February 11, 2026

Via Federal Rulemaking Portal (Regulations.gov)

Assistant Secretary Craig Trainor
Office of Fair Housing and Equal Opportunity
Department of Housing and Urban Development
451 7th Street S.W.
Washington, DC 20410

RE: **Comment on Proposed Rule entitled "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard," Docket No. FR–6540–P–01, RIN 2529–AB09, Document No. 2026-00590, 91 FR 1475 (January 14, 2026)**

Dear Assistant Secretary Trainor:

I. Introduction

The Attorneys General of Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Washington, and Wisconsin submit this comment in response to the above-referenced Proposed Rule ("Proposed Rule") issued by the Office of Fair Housing and Equal Opportunity ("FHEO") of the Department of Housing and Urban Development ("HUD").

The Proposed Rule would make two significant changes to HUD's regulations implementing the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, *et seq*. First, it would amend 24 CFR § 100.5(b) by deleting its reference to "illustrations of unlawful housing discrimination" that "may be established by a practice's discriminatory effect, even if not motivated by discriminatory intent, consistent with the standards outlined in § 100.500."[1] Second, it would delete § 100.500, which currently explains that "[l]iability may be established under the Fair Housing Act based on a practice's discriminatory effect . . . even if the practice was not motivated by a discriminatory intent."[2] The section then lays out the standards for establishing such liability, and the allocations of burdens of proof with respect to such a claim. The Proposed Rule would remove this information entirely.

In effect, the Proposed Rule eliminates all mention of liability under the FHA for discrimination that results from the effects of an action, rather than from an actor's intent. As explained in this letter, the existing regulations, which were first promulgated in 2013 and then reinstated in 2023[3] (the "Existing Rule"), align with the Supreme Court's interpretation of the

[1] 24 CFR § 100.5(b).

[2] 24 CFR § 100.500.

[3] *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013); Reinstatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. 33590 (June 25, 2021);

FHA. Further, discrimination and segregation in housing persist in our country and disproportionately harm people of color, women, LGBTQ+ individuals, individuals with disabilities, and other historically marginalized groups within our jurisdictions. Discriminatory effects liability, a recognized and lawful part of the FHA's anti-discrimination protections, is a critical tool for HUD and States to enforce the FHA and their own state laws to protect their residents against arbitrary and unnecessary practices that limit their access to housing. The Existing Rule provides clarity on the law, which helps decrease discriminatory practices, lessens the burdens of litigation, and promotes consistency across jurisdictions. The removal of these regulations would increase burdens on state fair housing agencies to provide information about rights and responsibilities. It would also send a false message that certain forms of unlawful discrimination are now acceptable.

Simply put, and as explained in this letter, the FHA prohibits discrimination based on effects, and HUD's Proposed Rule will not and cannot change that. Disparate impact and segregative effects are valid theories of liability under the FHA, and they will remain valid regardless of how HUD proceeds here. But HUD's Proposed Rule is unlawful, including because HUD fails to articulate a reasoned explanation for the removal of the Existing Rule, as required by the Administrative Procedure Act ("APA"). To the extent that HUD has offered any explanation for its proposed action, its decision is largely based on erroneous interpretations of case law. Additionally, HUD ignores the consequences of rescinding the Existing Rule on our States and housing discrimination victims, as well as the importance of the Existing Rule to preventing housing discrimination and segregation nationwide.

The undersigned Attorneys General strongly urge HUD and the FHEO to forego the Proposed Rule and retain the Existing Rule.

II. Discriminatory Effects Liability is a Critical Tool for Combatting Ongoing Housing Discrimination and Reducing Persistent Patterns of Segregation.

A. Historical background.

Deleting the Existing Rule about discriminatory effects liability disregards our country's shameful history of housing discrimination. Such discrimination has included explicitly discriminatory restrictive covenants providing for White-only ownership of houses in certain neighborhoods, use of zoning restrictions to exclude people of color from certain neighborhoods or towns, the refusal of governments to guarantee home loans in neighborhoods occupied by people of color (i.e. redlining), and towns that declared that people of color were banned from being within the city limits between dusk and dawn.[4]

Reinstatement of HUD's Discriminatory Effects Standard, 88 Fed. Reg. 19,450 (March 31, 2023) (noting one amendment to the 2013 Rule was adopted in the final rule, under § 100.70(d)(5), providing "additional illustrations of prohibited activities under the Fair Housing Act generally, though . . . not specific to discriminatory effects cases.").

[4] *See Shelley v. Kraemer*, 334 U.S. 1 (1948); *Thompson v. U.S. HUD,* 348 F. Supp. 2d 398, 471-72 (D. Md. 2005); James W. Loewen, Sundown Towns: Hidden Dimension of American Racism ((2005); Noah Kazis, *Ending Exclusionary Zoning in New York City's Suburbs*, NYU Furman Center, 12 (Nov. 9, 2020), https://furmancenter.org/files/Ending_Exclusionary_Zoning_in_New_York_Citys_Suburbs.pdf.

The consequences of this discrimination and the resulting segregation have been severe. For example, homes in Black neighborhoods are undervalued compared to non-Black neighborhoods, with some estimates putting the loss of equity as high as $156 billion.[5] Lower equity inhibits wealth accumulation and thwarts business development because home equity is a critical source of capital for starting a business.[6] Residential segregation is also a "fundamental cause of racial differences in the quality of education."[7] Schools are funded by property taxes, and the lower value of property in non-White neighborhoods means less money for education—as much as $23 billion less for schools predominated by Black, Latine, and Asian students.[8] Discrimination and segregation also diminish employment opportunities, for example as low skilled entry level jobs have moved out of cities in recent decades.[9]

Health outcomes are also affected by patterns of residential segregation. Among other things, poor communities and communities of color experience more closures of health care facilities. And one recent study in New York City shows that pharmacies in non-White neighborhoods were less likely to have an adequate supply of medication to treat severe pain.[10]

Furthermore, these practices of *de jure* segregation—by design—imposed concentrated environmental burdens on racially segregated communities of color, while simultaneously investing in the environmental wellbeing of predominately White communities. For example, Federal Housing Administration mortgage underwriting guidance issued in the 1930s assigned higher risk to areas where people of color resided as well as to areas with industrial uses, heavy traffic, nuisances, or "inharmonious uses of any kind."[11] The same guidance favored predominately White neighborhoods protected from environmental hazards for mortgage lending.[12] These redlining policies incentivized state and local governments to direct polluting and noxious land uses towards neighborhoods of color and away from White neighborhoods, diminishing property values in the former while elevating them in the latter.[13] Underenforcement

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[5] Rashawn Ray, et al., *Homeownership, racial segregation, and policy solutions to racial wealth equity*, BROOKINGS INST. (Sep. 2, 2021), https://www.brookings.edu/articles/homeownership-racial-segregation-and-policies-for-racial-wealth-equity/.

[6] *Id*.

[7] David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 Pub. Health Reps. 404, at 406 (Sept–Oct 2001), https://pmc.ncbi.nlm.nih.gov/articles/instance/1497358/pdf/12042604.pdf.

[8] Ray, *supra* note 5.

[9] Williams, *supra* note 7, at 406-07.

[10] *Id*. at 411 (citing R. Sean Morrison, *et al.*, "*We don't carry that": failure of pharmacies in predominantly nonwhite neighborhoods to stock opioid analgesics*, 342 N. ENGL. J. MED. 1023 (2000).

[11] *See* Fed. Housing Admin., *Underwriting and Valuation Procedure under Title II of the National Housing Act*, pts. I–II, §§ 306, 232–233, 278 (1936), available at https://fraser.stlouisfed.org/files/docs/publications/fha/1936apr_fha_underwritingmanual.pdf.

[12] *See id.* pt. II, §§227, 232–233, 284.

[13] *See Pollution and Prejudice: Redlining and Environmental Injustice in California*, CAL. ENV'T PROT. AGENCY (2021), at https://storymaps.arcgis.com/stories/f167b251809c43778a2f9f040f43d2f5; Dennis

of environmental regulations coupled with disinvestment in basic infrastructure and services in communities of color magnified the health and safety impacts borne by these communities.[14] Collectively, these policies created an enduring landscape of unequal housing opportunity and environmental burdens that the Proposed Rule disregards.

