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Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th Street, S.W., Room 10276
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Re: HUD Docket No. FR-6540-P-01; Comment Regarding Proposed Rule on Implementation of the Fair Housing Act's Disparate Impact Standard, 91 Fed. Reg. 1475 (Jan. 14, 2026)

To Whom It May Concern:

The Civil Rights Department (CRD)¹ of the State of California opposes the Department of Housing and Urban Development's (HUD) above referenced proposal (Proposed Rule) to remove the regulations setting out its disparate-impact liability standard. As the federal agency charged with enforcing and interpreting the Fair Housing Act (FHA or the Act), what HUD does—and does not—say about the law carries great weight and impacts advocates' and enforcers' ability to combat housing discrimination. The Proposed Rule undermines the purpose of the Fair Housing Act and may have serious negative implications for fair housing enforcement, across the Nation and in California. For the reasons discussed below, CRD urges HUD to not adopt the proposed rule and maintain the status quo.

I. Disparate Impact Liability Is a Vital Tool for Fair Housing Enforcement.

Disparate impact liability has been recognized as intrinsic to the Fair Housing Act for more than a half-century. In 1974, the Eighth Circuit ruled that discriminatory effect alone, without evidence of a discriminatory motivation, was sufficient to establish a claim under the Act: "Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because . . . 'we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.'" *United States v. City of Black Jack, Missouri*, 508 F.2d 1179, 1185 (8th Cir. 1974) (quoting *Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.D.C 1967)). This remains true a half-century later, and the underlying conditions that led to the FHA's adoption only a week after the assassination of Dr. Martin Luther King, Jr. also continue to haunt the Nation. Indeed, in 2015, in the context of a landmark ruling affirming disparate-impact liability under the FHA, the Supreme Court recognized that while "many cities have become more diverse" as a result of the FHA and the application of disparate-impact liability, "[m]uch progress remains to be made in our Nation's continuing struggle against racial isolation." *Texas Dep't of Hous. &*

¹ CRD is the California state agency charged with enforcing California's civil rights laws, including the Fair Employment and Housing Act (FEHA), California's cognate to the FHA. CRD's mission is to protect the people of California from unlawful discrimination, including in the context of housing.

Cnty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519, 546 (2015) (hereinafter “*Inclusive Communities*”).

a. Housing enforcers rely on HUD’s disparate impact regulation to combat both insidious discrimination and structural barriers to fair housing.

Disparate-impact liability remains a key tool in combatting insidious discrimination and realizing the goals of the FHA. Fair housing enforcers—including staff at HUD’s Office of Fair Housing and Equal Opportunity (FHEO), state fair housing agencies, state attorneys general, local governments, non-profit organizations, and private plaintiffs—rely on disparate-impact liability “to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment,” *id.* at 521, in a range of discriminatory housing practices ranging from zoning ordinances,² English-only policies,³ use of criminal history,⁴ unfair lending practices,⁵ to occupancy restrictions.⁶ Even in the absence of insidious intent or animus, many of these practices reflect and perpetuate a biased housing structure that impacts communities and individuals on the basis of familial status, disability, race, national origin, and sex, among other protected characteristics.

An example of a practice that “escapes easy classification” can be found in a 2018 case from the Northern District of California. There, the court held that the non-profit plaintiffs had sufficiently

² See, e.g., *Support Ministries for Persons With AIDS, Inc. v. Vill. of Waterford, N.Y.*, 808 F. Supp. 120, 136 (N.D.N.Y. 1992) (city’s interpretation and application of local zoning ordinance had disparate impact on 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).

³ See, e.g., *Conn. Comm’n on Human Rights & Opportunities (“CHRO”) ex rel. Hurtado*, CHRO No. 8230394 (alleging landlord’s English-only policy had disparate impact based on national origin and ancestry).

⁴ See, e.g., *Washington v. City of Sunnyside*, No. 19-cv-03174-RMP (E.D. Wash. filed July 30, 2019) (alleging municipal police department’s enforcement of its crime-free rental housing ordinance discriminated on the basis of national origin, sex, and familial status); *State v. Pac. Crest, LLC*, No. 16-2-20773-1 (King Cty. Super. Ct., Wash. Aug. 29, 2016) (alleging criminal history screening practices discriminated on the bases of race or color).

