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Regulations Division  
Office of the General Counsel  
Department of Housing and Urban Development  
451 Seventh St. SW, Room 10276  
Washington, D.C. 20410-0001

Submitted electronically at <http://www.regulations.gov>

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

Dear Secretary Fudge:

The undersigned civil rights, consumer advocacy, housing, and community development organizations write to offer comments in response to the Department of Housing and Urban Development's (HUD) proposed rule titled *Reinstatement of HUD's Discriminatory Effects Standard* ("Proposed Rule").<sup>1</sup> These comments convey our strong support for the robust implementation of HUD's previously promulgated rule titled, "Implementation of the Fair Housing Act's Discriminatory Effects Standard" ("2013 Rule"), which, as of the date of publication of this Proposed Rule, remains in effect due to a pending preliminary injunction. In short, it is critically important that HUD proceed with reinstating a meaningful disparate impact standard and vigorously enforce the strong laws that are designed to level the playing field and give everyone a fair shot at housing.

Disparate impact liability functions to eliminate policies that wrongly keep people from obtaining safe housing and accessing opportunities they need to be successful in life. Each year, there are over 4 million instances of discrimination impeding people's ability to secure affordable insurance products, access quality credit, rent affordable and safe housing, and obtain accessible housing units. Discriminatory policies and practices make it more difficult for survivors of domestic violence, families with children, and returning veterans to obtain or keep housing. They also undermine our shared interest in ensuring that housing opportunities are available to every individual, regardless of their personal characteristics.

Our shared interest in equal housing opportunity is embedded in HUD's mission and the Fair Housing Act itself which established "the policy of the United States to provide, within constitutional limits, for fair housing throughout the United States."<sup>2</sup> Passed in 1968, exactly seven days after the assassination of Dr. Martin Luther King, Jr., the federal Fair Housing Act

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<sup>1</sup> Reinstatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. 33590 (June 25, 2021) (to be codified at 24 C.F.R. § 100) ("Proposed Rule").

<sup>2</sup> 42 U.S. Code § 3601.

prohibits discrimination in housing and housing-related services on the basis of race, color, national origin, religion, sex, familial status, and disability. The Fair Housing Act makes it the policy of the United States to support the development and maintenance of diverse, inclusive, neighborhoods where every person has access to the community assets necessary to flourish. Fulfilling the promises of the Fair Housing Act for every person in the United States is a central component of HUD’s mission and national policy.

The fair housing movement and the undersigned organizations support this central mission and we urge you to ensure that HUD proceed with reinstating the 2013 Rule to fulfill the Department’s critical obligation to achieve the goals of the Fair Housing Act. The 2013 Rule properly codified the disparate-impact standard that has prevailed in the courts and has been used by regulators—including but not limited to HUD—for decades.<sup>3</sup> This standard has worked. It has fostered more inclusive lending markets, housing markets, and more, by providing entities subject to the Fair Housing Act with the incentive to search out less discriminatory alternatives to practices that have a discriminatory impact based on race or other protected classes and are not necessary to achieve any legitimate purpose. At the same time, it does not force any entity to modify practices that are necessary to accomplish legitimate purposes. This clear standard has been straightforward to apply and has struck the proper balance between competing interests.

Nevertheless, HUD issued a new rule in 2020<sup>4</sup> that attempted to change the 2013 Rule in multiple ways. The cumulative effect of these changes would be to require dismissal of what should be meritorious disparate impact claims under Supreme Court law, including dismissal of the types of cases the Supreme Court has described as “heartland” disparate-impact suits. It would upset the careful balancing of interests that has developed over decades of caselaw, industry practice, and regulatory scrutiny and prevent the Fair Housing Act from serving its intended purpose of “moving the Nation toward a more integrated society.”<sup>5</sup>

Before the 2020 Rule was to take effect, three federal lawsuits were filed challenging the Rule as a violation of the Administrative Procedure Act (“APA”).<sup>6</sup> A district court in Massachusetts subsequently entered a preliminary injunction preventing the 2020 Rule from taking effect, rightly finding that the plaintiffs were substantially likely to prevail on their claim that the 2020 Rule was arbitrary and capricious under the APA.<sup>7</sup> The court noted that HUD’s explanation for the 2020 Rule boiled down to two justifications: (1) it would bring HUD’s disparate impact standards into alignment with recent case law, and (2) it would provide greater

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<sup>3</sup> Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500) (“2013 Rule”).

<sup>4</sup> HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 85 Fed. Reg. 60288 (Sept. 24, 2020) (“2020 Rule”).

<sup>5</sup> *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2526 (2015) (“ICP”).

<sup>6</sup> See *National Fair Housing Alliance v. Carson*, Case No. 3:20-cv-7338 (N.D. Cal.); *Mass. Fair Housing Center v. U.S. Dep’t of Housing and Urban Development*, Case No. 20-cv-11765 (D. Mass.); *Open Communities Alliance v. U.S. Dept. of Housing and Urban Development*, Case No. 3:20-cv-1587 (D. Conn.).

<sup>7</sup> *Mass. Fair Housing Center*, 496 F. Supp. 3d 600, 611 (D. Mass. 2020).

clarity to the public.<sup>8</sup> The court, however, found that key provisions of the 2020 Rule could not be “found in any judicial decision,” and the Rule “raises more questions than it answers.”<sup>9</sup> On this basis, the court concluded that the Rule’s significant alterations to the 2013 Rule, which would “run the risk of effectively neutering disparate impact liability under the Fair Housing Act,” were “inadequately justified” and likely violated the APA. The preliminary injunction ordered by the court in *Massachusetts Fair Housing Center* remains in effect today. All three cases have been stayed pending HUD’s reevaluation of the 2020 Rule.

Achieving truly fair and equitable housing in all neighborhoods is one of the greatest challenges our nation faces. Confirming that disparate impact liability exists under the Fair Housing Act, Justice Anthony Kennedy wrote, “Much progress remains to be made in our Nation’s continuing struggle against racial isolation. ... The Court acknowledges the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.”<sup>10</sup> HUD’s 2013 Rule serves as an indispensable tool for victims of housing discrimination, communities, fair housing practitioners, and the housing industry in the ongoing struggle to achieve open housing markets free from discrimination.

Many of the undersigned civil rights, housing, and community development offices have a long history of engagement in federal litigation, administrative enforcement, or rulemaking involving disparate impact liability under the Fair Housing Act. Some of the undersigned offices have been active in using disparate impact to stop discriminatory behavior such as redlining in lending and insurance. Several undersigned organizations have filed amicus briefs in the Supreme Court supporting the view that the Fair Housing Act encompasses disparate impact liability in *Magner v. Gallagher*, No. 10-1032,<sup>11</sup> *Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507,<sup>12</sup> and *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, No. 13-1371,<sup>13</sup> as well as briefs supporting the standing of cities to bring fair housing claims in *Bank of America Corp. v. City of Miami*, No. 15-1111.<sup>14</sup> Many of the undersigned offices have also filed *amici curiae* briefs in both currently-pending

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<sup>8</sup> *Id.* at 610-11.

<sup>9</sup> *Id.*

<sup>10</sup> *ICP*, 135 S.Ct. 2507, 2525–26 (2015).

<sup>11</sup> See e.g., Brief amici curiae National Fair Housing Alliance, et al. filed, available at: <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/01/10-1032bsac.pdf>.

<sup>12</sup> See e.g., Brief amici curiae National Fair Housing Alliance, et al. filed, available at: [https://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs-v3/11-1507\\_resp\\_amcu\\_nfha-et-al.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/11-1507_resp_amcu_nfha-et-al.authcheckdam.pdf).

<sup>13</sup> See e.g., Brief amici curiae National Fair Housing Alliance, et al. filed, available at: [https://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/BriefsV4/13-1371\\_amicus\\_resp\\_NFHA.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-1371_amicus_resp_NFHA.authcheckdam.pdf).

<sup>14</sup> <https://www.aclu.org/legal-document/bank-america-v-city-miami-amicus-brief> (2014 brief in *AIA v. Dep’t of Hous. & Urb. Dev.*, No. 1:13-cv-00966-RJL (D.D.C.)); <https://www.aclu.org/legal-document/aia-v-hud-amicus-brief> (2016 brief in *AIA v. Dep’t of Hous. & Urb. Dev.*, *supra*); <https://lawyerscommittee.org/wp-content/uploads/2015/06/0219.pdf> (2015 brief in *PCIA v. Carson*, No. 1:13-cv-08564 (N.D. Ill.)).

insurance industry challenges to the Disparate Impact Rule.<sup>15</sup> Others have also pursued litigation of disparate impact claims in federal court under *Inclusive Communities* and the 2013 Rule.<sup>16</sup> Additionally, the undersigned offices submitted comments on the proposed Disparate Impact Rule in 2012,<sup>17</sup> the HUD Reducing Regulatory Burden notice in 2017,<sup>18</sup> the Advance Notice of Proposed Rulemaking in 2018,<sup>19</sup> and HUD's Implementation of the Fair Housing Act's Disparate Impact Standard in 2019.<sup>20</sup> Finally, several of the undersigned offices were responsible for bringing the three federal lawsuits challenging the 2020 Rule described above.

The lead organization in preparing this comment letter is the National Fair Housing Alliance ("NFHA").<sup>21</sup> NFHA is the nation's only national non-profit, civil rights organization dedicated to eliminating all forms of housing discrimination. Founded in 1988, we have worked for over 30 years to advance fairness and equal opportunities in our nation's housing, lending and insurance markets. The National Fair Housing Alliance has used the federal Fair Housing Act, including the disparate impact tool, to provide fair housing opportunities for millions of people, including:

- Assisting over 750,000 victims of discrimination;
- Working with thousands of housing providers to halt discriminatory practices;
- Working with lenders and other financial services partners to expand fair lending opportunities for millions of consumers;
- Creating 20,000 accessible housing units;
- Rehabbing 700 abandoned and blighted homes;
- Assisting 800 homeowners avoid foreclosure;
- Facilitating the improved maintenance of 750,000 foreclosed properties;
- Facilitating 10,000 financial literacy workshops for more than 200,000 consumers; and
- Facilitating the investment of over \$140,000,000 in under-served communities throughout the United States.

On the basis of this extensive experience and our shared interest in ridding housing markets of discrimination, we strongly assert that HUD should proceed with expeditiously

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<sup>15</sup> See e.g., Unopposed Motion for Leave to File a Brief Amicus Curiae NAACP Legal Defense & Educational Fund, Inc., et al. filed, available at: <https://www.aclu.org/legal-document/american-insurance-association-v-hud-amicus-brief>.

<sup>16</sup> See e.g., *National Fair Housing Alliance v. Federal National Mortgage Ass'n*, 294 F. Supp. 3d 940 (N.D. Cal. 2018); *National Fair Housing Alliance v. Travelers Indemnity Co.*, 261 F. Supp.3d 20 (D.D.C. 2017).

<sup>17</sup> See e.g., National Fair Housing Alliance comment, Implementation of the Fair Housing Act's Discriminatory Effect Standard (2012), Docket No. FR-5508-P-01.

<sup>18</sup> See e.g., National Fair Housing Alliance comment, Reducing Regulatory Burden; Enforcing the Regulatory Reform Act (2017), Docket No. HUD-2017-0029.

<sup>19</sup> See e.g., National Fair Housing Alliance, et al. comment, Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, Doc. No. FR-6111-A-01.

<sup>20</sup> See e.g., National Fair Housing Alliance comment, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, Docket No. FR-6111-A-01.

<sup>21</sup> See e.g., National Fair Housing Alliance website at [www.nationalfairhousing.org](http://www.nationalfairhousing.org).

implementing the Proposed Rule. Furthermore, HUD should proceed with vigorous enforcement under the Proposed Rule to remove unnecessary barriers to housing choice and give everyone a fair shot throughout our housing markets.

**A. Unlike the 2020 Rule, HUD’s 2013 Rule is Consistent with Decades of Case Law, Including the Inclusive Communities Project Decision (“ICP”).**

The 2013 Rule correctly codified decades of case law. In the process of formulating the 2013 Rule, HUD considered and rejected many of the changes that the 2020 Rule made because HUD determined that they would be inconsistent with that long-standing practice. The 2020 Rule made no attempt to justify any of its changes as good policy or as better interpretations of the law as it existed in 2013, but simply claims that *ICP* dramatically changed the law such that all of them suddenly are required. But *ICP* did no such thing. The Supreme Court was asked to consider the appropriate burdens and standards for disparate-impact claims, but it declined to do so. It *affirmed* existing disparate-impact doctrine rather than *changing* it. And it repeatedly cited and discussed the 2013 Rule without suggesting that anything in that rule required amendment. Indeed, all the safeguards *ICP* discussed exist in the 2013 Rule. Put simply, the 2020 Rule changes to the 2013 Rule to purportedly better conform with *ICP* was based on a fundamentally flawed premise, because there was no inconsistency that required conforming.

1. *HUD’s 2013 Disparate Impact Rule is Consistent with Decades of Case Law.*

HUD acknowledged in the 2020 Rule that its 2013 Rule correctly codified disparate-impact doctrine as it existed at that time, in the form of case law and long-standing HUD interpretations. The 2020 Rule also did not dispute that, in those places where the 2013 Rule resolved disagreements in the doctrine (*e.g.*, differences among the circuits as to the plaintiffs’ and defendants’ respective burdens), it did so permissibly. The 2020 Rule did not meaningfully disagree with any aspect of HUD’s findings or reasoning at the time, either with respect to reading of case law or with respect to policy determinations.

In fact, the 2013 Rule considered and rejected many of the very changes that the 2020 Rule made, and (unlike the 2020 Rule) it explained its reasoning in doing so. The 2020 Rule, however, ignored HUD’s prior justifications and in many cases did not acknowledge that it was making amendments at all. For example, the 2013 Rule:

- Rejected a suggestion that HUD delete “perpetuation of segregation” as a recognized discriminatory effect. It reasoned that “the elimination of segregation is central to why the Fair Housing Act was enacted” and that “every federal court of appeals to have addressed the issue has agreed.”<sup>22</sup>
- Rejected a suggestion that it explicitly require the disparity caused by a challenged practice to be “significant.” HUD found that the extent of the required disparity was too “fact-specific” to be codified across the wide variety of disparate-impact claims and that

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<sup>22</sup> 2013 Rule, 78 Fed. Reg. at 11469.

adding a significance requirement would cause undue deviation from claims brought under other statutes, including Title VII and the Equal Credit Opportunity Act (ECOA).<sup>23</sup>

- Rejected a suggestion to opine broadly as to what actions constitute policies or practices subject to disparate-impact challenge, finding that identifying the specific practice at issue “will depend on the facts of a particular situation and therefore must be determined on a case-by-case basis.”<sup>24</sup>
- Required that, to justify a practice with a disparate impact, a defendant’s interest be “substantial” and “legitimate.” HUD declined to find that “increasing profits, minimizing costs,” and other specific interests would always be considered sufficiently substantial, reasoning that what qualifies as substantial “for a given entity is fact-specific and must be determined on a case-by-case basis.”<sup>25</sup>
- Rejected a suggestion not to require the challenged practice to be “necessary” to achieving a defendant’s interest, finding that that change would be inconsistent with long-standing case law, agency practice, interpretations of similar statutes, as well as the Fair Housing Act’s “broad, remedial goal.”<sup>26</sup>
- Found that the FHA prohibits actions that “predictably” result in an unjustified discriminatory effect, explaining that that interpretation is supported by the plain language of the FHA and existing case law.<sup>27</sup>
- Required that legally sufficient justifications must be supported by evidence and may not be “hypothetical or speculative,” finding that that position is consistent with HUD’s “longstanding application of effects liability,” can be “uniformly applied” and is consistent with “the application of the standard by other federal regulatory and enforcement agencies under” the Fair Housing Act, ECOA, Title VII, as well as a number of federal courts.<sup>28</sup>
- Rejected a suggestion to require that alternative practices must be “equally effective,” finding that the current language is “consistent with the Joint Policy Statement, with Congress’s codification of the disparate impact standard in the employment context, and with judicial interpretations of the Fair Housing Act.” Moreover, HUD found that the “equally effective” language is inappropriate in the housing context “in light of the wider range and variety of practices covered by the Act that are not readily quantifiable.”<sup>29</sup>

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<sup>23</sup> *Id.* at 11468-69.

<sup>24</sup> *Id.* at 11469.

<sup>25</sup> *Id.* at 11471.

<sup>26</sup> *Id.* at 11471-72.

<sup>27</sup> *Id.* at 11468.

<sup>28</sup> *Id.* at 11471.

<sup>29</sup> *Id.* at 11473.

Leading fair housing scholars echo the consensus that *Inclusive Communities* is consistent with the 2013 Rule. Tulane University Law School Professor Stacy Seicshnaydre, whose scholarship on the subject was cited by Judge Kennedy in the *Inclusive Communities* decision,<sup>30</sup> looking to both the language of the opinion and its overarching message about the integration imperative of the Fair Housing Act, writes that the decision is in concert with the 2013 Rule.<sup>31</sup> Additionally, University of Kentucky School of Law Professor Robert Schwemm summarized, “the fact that HUD described [the Disparate Impact Rule] as analogous to the Title VII-*Griggs* standard suggests that it is consistent with the Court’s views in *Inclusive Communities*.”<sup>32</sup>

HUD’s 2020 Rule contradicted these reasoned prior findings and decisions of the agency, and others, without meaningful explanation, acknowledgment, or even awareness of its prior determinations.

2. *The 2020 Rule was Based on a Faulty Premise that ICP Changed Disparate Impact Law.*

The 2020 Rule did not meaningfully reject any of the reasoning, interpretations, or positions taken in the 2013 Rule. Nor did it contend that the 2013 Rule (or the long-standing case law and agency practice that it codifies) had caused any real-world problems or that its proposed changes would lead to policy outcomes that better reflect the purposes of the FHA. And it could *not* make any of these claims. As described below, had the 2020 Rule not been preliminarily enjoined, the 2020 Rule’s changes would result in dismissal of what should be meritorious disparate impact suits under existing law. It would thus destroy the disparate-impact doctrine’s effectiveness at requiring policies with an unnecessary discriminatory impact to be modified in favor of less discriminatory alternatives.

The 2020 Rule justified its sweeping changes by claiming that these changes were required by *ICP*. But, as explained in more detail below, *ICP* does not require any of HUD’s 2020 Rule changes. To the contrary, *ICP* did no more than affirm HUD’s position that disparate-impact claims are cognizable under the FHA. Nothing in *ICP* suggests that HUD’s 2013 Rule—which *ICP* discusses at length, including explicitly noting some of the burden-shifting provisions that the 2020 Rule would alter—failed to correctly state the law in any way, or that *ICP* intended to change that law in any way. Rather, *ICP* left the disparate-impact doctrine as it found it.

