CLPHA Strengthening Neighborhoods. Improving Lives.

RENO & CAVANAUGH PLLC

February 12, 2026

SUBMITTED ELECTRONICALLY VIA THE FEDERAL E-RULEMAKING PORTAL:
http:// www.regulations.gov.

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410–0500

Re: Docket No. FR-6540-P-01, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard; Proposed Rule

To Whom It May Concern:

The Council of Large Public Housing Authorities ("CLPHA") and Reno & Cavanaugh, PLLC ("Reno & Cavanaugh") hereby submit comments regarding the U.S. Department of Housing and Urban Development's ("HUD's") Proposed Rule entitled "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard", Docket No. FR-6540-P-01 (the "Proposed Rule") issued on January 14, 2026.

CLPHA is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. Our membership of eighty-five large public housing authorities ("PHAs") own and manage nearly half of the nation's public housing program, administer more than a quarter of the Housing Choice Voucher program, and operate a wide array of other housing programs. They collectively serve over one million low-income households.

Reno & Cavanaugh has represented hundreds of PHAs throughout the country and has worked with its clients on housing issues for many years. Founded in 1977, Reno & Cavanaugh has developed a national practice that encompasses the entire real estate, affordable housing, and community development industry. Although our practice has expanded significantly over the past nearly five decades to include a broad range of legal and legislative advocacy services, Reno & Cavanaugh's original goal of providing quality legal services dedicated to improving housing and communities remains at the center of everything we do.

We are deeply concerned that HUD intends to rescind the entirety of the disparate impact discriminatory effects regulations implemented pursuant to Title VIII of the Civil Rights Act of 1968, as amended ("the Fair Housing Act" or "the Act") through the Proposed Rule and thereby eliminate seminal, established national standards and abdicate HUD's statutory and regulatory responsibilities to the judicial system. Rather than amend the existing regulations in the ordinary course to reflect the current administration's priorities, HUD seeks to take the extraordinary step of removing the entirety of the applicable regulations in contravention of long-standing Supreme Court precedent that precludes this.[1] Furthermore, HUD's reliance on Executive Orders[2] as the primary justification for its extraordinary proposal is, at the very least, improper, as confirmed by recent court decisions.[3] For all of the reasons detailed below, the Proposed Rule is inappropriate and illegitimate and must be withdrawn.

I. Disparate Impact Jurisprudence and HUD's Role and Obligations

The Fair Housing Act (the "Act") was adopted to address decades of discriminatory actions that deprived or limited access to housing for our most vulnerable communities. Congress intended the Act to serve as a broad remedial statute, addressing not only overt discrimination but also structural practices that perpetuate segregation and result in unequal access to housing opportunity.[4] Congress specifically vested HUD with the authority and responsibility for administering the Act, including the obligation to affirmatively further fair housing and the purposes of the Act.[5] HUD's statutory authority includes the responsibility to interpret and enforce the Act, and the power to issue implementing rules.

Disparate impact liability under the Act developed as a means to address facially neutral policies that nevertheless produce discriminatory effects on protected classes, where such effects cannot be justified by a necessity to achieve substantial, legitimate, nondiscriminatory interests.[6] Courts recognized that limiting the Act to only intentional discrimination would undermine its remedial purpose, and would allow patterns of segregation to persist through neutral practices.[7] For decades,

---

[1] *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29 (1983).

[2] Executive Order 14281, "Restoring Equality of Opportunity and Meritocracy", 90 FR 17537 (Apr. 23, 2025); Executive Order 14192, "Unleashing Prosperity Through Deregulation" 90 FR 9065 (Feb. 6, 2025); and Executive Order 14219, "Ensuring Lawful Governance and Implementing the President's 'Department of Government Efficiency' Deregulatory Initiative", 90 FR 10583 (Feb. 19, 2025).

[3] *Martin Luther King, Jr. Cnty. v. Turner*, 785 F. Supp. 3d 863, 888 (W.D. Wash. 2025); *City & Cnty. of San Francisco v. Trump*, 783 F. Supp. 3d 1148, 1198 (N.D. Cal. 2025).

