

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASSACHUSETTS FAIR HOUSING
CENTER and HOUSING WORKS, INC.,

Plaintiffs,

V.

Civil Action No.

UNITED STATES DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT
and BEN CARSON, Secretary of the
Department of Housing and Urban
Development,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs Massachusetts Fair Housing Center (“MFHC”) and Housing Works, Inc. (“Housing Works”) seek a declaratory judgment and injunctive relief vacating a new rule promulgated by the Department of Housing and Urban Development (“HUD”), *Implementation of the Fair Housing Act’s Disparate Impact Standard*, 85 Fed. Reg. 60288 (September 24, 2020) (the “2020 Rule”). The 2020 Rule, as it would be codified in 24 C.F.R. §§ 100.5 and 100.500 on October 26, 2020 (when the 2020 Rule is set to take effect), is attached as Exhibit A.

2. The 2020 Rule undermines the ability of victims of housing and mortgage lending discrimination to pursue disparate impact claims under the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* (the “FHA”), by introducing novel pleading and proof requirements that will be virtually impossible to meet, and creating broad new defenses to liability, contrary to the language and intent of the FHA and decades of practice, both at HUD and in the courts.

3. The ability to bring disparate impact claims to root out and eliminate subtle, disguised or ignorant discrimination on the basis of race, color, religion, sex, disability, familial status or national origin is central to the FHA's structure and purpose to eradicate systemic housing discrimination and create inclusive communities.

4. If the 2020 Rule is allowed to take effect, the vitally important remedial purposes of the FHA will be seriously undermined. Victims of housing and lending discrimination will face unreasonably high barriers, erected by HUD to deter the pursuit of valid disparate housing claims, and fair housing advocates such as the Plaintiffs will be stripped of an essential tool they have relied on for decades in the continuing fight against segregated housing.

5. By making it nearly impossible for a victim of housing or lending discrimination to plead and prove their case, the 2020 Rule will allow perpetrators of housing and lending discrimination to act with impunity, defeating the central goal of the FHA.

6. The Court should issue a preliminary injunction, extending the effective date of the 2020 Rule during the pendency of this review proceeding, and then declare the 2020 Rule to be unlawful, and set it aside under the Administrative Procedure Act (the "APA"), to prevent irreparable harm and provide complete, uniform and fair protection to the Plaintiffs and similar organizations, and the victims of housing and lending discrimination they represent.

PARTIES

Plaintiffs

Massachusetts Fair Housing Center

7. Massachusetts Fair Housing Center is a non-profit, charitable corporation organized under the laws of the Commonwealth of Massachusetts with a principal place of business at 57 Suffolk Street, Fourth Floor, Holyoke, Massachusetts.

8. MFHC is a full-service fair housing organization dedicated to eliminating systemic housing discrimination and creating inclusive communities in the Commonwealth of Massachusetts. Founded in 1989, MFHC has been continuously operating for over thirty years, with a service area that includes Worcester, Franklin, Hampshire, Hampden and Berkshire Counties.

9. MFHC provides free legal services, conducts housing discrimination testing, and accepts housing discrimination complaints based on race, national origin, color, ancestry, religion, sex, disability, presence of minor children, sexual orientation, gender identity and expression, age, marital status, military or veteran status, receipt of public assistance, including Section 8 housing assistance, receipt of housing subsidies, or rental assistance, and genetic information.

10. MFHC accepts over 300 housing discrimination complaints per year, and has recovered hundreds of thousands of dollars in damages and extensive injunctive relief for victims of housing discrimination.

11. In addition to its legal work, MFHC provides extensive education and outreach services on issues of fair housing and fair lending.

12. MFHC provides training in fair housing to community groups, healthcare providers, tenants, landlords, property managers, realtors, first-time home buyers, and others. MFHC's trainings focus largely on educating the public about their rights under the FHA and state anti-discrimination law and educating housing professionals about their obligations under these laws. MFHC has expended resources in preparing training materials and training its own staff in the legal standards applicable to FHA cases in order to provide this education.

13. MFHC also advocates for local, state and federal policy changes to end systemic discrimination and promote housing choice.

14. MFHC's legal, education, and advocacy efforts have resulted in changes in behavior in the landlord and realtor communities in Massachusetts.

15. HUD has for many years recognized that as an organization with experience providing quality fair housing enforcement activities, MFHC is eligible under HUD's Fair Housing Initiatives Program ("FHIP") for grants to carry out testing and enforcement activities to prevent or eliminate discriminatory housing practices.

16. HUD has also consistently acknowledged MFHC's standing to bring charges of discriminatory housing practices under the FHA, most recently in *MFHC v. Kamins of Amherst, Inc., et al.*, FHEO No. 01-19-2559-8 (September 11, 2020), and *MFHC v. Bernashe Realty, Inc., et al.*, FHEO No. 01-18-8950-8 (August 7, 2018). In both of these cases, HUD recognized MFHC as an "aggrieved person" within the meaning of the FHA and HUD's regulations. 42 U.S.C. § 3602(i); 24 C.F.R. § 100.20.

Housing Works, Inc.

17. Housing Works, Inc. is a not-for-profit corporation organized under the laws of the State of New York with a principal place of business at 57 Willoughby St., Brooklyn, New York.

18. Housing Works is a healing community of people living with and affected by HIV/AIDS whose mission is to end the dual crises of homelessness and AIDS. Housing Works is deeply committed to ensuring fair and affordable housing for marginalized, indigent, and low-income communities. Founded in 1990, Housing Works provides a comprehensive array of services to more than 30,000 homeless and low-income New Yorkers living with and affected by HIV/AIDS.

19. Housing Works provides advocacy and comprehensive services to forward its mission, including legal services to help clients obtain housing and challenge discriminatory housing policies and practices.

20. Through its advocacy offices in New York City, Albany, New York, Washington, D.C., Puerto Rico and Haiti, Housing Works fights for funding and legislation to ensure that all people living with HIV/AIDS have access to quality housing, healthcare, HIV prevention information and other life-sustaining services, as well as legal protections from discrimination.

