



UNITED STATES COMMISSION ON CIVIL RIGHTS

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VIA MAIL AND ELECTRONIC FILING

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

RE: U.S. Commission on Civil Rights Comment in Opposition to Notice of Proposed Rulemaking re HUD's Implementation of the Fair Housing Act's Disparate Impact Standard
Docket ID: HUD-2019-0067

The U.S. Commission on Civil Rights, by majority vote, submits the following comments in opposition to the Department of Housing and Urban Development's (HUD) Notice of Proposed Rulemaking that seeks to change the standard for disparate impact liability in housing discrimination claims under the Fair Housing Act.¹ The Commission is an independent, bipartisan, fact-finding federal agency whose mission is to inform the development of national civil rights policy and enhance enforcement of federal civil rights laws.² Congress has charged the Commission to, among other duties, "make appraisals of the laws and policies of the Federal Government with respect to discrimination or denials of equal protection of the laws under the Constitution of the United States because of color, race, religion, sex, age, disability, or national origin, or in the administration of justice."³ For more than sixty years, the Commission and its state advisory committees have investigated and reported on the varied forms of discrimination that create barriers to civil rights equality in our country. Historically, discrimination carried with it an overt discriminatory intent, but over time, by way of changing views and norms, discrimination has tended to manifest in differently pernicious forms. In fact, during the Civil Rights Era, the Commission urged the creation of the disparate impact standard as a civil rights investigation and evaluation tool, and since that time has repeatedly recognized the utility of the standard for rooting out discrimination.⁴ The Commission has very strong concerns that the Proposed Rule will impose

¹ U.S. Dep't of Housing and Urban Development, Proposed Rule, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42854 (Aug. 19, 2019),

<https://www.federalregister.gov/documents/2019/08/19/2019-17542/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard>.

² Mission, U.S. Commission on Civil Rights, <https://www.usccr.gov/about/index.php>.

³ 42 U.S.C. § 1975a(a)(2)(B).

⁴ See Olatunde C.A. Johnson, *The Agency Roots of Disparate Impact*, 49 Harv. C.R.-C.L. L. Rev. 125, 139 (2014), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2086&context=faculty_scholarship (describing how, after Title VI passed in 1964, the Commission worked on a task force with the White House, the Department of Justice, and the Bureau of Budget to draft the final regulations first "for the Department of Health, Education, and Welfare, which then became the model for all other federal agencies."). The Commission has continued to lift up the critical utility of disparate impact analysis. See, e.g., U.S. Commission on Civil Rights, *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*, Jul. 2019, <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf> at 18-20.

substantial new obstacles for victims of discrimination and will undermine the protections of the Fair Housing Act, thereby substantially undermining necessary civil rights protection in an area about which the Commission and its state advisory committees continue to receive compelling evidence of need for meaningful federal corrective action.⁵ The Commission requests HUD to consider and respond to the following comments and strongly urges HUD to retain the existing Rule.

The Proposed Rule represents a departure from decades of judicial and HUD precedent, just reaffirmed in the United States Supreme Court's *Inclusive Communities* holding, emphasizing the importance of disparate impact theory in the enforcement of civil rights protections.

I. Disparate Impact Liability is Essential for the Enforcement of Civil Rights Protections and is Well-Established in the Law.

Commission reports have documented, over decades, pervasive and persisting housing discrimination. Real estate brokers, builders, and lending institutions utilized policies and practices plainly designed to preserve residential segregation.⁶ As late as 1950, the Code of Ethics of the National Association of Real Estate Boards⁷ stated that “[t]he realtor should not be instrumental in introducing into a neighborhood... members of any race or nationality or any individual whose presence will clearly be detrimental to property values in the neighborhood.”⁸ The passage of the Fair Housing Act in 1968 invalidated these overtly discriminatory practices, but the Commission found residential segregation remained “widely prevalent” into the 1980s⁹ and recent Commission testimony illustrates its persistence today. These practices included redlining (refusing to issue loans on homes in geographic areas heavily populated with residents of color) and steering (guiding prospective homebuyers towards or away from neighborhoods based on their race).¹⁰

After the passage of the Civil Rights Act of 1964, the Commission advocated for the use of disparate impact liability as a tool for federal agencies to effectively enforce these new civil rights

⁵ See, e.g., Written Statement of Bryan Greene, U.S. Department of Housing and Urban Development, submitted to the U.S. Commission on Civil Rights, Nov. 2, 2018 (on file); Testimony of Kim Kendrick, former Assistant Secretary of Fair Housing and Equal Opportunity, submitted to the U.S. Commission on Civil Rights, Nov. 2, 2018 (on file); Written Statement of the National Fair Housing Alliance, submitted to the U.S. Commission on Civil Rights, Dec. 17, 2018 (on file); Written Statement of Oregon and 16 State Attorneys General at 3-4, submitted to the U.S. Commission on Civil Rights, Dec. 17, 2018 (on file).

