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** Pro Hac Vice Application Forthcoming*

22 UNITED STATES DISTRICT COURT FOR THE
23 NORTHERN DISTRICT OF CALIFORNIA

24 **NATIONAL FAIR HOUSING ALLIANCE;**)
)
25 **FAIR HOUSING ADVOCATES OF**)
NORTHERN CALIFORNIA; and)
26)
27 **BLDS, LTD d/b/a BLDS, LLC;**)
)
28 Plaintiffs,)
)

Case No. _____

COMPLAINT
ADMINISTRATIVE
PROCEDURE ACT CASE

1 v.)
2)
3 **BEN CARSON, Secretary of the U.S.**)
4 **Department of Housing and Urban**)
5 **Development, in his official capacity; and**)
6 **U.S. DEPARTMENT OF HOUSING AND**)
7 **URBAN DEVELOPMENT;**)
8)
9 Defendants.)

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INTRODUCTION

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2 1. For nearly fifty years, disparate-impact claims have played a central role in making the
3 promise of the federal Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, a reality for millions of Americans.
4 This lawsuit challenges as violative of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*
5 (“APA”), a new rule promulgated by Defendants the U.S. Department of Housing and Urban
6 Development and its Secretary Ben Carson (together “HUD”) that radically alters, and effectively
7 eviscerates, well-settled disparate-impact doctrine. The new rule makes it nearly impossible for
8 plaintiffs to prevail in a disparate-impact case, thus undoing decades of hard-won fair housing and fair
9 lending progress in cities and counties across the nation.

10 2. In recent months, vast numbers of Americans of all races are recognizing how deeply
11 structural racism is engrained in the nation and the importance of rooting it out. The institutions and
12 realities of life in America have been and remain fundamentally shaped by our history, including
13 slavery, Jim Crow, and the fiction of “separate but equal.”

14 3. The Fair Housing Act was enacted in 1968 with the ambitious purpose of eliminating to
15 the greatest extent possible the role played by structural inequalities and racism in all facets of the
16 housing market. Accomplishing that purpose requires more than prohibiting explicitly discriminatory
17 acts. It also requires prohibiting facially neutral policies and practices that have an unnecessary
18 disparate and negative impact on Black people and members of other protected classes. From the
19 beginning, courts held that the Fair Housing Act bars such policies and practices by recognizing
20 disparate-impact claims.

21 4. HUD agreed, and in 2013 it adopted a rule that codified the principles courts had
22 employed for decades to adjudicate disparate-impact claims under the Act. Two years later, the
23 Supreme Court agreed, too, finding that “[r]ecognition of disparate-impact claims is consistent with the
24 FHA’s central purpose to eradicate discriminatory practices within [the housing] sector,” *Tex.*
25 *Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project*, 576 U.S. 519, 539 (2015) (“*Inclusive*
26 *Communities*”). It described with approval the then-existing state of the law.

1 5. HUD has now, however, adopted a rule gutting five decades of settled law regarding
2 disparate-impact claims, including its own rule from 2013. *See* HUD’s Implementation of the Fair
3 Housing Act’s Disparate Impact Standard, 85 Fed. Reg. 60288 (Sept. 24, 2020) (“Final Rule”). The
4 new rule takes effect in 4 days, on October 26.

5 6. The central tenet of disparate-impact law under the Act has always been that a public or
6 private entity must adopt an available alternative to a policy or practice that has discriminatory effect,
7 so long as the alternative can satisfy the entity’s legitimate needs with less discriminatory effect. This
8 rule does not require a business to sacrifice legitimate needs, like a bank’s need to accurately assess the
9 likelihood that an applicant will repay a mortgage loan; it only requires the bank to base policies on
10 legitimate needs and meet them in the least discriminatory manner reasonably available. It does not
11 require banks to ignore relevant considerations like unequal incomes or credit scores; it only requires a
12 company to avoid considerations that disproportionately harm members of protected classes
13 unnecessarily.

14 7. Through these longstanding requirements, disparate-impact law has been critical in
15 reducing inequities affecting housing. It has ferreted out covert intentional discrimination, such as
16 exclusionary zoning rules that effectively deny housing opportunities to persons of color. It has forced
17 companies to jettison policies based on unexamined assumptions, or “disguised animus,” *Inclusive*
18 *Communities*, 576 U.S. at 540, that is often difficult to identify. And it has caused lenders and others
19 that predict risk using models that incorporate many variables to search for and implement the precise
20 variable combinations that predict accurately *and* minimize disparate outcomes. In doing so,
21 responsible businesses have come to recognize that incorporating disparate-impact law into their
22 operations is good for business because it helps them to find more qualified customers in all
23 communities without regard to race, color, or national origin. With the growing role of complex
24 machine-learning models and artificial intelligence in all aspects of everyday life, this is especially
25 important to avoid the unnecessary perpetuation of discrimination, segregation, and inequality going
26 forward.

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1 8. The new rule undermines disparate impact’s ability to accomplish all this by eliminating
2 the requirement that a defendant explore less discriminatory alternatives to policies that have a
3 significant, adverse disparate impact on communities of color. This has long been the key to success in
4 reducing disparities caused by rules, laws, policies and models that perpetuate structural racism.

5 9. HUD’s Final Rule upends settled disparate-impact jurisprudence in other important
6 other ways as well, by imposing new pleading requirements for Fair Housing Act claims alleging
7 disparate impact, dramatically increasing plaintiffs’ evidentiary burdens while decreasing those placed
8 on defendants, and creating new defenses from whole cloth. The new pleading requirements will be
9 impossible to meet, and the defenses impossible to overcome, in many if not most instances, meaning
10 that important and meritorious cases will never even be filed. The Final Rule also requires disparate-
11 impact administrative complaints filed with HUD to meet the pleading standards for a federal-court
12 complaint, destroying the utility of that forum.

13 10. HUD purports to justify the Final Rule’s sweeping changes by asserting that they are
14 required in order to implement the Supreme Court’s 2015 *Inclusive Communities* decision. That is
15 baseless. *Inclusive Communities* upheld and affirmed existing disparate-impact law and spoke
16 approvingly of its history. The Court explained that “disparate-impact liability has always been
17 properly limited in key respects.” *Inclusive Communities*, 576 U.S. at 521. Nothing in the opinion
18 suggests that the law required narrowing, much less must be radically altered as HUD does in the Final
19 Rule.

20 11. Plaintiffs National Fair Housing Alliance (“NFHA”), Fair Housing Advocates of
21 Northern California (“FHANC”), and BLDS, LTD (“BLDS”) will be significantly harmed by the Final
22 Rule. NFHA also brings this suit on behalf of its members, which will be significantly harmed as well.

23 12. NFHA is a membership organization that combats discrimination in housing across the
24 country. It works with banks, insurers, and others that affect the housing market to encourage and,
25 when necessary, require their modification of policies to avoid unnecessary discriminatory impact.
26 NFHA relies on disparate-impact law to succeed. Companies have an incentive to cooperate with
27 NFHA because they know they may otherwise face liability pursuant to a disparate-impact complaint
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1 filed with HUD or in federal court. That incentive will be gone or largely curtailed because of the Final
2 Rule. This will directly impede NFHA’s ability to accomplish its mission. Moreover, NFHA has
3 already had to divert substantial resources to counteract HUD’s actions by advocating for companies to
4 continue, voluntarily, to identify and adopt the least discriminatory policies consistent with their
5 business needs notwithstanding the Final Rule. NFHA is also injured by the Final Rule because it has
6 invested in technology that will allow companies to test their predictive models for discriminatory
7 impact and, where found, determine whether less discriminatory alternatives are available. The
8 effectiveness of this “debiasing sandbox” will be much reduced because companies will no longer be
9 incentivized to use it by the prospect of disparate-impact liability.

10 13. NFHA’s member organizations share in the mission of combating discrimination in
11 housing. They often utilize the HUD administrative complaint process to challenge policies with
12 disparate impact. That process, until now, has been less costly to use than courts and has allowed
13 members to increase inclusive housing opportunities for all protected classes. The Final Rule, however,
14 substantially reduces its availability to NFHA members. NFHA members have complaints currently
15 pending which will be subject to these additional requirements and now have a greatly reduced chance
16 of success. Going forward, they will need to devote more resources to pre-filing investigations to meet
17 the heightened pleadings standards, if they can be met at all, meaning they will be able to challenge
18 fewer discriminatory practices.

19 14. FHANC is a NFHA member organization that operates in Northern California. FHANC
20 conducts a range of activities to protect the fair housing rights of its clients and community. These
21 include counseling, education programs, training, advocacy with housing providers and others, filing
22 administrative complaints with HUD, and litigating. Like NFHA and other NFHA members, FHANC
23 relies on disparate-impact law to succeed in achieving its goals and furthering its mission. The
24 effectiveness of its fair housing programs will be significantly impaired by the Final Rule because
25 victims of discrimination will have fewer enforceable rights and housing providers and others that
26 maintain unnecessarily discriminatory policies will face little risk of penalty for non-compliance. In
27 each part of its operations, FHANC will have to expend more staff time and funds than previously,
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1 leaving it able to serve fewer members of the community. FHANC's ability to protect the fair housing
2 rights of its community will be diminished, and its community will be subjected to more fair housing
3 violations, if the Final Rule remains in effect.

4 15. BLDS is a leading consulting firm that assists lenders and others in conducting
5 statistical analyses to determine whether their policies related to housing disparately impact members
6 of protected classes and, if so, whether alternative policies would satisfy their legitimate needs while
7 mitigating that impact. The Final Rule sharply curtails, or even outright eliminates, risk to BLDS's
8 clients of disparate-impact liability, meaning they will no longer require the same services from BLDS.
9 This will directly reduce or eliminate a substantial source of revenue for BLDS. It will also
10 substantially diminish the value of investments BLDS has made in recent years to create proprietary
11 methods and tools for analyzing models for fair lending risk.

12 16. HUD issued its rule changing decades-old law regarding disparate impact without
13 reasoned explanation, without responding adequately to comments submitted regarding the proposed
14 rule, without even first publishing certain provisions for comment, and in contravention of the Act's
15 fundamental purpose. HUD's action violates the APA for multiple reasons, including because it is
16 arbitrary and capricious, an abuse of discretion, not in accordance with law, and in excess of HUD's
17 statutory grant of authority, and was taken without observance of procedures required by law. HUD's
18 Final Rule should be vacated and set aside.

19 **PARTIES**

20 17. The National Fair Housing Alliance (NFHA), a non-profit and public service
21 organization, is a nationwide consortium of private non-profit fair housing organizations, legal services
22 groups, and other organizations. It has operating and supporting members located in every state,
23 including in California, where it has multiple members, including Plaintiff Fair Housing Advocates of
24 Northern California. NFHA's mission is to promote residential integration and to combat
25 discrimination in housing based on race, national origin, disability, and other protected classes covered
26 by federal, state, and local fair housing laws. NHFA is incorporated under the laws of the
27 Commonwealth of Virginia with its principal place of business in Washington, DC.

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1 18. Plaintiff FHANC is a nonprofit fair housing corporation incorporated under the laws of
2 California with its principal place of business in San Rafael, California.

3 19. Plaintiff BLDS, LTD d/b/a BLDS, LLC (BLDS) is a nationally recognized firm of
4 statistics and economics experts. Among the core services BLDS provides is statistical analysis of the
5 discriminatory effects of policies and practices and identification of available alternatives that would
6 ameliorate any discriminatory effects. BLDS is incorporated under the laws of Delaware with its
7 principal place of business in Philadelphia, Pennsylvania.

8 20. Defendant U.S. Department of Housing and Urban Development (HUD) is an agency of
9 the United States within the meaning of the APA. HUD is charged with administering and enforcing
10 the Fair Housing Act, including by accepting and adjudicating administrative complaints of violations.

11 21. Defendant Ben Carson is the Secretary of HUD and is sued in his official capacity.

12 JURISDICTION AND VENUE

13 22. This Court has jurisdiction over this matter under 28 U.S.C. § 1331 and 5 U.S.C. § 702.

14 23. Venue is proper in this District under 28 U.S.C. § 1391(e) and 5 U.S.C. § 703 because a
15 substantial part of the events giving rise to these claims occurred in this District and because Plaintiff
16 FHANC is a resident of this District.

17 24. Intradistrict assignment in the San Francisco Division or Oakland Division is proper
18 under Civil Local Rule 3.2(c) because a substantial part of the events giving rise to the claims occurred
19 in Marin County.

20 FACTUAL ALLEGATIONS

21 I. The Fair Housing Act's Prohibition Against Housing Policies with Unnecessary Disparate 22 Impact Has Been Central to the Act's Effectiveness in Combating Stark Racial Disparities

23 A. Structural Inequalities with Respect to Race Remain Deeply Embedded in Our 24 Country

25 25. Racism and racial segregation are woven into this country's fabric, and overtly
26 discriminatory housing policies and practices have been among the main causes. Such discrimination
27 has ranged from official government redlining to enforce housing segregation, to comparable private
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1 policies like racial steering by realtors and racially restrictive covenants, to widespread racism that has
2 been manifested in countless other ways.

3 26. Though overt discrimination was belatedly banned, its legacy—deeply engrained
4 inequality of opportunity and enduring disparities between Black and white—endures. The dramatic
5 and persistent difference in homeownership is emblematic. Throughout the fifty-two years since
6 Congress enacted the Fair Housing Act, the Black homeownership rate has remained under 50 percent
7 while the white homeownership rate has always been significantly higher, now exceeding 75 percent.
8 Indeed, the racial homeownership gap is now wider than it was when the Act became law.¹

9 27. In large part because Black people have been shut out of homeownership, this country’s
10 primary driver of wealth creation, the racial wealth gap is even starker. As of 2016, the median white
11 family had about \$171,000 in accumulated wealth, while the median Black family had barely one-tenth
12 as much, \$17,150.² Without accumulated wealth, Black families are stymied in attaining
13 homeownership, and so they continue to be denied the opportunity to accumulate wealth. It is a vicious
14 cycle.

15 28. The same is true of neighborhoods; government-sponsored segregation may be gone,
16 but its effects are not. Neighborhoods that are predominantly Black today track those that the federal
17 government redlined, and many continue to lack the opportunities available in white neighborhoods. In
18 San Francisco and Oakland, as in much of the country, neighborhoods that the government once
19 deemed “hazardous” because of their racial demographics remain highly segregated today. *See* Stephen
20 Menendian & Samir Gambhir, *Othering & Belonging* Institute at Univ. of Cal. Berkeley, *Racial*
21 *Segregation in the San Francisco Bay Area, Part 1* (2018), [https://belonging.berkeley.edu/racial-](https://belonging.berkeley.edu/racial-segregation-san-francisco-bay-area)
22 [segregation-san-francisco-bay-area](https://belonging.berkeley.edu/racial-segregation-san-francisco-bay-area); Robert K. Nelson, et al., *Mapping Inequality: Redlining in New*
23 *Deal America*, *American Panorama*, ed. Robert K. Nelson and Edward L. Ayers, accessed Oct. 21,

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26 ¹ Caitlin Young, *These Five Facts Reveal the Current Crisis in Black Homeownership*, Urban Institute (July 31, 2019),
<https://www.urban.org/urban-wire/these-five-facts-reveal-current-crisis-black-homeownership>.

27 ² Kristin McIntosh et al., *Examining the Black-white Wealth Gap*, Brookings (Feb. 27, 2020),
28 <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/>.

1 2020, <https://dsl.richmond.edu/panorama/redlining/#loc=12/37.758/-122.53&city=san-francisco->
 2 ca. These same historically redlined Bay-area communities are marked by higher rates of pollution
 3 and suffer the consequent health risks at higher rates than neighboring areas. Kara Manke, Univ. of
 4 Cal. Berkeley, *Historically Redlined Communities Face Higher Asthma Rates* (May 22, 2019),
 5 <https://vcresearch.berkeley.edu/news/historically-redlined-communities-face-higher-asthma-rates>. The
 6 “vestiges [of *de jure* segregation by race] remain today, intertwined with the country’s economic and
 7 social life.” *Inclusive Communities*, 576 U.S. at 528.

