

2-2021

The Uncertain Future of the Fair Housing Act: HUD's Recent Changes to the Disparate Impact Standard

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Recommended Citation

Leah Powers, *The Uncertain Future of the Fair Housing Act: HUD's Recent Changes to the Disparate Impact Standard*, 74 SMU L. REV. F. 29 (2021)

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SMU Law Review Forum

Volume 74

February 2021

29–54

THE UNCERTAIN FUTURE OF THE FAIR HOUSING ACT: HUD'S RECENT CHANGES TO THE DISPARATE IMPACT STANDARD

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ABSTRACT

In 2013, the Department of Housing and Urban Development (HUD) published its Disparate Impact Final Rule in which it sought to formalize its longstanding interpretation of disparate impact liability under the Fair Housing Act (FHA) by setting forth a three-part burden-shifting framework. HUD subsequently revisited its disparate impact standard following the 2015 Supreme Court ruling in Inclusive Communities and published a Proposed Rule on August 19, 2019. On September 24, 2020, HUD published a new Final Rule substantially altering the disparate impact standard laid out by the 2013 Rule.

This Comment will analyze the similarities and differences between the disparate impact standard in the 2013 Rule and the standard set forth in the current, 2020 Rule. Additionally, given that the 2020 Rule was drafted in response to Inclusive Communities, this Comment will examine whether, and to what extent, the 2020 Rule is consistent with the Court's ruling. Finally, this Comment will address the criticism leveled at the 2020 Rule by fair housing advocates and explore potential consequences of the new standard. Ultimately, this Comment will argue that, although the 2020 Rule finds some textual support in Inclusive Communities for several elements of its new framework, given the broad remedial purpose of the FHA, the core mission of HUD to eradicate housing discrimination, the potential, negative consequences of the new standard, and President Biden's recent memorandum on housing discrimination, HUD should abandon the 2020 Rule and readopt the 2013 Rule.

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I. INTRODUCTION

In 2013, the Department of Housing and Urban Development (HUD) published its Disparate Impact Final Rule (2013 Rule) in which it sought to formalize its longstanding interpretation of disparate impact liability under the Fair Housing Act (FHA) by setting forth a three-part burden-shifting framework.¹ HUD subsequently revisited its disparate impact standard following a 2015 Supreme Court ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,² and published a Proposed Rule on August 19,

1. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,460 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100 (2013)).

2. *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 546

2019.³ Ultimately, on September 24, 2020, HUD published a substantially altered version of its disparate impact standard in a new Final Rule (2020 Rule).⁴

This Comment will analyze the similarities and differences between the disparate impact standard in the 2013 Rule and the standard set forth in the current, 2020 Rule. Additionally, given that the 2020 Rule was drafted in response to *Inclusive Communities*, this Comment will also examine whether, and to what extent, the 2020 Rule is consistent with the Court's ruling. Finally, this Comment will address the criticism leveled at the 2020 Rule by fair housing advocates and explore potential consequences of the new standard. Ultimately, this Comment will argue that, although the 2020 Rule finds some textual support in *Inclusive Communities* for several elements of its new framework, given the broad remedial purpose of the FHA, the core mission of HUD to eradicate housing discrimination, the potential, negative consequences of the new standard, and President Biden's recent memorandum on housing discrimination, HUD should abandon the 2020 Rule and readopt the 2013 Rule.

II. THE FAIR HOUSING ACT

A. DEVELOPMENT OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

The origins of HUD are rooted in legislation enacted in the 1930s in response to the Great Depression.⁵ The Federal Housing Administration was created in 1934 and established mortgage insurance programs to make homeownership more affordable.⁶ Several years later, in 1937, Congress passed the U.S. Housing Act which provided public housing for low-income individuals.⁷ Decades later, Congress replaced both the National Housing Agency and the Housing and Home Finance Agency with a new cabinet-level agency: HUD.⁸ Since its inception, HUD has focused on establishing housing programs that take into account various political, economic, and social issues.⁹ Accordingly, there are five main policies at the core of HUD's mission: (1) "Increasing Homeownership"; (2) "Assisting Low-Income Renters"; (3) "Improving the Physical, Social, and Economic Health of Cities"; (4) "Fighting Discrimination in Housing Markets"; and (5) "Assisting Homeless Individuals with Housing and Support Services."¹⁰

(2015).

3. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854 (proposed Aug. 19, 2019).

4. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60,288 (Sept. 24, 2020) (codified at 24 C.F.R. pt. 100).

5. K. Heidi Smucker, Comment, *No Place Like Home: Defining HUD's Role in the Affordable Housing Crisis*, 71 ADMIN. L. REV. 633, 634 (2019).

6. NAT'L LOW INCOME HOUS. COAL., ADVOCATES' GUIDE 2017: A PRIMER ON FEDERAL AFFORDABLE HOUSING & COMMUNITY DEVELOPMENT PROGRAMS ch. 1, at 5 (2017).

7. *Id.*

8. *Id.*

9. Smucker, *supra* note 5, at 634.

10. LAWRENCE L. THOMPSON, A HISTORY OF HUD 2 fig. 1.1 (2006).

B. HISTORY OF THE FAIR HOUSING ACT

Housing segregation in the United States is not the result of some historic accident but rather the decades-long result of the interaction of several dynamics, including systemic discrimination, public and private housing policies, and economic disparities.¹¹ During the Great Migration from 1910 to 1970, approximately six million African Americans migrated “from the South to urban centers in other parts of the country.”¹² In the first few decades of the twentieth century, Whites reacted to this influx of African Americans by using restrictive deed covenants, discriminatory zoning practices, and discriminatory financing tactics to prohibit African Americans from living in certain neighborhoods.¹³ Federal housing policies in the 1930s under the New Deal and the Fair Housing Administration effectively reinforced and institutionalized housing segregation and racial discrimination.¹⁴ In the next few decades, the country witnessed the continued expansion of discriminatory housing policies with the introduction of practices such as blockbusting and redlining.¹⁵ Blockbusting is a tactic employed by real estate agents in which agents convince White homeowners that minorities are moving into their neighborhood in order to instill fear in them, resulting in White flight to other neighborhoods.¹⁶ Redlining is a discriminatory practice in which banks refuse to provide loans to minorities or provide loans at substantially higher interest rates.¹⁷ Even in the 1960s, as deaths from the Vietnam War “fell heaviest upon young, poor African American and Hispanic infantrymen,”¹⁸ at home in the United States, the families of these soldiers faced continued racial discrimination in the housing market.¹⁹ Those that returned from the war were relegated to segregated veterans’ homes.²⁰

In 1967, the nation experienced one hundred sixty-four race riots in urban cities across the country.²¹ The National Guard was called in to manage several of these protests.²² The riots in Detroit, Michigan, and Newark, New Jersey, were particularly significant and resulted in thousands of people injured and widespread property damage across the cities.²³ Many citizens were concerned that

11. Valerie Schneider, *In Defense of Disparate Impact: Urban Redevelopment and the Supreme Court’s Recent Interest in the Fair Housing Act*, 79 MO. L. REV. 539, 550 (2014).

12. *The Great Migration, 1910 to 1970*, U.S. CENSUS BUREAU (Sept. 13, 2012), <https://www.census.gov/dataviz/visualizations/020/> [<https://perma.cc/AQE2-72W4>].

13. Schneider, *supra* note 11, at 550.

14. *Id.*

15. *Id.* at 551.

16. *Id.*

17. *Id.* at 551–52.

18. *History of Fair Housing*, HUD.GOV, https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutftheo/history [<https://perma.cc/5YDD-8XGN>].

19. *Id.*

20. Schneider, *supra* note 11, at 552.

21. Bethany A. Corbin, *Should I Stay or Should I Go?: The Future of Disparate Impact Liability Under the Fair Housing Act and Implications for the Financial Services Industry*, 120 PA. ST. L. REV. 421, 428 (2015).

22. *Id.* at 428–29.

