

October 18, 2019

SUBMITTED VIA REGULATIONS.GOV

Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410-0001

Re: Reconsideration of HUD's Proposed Disparate Impact Rule under the Fair Housing Act, Docket No. FR-6111-P-02

Dear Sir or Madam,

We write to you on behalf of the Fair Housing Justice Center (“FHJC”) to offer comments in response to the above-docketed notice (“Notice”) proposing changes to HUD’s current Disparate Impact Rule. The FHJC strongly opposes any changes to the Disparate Impact Rule previously promulgated by the U.S. Department of Housing and Urban Development (“HUD”) pursuant to the Fair Housing Act (“FHA”), codified at 24 C.F.R. § 100.500. The FHJC respectfully requests that HUD reconsider and withdraw its proposed modifications to the Disparate Impact Rule (“the Rule” or “the 2013 Rule”). The 2013 Rule does not need to be amended; it is entirely consistent with subsequent Supreme Court decisions in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015) (“ICP”) and *Bank of America Corporation v. City of Miami*, 137 S. Ct. 1296 (2017). HUD’s claim that the Rule should be amended to conform with these two Supreme Court decisions is unfounded. The proposed amendments to the existing rule are not only unjustified, but in many respects they exceed HUD’s authority to act.

HUD has no authority to promulgate regulations that create pleading standards, *see Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), or that create affirmative defenses, safe harbors, or exemptions from liability, *see, e.g., Natural Resources Defense Council v. Environmental Protection Agency*, 749 F.3d 1055 (D.C. Cir 2014) (opinion by Kavanaugh, C.J.), all of which HUD’s Proposed Rule does. The power to expand or limit the scope of the Federal Rules of Civil Procedure and the FHA rests solely with Congress.¹ Moreover, the *prima facie* case requirements and other features of HUD’s proposed Disparate Impact Rule (“Proposed Rule”) are inconsistent with the purpose of the FHA to eradicate housing discrimination and eliminate segregation, as well as with HUD’s obligation to affirmatively further fair housing. *See* 42 U.S.C. § 3608. The new requirements in HUD’s Proposed Rule deviate dramatically from standards applied by HUD and the courts for over 40 years and serve to undermine rather than enforce the FHA. By attempting through rulemaking to

¹ *See* Fair Housing Act statutory exemptions and/or safe harbors enacted by Congress at 42 U.S.C. §§ 3603(b), 3604(f)(4), and 3607.

limit the reach of both the Federal Rules of Civil Procedure and the FHA, HUD usurps Congress's authority and perverts the purpose of the Fair Housing Act from protecting the fundamental right to shelter free from discrimination, *see* 42 U.S.C. § 3601, to sheltering the housing industry from liability.

Fair Housing Justice Center Mission and Program

The Fair Housing Justice Center ("FHJC") is a regional, non-profit, civil rights organization dedicated to eliminating systemic housing discrimination, advocating for policies that foster more open, accessible, and inclusive communities, and strengthening the enforcement of fair housing laws. FHJC assists individuals and organizations with housing discrimination complaints; undertakes investigations to identify and document discrimination; and engages in outreach and educational activities to increase public awareness about fair housing rights. FHJC serves all five boroughs of New York City and the seven surrounding New York counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester, roughly 3% of the United States' population. FHJC's service area has one of the most diverse populations in the United States, and yet, housing discrimination and residential segregation are highly pervasive. New York City is the third most segregated city for African Americans and the second most segregated city for Latinx and Asian Americans in the United States.²

The FHJC opened its doors in 2005 as a program of a larger non-profit homeless services organization, HELP USA. Within four years, it created a robust fair housing education and enforcement program and launched itself as an independent non-profit serving the greater New York Metro Area. For the last 10 years, the FHJC has assisted over a thousand individuals and organizations to exercise their fair housing rights. In addition, FHJC operates a full-service fair housing program which conducts pro-active testing investigations to ferret out systemic housing discrimination. FHJC investigations have led to the filing of over a hundred legal challenges to discriminatory housing policies and practices. These lawsuits have changed the way many private housing providers and government agencies do business by opening over 65,000 housing units to populations previously excluded and, with the assistance of cooperating attorneys, recovering \$34 million in damages and penalties. Despite this work, illegal housing discrimination is still pervasive and structural barriers to housing choice still permeate the regional housing market, and so the enforcement work of the FHJC is still necessary.

For nearly fifteen years, FHJC has successfully relied on the disparate impact theory of liability³ to advocate for open housing for all residents and communities within its service area.

² John R. Logan and Brian J. Stults. 2011. "The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census," Census Brief prepared for Project US2010, available at: <https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf>.

³ What is colloquially called the "disparate impact" standard was originally known by HUD and others as the effects test. *See Implementation of the Fair Housing Act's Discriminatory Effects Standard, Final Rule*, 77 Fed. Reg. 32, 11474 (Feb. 15, 2013) (explaining the derivation and of the terms under the FHA, the Civil Rights Act of 1964 (Title VII), and the Equal Credit Opportunity Act (ECOA)). For purposes of this letter and to avoid confusion, we use the term "disparate impact," which is the caption of HUD's proposed rule. Our use of HUD's recent terminology is not intended to convey agreement with HUD's attempt to limit the scope of the 40-year-old standard.

By identifying and eliminating those policies that have a disparate impact on a group of persons or that create, increase, reinforce, or perpetuate segregated housing patterns because of race, color, national origin, disability or other protected characteristics, FHJC has removed many unjustified barriers to housing choice throughout FHJC's service area.

HUD's Existing Disparate Impact Rule Is Consistent with Judicial Precedent and Analogous Civil Rights Laws.

