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

Re: Docket No. FR-6111-P-02
HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

Submitted via regulations.gov

The National Low Income Housing Coalition (NLIHC) is an organization whose members include state and local affordable housing coalitions, residents of public and assisted housing, nonprofit housing providers, homeless service providers, fair housing organizations, researchers, faith-based organizations, public housing agencies, private developers and property owners, local and state government agencies, and concerned citizens. While our members include the spectrum of housing interests, we do not represent any segment of the housing industry. Rather, we focus on policy and funding improvements for extremely low-income people who receive and those who need federal housing assistance.

NLIHC writes to express strong opposition to the radical changes proposed for the Disparate Impact regulation finalized on February 15, 2013. We urge HUD to withdraw its proposed rule designed to make it virtually impossible for people experiencing various forms of discrimination to challenge the policies and practices of housing providers, governments, and businesses. HUD's drastic proposal would discard the well-crafted and time-tested three-part burden shifting standard, replacing it with a nine-component set of tests that place all of the burden on people in the Fair Housing Act's protected classes who are experiencing housing discrimination.

NLIHC's Recent History Supporting Disparate Impact Theory

NLIHC submitted comments on January 17, 2012 generally supporting the November 16, 2011 proposed Disparate Impact rule. In response to HUD's May 15, 2017 *Federal Register* notice requesting comments about regulatory burden, NLIHC wrote that HUD must preserve the Disparate Impact rule. On August 20, 2018 in response to an Advance Notice of Proposed Rulemaking, NLIHC urged HUD to not amend the 2013 rule. NLIHC now expresses great support for the 2013 Disparate Impact regulation as currently codified, and urges HUD to withdraw its proposed rule intended to effectively dismantle disparate impact as a tool to enforce the Fair Housing Act.

NLIHC also joined an amicus brief filed on February 14, 2014 supporting a motion for summary judgement filed by HUD in response to an Administrative Procedures Act claim against HUD by the American Insurance Association and the National Association of Mutual Insurance Companies. The brief pointed out that over the previous two decades, virtually all of the major homeowner insurance carriers had been the subject of Fair Housing Act enforcement actions based on claims of race discrimination in the underwriting, marketing, advertising, and sale of their products. As a result, many homeowner insurance underwriting and pricing policies, such as using dwelling unit age and minimum market value, had been successfully challenged under the Fair Housing Act on disparate impact grounds. In addition, insurers subsequently abandoned explicitly race-based and geographically-based marketing plans.

Disparate Impact Rule's Evolution, Implicit Supreme Court Endorsement, and Subsequent Court Cases

For more than 50 years, HUD has interpreted the Fair Housing Act to prohibit housing policies or practices that have a discriminatory effect even if there was no apparent intent to discriminate. Each of the 11 U.S. Courts of Appeals that have had disparate impact cases before them have upheld disparate impact and applied a version of the three-part burden shifting standard. Because there were minor variations in how the courts and HUD applied the concept of disparate impact over the years, HUD proposed a rule in 2011 that offered a standard for comment. After 15 months of careful consideration of all public comments, HUD published the final Disparate Impact rule on February 15, 2013. That final regulation established uniform standards for determining when a housing policy or practice with a discriminatory effect violates the Fair Housing Act.

Despite HUD's current claim, there is nothing in the U.S. Supreme Court decision *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* that warrants a radical revision of the Disparate Impact rule. The Court implicitly endorsed the 2013 rule by not questioning or challenging it, and no lower court actions since *Inclusive Communities Project* suggest that the three-step burden shifting standard is inadequate or should be drastically rewritten. Because the Court in *Inclusive Communities Project* affirmed disparate impact liability under the Fair Housing Act, HUD's proposed rule making it virtually impossible to successfully allege a disparate impact claim is fundamentally inconsistent with the core holding of *Inclusive Communities Project*.

Court cases subsequent to *Inclusive Communities Project* have found that the Disparate Impact regulation is consistent with the *Inclusive Communities Project* ruling. For example, the Second Circuit concluded that "[the Supreme Court] implicitly adopted HUD's approach" in *MHANY Management v. County of Nassau*. In *Property Casualty Insurers Association of America v Carson*, the federal court for the Northern District of Illinois wrote, "In short, the Supreme Court in *Inclusive Communities Project* expressly approved of disparate impact liability under the FHA and did not identify any aspect of HUD's burden-shifting approach that required correction." And, on remand from the Supreme Court and the Fifth Circuit, the district court that originally addressed *Inclusive Communities Project* commented that the Supreme Court had affirmed "the Fifth Circuit's decision adopting the HUD regulations."

