July 9, 2026

Submitted electronically through www.regulations.gov
Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503

Re: Docket No. OMB-2026-0034 Regulation for Federal Financial Assistance

Thank you for the opportunity to provide feedback on the Office of Management and Budget's proposed Regulation for Federal Financial Assistance.[1] The following comments are submitted on behalf of the National Housing Law Project (NHLP).

NHLP's mission is to advance housing justice for people living in poverty and their communities. NHLP achieves this by strengthening and enforcing the rights of tenants and increasing housing opportunities for underserved communities. Our organization also provides technical assistance and policy support on a range of housing issues to legal services and other advocates nationwide. NHLP hosts the national Housing Justice Network (HJN), a vast field network of over 2,600 community-level housing advocates and resident leaders. HJN member organizations are committed to protecting affordable housing and residents' rights for low-income families across the country.

NHLP strongly opposes the proposed rule not only because of the immense burdens it will place on grantees of federal financial assistance, but most importantly due to its projected negative impact on the ultimate stakeholders of government-funded services. NHLP's comments will focus on HUD-funded programs and the people and communities they serve.

Congress has repeatedly declared and affirmed HUD's goal to provide decent, safe, and affordable housing and shelter for American families. These statements of purpose provide the foundation for all of HUD's funding programs.[2] OMB does not address how the proposed rule, which restricts what entities and projects are eligible for HUD funding, will advance HUD's statutory mission. To the contrary, and as detailed throughout this comment, the proposed rule is likely to depress affordable housing development due to the increased uncertainty it will inject into the housing market. The proposed rule also threatens to defund subsidized housing and homeless services providers for perceived noncompliance with this Administration's ideological priorities, including policies designed to provide program access to underserved groups. Both of

[1] Regulation for Federal Financial Assistance, 91 FR 32,198 (proposed May 29, 2026) (hereinafter "proposed rule").
[2] *See* 42 U.S.C. § 1437(a)(4); 42 U.S.C. § 1441; 42 U.S.C. § 3531; 42 U.S.C. § 5301 note; 42 U.S.C. § 11301(a); 42 U.S.C. § 12702.

these outcomes run directly counter to Congressionally dictated national housing goals and priorities.

The new regulations will take critical resources away from housing providers, increasing housing instability and homelessness throughout the country. The proposed regulatory changes are burdensome, unnecessary and illegal. If finalized, the rule will disrupt housing supply and preservation efforts and diminish tenants' rights.

OMB must rescind the proposed rule because (1) OMB does not have the statutory authority to promulgate the rule in the first place, (2) the rule violates HUD's procedural rulemaking requirements (3) the rule impermissibly creates new substantive conditions on grantees, (4) the rule impermissibly eliminates Limited English Proficiency, civil rights, and affirmative marketing requirements, (5) the rule is too vague to require compliance, (6) the rule gives unfettered discretion to a small group of political appointees which will wreak havoc on efforts to preserve affordable housing and tenants' right to organize, (7) tenants, homeowners, and their communities will be harmed by the rule and finally, (8) the rule will make legal representation impossible due to its prohibition on disparate impact.

I. OMB does not have the authority to impose the rule.

First, the Office of Management and Budget Proposal does not have the requisite statutory authority to implement the proposed revisions to the Guidance for Federal Financial Assistance because of the policy's enormous regulatory impact across all federal agencies. OMB claims their statutory authority to implement these extensive proposed revisions through rulemaking is derived from 31 U.S.C. § 503(a)(2), which allows OMB "to set government-wide financial management policies and requirements," and 31 U.S.C. § 6307, which allows OMB to "issue supplementary interpretative guidelines." This justification is incompatible with the most appropriate interpretation of the statute and is therefore impermissible.[3] Moreover, the proposed rule goes far beyond setting "financial management policies" and instead sets new substantive grantmaking requirements.

Federal agencies are "creatures of statute" and "possess only the authority that Congress has provided."[4] Additionally, agencies cannot claim novel and expansive powers based on a general grant of rulemaking authority or ambiguity in the governing statute because Congress must expressly delegate "powers of vast economic and political significance."[5] An agency that attempts to exercise regulatory authority to greatly change a statutory scheme, make a major policy decision, or assert "extravagant statutory power over the national economy" must be able to point to "clear congressional authorization" for the claimed power.[6]

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[3] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 400 (2024) ("In the business of statutory interpretation, if it is not the best, it is not permissible.").
[4] Nat'l Fed'n of Independent Business (NFIB) v. DOL, OSHA, 595 U.S. 109, 117 (2022).
[5] Ala. Ass'n of Realtors v. HHS, 594 U.S. 758, 764 (2021); *see also NFIB*, 595 U.S. at 117.
[6] West Virginia v. EPA, 597 U.S. 697, 723–24 (2022).

The OMB proposal certainly meets this baseline of immense regulatory authority, as the regulation would alter the expenditure of over one trillion dollars of federal funding. Therefore, this regulatory authority must have been expressly delegated to OMB by Congress to withstand the scrutiny due to such assertions of power.

Second, other federal agencies named in the proposed rule have clearly not delegated the power that would be necessary for OMB to implement this rule. Section 503 cannot support the proposed regulation because it does not explicitly authorize OMB to implement sweeping substantive requirements on all federal grants. Instead, its structure "strongly suggests that OMB occupies an oversight role."[7] This understanding of the agency's limitations is further supported by the statutory context of Section 503, which originated in the Chief Financial Officers Act of 1990. The stated purposes of the CFO Act included the development of "a modern financial management structure," ending the fraud, waste, abuse, and mismanagement of taxpayer-provided resources[8], and improving the "accuracy and reliability of the government's financial reporting practices."[9] These aims do not align with an interpretation of Section 503 that grants OMB the broad authority to impose extensive substantive conditions on federal awards.

Section 6307 also does not provide the statutory authorization for OMB's proposal because the statute authorizes "interpretative guidelines," not regulation. Guidance lacks the force of law and ultimately leaves funding decisions in the hands of independent, third-party agencies with subject-matter expertise, which this proposal does not do.[10] The lack of an express grant of regulatory authority for the proposed rule in either governing statute means that OMB does not have the authority to implement such an expansive, far-reaching policy and cannot implement sweeping conditions on federal grants that span all federal agencies.

Third, OMB's rule is unauthorized because the executive branch cannot place new limitations on funds allocated by Congress. The Appropriations Clause grants Congress the exclusive power to spend, and to "attach conditions on the receipt of federal funds… to further broad policy objectives."[11] The executive branch administrative agencies must execute appropriations laws without amendment and cannot withhold or redistribute funds without

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[7] *See* National Council of Nonprofits v. OMB, 775 F. Supp. 3d 100, 126 (D.D.C. 2025) (holding that OMB overstepped their legal authority by ordering a nationwide freeze on all federal funding).
[8] The reported fraud, waste, abuse, and mismanagement included the Department of Defense's failure to account for payments by foreign customers for equipment, uncollected nontax debt owed to the federal government, interest penalties resulting from agencies paying their bills late, and lost interest because agencies paid their bills too soon. It did not include the allocation of funds for federal grants purportedly inconsistent with the current policy directives of the executive branch.
[9] GAO, *Substantial Progress Made since Enactment of the 1990 CFO Act; Refinements Would Yield Added Benefits*, GA-20-566 4 (Washington, D.C.: August 6, 2020), https://www.gao.gov/assets/gao-20-566.pdf.
[10] *See e.g.*, *National Council of Nonprofits*, 775 F. Supp. 3d at 115 (finding that a memorandum issued by OMB requires all federal agencies to pause disbursement of Federal funds constituted a directive, not guidance).
[11] City & County of San Francisco v. Trump, 897 F.3d 1225, 1232 (9th Cir. 2018).

