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Comments to HUD Re: FR-6111-P-02, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

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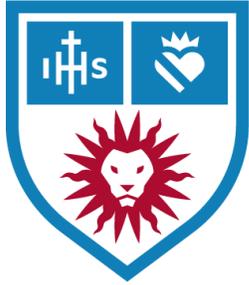
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Comments to HUD Re: FR-6111-P-02,
HUD's Implementation of the Fair
Housing Act's Disparate Impact
Standard

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October 18, 2019

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Office of the General Counsel
Rule Docket Clerk
Department of Housing and Urban Development
451 Seventh Street SW
Washington, D.C. 20410-0001

Re: FR-6111-P-02, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

To Whom It May Concern:

Thank you for the opportunity to comment on the Department of Housing and Urban Development's (HUD's) proposed "Implementation of the Fair Housing Act's Disparate Impact Standard," Docket No. FR-6111-P-02, published at 84 Fed. Reg. 42854-63, Aug. 19, 2019. We are legal academics who teach and write in the areas of civil procedure, administrative law, constitutional law, and civil rights. We write to draw attention to a number of ways in which the proposed rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "contrary to constitutional right, power, privilege, or immunity"; and "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2).

In key places, HUD's 2019 proposed rule is at odds with express provisions of the Fair Housing Act (FHA) and other statutes, and goes so far as to invent new defenses to liability for housing discrimination and to place the burden of pleading and proving the nonexistence of some of these defenses on plaintiffs. In addition, the proposed rule addresses itself to matters beyond the FHA; specifically, to evidentiary and procedural issues as they may arise in cases brought under the FHA in federal or state courts. HUD provides no reasoned justification for these changes in its regulations, and by creating additional obstacles to achieving Congress's purposes in enacting the FHA, HUD risks violating its statutory duty to further fair housing.

If adopted by HUD and applied by the courts, the proposed rule would:

- allow the executive branch of the federal government to interfere with and regulate access to our independent federal and state courts;
- give political appointees the authority to drastically redefine individual rights recognized by Congress; and
- create conflicts and uncertainty with respect to existing law.

To avoid such untenable results, the following portions of the proposed rule must not be adopted:

1. Data Collection.

Proposed § 100.5 provides:

*(d) Nothing in this part **requires or encourages the collection of data** with respect to race, color, religion, sex, handicap, familial status, or national origin. The absence of any such collection efforts shall not result in any adverse inference against a party.*

This is inconsistent with the expressed policy of Congress to require data collection in some instances and to generally encourage self-testing, both of which are aimed at eliminating discrimination in housing and promoting fair housing opportunity. Specifically, Congress has passed a variety of statutes that require or encourage housing providers, housing assistance providers, and home mortgage lenders to collect data on race, color, religion, sex, handicap, familial status, or national origin.¹ Further, the Fair Housing Act itself encourages providers of housing and housing-related services to engage in self-testing for housing discrimination, which ordinarily requires some race, color, religion, sex, handicap, familial status, or national origin data collection.² Because the proposed rule interferes with statutory choices Congress has made with respect to data collection, the proposed rule is not in accordance with law.

2. Permissible Inferences from Evidence.

Proposed § 100.5 provides:

*(d) Nothing in this part requires or encourages the collection of data with respect to race, color, religion, sex, handicap, familial status, or national origin. The absence of any such collection efforts shall not result in **any adverse inference** against a party.*

This provision is problematic in at least two respects.