Responding to an insurance trade group's motion to file an amended complaint against the Disparate Impact rule regarding *AIA v Department of Housing and Urban Development*, in March 2017 HUD wrote, "The Supreme Court's holding in *Inclusive Communities* is entirely consistent with the rule's reaffirmation of HUD's longstanding interpretation that the FHA authorizes disparate impact claims…Indeed, nothing in *Inclusive Communities* casts any doubt on the validity of the rule."

The above cited court cases, and indeed HUD's own response to a case as recently as March 2017, are cogent counters to HUD's present argument that *Inclusive Communities Project* suggests that the Disparate Impact rule warrants wholesale revision.

Specific Problems with the Proposed Rule

Omission of Perpetuation of Segregation Theory

HUD's proposed revision of §100.500(a) would eliminate the definition of "discriminatory effect" as presented in the 2013 rule. The current definition includes a clause explicitly defining "discriminatory effect" to include a practice that "creates, increases, reinforces, or perpetuates *segregated* housing patterns." (emphasis added) By attempting to erase liability under the perpetuation of segregation theory, HUD proposes to eviscerate an essential clause designed to address the very core problem that the Fair Housing Act intended to eliminate – segregation.

In *Metropolitan Housing Development Crop. v Village of Arlington Heights*, the court noted:

> "There are two kinds of racially discriminatory effects which a facially neutral decision about housing can produce. The first occurs when that decision has a greater adverse impact on one racial group than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act."

Removing perpetuation of segregation theory from the proposed rule is one more attack on the Fair Housing Act and its intent to foster and realize integration. HUD's attempt to suspend the Small Area FMR rule and HUD's actual suspension of the Affirmatively Furthering Fair Housing rule marks HUD's abdication of its responsibility to help eradicate housing segregation – much of which is the result of federal policies in previous decades.

Virtually Insurmountable Barriers to Presenting a Prima Facie Case

The first step in the current rule's three-step burden shifting standard, establishing a prima facie case, [at §100.500(c)(1)] calls for the plaintiff to prove that the challenged practice caused or predictably will cause a discriminatory effect. This first step under the current rule has already proven to be a formidable obstacle for many plaintiffs.

HUD proposes a new §100.500(b) that would require a plaintiff to allege a prima facie case to be based on facts supporting five new required elements. This provision dramatically increases the standard for a prime facie case at the pleading stage, before the benefit of discovery which could provide the information necessary to present a sufficiently robust challenge.

Opening Sentence of §100.500(b)

The opening sentence of (b) states that "To allege a prima facie case based on an allegation that a *specific identifiable policy* or practice has a discriminatory effect, a plaintiff must state facts plausibly alleging each of the following elements:" (emphasis added)

The preamble to the proposed rule emphasizes:

> "It is insufficient to identify a program as a whole without explaining how the program itself causes the disparate impact as opposed to a particular element of the program. Plaintiffs must identify the particular policy or practice that causes the disparate impact. *Plaintiffs will likely not meet the standard*, and HUD will not bring a disparate impact claim alleging that a single event – *such as a local government's zoning decision*…– is the cause of a disparate impact, unless the plaintiff can show that the single decision is the equivalent of a policy or practice." (emphasis added)

However, in *Inclusive Communities Project* the Supreme Court wrote "suits targeting unlawful zoning law and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification are at the heartland of disparate-impact liability."

Subsequent to the *Inclusive Communities Project* decision, in a 2016 affordable housing case, *MHANY Management, Inc. v. County of Nassau*, the Second Circuit cited the Supreme Court's recognition in *Inclusive Communities Project* of the importance of such "heartland" zoning cases. The Second Circuit held that the plaintiffs met their burden of establishing that a rezoning decision by the City of Garden City, NY, prevented the development of affordable multifamily housing and therefore disproportionately harmed African Americans and Latinxs and perpetuated residential segregation. The Second Circuit sent the case back to the District Court to determine whether the plaintiffs could also show that Garden City could achieve any legitimate zoning goals through less discriminatory alternative means.

Similarly, in *Avenue 6E Investments, LLC v. City of Yuma*, the Ninth Circuit emphasized the importance of "policy to provide fair housing nationwide" in holding that the denial of an affordable housing provider's zoning request in order "to permit the construction of housing that is more affordable" may constitute an unlawful disparate impact, and rejected an argument that the availability of affordable housing in the same region necessarily precludes a plaintiff from showing disparate impact. On remand, the district court denied the city's motion for summary judgment, holding that the record showed that the rezoning denial had a discriminatory effect on Latinxs and that whether the city could establish a valid justification and the availability of less discriminatory alternatives were material issues of fact for trial.