21. Housing Works also provides supportive services including housing, healthcare, meals and nutritional counseling, mental health and substance use treatment, job training, and legal assistance.

22. As part of its housing services, Housing Works operates twelve residences to provide housing to eligible individuals living with HIV; people of transgender experience living with HIV; single men and women with active substance abuse issues; HIV-positive single women recently released from a correctional setting; HIV-positive unstably housed LGBTQ youth; and families where the head-of-household is living with HIV.

23. Housing Works also provides free legal services to help clients obtain housing, through the Housing Works Legal Department and the HIV Law Project.

24. For over two decades, Housing Works' Legal Department has successfully prosecuted impact litigation on issues involving HIV/AIDS, homelessness, public benefits, and disability, housing and gender discrimination. Housing Works has been at the forefront of challenging source of income and disability discrimination in New York City's housing market.

25. Prosecuting disparate impact claims under the FHA, Housing Works has secured seminal legal decisions and successfully settled numerous cases against some of the largest

landlords in New York and around the country on behalf of New Yorkers living with HIV/AIDS who rely upon public subsidies to secure and maintain their housing.

The 2020 Rule's Impact on the Plaintiffs

26. The 2020 Rule will frustrate the Plaintiffs' ability to fulfill their missions of eradicating systemic housing discrimination and creating inclusive communities because the 2020 Rule arbitrarily raises the pleading standards and proof requirements plaintiffs must meet to bring disparate impact claims, a critical tool for providing legal relief and redress to victims of housing and lending discrimination.

27. The 2020 Rule's heightened pleading and proof requirements, as well as the novel defenses it creates, are intended to, and will, deter victims of housing or lending discrimination from working with the Plaintiffs to bring cases based on disparate impacts because of the vast amount of information victims must seek to gather at the outset of a case in order to meet the new pleading standards, including information that is likely to be in the exclusive possession of potential defendants who may not be subject to pretrial discovery or public records laws.

28. The 2020 Rule will require the Plaintiffs to divert resources from their existing programs to provide the assistance needed to meet the 2020 Rule's improperly heightened pleading and proof requirements.

29. The 2020 Rule will require the Plaintiffs to abandon cases and claims in development, on which the Plaintiffs had already expended time and resources, which would have previously been viable under the 2013 Rule, but are now made prohibitively more challenging by the new 2020 Rule.

30. The 2020 Rule undermines the important remedial purpose of recognizing disparate impact liability and will thwart the Plaintiffs' ability to advocate that property owners,

local land use officials, and lenders adhere to nondiscriminatory practices because they may no longer fear liability—or even scrutiny—under the FHA.

31. The 2020 Rule will undermine the Plaintiffs' ability to pursue disparate impact claims not only to address individual cases of housing discrimination, but also to change patterns of behavior that lead to disparate impacts on many members of protected classes.

32. The 2020 Rule will require the Plaintiffs to expend significant resources to reeducate victims of housing and lending discrimination on their rights under the FHA, and to assure them that they are still protected under the FHA, notwithstanding the 2020 Rule's heightened pleading and proof standards which are designed to deter them from vindicating their rights.

33. The 2020 Rule will require the Plaintiffs to expend significant time and resources to train staff members and prepare new training materials for public outreach. The Plaintiffs will have to divert resources and time that would otherwise have been available for other critically-important programming, all in the middle of a pandemic that already strains the resources of organizations at the frontlines of fighting housing insecurity.

34. The 2020 Rule will increase the demand for the Plaintiffs' services, because the 2020 Rule will dilute the FHA's deterrent effect on discriminatory behavior in housing and lending, but at the same time the 2020 Rule will make it far more difficult for the Plaintiffs to provide relief to the clients they serve.

Defendants

35. Defendant U.S. Department of Housing and Urban Development is a department of the Executive Branch of the United States Government. HUD published the 2020 Rule in the Federal Register on September 24, 2020.

36. Defendant Ben Carson is the Secretary of HUD and is responsible for overseeing all HUD operations, including the promulgation of regulations, the development and implementation of programs, and compliance with and enforcement of governing statutes, including the FHA. Secretary Carson is sued in his official capacity.

37. HUD and Secretary Carson have a statutory obligation to affirmatively further fair housing. 42 U.S.C. §§ 3608(d) & (e)(5).

JURISDICTION AND VENUE

38. This Court has jurisdiction over this matter under 28 U.S.C. § 1331, 5 U.S.C. §§ 702 & 703, and 28 U.S.C. § 2201.

39. Venue is proper in this Court under 28 U.S.C. § 1391 because Plaintiff MFHC has its principal place of business in Holyoke, Massachusetts.

FACTS

The Pursuit of Disparate Impact Claims is Essential to Fulfilling the Goals of the FHA

40. Passed in 1968, seven days after the assassination of Dr. Martin Luther King, Jr., the purpose of the FHA is to prohibit and eradicate entrenched racial segregation and exclusion in housing and related services such as mortgage lending.

41. The FHA is a fitting tribute to Dr. King, who devoted the final years of his life to ending segregation in housing. In March 1965, approximately one year before the FHA was signed into law, Dr. King gave a speech on the steps of the Alabama State Capitol at the end of the march from Selma to Montgomery, calling for an end to segregated housing “until every ghetto or social and economic depression dissolves, and Negroes and whites live side by side in decent, safe, and sanitary housing.”¹

¹ Dr. Martin Luther King, Jr., Address at the Conclusion of the Selma to Montgomery March (Mar. 25, 1965), <https://kinginstitute.stanford.edu/king-papers/documents/address-conclusion-selma-montgomery-march>.