¹ For example, the FHA requires the Secretary of HUD to “annually report to the Congress, and make available to the public, data on the race, color, religion, sex, national origin, age, handicap, and family characteristics of persons and households who are applicants for, participants in, or beneficiaries or potential beneficiaries of, programs administered by the Department.” 42 U.S.C. § 3608(e)(6). The Home Mortgage Disclosure Act requires mortgage lenders to collect and disclose with respect to each loan application and originated loan, “the number and dollar amount of mortgage loans and completed applications involving mortgagors or mortgage applicants grouped according to census tract, income level, racial characteristics, age, and gender.” 12 U.S.C. § 2803(b)(4). The Housing and Community Development Act of 1987 provides:

(a) In general - To assess the extent of compliance with Federal fair housing requirements (including the requirements established under title VI of Public Law 88-352 [42 U.S.C. 2000d et seq.] and title VIII of Public Law 90-284 [42 U.S.C. 3601 et seq.]), the Secretary of Agriculture shall collect, not less than annually, data on the racial and ethnic characteristics of persons eligible for, assisted, or otherwise benefiting under each community development, housing assistance, and mortgage and loan insurance and guarantee program administered by such Secretary. Such data shall be collected on a building by building basis if the Secretary determines such collection to be appropriate.

42 U.S.C. § 3608a (Collection of certain data).

² 42 U.S.C. § 3614-1. Incentives for self-testing and self-correction.

(a) Privileged information

(1) Conditions for privilege - A report or result of a self-test (as that term is defined by regulation of the Secretary) shall be considered to be privileged under paragraph (2) if any person - (A) conducts, or authorizes an independent third party to conduct, a self-test of any aspect of a residential real estate related lending transaction of that person, or any part of that transaction, in order to determine the level or effectiveness of compliance with this subchapter by that person; and (B) has identified any possible violation of this subchapter by that person and has taken, or is taking, appropriate corrective action to address any such possible violation.

(2) Privileged self-test - If a person meets the conditions specified in subparagraphs (A) and (B) of paragraph (1) with respect to a self-test described in that paragraph, any report or results of that self-test - (A) shall be privileged; and (B) may not be obtained or used by any applicant, department, or agency in any - (i) proceeding or civil action in which one or more violations of this subchapter are alleged; or ii) examination or investigation relating to compliance with this subchapter.

First, the Federal Rules of Evidence already cover what evidence is admissible and the purposes for which it may be admitted in federal courts,³ and Congress by statute requires the same evidentiary rules to be applied in administrative FHA proceedings.⁴ State courts have their own rules of evidence and procedure, and these rules apply to federal claims (including FHA claims) brought in state court unless doing so would “impose unnecessary burdens upon rights of recovery authorized by federal laws.”⁵ Only Congress or the Supreme Court can change the rules of evidence applicable in federal court or federal administrative adjudications.⁶ Only states can change their own rules of evidence. HUD lacks authority to change federal or state court evidentiary rules.

Second, after the presentation of evidence, factfinders decide what inferences to draw from the evidence, based on all the circumstances, and so long as those inferences are reasonable, the factfinder’s findings will not be disturbed. Reasonable inferences are frequently adverse to one party or another. For example, if a mortgage lender collected sex or national origin data and then stopped collecting it when the data showed disparate impact, a factfinder reasonably might draw the inference that the lender believed that further data collection would continue to show disparate impact, an inference that would be “adverse” to the lender. For HUD to regulate the inferences that factfinders can take from admissible evidence impinges on the authority of Congress, the federal courts, and the States. Moreover, in jury trials, a rule that dictates the inferences a jury can make could violate the Seventh Amendment to the U.S. Constitution.⁷

Because it runs counter to statutory choices Congress and the States have made with respect to evidentiary rules and to constitutional jury rights, the proposed rule is not in accordance with law, contrary to constitutional right and power, and in excess of statutory jurisdiction and authority.

3. The Costs or Other Burdens Defense.

Proposed § 100.500(d)(1) provides, e.g.:

*(ii) If the defendant produc[es] evidence showing that the challenged policy or practice advances a valid interest (or interests), the plaintiff must prove 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.***

Proposed § 100.500(d)(2) provides, e.g.:

The defendant may, as a complete defense ...

*(iii) Demonstrate that the alternative policy or practice identified by the plaintiff under paragraph (d)(1)(ii) of this section would not serve the valid interest identified by the defendant in an equally effective manner **without***

³ E.g., Fed. R. Evid. 401, Test for Relevant Evidence; Fed. R. Evid. 407, Subsequent Remedial Measures.

