

**Comments on the Department of Housing and Urban Development’s Proposed Rule to
Reinstate the Discriminatory Effects Standard**

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

**RE: Reinstatement of HUD’s Discriminatory Effects Standard
Docket No. FR–6251–P–01**

To Whom It May Concern:

Lawyers for Civil Rights (LCR) and Anderson & Kreiger LLP (A&K) respectfully submit these comments on behalf of our clients, Housing Works, Inc. and the Massachusetts Fair Housing Center (MFHC), in strong support of the U.S. Department of Housing and Urban Development’s (HUD’s) Proposed Rule reinstating the “Implementation of the Fair Housing Act’s Discriminatory Effects Standard,” as promulgated in 2013 (the “Proposed Rule”).

Most importantly, adopting the Proposed Rule, and abandoning “HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard,” (the “2020 Rule”), realigns HUD’s disparate impact practices with decades of agency and federal court jurisprudence and will once again embody the Fair Housing Act’ (“FHA’s”) remedial purpose of providing broad protections from housing discrimination and ready access to the courts when it does occur. As HUD is aware, we successfully sued to enjoin the promulgation of the 2020 Rule in *Massachusetts Fair Housing Center v. Department of Housing and Urban Development*, 496 F. Supp. 3d 600 (D. Mass. 2020), and we applaud HUD’s decisive step to dispose of the 2020 Rule’s ill-advised attempts to increase burdens on victims of housing discrimination, rather than protecting them as the FHA was intended to do.

I. The Commenters

Lawyers for Civil Rights (LCR) is a non-profit organization that provides free legal services to individuals, families, and small businesses in Massachusetts. For over 50 years, LCR has fought discrimination and sought equal opportunity for people of color and immigrants through creative legal action, outreach, and advocacy in collaboration with law firms and community partners. Together with A&K, LCR is proud to represent two organizations at the forefront of battling housing instability wrought by segregated housing practices:

The Massachusetts Fair Housing Center (MFHC) is a non-profit, charitable corporation based in Holyoke, Massachusetts, dedicated to ending systemic housing discrimination and creating inclusive communities. It is the oldest fair housing center in Massachusetts. MFHC provides free legal services, conducts housing discrimination testing, accepts housing discrimination

complaints, and provides education and outreach on fair housing and lending. Its efforts have resulted in significant injunctive and financial relief for victims of housing discrimination that affirms their rights under the FHA.

Housing Works, Inc. is a not-for-profit corporation in Brooklyn, New York, whose mission is to end the dual crises of homelessness and AIDS. Housing Works provides a comprehensive array of services to thousands of homeless and low-income New Yorkers living with and affected by HIV/AIDS. It provides legal services to help clients obtain housing and challenge discriminatory housing policies, operates residences for eligible individuals living with HIV and substance abuse issues, and advocates for funding and legislation to ensure that all people living with HIV/AIDS have access to quality housing and other life-sustaining services.

MFHC, Housing Works, and LCR previously submitted comments opposing HUD's 2020 Rule, noting the detrimental impact that it would have had on the victims of housing discrimination they serve. Specifically, we argued to HUD then that the 2020 Rule attempted to usurp the role of the judiciary, creating novel pleading and proof standards with no basis in federal law. Further, it attempted to create new defenses for discriminatory actors that ran contrary to the letter, spirit, and intent of the Fair Housing Act. Together, these changes would have had a prohibitive effect on plaintiffs seeking to bring disparate impact claims under the FHA, and in turn, would have frustrated Housing Works, Inc. and MFHC's ability to fulfill their missions of ending systemic housing discrimination.

Unfortunately, HUD ignored those comments and forged ahead with the 2020 Rule, which turned the remedial purposes of the FHA on its head. Accordingly, On September 28, 2020, LCR and A&K, serving as counsel for MFHC and Housing Works, Inc., filed the first lawsuit in the nation to challenge the 2020 Rule in the District Court for the District of Massachusetts. We sought declaratory judgment and injunctive relief because the 2020 Rule violated the Administrative Procedure Act (APA), as it was contrary to law, arbitrary and capricious, and failed to meet the APA's notice and comment requirements.¹ On October 25, 2020, District Court Judge Mark G. Mastroianni issued a nationwide injunction, preventing the 2020 Rule from going into effect.²

