LEGAL SERVICES NYC

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COMMENTS ON THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT'S PROPOSED AMENDMENTS TO 24 CFR PART 100 - DISCRIMINATORY CONDUCT UNDER THE FAIR HOUSING ACT DOCKET NO. FR-6540-P-01

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. LSNYC 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. LSNYC submits these comments in response to the U.S. Department of Housing and Urban Development's ("HUD") proposed amendments to regulations concerning discriminatory conduct in housing that would eliminate references to discriminatory effects or disparate impact liability under the Fair Housing Act.

A. Impact of Proposed Rule on LSNYC's Clients and Housing Providers

In addition to being repeatedly upheld and affirmed as a theory of discrimination by the Supreme Court and legislatures across the United States, disparate impact claims under the Fair Housing Act 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 significant 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 made up of homeowners of color.

In *Saint-Jean*, plaintiffs eventually prevailed in two jury trials 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); *see also Saint-Jean v. Emigrant Mortg. Co.*, 129 F.4th 124 (2d Cir. 2025), *cert. denied*, No. 25-229, 2026 WL 79895 (Jan. 12, 2026).

Disparate impact has also been an essential tool in LSNYC's efforts to vindicate the rights of victims of domestic violence. For example, 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 under disparate impact liability that New York City's policy of excluding domestic violence victims who were lawful Section 8 tenants from certain hearings alleged discrimination against women under the Fair Housing Act. Following that ruling, the City quickly offered 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 claimed that their landlord's practice of refusing to renew leases with nonprofit supportive housing programs had a disparate impact on disabled building residents, in violation of the Fair Housing Act.

We also pursue fair housing and fair lending administrative complaints filed at the Department of Housing and Urban Development ("HUD"), the New York State Division of Human Rights, and the New York City Commission on Human Rights. The proposed rule would constrain HUD and prevent investigative staff from applying applicable case law on disparate impact liability appropriately to assess these and other complainants' allegations.

LSNYC staff include hundreds of advocates who assist homeowners and tenants who are regularly subjected to discriminatory practices, including real estate redlining and reverse redlining, failure to rent, and discriminatory harassment. LSNYC regularly gathers data on housing practices in New York City and throughout New York State. These data, over decades, show the persistence of discriminatory practices. Tragically, these same practices continue and can be seen in our ongoing data collection and in the hundreds of intakes we conduct each year.

The proposed rule would harm Legal Services NYC's clients and the members of the communities in which they live, and would contravene long-standing case law that holds disparate impact claims to be cognizable under the Fair Housing Act.

B. HUD's Erasure of Disparate Impact from the Existing Regulation Lacks Justification and is Inconsistent with Supreme Court Precedent

The repeal of HUD's disparate impact regulation is not required by Executive Order 14281. That order instructs agencies to "review existing regulations and rules that impose disparate impact liability and consider amendment or repeal of these regulations as appropriate under applicable law." As the notice of proposed rulemaking acknowledges, HUD's regulation does not "impose" disparate impact liability. The Supreme Court held in *Texas Department of Housing and*

Community Affairs v. Inclusive Communities Project, Inc., 576 U.S. 519 (2015), that disparate impact liability is established by the Fair Housing Act. Thus, disparate impact liability is "imposed" by the statute and by the cases interpreting the statute, not only by the Supreme Court's decision in *Inclusive Communities*, but also by cases predating Inclusive Communities in all nine federal appeals courts that had addressed the question. *See Inclusive Communities*, 576 U.S. at 535–36.

Further, the proposed rulemaking relies on the assertion in Executive Order 14281 that disparate impact liability creates a "near insurmountable presumption of discrimination" when there are any differences in outcomes. This assertion is demonstrably false. From the Supreme Court first articulation of the test for disparate impact liability under Title VII of the Civil Rights Act in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), though its decision in *Inclusive Communities,* the Supreme Court has articulated and refined a standard for defendants to avoid disparate impact liability which has proved workable and not unduly burdensome for over fifty years.

Because the proposed repeal of the disparate impact regulation does not alter the existence of a disparate impact standard under the Fair Housing Act, it would only serve to make the rights and obligations of persons and businesses less clear, potentially blindsiding those without a comprehensive knowledge of the cases interpreting the Fair Housing Act. The notice of proposed rulemaking's dismissal of HUD's previously articulated justification of the rule as providing clarity and predictability is unpersuasive. To the extent that "case law continues to develop," the proper approach for HUD to take regarding this regulation is to update it to reflect new developments in the case law, not to gut it; excising the legally accurate references to disparate impact liability will only cause confusion for those who might be held liable under a disparate impact theory as well as those whose rights might be vindicated under such a theory.