The Fair Housing Act prohibits intentional discriminatory acts *and* facially "neutral" policies or practices that unnecessarily limit housing opportunities based on race, color, national origin, religion, sex, familial status and disability. HUD's existing disparate impact rule, codified in 2013, does not create any new obligations on defendants. It formalizes and harmonizes existing judicial interpretations and applications of the method for establishing Fair Housing Act liability without proof of intentional discrimination. *See Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 617-619 (2d Cir. 2016) (Second Circuit applies the burden-shifting framework in HUD's existing discriminatory effects regulation); *Property Casualty Insurers Assoc. of America v. Donovan*, 66 F. Supp 3d 1018, 1051-1054 (N.D. Ill. 2014) (Court found the burden-shifting framework in the existing rule to be reasonable). HUD's existing regulation is also consistent with the disparate impact standard in analogous civil rights statutes, namely, Title VII of the Civil Rights Act of 1964 and the Equal Credit Opportunity Act (ECOA). In its current form, the Rule has proven practical and effective and it comports with decades of established judicial precedent, including the 2015 Supreme Court decision, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015) ("*ICP*"). In fact, the Supreme Court quoted HUD's existing rule at length in its *ICP* opinion without suggesting any tension with the Court's ruling. The central premise of *ICP* is that disparate impact claims are necessary to prohibit policies that may not be readily challenged under disparate treatment theories even though they unjustifiably and unnecessarily exclude protected groups from housing. The Court recognized that the disparate impact method of proving housing discrimination is a necessary tool in the ongoing effort to achieve open housing markets free of discrimination and to eliminate housing discrimination and residential segregation. HUD's current rule embodies that fundamental purpose of the Fair Housing Act, consistent with the safeguards discussed by the Court in *ICP*.

We write to urge you not to revise HUD's 2013 Rule. The Proposed Rule creates unworkable enforcement standards that threaten to eliminate the use of a discriminatory effects theory of liability under the FHA, thereby nullifying the *ICP* decision. It would also keep HUD from meeting its critical responsibility in administering the FHA, whose central purpose is "to eradicate discriminatory practices within a sector of our Nation's economy."⁴ Accordingly, HUD's existing rule should not be revised. Instead, HUD should focus on vigorous enforcement of the FHA to remove unnecessary barriers to housing choice throughout the country.

For example, in the FHJC's service area, a number of predominantly white suburban communities have used local residency preferences in their Section 8 housing voucher programs

⁴ *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2511 (2015).

and zoning codes providing for affordable housing. These preferences cause substantially longer average wait times for non-white voucher applicants and disproportionately exclude non-white renters and buyers from access to affordable housing. By using the disparate impact theory of liability under the Fair Housing Act, the FHJC has successfully challenged many of these discriminatory practices, resulting in the elimination of these discriminatory preferences.

The Proposed Rule Exceeds HUD's Authority and Renders Disparate Impact Claims Futile

As described in greater detail in this section, the Proposed Rule contains a host of deeply flawed changes that would make it practically impossible for a plaintiff to prevail in a disparate impact challenge. With this letter, the FHJC highlights some, but by no means all, of these insurmountable and unauthorized obstacles, and provides the following specific comments and questions to HUD regarding the Proposed Rule:

1. HUD Does Not Have the Authority to Create Heightened Pleading Standards.

The Proposed Rule attempts to create an onerous, five-element pleading standard for civil actions and administrative complaints that does not comport with the Federal Rules of Civil Procedure or Supreme Court precedent. HUD has no authority to create or change the standards for pleading a complaint in federal court, and it would be arbitrary and capricious for HUD to impose stricter standards for pleading the same claim in its administrative process than apply in federal court. HUD points to *ICP* as justification for attempting to create enhanced pleading standards for disparate impact claims, but only Congress can create pleading standards, not an executive branch agency or the judiciary.

In 1989, HUD promulgated regulations implementing Section 3610 of the Fair Housing Act that describe what facts a complainant is required provide in a discrimination complaint filed with HUD. These regulations require the name and address of the complainant and respondent, a description and address of the dwelling that is involved, and a "concise statement of the facts, including pertinent dates, constituting the alleged discriminatory housing practice." *See* 42 U.S.C. § 3610(1)(a)(i); 24 C.F.R. 103.25. At this preliminary stage of the administrative process, a complainant is not required to allege a prima facie case of discrimination or to meet any burdens of proof that may be required at a later stage of the process.

Even at the next stage, HUD is required by the FHA only to "determine based on the facts whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur." 42 U.S.C. §3610(g)(1); 24 C.F.R 103.400(a). If HUD so determines, then it is required to issue a "charge," which "shall consist of a short and plain statement of the facts upon which the Secretary found reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur." 42 U.S.C. §3610(g)(2)(B)(i); 24 C.F.R 100.405(a)(1). According to longstanding HUD regulations, "in making the reasonable cause determination, the General Counsel shall consider whether the facts concerning the alleged discriminatory housing practice are sufficient to warrant the initiation of a civil action in Federal court." 24 C.F.R. § 103.400(a).

The standard for initiating a civil action in federal court is prescribed by the Federal Rules of Civil Procedure, as interpreted by the United States Supreme Court. HUD has no authority to alter those standards. HUD has appropriately determined that in its administrative process, in assessing the sufficiency of the facts alleged in its charging decisions, it will abide by the standard required by the Federal Rules of Civil Procedures. To create a different standard for administrative claims would be arbitrary and undermine the reason Congress created an administrative process for redressing housing discrimination. Thus, even if HUD does not abandon the rulemaking as we request, HUD should abort its attempt to create new pleading standards, which for civil actions are governed by Fed. R. Civ. 8, and thus can only be applied by HUD in its administrative process. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

2. The Pleading Standards and Evidentiary Burdens in the Proposed Rule are Not Required by ICP, Override Decades of Judicial Precedent, and Will be Virtually Impossible for Plaintiffs to Satisfy.

HUD justifies its need to create new pleading standards and prima facie case requirements on the Court's *ICP* ruling. *ICP* does not, however, create new pleading standards or evidentiary requirements. *ICP* merely reminds the parties to maintain existing standards governing disparate impact cases. HUD's proposal does the opposite. HUD completely rewrites a doctrine that has operated for decades, with no detrimental results, as the Court in *ICP* pointed out. *ICP*, 135 S. Ct. at 2525 (The existence of disparate-impact liability in the substantial majority of the Courts of Appeals for the last several decades "has not given rise to ... dire consequences." citing 132 S.Ct. 694, 710 (2012)). Under the Proposed Rule, a plaintiff or HUD complainant must plead and prove five prima facie elements, the prima facie case, in order to prevail. We discussed above why HUD has no authority to create any pleading requirements, and now provide some detail on why specific elements of the prima facie case HUD has fashioned would require plaintiffs and complainants to plead and prove, are illegitimate.

a. HUD's Requirement that a Plaintiff Must Plead and Prove No Legitimate Objective and Lack of Necessity Overrides Decades of Judicial and Administrative Precedent and Practice.