II. The Proposed Rule is Consistent with the Remedial Purpose of the Fair Housing Act.

We support the Proposed Rule, and are encouraged by HUD's efforts to firmly disavow the 2020 Rule and restore communities' faith in the federal government to use the FHA as a tool to battle the scourge of housing discrimination. Recognizing the unlawfulness of the 2020 Rule and citing extensively to the *Massachusetts Fair Housing Center* decision, the Proposed Rule reaffirms decades'-old standards for disparate impact cases.³

First, the Proposed Rule confirms that FHA liability may be based on a practice's "discriminatory effect" regardless of the existence of discriminatory intent, defined as practices that "result[] in a disparate impact on a group of persons" or that perpetuate segregated housing based on a number

¹ *MFHC*, 496 F. Supp. 3d at 609–10.

² *Id.* at 611–12.

³ See Reinstatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. 33,590 (June 25, 2021).

of protected statuses, such as race, religion, or national origin.⁴ The Proposed Rule defines a “legally sufficient justification” where a challenged practice is needed to achieve a “substantial, legitimate, nondiscriminatory interest” that cannot be achieved through a practice with a less discriminatory effect.⁵ It also omits the onerous pleading requirements and new defenses that were introduced for the first time in the 2020 Rule, which the *Massachusetts Fair Housing Center* Court correctly concluded were “inadequately justified.”⁶

Finally, the Proposed Rule follows the weight of settled law regarding the information needed to prove a discriminatory effect, returning the standard for the burden of proof to the three-part burden-shifting framework previously used by HUD.⁷ Under this framework, the complainant must prove that the challenged practice causes a discriminatory effect. At that point, the burden shifts to the responding party to prove that the practice is needed to achieve a legitimate interest. If that is proved, the burden returns to the complainant to prove that this legitimate interest could be served through a practice with a less discriminatory effect.

In contrast with the 2020 Rule, the Proposed Rule’s return to the 2013 standards supports the FHA’s important remedial aims. As MFHC and Housing Works emphasized in *Massachusetts Fair Housing Center*, the purpose of the FHA is “to prohibit and eradicate entrenched racial segregation and exclusion in housing and related services such as mortgage lending.”⁸ Judge Mastroianni agreed, acknowledging this purpose and citing *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, where the Supreme Court stated that disparate impact liability is “‘consistent with the FHA’s central purpose’ of ‘eradicat[ing] discriminatory practices within a sector of our Nation’s economy.’”⁹

These purposes of the FHA—enacted over fifty years ago in the wake of the Civil Rights Movement of the 1960s following the assassination of Martin Luther King, Jr.—remain as salient as ever. For example, despite advances made following *Brown v. Board of Education*, in the past two decades, hundreds of schools across the United States have re-segregated, animated in large part by continued housing discrimination and segregated neighborhoods.¹⁰ Students suffer from disparate funding and facilities, as predominantly White school districts receive an estimated “\$23

⁴ Proposed Amendment to 24 C.F.R. § 100.500, 86 Fed. Reg. 33,597 (June 25, 2021).

⁵ *Id.*

⁶ See *Massachusetts Fair Hous. Ctr.*, 496 F. Supp. 3d at 610–11 (noting that the changes incorporated into the 2020 Rule, such as the outcome prediction defense, alterations to the burden-shifting framework, and new pleading requirements, risked “effectively neutering disparate impact liability”).

⁷ See Proposed Amendment to 24 C.F.R. § 100.500(c), 86 Fed. Reg. 33,597 (June 25, 2021).

⁸ Complaint at ¶ 8, *Massachusetts Fair Hous. Ctr. v. United States Dep’t of Hous. & Urb. Dev.*, 496 F. Supp. 3d 600 (D. Mass. 2020) (No. 3:20-cv-11765-MGM).

⁹ *Massachusetts Fair Hous. Ctr.*, 496 F. Supp. 3d at 609 (quoting *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 539 (2015) (alteration in original)).