⁵ See, e.g., *City of Oakland v. Wells Fargo Bank, N.A.*, No. 15-CV-04321-EMC, 2018 WL 3008538, at *12 (N.D. Cal. June 15, 2018), *aff’d in part, rev’d in part and remanded sub nom. City of Oakland v. Wells Fargo & Co.*, 972 F.3d 1112 (9th Cir. 2020), *reh’g en banc granted, opinion vacated*, 993 F.3d 1077 (9th Cir. 2021), and *on reh’g en banc*, 14 F.4th 1030 (9th Cir. 2021), and *aff’d in part, rev’d in part and remanded sub nom. City of Oakland v. Wells Fargo & Co.*, 14 F.4th 1030 (9th Cir. 2021) (finding that the City of Oakland successfully alleged Wells Fargo “‘engaged in numerous facially neutral lending practices’ which resulted in a disparate impact on minority borrowers”); *McGlawn v. Pennsylvania Hum. Rels. Comm’n*, 891 A.2d 757 (Pa. Commw. Ct. 2006) (lending practices of obtaining predatory and unfair subprime mortgage loans had a disparate impact based on race); *Commonwealth v. H&R Block, Inc.*, Civ. No. 08-2474-BLS1 (Mass. Suffolk Sup. Ct. 2011) (consent order in case where Massachusetts Attorney General alleged that discretionary pricing policy caused African-American and Hispanic borrowers to pay hundreds of dollars more for loans than similarly-situated white borrowers).

⁶ See, e.g., *Insight Psychology & Addiction, Inc. v. City of Costa Mesa*, 801 F. Supp. 3d 942, 961–63 (C.D. Cal. 2025) (zoning and occupancy standards had disparate impact on disabled individual); *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); *In re Accusation of the Dep’t of Fair Employment & Hous. v. Merribrook Apartments, James C. Beard, Owner* 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).

alleged that Fannie Mae’s failure to maintain foreclosed homes in Black and Latino neighborhoods throughout the Nation led to decreased property values in minority neighborhoods and discouraged integration of those neighborhoods to state a claim under the FHA. *Nat’l Fair Hous. All. v. Fed. Nat’l Mortg. Ass’n (“Fannie Mae”)*, 294 F. Supp. 3d 940, 943, 947 (N.D. Cal. 2018). This practice had the effect of “entrenching segregation” that the FHA was created to address, yet would not neatly fall into a discriminatory treatment claim. *See id.* at 949. While not successful in their disparate treatment claim, the plaintiffs did successfully set forth a prima facie disparate impact claim. *Id.* Disparate-impact liability is necessary to address widespread and harmful practices like this.⁷

b. Disparate-impact liability is especially important in California where housing discrimination is exacerbated by California’s housing crises.

Combatting housing discrimination is especially important in California, where the State’s housing and homelessness crises disproportionately impact people of color and people with disabilities. In California, Black individuals are four times more likely to experience homelessness compared to the general population, and nearly half of those experiencing homelessness have a disabling condition.⁸ Homeownership rates among Black and Latino populations are also significantly lower than the rate of white home ownership in California.⁹ Housing practices which act to exclude members of protected classes from housing have the potential to exacerbate these stark inequalities, and disparate impact liability is a critical means of addressing them.

One area where this has prominently manifested is local jurisdictions’ discriminatory measures against group homes for people with disabilities. In *Insight Psychology and Addiction, Inc. v. City of Costa Mesa*, the city passed zoning ordinances which impacted the allowable number and size of group homes, thereby threatening to close multiple shared-housing facilities for persons with disabilities. 801 F. Supp. 3d 942, 961–63 (C.D. Cal. 2025). The court, relying on HUD’s disparate impact standard, found that the plaintiff had shown a genuine issue of material fact as to the disparate impact of the ordinance on disabled individuals in the area. *Id.* at 970–71. Disparate-impact liability—and HUD’s rule

⁷ In addition to litigation, California has modeled critical fair housing and other civil rights regulations related to disparate impact after HUD’s longstanding discriminatory effects standard. *See, e.g.,* CAL. C.R. COUNCIL, REGULATIONS REGARDING GOVERNMENT CODE SECTION 11135 ET SEQ. INITIAL STATEMENT OF REASONS at 43 (Feb. 10, 2023), <https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2023/02/Initial-Statement-of-Reasons.pdf> (last visited Jan. 29, 2026) (relying upon federal regulations, including HUD’s “Reinstatement of HUD’s Discriminatory Effects Standard,” in proposing the adoption of regulations that clarifies, makes specific, or supplements existing state regulations interpreting Article 9.5 of Chapter 1 of Division 3 of Title 2 of the Government Code); CAL. FAIR EMP. & HOUS. COUNCIL, FAIR HOUSING REGULATIONS INITIAL STATEMENT OF REASONS at 23-24 (Feb. 16, 2018), <https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2018/02/InitStmntReason-FairHousingReg.pdf> (last visited Jan. 29, 2026) (citing HUD’s 2013 Final Rule on Implementation of the Fair Housing Act’s Discriminatory Effects Standard to compare the FHA with certain California FEHA regulations).