42. Dr. King was not alone in his efforts. One month prior to the enactment of the FHA, a commission chaired by Illinois Governor Otto Kerner, Jr. released a report documenting the cause of protests that had swept the country in the prior summer (the “Kerner Report”).² The Kerner Report sounded the alarm that America was moving toward two “separate and unequal societies”—one Black and one white.³ The report found that white racism was “essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II.”⁴ The “ingredients of this mixture” included “pervasive discrimination and segregation” in housing, which the report found had “resulted in the continuing exclusion of great numbers of Negroes from the benefits of economic progress.”⁵ The Kerner Report concluded with a recommendation that Congress pass a “comprehensive and enforceable open housing law” to address the problem.⁶

43. Courts have understood and enforced the FHA in light of its historical roots. As the United States District Court for the District of Columbia recently observed, the FHA “was, in large part, a response to the heightened racial tensions and riots erupting in the United States throughout the 1960s, and the FHA’s passage reflected an understanding that ‘fair housing legislation’ was ‘the best way for Congress’ at that time ‘to start on the true road to integration.’” *National Fair Housing All. v. Carson*, 330 F. Supp. 2d 14, 24 (D.D.C. 2018).

² NAT’L ADVISORY COMM’N OF CIVIL DISORDERS, REPORT OF THE U.S. NAT’L ADVISORY COMMISSION ON CIVIL DISORDERS (1968), <https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf>.

³ *Id.* at 5.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 13.

44. As a remedial statute, the FHA is designed to provide broad and powerful protections from housing discrimination on the basis of race, color, religion, sex, disability, familial status, or national origin, and to provide ready access to and redress at HUD and in the courts when discrimination does occur.

45. The FHA makes it the policy of the United States to support the development and maintenance of diverse and inclusive neighborhoods by guaranteeing fair housing for all.

46. Until very recently, HUD understood and acknowledged its long-standing statutory mandate under the FHA to “affirmatively further fair housing” by “taking meaningful actions, in addition to combating discrimination, that . . . foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.” *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42272, 42353 (July 16, 2015) (defining “affirmatively further fair housing” in 24 C.F.R. § 5.152, rescinded in its entirety by HUD effective August 7, 2020).

47. By 1998, when Congress revisited and strengthened the FHA through the Fair Housing Amendments Act of 1988 (the “FHAA”), every federal Court of Appeals that had considered the issue had concluded that a plaintiff may prevail on a housing or lending discrimination claim under the FHA by demonstrating discriminatory intent or, alternatively, by showing that the challenged practice actually or predictably results in racial discrimination — in other words, that it has a discriminatory effect or “disparate impact.”

48. By that time, courts had arrived at a consistent understanding as to the pleading standards and shifting burdens of proof in disparate impact cases, drawing upon their experience adjudicating claims under Title VII of the Civil Rights Act (“Title VII”), 42 U.S.C. §§ 2000e *et seq.*, the FHA’s sister statute in employment.

49. When it enacted the FHAA in 1988, Congress accepted and ratified the approach HUD and the courts had taken in disparate impact cases under the FHA and expressly rejected a proposed amendment that would have eliminated disparate impact liability for certain zoning decisions.

50. In 2015, the Supreme Court unequivocally affirmed that the FHA prohibits both intentional discrimination and acts with unjustified disparate impacts that create “separate and unequal” conditions. *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 576 U.S. 519, 546 (2015) (“*Inclusive Communities*”). The Supreme Court underscored that “[r]ecognition of disparate-impact claims is consistent with the FHA’s central purpose” and that disparate impact liability is necessary to “counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.” *Id.* at 521. The Court based its analysis on the text of the FHA, overwhelming appellate court precedent endorsing such an interpretation, and the 1988 enactment of the Fair Housing Amendments Act, which strengthened the FHA and ratified this understanding. *Id.* at 534.

51. The Supreme Court explained the central role disparate impact cases play in FHA enforcement, noting that, all too often, “zoning laws and other housing restrictions . . . function unfairly to exclude minorities from certain neighborhoods without any sufficient justification,” and that suits “targeting such practices reside at the heartland of disparate-impact liability.” *Id.* at 540.

52. As the Supreme Court also pointedly noted, although many decades have passed since the initial passage of the FHA, “much progress remains to be made in our Nation’s continuing struggle against racial isolation.” *Id.* at 546.

53. Just as it did in 1968, when the FHA was enacted, where one lives continues today to dictate almost every aspect of an individual's life in America, perhaps most importantly, access to a good education. The re-segregation of school districts is fueled by factors including “pervasive housing discrimination (to include steering families of color into specific neighborhoods)” and “school zoning practices that intensify racial isolation.”⁷

54. The adverse impacts on children who attend racially concentrated schools cannot be overstated. One educational nonprofit reported that, nationwide, “predominantly White school districts get \$23 billion more than their non-White peers, despite serving a similar number of children,” a financial windfall that translates into less crowded classrooms, newer textbooks, fields trips, advanced courses, and access to green space and outdoor recreation.⁸ To that end, an individual family's income is less determinative of their child's access to educational resources than their residence in a majority-white school district.

55. Segregated communities of color are also far more likely to be exposed to pollution and its attendant environmental health impacts, with a community's racial composition the strongest predictor of whether an environmental hazard, such as a hazardous waste facility, would be sited there.⁹

56. Discrimination in lending, including the denial of conventional mortgage loans to families of color, exacerbates this problem.

⁷ John Kucsera and Gary Orfield, *New York State's Extreme School Segregation: Inequality, Inaction and a Damaged Future*, The UCLA Civil Rights Project (Mar. 2014), at 113.

⁸ EdBuild, *\$23 Billion*, <https://edbuild.org/content/23-billion> (last accessed Sep. 26, 2020).

⁹ Commission for Racial Justice, United Church of Christ, *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites* xiii (1987); U.S. Comm'n on Civil Rights, *Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898*, at 7-8 (2016) (“Both historical and current housing segregation amplifies the burden of toxic industrial waste on communities of color.”).

57. In denying mortgages to Black and Latinx applicants, private lenders prevent communities of color from accessing an important source of wealth, thereby entrenching and perpetuating generational poverty.

58. Today, emerging forms of discrimination, such as the use of data analysis and algorithms in decision-making, contribute to the perpetuation of segregated housing and discrimination in residential lending and insurance.

