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October 18, 2019

Office of General Counsel, Rules Docket Clerk
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500

Re: HUD Docket No. FR-6111-P-02, RIN 2529-AA98, Comments in Response to Proposed Rulemaking: HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

Dear Sir/Madam:

The Public Interest Law Center writes to oppose the Department of Housing and Urban Development's ("HUD") proposed rule changes regarding the Fair Housing Act's disparate impact standard.¹ HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42854 (proposed Aug 19, 2019) (to be codified at 24 C.F.R. 100) ("Proposed Rule"). The Proposed Rule will dismantle a foundational pillar of civil rights law which has allowed plaintiffs to challenge and quash insidious forms of discrimination in housing. Specifically, it will hinder efforts to combat racial segregation, something that our country still struggles with to a staggering degree. We urge that the Proposed Rule be withdrawn in its entirety, and that HUD's current rule regarding disparate impact remain in effect.

¹ The Public Interest Law Center uses high-impact legal strategies to advance the civil, social, and economic rights of communities in the Philadelphia region facing discrimination, inequality, and poverty. We use litigation, community education, advocacy, and organizing to secure access to fundamental resources and services including employment, environmental justice, healthcare, voting, education, and housing. For 50 years, the Law Center has been fighting 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 legal rights to fair and equitable housing compels us to strongly oppose this Proposed Rule. The Law Center is also a member of a national consortium of affiliates of the Lawyers' Committee for Civil Rights Under Law. In addition to submitting these comments, the Law Center is submitting comments with the Washington Lawyers' Committee for Civil Rights and Urban Affairs.

The twin goals of the Fair Housing Act, when Congress enacted the law in 1968, were to outlaw housing discrimination and promote residential racial integration. *See, e.g., Metro. Hous. Dev. Corp. v. Vill. Of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977); *Otera v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973). Disparate impact suits emerged early on as an effective tool in combatting residential segregation. Beginning in the 1970s, plaintiffs began successfully challenging housing policies that promoted segregation that were facially neutral but had a disparate impact on racial minorities and therefore violated the Fair Housing Act. That is, practices that perpetuated segregative housing practices were found to violate the FHA because they resulted in discriminatory impact and a showing of discriminatory intent was not required.

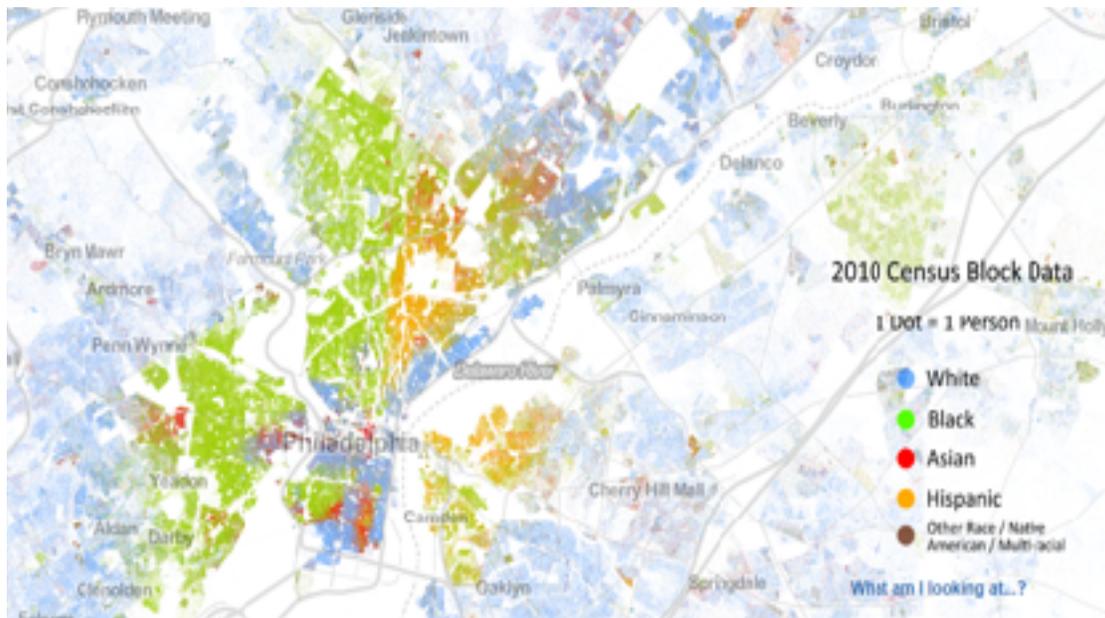
In fact, one of the very first cases litigated by the Law Center was *Shannon v. United States Dep't of Hous. and Urban Dev.*, 436 F.2d 809 (3d Cir. 1970), a disparate impact case challenging a plan that would increase segregation in Philadelphia. There, a group of residents and civic organizations in the East Poplar Urban Renewal Area of Philadelphia challenged HUD's decision to green-light a large, low-income rental development. The plaintiffs alleged that the location for the project was chosen to "have the effect of increasing the already high concentration of low income black residents in... East Poplar..." *Id.* at 812. The court cited HUD's own policies in finding that "any proposal to locate housing only in areas of racial concentration will be *prima facie* unacceptable" and held that the Fair Housing Act provided redress for plaintiffs challenging segregationist development plans. *Id.* at 820-22 (internal citations and quotations omitted). The court enjoined HUD from continuing with the project "until ... HUD makes a determination in substantive and procedural conformance...as to whether the location of [the housing] project...will enhance or impede a workable program for community in conformity with the Civil Rights Acts of 1964 and 1968." *Id.* at 822.

