*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

Sir or Madam:

I am writing to oppose HUD’s 2019 proposed rule “HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard.” HUD’s proposal would render the disparate impact standard a dead letter. As the 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]](#footnote-1) HUD’s proposal would allow discriminatory practices to continue unchecked as long as the business, housing provider, or government actor did not state an intent to discriminate. I strongly urge HUD to withdraw this proposed Rule.

[Please insert paragraph re: your organization or individual interest in the Rule]

1. **HUD’s proposed pule contradicts the central purpose of the Fair Housing Act**

HUD’s proposed rule would tip the scales in favor of businesses and landlords and harm vulnerable communities. This is the opposite of what Congress intended when it passed the Fair Housing Act. The Fair Housing Act was enacted with lofty goals; with its passage Congress boldly stated that “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”[[2]](#footnote-2) The standard outlined in this proposal would make it nearly impossible to establish disparate impact liability under the Fair Housing Act. HUD’s proposal ignores, rather than clarifies, the Supreme Court’s guidance as reflected in *Inclusive Communities Project*.

1. **HUD’s proposed Rule creates confusion and ignores decades of court precedent**

HUD asserts that it is “updating” the disparate impact standard, when in fact the proposed Rule ignores decades of carefully reasoned court decisions. HUD’s 2013 disparate impact rule reflected the agency’s expertise and laid out a reasonable balancing test that incorporated the longstanding approach to disparate impact analysis reflected in case law. This current proposal is a radical departure from both court precedent and HUD’s own prior interpretations of disparate impact analysis.[[3]](#footnote-3) HUD is now introducing a burdensome and confusing balancing test with nine subparts that puts an insurmountably high burden on individuals seeking to enforce the Fair Housing Act with disparate impact theory.

The proposed Rule is strongly biased against plaintiffs; while the plaintiff must meet a preponderance of the evidence standard, defendants are only required to “show” that a policy advances a legitimate interest.[[4]](#footnote-4) This ignores well-established precedent placing the burden of proof on the defendant to show “that the challenged practice is *necessary* to achieve one or more substantial, legitimate, nondiscriminatory interests.”[[5]](#footnote-5)

1. **HUD’s Rule improperly attempts to eliminate the “perpetuation of segregation” theory of discriminatory effects liability**

The 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.[[6]](#footnote-6) HUD’s proposal will take away a critical tool for tackling this fundamental civil rights issue.

As reflected in HUD’s 2013 disparate impact rule, and in court decisions that have considered the question,[[7]](#footnote-7) 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.”[[8]](#footnote-8) In many areas of the United States, segregation is increasing rather than decreasing; this theory is more important to realizing the Fair Housing Act’s goals than ever. [[9]](#footnote-9)

Retaining meaningful tools for challenging actions that increase segregation is especially important in my community because: [Personalize with data from your community using statistics here, or other local data: <https://s4.ad.brown.edu/Projects/Diversity/Data/Data.htm>] and explain how segregation has harmed you and your community.]

HUD removes all reference to perpetuation of segregation from 24 C.F.R. section 100.500 *without explanation or discussion.* These changes have critically important implications for our nation; research has demonstrated that “the neighborhood in which a child grows up is a significant predictor of his or her later life outcomes, even at a very local level.”[[10]](#footnote-10) Racial segregation impacts every aspect of a community; people of color are excluded from high quality schools, jobs, even access to fresh food or drinkable water.

HUD’s omission of perpetuation of segregation theory from the proposed Rule is a blatant attack on the ideals of integration that the Fair Housing Act was intended to make possible. Coupled with HUD’s suspension of implementation of its Affirmatively Furthering Fair Housing regulation, HUD is retreating from its obligation as an agency to meaningfully combat segregation.

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

In *Inclusive Communities Project,* the Supreme Court recognized that “suits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification are at the heartland of disparate-impact liability”.[[11]](#footnote-11) HUD’s proposal blatantly ignores the Supreme Court’s guidance by proposing that most zoning decisions will not be actionable under disparate impact theory: “Plaintiffs will likely not meet the standard, and HUD will not bring a disparate impact claim, alleging that a single event—such as a local government’s zoning decision or a developer’s decision to construct a new building in one location instead of another—is the cause of a disparate impact, unless the plaintiff can show that the single decision is the equivalent of a policy or practice.”[[12]](#footnote-12) In support of this proposition, HUD cites an unpublished district court case currently on appeal,[[13]](#footnote-13) and ignores Supreme Court and circuit court decisions holding that individual zoning decisions are a proper target for disparate impact liability.[[14]](#footnote-14) HUD’s proposal would improperly shield zoning and planning decisions from scrutiny under the Fair Housing Act.

