August 16, 2021

ATTORNEY GENERAL RAOUL: APPELLATE COURT REAFFIRMS RIGHTS OF TRANSGENDER INDIVIDUALS UNDER ILLINOIS HUMAN RIGHTS ACT

Chicago — Attorney General Kwame Raoul today announced an Illinois appellate court's opinion in Hobby Lobby v. Sommerville that reaffirms the rights of transgender individuals under the Illinois Human Rights Act.

The 2nd District Appellate Court issued the opinion in response to Hobby Lobby's appeal of a previous Illinois Human Rights Commission's determination. The commission had found that Hobby Lobby violated the Illinois Human Rights Act when it denied Meggan Sommerville, a transgender woman, use of the women's bathroom at the store where she works. The court affirmed the commission's determination that Hobby Lobby violated articles two and five of the Human Rights Act, which prohibit discrimination based on gender identity in the terms and conditions of employment and in the provision of facilities in a place of public accommodation. The commission had awarded Sommerville $220,000 in damages and required Hobby Lobby to grant Sommerville access to the women's bathroom.

"Nobody deserves to be discriminated against or feel unsafe in their workplace due to their gender identity," Raoul said. "I applaud the court for reaffirming the Illinois Human Rights Commission's determination and the rights of transgender individuals in Illinois. Discrimination of any kind has no place in our society, and I will continue to protect the rights of transgender individuals and fight to hold all employers accountable for following antidiscrimination laws."

Sommerville, a transgender woman, has worked at Hobby Lobby's East Aurora, Illinois location since the early 2000s. In 2007, she began transitioning from male to female. In early 2010, she legally changed her name, began presenting as female at work, and formally informed Hobby Lobby of her transition and her intent to begin using the women's bathroom at the store where she works. Hobby Lobby refused to allow Sommerville to use the women's bathroom.

In February 2013, Sommerville filed complaints with the Illinois Human Rights Commission alleging she had been discriminated against on the basis of her gender identity. In its appeal of the commission's determination, Hobby Lobby argued that its policy of regulating bathroom access based upon the users' "sex" – which, it contended, references users' reproductive organs and structures – does not violate the Illinois Human Rights Act. Hobby Lobby also argued that the damages awarded by the commission were excessive.

The Attorney General's office represented the Illinois Human Rights Commission and argued that the commission's determination was correct because Hobby Lobby's refusal to allow Sommerville to use the women's bathroom because she is a transgender woman – which resulted in her being treated differently from other women in the store based solely on her gender identity – falls within the Illinois Human Rights Act's definition of "unlawful discrimination." As Raoul explained, the law defines "sex" as "the status of being male or female," and does not draw distinctions based on reproductive organs, genetic information, or the sex marker used on a birth certificate. Raoul also argued that Hobby Lobby could stigmatize Sommerville by requiring her to use a single-occupant, unisex bathroom that, during the litigation, was built at the store where she works.

Supervising Attorney Evan Siegel handled the matter for Raoul's Civil Appeals Bureau.

Attorney General Raoul encourages individuals to report instances of discrimination or harassment by calling his Civil Rights Hotline at 1-877-581-3692.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

August 24, 2021

Via Electronic Submission

Jeanine Worden
Acting Assistant Secretary for Fair Housing and Equal Opportunity
Department of Housing and Urban Development
451 7th Street, NW
Washington, DC 20410

Re: Docket No. FR-6251-P-01
Reinstatement of HUD's Discriminatory Effects Standard

Dear Acting Assistant Secretary Worden:

The 23 undersigned State Attorneys General strongly support the Department of Housing and Urban Development's ("HUD") proposed rule on disparate impact liability under the Fair Housing Act ("FHA"), 86 Fed. Reg. 33,590 (June 25, 2021) ("the Proposed Rule"). While we believe that the Proposed Rule could be strengthened in the future by HUD providing further protections against discrimination, we urge HUD to finalize the Proposed Rule expeditiously.

The Proposed Rule looks to take concrete actions to address continuing housing discrimination in this country. The Proposed Rule would wipe away the unlawful rule finalized by the Trump Administration last fall, 85 Fed. Reg. 60,288 (Sept. 24, 2020) ("the 2020 Rule"). It would reinstate the rule that had since 2013 codified HUD's longstanding interpretation of disparate impact liability under the FHA, 78 Fed. Reg. 11,460, 11,463 (Feb. 15, 2013) ("the 2013 Rule"). By reinstating the 2013 Rule, HUD's regulation would again match the three-step framework endorsed by the United States Supreme Court in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015).

