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Submitted via regulations.gov

Sasha Samberg-Champion
Deputy General Counsel for Enforcement and Fair Housing
Department of Housing and Urban Development
451 7th Street, S.W.
Room 10110
Washington, DC 20410

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

Dear Mr. Samberg-Champion:

This letter is written on behalf of the National Housing Law Project (NHLP), as well as the undersigned organizations, in response to the notice of proposed rulemaking (NPRM) “Reinstatement of Discriminatory Effects Standard” issued by the Department of Housing and Urban Development (HUD) on June 25, 2021 (“Proposed 2021 Rule” or “Proposed Rule”).¹

NHLP is a legal advocacy center focused on increasing, preserving, and improving affordable housing; expanding and enforcing rights of low-income tenants and homeowners; and increasing housing opportunities for those groups protected by civil rights statutes, including the Fair Housing Act. Our organization provides technical assistance and policy support on a range of housing issues to legal services and other advocates nationwide.

NHLP commends HUD for recodifying its 2013 discriminatory effects standard (2013 Rule) and urges HUD to expeditiously adopt a final rule.² We agree with HUD’s current assessment that the 2013 Rule “is more consistent with judicial precedent construing the Fair Housing Act, including [the U.S. Supreme Court’s decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*], as well as the Act’s broad remedial purpose”³ than the

¹86 Fed. Reg. 33,590.

²Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 13, 2013).

³ 86 Fed. Reg. at 33,596.

2020 rulemaking promulgated under the previous administration. NHP strenuously opposed the promulgation of the 2020 disparate impact rule, and submitted an amicus brief with partner organizations in the *Massachusetts Fair Housing Center v. HUD* litigation in support of the plaintiffs.

A. Reinstating the 2013 Discriminatory Effects Standard is Consistent with HUD’s Affirmatively Furthering Fair Housing Duty and the Biden-Harris Administration’s Efforts to Redress a History of Racially Discriminatory Housing Policies.

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, the U.S. Supreme Court affirmed that disparate impact claims are cognizable under the Fair Housing Act, declaring that “recognition of disparate-impact claims is consistent with the FHA’s central purpose.”⁴ We strongly agree. Furthermore, within the Fair Housing Act, HUD has a longstanding statutory mandate to “administer the programs and activities relating to housing and urban development in a manner” that affirmatively furthers fair housing (AFFH).⁵ Recodifying the 2013 discriminatory effects standard is consistent with and required by HUD’s AFFH obligation, as HUD’s 2020 imposed practically insurmountable barriers to bringing successful discriminatory effects claims, gutting this crucial legal tool.⁶ The agency’s prior attempt in 2020 to promulgate a discriminatory effects standard that eliminated perpetuation of segregation as a distinct form of discriminatory effects liability constituted an agency action wholly inconsistent with HUD’s legal obligation to affirmatively further the aims of the Fair Housing Act.⁷ We agree with HUD’s explanation in the 2021 Proposed Rule preamble that the prior administration’s failure to recognize perpetuation of segregation as a separate form of discriminatory effects liability was “contrary to well established precedent,” and that clarity requires that “a discriminatory effects rule should explicitly state that perpetuation of segregation is a type of discriminatory effect, distinct from disparate impact.”⁸ We strongly believe that the Proposed Rule’s restoration of the reference to perpetuation of segregation as a distinct form of discriminatory effects liability is consistent with and required by HUD’s AFFH obligation, and is also needed to clarify any confusion caused by the 2020 rulemaking.

The reinstatement of a meaningful and effective discriminatory effects regulation also aligns with the Biden-Harris Administration’s stated policy of redressing the history of discriminatory housing practices and policies in the United States. This policy is reflected in Executive Order

⁴ 576 U.S. 519, 539 (2015).

⁵ 42 U.S.C. § 3608(e)(5).

⁶ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 85 Fed. Reg. 60,288 (Sept. 24, 2020).

⁷ Specifically, in response to comments in the 2020 preamble objecting to the elimination of the reference to perpetuation of segregation, HUD indicated that the elimination was a result of regulatory “streamlining,” while also seemingly indicating that the prior administration viewed perpetuation of segregation to be a result of a disparate impact and not a distinct form of discriminatory effects liability. 85 Fed. Reg. at 60,306.

⁸ 86 Fed. Reg. at 33,595 (footnote omitted).