59. A range of advanced digital techniques, ranging from profiling to data mining, now exist to analyze enormous datasets composed of individual decisions and activities in order to decipher patterns and make predictions. Decisions to accept or deny a loan or to target who will see a housing opportunity when browsing social media, are strongly influenced by machines and algorithms.¹⁰

60. Although these models appear facially neutral, they rely on data inputs to make future predictions, and if the inputs involve flawed or incomplete information that reflects historical inequality, the models can replicate and even amplify human biases affecting protected groups.¹¹

61. All of these developments underscore the continued importance of disparate impact liability.

¹⁰ Maddalena Favaretto *et al.*, *Big Data and Discrimination: Perils, Promises and Solutions. A Systematic Review*, 6:12 Journal of Big Data 2, 3 (2019); Latanya Sweeney, *Discrimination in Online Ad Delivery*, Data Privacy Lab (Jan. 28, 2013).

¹¹ Nicol Turner Lee *et al.*, *Algorithmic Bias Detection and Mitigation: Best Practices and Policies to Reduce Consumer Harms*, Brookings (May 22, 2019).

HUD’s 2013 Rule Properly Codified Well-Established Practice in Disparate Impact Cases

62. Congress vested the authority and responsibility for administering the FHA in HUD and authorized the Secretary to issue regulations interpreting the FHA. 42 U.S.C. § 3608.

63. In 2013, HUD promulgated a new rule setting forth how liability can be established under the FHA based on proof of discriminatory effects rather than discriminatory intent. *Implementation of the Fair Housing Act’s Discriminatory Effects Standard*, 78 Fed. Reg. 11460 (Feb. 15, 2013) (the “2013 Rule”). The 2013 Rule, as it currently appears in 24 C.F.R. § 100.500, is attached as Exhibit B.

64. The 2013 Rule reflected decades of accumulated experience in the adjudication of disparate impact claims, both at HUD and in the courts. The 2013 Rule defined an unlawful “discriminatory effect”; set forth what could be recognized as a “legally sufficient justification”; and codified the familiar three-part burden shifting framework. Unlike the 2020 Rule, the 2013 Rule did not alter existing law or purport to change applicable procedures for the adjudication of disparate impact claims.

65. The 2013 Rule was silent with respect to pleading requirements.

66. Under the 2013 Rule, a victim of housing or lending discrimination has the initial burden of proving that a policy or practice causes or predictably will cause a discriminatory effect, with a disproportionate impact on protected individuals, or that it will create, increase, reinforce or perpetuate “segregated housing patterns.” 24 C.F.R. § 100.500(c)(1).

67. Under the 2013 Rule, if the plaintiff is able to meet their burden, the defendant may then justify its actions by providing evidence that the policy or practice is necessary to achieve “substantial, legitimate, nondiscriminatory interests.” 24 C.F.R. § 100.500(c)(2).

68. Finally, under the 2013 Rule, even if the defendant proves a valid interest, the plaintiff can still prevail by proving that “the substantial, legitimate, nondiscriminatory interests

supporting the challenged practice could be served by another practice that has a less discriminatory effect.” 24 C.F.R. § 100.500(c)(3).

69. The 2013 Rule codified decades of well-accepted judicial interpretation and agency practice. HUD and the courts have continued to follow the approach codified by the 2013 Rule since its promulgation.

**The 2020 Rule Is Inconsistent with the Language and Intent of the FHA
and Decades of Federal Practice under the Statute**

70. On August 19, 2019, HUD published a Proposed Rule to replace the 2013 Rule. The Proposed Rule altered HUD’s definition of “discriminatory effect,” introduced novel pleading requirements, created new defenses and overhauled the well-accepted burden-shifting rules. *HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard*, 84 Fed. Reg. 42854, 42854 (the “Proposed Rule”).

71. HUD issued the final 2020 Rule on September 24, 2020. 85 Fed. Reg. 60288.

72. The 2020 Rule strikes the perpetuation of “segregated housing patterns” from the definition of “discriminatory effect,” as it appears in the 2013 Rule. 85 Fed. Reg. at 60306, 60332 (24 C.F.R. § 100.500(a)). HUD’s decision to remove references to segregated housing patterns from its new disparate impact rule highlights the agency’s disregard for the core purpose of the FHA and is not justified by, or even consistent with, *Inclusive Communities*.

73. The 2020 Rule dilutes the protections afforded by the FHA by requiring claimants to anticipate defenses and plead facts they may have no ability to discover before filing their claim; giving defendants a wide variety of new defenses that cannot be reconciled with the purpose of the FHA; and discarding the well-established burden-shifting framework that has been used for decades not only in housing discrimination cases, but in a wide variety of other kinds of civil rights actions such as those under Title VII. The 2020 Rule deviates from the

Proposed Rule, however, by announcing a new “outcome prediction” defense that was never subject to notice or comment.

74. Consistent with its overreaching intent to tilt the scales in favor of property owners and mortgage lenders, the 2020 Rule also signals to potential defendants that they should not collect data that might reveal the disparate impacts of their practices or policies, and eliminates the availability of exemplary damages in administrative cases.

75. HUD asserts that the 2020 Rule does not create new standards for liability under the FHA, but merely brings the 2013 Rule into alignment with the Supreme Court’s decision in *Inclusive Communities* and provides clarity to members of the public seeking to comply with the FHA or to bring a claim for disparate impact that meets the requirements outlined in *Inclusive Communities*.

76. Contrary to HUD’s assertions, the 2020 Rule is directly contrary to *Inclusive Communities*; introduces novel pleading and proof requirements, and new defenses, which upset accepted practice and undermine enforcement of the FHA; and will inevitably confuse members of the public seeking to understand their rights and obligations under the FHA.

The 2020 Rule Imposes Prohibitive New Pleading Requirements

77. Under the 2020 Rule, a plaintiff is not only required to plead that “a specific, identifiable policy or practice has a discriminatory effect”; a plaintiff must also “sufficiently plead facts” to support each of five new elements:

(1) That the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law;

(2) That the challenged policy or practice has a disproportionately adverse effect on members of a protected class;

(3) That there is a robust causal link between the challenged policy or practice and the adverse effect on members of a protected class, meaning that the specific policy or practice is the direct cause of the discriminatory effect;

(4) That the alleged disparity caused by the policy or practice is significant; and

(5) That there is a direct relation between the injury asserted and the injurious conduct alleged.

