American Bankers Association

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The Honorable Scott Turner
Secretary
Department of Housing and Urban Development
451 7th St. SW
Washington, DC 20410

Re: Discriminatory Impact Rule under the Fair Housing Act

Dear Secretary Turner:

On behalf of the American Bankers Association[1] (ABA), the principal national trade association of the financial services industry in the United States, we write to urge the Department's prompt consideration and replacement of a rule of United States Department of Housing and Urban Development (HUD), titled *Implementation of the Fair Housing Act's Discriminatory Effects Standard*,[2] (2013 Rule), which was repealed and replaced in 2020 and then reinstated in *Reinstatement of HUD's Discriminatory Effects Standard,*[3] (2023 Disparate Impact Rule or 2023 rule). The rule is codified at 24 C.F.R. § 100.500. The ABA and its members have long supported the fair and even-handed enforcement of laws prohibiting discrimination in lending, including the FHA. Banks devote substantial resources to compliance. However, the 2023 rule is not consistent with legal precedents and Administration policy, and should be rescinded and replaced.

Recission and replacement of the 2023 rule is required by Executive Order 14281, issued April 23, 2025, which directs all agencies, including HUD, to identify in coordination the Attorney General "all existing regulations, guidance, rules, or orders that impose disparate-impact liability or similar requirements, and detail agency steps for their amendment or repeal, as appropriate under applicable law."[4] The Executive Order also requires HUD to "deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability."[5] While the 2023 HUD rule will thus be of less impact with respect to agency enforcement actions, it will continue to be considered in private and state and local government actions under the FHA. *See, e.g., National Fair Housing Alliance v. Deutsche Bank Nat'l Trust,* 2025 U.S. Dist. LEXIS 60481 (N.D. Ill. March 31, 2025) (noting that "courts disagree on whether the Supreme Court implicitly adopted HUD's burden-shifting framework for disparate-impact liability"). Again, this makes it crucial that HUD act as promptly as possible to address a rule that is inconsistent with Administration policy and applicable legal precedent.

[1] The American Bankers Association is the voice of the nation's $24.5 trillion banking industry, which is composed of small, regional and large banks that together employ approximately 2.1 million people, safeguard $19.5 trillion in deposits and extend $12.8 trillion in loans.
[2] 78 Fed. Reg. 11,460, 11,473 (Mar. 18, 2013)
[3] 88 Fed. Reg. 19,450, 19,454 (Mar. 31, 2023)
[4] *See* 90 Fed. Reg. 17,537, 17,538. (April 23, 2025).
[5] *Id.*

Reconsideration of the rule is also consistent with the Office of Management and Budget's April 11, 2025 request for "proposals to rescind or replace regulations that stifle American businesses and American ingenuity," including regulations "that are unnecessary, unlawful, unduly burdensome, or unsound." *See* 90 Fed. Reg. 15,481, 15,482. The 2023 rule violates the necessary safeguards on disparate-impact liability set forth in the Supreme Court's decision in *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.* (*Inclusive Communities*), 576 U.S. 519 (2015), and wrongly fails to incorporate these safeguards. It is also based on the erroneous legal position that the Civil Rights Act of 1991 abrogated the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio ("Wards Cove")*, 490 U.S. 642 (1989) for disparate impact claims under the Fair Housing Act ("FHA"), and that *Inclusive Communities* also implicitly overruled aspects of *Wards Cove* that imposed specific legal requirements for a plaintiff to state, and win, a claim based on disparate impact. The 2023 rule's incorrect reading of the Supreme Court's decisions interpreting the FHA was impermissible even before the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), and is even more so now.

Challenges to the 2023 rule are currently pending in the federal courts of appeals for the D.C. Circuit and the Seventh Circuit. The D.C. Circuit has placed the case in abeyance based on HUD's representations that "the agency intends to reconsider the 2023 Rule," and that "HUD officials are continuing to review the 2023 Rule and considering the process for its reconsideration." Doc #2109694, No. 23-5275 (filed April 7, 2025). The Seventh Circuit has heard argument and has declined to put the case in abeyance. Both courts have questioned the plaintiffs' standing, suggesting that they may well not address the legality of the 2023 rule regardless of its merits. It is thus almost certain that HUD will have to act to address the legal deficiencies and harms of the current rule, rather than being able to rely on the courts to do so.

The 2023 HUD rule should be immediately rescinded. It should be replaced by a rule that more accurately reflects Supreme Court precedent. This was already done in 2020, before the reinstatement of the current rule in 2023. *See HUD's Implementation of the Fair Housing Act's Disparate Impact Standard*, 85 Fed. Reg. 60,288 (Sept. 24, 2020). It should be done again.

I. Recission and Replacement of the 2023 Disparate Impact Rule Is Required by Administration Policy

Executive Order 14281 states the "[p]olicy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals." 90 Fed. Reg. at 17,537. It also, as quoted above, requires HUD in coordination with the Attorney General to report to the President (by May 28, 2025) as to agency steps for amendment or repeal of any existing rule or guidance that imposes disparate impact liability or similar requirements. *Id.* at 17,538. The 2023 Disparate Impact Rule falls squarely within the rules required to be addressed under Executive Order 14281.

