



February 12, 2026

**SUBMITTED VIA REGULATIONS.GOV**

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

**Re: HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard  
Docket No. FR-6540-P-01 (RIN 2529-AB09)**

To Whom It May Concern:

We write to you on behalf of the American Civil Liberties Union (“ACLU”) and the Impact Fund to submit this comment in response to the above-docketed notice (“Proposed Rule”) concerning the proposed rescission of the existing disparate impact standard for the Fair Housing Act (“FHA”), as interpreted by the Department of Housing and Urban Development (“HUD”), which was published in the Federal Register on January 14, 2026. HUD’s existing disparate impact standard (“Current Rule”), codified at 24 C.F.R. §§ 100.500, is crucial to the ongoing fight for equal access to housing and lending opportunities in the United States. HUD’s Current Rule serves the American public by providing an effective and well-established civil rights enforcement tool to combat discriminatory policies and practices that appear neutral yet unnecessarily and disproportionately exclude people from historically marginalized communities from housing opportunities. We strongly oppose the Proposed Rule and urged HUD to preserve its existing disparate impact standard set forth in the Current Rule.

For over 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the law of the United States guarantee to everyone in the country. With more than three million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all fifty states, Puerto Rico, and Washington, D.C., for the right of every individual to access opportunity free of discrimination on the basis of race, color, religion, gender, sexual orientation, gender identity or expression, national origin, familial or marital status, status as a recipient of public assistance, or record of arrest or conviction. We have advocated at the local, state, and federal levels for increased enforcement of civil rights in the housing context; elimination of barriers to housing for survivors of domestic violence and sexual assault, the vast majority of whom are women; greater choice in housing options for those who receive public assistance and benefits; development of housing programs that promote residential integration, including among those with a disability that necessitates reasonable accommodation; and eradication of overbroad tenant screening policies that unfairly deny housing based on prior criminal and/or eviction records.

The ACLU and its state affiliates have long relied on disparate impact liability, including HUD’s Current Rule, to protect equal access to housing and lending opportunities. Through litigation, the ACLU and many of its state affiliates have challenged discriminatory policies and practices under the FHA by private and government actors, including crime-free housing and criminal activity nuisance ordinances, overbroad tenant screening policies that unfairly deny applicants based on prior eviction and/or criminal records, and exclusionary land use and zoning policies. In addition, the ACLU and many of its state affiliates have relied on the Current Rule in filing fair housing complaints through HUD’s administrative process to challenge housing policies and practices that are discriminatory and perpetuate segregation. Given the importance of these protections, the ACLU has fought to preserve disparate impact liability under the FHA by submitting comments in response to past rulemaking efforts<sup>1</sup> and challenging the Trump administration’s prior attempt to dismantle HUD’s existing disparate impact standard in *Open Communities Alliance v. U.S. Department of Housing and Urban Development*, No. 3:20-cv-01587 (D. Conn. Oct. 22, 2020).<sup>2</sup>

Impact Fund is a non-profit legal organization that provides strategic leadership and support for impact litigation to achieve economic, environmental, racial, and social justice. Impact Fund provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country. Impact Fund has served as party or *amicus* counsel in major civil rights actions nationwide and in California, including litigation to ensure equal access to housing opportunities and fighting housing and lending policies that unfairly burden historically marginalized and underserved communities. Our experience underscores the crucial importance of HUD’s existing disparate impact rule in enforcing our nation’s civil rights laws.

HUD’s Current Rule is a vital and well-established civil rights enforcement tool for combatting policies and practices that have an unjustified and discriminatory effect on housing and lending opportunities. Absent any valid legal justification, the Proposed Rule seeks to rescind HUD’s existing disparate impact standards in their entirety and, in HUD Secretary Scott Turner’s own words, “to end the agency’s use of disparate-impact theory in fair housing and related civil rights enforcement” and to send these critical protections to “the ash heap of history.”<sup>3</sup> Indeed, the Proposed Rule is just the latest in a broader series of systematic attacks by this administration on disparate impact liability and other key civil rights protections in housing

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<sup>1</sup> We incorporate by reference the materials cited and arguments made in the ACLU’s comments submitted in response to HUD’s prior rulemakings related to its disparate impact legal standards. See American Civil Liberties Union, Comment, *Reinstatement of HUD’s Discriminatory Effects Standard*, Docket No. FR-6251-P-01, Aug. 24, 2021, <https://perma.cc/AG2V-9BRT>; American Civil Liberties Union, Comment, *Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard*, Docket No. FR-6111-P-02, Oct. 17, 2019, <https://perma.cc/7W3M-PJY2>; American Civil Liberties Union, Public Comment, *Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard*, Docket No. FR-6111-A-01, Aug. 19, 2018, <https://perma.cc/PUU9-6HPI>.

<sup>2</sup> Complaint, *Open Communities Alliance v. U.S. Dep’t of Hous. & Urban Dev.*, No. 3:20-cv-01587 (D. Conn. Oct. 22, 2020), <https://perma.cc/7XUC-XELE>.

<sup>3</sup> Scott Turner, *It’s Time to Ditch ‘Disparate Impact Theory’ – and Biden’s Weaponization of Civil Rights Law*, National Review, Jan. 19, 2026, <https://perma.cc/FRT6-C5HH>.

and beyond.<sup>4</sup> The Proposed Rule would undermine critical and longstanding fair housing protections and effectively deny many subjected to unlawful discrimination access to HUD’s administrative enforcement mechanisms. It is in conflict with the FHA’s statutory mandate and the Supreme Court’s decision in *Inclusive Communities*, and fails to adequately consider the serious reliance interests that have developed over decades of consistent agency interpretation of the FHA. The Proposed Rule is further procedurally deficient because it erroneously invokes the “good cause” exception to deprive the public of adequate time to comment. We urge HUD to withdraw the Proposed Rule in its entirety.<sup>5</sup>

**I. The Proposed Rule Guts a Longstanding Civil Rights Enforcement Tool that Furthers Fair Housing and Addresses the Effects of Discrimination.**

The FHA prohibits intentionally discriminatory acts and facially “neutral” policies that disproportionately limit housing opportunities based on race, color, national origin, religion, sex, gender identity, sexual orientation, familial status, and disability. Fully realizing the promise of the FHA for every person is central to HUD’s mission. Discriminatory barriers to equal housing opportunity remain deeply entrenched and continue to harm our communities. Although there has been limited progress, equal access to housing is far from reality in this country. HUD’s existing disparate impact standards have long served as an important civil rights enforcement tool for advancing access to fair housing. The Proposed Rule would significantly undermine these protections while increasing barriers to challenging many forms of housing discrimination.

**a. HUD’s Existing Disparate Impact Standards Have Served as an Essential Tool in Combatting Housing Discrimination and Segregation for Over a Decade.**

HUD’s existing disparate impact standards, as set forth in the Current Rule, have long served as an essential civil rights enforcement tool in the fight against housing discrimination and residential segregation. In 2011, HUD published a Proposed Rule titled “Implementation of the Fair Housing Act’s Discriminatory Effects Standard,” acknowledging the agency’s interpretation of the FHA as permitting discriminatory effect (or disparate impact) claims for over two decades.<sup>6</sup> In 2013, HUD published a Final Rule, which adopted the agency’s current definition of the term “[d]iscriminatory effect” as a practice that “actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates

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<sup>4</sup> Sarah Hinger, Ricardo Mimbela, and Linda Morris, *Trump’s Attempt to Roll Back Key Civil Rights Enforcement Tool*, Oct. 23, 2025, <https://perma.cc/362X-CTV2>.

<sup>5</sup> The ACLU and the Impact Fund believe that the Proposed Rule should be withdrawn in its entirety for myriad reasons, and the fact that particular statements, proposals, reasoning, or other actions by HUD are not addressed herein does not indicate or concede that the ACLU or the Impact Fund agrees with such statements, proposals, reasoning, actions, or particular aspects of the Proposed Rule.

