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August 24, 2021

Submitted via www.regulations.gov

Regulations Division, Office of General Counsel
U.S. Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20110-00

Re: **Reinstatement of HUD's Discriminatory Effects Standard**
Docket No. FR-6251-P-01, RIN 2529-AB02

To Whom It May Concern:

Please accept this correspondence as the comments of the Poverty & Race Research Action Council ("PRRAC"), the Othering & Belonging Institute ("OBI") and Klein Hornig LLP ("Klein Hornig") (also representing PRRAC) in response to the June 25, 2021 notice of proposed rulemaking published at 86 Fed. Reg. 33,590 (June 25, 2021) and titled *Reinstatement of HUD's Discriminatory Effects Standard* ("NPRM"). The NPRM proposes to recodify rules the U.S. Department of Housing and Urban Development ("HUD") previously issued at 78 Fed. Reg. 11460 (February 15, 2013) and codified at 24 C.F.R. §100.500 ("2013 Rule") that implement the disparate impact principles of the Fair Housing Act (the "Act"). The 2013 Rule has remained in effect due to a preliminary injunction affecting a rule issued by HUD in 2020 that attempted to make a number of problematic changes to the 2013 Rule, including removing the definition of discriminatory effect, thereby eliminating "perpetuation of segregation" as an explicitly recognized type of discriminatory effect, distinct from disparate impact. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60,288 (Sept. 24, 2020) ("2020 Rule"). The comments that follow express our strong support of HUD's reinstatement of the 2013 Rule's discriminatory effects standard, which prohibits policies and practices that cause a disparate impact or perpetuate segregation and are not justified, and which provides a crucial tool for challenging structural discrimination and systemic inequality.

1. *Summary.*

This letter begins with a description of the interests of PRRAC, OBI and Klein Hornig that are affected by the NPRM. Substantively, this comment focuses on the importance of reinstating perpetuation of segregation as a basis for contending that a policy or practice has an unlawful discriminatory effect. Given the well-documented history of segregation in housing, HUD's responsibilities under the Act – including its statutory duty to affirmatively further fair housing – require that HUD's discriminatory effects regulation explicitly state that perpetuation of segregation is a type of discriminatory effect. PRRAC, OBI and Klein Hornig also endorse the comments of other civil rights, consumer advocacy, housing and community development groups, which support the reinstatement of the 2013 Rule.

2. *Interests of PRRAC, Othering & Belonging Institute and Klein Hornig.*

PRRAC is a civil rights law and policy organization based in Washington, D.C. Its mission is to promote research-based advocacy strategies to address structural inequality and disrupt the systems that disadvantage low-income people of color. PRRAC's work focuses on developing actionable policies to overcome the mechanisms that continue to reproduce historical patterns of racial segregation. Its fair housing work encompasses implementation of HUD's mandate to affirmatively further fair housing, as well as research and advocacy to expand opportunity in federal housing programs at HUD, the Treasury Department, and state housing finance agencies, including projects aimed at disrupting patterns of exclusion in the Low Income Housing Tax Credit program. In addition, PRRAC helped to organize Mobility Works, a technical assistance collaborative working with public housing authorities across the country to promote access to desegregated housing opportunities for low-income families of color.

The Othering & Belonging Institute at UC Berkeley convenes researchers, organizers, stakeholders, communicators, and policymakers to identify and eliminate the barriers to an inclusive, just, and sustainable society in order to create transformative change. OBI's mission is to promote a greater sense of belonging in society, which social segregation undermines. Its Equity Metrics program develops evidence-based research on pressing social problems, including racial residential segregation and "disparate" racial impacts. This team focuses on measuring and analyzing current levels of segregation and proposing policy solutions to address these issues and promote integration.