Executive Order 14219, issued on February 19, 2025 and titled *Rescinding Unlawful Regulations and Regulations That Undermine the National Interest,* further requires action on the 2023 rule. It directs agency heads to initiate a process to review regulations that, among other things, are based on anything other than the best reading of the underlying statutory authority or prohibition. A White House Memorandum of April 9, 2025, *Directing the Repeal of Unlawful Regulations*, further implemented Executive Order 14219 to direct agency heads to prioritize regulations that violate a series of Supreme Court cases, including *Loper Bright*, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023), and *Ohio v. EPA*, 603 U.S. 279 (2024).

Consistent with *Loper Bright,* agencies are to repeal any regulation that is not consonant with the "single, best meaning" of the statute authorizing it**.** Consistent with *Students for Fair Admissions*, agencies are to repeal any regulation that imposes racially discriminatory rules or preferences. And consistent with *Ohio v. EPA*, agencies must repeal any regulation that does not sufficiently account for the costs it imposes, or for which foundational assumptions have changed and are no longer defensible. As discussed more fully below, the HUD disparate impact rule should be prioritized for recission and replacement on all of these grounds. It does not reflect the "single, best meaning" of the FHA; to the contrary it is inconsistent with Supreme Court precedent interpreting it. It imposes requirements that could increase the consideration of race in a discriminatory manner. And it imposes burdens on the industry that are impermissible under the law as correctly interpreted, and would not be justified by the asserted benefits even if they were permissible.

A recent court filing states that HUD officials are reviewing the 2023 Rule and considering the process for its reconsideration. *See* Respondents' Status Report, Doc. #2109694, No. 23-5275 (D.C. Cir., filed April 7, 2025). The ABA urges that this process be completed promptly, and that the 2023 rule be rescinded and the 2020 rule reinstated.

II. The ABA And Other Affected Parties Have Challenged The 2023 Rule For Over A Decade Administratively And In Litigation, And Have Been Unable To Have It Properly Addressed

The ABA and its members have long supported the fair and even-handed enforcement of laws prohibiting discrimination in lending, including the FHA. Banks devote substantial resources to compliance. At the same time, the ABA has long attempted to address HUD interpretive rules that attempt to provide broader bases for disparate impact liability than are permissible under the law. It is important for the Administration to be cognizant of this background, and how the previous Administration ignored binding judicial precedent with which it disagreed, sought to apply congressionally enacted standards to laws that were not implicated by the congressional action, and divined its own view as to what the law should be. We thus explain these issues in some detail.

In its 2011 term, the Court considered a petition to determine whether disparate impact liability was permissible under the FHA. *See Magner v. Gallagher* (No. 10-032). Days after the Court

granted *certiorari* in the case, HUD issued for comment a proposed amendment to its existing interpretive rule that, for the first time, articulated that a violation of the FHA could be established through a disparate-impact approach. *See* Notice of Proposed Rulemaking, I*mplementation of Fair Housing Act's Discriminatory Effects Standard*, 76 Fed. Reg. 70,921, 70,924-25. (Nov. 16, 2011). That case was settled and in the 2012 term, the Court again considered a petition to decide the issue. *See Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.* (No. 11-1507). In October 2012, the Court invited the Solicitor General to express the views of the government, and between then and the date the Solicitor General responded in May 2013, HUD finalized its new disparate-impact rule. *See* Final Rule, 78 Fed. Reg. at 11,478. That case was also settled.

In 2015, the Supreme Court determined in *Inclusive Communities* that a violation of the FHA could be shown under a disparate impact theory. However, the court significantly circumscribed the scope of such liability. *Inclusive Communities* held that the FHA could be read to impose disparate-impact liability only because it "has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity." 576 U.S. at 540. *Inclusive Communities* also made clear that "adequate safeguards at the prima facie stage" were required, including the "robust causality requirement" first enunciated in *Wards Cove. Id*. at 542 (citing *Wards Cove,* 490 U.S. at 653). Despite these statements, the previous Administration sought to minimize, if not totally ignore, the Supreme Court's directive on limitations on the use of disparate impact.

Because the 2013 HUD rule did not properly include these safeguards, legal challenges to the HUD rule that had been filed in the Northern District of Illinois, *Property Casualty Insurers Association of America v. Donovan* 1:13-cv-08564, and the District of Columbia, *American Insurance Ass'n v. HUD* No. 1:13-cv-00966 (RJL), were continued after *Inclusive Communities.* Those challenges were stayed until HUD issued the rule in September, 2020 that, in HUD's words, "amends HUD's 2013 disparate impact standard regulation to better reflect the Supreme Court's 2015 ruling in [*Inclusive Communities*] and to provide clarification regarding the application of the standard to State laws governing the business of insurance." 85 Fed. Reg. at 60,288. The litigation was then delayed while the Biden Administration considered reinstating the 2013 rule, and then moved forward after the 2013 rule was reinstated in 2023. In each case, the district court declined to vacate the 2023 rule that reinstates the 2013 rule.