¹⁰ Janel George & Linda Darling-Hammond, *Brown at 67: Segregation, Resegregation, and the Promise of Federal Policy*, LEARNING POLICY INSTITUTE BLOG (May 18, 2021), <https://learningpolicyinstitute.org/blog/brown-67-segregation-resegregation-and-promise-of-federal-policy> (noting that current school resegregation rates rival rates prior to the landmark desegregation case, *Brown v. Board of Education*); see Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods: A Constitutional Insult*, 7 RACE & SOC. PROBLEMS 21, 22 (2015) (arguing that the worsening degree of school segregation is linked to increased housing segregation).

billion more than their non-White peers.”¹¹ Further, segregated communities of color continue to suffer from greater levels of pollution,¹² with racial composition representing the strongest predictor of where environmental hazards are located.¹³

In addition, technological developments since the passage of the FHA have created potentially new ways to discriminate in the housing lending market. Many companies use algorithms and models in residential lending and insurance decision-making processes. If they rely on inputs that reflect historical inequities, rather than removing bias, these tools serve to replicate existing biases.¹⁴ The enjoined 2020 Rule tried to insulate companies who engaged in this kind of discrimination by creating a novel “outcome prediction” defense. This defense would have shielded defendants from liability if they could show that the intent behind the discriminatory practice at issue was “to predict an occurrence of an outcome” that represented a “valid interest,” and that the predicted outcome would not disparately impact protected groups.¹⁵ The Court rightly kept this stark departure from the purpose and historical understanding of the FHA from taking effect, and we agree with HUD’s decision not to revisit it. By returning instead to long-trusted procedures for disparate impact claims, the Proposed Rule better supports the FHA’s remedial aims.

III. The Proposed Rule Realigns HUD Practice with Disparate Impact Jurisprudence.

A return to the 2013 rule also makes HUD practice consistent with prior disparate impact jurisprudence in other critical respects.¹⁶ In *Massachusetts Fair Housing Center*, the district court agreed that the 2020 Rule, through its imposition of new pleading and proof requirements and its introduction of additional defenses, undermined the FHA’s remedial purpose by making it virtually impossible for complainants to succeed on disparate impact claims.¹⁷ The Court recognized that

¹¹ EDBUILD, *\$23 Billion*, <https://edbuild.org/content/23-billion> (last accessed Aug. 3, 2021).

¹² Christopher W. Tessum et al., *PM2.5 Polluters Disproportionately and Systematically Affect People of Color in the United States*, 7(18) SCIENCE ADVANCES 1, 1 (2021) (reporting on an ambient fine particulate air pollution study which found that people of color were disparately exposed across “nearly all major emission categories”).

¹³ COMM’N FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES xiii (1987), <https://www.nrc.gov/docs/ML1310/ML13109A339.pdf> (finding that race was “the most significant among variables tested in association with the location of commercial hazardous waste facilities”); see U.S. COMM’N ON CIVIL RIGHTS, ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY’S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12,898 6–8 (2016), https://www.usccr.gov/pubs/2016/Statutory_Enforcement_Report2016.pdf (stating that “companies tend to site facilities that can negatively impact human health” in communities of color and poor communities, and referring to the seminal 1987 environmental racism report from the United Church of Christ Commission for Racial Justice).

¹⁴ See Maddalena Favaretto et al., *Big Data and Discrimination: Perils, Promises and Solutions. A Systematic Review*, 6:12 J. OF BIG DATA 2, 3 (2019); NICOL TURNER LEE ET AL., BROOKINGS, ALGORITHMIC BIAS DETECTION AND MITIGATION: BEST PRACTICES AND POLICIES TO REDUCE CONSUMER HARMS (2019), <https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/>.

¹⁵ 2020 Rule, 24 C.F.R. § 100.500(c)(2)(i).

¹⁶ Complaint at ¶¶ 70–76, *Massachusetts Fair Hous. Ctr. v. United States Dep’t of Hous. & Urb. Dev.*, 496 F. Supp. 3d 600 (D. Mass. 2020) (No. 3:20-cv-11765-MGM).

¹⁷ See *id.* at 607, 611 (“In short, these changes constitute a massive overhaul of HUD’s disparate impact standards, to the benefit of putative defendants and to the detriment of putative plaintiffs”); see also Complaint at ¶¶ 2, 4, 30,

the ability to bring disparate impact claims is essential to combatting forms of discrimination that lack a smoking gun of discriminatory intent, yet nevertheless perpetuate systemic discrimination.¹⁸ The 2020 rule also narrowed the definition of “discriminatory effect” to exclude such things as segregated housing patterns, falling out of step with *Inclusive Communities* by ignoring the clear difficulty of proving racial bias in housing cases.¹⁹

