

APPENDIX C

Regulations Division
Office of the General Counsel
Department of Housing and Urban Development 451 7th Street SW, Room 10276
Washington, DC 20410-0500

Re: Docket No. FR-6111-P-02: HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard

To Whom It May Concern:

The NYU Furman Center and the U.C. Berkeley Turner Center for Housing Innovation appreciate the opportunity to submit comments on HUD’s Notice of Proposed Rulemaking, HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard.¹ The NYU Furman Center advances research and debate on housing, neighborhoods, and urban policy by providing academic and empirical research, promoting frank and productive discussions among stakeholders, and providing essential data and analysis to practitioners and policymakers.² Through data-driven research, policy analysis, and stakeholder engagement, the U.C. Berkeley Turner Center for Housing Innovation informs policy and private sector solutions focused on housing families from all walks of life in sustainable and affordable homes and communities.³

As social scientists, we are committed to evidence-based research, and we work to ensure this research is available to policymakers. We are thus concerned that this proposed rule-making does not attempt to incorporate up-to-date and accurate understandings of important fair housing issues. We write to highlight two critical areas of disconnect between the Proposed Rule and established legal and social science research.

First, the Proposed Rule does not analyze the well-documented harms of segregation and the likelihood that these negative effects will increase under the Proposed Rule. This is inconsistent with a federal agency’s obligation to disclose and analyze the consequences and costs of its action, and with best practices in evidence-based policymaking that prioritize reliance on credible data and research. Second, in appearing to immunize “single events” from disparate impact scrutiny,

¹ 84 Fed. Reg. 42854 (proposed Aug. 19, 2019).

² These comments do not represent the institutional views (if any) of NYU, NYU’s School of Law, or NYU’s Wagner Graduate School of Public Service. The Furman Center and Turner Center are grateful for the primary authorship of these comments by Sophia House and Noah Kazis, along with the conscientious research assistance provided by Maia Cole and Alexis Captanian.

³ These comments do not represent the institutional views (if any) of U.C. Berkeley, U.C. Berkeley’s College of Environmental Design, or U.C. Berkeley’s Haas School of Business.

the Proposed Rule does not take into account the discretionary nature of local government zoning and land use processes.

Additionally, we believe that the Proposed Rule risks misconstruing the complex and context-specific nature of causality. Neither law nor social science suggests that a rigid definition of causality is available or appropriate. Finally, given the centrality of good data to quality policymaking, especially in critical areas like this one, we urge HUD to reverse course and reaffirm the importance of data collection in furthering quality research, good governance, and voluntary efforts to improve fair housing outcomes.

The Furman Center bases these comments on the considerable research we have conducted, over many years, on residential segregation and the connections between housing and neighborhood conditions.⁴ We also have studied the relationship between various land use and housing policies and economic and racial segregation.⁵ The Terner Center supports these comments based on the research we have conducted and continue to be engaged in on the ways in which housing and land use policies affect neighborhood conditions and access to economic opportunity, as well as our ongoing commitment to advancing data transparency and bridging data gaps in the field. Based on this work, along with the collective experience of our researchers and scholars, we believe that the Proposed Rule has substantial flaws that require significant reconsideration. This would be best accomplished by withdrawing the Proposed Rule for the reasons stated below.

I. The Proposed Rule’s Failure to Consider Well-Documented Harms Certain to Result from Rule

A. A Federal Agency Is Legally Obligated to Analyze the Consequences of Its Proposed Rule, Including Costs

HUD is required to assess and explain the costs of its anticipated course of action. This legal obligation advances a central tenet of strong policymaking: that agency decisions should be transparent, based on solid data and evidence, and conducive to meaningful public engagement.⁶ The importance of this principle is reflected in its centrality to administrative law, which requires agencies to consider, and articulate, the likely consequences of their proposed actions.⁷ A rule that “entirely failed to consider an important aspect of the problem” would be arbitrary and capricious.⁸

⁴ For a summary of our recent research related to residential segregation, *see* Appendix A.

⁵ *See* Appendix B.

⁶ HUD may also have obligations to discuss cost stemming from the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*

⁷ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that the Administrative Procedure Act requires agencies to “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made” (internal quotation marks omitted)).

⁸ *Id.*

As such, agencies generally cannot entirely ignore the costs of their proposals.⁹ A failure to consider costs can render rulemaking unreasonable, as “reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.”¹⁰

Costs, in this sense, are defined broadly. The Supreme Court has recognized that “cost includes more than the expense of complying with regulations” and that, when considering a rule’s consequences for affected parties, “any disadvantage could be termed a cost.”¹¹ Courts have thus consistently struck down rules imposing potentially significant indirect harms an agency failed to evaluate.¹²

Moreover, even where a formal cost-benefit analysis is not required, agencies still may not rely on flawed analyses of costs and benefits.¹³ Thus, a partial analysis—as the Proposed Rule might be viewed to have undertaken—is insufficient. The Proposed Rule does not address crucial sources of data and research that allow a full assessment of the harms that would result from the rule’s promulgation. Any resulting final rule should thus be viewed as arbitrary and capricious.

In the context of the Fair Housing Act (“the FHA”), it is particularly important that HUD consider whether any proposed regulation will result in increased or decreased access to fair housing, given that HUD’s “discretion must be exercised within the framework of the national policy against discrimination in federally assisted housing and in favor of fair housing.”¹⁴ These are the “relevant factors” under the FHA that HUD must prioritize in its rulemaking process.¹⁵

Executive Order 12866 also requires an agency to assess the costs and benefits of any significant regulatory action.¹⁶ HUD has categorized the Proposed Rule as a significant regulatory action (as defined in section 3(f) of the Order).¹⁷ HUD is thus obligated to analyze the Proposed Rule’s costs and benefits under Executive Order 12866. It is further imperative as a matter of sound policymaking that, for such an important rule, HUD engage fully with the Proposed Rule’s

⁹ The exception, of course, is where a statute mandates that an agency’s decision be made on other grounds. *See* *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 464-65 (2001).

¹⁰ *Michigan v. EPA*, 135 S.Ct. 2699, 2707 (2015).

¹¹ *Id.*

¹² *See, e.g.,* *Competitive Enter. Inst. v. Nat’l Highway Traffic Safety Admin.*, 956 F.2d 321, 326-27 (D.C. Cir. 1992) (remanding fuel-efficiency rule due to agency’s failure to consider indirect safety costs); *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1225 (5th Cir. 1991) (striking down rule for failure to consider indirect safety effects of substituting asbestos-free car brakes).

¹³ *See* *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012).

¹⁴ *Shannon v. U.S. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809, 819 (3d Cir. 1970) (internal citations omitted).

¹⁵ *Id.*

¹⁶ Exec. Order No. 12866 § 6(a)(3)(B), 58 Fed. Reg. 51,735 (Oct. 4, 1993). E.O. 12866 imposes an independent requirement for a consideration of cost. The EPA, for example, has prepared impact statements pursuant to E.O. 12866 even for rules where it statutorily barred from considering cost in setting its regulatory standard. *See, e.g.,* EPA, REGULATORY IMPACT ANALYSIS OF THE FINAL REVISIONS TO THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR GROUND-LEVEL OZONE (2015), https://www3.epa.gov/ttn/ecas/docs/ria/naaqs-o3_ria_final_2015-09.pdf; *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 471 (2001).

¹⁷ 84 Fed. Reg. 42,854, 42,861 (proposed Aug. 29, 2019).

foreseeable effects and with substantial research documenting the harms of segregation, exclusion, and discrimination in American housing markets.

B. The Proposed Rule Fails to Analyze Foreseeable Harms

The Proposed Rule omits any analysis of potential harms. Guidance from the Office of Management and Budget provides that agencies must consider both the direct and quantifiable harms of their proposed actions as well as indirect and non-quantifiable harms.¹⁸ But none of these potential harms is analyzed in the Proposed Rule. This omission is significant because, as this and other comments on the Proposed Rule demonstrate, the Proposed Rule would cause significant harm to groups protected by the FHA, stemming from, among other things, more entrenched residential segregation, exclusion from housing, and discrimination in home purchasing and the rental market. The failure to engage with abundant research documenting the scope of these harms is a serious deficiency.

There is no explanation of the decision not to evaluate the foreseeable harms of the Proposed Rule,¹⁹ and no adequate explanation appears forthcoming. For example, HUD does not point to any statutory text precluding or excusing it from considering the negative consequences of its actions.²⁰ If anything, the text of the Fair Housing Act has the opposite effect in this particular context. HUD is obligated to administer its programs “in a manner affirmatively to further the policies” of the Fair Housing Act.²¹ This duty requires careful attention to the harms of housing discrimination and segregation, and to the lost social benefits of alleviating these harms and increasing integration through federal oversight and disparate impact litigation.

Insofar as HUD may suggest that the Proposed Rule will not generate costs because it merely brings the agency’s disparate impact framework into conformity with *Inclusive Communities* and has no further independent effect, HUD would be in error. Several aspects of the rule, most obviously the inclusion of broad defenses shielding defendants’ use of algorithmic models from liability, are plainly novel. *Inclusive Communities* also does not direct HUD to exclude single

¹⁸ Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular A-4, Regulatory Analysis 26 (2003).

¹⁹ Any analysis of costs not made available to the public is both legally and analytically insufficient. The preamble to the Proposed Rule states that the docket file is available for public inspection in the Regulations Division of HUD’s Office of General Counsel. Even if this file, which is available only in Washington, D.C., and not included in the Federal Register, on regulations.gov or in another accessible format, contained information relevant to the analysis of costs, that would not satisfy HUD’s duty to analyze costs. “To fulfill its obligation to provide adequate notice, an agency must ‘make available to the public, in a form that allows for meaningful comment, the data the agency used to develop [its] proposed rule.’” *FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 315 (D.D.C. 2016) (quoting *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C.Cir.2006)) (“Agencies are required to make these disclosures in order to ‘allow[] the parties to focus on the information relied on by the agency and to point out where that information is erroneous or where the agency may be drawing improper conclusions from it.’”). The failure to make this information available in the Proposed Rule for public comments thus would itself be a deficiency rendering the agency’s proceedings unreasonable.

²⁰ *Cf. Whitman v. American Trucking Assn’s, Inc.*, 531 U.S. 457 (2001).

²¹ 42 U.S.C. 3608(e)(5).

events from disparate impact liability, nor does it require the agency to impose the burden of disproving a defendant’s case upon a plaintiff before discovery. Instead, the Proposed Rule significantly exceeds the bounds of *Inclusive Communities*. Notably, it does so consistently in a direction that favors defendants rather than plaintiffs.

