August 24, 2021

SUBMITTED VIA REGULATIONS.GOV

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410

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

Dear Secretary Fudge:

We write to you on behalf of the American Civil Liberties Union Foundation ("ACLU") in response to the above-docketed notice concerning the proposed reinstatement of the previously promulgated rule titled "Implementation of the Fair Housing Act's Discriminatory Effects Standard" ("2013 Rule"), as interpreted by the U.S. Department of Housing and Urban Development ("HUD"). The 2013 Rule has continued to be crucial to the ongoing fight for equal access to housing in the United States.[1] It serves the American public by requiring housing providers, financial institutions, insurance companies, municipalities, and other major corporations to eliminate policies that appear neutral yet wrongly and unnecessarily keep people from the opportunities they need to be successful in life. We strongly support the proposed reinstatement of the 2013 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 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, or record of arrest or conviction.

As a nation, we have a shared interest in ensuring that housing opportunities are available to every individual, regardless of their personal background or characteristics. The FHA prohibits intentional discriminatory acts *and* facially "neutral" policies that disproportionately limit housing opportunities based on race, color, national origin, religion, sex, familial status, and disability. Fully realizing the promise of the FHA for every person in the United States is central to HUD's mission.

[1] In 2020, HUD published a rule titled "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard" ("2020 Rule"), which was enjoined by a federal district court prior to its effective date. *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").

Disparate-impact legal theories have been essential to the ACLU's fight to protect access to fair housing and housing finance. The ACLU and many of its state affiliates have brought disparate-impact claims under the FHA to challenge myriad discriminatory policies and practices—including overly restrictive tenant-screening policies and unjust municipal ordinances—across the country.

The 2013 Rule is consistent with a long, well-settled line of precedent establishing FHA liability for practices that have a discriminatory effect. For more than forty years, courts have interpreted the FHA to authorize disparate-impact claims, including the 2015 Supreme Court decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 576 U.S. 519 (2015) ("*Inclusive Communities*"). In *Inclusive Communities*, the Supreme Court quoted and cited to HUD's 2013 Rule at length without any suggestion that its opinion was in tension with that rule. The central premise of *Inclusive Communities* is that disparate-impact claims are necessary to prohibit policies that may not be readily challenged under disparate treatment theories even though, particularly when overlaid on preexisting and long-standing disparities, they unnecessarily exclude members of protected classes from housing.

In contrast, absent any legal justification, the 2020 Rule significantly narrowed disparate-impact liability for discriminatory conduct and was enjoined when a federal court concluded that its key provisions could not be "found in any judicial decision" and were "inadequately justified."[2] Discriminatory barriers to equal housing opportunity remain deeply entrenched and pervasive in this country. While there has been limited progress, equal access to housing is far from a reality, and the 2013 Rule remains an essential tool in the fight against housing discrimination. It is critically important that HUD focus on the robust and vigorous enforcement of the 2013 Rule to remove unjust and unnecessary barriers to housing in all communities. The ACLU urges HUD to immediately finalize the proposed reinstatement of the 2013 Rule.

I. The 2013 Rule Correctly Implements the Fair Housing Act and Is Consistent with Decades of Case Law, Including *Inclusive Communities*.[3]

Unlike the 2020 Rule, the 2013 Rule provides a clear and straightforward burden-shifting test that is consistent with decades of Title VII and FHA precedent, including *Inclusive*

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[2] *Id.* at 610–11.

[3] The 2020 Rule was scheduled to take effect on October 26, 2020, but on October 25, 2020, a federal district court issued a nationwide injunction against implementation or enforcement of the rule and postponing the effective date. *Id.* Currently, under the order, the 2013 Rule remains the status quo. *See id.* Another case—filed by two fair housing nonprofit organizations with representation by the ACLU, ACLU of Connecticut, Lawyers' Committee for Civil Rights Under Law, Poverty & Race Action Council, and Cohen Milstein Sellers & Toll PLLC—also challenged the 2020 Rule as violating the APA and FHA and requested it be enjoined from implementation and enforcement. Pls.' Compl., *Open Cmtys. All. v. Carson*, No. 20-01587 (D. Conn. Oct. 22, 2020). The plaintiffs' injuries include, among other things, that the 2020 Rule would chill their enforcement actions, frustrate their data collection projects to document segregation, increase the burden to complete their planned HUD-funded activities, and force them to reshape their future funding strategies. The case has been stayed pending HUD's administrative review of the 2020 Rule. Order, *Open Cmtys. All.*, No. 20-01587 (D. Conn. Mar. 3, 2020).

The ACLU also signs onto the National Fair Housing Alliance's comments with respect to the 2013 Rule's correct implementation of the FHA and consistency with decades of case law, including the Supreme Court's decision in *Inclusive Communities*.

Communities, and that properly accommodates the competing interests at stake.[4] Moreover, the 2013 Rule appropriately applies a case-by-case analysis to insurance providers.

a. The 2013 Rule is Consistent with Decades of Case Law.

The 2013 Rule codified the three-part burden-shifting framework that had long been applied by federal appellate courts adjudicating disparate-impact claims.[5] Under the 2013 Rule, first, a plaintiff proved that a challenged practice caused a discriminatory effect (stage one); next, the burden moved to the defendant to persuade the decisionmaker that the challenged practice was necessary to achieve certain interests (stage two); and finally, if the defendant did so, the plaintiff had the opportunity to prove that the defendant's "substantial, legitimate, nondiscriminatory interests . . . could be served by another practice that has a less discriminatory effect" (stage three).[6]

As HUD explained in promulgating the 2013 Rule, the burden-shifting standard it adopted was consistent with the federal appellate case law, which had gravitated away from a balancing test, and which "does not require either party to prove a negative."[7] HUD also rejected comments arguing that plaintiffs should have to prove that a less discriminatory alternative under the third prong would be "equally effective" as the challenged practice.[8] In doing so, HUD explained that the 2013 Rule already required that the less discriminatory alternative must serve the respondent's or defendant's interests, that such language is consistent with Congressional and judicial interpretations of the disparate impact standard, and that such a requirement is not appropriate in the housing context where the practices covered by the FHA are "not readily quantifiable."[9] At that time, HUD also considered and rejected many of the very changes that the 2020 Rule included, *see infra* Section II, while explaining its reasoning in great detail.[10]

Importantly, the 2013 Rule is entirely consistent with the Supreme Court's decision in *Inclusive Communities*. In *Inclusive Communities*, the Supreme Court affirmed HUD's position that disparate-impact claims are cognizable under the FHA and did not suggest that HUD failed to correctly state the law in any way. Rather than announce any changes in the law, the Supreme Court stated that its description of disparate-impact liability was a description of existing

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4 *See Prop. Cas. Insurers Ass'n of Am. v. Donovan*, 66 F. Supp. 3d 1018, 1053 (N.D. Ill. 2014) ("HUD's framework is largely consistent with the framework courts have developed on their own for analyzing disparate impact claims.").

5 *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).

6 24 C.F.R. §§ 100.500(c)(1)-(3) (2013).

7 U.S. Dep't of Hous. & Urban Dev. (HUD), *Implementation of the Fair Housing Act's Discriminatory Effects Standard* ("2013 Rule"), 78 Fed. Reg. 11,460, 11,474 (2013).

8 *Id.* at 11,473.

