Submitted via www.regulations.gov
Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0001

Re: HUD's Implementation of the FHA's Disparate Impact Standard
Docket Number: FR-6111-P-02, RIN 2529-AA98

Sir or Madam:

We are writing to oppose HUD's 2019 proposed rule "HUD's Implementation of the FHA's (FHA) Disparate Impact Standard." This proposed rule would erode fair housing protections and allow for the perpetuation of segregation in Ohio. It would dismantle an essential tool for combatting discrimination and restrict housing access for people of color, individuals with disabilities, families with children, and others. Replacing existing standards with this proposed rule jeopardizes decades of civil and disability rights progress.

The undersigned organizations and individuals are committed to expanding access to safe, decent, fair, and affordable housing in Ohio. We oppose the proposed rule because it runs contrary to this goal.

The federal FHA prohibits housing policies that have a discriminatory effect, even if there was no obvious intent to discriminate. Eleven U.S. Courts of Appeals and the Supreme Court have ruled that violations of the FHA can be established through a disparate-impact standard of proof. In 2013, HUD codified decades of federal court jurisprudence to establish uniform "burden-shifting" standards for determining when a housing practice with a discriminatory effect violates the law. This is the current fair system used to show disparate impact.

This proposed rule moves to a discriminatory test that ignores the reality of residential segregation and would severely limit the application of the FHA. We should be advancing – not erasing the equal enforcement of housing codes for all Americans.

I. HUD's proposed rule contradicts the central purpose of FHA

HUD's proposed rule would tip the scales in favor of businesses and landlords and harm at-risk communities. This is the opposite of what Congress intended when it passed the FHA. The FHA was enacted with lofty goals; with its passage Congress boldly stated that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[1] The standard outlined in this proposed rule would

[1] 42 U.S.C. § 3601, quoted at *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015) 135 S. Ct. 2507, 2521.

make it nearly impossible to establish disparate impact liability under the FHA. HUD's proposal ignores the Supreme Court's guidance as reflected in *Inclusive Communities Project*.

II. HUD's proposed rule creates confusion, ignores decades of precedent

HUD's 2013 disparate impact rule laid out a reasonable balancing test that incorporated the longstanding approach to disparate impact analysis reflected in case law. This proposed changes are a radical departure from court precedent.[2] HUD is now introducing a burdensome and confusing balancing test with nine subparts that puts an insurmountably high burden on individuals seeking to enforce the FHA using disparate impact theory.

The Supreme Court relied on HUD's 2013 disparate impact rule and did not disfavor it.[3] It is not clear why HUD now seeks to ignore precedent because these changes are intended to significantly limit liability for landlords, lenders, insurance companies, local governments, and others involved in the provision of housing. Sophisticated housing providers know they may not overtly treat people differently. Actual discrimination often takes the form of seemingly neutral policies that effectively harm people of color. It can be profitable to discriminate against people of color and other protected minorities because those groups have less access to social benefits and wealth. By maintaining these kinds of race-neutral policies, businesses reinforce historical advantages of white people while perpetuating disadvantages of people of color. Yet, with HUD's proposal, profit is made a "legitimate objective."[4] HUD, the government enforcement arm for fair housing, should not use profit as a justification to perpetuate that segregation that the FHA was created to combat.

III. HUD's rule improperly attempts to eliminate the "perpetuation of segregation" theory of discriminatory effects liability

The core purpose of the FHA is ending segregation. The law was passed, in part, to combat racial segregation in the United States, yet our communities remain segregated to this day.[5]

Preserving meaningful tools to challenge actions that increase segregation is especially important in Ohio. In 2010, in the Cleveland metropolitan area, while nearly 72% of the population was white and nearly 20% of the population was black, the distribution of the

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[2] *Inclusive Communities Project, Inc.*, 135 S.Ct. at 2519-2520, 2523 (Justice Kennedy discusses the legislative history of the FHA, which shows that Congress ratified via amendment what nine Courts of Appeal all concluded unanimously prior to Congress's amendments to the FHA; he concluded that the FHA is properly interpreted to include disparate impact liability and HUD rulemaking).

[3] *Id.* at 2515.

[4] *Id.*

[5] *Racial Segregation in the San Francisco Bay Area*, Part 1, Stephen Menendian and Samir Gambhir (Oct. 29, 2018) Available at: https://haasinstitute.berkeley.edu/racial-segregation-san-francisco-bay-area.

population across the area indicated very high levels of segregation.[6] Cincinnati[7] and Columbus[8] have only a slightly lower levels of segregation than Cleveland, still has a very high level of segregation. Segregation of Ohio's neighborhoods, with its long history in housing and banking policies from the 1920's, such as redlining, has led to high income-inequality, poverty, and poorer health outcomes.[9] For example, residents of the Lyndhurst neighborhood on the East Side of Cleveland live 24 years longer on average than residents of the Hough neighborhood in Cleveland, only 8 miles away.[10] Ohio has one of the highest gaps between white and black infant mortality rates in the nation. African-American homeownership has also declined precipitously. Ohio, like the rest of the U.S., has a history of denying access to basic public services like water, sewer, or police protection.[11]

The legacy of segregation in Ohio, far from being an issue of the past, only demonstrates the need for remedies provided by the FHA, which demands the inclusion of disparate impact claims. HUD ought not forget that *separate can never be equal*, and tools like disparate impact liability are necessary to chip away at the ongoing perpetuation of segregation in Ohio and across the nation.