As a result—without quantifying precisely how many plaintiffs will be newly barred from bringing disparate impact claims under the standards set forth by the Proposed Rule as compared with the Supreme Court’s articulation of the standard for liability and the existing regulations—there is no doubt that fewer disparate impact claims will be brought and fewer will succeed. Changing the legal regime in this way will result in more discriminatory practices, with less federal intervention—imposing significant costs on those who would otherwise be protected by the Fair Housing Act.

There is considerable relevant information available that enables HUD to evaluate the impacts of its Proposed Rule. Given that HUD is obligated to analyze the Proposed Rule in light of “the best reasonably obtainable scientific, technical, economic, and other information,”²² HUD can and should consult, among others, the following readily available data sets:

- Data from the United States Census Bureau²³
- Data from the Federal Reserve²⁴
- Data on the Home Mortgage Disclosure Act²⁵
- The NYU Furman Center’s CoreData²⁶
- The Turner Center Housing Development Dashboard²⁷
- The Urban Institute Data Catalog²⁸
- Data from the American Communities Project²⁹
- Data from the Institute on Metropolitan Opportunity³⁰
- Depositions and declarations from borrowers, loan originators, and investment banks³¹

²² Exec. Order No. 12866 § 1(b)(7), 58 Fed. Reg. 51,735 (Oct. 4, 1993). HUD has concluded that the Proposed Rule is a significant regulatory action for the purposes of Executive Order 12866. 84 Fed. Reg. 42,854, 42,861 (proposed Aug. 29, 2019).

²³ *Data*, U.S. CENSUS BUREAU, <https://www.census.gov/data.html> (last visited Oct. 15, 2019).

²⁴ ²⁴ *Data*, BD. OF GOVERNORS OF THE FED. RESERVE, <https://www.federalreserve.gov/data.htm> (last visited Oct. 15, 2019).

²⁵ *Home Mortgage Disclosure Act*, FFIEC, <https://www.ffiec.gov/hmda> (last visited Oct. 15, 2019).

²⁶ *CoreData.nyc*, N.Y.U. FURMAN CTR., <http://coredata.nyc> (last visited Oct. 16, 2019).

²⁷ *Housing Development Dashboard*, TERNER CTR. FOR HOUS. INNOVATION, <https://turnercenter.berkeley.edu/dashboard> (last visited Oct. 15, 2019).

²⁸ *Data Catalog*, URB. INST., <https://datacatalog.urban.org> (last visited Oct. 15, 2019).

²⁹ *Diversity and Disparities*, AMERICAN CMTYS. PROJECT, <https://s4.ad.brown.edu/Projects/Diversity/Data/Data.htm> (last visited Oct. 15, 2019).

³⁰ *Metro Area Maps and Data*, UNIV. OF MINN. LAW. SCH., <https://www.law.umn.edu/institute-metropolitan-opportunity/metro-area-maps-data> (last visited Oct. 16, 2019).

³¹ See Justin P. Steil, et al., *The Social Structure of Mortgage Discrimination*, 33 HOUSING STUD. 759 (2018).

Each of these data sets offers quality, potentially probative information that enable HUD to analyze the costs of its Proposed Rule.

C. The Proposed Rule Will Impose Significant Harms

If the Proposed Rule is enacted, there will be an increase in housing discrimination and its accompanying harms. As other commenters explain in more detail,³² the Proposed Rule pairs steep pleading burdens for plaintiffs with sweeping defenses for housing providers and lenders. The Proposed Rule even appears to foreclose redress altogether in many instances.³³ Given these many legal barriers to pleading and proving disparate impact, a foreseeable and unavoidable consequence of the Proposed Rule's promulgation would be a decrease in successful disparate impact litigation. Public and private entities will also develop their policies in light of the Proposed Rule, curtailing their own internal disparate impact scrutiny of, among other things, zoning decisions, financial models and insurance practices. This, in turn, will expose members of protected classes to the harms that disparate impact litigation would otherwise address, including residential segregation, exclusion from rental housing, and lending discrimination.

As the Supreme Court observed in *Inclusive Communities*, "much progress remains to be made in our Nation's continuing struggle against racial isolation."³⁴ Discrimination persists in leasing,

³² See, e.g., Poverty Race Research Action Council and Klein Hornig LLP, Comment Letter on HUD's Implementation of the Fair Housing Act's Disparate Impact Standard (Oct. 17, 2019), <https://www.regulations.gov/document?D=HUD-2019-0067-1907>; Metropolitan Housing Coalition, Comment Letter on HUD's Implementation of the Fair Housing Act's Disparate Impact Standard (Oct. 16, 2019), <https://www.regulations.gov/document?D=HUD-2019-0067-1599>; National Low Income Housing Coalition, Comment Letter on HUD's Implementation of the Fair Housing Act's Disparate Impact Standard (Oct. 8, 2019), <https://www.regulations.gov/contentStreamer?documentId=HUD-2019-0067-1120&attachmentNumber=1&contentType=pdf>; Los Angeles Homeless Services Authority, Comment Letter on HUD's Implementation of the Fair Housing Act's Disparate impact Standard (Sept. 27, 2019), <https://www.regulations.gov/contentStreamer?documentId=HUD-2019-0067-0798&attachmentNumber=1&contentType=pdf>.

³³ As Michelle Aronowitz and Edward Golding of the Urban Institute observe: "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 Fair Housing Act. If the landlord instead decides to evict its Section 8 tenants, or passes the excess insurance costs on to the tenants, 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. Instead of taking steps to ensure their practices do not discriminate, parties would have more reason to look for ways to shift responsibility to others." MICHELLE ARONOWITZ & EDWARD GOLDING, URBAN INSTITUTE, HUD'S PROPOSAL TO REVISE THE DISPARATE IMPACT STANDARD WILL IMPEDE EFFORTS TO CLOSE THE HOMEOWNERSHIP GAP 6 (2019), https://www.urban.org/sites/default/files/publication/101015/huds_proposal_to_revise_the_disparate_impact_standard.pdf. This is only one example of many.

³⁴ Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2525 (2015).

lending, and code enforcement practices, among others.³⁵ But substantial progress towards diversity and integration since 1968 has taken place “against the backdrop of disparate-impact liability in nearly every jurisdiction,” as the Court indicated.³⁶ HUD, too, has relied upon disparate impact in combating discrimination and segregation.³⁷ Disparate impact is uniquely capable of providing recourse against facially neutral practices that nevertheless reproduce disadvantage without appropriate justification. A leading study on the effects of disparate impact litigation thus concludes that it “remains a vital tool” for accomplishing the FHA’s goals.³⁸

HUD has articulated several anticipated benefits of the Proposed Rule. In particular, the Proposed Rule suggests that its pleading burdens and novel defenses will benefit defendants by removing pressures that would lead defendants to “second-guess reasonable choices”³⁹ or “resort to the use of racial quotas.”⁴⁰ But HUD concludes, without further analysis, that “all parties . . . will benefit from the changes and clarifications in the rule.” Research shows otherwise. Under the Proposed Rule, marginalized groups protected by the Fair Housing Act will suffer, and the clear purposes of the FHA will be undermined.

The following sections provide a starting point for HUD’s consideration of the negative consequences of limiting disparate impact liability in the manner suggested in the Proposed Rule. We have summarized leading social science research that shows that, by failing to analyze costs at all, HUD has overlooked substantial harms likely to result from the perpetuation and expansion of segregation and barriers to housing; the further exclusion of marginalized populations from equal access to housing and homeownership; and the continuation of discriminatory lending practices. This analysis does not supplant HUD’s obligation to carry out its own assessment of the likely consequences, including resulting harms, of the Proposed Rule. Indeed, we address only a subset of likely harms: HUD’s own history, including its guidance documents, adjudications and investigations, makes clear that there are many other categories of cost.⁴¹ The failure to consider any, much less all, of these harms in the Proposed Rule renders HUD’s actions unreasonable, and casts doubt upon the basis for any resulting rule.

Segregation and Barriers to Housing

Perhaps the most important category of disparate impact lawsuits is those challenging residential segregation. As the Supreme Court has recognized, such suits sit at the “heartland” of disparate impact and at the core of the Fair Housing Act’s purpose. The Court celebrated the use of disparate

³⁵ Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis Of Forty Years of Disparate Impact Claims Under The Fair Housing Act*, 63 AM. U. L. REV. 357 (2013).

³⁶ *Tex. Dep’t of Hous. & Cmty. Affairs*, 135 S. Ct. at 2525.

³⁷ Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,461-63 (Feb. 15, 2013).

³⁸ Seicshnaydre, *supra* note 35, at 364.

³⁹ 78 Fed. Reg. at 42,855 (quoting *Tex. Dep’t of Hous. & Cmty. Affairs*, 135 S. Ct. at 2512).

⁴⁰ *Id.* (quoting *Tex. Dep’t of Hous. & Cmty. Affairs*, 135 S. Ct. at 2512).

⁴¹ For example, the harms of religious discrimination under the Fair Housing Act can be quite distinctive. HUD must also analyze costs to the victims of religious discrimination.

impact to challenge laws prohibiting multi-family construction or limiting rental housing to “blood relatives” of existing residents.⁴² Disparate impact has also helped to attack housing policies, both public and private, that give preferential treatment to current (predominantly white) residents, thereby maintaining a neighborhood or development’s existing racial composition and preventing integration.⁴³ As suits like these demonstrate, disparate impact has been successful in ensuring that our housing is not even more deeply segregated than it currently is.

Despite the success of disparate impact in promoting integration, the Proposed Rule will make disparate impact claims more difficult to win, including by eliminating current law’s reference to “perpetuation of segregation” suits altogether. Without the opportunity to bring a successful disparate impact claim, under the Proposed Rule, many plaintiffs will be forced to live in deeper segregation than they otherwise would. Given our social scientific understanding of the consequences of segregation, this will expose many Americans to serious and foreseeable harms.

To begin with, there is still an immense need for the Fair Housing Act—and, in particular, disparate impact litigation—to protect against segregation. Residential segregation remains pervasive in the United States. While Black-white segregation has declined since 1980, its levels remain quite high, with Black and white people highly unlikely to live in the same neighborhoods.⁴⁴ In 2010, the average American metropolitan area had a Black-white dissimilarity index of 73, meaning that 73 percent of Black people would need to move within the metropolitan area to achieve integration between Black and white populations.⁴⁵ Further, progress towards integration has been slower in metropolitan areas with lower Black population shares.⁴⁶ Meanwhile, Latinx and Asian households have remained largely segregated from white households since 1980, with no statistical progress towards integration;⁴⁷ by some measures, white-Latinx segregation may even be increasing.⁴⁸

⁴² *Inclusive Communities*, 135 S. Ct. at 2522 (citing *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 641 F. Supp. 2d 563, 569, 577–578 (E.D. La. 2009)).

