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

RE: Docket No. FR-6251-P-01, Reinstatement of Discriminatory Effects Standard

The Public Interest Law Center appreciates the opportunity to provide comments in strong support of HUD's Reinstatement of Discriminatory Effects Standard ("Proposed Rule"), which recodifies its previously promulgated Rule titled, "Implementation of the Fair Housing Act's Discriminatory Effects Standard" ("2013 Rule"). In sharp contrast to the 2020 Rule titled "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard" ("2020 Rule"), the 2013 Rule reflects Fair Housing Act jurisprudence and is consistent with the Act's purpose and spirit. HUD's reinstatement of the 2013 Rule effectuates the Fair Housing Act's aim of eradicating discrimination and racial segregation, including policies and practices that yield discriminatory effects, to ensure a more fair and equitable housing market.

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 more than 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.

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 lawsuit 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..."¹ 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

¹ *Shannon v. United States Dep't of Hous. and Urban Dev.*, 436 F.2d 809, 812 (3d Cir. 1970).

that the Fair Housing Act provided redress for plaintiffs challenging segregationist development plans.² 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.”³

Despite that early win, historic structural racism and patterns of discriminatory lending have made Philadelphia one of the country’s most racially segregated cities.⁴ Discriminatory lending patterns, first as a result of redlined appraisal maps and more recently in the forms of reverse redlining and other predatory mortgage lending practices, have caused long-term damage to neighborhoods of color.⁵ Discriminatory denial of opportunity has compounded over the decades, leading to unequal outcomes across Philadelphia’s segregated neighborhoods. Historically redlined areas of Philadelphia continue to experience disproportionate amounts of poverty, poor health outcomes, limited educational attainment, unemployment, and violent crime compared to other neighborhoods in the city.⁶ These neighborhoods also experience disproportionate numbers of eviction filings. Neighborhood racial makeup has a persistent, statistically significant effect on filing volume – predominantly African American neighborhoods have seen more filings than others have. For each 10% increase in percent African American in a census tract, there are 7.6 more eviction filings.⁷

On a daily basis, we see the devastating effects of this perpetual segregation on housing conditions in majority Black and Latino communities. We organize and educate majority Black renters via Renters United Philadelphia (“RUP”), our tenant organizing project, in which members share the same large corporate landlord. Members’ 50+ and 60+ unit buildings are occupied by largely Black renters in majority Black neighborhoods who face issues like mold, pest and rodent infestations, poor security and structural problems. In recent years, we have also represented six clients, all Black or Latino families, in affirmative cases against landlords for the horrific state of their rental homes. Conditions in these cases included raw sewage exploding into a living room, no running water, lack of heat in the winter and a collapsed ceiling. We know that some of the largest landlords in the City prey on low-income communities of color by refusing to repair these deplorable conditions, and rather, respond with an eviction lawsuit if a tenant complains or lawfully withholds rent. The Fair Housing Act can be important in combating these power imbalances and inequities, and the Proposed Rule and its workable discriminatory effects

² 436 F.2d 809 at 820-22 (internal citations and quotations omitted).

³ *Id.* at 822.

⁴ Nate Silver, *The Most Diverse Cities Are Often The Most Segregated*, FIVETHIRTYEIGHT (May 1, 2015), available at <https://fivethirtyeight.com/features/the-most-diverse-cities-are-often-the-most-segregated/> (finding Philadelphia to be the fourth most segregated city in the country); William H. Frey & Dowell Myers, *Neighborhood Segregation in Single Race and Multirace America: A Census 2000 Study of Cities and Metropolitan Areas*, (2002), available at https://www.researchgate.net/publication/2831165_Neighborhood_Segregation_in_Single-Race_and_Multirace_America_A_Census_2000_Study_of_Cities_and_Metropolitan_Areas.

⁵ See Asma Husain, *Reverse Redlining and the Destruction of Minority Wealth* (November 2, 2016), available at <https://mjrl.org/2016/11/02/reverse-redlining-and-the-destruction-of-minority-wealth/>; Caitlin McCabe, *Wells Fargo to pay Philly \$10 million to resolve lawsuit alleging lending discrimination against minorities*, PHILADELPHIA INQUIRER (December 16, 2019), available at <https://www.inquirer.com/real-estate/housing/philadelphia-settles-lawsuit-wells-fargo-allegations-discriminatory-mortgage-lending-minorities-20191216.html>.

⁶ City of Philadelphia, Office of the Controller, Rebecca Rynhart, *Mapping the Legacy of Structural Racism in Philadelphia* (January 23, 2020), available at <https://controller.phila.gov/philadelphia-audits/mapping-the-legacy-of-structural-racism-in-philadelphia/>.

⁷ Reinvestment Fund, *Evictions in Philadelphia: A Data and Policy Update* (2019), available at <https://www.reinvestment.com/research-publications/evictions-in-philadelphia-a-data-policy-update/>.

framework will aid us in our continued efforts to address policies and practices that have a disparate impact or segregative effect.

