

## **U.S. District Court Issues Preliminary Injunction on HUD Revisions to Disparate Impact Rule**

The U.S. District Court for the District of Massachusetts issued a preliminary nationwide injunction on October 25 to halt implementation of HUD's final Disparate Impact rule. Thanks to the efforts of the Lawyers for Civil Rights and Anderson & Kreiger, with the Massachusetts Fair Housing Center and Housing Works, Inc. serving as plaintiffs on the case—HUD's harmful rule is now postponed, in its entirety, until a review of the plaintiffs' claims is complete.

In a lawsuit filed on September 28, plaintiffs claim the new final Disparate Impact Rule violates the Administrative Procedure Act (APA). In order to obtain preliminary injunctive relief, court precedent requires a plaintiff to demonstrate: a substantial likelihood of success on the merits; a significant risk of irreparable harm if an injunction is withheld; a favorable balance of hardships; and a fit between the injunction and the public interest. The Court addressed the first three tests:

### Likelihood of Success on the Merits

The plaintiffs relied on three arguments: the 2020 Rule is "contrary to law," the changes to the 2013 Rule are "arbitrary and capricious," and the 2020 Rule's inclusion of the "outcome prediction defense" violates the APA's "notice and comment" requirements. The Court only addressed the second argument, "likelihood of success based on the merits."

HUD presented two arguments defending the 2020 Rule's changes. The first justification is that the rule revisions align the disparate impact standards with the Supreme Court's decision in *Texas Department of Housing Community Affairs v. Inclusive Communities Project, Inc.* (see [Memo, 05/29/2015](#)). While the Court agreed with HUD that the section of the new rule stating, "That the challenged policy or practice is arbitrary, artificial and unnecessary to achieve a valid interest or legitimate objective" is language taken directly from the *Inclusive Communities* case, the Court concluded that HUD's edition of "such as practical business, profit or policy consideration" to the section is not found in any judicial decision and is unjustified. The Court also agreed with the plaintiffs that the inclusion of the "outcome prediction" defense that the plaintiff proves "a less discriminatory policy or practice exists would serve the defendant's identified interest (or interests" in an *equally effective manner without imposing materially greater costs* on, or creating *other material burdens* for the defendant" is unjustified and runs the risk of rendering the disparate impact liability under the Fair Housing Act completely ineffective.

HUD's second justification for the rule change was that the changes provided greater clarity to the public. The Court agreed with the plaintiffs that HUD's revisions accomplishes the opposite of clarity and only raises more questions.

The Court concluded that the plaintiffs have shown a substantial likelihood of success on the merits as to their claim that HUD's revision to the Disparate Impact rule is arbitrary and capricious.

### Irreparable Harm

The Court agreed that the rule changes pose a real and substantial threat of imminent harm to the Massachusetts Fair Housing Center's mission by raising the burdens, costs, and effectiveness of disparate impact liability. The Court also found that these harms are not recoverable if the 2020 rule is allowed to go into effect but was later vacated. Consequently, the Court found that the plaintiffs demonstrated a significant risk of irreparable harm if the injunction is withheld.

### Balance of Harms and Public Interest

The Court noted that the defendants did not identify the risk of harm the government or the public would face should an injunction be issued, especially given the existence of the 2013 Rule, which has been and can continue to be workable for both sides. The Court found it in the public interest to require agencies to adequately justify significant changes to regulations, particularly change that weaken anti-discrimination provisions

The Court cited *Inclusive Communities*, noting that the Supreme Court explained that disparate impact liability “is consistent with the FHA's [Fair Housing Act's] central purpose” of “eradicate[ing] discriminatory practices within a sector of our Nation's economy.” The Supreme Court added, “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. The Court concluded that the balance of harms and public interest supports a preliminary injunction pending a complete review of plaintiffs' APA challenge.

In the opening background section of the decision, the Court wrote:

There can be [no] doubt that the 2020 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).

In a [statement](#) announcing the victory against HUD, Lauren Sampson, staff attorney at Lawyers for Civil Rights said, “This decision is a victory for our courageous plaintiffs, for our tireless community allies, and for the rule of law. We will continue to hold this Administration accountable for its violations of law and continued attacks on the rights of people of color and immigrants.”

NLIHC issued a [detailed analysis](#) prior to the rule being published in the *Federal Register*.

The Nationwide Preliminary Injunction from the U.S. District Court for the District of Massachusetts at: <https://bit.ly/2HEC0C2>

The filed complaint at: <https://bit.ly/34BoE2r>

The statement from the Lawyers for Civil Rights and Anderson & Kreiger at: <https://bit.ly/2HGvJpm>

A media statement from the National Fair Housing Alliance at: <https://bit.ly/37QBQ5u>