

October 18, 2019

Office of the General Counsel

Rule Docket Clerk
Department of Housing and Urban Development
451 Seventh Street SW
Washington, D.C. 20410-0001

Re: FR-6111-P-02, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

To Whom It May Concern:

The undersigned civil rights, environmental and environmental justice, public health, and fair housing organizations and practitioners submit this letter to urge HUD to leave intact its existing Discriminatory Effects Rule (issued in 2013). The existing Discriminatory Effects Rule provides an effective framework to protect Americans from discrimination and to meet HUD's statutory obligations under the Fair Housing Act, in accordance with Congressional intent. In contrast, the currently proposed Disparate Impact Standard (the "Proposed Standard") will fail to adequately safeguard against discrimination and segregation. The Proposed Standard is an abdication of HUD's responsibility to implement the Fair Housing Act's nondiscrimination provisions and its obligation to affirmatively further fair housing in its programs and activities. It lacks a reasoned basis, furthermore, for departing from HUD's thoughtfully crafted 2013 regulation, and it fails to consider the real-world, factual contours of housing-related policymaking and housing markets – flying in the face of the ample documentation and experience that undergird the 2013 framework.¹

Because the Proposed Standard fails to protect vulnerable Americans from discriminatory housing and land use policies and policies that promote segregation, it will result in increased harms to those households (including to low income children of color, and with impacts that accrue across generations); and to society at large (including lost benefits such as neighborhood and school diversity, broader access to good health, fuller economic participation, and more widespread housing security and choice). These are the very harms that the Fair Housing Act

¹ See, e.g., Letter submitted to HUD by PRRAC et al. re Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, Docket No. HUD-2017-0029, 82 Fed. Reg. 22344 (June 2017)(noting that "[j]ust as when it passes a new regulation, an agency's actions to rescind or modify regulations are subject to administrative and substantive statutory obligations. This requires that agencies engage in reasoned decision-making to interpret the laws and assess how best to execute the authority granted them by.... HUD must adhere to the requirements of the APA, the tenets of reasoned decision-making (including appropriate consideration of a regulation's benefits), and the Congressional directives of substantive fair housing law. This means that HUD must still regulate to advance the purposes of the underlying statutes, including the Fair Housing Act.); see also *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(an agency must consider the factors Congress intended for it to consideration and may not "rely on factors which Congress has not intended it to consider").

was created to remedy, alongside its aims of promoting equal housing choice and holding accountable the institutions that create and perpetuate segregation.

HUD's current rulemaking has so far failed to address or account for the toll of its prospective shift to the Proposed Standard in these areas, or for its shortcomings relative to the existing 2013 standard in achieving HUD's statutory objectives. Rather, HUD's proposed rulemaking focuses reductively on profit interests and on creating new ways to insulate institutions from liability even where such liability has longstanding legal precedent. While the Proposed Standard will drastically reduce (and to a significant degree eliminate) the viability of disparate impact claims, HUD has not articulated for the public a sufficient justification for its change in agency policy, nor is it able to provide a basis for such a departure from the statutory goals and principles that the disparate impact standard must implement.

Crucially, HUD proposes an ineffective or unworkable discriminatory effects rule that will have severe negative consequences in the areas of environmental justice and public health, especially for individuals and communities who already lack equal political empowerment and rights protections linked to housing discrimination, segregation, and other forms of institutional racism. Environmental health and equity have long been intertwined with fair housing, and were significant concerns of Congress in passing the Fair Housing Act.² We address this issue in greater detail below, and underscore the need for HUD to fully consider the Proposed Standard's ramifications and to keep the 2013 disparate impact rule's effective framework intact.

