NEW YORK STATE | Division of Human Rights

ANDREW M. CUOMO
Governor

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Commissioner

October 18, 2019

Office of the General Counsel
Rules Docket Clerk
U.S. Department of Housing and Urban Development
451 7th Street SW
Room 10276
Washington, DC 20410-0001

Re: **Docket No.: FR-6111-P-02, RIN 2529-AA98**
HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

To Whom it May Concern:

The New York State Division of Human Rights (NYSDHR) submits the following comments in response to the notice in the Federal Register soliciting comments on the Proposed Rules regarding "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard."

Thank you for the opportunity to comment.

Very Truly Yours,

Commissioner Angela Fernandez
New York State Division of Human Rights

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Proposed Rulemaking: Docket No.: FR-6111-P-02, RIN 2529-AA98
HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

The New York State Division of Human Rights (NYSDHR) has reviewed the above-referenced notice (the Proposed Rule), published in the Federal Register on August 19, 2019, proposing changes regarding HUD's Implementation of the Fair Housing Act's Disparate Impact Standard. NYSDHR opposes the Proposed Rule as it creates an undue burden on plaintiffs and does not serve "to bring HUD's disparate impact rule into closer alignment with the analysis and guidance provided by [the Supreme Court decision in] Inclusive Communities . . . ." Federal Register, Vol. 84, No. 160, Monday August 19, 2019, Proposed Rules, p. 42857. In New York State, NYSDHR will continue to analyze disparate impact claims in all areas of its jurisdiction, including housing, utilizing the well-established tripartite burden shifting scheme established by the United State Supreme Court and adopted by the highest Court in New York. Respondents in New York State will continue to be required to plead and prove their practices are necessary to achieve a valid interest/business necessity, see Section VI, below.

NYSDHR is the agency in charge of enforcing the New York State Human Rights Law. The law ensures equal opportunity in housing in New York State. NYSDHR has been certified as substantially equivalent to HUD for over 20 years, maintains a cooperative agreement with HUD pursuant to 24 CFR §§ 115.200-115.212 and participates in the Fair Housing Assistance Program pursuant to 24 CFR §§ 115.300-115.311. The Human Rights Law is enforced through investigation and adjudication of complaints filed by individuals as well as NYSDHR-initiated complaints; the creation of studies, programs, and campaigns designed to inform and educate the public on the effects of discrimination and their rights and obligations under the law; and the development of human rights policies and proposed legislation for the State.

NYSDHR was created "to encourage programs designed to insure that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the state; to encourage and promote the development and execution by all persons within the state of such state programs; to eliminate and prevent discrimination . . . in housing. N.Y. Exec. L. § 290.3.

I. The Heightened Pleading and Evidentiary Requirements in the Proposed Rule Would Effectively Eliminate Disparate Impact Claims

HUD's stated purpose for the Proposed Rule on disparate impact analysis in housing discrimination cases, Docket No. FR-6111-P-02RIN: 2529-AA98, is "to bring HUD's disparate impact rule into closer alignment with the analysis and guidance provided by [the Supreme Court decision in] *Inclusive Communities* . . . ." Federal Register, Vol. 84, No. 160, p. 42857. It fails in this purpose and instead creates a nearly impossible burden for victims of housing discrimination to meet.

Under the existing legal framework for disparate impact cases, a plaintiff must first establish that the practice or policy complained of has a substantial adverse impact on members of a protected class. A defendant must then produce evidence the practice or policy is a "business necessity." Finally, a plaintiff must establish that alternatives to the challenged practice or policy exist which have a lesser adverse impact on the members of the protected class.

However, the Proposed Rule creates a new burden-shifting framework under which a complainant would be required to identify a specific, identifiable policy or practice that has a discriminatory effect and must plead facts supporting the following five elements:

- The policy or practice was "arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective."
- A "robust causal link between the challenged policy or practice. Limitations are placed on the use of statistics to support the claim.
- The "challenged policy or practice has an adverse effect on members of a protected class" and has not just harmed the complainant or other members of the class as individuals.
- The disparity caused by the policy or practice is "significant" or "material" and not caused by chance.
- That the "complaining party's alleged injury is directly caused by the challenged policy or practice."

Under the Proposed Rule, the heightened pleading and evidentiary requirements effectively eliminate disparate impact claims. Already marginalized groups including minorities, people with disabilities, women, immigrants, families with children, and LGBTQ persons will be severely impacted. Plaintiffs will not have access to information that will enable them to sufficiently plead facts to support all five elements as this information is often solely within the purview of the defendant. The Proposed Rule will establish such sophisticated factual pleading requirements such that very few cases will be able to survive past judgment on the pleadings pursuant to FRCP Rule 12(B)(6).

The decision in *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project*, Inc., 135 S. Ct. 2507 (2015), does not require the adoption of such heightened pleading and evidentiary standards. To the contrary, the Court held that disparate impact claims are consonant with the central purpose of the Fair Housing Act, that such claims permit plaintiffs to combat prejudice, and disparate impact liability prevents segregated housing patterns. The Court identified two necessary elements of a prima facie case of disparate impact discrimination. The first element is that the challenged policy or practice must be an "artificial, arbitrary and unnecessary barrier" to fair housing, *Id.* at 2522, and second, a plaintiff must establish a causal connection between the policy or practice and the alleged disparity. *Id.* at 2523.

In analyzing whether disparate impact claims are cognizable under the FHA, the Court reiterated the tripartite burden shifting scheme it developed in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Under this scheme, a complainant must first establish that the practice or policy complained of has a substantial adverse impact on members of a protected class.

Respondent must then produce evidence the practice or policy is a "business necessity." Finally, complainant must establish that alternatives to the challenged practice or policy exist which have a lesser adverse impact on the members of the protected class. The Court affirmed HUD's position in its 2013 final rule "Implementation of the Fair Housing Act's Discriminatory Effects Standard" that the valid interest rebuttal in the housing context is analogous to the "business necessity" defense standard under Title VII. *Inclusive Communities,* 135 S. Ct. at 2522.

II. Even if a Plaintiff is Able to Meet the Heightened Pleading Requirements, the Proposed Rule Improperly Diminishes the Burden on Defendants to Prove Their Policy is Necessary to Achieve a Valid Interest and is Inconsistent with the Holding in *Inclusive Communities*.

The current HUD regulation 24 CFR 100.500(c) accurately reflects the tripartite burden shifting framework that has been applied to disparate impact cases for over 50 years.

The Proposed Rule eliminates the formal burden shifting framework as identified in the current rule. Although the Proposed Rule permits a defendant to "rebut" plaintiff's allegation under what is identified as "Plaintiff's burden," it is unclear what would be required of the defendant to rebut Plaintiff's allegation. It is also unclear when defendants would be able to interject this defense.

In *Inclusive Communities,* the Court described the burden shift to defendants to prove a business necessity or valid interest defense as "important and appropriate." *Id.* at 2522. Because the Proposed Rule does not reflect the Court's approval of the tripartite burden shifting scheme and because it would create confusion as to defendant's opportunity and obligation to state a business necessity defense, NYSDHR opposes the proposed amendments to 24 CFR 100.500(c).

NYSDHR also opposes the proposed amendments to 24 CFR 100.500(c)(2) that eliminates the requirement defendants prove the policy is "necessary to achieve" one or more substantia, legitimate, nondiscriminatory interests. Instead the Proposed Rule would allow defendants to rebut plaintiff's claim by showing the policy "advances a valid interest."

In *Inclusive Communities*, the Court adopted the exact language of the existing HUD rule, "housing authorities and private developers [must] be allowed to maintain a policy if they can prove it is *necessary to achieve* a valid interest." *Id.* at 2523.There is no justification for HUD to reduce this standard. 24 CFR 100.500(c)(2) should not be changed.

III. HUD Misapplied the Word "Robust" in the Proposed Rule.

In the second of the five proposed elements, HUD states that there must be "a robust causal link between the challenged policy or practice and a disparate impact of members of a protected class which shows the specific practice is the direct cause of the discriminatory effect."

In *Inclusive Communities*, the Court did not require there to be a "robust causal link" between the challenged policy or practice and a disparate impact. After describing the need for a plaintiff to identify an artificial barrier to housing in a pleading, the Court stated

> [i]n a similar vein, a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that 'racial imbalance . . . does not, without more establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create.

Id. at 2523. As the Court used the phrase, "robust" modifies, or describes "requirement." In other words, causation is a required prima facie element. However, in the proposed rule, HUD substitutes the phrase "robust causal *link*" for "robust causality *requirement*." In doing so, HUD requires the "link" to be robust. By changing the phrasing of the Court, HUD has altered the pleading requirement announced by the Court in *Inclusive Communities*.

As further evidence the Court did not intend such a reading, the Court went on twice to describe the causality requirement, without mention of "robust."

> A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence *demonstrating a causal connection* cannot make out a prima facie case of disparate impact.
>
> And as Judge Jones observed below, *if the ICP cannot show a causal connection* between the Department's policy and a disparate impact—for instance, because federal law substantially limits the Department's discretion—that should result in dismissal of this case.

Id. at 2523–24. It is imperative that HUD remove the phrase "robust causal link" from the Proposed Rule. The term suggests the plaintiff must identify not just causation but some particularly heightened causation. Nothing in *Inclusive Communities* requires this heightened pleading standard and adopting it would cause confusion and create an undue burden on plaintiffs. See, for example, *Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415 (4th Cir. 2018), cert. denied sub nom. *Waples Mobile Home Park Ltd. P'ship v. de Reyes*, 139 S. Ct. 2026, 204 L. Ed. 2d 218 (2019). In *Reyes*, the Fourth Circuit warned that the district court's

interpretation of what was needed to show "robust causality" seemed to require an intent to disparately impact a protected class. Such an interpretation "threatens to eviscerate disparate-impact claims altogether, as this view could permit any facially neutral rationale to be considered the primary *cause* for the disparate impact on the protected class and break the robust link required between the challenged policy and the disparate impact." *Id.* at 429-430.

IV. If a Decision Creates an "Artificial, Arbitrary and Unnecessary Barrier" to Fair Housing, Disparate Impact Claims Must be Permitted to Proceed Regardless of Whether it was a One-Time Decision.

HUD states that plaintiffs will not likely succeed on, and it will not bring a disparate impact claim involving, an allegation that a single event-such as a local government's zoning decision or a developer's decision to construct a new building in one location instead of another, is the cause of a disparate impact. Federal Register, Vol. 84, No. 160, p. 42858.

Although the court in *Inclusive Communities* noted that a plaintiff may have a hard time establishing that a one-time decision is a policy or practice, this caution does not warrant codification in HUD's rules. If a decision creates an "artificial, arbitrary and unnecessary barrier" to fair housing for a permitted class, disparate impact claims must be permitted to proceed and HUD should pursue such claims regardless of whether it was a one-time decision.

Underscoring this point, the Court explained "[t]he FHA . . . was enacted to eradicate discriminatory practices within a sector of our nation's economy . . . . These unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability." *Id.* at 2521-2522.

Further, the Court cited with approval two cases that involved one-time decisions. In *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish,* 641 F.Supp.2d 563, 569, 577–578 (E.D.La.2009) the court invalidated a housing ordinance passed by a town Council on September 19, 2006, post-Hurricane Katrina, that restricted the rental of housing units to only " 'blood relative[s]' " in an area of the city that was 88.3% white and 7.6% black. In *United States v. City of Black Jack, Missouri*, the court invalidated an ordinance enacted by the City Council on October 20, 1970 prohibiting the construction of any new low to moderate income multiple-family dwellings and made present ones nonconforming uses.

V. Defendants Must Be Required to Prove Algorithmic Models Are Not the Cause of Disparate Impact

Under the Proposed Rule, a respondent may rely on its use of an algorithmic model in prescribed ways to rebut a prima facie case. The defenses proposed include permitting a defendant to avoid liability if it can show that use of the model developed by a third party is standard in the industry and is being used for the purpose intended by the third party; an

additional defense permits defendants to prove through the use of a qualified expert that the model is not the cause of a disparate impact.

Algorithmic models that provide consumer risk assessments may perpetuate discrimination. See, Tufekci, Zeynep, *Algorithmic Harms Beyond Facebook and Google: Emergency Challenges of Computational Agency*, Colo. Tech L. J. [Vol. 13], SEPT 3RD http://ctlj.colorado.edu/wp-content/uploads/2015/08/Tufekci-final.pdf, describing "latent trait inference" which permits collectors of data to make "guesses" about traits, such as race, religion, sex, etc., that are not otherwise disclosed. In all cases involving the use of algorithmic models, the defendant relying on such models should be required to prove the model does not create or perpetuate a disparate impact.

The proposed defenses would create a loop-hole for banks/lenders to hide behind third-party vendors and their "standard practice or used as intended" model. If the bank/lender is not held liable for discriminatory outcomes from an algorithm the third-party uses, then they will not have any incentive to look for a third-party that guarantees its algorithms do not discriminate. Conversely, third-party vendors will not be incentivized to provide a guarantee (which requires investment on their part) that their algorithms will not create discriminatory outcomes. What this rule may do, in effect, is create the incentive for all parties involved to seek out or develop algorithms that have a discriminatory outcome. It also creates the incentive to not know whether certain algorithms are discriminatory.

VI. The Burden Shifting Framework for Disparate Impact Claims in New York State Remains Unchanged

Since 1974, New York courts have utilized the tripartite order of proof from *Griggs*, 401 U.S. at 424, in deciding disparate impact discrimination complaints under the Human Rights Law. *State Division of Human Rights v. Kilian Mfg. Corp.*, 35 N.Y.2d 201, 209, 360 N.Y.S.2d 603, 608 (1974), appeal dismissed 420 U.S. 915 (1975) ("Where a condition exists in fact which permits an objective test as to whether a practice operates invidiously against a particular group, if it be so found, such obstacle can and should be removed by appropriate action unless the practice can be justified by business necessity.")

In New York State, a disparate impact case can be established by statistical evidence, in conjunction with a policy or practice which has the effect, even without evidence of intention, to exclude or disadvantage persons in one or more protected categories, is sufficient to establish discriminatory action. *Id.* at 206-07. Although statistics are not required to prove disparate impact, when they are "used with other objectively established evidence, they may permit an inference of unintentional discrimination." *CUNY–Hostos Community College v. State Human Rights Appeal Board*, 59 N.Y.2d 69, 78, 463 N.Y.S.2d 173 (1983).

Once a prima facie case of adverse impact discrimination has been established, the focus shifts to whether the challenged practice or policy is justified by "business necessity" or "is necessary to achieve one or more substantial, legitimate, non-discriminatory reasons." *Inclusive Communities*, 135 S. Ct. at 2515. Under New York law, defendants must plead and prove a

compelling need for the challenged practice to make out a defense of valid interest/business necessity. *Margerum v. City of Buffalo*, 24 N.Y.3d 721, 731 (Court of Appeals, 2015) (Where the plaintiffs established a prima facie case of disparate impact discrimination, the burden then shifts to the City to defend its actions.)

In 2019, New York State reiterated and strengthened its longstanding liberal construction clause for the Human Rights Law, which must be interpreted liberally "for the accomplishment of the remedial purposes thereof, *regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed*." N.Y. Exec. L. § 300 (emphasis added). This legislation confirms that the federal anti-discrimination statutes establish a floor, not a ceiling, for anti-discrimination protections in New York. In cases brought to it, NYSDHR will continue to analyze disparate impact claims in all areas of jurisdiction, including housing, utilizing the well-established burden shifting scheme.

NEW YORK STATE OF OPPORTUNITY.
Office of Temporary and Disability Assistance

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Executive Deputy Commissioner

October 18, 2019

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Thank you for the opportunity to comment.

Sincerely,

Michael P. Hein
Commissioner

New York State Office of Temporary and Disability Assistance
Comments in Response to the U.S. Department of Housing and Urban Development Notice of Proposed Rulemaking

Table of Contents

I. Executive Summary
II. Weakening Protections against Discrimination Increases Housing Instability for Members of Protected Classes
    a. Increasing Procedural Protections for Discriminatory Policies and Practices is Unjust and Contrary to the Purposes of the FHA
    b. Discrimination Against Protected Class Members and Families Increases Housing Instability
III. Detrimental Physical and Mental Impact on Families and Individuals
IV. Increases the Fiscal Burden to the States and Localities
    a. Increase to Public Assistance Caseload
    b. Increase in Individuals Accessing the State's Homeless Shelter System
    c. Increased Demand for Rental Supplement Programs Serving Recently Evicted or Displaced Families
    d. Increased Moving and Storage Costs
    e. Increased Transportation Costs
V. Conclusion

I. Executive Summary

The Office of Temporary and Disability Assistance (OTDA) and the New York State Homeless Housing and Assistance Corporation (HHAC) strongly oppose the proposed rule change as outlined in the Department of Housing and Urban Development (HUD) Notice of Proposed Rulemaking, HUD's Implementation of the Fair Housing Act's (FHA) Disparate Impact Standard.[1]

HUD's proposed changes would make it far more difficult for the victims of discrimination to challenge the discriminatory policies or practices of housing providers and businesses, whether purposeful or unintended. Discrimination in housing and racial inequality are widely recognized as factors in housing instability. Discrimination is a factor in causing housing instability, a factor in extending its duration, and a barrier to exiting homelessness and improving housing outcomes.

This rule not only weakens the FHA but is in fact entirely contrary to its purposes. As such, it must be withdrawn. OTDA offers this comment in opposition to HUD's proposal.

As further detailed below, implementation of the proposed rule would:

- Result in long term, detrimental impacts on children and families due to housing instability, which would permeate a child's cognition, schooling, physical, emotional, and mental health.
- Force families into unstable or unaffordable housing, resulting in an increased number of homeless families.
- Increase the fiscal burden to the State and localities, with a projected surge of individuals accessing public assistance benefits (PA), including shelters for the homeless, shelter supplements, moving and transportation costs.

For these reasons discussed in depth below, we urge that the proposed rule be withdrawn.

II. Insulating Discriminatory Practices and Policies from the Protections of the FHA Forces Individuals into Unstable Housing or Homelessness

OTDA and HHAC strongly urge against implementation of the rule as it violates the bedrock principles and fundamental purposes of the FHA. Under the proposed rule, housing providers and businesses will be insulated from the consequences of their discriminatory practices by placing a heavy, and often impossible, burden on the victims of discrimination. As a result, some victims of discrimination would be forced into unstable housing or homelessness.

a. Increasing Procedural Protections for Discriminatory Policies and Practices is Unjust and Contrary to the Purposes of the FHA

Current law and regulations allowing disparate impact cases furthers the FHA's purpose of eradicating discriminatory practices in the housing market.[2] OTDA and HHAC oppose HUD's proposed changes because they would make it far more difficult for people experiencing

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[1] Docket No. FR-6111-P-02; RIN 2529-AA98; HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42854 (proposed Aug. 19, 2019) ("proposed rule").

[2] Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2521-2522 (2015).

discrimination to challenge the policies or practices of housing providers and businesses that seem neutral but have "hidden" types of discrimination, whether purposeful or unintended.

HUD proposes placing virtually all the burden of proving discrimination on its victims, those negatively affected by policies or practices due to their race, color, national origin, sex, disability, family status, or religion. The proposed changes would make it much more difficult, if not impossible, for people in protected classes to challenge and overcome discriminatory effects in housing policies or practices. This barrier would be insurmountable for victims of discrimination who are disabled or experiencing poverty, and who lack the ability or resources to challenge discriminatory policies or practices.

The proposed rule shifts the burden of proof to the victims of discrimination, even though the information that could sustain a charge of discrimination may be entirely in the hands of the perpetrator. Victims of discrimination would be left to guess what justifications a defendant might pose and then attempt to counter those justifications before discovery even occurs. The proposed rule would both clarify that the collection of data by housing providers regarding protected class members is neither required nor encouraged and require these same protected class members to prove a "specific, identifiable practice" and "robust causal link" proving disparate impacts on protected class members. Without data to support their claims of impact, protected class members face a significant burden.

Disparate impact cases are already difficult to prove under the current rule. The practical effect of the proposed rule would be to provide increased protections to those who practice discrimination in housing and limit the ability of individuals and families experiencing housing discrimination to receive the protections of the FHA. It would embolden those who intentionally discriminate against protected classes and increase discriminatory practices and policies.

b. Discrimination Against Protected Class Members and Families Increases Housing Instability

Discrimination in housing and racial inequality has been recognized as a factor in housing instability since the 1980s.[3] Discrimination impacts both sides of the problem; it is a factor in causing housing instability and a barrier to finding housing and improving housing outcomes.[4]

The impact of discrimination on African Americans is especially significant. Although African Americans comprise 13% of the US population and 26% of those living in poverty, they account for more than 40% of the overall homeless population.[5] Poverty rates alone do not explain the

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[3] George R Carter, III, From Exclusion to Destitution: Race, Affordable Housing, and Homelessness, 13 Cityscape: A Journal of Policy Development and Research 33 (2011).

