Legal Services NYC
DEMAND JUSTICE

October 18, 2019

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

COMMENTS ON HUD'S PROPOSED IMPLEMENTATION OF THE FAIR HOUSING ACT'S DISPARATE IMPACT STANDARD
DOCKET NO. FR-6111-P-02

Legal Services NYC ("LSNYC") is one of the largest law firms for low-income people in the United States. With 18 community-based offices and numerous outreach sites located throughout each of the New York City's five boroughs, LSNYC's mission is to provide expert legal assistance that improves the lives and communities of low-income New Yorkers. Legal Services NYC annually provides legal assistance to thousands of low-income clients throughout New York City in areas including immigration, housing, government benefits and family law. Our staff assists more than 120,000 clients annually, over 80% of whom are people of color.

Our clients who are people of color experience unequal conditions and treatment in virtually every aspect of their lives: they live in substandard housing, send their children to underperforming schools, receive second-rate medical care, and are relegated to lower-paying jobs with few benefits. These unequal outcomes are not the result of coincidence, nor are they the product of impersonal, race-neutral "market forces." Rather, they are the product of decades of deliberate government action, in concert with discriminatory private actors, which concentrated people of color in communities with few job and educational opportunities and barred them from housing and employment opportunities open to their white counterparts. *See* Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America*, Norton, 2017*; Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc. ("ICP")*, 135 S.Ct. 2507, 2515 (2015) ("[V]arious practices were followed, sometimes with governmental support, to encourage and maintain the separation of the races.")

As acknowledged by the Supreme Court in *ICP*, "recognition of disparate-impact claims is consistent with the FHA's central purpose … These unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification." *Id.*, 135 S.Ct. at 2521-22. The Court further noted that:

> [D]isparate-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. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.

Id. at 2522.

Accordingly, disparate impact claims under the FHA have been an important tool that we at LSNYC have used to vindicate our clients' rights and remedy the unequal outcomes they have suffered as a result of nominally "neutral" policies and practices. In *Saint-Jean v. Emigrant Mortgage Company*, 50 F.Supp.3d 300 (E.D.N.Y. 2014), for example, the court found that LSNYC's clients had stated a *prima facie* claim for disparate-impact discrimination where the plaintiffs offered evidence of an equity-stripping scheme targeted to homeowners with low-income, low credit scores, and homeowner equity. Plaintiffs alleged the costliest loans and disproportionate foreclosures resulted for people of color and in minority neighborhoods. Statistical evidence and mapping data confirmed disparate, and devastating, impact to non-white homeowners resulting from the Emigrant-marketed loans which were underwritten only to homeowners with very low credit scores and substantial equity in their homes, a group that is disproportionately homeowners of color.

In *Saint-Jean*, plaintiffs eventually prevailed in a jury trial that resulted in damage awards that redressed the defendants' equity stripping practice. *See Saint-Jean v. Emigrant Mortg. Co.*, 337 F.Supp.3d 186 (E.D.N.Y. 2018).

Disparate impact has also been an essential tool in LSNYC's efforts to vindicate the rights of victims of domestic violence. In its memo dated February 9, 2011, titled *Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act (FHAct) and the Violence against Women Act (VAWA)*, HUD explained that discrimination against victims of domestic violence may constitute disparate impact discrimination against women, because women constitute the vast majority of domestic violence victims. In a case filed by LSNYC, *A.S. v. Been*, 228 F.Supp.3d 315 (2017), the court upheld, at the motion to dismiss stage, the plaintiff's claim that New York City's policy of excluding domestic violence victims from VAWA hearings regarding the bifurcation of Section 8 vouchers had a disparate impact on women, in violation of the FHA. Following that ruling, the City quickly settled the case by offering our plaintiff a Section 8 housing subsidy necessary to prevent her from becoming homeless.

In addition, Legal Services NYC has used disparate impact claims to combat landlords' efforts to exclude disabled persons from their buildings. In *Ocasio v. 1555 Grand Concourse LLC et al.*, 18-cv-10159 (S.D.N.Y.), LSNYC's clients are claiming that their landlord's practice of refusing to renew leases with nonprofit supportive housing programs has a disparate impact on disabled building residents, in violation of the FHA.

