J. CRIM. L. & CRIMINOLOGY 253, 266 (2012) (discussing how companies store records on private databases, and have little incentive to remove the record from the database once it's expunged); James Jacobs & Tamara Crepet, *The Expanding Scope, Use & Availability of Criminal Records*, 11 N.Y.U. J. LEG. & PUB. POL'Y 177,

One might argue in response that a well-developed algorithm would correct for these issues, and that HUD’s proposed defenses only allow landlords to escape liability when the algorithm they use is sound—for example, in cases where the defendant shows the algorithm is “standard in the industry.”¹⁰⁹ This argument fails for two reasons.

First, when building algorithms, computer programmers rely on a simple adage: “garbage in, garbage out.”¹¹⁰ In other words, if the input is flawed, the output will be no better. And as demonstrated, by using criminal records as input, tenant screening algorithms rely on especially flawed and incomplete information. When the data used in the algorithm is insufficient, incomplete, or inaccurate, bias may result.¹¹¹

Second, the proposed rule is not calibrated to address machine-learning algorithms, which rely on an automated process of discovering correlations between variables in a dataset.¹¹² These correlations are developed by “training” the algorithm on a representative dataset. For example, a spam filter is “trained” every time an e-mail user indicates that a particular e-mail not labeled as spam should be labeled as spam, or visa versa. The algorithm then incorporates the information in that e-mail to better predict whether a future e-mail should be filtered as spam.¹¹³ Because the machine-learning algorithm recognizes correlations in the training data that are not obvious to a human, the programmer may not be able to unpack the inputs and retroactively identify the factors that led to the program’s decision.¹¹⁴

This feature undermines the premise of the first categorical defense HUD proposes, which allows a defendant to break down an algorithm “piece by piece” and show that the data used to make a decision does not rely on data that is a “proxy” for a protected class.¹¹⁵ (As with all terms it introduces, HUD has not provided definitions of what it means to break an algorithm

188-90 (2008) (describing how FBI has taken steps to erase any special treatment of juvenile records in the National Crime Information Center (“NCIC”) database).

¹⁰⁹ This defense presumes both that an industry standard exists, and that these industry standards have been developed to ensure that tenants’ Fair Housing rights are not violated. In the proposed rule, HUD has provided no evidence to support these presumption that there are “industry standards” for algorithms (which seems unlikely given that the technology is new and rapidly developing), or that such standards are developed with the goal of minimizing possible discrimination.

¹¹⁰ Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 Cal. L. Rev. 671, 683 (2016); *see also* Fed. Trade Comm’n, *Big Data: A Tool for Inclusion or Exclusion* 8, Jan. 2016, <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf> (“When not recognized and addressed, poor data quality can lead to inaccurate predictions, which in turn can lead to companies erroneously denying consumers offers or benefits.”).

¹¹¹ *See* Nicol Turner Lee et al., *Algorithmic Bias Detection and Mitigation: Best Practices and Policies to Reduce Consumer Harms*, Brookings Inst. (May 22, 2019), <https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/> (discussing how both insufficient data and over-representative data may result in bias); Laura Sydell, *It Ain’t Me, Babe: Researchers Find Flaws in Facial Recognition Technology*, NPR (Oct. 25, 2016), <https://www.npr.org/sections/alltechconsidered/2016/10/25/499176469/it-aint-me-babe-researchers-find-flaws-in-police-facial-recognition> (discussing findings that police facial-recognition technology can produce false positives).

¹¹² David Lehr & Paul Ohm, *Playing With the Data: What Legal Scholars Should Learn About Machine Learning*, 51 U.C. DAVIS L. REV. 653, 671 (2017) (see Attachment E).

¹¹³ Barocas & Selbst, *supra* note 107 at 678-79.

¹¹⁴ Karen Hao, *This is How AI Bias Really Happens—And Why It’s So Hard to Fix*, MIT TECH. REV. (Feb 4, 2019), <https://www.technologyreview.com/s/612876/this-is-how-ai-bias-really-happensand-why-its-so-hard-to-fix/>.