<sup>6</sup> Dep’t of Hous. & Urban Dev., *Implementation of the Fair Housing Act’s Discriminatory Effects Standard*, 76 Fed. Reg. 70921, 70922 (Nov. 16, 2011) (citing *HUD v. Twinbrook Vill. Apartments*, No. 02-000256-8, 2001 WL 1632533, at \*17 (HUD ALJ Nov. 9, 2001); *HUD v. Pfaff*, No. 10-93-0084-8, 1994 WL 592199, at \*7–9 (HUD-ALJ Oct. 27, 1994), *rev’d on other grounds*, 88 F.3d 739 (9th Cir. 1996); *HUD v. Carter*, No. 03-90-0058-1, 1992 WL 406520, at \*5 (HUD-ALJ May 1, 1992)).

segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.”<sup>7</sup> In doing so, HUD explained that eliminating disparate impact discrimination and residential segregation was necessary for the FHA’s “intended goal to advance equal housing opportunity and achieve integration be realized.”<sup>8</sup>

HUD also codified the existing burden-shifting framework, which had long been applied by federal courts adjudicating disparate impact claims.<sup>9</sup> In addition to “formaliz[ing] a long-recognized legal interpretation,” HUD explained the Rule’s adoption of a “clear, uniform standard” would help to reduce costs and burdens, particularly for regulated entities.<sup>10</sup> For example, the promulgation of a “uniform standard” helps to simplify compliance and reduce the risk of litigation by enabling covered entities to “conduct consistent self-testing and compliance reviews, document their substantial, legitimate nondiscriminatory interests, and resolve potential issues so as to prevent future litigation.”<sup>11</sup> In addition, the uniform standard “serves to reduce regulatory burden for all entities, large or small, by establishing certainty and clarity with respect to how a determination of unjustified discriminatory effect is to be made,”<sup>12</sup> and is particularly “a benefit to entities operating in multiple jurisdictions.”<sup>13</sup>

HUD’s existing disparate impact standard has been vital in challenging systemic inequalities, such as persistent residential segregation, housing and lending discrimination against historically marginalized groups, the unnecessary institutionalization of people with disabilities, and housing instability suffered by survivors of domestic violence. Despite these important advances, in 2020, HUD—under the first term of the Trump administration—published a rule titled “HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard” (“2020 Rule”), which significantly narrowed disparate impact liability for discriminatory conduct. The 2020 Rule was enjoined by a federal district court prior to its

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<sup>7</sup> Dep’t of Hous. & Urban Dev., *Implementation of the Fair Housing Act’s Discriminatory Effects Standard*, 78 Fed. Reg. 11460, 11463 (codified at 24 C.F.R. § 100.500(a)).

<sup>8</sup> *Id.* at 11466.

<sup>9</sup> See, e.g., *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49–51 (1st Cir. 2000) (holding defendant has the burden of proffering a “valid,” “rational,” “substantial,” and “legitimate” justification, as well as the burden of showing a less discriminatory alternative); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977); *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974); *Mountain Side Mobile Ests. P’ship v. Sec’y of Hous. & Urban Dev.*, 56 F.3d 1243 (10th Cir. 1995).

<sup>10</sup> 78 Fed. Reg. at 11472.

<sup>11</sup> *Id.* at 11472.

<sup>12</sup> *Id.* at 11478–79 See also *id.* at 11480 (“By providing certainty in this area to housing providers, lenders, municipalities, realtors, individuals engaged in housing transactions, and courts, this rule would reduce the burden associated with litigating discriminatory effects cases . . . by clearly establishing which party has the burden of proof, and how such burdens are to be met.”).

<sup>13</sup> *Id.* at 11472, 11480.

effective date.<sup>14</sup> The district court concluded that the key provisions of the 2020 Rule could not be “found in any judicial decision” and were “inadequately justified.”<sup>15</sup>

In 2023, following notice and comment rulemaking procedures, HUD rescinded the 2020 Rule and reinstated its existing disparate impact standard.<sup>16</sup> In doing so, HUD recognized the importance of disparate impact liability to achieving the FHA’s broad remedial purpose “to provide . . . for fair housing throughout the United States.”<sup>17</sup> Moreover, HUD again recognized the importance of maintaining a uniform standard for disparate impact claims, including “[r]educed compliance costs” for housing providers, as well as “clarity to persons seeking housing and persons engaged in housing transactions as to how to assess potential claims.”<sup>18</sup> HUD also explicitly rejected proposals that “would foreclose potentially meritorious claims in contravention of the Act’s broad remedial goals and HUD’s obligations to affirmatively further fair housing.”<sup>19</sup> Since its adoption in 2013, HUD’s existing disparate impact standard has remained the governing framework, and has been long relied on by regulated entities, housing providers, state and local governments, fair housing and civil rights organizations, service providers, community organizations, individuals, and other key stakeholders in understanding their rights and obligations under the FHA.

b. The Proposed Rule Would Dismantle a Key Tool for Proving Disparate Impact Liability and Combatting Myriad Discriminatory Housing Policies and Practices.

By rescinding HUD’s existing disparate impact standard, the Proposed Rule would eliminate a key fair housing enforcement tool and undermine the FHA’s broad remedial purpose to provide for fair housing across the country. The attempt to eviscerate disparate impact liability is further confirmed by recent public statements by HUD Secretary Scott Turner and other agency actions taken to dismantle disparate impact liability in housing and beyond. Days after publication, Secretary Turner declared that the Proposed Rule aims “to end the agency’s use of disparate-impact theory in fair housing and related civil rights enforcement” and to send these

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<sup>14</sup> *Mass. Fair Hous. Ctr. v. HUD*, 496 F. Supp. 3d 600, 611 (D. Mass. 2020) (holding that the 2020 Rule’s “new and undefined terminology, altered burden-shifting framework, and perplexing defenses accomplish the opposite of clarity”). The 2020 Rule was challenged in three separate lawsuits, including a lawsuit brought by two fair housing organizations with representation by the ACLU, the ACLU of Connecticut, Lawyers’ Committee for Civil Rights Under Law, Poverty and Race Research Action Council, and Cohen Milstein Sellers & Toll PLLC. Pls. Compl., *Open Cmty. All. v. Carson*, No. 20-01587 (D. Conn. Oct. 22, 2020). See also Pls.’ Compl., *Nat’l Fair Hous. Alliance v. Carson*, No. 3:20-cv-07388 (N.D. Cal. Oct. 22, 2020).

<sup>15</sup> *Mass. Fair Hous. Ctr.*, 496 F. Supp. 3d at 610–11.

<sup>16</sup> Dep’t of Hous. & Urban Dev., *Reinstatement of HUD’s Discriminatory Effects Standard*, 88 Fed. Reg. 19450 (Mar. 31, 2023) (codified at 24 C.F.R. Part 100).

<sup>17</sup> *Id.* at 19450, 19464, 19469.

<sup>18</sup> *Id.* at 19479.

<sup>19</sup> *Id.* at 19479.

critical protections to “the ash heap of history.”<sup>20</sup> Such statements echo President Trump’s Executive Order 14281, which declared the administration’s policy “to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible” and is cited by HUD in the Proposed Rule, as discussed below.<sup>21</sup>

Moreover, HUD has taken other actions to attack fair housing enforcement efforts, such as through the sudden dismissals of major investigations into systemic housing discrimination and segregation<sup>22</sup> and the mass terminations of hundreds of HUD employees, including many in its Office of Fair Housing and Equal Opportunity (“FHEO”), and regional office closures.<sup>23</sup> Over the past several months, HUD officials also have issued various memoranda and related directives aimed at eliminating the agency’s enforcement of the FHA’s protections against disparate impact discrimination.<sup>24</sup> For example, HUD officials issued a memorandum requiring FHEO to direct resources to cases “with strong evidence of intentional discrimination,” while declining to move forward with cases involving purportedly “novel and tenuous theories of discrimination concerned with appraisal bias, environmental justice, local zoning, screening for felony convictions, and gender identity.”<sup>25</sup> Similarly, HUD officials rescinded several guidance documents related to common forms of disparate impact discrimination, such as criminal record screening, source-of-income discrimination, and digital advertising for housing- and credit-related opportunities.<sup>26</sup>

By rescinding HUD’s existing disparate impact standards, the Proposed Rule would dismantle an essential tool for challenging systemic inequalities and combatting a broad swath of policies and practices that disproportionately exclude historically marginalized and otherwise vulnerable communities.