⁸ *See* Cal. Bus., Consumer Servs., and Hous. Agency, *Acting to Prevent, Reduce and End Homelessness*, <https://bcsh.ca.gov/calich/hdis.html> (Jan. 22, 2026).

⁹ Marisol Cuellar Mejia, et al., *California’s Housing Divide*, PUB. POL’Y INST. OF CAL. (Oct. 21, 2024), <https://www.ppic.org/blog/californias-housing-divide/>.

in particular—was integral to the plaintiff’s ability to challenge this alleged discrimination and maintain housing for the disabled residents. Zoning practices like those at issue in *Insight Psychology* and “other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification” are what the Supreme Court described as “the heartland of disparate-impact liability.” *Inclusive Communities*, 576 U.S. at 521.

c. The need for disparate impact liability as a tool for combatting discrimination will only increase with the rise in the use of artificial intelligence to make housing decisions.

In recent years, the use of artificial intelligence (AI) has risen dramatically and permeated nearly every industry, including housing. AI is used to advertise housing, review rental and lending applications, conduct background checks, draft lease agreements, and aid in property management.¹⁰ It is also being integrated by most major technology platforms, including Google and Microsoft, and chatbots like ChatGPT are regularly used by individuals and companies to perform a variety of tasks including researching laws, drafting emails, and assisting decision-making. In short, AI is influencing and contributing to housing practices in a variety of ways.

The algorithms underlying AI technology have a strong potential to adopt and perpetuate bias, which can lead to discriminatory housing outcomes in what has been dubbed “technological redlining.”¹¹ This bias can come from the training data, algorithmic recognition of discriminatory social patterns, third party programming and refinement, or reinforcement of the users’ preferences and beliefs.¹²

A disparate-impact liability theory is especially important for enforcing fair housing laws where AI and other similar technologies are involved. AI decision-making is a “black box,” making it

¹⁰ See, e.g., TurboTenant, <https://www.turbotenant.com/advertise-rental-property/#:~:text=We%27ll%20write%20your%20listing%20for%20you.%20Powered%20by%20AI> (advertising AI-generated property listings); ZipRent, <https://ziprent.com/ai-helping-landlords-find-tenants-interview-with-ziprent-ceo-arvand-sabetian-live-now-fox/> (providing AI-powered property management and tenant finding services); RentRedi <https://rentredi.com/blog/rentredi-launches-ai-accounting-features/> (providing AI accounting services to landlords); see also Gary Drenik, *AI In Lending – The Hidden Tech Refining Your Bank Experience*, FORBES, (Jan. 30, 2025), <https://www.forbes.com/sites/garydrenik/2025/01/30/ai-in-lendingthe-hidden-tech-refining-your-bank-experience/> (explaining how banks are using AI technology in loan decisions).

¹¹ See Kristina Lorch, *Regulating AI: Opportunities to Combat Algorithmic Bias and Technological Redlining*, PRINCETON J. OF PUB. AND INTL. AFFAIRS (Dec. 4, 2023) <https://jpia.princeton.edu/news/regulating-ai-opportunities-combat-algorithmic-bias-and-technological-redlining>.

¹² See Lorenzo Belenguer, *AI bias: exploring discriminatory algorithmic decision-making models and the application of possible machine-centric solutions adapted from the pharmaceutical industry*, 2 AI ETHICS 771-787, (2022); Grace Chang and Heidi Grant, *When AI Amplifies the Biases of its Users*, HARVARD BUS. REV. (Jan. 23, 2026), <https://hbr.org/2026/01/when-ai-amplifies-the-biases-of-its-users>.

extremely difficult to parse how and why an AI algorithm generated a particular output.¹³ This makes it nearly impossible to prove an intent-based legal standard, like the disparate treatment standard, where AI is used. Moreover, both creators and end users may not ever intend for the algorithm to produce a discriminatory effect, and yet it may do so anyway, and on a large scale.¹⁴

A number of recent examples from the housing context of facially neutral algorithms that produced discriminatory results, and were addressed via legal actions with disparate impact theories, are documented in The Leadership Conference on Civil and Human Rights' recent report, *When Machines Discriminate: The Critical Role of Disparate Impact in AI Accountability*.¹⁵ These include a tenant screening algorithm used by SafeRent Solutions, which discriminated against section 8 holders by failing to properly calculate their income¹⁶; automated criminal history checks, which discriminated against African American, Latino and disabled applicants¹⁷; and a chatbot which automatically rejected prospective tenants with government rental assistance¹⁸. The latter example highlights the need for disparate impact liability particularly well; this practice itself is not unlawful under the FHA,¹⁹ and plaintiffs were only able to successfully state a claim because they could show that the chatbot's practice had a disproportionate impact on African American applicants.²⁰

II. HUD Has Not Justified Departing from the Current Standard.

Agencies must follow the same rulemaking procedures “when they amend or repeal a rule as they used to issue the rule in the first instance.” *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 101 (2015). The same standards of review apply as well. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–15 (2009). Under the Administrative Procedure Act (APA) a court must set aside agency action which is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §

¹³ Yavar Bathaee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation*, 31 HARVARD J. OF L. AND TECH. 890, 897, 905–07 (2018) (discussing challenges related to proving intent where AI conduct is involved because of the difficulty in understanding AI decision-making and predicting outputs).