By returning to the 2013 rule, which defined “discriminatory effect” with appropriate scope, HUD practice will again be consistent with the FHA’s purpose and with decades of well-established disparate impact jurisprudence. The Proposed Rule would also eliminate needless barriers that accompanied the 2020 Rule, such as new defenses and heightened proof and pleading standards, and would reintroduce remedies such as exemplary damages.²⁰ The 2020 Rule would have added these barriers in spite of *Inclusive Communities*, which both acknowledged the difficulty of proving covert racial animus and discrimination and emphasized the FHA’s anti-discriminatory thrust.²¹

Formally abandoning the 2020 Rule will significantly reduce the confusion created by the 2020 Rule about the rights of victims of housing and lending discrimination under the FHA.²² In addition to dropping impractically high and novel barriers to making complaints, returning to the 2013 rule will discourage potential defendants from monitoring the discriminatory impact of their housing practices, as would have been the case under the 2020 Rule.²³ It would also shift HUD’s focus back to those whom the FHA aims to protect, providing predictable, consistent rules that our most vulnerable community members need when exercising housing choice.

IV. The Proposed Rule Will Provide Redress for Victims of Discriminatory Housing Practices, Underscored by the COVID-19 Pandemic

In addition to realigning HUD’s practices with the FHA’s purpose and with decades of jurisprudence, the Proposed Rule provides a more accessible pathway towards legal remedy for housing and lending discrimination victims. The importance of this access is highlighted by the work of MFHC and Housing Works, and the low-income and communities of color that they serve in Western Massachusetts and New York City, respectively. In addition to residential markets marked by decades of discrimination and segregation, these individuals must contend with a housing crisis worsened by the COVID-19 pandemic.

31, *Massachusetts Fair Hous. Ctr. v. United States Dep’t of Hous. & Urb. Dev.*, 496 F. Supp. 3d 600 (D. Mass. 2020) (No. 3:20-cv-11765-MGM) (explaining how the 2020 Rule ran counter to the FHA’s remedial purpose).

¹⁸ *See id.* at 609 (noting that disparate impact liability exposes discriminatory intent, allowing “plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification”).

¹⁹ *Id.* at ¶ 72.

²⁰ *Id.* at ¶¶ 74–76.

²¹ *See Texas Dep’t of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 521 (2015).

²² Complaint at ¶ 76, *Massachusetts Fair Hous. Ctr. v. United States Dep’t of Hous. & Urb. Dev.*, 496 F. Supp. 3d 600 (D. Mass. 2020) (No. 3:20-cv-11765-MGM).

²³ *See id.* at ¶¶ 74–76.

In parts of Western Massachusetts, for example, access to affordable housing has remained a consistent issue since the Great Recession of 2008, particularly in Springfield.²⁴ In the Pioneer Valley, where MFHC does the bulk of its work, over half of all renters are housing “cost burdened,” spending 30 percent or more of their household income on housing.²⁵ Of these cost burdened households, renters, who are disproportionately people of color, face the most difficulties. These challenges are likely to be exacerbated as eviction moratoria, put in place during the pandemic, are removed.

The situation only worsened during the pandemic. Unemployment rates in parts of Western Massachusetts, such as Holyoke and Springfield, (both located in Pioneer Valley), were some of the highest in the state in June 2020, at 24.1% and 25.9%, respectively.²⁶ Furthermore, in November and December of 2020, eviction filings rose, reaching higher than pre-pandemic levels in mid-December.²⁷ The locations of these evictions parallel job-loss trends and highlight patterns seen before the pandemic. Cities such as Lawrence (102 filings), New Bedford (255), and Springfield (291), all saw increases in evictions.²⁸

Additionally, Springfield remains one of the most segregated cities in the state. From 1997-2017, the index for residential segregation for medium-sized and small metro areas in Springfield dropped from 59.3% to 53.1%, compared to the national average during the same period, which fell from 48.4% to 41.1%.²⁹ As a result, Springfield still remains 12% more segregated than the national average for medium-sized metro areas. These areas remain susceptible to disparate housing impacts, due in large part to a history of segregative policies like redlining.