As explained below, HUD's unduly restrictive proposed regulations will place enormous obstacles in the way of low-income plaintiffs seeking to combat policies of lenders, landlords and governmental actors that impact people of color, women, and the disabled. These regulations are contrary to the letter and purpose of the FHA and to decades of settled jurisprudence, including the Supreme Court's most recent decision in *Texas Dept. of Housing v. Inclusive Communities Project.*

I. The Proposed Rule Will Impede the Core Goals of the FHA.

Disparate impact liability is essential to furthering the core purpose of the FHA—to address housing inequality, discrimination, and segregation. Without strong disparate impact protections, the FHA cannot effectively address the legacy of our country's long history of racist housing policies and practices, which have culminated in segregated communities and lesser access to housing for people of color, particularly in Black communities. This legacy includes racist zoning ordinances and covenants; housing "redevelopment" programs like urban renewal as provided for in the Housing Act of 1949, which displaced communities of color and destroyed their homes without meaningful recompense or relocation; redlining and other discriminatory lending practices; blockbusting by the real estate industry to encourage "white flight" to suburban enclaves; urban planning that actively segregated communities of color; affirmative assistance programs to enable home ownership which explicitly excluded people of color; tax subsidies to homeowners who are mostly white with no equivalent wealth-building mechanism for people of color who had been excluded from home ownership; and predatory financial products that have targeted low-income communities to strip what little equity people of color have managed to accumulate despite myriad obstacles. This legacy forms the bedrock for the housing policies and practices of today, and it has created and maintained persistent patterns of segregation and discrimination.

The Court in *ICP* recognized the "continuing role" the FHA plays in "moving the Nation toward a more integrated society." *Id*. 135 S.Ct. at 2525-2526. The Court acknowledged a range of enduring effects of *de jure* segregation, *id.* at 2515, and also affirmed the importance of disparate impact liability in addressing these lasting harms. *Id*. at 2521-2522. As Richard Rothstein points out in his book, *The Color of Law*, in the arena of housing, the past has a "structural legacy." Rothstein at 178. That is, segregation and discrimination remain physically present in a way that will not be remedied simply by engaging in different practices moving forward (a monumental challenge in itself) without efforts to dismantle the existing, inequitable structure. In addition to enacting non-discriminatory policies moving forward, the task at hand is also to apprehend and proactively counteract the impact that seemingly race-neutral policies have when they interact with the "structural legacy" of discriminatory housing practices. Disparate impact liability offers one avenue for accomplishing this task, in that it provides a legal mechanism for confronting facially neutral housing and lending policies that have discriminatory effects when deeply embedded inequalities resulting from segregationist and racist housing policies are taken into consideration.

In recognition of the critical importance of disparate impact protections to the purposes of the FHA, in 2013 HUD promulgated a Rule intended to codify decades of jurisprudence on disparate impact. The 2013 Rule clarified the standard and provided formal guidance to ensure a uniform interpretation and application of disparate impact liability nation-wide. In promulgating the Rule, HUD described it as "formaliz[ing] a clear, consistent, nationwide standard for litigating discriminatory effects cases under the Fair Housing Act." *See Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11460-01.

In the context of decades of jurisprudence on disparate impact liability, which is already synthesized under an existing HUD Rule, the currently Proposed Rule is an unnecessary intervention seemingly designed to weaken the effectiveness of disparate impact litigation. The framework the new Rule proposes represents a retrograde step in the fight for housing equality and desegregation.

The Proposed Rule creates unnecessary and unfairly burdensome impediments to plaintiffs with valid disparate impact claims, and as such it runs counter to the central goals of the FHA. As discussed in more detail below, plaintiffs will have little likelihood of making a *prima facie* case under the Proposed Rule and as such, disparate impact liability will be substantially curtailed. LSNYC's low and moderate income clients will be harmed by the dilution of disparate impact which the Proposed Rule seeks to codify.

The Proposed Rule will also impede the detection of racist and discriminatory intentions disguised by facially neutral policies. As noted above, in *ICP*, the Court pointed out that disparate impact liability enables those most impacted by discriminatory policies and practices to discover and expose discriminatory intent where it is the underlying basis for policies and practices:

> 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. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.

Id., 135 S.Ct. at 2522. Under the Proposed Rule, plaintiffs will be held to a largely unachievable *prima facie* standard. Consequently, significantly fewer cases will reach the stage of discovery where this type of discriminatory intent is usually unearthed.

