

DISPARATE IMPACT

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

Year Started: 1968

Population Targeted: Members of "Fair Housing Act" "protected classes," which include race, color, national origin, sex, disability, familial status (in other words, households with minor 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.

The Fair Housing Act not only prohibits intentional discrimination but also prohibits policies that have an unjustified "discriminatory effect" on the protected classes. The discriminatory effects doctrine (which includes both "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 policies that could result in an unjustified 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;
- Policies and practices that harm those relying on vouchers who are disproportionately people of color or who experience disabilities;
- 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://tr.ee/OQliiZ>) which became effective on May 1, 2023, reinstated the 2013 rule that was briefly held in abeyance by the first Trump administration. Given the second Trump administration's statements and actions regarding disparate impact theory more broadly, it is no surprise that in early 2026 HUD proposed (<https://tr.ee/h89hRP>) repealing the fair housing disparate impact regulations. Importantly, despite such actions by the second Trump administration, U.S. Supreme Court precedent from 2015 affirming disparate impact under the "Fair Housing Act" remains the law and cannot be undone by HUD or executive action.

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. 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://tr.ee/OPJaQJ>) 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://tr.ee/OhfkNe>) 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, disability, 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/complainant (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/complainant makes a convincing argument (satisfies that burden of proof), then the burden of proof shifts to the defendant/respondent (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/respondent’s substantial, legitimate, nondiscriminatory interests.

3. If the defendant/respondent satisfies the above burden of proof, the plaintiff/complainant can still win by proving that the defendant/respondent’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, U.S. Supreme Court issued its decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*. In a 5-4 opinion, the Court concluded that the “Fair Housing Act” allows housing discrimination cases to be based on a disparate impact theory. This decision remains an important legal victory for challenging discriminatory housing policies.

This case arose when the Inclusive Communities Project (ICP), a Dallas-based nonprofit that helps low-income people find affordable housing and that seeks racial and socioeconomic integration in Dallas housing, sued the Texas Department of Housing and Community Development. Specifically, ICP challenged the siting of Low-Income Housing Tax Credit properties in predominantly Black communities in Texas. ICP won in federal district court. Eventually, Texas appealed to the U.S. Supreme Court.

The Supreme Court considered whether the Fair Housing Act prohibits not only intentional discrimination, but also policies and practices that have a disparate impact (i.e., 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). In its opinion, the Supreme Court cited the 2013 HUD rule with approval multiple times and did not indicate that the 2013 rule required modification.

NLIHC prepared a summary (<https://tr.ee/8126cO>) of the Supreme Court decision.

Disparate Impact During the First Trump Administration

During the first Trump administration, HUD issued an [advance notice of proposed rulemaking](https://tr.ee/E4o28a) (https://tr.ee/E4o28a) (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://tr.ee/zZHq9x) (https://tr.ee/zZHq9x) a drastic revision of the 2013 rule in August 2019 and issued a [final rule on September 24, 2020](https://tr.ee/5CKN5m) (https://tr.ee/5CKN5m) 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 businesses) accused of discrimination. In effect, 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 the 2020 rule, profit justifies discrimination.

NLIHC prepared a [summary of key features](https://tr.ee/oZRNsl) (https://tr.ee/oZRNsl) of the proposed rule and an [analysis of the final 2020 rule](https://tr.ee/Bs2PbY) (https://tr.ee/Bs2PbY).

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

On October 25, 2020, the U.S. District Court for the District of Massachusetts issued a preliminary nationwide injunction 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 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://tr.ee/38tR5R) (https://tr.ee/38tR5R) 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://tr.ee/zUXFIW)” (<https://tr.ee/zUXFIW>) 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 that examination, the Secretary shall take any necessary steps, as appropriate and consistent with applicable law, to implement the Fair Housing Act’s requirements that HUD administer its programs in a manner that affirmatively furthers fair housing... 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 2020 disparate impact rule. By withdrawing the appeal, the preliminary injunction described above continued to delay implementation of the Trump 2020 disparate impact rule.

The 2023 Disparate Impact Rule Published

The final rule, “[Restoring HUD’s Discriminatory Effects Standard](https://tr.ee/F2whBi)” (<https://tr.ee/F2whBi>) 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.

Second Trump Administration Actions Regarding Disparate Impact

The second Trump administration has expressed a strong disapproval of disparate impact theory. On April 23, 2025, President Trump issued [Executive Order 14281](https://tr.ee/oq6pbD) (<https://tr.ee/oq6pbD>) which wrongly characterizes disparate impact theory as both undermining U.S. values and unconstitutional. The Executive Order declares it “the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals.” The order also requires agencies to outline their plans to repeal or amend existing disparate impact regulations or guidance. Furthermore, the order deprioritizes federal enforcement of statutes or regulations to the extent they provide for disparate impact liability.

The Trump administration has been working to rescind federal agency disparate impact regulations. For example, in November 2025, the Consumer Financial Protection Bureau [proposed rulemaking](https://tr.ee/N8gX9B) (<https://tr.ee/N8gX9B>) that interprets the “Equal Credit Opportunity Act” as not providing for disparate impact liability, despite the existence of contravening legislative history. On December 10, 2025, the Department of Justice published a final rule rescinding its longstanding disparate impact regulations for “Title VI of the Civil Rights Act of 1964.” Title VI prohibits discrimination on the basis of race, color, and national origin in programs or activities receiving federal financial assistance, including in federally assisted housing.

In early 2026, HUD proposed (<https://tr.ee/h89hRP>) repealing its 2023 disparate impact regulations. Importantly, despite Executive Order 14281 and HUD’s proposed rulemaking, the Inclusive Communities precedent affirming disparate impact under the “Fair Housing Act” remains the law and cannot be undone by executive order or HUD.

Forecast for 2026

Given the above context, advocates can expect that the government-wide effort to undercut the use of disparate impact theory, including under the “Fair Housing Act,” will continue in accordance with administration policy outlined in the April 2025 Executive Order.

For More Information

NLIHC (<https://tr.ee/WAnkUm>), 202-662-1530

NLIHC’s Fair Housing: Disparate Impact webpage (<https://tr.ee/2n082x>)

NLIHC Disparate Impact Resources (<https://tr.ee/PgnC3r>)

Federal Register version of the 2023 final rule, “Reinstating HUD’s Discriminatory Effects Standard” (<https://tr.ee/udrbp5>)

A 2023 archived version of a HUD [three-page fact sheet](https://tr.ee/DbTkbX) (<https://tr.ee/DbTkbX>) (no longer on HUD’s website and provided for historical purposes only)

National Fair Housing Alliance (<https://tr.ee/At1cBf>), 202-898-1661

NAACP Legal Defense and Educational Fund, Inc. (<https://tr.ee/Rmuu2g>) (LDF), 202-682-1300