

# CLASP

Policy solutions that work for low-income people

Office of the General Counsel, Rule Docket Clerk,  
Department of Housing and Urban Development,  
451 7<sup>th</sup> Street SW Room 10276,  
Washington D.C. 20410-0001

RE: HUD's Implementation of the Fair Housing Act's Disparate Impact Standard [Docket No. FR-6111-P-02]

October 18, 2019

Dear Secretary Carson,

The Center for Law and Social Policy (CLASP) is grateful for the opportunity to comment on the Department's proposed rule on the implementation of the Fair Housing Act's disparate impact standard. **CLASP strongly opposes the proposed regulation and urges the Department of Housing and Urban Development (HUD) to withdraw the proposed rule immediately and uphold HUD's current disparate impact rule.** The proposed changes to the disparate impact standard would undermine the goals of the Fair Housing Act (FHA) and make it much harder for individuals to demonstrate cases of discrimination in financing, home buying, and renting. This would lead to increased discrimination and housing segregation and would widen disparities in homeownership, income, and wealth for communities of color and other protected classes.

CLASP is a national, non-partisan, anti-poverty non-profit organization committed to promoting racial equity and advancing policy solutions for people who have low-incomes. For fifty years, we have been at the forefront of social change, working at the federal, state, and local levels to fight poverty and promote equity. CLASP has deep expertise about the multitude of systemic and policy barriers that block low-income people from economic justice and opportunity. The most devastating and persistent of these barriers arise from our nation's entrenched history of racial injustice. CLASP is opposed to the proposed rule because it would make the protection and enforcement of civil rights more difficult. This would allow discrimination to go unchecked furthering racial and other inequities in our society.

## **Systemic Racism Has Reduced Housing Opportunity for People of Color with Significant Impacts**

Access to safe, affordable housing is an essential human need. It has an outsized impact on individual, family and community well-being because it provides not only physical shelter, but can determine access to jobs, education, health care, and more. Stable, affordable housing is essential to families' economic stability and children's healthy development.

Housing discrimination, like other forms of discrimination, has a long history and it continues to be widespread today. Importantly, both governmental and non-governmental actors in this country have worked to intentionally segregate and divide communities along racial lines. For example, the practice of denying mortgages in certain neighborhoods to African Americans and immigrants, also known as redlining, was encouraged by the federal government for decades.<sup>1</sup>

As a result of decades of systemic racism in federal, state and private housing policies, today, racial disparities exist in all aspects of housing – from affordability and financing to home ownership to neighborhood segregation. Importantly, housing segregation is inextricably linked to housing inequality;

when people of color and other protected classes are discriminated against in housing markets, they are often forced into low-quality and unaffordable housing as a result.<sup>2</sup> Housing discrimination and segregation has negative and long-term consequences for entire communities. When communities are segregated, racial disparities in health, wealth, education, and more become entrenched.<sup>3</sup> CDC analyses show dramatically different health outcomes for residents of different census tracts including life expectancy.<sup>4</sup> Children are particularly vulnerable to the consequences of housing segregation and living in high-poverty, low-opportunity neighborhoods has been linked to adverse health outcomes, poor academic performance, decreased likelihood of attending college, and lower earnings as an adult.<sup>5</sup>

People of color and people who have low-incomes are disproportionately likely to spend more than half of their incomes on housing costs.<sup>6,7</sup> The lack of affordable housing can hurt families' abilities to make ends meet.<sup>8</sup> Severely cost burdened renters are more likely to face difficulty putting food on the table than those with less severe cost-burdens.<sup>9</sup>

High housing costs—and the large gap between poor families' incomes and housing costs—contributes to high rates of housing instability among low-income individuals, which is in turn linked to severe negative outcomes that often exacerbate poverty. This has long-lasting and significant negative effects on children in particular.<sup>10</sup>

Black and Hispanic families at every income level have higher rates of debt, lower rates of home ownership, and less wealth compared to white families.<sup>11</sup> In 2017, according to the U.S. Census Bureau, the real median household income for Black families was \$40,258, compared to \$50,486 for Hispanics, and \$68,145 for white families.<sup>12</sup> Median family wealth for Black families is just \$17,600 compared to \$171,000 for white families.<sup>13</sup> This means that many Black and Hispanic families are economically insecure and it affects their abilities to respond to an emergency situation, transition between jobs, save for retirement, and cover unexpected expenses.