Congress finally addressed the scourge of racial discrimination in housing by passing the FHA in 1968. However, the legacy of racism and segregation that Congress sought to wipe away could not be eliminated by prohibiting only overtly discriminatory housing practices. Thus, courts and government agencies soon properly understood that the FHA prohibited discriminatory effects as well as discriminatory intent. This understanding mirrored the disparate impact theory first developed in the employment context and endorsed by the Supreme Court 55 years ago in *Griggs v. Duke Power Co*.[15]

Disparate impact liability prohibits practices that have a "disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale."[16] Disparate impact liability "mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies."[17] Contrary to the description of such liability in the Proposed Rule, disparate impact liability does not create "a presumption of unlawful discrimination when any variance in outcomes exists among protected classes."[18]

The Supreme Court in *Inclusive Communities* validated disparate impact liability under the FHA. *Inclusive Communities* squarely held that "[r]ecognition of disparate-impact claims is

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Guignet, *et al.*, *The property value impacts of industrial chemical accidents*, 120 J. ENVTL. ECON. & MGMT. 102839 (2023), at https://www.sciencedirect.com/science/article/abs/pii/S0095069623000578 (finding that proximity to industrial facilities that manage hazardous chemicals is associated with significantly lower home values).

[14] *See* Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law, a Special* Investigation, 15 NAT'L L.J. 1, 1 (1992); Cynthia Swan, *Unequal Ground: Rural America's Legacy of Environmental Racism and Exploitation*, HUM. RTS. MAG. (Nov. 5, 2025), available at https://www.americanbar.org/groups/crsj/resources/human-rights/2025-october/unequal-ground/; Lucy Sherriff, *Fumes from a Meat Rendering Plant Spurred These Mother-Daughter Activists to Action*, THE STORY EXCHANGE (Mar. 8, 2022), at https://thestoryexchange.org/mary-curry-venise-curry-west-fresno-activists/; Michigan Civil Rights Commission, *The Flint Water Crisis: Systemic Racism Through the Lens of Flint* 39-40 (Feb. 17, 2017), at https://www.michigan.gov/-/media/Project/Websites/mdcr/mcrc/reports/2017/flint-crisis-report-edited.pdf?rev=db527d0e6c404254892c84c907988934; Jessica Trounstine, *Segregation by Design: Local Politics and Inequality in American Cities* 23-28 (Cambridge Univ. Press 2018).

[15] *Griggs v. Duke Power Co*., 401 U.S. 424 (1971).

[16] *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 524–25 (2015) (citation modified).

[17] *Id*. at 540 (citing *Griggs*, 401 U.S. at 341).

[18] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 91 Fed. Reg. 1,475 (proposed Jan. 14, 2026) (to be codified at 24 C.F.R. pt. 100).

consistent with the FHA's central purpose."[19] The Court noted disparate impact liability "allow[s] private developers to vindicate the FHA's objectives and to protect their property rights" and that some practices made unlawful by disparate impact liability "function unfairly to exclude minorities from certain neighborhoods without any sufficient justification."[20] The Court emphasized the continued importance of the FHA's disparate impact theory of liability in advancing the nation's efforts to advance justice and equality:

> Much progress remains to be made in our Nation's continuing struggle against racial isolation. In striving to achieve our historic commitment to creating an integrated society, we must remain wary of policies that reduce homeowners to nothing more than their race. But since the passage of the Fair Housing Act in 1968 and against the backdrop of disparate-impact liability in nearly every jurisdiction, many cities have become more diverse. The FHA must play an important part in avoiding the . . . grim prophecy that our Nation is moving toward two societies, one black, one white—separate and unequal. The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society.[21]

The FHA provides for a second type of discriminatory effects liability for any practice that, without justification, "creates, increases, reinforces, or perpetuates segregated housing patterns."[22] In *United States v. City of Black Jack*, the Eight Circuit explained that

> Effect, and not motivation, is the touchstone [of segregative effects liability], in part because clever men may easily conceal their motivations, but more importantly, because whatever our law was once, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.[23]

While overt discrimination is no longer legal, both "clever" and "thoughtless[]" forms of discrimination persist, leading to ongoing patterns of housing segregation. For example, a 2020 study of rental housing markets in Boston showed that White market-rate testers (i.e., testers not purporting to use a housing voucher) could arrange an apartment tour 80% of the time, while similarly-situated Black market-rate testers seeking to view the same apartments could only

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[19] 576 U.S. at 539.

[20] *Id*. at 540.

[21] *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys Project, Inc.*, 576 U.S. 519, 546–47 (2015) (citation modified).

[22] 24 C.F.R. § 100.500; *see also*, *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988) (recognizing segregated effects claim); *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977) (same); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974) (same).

[23] *City of Black Jack*, 508 F.2d at 1185 (citation modified).

arrange a tour 48% of the time.[24] A 2022 study of racial bias in home appraisals found that homes in Black neighborhoods were consistently valued at nearly a quarter less than comparable homes in comparable White neighborhoods, in part because of appraisal bias.[25] In addition to several recent state studies demonstrating that housing segregation persists across the United States,[26] a 2021 study found that 81 percent of all metropolitan regions in the United States with more than 200,000 residents were more segregated in 2019 than they were in 1990.[27]

Racially segregated communities of color continue to bear disproportionate environmental and health burdens. On a national basis, neighborhoods targeted by redlining in the 1930's experience significantly higher levels of air pollution today.[28] Communities of color across the country shoulder a disproportionate burden of asthma and premature death linked to air pollution exposure.[29] As one researcher explained, "[r]edlining and systemic racism have resulted in the least White areas of the US being located near factories, congested roadways, or shipping routes with heavily polluted air."[30] Recent studies have linked redlining to extreme heat, which exacerbates both the degraded air quality and the health burdens experienced in these same

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[24] *See* Jamie Langowski et al., *Qualified Renters Need Not Apply: Race and Housing Voucher Discrimination in the Metropolitan Boston Rental Housing Market*, 28 GEO. J. POVERTY L. & POL'Y 35, 42 (2020).

[25] Jonathan Rothwell & Andre M. Perry, *How Racial Bias in Appraisals Affects the Devaluation of Homes in Majority-Black Neighborhoods*, Brookings Inst. (Dec. 5, 2022), available at https://www.brookings.edu/articles/how-racial-bias-in-appraisals-affects-the-devaluation-of-homes-in-majority-black-neighborhoods/.

[26] *See, e.g.*, *Governor Hochul Releases Fair Housing Report Revealing Segregated Housing Patterns and Obstacles to Housing Opportunities Across New York* (May 5, 2023), https://www.governor.ny.gov/news/governor-hochul-releases-fair-housing-report-revealing-segregated-housing-patterns-and (finding "segregated housing patterns throughout New York" and "that access to community resources, poverty, and substandard housing conditions consistently fall along segregated racial and ethnic lines"); City of Portland, Oregon, Bureau of Planning and Sustainability, *Historical Context of Racist Planning: A History of How Planning Segregated Portland* 4 (Sep. 2019), available at https://www.portland.gov/bps/documents/historical-context-racist-planning/download ("Portland, like many U.S. cities, has a longstanding history of racist housing and land use practices that created and reinforced racial segregation and inequities. Exclusionary zoning, racially restrictive covenants, and redlining are early examples of this, with their effects still visible today.").

[27] Stephen Menendian, et. al., Twenty-First Century Racial Residential Segregation in the United States, OTHERING AND BELONGING INSTITUTE (Jun. 21, 2021), available at https://belonging.berkeley.edu/roots-structural-racism.

[28] Haley Lane, et al., *Historical Redlining is Associated with Present-Day Air Pollution Disparities in U.S. Cities*, 9 ENVTL. SCI. & TECH. LETTERS 345 (2022), available at https://depts.washington.edu/airqual/Marshall_149.pdf.

[29] Gaige Hunter Kerr, et al., *Increasing Racial and Ethnic Disparities in Ambient Air Pollution-Attributable Morbidity and Mortality in the United States*, 132 ENVIRON. HEALTH PERSP. 37002 (2024), available at https://pubmed.ncbi.nlm.nih.gov/38445892/.