IV. Suits targeting single land use are the heartland of disparate impact liability under the FHA, and this rule would exclude them

Eliminating plaintiffs' remedies in the face of discriminatory zoning practices ignores the devastating history of discrimination in the U.S., a legacy that is far from being dry ink in history books. Ohio is no exception.

In *Inclusive Communities Project,* the Supreme Court recognized that "suits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from

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[6] Data pulled from: Diversity and Disparities, https://s4.ad.brown.edu/Projects/Diversity/segregation2010/msa.aspx?metroid=17460 (last visited Sept. 27, 2019). The dissimilarity index for the white-black group was 72.6, where "a value of 60 (or above) is considered very high. It means that 60% (or more) of the members of one group would need to move to a different tract in order for the two groups to be equally distributed."

[7] The index number was 66.9. https://s4.ad.brown.edu/Projects/Diversity/segregation2010/msa.aspx?metroid=17140 (last visited Sept. 27, 2019).

[8] The Columbus metropolitan area had an index value of 60 in 2010. https://s4.ad.brown.edu/Projects/Diversity/segregation2010/msa.aspx?metroid=18140 (last visited Sept. 27, 2019).

[9] *See* Brie Zeltner, *Segregation, inequality reflected in Ohio's poor county health rankings,* CLEVELAND.COM, https://www.cleveland.com/healthfit/2016/03/segregation_inequality_reflect.html (last visited Sept. 27, 2019).

[10] *Id.*

[11] *See, e.g.*, James Dao, *Ohio Town's Water at Last Runs Past a Color Line*, N.Y. TIMES, Feb. 17, 2004, at A2 (describing Zanesville, Ohio's denial of water to an African American community for more than fifty years, even though community existed less than one mile from public water lines and city provided water to surrounding neighborhoods); *See Kennedy v. City of Zanesville, OH*, 505 F. Supp. 2d 456 (S.D. Ohio 2007). The plaintiffs successfully made a case for unlawful discrimination under the FHA and were awarded nearly $11 million by a jury in 2008. *See also https://www.relmanlaw.com/cases-zanesville*.

certain neighborhoods without sufficient justification are at the heartland of disparate-impact liability".[12] HUD's proposal blatantly ignores the Supreme Court's guidance by proposing that most zoning decisions will not be actionable under disparate impact theory: "Plaintiffs will likely not meet the standard, and HUD will not bring a disparate impact claim, alleging 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—is the cause of a disparate impact, unless the plaintiff can show that the single decision is the equivalent of a policy or practice."[13] This is an impossible burden of proof.

V. The proposed HUD rule creates a massive loophole by allowing discrimination via algorithm to go unchecked

HUD's proposed rule allows defendants to rely on third-party algorithms, burying the effects of discrimination even deeper and making it harder for plaintiffs to root out the causes. The Western Center on Law & Poverty notes that algorithms are routinely used for decisions that maintain existing disparities in the housing market, such as redlining.[14]

Jacob Metcalf, a researcher for the research institute Data & Society, points out that use of a third party vendor creates an incentive to remain ignorant about what kind of disparate impact an algorithm might create. He also notes that the parties can hide their calculations in a web of vendor relationships, making plaintiffs' ability to make a prima facie case prior to discovery impossible.[15] The proposed rule would allow housing providers to shield themselves from liability by using this spelled-out defense provided to them by HUD. If the use of third-party algorithms becomes standard practice, and those algorithms nevertheless perpetuate segregation, this HUD rule provides a staggering defense for actors complicit in undermining the FHA. Choosing to be ignorant of an algorithms impact on a protected class would serve as a defense under HUD's proposed rule. We should never promote ignorance over knowledge, especially when the outcome is discrimination.

We strongly oppose the proposed rule and call on HUD to withdraw it

This proposed rule is completely antithetical to HUD's mission and serves the interests of certain industry groups, while restricting the rights of people who suffer housing discrimination. It suggests landlords, banks, insurance companies, and other powerful entities should not be responsible for the discriminatory housing practices they perpetuate, and ignores the fact that housing segregation exists in the United States. Accordingly, we oppose the proposed rule and call on HUD to withdraw it.

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[12] *See, e.g., Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 16–18, 109 S.Ct. 276.

[13] *HUD's Implementation of the FHA's Disparate Impact Standard,* (Aug. 19, 2019) FR-6111-P-02, RIN 2529-AA98 at 42858.

[14] Western Center on Poverty & Law, https://wclp.org/the-trump-administration-is-threatening-the-right-to-fair-housing-were-fighting-back-and-you-can-too/ (last visited October 4, 2019).

[15] Jacob Metcalf, quoted in Capps, "How HUD Could Dismantle a Pillar of Civil Rights Law."

Sincerely,