Klein Hornig is a law firm whose work focuses solely on the development and preservation of affordable housing, the revitalization of distressed communities through improved housing conditions and access to decent, safe, affordable rental and homeownership opportunities, and the increased availability of social and economic opportunity through housing, community and economic development, including in places of historic racial exclusion. Our practice is national, and our clients span the entirety of organizations active in affordable housing and community development. They include small, not-for-profit, place-based community development corporations; providers of housing and services to homeless households, elders and people with disabilities; tenant organizations, housing cooperatives, and local and national civil rights

groups; national affordable housing advocacy organizations; public housing agencies; national non-profit groups carrying out affordable housing development, preservation, property management and resident services; charter schools, health centers and others non-profit groups carrying out community development projects; socially motivated lenders making Community Reinvestment Act loans and investments in low-income communities and in projects serving low-income households located in higher-income places; and investors who provide capital for affordable housing and community development through such programs as the Low-Income Housing Tax Credit, the New Markets Tax Credit, investment energy credits, and historic rehabilitation credits.

PRRAC, OBI and Klein Hornig direct our efforts at achieving the twin goals of the Act identified by the Supreme Court in *Texas Dep't of Hous. & Community Affairs v. Inclusive Communities Project, Inc.,* 135 S.Ct. 2507 (2015): to reverse both the deliberate exclusion of households of color from "affluent areas" and the deliberate segregation of people of color in "neighborhoods marked by substandard housing and blight." *Inclusive Communities Project*, 135 S.Ct. at 2515–16. In particular, the Supreme Court recognized perpetuation of segregation claims, especially in the zoning context, as the "heartland" of disparate impact liability under the Fair Housing Act. *Inclusive Communities Project*, 135 S.Ct. at 2521-22. Given the longstanding judicial precedent, agency practice and congressional affirmation recognizing discriminatory effects claims, as codified by the 2013 Rule and recodified in this NPRM, the organizations we work with and the communities we serve rely on their availability to address actions the consequences of which impede the ability to utilize affordable housing and community and economic development as means of achieving the Act's objectives. *See Inclusive Communities Project*, 135 S.Ct. at 2518.

3. *Residential Segregation, Zoning and Land-Use Policy*

As the *Inclusive Communities Project* Court recognized, "*de jure* residential segregation by race was declared unconstitutional almost a century ago, *Buchanan v. Warley*, 245 U.S. 60 (1917), but its vestiges remain today." *Inclusive Communities Project,* 115 S.Ct. at 2522. Residential segregation has continued to plague our country – and cannot be separated from other social and economic factors. Racial residential segregation remains at high levels in many metropolitan areas. As measured by the commonly-used Index of Dissimilarity as applied to just-released 2020 decennial Census data, Black-white segregation is high. This metric stands at 55, meaning that 55 percent of Blacks live in neighborhoods where they are over-represented. Black-white dissimilarity scores are especially high in 2020 (i.e., values above 70) for metro areas with large Black shares in the Northeast and Midwest. Similarly, another recent analysis holds that half of all Blacks in metropolitan areas lived where the 2015 Index of Dissimilarity was at 60 or higher. Paul Jargowsky, *Racial and Economic Segregation in the U.S.: Overlapping and Reinforcing Dimensions*, *in* Handbook of Urban Segregation 151 (Sako Musterd ed., 2020); *see also* Paul Jargowsky, *The Persistence of Segregation in the 21st Century*, 36 Law & Inequality 207 (2018). A recent report by the OBI computing multi-racial indices for metro areas with populations above 200,000 also found high levels of contemporary racial residential segregation in every region of the

United States, with surprising increases since 1990, driven in part by increasing Asian-white and Latino-white segregation (even as measured by the Dissimilarity Index). *See* Stephen Menendian, Arthur Gailes, and Samir Gambhir, Othering & Belonging Inst., *The Roots of Structural Racism: Twenty-First Century Racial Residential Segregation in the United States* (2021), https://belonging.berkeley.edu/roots-structural-racism.

