

Regulations Division, Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, D.C. 20410-0500

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

Submitted via the Federal eRulemaking Portal at <https://www.regulations.gov/>.

Dear Secretary Fudge:

The Center for Law and Social Policy (CLASP) is a national, nonpartisan, nonprofit organization that advocates for policies that advance economic and racial justice for people with low incomes. Founded more than 50 years ago, CLASP works to develop legislation and regulations that eliminate poverty, tear down barriers arising from systemic racism, and create pathways to economic security. CLASP is honored and grateful for the opportunity to comment on the Department’s proposed rule on the reinstatement of the Fair Housing Act’s discriminatory effects standard.

The cumulative impact of chattel slavery, segregation, and other racist housing and urban policies on the Black community, as well as our nation’s long history of excluding Native, Asian American and Pacific Islander (AAPI), disabled, and immigrant communities from federal housing programs has profoundly shaped which people in the United States experience excessive housing costs, predatory lending, concentrated poverty, exposure to lead and other toxins, eviction, homelessness, and wealth inequality.¹ Today, racial disparities exist in all aspects of housing. Standardized enforcement of the Fair Housing Act’s (FHA) long-held discriminatory effects liability is necessary to uncover policies and practices that have an unjustified discriminatory effect—regardless of intent—and legally require that the practice be replaced. Therefore, CLASP submits this comment in *firm support* of the Department of Housing and Urban Development’s (HUD) decision to reinstate the 2013 rule titled “Implementation of the Fair Housing Act’s Discriminatory Effects Standard”, as the three-step burden-shifting approach codified in the rule is simple yet effective in adjudicating fair housing cases.

In contrast, the 2020 Rule titled “HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard” set artificially high thresholds for plaintiffs to prove disparate impact. This Trump-era rule would have imposed a greater burden of proof on victims of housing discrimination, thereby limiting the number of cases that made it to trial, while enabling the defendant to claim additional, biased defenses such as whether a challenged policy or practice is “profitable”.² If the 2020 rule had gone into effect, the rights of all people protected under the FHA would have been severely weakened.³

CLASP values the discriminatory effects standard and the three-part burden shifting framework for its usefulness in uncovering covert, systemically oppressive methods that, despite their intention or the ability of charging parties to prove intent, harm protected classes. In this brief comment, CLASP would like to affirm HUD’s historical analysis of the discriminatory effects standard (also referred to as the “disparate impact theory” or “disparate impact”), as well as offer examples of potential practices that—while facially neutral in their targeting of unnamed groups—violate the civil rights of people protected under the FHA. In our comments, we

prioritize immigrants and people affected by the criminal legal system—most of whom rent due to historical exclusion from homeownership and other forms of wealth-building. Our views from a gender justice perspective were captured in the comment submitted by the National Women’s Law Center to which we signed on.

Legislative, Administrative, and Legal Precedent

Title VIII of the Civil Rights Act of 1968 (more often referred to as the “Fair Housing Act”) prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities because of race, color, religion, sex, disability, familial status, or national origin.⁴ The Department of Housing and Urban Development (HUD) is responsible for enforcing the Fair Housing Act (FHA), and one of the primary ways in which it fulfills this mandate is investigating discrimination claims filed by people who feel their fair housing rights have been violated.

Thus, the discriminatory effects liability that HUD sought to codify in the 2013 rule had been under judicial and administrative consensus for years and was only standardized after HUD analyzed decades of caselaw, culminating in an extensive notice and comment period that produced thorough feedback from key stakeholders.⁵ The burden-shifting framework codified in the 2013 rule operates as follows:

1. the plaintiff or charging party must prove that a challenged practice caused or predictably will cause a discriminatory effect as part of the *prima facie*;
2. if the plaintiff or charging party makes this *prima facie* showing, the defendant or respondent must then prove that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the defendant or respondent; and
3. if the defendant or respondent meets its burden at step two, the plaintiff or charging party may still prevail by proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.