[4] Id.; Report and Recommendations of the Ad Hoc Committee on Black People Experiencing Homelessness, Los Angeles Homeless Services Authority (Dec. 2018) https://www.lahsa.org/documents?id=2823-report-and-recommendations-of-the-ad-hoc-committee-on-black-people-experiencing-homelessness.

[5] United States Department of Housing and Urban Development, The 2018 Annual Homeless Assessment Report to Congress. Part 1: Point-in-Time Estimates of Homelessness (2018), https://files.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf; Kaya Lurie, Breanne Schuster, and Sara Rankin, Discrimination at the Margins: The Intersectionality of Homelessness & Other

dramatic over-representation of African Americans among people who are homeless. Nor does it explain why African Americans remain homeless longer than whites.[6]

Segregation increases the likelihood and impact of homelessness.[7] African American families are more likely to live in areas of concentrated poverty — areas that have limited economic opportunities, fewer services, and poorer educational resources. People who become homeless are likely to have lived in these neighborhoods immediately before their homelessness. HUD Pair Studies demonstrate that African Americans often face barriers when attempting to move to more favorable neighborhoods. A study by HUD found that people of color were often shown fewer rental units, offered higher rents, and denied more leases than whites. Minority homebuyers and renters also experience other forms of discriminatory treatment, relating to housing costs and financing, housing quality, and the helpfulness of the sales agent.[8]

It is unfathomable that the federal government is willing to propose a rule that increases procedural protections for discriminatory practices and policies, weakens the FHA, and protects housing providers and businesses from the consequences of their illegal practices. The consequence of such a rule change would be to increase homelessness and housing instability. OTDA and HHAC stand in strong opposition to the proposed rule and urge its withdrawal.

III. Detrimental Physical and Mental Impact on Children and Families

OTDA and HHAC strongly urge the proposed rule be withdrawn, as it would have a long term, severe and pervasive impact on individuals, children and families affected by housing discrimination.

Research demonstrates that children and families who experience housing instability,[9] especially homelessness, are at an increased risk of suffering detrimental physical and mental health effects.[10] The more frequent the housing instability, the greater the health risks posed to the child(ren) and caregiver(s).[11]

The consequences of housing instability are especially acute for children. "Housing instability has both immediate and long-term consequences for children. These consequences extend across multiple domains, including physical and mental health, learning and cognition, and academic

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Marginalized Groups, Homeless Rights Advocacy Project, at 8 (2015), http://digitalcommons.law.seattleu.edu/hrap/8.

[6] From Exclusion to Destitution: Race, Affordable Housing, and Homelessness.

[7] Id.

[8] The Urban Institute et al., Housing Discrimination Against Racial and Ethnic Minorities 2012 (June 2013), https://www.huduser.gov/portal/publications/fairhsg/hsg_discrimination_2012.html.

[9] "Housing instability" includes families who have experienced at least one of the following: 1) been behind on rent; 2) moved more than twice in the past year; 3) experienced homelessness. Megan Sandel et al., Unstable Housing and Caregiver and Child Health in Renter Families, American Academy of Pediatrics (Jan. 2018), https://pediatrics.aappublications.org/content/141/2/e20172199.

[10] See id.; MM Jones, Does Race Matter in Addressing Homelessness? A Review of the Literature, 8 World Med Health Policy 139 (June 2016), https://onlinelibrary.wiley.com/doi/abs/10.1002/wmh3.189.

[11] Id.; David R Williams, Harold W Neighbors, James S Jackson, Racial/Ethnic Discrimination and Health: Findings from Community Studies, 93 American Journal of Public Health 200 (2003).

achievement."[12] One report found that children experiencing housing instability are "more than twice as likely as others to repeat a school grade, be expelled or suspended, or drop out of high school."[13] "Homeless children have three times the rate of emotional and behavioral problems, such as anxiety, depression, sleep problems, withdrawal and aggression."[14] Furthermore:

> Longitudinal studies conducted over a 3-year period show that housing mobility among child welfare–involved children and adolescents—a particularly vulnerable group—disrupts acquisition of behavioral regulation and suppresses development of basic cognitive processes. As these studies show, frequent moves and moves at certain ages trigger developmental cascades that undermine basic skills necessary to do well in school and in adulthood.[15]

HUD has failed to account for these long-term effects on children, families, and society in their Regulatory Impact Statement. This is a glaring omission and of grave concern to OTDA and HHAC.

IV. Increases the Fiscal Burden to the State and Localities

OTDA strongly opposes the proposed rule on the basis that it will create a financial burden on the State and local governments.

a. Increase to Public Assistance Caseload

One group of programs that will be directly and negatively impacted by HUD's proposed rule change, if implemented, are the Public Assistance (PA) programs, which provide assistance to households to meet basic needs, including housing. PA is comprised of two main programs – Family Assistance (FA) and Safety Net Assistance (SNA). FA is primarily funded through federal Temporary Assistance for Needy Families (TANF) funds and SNA is funded with state and local county funds. Other components of PA include temporary housing assistance and rental subsidies.

It is anticipated that implementation of the proposed rule will cause increased homelessness and housing instability. Therefore, PA-eligible individuals and families in protected classes would seek PA funding in increased numbers to meet their basic housing needs. This influx of new recipients would increase PA costs.

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[12] Kate Marcal and Patrick J. Fowler, Housing and Child Well-Being, Center for Social Development at the George Warren Brown School of Social Work, Washington University in St. Louis (Sept. 2015), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1805&context=csd_research.
[13] Marci McCoy-Roth, Bonnie B. Mackintosh, and David Murphey, When the Bough Breaks: The Effects of Homelessness on Young Children, Early Childhood: Child Trends (Feb. 2012), http://www.buildinitiative.org/WhatsNew/ViewArticle/tabid/96/ArticleId/120/When-the-Bough-Breaks-The-Effects-of-Homelessness-on-Young-Children.aspx.
[14] Id.
[15] Housing and Child Well-Being.

b. Increase in Individuals Accessing the Homeless Shelter System in New York State

Individuals and families who are unable to find housing or are evicted due to increased discrimination are likely to end up in the State's homeless shelter system. HUD has acknowledged that "[t]he costs of homelessness to society can be substantial, arising from the provision of transitional shelters and community supports, emergency services, and health care. Some studies have found that the costs associated with homelessness could range from $20,000 to $50,000 per person per year."[16]

In New York, the homeless shelter system is largely funded through the PA program, which, is supported through the federal TANF grant, as well as State and local county funds. The influx of these individuals and families will further tax an already burdened homeless shelter system and will impose additional unbudgeted costs on localities and the State. The fiscal impact on New York City will be particularly significant given the right to shelter that exists.

c. Increased Demand for Rental Supplement Programs Serving Recently Evicted or Homeless Families

Twenty-one counties in New York State, including New York City, provide rental supplements to assist low-income households in obtaining or maintaining housing. Many of these rental subsidy programs are funded through PA. Many of these programs require that the household be homeless, recently evicted, or currently facing eviction in order to receive the supplement. The proposed rule could result in increased evictions of individuals or households that fall within a protected class, and as a result, these individuals may be eligible for rent supplements, which would increase costs to TANF and the State and counties.

d. Increased Moving and Storage Costs

In New York State, PA is also used to pay for moving and storage costs, brokers fees, and the cost of furniture for eligible individuals. In calendar year 2018, the average cost per case was: $1,326 for storage, $820 for moving expenses, $2,366 for brokers fees, and $418 for furniture and appliances. If individuals or families experience housing instability or homelessness as a result of the proposed rule, the aforementioned costs would be borne by TANF, the State and local counties.

e. Increased Transportation Costs

PA, at times, is used to pay for transportation costs for eligible children when they are displaced from their home school districts.[17] This transportation is provided to allow the children to continue to go to the same schools they attended prior to their displacement. Increasing housing instability and homelessness would result in increased transportation costs for children who are displaced.

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[16] See United States Housing and Urban Development, Regulatory Impact Analysis: Housing and Community Development Act of 1980: Verification of Eligible Status Proposed Rule, Dkt. No. FR-6124-P-01, p.16 (Apr. 15, 2019).
[17] See N.Y. Educ. Law § 3209(4).

V. Conclusion

Forcing families to meet an insurmountable pleading standard to prove the unjust actions taken against them in the form of discrimination is not only unconscionable, but will have long-term, detrimental consequences for the public health and welfare of New York State residents. Individuals and families will be jettisoned by the federal government into homelessness, increasing the financial burden to the State and localities. The federal agency entrusted with enforcing anti-discrimination law ought not seek to reduce the effectiveness of that law. Accordingly, in order to avoid the negative impacts to the public health and welfare of New York State residents and to New York State programs, OTDA and HHAC strongly urge HUD to withdraw the proposed rule.

NEW YORK STATE OF OPPORTUNITY. | Office for the Aging

ANDREW M. CUOMO
Governor

GREG OLSEN
Acting Director

October 18, 2019

Office of the General Counsel
Rules Docket Clerk
U.S. Department of Housing and Urban Development
451 7th Street SW
Room 10276
Washington, DC 20410-0001

Re: **Docket No.: FR-6111-P-02, RIN 2529-AA98**
HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

To Whom it May Concern:

The New York State Office for the Aging (NYSOFA) submits the following comments in response to the notice in the Federal Register soliciting comments on the Proposed Rules regarding "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard."

Thank you for the opportunity to comment.

Very Truly Yours,

Greg Olsen
Acting Director

New York State Office for the Aging Comments on Housing and Urban Development Proposed Rulemaking: HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

The Proposed Rule Creates an Adverse Impact on Older Americans

This Proposed Rule will have a negative impact on older individuals, burdening them as they attempt to maintain their quality of life through accessible and affordable housing.

The New York State Office for the Aging (NYSOFA) has reviewed the above-referenced notice (the Proposed Rule), published in the Federal Register on Monday, August 19, 2019. NYSOFA provides the following comments in opposition to the Proposed Rule.

NYSOFA's mission, based upon federal and state statutory law, is to help older New Yorkers be as independent as possible for as long as possible through advocacy, development, and delivery of person-centered, consumer oriented, and cost-effective policies, programs and services which support and empower older adults and their families, in partnership with the network of public and private organizations which serve them. NYSOFA submits these comments as part of its statutory role to be an advocate for older individuals.

Congress enacted the Older Americans Act (OAA) in 1965 in response to concern by policymakers about a lack of community social services for older individuals. The OAA established authority for grants to states for community planning and social services, research and development projects, and personnel training in the field of aging. The law also established the Administration on Aging (AoA) to administer the newly created grant programs and to serve as the federal focal point on matters concerning older individuals. Although older individuals may receive services under many other federal programs, today the OAA is considered to be a major vehicle for the organization and delivery of social and nutrition services to older individuals and their caregivers.

The OAA defines "older individual" as "an individual who is 60 years of age or older" – with one of the federally designated objectives being to assist older individuals in "obtaining and maintaining suitable housing, independently selected, designed and located with reference to special needs and available at costs which they can afford." 42 U.S.C. Section 3001 [3].

NYSOFA, established in 1965 by Article 19-J of the Executive Law (New York State Elder Law, Article II, Title 1), is New York's designated state unit on aging as required by the OAA. NYSOFA is the lead agency for promoting, coordinating, and administering federal, state, and local programs and services for older New Yorkers and their

caregivers. NYSOFA is the state's administrator for the federally designated Aging and Disability Resource Center (called NY Connects) as well as the state Long Term Care Ombudsman Program (LTCOP).

NYSOFA has a central role in advocating on behalf of New York's 3.7 million older adults as well as over 4 million informal caregivers (family, friends, and neighbors). The role of NYSOFA is based on its mission as established under the OAA and state statute. NYSOFA partners with fifty-nine (59) Area Agencies on Aging (AAAs), fifty-six (56) of which are county based, two (2) of which are located on the St. Regis and Seneca Reservations, respectively, and one (1) which is operated by the City of New York. Of the fifty-six (56) county-based AAAs, fifty-two (52) are sponsored by county governments and four (4) are sponsored by not-for-profit organizations. Combined, NYSOFA and the AAAs contract with over 1,200 organizations to deliver cost-effective, non-medical long-term services and supports in the homes and communities of at-risk older adults.

The Proposed Rule would impact the Fair Housing Act provisions that prohibits discriminating against people based on race, color, religion, national origin, sex, familial status, and disability. Unlike many state and local fair housing ordinances, the federal FHA does not include separate protections for age. However, the statute has a broad definition of disability: a physical or mental impairment which substantially limits one or more of such person's major life activities, or record of having such an impairment, or being regarded as having such an impairment. 42 U.S.C. section 3602 (h).

Older individuals are more likely to become disabled, either physically or mentally, as compared to the general population. These individuals often cease to be part of the workforce, have smaller, fixed incomes, and often experience evolving health issues – chronic conditions, cognitive impairment, mobility issues, etc. It is noteworthy that large numbers of older adults are disabled to some extent, with the percentage of those who are disabled increasing with age. The "US Census Bureau's American Community Survey 2017 One Year Estimates" showed 32.38% of NYS population 65 and over with a disability, and the nation-wide population of 34.63%. The percentage jumps to almost 50% for the 75 and over NYS population. Similar percentages apply to the population on a nationwide basis.

Discrimination against older individuals based on disability can be open and notorious, or subtle and hard to identify, particularly if the discrimination is facilitated by an informal practice or administrative policy that appears neutral on its face. Few landlords, real estate agents, home sellers, banks, or other housing providers will deliberately pursue policies that have the effect of proclaiming "no frail elderly need apply," yet may still establish policies that act to disadvantage older individuals in ways that they may not even realize are illegal. See: Idaho Legal Aid Services, Inc, "Fair Housing for Seniors" by Michael Allen and Susan Ann Silverstein, as reprinted with permission of TRIAL

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https://www.idaholegalaid.org/node/1037/fair-housing-seniors

As individuals age, they often develop medical problems that limit their abilities to perform their normal daily activities. Older individuals may need to modify or retrofit their existing homes to accommodate their evolving needs. These problems, in turn, may cause seniors, some for the first time in their lives, to face difficulties keeping their current housing or securing new housing. Past examples of discrimination have included rules that prohibit mobility scooters [*United States v. the Hillhaven Corp.*, 960 F. Supp. 259 (D. Utah 1997)] or companion (non-service) animals on residential property [*Castellano v. Access Premier Realty, Inc.*, 181 F. Supp. 3d 798 (E.D. Cal. 2016) and *Fair Housing of the Dakotas, Inc. v. Goldmark Prop. Mgmt., Inc.*, 78 F.Supp.2d 1028 (D.N.D. 2011)], rules that residents who used motorized wheelchairs purchase liability insurance [*HUD v. Country Manor Apartments* 2 FH -FL (Aspen) (HUDALJ Sept. 20, 2001)], rules requiring proof that an older individual was "capable of independent living" by living in the community on her own for eighteen months (delaying hospital or nursing home discharges) [*Carson v. Rochester Housing Authority*, 748 F. Supp. 1002 (W.D.N.Y. 1990)], policies that dictate how many people with disabilities can live together [*Erdman v. City of Fort Atkinson*, 84 F.3d 960 (7th Cir. 1969), lack of accessibility to include parking spaces [*Shapiro v. Cadman Towers Inc*, 51 F.3d 328 (2nd Cir 1995)], and zoning rules prohibiting the building of ramps [*Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993)].

Many older individuals will face significant obstacles in complying with various administrative or legal requirements that would be generated by the Proposed Rule. As they age, older individuals face increasing challenges due to lack of mobility, Alzheimer's or other types of dementia and cognitive impairment, and chronic health issues that limit their access to records and documents, which may be difficult to locate and obtain. Navigating administrative processes may be even more complicated for older individuals with a cognitive deficit. Most processes require active participation, if not presence, of the individual concerned. In addition, when that individual is an older adult, facility access, physical impairment, language and cognitive problems, among others, can greatly diminish that individual's ability to participate in an administrative or legal process.

Individuals with developmental disabilities have often relied on family members as caretakers. When these family members are no longer able to care for the now older individual with the disability, that individual loses her support system and faces the world's obstacles without adequate knowledge or experience of how to navigate the administrative and legal processes they encounter. If these older individuals face discrimination, they begin the complaint (legal) process at a distinct disadvantage. The Proposed Rule would negatively impact older individuals' ability to protect their own rights and create additional barriers to getting their "foot in the door" for a complaint to

be initiated or sustained regarding unlawful discrimination in housing. It could, in effect, bar older individuals with developmental disabilities from exercising their right to seek relief from discrimination they have encountered.

Conclusion

Older individuals desire to maintain their quality of life, and age with dignity. To do so, they need accessible and affordable housing. Given the choice, most prefer to age in place, staying in their own homes. If they need new housing, for reasons of cost or accessibility, older individuals prefer to make that decision for themselves.

The Fair Housing Act has been a successful public policy assisting older individuals to have and maintain housing that enables them to live high quality, independent, financially secure lives. The continued ability of older individuals to challenge policies that act to limit their quality of life within their communities must not be limited.

Any proposal that would increase the difficulties experienced by older individuals in New York to successfully oppose the eviction or displacement of older individuals from their homes, through legal action, is contrary to NYSOFA's mission under federal law to assist older individuals with aging in place, with dignity, in their own homes and communities.

If enacted, this Proposed Rule will have a detrimental impact on older individuals by making it much more difficult and burdensome for those with the inherent challenges accompanying disabilities, to pursue and obtain relief from discrimination based upon disparate impact theory under the Fair Housing Act.

NYSOFA strongly recommends that the Proposed Rule be withdrawn.

NEW YORK STATE OF OPPORTUNITY. | Division of Veterans' Services

ANDREW M. CUOMO
Governor

JAMES D. MCDONOUGH, JR.
Director

October 18, 2019

Office of the General Counsel
Rules Docket Clerk
U.S. Department of Housing and Urban Development
451 7th Street SW
Room 10276
Washington, D.C. 20410-0001

Re: **Docket No.: FR-6111-P-02, RIN 2529-AA98**
HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

To Whom it May Concern:

The *New York State Division of Veterans Services (NYSDVS)* submits the following comments in response to the notice in the Federal Register soliciting comments on the Proposed Rules regarding "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard."

Thank you for the opportunity to comment.

Very Truly Yours,

J. D McDonough Jr.

Director James D. McDonough
New York State Division of Veterans' Services

New York State Division of Veterans' Services Comments on Housing and Urban Development Proposed Rulemaking: HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

I. Introduction

The New York State Division of Veterans' Services (NYSDVS) has reviewed the above-referenced notice (the Proposed Rule), published in the Federal Register on Monday, August 19, 2019. NYSDVS provides these comments in opposition to the Proposed Rule. This Proposed Rule will add an unnecessary burden upon and have a detrimental impact on older and disabled Veterans and their families, including family caregivers, as they attempt to acquire and maintain housing that is affordable and accessible. The proposed change would alter the Fair Housing Act provisions to make it harder for individuals to challenge housing discrimination based on race, color, religion, national origin, sex, familial status, and disability.

NYSDVS, was established on April 1, 1945 by Article 17 of the Executive Law (New York State Executive Law, Article 17, § 350), is New York's designated state agency for Veterans' advocacy. NYSDVS has the central role in advocating on behalf of New York's 750,000 Veterans and their families. Initially, NYSDVS's mission was to advocate for New York Veterans to receive 100% of the benefits they earned due to their service to our country. Due to changes in federal and state statutory and case law, in the past almost 75 years, NYSDVS's mission has evolved to include numerous federal and state benefits including disability compensation, the New York State Blinded Annuity, the Gold Star Parents Annuity, and assisting Veterans seeking local services such as temporary shelter and permanent housing. As part of NYSDVS' overall mission, we take seriously the obligation to assist older or disabled New York Veterans to remain independent through programs and services which seek to help older and disabled Veterans, and all Veterans to live a dignified life after their service. NYSDVS submits these comments as part of its statutory role to be an advocate for all Veterans.

II. The Proposed Rule Will Have an Adverse Impact on Veterans Who Are Either Older or Disabled

The Proposed Rule would have a detrimental impact on older and disabled Veterans and their families, including family caregivers. This change would affect the Fair Housing Act provisions that prohibit landlords, real estate agents, home sellers, banks, and other housing providers from discriminating against people based on race, color, religion, national origin, sex, familial status, and disability. Unlike many state and local

fair housing ordinances, the federal FHA does not include separate protections for age or military status.