For the first element, the Proposed Rule would require a plaintiff to first identify a defendant's "legitimate objective" and then allege facts showing that the policy is "arbitrary, artificial, and unnecessary to advance this goal." HUD's new requirement would override decades of judicial and administrative precedent and practice and undermine the purpose of the Fair Housing Act disparate impact standard, as described by the Supreme Court in *ICP*. Brief of Amici Curiae Henry G. Cisneros, et al., *Texas Dept. of Housing and Comm. Affairs, et al. v. Inclusive Communities Project, Inc.*, No. 13-1371, 21-24 and 29-37 (December 22, 2014) (copy attached). In most instances, a plaintiff will be unable to meet this new standard.

No Legitimate Objective

For example, in a case filed in federal court by the FHJC challenging two housing cooperatives' policy of requiring prospective buyers to produce three references from current

shareholders, the FHJC did not know prior to filing its lawsuit why the cooperatives had adopted this policy. The cooperatives, containing a total of 1100 single family homes in the Bronx, operated as private corporations with no public minutes or meetings and were not subject to any open records laws. Through a pre-suit testing investigation, FHJC was able to identify each policy and how each cooperative applied its policy but was not able to discern any purported legitimate reason why each policy existed. Prior to filing a claim, FHJC was also able to determine, based on census data, that virtually no African Americans owned homes in the two cooperatives even though 35% of owner-occupied homes in the Bronx were owned by African Americans. The Court found FHJC's complaint sufficient to survive a motion to dismiss. *Fair Housing Justice Ctr., Inc. v. Silver Beach Gardens Corp.*, No. 10 CIV. 912 RPP, 2010 WL 3341907 (S.D.N.Y. Aug. 13, 2010). Following this decision, one of the defendants, Silver Beach Gardens, agreed to eliminate its requirement that applicants provide references from three current residents – precisely the kind of remedy the Court in *ICP* envisioned – one that eliminates the discriminatory policy.

At the conclusion of discovery, the remaining defendant, Edgewater Park, filed a motion for summary judgment. The district court evaluated the causal relationship between the challenged policy and the adverse impact on African Americans. The Court looked to, for example, expert testimony provided by FHJC showing that the racial disparity at Edgewater Park was statistically significant. The Court noted that FHJC's expert found that only 6 out of 675 households living at Edgewater Park (<1%) were African American compared to 36.6% of homeowners in the Bronx and 15.4% of homeowners in the New York City Metropolitan area. But the Court did not reject the owner's motions for summary judgment based only on overall racial disparities; it also considered the eligible housing market. It pointed to the FHJC's expert's findings that 35% of African American households in the Bronx had sufficient income to afford to purchase a home in the cooperative and that the adjoining census block group to the cooperative had a black homeownership rate of 10%. The Court also considered testing conducted by FHJC showing how the rule operated during the application process to first discourage and then exclude prospective minority applicants. The Court denied Edgewater Park's motion for summary judgment and scheduled the case for trial. *Fair Housing Justice Ctr., Inc. v. Edgewater Park Owners Co-op., Inc.*, No. 10 CV 912 RPP, 2012 WL 762323 (S.D.N.Y. Mar. 9, 2012). At that juncture of the case, Edgewater Park also agreed to eliminate its reference policy.

At the motion to dismiss and summary judgment phases of the case, the defendants never alleged a legitimate reason for the policy or that the policy was necessary. Nonetheless, during discovery, the president of Edgewater Park's Board testified that in his personal experience references from current residents were more reliable than from third parties, such as prior landlords, business associates, personal friends, employers, etc., and that the cooperative had always handled applications this way. Edgewater Park did not offer any other fact or expert testimony or documents during discovery to support this proffered reason. Records obtained by FHJC from Edgewater Park during discovery showed that the policy had no legitimate purpose, since other background checks, employer references, and income and asset verification procedures provided sufficient information from which to evaluate applications.

Yet under HUD's Proposed Rule requiring a plaintiff to plausibly plead facts showing the lack of a legitimate reason for a defendant's policy along with facts showing that the policy is arbitrary, artificial, and unnecessary, FHJC would have had to meet this heightened pleading standard at the time it filed its complaint.

Nothing in the Supreme Court's *ICP* decision would have required FHJC to plead in its complaint, prior to discovery, that the cooperatives' reference policies were not necessary to meet a legitimate objective known only to the Board members. There is no way any plaintiff could have plausibly alleged that reasons known only to the Board were illegitimate. FHJC's complaint survived a motion to dismiss. In this case, because FHJC conducted a pre-suit testing investigation, it was able to uncover sufficient facts at the pleading stage to identify the policy at issue and to allege that the policy "actually or predictably" caused a disproportionate adverse impact on a protected class of persons. This is not to say that such detailed pleading is required in every case, but it is to point out that even with its deep experience and extraordinary expertise at uncovering hidden discrimination, the FHJC would not have been able to satisfy HUD's proposed enhanced pleading standards in this case. Needless, yet significant, discrimination would have been left to damage yet another generation of African Americans excluded from the opportunity to own a home.

The Proposed Rule seeks to impose an obligation on a complainant or plaintiff to plead that no defense is possible, which is virtually impossible for any plaintiff to do. This new burden is far from anything contemplated by the Supreme Court in its opinion in *ICP*. When the Court stated that defendants must be allowed the opportunity to defend a challenged policy "if they can prove it is necessary to achieve a valid interest," it clearly considered the defendant, not the plaintiff, as the party who would identify the interest served by the challenged policy.⁵ In short, the Proposed Rule would override the *ICP* decision, not implement it.

Lack of Necessity

Not only are the proposed heightened pleading standards beyond HUD's authority to enact, as discussed above, but HUD's proposed evidentiary standards are not required or even hinted at by *ICP*, are inconsistent with decades of judicial precedent interpreting the FHA disparate impact standard, and at odds with the disparate impact standard in analogous civil rights statutes. The Proposed Rule seeks to impermissibly alter in several ways the longstanding burden shifting framework used in disparate impact cases. One key change that FHJC highlights and strongly objects to is the shift in which party bears the burden of proving "necessity," or lack thereof. The Proposed Rule would no longer require defendants to prove a policy is necessary to achieve a valid interest. Instead, the burden of proof would rest with a plaintiff to prove that a policy is unnecessary. This shift is not required by the *ICP* decision. It conflicts with judicial precedents and longstanding practice and undermines the Fair Housing Act. HUD should maintain the burden shifting framework in its current Rule, which adopted the disparate impact standard as developed by the federal courts over the past forty years. The Rule is consistent with the *ICP* decision, as well as Title VII statutory and judicial case law, which the *ICP* Court referenced as the benchmark standard.