⁴ 42 U.S. Code § 3612 (c) (“The Federal Rules of Evidence apply to the presentation of evidence in such hearing as they would in a civil action in a United States district court.”).

⁵ *Felder v. Casey*, 487 U.S. 131, 150 (1988) (quoting *Brown v. Western R. Co. of Alabama*, 338 U.S. 294, 298–299 (1949)).

⁶ Federal Rule of Evidence 1101, Applicability of the Rules, provides:

(a) To Courts and Judges. These rules apply to proceedings before ... United States district courts. ...

(e) Other Statutes and Rules. A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.

⁷ Cf. *Curtis v. Loether*, 415 U.S. 189 (1974) (holding that jury trials are available for private actions brought under the FHA).

imposing materially greater costs on, or creating other material burdens for, the defendant.

Proposed § 100.500(d)(1)(ii) and (2)(iii) create out of whole cloth a costs or other burdens defense to disparate impact fair housing claims, a defense for which no authority can be found in the text of the FHA or caselaw, including the Supreme Court’s ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).⁸ This defense directly conflicts with the purpose of the FHA. Refraining from housing discrimination, whether that be intentional discrimination or disparate impact discrimination, can be costly and burdensome. For example, landlords who rent to tenants of one race or religion may lose business as a result from potential tenants who of a different race or religion. Paying for a smaller number of online housing advertisements that are narrowly targeted to particular racial or ethnic groups, particularly where the online platform used for the advertising has made it easy to do so, is less costly and less burdensome than paying for broader advertising or advertising that otherwise does not exclude viewers by race or ethnicity.⁹ The FHA was written to require landlords to incur these types of costs.

An analogous situation was presented in *Natural Resources Defense Council v. E.P.A.*, 749 F.3d 1055 (D.C. Cir. 2014) (Kavanaugh, J.), a case finding that the Environmental Protection Agency lacked authority to create a defense to emissions violations caused by “unavoidable” equipment malfunctions in suits brought by private litigants under the Clean Air Act. As then-Judge Kavanaugh explained, the Clean Air Act “clearly vests authority over private suits in the courts, not EPA.” *Id.* at 1063. The EPA argued that the Clean Air Act did not “expressly deny EPA the ability to create an affirmative defense,” but Judge Kavanaugh rejected “the suggestion implicit in EPA’s argument—that we should ‘presume a delegation of power absent an express *withholding* of such power,’” as being “plainly out of keeping with *Chevron*....” *Id.* at 1064 (citing *Railway Labor Executives’ Assoc. v. Nat’l Mediation Bd*, 29 F.3d 655, 671 (D.C. Cir. 1994) (*en banc*)). The Clean Air Act having left the agency no gap to fill with respect to affirmative defenses, the agency had no authority to create one. So too the FHA vests authority over private suits in courts¹⁰ and nowhere suggests that HUD has the authority to create a costs or other burdens defense to liability for discrimination, whether that be intentional discrimination or disparate impact discrimination.

Because a costs or other burdens defense is in direct conflict with the FHA’s statutory purpose and because nothing in the FHA or other law supports the creation of such a defense, the proposed

⁸ The allocation of burdens of proof is well-established in a long line of judicial decisions, including *United States v. City of Black Jack, Missouri*, 508 F.2d 1179, 1184 (8th Cir. 1974); *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 934 (2nd Cir.), *aff’d in part sub nom. Town of Huntington, NY. v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15 (1989); and *Dens v. Town of Sunnyvale, Tex.*, 109 F. Supp.2d 526, 531 (N.D. Tex. 2000). Nothing in *Inclusive Communities* suggests a move away from the traditional disparate impact burden-shifting evidentiary scheme and indeed the Court approvingly refers to the discriminatory effects proof standards in Title VII and in the HUD rule. See *Inclusive Communities Project*, 135 S. Ct. at 2514-15; *id.* at 2516-17.