However, older and disabled Veterans, like all similarly situated Americans, are also subject to discrimination based on their race, color, national origin, religion, sex, family status, disability or military status. Discrimination can sometimes take subtle or hard-to-identify forms, even though the policy that facilitates the discrimination occurs openly and in plain sight.

Because disability crosses racial, religious, and economic boundaries, the most significant FHA litigation in senior housing will likely involve claims of disability discrimination which will disproportionally affect the Veterans population. The broad definition of disability in the statute (a physical or mental impairment which substantially limits one or more of such person's major life activities, or record of having such an impairment, or being regarded as having such an impairment [42 USC § 3602 (h)]) makes this outcome even more likely.

Like other older individuals, Veterans often have medical problems that limit their abilities to perform their normal daily activities. These problems may cause Veterans to face difficulties keeping their current housing or securing new housing. As Veterans age, they may need to modify or retrofit their existing homes to accommodate their evolving needs such as a wheel chair ramp or sensor/voice operated doors. Past examples of discrimination have included rules that prohibit scooters or companion animals on residential property, rules that residents who use motorized wheelchairs purchase liability insurance, rules requiring proof that an older individual was "capable of independent living" by living in the community on her own for eighteen months (delaying hospital or nursing home discharges), policies that dictate how many people with disabilities can live together, lack of accessibility to include parking spaces, and zoning rules prohibiting building ramps.

As Veterans grow older or their disabilities become more severe, they cease to be part of the workforce, have smaller, fixed incomes, while often experiencing health issues – chronic conditions, cognitive impairment, mobility issues, etc. They are more likely to become disabled, either physically or mentally. Substantial numbers of Veterans are disabled to some extent, and the percentage of those who are disabled increases as the age level rises. The "US Census Bureau's American Community Survey 2017 One Year Estimates" showed 32.38% of NYS population 65 and over with a disability, and the nation-wide population of 34.63%. The percentage jumps to almost 50% for the 75 and over NYS population. The percentages in the Veterans population are proportionally higher because Veterans who saw combat or served in war or peacetime, suffer from

various physical and mental disabilities at a rate far greater than the general population (Kabatchnick, *Obstacles Faced by the Elderly Veteran in the VA Claims Adjudication Process*, 12 Marquette Elder's Advisor 185 [2010]).

III. Conclusion

Requiring older and disabled Veterans to meet insurmountable pleading standards to prove the unjust discrimination actions taken against them is unconscionable, and will cause long-term, detrimental consequences for the public health and welfare of New York State Veterans and their families. If enacted, this Proposed Rule will make it much more difficult and burdensome for these Veterans to pursue and obtain relief from discrimination based on the disparate impact theory under the Fair Housing Act. It will allow the federal government to jettison older and disabled Veterans and their family members into homelessness, creating an increasing financial burden for the State and local governments.

The federal agency entrusted with enforcing anti-discrimination law should seek to increase the effectiveness of that law, and not to actively reduce or frustrate the law. In order to avoid the negative impacts to the public health and welfare of New York State Veterans and their families, NYSDVS strongly recommends that the Proposed Rule be withdrawn.

NEW YORK STATE OF OPPORTUNITY. | Department of Financial Services

ANDREW M. CUOMO
Governor

LINDA A. LACEWELL
Superintendent

October 18, 2019

Office of the General Counsel
Rules Docket Clerk
U.S. Department of Housing and Urban Development
451 7th Street SW
Room 10276
Washington, DC 20410-0001

Re: **Docket No.: FR-6111-P-02, RIN 2529-AA98**
HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

To Whom it May Concern:

The New York State Department of Financial Services submits the following comments in response to the notice in the Federal Register soliciting comments on the Proposed Rules regarding "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard."

Thank you for the opportunity to comment.

Very Truly Yours,

Linda A. Lacewell, Superintendent
New York State Department of Financial Services

NEW YORK STATE OF OPPORTUNITY. | Department of Financial Services

ANDREW M. CUOMO
Governor

LINDA A. LACEWELL
Superintendent

October 18, 2019

Office of General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 7th 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, RIN 2529-AA98

Dear Secretary Carson:

I write as New York's Superintendent of Financial Services to share my strong opposition to the U.S. Department of Housing and Urban Development's ("HUD") recent proposal that would effectively dismantle important federal civil rights protections that for decades have served as a critical safeguard to help prevent any form of discrimination related to housing. New York is the progressive capital of the United States, where we welcome and treat equally all people regardless of race, color, sex, religion, national origin, or sexual orientation. Our governor, Andrew M. Cuomo, served as HUD Secretary, where he vigorously fought for the fair treatment of all Americans seeking housing, and under his leadership in New York State we have continued that fight to ensure no one is denied housing opportunities for a discriminatory reason. The New York State Department of Financial Services is charged with enforcing state and federal fair lending laws, and we will not sit idly by as the current federal administration attempts to roll back the civil rights protections that are a central part of what makes America a land of opportunity and equality for all.

In its notice published in the Federal Register, HUD specifies that its proposed rule seeks to "better reflect the Supreme Court's [2015] ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* ('*Inclusive Communities*'), and to provide clarification regarding the application of the standard to State laws governing the business of insurance."[1] Not only does HUD's proposal fail to capture the *Inclusive Communities* ruling, it would help industry's worst actors while hurting the most vulnerable consumers by gutting critical FHA protections. Given the importance of fair housing protections and the all too common occurrence of discrimination across the country and in the State of New York, it is imperative that HUD abandon this proposal and maintain its current 2013 disparate impact standard.

[1] 84 F.R. 42854.

The New York State Department of Financial Services ("DFS") is mandated to protect consumers and supervise financial services. As part of this mandate, it is authorized to enforce state and federal fair lending laws, including the FHA,[2] and regularly issues industry guidance related to fair lending. DFS is also responsible for the overall supervision, regulation, and enforcement of laws regarding financial services companies in the State of New York, including all New York state-chartered banks. DFS oversees all insurance companies and insurance producers operating in New York, all non-depository financial institutions operating in New York, and all mortgage lenders, originators, and servicers for New York mortgage consumers. DFS-chartered entities and licensees comprise more than 3,500 companies with assets exceeding $7 trillion, as well as thousands of individuals.

DFS therefore has significant experience with both the protected classes that the FHA is supposed to protect and the industry that it is supposed to police. It is based on this experience that I urge HUD not to abandon those seeking safe and affordable housing by proceeding with this proposal.

Passed as Title VIII of the Civil Rights Act of 1968, and amended in 1988, the FHA was originally intended to "address[] the denial of housing opportunities on the basis of 'race, color, religion, or national origin,'"[3] and now includes sex, disability, and familial status as protected classes. The FHA applies broadly to the housing experience, covering both ownership and rental, as well as persons or businesses engaging in "residential real estate-related transactions."[4] In New York, in addition to the FHA, the New York State Human Rights Law provides broad protections in the fixing of rates, terms or conditions of credit, and public accommodations for protected classes identified on the basis of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, age, sex, marital status, disability, or familial status.[5] Collectively, these laws create a framework of protection and liability to identify and end practices or policies that perpetuate or contribute to discrimination and segregation. Unfortunately, more than fifty years after its original passage, the FHA is still a necessary tool in the struggle against discrimination.

At every tier of government, we should promote its use and strengthen its protections, however HUD's proposal would effectively eliminate disparate impact liability in FHA claims. This is an alarming break with the agency's past rulemaking and a potential dereliction of its obligation to ensure fair housing. As recently as 2016, HUD asserted that "the [FHA] requires HUD to affirmatively further fair housing in all of its housing-related programs and activities, one of which is the administration and enforcement of the Act,"[6] and determined that exemptions and

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[2] N.Y. Fin. Servs. Law § 408(a)(1)(B).

[3] *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2516 (2015) (quoting Civil Rights Act of 1968, § 804, 82 Stat. 83).

[4] 42 U.S.C. § 3604-05.

[5] N.Y. Exec. Law § 296-a.

[6] 81 F.R. 69013.

safe harbors "would undermine the Act's broad remedial purpose and contravene HUD's own statutory obligation to affirmatively further fair housing."[7] Now, only three years later, HUD is abandoning its statutory obligation by proposing broader safe-harbor defenses and limiting the FHA's ability to redress discriminatory effects. Moreover, HUD's proposed rule does not align with the framework described in *Inclusive Communities*, which is HUD's stated objective.

Every day homeowners and tenants experience discrimination as they work to overcome generations of segregation. At DFS we work tirelessly to help these consumers. I urge HUD to do the same by abandoning its proposal and focusing on enforcing the FHA using its existing disparate impact standard.

HUD's Current Disparate Impact Standard Balances Consumer Protections with Industry Needs

FHA protections do not have to offset economic growth. Disparate impact liability occurs where a facially neutral practice or policy has a discriminatory effect and could be replaced by an alternative practice or policy with a less discriminatory effect. HUD's existing disparate impact framework strikes such a balance by providing a well-tailored pleading standard and articulating a defense against disparate impact claims, and allows for valid practices and procedures while minimizing discriminatory effects on protected classes. Importantly, the current standard focuses on discriminatory effects, not intent.

However, HUD's proposed rule risks upsetting this balance by placing an onerous and unnecessary pleading standard on plaintiffs and by overextending defenses that essentially act as safe-harbor protections for defendants. Rather than address discrimination, this change would benefit industry at consumers' expense.

HUD's Proposed Rule Overly Burdens Consumers and Effectively Prohibits Claims

DFS interacts with consumers every day, and we understand how challenging it is to find an affordable apartment or to shop for the best mortgage rates. This is particularly true when communities and individuals have been historically excluded from the market or are offered worse rates. The FHA should help overcome these challenges, not add to them. But HUD's proposed rule would substitute the existing disparate impact framework with one that places too great a burden on plaintiffs, with a rigorous five-element pleading standard[8], and would effectively prevent average consumers from asserting their right to fair and equal housing opportunities.

Moreover, HUD's proposal goes far beyond the careful limitations articulated by the Supreme Court in *Inclusive Communities* by shifting the responsibility to identify a valid interest from defendants as a defense onto plaintiffs as a prima facie pleading requirement.[9] The Court's

[7] *Id.* at 69014.

[8] 84 F.R. 42862.

[9] *Compare Inclusive Communities*, 135 S. Ct. at 2522 ("An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies.") *with* proposed 24 C.F.R § 100.500(b)(1), 84 F.R. 42862 (to plead a prima

opinion is clear that a plaintiff's responsibility is to "allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection."[10] The Court confirms that defendants must articulate their own valid interest by drawing a comparison to the business necessity standard for Title VII claims, which an employer must affirmatively raise as a defense.[11] Requiring a plaintiff to prove that a challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective is both out of step with widely accepted discrimination and disparate impact liability standards and places an unfair burden on an already disadvantaged population. HUD appears to be using *Inclusive Communities* as cover to harm the very consumers it was meant to empower and protect.

HUD's Proposed Broad Defenses Frustrate the Very Purpose of Disparate Impact Claims

DFS regards disparate impact liability as a critical tool in addressing segregation and discriminatory practices because it addresses discrimination that arises from unconscious bias, inadvertence, and historical circumstances, rather than apparent animus or intent. The Supreme Court, too, in *Inclusive Communities*, highlighted this as one purpose of disparate impact liability and the FHA.[12] However, HUD's proposed standard provides defendants with broad intent-based defenses that frustrate this purpose and are more appropriate for a disparate treatment liability analysis. Contorting disparate impact liability into a disparate treatment standard will only serve to further disenfranchise an already-excluded set of protected classes.

Under section 100.500(c)(2) of the proposed rule, a defendant may raise a defense to a disparate impact claim in one of three ways. HUD's notice of its proposed rule specifically solicits comments on the nature, propriety, and use of algorithmic models as related to the second of its three proposed defenses, found in proposed section 100.500(c)(2), under which defendants may show that the alleged discriminatory effect is the result of a model, and that: i) the material factors used as inputs for the model are not proxies for protected classes and the model is predictive of credit risk or other similar valid objective; ii) that the model is produced, maintained, or distributed by a recognized third party that determines industry standards; or iii) that the model has been validated by an objective and unbiased third party that found the model to be statistically sound and that none of the factors used as inputs are proxies for protected classes.[13] The use of models does not eliminate the forms of bias and discrimination that disparate impact liability is intended to address, but HUD's proposal would permit defendants to engage in conduct with discriminatory effects and avoid liability simply because those effects were the result of models produced or

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facie case, a plaintiff must allege that "the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective").

[10] *Inclusive Communities*, 135 S. Ct. at 2524.

[11] *See Id*. at 2517, 2522 (discussing an employer's responsibility under Title VII to establish a business necessity as defense to a disparate impact claim).

[12] *Id*. at 2522 ("Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.").

[13] 84 F.R. 42860.

validated by third parties. Permitting defendants to rely on the fact that a model was produced or validated by a third party as a defense completely overlooks the central tenet of disparate impact liability: a practice or policy can be facially-neutral and still have impermissible discriminatory effects. Proposed section 100.500(c)(2)(ii) does not even require that the third party ensure the third party's inputs are not proxies for protected classes. This defense would work counter to the FHA's intended and articulated goals and would harm consumers in New York and nationwide.

HUD's proposal does nothing to protect individuals experiencing real discrimination and serves only to gut the FHA, particularly given the growing role of algorithmic decision making in finance and insurance. HUD's proposed defenses conflate disparate impact with disparate treatment and would significantly limit the use of the former to address housing discrimination, despite the Court's holding in *Inclusive Communities* that disparate impact claims are cognizable under the FHA.[14] As the various actors that the FHA covers increasingly rely on algorithmic decision-making, HUD's proposed rule risks becoming an industry-wide shield against liability for unacceptable discriminatory effects.

DFS is actively protecting consumers from potential discriminatory effects resulting from algorithmic underwriting and decision making. Pursuant to an investigation of algorithms in the life insurance market, DFS determined that use of external data sources in life insurance underwriting has the strong potential to mask the forms of discrimination prohibited by state and federal laws, including the federal Civil Rights Act, and that the use of models and algorithms may also have a strong potential to have a disparate impact on the protected classes identified in those laws. On January 18, 2019, DFS issued Insurance Circular Letter No. 1 (2019) to remind life insurers that they remain responsible for complying with both state and federal laws, and that a life insurer may not rely on external data or external predictive algorithms or models unless the insurer has determined that the external data or predictive model is otherwise permitted by law or regulation and is based on both sound actuarial principles or experience and a valid explanation or rationale.

This principle is applicable to other lending and financial services covered by the FHA, as HUD is aware. In 2016, HUD decided in its rulemaking that it is not "necessary or appropriate to create an exemption from discriminatory effects liability for all insurance practices or for all underwriting practices in order to accommodate the insurance industry's concerns"[15] and noted that "discriminatory effects liability has proven workable in other contexts involving risk-based decisions, such as mortgage lending, without the need for exemptions or safe harbors."[16] All aspects of fair housing are susceptible to discriminatory effects, and so should be subject to disparate impact liability, and consumers experience discriminatory effects regardless of whether they are the result of an analyst or an algorithm. Reducing discriminatory effects is part of HUD's FHA mandate, although its proposal would effectively eliminate this important protection.

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[14] *Inclusive Communities*, 135 U.S. at 2525.

[15] 81 F.R. 69014.

[16] *Id. at* 69015.

Moreover, there is no need for the broad defenses in HUD's proposal when, as HUD itself has argued, "practices that [a defendant] can prove are risk-based, and for which no less discriminatory alternative exists, will not give rise to discriminatory effects liability."[17] HUD proposes to transform a workable standard that seeks to find the policy or practice with the least discriminatory effect into an effects-neutral safe harbor for users of algorithms and third-party processes. This would fundamentally change the FHA and remove a critical bulwark against discrimination and segregation in the United States.

Disparate Impact Liability is Applicable to the Business of Insurance

HUD specifically solicited comments on its proposed addition of section 100.500(e), which would provide that "[n]othing in this section is intended to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance." New section 100.500(e) merely reiterates the language already set forth in McCarran-Ferguson.

DFS has broad authority under New York State law to oversee, regulate, and investigate the business of insurance in New York.[18] Per the McCarran-Ferguson Act, this authority is exclusive unless overridden by an act of Congress specifically relating to the business of insurance. DFS will continue to apply New York State laws, and specifically the insurance laws, to protect consumers from discriminatory practices.

Conclusion

We are a proudly diverse state, with a governor that as HUD Secretary, Attorney General of New York, and our state's chief executive has a legacy of promoting and enforcing the spirit and the letter of the FHA. DFS will continue this legacy by stepping up for consumers, particularly as the federal government steps down. On behalf of all New Yorkers, I oppose HUD's proposed rule and urge you to keep in place critical protections like disparate impact liability for those seeking safe and affordable housing.

Sincerely,

Linda A. Lacewell, Superintendent
New York State Department of Financial Services

[17] *Id*.

[18] *See* N.Y. Fin. Serv. Law § 102.

NEW YORK STATE | Office for the Prevention of Domestic Violence

ANDREW M. CUOMO
Governor

October 18, 2019

Office of the General Counsel
Rules Docket Clerk
U.S. Department of Housing and Urban Development
451 7th Street SW
Room 10276
Washington, DC 20410-0001

Re: **Docket No.: FR-6111-P-02, RIN 2529-AA98**
HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

To Whom it May Concern:

The New York State Office for the Prevention of Domestic Violence (NYSOPDV) submits the following comments in response to the notice in the Federal Register soliciting comments on the Proposed Rules regarding "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard."

Thank you for the opportunity to comment.

Very Truly Yours,

Shannon Cantiello

Deputy Director Shannon Cantiello

New York State Office for the Prevention of Domestic Violence

NEW YORK STATE | Office for the Prevention of Domestic Violence

ANDREW M. CUOMO
Governor

New York State Office for the Prevention of Domestic Violence
Comments in Response to Department of Housing and Urban Development's Notice of Proposed Rulemaking

"HUD's Implementation of the Fair Housing Act's Disparate Impact Standard"
Federal Register (Docket No. FR-6111-P-02)

Executive Summary

The New York State Office for the Prevention of Domestic Violence (OPDV) strongly opposes the Department of Housing and Urban Development (HUD) proposed rule regarding "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard." OPDV is an executive level state agency that works to improve New York's response to and prevention of domestic violence. Since its creation in 1992, OPDV's mission has been to enhance the safety of every New Yorker in their intimate and family relations. OPDV's primary areas of focus are advising the governor and lawmakers on best policies and practices for the state, providing training to professionals across the state about the intersection of domestic violence in their daily practice, and serving as a resource by disseminating public awareness campaigns and publishing materials for use by non-profits and victims.

OPDV opposes this rule because the heightened threshold for establishing a prima facie case of sex discrimination will result in it being nearly impossible for victims harmed by this harsh policy to receive any recourse. Moreover, landlords and municipalities will be less likely to consider the negative effects of their housing policies on victims of domestic violence, potentially triggering an increase in a problem that has an outsized impact on communities of color and the poor.

OPDV opposes the implementation of this proposed rule because:

1. Victims of domestic violence are particularly vulnerable to harm resulting from neutral policies.
2. The rule will limit the viability and the remedies available for claims of discrimination based on domestic violence victim status.
3. Without the ability to challenge these policies, victims are left susceptible to disproportionately harmful practices, which only exacerbate the problems facing domestic violence victims.

I. Proposed Rule's Effect on Domestic Violence Victims' Fair Housing Act Claims

a. Rule diminishes the viability of Fair Housing Act to provide protections against discriminatory housing policies for victims of domestic violence.

While victims of domestic violence are not a protected class, the Fair Housing Act (hereinafter FHA) has long provided protections against discriminatory housing policies on the basis of race, color, religion, sex, disability, familial status, or national origin.[1] Because women are significantly more likely to be victims of domestic violence than men, policies that negatively affect victims of domestic violence also discriminate based on sex.[2] Further, the impact of facially neutral policies on victims of domestic violence can be deadly. Victims who become homeless, or are forced to return to an abuser, face increased vulnerability to physical violence.