The proposed rule rejects the Supreme Court's guidance and the subsequent actions of circuit courts. Consequently, challenges to many zoning and government planning decisions (such as single-family housing only, minimum lot size, property density, and occupancy limit zoning and building ordinances) could not pass HUD's proposed prima facie burden test even though people in some of the protected classes (e.g., race, color, national origin, familial status, and disability) are often disproportionately harmed by those zoning and planning decisions.

Element (b)(1)

Element (b)(1) requires people experiencing a discriminatory policy or practice to demonstrate that the policy or practice "is arbitrary, artificial, and unnecessary to a achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law."

At this early stage of the process of challenging a policy or practice, this element of the proposed rule compares very unfavorably with the "legally sufficient justification" of the current rule at §100.500(b) by removing the defendant's burden to provide a legally sufficient justification, instead placing the heavy burden on the plaintiff. Current §100.500(b)(1) requires the defendant to demonstrate that the challenged policy or practice is "necessary to achieve one or more [of its] *substantial*, legitimate, *nondiscriminatory*, interests;" and that those interests could not be served by another policy or practice that has a *less discriminatory* effect. (emphasis added)

Proposed (b)(1) weakens the language to a mere "valid" interest – not a "substantial" interest. Proposed (b)(1) also eliminates the need for a defendant to address the discriminatory character of a business interest. Furthermore, the addition of the word "profit" without a modifier implies that a defendant could claim later in the process [at (c)(3)] that an exorbitant profit is their valid, legitimate objective, and that a "reasonable" profit would not be in the defendant's interest. A businesses' desire for excessive profit would thus superseded consideration of a less discriminatory policy or practice that still resulted in reasonable profits.

<u>Overwhelming Burdens on Plaintiffs to Prove Discriminatory Effect</u>

If a plaintiff overcomes the staggering obstacles presented during the pleading stage as proposed by §100.500(b) and (c), even without the benefit of information that could be provided through discovery, proposed §100.500(d) erects yet more overwhelming obstacles. (According to HUD's preamble, it is only at this late stage that the plaintiff may now have access to discovery to establish facts.)

The current rule at §100.500(c)(2) places the burden of proof on the defendant to prove "the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." HUD now proposes to place the burden on those experiencing the harmful impact of a defendant's policy or practice.

Preponderance of Evidence

Proposed (d)(1)(i) requires the plaintiff to prove by the *preponderance* of the evidence, four of the five elements already addressed at (b) [emphasis added]. Notably, the word "preponderance" is only used in reference to the plaintiff, further placing a thumb on the scale in favor of the defendant.

At this late stage proposed (d)(1)(ii) affords a defendant the chance to rebut a plaintiff's assertion that a policy or practice is arbitrary, artificial, and unnecessary. The defendant merely has to produce evidence (not a "preponderance" of evidence) showing the challenged policy or practice advances a valid interest. Under the current rule at (c)(2), the defendant's task is more rigorous; the defendant must prove that the challenged practice is necessary to achieve one or more *substantial*, legitimate, *nondiscriminatory* interests – not merely a valid interest. (emphasis added)

Heaping yet another overwhelming burden on the plaintiff, proposed (d)(1)(ii) requires the plaintiff to prove by the "preponderance" of the evidence that a less discriminatory policy or practice exists that would serve the defendant's interest. Furthermore, the plaintiff must prove by the "preponderance" of the evidence that any such less discriminatory policy or practice is "equally effective" and does not impose "materially greater costs on, or create other material burdens" for the defendant.

The current rule at (c)(3) simply requires a plaintiff to prove (not with a preponderance of the evidence) that the substantial, legitimate, nondiscriminatory interests of the defendant could be served by another practice that has a less discriminatory effect. The heavy weight placed on the plaintiff by proposed (d)(1)(ii) – "without imposing materially greater costs" and "equally effective" – forces the plaintiff (not the defendant who has far more knowledge of their own operations and options available to it) to guess the justifications a defendant might pose and then refute them in advance. The plaintiff must also demonstrate that working toward less discrimination will not entail materially greater cost, begging the question – what is the price of fair housing and what are the short-term and long-term costs of discriminatory effects? In other words, the proposed rule suggests preventing or eliminating discrimination against people protected by the Fair Housing Act should be cost free.