### **The Disparate Impact Standard is a Crucial Tool for Enforcing Civil Rights; The Proposed Rule Will Harm Communities of Color and Other Protected Groups**

Public policies, such as the Fair Housing Act, have helped to lessen overt housing discrimination; however, less obvious forms of discrimination continue today. The Fair Housing Act was intended to protect individuals from discrimination by race, color, national origin, religion, sex, disability or familial status when accessing a mortgage, buying a home or renting an apartment. The disparate impact standard is a key part of fulfilling the FHA's goal. Today the disparate impact standard allows plaintiffs to challenge housing policies or practices that have discriminatory effects even if there is not an explicit intention to discriminate. The discriminatory effects standard is particularly important today because modern discrimination is often covert.<sup>14</sup>

In its current form, the disparate impact rule has proven practical and effective. It comports with decades of established judicial precedent, including the 2015 Supreme Court decision, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015). The central premise of *Inclusive Communities* is that disparate impact claims are necessary to prohibit policies that may not be readily challenged under disparate treatment theories even though they unnecessarily exclude minorities from housing.<sup>15</sup> HUD's proposal would significantly increase the burden on victims of discrimination and make it easier for lenders and insurers to discriminate.

Recent reporting has shown that housing discrimination and the effects of redlining continue to run rampant across the country.<sup>16</sup> There were 28,181 reported complaints of housing discrimination in 2016 but an

estimated 4 million cases of housing discrimination happen every year since cases are often unreported and undetected.<sup>17</sup> The continued prevalence of housing discrimination and the alarming disparity between the estimated number of cases compared to the number of reported cases should spur the federal government to enact stronger anti-discrimination laws and regulations rather than weaken existing civil rights law.

HUD's proposed rule would make drastic changes to fundamentally weaken a longstanding enforcement tool and allow insurance companies, financial institutions, and other major corporations to engage in covert discriminatory practices with impunity. The proposed rule would create a nearly insurmountable burden of proof for plaintiffs of disparate impact claims. As a result, discriminatory practices would be prosecuted less frequently than they are now which would only worsen the current racial wealth and home ownership gap while contradicting the fundamental purpose of the Fair Housing Act.

The proposed rule would also eliminate the incentive for landlords and financial institutions to examine disparities and their causes to identify better, fairer practices and policies that do not discriminate.

### **The Proposed Rule Will Disproportionately Harm Children**

The proposed rule will make it harder for families with children to find safe, stable, and affordable housing. Access to quality, affordable housing is a prerequisite for positive outcomes in every facet of a child's life. Unsafe or unstable housing represents 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.<sup>18</sup> Children who frequently switch schools (as often happens when families move frequently) are less likely to finish high school or perform well academically than their peers.<sup>19</sup> 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.<sup>20</sup>

Millions of children lack stable, affordable housing. In total, nearly 23 million children live in households with high housing cost burdens.<sup>21</sup> Families with children constitute the largest share of households with what HUD calls worst case housing needs. Nearly 3 million families with children in 2015 experienced worst case housing needs, meaning those families had income below 50 percent of Area Median Income and faced severe rent burdens or severely inadequate housing and did not receive housing assistance.<sup>22</sup>

The difficulties families face in finding affordable housing is 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.<sup>23</sup> While outright discrimination has been reduced, facially-neutral 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.<sup>24</sup>

In 2017, familial status was the third most common type of discrimination cited in fair housing complaints after disability status and race. In total, there were 2,675 familial status discrimination complaints filed that year, the vast majority of which pertained to rental market discrimination.<sup>25</sup> The proposed rule would make it so that the disparate impact standard no longer protects families with children and their housing and will make it more difficult to challenge these unjust and discriminatory policies and practices.