13,985,⁹ regarding promoting racial justice and the equitable distribution of resources to create more inclusive communities, as well as in President Biden’s “Memorandum on Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies.” The memorandum states that HUD “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 and HUD’s overall duty to administer the Act ... including by preventing practices with an unjustified discriminatory effect.”¹⁰ Adoption of the Proposed Rule and reinstatement of HUD’s 2013 discriminatory effects standard is a necessary step in complying with this clear mandate from the current Administration, as the codification of the Proposed Rule is needed to more fully implement HUD’s AFFH obligation.

B. HUD’s 2013 Discriminatory Effects Standard is Consistent with *Inclusive Communities* and Subsequent Case Law.

In the landmark *Inclusive Communities* decision, the U.S. Supreme Court affirmed that disparate impact claims are cognizable under the Fair Housing Act.¹¹ In doing so, the Court referenced HUD’s 2013 disparate impact regulation several times throughout the opinion,¹² not once stating that the 2013 HUD Rule raised any constitutional or other concerns. The Court did not state any reservations about the Rule’s burden-shifting framework, nor did it indicate any significant differences between the Rule and what the Court viewed as the contours of disparate impact liability.

A number of post-*Inclusive Communities* cases have echoed the consistency between the Rule and the Supreme Court’s decision. As a federal district court concluded in 2017, the Court in *Inclusive Communities* “expressly approved of disparate-impact liability under the FHA and did not identify any aspect of HUD’s burden-shifting approach that required correction.”¹³ Other post-*Inclusive Communities* courts simultaneously have relied upon both the Rule and *Inclusive Communities* as authorities for analyzing disparate impact claims, demonstrating there is no fundamental conflict between the two.¹⁴ For example, the federal district court on remand in the

⁹Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009 (Jan. 25, 2021).

¹⁰ 86 Fed. Reg. 7487, 7488 (Jan. 29, 2021).

¹¹ See *generally* *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519 (2015).

¹² *Inclusive Cmty. Project, Inc. v. HUD*, 576 U.S. at 527, 541, 542 (referencing the HUD 2013 regulation or Rule preamble).

¹³ *Prop. Cas. Insurers Ass’n of Am. v. Carson*, 2017 WL 2653069, at *9 (June 20, 2017).

¹⁴ *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 510-13 (9th Cir. 2016) (citing both 24 C.F.R. § 100.500(c) and *Inclusive Communities* to support the court’s reasoning); see also *Ave. 6E Invs., LLC v. City of Yuma*, 2018 WL 582314, at *7 n.49 (“In its reply, the City argues that even if the regulations support Plaintiffs’ position, the court must then reject HUD’s interpretation of the FHA given the Supreme Court’s inconsistent interpretation of disparate impact liability in *Inclusive Communities*. ... However, as noted above, the court concludes that *Inclusive Communities* does not in fact hold that disparate impact claims cannot be based on a city’s individual zoning decision. Therefore, HUD’s regulations are consistent with that opinion and entitled to deference.”); *Burbank Apartments Tenant Ass’n v. Kargman*, 48 N.E.3d 394, 411 (Mass. 2016) (“[W]e will follow the burden-shifting framework laid out by HUD and adopted by the Supreme Court in *Inclusive Communities*.”). Even a case that references a “more

Inclusive Communities case stated, “As a result of the Fifth Circuit’s decision adopting the HUD regulations, and the Supreme Court’s affirmance (without altering the burden-shifting approach), the following proof regimen now applies to ICP’s disparate impact claim under the FHA”; the court proceeded to outline HUD’s existing standard at 24 C.F.R. § 100.500.¹⁵ The Second Circuit observed in *MHANY Management v. County of Nassau* that the Supreme Court in *Inclusive Communities* “implicitly adopted HUD’s approach” regarding the third step of the burden-shifting analysis.¹⁶

