

**Comments of the Public Interest Law Center, the Chicago Lawyers’ Committee for Civil Rights, Lawyers for Civil Rights, and the Washington Lawyers’ Committee for Civil Rights and Urban Affairs to HUD Docket No. FR-6111-P-02, “HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard”**

**Introduction**

The Washington Lawyers’ Committee for Civil Rights and Urban Affairs (the “Washington Lawyers’ Committee”),<sup>1</sup> the Public Interest Law Center,<sup>2</sup> the Chicago Lawyers’ Committee for Civil Rights,<sup>3</sup> and Lawyers for Civil Rights<sup>4</sup> write to oppose HUD’s “Implementation of the Fair Housing Act’s Disparate Impact Standard” (“Proposed Rule”). As organizations dedicated to the protection of civil rights and pursuit of racial justice, we urge HUD to abandon its misguided attempt to rewrite long-standing statutory and case law. The proposed revisions are so fundamentally at odds with existing law, judicial directives, and Congressional intent that, if left as is, they will unquestionably violate the Administrative Procedure Act (“APA”). Most fundamentally, the Proposed Rule is at odds with some of the most important policies and values that underpin an equitable society and animate decades of civil rights law.

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<sup>1</sup> The Washington Lawyers’ Committee brings extensive civil rights experience and housing justice expertise to these comments. Since its founding in 1968, the mission of the Committee was, and continues to be, to fight civil rights violations, racial injustice, and poverty in our community through litigation and advocacy, enlisting the *pro bono* resources of the private bar. For decades, the Committee has fought for fair and equal housing opportunity for its clients. Based on our historical perspective, current knowledge, and the experience of the Committee and of our clients, we strongly oppose HUD’s proposed rule on behalf of our clients and the individuals and communities who rely on the promise of fair and equitable housing long embodied in federal law.

<sup>2</sup> The Public Interest Law Center, part of the national consortium of affiliates of the Lawyers’ Committee for Civil Rights Under Law, uses high-impact legal strategies to advance the civil, social, and economic rights of communities in the Philadelphia region facing discrimination, inequality, and poverty. The Law Center works to secure access to fundamental resources and services including employment, environmental justice, healthcare, voting, education, and housing. For the last 50 years, the Law Center has been using litigation, community education, advocacy, and organizing to stop housing discrimination against low-income people and to promote healthy, affordable housing for people in the neighborhoods of their choice. The Law Center’s experience working with communities to secure their right to fair housing compels them to strongly oppose this proposed rule.

<sup>3</sup> For 50 years, the Chicago Lawyers’ Committee for Civil Rights has fought against discriminatory policies and practices in an effort to achieve equitable outcomes for all individuals. Our mission is to secure racial equity and economic opportunity for all by providing legal representation through partnerships with the private bar and collaborating with grassroots organizations and other advocacy groups. Chicago Lawyers’ Committee has decades of experience with systemic litigation and advocacy combatting housing discrimination and barriers to opportunity under the Fair Housing Act, including investigation of complaints of discrimination, educating people about fair housing rights and obligations and providing representation to individuals and groups to challenge discriminatory policies and practices based on race, national origin and other protected classes.

<sup>4</sup> Lawyers for Civil Rights fosters equal opportunity and fights discrimination on behalf of people of color and immigrants. We engage in creative and courageous legal action, education, and advocacy in collaboration with law firms and community partners. We focus on nine impact areas that represent the front lines in today’s battle for equality and justice. Lawyers for Civil Rights is headquartered in Boston. We represent clients across Massachusetts and surrounding communities—and the impact of our life-changing work ripples across the country.

## I. Executive Summary

The Proposed Rule conflicts with established judicial precedent that has enshrined a workable and balanced framework for challenging discriminatory policies and practices that are neutral on their face but disproportionately and adversely impact members of protected groups or that perpetuate segregation. It eviscerates a plaintiff's ability to protect against practices that have a discriminatory and segregative impact by: (1) heightening the *prima facie* case elements a plaintiff must establish to make out a disparate impact claim to make it virtually impossible to succeed; (2) creating defenses that subvert the well-established burden-shifting framework by affording defendants protections for practices that have discriminatory consequences and requiring plaintiffs to anticipate those defenses in their complaint to survive a motion to dismiss before they have the benefit of discovery; (3) establishing a "less discriminatory alternative" standard that contravenes case law by requiring plaintiffs to show that defendant's interests may otherwise be met in an equally effective manner; and (4) writing out the anti-segregative consequences from the scope of the regulation. By upending longstanding case law and creating elevated standards for pleading and proving disparate impact claims, HUD's Proposed Rule guts a critical protection afforded under the Fair Housing Act ("FHA" or "Act") and flies in the face of the intentionally broad and remedial purposes of the Act.<sup>5</sup> See *infra* at 4. If adopted, the Proposed Rule would make it virtually impossible to challenge practices that restrict housing choice and serve no legitimate business interest. Zoning laws that operate to exclude African-Americans from certain neighborhoods, because, for example, they restrict construction of higher density housing affordable to individuals who receive housing subsidies, to tenant screening policies that routinely and disproportionately exclude African-American and Latinx renters with outdated criminal convictions, are examples of practices that unnecessarily restrict housing choice for persons in protected classes but which could well survive challenge under the Proposed Rule.<sup>6</sup>

Providing insulation from effective challenges to such exclusionary and segregative practices vitiates a critical goal of the FHA. By ratifying and expanding the broad scope of the FHA in subsequent amendments, Congress left no doubt that the FHA should protect against both intentional discrimination *and* practices that have discriminatory and segregative consequences. HUD's effort to rewrite decades of law through radical revisions to the regulation is based on a fundamentally flawed premise. Although it claims it must overhaul the disparate impact standard set forth in HUD's 2013 disparate impact rule (Implementation of the Fair Housing Act's

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<sup>5</sup> *Trafficante v. Metro Life Ins. Co.*, 409 U.S. 205, 212 (1972) (holding that individual complainants who are aggrieved by a prohibited practice covered by the FHA have the right to sue); see also *id.* at 209 (noting broad and inclusive language of statute); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372-74 (1981); *Huntington Branch, NAACP v. Huntington*, 844 F.2d 926, 935-36 (2d. Cir. 1988); *Cnty. Hous. Tr. v. Dep't of Consumer & Regulatory Affairs*, 257 F. Supp. 2d 208, 220 (D.D.C. 2003) ("Traditionally, courts have broadly interpreted the FHA, so as to fully effectuate Congress' remedial purpose.") (citing *Trafficante*)).

<sup>6</sup> *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2521-2522 (2015) (describing cases that targeted unlawful practices, such as zoning laws or conduct aimed at restricting housing choice, as suits that "reside at the heartland of disparate impact liability") (citing *Huntington Branch, NAACP v. Huntington*, 488 U.S. 15, 16-18 (1988)); *United States v. Black Jack*, 508 F. 2d 1179, 1182-88 (8th Cir. 1974); *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish*, 641 F. Supp. 2d 563, 577-78 (ED La. 2009)); see also *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493 (9th Cir. 2016); see also *Borum v. Brentwood Vill., LLC*, 218 F. Supp. 3d 1 (D.D.C. 2016) (determining that plaintiffs pleaded sufficient factual allegations to show that families with minor children were more likely to live in larger units, and as a result, families were more than three times as likely as non-families to be adversely impacted by the proposed redevelopment).

Discriminatory Effects Standard, 78 Fed. Reg. 11460 (2013) (“2013 Rule”), including its burden-shifting approach, definitions, and causation standard, to better align the 2013 Rule with the Supreme Court’s decision in *Inclusive Communities Project*,<sup>7</sup> nowhere in that decision did the Supreme Court cast doubt on the basic framework set forth in the 2013 Rule. Prior to and following the Court’s decision in *Inclusive Communities*, courts across the country have ratified the three-part burden-shifting framework.<sup>8</sup> Indeed, *Inclusive Communities* explicitly affirmed that “[r]ecognition of disparate-impact claims is consistent with the FHA’s central purpose,” 135 S. Ct. at 2511, as such claims “permit[] plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.” *Id.* at 2511-12.<sup>9</sup> The Court then highlighted a series of considerations courts should take into account to ensure an appropriate balance is struck between the competing interests of plaintiffs and defendants—factors that lower courts have been implementing on a case-by-case basis.<sup>10</sup>

To achieve a fundamental alteration of existing law, the Proposed Rule attempts to change the substantive elements of disparate impact claims and improperly attempts to alter well-established pleading standards. And finally, HUD’s extraordinary new gauntlet of pleading requirements, available defenses, and unsupported interpretation of the “less discriminatory alternative” standard would limit disparate impact claims to a narrow set of circumstances that vitiates HUD’s statutory obligation to affirmatively further fair housing under the FHA. Such an outcome is squarely at odds with HUD’s statutory mandate, constitutes a significant overreach of HUD’s authority, and is unlikely to survive legal challenges under the APA.<sup>11</sup>

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<sup>7</sup> 135 S. Ct. 2507 (2015); HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42854, 42857-42859 (proposed August 19 2019).

<sup>8</sup> 135 S. Ct. at 2514-2515 (describing the burden-shifting framework set forth under 24 CFR § 100.500(c)).

<sup>9</sup> 135 S. Ct. at 2511 (pointing to lawsuits targeting unlawful zoning laws—often single decisions by a city or municipality—and other restrictions that “unfairly exclude minorities from certain neighborhoods without sufficient justification” as primary examples of disparate impact cases).

