

Congress of the United States
House of Representatives
Washington, DC 20515-3213

October 18, 2019

SUBMITTED VIA REGULATIONS.GOV

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

I write to you in response to the U.S. Department of Housing and Urban Development's ("HUD") notice ("Notice") concerning its interpretation of the disparate impact standard. I strongly oppose the proposed changes to HUD's use of disparate impact. The existing disparate impact rule—that was instituted in 2013 and enshrines decades of jurisprudence—efficiently and successfully serves the American public as a tool for challenging the structural inequalities that persist in housing and financial markets. Not only is the rule an effective mechanism for uncovering forms of discrimination which are covert or unintentional, it also upholds a critical function of the Fair Housing Act, which was passed just days after Dr. Martin Luther King, Jr.'s assassination and in his honor.

I am committed to eliminating discriminatory policies and practices, whether intentional or facially neutral, and I urge you to uphold HUD's and the Supreme Court's current interpretation of the disparate impact rule. As the elected Representative for New York's 13th Congressional District, I have the privilege of representing Harlem, East Harlem, West Harlem, Hamilton Heights, Marble Hill, Inwood/Northern Manhattan and the north-west Bronx. The constituents that I represent living in Manhattan and the Bronx according to the most recently available American Community Survey is 55 percent Hispanic and 29.7 percent Black or African American. Both demographic groups have historically been underserved and victims of racially targeted and often intention discriminatory practices. In New York's 13th Congressional District, affordable housing is rapidly becoming a scarce commodity. This is not only subsidized housing, but also includes private residential housing.¹ The share of recently available rental units that would be affordable to the median metro area renter has decreased from 24 percent (2006) to 22 percent (2014) while the median gross rent over the same period increased from \$1,400 to \$1,500.²

¹ https://furmancenter.org/files/NYUFurmanCenterCapitalOne_NationalAffordableRental_HousingLandscape2016_NewYorkCity.pdf

² Id.

In New York City, we have seen lawsuits brought under the Fair Housing Act that have shone a light on deceptive marketing and unfair rental practices targeting minority African American and Hispanic New Yorkers and has been a key means of recourse. Not just impacting individual cases, the Fair Housing Act has allowed for localities and local jurisdictions to challenge discriminatory zoning changes and land-use proposals would further divide and diffuse housing integration in communities where intentional “redlining” has occurred.

We have not resolved this Nation’s problems related to housing and residential segregation. According to the National Fair Housing Alliance, there are over 4 million instances of housing discrimination annually, and data show that reported housing discrimination may be on the rise. In the words of Justice Kennedy in his majority opinion in *Texas Dep’t. of Housing and Community Affairs v. Inclusive Communities Project* (“*Inclusive Communities*”), which upheld the Disparate Impact doctrine, “much progress remains to be made in our Nation’s continuing struggle against racial isolation...the FHA must play an important part in avoiding the Kerner Commission’s grim prophecy that “[o]ur Nation is moving toward two societies, one black, one white-separate and un-equal.”...The Court acknowledges the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.”³ Despite this clear articulation, HUD proposed rule would render the use of the disparate impact doctrine null and void. The existing disparate impact rule must remain intact and it must not be revised for a less effective or efficient standard. The majority opinion over twenty years of disparate impact consideration, the decisions of eleven U.S. Circuit Courts of Appeals,⁴ and disparate impact liability claims found to have merit both on their own and in concert with violations of Title VII of the Civil Rights Act of 1964 and such redress.

Among the proposed changes this rule presents is the removal or diminution of the 2013 rule’s explicit definition of “discriminatory effect”⁵ The impact of this elimination is tantamount to not consider the impact of segregation and intentional racism used to justify “redlining”. This is in contravention of the HUD agency and its work and resulting policies including the 2013 rule to eliminate housing segregation. The notion that we live in a post-racial society, where race and ethnicity are no longer factors of significance, is wholly irresponsible as we still to this day are attempting to reconcile the long-term impacts of those decisions. For many underserved communities, this is the overwhelmingly salient factor that shapes socioeconomic status and places housing security at the pinnacle of immediate concern. For families with limited to low-incomes, the disparate impact rule and standing affirmed by the Supreme Court in 2015 is the standard by which New Yorkers including my constituents may have to take recourse against unscrupulous actors and policies that would disenfranchise many in communities of color.

³ 135 S.Ct. 2507, 2525–26 (2015) (majority opinion).

