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October 18, 2019

VIA ELECTRONIC SUBMISSION

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

To Whom It May Concern:

On behalf of the Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee), we write to submit comments in response to the above-docketed Notice of Proposed Rulemaking (NPR) concerning the implementation of the Fair Housing Act's disparate impact standard by the U.S. Department of Housing and Urban Development (HUD).[1] Because the NPR is inconsistent with the U.S. Supreme Court's decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project* (*ICP*),[2] is belied by decades of consistent case law, and is divorced from the practical reality of Fair Housing Act enforcement, the Lawyers' Committee urges HUD to withdraw the NPR.

The Lawyers' Committee is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity—work that continues to be vital today. The principal mission of the Lawyers' Committee is to secure equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities. The Lawyers' Committee carries out its work through several projects focusing on a range of issues, including fair housing and community development, criminal justice, economic justice, educational opportunity, hate crimes and incidents, public policy, special litigation and advocacy, and voting rights.

Many of these projects regularly bring enforcement actions under statutes that prohibit policies and practices with unjustified discriminatory effects. By bringing

[1] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42854 (proposed Aug. 19, 2019).
[2] Texas Department of Housing & Community Affairs v. Inclusive Communities Project, 135 S. Ct. 2507, 2521-22 (2015).

claims under the Fair Housing Act, Title VII of the Civil Rights Act of 1964, and the Voting Rights Act, the Lawyers' Committee has developed substantial expertise in this area of the law. The Lawyers' Committee has litigated several precedent setting cases involving discriminatory effects claims, including *Mhany Management, Inc. v. County of Nassau*[3] and *Veasey v. Abbott*.[4] The Lawyers' Committee also frequently litigates intentional discrimination claims, including in both *Mhany Management, Inc.* and *Veasey*, and knows how important effects claims are in an era in which those who engage in discrimination seldom announce their true motivations. The lessons that the Lawyers' Committee has learned from its deep experience working on exclusionary zoning cases illustrates the NPR's significant flaws.

I. Exclusionary Zoning Cases Show How the NPR Is Inconsistent with the Supreme Court's Decision in *ICP*

Contrary to the NPR's assertion that the Supreme Court's decision in *ICP* necessitated this rulemaking, the bulk of the changes to the discriminatory effects standard that HUD has proposed are either entirely disconnected from the actual text of Justice Kennedy's majority opinion in *ICP* or are at odds with that opinion. As an initial matter, it is important to note that the Supreme Court did not grant *certiorari* on the question of what standard should govern discriminatory effects claims, instead only reviewing the overall cognizability of such claims. An overview of the earlier cases that Justice Kennedy cited with approval as at the "heartland" of Fair Housing Act jurisprudence further illustrates how the NPR strays from *ICP*.[5]

Specifically, Justice Kennedy cited three cases: *Huntington Branch, N.A.A.C.P. v. Town of Huntington* (*Huntington*),[6] *U.S. v. City of Black Jack* (*Black Jack*),[7] and *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish* (*St. Bernard Parish*).[8] The first two cases, in particular, are germane. *Huntington* was a challenge to the zoning policy of a predominantly White suburban municipality on Long Island that only allowed the development of multifamily housing within a small area near the train station.[9] That portion of the town was—and remains—more heavily Black and Latinx than the town as a whole.[10] Multifamily zoning was an effective prerequisite to the development of affordable housing on Long Island, and, in light of the correlation between race, ethnicity, and socioeconomic status in the region, Black and Latinx residents were more likely to occupy affordable housing than were White residents. Accordingly, the Second Circuit found that the Town of Huntington's policy of both severely limiting the amount of land zoned for multifamily housing and concentrating that land in an area that was already more diverse than the town as a whole resulted in a disparate impact on Black and Latinx households and perpetuated residential racial segregation.[11]

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[3] 819 F.3d 581 (2d Cir. 2016).
[4] 830 F.3d 216 (5th Cir. 2016).
[5] Texas Department of Housing & Community Affairs v. Inclusive Communities Project, 135 S. Ct. 2507, 2521-22 (2015).
[6] 844 F.2d 926 (2d Cir. 1988).
[7] 508 F.2d 1179 (8th Cir. 1974).
[8] 641 F. Supp. 2d 563 (E.D. La. 2009).
[9] *Huntington Branch, N.A.A.C.P.*, 844 F.2d at 928.
[10] *Id.* at 929.
[11] *Id.* at 938.