⁴³ *Fair Hous. Justice Ctr., Inc. v. Edgewater Park Owners Co-op., Inc.*, No. 10 CV 912 (RPP), 2012 WL 762323, at *11 (S.D.N.Y. Mar. 9, 2012); *Langlois v. Abington Hous. Auth.*, 234 F.Supp.2d 33 (2002).

⁴⁴ JOHN R. LOGAN & BRIAN J. SHULTS, US2010 PROJECT, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS 2-4 (2011), <https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf>. For an overview of residential segregation across American states and cities, see Daniel T. Lichter, Domenico Parisi & Helga De Valk, *Residential Segregation, PATHWAYS: STATE OF THE UNION* (2016), <https://inequality.stanford.edu/sites/default/files/Pathways-SOTU-2016-Residential-Segregation-3.pdf>.

⁴⁵ Daniel T. Lichter, Domenico Parisi & Michael C. Taquino, *Spatial Segregation, PATHWAYS: STATE OF THE STATES* 30 (2015).

⁴⁶ LOGAN & STULTS, *supra* note 44, at 6-7; Jacob S. Rugh & Douglas S. Massey, *Segregation in Post-Civil Rights America: Stalled Integration or End of the Segregated Century?*, 11 DU BOIS REV.: SOC. SCI. RES. RACE 205, 214 (2014).

⁴⁷ Jorge De La Roca, Ingrid Gould Ellen & Katherine M. O’Regan, *Race and Neighborhoods in the 21st Century: What Does Segregation Mean Today?*, 47 REGIONAL SCI. & URB. ECON. 138 140 (2014).

⁴⁸ *Id.*

Research suggests that the negative consequences of segregation for people of color are substantial.⁴⁹ Racial and economic segregation interfere with low-income adults' employment prospects.⁵⁰ David Cutler and Edward Glaeser, for example, found that a one-standard-deviation decrease in segregation would eliminate one-third of the Black-white gap in earnings and unemployment.⁵¹ Recent research indicates that the negative effects of segregation may even be larger for Latinx households than for Black households.⁵² For example, a move from Phoenix, a metropolitan area with moderate Black-white segregation, to a more highly segregated metro area like New Orleans is associated with a 14.8 percent decrease in a Black person's earnings as compared with those of a white person; a move from Las Vegas, a metro area with moderate Latinx-white segregation to highly segregated Los Angeles is associated with a 17.7 percent decrease in Latinx earnings.⁵³ For every standard deviation increase in segregation at the metropolitan area level, Latinx earnings drop by 15 percent, equivalent to more than \$4,200 in income.⁵⁴

The burdens borne by communities of color under segregation extend to educational outcomes. Attending school in a segregated, high-poverty neighborhood reduces a Black student's verbal ability (a powerful predictor of future outcomes) as much as missing an entire year of school.⁵⁵ According to one estimate, shifting from a fully segregated to a fully integrated city would close one-fourth of the racial gap in SAT scores.⁵⁶ Black residents in highly segregated neighborhoods

⁴⁹ See, e.g., Nancy McArdle & Dolores Acevedo-Garcia, *Consequences of Segregation for Children's Opportunity and Wellbeing*, HARV. JOINT CTR. FOR HOUSING STUD., 2017.

⁵⁰ NYU FURMAN CTR., RACE AND NEIGHBORHOODS IN THE 21ST CENTURY, (2015) https://furmancenter.org/files/NYUFurmanCenter_BriefRace21stC_Jan2015.pdf; David M. Cutler & Edward L. Glaeser, *Are Ghettos Good or Bad?*, 112 QUARTERLY J. ECON. 827 (1997); MARGERY AUSTIN TURNER & KARINA FORTUNY, URB. INST., RESIDENTIAL SEGREGATION AND LOW-INCOME WORKING FAMILIES (2009), <https://www.urban.org/sites/default/files/publication/32941/411845-Residential-Segregation-and-Low-Income-Working-Families.PDF>; Margery Austin Turner, *Residential Segregation and Employment Inequality*, in SEGREGATION: THE RISING COSTS FOR AMERICA 151, 153–55 (James H. Carr & Nandinee K. Kutty eds., 2008).

⁵¹ Cutler and Glaeser, *supra* note 50.

⁵² Jorge De la Roca, Justin Steil & Ingrid Gould Ellen, *Does Segregation Matter for Latinos*, 40 J. HOUSING ECON. 129 (2018).

⁵³ NYU FURMAN CTR., BLACK AND LATINO SEGREGATION AND SOCIOECONOMIC OUTCOMES (2015), https://furmancenter.org/files/NYUFurmanCenter_BlackLatinoSegregation_16SEPT15.pdf

⁵⁴ la Roca, Steil & Ellen, *supra* note 52, at 130.

⁵⁵ Robert J. Sampson, Patrick Sharkey & Stephen W. Raudenbush, *Durable Effects of Concentrated Disadvantage on Verbal Ability Among African-American Children*, 105 PNAS 845 (2008).

⁵⁶ David Card & Jesse Rothstein, *Racial Segregation and the Black-White Test Score Gap*, (Nat'l Bureau of Econ. Research, Working Paper No. 12078, 2006).

are also exposed to higher levels of violent crime,⁵⁷ with negative consequences for children's psychological development and performance in school.⁵⁸

Research suggests that health, too, suffers as a result of segregation. In highly segregated cities, people of color tend to be disproportionately exposed to air pollution and other hazardous environmental conditions.⁵⁹ They are also exposed to higher poverty and crime rates. Research from HUD's Moving to Opportunity Program showed that adults living in higher poverty neighborhood suffer worse health.⁶⁰ Numerous studies have shown an association between living in highly segregated, high-poverty neighborhoods and a variety of poor health outcomes, including higher rates of mental health conditions like depression and anxiety,⁶¹ more cardiovascular disease,⁶² and increased blood pressure,⁶³ among others. Some studies demonstrate causal relationships between segregation and negative health outcomes. For example, Furman Center Faculty Director Ingrid Gould Ellen studied the effects of racial segregation on low-birth-weight outcomes among Black women and showed that greater segregation led to worse birth outcomes for Black infants.⁶⁴

These educational and health consequences matter in their own right, but the economic effects of segregation extend beyond the individual, and even beyond the communities of color who are the primary victims of segregation. Increasingly, research indicates that society as a whole is harmed

⁵⁷ Douglas S. Massey & Jonathan Tannen, *A Research Note on Trends in Black Hypersegregation*, 52 DEMOGRAPHY 1025 (2015).

⁵⁸ Patrick Sharkey et al., *High Stakes in the Classroom, High Stakes on the Street: The Effects of Community Violence on Students' Standardized Test Performance*, 1 SOC. SCI. 199, 209 (2014); Cutler & Glaeser, *supra* note 50; NYU FURMAN CTR., *supra* note 50.

⁵⁹ See, e.g., Rachel Morello-Frosch & Bill M. Jesdale, *Separate and Unequal: Residential Segregation and Estimated Cancer Risks Associated with Ambient Air Toxics in U.S. Metropolitan Areas*, 114 ENVTL. HEALTH PERS. 386 (2006); Patricia O'Campo et al., *Neighborhood Risk Factors for Low Birthweight in Baltimore: A Multilevel Analysis*, 87 AM. J. PUB. HEALTH 1113 (1997); Wang, Xiaobin, et al., See, e.g., Rachel Morello-Frosch & Bill M. Jesdale, *Separate and Unequal: Residential Segregation and Estimated Cancer Risks Associated with Ambient Air Toxics in U.S. Metropolitan Areas*, 114 ENVTL. HEALTH PERS. 386 (2006); Patricia O'Campo et al., *Neighborhood Risk Factors for Low Birthweight in Baltimore: A Multilevel Analysis*, 87 AM. J. PUB. HEALTH 1113 (1997) ; Xiaobin Wang et al., *Association between Air Pollution and Low Birth Weight: A Community-Based Study*, 105 ENVTL. HEALTH PERSPS. 514 (1997), 105 ENVTL. HEALTH PERSPS. 514 (1997).

⁶⁰ Jens Ludwig et al., *Neighborhood Effects on the Long-Term Well-Being of Low-Income Adults*, 337 SCIENCE 1505 (2012).

⁶¹ Carol S. Aneshensel & Clea A. Sucoff, *The Neighborhood Context of Adolescent Mental Health*, 37 J. HEALTH & SOC. BEHAV. 293 (1996).

⁶² Karri N. Kershaw & Sandra S. Albrecht, *Racial/Ethnic Residential Segregation and Cardiovascular Disease Risk*, 9 CURRENT CARDIOVASCULAR RISK REP. 10 (2015) (providing review of nineteen relevant studies on black segregation and sixteen studies on Hispanic segregation).

Karri N. Kershaw et al., *Association of Changes in Neighborhood-Level Racial Residential Segregation with Changes in Blood Pressure Among Black Adults: The CARDIA Study*, 177 JAMA INTERN. MED. 996 (2017).

⁶⁴ Ingrid Gould Ellen, *Is Segregation Bad for Your Health? The Case of Low Birth Weight*, BROOKINGS-WHARTON PAPERS ON URB. AFF. 203 (2000).

by segregation. Economies in segregated areas tend to grow more slowly or for shorter periods of time.⁶⁵ Additionally, more segregated areas have lower levels of economic mobility.⁶⁶

Nevertheless, and despite the well-documented benefits of integration, local opposition often frustrates efforts to increase housing access and equity for communities of color. As part of a recent series on California land use put together by the Turner Center, Dr. Jonathan Rothwell analyzed this pattern and found that jurisdictions with exclusionary zoning practices limiting multi-family development and with greater opposition to development are more racially segregated.⁶⁷ Disparate impact liability has repeatedly provided a way for plaintiffs of color—along with affordable housing developers and government agencies—to challenge zoning and siting decisions that exclude affordable housing in predominantly white neighborhoods.⁶⁸ Narrowing this avenue of recourse, as the Proposed Rule would, risks subjecting another generation to the established and corrosive effects of segregation, at enormous social and economic cost.