I. Disparate Impact Liability Is an Important Tool to Combat Housing Discrimination on which States Rely

Our country has a shameful history of engaging in discrimination related to housing. Such discrimination included explicitly discriminatory restrictive covenants providing for white-only ownership of houses in certain neighborhoods, the refusal of governments to guarantee home loans in neighborhoods with significant non-white populations, and towns that declared that non-white

individuals were banned from being within the city limits between dusk and dawn.[1] Congress finally took action in 1968 to address this explicit, *de jure* discrimination through passage of the FHA. However, the legacy of racism and segregation could not be wiped away by eliminating only overtly discriminatory housing practices. Courts and government agencies soon began analyzing claims of housing discrimination using the disparate impact theory of liability first developed in the employment context and endorsed by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

The Supreme Court in *Inclusive Communities* validated disparate impact liability in the FHA context. *Inclusive Communities* squarely held that "[r]ecognition of disparate-impact claims is consistent with the FHA's central purpose." 576 U.S. at 539. The Court noted disparate impact liability "allow[s] private developers to vindicate the FHA's objectives and to protect their property rights" and that some practices made unlawful by disparate impact liability "function unfairly to exclude minorities from certain neighborhoods without any sufficient justification." *Id*. at 540. The Court concluded its opinion by emphasizing the continued importance of the FHA's disparate impact theory of liability in advancing the nation's efforts to advance justice and equality:

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

Id. at 546-47 (cleaned up).

Enforcement actions under the FHA and similar state laws[2] based on disparate impact theories are a critical component of states' efforts to combat discrimination and ensure greater

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[1] *See Shelley v. Kraemer*, 334 U.S. 1 (1948); *Thompson v. U.S. HUD*, 348 F. Supp. 2d 398, 471-72 (D. Md. 2005); James W. Lowen, Sundown Towns (2005).

[2] *See, e.g.*, Cal. Gov. Code § 12955.8 (prohibiting housing discrimination "if an act or failure to act . . . has the effect, regardless of intent, of unlawfully discriminating"); D.C. Code § 2-1402.68 ("Any practice which has the effect or consequence of violating any of the provisions of [the District's fair housing law] shall be deemed to be an unlawful discriminatory practice."); N.C. Gen. Stat. § 41A-5(a)(2) (prohibiting housing discrimination if a "person's act or failure to act has the effect, regardless of intent, of discriminating"); Haw. Code R. § 12-46-305(8); *Kumar v. Gate Gourmet, Inc.*, 325 P.3d 193, 204 (Wash. 2014) (Washington Law Against Discrimination creates a cause of action for disparate impact); *Saville v. Quaker Hill Place*, 531 A.2d 201, 206 (Del. 1987) ("[C]laims of disparate impact against the handicapped may lie in appropriate cases under

equality of opportunity in obtaining housing. States have used disparate impact claims to challenge many types of seemingly neutral housing policies that have a discriminatory effect, such as zoning ordinances, occupancy restrictions, no pet policies, and English-only policies.[3] For example, since 2015, the State of Washington has brought 16 enforcement actions and filed two amicus briefs involving disparate impact discrimination in violation of the FHA, including issues related to overbroad use of criminal background checks by landlords and the effect of crime-free rental housing ordinance on victims of domestic violence.[4] Additionally, the states' enforcement efforts

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[Delaware's fair housing law]."); *Burbank Apartments Tenant Ass'n v. Kargman*, 48 N.E.3d 394, 408 (Mass. 2016) (disparate impact claims cognizable under Massachusetts' fair housing law).