As standardized in the 2013 rule, this method for adjudicating fair housing violations has proven practical and effective. It aligns with decades of established judicial precedent, including the 2015 Supreme Court decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*.⁶ The *Inclusive Communities* ruling clarified that disparate impact claims are necessary to support litigation against policies that cannot be challenged under disparate treatment theories; in other words, *Inclusive Communities* upheld the discriminatory effect standard by recognizing that HUD must have a mechanism to challenge facially neutral policies that exclude protected classes from housing. The Court also noted that the burden-shifting framework of *Griggs*—the three-part approach adopted by HUD in the 2013 Rule outlined above—balanced the interests of plaintiffs and defendants by giving housing providers the ability “to state and explain the valid interest served by their policies.”⁷ *Inclusive Communities* also further validated step one in the 2013 rule’s burden-shifting framework in its suggestion that disparate impact claims must point to a “defendant’s policy or policies” that causes the challenged disparity.⁸

Immigrant Families, Worker, and Unaccompanied Youth

Immigrant families, workers, and unaccompanied youth are disproportionately exposed to housing discrimination, especially in the rental market and through local city ordinances.^{9 10 11} Reinstating the 2013 rule will enable plaintiffs or charging parties to use disparate treatment *or* disparate impact theories to challenge immigration status discrimination. While “non-citizen” is not a protected class, the FHA does prohibit discrimination on the basis of race, color, religion, and national origin, and these protections apply to “any

person”—regardless of immigration status.¹² The reinstated 2013 rule will help victims of housing discrimination challenge anti-immigrant practices among landlords and other private housing providers, such as refusing to show a person without citizenship status a home or apartment that is for rent because they are from a particular country/not from the United States, celebrate a different religion, or prefer to speak a language other than English.

The three-part burden-shifting test has also proven its efficacy in framing key cases where public actors were the defendant. For example, in the 2017 case *Georgia Conference of the NAACP v. City of LaGrange*, the City's utility service policies were challenged for having an unlawful disparate impact on Black and Latinx people. LaGrange required its residents to provide a Social Security number to receive utility services, restricting access to electricity, running water, and sewage for Latinx people, who made up the majority of foreign-born non-citizens ineligible for SSNs in LaGrange.¹³ This limitation significantly impeded housing choice and home ownership among Latinx residents. What's more, the consequences would have predictably worsened segregation in LaGrange by forcing non-citizens who were ineligible for SSNs to live in the limited housing where landlords were willing to hold utility accounts for tenants. In late 2020, the two parties reached a settlement: the policy was repealed and \$450,000 in damages and attorneys' fees was issued to the plaintiffs.

People Affected by the Criminal Legal System

With the highest rate of incarceration in the world, the United States imprisons 2.2 million people. Nearly half are non-violent drug offenders, accused people held pre-trial because they cannot afford bail, or arrested for failure to pay debts or fines for minor infractions.¹⁴ Yet having a criminal record—and the stigma associate with it—artificially limits the number of housing resources available for people affected by the criminal legal system. It's imperative that the discriminatory effects standard be reinstated so that people with criminal records, especially felony convictions, have a pathway to challenge policies or practices that unjustifiably restrict their access to federal, state, or local housing programs, homelessness assistance programs, and private rental units.

Beginning in the 1970s, federal, state, and local governments grossly pursued “tough on crime” policies and expanded the use of imprisonment for a variety of felonies, with a particularly sharp growth in the number of people imprisoned for drug-related felonies between 1987 and 1991. This growth was due, in part, to the Anti-Drug Abuse Act of 1986 that introduced a sentencing disparity between crack and powder cocaine and raised federal penalties for marijuana-related offenses. In the mid-1990s, policymakers further entrenched the United States' system of mass incarceration through policies like the “three strikes” rule and harsher treatment of parole violations, leading to an inhumane number of life sentences for most drug-related felonies.¹⁵

Despite evidence that white and Black people use drugs at roughly the same rate, racial disparities are especially severe for drug-related arrests and convictions. A study by the Human Rights Watch found that, from 1995 to 2005, Black people comprised approximately 13 percent of drug users but over 35 percent of drug arrests and 46 percent of those convicted for drug offenses.¹⁶ Between these systemic disparities, the over-policing of Black and Brown neighborhoods, and the racist beliefs harbored by individuals who hold systemic power within the criminal legal system, it is a clear and established fact that the United States disproportionately arrests, convicts, and incarcerates Black and Brown people. Anti-Blackness and xenophobia permeate the criminal legal system, meaning that the experience of being arrested, going to trial, and being imprisoned or incarcerated cannot be separated from race, color, religion, and/or national origin.