Despite Justice Kennedy's approval of the Second Circuit's decision in *Huntington*, the NPR deviates from Huntington in several important ways. First, the NPR eliminates the current HUD rule's definition of discriminatory effect, which states that the perpetuation of segregation is a type of potentially actionable discriminatory effect.[12] In laying out its proposed new elements for a *prima facie* case,[13] the NPR appears to only contemplate "disparate impact" claims or challenges to the disproportionate adverse effect of policies or practices and not perpetuation of segregation claims. In light of Justice Kennedy's endorsement of *Huntington*, the removal of the definition of "discriminatory effect" and the apparent elimination of perpetuation of segregation claims from HUD's interpretation of the Fair Housing Act are impossible to justify.

Second, the NPR proposes to assign the burden of preemptively disproving hypothetical justifications for the policy or practice of a respondent or defendant to a complainant or plaintiff.[14] This is the opposite of the Second Circuit's assignment of the burdens in *Huntington*, and the assignment of this burden is not directly discussed at any point in Justice Kennedy's decision in *ICP*. Essentially, the NPR proposes to upend decades of case law, including a case cited with approval by Justice Kennedy, without any support for so doing in Justice Kennedy's opinion. The effects of this change would be profound. There are basic disparities in access to information between the parties to a Fair Housing Act dispute that render it impractical to the point of near impossibility for a victim of discrimination to know how a perpetrator will justify its policy or practice.

Third, the NPR, without reference to any supporting Fair Housing Act case law, significantly increases the complainant's burden from that set forth in HUD's 2013 Rule with respect to less discriminatory alternatives to challenged policies or practices.[15] Specifically, the NPR would require that a less discriminatory alternative serve a respondent's interest in "an equally effective manner without imposing materially greater costs on, or creating other material burdens."[16] These two additional requirements have no grounding in cases like *Huntington*.

HUD's departure from established case law is all the more baseless in that the Second Circuit's decision in *Huntington* actually deemed it fairer to assign the burden of disproving that there is a less discriminatory alternative to defendants.[17] HUD ultimately did not adopt that view in its 2013 Rule, but the contrast between *Huntington*, a case cited with approval by Justice Kennedy, and the NPR on this issue illustrates how extreme of a departure the NPR is from a framework that already had the kinds of safeguards that Justice Kennedy thought were necessary.

The Eighth Circuit's decision in *Black Jack* provides more context for how deeply disconnected the NPR is from both Justice Kennedy's decision in *ICP* and the vast body of case law. First, although the court did not identify perpetuation of segregation as a distinct type of discriminatory effects claim, the court clearly stated that the Fair Housing Act is concerned with

[12] 24 C.F.R. § 100.500(a).
[13] 24 C.F.R. § 100.500(b)(2) (Proposed Rule).
[14] 24 C.F.R. § 100.500(b)(1) (Proposed Rule).
[15] 24 C.F.R. § 100.500(d)(1)(ii) (Proposed Rule).
[16] *Id.*
[17] *Huntington Branch, N.A.A.C.P.*, 844 F.2d at 936.

rooting out residential racial segregation and that the zoning policy under challenge had the effect of contributing to such patterns of segregation:

