MAXINE WATERS, CA
CHAIRWOMAN

United States House of Representatives
Committee on Financial Services
2129 Rayburn House Office Building
Washington, D.C. 20515

PATRICK MCHENRY, NC
RANKING MEMBER

November 22, 2019

The Honorable Dr. Benjamin S. Carson
Secretary
U.S. Department of Housing and Urban Development
451 7th Street S.W.
Washington, DC 20410-0001

Dear Secretary Carson:

We write in strong opposition to the Department of Housing and Urban Development's (HUD) proposed changes to the disparate impact standard under the Fair Housing Act, which would make it harder for everyday Americans who find themselves victims of housing discrimination to get justice. We urge that you immediately rescind this proposed rule and discontinue any further efforts to weaken the Fair Housing Act.

According to the most recently reported figures, although nearly 31,202 individuals reported fair housing violations in 2018, incidents of housing discrimination often go unreported.[1] The National Fair Housing Alliance estimates that 4 million acts of housing discrimination occur each year.[2] A 2018 survey of 10,000 adults in the nation's 20 largest metro areas found that 1 in 4 people, or 68 million, believe they have been treated differently in their search for housing because of their status as a member of a protected class under the Fair Housing Act.[3] As incidents of discrimination become less overt in today's world, and are increasingly hidden behind algorithms and other technological evolutions in the housing market, we must be more vigilant in the face of evolving threats to American civil rights.

The disparate impact standard is the most important tool for enforcing the Fair Housing Act in today's rapidly evolving housing market. The disparate impact standard holds actors accountable for the discriminatory impacts of their actions regardless of whether the discrimination was intentional. Without the disparate impact standard, a plaintiff would essentially have to prove malicious intent as plain as a "No Blacks Allowed" sign in order to get relief.

Once a plaintiff proves that a challenged practice or policy has a discriminatory effect, the current standard allows defendants to respond to such a suit by providing legitimate business justifications for their policies and practices. Plaintiffs can then show that there is a less discriminatory alternative that meets the same business justifications. It is this burden-shifting framework that has effectively governed the investigation and litigation of fair housing cases for decades.

HUD's proposed rule represents a huge departure from a standard and framework that has been expressly supported by HUD under every Democratic and Republican administration before the current administration. The standard is also a deviation from decades of legal precedent, including a Supreme Court decision affirming the legitimacy of the disparate impact standard under the Fair Housing Act. Specifically, HUD's proposed rule would weaken the disparate impact standard by: 1) substantially raising the burden of proof on plaintiffs and victims of housing discrimination while making it easier for defendants to deflect allegations; 2) disincentivizing the collection

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[1] National Fair Housing Alliance, "Fair Housing Trends Report." 2019.
[2] National Fair Housing Alliance, "Fair Housing Trends Report." 2017.
[3] Zillow Research, "What Modern-Day Housing Discrimination Looks Like: A Conversation With the National Fair Housing Alliance." 2019.

of demographic data that would otherwise help entities have proactive strategies around fair housing; and 3) creating safe harbors that make challenging algorithmic bias incredibly difficult.

First, HUD's proposed rule would eliminate the current burden shifting framework in favor of a newly proposed analysis that places much of the burden of proof on the plaintiff and creates new ambiguous standards that will undoubtedly create confusion among plaintiffs and defendants alike. Under the proposed burden-shifting framework, plaintiffs are left to speculate as to what a defendant's business justifications might be. By contrast, under the current framework, it is the defendant's burden to prove that the challenged practice is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." Further, under the current framework, plaintiffs have the ability to rebut a defendant's business interest by showing that the there is an alternative policy that furthers the same interest with less discriminatory effects than the challenged practice. By contrast, HUD's proposal would require the plaintiff to prove not only that there is a less discriminatory alternative, but also that it does not result in "materially greater" costs or burden on defendants. It is entirely unclear how a plaintiff would be able to meet their burden of proof under this proposed framework without both the benefit of a trial discovery phase, and also, as explained earlier, without knowing what a defendant's business justifications might be in advance. This is not only an inefficient mechanism to sort through counter-arguments, it effectively places profit over people, and imposes unfair burdens of proof on victims of housing discrimination.

Second, without data, housing discrimination can go undetected. In its proposed changes to the rule, HUD states that nothing in Part 100 "requires or encourages the collection of data" with respect to protected classes and that "[t]he absence of any such collection efforts shall not result in any adverse inference against a party." This proposed change will undoubtedly send a message to industry that they do not need to collect relevant data to monitor their compliance with the Fair Housing Act, and that this may actually work to their benefit because it will be harder for a plaintiff to prove their case if the defendant does not have any readily available data. In fact, this could very well interfere with HUD's existing efforts to enforce the Fair Housing Act. For example, in HUD's recent housing discrimination charge against Facebook, the company's failure to share relevant data limited HUD's ability to fully investigate the company's fair housing violations.[4] And the company's failure to share data with academics and researchers broadly limits any form of holding the company liable for any wrongdoing.[5] This proposed change could also exacerbate plaintiffs' ability to prove their case as the data necessary to demonstrate the impact they are alleging would simply be unavailable.