9 *Id.*

10 *Id.* at 11,469–73.

doctrine.[11] Notably, the Supreme Court cited to and discussed the 2013 Rule at length with apparent approval on multiple occasions, including with respect to aspects of the burden-shifting framework for disparate-impact claims.[12] The Supreme Court also emphasized that one of the central purposes of the FHA was to combat residential segregation and to promote a more integrated society.[13]

Following the Supreme Court's decision in *Inclusive Communities*, other federal courts of appeal have affirmed the use of the burden-shifting framework articulated in the 2013 Rule. In *Avenue 6E Investments, LLC v. City of Yuma*, for example, the Ninth Circuit cited the 2013 Rule as authority for the proper burden-shifting framework without noting any inconsistencies between the 2013 Rule and *Inclusive Communities*.[14] Moreover, the Second Circuit held that the Supreme Court implicitly endorsed the standards of the 2013 Rule in *Inclusive Communities*.[15] Out of more than forty federal appellate and district court decisions in disparate-impact FHA cases following *Inclusive Communities*, only one decision—that of the Fifth Circuit in *Inclusive Communities Project v. Lincoln Property Co.*, 920 F.3d 890 (5th Cir. 2019)—found *any* inconsistency between the 2013 Rule and the Supreme Court's decision in *Inclusive Communities.* Accordingly, reinstatement of the 2013 Rule would be fully consistent with decades of FHA jurisprudence and the FHA's purpose and mandate.

b. <u>The 2013 Rule Appropriately Applies a Case-by-Case Analysis to Insurance Providers.</u>

Courts have long held that the FHA reaches discrimination in housing insurance. As the Seventh Circuit bluntly stated, "No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable."[16] Insurance companies have deployed myriad practices that have denied access to or increased costs of insurance for people of color and Black people in particular.[17] These practices range from explicit bars to obtaining insurance to more covertly

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11 *Inclusive Cmtys.*, 576 U.S. at 539–40.

12 *Id.* at 525–28.

13 *Id.*

14 818 F.3d 493, 510 (9th Cir. 2016).

15 *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 618–20 (2d Cir. 2016).

16 *NAACP v. Am. Family Mut. Ins. Co*., 978 F.2d 287, 296 (7th Cir. 1992); *see also Ojo v. Farmers Grp. Inc.*, 600 F.3d 1205, 1208 (9th Cir. 2010); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1360 (6th Cir. 1995); *United Farm Bureau Mut. Ins. Co. v. Metro. Hum. Rels. Comm'n*, 24 F.3d 1008, 1016 (7th Cir. 1994); *Nevels v. W. World Ins. Co., Inc.*, 359 F. Supp. 2d 1110. 1117–22 (W.D. Wash. 2004); *Nat'l Fair Hous. All. v. Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46, 55–59 (D.D.C. 2002); *Lindsey v. Allstate Ins. Co.*, 34 F. Supp. 2d 636, 641-43 (W.D. Tenn. 1999); *Strange v. Nationwide Mut. Ins. Co.*, 867 F. Supp. 1209, 1212, 1214–15 (E.D. Pa. 1994).

17 In addition to discriminating based on race, insurance industry practices have discriminated based on other FHA-protected characteristics. *See, e.g.*, *Fuller v. Tchrs. Ins. Co*., No. 06-cv-00438, 2007 WL 2746861 (E.D.N.C. Sept. 19, 2007) (denying a motion to dismiss FHA claim based on insurer cancelling policy because home was in use for people recovering from drug and alcohol addiction); *Nevels*, 359 F. Supp. 2d at 1118–19 (denying motion to dismiss FHA claim against insurers who cancelled policies of adult home owners because plaintiffs provided care and residence for individuals with disabilities) (citing *Wai v. Allstate Ins. Co*., 75 F. Supp. 2d 1, 6–8 (D.D.C. 1999)); *Nat'l Fair Hous. All. v. Travelers Indem. Co*., 261 F. Supp. 3d 20 (D.D.C. 2017) (holding that plaintiffs sufficiently pled that failure to provide insurance to properties that rent to Section 8 voucher holders had a disparate impact on Black people and women); Women's Law Project & Pennsylvania Coalition Against Domestic Violence, *Insurance Discrimination Against Victims of Domestic Violence*, 4-7 (1998), https://www.womenslawproject.org/wp-

discriminatory practices (such as barring insurance for homes exceeding a certain age or below a minimum value or using credit scoring in underwriting), which disproportionately impact communities of color that have long faced barriers to accumulating wealth through centuries of systematically discriminatory practices.[18]

When HUD codified the 2013 Rule that is a critical tool in combatting more covert forms of discrimination and further issued a supplementary rule in 2016, HUD concluded that the disparate-impact standard appropriately applied to the insurance industry. In so doing, HUD properly rejected industry claims that the disparate-impact standard is incompatible with the actuarial process and that a broad exemption for insurance should apply.

i. *Discriminatory Effects Liability Is Compatible with the Business of Insurance, and HUD Adequately Responded to Insurance Industry Comments.*

Insurance industry trade groups have argued that the application of disparate-impact liability is fundamentally incompatible with the nature of insurance and the actuarial process. HUD has addressed these concerns in detail through its rulemaking process.

In its 2013 Rule, HUD explained that insurance industry concerns were "misplaced," as the disparate-impact standard would not make any policy or practice that causes a disparate impact *per se* illegal; rather, defendants or respondents would still have the ability to justify their policy or practice at the second step of the burden-shifting framework.[19] More generally, HUD explained that broad exemptions, such as that requested for the business of insurance, would undermine Congress's intent in enacting the FHA, which was to root out the various forms of discrimination in housing and to provide for fair housing throughout the United States.[20]

In litigation following the 2013 Rule's promulgation, industry trade groups argued that these explanations were insufficient, and a federal district court agreed, deeming the level of detail and specificity in HUD's explanation of its refusal to make broad exceptions arbitrary and capricious before remanding the rulemaking to HUD.[21] HUD's subsequent rule, however, robustly addressed those concerns.[22] HUD explained that the insurance industry is replete with practices in which insurers consider certain non-actuarial factors in making decisions, such as

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content/uploads/2019/09/Insurance-Discrimination-2019-Final.pdf (detailing widespread insurance industry practice of discrimination against domestic violence victims).

18 *See generally* Homeowners' Insurance Discrimination: Hearings Before the S. Comm. on Banking, Housing and Urban Affairs, 103d Cong. (1994); *Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins. Co.*, 704 N.E.2d 667, 674 (Ohio Ct. Com. Pl. 1997) (denying summary judgment to insurers in FHA claim based on practices of denying insurance based on maximum age or minimum insurance amount, which plaintiffs' expert determined respectively allowed less than 10 percent or 17 percent of homeowners in Black neighborhoods to qualify for insurance v. 69 percent or 39 percent of homeowners in white neighborhoods); *Prudential Ins. Co. of Am.*, 208 F. Supp. 2d at 50 (denying motion to dismiss in FHA case based on allegations of having minimum underwriting requirements that include the market value and age of home, rating territories according to zones reflecting racial composition, not selling insurance in D.C., and using applicant credit scores to determine eligibility).

19 *See* 2013 Rule, 78 Fed. Reg. at 11,460 (Feb. 15, 2013).

20 *Id.*

21 *See, e.g.*, *Donovan*, 66 F. Supp. 3d at 1051.

22 *See* HUD, *Application of the Fair Housing Act's Discriminatory Effects Standard to Insurance* ("2016 Supplemental Rule", 81 Fed. Reg. 69,012, 69,017 (October 5, 2016).

"marketing and claims processing and payment."[23] Moreover, HUD noted that ratemaking—frequently a risk-based decision-making process—often involves consideration of subjective factors outside of actuarial concerns.[24] HUD observed that the industry's long-time consideration of subjective, non-risk-based factors has not led to the inevitable demise of the entire industry.[25] Moreover, other risk-based industries, such as mortgage lending, are subject to disparate-impact liability and have not had to forego risk-based analysis in its entirety to avoid FHA liability. In addition to explaining why a blanket exemption is undesirable, HUD elaborated on the benefits of a case-by-case approach for assessing disparate-impact claims. Specifically, a blanket exemption would prevent the development of alternative policies that serve both parties' interests, consistent with the third step of the burden-shifting framework. As HUD explained, it would be impossible for insurers to argue that, in every situation, there is no other policy which might serve their same interests, especially with changes in technology and the sophistication of risk analysis.[26]

ii. *A Blanket Exemption from Disparate-Impact Liability Would Not Promote Efficiency and Would Be Overinclusive.*

Insurance industry groups have argued that applying the 2013 Rule's burden-shifting framework to the business of homeowners insurance would be inefficient because claims against insurance companies will categorically fail, claiming that disparate-impact liability is inherently incompatible with the inherently risk-based nature of insurance. But this argument overstates the comparative ease of the process of creating an exemption to liability for risk-based practices.

