PUBLIC JUSTICE
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February 13, 2026

Via Online Submission

Regulations Division
Office of the General Counsel
Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410-0500

Re: HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, Docket No. FR–6540–P–01, RIN 2529–AB09

Dear Sir or Madam:

Public Justice, a non-profit legal advocacy organization dedicated to protecting civil, consumer, and workers' rights, submits this comment in opposition to the U.S. Department of Housing and Urban Development's (HUD's) Notice of Proposed Rulemaking (Notice) regarding the removal of HUD's Fair Housing Act's (FHA) discriminatory effects regulations from the Code of Federal Regulations, in furtherance of HUD's policy of refusing to fully enforce the Fair Housing Act with respect to disparate impact.

Our opposition to the Proposed Rule is closely tied to Public Justice's broad efforts to ensure disparate impact theories may be used to combat facially neutral policies and practices that adversely affect people based on their race, sex, age, disability, or other protected traits. Public Justice is committed to protecting this important avenue of relief. For example, Public Justice represents three Amazon delivery drivers in a class action suit against Amazon.com for its failure to provide reasonable access, which created a disparate impact on female drivers. Public Justice also represented the named plaintiff in a related suit against the Equal Employment Opportunity Commission challenging that agency's policy to stop investigating disparate impact claims. Additionally, Public Justice has filed an amicus brief on behalf of the National Fair Housing Alliance, the Center for Responsible Lending, and local fair housing groups explaining the disparate impact of blanket criminal background bans in housing. And Public Justice joined other disability rights organizations in filing an amicus brief in a Supreme Court case concerning discrimination on the basis of disability under Section 504 of the Rehabilitation Act and discrimination in access to health insurance under the Affordable Care Act.

Most relevant to this Proposed Rule, Public Justice believes firmly that all individuals and families deserve to have access to the housing they need without facing unfair discrimination. This is equally true whether that discrimination takes the form of disparate treatment based on race, national origin, religion, sex, disability, or familial status, or whether it is manifested in the kinds of hidden, sometimes subtle forms of discrimination against which the disparate impact standard, as codified in HUD's current regulation and based in over 50 years of legal precedent, has been successful in combatting. The existing disparate impact standard is a vital tool to ensure that the

housing market operates in a manner that is free from discrimination. This, in turn, is fundamental to the social and economic vitality of communities nationwide.

Disparate impact liability is a particularly critical tool for the FHA to fulfill its purpose of combating modern forms of discrimination. While *de jure* racial discrimination has been unlawful for nearly half a century, "its vestiges remain today" with many cities continuing to be de facto segregated by race, and, with that, unequal access to jobs, transportation, and adequate housing.[1] Meanwhile, modern discrimination takes more subtle and covert forms, often disguised as neutral, or even well-intentioned, practices. But sometimes, "good intent or absence of discriminatory intent" does not capture the "built-in headwinds" that work against minority groups.[2] Disparate impact liability recognizes that fact: Our antidiscrimination laws must proscribe "not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[3]

I. Facially neutral criminal background bans have discriminatory effects on families of color.

One example of a facially neutral, seemingly well-intentioned practice that has a discriminatory impact on the ability of families to secure housing is housing providers screening out any prospective tenant with a criminal background. Though such facially neutral bans may appear to be a useful screening tool, studies have repeatedly found that a criminal record is a poor indicator of whether someone will be a good tenant.[4] For example, one study found that having a felony conviction that is over 5 years old or a misdemeanor conviction that is over 2 years old has no significant effect on the risk that the tenant will have a negative outcome.[5]

Not only are criminal background bans not useful for ascertaining whether someone will be a good tenant, they also have a disproportionate negative impact on families of color. Due to vestiges of overt discrimination, including over policing and pervasive inequalities in the legal system, Black people are disproportionately likely to have a criminal record. As of 2010, approximately 23% of Black adults and a staggering 33% of Black adult men had a felony conviction on their record, as compared to 8% of adults as a whole.[6]

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[1] *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Comtys. Project, Inc.*, 576 U.S. 519, 528-30 (2015).

[2] *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

[3] *Texas Dep't of Hous. & Cmty. Affs.*, 576 U.S. at 528.