23. *Id.*

the country was “rapidly approaching a state of anarchy.”²⁴ In response to the race riots and social unrest, President Lyndon B. Johnson established the National Advisory Commission on Civil Disorders (the Kerner Commission) to investigate the situation, publish a report on the causes of the unrest, and propose possible solutions.²⁵ The final report began by stating the Kerner Commission’s basic conclusion: that “[o]ur nation is moving toward two societies, one black, one white—separate and unequal.”²⁶ The Kerner Commission found that racial discrimination and segregation in employment, education, and housing were largely to blame for the social unrest.²⁷ To achieve its ultimate goal of moving toward “a single society and a single American identity,” the Kerner Commission recommended taking concrete steps to eliminate racial segregation and discrimination in employment, education, and housing.²⁸ Regarding housing in particular, the Kerner Commission suggested enacting a comprehensive federal anti-discrimination law for the sale and rental of all housing.²⁹

In the two years prior to 1968, fair housing legislation repeatedly stalled in Congress.³⁰ The National Association for the Advancement of Colored People and other civil rights organizations had thus far been unsuccessful in pushing fair housing legislation through Congress.³¹ In March 1968, housing legislation cosponsored by Senator Edward Brooke III, the first African American member popularly elected to the U.S. Senate,³² and Senator Walter Mondale, had again been blocked in the Senate.³³ However, following the release and publicity of the Kerner Commission Report, the Senate narrowly passed the FHA and sent it to the House for consideration.³⁴ But given the conservative makeup of the House, the FHA was expected to fail once again.³⁵ However, the assassination of Dr. Martin Luther King, Jr. on April 4, 1968, rapidly accelerated the Fair Housing Act’s progress in the House, which passed the bill without debate.³⁶ The bill was signed by President Johnson only seven days later on April 11, 1968.³⁷ The bill represented “the last major piece of legislation to come out of the contemporary civil rights movement.”³⁸

24. *Id.* at 429.

25. Susan T. Gooden & Samuel L. Myers, Jr., *The Kerner Commission Report Fifty Years Later: Revisiting the American Dream*, 4 RUSSELL SAGE FOUND. J. SOC. SCIS. 1, 1 (2018).

26. NAT’L ADVISORY COMM’N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

27. *Id.* at chs. 4, 8.

28. *Id.* at ch. 17.

29. *Id.*

30. *History of Fair Housing*, *supra* note 18.

31. Schneider, *supra* note 11, at 552.

32. Edward Brooke: A Featured Biography, U.S. SENATE, https://www.senate.gov/senators/FeaturedBios/Featured_Bio_Brooke.htm [<https://perma.cc/U8UB-FHXJ>].

33. Schneider, *supra* note 11, at 553.

34. Corbin, *supra* note 21, at 430.

35. *Id.*

36. *Id.*; Schneider, *supra* note 11, at 553.

37. Schneider, *supra* note 11, at 553.

38. Elizabeth Julian, *The Fair Housing Act at Fifty: Time for a Change*, 40 CARDOZO L. REV. 1133, 1134 (2019).

C. FAIR HOUSING ACT PROTECTIONS

Title VIII of the Civil Rights Act of 1968, also known as the FHA, was intended to supplement the earlier Civil Rights Act of 1964.³⁹ The FHA begins with a broad declaration that “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”⁴⁰ To further this goal, the FHA prohibits discrimination in the sale or rental of housing, in residential real estate transactions, and in the provision of brokerage services on the basis of race, color, national origin, religion, sex, familial status, or disability.⁴¹ The Secretary of HUD was granted the “authority and responsibility for administering” the FHA.⁴² The Secretary has the authority to make appropriate rules in order to administer the Act but must provide an opportunity for the public to comment on any proposed rules.⁴³

D. HUD’S INTERPRETATION OF THE FAIR HOUSING ACT

For the past several decades, HUD has interpreted the FHA to prohibit both intentional housing discrimination and facially neutral practices that have a discriminatory effect.⁴⁴ Consistent with HUD’s interpretation, the eleven federal courts of appeals that have considered the issue have also held that the FHA creates liability for discriminatory effects.⁴⁵ However, between HUD’s adjudication and the eleven federal courts of appeals, variation regarding the discriminatory effects standard soon arose because the FHA does not actually provide a specific standard for establishing discriminatory effects claims.⁴⁶ For example, although HUD has long used a three-part burden-shifting framework, the Seventh Circuit chose to use a four-factor balancing test instead.⁴⁷ The Sixth and Tenth Circuits combined a burden-shifting framework and a balancing test

39. *History of Fair Housing*, *supra* note 18.

40. 42 U.S.C. § 3601.

41. *Id.* §§ 3604–3606.

42. *Id.* § 3608(a).

43. *Id.* § 3614a.

44. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,460 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100 (2013)).

45. *Id.* at 11,462; *see, e.g.*, *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934–35 (2d Cir. 1988); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146–48 (3d Cir. 1977); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 986–87 (4th Cir. 1984); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Graoch Assocs. #33 v. Louisville/Jefferson Cnty. Metro Hum. Rels. Comm’n*, 508 F.3d 366, 371 (6th Cir. 2007); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179, 1184–85 (8th Cir. 1974); *Keith v. Volpe*, 858 F.2d 467, 482 (9th Cir. 1988); *Reinhart v. Lincoln County*, 482 F.3d 1225, 1229 (10th Cir. 2007); *Hallmark Devs., Inc. v. Fulton County*, 466 F.3d 1276, 1286 (11th Cir. 2006) (quoting *Jackson v. Okaloosa County*, 21 F.3d 1531, 1543 (11th Cir. 1994)).

46. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. at 11,460.

47. *Id.* at 11,462; *see, e.g.*, *Metro. Hous. Dev. Corp.*, 558 F.2d at 1290. The four factors include the strength of the discriminatory effect, evidence of discriminatory intent, the defendant’s interest in the challenged policy, and whether the plaintiff seeks to restrain the defendant’s action or compel the defendant to take affirmative steps. *Metro. Hous. Dev. Corp.*, 558 F.2d at 1290.

into one standard.⁴⁸ The Fourth Circuit adopted a four-factor balancing test for public defendants and a burden-shifting test for private defendants.⁴⁹

III. THE 2013 DISPARATE IMPACT FINAL RULE

A. PURPOSE OF THE 2013 RULE

In 2013, HUD published its Disparate Impact Final Rule.⁵⁰ In doing so, HUD sought to formalize its longstanding interpretation of discriminatory effects liability under the FHA.⁵¹ To provide national uniformity, HUD set forth a three-part burden-shifting framework to prove a discriminatory effects violation under the FHA.⁵² HUD hoped that establishing a formal burden-shifting framework would provide “greater clarity and predictability” for parties in understanding how the discriminatory effects standard applies in the housing context.⁵³ In its publication in the Federal Register, HUD stressed that the 2013 Rule was not intended to create new substantive law, but rather was meant to reflect discriminatory effects liability as understood by HUD, the Department of Justice, several federal agencies, and eleven federal courts of appeals.⁵⁴

B. THE THREE-PART BURDEN-SHIFTING FRAMEWORK

Under HUD’s 2013 Rule, the plaintiff had the initial burden of proving its prima facie case that the challenged practice results in a discriminatory impact on the basis of a protected characteristic under the FHA.⁵⁵ The 2013 Rule defined “[a] practice [as having] a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons,” or results in a perpetuation of housing segregation, “because of race, color, religion, sex, handicap, familial status, or national origin.”⁵⁶ If the plaintiff successfully established its prima facie case, the burden of proof then shifted to the defendant to prove that its challenged practice could be supported by a “legally sufficient justification.”⁵⁷ Such a justification included showing that the challenged practice was necessary to accomplish one of the defendant’s “substantial, legitimate, nondiscriminatory interests” and that these interests could not be accomplished by “another practice

48. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. at 11,462; see, e.g., *Graoch Assocs. #33*, 508 F.3d at 373–74 (merging the burden-shifting framework with three additional factors); *Mountain Side Mobile Ests. P’ship v. Sec’y of Hous. & Urb. Dev. ex rel. VanLoozenoord*, 56 F.3d 1243, 1252 (10th Cir. 1995) (adopting the Sixth Circuit’s disparate impact analysis framework).

49. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. at 11,462 n.33; see, e.g., *Betsey*, 736 F.2d at 988 n.5.

50. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. at 11,460.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 11,462.

55. *Id.* at 11,460; 24 C.F.R. § 100.500(c)(1) (2013) (amended 2020).

56. 24 C.F.R. § 100.500(a) (2013) (amended 2020).