Similarly, many plaintiffs and advocates across the country have brought disparate impact suits to fight segregation. The Seventh Circuit held a municipality in violation of the Fair Housing Act after it refused to rezone a parcel of land to allow for development of low-income rental housing, even though there was no evidence that the decision was based on discriminatory intent. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) ("[A] violation of section 3604(a) can be established by a showing of discriminatory effect without a showing of discriminatory intent."). The court in *United States v. Hous. Auth. of Chickasaw*, 504 F. Supp. 716, 732 (S.D. Ala. 1980), found that residency requirement violated the Fair Housing Act, even though the policy was "nonintentional discrimination," because it had an adverse impact on racial minorities. And the seminal Supreme Court case explicitly recognizing that "disparate-impact claims are cognizable under the Fair Housing Act," was a case attacking a proposed development because it would increase residential segregation. *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.* ("*Inclusive Communities*"), 135 S. Ct. 2507, 2525 (2015).

Ironically, HUD ignores the overarching holding of this Supreme Court case it claims to follow in its Proposed Rule. As discussed in great depth in hundreds of other comments, including the Law Center’s comments submitted with other Lawyers’ Committees, the Proposed Rule will gut disparate impact theory’s effectiveness by: (1) increasing the prima facie case elements a plaintiff must plead to make out a disparate impact claim; (2) creating defenses that destroy the well-established burden-shifting framework and providing protection even when a defendant’s practices have discriminatory consequences; and (3) requiring a plaintiff to establish that a “less discriminatory alternative” serves the defendant’s interests in an equally effective manner. This overhaul directly contradicts congressional intent, decades of judicial interpretation, and HUD’s own 2013 promulgated Rule. 24 C.F.R. 100.500.²

But the Proposed Rule not only revamps the burden-shifting framework outlined in the 2013 Rule, it removes the language about the perpetuation of segregative housing patterns from the definition of “discriminatory effect.” 24 C.F.R. 100.500(a). Although HUD suggests that the elimination of the “perpetuation of segregation” claims from the Proposed Rule is inconsequential, it is of great importance to cities like Philadelphia where housing segregation remains rampant and has dire consequences.

As illustrated below, Philadelphia has a significant, demonstrable problem with racial residential segregation:



² Courts around the country and HUD itself have actually found that HUD’s 2013 Rule is consistent with *Inclusive Communities*. See Defs.’ Opp’n to Pls.’ Mot. for Leave to Amend Compl., ECF No. 122, at 9, *PCIA v. Carson*, No. 1:13-cv-08564 (N.D. Ill.); *Ave. 6E Invs., LLC*, 818 F.3d 493, 513 (9th Cir. 2016); *Azam v. City of Columbia Heights*, o. CV 14-1044 (JRT/BRT), 2016 WL 424966, at *10 (D. Minn. Feb. 3, 2016) aff’d, 865 F.3d 980 (8th Cir. 2017); *Nat’l Fair Hous. All. v. Fed. Nat’l Mortg. Ass’n (“Fannie Mae”)*, 294 F. Supp. 3d 940 (N.D. Cal. 2018)).