Congressional authorization.[12] OMB cannot add or change conditions to the expenditure of public funds, and courts across the country have found grant conditions imposed by administrative agencies to violate the Separation of Powers principle.[13] This rule imposes government-wide, politically motivated restrictions on the use of federal funds, requiring administrative agencies to award and terminate grants in accordance with standards set by the executive branch. OMB has not been authorized by Congress to implement conditions on all federal grants related to diversity, equity, inclusion, and accessibility (DEIA), immigration, gender identity, and abortion for example, so the policy will unconstitutionally violate separation of powers principles.

Under the statutory authority granted to OMB by Congress, as it relates both to the promulgation of an enormously politically and economically impactful rule and to the imposition of conditions for federal grants, this proposed regulation oversteps the agency's statutory authority. OMB must therefore rescind its proposed rule.

II. The proposed rule violates HUD's procedural rulemaking requirements.

The OMB rule violates HUD's procedural rulemaking requirements which Congress mandated the agency follow in regulating HUD funding programs. HUD's rulemaking regulations state that **"**It is the policy of the Department of Housing and Urban Development to provide for public participation in rulemaking with respect to all HUD programs and functions, including matters that relate to… grants…"[14] Toward this end, HUD is required to "publish [ ] notices of proposed rulemaking in the Federal Register" and "afford the public not less than sixty days for submission of comments."[15]

And Congress recently affirmed that HUD must follow its own procedural rules, above. According to Section 232 of the 2026 Appropriations Act, "The Secretary [of Housing and Urban Development] shall comply with all process requirements, including public notice and comment, when seeking to revise any annual contributions contract" and the public comment process must be for "not less than 60 days."[16]

The OMB rule would substantively revise HUD grant making, with implications for all HUD funding, including PHAs' annual contributions contracts.[17] For example, HUD's form

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[12] *See Id.* at 1233–35.
[13] *See, e.g.*, Housing Authority of the City & County of San Francisco v. Turner, No. 25-cv-08859-JST, 2025 LX 557338 (N.D. Cal. Nov. 14, 2025) (holding HUD's grant conditions regarding DEI, immigration enforcement, gender ideology, and abortion likely violated Separation of Powers because HUD lacked congressional approval for such criteria); Martin Luther King, Jr. Cty. v. Turner, 785 F. Supp. 3d 863, 868-869 (W.D. Wash. 2025) (holding that HUD's conditions on federal grants likely violated the Separation of Powers doctrine because Congress had not authorized the agency to implement such requirements).
[14] 24 C.F.R. § 10.1.
[15] *Id*.
[16] 2026 Appropriations Act, Pub. L. No. 119-75, §232, 140 Stat. 173, 419.
[17] Form HUD-53012 defines the annual contributions contract as a "grant agreement."

annual contributions contract (Form HUD-53012) contains civil rights and equal opportunity requirements that the OMB rule seeks to alter or redefine. Therefore, the regulations require, and Congress affirmed, that HUD must issue a notice of proposed rulemaking and allow a minimum of 60 days for public comment. It has done neither. The 45-day notice and comment period provided by OMB is insufficient.

OMB implies that HUD is not promulgating the proposed regulations, so HUD rules don't apply. However, OMB is proposing vast substantive changes to HUD programs. The fact that these changes are disguised as an OMB rule does not change the fact that they are, in the end, regulations for HUD programs. HUD cannot circumvent its obligations by having another agency step in to revise its regulations. The rule is therefore legally impermissible on HUD's own procedural grounds.

III. The rule violates the will of Congress by impermissibly creating new substantive funding conditions for HUD programs (Sec. 200.205, 200.218, 200.300, and 200.332).

A. The proposed rule imposes new funding conditions related to disparate impact, DEIA, "gender ideology" and "anti-American values" that are not authorized by Congress.

As detailed in Section I, *supra*, OMB cannot impose major policy changes on housing programs that will have vast social and economic impacts without clear Congressional authorization. In contravention of this principle, OMB proposes to add onerous new eligibility criteria and other substantive requirements to HUD grants that are not authorized by Congress. For example, the proposed rule would require that HUD conduct a "pre-issuance review" of discretionary awards to ensure that grant proposals (1) demonstrably advance the President's policy priorities, (2) do not utilize racial preferences, (3) subscribe to the idea that sex is an immutable binary characteristic, (4) do not promote "illegal immigration," and (5) do not promote "anti-American values."[18] And all awards would be subject to new vague prohibitions on any work or policies related to disparate impact liability, DEIA, and "gender ideology" (defined as denying the idea that sex is immutable and binary).[19] Further, subrecipients that "take actions that could significantly damage the reputation of... the Federal Government" would no longer be eligible for funding.[20]

Congress detailed the required applicant criteria and other conditions of funding in the authorizing statutes for many impacted HUD funding programs (or, as explained in the next section, left those decisions to HUD). Indeed, even when HUD has tried to impose some of these same conditions, courts have preliminarily ruled that the terms may fall outside of even

[18] 91 Fed. Reg. at 32,248-49 (proposing changes to 2 C.F.R. § 200.205).
[19] 91 Fed. Reg. at 32,252-53 (proposing changes to 2 C.F.R. §§ 200.218 and 200.300).
[20] 91 Fed. Reg. at 32,257 (proposing changes to 24 C.F.R. § 200.332).

HUD's statutory authority.[21] Congress did not authorize OMB's new proposed requirements, and therefore OMB cannot impose them on grantees. For example:

- **Choice Neighborhoods Initiative**. Congress defined who qualifies as an "applicant" under HUD's Choice Neighborhoods Initiative program.[22] The list of required criteria does not include the absence of policies that reflect DEIA or "gender ideology" as determined by the Trump Administration. Congress did not authorize OMB to create additional criteria for "applicants."

- **Section 18 Demolition/Disposition**. Congress enumerated the requirements for approval and the conditions for disapproval of applications to reposition public housing under Section 18 of the United States Housing Act.[23] Congress did not include any requirements related to DEIA, "gender ideology," or anti-American values as defined by the Trump Administration. Congress did not authorize OMB to create additional criteria for approval or bases for disapproval.

- **Community Development Block Grants.** Congress enumerated what activities are eligible uses for CDBG funds,[24] and prohibited uses of those funds.[25] Congress did not include DEIA, "gender ideology," disparate impact liability, or "anti-American" activities in its list of prohibited uses of CDBG funds. Congress did not authorize OMB to create additional prohibited uses.

- **Emergency Solutions Grants.** Congress enumerated the activities that are eligible uses of ESG funds,[26] and the certifications each recipient must make to be eligible for funding.[27] Those certifications do not include provisions related to DEIA, "gender ideology," disparate impact, or "Anti-American" activities. Congress did not authorize OMB to create additional criteria for eligible use.

OMB cannot legally create new substantive criteria for HUD grantmaking that Congress did not authorize when it created the programs affected.

B. The proposed rule conflicts with Congress' mandate that HUD, and HUD alone, has authority to set substantive conditions for its grant programs.