¹⁴ *Id.* at 906–07 (describing how AI “may function in a manner well outside of what the program’s creators could foresee” and “do things in ways the creators of the AI may not understand or be able to predict”).

¹⁵ Chiraag Bains, *When Machines Discriminate: The Critical Role of Disparate Impact in AI Accountability*, The Leadership Conference on Civil and Human Rights, <https://civilrights.org/disperate-impact-ai/>.

¹⁶ See Bains, *supra* n.15; Press Release, Cohen Milstein, “Rental Applicants Using Housing Vouchers Settle Ground-Breaking Discrimination Class Action Against SafeRent Solutions” (Apr. 26, 2024), <https://www.cohenmilstein.com/rental-applicants-using-housing-vouchers-settle-ground-breaking-discrimination-class-action-against-saferent-solutions>.

¹⁷ See Bains, *supra* n.15; *Conn. Fair Housing Ctr. v. CoreLogic Rental Prop. Solutions, LLC*, No. 3:18cv705 (D. Conn. Apr. 4, 2018), https://www.cohenmilstein.com/wp-content/uploads/2023/07/CoreLogic-Complaint-04242018_0.pdf.

¹⁸ See Bains, *supra* n.15; Jeff Hirsch, *Fair Housing Group Wins Voucher Discrimination Settlement*, Evanston Now (Feb. 5, 2024), <https://evanstonnow.com/fair-housing-group-wins-voucher-discrimination-settlement>.

¹⁹ Although it would be under FEHA; see Cal. Gov. Code § 12955(a).

²⁰ See Compl., *Open Communities, et al., v. Harbor Group Management Co., et al.*, Case No. 23-CV-14070 (N.D. Ill., Sept. 23, 2023) <https://acrobat.adobe.com/link/track?uri=urn%3Aaaid%3Aascds%3AUS%3A89eb2dbe-6807-3019-8b22-0cd715598c3e>.

706(2)(a). This requires that the agency provide “good reasons for the new policy” and a “more detailed justification . . . when its prior policy has engendered serious reliance interests.” *FCC v. Fox*, 556 U.S. at 515. “It would be arbitrary and capricious to ignore such matters.” *Dep’t of Homeland Sec. v. Regents of the U. of Cal.*, 591 U.S. 1, 30 (2020) (citations omitted). HUD has failed to meet these requirements, providing no supportable justification for rescinding the current rule.

a. The current standard accurately reflects the state of the law.

HUD implemented the current standard in 2013 to formalize the long-standing interpretation of the FHA by every court of appeals that disparate impact (or “discriminatory effects”) liability is an inherent part of the statute, and to standardize the three-step burden-shifting test adopted by the majority of federal courts. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (hereinafter “2013 Final Rule”). In 2015, the Supreme Court cited the HUD rule approvingly. *Inclusive Communities*, 576 U.S. at 527, 540–41 (finding that “disparate-impact liability has always been properly limited in key respects” by the existing framework); *see Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016) (“The Supreme Court implicitly adopted HUD’s approach”); *Burbank Apartments Tenant Ass’n v. Kargman*, 48 N.E.3d 394, 411 (Mass. 2016) (explaining that it was following the “burden-shifting framework laid out by HUD and adopted by the Supreme Court in [*Inclusive Communities*]”).

Since *Inclusive Communities*, HUD has repeatedly asserted that its rule is consistent with the Supreme Court’s decision. In briefs filed by HUD, the agency has stated that “the Rule’s burden-shifting framework is consistent with *Inclusive Communities*,” and that “[w]hile *Inclusive Communities* elucidated the broad principles governing discriminatory effects liability, it did not mandate any specific articulation of the burden-shifting framework different from that applied to Title VII disparate impact cases.”²¹ Although HUD adopted a new rule altering the 2013 standard in 2020, the rule was enjoined and never took effect. In 2021, HUD re-adopted the 2013 rule, finding that it “has provided a workable and balanced framework for investigating and litigating discriminatory effects claims **that is consistent with the Act, HUD’s own guidance, *Inclusive Communities*, and other jurisprudence.**” Reinstatement of HUD’s Discriminatory Effects Standard, 86 Fed. Reg. 33590 (June 25, 2021) (hereinafter “2021 Proposed Rule”) (emphasis added). The 2013 Rule was recodified in March 2023. Reinstatement of HUD’s Discriminatory Effects Standard, 88 Fed. Reg. 19450, 19454–55 (Mar. 31, 2023).