<sup>10</sup> *See, e.g., Ellis v. City of Minneapolis*, 2016 WL 1222227 (D. Minn. Mar. 28, 2016), *aff’d*, 860 F.3d 1106 (8th Cir. 2017) and *infra* at n. 25 and 11. *See also See Huntington Branch, NAACP v. Huntington*, 844 F. 2d 926, 933-36 (2d Cir. 1988) (endorsing disparate impact claims and a burden-shifting framework for pleading and proving such claims); *Resident Advisory Bd. v. Rizzo*, 564 F. 2d 126, 146-48 (3d Cir. 1977) (recognizing viability of disparate impact claims); *Smith v. Clarkton*, 682 F. 2d 1055, 1065 (4th Cir. 1982) (same); *Hanson v. Veterans Administration*, 800 F. 2d 1381, 1386 (5th Cir. 1986) (same); *Arthur v. Toledo*, 782 F. 2d 565, 574-75 (6th Cir. 1986) (same); *Metropolitan Housing Development Corp. v. Arlington Heights*, 558 F. 2d 1283, 1290 (7th Cir. 1977) (same); *United States v. Black Jack*, 508 F. 2d 1179, 1184-1185 (8th Cir. 1974) (same); *Halet v. Wend Investment Co.*, 672 F. 2d 1305, 1311 (9th Cir. 1982); *United States v. Marengo Cty. Comm’n*, 731 F. 2d 1546, 1559, n. 20 (11th Cir. 1984) (same); *see also Greater New Orleans Fair Housing Action Center v. St. Bernard Parish*, 641 F. Supp. 2d 563, 577-78 (ED La. 2009) (deciding to apply the more rigorous *Arlington Heights II* standard rather than the three-part burden-shifting framework articulated in *Huntington Branch, NAACP*); *2922 Sherman Ave. Tenants Ass’n v. District of Columbia*, 444 F.3d 673, 679-80 (D.C. Cir. 2006) (concluding that under both the *Arlington Heights II* factors or the *Huntington Branch, NAACP* frameworks, plaintiffs failed to state a disparate impact claim); *MHANY Mgmt. v. Cnty. of Nassau*, 985 F. Supp. 2d 390 (E.D.N.Y. 2013); *MHANY Mgmt. v. Cnty. of Nassau*, 819 F.3d 581, 617-620 (adopting HUD’s 2013 Rule and remanding to the district court for a determination of whether plaintiffs met their burden to establish that “the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect” (citing 24 C.F.R. § 100.500(c)(3)).

<sup>11</sup> 5 U.S.C. § 706 (2)(A).

## II. The Proposed Rule does not withstand legal scrutiny.

### a. Congress intended the FHA to be interpreted broadly, including with respect to disparate impact claims.

From the outset, Congress intended the FHA to be broadly remedial. As the Supreme Court pointed out in *Trafficante*, “the language of the Act is broad and inclusive,” and its legislative history confirms an intent to provide ready access to the courts to remedy violations of the Act.<sup>12</sup> When Congress revisited the Act and expanded its scope through the Fair Housing Amendments Act of 1988 (“FHAA”),<sup>13</sup> it was fully aware that the disparate impact framework had been embraced as the consensus view of the federal appellate courts that had ruled on the issue. By the time the FHAA passed in June 1988, appellate courts had also addressed the appropriate *prima facie* case standard a plaintiff needed to meet to survive a motion to dismiss on a disparate impact claim. For example, the Second Circuit had rejected the attempt to raise the pleading standard in a way that would “place[] too onerous a burden on [plaintiffs and] appellants”<sup>14</sup> because, as it noted, “[t]he legislative history of the Fair Housing Act, although sparse, argues persuasively against so daunting a *prima facie* standard.”<sup>15</sup> Decades later, the *Inclusive Communities* Court concluded that Congress accepted and ratified these judicial rulings regarding disparate impact liability when its 1988 amendments left intact those decisions and the framework they established for liability.<sup>16</sup>

### b. The proposed rule subverts the existing burden-shifting framework in contravention of *Inclusive Communities Project*.

HUD’s 2013 Rule utilizes a three step burden-shifting framework, first articulated in *Griggs v. Duke Power Co.*,<sup>17</sup> adopted nearly unanimously by federal appellate courts, and ratified in *Inclusive Communities*. This well-established burden-shifting framework requires the plaintiff, first, to plead and, ultimately, to prove, facts which establish that the challenged policy *actually*

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<sup>12</sup> See 409 U.S. at 209; see also *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 105-06 (1979).

<sup>13</sup> When Congress amended the FHA in 1988, it chose to add two protected characteristics—familial status and disability—and to include additional prohibited practices protecting individuals with disabilities, further procedural protections, and three exemptions from liability, among other changes. H.R. Rep. No. 100-711, p. 2-11 (1988). By 1988, disparate impact liability was well established and blessed by the Supreme Court in the employment context. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), discussed *infra*.

<sup>14</sup> *Huntington Branch, NAACP*, 844 F.2d at 935 (rejecting consideration of the *Arlington Heights II* (*Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1287-90 (7<sup>th</sup> Cir. 1977), cert. denied, 434 U.S. 1025 (1978)) factors “normally advanced as part of a defendant’s justification for its challenged action” when assessing whether the plaintiff had established a *prima facie* case).

<sup>15</sup> *Huntington Branch, NAACP*, 844 F.2d at 936 (recognizing that employing the test in *Arlington Heights II* within a plaintiff’s *prima facie* burden “would cripple Title VIII”).

<sup>16</sup> *Inclusive Cmty. Project, Inc.*, 135 S. Ct. at 2520 (“Against this background understanding in the legal and regulatory system, Congress’ decision in 1988 to amend the FHA while still adhering to the operative language in §§804(a) and 805(a) is convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals finding disparate-impact liability.”); see also *id.* (citing *Manhattan Properties, Inc. v. Irving Trust Co.*, 291 U.S. 320, 336 (1934) (“where the Courts of Appeals had reached a consensus interpretation of the Bankruptcy Act and Congress had amended the Act without changing the relevant provision, “[t]his is persuasive that the construction adopted by the [lower federal] courts has been acceptable to the legislative arm of the government”).

<sup>17</sup> 401 U.S. 424 (1971).

causes or “predictably will cause” a disproportionate impact on protected individuals or that it “increases, reinforces, or perpetuates segregated housing patterns.”<sup>18</sup> Under this framework, embodied in HUD’s current rule, without evidence of a statistical disparity or other showing of adverse impact, the plaintiff’s claim will fail. If the plaintiff meets its *prima facie* showing, the defendant then has the opportunity to demonstrate that the challenged policy or practice is necessary to achieve “substantial, legitimate, non-discriminatory interests.”<sup>19</sup> Once the defendant has proffered a valid interest, the plaintiff can prevail by showing that “the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.”<sup>20</sup>

This framework is designed to balance competing interests. It does not simply impose liability for all practices that disproportionately harm members of protected classes. Rather, it provides a predictable approach to weighing disproportionately harmful consequences to members of groups protected by the FHA against substantial and legitimate business or other needs of defendants, and affords a plaintiff the opportunity to demonstrate that there is a way to minimize the harm while still serving the defendant’s legitimate interest underlying the policy or practice. Thus, the existing burden-shifting framework, as set forth in the 2013 Rule, strikes a critical balance: defendants will not be liable for practices or policies that may have an adverse impact on a protected class unless a court determines that their policy rationale is not legitimate or substantial, or if the plaintiff proves that a less discriminatory alternative can meet those interests.

HUD’s Proposed Rule scraps the three-step analysis and substitutes the framework with new standards and requirements at each of those steps. With respect to the first step, the Proposed Rule would require plaintiffs to allege and subsequently prove facts that would support five complex and ill-defined elements as part of the *prima facie* case, namely, that: 1) the challenged policy or practice is “arbitrary, artificial, and unnecessary to a valid interest or legitimate objective”; 2) there is a “robust causal link” between the challenged policy or practice and a disparate impact; 3) the alleged disparity has an adverse effect on members of a protected class; 4) the disparity is significant and material; and 5) there is a direct link between the disparate impact and the plaintiff’s injury.

There is little, if any, analysis in the Proposed Rule to support this complex, newly articulated set of requirements. HUD asserts that the changes to the 2013 Rule are necessary to: (1) bring the rule into alignment with the *Inclusive Communities* decision; (2) ensure that courts are not “second guessing” defendants’ “reasonable choices”; and (3) ensure that defendants are not forced to “resort to the use of racial quotas” to avoid liability for policies that have a negligible disparity or where the disparity is not sufficiently linked to the defendant’s policy or practice.<sup>21</sup>

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<sup>18</sup> 24 C.F.R. § 100.500(c)(1); *see also* 24 C.F.R. § 100.500(a).

<sup>19</sup> 24 C.F.R. § 100.500(c)(2).

<sup>20</sup> 24 C.F.R. § 100.500(c)(3).

<sup>21</sup> HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, Proposed Rule at 42855; <https://www.federalregister.gov/documents/2019/08/19/2019-17542/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard> (last visited Sept. 20, 2019) (citing *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2512 (2015)).

Nowhere in the analysis accompanying the proposed rule, however, does HUD offer evidence of judicial “second guessing” or defendants’ resort to racial quotas. It fails to provide a factual basis or sound legal analysis for any of its purported concerns.

**1. The new requirement that a plaintiff plead that a challenged policy or practice is arbitrary, artificial, and unnecessary does not further a legitimate objective and will create confusion.**

The requirement that a plaintiff plead facts that a challenged policy or practice is “arbitrary, artificial, and unnecessary” to make out a *prima facie* case is the product of a misreading of *Inclusive Communities*. What HUD has done is take language from *Inclusive Communities* and freight it with consequences far beyond those even suggested by the Court. Adopting the language from the 40-year old *Griggs* disparate impact in employment case, the Court explains that disparate impact liability is not established unless the challenged policy or practice is an “‘artificial, arbitrary, and unnecessary’ barrier.”<sup>22</sup> What the Court’s discussion makes clear, however, is that these are not pleading requirements nor elements of a plaintiff’s *prima facie* case, but the result of the application of the three-step burden-shifting framework, which balances the impact of the policy against its business justification. Indeed, whether a practice is “artificial, arbitrary, and unnecessary” cannot be determined until the parties are permitted to proffer evidence in support of the three steps of the framework, and a court is able to consider this evidence in turn.