Furthermore, racial residential segregation is higher among children than adults. *See* John R. Logan et al., Lewis Mumford Ctr., Separating the Children (2001), https://s4.ad.brown.edu/Projects/usschools/reports/report5.pdf; John Iceland, Kimberly A. Goyette, Kyle Anne Nelson & Chaowen Chan, *Racial and Ethnic Residential Segregation and Household Structure: A Research Note*, 39 Soc. Sci. Res. 39 (2010); Paul A. Jargowsky, *Segregation, Neighborhoods, and Schools*, *in* Choosing Homes, Choosing Schools 97 (Annette Lareau & Kimberly A. Goyette eds., 2014); Ann Owens, *Racial Residential Segregation of School-Age Children and Adults: The Role of Schooling as a Segregating Force*, 3 RSF: Russel Sage Found. J. of the Soc. Sciences 63 (2017); Ann Owens *Unequal Opportunity: School and Neighborhood Segregation in the USA*, 12 Race & Soc. Probs. 29 (2020). A similar trend is observed with respect to economic segregation: between 1990 to 2014, income segregation between neighborhoods within metropolitan areas was higher among families with children than those without. Owens, *supra*. New research also finds that "among blacks, single-mother families are significantly more segregated from whites than married couples, regardless of the presence of children. However, these same differences in segregation are not found among Hispanics and Asians." Samantha Friedman, Colleen E. Wynn, & Hui-shien Tsao, *Racial and Ethnic Residential Segregation by Family Structure and the Presence of Children in Metropolitan America*, Race and Social Problems (2021), https://doi.org/10.1007/s12552-021-09342-3.

The number of high-poverty census tracts (i.e., those with poverty rates of 40 percent or higher) grew by 76 percent since 2000 and the total population living in these neighborhoods grew by 91 percent. Also, 25 percent of poor Blacks and 17 percent of poor Hispanics lived in high-poverty neighborhoods versus only about 8 percent of poor Whites. *See* Paul Jargowsky, The Century Found., The Architecture of Segregation: Civil Unrest, the Concentration of Poverty, and Public Policy (2015), https://tcf.org/content/report/architecture-of-segregation. The negative effects of racial segregation today are worsened by increasing income inequality and economic segregation. *See* Jargowsky, *Racial and Economic Segregation in the U.S.*, *supra*.

Historically, explicit federal, state and local governmental policies created segregated residential patterns and housing inequities that are today perpetuated by current policies and decisions, even those that are seemingly race neutral. *See* Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America (2017). The Federal Housing Administration played a paramount role in creating present-day patterns of segregation through redlining and the use of both restrictive covenants and racial zoning. *See* Fed. Housing Admin., Underwriting Manual: Underwriting and Valuation

Procedure Under Title II of the National Housing Act (1938). Recent research by OBI found a strong connection between racial residential segregation and the density of municipal single-family only zoning. Stephen Menendian, Samir Gambhir, and Arthur Gailes, Othering & Belonging Inst*., Racial Segregation in the San Francisco Bay Area, Part 5* (2021), https://belonging.berkeley.edu/racial-segregation-san-francisco-bay-area-part-5 (showing how restrictive land use policies reinforce and promote racial residential segregation). Exclusionary land-use policies too often have the effect, if not the purpose, of denying housing opportunity to people of color, families with children, people with disabilities and other protected classes who desire to live in opportunity-rich, integrated locations. *See, e.g.*, Douglas S. Massey & Jonathan Rothwell, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 Urban Affairs Rev. 779 (2009). There is evidence that stringent land use regulations preserve racial homogeneity. *See* Jessica Trounstine, "The Geography of Inequality: How Land Use Regulation Produces Segregation," American Political Science Review, Vol. 114, Issue 2, May 2020, pp. 443-455, available at https://www.cambridge.org/core/journals/american-political-science-review/article/abs/geography-of-inequality-how-land-use-regulation-produces-segregation/BAB4ABDF014670550615CE670FF66016.