The challenges to the 2023 rule are currently pending on appeal in the Seventh Circuit, *Property Casualty Insurers Association of America v. Turner*, No. 24-1947, and the D.C. Circuit, *National Ass'n of Mutual Insurance Cos. v. HUD*, No. 23-5275. The D.C. Circuit has heard argument and placed the case in abeyance based on the HUD's representations that "the agency intends to reconsider the 2023 Rule, and that "HUD officials are continuing to review the 2023 Rule and considering the process for its reconsideration." Doc #2109694, No, 23-5275 (filed April 7, 2025). The Seventh Circuit has heard argument in the appeal pending there, and declined to place the appeal in abeyance. As noted above, these court actions appear unlikely to consider the rule on its merits, and thus provide no basis on which to forestall HUD action on it.

HUD should therefore move forward promptly to rescind the 2023 rule and reinstate the 2020 rule.

III. The 2023 Rule Does Not Accurately State or Apply Supreme Court Or Other Appellate Precedent

One federal appeals court has expressly held that "the Supreme Court's opinion [in *Inclusive Communities*] undoubtedly announce[s] a more demanding test than that set forth in the HUD regulation." *Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co. ("Lincoln Properties")*, 920 F.3d 890, 902 (5th Cir. 2019). In particular, "the Supreme Court announced several 'safeguards' to incorporate into the burden-shifting framework to ensure that disparate impact liability does not 'displace valid governmental and private priorities.' " *Id.*, (quoting *Crossroads Residents Organized for Stable & Secure Residencies v. MSP Crossroads Apartments LLC*, No. 16-233, 2016 WL 3661146, at *6 (D. Minn. 2016). For example, *Inclusive Communities* requires a "robust causality requirement' at the prima facie stage and "leeway to state and explain the valid interest served by the defendant's policies." *Id.* (quoting *Inclusive Communities*, 135 S. Ct. at 2522-23)(internal quotations omitted). "In contrast, the HUD regulation contains no 'robust causation' requirement; rather it requires only a showing that 'a challenged practice caused or predictably will cause a discriminatory effect." Id. (citing 24 C.F.R. § 100.500(c)(1)). The court held the "modification of HUD's test" in the 2013 rule, now the 2023, rule, "to be both purposeful and significant." *Lincoln Properties,* 920 F.3d at 903.

The only decision to have expressly stated it was adopting the approach in HUD's 2013 rule, *Mhany Mgmt.* v. *City of Nassau,* 819 F.3d 581 (2d Cir. 2016), did so in finding that the district court in that case had failed to properly place on the *plaintiff* the "burden of proving an available alternative practice that has less disparate impact and serves Defendants' legitimate nondiscriminatory interests." *Id*. at 618–20. This holding in no way conflicts with *Wards Cove* or *Inclusive Communities*. And it provides no support whatsoever for HUD's assertion that the provisions of its rule that do so conflict have somehow been endorsed by the courts. *See also Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415, 424 n.4 (4th Cir. 2018) ("without deciding whether there are meaningful differences between the frameworks . . . the standard announced in *Inclusive Communities*, rather than the HUD regulation, controls our inquiry.")(cleaned up). The 2023 rule is inconsistent not only with *Inclusive Communities* and *Wards Cove*, but also with appellate decisions applying them, in several specific ways.

First, the HUD rule does not require a plaintiff to identify a specific policy of the defendant that causes the disparity challenged under the standard. Emphasizing the *Wards Cove* standard, *Inclusive Communities* held that a "disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity." 576 U.S. at 542 (citing W*ards Cove,* 490 U. S. at 653). The focus of a disparate-impact claim should be on eliminating a *specific* policy that causes an adverse statistical outcome. The HUD rule supports broader based claims – such as challenges to entire underwriting policies spanning hundreds of pages – which cannot plausibly be eliminated as a remedy.

Second, the HUD rule does not apply the "robust causality requirement" that *Inclusive Communities* recognized, again relying on *Wards Cove*. This requirement "ensures that 'racial imbalance . . . does not, without more, establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create." 576 U.S. at 542 (quoting W*ards Cove,* 490 U. S. at 653).

Third, the HUD rule adopts a burden-shifting approach that places a burden of proof on a defendant if a plaintiff can merely show statistical differences. That is wrong. As in all litigation, and as confirmed by *Wards Cove*, the burden of proof remains on plaintiff "*at all times." See Wards Cove*, 490 U.S. at 659 (emphasis in original, quotation omitted).

Fourth, and related to the above, *Inclusive Communities* concluded, as did *Wards Cove*, that when a defendant offers a legitimate business justification, a plaintiff cannot sustain a disparate-impact claim if it cannot prove "there is 'an available alternative … practice that has less disparate impact and serves the [entity's] legitimate needs.'" See *Wards Cove*, 490 U.S. at 661 ("any alternative practices … must be equally effective … in achieving [] legitimate [] goals"). HUD refused to adopt this standard. *See* 88 Fed. Reg. at 19491.