> "Black Jack's action is but one more factor confining blacks to low-income housing in the center city, confirming the inexorable process whereby the St. Louis metropolitan area becomes one that 'has the racial shape of a donut, with the Negroes in the hole and with mostly Whites occupying the ring.' Park View Heights was particularly designed to contribute to the prevention of this prospect so antithetical to the Fair Housing Act. The Board of Directors of the Park View Heights Corporation was one-half white and one-half black. Affirmative measures were planned to assure that members of the black community would be aware of the opportunity to live in Park View Heights. There was ample proof that many blacks would live in the development, and that the exclusion of the townhouses would contribute to the perpetuation of segregation in a community which was 99 percent white." (internal citations omitted)[18]

Second, following the prima facie case, the court unambiguously shifted the burden to the "governmental defendant to demonstrate that its conduct was necessary to promote a compelling governmental interest."[19] As in *Huntington*, the court, in a decision cited with approval by Justice Kennedy, actually established a standard that was more favorable to plaintiffs than that of the 2013 HUD rule, which sets the bar for governmental interests at substantial, legitimate, and nondiscriminatory rather than the more stringent "compelling."[20] This shows the extent to which HUD already has in place standard that includes the types of safeguards called for by Justice Kennedy and is less favorable to plaintiffs than the law in several circuits.

II. Exclusionary Zoning Cases Refute the Fifth Circuit's Definition of Robust Causality

In the NPR, HUD solicits public comment on how the department should define the concept of robust causality.[21] Rather than a fundamental departure from existing case law, Justice Kennedy's reference to robust causality in *ICP* was a reemphasis on the importance of connecting a disparate impact to a specific policy or practice.[22] Post-*ICP* litigation in which parties have litigated the question of robust causality (but in which courts have not adopted the Fifth Circuit's impossible-to-meet standard) show that the ability to bring disparate impact claims is already significantly limited.[23] Additionally, given the variety of different types of policies and practices that are subject to challenge under the Fair Housing Act, robust causality could look very different in different cases, rendering the project of defining the term in regulation a fool's errand.

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[18] *City of Black Jack*, 508 F.2d at 1186.
[19] *Id.* at 1185.
[20] *Id.*
[21] 84 Fed. Reg. at 42860.
[22] *ICP*, 135 S. Ct. at 2523.
[23] *See, e.g.*, City of Los Angeles v. Wells Fargo & Co., 691 Fed.Appx. 453, 454-55 (9th Cir. 2017); Inclusive Communities Project v. Texas Department of Housing & Community Affairs, 2016 WL 4494322, *10 (N.D. Tex. 2016).

Although HUD solicits input on a definition of robust causality, it has not proffered a proposed definition. HUD's failure to define the term in the NPR shows that HUD must not define it in a Final Rule without going through another round of public comment on a notice that includes a proposed definition of the term. At this juncture, HUD has not provided meaningful notice to the public with respect to its plans to define robust causality. Interested stakeholders are left to guess at hypothetical definitions that HUD might arrive at and respond to those, with no way of knowing whether those hypothetical definitions comprise the complete universe of possibilities.

Nonetheless, it is clear that HUD must not adopt one conception of robust causality that has emerged in a small minority of post-*ICP* reported decisions. In *Inclusive Communities Project v. Lincoln Property Co.*, the U.S. Court of Appeals for the Fifth Circuit effectively held that, in order for a challenge to the disparate impact of a policy of not accepting Housing Choice (Section 8) Vouchers on African Americans to satisfy the robust causality requirement, the plaintiff would have to show that the defendant had caused African Americans to comprise a disproportionate share of voucher holders.[24] Dissents to both the panel decision[25] and the full Fifth Circuit's denial of a petition for *en banc* review[26] illustrate the absurdity of this view, which is directly at odds with *Huntington* and *Black Jack*. The primary reason why African Americans in Dallas comprise a disproportionate share of voucher holders is that there is a correlation between race and socioeconomic status, which is the primary criterion for voucher eligibility. The underlying reasons for that correlation are manifold and relate to the legacies of slavery, Jim Crow, redlining, and a panoply of discrimination in public policies and private industry practices. It is difficult to imagine a circumstance in which any victim of discrimination could show that a specific perpetrator was responsible for that historical legacy.