[4] 88 FR 8516 (Feb. 9, 2023) (stating that the Act not only prohibits discrimination, but also directs HUD to ensure that the agency and its program participants will proactively take meaningful actions to overcome patterns of segregation, promote fair housing choice, eliminate disparities in housing-related opportunities, and foster inclusive communities that are free from discrimination); *see also Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Communities. Project, Inc*, 576 U.S. 519, 540 (2015) (noting Congress enacted the Act to "eradicate discriminatory practices within [the housing] sector of our Nation's economy.")

[5] 42 U.S.C. § 3608.

[6] 24 C.F.R. § 100.500(b)(1)(i).

[7] Early recognition of disparate impact liability under the Act emerged through a small number of foundational cases addressing facially neutral policies that produced discriminatory effects. In *United States v. City of Black Jack, Missouri*, 508 F.2d 1179,1182, 1184 (8th Cir. 1974), the Eighth Circuit held that a municipality's zoning practices could violate the Act based on their discriminatory effects, even absent proof of discriminatory intent, emphasizing that restricting liability to intentional discrimination would undermine the Act's remedial purpose. A decade later, in

federal courts consistently recognized disparate impact liability under the Act, and the governing standards evolved through judicial interpretation rather than executive directive.

By 1988, this principle had been widely adopted across the federal court of appeals, with every circuit to consider the issue recognizing some form of disparate impact liability under the Act.[8] Notably, by declining to intervene when it comprehensively amended the Act in 1988, Congress ratified the concept of disparate impact liability under the Act.[9]

Following four decades of HUD's and the courts' application of the Act's discriminatory effects principle, differences developed regarding the criteria necessary to prove a claim, and it became apparent that a national standard was needed. Thus, in 2013, HUD published a final rule implementing the discriminatory effects standard under the Act that, among other things, formally established a three-part burden-shifting test.[10] HUD codified this framework grounded in settled legal precedent to provide a clear, workable framework for parties to assess and litigate discriminatory effects claims, and thereby established a consistent and predictable means of evaluating claims. In other words, HUD executed its statutory and regulatory obligations under the Act by undertaking rulemaking to implement the discriminatory effects standard.

Two years later, in *Texas Dept. of Housing & Community Affairs v. Inclusive Communities Project, Inc.* the Supreme Court confirmed that disparate impact claims are cognizable under the Act, and articulated that liability requires a robust causal link between the challenged practice and the observed disparities.[11] The Court specifically addressed HUD's 2013 regulations, which were implemented while the District Court's decision was on appeal, and it endorsed the Fifth Circuit's application of HUD's burden-shifting framework.[12] Since then, myriad courts have applied HUD's discriminatory effects standard,[13] and the courts, litigants, government entities, and housing

---

Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P., 488 U.S. 15, 17, (1988), the Supreme Court and Second Circuit likewise invalidated a zoning scheme that confined multifamily housing to minority neighborhoods, reaffirming that practices with unjustified discriminatory effects are actionable under the Act.

[8] *Resident Advisory Bd. v. Rizzo,* 564 F.2d 126, 146 (C.A.3 1977); *Smith v. Clarkton,* 682 F.2d 1055, 1065 (C.A.4 1982); *Hanson v. Veterans Administration,* 800 F.2d 1381, 1386 (C.A.5 1986); *Arthur v. Toledo,* 782 F.2d 565, 574–575 (C.A.6 1986); *Metropolitan Housing Development Corp. v. Arlington Heights,* 558 F.2d 1283, 1290 (C.A.7 1977); *Halet v. Wend Investment Co.,* 672 F.2d 1305, 1311 (C.A.9 1982); *United States v. Marengo Cty. Comm'n,* 731 F.2d 1546, 1559, n. 20 (C.A.11 1984).

[9] *Inclusive Communities*, 576 U.S. at 536-38.

[10] 78 FR 11460 (Feb. 15, 2013).