Despite the consistency between *Inclusive Communities* and HUD’s 2013 Rule in a number of cases, we urge HUD to highlight cases in the preamble to the Final Rule where courts have incorrectly interpreted any steps within the burden-shifting framework. For example, HUD should explain why the Fifth Circuit decision in *Inclusive Communities Project v. Lincoln Property Company*¹⁷ was incorrect. In that opinion, the court had such a narrow reading of causation that the plaintiffs would have had to show that a particular defendant *created* the complex dynamics that result from decades of discriminatory housing policies in order to satisfy Step 1 of the discriminatory effects analysis. Simply put, this reasoning establishes an impossible standard of causation to meet. As the dissent in the *Lincoln Property* case rightly points out, “[T]he majority’s interpretation of ‘robust causation’ threatens to eviscerate disparate-impact claims under the FHA altogether.”¹⁸ In light of this federal appeals court decision, HUD should utilize the Final Rule preamble to outline why such a causality requirement as outlined by the *Lincoln Property* majority exceeds what is required both by *Inclusive Communities* and the Final Rule. It is worth noting that in HUD’s 2020 rulemaking, HUD stated that it did not intend to endorse the *Lincoln Property* decision (though it agreed with certain statements in the opinion).¹⁹ In the 2021 Final Rule preamble, HUD should therefore explain why the *Lincoln Property* decision was incorrect given the 2013 Rule standard.

C. Practices Challenged Under a Discriminatory Effects Framework Must Be Evaluated on a Case-by-Case Basis, and HUD Must Refrain from Creating Any Safe Harbors from Discriminatory Effects Liability for Any Industry or Practice.

HUD must not adopt safe harbors or exemptions from disparate impact liability for specific industries, practices, or subsets of potential defendants, including the insurance industry. Instead, HUD should retain the case-by-case approach reflected in HUD’s 2013 Rule and in the Proposed 2021 Rule. We strongly agree with HUD’s prior rejection of any “carve outs” or “safe

stringent pleading standard” under *Inclusive Communities* does not say that the HUD Rule is inconsistent with *Inclusive Communities*, and even goes on to cite § 100.500(c) in the opinion. *National Fair Housing Alliance v. Travelers Indemnity Co.*, 261 F.Supp.3d 20, 22, 29 (D.D.C. 2017); *see also Burbank*, 48 N.E.3d at 411 (referencing a “rigorous examination on the merits at the pleading stage” being required by *Inclusive Communities*, and quoting the Supreme Court’s reference to 24 C.F.R. § 100.500(c)(1) in the prior sentence, and also never stating the Rule is inconsistent with *Inclusive Communities*).

¹⁵ 2015 WL 5916220, at *3 (N.D. Tex. Oct. 8, 2015).

¹⁶ 819 F.3d 581, 618 (2d Cir. 2016).

¹⁷ 920 F.3d 890 (5th Cir. 2019).

¹⁸ 920 F.3d at 913 (Judge W. Eugene Davis, dissenting).

¹⁹ 85 Fed. Reg. at 60,313.

harbors” from discriminatory effects liability and believe that HUD should continue to reject any requests for carve outs or safe harbors from any industry in finalizing the 2021 Proposed Rule.

First, the adoption of safe harbors, or “carve outs” regarding Fair Housing Act liability would conflict with Congressional intent and the Act’s statutory text itself. The Fair Housing Act’s text, as amended, includes specific, explicit exemptions from liability.²⁰ In fact, Congress actually “rejected a proposed amendment that would have eliminated disparate-impact liability for certain zoning decisions” in the 1988 amendments to the Act, while opting to include three other exemptions from Fair Housing Act liability.²¹ HUD previously (and correctly) rejected the idea of including safe harbors in the Rule because additional exemptions would contradict Congress’ intent in light of existing exemptions in the Fair Housing Act’s text and “the Act’s important remedial purposes.”²² Furthermore, the Sixth Circuit Court of Appeals previously declined to apply an exemption under the Fair Housing Act in a case where an owner sought an exemption from disparate impact liability in instances of landlord withdrawal from the Section 8 Housing Choice Voucher program. The Sixth Circuit stated that “[w]e cannot create categorical exemptions from [the Act] without a statutory basis. . . Nothing in the text of the FHA instructs us to create practice-specific exceptions.”²³ A state supreme court concluded post-*Inclusive Communities* that adoption of “a bright-line rule prohibiting disparate impact liability where a property owner follows the project-based Section 8 statutory scheme, absent evidence of intentional discrimination, would run counter to those policies preventing housing discrimination in all forms that were delineated by ... Congress...”²⁴ In that case, the court refused to “shoehorn” additional exemptions into fair housing law.²⁵

Second, the burden-shifting framework in the Proposed 2021 Rule sufficiently addresses concerns that disparate impact liability will adversely affect legitimate, nondiscriminatory business or industry practices. This therefore makes carve-outs or safe harbors unnecessary, as a defendant can always assert a legitimate, nondiscriminatory reason for the practice.