2020 Rule, 24 C.F.R. § 100.500(b).

78. The 2020 Rule then permits a defendant, again at the “pleading stage,” to “establish” that the plaintiff failed to make out a case by “showing” that a plaintiff has failed to sufficiently plead facts to establish any of the required elements of a *prima facie* case. 2020 Rule, 24 C.F.R. § 100.500(d)(1). In effect, this requires a plaintiff, without the benefit of discovery, not only to meet the overwhelming demands of the 2020 Rule’s new five-part pleading requirements, but also to anticipate in their complaint every practical, profit-oriented, policy consideration or requirement of law a defendant might invoke in defense of its discriminatory policy or practice.

79. By imposing these onerous requirements at the pleading stage, the 2020 Rule will deter the filing of complaints and prevent victims of housing or lending discrimination from engaging in pretrial discovery and obtaining a full and fair adjudication of their claims.

80. None of the new elements a plaintiff must allege under the 2020 Rule’s pleading provisions is required by or consistent with the FHA or *Inclusive Communities*. To the contrary, they undermine the ability of victims of housing and lending discrimination to pursue the disparate impact liability *Inclusive Communities* described as central to the FHA’s statutory scheme.

81. HUD acknowledges that it lacks the authority to dictate pleadings standards to the federal courts and can, at most, set forth the required elements of a disparate impact claim under the FHA. 85 Fed. Reg. at 60307-60308. The 2020 Rule itself is silent as to whether the new pleading requirements it imposes apply only in administrative proceedings at HUD or also in the courts. HUD implies throughout the preamble to the 2020 Rule, however, and in its response to submitted comments that the new rule is intended to apply both at HUD and in the courts.

The 2020 Rule Invents Broad and Unjustifiable New Defenses

82. While the 2020 Rule piles up the burdensome requirements plaintiffs must meet to bring and sustain their case, it eases the burdens of proof on defendants, and arms them with a slew of new defenses to escape liability.

83. The 2020 Rule gives a defendant the opportunity to rebut a victim's allegation that the challenged policy or practice is "arbitrary, artificial and unnecessary" simply by producing evidence showing that the challenged policy or practice "advances a valid interest," 2020 Rule, 24 C.F.R. § 100.500(c)(2), rather than by showing that the interest be "substantial, legitimate, [and] non-discriminatory," as required by the 2013 Rule. 24 C.F.R. § `100.500(c)(2).

84. Even if a plaintiff survives a motion to dismiss at the pleading stage, the 2020 Rule provides that a defendant may still escape liability by demonstrating that the discriminatory policy or practice "is intended to predict an occurrence of an outcome, the prediction represents a valid interest, and the outcome predicted by the policy or practices does not or would not have a disparate impact on protected classes compared to similarly situated individuals not part of the protected class." 2020 Rule, 24 C.F.R. § `100.500(c)(2)(i).

The 2020 Rule Imposes New Burdens of Proof That Unreasonably Favor Business Interests

85. Whereas under the 2013 Rule a plaintiff could still succeed on a disparate impact claim, even if the defendant offered a nondiscriminatory justification, by “proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect,” 2013 Rule, 24 C.F.R. § 100.500(c)(3), the 2020 Rule improperly and unjustifiably raises this ultimate burden of proof, requiring a plaintiff to prove not only that a practice with less discriminatory effects exists, but also that the alternative practice serves the defendants’ identified interest “in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant.” 2020 Rule, § 100.500(c)(3).

86. Requiring a victim to identify an alternative that is least costly or burdensome to defendants introduces a profit defense to justify discriminatory practices—a result completely at odds with the language and history of the FHA and civil rights law in general.

87. By allowing a profit defense, HUD endorses the commodification of exclusion, permitting discrimination to continue to preserve profits—a result that neither Congress nor the courts have ever condoned.

88. HUD has not offered adequate jurisdiction to drastically rewrite the 2013 Rule and create these heightened burdens of proof, which are inconsistent with decades of HUD’s own policies, guidance and decisions.

89. Nowhere in the Proposed Rule nor the 2020 Rule does HUD meaningfully consider the adverse impact of the new 2020 Rule on access to fair housing, an inexcusable failure given HUD’s statutory mandate to eradicate, not perpetuate, housing discrimination.

90. In sum, the 2020 Rule’s extraordinary new pleading requirements, available defenses, and burdens of proof will deter and prevent victims of housing and lending

discrimination from seeking and obtaining relief under the FHA, contravening HUD's statutory obligation to affirmatively further fair housing.

91. The 2020 Rule is contrary to the text and purpose of the FHA because it undermines, rather than furthers, the goal of fair housing; stands in the way of efforts to combat discrimination; and will make it much harder to foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.

92. The 2020 Rule is an arbitrary and capricious departure from 2013 Rule.

93. If the Court does not set it aside, the 2020 Rule will leave victims short of the promise of fair housing that Dr. King and other civil rights leaders called for and that Congress sought to achieve through the FHA.

94. The Plaintiffs will suffer irreparable harm if the 2020 Rule is permitted to take effect.

CLAIMS

Count I: Violation of the APA – Contrary to Law

95. Plaintiffs adopt by reference the allegations of ¶¶ 1-94 of this Complaint.

96. HUD's 2020 Rule is final agency action reviewable in this court under 5 U.S.C. § 704.

97. The APA empowers federal courts to "hold unlawful and set aside agency actions," such as the 2020 Rule, that are "not in accordance with law." 5 U.S.C. § 706(2)(A).

98. Congress declared in 42 U.S.C. § 3601: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."

99. To implement this national policy, in 42 U.S.C. § 3608(e)(5) Congress commanded the Secretary of HUD "to administer the programs and activities relating to housing

and urban development in a manner affirmatively to further the policies” of preventing and eliminating discriminatory housing practices.