Where Congress did not enumerate the substantive parameters of HUD grant-making, it delegated this responsibility to the HUD Secretary alone. Congress did not permit HUD

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[21] *Housing Authority of the County of San Diego v. Turner* (Case 4:25-cv-08859).
[22] 42 U.S.C. § 1437v(j)(1).
[23] 42 U.S.C. § 1437p(a); (b).
[24] 42 U.S.C. § 5305(a).
[25] 42 U.S.C. § 5305(h).
[26] 42 U.S.C. § 11374.
[27] 42 U.S.C. § 11376(c).

to delegate its rulemaking authority, or its authority to determine the substantive terms and conditions of any NOFO, to OMB or any other agency. For example, Congress dictated that:

- **Public Housing.** "The Secretary [of HUD] *shall* develop a formula" for distribution of Public Housing Capital and Operating Funds to public housing agencies, that takes into account certain statutorily required considerations and "any other factors that the Secretary [of HUD] determines to be appropriate."[28] Congress did not permit HUD to delegate its authority to determine the factors for consideration when awarding funds to public housing authorities under these programs.

- **Section 8 Project-Based Rental Assistance.** Section 8 Project-Based Rental Assistance may be provided to a property "in accordance with regulations prescribed by the Secretary [of HUD]."[29] Congress did not permit HUD to delegate its rulemaking authority for the Section 8 program.

- **Community Development Block Grants.** The criteria for CDBG awards to tribes, cities, and urban areas "*shall* be contained in a regulation promulgated by the Secretary [of HUD] after notice and public comment."[30] In allocating CDBG funds to states for non-entitlement areas, "distribution *shall* be made in accordance with determinations of the Secretary pursuant to... [statutory requirements] and in accordance with regulations and procedures prescribed by the Secretary."[31] For special purpose grants, the "Secretary [of HUD] *shall* by regulation establish" the "criteria for selection of recipients."[32] Congress did not permit HUD to delegate its authority to conduct substantive rulemaking for the CDBG program.

- **Emergency Solutions Grants.** "[T]he Secretary [of HUD] *shall* by notice establish such requirements as may be necessary to carry out the provisions of" the Emergency Solutions Grant ("ESG") program.[33] Congress did not permit HUD to delegate its authority to conduct substantive rulemaking for the ESG program.

- **HOME Program.** "The Secretary [of HUD] shall establish in regulation an allocation formula" for awarding HOME program funds to states and units of local government that incorporates certain statutory considerations.[34] "The Secretary shall provide for the distribution of [HOME funds] among insular areas pursuant to specific criteria for such distribution, which *shall* be contained in a regulation issued by the Secretary [of HUD]."[35] For direct reallocation of HOME funds to participating jurisdictions and other

[28] 42 U.S.C. §§ 1437g(d)(2) (emphasis added); 1437g(e)(2).
[29] 42 U.S.C. § 1437f(g).
[30] 42 U.S.C. § 5306(a)(1) (emphasis added).
[31] 42 U.S.C. § 5306(d)(3)(B).
[32] 42 U.S.C. § 5307(f).
[33] 42 U.S.C. §11376(a).
[34] 42 U.S.C. § 12747(b)(1)(A).
[35] 42 U.S.C. § 12747(a)(3).

entities, "[t]he Secretary *shall* by regulation establish objective selection criteria..."[36] Congress did not permit HUD to delegate its authority to conduct substantive rulemaking for the ESG program.

- **Housing Opportunity for People With AIDS.** Housing Opportunities for People with AIDS ("HOPWA") discretionary grants must be distributed based on applications that reflect statutory requirements and "such other information or certifications that the Secretary [of HUD] determines to be necessary to achieve the purposes of this section" submitted "in such form and in accordance with such procedures as the Secretary [of HUD] shall establish."[37] HOPWA formula grants must be awarded based on criteria established by Congress or "another methodology established by Secretary through regulation."[38] Congress did not permit HUD to delegate its authority to conduct substantive rulemaking for the HOPWA program.

- **Continuum of Care Funds.** "The Secretary [of HUD] *shall* award" Continuum of Care funds "through a national competition between geographic areas based on criteria established by the Secretary [of HUD]" including statutorily required criteria.[39] "The Secretary [of HUD] *shall* issue final regulations to carry out [the CoC program] after notice and opportunity for public comment..."[40] Congress did not permit HUD to delegate its authority to conduct substantive rulemaking for the CoC program.

- **Section 811 Supportive Housing for Persons with Disabilities.** "The Secretary [of HUD] *shall* establish selection criteria for assistance" under the Section 811 Project Rental Assistance program that includes statutorily required criteria and "such other factors as the Secretary [of HUD] determines to be appropriate to ensure that funds made available... are used effectively."[41] Congress did not permit HUD to delegate its authority to determine the substantive requirements of the Section 811 PRA program.

- **Indian Housing Block Grants.** "The Secretary [of HUD] *shall* issue final regulations necessary to carry out"[42] the Indian Housing Block Grant ("IHBG") program and must engage in negotiated rulemaking in collaboration with "geographically diverse small, medium, and large Indian tribes ..."[43] Congress did not permit HUD to delegate its authority to conduct substantive rulemaking for the IHGP program or waive the requirement to consult with tribes.

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[36] 42 U.S.C. § 12747(c).
[37] 42 U.S.C. § 12903(d).
[38] 42 U.S.C. § 12903(c)(1)(C).
[39] 42 U.S.C. §§ 11386a(a); (b).
[40] 42 U.S.C. § 11387.
[41] 42 U.S.C. § 8013(g).
[42] 25 U.S.C. § 4116(b)(1).
[43] 25 U.S.C. § 4116(b)(2)(B)(ii).

- **Family Self Sufficiency Program.** Recipients of Family Self-Sufficiency program funding must "submit, for approval by the Secretary [of HUD], an action plan under this subsection in such form and in accordance with such procedures as the Secretary [of HUD] *shall* require."[44] Then "the Secretary *shall* establish a formula by which annual funds shall be awarded..."[45] Congress did not permit HUD to delegate its authority to determine the substantive requirements of the FSS grant program.

- **Choice Neighborhoods Initiative.** "The Secretary [of HUD] *shall* establish [selection] criteria" for Choice Neighborhood Initiatives grants.[46] Congress did not permit HUD to delegate its authority to determine the selection criteria for the CNI program.

Congress granted HUD the power to promulgate rules regarding the substantive requirements of many of its grant programs. The expertise regarding housing and homeless programs lies with HUD staff, not with OMB. OMB cannot legally circumvent Congress's will by issuing new requirements and conducting substantive rulemaking on behalf of HUD.

IV. The rule attempts to eliminate Limited English Proficiency (LEP), civil rights, and affirmative marketing requirements mandated by Congress (§§ 200.111, 200.218, and 200.300).