HUD's Proposed Standard Will Legalize Discriminatory Housing Practices that Congress Sought to Prevent by Enacting the Fair Housing Act

HUD is charged by statute with the "authority and responsibility"³ of implementing the Fair Housing Act, which seeks to (1) "remove the walls of discrimination which enclose minority groups"⁴ and (2) foster "truly integrated and balanced living patterns."⁵ The Act provides for protection from discrimination, including both intentional and disparate impact discrimination (which also includes the reinforcement of segregation).⁶ The Act also requires HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies [of the legislation]."⁷ As both the statute and court decisions interpreting the Act provide, HUD is required to act in accordance with these statutory duties and to implement an effective framework for civil rights compliance.

² See, e.g., discussion of evidence that residential segregation was subjecting people of color to "less healthy surroundings," 134 Cong. Rec. 19715, 19716-17 (1988) (statement of Sen. Specter) (quoting exhibit read into the record regarding a study of conditions for African Americans), while freedom from housing barriers "may give children the opportunity to grow up in a healthier atmosphere," 114 Cong. Rec. 2277 (1968) (statement of Sen. Mondale) (quoting Commission on Civil Rights Report for 1967 regarding African Americans in segregated communities).

³ 42 U.S.C. § 3608(a).

⁴ See *Evans v. Lynn*, 537 F.2d 571, 577 (2d Cir. 1975) (citing 114 Cong. Rec. 9563 (1968) (statement of Rep. Celler)).

⁵ *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (citing 114 Cong. Rec. 3422 (1968) (statement of Sen. Mondale)).

⁶ See, e.g., 42 U.S.C. § 3604; *Texas Dep't. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) (affirming that disparate impact is cognizable under the Fair Housing Act).

⁷ 42 U.S.C. § 3608(e)(5).

The Proposed Standard, in contrast to the existing 2013 rule, fails to provide workable or effective safeguards against housing discrimination. Instead, its structure, prima facie requirements, and defenses will collectively operate to make it impossible to successfully challenge housing discrimination under its framework. The Proposed Standard cannot be squared with the *Inclusive Communities Project* decision, which upholds the viability of discriminatory effects liability—and cannot be read as rendering that standard effectively inoperable. Nor did the Supreme Court in its *Inclusive Communities* decision instruct HUD to depart from the agency’s 2013 Disparate Impact rule, which remains fully consistent with that decision.

Specifically, the current burden-shifting framework appropriately protects the interests of defendants in sound business and policy goals but serves to root out justifications that are in fact pretextual or discriminatory.⁸ For example, barriers to the production and siting of affordable homes in predominantly white communities – which often also offer access to good schools and healthy neighborhoods – have been challenged where these barriers lack sufficient justification or where an alternative, less discriminatory policy was available.⁹ Such cases advance core statutory goals of the Fair Housing Act in expanding choice and creating open and diverse communities, as well as boosting the production of housing in locations where it has traditionally been excluded. Similarly, in the context of revitalization and housing production in predominantly minority neighborhoods, the disparate impact rule implements clear statutory law in protecting against policies that deepen segregation and that cannot be justified. (For example, where subsidized housing effectively operates as a policy of “containment” of people of color in certain neighborhoods, even though alternative siting policies are available to the decision-maker.) Importantly, the current standard does not impair the ability to engage in sound revitalization or preservation policies that have been thoughtfully constructed and that actually benefit communities. Rather, the current standard allows for case by case consideration of potential fair housing violations on a basis that examines local conditions and nuances in local policy.

Furthermore, the 2013 rule reflects HUD’s careful consideration of the ways in which housing markets and policymaking work, including in contemporary institutional contexts and in the broad variety of different areas and practices encompassed by the Fair Housing Act. HUD’s current rulemaking fails to articulate or explain why it has departed from these prior determinations, which were and remain supported by extensive evidence and experience. The 2013 rule provides for a workable and meaningful nondiscrimination standard that necessarily reflects the factual realities of the housing market and housing policymaking, emphasizes the benefits of a clear and consistent grounding in existing law, and explicitly safeguards the legitimate interests of all parties. The Proposed Standard, in contrast, fails on each of those grounds. Instead, with the Proposed Standard, HUD has contorted and reconstituted fragmentary phrases plucked out of the *Inclusive Communities* opinion, without grounding them in context or providing sufficient reasoning to explain how this will serve as an operable standard or how it will meet HUD’s statutory obligations under the Fair Housing Act.