HUD and the courts have long recognized that the Fair Housing Act prohibits not only intentional discrimination, but also policies and practices that have unjustified discriminatory effects.⁸ Specifically, the 2013 Rule codified the consensus that a neutral policy or practice that has a disparate impact on a protected group or that creates, perpetuates, or increases segregation violates the Fair Housing Act, regardless of intent.⁹ And the 2013 Rule confirmed that both types of discriminatory effects – disparate impact and segregative effect – are subject to a three step burden-shifting proof scheme for determining liability under the Act.¹⁰ To promote consistent and predictable application of the test across the circuits, the 2013 Rule offered a straightforward framework: a policy that had a discriminatory effect on a protected class or that perpetuated segregation was unlawful if it did not serve a substantial, legitimate, nondiscriminatory interest or if a less discriminatory alternative could also serve that interest.¹¹ Firmly grounded in judicial precedent, the 2013 Rule provided a workable and balanced framework for challenging more covert forms of discrimination in housing.

These more covert forms of discrimination impede access to safe, affordable, and integrated housing for low-income Philadelphia tenants. For example, about 83% of Housing Choice Voucher recipients in Philadelphia are Black, but many landlords, often in majority white neighborhoods, refuse to participate in the program.¹² A recent study from the Urban Institute found that 67% of landlords surveyed refused to rent to the Housing Choice Voucher recipient¹³— and this is despite a local ordinance forbidding discrimination on the basis of source of income.¹⁴ In another instance, a “Latinx Paradox” exists in Philadelphia wherein Latino individuals are underrepresented in homeless-related services compared to their relative population in poverty, disrupting access to housing subsidies and assistance that may flow through local homeless service providers.¹⁵ The Proposed Rule’s burden-shifting framework is a vital tool in addressing these discriminatory effects.

⁸ See 78 Fed. Reg. 11460 (“HUD . . . has long interpreted the [Fair Housing] Act to prohibit practices with an unjustified discriminatory effect, regardless of whether there was an intent to discriminate. The eleven federal courts of appeals that have ruled on this issue agree with this interpretation.”).

⁹ *Id.* at 11461.

¹⁰ *Id.* at 11462.

¹¹ *Id.* at 11460. (“Under this test, the charging party or plaintiff first bears the burden of proving its prima facie case that a practice results in, or would predictably result in, a discriminatory effect on the basis of a protected characteristic. If the charging party or plaintiff proves a prima facie case, the burden of proof shifts to the respondent or defendant to prove that the challenged practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests. If the respondent or defendant satisfies this burden, then the charging party or plaintiff may still establish liability by proving that the substantial, legitimate, nondiscriminatory interest could be served by a practice that has a less discriminatory effect.”).

¹² See HUD OFFICE OF POLICY DEVELOPMENT AND RESEARCH DATABASE, DATASET: PICTURE OF SUBSIDIZED HOUSING, https://www.huduser.gov/portal/datasets/asshsg.html#2009-2020_query (last accessed Aug. 23, 2021).

¹³ Mary Cunningham, et al., *A Pilot Study of Landlord Acceptance of Housing Choice Vouchers* (Sept. 2018), available at <https://www.huduser.gov/portal/pilot-study-landlord-acceptance-hcv.html>.

¹⁴ See Philadelphia Fair Practices Ordinance, Phila. Code § 9-1100 *et seq.*

¹⁵ See Dennis P. Culhane, et al., *Latinx Homelessness in Philadelphia: Rates of Services Use, Perceived Barriers and Assets, and Potential Opportunities for Leveraging City Reform Efforts to Address Service Gaps* (2019), available at https://works.bepress.com/dennis_culhane/233/.

The 2020 Rule was an abrupt change in course. Specifically, the 2020 Rule: (1) heightened the *prima facie* case elements a plaintiff must establish to make out a disparate impact claim making it virtually impossible to succeed; (2) created 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) established 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) eliminated “perpetuation of segregation” as a recognized discriminatory effect. By effectively gutting a plaintiff’s ability to challenge practices that have a discriminatory effect, the 2020 Rule was fundamentally at odds with existing law, judicial directives, and Congressional intent. While at the time HUD insisted the 2020 Rule was necessary to better align the 2013 Rule with the Supreme Court’s decision in *Inclusive Communities*, prior to and following that decision, courts across the country have ratified the three-part burden-shifting framework.¹⁶ Indeed, *Inclusive Communities* explicitly affirmed that “[r]ecognition of disparate-impact claims is consistent with the FHA’s central purpose.”¹⁷ The Court further noted that suits targeting the types of unlawful housing practices and restrictions that function to segregate neighborhoods “reside at the heartland of disparate-impact liability.”¹⁸

For these reasons, the Public Interest Law Center welcomes and strongly supports HUD’s proposed return to the 2013 Rule’s demonstrably workable and balanced framework, which served to effectuate the central purpose of the Fair Housing Act – eradicating discrimination and segregation in housing. 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.”¹⁹ We see that still in readily apparent ways here in Philadelphia. As such, we especially welcome the Proposed Rule’s explicit reaffirmation of the perpetuation of segregation as a distinct form of discriminatory effect. The Proposed Rule will ensure that the Fair Housing Act is once again a viable law to combat housing discrimination – both intentional discrimination *and* practices that have discriminatory or segregative consequences. Thank you for the opportunity to provide comments.

Respectfully submitted,



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¹⁶ *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2514-2515 (2015) (describing the burden-shifting framework set forth under 24 CFR § 100.500(c)).

¹⁷ 135 S. Ct. at 2511.

¹⁸ *Id.* at 2521-22.

¹⁹ *Id.* at 2515.