[4] Daniel K. Malone, *Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavior Health Disorders*, 60 J. Psych. Servs. 224-30 (Feb. 2009), https://ps.psychiatryonline.org/doi/epdf/10.1176/ps.2009.60.2.224; Cael Warren, *Success in Housing: How Much Does Criminal Background Matter?*, Wilder Research (Jan. 2019), https://www.wilder.org/sites/default/files/imports/AEON_HousingSuccess_CriminalBackground _Report_1-19.pdf.

[5] Warren, *Success in Housing*, at 20.

[6] Sarah Shannon, et al., *The Growth, Scope and Spatial Distribution of People with Felony Records in the United States, 1948-2010*, 54 Demography 1795 (Oct. 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5996985/.

Black and Latino people are disproportionately arrested[7] and disproportionately more likely to be jailed pending trial than similarly situated White defendants.[8] And because they are disproportionately more likely to be jailed pending trial, they are also more than twice as likely to plead guilty.[9]

The high proportion of Black men with criminal convictions, can reenforce stereotypes that members of these groups are more likely to be engaged in illegal behavior. But the data tells a more complicated story, beginning with asymmetries in police encounters. A study of New York's now-infamous "stop and frisk" policy throughout the early 2000s found that Black people were more than twice as likely as white people to be stopped on the street by police, even after controlling for the level of crime in the neighborhood.[10] Moreover, the "hit rate" of these stops—the likelihood that stops would lead to discovery of drugs or other contraband and thus to an arrest—declined from 15% to 4% between 1998 and 2006, and was lower for Black people than for white people.[11]

A more recent study of nearly 100 million traffic stops conducted by 21 state patrol agencies and 35 municipal police departments across the country found that Black drivers were less likely to be stopped after sunset, when the "veil of darkness" prevented officers from identifying them by race.[12] This same study found that traffic stops were more likely to lead to searches for contraband, on the basis of less evidence, for Black and Latino drivers than for white drivers.[13] This tendency of Black and Latino drivers to be disproportionately stopped and searched by police explains, at least in part, why Black people have historically been arrested for drug crimes at much higher rates than white people despite data showing that Black and white people are roughly equally likely to use and sell drugs.[14]

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[7] *Uniform Crime Reporting Program, Table 43, Arrests by Race and Ethnicity,* 2019 (2019), Federal Bureau of Investigation, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.- 2019/topic-pages/tables/table-43. Christine Tamir, et al., *Facts about the U.S. Black Population, Pew Research Center* (Mar. 25, 2021), https://www.pewresearch.org/social-trends/fact-sheet/facts-about-the-us-black-population/. *Compare Table 43, Uniform Crime Reporting Program* (19.1% of arrestees for whom ethnicity provided were Hispanic) with Luis Noe-Bustamonte et al., *US Hispanic Population Reached New High in 2019, but Growth Slowed,* Pew Research Center (July 7, 2020), https://www.pewresearch.org/fact-tank/2020/07/07/u-s-hispanic-population-surpassed-60- million-in-2019-but-growth-has-slowed/ (Hispanics made up 18% of U.S. population in 2019).

[8] John R. Sutton, *Structural Bias in the Sentencing of Felony Defendants*, 42 Social Science Research 1207 (2013).

[9] *Id.* at 1215.

[10] Jeffrey Fagan, et al., *Street Stops and "Broken Windows" Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, in RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS, Stephen K. Rice & Michael D. White, Eds., New York University Press (2010).

[11] *Id.*

[12] Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nature Human Behavior 736, 736 (2020), https://www.nature.com/articles/s41562-020-0858-1.

[13] *Id.* at 739. These searches were more likely to lead to discovery of contraband when police searched the vehicles of white drivers than Black or Latino drivers, with the "hit rate" being significantly lower for Latino drivers.