Lending and Insurance Practices

Disparate impact litigation is also used to enforce the FHA's protections against discrimination in residential real estate transactions. Disparate impact has provided plaintiffs of color with relief when financial institutions' facially neutral policies—such as refusing to extend single family home loans below a certain value⁶⁹ or denying insurance to holders of Housing Choice Vouchers⁷⁰—nevertheless operated to exclude people of color from equal credit and financing opportunities without justification.⁷¹ In 2012, the Department of Justice sued Wells Fargo for lending practices that adversely affected Black customers, ultimately finding that Black customers in Chicago paid, on average, \$2,937 more in broker fees than similarly situated white customers.⁷² That same year, HUD investigated discriminatory lending practices at GFI Mortgage Bankers,⁷³ demonstrating that the agency is on ample notice of these practices. Recently, HUD signed a conciliation agreement with two different insurance groups that denied coverage to subsidized or

⁶⁵ See Raj Chetty et al., *Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, (Nat'l Bureau of Econ. Research, Working Paper No. 19843, 2014).

⁶⁶ *Id.* at 3.

⁶⁷ JONATHAN ROTHWELL, TERNER CTR. FOR HOUS. INNOVATION, U.C. BERKELEY, *LAND USE POLITICS, HOUSING COSTS, AND SEGREGATION IN CALIFORNIA CITIES* (2019), <http://californialanduse.org/download/Land%20Use%20Politics%20Rothwell.pdf>.

⁶⁸ See *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974); *Mhany Mgmt. v. County of Nassau*, 985 F. Supp. 2d 390 (E.D.N.Y. 2013).

⁶⁹ *Fair Lending*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, <https://www.occ.treas.gov/topics/consumers-and-communities/consumer-protection/fair-lending/index-fair-lending.html> (last visited Oct. 16, 2019).

⁷⁰ *Nat'l Fair Housing Alliance v. Travelers Indemnity Corp.*, 261 F. Supp. 3d 20, 34 (D.D.C 2016).

⁷¹ For an extensive review of homeowners' insurance policies and practices which have been challenged under the Fair Housing Act, many of them by HUD itself, see Stephen M. Dane, *Race Discrimination Is Not Risk Discrimination: Why Disparate Impact Analysis of Homeowners Insurance Practices Is Here to Stay*, 33 *BANKING & FIN. SERVS. POL'Y REP.* 1 (June 2014).

⁷² Complaint at 29, *United States v. Wells Fargo*, No. 1:12-cv-01150 (D.D.C 2012), ECF No. 1.

⁷³ Complaint, *United States v. GFI Mortgage Bankers*, No. 1:12-cv-2502 (S.D.N.Y. 2012), ECF No. 1.

low-income housing. Those complaints were expressly based on a theory of discriminatory effects, further demonstrating the importance of disparate impact in curtailing discrimination in the insurance industry.⁷⁴

The Proposed Rule will impede much of this progress in addressing discriminatory financial practices. The Proposed Rule not only limits disparate impact liability generally, but also provides specific and sweeping defenses for insurance laws and novel defenses for institutions that make lending and insurance decisions based on algorithms (which, as other commenters demonstrate, describes nearly every major financial institution⁷⁵).

By adding new obstacles to disparate impact claims, the Proposed Rule will expose people of color to more unfair lending practices and, in turn, to greater risks of foreclosure, eviction, and neighborhood decline. Research has consistently shown that “black and Latino borrowers over the past decade were frequently charged more for mortgage loans than similarly situated white borrowers.”⁷⁶ Researchers who controlled for variables like credit scores, loan to value ratios, the presence of subordinate liens, debt loads, and age, found that Black and Latinx borrowers were significantly more likely to get high-interest loans; in one study, Black homeowners paid five percent more than white homeowners for their mortgage, after controlling for these kinds of variables.⁷⁷ A recent study from the University of California, Berkeley shows that discriminatory lending practices have persisted even with the advent of online lending.⁷⁸ In the insurance context, one famous investigation in Missouri found that low-income people of color paid higher rates for less coverage than their white counterparts, even though losses were actually greater in predominantly white areas.⁷⁹

These harms intersect with, and are compounded by, segregation. A study by Furman Center Faculty Directors Ingrid Gould Ellen and Vicki Been⁸⁰ highlights the relationship between

⁷⁴ Conciliation Agreement, U.S. Dep’t of Hous. & Urb. Dev. v. Mack, Mack & Waltz Ins. Grp., FHEO No. 04-13-0910-8 (2016); Conciliation Agreement, U.S. Dep’t of Hous. & Urb. Dev. v. McGowan & Co., Inc., FHEO No. 04-13-0910-8 (2016).

⁷⁵ See, e.g., Poverty Race Research Action Council and Klein Hornig LLP, Comment Letter on HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard (Oct. 17, 2019), <https://www.regulations.gov/document?D=HUD-2019-0067-1907>; Metropolitan Housing Coalition, Comment Letter on HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard (Oct. 16, 2019), John Yinger, Syracuse University, Comment Letter on HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard (Oct. 9, 2019), <https://www.regulations.gov/document?D=HUD-2019-0067-1117>.

⁷⁶ Steil et al., *supra* note 31, at 760.

⁷⁷ Patrick Bayer, Fernando Ferreira & Stephen L. Ross, *Race, Ethnicity and High-Cost Mortgage Lending* (Nat’l Bureau of Econ. Research Working Paper No. 20762, 2014); Jacob S. Rugh, Len Albright & Douglas S. Massey, *Race, Space, and Cumulative Disadvantage: A Case Study of the Subprime Lending Collapse*, 62 SOC. PROBS. 186 (2015).

⁷⁸ Robert Bartlett et al., *Consumer-Lending Discrimination in the FinTech Era* (Nat’l Bureau of Econ. Research Working Paper No. 25943, 2019).

⁷⁹ See 139 Cong. Rec. 22,459 (1993) (statement of Rep. Joseph P. Kennedy, II).

⁸⁰ Professor Been is currently on leave while serving as New York City’s Deputy Mayor for Housing and Economic Development.

discriminatory lending and segregation, finding that “black borrowers who live in more segregated metropolitan areas are more likely to get high-cost loans.”⁸¹ Our research thus shows that people of color who already live in segregated neighborhoods are further disadvantaged through discriminatory lending practices.⁸²

Decades of discrimination in home financing have created stark racial wealth gaps. As Steil et al. observe, “gaps in wealth by race are less a product of income disparities than of differential access to good homes in high-quality neighborhoods, which in turn produces racial differences in homeownership rates, home values and the accumulation of home equity, the principal source of wealth for most American families.”⁸³ According to one study, disparities in homeownership were the single largest contributor to the racial wealth gap.⁸⁴

The kind of lending discrimination HUD has repeatedly targeted under disparate impact theories has also led to a foreclosure crisis in Black and Latinx communities. Leading up to the Great Recession, Black and Latinx households were disproportionately targets of subprime lending. These subprime loans were foreclosed upon at rates significantly higher than prime loans.⁸⁵ The subsequent foreclosure crisis massively reduced homeownership rates in these communities.⁸⁶ In the aggregate, this represented an enormous loss of wealth in Black and Latinx communities. At the individual level, the loss of a home is a severely disruptive and costly event for residents, who lose their home equity and may be forced to relocate.⁸⁷ In fact, foreclosure has been consistently

⁸¹ Vicki Been, Ingrid Ellen & Josiah Madar, *The High Cost of Segregation: Exploring Racial Disparities in High-Cost Lending*, 36 *FORDHAM URB. L.J.* 361, 381 (2009) (“These relationships hold true even when individual borrower characteristics and other metropolitan area attributes are taken into account. . . . We see a generally similar story for Hispanic borrowers.”).

⁸² See also Derek S. Hyra et al., *Metropolitan Segregation and the Subprime Lending Crisis*, 23 *HOUSING POL’Y DEBATE* 177 (2013) (finding that black/white segregation helped predict subprime lending, after controlling for demographic and financial factors).

⁸³ Steil et al., *supra* note 31, at 759. see also Laurie Goodman, Jun Zhu & Bing Bai, *Overly Tight Credit Killed 1.1 Million Mortgages in 2015*, *URB. INST.: URB. WIRE* (Nov. 20, 2016), <https://www.urban.org/urban-wire/overly-tight-credit-killed-11-million-mortgages-2015>; *Housing Credit Availability Index, Q1 2019*, *URB. INST.: HOUS. FIN. POL’Y CTR.*, (last updated July 16, 2019), <https://www.urban.org/policy-centers/housing-finance-policy-center/projects/housing-credit-availability-index>.

⁸⁴ THOMAS SHAPIRO, TATJANA MESCHEDÉ & SAM OSORO, *THE ROOTS OF THE WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE* (2013), <https://heller.brandeis.edu/iasp/pdfs/racial-wealth-equity/racial-wealth-gap/roots-widening-racial-wealth-gap.pdf>.

⁸⁵ Dan Immergluck & Geoff Smith, *Risky Business—An Econometric Analysis of the Relationship Between Subprime Lending and Neighborhood Foreclosures*, *WOODSTOCK INST.* (2004); Dan Immergluck & Geoff Smith, *Measuring the Effect of Subprime Lending on Neighborhood Foreclosures: Evidence from Chicago*, 40 *URB. AFF. REV.* 362 (2005).

⁸⁶ Steil et al., *supra* note 31.

⁸⁷ G. THOMAS KINGSLEY, ROBIN SMITH & DAVID PRICE, *URB. INST.*, *THE IMPACTS OF FORECLOSURES ON FAMILIES AND COMMUNITIES* (2009), <https://www.urban.org/sites/default/files/publication/30426/411909-The-Impacts-of-Foreclosures-on-Families-and-Communities.PDF>.

shown to adversely affect health, leading to increased rates of depression, anxiety and even suicide.⁸⁸

Foreclosures also have a host of negative spillover effects on the broader community. Many studies have shown that foreclosures increase crime.⁸⁹ Furman Center Faculty Director Ingrid Gould Ellen, working with Johanna Lacoé and Claudia Sharygin, has demonstrated that additional foreclosures increase crime on the same blockface as the foreclosed property, primarily as a result of the reduced maintenance and oversight of properties on their way to bank ownership.⁹⁰ Foreclosed properties also drag down the property values of nearby homes.⁹¹

The Proposed Rule would substantially reduce oversight of predatory, racially-targeted lending and insurance practices and make homeownership and prosperity more elusive for communities of color.⁹² HUD overlooks a vast research base in failing to explain how the Proposed Rule will affect the scope of discriminatory lending and insurance practices and how increased discrimination in these fields will harm borrowers and homeowners.

Barriers to Housing for Survivors of Domestic Violence

Disparate impact litigation also provides redress against housing policies that have discriminatory effects on survivors of domestic violence, most of whom are women. HUD has previously identified chronic nuisance ordinances as likely to disparately impact women, at least where they do not offer protections to domestic violence victims.⁹³ Leading studies show that domestic violence is disproportionately the basis for citations under chronic nuisance ordinances. In

⁸⁸ Alexander C. Tsai, Home Foreclosure, Health, and Mental Health: A Systematic Review of Individual, Aggregate, and Contextual Associations (2015), PLOS ONE <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0123182>.