HUD itself has acknowledged the viability of these claims and encouraged its Offices of Fair Housing and Equal Opportunity field staff to analyze domestic violence discrimination claims in this way. In 2011, HUD's Deputy Assistant Secretary for Enforcement and Programs issued a memo entitled "Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act and the Violence Against Women Act," which explains that "domestic violence survivors who are denied housing, evicted, or deprived of assistance based on the violence in their homes may have a cause of action for sex discrimination under the Fair Housing Act."[3]

Additionally, HUD's memo points out that because other protected classes, such as American Indian women or black women, represent disproportionately high rates of domestic violence victims, victims of domestic violence may also be able to bring claims under the FHA for race or national origin discrimination. Victims of domestic violence are also likely to be negatively affected by neutral policies that have a discriminatory effect based on familial status because the majority of female domestic violence victims live in households with children under ten years old.[4]

While domestic violence victims are sometimes intentionally discriminated against in employment, housing, and other contexts, it is very common for victims of domestic violence to be unintentionally harmed by even the most well-meaning of policies. Examples of such policies that have unintended negative consequences for victims include tenant screenings, nuisance ordinances, and zero tolerance rules, which are detailed in the following sections. Other policies that harm domestic violence victims that have been repealed or amended after successful challenges under a disparate impact theory of sex discrimination include property

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[1] 142 U.S.C. §§ 3601-19.

[2] *See* Bouley v. Young- Sabourin, 394 F. Supp. 2d 675 (D. Vt. 2005); *See also* Alvera v. C.B.M. Group Inc., No. HUDALJ 10-99-0538-8 (HUD Apr. 1, 2001), available at http://www.aclu.org/images/asset_upload_file37_33994.pdf.

[3] Memorandum from Sara K. Pratt to FHEO Office Directors and FHEO Regional Directors, "Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act and the Violence Against Women Act," (February 9, 2011).

[4] Marielsa Bernard, Domestic Violence's Impact on Children, 36-JUN Md. B.J 10, 12 (May/June 2003).

damage fees and public housing policies that deny emergency transfers to another apartment for crime victims.[5]

b. The proposed rule will make it more difficult for victims of domestic violence to bring disparate impact discrimination claim under the FHA.

The proposed rule raises the standards a plaintiff must meet to make out a prima facie case of disparate impact discrimination. Under the current framework, which recognizes that a plaintiff who is being discriminated against should not have the burden of predicting the defendant's rationales, a victim of domestic violence who has been harmed under a neutral housing policy can more easily bring a claim challenging the policy. As explained in the following sections, the burden-shifting framework that is currently in use has historically been used to successfully root out hidden discrimination, especially with regards to domestic violence victims who are often harmed by policies that seem sensible for the general population.

If these new rules go into effect, a victim of domestic violence who has been forced out of housing would have to meet an impossibly high burden and show there is a specific policy that is "arbitrary, artificial and unnecessary" to achieve a legitimate objective. Without the benefit of discovery, plaintiffs will have to anticipate the defendant's motivations. The victims will also have to show, amongst other new requirements, that the policy negatively affects members of a protected class, and not just that the plaintiff is an adversely impacted member of a protected class. This is problematic for these victims because it is inherently difficult to generalize about domestic violence victims. The additional burdens that a plaintiff must meet, and the new defenses available that shield landlords and towns from liability, will necessarily result in these cases being routinely dismissed.

The purpose of disparate impact analysis is to recognize that some legitimate purposes have a possibly unintended negative impact on specific groups. The proposed regulations would prevent people from achieving relief in such circumstances by prohibiting claims in situations where rules are not deemed "arbitrary, artificial and unnecessary." In essence, as long as whomever wishes to implement the rules or regulations has *some* purpose at all, a person experiencing a negative impact would be prohibited from seeking relief. The question becomes what is a "legitimate objective"? Would making more money for a landlord be considered a "legitimate objective"? This language is so permissive that almost any reason will suffice, meaning almost any claim can be disallowed.

The proposed rule also prohibits punitive and exemplary damages in administrative proceedings deciding these claims. While equitable remedies are important, this rule limits the damages available for victims of domestic violence who may have lost critical housing under policies that penalize them as a result of their victim status. Not only do victims of domestic violence deserve to be compensated for the serious harm these discriminatory policies can cause, but allowing them to receive punitive damages in cases where they are

[5] *See respectively*, Lewis v. N. End Vill., No. 07cv10757 (E.D. Mich. Feb. 21, 2007), Blackwell v. H.A. Housing LP, Civil Action No. 05-cv-01225-LTB-CBS (D. Colo. 2005)

warranted can greatly improve financial security and victim safety, as explained in the next section.

As a result of the new rules, landlords and municipalities will not be held accountable for policies that have disparate impact because those harmed will be less likely to bring cases and, because if plaintiffs are somehow able to be successful, the damages ordered will be limited. Building owners and municipalities will have less incentive to thoroughly consider the impact of their seemingly neutral policies on victims of domestic violence, leaving more women and their families facing homelessness.

II. Domestic Violence Victims' Need for Disparate Impact Claims Under the FHA

a. Safety Through Affordable Housing

Victims of domestic violence have a strong need for housing protections because housing is already one of the most significant issues facing victims. Domestic violence is one of the main causes of homelessness for women and children throughout the nation, and in New York City, 31% of families in shelters include a parent who is a survivor of domestic violence.[6] A survey by the Wilson Foundation found that 93% of mothers who were experiencing homelessness in Buffalo, Rochester, Syracuse and Albany surveyed had experienced trauma, 70% of which was from a physical assault by a family member or a perpetrator she knew.[7]

The threat of homelessness also adversely affects the safety options available for victims of domestic violence who are thinking of leaving their abusers. A recent study conducted by the Institute for Women's Policy Research found that 73% of the domestic violence survivors surveyed felt they had no choice but to remain with their abusers longer than they wanted to, or were forced to go back to their abusers after they left, due to economic factors.[8] If these victims are being discriminated against by landlord's policies and housing laws that lead to rental application denials and evictions, and are unable to challenge these policies under the FHA, it will be less possible for victims to achieve safety and independence from abusive partners.

Studies have also shown that if a woman is less financially secure, she is more likely to become a victim of domestic violence.[9] Housing insecurity can compound other issues of

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[6] 57% of all homeless women across the United States say that domestic violence was the immediate cause of their homelessness. National Network to End Domestic Violence: Domestic Violence, Housing, and Homelessness Fact Sheet; "*Out in the Cold: Housing Cuts Leave Domestic Violence Survivors With No Place to Go*," HousingLink Report, October 2012.

[7] Maureen A. Hayes, Ph.D Megan Zonneville Ellen Bassuk, M.D. Maureen A. Hayes, Ph.D Megan Zonneville Ellen Bassuk, M.D. "Service and Housing Interventions for Families in Transition: Final Report," American Institutes for Research (2010).

[8] Susan Green, "Intimate Partner Violence has Lasting Economic Repercussions," *Institute for Women's Policy Research,* last modified January 17, 2019, https://iwpr.org/intimate-partner-violence-has-lasting-economic-repercussions/.

[9] Kathryn Showalter, "Women's Employment and Domestic Violence: A Review of the Literature," Aggression and Violent Behavior, 31 (2016): 37.

domestic violence and is known to negatively affect job performance, leading to unemployment and more financial difficulties.[10]

If HUD implements the proposed rule, victims of domestic violence and their families may lose their housing and have no ability to bring a disparate impact claim. The costs of moving, which are likely to be much greater in New York than in other states, will only exacerbate the financial insecurity of victims. Households may be forced to move to different parts of the state after being penalized by policies with discriminatory impacts, which can result in cutting victims off from support networks and resources. Moreover, people who are forced to move rather than moving voluntarily are more likely to end up in poorer, less safe neighborhoods, making these families more likely to be victims of violence. The potential financial instability and isolation this proposed rule will cause will result in fewer victims of domestic violence leaving their abusers and will make more women vulnerable to abuse.

b. Discrimination Through Nuisance Ordinances

Nuisance ordinances, which victims will no longer be able to challenge if the rulemaking goes into effect, are increasingly prevalent in municipalities across the country, and result in penalties for tenants who call the police or for emergency assistance. While these laws do not all operate in the same way, many authorize municipalities to issue fines or revoke licenses of building owners if emergency assistance is called to the building a certain number of times.[11] In certain nuisance ordinances, building owners can also face criminal sanctions if they do not abate the nuisance. These nuisance ordinances harm domestic violence victims by either authorizing the municipality to penalize the victim directly if there are too many incidents involving police or by causing the landlord to avoid fines or closures by making the victim pay the fines, or evicting the tenant. Other nuisance laws consider things like disturbing the peace, excessive noise, disorderly conduct, or other issues that are often associated with domestic violence, without specifying that victims of the domestic violence should not be penalized.

Nuisance ordinances and nuisance provisions in leases have historically been used to remove victims of domestic violence from their homes. A 2012 study of every nuisance property citation issued under similar ordinances in Milwaukee over a two-year period found that domestic violence was the third most common citation reason, and 83% of those cases resulted in landlords either formally evicting the tenant, forcing the tenant out, or threatening the tenant with eviction if she called 911 again.[12]

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[10] A survey of New York domestic violence service providers conducted by OPDV in 2013 found that 100% of the service providers from the 28 counties surveyed stated that without affordable stable housing, all other obstacles are compounded for victims. "Financial Stability for the Workforce: Helping Employees Manage Their Finances," ideas42, http://www.ideas42.org/wp-content/uploads/2016/11/Project-Brief_Financial-Stability-for-the-Workforce.pdf.

[11] According to the Sargent Shriver National Center on Poverty Law, in 2013, there were more than 100 municipalities in just one state (Illinois) with nuisance or crime-free ordinances and that number was increasing. Emily Werth, SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW, The Cost of Being "Crime Free": Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances 1 (2013), http://povertylaw.org/sites/default/files/files/housing-justice/cost-of-being-crime-free.pdf.

[12] Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 Am. Sociological Rev. 117 (2012).

While nuisance ordinances, and the resulting provisions in leases or housing policy, do not on their faces discriminate on the basis of sex, there is a clear disparate impact on women. As noted above, women are more likely to be victims of domestic violence, and among home renters, women are 7.4 times more likely than men to be victims of crime. Moreover, domestic violence-related calls are often the most frequent calls that local law enforcement agencies receive, thus the penalties for needing emergency assistance undoubtedly fall disproportionately on women.[13]

In 2016, HUD issued guidance to address this very issue.[14] According to the guidance issued, "a local government's policies and practices to address nuisances, including enactment or enforcement of a nuisance or crime-free housing ordinance, violate the Fair Housing Act when they have an unjustified discriminatory effect, even when the local government had no intent to discriminate."[15] The guidance goes on to explain how these cases should be evaluated under the current disparate impact framework that this proposed rulemaking would change, and concludes by noting that municipalities should follow this guidance carefully to avoid discriminating and "as a strategy to affirmatively further fair housing."[16]

Victims of domestic violence have seen success filing disparate impact complaints to challenge nuisance ordinances that have resulted in the landlord evicting, or threatening to evict, the victim. In *Briggs v. Borough of Norristown, et. al,* a woman was threatened with eviction after calling the police three times to report disorderly conduct. When her ex-partner returned to attack her several times after, including once with a brick, she did not call the police. After another assault, her neighbors called for emergency assistance and, after being airlifted to the hospital, the city told her she would lose her housing. She was able to file a complaint based on several theories of law, including disparate impact sex discrimination under the FHA. HUD itself initiated a separate FHA complaint against the town, and the case settled in her favor with an agreement than included repealing the nuisance ordinance and promising not to enact similar legislation.[17]

Advocacy groups like the National Housing Law Project and the American Civil Liberties Union point to the FHA as one of the few laws that provide protections to victims who are being harmed nuisance laws.[18] If the proposed rulemaking goes into effect, this option will not be available to these victims as the burdens will be too difficult for them to meet and survivors will not be able to bring cases like *Briggs*. Without the ability to use the current disparate impact framework that has a more feasible standard for meeting a prima facie case of

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[13] Callie Marie Rennison & Sarah Welchans, U.S. Dep't of Justice, Intimate Partner Violence (2000); Andrew R. Klein, NATIONAL INST. OF JUSTICE, U.S. DEP'T. OF JUSTICE, Practical Implications of Current Domestic Violence Research 1 (2009), https://www.ncjrs.gov/pdffiles1/nij/225722.pdf.

[14] U.S. Department of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services (September 13, 2016)

[15] *Id.*

[16] *Id.*

[17] Briggs v. Borough of Norristown et al., No. 2013 C 2191 (E.D. Pa. Apr. 24, 2013).

[18] According to the National Alliance for Safe Housing and the National Housing Law Project, as of 2017, only 19 state and local laws establish a right to call 911 for tenants. New York's new legislation signed in 2019 increases that number to 20. "Community-Based Advocates Toolkit: How to Make Sure Your Clients Have Safe Housing," National Alliance for Safe Housing and National Housing Law Project, (2019).

discrimination, victims of domestic violence will be faced with the choice between calling for emergency assistance and losing their housing. New Yorkers and residents of a few other states may be able to rely on statutes prohibiting the use of nuisance ordinances, but in a vast majority of states, victims only have the federal government for protection.[19]

The inability to bring these claims under the FHA makes it significantly more difficult to challenge these ordinances. These laws will remain in effect and women will be deterred from reporting domestic violence incidents and getting help. Moreover, municipalities and property owners will undoubtedly have few incentives to follow the HUD guidance to ensure their provisions are not discriminating if these changes are implemented.

c. Vulnerability to Tenant Screenings

Tenant screenings are common tools that landlords use, and despite the clear disparate impact on many protected groups, these processes would be invulnerable to legal challenges because of proposed rule's defenses that shield landlords from liability.

In an abusive relationship, financial sabotage, exploitation and control is one of the most powerful tactics for either preventing a victim's ability to leave or diminishing their ability to stay safe after leaving. Victims who suffer financial abuse can be coerced into acquiring debt on behalf of their partners and have their identity wrongfully and illegally used by their abusive partner resulting in long-term credit damage and low credit scores. It is estimated that between 78 and 99 percent of domestic violence survivors experienced economic abuse.[20] In a recent survey of New York City domestic violence shelters, 86% of staff members who responded said that those victims in their shelter "often" or "very often" have difficulties finding housing due to their credit histories.[21] As a result, victims of domestic violence are disproportionately harmed by credit checks that may be required for every tenant under that building's policy.

Landlords have long used tenant screening companies, credit reports, and criminal background checks to determine to whom they will lease apartments, and sometimes, even to decide which potential tenants may apply for housing. It is a widely common practice among tenant screening companies to use software platforms with algorithms designed to pull information from various databases (like public court records) and copy/paste the information into a tenant screening report. As a result, a large majority of tenant screening services do not use FCRA (Fair Credit Reporting Act) Certified Screeners, therefore are at risk of using data in a report that is not FCRA compliant. The effects are two-fold. Screening reports many times contain incomplete, inaccurate or misleading information, and can include negative information that is deemed unreportable, and thus noncompliant with the time limitation rules of the FCRA. Under the proposed rule, the use of these software algorithms would make them in compliance with industry standards even though they illegally contain

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[19] *Id.;* Sandra S. Park, "Stopping Evictions Caused by Nuisance Ordinances," American Civil Liberties Union, in "Protect Tenants, Prevent Homelessness," National Law Center on Homelessness and Poverty" (2018).
[20] Adrienne E. Adams et al., Development of the Scale of Economic Abuse, 14 Violence Against Women 563, 580 (2008)
[21] "Denied: How Economic Abuse Perpetuates Homelessness for Economic Survivors," CAMBA Legal Services, Inc. Fordham Law School Feerick Center for Social Justice, The Legal Aid Society (2018).

negative and outdated information on a report that can lead a survivor to be illegally denied housing.

In the tenant screening report, landlords regard eviction history as some of the most telling information about their applicant. When a tenant is threatened with an eviction the record will often not reflect if the tenant won in court, or distinguish if the tenant was evicted due to a foreclosure at no fault of their own, or even if they were never actually evicted at all. As a result, many reports are often inaccurate, incomplete, and/or misleading. For example, many property managers will begin the eviction process when the rent is past due. When the tenant gets the notification and pays the rent - including late fees, the property manager drops the filing. While there is no eviction judgement against the tenant there is an eviction filing record with the courts under the tenant's name. Additionally, if a tenant is awarded a 90% rent abatement because of deplorable conditions in the home, the report will show the disposition of that case simply as a "judgment" against the tenant for the remaining 10% of the rent. That makes it appear as though the landlord won the case when, in fact, the tenant won the case.[22] These instances of misleading, inaccurate, and/or incomplete records will systematically result in the denial of housing, effectively chilling a tenant's rights and access to justice. Victims are routinely denied housing by screening reports they never get to see.

The decision to use a credit check from a certain credit reporting agency is likely to be a policy that applies to every application, and is neutral on its face, but this procedure clearly has a disparate impact on victims of domestic violence and other protected classes. There are numerous problems with running credit checks that include inaccurate reports from credit report agencies that include fraudulent information, and a recent study found that victims of domestic violence have more incorrect information on these reports than the general population.[23] Victims suffer from financial abuse that can result in their identity being stolen by abusers for financial exploitation, and can be coerced into accumulating debt for the abusers' benefit. The wide use of credit information for tenancy and insurance determinations disproportionally marginalizes victims and makes housing and insurance out of reach.

However, under the proposed rule, if victims of domestic violence are somehow able to meet the high demands of establishing a prima facie case of disparate impact discrimination, landlords who use credit report agencies will be able to use one of the new defenses available under the proposed rulemaking based on the use of risk models created by a third party to avoid liability for this unfair policy. The knowledge that these defenses can easily shield them from liability for these policies will result in landlords not being held accountable for using credit reporting agencies known for significant inaccuracies. Landlords will not be motivated to carefully select which third party they are using for these reports.

The result of this proposed rule-making will be an increasing number of victims of domestic violence struggling to secure housing, exacerbating the already strained shelter system in New York and other states. The inability to find a safe home also negatively affects the safety of victims as they think about leaving their abusers or remaining apart. Even HUD acknowledges the seriousness of this problem, by explicitly recommending that public housing authorities should investigate whether domestic violence was a factor if an applicant

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[22] New York State Bar Association, " LEGALEase: The Use of Tenant Screening Reports and Tenant Blacklists," (2018 Pamphlet) Product Code: A41340 | 2M 5/18; retrieved 9/18/2019 from https://www.nysba.org/TenantLE/

[23] *Id.*

has a poor rental history. Under the new rules, the use of these tools by most private landlords will go unchecked.[24]

d. Zero Tolerance Policies Deter Victims from Reporting

"Zero tolerance" policies often state that an entire household can be evicted if one of its members commits a criminal act. Because women are the vast majority of domestic violence victims, a policy like this that is neutral on its face will have a disproportionate impact on the basis of sex. Similar to nuisance ordinances, these policies deter victims from reporting acts of violence for fear that if they do so, their entire family will end up without housing. Ultimately, these policies punish victims for the acts of their offenders.

According to the National Housing Law Project, "disparate impact theory has *most commonly* been used to challenge policies or practices that result in the eviction of an entire household when a violent act is committed at the unit, regardless of who perpetrated the violence."[25] For example, in *Alvera v. C.B.M. Group Inc.,* a woman filed a sex discrimination complaint with HUD after she was evicted from her home following an incident where her husband assaulted her in the apartment. HUD investigated the complaint and issued findings that because women are more likely than men to be victims of domestic violence, the policy mandating evicting the victim as well as the offender after a violence incident had a disparate impact on the basis of sex.[26]

If this rule goes into effect, victims like Ms. Alvera will have little ability to challenge an eviction based on a zero-tolerance policy due to the heightened burdens of proof that will be required from the plaintiffs. Policies like these, if left unchallenged, are especially harmful to domestic violence victims because housing is such a critical need for victims. These policies can have detrimental effects on the safety and well-being of victims and their family members, and this proposed rule will result in these rules remaining in place despite their dangerous and discriminatory impacts.

III. Conclusion

The New York State Office for the Prevention of Domestic Violence respectfully opposes the proposed rules, and thanks you for the opportunity to comment on the proposed amendments to HUD's Implementation of the Fair Housing Act's Disparate Impact Standard.

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[24] U.S. Department of Housing and Urban Development, Public Housing Occupancy Guidebook, 218 (2003).
[25] Domestic Violence and Housing: A Manual and Toolkit for California Advocates," 44, National Housing Law Project, emphasis added.
[26] Alvera v. C.B.M. Group Inc., No. HUDALJ 10-99-0538-8 (HUD Apr. 1, 2001). *See also,* Warren v. Ypsilante Housing Commission, Case No. 4:02-cv-40034 (E.D. Mich. 2003).

NEW YORK STATE | Office of Children and Family Services

ANDREW M. CUOMO
Governor

SHEILA J. POOLE
Commissioner

October 18, 2019

Office of General Counsel
Rules Docket Clerk
U.S. Department of Housing and Urban Development
451 7th Street SW
Room 10276
Washington, DC 20410-0001

Re: Docket No. FR 6111-P-02, RIN 2529-AA98
HUD's Implementation of the Fair Housing Act's Disparate Impact Statement

To Whom It May Concern:

The New York State Office of Children and Family Services (OCFS) submits the following comments in response to the notice in the Federal Register soliciting comments on the Proposed Rule regarding "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard."