Over fifty years after the passage of the Fair Housing Act, residential segregation resulting from government decisions continues to limit opportunities for many families, even though the Act prohibits local governments from making zoning and land use decisions, or implementing policies, that exclude or otherwise discriminate against those protected by the Act. *See* Brief of Housing Scholars as *Amici Curiae* Supporting Respondent, *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.,* 135 S.Ct. 2507 (2015). In Boston, for example, zoning practices are identified by fair housing and civil rights analyses as a cause of continuing racial segregation in housing. *See, e.g.*, Alicia Sasser Modestino et al., Bos. Found., The Greater Boston Housing Report Card 2019: Supply, Demand and the Challenge of Local Control 67 (2019) ("More affluent communities in Greater Boston have zoning ordinances that effectively prohibit dense development. They often exclude the development of multifamily housing projects, and because of the connection between class and race, perpetuate current patterns of racial and income segregation"). An analysis carried out with a Sustainable Communities Planning grant from HUD surveyed about twenty of the analyses of impediments ("AI") to fair housing choice required under consolidated planning rules. "Almost all the AI consider land use regulation and the high cost of housing as a primary barrier to housing choice." Metro. Area Planning Council, Fair Housing and Equity Assessment for Metropolitan Boston 100 (2013).

It is crucial to be able to rely on the Act to challenge barriers to development of affordable and accessible rental housing in opportunity-rich areas of racial residential segregation. The NPRM, and in particular HUD's reinstatement of "perpetuation of segregation" as prohibited conduct, affirms that the Act can be used to remove obstacles to residential integration posed by governmental land-use policies that intentionally and unintentionally reinforce and perpetuate patterns of racial residential segregation and deny housing opportunities to those protected by the Act.

4. Reinstatement of "Perpetuation of Segregation" as Prohibited Conduct

HUD's proposed changes to reaffirm "perpetuation of segregation" as a recognized type of prohibited discriminatory effect ensure a robust discriminatory effects framework under the Fair Housing Act. *See Inclusive Communities Project,* 115 S.Ct. at 2522 (the purpose of disparate impact is to avoid "arbitrarily creating discriminatory effects or perpetuating segregation"). The 2013 Rule, in establishing liability under the Act based on a practice's discriminatory effect, defined it to include one that "creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin." 78 Fed. Reg. 11,463. HUD's findings in promulgating the 2013 Rule observed that "the elimination of segregation is central to why the Fair Housing Act was enacted." 78 Fed. Reg. 11,469. This is consistent with the view of the *Inclusive Communities Project* Court. *See Inclusive Communities Project,* 115 S.Ct. at 2522 ("[U]nlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability . . . ."). As HUD recognized, the 2013 Rule was consistent with judicial holdings spanning nearly five decades from the very first decisions recognizing the viability of disparate impact claims under the Act. *See* 78 Fed. Reg. 11,469 & n.102 (collecting cases). It was based on "longstanding judicial interpretations" of disparate impact, as well as agency practice. *Inclusive Communities Project,* 135 S.Ct. at 2525. *See also* 78 Fed. Reg. 11,460 ("Through this final rule, HUD formalizes its long-held recognition of discriminatory effects liability under the Act.").

Indeed, the Supreme Court and other federal courts have held that the Act should be interpreted broadly to achieve the goal of racial integration. *See Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972) (quoting the Act's sponsor Walter Mondale saying that the law was designed to replace the segregated neighborhoods by "truly integrated and balanced living patterns"); *Otero v. N.Y.C. Hous. Auth,* 484 F.2d 1122 (1973) (stating that the Act's principal purpose was to promote "open, integrated residential housing patterns and to prevent the increase of segregation . . . of racial groups whose lack of opportunities the Act was designed to combat").

More specifically, federal appellate courts have long embraced the "perpetuation of segregation" theory of liability under the Act. *See, e.g.*, *United States v. City of Black Jack,* 508 F.2d 1179 (8th Cir. 1974) (stating that the Act curbs the "discretion of local zoning officials. . . where 'the clear result of such discretion is the segregation of low-income Blacks from all White neighborhoods'"); *Huntington Branch, N.A.A.C.P. v. Town of Huntington,* 844 F.2d 926, 934 (2d Cir.), *aff'd in part,* 109 S. Ct. 276 (1988) (criticizing the district court for failing even to consider the plaintiffs' segregative-effect theory, noting that "recognizing this second form of effect advances the principal purpose of [the Act] to promote, 'open integrated residential housing patterns'"); *Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526 (N.D. Tex. 2000) (ruling that the defendant-town's zoning restrictions were racially motivated in violation of various civil rights laws and also had both a disparate impact and segregative effect that violated the Act). Following the 2013 Rule, federal courts continued to recognize perpetuation of segregation as a distinct