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<sup>20</sup> Scott Turner, *It’s Time to Ditch ‘Disparate Impact Theory’ – and Biden’s Weaponization of Civil Rights Law*, National Review, Jan. 19, 2026, <https://perma.cc/6UGR-SG9K>.

<sup>21</sup> Exec. Order 14281, 90 Fed. Reg. 17537 (Apr. 23, 2025).

<sup>22</sup> See, e.g., Jesse Coburn, *How the Trump Administration Is Weakening the Enforcement of Fair Housing Laws*, ProPublica, May 15, 2025, <https://perma.cc/8SN7-G426>; Jesse Coburn, *Trump Administration Prepares to Drop Seven Major Housing Discrimination Cases*, ProPublica, July 18, 2025, <https://perma.cc/9JZD-8WTW>.

<sup>23</sup> Cassandra Dumay and Katherine Hapgood, *White House fires hundreds of HUD employees in latest staff reduction*, PoliticoPro, Oct. 10, 2025, <https://perma.cc/LE4Q-C2EZ>.

<sup>24</sup> Lori Sommerfield & Chris Willis, *HUD’s New Direction in Fair Housing Act Enforcement and Rescission of Certain Office of Fair Housing and Equal Opportunity Guidance*, Consumer Financial Services Law Monitor, Sept. 29, 2025, <https://perma.cc/3HG2-F6FB>. See also Bryce Covert, *HUD Is Refusing to Enforce Anti-Discrimination Law – and Won’t Let Anyone Else Do It, Either*, The Nation, Dec. 29, 2025, <https://perma.cc/8LBK-H83B>.

<sup>25</sup> John Gibbs, Dep’t of Hous. & Urban Dev., *Fair Housing Act Enforcement and Prioritization of Resources*, Sept. 16, 2025, at 1-3, <https://perma.cc/5UZ5-2FVP>.

<sup>26</sup> John Gibbs, Dep’t of Hous. & Urban Dev., *Notice of Withdrawal of FHEO Guidance Documents*, Sept. 17, 2025, <https://perma.cc/NU9G-J9F7>.

i. *Discrimination Through Overly Restrictive Tenant Screening Policies*

The Proposed Rule will undermine efforts to address unjust and overly restrictive tenant screening policies that disproportionately exclude certain protected groups from housing opportunities. HUD’s existing disparate impact standards have been critical in challenging overbroad and arbitrary restrictions on prior criminal history. Tenant screening policies and other related policies have been and continue to be a formidable barrier to housing and reentry, and several jurisdictions have “crime-free housing” ordinances requiring housing providers to conduct criminal background checks and reject or evict tenants for alleged criminal conduct. Housing instability and exclusion can follow people throughout their lives because of overbroad and discriminatory arrest and conviction record policies that mean “people face housing denials based on their criminal records years or decades”<sup>27</sup> after serving a term of incarceration, after receiving a conviction that did not result in incarceration, and even when they were simply arrested and their case did not result in a conviction.<sup>28</sup> These housing denials occur “even when their criminal history does not indicate that they present a substantial risk to persons or property.”<sup>29</sup> These arrest and criminal records policies do not make communities safer and perpetuate housing segregation in the United States.<sup>30</sup>

The Current Rule has provided a workable and helpful basic framework for addressing unjust policies that denied housing based on prior arrest and conviction records. In 2016, HUD recognized in now-rescinded guidance that “as many as 100 million U.S. adults” have some sort of criminal record and that “their ability to access safe, secure and affordable housing is critical to their successful reentry to society.”<sup>31</sup> HUD further emphasized that tenant screening policies that incorporate arrest and conviction record screening likely have a disparate impact on Black and Latine renters due to the history of structural racism in the criminal legal system in the United States. Accordingly, HUD concluded that “[w]hile having a criminal record is not a protected characteristic under the [FHA], criminal history-based restrictions on housing opportunities violate the Act if, without justification, their burden falls more often on renters or other housing market participants of one race or national origin over another.”<sup>32</sup> HUD further explained that “[a] housing provider must [] be able to prove through reliable evidence that its

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<sup>27</sup> HUD, *Letter Outlining HUD Actions to Address Reentry Housing Needs and Increase Public Safety*, June 23, 2021, <https://perma.cc/8EPT-5X9M>.

<sup>28</sup> HUD, *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, Apr. 4, 2016, <https://perma.cc/6K5H-LZJT>.

<sup>29</sup> HUD, *Letter Outlining HUD Actions to Address Reentry Housing Needs and Increase Public Safety*, June 23, 2021, <https://perma.cc/8EPT-5X9M>.

<sup>30</sup> NYU Law, *New Barriers: Deborah Archer’s Research Reveals How Today’s Crime-Free Housing Ordinances Uphold the Legacy of Segregation*, <https://perma.cc/AP6J-VHBL>; Liam Dillion et al., Black and Latino renters face eviction, exclusion amid police crackdowns in California, LA Times, Nov. 19, 2020, <https://perma.cc/FA6S-D2PS>.

<sup>31</sup> HUD, *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, *supra* note 28.

<sup>32</sup> *Id.* at 2.

policy or practice of making housing decisions based on criminal history actually assists in protecting resident safety and/or property,” and that a tenant screening policy that fails to consider the nature, severity, and recency of the alleged conduct is unlikely to satisfy this standard.<sup>33</sup> HUD’s existing disparate impact standard is critical to combatting overly restrictive and unjust criminal record screening policies that reflect and reinforce racial disparities in housing.

The Current Rule also has been critical to challenging overbroad tenant screening policies that categorically deny housing to applicants based on prior eviction records, regardless of whether the eviction cases were ultimately dismissed, filed unlawfully, or occurred many years ago.<sup>34</sup> Such blanket bans on prior eviction records have a discriminatory impact on people of color, and especially Black women renters.<sup>35</sup> For example, the ACLU’s Data Analytics team examined national eviction data from 2012 to 2016 and found that, on average, Black renters had evictions filed against them by landlords at more than twice the rate of white renters.<sup>36</sup> Moreover, the team found that Black women were more likely to have a prior eviction filing that ultimately resulted in dismissal—and, therefore, were more likely to be denied housing due to prior eviction filings, even when they won those cases.<sup>37</sup> As a result, “No-Evictions” policies reflect and reinforce existing race and gender disparities in housing and related harms across the country.<sup>38</sup> Disparate impact liability, and especially HUD’s Current Rule, help to combat such policies and the housing barriers they impose on all renters, especially for Black women and other people of color.

## ii. *Discrimination Against Domestic Violence Survivors*

Domestic violence is a leading cause of homelessness for women in the United States.<sup>39</sup> Over 90 percent of women experiencing homelessness report having experienced domestic abuse or sexual violence in their lives, while over 50 percent of women experiencing homelessness

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<sup>33</sup> *Id.* at 5.

<sup>34</sup> Josefina Navar, *How Eviction Brands Renters With a Scarlet Letter*, ACLU News & Commentary, July 25, 2023, <https://perma.cc/ES2V-BA5V>. See also Sandra Park, *Unfair Eviction Screening Policies Are Disproportionately Blacklisting Black Women*, ACLU News & Commentary, Mar. 30, 2017, <https://perma.cc/8U5H-H9PU>.

<sup>35</sup> Sophie Beiers, Sandra Park, and Linda Morris, *Clearing the Record: How Eviction Sealing Laws Can Advance Housing Access for Women of Color*, ACLU News & Commentary, Jan. 10, 2020, <https://perma.cc/AC8F-S2PD>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* See also Cleo Blumenthal, *The Disproportionate Burden of Eviction on Black Women*, Center for American Progress, Aug. 14, 2023, <https://perma.cc/D66P-ACH4>.