⁶ U.S. Commission on Civil Rights, *Understanding Fair Housing* (1973), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr11042.pdf>, at 3.

⁷ Now called the National Association of Realtors (NAR).

⁸ U.S. Commission on Civil Rights, *Understanding Fair Housing* (1973), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr11042.pdf>, at 3.

⁹ U.S. Commission on Civil Rights, *A Sheltered Crisis: The State of Fair Housing in the Eighties (Presentations at a consultation sponsored by the United States Commission on Civil Rights)* (Sept. 1983), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr12f133.pdf>, at 5.

¹⁰ U.S. Commission on Civil Rights, *A Sheltered Crisis: The State of Fair Housing in the Eighties (Presentations at a consultation sponsored by the United States Commission on Civil Rights)* (Sept. 1983), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr12f133.pdf>, at 4, 148; U.S. Commission on Civil Rights, *Understanding Fair Housing* (1973), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr11042.pdf>, at 14.

laws.¹¹ Nondiscrimination in housing is an especially important area of civil rights law because, as the Commission recognized in the years following the passage of the Fair Housing Act: “Housing is a key to improvement in a family’s economic condition. Homeownership is one of the important ways in which Americans have traditionally acquired financial capital. Tax advantages, the accumulation of equity, and the increased value of real estate property enable homeowners to build economic assets. These assets can be used to educate one’s children, to take advantage of business opportunities, to meet financial emergencies, and to provide for retirement.”¹² The Commission declared in no uncertain terms: “[I]f racial divisions are to be bridged, equal housing is an essential element.”¹³

Preserving strong protections against housing discrimination is especially important because residential segregation is an effective mechanism for discrimination in other areas – such as employment and education. The Commission found in 1973 that “Despite a variety of laws against job discrimination, lack of access to housing in close proximity to available jobs is an effective barrier to equal employment.”¹⁴ These compounded issues of access and equity remain true today. In our 2018 report on public education inequities, the Commission found that “[m]any students in the U.S. living in segregated neighborhoods and concentrations of poverty do not have access to high-quality schools simply because of where they live, and there is potential for housing policy to help provide better educational opportunities for these students.”¹⁵

Modern-day policies and practices in housing that tend to result in discriminatory effects and entrenched residential segregation persist. Any proposal to weaken protections against covert forms of discrimination ignores this reality and undermines HUD’s mission to “create strong, sustainable, inclusive communities and quality affordable housing for all.”¹⁶ HUD testified to the Commission just last year that “[o]ngoing segregation in America, regular reports of sexual harassment in

¹¹ It was against a similar backdrop that the Commission argued in 1983 for the adoption of a disparate impact standard in the area of voting rights. Though the Fifteenth Amendment and the Voting Rights Act of 1965 prohibited policies unambiguously intended to prevent racial minorities from voting, states increasingly utilized less conspicuous methods of achieving the same end—including the use of at-large elections, municipal annexations, and redistricting. Because the nature of these practices made it difficult for victims to prove discriminatory intent, the Commission urged Congress to codify a disparate impact standard under the VRA, which it ultimately did. U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States*, Sept. 2018, https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf, at 35-36. See also U.S. Commission on Civil Rights, *Voting Rights Act: Unfulfilled Goals*, https://books.googleusercontent.com/books/content?req=AKW5QadJhZ4KEcpvYOIOabNDh9-FfsXFkztjADjwQ9-WkZwZyQ1qv6lfpCLatO0DbYXXbwEc-wKhZSpOSH8eMGay4Ucp6TF6iLZ4NJryp-alHEfOO6g0gk3bxGRbsBfChJTR9VojUTC_JeAmkt3CU5Ma_4XP9x4AEgMEEvdgZ1e2QziQC5ont5eJ58PCXM ON8wabUI2CP8BZzKAMzywq4bVf9t9Exvz8XuKxVQk3BHTj_2eIFmXdfCbu3dindC92uL68Q1K-5uHNuLGI-ADqvZc7s3fiSAirg, at 92.