An example: if a municipality denied a zoning variance to an affordable housing developer that would permit that developer to build an affordable residential development in a district zoned for commercial purposes, and the plaintiff had to allege in its complaint why the policy—the zoning variance denial—constituted an “artificial, arbitrary, and unnecessary” barrier, it would surely fail unless it had access to discovery. Only through discovery could the plaintiff explore the reasons for the policy, namely whether the denial was based on a valid governmental interests and even, if so, whether the approach was “unnecessary” because that interest could be met with less adverse impact on low-income persons of color. In other words, it would be virtually impossible to set forth facts in a complaint to meet each of the steps of what is, of necessity, a sequential burden-shifting framework.

The 2013 Rule and case law already require plaintiffs to identify, with specificity, the policy or practice that is causing a disparity. HUD suggests that it is motivated by a concern that legitimate business interests are somehow thwarted by “the specter of disparate-impact litigation,” but it provides no data to support the existence of such a “specter.” Instead, it again misreads *Inclusive Communities*.<sup>23</sup> While *Inclusive Communities* noted that the goals of the FHA would be

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<sup>22</sup> *Inclusive Cmty. Project, Inc.*, 135 S. Ct. at 2524 (citing *Griggs*, 401 U.S. at 431). The Court additionally notes that disparate impact liability mandates “removal of artificial, arbitrary, and unnecessary barriers,” rather than displacement of valid governmental policies. 135 S. Ct. at 2522.

<sup>23</sup> HUD’s Implementation of the fair Housing Act’s Disparate Impact Standard, Proposed Rule at 42858 <https://www.federalregister.gov/documents/2019/08/19/2019-17542/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard> (citing 135 S. Ct. at 2524, where the Court stated that “[i]f the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose as well as the free-market system. And as to governmental entities, they must not be prevented from achieving legitimate objectives. . .”).

undermined were developers deterred from building low-income housing or were governmental entities thwarted in implementing appropriate policies due to disparate impact suits, its discussion was entirely hypothetical. It did not suggest that current interpretations of disparate impact liability in fact caused or contributed to any such reluctance. In fact, the Supreme Court recognized that legitimate business interests are already accommodated and protected under the law, noting that, while disparate impact liability should not place unreasonable restrictions on housing providers, “disparate impact liability has always been properly limited”<sup>24</sup> so that “housing authorities and private developers [are] allowed to maintain a policy if they can prove it is necessary to achieve a valid interest.”<sup>25</sup>

**2. There is no need for HUD’s change to the “causality” requirement since the existing rule requires a causal link between the disparity and the challenged policy—a case-specific inquiry that has been readily applied by courts.**

The 2013 Rule<sup>26</sup> and courts construing the FHA before and after *Inclusive Communities* have required plaintiffs to plead and prove a causal connection between the challenged policy or practice and the disparity.<sup>27</sup> Causation is nothing new. This is necessarily a fact-specific inquiry; one that trial courts are best suited to, and routinely, make. While HUD invokes the Supreme Court’s “robust causality” language, the agency does not explain what, if anything, distinguishes

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<sup>24</sup> 135 S. Ct. at 2522.

<sup>25</sup> Further evidence of the adequacy of the current standard to protect legitimate objectives of policies that may disproportionately hurt members of protected classes is found in the very case on which HUD relies for its reformulation. In the post-*Inclusive Communities* case of *Ellis v. City of Minneapolis*, 860 F.3d 1106 (8th Cir. 2017), plaintiffs challenged the substance and application of the City’s housing code on the grounds that it reduced the supply of rental housing and made rental housing disproportionately unavailable to African Americans. *Id.* at 1109. In rejecting plaintiffs’ claims, the court accepted the City’s argument that the housing code furthered a substantial and legitimate interest to promote health and safety. *Id.* at 1112. *Ellis* demonstrates exactly the opposite of what HUD argues: The existing burden-shifting framework protects defendants’ ability to pursue legitimate business interests as illustrated by *Ellis* where the plaintiffs were unable to convince the Court that there was a less discriminatory alternative to defendant’s policy and practices. This further shows that even the third step of the traditional burden-shifting framework does not thwart effective defense of legitimate business practices.

<sup>26</sup> See 24 C.F.R. § 100.500 (c)(1). The charging party, with respect to a claim brought under 42 U.S.C. 3612, or the plaintiff, with respect to a claim brought under 42 U.S.C. 3613 or 3614, has the burden of proving that a challenged practice *caused* or predictably will *cause* a discriminatory effect.

<sup>27</sup> Compare *Nat’l Fair Hous. Alliance v. Travelers Indem. Co.*, 261 F. Supp. 3d 20, 30 (D.D.C. 2017) (where majority of the recipients of Housing Choice Vouchers are African American and/or women, defendants’ policy of not insuring homes rented to Housing Choice Voucher holders caused housing to be disproportionately unavailable to African Americans and women); *Rhode Island Commission for Human Rights v. Graul*, 120 F. Supp. 3d 110, 124 (D.R.I. 2015) (landlord’s policy not to rent one-bedroom to three people caused those units to be three times more likely to be unavailable to families with children compared to those without and thus discriminated against families); *Avenue 6E Investments, LLC v. City of Yuma*, 217 F. Supp. 3d 1040 (D. Ariz. 2017) (statistical evidence that was specific to the relevant market and time frame established that the zoning policy caused housing to be disproportionately unavailable to Hispanics), with *Boykin v. Fenty*, 650 F. App’x 42, 43 (D.C. Cir. 2016) (plaintiffs failed to show that decision to close a low-barrier shelter caused housing to be disproportionately unavailable to individuals with disabilities because it did not show that homeless individuals with disabilities were more likely to rely on low-barrier shelters than homeless individuals without disabilities); *Burbank Apartment Tenants Ass’n v. Kargman*, 474 Mass. 107, 48 N.E.3d 394, 398 (Mass. 2016) (plaintiffs failed to show that defendants’ decision not to switch from a project-based subsidy to vouchers caused a disparity because they did not show that those living in units with a project based subsidy were more likely to be members of a protected class as compared to voucher holders).

a “robust causality” standard from the fact-specific inquiries in which courts have long engaged. Thus, by including the phrase, without more, HUD is creating uncertainty for litigants and courts alike. As courts applying *Inclusive Communities* have recognized, the “robust causality” requirement “does not require courts to abandon common sense or necessary logical inferences that follow from the facts alleged.”<sup>28</sup>

**3. HUD has injected needless confusion regarding the scope of protection afforded members of a protected class in the third proposed element of its newly formulated *prima facie* case requirements.**

The third element of HUD’s proposed disparate impact standard—that the challenged practice or policy affects a protected class—does not merit extensive discussion. That has always been, and continues to be the structure of the FHA. However, HUD creates confusion of the reach of the FHA in stating that “it would be insufficient to allege only that the plaintiff is a member of a protected class and would be adversely affected or that members of a protected class are impacted as are all individuals.” Why this is the case, and what HUD believes would satisfy this element remains unexplained and appears contrary to the FHA. HUD compounds the lack of clarity with respect to this element by contending that, as part of the new *prima facie* requirements, a plaintiff must “show that the policy or practice has the ‘effect of discriminating against a protected class’” as a “group,” citing *Anderson v. City of Blue Ash*, 798 F.3d 338, 364 (6<sup>th</sup> Cir. 2015). First, nowhere in that case does the phrase “as a group” appear.<sup>29</sup> Nor is it identified as a pleading requirement in *Inclusive Communities* or any of its progeny. If, by saying the plaintiff must prove the policy or practice has the effect of discriminating against a protected class as a group, HUD means that a plaintiff must prove that all members of a protected class would suffer an adverse effect because of the policy, it is unsupported by case law. If HUD means something else, the lack of explanation and clarity creates a trap, rather than guidance, for both plaintiffs and defendants that likely to protract and complicate litigation.

**4. HUD has not explained the purpose or meaning of its new “significant and material” disparity language; courts do and should continue to determine the significance of the disparity on a case-by-case basis.**

The fourth element of the new *prima facie* pleading requirement HUD would impose through the Proposed Rule is that a plaintiff plead a “significant and material” disparity as a result of the challenged policy. According to HUD, based on another misinterpretation of *Inclusive Communities*, “[i]f a defendant were subject to liability for policies that have a negligible disparity, the defendant could be forced to ‘resort to the use of racial quotas’ to ensure that no subset of its

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<sup>28</sup> *Travelers Indem. Co.*, 261 F. Supp. 3d at 30 (citing *Inclusive Cmty. Project, Inc.*, 135 S. Ct. at 2524).

<sup>29</sup> In *Anderson v. City of Blue Ash*, the court determined that the plaintiffs alleging disparate impact claims under the FHA failed to show that defendant’s actions caused individuals with disabilities to suffer disproportionately more than other individuals. The plaintiff alleged that a City of Blue Ash ordinance prohibiting residents from keeping farm animals on their property had a disparate impact on persons with disabilities who might rely on those animals as service animals. 798 F. 3d at 364. The claim ultimately failed because the challenged ordinance exempted “any animals protected by federal law, including the FHA[.]” thereby protecting the ability of persons with disabilities to keep farm animals as service animals. *Id.* The case does not stand for the proposition that a challenged policy or practice must affect an otherwise undefined “group.”

data appears to present a disparate impact.” However, there is no indication in the *Inclusive Communities* opinion or in HUD’s analysis, that, under the current Rule, potential defendants have resorted to, or might use, racial quotas to avoid liability. There is therefore no existing problem to address; there is simply the Supreme Court’s identification of a potential, future concern: “Without adequate safeguards at the *prima facie* stage, disparate-impact liability might cause race to be used and considered in a pervasive way and ‘would almost inexorably lead’ governmental or private entities to use ‘numerical quotas,’ and serious constitutional questions then could arise.”<sup>30</sup> The Court indicated that protection against this possible consequence lies in application of the causation standard.<sup>31</sup> Its opinion does not suggest that there needs to be a higher threshold than courts currently apply to measure the significance of the disparity occasioned by a practice or policy.