¹¹⁵ 84 Fed. Reg. 42859.

down “piece by piece” or what counts as a “proxy” in this instance.) Thus, a programmer could build a tenant-screening algorithm that actually considers “proxy” factors--such as arrests--but where a “piece by piece” evaluation would not actually reveal that this factor was considered in the ultimate decision.¹¹⁶

B. HUD’s Proposed Algorithm Defense Contradicts Its Own Prior Guidance Finding that Disparate Impact in the Criminal Records Context is a “Fact-Specific and Case-Specific” Inquiry

As mentioned, HUD has recently issued guidance--after the Supreme Court’s decision in *Inclusive Communities*--to housing providers addressing how the use of criminal records background checks could violate the Fair Housing Act under a discriminatory effects or disparate impact theory.¹¹⁷ HUD concluded its analysis by finding that “regardless of the data used” the question of whether a criminal record screening policy or practice results in a disparate impact is “ultimately a fact-specific and case-specific inquiry.”¹¹⁸

Yet with its proposed rule, HUD has eliminated any case or fact-specific inquiry simply because the data used to make the decision was processed through an algorithm. The only basis for this change, according to HUD, is that the proposed defense will align existing regulations with the decision in *Inclusive Communities*.¹¹⁹ Yet by adopting a categorical defense, the proposed rule is the very antithesis of the prior guidance, and entirely ignores how the proposed categorical defense will impact tenants with arrest records who are attempting to find decent, safe housing.

This impact is not an abstract concern. Indeed, in a recent case, *Connecticut Fair Housing Center v. Corelogic Rental Property Solutions, LLC*,¹²⁰ a plaintiff has alleged facts that illustrate the exact harm that the disparate impact rule is designed to protect against. In that case, a woman attempted to add her Latinx son--who was severely injured in an accident that left him unable to speak, walk, or care for himself--to her existing lease at a private apartment complex.¹²¹ Because of his disability, the mother consented to a tenant screening check on her son’s behalf.¹²² The screening algorithm recommended denying the son, even though the screening product used did not provide any information to the landlord about the disqualifying records except the tenants name and date of birth.¹²³ As it turned out, the only disqualifying record was a single charge for retail theft that was ultimately withdrawn.¹²⁴ Yet the algorithm recommended denying the tenant’s application on this basis, despite the fact that the defendant had never been convicted of

¹¹⁶ See generally Joshua A. Kroll et al., *Accountable Algorithms*, 165 Penn. L. Rev. 633, 642-56 (2017) (discussing the inherent limitations of different auditing techniques for computer algorithms).

¹¹⁷ 2016 Criminal Records Guidance, *supra* note 79.

¹¹⁸ *Id.* at 4.

¹¹⁹ 84 Fed. Reg. 42859-60. Specifically, HUD argues that the rule is meant to align with *Inclusive Communities*’s requirement that a plaintiff show a “causal connection” between the policy and the disparate impact. *Id.*

¹²⁰ 369 F. Supp. 3d 362 (D. Conn. 2019).

¹²¹ *Id.* at 367.

¹²² *Id.*

¹²³ *Id.* at 367.

¹²⁴ *Id.* at 367-68.

a crime (the landlord conducted no follow up investigation, and did not provide the tenant any reason for the denial at the time).¹²⁵

Under this proposed rule, landlords and screening companies¹²⁶ could evade liability in cases like this with a cursory showing that the factors considered in the algorithm are not the “cause” of a disparate impact (a nonsensical defense in many cases) or by showing that the algorithm is compliant with non-existent industry standards. This would do away with the case-specific inquiry that is the hallmark of disparate impact liability, and erect arbitrary and harmful barriers that prevent the millions of Americans with criminal records from escaping the mistakes of their past and their successful reintegration into society.

VI. Creating a separate standard for “housing authorities” is not consistent with *Inclusive Communities*.

The Proposed Rule preamble asks 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.”¹²⁷ First, in asking this question, HUD failed to clarify what it meant when it was referring to “housing authorities.” Was HUD asking about PHAs, or was HUD in fact asking about state housing finance agencies? Without this clarification or further explanation, commenters cannot fully assess the broader impacts of this additional defense to disparate impact liability. These impacts would look very different, depending upon whether they were applied to state housing finance agencies (allocation of tax credits), or PHAs (policies related to housing authority admissions, occupancy, terminations, waitlists, etc. in programs such as public housing and the Housing Choice Voucher program).

It seems clear from the context of the case that, in using the term “housing authorities,” the Court in *Inclusive Communities* was not referring to public housing authorities (PHAs) but rather to state housing finance agencies (HFAs). Specifically, the Court in *Inclusive Communities* states, “This 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*.”¹²⁸ PHAs do not allocate tax credits for low-income housing; that is the role of state housing finance agencies through the Qualified Allocation Plan process.¹²⁹ Despite this ambiguity in term usage, HUD fails to explain what it means by “housing authorities.”