Disparate impact liability also plays a role in guiding government and private decision-makers in their policies and practices. HUD recognized this aspect of disparate impact liability in 2013, when it concluded that the Rule "also offers clarity to persons seeking housing and persons engaged in housing transactions as to how to assess potential claims involving discriminatory effects." *See Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11460-01. To the extent that the Proposed Rule will severely curtail the availability and detectability of claims based on disparate impact liability, the Proposed Rule will certainly discourage public and private actors from thinking about inequitable outcomes of their decision-

making. This will likely have detrimental consequences for housing policy at all levels of government and will also impact the operations of private actors, in particular landlords, lending institutions, mortgage servicers, housing developers, insurance providers and others who make decisions that affect the provision of housing. At worst, by significantly reducing the likelihood of successful legal actions, the Proposed Rule will effectively sanction and encourage inequitable practices that present as facially equal. As such, there is a risk that discriminatory effects will proliferate and the Proposed Rule will ultimately undermine the FHA's statutory mandate.

With this context in mind, LSNYC submits the following comments in response to specific provisions of the Proposed Rule.

II. The 2013 Final Rule is Consistent with *ICP* and the FHA, While the Proposed Rule Would Unnecessarily and Unjustly Limit Disparate Impact Liability.

A. The Definition of "Discriminatory Effects" Under the 2013 Final Rule is Consistent with Inclusive Communities and the Purposes of the FHA.

HUD's 2013 discriminatory effects rule is consistent with the purpose of the FHA, as acknowledged in *ICP*, to "move the Nation toward a more integrated society." 135 S.Ct. at 2526. Specifically, the 2013 rule defined "discriminatory effect" as follows: "A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin." 24 C.F.R. § 100(a). Yet, HUD now seeks to eliminate that definition from the Proposed Rule, stating that the definition is unnecessary because it "simply reiterates the elements of a disparate impact claim." Proposed Rule: HUD's Implementation of the Fair Housing Act's Disparate Impact Standard**,** 84 Fed. Reg. 42854 (August 19, 2019).

Removal of the definition of discriminatory effects from the rule is an attempt to dilute and obscure the goals of the FHA. As the Supreme Court noted in *ICP*, "*De jure* residential segregation by race was declared unconstitutional almost a century ago, but its vestiges remain today, intertwined with the country's economic and social life. Some segregated housing patterns can be traced to conditions that arose in the mid-20th century." 135 S.Ct. at 2515. In the mid-1960s, President Lyndon Johnson established the National Advisory Commission on Civil Disorders, commonly known as the Kerner Commission, to investigate the root causes of and propose solutions to address civil and social unrest. *Id.* at 2516. The Commission found that segregation, poor housing conditions, and unequal economic opportunities were factors contributing to social unrest, and "that both open and covert racial discrimination prevented black families from obtaining better housing and moving to integrated communities. The Commission concluded that '[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.'" *Id.* (internal citations omitted).

This is the context in which Congress passed the Fair Housing Act. The purpose of the FHA, as described in *ICP*, is to "eradicate discriminatory practices within a sector of our

Nation's economy . . . that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification." *Id.* at 2522.

Thus, it is clear that the definition of discriminatory effects in the 2013 rule does not merely speak to the elements needed to state a claim, as HUD stated in the preamble to the Proposed Rule. Instead, the definition explicitly recognizes the role of the FHA in furthering equitable, integrated housing—a role affirmed in *ICP*—by defining discriminatory effects to include not only actions that have a disparate impact on a protected class of people, but also actions that "create, increase, reinforce, or perpetuate" segregation. Deleting the definition from the Proposed Rule appears to be one piece of HUD's larger attempt (as further described below) to narrow the scope of disparate impact liability in order to limit an aggrieved party's ability to seek redress for policies and practices that perpetuate or exacerbate segregation and existing housing inequities.

B. The Proposed Burden-Shifting Framework Would Severely Limit the Availability of Disparate Impact Protections by Placing an Unduly High Burden on Plaintiffs

The pleading standard and burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and refined in the 2013 final rule ensure that to successfully plead a claim for disparate impact liability, plaintiffs must challenge a policy or practice that has caused or will cause a discriminatory effect on members of a protected class. This standard is consistent with the Court's decision in *ICP*. 135 S.Ct. at 2523 (to establish a *prima facie* case a plaintiff must be able to "point to a defendant's policy or policies causing the disparities"). The Proposed Rule, however, would create a heightened pleading standard for disparate impact claims that is stricter than what the Court alluded to in *ICP*. In particular, the Proposed Rule would require a plaintiff to allege "that a specific, identifiable policy or practice has a discriminatory effect." *Id.* While that language tracks *ICP*, the preamble to the Proposed Rule further notes: "It is insufficient to identify a program as a whole without explaining how the program itself causes the disparate impact as opposed to a particular element of the program."