8 29. This longstanding residential segregation means Black and white people largely
 9 continue to live apart, in different neighborhoods that are far from equivalent. Outside largely white
 10 neighborhoods, high-performing schools are less common, unemployment and poverty are higher,
 11 health is worse (as the coronavirus pandemic has most recently made plain), access to financial
 12 institutions remains inadequate, and the list goes on. These neighborhoods are also much likelier to be
 13 targeted by unscrupulous companies, such as disreputable lenders targeting Black homeowners with
 14 equity-stripping mortgage schemes.³

15 30. Vast disparities in how Black and white communities have experienced the current
 16 coronavirus pandemic provide just the latest example of how our long legacy of residential segregation
 17 and racial discrimination lead to unequal results today. In California, for example, Black people are 1.5
 18 times more likely to contract COVID-19 than white people,⁴ and once people who live in formerly
 19 redlined neighborhoods contract the disease, they are likelier to die of it than those who live
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 25 ³ Jury Verdict Form, ECF No. 518, *Saint-Jean, et al. v. Emigrant Mortgage Co.*, 337 F. Supp. 3d 186 (E.D.N.Y. 2016) (No. 11-2122).

26 ⁴ *Tracking the Coronavirus in California*, Los Angeles Times (Updated Oct. 19, 2020 9:51 A.M.),
 27 <https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak/#who-has>; Rong-Gong Lin II, *California*
 28 *Latino, Black residents hit even harder by coronavirus as white people see less danger*, Los Angeles Times (June 27, 2020),
<https://www.latimes.com/california/story/2020-06-27/california-latinos-black-people-hit-even-harder-by-coronavirus>

1 elsewhere.⁵ The result is that Black Americans are dying from COVID-19 at rates 3.6 times higher
 2 than are white Americans.⁶

3 **B. Congress Intended the Fair Housing Act to Combat Structural Inequalities**

4 31. Congress enacted the Fair Housing Act in 1968 to address such longstanding structural
 5 inequalities. Earlier that year, the Kerner Commission warned that discriminatory practices and
 6 inequities like those described above were producing “two societies, one black, one white—separate
 7 and unequal.” *Inclusive Communities*, 576 U.S. at 529 (quoting Report of the National Advisory
 8 Commission on Civil Disorders 91 (1968)). The Commission found that “residential segregation and
 9 unequal housing and economic conditions” were central to this “deepening racial division.” *Id.* As the
 10 Supreme Court explained, it was to address these problems that Congress followed the Kerner
 11 Commission’s recommendation and passed the Fair Housing Act. *Id.* Consistent with the scope of the
 12 problem, the Act sweepingly codified “the policy of the United States to provide, within constitutional
 13 limitations, for fair housing throughout the United States.” 42 U.S.C. § 3601.

14 32. To carry out such a policy in the face of the long history of official and unofficial
 15 racism in housing and its persistent legacy, the Fair Housing Act necessarily must do more than ban
 16 intentionally discriminatory acts. As the Supreme Court recognized in the employment context at the
 17 time—and as it later recognized with respect to the Fair Housing Act—“practices, procedures, or tests
 18 neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to
 19 ‘freeze’ the status quo of prior discriminat[ion].” *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).
 20 Housing policies, like employment policies, do not need to be stated in terms of race to reinforce or
 21 reproduce historic disparities. And often it is uncertain, or difficult to prove, that anyone has acted with
 22 discriminatory intent in adopting or maintaining them. So the Supreme Court agreed, finding that
 23 “[r]ecognition of disparate-impact claims is consistent with the FHA’s central purpose to

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 26 ⁵ Cristina Kim, *New Study Finds Formerly Redlined Neighborhoods Are More At Risk For COVID-19*, WBUR (Sept. 14,
 27 2020), <https://www.wbur.org/hereandnow/2020/09/14/redlined-neighborhoods-coronavirus-study>

28 ⁶ *Id.*

1 eradicate discriminatory practices within a sector of our Nation’s economy,” *i.e.*, housing. *See*
2 *Inclusive Communities*, 576 U.S. at 539.

3 33. Accordingly, since the Fair Housing Act’s early days, courts have consistently held that
4 the Fair Housing Act permits claims challenging policies with unnecessary discriminatory effect. *See*,
5 *e.g.*, *United States v. City of Black Jack, Missouri*, 508 F.2d 1179 (8th Cir. 1974). For decades, policies
6 that have a significant and unnecessary discriminatory effect on the availability or terms of housing
7 based on race or other protected class have been unlawful.

8 34. The touchstone of the disparate-impact doctrine has always been the requirement to
9 adopt an available alternative that can accomplish a policy’s legitimate ends with less discriminatory
10 impact. Accordingly, even when legitimate reasons are proffered for policies that have discriminatory
11 effects, the Fair Housing Act requires that if there are less discriminatory ways to achieve those
12 legitimate ends, they must be adopted. This rule applies both to official policies with unnecessary
13 discriminatory impact (such as zoning decisions), and to private industry policies (such as mortgage
14 lending or property insurance policies) that have the effect of excluding people from housing
15 opportunities in a discriminatory way.

16 35. The Act provides that those victimized by policies with unnecessary discriminatory
17 effect may bring a disparate-impact claim in court or before HUD. Such a claim has always proceeded
18 in three basic steps. First, a plaintiff must demonstrate that a policy causes or predictably will cause a
19 disparate impact based on race or other protected class. If the plaintiff meets that burden, the defendant
20 then must show the policy is necessary to achieve a legitimate purpose. Finally, if the defendant does
21 so, the plaintiff must show the defendant’s legitimate ends could be served by a less discriminatory
22 alternative policy. If the plaintiff makes that last showing, the Fair Housing Act requires adoption of
23 the less discriminatory alternative. By thus requiring the refinement of unnecessarily discriminatory
24 policies, disparate-impact doctrine assures everyone a fair opportunity to obtain housing and related
25 services while preserving the ability of governments and businesses to meet their needs. Taken
26 together, the Supreme Court explained, these three steps have always functioned as “safeguards” so
27 that “solely . . . ‘artificial, arbitrary, and unnecessary barriers’” are removed. *Inclusive Communities*,

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1 576 U.S. at 544 (quoting *Griggs*, 401 U.S. at 431). Those are the very types of barriers frequently
 2 presented by structural inequalities that are the persistent legacy of the county’s history of
 3 discrimination.

4 **C. Disparate Impact Has Been Central to Addressing Housing Inequalities**

5 36. Disparate-impact doctrine has been vital to the Fair Housing Act’s success over the last
 6 half century. It has driven many important policy changes that have made our society fairer and less
 7 segregated—often while making the policies that are changed *better* at achieving their legitimate ends.
 8 Broadly speaking, disparate impact has furthered Congress’ purpose of “eradicat[ing] discriminatory
 9 practices” in housing, *Inclusive Communities*, 576 U.S. at 539, in three fundamental ways: (1)
 10 uncovering hidden intentional discrimination; (2) requiring scrutiny of unfounded policies or practices
 11 that, as applied, operate to perpetuate discrimination; and (3) requiring lenders and others to
 12 continually improve and refine dynamic decision models and policies to minimize unequal outcomes.
 13 Today, disparate impact takes on even greater importance in ensuring that decisions made with the
 14 next generation of artificial-intelligence-based, machine-learning tools and platforms are non-
 15 discriminatory.

16 ***i. Disparate Impact Ferrets Our Covert Intentional Discrimination***

17 37. Disparate-impact doctrine ferrets out continuing intentional discrimination that is not
 18 overtly expressed. In *Inclusive Communities*, the Supreme Court recognized this important role: “It
 19 permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy
 20 classification as disparate treatment. In this way disparate-impact liability may prevent segregated
 21 housing patterns that might otherwise result from covert and illicit stereotyping.” 576 U.S. at 540.
 22 With many having learned to hide their discriminatory intent, it is critical that a disparate-impact claim
 23 triggers further scrutiny where the evidence of a policy’s discriminatory effect is stark and the
 24 justification for the policy thin or non-existent.

25 38. One of the earliest uses of disparate-impact doctrine under the Fair Housing Act
 26 addressed this type of situation. In 1970, the almost all-white city of Black Jack, Missouri adopted an
 27 ordinance prohibiting the construction of multi-family dwellings. This policy, although race-neutral on
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1 its face, had the effect of excluding Black people, who largely could not afford single-family homes in
 2 the area. As the Eighth Circuit found, “[t]he ultimate effect of the ordinance was to foreclose 85
 3 percent of the blacks living in the metropolitan area from obtaining housing in Black Jack, and to
 4 foreclose them at a time when 40 percent of them were living in substandard or overcrowded
 5 units.” *Black Jack*, 508 F.2d at 1186. The evidence developed in the case showed that the policy was
 6 unnecessary to further any of the City’s stated justifications, such as addressing concerns related to
 7 traffic, school overcrowding, and property values. *Id.* at 1187.

8 39. More recently, but all too similarly, an all-white parish bordering New Orleans adopted
 9 an ordinance in the aftermath of Hurricane Katrina limiting housing rentals to blood relatives of the
 10 owners—thus excluding any renter without (white) family already living in the parish—and then
 11 placed a moratorium on the construction of all multi-family housing. *See, e.g., Greater New Orleans*
 12 *Fair Hous. Action Center v. St. Bernard Parish*, 641 F. Supp. 2d 563, 565-66 (E.D. La. 2009). That
 13 moratorium had a disparate impact based on race because it prevented the construction of the housing
 14 most likely to be used by Black families from the neighboring lower ninth ward of New Orleans, and
 15 thus prevented them from moving to the parish. *Id.* at 568. As in *Black Jack*, the disparate impact
 16 analysis in the *St. Bernard* litigation revealed that the Parish’s stated justifications for its policies were
 17 unsupported and that, in fact, the Parish’s intent in enacting them was racially discriminatory. *Id.* at
 18 577-78.

19 ***ii. Disparate-Impact Doctrine Forces the Examination of Unfounded***
 20 ***Assumptions***

21 40. Disparate impact has lessened structural inequalities in industries with long histories of
 22 overt discrimination like home lending, property insurance, and rental housing, because it forces
 23 careful examination of assumptions used to justify policies. Many policies with stark discriminatory
 24 effects are based on deeply entrenched but unexamined assumptions. Often these are rooted in
 25 subconscious bias and influenced by the country’s long history of intentional, institutionalized
 26 discrimination and housing segregation. *See, e.g., The Nat’l Comm’n on Fair Hous. & Equal*
 27 *Opportunity, The Future of Fair Housing: Report of the National Commission on Fair Housing and*
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1 Equal Opportunity 6-9 (2008), [https://lawyerscommittee.org/wp-content/uploads/2015/08/The-Future-](https://lawyerscommittee.org/wp-content/uploads/2015/08/The-Future-of-Fair-Housing-National-Commission-on-Fair-Housing-and-Equal-Opportunity.pdf)
2 [of-Fair-Housing-National-Commission-on-Fair-Housing-and-Equal-Opportunity.pdf](https://lawyerscommittee.org/wp-content/uploads/2015/08/The-Future-of-Fair-Housing-National-Commission-on-Fair-Housing-and-Equal-Opportunity.pdf) (summarizing
3 some of this history). The lending and homeowners' insurance industries, for example, which spent
4 decades redlining majority-Black neighborhoods, developed standards and procedures that do not
5 necessarily assess property or creditworthiness accurately.

6 41. Present-day actors, sometimes without awareness that they are doing so, perpetuate past
7 discrimination through requirements and processes that have unnecessary adverse impact on
8 communities of color. They may believe their methods are sound and their results non-discriminatory
9 until confronted with evidence of unjustified discriminatory impact. *See, e.g.,* Kenneth Temkin, et al.,
10 *Inside A Lender: A Case Study Of The Mortgage Application Process*, in *Mortgage Lending*
11 *Discrimination: A Review of Existing Evidence* 145-149 (Margery Austin Turner and Felicity
12 Skidmore eds., 1999), http://webarchive.urban.org/UploadedPDF/mortgage_lending.pdf (describing
13 lender whose staff genuinely believed in commitment to fair lending and non-discrimination, but that
14 nonetheless rejected non-white loan applicants disproportionately).

15 42. For example, many lenders refused for years to make home loans for row houses. This
16 policy had a stark discriminatory effect based on race because row houses are found largely in urban
17 areas with a significant non-white population. Lenders adopted this policy because, in a limited
18 number of areas, row houses had been the subject of fraudulent appraisals that facilitated "flipping" at
19 inflated prices. Inexperienced homebuyers were targeted by predatory sellers and found themselves
20 stuck with purportedly renovated dwellings that proved uninhabitable. *See, e.g., Predatory Lending:*
21 *Joint Hearing Before a Subcommittee of the Committee on Appropriations*, 107th Cong. (2001),
22 <https://www.govinfo.gov/content/pkg/CHRG-107shrg85218/pdf/CHRG-107shrg85218.pdf>.

23 43. That a few row houses had been the subject of such fraud (which could have been
24 perpetrated with other homes) did not justify the categorical exclusion of *all* row houses from
25 eligibility for home loans. Yet many lenders simply assumed it did (in part due to bias, conscious or
26 unconscious, about those living in row houses), and they adopted corresponding blanket bans, thus
27 excluding many qualified customers who were disproportionately Black from obtaining home loans.

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1 Even after the fraudulent appraisal issue was resolved in the few areas where it was a problem, lenders
2 failed to reexamine the policy. Only when faced with administrative litigation before HUD based on
3 disparate impact did they agree to drop their no-row-houses policies. *See, e.g.*, U.S. Dep't of Hous. &
4 Urban Dev., HUD Announces \$100,000 Settlement Of Fair Lending Complaint Against First Indiana
5 Bank, N.A. (June 4, 2007), <http://archives.hud.gov/news/2007/pr07-080.cfm>.

6 44. The disparate-impact doctrine has required the same type of scrutiny within the property
7 insurance industry. Even after the Fair Housing Act banned redlining policies that denied insurance to
8 homeowners in predominantly Black communities, the industry for many years adopted, and then
9 refused to re-examine, policies that produced the same discriminatory effect. When pressed to justify
10 these policies as necessary to achieve their stated purposes, the unsupported assumptions upon which
11 they were based came to light.

12 45. For example, property insurers would refuse to insure homes worth less than a certain
13 amount, or homes of a certain age. These arbitrary exclusions disproportionately rendered homes in
14 majority-Black neighborhoods uninsurable. *See, e.g., Toledo Fair Hous. Ctr v. Nationwide Mut. Ins.*
15 *Co.*, 704 N.E.2d 667, 674 (Ct. C.P. Ohio 1997) (describing evidence showing that minimum-value
16 requirement excluded 83 percent of homeowners in majority-Black neighborhoods, compared with 31
17 percent in white neighborhoods). Or property insurers would refuse to insure homes valued at less than
18 the estimated cost to rebuild them, on the assumption that the owners of such homes would burn them
19 down, thus effectively redlining predominantly minority neighborhoods where the appraised value of
20 homes tends to be lower. *See Gregory D. Squires, Racial Profiling, Insurance Style: Insurance*
21 *Redlining And The Uneven Development Of Metropolitan Areas*, 25 J. of Urban Aff. 391, 400 (2003).

22 46. To remedy such discriminatory practices, plaintiff NFHA and others brought disparate-
23 impact claims under the Fair Housing Act. *See, e.g., Nat'l Fair Hous. All. v. Prudential Ins.*, 208 F.
24 Supp. 2d 46 (D.D.C. 2002). Once pressed to provide evidence in litigation, insurers could not
25 demonstrate the actuarial necessity for these policies. Rather, they had simply maintained unsupported
26 categorical exclusions that tracked their prior overt exclusion of the same neighborhoods from
27 coverage.

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1 47. Once it was clear they faced legal risk for maintaining practices with an unjustified
2 discriminatory impact, many insurance companies began scrutinizing their previously unexamined
3 policies more closely. They worked with NFHA and others to make their policies more inclusive.
4 When they did, some of their stated concerns proved entirely unfounded, and others could be
5 addressed in less discriminatory ways. Instead of categorically excluding older homes, property
6 insurers found they could require more rigorous inspection of older heating, plumbing, and electrical
7 systems. This alternative satisfied their legitimate needs without categorically excluding whole
8 neighborhoods.

9 48. As a HUD official stated in announcing one settlement, policy changes stemming from
10 the application of disparate impact to the insurance industry provide an “example of how the Fair
11 Housing Act works to benefit all Americans.” HUD, HUD Commends Settlement Of Case Against
12 Nationwide Insurance (Mar. 10, 1997), <https://archives.hud.gov/news/1997/pr97-27.cfm>.

