NEW YORK STATE OF OPPORTUNITY. | Homes and Community Renewal

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October 18, 2019

Office of the General Counsel
Rules Docket Clerk
U.S. Department of Housing and Urban Development
451 7th Street SW
Room 10276
Washington, DC 20410-0001

Re: **Docket No.: FR-6111-P-02, RIN 2529-AA98**
HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

To Whom it May Concern:

New York State Homes and Community Renewal (NYSHCR) submits the following comments in response to the notice in the Federal Register soliciting comments on the Proposed Rules regarding "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard."

Thank you for the opportunity to comment.

Very Truly Yours,

Commissioner/CEO RuthAnne Visnauskas
New York State Homes and Community Renewal

I. Executive Summary

New York State Homes and Community Renewal (NYSHCR) reviewed the above-referenced notice (the Proposed Rule), published in the Federal Register on August 19, 2019. NYSHCR provides the following comments in opposition to the Proposed Rule.

NYSHCR is a consolidated leadership platform of associated New York State executive agencies and public benefit corporations with the shared mission to build, preserve, and protect affordable housing and increase home ownership across New York State. NYSHCR administers funding received by New York State from the U.S. Department of Housing and Urban Development (HUD) through several grant programs, including Section 8. Through these and other programs, NYSHCR works to fulfill its mission to provide New York State residents with access to safe and affordable housing.

NYSHCR's main concerns with the Proposed Rule are summarized as follows:

- The Proposed Rule is contrary to both the plain language and underlying purpose of the Fair Housing Act. It is also in conflict with decades of federal case law and HUD's established practices.
- The Proposed Rule will undermine NYSHCR's efforts to develop affordable housing in all parts of New York State and increase access to housing for all New Yorkers.
- The Proposed Rule will further entrench racial and economic segregation in housing and weaken efforts to combat existing socioeconomic inequities. This will directly harm some of New York State's most vulnerable people.

For these reasons, NYSHCR urges that the Proposed Rule be withdrawn.

II. The Proposed Rule Will Gut the Fair Housing Act

A. The Disparate Impact Method of Proof Is a Long-Established and Necessary Feature of the FHA

Housing discrimination often takes a subtle or facially neutral form that is systematically entrenched in laws and policies, resulting in devastating consequences. In recognition of these facts, courts have long understood that the FHA allows plaintiffs to raise claims based on a disparate impact method of proof. The Second Circuit, for example, established this principal as early as the 1980s.[1] This earlier case law utilized a burden-shifting test used in other civil rights contexts, notably the disparate impact approach of Title VII employment discrimination cases.

In 2013, HUD promulgated a regulation (2013 Final Rule) which codified a burden-shifting framework for FHA disparate impact claims.[2] This framework was not a new innovation but, rather, developed from decades of federal case law from across the country. Under the first step of this test, the plaintiff must make a prima facie claim of a discriminatory disparate impact.

[1] *Huntington Branch, NAACP v. Huntington*, 844 F.2d 926 (2d Cir. 1988).
[2] 78 FR 11460

This means that the plaintiff has the burden of proving that the defendant's challenged practice caused or will predictably cause a discriminatory effect. Under the second step, the burden shifts to the defendant, who may rebut the plaintiff's claim by demonstrating that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests. Finally, the burden returns to the plaintiff, who must demonstrate that this legitimate interest could be served by another practice that has a less discriminatory effect.

In the 2015 case *Texas Department of Housing Community Affairs v. Inclusive Communities Project*, the United States Supreme Court affirmed that disparate impact claims can be raised under the FHA.[3] Writing for the majority, Justice Kennedy noted that disparate impact claims allow "plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[4] The majority's analysis in *Inclusive Communities* was limited to whether or not the FHA permits disparate impact claims and did not elaborate on any single test for reviewing such claims. While Justice Kennedy wrote that disparate impact claims must satisfy "a robust causality requirement," there was no indication that the majority intended to displace the burden-shifting tests already established by HUD and the lower courts.[5] Like the 2013 Final Rule, *Inclusive Communities* should be viewed as a continuation of earlier practice, not a breach with the past.

The Proposed Rule, on the other hand, represents a severe deviation from earlier precedent and existing practice. Most significantly, the Proposed Rule would both significantly raise the requirements that a plaintiff must meet to make a prima facie claim and create extremely broad new defenses for defendants in these cases. Taken together, these changed would effectively eliminate most disparate impact claims and deprive victims of housing discrimination of access to the courts. As such, the Proposed Rule is in direct conflict with decades-worth of federal case law.

