THE EQUAL PROTECTION PROJECT
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January 28, 2026

Hon. Craig Trainor
Assistant Secretary for Fair Housing and Equal Opportunity
U.S. Department of Housing and Urban Development
451 7th Street, SW
Washington, DC 20410

In re: RIN 2529-AB09 – In Support of Proposed Rule

Dear Assistant Secretary Trainor:

This letter is in response to the Fair Housing and Equal Opportunity Office's request for public comment on the proposed rule to remove its discriminatory effects regulations and leave to courts questions related to interpretations of disparate impact liability under the Fair Housing Act. 42 U.S.C. 3601, *et seq.*

The Equal Protection Project (EPP), a project of the non-profit Legal Insurrection Foundation, is dedicated to the fair treatment of all persons without regard to race, ethnicity, or sex. EPP's guiding principle is that there is no "good" form of unlawful discrimination, and that the remedy for unlawful discrimination is never more unlawful discrimination. Since its creation, EPP has filed civil rights complaints against more than two hundred seventy-five governmental and private entities and more than seven hundred fifty allegedly discriminatory programs.

Based on its experience, EPP submits this comment in support of the Department's decision to pursue rulemaking to remove its discriminatory effects regulations. Not only is there a well-supported legal basis for questioning whether HUD's previous discriminatory effects rulemaking is legally valid, but this new rule comports with the principles of equal protection and basic fairness. The proposed rule should be enacted.

1. Background on proposed rulemaking.

Title VIII of the Civil Rights Act of 1968, as amended (the FHA), prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status, or national origin. 42 U.S.C. 3601, *et seq*. Since 2013, HUD has issued three final rules for determining whether a given practice has an unjustified discriminatory effect under the FHA. Discriminatory effects, better known as "disparate impact," holds that a neutral policy or practice is unlawfully discriminatory if it has an unequal effect on different demographic groups, even absent evidence of discriminatory intent. The theory rests on the assumption that any policy that creates a racial disparity is inherently discriminatory.

HUD's previous discriminatory effect rules formalized legal tests that were not explicit in the FHA, and were either replaced in short order, or suffered legal challenge staying implemented and enforcement. The most recent was titled "Reinstatement of HUD's Discriminatory Effects Standard," and was enacted on March 31, 2023, at 88 FR 19450. However, several subsequent events have now prompted HUD to reconsider its discriminatory effects regulations.

The first was the Supreme Court's overruling of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984). According to *Loper Bright v. Raimondo*, 603 U.S. 369 (2024), federal agency interpretations of statutes and agency actions that rely on them are not due any judicial deference. As a result, HUD's prior disparate impact rules, HUD's interpretation of the FHA, and the codification of those interpretations, do not carry deferential weight. A reviewing court could conceivably wholly reject HUD's claims in prior rulemakings regarding discriminatory effect.

The second was President Trump's Executive Order 14281, titled "Restoring Equality of Opportunity and Meritocracy." Executive Order 14281 instructs all federal agencies, including HUD, to review existing regulations and rules that impose disparate impact liability and consider amendment or repeal of these regulations as appropriate under applicable law. Consistent with this, HUD has now reviewed its disparate impact regulations and related prior rulemakings and determined they are unnecessary because case law continues to develop and HUD's regulation does not provide an up-to-date picture of the legal landscape.

2. The previous and newly proposed rule.

Through the proposed rulemaking, HUD intends to remove its discriminatory effects regulations and leave to courts questions related to interpretations of disparate impact liability under the FHA. Specifically, this proposal will: Remove 24 CFR part 100, subpart G, which contains the disparate impact rule in section 100.500, and remove the second sentence of 24 CFR § 100.5(b), which currently provides as follows: "This part provides the Department's interpretation of the coverage of the Fair Housing Act regarding discrimination related to the sale or rental of dwellings, the provision of services in connection therewith, and the availability of residential real estate-related transactions. The illustrations of unlawful housing discrimination in this part may be established by a practice's discriminatory effect, even if not motivated by discriminatory intent, consistent with the standards outlined in § 100.500."