As an initial matter, it is important to recognize that under the Supreme Court’s rules, *ICP* could *not* have changed the standards and burdens for disparate-impact claims at all—let alone imposed the profound changes contemplated by the 2020 Rule. The petitioner in *ICP* presented two questions: (1) whether the FHA permits disparate-impact claims and (2) what the

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<sup>30</sup> Stacy Seicshnaydre, *Disparate Impact and the Limits of Local Discretion after Inclusive Communities*, 24 Geo. Mason L. Rev. 663 (2017).

<sup>31</sup> Robert Schwemm, *Fair Housing Litigation After Inclusive Communities: What’s New and What’s Not*, 115 Colum. L. Rev. Sidebar 106 [now: CLR Online] (2015).

<sup>32</sup> *Id.*

standards and burdens are for adjudicating such claims.<sup>33</sup> The Supreme Court granted certiorari only on the first question, declining to take up the second.<sup>34</sup> Thus, the Court specifically declined to assert jurisdiction over questions regarding the appropriate standards and burdens.<sup>35</sup> Unsurprisingly, the parties and the many amici who briefed the case spent little time contesting what the burdens and standards are in disparate-impact litigation, since those questions were not before the Court for decision.

The opinion in *ICP* reflected the Court’s decision to grant certiorari only on whether disparate-impact claims were cognizable and to otherwise leave the doctrine as the Court found it. Far from announcing any changes in the law, the Court repeatedly stated that its description of disparate impact was a description of *existing* doctrine:

- The Court explained that “disparate-impact liability *has always* been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA.”<sup>36</sup>
- The Court discussed at length the 2013 Rule—including its requirements for making out a prima facie case and burden-shifting—without suggesting that the Rule required revision.<sup>37</sup>
- The Court cited numerous lower-court disparate-impact cases with approval, without suggesting they were litigated under an improper standard.<sup>38</sup>
- The Court observed, as one of its rationales for affirming the availability of disparate-impact liability, that “residents and policymakers have come to rely on the availability of disparate-impact claims.”<sup>39</sup>

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<sup>33</sup> See Pet. For Certiorari, No. 13-1371 (Sup. Ct.), available at

<http://sblog.s3.amazonaws.com/wp-content/uploads/2014/06/ICP-Cert-Petition-FILED-5.13.14.pdf>.

<sup>34</sup> See Order of Oct. 2, 2014; see also *ICP*, 135 S. Ct. at 2513 (“The question presented for the Court’s determination is whether disparate-impact claims are cognizable under the Fair Housing Act (or FHA), 82 Stat. 81, as amended, 42 U.S.C. § 3601 *et seq.*”).

<sup>35</sup> See Sup. Ct. Rule 14(1)(a) (“Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”).

<sup>36</sup> *ICP*, 135 S. Ct. at 2522 (emphasis added).

<sup>37</sup> See, e.g., *id.* at 2514-15 (describing prima facie case and burden-shifting in the 2013 rule); *id.* at 2522-23 (describing defendants’ burden “to state and explain the valid interest served by their policies” and HUD’s decision in 2013 rule not to use term “business necessity” in formulating defendant’s burden); *id.* at 2523 (after describing concerns raised by specific claim at issue in case, observing with approval that HUD’s 2013 rule “does not mandate that affordable housing be located in neighborhoods with any particular characteristic”) (quoting 78 FR 11476).

<sup>38</sup> See, e.g., *id.* at 2521-22 (citing cases involving “zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification” as “resid[ing] at the heartland of disparate-impact liability”).

<sup>39</sup> *Id.* at 2525.



- The Court noted that the existence of disparate-impact claims “for the last several decades ‘has not given rise to . . . dire consequences.’”<sup>40</sup>

Moreover, consistent with HUD’s 2013 Rule, *ICP* articulated multiple times an understanding of disparate impact doctrine under the FHA that parallels contemporary Title VII doctrine with respect to the burdens of proof allocated to plaintiffs and defendants.<sup>41</sup> It is impossible to square those statements with a reading of *ICP* that requires HUD to untether disparate-impact litigation under the FHA from well-established Title VII doctrine.

This is not the language of a Court *changing* existing law; it is the language of a Court *approving* existing law.

In short, *ICP* explicitly did not change disparate impact law. The 2020 Rule failed to explain why HUD believed that *ICP* required drastic changes to the 2013 Rule.

3. *The 2020 Rule That Requires a Plaintiff to Plead Facts Showing That a Policy is “Arbitrary, Artificial, and Unnecessary” Would Effectively Destroy Disparate-Impact Doctrine and Has No Basis in the Law.*

The 2020 Rule would require a plaintiff to plead facts demonstrating that a challenged policy or practice is “arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective.”<sup>42</sup> This change would effectively make it impossible to challenge discriminatory policies absent facts stating discriminatory *intent*, inoculating those policies from disparate impact scrutiny. It would impose an unjustified, new substantive requirement: that a challenged policy is “arbitrary,” “artificial,” and “unnecessary.” That is, it would not be enough that a policy with discriminatory effects is “unnecessary” and “arbitrary” to achieve any legitimate purpose; the policy would have to be “artificial” to be unlawful. “Artificial” policies are pretextual policies; in any discrimination case, the allegation would be that that artifice is pretext for intentional discrimination. Requiring a plaintiff in a disparate *impact* case to show *intentional* discrimination is exactly the opposite of the holding in *ICP*.<sup>43</sup>

Moreover, the 2020 Rule would radically change the *procedure* of disparate-impact litigation by requiring the plaintiff to prove a negative—to plead facts showing that defendant’s policy has no legitimate purpose—even before defendant must articulate what its claimed

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<sup>40</sup> *Id.* (quoting *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 196 (2012)).

<sup>41</sup> *See, e.g.*, 135 S. Ct. at 2518 (“The cases interpreting Title VII and the ADEA provide essential background and instruction in the case now before the Court”; citing *Ricci* for statement of plaintiff’s burden to show less discriminatory alternative); *id.* at 2523 (“housing authorities and private developers [must] be allowed to maintain a policy *if they can prove it is necessary to achieve a valid interest*”) (emphasis added).

<sup>42</sup> 2020 Rule, 85 Fed. Reg. at 60332.

<sup>43</sup> This observation is especially true because there is a separate burden-shifting standard for evaluating allegations involving only indirect evidence of intentional discrimination and pretext. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

legitimate purpose is. This would be a radical and unjustified change to the parties' respective burdens and the timing at which a plaintiff must be prepared to disprove potential justifications.

a. ICP does not support, let alone require, the 2020 Rule changes.

The 2020 Rule did not acknowledge that it was changing long-established doctrine at all, let alone try to justify it. It simply claimed that *ICP* requires that disparate-impact be eviscerated in this manner.<sup>44</sup> But *ICP* requires no such thing. Rather, it quoted the Supreme Court's decades-old formulation "arbitrary, artificial, and unnecessary"—a phrase that dates to the very beginning of disparate-impact jurisprudence—and used that phrase as it always has: as a shorthand for the types of policies that must be invalidated at the end of the existing, three-step disparate-impact analysis. Nothing in *ICP* suggests that this phrase has transformed into a new element for a plaintiff to plead or otherwise changes the long-standing doctrine that is summarized by HUD's 2013 Rule.

In the seminal case *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in which the Supreme Court recognized that Title VII bars employment practices that have unjustified disparate impact, the Court noted that Title VII does not require any person to be hired "simply because he was formerly the subject of discrimination, or because he is a member of a minority group."<sup>45</sup> Rather, it stated: "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."<sup>46</sup> It continued: "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."<sup>47</sup> And because the full record before the Court (reflecting completed discovery) showed no such relationship, the practice was unlawful.<sup>48</sup> That is, the defendant lost at what the 2013 Rule makes the second step of the burden-shifting analysis; because the defendant could not demonstrate that the rule served any legitimate purpose, the plaintiff was never required to prove that a less discriminatory alternative could serve such purpose.

Lower courts that extended *Griggs's* reasoning to the FHA quoted this language even as they applied a burden-shifting analysis that mirrors the one required by HUD's current 2013 Rule. For example, *United States v. City of Black Jack, Mo.*, 508 F.2d 1179 (8th Cir. 1974)—one of the precedents that quoted *Griggs's* "artificial, arbitrary, and unreasonable" formulation and a case *ICP* described as in the "heartland" of disparate impact—reasoned that *Griggs's* logic applied to the FHA.<sup>49</sup> It then stated that plaintiff's burden to prove a prima facie case was to show "that the conduct of the defendant actually or predictably results in racial discrimination."<sup>50</sup> Once a plaintiff makes out such a prima facie case, it held, "the burden shifts

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<sup>44</sup> 2020 Rule, 2020 Rule, 85 Fed. Reg. at 60289.

<sup>45</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31, (1971).

<sup>46</sup> *Id.* at 431.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 431-32.

<sup>49</sup> *United States v. City of Black Jack, Mo.*, 508 F.2d 1179, 1184 (8th Cir. 1974)

<sup>50</sup> *Id.*

to the governmental defendant to demonstrate that its conduct was necessary to promote a compelling governmental interest.”<sup>51</sup>

Subsequent jurisprudence continued to make clear that there is no tension between the Supreme Court’s long-standing “artificial, arbitrary, and unnecessary” shorthand and well-established case law governing the respective burdens in pleading and then proving a disparate-impact case under the FHA. Rather, the two concepts are synonymous, with a policy being an “artificial, arbitrary, and unnecessary barrier” to fair housing if the plaintiff can ultimately establish at the end of a case that the policy causes a disparate impact and either that it serves no legitimate purpose or that any legitimate purpose could be served by an alternative policy with less discriminatory effect. Courts have consistently used the phrase “artificial, arbitrary, and unnecessary” as shorthand for the three-step process, not as an independent element.<sup>52</sup>

*ICP* is consistent with this well-established doctrine. *ICP* quoted the “artificial, arbitrary, and unnecessary” formulation twice. The first time was as follows:

But disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity. Disparate-impact liability mandates the “removal of artificial, arbitrary, and unnecessary barriers,” not the displacement of valid governmental policies. *Griggs*, *supra*, at 431.<sup>53</sup>

This passage makes the unremarkable point that successful disparate impact claims—*i.e.*, those that lead to the “removal of artificial, arbitrary, and unnecessary barriers”—are based on more than “a showing of a statistical disparity,” as a court considers both whether a defendant’s policy causes that disparity and the strength of a defendant’s proffered justification. This point aligns with the 2013 Rule as well as preexisting FHA jurisprudence.

The second time *ICP* quoted this formulation was as follows:

And as Judge Jones observed below, if the *ICP* cannot show a causal connection between the Department’s policy and a disparate impact—for instance, because federal law substantially limits the Department’s discretion—that should result in dismissal of this case. 747 F. 3d, at 283–284 (specially concurring opinion). The FHA imposes a command with respect to disparate-impact liability. Here, that command goes to a state entity. In other cases, the command will go to a private

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<sup>51</sup> *Id.* at 1185.

<sup>52</sup> See, e.g., *Graoch Assocs. # 33, L.P. v. Louisville/Jefferson Cty. Metro Human Relations Comm’n*, 508 F.3d 366, 374–75 (6th Cir. 2007) (“We use the burden-shifting framework described above—and especially the final inquiry considering the strength of the plaintiff’s statistical evidence and the strength of the defendant’s business reason—to distinguish the artificial, arbitrary, and unnecessary barriers proscribed by the FHA from valid policies and practices crafted to advance legitimate interests.”).

<sup>53</sup> *ICP*, 135 S. Ct. at 2522.

person or entity. Governmental or private policies are not contrary to the disparate-impact requirement unless they are “artificial, arbitrary, and unnecessary barriers.” *Griggs*, 401 U.S., at 431.<sup>54</sup>

In other words, the Court used this quote from *Griggs* to make exactly the same point that *Griggs* did: disparate-impact claims can only succeed where the challenged policy causes a disparity. There is no indication that *ICP* meant to unsettle the jurisprudence that has developed since *Griggs* by repeating a phrase from *Griggs* for precisely the same point.

The 2020 Rule thus misread *ICP* in requiring plaintiffs to plead facts showing that a policy is “artificial, arbitrary, and unnecessary.” This phrase has only ever been used in disparate-impact jurisprudence as a collective description of the sort of policies that will be declared unlawful at the *end* of the burden-shifting process described in HUD’s current rule, *i.e.*, plaintiff pleads that a policy causes an unjustified disparate impact, and either defendant cannot establish that the policy furthers a legitimate end or plaintiff proves that the legitimate end could be furthered through less discriminatory means. It has never been used as part of a plaintiff’s initial pleading obligation for an individual case. Indeed, *ICP*, *Griggs*, and the other cases in which this formulation appears use it to characterize successfully challenged policies *collectively*, not *individually*.<sup>55</sup> That makes sense, because different terms suggest different reasons why a policy violates the FHA. A policy is “artificial” if it is pretextual. It is “arbitrary” if it serves no valid purpose. It is “unnecessary” if its purposes could be served by a less discriminatory alternative. It makes no sense to require a plaintiff to demonstrate that all three are true with regard to every challenged policy.

The 2020 Rule pointed to *Ellis v. City of Minneapolis, Minnesota*, 860 F.3d 1106 (8th Cir. 2017), and suggested that this case illustrates a requirement that a plaintiff, as an independent prong, allege facts that the challenged practice is arbitrary, artificial, and unnecessary.<sup>56</sup> But, as discussed below, all *Ellis* held—consistent with *ICP*—was that a plaintiff cannot plead a disparate impact case without identifying a causal connection between a policy and a disparity.<sup>57</sup> Applying this rule, it upheld the dismissal of a challenge to a city’s housing code enforcement that failed to make such a connection and, indeed, failed to challenge any concrete policy, as opposed to individual enforcement decisions.<sup>58</sup>

Thus, case law, including *ICP*, does not support the premise that a plaintiff who pleads facts plausibly showing that a specific policy causes a disparity, thus satisfying the requirements set forth in the 2013 Rule, must *also* plead *additional* facts showing that the policy is “arbitrary, artificial, and unnecessary.”

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<sup>54</sup> *ICP*, 135 S. Ct. at 2524.

<sup>55</sup> *See, e.g., ICP*, 135 S. Ct. at 2522 (“Disparate-impact liability mandates the ‘removal of artificial, arbitrary, and unnecessary barriers,’ not the displacement of valid governmental policies.” (quoting *Griggs*, 401 U.S. at 431)).

<sup>56</sup> 2020 Rule, 85 Fed. Reg. at 60312.

<sup>57</sup> *Ellis v. City of Minneapolis, Minn.*, 860 F.3d 1106, 1112 (8th Cir. 2017) (quoting *ICP*, 135 S. Ct. at 2523) (brackets in original).

<sup>58</sup> *Id.*

- b. Adding an entirely new requirement that plaintiffs plead that each challenged policy is “artificial,” “arbitrary,” and “unnecessary” would eviscerate disparate-impact doctrine.

Adding this completely undefined pleading obligation—using words that are ripped out of a different context altogether—would cause uncertainty and chaos in the doctrine. The 2020 Rule did not explain what it means to be “artificial,” “arbitrary,” or “unnecessary” as a pleading requirement. *ICP* did not use these terms as pleading or prima facie requirements, and so *any* meaning attached to them in this context necessarily will change the disparate-impact doctrine significantly. The most likely effect will be to prevent plaintiffs from bringing claims that currently would be meritorious, thus shielding entities that maintain discriminatory policies from scrutiny.

HUD’s 2020 Rule suggests this standard would mean that plaintiffs must demonstrate that a challenged policy does not accomplish any legitimate purpose or is unnecessary to accomplish that purpose.<sup>59</sup> Only then—after the plaintiff already has made this demonstration—does the defendant have the burden of identifying a valid interest or interests that the challenged policy or practice serves.<sup>60</sup> That is, the defendant need not offer (much less prove) a justification for its policy until the plaintiff already has demonstrated the *lack* of an adequate justification.

This makes no sense, and HUD made no attempt in the 2020 Rule to explain why it is sensible. Requiring plaintiffs to “prove a negative” not only deviates from all FHA case law, but it flies in the face of HUD’s express determination in the 2013 Rule that burdens should be allocated such that no party is put in that position.<sup>61</sup> HUD did not acknowledge that it was changing this position. *ICP* provides no support for this nonsensical position; it certainly does not require it. Adding this new pleading obligation would radically change the parties’ respective burdens, by forcing plaintiffs to prove that defendants’ practices are unnecessary prematurely, and HUD failed to acknowledge or justify that change in the doctrine’s practical workings.

In response to comments raising these concerns, the 2020 Rule cursorily dismissed them with reference to an irrelevant federal driver privacy law, completely ignoring the practical consequences of this drastic change.<sup>62</sup> That response demonstrated that HUD either had not thought through those consequences or simply refused to acknowledge them. In particular, the 2020 Rule did not explain how the cases that *ICP* identified as forming the “heartland” of disparate-impact liability could be brought under these new pleading rules, pursuant to which plaintiffs must plead facts showing a defendant’s (still unstated) purpose to be “artificial, arbitrary, and unnecessary” at the very outset of the case. That would be difficult to do, since those cases relied heavily on information obtained *after the cases began* to demonstrate the “artificial, arbitrary, and unnecessary” nature of the challenged policies.

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<sup>59</sup> 2020 Rule, 85 Fed. Reg. at 60311, 60332.

<sup>60</sup> *Id.* at 60311.

<sup>61</sup> *See* 2013 Rule, 78 Fed. Reg. at 11474.

<sup>62</sup> 2020 Rule, 85 Fed. Reg. at 60312.

For example, the “heartland” decision in *United States v. City of Black Jack, Mo.*, 508 F.2d 1179 (8th Cir. 1974)—a successful challenge to a municipal ban on the construction of new multi-family dwellings—was based on an extensive trial record that refuted the asserted justifications. That evidence included the Mayor conceding on cross-examination that his traffic justification was based on mistaken information; the city’s failure to produce evidence backing up school-overcrowding and “already too many apartments” justifications; and expert testimony contradicting a property-value justification. Thus, specific facts produced *during the case* supported the court’s determination that the policy was one of those “artificial, arbitrary, and unnecessary” practices that is properly invalidated under disparate impact doctrine.<sup>63</sup> This information would not have been available during the pleading stage; accordingly, HUD’s 2020 Rule requirement that a plaintiff *plead* facts that a policy is “artificial, arbitrary, and unnecessary,” would have meant dismissal of the claims in *Black Jack*.