A. The proposed rule imposes an "English Only" policy that conflicts with statutory law.

OMB's proposed changes to 24 C.F.R. 200.111 removes agency discretion related to issuing or translating awards or other documents in languages other than English. Many HUD programs rely on translated documents to provide language access to populations that grantees are required to serve. And in some cases, Congress mandated that recipients serve groups of people who may have limited English proficiency ("LEP"). For example:

- **Housing Counseling**. Section 106 of the Housing and Urban Development Act of 1968 authorizes HUD to "provide... counseling and advisory services to tenants and homeowners."[47] The statute explicitly requires the Secretary to provide funding for housing counseling services to a few specific categories of homeowners: those in the section 8 homeownership program, and first-time homebuyers with USDA guaranteed SF loans.[48] The categories have no exclusions for people who speak a language other than English. Indeed, HUD has interpreted this to require grantees to provide services that are accessible to clients in the language they serve.[49]

[44] 42 U.S.C. § 1437u(h)(1).
[45] 42 U.S.C. § 1437u(i)(1).
[46] 42 U.S.C. § 1437v(e)(2).
[47] 12 U.S.C. § 1701x(a)(1)(iii).
[48] 12 U.S.C. § 1701x(a)(2).
[49] 24 C.F.R. § 214.103(g)(3).

- **Eviction Protection Grant Program**. In authorizing the Eviction Protection Grant Program, Congress mandated that "the Secretary [of HUD] shall give preference to applicants that "have experience providing no-cost legal assistance to low-income individuals, including those with limited English proficiency or disabilities..."[50]

- **Emergency Solutions Grants and Continuums of Care.** The authorizing statute for the ESG and CoC programs defines "underserved populations" to include "populations underserved because of special needs (such as language barriers...)"[51] HUD has interpreted the authorizing statute to require that "subrecipients are also required to take reasonable steps to ensure meaningful access to programs and activities for limited English proficiency (LEP) persons."[52]

OMB is not authorized to override the statutory requirements or HUD's implementing regulations regarding language access.

B. The proposed rule conflicts with Congressionally authorized civil rights and affirmative marketing requirements.

Finally, the proposed rule conflicts with civil rights and affirmative marketing requirements that are explicitly authorized by Congress. Many authorizing statues for HUD programs that will be constrained by the proposed rule have anti-discrimination and/or affirmative marketing requirements that are incompatible with the proposed rule's categorical ban on disparate impact work, DEIA, and "gender ideology."[53] For example:

- **Eviction Protection Grant Program**. In authorizing the Eviction Protection Grant Program, Congress mandated that "the Secretary [of HUD] shall give preference to applicants that include a marketing strategy for residents in areas with high rates of eviction..."[54] Because neighborhoods with large populations of Black residents have disproportionately high rates of eviction, a grantee's efforts to comply with the affirmative marketing requirement could be misperceived as DEIA or disparate impact work because it targets benefits at majority Black residential areas and people with limited English proficiency. In this way, OMB's proposed new requirements may directly conflict with the appropriations language for this program.

- **Violence Against Women Act.** Shelters and housing assistance programs that receive funding from the Department of Justice's Office of Violence Against Women are prohibited from discrimination by grantees on the basis of gender identity or

[50] Consolidated Appropriations Act, 2021, Pub. L. 116-260, 134 Stat. 1182, 1187 (Dec. 27, 2020).
[51] 42 U.S.C. § 11360(33).
[52] 24 C.F.R. § 576.407(b).
[53] 91 Fed. Reg. at 32,249, 32,252-32,253 (proposing changes to 2 C.F.R. §§ 200.205, 200.218, 200.300)
[54] Consolidated Appropriations Act, 2021, Pub. L. 116-260, 134 Stat. 1182, 1187 (Dec. 27, 2020).

sexual orientation.[55] Nondiscrimination based on gender identity requires that an entity respect the identity of transgender, nonbinary, and gender non-conforming people and provide them equal access to programs and services. This conflicts with the proposed rule's ban on "gender ideology," defined as rejection of sex as an immutable and binary biological characteristic.

- **Community Development Block Grants.** Congress mandated that recipients of CDBG funds are prohibited from discriminating "on the ground of... sex..."[56] Discrimination against someone because of their gender identity is a form of discrimination on the ground of sex.[57] Thus the proposed rule's ban on "gender ideology" fundamentally conflicts with the statutory anti-discrimination provision.

- **Emergency Solutions Grants.** Congress mandated that recipients of ESG and CoC funds complete an affordable housing plan that includes a certification that the recipient will affirmatively further fair housing.[58] The obligation to affirmatively further fair housing in the Fair Housing Amendments Act means that HUD must "use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases."[59] HUD has interpreted this statutory authority to require affirmative marketing of ESG and CoC-funded facilities and services, including special outreach to eligible individuals in particular racial, ethnic, religious, or sex identity groups who may be hard to reach through traditional methods.[60] This statutory mandate (and HUD's implementing regulation) directly conflicts with the proposed rule's ban on DEIA and disparate impact work, both of which are designed to eradicate barriers to opportunity and create an equal playing field for historically marginalized groups.

- **HOME Program.** The proposed rule's prohibition on DEIA and "gender ideology" will have the effect of punishing jurisdictions that have more inclusive and progressive anti-discrimination laws. This is impermissible under the Cranston-Gonzalez Affordable Housing Act, which among other things authorizes the HOME program. In the Act, Congress dictated that HUD "shall not establish any criteria for allocating or denying funds made available under programs administered by the Secretary based on the adoption, continuation, or discontinuation by a jurisdiction of any public policy, regulation, or law that is (1) adopted, continued, or discontinued in accordance with the jurisdiction's duly established authority, and (2) not in violation of any Federal law."[61] The

[55] 34 U.S.C. § 12291(b)(13)(A).
[56] 34 U.S.C. § 12291(b)(13)(A).
[57] Bostock v. Clayton Cnty., Georgia, 590 U.S. 644, 652, 140 S. Ct. 1731, 1737, 207 L. Ed. 2d 218 (2020) (in the context of Title VII).
[58] 42 U.S.C. § 11361 (referencing 42 U.S.C. § 12705(b)(15)).
[59] N.A.A.C.P. v. HUD, 817 F.2d 149, 155 (1st Cir. 1987).
[60] 24 C.F.R. § 578.93(c)(1)(CoC); 24 C.F.R. § 576.407(b).
[61] 42 U.S.C. §12711.

proposed rule is incompatible with this provision because it penalizes jurisdictions with local laws that run counter to the Administration's political agenda.

OMB does not have the authority to override Congressional intent to provide program access in a non-discriminatory manner and to focus efforts on underserved groups. The proposed rule should be withdrawn as it conflicts with these statutory anti-discrimination and other program mandates.

C. The proposed rule conflicts with Congressional intent to provide local discretion to grantees (§§ 200.332 and 200.340).

Fundamental to the administration of HUD's major housing programs is a degree of local control. Congress has long recognized that housing and homeless resources are best administered by local agencies to suit the needs of any given community. The public housing program, for example, is administered by Public Housing Authorities nationwide. PHAs are state-enabled agencies that play a critical role in local communities throughout the country. There are over 2,677 PHAs nationwide that administer public housing at 6,218 developments.[62] PHAs enjoy a significant amount of local control over their programs and are structured differently depending on the state. It is states and localities that shape the policies and procedures at individual PHAs, within the confines of federal statutes and regulations.