<sup>39</sup> See ACLU Women’s Rights Project, *Domestic Violence and Homelessness* (2006), <https://perma.cc/75LZ-AJXG>; see also U.S. Conference of Mayors, *A Status Report on Hunger and Homelessness in America’s Cities: A 25-City Survey* (Dec. 2014); Baker et al., *Domestic Violence, housing instability, and homelessness: A review of housing policies and program practices for meeting the needs of survivors*, 15 *Aggression & Violent Behavior* 430 (2010).

report that domestic violence was the immediate cause of their loss of housing.<sup>40</sup> Access to housing is absolutely critical for survivors, as lack of safe and affordable housing options is regularly reported as a primary barrier to escaping abuse.<sup>41</sup> The Current Rule ensures adequate protections for domestic violence survivors who are denied housing because they accessed emergency services, defended themselves, or experienced abuse in their homes.

In particular, disparate impact liability under the FHA has provided significant protections against policies and practices that punish or jeopardize housing for survivors because of the abuse they experienced, such as criminal activity nuisance ordinances that penalize survivors based on calls for emergency assistance and unjust landlord policies that evict survivors for reasons directly related to the abuse and/or violence they experienced.<sup>42</sup> Because the vast majority of domestic violence survivors are women, such policies and practices have an unlawful sex-based disparate impact.<sup>43</sup> HUD’s existing disparate impact standard has been critical to preventing landlords, housing providers, municipalities, and other actors from adopting discriminatory policies and practices that disproportionately harm domestic violence survivors, including the following:

- Many landlords evict or threaten to evict domestic violence survivors based on “one-strike” or “crime-free” housing policies that punish survivors because of the abuse and/or violence that they experienced in their home.<sup>44</sup> Such sudden loss of housing often leads to far-reaching and lasting consequences, including loss of employment, disruptions in education, financial hardship, food insecurity, physical and mental health issues, housing instability, and even homelessness.<sup>45</sup>

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<sup>40</sup> Monica McLaughlin & Debbie Fox, National Network to End Domestic Violence, *Housing Needs of Victims of Domestic Violence, Sexual Assault, Dating Violence, and Stalking* (2019), <https://perma.cc/D3B2-6299>.

<sup>41</sup> See Charlene K. Baker et al., *Domestic violence, housing instability, and homelessness: A review of housing policies and program practices for meeting the needs of survivors*, 15 *Aggression & Violent Behavior* 430, 430–39 (2010), <https://perma.cc/2UDN-7UXC>.

<sup>42</sup> See, e.g., American Civil Liberties Union, *I Am Not a Nuisance: Local Ordinances Punish Victims of Crime*, Oct. 6, 2020, <https://perma.cc/7E5X-3C8Q>; *Somai v. City of Bedford*, Case No. 1:19-cv-00373-KBB (N.D. Ohio 2020) (defendant agreed to repeal its criminal activity nuisance ordinance that penalized survivors of domestic violence based on calls for police or emergency assistance).

<sup>43</sup> See Noah M. Kazis, *Fair Housing for a Non-Sexist City*, 134 *Harv. L. Rev.* 1683, 1703-10 (2021). Indeed, HUD itself has recognized that such policies and practices may have an unlawful discriminatory impact on women. See, e.g., Sara K. Pratt, Dep’t of Hous. & Urban Dev., *Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act (FHA) and the Violence Against Women Act (VAWA)*, Feb. 9, 2011, <https://perma.cc/NH2A-D2KQ>.

<sup>44</sup> See, generally, *Warren v. Ypsilanti Hous. Auth.*, Case No. 4:02-cv-40034 (E.D. Mich. 2003) (defendant agreed to cease evicting survivors of domestic violence under its “one-strike policy”).

<sup>45</sup> See Beiers, Park, and Morris, *supra* note 35. See also American Civil Liberties Union & Nat’l Coal. for a Civil Right to Counsel, *No Eviction Without Representation: Evictions’ Disproportionate Harms and the Promise of Right to Counsel* (2022), <https://perma.cc/7ZB2-J8PR>.

- Some landlords evict survivors and their children for reasons directly related to domestic violence, like noise complaints during abusive incidents, property damage caused by abusive partners, and financial and economic abuse.<sup>46</sup> While the Violence Against Women Act (“VAWA”) offers housing-related protections for survivors, some of those protections only apply to survivors living in covered housing programs.<sup>47</sup> HUD’s existing disparate impact standard provides critical protections for survivors who live in non-covered housing, such as certain private rental housing that does not receive federal assistance.
- In many jurisdictions, crime-free or chronic nuisance ordinances coerce landlords to evict or threaten to evict households based on calls for police or emergency assistance and/or for alleged criminal activity occurring at or near their homes.<sup>48</sup> Such ordinances disproportionately impact domestic violence survivors, as well as communities of color and people with disabilities.<sup>49</sup> In 2016, HUD issued guidance recognizing that disparate impact liability under the FHA is an important tool for challenging the devastating consequences of nuisance ordinances on survivors and other vulnerable and marginalized communities.<sup>50</sup>

Such discriminatory policies not only increase the risk of homelessness for domestic violence survivors but also prevent them from accessing safe and stable housing in the first place. Because these policies and practices often appear neutral and aren’t always accompanied by clear evidence of intentional discrimination, advocates have relied heavily on the Current Rule to address these harmful and pervasive barriers to housing for domestic violence survivors.

### iii. *Discrimination Against Families with Children*

The Current Rule affords significant protections to families, and particularly women with children.<sup>51</sup> Indeed, research has consistently shown that the majority of primary caregivers are

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<sup>46</sup> See, e.g., American Civil Liberties Union & ACLU of Michigan, Jan. 17, 2007, *ACLU Fights Eviction of Domestic Abuse Victim*, <https://perma.cc/39NR-N55V>.

<sup>47</sup> Nat’l Hous. Law Project, *Know Your Rights! Domestic and Sexual Violence and Federally Assisted Housing*, July 2023, <https://perma.cc/A659-Q6GT>, See also Dep’t of Hous. & Urban Dev., *Frequently Asked Questions (FAQs) – Housing Services for Persons Impacted by Domestic Violence and Sexual Assault Webinar Series*, <https://perma.cc/4DXY-FBVX>.

<sup>48</sup> See, e.g., American Civil Liberties Union, *I Am Not a Nuisance: Local Ordinances Punish Victims of Crime*, Oct. 6, 2020, <https://perma.cc/7E5X-3C8Q>; *Somai v. City of Bedford*, Case No. 1:19-cv-00373-KBB (N.D. Ohio 2020).

<sup>49</sup> ACLU & New York Civil Liberties Union, *More Than a Nuisance: The Outsized Consequences of New York’s Nuisance Ordinances* (2018), <https://perma.cc/ZNB6-Z56N>.

<sup>50</sup> HUD, *Office of General Counsel Guidance on Application of FHA 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* (2016), available at <https://perma.cc/P94N-QF3W>.

<sup>51</sup> See 42 U.S.C. §§ 3601–19.

women.<sup>52</sup> Advocates across the country have relied on the Current Rule to challenge policies and practices that unreasonably limit families' housing choices, such as overly restrictive occupancy requirements, based on their discriminatory impact based on familial status, gender, and race. Similarly, disparate impact liability has been used to challenge housing policies that unnecessarily restrict the use of certain facilities that are overwhelmingly enjoyed by children, such as pools or courtyards.<sup>53</sup> HUD's existing disparate impact standard has been essential to advancing access to safe and affordable housing opportunities for families with children, and especially low-income mothers, so that they are able to thrive and support themselves and their loved ones.

#### iv. *National Origin Discrimination*

The Current Rule has been a vital tool for holding housing providers accountable for excluding people of particular national origins, under the guise of excluding immigrants. The statuses of being a non-citizen, an immigrant, or unable to communicate in English are not statutorily enumerated as protected classes under the FHA. This statutory gap allows housing providers to establish barriers to housing access based on criteria, such as language ability or having a Social Security Number. These criteria work to exclude people based on immigration status but are frequently closely correlated with being of Latine or Asian national origin. In 2017, the National Fair Housing Alliance reported elevated rates of housing discrimination complaints from Latine complainants experiencing housing harassment or displacement from housing because of immigration status.<sup>54</sup>

Courts have applied the disparate impact theory of liability to such policies and practices, allowing challenges to discriminatory practices to proceed where proving intent to discriminate based on national origin would be extremely difficult. For example, in *de Reyes v. Waples Mobile Home Park Ltd. P'ship*, the Fourth Circuit held that a group of immigrant plaintiffs adequately stated a national origin disparate impact claim against a landlord who began requiring a Social Security Number or other evidence of lawful immigration status in order to renew their leases.<sup>55</sup>

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<sup>52</sup> National Partnership for Women & Families, *The Female Face of Family Caregiving* (Nov. 2018), <https://perma.cc/EYF7-9429>.