⁵ 135 S. Ct. at 2523.

For example, the FHJC has received complaints from individuals with disabilities who receive a rental voucher or subsidy only available for disabled persons, such as New York City's HIV and AIDS Services Administration ("HASA") subsidy or New York State's Olmstead rental voucher for previously institutionalized or homeless individuals with disabilities. Testing by FHJC confirmed that the private landlord or real estate broker has a policy of refusing to provide service to individuals with these rental subsidies, refusing to accept the disability-based voucher, or applying minimum income requirements set above the subsidy program eligibility rules. Since these complaints arise in New York City with a local law prohibiting source of income discrimination, the housing providers cannot claim their legitimate interest is to avoid or limit the number of tenants with subsidies. Even assuming that FHJC could discern a claimed lawful reason for the policies prior to filing a complaint, it should not be required to allege or prove facts that the policies are not necessary to accomplish those reasons. Only the defendant is in control of waiting lists, applications, leases, and other business records that could reveal whether renting to disabled persons with subsidies poses an actual risk to the defendant's ability to operate its business that might necessitate adoption of such a rule.

Three of FHJC's cases illustrate this point. In all three instances, the federal court denied defendants' motions to dismiss, finding plaintiffs pled sufficient facts to meet their pleading requirements. See enclosed copies of the Amended Complaints in *L.C. and Fair Housing Justice Center, Inc. v. LeFrak Organization, Inc.*, No. 13 Civ. 2759 DLC (S.D.N.Y. July 11, 2013); *Spooner and Fair Housing Justice Center, Inc. v. Goldfarb Properties, Inc.*, No. 1:18-cv-01564 (S.D.N.Y. June 4, 2018); *Fair Housing Justice Center, Inc. v. Town of Eastchester*, No. 16-9038 (VB) (JCM) (S.D.N.Y. Mar. 16, 2018). First, in the LeFrak case, the defendants tried to convince the district court to apply the evidentiary standards from Second Circuit decisions considering appeals of summary judgment and final judgment rulings by district courts. The district court refused to do this and instead followed the pleading standards applied at the motion to dismiss phase of another case challenging the landlord's policy toward HASA clients, which did not require the complaint to allege the defendant's reason for acting. See *L.C. and Fair Housing Justice Center, Inc. v. LeFrak Organization, Inc.*, 987 F.Supp.2d 391, No. 13 Civ. 2759 DLC (S.D.N.Y. Dec. 13, 2013) (finding FHJC pled sufficient facts to allege landlord's policy adversely impacted HASA clients, all of whom are persons with disabilities). If at the pleadings stage, FHJC had been required to plead why LeFrak wanted a particular type of document before renting to HASA clients and also plead that the document at issue was not necessary, it may not have been able to challenge this and other similar unjustified rental policies.

Similarly, in a case currently pending against Goldfarb Properties, the FHJC is challenging Goldfarb's policy of requiring a minimum gross annual income of 43x the total rent (not the tenant's share of the rent). Applicants with Olmstead rental vouchers who receive SSI or SSD and pay only 30% of their income for rent can never meet this neutral requirement even though with the voucher they are able to pay the rent. After receiving a complaint from a homeless man with a disability who had an Olmstead voucher, FHJC conducted a testing investigation that confirmed Goldfarb's policy. However, no pre-suit testing investigation could uncover why the management company believed the rule was necessary when applied to persons with rental subsidies whose share of the rent is limited. Only requests for production of documents and depositions during discovery have uncovered the company's claim that applicants with subsidies have to show multiples of the total rent in income, not just their share

of the rent, to insure they have sufficient funds to buy cleaning supplies for their apartment. On its face this “defense” appears ridiculous. Under Goldfarb’s policy, if rent is \$1600 per month and the tenant has \$1200 per month in income and pays \$360 per month for his share of the rent, with the Olmstead program paying the balance of \$1240 per month in rent, then the tenant must have a minimum annual income of \$68,800. But Goldfarb’s “cleaning supplies” defense is not something FHJC could have known before discovery.

Nonetheless, under the Proposed Rule, plaintiffs would be required to allege facts showing that the defendant’s minimum income policy is not necessary, even if there is no publicly known or discernable rationale for the rule prior to filing a complaint and obtaining discovery. A copy of FHJC’s Amended Complaint against Goldfarb alleging disability and source of income discrimination is attached. In response to a motion to dismiss, the court denied the motion finding that FHJC’s allegations in the Amended Complaint were sufficient at the pleadings stage. See enclosed copy of Transcript of 7-9-18 Status Conference before Judge Forrest in *Spoooner and Fair Housing Justice Center, Inc. v. Goldfarb Properties, Inc.*

Discovery of Goldfarb’s rental records, including internal calculators and applications, conducted after the motion to dismiss was denied, has confirmed that Goldfarb is unable to identify any HASA or Olmstead applicant it has ever rented to and that Section 8 applicants experience a greater than 97% rejection rate. At his deposition, Goldfarb’s designated corporate witness was unable to explain the necessity for the company’s rule. If it took the deposition of Goldfarb’s own witnesses to reveal that there may not be a need for the rule, it is hard to imagine how HUD could rationally expect a plaintiff to come to that conclusion pre-suit.