As HUD addressed in 2016, it would need to outline narrow and highly specific standardized rules to determine if a practice was exempt, as actuarial practices are constantly changing and evolving. Indeed, the diversity and ingenuity of insurer practices makes it practically impossible to define the scope of exempted practices to avoid case-by-case disputes. Moreover, whether a practice qualified for the exemption would itself be a lengthy, fact-intensive determination. "The arguments and evidence that would be necessary to establish whether a practice qualifies for the requested exemption would effectively be the same as the arguments and evidence necessary for establishing a legally sufficient justification."[27] The 2013 Rule's case-by-case approach best enables HUD to enforce the FHA, as it takes into consideration the variety of insurer practices, present and future. Thus, HUD determined categorical exemptions or safe harbors are "unworkable and inconsistent with its statutory mandate."[28]

The fact that insurers regularly engage in practices that combine risk-based decision making with more subjective factors supports this conclusion. For example, practices such as ratemaking, which are largely actuarially based, can nonetheless incorporate elements of non-

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23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.*
27 *Id.*
28 *Id.* at 69,013.

actuarially based subjective judgment or discretion under law.[29] Accordingly, creating a broad exemption for risk-based policies would be overinclusive and have the effect of shielding discriminatory practices that are unrelated to risk.

Price optimization is a particularly pernicious example of a common homeowners insurance practice that is not risk-based and thus is routinely subject to disparate-impact liability. In recent years, insurers have begun using data-driven price optimization to set rates, involving "data mining of insurance and noninsurance databases of personal consumer information[, . . .] advanced statistical modeling or both to select prices that differ from indicated rates at a very detailed or granular level."[30] Put simply, this practice allows insurers to charge the greatest amount possible without losing the consumer's business.[31] For example, an insurer's actuaries may determine a fair and reasonable price for an insurance product in a specific geographic area based on risk and expected loss. Using price optimization, the company may reject that price and set a price based on maximum profitability.[32] According to HUD, determining if a specific form of price-optimization is sufficiently "risk-based" to qualify for a broad *per se* exemption would require exorbitant agency, time, and resources given the complicated nature of this technology.[33] And price optimization strategies can undoubtedly have an illegal disparate impact—even when combined with risk-based decision-making. To assume otherwise would be to simply take insurance adjusters and actuaries at their word that they will not discriminate against communities of color—an assumption that runs counter to the history of racially discriminatory practices that informed passage of the FHA.[34]

Even if practices are predominantly based on actuarial decision-making, that does not preclude them from having an illegal disparate impact.[35] Take, for example, credit scoring, which is frequently accounted for in insurer's risk-based analyses. This is even though multiple studies have concluded that credit scores are themselves a combination of historically biased indices, such that reliance on them has the effect of exacerbating long standing race-based economic inequality. As HUD noted in its Supplemental Rule, the court in *Lumpkin v. Farmers*

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[29] *Id.* at 69,017. *See* D.J. Powers, *The Discriminatory Effects of Homeowners Insurance Underwriting Guidelines*, at 119 ("Today, we still find insurance companies making underwriting decisions based on all kinds of factors that have nothing to do with a statistically measured or measurable probability of risk.") (quoting S. Comm. on Banking, Hous., and Urban Affairs, 103rd Cong. (1994) (statement of J. Robert Hunter, former Texas Insurance Commissioner) ("Underwriting guidelines are typically not the result of careful, statistical studies. Rather, they are often based on hunches and subjective stereotypes about classes.").

[30] Nat'l Ass'n of Ins. Comm'rs, *Price Optimization White Paper*, at 1 (Nov. 19, 2015), http://www.naic.org/documents/committees_c_catf_related_price_optimization_white_paper.pdf.

[31] *Id.* at 2.

[32] Meryl Golden & Mike Miller, *Introduction to Price Optimization*, Earnix, 7, 10 (2014) (listing certain competitive adjustments that are often made to predicted loss costs during the rate-setting process).

[33] 2016 Supplemental Rule, 81 Fed. Reg. at 69,016.

[34] Growing concern over the potential discriminatory effects of data-driven price optimization has led numerous states to determine that data-driven price optimization constitutes illegal discrimination. *See, e.g.*, Fla. Office of Insurance Regulation, *Use of Price Optimization in Premium Determination*, Informational Memorandum OIR-15-04M (May 14, 2015), https://www.floir.com/siteDocuments/OIR-15-04M.pdf.; Va. Bureau of Insurance, *Compliance with Statutory Rate Standards in File-and-Use Lines of Insurance*, Virginia Administrative Letter 2016-03 (April 15, 2016), https://scc.virginia.gov/getattachment/10491abc-4ade-4431-8641-34d15f16b9a7/16-03.pdf.

[35] *See* Nat'l Consumer Law Ctr. & Ctr. for Econ. Just., *Credit Scoring and Insurance: Costing Consumers Billions and Perpetuating the Economic Racial Divide*, at 4 (June 2007), https://www.nclc.org/images/pdf/pr-reports/report-insurance-scoring-2007.pdf.

Group found that certain credit scoring practices have a disparate impact, and that even if they have some predictive value, there are other, less discriminatory alternatives.[36] In other words, an insurance practice can have an illegal disparate impact even if it is predominantly derived from risk-based decision-making. A broad exception would therefore protect unlawful practices.

iii. *The Presence of Significant Differences in State Law Regarding Both Insurance and Housing Discrimination Protections Supports HUD's Case-by-Case Approach.*

Insurance industry trade groups have argued that reverse preemption under the McCarran-Ferguson Act, as interpreted by the Seventh Circuit,[37] precludes federal courts from passing judgment on the actuarial soundness of risk-based practices. Yet the McCarran-Ferguson Act only restricts "those applications of federal law that directly conflict with state insurance laws, frustrate a declared state policy, or interfere with a State's administrative regime,"[38] and the heterogeneity of state insurance laws thus necessitates a case-by-case determination in lieu of the blanket exemptions that insurance industry trade groups have sought. Indeed, the McCarran-Ferguson Act does not preclude *all* disparate-impact claims against insurers because many states have regulations that complement disparate-impact liability under federal law, such that McCarran-Ferguson reverse-preemption is entirely irrelevant. For example, California, North Carolina, and the District of Columbia expressly provide by statute for disparate-impact fair housing claims without exemptions for any particular type of business, including homeowner insurers.[39] Whether a state's insurance law will preempt the FHA under the McCarran-Ferguson Act depends, in large part, on which state's law applies.

Furthermore, courts have indicated that a determination of McCarran-Ferguson reverse-preemption requires a case-specific factual inquiry.[40] If anything, the relationship between state insurance regulatory regimes and federal law, as shaped by McCarran-Ferguson, actually *supports* HUD's rejection of claims that the McCarran-Ferguson Act entitles insurance to blanket exemptions. Even if state anti-discrimination law does not provide for disparate impact liability,

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36 2016 Supplemental Rule, 81 Fed. Reg. at 69,016 (citing *Lumpkin v. Farmers Grp.*, No. 05– 2868, 2007, U.S. Dist. LEXIS 98949, at *19 (W.D. Tenn. July 6, 2007).

37 *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999), cert. denied, 528 U.S. 1106 (2000).

38 *Humana, Inc. v. Forsyth*, 525 U.S. 299, 310 (1999) ("When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application.").

39 *See* Cal. Gov't Code § 12955.8 (West 2012); N.C. Gen. Stat. § 41A-5(a)(2) (West 2009); D.C. Code § 2-1401.03 (2012). Additionally, several states' highest courts have interpreted their state fair housing laws to encompass disparate impact claims, even if their statutes do not explicitly use that term or a close equivalent. *See, e.g.*, *Comm'n on Hum. Rts. & Opportunities v. Sullivan Assocs.*, 739 A.2d 238, 255–56 (Conn. 1999); *Saville v. Quaker Hill Place*, 531 A.2d 201, 205–06 (Del. 1987); *Bowman v. City of Des Moines Mun. Hous. Agency*, 805 N.W.2d 790, 798–99 (Iowa 2011); *Malibu Inv. Co. v. Sparks*, 996 P.2d 1043, 1050–51 (Utah 2000); *State of Ind., Civ. Rts. Comm'n v. Cnty. Line Park, Inc.*, 738 N.E.2d 1044, 1049 (Ind. 2000).