57. *Id.* § 100.500(b).

that has a less discriminatory effect.”⁵⁸ If the defendant successfully carried its burden by establishing a legally sufficient justification for its practice, the burden then shifted back to the plaintiff to show that the defendant’s “substantial, legitimate, nondiscriminatory interests” could be achieved through an alternative practice that has a less discriminatory effect.⁵⁹

IV. THE 2015 SUPREME COURT RULING IN *INCLUSIVE COMMUNITIES*

In 2015, the Supreme Court addressed the question of whether disparate impact claims are cognizable under the FHA in *Inclusive Communities*.⁶⁰ Under 26 U.S.C. § 42, the federal government is able to provide low-income housing tax credits to housing developers through designated state agencies.⁶¹ In Texas, the designated state agency that distributes these tax credits is the Texas Department of Housing and Community Affairs (the Department).⁶² Inclusive Communities Project, Inc. (ICP) is a Texas-based nonprofit organization that helps low-income families secure affordable housing.⁶³ In 2008, ICP brought suit against the Department on a disparate impact claim under the FHA.⁶⁴ ICP alleged that the Department’s allocation of tax credits resulted in the perpetuation of segregated housing patterns.⁶⁵ Specifically, ICP alleged that the Department granted a disproportionately large number of tax credits in predominantly Black, inner-city areas and did not grant enough credits in predominantly White, suburban areas.⁶⁶ For example, the district court found that the Department granted tax credits for approximately fifty percent of proposed housing in predominantly non-White areas but only granted thirty-seven percent of proposed housing in predominantly White areas.⁶⁷

The district court ruled in favor of ICP and the Department appealed, during which time HUD issued its 2013 Rule and codified its burden-shifting framework.⁶⁸ The Fifth Circuit, relying on HUD’s 2013 Rule, determined that the district court had improperly placed the burden of proving alternative practices on the Department and reversed the case on the merits.⁶⁹ The Department then filed a petition for a writ of certiorari on the question of whether disparate impact claims are cognizable under the FHA.⁷⁰

In a 5-4 decision, the Supreme Court held that disparate impact claims are

58. *Id.* § 100.500(c)(2).

59. *Id.* § 100.500(c)(3).

60. 576 U.S. 519, 525 (2015).

61. 26 U.S.C. § 42(a).

62. *Inclusive Cmty.*, 576 U.S. at 525.

63. *Id.* at 526.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 527.

68. *Id.*

69. *Id.* at 527-28.

70. *Id.* at 528.

cognizable under the FHA.⁷¹ However, rather than simply relying on the burden-shifting framework from HUD's 2013 Rule, the Court based its analysis on the results-oriented language of the FHA, the Court's interpretation of similar language in Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act of 1967 (ADEA), later amendments to the FHA, and the FHA's statutory purpose.⁷² After a brief discussion of the historical context in which the FHA was enacted, the Court turned to two federal anti-discrimination laws to guide its interpretation of the FHA: Title VII and the ADEA.⁷³ The Court concluded that these two statutes demonstrate that anti-discrimination statutes must be interpreted to allow disparate impact liability when the text of the statute references the consequences of actions and when such interpretation is consistent with the purpose behind the statute.⁷⁴ Accordingly, the Court found that both Title VII and the ADEA support the finding that the FHA allows disparate impact claims.⁷⁵ The Court also considered Congressional amendments to the FHA enacted in 1988.⁷⁶ The Court argued that at the time of the amendments Congress was aware of precedent from several courts of appeals that recognized disparate impact liability under the FHA and chose to reject a proposed amendment that would have excluded disparate impact liability.⁷⁷ Finally, the Court took note of the fact that the main purpose of the FHA is to prohibit discrimination in housing.⁷⁸ Allowing disparate impact claims is therefore consistent with the statutory purpose of the FHA.⁷⁹

However, although it found disparate impact claims cognizable under the FHA, the Court was also careful to place restraints on disparate impact liability so as to avoid certain constitutional questions.⁸⁰ The Court made clear that disparate impact liability is focused on the "removal of artificial, arbitrary, and unnecessary barriers" and is not meant to displace "valid governmental policies."⁸¹ Further, the Court asserted that defendants should be given an opportunity to "explain the valid interest served by their policies."⁸² The Court also demanded a "robust causality requirement" in disparate impact claims which requires the plaintiff to identify the specific policy of the defendant that is allegedly responsible for the disparate impact.⁸³ Simply showing that a "statistical disparity" exists is insufficient if the plaintiff cannot also show that the defendant's practice actually caused the disparity.⁸⁴ The Court placed great emphasis on these safeguards at the

71. *Id.* at 545.

72. *Id.* at 530-34.

73. *Id.* at 528-33.

74. *Id.* at 533.

75. *Id.* at 533-34.

76. *Id.* at 535-38.

77. *Id.* at 535-36.

78. *Id.* at 539-40.

79. *Id.* at 540.

80. *See id.*

81. *Id.* (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

82. *Id.* at 541.

83. *Id.* at 542.

84. *Id.*

prima facie stage to prevent race from being considered in a “pervasive way.”⁸⁵ The Court cautioned against “interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.”⁸⁶ If these precautions were not taken, the Court worried that disparate impact liability would replace valid governmental and private interests instead of simply removing “artificial, arbitrary, and unnecessary barriers,” and that this would ultimately “set our Nation back in its quest to reduce the salience of race in our social and economic system.”⁸⁷ Lastly, the Court clarified that, in crafting remedial orders, lower courts should focus on eliminating the discriminatory practice and should be wary of imposing racial quotas which could have serious constitutional implications.⁸⁸

Despite the Court’s emphasis on these constraints and safeguards, Justice Kennedy concluded the opinion by returning to the purpose of the FHA and stressing that “[m]uch progress remains to be made in our Nation’s continuing struggle against racial isolation.”⁸⁹ He highlighted the important role the FHA plays in “avoiding the Kerner Commission’s grim prophecy” of a racially segregated society and recognized the FHA’s “continuing role in moving the nation toward a more integrated society.”⁹⁰ Justice Kennedy clearly understood the “need for an expansive reading of the FHA” and disparate impact liability in order to accomplish these fair housing goals.⁹¹

V. THE 2020 DISPARATE IMPACT FINAL RULE

A. PURPOSE OF THE 2020 RULE

Following the Supreme Court’s decision in *Inclusive Communities*, HUD published a Federal Register notice on May 15, 2017, seeking public input on any regulations that were potentially “outdated, ineffective, or excessively burdensome.”⁹² HUD received many comments regarding its Disparate Impact Final Rule from 2013 and the Court’s ruling in *Inclusive Communities*, and in response, HUD published an advance notice of proposed rulemaking on June 20, 2018, seeking comments on the 2013 Rule.⁹³ Based on the public comments it received, HUD subsequently published a Proposed Rule on August 19, 2019, in the Federal Register.⁹⁴ Ultimately, on September 24, 2020, HUD published a new Final Rule.⁹⁵ The 2020 Rule made slight changes to the Proposed Rule and

85. *Id.*

86. *Id.* at 543.

87. *Id.* at 544.

88. *Id.* at 544-45.

89. *Id.* at 546.

90. *Id.* at 546-47.

91. See Robert G. Schwemm, *Fair Housing Litigation After Inclusive Communities: What’s New and What’s Not*, 115 COLUM. L. REV. SIDEBAR 106, 110 (2015).

92. HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,856 (proposed Aug. 19, 2019).

93. *Id.*

94. *Id.* at 42,854, 42,857.

95. HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 85 Fed. Reg.

substantially altered the disparate impact standard laid out by the 2013 Rule.⁹⁶

According to HUD, the 2020 Rule was intended to amend the 2013 Rule to make it more consistent with the Supreme Court's 2015 ruling in *Inclusive Communities*.⁹⁷ HUD pointed out that in determining whether disparate impact claims are cognizable under the FHA, the Court in *Inclusive Communities* did not rely on HUD's 2013 Rule in reaching its holding.⁹⁸ Although the Court briefly mentioned HUD's 2013 Rule, it relied on its own analysis of the FHA and disparate impact liability.⁹⁹

B. HUD'S INTERPRETATION OF *INCLUSIVE COMMUNITIES*

In interpreting the Court's holding in *Inclusive Communities*, HUD paid particular attention to the Court's discussion of the standards for disparate impact claims, necessary constraints on such claims, and the potential constitutional questions raised by allowing broad disparate impact liability.¹⁰⁰ For instance, regarding the standard for a plaintiff's prima facie case, HUD emphasized that the Court articulated a "robust causality" requirement in which the plaintiff must specify which of the defendant's policies or practices allegedly caused the discriminatory impact.¹⁰¹

Regarding necessary constraints on disparate impact claims, HUD also pointed to the Court's assertion that disparate impact liability should be limited in a way that allows entities to make "practical business choices and profit-related decisions."¹⁰² Moreover, the Court also cautioned against adopting an interpretation of disparate impact claims that would displace "valid governmental and private priorities" and rejected a broad construction of disparate impact liability that would effectively "inject racial considerations into every housing decision."¹⁰³

Finally, HUD noted that the Court addressed potential constitutional questions that could arise from failing to impose these "adequate safeguards at the prima facie stage."¹⁰⁴ The Court warned against race being used in a "pervasive way" and strongly disapproved of the use of racial quotas in housing.¹⁰⁵ In shaping remedial orders, the Court offered some guidance to lower courts by directing them to narrowly focus their remedial orders on abolishing the "offending practice" and work to "eliminate racial disparities through race-neutral means."¹⁰⁶

60,288 (Sept. 24, 2020) (codified at 24 C.F.R. pt. 100).