B. The Heightened Standard for a Prima Facie Case is Irrational, Ineffective and Contrary to Law

Under the Proposed Rule, the plaintiff must prove *each* of the following five elements to make a prima facie case: first, the plaintiff must demonstrate that the challenged policy is arbitrary, artificial, and unnecessary to achieve a valid interest; second, plaintiffs must allege a "robust causal link" between policy and the disparate impact; third, the plaintiff must allege that the policy has an adverse effect on members of a protected class and not just the individual plaintiff; fourth, the plaintiff must show that the disparity caused by the policy or practice is significant; and finally, the plaintiff must allege that the complaining party's alleged injury is directly caused by the challenged policy.

HUD maintains that this new system will bring the regulation into closer alignment with *Inclusive Community's* "robust causality requirement." However, this is entirely unnecessary as the first step of the 2013 Final Rule's burden-shifting test already requires plaintiffs to

[3] *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.,* 135 S. Ct. 2507 (2015).
[4] Id. at 2522.
[5] Id. at 2523.

demonstrate that the alleged disparate impact was directly caused by the defendant's challenged action. Under the 2013 Final Rule, if the discriminatory effect was caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case and there is no liability. This is fully consistent with Justice Kennedy's holding and, thus, HUD is wrong to use the *Inclusive Communities* decision as a justification for the Proposed Rule.

Furthermore, the Proposed Rule's five elements create an almost impossibly high standard for most plaintiffs in FHA disparate impact cases. The first element creates an irrational system which requires the plaintiff to rebut their own claim on behalf of the defendant. The plaintiff is clearly not the best-positioned party to determine what "valid interests" may or may not be achieved by the challenged action. Additionally, as noted in HUD's preamble, these elements will often be most relevant when the defendant files a 12(b)(6) motion to dismiss. It will be impossible for many plaintiffs to meet the Proposed Rule's heightened evidentiary standards at this stage in the litigation, before discovery has taken place. Therefore, the Proposed Rule's changes would deprive many victims of disparate impact housing discrimination of the ability to assert their rights in court.

C. The Algorithm Defense Creates a Wide Loophole that Invalidates Disparate Impact Liability

In addition to the new elements required to plead a prima facie case, the Proposed Rule also introduces two defenses that housing providers may use to rebut a disparate impact claim. The plaintiff's claim would be defeated if the defendant is able to prove either of these defenses. The most troubling defense relates to disparate impact claims which challenge the plaintiff's use of an algorithmic model. Here, the defendant may defeat the plaintiff's claim by showing any of the following: that the inputs used in the model are not substitutes for a protected characteristic; that a recognized third party is responsible for the model; or that a neutral third party has analyzed the model and determined that it is sound.

Housing providers regularly use algorithms to weigh an applicant's credit risk, home insurance, and mortgage interest rates, among other factors. While these models may appear facially neutral, they can create significant discriminatory effects. For example, the data inputs for these algorithms may simply reflect past and present social biases and inequalities. In the words of one study, "unthinking reliance on data mining can deny historically disadvantaged and vulnerable groups full participation in society."[6] In 2018, the National Fair Housing Alliance and three other organizations filed a law suit against Facebook, alleging that the company's advertising platform enables landlords to exclude protected classes of people from receiving housing ads.[7] In March of this year, HUD filed a similar lawsuit against Facebook's. In a statement from that time, Secretary Ben Carson noted that "using a computer to limit a person's housing choices can be just as discriminatory as slamming a door in someone's face."[8]

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[6] Solon Barocas and Andrew D. Selbst, *Big Data's Disparate Impact*, 103 California Law Review 671 (2016).
[7] https://www.ecbalaw.com/wp-content/uploads/2018/03/NFHA-v.-Facebook.-Complaint-w-Exhibits-dkt-1-3-27-18-00325110x9CCC2....pdf
[8] Tracy Jan and Elizabeth Dwoskin, "HUD Is Reviewing Twitter's and Google's Ad Practices as Part of Housing Discrimination Probe," *The Washington Post*, Mach 28, 2019 https://www.washingtonpost.com/business/2019/03/28/hud-charges-facebook-with-housing-discrimination/.