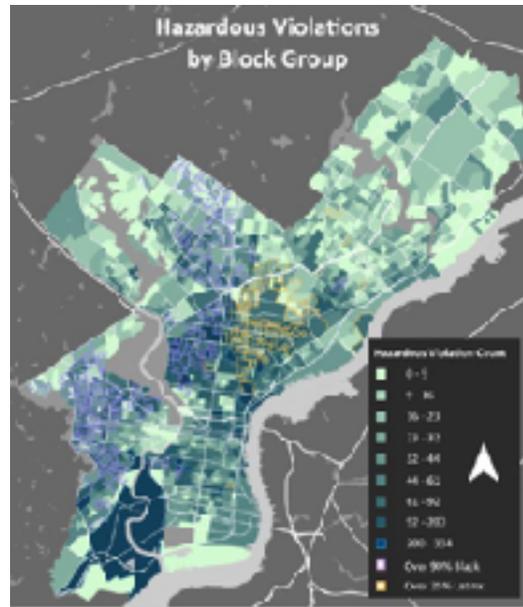
Dustin A. Cable, *2010 Racial Dot Map*, UNIVERSITY OF VIRGINIA WELDON COOPER CENTER FOR PUBLIC SERVICE, DEMOGRAPHICS RESEARCH GROUP, <https://demographics.virginia.edu/DotMap/index.html> (last accessed Oct. 16, 2019).

Philadelphia remains heavily segregated, with Black Philadelphians living largely in the North and West Philadelphia and White Philadelphians clustered in Center City, South Philadelphia, and the Northeast. Data analysis further illustrates the problem of segregation in Philadelphia. Nate Silver found that Philadelphia was the fourth most segregated major city in the country, trailing only Chicago, Milwaukee, and Atlanta. Nate Silver, *The Most Diverse Cities Are Often The Most Segregated*, FIVETHIRTYEIGHT (May 1, 2015 at 8:28 AM), <https://fivethirtyeight.com/features/the-most-diverse-cities-are-often-the-most-segregated/>.

The consequences of racial segregation are enormous. Residents of North Philadelphia's 19132 zip code, the vast majority of whom are black, have an average life expectancy of 65.7 years, compared with 82.9 years in the largely white neighborhood of Society Hill. Eric Hartman, *The radical act of thinking globally – at home*, GENEROCITY (Mar. 7, 2019 at 11:36 AM) <https://generocity.org/philly/2019/03/07/the-radical-act-of-thinking-globally-at-home-eric-hartman-haverford-college-burbs/>. Nationwide, black families living in moderately integrated metropolitan areas have better employment levels, income, and mortality rates than those in segregated communities. Kimberly Quick and Richard D. Kahlenberg, *Attacking the Black-White Opportunity Gap That Comes from Residential Segregation*, THE CENTURY FOUNDATION (June 25, 2019) <https://tcf.org/content/report/attacking-black-white-opportunity-gap-comes-residential-segregation/?session=1>. Wealth accumulation in segregated, majority black neighborhoods is stagnant due to low rates of home appreciation. *Id.* And children are particularly affected by segregated areas, suffering from greater health ailments and attending less-resourced schools than their peers in more integrated neighborhoods. *Id.*

Moreover, in the Law Center's recent housing work, we have seen the devastating effects of residential segregation on housing conditions. We have represented six clients, all black or Latino families, in affirmative cases against landlords for the horrific state of their rental homes just in the past two years. Raw sewage exploding into the living room, no running water, lack of heat in the winter, and a collapsed ceiling are just some of the issues our clients faced when renting on the private market. Each of these clients lived in neighborhoods where the vast majority of residents were black.

These lived experiences from our clients are backed by data. We know, from our own research, that racially segregated neighborhoods have poor quality housing stock, as housing code violations are significantly higher in black neighborhoods, even after adjusting for household income and wealth. The map below depicts hazardous housing code violations overlaying racial demographic data:



Mapping Substandard Housing in Philly –Public Interest Law Center, AZAVEA (Aug. 30, 2019).

In soliciting public comment on its new proposed rule regarding disparate impact, HUD asked the public a simple question: “How well do [the] proposed changes to... disparate impact standard align with the decision and analysis in *Inclusive Communities* ...?” The answer, in short, is poorly. *Inclusive Communities*, judicial opinions that both predated and postdated that decision, and HUD’s own 2013 Rule recognized the importance disparate impact claims play in eliminating policies and practices that promote or perpetuate segregation. The Proposed Rule would decimate this important tool. HUD should withdraw the Proposed Rule in its entirety.

Sincerely,

/s/ George Donnelly
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