Yet OMB's proposed rule exerts a new level of control and oversight over local decision-making that interferes with the ability of grantees to ensure that their programs are tailored to local needs and conditions. For example, current grantees who are pass-through entities have control over monitoring compliance of subgrantees that receive a subaward or contract.[63] The proposed rule requires grantees to consult with the federal government over subgrantee compliance, including compliance with vague new provisions related to reputational harm, and allows the federal agency to direct the grantee to terminate its subaward or, in the alternative, to terminate the grantee's funding.[64]

In addition, current regulations allow for discretionary termination if an award no longer effectuates program goals or agency priorities.[65] OMB proposes to change this language to allow for discretionary termination where the award no longer effectuates the *federal* agency's priorities (as opposed to the state or local agency grantee), or when the grant no longer effectuates "the national interest."[66] In this way, OMB shifts the focus from whether the grant and grantee are serving the local community to whether they are serving an undefined

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[62] HUD, *Public Housing Data Dashboard*, https://www.hud.gov/helping-americans/public-housing-dashboard.
[63] 2 C.F.R. § 200.332(i).
[64] 91 Fed. Reg. at 32,257 (proposing changes to 2 C.F.R. § 200.332(i)).
[65] 2 C.F.R. § 200.340.
[66] 91 Fed. Reg. at 32,258 (proposing changes to 2 C.F.R. § 200.340).

"national interest." And it takes decisions out of local agencies' hands, contrary to the fundamental nature of HUD programs.

This shift from local to federal control is at odds with Congress's directives for many impacted grant programs. Congress allowed for a substantial amount of local control over HUD funding programs for a good reason: local entities are better equipped to determine how to meet local needs than HUD, let alone OMB. There are a number of places where the proposed rule conflicts with Congress's intent to provide for local discretion. For example:

- **Indian Housing Block Grants.** Congress dictated that, in line with principles of tribal sovereignty, tribes have the right to "use a portion of [IHBG funds] for the Indian tribe in manners that are wholly self-determined by the Indian tribe for housing activities involving construction, acquisition, rehabilitation, or infrastructure relating to housing activities or housing that will benefit the community served by the Indian tribe."[67] Housing activities under this section are "selected at the discretion of the recipient"[68] and HUD has limited ability to disapprove activities.[69] Thus OMB's attempt to exert additional control over local decision-making conflicts with Congress's intent to provide for tribal sovereignty certain housing programs for indigenous Americans.

- **Housing Choice Vouchers.** Congress dictated that public housing agencies may create local preferences for admission to their Housing Choice Voucher program to "eligible families having certain characteristics" based on "local needs and priorities, as determined by the public housing agency... and under the requirements applicable to the comprehensive housing affordability strategy for the relevant jurisdiction."[70] The proposed rule would allow HUD to circumvent this local discretion if it determined that a housing agency's preference did not serve federal government priorities or "national interest." For example, the current administration has rejected permanent housing as a solution to the homelessness crisis, and shifted funding to temporary housing, shelter, and treatment programs.[71] Because of this, HUD could determine that a housing authority's preference for eligible applicants who are currently homeless does not serve the national interest and override local discretion or even terminate the housing authority's contract.

- **Moving To Work.** Congress created the Moving to Work Demonstration Program ("MTW") to allow select public housing agencies "flexibility to design and test various approaches for providing and administering housing assistance in order

[67] 25 U.S.C. § 4145.
[68] 25 U.S.C. § 4145b(a).
[69] 25 U.S.C. § 4113(e).
[70] 42 U.S.C. § 1437f(o)(6)(A).
[71] *See, e.g.,* HUD, *HUD Overhauls Federal Homeless Assistance*, https://www.hud.gov/news/hud-no-26-038; Exec. Order No. 14321, 90 FR 35,817 (July 24, 2025); National Alliance to End Homelessness v. United States Dept of Housing and Urban Development, 2026 WL 895909 (Feb. 27, 2026).

to increase cost effectiveness, self-sufficiency, and housing choice..."[72] Accordingly, MTW agencies currently have a large amount of autonomy and discretion to craft programs that are responsive to local conditions. The proposed rule would allow HUD to override local decision-making in the MTW program and circumvent Congress's purpose and directive for the program.

- **Emergency Solutions Grants.** The authorizing statute for the ESG program provides discretion to state and local government recipients of funds to distribute all or a portion of their assistance to private nonprofit organizations, public housing agencies, or local redevelopment authorities that serve homeless individuals.[73] A state government recipient must obtain local government approval.[74] This indicates Congress's intent to provide local entities with discretion over how to best serve local unhoused populations, and to subgrant federal funds accordingly.

Thus, in many HUD programs Congress mandated local control over the activities of federal grantees in operating housing programs. This conflicts with OMB's proposed rule, which subjects grantees and subgrantees to the constant threat of termination for failure to align with the federal government's priorities and a vague concept of "the national interest."

V. OMB's proposed changes to the grantee selection process uses vague and overly broad terms that will make compliance burdensome, if not impossible (Sec. 200.218, 200.300, and 200.340).

First, OMB's proposed new substantive requirements on grantees are so vague that it will be impossible for housing providers and other HUD grantees to comply. Practically, in the absence of any definitions, it is unclear what actions a housing provider would take to ensure an award is not used to promote "illegal DEIA" per the proposed change to § 200.300. Similarly, what does it mean to use funding to support the use of "disparate impact" per the proposed change to § 200.218? And how can a grantee ensure that its activities are in line with the "national interest" per § 200.340 if that term is not defined?

The new substantive requirements for grantees prompt more questions than answers. For example, would a PHA put their funding at risk if they work with a support service organization that provides gender-neutral bathrooms? Is that considered promoting or encouraging gender ideology? What about a PHA that works with an organization that provides services for survivors of domestic violence, with a focus on LGBTQ survivors? Will HUD pull a PHA's funding if its resident services department organizes college tours for youth in the public housing and voucher programs that includes Historically Black Colleges and Universities

[72] Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321, 1321-281 (Apr. 26, 1996).
[73] 42 U.S.C. § 11373(a).
[74] 42 U.S.C. § 11373(c).

(HBCUs)? No matter the answer to these questions, courts have repeatedly showed an unwillingness to uphold similar vague requirements under both First Amendment and Fifth Amendment grounds.[75] It is untenable to leave under-resourced housing providers like Public Housing Authorities guessing as to whether their programs comply with such vague and confusing terms, nor should their funding be put at risk for it. HUD housing providers are already operating in a time of financial uncertainty. OMB should not add to the uncertainty by requiring PHAs to certify to ambiguous terms.

The vagueness of the requirements also contributes to high compliance burdens for housing providers. OMB greatly undervalued the administrative burden on grantees that will be necessary to comply with this rule. For many housing providers, the burden to comply will be incredibly high. Due to the vague nature of the certification terms, it is likely that many HUD-funded housing and services providers will be forced to consult with either in-house counsel or an external legal consultant to determine whether they are complying with the grant's requirements. This requires both time and money. It is also likely that applicants will request technical assistance from HUD, national industry groups, city council members, and others, before applying for funding. Many housing providers will also need to engage in discussions with subcontractors – such as social service providers – that could be implicated by the new requirements and may even feel the need to end contracts and secure new subcontractors out of fear of accidentally running afoul of the vague requirements. The consultations will be time-consuming and costly and interfere with the important work of running a housing program. Yet, HUD provides minimal explanation of its burden estimate, including whether it has considered any of these factors.

VI. The rule gives any administration unfettered discretion to eliminate federal grantees it disfavors which is particularly harmful in the housing context (Sec. 200.205 and 200.340-343).