Another “heartland” case—*Town of Huntington, NY v. Huntington Branch, NAACP*, 488 U.S. 15 (1988)—also included an extensive trial record refuting facially plausible justifications. The Town of Huntington gave seven reasons for its challenged conduct, including divergent program goals, zoning classification issues, traffic concerns, parking limitations, inadequate recreation areas, proximity to a railroad, and unit layout issues.<sup>64</sup> Only after being tested through discovery and trial was it clear that the justifications were inadequate.<sup>65</sup> The Supreme Court affirmed, noting approvingly that “in order to establish a prima facie case, a Title VIII plaintiff need only demonstrate that the action or rule challenged has a discriminatory impact.”<sup>66</sup> Neither the Second Circuit nor the Supreme Court mentioned the phrase “artificial, arbitrary, and unnecessary.” As with *Black Jack*, HUD’s 2020 Rule would have meant dismissal of the claims in *Huntington Branch* before the purported justifications could have been tested.

Finally, in *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish*, 641 F. Supp. 2d 563 (E.D. La. 2009)—another “heartland” case—information gathered *after* the pleadings was central to establishing that six separate purported justifications for the challenged action (blocking affordable housing from being built) were unsupported and inadequate.

Requiring plaintiffs to state *facts* alleging as part of the *pleading standard* why the challenged policy is artificial, arbitrary, and unnecessary would prevent any of that relevant information from being developed. Particularly in cases challenging discriminatory zoning ordinances—the very cases that Justice Kennedy says are at the “heartland” of the FHA—plaintiffs would be required to both identify the myriad justifications that a town might use to defend discriminatory zoning decisions, and then marshal enough facts to plausibly show that each justification is unsupported, even when the town would be unable to support those reasons if pressed. HUD’s 2020 Rule failed to explain how these “heartland” cases could be brought under its proposed requirements, or else it was not faithfully following *ICP* as it purported to do.

c. *Wards Cove* cannot justify HUD’s 2020 pleading requirements.

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<sup>63</sup> *City of Black Jack*, 508 F.2d at 1184.

<sup>64</sup> *Huntington Branch, NAACP v. Town of Huntington, NY*, 844 F.2d 926, 940 (2d Cir. 1988).

<sup>65</sup> *Id.*

<sup>66</sup> *Town of Huntington, NY v. Huntington Branch, NAACP*, 488 U.S. 15, 17 (1988).

The 2020 Rule suggested that HUD believed putting this pleading burden on the plaintiff makes FHA jurisprudence more consistent with the Title VII analysis articulated in the 1989 Supreme Court case *Wards Cove Packing Co., Inc., v. Antonio*, 490 U.S. 642 (1989), but quickly overruled by statute with respect to Title VII itself.<sup>67</sup> As an initial matter, even if this were true—and it is not—that would not justify the 2020 Rule’s changes. The 2013 Rule—promulgated more than two decades after *Wards Cove*—declined to apply *Wards Cove* to the FHA where it was inconsistent with case law and agency practice that had prevailed subsequent to *Wards Cove*, and nothing happened in the interim to require revisiting that decision.

*ICP* cites *Wards Cove* for a specific proposition that is fully consistent with the 2013 Rule: plaintiffs must identify a concrete policy that they contend causes a disparate impact, to ensure that they are not really seeking changes in *outcomes* untethered from policies.<sup>68</sup> Nowhere does *ICP* suggest that, in doing so, it was requiring a rewriting of the 2013 Rule to conform to *other* aspects of *Wards Cove*. To the contrary, it cites the 2013 Rule and post-*Wards Cove* precedent under both Title VII and the FHA more frequently—and more on point to the changes that the 2020 Rule made. The 2020 Rule failed to explain how *ICP* nonetheless requires changes to adhere to *Wards Cove*, a 30-year-old decision under a different statute.

But in any event, even if *Wards Cove* applied, it cannot support the 2020 Rule’s novel pleading requirements; if anything, *Wards Cove*’s reasoning suggests that putting such a burden on plaintiff at the pleading stage is *not* appropriate. *Wards Cove*’s reasoning is based largely on careful analysis of the practical realities of the Title VII compliance function and litigating a Title VII claim, to ensure both that Title VII creates the appropriate incentives for employers and that plaintiffs can challenge Title VII violations. Unlike the 2020 Rule, *Wards Cove* engages with the practical realities of litigating a discrimination case and sets forth requirements that, in its view, are consistent with continued vigorous enforcement rather than improperly foreclosing meritorious claims. HUD performed a similar analysis with respect to the FHA when promulgating the 2013 Rule, but it ignored these issues in its 2020 Rule.

Like *ICP*, *Wards Cove* was a case decided after discovery and a trial, and so it does not directly opine on pleading standards. Rather, it held—consistent with the 2013 Rule—that a plaintiff must establish, as part of its *prima facie* case (*e.g.*, to survive summary judgment or to prevail at trial) that a specific practice caused a disparate impact.<sup>69</sup> Having to prove that a specific practice causes discriminatory effect will not be “unduly burdensome on Title VII plaintiffs,” *Wards Cove* reasoned, because “liberal civil discovery rules give plaintiffs broad access to employers’ records in an effort to document their claims.”<sup>70</sup> In particular, it noted, many employers must maintain records regarding the impact of their tests and other selection procedures—including the individual components of their selection process—based on race or sex.<sup>71</sup> Plaintiffs therefore “will have the benefit of these tools to meet their burden of showing a

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<sup>67</sup> 2020 Rule, 85 Fed. Reg. at 60308.

<sup>68</sup> *ICP*, 135 S. Ct. at 2523.

<sup>69</sup> 490 U.S. at 657.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 657-58.

causal link between challenged employment practices and racial imbalances in the work force.”<sup>72</sup> *Wards Cove* took care not to impose on plaintiffs a burden that would make a Title VII disparate-impact claim impossible to prove in practice.

HUD’s 2020 Rule, in contrast, would stop cold at the pleading stage what should be meritorious disparate impact claims under existing law.

Not only is *Wards Cove*’s reasoning inconsistent with that of the 2020 Rule, but it did not require anything like the 2020 Rule’s requirement that a plaintiff plausibly plead with facts *before defendant provides evidence supporting its policy’s legitimacy* that a policy is “arbitrary, artificial, and unnecessary.” Rather, it stated—consistent with the 2013 Rule—that a plaintiff’s burden at the prima facie stage (*i.e.*, at the summary judgment stage, after the close of discovery) is to demonstrate “that specific elements of the petitioners’ hiring process have a significantly disparate impact on nonwhites.”<sup>73</sup> That shifted the burden to the defendant, under *Wards Cove*, to “produc[e] evidence of a business justification for his employment practice.”<sup>74</sup> Based on that evidentiary record, the plaintiff could prove either that the practice serves no legitimate purpose or that the legitimate purpose could be served by an alternative “without a similarly undesirable racial effect.”<sup>75</sup> The plaintiff would be in a position to prove this, with an evidentiary record as well as the defendant’s articulation of what purpose the challenged policy purportedly serves.

None of this is consistent with HUD’s 2020 Rule that requires the plaintiff to articulate with specific facts why a rule is arbitrary, artificial, and unnecessary at the pleading stage, before receiving the relevant evidence and before the defendant even has articulated its own justification. Thus, *Wards Cove* does not justify, let alone require, the 2020 Rule changes.

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HUD should withdraw the 2020 Rule’s new and unjustified requirement that plaintiffs plead facts showing that any challenged policy is “arbitrary,” “artificial,” *and* “unnecessary.” That new requirement is based on a fundamental misreading of *ICP* and *Wards Cove*; it uses those familiar words out of context, in a way that neither *ICP* nor any other Supreme Court case does; and it results in a radical narrowing of the disparate-impact doctrine, which is the *opposite* of what *ICP* requires. There is no basis for imposing a pleading requirement that does not appear in, and is inconsistent with, *ICP*.

#### 4. *There Is No Basis In ICP or Any Other Case for the 2020 Rule’s New Causation Pleading Requirements.*

Two of the five elements in the 2020 Rule’s new pleading requirement are closely linked, as they both address the required causal relationship between the challenged policy and its alleged effects on protected classes and plaintiffs. The 2020 Rule casts them as implementation

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<sup>72</sup> *Id.*

<sup>73</sup> *Wards Cove*, 490 U.S. at 658.

<sup>74</sup> *Id.* at 659.

<sup>75</sup> *Id.* at 660 (internal quotation omitted).



of *ICP* and another Supreme Court decision, *Bank of America v. City of Miami, Florida*, 137 S. Ct. 1296 (2017). But these causation elements do not fairly implement those decisions. Instead, they adopt entirely new “robust causal link” requirements that do not appear in those cases and would radically circumscribe the disparate-impact doctrine.

- a. *ICP* does not require plaintiffs to show a causal link between a policy and differential effect that is more “robust” than the standard causation requirement, and imposing any such heightened causation requirement would hobble disparate-impact litigation.

The 2020 Rule requires, first, that there is “a robust causal link between the challenged policy or practice and the adverse effect on members of a protected class.”<sup>76</sup> Thus, it requires not just that the policy cause a disparate impact, but that there exists a “robust causal link,” a term it leaves undefined but that presumably means that plaintiffs must plead and prove something more than normal causation.

*ICP* does not justify (let alone mandate) requiring plaintiffs to go beyond simply showing causation to demonstrating a more “robust” causal link, and the 2020 Rule failed to otherwise justify changes that would have such dramatic impact. The 2020 Rule appeared to rely on, but misquoted, a passage from *ICP* that states:

As HUD itself recognized in its recent rulemaking, disparate-impact liability “does not mandate that affordable housing be located in neighborhoods with any particular characteristic.” 78 Fed. Reg. 11476. In a similar vein, a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity. *A robust causality requirement* ensures that “[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact” and thus protects defendants from being held liable for racial disparities they did not create.<sup>77</sup>

Thus, the Court called for a “robust causality requirement” that ensures that a plaintiff identifies not merely statistical *disparities*, but also a *policy* that causes those disparities. The robust causality requirement refers to the existence of a causal connection between the defendants’ policy and a statistical disparity, nothing more. *ICP* did *not* require “a robust causal link” between a challenged practice and discriminatory effect that exceeds in any way the causation requirement that has always existed. The 2020 Rule, while purporting to take this requirement directly from *ICP*, failed to quote it accurately and thereby completely changed its meaning.

As articulated in *ICP*, the “robust causality requirement” mirrors the 2013 Rule, which requires that plaintiff prove “that a challenged practice caused or predictably will cause a

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<sup>76</sup> 2020 Rule, 85 Fed. Reg. at 60332.

<sup>77</sup> *ICP*, 135 S. Ct. at 2523 (quoting *Wards Cove*, 490 U.S. at 653) (brackets and ellipses in original) (emphasis added); see 2020 Rule, 85 Fed. Reg. at 60320 n.141 (quoting *ICP*).

discriminatory effect.”<sup>78</sup> Indeed, HUD’s 2013 Rule proved fully sufficient to vindicate the Supreme Court’s concerns in *ICP* itself; that case was dismissed on remand for failure to meet the HUD Rule’s causation requirements, which the district court had not previously applied.<sup>79</sup> It thus is clear in context that the problem in *ICP* was *not* that the 2013 Rule (then in effect) was inadequate, but that the district court had adjudicated the case without applying the safeguards built into the 2013 Rule.

The phrase “robust causal link” does *not* appear in *ICP*, nor does it have any obvious meaning given the full context in which *ICP* described the “robust causality requirement” of the 2013 Rule. There was no basis for amending the 2013 Rule causation requirements that have always proven fully sufficient to vindicate *ICP*’s concerns about defendants facing liability for disparities their policies did not create—including in that very case on remand. Nor is it defensible to introduce as a new pleading requirement an undefined phrase that has no pre-existing meaning in the case law. The 2020 Rule did not identify any cases or factual situations in which it intended this novel phrase “robust causal link” to change the outcome, meaning that NFHA can only speculate as to what substantive change, exactly, the 2020 Rule was intended to achieve. All that is clear is that the 2020 Rule was intended to require plaintiffs to show that the policy or practice is “the direct cause,” which apparently means simply *more* causation, in order to make disparate-impact claims harder to bring.<sup>80</sup>

The only “explanation” as to this novel phrase’s exact meaning provided in the 2020 Rule is this from the comments: “HUD equates being ‘responsible’ for observed statistical disparities with being the actual cause of those disparities.”<sup>81</sup> This sentence is untethered to any text in the 2020 Rule or, for that matter, in *ICP*. Instead, the 2020 Rule cites only to *Wards Cove*. As described above, there is no obvious reason (and HUD’s 2020 Rule provides none) for how *Wards Cove*—a case decided under a different statute, more than two decades before HUD promulgated the current disparate-impact rule—can require revision of the 2013 Rule given the 2013 Rule codified the then prevailing case law for bringing a discriminatory effect claim and provided clarity to all parties by doing so. But in any event, even if *Wards Cove* were issued now, it would not support the principle articulated in the 2020 Rule.

What *Wards Cove* held was that, in a case relying on comparative statistical evidence to make out a prima facie case that defendant’s hiring and promotion practices have a disparate

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<sup>78</sup> 24 C.F.R. § 100.500(c)(1).

<sup>79</sup> See *Inclusive Cmty. Project, Inc. v. Texas Dep’t of Hous. & Cmty Affairs*, No. 3:08-CV-0546-D, 2015 WL 5916220, at \*4 (N.D. Tex. Oct. 8, 2015) (“[G]iven the significant developments in this case on appeal, the court concludes that the interests of justice and fundamental fairness require not only that ICP’s disparate impact claim be decided anew under the burden-shifting regimen adopted by HUD and the Fifth Circuit, but that the court start with whether ICP has established a prima facie case. See 24 C.F.R. § 100.500(c)(1).”); *Inclusive Cmty. Project, Inc. v. Texas Dep’t of Hous. & Cmty Affairs*, No. 3:08-CV-0546-D, 2016 WL 4494322, at \*6 (Aug. 26, 2016) (“ICP has failed to point to a specific, facially neutral policy that purportedly caused a racially disparate impact.”).

<sup>80</sup> 2020 Rule, 85 Fed. Reg. at 60312.

<sup>81</sup> 2020 Rule, 85 Fed. Reg. at 60308 (referencing *Wards Cove*, 490 U.S. 642).

impact, a plaintiff must rely on the *right* comparison. It found that, in that case, plaintiff improperly relied on a comparison between the low percentage of non-white employees working in preferred non-cannery jobs and the much higher percentage of non-white employees working in less desirable cannery jobs. Plaintiff's analysis did not include the pool of qualified applicants or prospective applicants for such positions.<sup>82</sup> Without that additional information, the comparison didn't establish that any specific hiring or promotion policy of the defendant caused these disparate employment outcomes. This holding is consistent with the 2013 Rule and the well-reasoned FHA precedent that it codifies (though, notably, not with the first decision that the district court reached in *ICP* without the benefit of applying the 2013 Rule).

The 2020 Rule did not identify any FHA decisions that have failed to correctly apply this well-established principle that comparisons used to demonstrate the disparate impact caused by a challenged policy must be properly tailored to show such a causal effect. Nor did the 2020 Rule appear to be aimed at implementing that actual holding of *Wards Cove*. Instead, the 2020 Rule comments suggested that a plaintiff must satisfy this requirement—using proper statistical comparisons to isolate the effects of a defendant's challenged policy from other variables contributing to the disparate outcomes—at the *pleading stage*, *i.e.*, before a plaintiff has access to the data (such as the applicant pool in *Wards Cove*) that would permit this comparison. The 2020 Rule did not explain how this is feasible or consistent with current doctrine, and it is neither. Rather, it amounts to cutting off statistics-based claims altogether, by requiring the dispositive statistical analysis to be performed before the relevant data can be gathered.

The 2020 Rule's "robust causal link" pleading requirement thus finds no support in *ICP*, *Wards Cove*, or the practical realities of litigating disparate-impact claims under the FHA. Accordingly, lower courts have correctly declined to construe *ICP* in this manner. As described further below, most post-*ICP* circuit courts have recognized that the "robust causality requirement" articulated in *ICP* simply reflects the long-standing requirements codified in the 2013 Rule.

One case, *Inclusive Communities Project, Inc., v. Lincoln Property Co.*, 920 F.3d 890 (5th Cir. 2019), is an outlier and wrongly decided. That case is clearly inconsistent with *ICP* and other established disparate impact case law; it imposes a causation requirement (purportedly grounded in the "robust causality requirement," but bearing no resemblance to any reasonable reading of *ICP*) that makes no practical sense and would eliminate disparate impact liability.

The 2020 Rule comments assert that "HUD recognizes the concerns that commenters have with the Lincoln Property decision and does not intend to endorse this decision," but then it cites to *Lincoln Property* "as one of several cases which recognize the robust causality requirement articulated in *Inclusive Communities*."<sup>83</sup> HUD should now clearly articulate that the causation standard articulated in *Lincoln Property* is inconsistent with *ICP* and HUD rejects it.

*Lincoln Property* affirmed the dismissal of a complaint that alleged that apartment owners and managers' refusal to accept Section 8 vouchers in complexes in majority-white, high

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<sup>82</sup> *Wards Cove*, 490 U.S. at 651.

<sup>83</sup> 2020 Rule, 85 Fed. Reg. at 60313.

opportunity areas violated the FHA. The complaint alleged that this policy perpetuated segregation because the majority of affected Section 8 voucher holders were African American and were thereby precluded from living in majority-white areas. *Lincoln Property* found that these allegations failed to adequately plead a causal link between the defendants' challenged policy and the perpetuation of segregation. That was so, it reasoned, because the complaint did not allege that the defendants "caused black persons to be the dominant group of voucher holders in the Dallas metro area," or that the defendants "bear any responsibility for the geographic distribution of minorities throughout the Dallas area prior to the implementation of the 'no vouchers' policy."<sup>84</sup> Put simply, *Lincoln Property* reasoned that it is insufficient to plead and prove that a defendant's challenged policy has a discriminatory impact based on race because of its interaction with pre-existing societal disparities; it found that the defendants must be responsible for the underlying societal disparities, too.

This is not how disparate-impact doctrine has ever worked. As the dissent in *Lincoln Property* correctly and succinctly stated, such reasoning "would render disparate-impact liability under the FHA a dead letter."<sup>85</sup> The premise of disparate-impact doctrine, from *Griggs* on, has been that facially neutral policies have differential results based on race or other protected class because history (much of it discriminatory) has situated people differently. If the defendant must be proven responsible for that history in addition to the challenged policy, a disparate impact claim could never be brought.