In addition to discrimination related to family status, children are the most diverse of any age group in the

country, and likely to experience the adverse impacts of racial discrimination. In 2018, 50 percent of children were non-Hispanic white; 14 percent were non-Hispanic African American or Black; and 25 percent were Hispanic regardless of race.<sup>26</sup> Children born in recent years have been “majority minority,” as racial and ethnic minorities now make up more than half of all children birth through five.<sup>27</sup> Children of color disproportionately live in poor families (which are more likely to have high housing cost burdens and experience housing instability). In 2018, 9 percent of non-Hispanic White children lived in poverty, compared to 30 percent of Black children and 24 percent of Hispanic children of any race.<sup>28</sup>

Children of color, already at greater risk of adverse health, academic and employment outcomes, are more likely than their white peers to experience housing instability and its harmful outcomes.<sup>29</sup> Children who move frequently are also more likely to be food insecure and to have fair or poor health outcomes, such as developmental delays, behavior problems, and difficulty maintaining a healthy weight.<sup>30</sup> Young children living in crowded conditions or whose families were behind on rent are about a fifth less likely to be considered “well” and more likely to face material hardship than children in stable housing.<sup>31</sup> These problems have broader implications for our economy, as children who experience housing instability have additional health and educational needs over time.<sup>32</sup>

Children of color—especially those with low-incomes—will be disproportionately harmed by this rule as they are impacted by racial discrimination as well as discrimination due to family status. Removing protections for these children to better housing opportunities will be detrimental to their growth and development and have lasting implications on their health, well-being and adult outcomes.<sup>33</sup> Endangering the wellbeing of a large share of this country’s children—America’s future labor force—will harm our country as a whole and our economic future.<sup>34</sup>

## Conclusion

This proposed rule should be withdrawn, and the administration should commit to upholding civil rights laws. CLASP believes in and is committed to eliminating discriminatory policies and practices, whether facially neutral or not, and we urge you to uphold HUD’s current interpretation of the disparate impact rule. Instead of weakening the disparate access standard, the government should be strengthening its commitment to fighting discrimination, promoting civil rights and advancing equity.

Our comments include citations to supporting research and documents for the benefit of HUD in reviewing our comments. We direct HUD to each of the items cited and made available to the Department through active hyperlinks, and we request that these, along with the full text of our comments, be considered part of the formal administrative record on this proposal for purposes of the Administrative Procedures Act.

Sincerely,

A handwritten signature in blue ink, appearing to read 'H M', is displayed on a light-colored background.