Finally, in a pending case brought by the FHJC against the Town of Eastchester, a predominantly white suburban community, with local residency preferences in both its Section 8 voucher program and affordable senior housing zoning permit, the Town has been unable to articulate the necessity for its use of the preferences. For example, after the close of fact and expert discovery, the Town abruptly closed its decades-old Section 8 program when it became clear that even its expert could not explain the need for the residency preferences. At a recent pre-motion conference with the Court to discuss filing summary judgment motions, the Court discouraged the Town from filing a summary judgment motion for a number of reasons. One reason given by the Court was that the *ICP* decision and current HUD regulations require the Town, not the FHJC, to prove the necessity of its policy. The Court pressed the Town’s attorney to identify a single witness who will be able to do that. Here, where the average wait time for African American and Hispanic applicants for a voucher was 10 years compared to the average wait time of 6 months for white applicants (almost all of whom were Town residents), the Town’s inability to explain the need for a local residency preference with such dramatic exclusionary outcomes is stark. However, under the Proposed Rule, FHJC would be required to allege facts in its complaint showing that the preferences were unnecessary prior to any discovery. And if FHJC were to file a HUD complaint instead of a lawsuit, the Proposed Rule would require FHJC to articulate the Town’s rationale before HUD would conduct an investigation into how the Town has used federal funds for decades to benefit white low-income families to the detriment of African-American and Hispanic households.

b. The Proposed Rule Definition of Adverse Impact Inexplicably Removes Segregation Claims from the Scope of the Disparate Impact Rule

The third element of HUD's Proposed Rule requires the plaintiff to plead and prove that the disparate impact had an adverse effect on a protected group. HUD has smuggled a number of poison pills into this seemingly unobjectionable requirement, one of which is what looks like an attempt to eradicate segregation claims from the rule by limiting adverse impact to protected group members. This flatly constricts the Supreme Court's Fair Housing Act precedents, which long recognized segregation claims, holding that segregation deprives everyone in the community of the economic and social benefits of living in an integrated environment. It also flies in the face of *ICP*'s detailed exposition of the history and purpose of the Fair Housing Act to eradicate segregation.

The 2013 Rule, by contrast, states that "a practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race,..." 24 C.F.R. § 100.500(a). Inexplicably HUD has altered the definition of a "discriminatory effect" to remove any reference to those practices that create, increase, reinforce or perpetuate residential segregation ("segregation claims"). This wholesale removal of a cause of action with no justification cannot be considered an "update to HUD's existing framework" HUD should restore the language from the 2013 Rule to the Proposed Rule regarding segregation claims.

The FHA's legislative history and the courts' longstanding and consistent application of the FHA to segregation claims is well known. Nothing in the *ICP* decision changes this legal landscape and HUD's attempt to do so by re-defining the term "adverse impact" and deleting all reference to such claims in the Proposed Rule is a shocking abdication of its duty to affirmatively further fair housing, as required by the FHA. As HUD explained and summarized in its response to commenters in 2013:

As discussed in the preambles to both the proposed rule and this final rule, the elimination of segregation is central to why the Fair Housing Act was enacted. HUD therefore declines to remove from the rule's definition of "discriminatory effects" "creating, perpetuating, or increasing segregated housing patterns." The Fair Housing Act was enacted to replace segregated neighborhoods with "truly integrated and balanced living patterns." It was structured to address discriminatory housing practices that affect "the whole community" as well as particular segments of the community, with the goal of advancing equal opportunity in housing and also to "achieve racial integration for the benefit of all people in the United States." (citations removed)

HUD's 2013 response went on further to explain that every federal court of appeals to have addressed the issue had agreed that the Act prohibits practices with the unjustified effect of perpetuating segregation. The response included a list of cases from the various circuits demonstrating that HUD's position was reasonable and firmly grounded in the law and its application by courts since 1968. *See, e.g., Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir. 1988) ("the discriminatory effect of a rule arises in two

contexts: adverse impact on a particular minority group and harm to the community generally by the perpetuation of segregation ... recognizing this second form of effect advances the principal purpose of Title VIII to promote, open, integrated residential housing patterns.’’) (internal citations and quotation marks omitted); *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (“There are two kinds of racially discriminatory effects which a facially neutral decision about housing can produce. The first occurs when that decision has a greater adverse impact on one racial group than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups.’’) (internal citations omitted); *U.S. v. City of Black Jack*, 508 F.2d 1179, 1184–86 (8th Cir. 1974) (“The discriminatory effect of the ordinance is more onerous when assessed in light of the fact that segregated housing in the St. Louis metropolitan area was in large measure the result of deliberate racial discrimination in the housing market by the real estate industry and by agencies of the federal, state, and local governments. Black Jack’s action is but one more factor confining blacks to low-income housing in the center city, confirming the inexorable process whereby the St. Louis metropolitan area becomes one that has the racial shape of a donut, with the [black people] in the hole and with mostly whites occupying the ring.’’)(internal citations and quotation marks omitted).

Some of the cases referenced by HUD in 2013 involved claims by affordable housing developers that local government rejections of requests for site plan approval, building permits, variances, and other land use and zoning decisions in predominantly white communities perpetuated residential segregation, one of the very evils Congress sought to address by enacting the Fair Housing Act. HUD’s attempt to suddenly reverse course and eliminate segregation claims from the Fair Housing Act, even if limited to disparate impact claims, usurps the essential role of Congress in enacting civil rights protections in the United States such as those provided by the FHA.

For the FHJC, abandonment of this longstanding judicially recognized theory of liability would cut directly into the heart of its work to create more open and integrated communities in one of the most racially segregated metropolitan areas of the county. See *MHANY v. Cty. Of Nassau*, 819 F.3d 581, 620-21 (2d Cir. 2016); *FHJC and Westchester Residential Opportunities, Inc. v. Town of Bedford et al.*, (S.D. N.Y., filed July 26, 2017) (complaint attached); *FHJC v. Town of Eastchester*, Case No. 16-CV-09038 (S.D. N.Y., filed November 21, 2016) (complaint attached); *United States v. Town of Oyster Bay*, Case No. 14-CV-2317 (E.D. N.Y., filed April 10, 2014) (complaint attached); *Long Island Housing Services and Fair Housing Justice Center v. Village of Great Neck Plaza, et. al.*, Case No. 14-CV-3307(ADS) (AKT) (S.D. N.Y., filed May 30, 2014) (complaint attached); *FHJC v. Town of Yorktown*, Case No. 10-CV-09337 (S.D. N.Y. filed December 15, 2010) (complaint attached);

c. The Zoning Example and Statements in the Preamble Regarding a “Single Event” Appear to Arbitrarily Narrow the Definition of a Neutral Policy or Practice Susceptible to Disparate Impact Challenge

The Comments to the Proposed Rule state that “HUD will not bring a disparate impact claim” and “plaintiffs will likely not meet the standard” if alleging a “single event” is the cause

of a disparate impact. This language appears to qualify the type of policies and practices susceptible to disparate impact challenge. HUD should remove this Comment from the Proposed Rule because it is vague and appears to arbitrarily narrow the definition of what constitutes a policy or practice that may be the subject of a disparate impact challenge.