Examples of the Importance of Disparate Impact to Protect People in the Protected Classes

The proposed rule would make it virtually impossible for people in protected classes to challenge a range of policies or practices that can harm them, including:

- Housing provider policies that allow only one person per room, which excludes families with children from housing that they can afford because they have to rent more expensive units.
- Housing provider policies that prohibit renting to families with children.
- Housing provider policies that prevent disabled people from renting an apartment because they do not have full-time jobs, even though they have adequate income to pay rent.
- Nuisance abatement ordinances that lead to women who are survivors of domestic violence to be evicted because they have sought police assistance.
- Exclusionary zoning policies that have the effect of limiting affordable housing opportunities for people of color.
- Jurisdictions' residency preferences that have the effect of limiting affordable housing opportunities for people of color.

A number of court cases exemplify how disparate impact is an essential tool to enforce the Fair Housing Act, a tool that HUD proposes to render inoperable.

Nuisance Ordinances Endanger Women Experiencing Domestic Violence

Nuisance abatement ordinances often cause women who are survivors of domestic violence to be evicted because they sought police assistance or emergency services. Such ordinances may also have a chilling effect by discouraging domestic violence survivors from calling the police for fear of losing housing. In the past, the disparate impact standard has served as an effective protection for women survivors of domestic violence.

For example, a woman who experienced extreme and life-threatening domestic violence was threatened with eviction after the police were called to her apartment three times. She sued the Borough of Norristown, PA, which applied its disorderly conduct ordinance to compel her landlord to evict her. The plaintiff argued, among other things, that the Norristown ordinance violated the Fair Housing Act because it adversely affected and penalized survivors of domestic violence, who are disproportionately women. This case was ultimately settled. (*Briggs v. Borough of Norristown*)

In another example, an Oregon woman was evicted from her low-income apartment complex after she informed the property manager that her husband had physically assaulted her and that she had obtained a protection order prohibiting him from entering the complex. She and the Justice Department filed a suit, alleging that the apartment complex engaged in disparate impact discrimination on the basis of sex in violation of the Fair Housing Act. As a result, a consent decree was concluded that prohibited "evicting, or otherwise discriminating against tenants because they have been victims of violence, including domestic violence." In addition, the court awarded her compensatory damages and required the property manager to participate in education about discrimination and fair housing law. (*United States ex rel. Alvera v. The CBM Group, Inc.*)

Hundreds of jurisdictions across the country have similar nuisance laws. To the extent that such laws lead to the evictions of women affected by domestic violence, they will also create a risk of increased homelessness for domestic violence survivors and their children. According to the National Network to End Domestic Violence, more than 50% of homeless women cite domestic violence as the primary cause of their homelessness, demonstrating a strong correlation between domestic violence and homelessness.

For example, a Michigan woman who experienced severe harassment and stalking by her ex-boyfriend obtained a personal protection order against him. She informed the company managing her apartment complex about the order. Her ex-boyfriend subsequently broke the windows of her apartment and kicked in her door. She immediately reported the incident to the police and the property manager. Based on this incident, the woman and her two daughters were evicted and forced to live in a shelter. The property manager stated that the reason for eviction was failure to properly supervise a "guest." She filed suit under the Fair Housing Act's disparate impact protections, arguing that the "supervision" policy discriminated against female domestic violence survivors. She ultimately prevailed, receiving monetary damages in a settlement that required the landlord and management company to adopt a comprehensive policy on domestic violence. (*Lewis v. NorthEnd Village*)

HUD's proposed rule will severely limit the disparate impact standard as an enforcement tool that allows women who survive domestic violence to bring successful challenges to discriminatory nuisance ordinances.

Occupancy Limit Policies Adversely Impact Families with Children

A married couple in Connecticut lived in a one-bedroom condominium. After the birth of their first child, they received a letter from management stating they were in violation of a policy that permitted no more than two persons per bedroom. The couple sued, arguing that the policy had a disparate impact on families with children. The court found that the policy had a disparate impact on families with children in violation of the Fair Housing Act. (*Gashi v. Grubb & Ellis*)

Another Connecticut case involved a mobile home owner who wanted to sell his mobile home to a family with four children. The mobile home park operator refused to approve the rental application for residency in the mobile home park, citing occupancy limits under the mobile home park rules and state building code. The operator argued that the rules were based on business necessity – the capacity of their septic system and other limitations. The court was unconvinced by the operator's argument, finding in favor of the seller. (*Chro ex rel. Rowley v. Ackley*)