<sup>53</sup> See *Housing Opps. Project for Excellence, Inc. v. Key Colony No. 4 Condo. Assoc.*, 510 F. Supp. 2d 1003 (S.D. Fla. 2007) (holding that residents had successfully stated a disparate impact claim because the restrictive occupancy rules had discouraging effects on families with more than two children).

<sup>54</sup> Nat'l Fair Hous. Alliance, *Making Every Neighborhood a Place of Opportunity: 2018 Fair Housing Trends Report* at 80 (2018), available at <https://perma.cc/AB4W-5FRN>.

<sup>55</sup> See *de Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415, 431–32 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 2026 (2019) (citing plaintiffs' allegations that in the relevant housing market, "being an illegal immigrant . . . correlates with being Latino (a protected class) . . . we must infer that Congress intended to permit disparate impact liability for policies aimed at illegal immigrants when the policy disparately impacts a protected class . . ."). See also *Cent. Ala. Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1194–97 (M.D. Ala. 2011), *vacated as moot*, No. 11-16114-CC (11th Cir. May 17, 2013) (finding likelihood of success on the merits of challenge to state law limiting ability to occupy mobile homes based on immigration status would have an unjustified discriminatory impact on

Consistent with legal precedent, HUD previously recognized in now-rescinded guidance that discrimination based on language can result in an unlawful discriminatory impact based on national origin.<sup>56</sup> The Proposed Rule would impede the ability of many of the most vulnerable members of our communities to access housing opportunities, contrary to the FHA’s purpose to further fair housing.

v. *Perpetuation of Racial Segregation*

Residential segregation in the United States persists at alarming rates and inflicts far-reaching and lasting harms, particularly on Black communities and other communities of color.<sup>57</sup> Segregation in neighborhoods correlates with high rates of school segregation and contributes to negative educational and socioeconomic outcomes for low-income students and students of color, including high dropout rates, poor test results, and limited educational achievements.<sup>58</sup> Persistent segregation also inhibits property value appreciation in predominantly Black neighborhoods as compared to predominantly white neighborhoods, even when the characteristics of the homes and neighborhoods are otherwise the same.<sup>59</sup> Research has further found that residential segregation may influence discriminatory policing in neighborhoods that are predominantly minority residents.<sup>60</sup>

The Proposed Rule threatens to undermine a vital tool in “moving the Nation toward a more integrated society.”<sup>61</sup> In rescinding HUD’s existing disparate impact standards, the Proposed Rule would eliminate the definition of the term “discriminatory effect,” including its inclusion of practices that “actually or predictably . . . creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin”<sup>62</sup> The Current Rule explicitly recognizes perpetuation-of-segregation claims as an independent basis for liability, consistent with the FHA’s broad remedial purpose, longstanding agency interpretation, and legal precedent.<sup>63</sup> HUD’s attempted elimination of

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Latinos, who were overrepresented among mobile home residents in the state and among the state’s noncitizen population).

<sup>56</sup> U.S. Dep’t of Hous. & Urban Dev., *Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency*, at 3 (Sept. 15, 2016), <https://perma.cc/9BLT-4Y59> ; 24 C.F.R. § 1.4(b)(2)(i).

<sup>57</sup> Aaron Williams & Armand Emamjomeh, America is more diverse than ever – but still segregated, Wash. Post (May 10, 2018), <https://perma.cc/A9KG-XUHU> .

<sup>58</sup> Margery Austin Turner & Karina Fortuny, The Urban Institute, *Residential Segregation and Low-Income Working Families* (Feb. 2009), <https://perma.cc/N6EJ-XC4T>.

<sup>59</sup> Richard D. Kahlenberg & Kimberly Quick, *The Government Created Housing Segregation. Here’s How the Government Can End It.*, The American Prospect, July 2, 2019, <https://perma.cc/86SU-BK6B> .

<sup>60</sup> Emily Badger, *Baltimore shows how historic segregation shapes biased policing today*, Wash. Post (Aug. 10, 2016), <https://perma.cc/E2VG-8KPF>.

<sup>61</sup> *Inclusive Cmty.*, 576 U.S. at 547.

<sup>62</sup> 24 C.F.R. § 100.500(a).

<sup>63</sup> 85 Fed. Reg. at 60, 306.

perpetuation-of-segregation claims, without acknowledgement or explanation, would undermine existing efforts to combat segregation and threaten to exacerbate these conditions nationwide.

vi. *Access to Housing and Olmstead Compliance for People with Disabilities*

The Current Rule provides a vital tool for advancing access to safe and affordable housing opportunities for people with disabilities. The Technical Assistance Collaborative, a policy group focused on affordable and permanent supportive housing for very low-income people with disabilities, and the Consortium for Citizens with Disabilities Housing Task Force published a 2017 report entitled “Priced Out: The Housing Crisis for People with Disabilities.” The report concluded that in 2016, millions of adults with disabilities living solely on Supplemental Security Income (SSI) found that renting even a modest unit in their community would require nearly all of their monthly income. In hundreds of higher-cost housing markets, the average rent for such basic units is actually much greater than the entirety of an SSI monthly payment.<sup>64</sup>

As a result, “non-elderly adults with significant disabilities in our nation are often forced into homelessness or segregated, restrictive, and costly institutional settings such as psychiatric hospitals, adult care homes, nursing homes, or jails.”<sup>65</sup> Compounding this concern, people with many types of disabilities, including people with mobility impairments, people who are blind, and people who are deaf or hard of hearing, face additional barriers securing affordable housing that is also accessible.<sup>66</sup>

These concerns make it critical to ensure that protections against disability-based discrimination in housing are not weakened. Complaints of disability discrimination already comprise the largest percentage of housing discrimination complaints received by both public and private fair housing enforcement organizations since the early 2000s.<sup>67</sup> The inability to preserve housing will not only put people with disabilities at risk of homelessness and forced institutionalization,<sup>68</sup> but will likely increase costs to service providers and state and local

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<sup>64</sup> Technical Assistance Collaborative, *Priced Out in the United States* (2017), <https://perma.cc/4YQ7-764W>.

<sup>65</sup> Gina Schaak, et al., *Priced Out: The Housing Crisis for People with Disabilities* (Technical Assistance Collaborative and Consortium for Citizens with Disabilities Housing Task Force, Dec. 2017), at 8, <https://perma.cc/4GHY-N5PS>.

<sup>66</sup> Urban Institute, *People with Disabilities Living in the US Face Urgent Barriers to Housing*, Oct. 21, 2022, <https://perma.cc/TS9Q-NP9G>. See also Keisha Greaves, *Housing: The Overlooked Crisis for Disabled People*, Apr. 25, 2025, <https://perma.cc/ZF2N-XUUN>.

<sup>67</sup> Nat’l Fair Hous. Alliance, *The Case for Fair Housing*, 2017 Fair Housing Trends Report (Apr. 2017), at 26-27, <https://perma.cc/KW37-T5Q3>. See also Nat’l Fair Hous. Alliance, *2025 Fair Housing Trends Report*, at 5, 9, 21-22, <https://perma.cc/9ZAB-VS2W>.