Exclusionary hiring practices, discriminatory eligibility requirements for benefits programs like SNAP and TANF,¹⁷ and other financial burdens such as supervision or restitution fees force people who are recently released from federal or state prison to find housing that is affordable. Approximately two-thirds of people who are recently released from prison turn to family members for housing.¹⁸ However, this living situation is

tenuous. There is always the threat of displacements—for both the person recently released from prison *and* the family members housing them. If the housing provider discovers that an additional person has joined the household without being notified, the tenants could be in violation of their lease, but enabling the landlord to do a background check on the person recently released from prison often ends in a demand that the person leave. Thus, people affected by the criminal legal system—the majority of whom experienced low incomes before being imprisoned¹⁹—are largely confined to public housing or the private rental market. Widespread discrimination in both options has left formerly incarcerated people 10 times more likely to be homeless than people with no criminal record.²⁰

In 2017, a discriminatory screening policy was successfully challenged in *Equal Rights Center v. Mid-America Apartments Association* using the disparate impact theory.²¹ According to the plaintiff, the criminal records screening policy that Mid-America Apartments Association (MAA) employed to determine tenant eligibility had a discriminatory effect on Black and Latinx applicants without providing any greater security to existing MAA tenants, thereby violating the FHA. In the online application portal, people who disclosed a felony conviction were prevented from applying completely; as a result, Black and Latinx applications were between 2 and 12 times as likely as whites to be denied.²² The agreement reached by both parties in 2018 required MAA to implement individualized assessment of each applicant with certain criminal conviction. The factors considered in these individual assessments included:

- the facts or circumstances surrounding the criminal conduct;
- the age of the individual at the time of the occurrence of the offense and the time that has elapsed since the occurrence of the conduct;
- and any evidence of rehabilitation efforts.

This ruling was significant because private landlords or those affiliated with the Housing Choice Voucher program often employ private screening companies to run background checks on applicants. Despite potentially pulling incomplete or misleading information, these companies then provide a “yes” or “no” answer to the private housing providers, who accept or deny applicants based on that determination.²³ Case studies in various cities including Austin, Baltimore, Dallas, and Cleveland showed that few private housing providers would approve applicants with felony convictions.²⁴ Although it is argued that these blanket bans are facially neutral, a recent study examining tenant screening practices among private D.C.-area housing providers revealed significant racial disparities in who has the privilege of being treated as an exception. White applicants more often received sympathetic reactions and explicit encouragement to apply after disclosing their criminal records than black applicants, ultimately experiencing preferential treatment 47 percent of the time.²⁵

As with anti-immigrant policies and practices, the discriminatory effects standard also enables victims of federal, state, and local policies that unjustifiably restrict access to housing programs to challenge these practices. This flexibility is necessary because Public Housing Authorities (PHAs) have broad authority to create additional screening criteria that ultimately determines who will receive subsidized housing. Several city ordinances also discriminate against people experiencing homelessness, a group much more likely to interact with the justice system because law enforcement gives citations or arrests people living outside for low-level offenses like loitering or sleeping in parks.^{26 27} In 2019, the National Law Center of Homelessness and Poverty published a report examining laws related to homelessness in 187 cities across the United States. The report revealed a significant increase in laws that criminalized people experiencing homelessness for existing in public spaces such as bans on sleeping, sitting, or lying down in public, sleeping in your vehicle, begging, and loitering.²⁸ Nine percent of cities have even outlawed sharing food with homeless people.²⁹

Children and Families

Unsafe or unstable housing conditions represent one of the greatest threats to children’s health and development. Children who move frequently or live in crowded conditions are more likely to have poor health outcomes, including developmental delays or behavior problems, and worse academic and social outcomes—all of which contribute to lower adult educational attainment.³⁰ In contrast, stable housing supports family well-being and lowers stress levels. When young children have safe housing, it improves their ability to sleep, eat, play, and otherwise develop healthily.³¹ Access to quality, affordable housing is a prerequisite for positive outcomes in every facet of a child’s life, but families with low incomes, especially those of color, are displaced or evicted at much higher rates than their white, middle-to-high income counterparts. The difficulties families face in finding affordable housing is only compounded by discrimination against families with children in the rental market.

Discrimination based on family status has long limited options for families with children looking for a place to live. More than a fourth of the nation’s rental housing was off-limits to families with children before 1988, when the Fair Housing Act was amended to prohibit discrimination based on family status.³² While outright discrimination has been reduced, policies that discriminate against families with children persist. The existing disparate impact rule has been crucial to protecting families with children against facially neutral types of discrimination, such as requirements on the number of people per bedroom or per unit rental or restrictions on play in or near apartment complexes.³³ CLASP directs you to the comment submitted by the National Women’s Law Center to which we signed on for more on our support for the discriminatory effects standard from a gender justice perspective.