40 *See, e.g.*, *Dehoyos v. Allstate Corp.*, 345 F.3d 290, 297 (5th Cir. 2003) (rejecting McCarran-Ferguson reverse-preemption after appellant failed to indicate any state laws or declared regulatory policies which would conflict with federal civil rights statutes); *see also Forsyth*, 525 U.S. at 308 (("We reject any suggestion that Congress intended to cede the field of insurance regulation to the States, saving only instances in which Congress expressly orders otherwise."); *Wai*, 75 F. Supp. 2d at 5 (rejecting defendant's argument for McCarran-Ferguson reverse-preemption after noting that Maryland law did not grant the state's insurance commissioner exclusive jurisdiction over discrimination claims).

the comments of insurance industry groups did not establish that the imposition of disparate impact liability under federal law would invariably conflict with state law. Some state regulatory requirements establish a baseline, or floor, for anti-discrimination protections in housing. In many cases, the FHA appropriately raises the standard for compliance beyond that established by the state regulations. Because each state's statutory and regulatory regime is different and interacts differently with the FHA, it was entirely reasonable for HUD to adopt a case-by-case analysis.

II. The 2020 Rule Violates the Administrative Procedure Act and the Fair Housing Act and Should Be Rescinded.

a. HUD's Changes to FHA Regulations with the 2020 Rule Are Arbitrary, Capricious, and Contrary to Law.

At least five distinct changes included in the 2020 Rule would render it virtually impossible for most victims of discrimination to prevail in HUD's administrative enforcement process when alleging that they have been injured by a policy or practice with an unjustified discriminatory effect. Each of the changes is arbitrary and capricious and contrary to law.

First, the 2020 Rule eliminated the 2013 Rule's definition of "discriminatory effect," which confirmed that liability can be established under the FHA where a policy or practice *either* results in a disparate impact on a group of persons, *or* "creates, increases, reinforces, or perpetuates segregated housing patterns."[41] Courts have long recognized a theory of liability based on the perpetuation of segregation as distinct from the disparate impact theory of liability.[42] In its Preamble to the 2020 Final Rule, HUD claimed that its removal of the phrase "perpetuates segregated housing patterns" did not change any obligation under the FHA, since perpetuation of segregation could still be "a harm prohibited by disparate impact liability."[43] But, permitting evidence of a segregative effect to serve as proof of injury in support of a disparate impact claim is not the same as recognizing an independent claim of perpetuation of segregation.

Next, the 2020 Rule imposed a much higher pleading standard that requires plaintiffs to, among other things, credibly allege facts demonstrating that a challenged policy or practice is "arbitrary, artificial, and unnecessary" to achieve *any* "valid interest"—including "profit." This pleading requirement essentially shifts the burden to the plaintiff to show that a defendant has no valid interest in the challenged policy. However, decades of precedent have established that it is a defendant's burden to demonstrate a valid interest to avoid a disparate impact claim.[44]

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41 24 C.F.R. § 100.500(a).

42 *See, e.g.*, *Huntington Branch, N.A.A.C.P.*, 844 F.2d at 937, *aff'd in part sub nom. Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15 (1988) ("The discriminatory effect of a rule arises in two contexts: adverse impact on a particular minority group and harm to the community generally by the perpetuation of segregation."); *Arlington Heights*, 558 F.2d at 1291; *Black Jack*, 508 F.2d at 1184–86.

43 85 Fed. Reg. at 60,306.

44 *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). *See also Huntington Branch*, 844 F.2d 926; *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977); *Reyes v. Waples Mobile Home Park L.P.*, 903 F.3d 415 (4th Cir. 2018); *Inclusive Cmtys. Project v. Lincoln Prop. Co.*, 920 F.3d 890 (5th Cir. 2019); *Arthur v. City of Toledo*, 782 F.2d 565

Additionally, HUD does not explain why plaintiffs should be required to allege that a defendant's policy or practice falls into all three categories. For example, a policy may be arbitrary and unnecessary without being "artificial"—i.e., a pretext to cover up discriminatory intent.

Third, the 2020 Rule abandoned the well-established burden-shifting standard for disparate impact claims. Under the 2013 Rule, after a plaintiff proved that a challenged practice caused a discriminatory effect, the burden moved to the defendant to persuade the decisionmaker that the challenged practice was necessary to achieve certain interests, and if the defendant did so, the plaintiff had to prove that the defendant's "substantial, legitimate, nondiscriminatory interests . . . could be served by another practice that has a less discriminatory effect."[45] The 2020 Rule decimated this burden-shifting standard, replacing it with a confusing, nonlinear series of "showings" that a plaintiff must make to first plead and then prove its prima facie case. For example, under the 2020 Rule, a defendant may rebut the allegation by producing evidence showing the policy "advances a valid interest (or interests)," without a requirement of persuasion as to justify their interest.[46]

Moreover, under the 2020 Rule, if a defendant produces such evidence, the analysis stops there. Unlike the 2013 Rule, the 2020 Rule offered no opportunity for a plaintiff to then suggest that a less discriminatory policy exists. In other words, the 2020 Rule offered no pathway for a plaintiff to move from stage two to stage three: It is simply silent on what happens after a defendant rebuts the first element—whether the case ends; whether the plaintiff then reverts to stage one to allege (and then prove) the remaining elements; or something else. Then, assuming plaintiffs can even reach a third stage in the burden-shifting framework to raise less discriminatory alternatives, the 2020 Rule obligates them to prove that the less discriminatory alternative is "equally effective" as the challenged practice and does not "impos[e] materially greater costs on, or creat[e] other material burdens for, the defendant."[47]

Fourth, the 2020 Rule added two new exemptions to liability for defendants in discriminatory effects cases, separate from the burden-shifting standard laid out in 24 C.F.R. § 100.500(b)–(c). The first exemption allows defendants to establish either that a plaintiff failed to plead facts in support of a prima facie case, or that a plaintiff failed to establish that a policy or practice has a discriminatory effect, if the defendant shows it was "reasonably necessary to comply with a third party requirement."[48] The 2020 Rule lists three such requirements, including "[f]ederal, state, or local law"; "[b]inding or controlling court, arbitral, administrative order or opinion"; and "[b]inding or controlling regulatory, administrative or government guidance or requirement."[49] This defense denies plaintiffs any opportunity to address whether, despite the third party's requirement, there were less discriminatory options available to the defendant.

(6th Cir. 1986); *Arlington Heights*, 558 F.2d 1283; *Black Jack*, 508 F.2d 1179; *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493 (9th Cir. 2016); *Mountain Side Mobile Ests. P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243 (10th Cir. 1995).

45 24 C.F.R. § 100.500(c)(1)–(3) (2013).

46 *Id.* § 100.500(c)(2).

47 *Id.* § 100.500(c)(3) (2020).

48 *Id.* § 100.500(d)(1), (2)(iii).

49 *Id*.

The second exemption applies when "[t]he policy or practice is intended to predict an occurrence of an outcome, the prediction represents a valid interest, and the outcome predicted by the policy or practice does not or would not have a disparate impact on protected classes compared to similarly situated individuals not part of the protected class . . ."[50] Following the assertion of this defense, the plaintiff has the opportunity to "demonstrate[] that an alternative, less discriminatory policy or practice would result in the same outcome of the policy or practice, without imposing materially greater costs on, or creating other material burdens for the defendant."[51] HUD explained in its preamble to the 2020 Rule that that the "similarly situated individuals" analysis would protect predictive models that are "accurate" because they are "not overly restrictive on members of the protected class."[52] HUD reasoned that a lender who rejects people in a protected class at higher rates than people not in a protected class could avoid liability through the prediction exemption by showing that approved borrowers from the protected class default more or just as often as approved borrowers not in the protected class, which HUD claimed would show that the lender did not hold members in the protected class to a higher standard in order to obtain a loan.