basis for discriminatory effects liability. *See Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 618 (2d Cir. 2016) (finding that a discriminatory effect violating the Act could be shown by a disparate impact on a minority group or a segregative effect); *see also Avenue 6E Investments, LLC v. City of Yuma*, 818 F.3d 493 (9th Cir. 2016) (explaining that the City's action to prevent the project in question from being built had the effect of perpetuating segregation). Contrary to this well-established precedent, the 2020 Rule eliminated the 2013 Rule's definition of "discriminatory effect," thereby eliminating "perpetuation of segregation" as a type of discriminatory effect separate from disparate impact.

The 2013 Rule "broke no new ground, but instead largely codified longstanding judicial and agency consensus regarding discriminatory effects law." 86 Fed. Reg. 33,591. It provided a "a workable and balanced framework for investigating and litigating discriminatory effects claims that is consistent with the Act, HUD's own guidance, Inclusive Communities, and other jurisprudence." 86 Fed. Reg. 33,594. The NPRM's reaffirmation that showing a policy or practice creates, perpetuates or increases segregation remains a basis for establishing liability under the Act follows this well-established precedent, is consistent with the Act's remedial purpose and HUD's obligations under the Act to affirmatively further fair housing and clarifies confusion introduced by the 2020 Rule.

5. *Conclusion: We Applaud HUD's Recodification of the 2013 Rule, including the Reinstatement of the Perpetuation of Segregation as a Type of Discriminatory Effect*

HUD's recodification of the 2013 Rule enables HUD to carry out its duty to further fair housing under 42 U.S.C. §3608(e)(5), which is closely linked to its duty to avoid discriminatory effects. *See, e.g.*, *Resident Advisory Bd. V. Rizzo*, 564 F.2d 126, 140 (3d Cir. 1977) (in Fair Housing Act dispute involving discriminatory effect of refusal to construct assisted housing, "HUD, obviously recognizing its affirmative duty" did not appeal from district court injunction). The Court in *Inclusive Communities Project* recognized this close link when it observed that the Act ensures that public or business "priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation." 135 S.Ct. at 2522. The duty to further fair housing includes carrying out enforcement activities to eliminate intentional and unintentional discrimination. *See., e.g.*, *Clients' Council v. Pierce,* 711 F.2d 1406, 1408 (8th Cir. 1983) ("HUD officials abdicated their affirmative duty to eliminate the racially discriminatory practices of the Texarkana Housing Authority"); *see also* Exec. Order No. 13985, Exec. Order on Advancing Racial Equity and Support of Underserved Communities through the Fed. Gov't (2021) (directing federal agencies to "assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups"); *see also* Memorandum on Redressing Our Nation's and the Fed. Govt's History of Discriminatory Housing Practices and Policies (2021) (directing the Secretary of HUD to examine the effects of the 2020 Rule and the "affirmatively furthering fair housing" rule issued by HUD during the prior administration and to take any necessary steps to implement the Act in a manner that prevents practices with an unjustified discriminatory effect and affirmatively furthers fair housing). In returning to the 2013 Rule, HUD uses its rule-making authority "to assist in ending discrimination and segregation, to the point where the supply of

genuinely open housing increases." *N.A.A.C.P. v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149 (1st Cir. 1987).

We applaud HUD's reinstatement of the 2013 Rule and HUD's return to its congressionally mandated duty to further fair housing and prevent the perpetuation of residential segregation resulting from government decisions – and call on HUD to use its enforcement powers to promote access to opportunities for people of color, families with children and people with disabilities.

Thank you for considering our comments.

Sincerely,

Emily Blumberg