13 49. Disparate impact continues to drive inclusiveness in the property insurance industry. As
14 policies that unnecessarily exclude people in protected classes from housing opportunities are
15 identified, NFHA and its allies work with the industry to voluntarily change them. If that fails, NFHA
16 and others file claims with HUD or in court and put the industry to the test of showing that these
17 exclusionary policies serve legitimate purposes that could not be served in a less discriminatory way—
18 scrutiny that these policies often cannot survive. *See, e.g., Nat’l Fair Hous All. v. Travelers Indem.*
19 *Co.*, 261 F. Supp. 3d 20 (D.D.C. 2017) (insurance company refused to insure residential properties that
20 rented to Section 8 voucher users, thus coercing property owners into refusing to rent to them and
21 eliminating housing opportunities for predominantly Black population); *Viens v. Am. Empire Surplus*
22 *Lines Ins. Co.*, No. 14-cv-952, 2015 WL 3875013 (D. Conn. June 23, 2015) (same); *Jones v. Travelers*
23 *Casualty Ins. Co.*, No. 13-cv-02390, 2015 WL 5091908 (N.D. Cal. May 7, 2015) (same).⁷

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⁷ Many more examples exist of such unjustified restrictions. *See, e.g.,* Stephen M. Dane, *Race Discrimination Is Not Risk Discrimination: Why Disparate Impact Analysis Of Homeowners Insurance Practices Is Here To Stay*, 33 No. 6 Banking & Fin. Servs. Pol’y Rep. 1, 4 (2014) (collecting examples of insurance practices based not on “careful, statistical studies[,]” but rather on “subjective stereotypes about classes of consumers and types and geographic location of property”).

1 50. Disparate impact has forced housing providers, too, to refine overbroad exclusions that
2 have had unnecessary discriminatory effects on tenants and would-be tenants. For example, with
3 consistent support from HUD, disparate impact has barred overly restrictive apartment occupancy
4 limits, which have the effect of unnecessarily barring families with children. *See, e.g.*, Department of
5 Housing and Urban Development’s Fair Housing Enforcement—Occupancy Standards; Notice of
6 Statement of Policy, 63 Fed. Reg. 70982-70987 (Dec. 22, 1998). It has forced landlords to reconsider
7 requirements that applicants have full-time employment, which have the effect of unnecessarily
8 barring many people with disabilities. And it has forced landlords to reconsider overly broad criminal-
9 history restrictions, which have the effect of disproportionately excluding Black would-be tenants, who
10 are more likely to have arrests or convictions on their records that have nothing to do with fitness for
11 tenancy due to continuing systemic racism in policing and the criminal justice system.

12 51. By forcing the key players in the housing markets to justify policies with discriminatory
13 effects—and forcing them to change those policies if they cannot do so—disparate impact has helped
14 to reduce structural inequalities that continue to disadvantage communities of color.

15 *iii. Disparate Impact Drives Innovation and Improvements That Make*
16 *Policies and Models More Effective and Fair*

17 52. Disparate impact has reduced disparities in ways more profound than the modification
18 of individual policies; it has changed the ongoing processes by which many lenders and other entities
19 create and maintain the models they use to make loans or otherwise decide who gets to participate in
20 the housing market. Lenders often combine numerous variables in models to predict an applicant’s
21 creditworthiness or risk of default. Different combinations of variables may predict risk with
22 comparable effectiveness, yet some disproportionately exclude members of protected classes to a
23 greater degree than others. Because of disparate impact, responsible lenders and financial institutions
24 now identify and implement the least discriminatory models consistent with their need for accuracy in
25 predicting risk. *See Ex. A, Decl. of J. Jaffee (Oct. 19, 2020) at ¶¶ 11-14.*

26 53. These advances would not have come to pass absent an incentive structure requiring
27 lenders and others to revisit policies that have discriminatory effects and modify those that are
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1 unnecessary to achieve legitimate ends. Knowing they risk liability from both private litigants and
2 federal regulators, many of the major players that shape the availability and terms of housing have
3 adopted compliance systems to make their policies fairer. Once required to adopt less discriminatory
4 alternatives, companies frequently have found that such alternatives cost them little if any profits and
5 may even increase profits by helping them find new customers and be more precise about the lines
6 they draw to exclude people. Disparate impact created and maintains that structure. *See id.* at ¶¶ 10, 12,
7 14-15, 17, 19-21.

8 54. One of the important ways disparate impact has reduced systemic structural inequalities
9 in this manner can be seen in the improvements made to automated underwriting models that the
10 Federal National Mortgage Association (“Fannie Mae”) and the Federal Home Loan Mortgage
11 Corporation (“Freddie Mac”) use to evaluate home loan applications.

12 55. Fannie Mae’s and Freddie Mac’s introduction of automated underwriting systems was a
13 great innovation in lending because it permitted lenders to originate loans based on objective rather
14 than subjective criteria, but they initially used criteria under which comparatively few Black borrowers
15 were approved. Under pressure to do better or face disparate-impact liability from federal regulators,
16 Fannie Mae and Freddie Mac worked with experts such as Dr. Bernie Siskin of Plaintiff BLDS to
17 make their methodologies both fairer and more accurate. Between 1995 and 2000, the percentage of
18 Black borrowers approved by Loan Prospector—Freddie Mac’s automated underwriting system—
19 increased from 23 percent to 54 percent, while minority-owned home loans increased from 8.5 percent
20 of those Freddie Mac purchased in 1995 to 14.9 percent in 2000. *See* Susan Wharton Gates et al.,
21 *Automated Underwriting in Mortgage Lending: Good News For The Underserved?*, 13 Hous. Policy
22 Debate 369, 380-82 (2002). In the process, Loan Prospector became *more* accurate at predicting risk.
23 *Id.* It turned out that, upon closer review, it was possible to make underwriting far more inclusive while
24 not sacrificing the ability to achieve any legitimate end.

25 56. As an example of how Fannie Mae’s original rules were unnecessarily restrictive, its
26 initial matrix favored those who consistently made mortgage payments, giving no credit to those who
27 consistently make other monthly payments, such as rent. This policy favored people who could buy
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1 homes previously, recreating the discrimination of past housing policies. Incentivized by disparate-
2 impact requirements to look for less discriminatory variables to use in its automated underwriting
3 models, Fannie Mae now employs a more inclusive model that permits lenders to look at a prospective
4 borrower's history of rental payments in combination with many other variables. This allows those
5 without mortgage payment history—disproportionately people of color—to demonstrate their
6 creditworthiness. See Fannie Mae, *Selling Guide: B3-5.4-03, Documentation and Assessment of a*
7 *Nontraditional Credit History* (last revised Aug. 30, 2016), [https://selling-](https://selling-guide.fanniemae.com/Selling-Guide/Origination-thru-Closing/Subpart-B3-Underwriting-Borrowers/Chapter-B3-5-Credit-Assessment/Section-B3-5-4-Nontraditional-Credit-History/1032991091/B3-5-4-03-Documentation-and-Assessment-of-a-Nontraditional-Credit-History-08-30-2016.htm)
8 [guide.fanniemae.com/Selling-Guide/Origination-thru-Closing/Subpart-B3-Underwriting-](https://selling-guide.fanniemae.com/Selling-Guide/Origination-thru-Closing/Subpart-B3-Underwriting-Borrowers/Chapter-B3-5-Credit-Assessment/Section-B3-5-4-Nontraditional-Credit-History/1032991091/B3-5-4-03-Documentation-and-Assessment-of-a-Nontraditional-Credit-History-08-30-2016.htm)
9 [Borrowers/Chapter-B3-5-Credit-Assessment/Section-B3-5-4-Nontraditional-Credit-](https://selling-guide.fanniemae.com/Selling-Guide/Origination-thru-Closing/Subpart-B3-Underwriting-Borrowers/Chapter-B3-5-Credit-Assessment/Section-B3-5-4-Nontraditional-Credit-History/1032991091/B3-5-4-03-Documentation-and-Assessment-of-a-Nontraditional-Credit-History-08-30-2016.htm)
10 [History/1032991091/B3-5-4-03-Documentation-and-Assessment-of-a-Nontraditional-Credit-History-](https://selling-guide.fanniemae.com/Selling-Guide/Origination-thru-Closing/Subpart-B3-Underwriting-Borrowers/Chapter-B3-5-Credit-Assessment/Section-B3-5-4-Nontraditional-Credit-History/1032991091/B3-5-4-03-Documentation-and-Assessment-of-a-Nontraditional-Credit-History-08-30-2016.htm)
11 [08-30-2016.htm](https://selling-guide.fanniemae.com/Selling-Guide/Origination-thru-Closing/Subpart-B3-Underwriting-Borrowers/Chapter-B3-5-Credit-Assessment/Section-B3-5-4-Nontraditional-Credit-History/1032991091/B3-5-4-03-Documentation-and-Assessment-of-a-Nontraditional-Credit-History-08-30-2016.htm).

12 57. Thus, due to the Fair Housing Act's disparate-impact doctrine, some lenders have gone
13 from reliance on judgmental assessments of potential borrowers frequently infected by bias or
14 stereotypes (whether knowingly or otherwise) to use of sophisticated statistical analyses to produce
15 policies that are both less discriminatory *and* more predictive of risk. As a result, many lenders now
16 are better at identifying qualified borrowers in all neighborhoods, without sacrificing the legitimate
17 business need to identify real risk.

18 58. Disparate-impact doctrine has also given important entities in the housing market,
19 advocates such as Plaintiff NFHA, and consultants such as Plaintiff BLDS a shared vocabulary to
20 assess the propriety of policies that influence the availability and terms of housing, without charging
21 anyone with discriminatory intent and with the goal of constructive solutions. It has done so by
22 requiring a singular focus on the search for less discriminatory alternatives—the touchstone of
23 disparate impact—that produce fairer policies and models without sacrificing business goals, needs,
24 and interests.

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1 **D. A Robust Disparate-Impact Doctrine Is Vital to Ensuring the Fairness of the Next**
2 **Generation of Automated Policies that Rely on Machine Learning and Artificial**
3 **Intelligence**

4 59. The importance of disparate impact has increased with technological advances. The
5 introduction of artificial intelligence and machine-learning models in recent years has brought new
6 computing power and complexity to the decision-making process for many players in the housing
7 industry.

8 60. Today’s lenders and insurers can consider a vast number of alternatives for their models
9 and systems. As the information available to them about customers and potential customers has grown,
10 and as more powerful computing systems are brought to bear, they now may choose from a large
11 number of potential variables and model choices in underwriting and other aspects of their business.

12 61. Entities are increasingly using artificial intelligence models to make predictive
13 decisions regarding creditworthiness, marketing, and other key issues related to housing. These models
14 assess the value of many variables, in countless combinations, in making predictions about, for
15 example, the likelihood of someone defaulting on a loan.

16 62. Because machine-learning models draw on a larger variety of data and rely on so many
17 different variables, they offer a range of alternatives that can have very different levels of
18 discriminatory effect while providing similar predictive power. If trained to do so, they can be used to
19 make less discriminatory alternatives available for variables that have an unnecessary discriminatory
20 effect. For example, they can avoid depending as heavily on a consumer’s credit history, thus making
21 home loans available to people of color who regularly pay their bills but have been historically denied
22 credit because they disproportionately lack the history of credit payments that is typically used to build
23 a good credit score.

24 63. However, machine-learning models must be carefully and regularly evaluated to avoid
25 recreating or exacerbating the discriminatory patterns that exist in society. For example, minority
26 borrowers with high credit scores have disproportionately received subprime or higher cost products in
27 the past, even when they qualified for prime credit. Models trained on this historical data can “learn”
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1 that Black borrowers with high credit scores “should” nonetheless receive lesser-quality loans, and
2 otherwise will reflect and recreate these historical disparities.

3 64. Moreover, machine-learning models can have a black-box quality that makes it difficult
4 for those harmed by them to determine why. Such models may rely on many variables, some of which
5 would not be obvious choices for a model builder but that nonetheless correlate to risk when selected
6 with the help of an algorithm. Adding further complexity, those variables often correlate to risk only in
7 combinations that, again, are obvious to the computer, but not to an underwriter.

8 65. With the advent of artificial intelligence models and platforms, and the increasing use
9 being made of these new computer technologies by businesses large and small, the continuing
10 effectiveness of the Fair Housing Act’s disparate-impact doctrine in providing the proper incentives is
11 of critical importance in ensuring that people of color and others in protected classes are not
12 unnecessarily excluded from housing opportunities. Disparate impact, as it has been applied until now,
13 requires that model builders and those who research new algorithmic models search for less
14 discriminatory alternatives. Failure to apply that requirement to this powerful new generation of
15 models will permit outcomes that worsen structural inequalities and perpetuate segregation.

16 **E. Continuing the Application of Longstanding Rules of Disparate-Impact Law,
17 Rather Than Upending Those Rules, Serves the Interests of Responsible
18 Companies That Have Incorporated Disparate Impact Analysis into Their Regular
Operations**

19 66. Responsible businesses have shown that incorporating traditional, well-established
20 disparate-impact analysis enables them to create fairer policies without sacrificing legitimate business
21 interests. Upsetting the longstanding rules of disparate-impact law would be harmful to those
22 businesses that have already done the work to make their policies more inclusive.

23 67. The risk of disparate-impact liability incentivizes companies to internalize fair housing
24 principles and critically evaluate their own policies. Many have responded by institutionalizing
25 compliance mechanisms. They have invested in people and technology, designing protocols to
26 incorporate impact testing and awareness into their overall regulatory compliance regimes. The
27 consistency of the doctrine over decades has allowed and encouraged them to make these investments,
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1 because they can rely on the protocols they have developed without fear they will need to change them
2 from year to year. Sophisticated FHA compliance protocols and procedures are now the norm for many
3 leading lenders and housing market participants.

4 68. When a new mortgage underwriting or pricing model is developed, for example, a bank
5 that has integrated traditional disparate-impact analysis into its compliance functions looks for
6 variables to include in its models that maximize predictiveness with the least discriminatory impact.
7 The same is true for criteria used in marketing campaigns.

8 69. Any significant change to the rules governing disparate impact would throw decades of
9 compliance efforts into disarray. It therefore comes as no surprise that, as described below, leading
10 banks and lending institutions have spoken out in favor of preserving well-established disparate-impact
11 doctrine as beneficial for consumers and shareholders alike.

12 **II. The 2013 HUD Rule and the Supreme Court’s *Inclusive Communities* Decision Affirm** 13 **Longstanding Disparate-Impact Doctrine**

14 70. In 2011, HUD proposed a rule to formalize the longstanding disparate-impact doctrine.
15 It finalized this rule in February 2013 after receiving and considering comments. *See* Implementation
16 of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013)
17 (codified at 24 C.F.R. § 100.500) (“2013 Rule”).

18 71. In the 2013 Rule, HUD codified the disparate-impact doctrine as it had applied for
19 decades. As HUD put it: “[T]his final rule embodies law that has been in place for almost four decades
20 and that has consistently been applied, with minor variations, by HUD, the Justice Department and
21 nine other federal agencies, and federal courts.” *Id.* at 11462. Consistent with the longstanding
22 doctrine, HUD codified the three-part burden-shifting analysis described above. *Id.* at 11463.

23 72. HUD did not purport to impose pleading standards in the 2013 Rule. Each of the
24 burdens it described applies at the proof stage, after an investigation by HUD or discovery in a federal-
25 court case.

26 73. After the promulgation of the 2013 Rule, the Supreme Court granted certiorari on the
27 question of whether disparate-impact claims are available under the Fair Housing Act. It was also
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1 presented with the question of what standards should apply to such claims, but it declined to review
2 that question.

3 74. In 2015, in *Inclusive Communities*, the Supreme Court affirmed that the Fair Housing
4 Act bars practices with unnecessary discriminatory impact. Repeatedly referencing its seminal *Griggs*
5 decision finding disparate-impact employment claims available under Title VII of the Civil Rights Act,
6 the Court reasoned that the Fair Housing Act should function similarly. *Inclusive Communities*, 576
7 U.S. at 530-32. It also held that, when Congress expanded the reach of Fair Housing Act in 1988, it
8 ratified the disparate-impact doctrine, which by then was already well-established under the Act. *Id.* at
9 536-37. Finally, the Court observed that federal agencies and the lower courts had applied disparate
10 impact for decades, creating reliance interests that counseled against overruling the lower-court
11 consensus. *Id.* at 536, 546.