Thank you for the opportunity to comment.

Sincerely,

Sheila J. Poole
Commissioner

New York State Office of Children and Family Services
Comments in Response to the Department of Housing and Urban Development's Notice of Proposed Rule

I. Background

The New York State (NYS) Office of Children and Family Services (OCFS) respectfully submits these comments regarding the Notice of Proposed Rulemaking titled, "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard" that was published in the Federal Register, (84 FR 42854), on August 19, 2019 ("the Proposed Rule"). OCFS submits these comments in opposition to the Proposed Rule.

OCFS is the state agency that oversees and regulates the child welfare, juvenile justice, child day care, domestic violence services, and adult protective services systems in New York. These systems are comprised of not-for-profit voluntary agencies authorized by OCFS, local departments of social services (LDSS), child day care programs and associated service providers, runaway and homeless youth programs, vulnerable adults in need of assistance, and the families residing in our state who utilize child day care services, child welfare services or who come forward to provide care for youth no longer able to reside with their parents in their family home.

In our role providing oversight of these extensive systems, OCFS has serious concerns that the Proposed Rule's new standard for bringing a disparate impact claim under the Fair Housing Act will increase the risk of discrimination against persons of color and families with children involved in the child welfare system.

II. Impact on Child Welfare System

By shifting the burden of proof and increasing the pleading requirements to the victims of discrimination, the Proposed Rule has the detrimental effect of likely increasing housing instability to vulnerable families and children. Increased housing instability will adversely impact the ability of states and localities to meet their federal child welfare requirements, and the best interests of the children and families they serve. Of particular risk are children in foster care, foster parents and youth aging out of foster care.

National and state data indicates that children and families of color are disproportionately represented in all stages of the child welfare system.[1] In New York, as of March 2019, there were 16,101 children in foster care.[2] Of those, more than 60% were children of color. The vast majority of foster children (more than 80%) are cared

[1] Child Welfare Information Gateway. Children's Bureau/ACYF/ACF/HHS, Racial Disproportionality and Disparity in Child Welfare, (November 2016), available at https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf
[2] OCFS 2019 – Q1 – Statewide Quarterly Report available at https://ocfs.ny.gov/main/reports/quarterly_youth/2019-Q1-Statewide-Quarterly-Report.pdf

for in familial homes otherwise known as foster homes. A subset of foster homes includes relative foster homes and 27% of New York's foster care children are cared for in relative foster homes. Since the majority of children in foster care are served in foster homes, the availability of safe and suitable housing is vital to the success of New York's child welfare system.

Related to these facts is the issue of compliance with federal foster care standards set forth in Title IV-E of the Social Security Act. In order for a state to be eligible to receive federal Title IV-E funding, a state must comply with various significant federal standards directly linked to the issue of housing. They include that children must be placed in the least restrictive (most family like) and most appropriate setting available and in close proximity to the parent's home consistent with the best interests and special needs of the child (42 U.S.C. 675(5)(A)). In regard to foster care placements, states must give preference of placement to relatives over non-relatives (42 U.S.C. 671(a)(19)). States must make reasonable efforts to keep siblings together in foster care (42 U.S.C. 671(a)(31)). Also, when it is in the best interests of a foster child, the child is to remain in the same school the child attended at the time of removal for his or her parent (42 U.S.C. 675(1)(G)).

These Title IV-E requirements that relate to the appropriateness of a child's living arrangements presume the availability of safe and suitable housing. The inability to secure such housing may result in the inability of child welfare agencies to place children with otherwise suitable relatives, the separation of siblings, placements of children distances away from their parents impacting visitation and permanency, the inability of a child to remain in his or her prior school and even the potential of children being placed in an otherwise unnecessary higher level of placement. Moreover, the Family First Prevention Services Act (FFPSA), enacted in February 2018, requires states to prioritize family-based foster homes, including kinship homes, over residential, congregate care placements by limiting federal reimbursement for certain residential, congregate care placements. Reducing reliance on residential, congregate care placements presupposes the availability of safe and suitable foster homes, which the Proposed Rule will likely have the effect of diminishing and therefore, contravening the directives of FFPSA.

Likewise, the availability of safe, suitable housing is a significant issue in regard to youth who age out of foster care either at age 18 or 21. Studies have shown that these youth are at risk of becoming homeless, leading HUD to declare that youth who age out of foster care "may be the single age group most at risk of homelessness."[3] Further, housing for youth aging out of foster care is the very subject addressed in HUD's Foster Youth to Independence Initiative issued in July of this year. That initiative focuses on the serious issue of former foster youth becoming homeless. The potential impact of the Proposed Rule would be counterproductive to the hoped gains of this initiative because instead of enhancing protections and enforcing anti-discrimination laws

[3] HUD Office of Policy Development and Research, Housing for Youth Aging Out of Foster Care, available at https://www.huduser.gov/portal/youth_foster_care.html

designed to protect vulnerable populations like youth aging out of foster care, HUD would instead be adding barriers.

On a daily basis, child welfare agencies must place abused, neglected, destitute, persons in need of supervision, juvenile delinquents and other categories of children in safe, suitable foster care placements. The Proposed Rule will make that task more difficult to the detriment of the families and children they serve.

III. Conclusion

The Proposed Rule will have a determinantal impact on vulnerable children and families, particularly for those involved in the child welfare system. It further poses additional, undue burdens on states and localities to meet federal child welfare requirements. For these reasons, OCFS respectfully opposes the Proposed Rule.

NEW YORK STATE OF OPPORTUNITY. | Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

October 15, 2019

Office of the General Counsel
Rules Docket Clerk
U.S. Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, D.C. 20410-0001

Re: HUD Docket No. FR–6111–P–02

To Whom It May Concern:

The New York State Department of Health (Department) submits the following comments in response to the Notice of Proposed Rulemaking in the Federal Register (84 Fed. Reg. 42854) titled "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard." The Department supervises the administration of a wide range of programs that provide services and support to low-income families and individuals. The mission of the Department is to protect, improve and promote the health, productivity and well-being of all New Yorkers.

Thank you for the opportunity to comment.

Sincerely,

Howard A. Zucker, M.D., J.D.
Commissioner of Health

NEW YORK STATE OF OPPORTUNITY. Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

New York State Department of Health
Comments in Response to the Department of Housing and Urban Development's Proposed Rule

I. EXECUTIVE SUMMARY

The New York State Department of Health (NYSDOH) strongly opposes the proposed regulatory changes outlined in the U.S. Department of Housing and Urban Development's (HUD) Notice of Proposed Rulemaking titled, "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard" (hereinafter, Proposed Rule).[1]

The Proposed Rule would, *inter alia*, create new requirements for plaintiffs to support a disparate-impact claim of housing discrimination under the Fair Housing Act (42 USC §§ 3601-3631). Specifically, the proposed rule would require plaintiffs to plead facts sufficient to support five elements: (1) the policy is "arbitrary, artificial, and unnecessary" to achieve a valid interest or legitimate objective; (2) there is a "robust causal link" between the challenged policy or practice and the disparate impact on members of a protected class; (3) the policy negatively affects members of a protected class, i.e., based on race, color, religion, sex, familial status, or national origin (*see* 5 42 USC § 3604[a]); (4) the disparate impact is "significant"; and (5) the "complaining party's alleged injury" is directly caused by the policy or practice in question.

The United States Supreme Court, in *Texas Department of Housing and Community Affairs v Inclusive Communities Project* (83 US 4555, 135 S Ct 2507 [2015]), recognized the important contributions of disparate impact liability in adjudicating Fair Housing Act discrimination cases. Such contributions included challenges to "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification" (135 S Ct at 2522, citing *Huntington Branch NAACP v Town of Huntington*, 844 F2d 926 [2d Cir 1988]). Disparate impact claims have also challenged subsidized housing waitlist preferences (*see e.g.*, *Langlois v Abington Hous. Auth.*, 207 F3d 43, 49 [1st Cir 2000]), and redlining and predatory lending (*see e.g.*, *Ramirez v GreenPoint Mortg. Funding Inc.*, 633 F Supp 2d 922 [ND Cal 2008]).

Fair housing advocates warn that by setting a higher bar for plaintiffs to prove disparate impact, the Proposed Rule will "dismantle an important enforcement tool for combatting discrimination, further restricting access to housing for people of color, seniors, people with disabilities, families

[1] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42854 (proposed August 19, 2019) (to be codified at 24 CFR Part 100).

with children, LGBTQ people, victims of domestic violence, and others."[2] By making it harder for some individuals to access housing, NYSDOH is deeply concerned that the Proposed Rule will increase homelessness and housing instability[3], particularly for already vulnerable populations such as children, those living with HIV/AIDS, and communities of color.[4]

Housing is one of the best-researched social determinants of health. Housing interventions for low-income people are proven to improve health outcomes and decrease health care costs.[5] Research further demonstrates that children and families who experience housing instability, especially homelessness, are at an increased risk of suffering detrimental physical and mental health effects.[6] The more frequent the housing instability, the greater the health risks posed to children and their caregivers.[7] By threatening the safeguards in place to ensure that all persons—regardless of race, color, religion, sex, familial status, or national origin—have access to stable housing, the Proposed Rule will have widespread health implications.

For these reasons, discussed in further detail below, NYSDOH urges HUD not to adopt the Proposed Rule.

II. HEALTH IMPACTS OF THE PROPOSED RULE

1. Impacts on Children

a. Effects of Housing Instability on Children's Health and Development

NYSDOH is alarmed that families who are unable to secure safe, affordable housing due to discriminatory policies or practices will be unable to effectively challenge those practices under the Proposed Rule. As a result, the Proposed Rule may lead many families to live in substandard, unstable housing conditions. Housing instability can be linked to health complications such as low birth rates, respiratory infections, hospitalizations, asthma, injuries

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[2] National Low Income Housing Coalition, "Statement from NLIHC President & CEO Diane Yentel on HUD's Implementation of the Disparate-Impact Rule" (August 19, 2019), available at https://nlihc.org/news/statement-nlihc-president-ceo-diane-yentel-huds-implementation-disparate-impact-rule. *See also* National Fair Housing Alliance, "NFHA and Other Civil Rights Leaders Fight Trump's Attempt to Gut Core Civil Rights Protection" (August 16, 2019), available at https://nationalfairhousing.org/2019/08/16/nfha-and-other-civil-rights-leaders-fight-trumps-attempt-to-gut-core-civil-rights-protection/.

[3] The term "housing instability" or "unstable housing" includes families who have experienced at least one of the following: (1) been behind on rent, (2) moved more than twice in the past year, or (3) experienced homelessness. *See* Megan Sandel *et al*., Unstable Housing and Caregiver and Child Health in Renter Families, American Academy of Pediatrics (January 2018), https://pediatrics.aappublications.org/content/141/2/e20172199.

[4] *See generally* New York State Department of Health, New York State 2017 Health Equity Reports, https://www.health.ny.gov/statistics/community/minority/mcd_reports.htm. N.Y. Public Health Law § 241 establishes an Office of Minority Health which, together with the Minority Health Council, advocates for NYSDOH on minority health matters, including publication of such Health Equity Reports.

[5] *See e.g.* The National Housing Conference, The Center for Housing Policy. The Impacts of Affordable Housing on Health: A Research Summary. (2015). https://www.rupco.org/wp-content/uploads/pdfs/The-Impacts-of-Affordable-Housing-on-Health-CenterforHousingPolicy-Maqbool.etal.pdf

[6] Sandel, *supra*, note 3

[7] Sandel, *supra*, note 3

and mental health.[8] When compared to their peers with more stable housing, children experiencing housing instability have higher rates of suicide and poorer mental health as a whole.[9]

Poor housing conditions, including living in crowded housing, can negatively impact children's academic achievement, behavior, and health.[10] For example, the lack of physical space in a home can create stress in the home environment and impair children's academic performance due to lack of space for studying and sleeping.[11] A crowded home can also cause behavioral issues in school, as the lack of productive sleep can negatively affect a child's mood, behavior, and concentration.[12] In addition, children in crowded homes are more likely to become sick, which can interfere with their daily routine and interrupt their schooling.[13]

Children experiencing housing instability can also be at a higher risk of developing childhood obesity.[14] The stress caused by their housing situation can disrupt a child's stress response system, causing a biological imbalance that can increase a child's risk of becoming obese.[15] Children experiencing housing instability may also consume more high-caloric fast food meals, as parents' housing-relating stress can make them less likely to cook for their children.[16] Parents may also be forced to cut their food budget due to high housing costs, relying more heavily on cheap, highly-caloric food.[17] Such financial strain may disproportionately impact communities of color, which often have lower median incomes than majority white areas.[18]

b. Effects of Homelessness on Childhood Health and Development

Housing instability can also lead to periods of homelessness. Homelessness has an adverse impact on all aspects of a child's life, inhibiting a child's physical health and emotional, cognitive, social, and behavioral development.[19] Homeless children are more likely to experience physical and behavioral health problems with less access to medical, dental, and

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[8] Bottino, C., et al. *The Relationship Between Housing Instability and Poor Diet Quality Among Urban Families.* April 2019. Academic Pediatrics.
[9] Crume, H., et al. *Cumulative Adversity Profiles Among Youth Experiencing Housing and Parental Care Instability.* February 2019. Academic Pediatrics.
[10] Solari, C., Mare, R. *Housing Crowding Effects on Children's Wellbeing.* October 2015. Academic Pediatrics.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Nobari, T., et al. *Severe Housing-Cost Burden and Obesity Among Preschool-Aged Low-Income Children in Los Angeles County.* Preventive Medicine Reports. 2019.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *See e.g.* New York State Department of Health, City of Newburgh Health Equity Report (Feb. 2017), at 7, https://www.health.ny.gov/statistics/community/minority/docs/mcd_reports/orange_county_city_of_newburgh.pdf
[19] Sandel, M., et al. "Compounding Stress: The Timing and Duration Effects of Homelessness on Children's Health" (June 2015). https://childrenshealthwatch.org/compounding-stress-the-timing-and-duration-effects-of-homelessness-on-childrens-health-2/.

mental health care.[20] Homeless children often have significant psychosocial development issues, and their education is frequently interrupted.[21]

Developmental delays in homeless children start to present at 18 months of age and impact how a toddler can handle stress. Most children who are homeless under the age of five have at least one developmental delay, and half of all children who are homeless have two or more developmental delays.[22] Additionally, studies demonstrate that homeless children experience toxic stress exposure, which undermines brain development and long-term functioning.[23]

These health effects are especially severe for very young children. Children who first experience homelessness as a toddler are at greater risk for poor achievement relative to students who have their first homeless experience later, during preschool or elementary school. Unruly behavior and withdrawal are often the initial response of children to homelessness, followed later by learning disabilities, developmental delays, and mental health issues.[24]

Cumulative risk scores further demonstrate that homeless children are more likely to experience poor health well into adulthood. A cumulative risk score represents a sum of the number of established risk factors present in a child's life. The higher a child's cumulative risk score, the greater the risk of developing adult risk factors for chronic diseases.[25] Numerous studies have found that adverse childhood experiences, including household instability and homelessness, are associated with adult health consequences. Adult health consequences include physical and psychological conditions, risk behaviors, developmental disruption, and increased healthcare utilization.[26]

Additionally, a recent study found a close relationship between exposure to abuse or household dysfunction during childhood and multiple risk factors for several of the leading causes of death in adults, including ischemic heart disease, cancer, chronic lung disease, skeletal fractures, and liver disease.[27] Studies have further shown that children who experience homelessness have the same chronic health outcomes as a child who experienced abuse or neglect.[28] Together, these findings demonstrate the profound long-term health consequences that homeless children face.

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[20] Dwomoh, I., Dinolfo, E.A. *Effects of Homelessness on Children*. Pediatrics in Review 2018; 39; pp. 530-532

[21] Chilton LA, Handal GA, Paz-Soldan GJ, et al. Providing care for children and adolescents facing homelessness and housing insecurity. Pediatrics 2013; 131(6). pp. 1206-1210.

[22] Family Housing Fund. *Children Pay the Price for Homelessness.* (2014). https://www.fhfund.org/fact-sheets/. *See also* Center for Advanced Studies in Child Welfare. *Impact of Housing and Homelessness on Child Well-Being*. (2017). https://cascw.umn.edu/wp-content/uploads/2017/04/CW360_Spring2017_WEB508.pdf.

[23] Shonkoff, Jack, et al. *The Lifelong Effects of Early Childhood Adversity and Toxic Stress.* (2012). American Academy of Pediatrics, 129(1), e232-e246.

[24] HCH Clinicians' Network. *Protecting the Mental Health of Homeless Children and Youth* (February 2000). https://www.nhchc.org/wp-content/uploads/2012/02/hh.02_00.pdf

[25] Cutuli J., et al. *Promoting Resilience for Children Who Experience Family Homelessness: Opportunities to Encourage Developmental Competence.* Cityscape: A J Policy Development and Research 2014; 16(1).

[26] Karen A. Kalmakis ka, Chandler GE. *Health consequences of adverse childhood experiences: A systematic review.* J Am Assn Nurse Practitioners. (2015). pp. 457-465.

[27] Felitti V., et al. *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*. Am J Prev Med 2019; 56(6): pp. 774-786. Available online at https://www.ajpmonline.org/article/S0749-3797(19)30143-6/fulltext

[28] Firesteel. "Children and Adversity: Childhood Homelessness Can Cast a Long Shadow." *Firesteel*, 31 July 2014, https://firesteelwa.org/2013/04/children-and-adversity-childhood-homelessness-can-cast-a-long-shadow/

2. *Impacts on Those Living with HIV/AIDS, Hepatitis C, and STIs*

In New York, the NYSDOH AIDS Institute is the primary state agency responsible for coordinating state programs, services, and activities relating to HIV/AIDS, sexually transmitted infections (STIs), and hepatitis C. Studies show strong correlations between improved housing status and reduced HIV risk, improved access to medical care, and better health outcomes.[29] As noted by the U.S. Department of Health & Human Services via HIV.gov, "[s]table housing is closely linked to successful HIV outcomes. With safe, decent, and affordable housing, people with HIV are better able to access medical care and supportive services, get on HIV treatment, take their HIV medication consistently, and see their health care provider regularly. In short: the more stable your living situation, the better you do in care."[30]

Threatening the ability of individuals who are living with or at increased risk of HIV/AIDS, hepatitis C, or STIs to access safe, stable housing can lead to poor health outcomes, increase disease transmission, and undermine New York State's gains in combating these issues. For instance, if the Proposed Rule is implemented, individuals may be forced to move more frequently if they cannot access affordable housing due to discriminatory housing policies and practices, which will be harder to challenge. In search of alternative housing, individuals living with HIV/AIDS could be forced to relocate out of their current NYSDOH-designated assistance area (the "Ryan White Region"), thereby severing crucial ties with important support systems, such as family and friends, as well as community providers and local assistance agencies, including the local Department of Social Services, pharmacies, and community assistance groups. At best, individuals living with HIV/AIDS may experience gaps in supportive services as they work to establish new connections. At worst, some individuals may never forge ties within their new community, which can compromise the individual's viral suppression, increase chances of HIV transmission, and lead to feelings of isolation.[31]

Relocation to a different Ryan White Region can also have serious consequences to individuals living with HIV/AIDS if the individual is forced to move far from his or her care providers and pharmacies. Individuals generally see their HIV care provider every six months if their status is stable. However, many see their HIV care providers more frequently, particularly if the individual has co-morbid conditions that require frequent doctor and specialist visits. Many individuals must also visit mental health and substance abuse providers. In all, individuals living with HIV/AIDS may need to travel multiple times a week to visit their care providers. As such, reliable transportation and proximity to providers are essential to ensuring that individuals living with HIV/AIDS adhere to their treatment regimen and can physically withstand the commute. If individuals are forced to relocate to a different Ryan White Region or move outside of an urban

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[29] The National Housing Conference, The Center for Housing Policy. The Impacts of Affordable Housing on Health: A Research Summary. (2015).

[30] U.S. Department of Health & Human Services, "Why Do People with HIV Need Stable Housing?", https://www.hiv.gov/hiv-basics/living-well-with-hiv/taking-care-of-yourself/housing-and-health (last accessed Sept. 30, 2019).