96. *See id.*

97. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,854.

98. *Id.* at 42,855.

99. *See id.*

100. *See id.*

101. *Id.* (quoting *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 542 (2015)).

102. *Id.* (quoting *Inclusive Cmty.*, 576 U.S. at 533).

103. *Id.* at 42,856 (quoting *Inclusive Cmty.*, 576 U.S. at 521, 544).

104. *Id.* at 42,855 (quoting *Inclusive Cmty.*, 576 U.S. at 543).

105. *Id.* (quoting *Inclusive Cmty.*, 576 U.S. at 542).

106. *Id.* at 42,856 (quoting *Inclusive Cmty.*, 576 U.S. at 544-45).

C. THE NEW DISPARATE IMPACT FRAMEWORK

In response to public comments, HUD published its new Final Rule on September 24, 2020.¹⁰⁷ The 2020 Rule sets forth a new five-element framework for establishing a disparate impact claim under the FHA, which replaces the 2013 Rule's three-part, burden-shifting framework.¹⁰⁸ Under the 2020 Rule, plaintiffs must first identify a "specific, identifiable policy or practice" of the defendant that has a discriminatory effect on a protected class, explain how that practice causes the alleged disparate impact, and then plead sufficient facts to support each of the five elements of the new framework.¹⁰⁹ The plaintiff must prove each element by a preponderance of the evidence¹¹⁰ and may not rely solely on evidence of "statistical imbalances or disparities"; instead, the plaintiff must present sufficient evidence that is "not remote or speculative."¹¹¹

The first element of the new framework requires the plaintiff to show that the challenged policy is "arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective."¹¹² If the plaintiff successfully establishes this element, the burden then shifts to the defendant to identify a "valid interest" that the challenged policy is meant to serve.¹¹³ HUD acknowledged that under this element, plaintiffs will not always be able to anticipate what legitimate objective the defendant will put forth and therefore will have difficulty pleading this element with sufficient facts.¹¹⁴ HUD ambiguously stated that a pleading "plausibly alleging" that no legitimate objective is served by the defendant's practice would be considered sufficient.¹¹⁵ If the defendant is able to carry its burden and show that its challenged policy advances a valid interest, the burden then shifts back to the plaintiff to demonstrate, by a preponderance of the evidence, "that the interest (or interests) advanced by the defendant are not valid or that a less discriminatory alternative exists."¹¹⁶ This is a particularly heavy burden to meet as the plaintiff must show that this proposed alternative is able to "serve the defendant's identified interest (or interests) in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant."¹¹⁷

The second element requires the plaintiff to show that the challenged policy

107. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60,288, 60,288 (Sept. 24, 2020) (codified at 24 C.F.R. pt. 100).

108. *See id.*

109. 24 C.F.R. § 100.500(b)(1)-(5) (2020).

110. *Id.* § 100.500(c)(1).

111. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,860. Although the Final 2020 Rule eliminates the originally proposed "not remote or speculative" language, HUD did so only because it viewed this language as redundant. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. at 60,322.

112. 24 C.F.R. § 100.500(b)(1) (2020).

113. *Id.* § 100.500(c)(2).

114. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,858.

115. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. at 60,311.

116. 24 C.F.R. § 100.500(c)(3) (2020).

117. *Id.*

has a “disproportionately adverse effect on members of a protected class.”¹¹⁸ A “protected class” according to the FHA refers to “members of a particular race, color, religion, sex, [disability,] familial status, or national origin.”¹¹⁹ However, HUD complicated this element by clarifying that, according to its interpretation of *Inclusive Communities*, the plaintiff must not only allege that the plaintiff is a member of a protected class under the FHA and would be adversely affected by the challenged policy but also demonstrate that the challenged policy has a discriminatory effect “‘against a protected class,’ as a group.”¹²⁰

The third element requires the plaintiff to demonstrate a “robust causal link” between the challenged policy and a discriminatory effect on individuals of a protected class.¹²¹ Disparate impact claims that rely on statistical evidence cannot depend solely on the existence of a disparity and must be able to show how the challenged policy is the “actual cause of the disparity.”¹²²

The fourth element requires the plaintiff to allege that the disparate impact caused by the challenged policy is “significant.”¹²³ Even if a disparity exists, if it is not significant or material, the plaintiff will fail to satisfy this element and therefore will fail to state a claim.¹²⁴ HUD explained that, if defendants could be held liable for insignificant, non-material disparities, they would turn to using racial quotas in order to combat potential disparities and avoid disparate impact liability.¹²⁵ In support of this element, HUD pointed to language from *Inclusive Communities* that stressed the importance of avoiding the introduction of “racial considerations into every housing decision.”¹²⁶ However, HUD did not provide a definition of what constitutes a material or significant disparity; rather, HUD merely hinted that a material disparity is one that is not “negligible,” is actually caused by the discriminatory policy, and is not “attributable to chance.”¹²⁷

The fifth and final element requires that the plaintiff prove “[t]hat there is a direct relation between the injury asserted and the injurious conduct alleged.”¹²⁸ In choosing to add this element, HUD did not rely on any language from *Inclusive Communities*, but rather argued that it was simply codifying “the proximate cause requirement found under the Fair Housing Act.”¹²⁹ The FHA’s proximate cause

118. *Id.* § 100.500(b)(2).

119. HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. at 42,858 (quoting 42 U.S.C. § 3604(a)); see HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 85 Fed. Reg. at 60,314 (noting that the failure to include disability as a protected class in the Proposed Rule was an unintentional oversight).

120. HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. at 42,858 (quoting *Anderson v. City of Blue Ash*, 798 F.3d 338, 364 (6th Cir. 2015)).

121. 24 C.F.R. § 100.500(b)(3) (2020).

122. HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. at 42,858.

123. 24 C.F.R. § 100.500(b)(4) (2020).

124. HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. at 42,858.

125. *Id.*

126. *Id.* (quoting *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 544 (2015)).

127. *Id.* at 42,858–59.

128. 24 C.F.R. § 100.500(b)(5) (2020).

129. HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg.

requirement demands that a direct relationship exist between the plaintiff's injury and the challenged conduct of the defendant.¹³⁰

If a plaintiff successfully brings a disparate impact claim that meets all five elements, the 2020 Rule provides the defendant with several defenses, depending on the stage of litigation.¹³¹ At the pleading stage, the defendant "may argue that the plaintiff has failed to sufficiently plead one of the elements of the prima facie case."¹³² The defendant can also show that its conduct is "reasonably necessary to comply with a third-party requirement," such as a federal, state, or local law; binding regulation; or binding administrative order.¹³³ However, HUD failed to elaborate on what it means for a defendant's policy to be "reasonably necessary" to establish this defense.¹³⁴ HUD rationalized the inclusion of this particular defense by asserting that it allows a defendant to attack the causality element of the plaintiff's claim and works to establish that the defendant's policy is not the actual cause of the disparate impact.¹³⁵

After the pleading stage, the defendant has three defenses available.¹³⁶ The first defense pertains to the defendant's use of "predictive model[s]" and "practices that predict outcomes, such as risk analysis."¹³⁷ The defendant can show that the plaintiff failed to meet their burden of proof if "the prediction represents a valid interest" and the prediction "does not or would not have a disparate impact on protected classes compared to similarly situated individuals not part of the protected class."¹³⁸ This defense was added to the 2020 Rule by HUD as "an alternative for the algorithm defenses" set forth in the Proposed Rule.¹³⁹ In the Proposed Rule, if the plaintiff challenged a policy that relied on an algorithmic model, the defendant could defeat the plaintiff's claim through one of three ways:

- (i) Identifying the inputs used in the model and showing that these inputs are not substitutes for a protected characteristic and that the model is predictive of risk or other valid objective; (ii) showing that a recognized third party, not the defendant, is responsible for creating or maintaining the model; or (iii) showing that a neutral third party has analyzed the model in question and determined it was empirically derived, its inputs are not substitutes for a protected characteristic, the model is predictive of risk or other valid objective, and is a demonstrably and statistically sound

at 42,859.

