

Disparate Impact

By Ed Gramlich, Senior Advisor, NLIHC

Administering Agencies: HUD's Office of Fair Housing and Equal Opportunity (FHEO), and U.S. Department of Justice

Year Started: 1968

Population Targeted: The "Fair Housing Act" "protected classes"—race, color, national origin, sex, disability, familial status (in other words, households with children), and religion.

See Also: *Affirmatively Furthering Fair Housing* section of this *Advocates' Guide*

Title VIII of the "Civil Rights Act of 1968," also known as the "Fair Housing Act," prohibits discrimination on the basis of race, color, national origin, sex, disability, familial status, or religion (the "protected classes") in the sale, rental, or financing of dwellings and in other housing-related activities. Section 804(a) of the Fair Housing Act makes it unlawful "[t]o refuse to sell or rent..., **or otherwise make unavailable or deny**, any dwelling to any person because of race, color, national origin, religion, sex, familial status, or handicap." (emphasis added). The Fair Housing Act not only prohibits intentional discrimination, it also prohibits policies that have an unjustified "discriminatory effect" on the protected classes. The discriminatory effects doctrine (which includes "disparate impact and perpetuation of segregation") is a tool for addressing policies that unnecessarily cause systemic inequality in housing, regardless of whether the policies intended to discriminate.

In simple terms, "disparate impact" refers to a method of proving housing discrimination without having to show that discrimination is intentional.

Some common examples of disparate impact include:

- Nuisance ordinances that endanger women experiencing domestic violence;

- Occupancy limit policies that adversely affect families with children;
- Policies that restrict access to housing for people who have arrest records or criminal convictions;
- Restrictive zoning laws and building codes that harm people with disabilities;
- Restrictive zoning laws and building codes that disproportionately impact people of color;
- Restrictive zoning laws and building codes that prevent the development of affordable housing, disproportionately harming people of color and perpetuating segregation;
- Policies and practices that harm those relying on vouchers who are disproportionately people of color;
- Redevelopment policies and practices that result in greatly increased rents and/or displacement disproportionately harming people of color; and
- Disaster recovery policies and programs that disproportionately harm or underserve people of color.

The [2023 final Disparate Impact rule: https://bit.ly/3Gk0Fdp](https://bit.ly/3Gk0Fdp), which became effective on May 1, 2023, reinstated the 2013 rule that was briefly held in abeyance by the first Trump Administration.

The 2013 Disparate Impact Rule

For more than 45 years, HUD interpreted the Fair Housing Act to prohibit housing policies or practices that had a discriminatory effect, even if there was no apparent intent to discriminate. There are 13 U.S. Courts of Appeals, 11 of which had disparate impact cases before them and all of which upheld disparate impact and applied a "burden shifting standard" (described below). Because minor variations existed over the years in how the courts and HUD applied the concept of

discriminatory effects, HUD published a [proposed rule: https://bit.ly/4jNdPy0](https://bit.ly/4jNdPy0) for public comment in 2011.

The preamble to the proposed rule provided examples of “disparate impact” and “perpetuating segregation,” each based on court decisions. Examples included: zoning ordinances that restrict construction of multifamily housing to areas predominantly occupied by people of color, public housing agency use of a local residency preference for distributing Housing Choice Vouchers where most residents are white, and demolition of public housing principally occupied by African Americans.

A [final Disparate Impact rule: https://bit.ly/430dHFR](https://bit.ly/430dHFR) was published February 15, 2013. It defined the term “discriminatory effect” as a practice that actually or predictably results in a “disparate impact” on a group of people or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, sex, handicap, familial status, national origin, or religion. Importantly, the 2013 rule established a uniform standard for determining when a housing policy or practice with a discriminatory effect violates the Fair Housing Act.

The three-step “burden shifting standard” in the 2013 rule was very simple:

1. The plaintiff (the party alleging disparate impact) has the burden of proving that a policy or practice caused or predictably will cause a discriminatory effect.
2. If the plaintiff makes a convincing argument (satisfies that burden of proof), then the burden of proof shifts to the defendant (the housing provider, business, government, or other entity) to show that the challenged policy or practice is necessary to achieve one or more of the defendant’s substantial, legitimate, nondiscriminatory interests.
3. If the defendant satisfies the above burden of proof, then the burden of proof shifts again

to the plaintiff to demonstrate that the defendant’s substantial, legitimate, nondiscriminatory interests could be served by another policy or practice that has a less discriminatory effect.