¹² U.S. Commission on Civil Rights, *Understanding Fair Housing* (1973), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr11042.pdf>, at 1.

¹³ U.S. Commission on Civil Rights, *Understanding Fair Housing* (1973), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr11042.pdf>, at 1.

¹⁴ U.S. Commission on Civil Rights, *Understanding Fair Housing* (1973), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr11042.pdf>, at 1.

¹⁵ U.S. Commission on Civil Rights, *Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation* (2018), <https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf> at 106.

¹⁶ U.S. Department of Housing and Urban Development, Mission, <https://portal.hud.gov/hudportal/HUD?src=/about/mission>.

housing, and newly-constructed properties inaccessible to people with disabilities are just some examples that underscore that we have not yet conquered housing discrimination.”¹⁷

The Vermont Advisory Committee to the Commission took in testimony about the critical need for disparate impact claims under the Fair Housing Act.¹⁸ One fair housing expert shared: “A lot of fair housing enforcement, especially when you move away from individual cases and into cases of breaking down segregation, the kind of policies and practices that create concentrations of race and economic status are really very much dependent on disparate impact principles.”¹⁹ The Vermont Advisory Committee concluded, on the basis of the testimony they received, that “[d]iscrimination against people who are members of protected classes under state and federal law persists in Vermont.”²⁰

The Illinois Advisory Committee to the Commission also took in testimony about the utility of disparate impact liability to ensure access to fair housing. One advocate spoke about municipal level fair housing activities, and the work of Cook County in affirmatively furthering fair housing under state and federal law. Patrica Fron of the Chicago Fair Housing Alliance testified that “local land use zoning laws and also building codes in many jurisdictions prevent the development of balanced affordable and multi-family housing and this perpetuates segregation. . . . local ordinances like crime-free and nuisance-free rental housing ordinances, occupancy restrictions, all can have a disparate impact on people of color, women, families, and people with disabilities.” On the basis of working to remove any impediments to fair housing, local advocates encourage municipalities “to conduct an annual review of local ordinances and land use and zoning codes to ensure that there aren’t potential, unintended consequences or they’re not impeding fair housing aims.”²¹ State Attorneys General have also recently submitted testimony to the Commission regarding the crucial role that the federal disparate impact liability standards play in their work at the state level; a joint letter from 17 State Attorneys General in 2018 noted that enforcement actions “based on disparate impact theories are a critical component of states’ efforts to combat discrimination and ensure greater equality of opportunity.”²²

As the Commission documented in a recent report on the collateral consequences of past criminal justice involvement, the disparate impact standard is also necessary to combat the particular

¹⁷ Written Testimony of Bryan Greene, General Deputy Assistant Secretary, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Nov. 2, 2018 (on file) at 3.

¹⁸ Vermont Advisory Committee to the U.S. Commission on Civil Rights, *Housing Discrimination in Vermont: A Handshake and a Smile*, Sept. 2018, <https://www.usccr.gov/pubs/2018/09-21-VT-Housing.pdf> at 9 (citing testimony of Ted Wimpey, Project Director of the Fair Housing Project of the Champlain Valley Office of Economic Opportunity).

¹⁹ Briefing Transcript of Vermont Advisory Committee to the U.S. Commission on Civil Rights, Aug. 10, 2015, at 35 (on file).

²⁰ Vermont Advisory Committee to the U.S. Commission on Civil Rights, *Housing Discrimination in Vermont: A Handshake and a Smile*, Sept. 2018, <https://www.usccr.gov/pubs/2018/09-21-VT-Housing.pdf> at 1.

²¹ Briefing Transcript of Illinois Advisory Committee to the U.S. Commission on Civil Rights, May 3, 2019 at 103-04 (on file).

²² U.S. Commission on Civil Rights, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities*, Jun. 2019, <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf> at 71.

consequences for marginalized communities when housing is restricted on the basis of criminal records.²³

- II. The Proposed Rule fails to advance the purpose of the Fair Housing Act, is unnecessary in light of established judicial and HUD precedent, and imposes a heightened bar to recovery for victims of discrimination.