The proposed rule places unfettered discretion into the hands of political appointees. Funding terminations and other adverse actions could ultimately be made at the whim of a few individuals, in many cases without any due process. OMB proposes to expand the reasons for discretionary termination, including when continuing funding is no longer in the "national interest."[76] While the current version of 2 C.F.R. § 200.340 does contain a provision allowing termination if the award no longer effectuates program goals or agency priorities, OMB seeks to elevate this *guidance* to a binding regulation.[77] OMB also proposes to limit notice and the

[75] *See, e.g.,* National Association of Diversity Officers in Higher Education v. Trump, 2025 WL 573764 (D. Md. Feb. 21, 2025); Rhode Island Coal. Against Domestic Violence v. Bondi, No. CV 25-279 WES, 2025 WL 2271867, at *8 (D.R.I. Aug. 8, 2025) (granting preliminary injunction where DOJ imposed new conditions on VAWA grantees, including a bar on facilitating "gender ideology," in such a "vague and haphazard manner to be arbitrary, capricious, and an abuse of discretion.")

[76] 91 Fed. Reg. at 32,258 (proposing amendment to 24 C.F.R. § 200.340).

[77] *Comp.* 2 C.F.R. § 1.105(b) (clarifying that subtitle A of Title 2 "is guidance, not regulation"); 91 Fed. Reg. 32,241 (proposing amendments to 2 C.F.R. § 1.100).

opportunity to challenge these discretionary terminations.[78] Finally, OMB proposes a new 90 day suspension option with no notice or opportunity for the grantee to challenge the suspension.[79] The expanded discretion to terminate and suspend grants based on the whims of political appointees violates the will of Congress and will have severe impacts on affordable housing production and the ability of tenants to organize without retaliation.

A. Expanded discretion to terminate and suspend funding conflicts with the authorizing statutes for various HUD programs.

First, OMB's attempt to regulate HUD's ability to quickly withdraw funding on a discretionary basis with minimal process conflicts with the authorizing statutes of a number of HUD funding programs. For example:

- **Section 8 Mortgage Prepayment.** Under the Low-Income Housing Preservation and Resident Homeownership Act of 1990, HUD may terminate a Section 8 Housing Assistance Payment contract in the event of mortgage prepayment only if certain conditions specified by Congress are met.[80] Where an owner submits a plan to extend low-income affordability commitments, "Secretary [of HUD] *shall*, subject to the availability of appropriations for such purpose, enter into such agreements as are necessary to enable the owner to receive" ongoing subsidy funding.[81] Congress did not permit suspension or termination for discretionary reasons.

- **Section 8 Housing Assistance Payments.** Owners of Section 8 Project-Based Rental Assistance properties receive a monthly assistance payment from HUD on behalf of each assisted tenant based on their income, pursuant to a Housing Assistance Payment Contract. The amount of assistance payment is specified in the statute and is equal to the difference between the maximum monthly rent which the contract provides and the rent the family is required to pay based on its income.[82] Congress did not permit HUD to reduce or suspend an assistance payment under a HAP contract for discretionary reasons.

For these programs and others, OMB's proposed new discretionary termination, notice, and suspension requirements directly conflict with limitations put in place by Congress. OMB cannot expand the bases or procedures for termination without congressional authorization.

B. Unfettered discretion to terminate grants will destabilize efforts to preserve affordable housing.

[78] 91 Fed. Reg. at 32,260 (proposing amendments to 24 C.F.R. § 200.341(c)).
[79] 91 Fed. Reg. at 32,259 (proposing new 24 C.F.R. § 200.340(e)).
[80] 12 U.S.C. § 4108(a).
[81] 12 U.S.C. § 4109(a).
[82] 42 U.S.C. § 1437f(c)(3).

OMB's proposed provisions regarding termination are especially problematic for HUD grantees because of the uncertainty housing providers will face when doing business with the federal government. The proposed rule directly impacts much of the funding public housing agencies, local government, non-profits, and developers use to preserve affordable housing. The rule's termination provisions inject uncertainty and chaos into a system which requires and is predicated on stable, long-term funding.

One example of a program impacted by the proposed rule is the Choice Neighborhoods Initiative. Choice Neighborhoods provides competitive grants to support revitalization efforts to transform struggling neighborhoods by replacing severely affordable housing and converting vacant or foreclosed private housing into affordable housing.[83] Public housing agencies, local governments, non-profits, and tribal entities may apply for a Choice Neighborhood grant. For-profit developers may also apply jointly with a public entity. Development of a Choice Neighborhood plan requires the input of residents and the impacted community.[84] Since its inception in 2010, Choice Neighborhoods grants have provided approximately $2 billion to communities.[85] Like many other preservation-related grants, Choice Neighborhood grants are used not in isolation, but in combination with other funding from federal, state, local, and private partners.[86] This leveraging of funds from other sources is required given the federal government's disinvestment in preservation funding. Often HUD's awarding of a Choice Neighborhood grant is key to securing the additional funding needed to complete a project.[87]

The proposed rule will allow HUD to terminate grants based on its assessment that the award does not "effectuate program goals, Federal agency priorities, or the national interest as they exist at the time of the termination" even if the grantee is in full compliance with their grant.[88] Lenders, state and local housing finance agencies, and other funders will be less likely to supplement federal grants if they know the federal funding they are supplementing can be terminated at any time, based on the whim of a political appointee.[89]

Indeed, the proposed termination provisions' impact on affordable housing preservation are not theoretical but will cause real harm, as evidenced by this administration's prior attempt to suddenly freeze critical preservation funding. The Administration's attacks on programs like

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[83] Consolidated Appropriations Act, 2010, Pub. L. No. 111–117, 123 Stat. 3081.
[84] *Id.*
[85] U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *Choice Neighborhoods: An Evaluation of Outcomes and Neighborhood Impact* viii (2024), https://www.huduser.gov/portal/portal/sites/default/files/pdf/Choice-Neighborhoods-An-Evaluation-of-Outcomes-and-Neighborhood-Impact.pdf.
[86] *Id.* at 49-51.
[87] *Id.*
[88] 91 Fed. Reg. 32,258 (proposing changes to 2 C.F.R. § 200.340(a)).
[89] The Supreme Court's recent decision in *Trump v. Slaughter*, 2026 WL 1855612 (June 29, 2026) may allow, but will certainly embolden the executive branch to fire almost any civil servant who refuses to do the president's bidding. "The majority, however, at best consigns these issues to years of future uncertainty and at worst risks the end of the employment protections that apply to members of the civil service." (Sotomayor, J. dissenting).

the Green and Resilient Retrofit Program (GRRP) are an example of OMB violating federal law to advance administrative priorities, underscoring why the concerns about weaponized federal funding are real and well-founded. In response to the current housing crisis, Congress created GRRP in 2022, authorizing up to $1 billion in direct grant funding and $4 billion in loans for "projects that improve energy or water efficiency, enhance indoor air quality or sustainability," and other greening and resiliency efforts.[90] Eligibility was limited to owners already receiving HUD multifamily subsidies.[91] And although characterized as a greening program, GRRP awards allowed private owners to break the cycle of building disrepair, preserving these important affordable units, and invited tenants to take part in the preservation effort.[92]

The Department of Housing and Urban Development ("HUD") froze GRRP awards in early 2025 in response to President Trump's executive order and a subsequent OMB memoranda directing a government-wide freeze on billions of dollars in federal grants, loans, and other assistance programs for a review of consistency with the Administration's priorities.[93]