Restrictive Zoning Laws and Building Codes Adversely Harm People with Disabilities

An example of a claim alleging that a single event is the cause of a disparate impact involved a builder in the Town of Huntington, NY, who proposed construction of an assisted living facility for disabled residents and senior citizens. While the builder awaited approval of a special use permit, the town passed a local law that applied retroactively and required builders of assisted living facilities to apply for a zoning change, which was more difficult to obtain. A public hearing revealed that town residents believed the proposed facility would reduce property values and drain community resources. Relying on the disparate impact theory, the builder sued and successfully enjoined the local law. The court found that requiring such facilities to apply for a zoning change rather than a special use permit made it more difficult for disabled than able-bodied elderly persons to obtain approval for construction of housing suited to their needs in residential neighborhoods. (*Sunrise Development, Inc. v. Town of Huntington*)

A Pennsylvania nonprofit purchased a home to provide residential services to persons with disabilities, initially for a 17-year-old man with intellectual and physical disabilities. The Borough of Plum accused the nonprofit of violating a zoning ordinance, claiming the nonprofit would be operating a group home in a single-family residential neighborhood. A court struck down the ordinance, finding that the borough's interpretation of the term "family" to prohibit a single individual with disabilities from living in a "single-family dwelling" amounted to a disparate impact violation. The court held that the borough "created restrictions on the establishment of homes for people with disabilities in single-family neighborhoods" that limited the resident's "endeavor to live individually in the house of his own choosing." (*Sharpvisions, Inc. v. Borough of Plum*)

Another Pennsylvania case involved a nonprofit housing and services provider that sought to operate two group homes for people with intellectual disabilities in a suburb outside Philadelphia. The nonprofit could not do so because a local ordinance prohibited the establishment of a group home within 1,000 feet of an existing group home. A court invalidated the 1,000-foot spacing requirement for group homes because, among other things, it had an unjustifiable disparate impact on people with disabilities. After a trial, the court found that the township had failed to show how this limitation "furthers, in theory and in practice," any legitimate governmental interest, and entered an order invalidating the limitation. (*Horizon House Dev. Services v. Township of Upper Southampton*)

Restrictive Zoning Laws and Building Codes Adversely Harm People of Color

Recently, the Des Moines, IA city council proposed new minimum house sizes and a prohibition on the use of less expensive building materials. The city council proposes these changes just as the local Latinx population is increasing. The Des Moines Latinx population has, on average, lower incomes than the white Des Moines population, and so would be disproportionately harmed by these proposed zoning changes.

Policies and Practices that Adversely Harm People of Color

The District Court for the District of Columbia found a sufficient causal connection between a habitational insurance policy that excluded landlords who rent to tenants who use Housing Choice Vouchers to pay their rent, and harm to African American and women-headed households who were more likely to be voucher recipients in the relevant geographical housing market. The court cited a long line of cases finding insurance policies susceptible to challenge under the Fair Housing Act and rejected the defendant's argument that the "robust causality" language in *Inclusive Communities Project* rendered them invalid. The district court observed that *Inclusive Communities Project* "does not require courts to abandon common sense or necessary logical inferences that follow from the facts alleged. Indeed, quite the opposite – the Supreme Court instructed courts to ensure that disparate impact liability is confined to removing 'artificial, arbitrary, and unnecessary barriers.'" (*Nat'l Fair Housing Alliance v. Travelers Indemnity Company*)

Local civil rights groups in Southern California filed a fair housing case against the cities of Lancaster and Palmdale for discriminatory enforcement against Latinx and African American Housing Choice Voucher holders. The groups charged that families of color using vouchers were victims of constant intimidation and harassment by housing authority investigators, sheriff's deputies, and local politicians. They contended that the practices discouraged and excluded them from living in these two cities. The lawsuit settled. (*Community Action League v. City of Palmdale*)

In Minnesota, a private housing provider of an apartment complex occupied mostly by low-income Latinx families wanted to "reposition the complex in the market in order to appeal to and house a different [young professional] tenant demographic population." As part of the repositioning effort, the owner imposed new rental criteria and stopped participating in the Section 8 program, all of which would have displaced 267 families. The tenants challenged the owner's plan. The District Court held that the plaintiffs adequately alleged both disparate treatment and disparate impact under the Fair Housing Act and allowed those claims to proceed. The court found that the owner's business interest could be served by more modest rent increases or negotiating public subsidies in exchange for retaining affordable rents. The case settled as a certified class action that will amend the screening criteria and fund the acquisition and preservation of affordable rental properties. (*Crossroads Residents Organized for Stable and Secure ResiDencieS (CROSSRDS) v. MSP Crossroads Apartments LLC*)