In *Griggs*, for example, the employer was liable for using an unnecessary employment test that had a discriminatory effect on African-American job applicants because (due to a history of educational discrimination) they had disproportionately lower educational levels and test scores. Under *Lincoln Property*, that would not matter unless the employer was responsible for those educational disparities—which no employer would be. Similarly, no housing providers are responsible for the underlying residential segregation against which they operate. There was no need to show, for example, that the defendant in the heartland *Black Jack* case was responsible for the historical racial composition of the town. Accordingly, *Lincoln Property* generated a seven-judge dissent from the denial of rehearing en banc, explaining in detail the myriad problems with the majority's reasoning, including that it is inconsistent with Supreme Court precedent and the continued existence of disparate-impact doctrine.<sup>86</sup> *Lincoln Property* is wildly inconsistent with *ICP* (which upheld the availability of disparate-impact claims under the FHA). And while it shares with the 2020 Rule an unjustified reading of *ICP* as fundamentally changing disparate-impact doctrine, the unreasonable gloss it puts on *ICP* is not the same as the 2020 Rule's.

Every other circuit to apply *ICP*, on the other hand, has correctly understood the "robust causality requirement" to be consistent with HUD's 2013 Rule. In *MHANY Management, Inc. v. County of Nassau*, 819 F.3d 581 (2d Cir. 2016), for example, the Second Circuit found that a majority-white town's zoning decision precluding multifamily houses and meaningful development of affordable housing violated the FHA by perpetuating segregation, although the

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<sup>84</sup> *Inclusive Cmty. Project, Inc. v. Lincoln Property Co.*, 920 F.3d 890,907 (5th Cir. 2019).

<sup>85</sup> *Id.* at 925 (Davis, W., dissenting).

<sup>86</sup> *Lincoln Property Co.*, 930 F.3d 890 (Haynes, dissent from denial of rehearing en banc).

town was already quite segregated when the law was passed.<sup>87</sup> The Fourth Circuit, too, rejected the notion that a defendant must be responsible for the underlying disparity before it can be held responsible for its policy's discriminatory effects.<sup>88</sup>

HUD should reinstate the 2013 Rule and rescind the 2020 Rule that adds the phrase "robust causal link" and the 2013 Rule causation standards for the pleading stage should be maintained.

5. *HUD's 2020 Rule Changes to the Type and Strength of Defendants' Legitimate Interests Are Inconsistent with ICP and Exceed HUD's Authority.*

The 2020 Rule dramatically changes the type and strength of defendants' legitimate interest that would make a policy lawful even after plaintiff establishes that the policy has a disparate impact based on race or other protected class. It also shifts much of the defendant's burden for proving such an interest to the plaintiff to *disprove*. These changes would result in dismissal of what should be meritorious disparate impact claims under existing law, and would insulate from scrutiny many policies that have an unjustified or unnecessary disparate impact. They are not consistent with, let alone required by, *ICP*. The 2020 Rule makes no attempt to justify them otherwise, and no such justification would be possible.

The 2013 Rule provides that, once a plaintiff establishes that a policy has the necessary discriminatory effect, the defendant must establish that the policy is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests[.]"<sup>89</sup> The defendant must do so with "evidence"; its justification "may not be hypothetical or speculative."<sup>90</sup> If the defendant meets that burden, the plaintiff must show that those interests "could be served by another practice that has a less discriminatory effect."<sup>91</sup> For a defendant's interest to be "substantial," it must "be a core interest of the organization that has a direct relationship to the function of that organization."<sup>92</sup>

As HUD explained in the 2013 Rule, these burdens are consistent with both well-established FHA case law<sup>93</sup> and longstanding federal agency practice. They are intended to be largely synonymous with the "business necessity" standard that applies to employment discrimination claims under Title VII, except removing the word "business" to clarify that this test applies to activities (such as municipal zoning decisions) that are not business.<sup>94</sup> Both HUD

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<sup>87</sup> *MHANY Management, Inc. v. County of Nassau*, 819 F.3d 581, 588, 619-20 (2d Cir. 2016).

<sup>88</sup> *See, e.g., Reyes v. Waples Mobile Home Park Ltd P'ship*, 903 F.3d 415, 429-430 (4th Cir. 2018).

<sup>89</sup> 2013 Rule, 78 Fed. Reg. at 11482.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> 2013 Rule, 78 Fed. Reg. at 11470.

<sup>93</sup> *See, e.g., Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 902 (8th Cir. 2005).

<sup>94</sup> 2013 Rule, 78 Fed. Reg. at 11470.

and financial regulators had applied the “business necessity” standard for many years, and so this standard was chosen to maintain continuity for regulated entities.<sup>95</sup>

In its 2013 Rule, HUD rejected the suggestion that it remove “necessary” from the rule. It determined that its “substantial experience in administering the FHA confirms that requiring a challenged practice with a discriminatory effect to be necessary best effectuates the broad remedial goal of the Act.”<sup>96</sup> It observed that, since at least 1994, “lenders have been on notice that they must prove the necessity of a challenged practice to their business under both the Fair Housing Act and ECOA.”<sup>97</sup> It found that this established standard was “clear” and “uniform,” permitting covered entities to “conduct consistent self-testing and compliance reviews, document their substantial, legitimate nondiscriminatory interests, and resolve potential issues so as to prevent future litigation.”<sup>98</sup> Moreover, it reasoned, “in order to effectuate the FHA’s broad, remedial goal, practices with discriminatory effects cannot be justified based on interests of an insubstantial nature.”<sup>99</sup>

The 2020 Rule dramatically changed these provisions of the rule, without addressing any of its prior findings and rationales for adopting them. In doing so, the 2020 Rule would permit defendants to maintain policies that have a discriminatory effect even if those policies are not necessary to achieve any substantial interest.

First, the 2020 Rule requires the defendant only to “produc[e] evidence” that its policy “*advances a valid interest,*” rather than requiring it to *prove* that its policy is “*necessary to achieve*” that interest.<sup>100</sup> This component of the 2020 Rule is inconsistent with HUD’s 2013 Rule, as well as with *ICP*’s requirement that “housing authorities and private developers be allowed to maintain a policy if they can *prove it is necessary* to achieve a valid interest.”<sup>101</sup>

HUD’s 2020 Rule then requires the plaintiff to demonstrate that a less discriminatory alternative “*exists that would serve the defendant’s identified interest (or interests) in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant.*”<sup>102</sup> The 2020 Rule additionally provides that a “valid interest” includes “a practical business, profit, policy consideration, or requirement of law.”<sup>103</sup> It eliminates entirely (without acknowledgment) the requirement that the valid interest be substantial.

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<sup>95</sup> *Id.* & n.110 (citing HUD’s 1998 Enforcement Handbook, a HUD ALJ decision, and the 1994 Joint Policy Statement of agencies regulating lending); *Id.* at 11471 & n.116 (citing Joint Policy Statement as well as Interagency Fair Lending Examination Procedures).

<sup>96</sup> 2013 Rule, 78 Fed. Reg. at 11471.

<sup>97</sup> *Id.* at 11472.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 11470.

<sup>100</sup> 2020 Rule, 85 Fed. Reg. at 60332 (emphasis added).

<sup>101</sup> *ICP*, 135 S. Ct. at 2523 (emphasis added).

<sup>102</sup> 2020 Rule, 85 Fed. Reg. at 60333 (emphasis added).

<sup>103</sup> *Id.* at 60332.

The 2020 Rule thus would (1) require a challenged policy only to “advance” any valid interest rather than be “necessary” to achieve it; (2) define that valid interest to include “profit” as well as any “policy consideration,” no matter how discriminatory, and eliminate the requirement that the interest be “substantial”; (3) excuse a defendant from having to *prove* even that reduced standard; (4) require a plaintiff to prove that an alternative, less discriminatory policy already “exists” somewhere, regardless of whether a defendant could feasibly implement it; (5) require the plaintiff to prove that this already existing alternative would be “equally effective” in serving the identified interest, not just good enough; and (6) require the plaintiff to show that adopting this already existing alternative would impose *no* material costs or burdens on the defendant, even if the defendant could readily bear those costs and burdens.

As acknowledged by the court in the course of preliminarily enjoining the 2020 Rule, these “significant alterations” “run the risk of effectively neutering disparate impact liability under the Fair Housing Act” and “appear inadequately justified.”<sup>104</sup> Each of these changes individually weakens the disparate-impact standard; collectively, they gut it. Under the 2020 Rule, a defendant’s only burden is to have some reason to think its policy “advances” some valid interest, *i.e.*, to not behave completely arbitrarily or intentionally discriminate. And ultimately, even a policy with the most flagrantly discriminatory effects would pass legal muster so long as a less discriminatory alternative is the least bit more costly and burdensome. Moreover, because a defendant need not adopt a less discriminatory alternative unless it actually “exists,” the 2020 Rule would give covered industries and government entities the incentive *not* to seek out such alternatives proactively. The only time a policy could be successfully challenged under the 2020 Rule is if an entity refuses to adopt a less discriminatory alternative that is already in place elsewhere and would cost nothing to adopt. That is to say, the entity would have to be making the irrational decision to continue a discriminatory policy for no reason after its peers have abandoned it. That is generally thought to be a showing sufficient to establish *intentional* discrimination.

The 2020 Rule did not acknowledge that it was making these changes. It made no attempt to justify these changes, reconcile them with the conclusions it reached in the 2013 Rule, or explain how any of this is consistent with the disparate-impact standard continuing to play its current role outside litigation, *i.e.*, structuring efforts by lenders and others to seek out and adopt the most inclusive policies possible consistent with business necessity.

Nor did the 2020 Rule attempt to justify this change by reference to *ICP*, and any such attempt would fail. To the contrary, *ICP* characterizes the defendant’s burden multiple times in ways that are consistent with the 2013 Rule, and inconsistent with the 2020 Rule. *See, e.g., ICP*, 135 S. Ct. at 2522 (characterizing defendant’s burden as “analogous to the business necessity standard under Title VII” and pointing to *Ricci v. DeStefano*, 557 U.S. 557 (2009)); *id.* at 2523 (housing authorities and private developers must “be allowed to maintain a policy if they *can prove it is necessary* to achieve a valid interest”) (emphasis added). Indeed, the very “artificial, arbitrary, and unnecessary” formulation for invalid rules that *ICP* quotes, and that the 2020 Rule relies on elsewhere, is inconsistent with the 2020 Rule’s removal of the requirement that valid rules be “necessary” to serve a valid interest.

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<sup>104</sup> *Massachusetts Fair Housing Center v. HUD*, 496 F. Supp. 3d 600, 611 (D. Mass. 2020).

That is unsurprising, because the 2013 Rule already addressed the issues that manifested in *ICP* itself with respect to the plaintiff’s and defendant’s burdens. Prior to the Supreme Court’s decision in *ICP*, the district court had required the *defendant* to prove that no other less discriminatory alternatives would advance its interests, rather than (as provided by the 2013 Rule) requiring the *plaintiff* to prove that an alternative would.<sup>105</sup> The 2013 Rule corrected this problem. By the time the Supreme Court heard the case, the Fifth Circuit already had reversed and remanded on the ground that the district court’s burden allocation was inconsistent with the 2013 Rule.<sup>106</sup>

The 2020 Rule’s removal of the “necessity” standard altogether thus appears to be a solution in search of a problem. The 2013 Rule accurately restates well-established law, and its allocation of burdens has worked well to ensure that entities have the incentive to seek out less discriminatory practices while not forcing them to make changes that would prevent them from achieving legitimate interests. The 2020 Rule did not contend that this burden-allocation has caused any real-world problems, and it has not.

HUD got it right in 2013. NFHA and other fair housing advocates work regularly with regulated entities who make good-faith efforts to comply with disparate-impact requirements. Their experience is that those entities who wish to do so can implement effective compliance functions to ensure they are avoiding unnecessary discriminatory effects by seeking out less discriminatory alternatives where appropriate. Thus, the 2013 Rule (and, before that, the long-standing disparate-impact jurisprudence and regulatory procedures that the 2013 Rule codified) was well calibrated to provide the correct incentives for entities that are fully capable of taking reasonable steps to reduce unnecessary discriminatory effects in lending, housing, and elsewhere. The 2020 Rule, on the other hand, would eliminate those incentives by making only the most crudely discriminatory policy subject to challenge.

6. *HUD’s 2020 Rule is Inconsistent with the Overwhelming Weight of Disparate Impact Case Law Since Inclusive Communities.*

For all the reasons stated above, the 2020 Rule is a solution in search of a problem. The 2020 Rule claims that extensive changes are necessary because courts and the public need to reconcile how to implement HUD’s regulations consistent with *Inclusive Communities*, but the 2020 Rule makes clear that HUD itself had not surveyed—or tried to account for—post-*ICP* case law, the overwhelming weight of which is consistent with HUD’s 2013 Rule and inconsistent with HUD’s 2020 Rule. The 2020 Rule purported to realign the 2013 Rule to accord with *ICP*, but the 2013 Rule required no such realignment, since *ICP* did not change the prevailing law that the 2013 Rule codified. This is confirmed by post-*ICP* case law, which has continued to apply the 2013 Rule and pre-*ICP* doctrine. Courts have correctly found that, far from requiring the

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<sup>105</sup> *ICP*, 135 S. Ct. at 2514.

<sup>106</sup> *Id.* at 2515.



extensive changes that HUD is now proposing in the 2020 Rule, *ICP* approved the basic framework presented in the 2013 Rule.<sup>107</sup>

Yet the 2020 Rule does not meaningfully address at least three circuit courts of appeals that found that the 2013 Rule (as well as pre-*ICP* circuit precedent) remains valid; even as it purports to reconcile regulation to case law, it fails to grapple with the actual case law that continues to apply the existing regulation without change.

For example, the 2020 Rule did not properly account for the holding in *MHANY Management, Inc. v. County of Nassau*, 819 F.3d 581 (2d Cir. 2016). In that case, the Second Circuit explicitly found that *ICP* did not change disparate impact law and, instead, adopted the framework in HUD's existing rule. Consistent with the 2013 Rule, it found that plaintiff's burden to establish a prima facie case (at trial, not at the pleading stage) requires showing only: "(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices."<sup>108</sup> That long-standing test, it found, was left unchanged by *ICP*. The burden then "shifts to the defendant to prove that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest."<sup>109</sup>

The court in *MHANY Management* held that "[t]he Supreme Court implicitly adopted HUD's approach"—reflected in the existing rule—and it remanded for the district court to apply HUD's methodology.<sup>110</sup> Moreover, the Second Circuit noted it was "mindful of the Supreme Court's admonishment that all too often 'zoning laws and other housing restrictions . . . function unfairly to exclude minorities from certain neighborhoods without any sufficient justification' and that '[s]uits targeting such practices reside at the heartland of disparate-impact liability.'"<sup>111</sup>

The Fourth Circuit applied a similar approach in *Reyes v. Waples Mobile Home Park Limited Partnership*, 903 F.3d 415 (4th Cir. 2018), confirming that *ICP* did not change disparate-impact law. *Reyes* noted:

In *Inclusive Communities*, the Supreme Court explained that an FHA disparate-impact claim should be analyzed under a three-step, burden-shifting framework. Under the first step, the plaintiff must demonstrate a robust causal connection between the defendant's challenged policy and the disparate impact on the protected class. Under the second step,

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<sup>107</sup> See, e.g., *Prop. Cas. Insurers Assoc. v. Carson*, No. 12-cv-10456, 2017 WL 2653069, at \*9 (N.D. Ill. June 20, 2017) ("[T]he 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."); *MHANY Mgmt., Inc.*, 819 F.3d at 618 (explaining that in *ICP*, "[t]he Supreme Court implicitly adopted HUD's approach").

<sup>108</sup> *MHANY Mgmt., Inc.*, 819 F.3d at 617 (citing *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 52-3 (2d Cir. 2002)) (quotations omitted).

<sup>109</sup> *Id.* at 617 (citing *Tsombanidis v. West Haven Fire Dept.*, 352 F.3d 565, 575 (2d Cir. 2003) (quotations omitted)).

<sup>110</sup> *Id.* at 618-29.

<sup>111</sup> *Id.* at 619 (quoting *ICP*, 135 S. Ct. at 2521-22).

the defendant has the burden of persuasion to “state and explain the valid interest served by their policies.” Under the third step of the framework, and in order to establish liability, the plaintiff has the burden to prove that the defendant’s asserted interests “could be served by another practice that has a less discriminatory effect.”<sup>112</sup>

The “robust causality requirement” that *ICP* articulated, *Reyes* explained, is nothing more than a restatement of the requirement (already present in the 2013 Rule) that the plaintiff identify a specific practice or practices causing a disparate impact on a protected class.<sup>113</sup> The court found that its pre-*ICP* FHA disparate-impact cases apply the same “robust causality” requirement and thus “are still good law.”<sup>114</sup>

Other post-*ICP* decisions illustrate that, if anything, *ICP* reflects a more *expansive* view of disparate impact than some pre-*ICP* precedent (decided without the benefit of the 2013 Rule) acknowledged. In *Avenue 6E Investments, LLC v. City of Yuma, Ariz.*, 818 F.3d 493 (9th Cir. 2016), plaintiffs alleged that rejection of a zoning request caused a disparate impact by preventing minority consumers from purchasing affordable homes in a particular area. The district court granted summary judgment on the grounds that those consumers were not truly harmed because there existed an ample stock of affordable housing elsewhere that they could purchase. The Ninth Circuit reversed. It noted that the lower court did not have the benefit of *ICP*, which made clear that cases challenging policies that perpetuated residential housing segregation are within the heartland of disparate-impact claims; it assumed that the lower court would have applied disparate impact more expansively with the benefit of *ICP* and the 2013 Rule.<sup>115</sup> On remand, the district court denied defendants’ motion for summary judgment, finding that the zoning decision challenged by plaintiffs “appear(s) to fall within what [the *ICP* Court] described as the ‘heartland of disparate-impact liability,’” which includes “cases that challenge ‘zoning laws and other housing restrictions that *function* unfairly to exclude minorities from certain neighborhoods without any sufficient justification.”<sup>116</sup>

In an unpublished decision, the Eleventh Circuit, too, declined to find that *ICP* changed the law such that its precedent was no longer valid. Analyzing the “robust causality requirement,” it found that requirement to be consistent with the requirements that it has required all along: “Even before the Supreme Court spoke to this question, this Court had arrived at similar conclusions, entirely consistent with *Inclusive Communities*, about the need for a relevant statistical showing in order to support a disparate-impact claim under the FHA.”<sup>117</sup>

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<sup>112</sup> *Reyes*, 903 F.3d at 424 (quoting *ICP*, 135 S. Ct. at 2515 (quoting 24 C.F.R. § 100.500(c)(3)) (citing *Wards Cove*, 490 U.S. at 653 *cert. denied sub nom. Waples Mobile Home Park Ltd. P’ship v. de Reyes*, 139 S. Ct. 2026 (2019)).

<sup>113</sup> *Reyes*, 903 F.3d at 425.

<sup>114</sup> 903 F.3d at 428 (citing *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 (1984); *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1064-66 (4th Cir. 1982)).