Conclusion

There were 28,880 reported complaints of housing discrimination in the United States in 2019. However, the data collected for the National Fair Housing Alliance’s (NFHA) most recent Fair Housing Trends report represents a mere portion of the estimated 4 million incidents of housing discrimination that occur each year.³⁴ The alarming disparity between the estimated number of cases compared to the number of reported cases underscores the need for the United States to maintain a clear, consistent mechanism for people protected under the FHA to challenge facially neutral, yet systemically racist or xenophobic policies employed by housing providers, lenders, and/or insurance companies. For these reasons, we strongly support HUD’s reinstatement of the discriminatory effects standard. Please reach out to jrussell@clasp.org for any questions regarding CLASP’s comment.

¹ Rebecca Yae, Jessi Russell, et.al, “Prioritization in Emergency Rental Assistance Programs: A Framework of Strategies, Policies, and Procedures to Better Serve Priority Populations,” CLASP and the National Low Income Housing Coalition (NLIHC), 2021, <https://www.clasp.org/sites/default/files/publications/2021/04/Prioritization-in-Emergency-Rental-Assistance-Programs.pdf>.

² HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, Docket No. FR-6111-P-02, Citation No. 84 FR 42854, 2020, <https://www.federalregister.gov/documents/2019/08/19/2019-17542/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard>.

³ CLASP Responds to HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard (Docket No. FR-6111-P-02), 2019, <https://www.clasp.org/sites/default/files/publications/2019/10/HUD%20comments%20final.pdf>.

⁴ 42 U.S.C. § 3601-3619, 3631.

⁵ HUD’s Implementation of the Fair Housing Act’s Discriminatory Effects Standard, Docket No. FR-5508-F-02, Citation No. 78 FR 11460, <https://www.federalregister.gov/documents/2013/02/15/2013-03375/implementation-of-the-fair-housing-acts-discriminatory-effects-standard>.

⁶ *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc., et al.* 576 U.S. at 519, 532-35,

https://www.supremecourt.gov/opinions/14pdf/13-1371_8m58.pdf.

⁷ Id. at 540-541.

⁸ Id. at 541, 542.

⁹ "Fair Housing and Immigrants' Rights," *National Housing Law Project (NHLP)*, <https://www.nhlp.org/about/housing-justice-network-conference/2019-hjn-conference-materials/2b-fair-housing-and-immigrants-rights/>.

¹⁰ John Arroyo, "Facades of Fear: Anti-Immigrant Housing Ordinances and Mexican Rental Housing Preference in the Suburban New Latinx South." *Cityscape* 23, no. 2 (2021): 181-206. Accessed August 15, 2021, <https://www.jstor.org/stable/27039957>.

¹¹ Daniel Edwardo Guzman, "There Be No Shelter Here: Anti-Immigrant Housing Ordinances and Comprehensive Reform," 2020, *Cornell Journal of Law and Public Policy*: Vol. 20: Iss. 2, Article 7. Accessed August 10, 2021, <http://scholarship.law.cornell.edu/cjlp/vol20/iss2/7>.

¹² 42 U.S.C. § 3601

¹³ *Georgia State Conference of the NAACP v. City of LaGrange*, No. 18-10053 (11th Cir. 2019), D.C. Docket No. 3:17-cv-00067-TCB, <https://law.justia.com/cases/federal/appellate-courts/ca11/18-10053/18-10053-2019-10-10.html>.

¹⁴ Tara O'Neill Hayes and Margaret Barnhorst, "Incarceration and Poverty in the United States", *American Action Forum*, 2020, <https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states/#ixzz745v9ozCM>.

¹⁵ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 2010.

¹⁶ "Decades of Disparity: Drug Arrests and Race in the United States," *Human Rights Watch*, 2009, <https://www.hrw.org/report/2009/03/02/decades-disparity/drug-arrests-and-race-united-states#>.

¹⁷ Darrel Thompson and Ashley Burnside, "No More Double Punishments: Lifting the Ban on SNAP and TANF for People with Prior Felony Drug Convictions", *CLASP*, 2021, <https://www.clasp.org/publications/report/brief/no-more-double-punishments>.

¹⁸ *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities*, U.S. Commission on Civil Rights, 2019, <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf>.

¹⁹ Bernadette Rabuy and Daniel Kopf, "Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned," *Prison Policy Initiative*, 2015, <https://www.prisonpolicy.org/reports/income.html>. In 2014, incarcerated people had a median annual income of \$19,185 prior to being imprisoned, which is 41 percent less than non-incarcerated people of similar ages.