<sup>68</sup> Shelby R. King, *How the Housing Shortage Is Forcing People with Disabilities into Institutions*, ShelterForce, July 25, 2023, <https://perma.cc/5HUF-FKYY>.

governments, which will incur the costs of shelter placements, institutionalization, increased demands for services, and emergency department visits.<sup>69</sup>

The availability of rental subsidies has been critical to ensure the availability of affordable and accessible housing options for people with disabilities. Such subsidies are a key aspect of implementing the Americans with Disabilities Act’s (“ADA’s”) integration mandate and the Supreme Court’s *Olmstead* decision. The ADA requires public entities to administer services to people with disabilities in the most integrated setting appropriate. Supported housing units scattered in buildings throughout the community are necessary to implement the ADA’s integration mandate. To make this type of supported housing available, state and local governments typically rely on rental subsidies that help support people with disabilities to live in their own apartments or homes, secured through the ordinary housing market.

But many housing providers discriminate against people who rely on disability benefits and use rental subsidies.<sup>70</sup> And many covered entities attempt to bar supportive housing for people with disabilities, including through criminal activity or “chronic” nuisance ordinances and exclusionary zoning policies.<sup>71</sup> Preserving HUD’s existing disparate impact standard is critical to advancing access to housing for people with disabilities, and fulfilling the obligation of public entities to comply with the ADA’s integration mandate.

## **II. HUD’s Proposed Rule Fails to Implement the Fair Housing Act and Is Inconsistent with Decades of Case Law.**

HUD provides three reasons for abandoning its existing disparate impact regulation—none of which justifies HUD’s dramatic departure from longstanding policy. HUD’s purported justifications fail because they conflict with established Supreme Court precedent and decades of case law. Moreover, the Proposed Rule fails to consider many critical factors, including the significant reliance interests engendered by HUD’s existing disparate impact standards, and the major costs and burdens that would be inflicted by the rescission of the Current Rule.

To justify the Proposed Rule’s rescission of longstanding disparate impact standards, HUD cites Executive Order 14281 (“E.O. 14281”), titled “Restoring Equality of Opportunity and Meritocracy,” issued on April 23, 2025.<sup>72</sup> E.O. 14281 asserts that “it is the policy of the United

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<sup>69</sup> See, e.g., Hannah Chimowitz & Adam Ruege, *The Costs and Harms of Homelessness*, Community Solutions, Sept. 25, 2023, <https://perma.cc/T396-VWDP>; Nat’l Prevention Science Coal., *Fact Sheet: Cost of Homelessness*, Apr. 14, 2025, <https://perma.cc/ZNF9-L9RB>; Am. Public Health Ass’n, *Housing and Homelessness as a Public Health Issue*, Nov. 7, 2017, <https://perma.cc/XH78-K3EN>.

<sup>70</sup> Antonia K. Fasanelli & Philip Tegeler, *Your Money’s No Good Here: Combating Source of Income Discrimination in Housing*, American Bar Association Human Rights Magazine, Nov. 30, 2019, <https://perma.cc/PXN7-6UPX>.

<sup>71</sup> 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, 883-88 (2019); Joseph Mead et al., *Who is a Nuisance? Criminal Activity Nuisance Ordinances in Ohio*, Nov. 8, 2017, <https://perma.cc/AEK4-VL67>.

<sup>72</sup> 90 Fed. Reg. 17537.

States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible” and directs federal agencies, in coordination with the Attorney General, to identify and consider amending or repealing disparate impact regulations “as appropriate under applicable law.”<sup>73</sup> Relying on this directive, HUD summarily concluded that its existing disparate impact standards “are unnecessary,” and that its prior position that the Current Rule “provided clarity and predictability . . . is diminished by the facts that case law continues to develop and HUD’s regulation does not provide an up-to-date picture of the legal landscape.”<sup>74</sup> In doing so, HUD has failed to “reasonably” explain its decision, cite case law casting doubt or diverging from the existing standards, or provide any data, information, or analysis to support these broad conclusions.<sup>75</sup> Moreover, HUD has not addressed, let alone acknowledged, many important factors, including the significant reliance interests engendered by the Current Rule, as discussed *supra*, or the harmful impacts of the Proposed Rule on HUD’s administrative enforcement process, as discussed *infra*.

Contrary to HUD’s conclusory assertions, the Current Rule is faithful to the FHA and over fifty years of legal precedent interpreting the FHA and thus should remain in place.<sup>76</sup> In *Inclusive Communities*, the Supreme Court affirmed HUD’s position that disparate impact claims are cognizable under the FHA. Notably, the Supreme Court cited to and discussed HUD’s existing disparate impact standards<sup>77</sup> at length with apparent approval on multiple occasions, including with respect to aspects of the burden-shifting framework for disparate impact claims.<sup>78</sup> And indeed, HUD itself has previously stated that its regulations are consistent with *Inclusive Communities*, specifically noting that “the [Supreme] Court cited [HUD’s disparate impact rule] twice in support of its analysis.”<sup>79</sup>

In the more than ten years since *Inclusive Communities* was decided, courts have interpreted and applied the Supreme Court’s discussion of disparate impact claims in a variety of contexts, none of which disturb its holding or cast doubt on HUD’s existing standards. For example, the Second Circuit has held that the Supreme Court had implicitly endorsed HUD’s existing standards in *Inclusive Communities*.<sup>80</sup> Other courts of appeals have likewise affirmed the

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<sup>73</sup> *Id.*

<sup>74</sup> 91 Fed. Reg. at 1476.

<sup>75</sup> See *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).

<sup>76</sup> For further discussion about the extensive legal precedent supporting the Current Rule’s disparate impact standards, we incorporate by reference the extensive discussion of such precedent in the ACLU’s prior comments in response to HUD’s rulemakings, as cited in note TK.

<sup>77</sup> The Supreme Court in *Inclusive Communities* cited HUD’s 2013 Disparate Impact Rule, which was reinstated in 2023, as discussed *supra*. See 88 Fed. Reg. at 19450.

<sup>78</sup> *Inclusive Cmty.*, 576 U.S. at 525–28.

<sup>79</sup> Defs.’ Opp’n to Pls.’ Mot. for Leave to Amend Compl., ECF No. 122, at 9, *PCIA v. Carson*, No. 1:13-cv-08564 (N.D. Ill.).

<sup>80</sup> *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 618–20 (2d Cir. 2016).

use of the burden-shifting approach articulated the Current Rule.<sup>81</sup> Most recently, in January 2026, the Supreme Court denied certiorari of a Second Circuit decision affirming a verdict in favor of Black homeowner plaintiffs who were victims of reverse redlining lending practices,<sup>82</sup> including the defendants’ request that the Supreme Court consider the question of whether *Inclusive Communities* “has proven unworkable.”<sup>83</sup> The denial of certiorari suggests that the Second Circuit and other circuits’ application of *Inclusive Communities* raises no major concerns. HUD thus has failed to justify rescinding its existing rule, which establishes standards consistent with the FHA and case law.

Second, HUD’s reliance on the Supreme Court’s decision in *Loper Bright Enterprises v. Raimundo*, 603 U.S. 369 (2024), is arbitrary and overreaching. Specifically, HUD claimed that, because courts may not defer to agency interpretation where the underlying statute is ambiguous, its prior rulemakings “do not carry deferential weight” and that “[i]t is appropriate for courts, not a Federal agency, to make determinations related to the interpretation of disparate impact liability under the [FHA].”<sup>84</sup> Yet, HUD has failed to articulate any “rational connection” between the Supreme Court’s holding concerning appropriate judicial deference to agency interpretations and HUD’s decision to rescind the Current Rule.<sup>85</sup> Nothing in the Supreme Court’s decision in *Loper Bright* precludes HUD from maintaining its existing regulations—particularly where the Supreme Court and other courts have long held that the FHA permits disparate impact claims based on its statutory language and legislative history. Such an “unjustified leap of logic or unwarranted assumption” cannot support the Proposed Rule’s sweeping rescission of HUD’s longstanding disparate impact standards.<sup>86</sup>

Moreover, HUD’s apparent application of *Loper Bright* to preclude agency interpretation of statutory requirements is inconsistent with the positions it has taken in other actions. Indeed, HUD has continued to adopt interpretations of various statutes notwithstanding the Supreme Court’s holding in *Loper Bright*. For example, HUD recently issued a Notice setting forth the agency’s interpretation of the statutory term “Federal public benefit” as used in Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PWRORA).<sup>87</sup> HUD also has issued memoranda in which it offered other agency interpretations of the FHA’s statutory requirements, as well as guidance on how staff should implement such interpretations

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<sup>81</sup> See, e.g., *Ave. 6E Invs., LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 510–13 (9th Cir. 2016) (citing the 2013 Final Rule as authority for the proper burden-shifting framework, without noting any inconsistency between the 2013 HUD rule and the Supreme Court’s decision in *ICP*); *Reyes v. Waples Mobile Home Park L.P.*, 903 F.3d 415, 423–24 (4th Cir. 2018) (same).