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

[4] *See State v. DSB Invs., LLC*, No. 15-2-26732-9 (King Cty. Super. Ct., Wash. Nov. 2, 2015) (application of tenancy terms and conditions that discriminated on characteristics associated with race); *State v. Pac. Crest, LLC*, No. 16-2-20773-1 (King Cty. Super. Ct., Wash. Aug. 29, 2016) (criminal history screening practices that discriminated on the bases of race or color); *State v. Premier Residential*, No. 16-2-19043-0 (King Cty. Super. Ct., Wash. Aug. 10, 2016) (same); *State v. Coho Real Estate Grp.*, LLC, No. 16-2-26931-1 (King Cty. Super. Ct., Wash. Nov. 4, 2016) (same); *State v. Dobler Mgmt. Co.*, No. 16-2-12461-1 (Pierce Cty. Super. Ct., Wash. Nov. 7, 2016) (same); *State v. Weidner Prop. Mgmt.*, LLC, No. 17-2-00821-4 (King Cty. Super. Ct., Wash. Jan. 19, 2017) (same); *State v. KPS Realty, LLC*, No. 17-2-00564-3 (Spokane Cty. Super. Ct., Wash. Feb. 15, 2017) (blanket refusal to accept veterans' housing choice vouchers discriminated on the basis of disability); *State v. Realty Mart Prop. Mgmt, LLC*, No. 17-2-00677-1 (Spokane Cty. Super. Ct., Wash. Feb. 23, 2017) (policy of charging double damage deposit to tenants who pay rent with disability income discriminated on the basis of disability); *Yakima Neighborhood Health Servs. v. City of Yakima*, No. 1:16-cv-03030 (E.D. Wash. Aug. 10, 2017) (adoption of zoning and land use ordinances to limit housing for homeless individuals discriminated against people with disabilities); *State v. TJ Cline, LLC*, No. 17-2-00716-2 (Walla Walla Cty. Super. Ct., Wash. Aug.

against the mortgage lending industry illustrates the critical importance of disparate impact theories to combat housing discrimination.[5] States have also joined city and local governments' efforts to combat lending discrimination through disparate impact liability. As an example, California joined the City of Oakland as amicus on appeal in a case against Wells Fargo, alleging the bank harmed the city through a pattern of illegal and discriminatory mortgage lending, heavily impacting minority community members in violation of the FHA and California Fair Employment and Housing Act.[6]

Disparate impact liability provides Attorneys General and state fair housing enforcement agencies a critical tool to combat this form of discrimination where direct proof of overt bias is hidden or impossible to ferret out. The Attorneys General thus share the Supreme Court's observation in *Inclusive Communities* that disparate impact liability "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." 576 U.S. at 536.

30, 2017) (blanket refusal to accept veterans' housing choice vouchers discriminated on the basis of disability); *State v. Domus Urbis, LLC*, No. 17-2-03584-4 (Spokane Cty. Super. Ct., Wash. Sept. 14, 2017) (same); *State v. Rowley Props.*, No. 17-2-27276-1 (King Cty. Super. Ct., Wash. Oct. 19, 2017) (same); *State v. Welcome Home Props., LLC*, No. 17-2-00861-4 (Walla Walla Cty. Super. Ct., Wash. Oct. 25, 2017) (same*); State v. Yelm Creek Apartments, LLC*, No. 17-2-06117-34 (Thurston Cty. Super. Ct., Wash. Nov. 21, 2017) (disability and housing vouchers); *State v. Celski & Assocs., Inc.*, No. 17-2-03255-4 (Benton Cty. Super. Ct., Wash. Jan. 17, 2018) (same); *State v. Country Homes Realty, LLC*, No. 18-2-00336-3 (Spokane Cty. Super. Ct., Wash. Jan. 26, 2018) (same); *Fair Housing Center of Wash. v. Breier-Scheetz Props., LLC*, 743 F. App'x. 116 (9th Cir. 2018) (multi-family property's occupancy standards discriminated against families with children); *Washington v. City of Sunnyside*, No. 20-cv-03018-RMP (E.D. Wash. filed February 5, 2020) (municipal police department's enforcement of its crime-free rental housing ordinance discriminated on the basis of national origin, sex, and familial status).

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

[6] *City of Oakland v. Wells Fargo Bank & Co.*, 972 F.3d 1112 (9th Cir. 2020), *reh'g en banc granted*, 993 F.3d 1077 (9th Cir. 2021).