This predictive model exemption is problematic for several reasons. First, the FHA does not grant HUD authority to create safe harbors, exemptions, or exceptions from discriminatory effects liability, and no court has ever held that entire categories of policies or practices that might otherwise be subject to challenge are exempt from such liability. Despite this, HUD's 2020 Rule impermissibly created exemptions for predictive models that have no basis in the FHA or any other source of authority.[53] The proposed Rule would shield a wide range of discriminatory policies and practices. Many discriminatory models would qualify for liability exemption because of the Rule's novel "similarly situated individuals" analysis, for which there is no basis as a matter of law or as a matter of fact. For example, a predictive model that disparately impacts borrowers of color because it charges higher rates to those attending colleges that are predominantly attended by students of color is not any less discriminatory because borrowers of color from Ivy League schools default at the same or similar rates as approved white borrowers. In many situations, it will also be difficult for plaintiffs to demonstrate that an alternative, less discriminatory policy would result in the *same* outcome, without imposing materially greater costs or other material burdens. Moreover, the 2020 Rule's exemption for predictive technology was adopted without providing the public an opportunity to object to it. With respect to the use of predictive technologies, HUD had proposed a very different—and also problematic—defense in its 2019 Proposed Rule that drew numerous concerns from commentators.[54] In response to those concerns, HUD simply eliminated the proposed defense in its 2020 Rule and replaced it with completely new language that had not been vetted through

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50 *Id.* § 100.500(d)(2)(i).

51 *Id.*

52 85 Fed. Reg. at 60,290.

53 Pls.' Compl., *Open Cmtys. All. v. HUD*, https://www.aclu.org/sites/default/files/field_document/oca_v._carson_-_filed_complaint_0.pdf

54 The 2019 Proposed Rule created a defense that would apply "[w]here a plaintiff alleges that the cause of a discriminatory effect is a model used by the defendant, such as a risk assessment algorithm," and the defendant is able to show that the model's inputs do not rely on substitutes or close proxies for protected classes, but is predictive of a valid objective; that the model is produced, maintained, or distributed by a recognized third party—not the defendant; and that the model has been subjected to critical review and validated by a third party." 84 Fed. Reg. at 42,862.

public comment and was not a "logical outgrowth" of the Proposed 2019 Rule, thereby violating the procedures required by the Administrative Procedure Act, 5 U.S.C. § 706(2)(D).[55] Had the exemption gone through proper notice and comment, commenters could have had the opportunity to address the lack of statutory authorization for such an exemption, the vague and confusing wording of the exemption, and the wide range of potentially harmful policies that it would inoculate from liability.

Finally, the 2020 Rule sharply limited the circumstances in which HUD will seek civil money penalties against defendants in discriminatory effects cases. Under the FHA, an administrative law judge may assess a civil penalty against the respondent, with the amount depending on the respondent's history of violations: The penalty cannot exceed $10,000 if the respondent has no prior history of discriminatory housing practices, $25,000 if the respondent committed one other discriminatory housing practice during the prior five-year period, and $50,000 if the respondent committed two or more discriminatory housing practices during the prior seven-year period.[56] The 2020 Rule, by contrast, stated that "HUD will seek only equitable remedies" in disparate effects cases and will pursue civil money penalties "only where the defendant has previously been adjudged, within the last five years, to have committed unlawful housing discrimination under the [FHA]."[57] A reasonable interpretation of this section conveys that HUD will always decline to request penalties available under the statute if it is the defendant's first offense and liability is based on a disparate effects claim, or if the defendant has two or more prior offenses, but they were more than five years prior to the complaint—even if they were committed less than seven years ago or by the same person.

The five changes described above conflict with longstanding liability standards for FHA claims, making the 2020 Rule contrary to law. HUD also failed to articulate valid reasons for changing these standards and failed to address the impact of the changes, making the 2020 Rule arbitrary and capricious. Furthermore, the changes run counter to HUD's duty to "affirmatively further fair housing" ("AFFH")—a duty that requires HUD to address segregation and other barriers to fair housing in its own policies and practices. With the 2020 Rule, HUD abdicated its statutory responsibilities by eliminating perpetuation of segregation as a basis for liability and making it much more difficult—impossible in some situations—to bring a successful disparate impact claim. The 2020 Rule exempted from disparate-impact liability practices that perpetuate segregation or have a discriminatory impact on protected classes. Reinstatement of the 2013 Rule is critical to combatting pervasive housing discrimination, meeting HUD's AFFH obligation, and fulfilling the very purpose and intent of the FHA.

b. <u>The 2020 Rule Failed to Address the Numerous Comments Describing the Negative Impacts that Would Result from the Proposed Changes.</u>

In promulgating the 2020 Rule, HUD "acknowledge[d]," but did not address, the numerous comments offering detailed descriptions of the negative impacts the Rule would have

55 *See Nat'l Black Media Coal. v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986).

56 42 U.S.C. § 3612(g)(3).

57 24 C.F.R. § 100.500(f).

on plaintiffs' ability to successfully challenge housing discrimination.[58] At most, "HUD also agree[d] that [the Rule] will benefit banks and landlords," indicating that HUD understood that the 2020 Rule could hurt plaintiffs who are suing banks and landlords for discrimination. Yet again, the 2020 Rule failed to account for the impact of its changes, and specifically, for the impact of making it harder to bring disparate impact claims.[59] Because it failed to address comments raising significant and reasonable concerns that changes to the disparate impact standard would undermine the purpose of the FHA, the 2020 Rule was formed through a deficient process.

III. Reinstatement of the 2013 Rule is Necessary to Address Myriad Forms of Housing Discrimination and to Fully Implement the Biden Administration's Civil Rights Agenda.

HUD's reinstatement of the 2013 Rule is critical to 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.

i. Discrimination through Housing Technologies

Reinstatement of the 2013 Rule is an important step in providing the necessary safeguards to avoid and address actions that perpetuate and exacerbate longstanding housing segregation in the United States. Governments and corporations, at the national, state, and local level, are increasingly using computer software, statistical models, assessment instruments, and other algorithmic tools to make decisions about access to housing and credit. Housing discrimination has evolved along with new and expanding uses of technology,[60] such as machine learning-based mortgage and lending models,[61] algorithms for determining eligibility for and

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58 *See, e.g.*, National Fair Housing Alliance, Comment Letter on HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 2 (Oct. 18, 2019), https://beta.regulations.gov/comment/HUD-2019-0067-3079 ("The cumulative effect of these proposed changes would be to require dismissal of what should be meritorious disparate impact claims" and "would eliminate the duty and incentive of regulated entities to seek out less discriminatory alternatives"); Open Communities Alliance, Comment Letter on HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 2, 4 (Oct. 18, 2019), https://beta.regulations.gov/comment/HUD-2019-0067-3356at (same); American Civil Liberties Union, Comment Letter on HUD's Implementation of the Fair Housing Act's Disparate Impact Standard (hereinafter "ACLU Comment") (Oct. 17, 2019), https://beta.regulations.gov/comment/HUD-2019-0067-3539 (same); Lawyers' Committee for Civil Rights Under Law, Comment Letter on HUD's Implementation of the Fair Housing Act's Disparate Impact Standard (Oct. 18, 2019), https://beta.regulations.gov/comment/HUD-2019-0067-3244 (same). *See also* 85 Fed. Reg. 60,288.

59 *Id.* at 60,292.