Hannah Matthews  
Deputy Executive Director for Policy

- 
- <sup>1</sup> Terry Gross, “A Forgotten History of how the U.S. Government Segregated America”, NPR, 2017, <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america>.
- <sup>2</sup> Nancy McArdle, Dolores Acevedo-Garcia, *A Shared Future: Consequences of Segregation for Children’s Opportunity and Wellbeing*, Harvard Joint Center for Housing Studies, 2017, [https://www.jchs.harvard.edu/sites/default/files/a\\_shared\\_future\\_consequences\\_of\\_segregation\\_for\\_children.pdf](https://www.jchs.harvard.edu/sites/default/files/a_shared_future_consequences_of_segregation_for_children.pdf).
- <sup>3</sup> Brian Smedley, Rachel A. Davis, “The Effects of Housing Discrimination on Health can Reverberate for Decades”, The Hill, 2019, <https://thehill.com/opinion/civil-rights/458899-the-effects-of-housing-discrimination-on-health-can-reverberate-for>.
- <sup>4</sup> Centers for Disease Control and Prevention, *U.S. Small Area Life Expectancy Estimates Project (USALEEP)*, National Center for Health Statistics, 2018, <https://www.cdc.gov/nchs/nvss/usaleep/usaleep.html>.
- <sup>5</sup> Nancy McArdle, *A Shared Future*.
- <sup>6</sup> National Low Income Housing Coalition, *The Gap A Shortage of Affordable Homes*, 2018, [https://reports.nlihc.org/sites/default/files/gap/Gap-Report\\_2018.pdf](https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2018.pdf).
- <sup>7</sup> David Montgomery, *The Neighborhoods Where Housing Costs Devour Budgets*, CityLab, 2019, <https://www.citylab.com/equity/2019/04/affordable-housing-map-monthly-rent-home-mortgage-budget/586330/>; National Low Income Housing Coalition, *The Problem*, <https://nlihc.org/explore-issues/why-we-care/problem>.
- <sup>8</sup> Lauren Taylor “Housing and Health: An Overview of the Literature” Health Affairs, June 2018 <https://www.healthaffairs.org/doi/10.1377/hpb20180313.396577/full/>.
- <sup>9</sup> Joint Center for Housing Studies of Harvard University, *The State of the Nation’s Housing*, 2017 [http://www.jchs.harvard.edu/sites/default/files/harvard\\_jchs\\_state\\_of\\_the\\_nations\\_housing\\_2017.pdf](http://www.jchs.harvard.edu/sites/default/files/harvard_jchs_state_of_the_nations_housing_2017.pdf).
- <sup>10</sup> Douglas Rice, Stephanie Schmit, Hannah Matthews, *Child Care and Housing: Big Expenses With Too Little Help Available*, CLASP, the Center on Budget and Policy Priorities, 2019, <https://www.clasp.org/sites/default/files/publications/2019/04/Child%20Care%20and%20Housing%20Big%20Expenses%20with%20Too%20Little%20Help%20Available%20.pdf>; Terry Gross, “First Ever Evictions Database Shows” We’re in the Middle of a Housing Crisis’, NPR, 2018, <https://www.npr.org/2018/04/12/601783346/first-ever-evictions-database-shows-were-in-the-middle-of-a-housing-crisis#targetText=Sociologist%20Matthew%20Desmond%20estimates%20that,rate%20of%20four%20every%20minute.&targetText=%22Eviction%20is%20a%20direct%20cause,%5Band%5D%20community%20instability.%22>.
- <sup>11</sup> Angela Hanks, Denyelle Soloman, Christian E. Weller, *Systemic Inequality: How America’s Structural Racism Helped Create the Black-White Wealth Gap*, Center for American Progress, 2018, <https://www.americanprogress.org/issues/race/reports/2018/02/21/447051/systematic-inequality/>.
- <sup>12</sup> U.S. Census Bureau, Current Population Survey, 1968 to 2018 Annual Social and Economic Supplements
- <sup>13</sup> Trymaine Lee, “The 1619 Project”, The New York Times Magazine, 2019, <https://www.nytimes.com/interactive/2019/08/14/magazine/racial-wealth-gap.html>.
- <sup>14</sup> Margery Austin Turner, et.al, *Housing Discrimination Against Racial and Ethnic Minorities 2012: Full Report*, Urban Institute, 2013, <https://www.urban.org/research/publication/housing-discrimination-against-racial-and-ethnic-minorities-2012-full-report>.
- <sup>15</sup> National Low Income Housing Coalition, *Federal District Court Dismisses Fair Housing Disparate Impact Claim*, 2016, <https://nlihc.org/resource/federal-district-court-dismisses-fair-housing-disparate-impact-claim>.
- <sup>16</sup> Emmanuel Martinez, Aaron Glantz, *How we Identified Lending Disparities in Federal Mortgage Data*, Reveal, 2018, <https://www.revealnews.org/article/how-we-identified-lending-disparities-in-federal-mortgage-data/>.
- <sup>17</sup> National Fair Housing Alliance, *2017 National Fair Housing Trends Report*, 2018, <https://nationalfairhousing.org/2017-fair-housing-trends-report/>.
- <sup>18</sup> Heather Sandstrom, 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/wpcontent/uploads/pdfs/The-Impacts-of-Affordable-Housing-on-Health-CenterforHousingPolicyMaqbool.etal.pdf>.
- <sup>19</sup> Douglas Rice et al., *Child Care and Housing: Big Expenses With Too Little Help Available*.
- <sup>20</sup> 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%282%29.pdf>.