[31] *See* National Center for Innovation in HIV Care, "Housing as a Determinant of HIV Health Outcomes," https://targethiv.org/sites/default/files/supporting-files/Housing%20and%20HIV%20Health%20Outcomes%20Final.pdf (last accessed Sept. 30, 2019) (authors conducted a systematic review of research from 1996-2014 and found that homelessness or unstable/inadequate housing is associated with poor HIV clinical outcomes, including failure to achieve viral suppression).

area, they could face longer commute times, which they may not be healthy enough to endure, or may be unable to access steady, reliable transportation to appointments. These issues—compounded with the loss of community support discussed above—can disrupt an individual's adherence to treatment, impairing viral suppression and increasing the risk of transmission.

Additionally, individuals living with HIV/AIDS, hepatitis C, or STIs who are unable to access stable housing due to the Proposed Rule may be forced to return to unsafe living conditions, such as cohabiting with an abusive partner or persons with substance abuse issues. Dangerous housing conditions such as these can lead to increased intimate partner violence, relapse, and increased transmissions.[32]

The federal government has repeatedly recognized the need to end the HIV/AIDS, hepatitis C, and STI epidemics. As part of the 2019 State of the Union address, President Trump announced a 10-year plan to end the HIV epidemic in the United States.[33] The Centers for Disease Control and Prevention (CDC) has noted the urgent need to diagnose and cure more Americans living with hepatitis C and to address rising infections due to the opioid crisis.[34] The CDC has further noted the troubling rise in STIs and has stated that turning back the rise in STIs will require renewed commitment from all players.[35] If the federal government is serious about ending these epidemics, it must withdraw the Proposed Rule.

3. Impeded Access to Medicaid and WIC

Recipients of Medicaid and some public assistance benefits must provide New York State with an address to receive important notices, and, if applicable, benefit cards. NYSDOH administers both Medicaid and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), both of which require applicants to provide their address.

Medicaid is an important source of primary health insurance coverage and supplementary coverage for low-income residents and the most vulnerable New Yorkers. Eligible populations include children, pregnant women, single individuals, families, and individuals certified blind or disabled. In addition, certain persons with medical bills may be eligible for Medicaid if paying such bills allows them to spend down their income and resources to meet required Medicaid income levels. Medicaid enrollees do not pay premiums and have little to no out-of-pocket costs for many services. Reducing the uninsured rate through low-income health programs like Medicaid has widespread positive public health effects. For example, a greater number of insured individuals can lead to more immunizations, which reduces the spread of communicable diseases.

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[32] *See e.g.* Centers for Disease Control and Prevention, "Intersection of Intimate Partner Violence and HIV in Women," https://www.cdc.gov/violenceprevention/pdf/ipv/13_243567_Green_AAG-a.pdf (last accessed Sept. 30, 2019).
[33] U.S. Health Resources and Service Administration. *Ending the HIV Epidemic: A Plan for America.* https://www.hrsa.gov/ending-hiv-epidemic
[34] Hofmeister, M., et al. *Hepatitis C Prevalence Estimates 2013-2016*. (2018). https://doi.org/10.1002/hep.30297
[35] Centers for Disease Control and Prevention. "STDs at record high, indicating urgent need for prevention." (2017). https://www.cdc.gov/media/releases/2017/p0926-std-prevention.html

Access to Medicaid is especially important for those individuals who would become homeless if this rule is implemented. Homeless people are three to six times more likely to become ill than housed people and three to four times more likely to die than the general population.[36] Homelessness hinders good nutrition and personal hygiene, and conditions that require regular treatment, such as tuberculosis and HIV/AIDS, are often inadequately treated.[37] Diseases that are common among the homeless population include chronic diseases such as heart disease, cancer, liver disease, kidney disease, and HIV/AIDS. People who live on the streets or spend most of their time outside are also at high risk for frostbite, immersion foot, and hypothermia.[38]

Despite these staggering health risks, many homeless people never receive medical care. Although there are several barriers to healthcare among the homeless, the most common obstacle is cost.[39] Without access to Medicaid, many homeless people will utilize only hospital emergency departments as their primary source of health care. Not only are emergency departments not the most effective form of care, but the costs of treatment are shifted to the insured, hospitals, and state and local governments.[40]

Losing WIC benefits will also have serious health consequences. The WIC Program provides breastfeeding support, nutrition counseling, health education, health care referrals, referrals to other services, and nutritious foods to approximately 375,000 women, infants and children each month through 90 local providers (hospitals, local health departments, and community-based organizations) at nearly 400 service sites. The fundamental purpose of the program is to ensure the health and well-being of income-eligible families with young children.

WIC has consistently been shown to support healthy pregnancies, positive birth outcomes, and child development since it was established in the 1970s. WIC's targeted nutrition intervention and breastfeeding support during the prenatal, perinatal, and postpartum periods have significant short- and long-term health gains for both the mother and child.

If the Proposed Rule is implemented, individuals who experience housing instability, including homelessness, as a result will have a harder time accessing these crucial Medicaid and WIC benefits given their inability to provide a stable address. As a result, individuals could forego access to public assistance for which they are otherwise eligible, undermining their own health and economic security, as well as the health of all New Yorkers. Housing instability can even harm those who are still able to access WIC benefits, as these individuals may be unable to obtain consistent access to storage, refrigeration, and clean water, making it difficult to safely utilize their food.

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[36] National Coalition for the Homeless. "Health Care and Homelessness." (2009). https://www.nationalhomeless.org/factsheets/health.html
[37] *Id*.
[38] *Id*.
[39] *Id*. (citing Whitbeck, L. *Mental health and Emerging Adulthood among Homeless Young People*. [2009]).
[40] Coughlin, Teresa A. "Uncompensated Care for the Uninsured in 2013: A Detailed Examination." (2014). https://www.kff.org/uninsured/report/uncompensated-care-for-the-uninsured-in-2013-a-detailed-examination/

III. CONCLUSION AND RECOMMENDATIONS

The Proposed Rule would have devastating short- and long-term consequences on the health and well-being of New Yorkers. The most at risk of adverse impacts are vulnerable populations, including children, low-income New Yorkers, and individuals living with HIV/AIDS. The Proposed Rule may also have a profound impact on public health, including a rise in uninsured New Yorkers, an increase in children with developmental delays, and the spread of HIV/AIDS, STIs, and hepatitis C. For these reasons, NYSDOH strongly opposes HUD's proposal.

NEW YORK STATE OF OPPORTUNITY. | Homes and Community Renewal

ANDREW M. CUOMO
Governor

RuthAnne Visnauskas
Commissioner/CEO

October 18, 2019

Office of the General Counsel
Rules Docket Clerk
U.S. Department of Housing and Urban Development
451 7th Street SW
Room 10276
Washington, DC 20410-0001

Re: **Docket No.: FR-6111-P-02, RIN 2529-AA98**
HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

To Whom it May Concern:

New York State Homes and Community Renewal (NYSHCR) submits the following comments in response to the notice in the Federal Register soliciting comments on the Proposed Rules regarding "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard."

Thank you for the opportunity to comment.

Very Truly Yours,

Commissioner/CEO RuthAnne Visnauskas
New York State Homes and Community Renewal

I. Executive Summary

New York State Homes and Community Renewal (NYSHCR) reviewed the above-referenced notice (the Proposed Rule), published in the Federal Register on August 19, 2019. NYSHCR provides the following comments in opposition to the Proposed Rule.

NYSHCR is a consolidated leadership platform of associated New York State executive agencies and public benefit corporations with the shared mission to build, preserve, and protect affordable housing and increase home ownership across New York State. NYSHCR administers funding received by New York State from the U.S. Department of Housing and Urban Development (HUD) through several grant programs, including Section 8. Through these and other programs, NYSHCR works to fulfill its mission to provide New York State residents with access to safe and affordable housing.

NYSHCR's main concerns with the Proposed Rule are summarized as follows:

- The Proposed Rule is contrary to both the plain language and underlying purpose of the Fair Housing Act. It is also in conflict with decades of federal case law and HUD's established practices.
- The Proposed Rule will undermine NYSHCR's efforts to develop affordable housing in all parts of New York State and increase access to housing for all New Yorkers.
- The Proposed Rule will further entrench racial and economic segregation in housing and weaken efforts to combat existing socioeconomic inequities. This will directly harm some of New York State's most vulnerable people.

For these reasons, NYSHCR urges that the Proposed Rule be withdrawn.

II. The Proposed Rule Will Gut the Fair Housing Act

A. The Disparate Impact Method of Proof Is a Long-Established and Necessary Feature of the FHA

Housing discrimination often takes a subtle or facially neutral form that is systematically entrenched in laws and policies, resulting in devastating consequences. In recognition of these facts, courts have long understood that the FHA allows plaintiffs to raise claims based on a disparate impact method of proof. The Second Circuit, for example, established this principal as early as the 1980s.[1] This earlier case law utilized a burden-shifting test used in other civil rights contexts, notably the disparate impact approach of Title VII employment discrimination cases.

In 2013, HUD promulgated a regulation (2013 Final Rule) which codified a burden-shifting framework for FHA disparate impact claims.[2] This framework was not a new innovation but, rather, developed from decades of federal case law from across the country. Under the first step of this test, the plaintiff must make a prima facie claim of a discriminatory disparate impact.

[1] *Huntington Branch, NAACP v. Huntington*, 844 F.2d 926 (2d Cir. 1988).
[2] 78 FR 11460

This means that the plaintiff has the burden of proving that the defendant's challenged practice caused or will predictably cause a discriminatory effect. Under the second step, the burden shifts to the defendant, who may rebut the plaintiff's claim by demonstrating that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests. Finally, the burden returns to the plaintiff, who must demonstrate that this legitimate interest could be served by another practice that has a less discriminatory effect.

In the 2015 case *Texas Department of Housing Community Affairs v. Inclusive Communities Project*, the United States Supreme Court affirmed that disparate impact claims can be raised under the FHA.[3] Writing for the majority, Justice Kennedy noted that disparate impact claims allow "plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[4] The majority's analysis in *Inclusive Communities* was limited to whether or not the FHA permits disparate impact claims and did not elaborate on any single test for reviewing such claims. While Justice Kennedy wrote that disparate impact claims must satisfy "a robust causality requirement," there was no indication that the majority intended to displace the burden-shifting tests already established by HUD and the lower courts.[5] Like the 2013 Final Rule, *Inclusive Communities* should be viewed as a continuation of earlier practice, not a breach with the past.

The Proposed Rule, on the other hand, represents a severe deviation from earlier precedent and existing practice. Most significantly, the Proposed Rule would both significantly raise the requirements that a plaintiff must meet to make a prima facie claim and create extremely broad new defenses for defendants in these cases. Taken together, these changed would effectively eliminate most disparate impact claims and deprive victims of housing discrimination of access to the courts. As such, the Proposed Rule is in direct conflict with decades-worth of federal case law.

B. The Heightened Standard for a Prima Facie Case is Irrational, Ineffective and Contrary to Law

Under the Proposed Rule, the plaintiff must prove *each* of the following five elements to make a prima facie case: first, the plaintiff must demonstrate that the challenged policy is arbitrary, artificial, and unnecessary to achieve a valid interest; second, plaintiffs must allege a "robust causal link" between policy and the disparate impact; third, the plaintiff must allege that the policy has an adverse effect on members of a protected class and not just the individual plaintiff; fourth, the plaintiff must show that the disparity caused by the policy or practice is significant; and finally, the plaintiff must allege that the complaining party's alleged injury is directly caused by the challenged policy.

HUD maintains that this new system will bring the regulation into closer alignment with *Inclusive Community's* "robust causality requirement." However, this is entirely unnecessary as the first step of the 2013 Final Rule's burden-shifting test already requires plaintiffs to

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[3] *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.,* 135 S. Ct. 2507 (2015).
[4] Id. at 2522.
[5] Id. at 2523.

demonstrate that the alleged disparate impact was directly caused by the defendant's challenged action. Under the 2013 Final Rule, if the discriminatory effect was caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case and there is no liability. This is fully consistent with Justice Kennedy's holding and, thus, HUD is wrong to use the *Inclusive Communities* decision as a justification for the Proposed Rule.

Furthermore, the Proposed Rule's five elements create an almost impossibly high standard for most plaintiffs in FHA disparate impact cases. The first element creates an irrational system which requires the plaintiff to rebut their own claim on behalf of the defendant. The plaintiff is clearly not the best-positioned party to determine what "valid interests" may or may not be achieved by the challenged action. Additionally, as noted in HUD's preamble, these elements will often be most relevant when the defendant files a 12(b)(6) motion to dismiss. It will be impossible for many plaintiffs to meet the Proposed Rule's heightened evidentiary standards at this stage in the litigation, before discovery has taken place. Therefore, the Proposed Rule's changes would deprive many victims of disparate impact housing discrimination of the ability to assert their rights in court.

C. The Algorithm Defense Creates a Wide Loophole that Invalidates Disparate Impact Liability

In addition to the new elements required to plead a prima facie case, the Proposed Rule also introduces two defenses that housing providers may use to rebut a disparate impact claim. The plaintiff's claim would be defeated if the defendant is able to prove either of these defenses. The most troubling defense relates to disparate impact claims which challenge the plaintiff's use of an algorithmic model. Here, the defendant may defeat the plaintiff's claim by showing any of the following: that the inputs used in the model are not substitutes for a protected characteristic; that a recognized third party is responsible for the model; or that a neutral third party has analyzed the model and determined that it is sound.

Housing providers regularly use algorithms to weigh an applicant's credit risk, home insurance, and mortgage interest rates, among other factors. While these models may appear facially neutral, they can create significant discriminatory effects. For example, the data inputs for these algorithms may simply reflect past and present social biases and inequalities. In the words of one study, "unthinking reliance on data mining can deny historically disadvantaged and vulnerable groups full participation in society."[6] In 2018, the National Fair Housing Alliance and three other organizations filed a law suit against Facebook, alleging that the company's advertising platform enables landlords to exclude protected classes of people from receiving housing ads.[7] In March of this year, HUD filed a similar lawsuit against Facebook's. In a statement from that time, Secretary Ben Carson noted that "using a computer to limit a person's housing choices can be just as discriminatory as slamming a door in someone's face."[8]

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[6] Solon Barocas and Andrew D. Selbst, *Big Data's Disparate Impact*, 103 California Law Review 671 (2016).
[7] https://www.ecbalaw.com/wp-content/uploads/2018/03/NFHA-v.-Facebook.-Complaint-w-Exhibits-dkt-1-3-27-18-00325110x9CCC2....pdf
[8] Tracy Jan and Elizabeth Dwoskin, "HUD Is Reviewing Twitter's and Google's Ad Practices as Part of Housing Discrimination Probe," *The Washington Post*, Mach 28, 2019 https://www.washingtonpost.com/business/2019/03/28/hud-charges-facebook-with-housing-discrimination/.

NYSHCR fully agrees with that view. However, the Proposed Rule would, in effect, make housing providers who employ these discriminatory models immune from liability. This loophole will become increasingly significant as prospective tenants become more and more dependent on computerized searches when looking for housing. Discriminatory marketing sanctioned through this loophole will deny housing opportunity to many, exacerbating homelessness while undermining the right to equal access to stable housing and homeownership.

As discussed above, HUD states that these defenses will bring FHA disparate impact claims in line with *Inclusive Community's* causality requirement. However, in practice, these measures go far beyond anything required by that decision. Most significantly, the Proposed Rule elides the distinct concepts of causality and intent. It is a central tenet of disparate impact doctrine that defendants may be held liable for discriminatory effects they have caused, even if they did not intend to create those effects. Thus, housing providers who use discriminatory algorithms could be liable, regardless of whether or not they intended to discriminate. However, by removing liability in these cases, the Proposed Rule, in effect, imposes an intent requirement on FHA disparate impact cases and no legal means to stop the practice.

III. The Proposed Rule Will Undermine NYSHCR's Efforts to Develop Affordable Housing Across New York State, Increase Access to Housing, and Affirmatively Further Fair Housing and Desegregation

Signed just days after the assassination of Dr. Martin Luther King Jr., the Fair Housing Act of 1968 (FHA) states that it is "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[9] In part, the FHA sought to reach this goal by prohibiting discrimination in the sale, rental, and financing of housing. However, the drafters of the FHA recognized that any effective fair housing legislation would have to go further than this by addressing the country's long history of segregation. As President Lyndon B. Johnson noted when signing the FHA, "we all know that the roots of injustice run deep."[10] For this reason, the FHA also imposed a positive duty to affirmatively further fair housing for recipients of HUD funding.[11] In the words of a HUD analysis from 2015, this duty requires "meaningful actions to be taken to overcome the legacy of segregation, unequal treatment, and historic lack of access to opportunity in housing."[12]

NYSHCR, recognizing both this history and how far we have yet to go to address ongoing segregation, maintains that the promotion of fair housing is central to our agency's core mission of increasing access to affordable housing for all New Yorkers. Many of NYSHCR's most essential functions, such as developing affordable housing in all parts of New York State, would be impossible or severely hampered in the absence of the ability to robustly enforce the FHA.

Disparate impact liability addresses practices and policies, that while facially neutral, adversely affect those protected by the Fair Housing Act. These practices and policies prevent

[9] 42 U.S.C. 3601.
[10] Johnson, Lyndon B. (April 11, 1968). "Remarks Upon Signing the Civil Rights Act."
[11] 42 U.S.C. 3608.
[12] 80 FR 42272 (July 16, 2015).

equal access to housing, to neighborhoods and to financing that allows families to buy homes and build intergenerational wealth. Exclusionary tenant selection policies, such as requirements that applicants already live in the local area or have full-time jobs, may affect minorities who have historically been excluded from that community and disabled individuals who are unable to work full-time. Municipal zoning ordinances and siting decisions that make multi-family and/or affordable housing projects impossible to develop in certain areas perpetuate racial and economic segregation. Marketing practices targeted only at a certain demographic exclude others who have just as much right to that same housing. A financial institution's facially neutral lending policies may still disproportionately exclude groups historically and systemically left out of homeownership through prior overt practices like redlining. In each of these cases, and in many others, it is the specter of disparate impact liability that forces market actors and regulators to think about access and equity, not just the bottom line, when it comes to housing.

Disparate impact liability removes barriers to a family being able to live in neighborhoods of their choosing and purchase a home they can pass down to future generations. This matters. Social science has found that access to neighborhoods, especially well-resourced neighborhoods, changes a family's long-term outlook. A recent study published by the economist Raj Chetty and others found that low-income children who move to well-resourced areas will benefit from life-long improvements in educational, income, and health outcomes. [13] As described by Richard Rothstein in his seminal book, The Color of Law, the systemic exclusion of African Americans from purchasing homes in the suburbs into the 1960's by the Federal Housing Administration is part of what undergirds the enormous racial wealth disparity that persists today. Where white families have been able to gain equity appreciation of these homes, African Americans families have been left out.[14] The persistence of racial segregation has consequences in educational outcomes as well. One recent study, for example, concluded that "racial segregation appears to be harmful because it concentrates minority students in high-poverty schools, which are, on average, less effective than lower-poverty schools."[15] By gutting disparate impact, the Proposed Rule destroys a major protector of housing access and opportunity in New York and across the country.

By eliminating these protections, the Proposed Rule will exacerbate racial segregation and housing instability, with devastating consequences for the people of New York. Families protected by the Fair Housing Act, including women-headed households, those with members with a disability, domestic violence survivors leaving shelters and communities of color have one less tool to combat the housing discrimination that has led to systemic entrenched segregation and economic disadvantages. These families will face fewer options for housing, which can lead to increased instances of housing instability and homelessness.

The toll of housing instability is severe, particularly for children. Childhood homelessness and other forms of housing instability are associated with increased hospital visits

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[13] Raj Chetty et al., *Creating Moves to Opportunity: Experimental Evidence on Barriers to Neighborhood Choice* (August 2019), https://opportunityinsights.org/wp-content/uploads/2019/08/cmto_paper.pdf

[14] Pedro da Costa, "Housing Discrimination Underpins the Staggering Wealth Gap Between Blacks and Whites," Economic Policy Institute (April 8, 2019), https://www.epi.org/blog/housing-discrimination-underpins-the-staggering-wealth-gap-between-blacks-and-whites/.