¹²⁵ *Id.*

¹²⁶ The proposed rule allows a landlord to categorically defend a disparate impact claim if it can show the algorithm was developed by a third party (which almost all tenant screening algorithms are). 84 Fed. Reg. 42859. In fact, in *Corelogic*, the suit was brought against the tenant screening company, which sought to dismiss the suit on the grounds that only the landlord should be held liable for a Fair Housing Act violation. *Id.* at 371-75. The court did not accept the screening company’s argument, but if another court accepted this argument and HUD’s rule were implemented, both landlords and screening companies could theoretically both defend themselves against any claim for disparate impact, leaving plaintiffs with no one to sue.

¹²⁷ 48 Fed. Reg. 42,854, 42,860.

¹²⁸ *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2512 (2015).

¹²⁹ *See generally* 26 U.S.C. § 42.

Ambiguity aside, *Inclusive Communities* does not provide support for adding a separate defense for either PHAs or housing finance agencies. As noted above, HUD asks whether there should be 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.”¹³⁰ This question, which is based upon a line in the *Inclusive Communities* decision, fails to recognize that the Court was simply making an observation of what could happen in that particular case on remand. The Court did not indicate that the Current Rule was somehow insufficient to analyze the claim in this case. In fact, in the very next paragraph, the Court went on to discuss the business necessity defense under Title VII, while also referencing the preamble of the Current Rule.¹³¹ The Court engaged in this discussion without indicating that the Current Rule was problematic or exceeded constitutional boundaries.

Furthermore, HUD fails to cite to language in *Inclusive Communities* or other case law that supports the idea that housing authorities (whether PHAs or state housing finance agencies) should be afforded a special, distinct defense from disparate impact liability that would differ from other potential defendants in a Fair Housing Act case. In fact, HUD gives almost no context for this question, making it difficult to understand HUD’s reasoning in considering such a defense, aside from the fact that the Court made an observation about the future disposition of the case at bar.

Finally, it is unclear why HUD’s current standard – one that requires a defendant to prove that the challenged practice is necessary to achieve one or more of the defendant’s substantial, legitimate, nondiscriminatory interests – is insufficient to ensure that “housing authorities” are afforded “leeway to state and explain the valid interest served by their policies.”¹³² In light of these arguments, we strongly oppose a separate standard for “housing authorities,” whether they be public housing authorities or housing finance agencies.

VII. Codified in the Current Rule and used for decades by courts, the three-step burden-shifting disparate impact standard has been an integral tool for the Shriver Center on Poverty Law to ensure racially equitable access to safe, decent and affordable housing for people living in poverty.

The Shriver Center’s housing justice work has depended heavily on using the disparate impact theory under the Fair Housing Act. We have seen firsthand how the three-step burden-shifting tests helps tenants access housing in the face of structural barriers based on race, gender, and other protected classes. The disparate impact standard as it is codified in the Current Rule already provides the safeguards for abuse that HUD’s Proposed Rule is purportedly concerned with. If the standard were to change, the Shriver Center likely would not have achieved the same outcomes – increased access to safe, decent, and affordable housing – for our clients.

¹³⁰ 48 Fed. Reg. 42,854, 42,860.

¹³¹ *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2512 (2015).

¹³² *Id.*

We have filed numerous cases against public housing authorities relying in part on the disparate impact theory (both discriminatory effects and perpetuation of segregation). In *Wallace v. Chicago Housing Authority*, for example, we brought a case on behalf of current and former Chicago Housing Authority (CHA) residents challenging the CHA’s policy of displacing CHA tenants from public housing to make way for mixed-income communities. We also challenged the CHA’s policy of either failing to provide adequate relocation services or providing relocation services that steered Plaintiffs into racially and economically segregated neighborhoods.¹³³ This lawsuit helped lead to the CHA making changes to its policies to redress the claims made by the plaintiffs. In 2016, we also represented a class of residents in a case against the Alexander County Housing Authority for rampant discrimination on the basis of race and familial status.¹³⁴

In addition, we have fought hard against crime free and nuisance ordinances that harm survivors of domestic violence as well as communities of color. In Peoria, Illinois, the Shriver Center currently represents a nonprofit organization challenging the city’s enforcement of a chronic nuisance ordinance under a disparate impact theory, where the organization’s own investigation suggested that the ordinance is selectively enforced in African-American neighborhoods.¹³⁵ Under the ordinance, if the police receive three reports documenting “nuisance activity” in a 365-day period, they may demand that the landlord take steps to “abate” the nuisance, including evicting households, and the landlord may face stiff financial penalties if they fail to properly abate the nuisance. Had the Proposed Rule been in place when the complaint was filed, it is unclear that this case would have been able to proceed past the pleading phase since much of the relevant evidence has been uncovered during discovery. This case is a clear example, therefore, in favor of keeping the Current Rule in place.