[14] *Punishment and Prejudice: Racial Disparities in the War on Drugs*, Human Rights Watch (May 2000), https://www.hrw.org/reports/2000/usa/index.htm. See also Katherine Becket et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 Criminology 105 (2006), at 119 (finding that Black people

Implicit bias within the legal system, which mirrors the same biases in society writ large, also plays a role in explaining why Black and Latino people tend to experience worse outcomes than white people once they enter that system. For reasons dating back to explicit racist laws in the Reconstruction era that caused Black people to be arrested and incarcerated at disproportionate rates for crimes like "walking at night," a "statistical discourse" linking race to criminality has become deeply entrenched within the American popular imagination.[15] One 2010 study found that white people overestimated the proportion of burglaries, illegal drug sales and juvenile crimes committed by Black people by 20% to 30%,[16] whereas Latino people are often stereotyped as "foreigners," "immigrants," or "gang members" who are "hot-tempered and prone to violence."[17] Prosecutors, judges, and others involved in the legal system are not immune from these biases. Indeed, given the high volume of cases they handle and the fact that they have limited information about the defendants who appear before them, the temptation to fall back on the "perceptual shorthand" of race and ethnicity as a proxy for culpability and dangerousness is difficult to resist, especially when such biases operate beneath the level of conscious awareness.[18]

High-profile examples of wrongful convictions have also made plain the criminal justice system' infallibility and racial biases. Because of the overrepresentation of Black people within that system, as well as for other more race-specific reasons like the unreliability of cross-racial identifications, Black people are disproportionately represented among the ranks of the formally exonerated. Indeed, a study of 3200 people on the National Registry of Exonerations compiled through August of 2022 found that 53% of those on the list were Black.[19] These imbalances were especially pronounced for certain types of crimes, with Black people 19 (nineteen) times more likely to be falsely convicted of a drug offense than white people.[20] And because not every wrongful conviction results in a formal exoneration, these statistics likely undercount the number of innocent Black people.

In short, the evidence is overwhelming that Black and Latino people are staggeringly overrepresented in the criminal justice system for reasons stemming from vestiges of historical discrimination and resulting modern bias. In turn, a housing provider's facially neutral practice of screening out tenants based on the results of that systemically discriminatory criminal justice system also results in discrimination. Only a prohibition on disparate impact—and not a

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comprised 47% of those selling crack cocaine but 79% of those arrested, while white people comprised around 41% of those selling crack but only 9% of those arrested).

[15] Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Evidence Brief (May 2018) at 3, https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf (quoting Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America*, Harvard Univ. Press (2011)).

[16] *Id.*

[17] Besiki Kutateladze, *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, 52 Criminology 514, 520 (2014).

[18] *Id.* at 519.

[19] Samuel R. Gross, et al., *Race and Wrongful Convictions in the United States 2022* (September 2022), https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20Preview.pdf.

[20] *Id.*

prohibition on overt discrimination—can eradicate the type of racial disparity the FHA was designed to end.

II. Modern technologies render disparate impact more important than ever.

Modern technologies used by housing providers to screen tenants render disparate impact liability under the FHA more critical than ever. As with the example of criminal background bans, "overbroad criteria may unjustifiably exclude people from housing opportunities in discriminatory ways."[21] Those "issues have been magnified in recent years by the increasing reliance by housing providers on tenant screening companies" that "claim that they use advanced technologies, such as machine learning and other forms of artificial intelligence ('AI')."[22]

Where previously, employees researched potential tenants from a relatively limited pool of information, today, both information gathering and decision-making are increasingly automated.[23] That information may include not only expected data points like credit scores, eviction histories, and criminal histories, but also things like prior addresses and internet browsing histories that go well beyond what was traditionally considered.[24] That information is then fed into algorithms or AI to determine whether a potential applicant passes muster.

Those algorithms—even if they do not explicitly consider a protected characteristic—have the potential to "reproduce existing patterns of discrimination, inherit the prejudice of prior decision makers, or simply reflect the widespread biases that persist in society."[25] Because algorithms necessarily use historical data to produce and apply rules, "[t]o the extent that historical data reflects the results of de jure segregation, Jim Crow laws, redlining, restrictive covenants, white flight, and other explicitly and implicitly racist laws, policies, and actions, any given algorithmic 'rule' is likely to produce racist results. Even more troubling, artificial intelligence systems, or 'deep learning' algorithms, allow machines to 'learn' from past data, refining algorithms to more accurately draw from patterns, including when those patterns reflect past discrimination."[26] As such, regardless of whether the creators of an algorithm or other machine learning program intend the program to discriminate, algorithms that learn from patterns rife with systemic discrimination may "exacerbat[e] existing inequalities by suggesting that historically disadvantaged groups actually deserve less favorable treatment."[27]

Moreover, how an algorithm has considered particular data is impossible to know. Algorithms are a "black box": their complexity makes it impossible to understand exactly why a particular

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[21] U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, *Guidance on Application of Applicants for Rental Housing* 1 (Apr. 29, 2024), https://archives.hud.gov/news/2024/FHEO_Guidance_on_Screening_of_Applicants_for_Rental_Housing.pdf.