12 75. *Inclusive Communities* repeatedly referenced HUD's 2013 Rule, as well as many cases
13 decided under the doctrine that the 2013 Rule codified, without suggesting that either needed to be
14 changed. *Id.* at 527. The Supreme Court observed that the disparate-impact doctrine has "always been
15 properly limited in key respects" to maintain its focus on "the 'removal of artificial, arbitrary, and
16 unnecessary barriers.'" *Id.* at 540 (quoting *Griggs*, 401 U.S. at 431). Those limitations include the
17 requirements that a plaintiff challenge a specific policy and show how it causes the alleged disparity,
18 and that the defendant be given the opportunity to articulate how the challenged policy serves a
19 legitimate interest. That is, the limitations it identified were ones that always had been present in
20 disparate-impact doctrine and were reflected in the 2013 Rule.

21 76. Following *Inclusive Communities*, HUD took the position that the decision was
22 consistent with the 2013 Rule. When defending the 2013 Rule against a challenge by an insurance
23 trade group, HUD explained that the Supreme Court's decision is "fully consistent with the standard"
24 set forth in the 2013 Rule.⁸ And in April 2017, HUD reiterated that the *Inclusive Communities* decision
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27 ⁸ Defendants' Memorandum in Support of Their Motion for Summary Judgment and in Opposition to Plaintiff's Motion
28 for Summary Judgment at 33, ECF No. 65, *Am. Ins. Ass'n, et al. v. U.S. Dep't of Hous. & Urban Dev., et al.*, 74 F. Supp.
3d 30 (D.D.C. 2016) (No. 1:13-cv-00966-RJL).

1 “is entirely consistent” with the 2013 Rule, adding that “nothing in *Inclusive Communities* casts any
 2 doubt on the validity of the Rule. To the contrary, the Court cited the Rule twice *in support* of its
 3 analysis.”⁹

4 77. Several courts explicitly agreed. *See, e.g., MHANY Management, Inc. v. County of*
 5 *Nassau*, 819 F.3d 581 (2d Cir. 2016); *Reyes v. Waples Mobile Home Park Ltd. P’ship*, 903 F.3d 415
 6 (4th Cir. 2018).

7 78. Following *Inclusive Communities*, HUD continued to apply the longstanding disparate-
 8 impact analysis to emerging issues, reflecting the key role that the Fair Housing Act was designed to
 9 play in overcoming structural inequality caused by years of racism. For example, in 2016, HUD issued
 10 guidance to housing providers concerning the use of criminal history information in denying rental
 11 applications or making other housing decisions. HUD, Office of General Counsel Guidance on
 12 Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing
 13 and Real Estate-Related Transactions (Apr. 4, 2016), *available at*
 14 https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

15 79. Consistent with the relaxed pleading standards that always have applied to HUD
 16 administrative complaints, HUD stated that national statistics showing that racial minorities face
 17 disproportionately high rates of arrest and incarceration—and thus are disproportionately excluded by
 18 criminal-background rules—“provide grounds for HUD to investigate complaints challenging criminal
 19 history policies.” *Id.* at 3. It added that, during that HUD investigation, a housing provider must “be
 20 able to prove through reliable evidence that its policy or practice of making housing decisions based on
 21 criminal history actually assists in protecting resident safety and/or property.” *Id.* at 5. Moreover, HUD
 22 stated, policies that exclude based on criminal history “must be tailored to serve the housing provider’s
 23 substantial, legitimate, nondiscriminatory interest” rather than being unnecessarily exclusionary. *Id.* at
 24 10. To be the least discriminatory alternative that serves legitimate interests, such a policy should “take
 25 into consideration such factors as the type of the crime and the length of the time since conviction,” *id.*

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 27 ⁹ Defendants’ Opposition to Plaintiff’s Motion for Leave to Amend Complaint at 9, ECF. No. 122, *Prop. Casualty Insurers*
 28 *Ass’n of Am. v. Carson*, 2017 WL 2653069 (N.D. Ill. Apr. 21, 2017) (No. 1:13-cv-08564).

1 and should provide the opportunity for a prospective tenant to present mitigating information and be
2 evaluated individually. *Id.* at 7.

3 **III. The Final Rule Guts Long-Standing Disparate-Impact Doctrine**

4 80. Now, however, HUD has abandoned the view that *Inclusive Communities* is fully
5 consistent with the 2013 Rule. Based on the pretext that *Inclusive Communities* requires it to do so,
6 HUD first proposed and has now finalized a rule that completely rewrites the 2013 Rule and upends
7 decades of law. The new Rule effectively guts disparate impact by excusing lenders, insurance
8 companies, housing providers, and others from the duty to adopt less discriminatory alternatives to
9 practices that have an unjustified disparate impact. This is a dismantling of the Fair Housing Act that
10 will prevent it from being used, as Congress intended, to address and diminish structural inequalities
11 and segregation in housing throughout the country.

12 81. On August 19, 2019, HUD issued a notice of proposed rulemaking. It proposed to
13 radically alter and weaken the disparate-impact doctrine, adding requirements for pleading and proving
14 a case and defenses that HUD has never previously required and that have never existed in the case
15 law. *See* HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg.
16 42,854 (proposed Aug. 19, 2019) (“Proposed Rule”). The agency justified these changes as
17 conforming its existing regulation with *Inclusive Communities*, although HUD had just three years
18 earlier taken the position that “nothing in *Inclusive Communities* casts any doubt on the validity” of the
19 existing rule.¹⁰

20 82. HUD received 45,758 comments on its Proposed Rule, *see* HUD’s Implementation of
21 the Fair Housing Act’s Disparate Impact Standard, 85 Fed. Reg. 60288, 60289 (Sept. 24, 2020) (“Final
22 Rule”), the vast majority opposing it.

23 83. Opposition to the Proposed Rule came not only from civil rights and fair housing
24 advocates, but also from businesses regulated by the Act. For example, in June 2020, Bank of America
25 and Quicken Loans executives sent a letter to HUD stating that the Proposed Rule was inappropriate in
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27 ¹⁰ Defendants’ Opposition to Plaintiff’s Motion for Leave to Amend Complaint, ECF. No. 122, at 9, *PCIA v. Carson*, No.
28 1:13-cv-08564 (N.D. Ill.)

1 light of the national movement towards addressing the impact of discrimination, in particular structural
 2 racism, on Black Americans.¹¹ Similarly, the National Association of Realtors urged HUD to abandon
 3 the Proposed Rule, stating: “There is broad consensus across the country that now is not the time to
 4 issue a regulation that could hinder further progress toward addressing ongoing systemic racism.”¹²
 5 These echoed concerns the realtors’ group had expressed in comments, when it stated that HUD’s
 6 proposed changes “place too heavy a burden on the ability of parties to bring an initial disparate impact
 7 claim.”¹³

8 84. Nonetheless, on September 24, 2020, HUD issued the Final Rule. Although HUD made
 9 some slight adjustments, the effect of the Final Rule is the same: It makes it virtually impossible to
 10 plead and prove a disparate-impact case under many circumstances. The Final Rule will prevent many
 11 injured parties from ever filing important and meritorious suits, and it will cause the unwarranted
 12 dismissal of many of those that do get filed. HUD promulgated this rule without providing any
 13 reasoned explanation and without meaningfully acknowledging the overwhelming opposition,
 14 including from the regulated industries. HUD also added a new defense that it did not even hint at in its
 15 Proposed Rule, without providing notice nor the opportunity to comment.

16 85. The Final Rule purports to radically change the substantive law governing the conduct
 17 of lenders, insurance companies, housing providers, and others. Until now, disparate-impact doctrine
 18 has required them to evaluate their policies for discriminatory effect and, where possible consistent
 19 with business needs, adopt less discriminatory alternatives. Now HUD has effectively eliminated any
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 23 ¹¹ Andrew Ackerman, Lenders Oppose Federal Effort to Weaken Housing-Discrimination Rule, Wall Street Journal (July
 24 13, 2020), <https://www.wsj.com/articles/lenders-oppose-federal-effort-to-weaken-housing-discrimination-rule-11594667932>. Wells Fargo, Citibank, and J.P. Morgan Chase likewise urged HUD not to destroy the effectiveness of
 25 disparate impact and instead to acknowledge the growing understanding that, as Wells Fargo put it, “centuries of
 26 discrimination, segregation and economic disenfranchisement have lasting impacts today.” Emily Flitter, Big Banks’
 “Revolutionary” Request: Please Don’t Weaken This Rule, N.Y. Times (July 16, 2020),
<https://www.nytimes.com/2020/07/16/business/banks-housing-racial-discrimination.html>.

27 ¹² *Id.*

28 ¹³ National Association of Realtors, Comment Letter on HUD’s Implementation of the Fair Housing Act’s Disparate
 Impact Standard (Oct. 18, 2019), <https://narfocus.com/billdatabase/clientfiles/172/3/3449.pdf>.

1 mechanism for accountability, allowing them to continue existing practices with unnecessary
2 discriminatory effect or implement new ones.

3 86. Illustrating how the Final Rule unsettles the law, HUD explicitly stated that it will
4 reconsider its guidance for housing providers regarding proper consideration of criminal records—as
5 well as all other guidance to regulated entities based on traditional disparate-impact principles—“for
6 consistency with the Final Rule.” Final Rule, 85 Fed. Reg. at 60330.

7 87. HUD has made these dramatic changes without providing reasoned explanation. It
8 contends it is simply following *Inclusive Communities*, but that decision *reaffirmed* the validity of
9 longstanding disparate-impact doctrine, as well as the importance of the practical availability of
10 disparate-impact claims to the achievement of the Fair Housing Act’s purposes. It cannot justify
11 making such claims largely unavailable. And because the Supreme Court specifically declined to
12 review the details of how disparate-impact claims are adjudicated in *Inclusive Communities*, that case
13 cannot justify HUD’s wholesale rewriting of the law.

14 88. Based on the false premise that *Inclusive Communities* fundamentally upended
15 disparate-impact doctrine, the Final Rule rewrites the 2013 Rule and explicitly declines to follow
16 decades of precedent, imposing novel and onerous requirements on plaintiffs and inventing new
17 defenses that courts have never applied. It decisively changes the rules at every stage of a disparate
18 impact case, with the cumulative effect being to insulate potential defendants from having to consider
19 and adopt less discriminatory alternatives. The bottom line is that the Final Rule destroys the disparate-
20 impact doctrine’s effectiveness at “eradicat[ing] discriminatory practices within a sector of our
21 Nation’s economy.” *Inclusive Communities*, 576 U.S. at 539.

22 **A. The Final Rule Imposes Onerous New Pleading Requirements, Making It Virtually**
23 **Impossible to Plead a Disparate-Impact Case**

24 89. The Final Rule begins by purporting to impose new pleading requirements that will
25 prevent most disparate-impact cases from even getting started. It requires a plaintiff in federal court or
26 a charging party before HUD to *plead* facts that have never been required to *prove* a claim, and that
27 amount to allegations that a defendant is acting so arbitrarily as to raise an inference of intentional
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1 discrimination. All this must be done before a defendant is even required to articulate a justification for
2 its policy or practice.

3 *i. Arbitrary, Artificial and Unnecessary*

4 90. The Final Rule purports to add entirely new substantive elements to a disparate-impact
5 claim. It requires the plaintiff to plead facts showing:

6 That the challenged policy or practice is *arbitrary, artificial, and unnecessary* to
7 achieve a valid interest or legitimate objective such as a practical business, profit, policy
8 consideration, or requirement of law[.]

9 85 Fed. Reg. at 60332 (codified at New 24 C.F.R. § 100.500(b)(1)) (emphasis added).

10 91. Plaintiffs have always had to plead that a policy has a disparate impact based on race or
11 another protected class. Now HUD purports to require also the pleading of facts that anticipate and
12 rebut the defendant’s justification for the policy, that is, facts showing that the policy is entirely
13 “arbitrary,” *and* “artificial,” *and* “unnecessary.” A policy is “arbitrary, artificial, and unnecessary,” the
14 Final Rule says, only if it does not serve any “valid interest” at all. *Id.* HUD confirms in the Final
15 Rule’s preamble that a plaintiff must plead facts to support each new adjective—artificial, arbitrary,
16 *and* unnecessary—separately, such that HUD effectively is imposing *three* new requirements at once.
17 Final Rule, 85 Fed. Reg. at 60312 & n. 105.

18 92. None of this has ever been required to *prove* a disparate impact case, much less *plead*
19 one, and for good reason: these requirements are incompatible with the very premises of the disparate-
20 impact doctrine. Many policies with a disparate impact have at least *some* facially legitimate
21 justification, and so they are not entirely “arbitrary,” and “artificial,” and “unnecessary.” Yet it has
22 always been unlawful for a defendant to maintain them if the defendant could accomplish its legitimate
23 purpose with a less discriminatory alternative. Through the artifice of a new pleading requirement, the
24 Final Rule makes it irrelevant whether a less discriminatory alternative could accomplish the
25 defendant’s legitimate purposes.

26 93. And even where the defendant’s practices *are* entirely “arbitrary, artificial, and
27 unnecessary,” the Final Rule *still* immunizes them from effective scrutiny. It does so by requiring a
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1 plaintiff or charging party to *plead* specific facts demonstrating as much just to start a case. That is, it
 2 requires pre-discovery pleading of facts that only the defendant knows regarding the lack of
 3 justification for the challenged practices. The Final Rule thus reverses the longstanding sequence
 4 whereby a defendant proffers a legitimate justification and then the validity of that justification is the
 5 subject of discovery. Cases such as *Black Jack* and *St. Bernard Parish*—in which the flimsiness of the
 6 defendant’s purported justifications was revealed in discovery—could not have gotten started under
 7 this rule.

8 94. Commenters explained to HUD that requiring plaintiffs to meet this new pleading
 9 requirement would greatly curtail or eliminate the disparate-impact doctrine. As the National
 10 Association of Realtors put it: “It is unreasonable to expect a claimant, especially a vulnerable, injured
 11 party, to know the specifics of a defendant’s business so as to be able to make this assertion of
 12 ‘arbitrary, artificial, or unnecessary.’”¹⁴

13 95. HUD did not meaningfully respond to those comments, and it did not explain how a
 14 plaintiff would plead that a claim is “artificial,” and “arbitrary,” and “unnecessary” without pleading a
 15 claim of intentional discrimination. Tellingly, HUD provides no example—real or even hypothetical—
 16 of a plaintiff in a disparate-impact suit successfully pleading facts showing that a policy is “arbitrary”
 17 and “artificial,” and “unnecessary.”

18 ***ii. Significant Disparity, Robust Causal Link, Direct Cause, and Direct***
 19 ***Relation***

20 96. The Final Rule purports to impose a host of other new pleading requirements that make
 21 it even *more* difficult for a victim of discrimination to allege a disparate-impact claim such that their
 22 claim can be investigated by HUD or proceed to discovery in federal court.

23 97. The Final Rule carries forward the requirement of the 2013 Rule and decades of case
 24 law that a plaintiff must identify a policy or practice that is responsible for causing the disparate impact
 25 alleged. 85 Fed. Reg. 60332 (24 C.F.R. § 100.500(a)). Then it goes much further. It requires the

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 27 ¹⁴ National Association of Realtors, Comment Letter on HUD’s Implementation of the Fair Housing Act’s Disparate
 28 Impact Standard 2.

1 plaintiff to allege that the disparity is “significant,” *id.* § 100.500(b)(4); that there is a “robust causal
2 link” between the challenged policy or practice and the adverse effect on members of a protected class,
3 which the Final Rule states means that the specific policy or practice is the “direct cause” of the
4 discriminatory effect, *id.* § 100.500(b)(3); and that there is a “direct relation” between the alleged
5 injury and conduct, *id.* § 100.500(b)(5). These overlapping requirements—none of which HUD
6 meaningfully defines—create ill-defined hurdles that will be insurmountable for many victims of
7 discrimination. Despite requests from commentators that HUD provide a modicum of clarity by
8 defining its new terms, HUD explicitly refuses to do so.