In 2015, the Supreme Court in *Texas Dep't of Housing and Community Affairs v. Inclusive Communities Project, Inc.* upheld the disparate impact standard under the Fair Housing Act. Writing for the majority, Justice Kennedy emphasized that “recognition of disparate impact liability under the [Fair Housing Act] plays an important role in uncovering discriminatory intent: it permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.”²⁴ In deciding *Inclusive Communities*, the Court did not announce a new rule of law. On the contrary, its decision affirmed almost four decades of precedent in eleven Courts of Appeals, beginning with *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights* in 1977.²⁵ In that case, on remand from the Supreme Court, the Seventh Circuit held that “a requirement that the plaintiff prove discriminatory intent before relief can be granted under the [Fair Housing Act] is often a burden that is impossible to satisfy. . . . A strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry . . . [which] has become harder to find.”²⁶

While *Inclusive Communities* was pending, HUD promulgated the current disparate impact rule, which codified the burden-shifting approach used by the *Arlington Heights* court, “to formalize HUD’s long-held interpretation of the availability of ‘discriminatory effects’ liability under the Fair Housing Act... and to provide nationwide consistency in the application of that form of liability.”²⁷ At the time, HUD noted that its rule was “not establishing new substantive law [but] rather, this final rule embodies law that has been in place for almost four decades.”²⁸

HUD’s Proposed Rule unnecessarily amends the burden-shifting standard codified in its current Rule, which HUD itself has utilized and was applied by the Supreme Court in *Inclusive Communities*. Since 2015, Courts of Appeals have held that *Inclusive Communities* implicitly

²³ U.S. Commission on Civil Rights, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities*, Jun. 2019, <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf> at 66-72.

²⁴ *Texas Dep't of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2522 (2015).

²⁵ U.S. Department of Housing and Urban Development, Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, Feb. 15, 2013, <https://www.hud.gov/sites/documents/DISCRIMINATORYEFFECTRULE.PDF>.

²⁶ *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (on remand).

²⁷ U.S. Department of Housing and Urban Development, Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, Feb. 15, 2013, <https://www.hud.gov/sites/documents/DISCRIMINATORYEFFECTRULE.PDF>.

²⁸ U.S. Department of Housing and Urban Development, Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, Feb. 15, 2013, <https://www.hud.gov/sites/documents/DISCRIMINATORYEFFECTRULE.PDF>.

adopted the HUD rule, and HUD itself has stated that “*Inclusive Communities* is fully consistent with [the existing HUD Rule].”²⁹

Moreover, despite the Supreme Court’s statement in *Inclusive Communities* that “disparate impact liability has always been properly limited,”³⁰ the Proposed Rule would actually increase the burden on disparate impact plaintiffs.

The current rule places an initial burden on plaintiffs to prove that a policy or practice “caused or predictably will cause a discriminatory effect.” If the plaintiff satisfies this step, the burden shifts to the defendant to prove that the policy is “necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.” If the defendant satisfies the third step, the plaintiff may still prevail by proving that “the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.”³¹

The Proposed Rule eliminates the burden-shifting approach altogether and replaces it with a substantial upfront *prima facie* requirement for plaintiffs and several new defenses. Under the Proposed Rule, in order to even proceed with discovery, a plaintiff must establish by a preponderance of the evidence a series of five elements in order to proceed with discovery:³²

- 1) The challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law;
- 2) There is a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class which shows the specific practice is the direct cause of the discriminatory effect;
- 3) The disparity caused by the policy or practice has an adverse effect on members of a protected class;
- 4) The disparity caused by the policy or practice is significant; and
- 5) There is a direct link between the disparate impact and the complaining party’s alleged injury.

The *prima facie* requirement imposes a demanding test at the pleadings stage. The first element alone shifts substantial responsibility from defendants to plaintiffs when compared with the current

²⁹ *MHANY Mgmt. Inc. v. County of Nassau*, 819 F.3d 581, 618 (2d. Cir. 2016); *6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 512-13 (9th Cir. 2016); *Prop. Cas. Insurers Ass’n of Am. v. Carson*, 2017 WL 2653069 (N.D. Ill. June 20, 2017) at *8; *American Insurance Association v. Dep’t of Hous. & Urb. Dev.*, No. 1:13-cv-00966-RJL (D.D.C.), Defendant’s Memorandum in Support of Their Motion for Summary Judgment and in Opposition to Plaintiff’s Motion for Summary Judgment, ECF No. 65 at 33; *Prop. Cas. Insurers Ass’n of Am. v. Carson*, 66 F.Supp. 3d 1018 (N.D. Ill. 2014), HUD’s Opposition to Plaintiff’s Motion to Amend Complaint, ECF No. 122 at 9.