[22] *Id.*

[23] Valerie Schneider, *Locked Out by Big Data: How Big Data, Algorithms and Machine Learning May Undermine Housing Justice*, 52 COLUM. HUM. RTS. L. REV. 251, 266-70 (2020).

[24] *Id.* at 270.

[25] Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CAL. L. REV. 671, 674 (2016).

[26] *Locked Out by Big Data* at 275.

[27] *Big Data's Disparate Impact* at 674.

decision was made. For example, an algorithm might "assign low scores to jobs like seasonal agricultural work or low-wage service positions."[28] Although that's a race-neutral categorization, it could unfairly impact "outcomes for racial minorities who disproportionately hold these jobs."[29] But, "those who design or use these systems have little understanding of how algorithmic decisions are made based on the millions of points of data fed into the system."[30] And the "technical complexity and legal protections for trade secrets" allow these "opaque scoring systems" to "remain protected from examination."[31] Thus, showing *intentional* discrimination in this context is near-impossible.

Instead, "disparate impact claims will be critical" in "prevent[ing] and address[ing] algorithmic discrimination."[32] For example, in a slightly different context, in 2024, Wells Fargo was sued for race discrimination over its automated underwriting system that deemed minority applicants a higher risk. The system resulted in minority applicants disproportionately denied mortgages and mortgage refinancing. But there was "no explanation" for how the system might have caused statistically significant disparities. And "even Wells Fargo didn't know."[33] In another case, the Massachusetts Attorney General's Office reached a $2.5 million settlement with a private student loan company to resolve allegations that its use of artificial intelligence models that led to disparate impact harm to Black, Hispanic, and non-citizen applicants and borrowers.[34] Requiring a showing of intentional discrimination—many of which involve decisions difficult to attribute to a human at all—would be impossible.

Additionally, disparate impact liability "creates the right incentives for AI developers and deployers."[35] When faced with potential liability for disparate impact discrimination, AI developers will be encouraged to "test[] their models for discriminatory results and adjust[] them accordingly." Disparate impact liability is key to protecting Americans from algorithmic

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[28] Korin Munsterman, *When Algorithms Judge Your Credit: Understanding AI Bias in Lending Decisions*, Accessible Law (2025), https://www.accessiblelaw.untdallas.edu/post/when-algorithms-judge-your-credit-understanding-ai-bias-in-lending-decisions

[29] *Id.*

[30] Danah Boyd, *The Networked Nature of Algorithmic Discrimination* (2014), https://www.danah.org/papers/2014/DataDiscrimination.pdf.

[31] Munsterman, *supra* note 28.

[32] Chiraag Bains, *The legal doctrine that will be key to preventing AI discrimination*, Brookings (Sept. 13, 2024), https://www.brookings.edu/articles/the-legal-doctrine-that-will-be-key-to-preventing-ai-discrimination/.

[33] Jonathan Stempel, Wells Fargo won't face mortgage discrimination class action (Aug. 6, 2025), https://www.reuters.com/sustainability/boards-policy-regulation/wells-fargo-wont-face-mortgage-discrimination-class-action-2025-08-06/.

[34] *AG Campbell Announces $2.5 Million Settlement With Student Loan Lender For Unlawful Practices Through AI Use, Other Consumer Protection Violations*, Office of the Attorney General (July 10, 2025), https://www.mass.gov/news/ag-campbell-announces-25-million-settlement-with-student-loan-lender-for-unlawful-practices-through-ai-use-other-consumer-protection-violations.

[35] Baines, *supra* note 32.

discrimination: it helps "root out discrimination that is unintentional but unjustified—precisely the risk with AI."[36]

III. Disparate impact theory has been upheld by federal courts, including the Supreme Court, for half a century.

Unsurprisingly, courts have long recognized the importance of disparate impact across statutes, including the FHA. HUD's Proposed Rule stands in direct conflict with that well-established precedent.