60 *See, e.g.*, Patrick Sisson, *Housing discrimination goes high tech*, Curbed, Dec. 17, 2019, https://archive.curbed.com/2019/12/17/21026311/mortgage-apartment-housing-algorithm-discrimination; Robert Bartlett et al., *Consumer-Lending Discrimination in the FinTech Era* (Nov. 2019), https://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf

61 *See, e.g.*, Jennifer Miller, *Is an Algorithm Less Racist than a Loan Officer?*, N.Y. Times, Sept. 18, 2020, https://www.nytimes.com/2020/09/18/business/digital-mortgages.html?searchResultPosition=1.

allocating housing services,[62] online advertising,[63] and tenant screening algorithms.[64] Too often, these technologies amplify and exacerbate racial, gender, disability, economic, and intersectional inequity in accessing to housing. Bias is often baked into the outcomes the algorithms are asked to predict. For example, algorithms that attempt to predict risk often use "arrest" as a proxy for "likelihood to compromise safety in housing." Given the realities of disproportionate and unjust policing of communities of color, the idea that an arrest, without more information about context, can indicate a future housing safety risk, is inherently biased. Likewise, bias is in the data used to train the AI—data that is often discriminatory or unrepresentative for people of color, women, or other marginalized groups—and can rear its head throughout the AI's design, development, implementation, and use. For example, if an algorithm is given "successful tenant" profiles compromised entirely of men within a particular income bracket with the goal of having the algorithm learn to evaluate future tenants, it will learn to look for characteristics common to that demographic when evaluating new tenants and potentially exclude people who fall into other demographic categories or who have other life experiences, possibly including protected classes. And because of the black box nature of these systems and insufficient notice to impacted people when they are utilized, it is often difficult or impossible for people to learn about housing discrimination in these systems.

Concerns that algorithms and other technologies enable and perpetuate widescale housing discrimination are not theoretical. For example, a 2017 ProPublica investigation uncovered that Facebook's advertisement targeting function allowed users to request that housing advertisements not be shown to people who fell into protected classes under the FHA.[65] HUD's own investigations resulted in the same conclusion and, given the 2013 Rule, HUD brought a complaint to enforce compliance with the FHA.[66] Similarly, researchers from the University of Berkeley found that FinTech lending companies using algorithms to generate decisions on loan pricing discriminated against borrowers of color. They concluded that this algorithmic discrimination resulted in a collective overcharge of $765 million each year for home and refinance loans. The researchers also found that both in-person and online lenders rejected a total of 1.3 million creditworthy applicants of color between 2008 and 2015.[67]

The 2013 Rule provided a workable basic framework through which Courts could analyze claims brought by individuals seeking redress for housing discrimination resulting from the use of algorithms and artificial intelligence technologies, including tenant screening

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62 *See, e.g.*, Catriona Wilkey et al., *Coordinated Entry Systems: Racial Equity Analysis of Assessment Data*, Oct. 2019, https://c4innovates.com/wp-content/uploads/2019/10/CES_Racial_Equity-Analysis_Oct112019.pdf.

63 *See, e.g.*, Charge of Discrimination, *HUD v. Facebook*, FHEO No. 01-18-0323-8 (HUD Mar. 28, 2019), https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf; Muhammad Ali et al., *Discrimination Through Optimization: How Facebook's Ad Delivery Can Lead to Skewed Outcomes* (2019), https://arxiv.org/abs/1904.02095; Julia Angwin et al., *Facebook (Still) Letting Housing Advertisers Exclude Users by Race*, ProPublica, Nov. 21, 2017, https://www.propublica.org/article/facebook-advertising-discrimination-housing-race-sex-national-origin;

64 *See, e.g.*, Kaveh Waddell, *How Tenant Screening Reports Make It Hard for People to Bounce Back from Tough Times*, Consumer Reports, March 11, 2021, https://www.consumerreports.org/algorithmic-bias/tenant-screening-reports-make-it-hard-to-bounce-back-from-tough-times/.

65 Angwin et al., *supra* note 63.

66 *See, e.g.*, Charge of Discrimination, *HUD v. Facebook*, *supra* note 63.

67 Sisson, *supra* note 60.

algorithms.[68] Reinstatement of the 2013 Rule is a first step to addressing the harm that these systems can cause, and far from giving algorithmic systems an exemption from liability as the 2020 Rule had done, HUD should strengthen enforcement of disparate impact protections by proactively monitoring and investigating the use of predictive technologies in housing.

ii. Discrimination through Reentry Barriers

Reinstatement of the 2013 Rule is critical to ensuring FHA compliance and recourse for individuals and communities who are excluded from housing opportunities due to contact with the criminal legal system. Tenant screening and eviction 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.[69] HUD Secretary Fudge recently acknowledged the barriers to reentry that millions of people in the United States face and emphasized that "too many people exit prisons and jails in America without a stable home to return to."[70] 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"[71] 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.[72] These housing denials occur "even when their criminal history does not indicate that they present a substantial risk to persons or property."[73] These arrest and criminal records policies have the effect of perpetuating housing segregation in the United States.[74] A robust disparate impact rule is essential to fulfilling the

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[68] *See, e.g.*, *Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Solutions, LLC*, 369 F. Supp. 3d 362 (D. Conn. 2019) (denying motion to dismiss FHA disparate-impact and disparate treatment claims based on tenant screening algorithm).

[69] *See, e.g.*, Housing Equality Ctr. of Penn., *Nuisance and Crime-Free Housing Ordinances*, https://www.equalhousing.org/fair-housing-topics/nuisance-and-crime-free-housing-ordinances/#:~:text=Crime%2Dfree%20ordinances%20may%20define,Housing%20Act%20in%20several%20circumstances; ACLU, *I Am Not a Nuisance: Local Ordinances Punish Victims of Crime*, https://www.aclu.org/other/i-am-not-nuisance-local-ordinances-punish-victims-crime; Leora Smith, *When the Police Call Your Landlord*, Atlantic, Mar. 13, 2020, https://www.theatlantic.com/politics/archive/2020/03/crime-free-housing-lets-police-influence-landlords/605728/; Emily Werth, *The Cost of Being "Crime Free": Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances*, Aug. 2013, https://www.povertylaw.org/wp-content/uploads/2019/09/cost-of-being-crime-free.pdf (discussing the features of crime-free and nuisance property ordinances); Ann Cammett, Confronting Race and Collateral Consequences in Public Housing, 39 Seattle U. L. Rev. 1123, 1137–38 (2016) (identifying restrictions on housing opportunities as one of the most significant obstacles to successful reentry); Jesse Kropf, Note, *Keeping "Them" Out: Criminal Record Screening, Public Housing, and the Fight Against Racial Caste*, 4 Geo. J.L. & Mod. Critical Race Persp. 75 (2012).

[70] HUD, *Letter Outlining HUD Actions to Address Reentry Housing Needs and Increase Public Safety*, June 23, 2021, https://www.hud.gov/sites/dfiles/PA/documents/SOHUD_reentry_housing_letter.pdf

[71] *Id.*

[72] 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://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

[73] HUD, Letter Outlining HUD Actions to Address Reentry Housing Needs and Increase Public Safety, June 23, 2021, https://www.hud.gov/sites/dfiles/PA/documents/SOHUD_reentry_housing_letter.pdf

[74] NYU Law, *New Barriers: Deborah Archer's Research Reveals How Today's Crime-Free Housing Ordinances Uphold the Legacy of Segregation*, https://www.law.nyu.edu/news/deborah-archer-crime-free-housing-

Biden Administration's articulated vision of "taking a comprehensive approach to addressing the housing needs of returning citizens and people with criminal records" through the FHA's protections.

Unlike the 2020 Rule, the 2013 Rule 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 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."[75] HUD further emphasized that tenant screening policies that incorporate arrest and conviction record screening likely have a disparate impact on Black and Latinx 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."[76] HUD further explained that "[a] housing provider must [] be able to prove through reliable evidence that its 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.[77]

Numerous courts have found both the 2013 Rule and the accompanying 2016 Guidance helpful and workable in analyzing how disparate impact claims "apply to situations where a housing provider takes an adverse action based on an individual's criminal history."[78] Specifically, courts have found the rule useful in (i) identifying policies and practices around arrest and conviction records subject to challenge; (ii) evaluating and establishing whether there is a causal connection between the identified policy and impact; and (iii) assessing business justification defenses and less discriminatory alternatives. Several post-*Inclusive Communities* decisions have applied long-standing FHA disparate impact jurisprudence in conjunction with the 2013 Rule codifying these decisions to cases challenging housing policies on arrest and conviction records.[79]

The 2013 Rule and 2016 Guidance have also assisted in providing clarity about the showing required at the pleading and merits stages in cases claiming disparate impact liability based on housing policies that consider arrest and conviction records. For example, in *Fortune*

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ordinances-segregation; Liam Dillion et al., *Black and Latino renters face eviction, exclusion amid police crackdowns in California*, LA Times, Nov. 19, 2020, https://www.latimes.com/homeless-housing/story/2020-11-19/california-housing-policies-hurt-black-latino-renters.