9 98. Each of these pleading requirements is problematic individually. Cumulatively, they
10 make it unreasonably and improperly difficult to plead a disparate-impact claim.

11 99. The requirement to plead a “significant” disparity raises the bar to plead a case, while
12 leaving litigants and courts uncertain as to how much, because HUD refused to define the term. Final
13 Rule, 85 Fed. Reg. at 60314. It also constitutes an unjustified and unexplained about-face, because
14 HUD expressly considered and rejected a significance requirement when promulgating the 2013 Rule.
15 78 Fed. Reg. at 11468-69. In the Final Rule, HUD fails to acknowledge this reversal, let alone explain
16 why the reasons for rejecting this requirement in 2013 are no longer valid.

17 100. With respect to causation, the 2013 Rule already required the plaintiff to plead that the
18 challenged policy *caused* the discriminatory effect. Under the Final Rule, victims of discrimination
19 must plead a “robust causal link” between the challenged policy or practice and the discriminatory
20 effect, which HUD defines to mean “that the specific policy or practice is the direct cause of the
21 discriminatory effect.” 85 Fed. Reg. at 60332. The requirement that a plaintiff plead that the
22 challenged policy or practice is the “direct cause” of the alleged discriminatory effect has no basis in
23 either the agency’s past work or in case law, and HUD makes no effort to justify it in policy terms.
24 HUD simply claims this new element is required by *Inclusive Communities*, although that decision
25 does not use the phrase “robust causal link,” nor does it suggest a “direct cause” requirement. *Id.*

26 101. NFHA and other commenters identified these problems in response to the Proposed
27 Rule. HUD’s only reply was to point to language in *Inclusive Communities* discussing the importance
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1 of enforcing a “robust causality requirement” (which, in context, clearly referred to the long-standing
2 requirement, reflected in the 2013 Rule but not followed by the district court in that case, that a
3 plaintiff must allege that a specific practice causes the alleged disparate impact; it did not suggest any
4 heightened causation standard). *Id.* at 60313. Simply referring in a conclusory manner to language in
5 *Inclusive Communities* is not a reasoned response to comments stating that HUD is misconstruing that
6 language.

7 102. Furthermore, the phrase “robust causal link” does not have any pre-existing meaning,
8 either in case law or in plain English. HUD stated, without explanation, that it intends the phrase to
9 mean “that the policy or practice is the direct cause of the discriminatory effect,” *id.* at 60312. That is,
10 HUD not only has invented a “robust causal link” pleading requirement through a misquoting of
11 *Inclusive Communities*, it has assigned a “direct cause” meaning to that term that it does not even try to
12 tether to that decision.

13 103. HUD separately requires plaintiffs to plead that “there is a direct relation between the
14 injury asserted and the injurious conduct alleged.” *Id.* at 60315. The Final Rule does not explain how
15 this requirement differs from or interacts with the “direct cause” requirement. HUD derives this “direct
16 relation” language not from *Inclusive Communities*, but from *Bank of America Corp. v. City of Miami*,
17 137 S. Ct. 1296 (2017). That case stated that, like most torts, a Fair Housing Act claim requires
18 proximate cause, *i.e.*, a showing of “some direct relation between the injury asserted and the injurious
19 conduct alleged.” *Id.* at 1306 (quotations and citation omitted). Observing that such a showing varies
20 by statute, the Court declined to determine how direct a relationship is required under the Fair Housing
21 Act, instead remanding for lower courts to do so.

22 104. On remand in *Bank of America* itself, the Eleventh Circuit found that proximate cause
23 for claims brought under the Act, which “has a broad remedial purpose” and “is written in decidedly
24 far-reaching terms,” must extend “far beyond the single most immediate consequence of a violation.”
25 *City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260, 1278-80 (11th Cir. 2019). Accordingly, the
26 Eleventh Circuit explicitly rejected the argument that the defendant’s actions must “direct[ly] cause” a
27 plaintiff’s injury, observing that the Supreme Court instead has required only “some direct relation”—
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1 which it characterized as “a meaningful and logical continuity”—between the challenged practice and
 2 the alleged harm. *Id.* at 1272.

3 105. Similarly, the Ninth Circuit, construing the Fair Housing Act proximate cause
 4 requirement established by *Bank of America*, rejected the notion that a defendant’s challenged policy
 5 must be the “direct cause” of the alleged harm. It found that “Congress intended the scope of the
 6 statute’s proximate-cause requirement to be far-reaching, and to include aggregate, city-wide injuries,”
 7 not just injuries inflicted directly on an individual plaintiff. *City of Oakland v. Wells Fargo & Co.*, 972
 8 F.3d 1112, 1124 (9th Cir. 2020).

9 106. Thus, the “direct cause” requirement appears nowhere in *Inclusive Communities* or
 10 *Bank of America*, and it is directly contradicted by the two federal appellate courts that have
 11 considered whether such a requirement exists.

12 **iii. Forcing HUD Complaints to Meet the Pleading Standards of Federal**
 13 **Court Complaints**

14 107. In addition to purporting to impose pleading standards that will often be impossible to
 15 meet for disparate-impact claims filed in federal court, HUD also imposed these newly heightened
 16 requirements on administrative complaints alleging disparate impact. In so doing, HUD made its own
 17 administrative process—which is meant to be a much less formal, less burdensome alternative to filing
 18 in court—virtually unavailable to people harmed by policies with an unjustified disparate impact.

19 108. HUD has long maintained its complaint process as one that can be navigated even by a
 20 non-lawyer. Its regulations regarding what information a complainant must provide are written plainly,
 21 and require the most basic information: (1) Name, address, and phone number of complainant; (2) The
 22 same for the defendant; (3) If a specific property is involved, its address and description; and (4) “A
 23 brief description of how you were discriminated against in an activity related to housing[,]” including
 24 “the date when the discrimination happened and why you believe the discrimination occurred because
 25 of race” or other protected classes. 24 C.F.R. § 103.25.

26 109. Once that simple complaint is filed, HUD takes on the responsibility to investigate.
 27 HUD has the responsibility to “obtain information concerning the events or transactions that relate to
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1 the alleged discriminatory housing practice,” to “document policies or practices of the respondent
 2 involved,” and to “develop factual data necessary . . . to make a determination . . . whether reasonable
 3 cause exists to believe that a discriminatory housing practice has occurred or is about to occur[.]” 24
 4 C.F.R. § 103.200.

5 110. The Final Rule upends this process, requiring a complaint filed with HUD alleging
 6 unlawful discriminatory impact to meet the pleading standards of a federal court complaint in order to
 7 trigger HUD’s duty to investigate and adjudicate the complaint.

8 111. Commenters explained to HUD that this change would be inconsistent with HUD’s own
 9 regulations and long-standing practices, and that it would destroy the efficacy of the complaint process
 10 for resolving disputes without the formality and expense of federal court. In response, HUD stated only
 11 that doing this is “within HUD’s expertise given its role in implementing the Fair Housing Act” and
 12 that its rule “is consistent with the FRCP [Federal Rules of Civil Procedure].” Final Rule, 85 Fed. Reg.
 13 at 60307. HUD neither offered a reasoned explanation for requiring agency complaints to meet that
 14 standard, nor denied that the HUD process will no longer be as effective a forum for disparate-impact
 15 claims.

16 **B. The Final Rule Dramatically Changes Both Parties’ Burdens At The Proof Stage,
 17 Making It Virtually Impossible To Prove A Disparate-Impact Case**

18 112. The Final Rule also radically alters the burden-shifting framework of the 2013 Rule for
 19 the proof stage. In doing so, it purports to eliminate substantive obligations that disparate-impact law
 20 has always imposed on lenders, insurance companies, housing providers, and others. Even after a
 21 plaintiff has *proven* that a policy causes discriminatory effects, the Final Rule permits a defendant to
 22 maintain the policy so long as that policy serves *some* legitimate purpose, even an insubstantial one.
 23 Disparate impact’s traditional and core requirement that a defendant search for, and where available,
 24 adopt a less discriminatory alternative is cast aside.

25 113. Consistent with decades of case law, the 2013 Rule provided that, once a plaintiff
 26 established a policy’s discriminatory effect, the burden shifted to the defendant to establish that the
 27 policy was “necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.” 78
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1 Fed. Reg. at 11463. The 2013 Rule required the defendant to do so with “evidence”; its justification
2 “may not be hypothetical or speculative.” *Id.* For a defendant’s interest to be “substantial,” it had to be
3 “a core interest of the organization that has a direct relationship to the function of that organization.”
4 *Id.* at 11470. Finally, if the defendant met that burden, the burden shifted back to the plaintiff to show
5 that those interests “could be served by another practice that has a less discriminatory effect.” *Id.* at
6 11480. If the plaintiff met that burden, the practice was unlawful.

7 114. As HUD explained in the 2013 Rule, those burdens were consistent with well-
8 established FHA case law. Moreover, they were largely synonymous with the “business necessity”
9 standard that applies to employment discrimination claims under Title VII and that both HUD and
10 financial regulators had applied for many years with respect to the FHA and other laws such as ECOA.
11 *Id.* at 11471.

12 115. The Final Rule changes this framework in several ways. These changes allow a
13 defendant to maintain a policy with proven discriminatory effects *without* establishing that the policy is
14 necessary to meet legitimate interests.

15 116. First, even after a plaintiff has successfully met the high bar of pleading that a policy is
16 “arbitrary, artificial, and unnecessary to achieve a valid interest,” the Final Rule does not require a
17 defendant to prove otherwise; it only requires the defendant to produce some unspecified quantum of
18 evidence to the contrary. New 24 C.F.R. § 100.500(c)(2). Second, the defendant need only produce
19 evidence suggesting that the challenged policy or practice “advances a valid interest,” not that it is
20 *necessary* to accomplish that interest. *Id.* § 100.500(c)(2). Third, the Final Rule defines a “valid
21 interest” expansively to include any “practical business, profit, policy consideration, or requirement of
22 law.” *Id.* § 100.500(b)(1).

23 117. Thus, in response to allegations demonstrating that its policy is “arbitrary, artificial, and
24 unnecessary,” under the Final Rule, 85 Fed. Reg. at 60311, a defendant need only produce evidence
25 suggesting that the challenged policy is not wholly irrational for a profit-seeking enterprise. This
26 burden can be met readily in virtually any case challenging, for example, a requirement to secure a
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1 home loan. A lender can almost always produce evidence suggesting that the requirement helps it
2 make a profit.

3 118. If the defendant meets that low burden of “rebut[ting]” an allegation that its policy is
4 “arbitrary, artificial, and unnecessary,” that ends the case. *See* New 24 C.F.R. § 100.500(c)(3). The
5 Final Rule only shifts the burden back to the plaintiff if the defendant rebuts *other* allegations, but not
6 if the defendant rebuts the allegation that its policy is “arbitrary, artificial, and unnecessary.” *See id.*
7 Under the Final Rule, it does not matter that the policy excludes people in discriminatory ways and that
8 a less discriminatory alternative could serve the defendant’s legitimate interests.

9 119. This change eviscerates longstanding substantive requirements for lenders, insurance
10 companies, and housing providers to comply with the Fair Housing Act. So long as they maintain some
11 evidence supporting the argument that their policies are meant to further a profit motive or other
12 standard business rationale, they will not face disparate-impact liability and so can maintain
13 discriminatory practices with impunity.

14 120. Relieving potential defendants of the requirement to adopt less discriminatory
15 alternatives is contrary to decades of precedent, including *Inclusive Communities*, and HUD has no
16 authority to change this law. HUD offers no explanation for doing so. And HUD violated notice-and-
17 comment requirements by omitting this change from the Proposed Rule but including it in the Final
18 Rule.

19 121. The Final Rule changes the proof standards in other ways as well, all of which make it
20 substantially more difficult for the victim of a discriminatory practice to prove their case and thereby
21 immunize regulated entities from any real risk of disparate-impact liability. *See, e.g.*, New 24 C.F.R.
22 §§ 100.500(b)(1), (c)(3).

23 122. HUD offers no reasoned explanation for these changes—many of which contradict
24 substantiated findings in the 2013 Rule as to not only the Fair Housing Act’s best interpretation, but
25 also the best policy choices for implementing it. In 2013, HUD explained that the burden-shifting test
26 it then codified would create real-world incentives, consistent with the FHA’s broad purposes, for
27 covered entities to “conduct consistent self-testing and compliance reviews, document their substantial,
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1 legitimate nondiscriminatory interests, and resolve potential issues so as to prevent future litigation.”
2 2013 Rule, 78 Fed. Reg. at 11472. In the Final Rule, by contrast, HUD does not acknowledge, let alone
3 justify, that it is eliminating any such incentive.

4 123. The only justifications HUD musters for drastically changing the parties’ respective
5 burdens are woefully lacking. HUD asserts that *Inclusive Communities* stated “that the Fair Housing
6 Act is not an instrument to force housing authorities to reorder their priorities, but rather to ensure that
7 those priorities can be achieved without arbitrarily creating discriminatory effects.” 85 Fed. Reg. at
8 60320. But HUD makes no attempt to connect this language—which has no obvious relevance—to its
9 actions. Nor does anything else in *Inclusive Communities* support HUD’s action. To the contrary,
10 *Inclusive Communities* characterizes the defendant’s proper burden several times in ways that are
11 consistent with the 2013 Rule, and inconsistent with the 2020 Rule. *See, e.g., Inclusive Communities*,
12 576 U.S. at 541 (characterizing defendant’s burden as “analogous to the business necessity standard
13 under Title VII”); *id.* (housing authorities and private developers must “be allowed to maintain a policy
14 if they *can prove it is necessary* to achieve a valid interest”) (emphasis added). That is to be expected,
15 since the Supreme Court explicitly declined to review anything other than whether disparate-impact
16 claims are cognizable under the Fair Housing Act.

17 124. HUD predominantly relies instead on *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642
18 (1989), to justify its drastic changes to the burden-shifting framework. But *Wards Cove*, a decision
19 construing Title VII of the Civil Rights Act that Congress immediately overruled with respect to that
20 statute, cannot justify a change decades later to the long-standing rules governing Fair Housing Act
21 claims.

22 125. The bottom line is that the Final Rule fundamentally changes the law of disparate
23 impact by increasing the evidentiary burden on plaintiffs and lowering the evidentiary burden on
24 defendants, making claims nearly impossible to prove. HUD thus fundamentally and without
25 justification alters the incentive structure for regulated entities that HUD itself recognized in 2013 but
26 no longer acknowledges.

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1 **C. The Final Rule Adds New and Unfounded Affirmative Defenses that Exempt**
2 **Whole Industries from Effective Disparate-Impact Scrutiny**

3 126. The Final Rule also adds two new affirmative defenses to a Fair Housing Act disparate-
4 impact claim. Neither has any foundation in the law.

5 **i. Predictive Policy Defense**

6 127. Without having first proposed it for comment, HUD in the Final Rule instituted a
7 special defense for defendants who employ a “policy or practice” that is “intended to predict an
8 occurrence of an outcome.” New 24 C.F.R. § 100.500(d)(2)(i)). This “predictive policy” defense has
9 no basis in any Fair Housing Act jurisprudence or any current industry compliance practices, and HUD
10 does not contend otherwise. *See* 85 Fed. Reg. at 60290. The provision is drafted in an exceptionally
11 confusing manner, and HUD offers little explanation for how it works. Based on what little
12 explanation HUD does provide, it appears to create an enormous loophole that further immunizes from
13 disparate-impact scrutiny many of the policies that have the greatest potential for discriminatory
14 effects on the housing market.

15 128. This defense did not appear in the Proposed Rule, which instead included several
16 defenses against challenges to policies based on algorithmic models. Many comments explained how
17 these defenses did not conform to law and would have exempted entirely from disparate-impact
18 scrutiny a wide swath of discriminatory models. HUD deleted the algorithmic model defenses, which it
19 acknowledged “would likely have been unnecessarily broad in their effect,” *id.*, and replaced them
20 with the novel “predictive policy” defense, which it characterizes as “an alternative for the algorithm
21 defenses.” *Id.*

22 129. This “alternative” was not included or mentioned in the Proposed Rule such that the
23 public had a chance to comment on it. It functions entirely differently from the earlier algorithm
24 defense. HUD does not justify it by reference to any existing case law or compliance practice, and it
25 does not explain what gives it the authority to create an entirely new defense.