⁸ See, e.g., Stacy E. Seicshnaydre, *Disparate Impact and the Limits of Local Discretion after Inclusive Communities*, 24 *George Mason Law Review* 663 (2017).

⁹ See, e.g., *Huntington Branch, NAACP v. Huntington*, 844 F. 2d 926, 935–936 (2nd Cir. 1988); *United States v. Black Jack*, 508 F. 2d 1179 (8th Cir. 1974).

HUD's Proposed Standard Eliminates the Long-Standing Perpetuation of Segregation Standard

As well as making it effectively impossible to prevail on a wide range of disparate impact claims, HUD's Proposed Standard erases a core aspect of established fair housing law: it fully eliminates the 2013 regulatory language providing for liability for the creation or reinforcement of segregation, currently found in at 24 CFR 100.500: "Discriminatory effect. 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, color, religion, sex, handicap, familial status, or national origin." (Emphasis added.) See also 78 Fed. Reg. 11469-70, FNs 97-106 and accompanying text, providing examples of caselaw relying on the perpetuation of segregation provision and stating that "the elimination of segregation is central to why the Fair Housing Act was enacted," and that "moreover, every federal court of appeals to have addressed the issue has agreed with HUD's interpretation that the Act prohibits practices with the unjustified effect of perpetuating segregation," such that HUD included specific language to this effect.

HUD has provided no reasoning or justification for its elimination of this core fair housing principle within its Proposed Standard. Nor would it be possible for HUD to provide a basis for doing so, given the centrality of segregation to the Fair Housing Act, as reinforced by the *Inclusive Communities* decision¹⁰ and by a body of longstanding and well recognized legal precedent. Furthermore, as we discuss in the following section, HUD's current rulemaking and the Proposed Standard fail to reckon with the significant costs and harms of housing segregation and with the ongoing need to effectively safeguard against segregation, as well as other forms of structural and institutional discrimination.

HUD Has Failed to Consider the Connections between Housing Discrimination and Segregation and Environmental Injustice and the Harms to Environmental Justice Communities

HUD has, furthermore, failed to adequately consider the numerous negative social impacts of housing discrimination and segregation, including their role in contributing to environmental injustice and unequal health outcomes. Discriminatory housing practices, historically and in the present, directly affect neighborhood health for communities of color.¹¹ Residents of segregated communities are significantly more likely to experience high-volume releases of toxic chemicals.¹² Segregated housing results in communities of color, as well as immigrant and

¹⁰ See ICP, 135 S. Ct. at 2525-26 ("The [Fair Housing Act] must play an important part in avoiding the Kerner Commission's grim prophecy that '[o]ur Nation is moving toward two societies, one black, one white-separate and unequal' The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society.")

¹¹ See, e.g., Rachel D. Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules and Environmental Racism*, 53 Emory L.J. 1807, 1841-49 (2004), <https://ssrn.com/abstract=594066>; see generally *The Call for Environmental Justice Legislation: An Annotated Bibliography* (PRRAC 2018), <https://www.prrac.org/pdf/EJLegislationResearchGuide.pdf>.

¹² See, e.g., Daniel R. Faber & Eric J. Krieg, *Unequal Exposure to Ecological Hazards 2005: Environmental Justice in the Commonwealth of Massachusetts vi* (Oct. 12, 2005), available at

refugee communities, breathing higher concentrations of harmful air pollutants,¹³ including from transportation emissions¹⁴ and chronically substandard housing with multiple asthma triggers as well as lead hazards in paint, dust, and soil.¹⁵ Communities of color and immigrant and refugee communities are also less likely to benefit from the reliable municipal infrastructure¹⁶ or access to food,¹⁷ green spaces, and other resources for recreation and healthy, active living that mitigate other environmental burdens.¹⁸ The finding, reached by the United Church of Christ Commission