Despite having confirmed the continued applicability of the current rule just five years ago, HUD now claims that the rule “does not provide an up-to-date picture of the legal landscape”; tellingly,

²¹ Defs.’ Reply Mem. in Supp. of Mot. for Summ. J., *Am. Ins. Ass’n v. HUD*, No. 13-cv-966, (D.D.C Oct. 28, 2016) Dkt. 70 at 16, 24; *see also* Defs.’ Mem. in Supp. of Mot. for Summ. J., *Am. Ins. Ass’n v. HUD*, No. 13-cv-966, (D.D.C Aug. 30, 2016) Dkt. 65 at 33 [*Inclusive Communities* is fully consistent with the standard that HUD promulgated.]; Defs.’ Opp’n to Pl.’s Mot. for Leave to Am. Compl., *Prop. Cas. Insurers Ass’n of Am. v. Carson*, No. 13-cv-8564, (N.D. Ill. Apr. 21, 2017) Dkt. 122 at 9–10.

however, in the Proposed Rule HUD fails to cite even a single case to support this assertion. Every court of appeals to have reached the issue since *Inclusive Communities* has recognized the continued viability of disparate impact in the context of the FHA.²²

b. HUD’s reliance on *Loper Bright* is misplaced.

HUD further attempts to justify its Proposed Rule by effectively claiming that HUD’s regulations in the space are rendered useless by the Supreme Court’s *Loper Bright* ruling (*see* Proposed Rule at 1476); however, this misses the mark. In *Loper Bright*, the Supreme Court held that courts must resolve statutory ambiguities and not defer to agencies’ interpretation as previously compelled by *Chevron*. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 401 (2024). *Loper Bright* has minimal—if any—relevance here where the Supreme Court itself has interpreted the statute at issue without deference to the agency’s interpretation and approved of the agency’s regulation.

Moreover, although courts are no longer bound by *Chevron* deference, they remain free to utilize agency regulations and consider agency interpretation to assist their review of ambiguous statutes. The *Loper Bright* Court repeatedly emphasized the history of affording due respect to agency interpretation, particularly where the agency’s position “remained consistent over time.” *Id.* at 386–87. “[T]he longstanding practice of the government”—like any other interpretive aid—“can inform [a court’s] determination of what the law is.” *Id.* (quoting *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 525 (2014). (cleaned up).

HUD’s longstanding statement of the appropriate standard—which itself represents the agency’s even longer-held interpretation of disparate impact liability (*see* 2013 Final Rule)—is entitled to due respect by courts. This regulation provides an authoritative and consistent statement of the appropriate standard. In fact, district courts across the Nation have continued to cite HUD’s rule and other guidance when assessing disparate impact cases post-*Loper Bright*. *See, e.g., Howlett v. City of Susanville*, No. 2:25-CV-00729-DAD-DMC, 2025 WL 2675806, at *5 (E.D. Cal. Sept. 18, 2025); *Atl. Hous. Partners L.L.P. v. Brevard Cnty.*, No. 6:23-CV-2473-JSS-DCI, 2026 WL 91583, at *3 (M.D. Fla. Jan. 13, 2026); *Smith v. New Neighborhoods, Inc.*, No. 3:24-CV-00327 (KAD), 2025 WL 2615052, at *7 (D. Conn. Sept. 10, 2025). In *Fair Housing Center of Central Indiana, Inc. v. M&J Management Company, LLC*, the district court noted that while it did not rely on a HUD guidance memo as “anything more than guidance,” consistent with *Loper Bright*, the memo was “helpful in determining the reasonableness of Defendants’ occupancy standard.” No. 1:22-CV-00612-TAB-JPH, 2024 WL 3859997, at *8 (S.D. Ind. Aug. 19, 2024). These cases highlight the continuing relevance of and need for HUD regulation.

²² *See, e.g., Saint-Jean v. Emigrant Mortg. Co.*, 129 F.4th 124, 139 (2d Cir. 2025), *cert. denied*, No. 25-229, 2026 WL 79895 (U.S. Jan. 12, 2026); *Inclusive Communities Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 901 (5th Cir. 2019); *Reyes v. Waples Mobile Home Park Ltd. P’ship*, 903 F.3d 415, 423–24 (4th Cir. 2018); *Mhany Management, Inc.*, 819 F.3d at 599–600; *Avenue 6E Investments, LLC v. City of Yuma*, 818 F.3d 493, 503 (9th Cir. 2016).

c. The current regulation does not impose a regulatory burden.