⁹ See *Sec’y of Hous. & Urban Dev. v. Facebook, Inc., Charge of Discrimination*, FHEO No. 01-18-0323-8, https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf.

¹⁰ 42 U.S.C. § 3613(a) (“An aggrieved person may commence a civil action in an appropriate United States district court or State court ... to obtain appropriate relief with respect to such discriminatory housing practice....”).

rule is an abuse of discretion, not in accordance with law, and in excess of statutory jurisdiction and authority.¹¹

4. The Algorithm Defenses.

Proposed § 100.500(c)(2) provides, e.g. that “[w]here a plaintiff alleges that the cause of a discriminatory effect is a model used by the defendant, such as a risk assessment algorithm,” the defendant can defeat the plaintiff’s claim if the defendant:

(i) Provides the material factors that make up the inputs used in the challenged model and shows that these factors do not rely in any material part on **factors that are substitutes or close proxies for protected classes** under the Fair Housing Act and that the model is predictive of credit risk or other similar valid objective;

(ii) Shows that the challenged model is produced, maintained, or distributed by **a recognized third party that determines industry standards**, the inputs and methods within the model are not determined by the defendant, and the defendant is using the model as intended by the third party; or

(iii) Shows that the model has been subjected to critical review and has been validated by an objective and unbiased neutral third party that has analyzed the challenged model and found that the model was empirically derived and is a demonstrably and statistically sound **algorithm that accurately predicts risk or other valid objectives**, and that none of the factors used in the algorithm rely in any material part on factors that are substitutes or close proxies for protected classes under the Fair Housing Act.”

Proposed § 100.500(c)(2) invents three more defenses to discriminatory effect fair housing claims, again for which no authority can be found in the text of the FHA and each of which undermine the aims of the FHA. If the proposed rule is adopted, these defenses will become increasingly relevant, because algorithmic models will increasingly be used to make decisions about housing, housing-related services, and home mortgage lending. Of course, as technology changes, the law must evolve with it. Yet these defenses are likely to prevent the law from meeting the challenge of housing discrimination in the twenty-first century.

The first defense, that the defendant employed an algorithm that does not rely on factors that are substitutes or close proxies for protected classes, would immunize much algorithmic housing discrimination because factors which are not themselves substitutes or close proxies for protected classes, when fed into an algorithm, can produce large discriminatory effects.¹² The second defense, that the defendant relied on an algorithm maintained by a third-party, would insulate many landlords, relators, and lenders from liability despite their engagement in housing practices with significant

¹¹ Cf. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 140 (D.D.C. 2018) (“Because the government’s reading could lead to the exact harm that Congress sought to avoid, it is arbitrary capricious and contrary to law.”).

¹² See, e.g., Muhammad Ali et al., *Discrimination Through Optimization: How Facebook’s Ad Delivery Can Lead To Skewed Outcomes*, Proceedings of the ACM on Human-Computer Interaction 2019 (Sept. 2019) (“[W]e observe significant skew in delivery along gender and racial lines for “real” ads for employment and housing opportunities despite neutral targeting parameters.”). For example, algorithms that run search engines use data about which search results are selected most often by people who have searched for particular terms to determine which search results to show when other people search for the same terms in the future. When people using the search engine make choices reflecting discrimination, the algorithm will perpetuate and reinforce this pattern. See Latanya Sweeney, *Discrimination in Online Ad Delivery*, 56 Comm. Assoc. Computing Machinery 44, 48-49 (2013). Yet people’s choices about which search results to select would be unlikely to be recognized as “substitutes or close proxies for protected classes,” meaning that a search engine with dramatic discriminatory effects would be immune from discriminatory effects liability.

discriminatory effects, because these potential defendants increasingly rely on algorithms maintained by third parties, such as Facebook or Google, in their housing practices. To limit liability in discriminatory effects cases to these third parties contravenes basic precepts of agency law long held to be applicable to FHA cases.¹³ The third defense, that the defendant relied on an algorithm that accurately predicts risk or other valid objectives, would shield discriminatory housing practices from liability because a biased algorithm can still predict risk with some accuracy.¹⁴