- 
- <sup>21</sup> The Annie E. Casey Foundation, KIDS COUNT Data Center. *Children Living Households with a High Housing Cost Burden in the United States*, 2019, <https://datacenter.kidscount.org/data/tables/7244-children-living-in-households-with-a-high-housing-cost-burden?loc=1&loct=2#detailed/1/any/false/871,867/any/14287,14288>.
- <sup>22</sup> U.S. Department of Housing and Urban Development. *Worst Case Housing Needs: 2017 Report to Congress*, 2017, <https://www.huduser.gov/portal/sites/default/files/pdf/Worst-Case-Housing-Needs.pdf>.
- <sup>23</sup> 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>.
- <sup>24</sup> 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), Yazdini v. Las Virgenes Village Community Association, No. cv-11-07611 (C.D. Cal. 2012).
- <sup>25</sup> National Fair Housing Alliance, *Making Every Neighborhood a Place of Opportunity: 2018 Fair Housing Trends Report*, 2018, [https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report\\_4-30-18.pdf](https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report_4-30-18.pdf).
- <sup>26</sup> CLASP Analysis of U.S. Census Current Population Survey (CPS) 1 year-estimates, March 2018 Supplement. We use the terms Hispanic and Latinx interchangeably.
- <sup>27</sup> U.S. Census Bureau, *Projections of the Size and Composition of the U.S. Population: 2014 to 2060*, U.S. Department of Commerce, 2015, <https://www.census.gov/newsroom/press-releases/2015/cb15-tps16.html>.
- <sup>28</sup> U.S. Census Bureau, *Income and Poverty in the United States: 2018*, <https://www.census.gov/library/publications/2019/demo/p60-266.html>, 2019..
- <sup>29</sup> Annie E. Casey Foundation, *Race for Results*, 2017, <https://www.aecf.org/resources/2017-race-for-results/>.
- <sup>30</sup> Diana Becker Cutts, et al., “US Housing Insecurity and the Health of Very Young Children; Kathleen M. Ziol-Guest “Early Childhood Housing Instability and School Readiness; Maqbool et al., “The Impacts of Affordable Housing on Health”.
- <sup>31</sup> Ingrid Weiss, et al., *Safe, Stable Homes Lead to Healthier Children and Families for Baltimore*, Children’s HealthWatch, 2012, [www.childrenshealthwatch.org/wp-content/uploads/MDHousing\\_brief\\_October2012.pdf](http://www.childrenshealthwatch.org/wp-content/uploads/MDHousing_brief_October2012.pdf).
- <sup>32</sup> Ana Poblacion, et al., *Stable Homes Make Healthy Families*, Children’s HealthWatch, 2017, <http://childrenshealthwatch.org/wp-content/uploads/CHW-Stable-Homes-2-pager-web.pdf>.
- <sup>33</sup> Bernard Fulton, *Housing Assistance, A Critical Support*.
- <sup>34</sup> American Psychological Association, *Effects of Poverty, Hunger and Homelessness on Children and Youth*, 2018, <https://www.apa.org/pi/families/poverty.aspx>; Greg Duncan, Suzanne Le Menestrel, et al., *A Roadmap to Reducing Child Poverty*, The National Academy of Sciences, Engineering and Medicine, 2019, <https://www.nap.edu/read/25246/chapter/1>.