²⁰ Lucius Couloute, "Nowhere to Go: Homelessness among formerly incarcerated people," *Prison Policy Initiative*, 2018, <https://www.prisonpolicy.org/reports/housing.html>.

²¹ *Equal Rights Center v. Mid-America Apartment Communities, Inc. and Mid-America Apartments, L.P.*, Case No. [1:17-cv-02659](#)

²² *Ibid.*

²³ "Public Housing Bans: Tenant Screening as a Barrier to Housing," *NLIHC*, 2020, <https://nlihc.org/resource/public-housing-bans>.

²⁴ "Austin/Travis County Reentry Roundtable: Locked Out: Criminal History Barriers to Affordable Rental Housing in Austin & Travis County," *Texas*, 2016, <http://www.austintexas.gov/edims/document.cfm?id=269602>; Phillip Garboden and Eva Rosen, "When Landlords Discriminate," *Talk Poverty*, 2016, <https://talkpoverty.org/2016/05/17/when-landlords-discriminate/>.

²⁵ "Unlocking Discrimination: A DC Area Testing Investigation about Racial Discrimination and Criminal Records Screening Policies in Housing," *Equal Rights Center*, 2016, <https://equalrightscenter.org/wp-content/uploads/unlocking-discrimination-web.pdf>.

²⁶ Sarah Gillespie and Samantha Batko, "Five Charts That Explain the Homelessness-Jail Cycle—and How to Break It," *Urban Institute*, 2020, <https://www.urban.org/features/five-charts-explain-homelessness-jail-cycle-and-how-break-it>.

²⁷ "New data: The revolving door between homeless shelters and prisons in Connecticut," *Prison Policy Initiative*, 2021, <https://www.prisonpolicy.org/blog/2021/02/10/homelessness/>.

²⁸ "No Safe Place: The Criminalizing of Homelessness in U.S. Cities," *National Law Center on Homelessness and Poverty*, 2019, https://nlchp.org/wp-content/uploads/2019/02/No_Safe_Place.pdf.

²⁹ *Ibid.*

³⁰ Heather Sandstrom and Sandra Huerta, "Negative Effects of Instability on Child Development A Research Synthesis," *The Urban Institute*, 2013, <https://www.urban.org/sites/default/files/publication/32706/412899-The-Negative-Effects-of-Instability-on-Child-Development-A-Research-Synthesis.PDF>; Diana Becker Cutts, Alan F. Meyers, Maureen M. Black, et al., "US Housing Insecurity and the Health of Very Young Children," *American Journal of Public Health*, 2011; Kathleen M. Ziol-Guest, Claire C. McKenna, "Early Childhood Housing Instability and School Readiness," *Child Development* 85, 2014; Nabihah Maqbool, Janet Viverios, Minday Ault, "The Impacts of Affordable Housing on Health," *Center for Housing Policy*, 2015, <https://www.rupco.org/wp-content/uploads/pdfs/The-Impacts-of-Affordable-Housing-on-Health-CenterforHousingPolicy-Maqbool.etal.pdf>.

³¹ Bernard Fulton, et. al, "Housing Assistance: A Critical Support for Infants, Toddlers and Families," *CLASP & ZERO TO THREE*, 2017, <https://www.clasp.org/sites/default/files/publications/2017/10/Housing%20FINAL%2010-17-17%20%28%29.pdf>.

³² U.S. Department of Housing and Urban Development, *Discrimination Against Families with Children in Rental Housing Markets: Findings of the Pilot Study*, 2016,

<https://www.huduser.gov/portal/sites/default/files/pdf/HDSFamiliesFinalReport.pdf>.

³³ Gashi v. Grubb & Ellis, 801 F. Supp. 2d 12 (D. Conn. 2011), Chro ex rel. Rowley v. Ackley, 2001 Ct. Sup. 9670 (Conn. Super. Ct. 2001), Housing Opportunities Project for Excellence v. Key Colony No. 4 Condominium Association, 510 F. Supp. 2d 1003 (S.D. Fla. 2007), Yazdinian v. Las Virgenes Village Community Association, No. cv-11-07611 (C.D. Cal. 2012).

³⁴ "Fair Housing in Jeopardy: Trump Administration Undermines Critical Tools For Achieving Racial Equity," *National Fair Housing Alliance*, 2020, <https://nationalfairhousing.org/wp-content/uploads/2020/09/NFHA-2020-Fair-Housing-Trends-Report.pdf>.