⁸⁹ See, e.g., Sonya Williams, George Galster & Nandita Verma, *Home Foreclosures and Neighborhood Crime Dynamics*, 29 HOUSING STUD. 380 (2013); Charles M. Katz, Danielle Wallace & E.C. Hedberg, *A Longitudinal Assessment of the Impact of Foreclosure on Neighborhood Crime*, 50 J. RESEARCH CRIME & DELINQ. 359 (2011); Thomas D. Stucky, John R. Ottensmann & Seth B. Patyon, *The Effect of Foreclosures on Crime in Indianapolis, 2003-2008*, 93 SOC. SCI. Q. 602 (2012).

⁹⁰ Ingrid Gould Ellen, Johanna Lacoé & Claudia Ayanna Sharygin, *Do Foreclosures Cause Crime?*, 74 J. URB. ECON. 59 (2013).

⁹¹ See, e.g., Jenny Schuetz, Vicki Been & Ingrid Gould Ellen, *Neighboring Effects of Concentrated Mortgage Foreclosures*, 17 J. HOUSING ECON. 306 (2008); John P. Harding, Eric Rosenblatt & Vincent W. Yao, *The Contagion Effect of Foreclosed Properties*, 66 J. URB. ECON. 164 (2008); Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single Family Mortgage Foreclosures on Property Values*, 17 HOUSING POL'Y DEBATE 57 (2006).

⁹² See *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1360 (6th Cir. 1995) (“the availability of property insurance has a direct and immediate affect [sic] on a person’s ability to obtain housing”); *N.A.A.C.P. v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 297 (7th Cir. 1992) (“No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable.”).

⁹³ U.S. Dep’t of Hous. & Urb. Dev., Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services (Sept. 13, 2016), <https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF>.

Milwaukee, for example, domestic violence was the second-most commonly specified nuisance activity cited, with a citation issued every 4.6 days.⁹⁴

The effect on domestic violence survivors can be catastrophic. In the same study of Milwaukee, Desmond and Valdez found that after receiving a nuisance citation involving domestic violence, landlords evicted their tenants 57 percent of the time (and threatened eviction in still more cases).⁹⁵ Women are forced to choose between eviction and silence—a choice that gives abusers still more power over their victims.⁹⁶ In one case brought by HUD, for example, a woman could not escape her ex-boyfriend’s abuse because under her local nuisance ordinance, any further calls to the police would lead to her eviction. His abuse escalated until he eventually stabbed her in the neck, at which point she could not avoid seeking medical help—and was ultimately served eviction papers for doing so.⁹⁷

Evictions stemming from chronic nuisance ordinances help contribute to extremely high rates of homelessness among domestic violence survivors. According to the Department of Health and Human Services, as many as 57 percent of homeless women identify domestic violence as the immediate cause of their being homeless.⁹⁸ Thirty-eight percent of domestic violence victims become homeless at some point in their lives.⁹⁹

These costs are considerable: they are the difference between being housed and being homeless, and in some cases the difference between life and death. HUD must acknowledge that its Proposed Rule would increase these harms to domestic violence survivors. As a comment submitted by Michelle Aronowitz and Edward Golding in response to the Proposed Rule notes, the Proposed Rule risks foreclosing liability altogether in scenarios that could leave domestic violence survivors without recourse¹⁰⁰—yet HUD fails to address the consequences of removing such a crucial lifeline.

⁹⁴ Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC’Y REV. 130 (2013); see also ACLU WOMEN’S RIGHTS PROJECT & SOC. SCI. RESEARCH COUNCIL, SILENCED: HOW NUISANCE ORDINANCES PUNISH CRIME VICTIMS IN NEW YORK 2 (2015), https://www.aclu.org/sites/default/files/field_document/equ15-report-nuisanceord-rel3.pdf (finding that half of all warnings issued under one New York city’s chronic nuisance ordinance involved domestic violence).

⁹⁵ Desmond & Valdez, *supra* note 94, at 133.

⁹⁶ Gretchen Arnold & Megan Slusser, *Silencing Women’s Voices: Nuisance Property Laws and Battered Women*, 40 L. & SOC. INQ. 908 (2015).

⁹⁷ Complaint, *Briggs v. Borough of Norristown et al.*, No. 2013 C 2191 (E.D. Pa. Apr. 24, 2013).

⁹⁸ *Domestic Violence and Homelessness: Statistics*, U.S. DEP’T OF HEALTH & HUMAN SERVS.: FAMILY & YOUTH SERVS. BUREAU (2016), <https://www.acf.hhs.gov/fysb/resource/dv-homelessness-stats-2016>.

⁹⁹ *Id.*

¹⁰⁰ Aronowitz & Golding, *supra* note 33, at 5 (“The proposed third-party defense does more than simply allow a defendant to challenge causation—which the defendant is already entitled to do without a regulatory safe harbor. It gives the defendant 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 other

Barriers to Housing for People with Disabilities

The harms of housing discrimination are not confined to race or sex. Disparate impact litigation has also provided people with disabilities with recourse in the face of pervasive discrimination and barriers to accessible, equitable housing.¹⁰¹ This exclusion contributes to high poverty rates among people with disabilities.¹⁰² People with disabilities also suffer from a particularly acute need for housing. Nearly forty percent of people experiencing homelessness have some form of disability,¹⁰³ and they are substantially more likely to experience chronic homelessness.¹⁰⁴ While the Americans with Disabilities Act provides recourse against many forms of disability discrimination, the Act does not apply to private housing, leaving the Fair Housing Act an important protection.

Discrimination in private housing markets affects people with disabilities in myriad ways. For example, chronic nuisance enforcement disproportionately penalizes people who must regularly make calls for emergency medical assistance, as frequent emergency calls are considered a form of chronic nuisance.¹⁰⁵ Disparate impact litigation has also been used to mount successful challenges to facially neutral zoning practices that provide obstacles to constructing accessible housing¹⁰⁶ or siting group homes¹⁰⁷ and recovery facilities¹⁰⁸ for plaintiffs with disabilities. HUD should therefore analyze and disclose the consequences of curtailing disparate impact liability on people with disabilities.

protected characteristic. Although the landlord may not always be sued for such discrimination, liability would not necessarily be limited to the city, as the proposed rule would have it.”) (internal citations omitted)

¹⁰¹ MARGERY AUSTIN TURNER ET AL., URB. INST., DISCRIMINATION AGAINST PERSONS WITH DISABILITIES: BARRIERS AT EVERY STEP (2005), https://www.urban.org/research/publication/discrimination-against-persons-disabilities/view/full_report.

¹⁰² *Disability and Socioeconomic Status*, AMERICAN PSYCHOLOGICAL ASS’N, <https://www.apa.org/pi/ses/resources/publications/disability> (last visited Oct. 16, 2019).

¹⁰³ *Homelessness in America: Overview of Data and Causes*, NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, https://nlchp.org/wp-content/uploads/2018/10/Homeless_Stats_Fact_Sheet.pdf (last visited Oct. 16, 2019).

¹⁰⁴ U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, HOMELESSNESS IN AMERICA: FOCUS ON CHRONIC HOMELESSNESS AMONG PEOPLE WITH DISABILITIES (2018), https://www.usich.gov/resources/uploads/asset_library/Homelessness-in-America-Focus-on-chronic.pdf.

¹⁰⁵ See Alisha Jarwala & Sejal Singh, *When Disability Is a “Nuisance”: How Chronic Nuisance Ordinances Push Residents with Disabilities Out of Their Homes*, 54 Harv. C.R.-C.L. L. Rev. 875, 896 (2019) (arguing that chronic nuisance ordinances “that punish police calls have the predictable result of disproportionately punishing people for clear manifestations of disabilities, such as calling a suicide hotline or engaging in self-harm”).

¹⁰⁶ *Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp. 2d 762 (E.D.N.Y. 1999).

¹⁰⁷ *Horizon House Dev. Servs. v. Township of Upper Southampton*, 804 F. Supp. 683 (E.D. Pa. 1992).

¹⁰⁸ *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992). See also *Ass’n of Relatives & Friends of AIDS Patients v. Regulations & Permits Admin.*, 740 F. Supp. 95 (D.P.R. 1990) (finding disparate impact on the basis of disability when government agency refused to issue zoning permit for AIDS hospice).

The benefits of integration for people with disabilities are important but distinct from issues of racial segregation. The effects of limiting federal oversight and disparate impact litigation in the context of disability merit thorough and separate consideration.¹⁰⁹

II. The Proposed Rule’s Problematic Distinction Between “Single Events” and Policies or Practices

The Furman Center’s and Terner Center’s research and experience with local land use and zoning policy and practice gives rise to a serious concern about the Proposed Rule’s introduction of a problematic distinction between “single events” and “policies or practices” for purposes of determining the scope of disparate impact review. This distinction does not comport with actual land use practice, and we strongly encourage HUD to remove this distinction.

The Proposed Rule sharply limits the policies or practices against which a disparate impact claim can be brought by suggesting in its preamble that a “single event—such as a local government’s zoning decision or a developer’s decision to construct a new building in one location instead of another” will generally not suffice. The Proposed Rule states that only a plaintiff who can prove that “the one-time decision is in fact a policy or practice” or is “the equivalent of a policy or practice” can make out a prima facie case.¹¹⁰ Moreover, the preamble suggests that HUD itself, as opposed to a private plaintiff, will *never* bring a disparate impact claim against a “single event” land-use decision.

This attempt to distinguish single decisions from policies or practices is inconsistent with how zoning and land use regulation is conducted in contemporary life, and inappropriately curbs the application of the Fair Housing Act to large swathes of zoning and land-use practices.¹¹¹ In many—if not most—jurisdictions, so-called “single decisions” are, in fact, the way in which land use policies and practices take place. To immunize them from disparate impact scrutiny is inconsistent with *Inclusive Communities* and incompatible with the purposes of the Fair Housing Act.

¹⁰⁹ For example, the University of Minnesota’s Institute on Community Integration has reviewed the extensive literature on deinstitutionalization and concluded that small community settings—the residences often at issue in the fair housing context—have substantial benefits for people with disabilities, including improved academic, social and self-care skills. *Behavioral Outcomes of Deinstitutionalization for People with Intellectual and/or Developmental Disabilities: Third Decennial Review of U.S. Studies, 1977-2010*, POL’Y RESEARCH BRIEF, Apr. 2011. These are the distinctive types of cost and benefit that HUD must consider with respect to disability discrimination.

¹¹⁰ HUD offers no explanation or definition of when a one-time decision is the “equivalent” of a policy.