[30] Milken Inst. Sch. of Pub. Health, George Washington Univ., *Communities of Color Across the US Suffer a Growing Burden from Pollution Air* (Mar. 6, 2024), available at https://publichealth.gwu.edu/communities-color-across-us-suffer-growing-burden-polluted-air.

neighborhoods and can cause "financial burdens due to higher energy and more frequent health bills[.]"[31] Similar race-based disparities in exposures to environmental hazards in housing continue to impact communities of color across the U.S.[32] For instance, Black children are exposed to higher levels of lead, a known developmental neurotoxin with no safe exposure level, in their housing than White children, due in part to the presence of lead in drinking water and deteriorated lead-based paint in predominately Black communities.[33] While redlining and other discriminatory practices created segregated communities disproportionately inundated by environmental harms, public and private actions and omissions—including industrial facility sitings, freeway widenings and chronic disinvestment in communities of color—continue to perpetuate, entrench, and deepen these disparities.[34]

B. Discriminatory Effects Liability Remains Central to the Fight for Fair Housing.

Enforcement actions under the FHA and similar state laws[35] based on discriminatory effects theories are a critical component of states' efforts to combat discrimination and ensure

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[31] Jeffrey Hoffman, *et al*., *The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas*, Climate 11 (2020) https://www.mdpi.com/2225-1154/8/1/12. (pointing to patterns of low tree canopy combined with concentrations of high-asphalt transportation infrastructure, and large building complexes in historically redlined neighborhoods); *see also* See David J. Novak, *et al*., *The Disparity in Tree Cover and Ecosystem Service Values Among Redlining Classes in the United States*, 221 Landscape & Urb. Planning 104370 (2022), https://doi.org/10.1016/j.landurbplan.2022.104370.

[32] In California, data from the California Environmental Protection Agency shows that, in the top 10% of communities with the highest levels of pollution from multiple sources and the greatest vulnerability to pollution exposure, more than 90% of the population are people of color. On the other hand, the population of the 10% of neighborhoods least impacted by pollution exposures is more than two-thirds White. *See* Cal. Env't Prot. Agency, Off. Of Env't Health Hazard Assessment, *Analysis of Race/Ethnicity and CalEnviroScreen 4.0 Scores* (2021), available at https://oehha.ca.gov/media/downloads/calenviroscreen/document/calenviroscreen40raceanalysisf2021.

[33] Deniz Yeter, *Disparity in Risk Factor Severity for Early Childhood Blood Lead among Predominately African-American Black Children: The 1999 to 2010 U.S. NHANES*, 17 INT'L J. ENVTL. RES. & PUB. HEALTH 1552 (2020), available at https://pmc.ncbi.nlm.nih.gov/articles/PMC7084658/; *see* U.S. Env't Prot. Agency, *EPA Strategy to Reduce Lead Exposures and Disparities in U.S. Communities* 5 (Oct. 2022), available at https://www.epa.gov/system/files/documents/2022-11/Lead%20Strategy_1.pdf.

[34] *See* Paul Mohai & Robin Saha, *Which Came first, people or pollution? Assessing the disparate siting and post-siting demographic change hypotheses of environmental injustice* 10 ENVTL. RES. LETTERS 115008 (2015), available at https://iopscience.iop.org/article/10.1088/1748-9326/10/11/115008/pdf; Liam Dillon & Ben Poston, *Freeways force out residents in communities of color – again*, LOS ANGELES TIMES (Nov. 11, 2021), available at https://www.latimes.com/projects/us-freeway-highway-expansion-black-latino-communities/.

[35] *See, e.g.*, Cal. Gov't. Code § 12955.8(b) (prohibiting housing discrimination "if an act or failure to act . . . has the effect, regardless of intent, of unlawfully discriminating"); D.C. Code § 2-1402.68 ("Any practice which has the effect or consequence of violating any of the provisions of [the District's fair housing law] shall be deemed to be an unlawful discriminatory practice."); 775 Ill. Comp. Stat. Ann. 5/3-102(H) (prohibiting the use of "criteria or methods that have the effect of subjecting individuals to unlawful discrimination or discrimination based on familial status, immigration status, source of income, or an arrest

greater equality of opportunity in housing. These legal claims can be used to dismantle arbitrary and unnecessary barriers to housing based on race, ethnicity, sex, familial status, and disability. Thus, both states and private plaintiffs rely on it to counter discrimination across *all* protected categories.[36]

States have used discriminatory effects claims—chiefly disparate impact liability—to challenge many types of seemingly neutral policies that have a discriminatory effect, such as zoning ordinances, occupancy restrictions, no pet policies, and English-only policies.[37] For example, since 2015, the State of Washington has brought 16 enforcement actions and filed two amicus briefs involving disparate impact discrimination in violation of the FHA, including issues related to overbroad use of criminal background checks by landlords and the effect of so-called "crime-free" rental housing ordinances on Latine renters and victims of domestic violence.[38]

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record in a real estate transaction."); N.C. Gen. Stat. § 41A-5(a)(2) (prohibiting housing discrimination if a "person's act or failure to act has the effect, regardless of intent, of discriminating"); Haw. Code R. § 12-46-305(8); *Kumar v. Gate Gourmet, Inc*., 325 P.3d 193, 204 (Wash. 2014) (Washington Law Against Discrimination creates a cause of action for disparate impact); *Saville v. Quaker Hill Place*, 531 A.2d 201, 206 (Del. 1987) ("[C]laims of disparate impact against the handicapped may lie in appropriate cases under [Delaware's fair housing law]."); *Burbank Apartments Tenant Ass'n v. Kargman*, 48 N.E.3d 394, 408 (Mass. 2016) (disparate impact claims cognizable under Massachusetts' fair housing law).

[36] *See*, *e.g.*, *State v. KPS Realty, LLC*, No. 17-2-00564-3 (Spokane Cty. Super. Ct., Wash. Feb. 15, 2017) (blanket refusal to accept veterans' housing choice vouchers discriminated on the basis of disability); *Washington v. City of Sunnyside*, No. 20-cv-03018-RMP (E.D. Wash. filed February 5, 2020) (municipal police department's enforcement of its crime-free rental housing ordinance discriminated on the basis of national origin, sex, and familial status).

[37] *See*, *e.g.*, *R.I. Comm'n for Human Rights v. Graul*, 120 F. Supp. 3d 110 (D.R.I. 2015) (landlord's policy of limiting occupancy had disparate impact based on familial status); *Support Ministries for Persons with AIDS, Inc. v. Vill. of Waterford*, 808 F. Supp. 120 (N.D.N.Y. 1992) (city's interpretation and application of a local zoning ordinance had disparate impact on basis of disability); *Conn. Comm'n on Human Rights & Opportunities ("CHRO") ex rel. Hurtado*, CHRO No. 8230394 (landlord's English-only policy had disparate impact based on national origin and ancestry); *CHRO ex rel. Schifini*, CHRO No. 8520090 (landlord's policy of limiting occupancy had disparate impact based on familial status); *In re-Accusation of the Dep't of Fair Employment & Hous. v. Merribrook Apartments, James C. Beard, Owner*, FEHC Dec. No. 88-19, 1988 WL 242651, at *12-13 (Cal. F.E.H.C. Nov. 9, 1988) (facially neutral occupancy limit had adverse disparate impact on prospective renters with children); *McGlawn v. Pa. Human Relations Comm'n*, 891 A.2d 757 (Pa. Commw. Ct. 2006) (lending practices of obtaining predatory and unfair sub-prime mortgage loans had a disparate impact based on race); *Girard Fin. Co. v. Pa. Human Relations Comm'n*, 52 A.3d 523 (Pa. Commw. Ct. 2012) (finance company's predatory and unfair lending practices and loan terms had a disparate impact based on race); *Detter v. Sharp's Village Mobile Home Park*, Doc. No. H-7404 (Pennsylvania Human Relations Commission's order finding a mobile home park's imposition of a fee on residents in excess of two per unit had a disparate impact based on family status).