26 130. Because HUD fashioned a new defense without the benefit of public comment or
27 grounding in case law or existing compliance practice, it is unsurprising that what it produced is
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1 virtually unintelligible. But to the extent that the defense’s meaning can be parsed, it functions as an
2 exemption from traditional disparate-impact scrutiny.

3 131. HUD incorrectly suggests that the “predictive policy” defense cures the problems of the
4 jettisoned algorithmic model defense because it is narrower. By its plain terms, this defense extends
5 even more broadly, to not only the growing number of models that automate decision making, but also
6 the crudest discretionary and judgmental prediction policies. For example, a policy directing loan
7 officers to deny credit to anyone they deem too “suspicious” to be creditworthy is, on its face, a policy
8 “intended to predict an occurrence of an outcome.” *Id.* at 60333.

9 132. For the vast number of policies that qualify for this defense, the defense represents a
10 virtual get-out-of-jail-free card against a disparate-impact challenge. A policy is largely immune from
11 challenge if “the prediction represents a valid interest, and the outcome predicted by the policy or
12 practice does not or would not have a disparate impact on protected classes compared to similarly
13 situated individuals not part of the protected class.” New 24 C.F.R. § 100.500(d)(2)(i).

14 133. This language is confusingly drafted, and HUD does not explain what it means for an
15 “outcome predicted” to have a “disparate impact,” or for classes to be “similarly situated” for these
16 purposes. But HUD appears to construe this defense to permit entities to escape disparate-impact
17 liability even if their policies unnecessarily exclude Black people (or other protected classes) in a
18 discriminatory fashion. A defendant need only proffer an analysis of what happens to those to whom
19 the defendant *did* offer service. If that set of individuals have similar “outcomes” (*e.g.*, likelihood of
20 defaulting on a home loan) regardless of protected class status, then the defendant is exempt from
21 liability notwithstanding the discriminatory impact of its policy on people that were *denied* service.

22 134. HUD explains that, in its view, if a lender disproportionately excludes people in a
23 protected class improperly, those applicants from the protected class who *do* receive loans necessarily
24 must be overqualified, and so should be expected to default less frequently. Final Rule, 85 Fed. Reg. at
25 60290. If, instead, they default at the same rate as non-members once they do get loans, the defendant
26 was *right* to exclude protected class members at a higher rate, and so there *cannot* have been
27 discrimination in the application process. *Id.*

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1 135. This new defense is inconsistent with established disparate-impact principles—HUD
2 does not even attempt to root it in established jurisprudence—and the premise is severely flawed.
3 There is little relationship between whether a policy fails traditional disparate-impact analysis (*i.e.*,
4 whether it is unnecessarily exclusionary in a discriminatory way, and could be made more inclusionary
5 consistent with legitimate interests) and whether it fails HUD’s novel substitute test, which focuses
6 only on people that were approved by a challenged policy. The latter has little bearing on the former.
7 Without considering the characteristics of *all* applicants, including those who were rejected, it is not
8 possible to determine that the selection process was more lenient or “overly restrictive” for a protected
9 class.

10 136. As a statistical matter, it is wrong that equal default rates among protected class
11 members who *do* meet credit-worthiness requirements indicate whether a model was “overly
12 restrictive” or discriminatory in excluding others that do *not* meet those requirements. *Id.* Accordingly,
13 the “predictive policy” defense necessarily allows many of those employing predictive policies to be
14 excused from compliance with the Fair Housing Act.

15 137. At least one court in an employment discrimination suit has rejected arguments akin to
16 the HUD defense. *See Com. of Pa. v. O’Neill*, 348 F. Supp. 1084, 1095-96 (E.D. Pa. 1972), *order*
17 *vacated in part*, No. 72-1614, 1972 WL 2595 (3d Cir. Sept. 14, 1972), *on reh’g*, 473 F.2d 1029 (3d
18 Cir. 1973), *and aff’d in part, vacated in part*, 473 F.2d 1029 (3d Cir. 1973). The defendant in that suit
19 attempted to defend against disparate-impact claims by focusing only on characteristics of employees
20 that benefitted from a policy or practice (*i.e.*, “accepted” employees), and argued that characteristics of
21 employees within that “accepted” population indicated the defendant must have been more lenient in
22 accepting minority applicants. The court rejected that defense. *Id.* at 1096 (rejecting as unsound
23 argument that “because accepted blacks in all three years covered by the study had a higher number of
24 negative factors than accepted whites” the defendant “must be more lenient in accepting blacks than
25 whites”).

26 138. To illustrate the illogic of this defense—and how it eviscerates traditional disparate-
27 impact doctrine—imagine a policy that denies home loans to all applicants with any arrest history, on
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1 the dubious premise that such history predicts likelihood of default. The policy will almost certainly
2 have a disproportionately adverse effect on minority applicants, who are more likely to have been
3 arrested due to discriminatory laws and law enforcement practices.

4 139. Under HUD's new defense, however, this policy would be immune from challenge if
5 those minority borrowers who *received* credit (who, by definition, have no arrest history) default as
6 frequently as non-minority borrowers (who also, by definition, have no arrest history). That condition
7 will frequently be met, because so many *other* variables unrelated to the challenged policy influence
8 default rates (including *other* discrimination), yet it has nothing to do with whether the arrest record
9 ban can be justified.

10 140. This defense thus allows defendants to maintain policies that have unnecessary
11 disparate impact based on facts that should be irrelevant to the analysis. Moreover, a person who is
12 *denied* service will not know in advance whether this defense applies, further discouraging disparate-
13 impact challenges.

14 141. In many cases, public data is available to support claims that policies and practices have
15 disproportionate adverse effects on protected classes, *i.e.*, to state a claim under current disparate-
16 impact jurisprudence. For example, under the Home Mortgage Disclosure Act, loan-level data about
17 mortgage *applications* and *originations* is publicly available for large-volume lenders. See 12 U.S.C.
18 § 2801 *et seq.*; 12 C.F.R. pt. 1003. It thus is possible to see whether some lenders deny mortgage loans
19 to people in protected classes at disproportionate rates.

20 142. In contrast, comparable information about how often people *default* on their loans is *not*
21 publicly available.

22 143. The Final Rule purports to allow proof of the existence of a less discriminatory
23 alternative in response to a defendant interposing this new “predictive policy” defense, but it does so in
24 a way that makes that right illusory. The Final Rule provides that the defense does not apply “if the
25 plaintiff demonstrates that an alternative, less discriminatory policy or practice would result in the
26 *same outcome* of the policy or practice, without imposing materially greater costs on, or creating other
27 material burdens for the defendant.” New 24 C.F.R. § 100.500(d)(2)(i) (emphasis added). That is,
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1 rather than being required to show that a less discriminatory alternative would satisfy a defendant’s
2 legitimate interests (the traditional disparate-impact test), a plaintiff now must show that the less
3 discriminatory alternative would “result in the same outcome.” *Id.*

4 144. HUD does not explain what the rule means by “same outcome.” But this language
5 appears to require a plaintiff to prove counterfactuals that will generally be unknowable. HUD does not
6 explain how any plaintiff could ever avail itself of this supposed opportunity to overcome the
7 “predictive policy” defense.

8 145. The predictive policy defense is especially problematic as lenders and others move to
9 reliance on machine learning models that “learn” what makes people better or worse credit candidates
10 based on a host of variables that do not appear on a conventional application or in traditional credit
11 files. Left to their own devices, machine learning models will find ways to proxy race as a factor
12 through combining other factors—effectively instituting intentional race discrimination—and the Final
13 Rule would often permit them to do so. A model that rejects Black applicants based on factors closely
14 correlated to race will pass scrutiny so long as those Black consumers approved by the model perform
15 the same as white consumers, regardless of how many Black applicants are unnecessarily excluded.

16 146. These defects would have been explained to HUD had the agency included its new
17 predictive policy defense in the proposed rule. HUD did not do so, precluding any opportunity to
18 comment on this novel defense that will effectively excuse any number of discriminatory policies that
19 can be characterized as making a prediction.

20 ***ii. Third-Party Requirements Defense***

21 147. The Final Rule also allows a defendant to escape disparate-impact liability by
22 establishing that challenged policy or practice was “reasonably necessary to comply with a third-party
23 requirement,” including a federal or state law, or a judicial decision. New 24 C.F.R.
24 § 100.500(d)(2)(iii). This affirmative defense is entirely new.

25 148. As HUD makes clear in the Final Rule’s Preamble, “reasonably necessary” does not
26 mean “actually necessary.” Under the Final Rule, a defendant need not show that it was *required* by a
27 third party to take the challenged action, that the third party prevents it from adopting a less
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1 discriminatory alternative, or even that the supposedly restricting third-party requirement was the
2 primary reason it adopted the policy. 85 Fed. Reg. at 60290.

3 149. This defense is another large loophole for heavily regulated industries such as banks
4 and insurance companies. Virtually any policy that such companies adopt amounts to some form of
5 compliance with a legal or regulatory requirement. Moreover, the Final Rule would allow defendants
6 to proffer this defense at the *pleading* stage, making the facts irrelevant. All a defendant need show is
7 that it operates in a heavily regulated space, and it is exempted from disparate-impact liability.

8 150. The third-party requirement defense amounts to a retreat by HUD from a proposed
9 change it could not defend to a substitute that is no better. HUD originally proposed an exemption that
10 applies whenever an entity's "discretion" is "materially limited" by law or other third parties. Proposed
11 Rule, 84 Fed. Reg. at 42859. Many commenters explained that this proposal would effectively
12 immunize heavily regulated industries from any requirement to exercise their discretion in the least
13 discriminatory fashion feasible. Final Rule, 85 Fed. Reg. at 60316. HUD substituted the "reasonably
14 necessary" language in response, but then made clear in that the new language amounts to the same
15 thing. *Id.* at 60290.

16 151. HUD has no statutory authority to provide such categorical immunity to regulated
17 industries. And HUD's decision to do so is arbitrary and capricious, because (among other things)
18 HUD has not explained why such immunity *should* be given. Indeed, HUD responded to criticisms of
19 the "materially limited" proposed defense by acknowledging that they were correct, but then imposed a
20 defense that functions in the same fashion anyway.

21 **D. The Final Rule Eliminates Perpetuation of Segregation as a Cognizable Harm and**
22 **Eliminates Claims Based on Predictable Disparate Impact**

23 152. Finally, the Final Rule removes "perpetuation of segregation" as a recognized
24 discriminatory effect under the FHA. 85 Fed. Reg. at 60306. That is, under the Final Rule, a policy that
25 perpetuates racial segregation without justification is not unlawful for that reason; it must *also* have
26 some *other* form of discriminatory effect. The Final Rule also eliminates the opportunity for a plaintiff
27 to show that a policy causes "or predictably causes" a discriminatory effect. *Id.*

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1 153. Under the 2013 Rule—and consistent with decades of FHA jurisprudence—a practice
2 produces a discriminatory effect where it “*actually or predictably* results in a disparate impact on a
3 group of persons or creates, increases, reinforces, *or perpetuates segregated housing patterns* because
4 of race, color, religion, sex, handicap, familial status, or national origin.” Former 24 C.F.R. §
5 100.500(a) (emphasis added). The Final Rule eliminates this definition, thus simultaneously changing
6 the law in two different ways. First, the perpetuation of segregation is no longer a cognizable harm that
7 can be challenged under the Fair Housing Act in its own right. Second, the Final Rule no longer
8 reflects established Supreme Court law recognizing that a challenge can be brought to a policy with a
9 “predictable” disparate impact that has not yet manifested. *Inclusive Communities*, 576 U.S. at 527.

10 154. HUD’s only explanation is to deny that it is changing the law, even as it confirms that it
11 is. With respect to its removal of the 2013 Rule’s “perpetuation of segregation” language, HUD
12 explained that it removed this definition as part of “streamlining” the regulation. Final Rule, 85 Fed.
13 Reg. at 60306. It continued: “A plaintiff need only prove in a case brought under disparate impact
14 theory that a policy or practice has led to the perpetuation of segregation, *which has a discriminatory*
15 *effect* on members of a protected class.” *Id.* (emphasis added). Furthermore, it continued, “HUD views
16 ‘perpetuation of segregation’ as a possible harmful result of unlawful behavior under the disparate
17 impact standard.” *Id.* That is, HUD acknowledges that the perpetuation of segregation can *lead* to
18 discriminatory results, or can be the downstream result of a policy that is *otherwise* unlawful. But its
19 explanation confirms that HUD no longer believes a policy that causes the perpetuation of segregation
20 is discriminatory and potentially unlawful *for that reason alone*, and has altered its regulation to reflect
21 that view.

22 155. This change in the law misunderstands and is inconsistent with decades of FHA
23 jurisprudence, including *Inclusive Communities*. Federal courts—as early as *Black Jack*, and in a line
24 of cases since—have consistently and properly recognized that a policy’s perpetuation of segregation
25 remains a basis for liability without a separate showing that the policy *also* has a differential impact
26 based on protected class. As *Inclusive Communities* put it, “the FHA aims to ensure that those
27 [legitimate] priorities can be achieved without arbitrarily creating discriminatory effects *or*
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1 perpetuating segregation.” *Inclusive Communities*, 576 U.S. at 540 (emphasis added). The rule thus
2 blatantly conflicts with the very Supreme Court case that HUD purports to implement.

3 156. HUD’s explanation is equally unreasoned with respect to the removal of language
4 recognizing that a claim based on a “predictable” disparate impact may succeed. HUD eliminates this
5 language from the Final Rule, even as it recognizes in the preamble to the Final Rule that such claims
6 “may succeed” and that *Inclusive Communities* “does use the phrase ‘caused or predictably will cause
7 a discriminatory effect’ when discussing the prima facie burden for discriminatory effect plaintiffs.” 85
8 Fed. Reg. at 60307. HUD provides no explanation for removing language that it concedes is consistent
9 with established Supreme Court precedent.

10 157. Deleting this language from the Final Rule will cause confusion and uncertainty among
11 courts and litigants, who will try to discern the meaning behind HUD’s decision to include this
12 language in the 2013 Rule and then remove it in the 2020 Rule. Commenters identified these problems
13 for HUD, but HUD did not provide reasoned responses.

14 * * *

15 158. The cumulative effect of all these changes the Final Rule makes is to effectively render
16 disparate impact under the Fair Housing Act toothless. By changing pleading and evidentiary
17 standards, and fashioning wholly new defenses, the Final Rule undermines the Act’s ability to continue
18 its historic role of confronting and reducing structural inequalities in the housing market.

19 **IV. The Final Rule’s Gutting of Disparate-Impact Law Is Based on Erroneous Reading of**
20 **Supreme Court Precedent And Is Otherwise Unlawful**

21 159. As described above, the Final Rule has many provisions that are unlawful for reasons
22 individual to each. But more fundamentally, the Final Rule is defective as a whole, because it is based
23 on the overarching premise that the Supreme Court’s 2015 decision in *Inclusive Communities*—a
24 decision that *upheld* existing disparate-impact doctrine—somehow requires HUD to gut that doctrine
25 in response. That faulty premise results in a cascade of legal errors, from failing to offer adequate
26 explanation for abruptly changing the law to failing to account for all the costs that will flow from
27 doing so.

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1 **A. The Final Rule’s Gutting of Disparate Impact Is Based on the Faulty Premise that**
 2 ***Inclusive Communities* Changed Disparate-Impact Law**

3 160. HUD does not dispute that its 2013 Rule correctly codified disparate-impact doctrine as
 4 it existed at that time, in the form of case law and long-standing HUD interpretations. And HUD takes
 5 no issue with any aspect of its 2013 Rule as a matter of policy. It does not contend that the 2013 Rule
 6 (or the longstanding case law and agency practice that it codifies) caused any real-world problems or
 7 that its proposed changes would lead to policy outcomes that better reflect the Fair Housing Act’s
 8 purposes.