¹¹¹ It is likely also untenable in many other contexts, including public sector decisions about public housing and some private sector decision making. *See, e.g.,* Smith v. Town of Clarkton, N.C., 682 F.2d 1055, 1065-66 (4th Cir. 1982) (town’s withdrawal from a multi-municipality housing authority led to disparate impact). HUD should consider how the arguments laid out here with respect to land use apply to private sector decision-making processes as well.

A. Because Zoning and Land Use Policy and Practice Are Carried Out Through Single Decisions, the Proposed Rule Would Inappropriately Exempt Most Land-Use Regimes from Disparate-Impact Scrutiny

Contemporary local land use regulation has become a highly discretionary process characterized by individualized decisions.¹¹² As a leading treatise on zoning law states, “*Individual* discretionary review of any significant development application, whether by the local legislative body or an administrative zoning agency, is now the hallmark of most modern zoning ordinances.”¹¹³

A plethora of tools allow local governments to individually review each proposed development before them. Some jurisdictions require special permits or conditional use permits for broad ranges of uses, including important housing types like senior housing and even residences with as few as two units.¹¹⁴ By requiring special permits, rather than allowing the use as-of-right, the local government reserves for itself the chance to review the merits of each project. Others use “floating zones,” a technique in which a local government sets zoning text ahead of time, but requires a separate approval to fix that text to a particular location on the zoning map. Like special permits, this allows local governments to exercise discretion as to whether a particular project will be allowed at a particular location. Still other municipalities impose site plan review or design review processes on some or all development. In some areas, planned unit developments, in which customized zoning is created for an entire development, are used for most significant projects. Even as-of-right zoning codes are often used, in practice, to ensure ad hoc review of development. By imposing highly restrictive zoning in the first instance, local governments can effectively require any project to seek a variance or a rezoning. As scholars have observed, “piecemeal changes in local land regulations” are “the everyday fare of local land regulations.”¹¹⁵ In other words, the widespread use of discretionary decision-making is a fundamental part of local land-use policy and practice rather than an exception to it.

This is reflected in studies of local zoning and land-use policy. In a 2004 study of the 101 cities and towns in the Boston area, for example, only 17 percent allowed multi-family residential development (an issue at the “heartland” of disparate impact analysis¹¹⁶) as-of-right, while another 16 percent prohibited multi-family residential development outright. The remaining two-thirds of

¹¹² While this comment focuses on zoning as the most important tool of land use regulation, its arguments apply with full force to many other forms of land use regulation, such as subdivision rules.

¹¹³ EDWARD H. ZIEGLER, JR., 1 RATHKOPF’S THE LAW OF ZONING AND PLANNING § 11:4 (4th ed. 2019) (emphasis added).

¹¹⁴ SARA C. BRONIN & DWIGHT H. MERRIAM, 3 RATHKOPF’S THE LAW OF ZONING AND PLANNING § 61:5 (4th ed. 2019).

¹¹⁵ Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls As Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 841 (1983); see also, e.g., Douglas W. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 130 (1981) (“[F]ew developments can proceed today without a zoning variance, amendment, or conditional use permit. Especially in the case of undeveloped land, zoning officials frequently employ low density holding zones to ensure their ability to exercise discretion over the project.”).

¹¹⁶ *Inclusive Communities*, 135 S. Ct. at 2522.

local governments required a special permit for multi-family development.¹¹⁷ Thus, the decision whether to allow multi-family development was not usually made under a blanket policy, but rather reserved to local governments for determination on a case-by-case basis.

The same study also found that the special permit often was not the only discretionary approval required. To build multi-family housing in the town of Northborough, for instance, the Town Meeting would be required to vote to map a parcel into a floating Apartment District, at which point the developer would still be required to secure a special permit from the Zoning Board of Appeals. These independent bodies may not share any overarching “policy”; rather, each is empowered to decide the fate of a development on its own terms.¹¹⁸ As this example illustrates, the town’s policy and practice is manifested in the individualized zoning decisions. The decision-making process has been intentionally structured to give the town—and indeed to give multiple, separate actors within the town—the ability to decide land use questions one by one.¹¹⁹

Another recent analysis of five jurisdictions in the San Francisco Bay Area found that none allowed any as-of-right development whatsoever.¹²⁰ In fact, each required an average of between two and three approvals per development. Depending on the jurisdiction and the type of project, those approvals ranged from conditional use permits, to rezonings, to variances, to planned development permits, to design reviews.¹²¹ In these jurisdictions, there is no development whatsoever approved by a mechanism other than single zoning decisions.

The same is true in numerous other jurisdictions. A larger survey of local governments in California found that in nearly one-third of jurisdictions, every project goes through at least one discretionary review, and that half of jurisdictions that allow as-of-right development limit it to small, single-family homes.¹²² As Turner Center researchers Sarah Mawhorter and Carolina Reid concluded, “Zoning may define the initial rules of development, but the approvals process is where the decisions are made.”¹²³

¹¹⁷ JENNY SCHUETZ, RAPPAPORT INST. FOR GREATER BOS., HARV. KENNEDY SCH. OF GOV., *GUARDING THE TOWN WALLS: MECHANISMS AND MOTIVES FOR RESTRICTING MULTI-FAMILY HOUSING IN MASSACHUSETTS* 4 (2006) https://www.hks.harvard.edu/sites/default/files/centers/rappaport/files/final_townwalls.pdf.

¹¹⁸ The difficulty of ascribing a “policy” distinct from the decisions of the relevant regulators is particularly stark in this example, where the Town Meeting is neither elected nor appointed but rather consists of whichever citizens choose to attend.

¹¹⁹ Of course, regardless of the application of the Proposed Rule, disparate impact continues to apply to a range of zoning and land use actions, such as a comprehensive citywide rezoning, which are unambiguously “policies.”

¹²⁰ Moira O’Neill, Giulia Gualco-Nelson, and Eric Biber, *Developing Policy from the Ground Up: Examining Entitlement in the Bay Area to Inform California’s Housing Policy Debates*, 25 HASTINGS ENV’T L. J. 1, 49 (2019).

¹²¹ *Id.* at 50-51.

¹²² SARAH MAWHORTER & CAROLINA REID, TERNER CTR. FOR HOUS. INNOVATION, U.C. BERKELEY, *LOCAL HOUSING POLICIES ACROSS CALIFORNIA: PRESENTING THE RESULTS OF A NEW STATEWIDE SURVEY* 14 (2018), http://californialanduse.org/download/Terner_California_Residential_Land_Use_Survey_Report.pdf.

¹²³ *Id.* at 15.

The Proposed Rule’s attempted distinction thus lacks a factual basis and does not engage with the reality of contemporary practice. Given the reality that individualized decision-making is a fundamental part of zoning and land-use policy and practice, the Proposed Rule would remove from scrutiny the primary way in which many jurisdictions operationalize their zoning and land-use authority.

B. It Was Understood When the Fair Housing Act was Enacted that Zoning Takes Place Through Single Decisions, and the Federal Government Has Consistently Reaffirmed that Understanding

That zoning frequently takes place through a system of sequential, discretionary “single events” was recognized at the time the Fair Housing Act was enacted. In 1968, the same year as the enactment of the Fair Housing Act, the National Commission on Urban Problems (one of the three blue-ribbon commissions established by the federal government in the wake of the urban riots of the late 1960s) recognized that many local governments had adopted a “wait and see” approach to zoning:

The community obtains de facto control over land development by zoning undeveloped areas for very low densities and then waiting for landowners to seek a map change. The real decisions—perhaps in accordance with an approved plan or pre-stated policies but more often not—are then taken by the local governing body when each application for rezoning is filed.¹²⁴

Consistent with this widespread understanding, the drafters of the Fair Housing Act did not include in the statute anything that suggested an intent to exclude such zoning decisions. For example, the Act defines specific circumstances that are carved out from its reach, none of which relate to individual zoning decisions.

The federal government has consistently reaffirmed this understanding of the zoning process. The 1982 President’s Commission on Housing, convened by President Reagan, identified “increased discretionary zoning authority” as a trend dating back at least to the late 1960s (referencing and reaffirming the National Commission on Urban Problems’ analysis, among other things).¹²⁵ And in 2005, HUD observed that “the increased use of discretionary approvals” requires a “complex negotiating process” between developers and communities, and noted that some localities had eliminated as-of-right zoning altogether.¹²⁶ More recently, the White House’s 2016 Housing

¹²⁴ NATIONAL COMM’N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 206-08 (1968).

¹²⁵ THE PRESIDENT’S COMM’N ON HOUSING, THE REPORT OF THE PRESIDENT’S COMM’N ON HOUSING 179 (1982).

¹²⁶ OFFICE OF POLICY DEV. AND RESEARCH, U.S. DEP’T OF HOUS. & URB. DEV., “WHY NOT IN OUR COMMUNITY?”: REMOVING BARRIERS TO AFFORDABLE HOUSING 8 (2005).

Development Toolkit explained that “[m]ost development today goes through a discretionary review process prior to approval, such as public hearings or local legislative actions.”¹²⁷

As this history reflects, there is and has been widespread understanding from the federal government that nearly all land use decisions now include a discretionary component involving individual decisions. This reinforces the conclusion that any effort to distinguish these from zoning policy and practice is problematic and in conflict with the federal government’s (including HUD’s) long-standing understanding of the factual and legal landscape of American land use regulation.

C. *Inclusive Communities* Makes Clear that Single Zoning Decisions are Subject to Disparate Impact Review

The Proposed Rule’s preclusion of disparate impact review of individual land-use decisions is not required by *Inclusive Communities* or subsequent judicial decisions. To be sure, *Inclusive Communities* cautioned that “a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all.”¹²⁸ Thus, there are one-time decisions for which a disparate impact analysis is inapt.¹²⁹ But, within the zoning and land-use context, the Proposed Rule, without a reasoned basis, goes much further than *Inclusive Communities* requires or suggests.

First, the cautionary language about one-time decisions in *Inclusive Communities* refers only to a private developer deciding where to site a new building. But the Court made it clear that it did not intend to limit liability for public zoning decisions by approvingly citing cases in which single land-use decisions or events were the basis for disparate impact liability. The Court referenced cases like *Huntington Branch, N.A.A.C.P. v. Town of Huntington*¹³⁰ as the “heartland” of disparate impact liability. *Huntington* turned not on a challenge to the Town’s underlying single-family zoning, but rather on “the refusal to rezone” a specific parcel for a specific project.¹³¹ Indeed, in *Huntington*, a town official explained to the plaintiff-developer that the underlying zoning would not affect its ability to build subsidized multifamily housing in a predominantly white neighborhood: the official “assured [the developer] that the property’s R-40 designation (single family homes on one-acre lots) should not be an obstacle because the Town Board, if it supported

¹²⁷ THE WHITE HOUSE, HOUSING DEVELOPMENT TOOLKIT 14 (2016), https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf.