<sup>115</sup> *Avenue 6E Invs., LLC*, 818 F.3d at 511 n.12, 513.

<sup>116</sup> *Avenue 6E Invs., LLC v. City of Yuma, Ariz.*, No. 2:09-cv-0297, 2018 WL 582314, at \*6 (D. Ariz. Jan. 29, 2018).

<sup>117</sup> See *Oviedo Town Ctr. II, L.L.L.P. v. City of Oviedo, Fla.*, 759 F. App’x 828, 834–35 (11th Cir. 2018) (citing *Schwarz v. City of Treasure Island*, 544 F.3d 1201 (11th Cir. 2008)).

The weight of district court precedent since *ICP*, too, establishes that *ICP* did not change disparate-impact law at all, let alone to the extent necessary to support the additional pleading requirements and other drastic changes reflected in the 2020 Rule. NFHA is well aware of the currently prevailing standards in courts around the country, as many of the cases below have been litigated by NFHA and its members. Yet HUD’s 2020 Rule did not meaningfully grapple with any of them; it simply ignores the extent to which district courts have encountered no problems in continuing to apply the current rule and long-standing doctrine alongside *ICP*.

For example, *National Fair Housing Alliance v. Travelers Indemnity Co.*, 261 F. Supp. 3d 20 (D.D.C. 2017), held that plaintiffs sufficiently pled that failure to provide insurance to properties that rent to Section 8 voucher holders had a disparate impact on African Americans and women. Defendants argued that a “large body of case law holding that insurers . . . can be held liable under the FHA” under the disparate impact doctrine was “no longer sound given *Inclusive Communities*’ ‘robust causality requirement.’”<sup>118</sup> The court correctly rejected this argument, concluding that the refusal to provide insurance to landlords who rent to voucher recipients remained the “type of clear, non-speculative, connection[] that *Inclusive Communities* requires to make out a prima facie claim of disparate impact.”<sup>119</sup> It found that plaintiffs continued to meet well-established pleading standards by pleading the existence of statistical evidence demonstrating a causal connection between the challenged policy and the disparities.<sup>120</sup>

Similarly, *National Fair Housing Alliance v. Bank of America, N.A.*, 401 F. Supp. 3d 619 (D. Md. 2019), explained that the Supreme Court in *ICP*, “[h]ew[ed] closely to regulations promulgated by HUD in 2013, 24 C.F.R. § 100.500,” when it “announced a three-step burden shifting framework for disparate impact claims brought under the FHA.”<sup>121</sup> The court followed *ICP* by requiring the plaintiffs to identify a policy that would be proven to be among the “arbitrary, artificial, and unnecessary” policies that fail disparate-impact scrutiny, but it correctly did *not* require plaintiffs to plead specific facts demonstrating as much at the outset of the case.<sup>122</sup> The court did not require any allegations supporting that shorthand beyond identifying the policy, the disparities, and the causal connection between the two.

Other post-*ICP* courts likewise have followed long-standing FHA disparate impact jurisprudence, incorporating the safeguards and terminology described by *ICP* as restatements of HUD’s 2013 Rule rather than the sort of seismic shift in doctrine that the 2020 Rule embodies. Several of the many examples include:

- *Prince George’s County, Md. v. Wells Fargo & Co.*, 397 F. Supp. 3d 752, 766 (D. Md. 2019) (denying motion to dismiss disparate impact claim against lender as a result of discriminatory equity-stripping mortgage lending scheme and describing that first step only requires plaintiff to plead the existence of a policy that causes a disparate impact);

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<sup>118</sup> *Nat’l Fair Hous. Alliance*, 261 F. Supp. at 29-30.

<sup>119</sup> *Id.* at 30.

<sup>120</sup> *Id.* at 31-34.

<sup>121</sup> *Nat’l Fair Hous. Alliance*, 401 F. Supp. 3d at 631.

<sup>122</sup> *Id.* at 631-633.

- *Fortune Society v. Sandcastle Housing Development Fund Corp.*, 388 F. Supp. 3d 145, 172-173 (E.D.N.Y. 2019) (denying summary judgment against disparate impact claim based on landlord's criminal records ban on tenants and explaining that prima facie case requires showing only outwardly neutral practice that caused adverse impact);
- *Connecticut Fair Housing Center v. Corelogic Property Solutions, LLC*, 369 F. Supp. 3d 362, 377-78 (D. Conn. 2019) (denying motion to dismiss disparate impact claim against entity offering a criminal tenant screening product and explaining that prima facie case requires only neutral practice that causes adverse impact);
- *National Fair Housing Alliance v. Federal National Mortgage Ass'n*, 294 F. Supp. 3d 940, 947 (N.D. Cal. 2018) (denying motion to dismiss disparate impact claims based on failure to perform basic maintenance on foreclosed properties in minority neighborhoods and explaining that prima facie case requires identifying a policy that causes disparities);
- *City of Philadelphia v. Wells Fargo & Co.*, No. 17-cv-2203, 2018 WL 424451, at \*4 (E.D. Pa. Jan. 16, 2018) (denying motion to dismiss disparate impact claims based on discriminatory mortgage lending and explaining alleging a claim requires only identifying a specific policy that causes a disparity);
- *Paige v. New York City Housing Authority*, No. 17-cv-7481, 2018 WL 3863451, at \*3 (S.D.N.Y. Aug. 14, 2018) (denying motion to dismiss disparate impact claims based on failure to inspect lead paint that would adversely impact families with children and explaining that plaintiff need only plead identification of a policy that causes discriminatory effect);
- *Rhode Island Commission for Human Rights v. Graul*, 120 F. Supp. 3d 110, 123-24 (D.R.I. 2015) (granting partial summary judgment to plaintiffs in case challenging policy of prohibiting more than two persons in an apartment, which had a disparate impact on the basis of familial status and explaining that a prima facie case requires only identifying a neutral policy that causes an adverse impact);
- *Sams v. Ga West Gate LLC*, No. cv-415-282, 2017 WL 436281, at \*5 (S.D. Ga. Jan. 30, 2017) (denying motion to dismiss disparate impact claims based on apartment policy barring residency for any individual who had felony or misdemeanor convictions within 99 years and explaining that pleading requires only identifying a policy that causes disparities);
- *Winfield v. City of New York*, No. 15-cv-5236, 2016 WL 6208564, at \*5 (S.D.N.Y. Oct. 24, 2016) (denying motion to dismiss disparate impact claims based on community preference in city affordable housing program and explaining that prima facie case requires only identifying neutral policy that causes adverse impact);
- *Alexander v. Edgewood Management Corp.*, No.15-01140, 2016 WL 5957673, at \*2-3 (D.D.C. July 25, 2016) (denying motion to dismiss disparate impact claims related to policy of rejecting rental applicants based on criminal history).

In NFHA's comment in response to HUD's proposal leading up to the 2020 Rule, NFHA identified 36 district court cases that cited the 2013 Rule since *ICP*, and explained that only one of them suggested that *ICP* invalidated any aspect of the 2013 Rule; the others continued to

follow the burden-shifting analysis and other requirements set out in the 2013 Rule as well as HUD guidance documents that apply that Rule.<sup>123 124</sup>

Since that time, at least an additional nine district court cases citing HUD's Disparate Impact Rule have been decided, only one of which suggest any inconsistency between the 2013 Rule and *ICP*, and that case was another instance of a district court bound by the Fifth Circuit's incorrect decision in *Lincoln Properties*. See, e.g., *River Cross Land Co. v. Seminole County*, No. 6:18-cv-1646-ACC-LRH, 2021 WL 2291344, at \*24 (M.D. Fl. June 4, 2021) ("While the Supreme Court's decision [in *ICP*] did not rely on giving deference to HUD's 2013 regulation, it did cite the 2013 regulation and HUD's commentary on it with apparent approval several times."); *Jones v. City of Faribault*, No. 18-1643 (JRT/HB), 2021 WL 1192466 (D. Minn. Feb. 18, 2021); *Conn. Fair Housing Center v. CoreLogic Rental Property Solns., LLC*, 478 F. Supp. 3d 259 (Aug. 7, 2020) (and related decisions, see *CoreLogic*, No. 3:17-cv-705 (VLB), 2020 WL 401776 (D. Conn. Jan. 24, 2020)); *Borum v. Brentwood Vill., LLC*, No. 16-1723(RC), 2020 WL 1508906 (D.D.C. Mar. 30, 2020); *Southwest Fair Housing Council v. Maricopa Domestic Water Improvement District*, 438 F. Supp. 3d 991 (D. Ariz. Feb. 21, 2020); *NFHA v. Deutsche Bank Nat'l Trust*, No. 18 CV 839, 2019 WL 5963633 (N.D. Ill. Nov. 13, 2019); *Yellowstone Women's First Step House, Inc. v. City of Costa Mesa*, No. SACV 14-1852 JVS, 2019 WL 6998663 (C.D. Cal. Nov. 4, 2019). As noted, the only exception is a district court in the Fifth Circuit, which followed the Fifth Circuit's incorrect decision in *Lincoln Properties*. See *Treece v. Perrier Condominium Owners Assoc., Inc.*, ---F. Supp. 3d---, No. 17-10153, 2021 WL 533720 (E.D. La. Feb. 12, 2021).

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<sup>123</sup> In addition to the decisions cited *supra*, see also, e.g., *Hall v. Philadelphia Hous. Auth.*, No. 17-5753, 2019 WL 1545183, at \*5 & n.5 (E.D. Pa. Apr. 9, 2019); *Jackson v. Tryon Park Apartments, Inc.*, No. 6:18-cv-06238, 2019 WL 331635, at \*1 (W.D.N.Y. Jan. 25, 2019); *Johnson v. Johnson*, No. 4:18-CV-04138-RAL, 2018 WL 5983508, at \*2 (D.S.D. Nov. 14, 2018); *Paige v. N.Y.C. Hous. Auth.*, 2018 WL 3863451, at \*4; *Ekas v. Affinity Property Mgmt.*, No. 3:16-cv-1636, 2017 WL 7360366, at \*3 (D. Ore. Dec. 7, 2017); *Alms Residents Ass'n v. U.S. Dep't of Hous. & Urban Dev.*, No. 1:17-cv-605, 2017 WL 4553401, at \*11 (S.D. Ohio Oct. 12, 2017); *Oviedo Town Ctr. II, L.L.L.P. v. City of Oviedo, Fla.*, No. 6:16-cv-1005, 2017 WL 3621940, at \*4 (M.D. Fla. Aug. 23, 2017), *aff'd*, 759 Fed. App'x 828 (11th Cir. 2018); *Prop. Cas. Insurers Assoc. v. Carson*, 2017 WL 2653069, at \*9 ("[T]he 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."); *Martinez v. Optimus Props., LLC*, Nos. 2:16-cv-08598-SVW-MRW, 2017 WL 1040743, at \*2 (C.D. Cal. Mar. 14, 2017); *Borum v. Brentwood Vill., LLC*, 218 F. Supp. 3d 1, 21-22 (D.D.C. 2016); *Khodeir v. Sayyed*, No. C 15-8763, 2016 WL 5817003, at \*6 (S.D.N.Y. Sept. 28, 2016); *Crossroads Residents Organized for Stable and Secure ResidencieS v. MSP Crossroads Apartments LLC*, No. C 16-233, 2016 WL 3661146, at \*8 (D. Minn. July 5, 2016); *Azam v. City of Columbia Heights*, No. C No. 14-1044, 2016 WL 424966, at \*10 (D. Minn. Feb. 3, 2016).

<sup>124</sup> The only exception is *Inclusive Communities Project, Inc. v. Heartland Community Ass'n*, 399 F. Supp. 3d 657 (N.D. Tex. 2019), which followed the Fifth Circuit's incorrect decision in *Lincoln Properties*. In other words, no district court not bound by the erroneous *Lincoln Properties* holding has suggested that the 2013 HUD Rule is at all inconsistent with *ICP*.

Of course, these cases include the district court that preliminarily enjoined the 2020 Rule, finding that that Rule, “with its new and undefined terminology, altered burden-shifting framework, and perplexing defenses accomplish the opposite of clarity—it raises far more questions than it answers.” *Mass. Fair Housing Center v. HUD*, 496 F. Supp. 3d 600, 611 (D. Mass. 2020).

Even in the Title VII disparate impact context, courts reject arguments that *ICP* changed the disparate impact doctrine. For example, one court expressly rejected the argument that *ICP* imposed a new rule that it could not reject a defendant’s business-necessity defense if a plaintiff had not proven a less discriminatory alternative: “The Court notes that the Supreme Court majority favorably cited Title VII precedent and made no indication that it was changing a decades-old three-prong doctrine.”<sup>125</sup>

None of these cases support the novel pleading burdens, affirmative defenses, or burdens of proof HUD codified in the 2020 Rule. That is to say, even though the 2020 Rule purported not to make policy decisions, but to merely codify the law post-*ICP*, it utterly failed to grapple with the law that it claimed to be codifying. Without actually surveying this case law, HUD had no basis for its claim in the 2020 Rule that it is merely codifying the current framework consistent with new case law. By ignoring these cases, parties, courts and entities are left to puzzle over whether HUD’s 2020 Rule amendments would be consistent with this case law or deviate in unexplained ways.

The primary post-*ICP* case that the 2020 Rule does cite is *Ellis v. City of Minneapolis*, 860 F.3d 1106 (8th Cir. 2017), but that case does nothing more than apply well-established disparate-impact doctrine consistent with the 2013 Rule. The plaintiffs in *Ellis* alleged that “heightened enforcement of housing and rental standards” had a disparate impact on the availability of housing.<sup>126</sup> Because the plaintiffs’ complaint focused on an alleged “unannounced policy to *disregard* explicit City [housing code] policy,” it mounted “no serious challenge to the housing code itself.”<sup>127</sup> The court held the allegations were insufficient to plausibly suggest a “*policy* to misapply the housing code,” and so concluded that no prima face case was pled.<sup>128</sup> *Ellis* thus stands for the unremarkable proposition—consistent with the 2013 Rule as well as *ICP*—that disparate-impact claims require identification of: (1) a policy or practice; (2) that results in a disparate impact. Plaintiffs did not seriously contend that the code itself resulted in a disparate impact and they failed to otherwise identify a policy or practice. As a subsequent court explained, “the key problem with plaintiffs’ allegations [in *Ellis*] was that they failed to show that the city had a *policy*, that could cause a disparate impact.”<sup>129</sup> Indeed, while the Eighth Circuit did not cite the 2013 Rule in *Ellis*, the district court in that case did, and it reached

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<sup>125</sup> *Smith v. City of Boston, Mass.*, 144 F. Supp. 3d 177, 211 n.43 (D. Mass. 2015).

<sup>126</sup> *Ellis*, 860 F.3d at 1107.

<sup>127</sup> *Id.* at 1112.

<sup>128</sup> *Id.* at 1113.

<sup>129</sup> *Nat’l Fair Hous. Alliance*, 261 F. Supp. 3d at 33 (citing *Ellis v. City of Minneapolis, Minn.*, No. 14-CV-3045 (SRN/SER), 2016 WL 1222227, at \*6 (D. Minn. Mar. 28, 2016)).at ).

precisely the same result without suggesting that the result was in conflict with the 2013 Rule in any way.<sup>130</sup>

Accordingly, there is simply no justification in the case law for the entire premise underlying the 2020 Rule—that the 2013 Rule somehow fails to properly restate the law of disparate-impact claims post-*ICP*. To the contrary, the 2013 Rule better restates the law that currently prevails in the courts than the 2020 Rule does. Far from bringing clarity to the law, the 2020 Rule introduces uncertainty where none previously existed.

### **B. HUD’s 2013 Rule Outlines Meaningful Standards That Can Be Used to Evaluate Technological Developments in the Market, Including Those That Involve AI and Machine Learning.**

Disparate impact law has been critical in reducing inequities affecting housing, particularly for mortgage lending, home insurance, and other housing-related transactions that rely on automated models to predict risk. The disparate impact doctrine has caused lenders, insurers, and others to search for and implement the precise variable combinations that predict accurately *and* minimize disparate outcomes. In doing so, responsible businesses have come to recognize that incorporating disparate impact law into their operations is good for business because it helps them to find more qualified customers in all communities without regard to race, color, or national origin.

With the growing role of complex machine-learning models and artificial intelligence (“AI”) in all aspects of everyday life, this is especially important to avoid the unnecessary perpetuation of discrimination, segregation, and inequality going forward. HUD’s 2013 Rule provides meaningful standards that can be used to evaluate technological developments in the market, including those that involve AI and machine learning.

#### *1. HUD’s 2013 Rule Provides Meaningful Standards That Can Be Used to Appropriately Evaluate Automated Models and Make Them Fairer and More Effective.*

Today, models are ubiquitous in housing markets and are constantly being applied in new ways. For example, consumer reporting agencies offer tenant screening algorithms, some of which have serious discriminatory effects.<sup>131</sup> Entities like Facebook—which are not themselves housing providers but increasingly play an important gatekeeping role in the housing markets, just as brokers and agents always have—offer marketing and advertising services based on models, some of which have also been the focus of civil rights suits.<sup>132</sup> Localities are

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<sup>130</sup> See *Ellis v. City of Minneapolis* 2016 WL 1222227, at \*5.

<sup>131</sup> *Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Solutions, LLC*, 369 F. Supp. 3d 362 (D. Conn. 2019) (denying motion to dismiss FHA disparate impact and disparate treatment claims based on tenant screening algorithm).

<sup>132</sup> See NFHA, Facebook Settlement (Mar. 19, 2019), <https://nationalfairhousing.org/facebook-settlement/>.

experimenting with algorithmic-based zoning codes,<sup>133</sup> and real-estate companies are using sophisticated algorithms to locate developments<sup>134</sup> and rental properties.<sup>135</sup>

Fortunately, as these models have proliferated, the disparate impact doctrine has motivated lenders and others to continually improve and refine dynamic decision models and policies to minimize unequal outcomes while maintaining accuracy. Disparate impact law has reduced disparities in ways more profound than the modification of individual policies; it has changed the ongoing processes by which many lenders and other entities create and maintain the models they use to make loans or otherwise decide who gets to participate in the housing market. Lenders often combine numerous variables in models to predict an applicant's creditworthiness or risk of default. Different combinations of variables may predict risk with comparable effectiveness, yet some disproportionately exclude members of protected classes to a greater degree than others. Because of disparate impact, responsible lenders and financial institutions now identify and implement less discriminatory models consistent with their need for accuracy in predicting risk.

These advances would not have come to pass absent an incentive structure requiring lenders and others to revisit policies that have discriminatory effects and modify those that are unnecessary to achieve legitimate ends. Knowing they risk liability from both private litigants and federal regulators, many of the major players that shape the availability and terms of housing have adopted compliance systems to make their policies fairer. Disparate impact created and maintains that structure.