Another example of continued discriminatory housing patterns is seen in the communities that Housing Works, Inc. works with in New York City, where residents of public housing developments have been hit particularly hard by the pandemic. Communities in New York City’s public housing, estimated at 400,000 to 600,000 residents citywide, are nearly all Black and Latinx residents.³⁰ Within these communities, 33% of households in New York experienced some degree of income loss or job insecurity since the start of the pandemic. That number rises to 45% for low-income households.³¹

²⁴ UMASS DONAHUE INSTITUTE’S ECONOMIC & PUBLIC POLICY RESEARCH GROUP, GREATER SPRINGFIELD REGIONAL HOUSING ANALYSIS 2 (2021), https://donahue.umass.edu/documents/Greater_Springfield_Regional_Housing_Analysis_Report.pdf [hereinafter Springfield Regional Housing Analysis].

²⁵ *Id.* at 17 (“In the period from 2013 to 2017, Black, Asian and Hispanic homeowners were more likely to spend more than 30 percent of their income than White residents in the region. While less than half of White and Asian Renters spent 30 percent or more of their income on housing, more than half of Black and Hispanic renters did.”)

²⁶ Anne Calef et al., *Disparate Regional Impacts of the COVID Crisis*, BOSTON INDICATORS, (Jan. 19, 2021), https://www.bostonindicators.org/reports/report-website-pages/covid_indicators-x2/2021/january/regional-impacts.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Nicholas Chiumenti, *Recent Trends in Residential Segregation in New England*, FED. RESERVE BANK OF BOSTON (April 28, 2020) <https://www.bostonfed.org/publications/new-england-public-policy-center-regional-briefs/2020/recent-trends-in-residential-segregation-in-new-england.aspx>.

³⁰ Victor Bach, Kate Ham, and Samuel Stein, *NYCHA and the Pandemic: Impact on Public Housing Residents*, COMMUNITY SERVICE SOCIETY (May 3, 2021), <https://www.cssny.org/news/entry/nycha-pandemic-impacts-on-public-housing-residents>.

³¹ *Id.*

In these same Black and Latinx neighborhoods ravaged by COVID-19, landlords are filing evictions at four times the rate of communities less affected by the pandemic.³² Areas with the lowest COVID-19 death rate only had 4,224 eviction filings through the end of February 2021. On the other hand, neighborhoods with the highest COVID-19 death rates reported 15,517 filings during the same time.³³

The housing instability in these communities presents just several examples of the nationwide impact of decades of segregative housing policies, whose disparate impacts have been brought to the forefront by the COVID-19 pandemic. As in Western Massachusetts and New York City, many other communities of color across the country have similarly experienced drastic housing instability during the pandemic.³⁴ Many also continue to experience the effects of segregative policies that, as President Biden's memorandum on discriminatory housing practices highlighted, the U.S. government caused and perpetuated.³⁵ This discrimination on a national level has led to economic, educational, health, and environmental inequities that continue to shape communities to this day.

V. Conclusion

As the COVID-19 pandemic has spotlighted housing inequities faced by communities of color in Massachusetts, New York, and around the country, the need for the Proposed Rule could not be clearer. The Proposed Rule will return the requirements for disparate impact claims to an attainable level, providing victims of discrimination in the housing market with much-needed legal remedies. Armed with the new rule, HUD should also actively work with community partners like MFHC and Housing Works to investigate complaints filed directly with the agency, pursuing affirmative litigation against discriminatory actors.

We therefore reiterate our strong support for the Proposed Rule to reinstate HUD's Discriminatory Effects Standard. The Proposed Rule bolsters the FHA's aim to eliminate long-standing patterns of racial segregation and discrimination in housing, realigns HUD practice with decades of court and agency precedent on disparate impact claims, and provides an attainable remedy for victims of discriminatory housing and lending practices. As HUD is well aware, the COVID-19 pandemic has only exacerbated these equity issues plaguing our nation. The commenters stand at the ready to provide technical assistance and expertise to support the full enforcement of the FHA and to ensure the achievement of its goals to end housing and lending discrimination.

³² Stefanos Chen, *New York Renters in Covid Hot Spots Are Four Times More Likely to Face Eviction*, N.Y. TIMES (March 17, 2021), <https://www.nytimes.com/2021/03/17/realestate/new-york-city-renters-evictions.html>.

³³ *Id.*

³⁴ See generally Michael Kolomatsky, *People of Color Face the Most Pandemic Housing Insecurity*, N.Y. TIMES (Jan. 28, 2021), <https://www.nytimes.com/2021/01/28/realestate/people-of-color-rent-mortgage-pandemic.html>.

³⁵ See Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, from President Joseph R. Biden, Jr. (Jan. 26, 2021).

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