¹²⁸ *Inclusive Communities*, 135 S. Ct. at 2523.

¹²⁹ The decision in *Barrow v. Barrow*, Civil Action No. 16-11493-FDS, 2017 U.S. Dist. LEXIS 103495, at *8 (D. Mass. July 5, 2017), cited by the Proposed Rule, may be one such example. That case, which was brought pro se, involved a dispute among siblings over the terms of a will and the devise of their mother’s property. Whether such a dispute can give rise to disparate impact liability has little in common with whether a single zoning decision can do so.

¹³⁰ 844 F.2d 926 (2d Cir. 1988), *aff’d* 488 U.S. 15 (1988)

¹³¹ *Id.* at 938.

the project, would simply amend the zoning ordinance.”¹³² In *Huntington*, what mattered was the Town’s decision about a single proposal, not its broader zoning policy. Thus, far from being necessitated by *Inclusive Communities*, this aspect of the Proposed Rule contradicts the Supreme Court’s guidance. Accordingly, at least one federal court of appeals has already rejected efforts, post-*Inclusive Communities*, to defeat disparate impact claims brought against a single zoning decision.¹³³

Second, the Proposed Rule’s proposed distinction transforms cautionary language about one-time decisions into binding presumptions and rules. The Supreme Court suggested only that a one-time decision “*may* not be a policy at all.”¹³⁴ Ultimately, this is a context-specific and fact-sensitive inquiry.¹³⁵ The Proposed Rule, in contrast, instructs as a general rule that one-time decisions will not constitute policies or practices. As one court observed in interpreting *Inclusive Communities*, “not all one-time decisions are equal. It is the type and effect of the decision that dictates whether it can be subject to a disparate impact claim.”¹³⁶

D. The Proposed Rule Fails to Acknowledge Or Evaluate the Impact of This New Exemption from the Fair Housing Act

HUD must provide a reasoned explanation for its new position that single zoning decisions are not subject to disparate impact scrutiny. At a minimum, the law requires that HUD “display awareness that it *is* changing position.”¹³⁷ And given past factual findings about the importance of single zoning events—as well as HUD’s statement in its 2013 rulemaking that “practice” is to be defined broadly, to include any facially neutral action¹³⁸—a “more detailed justification than what would suffice for a new policy created on a blank slate” is needed.¹³⁹ Moreover, sound policymaking

¹³² *Id.* at 931.

¹³³ *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 619 (2d Cir. 2016).

¹³⁴ *Inclusive Communities*, 135 S. Ct. at 2523 (emphasis added).

¹³⁵ *See, e.g.*, *Council 31, American Federation of State, County & Municipal Employees v. Ward*, 978 F.2d 373, 377-78 (7th Cir. 1992) (holding that single decisions can be challenged for disparate impact as a matter of law, but explaining difficulties of pleading or proving disparate impact from many single decisions). Even where appellate courts, post-*Inclusive Communities*, have declared government decisions not to be policies, they have looked to lower court fact-finding to reach that conclusion. *See City of Joliet, Illinois v. New W., L.P.*, 825 F.3d 827, 830 (7th Cir. 2016) (“The district court’s *findings* show that the condemnation of Evergreen Terrace is a specific decision, not part of a policy to close minority housing in Joliet”) (emphasis added).

¹³⁶ *Ave. 6E Investments, LLC v. City of Yuma, Arizona*, No. 2:09-CV-00297 JWS, 2018 WL 582314, at *6-7 (D. Ariz. Jan. 29, 2018).

¹³⁷ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

¹³⁸ Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,468 (Feb. 15, 2013) (“The Act and HUD regulations define ‘discriminatory housing practice’ broadly as ‘an act that is unlawful under section 804, 805, 806, or 818.’ As HUD explained in the preamble to the proposed rule, any facially neutral actions, e.g., laws, rules, decisions, standards, policies, practices, or procedures, including those that allow for discretion or the use of subjective criteria, may result in a discriminatory effect actionable under the Fair Housing Act.”).

¹³⁹ *FCC v. Fox*, 556 U.S. at 515.

principles counsel that HUD should engage with the substantial body of research showing the importance of “single events” in contemporary land use regulation.

In providing this explanation, HUD also must grapple with the likely effects of the Proposed Rule. In *Huntington*, the consequence of barring claims based on single events would have been continued racial segregation. Segregation, in turn, has the already-described effects of reducing incomes, decreasing economic mobility, leaving people less healthy, and weakening educational outcomes. For a group home denied a special permit—another single zoning decision—the effect of this provision would be to further isolate people with disabilities from “family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment” and stigmatize them as “incapable or unworthy of participating in community life.”¹⁴⁰ HUD’s explanation of its new position excluding single events from disparate impact scrutiny must also provide a justification for going beyond, and at times contravening, the command of *Inclusive Communities*.

By arbitrarily excluding single zoning decisions from the ambit of the Fair Housing Act, the Proposed Rule would foreclose review of many, and perhaps most, land use decisions—no matter how arbitrary or unjustified. This is inconsistent with the nature of land-use policy and practice in the country today, is not the command of *Inclusive Communities*, and is not compatible with HUD’s duty to carry out the Fair Housing Act by affirmatively furthering fair housing and empowering communities to do the same.

III. “Robust Causality,” Significance, and Materiality

The Proposed Rule invites proposed definitions for “robust causal link.” The Proposed Rule identifies robust causality as a new requirement imposed by *Inclusive Communities*. As other commenters have pointed out, however, *Inclusive Communities* did not suggest the creation of a new, heightened causality requirement.¹⁴¹ Rather, it called attention to, and described as “robust,” a longstanding requirement that a plaintiff be able to show that a defendant’s challenged policy or practice is a cause of the plaintiff’s harm.¹⁴²

¹⁴⁰ *Olmstead v. L.C.*, 527 U.S. 581, 600-601 (1999).

¹⁴¹ See, e.g., Poverty Race Research Action Council and Klein Hornig LLP, Comment Letter on HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard (Oct. 17, 2019), <https://www.regulations.gov/document?D=HUD-2019-0067-1907>; Constitutional Accountability Center, Comment Letter on HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard (Oct. 15, 2019), <https://www.regulations.gov/document?D=HUD-2019-0067-1578>; National Low Income Housing Coalition, Comment Letter on HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard (Oct. 8, 2019), <https://www.regulations.gov/contentStreamer?documentId=HUD-2019-0067-1120&attachmentNumber=1&contentType=pdf>; Fair Housing Center of West Michigan, Comment Letter on HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard (Sept. 9, 2019), <https://www.regulations.gov/document?D=HUD-2019-0067-0311>.

¹⁴² Notably, the Court’s description of the “robust causality requirement” consisted of a quote from *Wards Cove Packing Co. v. Atonio*, 490 U. S. 642, 653 (1989), a standard that is now thirty years old.

Any final rule, if one is promulgated, should reflect the existing doctrine’s understanding that a plaintiff who is able to identify a policy or practice and marshal a showing of causation has identified a robust cause of their alleged harm, rather than impose a requirement not grounded in *Inclusive Communities*, that plaintiffs prove causality an additional quantum of “robustness.” Any new definition of causality or “robust” risks being overly prescriptive for what is necessarily a case- and context-sensitive question of fact.

Similar issues plague any attempt to define “significance” or “materiality.” The final rule should allow these terms to be defined contextually, as they traditionally have been, and not create novel safe harbors for acts of discrimination artificially defined as “insignificant,” “immaterial” or otherwise small.

A. Demonstrating Causation is a Context-Specific Determination that Should Not Be Restrictively Defined

Demonstrating causation, in both the legal and statistical senses, is context-specific.¹⁴³ Sometimes causation is self-evident. Take, for example, a landlord policy that prohibits the installation of anything upon a doorframe, upon penalty of eviction. If a Jewish family is evicted for installing a mezuzah, the causal connection is plain.¹⁴⁴ No statistical proof at all would be necessary to show causation—just a basic explanation of the sequence of events and the operation of the landlord’s policy.

In many other cases, only relatively simple statistics are required. In *Wards Cove Packing Co. v. Atonio*, for example, the Court made clear that a plaintiff could have satisfied its prima facie case with a comparison “between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs.”¹⁴⁵ Put differently, the Court required only a side-by-side comparison of two percentages. To be sure, plaintiffs were required to compare the correct percentages—hence providing evidence that shed light on causation—but no advanced statistical technique was required. Nor did the Court impose any particular threshold of significance. Notably, *Inclusive Communities* described *Wards Cove* as embodying the “robust” causation requirement, and its approach has consistently been shown capable of demonstrating a robust causal link.

By way of analogy, social science also provides many ways to show causation.¹⁴⁶ In academic settings, economists and other statisticians use a wide variety of techniques to investigate

¹⁴³ It goes without saying that legal causation and statistical causation are in other ways distinct.

¹⁴⁴ Cf. *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009) (en banc).

¹⁴⁵ 490 U.S. at 650.

¹⁴⁶ It is important to reiterate that this is only an analogy—legal and statistical causation do not require the same standards and are not used for the same purposes. To illustrate this point, the gold standard (not always achievable) in social science is a randomized and controlled experiment. Such experiments almost never happen naturally, but the law still must provide redress to individuals who were harmed by a particular course of events.

causation.¹⁴⁷ The analysis of causation varies based on the data available, the number and type of variables at play, the theoretical and historical grounding for a hypothesis, and, perhaps most importantly, what question a researcher is trying to answer.¹⁴⁸ In the scholarly context, it would be impossible and highly counter-productive to provide a single definition of what suffices to show causality.

Doing so would be even more counter-productive in the legal context, as courts must be able to analyze causation in the context of any particular plaintiff’s allegations and the particular facts and information available (both pre- and post-discovery). Indeed, the Supreme Court has made clear that the evidence required to demonstrate causation has “never been framed in terms of any rigid mathematical formula.”¹⁴⁹ Thus, even where plaintiffs have turned to more complex statistical techniques, like regression analyses, to uncover less obvious disparities, courts have not demanded any *particular* technique or quantitative showing to show causation; that is a question of proof, to be resolved at summary judgment or trial according to the facts at hand.¹⁵⁰

Indeed, any definition of causation would need to allow for such factual development over the course of litigation. The simplest showings—with few or no statistics—might be obvious, robust evidence of causality, under the right facts (as in the example of the mezuzah). In other cases, a qualitative description of the challenged policy might be enough to plausibly suggest causation at the pleading stage, but statistics might be necessary to demonstrate causation post-discovery or at trial.