Because the algorithm defenses directly conflict with the FHA's statutory purpose and because nothing in the FHA or other law supports the creation of these defenses, the proposed rule is an abuse of discretion, not in accordance with law, and in excess of statutory jurisdiction and authority.¹⁵

5. Heightened Pleading Requirements.

Proposed § 100.500(b) provides that to allege a discriminatory effects case, a plaintiff must do more than state facts plausibly alleging that a defendant has engaged in a housing-related practice that has caused or will cause a discriminatory effect, thereby causing the plaintiff injury. Instead, the proposed rule effectively adds a host of additional “elements” to the plaintiff’s “prima facie case” at the pleading stage, before the plaintiff has access to discovery. These include pleading facts plausibly demonstrating that, e.g.:

- the challenged 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*”;
- “*a robust causal link*” exists between the challenged practice and its discriminatory effect; and
- the disparity caused by the challenged practice is “*significant*”.

The “arbitrary, artificial, and unnecessary” language is taken out of context from *Inclusive Communities Project*, 135 S. Ct. at 2522 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)). The Court used “arbitrary, artificial, and unnecessary” to mean that the discriminatory practice is not needed to achieve a valid purpose. But whether a practice is needed to achieve a valid purpose is something a plaintiff cannot determine without knowing what the defendant’s asserted purpose is. This is why existing caselaw uses the phrase “arbitrary, artificial, and unnecessary” in the context of describing a potential affirmative defense to discrimination claims. HUD itself recognizes that “plaintiffs will not always know what legitimate objective the defendant will assert in response to the plaintiff’s claim or how the policy advances that interest, and, in such cases, will not be able to plead specific facts showing why the policy or practice is arbitrary, artificial, and unnecessary.” HUD suggests that “in such cases, a pleading plausibly alleging that a policy or practice advances no obvious

¹³ E.g., *Walker v. Crigler*, 976 F.2d 900, 904 (4th Cir. 1992). As recognized in *Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 602 (4th Cir. 2010):

Allowing an owner to completely insulate itself from liability for an ... FHA violation through contract diminishes its incentive to ensure compliance with discrimination laws. If a developer of apartment housing, who concededly has a non-delegable duty to comply with the ... FHA, can be indemnified under state law for its ... FHA violations, then the developer will not be accountable for discriminatory practices in building apartment housing. Such a result is antithetical to the purposes of the FHA...

¹⁴ See, e.g., Matthias Spielkamp, *Inspecting Algorithms for Bias*, MIT Technology Review, June 12, 2017.

¹⁵ Cf. *Grace v. Whitaker*, 344 F. Supp. 3d at 140 (“Because the government’s reading could lead to the exact harm that Congress sought to avoid, it is arbitrary capricious and contrary to law.”).

legitimate objective would be sufficient to meet this pleading requirement,” 84 Fed. Reg. 42,858, but the language of the proposed rule does not allow a plaintiff to do this.

The meaning of “robust causal link” and “significant disparity” are too unclear for a plaintiff to know what facts might be sufficient to plead or prove these. Agencies with appropriate authority can clarify ambiguous or otherwise unclear statutory language, but they have no authority to introduce opacity.¹⁶

These additional pleading requirements of the proposed rule appear to serve no purpose other than to make it more burdensome or even impossible for plaintiffs to plead and prove disparate impact claims. The Supreme Court has decisively rejected attempts to heighten the pleading standards required of civil rights plaintiffs, absent Congressional action. Unless subject to Federal Rule of Civil Procedure 9 or otherwise specified by Congress, Federal Rule of Civil Procedure 8(a)(2) states the pleading standard for all other federal actions, including those brought under the FHA: “a short and plain statement of the claim showing that the pleader is entitled to relief.” State courts have their own pleading requirements. HUD has no authority to heighten pleading requirements for the presentation of a plaintiff’s claims in a federal or state court action. There is only one vehicle for amending federal court pleading requirements, the Rules Enabling Act, 28 U.S.C. §§ 2071-2072.¹⁷ State courts have their own rules for altering pleading requirements.