Finally, and critically important, the HUD rule does not require that a policy be an "artificial, arbitrary, and unnecessary barrier" to even be subject to a disparate impact claim. *See Inclusive Communities*, 576 U.S. at 541 ("policies are not contrary to the disparate-impact requirement unless they are artificial, arbitrary, and unnecessary barriers"). This requirement did not originate with *Inclusive Communities*, and was first set forth in the employment context in *Griggs v. Duke Power Co*., 401 U.S. 424, 431 (1971) ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification"). It was quoted with approval even in the *Wards Cove* dissent. *See* 490 U.S. at 666 n.11 (Stevens, J, dissenting). This requirement does make it more difficult to even state a claim of disparate impact than the prior Administration and some advocacy groups would like, but it is a bedrock legal principle that cannot be ignored.

A. The legal errors in the 2023 rule are based on disregard of the statutory history and misstatement of applicable precedent

When HUD issued the 2013 rule that the current rule re-adopts, it explicitly—and wrongly—rejected the concept that *Wards Cove* governs FHA disparate-impact claims, stating without explanation that "HUD does not agree … that *Wards Cove* even governs Fair Housing Act claims," and describing *Wards Cove* as "superseded." 78 Fed. Reg. at 11473. The repromulgated 2023 rule repeats this error, stating that *Ward's Cove* has been "superseded" by the 1991 Civil Rights Act. *See* 88 Fed. Reg. at 19488 n.311 (noting that "the *Wards Cove* framework was abrogated by the Civil Rights Act of 1991, which restored the *Albemarle* standard.") HUD notes that this view is directly contrary to the Ninth Circuit's decision in *Sw. Fair Hous. Council,* discussed above. *Id. See, e.g., Sw. Fair Hous. Council, Inc.* v. *Maricopa Domestic Water*

Improvement Dist., 17 F.4th 950, 960 n.5 (9th Cir. 2021) ("The Civil Rights Act of 1991 abrogated *Wards Cove* with respect to claims under Title VII, but the Supreme Court has continued to apply *Wards Cove* burden shifting to other antidiscrimination statutes."). HUD asserts that the Ninth Circuit erred, but HUD is wrong. The 1991 law did not amend the FHA or any statute other than Title VII, and even as to Title VII it applied a new standard only to injunctive claims, not to claims for damages. The Ninth Circuit held exactly that, and that is the only permissible reading of Congress' actions.

HUD's misreading of the law stems largely from this incorrect premise that the Civil Rights Act of 1991 abrogated the Supreme Court's decision in *Wards Cove*, and that *Inclusive Communities* had implicitly overruled aspects of *Wards Cove* that HUD did not follow in the rule. *See* 2013 Rule, 78 Fed. Reg. at 11473, *as reinstated*, 88 Fed. Reg. at 19488 nn.311-312. HUD stated that it was not bound by anything that Court had said in *Wards Cove*, even though *Inclusive Communities* cites *Wards Cove* with approval, and as to FHA claims neither the Supreme Court nor Congress has ever overturned it or even expressly limited it. Rather than following and being informed by the standards the Supreme Court requires, HUD improperly grafted the standard Congress enacted only for a limited type of disparate-impact claim brought under Title VII of the Civil Rights Act of 1964 ("Title VII") onto disparate-impact claims brought under the FHA. HUD's action is thus inconsistent with *Inclusive Communities*, as the Fifth Circuit has held.

HUD's improper use of standards applicable since 1991 only to some types of disparate-impact claims brought under Title VII, and not to FHA claims, is based on its misunderstanding of the history of the amendments. The basic prohibitory language of Title VII, before its amendment by Congress in 1991, was similar to that of the FHA. The Supreme Court recognized the "similarity in text and structure" between the two statutes in *Inclusive Communities*. 576 U.S. at 535. The Court also observed that this similarity "is all the more compelling given that Congress passed the FHA in 1968—only four years after passing Title VII" in 1964. *Id.* And the two statutes serve similar purposes, with Title VII designed to eradicate discrimination in employment and the FHA designed to eradicate discrimination in housing. *See id.* at 539. In such circumstances, courts have recognized "a strong indication that [the two laws] should be interpreted pari passu"—i.e., in the same way. *Northcross v. Board of Educ. of Memphis City Schs.*, 412 U.S. 427, 428 (1973) (per curiam). *See also Smith v. City of Jackson, Miss.*, 544 U.S. 228, 233–34 (2005). *Inclusive Communities* concluded that "cases interpreting Title VII … provide essential background and instruction" for construing the FHA. 576 U.S. at 533.

There is a break point, however, at which Title VII jurisprudence can no longer guide interpretation of the applicable standard for disparate-impact liability under the FHA. The break point occurred when Congress passed the Civil Rights Act of 1991, which, in pertinent part, displaced the *Wards Cove* disparate-impact standard for future disparate-impact claims brought under Title VII. *See* 42 U.S.C. § 2000e-2(k)(1)(A)–(B). Perceiving the *Wards Cove* disparate-impact standard as too rigorous for Title VII plaintiffs, Congress amended Title VII in 1991 to create a less rigorous standard for disparate-impact claims brought under that statute. *See Smith*, 544 U.S. at 240 ("One of the purposes of th[e] amendment [to Title VII] was to modify the

Court's holding in *Wards Cove* …, a case in which we narrowly construed the employer's exposure to liability on a disparate-impact theory.").