<http://www.northeastern.edu/nejrc/wpcontent/uploads/Final-Unequal-Exposure-Report-2005-10-12-05.pdf>; Robert D. Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* 98, n.12-17 (3d ed. 2000); Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 *Ecology L.Q.* 1, 34 (1997) (rejecting Been’s prior hypothesis that “market dynamics” increase minority residency rates in neighborhoods after siting of hazardous waste facilities); Paul Mohai & Robin Saha, *Racial Inequality in the Distribution of Hazardous Waste: A National-Level Reassessment*, 54 *Soc. Probs.* 343, 361 (2007) (“[R]acial disparities in the distribution of the nation’s [hazardous waste facilities] persist despite controlling for the economic and sociopolitical make-up of the tracts . . .”), available at http://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1001&context=environstudies_pubs; Godsil, *supra*, at 1118; Seema Arora & Timothy N. Cason, *Do Community Characteristics Influence Environmental Outcomes? Evidence from the Toxics Release Inventory*, 1 *J. App. Econ.* 413, 415-16 (1998).

¹³ See, e.g., Lara P. Clark et al., *National Patterns in Environmental Injustice and Inequality: Outdoor NO₂ Air Pollution in the United States*, 9 *PLOS ONE* e94431, 2 (2014), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC3988057/pdf/; Marie Lynn Miranda et al., *Making the Environmental Justice Grade: The Relative Burden of Air Pollution Exposure in the United States*, 8 *Int’l J. Envtl. Res. Pub. Health* 1755, 1768-69 (2011), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC3137995/pdf/ijerph-08-01755.pdf; Ihab Mikati, Adam F. Benson, Thomas J. Luben, Jason D. Sacks, and Jennifer Richmond-Bryant, 2018:

Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status
American Journal of Public Health 108, 480-485, <https://doi.org/10.2105/AJPH.2017.304297>

¹⁴ See e.g. Union of Concerned Scientists, *Inequitable Exposure to Air Pollution in California: Fact Sheet* (February 2019) available at <https://www.ucsusa.org/resources/inequitable-exposure-air-pollution-vehicles-california-2019>; *Inequitable Exposure to Air Pollution from Vehicles in the Northeast and Mid-Atlantic: Fact Sheet*, 1 (June 2019) available at <https://www.ucsusa.org/sites/default/files/attach/2019/06/Inequitable-Exposure-to-Vehicle-Pollution-Northeast-Mid-Atlantic-Region.pdf>.

¹⁵ See, e.g., Jeremy L. Mennis & Lisa Jordan, *The Distribution of Environmental Equity: Exploring Spatial Nonstationarity in Multivariate Models of Air Toxic Releases*, 95 *Annals Soc’y Am. Geog’rs* 249 (2005); Russ Lopez, *Segregation and Black/White Differences in Exposure to Air Toxics in 1990*, 110 *Envtl. Health Persp.* 289 (2002); see also Jayajit Chakraborty & Paul A. Zandbergen, *Children at Risk: Measuring Racial/Ethnic Disparities in Potential Exposure to Air Pollution at School and Home*, 61 *J. Epidem. Cmty. Health* 1074, 1074 (2007).

¹⁶ See e.g. Robert Bullard, *Addressing Urban Transportation Equity in the United States* 31 *FORDHAM U.L.J.* 1183 (2004); Stephanie Pollack et al., *The Toll of Transportation*, Northeastern University Dukakis Center for Urban & Regional Policy (2013); Brian S. McKenzie *Neighborhood Access to Transit by Race, Ethnicity, and Poverty in Portland, OR*, 12 *City & Cmty* 134–155 (2013).

¹⁷ See e.g. Kimberly Morland et al., *Neighborhood characteristics associated with the location of food stores and food service places*, 22 *Preventative Med.* 23-29 (Jan. 2002); L. Powell L et al., “*Food Store Availability and Neighborhood Characteristics in the United States*” 44 *Preventive Med.* 189 –195 (2007); Thomas A. LaVeist, *Segregated Spaces, Risky Places: The Effects of Racial Segregation on Health Inequalities* (Joint Center for Political and Economic Studies 2011).