Third, carve-outs or safe harbors will undermine, rather than create, the certainty and stability that regulated parties and entities require by creating non-uniform standards for fair housing liability across industries. Safe harbors, as they clearly conflict with Congressional intent, establish no objective limiting principle as to which industries or defendants should receive a safe harbor, and which should not. Other industries and potential defendants, in turn, likely

²⁰ 78 Fed. Reg. at 11,466 (discussing statutory exemptions, such as the exemption at 42 U.S.C. § 3605(c) regarding appraisals based on other factors beyond protected class membership); see also *id.* at 11,477 (“HUD notes further that Congress created various exemptions from liability in the text of the Act, [] and that in light of this and the Act’s important remedial purposes, additional exemptions would be contrary to Congressional intent.”) (internal footnote omitted).

²¹ *Inclusive Cmty.*, 576 U.S. at 536-37.

²² Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. at 11,477.

²³ *Graoch Associations # 33, L.P. v. Louisville/Jefferson County Metro Human Relations Commission*, 508 F.3d 366, 375 (6th Cir. 2007).

²⁴ *Burbank Apartments Tenant Ass’n v. Kargman*, 48 N.E.3d 394, 409 (Mass. 2016).

²⁵ *Id.*

would seek to exempt themselves from disparate impact liability despite not being covered by the specific exemptions outlined in the Fair Housing Act's text.

Applicability to the Insurance Industry

Discriminatory effects liability must encompass insurance companies to effectuate the purposes of the Fair Housing Act. In 2016, HUD published a notice in the Federal Register that specifically addressed the applicability of discriminatory effects liability to insurance. HUD's 2016 notice acknowledged the "long and well documented" "history of discrimination in the homeowners insurance industry . . . beginning with insurers overtly relying on race to deny insurance to minorities and evolving into more covert forms of discrimination."²⁶ As the 2016 notice correctly notes, ensuring nondiscriminatory access to insurance is necessary to achieve the Fair Housing Act's objective of moving the United States toward a more integrated society because of the role that insurance plays in obtaining a mortgage or renting a home.²⁷ Thus, practically speaking, "categorical exemptions or safe harbors for insurance practices are unworkable and inconsistent with HUD's statutory mandate."²⁸ HUD also noted that creating Fair Housing Act safe harbors or exemptions for the insurance industry would allow "at least some discriminatory insurance practices that can be subject to disparate impact challenges" to go uncorrected, which would "undermine the efficacy of the Act and run counter to the Act's purpose and HUD's statutory responsibilities."²⁹ Furthermore, we agree with HUD's 2016 observation that the insurance industry has been subject to discriminatory effects liability for several decades, and that subjecting the insurance industry to disparate impact liability "does not threaten the fundamental nature of the insurance industry."³⁰ Accordingly, HUD must continue to reject the creation of carve outs or a safe harbor for the insurance industry from discriminatory effects liability.

Disparate impact theory under the Fair Housing Act has been used to challenge insurance companies' refusal to insure (or insure on less favorable terms) rental housing owners who rent to Section 8 Housing Choice Voucher tenants.³¹ The availability of discriminatory effects theory to challenge such practices is critical, as Voucher households are disproportionately represented by groups protected by the Fair Housing Act, including people of color, households

²⁶Application of the Fair Housing Act's Discriminatory Effects Standard to Insurance, 81 Fed. Reg. 69,012, 69,014 (Oct. 5, 2016).

²⁷ *Id.*

²⁸ *Id.* at 69,013.

²⁹ *Id.*

³⁰ *Id.* at 69,015.

³¹ Nat'l Fair Hous. All. v. Travelers Indem. Co., et al., 261 F. Supp. 3d 20 (D.D.C. 2017) (denying insurance company's motion to dismiss regarding FHA and D.C. law claims, including FHA disparate impact claim); Viens v. Am. Empire Surplus Lines Ins. Co., 113 F. Supp. 3d 555 (D. Conn. 2015) (denying insurer's motion to dismiss second amended complaint, which alleged disparate impact under FHA arising out of insurer's refusal to insure landlords accepting Section 8 Vouchers or charging higher insurance premiums); Transcript of Proceedings, Jones v. Travelers Cas. Ins. Co. of Am., 2015 WL 5091908 (N.D. Cal. May 7, 2015) (denying insurer's motion for summary judgment on FHA claim under disparate impact theory because the plaintiffs provided evidence that Travelers' no-Section-8 rule had a statistically significant disparate impact on the basis of race, sex, age, and familial status).

with children, and persons with disabilities.³² Owners of rental properties who accept Section 8 Vouchers must have an avenue to challenge insurance policies that penalize them simply because they rent to Voucher households. Exempting insurance companies from discriminatory effects liability would substantially undercut such owners' ability to combat these harmful, discriminatory policies.