[11] *Inclusive Communities*, 576 U.S. at 546.

[12] *Id*. at 527-28.

[13] *Farhan v. 2715 NMA LLC*, 161 F.4th 475, 480 (7th Cir. 2025) (a plaintiff may bring a claim under the FHA based on a decision or policy that has a discriminatory effect and no legitimate business or public interest justification); *see also Jetter v. City of Cincinnati*, No. 1:20-CV-581, 2021 WL 4504247, at *7 (S.D. Ohio Sept. 30, 2021) (disparate impact claims may challenge practices that have a disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale); *see also Nat'l Fair Hous. All. v. Travelers Indem. Co.*, 261 F. Supp. 3d 20, 28–29 (D.D.C. 2017) (disparate-impact liability under the FHA can be proven under a burden-shifting framework); *see also TBS Grp., LLC v. City of Zion, Illinois*, No. 16-CV-5855, 2017 WL 5129008, at *8 (N.D. Ill. Nov. 6, 2017) (causation remains a key element of a disparate impact claim); *see also Nat'l Fair Hous. All. v. Fed. Nat'l Mortg. Ass'n ("Fannie Mae")*, 294 F. Supp. 3d 940, 947 (N.D. Cal. 2018) (describing the burden-shifting analysis as the plaintiff must plead a prima facie case of discrimination, the defendant may rebut by presenting non-discriminatory reasons for the challenged policy, and the plaintiff bears the ultimate burden of persuasion when proving disparate impact liability).

practitioners have relied, and continue to rely, on the parameters set forth in the regulations to make a wide variety of housing decisions.

Against this backdrop and despite decades of judicial precedent and reliance, HUD proposes to sweep away the operative regulations and return the country to a hodgepodge of judicial interpretations increasing the likelihood of divergent fair housing determinations across jurisdictions and dissimilar treatment of protected classes. This is a clear dereliction of HUD's affirmative duties to administer the Act to ensure protected classes receive equal access to housing under the Act, and ignores the Congressional mandates that HUD affirmatively further fair housing and remedy discriminatory actions.

II. HUD's Justification for Rulemaking is Improper

HUD premises its justification to rescind the disparate impact regulations on several Executive Orders[14] and the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*,[15] which overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* and the principal that agency interpretations of statutes are entitled to deference.[16] HUD's justifications for rulemaking are inadequate, improper, and violate the Administrative Procedure Act ("APA").[17]

Executive Orders lack the authority to modify or bypass statutory obligations, nor can they override binding judicial precedent. The current administration's reliance on Executive Orders to underpin major policy changes has faced repeated challenges, and they are frequently enjoined especially when they are unrelated to legitimate statutory purposes.[18] Executive Orders do not enjoy the force of law, and constitute an illegitimate basis to wholly rescind duly promulgated regulations, particularly if they are unaccompanied by reasoned decision making as required by the APA.[19]

Notably, "the fact that an agency's actions were undertaken to fulfill a presidential directive does not exempt them from arbitrary-and-capricious review."[20] If it did, "presidential administrations [could] issue agency regulations that evade APA-mandated accountability by simply issuing an executive order first. Agencies would be permitted to implement regulations without the public involvement, transparency, and deliberation required under the APA."[21] Here, HUD's disparate impact regulatory framework reflects statutory interpretation shaped by binding judicial holdings

---

[14] *See supra* note 2.
[15] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).
[16] 467 U.S. 837 (1984).
[17] 5 U.S.C. §§ 551-559.
[18] *City of Fresno et al. v. Scott Turner, et al*, No. 25-cv07070-RS, 2025 WL 2721390, at 10 (ND Cal. Sep. 23, 2025) (enjoining federal grant conditions premised on Executive Orders that were not imposed to advance statutory aims).
[19] "[R]ote incorporation of executive orders … does not constitute 'reasoned decisionmaking'" as required by the APA. *Martin Luther King, Jr. Cnty*., No. 2:25-CV-814, 2025 WL 1582368, at *17.
[20] *Kingdom v. Trump*, No. 25-cv-691, 2025 WL 1568238, at *10 (D.D.C. June 3, 2025) (collecting cases); *Martin Luther King, Jr. Cnty. v. Turner*, No. 2:25-CV-814, 2025 WL 1582368, at *17; *Louisiana v. Biden*, 622 F. Supp. 3d 267, 295 (W.D. La. 2022); *R.I. Coal. Against Domestic Violence v. Bondi*, No. 25-279, 2025 WL 2271867, at *8 (D.R.I. Aug. 8, 2025).
[21] *State v. Su*, 121 F.4th 1, 16 (9th Cir. 2024).