¹⁸ See, e.g., Penny Gordon-Larsen et al., *Inequality in the Built Environment Underlies Key Health Disparities in Physical Activity and Obesity*, 117 *Pediatrics* 417 (2006); Lisa M. Powell et al., *Availability of Physical Activity–Related Facilities and Neighborhood Demographic and Socioeconomic Characteristics: A National Study*, 96 *Am. J. Pub. Health* 1676 (2006); Lisa M. Powell et al., *The Relationship Between Community Physical Activity Settings and Race, Ethnicity, and Socioeconomic Status*, 1 *Evidence-Based Preventive Med.* 135 (2004); Robert Garcia, *The George Butler Lecture: Social Justice and Leisure*, 46 *J. Leisure Res.* 7 (2013); Robert Garcia & Erica Flores Baltodano, *Free the Beach! Public Access, Equal Justice, and the California Coast*, 2 *Stan. J. C.R. & C.L.* 143 (2005); Chona Sister et al., *Got Green? Addressing Environmental Justice in Park Provision*, 75 *GeoJournal* 229 (2010); Jennifer Wolch et al., *Parks and Park Funding in Los Angeles: An Equity-Mapping Analysis*, 26 *Urb.*

for Racial Justice just prior to the 1988 amendments to the Act, “that race was consistently a more prominent factor in the location of commercial hazardous waste facilities than any other factor examined” has been repeatedly confirmed since that time. Hazardous materials disposal sites, municipal waste facilities, power plants, and other sources of pollution continue to be disproportionately located in racially and ethnically identifiable communities of color, in a way that neither housing preferences nor wealth gaps have ever adequately explained.¹⁹ Finally, segregated housing has created conditions that put communities of color and immigrant and refugee communities most at risk from the immediate threats and long term impacts of climate change and render recovery from extreme weather events most inaccessible for these very same communities.²⁰ HUD’s Proposed Standard will only further entrench these disparities.

HUD Has Failed to Consider an Array of Significant Public Health Impacts that the Proposed Standard Will Exacerbate

As noted above, the Proposed Standard will adversely affect the health of families and children across the country. The public health adage that one’s zip code is a better predictor of health than one’s genetic code²¹ holds true largely because of policies that perpetuated neighborhood

Geography 4 (2005); Ming Wen et al., Spatial Disparities in the Distribution of Parks and Green Spaces in the USA, 45 Supp. 1 *Annals Behav. Med.* 18 (2013); Dustin T. Duncan et al., The Geography of Recreational Open Space: Influence of Neighborhood Racial Composition and Neighborhood Poverty, 90 *J. Urb. Health* 618 (2013).

¹⁹ See, e.g., Helen H. Kang, Pursuing Environmental Justice: Obstacles and Opportunities – Lessons from the Field, 31 *Wash. U.J.L. & Pol’y* 121, 126-27 (2009); U.S. Evtl. Prot. Agency, Environmental Equity: Reducing Risk for All Communities 15 (1992), available at <http://infohouse.p2ric.org/ref/32/31476.pdf>.; Robert D. Bullard et al., Toxic Wastes and Race at Twenty: 1987–2007, 38-47 (2007), available at www.ucc.org/justice/advocacy_resources/pdfs/environmental-justice/toxic-wastes-and-race-at-twenty-1987-2007.pdf (summarizing confirmatory effect of more recent studies); U.S. Comm’n on Civil Rights, Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice 16-19 (2003), available at www.usccr.gov/pubs/envjust/ej0104.pdf (same); Luke W. Cole & Sheila R. Foster, From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement 167-83 (2001) (annotated bibliography of studies); see also Rachel D. Godsil, Environmental Justice and the Integration Ideal, 49 *N.Y.L. Sch. L. Rev.* 1109, 1115 (2005) (noting that inequitable distribution of environmental risks “has been confirmed by scores of studies,” to the point that “few now dispute” it).