Applicability to Entities Relying on Algorithms, Including Tenant Screening Companies

Entities that rely on algorithms with respect to housing-related transactions, including tenant screening companies, must remain subject to discriminatory effects liability under the Fair Housing Act. Algorithmic models are used in all manner of housing-related decision-making, including for rental admission screening, insurance, mortgage lending, and more. These models are often provided by third-party consumer reporting agencies, such as tenant-screening companies, credit bureaus, criminal background check providers, and other such entities. Given the pervasive use of algorithms in the sale and rental of housing, the use of algorithmic models must continue to be considered under a case-by-case analysis as the Proposed 2021 Rule requires.

Importantly, the Supreme Court stated in *Inclusive Communities* that the “[r]ecognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.”³³ Unconscious prejudices and disguised animus are precisely the issue with the reliance upon algorithms to make decisions, as the assumptions forming the basis of algorithmic models inherently reflect these unconscious biases. Given our nation’s history of structural and institutional racism, it is unfortunately no surprise that multiple studies have demonstrated that algorithms result in people of color being denied credit, employment, and housing at disproportionate rates.³⁴

Given HUD’s attempt during the prior administration (within the 2019 Proposed Rule) to create specific defenses for the use of algorithms, we urge HUD to clarify in the preamble to the Final Rule that entities that rely on algorithms, including tenant screening companies, are subject to the discriminatory effects liability under the Fair Housing Act³⁵ and the case-by-case analysis applies.

³² Sonya Acosta & Erik Gartland, Center on Budget and Policy Priorities, “Families Wait Years for Housing Vouchers Due to Inadequate Funding,” (July 21, 2021), <https://www.cbpp.org/research/housing/families-wait-years-for-housing-vouchers-due-to-inadequate-funding> (noting that “60 percent of households on waitlists are families with children, 11 percent are older adults, and 18 percent include at least one person with a disability,” and that for large public housing agencies, 66 percent of individuals on waitlists are Black).

³³ 576 U.S. at 540.

³⁴ See e.g., *When Algorithms Discriminate*, Claire Cain Miller, *New York Times* (July, 9, 2015) (noting multiple studies finding discriminatory impact of algorithms), <https://www.nytimes.com/2015/07/10/upshot/when-algorithms-discriminate.html>

³⁵ See *generally* Conn. Fair Housing Ctr. v. Corelogic, 369 F.Supp.3d 362 (D. Conn. 2019) (concluding that tenant screening companies are subject to the Fair Housing Act).

Applicability in Affordable Housing Preservation Cases

Discriminatory effects liability is also important for advocates and residents seeking to ensure the preservation of affordable housing. Advocates have utilized discriminatory effects theory to challenge the loss of affordable units, such as an owner's opt-out (refusal to renew a contract) from the Section 8 program.³⁶ The loss of affordable units itself, even in instances where tenants receive enhanced vouchers, has a negative impact on members of protected classes who will need to access these units in the future, once those units with enhanced vouchers turn over. Furthermore, in instances where affordable units are lost and tenants receive tenant protection vouchers (TPVs), many families face challenges such being unable to lease up outside of segregated neighborhoods with the TPV despite the family's desire to do so³⁷ or being rescreened as ineligible by the PHA.