130. See *id.* (quoting *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017)).

131. See 24 C.F.R. § 100.500(d)(1)-(2) (2020).

132. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60,288, 60,289-90 (Sept. 24, 2020) (codified at 24 C.F.R. pt. 100).

133. 24 C.F.R. § 100.500(d)(1) (2020).

134. See HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. at 60,317.

135. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,859.

136. See 24 C.F.R. § 100.500(d)(2) (2020).

137. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. at 60,290.

138. 24 C.F.R. § 100.500(d)(2)(i) (2020).

139. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. at 60,290.

algorithm.¹⁴⁰

However, HUD removed this algorithmic defense from the 2020 Rule over concerns that the defense would prove “unnecessarily broad.”¹⁴¹ Moreover, HUD noted that “there will be further development in the law in the emerging technology area of algorithms, artificial intelligence, machine learning and similar concepts” and therefore “it is premature at this time to more directly address algorithms.”¹⁴²

Next, the second defense available after the pleading stage allows the defendant to show that the plaintiff failed to prove the *prima facie* case.¹⁴³ Finally, the third defense again allows the defendant to show that its conduct was “reasonably necessary to comply with a third-party requirement.”¹⁴⁴

VI. COMPARISON OF THE 2013 RULE AND THE 2020 RULE

In order to anticipate potential consequences of the 2020 Rule, it is necessary to analyze both the ways in which the 2020 Rule and the 2013 Rule are consistent with one another and the ways in which the rules differ. At a minimum, obviously, both continue to allow for disparate impact liability under the FHA.¹⁴⁵ However, whereas the text of the 2013 Rule began with a definition of “discriminatory effect,”¹⁴⁶ the 2020 Rule removes this allegedly redundant definition from its language altogether.¹⁴⁷ Under the 2013 Rule, a discriminatory effect occurred when a policy or practice “actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns” because of a protected characteristic under the FHA.¹⁴⁸ The 2020 Rule offers no corresponding definition of discriminatory effect and HUD argues such a definition is redundant because it is effectively captured in the elements of the 2020 Rule.¹⁴⁹ However, relying on a combination of five new elements to provide a definition of discriminatory effect is much less clear than if HUD had simply set forth a concise definition. It seems unnecessary for HUD to have deleted a helpful definition from the opening language of the 2020 Rule. Without an explicit definition of arguably the most important term in the entire rule, HUD seems to have opened the door for unnecessary confusion among

140. HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. at 42,859.

141. HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 85 Fed. Reg. at 60,290.

142. *Id.*

143. 24 C.F.R. § 100.500(d)(2)(ii) (2020).

144. *Id.* § 100.500(d)(2)(iii).

145. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,460 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100 (2013)); HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 85 Fed. Reg. at 60,288.

146. 24 C.F.R. § 100.500(a) (2013) (amended 2020).

147. See 24 C.F.R. § 100.500(a) (2020); HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,858 (proposed Aug. 19, 2019).

148. 24 C.F.R. § 100.500(a) (2013) (amended 2020).

149. HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. at 42,858.

litigants.

In comparing the frameworks of the two rules, the entire three-part burden-shifting framework of the 2013 Rule is, arguably, largely captured in the first element of the 2020 Rule. Specifically, whereas the 2013 Rule required that the plaintiff prove a discriminatory effect, allowed the defendant to show a sufficient justification for the practice, and then allowed the plaintiff to show a less discriminatory alternative,¹⁵⁰ the first element of the 2020 Rule requires the plaintiff to show that the challenged policy is unnecessary to achieve a valid interest.¹⁵¹ If the defendant can show that the practice is necessary, the burden shifts back to the plaintiff to show that there is an alternative practice that does not impose a material burden on the defendant.¹⁵² However, while both rules shift the burden back to the plaintiff and allow them to demonstrate that a less discriminatory alternative exists, the 2020 Rule substantially heightens this burden by adding that the alternative must also be “equally effective” and cannot impose “greater costs” or “other material burdens” on the defendant.¹⁵³ This is a higher standard than simply showing that a less discriminatory alternative practice exists. Further, there is a notable evidentiary distinction between the two rules as well. While the 2013 Rule stated that, in showing that a sufficient justification for the challenged practice exists, the defendant may not use “hypothetical or speculative” evidence,¹⁵⁴ the 2020 Rule reverses the roles and indicates that it is the plaintiff who cannot rely solely on statistical or speculative evidence.¹⁵⁵

Beyond the initial overlap between the burden-shifting framework of the 2013 Rule and the first element of the 2020 Rule, the 2020 Rule adds significant requirements that do not correspond to any language in the 2013 Rule. For instance, the 2020 Rule requires both proximate cause and a robust causality between the disparity and the challenged practice,¹⁵⁶ but the 2013 Rule only required the plaintiff to demonstrate that the challenged policy “caused or predictably will cause” a disparate impact.¹⁵⁷ Thus, the 2020 Rule adds a heightened causality requirement for plaintiffs.

Additionally, the 2020 Rule clarifies that the challenged policy must adversely impact a protected class as a group, rather than simply showing that the plaintiff is a member of a protected group and is adversely impacted as an individual.¹⁵⁸ While the text of the 2013 Rule referred to “a disparate impact on a group of persons,”¹⁵⁹ it did not place the same emphasis on demonstrating that the protected group, rather than an individual of a protected group, is adversely

150. 24 C.F.R. § 100.500(c)(1)–(3) (2013) (amended 2020).

151. 24 C.F.R. § 100.500(b)(1) (2020).

152. *Id.* § 100.500(c)(3).

153. *Id.*

154. 24 C.F.R. § 100.500(b)(ii)(2) (2013) (amended 2020).

155. See HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,860, 42,863 (proposed Aug. 19, 2019).

156. 24 C.F.R. § 100.500(b)(3), (5) (2020).

157. 24 C.F.R. § 100.500(c)(1) (2013) (amended 2020).

158. HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. at 42,858.

159. 24 C.F.R. § 100.500(a) (2013) (amended 2020).

impacted by a challenged practice.¹⁶⁰

Finally, the 2020 Rule requires that the alleged disparate impact be significant, although HUD provides no definition or explanation of what constitutes a significant disparity.¹⁶¹ There was no corresponding significance requirement in the text of the 2013 Rule, rather, the plaintiff had to prove only that the challenged practice either “predictably results in a disparate impact” or results in a perpetuation of housing segregation.¹⁶² The 2013 Rule made no distinction between so-called significant and insignificant disparate impacts.

Besides these significant differences in the frameworks, the 2020 Rule also includes specific defenses that the defendant may use to rebut the plaintiff's claim both at the pleading stage and after the pleading stage.¹⁶³ The 2013 Rule included no such advantages for the defendant; rather, the 2013 Rule merely allowed the defendant to rebut the plaintiff's claim by proving that the challenged practice is necessary to one of its “substantial, legitimate, nondiscriminatory” interests.¹⁶⁴

The two rules also appear to be motivated by different policy concerns and reflect different conceptions of the FHA's purpose and its proper role in combating housing discrimination. Specifically, comparing the Federal Register publications of the 2013 Rule, the Proposed Rule, and the 2020 Rule reveals key differences in the way the FHA is framed. These different conceptions of the FHA's purpose shed light on the rationale behind certain differences in the two rules. The 2013 Rule highlighted the “broad remedial intent” of the FHA and its prohibition of both intentional discrimination and practices with discriminatory effects.¹⁶⁵ It emphasized that the text of the FHA is “broad and inclusive” and should be interpreted as such in order to effectively combat housing segregation, end racial discrimination, achieve racial integration, and promote equal opportunity.¹⁶⁶ While the Proposed Rule also briefly acknowledged the “broad and inclusive” language of the FHA, it moved on from this discussion quickly and instead placed significant emphasis on language from *Inclusive Communities* that stressed the importance of safeguards and constraints on disparate impact liability at the prima facie stage.¹⁶⁷ Specifically, HUD cited the Court's warning against forcing defendants to resort to the use of racial quotas in an effort to avoid FHA liability.¹⁶⁸ HUD argued that, without such safeguards, disparate impact liability would effectively set “our Nation back in its quest to reduce the salience of race in our social and economic system.”¹⁶⁹ This brief discussion of the FHA and

160. See *id.*

161. See 24 C.F.R. § 100.500(b)(4) (2020); HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,858.

162. 24 C.F.R. § 100.500(a) (2013) (amended 2020).