²⁰ See generally, Robert D. Bullard and Beverly Wright, Race, Place, and Environmental Justice After Hurricane Katrina: Struggles to Reclaim, Rebuild, and Revitalize New Orleans and the Gulf Coast (2009); Rachel Morello Frosch, Manuel Pastor, Jim Sadd, and Seth Shonkoff, The Climate Gap: Inequalities in How Climate Change Hurts Americans & How to Close the Gap (2009); Gustavo A. Garcia-Lopez, The Multiple Layers of Environmental Injustice in Contexts of (Un)natural Disasters: The Case of Puerto Rico Post-Hurricane Maria, 11 *Environmental Justice* 101-108 (2018); USGCRP, Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II (2018) *available at*

https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf. See e.g. regarding disparities in exposure to risks of flooding and other extreme weather events: Marilyn Montgomery and Jayajit Chakraborty, “Assessing the Environmental Justice Consequences of Flood Risk: A Case Study in Miami, Florida,” 10 *Environmental Research Letters* (2015); Stacy Seicshnaydre et al., Rigging the Real Estate Market: Segregation, Inequality, and Disaster Risk, The Data Center (2018). See e.g. regarding disparities in exposure to extreme heat: Bill M. Jesdale, Rachel Morello-Frosch and Lara Cushing, “The Racial/Ethnic Distribution of Heat Risk–Related Land Cover in Relation to Residential Segregation,” 121 *Environmental Health Perspectives* 811-817 (2013); Jackson Voelkel et al. “Assessing Vulnerability to Urban Heat: A Study of Disproportionate Heat Exposure and Access to Refuge by Socio-Demographic Status in Portland, Oregon,” 15 *Int J Environ Res Public Health* (2018).

²¹ See e.g. Virginia Commonwealth University Center on Society and Health, Mapping Life

segregation and created concentrated pockets of disinvestment and wealth. The health consequences of policies such as redlining are still evident in most American cities.²² For example, a study by the Kirwan Institute found that people who lived in formerly redlined areas of Cleveland had higher rates of exposure to lead and toxic waste, infant mortality rates 5 to 6 times higher than those in non-redlined areas, and a 15-year reduction in life expectancy.²³ The Proposed Standard will only exacerbate such disparities.

Populations that historically or currently face housing discrimination experience additional barriers to health. In addition to the neighborhood- and community-level effects of harmful policies such as toxic waste siting and permitting that disproportionately affect communities of color, policies that deny people the opportunity to rent or purchase homes in resource-rich neighborhoods (or that prioritize the production of unaffordable housing in high-opportunity or gentrifying areas) often restrict opportunities for low-income households of color (including families with children). With limited options, such households are often forced to relocate to more affordable neighborhoods that contribute to poor health in a variety of ways. This includes lower density suburban and rural neighborhoods that are farther away from jobs, schools, parks, and other destinations.²⁴ Residents of such neighborhoods are less likely to get enough daily exercise²⁵ and have 15 percent higher rates of obesity, 10 percent higher rates of high blood pressure, and 6 percent higher rates of heart disease because of auto-oriented street networks that lack sidewalks and have low intersection density.²⁶ Moreover, segregation and discrimination often force households of color and immigrant and refugee households into neighborhoods—whether in urban, suburban, or rural settings—with poor conditions characterized by low educational attainment from low-performing schools,²⁷ lack of access to healthy and affordable

Expectancy: Philadelphia (April 6, 2016).

<http://www.societyhealth.vcu.edu/work/theprojects/mapsphiladelphia.html>. (“[B]abies born in Philadelphia zip codes only five miles apart face up to a 20-year difference in life expectancy.”).