NYSHCR fully agrees with that view. However, the Proposed Rule would, in effect, make housing providers who employ these discriminatory models immune from liability. This loophole will become increasingly significant as prospective tenants become more and more dependent on computerized searches when looking for housing. Discriminatory marketing sanctioned through this loophole will deny housing opportunity to many, exacerbating homelessness while undermining the right to equal access to stable housing and homeownership.

As discussed above, HUD states that these defenses will bring FHA disparate impact claims in line with *Inclusive Community's* causality requirement. However, in practice, these measures go far beyond anything required by that decision. Most significantly, the Proposed Rule elides the distinct concepts of causality and intent. It is a central tenet of disparate impact doctrine that defendants may be held liable for discriminatory effects they have caused, even if they did not intend to create those effects. Thus, housing providers who use discriminatory algorithms could be liable, regardless of whether or not they intended to discriminate. However, by removing liability in these cases, the Proposed Rule, in effect, imposes an intent requirement on FHA disparate impact cases and no legal means to stop the practice.

III. The Proposed Rule Will Undermine NYSHCR's Efforts to Develop Affordable Housing Across New York State, Increase Access to Housing, and Affirmatively Further Fair Housing and Desegregation

Signed just days after the assassination of Dr. Martin Luther King Jr., the Fair Housing Act of 1968 (FHA) states that it is "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[9] In part, the FHA sought to reach this goal by prohibiting discrimination in the sale, rental, and financing of housing. However, the drafters of the FHA recognized that any effective fair housing legislation would have to go further than this by addressing the country's long history of segregation. As President Lyndon B. Johnson noted when signing the FHA, "we all know that the roots of injustice run deep."[10] For this reason, the FHA also imposed a positive duty to affirmatively further fair housing for recipients of HUD funding.[11] In the words of a HUD analysis from 2015, this duty requires "meaningful actions to be taken to overcome the legacy of segregation, unequal treatment, and historic lack of access to opportunity in housing."[12]

NYSHCR, recognizing both this history and how far we have yet to go to address ongoing segregation, maintains that the promotion of fair housing is central to our agency's core mission of increasing access to affordable housing for all New Yorkers. Many of NYSHCR's most essential functions, such as developing affordable housing in all parts of New York State, would be impossible or severely hampered in the absence of the ability to robustly enforce the FHA.

Disparate impact liability addresses practices and policies, that while facially neutral, adversely affect those protected by the Fair Housing Act. These practices and policies prevent

[9] 42 U.S.C. 3601.
[10] Johnson, Lyndon B. (April 11, 1968). "Remarks Upon Signing the Civil Rights Act."
[11] 42 U.S.C. 3608.
[12] 80 FR 42272 (July 16, 2015).

equal access to housing, to neighborhoods and to financing that allows families to buy homes and build intergenerational wealth. Exclusionary tenant selection policies, such as requirements that applicants already live in the local area or have full-time jobs, may affect minorities who have historically been excluded from that community and disabled individuals who are unable to work full-time. Municipal zoning ordinances and siting decisions that make multi-family and/or affordable housing projects impossible to develop in certain areas perpetuate racial and economic segregation. Marketing practices targeted only at a certain demographic exclude others who have just as much right to that same housing. A financial institution's facially neutral lending policies may still disproportionately exclude groups historically and systemically left out of homeownership through prior overt practices like redlining. In each of these cases, and in many others, it is the specter of disparate impact liability that forces market actors and regulators to think about access and equity, not just the bottom line, when it comes to housing.

Disparate impact liability removes barriers to a family being able to live in neighborhoods of their choosing and purchase a home they can pass down to future generations. This matters. Social science has found that access to neighborhoods, especially well-resourced neighborhoods, changes a family's long-term outlook. A recent study published by the economist Raj Chetty and others found that low-income children who move to well-resourced areas will benefit from life-long improvements in educational, income, and health outcomes. [13] As described by Richard Rothstein in his seminal book, The Color of Law, the systemic exclusion of African Americans from purchasing homes in the suburbs into the 1960's by the Federal Housing Administration is part of what undergirds the enormous racial wealth disparity that persists today. Where white families have been able to gain equity appreciation of these homes, African Americans families have been left out.[14] The persistence of racial segregation has consequences in educational outcomes as well. One recent study, for example, concluded that "racial segregation appears to be harmful because it concentrates minority students in high-poverty schools, which are, on average, less effective than lower-poverty schools."[15] By gutting disparate impact, the Proposed Rule destroys a major protector of housing access and opportunity in New York and across the country.