[38] *See State v. DSB Invs., LLC*, No. 15-2-26732-9 (King Cty. Super. Ct., Wash. Nov. 2, 2015) (application of tenancy terms and conditions that discriminated on characteristics associated with race); *State v. Pac. Crest, LLC*, No. 16-2-20773-1 (King Cty. Super. Ct., Wash. Aug. 29, 2016) (criminal history screening practices that discriminated on the bases of race or color); *State v. Premier Residential*, No. 16-2-19043-0 (King Cty. Super. Ct., Wash. Aug. 10, 2016) (same); *State v. Coho Real Estate Grp.*, LLC, No. 16-2-26931-1 (King Cty. Super. Ct., Wash. Nov. 4, 2016) (same); *State v. Dobler Mgmt. Co.*, No. 16-2-12461-1 (Pierce Cty. Super. Ct., Wash. Nov. 7, 2016) (same); *State v. Weidner Prop. Mgmt.*, LLC, No. 17-2-00821-4 (King

Additionally, the states' enforcement efforts against the mortgage lending industry illustrate the critical importance of disparate impact liability to combat housing discrimination.[39] States have also joined city and local governments' efforts to combat lending discrimination through disparate impact liability. As an example, California joined the City of Oakland as amicus on appeal in a case against Wells Fargo, alleging the bank harmed the city through a pattern of illegal and discriminatory mortgage lending, heavily impacting minority community members in violation of the FHA and California Fair Employment and Housing Act.[40]

Segregated effects liability remains important as well. In contrast to disparate impact liability, segregated effects liability focuses on "harm to the community generally by the perpetuation of segregation,"[41] rather than disproportionate harms to a protected group. Together with disparate impact, these two forms of liability provide Attorneys General and state fair housing

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Cty. Super. Ct., Wash. Jan. 19, 2017) (same); *State v. KPS Realty, LLC*, No. 17-2-00564-3 (Spokane Cty. Super. Ct., Wash. Feb. 15, 2017) (blanket refusal to accept veterans' housing choice vouchers discriminated on the basis of disability); *State v. Realty Mart Prop. Mgmt, LLC*, No. 17-2-00677-1 (Spokane Cty. Super. Ct., Wash. Feb. 23, 2017) (policy of charging double damage deposit to tenants who pay rent with disability income discriminated on the basis of disability); *Yakima Neighborhood Health Servs. v. City of Yakima*, No. 1:16-cv-03030 (E.D. Wash. Aug. 10, 2017) (adoption of zoning and land use ordinances to limit housing for homeless individuals discriminated against people with disabilities); *State v. TJ Cline, LLC*, No. 17-2-00716-2 (Walla Walla Cty. Super. Ct., Wash. Aug. 30, 2017) (blanket refusal to accept veterans' housing choice vouchers discriminated on the basis of disability); *State v. Domus Urbis, LLC*, No. 17-2-03584-4 (Spokane Cty. Super. Ct., Wash. Sept. 14, 2017) (same); *State v. Rowley Props.*, No. 17-2-27276-1 (King Cty. Super. Ct., Wash. Oct. 19, 2017) (same); *State v. Welcome Home Props., LLC*, No. 17-2-00861-4 (Walla Walla Cty. Super. Ct., Wash. Oct. 25, 2017) (same*); State v. Yelm Creek Apartments, LLC*, No. 17-2-06117-34 (Thurston Cty. Super. Ct., Wash. Nov. 21, 2017) (disability and housing vouchers); *State v. Celski & Assocs., Inc.*, No. 17-2-03255-4 (Benton Cty. Super. Ct., Wash. Jan. 17, 2018) (same); *State v. Country Homes Realty, LLC*, No. 18-2-00336-3 (Spokane Cty. Super. Ct., Wash. Jan. 26, 2018) (same); *Fair Housing Center of Wash. v. Breier-Scheetz Props., LLC*, 743 F. App'x. 116 (9th Cir. 2018) (multi-family property's occupancy standards discriminated against families with children); *Washington v. City of Sunnyside*, No. 20-cv-03018-RMP (E.D. Wash. 2021) (municipal police department's enforcement of its crime-free rental housing ordinance discriminated on the basis of national origin, sex, and familial status); *State v. Sunset Ridge Apartment Investors, LP*, No. 24-3-10109-3 (Pierce Cty Super. Ct., Wash. filed Aug. 15, 2024) (alleging refusal to rent to qualified tenants based on their source of income discriminated against people with disabilities).

[39] *See Commonwealth v. H&R Block, Inc.*, Civ. No. 08-2474-BLS1 (Mass. Suffolk Sup. Ct. 2011) (consent order in case where the Massachusetts Attorney General alleged that Option One's discretionary pricing policy caused African-American and Hispanic borrowers to pay, on average, hundreds of dollars more for their loans than similarly-situated White borrowers); *In re Countrywide Home Loans*, Assurance of Discontinuance Pursuant to N.Y. Exec. Law § 63(15) (N.Y. Nov. 22, 2006) (settlement of investigation where the New York Attorney General found statistically significant discriminatory disparities in "discretionary components of pricing, principally [p]ricing [e]xceptions in the retail sector and [b]roker [c]ompensation in the wholesale sector"); *United States v. Countrywide Fin. Corp.*, No. 2:11-cv-10540 (C.D. Cal. 2011) (settlement resolving discriminatory lending lawsuits filed by the Illinois Attorney General and the United States Department of Justice); *United States v. Wells Fargo Bank, NA*, No. 12-cv-1150 (D.D.C. 2012) (same).

[40] *City of Oakland v. Wells Fargo Bank & Co.*, 14 F.4th 1030 (9th Cir. 2021) (en banc).

[41] *Anderson Grp., LLC v. City of Saratoga Springs*, 805 F.3d 34, 49 (2d Cir. 2015).

enforcement agencies a critical tool to combat discrimination where direct proof of overt bias is hidden or impossible to ferret out. The Attorneys General thus share the Supreme Court's observation in *Inclusive Communities* that such liability "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[42] Discriminatory effects liability may thus "prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping."[43]

III. HUD should retain the Existing Rule, Including Because HUD Fails to Reasonably Explain Its Proposed Elimination of the Discriminatory Effects Standard in Violation of the APA.

HUD's Proposed Rule is unlawful, including because HUD fails to articulate a reasoned explanation for its elimination of longstanding regulations, as required by the APA. Under the APA, an agency action is arbitrary and capricious if it is not "reasonable and reasonably explained"[44]—meaning "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[45] Agency action is unreasonable and therefore arbitrary and capricious when it "relied on an erroneous interpretation of the law."[46] For decisions to be reasonable, agencies must offer "genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public."[47] When an agency changes its existing policy, it must "display awareness that it is changing position" and "show that there are good reasons for the new policy[.]"[48] Agencies must provide "more detailed justification" for a change in policy when their prior policy "engendered serious reliance interests."[49]

HUD fails to meet this standard for several reasons. To begin with, the Existing Rule accurately reflects the law, and HUD's suggestions otherwise are wrong. HUD also fails to consider longstanding reliance interests, the costs of eliminating the Existing Rule, and significant problems with removing the discriminatory effects regulations on several fronts. First, the Existing Rule provides clarity regarding rights and responsibilities under the FHA, which in turn promotes compliance and uniformity across jurisdictions. Without it, the regulations will misleadingly represent the law, obscuring an important source of liability and misinforming potential claimants

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[42] *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 536 (2015).

[43] *Id*.

[44] *F.C.C. v. Prometheus Radio Project,* 592 U.S. 414, 423 (2021).

[45] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[46] *Filazapovich v. Dep't of State*, 560 F. Supp. 3d 203, 243 (D.D.C. 2021), *rev'd and remanded on other grounds sub nom. Goodluck v. Biden*, 104 F.4th 920 (D.C. Cir. 2024); *see also SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (holding that agency action is unlawful "if the agency has misconceived the law".)

[47] *Dep't of Commerce v. New York*, 588 U.S. 752, 756 (2019).

[48] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[49] *Housatonic River Initiative v. EPA*, 75 F.4th 248, 270 (1st Cir. 2023) (quoting *Fox*, 556 U.S. at 515).

and housing providers that FHA claims always require proof of discriminatory intent. Second, the loss of the Existing Rule would impose unwarranted burdens on states and their agencies. Third, the recission would undermine deterrence and signal weakened enforcement, leading foreseeably to increased housing discrimination and segregation with their collateral negative effects. Fourth, eliminating the Existing Rule runs counter to HUD's obligation not merely to prohibit discrimination, but to affirmatively further fair housing. For all of these reasons, HUD should withdraw the Proposed Rule and retain the Existing Rule.