²² See e.g. Kara Manke, “Historically redlined communities face higher asthma rates,” *Berkeley News* (May 22, 2019) (discussing forthcoming joint study by UC Berkeley-UCSF Joint Medical Program entitled “Historic Redlining and Asthma Exacerbations Across Eight Cities of California”).

²³ See Reece J, Matt M, Bates J, Golden A, Mailman K, Nimps R. History Matters: Understanding the Role of Policy, Race and Real Estate in Today’s Geography of Health Equity and Opportunity in Cuyahoga County. Cuyahoga County; 2015. <http://kirwaninstitute.osu.edu/wp-content/uploads/2015/06/The-History-of-Race-RealEstate-Cuyahoga-County-Final-Report-February-2015.pdf>.

²⁴ See Steven Raphael and Michael A. Stoll, Job Sprawl and the Suburbanization of Poverty (Metropolitan Policy Program at Brookings 2010) (detailing declines in job proximity for low income communities).

²⁵ See AARP, “AARP Poll: Fighting Gas Prices, Nearly A Third of Americans Age 50+ Hang Up Their Keys To Walk But Find Streets Inhospitable, Public Transportation Inaccessible.” Aug. 13, 2008. Available at:

[http://www.aarp.org/about-aarp/press-center/info-08-](http://www.aarp.org/about-aarp/press-center/info-08-2008/aarp_poll_fighting_gas_prices_nearly_a_third_of_am.html)

[2008/aarp_poll_fighting_gas_prices_nearly_a_third_of_am.html](http://www.aarp.org/about-aarp/press-center/info-08-2008/aarp_poll_fighting_gas_prices_nearly_a_third_of_am.html) (national survey of people over 50 finding that that 40% had no sidewalks); U.S. Department of Transportation, Bureau of Transportation Statistics. “Sidewalks Promote Walking.” Issue Brief No. 12, 2004 at p.1. Available at:

http://www.bts.gov/publications/special_reports_and_issue_briefs/issue_briefs/number_12/pdf/entire.pdf (national survey showing 66% of respondents reporting they had sidewalks).

²⁶ Jonathan H. Todd, How Street Network Design Affects Your Health, *Urban Land Magazine* (2014) *available at* <http://urbanland.uli.org/planning-design/research-shows-street-network-design-affects-health/>.

²⁷ David Culter and Adriana Lleras- Muney, “Education and Health: Evaluating Theories and Evidence” (Cambridge, MA, 2006), <http://www.nber.org/papers/w12352.pdf>

food,²⁸ poor-quality housing,²⁹ unmaintained parks,³⁰ and exposure to crime and violence,³¹ all of which contribute to negative health.

If implemented, the Proposed Standard will make it more difficult for many households of color (including those with children) to find and maintain safe, healthy, stable, and affordable housing – in addition to the likelihood that ongoing and increased segregation will result in environmental injustices in many neighborhoods. As a result, there is likely to be a wide range of negative effects on people’s physical, mental, and social health; on their access to opportunities that support healthy living; and on the conditions that shape their ability to live healthy lives.

The Proposed Standard Fails to Safeguard Against Discrimination and Inappropriately Insulates Actors and Institutions from Liability, Including in Important Subsidized Housing Programs

One of the most valuable aspects of the long-standing disparate impact standard in fair housing law is the positive constraint it places on public agencies that might not otherwise consider the discriminatory impacts of their policies before adopting them. State and local government housing agencies and housing developers and managers administer a wide variety of housing programs – including but not limited to Public Housing, Housing Choice Vouchers, Project-Based Rental Assistance, Low Income Tax Credit housing, the HOME program, Housing Trust Fund grants, Community Development Block Grants, and inclusionary zoning programs. Each of these programs has the potential to unintentionally exclude persons protected by the Act, and each of these programs has the potential to perpetuate or increase patterns of segregation. An important value of the disparate impact standard for public agencies is that it requires them to consider these potential impacts in selecting among alternative means to achieve their objectives. The current standard allows for the appropriate use of discretion in housing policy decisions, while ensuring that such discretion stays within the boundaries of civil rights law and does not discriminate or reinforce segregation. And contrary to HUD’s characterization of the current standard, the 2013 rule provides for robust consideration of all parties’ interests and for the advancement of multiple policy objectives and social interests – while still protecting against discrimination and furthering the aims of the Fair Housing Act. With a severely weakened standard, agencies and property owners will have little incentive to consider the effects of their choices – and a longstanding equilibrium in the housing market will be disrupted.