Woonasquatucket River Watershed Council et al. v. U.S. Department of Agriculture et al. was filed to challenge the Administration's arbitrary attempt to rescind obligated funding.[94] The district court appropriately determined that the Government "failed to provide a rational reason that the need to safeguard valuable taxpayer resources justifie[d] a sweeping pause of all already-awarded... funds with such short notice."[95] The district court issued an injunction against HUD and OMB's actions and they were ordered to resume GRRP's funding.[96] Despite this legal victory for GRRP awardees, HUD and OMB continued to hamper the program by removing the option for awards to be grants rather than surplus cash loans and minimizing the program's greening focus.[97]

Following the district courts' decision, many of the grants were still delayed by at least one year and some contained new requirements. The year-long delay put many preservation projects at risk of falling apart, especially subsidies seeking RAD conversions for long-term preservation.[98] GRRP funding was intended to be leveraged to secure additional private capital to fund the intensive repair efforts at awardee properties. HUD's pause on processing these awards threatened projects' ability to meet important benchmarks and requirements for other financing, or to prepare needed assessments or documents. These delays made projects'

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[90] The Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 30002(a), 136 Stat. 1818, 2027.
[91] *Id.* § 30002(c)(2).
[92] Juliana Bilowich, *Urgency for HUD's Release of GRRP-C Guidance Grows, Impacts of Funding Delays on Property Preservation Feasibility*, LeadingAge (Dec. 3, 2025), https://leadingage.org/urgency-for-huds-release-of-grrp-c-guidance-grows-impacts-of-funding-delays-on-property-preservation-feasibility/.
[93] Exec. Order No. 14,154, 90 Fed. Reg. 8,353 (Jan. 20, 2025).
[94] Woonasquatucket River Watershed Council et al. v. U.S. Department of Agriculture et al., National Council of Nonprofits, 778 F.Supp.3d 440 (Apr. 15, 2025).
[95] *Id.* at 470.
[96] *Id*. at 479.
[97] GRRP for Multifamily Housing, Notice H 2026-01 (Jan. 26, 2026), https://www.hud.gov/sites/dfiles/hudclips/documents/2026-01hsng.pdf.
[98] *See* Bilowich, *supra* note 89.

financing more precarious and threatened the feasibility of some renovations. The ongoing legal battle that GRRP awardees continue to face despite multiple legal victories, coupled with OMB's new attack on GRRP should serve as a strong indicator of the potential harms posed by these proposed changes.

C. Unfettered discretion to terminate grants will interfere with tenants' right to organize free from targeting and retaliation.

Congress and HUD acknowledge the importance of active resident participation in the operation of HUD-subsidized properties.[99] HUD's regulations require that tenant organizations be independent and representative of their constituencies.[100] HUD statutes and regulations also require that tenant organizations play a key role in local administration of federal housing programs. OMB's proposed rule incentivizes the weaponization of federal funding against tenant organizations who have countering or unfavored views, or those challenging agency action.

The proposed rule would expand HUD and any pass-through entity's discretion to terminate federal funding if the agency determines that termination is "in the interest of the Federal agency or the pass-through entity," including where the award "does not effectuate program goals, Federal agency priorities, or the national interest as they exist at the time of the termination."[101] The proposed rule also requires the use of a pre-issuance review by a senior appointee, removal of procedural protections for awardees, and increases awardees' legal liabilities.[102] The pre-issuance review by a senior appointee introduces a new layer of political review into the award process, creating uncertainty about awardees' long-term ability to maintain their housing subsidies at adequate levels.[103]

These arbitrary standards would allow HUD to intimidate tenant leaders and organizations by withholding or terminating Section 514 or tenant participation funding and by using the pre-issuance review to overly restrict eligibility requirements for the funding. The proposed rule also removes important procedural protections for awardees. OMB's rule would allow HUD to legally target and discriminate against tenant leaders and organizations who have campaigns challenging HUD or the pass-through entity's action while not providing awardees proper due process.

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[99] 12 U.S.C. § 1715z-1b(a); 42 USC §§ 1437(b)(1), 1437r(a), 1437c-1(e); 24 C.F.R. §§ 964.11, 245.5.
[100] 24 C.F.R. §§ 245.110; 964.115.
[101] 91 Fed. Reg. 32,258 (proposing changes to 2 C.F.R. § 200.340).
[102] 91 Fed. Reg. 32,258-61 (proposing changes to 2 CFR §§ 200.340-200.343.)
[103] Mark Barnes et al., *OMB Proposed Revisions to the Uniform Guidance: Key Takeaways for Award Recipient Organizations*, Ropes & Gray (Jun. 2, 2026), https://www.ropesgray.com/en/insights/alerts/2026/06/omb-proposed-revisions-to-the-uniform-guidance-key-takeaways-for-award-recipient-organizations.

These are not theoretical concerns but are borne out of the government's practice of using funding to abuse tenant leaders and organizations.[104] OMB's proposed changes also allow for tenant leaders and organizations to be targeted for their speech challenging a federal agency. These abuses are not only a violation of tenants' rights in the federal housing programs but are also a violation of their constitutional right to freedom of speech. The OMB proposed rule will make it more difficult for tenant organizations to maintain their funding and will allow for federal funding intended to empower tenants to be used to intimidate them.

VII. The rule will undermine federally assisted tenants' rights and cause serious harm.

Evictions. Along with creating obstacles to affordable housing preservation and tenant organizing, the OMB Rule will undermine tenants' rights in other significant ways. For HUD-assisted tenants, the most immediate concern is whether the federal government will pay the rent consistently and on time. Because the OMB Rule subjects federal funding to the whims of the executive branch's policies and priorities, HUD may decide to cancel funding to certain PHAs or other housing providers arbitrarily, threatening their ability to pay the rent of assisted tenants in a timely way. This looming threat puts tenants in the precarious position of being evicted for nonpayment of rent and suffering the multitude of harms that come from the mere filing of an eviction, such as barriers to future rental housing, increased household instability, and worsened physical and mental health.[105] Unreliable rental payments will also drive away private landlords and owners who are integral partners in major HUD housing programs. Having fewer participating landlords diminishes the value of the voucher for tenants by reducing the number of units where tenants can use their voucher. In addition to throwing more tenants into housing precarity, this will undermine the program's long-term sustainability and shrink the supply of affordable housing in communities.

Poor Housing Conditions. As explained above, in the preservation context, the OMB rule will also harm the health and safety of tenants by jeopardizing funding to improve the habitability of affordable housing. The rental housing stock is extremely old (median age of 45) and increasingly plagued with inadequate conditions and repair needs. The Federal Reserve Bank of Philadelphia estimated that 18.8 million occupied rental units (41 percent) had at least one repair need in 2024.[106] Federally assisted housing is disproportionately located in highly segregated and resource-deprived neighborhoods and is frequently cited for substandard

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[104] *See*, HUD Office of Inspector General, *Semiannual Report to Congress Oct.1, 2002-Mar. 31,2003* 43 (Oct. 1, 2002), https://www.hudoig.gov/sites/default/files/documents/sar49.pdf; *Empowering Tenants with OTAG-ITAG-VISTA Accomplishments and Recommendations 2002*, 18-19 (Nov. 26, 2002), https://shelterforce.org/wp-content/uploads/2021/03/Williams-Report-on-514-TA-Nov02.pdf (describing awardees' success with using Section 514 funding to create new tenant organizations and preserve federally-assisted multifamily properties despite poor federal oversight and program structuring).