Finally, in what appears almost an aside, HUD asserts that repealing the current standard will “reduce unnecessary regulatory burdens” consistent with “deregulatory” executive orders. Proposed Rule at 1476. HUD provides no evidence that the current regulation imposes **any** “regulatory burdens,” still less “unnecessary” ones. Any burden on entities subjected to disparate-impact liability arises from the FHA itself, as interpreted in *Inclusive Communities*; HUD’s rule provides a framework consistent with that imposed by the Supreme Court without imposing additional regulatory burden. In contrast to the labyrinthine set of regulations proposed in 2019, the current three-step rule is simple, familiar, and easily navigable.

III. Repealing the Disparate Impact Standard Will Create Inconsistency and Uncertainty.

HUD’s current rule, by design, provides clarity and predictability in the law. The stated purpose of the 2013 rule was to “provide[] for consistent and predictable application of the [disparate impact] test on a national basis.” 2013 Final Rule at 11460. The rule benefits all parties involved in housing transactions by helping localities, housing providers, lenders, and developers avoid legal violations, and providing individuals with a clear understanding of their rights. Removing this clear and reliable guidance will lead to uncertainty, additional and unnecessary litigation, and a mosaic of potentially incompatible standards.²³

a. Removing this regulation may communicate that disparate impact theory is not viable under federal law, despite contrary caselaw.

Although HUD attempts to frame the proposed rule as adopting a neutral position on the issue, by completely removing reference to disparate-impact liability in its regulations, HUD is signaling its view that disparate-impact is not a viable theory of liability. If this proposed rule were adopted, HUD would be strongly signaling that liability can only be established by proving intentional discrimination. And in fact, HUD has stated that by revoking the standard it is furthering the “policy of the United States to eliminate the use of disparate-impact liability in all contexts.” Proposed Rule at 1476. Such an articulation of the law is directly contrary to the Supreme Court’s holding in *Inclusive Communities*.²⁴ This dissonance in and of itself will lead to confusion among litigants and courts about the continued viability of disparate-impact theory.

²³ See, e.g., Grace Dixon, *Attys Fear HUD Bias Rule Would Muddy Fair Housing Waters*, LAW 360 (Jan. 21, 2026), <https://www.law360.com/real-estate-authority/articles/2431896/attys-fear-hud-bias-rule-would-muddy-fair-housing-waters> (quoting, inter alia, former HUD compliance director regarding harmful impact of HUD’s rescission of disparate impact regulation on litigants, HUD staff, and state and local governments).

²⁴ For the same reason, HUD’s Proposed Rule is also in violation of the APA as being contrary to law. See 5 U.S.C. § 706(2)(a).

b. Loss of this regulation could undermine the use and development of important caselaw that has been built up in reliance on it.

Further, HUD’s revocation of this regulation may be used by litigants opposing fair housing claims to undermine important existing caselaw which relies on the HUD standard. After *Inclusive Communities*, many lower federal courts, as well as state courts (including California federal district and state appellate courts) have continued to rely on HUD’s regulation to assess disparate impact cases.²⁵ In general, California “[c]ourts often look to cases construing the FHA . . . when interpreting FEHA.” *Sisemore v. Master Fin., Inc.*, 151 Cal. App. 4th 1386, 1420 (2007) (referencing the viability of disparate impact claims under FHA in finding that such claims are also viable under FEHA) (quoting *Auburn Woods I Homeowners Assn. v. Fair Emp. & Hous. Comm’n*, 121 Cal. App. 4th 1578, 1590 (2004)).

This has manifested in the specific context of the disparate impact rule. For example, in *Martinez v. City of Clovis*, the plaintiff sued the city for fair housing violations based on its failure to comply with state housing element law, alleging (inter alia) that its failure “to accommodate and to provide opportunities to develop very low- and low-income housing” had an adverse and disparate impact on people of color. 90 Cal. App. 5th at 252–53. After relying on HUD’s rule for the operative test under FHA, the court found that the plaintiff had also established a claim under FEHA “based on our conclusion that Martinez adequately alleged a disparate impact and a segregative effect under the FHA.” *Martinez*, 90 Cal. App. 5th at 256–58, 271. The adoption of this Proposed Rule would provide an opening for litigants to question and undermine settled disparate impact caselaw, and reduce momentum for the lines of cases which have recognized and addressed certain discriminatory practices, setting the Nation back in its fight for fair and equal housing.

c. The Proposed Rule will open the door for conflicting and inconsistent standards.