A. The Existing Rule accurately reflects the law.

HUD's stated reasons for the Proposed Rule are based on erroneous interpretations of case law and cannot be used to justify the Rule.[50] HUD vaguely contends that "HUD's regulation does not provide an up-to-date picture of the legal landscape,"[51] but offers no support for this contention. Nonetheless, the Existing Rule accurately lays out the legal standard for discriminatory-effect violations of the FHA, aligns with the Supreme Court's decision in *Inclusive Communities*, and correctly represents prevailing law. Indeed, in *Inclusive Communities* the Supreme Court favorably cited the Existing Rule multiple times, including referencing the Rule to approvingly discuss how step two of the three-step burden-shifting framework provides "housing authorities and private developers leeway to state and explain the valid interest served by their policies."[52] As HUD, under the former leadership of Secretary Ben Carson, has made clear:

> [T]he Supreme Court's holding in *Inclusive Communities* is entirely consistent with the [Existing] Rule's reaffirmation of HUD's longstanding interpretation that the FHA authorizes disparate impact claims. And the portions of the Court's opinion . . . which discuss limitations on the application of disparate impact liability that have long been part of the standard. . . do not give rise to new causes of action, nor do they conflict with the Rule. *Indeed, nothing in* Inclusive Communities *casts any doubt on the validity of the Rule*.[53]

[50] *See Fox*, 556 U.S. at 516.

[51] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 91 Fed. Reg. 1,476 (Jan. 14, 2026).

[52] *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 541 (2015); *see also id.* at 527 (describing the 2013 Rule, its burden shifting framework, and that the second prong is analogous to Title VII's requirement that a challenged practice be job related); *id*. at 528 (noting the Court of Appeals for the Fifth Circuit relied on the Rule); and *id*. at 542 (supporting the Rule's recognition that disparate impact liability "does not mandate that affordable housing be located in neighborhoods with any particular characteristic").

[53] Defs.' Opp'n to Pl.'s Mot. for Leave to Amend Compl. at 9, *Prop. Cas. Insurers Ass'n of Am. v. Carson*, No. 13-CV-8564 (N.D. Ill. Apr. 21, 2017), Dkt. No. 122 (citations omitted) (emphasis added); *see also id.* at 10 ("[T]he Court's opinion in *Inclusive Communities* did not alter the limitations on the application of disparate impact liability and indeed affirmed the validity of the Rule's approach.").

Since *Inclusive Communities*, numerous courts have held that the 2013 Rule was "adopted" by, or consistent with, the Supreme Court's decision.[54]

To the extent the Proposed Rule's reference to an "up-to-date picture of the legal landscape" alludes to the Supreme Court's 2024 decision in *Loper Bright Enterprises v. Raimondo*,[55] that purported justification for amending the Existing Rule is similarly misplaced. Elsewhere in the Proposed Rule, HUD erroneously cites *Loper Bright* for the proposition that "federal agency interpretations of statutes and agency actions that rely on them do not receive any judicial deference."[56] But *Loper Bright*'s directive that "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority,"[57] presents no bar to preserving the discriminatory effects-related provisions of the Existing Rule. The Supreme Court has already confirmed that the FHA includes liability for practices with discriminatory effects, and described the framework for analyzing those claims consistent with the three-step burden-shifting framework found in the Existing Rule.[58] The Proposed Rule speculates that "[a] reviewing court may wholly reject HUD's claims in prior rulemakings that the regulations provide greater clarity and predictability and may vacate or set aside HUD's rules,"[59] but HUD makes no effort to explain why this hypothetical is at all probable in light of the numerous courts that have looked to the Existing Rule in analyzing discriminatory effects claims. For this reason, it cannot serve as the "reasoned explanation" demanded by the APA for the agency's proposed action.[60]

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[54] *See, e.g.*, *Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415, 432 n.10 (4th Cir. 2018) (disagreeing that HUD's regulation "conflict[s] with *Inclusive Communities* and thus cannot be relied upon"); *MHANY Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016) ("The Supreme Court implicitly adopted HUD's approach"); *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 512–13 (9th Cir. 2016) (describing what the Supreme Court "made clear" in *Inclusive Communities* followed by a "see also" citation to HUD's 2013 Rule); *Prop. Cas. Insurers Ass'n of Am. v. Carson*, No. 13-CV-8564, 2017 WL 2653069, at *9 (N.D. Ill. June 20, 2017) ("[T]he Supreme Court in *Inclusive Communities* . . . did not identify any aspect of HUD's burden-shifting approach that required correction."); *Nat'l Fair Hous. All. v. Travelers Indem. Co.*, 261 F. Supp. 3d 20, 28–29 (D.D.C. 2017) (citing *Inclusive Communities* and HUD's Rule at 24 C.F.R. § 100.500(c) as standing for the same proposition); *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"); *Martinez v. City of Clovis*, 307 Cal. Rptr. 3d 64, 104 (Cal. App. 2023) ("We regard the 2013 Rule as a reliable statement of the elements of a discriminatory effects claim under the FHA because it was described without criticism by the United States Supreme Court in 2015. . . .").

[55] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

[56] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 91 Fed. Reg. 1,476 (Jan. 14, 2026). *But see Loper Bright*, 603 U.S. at 402 ("Although an agency's interpretation of a statute cannot bind a court, it may be especially informative to the extent it rests on factual premises within the agency's expertise." (citation modified)).

[57] *Loper Bright*, 603 U.S. at 412.

[58] *See Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 539–41 (2015).

[59] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 91 Fed. Reg. 1,476 (Jan. 14, 2026).

[60] *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009).

B. By providing clarity about everyone's rights and obligations under the FHA, the Existing Rule promotes compliance and consistency across jurisdictions.

HUD also fails to consider that the Existing Rule benefits the public by providing a consistent, nationwide resource that clearly explains what conduct violates the FHA and what the legal standard is for setting out and defending against discrimination claims, including claims alleging discriminatory effects. HUD's Proposed Rule is arbitrary and capricious under the APA, including because it fails to consider the serious reliance interests of states, housing providers, plaintiffs and others who count on the Existing Rule to ensure consistent and uniform enforcement. HUD's general rulemaking authority provides that HUD's Secretary "may make such rules and regulations as may be necessary to carry out his functions, powers, and duties."[61] Moreover, HUD has a duty to "cooperate with and render technical assistance to Federal, State, local, and other public or private agencies, organizations, and institutions which are formulating or carrying on programs to prevent or eliminate discriminatory housing practices."[62] Regulations from HUD that offer a detailed, common understanding of discriminatory effects liability across jurisdictions are necessary to ensure the FHA is consistently enforced. They also assist other public and private entities in their work to end discrimination.

The Existing Rule promotes such uniformity. Even while its 2013 enactment "embodie[d] law that ha[d] been in place for almost four decades and that ha[d] consistently been applied, with minor variations, by HUD, the Justice Department and nine other federal agencies, and federal courts," those minor variations had created inconsistencies in how FHA claims were adjudicated across the country and across judicial and administrative proceedings.[63] As HUD explained in first issuing the Existing Rule, "By formalizing the three-part burden-shifting test for proving such liability under the Fair Housing Act, the rule provides for consistent and predictable application of the test on a national basis. It also offers clarity to persons seeking housing and persons engaged in housing transactions as to how to assess potential claims involving discriminatory effects."[64] And without regulations to synthesize the case law and state the standard in plain language, no comprehensive source would exist for understanding judicial interpretation of the statute, particularly given the varied procedural postures of the cases ruling on it.[65] Additionally, the FHA provides for aggrieved persons or HUD's Secretary to file administrative complaints to resolve

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[61] 42 U.S.C. § 3535(d).

[62] 42 U.S.C. § 3608(e)(3).

[63] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,461 (Feb. 15, 2013).

[64] *Id.*

[65] For example, as the 2021 proposed rule on reinstatement notes, "because *Inclusive Communities* considered a judgment reached after discovery and bench trial, the Court had no occasion or opportunity to consider the proper pleading standards for cases brought under the Act." Reinstatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. 33,594 (June 25, 2021); *see also* Reinstatement of HUD's Discriminatory Effects Standard, 88 Fed. Reg. 19,453 (Mar. 31, 2023) (stating the same in the context of the final rule). As a result, for a specific inquiry about a particular aspect of the pleading standard, the text of that opinion does not afford a complete guide. *See Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 541–43 (2015).

FHA violations,[66] and the Existing Rule makes clear HUD's own standard for evaluating and investigating those complaints through HUD's Office of Fair Housing and Equal Opportunity.