[15] Sean F. Reardon, et al., *Is Separate Still Unequal? New Evidence on School Segregation and Racial Academic Achievement Gaps*, Stanford Center for education Policy Analysis Working Paper No. 19-06 (September 2019). https://edopportunity.org/papers/wp19-06-v092019.pdf

and mental health problems, such as depression and anxiety.[16] Child poverty and housing instability also cause severe stress. This type of stress in children "disrupts normal brain and organ development and, consequently, damages brain architecture and neurocognitive systems."[17] These health consequences may be felt by these children for the rest of their lives. A lack of access to safe and affordable housing can also limit a child's educational opportunities and exacerbate child poverty. Statistically, homeless children have lower passing rates across a number of academic subjects, have higher rates of absenteeism, and are more likely to face disciplinary action than children who live in stable housing.[18] Additionally, children who lack safe and secure housing will suffer long-term negative economic consequences and can also lead directly to employment insecurity among adults.[19]

New York State and NYSHCR have made a priority of combatting historic segregation in housing. In recent years, NYSHCR has created new incentives for state-funded housing providers to develop new affordable housing in well resourced areas. Furthermore, NYSHCR scrutinizes proposed local community preferences for potential discriminatory effects. In 2016, NYSHCR introduced a new anti-discrimination policy regarding the review of applicants' criminal history in state-funded housing developments. This policy prohibits automatic denials of individuals with criminal histories and, instead, requires housing providers to conduct an individualized assessment of each applicant based on multiple factors. Notably, the policy builds on HUD's analysis in a 2016 guidance letter, which noted that, due to the racial and ethnic disparities in the criminal justice system, automatic denials based on an applicant's criminal history may violate the FHA.[20]

Any action that undermines enforcement of the FHA is a direct challenge to NYSHCR's efforts to promote affordable housing and further fair housing in New York State.

IV. Conclusion

For the foregoing reasons, it is NYSHCR's hope that the existing regulations will be preserved. The Proposed Rule, if allowed to go into effect, would hamper NYSHCR's efforts to build affordable housing across New York State and increase access to housing for all New Yorkers. Furthermore, it will ensconce existing racial inequities and hamstring efforts to address segregation and further fair housing. The Proposed Rule is contrary to New York State's values and NYSHCR's mission and core work. It must be withdrawn.

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[16] Meredith Horowki, *Housing Instability and Health: Findings from the Michigan Recession and Recovery Study,* National Poverty Center Policy Brief #29 (March 2012), http://www.npc.umich.edu/publications/policy_briefs/brief29/NPC%20Policy%20Brief%20-%2029.pdf.

[17] Heather Sandstrom et al., *The Negative Effects of Instability on Child Development: A Research Synthesis*, Urban Institute, 13 (September 2013), https://www.urban.org/sites/default/files/publication/32706/412899-The-Negative-Effects-of-Instability-on-Child-Development-A-Research-Synthesis.PDF.

[18] Anne Ray et al. *Homelessness and Education in Florida: Impacts on Children and Youth*, Shimberg Center for Housing Studies, University of Florida, and Miami Homes for All (December 2017), http://www.shimberg.ufl.edu/publications/homeless_education_fla171205RGB.pdf.

[19] Matthew Desmond and Carl Gersheson, *Housing and Employment Security Among the Working Poor*, Soc. Problems 1 (2016), https://academic.oup.com/socpro/article/63/1/46/1844105.

[20] HUD, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions," (April 4, 2016).

NEW YORK STATE OF OPPORTUNITY. | Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

October 15, 2019

Office of the General Counsel
Rules Docket Clerk
U.S. Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, D.C. 20410-0001

Re: HUD Docket No. FR–6111–P–02

To Whom It May Concern:

The New York State Department of Health (Department) submits the following comments in response to the Notice of Proposed Rulemaking in the Federal Register (84 Fed. Reg. 42854) titled "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard." The Department supervises the administration of a wide range of programs that provide services and support to low-income families and individuals. The mission of the Department is to protect, improve and promote the health, productivity and well-being of all New Yorkers.

Thank you for the opportunity to comment.

Sincerely,

Howard A. Zucker, M.D., J.D.
Commissioner of Health

NEW YORK STATE OF OPPORTUNITY. Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

New York State Department of Health
Comments in Response to the Department of Housing and Urban Development's Proposed Rule

I. EXECUTIVE SUMMARY

The New York State Department of Health (NYSDOH) strongly opposes the proposed regulatory changes outlined in the U.S. Department of Housing and Urban Development's (HUD) Notice of Proposed Rulemaking titled, "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard" (hereinafter, Proposed Rule).[1]

The Proposed Rule would, *inter alia*, create new requirements for plaintiffs to support a disparate-impact claim of housing discrimination under the Fair Housing Act (42 USC §§ 3601-3631). Specifically, the proposed rule would require plaintiffs to plead facts sufficient to support five elements: (1) the policy is "arbitrary, artificial, and unnecessary" to achieve a valid interest or legitimate objective; (2) there is a "robust causal link" between the challenged policy or practice and the disparate impact on members of a protected class; (3) the policy negatively affects members of a protected class, i.e., based on race, color, religion, sex, familial status, or national origin (*see* 5 42 USC § 3604[a]); (4) the disparate impact is "significant"; and (5) the "complaining party's alleged injury" is directly caused by the policy or practice in question.

The United States Supreme Court, in *Texas Department of Housing and Community Affairs v Inclusive Communities Project* (83 US 4555, 135 S Ct 2507 [2015]), recognized the important contributions of disparate impact liability in adjudicating Fair Housing Act discrimination cases. Such contributions included challenges to "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification" (135 S Ct at 2522, citing *Huntington Branch NAACP v Town of Huntington*, 844 F2d 926 [2d Cir 1988]). Disparate impact claims have also challenged subsidized housing waitlist preferences (*see e.g.*, *Langlois v Abington Hous. Auth.*, 207 F3d 43, 49 [1st Cir 2000]), and redlining and predatory lending (*see e.g.*, *Ramirez v GreenPoint Mortg. Funding Inc.*, 633 F Supp 2d 922 [ND Cal 2008]).

Fair housing advocates warn that by setting a higher bar for plaintiffs to prove disparate impact, the Proposed Rule will "dismantle an important enforcement tool for combatting discrimination, further restricting access to housing for people of color, seniors, people with disabilities, families

[1] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42854 (proposed August 19, 2019) (to be codified at 24 CFR Part 100).

with children, LGBTQ people, victims of domestic violence, and others."[2] By making it harder for some individuals to access housing, NYSDOH is deeply concerned that the Proposed Rule will increase homelessness and housing instability[3], particularly for already vulnerable populations such as children, those living with HIV/AIDS, and communities of color.[4]

Housing is one of the best-researched social determinants of health. Housing interventions for low-income people are proven to improve health outcomes and decrease health care costs.[5] Research further demonstrates that children and families who experience housing instability, especially homelessness, are at an increased risk of suffering detrimental physical and mental health effects.[6] The more frequent the housing instability, the greater the health risks posed to children and their caregivers.[7] By threatening the safeguards in place to ensure that all persons—regardless of race, color, religion, sex, familial status, or national origin—have access to stable housing, the Proposed Rule will have widespread health implications.

For these reasons, discussed in further detail below, NYSDOH urges HUD not to adopt the Proposed Rule.

II. HEALTH IMPACTS OF THE PROPOSED RULE

1. Impacts on Children

a. Effects of Housing Instability on Children's Health and Development

NYSDOH is alarmed that families who are unable to secure safe, affordable housing due to discriminatory policies or practices will be unable to effectively challenge those practices under the Proposed Rule. As a result, the Proposed Rule may lead many families to live in substandard, unstable housing conditions. Housing instability can be linked to health complications such as low birth rates, respiratory infections, hospitalizations, asthma, injuries

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[2] National Low Income Housing Coalition, "Statement from NLIHC President & CEO Diane Yentel on HUD's Implementation of the Disparate-Impact Rule" (August 19, 2019), available at https://nlihc.org/news/statement-nlihc-president-ceo-diane-yentel-huds-implementation-disparate-impact-rule. *See also* National Fair Housing Alliance, "NFHA and Other Civil Rights Leaders Fight Trump's Attempt to Gut Core Civil Rights Protection" (August 16, 2019), available at https://nationalfairhousing.org/2019/08/16/nfha-and-other-civil-rights-leaders-fight-trumps-attempt-to-gut-core-civil-rights-protection/.

[3] The term "housing instability" or "unstable housing" includes families who have experienced at least one of the following: (1) been behind on rent, (2) moved more than twice in the past year, or (3) experienced homelessness. *See* Megan Sandel *et al*., Unstable Housing and Caregiver and Child Health in Renter Families, American Academy of Pediatrics (January 2018), https://pediatrics.aappublications.org/content/141/2/e20172199.

[4] *See generally* New York State Department of Health, New York State 2017 Health Equity Reports, https://www.health.ny.gov/statistics/community/minority/mcd_reports.htm. N.Y. Public Health Law § 241 establishes an Office of Minority Health which, together with the Minority Health Council, advocates for NYSDOH on minority health matters, including publication of such Health Equity Reports.

[5] *See e.g.* The National Housing Conference, The Center for Housing Policy. The Impacts of Affordable Housing on Health: A Research Summary. (2015). https://www.rupco.org/wp-content/uploads/pdfs/The-Impacts-of-Affordable-Housing-on-Health-CenterforHousingPolicy-Maqbool.etal.pdf

[6] Sandel, *supra*, note 3

[7] Sandel, *supra*, note 3

and mental health.[8] When compared to their peers with more stable housing, children experiencing housing instability have higher rates of suicide and poorer mental health as a whole.[9]

Poor housing conditions, including living in crowded housing, can negatively impact children's academic achievement, behavior, and health.[10] For example, the lack of physical space in a home can create stress in the home environment and impair children's academic performance due to lack of space for studying and sleeping.[11] A crowded home can also cause behavioral issues in school, as the lack of productive sleep can negatively affect a child's mood, behavior, and concentration.[12] In addition, children in crowded homes are more likely to become sick, which can interfere with their daily routine and interrupt their schooling.[13]

Children experiencing housing instability can also be at a higher risk of developing childhood obesity.[14] The stress caused by their housing situation can disrupt a child's stress response system, causing a biological imbalance that can increase a child's risk of becoming obese.[15] Children experiencing housing instability may also consume more high-caloric fast food meals, as parents' housing-relating stress can make them less likely to cook for their children.[16] Parents may also be forced to cut their food budget due to high housing costs, relying more heavily on cheap, highly-caloric food.[17] Such financial strain may disproportionately impact communities of color, which often have lower median incomes than majority white areas.[18]

b. Effects of Homelessness on Childhood Health and Development

Housing instability can also lead to periods of homelessness. Homelessness has an adverse impact on all aspects of a child's life, inhibiting a child's physical health and emotional, cognitive, social, and behavioral development.[19] Homeless children are more likely to experience physical and behavioral health problems with less access to medical, dental, and

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[8] Bottino, C., et al. *The Relationship Between Housing Instability and Poor Diet Quality Among Urban Families.* April 2019. Academic Pediatrics.
[9] Crume, H., et al. *Cumulative Adversity Profiles Among Youth Experiencing Housing and Parental Care Instability.* February 2019. Academic Pediatrics.
[10] Solari, C., Mare, R. *Housing Crowding Effects on Children's Wellbeing.* October 2015. Academic Pediatrics.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Nobari, T., et al. *Severe Housing-Cost Burden and Obesity Among Preschool-Aged Low-Income Children in Los Angeles County.* Preventive Medicine Reports. 2019.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *See e.g.* New York State Department of Health, City of Newburgh Health Equity Report (Feb. 2017), at 7, https://www.health.ny.gov/statistics/community/minority/docs/mcd_reports/orange_county_city_of_newburgh.pdf
[19] Sandel, M., et al. "Compounding Stress: The Timing and Duration Effects of Homelessness on Children's Health" (June 2015). https://childrenshealthwatch.org/compounding-stress-the-timing-and-duration-effects-of-homelessness-on-childrens-health-2/.

mental health care.[20] Homeless children often have significant psychosocial development issues, and their education is frequently interrupted.[21]

Developmental delays in homeless children start to present at 18 months of age and impact how a toddler can handle stress. Most children who are homeless under the age of five have at least one developmental delay, and half of all children who are homeless have two or more developmental delays.[22] Additionally, studies demonstrate that homeless children experience toxic stress exposure, which undermines brain development and long-term functioning.[23]

These health effects are especially severe for very young children. Children who first experience homelessness as a toddler are at greater risk for poor achievement relative to students who have their first homeless experience later, during preschool or elementary school. Unruly behavior and withdrawal are often the initial response of children to homelessness, followed later by learning disabilities, developmental delays, and mental health issues.[24]

Cumulative risk scores further demonstrate that homeless children are more likely to experience poor health well into adulthood. A cumulative risk score represents a sum of the number of established risk factors present in a child's life. The higher a child's cumulative risk score, the greater the risk of developing adult risk factors for chronic diseases.[25] Numerous studies have found that adverse childhood experiences, including household instability and homelessness, are associated with adult health consequences. Adult health consequences include physical and psychological conditions, risk behaviors, developmental disruption, and increased healthcare utilization.[26]

Additionally, a recent study found a close relationship between exposure to abuse or household dysfunction during childhood and multiple risk factors for several of the leading causes of death in adults, including ischemic heart disease, cancer, chronic lung disease, skeletal fractures, and liver disease.[27] Studies have further shown that children who experience homelessness have the same chronic health outcomes as a child who experienced abuse or neglect.[28] Together, these findings demonstrate the profound long-term health consequences that homeless children face.

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[20] Dwomoh, I., Dinolfo, E.A. *Effects of Homelessness on Children*. Pediatrics in Review 2018; 39; pp. 530-532

[21] Chilton LA, Handal GA, Paz-Soldan GJ, et al. Providing care for children and adolescents facing homelessness and housing insecurity. Pediatrics 2013; 131(6). pp. 1206-1210.

[22] Family Housing Fund. *Children Pay the Price for Homelessness.* (2014). https://www.fhfund.org/fact-sheets/. *See also* Center for Advanced Studies in Child Welfare. *Impact of Housing and Homelessness on Child Well-Being*. (2017). https://cascw.umn.edu/wp-content/uploads/2017/04/CW360_Spring2017_WEB508.pdf.

[23] Shonkoff, Jack, et al. *The Lifelong Effects of Early Childhood Adversity and Toxic Stress.* (2012). American Academy of Pediatrics, 129(1), e232-e246.

[24] HCH Clinicians' Network. *Protecting the Mental Health of Homeless Children and Youth* (February 2000). https://www.nhchc.org/wp-content/uploads/2012/02/hh.02_00.pdf

[25] Cutuli J., et al. *Promoting Resilience for Children Who Experience Family Homelessness: Opportunities to Encourage Developmental Competence.* Cityscape: A J Policy Development and Research 2014; 16(1).

[26] Karen A. Kalmakis ka, Chandler GE. *Health consequences of adverse childhood experiences: A systematic review.* J Am Assn Nurse Practitioners. (2015). pp. 457-465.

[27] Felitti V., et al. *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*. Am J Prev Med 2019; 56(6): pp. 774-786. Available online at https://www.ajpmonline.org/article/S0749-3797(19)30143-6/fulltext

[28] Firesteel. "Children and Adversity: Childhood Homelessness Can Cast a Long Shadow." *Firesteel*, 31 July 2014, https://firesteelwa.org/2013/04/children-and-adversity-childhood-homelessness-can-cast-a-long-shadow/

2. *Impacts on Those Living with HIV/AIDS, Hepatitis C, and STIs*

In New York, the NYSDOH AIDS Institute is the primary state agency responsible for coordinating state programs, services, and activities relating to HIV/AIDS, sexually transmitted infections (STIs), and hepatitis C. Studies show strong correlations between improved housing status and reduced HIV risk, improved access to medical care, and better health outcomes.[29] As noted by the U.S. Department of Health & Human Services via HIV.gov, "[s]table housing is closely linked to successful HIV outcomes. With safe, decent, and affordable housing, people with HIV are better able to access medical care and supportive services, get on HIV treatment, take their HIV medication consistently, and see their health care provider regularly. In short: the more stable your living situation, the better you do in care."[30]

Threatening the ability of individuals who are living with or at increased risk of HIV/AIDS, hepatitis C, or STIs to access safe, stable housing can lead to poor health outcomes, increase disease transmission, and undermine New York State's gains in combating these issues. For instance, if the Proposed Rule is implemented, individuals may be forced to move more frequently if they cannot access affordable housing due to discriminatory housing policies and practices, which will be harder to challenge. In search of alternative housing, individuals living with HIV/AIDS could be forced to relocate out of their current NYSDOH-designated assistance area (the "Ryan White Region"), thereby severing crucial ties with important support systems, such as family and friends, as well as community providers and local assistance agencies, including the local Department of Social Services, pharmacies, and community assistance groups. At best, individuals living with HIV/AIDS may experience gaps in supportive services as they work to establish new connections. At worst, some individuals may never forge ties within their new community, which can compromise the individual's viral suppression, increase chances of HIV transmission, and lead to feelings of isolation.[31]

Relocation to a different Ryan White Region can also have serious consequences to individuals living with HIV/AIDS if the individual is forced to move far from his or her care providers and pharmacies. Individuals generally see their HIV care provider every six months if their status is stable. However, many see their HIV care providers more frequently, particularly if the individual has co-morbid conditions that require frequent doctor and specialist visits. Many individuals must also visit mental health and substance abuse providers. In all, individuals living with HIV/AIDS may need to travel multiple times a week to visit their care providers. As such, reliable transportation and proximity to providers are essential to ensuring that individuals living with HIV/AIDS adhere to their treatment regimen and can physically withstand the commute. If individuals are forced to relocate to a different Ryan White Region or move outside of an urban

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[29] The National Housing Conference, The Center for Housing Policy. The Impacts of Affordable Housing on Health: A Research Summary. (2015).

[30] U.S. Department of Health & Human Services, "Why Do People with HIV Need Stable Housing?", https://www.hiv.gov/hiv-basics/living-well-with-hiv/taking-care-of-yourself/housing-and-health (last accessed Sept. 30, 2019).

[31] *See* National Center for Innovation in HIV Care, "Housing as a Determinant of HIV Health Outcomes," https://targethiv.org/sites/default/files/supporting-files/Housing%20and%20HIV%20Health%20Outcomes%20Final.pdf (last accessed Sept. 30, 2019) (authors conducted a systematic review of research from 1996-2014 and found that homelessness or unstable/inadequate housing is associated with poor HIV clinical outcomes, including failure to achieve viral suppression).

area, they could face longer commute times, which they may not be healthy enough to endure, or may be unable to access steady, reliable transportation to appointments. These issues—compounded with the loss of community support discussed above—can disrupt an individual's adherence to treatment, impairing viral suppression and increasing the risk of transmission.

Additionally, individuals living with HIV/AIDS, hepatitis C, or STIs who are unable to access stable housing due to the Proposed Rule may be forced to return to unsafe living conditions, such as cohabiting with an abusive partner or persons with substance abuse issues. Dangerous housing conditions such as these can lead to increased intimate partner violence, relapse, and increased transmissions.[32]

The federal government has repeatedly recognized the need to end the HIV/AIDS, hepatitis C, and STI epidemics. As part of the 2019 State of the Union address, President Trump announced a 10-year plan to end the HIV epidemic in the United States.[33] The Centers for Disease Control and Prevention (CDC) has noted the urgent need to diagnose and cure more Americans living with hepatitis C and to address rising infections due to the opioid crisis.[34] The CDC has further noted the troubling rise in STIs and has stated that turning back the rise in STIs will require renewed commitment from all players.[35] If the federal government is serious about ending these epidemics, it must withdraw the Proposed Rule.

3. Impeded Access to Medicaid and WIC

Recipients of Medicaid and some public assistance benefits must provide New York State with an address to receive important notices, and, if applicable, benefit cards. NYSDOH administers both Medicaid and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), both of which require applicants to provide their address.

Medicaid is an important source of primary health insurance coverage and supplementary coverage for low-income residents and the most vulnerable New Yorkers. Eligible populations include children, pregnant women, single individuals, families, and individuals certified blind or disabled. In addition, certain persons with medical bills may be eligible for Medicaid if paying such bills allows them to spend down their income and resources to meet required Medicaid income levels. Medicaid enrollees do not pay premiums and have little to no out-of-pocket costs for many services. Reducing the uninsured rate through low-income health programs like Medicaid has widespread positive public health effects. For example, a greater number of insured individuals can lead to more immunizations, which reduces the spread of communicable diseases.