163. 24 C.F.R. § 100.500(d)(1)-(2) (2020).

164. 24 C.F.R. § 100.500(c)(2) (2013) (amended 2020).

165. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,461 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100 (2013)).

166. *Id.*

167. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,855 (proposed Aug. 19, 2019).

168. *Id.* (citing *Tex. Dep't of Hous. and Cmty. Affairs Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 542-43 (2015)).

169. *Id.* (quoting *Inclusive Cmty.*, 576 U.S. at 544)).

repeated emphasis on safeguards is consistent with, and partly explains the rationale behind, the heightened requirements for the plaintiff and newly available defenses for defendants. In the 2020 Rule, HUD went even further and declared that it was “exercising its discretion” in interpreting the FHA’s disparate impact standard in this new, more demanding way.¹⁷⁰

VII. COMPARISON OF THE 2020 RULE AND THE SUPREME COURT’S RULING IN *INCLUSIVE COMMUNITIES*

Given that HUD allegedly proposed its new disparate impact rule in order to comply with the Court’s ruling in *Inclusive Communities*, it is necessary to evaluate whether, and to what extent, the 2020 Rule is consistent with the ruling. At a minimum, both the 2020 Rule and the ruling in *Inclusive Communities* hold that disparate impact liability is available under the FHA.¹⁷¹ While the Court in *Inclusive Communities* did not set forth a specific standard for bringing a disparate impact claim, it did examine several considerations and constraints that it believed should be incorporated into a disparate impact standard.¹⁷² Although the 2020 Rule manages to incorporate several of these considerations and constraints into its new five-part framework, it does so in a manner that imposes heightened standards for plaintiffs above and beyond what is required by *Inclusive Communities*.

The 2020 Rule’s first element, which requires a plaintiff to show the challenged practice is “arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective,”¹⁷³ is consistent with the Court’s direction that disparate impact liability should be focused on the “removal of artificial, arbitrary, and unnecessary barriers” and is not meant to displace “valid governmental policies.”¹⁷⁴ HUD lifted the language for this first element right out of *Inclusive Communities*. HUD argued that this first element is consistent with the Court’s instruction that disparate impact liability should not be construed too broadly or prevent parties from “achieving legitimate objectives.”¹⁷⁵ Further, consistent with language from *Inclusive Communities*, the 2020 Rule gives defendants the opportunity to justify their challenged policy and show that it is necessary to advance a valid interest.¹⁷⁶ The Court stated that allowing a defendant to justify its challenged policy is important because it ensures disparate impact claims are “properly limited” so as to avoid constitutional issues.¹⁷⁷ However, in rebutting the defendant’s justification for its challenged practice, *Inclusive Communities*—relying on Title VII and ADEA precedent—only requires that a plaintiff

170. HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 85 Fed. Reg. 60,288, 60,289 (Sept. 24, 2020) (codified at 24 C.F.R. pt. 100).

171. See 24 C.F.R. § 100.500(a) (2020); *Inclusive Cmty.*, 576 U.S. at 545–46.

172. *Inclusive Cmty.*, 576 U.S. at 540–45.

173. 24 C.F.R. § 100.500(b)(1) (2020).

174. See *Inclusive Cmty.*, 576 U.S. at 540 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

175. HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,858 (proposed Aug. 19, 2019).

176. See 24 C.F.R. § 100.500(c)(2) (2020).

177. *Inclusive Cmty.*, 576 U.S. at 540.

demonstrate that a less discriminatory alternative practice exists; it does not impose the same heightened requirements found in the 2020 Rule.¹⁷⁸ Thus, although the 2020 Rule still allows the plaintiff to rebut the defendant's justification for its challenged practice, HUD chose to heighten the standard for plaintiffs when it crafted the 2020 Rule.

The second element requires a showing that the challenged practice disproportionately and adversely affects not just a member of a protected class as an individual, but members of a protected class as a group.¹⁷⁹ HUD claimed this element is consistent with *Inclusive Communities* but has not explained how it is consistent or what language from the ruling it relies upon.¹⁸⁰ In examining the Court's reasoning, there does not appear to be any discussion of this "individual of a protected group" versus "protected group" distinction that the 2020 Rule adopts. Thus, it appears that, contrary to what HUD asserted, this particular element finds no support in *Inclusive Communities*.

The third element, which requires that the plaintiff demonstrate a "robust causal link between the challenged policy or practice and the adverse effect on members of a protected class," is seemingly consistent with *Inclusive Communities* and lifts this language right out of the Court's decision.¹⁸¹ The Court's "robust causality requirement" demanded that the plaintiff identify the specific policy responsible for the disparity at issue.¹⁸² Under both the holding and the 2020 Rule, simply showing the existence of a statistical disparity is insufficient if the plaintiff cannot also show that the challenged practice is actually responsible for causing the disparity.¹⁸³ The Court believed this causality requirement would help prevent defendants from facing liability for racial disparities that they were not responsible for creating.¹⁸⁴

The fourth element requires that the alleged disparity be significant.¹⁸⁵ In drafting this new significance requirement, HUD relied on language from *Inclusive Communities* that warned lower courts against reading disparate impact liability in such a broad manner that would force defendants to turn to racial quotas and effectively introduce racial considerations into all housing situations.¹⁸⁶ In order to avoid such an expansive reading of disparate impact liability, HUD chose to add a requirement that the disparity at issue be significant.¹⁸⁷ Thus, this element

178. See *id.* at 533; 24 C.F.R. § 100.500(c)(3) (2020); see also HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,859.

179. See 24 C.F.R. § 100.500(b)(2) (2020); HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,858.

180. See HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,858; HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60,288, 60,313-14 (Sept. 24, 2020) (codified at 24 C.F.R. pt. 100).

181. See 24 C.F.R. § 100.500(b)(3) (2020); *Inclusive Cmty.*, 576 U.S. at 542; see also HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,858.

182. *Inclusive Cmty.*, 576 U.S. 519 at 542.

183. See *id.*; HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,858.

184. See *Inclusive Cmty.*, 576 U.S. 519 at 542.

185. 24 C.F.R. § 100.500(b)(4) (2020).

186. See HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,858; *Inclusive Cmty.*, 576 U.S. 519 at 545.

187. See HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed.

finds support in the text of *Inclusive Communities* although the Court itself does not use any such language regarding significance.¹⁸⁸ Additionally, as discussed previously, HUD's 2020 Rule does not provide a definition of what constitutes a significant disparity.¹⁸⁹ The only hint that HUD provided is that a significant disparity is not "negligible" and is actually caused by the defendant's practice.¹⁹⁰

The fifth and final element requires the plaintiff to show that "there is a direct relation between the injury asserted and injurious conduct alleged."¹⁹¹ This element seems strangely redundant given that the third element requires a robust causal link between the challenged policy and the disparate impact.¹⁹² However, HUD attributes this element to the FHA's proximate cause requirement, rather than to any language from *Inclusive Communities*.¹⁹³ But, given that the fifth element is so similar to the third element, it is arguably consistent with the *Inclusive Communities* causality requirement as well.

While the 2020 Rule does find support in the language of *Inclusive Communities* for several of its five elements, it also goes further than *Inclusive Communities* by including specific defenses for the defendant to use in defeating a plaintiff's prima facie case.¹⁹⁴ HUD argued that the first defense, in which the defendant can show its conduct was limited by a third party requirement, goes to rebut the causal link between the defendant's conduct and the disparate impact.¹⁹⁵ However, while the causality requirement is supported by language from *Inclusive Communities*, this particular defense refuting that requirement is not included in the Court's reasoning. Similarly, the outcome prediction defense, which replaced the algorithmic model defense from the Proposed Rule, is not rooted in any language from *Inclusive Communities*.¹⁹⁶ HUD went far beyond the text of *Inclusive Communities* in creating these advantages for defendants.