100. In promulgating the 2020 Rule, Secretary Carson and HUD have violated the clear statutory command of the FHA to affirmatively further fair housing and have, instead, chosen to protect the financial interests of property owners and lenders who engage in discriminatory practices.

101. The novel pleading rules, defenses and burden shifting provisions of the 2020 Rule erect unreasonable barriers to the pursuit of disparate impact claims.

102. The Court should vacate the 2020 Rule under 5 U.S.C. § 706(2)(A) because the 2020 Rule is inconsistent with the text of the FHA, undermines its core purposes, and is thus not in accordance with law.

Count II: Violation of the APA – Arbitrary and Capricious

103. Plaintiffs adopt by reference the allegations of ¶¶ 1-102 of this Complaint.

104. The APA empowers federal courts to “hold unlawful and set aside agency actions,” such as the 2020 Rule, that are “arbitrary” or “capricious.” 5 U.S.C. § 706(2)(A).

105. HUD has not provided reasoned justification for its decisions to abandon its 2013 Rule, which codified well-accepted interpretations of the FHA and burden-shifting rules, and to replace it with the 2020 Rule, which undermines the purposes of the FHA; introduces new pleading requirements and creates novel defenses that cannot be reconciled with the FHA; and discards long-standing burden-shifting rules in favor of a new framework that puts profits ahead of fairness.

106. HUD’s purported reliance on *Inclusive Communities* as the basis for its radical departure from the 2013 Rule is a pretext; *Inclusive Communities* did not require, or even

encourage, the adoption of HUD's new Rule. The 2020 Rule is inconsistent with *Inclusive Communities*.

107. HUD relied on factors Congress did not intend the agency to consider when HUD invented the new defenses introduced in the 2020 Rule and altered the well-established burden-shifting framework.

108. HUD's distinction between "single events" and "policies and practices" is artificial, unexplained and inconsistent with the purposes of the FHA.

109. HUD's new pleading rules are internally inconsistent and of uncertain application.

110. HUD did not take adequate account of the differences between the new pleading rules established by the 2020 Rule and the Federal Rules of Civil Procedure.

111. HUD did not take adequate account of the adverse impact its 2020 Rule would have on the ability of aggrieved parties to prosecute valid housing and lending discrimination claims.

112. The Court should vacate the 2020 Rule under 5 U.S.C. § 706(2)(A) because the 2020 Rule is arbitrary and capricious.

Count III: Violation of the APA – Notice and Comment

113. Plaintiffs adopt by reference the allegations of ¶¶ 1-112 of this Complaint.

114. The APA directs federal courts to hold unlawful and set aside federal agency action that is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

115. HUD was required both by the FHA, 42 U.S.C. § 3614a, and the APA, 5 U.S.C. § 553, to provide adequate notice and opportunity for comment before promulgating the 2020 Rule.

116. In its 2019 Proposed Rule, HUD introduced an "algorithmic model" defense that sought to shield defendants from liability for policies or practices which utilized algorithms that

were (a) based on “neutral inputs” that were not substitutes for protected characteristics such that the model was not predictive of risk or other valid objectives; (b) considered “industry standard,” used for the intended purpose of the third party, and the responsibility of the third party; or (c) analyzed by a neutral third party who determined the model was empirically derived, that its inputs were not substitutes for a protected characteristic, the model was predictive of risk or other valid objective, and was a demonstrably and statistically sound algorithm. 84 Fed. Reg. at 42862.

117. In the 2020 Rule, HUD discarded the “algorithmic model” approach and inserted an opaque, new provision allowing a defendant to avoid liability by demonstrating that the policy or practice being challenged “is intended to predict the occurrence of an outcome, the prediction represents a valid interest, and the outcome predicted by the policy or practice does not or would not have a disparate impact on protected classes compared to similarly situated individuals not part of the protected class.” 85 Fed. Reg. at 6033, 2020 Rule, 24 C.F.R. § 100.500(d)(2)(i).

118. HUD never gave the public notice of, or any opportunity to comment on, the “outcome prediction” defense that was first announced when the 2020 Rule was published.

119. The “outcome prediction” defense in the 2020 Rule is not the same as the “algorithmic model” defense in the Proposed Rule. It is a new and entirely different defense than what HUD made available for notice and comment when it published the Proposed Rule.

120. Under both the FHA and the APA, HUD was required to give notice of its proposed “outcome prediction” defense and provide an opportunity for comment before adopting the 2020 Rule, but HUD did not do so.

121. The Court should vacate the 2020 Rule under 5 U.S.C. § 706(2)(A) because the 2020 Rule was adopted without adequate notice and comment.

Count IV: Violation of the APA – Without Lawful Authority

122. Plaintiffs adopt by reference the allegations of ¶¶ 1-121 of this Complaint.

123. The APA directs federal courts to hold unlawful and set aside federal agency action that is “in excess or statutory jurisdiction [or] authority.” 5 U.S.C. § 706(2)(C).

124. The 2020 Rule purports to create new pleading requirements, motion practice and burden-shifting rules for all disparate impact complaints, whether they are brought to the FHA by charging parties under 42 U.S.C. § 3610 or brought by plaintiffs in federal or state court.

125. HUD has no statutory power to alter pleading, motion or trial practice in the federal or state courts.

126. HUD has no authority to promulgate retroactive rules under the FHA.

127. Even if it were valid, the 2020 Rule cannot lawfully be applied to pending claims at HUD or in the courts.

PRAYERS FOR RELIEF

Wherefore, the Plaintiffs respectfully request that the Court grant the following relief:

1. Upon motion, issue a preliminary injunction under 5 U.S.C. § 705 postponing the effective date of the 2020 Rule pending conclusion of this review proceeding.
2. Declare that HUD’s 2020 Rule violates the Administrative Procedures Act and the Fair Housing Act.
3. Vacate the 2020 Rule and set it aside under 5 U.S.C. § 706.
4. Award Plaintiffs reasonable attorneys’ fees and costs under the Equal Access to Justice Act or as otherwise authorized by law.
5. Such other relief as justice may warrant.