³⁰ *Inclusive Communities*, 135 S.Ct. at 2521-22.

³¹ U.S. Department of Housing and Urban Development, Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, Feb. 15, 2013, <https://www.hud.gov/sites/documents/DISCRIMINATORYEFFECTRULE.PDF>.

³² U.S. Dep’t of Housing and Urban Development, Proposed Rule, HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42854 (Aug. 19, 2019), <https://www.federalregister.gov/documents/2019/08/19/2019-17542/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard>.

rule. Whereas the current rule places a burden on defendants to demonstrate a “legally sufficient justification” for the policy or practice – in other words, that it is “necessary to achieve one or more substantial, legitimate, nondiscriminatory interests” – the Proposed Rule requires plaintiffs to prove beyond a preponderance of the evidence that the practice *does not* serve a legitimate business interest. The Proposed Rule not only shifts this burden to the plaintiff, but also weakens the standard in the defendant’s favor when asserted as a defense. While the current rule requires defendants to prove that the challenged practice “is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests,” the Proposed Rule allows a defendant to rebut the plaintiff’s *prima facie* case by merely “producing evidence showing that the challenged policy or practice advances a valid interest.”³³

Furthermore, if the defendant meets this lower threshold, the plaintiff may prevail only by proving beyond a preponderance of the evidence that a less discriminatory practice exists that would serve the defendant’s interest “in an equally effective manner without imposing materially greater costs on” the defendant. The current rule, by contrast, requires the plaintiff to show only that the defendant’s interest “could be served by another practice that has a less discriminatory effect.”³⁴ This change is especially concerning given the inclusion of “profit” as a valid business interest under the Proposed Rule; an alternative practice demonstrated by the plaintiff may fail to satisfy the requirement solely on the grounds that the practice would result in a lower profit.³⁵

Even if a plaintiff is able to satisfy the robust *prima facie* requirement, the plaintiff’s claim may still fail under several new defenses. A defendant may defeat the plaintiff’s claim by disproving any of the elements of the *prima facie* requirement. Additionally, a plaintiff’s claim will fail if the defendant can show that its discretion is “materially limited by a third party” such as a federal, state, or local law, or a court, arbitral, or regulatory order. Finally, a defendant may, as a complete defense, assert that the cause of the discriminatory effect is a model or risk assessment algorithm used by the defendant.³⁶

³³ U.S. Dep’t of Housing and Urban Development, Proposed Rule, HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42854 (Aug. 19, 2019), <https://www.federalregister.gov/documents/2019/08/19/2019-17542/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard>; U.S. Department of Housing and Urban Development, Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, Feb. 15, 2013, <https://www.hud.gov/sites/documents/DISCRIMINATORYEFFECTRULE.PDF>. Also note the contrast from the parallel standard in employment discrimination disparate impact analysis codified by the 1991 Civil Rights Act, which sought to restore the defendant’s burden in establishing a defense, requiring the defendant to “demonstrate that the challenged practice is job related for the position. . . and consistent with business necessity.” Pub. L. 102-166, codified at 42 U.S.C. 2000e-2(k)(1)(A)(i). The legislation was passed in response to the Court in *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, proffering that a “legitimate business interest” was adequate.

³⁴ U.S. Dep’t of Housing and Urban Development, Proposed Rule, HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42854 (Aug. 19, 2019), <https://www.federalregister.gov/documents/2019/08/19/2019-17542/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard>; U.S. Department of Housing and Urban Development, Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, Feb. 15, 2013, <https://www.hud.gov/sites/documents/DISCRIMINATORYEFFECTRULE.PDF>.

³⁵ National Low Income Housing Coalition, *HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard* (Oct. 8, 2019), <https://www.regulations.gov/document?D=HUD-2019-0067-1120>, at 5.