Latinx residents of low-income housing in the Village of Farmingdale, New York challenged a redevelopment plan that would increase rents and result in their displacement. Although only 12.6% of the village's population was Latinx, the proposed redevelopment area had a Latinx population of 56.2%. The plan was projected to displace 21% of Latinx residents while displacing only 1.2% of white residents. The court ruled that the plaintiffs stated a disparate impact claim under the Fair Housing Act by alleging that the actions of the village would eliminate affordable housing, thereby disproportionately impacting Latinxs who are in need of low-income housing. (*Rivera v. Incorporated Village of Farmingdale*)

Plaintiffs have used disparate impact to challenge housing restrictions that adversely affect people with criminal records. Current and former tenants and a fair housing organization in Georgia challenged an apartment complex's "99-year criminal history rule," which "barred from residency any individual who had certain felony or misdemeanor convictions within the past 99 years." The district court held that the plaintiffs had adequately pleaded a disparate impact claim by showing that nationwide, African Americans were more likely than whites to have criminal convictions and were over-represented in the prison population, and that the 99-year criminal history rule therefore adversely impacted African Americans. (*Sams v. Ga West Gate, LLC*)

Inequitable Distribution of Disaster Recovery Funds

With human-caused climate change, more severe weather events are occurring and will very likely continue to occur with greater frequency and severity. Time and again NLIHC has seen federal disaster rebuilding dollars favor higher-income white communities over lower-income black communities. After Hurricane Harvey, local discretion in designing and implementing rebuilding programs resulted in white families in higher-income neighborhoods receiving about $60,000 of recovery dollars per resident while black families in poorer neighborhoods received, on average, $84 per person.

After Hurricane Katrina, two court cases exemplify the importance of disparate impact as a fair housing tool:

African American homeowners in New Orleans filed suit against HUD and the Louisiana Recovery Authority for discrimination in the aftermath of Hurricane Katrina. The Road Home program was established to provide storm victims with funding to rebuild their homes. But the Road Home based compensation on the lower of two values: the pre-storm value of the home or the cost to rebuild. As a result, owners of homes in black neighborhoods, where properties typically have lower value than white neighborhoods, received less money to rebuild. HUD settled the case by distributing $62 million to 1,300 homeowners in areas that suffered the most damage. (*Greater New Orleans Fair Housing Center v. HUD*)

In the aftermath of Hurricane Katrina, St. Bernard Parish in Louisiana enacted a "blood relative" ordinance which restricted the rental of single family residences to those related by blood to the owners of the property. A local fair housing organization challenged the ordinance as racially discriminatory because it would disproportionately exclude people of color from renting. White individuals owned 93% of all owner-occupied housing and constituted 88% of the parish's population. The case settled. (*Greater New Orleans Fair Housing Action Center v. St. Bernard Parish*)

Conclusion

Access to housing, particularly affordable, accessible housing, impacts all aspects of an individual's life. The proposed rule would allow more discriminatory practices to exist, potentially limiting opportunity and heightening existing disparities in health, education, and economic wealth.

The affordable housing crisis is worsening, along with its disproportionate harm to people of color. In addition, the racial wealth gap is growing, with generational impacts on black and Latinx families. Racial segregation persists and concentrated poverty grows. Given these tremendous racial disparities in our country's housing system, disparate impact is a critical tool for overcoming and reversing these disparities.

Disparate impact cases are already difficult to prove under the current rule. The proposed rule is one more example of HUD's unrelenting actions aimed at vitiating fair housing protections built over years of legislative, judicial, and administrative efforts to combat discrimination and institutional segregation. The proposed rule would dismantle an important enforcement tool for combatting discrimination by overwhelmingly favoring those accused of discrimination. The practical effect of the proposed rule would be to require people experiencing housing discrimination to show that a housing provider, government, or business intended to discriminate. That is why we oppose the proposed rule and urge HUD to withdraw it.

The current Disparate Impact rule represents, in a uniform fashion, decades of extensive federal jurisprudence and HUD administrative practice. It is a critical tool that people in protected classes use to attempt to secure changes to policies and procedures that subtly discriminate them. For this reason NLIHC fully supports the 2013 Disparate Impact rule and urges HUD to not amend it.

If there are any questions about these comments, please contact Ed Gramlich at ed@nlihc.org or 202.662.1530 x 314.

Sincerely,



Diane Yentel
President and CEO