In 2015, the Supreme Court explained that the FHA "proscribed not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[37] That is "consistent with the FHA's central purpose, which, "like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of our Nation's economy."[38] To fulfill that promise, the Act must function to prohibit certain zoning laws and other housing restrictions that "function unfairly to exclude minorities from certain neighborhoods without any sufficient justification"—the "heartland of disparate-impact liability."[39]

And in *Griggs v. Duke Power Company*, the Supreme Court recognized disparate impact liability in Title VII employment actions.[40] There, the Court recognized that Congress's objective in enacting Title VII was to "achieve equality of employment opportunities and remove barriers that have operated in the past" to disadvantage minority groups.[41] Accordingly, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[42] In other words, what matters is not only the "motivation" behind a policy or practice, but also its "consequences."[43]

So, too, in credit lending discrimination: Courts have consistently held that "ECOA allows for a cause of action for either overtly discriminatory policies or facially neutral policies that have a discriminatory effect."[44] That is consistent with the legislative history, which indicates that

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[36] *Id.*

[37] *Texas Dep't of Hous. & Cmty. Affs.*, 576 U.S. 519.

[38] *Id.* at 539.

[39] *Id.*

[40] *Griggs*, 401 U.S. 424.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Duarte v. Quality Loan Serv. Corp*., No. 217CV08014ODWPLA, 2018 WL 2121800, at *4 (C.D. Cal. May 8, 2018); *Bhandari v. First Nat'l Bank of Commerce*, 808 F.2d 1082, 1101 (5th Cir. 1987), *vacated and remanded on other grounds*, 492 U.S. 901 (1989) (national origin discrimination under ECOA can be shown "by analogy to *Griggs v. Duke Power* and its progeny" based on showing the effects of a credit policy); *Haynes v. Bank of Wedowee*, 634 F.2d 266, 270 (5th Cir. 1981) (agreeing that disparate impact claims are cognizable under ECOA); *Golden v. City of Columbus*, 404 F.3d 950, 963 n. 11 (6th Cir.2005) (assuming that "disparate impact claims can permissible under ECOA"); *Midkiff v. Adams Cnty. Reg'l Water Dist.*, 409 F.3d 758, 772 (6th Cir. 2005) (same); *Vander Missen v. Kellogg Citizens Nat'l Bank of Green Bay*, 481 F. Supp. 742, 745 (E.D. Wis. 1979) ("[i]t is thus clear that the use of

"Congress intended an 'effects test' concept, as outlined in the employment field by the Supreme Court in the cases of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), to be applicable to a creditor's determination of creditworthiness."[45]

HUD's proposal is at odds with Congress's intent in enacting the FHA to eradicate discrimination in all its forms, as well as federal courts' longstanding interpretation of the FHA and other statutes.

Conclusion

The FHA's ban on disparate impact discrimination is essential to identifying and remedying housing discrimination. Eliminating this well-established protection would undermine the FHA's core purpose, conflict with judicial precedent, and expose consumers to unchecked discrimination. For these reasons, we strongly oppose HUD's Proposed Rule.

Sincerely,

Leah M. Nicholls
Director, Access to Justice Project
Public Justice

the 'effects' test was intended by Congress" to apply "to the determination of whether discriminatory practices exist" under ECOA); *Masudi v. Ford Motor Credit Co.*, 2008 WL 2944643 (E.D.N.Y. 2008) (recognizing the ECOA allows disparate impact actions); *Barrett v. H & R Block, Inc.*, 652 F. Supp. 2d 104, 108 (D. Mass. 2009) (listing cases); *Duarte v. Quality Loan Serv. Corp.*, No. 217CV08014ODWPLA, 2018 WL 2121800, at *4 (C.D. Cal. May 8, 2018) ("ECOA allows for a cause of action for either overtly discriminatory policies or facially neutral policies that have a discriminatory effect."); *Palmer v. Homecomings Fin. LLC*, 677 F. Supp. 2d 233, 240 (D.D.C. 2010) ("There appears to be agreement among the federal courts that disparate impact claims are permissible under the ECOA.").

[45] 12 C.F.R. § 202.6.