Thus, due to the Fair Housing Act's disparate impact doctrine, some lenders have gone from reliance on judgmental assessments of potential borrowers frequently infected by bias or stereotypes (whether knowingly or otherwise) to use of sophisticated statistical analyses to produce policies that are both less discriminatory and more predictive of risk. As a result, many lenders now are better at identifying qualified borrowers, without sacrificing the legitimate business need to identify real risk.

2. *HUD is Right to Reject the 2020 Rule's "Outcome Prediction Defense," which Would Have Exceeded HUD's Authority and Wrongfully Undermined Meritorious Claims Related to Lending and Insurance.*

HUD has no authority to create safe harbors, exemptions, or exceptions from Fair Housing Act coverage. Agencies require statutory authority to waive, or to grant a safe harbor,

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<sup>133</sup> See Danny Crichton, *Algorithmic Zoning Could Be the Answer To Cheaper Housing and More Equitable Cities*, TechCrunch (Feb. 19, 2018), <https://techcrunch.com/2018/02/19/algorithmic-zoning-could-be-the-answer-to-cheaper-housing-and-more-equitable-cities/>.

<sup>134</sup> See Matthew Stewart, *The Real Estate Sector is Using Algorithms to Work Out the Best Places to Gentrify*, Failed Architecture (Feb. 11, 2019), <https://failedarchitecture.com/the-extractive-growth-of-artificially-intelligent-real-estate/>.

<sup>135</sup> Shawn Tully, *Meet the A.I. Landlord That's Building a Single-Family-Home Empire*, Fortune (June 21, 2019), <https://fortune.com/longform/single-family-home-ai-algorithms/>.



exemption or exception from, a statutory requirement.<sup>136</sup> The Fair Housing Act does not provide HUD such authority and HUD has acknowledged this limitation previously.<sup>137</sup> Courts too have declined to adopt these types of exemptions and safe harbors from disparate impact liability as beyond their authority.<sup>138</sup>

Despite this clear lack of authority, HUD's 2020 Rule created a new "Outcome Prediction Defense" purportedly available to the defendant after the pleading stage. Section 100.500(d)(2)(i) of the 2020 Rule reads as follows:

(2) *After the pleading stage.* The defendant may establish that the plaintiff has failed to meet the burden of proof to establish a discriminatory effects claim under paragraph (c) of this section, by demonstrating any of the following:

(i) The policy or practice is intended to predict an occurrence of an outcome, the prediction represents a valid interest, and the outcome predicted by the policy or practice does not or would not have a disparate impact on protected classes compared to similarly situated individuals not part of the protected class, with respect to the allegations under paragraph (b). This is not an adequate defense, however, if the plaintiff demonstrates that an alternative, less discriminatory policy or practice would result in the same outcome of the policy or practice, without imposing materially greater costs on, or creating other material burdens for the defendant.

In the preamble to the 2020 Rule, HUD acknowledged that this section was specifically designed to address concerns about the use of disparate impact in connection with algorithms and was designed to be a "results-based approach."<sup>139</sup> HUD further stated:

The defense eliminates the issue of whether the challenged policy or practice is the use of an algorithm and who created or reviewed the algorithm. The defense also does not rely on whether the inputs are proxies for protected classes, eliminating the necessity for examining all the components of the algorithm.

Instead, HUD believes that the Final Rule is improved by focusing the inquiry on whether the defendant has a valid interest in predicting an outcome and whether the

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<sup>136</sup> See, e.g., *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977) (holding EPA could not provide variances from statutory requirement in absence of statutory authority); *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977) (holding EPA does not have authority to exempt categories of point sources from requirements of the CWA).

<sup>137</sup> 2013 Rule, 78 Fed. Reg. 11477 ("HUD notes further that Congress created various exemptions from liability in the text of the Act, and that in light of this and the Act's important remedial purposes, additional exemptions would be contrary to Congressional intent.").

<sup>138</sup> *Graoch Assoc. #33, LP v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n.*, 508 F.3d 366 (6th Cir. 2007) ("Nothing in the text of the FHA instructs us to create practice-specific exceptions. Absent such instruction, we lack the authority to evaluate the pros and cons of allowing disparate-impact claims challenging a particular housing practice and to prohibit claims that we believe to be unwise as a matter of social policy.")

<sup>139</sup> 2020 Rule, 85 Fed. Reg. 60319.

ultimate outcome of the challenged policy or practice has a disparate impact on a protected class compared to similarly situated individuals outside of the protected class.<sup>140</sup>

Despite HUD's claims in the 2020 Rule, there is nothing in the statute or case law that supports such a broad defense in connection with algorithms or models.

Fortunately, in the Proposed Rule, HUD has eliminated this defense and recognized the error. In the preamble to the Proposed Rule, HUD stated:

The 2020 Rule also created a new “outcome prediction” defense, which would in practice exempt most insurance industry practices (and many other housing-related practices that rely on outcome predictions, such as lending practices) from liability under a disparate impact standard. This is inconsistent with HUD's repeated finding, including in the 2020 Rule, that “a general waiver of disparate impact law for the insurance industry would be inappropriate.”<sup>141</sup> Although unclear, it appears that this defense would suggest using comparators that are, in HUD's experience, inappropriate. At the very least, the defense introduces unnecessary confusion into the doctrine.<sup>142</sup>

We agree that the 2020 Rule's Outcome Prediction Defense would have foreclosed meritorious disparate impact claims related to models and algorithms, and inappropriately up-ended longstanding disparate impact law.

### **C. HUD's 2013 Rule and Supplemental Response to Insurance Industry Comments Appropriately Apply a Case-by-Case Analysis to All Housing-Related Industries, Including Insurance.**<sup>143</sup>

The 2013 Rule and 2016 Supplemental Rule response to insurance industry comments appropriately apply a case-by-case analysis under *ICP* to all housing-related industries – including the insurance industry. In the more than twenty years since the Fair Housing Act was amended and HUD issued interpretive regulations, courts that have considered the issue have consistently held that the Fair Housing Act prohibits acts of discrimination by homeowners' insurers.<sup>144</sup> The discriminatory effects liability is compatible with the business of insurance, and HUD adequately responded to comments claiming otherwise.

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<sup>140</sup> *Id.* (emphasis added)

<sup>141</sup> 85 Fed. Reg. 60321 (citing “Application of the Fair Housing Act's Discriminatory Effects Standard to Insurance” 81 FR 69012).

<sup>142</sup> 2021 Proposed Rule, 86 Fed. Reg. 33595.

<sup>143</sup> Many of the assertions raised in this section derive from a recent brief amici curiae Chicago Lawyers Committee, et al. filed support of HUD in the Summary Judgement Briefing in *Prop. Cas. Insurers Ass'n of Am. v. Donovan*, available at:

<https://static1.squarespace.com/static/5871061e6b8f5b2a8ede8ff5/t/60fad243cfaaf110f69cc262/1627050564456/2021-07-16+233.PCIA+v.+HUD.Amicus+Brief.pdf>.

<sup>144</sup> See, e.g., *Ojo v. Farmers Group Inc.*, 600 F.3d 1205, 1208 (9th Cir. 2010); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1360 (6th Cir. 1995); *United Farm Bureau Mut. Ins. Co. v.*

1. *A Case-by-Case Disparate Impact Analysis Is Consistent with the Business of Insurance.*

Some insurance trade groups have claimed that the application of disparate impact liability would force insurers to introduce considerations into their processes that would undermine and potentially destroy the actuarial process. In its 2013 Rule, HUD explained that these concerns were “misplaced,” as it would not make any policy or practice that causes a disparate impact *per se* illegal; insurance providers would still have the ability to justify their policy or practice at the second step of the burden shifting framework.<sup>145</sup> More generally, HUD rightly explained that broad exemptions, such as those requested for the business of insurance, would undermine Congress’s intent in enacting the Fair Housing Act, which was to root out the various forms of discrimination in housing and to provide for fair housing throughout the United States.<sup>146</sup>

Insurance trade groups have argued in subsequent litigation against HUD that these explanations were insufficient, and a district court agreed, deeming the level of detail and specificity in HUD’s explanation of its refusal to make broad exceptions arbitrary and capricious before remanding the rulemaking to HUD.<sup>147</sup>

HUD’s subsequent 2016 Supplemental Rule, however, robustly addressed those concerns.<sup>148</sup> HUD explained that the insurance industry is replete with practices in which insurers consider certain non-actuarial factors in making decisions, such as marketing and claims processing and payment. Moreover, HUD noted that ratemaking—frequently a risk-based decision-making process—often involves consideration of subjective factors outside of actuarial concerns. HUD observed that the industry’s long-time consideration of subjective, non-risk-based factors has not led to the inevitable demise of the entire industry.

In addition to explaining why a blanket exemption is undesirable, HUD further elaborated on the benefits of a case-by-case approach to assessing disparate impact claims. Specifically, a blanket exemption would prevent the development of alternative policies that serve both parties’ interests, consistent with the third step of the burden-shifting framework. As HUD explained, it would be impossible for insurers to argue that, in every situation, there is no

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*Metropolitan Human Relations Comm’n*, 24 F.3d 1008, 1016 (7th Cir. 1994); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 301 (7th Cir. 1992); *Nevels v. Western World Ins. Co., Inc.*, 359 F. Supp. 2d 1110, 1117-1122 (W.D. Wash. 2004); *National Fair Hous. Alliance v. Prudential Ins. Co. of America*, 208 F. Supp. 2d 46, 55-9 (D.D.C. 2002); *Lindsey v. Allstate Ins. Co.*, 34 F. Supp. 2d 636, 641-43 (W.D. Tenn. 1999); *Strange v. Nationwide Mut. Ins. Co.*, 867 F. Supp. 1209, 1212, 1214-15 (E.D. Pa. 1994).

<sup>145</sup> See 2013 Rule, 78 Fed. Reg. at 11460.

<sup>146</sup> *Id.*

<sup>147</sup> See e.g., *Prop. Cas. Insurers Ass’n of Am. v. Donovan*, 66 F. Supp. 3d 1018, 1046 (N.D. Ill. 2014).

<sup>148</sup> See Federal Regulations for Department of Housing and Urban Development, 81 Fed. Reg. 69,012, 68017 (Oct. 15, 2016) (to be codified at 4 C.F.R. Pt.100) (“2016 Supplementary Rule”).

other policy which might serve their same interests, especially with changes in technology and the sophistication of risk analysis.<sup>149</sup>

Moreover, the 2013 Rule and 2016 Supplemental Rule's application to insurance markets is consistent with sound actuarial practices. The 2013 Rule's burden-shifting approach accommodates underwriting decisions that are based on legitimate business purposes. As such, the Rule is consistent with actuarially sound principles and only establishes liability for insurance policies and practices that are artificial, arbitrary, and unnecessary, i.e., that have the effect of discriminating on a protected basis without a business need to do so. Such practices are, by definition, not actuarially sound.<sup>150</sup>

In the past few decades, the insurance industry has modified its practices to be more inclusive, removing the barriers that restrict homeowners' insurers from writing policies in communities of color and creating industry opportunities to expand their market penetration. In response to disparate-impact challenges, insurers have refined their underwriting and pricing systems to eliminate unnecessary, arbitrary barriers to the availability of adequate homeowners' coverage.<sup>151</sup> Insurance companies that have amended their policies to remove discriminatory effects have seen their businesses grow. Consumers have benefited greatly from having access to quality insurance products and services. Much work remains to be done to open insurance markets, but progress has been made in challenging policies that have an unjustified negative effect on neighborhoods of color. In short, fair housing experts have used the Fair Housing Act and the disparate impact doctrine to significantly reduce discrimination in the insurance sector. HUD must not limit or remove this important tool in the effort to eliminate discrimination in housing and insurance markets.

2. *A Blanket Exemption from Disparate Impact Liability Would Not Promote Efficiency and Would Be Over-Inclusive.*

Some insurance industry trade groups unconvincingly argue that applying the 2013 Rule's burden-shifting framework to the business of homeowners insurance would be inefficient because claims against insurance companies will categorically fail. Specifically, they claim that reverse preemption under the McCarran-Ferguson Act, as interpreted by the Seventh Circuit,<sup>152</sup> precludes federal courts from passing judgment on the actuarial soundness of risk-based practices, and homeowners insurance policies and practices are inherently risk-based, such that disparate impact liability is incompatible with the nature of insurance.

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<sup>149</sup> *Id.*

<sup>150</sup> [Race Discrimination Is Not Risk Discrimination: Why Disparate Impact Analysis of Homeowners Insurance Practices Is Here to Stay](#), Banking & Financial Services Policy Report, Vol. 33, No. 6 (June 2014), at pp. 1-12.

<sup>151</sup> Joseph B. Treaster, "Protest and Possible Profit Bring Back the Insurers," New York Times, October 30, 1996, available at: <http://www.nytimes.com/1996/10/30/business/protest-and-possible-profit-bring-back-the-insurers.html?pagewanted=all>.

<sup>152</sup> *Doe v. Mutual of Omaha*, 179 F.3d 557 (7th Cir. 1999), *cert. denied* 528 U.S. 1106 (2000).

The McCarran-Ferguson Act only restricts “those applications of federal law that directly conflict with state insurance laws, frustrate a declared state policy, or interfere with a State’s administrative regime.”<sup>153</sup> Some insurance trade groups argue that the 2013 Rule’s burden-shifting standard framework would be inefficient, as it would require a lengthy, fact-intensive process to determine whether a practice is based on a legitimate business purpose and whether there are other, equally effective alternatives. But this argument overstates the comparative ease of the process of creating an exemption to liability for risk-based practices.

HUD addressed these points in full in its 2016 Supplementary Rule.<sup>154</sup> In addition to the incorrect assumption that disparate impact claims challenging risk-based policies would categorically fail, the assertion misses another crucial point: in order to narrowly exempt risk-based policies and practices, HUD would have to go through a case-by-case determination of whether a policy or practice is risk-based and entitled to the exemption. HUD would need to outline narrow and highly-specific standardized rules to determine if a practice was exempt, as these actuarial practices are constantly changing and evolving, and whether a practice qualified for the exemption would itself be a lengthy, fact-intensive determination. HUD accounts for this in the 2016 Supplemental Rule, when it notes, “The arguments and evidence that would be necessary to establish whether a practice qualifies for the requested exemption would effectively be the same as the arguments and evidence necessary for establishing a legally sufficient justification.”<sup>155</sup>

HUD explained that the 2013 Rule’s case-by-case approach best enables it to enforce the Fair Housing Act, as it takes into consideration the variety of insurer practices, both present and future. The diversity and ingenuity of insurer practices makes it practically impossible to define the scope exempted practices in order to avoid case-by-case disputes. Thus, HUD has determined that categorical exemptions or safe harbors are unworkable and inconsistent with its statutory mandate.

The fact that insurers regularly engage in practices that combine risk-based decision making with more subjective factors supports this conclusion. For example, practices such as ratemaking, which are largely actuarially based, can nonetheless incorporate elements of non-actuarially based subjective judgment or discretion under law.<sup>156</sup> Accordingly, creating a broad exemption for risk-based policies would be overinclusive and have the effect of shielding discriminatory practices that are unrelated to risk.

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<sup>153</sup> *Humana v. Forsyth*, 525 U.S. 299, 310 (1999) (“When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State’s administrative regime, the McCarran-Ferguson Act does not preclude its application.”).

<sup>154</sup> 2016 Supplementary Rule, 81 Fed. Reg. 69012.

<sup>155</sup> 2016 Supplemental Rule, 81 Fed. Reg. at 69017.

<sup>156</sup> *See* 2016 Supplemental Rule, 81 Fed. Reg. at 69017.

Even if practices are predominantly based on actuarial decision-making, that does not preclude them from having an illegal disparate impact.<sup>157</sup> Take, for example, credit scoring, which is frequently accounted for in insurer's risk-based analyses. This is despite the fact that multiple studies have concluded that credit scores are themselves a combination of historically biased indices, such that reliance on them has the effect of exacerbating long standing race-based economic inequality. As HUD noted in the 2016 Supplemental Rule, the court in *Lumpkin v. Farmers Group* found that certain credit scoring practices have a disparate impact, and that even if they have some predictive value, there are other, less discriminatory alternatives.<sup>158</sup> In other words, an insurance practice can have an illegal disparate impact even if it is predominantly derived from risk-based decision-making. A broad exception for such practices would therefore protect unlawful practices.

3. *The Presence of Significant Differences in State Law Regarding Both Insurance and Housing Discrimination Protections Supports HUD's Case-by-Case Approach.*

The tremendous heterogeneity of states' insurance laws further necessitates a case-by-case determination in lieu of blanket exemptions. The McCarran-Ferguson Act does not preclude *all* disparate impact claims against insurers because insurance regulatory schemes vary dramatically by state. In fact, many states have regulations that complement disparate impact liability under federal law, such that McCarran-Ferguson reverse-preemption is entirely irrelevant. For example, California, North Carolina, and the District of Columbia expressly provide by statute for disparate impact fair housing claims without exemptions for any particular type of business, including homeowners insurers.<sup>159</sup> Additionally, several states' highest courts have interpreted their state fair housing laws to encompass disparate impact claims, even if their statutes do not explicitly use that term or a close equivalent.<sup>160</sup> Whether a state's insurance law will preempt the FHA under the McCarran-Ferguson Act depends, in large part, on which state's law applies.

Furthermore, courts have indicated that a determination of McCarran-Ferguson reverse-preemption requires a case-specific factual inquiry.<sup>161</sup> If anything, the relationship between state

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<sup>157</sup> See National Consumer Law Center & Center for Economic Justice, *Credit Scoring and Insurance: Costing Consumers Billions and Perpetuating the Economic Racial Divide* 4 (June 2007).

<sup>158</sup> 2016 Supplemental Rule, 81 Fed. Reg. at 69016 (citing *Lumpkin v. Farmers Grp.*, No. 05–2868, 2007 U.S. Dist. LEXIS 98949, at \*19 (W.D. Tenn. July 6, 2007)).

<sup>159</sup> See Cal. Gov't Code § 12955.8 (West 2012); N.C. Gen. Stat. § 41A-5(a)(2) (West 2009); D.C. Code § 2-1401.03 (2012).

<sup>160</sup> See, e.g., *Comm'n on Human Rights & Opportunities v. Sullivan Assocs.*, 739 A.2d 238, 255-56 (Conn. 1999); *Saville v. Quaker Hill Place*, 531 A.2d 201, 205-06 (Del. 1987); *Bowman v. City of Des Moines Mun. Hous. Agency*, 805 N.W.2d 790, 798-99 (Iowa 2011); *Malibu Inv. Co. v. Sparks*, 996 P.2d 1043, 1050-51 (Utah 2000); *State of Ind., Civ. Rights Comm'n v. Cty. Line Park, Inc.*, 738 N.E.2d 1044, 1049 (Ind. 2000).