Finally, in shaping a remedy for a disparate impact violation, HUD relied on language from *Inclusive Communities* which directed lower courts to shape their remedial orders narrowly and focus on eliminating the discriminatory practice and disparities through "race-neutral means."¹⁹⁷ The 2020 Rule states that "remedies should be concentrated on eliminating or reforming the discriminatory practice so as to eliminate disparities between persons in a particular protected

Reg. at 42,858.

188. See *Inclusive Cmty.*, 576 U.S. 519 at 541-43.

189. See HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,858; HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60,288, 60,314 (Sept. 24, 2020) (codified at 24 C.F.R. pt. 100).

190. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,858.

191. 24 C.F.R. § 100.500(b)(4) (2020).

192. *Id.* § 100.500(b)(3).

193. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,859.

194. See 24 C.F.R. § 100.500(d)(1)-(2) (2020).

195. *Id.* § 100.500(d)(1); HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,859.

196. 24 C.F.R. § 100.500(d)(2)(i) (2020).

197. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,856; *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 544 (2015).

class and other persons”¹⁹⁸—reiterating HUD’s previous emphasis on construing disparate impact liability narrowly and avoiding the introduction of racial considerations when possible.

VIII. POTENTIAL CONSEQUENCES OF THE 2020 RULE

A. CRITICISM OF THE 2020 RULE

Despite finding support in *Inclusive Communities* for several of its new elements, the 2020 Rule has been met with sharp criticism by those who believe it will have negative consequences for the future of disparate impact liability and will interfere with the FHA’s goal of eliminating racial discrimination and segregation in America.¹⁹⁹ Among the critics’ main arguments are concerns that the 2020 Rule departs from decades of relatively consistent judicial and agency precedent, that it is inconsistent with the Supreme Court’s ruling in *Inclusive Communities*, and that it undermines a crucial aspect of civil rights law.²⁰⁰ There are also evidentiary concerns that the 2020 Rule significantly heightens the burden of proof for plaintiffs and demands that plaintiffs plead an unreasonable amount of evidence to satisfy each element before reaching the discovery phase.²⁰¹

B. THE 2020 RULE DEPARTS FROM PRECEDENT

Some critics of the rule, such as the United States Commission on Civil Rights, argue that the 2020 Rule departs from decades of judicial precedent and the Supreme Court’s decision in *Inclusive Communities*.²⁰² To these critics, the Court affirmed decades of precedent from the federal courts of appeals regarding disparate impact liability and did not set forth any new substantive law in *Inclusive Communities*.²⁰³ Further, it was upon this decades-long precedent that HUD based its burden-shifting framework and the 2013 Rule in the first place, thus rendering the creation of the new 2020 Rule unnecessary.²⁰⁴ Additionally, in the years since *Inclusive Communities*, several federal courts of appeals have found that the Court actually embraced HUD’s 2013 Rule framework in *Inclusive Communities*.²⁰⁵ The Second Circuit found that the Supreme Court implicitly adopted HUD’s framework by placing the burden of proving a less discriminatory alternative on

198. 24 C.F.R. § 100.500(f) (2020).

199. See, e.g., Kriston Capps, *How HUD Could Dismantle a Pillar of Civil Rights Law*, CITY LAB (Aug. 16, 2019, 11:34 AM), <https://www.citylab.com/equity/2019/08/fair-housing-act-hud-disparate-impact-discrimination-lenders/595972/> [<https://perma.cc/PUR6-26H6>].

200. U.S. Comm’n on C.R., Comment Letter in Opposition to Notice of Proposed Rulemaking re HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard 2 (Oct. 18, 2019), <https://www.usccr.gov/press/2019/10-18-HUD-Disparate-Impact-Proposed-Rule.pdf> [<https://perma.cc/A635-RM8G>] [hereinafter Opinion Letter].

201. See *id.*; Capps, *supra* note 199.

202. Opinion Letter, *supra* note 200, at 2.

203. *Id.* at 5.

204. *Id.* at 5–6; Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,460 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100 (2013)).

205. Opinion Letter, *supra* note 200, at 5–6.

the plaintiff rather than the defendant.²⁰⁶ Similarly, the Ninth Circuit interpreted *Inclusive Communities* to adopt a burden-shifting framework by requiring that a defendant in a disparate impact action demonstrate that its challenged policy has a sufficient justification in order to carry its burden of proof.²⁰⁷ In litigation subsequent to the *Inclusive Communities* decision, HUD itself made comments that *Inclusive Communities* and the 2013 Rule are “entirely consistent” with each other.²⁰⁸ Indeed, HUD even argued that “nothing in *Inclusive Communities* casts any doubt on the validity of the Rule,” insisting that the Supreme Court even “cited the Rule twice in support of its analysis.”²⁰⁹ As further proof of the consistency between the 2013 Rule and the Court’s ruling, HUD pointed to the fact that in applying the Court’s reasoning on remand, the district court concluded that the 2013 Rule’s burden-shifting framework was the correct standard to be applied for disparate impact liability.²¹⁰ Given that the 2013 Rule was consistent with decades-long interpretation by HUD and with precedent from eleven federal courts of appeals, the substantially different framework introduced by the 2020 Rule will likely lead to confusion among parties in the housing industry, unpredictability in the courts, and increased litigation over the precise meaning of the new standard.²¹¹

C. IMPORTANCE OF DISPARATE IMPACT LIABILITY IN CIVIL RIGHTS LAW

Advocates of disparate impact liability argue that it is an important tool of civil rights law because housing discrimination and racial segregation give rise to, and are often intertwined with, other forms of discrimination such as education and employment discrimination.²¹² Because homeownership is an important source of household wealth, strong housing protections are also important to close the wealth gap between Whites and non-Whites.²¹³ For the average American household, housing equity accounts for roughly two-thirds of total household wealth.²¹⁴ Recent data has indicated that Black households have ten times less wealth than White households.²¹⁵ Disparate impact liability is a critical tool in rooting out housing discrimination “[b]ecause direct proof of subjective intent is

206. *Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016).

207. *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 512–13 (9th Cir. 2016).

208. Defendants’ Opposition to Plaintiff’s Motion for Leave to Amend Complaint at 9, Prop. Cas. Insurers Ass’n of Am. v. Donovan, 66 F. Supp. 3d 1018 (N.D. Ill. 2014) (No. 1:13-CV-08564).

209. *Id.* (emphasis in original).

210. *Id.*

211. See Shaun Donovan, *The Trump Administration Is Clearing the Way for Housing Discrimination*, N.Y. TIMES (Jan. 22, 2020), <https://www.nytimes.com/2020/01/22/opinion/fair-housing-act-trump.html> [<https://perma.cc/2MB9-AZDV>].

212. Opinion Letter, *supra* note 200, at 3.

213. Donovan, *supra* note 211.

214. Janelle Jones, *The Racial Wealth Gap: How African-Americans Have Been Shortchanged Out of the Materials to Build Wealth*, ECON. POL’Y INST.: WORKING ECON. BLOG (Feb. 13, 2017, 12:01 PM), <https://www.epi.org/blog/the-racial-wealth-gap-how-african-americans-have-been-shortchanged-out-of-the-materials-to-build-wealth/> [<https://perma.cc/QU3F-BGDX>].