For example, the predominantly white Village of Great Neck Plaza on Long Island enacted an affordable housing ordinance which permitted mixed-income housing to be built in certain zoning districts within the Village. The Village incorporated a mandatory local residency preference and applicant age requirements into the new ordinance (favoring applicants under 30 or over 65 with 10 or more years of Town residency) and required all affordable housing rental applications to be filed with the Town. One developer submitted a proposal to build a mixed-income rental building under the new ordinance and obtained financing to construct additional affordable units in the same building from the Nassau County Industrial Development Agency (“NCIDA”).

The FHJC filed a lawsuit in federal court under the Fair Housing Act against the Village and the NCIDA prior to the initial rental of the affordable units. The complaint challenged the Village’s zoning code in general and as applied specifically to the one site under construction. The complaint also challenged NCIDA’s policy of applying a local municipality’s zoning code restrictions to additional affordable units subsidized by the County. FHJC had no evidence that NCIDA’s policy had ever led to discriminatory restrictions being placed on any other similarly financed affordable units and had no evidence that the developer had ever agreed to residency or age preferences at any other sites. *Long Island Housing Services, Inc. and Fair Housing Justice Center, Inc. v. Nassau County Industrial Development Agency*, No. 14-cv-3307 (ADS) (AKT) (E.D. N.Y. Dec. 1, 2015) (denying defendants’ motion to stay discovery) (order attached).

Under the Proposed Rule, it is unclear whether plaintiffs would be allowed to file an FHA complaint in these circumstances against the Village, County agency, and the private developer.

- Would the Proposed Rule prohibit claims against the developer because the rental of the affordable units at issue had occurred at one site or for one building?
- What if the site contained multiple buildings or hundreds of units?
- Would the Proposed Rule prohibit claims against the County agency because its policy of incorporating a local municipality’s zoning requirements had only resulted in this one instance of applying residency and age preferences to a County financed rental building?
- And even though the Village’s affordable housing ordinance applied to several developable sites, only one developer had come forward to build on one site. Would that mean that the Village’s ordinance was only a “single event” and thus, not subject to challenge?

This cannot possibly be what HUD means when it uses the term “single event” in its Comments to the Proposed Rule. And yet, HUD does not define the phrase and only provides two narrow examples to explain the undefined term in its Comments.

- d. HUD’s Proposal to Require “Direct” or “Actual” Causation is Incoherent and Found Nowhere in ICP or Wards Cove Decisions

In the second element of HUD's proposed pleading standards for a prima facie case, HUD would require plaintiffs and complainants to plead and prove "the specific practice is the direct cause of the discriminatory effect." However, the Preamble to the Proposed Rule says plaintiffs and complainants would be required to show the policy is the "actual" cause of the disparity.

In *ICP*, the Supreme Court did not refer to the concept of "robust causation" to create a new evidentiary requirement, but to warn courts not to veer away from existing Title VII causation standards, as explained in *Wards Cove v. Atonio*, 490 U.S. 642, 653, 109 S.Ct. 2115 (1989). Neither *ICP* nor *Wards Cove* imposed pleading standards or specific data requirements for pleading or proving causation. As cited in *ICP* decision, the Court was concerned in *Wards Cove* with identifying the right comparators and offering reassurance that requiring a plaintiff to prove that a specific practice caused the disparity would not be unduly burdensome because "liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims." *Wards Cove*, 490 U.S. at 657.

Whatever authority HUD may have to revise its own regulations, it has no power to change the meaning of a Supreme Court opinion. There is no mystery to what the *ICP* Court meant when it used the phrase "robust causality." The Court was ensuring the continued application of the 30-year old requirement that a plaintiff can sue a defendant only for those disparities caused by one or more of the defendant's own practices. As the Court explained,

.... a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that "[r]acial imbalance ... does not, without more, establish a prima facie case of disparate impact" and thus protects defendants from being held liable for racial disparities they did not create. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), *superseded by statute on other grounds*, 42 U.S.C. § 2000e-2(k). 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. 490 U.S., at 653, 109 S.Ct. 2115.

ICP at 2523.

The Court has long been concerned that without requiring the plaintiff to identify which of the defendant's practices caused the disparity, a defendant might resort to race-based quotas to avoid liability for general societal inequities, which would not necessarily correct the cause of the discrimination and could raise equal protection concerns. HUD shared the same concern in 2013, hence, the Rule requires the plaintiff to prove that the challenged practice causes the discriminatory effect. See 24 C.F.R. 100.500(c)(1). Despite what HUD now claims, the 2013 Rule does not permit liability based on statistical disparities alone.

In the Proposed Rule and Preamble, HUD obscures the obvious meaning of the Court's opinion in *ICP* by tossing in random words not contained in the *ICP* decision, and with no

explanation of why HUD believes those terms elucidate rather than alter the meaning of *ICP*. HUD uses, interchangeably, four different causation phrases: “robust causality,” “robust causal link,” “direct causation,” and “actual causation.” HUD does not explain in its Preamble or Proposed Rule how these fluctuating terms provide a consistent, let alone, reasonable interpretation of the FHA or *ICP*.

A closer look at *ICP* shows that by “robust causality” the Court meant a “causal connection” between a defendant’s practice and the disparity alleged by a plaintiff. *ICP* at 2523. In its decision, the Court cited to a specific portion of its 1989 *Wards Cove* ruling, page 653, the portion of that opinion that was not superseded by Congress with the 1991 amendments to Title VII. Page 653 of *Wards Cove* mirrors the causal connection discussed in *ICP*. It is the same causation standard plaintiffs, courts, and the EEOC have been applying in the employment context for thirty years or more. It is the standard courts have been applying in the housing context. And it is the standard that applies in HUD’s 2013 Rule, which as the Court in *ICP* confirmed, is nearly identical to the Title VII standard.

In this context, HUD’s proposal to require “direct” and “actual” causation is incoherent and found nowhere in *ICP* or *Wards Cove* decisions.⁶

e. HUD’s Inclusion of a Separate Significance Requirement, Conflated with Materiality in the Preamble to the Proposed Rule, Causes Further Confusion

In the Proposed Rule itself, HUD creates an additional element for a prima facie case based on disparate impact requiring that the “alleged disparity caused by the policy or practice is significant” Section 100.500(b)(4) (emphasis added). However, in the Preamble, HUD states that a plaintiff “would be required to show that the statistical disparity identified is material.” Proposed Rule Preamble, 84 Fed. Reg. 42854, 42859 (Aug. 19, 2019). Significance is a feature of the causal relationship between the disparity and the practice. If the size of the disparity were not statistically significant, the correlation between the two may be per chance.