Some circuit courts have disagreed about whether *Inclusive Communities* articulated a heightened or different standard from the current HUD standard. Most notably, the Fifth Circuit has read *Inclusive Communities* to “announce a more demanding test than that set forth in the HUD regulation” including a heightened “robust causality” requirement. *Inclusive Communities Project, Inc. v. Lincoln*

²⁵ See, e.g., *Martinez v. City of Clovis*, 90 Cal. App. 5th 193, 256–8 (2023) (regarding the “2013 Rule as a reliable statement of the elements of a discriminatory effects claim under the FHA because it was described without criticism by the United States Supreme Court in 2015”); *Howlett v. City of Susanville*, No. 2:25-CV-00729-DAD-DMC, 2025 WL 2675806, at *5 (E.D. Cal. Sept. 18, 2025); *Atl. Hous. Partners L.L.L.P. v. Brevard Cnty.*, No. 6:23-CV-2473-JSS-DCI, 2026 WL 91583, at *3 (M.D. Fla. Jan. 13, 2026); *Smith v. New Neighborhoods, Inc.*, No. 3:24-CV-00327 (KAD), 2025 WL 2615052, at *7 (D. Conn. Sept. 10, 2025); *Fair Hous. Ctr. of Cent. Indiana, Inc. v. M&J Mgmt. Co., LLC*, No. 1:22-CV-00612-TAB-JPH, 2025 WL 406942, at *8 (S.D. Ind. Feb. 5, 2025); *Fair Hous. Ctr. of Cent. Indiana, Inc. v. M&J Mgmt. Co., LLC*, No. 1:22-CV-00612-TAB-JPH, 2024 WL 3859997, at *4 (S.D. Ind. Aug. 19, 2024); *Hare v. David S. Brown Enterprises, Ltd.*, 340 A.3d 698, 713–14 (Md. 2025); *Triglione v. Town of Mansfield*, No. TTD-CV24-6028923-S, 2025 WL 972496, at *5 (Conn. Super. Ct. Mar. 25, 2025); *Burbank Apartments Tenant Ass’n v. Kargman*, 48 N.E.3d 394 (Mass. 2016); *contra Nat’l Fair Hous. Alliance v. Bank of Am., N.A.*, No. CV SAG-18-1919, 2025 WL 2030225 (D. Md., July 21, 2025) (deciding to “not defer to the burden-shifting language set forth by HUD,” rather “adher[ing] to the framework articulated by the Supreme Court in *Inclusive Communities*” [citing *Reyes*, 903 F.3d at 424 n.4]).

Property Company, 920 F.3d 890, 902–03 (5th Cir. 2019). The Second Circuit, in contrast, did not read *Inclusive Communities* to “set forth a new rule requiring use of the words ‘robust causality,’” and held that “that language is not at odds” with the causation requirement in HUD’s regulation. *Saint-Jean*, 129 F.4th at 152, n.13; *see also Mhany Management, Inc.*, 819 F.3d at 618 (“The Supreme Court implicitly adopted HUD’s approach”). Other courts, like the Fourth Circuit, have understood “robust causality” to have already been contained within the pre-*Inclusive Communities* framework (i.e., the framework articulated by HUD). In *Reyes v. Waples Mobile Home Park Limited Partnership*, the court noted that its “pre-*Inclusive Communities* FHA disparate-impact cases are consistent with this robust causality requirement,” and approvingly cited the Second Circuit’s causation analysis as an example of “robust causality” despite the Second Circuit’s reliance on the HUD standard. *See Reyes*, 903 F.3d at 427–28 (citing *Mhany Management, Inc.*, 819 F.3d at 619–20).

If HUD rescinds the Rule, conflicting standards and applications, including on this “robust causality” issue, will flourish. Although HUD’s guidance is not entitled to deference under *Loper Bright*, it is still entitled to due respect and consideration, *see supra* Part II.b, and plays a key role in refereeing splits in authority. When HUD re-adopted the 2013 rule in 2021, it considered these differing views, and determined that the weight of authority supported the view that the causation standard articulated in 24 C.F.R. § 100.500(c)(1) was consistent with *Inclusive Communities*. *See* 2021 Proposed Rule. The revocation of this guidance will open the door for further litigation about the appropriate causation standard and potentially other aspects of disparate-impact liability,²⁶ creating confusion and unpredictability for litigants and courts.

d. Repeal will generate confusion among enforcers, including state agencies.