Because of Attorneys Generals' experience combatting housing discrimination using disparate impact claims, the judiciary and interested entities have come to rely on our views concerning disparate impact liability under the FHA. Indeed, the Supreme Court in *Inclusive Communities* favorably cited an amicus brief submitted by a group of 17 Attorneys General in concluding that "residents and policymakers have come to rely on the availability of disparate-impact claims." *Id*. at 546. Additionally, Congress directed state and local governments to share responsibility with the federal government to process and investigate administrative complaints made pursuant to the FHA.[7]

II. HUD Is Correct that the 2020 Rule Is Unlawful and Makes Discriminatory Effects Liability a Practical Nullity

At its core, the 2020 Rule radically alters the simple, three-step framework of the 2013 Rule for proving FHA disparate impact claims and turns it into a complex, four-step framework that is procedurally defective, creates uncertainty for potential litigants, enforcement agencies and the courts and makes discriminatory effects liability a practical nullity. At the first step under the 2013 Rule's framework, the plaintiff "has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect" on a protected class. 24 C.F.R. § 100.500(c)(1) (2019). At the second step, a defendant "has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." *Id*. § 100.500(c)(2). In the third step, a plaintiff prevails if it proves that interest could be served by a less discriminatory alternative to the challenged practice. *Id*. § 100.500(c)(3).

The 2020 Rule amends the first step by adding a five-element test with specific requirements on matters including causation and significance. 24 C.F.R. § 100.500(b)(1)-(5) (2021). It amends the second step to require that a defendant only "produc[e] evidence showing that the challenged policy or practice advance a valid interest (or interests)" with no prohibition on the use of hypothetical or speculative evidence. *Id*. § 100.500(c)(2). It amends the third step to add two further requirements on a plaintiff's burden to prove a less discriminatory alternative policy or practice: the plaintiff must prove it would (1) serve the defendant's identified interest in "an equally effective manner"; and (2) "without imposing materially greater costs on, or creating other material burdens for, the defendant." *Id*. § 100.500(c)(3). And it adds a forth step allowing a defendant to also avoid liability if (1) "the defendant's policy or practice was reasonably necessary to comply with a third-party requirement, such as a[] Federal, state, or local law" or (2) "[t]he policy or practice is intended to predict an occurrence of an outcome, the prediction represents a valid interest, and the outcome predicted by the policy or practice does not or would not have a disparate impact on protected classes compared to similarly situated individuals not part of the protected class." *Id*. § 100.500(d).

[7] *See* 42 U.S.C. § 3610(f); *see also id*. § 3616 (providing for cooperation between HUD and state and local governments); H.R. Rep. No. 100-711, at 35 (1988) (House Committee Report to the Fair Housing Amendments Act of 1988 noting "the valuable role state and local agencies play in the [FHA] enforcement process").

The defects of the 2020 Rule are so serious that a federal district court issued a preliminary injunction staying its implementation and postponing its effective date. *Mass. Fair Housing Ctr. v. HUD*, 496 F Supp 3d 600 (D. Mass. 2020). The Proposed Rule would correctly respond to this ruling, and President Biden's order to review the 2020 Rule in his January 26, 2021 Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Polices, by revoking the unlawful 2020 Rule.

As described in *Massachusetts Fair Housing Center*, the 2020 Rule "introduc[es] new, onerous pleading requirements on plaintiffs, and significantly alter[s] the burden-shifting framework by easing the burden on defendants of justifying a policy with discriminatory effect while at the same time render[s] it more difficult for plaintiffs to rebut that justification." *Id*. at 606-07. The Court went on to note that the 2020 Rule also "arms defendants with broad new defenses which appear to make it easier for offending defendants to dodge liability and more difficult for plaintiffs to succeed." *Id.* at 607. The Court concluded that "these changes constitute a massive overhaul of HUD's disparate impact standards, to the benefit of putative defendants and to the detriment of putative plaintiffs . . . ." *Id*. The undersigned Attorneys General detail below our agreement with the Court's analysis and support for HUD's current position on the 2020 Rule.