By their attorneys,

/s/ Lauren Sampson

Lauren Sampson (BBO # 704319)

Oren Sellstrom (BBO # 569045)

LAWYERS FOR CIVIL RIGHTS

61 Batterymarch Street, 5th Floor

Boston, Massachusetts 02210

(617) 482-1145

Scott P. Lewis (BBO # 298740)

Mina S. Makarious (BBO # 675779)

Annie E. Lee (BBO # 705568)

ANDERSON & KREIGER LLP

50 Milk Street, 21st Floor

Boston, Massachusetts 02109

(617) 621-6525

September 28, 2020

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

1. Title of case (name of first party on each side only) Massachusetts Fair Housing Center v. United States Department of Housing and Urban Development
2. Category in which the case belongs based upon the numbered nature of suit code listed on the civil cover sheet. (See local rule 40.1(a)(1)).
- ☐ I. 160, 400, 410, 441, 535, 830*, 835*, 850, 891, 893, R.23, REGARDLESS OF NATURE OF SUIT.
- ☒ II. 110, 130, 190, 196, 370, 375, 376, 440, 442, 443, 445, 446, 448, 470, 751, 820*, 840*, 895, 896, 899.
- ☐ III. 120, 140, 150, 151, 152, 153, 195, 210, 220, 230, 240, 245, 290, 310, 315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 367, 368, 371, 380, 385, 422, 423, 430, 450, 460, 462, 463, 465, 480, 490, 510, 530, 540, 550, 555, 560, 625, 690, 710, 720, 740, 790, 791, 861-865, 870, 871, 890, 950.

*Also complete AO 120 or AO 121. for patent, trademark or copyright cases.

3. Title and number, if any, of related cases. (See local rule 40.1(g)). If more than one prior related case has been filed in this district please indicate the title and number of the first filed case in this court.

NA

4. Has a prior action between the same parties and based on the same claim ever been filed in this court?

YES ☐ NO ☒

5. Does the complaint in this case question the constitutionality of an act of congress affecting the public interest? (See 28 USC §2403)

YES ☐ NO ☒

If so, is the U.S.A. or an officer, agent or employee of the U.S. a party?

YES ☐ NO ☐

6. Is this case required to be heard and determined by a district court of three judges pursuant to title 28 USC §2284?

YES ☐ NO ☒

7. Do all of the parties in this action, excluding governmental agencies of the United States and the Commonwealth of Massachusetts ("governmental agencies"), residing in Massachusetts reside in the same division? - (See Local Rule 40.1(d)).

YES ☒ NO ☐

- A. If yes, in which division do all of the non-governmental parties reside?

Eastern Division ☐ Central Division ☐ Western Division ☒

- B. If no, in which division do the majority of the plaintiffs or the only parties, excluding governmental agencies, residing in Massachusetts reside?

Eastern Division ☐ Central Division ☐ Western Division ☐

8. If filing a Notice of Removal - are there any motions pending in the state court requiring the attention of this Court? (If yes, submit a separate sheet identifying the motions)

YES ☐ NO ☒

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME Mina S. Makarioius

ADDRESS Anderson & Kreiger LLP, 50 Milk St. 21st Floor, Boston, MA 02109

TELEPHONE NO. 617-621-6525

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Massachusetts Fair Housing Center and
Housing Works, Inc.

(b) County of Residence of First Listed Plaintiff Hampden
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Lauren Sampson, Lawyers for Civil Rights, 61 Batterymarch St., 5th Floor,
Boston, MA 02210 617-482-1145 and Mina S. Makarios, Anderson &
Kreiger LLP, 50 Milk St. 21st Flr, Boston, MA 02109 617-625-6525

DEFENDANTS United States Department of Housing and
Urban Development and Ben Carson, Secretary of the Department
of Housing and Urban Development

County of Residence of First Listed Defendant _____

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 896 Arbitration <input checked="" type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

Brief description of cause: Action to Set Aside Dept. of Housing and Urban Development's ("HUD's") Final Rule, "Implementation of the Fair Housing Act's ("FHA's") Disparate Impact Standard"

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION DEMAND \$ _____
UNDER RULE 23, F.R.Cv.P.

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE _____

DOCKET NUMBER _____

DATE

09/28/2020

SIGNATURE OF ATTORNEY OF RECORD

/s/ Mina S. Makarios

FOR OFFICE USE ONLY

RECEIPT # _____

AMOUNT _____

APPLYING IFP _____

JUDGE _____

MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

EXHIBIT A

24 C.F.R. §§ 100.5 and 100.500 under 2020 Rule

24 C.F.R. § 100.5

(a) It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States. No person shall be subjected to discrimination because of race, color, religion, sex, handicap, familial status, or national origin in the sale, rental, or advertising of dwellings, in the provision of brokerage services, or in the availability of residential real estate-related transactions.

(b) This part provides the Department's interpretation of the coverage of the Fair Housing Act regarding discrimination related to the sale or rental of dwellings, the provision of services in connection therewith, and the availability of residential real estate-related transactions. The illustrations of unlawful housing discrimination in this part may be established by a practice's discriminatory effect, even if not motivated by discriminatory intent, and defenses and rebuttals to allegations of unlawful discriminatory effect may be made, consistent with the standards outlined in § 100.500. Guidance documents and other administrative actions and documents issued by HUD shall be consistent with the standards outlined in § 100.500.

(c) Nothing in this part relieves persons participating in a Federal or Federally-assisted program or activity from other requirements applicable to buildings and dwellings.

(d) Nothing in this part requires or encourages the collection of data with respect to race, color, religion, sex, handicap, familial status, or national origin.

24 C.F.R. § 100.500

(a) General. Liability may be established under the Fair Housing Act based on a specific policy's or practice's discriminatory effect on members of a protected class under the Fair Housing Act even if the specific practice was not motivated by a discriminatory intent.