³⁶ U.S. Dep’t of Housing and Urban Development, Proposed Rule, HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42854 (Aug. 19, 2019),

Several additional changes raise concerns about the level of protection the Proposed Rule will provide against disparate impact discrimination. A paragraph in the current rule states that a practice having a discriminatory effect is one that “creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.” The Proposed Rule eliminates this definition of “discriminatory effect” altogether, leaving unclear the meaning of a term central to the Rule itself. Removing definitions of terms should be reconsidered if the proposed regulations indeed aim to increase clarity in existing law. The Proposed Rule also imposes a “preponderance of the evidence” standard on plaintiffs but does not specify an evidentiary burden for defendants, suggesting that the standard for defendants is either different from that for plaintiffs or that courts will need to make this determination.³⁷

HUD seems to confirm in the preamble to the Proposed Rule that the Rule will actually weaken efforts to combat housing discrimination. The preamble states that “plaintiffs will likely not meet the standard, and HUD will not bring a disparate impact claim alleging that a single event – such as a local government’s zoning decision...– is the cause of a disparate impact, unless the plaintiff can show that the single decision is the equivalent of a policy or practice.” This starkly contrasts with the Supreme Court’s statement in *Inclusive Communities* that “suits targeting unlawful zoning law and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification are at the heartland of disparate-impact liability.” Since *Inclusive Communities*, at least two Circuit Courts of Appeals have allowed claims of disparate impact liability under the Fair Housing Act to proceed on the basis of local government zoning decisions. According to HUD, these claims would no longer be actionable under the Proposed Rule.³⁸ Moreover, as the Vermont Advisory Committee advised the Commission in its opposition to the Proposed Rule, “the proposed rule would likely diminish disparate impact liability and could potentially decrease incentives for municipalities, large corporations, and others to remain vigilant and continue to do what is necessary to eliminate systemic housing discrimination in Vermont.”³⁹

It is imperative that private litigants have an effective channel through which to pursue enforcement of the Fair Housing Act and other critical civil rights laws.

III. HUD Should Retain the Current Rule

<https://www.federalregister.gov/documents/2019/08/19/2019-17542/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard>.

³⁷ U.S. Dep’t of Housing and Urban Development, Proposed Rule, HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42854 (Aug. 19, 2019),

<https://www.federalregister.gov/documents/2019/08/19/2019-17542/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard>; U.S. Department of Housing and Urban Development, Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, Feb. 15, 2013, <https://www.hud.gov/sites/documents/DISCRIMINATORYEFFECTRULE.PDF>.

³⁸ National Low Income Housing Coalition, *HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard* (Oct. 8, 2019), <https://www.regulations.gov/document?D=HUD-2019-0067-1120>, at 5.

³⁹ Vermont Advisory Committee to the U.S. Commission on Civil Rights, *Statement of the Vermont Advisory Committee Concerned by Proposed Rule by the Housing and Urban Development Department*, Oct. 18, 2019 (attached in full as Attachment A).

For the foregoing reasons, the Commission urges the U.S. Department of Housing and Urban Development to retain the current Rule and not implement the Proposed Rule.



Statement of the Vermont Advisory Committee Concerned by Proposed Rule by the Housing and Urban Development Department

Herein, the Vermont Advisory Committee (VSAC) respectfully informs the U.S. Commission on Civil Rights of its concern about the recent the Housing and Urban Development (HUD) proposed rule to amend the disparate impact standard.¹ On August 19, 2019, HUD posted notice it would revise the disparate impact rule, which would replace the current standard with a more complex burden shifting framework that would first require a plaintiff allege that the policy or practice has a systemic discriminatory effect and further identify five elements about the practice and its effects if the defendant successfully rebuts the plaintiff's prima facie claim. This would likely make it harder for people to bring forward discrimination complaints under the Fair Housing Act, thereby fundamentally reshaping federal fair housing enforcement.²

In September 2018, the VSAC issued its report on housing discrimination, "A Handshake and a Smile," which concluded discrimination in housing persists in Vermont against people who are members of protected classes; more disturbing is that "this discrimination is more subtle."³ The VSAC found that there is a persistence of housing discrimination against individuals based on race and disability.⁴ Similar to the VSAC report's findings, the Vermont Legal Aid released a report finding that housing providers gave preferential treatment to white renters of U.S. origin without children and without an apparent disability and that "housing providers generally disfavor[ed] African American renters, renters of foreign origin, renters with children, and renters with disabilities."⁵

¹ HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854 (August 19, 2019).