The 2020 Rule adds unprecedented defenses to FHA disparate impact liability. Particularly egregious is its intrusion on questions of judicial process by specifying how the burden-shifting framework applies at the pleading stage of a case, creating pleading-stage defenses, and interpreting where and when certain evidentiary inferences with respect to data can be drawn.[8] 24 C.F.R. § 100.500(b), (d)(1). The 2020 Rule goes far beyond HUD's authority and would raise constitutional concerns if followed. *Cf. De Niz Robles v. Lynch*, 803 F.3d 1165, 1171-72 (10th Cir. 2015) (Gorsuch, J.) (cataloguing constitutional problems with deference to agencies overriding the function of courts). It also creates a new, special defense for a "policy or practice . . . intended to predict an occurrence of an outcome" that is replete with ambiguity and would be difficult for a plaintiff, defendant, or court to apply. 24 C.F.R. § 100.500(d)(2)(i). This defense may effectively create exemptions for categories of practices in the lending and insurance industry notwithstanding HUD's cogent prior explanations in 2013 and 2016 why categorical exemptions from disparate impact liability are undesirable.[9] Finally, the 2020 Rule inappropriately allows a

[8] The 2020 Rule addresses the required causal link between a challenged practice or policy and the disparity at issue by requiring a plaintiff to demonstrate that the challenged practice or policy is "the direct cause of the discriminatory effect," that a "disparity caused by the policy or practice is significant," and that "there is a direct relation between the injury asserted and the injurious conduct alleged." 24 C.F.R. § 100.500(b)(3)-(5). These three subsections are problematic because of their confusing overlap and lack of precision, and because they purport to require pleading about statistical significance before a plaintiff had access to data through discovery.

[9] Indeed, the Trump Administration touted this defense "achieves many of the goals" of the "algorithmic defenses" proposed in the 2019 Advanced Notice for Proposed Rulemaking. 85 Fed. Reg. at 60,290, 60,319. The originally proposed algorithmic defenses would have given a free pass to the lending and insurance industry and had absolutely no basis in the text of the FHA and were wholly inconsistent with longstanding judicial application of the disparate impact

defendant to avoid liability by "showing that [its] policy or practice was reasonably necessary to comply with a third-party requirement, such as a . . . state, or local law." *Id.* § 100.500(d)(1); *see also id.* § 100.500(d)(2)(iii). Allowing state and local law to supersede federal law is directly contrary to the FHA's strong preemption provision that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this title shall to that extent be invalid." 42 U.S.C. § 3615.

Moreover, the 2020 Rule unlawfully rejects the Supreme Court's holding that certain categories of FHA disparate impact claims are particularly meritorious: those targeting "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification"; those "allow[ing] private developers . . . [to] stop[] municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units"; and those "permit[ting] plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." *Inclusive Cmtys.*, 576 U.S. at 539-40. The 2020 Rule establishes prima facie burdens so high that it would make it practically impossible for meritorious claims endorsed by the Supreme Court to proceed. Such a result would be contrary to the text and purpose of the FHA as well as HUD's statutory duty to affirmatively further fair housing. 42 U.S.C. § 3608(e)(5).

Finally, the 2020 Rule unnecessarily and unwisely provides that "[n]othing in" HUD's Fair Housing regulations "requires or encourages the collection of data" relevant to characteristics protected by the FHA. 24 C.F.R. §100.5(d). Although this provision is not limited to disparate impact claims, its discouragement of data collection has a grave effect on disparate impact litigation. *See Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 382 (3d Cir. 2011) ("Typically, a disparate impact is demonstrated by statistics") (internal quotation marks omitted). Nevertheless, HUD provided no consideration in promulgating the 2020 Rule of how it would limit access to credit for borrowers of color and would further deregulate private credit markets that have historically failed to serve borrowers of color equally.[10]

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standard. The proposed algorithmic defenses created a higher standard of proof for FHA claims related to algorithmic discrimination by lenders or insurers, deviated from the FHA's text by incorrectly attempting to tie the standard of proof to the development of the algorithm rather than its use, and further upended the burden-shifting framework employed by the 2013 Rule by incorrectly allowing algorithm uses to shield themselves from liability if the algorithm was produced by a "recognized third party." In addition, the proposed algorithmic defenses were written in a manner that did not consider the role that proxies could play in potential algorithmic discrimination even when neutral factors were being input to the algorithm.

[10] *See, e.g.*, Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 Harv. C.R.-C.L. L. Rev 375, 385-402 (2010); Calvin Schermerhorn, Op.-Ed., *Why the Racial Wealth Gap Persists, More than 150 Years After Emancipation*, Wash. Post, June 19, 2019.