We urge HUD, in the preamble to the Final Rule, to reaffirm its commitment to a case-by-case analysis, such that there are no ipso facto legitimate or valid objectives. For example, in affordable housing preservation cases where an owner seeks to exit an affordable housing program (e.g., an opt-out from the Section 8 program), maximizing profits, without more, cannot be automatically assumed to be a substantial, legitimate, nondiscriminatory interest of an owner. When HUD's 2013 Rule was being considered, HUD rejected the suggestion that "increasing profits, minimizing costs, and increasing market share" would inherently "qualify as legitimate, nondiscriminatory interests."³⁸ HUD responded that it was not adopting that suggestion "because the Fair Housing Act covers many different types of entities and practices, and a determination of what qualifies as a substantial, legitimate, nondiscriminatory interest for a given entity *is fact-specific and must be determined on a case-by-case basis.*"³⁹ HUD thus did not "provide examples of interests that would always qualify as substantial, legitimate, nondiscriminatory interests for every respondent or defendant in any context."⁴⁰ We believe that HUD should clarify in the preamble to the Final Rule that reasons such as maximizing profits, or a desire not to deal with the "administrative burden" of an affordable housing subsidy, are all scenarios subject to a case-by-case analysis, and there are no ipso facto substantial, legitimate, and nondiscriminatory interests.

³⁶ See e.g., *Charleston Hous. Auth. v. USDA*, 419 F.3d 729 (8th Cir. 2005) (affirming trial court decision that PHA's plan to vacate and demolish Section 515 project and opt-out of Project-Based Section 8 contract violated the Fair Housing Act because it had a disparate impact on people of color and was not adequately justified); *Burbank Apartments Tenant Ass'n v. Kargman*, 48 N.E.3d 394 (Mass. 2016) (affirming legal basis of disparate impact claim brought against owner of 173-unit Project-Based Section 8 development but denying relief for insufficient showing of harm to either existing or future prospective tenants).

³⁷ See generally Vincent Reina & Ben Winter, *Safety Net? The Utility of Vouchers When a Place-Based Rental Subsidy Ends* (May 10, 2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940015.

³⁸ 2013 HUD Rule at 11,471.

³⁹ *Id.* (emphasis added).

⁴⁰ *Id.*

Furthermore, we urge HUD to underscore in the preamble that opting out of an affordable housing program can fall within the definition of a “policy” or “practice” to satisfy the requirement outlined in both *Inclusive Communities* and the Final Rule. As a federal district court explained, “the limitations of FHA disparate impact liability discussed in *Inclusive Communities* do[] not, as a matter of law, prohibit disparate impact claims that challenge a single decision by a municipality’s governing body. That is, not all one-time decisions are equal. It is the type and effect of the single decision that dictates whether it can be subject to a disparate impact claim.”⁴¹ The court in that case further noted that the “guidance provided by HUD in connection to the publication of its final rule on disparate impact explains that a discriminatory housing practice is construed broadly to include ‘[a]ny facially neutral *actions*, e.g., laws, rules, *decisions*, standards, policies, practices, or procedures, including those that allow for discretion or the use of subjective criteria.’”⁴² We believe that logic applies regardless of whether a municipality or private owner has dictated the policy or practice. We therefore urge HUD to reiterate its support of a broad construction of the definition of a discriminatory housing practice.

D. We Strongly Support the Inclusion of the Theory of Perpetuation of Segregation in the Proposed 2021 Rule

We strongly support the Proposed 2021 Rule’s inclusion of perpetuation of segregation. Perpetuation of segregation theory has long been recognized by case law as a form of discriminatory effects liability, along with disparate impact.⁴³ We firmly opposed the attempt by the 2020 Rule to remove references to perpetuation of segregation, which the prior administration did without legal basis or explanation.

Perpetuation of segregation is an important tool for advocates seeking to combat policies that negatively impact residents of color living in affordable housing. For example, perpetuation of segregation theory has been used by public housing residents to allege housing discrimination with respect to the demolition and disposition of public housing, including where residents of demolished public housing units were provided inadequate relocation services, or steered to segregated neighborhoods.⁴⁴

Demolition of public housing, and where the replacement housing is sited, have considerable fair housing implications -- and perpetuation of segregation theory must be available for residents and their advocates to use in challenging policies that reinforce existing patterns of segregation. Similarly, other losses of affordable housing have the potential to perpetuate

⁴¹ *Avenue 6E Investments, LLC v. City of Yuma, Ariz.*, 2018 WL 582314, at *6 (D. Ariz. Jan. 29, 2018) (“The act of zoning is, consequently, an act of policy making that sets it apart from other isolated decisions a municipality might make.”).

⁴² *Id.* at *7 (citing HUD’s 2013 Rule preamble) (emphasis in original).