that cannot be undone based on shifting executive preference. Because HUD's justification lacks reasoned decision making and rests on authority that cannot lawfully support recission of the regulations, the Proposed Rule is arbitrary and capricious and must be withdrawn.

HUD's reliance on *Loper Bright* is equally misplaced. In *Loper Bright*, the Supreme Court held that courts may no longer accord binding deference to agency interpretation of ambiguous statutes, reaffirming that it is the judiciary's role to exercise independent judgment in interpreting the law.[22] Critically, however, the Court made clear that overruling *Chevron* does not call into question prior cases that relied on Chevron deference, and that holdings upholding specific agency actions remain subject to principles of statutory stare decisis notwithstanding the change in interpretive methodology.[23] *Loper Bright* therefore does not diminish the legal force of longstanding judicial precedent recognizing disparate impact liability under the Act, nor does it undermine the regulations adopted in support of the legislative principles and upheld in reliance of those precedents.

The *Loper Bright* decision also does not relieve agencies of their statutory responsibility to interpret and implement the laws they administer through reasoned rulemaking. *Loper Bright* does not stand for the proposition that because agency regulations are not entitled to deference, they are improper and therefore ripe for rescission. HUD's misreading of *Loper Bright* is an improper attempt to cherry-pick aspects of the decision to justify rescission of its regulations, while ignoring the Court's express preservation of prior law and its expectation that agencies interpret and implement statutes in good faith.[24]

HUD's justification further ignores the Supreme Court's *Inclusive Communities* decision, which addressed and did not rescind or criticize HUD's 2013 disparate impact rule.[25] In proposing to rescind the rule now, HUD improperly assumes that the Act is self-implementing and does not require regulatory guidance to effectuate its purposes—an assertion directly contradicted by *Inclusive Communities,* which emphasized the importance of structured standards to channel judicial analysis and avoid uncertainty. HUD's assumption and related assertions are flawed. While HUD argues that the development of case law obviates the need for regulatory standards that provide clarity and predictability for all parties engaged in housing transactions, the existence and evolution of that very case law demonstrate why regulations remain necessary.

HUD's claim that the current disparate impact regulatory framework is unnecessary is misplaced and is likely to endanger bedrock principles of equity and justice by failing to ensure that protected classes have meaningful and equal access to housing on a nationwide basis.

III. The Proposed Rule Violates the Administrative Procedure Act

[22] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 369 (2024).
[23] *Id*. at 412 ("by overruling *Chevron*, we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology").
[24] *Id*. at 413.
[25] 576 U.S. at 527-28.

The Administrative Procedure Act was established to protect the public from arbitrary and capricious agency actions by ensuring the regulatory process is deliberative, transparent, and provides a meaningful opportunity to review and comment. The APA requires agencies to provide substantive justification for proposed actions, particularly if they propose radical changes,[26] as HUD does here. Under the APA, HUD must also take into account the serious reliance interests engendered by the current regulations.[27]