Many disparate impact Fair Housing Act complaints, including those related to exclusionary zoning, challenge policies that have a disparate impact because there is a correlation between a protected characteristic, such as race or disability, and socioeconomic status. The causes of those correlations are complex and are never attributable to discrimination by one actor alone. This has not stopped courts, in decisions cited approvingly by Justice Kennedy, from finding a sufficient causal relation between a challenged policy or practice and a resulting disparate impact. For example, the City of Black Jack, Missouri incorporated in 1970.[27] The U.S. Department of Justice filed suit in 1971. The idea that a newly incorporated municipality might have caused a correlation between race and socioeconomic status in just one year defies belief.

Other courts, including the U.S. Courts of Appeals for the Fourth and Eleventh Circuits, have explicitly rejected the view of robust causality reflected in the Fifth Circuit's decision, instead interpreting Justice Kennedy's cautionary language to require rigor in the identification of the specific policy that has caused a disparate impact and in identifying an appropriate comparison group.[28] The Fourth Circuit's decision in the *Reyes* case is illustrative: in that case,

[24] 920 F.3d 890 (5th Cir. 2019).
[25] 920 F.3d at 912 (Davis, J., concurring in part and dissenting in part).
[26] Inclusive Communities Project v. Lincoln Property Co., 930 F.3d 660, 661 (Haynes, J., dissenting).
[27] *City of Black Jack*, 508 F.2d at 1182-83.
[28] Oviedo Town Center II, L.L.L.P. v. City of Oviedo, 759 Fed.Appx. 828 (11th Cir. 2018) (affirming the dismissal of a disparate impact Fair Housing Act challenge to municipal utility rates that were effectively higher for multi-

the plaintiffs were families with mixed immigration status who were forced to leave a manufactured home park because of a newly adopted and enforced policy of requiring residents to provide Social Security numbers. Undocumented residents could not comply, and the park evicted them. This had a disparate impact because of the correlation between undocumented status and Latinx ethnicity, but the Fourth Circuit did not require any showing that the park had created that correlation. The Fifth Circuit's view is also inconsistent with the application of the disparate impact standard in other statutory contexts. Under Title VII of the Civil Rights Act, courts—including the Supreme Court—have not applied a causality standard that would require a plaintiff to show that a defendant caused the underlying correlation that explained why a policy or practice disproportionately harmed a group of which a plaintiff was a member. In *Griggs v. Duke Power Co.*, the Supreme Court first held that disparate impact claims were cognizable under Title VII. That case involved a challenge to a requirement that applicants for certain jobs either have a high school diploma or pass a standardized test.[29] There was no suggestion in that case that the defendant, a private utility, had caused disparities in educational attainment in the small town in North Carolina where the power plant at issue was located.

III. The Issue of Exclusionary Zoning Shows That Exemptions to Liability Are Unauthorized and Unwise

The NPR would create categorical exemptions from disparate impact liability that have no basis in the text or history of the Fair Housing Act and that are, in fact, belied by that very history. The NPR would create safe harbors when (1) a third party materially limits the discretion of a perpetrator, such as through a law, court decision, or administrative requirement, and (2) when the challenge is to an algorithm that meets certain criteria that HUD implicitly argues would validate that algorithm.[30] The Fair Housing Act already has several exemptions, but Congress enacted each of those exemptions in a very explicit fashion. Additionally, members of Congress have proposed exemptions in the past that ultimately were not passed into law. From this, it is starkly apparent that Congress knows how to create an exemption when it wants to do so, and that the administrative creation of exemptions would be a usurpation of Congress's legislative role.