The U.S. Supreme Court Upholds Disparate Impact Theory

On June 25, 2015, Justice Anthony Kennedy announced the 5-4 decision of the Supreme Court of the United States upholding the disparate impact theory in housing discrimination cases, a theory that was challenged by the State of Texas in *Texas Department of Housing and Community Affairs v The Inclusive Communities Project*. At issue was whether the Fair Housing Act of 1968 bars not only intentional discrimination, but also policies and practices that have a disparate impact – policies and practices that do not have a stated intent to discriminate but that have the effect of discriminating against the Fair Housing Act’s protected classes. The Supreme Court cited the 2013 rule with approval multiple times and did not suggest in any way that the 2013 rule required modification.

The Inclusive Communities Project (ICP) sued the Texas Department of Housing and Community Development over the siting of most Low-Income Housing Tax Credit properties in predominately Black communities in Texas. ICP won in District Court. Texas appealed to the U.S. Supreme Court.

ICP is a Dallas-based nonprofit that helps low-income people find affordable housing and that seeks racial and socioeconomic integration in Dallas housing. ICP assists voucher holders who want to rent apartments in areas that do not have concentrations of people of color by offering counseling, assisting in negotiations with landlords, and by helping with security deposits.

NLIHC prepared a [summary: https://bit.ly/3EG-cYAn](https://bit.ly/3EG-cYAn) of the Supreme Court decision.

Disparate Impact During the Trump Administration

During the first Trump Administration, HUD issued an [advance notice of proposed rulemaking](https://bit.ly/3YN0EFb): <https://bit.ly/3YN0EFb> (ANPR) in the *Federal Register* on June 20, 2018. HUD acknowledged that the Supreme Court upheld the use of disparate impact theory, but HUD asserted that the Court “did not directly rule upon it [the disparate impact rule].” Advocates and their attorneys asserted that the Court implicitly endorsed the rule by not questioning it or challenging it. Since the *Inclusive Communities* Supreme Court decision, courts have found that the rule is consistent with the Supreme Court’s decision.

The first Trump Administration subsequently [proposed](https://bit.ly/4jL17jh): <https://bit.ly/4jL17jh> a drastic revision of the 2013 rule in August 2019 and issued a [final rule on September 24, 2020](https://bit.ly/3Gk5unh): <https://bit.ly/3Gk5unh> that would make it far more difficult for people experiencing various forms of discrimination to challenge the practices of housing providers, governments, businesses, and other large entities. The 2013 rule’s three-part “burden shifting” standard to show disparate impact would be radically changed to a five-component set of tests placing virtually all the burden on people who are in protected classes. The changes were designed to make it much more difficult, if not impossible, for people in protected classes to challenge and overcome discriminatory effects in housing policies or practices.

The proposed rule would have tipped the scale in favor of defendants (housing providers, governments, and business) that are accused of discrimination. It would have shifted the burden of proof entirely to the plaintiffs; victims of discrimination would be asked to try to guess what justifications a defendant might invoke, and plaintiffs would have to preemptively counter those justifications. HUD further proposed making a profitable policy or practice immune from challenge

of disparate impact unless the victims of discrimination could prove that a company could make at least as much money without discriminating. In other words, according to HUD, profit justifies discrimination.

NLIHC prepared a [summary of key features](https://bit.ly/2MALi2r): <https://bit.ly/2MALi2r> of the proposed rule and an [analysis of the final 2020 rule](https://bit.ly/4jINzop): <https://bit.ly/4jINzop>.

U.S. District Court Issues Preliminary Injunction on Trump 2020 Final Disparate Impact Rule

The National Fair Housing Alliance (NFHA), the NAACP Legal Defense and Educational Fund, Inc. (LDF), Fair Housing Advocates of Northern California, and BLDS, LLC filed a lawsuit against HUD with the U.S. District Court for the Northern District of California. In addition, the Open Communities Alliance (OCA) and SouthCoast Fair Housing of Massachusetts and Rhode Island filed a lawsuit with the United States District Court for the District of Connecticut.