215. WILLIAM DARITY JR., DARRICK HAMILTON, MARK PAUL, ALAN AJA, ANNE PRICE, ANTONIO MOORE & CATERINA CHIOPRIS, *WHAT WE GET WRONG ABOUT CLOSING THE RACIAL WEALTH GAP* 7–8 (2018).

likely to be unavailable” to plaintiffs.²¹⁶ Weakening the method by which plaintiffs can challenge housing discrimination will perpetuate segregated housing patterns, exacerbate other forms of discrimination, and help preserve the current racial wealth gap among American households.²¹⁷

D. THE 2020 RULE INCREASES THE BURDEN OF THE PLAINTIFF

Other critics oppose the 2020 Rule because they believe it significantly increases the plaintiff's burden in a way that potentially prohibits them from being able to bring disparate impact claims.²¹⁸ This heightened standard for the plaintiff is apparent at the outset simply by observing the fact that the 2020 Rule replaces the 2013 Rule's three-part burden-shifting framework with a much more rigorous five-element framework and builds in extra defenses for defendants but provides no corresponding advantages for the plaintiff.²¹⁹ According to the 2020 Rule, a plaintiff must prove each element by a preponderance of the evidence.²²⁰ Forcing plaintiffs to plead substantial evidence to meet each of the five elements before getting to the discovery phase greatly weakens the use of disparate impact liability as a tool to eliminate housing discrimination.²²¹ Moreover, under the 2013 Rule, the plaintiff only had to prove that the challenged policy had a discriminatory effect, and then the burden would shift to the defendant to provide a legally sufficient justification for its challenged practice.²²² Yet under the first element of the 2020 Rule, this burden is reversed, and it is the plaintiff who must demonstrate that the defendant's challenged practice does not achieve a valid interest or legitimate objective.²²³ HUD even acknowledged in the preamble to the Proposed Rule that plaintiffs will likely fail at the outset in identifying a “specific, identifiable, policy or practice” that has a discriminatory effect because single events will likely not qualify as a “policy or practice” for purposes of the rule.²²⁴ HUD made this declaration despite the fact that the Court in *Inclusive Communities* viewed certain singular events as sufficient basis to bring a disparate impact claim and despite the fact that two other federal courts of appeals have ruled similarly to *Inclusive Communities* on this issue.²²⁵

E. THE 2020 RULE IS INCONSISTENT WITH THE PURPOSE OF THE FHA

Finally, and perhaps most importantly, the 2020 Rule is inconsistent with both the purpose of the FHA and HUD's core mission. The FHA opens with the broad

216. Brief of Massachusetts as Amici Curiae in Support of Respondent at 16–18, *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519 (2015) (No. 13–1371).

217. See Opinion Letter, *supra* note 200, at 3.

218. *Id.* at 7.

219. See 24 C.F.R. § 100.500(b)(1)–(5), (d)(1)–(2) (2020).

220. *Id.* § 100.500(c)(1)–(c)(3).

221. Opinion Letter, *supra* note 200, at 6–7.

222. See 24 C.F.R. § 100.500(c)(1)–(2) (2013) (amended 2020).

223. See 24 C.F.R. § 100.500(b)(1) (2020).

224. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,858 (proposed Aug. 19, 2019).

225. Opinion Letter, *supra* note 200, at 8.

declaration that it is “the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”²²⁶ The FHA was enacted after decades of overt racial discrimination in the housing market and in response to the somber recognition that “[o]ur nation is moving toward two societies, one black, one white—separate and unequal.”²²⁷ HUD echoes this fair housing goal and was specifically founded with the mission of eradicating racial discrimination in housing.²²⁸ HUD specifically acknowledged in the 2013 Rule that the FHA has a “broad remedial intent” aimed at eradicating discrimination in the housing industry.²²⁹ In concluding his opinion in *Inclusive Communities*, Justice Kennedy stressed that the “FHA must play an important part in avoiding the Kerner Commission’s grim prophecy” and emphasized that the FHA has a “continuing role in moving the Nation toward a more integrated society.”²³⁰ By significantly heightening the burden for the plaintiff and providing extra advantages for the defendant, the 2020 Rule makes it harder for plaintiffs to successfully bring disparate impact claims. Disparate impact liability has long been viewed as a crucial tool to root out covert discrimination in housing. By effectively preventing plaintiffs from challenging discriminatory practices on the basis of disparate impact, the 2020 Rule undermines the purpose of the FHA and thwarts the eradication of housing discrimination.

IX. RECENT DEVELOPMENTS

A. FEDERAL LITIGATION

It is also worth noting that, since the publication of the 2020 Rule, there have been a series of federal lawsuits challenging the new standard. Housing advocates have brought cases in California,²³¹ Connecticut,²³² and Massachusetts.²³³ Most notably, the U.S. District Court for the District of Massachusetts granted a preliminary injunction staying the implementation of the 2020 Rule on October 25, 2020—just one day before the rule was scheduled to take effect.²³⁴ The Massachusetts Fair Housing Center and Housing Works, Inc. sought to vacate the 2020 Rule under the Administrative Procedure Act (APA).²³⁵ The Plaintiffs set forth three arguments: “(1) the 2020 Rule is ‘contrary to law’; (2) the changes to the 2013 Rule are ‘arbitrary and capricious’; and (3) the 2020 Rule’s inclusion of the ‘outcome prediction defense,’ to be codified at 24 C.F.R § 100.500(d)(2)(i),

226. 42 U.S.C. § 3601.

227. NAT’L ADVISORY COMM’N ON CIV. DISORDERS, *supra* note 26.

228. THOMPSON, *supra* note 10, at 2.

229. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,461 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100 (2013)).

230. Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc., 576 U.S. 519, 546–47 (2015).

231. Nat’l Fair Hous. All. v. Carson, No. 20-07388 (N.D. Cal. filed Oct. 22, 2020).

232. Open Cmty. All. v. Carson, No. 20-01587 (D. Conn. filed Oct. 22, 2020).

233. Mass. Fair Hous. Ctr. v. U.S. Dep’t of Hous. & Urb. Dev., No. 20-11765, 2020 U.S. Dist. LEXIS 205633, at *1 (D. Mass. Oct. 25, 2020).

234. *Id.* at *21.

235. *Id.* at *10.

violates the APA's 'notice and comment' requirements."²³⁶ The court addressed only the second argument and concluded that the Plaintiffs demonstrated "a substantial likelihood of success on the merits as to their claim that the 2020 Rule is arbitrary and capricious under the APA."²³⁷ The court found that the "significant alterations" in the 2020 Rule "run the risk of effectively neutering disparate impact liability under the Fair Housing Act" and "appear inadequately justified" by HUD.²³⁸ Moreover, the court found that the "2020 Rule's massive changes pose a real and substantial threat of imminent harm . . . by raising the burdens, costs, and effectiveness of disparate impact liability."²³⁹ After balancing the potential harm and public interest, the court granted a preliminary injunction staying implementation of the 2020 Rule and enjoining its enforcement.²⁴⁰ Thus, the effective date of the 2020 Rule has been postponed until the court reaches a final judgment on the Plaintiffs' APA claims.²⁴¹

B. PRESIDENT BIDEN'S MEMORANDUM ON HOUSING DISCRIMINATION

On January 26, 2021, just days after assuming office, President Biden issued a memorandum directing the Secretary of HUD to "examine the effects" of the 2020 Rule and "take any necessary steps" to "affirmatively [further] fair housing."²⁴² President Biden began the memorandum with an acknowledgment of the federal government's role in "systematically implement[ing] racially discriminatory housing policies."²⁴³ He recognized that despite the passage of the FHA, "access to housing and the creation of wealth through homeownership have remained persistently unequal" and understands that the government "has a critical role to play in overcoming and redressing this history of discrimination."²⁴⁴ He interprets the language of the FHA as "not only a mandate to refrain from discrimination but a mandate to take actions that undo historic patterns of segregation and other types of discrimination and that afford access to long-denied opportunities."²⁴⁵ He set forth the policy of his administration as follows:

Accordingly, it is the policy of my Administration that the Federal Government shall work with communities to end housing discrimination, to provide redress to those who have experienced housing discrimination, to eliminate racial bias and other forms of discrimination in all stages of homebuying and renting, to lift barriers that restrict housing and neighborhood choice, to promote diverse and inclusive communities, to ensure sufficient physically accessible housing, and to secure equal access to housing

236. *Id.* at *15.

237. *Id.* at *18–19.

238. *Id.* at *18.

239. *Id.* at *19.

240. *Id.* at *20.

241. *Id.*

242. Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, 2021 DAILY COMP. PRES. DOC. 202100090, at 2 (Jan. 26, 2021).

243. *Id.* at 1.

244. *Id.* at 1–2.

245. *Id.* at 2.

opportunity for all.²⁴⁶

Thus, in light of this policy agenda, President Biden called upon the Secretary of HUD to reexamine the 2020 Rule.

X. CONCLUSION

Although the 2020 Rule arguably finds textual support in the language of *Inclusive Communities* for several of its five elements, HUD made the deliberate choice to go beyond the Court's language in crafting its new standard. By heightening the plaintiff's burden even further than required by the Court's ruling and providing advantageous new defenses for defendants, HUD has greatly reduced the effectiveness of disparate impact liability as a tool to fight housing discrimination. In light of the broad remedial intent of the FHA, the core mission of HUD to eradicate housing discrimination, decades of disparate impact precedent, various negative consequences of the new standard, and President Biden's recent memorandum on housing discrimination, HUD should abandon the 2020 Rule and readopt the 2013 Rule.

246. *Id.*