Zoning and land use are deeply implicated in this history, and the NPR's vague and confusing exemption language could have harmful effects in that realm if finalized. In 1980, Congress rejected an amendment offered by Senator Orrin Hatch that would have exempted zoning and land use decisions from disparate impact liability. The juxtaposition of that decision with Congress's decision in 1988 to add an exemption for conduct against persons who have been convicted of the illegal manufacture or distribution of controlled substances clearly shows the rightful primacy of Congress with respect to exemptions.[31]

The NPR's proposed exemption for circumstances in which, for example, a local government's discretion is limited by state law could also have harmful ramifications for the fight against exclusionary zoning. Most Fair Housing Act challenges to exclusionary zoning

family housing than single-family housing but on the basis of different reasoning from the district court, which had adopted a similar view to the Fifth Circuit); Reyes v. Waples Mobile Home Park L.P., 903 F.3d 415 (4th Cir. 2018).

[29] 401 U.S. 424 (1971).

[30] 24 C.F.R. § 100.500(c)(1)-(2).

[31] 42 U.S.C. § 3607(b)(4).

arise after an affordable housing developer has sought and been denied approval to build higher density housing. Under state land use law throughout most of the country, developers seek such approval through either a request for rezoning of their property from a lower density designation to a higher density designation or a request for a variance that would provide comparatively minor relief from requirements of a particular zoning designation. That relief might include allowing a developer to build a structure that is 15 feet from the neighboring property line instead of 25 feet or that has 25 units per acre instead of 20 units per acre.

State land use law provides standards for the circumstances under which municipalities may and may not grant rezonings and variances. The standard for granting a variance in many states—that failure to grant a variance would result in an unnecessary hardship on the property owner—is a very high one indeed; but under the Supremacy Clause that state law constraint on local discretion to grant variances would be preempted by the Fair Housing Act if the failure to allow the affordable housing development resulted in an unjustified disparate impact. Similarly, the rezoning of one specific parcel in order to facilitate affordable housing development may conflict with state law restrictions on spot zoning, but the Fair Housing Act would also preempt such limitations on local discretion. Thus, not only does how Congress dealt with proposed exemptions related to zoning illustrate the inappropriateness of the NPR's approach, the proposed exemptions, both with respect to state or local legal requirements and algorithms, also have the potential to conflict with established applications of disparate impact liability.

IV. Making Exclusionary Zoning Cases Harder to Prove Is at Odds with Attempts to Reduce Regulatory Barriers to Housing Production

On June 25, 2019, President Trump issued Executive Order 13878, Establishing a White House Council on Eliminating Regulatory Barriers to Affordable Housing. This Executive Order listed "overly restrictive zoning" as its first barrier to affordable housing. This apparent recognition on the part of President Trump and Secretary Carson, the designated Chair of the Council, is deeply inconsistent with the approach that HUD has taken in the NPR. As the cases discussed above and cited by Justice Kennedy's majority opinion in *ICP* demonstrate, the Fair Housing Act's disparate impact standard has proven to be one of the only viable tools for reforming exclusionary zoning and reducing the extent to which it impedes affordable housing. Between the Executive Order and this NPR, Secretary Carson and President Trump appear to be talking out of both sides of their respective mouths. Nevertheless, it is grounds for the withdrawal of the NPR.

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This NPR threatens to undermine decades of hard-won gains in the fight for equity in housing policy and the housing market. By making it practically impossible for victims of discrimination to vindicate their fair housing rights, the NPR is inconsistent with the text and purpose of the Fair Housing Act, as well as with Justice Kennedy's decision in the *ICP* case. Cases applying the disparate impact standard to the problem of exclusionary zoning illustrate how the NPR is fatally flawed as the manner in which the NPR will prevent this administration from achieving its own stated policy goals. In light of the near unanimous view of the federal courts that *ICP* and HUD's 2013 rule on this subject are consistent, there is no need for this harmful NPR.

Accordingly, the Lawyers' Committee urges HUD to withdraw the NPR and reinvigorate its enforcement of the Fair Housing Act through the aggressive use of the disparate impact standard. If you have any questions or need any additional information regarding this comment, I can be reached by phone at 202-662-8600 or by email at tsilverstein@lawyerscommittee.org.

Sincerely,

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