[75] 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 72.

[76] *Id.*

[77] *Id.*

[78] *Conn. Fair Hous. Ctr.*, 369 F. Supp. 3d at 378.

[79] *See, e.g.*, *Sams v. Ga West Gate LLC*, No. cv-415-282, 2017 WL 436281, at *5 (S.D. Ga. Jan. 30, 2017) (citing *ICP* and the causality requirements codified under the 2013 Rule in denying motion to dismiss disparate impact claims based on apartment complex's criminal records policy); *Jones v. City of Faribault*, No. 18-1643 (JRT/HB), 2021 WL 1192466, at *17 (D. Minn. Feb. 18, 2021) (applying the 2013 Rule's burden-shifting test and specifically using *the ICP* causality requirement in evaluating the first prong of the test).

Society v. Sandcastle Housing Development Fund Corp, the Court applied the three-part burden-shifting test, codified in the 2013 Rule, and explained that *prima facie* disparate impact claims only require a showing that an outwardly neutral practice that caused or could predictably cause an adverse impact but that to prevail on the merits, there must be a showing that there is a less discriminatory alternative that addresses a defendant's legitimate business interests.[80] In doing so, the 2013 Rule effectively balances each side's interests.

Reinstatement of the 2013 Rule would provide needed clarity on the basic framework to evaluate disparate-impact claims as applied to policies that unjustly deny housing based on arrest and conviction records as well as necessary protection for Black and Brown communities that suffer ongoing and devastating discrimination due to contact with the criminal legal system.

iii. Perpetuation of Racial Segregation

The 2013 Rule has played a vital role in "moving the Nation toward a more integrated society" and combatting the perpetuation of residential segregation through exclusionary zoning and other land-use restrictions.[81] Specifically, the 2013 Rule provides a tool for enforcing the FHA's protections against facially neutral conduct that perpetuates existing patterns of residential segregation by race without any legitimate basis.[82] Courts have consistently recognized that "housing segregation both perpetuates and reflects this country's basic problems regarding race relations: educational disparities, police-community relations, crime levels, wealth inequality, and even access to basic needs such as clean water and clean air."[83] Considering the major impact of residential segregation on an individual's opportunities, the 2013 Rule helps to fulfill the FHA's objectives in creating a just and equitable society.

Today, residential segregation in the United States persists at alarming rates and inflicts far-reaching and lasting harms on communities of color and low-income families. Despite growing diversity in population, many cities across the country remain deeply segregated.[84] 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.[85] Schools in segregated neighborhoods, for example, suffer from high dropout rates, poor test results, and limited educational achievements.[86] Persistent segregation of neighborhoods also inhibits property value appreciation in predominantly Black neighborhoods as compared to predominantly white neighborhoods, even when the characteristics of the homes and

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80 388 F. Supp. 3d 145, 172–73 (E.D.N.Y. 2019); *see also Conn. Fair Hous. Ctr.*, 369 F. Supp. 3d at 377–78 (denying motion to dismiss disparate-impact claim against entity offering a criminal tenant screening product and explaining that a *prima facie* case only requires a neutral practice that causes adverse impact).

81 *Inclusive Cmtys.*, 576 U.S. at 546–47.

82 *Mhany Mgmt*, 819 F.3d at 619–20.

83 *Avenue 6E Investments*, 818 F.3d at 503.

84 Aaron Williams & Armand Emamjomeh, *America is more diverse than ever – but still segregated*, Wash. Post (May 10, 2018), https://www.washingtonpost.com/graphics/2018/national/segregation-us-cities/.

85 Urban Institute, *Segregated Neighborhoods, Segregated Schools?* (Nov. 28, 2018), https://www.urban.org/features/segregated-neighborhoods-segregated-schools.

86 Margery Austin Turner & Karina Fortuny, The Urban Institute, *Residential Segregation and Low-Income Working Families* (Feb. 2009), https://www.urban.org/sites/default/files/publication/32941/411845-Residential-Segregation-and-Low-Income-Working-Families.PDF.

neighborhoods are otherwise the same.[87] Research has further found that residential segregation may influence discriminatory policing in neighborhoods that are predominantly minority residents.[88]

Reinstatement of the 2013 Rule is critical to addressing the continuing harm of residential segregation. In promulgating its 2013 Rule, HUD considered and rejected the suggestion to delete "perpetuation of segregation" as a recognized discriminatory effect."[89] HUD reasoned that the "elimination of segregation is central to why the [FHA] was enacted" and that "every federal court of appeals to have addressed the issue has agreed."[90] Accordingly, the ACLU urges HUD to reinstate its 2013 Rule and make clear that perpetuation of segregation is a component of disparate-impact liability.

iv. Discrimination Based on National Origin Against Immigrants and Language Minorities

Disparate impact liability 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 Latinx or Asian national origin. In 2017, the National Fair Housing Alliance reported elevated rates of housing discrimination complaints from Latinx complainants experiencing housing harassment or displacement from housing because of immigration status.[91]

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 to renew their leases.[92]

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87 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://prospect.org/article/government-created-housing-segregation-heres-how-government-can-end-it.

88 Emily Badger, *Baltimore shows how historic segregation shapes biased policing today*, Wash. Post (Aug. 10, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/08/10/baltimore-shows-how-historic-segregation-shapes-biased-policing-today/.

89 2013 Rule, 78 Fed. Reg. at 11,469.

90 *Id.*

91 Nat'l Fair Hous. Alliance, *Making Every Neighborhood a Place of Opportunity: 2018 Fair Housing Trends Report* at 80 (2018), *available at* https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report_4-30-18.pdf.

92 *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*,

Consistent with these precedents, HUD's own guidance recognizes that discrimination based on language can have a discriminatory impact based on national origin, and that this would violate the FHA.[93] In this 2016 guidance, HUD stated that "[a] requirement involving citizenship or immigration status will violate the [FHA] when it has the purpose or unjustified effect of discriminating on the basis of national origin."[94]

Despite such precedent and guidance, the 2020 Rule substantially increased a plaintiff's burden to allege a *prima facie* case and created absolute defenses that are inconsistent with the FHA and the broad construction it has been given by the Supreme Court and other courts. Reinstatement of the 2013 Rule is vital to ensure that the most vulnerable and marginalized communities have an avenue to enforce their fair housing rights.

v. Gender-Based Housing Discrimination Against Women and Women-Headed Families

Women of all identities, particularly those who face violence and who have families to support, should be protected under the FHA. Property owners, housing providers, and local governments are increasingly enforcing discriminatory policies that not only bar women from accessing housing, but also evict them from their homes.[95] The ACLU urges HUD to reinstate the 2013 Rule and advance housing policies that strengthen—not undermine—the existing disparate impact theory that allows for stable, safe, and affordable housing for all.

1. Discrimination Against Domestic Violence Survivors

Domestic violence is a leading cause of homelessness for women in the United States.[96] Over 90% of homeless women report having experienced domestic abuse or sexual violence in their lives, while over 50% of homeless women report that domestic violence was the immediate cause of their homelessness.[97] Access to housing is absolutely critical for survivors, as lack of

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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 Latinos, who were overrepresented among mobile home residents in the state and among the state's non-citizen population).

93 HUD, *Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency*, at 3 (Sept. 15, 2016), https://archives.hud.gov/news/2016/pr16-135-lepmemo091516.pdf; 24 C.F.R. § 1.4(b)(2)(i).

94 *Id.*

95 ACLU Women's Rights Project, *Chronic Nuisance and Crime-Free Ordinances: Endangering the Right of Domestic Violence Survivors to Seek Police Assistance*, https://www.aclu.org/sites/default/files/assets/nuisance_ordinance_issue_summary_-_final.pdf; *see also* Amanda K. Gavin, Comment, *Chronic Nuisance Ordinances: Turning Victims of Domestic Violence into "Nuisances" in the Eyes of Municipalities*, 119 Penn. St. L. Rev. 257, 257–58 (2014).