9 161. Instead, HUD set this rulemaking in motion and then finally justifies its sweeping
 10 changes by claiming that *Inclusive Communities* somehow requires them. *See* Proposed Rule, 84 Fed.
 11 Reg. at 42857 (“These amendments are intended to bring HUD’s disparate impact rule into closer
 12 alignment with the analysis and guidance provided in *Inclusive Communities* as understood by HUD . .
 13 . .”); Final Rule, 85 Fed. Reg. at 60288 (“This rule amends HUD’s 2013 disparate impact standard
 14 regulation to better reflect the Supreme Court’s 2015 ruling in [*Inclusive Communities*]”). But
 15 *Inclusive Communities* does no such thing. Most of HUD’s “reasoning” amounts to severe misreading
 16 of snippets of *Inclusive Communities* taken out of context and assigned a meaning they do not have in
 17 the case itself.

18 162. Far from announcing or calling for any changes in the law, *Inclusive Communities*
 19 repeatedly stated that it was describing *existing* law:

- 20 • The Court explained that “disparate-impact liability *has always* been properly limited in key
 21 respects that avoid the serious constitutional questions that might arise under the FHA.”
 22 *Inclusive Communities*, 576 U.S. at 540 (emphasis added).
- 23 • The Court discussed at length the 2013 Rule—including its requirements for making out a
 24 prima facie case and burden-shifting—without suggesting that the Rule required revision. *See*,
 25 *e.g., id.* at 525-27 (describing prima facie case and burden-shifting in the 2013 Rule); *id.* at
 26 2522-23 (describing defendants’ burden “to state and explain the valid interest served by their
 27 policies” and HUD’s decision in 2013 Rule not to use term “business necessity” in formulating
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1 defendant’s burden); *id.* at 541 (after describing concerns raised by specific claim at issue in
 2 case, observing with approval that HUD’s 2013 rule “does not mandate that affordable housing
 3 be located in neighborhoods with any particular characteristic”) (quoting 2013 Rule, 78 Fed.
 4 Reg. at 11476).

- 5 • The Court cited numerous lower-court disparate-impact cases with approval, without
 6 suggesting they were litigated under an improper standard. *See, e.g., id.* at 539-40 (citing cases
 7 involving “zoning laws and other housing restrictions that function unfairly to exclude
 8 minorities from certain neighborhoods without any sufficient justification” as “resid[ing] at the
 9 heartland of disparate-impact liability”).
- 10 • The Court observed, as one of its rationales for affirming the availability of disparate-impact
 11 liability, that “residents and policymakers have come to rely on the availability of disparate-
 12 impact claims.” *Id.* at 546.
- 13 • The Court noted that the existence of disparate-impact claims “for the last several decades ‘has
 14 not given rise to . . . dire consequences.’” *Id.* (quoting *Hosanna-Tabor Evangelical Lutheran*
 15 *Church and School v. EEOC*, 565 U.S. 171, 196 (2012)).

16 163. This is not the language of a Court *changing* existing law; it is the language of a Court
 17 *describing* existing law (and ultimately affirming it). HUD ignores all this language.

18 164. HUD took the position in 2016 and in 2017 that *Inclusive Communities* did not change
 19 disparate-impact law. *See* ¶ 76, *supra*. It has offered no reasoned explanation for its reversal in
 20 position.

21 165. At its core, the Final Rule attempts to undo *Inclusive Communities*, not to implement it.
 22 It takes a decision that *upheld* disparate-impact doctrine and misleadingly quotes from it to justify the
 23 *destruction* of disparate-impact law.

24 **B. HUD Lacks Authority to Change Pleading Standards, Burdens of Proof, or Other**
 25 **Litigation Requirements**

26 166. Compounding that overarching error, rather than simply articulating the manner in
 27 which HUD’s substantive construction of the Fair Housing Act has changed, the Final Rule purports to
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1 amend pleading standards, reallocate burdens of proof, and create artificial exemptions and affirmative
 2 defenses to FHA liability. Congress has not delegated to HUD the authority to make these types of
 3 changes.

4 167. In particular, HUD has no authority to fashion defenses that appear nowhere in the text
 5 of the Fair Housing Act. Indeed, HUD concedes as much in rejecting a proposal that it create *other*
 6 defenses, stating—correctly—that it “does not have the authority to create new exceptions under the
 7 Fair Housing Act.” Final Rule, 85 Fed. Reg. at 60331. Yet that is exactly what HUD does in the Final
 8 Rule.

9 168. HUD also lacks authority to erect new pleading standards, such as the requirement to
 10 plead that a policy is “artificial, arbitrary, and unnecessary.” New 24 C.F.R § 100.500(b)(1). Rather, it
 11 is the Supreme Court that is responsible for establishing pleading standards under the Rules Enabling
 12 Act, 28 U.S.C. § 2072 (1934), and the Federal Rules of Civil Procedure. All these new pleading
 13 requirements thus are contrary to law and—because HUD entirely fails to justify them (except to
 14 erroneously claim they are *already* the law)—they are arbitrary and capricious as well.

15 **C. HUD Failed to Consider or Address the Costs and Burdens Imposed by the Final**
 16 **Rule**

17 169. HUD failed to acknowledge or adequately explain the burdens and complications it
 18 created by promulgating standards inconsistent with overlapping laws and regulatory guidance.

19 170. For example, the Final Rule creates disparate-impact standards that are inconsistent
 20 with those applicable under the Equal Credit Opportunity Act (ECOA), notwithstanding that many
 21 lenders and others are governed with both laws. It also is inconsistent with longstanding agency
 22 guidance for regulated entities, such as the 1994 Joint Policy Statement on Discrimination in Lending,
 23 which applies to lending discrimination under both the FHA and ECOA and was signed by HUD, the
 24 Department of Justice, and nine other federal regulatory and enforcement agencies.¹⁵

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 26
 27 ¹⁵ Interagency Task Force on Fair Lending, *Policy Statement on Discrimination in Lending*, 59 Fed. Reg. 18,266 (Apr. 15,
 1994), <https://www.federalregister.gov/documents/1994/04/15/94-9214/policy-statement-on-discrimination-in-lending-notice-department-of-housing-and-urban-development>.
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1 171. HUD’s 2013 Rule acknowledged the importance of avoiding inconsistent disparate-
 2 impact regimes, both for compliance and for litigation, and was drafted to avoid such an outcome. *See*,
 3 *e.g.*, 2013 Rule, 78 Fed. Reg. at 11482 (“in litigation involving claims brought under both the Fair
 4 Housing Act and ECOA, the parties and the court will not face the burden of applying inconsistent
 5 methods of proof to factually indistinguishable claims. Having the same allocation of burdens under
 6 the Fair Housing Act and ECOA will also provide for less confusion and more consistent decision
 7 making by the fact finder in jury trials.”). Yet the Final Rule splits FHA law from ECOA law and years
 8 of agency guidance in all the ways described above. Institutions subject both to ECOA and the FHA,
 9 including all mortgage lenders, are faced with conflicting regimes and inconsistent agency positions.

10 172. Commenters pointed out the burdens and uncertainty HUD proposed to create,
 11 especially for those situations governed by both ECOA and the FHA. HUD offered no reasoned
 12 response.

13 173. The Final Rule also lacks any discussion of the costs of the changes it makes. As
 14 commenters explained, HUD’s changes increase costs for entities—among them affordable housing
 15 developers, small businesses, governmental jurisdictions, and not-for-profits, such as those that run
 16 group homes for people with disabilities—that rely on the ability to bring disparate-impact litigation
 17 and HUD complaints where necessary to vindicate their rights.

18 **V. HUD’s Final Rule Will Harm Plaintiffs**

19 **A. Harm to NFHA**

20 174. The 2020 Rule harms both NFHA and its members. Accordingly, NFHA sues both on
 21 its own behalf and on behalf of its members.¹⁶

22 175. NFHA’s mission is to promote residential integration, combat discrimination in
 23 housing, and ensure equal housing opportunity for all people.
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 28 ¹⁶ A declaration describing the harm to Plaintiff NFHA can be found in Ex. B, Decl. of L. Rice (Oct. 21, 2020).

1 176. NFHA carries out this mission through, among other things, education, outreach,
2 membership services, public policy initiatives, consulting and compliance, community development,
3 advocacy, and enforcement.

4 177. NFHA works with industry players, such as banks, insurance companies, and others
5 whose activities impact the availability of housing, to make their policies and practices less
6 discriminatory. Since its inception, NFHA has supported and engaged in work to encourage and, where
7 necessary, require financial institutions, insurance companies, housing providers, real estate agencies,
8 and others to modify practices that have an unnecessary disparate impact on communities of color and
9 others who have historically been excluded from equal access to housing opportunities.

10 178. As described above, NFHA and its members have used disparate-impact law to compel
11 insurance companies to drop policies that had the effect of redlining communities. They also have used
12 disparate impact to address the discriminatory maintenance and management of bank-owned homes in
13 communities of color, resulting in over \$56 million in revitalization investments and other important
14 benefits in these areas. And those are just two of the many examples of NFHA and its members using
15 disparate impact to further their fair housing missions.

16 179. The desire to avoid potential liability provides an important incentive for corporations
17 to work with NFHA in good faith to determine whether their policies and practices create unnecessary
18 disparate impact and explore less discriminatory alternatives. Well-established disparate-impact law, as
19 set forth in HUD's 2013 Rule and in case law, has greatly facilitated the ability of NFHA and its
20 members to advocate for fairer policies and otherwise further fair housing objectives.

21 180. Sometimes NFHA, through its compliance or outreach activities, can convince
22 industries to change their practices voluntarily, relying on the leverage that disparate-impact law
23 provides. Sometimes it must sue one or more industry members, or it must file a complaint with HUD.
24 Either way, existing disparate-impact law empowers NFHA to carry out its mission effectively. And,
25 as outlined above, the HUD complaint process has, until now, provided a way to articulate a disparate-
26 impact complaint in a relatively efficient way, consistent with longstanding case law, that permits all
27 parties to discuss resolution quickly.

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1 181. Once NFHA succeeds in getting one company to implement less discriminatory
2 alternatives, thereby demonstrating that these alternatives do not inhibit the ability to accomplish
3 legitimate ends, the disparate-impact doctrine creates an incentive for others in the industry to follow
4 suit. They do so in part to avoid liability, but also because they see that adopting the less
5 discriminatory alternative is not detrimental to business interests and often results in a win-win,
6 providing a company with more customers rather than fewer. Many companies reflexively refuse to
7 consider less discriminatory alternatives until they see that those alternatives are perfectly consistent
8 with their legitimate needs and may even be in their best interests.

9 182. In this manner, NFHA relies on disparate-impact law to promote fair housing
10 throughout entire industries efficiently and effectively.

11 183. HUD's changes to the disparate-impact standard will reduce NFHA's leverage with
12 industry players and make it more difficult for NFHA to promote fair housing. Lenders, insurance
13 companies, landlords, and others that would change discriminatory policies if facing an evident risk of
14 liability will not readily do so if they perceive no such risk. This will interfere with NFHA's ability to
15 conduct its activities, and to do so successfully. People in the communities that NFHA serves will be
16 harmed because of NFHA's reduced ability to vindicate their fair housing rights.

17 184. Under the Final Rule, challenging a policy that has unjustified disparate impact will be
18 much more difficult and expensive—where it is even still possible—because the Rule requires
19 considerably more information to be gathered and analyzed before a complaint can be filed, whether in
20 federal court or before HUD. NFHA will have to scale back the number of complaints it files, assist
21 fewer victims of discrimination, and expend considerably more resources to maintain the same level of
22 effectiveness. People whose rights would otherwise be protected by NFHA's activities will be harmed
23 because their rights will be violated with impunity.

24 185. NFHA's mission will be impaired and frustrated by the Final Rule's interference with
25 its fair housing work and the consequent harm to members of the communities that NFHA serves.

26 186. NFHA already has had to divert considerable resources from other important projects to
27 activities designed to counteract the effects of HUD's rule. In particular, it has had to expend resources
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1 to educate and help its members educate various entities that had complied with disparate-impact law
2 to avoid legal risk under the Fair Housing Act, but no longer perceive themselves to face substantial
3 risk because of the Final Rule, on the benefits of continuing, now voluntarily, to comply with
4 traditional disparate-impact law. It would not have to expend resources in this way if HUD had not
5 undercut the clear legal obligation for those entities to do so.

6 187. In particular, HUD's action directly undermines and interferes with one of NFHA's
7 most important current projects, which it calls the Tech Equity Initiative. This project will encourage
8 the lending and housing industries and others using predictive models to use a NFHA-developed
9 platform to robustly test their models for discriminatory impact and modify them as necessary to lessen
10 that impact and achieve fairer results. By dramatically reducing the relevance of the availability of less
11 discriminatory alternatives, and by providing predictive methods with an additional layer of insulation
12 from liability, the Final Rule eliminates a large part of the incentive for companies to do so.

13 188. Ensuring the fairness of policies based on algorithmic models is the next frontier of fair
14 housing. Such models are increasingly being used to drive the decision-making of financial
15 institutions, real estate marketing and search firms, property insurers, and other entities whose
16 decisions affect the availability of housing and the terms on which it is available. Unfortunately, many
17 of the models currently used—as well as those in development—systematically generate results that
18 are discriminatory based on race or other protected class, threatening to entrench housing
19 discrimination on a large scale.

20 189. Accordingly, NFHA has invested resources—in money and staff-time—to developing
21 the Tech Equity Initiative in response. This initiative relies on the long-established disparate-impact
22 standard to drive the various industries that affect the housing market to reduce the discriminatory
23 impact of the models they use for decision-making.

24 190. NFHA is in the process of developing an automated tool to assess the disparate impact
25 of models that it can make widely available. Companies involved in the housing market, such as
26 financial institutions and insurance companies, will be able to upload their models—or, in the case of
27 companies concerned about the exposure of proprietary information, dummy versions that operate
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1 substantially similarly—and see the disparate impact those models likely will cause and the ability of
2 debiasing tools to reduce that impact.

3 191. By using this tool, which NFHA calls a debiasing sandbox, companies will have a
4 common space to test different methodologies for reducing discriminatory outcomes. They will have
5 the opportunity to see how these debiasing tools can make their models less discriminatory while
6 serving legitimate ends, and then can determine which debiasing methodologies best serve their and
7 their clients' needs.

8 192. NFHA's tool will help and encourage individual companies to reduce the disparate
9 impact that their models cause, and its widespread use will generate considerable data about how the
10 use of models affects the housing market. NFHA plans to analyze this data for lessons about the
11 efficacy of various debiasing tools, publish results, and convene forums for further discussion and
12 research. The end results of this project are expected to include increased transparency around how
13 models reach results and the advancement of research on how to reduce bias in new technologies.

14 193. All these plans are predicated on the continued existence of a real risk of disparate-
15 impact liability to motivate various entities to participate. Many companies will not participate unless
16 they believe failing to do so exposes them to legal risk, and HUD's rule largely eliminates that risk.

17 194. By eliminating the incentive for companies to participate in NFHA's program, HUD's
18 Rule diminishes the effectiveness of the Tech Equity Initiative as a whole. The program has great
19 potential to make the housing market fairer—while also making models more effective at their
20 legitimate purposes—but only if enough companies participate.

21 195. HUD's change to the disparate-impact standard has forced NFHA to divert resources it
22 otherwise would not need to spend to encourage industry players to participate and to educate them
23 and the public about the importance of analyzing models to avoid unnecessary disparate impact. Put
24 simply, it has had to expend resources to convince the players that shape the housing market to do
25 voluntarily what, until the Final Rule, they were required to do by law. It will need to continue to do so
26 indefinitely so long as the Final Rule remains in effect.

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1 196. As a result of this continuing diversion of resources, NFHA has had to curtail or forego
2 entirely a variety of planned activities.

3 197. In particular, NFHA has been forced to divert resources from the roll-out of the Tech
4 Equity Initiative described above, delaying that important program.

5 198. NFHA also has been forced to divert resources from, and thereby must delay, the
6 planned roll-out of its Keys Unlock Dreams Initiative. This initiative is a coordinated partnership
7 between NFHA, its members, and local communities and stakeholders to educate municipalities about
8 the link between racism, public health, and housing policies, and work jointly towards solutions that
9 address those challenges. NFHA, its members, and partnering organizations and companies have been
10 able to convince some municipalities to, among other things, declare racism to be a public health crisis
11 and focus on the racial disparities in how communities experience the COVID-19 pandemic. NFHA
12 has had to push back full implementation of the Keys Unlock Dreams Initiative to prevent backsliding
13 across the board in fair housing compliance as a result of the Final Rule.