<sup>161</sup> See, e.g., *Dehoyos v. Allstate Corp.*, 345 F.3d 290, 297 (5th Cir. 2003) (rejecting McCarran-Ferguson reverse-preemption after appellant failed to indicate any state laws or declared regulatory policies which would conflict with federal civil rights statutes); see also *Humana Inc.*

insurance regulatory regimes and federal law, as shaped by McCarran-Ferguson, actually *supports* HUD’s rejection of some insurance trade group claims that the McCarran-Ferguson Act entitles them to blanket exemptions. Even if state anti-discrimination law does not provide for disparate impact liability, the comments of some industry groups did not establish that the imposition of disparate impact liability under federal law would invariably conflict with state law. Some state regulatory requirements establish a baseline, or floor, for anti-discrimination protections in housing. In many cases, the Fair Housing Act appropriately raises the standard for compliance beyond that established by the state regulations. Because each state’s statutory and regulatory regime is different and interacts differently with the Fair Housing Act, it was entirely reasonable for HUD to adopt a case-by-case analysis.

**D. A Robust Disparate Impact Rule is Critical to Ensure the Fair Housing Act Remains a Tool to Promote an Open, Equitable and Vibrant Housing Market.**

1. *A Robust Disparate Impact Rule is Necessary to Eliminate Residential Segregation and Ensure Equity in the Housing Market.*

For decades, discriminatory policies in the U.S. created distinct advantages for White families, leading to massive wealth, homeownership, and credit gaps that persist today. The nation’s largest affordable housing initiative was arguably the Federal Housing Administration (FHA) mortgage insurance program. It did very little to benefit people of color in the first decades of the effort largely because the guidelines and policies adopted by the program were designed to restrict access for Black people and other underserved groups.<sup>162</sup>

Policies and practices in other federal programs also supported a separate and unequal housing market. For example, federal housing policies mandated by the then US Housing Authority mandated residential segregation in publicly funded multi-family rental housing developments. Even today, housing authorities still continue to practice segregation, offering facilities located in well-resourced neighborhoods to white tenants while steering Black tenants to complexes located in under-resourced areas.<sup>163</sup>

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*v. Forsyth*, 525 U.S. 299, 308 (1999) (“We reject any suggestion that Congress intended to cede the field of insurance regulation to the States, saving only instances in which Congress expressly orders otherwise.”); *Wai v. Allstate Ins. Co.*, 75 F. Supp. 2d 1, 5 (D.D.C. 1999) (rejecting defendant’s argument for McCarran-Ferguson reverse-preemption after noting that Maryland law did not grant the state’s Insurance Commissioner exclusive jurisdiction over discrimination claims).

<sup>162</sup> Rothstein, Richard, *The Color of Law: A Forgotten History of How Our Government Segregated America*. 2017. New York. Liveright Publishing Corporation.

<sup>163</sup> <https://www.ajc.com/news/atlanta-based-management-companies-faces-housing-discrimination-suit/VzX5hVxIQ1QnLezhsw2kII/>

Blatant discrimination in the implementation of the GI bill,<sup>164</sup> the Social Security program, the National Highway Act, Urban Renewal program, and more contributed to the permanent installation of a dual credit and housing market that too often prohibits consumers of color from accessing quality, sustainable credit options. These policies followed centuries of slavery, racial violence, and a race-based caste system that systematically robbed Black people and other people of color opportunities to own homes, pass down assets to their heirs, and build wealth.

The inequities built into our society from race-based policies and practices are seen today in persistent wealth and homeownership gaps. A seminal 2012 HUD report cautioned that “[c]reditworthy low-income and minority families face significant barriers to sustainable homeownership, a major vehicle for building wealth and economic opportunity.”<sup>165</sup> Recent Home Mortgage Disclosure Act (HMDA) data reflect these disparities. Among other metrics, the 2019 denial rate for conventional home-purchase loans was 16.0% for Black borrowers and 10.8% percent for Hispanic white borrowers. In contrast, the denial rate was only 6.1% for non-Hispanic white borrowers.<sup>166</sup> According to the U.S. Census, the homeownership rate for White families sits at 74%, compared to 44.1% and 49% for Black and Latino families, respectively. This homeownership gap is even larger than it was when redlining was legal.

These disparities are the result, in part, of wealth disparities.<sup>167</sup> In 2019, white family wealth sat at \$188,200 (median) and \$983,400 (mean).<sup>168</sup> In contrast, Black families’ median and mean net worth was \$24,100 and \$142,500, respectively.<sup>169</sup> These wealth disparities, in turn,

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<sup>164</sup> Blakemore, Erin, “How the GI Bill’s Promise Was Denied to a Million Black WWII Veterans,” *History*, June 21, 2019, <https://www.history.com/news/gi-bill-black-wwii-veterans-benefits>

<sup>165</sup> U.S. Department of Housing and Urban Development, *Paths to Homeownership for Low-Income and Minority Households*, Evidence Matters (Fall 2012) at 3 (“*HUD Paths to Homeownership*”), <https://www.huduser.gov/portal/periodicals/em/fall12/highlight1.html>.

<sup>166</sup> CFPB, *Data Point: 2019 Mortgage Market Activity and Trends*, at 36 (June 2020), [https://files.consumerfinance.gov/f/documents/cfpb\\_2019-mortgage-market-activity-trends\\_report.pdf](https://files.consumerfinance.gov/f/documents/cfpb_2019-mortgage-market-activity-trends_report.pdf).

<sup>167</sup> *HUD Paths to Homeownership*, at 6 (“Along with income, household wealth determines whether families can afford down payment and closing costs and can sustain homeownership after purchase.”); Christopher Herbert, *Expanding Access to Homeownership as a Means of Fostering Residential Integration and Inclusion*, at 3 (2017) (“[A] lack of savings to meet downpayment requirements and pay closing costs is by far the most significant financial barrier to buying a home.”), [https://www.jchs.harvard.edu/sites/default/files/a\\_shared\\_future\\_expanding\\_access\\_to\\_homeownership\\_fostering\\_inclusion.pdf](https://www.jchs.harvard.edu/sites/default/files/a_shared_future_expanding_access_to_homeownership_fostering_inclusion.pdf).

<sup>168</sup> Bhutta, Neil, Jesse Bricker, Andrew Chang, et al., *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, *Federal Reserve Bulletin*, vol. 106, no. 5 (September 2020), <https://www.federalreserve.gov/publications/files/scf20.pdf>.

<sup>169</sup> *Id.*



reflect intergenerational transfer disparities: 29.9% of white families have received an inheritance, compared with only 10.1% percent of Black families.<sup>170</sup>

The effects of redlining, residential segregation, discriminatory policies, and disinvestment have created a scenario where people of color do not live in areas with ample access to healthcare facilities, green and healthy environments, clean water, quality credit, healthy foods, high-performing schools, and other important amenities that people need to thrive.

Against this backdrop, policies and guidelines that are not explicitly discriminatory can (and do) still generate widescale disparate outcomes based on race. For example, credit overlay policies, overreliance on outdated credit scoring systems, and lending policies linked to debt-to-income ratios or loan-to-value ratios are all highly correlated to race and national origin and disproportionately disadvantage Latinos, Native Americans, Blacks, and certain segments of the Asian-American and Pacific Islander populations. Algorithm-based systems, like automated underwriting systems and risk-based pricing systems, can also manifest and perpetuate these biases without proper attention and care. Take, for example, an underwriting model that assesses creditworthiness in part based on the median household value in the census tract where the applicant lives. Because of the history of residential segregation and redlining in the U.S., Black people tend to live in census tracts with lower home values than whites. As a result, a model incorporating this variable is likely to have a disproportionately negative effect on historically disadvantaged protected classes.

These unintended negative effects are pervasive in the housing market, and are just as damaging as intentional discrimination. The robust disparate impact standards embodied in the 2013 Rule are an indispensable tool for addressing facially neutral policies that could unnecessarily perpetuate discrimination, calcify systemic inequality, and hold people back from reaching their full potential. Furthermore, disparate impact often helps to uncover discrimination that is intentional, but subtle or hidden. The 2020 Rule would have made it virtually impossible to bring fair housing cases based on this theory, allowing unnecessarily discriminatory policies to flourish.<sup>171</sup>

## 2. *Robust Disparate Impact Standards Drive Innovation and a Vibrant and Inclusive Housing Market.*

The touchstone of disparate impact law has always been that an entity must adopt an available alternative to a policy or practice that has discriminatory effect, so long as the alternative can satisfy the entity's legitimate needs with less discriminatory effect. Strong

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<sup>170</sup> Bhutta, Neil, Andrew C. Chang, Lisa J. Dettling, et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FEDS Notes, Washington: Board of Governors of the Federal Reserve System, (September 2020), <https://doi.org/10.17016/2380-7172.2797>.

<sup>171</sup> CRL Comment to HUD, Implementation of the Fair Housing Act's Disparate Impact Standard (Oct. 18, 2019), <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-sh-commentdisparateimpact-oct2019.pdf>.

disparate impact standards incentivize housing providers, lenders, and other participants in the housing market to have systems in place to identify and implement the least discriminatory policies consistent with their business needs. This is a win-win for everyone. It encourages entities to innovate and improve decision-making, and it makes the housing market more inclusive.

For example, many major financial institutions have adopted compliance systems designed to ensure that their marketing, underwriting, pricing, servicing, and other policies and statistical models remain fair and compliant with disparate impact law. The institutions with the strongest programs routinely evaluate their credit-related models for disparate impact risk and, to the extent models have a discriminatory effect, they actively search for alternatives that maintain performance while minimizing impact.

Institutions frequently have found that alternatives cost them little if any profits and may help them find new customers and be more precise about the lines they draw so as not to exclude people unnecessarily. Some have developed lending standards of their own – customized to reflect their unique customer bases – that more accurately and objectively separate qualified from unqualified borrowers. The result has been that credit markets, though still far from completely fair, are now more open to those traditionally shut out of credit. Meanwhile, banks have discovered that these less discriminatory criteria also work better at identifying real risk. This is the promise that disparate impact offers—causing lenders to critically and continuously evaluate their policies to ensure they are as inclusive as possible while growing their customer base and meeting legitimate business objectives.

In short, strong disparate impact standards encourage participants in the housing market to take a hard look at unexamined assumptions and to think creatively about better solutions. In doing so, they can unleash considerable entrepreneurship. The result is good for business, good for consumers, and good for the economy.

A current example is the ongoing development of creative, less discriminatory refinements to widely used credit score formulas. Lenders have long relied on “credit scores,” proprietary numbers that purport to measure how likely the prospective borrower is to make regular and timely debt payments. But historically credit scores have considered only a small amount of the information that now is available for assessing creditworthiness. In doing so, they have perpetuated the history of unequal access to credit for communities of color. For example, the major credit scoring companies traditionally have counted as positive events only the repayment of conventional credit. They have treated as non-events the regular and timely payment of other recurring expenses, such as utility and phone bills (though they do note the non-payment of those bills as negative events). They have ignored the regular and timely payment of rent, even as they give great weight to almost identical mortgage payments.<sup>172</sup> This produces a vicious cycle: it is difficult to qualify for credit unless one already has access to it or one’s family has the wealth to secure credit despite a poor personal credit score, which is much

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<sup>172</sup> See, e.g., Jonnelle Marte, *The Monthly Bill That Could Save – Or Destroy – Your Credit Score*, Wash. Post (Dec. 9, 2014), <http://www.washingtonpost.com/news/g et-there/wp/2014/12/09/the-monthly-bill-that-couldsave-or-destroy-your-credit-score/>.

less common for families of color than for white families. As a result, millions of people – disproportionately people of color – are considered “subprime” borrowers despite being creditworthy.

According to the Consumer Financial Protection Bureau (CFPB), 26 million American consumers – 11% of the adult population – are credit invisible. These “credit invisibles” pay significantly higher rates for loans if they can secure conventional loans at all. They are impaired in their ability to buy a house or a car, or to get a small-business loan to start an enterprise.<sup>173</sup> And an analysis by the CFPB reveals that almost 30% of Black and Latino adults are credit invisible or have an un-scorable credit profile – compared to about 17% of White adults.<sup>174</sup> Thus, communities that long have been excluded from opportunities to secure credit or build wealth have continued to be shut out by the restrictive criteria fed into credit scoring systems.

Now, multiple companies are developing mechanisms by which additional information relevant to a credit decision—such as history of on-time rental payments—will reach credit scorers. One of the major credit scorers is creating a tool through which property managers can report rent payments.<sup>175</sup> Other companies are competing to create tools by which renters themselves can report their payments.<sup>176</sup> Robust disparate impact standards help create an environment in which such innovation can flourish. Disparate impact law fosters a data-driven culture that thrives on better information and fairer measurements. And it creates a marketplace for innovations because alternatives that are proven to be effective but less discriminatory must be adopted.

Such a marketplace is not just good for market participants—it is also good for the economy as a whole. Discrimination is a drag on the economy that hurts families and limits economic opportunity for all Americans. A recent report shows that discrimination targeted at Black Americans alone cost the US economy \$16 trillion over the last 20 years.<sup>177</sup> The same report revealed that if we eliminated racial inequality, the U.S. GDP would increase by \$5 trillion over a 5-year period, create thousands of jobs, and generate billions in tax revenues.<sup>178</sup> Our

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<sup>173</sup> See David Bornstein, ‘Invisible’ Credit? (Read This Now!), N.Y. Times (Oct. 2, 2014), [http://opinionator.blogs.nytimes.com/2014/10/02/invisible-credit-read-thisnow/?\\_r=0](http://opinionator.blogs.nytimes.com/2014/10/02/invisible-credit-read-thisnow/?_r=0).

<sup>174</sup> Brevoort, Kenneth P., Philipp Grimm, and Michelle Kambara. 2015. Data Point: Credit Invisibles, CFPB Office of Research, May 2015.

<sup>175</sup> See *supra*, note 172 Marte, Monthly Bill.

<sup>176</sup> See Ann Carrns, Paying The Rent On Time Can Enhance Your Credit Report, N.Y. Times (Feb. 4, 2014), <https://www.nytimes.com/2014/02/04/your-money/paying-the-rent-on-time-can-enhance-your-credit-report.html>.

<sup>177</sup> Dana M. Peterson and Catherine L. Mann, Closing the Racial Inequality Gaps: The Economic Cost of Black Inequality in the U.S., Citi Global Perspectives & Solutions (Sept. 2020), <https://ir.citi.com/%2FPRxPvgNWu319AU1ajGf%2BsKbjJjBJSaTOSdw2DF4xynPwFB8a2jV1FaA3Idy7vY59bOtN2lxVQ M%3D>.

<sup>178</sup> *Id.*; see also Nick Noel, Duwain Pinder, Shelley Stewart III, and Jason Wright, The Economic Impact of Closing the Racial Wealth Gap, McKinsey & Company, at 6, Exhibit 2 (Aug. 2019), <https://www.mckinsey.com/industries/publicandsocial-sector/our-insights/the-economic-impact-of-closing-the-racial-wealth-gap>; Jeff Cox, Morgan Stanley says Housing Discrimination Has

diversity, it turns out, is our strength, and broadening opportunity provides exponential benefits to everyone. The disparate impact standards reflected in the 2013 Rule is vital to continuing to broaden housing opportunities.

3. *Major Mortgage Industry Leaders Support Disparate Impact as a Tool That Can Strengthen Equity for Underserved Communities and Benefit the Economy.*

Even industry itself appreciates the role of disparate impact law in driving equitable outcomes and producing strong economic results. Top mortgage lenders and other industry leaders<sup>179</sup> asked the previous administration not to go forward with its repeal of the 2013 Rule. Those appeals came on the heels of the devastating murder of Mr. George Floyd by former police officer Derek Chauvin and the justified unrest that followed. That unrest was the culmination of centuries of unjust practices, lack of enforcement of civil rights laws, and structural racism rooted in residential segregation that serves as a barrier to advancement for people of color.

Indeed, due in large part to residential segregation, Black Americans and other families of color are more likely to live in neighborhoods in which they lack access to good schools, clean environments, living wage jobs, quality credit, transit, healthy food options, healthcare, and opportunities to build wealth. Black and Brown people disproportionately live in spaces that are under-resourced and toxic. These challenges manifest in real harm and pain for people — higher rates of infection and mortality from COVID-19, lower net worth, lower life expectancy, and an inability to give children the best education possible, feed families, and be stably housed. They are compounded by the overt and implicit bias Black Americans and other people of color often experience at the hands of [real estate agents](#), [lenders](#), [law enforcement](#), [health professionals](#), and others.

Industry recognized that this unprecedented moment in our nation requires that every tool in the toolbox, especially disparate impact, is needed to drive equitable outcomes that will provide all people a chance to thrive. Thriving families equate to strong communities and economies that benefit everyone.

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Taken a Huge Toll on the Economy, CNBC, November 13, 2020, <https://www.cnbc.com/2020/11/13/morgan-stanley-says-housing-discrimination-hastaken-a-huge-toll-on-theeconomy.html>.

<sup>179</sup> See NFHA Statement highlighting statements from Bank of America, Quicken Loans, Citi, Wells Fargo, and National Association of Realtors, Civil Rights Groups Commend Top Mortgage Lenders & Industry Leaders for Urging HUD to Reconsider Disparate Impact Rule, July 15, 2021, available at <https://nationalfairhousing.org/2020/07/15/civil-rights-groups-commend-top%E2%80%AFmortgage-lenders-industry-leaders-for-urging-hud-to-reconsider%E2%80%AFdisparate-impact%E2%80%AFrule/>.

4. *An Effective and Meaningful Disparate Impact Rule is Necessary to Fulfill the Biden Administration's Ongoing Efforts on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies.*

HUD must fully restore the 2013 Rule to realize the goals of President Biden's fair housing-related [executive action](#), "Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies,"<sup>180</sup> which recognizes the central role the federal government has played in implementing and continuing discriminatory housing practices throughout the United States.<sup>181</sup> By directing HUD to investigate the negative impacts the previous administration had on fair housing policies and laws, and ensure that HUD will take the necessary steps to fully implement the Fair Housing Act and its requirements, the administration created a pathway to reinstate this critically important rule.

Our nation's fair lending laws have yet to be fully enforced. By restoring the 2013 Rule, HUD will go a long way in helping to establish a comprehensive strategy to advance equity in the U.S. and help undo the legacy and damage caused by centuries of discriminatory and unfair policies and practices rooted in past and ongoing housing discrimination. When President Biden issued the memorandum, he stated that "We need to make equity and justice part of what we do every day."<sup>182</sup> He was exactly right.