Because Congress chose to amend Title VII in response to *Wards Cove* but did not choose to amend the FHA, *Wards Cove* and the cases that have followed it continue to provide the proper application of disparate impact under the FHA. The 1991 amendments to Title VII "highlight[] the principle that a departure from the traditional understanding of discrimination requires congressional action." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 618 n.3 (1999) (Thomas, J., dissenting). Congress has *never* taken action with respect to the FHA authorizing "a departure from the traditional understanding of discrimination" as described in *Wards Cove* and applied in *Inclusive Communities*. Thus, while prior to 1991 it was both appropriate and common to look to interpretations of Title VII to guide the standard of proof for disparate-impact claims under the FHA, after Congress's 1991 amendments to Title VII it is error to do so. Title VII is now governed by a congressionally-enacted disparate-impact standard that does not apply to other laws prohibiting discrimination.

The Supreme Court has squarely addressed this issue in evaluating the continued application of the *Wards Cove* standard to disparate-impact claims under the Age Discrimination in Employment Act ("ADEA"). In ruling that interpretation of the ADEA is not guided by post-1991 Title VII jurisprudence, the Court stated: "We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009). "Congress neglected to add such a provision to the ADEA when it amended Title VII" and "[a]s a result, the Court's interpretation of the ADEA is not governed by Title VII decisions" that post-date the Title VII amendments. *Id.* at 174–75.

The Supreme Court has thus unambiguously concluded that the *Wards Cove* standard continues to apply in disparate-impact cases arising under civil rights statutes other than Title VII, such as the ADEA:

While the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination. Hence, *Wards Cove's* pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA.

Smith, 544 U.S. at 240. The Ninth Circuit has agreed. *See Sw. Fair Hous. Council,* 17 F.4th at 960 n.5 ("The Civil Rights Act of 1991 abrogated *Wards Cove* with respect to claims under Title VII, but the Supreme Court has continued to apply *Wards Cove* burden shifting to other antidiscrimination statutes.") In the absence of a "congressional action" similar to the 1991 amendments to Title VII, there is no basis to conclude that *Wards Cove,* as interpreted in *Inclusive Communities,* does not continue to supply the disparate-impact standard under the FHA. *See Gross*, 557 U.S. at 174. Indeed, as noted above the Supreme Court itself relied on *Wards Cove* in the FHA context in its *Inclusive Communities* decision. *See, e.g.,* 576 U.S. at 542 (citing *Wards Cove,* 490 U.S. at 653, for its "robust causality requirement").

In issuing the 2023 rule, HUD discussed none of this statutory background or Supreme Court precedent, but simply asserted that the Ninth Circuit's decision "conflicts with the other circuits." 88 Fed. Reg. at 19488 n.312 (citing *Mhany Mgmt.; Inclusive Cmtys. Project, Inc.* v. *Heartland Cmty. Ass'n ("Inclusive Communities II"),* 824 F. App'x 210 (5th Cir. 2020), and *de Reyes*. HUD does not discuss any of these cases, much less explain how they "conflict" with the Ninth Circuit's ruling. In fact, two of these cases ruled in the *defendant*'s favor as to a claim of disparate impact liability under the FHA and the third expressly relied on *Wards Cove*. All of them directly undermine HUD's assertion of a "conflict."

Mhany Mgmt. does not discuss or even cite *Wards Cove*, and cites the Civil Rights Act of 1991 only in passing. *Mhany Mgmt.*, 819 F.3d at 615 n.8. It thus cannot "conflict" with the Ninth Circuit's recognition of the plain fact that the 1991 legislation repealed *Wards Cove only* as to Title VII and *not* as to the FHA or any other statute. Moreover, as noted at p. 4 above, the holding in *Mhany* -- remanding a disparate impact claim to the district court for failure to have properly placed on the *plaintiff* the "burden of proving an available alternative practice that has less disparate impact and serves Defendants' legitimate nondiscriminatory interests" -- in no way conflicts with *Wards Cove* or *Inclusive Communities.* To the extent the Second Circuit noted that its conclusion was consistent with HUD's rule, it was only as to a matter that did not undermine the continued vitality of *Wards Cove* or disregard *Inclusive Communities* in any way. *See Wards Cove*, 490 U.S. at 659 (the "ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff *at all times*" (emphasis in original, quotation omitted).

The second case on which the HUD rule relies, *Inclusive Communities II* on remand from the Supreme Court*,* affirmed the dismissal of an action claiming disparate-impact race discrimination in violation of the FHA. Like *Mhany Mgmt.,* the case does not discuss or even cite *Wards Cove.* Nor does it refer to the 1991 legislation. And it was issued by a court that was bound by its precedent in *Lincoln Properties*, which held that the HUD rule is inconsistent with the Supreme Court's ruling in *Inclusive Communities*.