But HUD in its Proposed Rule does not define what it means by using the word “significance.” It instead equates the term with “materiality.” The use of two different terms, significant and material, when describing the same evidentiary standard is confusing and, on its face, unsupportable. Significant and material are not synonyms for each other. While “significance” is a concept applied by courts regularly in FHA and Title VII cases, and they use it to refer to statistical significance, materiality is not a concept used in fair housing law and is more commonly applied in the fraud or breach of contract contexts.

Imposing a new materiality standard suggests that HUD believes there may be some undefined quantum of housing discrimination permitted by the Fair Housing Act before liability attaches. For example, under HUD’s framing of this element, a housing policy could have a statistically significant adverse impact against a racial group, but not be “material.” Does HUD

⁶ Oddly, after muddying up the otherwise clear causation standard in *ICP*, HUD has the temerity to ask the public, at the proposed rule stage, whether it should provide a definition for “robust causal link.” This signals that HUD may replace or enhance the existing causation requirement even more, with no opportunity for the public to comment on it.

intend for defendants to be able to argue that some discrimination is acceptable as long as it falls below some level of materiality? The Fair Housing Act does not permit some amount of illegal discrimination; it makes unlawful *all* prohibited practices described by the Act. See 42 U.S.C. §§ 3604, 3605, and 3606.

3. Less Discriminatory Alternative: HUD Redefined Business Justification Defense Is Facially Unreasonable

The current Rule, §100.500(c)(2), states that “the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.” (emphasis added). HUD now proposes removing key elements of a defendant’s burden of proof including necessity, substantial, legitimate and nondiscriminatory, leaving behind a facially weakened burden to produce “evidence showing that the challenged policy or practice advances a valid interest.” (emphasis added). The Proposed Rule continues by defining a “valid interest” as a “practical business, profit, policy consideration, or requirement of law.”

By doing so, HUD empties the standard for what qualifies as a business justification defense and leaves us with administrative convenience and profit. On their face, these two purported justifications for harming consumers based on their protected characteristics or harming communities by perpetuating segregation, conflict with the very goals of the Fair Housing Act. And since our economic system is one in which trade and industry, including the sale and purchase of real estate, are privately owned for the very purpose of building or creating profit, a defense based on the core value of “profit” is meaningless and should be removed from the Proposed Rule. If “profit” alone, no matter how small, and without proof of necessity, becomes a “valid interest” supporting a business justification defense, the concept of a disparate impact theory of liability becomes meaningless.

The Proposed Rule conflicts with the 2013 Rule, Title VII, and ECOA in various ways. The Proposed Rule does not require the business interest to be a substantial one or nondiscriminatory. The Proposed Rule does not require a defendant to establish that the challenged policy is necessary to accomplishing the purported interest. The Proposed Rule does not require that a defendant’s evidence be material or that it not be removed, speculative or hypothetical as HUD requires of plaintiffs in the Proposed Rule. HUD provides no explanation for this in the Preamble and does not, nor can it, point to any portion of the *ICP* decision mandating this section of the Proposed Rule. This dramatic imbalance created by HUD in the quality of evidence required for each side is arbitrary and irrational and raises due process concerns.

4. HUD’s Attempt to Manufacture a Third-Party Defense Out of Whole Cloth Should be Rejected

By creating new defenses outside of the statutory text of the Act and without judicial support, HUD belies its claim that the Proposed Rule is intended to “better reflect” the *ICP* decision. Specifically, HUD proposes to protect any entity whose discretion is shown to be “materially limited” by a third party, giving as examples a federal, state, or local law; a binding

or controlling court, arbitration, regulatory, or administrative order; or an administrative requirement. The Preamble explains that the defense would operate like a “safe harbor” by ensuring that defendants will never be placed in a “double bind of liability” where they could be subject to suit under disparate impact for actions required for good faith compliance with another law. The proposed third-party defense gives defendants a blank check to violate the Fair Housing Act by pointing the finger at someone else. For example, if a landlord evicts domestic violence victims to avoid sanctions from a property nuisance ordinance, depending on the facts, both the city and the landlord could be liable for disparate impact discrimination based on sex, race, or another protected characteristic. Or, if a town adopts a residency preference for newly constructed affordable housing, with the effect of limiting affordable units to white families, the town might be subject to Fair Housing Act liability under a disparate impact theory. But so too might others that implement the ordinance, such as the developer that built it.

HUD’s Proposed Rule purports to solve a problem that, in fact, does not exist. The Fair Housing Act currently contains a preemption clause that invalidates conflicting state and local laws: “any law of a state, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under the Act shall to that extent be invalid.” 42 U.S.C. §3615. The Act’s preemption clause is grounded in the supremacy of federal law required by the US Constitution.

The answer to this seeming mystery about HUD’s intent can be found in the Proposed Rule itself which states that federal, state or local law and a binding court or administrative order are only examples of situations that may materially limit a defendant’s discretion. Proposed 24 C.F.R. §100.500 (c)(1) (“the defendant shows that its discretion is materially limited by a third party such as through...”) (emphasis added). So if HUD were transparent about its purpose for inserting a third-party defense in the Proposed Rule, it would acknowledge that the proposed defense is not limited to those situations already covered by Section 3615 of the Act, but may reach other claimed defendants none of which are defined, described, or identified in the Proposed Rule.

More perplexing is that HUD’s proposed defense is not in keeping with the well-established economic principle of externalities—that is, to achieve efficiency, all contributing parties must be responsible for remedying harms they caused. It would thwart a plaintiff’s ability to obtain full relief for housing discrimination, which under the FHA requires the elimination of past discriminatory effects and the prevention of future discrimination. Under HUD’s proposal, parties necessary for full relief—such as the property owners in the earlier eviction and refusal-to-rent examples—appear to be automatically immune from liability

HUD’s proposed defense also would remove an important incentive for such actors to evaluate their own practices to ensure they are not discriminatory. Where a homeowners’ insurance policy requires a landlord to either evict its Section 8 tenants or pay a higher premium, for example, the landlord can likely sue the insurance company for disparate impact discrimination under the Act. If the landlord instead decides to evict its Section 8 tenants or pass the excess insurance costs on to them, the tenants may have a disparate impact claim against both the landlord and the insurance company. Under HUD’s proposed third-party defense, arguably

no one would be liable. The insurance company could attempt to escape liability by blaming the landlord as the intervening third party causing the violation, while the landlord could attempt to blame the insurance company for limiting its discretion.