⁴³ See e.g., *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (outlining “two kinds of racially discriminatory effects,” including perpetuation of segregation); *Nat’l Fair Hous. All. v. Bank of Am.*, 401 F. Supp. 3d 619, 641 (D. Md. 2019) (“Perpetuation of segregation is, in effect, an alternate avenue of pleading disparate impact under the FHA.”) (citing *Graoch Associates # 33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm’n*, 508 F.3d 366, 378 (6th Cir. 2007)).

⁴⁴ See generally *Wallace v. Chicago Hous. Auth.*, 298 F. Supp.2d 710 (N.D. Ill. 2003).

segregation, including project-based rental assistance terminations. Section 8 opt-outs or terminations in gentrifying areas raise the concern of the displacement of protected classes from the community. As noted previously, tenant protection vouchers provided to tenants often will replicate existing patterns of segregation seen within the local Housing Choice Voucher program. Furthermore, the siting of affordable housing in areas with negative environmental stressors and exposure (as well as the siting of environmental stressors, such as highways, toxic waste sites, or other polluters near housing) perpetuates residential patterns of segregation, such that communities of color are disproportionately exposed to disruptive noise, industrial byproducts, and other environmental hazards. As the Administration has pointed out in its memo discussing the persistence of racial discrimination and segregation in housing, “people of color disproportionately bear the burdens of exposure to air and water pollution.”⁴⁵ As HUD continues implementation of the affirmatively furthering fair housing obligation and reinstates the 2013 Rule regarding discriminatory effects, HUD must take steps to ensure that jurisdictions are affirmatively considering -- with the input of low-income residents and members of protected classes -- the impacts of siting affordable housing near environmental hazards, and that jurisdictions are actively addressing the racially discriminatory environmental impacts on communities of color. HUD must also make clear that environmental racism claims are not foreclosed from a perpetuation of segregation theory.

Advocates have also alleged perpetuation of segregation in a case regarding the closure of a shelter serving people experiencing homelessness.⁴⁶

E. Discriminatory Effects Liability is Important for Challenging a Range of Discriminatory Policies and Practices

Discriminatory effects liability is critical for challenging a number of discriminatory housing practices and policies, a select small number of which are described in further detail below.

Discrimination Against Survivors of Gender-Based Violence

Reinstatement of HUD’s 2013 Rule is necessary and consistent with HUD’s long-standing views on the relationship between sex discrimination and gender-based violence. In 2011, HUD issued groundbreaking guidance entitled, “Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act (FHA) and the Violence Against Women Act (VAWA)” (“2011 Fair Housing Guidance”).⁴⁷ A decade after it was issued, this guidance remains a key resource for the field -- specifically for advocates who are working on behalf of survivors facing eviction or other adverse housing consequences because of the actions of an abuser or perpetrator. HUD has also investigated and issued charges of housing

⁴⁵ 86 Fed. Reg. at 7487-88.

⁴⁶ *Boykin v. Gray*, 986 F. Supp. 2d 14, 23–25 (D.D.C. 2013) (ultimately granting city summary judgment against homeless individuals’ FHA claim asserting perpetuation of segregation, explaining that plaintiffs had not presented sufficient evidence to show that closure of shelter created a discernible impact on racial make-up of D.C. neighborhoods).

⁴⁷ <https://www.hud.gov/sites/documents/FHEODOMESTICVIOLGUIDENG.PDF>

discrimination regarding policies that have negatively impacted survivors of domestic violence.⁴⁸ Furthermore, in 2016, HUD issued important fair housing guidance that addressed the issue of nuisance and crime-free housing policies, and how enforcement of such policies against survivors could constitute both intentional discrimination and have a possible discriminatory effect based upon sex.⁴⁹ This 2016 guidance explicitly relies upon the 2013 Rule's discriminatory effects framework. The Fair Housing Act is an important tool for enforcing the housing rights of survivors, particularly given the Violence Against Women Act's (VAWA) applicability to federally subsidized, but not private, unsubsidized housing.

We incorporate by reference a more detailed comment letter submitted by advocates for survivors of gender-based violence, joined by the National Housing Law Project.

