August 20, 2018

Regulations Division
Office of the General Counsel
Department of Housing and Urban Development
451 7th Street SW
Room 10276
Washington, DC 20410-0001

RE: Docket No. FR-6111-A-01

To Relevant Parties:

We write in response to the Department of Housing and Urban Development (the Department or HUD)’s Advanced Notice of Proposed Rulemaking (ANPR) regarding HUD’s reconsideration of HUD’s Disparate Impact Rule and its implementation of the Fair Housing Act’s disparate impact standard.

The Supreme Court’s 2015 ruling in Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc. (ICP), required no changes to HUD’s 2013 Disparate Impact Rule. The ICP decision reinforced both previous Supreme Court and lower court decisions that broadly interpreted the Fair Housing Act over the past forty years. The Court ruled that the Fair Housing Act does allow for disparate impact claims that are consistent with the Rule. The Court’s decision defines procedures that mandate the “‘removal of artificial, arbitrary, and unnecessary barriers,’ not the displacement of valid governmental policies.”¹ It also clarifies that a defendant could still prevail if its challenged policy is “necessary to achieve a valid interest” or if the plaintiff could not prove a robust causal connection. All of these clarifications are consistent with the current Disparate Impact Rule. The clarifications are also consistent with eleven Courts of Appeal, which have held that the Fair Housing Act encompasses disparate impact claims.

There must be no exemption for any products or services that are part of the housing process. There should be no exemption for insurance firms because there is a history of redlining and discriminatory practices in homeowners’ insurance products.² Thanks to enforcement using the Fair Housing Act’s disparate impact standard, the insurance industry has modified many of its practices to write more policies in communities of color and to address disparities in pricing. These changes have resulted in more customers and greater profits for insurance firms and higher quality products and services for homebuyers. Progress has been made in this area, but it is not

self-executing. HUD should retain its standards included in the Disparate Impact Rule, not weaken them.

The Fair Housing Act was signed into law 50 years ago. In that short time period, the law has ensured that millions of Americans are protected from discrimination in housing and housing-related services based on race, color, religion, national origin, sex, disability, or familial status. While some examples of discrimination or segregation may be obvious, other instances may be more subtle. Disparate impact is meant to provide a path by which to examine whether certain policies and procedures may be exacerbating discrimination.

Where families live is a key determinant of educational outcomes, health outcomes, and employment, and we have a responsibility to ensure that all Americans, regardless of race, color, sex, national origin, religion, disability or familial status, have equal access to housing. Housing segregation is an insidious and pervasive problem that must be eliminated to enable economic mobility and opportunity.

In closing, the Department should ensure the Disparate Impact Rule remains a robust tool by which to determine discrimination. The Department should not use the Supreme Court’s ruling as a pretext to gut or otherwise eliminate the Rule. Thank you for your consideration.

Sincerely,

Catherine Cortez Masto
United States Senator

Sherrod Brown
United States Senator

Elizabeth Warren
United States Senator

Kamala D. Harris
United States Senator

Tammy Duckworth
United States Senator

Maria Cantwell
United States Senator
Mazie K. Hirono  
United States Senator

Cory A. Booker  
United States Senator