The Existing Rule furthers the statute's purpose of "eradicate[ing] discriminatory practices" within the nation's housing[67] by clearly defining what those practices are, so those who may be victims of housing discrimination know what claims are available to vindicate their rights. It is imperative to have regulations that inform a potential plaintiff of the ability to bring a cause of action based on discriminatory effects since, as the Supreme Court has emphasized, such a claim "plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[68] Conversely, regulations that obscure or ignore discriminatory effects liability misrepresent the law. In addition to eliminating § 100.500 itself, the Proposed Rule would also remove 24 C.F.R. § 100.5(b)'s reference to discriminatory effects while preserving its statement that: "This part provides the Department's interpretation of the coverage of the Fair Housing Act regarding discrimination related to the sale or rental of dwellings, the provision of services in connection therewith, and the availability of residential real estate-related transactions." With the Proposed Rule, HUD would in effect be telling potential complainants or plaintiffs—incorrectly—that evidence of discriminatory intent is always required to bring an FHA claim, misleading individuals about their rights.

Likewise, the Existing Rule fosters compliance with the FHA by landlords, developers, municipalities, and other housing providers by offering clear guidance on their obligations, assisting them to conform their conduct to the law. The consistency offered by the Existing Rule is a particular asset to housing providers and other entities operating across multiple jurisdictions. However, all housing providers benefit from understanding their legal liability in order to mitigate risk, something they can only do effectively when they consider all, not just some, forms of liability. By providing clear descriptions of the elements of a discriminatory effects violation, legally sufficient justification defenses, and burdens of proof,[69] the Existing Rule helps prevent unnecessary litigation caused by ignorance or misapprehension of the legal standard for liability based on both disparate impact and segregative effects.

As HUD explained in 2021 when reinstating the 2013 Rule: "[T]he 2013 Rule provided a workable and balanced framework for investigating and litigating discriminatory effects claims that is consistent with the Act, HUD's own guidance, *Inclusive Communities*, and other jurisprudence."[70] This framework has "engendered serious reliance interests" among states,

[66] *See* 42 U.S.C. §§ 3610, 3612.

[67] *Inclusive Cmtys.*, 576 U.S. at 521.

[68] *Id.* at 540. Potential victims include private housing developers, for whom discriminatory effects claims offer the opportunity to "vindicate the FHA's objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units." *Id.* (citing *Town of Huntington v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15, 18 (1988)).

[69] 24 C.F.R. § 100.500 (2025).

[70] Reinstatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. 33,594 (June 25, 2021); *see also* Reinstatement of HUD's Discriminatory Effects Standard, 88 Fed. Reg. 19,453 (Mar. 31, 2023).

housing providers, plaintiffs and others who count on the Existing Rule to ensure consistent and uniform enforcement.[71] HUD fails even to acknowledge these interests, much less provide sufficient justification for its departure from past practice.[72]

C. The loss of the Existing Rule would negatively impact state agencies.

HUD's rescission is also arbitrary and capricious because it fails to consider the impact of the Proposed Rule on States. As state Attorneys General, we are committed to ensuring housing access free of discrimination and that housing providers comply with federal and state fair housing laws. HUD's proposed elimination of the Existing Rule is arbitrary and capricious, in violation of the APA, because HUD failed to consider how its elimination will increase state enforcement responsibilities and administrative burdens. Eliminating the Existing Rule will create confusion for housing providers and other regulated entities and increase non-compliance with both the FHA and state fair housing laws. In turn, this confusion and increased non-compliance will significantly harm states by increasing the incidence of housing discrimination within our jurisdictions. It will also increase administrative burdens for states and their agencies who will assume greater fair housing enforcement responsibilities and respond to increased technical assistance requests.

The confusion caused by the Proposed Rule will reduce compliance with federal and state fair housing laws and decrease the FHA's deterrent effect. The sudden withdrawal of HUD's discriminatory effects regulations will introduce uncertainty into fair housing requirements, leading to increased noncompliance with the FHA and substantially equivalent state laws. As a result, we anticipate that a higher volume of discrimination complaints will be filed with our state Fair Housing Assistance Program ("FHAP")[73] agencies, thus increasing their enforcement burdens. To address these burdens, states will need to devote additional staff resources and time to enforce federal and state fair housing laws, which would strain budgets and resources. These increased enforcement demands on our FHAP agencies are particularly problematic at a time when enforcement capacity has been reduced due to reductions to key federal fair housing funding beginning in 2025.[74]

In sharp contrast, maintaining clear fair housing standards reduces housing discrimination and enforcement burdens for our states. For example, California's implementation of a clear Affirmatively Furthering Fair Housing ("AFFH") law has been effective in advancing equal housing opportunities: in the four years following its implementation, the number of Low-Income Housing Tax Credit ("LIHTC") units for families increased by over 60% in neighborhoods identified as high-opportunity areas, compared to just 5% of LIHTC awards in such areas between

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[71] *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[72] *Id.*

[73] U.S. Dep't of Hous. & Urb. Dev., *Fair Housing Assistance Program*, available at https://www.hud.gov/stat/fheo/assistance-program (last visited Feb. 10, 2026).

[74] Michael Akinwumi et al., *2025 Trends Report*, Nat'l Fair Hous. All., 4 (2025), available at https://nationalfairhousing.org/wp-content/uploads/2025/11/2025-NFHA-Fair-Housing-Trends-Report.pdf.

2003 and 2015.[75] This translates to a significant increase in the share of affordable family units in higher-opportunity areas, which reduces housing segregation and expands access to economic opportunities.

Moreover, these regulations also promote compliance with other parts of the FHA that are mirrored in state requirements, namely HUD grantees' requirement to affirmatively further fair housing.[76] For example, in California, HUD's discriminatory effects regulations serve as an important tool for HUD grantees seeking to comply with their AFFH obligations under the FHA and California law, as both frameworks require an assessment of the fair housing impacts of housing decisions.[77] Eliminating these regulations would thus create uncertainty for HUD grantees who are subject to both federal and state AFFH laws.

Absent clear federal regulations, states will also have to provide increased technical assistance to both housing providers and the public regarding their obligations and rights under the FHA and state and local fair housing laws. The regulations HUD proposes to eliminate are critical to understanding the federal standards that housing providers must follow. Even more critical, several states and localities have modeled their fair housing laws and rules related to disparate impact after HUD's longstanding discriminatory effects standard, and housing providers and the public often use the current regulations as an interpretive tool for understanding their rights and obligations under these state and local fair housing laws.[78]

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[75] Christi Economy, *Lessons from California's Statewide Efforts to Affirmatively Further Fair Housing*, Terner Ctr. for Hous. Innovation, 4 (Dec. 2024), available at https://ternercenter.berkeley.edu/wp-content/uploads/2024/12/TernerCenterLessonsfromCAAFFH.pdf.

[76] 42 U.S.C. § 3608.

[77] *See* Cal. Gov't Code § 8899.50 (2022); Cal. Dep't of Hous. & Cmty. Dev., *Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements*, 16, 22–44 (Apr. 2021), available at https://www.hcd.ca.gov/community-development/affh/docs/AFFH_Document_Final_4-27-2021.pdf.