The final case on which the HUD rule relies, *de Reyes v. Waples Mobile Home Park Ltd. P'ship*, cites and relies on *Wards Cove* throughout and states "[t]he Supreme Court's opinion in *Wards Cove* provides a clear example of *Inclusive Communities*' robust causality requirement." It goes on to note that "[i]n *Wards Cove*, the Supreme Court concluded that the Ninth Circuit erred in holding that plaintiffs had made out a prima facie case of disparate impact under Title VII using evidence that the percentage of salmon cannery workers in 'noncannery jobs' (generally skilled) who were non-white was significantly lower than the number of workers in 'cannery jobs' (unskilled) who were non-white, as this only demonstrated that a racial imbalance existed between the two jobs without demonstrating how a specific policy caused a racial imbalance in either job." 903 F.3d at 426. And as noted above, it noted that its consideration proceeds under *Inclusive Communities*, not under the HUD rule. *Id.*, at 424 n.4

While *Inclusive Communities* is the Supreme Court's most recent word on the disparate impact standard under the FHA, there is no basis for HUD's position that the reasoning of *Wards Cove*, with which *Inclusive Communities* is fully consistent, is no longer relevant or persuasive in assessing FHA claims. Indeed, as the Fourth Circuit noted in the *de Reyes* case on which HUD purports to rely, "*Inclusive Communities* cited to *Wards Cove* in explaining the robust causality requirement." *See* 903 F.3d at 426 n.6 (citing *Inclusive Communities*, 576 U.S. 542).

HUD thus should have considered itself bound by this Supreme Court precedent of continuing vitality when promulgating the 2013 rule and reinstating it in 2023, and erred in applying the 1991 amendments to Title VII to disparate-impact claims under the FHA, rather than the standards *Inclusive Communities* which adopted *Wards Cove* and is fully consistent with it.

B. The 2023 rule impermissibly rejects the *Inclusive Communities* standard for disparate impact liability under the Fair Housing Act.

Other than to argue erroneously that *Wards Cove* has been "superseded" and "abrogated" in FHA cases, HUD's final rule brushes aside *Wards Cove's* limitations on disparate impact liability under the FHA, and thus also wrongly disregards the standards of *Inclusive Communities* that look to *Wards Cove* for support. HUD is, of course, not free to simply ignore Supreme Court precedent in purporting to apply a statute. *See Neal v. United States,* 516 U.S. 284, 290 (1996)("the Commission does not have the authority to amend the statute we construed in [a prior case]."). HUD's failure to recognize and apply the limitations of *Inclusive Communities* was further legal error.

HUD's error is particularly significant since the supposed purpose of the Disparate-Impact Rule is to set out the governing legal standards for such claims. The court decision enjoining HUD's 2020 rule, which the 2023 rule replaces, noted that although portions of the 2020 rule were consistent with the law, it thought that portions were not, and the injunction issued based on those parts that were not. *See Massachusetts Fair Hous. Ctr. v. HUD*, 496 F. Supp. 3d 600, 607, 611–612 (D. Mass. 2020). *See also Lincoln Properties*, 920 F.3d at 902 (noting that the 2013 HUD rule that the 2023 rule repromulgated was inconsistent with *Inclusive Communities* because it did not impose as demanding a test for liability). The 2023 rule should be rescinded on the same basis.

HUD's action here would be comparable to a hypothetical proposal from the Equal Employment Opportunity Commission ("EEOC") to promulgate a rule to supersede the *Inclusive Communities* decision for future ADEA claims. Federal agencies do not have the power of Congress to enact legislation; nor may they decide that legal standards that Congress limited to one law should be applied to other laws. In the rule at issue HUD sought to act in the stead of Congress rather than promulgate rules that comply with decisions of the Supreme Court. *See, e.g.*, *United States v. Batato*, 833 F.3d 413, 437 (4th Cir. 2016) ("Article III courts cannot render decisions subject to revision by another branch of government.") (citing *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)) (Floyd, J., dissenting).

C. The 2023 rule adopting the standard of the Civil Rights Act of 1991 is a substantial departure from *Inclusive Communities*.

Congress designed the 1991 Title VII amendments to alter the *Wards Cove* disparate-impact standard as applied to that statute, so it comes as no surprise that, in improperly adopting the 1991 Title VII amendments, the 2023 rule also diverges widely from *Inclusive Communities*, and portions of *Wards Cove* that it explicitly adopted, in several significant ways, outlined at pp. 4-5 above.

Inclusive Communities, citing *Wards Cove,* requires a plaintiff to identify a specific policy of the defendant and adequately plead that such policy is the cause of the disparity. This "robust causality requirement ensures that racial imbalance does not, without more, establish a prima facie case of disparate impact," 576 U.S. at 542 (quoting *Wards Cove*, 490 U.S. at 653) (cleaned up). In contrast, HUD's rule permits a plaintiff "to challenge the decision-making process as a whole," 2023 rule, 88 Fed. Reg. at 19,485, and HUD rejected a requirement to show that each challenged practice has a significantly disparate impact. *Id*., at 19,486.

Inclusive Communities also cautioned that *"*policies are not contrary to the disparate-impact requirement unless they are artificial, arbitrary, and unnecessary barriers," and that defendants must be given "leeway to state and explain the valid interest served by their policies," 576 U.S. at 541, and should be able "to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system. *Id*., at 533. HUD, however requires the "defendant to prove that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." 2023 rule, 88 Fed. Reg. at 19,484. HUD also refused to require a plaintiff to allege that a challenged barrier was artificial, arbitrary, and unnecessary.