A. Rescission of Regulations Without Replacement is Arbitrary and Capricious

An agency acts arbitrarily and capriciously when it rescinds binding regulatory standards without replacing them, thereby leaving regulated parties without guidance and undermining settled expectations—especially in a complex, liability-driven area like discriminatory effects liability under the Act.[28] In *Motor Vehicle Manufacturers Association v. State Farm*, the Court concluded it was arbitrary and capricious to rescind automobile safety standards without promulgating new regulations, and it held that rescinding a rule is subject to the same searching review as adopting new regulations.[29] Furthermore, significant policy changes must be accompanied by heightened justification where, as here, serious reliance interests exist and rescinding the regulations contradicts settled judicial precedent and the reasoned decision making that informed the development of the prior rules.[30] Additionally, alternatives to rescinding regulations must also be considered.[31]

HUD has failed to meet all of the APA standards of review. Recitation of Executive Orders without substantive analysis fails to satisfy the standard of reasoned review and decision making. Specifically, without elaborating and in a single sentence that it repeats twice, HUD asserts that rescission of the regulations "does not change any requirements or affect any rights or obligations."[32] HUD goes on to claim that it unilaterally determined, again, without reasoned explanation, that "it is in the public interest to remove HUD's disparate impact regulations as expeditiously as possible."[33] HUD's declarations fall well short of the reasoned decision making standard.

Additionally, HUD utterly neglected to mention, much less address, the serious reliance interests at stake.[34] HUD also failed to advance any amendments to the existing regulations nor discuss any

---

[26] *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1915 (2020).
[27] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 212 (2016).
[28] *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 41-43 (1983).
[29] "[T]he forces of change do not always or necessarily point in the direction of deregulation. In the abstract, there is no more reason to presume that changing circumstances require the rescission of prior action, instead of a revision in or even the extension of current regulation. . . . [T]he direction in which an agency chooses to move does not alter the standard of judicial review established by law." *Id*. at 42.
[30] *F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502, 515-16 (2009); *see also California v. Bernhardt*, 472 F. Supp. 3d 573 (N.D. Cal. 2020) (Bureau of Land Management's near-total rescission of a prior rule was ruled arbitrary and capricious because the Bureau had articulated "conclusory, boilerplate justifications" for completely reversing its prior factual findings).
[31] *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795 (D.C. Cir. 1983).
[32] 91 FR at 1476, 1477.
[33] *Id*. at 1477.
[34] Section 6(c) of Executive Order 14281, upon which HUD relies, is particularly problematic because it mandates revisiting already executed settlement agreements, conciliation agreements, and voluntary compliance agreements so

alternatives to outright rescission. Instead, HUD's proposal to eliminate the disparate impact standards would create a regulatory vacuum that deprives developers, public housing authorities, and housing providers of essential guidance about how to structure policies and adopt practices that comply with the Act's requirements.

B. HUD's Abbreviated Comment Period is Improper and Unjustified

HUD's own rulemaking regulations provide that "[i]t is the policy of the Department that its notices of proposed rulemaking are to afford the public not less than sixty days for submission of comments."[35] Furthermore, Section 242 of the Consolidated Appropriations Act, 2026 (the "FY26 Appropriations Act") provides "[t]he Secretary shall conduct all rulemaking in accordance with the policies of part 10 of title 24 of the Code of Federal Regulations and Executive Order 12866, as amended, including providing for public participation and not less than 60 days for the submission of written comments."[36] Although the Proposed Rule predates the FY26 Appropriations Act, the APA requires HUD to adhere to procedural requirements and consider all relevant factors,[37] including the Congressional mandate that HUD adhere to a minimum sixty day comment period. Congress' directive repudiates prior HUD actions to shorten public comment periods.

Nevertheless, HUD justified the Proposed Rule's shorter thirty (30) day comment period by inexplicably claiming that past participation in prior rulemaking satisfies the requirement for a meaningful notice and comment period here. HUD's approach flips the APA's public participation requirement on its head, and its justifications fall flat.

While HUD may omit or abbreviate notice and comment if it finds that doing so is "impracticable, unnecessary, or contrary to the public interest," it must clearly state those reasons in the rulemaking document itself.[38] HUD has done none of that. Instead, without explanation, HUD asserts its "general statement of policy now is that this matter is best left to the courts."[39] Additionally, HUD unjustifiably speculates that "members of the public are familiar with these regulations and should be able to respond effectively within the 30-day period."[40] HUD also references "other relevant materials" that informed its decision making, but fails to elaborate on those materials.[41] Furthermore, despite HUD's recent justifications for shortened comment periods, no court has held that the sheer volume of prior comments is itself a valid legal basis for shortening the comment period under HUD's regulations or the APA.