The proposed rule bears a striking similarity to attempts made by courts to impose heightened pleading requirements on plaintiffs in the context of civil rights claims. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), lower federal courts had tried to require plaintiffs asserting a claim against a municipality under 42 U.S.C. § 1983 to “state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity.” Note the placement on the civil rights plaintiff of the burden to negate the affirmative defense of immunity, which parallels the proposed rule’s placement of the burden on the housing discrimination plaintiff to negate the affirmative business necessity defense in a discriminatory effects fair housing case. A unanimous Supreme Court in *Leatherman* ruled decisively that this was an impermissible attempt to heighten the pleading standard for Section 1983 claims, a result which could “only be obtained by the process of amending the Federal Rules and not by judicial interpretation.”

Another instructive case is *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002), which dealt with a claim filed under Title VII and the Age Discrimination in Employment Act. In that case, lower federal courts had required the plaintiff to allege the prima facie elements of an employment discrimination claim in his complaint: (1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination. In a Justice Thomas opinion, a unanimous Supreme Court rejected this attempt to require a heightened pleading standard, explaining:

The precise requirements of a prima facie case can vary depending on the context and were “never intended to be rigid, mechanized, or ritualistic.” *Furnco Constr. Corp. v. Waters*, 438 U.S.

¹⁶ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

¹⁷ Even the Supreme Court has no authority to rewrite the requirements of Federal Rules of Civil Procedure 8 and 9 through judicial interpretation. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 (“[W]e do not apply any ‘heightened’ pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished “by the process of amending the Federal Rules, and not by judicial interpretation.”).

567, 577, 98 S. Ct. 2943, 57 L.Ed.2d 957 (1978); see also ... *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 927 (C.A.8 1993) (“[T]o measure a plaintiff’s complaint against a particular formulation of the prima facie case at the pleading stage is inappropriate”). Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.

Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512 (2002).

So too here, the burden-shifting scheme for discriminatory effects cases, which was designed as an evidentiary standard, should not be imported into the pleading stage. Although *Leatherman* and *Swierkiewicz* involved attempts by the judiciary to heighten pleading standards, the principle firmly upheld in each—that the only way to impose a heightened pleading standard is for Congress to do so—applies with equal force to attempts by agencies to do the same through rulemaking.

Because the proposed rule would stand as an obstacle to the achievement of the FHA’s objectives and impinges on statutory choices Congress and the States have made with respect to pleading rules, the proposed rule is not in accordance with law and is in excess of statutory jurisdiction and authority.

* * * * *

HUD has a statutory duty to affirmatively further fair housing, a duty that, as then-Judge Breyer has explained, goes beyond merely refraining from engaging in discrimination itself or refraining from purposively supporting discrimination by others.¹⁸ Collectively, key parts of the proposed rule would effectively insulate defendants from liability for the discriminatory effects of their housing practices. Without the threat of liability, defendants will have insufficient reason to incur the effort of working to ensure that their own practices do not have discriminatory effects. Adopting the proposed rule would therefore violate HUD’s own duty under the Fair Housing Act to affirmatively further fair housing. The proposed rule is thus not in accordance with law and is short of statutory right.¹⁹

Respectfully submitted,

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¹⁸ *N.A.A.C.P. v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 154-56 (1st Cir. 1987) (Breyer, J.).

¹⁹ 42 U.S.C. § 3608(d) & (e)(5). See also *N.A.A.C.P. v. Sec’y of Hous. & Urban Dev.*, 817 F.2d at 158 (finding judicial review appropriate for claim that HUD had violated its statutory duty under the Fair Housing Act to affirmatively further fair housing, under the Administrative Procedure Act’s limits on agency actions that are not in accordance with law).