96 *See* ACLU Women's Rights Project, *Domestic Violence and Homelessness* (2006), http://www.aclu.org/pdfs/dvhomelessness032106.pdf; *see also* U.S. Conference of Mayors, *A Status Report on Hunger and Homelessness in America's Cities: A 25-City Survey* (Dec. 2014); *see also* 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).

97 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://nlihc.org/sites/default/files/AG-2019/06-02_Housing-Needs-Domestic-Violence.pdf.

safe and affordable housing options is regularly reported as a primary barrier to escaping abuse.[98] Homelessness can also be a precursor to additional violence, because a survivor is at the greatest risk of violence when separating from an abusive partner.[99] HUD's 2013 Rule ensures adequate protections for domestic violence survivors who denied housing because they accessed emergency services, defended themselves, or experienced abuse in their homes.

In particular, the FHA has provided significant protections against unjust landlord policies that penalize survivors because of the abuse they experienced—including unjust policies that hold survivors responsible for abuse in their homes or noise or property damage arising from the violence. Because the vast majority of survivors are women, policies that discriminate against survivors have an unlawful disparate impact on women. The 2013 Rule is critical to preventing landlords, housing providers, municipalities, and other actors from adopting discriminatory policies and practices that disproportionately harm survivors. Notably, the disparate impact framework has been an effective tool in HUD's efforts to combat the following deeply flawed policies:

- Some landlords and housing providers evict or threaten to evict domestic violence survivors in accordance with "one-strike" or "crime-free" policies that punish survivors because of the abuse they experienced in their home.[100] These policies result in survivors and their children being evicted and rendered homeless for violence done to them or by their abusers.[101] The 2013 Rule remains critical for combatting these unjust policies.[102]

- Some landlords evict survivors and their children from housing for reasons directly related to domestic violence, like noise complaints during abusive attacks, damage to the rental unit caused by abusive partners, and economic abuse. The Violence Against Women Act ("VAWA") does not protect the housing of survivors who live in apartments that are not subsidized by the federal government. The 2013 Rule helps to protect survivors who live in private apartments or state-funded subsidized housing from eviction due to abuse.

- In many jurisdictions, nuisance or crime-free ordinances coerce landlords to evict or threaten to evict households based on calls for police or emergency assistance or for criminal activity occurring at tenants' homes, disproportionately harming domestic violence victims.[103] Research has also demonstrated that nuisance and crime-free ordinances disproportionately

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98 *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://b.3cdn.net/naeh/416990124d53c2f67d_72m6b5uib.pdf.

99 *See id.* at 431.

100 *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").

101 *See id.*; *see also* Federal Consent Decree, *Alvera v. C.B.M. Group*, Civil No. 01-857-PA (D. Or. Nov. 5, 2001), https://www.aclu.org/legal-document/alvera-v-cbm-group-federal-consent-decree.

102 *See id.*

103 *See, e.g., 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).

impact communities of color, low-income households, and people with disabilities.[104] In 2016, HUD issued guidance on how the 2013 Rule is an important tool for challenging the devastating consequences of nuisance ordinances on survivors and other vulnerable and marginalized communities.[105]

Not only do these policies increase the risk of homelessness for survivors, but they prevent survivors from obtaining stable housing in the first place. A landlord may choose not to rent to applicants because they are domestic violence survivors.[106] This can take the form of intentional discrimination, or it can take the form of unintentional discrimination that the FHA can only eradicate through disparate impact theory. The 2013 Rule is critical to combatting housing discrimination against survivors of gender-based violence.

2. Discrimination Against Families with Children

Moreover, the 2013 Rule affords significant protections to families, particularly women with children.[107] Research has consistently shown that the majority of primary caregivers are women.[108] Moreover, nearly one out of four mothers are raising their children on their own.[109] The 2013 Rule is critical to preventing landlords and housing providers from implementing overly restrictive policies that unreasonably limit families' housing choices.[110]

Advocates have relied on the 2013 Rule to challenge unjust policies that harm families, such as overly restrictive occupancy requirements. Under the FHA, for example, HUD is tasked with determining if an occupancy standard is reasonable. HUD considers factors such as the size of bedroom and unit and age of the children. This analysis is extremely important because it prevents discrimination based on familial status, a protected class under the FHA.[111] Similarly, the FHA's disparate-impact theory has been used to challenge housing policies that overly restrict the use of facilities that are overwhelmingly enjoyed by children, such as pools or

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104 ACLU & New York Civil Liberties Union, *More Than a Nuisance: The Outsized Consequences of New York's Nuisance Ordinances* (2018), https://www.nyclu.org/sites/default/files/field_documents/nyclu_nuisancereport_20180809.pdf.

105 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://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF.

106 1985 N.Y. Op. Att'y Gen. 45 (Nov. 22, 1985); Anti-Discrimination Ctr. of Metro N.Y., *Adding Insult to Injury: Housing Discrimination Against Survivors of Domestic Violence* (Aug. 2005), http://www.antibiaslaw.com/sites/default/files/all/DVReport.pdf; *see also* Equal Rights Ctr., *No Vacancy: Housing Discrimination Against Survivors of Domestic Violence in the District of Columbia* (Apr. 2008).

107 *See* 42 U.S.C. §§ 3601-19.

108 National Partnership for Women & Families, *The Female Face of Family Caregiving* (Nov. 2018), http://www.nationalpartnership.org/our-work/resources/economic-justice/female-face-family-caregiving.pdf.

109 A.W. Geiger et al., Pew Research Center, *6 Facts About U.S. Moms* (May 8, 2019), https://www.pewresearch.org/fact-tank/2019/05/08/facts-about-u-s-mothers/.

110 *See* Lauren Brasil, *Occupancy Policies and the FHA: How Many is Too Many?*, Fair Housing Project (Dec. 4, 2018), available at https://www.fairhousingnc.org/newsletter/occupancy-policies-and-the-fair-housing-act-how-many-is-too-many/.

111 *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).

courtyards, can be considered discriminatory under the FHA.[112] For example, a landlord's policy against congregating in common areas may have a discriminatory impact on families with children when evidence shows that children are more likely than adults to play, or congregate, in such places.[113] The 2013 Rule has been the foundation to preventing overly restrictive landlord policies that negatively impact families, particularly women with children.

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

A 2017 report entitled *Priced Out: The Housing Crisis for People with Disabilities*, co-authored by 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, concluded:

> 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.[114]

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."[115]

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.

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.[116] The inability to preserve housing will not only put people with disabilities at risk of homelessness and institutionalization, but will likely increase costs to state and local governments, which will incur the costs of institutionalization, shelter placements, and emergency department visits.

The availability of rental subsidies has been critical to ensure the availability of affordable and accessible housing for people with disabilities. Such subsidies are a key aspect of

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112 *See id.*

113 *Khalil v. Farash Corp.*, 260 F. Supp. 2d 582, 589 (W.D.N.Y. 2003).

114 Technical Assistance Collaborative, *Priced Out in the United States* (2017), http://www.tacinc.org/knowledge-resources/priced-out-v2/.

115 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, http://www.tacinc.org/media/59493/priced-out-in-2016.pdf.

116 National Fair Housing Alliance, *The Case for Fair Housing, 2017 Fair Housing Trends Report* (Apr. 2017), at 27, https://nationalfairhousing.org/wp-content/uploads/2017/04/TRENDS-REPORT-4-19-17-FINAL-2.pdf.

implementing the Americans with Disabilities Act'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. And many covered entities attempt to bar "group homes" for people with mental disabilities. Reinstatement of the 2013 Rule 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.

IV. Conclusion

The promise of housing equality is still unfulfilled in the United States, and disparate impact liability is an essential tool for combating the insidious housing discrimination that persists in our communities. Before finalizing the 2013 Rule, HUD engaged in a thoughtful and thorough process, considering decades of federal court jurisprudence. The Supreme Court in *Inclusive Communities* affirmed disparate-impact liability without suggesting that the 2013 Rule was inconsistent in any way with existing doctrine. Moreover, reinstatement of the 2013 Rule is critical to advancing access to housing opportunities for vulnerable and historically marginalized communities throughout the country.

Thank you for the opportunity to comment.

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