Accordingly, the final rule should not offer a restrictive description or definition of what constitutes a showing of causation. As HUD itself recognized in promulgating its 2013 discriminatory effects standard, any such definition will artificially close off important forms of causation and methods of proof.¹⁵¹ In social science and in law alike, establishing causation is necessarily a flexible and context-sensitive inquiry. It is best left for the finder of fact, as it has traditionally been.¹⁵² Moreover, just as there is no set threshold at which causation is established, there is no threshold at which evidence of causation is considered “robust” causation. As already noted, this concept finds no support in existing law. *Inclusive Communities* described the robustness of the ordinary, *Wards Cove* standard of causation; it did not create a novel, elevated

¹⁴⁷ See generally Joshua D. Angrist & Jörn-Steffen Pischke, *MOSTLY HARMLESS ECONOMETRICS: AN EMPIRICIST’S COMPANION* (2008), a guide to major econometrics techniques.

¹⁴⁸ *Id.* at 3-7 (noting that econometric techniques can only be employed after defining research agenda, including defining question precisely in light of available data and theoretical grounding).

¹⁴⁹ *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 994–95 (1988).

¹⁵⁰ *Nat’l Fair Hous. All. v. Fed. Nat’l Mortg. Ass’n (“Fannie Mae”)*, 294 F. Supp. 3d 940, 944, 948 (N.D. Cal. 2018) (“[T]he specific contentions about alleged deficiencies in methodology go to the weight of the evidence and are not dispositive of the determination whether Plaintiffs have adequately pled” a disparate impact).

¹⁵¹ *Implementation of the Fair Housing Act’s Discriminatory Effects Standard*, 78 Fed. Reg. 11,460, 11,469 (Feb. 15, 2013) (“In HUD’s experience, identifying the specific practice that caused the alleged discriminatory effect will depend on the facts of a particular situation and therefore must be determined on a case-by-case basis.”).

¹⁵² *Restatement (Third) of Torts: Phys. & Emot. Harm* § 28 cmt. c (Am. Law Inst. 2010) (“Causation is a question of fact normally left to the jury, unless reasonable minds cannot differ.”).

causation standard. Even if *Inclusive Communities* had created a new heightened causation requirement, however, there would be no basis for a fixed definition of the evidence that determines “robust” causation.

Again, the analogy to social scientific concepts of causation is instructive. What constitutes robustness, in the statistical (as opposed to legal) sense, is dependent on the statistical model being used and the strength of the underlying theory being tested; it is therefore even more infeasible to define *ex ante* than causation.¹⁵³ Additionally, whether evidence of causation is robust is distinct from the magnitude of the causal relationship.

As such, the appropriate definition of “robust causal link” should be only that which the Supreme Court has *already* provided: “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.”¹⁵⁴

B. “Significance” and “Materiality” Are Also Context-Dependent and Should Not Be Restrictively Defined, Nor Allowed to Create Safe Harbors for Discrimination

The same reasoning extends to the Proposed Rule’s imposition of a new requirement that a disparity be “significant” and its request for a definition of a “material part.” The significance of a disparity—from both social scientific and legal perspectives—cannot be defined *ex ante*, without reference to the inquiry at hand, the facts available, and the broader context.

Even quantitatively small disparities can be highly “significant” in terms of outcomes. A policy which affected only 0.5 percent of a housing authority’s dwelling units, but which had the certain effect of excluding members of a particular protected class from those units, would have a significant and material effect on the families who otherwise would have lived there, although the magnitude of the effect is small.

Excluding “negligible” disparities is also unworkable as a matter of law: the Fair Housing Act is meant to “eradicate discriminatory practices.”¹⁵⁵ It is not meant to allow discrimination to continue, provided that discrimination is somehow deemed minor. Disparities must, of course, be significant in the narrow sense that they are sufficient to show causation.¹⁵⁶ But there is no stand-alone exemption in the Fair Housing Act for small acts of discrimination.

As with “robust” evidence of causation, an understanding of the nature of significance and materiality in both law and social science counsels these concepts should not be modified from existing practice, which leaves them for courts to evaluate in their proper factual context.

¹⁵³ Robustness has a distinct meaning in statistics, concerning how a statistical method is affected by outliers or other deviations from assumptions in the statistical model. This definition is largely inapplicable to the issue at hand.

¹⁵⁴ 135 S. Ct. at 2523. The best reading of *Inclusive Communities* is that the Court was describing the robust causation requirement already present in civil rights law (citing *Wards Cove*), not introducing a brand-new robustness requirement without claiming to do so or offering a definition of robustness.

¹⁵⁵ *Id.* at 2511.

¹⁵⁶ *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 96 n.13, (2008).

Moreover, any final rule should make clear that the significance of a disparity is relevant only insofar as it affects the showing of causation, not as an independent safe harbor for quantitatively small disparities.

This approach, with respect to causation, significance, and materiality alike, does not risk the use of quotas or a flood of litigation. As Stacy Seicshnaydre points out, the proffer required of disparate impact plaintiffs is already thoroughly robust, and courts regularly conduct rigorous assessments of plaintiffs' showings at the summary judgment stage. Seicshnaydre thus concludes that numerous doctrinal safeguards already in place "limit the number of claims and the judicial resources required to be expended on them."¹⁵⁷ Going beyond current law would be unsupported by *Inclusive Communities*, not required by any problem in existing fair housing litigation, and ultimately based on highly arbitrary definitions of the evidence needed to establish robustness, significance, and materiality.

IV. Encouraging or Discouraging Data Collection

A. The Proposed Rule Unnecessarily Discourages Data Collection

Finally, we urge HUD to remove language from any final rule discouraging the collection of data. The Proposed Rule adds language stating that nothing in HUD's Part 100 regulations "requires or encourages the collection of data" with respect to protected classes, and that the "absence of any such collection efforts shall not result in any adverse inference against a party." This language is overbroad and, contrary to the Proposed Rule's suggestion, not necessary to prevent the use of racial quotas.

Adverse inferences based on a failure to collect data can be appropriate, regardless of whether the disparate impact regime itself requires data collection. When a defendant fails to collect data about a protected class in violation of *some other* law, policy, or practice—apart from HUD's disparate impact rules—an adverse inference may be appropriate. The case of *Morrow v. Washington* is instructive.¹⁵⁸ There, the court drew an adverse inference against a city's failure to collect data on racial profiling, where Texas law required the city to collect such data. Likewise, if a party conspicuously fails to collect one set of data, when it has a clear policy of collecting other analogous data sets, inferences may be appropriate.¹⁵⁹ Whether or not data collection is required by HUD's disparate impact regulations, a failure to collect data may be illegal or irregular. There is no logical basis for a categorical ban on adverse inferences based on failures to collect (or analyze) data. Such inferences may be an important part of adjudicating whether disparate impact

¹⁵⁷ Seicshnaydre, *supra* note 35, at 412.

¹⁵⁸ 277 F.R.D. 172, 184-85 (E.D. Tex. 2011).

¹⁵⁹ *See, e.g.*, Floyd v. City of N.Y., 959 F.Supp.2d 540, 659 (S.D.N.Y. 2013) ("while the NYPD is an acknowledged leader in the use of data collection and analysis to improve the effectiveness of policing, it has hindered the collection of accurate data concerning the constitutionality of its stops").

liability exists, including helping to determine whether a policy or practice exists and assessing a defendant’s proffered justification for a policy.

We also note that this language extends beyond disparate impact. HUD’s Part 100 regulations cover a wide array of violations under the Fair Housing Act. This language discouraging data collection therefore cannot be justified based only on *Inclusive Communities*, as the Proposed Rule suggests, for *Inclusive Communities* only concerned disparate impact.

Nor does data collection somehow require the use of quotas. HUD does not explain why this would be, and it is difficult to see the logic. Given *Inclusive Communities*’ discussion of the robust causation requirement for a disparate impact claim under the Fair Housing Act, it is clear that a mere “racial imbalance” does not establish a prima facie case of disparate impact.¹⁶⁰ Data about protected classes cannot, without other elements like causation and a lack of justification, require any remedy under the FHA’s protection against disparate impact, much less compel the use of quotas. Tellingly, the EEOC has required large companies to report the number of individuals employed by job category, sex, race and ethnicity since 1966; such data collection has not led to the use of quotas under Title VII.¹⁶¹ Data collection would not do so under Title VIII either.

B. The Proposed Rule Should Encourage, Not Discourage, Data Collection

Formally, the Proposed Rule only fails to encourage data collection. Including language that data collection is not encouraged, however, may be interpreted as blessing the non-collection of data. Data is essential to improving housing outcomes. In part, this is because the housing market is complex and dynamic; there is often more to it than meets the naked eye. Especially when it comes to opaque algorithms or facially-neutral local regulations, data is the key to determining what a policy actually does in practice.¹⁶² It was data collection, for example, that demonstrated that seemingly neutral chronic nuisance ordinances in fact disproportionately hurt female domestic violence survivors; there would be no way to discern that disparity from the face of the policy. Moreover, data collection allows a variety of stakeholders, including cities, landlords, and lenders, to improve voluntarily, rather than after litigation, and allows researchers to identify and disseminate best practices.

V. Conclusion

Disparate impact is a cornerstone of the Fair Housing Act and, as the Supreme Court has affirmed, an essential tool for breaking down residential segregation and addressing discrimination in the housing market. Revisions to the standards for a disparate impact claim, therefore, must be based on a thorough and thoughtful consideration of the likely effects of any such revision. The Proposed Rule, however, appears not to incorporate much of what research shows about segregation,

¹⁶⁰ *Inclusive Communities*, 135 S. Ct. at 2523.

¹⁶¹ *Cf. Nat’l Women’s Law Ctr. v. Office of Mgmt. & Budget*, 358 F.Supp.3d 66, 72 (D.D.C. 2019) (describing EEO-1 form).

¹⁶² *See generally* Anupam Chander, *The Racist Algorithm?*, 115 MICH. L. REV. 6, 1023 (2017).

housing discrimination, and the land use decision-making process. The Proposed Rule does not engage with extensive research showing that, by limiting the availability of disparate impact claims and decreasing federal oversight of discriminatory effects, it will impose additional social costs on the classes of people protected by the Fair Housing Act. Nor does the Proposed Rule account for the discretionary nature of modern land use planning; the fact-sensitive nature of causation and statistical significance; and the critical importance of data collection in the housing field. This latter point is of particular significance to our respective centers. Accordingly, HUD should reconsider and withdraw its Proposed Rule.

Sincerely,



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