This interpretation represents a contraction of the standard laid down by *ICP*. The question of whether one or more specific *pieces* of the challenged policy or practice are at issue is better addressed post-discovery. Prior to discovery, many plaintiffs—especially those who are low-income—will not have access to resources needed to conduct research, statistical analysis, and in-depth policy examination to determine whether a policy as a whole has caused the alleged harm or if a discrete element of the policy is to blame. A plaintiff's lack of access to information about the inner-workings of a private actor or government policy should not be a bar to their bringing a legitimate, good-faith challenge to discrimination.

The new burden-shifting framework in the Proposed Rule also unfairly and unnecessarily increases the burden on plaintiffs to plead and then prove a disparate impact claim while reducing the burden on defendants. Under the 2013 final rule, a plaintiff's initial burden was to show that a challenged practice caused or predictably would cause a discriminatory effect as defined under the rule. If the plaintiff did so, the burden shifted to the defendant to prove that "the challenged practice is necessary to achieve one or more substantial, legitimate,

nondiscriminatory interests of the respondent or defendant." If the defendant met this burden, the plaintiff could still succeed on its claim by proving that another, less discriminatory practice could serve the defendant's legitimate interests. *See Implementation of the Fair Housing Act's Discriminatory Effects Standard,* 78 Fed. Reg. at 11482.

Under the Proposed Rule, however, plaintiffs have the burden of proving "by a preponderance of the evidence" "that the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law." The inclusion of such broad, subjective examples of "valid interests" as "practical business, profit, [or] policy consideration[s]" in the burden-shifting framework would make it very difficult for any plaintiff – even those with well-pled, statistically supported discrimination claims – to prove that a challenged policy is entirely "arbitrary" and "artificial."

The Proposed Rule would further require that plaintiffs prove by a preponderance of the evidence a "robust causal link" between the challenged practice and the disparity—that is, that the "specific practice is the *direct* cause of the discriminatory effect" (emphasis added). The Proposed Rule also contains a separate element requiring plaintiffs to show that their "alleged injury is directly caused by the challenged policy or practice." These two elements appear to require the same showing, and both are far stricter than what is mandated by *ICP*. In reality, housing inequity is often the result of a combination of historical practices and social and economic policies, including the discriminatory zoning laws and restrictive housing covenants that the FHA was enacted to eradicate. *See Inclusive Communities,* 135 S. Ct. at 2511. Yet, this does not mean that a particular current policy or practice cannot exacerbate or reinforce these inequities and give rise to disparate impact liability.

Plaintiffs, of course, are not relieved of the obligation to plead a causal connection between the challenged policy and the harm suffered. Indeed, the Court in *ICP* stated, "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." 135 S.Ct. at 2523. However, *ICP* does not support the Proposed Rule's requirement that that causal link be the *direct* cause of the disparity plaintiffs seek to remedy.

A recent example that highlights the complex nature of causality is found in Corpus Christi, Texas, where tenants who were affected by Hurricane Harvey have filed a lawsuit against HUD and the Texas General Land Office, which is administering disaster relief funds in the state. While both homeowners and tenants may have lost their places of residence and significant personal property as a result of the storm, the state's action plan, which details how $5 billion in disaster-relief funds will be spent, allows for direct disbursement to homeowners but bars renters from receiving any direct financial assistance. *See* Manny Fernandez, *Two Years After Hurricane Harvey, One Group Says It Has Been Overlooked: Renters*, New York Times, Oct. 11, 2019, https://www.nytimes.com/2019/10/11/us/hurricane-harvey-lawsuit-texas.html (last visited Oct. 15, 2019). Because "[t]he vast majority of tenants in the counties hit by Harvey are black and Hispanic, while the majority of homeowners are white," *id*., people of color who

were harmed by the storm are less likely to be able to recover than are white people under the state's disaster-recovery program.

There are many historical, social, and economic factors that contribute to people of color being overrepresented among tenants and underrepresented among homeowners, as described in Section I above. Yet, that should not mean that a policy that artificially and unnecessarily discriminates against tenants, resulting in disproportionate harm to people of color, is immune to challenge simply because the policy itself did not cause people of color to become tenants in the first place. The fact that numerous factors created and perpetuated an inequity does not mean that a current government policy or practice cannot contribute to or worsen that disparity. Strong disparate-impact protections make the FHA an important tool in helping repair historical inequities in the housing market. *See ICP*, 135 S.Ct. at 2525 ("The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that '[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.'").