Examples of the positive effects of the current disparate impact standard can be found throughout federal, state, and local housing policy. For example, the *Inclusive Communities Project* case,

²⁸ See *supra* n. 17. See also Judith Bell et al., Access to Healthy Food and Why It Matters: A Review of the Research (Policylink 2013).

²⁹ See *supra* n. 15.

³⁰ See Powell, L., Slater, S., and Chaloupka, F. (2004) “The relationship between community physical activity settings and race, ethnicity and socioeconomic status”. Evidence-Based Preventive Medicine. 1(2) 135-144. <https://medium.com/@RWJFCcommission/to-improve-our-health-lets-transform-the-places-we-live-7f85d97c51b9#ebhup0xq1>

³¹ See HUD – Neighborhoods and Violent Crime 2016, available at: <https://www.huduser.gov/portal/periodicals/em/summer16/highlight2.html>; Slopen, Shonkoff, Albert, Yoshikawa, Jacobs, Stoltz, Williams – Racial Disparities in Child Adversity in the U.S.: Available at: <https://www.ncbi.nlm.nih.gov/pubmed/26342634>.

and several similar cases over the past 15 years,³² have led to positive changes in the LIHTC program, including more balanced siting policies in many states (including Texas, where the *Inclusive Communities Project* case was filed), and a best practices guide issued by the National Council of State Housing Agencies (the national trade association for state housing finance agencies) that includes several key fair housing policies.³³ In the Housing Choice Voucher program, early cases filed against discriminatory local residency preferences in predominantly white communities have led to elimination of the policy in places where the impact is most egregious, and HUD has issued a regulation on local residency preferences consistent with the standard. Similarly, positive results from fair housing litigation challenging the discriminatory setting of Fair Market Rents in the Dallas area³⁴ ultimately led HUD to adopt the Small Area Fair Market Rent program more broadly, in 24 metropolitan areas, where families now have much wider access to rental housing outside of low income, segregated neighborhoods.³⁵ In the field of public housing redevelopment, litigation challenging harmful demolition and dispersion policies in the HOPE VI program have led to revised policies that include one for one replacement, stronger relocation guarantees (including the right to relocate to a lower poverty neighborhood), and a right to return to the redeveloped property for former residents.³⁶ The disparate impact standard provides the yardstick by which these kinds of positive policies are assessed and adopted. Fair housing lawsuits challenging policies of public agencies are comparatively rare, but without a strong disparate impact standard, and at least the *potential* for liability, civil rights concerns will take a back seat to other local policy considerations and we will see a return to routine discrimination in federal and state housing programs.

Conclusion

In conclusion, we urge HUD to keep intact its existing discriminatory effects standard, which properly implements the Fair Housing Act and furthers important interests in equality, public health, and justice for all communities.

Sincerely,

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³² See, e.g., *Baltimore Regional Housing Campaign v. State of Maryland* (HUD FHEO 2011); *Asylum Hill Problem Solving Revitalization Association et al. v. Gary E. King*, 277 Conn. 238 (2006).

³³ “*NCSHA Recommended Practices in Housing Credit Administration*” (2018).

³⁴ *Inclusive Communities Project v. United States Department of Housing and Urban Development*, 2009 WL 3122610; 3446232 (N.D. Tex. 2009)

³⁵ Small Area Fair Market Rents, 24 C.F.R. § 888.113(c)

³⁶ See HUD’s Choice Neighborhoods Initiative, www.hud.gov/cn, and the HUD Rental Assistance Demonstration, www.hud.gov/RAD.

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