(b) Pleading stage. At the pleading stage, to state a discriminatory effects claim based on an allegation that a specific, identifiable policy or practice has a discriminatory effect, a plaintiff or charging party (hereinafter, "plaintiff") must sufficiently plead facts to support each of the following elements:

(1) That the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law;

(2) That the challenged policy or practice has a disproportionately adverse effect on members of a protected class;

(3) That there is a robust causal link between the challenged policy or practice and the adverse effect on members of a protected class, meaning that the specific policy or practice is the direct cause of the discriminatory effect;

(4) That the alleged disparity caused by the policy or practice is significant; and

(5) That there is a direct relation between the injury asserted and the injurious conduct alleged.

(c) Burdens of proof in discriminatory effect cases. The burdens of proof to establish that a policy or practice has a discriminatory effect, are as follows:

(1) A plaintiff must prove by the preponderance of the evidence each of the elements in paragraphs (b)(2) through (5) of this section.

(2) A defendant or responding party (hereinafter, “defendant”) may rebut a plaintiff’s allegation under (b)(1) of this section that the challenged policy or practice is arbitrary, artificial, and unnecessary by producing evidence showing that the challenged policy or practice advances a valid interest (or interests) and is therefore not arbitrary, artificial, and unnecessary.

(3) If a defendant rebuts a plaintiff’s assertion under paragraph (c)(1) of this section, the plaintiff must prove by the preponderance of the evidence either that the interest (or interests) advanced by the defendant are not valid or that a less discriminatory policy or practice exists that would 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.

(d) Defenses. The following defenses are available to a defendant in a discriminatory effect case.

(1) Pleading stage. The defendant may establish that a plaintiff has failed to sufficiently plead facts to support an element of a prima facie case under paragraph (b) of this section, including by showing that the defendant’s policy or practice was reasonably necessary to comply with a third-party requirement, such as a:

(i) Federal, state, or local law;

(ii) Binding or controlling court, arbitral, administrative order or opinion; or

(iii) Binding or controlling regulatory, administrative or government guidance or requirement.

(2) After the pleading stage. The defendant may establish that the plaintiff has failed to meet the burden of proof to establish a discriminatory effects claim under paragraph (c) of this section, by demonstrating any of the following:

(i) The policy or practice is intended to predict an occurrence of an outcome, the prediction represents a valid interest, and the outcome predicted by the policy or practice does not or would not have a disparate impact on protected classes compared to similarly situated individuals not part of the protected class, with respect to the allegations under paragraph (b). This is not an adequate defense, however, if the plaintiff demonstrates that an alternative, less discriminatory

policy or practice would result in the same outcome of the policy or practice, without imposing materially greater costs on, or creating other material burdens for the defendant.

(ii) The plaintiff has failed to establish that a policy or practice has a discriminatory effect under paragraph (c) of this section.

(iii) The defendant's policy or practice is reasonably necessary to comply with a third party requirement, such as a:

(A) Federal, state, or local law;

(B) Binding or controlling court, arbitral, administrative order or opinion;
or

(C) Binding or controlling regulatory, administrative, or government guidance or requirement.

(e) Business of insurance laws. Nothing in this section is intended to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance.

(f) Remedies in discriminatory effect cases. In cases where liability is based solely on a discriminatory effect theory, remedies should be concentrated on eliminating or reforming the discriminatory practice so as to eliminate disparities between persons in a particular protected class and other persons. In administrative proceedings under 42 U.S.C. 3612(g) based solely on discriminatory effect theory, HUD will seek only equitable remedies, provided that where pecuniary damage is proved, HUD will seek compensatory damages or restitution; and provided further that HUD may pursue civil money penalties in discriminatory effect cases only where the defendant has previously been adjudged, within the last five years, to have committed unlawful housing discrimination under the Fair Housing Act, other than under this section.

(g) Severability. The framework of the burdens and defenses provisions are considered to be severable. If any provision is stayed or determined to be invalid or their applicability to any person or circumstances invalid, the remaining provisions shall be construed as to be given the maximum effect permitted by law.

EXHIBIT B

24 C.F.R. §§ 100.5 and 100.500 under 2013 Rule

24 C.F.R. § 100.5

(a) It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States. No person shall be subjected to discrimination because of race, color, religion, sex, handicap, familial status, or national origin in the sale, rental, or advertising of dwellings, in the provision of brokerage services, or in the availability of residential real estate-related transactions.

(b) This part provides the Department's interpretation of the coverage of the Fair Housing Act regarding discrimination related to the sale or rental of dwellings, the provision of services in connection therewith, and the availability of residential real estate-related transactions. The illustrations of unlawful housing discrimination in this part may be established by a practice's discriminatory effect, even if not motivated by discriminatory intent, consistent with the standards outlined in § 100.500.

(c) Nothing in this part relieves persons participating in a Federal or Federally-assisted program or activity from other requirements applicable to buildings and dwellings.

24 C.F.R. § 100.500

Liability may be established under the Fair Housing Act based on a practice's discriminatory effect, as defined in paragraph (a) of this section, even if the practice was not motivated by a discriminatory intent. The practice may still be lawful if supported by a legally sufficient justification, as defined in paragraph (b) of this section. The burdens of proof for establishing a violation under this subpart are set forth in paragraph (c) of this section.

(a) Discriminatory effect. A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.

(b) Legally sufficient justification.

(1) A legally sufficient justification exists where the challenged practice:

(i) Is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent, with respect to claims brought under 42 U.S.C. 3612, or defendant, with respect to claims brought under 42 U.S.C. 3613 or 3614; and

(ii) Those interests could not be served by another practice that has a less discriminatory effect.

(2) A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative. The burdens of proof for establishing each of the two

elements of a legally sufficient justification are set forth in paragraphs (c)(2) and (c)(3) of this section.

(c) Burdens of proof in discriminatory effects cases.

(1) The charging party, with respect to a claim brought under 42 U.S.C. 3612, or the plaintiff, with respect to a claim brought under 42 U.S.C. 3613 or 3614, has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.

(2) Once the charging party or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.

(3) If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.

(d) Relationship to discriminatory intent. A demonstration that a practice is supported by a legally sufficient justification, as defined in paragraph (b) of this section, may not be used as a defense against a claim of intentional discrimination.