Finally, *Inclusive Communities* concluded, as did *Wards Cove*, that when a defendant offers a legitimate business justification, a plaintiff cannot sustain a disparate-impact claim if it cannot prove "there is 'an available alternative … practice that has less disparate impact and serves the [entity's] legitimate needs.'" See *Wards Cove*, 490 U.S. at 661 ("any alternative practices … must be equally effective … in achieving [] legitimate [] goals"). HUD refused to adopt this standard. 88 Fed. Reg. at 19,491.

Inclusive Communities cautioned that "disparate-impact liability has always been properly limited in key respects." It described both the limits in detail, and the harmful and unconstitutional consequences flowing from an overbroad application of disparate impact—including the possible invidious consideration of race or national origin in decision-making through racial quotas. *Inclusive Communities*, 576 U.S. at 540-42. Yet the 2023 rule describes no meaningful limits on the use of disparate impact and certainly not the type of limits that the Supreme Court has mandated. *See Lincoln Properties*, 920 F.3d at 902 (noting the inconsistencies between the HUD rule and *Inclusive Communities*).

Even if HUD had the authority to promulgate in the housing-discrimination realm what it took an act of Congress to achieve in the employment-discrimination realm, which it does not, the 2023 rule exceeds HUD's authority for a separate but interrelated reason. Although HUD purports to adopt the "Title VII discriminatory effects standard codified by Congress in 1991," 2023 rule, 88 Fed. Reg. at 19490, HUD did not adopt the entirety of the standard Congress enacted for Title VII. Instead, by adopting the 1991 statute's burdens on defendants while ignoring the same statute's limitations on disparate impact, HUD formulated a standard for the FHA quite different from what Congress enacted for Title VII.

For instance, under the 1991 Title VII standard, employment-discrimination plaintiffs must establish intent—not merely discriminatory effect—to state a claim for money damages. *See* 42 U.S.C. § 1981a(b)(1)–(2) (prohibiting compensatory and punitive damages in Title VII disparate-impact cases). This is the type of limitation on disparate-impact liability envisioned by *Inclusive Communities* when the Supreme Court observed that "[r]emedial orders in disparate-impact cases should concentrate on the elimination of the offending practice that arbitrarily operates to discriminate on the basis of race." 576 U.S. at 544 (internal quotations omitted). Congress has never enacted, and the Supreme Court has never recognized, a disparate-impact standard that both *rejects* the limitations the Supreme Court placed on disparate impact claims in *Wards Cove* and, at the same time, *allows* a claim for money damages.

The 2023 rule nonetheless does exactly that. HUD rejected the provisions of the 1991 legislation precluding disparate-impact plaintiffs from obtaining money damages under Title VII (either compensatory or punitive) under use of the more lenient standard enacted by the 1991 Act, and set no limits on the use of disparate impact to obtain money damages under the FHA. The Rule provides no sound rationale for adopting certain provisions of the 1991 Title VII amendments (those which might be viewed as plaintiff-friendly) while rejecting other provisions of the same statute (those which establish limitations on the use of disparate impact). The 1991 amendments reflect Congress's comprehensive statutory framework for the application of disparate impact under Title VII. Indeed, the legislative history of the 1991 amendments confirms the delicate balance Congress envisioned: "The bill does not give victims an unlimited entitlement to damages. Compensatory and punitive damages are available only in cases of intentional discrimination." 137 Cong. Rec. S15219, S15234 (Oct. 25, 1991) (emphasis added).

It is, of course, markedly different to provide a "no requirement of intent" standard for lawsuits that seek to eliminate offending business practices than it is to provide such a standard in lawsuits that seek compensatory and punitive damages. And HUD has not identified any reasoned basis for adopting only a portion of Congress's 1991 Title VII amendments.

IV. The 2023 Rule Imposes Unwarranted and Unlawful Burdens on the Lending Industry

The 2023 rule's failure to adhere to Supreme Court precedent has important and harmful effects on the ABA and its members. For instance, credit decisions related to residential mortgage applications do not align neatly with the realities of racial distribution within the population.

Differences that might be correlated with factors such as age, race, or national origin are to be expected even with the application of fair and prudent underwriting standards, simply because of societal differences in wealth, income, employment, and credit scores. *Inclusive Communities* imposes a significantly greater burden on a plaintiff than the HUD rule by requiring the plaintiff to identify the specific and uniformly applied business practice that is challenged and to demonstrate "robust" causality between the challenged practice and the statistical imbalance. Moreover, *Inclusive Communities* limits disparate-impact claims to the "removal of artificial, arbitrary and unnecessary barriers" to housing. 576 U.S. at 540. HUD ignores these important limitations. HUD's misapplication of Supreme Court precedent substantially increases both the likelihood and cost of litigation, as well as ensuing risk of reputational injuries, over that which would be present if HUD had properly followed that precedent.