C. HUD Misreads *Loper Bright*

In its notice of proposed rulemaking, HUD erroneously relies on *Loper Bright Enterprises v. Raimondo* (*Loper Bright*) to justify its change in the regulation. *See* 91 Fed. Reg. 1475 (citing *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024)). HUD contends that because *Loper Bright* overruled *Chevron* deference, agencies are no longer empowered to define the scope of disparate-impact liability under the Fair Housing Act, as courts will no longer afford agencies' interpretations deference under the Administrative Procedure Act. HUD argues that "it is appropriate for courts, not a Federal agency, to make determinations related to the interpretation of disparate impact liability under the Fair Housing Act." *Id.*

HUD proceeds under the erroneous assumption that because *Loper Bright* empowers courts to independently interpret a statute to determine whether an agency's regulation falls within its statutory authority, a regulation that interprets a statute is therefore "unnecessary." *Id.* HUD's reasoning ignores that fact that no court had reviewed this regulation, and the regulation fully complies with the law as defined by the Supreme Court. HUD's reasoning conflates the absence of deference with the absence of authority: HUD says that the fact that *Loper Bright* held that agencies' interpretations are not entitled to deference means that agencies cannot pass regulations in the first place. But that interpretation is flatly incorrect and would suggest that agencies serve no role other than to interpret statutes. *Loper Bright* held only that courts must independently assess whether an agency's interpretation is correct; it does not prohibit agencies from interpreting

statutes or promulgating regulations in the first instance. HUD is correct that "[a] reviewing court may wholly reject HUD's claims in prior rulemakings that the regulations provide greater clarity and predictability and may vacate or set aside HUD's rules." *Id.* However, agencies are obligated to exercise the authority that Congress delegates to them. Agencies remain responsible for interpreting statutory delegations unless and until a court adopts a contrary construction. Amendment or repeal of a regulation is warranted only if a court determines that an agency's interpretation conflicts with the statute.

HUD has exercised its authority in the past by issuing essential guidance to home homeowners, home buyers, tenants, sellers, lenders, and landlords as to the conduct that may constitute unlawful discrimination in housing. *See* 24 C.F.R. pt. 100. Such guidance has, as discussed *supra*, remained consistent with the Supreme Court's holding in *Inclusive Communities*, 576 U.S. at 545. This guidance, far from being "unnecessary," is critical, and *Loper Bright* in no way vitiated agencies' public role.

Federal regulations serve purposes that extend beyond withstanding judicial scrutiny. They clarify how agencies will carry out their congressionally delegated authority by converting broad legislative objectives into concrete, enforceable rules that promote consistency and accountability for both agencies and the public. To read *Loper Bright* as barring agencies from interpreting statutes absent prior judicial clarification would effectively prevent agencies from regulating at all, a result the Court in *Loper Bright* neither requires nor suggests. HUD must also process complaints for discriminatory housing practices and determine whether probable cause exists to pursue cases against bad actors. HUD's misinterpretation of *Loper Bright* would strip the agency of these essential functions that are core to the agency's mission as established by Congress.

D. HUD Has Failed to Conclude That Regulatory Change Is Called For

HUD notes that "Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are 'outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned,'" and "directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public." Nowhere in its proposed rulemaking, however, does HUD make any findings about the existing regulation that would implicate the concerns articulated in EO 13563.

Specifically, HUD never says that the portion of the existing regulation addressing disparate impact is outmoded; clearly it is not, because *Inclusive Communities*' holding that disparate impact claims are cognizable under the Fair Housing Act is the law of the land, and the existing regulation is therefore current. HUD has not claimed that the existing regulation is made ineffective by providing for disparate-impact liability, and indeed it could not, because instances of housing discrimination are effectively proven via evidence of disparate impact. Similarly, nowhere does HUD assert that the regulation is insufficient in its current form. It does not even say that the regulation's provision for disparate-impact liability renders it excessively burdensome. It does not provide any basis for any claim that excising disparate-impact liability yields more flexibility greater freedom for the American public. Accordingly, the authority it cites as the

rationale for the proposed elimination of disparate liability from the existing regulation fails to supply any basis for the change it seeks to make.

Because HUD's proposed amendments to the regulations governing housing discrimination are unnecessary by HUD's (and the administration's) own standards, because the changes are neither necessary nor consonant with settled law, because they would sow confusion, because they constitute an abdication of the agency's mission, and most of all because they would harm people who seek to challenge discrimination underlying facially neutral policies, we urge HUD not to go forward with its proposed amendments.

Sincerely,

Legal Services NYC