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[32] *See e.g.* Centers for Disease Control and Prevention, "Intersection of Intimate Partner Violence and HIV in Women," https://www.cdc.gov/violenceprevention/pdf/ipv/13_243567_Green_AAG-a.pdf (last accessed Sept. 30, 2019).
[33] U.S. Health Resources and Service Administration. *Ending the HIV Epidemic: A Plan for America.* https://www.hrsa.gov/ending-hiv-epidemic
[34] Hofmeister, M., et al. *Hepatitis C Prevalence Estimates 2013-2016*. (2018). https://doi.org/10.1002/hep.30297
[35] Centers for Disease Control and Prevention. "STDs at record high, indicating urgent need for prevention." (2017). https://www.cdc.gov/media/releases/2017/p0926-std-prevention.html

Access to Medicaid is especially important for those individuals who would become homeless if this rule is implemented. Homeless people are three to six times more likely to become ill than housed people and three to four times more likely to die than the general population.[36] Homelessness hinders good nutrition and personal hygiene, and conditions that require regular treatment, such as tuberculosis and HIV/AIDS, are often inadequately treated.[37] Diseases that are common among the homeless population include chronic diseases such as heart disease, cancer, liver disease, kidney disease, and HIV/AIDS. People who live on the streets or spend most of their time outside are also at high risk for frostbite, immersion foot, and hypothermia.[38]

Despite these staggering health risks, many homeless people never receive medical care. Although there are several barriers to healthcare among the homeless, the most common obstacle is cost.[39] Without access to Medicaid, many homeless people will utilize only hospital emergency departments as their primary source of health care. Not only are emergency departments not the most effective form of care, but the costs of treatment are shifted to the insured, hospitals, and state and local governments.[40]

Losing WIC benefits will also have serious health consequences. The WIC Program provides breastfeeding support, nutrition counseling, health education, health care referrals, referrals to other services, and nutritious foods to approximately 375,000 women, infants and children each month through 90 local providers (hospitals, local health departments, and community-based organizations) at nearly 400 service sites. The fundamental purpose of the program is to ensure the health and well-being of income-eligible families with young children.

WIC has consistently been shown to support healthy pregnancies, positive birth outcomes, and child development since it was established in the 1970s. WIC's targeted nutrition intervention and breastfeeding support during the prenatal, perinatal, and postpartum periods have significant short- and long-term health gains for both the mother and child.

If the Proposed Rule is implemented, individuals who experience housing instability, including homelessness, as a result will have a harder time accessing these crucial Medicaid and WIC benefits given their inability to provide a stable address. As a result, individuals could forego access to public assistance for which they are otherwise eligible, undermining their own health and economic security, as well as the health of all New Yorkers. Housing instability can even harm those who are still able to access WIC benefits, as these individuals may be unable to obtain consistent access to storage, refrigeration, and clean water, making it difficult to safely utilize their food.

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[36] National Coalition for the Homeless. "Health Care and Homelessness." (2009). https://www.nationalhomeless.org/factsheets/health.html
[37] *Id*.
[38] *Id*.
[39] *Id*. (citing Whitbeck, L. *Mental health and Emerging Adulthood among Homeless Young People*. [2009]).
[40] Coughlin, Teresa A. "Uncompensated Care for the Uninsured in 2013: A Detailed Examination." (2014). https://www.kff.org/uninsured/report/uncompensated-care-for-the-uninsured-in-2013-a-detailed-examination/

III. CONCLUSION AND RECOMMENDATIONS

The Proposed Rule would have devastating short- and long-term consequences on the health and well-being of New Yorkers. The most at risk of adverse impacts are vulnerable populations, including children, low-income New Yorkers, and individuals living with HIV/AIDS. The Proposed Rule may also have a profound impact on public health, including a rise in uninsured New Yorkers, an increase in children with developmental delays, and the spread of HIV/AIDS, STIs, and hepatitis C. For these reasons, NYSDOH strongly opposes HUD's proposal.

NEW YORK STATE OF OPPORTUNITY. | Homes and Community Renewal

ANDREW M. CUOMO
Governor

RuthAnne Visnauskas
Commissioner/CEO

October 18, 2019

Office of the General Counsel
Rules Docket Clerk
U.S. Department of Housing and Urban Development
451 7th Street SW
Room 10276
Washington, DC 20410-0001

Re: **Docket No.: FR-6111-P-02, RIN 2529-AA98**
HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

To Whom it May Concern:

New York State Homes and Community Renewal (NYSHCR) submits the following comments in response to the notice in the Federal Register soliciting comments on the Proposed Rules regarding "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard."

Thank you for the opportunity to comment.

Very Truly Yours,

Commissioner/CEO RuthAnne Visnauskas
New York State Homes and Community Renewal

I. Executive Summary

New York State Homes and Community Renewal (NYSHCR) reviewed the above-referenced notice (the Proposed Rule), published in the Federal Register on August 19, 2019. NYSHCR provides the following comments in opposition to the Proposed Rule.

NYSHCR is a consolidated leadership platform of associated New York State executive agencies and public benefit corporations with the shared mission to build, preserve, and protect affordable housing and increase home ownership across New York State. NYSHCR administers funding received by New York State from the U.S. Department of Housing and Urban Development (HUD) through several grant programs, including Section 8. Through these and other programs, NYSHCR works to fulfill its mission to provide New York State residents with access to safe and affordable housing.

NYSHCR's main concerns with the Proposed Rule are summarized as follows:

- The Proposed Rule is contrary to both the plain language and underlying purpose of the Fair Housing Act. It is also in conflict with decades of federal case law and HUD's established practices.
- The Proposed Rule will undermine NYSHCR's efforts to develop affordable housing in all parts of New York State and increase access to housing for all New Yorkers.
- The Proposed Rule will further entrench racial and economic segregation in housing and weaken efforts to combat existing socioeconomic inequities. This will directly harm some of New York State's most vulnerable people.

For these reasons, NYSHCR urges that the Proposed Rule be withdrawn.

II. The Proposed Rule Will Gut the Fair Housing Act

A. The Disparate Impact Method of Proof Is a Long-Established and Necessary Feature of the FHA

Housing discrimination often takes a subtle or facially neutral form that is systematically entrenched in laws and policies, resulting in devastating consequences. In recognition of these facts, courts have long understood that the FHA allows plaintiffs to raise claims based on a disparate impact method of proof. The Second Circuit, for example, established this principal as early as the 1980s.[1] This earlier case law utilized a burden-shifting test used in other civil rights contexts, notably the disparate impact approach of Title VII employment discrimination cases.

In 2013, HUD promulgated a regulation (2013 Final Rule) which codified a burden-shifting framework for FHA disparate impact claims.[2] This framework was not a new innovation but, rather, developed from decades of federal case law from across the country. Under the first step of this test, the plaintiff must make a prima facie claim of a discriminatory disparate impact.

[1] *Huntington Branch, NAACP v. Huntington*, 844 F.2d 926 (2d Cir. 1988).
[2] 78 FR 11460

This means that the plaintiff has the burden of proving that the defendant's challenged practice caused or will predictably cause a discriminatory effect. Under the second step, the burden shifts to the defendant, who may rebut the plaintiff's claim by demonstrating that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests. Finally, the burden returns to the plaintiff, who must demonstrate that this legitimate interest could be served by another practice that has a less discriminatory effect.

In the 2015 case *Texas Department of Housing Community Affairs v. Inclusive Communities Project*, the United States Supreme Court affirmed that disparate impact claims can be raised under the FHA.[3] Writing for the majority, Justice Kennedy noted that disparate impact claims allow "plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[4] The majority's analysis in *Inclusive Communities* was limited to whether or not the FHA permits disparate impact claims and did not elaborate on any single test for reviewing such claims. While Justice Kennedy wrote that disparate impact claims must satisfy "a robust causality requirement," there was no indication that the majority intended to displace the burden-shifting tests already established by HUD and the lower courts.[5] Like the 2013 Final Rule, *Inclusive Communities* should be viewed as a continuation of earlier practice, not a breach with the past.

The Proposed Rule, on the other hand, represents a severe deviation from earlier precedent and existing practice. Most significantly, the Proposed Rule would both significantly raise the requirements that a plaintiff must meet to make a prima facie claim and create extremely broad new defenses for defendants in these cases. Taken together, these changed would effectively eliminate most disparate impact claims and deprive victims of housing discrimination of access to the courts. As such, the Proposed Rule is in direct conflict with decades-worth of federal case law.

B. The Heightened Standard for a Prima Facie Case is Irrational, Ineffective and Contrary to Law

Under the Proposed Rule, the plaintiff must prove *each* of the following five elements to make a prima facie case: first, the plaintiff must demonstrate that the challenged policy is arbitrary, artificial, and unnecessary to achieve a valid interest; second, plaintiffs must allege a "robust causal link" between policy and the disparate impact; third, the plaintiff must allege that the policy has an adverse effect on members of a protected class and not just the individual plaintiff; fourth, the plaintiff must show that the disparity caused by the policy or practice is significant; and finally, the plaintiff must allege that the complaining party's alleged injury is directly caused by the challenged policy.

HUD maintains that this new system will bring the regulation into closer alignment with *Inclusive Community's* "robust causality requirement." However, this is entirely unnecessary as the first step of the 2013 Final Rule's burden-shifting test already requires plaintiffs to

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[3] *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.,* 135 S. Ct. 2507 (2015).
[4] Id. at 2522.
[5] Id. at 2523.

demonstrate that the alleged disparate impact was directly caused by the defendant's challenged action. Under the 2013 Final Rule, if the discriminatory effect was caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case and there is no liability. This is fully consistent with Justice Kennedy's holding and, thus, HUD is wrong to use the *Inclusive Communities* decision as a justification for the Proposed Rule.

Furthermore, the Proposed Rule's five elements create an almost impossibly high standard for most plaintiffs in FHA disparate impact cases. The first element creates an irrational system which requires the plaintiff to rebut their own claim on behalf of the defendant. The plaintiff is clearly not the best-positioned party to determine what "valid interests" may or may not be achieved by the challenged action. Additionally, as noted in HUD's preamble, these elements will often be most relevant when the defendant files a 12(b)(6) motion to dismiss. It will be impossible for many plaintiffs to meet the Proposed Rule's heightened evidentiary standards at this stage in the litigation, before discovery has taken place. Therefore, the Proposed Rule's changes would deprive many victims of disparate impact housing discrimination of the ability to assert their rights in court.

C. The Algorithm Defense Creates a Wide Loophole that Invalidates Disparate Impact Liability

In addition to the new elements required to plead a prima facie case, the Proposed Rule also introduces two defenses that housing providers may use to rebut a disparate impact claim. The plaintiff's claim would be defeated if the defendant is able to prove either of these defenses. The most troubling defense relates to disparate impact claims which challenge the plaintiff's use of an algorithmic model. Here, the defendant may defeat the plaintiff's claim by showing any of the following: that the inputs used in the model are not substitutes for a protected characteristic; that a recognized third party is responsible for the model; or that a neutral third party has analyzed the model and determined that it is sound.

Housing providers regularly use algorithms to weigh an applicant's credit risk, home insurance, and mortgage interest rates, among other factors. While these models may appear facially neutral, they can create significant discriminatory effects. For example, the data inputs for these algorithms may simply reflect past and present social biases and inequalities. In the words of one study, "unthinking reliance on data mining can deny historically disadvantaged and vulnerable groups full participation in society."[6] In 2018, the National Fair Housing Alliance and three other organizations filed a law suit against Facebook, alleging that the company's advertising platform enables landlords to exclude protected classes of people from receiving housing ads.[7] In March of this year, HUD filed a similar lawsuit against Facebook's. In a statement from that time, Secretary Ben Carson noted that "using a computer to limit a person's housing choices can be just as discriminatory as slamming a door in someone's face."[8]

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[6] Solon Barocas and Andrew D. Selbst, *Big Data's Disparate Impact*, 103 California Law Review 671 (2016).
[7] https://www.ecbalaw.com/wp-content/uploads/2018/03/NFHA-v.-Facebook.-Complaint-w-Exhibits-dkt-1-3-27-18-00325110x9CCC2....pdf
[8] Tracy Jan and Elizabeth Dwoskin, "HUD Is Reviewing Twitter's and Google's Ad Practices as Part of Housing Discrimination Probe," *The Washington Post*, Mach 28, 2019 https://www.washingtonpost.com/business/2019/03/28/hud-charges-facebook-with-housing-discrimination/.

NYSHCR fully agrees with that view. However, the Proposed Rule would, in effect, make housing providers who employ these discriminatory models immune from liability. This loophole will become increasingly significant as prospective tenants become more and more dependent on computerized searches when looking for housing. Discriminatory marketing sanctioned through this loophole will deny housing opportunity to many, exacerbating homelessness while undermining the right to equal access to stable housing and homeownership.

As discussed above, HUD states that these defenses will bring FHA disparate impact claims in line with *Inclusive Community's* causality requirement. However, in practice, these measures go far beyond anything required by that decision. Most significantly, the Proposed Rule elides the distinct concepts of causality and intent. It is a central tenet of disparate impact doctrine that defendants may be held liable for discriminatory effects they have caused, even if they did not intend to create those effects. Thus, housing providers who use discriminatory algorithms could be liable, regardless of whether or not they intended to discriminate. However, by removing liability in these cases, the Proposed Rule, in effect, imposes an intent requirement on FHA disparate impact cases and no legal means to stop the practice.

III. The Proposed Rule Will Undermine NYSHCR's Efforts to Develop Affordable Housing Across New York State, Increase Access to Housing, and Affirmatively Further Fair Housing and Desegregation

Signed just days after the assassination of Dr. Martin Luther King Jr., the Fair Housing Act of 1968 (FHA) states that it is "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[9] In part, the FHA sought to reach this goal by prohibiting discrimination in the sale, rental, and financing of housing. However, the drafters of the FHA recognized that any effective fair housing legislation would have to go further than this by addressing the country's long history of segregation. As President Lyndon B. Johnson noted when signing the FHA, "we all know that the roots of injustice run deep."[10] For this reason, the FHA also imposed a positive duty to affirmatively further fair housing for recipients of HUD funding.[11] In the words of a HUD analysis from 2015, this duty requires "meaningful actions to be taken to overcome the legacy of segregation, unequal treatment, and historic lack of access to opportunity in housing."[12]

NYSHCR, recognizing both this history and how far we have yet to go to address ongoing segregation, maintains that the promotion of fair housing is central to our agency's core mission of increasing access to affordable housing for all New Yorkers. Many of NYSHCR's most essential functions, such as developing affordable housing in all parts of New York State, would be impossible or severely hampered in the absence of the ability to robustly enforce the FHA.

Disparate impact liability addresses practices and policies, that while facially neutral, adversely affect those protected by the Fair Housing Act. These practices and policies prevent

[9] 42 U.S.C. 3601.
[10] Johnson, Lyndon B. (April 11, 1968). "Remarks Upon Signing the Civil Rights Act."
[11] 42 U.S.C. 3608.
[12] 80 FR 42272 (July 16, 2015).

equal access to housing, to neighborhoods and to financing that allows families to buy homes and build intergenerational wealth. Exclusionary tenant selection policies, such as requirements that applicants already live in the local area or have full-time jobs, may affect minorities who have historically been excluded from that community and disabled individuals who are unable to work full-time. Municipal zoning ordinances and siting decisions that make multi-family and/or affordable housing projects impossible to develop in certain areas perpetuate racial and economic segregation. Marketing practices targeted only at a certain demographic exclude others who have just as much right to that same housing. A financial institution's facially neutral lending policies may still disproportionately exclude groups historically and systemically left out of homeownership through prior overt practices like redlining. In each of these cases, and in many others, it is the specter of disparate impact liability that forces market actors and regulators to think about access and equity, not just the bottom line, when it comes to housing.

Disparate impact liability removes barriers to a family being able to live in neighborhoods of their choosing and purchase a home they can pass down to future generations. This matters. Social science has found that access to neighborhoods, especially well-resourced neighborhoods, changes a family's long-term outlook. A recent study published by the economist Raj Chetty and others found that low-income children who move to well-resourced areas will benefit from life-long improvements in educational, income, and health outcomes. [13] As described by Richard Rothstein in his seminal book, The Color of Law, the systemic exclusion of African Americans from purchasing homes in the suburbs into the 1960's by the Federal Housing Administration is part of what undergirds the enormous racial wealth disparity that persists today. Where white families have been able to gain equity appreciation of these homes, African Americans families have been left out.[14] The persistence of racial segregation has consequences in educational outcomes as well. One recent study, for example, concluded that "racial segregation appears to be harmful because it concentrates minority students in high-poverty schools, which are, on average, less effective than lower-poverty schools."[15] By gutting disparate impact, the Proposed Rule destroys a major protector of housing access and opportunity in New York and across the country.

By eliminating these protections, the Proposed Rule will exacerbate racial segregation and housing instability, with devastating consequences for the people of New York. Families protected by the Fair Housing Act, including women-headed households, those with members with a disability, domestic violence survivors leaving shelters and communities of color have one less tool to combat the housing discrimination that has led to systemic entrenched segregation and economic disadvantages. These families will face fewer options for housing, which can lead to increased instances of housing instability and homelessness.

The toll of housing instability is severe, particularly for children. Childhood homelessness and other forms of housing instability are associated with increased hospital visits

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[13] Raj Chetty et al., *Creating Moves to Opportunity: Experimental Evidence on Barriers to Neighborhood Choice* (August 2019), https://opportunityinsights.org/wp-content/uploads/2019/08/cmto_paper.pdf

[14] Pedro da Costa, "Housing Discrimination Underpins the Staggering Wealth Gap Between Blacks and Whites," Economic Policy Institute (April 8, 2019), https://www.epi.org/blog/housing-discrimination-underpins-the-staggering-wealth-gap-between-blacks-and-whites/.

[15] Sean F. Reardon, et al., *Is Separate Still Unequal? New Evidence on School Segregation and Racial Academic Achievement Gaps*, Stanford Center for education Policy Analysis Working Paper No. 19-06 (September 2019). https://edopportunity.org/papers/wp19-06-v092019.pdf

and mental health problems, such as depression and anxiety.[16] Child poverty and housing instability also cause severe stress. This type of stress in children "disrupts normal brain and organ development and, consequently, damages brain architecture and neurocognitive systems."[17] These health consequences may be felt by these children for the rest of their lives. A lack of access to safe and affordable housing can also limit a child's educational opportunities and exacerbate child poverty. Statistically, homeless children have lower passing rates across a number of academic subjects, have higher rates of absenteeism, and are more likely to face disciplinary action than children who live in stable housing.[18] Additionally, children who lack safe and secure housing will suffer long-term negative economic consequences and can also lead directly to employment insecurity among adults.[19]

New York State and NYSHCR have made a priority of combatting historic segregation in housing. In recent years, NYSHCR has created new incentives for state-funded housing providers to develop new affordable housing in well resourced areas. Furthermore, NYSHCR scrutinizes proposed local community preferences for potential discriminatory effects. In 2016, NYSHCR introduced a new anti-discrimination policy regarding the review of applicants' criminal history in state-funded housing developments. This policy prohibits automatic denials of individuals with criminal histories and, instead, requires housing providers to conduct an individualized assessment of each applicant based on multiple factors. Notably, the policy builds on HUD's analysis in a 2016 guidance letter, which noted that, due to the racial and ethnic disparities in the criminal justice system, automatic denials based on an applicant's criminal history may violate the FHA.[20]

Any action that undermines enforcement of the FHA is a direct challenge to NYSHCR's efforts to promote affordable housing and further fair housing in New York State.

IV. Conclusion

For the foregoing reasons, it is NYSHCR's hope that the existing regulations will be preserved. The Proposed Rule, if allowed to go into effect, would hamper NYSHCR's efforts to build affordable housing across New York State and increase access to housing for all New Yorkers. Furthermore, it will ensconce existing racial inequities and hamstring efforts to address segregation and further fair housing. The Proposed Rule is contrary to New York State's values and NYSHCR's mission and core work. It must be withdrawn.

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[16] Meredith Horowki, *Housing Instability and Health: Findings from the Michigan Recession and Recovery Study,* National Poverty Center Policy Brief #29 (March 2012), http://www.npc.umich.edu/publications/policy_briefs/brief29/NPC%20Policy%20Brief%20-%2029.pdf.

[17] Heather Sandstrom et al., *The Negative Effects of Instability on Child Development: A Research Synthesis*, Urban Institute, 13 (September 2013), https://www.urban.org/sites/default/files/publication/32706/412899-The-Negative-Effects-of-Instability-on-Child-Development-A-Research-Synthesis.PDF.

[18] Anne Ray et al. *Homelessness and Education in Florida: Impacts on Children and Youth*, Shimberg Center for Housing Studies, University of Florida, and Miami Homes for All (December 2017), http://www.shimberg.ufl.edu/publications/homeless_education_fla171205RGB.pdf.

[19] Matthew Desmond and Carl Gersheson, *Housing and Employment Security Among the Working Poor*, Soc. Problems 1 (2016), https://academic.oup.com/socpro/article/63/1/46/1844105.

[20] HUD, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions," (April 4, 2016).