By eliminating these protections, the Proposed Rule will exacerbate racial segregation and housing instability, with devastating consequences for the people of New York. Families protected by the Fair Housing Act, including women-headed households, those with members with a disability, domestic violence survivors leaving shelters and communities of color have one less tool to combat the housing discrimination that has led to systemic entrenched segregation and economic disadvantages. These families will face fewer options for housing, which can lead to increased instances of housing instability and homelessness.

The toll of housing instability is severe, particularly for children. Childhood homelessness and other forms of housing instability are associated with increased hospital visits

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[13] Raj Chetty et al., *Creating Moves to Opportunity: Experimental Evidence on Barriers to Neighborhood Choice* (August 2019), https://opportunityinsights.org/wp-content/uploads/2019/08/cmto_paper.pdf

[14] Pedro da Costa, "Housing Discrimination Underpins the Staggering Wealth Gap Between Blacks and Whites," Economic Policy Institute (April 8, 2019), https://www.epi.org/blog/housing-discrimination-underpins-the-staggering-wealth-gap-between-blacks-and-whites/.

[15] Sean F. Reardon, et al., *Is Separate Still Unequal? New Evidence on School Segregation and Racial Academic Achievement Gaps*, Stanford Center for education Policy Analysis Working Paper No. 19-06 (September 2019). https://edopportunity.org/papers/wp19-06-v092019.pdf

and mental health problems, such as depression and anxiety.[16] Child poverty and housing instability also cause severe stress. This type of stress in children "disrupts normal brain and organ development and, consequently, damages brain architecture and neurocognitive systems."[17] These health consequences may be felt by these children for the rest of their lives. A lack of access to safe and affordable housing can also limit a child's educational opportunities and exacerbate child poverty. Statistically, homeless children have lower passing rates across a number of academic subjects, have higher rates of absenteeism, and are more likely to face disciplinary action than children who live in stable housing.[18] Additionally, children who lack safe and secure housing will suffer long-term negative economic consequences and can also lead directly to employment insecurity among adults.[19]

New York State and NYSHCR have made a priority of combatting historic segregation in housing. In recent years, NYSHCR has created new incentives for state-funded housing providers to develop new affordable housing in well resourced areas. Furthermore, NYSHCR scrutinizes proposed local community preferences for potential discriminatory effects. In 2016, NYSHCR introduced a new anti-discrimination policy regarding the review of applicants' criminal history in state-funded housing developments. This policy prohibits automatic denials of individuals with criminal histories and, instead, requires housing providers to conduct an individualized assessment of each applicant based on multiple factors. Notably, the policy builds on HUD's analysis in a 2016 guidance letter, which noted that, due to the racial and ethnic disparities in the criminal justice system, automatic denials based on an applicant's criminal history may violate the FHA.[20]

Any action that undermines enforcement of the FHA is a direct challenge to NYSHCR's efforts to promote affordable housing and further fair housing in New York State.

IV. Conclusion

For the foregoing reasons, it is NYSHCR's hope that the existing regulations will be preserved. The Proposed Rule, if allowed to go into effect, would hamper NYSHCR's efforts to build affordable housing across New York State and increase access to housing for all New Yorkers. Furthermore, it will ensconce existing racial inequities and hamstring efforts to address segregation and further fair housing. The Proposed Rule is contrary to New York State's values and NYSHCR's mission and core work. It must be withdrawn.

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[16] Meredith Horowki, *Housing Instability and Health: Findings from the Michigan Recession and Recovery Study,* National Poverty Center Policy Brief #29 (March 2012), http://www.npc.umich.edu/publications/policy_briefs/brief29/NPC%20Policy%20Brief%20-%2029.pdf.

[17] Heather Sandstrom et al., *The Negative Effects of Instability on Child Development: A Research Synthesis*, Urban Institute, 13 (September 2013), https://www.urban.org/sites/default/files/publication/32706/412899-The-Negative-Effects-of-Instability-on-Child-Development-A-Research-Synthesis.PDF.

[18] Anne Ray et al. *Homelessness and Education in Florida: Impacts on Children and Youth*, Shimberg Center for Housing Studies, University of Florida, and Miami Homes for All (December 2017), http://www.shimberg.ufl.edu/publications/homeless_education_fla171205RGB.pdf.

[19] Matthew Desmond and Carl Gersheson, *Housing and Employment Security Among the Working Poor*, Soc. Problems 1 (2016), https://academic.oup.com/socpro/article/63/1/46/1844105.

[20] HUD, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions," (April 4, 2016).