III. The Proposed Rule Is Amply Supported by the FHA and Judicial Precedent

HUD's preface to the Proposed Rule observes that, as compared to the 2020 Rule, "the 2013 Rule is more consistent with judicial precedent construing the Fair Housing Act, including *Inclusive Communities,* as well as the Act's broad remedial purpose." 86 Fed. Reg. at 33,596. The undersigned Attorneys General agree.

In promulgating the 2013 Rule, HUD relied upon existing law under the FHA and Title VII of the Civil Rights Act to specify the framework for proving a disparate impact claim. *See* 78 Fed. Reg. at 11,461-62 ("[T]his final rule embodies law that has been in place for almost four decades . . . ."); 76 Fed. Reg. 70,921, 70,924 (Nov. 16, 2011) (explaining the framework set out in the 2013 Rule is consistent with Title VII's framework). In so doing, the 2013 Rule provided for a three-step framework that clearly assigned burdens at each step. That standard, which HUD reinstates here, also is fully consistent with the Supreme Court's decision in *Inclusive Communities*.

In *Inclusive Communities*, the Supreme Court explicitly drew on Title VII in discussing the standards applicable to an FHA disparate impact claim. 576 U.S. at 541 (giving covered entities "leeway to state and explain the valid interest served by their policies . . . analogous to the business necessity standard under Title VII"). The Court also heavily relied on *Griggs v. Duke Power Co.*, which is the foundation of Title VII disparate impact proof standards, to articulate the limits of FHA disparate impact. *See id.* at 540 (quoting *Griggs*, 401 U.S. at 431).

Courts that have interpreted *Inclusive Communities* generally agree that it dictates continuing reliance on preexisting FHA and Title VII law in resolving granular questions about disparate impact liability. For example, the Fourth Circuit has held both that "*Inclusive Communities* . . . expressly acknowledged that its FHA burden-shifting framework closely resembles the Title VII framework for disparate-impact claims" and that "pre-*Inclusive Communities* FHA disparate-impact cases are consistent with [*Inclusive Communities*'] robust causality requirement." *de Reyes v. Waples Mobile Home Park L.P.*, 903 F.3d 415, 426 n.6, 428 (4th Cir. 2018); *see also Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 863 (7th Cir. 2018) (citing *Inclusive Communities* to support that Title VII and the FHA are "functional equivalents to be given like construction and application"); *Nat'l Fair Hous. Alliance v. Travelers Indem. Co.*, 261 F. Supp. 3d 20, 30 (D.D.C. 2017) (holding preexisting FHA cases remain "sound" pursuant to *Inclusive Communities*' "robust causality requirement."). Indeed, the Fourth Circuit has observed "[i]n *Inclusive Communities*, the Supreme Court explained that an FHA disparate-impact claim should be analyzed under a three-step, burden-shifting framework." *de Reyes*, 903 F.3d at 424.

Moreover, in the portion of the opinion discussing the standards of proving a disparate impact claim, the Supreme Court favorably cited the 2013 Rule multiple times, including the Rule's burden-shifting framework that provides "housing providers and private developers" an opportunity to "state and explain the valid interest served by their policies." *Inclusive Cmtys.*, 576 U.S. at 541. Numerous courts have held after *Inclusive Communities* that the 2013 Rule was "adopted" by, or consistent with, the Supreme Court's decision. *See, e.g.*, *MHANY Mgmt., Inc. v.*

Cty. of Nassau, 819 F.3d 581, 618 (2d Cir. 2016) ("Supreme Court implicitly adopted HUD's approach"); *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 512-13 (9th Cir. 2016) (describing what the Supreme Court "made clear" in Inclusive Communities followed by a "see also" cite to the Rule); *Burbank Apartment Tenant Ass'n*, 48 N.E.3d at 411 ("framework laid out by HUD and adopted by the Supreme Court"). In 2017, then-District (now Circuit) Judge Amy St. Eve ruled that "the Supreme Court in *Inclusive Communities* . . . did not identify any aspect of HUD's burden-shifting approach that required correction." *Prop. Cas. Insurers Ass'n of Am. v. Carson*, No. 13-cv-8564, 2017 U.S. Dist. LEXIS 94502, at *29 (N.D. Ill. June 20, 2017).