3. Courts control the definitive interpretation of the FHA.

HUD is correct in its assertions that courts, not federal agencies, are the legally appropriate actors to make determinations related to the interpretation of federal statutes.

The Framers envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts." *The Federalist No. 78*, at 525 (J. Cooke ed. 1961) (A. Hamilton). This interpretive supremacy is reflected not only in the Constitution, *see* U.S. Const., Art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution…"), but in the Administrative Procedure Act (APA), under which courts must "decide all relevant questions of law, " 5 U.S.C. § 706. And in *Loper Bright*, the Supreme Court found that *Chevron's* previous requirement of judicial deference to agencies' statutory interpretations and subsequent rulemakings could not be reconciled with the traditional understanding of judicial power as expressed in the APA. 603 U.S. at 396. In reaching that result, the Supreme Court made clear that "statutes…have a single, best meaning" that is "fixed at the time of enactment." *Id*. at 400 (quoting *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018)).

Courts, not federal agencies, are the legally appropriate actors to make determinations related to the interpretation of disparate impact liability under the FHA. The FHA's prohibition on discrimination in housing can have only one meaning, and the single, best meaning of the statute is that it only prohibits intentional discrimination, and does not prohibit facially neutral policies that result in disparate outcomes when there is no discriminatory intent. As a result, as noted, HUD's prior disparate impact rulemaking, HUD's interpretation of the FHA, and the codification of that interpretation, do not carry any deferential weight. A reviewing court may, and should, wholly reject HUD's previous regulations regarding differential effects. There is no textual or interpretive basis for reading differential effects liability into the FHA. Instead, differential effects is a subversion of the bedrock principle of equality before the law.

4. Differential effects liability leads to unconstitutional and unjust results.

HUD is correct in its decision to reconsider its differential effects regulations.

As the Supreme Court recently held in *Students for Fair Admissions, v. President & Fellows of Harvard College*, "the Equal Protection Clause…applies without regard to any differences of race, of color, or of nationality—it is universal in its application" and the "guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." 600 U.S. 181, 206 (2023) (quoting *Yick Wo* v. *Hopkins,* 118 U.S. 356, 369 (1886) and *Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-90 (1978)). Despite the protections of equal protection, an owner or landlord is at risk of differential effects liability under the current rule, whether the supposed discrimination was entirely unintended and undiscovered. Additionally, making differential effects allegations actionable in court encouraged supposedly affected individuals to file lawsuits against owners and landlords even where no evidence of intentional discrimination against them exists.

Instead, ensuring equality means ensuring equality for all. *See Students for Fair Admissions,* 600 U.S. at 206. EO 14281 correctly states that equal treatment under the law is a "bedrock principle of the United States" which "guarantees equality of opportunity, not outcomes." Disparate impact liability "endangers this foundational principle" by creating a "near insurmountable presumption of discrimination" when there are any differences in outcomes, "even if there is no facially discriminatory policy or practice or discriminatory intent involved, and even if everyone has an equal opportunity to succeed." In order to prevent this unjust result, EO 14281 establishes that "it is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals."

The proposed rule under discussion falls squarely within this mandate. Additionally, two other recent executive orders, Executive Order 14192 ("Unleashing Prosperity Through Deregulation"), and Executive Order 14219 ("Ensuring Lawful Governance and Implementing the President's `Department of Government Efficiency' Deregulatory Initiative"), favor of HUD's newly proposed rule rolling back differential effects liability. Indeed, HUD is already in good company when it comes to these efforts. In mid-December the U.S. Department of Justice issued a final rule eliminating its own disparate impact regulations under Title VI of the Civil Rights Act of 1964. Both the DOJ's new rule, and the proposed rule under discussion, are the first steps in rolling back decades of abuse of disparate impact and differential effect standards.

5. Conclusion

Not only is there a well-supported legal basis for questioning whether HUD's previous discriminatory effects rulemaking is legally valid, but this new rule comports with the principles of equal protection and basic fairness. Accordingly, EPP supports HUD's decision to pursue rulemaking to remove its discriminatory effects regulations.

Respectfully submitted,

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