HUD's reliance on prior comments, which pertain to different regulatory proposals, to justify a shortened review period is illogical and legally irrelevant. In fact, the prior regulatory proposals

---

that they are consistent with the Executive Order. This deprives housing providers of finality and sets respondents up for further liability based on deliverables that HUD and or the Department of Justice mandated in those agreements in the first place.

[35] 24 C.F.R § 10.1 (emphasis added).
[36] PL 119-75, Feb. 3, 2026, 140 Stat. 173 (emphasis added).
[37] 5 U.S.C. § 706(2)(D); *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. at 43.
[38] 5 U.S.C. § 553(b)(B); 24 CFR § 10.1.
[39] 91 FR at 1476.
[40] *Id*. at 1477.
[41] *Id.*

are diametrically opposite to the Proposed Rule because the prior proposals sought to implement changes to the regulations whereas the Proposed Rule seeks to eliminate the regulations altogether. Further, the volume of prior comments says nothing about the adequacy or need for public participation in the Proposed Rule. Rather, the high participation in prior rulemaking, particularly the 45,758 comments submitted in response to HUD's 2019 proposed changes to the original disparate impact rule, illustrate that there is significant public interest in this topic, particularly when the stakes are high and HUD's proposal is controversial. If anything, the volume of comments received with respect to prior rulemaking weighs in favor of more, not less, time to evaluate and comment on the Proposed Rule.

IV. Conclusion

The Proposed Rule is arbitrary and capricious, violates the APA, contradicts settled Supreme Court precedent, and ignores HUD's Congressionally mandated duties to administer the Act and affirmatively further fair housing. For all of the reasons discussed herein, it must be withdrawn.

HUD failed to engage in reasoned decision making by impermissibly grounding rulemaking on various Executive Orders and a mis-reading of the *Loper Bright* decision, neither of which were adequately explained or justified. Furthermore, HUD failed to consider the reliance interests at stake and the harm that rescission of the operable regulations would cause. Likewise, HUD offered no amendments to the regulations nor alternatives despite the APA requirements, and rescission of regulations without replacement is invalid per long-standing Supreme Court precedent. Additionally, the shortened comment period deprived the public of a meaningful opportunity to evaluate and respond to the Proposed Rule.

If the Proposed Rule were to be implemented and the regulations removed, HUD would relegate developers, public housing authorities, housing providers, tenants, applicants, and other affected parties to the varied decisions of whichever circuit governs, subjecting them to different interpretations of what constitutes a cognizable disparate impact claim under the Act. This would increase the likelihood of divergent fair housing determinations across jurisdictions and dissimilar treatment of protected classes – the very problems that the 2013 rule was enacted to prevent. HUD does more than merely propose to return disparate impact decision making to the courts. In the Proposed Rule, HUD abdicates its essential responsibilities and obligations under the Act, and washes its hands of it.

Laws without guidance or enforcement are arrows without aim – flying, but never hitting the mark. Rescinding the disparate impact regulations while ignoring HUD's duty to administer the Act is a failure to defend core principles of justice. To ensure alignment with the Act's fundamental principles and to genuinely secure equal opportunities and outcomes for all, we urge HUD to maintain the disparate impact regulations. We welcome proposals consistent with the concerns expressed here. Unequal opportunity for some is injustice for all – and equality cannot stand on such a fractured foundation.

Thank you for the opportunity to comment. If you have any questions, please do not hesitate to contact us.

Sincerely,

La Shelle Dozier
Chief Executive Officer
CLPHA

Stephen I. Holmquist
Member
Reno & Cavanaugh, PLLC

Iyen A. Acosta
Member
Reno & Cavanaugh, PLLC