Accordingly, if these plaintiffs can demonstrate that Texas's current disaster relief program will "cause, increase, reinforce, or perpetuate" segregation or inequity because the established criteria for financial assistance (homeownership) disproportionately excludes people of color, under *ICP* they will have made out a *prima facie* case for disparate impact. Yet, under the Proposed Rule, there would be an argument that they have not provided a "direct" causal link strong enough to support their *prima facie* case. Similarly, in LSNYC's case *A.S. v. Been*, the defendant Section 8 provider's policy of excluding domestic violence victims from hearings to decide whether either or both parties would remain a Section 8 tenant following allegations of domestic violence is not itself to blame for the gender disparity among domestic violence victims. Nonetheless, such a policy would result in a disproportionate number of women being excluded from hearings regarding the future of their tenancies. In this way the policy could contribute to or perpetuate unequal housing opportunities for women, and it should not be immune to challenge. The Proposed Rule's requirement that plaintiffs identify a single, specific cause for alleged inequality and segregation would present them with a nearly impossible task that would prevent many plaintiffs from even trying to challenge policies and practices that contribute to inequity today.

In addition to placing this unduly onerous burden on plaintiffs alleging disparate-impact discrimination, the Proposed Rule would *lessen* the burden on defendants. Under the Proposed Rule, after plaintiffs meet the burdensome *prima facie* requirements described above, the defendant is required only to prove "that the challenged policy or practice advances [defendant's] valid interest (or interests)." In contrast, under the 2013 final rule, a defendant had to prove that its policy was "necessary to achieve" its legitimate, nondiscriminatory interests. The Proposed Rule does not require a defendant to prove necessity; instead, it places the burden on the plaintiff (who will necessarily have less information at this stage) to prove the *lack* of necessity of the policy.

Furthermore, if a defendant meets this lessened burden, a plaintiff can only prevail by proving "by the preponderance of the evidence that a less discriminatory policy or practice exists

that would serve the defendant's identified interest in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant." The requirement that plaintiffs offer a policy that will serve defendant's interests "in an equally effective manner" is unnecessarily narrow and goes beyond what is suggested by *ICP*, where the Court reiterated that suggested alternatives must "serve" a defendant's legitimate interests and must not prevent a defendant from "achieving legitimate objectives." *See* 135 S.Ct. at 2518, 2523 (looking to its own disparate impact jurisprudence and concluding that for a plaintiff to prevail, "a court must determine that a plaintiff has shown that there is an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs.") (internal citations omitted). Similarly, the Proposed Rule's requirement that a plaintiff's suggested alternative policy must not impose any greater costs on defendant also is inconsistent with *ICP*, where the Court cautioned only against "onerous costs" *id.* at 2523, not *any* costs. The narrow, heightened language in the Proposed Rule would place a nearly impossible burden on plaintiffs, as almost any change in policy or practice will have associated costs.

The Proposed Rule limits disparate impact liability and increases the *prima facie* burden on plaintiff far more than the Court called for in *ICP*. *Inclusive Communities* required only that "housing authorities and private developers be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest." 135 S.Ct. at 2523. Thus, the burden on a plaintiff should not be to prove that there is another policy or practice that can achieve the defendant's interests in an "equally effective manner" without creating any other "material burdens" or "greater costs" on the defendant. It merely should be to prove that there is another policy that can achieve defendant's interest, and, therefore, defendant's challenged policy is not "necessary." This is consistent with *ICP*'s command that disparate-impact liability mandates the removal of "arbitrary, artificial, and *unnecessary* barriers" to equality, *see* 135 S.Ct. at 2522. The burden-shifting framework in HUD's Proposed Rule would have the opposite effect – it would reinforce unnecessary disparities by placing profits and cost saving above the FHA's mandate for fair and equitable housing.

Many practices that result in disparate effects may serve presumptively valid interests, but that does not mean that those interests could not be served in less discriminatory ways. Nor does it mean a practice that serves a presumptively valid interest should be immune to all challenges. Indeed, the proposed burden-shifting framework would render meaningless *ICP*'s warning that disparate impact challenges can also help uncover hidden discriminatory intent or unconscious bias. *See* 135 S.Ct. at 2522. If a defendant has no interest in perpetuating racial, gender, or other discrimination, there is no reason for it not to be asked to achieve its legitimate goals in a less discriminatory manner.