Just as with a causation determination, assessment of the severity or significance of a disparate result should continue to be left to trial courts as they address the specifics of any given policy or practice. Furthermore, HUD does not provide any guidance or content to what constitutes a “significant” and “material” disparity and how the change in language is intended to change existing pleading and proof standards, if at all. It therefore fails to articulate whatever new bar it is seeking to impose with sufficient specificity to enable litigants to either meet or dispute it.<sup>32</sup>

**c. HUD improperly substitutes its judgment for that of Congress and the courts by revising the pleading and substantive proof standards, making it impossible for disparate impact claims to succeed.**

HUD’s attempt to revise *prima facie* case elements for disparate impact cases set forth in the Proposed Rule radically departs from the pleading standards and burden that plaintiffs have been required to meet long before the 2013 Rule, *see supra* at 4, and from *Inclusive Communities*’ formulation of what a plaintiff must allege and eventually prove at step one of the burden-shifting framework. The Proposed Rule instead creates a new pleading standard for plaintiffs. The result will establish hurdles that unjustifiably thwart plaintiffs, and prevent them from achieving the anti-discrimination and anti-segregative mandates of the FHA.

In addition to creating a set of ill-defined standards, as discussed above, the Proposed Rule requires plaintiffs to anticipate a range of potential defenses in their initial pleadings in order to

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<sup>30</sup> 135 S. Ct. at 2523 (citation omitted).

<sup>31</sup> *Id.*

<sup>32</sup> Similar to the first four *prima facie* elements, HUD bases the Proposed Rule’s proximate cause element on equally infirm grounds. By requiring plaintiffs “to allege that the complaining party’s alleged injury is directly caused by the challenged policy or practice,” 84 Fed. Reg. 42859 (proposed Aug. 19, 2019), HUD substitutes its judgment for that of competent courts of law. HUD uses language from *Bank of Am. Corp. v. City of Miami* decision to support its new requirement, but in doing so, it ignores the case’s broader holding. 137 S. Ct. 1296 (2017).

In *Bank of Am. Corp.*, the Supreme Court declined to “draw the precise boundaries of proximate cause under the FHA.” *Id.* at 1306. It held that “lower courts should define, in the first instance, the contours of the proximate cause under the FHA and decide how that standard applies.” *Id.* Here, the Supreme Court has clearly indicated that the lower courts, should define the proximate cause requirement under the FHA. This directive extends to HUD, which also lacks the benefit of a court’s judgment on how the various principles associated with proximate cause—a common law principle traditionally defined by the courts—apply in a given FHA case.

survive a motion to dismiss. As an initial matter, this wholesale revision of plaintiffs' pleading requirements usurps the Judicial Conference and judiciary's role in establishing pleading requirements. Rule 8 of the Federal Rules of Civil Procedure simply requires a short plain statement of: 1) the grounds for which the court has jurisdiction, 2) the claim showing that the plaintiff is entitled to relief and 3) a demand for relief. Over time, the Supreme Court has expanded upon what the "short plain statement" should include, and heightened the pleading standard for plaintiffs. In *Twombly* and *Iqbal*, the Court was clear that complaints that only rest on bare assertions, the recitation of the elements of applicable causes of action, and legal conclusions do not meet the requirements of Rule 8.<sup>33</sup> A plaintiff must allege facts that, if proven true, would entitle the plaintiff to relief—specifically, "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."<sup>34</sup> But even as it stiffened pleading requirements, the Supreme Court has not required plaintiff to make a *prima facie* showing at the pleading stage, prior to the opportunity to conduct discovery.<sup>35</sup>

Additionally, nothing in *Twombly*, *Iqbal*, or their progeny requires a plaintiff to anticipate and state facts that would refute a wide range of defenses, many of which may be potentially unknown at the pleading stage. Yet, that is exactly what HUD's Proposed Rule requires. By requiring plaintiffs to set forth, at the outset of the case that the challenged policy or practice is "arbitrary, artificial, and unnecessary to a valid interest or legitimate objective", plaintiffs would have to anticipate what those "valid interest[s] or legitimate objective[s]" could be. HUD offers defendants a myriad of available defenses which would defeat a *prima facie* case. This means that, as a practical matter, if a plaintiff has any chance to survive a motion to dismiss by the defendant, the plaintiff must anticipate those defenses, gather evidence to substantiate the plaintiff's rebuttal

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<sup>33</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("While a complaint attacked by a Fed. R. Civ. P. 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level."); *Ashcroft v. Iqbal*, 556 U.S. 662,678 ("The pleading standard Rule 8 announces does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.").

<sup>34</sup> *Iqbal*, 556 U.S. at 678.

<sup>35</sup> The majority of courts do not require the establishment of a *prima facie* case in the complaint. See, e.g., *Boykin v. Gray*, 895 F. Supp. 2d 199, 208 (D.D.C. 2012) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510-11 (2002)) ("At the motion to dismiss stage, the district court cannot throw out a complaint even if the plaintiff did not plead the elements of a *prima facie* case"); accord *Nat'l Cmty. Reinvestment Coalition v. Accredited Home Lenders Holding Co.*, 573 F. Supp. 2d 70, 79 (D.D.C. 2008) (finding that the plaintiff sufficiently stated a claim of disparate impact under the FHA, rejecting defendant's allegations that plaintiff's data was insufficient and denying defendant's motion to dismiss); see also *Swierkiewicz*, 534 U.S. at 511 ("This Court has never indicated that the requirements for establishing a *prima facie* case . . . apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss.").

to the defenses raised before filing a complaint, and then plead the anticipatory rebuttal. Once again, the justification for these requirements is based on a misreading of *Inclusive Communities*. HUD has lifted from the decision examples of the kind of considerations that should inform a court’s consideration of the merits of disparate impact claims and elevated them to the level of mandatory initial factual allegations, without which disparate impact cases will fail from the outset.

A current case that survived a motion to dismiss under *ICP* and the 2013 Rule is illustrative. The suit raises a disparate impact challenge to a redevelopment plan on the basis of familial status because the plan excludes four- and five-bedroom units and reduces three-bedroom apartments from the redevelopment. As written, the Proposed Rule would have surely resulted in dismissal of the case at the pleading stage. Defendants could have argued that the disparities plaintiffs alleged were justified under application of a different occupancy standard. Plaintiffs, on the other hand, would have had no information to contest such an inherently factual defense without discovery.

*Ellis* is also instructive because it demonstrates the adequacy of existing pleading standards. The court’s determination that plaintiffs lacked an adequate factual basis for the challenge was made at the early stage of the case, on a motion for judgment on the pleadings prior to the initiation of discovery. The court found that the complaint failed to meet existing pleading standards under the federal rules and the “plausibility” requirements articulated in *Twombly* and that the evidence upon which plaintiff based its claims were simply disagreements among stakeholders and between the *Ellises* and the City regarding the policy.<sup>36</sup> As illustrated by these cases, the Proposed Rule wrongfully attempts to substitute its judgment for that of the courts and Congress, and blatantly disregards decades of well-settled precedent.

**III. The Proposed Rule would permit a defendant to raise factual defenses, including newly articulated ones, as dispositive at the pleading stage—before a plaintiff has had the benefit of discovery—and would therefore heighten the burden of pleading required of plaintiffs beyond that set out by established law.**

In stark contrast to the current framework, the Proposed Rule arms defendants with new arguments to raise at the pleading stage to dismiss a claim before the parties engage in fact discovery to test the existence and strength of the claims. This effort not only truncates the fact-finding process by heightening pleading standards, *see supra* at Section II, but eliminates the opportunity available in theory to plaintiffs even under the Proposed Rule to defeat these defenses in the third step of the burden-shifting framework by demonstrating the existence of a less discriminatory practice that would satisfy the defendant’s identified interest.<sup>37</sup> We discuss each of these new defenses below.

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<sup>36</sup> 860 F.3d at 1112.

<sup>37</sup> As set forth below, *infra* at Section IV, the third step of the well-established burden-shifting analysis in disparate impact cases is also subject to HUD’s efforts to rewrite the law. Currently, following defendant’s demonstration of a “substantial, legitimate [and] nondiscriminatory interest,” a plaintiff may prevail at this third stage by showing that the interest “could be served by another practice that has a less discriminatory effect.” 24 C.F.R. § 100.500(c)(2)-(3). HUD seeks to erase decades of law by requiring, in this third phase, that a plaintiff “prove by the preponderance of the evidence that a less discriminatory policy or practice exists which would serve the defendant’s identified interest in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant.”

**a. Limitations imposed by other laws, orders or requirements.**

The Proposed Rule provides that a defendant may show “its discretion is materially limited by a third party, such as through: (i) [a] Federal, state, or local law; or (ii) [a] binding or controlling court, arbitral, regulatory, administrative order, or administrative requirement[.]”<sup>38</sup> It is unnecessary to codify the defense addressing the applicability of another federal, state or local law. When another federal statute limits a housing provider’s discretion, such as, for example, a law that prevents public housing authorities or owners and operators of subsidized housing from renting to persons convicted of certain felonies, such as individuals who are registered sex offenders, the legal prohibition would certainly serve as a legitimate and substantial basis under the current rule for the policy even if the result of the policy would be to disproportionately exclude members of a protected class.