² Daniel H. Burd. "HUD Issues Proposal to Conform 'Disparate Impact' Rule to Supreme Court's Inclusive Communities Decision". The National Law Review. <https://www.natlawreview.com/article/hud-issues-proposal-to-conform-disparate-impact-rule-to-supreme-court-s-inclusive> (retrieved October 10, 2019); Ben Lane. "HUD Proposes Change to Fair Housing Rules". Housing Wire. <https://www.housingwire.com/articles/49873-hud-proposes-changes-to-fair-housing-rules/>. (retrieved October 10, 2019).

³ Vermont Advisory Committee to the U.S. Commission on Civil Rights. "Housing Discrimination in Vermont: a Handshake and a Smile." p. 1. <https://www.usccr.gov/pubs/2018/09-21-VT-Housing.pdf>. (hereafter cited as *Vermont Housing Discrimination Report*).

⁴ *Vermont Housing Discrimination Report*, p. 13.

⁵ Vermont Legal Aid, "Rental Discrimination Report: Housing Discrimination in Vermont Rental Markets," Housing Discrimination Law Project, May 2014, <http://hrc.vermont.gov/sites/hrc/files/publications/Rental-Discrimination-Report-2014.pdf> (hereafter cited as *Vermont Legal Aid, Rental Discrimination Report*).

The VSAC noted that not that long ago, the Federal Housing Administration openly encouraged discrimination to protect neighborhoods from the “infiltration of inharmonious racial groups.”⁶ Essentially, the government created and then enforced segregation and this insidious housing discrimination persists in Vermont and the Nation. HUD needs to remove the hurdles to those seeking redress under the Fair Housing Act instead of making it significantly harder – if not impossible.

HUD’s proposed rule would fundamentally weaken longstanding enforcement options under the Fair Housing Act, by changing the burden shifting framework so that a plaintiff must satisfy the five element prima facie rather than the three element prima facie case by the previous rule promulgated in 2013.⁷ Insurance companies, financial institutions, and other major corporations could engage in covert discriminatory practices with greater impunity than under previous standards due to the difficulties plaintiffs would likely experience in attempting to challenge these practices and meeting a higher burden of proof.⁸ VSAC believes that the proposed rule would likely diminish disparate impact liability and could potentially decrease incentives for municipalities, large corporations, and others to remain vigilant and continue to do what is necessary to eliminate systemic housing discrimination in Vermont. Accordingly, the VSAC believes the proposed rule contravenes the Fair Housing Act and is a step backwards in the efforts to eliminate housing discrimination.

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The U.S. Commission on Civil Rights, established by the Civil Rights Act of 1957, is the only independent, bipartisan agency charged with advising the President and Congress on civil rights and reporting annually on federal civil rights enforcement. Our 51 state Advisory Committees offer a broad perspective on civil rights concerns at state and local levels. The Commission: in our 7th decade, a continuing legacy of influence in civil rights. For more information about the Commission and our Committees, please visit www.usccr.gov and follow us on [Twitter](#) and [Facebook](#).

⁶ Valerie Schneider, *In Defense of Disparate Impact: Urban Redevelopment and the Supreme Court's Recent Interest in the Fair Housing Act*, 79 MO. L. REV. 539, 550 (2014) (quoting Karl Taeuber, *The Contemporary Context of Housing Discrimination*, 6 YALE L. & POL'Y REV. 339, 341 (1988)). Congress created the Federal Housing Administration (FHA) in 1934. The FHA became a part of the Department of Housing and Urban Development's (HUD) Office of Housing in 1965.

⁷ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42,857, 42,858 (August 19, 2019); Katy O’Donnell. “HUD to Propose More Hurdles to Prove Housing Discrimination”. Politico. <https://www.politico.com/story/2019/07/31/hud-prove-housing-discrimination-1629826>. (retrieved October 17, 2019).

⁸ Kriston Capps. “How HUD Could Dismantle a Pillar of Civil Rights Law”. CityLab. <https://www.citylab.com/equity/2019/08/fair-housing-act-hud-disparate-impact-discrimination-lenders/595972/> (retrieved October 17, 2019); Sarah Brundage “Enterprise Strongly Opposes Proposed Revision to Final Disparate Impact Rule.” Enterprise. <https://www.enterprisecommunity.org/blog/enterprise-strongly-opposes-proposed-revision-to-disparate-impact-rule> (retrieved October 17, 2019).