[78] *See, e.g.*, CAL. C.R. COUNCIL, REGUL. REGARDING GOV'T CODE SECTION 11135 ET SEQ. INITIAL STATEMENT OF REASONS 43 (Feb. 2023), available at https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2023/02/Initial-Statement-of-Reasons.pdf (stating that the California Civil Rights Council utilized HUD's 2013 Rule in crafting the Cal. Gov't Code § 11135 regulations); CAL. C.R. COUNCIL, REGUL. REGARDING GOV'T CODE SECTION 11135 ET SEQ. FINAL STATEMENT OF REASONS 75 (Mar. 2024), available at https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2024/03/GC11135-Final-Statement-of-Reasons.pdf (stating that Cal. Code Regs. tit. 2, § 14030 provides guidance and clarity regarding "the well-established distinctions between intentional discrimination claims and disparate impact claims"); CAL. FAIR EMP. & HOUS. COUNCIL, FAIR HOUS. REGUL. FINAL STATEMENT OF REASONS 65, 125 (Sep. 2019), available at https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2019/09/FinalStatementofReasons-FairHousingRegulations.pdf (citing HUD's definition of a discriminatory effect [24 C.F.R. § 100.500(a)] to support that "the [FEHA] regulation is at least as protective as federal law which recognizes segregative practices separately"); Assemb. B. 4040-A, 206th Leg., 2025-26 Reg. Sess. (N.Y. 2025); H.B. 5371, 103rd Gen. Assemb., 2023-2024 Reg. Sess. (Ill. 2024); Ill Dep't of Hum. Rts., *Fair Housing Implications of Nuisance and Crime-Free Ordinances: A Guide for Units of Local Government*, 14 (Jan. 2023), available at https://dhr.illinois.gov/content/dam/soi/en/web/dhr/publications/documents/idhr-uic-nuisance-ordinance-guidebook-2023-01-25.pdf; D. KIRK DRUSSEL, MARY A. FORAN & MARVIN R. BAUM, SECTION 5:4. DISCRIMINATION UNDER THE FAIR HOUSING ACT, MORTG. & MORTG. FORECLOSURE IN N.Y. (Sep. 2025);

Thus, the lack of clear federal standards in this area will generate a high volume of technical assistance requests to state agencies from housing providers, municipalities, and other entities seeking guidance on how to comply with both federal and state fair housing requirements. We are particularly concerned that increased technical assistance requests will negatively impact our states' FHAP agencies. These agencies are often the first (and only) stop for housing discrimination victims seeking out information about their rights under the FHA and other fair housing laws. These agencies also handle the lion's share of fair housing enforcement in our states, and housing discrimination victims often look first to these agencies to remedy the discrimination they face. Nevertheless, these agencies have limited budgets and resources, which will be strained by increased technical assistance requests.

Most harmful, increased technical assistance requests would divert staff resources and time from investigating and resolving housing discrimination complaints and providing community education, which are necessary and vital to achieving the FHA's goal of promoting fair housing and integrated and balanced living patterns nationwide.[79] These requests would possibly require FHAP agencies to allocate additional staff to provide assistance, resulting in increased compliance costs for states that they cannot readily fund. In other words, elimination of the regulations would create administrative burdens that cannot be easily rectified. Therefore, we firmly believe that HUD should retain the Existing Rule so as to promote compliance with the FHA and avoid the unnecessary administrative burdens caused by the elimination of these rules. Eliminating the Existing Rule would be arbitrary and capricious due to HUD's failure to consider the increased state enforcement responsibilities and administrative burdens placed on state agencies.

D. The elimination of the Existing Rule undermines deterrence and signals reduced federal enforcement of the FHA, leading to increased segregation and collateral health and environmental effects.

Moreover, HUD fails to consider that removing the discriminatory effects regulations will signal to the public that it is retreating from its commitment to enforce the FHA. The Proposed Rule suggests that HUD will deprioritize housing discrimination cases that are premised on discriminatory effects liability, which would incentivize bad actors to engage in unlawful housing discrimination through facially neutral means.

This message is amplified by HUD's recent actions in this area. For example, over the past year, HUD has rescinded other key and longstanding rules interpreting the FHA.[80] Similarly, recent HUD Guidance strongly suggests that the agency seeks to prioritize cases involving intentional discrimination and revoke several longstanding guidance documents related to discriminatory effects liability. In February 2025, HUD and the Department of Government Efficiency terminated

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WILLIAM WEST, RACIAL IMPACT ASSESSMENT IN LAND USE PLANNING AND ZONING COMES TO NEW YORK, 22 N.Y. ZONING L. & PRAC. REP. (May/June 2022).

[79] 42 U.S.C. § 3601; *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) (citing 114 CONG.REC. 2706 (Feb. 6, 1968) (statement of Sen. Mondale)).

[80] Rescission of Affirmative Fair Housing Marketing Regulations, 90 Fed. Reg. 23,491 (Jun. 3, 2025); Affirmatively Furthering Fair Housing Revisions, 90 Fed. Reg. 11,020 (Mar. 3, 2025).

roughly $30 million in federal grants for nonprofit fair housing organizations.[81] HUD also halted or closed at least 115 fair housing cases, including several where HUD found civil rights violations, over the past year.[82] Most recently, in October 2025, HUD communicated to FHAP agencies that they may no longer "issue findings utilizing disparate impact liability" if they receive FHAP funds.[83] These developments, along with HUD's reorganization and reduction of HUD staff,[84] give the strong impression that HUD seeks to deprioritize enforcement of the FHA writ large. Furthermore, these actions communicate to the public that housing providers may engage in practices that produce discriminatory effects so long as they can sufficiently disguise any discriminatory intent. This message erodes the FHA's core purpose of remedying the enduring effects of historical segregation and ensuring equal access to housing opportunities.[85]

The sustained rollback of FHA protections will foreseeably increase segregation. As a consequence, it will exacerbate the existing environmental and health disparities that are associated with segregation. With greater segregation, greater numbers of people of color will be exposed to environmental stressors clustered in communities already predominately occupied by people of color, and public and private actors will face fewer constraints on the disparate effects of decisions to allow and concentrate pollution sources within communities of color. States will be left to bear the burdens from increased costs associated with worsened health outcomes and lower property tax revenues for housing that stem from these conditions.[86] HUD's failure to recognize the environmental and health impacts of its Proposed Rule is arbitrary and capricious.

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[81] Heather Senison, *U.S. Housing Discrimination Complaints Rise as Support Network Thins*, N.Y. TIMES (Dec. 22, 2025), available at www.nytimes.com/2025/12/22/realestate/housing-discrimination-report-us-hud-cuts.html; Nat'l Fair Hous. All., *Relman Colfax and Fair Housing Advocates Ask Court to Halt HUD's and DOGE's Termination of Grants to Fight Housing Discrimination* (Mar. 13, 2025), available at nationalfairhousing.org/relman-colfax-and-fair-housing-advocates-ask-court-to-halt-huds-and-doges-termination-of-grants-to-fight-housing-discrimination/.

[82] Jesse Coborn, *How the Trump Administration is Weakening the Enforcement of Fair Housing Laws*, ProPublica (May 15, 2025), www.propublica.org/article/trump-hud-weakening-enforcement-fair-housing-laws (last visited Feb. 2, 2026); Jesse Coburn, *Trump Administration Prepares to Drop Seven Major Housing Discrimination Cases* (Jul. 18, 2025), www.propublica.org/article/trump-hud-drop-housing-discrimination-cases-housing-pollution (last visited Feb. 2, 2026).

[83] U.S. DEP'T OF HOUS. & URB. DEV., TRANSMITTAL MEMO: FY2025 GUIDANCE PACKAGE FOR THE FAIR HOUSING ASSISTANCE PROGRAM (2025) (imposing a funding condition on FHAP agencies to not issue findings utilizing disparate impact liability, a type of discriminatory effects liability, as defined by Executive Order 14281); *see also* Exec. Order No. 14281, 90 Fed. Reg. 17,537 (Apr. 28, 2025).

[84] In 2025, there was a 65% staff reduction at HUD's Office of Fair Housing and Equal Opportunity from 31 to 11 staff members. Debra Kamin, *Trump Appointees Roll Back Enforcement of Fair Housing Laws*, N.Y. TIMES (Sep. 22, 2025), available at https://www.nytimes.com/2025/09/22/realestate/trump-fair-housing-laws.html.

[85] 42 U.S.C. § 3601; *see* 114 CONG. REC. 2270 (Feb. 6, 1968) (statement of Sen. Mondale).

[86] *See e.g.,* Brian Doctrow, Racial segregation makes consequences of lead exposure worse, NAT'L INST. OF HEALTH (Aug. 30, 2022), available at https://www.nih.gov/news-events/nih-research-matters/racial-segregation-makes-consequences-lead-exposure-worse.

E. The Proposed Rule will interfere with HUD's statutory obligation to affirmatively further fair housing.

HUD also ignores how the Existing Rule furthers HUD's statutory obligation to "affirmatively . . . further" fair housing in the United States.[87] By eliminating it, HUD abandons a tool for fighting segregation and hides the tool from others. HUD thus fails to carry out its obligations to proactively address barriers to fair housing in all communities. This failure, made without a reasonable justification, is arbitrary and capricious in violation of the APA.