HUD’s reliance on *Inclusive Communities* to justify this revision is misplaced. As the Supreme Court noted, the existence of a constraining federal law may create a defense because it breaks the causal link between the challenged practice or policy and its results; it does not, in and of itself, provide an automatic safe harbor.<sup>39</sup> Indeed, the fact that the limitation is embodied in law indicates that either the Congress or the State has identified a legitimate interest, which any alternative will have to satisfy in order to prevail.

HUD attempts to stretch what is already an overstatement of the impact of applicable laws even further, by adding arbitral, administrative and regulatory requirements to the “limitations” defendants may raise at the initial pleading stage. A defendant may, of course, raise the existence of a legal defense emanating from a prior proceeding in a motion to dismiss, but the applicability of such a prior proceeding must be assessed on its own facts and legal merits. By including the language in the Proposed Rule, HUD gives such rulings greater presumptive weight than is warranted and is likely to result in undue deference to such prior proceedings. Such a result is not grounded in the statute or case law and, were it to survive an APA challenge, almost certainly will generate more protracted litigation, harming the interests of all stakeholders.

**b. Reliance on algorithms.**

Second, the Proposed Rule presents a series of defenses in cases where a discriminatory policy or practice relies on an algorithmic model. Algorithmic models, such as ones used for credit scoring, insurance pricing, underwriting mortgages, or advertising, can be a useful tool for data analysis and for the prediction of patterns. But these models can also result in discriminatory practices. As a recent example, human rights complaints were filed in September 2019 alleging that “seven housing companies that lease or manage properties in the [D.C.] metropolitan area used Facebook’s advertising system to target specific age groups” to the exclusion of others, and that “Facebook’s algorithms compounded the issue by disproportionately showing the

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<sup>38</sup> 84 Fed. Reg. 42854, 42862 (proposed Aug. 19, 2019).

<sup>39</sup> *Inclusive Cmty. Project, Inc.*, 135 S. Ct. at 2524 ( “. . . 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.” ) (internal citations omitted).

advertisements to younger users.”<sup>40</sup> Under the Proposed Rule, a defendant using an algorithmic model will essentially be able to escape liability, even if the challenged policy or practice has the effect of, for example, improperly denying a protected class access to housing or home loans. While there may be additional technical defects to setting up algorithms essentially as safe harbors, some are readily identifiable.

The first defense related to algorithms will ask a defendant to “[i]dentif[y] the inputs used in the model and show[] that these inputs are not substitutes for a protected characteristic and that the model is predictive of risk or other valid objective.”<sup>41</sup> Even when the algorithm has a valid objective and none of its individual inputs are a close proxy for a protected characteristic, however, algorithms may still disproportionately affect members of a protected class. In fact, “[t]he whole point of sophisticated machine-learning algorithms is that they can learn how combinations of different inputs might predict something that any individual variable might not predict on its own. And these combinations of different variables could be close proxies for protected classes, even if the original input variables are not.”<sup>42</sup> By way of example, researchers have explained that an employer who aims to discriminate using an algorithm could do so using “some combination of musical tastes, stored “likes” on Facebook, and network of friends [that] will reliably predict membership in protected classes. An employer can use these traits to discriminate by setting up future models to sort by these items and then disclaim any knowledge of such proxy manipulation.”<sup>43</sup> The same researchers point out that redlining can be achieved through similar, seemingly neutrally focused algorithms.<sup>44</sup>

Misuse of algorithms is possible and pernicious. Indeed, “[a]pproached without care, data mining can reproduce existing patterns of discrimination, inherit the prejudice of prior decision makers, or simply reflect the widespread biases that persist in society,” and “can even have the perverse result of exacerbating existing inequalities by suggesting that historically disadvantaged groups actually deserve less favorable treatment.”<sup>45</sup> Intentionally or not, “[a]lgorithms could

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<sup>40</sup> Marie C. Baca, Housing Companies Used Facebook’s Ad System to Discriminate Against Older People According to New Human Rights Complaints, THE WASHINGTON POST (Sep. 18, 2019, 2:04 PM) <https://www.washingtonpost.com/technology/2019/09/18/housing-companies-used-facebooks-ad-system-discriminate-against-older-people-according-new-human-rights-charges/>.

<sup>41</sup> 84 Fed. Reg. 42854, 42859 (proposed Aug. 19, 2019).

<sup>42</sup> Jamie Williams, Saira Hussain, and Jeremy Gillula, *EFF to HUD: Algorithms Are No Excuse for Discrimination*, ELECTRONIC FRONTIER FOUNDATION (Sep. 26, 2019), <https://www.eff.org/deeplinks/2019/09/dangerous-hud-proposal-would-effectively-insulate-parties-who-use-algorithms>.

<sup>43</sup> Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 Calif. L. Rev. 671, 692-693, 712 (2016) (internal citations omitted). For further context, the full quote reads: “Data mining allows employers who wish to discriminate on the basis of a protected class to disclaim any knowledge of the protected class in the first instance while simultaneously inferring such details from the data. An employer may want to discriminate by using proxies for protected classes, such as in the case of redlining. Due to housing segregation, neighborhood is a good proxy for race and can be used to redline candidates without reference to race. This is a relatively unsophisticated example, however. It is possible that some combination of musical tastes, stored “likes” on Facebook, and network of friends will reliably predict membership in protected classes. An employer can use these traits to discriminate by setting up future models to sort by these items and then disclaim any knowledge of such proxy manipulation.”

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 674.

exhibit these tendencies *even if they have not been manually programmed to do so . . .* Discrimination may be an artifact of the data mining process itself, rather than a result of programmers assigning certain factors inappropriate weight.”<sup>46</sup> Finally, “[e]ven in situations where data miners are extremely careful, they can still effect discriminatory results with models that, quite unintentionally, pick out proxy variables for protected classes.”<sup>47</sup>

The second defense HUD creates in the Proposed Rule related to algorithms is similarly problematic. “[S]how[ing] that use of the model is standard in the industry, it is being used for the intended purpose of the third-party, and that the model is the responsibility of a third party”<sup>48</sup> at the pleading stage would, under HUD’s proposal, protect defendants “even if an algorithm they used had a demonstrably discriminatory impact – and even if they *knew* it was having such an impact.”<sup>49</sup> It would also deny plaintiffs the opportunity to engage in the discovery process, allow experts to examine and challenge the model, and to potentially join the model maker as a defendant under the Federal Rules of Civil Procedure, should discovery reveal facts sufficient to support such a joinder. And, even if a plaintiff were able to bring suit “against the creator of an algorithmic model, the model maker would likely attempt to rely on trade secrets law to resist disclosing any information about how its algorithm was designed or functioned. . . Many of these algorithms are black boxes, and their creators want to keep it that way.”<sup>50</sup>

Furthermore, HUD does not define what it means by “industry standard” and, by suggesting that such a defense may be sufficient to defeat a claim without further inquiry, leaves the putative defense substantially untested and untestable. A skillful defendant is likely to seize on this undefined source of protection to thwart any meaningful inquiry into the legitimacy of the challenged practice, rendering the protections afforded by the FHA essentially meaningless or unenforceable. In effect, this defense removes “any incentive for landlords, banks, and insurance companies to make sure that the algorithms they choose to use do not have discriminatory impacts[.]”<sup>51</sup>

The Proposed Rule would allow a plaintiff to “rebut this allegation by showing that the plaintiff is not challenging the standard model alone, but the defendant’s unique use or misuse of the model, as the cause of the disparate impact.”<sup>52</sup> However, the professed opportunity to rebut is likely meaningless at the initial pleading stage, insofar as it would require a plaintiff to have

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<sup>46</sup> *Id.* (emphasis added) (internal citations omitted). The article goes on to state, “Such a possibility has gone unrecognized by most scholars and policy makers, who tend to fear concealed, nefarious intentions or the overlooked effects of human bias or error in hand coding algorithms. Because the discrimination at issue is unintentional, even honest attempts to certify the absence of prejudice on the part of those involved in the data mining process may wrongly confer the imprimatur of impartiality on the resulting decisions.”

<sup>47</sup> *Id.* at 675.

<sup>48</sup> 84 Fed. Reg. 42854, 42859 (proposed Aug. 19, 2019).

<sup>49</sup> Jamie Williams, Saira Hussain, and Jeremy Gillula, *EFF to HUD: Algorithms Are No Excuse for Discrimination*, ELECTRONIC FRONTIER FOUNDATION (Sep. 26, 2019), <https://www.eff.org/deeplinks/2019/09/dangerous-hud-proposal-would-effectively-insulate-parties-who-use-algorithms> (emphasis in original).

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

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

<sup>52</sup> 84 Fed. Reg. 42854, 42859 (proposed Aug. 19, 2019).

information distinguishing the industry algorithm from a defendant’s particular use—information that may only be able through discovery. In sum, this defense may have the unintended consequence of foreclosing liability for upholding a widespread but discriminatory algorithm that evades challenge simply because it has been carefully crafted to be consistent with an undefined “industry standard.”

The third and last defense, “showing that a neutral third party has analyzed the model in question and determined it was empirically derived, that its inputs are not substitutes for a protected characteristic, the model is predictive of risk or other valid objective, and is a demonstrably and statistically sound algorithm”<sup>53</sup> suffers from similar deficiencies. As discussed above, even algorithms that have a valid objective and no inputs that serve as substitutes for a protected characteristic can have a disparate impact on a protected class. Furthermore, many of the key terms of the defense, such as “empirically derived,” are not defined. If this defense is codified, a plaintiff will need to anticipate and have analyzed a wide range of algorithmic defenses, set forth those analyses in their complaint and, likely through expert testimony, rebut the legitimacy of the range of possible defenses in responding to a motion to dismiss without knowing how the algorithm in question was specifically designed or employed. Potentially requiring plaintiffs to retain an expert at the pleading stage who can rebut an almost endless range of technical arguments related to an algorithm, on top of retaining a statistical expert to show that a policy or practice has a disproportionate impact on a particular protected class, at the very least significantly increases costs for plaintiffs, and flies in the face of established pleading requirements. Indeed, HUD’s proposed rebuttal—that a plaintiff can “show[] that the third party is not neutral, that the analysis is incomplete, or that there is some other reason why the third party’s analysis is insufficient evidence that the defendant’s use of the model is justified”<sup>54</sup>—would have to rely, in large part, on an expert’s review of a defendant’s defense arguments, without having the opportunity to inquire through discovery about the model or explore its application.