In my community [please insert examples of how land use and zoning decisions have impacted where people of color, people with disabilities, families with children, or other protected groups can live in your community. For example, are multifamily developments or housing for people with disabilities limited to one part of the community?]

1. **Disparate impact is critical to combat implicit bias**

In *Inclusive Community Project* the Supreme Court acknowledged that “[r]ecognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.”[[15]](#footnote-15) By setting an impossibly high standard of proof for disparate impact liability, HUD seeks to foreclose use of disparate impact theory that works to counteract the toxic impacts of implicit bias in housing decisions. HUD’s proposal will make it much more difficult to realize the goals of housing integration.

Please insert examples of implicit bias that you have experienced in your community

1. **We strongly oppose the proposed rule and call on HUD to withdraw it**

The Fair Housing Act was enacted to promote integration. HUD’s proposed Rule ensures continued segregation and intentionally harms protected classes. This proposal is completely antithetical to HUD’s mission and serves the interests of certain industry groups, while restricting the rights of people who suffer housing discrimination every day. We oppose the proposed rule and call on HUD to withdraw it.

Sincerely,

YOUR SIGNATURE

YOUR NAME, YOUR TITLE

1. *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015) 135 S.Ct. 2507, 2521. [↑](#footnote-ref-1)
2. 42 U.S.C. § 3601, quoted at *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015) 135 S.Ct. 2507, 2521. [↑](#footnote-ref-2)
3. *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015) 135 S.Ct. 2507, 2519-2520, 2523 (discussing legislative history showing that Congress ratified unanimous conclusion of nine Courts of Appeal all of which found that the FHA is properly interpreted to include disparate impact liability, and HUD rulemaking). [↑](#footnote-ref-3)
4. *HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard*, (Aug. 19, 2019) FR-6111-P-02, RIN 2529-AA98 at 42860. [↑](#footnote-ref-4)
5. *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, (Feb. 15, 2013) 78 FR 11460-01, 24 C.F.R. 100.500(c)(2). [↑](#footnote-ref-5)
6. *Racial Segregation in the San Francisco Bay Area*, Part 1, Stephen Menendian and Samir Gambhir (Oct. 29, 2018) Available at: <https://haasinstitute.berkeley.edu/racial-segregation-san-francisco-bay-area>. [↑](#footnote-ref-6)
7. *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”). [↑](#footnote-ref-7)
8. *HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard,* (Aug. 19, 2019) FR-6111-P-02, RIN 2529-AA98. [↑](#footnote-ref-8)
9. *See e.g*., *Rising Housing Costs and Re-Segregation in the San Francisco Bay Area*, UC Berkeley’s Urban Displacement Project and the California Housing Partnership, Philip Verma, Dan Rinzler, Eli Kaplan, and Miriam Zuk. Available at: https://www.urbandisplacement.org/sites/default/files/images/bay\_area\_re-segregation\_rising\_housing\_costs\_report\_2019.pdf [↑](#footnote-ref-9)
10. *The Opportunity Atlas: Mapping the Childhood Roots of Social Mobility*, by Raj Chetty, John N. Friedman, Nathaniel Hendren, Maggie R. Jones, Sonya R. Porter, October 2018, at p. 25. Available at: https://opportunityinsights.org/wp-content/uploads/2018/10/atlas\_paper.pdf [↑](#footnote-ref-10)
11. *See, e.g., Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 16–18, 109 S.Ct. 276. [↑](#footnote-ref-11)
12. *HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard,* (Aug. 19, 2019) FR-6111-P-02, RIN 2529-AA98 at 42858. [↑](#footnote-ref-12)
13. *Barrow v. Barrow* (D. Mass., July 5, 2017, No. CV 16-11493-FDS) 2017 WL 2872820, at \*3. [↑](#footnote-ref-13)
14. *Mhany Management, Inc. v. County of Nassau* (2d Cir. 2016) 819 F.3d 581, 619. [↑](#footnote-ref-14)
15. *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015) 135 S.Ct. 2507, 2522. [↑](#footnote-ref-15)