<sup>82</sup> *Emigrant Mortg. Co. v. Saint-Jean*, No. 25-229, 2026 WL 79895, at \*1 (U.S. Jan. 12, 2026).

<sup>83</sup> Petition for A Writ of Certiorari, *Emigrant Mortgage Company, Inc., and Emigrant Bank, Petitioners, v. Jean Robert SAINT-JEAN, et al., Respondents.*, 2025 WL 2491762, at \*1.

<sup>84</sup> 91 Fed. Reg. at 1476.

<sup>85</sup> See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins.*, 463 U.S. 29, 43 (1983).

<sup>86</sup> See *Friends of Back Bay v. U.S. Army Corps of Engineers*, 681 F.3d 581, 588 (4th Cir. 2012).

<sup>87</sup> U.S. Dep’t of Hous. & Urban Dev., *Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA); Interpretation of “Federal Public Benefit,”* 90 Fed. Reg. 54363, 54364 (Nov. 26, 2025).

in HUD’s administrative enforcement process.<sup>88</sup> Yet, HUD has offered no valid explanation for these apparent inconsistencies in determining whether and when agency interpretation of statutory requirements is appropriate. Such “[u]nexplained inconsistency between agency actions” is arbitrary and capricious and undermines HUD’s purported justifications for the Proposed Rule.<sup>89</sup>

Lastly, HUD references broader deregulatory efforts under Executive Order 14192 (“E.O. 14192”), titled “Unleashing Prosperity Through Deregulation,” and Executive Order 14219 (“E.O. 14219”), titled “Ensuring Lawful Governance and Implementing the President’s Department of Government Efficiency Deregulatory Initiative.”<sup>90</sup> Citing these executive orders, HUD explained that “is undertaking a comprehensive review of its regulations to reduce regulatory burdens, enhance the effectiveness of those regulations that are necessary, and promote principles underlying the rule of law,” and concluded that removing its disparate impact regulations are consistent with these principles.<sup>91</sup> However, the Proposed Rule fails to meaningfully acknowledge or address the myriad ways in which HUD previously recognized that the Current Rule helps to simply or decrease the costs and burdens for regulated entities by providing a “uniform standard,”<sup>92</sup> as discussed further *supra*. Moreover, HUD has not acknowledged the increased costs and burdens to regulated entities and other key stakeholders that would result from the rescission of its existing disparate impact standards, as discussed further *infra*. Regardless of HUD’s stated reasons for promulgating the Proposed Rule, it has failed to adequately “take[] into account” the “serious reliance interests” that “longstanding policies may have engendered,” where, as here, an agency changes or reverses its prior position.<sup>93</sup>

### **III. The Proposed Rescission of HUD’s Existing Disparate Impact Standards Would Inflict Widespread and Devastating Harms, Costs, and Burdens.**

The Proposed Rule’s sudden and total rescission of HUD’s existing disparate impact standards would fundamentally undermine and effectively deny access to HUD’s administrative enforcement process for victims of disparate impact discrimination. These harmful consequences are especially evident in light of HUD Secretary Scott Turner’s contemporaneous statements that the Proposed Rule would “end the agency’s use of disparate-impact theory in fair housing and related civil rights enforcement” and send disparate impact liability to “the ash heap of history.”<sup>94</sup> Such disruptions to HUD’s administrative enforcement process would not only

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<sup>88</sup> See, e.g., U.S. Dep’t of Hous. & Urban Dev., *Fair Housing Act Enforcement and Prioritization of Resources*, Sept. 16, 2025, <https://perma.cc/6XZF-PWTH>.

<sup>89</sup> *Organized Village of Kake v. U.S. Dep’t of Agriculture*, 795 F.3d 956, (9th Cir. 2015) (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

<sup>90</sup> Exec. Order 14192, 90 Fed. Reg. 9065; Exec. Order 14219, 90 Fed. Reg. 10583.

<sup>91</sup> 91 Fed. Reg. at 1476.

<sup>92</sup> 88 Fed. Reg. at 19479.

<sup>93</sup> *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2016)).

<sup>94</sup> Scott Turner, *It’s Time to Ditch ‘Disparate Impact Theory’ – and Biden’s Weaponization of Civil Rights Law*, National Review, Jan. 19, 2026, <https://perma.cc/T5AX-XUZX>. Indeed, these harms will be further compounded by other recent actions taken by HUD to roll back the agency’s fair housing enforcement, including through staff cuts

conflict with HUD’s obligations under the Fair Housing Act, but also inflict significant and far-reaching harms, costs, and burdens for current and future complainants, respondents, and other key stakeholders.

By rescinding HUD’s existing disparate impact standards and refusing to apply disparate impact liability in fair housing enforcement,<sup>95</sup> the Proposed Rule would categorically deny access to HUD’s administrative enforcement process for current and future complainants alleging disparate impact discrimination. As a result, many victims of housing discrimination would be denied the many benefits of HUD’s administrative process. For example, HUD investigators often provide critical support through interviewing key witnesses, inspecting properties, and gathering information, data, and documentation,<sup>96</sup> which may be particularly burdensome and, in some cases, nearly impossible for complainants to obtain without filing litigation and seeking discovery. This is especially true for fair housing complaints involving multiple respondents and/or respondents with significant financial resources, such as well-resourced commercial landlords and financial institutions, or involving challenges to policies and practices that are less likely to be transparent to the public, such as discriminatory ad-targeting and other forms of algorithmic discrimination.<sup>97</sup> Thus, HUD is abandoning its unique role in addressing the most far-reaching and pernicious forms of housing discrimination.

Moreover, HUD’s administrative enforcement process is particularly valuable for investigations into disparate impact discrimination claims, which often require complex data analysis, data cleaning, statistical testing, and mapping.<sup>98</sup> Such analyses are especially complicated in cases where the documentation collected does not contain information about the relevant protected classes.<sup>99</sup> Without access to HUD’s investigative staff and resources, complainants will be forced to incur significant costs to hire statisticians and other experts to complete the required data analyses to support their disparate impact claims in litigation.<sup>100</sup> And because such analyses would be completed by experts hired by complainants, rather than a separate government agency, respondents would likely incur similarly substantial costs and expenses to hire statisticians and other experts to perform their own rebuttal analyses. Limiting access to HUD’s administrative process for disparate impact claims also would force many complainants and respondents alike to incur legal fees and costs associated with litigation, while imposing greater burdens on courts and state and local agencies as a result of increased filings.

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and reassignments, office closures, and abandonment of pending matters. *See, e.g.,* Debra Kamin, *Trump Appointees Roll Back Enforcement of Fair Housing Laws*, N.Y. Times, Sept. 22, 2025, <https://perma.cc/63PQ-HWNH>; Jonathan Delozier, *Trump appointees roll back fair housing enforcement, internal records show*, HousingWire, Sept. 22, 2025, <https://perma.cc/77MY-659F>.

<sup>95</sup> Proposed Rule, 91 Fed. Reg. at 1476.

<sup>96</sup> U.S. Dep’t of Hous. & Urban Dev., *Learn About FHEO’s Process to Report and Investigate Housing Discrimination*, <https://perma.cc/4YQ9-SM7S>.

<sup>97</sup> *See, e.g.,* Nat’l Consumer Law Ctr., *Digital Denials: How Abuse, Bias, and Lack of Transparency in Tenant Screening Harm Renters*, Sept. 2023, <https://perma.cc/7ZXP-DNYS>.