C. The Proposed Rule Contains Unnecessary and Harmful Carve-Outs to Liability

The Proposed Rule also includes unnecessary and even harmful carve-outs to disparate impact liability, which would complicate the test, establish needless hurdles to plaintiffs who seek to challenge discriminatory practices in important areas of the housing market, and protect pernicious, discriminatory policies.

Under proposed section 100.500(c)(1), HUD's regulations would permit a potential defendant to avoid liability for the discriminatory effects of its policies simply by demonstrating that the defendant's discretion is limited by a "third party," such as a federal, state, or local law, or a "binding or controlling court, arbital, regulatory, administrative order, or administrative requirement." The preamble to the Proposed Rule specifically identifies that this provision would overlap with a targeted carve-out in proposed 100.500(e) for insurance providers. To the extent that this provision merely establishes that a defendant's challenged practice falls outside of the discriminatory effects standard because it is required by a state or local law, this provision is entirely unnecessary. Following such a requirement would squarely constitute a "legally sufficient justification" under the 2013 final rule. 24 C.F.R. § 100.500(b). In contrast, the language of the Proposed Rule is vague, encompassing "arbital . . . and administrative requirements" that are undefined, and may in fact encompass private, non- and quasi-governmental arbiters that serve only to protect industry players. Such practices should be subject to the scrutiny of the Courts and should not be wholly insulated from disparate impact liability.

Similarly, insurance regulation is already protected from undue federal judicial oversight by means of the McCarran-Ferguson Act. Courts have interpreted this Act extensively and have, in close analysis, already established how to determine whether a claim is cognizable under the Fair Housing Act in light of existing state laws governing insurance. At best, the carve-outs in the Proposed Rule are a restatement of the principles set forth in McCarran-Ferguson and the governing case law. *See, e.g., Ojo v. Farmers Grp., Inc.*, 600 F.3d 1205, 1209-10 (9th Cir. 2010), as amended (Apr. 30, 2010) (holding that McCarran-Ferguson may reverse-preempt the Fair Housing Act and certifying to the Texas Supreme Court whether the application of the FHA might "invalidate, impair, or supersede" the provisions of the Texas Insurance Code). More likely, however, this proposed provision would improperly deter appropriate scrutiny of the insurance markets, an industry that has a demonstrated history of discriminatory practices.

Finally, the proposed regulations provide three separate safe harbors for "models" and "algorithms" used in the housing industry. Complicated financial models and "black box" algorithms have become ever-present in the housing market, from credit scoring models, to the underwriting and pricing of mortgages and other financial products, to tenant screening tools, and beyond. *See, e.g.*, Robert Bartlett et al., *Consumer-Lending Discrimination in the FinTech Era*, May 2019, *available at* https://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf. However, these models and tools can also contribute to, or provide cover for, discrimination. *Id.* Each of HUD's three proposed safe harbors for these algorithms is troubling. HUD's proposed rule would protect a potential defendant simply because it hires a third party to conduct its discriminatory analyses (100.500(c)(2)(i)), because a proxy for a race or another protected classification is not deemed sufficiently "close" to be actionable (100.500(c)(2)(ii)), or because a purportedly unbiased industry actor has "certified" the model for non-discriminatory use (100.500(c)(2)(iii). At best, these substantial safe harbors are unnecessary: truly necessary, non-discriminatory algorithms could be defended with a legally sufficient justification under the 2013

final rule. 24 C.F.R. § 100.500(b). At worst, these provisions will shield discriminatory models from action and permit unbridled discriminatory effects throughout the housing markets.

For the above reasons, Legal Services NYC believes that the promulgation of HUD's Proposed Rule will gravely impair the ability of our clients to combat segregation and the effects of past and current discrimination. Thank you for the opportunity to comment on this important matter. If you have any questions or would like additional information from LSNYC, please contact:

Legal Services NYC
Veronica Cook, Senior Staff Attorney, Civil Rights Justice Initiative
Rachel Geballe, Supervising Attorney, Foreclosure Prevention Project
Ed Josephson, Director of Litigation
Marika Dias, Director, Tenants' Rights Coalition
40 Worth Street, Suite 606, New York, NY 10013
(646)-442-3600