Multiple enforcement entities rely on HUD guidance in evaluating potential legal violations. These entities include HUD and FHEO staff, private and non-profit fair housing entities, and state enforcement agencies. This guidance is needed for enforcement staff to evaluate complaints and conduct investigations. It is also necessary for private complainants and non-profit organizations to have guidance on how to structure their complaints so enforcement staff can recognize violations. As the former HUD Compliance Director has observed, “[i]f there is no guidance to explain to [complainants] how to structure their argument or even how to analyze whether a particular policy might have a disparate impact that would violate the Fair Housing Act, they’re . . . disadvantage[d].”²⁷

²⁶ *See, e.g., Nat’l Fair Hous. Alliance v. Bank of Am., N.A.*, 2025 WL 2030225, at *16 (articulating the defendants’ argument that “they are not required ‘to show that any practice is “necessary” to avoid summary judgment . . . on Step Two [of the HUD standard],’ [citation], but have ‘leeway to state and explain the valid interests served by their policies’” under *Inclusive Communities* [quoting *Inclusive Communities*, 576 U.S. at 541]); *Crossroads Residents Organized for Stable & Secure ResiDencieS (CROSSRDS) v. MSP Crossroads Apartments LLC*, No. CV 16-233 ADM/KMM, 2016 WL 3661146, at *6 (D. Minn. July 5, 2016) (citing the same language but describing it as an additional “safeguard” while relying on the HUD standard).

²⁷ *See* Dixon, *supra* note 23.

In September 2025, HUD withdrew guidance to FHEO staff about how to recognize and prove disparate impact cases, and explicitly instructed that the guidance “no longer be used for intake, investigations, cause determinations, or any other official purpose by any FHEO staff, FHIPs, FHAPs, or equal opportunity specialists.”²⁸ Now, the rule subject to repeal here is the only remaining guidance on how to assess these types of claims. The loss of this remaining guidance will lead to confusion and inconsistency in the treatment of disparate impact complaints, slow down investigations and resolution of these complaints, and leave many people affected by discriminatory practices and policies without redress.²⁹

IV. The Elimination of HUD’s Disparate Impact Standard Will Increase the Burden on State Housing Enforcers like CRD and Limit Californians’ Ability to Seek Redress.

CRD has a particular interest in the impact the Proposed Rule will have on Californians affected by housing discrimination. While California maintains strong protections against discrimination in all forms, including housing practices with discriminatory effect, the loss of federal regulation and enforcement will seriously undermine California’s efforts.

Particularly when viewed in conjunction with other recent HUD actions, the rescission of this rule will increase the burden on CRD to investigate and pursue disparate-impact claims with its limited resources, and potentially lead to discrimination going unaddressed. In addition to the September 2025 memorandum deprioritizing disparate impact cases discussed above, HUD has also fired or reassigned FHEO staff in a way that whistleblowers claim has undermined the agency’s ability to investigate and enforce fair housing laws.³⁰ This latest proposed action reinforces HUD’s abdication of its responsibility to investigate and resolve disparate impact complaints.

In the face of HUD’s inaction, CRD and other state housing enforcers will be forced to take up the torch. However, CRD is charged with enforcing all state civil rights laws—not just housing-related laws—and lacks the resources and housing expertise that HUD has (or had, before the layoffs and reassignments discussed above) developed. The added enforcement burden puts significant strain on CRD’s resources. At the same time, CRD will be receiving less federal funding to support its efforts. As a Fair Housing Assistance Program (FHAP) participant, CRD receives funding from HUD to process fair housing complaints. Last year, HUD issued guidance barring recipients from using funds to pursue

²⁸ HUD, *Fair Housing Act Enforcement and Prioritization of Resources*, (Sept. 16, 2025) (mandating that “Proving Disparate Impact in Fair Housing Cases After Inclusive Communities,” among other guidance related to disparate impact, be removed from FHEO’s guidance repository) (Exhibit 1).

²⁹ See Dixon, *supra* note 23.

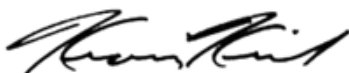
³⁰ Kriston Capps and Sarah Holder, *HUD Issues Layoff Notices, Targeting Fair Housing Staff With Deep Cuts*, MSN, <https://www.msn.com/en-us/urban-infrastructure/housing-and-urban-development/hud-issues-layoff-notices-targeting-fair-housing-staff-with-deep-cuts/ar-AA1Ohpxo> (Jan. 30, 2026).

disparate-impact claims.³¹ Taken together, these actions may hamper CRD's ability to carry out its mission and will reduce Californians' ability to secure recourse for civil rights violations.

V. Conclusion

Disparate-impact liability is a key component of the FHA, and a necessary tool in realizing the purpose of the Act. HUD's proposal to revoke the disparate impact standard is not only unfounded and contrary to law, it is likely to have profound implications for fair housing law throughout the Nation by sowing confusion, unpredictability, and potentially undermining fair housing enforcement in California and nationwide. CRD opposes HUD's adoption of the Proposed Rule and calls on the agency to reinvigorate its enforcement of this important fair housing mechanism.

Sincerely,



KEVIN KISH
Director
California Civil Rights Department

³¹ HUD, *Transmittal Memo: FY2025 Guidance Package for the Fair Housing Assistance Program* (Exhibit 2).