The 2023 rule puts at risk sensible, risk-based lending standards that are applied fairly. In general, lenders and investors must evaluate available information relative to both the *ability* of a consumer to repay a loan and the apparent *willingness* of the consumer to repay debts. Today, this evaluation is mainly performed using automated underwriting systems that consider multiple factors. Fannie Mae and Freddie Mac require the submission of loan applications by means of proprietary automated underwriting systems. Underwriting systems are complex and consider the relationship among many factors There are, however, certain basic factors relevant to underwriting virtually all residential mortgage loan applications, three of which are highlighted here. These include down-payment or loan-to-value requirements, debt-to-income requirements, and credit-score requirements.

National data indicate that on average, racial and ethnic groups have differences in economic and credit characteristics. Similarly, the Federal Reserve Board ("FRB") has recognized that standardized credit scores, such as those FICO generates, "are predictive of credit risk for the population as a whole and for all major demographic groups." *See* Board of Governors of Fed. Reserve Sys., *Report to the Congress on Credit Scoring and its Effects on the Availability and Affordability of Credit*, at S-1, O-13 (Aug. 2007), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/creditscore/creditscore.pdf. The sensible, risk-based criteria used to evaluate a consumer's qualification for residential mortgage credit assess the economic and credit characteristics of the *individual* consumer and are applied fairly and uniformly to all consumers. Yet, differences in the economic and credit characteristics across race and ethnicity can lead to differences in the availability or terms of credit when those groups are viewed as a whole. The 2023 rule suggests that such outcomes can provide the basis for a legal challenge pursuant to a disparate-impact theory. For instance, in promulgating the rule originally in 2013, HUD asserted that it and the courts " have recognized that analysis of loan level data identified through [the Home Mortgage Disclosure Act] may indicate a disparate impact." 78 Fed. Reg. at 11,478

Of course, a lender might ultimately prevail in litigation that goes forward based on such statistical disparities, but under HUD's rule, lenders face a shift in the burden of proof, *see* 78 Fed. Reg. at 11,482, *codified at* 24 C.F.R. § 100.500(c)(contrary to *Wards Cove*), and have to expend substantial resources in defense and suffer the reputational consequences of a

discrimination charge. Defending against these types of claims raises significant challenges. A lender may argue, for example, that a certain credit-score threshold is necessary to maintain a certain level of loan performance, in recognition of the fact that a lower cutoff would result in increased defaults and a decline in revenue. Reducing losses and increasing return on investment are legitimate business interests, yet under the disparate-impact theory as articulated in the HUD rule lenders may be required to justify the necessity of a certain level of return given the racial or ethnic impact that results from the use of credit-score thresholds. *See* 78 Fed. Reg. at 11,479-80. For example, under the reasoning of the rule, HUD has refused to recognize that business and profit considerations are a justifiable basis for a lending standard even though *Inclusive Communities* stated that "disparate impact liability must be limited so . . . regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system" and " [e]ntrepreneurs must be given latitude to consider market factors." 576 U.S. at 533, 541-42. *See* 78 Fed. Reg. at 11,471.

The HUD rule could also be cited to support a challenge to the standard business practice of permitting loan originators an amount of discretion to compete in the marketplace, for example, by reducing the price of a loan to match or beat the offer of another lender, notwithstanding the Supreme Court's recognition of the value of such discretion in *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338 (2011). HUD stated in promulgating the rule that it "does not agree that the Supreme Court's decision in *Wal-Mart* means that policies permitting discretion may not give rise to discriminatory effects liability under the Fair Housing Act." 78 Fed. Reg. at 11,468.

V. The 2023 Rule Encourages Discrimination on the Basis of Race

The Supreme Court cautioned in *Inclusive Communities* that "[c]ourts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision." 576 U.S. at 544. A rule that allows a broad focus on the racial and ethnic *outcomes* of a process that may otherwise be fair and non-discriminatory has the potential to push businesses to consider the very factors that the Act prohibits.

To take one example, if disparate-impact claims can be based simply on outcomes of fair practices, such as the non-discriminatory exercise of discretion, some lenders may feel compelled to mitigate the risk of having to defend such outcomes by affirmatively considering race in lending decisions. But such conduct would likely constitute intentional discrimination that itself violates the Act. *See, e.g., Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (under Title VII, "before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action"). The Supreme Court has cautioned against this result even as it has permitted the use of a disparate-impact theory of liability based on language in other federal anti-discrimination statutes. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992-93 (1988) (in Title VII context, noting that "the inevitable focus on statistics in disparate-impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures").

Conclusion

The 2023 rule does not accurately state the law, puts necessary and nondiscriminatory lending practices at risk, and creates incentives to discriminate rather than reducing discrimination. Moreover, it continues to create confusion in the courts as to the proper standards under the FHA as interpreted by the Supreme Court. *See, e.g., National Fair Housing Alliance, supra.* The harmful effects of the rule should be addressed by its immediate recission.

The rule should be replaced, as it was in 2020, by a rule that "better reflect[s]" Supreme Court precedent, *see* 85 Fed. Reg. at 60,288, and that is not infected by the legal errors in the 2023 rule. The 2020 rule provides a sound basis for such a rule.

Respectfully submitted,

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