The Shriver Center has also used the disparate impact standard to redress environmental harms. A home and its surrounding environment are inseparable, and it is unsurprising that the victims of housing discrimination are often located in areas with the worst environmental conditions.¹³⁶ For example, studies have found that the racial composition of an area strongly predicts whether that area will host a toxic waste site, or the likelihood that someone will breathe dangerous compounds such as vanadium, nitrates, and zinc.¹³⁷

To combat the environmental harms that result from segregated housing patterns, the Shriver Center has used the disparate impact theory to bring a Fair Housing Act complaint against HUD on behalf of Black residents of a public housing complex built on a lead-contaminated site¹³⁸ and to challenge decisions to build a highway through a predominantly

¹³³ *Wallace v. Chicago Housing Authority*, 224 F.R.D. 420 (N.D. Ill. 2004) See also *Wallace v. Chicago Housing Authority*, 321 F.Supp.2d 968 (N.D. Ill. 2004).

¹³⁴ Complaint: <https://www.clearinghouse.net/chDocs/public/PH-IL-0002-0002.pdf>.

¹³⁵ *HOPE Fair Housing Ctr. v. City of Peoria*, Case No. 1:17-cv-1360 (C.D. Ill.).

¹³⁶ See, e.g., U.S. Comm’n on Civil Rights, *Environmental Justice: Examining the Environmental Protection Agency’s Compliance and Enforcement of Title VI and Executive Order 12,898* at 12-13 (Sept. 2016).

¹³⁷ *Id.* at 12-13.

¹³⁸ Press Release, Shriver Center, *East Chicago Residents, Local Housing Officials Settle Civil Rights Complaint* (Nov. 4, 2016), <https://www.povertylaw.org/press/eastchicago>.

Black community under Title VI of the Civil Rights Act.¹³⁹ Courts, including the Supreme Court in *Inclusive Communities*, rely on interpretations of related civil rights laws when adopting legal standards.¹⁴⁰ If HUD's proposed rule is enacted, it will have a negative effect in cases where protected classes suffer harm that directly impacts their health and well-being, harm that is the product of America's legacy of housing discrimination. It could also have a ripple effect on the use of disparate impact in other areas, such as Title VI and Title VII of the Civil Rights Act.

In light of our experience using the disparate impact theory to obtain equitable access to safe, decent and affordable housing for people living in poverty, we strongly urge HUD to withdraw the Proposed Rule. The Current Rule adequately protects against the concerns that HUD has about balancing the interests of protected classes and potential defendants. The Proposed Rule tips that balance too far in favor of housing providers, business, and other defendants, which runs contrary to the purpose of the Fair Housing Act in eradicating housing discrimination. HUD also risks violating the Administrative Procedures Act if it goes forward with this proposal. For all the reasons articulated in this comment letter, the Shriver Center highly recommends withdrawal of HUD's Proposed Rule and increased enforcement of the Current Rule.

Sincerely,

/s/ Marie Claire Tran-Leung
Marie Claire Tran-Leung
Senior Attorney, Housing & Community Justice
Shriver Center on Poverty Law
marieclairetran@povertylaw.org

/s/ Tex Pasley
Tex Pasley
University of Virginia Powell Fellow in Legal Services
Shriver Center on Poverty Law
texpasley@povertylaw.org

Attachments:

- A. Chicago Area Fair Housing Alliance, *A CITY FRAGMENTED: HOW RACE, POWER, AND ALDERMANIC PEROGATIVE SHAPE CHICAGO'S NEIGHBORHOODS* (2018),

¹³⁹ Shriver Center on Poverty Law, *Complaint Against Will County Division of Transportation Pursuant to Title VI of the Civil Rights Act of 1964* (Dec. 21, 2016).

¹⁴⁰ See *Inclusive Cmty's*, 135 S. Ct. at 2519 (relying on comparison to cases interpreting Title VII and the Age Discrimination in Employment Act to uphold disparate impact liability under the Fair Housing Act); see also U.S. Dep't of Justice, Civil Rights Div., *Title VI Legal Manual, Section VII: Proving Discrimination--Disparate Impact* at 5 n. 2, <https://www.justice.gov/crt/case-document/file/923556/download> (noting that cases decided under Title VII or the Fair Housing Act "may be instructive" when interpreting Title VI of the Civil Rights Act).

- B. Metropolitan Planning Council, *THE COST OF SEGREGATION* (2018).
- C. Robert Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After Inclusive Communities*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 685, 706-08 (2016).
- D. Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 LEG. & PUB. POL'Y 709 (2017).
- E. David Lehr & Paul Ohm, *Playing With the Data: What Legal Scholars Should Learn About Machine Learning*, 51 U.C. DAVIS L. REV. 653, 671 (2017).