While ultimately disparate impact cases rely heavily on the use of experts, this initial burden of the Proposed Rule is imposed on the aggrieved party who seeks the protection of the nation’s civil rights laws, but almost always has fewer resources than the government or private entity whose practice is challenged. It thus creates virtually insuperable obstacles to vindication of important rights for those who are most in need and thwarts the purposes and remedial focus of the FHA. Imposing these new and profound obstacles in the path of persons seeking to protect core civil rights, repeatedly reaffirmed by Congress and enshrined in volumes of case law, reflects a fundamental misunderstanding of HUD’s role as an administrative agency and constitutes policy overreach at its most extreme.

#### **IV. The proposed rule imposes burdensome requirements on plaintiffs alleging discriminatory effect.**

The final step in the current three-step burden-shifting framework for assessing disparate impact liability under the FHA provides that that the “plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 42860.

served by another practice that has a *less discriminatory effect*.<sup>55</sup> This “less discriminatory alternative” rule is supported by decades of judicial and agency interpretation. And it has proven workable and effective in addressing a critical aspect of the FHA—ending practices that have a discriminatory effect, even if those practices were not motivated by discriminatory intent or have a legitimate reason, when there is a way to achieve the intended result with less harmful consequences.

The Proposed Rule substantially changes the substance of the third step of the analysis. It requires that, where a defendant produces evidence showing that the challenged policy or practice advances a valid interest, the plaintiff “must prove by the preponderance of the evidence that a less discriminatory policy or practice exists that would serve the defendant's identified interest in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant.”<sup>56</sup> The defendant will have a complete defense to a disparate impact claim under the Proposed Rule where it can prove that the alternative policy or practice identified by the plaintiff would not serve its interest “in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant.”<sup>57</sup>

As discussed below, neither the courts nor HUD have ever required that a plaintiff prove an alternative is “equally effective.” Further, requiring a plaintiff to identify an alternative that is not more costly or burdensome to defendants effectively introduces a profit defense to justify discriminatory practices—a result completely at odds with civil rights law.

**a. As a threshold matter, HUD’s reliance on *Wards Cove* to justify its proposed change is misplaced.**

HUD claims that its burdensome revisions to the current less discriminatory alternative standard are somehow “consistent with existing disparate impact case law” (Proposed Rule, 84 FR 42854, 42860), but the case law does not support HUD’s claim. In fact, the only support HUD cites for its claim is *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)—a relatively short-lived Title VII case, not a FHA case—which Congress has unequivocally rejected and no administrative action can properly revive.<sup>58</sup>

In the Civil Rights Act of 1991, just two years after the opinion issued, Congress rejected the *Wards Code* requirement that placed the burden of demonstrating a lack of business necessity for a particular practice on plaintiffs.<sup>59</sup> Congress’s 1991 codification of disparate impact

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<sup>55</sup> 24 CFR 110.5(c)(3) (emphasis added).

<sup>56</sup> 84 Fed. Reg. 42854, 42863 (proposed August 19, 2019).

<sup>57</sup> Proposed Rule, 24 CFR 100.500(d)(2)(iii).

<sup>58</sup> In *Wards Cove*, a case involving a disparate impact challenge to racially segregated salmon canneries in Alaska, the Court held that the “business necessity” defense, which had long been an affirmative defense requiring proof/persuasion by employers, was now the responsibility of the plaintiff. *Wards Cove Packing Co.*, 490 U.S. 642 at 657-659. In other words, the disparate impact plaintiff would be required to demonstrate that the challenged practice was not a business necessity. *Id.* at 659. The Court also held that a plaintiff could identify a less discriminatory alternative, but “any alternative practices which respondents offer up in this respect must be equally effective as petitioners’ chosen hiring procedures in achieving petitioners’ legitimate employment goals” and that the cost of implementing any change was a relevant consideration to whether an alternative was reasonable. *Id.* at 661.

<sup>59</sup> See Pub. Law No. 102–166, 105 Stat. 1071 (1991); 42 U.S.C. §§ 2000e-2(k)(1)(A)-(C).

specifically returned the law to its pre-*Wards Cove* status. In pertinent part, the 1991 Act explicitly returned the meaning of “alternative employment practice” to that which it had been under “the law as it existed on June 4, 1989”—the day before *Wards Cove* was decided.<sup>60</sup> *Wards Cove* was legislatively overruled so quickly that courts have next to no experience applying its standards to Title VII cases or in any other context. Applying the *Wards Cove* framework in FHA disparate impact claims now flies in the face of this unequivocal Congressional statement of intent, and would undoubtedly create uncertainty and confusion. Simply put, it does not reflect the statutorily-intended disparate impact framework that has been in place for over twenty-five years.

The fact that Congress unequivocally rejected the reasoning of *Wards Cove* is itself a sufficient and compelling reason for why HUD’s reliance on it is absolutely unsound. There are, however, additional reasons that demonstrate how the case fails to provide HUD with a basis for what would be a fundamental and substantive burden-shifting. First, no judicial decision has held that the *Wards Cove* framework ought to apply in the FHA context. Tellingly, *Inclusive Communities*, the decision purportedly prompting the revisions in the proposed rule, cites to *Wards Cove* only once.<sup>61</sup> That narrow citation is in connection with a discussion of the causality requirement for plaintiff’s prima facie case, and was unrelated to the less discriminatory alternative step of the analysis.<sup>62</sup>

Second, HUD has, in the past, directly considered whether *Wards Cove* supplies the appropriate framework for FHA disparate impact cases and expressly rejected the suggestion from public commenters to the then proposed 2013 Rule.<sup>63</sup> HUD underscored how the framework in the superseded *Wards Cove* case is “even less appropriate in the housing context than in the employment area in light of the wider range and variety of practices covered by the [Fair Housing] Act that are not readily quantifiable.”<sup>64</sup> The burden-shifting framework that HUD did adopt in the current Rule is “largely consistent with the framework courts have developed on their own for analyzing disparate impact claims” in the housing context.<sup>65</sup>

In light of Congress’s rejection of the burden allocation of the case for disparate impact analysis, the glaring absence of any judicial precedent indicating that the *Wards Cove* standards are applicable in the FHA context, and HUD guidance rejecting its applicability to fair housing cases, there is simply no legal basis for HUD to now look to this decade’s old superseded case to support its significant proposed revisions to the standard. In short, HUD’s reliance on *Wards Cove* as justification for the proposed rule change is not just misguided policy; it is wrong as a matter of law.

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<sup>60</sup> 42 U.S.C. § 2000e-2(k)(1)(C).

<sup>61</sup> See *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015).

<sup>62</sup> *Id.*

<sup>63</sup> 78 Fed. Reg. 11,460, 11,473 (“HUD does not agree . . . that *Wards Cove* even governs FHA claims.”).

<sup>64</sup> *Id.* at 11,473.

<sup>65</sup> See *Prop. Cas. Insurers Ass’ of Am. v. Donovan*, 66 F. Supp. 3d 1018, 1053 (N.D. Ill. 2014).

- b. The Courts and HUD itself have made clear that plaintiffs must identify a less discriminatory alternative that serves a defendant’s legitimate interests—not that the alternative need be “equally effective” (or anything more).**

- 1. The Courts have never required plaintiffs to identify a less discriminatory alternative that is “equally effective” (or less costly or burdensome).**

It is not the role of an administrative agency to unilaterally undo volumes of case law, yet that is what HUD’s effort to change the final step of the burden-shifting analysis is. The Courts have long held that the less discriminatory effect standard in step three of the current burden shifting framework requires a plaintiff to identify a viable alternative, *not* an equally effective or less costly or burdensome alternative.<sup>66</sup> Indeed, the Supreme Court in *Inclusive Communities* “expressly approved of disparate-impact liability under the FHA and did not identify *any* aspect of HUD’s burden-shifting approach that required correction.”<sup>67</sup> The *Inclusive Communities* Court did not use the phrase “equally effective” or anything like it. The existing Rule already affords defendants protection, since plaintiffs must show the less discriminatory alternative “serve[s] the respondent’s or defendant’s substantial, legitimate nondiscriminatory interest,” and is “supported by evidence, [that] may not be hypothetical or speculative.”<sup>68</sup>

In one recent case, *MHANY Mgmt. v. Cty. of Nassau* (“Garden City”), a federal district court expressly rejected the argument that a plaintiff must prove that a less discriminatory alternative serves the defendant’s interest in an “equally effective” manner.<sup>69</sup> In *Garden City*, the Court held that a zoning decision by the Village of Garden City had an unjustified disparate impact on African Americans and Latinxs in violation of the federal FHA.<sup>70</sup> The case was on remand from the Second Circuit for a determination as to whether the plaintiffs had shown that Garden City’s interests in preventing school overcrowding and vehicular traffic could be served by a less discriminatory alternative zoning classification. Contrary to the defendant’s assertions that plaintiffs needed to show an alternative would be “equally effective,” the Court held that the courts

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<sup>66</sup> See *Inclusive Communities Project*, 135 S. Ct. at 2518 (“[A] court must determine that a plaintiff has shown that there is ‘an available alternative . . . practice that has less disparate impact and serves the [entity’s] legitimate needs.’” (quoting *Ricci v. DeStefano*, 557 U.S. 557, 578, (2009))); *Keller v. City of Fremont*, 719 F.3d 931, 949 (8th Cir. 2013) (“[W]hether plaintiffs can show that ‘a viable alternative means was available to achieve the legitimate policy objective without discriminatory effects.’” (quoting *Gallagher v. Magner*, 619 F.3d 823, 834 (8th Cir. 2010))); *Oviedo Town Ctr. II, L.L.L.P. v. City of Oviedo, Florida*, No. 616CV1005ORL37GJK, 2017 U.S. Dist. LEXIS 134930, at \*4 (M.D. Fla. Aug. 23, 2017) (“If the defendant satisfies its burden, the plaintiff may still prevail by proving that the defendant’s interests could be served by another practice that has a less discriminatory effect.” (citing 24 C.F.R. § 100.500(c)(3)); *Inclusive Communities Project, Inc. v. Lincoln Prop. Co.*, No. 3:17-CV-206-K, 2017 U.S. Dist. LEXIS 130818, at \*9 (N.D. Tex. Aug. 16, 2017) (“If the defendant meets its burden, the plaintiff must then show that the defendant’s interests could be served by another practice that has a less discriminatory alternative” (citing 24 C.F.R. § 100.500(c)(3))).