IV. FHA Disparate Impact Analysis Could be Strengthened

Although the undersigned Attorneys General fully support reinstating the 2013 Rule, we also urge HUD to make disparate impact liability even more protective of the housing rights of protected groups. Specifically, the proposed language of 24 C.F.R. § 100.500(c)(3) could be strengthened to require defendants to bear the burden of showing that less discriminatory alternatives are not available at the final stage of the burden-shifting test. California has already interpreted its state fair housing statute to place this burden on defendants. Cal. Code. Regs. tit. 2, § 12062. Indeed, the Second Circuit placed this burden on the defendant prior to the 2013 Rule, and it only stopped doing so based on deference to HUD's assignments of the burdens. *See MHANY Mgmt.*, 819 F.3d at 617-19 (holding the 2013 Rule abrogated Second Circuit precedent placing the burden at the final stage on the defendant).

Accordingly, the Attorneys General encourage HUD to use either this rulemaking or a future rulemaking to consider strengthening the 2013 Rule. In the eight years since its promulgation, the issues of segregation and discrimination in housing and lending have not abated. Many urban centers have seen increasing displacement of communities of color during that time,[11] and housing has become more unaffordable especially after the housing market disruptions brought about by the COVID pandemic.[12] Additionally, lending standards have remained restrictive after the 2008 economic crisis, which causes borrowers of color to be substantially more

[11] *See* Olatunde C.A. Johnson, *Unjust Cities? Gentrification, Integration, and the Fair Housing Act*, 53 U. Rich. L. Rev 835, 843-45 (2019); Anne Bellows & Michael Allen, *The Fair Housing Imperative to Address the Displacement Crisis*, Civil Rights Insider 5, 5 (Winter 2018), *available at* http://www.fedbar.org/Image-Library/Sections-and-Divisions/Civil-Rights/Civil-Rights-Winter-2018.aspx.

[12] *See, e.g.*, Joint Ctr. for Housing Studies of Harvard Univ., The State of the Nation's Housing: 2021, at 1-2, 32-33 *available at* http://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_Nations_Housing_2021.pdf ("[H]ome price gains continued to outrun income growth last year, lifting the national price-to-income ratio to 4.4—the highest level since 2006. . . . The prevalence of cost burdens reflects the chronic lack of affordable housing for households of modest means, particularly those with extremely low incomes (earning less than 30 percent of area median income).").

likely than white borrowers to be denied conventional loans,[13] and leaves them to be disproportionately served by the nonconventional mortgage market.[14] Moreover, the growing role of data analytics and online platforms in the housing sale and rental markets means that risks are greater that segments of society will be steered away from or denied housing in a way that is immune to examination of intent yet results in even more segregated housing patterns.[15] That these developments may be resulting in greater housing discrimination is borne out by data in a recent Harvard University report that found the gap between whites and African Americans in homeownership rate stands at an usually high 28.1 percentage points, with the gap for Hispanics also at a troubling 23.8 percentage points.[16] At the very least, these factual developments strongly support reinstating the 2013 Rule rather than allowing the weakened 2020 Rule to remain in place.

V. The Proposed Rule Does Not Have a Significant Economic Impact

As part of the Proposed Rule, HUD has certified it will not have a significant economic impact on a substantial number of small entities. In response to HUD's invitation of comments on this question, the undersigned Attorneys General agree and observe that the Proposed Rule will actually eliminate economic burdens that the 2020 Rule imposes.

The 2020 Rule's abundance of ambiguous, undefined phrases creates substantial difficulty for regulated parties, government investigators, parties to litigation, or factfinders to follow. *See, e.g.*, 24 C.F.R. § 100.500(b)(3) (using the undefined term "robust causal link"). This ambiguity may make disputes over disparate impact liability more difficult to resolve by settlement because the parties may have had a fundamental, irreconcilable legal dispute over the meaning of terms. Additionally, plaintiffs under the 2020 Rule would bear the costs of having to perform extensive

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[13] *See* Aaron Glantz & Emmanuel Martinez, *For People of Color, Banks Are Shutting the Door to Homeownership,* Reveal (Feb. 15, 2018), https://www.revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership/.