The AFFH mandate is distinct from the FHA's prohibition of discrimination.[88] The FHA's anti-discrimination provisions are proscriptive, prohibiting all covered persons and entities from engaging in housing discrimination based on certain protected characteristics. By comparison, the AFFH mandate's language is affirmative and proactive—it requires HUD, its grantees, and other federal agencies to take affirmative steps to achieve the FHA's purposes, which include undoing the effects of past housing segregation.[89]

As discussed above, segregation remains entrenched across the United States as a result of both historical and contemporary practices. Discriminatory effects liability represents an important means of fighting these patterns and has a "continuing role in moving the Nation toward a more integrated society."[90] Further, the Supreme Court has specifically highlighted the value of lawsuits that target unlawful practices including "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification," characterizing such litigation as "at the heartland of disparate-impact liability."[91] HUD should therefore expand its efforts to educate the public and potential litigants about the availability of these causes of action. Instead, the Proposed Rule would entirely erase from HUD's regulations any reference to this liability, even though addressing segregation was a primary goal of the FHA and the AFFH obligation.[92] In doing so, HUD is impeding, not affirmatively furthering, fair housing.

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[87] 42 U.S.C. § 3608(e) ("The Secretary of Housing and Urban Development shall . . . administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter. . . .").

[88] *Compare* 42 U.S.C. §§ 3604–3606 (prohibition of discrimination in rental and sale of housing, residential real estate related transactions, and provision of brokerage services) *with* 42 U.S.C. §§ 3608(d), (e)(5) (requiring federal agencies, HUD, and HUD's grantees to affirmatively further fair housing).

[89] *See N.A.A.C.P., Boston Chapter v. Sec'y of Hous. & Urb. Dev.*, 817 F.2d 149, 154-55 (1st Cir. 1987); *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1133–34 (2d Cir. 1973); *Thompson v. U.S. Dep't of Hous. & Urb. Dev.*, 348 F. Supp. 2d 398, 457 (D. Md. 2005).

[90] *See Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 546–47 (2015).

[91] *Id.* at 539–40 (citing *Town of Huntington v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15, 16–18; *United States v. City of Black Jack*, 508 F.2d 1179, 1182–88 (8th Cir. 1974); *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 641 F.Supp.2d 563, 569, 577–78 (E.D. La. 2009)).

[92] *See* 24 C.F.R. § 100.5(a) (2025).

IV. HUD's shortened comment period violates the APA.

HUD also violates the APA because it has failed to comply with its own notice-and comment rulemaking regulations when promulgating the rule.[93] HUD offers only 30 days for public comment on the Proposed Rule, even though HUD's rulemaking policy at 24 CFR § 10.1 requires "not less than sixty days for submission of comments," and neither the APA nor HUD's own rules permit shortening a public comment period. The APA's narrow "good cause" exception for a proposed rule allows an agency to skip notice and comment when the agency finds and explains its reasoning for why the process is "impracticable, unnecessary, or contrary to the public interest," but the APA has no provisions allowing public comment to be shortened.[94] HUD's rules offer the same exception for when the notice and comment process may be omitted, but the rules similarly contain no provision allowing public comment to be shortened.[95] HUD therefore has no legal basis for the Proposed Rule's claim that it can shorten the comment period.

But even assuming the good cause exception found in the APA or HUD rules could apply to a shortened comment period, HUD fails to show good cause. Congress intended the good cause exception to be narrowly construed.[96] Indeed, the good cause exception applies only in emergency situations, or in cases when delay could result in serious harm.[97] Yet the Proposed Rule's purported "Justification for Shortened Comment Period" makes no attempt to argue that a sixty-day period for the submission of public comment would be impracticable, unnecessary, or contrary to public interest. Instead, it merely states that, given that the Proposed Rule "does not change any requirements or affect any rights or obligations," as well as the volume of comments HUD considered during three prior rulemakings on this topic, "HUD has determined that it is in the public interest to remove HUD's disparate impact regulations as expeditiously as possible." As discussed above, the Proposed Rule does affect rights and obligations, including by "encod[ing] a substantive value judgment"[98] that discriminatory effect claims are not recognized by HUD, even though they are available under the FHA. Moreover, HUD provides no authority for the idea that a significant volume of comments received in the past in response to different proposed rulemaking can somehow obviate the need for a full comment opportunity on a new and distinct proposed rule. If anything, HUD's acknowledgment that recent prior rulemakings generated more than 50,000 comments from a "wide variety of individuals and entities" covering "a vast array of topics and issues," only underscores the potential significance of any rule change in this area. HUD's failure to abide by its own mandated sixty-day comment period is unjustified and counter to the APA's "important policy goals of maximum participation and full information."[99]

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[93] *See, e.g.*, 5 U.S.C. § 706(2)(D).

[94] 5 U.S.C. § 553(b)(B).

[95] 24 C.F.R. § 10.1 (2025).

[96] *See Nat'l Nutritional Foods Ass'n v. Kennedy*, 572 F.2d 377, 384–85 (2d Cir. 1978).

[97] *N. C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 767 (4th Cir. 2012).

[98] *See Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Nat'l Lab. Rels. Bd.*, 57 F.4th 1023, 1034 (D.C. Cir. 2023) (citing *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 640 (D.C. Cir. 2002)).

[99] *See Comm. For Fairness v. Kemp*, 791 F. Supp. 888, 893 (D.D.C. 1992) (internal quotation marks omitted).

V. HUD Violates the APA Because it Fails to Provide a Reasoned Explanation of Why Its Proposed Rule Imposes No Costs.

Finally, HUD asserts that its Proposed Rule is a new regulation that imposes "no regulatory costs."[100] This extraordinary claim—that ending two decades of FHA standards supported by Supreme Court precedent will impose no costs on any party that relies on these standards—is supported by nothing more than HUD's say-so.[101] That does not make it true.

Consideration of the costs associated with *any* regulatory action is "a centrally relevant factor when deciding whether to regulate."[102] In considering the costs of a proposed regulatory action, including a determination that a regulatory action would impose no cost whatsoever, an agency "must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made."[103] Here, HUD must either offer a reasonable explanation of how it determined the rescission of the disparate impact regulations would impose no costs, or concede that this rule will have great costs, and comply with the requirements of EO 14192.

VI. Conclusion

Discriminatory effects liability has allowed HUD, its cooperating state agencies, and individuals facing unfair barriers to housing to increase opportunities for all Americans by reducing unjustified exclusionary practices. It remains a critical tool in the fight for more inclusive housing across the country, but that tool is blunted by the Proposed Rule. The undersigned Attorneys General strongly urge HUD to forego its proposed changes and retain the Existing Rule.

Sincerely,

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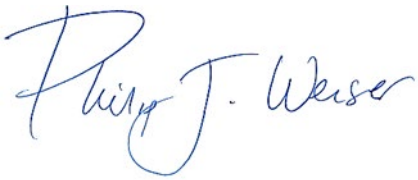
[100] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 91 Fed. Reg. 1,477 (Jan. 14, 2026).

[101] *Id.*

[102] *Michigan v. E.P.A.*, 576 U.S. 743, 752–53 (2015).

[103] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).



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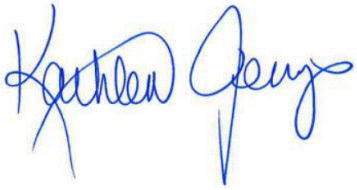

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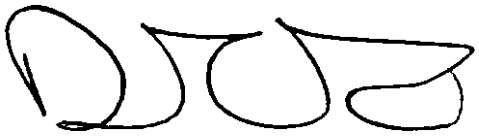

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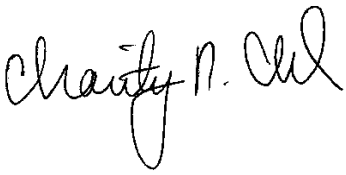

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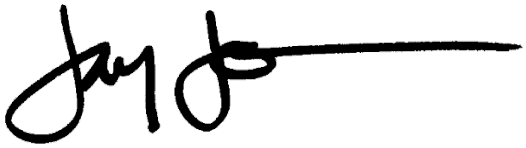

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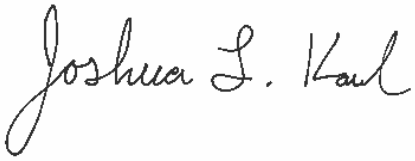

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