Third, HUD has created three new safe harbors for defendants who use algorithms. As our housing markets become increasingly automated, HUD must ensure that algorithmic models and other technological advances are developed, used, and managed in ways that meet the standards of fair housing law. However, this proposed rule would set an extremely low bar for defendants using algorithms to be shielded by these new safe harbor protections. For example, under the proposed rule, a defendant is not liable for disparate impact if it is able to show that the challenged algorithmic model is "produced, maintained, or distributed by a recognized third party that determines industry standards." This would essentially allow defendants to avoid liability by simply outsourcing certain tasks to third parties. The other two safe harbors that HUD establishes in this proposed rule are also problematic because they allow defendants to avoid liability if, among other things, they can show that individual algorithmic inputs do not serve as proxies for protected classes. This emphasis on input review ignores the possibility that the factors could collectively have a discriminatory impact. For example, while a defendant may be able to show that data inputs such as credit score, debt-to-income ratio, and lines of credit are neutral on their own, the safe harbors do not consider that, when taken together, these inputs may result in Whites receiving home loans at more than two times the rate of Blacks and Latinos.[6]

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[4] Washington Post, "HUD is reviewing Twitter's and Google's ad practices as part of housing discrimination probe." 2019.
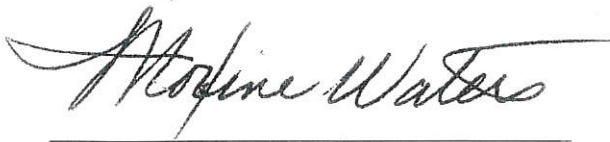[5] BuzzFeed News, "Facebook Said It Would Give Detailed Data To Academics. They're Still Waiting." 2019.
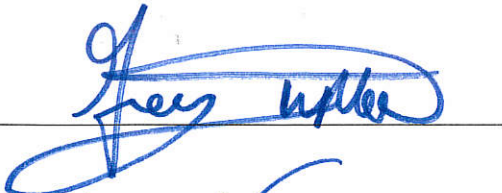[6] Reveal News, "For people of color, banks are shutting the door to homeownership." 2018.

We remind you that HUD's mission includes building "inclusive and sustainable communities free from discrimination." HUD's ability to carry out this mission will be seriously compromised if it moves forward with this proposed rule, and this is no time to weaken our enforcement of the Fair Housing Act. In 2018, Black homeownership rates reached the lowest they had since before the Fair Housing Act was passed[7] and a 2019 study found that Black and Latinx borrowers are paying $765 million more in annual interest compared to other borrowers.[8] Researchers[9] and HUD[10] alike found that algorithmic bias in online housing markets are keeping racial minorities from viewing housing opportunities. In light of these concerning trends, HUD should be looking for ways to strengthen its enforcement of the Fair Housing Act, but instead, you have established a shameful record of undermining fair housing. In addition to putting forward this harmful proposed rule on the disparate impact standard, you have also indefinitely delayed[11] the implementation the Affirmatively Furthering Fair Housing rule, undermined protections for LGBTQ+ individuals experiencing homelessness,[12] and put forward a cruel proposal[13] to terminate housing benefits for families with mixed-immigration status.
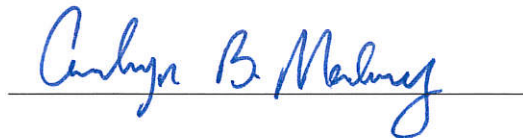
We ask that you give our request full and fair consideration in accordance with all applicable laws and regulations, and strongly urge that you rescind this harmful proposal that would silence victims of housing discrimination while protecting industry profits and shielding bad actors from accountability. If you have any questions about this letter, please contact Alia Fierro with Chairwoman Waters' staff at (202) 225-4247.
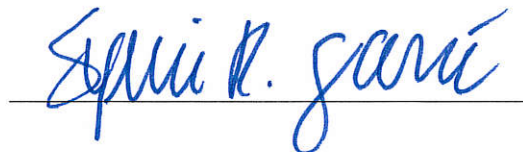
Sincerely,

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[7] Urban Institute, "Black Homeownership Gap: Research Trends And Why The Growing Gap Matters." 2019.

[8] Robert Bartlett et al., "Consumer-Lending Discrimination in the FinTech Era." 2019.

[9] Ali, Muhammad, et al., "Discrimination through optimization: How Facebook's ad delivery can lead to skewed outcomes." 2019.

[10] HUD Public Affairs, "Hud Files Housing Discrimination Complaint Against Facebook." 2018.

[11] Press Release, "Waters Slams HUD's Delay of Fair Housing Rule." 2018.

[12] CNN. "HUD proposes rule that would roll back protections for transgender homeless." 2019.

[13] Press Release, "Waters, Garcia and 21 Committee Democrats Condemn Carson's Cruel Proposal to Evict Mixed-Immigration Status Families." 2019.

(signatures)

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