**E. HUD Should Pursue Robust Disparate Impact Enforcement to Address the Policies and Practices That Lead to Systemic Discrimination in Housing and Lending Markets.**

With a strong disparate impact standard reinstated, HUD will be better positioned to challenge systemic discrimination in the sales, rental, lending, and insurance spaces, including discrimination arising from emerging technology and data-driven practices. HUD should leverage the reinstated rule to bring more Secretary-Initiated Complaints, with the goal of putting a stop to practices that make housing opportunity less available, less equitable, and more expensive. HUD should work with the Department of Justice (DOJ) to challenge some of the most systemically harmful practices in housing that are known to have an unjustified and discriminatory impact on protected classes, including discrimination against the use of credit scores that result in exclusion or higher cost credit, Housing Choice Voucher households, and zoning and land use limitations on the development of affordable rental housing.

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<sup>180</sup> The White House, Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies (January 26, 2021), <https://www.whitehouse.gov/briefingroom/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/>.

<sup>181</sup> Testimony of Lisa Rice President and CEO, National Fair Housing Alliance Before the Senate Committee on Banking, Housing, and Urban Affairs (April 13, 2021), [https://www.banking.senate.gov/imo/media/doc/Rice Testimony 4-13-21.pdf](https://www.banking.senate.gov/imo/media/doc/Rice%20Testimony%204-13-21.pdf).

<sup>182</sup> Remarks by President Biden at Signing of an Executive Order on Racial Equity (Jan. 26, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/26/remarks-by-president-biden-at-signing-of-an-executive-order-on-racial-equity/>.

## 1. *Challenging the Discriminatory Use of Credit Scores.*

Credit scores are, by virtue of their design, a measure of access to wealth and credit opportunity, which are directly related to the impact that residential segregation has had on a person's financial choices. The relationship between access to banking and financial services and residential segregation is reflected in neighborhood credit scores and related to the lack of mainstream financial institutions in communities with higher concentrations of people of color than in less diverse and mostly White neighborhoods. The CFPB conducted an examination of credit scores for about 200,000 consumers and found that areas with higher concentrations of people of color tended to have lower median credit scores.<sup>183</sup> In 2019 the Federal Reserve reported that 14% and 10% of Black and Hispanic people, respectively, did not have checking, savings, or money market accounts, compared to just 3% of their White counterparts.<sup>184</sup> The result of this lack of access is that Black and Hispanic families must find alternative sources for banking and financial services, like payday lenders, where high fees and interest rates proliferate and cost families much more than if mainstream services were available to them.

Researchers at the University of California Berkeley recently found that borrowers of color are being overcharged by anywhere between \$250 million and \$500 million annually in mortgage lending alone.<sup>185</sup> These researchers also noted that the automated systems that FinTech companies rely on simply replaced discriminatory systems with other discriminatory systems and that the use of credit scoring in all mortgage lending plays a role in mortgage lending pricing discrimination. Additionally, HUD has already noted that the use of risk-based decision-making that consider credit scores can have an illegal disparate impact on protected classes.<sup>186</sup>

Credit repositories do not distinguish whether a consumer has obtained credit from a predatory, discriminatory, or abusive debtor, and only rely upon the data any such product carrier reports. Additionally, there is an imbalance in what is reported, in that negative payment performance tends to be reported while positive payment performance is not across various accounts and services that are captured in credit reports and scores. HUD must scrutinize the use of credit scores in housing and housing related transactions, and challenge through enforcement action, including Secretary Initiated Complaints, instances where the reliance of credit scores may discriminate against protected classes.

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<sup>183</sup> See CFPB Study – Analysis of Differences between Consumer- and Creditor-Purchased Credit Scores. 2012. Available at:

[https://files.consumerfinance.gov/f/201209\\_Analysis\\_Differences\\_Consumer\\_Credit.pdf](https://files.consumerfinance.gov/f/201209_Analysis_Differences_Consumer_Credit.pdf)

<sup>184</sup> See Federal Reserve – Report on the Economic Well-Being of U.S. Households in 2019-May 2020. Available at <https://www.federalreserve.gov/publications/2020-economic-well-being-of-us-households-in-2019-banking-and-credit.htm>.

<sup>185</sup> Bartlett, Robert P. and Morse, Adair and Stanton, Richard H. and Wallace, Nancy E. 2017. *Consumer Lending Discrimination in the FinTech Era*. UC Berkeley Public Law Research Paper. Available at SSRN: <https://ssrn.com/abstract=3063448> or <http://dx.doi.org/10.2139/ssrn.3063448>.

<sup>186</sup> 2016 Supplemental Rule, 81 Fed. Reg. at 69016 (citing *Lumpkin v. Farmers Grp.*, No. 05–2868, 2007 U.S. Dist. LEXIS 98949, at \*19 (W.D. Tenn. July 6, 2007)).

## 2. *Source of Income Discrimination.*

Fair housing enforcement organizations have for years documented discrimination against individuals who use Housing Choice Vouchers. A review of 15 source of income discrimination testing and audit reports conducted between 2002 and 2020 across various areas found alarming rates of discrimination against Housing Choice Voucher holders. Tests were conducted via phone calls, text messaging, and emails with landlords and property owners, or in limited instances, through a review of online advertisements. The most common form of discrimination documented was outright refusal or denial of vouchers, steering to other units or neighborhoods, layering on additional and unattainable eligibility requirements, such as minimum income limits.<sup>187</sup> Among the 12 reports that involved testing, investigators observed

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<sup>187</sup> See Lawyers' Committee for Better Housing, Inc., "Locked Out: Barriers to Choice for Housing Voucher Holders," 2002, available at <https://lcbh.org/sites/default/files/resources/2002-lcbh-housing-voucher-barriers-report.pdf>; Fair Housing Justice Center, "No License to Discriminate: Real Estate Advertising, Source of Income Discrimination, and Homelessness in New York City," 2008, available at [https://www.fairhousingjustice.org/wp-content/uploads/2012/11/License\\_to\\_Discriminate\\_finalDRAFT.pdf](https://www.fairhousingjustice.org/wp-content/uploads/2012/11/License_to_Discriminate_finalDRAFT.pdf); Louisiana Fair Housing Action Center, "Housing Choice in Crisis: An Audit Report on Discrimination against Housing Choice Voucher Holders in the Greater New Orleans Rental Housing Market," 2009, available at <https://storage.googleapis.com/wzukusers/user-33549461/documents/5b47887358f3cNIEd9KN/HousingChoiceInCrisis2009.pdf>; Austin Tenants' Council, "Voucher Holders Need Not Apply: An Audit Report on the Refusal of Housing Choice Vouchers by Landlords in the Austin MSA," 2012, available at <https://www.austintexas.gov/edims/document.cfm?id=211114>; Equal Rights Center, "Will You Take My Voucher?: An Update on Housing Voucher discrimination in the District of Columbia," 2013, available at [https://equalrightscenter.org/wp-content/uploads/will\\_you\\_take\\_my\\_voucher.pdf](https://equalrightscenter.org/wp-content/uploads/will_you_take_my_voucher.pdf); Fair Housing Center of Central Indiana, "Fair Housing Rental Testing Audit Report on Section 8 Denial Rates in Marion County, IN," 2014, available at <https://www.fhcci.org/wp-content/uploads/2011/12/11-11-14-Section-8-Report.pdf>; Fair Housing Center for Rights and Research, "Housing Voucher Discrimination and Race Discrimination in Cuyahoga County," 2017, available at <https://www.thehousingcenter.org/wp-content/uploads/2017/12/Voucher-and-Race-Discrimination.pdf>; Chicago Lawyers' Committee for Civil Rights, "Fair Testing Project for the Chicago Commission on Human Relations," 2018, available at [https://www.chicago.gov/content/dam/city/depts/cchr/supp\\_info/FairHousingReportAUG2018.pdf](https://www.chicago.gov/content/dam/city/depts/cchr/supp_info/FairHousingReportAUG2018.pdf); Housing Opportunities Made Equal of Virginia, "Choice Constrained: Limited Housing Options for Households Utilizing Housing Choice Vouchers," 2019, available at [https://homeofva.org/wp-content/uploads/2019/07/Choices-Constrained-2019\\_5\\_14\\_19.pdf](https://homeofva.org/wp-content/uploads/2019/07/Choices-Constrained-2019_5_14_19.pdf); ee South Coast Fair Housing, Inc., "It's All About the Voucher: Source of Income Discrimination in Rhode Island," 2019, available at [http://southcoastfairhousing.org/wp-content/uploads/2019/02/Its-About-the-Voucher\\_-\\_Source-of-Income-Discrimination-in-Rhode-Island.pdf](http://southcoastfairhousing.org/wp-content/uploads/2019/02/Its-About-the-Voucher_-_Source-of-Income-Discrimination-in-Rhode-Island.pdf); Metro St. Louis Equal Housing Opportunities Council, "Locked Out/ Locked In Metro St. Louis Equal Housing Opportunities Council," 2019, available at <https://drive.google.com/file/d/1gGtYFoT1F28KFEZ6QNgWlTlVA8nBoDz7/view>; Fair

some form of voucher-based discrimination 28% to 91.2% of the time, with over half of those documenting levels of discrimination above 70%. Of the 12 testing reports, nearly a third found that source of income discrimination served as a proxy for race- and national-origin-based discrimination, and each found elevated levels of discrimination against voucher holders of color compared to White voucher holders.

This trend has only increased. Indeed, source of income complaints have steadily risen since 2017, and in 2020 they outpaced complaints based on color and religion.<sup>188</sup> Fair housing enforcement organizations reported 1,363 source of income complaints in 2020, representing 4.7% of all reported complaints and 36% of all reported complaints based on a characteristic not protected by the Fair Housing Act.

NFHA recently settled a source of income discrimination case against Evolve LLC, a privately-owned development company that owns and manages multi-family properties in Washington, DC.<sup>189</sup> NFHA conducted an investigation beginning in 2017 and found that Evolve used its website to deter voucher holders from renting Evolve properties. In particular, Evolve’s website required prospective tenants to identify whether they planned to use a voucher, and if the prospective tenant answered yes, the web-based system prevented them from scheduling a viewing. Evolve’s voucher policy also had a disparate impact on various protected classes. The policy was four times as likely to result in a Black prospective tenant being turned away and three times as likely to result in Latino prospective tenants being turned away when compared to White prospective renters. Families with children were also twice as likely to be turned away than prospective tenants without children.

This is but one example among many instances of source of income discrimination, which has become a systemic crisis that has only worsened during the COVID-19 pandemic. Many fair housing enforcement organizations have reported an uptick in landlords refusing to renew leases for voucher holders during the pandemic. And in many instances, landlords are placing overlays on voucher holders, such as minimum income requirements and additional rent charges above what they are responsible for paying through the program. It is reasonable to

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Housing Advocates of Northern California, “National Origin and Source of Income Discrimination in Rental Housing,” 2020, available at <https://files.constantcontact.com/0bd62b1a001/9749d66c-1f4f-42db-b6d7-c20b3e367ee6.pdf>; Suffolk University Law School Housing Discrimination Testing Program, “Qualified Renters Need Not Apply: Race and Voucher Discrimination in the Metro Boston Rental Housing Market,” 2020, available at <https://www.tbf.org/-/media/tbf/reports-and-covers/2020/housing-voucher-report-20200701.pdf>; VOCAL–NY and TakeRoot Justice, “Vouchers to Nowhere: How Source of Income Discrimination Happens and Policies that can Fix It,” 2020, available at <https://takerootjustice.org/wp-content/uploads/2020/09/Vouchers-To-Nowhere.pdf>.

<sup>188</sup> See National Fair Housing Alliance, “2021 Fair Housing Trends Report,” 2021, available at <https://drive.google.com/file/d/1R4JAZIE8gp7BcoFcZC5bJkE4ZPx0t4UL/view?usp=sharing>.

<sup>189</sup> See National Fair Housing Alliance, Press Release, “National Fair Housing Alliance Settles Housing Discrimination Case with Evolve, LLC.,” July 2, 2020, available at <https://nationalfairhousing.org/2020/07/02/national-fair-housing-alliance-settles-housing-discrimination-case-with-evolve-llc/>.



expect that, as Congress continues to appropriate or legislate for increases in Housing Choice Vouchers and other income assistance, source of income discrimination will only increase.

In light of these factors, HUD must commit its resources to using its full enforcement authority—including the use of Secretary-Initiated Complaints—to curb the nation’s voucher discrimination crisis. It cannot be only up to the private fair housing movement to stop rampant source of income discrimination on its own. Absent a federal prohibition against source of income discrimination, the federal government must take strategic enforcement action against landlords, development companies, and regional leasing companies who discriminate against voucher holders. HUD must be prepared to take bold enforcement in the housing market to make clear that source of income discrimination will not be tolerated and that it will be challenged using the full extent of the federal government’s resources. A robust disparate impact rule will give HUD the tools it needs to take such needed action.

### *3. Zoning and Land Use Barriers to Affordable Multifamily Housing.*

The legacy of residential segregation and financial exclusion in the United States has prevented many people of color and people with disabilities from accumulating the wealth necessary to access homeownership, resulting in greater reliance on the availability of rental housing. Land use and zoning practices across the nation have been and continue to be some of the best tools for exclusion, and there is evidence which shows that the less diverse a city is the more stringent its land use policies are.<sup>190</sup> The Fair Housing Act prohibits local governments from making zoning and land use decisions, or implementing policies, that exclude or otherwise discriminate against protected classes. But segregation is often maintained through land use and zoning policy which constrict the development of affordable, accessible, rental housing in communities.

Local zoning and land use decisions that restrict the development of multi-family affordable housing are more likely to adversely affect people of color, families with children, and people with disabilities. Between 2004 and 2018, people of color drove 76% of renter household growth, and trends during this same time period show that renters were increasingly likely to be older, people of color, and in nontraditional households – many of which include younger people and people with disabilities who live in group settings.<sup>191</sup> During the same time period, the number of married couples with children that owned homes fell by 2.7 million while the percent of families with children made up 29% of renter households, surpassing their share of 26% of

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<sup>190</sup> See Jessica Trounstein, “The Geography of Inequality: How Land Use Regulation Produces Segregation,” *American Political Science Review*, Vol. 114, Issue 2, May 2020, PP. 443-455, available at <https://www.cambridge.org/core/journals/american-political-science-review/article/abs/geography-of-inequality-how-land-use-regulation-produces-segregation/BAB4ABDF014670550615CE670FF66016>.

<sup>191</sup> Joint Center for Housing Studies of Harvard University, “America’s Rental Housing 2020,” 2020, p. 9, available at [https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard\\_JCHS\\_Americas\\_Rental\\_Housing\\_2020.pdf](https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_Americas_Rental_Housing_2020.pdf).

owner households.<sup>192</sup> These same failures to approve affordable multifamily housing development harms people of color, who are more likely to experience housing cost burdens that divert income from health and other basic needs. In 2018, Black renters had the highest burden rate in the United States, at 55%, followed by Latino renters at 53%, then Asian and other renters at 45%, compared to 43% of White renter households.<sup>193</sup> Additionally, more than 7 million renters of all households have one or more persons with a disability<sup>194</sup> and by 2035 there will be an additional 5.1 million older adult renter households.<sup>195</sup> This trend will only compound existing barriers to affordable, accessible, housing for Black and Latino households, who have a higher likelihood of disability compared to White households.<sup>196</sup>

Municipalities must carefully consider existing need for integrated housing options in a community according to its demographics. Major barriers to affordable housing development include the designation of single-family residential zones where multifamily housing may not be developed; strict definitions of “family” that may restrict the presence of group homes of unrelated people who congregate due to having a mutual disability; zoning policies such as minimum lot requirements that limit the number of units that may be developed; and density and design requirements that make residential development prohibitively expensive. Additionally, municipalities that cave to NIMBYism and either reject affordable housing development in reaction to local fears about changing neighborhood demographics; require notification of neighbors or public hearings only for the development of affordable housing or group homes but not other types of residential building; create spacing requirements for group homes for persons with disabilities; or require additional steps when considering a development that may disproportionately serve members of a protected class, all serve as examples of common discriminatory zoning and land use practices.

It has been the case that cities that face enforcement action under the Fair Housing Act tend to become more racially diverse, suggesting that when threatened by significant enforcement action concerning discriminatory land use and zoning regulations cities will become more diverse.<sup>197</sup>

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<sup>192</sup> *Id.* at 1.

<sup>193</sup> Joint Center for Housing Studies of Harvard University, “America’s Rental Housing 2020,” 2020, p. 29, available at [https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard\\_JCHS\\_Americas\\_Rental\\_Housing\\_2020.pdf](https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_Americas_Rental_Housing_2020.pdf).

<sup>194</sup> Gillian White, “Nowhere to Go: The Housing Crisis Facing Americans With Disabilities,” *The Atlantic*, Dec. 15, 2015, available at <https://www.theatlantic.com/business/archive/2015/12/renting-with-a-disability/420555/>.

<sup>195</sup> Joint Center for Housing Studies of Harvard University, “Projections and Implications for Housing a Growing Population: Older Households 2015-2035,” p. 9, available at <https://www.jchs.harvard.edu/research-areas/reports/projections-and-implications-housing-growing-population-older-households>.

<sup>196</sup> *Id.* at 39.

<sup>197</sup> *See* Jessica Trounstine, “The Geography of Inequality: How Land Use Regulation Produces Segregation,” *American Political Science Review*, Vol. 114, Issue 2, May 2020, PP. 443-455, available at <https://www.cambridge.org/core/journals/american-political-science->

Using the reinstated rule, HUD must take enforcement actions that send a clear message that, where local policies have a disparate impact, nondiscriminatory alternatives must be pursued and implemented to avoid the kinds of harms that land use and zoning policies have historically had on people of color, families with children, and people with disabilities. Only by enforcing the Fair Housing Act to its fullest extent can HUD make lasting changes to the ways in which local governments utilize their local zoning and land use powers to discriminate. These enforcement actions should dovetail with monitoring of local governments' compliance with the Fair Housing Act's Affirmatively Furthering Fair Housing requirement. HUD should call on local governments to adopt inclusionary zoning policies that promote mixed-income development where people with disabilities, families with children, and people of color have access to opportunity, as well as the threat of losing federal funding in the absence of compliance.

### **Conclusion**

For the reasons outlined above, we urge HUD to finalize the Proposed Rule to rescind the 2020 Rule and reinstitute the 2013 Rule and 2016 Supplemental Rule. Thank you for the opportunity to comment on the proposed regulation implementing the FHA's discriminatory effect standard. Please contact Nikitra Bailey at [nbailey@nationalfairhousing.org](mailto:nbailey@nationalfairhousing.org) and Morgan Williams at [mwilliams@nationalfairhousing.org](mailto:mwilliams@nationalfairhousing.org) with any questions.

Sincerely,