<sup>67</sup> *Prop. Cas. Insurers Ass’n of Am. v. Carson*, No. 13-CV-8564, 2017 U.S. Dist. LEXIS 94502, at \*29 (N.D. Ill. June 20, 2017) (emphasis added).

<sup>68</sup> 78 Fed. Reg. at 11,473; see also 24 C.F.R. § 100.500(b)(2).

<sup>69</sup> See *MHANY Mgmt. v. Cty. of Nassau*, No. 05-cv-2301 (ADS)(ARL), 2017 U.S. Dist. LEXIS 153214, at \*25-26 (E.D.N.Y. Sep. 19, 2017).

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

have not imposed a heightened standard on plaintiffs, but have instead followed the plain language of the statute.<sup>71</sup> In so doing, the Court found that plaintiffs had successfully demonstrated the alternative zoning classification that they proposed served the defendant's interests in not overburdening schools and reducing traffic.<sup>72</sup>

Another recent case, *CROSSRDS*, demonstrates that a plaintiff “need only identify a viable alternative to the challenged practice.”<sup>73</sup> There, plaintiff tenants brought a class action lawsuit under the FHA against a defendant who purchased, renovated, and re-branded their once affordable apartment building resulting in the displacement of tenants who were members of protected classes.<sup>74</sup> As part of the disparate impact burden shifting framework, plaintiffs identified an alternative practice for defendants, asserting that Defendants could serve their business interests by either undertaking more modest renovations and rent increases, or negotiating a public subsidy in exchange for retaining affordable rents in some portion of units in the complex.<sup>75</sup> The Court held that both of these alternatives were common-sense strategies for rental property and “appear[ed] to have the potential to serve Defendants’ business interests” such that plaintiffs alleged “a viable alternative” to the challenged practices.<sup>76</sup> Notably, the court did not require that plaintiffs demonstrate the alternative practices would be equally effective or proportional in terms of cost. Under the proposed rule, common sense alternatives like alternative zoning or obtaining public subsidies will likely not meet plaintiff’s burden.

## **2. HUD has made clear that plaintiffs must only identify a less discriminatory alternative.**

Consistent with the courts, HUD itself has long indicated that to prevail, disparate impact plaintiffs must identify a less discriminatory alternative that serves a defendant’s legitimate interests, *not* that the alternative need be “equally effective,” as required by the proposed rule. And yet, the proposed rule goes even further, requiring plaintiffs to also prove that the alternative would not impose materially greater costs on the defendant or create other material burdens for the defendant. The requirements of the proposed rule far surpass the scope of the standard established by legal precedent and prior agency interpretation.

In fact, HUD has previously rejected these proposed revisions. HUD’s historic guidance outlined the appropriate boundaries of the discriminatory effects standard—that a plaintiff’s burden is not to show that the less discriminatory practice would be equally effective, but merely that it must serve a defendant’s legitimate interests.<sup>77</sup> At one point, HUD directly considered whether the alternative practice identified by the plaintiff must be “equally effective” as the challenged

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<sup>71</sup> *Id.* at \*25.

<sup>72</sup> *Id.* at \*30-37.

<sup>73</sup> *Crossroads Residents Organized for Stable & Secure ResidencieS (CROSSRDS) v. MSP Crossroads Apartments LLC*, No. 16-233 ADM/KMM, 2016 U.S. Dist. LEXIS 86965, at \*23-24 (D. Minn. July 5, 2016).

<sup>74</sup> *Id.* at \*12.

<sup>75</sup> *Id.* at \*23.

<sup>76</sup> *Id.* at \*24.

<sup>77</sup> *See* 78 Fed. Reg. 11,460.

practice.<sup>78</sup> HUD explicitly stated that it did not believe the Rule should require that the alternative be “equally effective” in serving the defendant’s interests since the current language is already consistent with HUD and other regulatory agencies’ guidance,<sup>79</sup> with Congress’s codification of the disparate impact standard in the employment context,<sup>80</sup> and with judicial interpretations of the Fair Housing Act.<sup>81</sup> Specifically, HUD noted that the additional modifier “equally effective,” is even less appropriate in the housing context than in the employment area “in light of the wider range and variety of practices covered by the [FHA] that are not readily quantifiable.”<sup>82</sup>

HUD’s historic interpretation could not be clearer that a plaintiff’s burden is *not* to show that the less discriminatory practice would be equally effective, but merely that it must serve a defendant’s legitimate interests. *See Prop. Cas. Insurers Ass’n of Am. v. Donovan*, 66 F. Supp. 3d 1018, 1052 (N.D. Ill. 2014) (“[I]n *Wards Cove*, the Supreme Court held that any alternative practice the plaintiff offered in the third step must be ‘equally effective’ as the challenged practice. HUD, on the other hand, has determined that an ‘equally effective’ standard is inappropriate.”). The proposed rule dramatically strays from prior HUD guidance, which was grounded in judicial precedent and Congressional intent. It follows therefore that the proposed rule’s even more onerous requirements related to costs and material burdens are, like the “equally effective” modifier, beyond the scope of what the courts or Congress have contemplated as appropriate burdens for disparate impact plaintiffs.

Extensive legal precedent and explicit agency interpretation make clear the appropriate elements of the less discriminatory effect standard. HUD’s blatant disregard for its own historic interpretation of the FHA and that of the courts contradicts its longstanding mission to eliminate discriminatory housing practices prompted not just by discriminatory intent but also practices that produce a discriminatory effect or disparate impact. Its radical and inadequately explained departure from its own longstanding practice, current valid precedent and the purposes of the FHA is likely to give rise to a successful APA challenge.

### **c. The proposed rule wrongly prioritizes profit over the protection of rights.**

The Proposed Rule creates for the first time a profit defense to discrimination for a disparate impact defendant. Since, under its novel formulation, any alternative identified by plaintiffs cannot impose materially greater costs or burdens on defendants, a defendant’s practice or policy that produces a profit will be effectively immunized from challenge for its discriminatory

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<sup>78</sup> *Id.*

<sup>79</sup> Policy Statement on Discrimination in Lending, 59 FR 18266, 18269 (Apr. 15, 1994) (“Joint Policy Statement”).

<sup>80</sup> *See* 42 U.S.C. 2000e-2(k)(1)(A)(i) (“the concept of alternative employment practice” under Title VII “shall be in accordance with the law as it existed on June 4, 1989”); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (“[I]t remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer’s legitimate interest.”).

<sup>81</sup> *See, e.g., Darst-Webbe*, 417 F.3d at 906 (“plaintiffs must offer a viable alternative that satisfies the Housing Authority’s legitimate policy objectives while reducing the [challenged practice’s] discriminatory impact”); *Huntington*, 844 F.2d at 939 (analyzing whether the “[t]own’s goal \* \* \* can be achieved by less discriminatory means”); *Rizzo*, 564 F.2d at 159 (it must be analyzed whether an alternative “could be adopted that would enable [the defendant’s] interest to be served with less discriminatory impact.”).

<sup>82</sup> 78 Fed. Reg. 11,460, 11,473.

impact unless there is an alternative approach that produces almost just as much profit. In other words, even alternate business approaches that are less discriminatory yet still significantly profitable will not pass muster under the new rule if this occurs at greater cost to the defendant. HUD's formulation turns decades of civil rights jurisprudence on its head as courts have never before prioritized profit over protection of rights.

Judicial disparate impact analysis, in the context of the less discriminatory alternative, has never required plaintiffs to identify equally profitable alternatives. By way of example, the Third Circuit denied summary judgment to a township, noting that plaintiffs had identified less discriminatory alternatives warranting further factual development. *See Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 387 (3d Cir. 2011) (low-income African American and Latinx residents sued township over redevelopment plans that demolished their blighted neighborhood to rebuild expensive housing, and while township argued residents' identified rehabilitation alternatives were "not economically feasible" and "extremely costly," Court found alternatives were sufficient to create issues of material fact).

Further still, Congress has extended the FHA's protection to persons with disabilities in the Fair Housing Amendments Act of 1988 ("FHAA"), Pub. L. 100-430, 102 Stat. 1619. Congress based the FHAA's reasonable accommodations provision on the "regulations and case law dealing with discrimination on the basis of handicap" under section 504 of the Rehabilitation Act, 20 U.S.C. § 794, which prohibits discrimination against individuals with disabilities in federally funded programs.<sup>83</sup> The Supreme Court has held that, under the Rehabilitation Act, a proposed accommodation should not impose "undue financial . . . burdens" upon the accommodator.<sup>84</sup> This rule "clearly contemplates the permissibility of *some* financial burden resulting from accommodation."<sup>85</sup> The FHA already contemplates additional financial burdens where necessary to protect against discrimination in housing for persons with disabilities. The language in the proposed rule shielding defendants from additional costs and prioritizing protection of profit flies in the face of this long-standing and important precedent and clear statutory intent.