5. HUD's Purported Algorithmic Defense is Equally Fabricated with No Connection to the ICP Decision or HUD's Claimed Reasons for the Proposed Rule

HUD's Proposed Rule also provides three complete defenses for defendants who rely on algorithmic models to make housing decisions. HUD's approach is flawed and shows the agency fails to understand how algorithmic tools actually work in practice. This is most concerning as algorithmic tools are increasingly relied upon by landlords, banks, and insurance companies to make assessments of creditworthiness and risk. HUD's Proposed Rule will effectively insulate businesses that use algorithmic models from liability, even if it is clear that their practices result in the discriminatory denial of access to housing and residential real estate-related transactions.

Under HUD's Proposed Rule, defendants who use algorithmic models will be shielded from liability if (1) the inputs used in the algorithmic models are not themselves "substitutes or close proxies" for protected characteristics and the model is "predictive of credit risk or other similar valid objective;" (2) the model is produced and maintained by a "recognized third party that determines industry standards;" or (3) a neutral third party examines the model and determines the model's inputs are not close proxies for protected characteristics and the model is predictive of risk or other valid objective." Proposed 24 C.F.R. §100.500 (c)(2).

In the first and third defenses, HUD mistakenly indicates that as long as a model's inputs are not discriminatory, the overall model cannot be discriminatory. However, the whole point of complex algorithms is that they are often designed to 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, which can lead to a model having a discriminatory effect. HUD does not account for this in its Proposed Rule, even though it recently issued a Charge against Facebook's advertising platform delivery system for this very thing.

In the second defense, defendants are insulated from liability if a third party created the algorithm, which will be the case for many defendants, especially landlords. With this defense, HUD eliminates any incentive for defendants not to use models that result in discriminatory effect or to pressure third-party model makers to ensure their algorithms avoid discriminatory outcomes. In addition, it is unclear whether aggrieved parties can obtain relief under the Fair Housing Act by filing claims against the creator of the algorithm, a distant and possibly unknown third party, as HUD suggests in its proposal. 84 Fed. Reg. at 42862.

HUD claims that its proposed algorithmic defenses are not meant to create a "special exemption for parties using algorithmic models." *Id.* at 42859. But that is exactly what the Proposed Rule will do. Under the current Rule, a defendant's use of an algorithmic model in a disparate impact case is considered on a case-by-case basis, with careful attention paid to the particular facts at issue. *See, e.g., Connecticut Fair Housing v. CoreLogic Rental Prop.*

Solutions, LLC, 369 F.Supp.3d 362 (D. Conn. 2019). In contrast, HUD’s proposed defenses are inconsistent with how algorithmic models actually work and will impede enforcement of the Fair Housing Act in the future. FHJC requests that HUD withdraw the flawed algorithmic model defenses.

6. The Proposed Rule Inexplicably Alters Vicarious Liability Standard of *Meyer v. Holley* for Disparate Impact Cases

While claiming to promulgate the Proposed Rule to “better reflect” the *ICP* decision, HUD oversteps again by creating a standard that does not comport with the Supreme Court’s decision in *Meyer v. Holley*, 537 U.S. 280 (2003). In addition, the Proposed Rule modifies the 2013 Rule for no reason and only for disparate impact, not disparate treatment, cases.

The Current Rule states as follows:

Vicarious liability. A person is vicariously liable for a discriminatory housing practice by the person’s agent or employee, regardless of whether the person knew or should have known of the conduct that resulted in a discriminatory housing practice, consistent with agency law. 24 C.F.R. §100.7(b) (emphasis added)

In contrast, HUD’s Proposed Rule states:

Vicarious liability. Where a principal-agent relationship exists under common law, a person may be held vicariously liable for a discriminatory housing policy or practice by the person’s agent or employee. Proposed 24 C.F.R. §100.7(b) (emphasis added)

While HUD’s proposed revision claims to follow *Meyer v. Holley*, it does not actually state that it is applying the common law rules of agency as the Current Rule does and as the Supreme Court so held. The Proposed Rule also removes a key element of vicarious liability – whether the principal knew or should have known of the conduct at issue. By deleting this text, HUD appears to be suggesting without any justification or rationale that this is no longer the standard. Finally, HUD’s insertion of a new clause at the beginning of the definition is unclear and may serve to eliminate a common form of vicarious liability for discrimination aided by the agency relationship. *See* 81 FR 63054, 63065, Sept. 14, 2016 (“In addition, under traditional principles of agency law, a housing provider may be held vicariously liable for the discriminatory acts of an employee or agent regardless of whether the housing provider knew of or intended the discriminatory conduct where the employee was acting within scope of his or her agency, or where the [discrimination] was aided by the agency relationship”). Together these changes in vicarious liability create two different standards of vicarious liability between disparate impact and disparate treatment or intent claims. What is HUD’s purpose for doing this? What portion of the *ICP* decision compels HUD to alter this section of the Current Rule? FHJC asks HUD to withdraw its arbitrary and unreasonable proposed revised definition of vicarious liability.

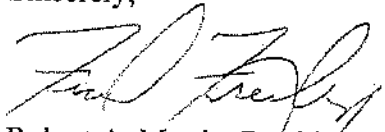
Conclusion

The Proposed Rule operates to destroy disparate impact liability. It is in direct contradiction to HUD's mission, decades of legal precedent, and the Supreme Court's recent *ICP* decision.

Before finalizing the current Disparate Impact in 2013, HUD engaged in a thoughtful and thorough process, considering decades of federal court jurisprudence. In 2016, HUD considered additional federal court jurisprudence when it issued its well-reasoned supplement to insurance industry comments. HUD should not change the Current Rule.

Thank you for the opportunity to comment.

Sincerely,



Robert A. Martin, President
Fred Freiberg, Executive Director
Fair Housing Justice Center