⁴ *Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm’n*, 508 F.3d 366, 374-78 (6th Cir. 2007); *Reinhart v. Lincoln Cnty.*, 482 F.3d 1225, 1229 (10th Cir. 2007); *Hallmark Developers, Inc. v. Fulton County, Ga.*, 466 F.3d 1276, 1286 (11th Cir. 2006); *Charleston Hous. Auth. v. U.S. Dep’t of Agric.*, 419 F.3d 729, 740-41 (8th Cir. 2005); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49-50 (1st Cir. 2000); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996); *Jackson v. Okaloosa Cnty., Fla.*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Keith v. Volpe*, 858 F.2d 467, 484 (9th Cir. 1988); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937-38 (2d Cir. 1988), *aff’d*, 488 U.S. 15 (1988) (*per curiam*); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 987-89 & n.3 (4th Cir. 1984); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290-91 (7th Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179, 1184-86 (8th Cir. 1974)

⁵ 24 CFR § 100.500

The Fair Housing Act extends and specifies freedom from discrimination for individuals regardless of race, color, national origin, religion, sex, disability or familial status. Importantly, the law not only prohibits intentionally discriminatory policies and practices, but also prohibits facially “neutral” policies and practices that have a discriminatory result and unnecessarily limit housing opportunities for a particular group of people. This new Disparate Impact standard will have downstream impact on cities and localities where renters and homeowners have come together to successfully challenge and correct policies or operational paradigms that may seem facially neutral but are in fact discriminatory.

Indeed, Congress intended to authorize disparate impact claims under the Fair Housing Act. The Fair Housing Act aims “to provide, within constitutional limitations, for fair housing throughout the United States.” 42 U.S.C. § 3601. To that end, § 804(a) of the Act makes it unlawful “[t]o refuse to sell or rent . . . , or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” Id. § 3604(a) (emphasis added). By focusing on the consequences of an action and not the mindset of the actor, this language permits disparate impact claims.⁶

The current disparate impact rule is critical to ensuring that the goals and objectives of the Fair Housing Act are achieved. Consistent with the standard set forth in the 2015 *Inclusive Communities* decision, it includes a burden-shifting framework to ensure cases are not frivolously brought. HUD’s proposed rule ignores this reality. By proposing safe harbor defenses for housing market actors that use algorithms in housing and credit application decisions or the failure to collect demographic data about their business and product lines, HUD is positioning the housing market to be rife with discrimination on an order of magnitude not unlike the government-sponsored policies that baked residential segregation into the American landscape prior to the passage of the Fair Housing Act; the remnants of this “redlining” we still see to this day. By eliminating the burden-shifting framework expressly supported by decades of legal precedent and adopted by the *Inclusive Communities* decision and replacing it with a five-prong standard that makes it impossible for plaintiffs to establish a *prima facie* case, HUD is flagrantly abandoning a long-held standard for combatting illegal discrimination.

For individual plaintiffs, the proposed rule would make the initial step of a *prima facie* claim successfully make a *prima facie* claim increase the burden on the plaintiff to degree well beyond the scope of the 2013 final regulation set and that the SC affirmed in 2015. In fact, the burden is so high, that seeking a claim of discrimination may be unsurmountable for any individual. The difference between plaintiff burden in the currently enforced and affirmed design of the three-part test will leave plaintiffs with little to no recourse if the proposed new test by HUD is adopted as drafted. And by proposing immunity for practices or policies that are more profitable than reasonable non-discriminatory alternatives and defenses regarding practices that involve the use of statistics or algorithms, HUD has shown that it is more concerned with the interests of market actors than with those of everyday Americans.

⁶ For more information on the Congressional intent behind the authorization of disparate impact claims under the Fair Housing Act, see the Attachment.

These immunities and outright prohibitions especially the new proscriptions against seeking recourse against a single or isolated policy is one more way that this proposed rule allows for discriminatory policies and practices to remain unabated and pernicious to communities of color to whom they are overwhelmingly directed. Disparate Impact Liability is used to challenge policies and practices that put up discriminatory barriers that needlessly prevent *all* Americans from accessing safe, affordable, and sustainable housing options. For example, in 2018, the New York City Commission on Human Right (“NYCHR”) brought cause against PRC Management LLC, for discriminating against prospective African American and Latinx individuals and families by inappropriately using criminal backgrounds – regardless of outcome or decision – but merely the indication of impropriety and policing trends to deny homes. Disparate impact was at the crux of NYCHR’s ability to end this discriminatory practice and open housing opportunities for African American and Latinx New Yorkers.

HUD should focus on vigorously ensuring that housing market actors comply with the Fair Housing Act and meet the standards set forth by the existing disparate impact rule. The existing disparate impact rule allows victims of all types of systemic discrimination to seek recourse and change policies and practices that limit their housing opportunities or put them in danger.

As noted in the *Inclusive Communities* decision, inequity persists in housing markets across the country and unfortunately remains omnipresent in New York’s 13th Congressional District. A viable disparate impact standard is critical to addressing these entrenched problems. Thank you for the opportunity to comment. Please contact Shahryar Baig at Shahryar.Baig@mail.house.gov regarding these comments.

Sincerely,



Adriano Espaillat
Member of Congress
New York’s 13th Congressional District