14 199. The bottom line is that, in the absence of the Final Rule, NFHA was prepared to take
15 advantage of this historic moment when much of the country is newly engaged in discussions of
16 systemic racial inequities. Because of the Final Rule, it has been forced to divert resources to ensuring
17 bare compliance with what had been clear Fair Housing Act obligations but now are perceived by
18 many regulated entities as mere unenforceable suggestions.

19 **B. Harm to NFHA's Members**

20 200. NFHA also sues on behalf of its members, many of which are greatly harmed by HUD's
21 gutting of disparate-impact liability. NFHA members are small, local non-profits that lack significant
22 resources. Like NFHA, promoting residential integration and combating discrimination in housing
23 based on race, national origin, disability, and other protected classes covered by federal, state, and
24 local fair housing laws is central to their missions. The Final rule makes it more difficult and more
25 expensive for NFHA members to carry out their core activities effectively.

26 201. NFHA members counsel and represent individuals affected by discriminatory housing
27 practices. They also advocate for state and local jurisdictions, housing providers, lenders, and others to
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1 modify policies that have a discriminatory effect and assist in the identification and implementation of
2 less discriminatory alternatives. They educate players in the housing market, public officials,
3 community leaders, and others on practices that cause discriminatory effects in housing and available
4 alternatives that can make the housing market fairer.

5 202. NFHA members have filed many HUD complaints regarding practices that have
6 unjustified discriminatory effects. Until now, HUD has not required an extensive pleading to initiate
7 this process, which triggers HUD investigation and allows additional information to be obtained. HUD
8 guidance regarding the application of disparate-impact analysis to common fact patterns, such as
9 criminal records bans in rental housing, has further streamlined the process for NFHA members by
10 setting forth exactly what they need to plead to trigger HUD's duty to investigate. Particularly because
11 they lack the resources to do extensive pre-filing investigation, the HUD complaint and resolution
12 process has provided NFHA members with an effective and efficient means to enforce the Fair
13 Housing Act.

14 203. The Final Rule dramatically increases the burden of filing a disparate-impact complaint
15 with HUD. It will now require more investigation than previously was required to file in federal court.
16 Moreover, NFHA members will no longer be able to rely on previously clear guidance regarding
17 HUD's views on certain practices because HUD states in the Final Rule that it will be reconsidering
18 prior guidance due to the content of the Final Rule.

19 204. Thus, the Final Rule substantially diminishes, if not eliminates altogether, the utility of
20 HUD complaints and administrative enforcement. NFHA members will be significantly less able to
21 effectively enforce the Fair Housing Act.

22 205. What enforcement options remain available to them will require spending considerably
23 more resources on pre-filing investigations, forcing them to divert resources from other projects to
24 meet the new, much higher pleading standards. NFHA members will not be able to challenge at all
25 many of the discriminatory practices brought to their attention, due to the much heavier burden the
26 Final Rule imposes.

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1 206. NFHA members will also be less able to fulfill their missions by persuading companies
2 and government jurisdictions in their area to make their policies less discriminatory because of the
3 reduced risk of disparate-impact liability.

4 207. The Final Rule also introduces considerable confusion into what had been well-settled
5 law. It will force NFHA members to engage in considerable revision of training and educational
6 materials, at great expense. When HUD changes the law so drastically—and in, some respects,
7 incomprehensibly—the responsibility falls on entities like NFHA members to translate that change into
8 guidance that can be applied on the ground by real people.

9 208. By thus impairing their activities, the Final Rule harms NFHA members’ clients and
10 communities and impairs NFHA members’ ability to achieve their goals.

11 209. The Final Rule will also create an added burden for NFHA members by making it
12 virtually impossible for most individuals to file their own HUD complaint, due to added complexity
13 and hurdles. Members will need to devote additional resources to assisting or taking on representation
14 of additional individuals because they no longer can simply refer individuals to the HUD process
15 without further involvement. Those resources will need to be diverted from members’ other important
16 activities.

17 210. Many NFHA members are hurt in these ways by the 2020 Rule. In a recent survey of 45
18 NFHA members, 31 reported that they currently are handling a case involving disparate-impact claims.
19 The following are just three examples.

20 211. The Housing Equality Center of Pennsylvania is a NFHA member operating in Bucks,
21 Chester, Delaware, Lehigh, Montgomery, and Northampton Counties, PA, as well as in Philadelphia.

22 212. The Housing Equality Center currently has a complaint pending before HUD alleging
23 that a landlord applies three separate exclusionary policies, each of which has a disparate impact based
24 on protected class. For example, the landlord uses an overly broad criminal history exclusion, which
25 disproportionately and unnecessarily excludes Black prospective tenants who should be qualified for
26 tenancy.

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1 213. The Housing Equality Center is currently preparing other disparate-impact complaints
2 for filing before HUD or in federal court.

3 214. The Fair Housing Center of Central Indiana is a non-profit organization and NFHA
4 member that serves 24 counties in central Indiana.

5 215. The Fair Housing Center is currently litigating four Fair Housing Act complaints that
6 have disparate-impact claims in federal courts. It is also preparing to file at least one complaint with
7 HUD that will include a disparate-impact claim. It has recently settled another such complaint that was
8 filed with and processed by HUD.

9 216. Housing Opportunities Made Equal of Virginia (“HOME”) is a non-profit organization
10 and a NFHA member. The oldest fair housing organization in the country, HOME has a long history of
11 bringing fair housing cases with disparate-impact claims in federal court and in agency proceedings.
12 Relying in part of HUD’s 2013 Rule and subsequent guidance on the use of criminal records, HOME
13 has successfully litigated two claims in the past two years regarding landlords’ use of overbroad
14 criminal record restrictions that unnecessarily excluded people of color from housing opportunities.

15 217. HOME is actively investigating several other cases it expects to file with HUD for
16 investigation in the near future.

17 **C. Harm to FHANC**

18 218. FHANC is a nonprofit fair housing agency operating in Marin County and elsewhere in
19 Northern California. Its mission is to ensure equal housing opportunity in the community that it serves.
20 FHANC seeks to promote racially integrated communities and neighborhood diversity. FHANC is
21 harmed by the Final Rule.¹⁷

22 219. FHANC furthers its mission by counseling residents of the communities it serves about
23 their fair housing rights and how to vindicate those rights; providing community education programs
24 that inform residents of their fair housing rights; working with advocates, housing providers, tenants,
25 homeowners, homebuyers, social service providers, and others to protect the fair housing rights of the
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28 ¹⁷ A declaration describing the harm to Plaintiff FHANC can be found in Ex. C, Decl. of C. Peattie (Oct. 21, 2020).

1 clients and communities that they and FHANC both serve; training housing providers and other real
2 estate professionals how to comply with fair housing laws; filing administrative complaints with HUD
3 on behalf of FHANC and the clients and communities they serve; and litigating in court.

4 220. In its fiscal year 2019, FHANC served nearly 5,000 tenants, homeowners, homebuyers,
5 housing providers, children, social service providers, and advocates. Ninety percent were low-income.
6 Half of the people it served were Black or Latinx. Many spoke little or no English.

7 221. As part of its work, FHANC works to change rules, policies and practices that have a
8 significant disproportionate adverse impact on communities of color, families with children, and other
9 marginalized groups protected under the Fair Housing Act. FHANC counsels its clients and client
10 communities about how disparate impact law can be used to require less discriminatory alternatives to
11 policies that have discriminatory and segregative effects. Policies and practices that have significant
12 disproportionate adverse impact on the client communities that FHANC serves include occupancy
13 restrictions; criminal records bans on those seeking housing; source of income restrictions (including
14 restrictions on those seeking to use Section 8 vouchers); bank policies that have the effect of redlining
15 minority communities or targeting those communities for predatory practices; policies that result in the
16 eviction of survivors of domestic violence from their homes; and practices that result in the
17 deterioration of foreclosed properties in communities of color. These are just some of the policies,
18 rules and practices that impede fair housing in FHANC's service area and that FHANC works to
19 change.

20 222. FHANC's efforts to combat these discriminatory practices are not just limited to
21 counseling clients and the communities it serves. FHANC files administrative complaints and federal
22 litigation on behalf of these clients and client communities that use disparate-impact law to challenge
23 these practices and require less discriminatory alternatives. It advocates with housing providers, social
24 service agencies, and local governments about how to comply with disparate-impact law in ways that
25 promote its fair housing mission.

26 223. In addressing these issues and practices, FHANC relies on well-settled law, as set forth
27 in the 2013 Rule and applied for decades by courts, HUD, and state and local governments, to protect
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1 fair housing rights and pursue its mission. This is critical to the organization's efforts. HUD's Final
2 Rule will significantly interfere with FHANC's ability to conduct these activities and provide these
3 services successfully.

4 224. Core aspects of FHANC's work will be upended, curtailed, or made significantly more
5 difficult by HUD's radical revision of well-established disparate-impact law and requirements.

6 225. HUD's action makes it much more difficult, and frequently impossible, for FHANC to
7 file and prevail in lawsuits and administrative complaints. Without an effective enforcement
8 mechanism, FHANC's leverage in advocating for clients and client communities will be greatly
9 diminished.

10 226. FHANC will need to spend vastly more time and resources to explicate the confusing
11 and unclear aspects of the new Rule and what remains of fair housing obligations to clients, client
12 communities, and others that depend on FHANC to be an authoritative source of fair housing
13 information. The effectiveness of its counseling, training, and education programs will be severely
14 compromised as well. FHANC will not be able to show individuals that they have strong and
15 enforceable fair housing rights, making it much harder for FHANC's programs to accomplish the
16 purpose of empowering people to vindicate their rights and leaving many people unable to protect
17 those rights. Housing providers, meanwhile, will see that they are unlikely to be penalized for
18 maintaining policies with unnecessary disparate impact, or even for discriminating intentionally,
19 undercutting FHANC's ability to use training of housing providers to further fair housing compliance.

20 227. FHANC is already receiving requests for assistance from potential clients whose cases
21 are now more difficult if not impossible to resolve favorably because of the Final Rule. These cases
22 present familiar situations, such as buildings that exclude people with criminal records unnecessarily or
23 that evict survivors of domestic violence pursuant to overbroad eviction policies that FHANC could
24 readily resolve prior to the Final Rule.

25 228. This interference with and impairment of FHANC's ability to perform the fair housing
26 work described above will significantly harm FHANC's clients and the communities it serves. There
27 will be no redress for many violations of clients' and community members' fair housing rights because
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1 the disparate-impact law that is crucial to FHANC’s ability to achieve voluntary or compulsory
2 compliance will be eviscerated in so many critical respects. The lack of redress will, furthermore,
3 cause more violations to occur as landlords and others discover that they can easily avoid liability
4 despite discriminating.

5 229. These direct consequences of the Final Rule will impair FHANC’s ability to accomplish
6 its mission of ensuring equal housing opportunities and promoting racially integrated communities and
7 neighborhood diversity. They will cause a substantial setback to and frustration of that mission.
8 Redressing the frustration to its mission going forward will require the investment and expenditure of
9 significant new resources by FHANC to forestall and counteract conduct and violations that would not
10 occur but for the Final Rule.

11 230. The Final Rule will cause FHANC to divert its limited resources from investigations,
12 representations, and other mission-related activities that it would otherwise engage in. FHANC will
13 need to expend more resources to explain the new rule to clients and client communities and otherwise
14 counsel clients about their fair housing rights, and it likewise will have to expend more resources to
15 pursue the work that is undermined by the Final Rule.

16 231. For example, significantly more factual development will be required to file a lawsuit or
17 administrative complaint that is not quickly dismissed, or to compile a strong enough case to succeed
18 in informal advocacy with landlords. Clear violations that formerly could be remedied quickly are
19 already taking longer to resolve. In each part of its operations, FHANC will have to expend more staff
20 time and funds than previously, and so it will be able to serve fewer members of the community
21 because of this diversion of its resources.

22 **D. Harm to BLDS**

23 232. The 2020 Rule dramatically reduces any enforceable obligation for lenders and other
24 companies to evaluate their practices for disparate impact and adopt less discriminatory alternatives

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1 that would accomplish their legitimate interests. In doing so, it undercuts BLDS's core business in a
2 way that causes direct and concrete economic harm.¹⁸

3 233. BLDS is a consulting company that assists lenders and a variety of other entities in
4 performing statistical analysis.

5 234. Among the core services BLDS provides is statistical analysis to determine whether
6 policies and practices have discriminatory effects and to identify available alternatives that would
7 mitigate such discriminatory effects. BLDS is among the national leaders in this field. Its work, and the
8 work of BLDS's experts before they joined BLDS, has been cited repeatedly in judicial opinions and
9 has formed the basis of many regulatory actions and corporate decisions and policies.

10 235. BLDS's clients include institutions that engage in a variety of actions covered by the
11 Fair Housing Act, particularly with respect to the making of home loans for purchasing, constructing,
12 improving, repairing, or maintaining dwellings. BLDS has provided its services to both creditors and
13 non-creditors, including mortgage lenders, housing authorities, credit reporting agencies, and entities
14 that purchase mortgages on the secondary market. BLDS also advises parties that are contemplating
15 bringing or defending against disparate impact litigation, and its partners regularly serve as expert
16 witnesses in such litigation.

17 236. Institutions hire BLDS to perform fair lending analyses in part because they are
18 concerned about liability risks under the traditional disparate-impact standard. They face risk if their
19 policies or practices cause discriminatory effects and they fail to adopt less discriminatory alternatives.
20 Many lenders and others whose actions affect the availability of housing have adopted rigorous
21 compliance functions that monitor policies for disparate impact and seek alternatives with less
22 discriminatory results. Such companies retain the assistance of BLDS to perform and assist with these
23 functions.

24 237. To meet the needs of this market created by the traditional disparate-impact doctrine,
25 BLDS has created sophisticated proprietary tools and techniques. These tools and techniques allow
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28 ¹⁸ A declaration describing the harm to Plaintiff BLDS can be found in Ex. D, Decl. of B. Siskin (Oct. 16, 2020).

1 BLDS to assess whether policies have a disparate impact, such as disproportionately excluding people
2 of a certain race, and then identify whether potential alternatives exist that may have less
3 discriminatory effect while fulfilling the purposes of the model, *e.g.*, predicting the risk of loan default.

4 238. BLDS's proprietary methods for assessing their clients' models track the elements of
5 well-established disparate-impact law. The market for its work is intrinsically bound up with
6 longstanding precedent and regulatory guidance. That market will dry up or disappear entirely under
7 the framework advanced in HUD's rule. Without the risk of traditional disparate-impact liability, these
8 institutions would not have the same incentive to retain BLDS to assess whether their policies and
9 practices disproportionately hurt protected classes or whether less discriminatory alternatives are
10 available.

11 239. The Final Rule thus will directly reduce or destroy altogether a significant and
12 consistent existing source of revenue for BLDS.

13 240. The Final Rule also will directly reduce the value of investments that BLDS has made
14 into the analysis of machine-learning models, including investments in proprietary software, that
15 otherwise are likely to produce significantly more revenue in the future.

16 241. In the last few years, BLDS has devoted considerable resources to developing
17 proprietary methods for assessing traditional and machine-learning models to (1) determine whether
18 these models unnecessarily cause discriminatory outcomes and then (2) where necessary, develop
19 alternatives to these models that reduce discriminatory effect while fulfilling the models' purposes.

20 242. These proprietary methods for reducing the discriminatory effect of models are of
21 considerable value so long as companies face risk for failing to comply with traditional disparate-
22 impact law. Indeed, companies that perform similar services are being valued at millions of dollars by
23 investors. BLDS's methodology is implemented in easy to use and cost-effective ways that would be
24 of great use to regulators and to creditors applying the traditional disparate-impact analysis. BLDS
25 reasonably anticipates this being one of its core growth areas, and so it has invested much time and
26 money into developing methods that will make it an industry leader. These investments were made in
27 reliance on existing, consistent disparate-impact law.

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1 (b) Vacate and set aside the Final Rule;

2 (c) Award Plaintiffs their reasonable attorneys' fees and costs under 28 U.S.C. § 2412; and

3 (d) Order such other relief as this Court deems just and equitable.

4 Dated: October 22, 2020

5 Respectfully Submitted,

6 /s/ Glenn Schlactus

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