[14] *See* Joint Ctr. for Housing Studies of Harvard Univ., *supra* note 12, at 23-24; Consumer Fin. Protection Bureau, Data Point: 2019 Mortgage Market Activity and Trends 31-35 (June 2020), *available at* https://www.consumerfinance.gov/documents/8942/cfpb_2019-mortgage-market-activity-trends_report.pdf; Peter Smith & Melissa Stegman, Ctr. Responsible Lending, Repairing a Two-Tiered System: The Crucial but Complex Role of FHA 6-11 (May 2018), *available at* https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-repairing-two-tiered-system-fha-may2018.pdf.

[15] *See Sandvig v. Sessions,* 315 F. Supp. 3d 1, 9 (D.D.C. 2018) (describing work of researchers looking into the effect of these trends on housing discrimination based on the "concern[] that, 'when algorithms automate decisions, there is a very real risk that those decisions will unintentionally have a prohibited discriminatory effect'"); Valerie Schneider, *Locked Out by Big Data: How Big Data, Algorithms and Machine Learning May Undermine Housing Justice*, 52 Colum. Human Rights L. Rev. 251, 266-90 (2020).

[16] Joint Ctr. for Housing Studies of Harvard Univ., *supra* note 12, 3.

pre-litigation investigation without the benefit of formal discovery. And assuming that this pre-litigation discovery was even attainable, it may create additional workloads for other entities, including state governments. Further, when a private sector lender, bank, or insurer is the prospective defendant, a plaintiff may need to look to state regulatory agencies to secure pre-litigation information from the private sector entity through administrative procedures, thereby increasing costs to the public. This would likely increase costs and burdens to all potential litigants and decreased potential litigants' and liability insurers' ability to analyze the risks and costs of litigating. Overall, these added costs on both sides would be especially troubling to Attorneys General, as we have a unique perspective of representing both prospective plaintiffs and prospective defendants in FHA actions.

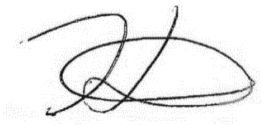
Returning to the 2013 Rule eliminates these needless expenses. Moreover, case law has demonstrated that the 2013 Rule's burden-shifting test provided courts with both guidance and flexibility to quickly dismiss uncertain disparate impact cases while allowing meritorious cases to proceed. *See, e.g.*, *Boykin v. Fenty*, 650 F. App'x. 42, 44 (D.C. Cir. 2016) (unpublished) (affirming dismissal of a disparate impact claim when the complaint "failed to allege facts suggesting that the [challenged action] affected a greater proportion of disabled individuals than non-disabled"). The requirements for a disparate impact claim under the 2013 Rule and *Inclusive Communities* already make it difficult for plaintiffs to allege disparate impact claims, let alone prove them on the merits.[17]

[17] Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 Am. U. L. Rev. 357 (2013); Lorren Patterson, *The Impact of Disparate Impact: The Benefits Outweigh the Costs of Recognizing Disparate Impact Claims Under the Fair Housing Act*, 8 Geo. J. L. & Mod. Critical Race Persp. 211 (2016). Importantly, plaintiffs already face an uphill battle to plead and prove disparate impact claims, even prior to the 2013 Rule and *Inclusive Communities*. According to one analysis of 40 years of disparate impact litigation, as of December 2013, (1) plaintiffs secured favorable decisions in only 20% of the disparate impact claims considered on appeal; (2) defendants had 83.8% of their favorable trial court disparate impact rulings affirmed on appeal while plaintiffs received affirmance on appeal of only 33.3% of their favorable trial court rulings; and (3) plaintiffs successfully reversed on appeal only four adverse summary judgment rulings in the 40-year period studied. Seicshnaydre, *supra*, at 362, 391-403.

V. Conclusion

Based on the undersigned Attorneys General's wide-ranging experience with and reliance on disparate impact liability under the FHA, we fully support the Proposed Rule. For all the reasons described in this letter, we urge HUD to promptly finalize the Proposed Rule and reinstate the 2013 Rule.

Sincerely,



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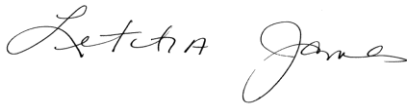
District of Columbia Attorney General



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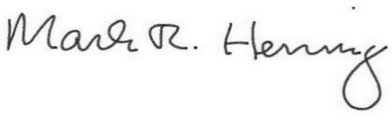

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