<sup>98</sup> *See* Mia Ives-Rublee, *The Truth About Disparate Impact and Equity*, Center for American Progress, Aug. 13, 2025, <https://perma.cc/YCQ7-RX3Z>.

<sup>99</sup> *Id.*; *see also* John Yinger, *Detecting Disparate-Impact Discrimination in the Big-Data Era*, 22 Loyola Consumer L. Rev. 2, TK (2021), <https://perma.cc/CU3R-29Y4>.

<sup>100</sup> *See, e.g.,* Mia Ives-Rublee, *The Truth About Disparate Impact and Equity*, Center for American Progress, Aug. 13, 2025, <https://perma.cc/YCQ7-RX3Z>.

Even assuming that HUD will continue to enforce fair housing protections despite Secretary Turner’s statements to the contrary, the Proposed Rule fails to provide any meaningful guidance or clarity as to whether and how HUD will evaluate pending or future complaints alleging disparate impact and/or perpetuation-of-segregation theories of discrimination—especially where a complaint raises issues for which there is no relevant legal precedent in the applicable jurisdiction. Indeed, many complainants have relied on HUD’s existing disparate impact standards in reporting and investigating housing discrimination, gathering and analyzing data and materials, developing their claims and theories of liability, evaluating potential legal options, and ultimately filing administrative complaints with HUD. Similarly, respondents have relied on these same disparate impact standards, including through preparing their responses and any potential defenses to those complaints. The Proposed Rule would leave many complainants, respondents, their representatives and/or legal counsel, and even HUD’s own staff unsure as to whether and how to proceed with the administrative enforcement process. Such disruptions would likely interfere with the resolution of pending complaints without resorting to litigation and/or other state and local administrative enforcement mechanisms that would be even more costly and burdensome for parties.

In addition to these costs and burdens, the Proposed Rule’s rescission of existing disparate impact standards will cause profound confusion as key stakeholders—such as fair housing organizations, legal service providers, community groups, and regulated entities—attempt to understand its impacts and the applicable standards in their jurisdictions. In fact, HUD previously recognized these burdens on regulated entities in adopting its uniform disparate impact standard in 2013, explaining that such uniformity would assist in providing clarity, simplifying compliance, and minimizing the risks and burdens of litigation. The Proposed Rule fails to acknowledge or address HUD’s change in position on the benefits of a uniform legal standard. In light of these significant costs and burdens, HUD should withdraw the Proposed Rule and preserve its existing disparate impact standard.

#### **IV. The Proposed Rule is Procedurally Flawed and Must be Withdrawn.**

An agency must take action in accordance with the “procedure required by law[.]”<sup>101</sup> For this reason alone, HUD must withdraw the Proposed Rule or, at minimum, allow the public sixty days to comment on this significant proposal to remove regulations that have effectively been in place since 2013.

As HUD acknowledges in its preamble to the Proposed Rule,<sup>102</sup> its own regulations require a sixty-day notice and comment period.<sup>103</sup> This sixty-day period can only be avoided if “the Department determines in a particular case . . . that notice and public procedure are impracticable, unnecessary or contrary to the public interest.”<sup>104</sup> This language tracks the “good

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<sup>101</sup> 5 U.S.C. § 706(2)(D).

<sup>102</sup> 91 Fed. Reg. at 1476.

<sup>103</sup> 24 CFR § 10.1.

<sup>104</sup> *Id.*

cause” exception to the APA’s notice and comment requirements,<sup>105</sup> and should be interpreted in the same way.

HUD states that it is providing only 30 days for public comment because “[t]his document does not change any requirements or affect any rights or obligations” and because “HUD has thoroughly solicited and reviewed public comments on the relevant topics and issues concerning disparate impact liability under the Fair Housing Act and related proposals for HUD’s discriminatory effects regulations” in 2011, 2019, and 2021.<sup>106</sup> HUD thus “has determined that it is in the public interest to remove HUD’s disparate impact regulations as expeditiously as possible.”<sup>107</sup>

As discussed above, HUD is incorrect in stating that no rights or obligations are affected. Indeed, this rescission leaves entirely unclear the standards that would apply in HUD enforcement proceedings for disparate impact claims under the FHA. Further, none of HUD’s purported justifications require such immediate action as to justify such a significant abbreviation of the required notice and comment period. HUD may not make such significant changes to regulations under the good cause exception.

The D.C. Circuit warns, “[w]e have repeatedly made clear that the good cause exception ‘is to be narrowly construed and only reluctantly countenanced.’”<sup>108</sup> Significantly, a federal court has previously enjoined HUD from abbreviating a comment period to thirty days. In *Housing Study Group v. Kemp*, a court granted a temporary restraining order against a thirty-day comment period for a HUD notice of proposed rulemaking after holding that HUD’s justifications for an abbreviated period were insufficient to “stifle the public’s entitlement to full illumination and vigorous discourse provided through the normal notice and comment period required for all substantive rules of an agency.”<sup>109</sup> The court reached this holding despite the fact that HUD claimed delaying the rule would result in significant financial losses.<sup>110</sup> Of importance to the court was the fact that HUD had been studying the underlying problem for one and a half years

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<sup>105</sup> 5 U.S.C. § 553(b)(4)(B) (permitting departure from standard notice and comment requirements “when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”).

<sup>106</sup> 91 Fed. Reg. at 1476–77.

<sup>107</sup> *Id.* at 1477.

<sup>108</sup> *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001)) (rejecting EPA’s argument that good cause exception was warranted because agency failed to satisfy the “impracticable” and “contrary to public interest” prongs of the good cause exception and the disputed rule was one “about which these members of the public [the petitioners] were greatly interested” (collecting cases); see also *N.C. Growers’ Ass’n, Inc. v. United Farm Workers*, 702 F.3d 755, 767 (4th Cir. 2012) (“[T]he circumstances justifying reliance on the good cause exception are ‘rare,’ and will be accepted only after a reviewing court ‘examine[s] closely’ the proffered reason for an agency’s deviation from public notice and comment.”) (quoting *Council of the S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 (D.C. Cir. 1981) (citation omitted)); *Util. Solid Waste Activities Grp.*, 236 F.3d at 755 (EPA could not satisfy “unnecessary” prong where new rule lowered threshold for cleanup and contamination standards for porous materials, like wood and concrete, because “the rule greatly expanded the regulated community and increased the regulatory burden[,]” which was, “without doubt, something about which these members of the public were greatly interested.”).

<sup>109</sup> 736 F. Supp. 321, 335 (D.D.C.), *order clarified*, 739 F. Supp. 633 (D.D.C. 1990).

<sup>110</sup> *Id.*

without acting, negating any sense of urgency.<sup>111</sup> Comparatively, here, HUD has not offered any explanation for why urgency is needed in eliminating the regulations when they have been in place for years. Even if EO 14281 required rescission of HUD’s disparate impact regulations, which it does not, that Executive Order was issued in April of 2025, almost eight months prior to this Proposed Rule, negating any sense of urgency. HUD thus cannot justify an abbreviated notice and comment period. Further, federal courts have noted that “an agency’s obligation to explain its action is not reduced when it rescinds rather than promulgates a regulation.”<sup>112</sup>

As explained, because countless individuals, organizations, states, and regulated entities themselves rely on these longstanding regulations, particularly in the HUD enforcement context, HUD must withdraw the Proposed Rule or, at a minimum, afford the full sixty-day notice and comment period required by its regulation.

## V. Conclusion

The Fair Housing Act’s promise of housing equality and residential integration remains unfulfilled in the United States. Disparate impact liability—and HUD’s existing disparate impact standards—are an essential civil rights enforcement tool for combatting the most pervasive and insidious forms of discrimination in housing and lending decisions. We urge HUD to withdraw its Proposed Rule and preserve HUD’s existing disparate impact standard. If you have any questions regarding these comments, please contact Linda Morris, Senior Staff Attorney at the ACLU Women’s Rights Project, by email at [LindaM1@aclu.org](mailto:LindaM1@aclu.org).

Sincerely,

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<sup>111</sup> *Id.*

<sup>112</sup> *Action on Smoking and Health v. C.A.B.*, 699 F.2d 1209, 1216 (D.D.C. 1983).