The FHA plays a vital and continuing role "in moving the Nation toward a more integrated society."<sup>86</sup> To sanction conduct which perpetuates and reinforces discrimination—such as allowing profit to serve as an absolute defense to discrimination—would abruptly halt progress and thwart national commitment to integrated housing. "In light of the longstanding judicial interpretation of the FHA to encompass disparate impact claims and congressional reaffirmation of that result," the revisions in the proposed rule, which deal a mighty blow to the viability of disparate impact claims, should be omitted.<sup>87</sup>

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<sup>83</sup> *See United States v. Cal. Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1416-17 (9th Cir. 1994)(internal citations omitted).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*; *Southeastern Community College v. Davis*, 442 U.S. 397, 412, (1979); *see also Nelson v. Thornburgh*, 567 F. Supp. 369, 380-81 (E.D. Pa. 1983) (requiring employer to expend its own funds to provide readers for blind employees pursuant to Rehabilitation Act), *aff'd*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188, (1985).

<sup>86</sup> *Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 at 2525-26.

<sup>87</sup> *Id.* at 2525.

**V. The Proposed Rule incorrectly absolves defendants of liability for a single decision.**

The Proposed Rule also would override established cases which have found that a single decision may be evidence of a policy or practice creating liability under a disparate impact theory. In the preamble to the Proposed Rule, HUD states that a single instance will rarely be considered to constitute a policy or practice—thus rendering the disparate impact theory inapplicable in a situation where one decision by a housing provider or government entity has unjustifiable drastic and disproportionate consequences for a protected class. This pronouncement ignores decades of jurisprudence, recited in *Inclusive Communities*, in which courts have applied disparate impact liability in instances in which a single decision has triggered liability.<sup>88</sup> These cases are among those which the Supreme Court referred to as at the “heartland” of cases for which the FHA was to provide a remedy, such as those that target zoning laws and other housing restrictions that reflect a single decision, but that function to perpetually and unfairly exclude protected groups from certain neighborhoods and housing opportunities, without sufficient justification. Since *Inclusive Communities*, courts have continued to recognize the discriminatory and lasting impact these single decisions can have on protected classes. For example, in *Avenue 6E Investments, LLC v. City of Yuma*, the Ninth Circuit held that the denial of an affordable housing provider’s zoning request in order “to permit the construction of housing that is more affordable” may constitute an unlawful disparate impact, and rejected an argument that the availability of affordable housing in the same region necessarily precludes a plaintiff from showing disparate impact.<sup>89</sup>

**VI. The Proposed Rule will violate HUD’s statutory obligation to affirmatively further fair housing under the FHA.**

The Proposed Rule violates HUD’s obligation to affirmatively further fair housing (“AFFH”) under the FHA—an obligation that arises from the agency’s core mission to provide fair and equal housing. HUD has a statutory duty to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of” the FHA.<sup>90</sup> HUD itself has defined affirmatively furthering fair housing to mean “taking meaningful actions, in addition to combating discrimination, that . . . foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics,” including national origin.<sup>91</sup> Communities can only remain free of such barriers if HUD ensures meaningful enforcement mechanisms to challenge discriminatory policies and practices that have the effect of discriminating against members of a protected group or that perpetuate segregation. In preventing plaintiffs from vindicating their rights to equal housing opportunity due to the rule’s overly

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<sup>88</sup> *Inclusive Communities*, 135 S. Ct. at 2522 citing *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926; 2d Cir. 1988 (holding that town’s zoning restrictions against multifamily housing had an unlawful adverse racial impact and perpetuated segregation); *United States v. City of Black Jack*, 508 F.2d 1179 8th Cir. 1974 (invalidating ordinance prohibiting construction of multifamily rental units); *Greater New Orleans Fair Hous. Action Ctr. v. Saint Bernard Parish*, 641 F. Supp. 2d 563 E.D. La. 2009 (invalidating post-Hurricane Katrina ordinance restriction the rental of housing units to only “blood relative[s]” in an area of the city that was 88.3% white and 7.6% Black).

<sup>89</sup> 818 F.3d 493, 509-13 (9th Cir. 2016).

<sup>90</sup> See 42 U.S.C. § 3608(e)(5).

<sup>91</sup> *Id.*; 24 C.F.R. § 5.152 (defining “affirmatively furthering fair housing”).

onerous pleading requirements, revisions to the *prima facie* case, and imposition of defenses that end run plaintiffs' ability to obtain discovery needed to move their cases forward, the proposed rule flies directly in the face of HUD's duty to affirmatively further fair housing.

An inability to meaningfully challenge discriminatory policies and practices under a disparate impact theory through a workable framework will *create* rather than tear down barriers to housing choice for anyone seeking to bring a disparate impact claim. In other words, because any "aggrieved person" who seeks to bring a disparate impact claim will face the same hurdles to plead a claim or defend against attempts to dismiss a disparate impact claim as a result of one of the newly established defenses, aggrieved persons and communities will be left with no meaningful judicial recourse to address the discrimination they face.

By elevating the burden for plaintiffs—both to get into court and keep their cases moving through successive stages of litigation—HUD will be erecting barriers to housing choice. This is so because it is likely to embolden defendants who are implementing discriminatory policies and practices who will see those additional plaintiff-directed hurdles as a new way to avoid or survive litigation. Such a result is anathema to HUD's duty to affirmatively further fair housing.

## **VII. HUD's unexplained redefinition of "discriminatory effect" to exclude perpetuation of segregative housing patterns undermines the goals of the FHA and ignores legal precedent.**

The current rule contains an explicit definition of the "discriminatory effect" that may give rise to liability under the FHA. The definition has two prongs. First, it states that a practice has a discriminatory effect "where it actually or predictably results in a disparate impact on a group of persons [*protected by the Act*]." It then explicitly adds to the definition another category of discriminatory practices for which disparate impact liability can arise: those that "create[], increase[], reinforce[], or perpetuate[] segregative housing patterns because of race, color, religion, sex, handicap, familial status or national origin."<sup>92</sup> In other words, the current rule makes clear that a practice that causes, fosters or continues segregative housing practices violates the Act because it results in discriminatory impact. Thus, when a practice perpetuates segregation, liability for discrimination can be established without the need to show discriminatory intent.

The definition of discriminatory effect in the proposed rule drops the current rule's reference to perpetuation of segregation. Instead, it simply states that liability for a violation of the FHA "may be established . . . based on a specific policy's or practice's discriminatory effect on members of a protected class." HUD offers no explanation for the omission, characterizing it simply as a "slight[] amend[ment]."<sup>93</sup>

HUD's effort to paint the change as innocuous is misleading. First, the definition in the current rule did not simply recite elements of a claim. Rather, it addressed the scope of the disparate impact doctrine and made clear that liability for a policy or practice that perpetuates segregation could be established by demonstrating the practice's disparate impact. Second, it is

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<sup>92</sup> 24 CFR § 100.500(a).

<sup>93</sup> "Paragraph (a) would be slightly amended to reflect the removal of a definition for discriminatory effect. . .The previous definition simply reiterated the elements of a disparate impact claim, which HUD believes is now adequately defined in more detail in the later sections, making the definition unnecessary." 84 Fed. Reg. 42858 (Aug. 19, 2019).

also wrong to suggest that the proposed regulation elsewhere reaffirms or otherwise discusses the continued applicability of a disparate impact analysis to a practice which creates, strengthens or perpetuates segregative housing patterns. It does not. Far from making its prior definition “unnecessary,” HUD’s revision signals an attempt to eliminate the availability of this well-established tool to combat practices that foster or maintain segregation of the nation’s communities. Its revision directly conflicts with the FHA and *Inclusive Communities*’ reaffirmation of the FHA’s important anti-segregative purposes.

There is no question but that the FHA was intended to remedy the consequences of widespread *governmental* and private actions that created and maintained segregative housing patterns. The effects of those *de jure* and *de facto* practices are longstanding; they continue to thwart housing choice for persons of color and integration of many of the nation’s communities. As the Supreme Court recognized in *Inclusive Communities*, the FHA was enacted against a legacy of segregative practices, whose “vestiges remain today, intertwined with the country’s economic and social life.”<sup>94</sup> The opinion makes clear that the ability to challenge discriminatory practices by raising a claim of disparate impact is “consistent with the FHA’s central purpose” to eradicate the consequences of this history.<sup>95</sup> The decision explicitly recognizes the dual goals of stopping practices that have discriminatory effects and those that continue segregative housing patterns—the dual focus of HUD’s current rule.<sup>96</sup> (“...the FHA aims to ensure that those [housing authority] priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.”). In sum, what HUD describes as little more than tinkering with superfluous language in a definitional section is a below-the-radar attempt to undermine the applicability of disparate impact analysis to “perpetuation of segregation” claims under the FHA, end-running both Congress and the courts. It fundamentally alters the reach of the FHA in a way that thwarts Congress’s intent and ignores the teaching of the very Supreme Court case it purports to follow. Such a deviation from the statute, established law and the principles enunciated in *Inclusive Communities* is left essentially unexplained and is contrary to existing law.

## **Conclusion**

For the reasons described above, HUD must abandon its attempt to overhaul the 2013 Rule. If implemented, the Proposed Rule will contravene *Inclusive Communities* and decades of FHA case law, subvert legislative intent, improperly substitute HUD’s judgment for that of the courts, and result in bad policy. The 2013 Rule already provides a balanced, administrable approach to adjudicating disparate impact claims. There is no legitimate reason to disturb that demonstrably workable framework.

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<sup>94</sup> 135 S. Ct. at 2515.

<sup>95</sup> *Id.* at 2521.

<sup>96</sup> *Id.* at 2522.