The U.S. District Court for the District of Massachusetts issued a preliminary nationwide injunction on October 25, 2020 to halt implementation of HUD’s final disparate impact rule, thanks to the efforts of Lawyers for Civil Rights and Anderson & Kreiger, with the Massachusetts Fair Housing Center and Housing Works, Inc. serving as plaintiffs on the case.

The plaintiffs claimed the new final disparate impact rule violated the “Administrative Procedure Act” (APA). To obtain preliminary injunctive relief, the plaintiffs demonstrated: a substantial likelihood of success on the merits; a significant risk of irreparable harm if an injunction was withheld; a favorable balance of hardships; and a fit between the injunction and the public interest.

The court wrote, “There can be [no] doubt that the 2020 [disparate impact] Rule weakens, for housing discrimination victims and fair housing

organizations, disparate impact liability under the Fair Housing Act. It does so by introducing new, onerous pleading requirements on plaintiffs, and significantly altering the burden-shifting framework by easing the burden on defendants of justifying a policy with discriminatory effect while at the same time rendering it more difficult for plaintiffs to rebut that justification. In addition, the 2020 Rule arms defendants with broad new defenses which appear to make it easier for offending defendants to dodge liability and more difficult for plaintiffs to succeed. 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 (and, by extension, fair housing organizations, such as MFHC)."

An NLIHC [summary](https://bit.ly/4cLDDbL): <https://bit.ly/4cLDDbL> provides more detail.

Disparate Impact in the First Year of the Biden Administration

President Biden issued "[Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies](https://bit.ly/3S3h8Fp)": <https://bit.ly/3S3h8Fp> to the HUD Secretary on January 26, 2021, instructing HUD to examine the effect of the previous Administration's September 24, 2020 final disparate impact rule replacing the 2013 disparate impact rule.

The memorandum further instructed the HUD Secretary to take the necessary steps to prevent practices that have a disparate impact. The memorandum stated, "Based on these examinations, the Secretary shall take any necessary steps, as appropriate and consistent with applicable law, to administer the Fair Housing Act including by preventing practices with an unjustified discriminatory effect."

In addition, the U.S. Department of Justice withdrew the previous Trump-era HUD appeal of the case postponing implementation of the dispa-

rate impact rule. By withdrawing the appeal, the preliminary injunction described above continued to delay implementation of the Trump 2020 disparate impact rule.

Final Disparate Impact Rule Published

The final rule, "[Restoring HUD's Discriminatory Effects Standard](https://bit.ly/3Gk0Fdp)": <https://bit.ly/3Gk0Fdp> was formally published in the *Federal Register* March 31, 2023 and became effective May 1, 2023. It restored the 2013 discriminatory effects rule and rescinded the first Trump Administration's 2020 rule. The final 2023 rule recodified the 2013 rule's discriminatory effects three-step burden shifting standard and returned the definition of "discriminatory effect" eliminated from the 2020 rule, which also erased "perpetuation of segregation" as a recognized type of discriminatory effect distinct from disparate impact.

Forecast for 2025

With the second Trump Administration, the Disparate Impact rule will again be in jeopardy, if not in 2025 then soon thereafter. Advocates will continue to work against changes to the Disparate Impact rule if and when proposed, and legal advocates will once again file law suits.

For More Information

NLIHC, 202-662-1530, www.nlihc.org.

NLIHC's Fair Housing: Disparate Impact webpage, <https://nlihc.org/racial-equity-and-fair-housing-disparate-impact>.

NLIHC's Disparate Impact HUD Updates and Links, <https://nlihc.org/hud-updates-and-links-0>.

NLIHC Disparate Impact Resources, <https://nlihc.org/nlihc-resource-disparate-impact>.

Federal Register version of the final rule, "[Reinstating HUD's Discriminatory Effects Standard](https://bit.ly/3RyVHw0)": <https://bit.ly/3RyVHw0>

An easier to read preview version of “Reinstating HUD’s Discriminatory Effects Standard,” <https://bit.ly/3Z1JAbL>.

A HUD three-page fact sheet, <https://bit.ly/3Ju9YW6>.

National Fair Housing Alliance, 202-898-1661, <https://nationalfairhousing.org/?s=Disparate+Impact>.

NAACP Legal Defense and Educational Fund, Inc. (LDF), 202-682-1300, https://www.naacpldf.org/search-results/?_sf_s=Disparate+Impact.