Discrimination Against Individuals Impacted by the Criminal Legal System

Discriminatory effects liability is also an important tool for applicants and tenants to challenge policies that exclude individuals who have had contact with the criminal legal system from accessing and maintaining housing. HUD clearly outlined the applicability of discriminatory effects liability to such policies in its 2016 guidance, which acknowledged longstanding inequities in the criminal legal system -- particularly how people of color in the United States are disproportionately arrested and incarcerated.⁵⁰ Advocates have challenged housing providers' use of blanket bans to exclude anyone with a conviction from housing, alleging discrimination under the Fair Housing Act.⁵¹ The ability to challenge these policies using a discriminatory effects theory underscores the need and importance of a workable discriminatory effects standard. Given the ubiquity of tenant screening tools, and the implications such tools have for individuals impacted by the criminal legal system, we reiterate the need for HUD to explain in the Final Rule preamble why tenant screening companies are subject to the Fair Housing Act.

Discrimination Against Section 8 Voucher Holders

Voucher households are disproportionately represented by protected groups, including people of color, households with children, and persons with disabilities.⁵² Accordingly, it is important

⁴⁸ See e.g., 2011 Fair Housing Guidance, at 6 (describing *Alvera* case).

⁴⁹ U.S. Dep't of Housing & Urban Development, *Office of General Counsel Guidance on Application of Fair Housing Act 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), <https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF>.

⁵⁰ U.S. Dep't of Housing & Urban Development, *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*, 2 (Apr. 2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

⁵¹ See e.g., First Amended Complaint, *The Fortune Soc'y v. Sandcastle Towers Hous. Dev. Fund Corp.*, et al., No. 1:14-cv-06410-VMS (E.D.N.Y. May 1, 2015); see also *Fortune Soc'y*, 388 F.Supp.3d 145 (E.D.N.Y. 2019) (denying summary judgment on disparate impact claim).

⁵² See Center on Budget and Policy Priorities, *Trump Administration's Proposed Rule Would Perpetuate Racist and Discriminatory Housing Practices*, Table 1 (Oct. 18, 2019) ("Receiving Housing Choice Vouchers" column), available at: <https://www.cbpp.org/sites/default/files/atoms/files/10-18-19hous.pdf>.

that Housing Choice Voucher families be able to use discriminatory effects liability to challenge discriminatory blanket policies that reject Section 8 Vouchers, particularly in low-poverty areas. The difficulties Voucher families (and, thus, many members of protected classes) face to “lease up” with their Vouchers are very real – a reality that a recent HUD-funded pilot study acknowledged.⁵³

Discriminatory effects theory is an important tool that has also been used to challenge discriminatory residency preferences adopted by public housing agencies that have excluded Voucher applicant families of color. We reiterate the need for HUD to emphasize the case-by-case nature of the discriminatory effects standard, such that no proffered reason to fail to accept Section 8 Vouchers is automatically deemed to be a substantial, legitimate, non-discriminatory reason that satisfies the defendant’s burden in Step 2 of the analysis.

Furthermore, as demonstrated by the *Lincoln Property* decision, it is important for HUD to explain that plaintiffs alleging discrimination with respect to the Voucher program under a discriminatory effects theory need not show that the defendant caused the underlying history of housing discrimination in a specific geography to make a prima facie showing.

* * *

In conclusion, we strongly support HUD’s decision to reinstate the 2013 Discriminatory Effects Rule, and the agency’s rejection of the harmful changes found in the 2020 rulemaking. We agree with HUD’s assessment that the 2013 Rule reflects decades of case law and is consistent with the *Inclusive Communities* decision. This rulemaking is also necessary to comply with HUD’s statutory obligation to affirmatively further fair housing. We again urge HUD to continue rejecting any requests for carve outs or safe harbors under the discriminatory effects standard, and to provide further context and explanation as noted throughout this letter.

We appreciate your time and consideration of these comments. Please contact Noëlle Porter, Director of Government Affairs, nporter@nhlp.org, if you wish to discuss these comments further.

Sincerely,

National Housing Law Project

National Low Income Housing Coalition

Public Law Center

⁵³ See generally The Urban Institute (prepared for HUD), “A Pilot Study of Landlord Acceptance of Housing Choice Vouchers” (2018).

Public Justice Center

The Public Interest Law Project

Housing and Economic Rights Advocates (HERA)

Fair Housing Napa Valley

Center for Civil Justice

Disability Rights California

Asian Americans Advancing Justice – Asian Law Caucus

Legal Action Chicago

Eviction Defense Collaborative

Everyone for Accessible Community Housing Rolls! Inc.

North Carolina Justice Center

Western Center on Law & Poverty

Shriver Center on Poverty Law

The Legal Aid Society

Texas Appleseed