[105] *See* Clark Merrefield, *Evictions: Physical, financial, and mental health consequences* (Oct. 15, 2021), https://journalistsresource.org/economics/evictions-physical-financial-mental-health/.

[106] Federal Reserve Bank of Philadelphia, *Home Repair Costs 2025: Updated Estimates and New Measures of Cooling Needs* 13 (Dec. 2025), https://www.philadelphiafed.org/-/media/FRBP/Assets/Community-Development/Briefs/home-repair-costs-2025/home-repair-costs.pdf.

conditions.[107] These units place tenants at increased risk of exposure to lead, radon, mold, asbestos, among other severe health hazards that have permanent and devastating impacts.

The OMB rule would jeopardize funding used to maintain and improve the federal housing stock. For example, the rule would easily allow HUD to withhold a PHA's Public Housing Capital Fund, impairing the ability of public housing authorities to address the long-term repair needs of their buildings. Further, public housing authorities are required "to affirmatively further fair housing in its use of [Capital Funds],"[108] but because the OMB Rule attempts to eliminate the use of disparate impact, HUD could decide to take funding away from activities that it perceives to be benefiting communities of color, despite the fact that they are protected classes under the Fair Housing Act.

HUD could also throw specific grant programs into chaos, such as the Healthy Homes Production Program, whose purpose is to take "a comprehensive approach to addressing multiple childhood diseases and injuries in the home by focusing on housing-related hazards in a coordinated fashion, rather than addressing a single hazard at a time."[109] The hazards that this grant program tries to protect against include lead, mold, carbon monoxide, home safety hazards, pesticides and allergens from pets and pests. One of the program's objectives is to "identify and remediate household-related health and safety hazards in privately-owned, low-income rental and/or owner-occupied housing, especially in units and/or buildings where families with children, older adults 62 years and older, or families with persons with disabilities reside."[110] Given the vagueness of the proposed rule's definition of DEIA, it is possible that the mere mention of people with disabilities could cause HUD to terminate this funding, thus allowing these conditions to continue to worsen and harm the health of tenants.

Displacement of public housing residents. Health-harming conditions in public housing disproportionately harm Black families.[111] And repositioning public housing to address these conditions disproportionately displaces Black families. For example, 80% of public housing tenants displaced by demolition of public housing, often with HOPE VI funds, from 1992 to 2007 were Black, despite the fact that Black people only represented 48% of the nationwide

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[107] *See, e.g.*, U.S. Atty's Off/ SDNY, *U.S. Attorney Announces Application Process for Second Term Of NYCHA Monitorship* (May 24, 2023), https://www.justice.gov/usao-sdny/pr/us-attorney-announces-application-process-second-term-nycha-monitorship; D.C. Off. of the Att'y Gen., *Creating a Truly Independent DC Housing Authority: Increasing Political Insulation to Improve Outcomes at DCHA*, (2022), https://oag.dc.gov/sites/default/files/2022-12/DCHA-Report-final-.pdf.

[108] 24 C.F.R. § 905.308(b)(1).

[109] HUD, *Healthy Homes Production Grant Program* (May 13, 2026), https://simpler.grants.gov/opportunity/b74b4ad6-6a81-4417-ad1b-11d011365946.

[110] *Id.*

[111] Mariya Denisenko, *The Impact of Government Sponsored Segregation on Health Inequities: Addressing Death Gaps Through Reparations*, 80 Wash. & Lee L. Rev. 1687, 1723 (Fall 2023), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4842&context=wlulr/.

public housing population.[112] PHAs must consider and mitigate the displacement impacts on Black families in order to comply with civil rights program requirements and statutes. One Court held that HUD wrongly approved an application for approval and funding to reposition a nearly 100% Black public housing complex in south Louisiana where the PHA failed to address concerns about the displacement of Black families to segregated neighborhoods.[113] The proposed rule would punish PHAs for attempting to address the needs of tenants in disproportionately Black public housing communities who are facing unsafe conditions due to decades of disinvestment, deferred maintenance, and capital needs.

The proposed rule's expanded discretion to terminate grants, combined with its anti-DEIA and disparate impact provisions, create a problem for hundreds of public housing authorities nationwide and the tenants they serve.

VIII. The rule will make legal representation of tenants impossible because of its prohibition on disparate impact.

Proposed new section 2 C.F.R. § 200.218 would prohibit federal agencies and pass-through entities from making federal awards that "in a way … promote or support the use of disparate impact liability."[114] If adopted, this provision would be highly disruptive to federally funded legal services programs that provide legal assistance to tenants and low-income homeowners, and destructive to fair housing programs. The rule would subvert and violate the Fair Housing Act and would impede attorneys funded by federal agencies from providing proper legal advice and zealous representation to clients in housing cases.

A. The Fair Housing Act is a core component of U.S. housing law.

The Fair Housing Act makes it federal policy "to provide, within constitutional limitations, for fair housing throughout the United States."[115] Since its original enactment in 1968 and amendments in 1988, the Fair Housing Act has prohibited housing discrimination nationwide based on race, color, religion, sex, familial status, or national origin, as well as disability (which the statute calls "handicap").[116]

The Act applies to an extensive range of discriminatory practices, including various forms of denying or making housing unavailable to persons because of protected class status, unequal treatment in the terms and conditions of housing or in "services or facilities in connection" with housing or in real estate related transactions, making discriminatory public

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[112] Derek S. Hyra, *Conceptualizing the New Urban Renewal: Comparing the Past to the Present*, Urban Affairs Review 498, 509 (May 15, 2012), https://www.researchgate.net/profile/Derek-Hyra/publication/258198201_Conceptualizing_the_New_Urban_Renewal/links/5553ddce08ae980ca6085c10/Conceptualizing-the-New-Urban-Renewal.pdf.
[113] Anderson v. U.S. Dep't of Hous. & Urb. Dev., 731 F. Supp. 3d 19 (D.D.C. 2024).
[114] 91 Fed. Reg. at 32,252.
[115] 42 U.S.C. § 3601.
[116] *See* 42 U.S.C. § 3604.

statements or advertisements, failing to make reasonable physical modifications or administrative changes in rules and policies for people with disabilities, and more.[117] Courts are instructed to broadly and liberally construe the Act, and all federal executive departments and agencies are obligated to administer their programs and activities relating to housing and urban development "in a manner affirmatively to further [the Act's] purposes."[118]

Advocates working with tenants, homeowners, or persons seeking to obtain housing frequently find that their clients have experienced unlawful discrimination. Discriminatory policies and practices may prevent a renter from securing an apartment because of their skin color or the language they speak, cause a borrower to be charged a higher interest rate on a home loan because of the racial composition of their neighborhood, steer homebuyers to segregated parts of town and away from areas of higher opportunity, deter families with children from moving in, deny the ability to have a critical assistance animal, and so on. Some discriminatory practices may exclude members of protected classes from entire communities, such as exclusive zoning laws that prevent the development of multifamily housing likely to serve higher percentages of racial minorities.

Often, the Fair Housing Act provides the best or the only avenue of redress for persons experiencing housing-related harms such as these.[119] Entities funded by HUD's Fair Housing Initiatives Program (FHIP) have traditionally investigated housing discrimination cases such as those described above, and either helped impacted individuals to bring enforcement proceedings or in some cases have brought enforcement proceedings of their own. Indeed, FHIP grantees are statutorily obligated to use HUD funds to "discover and remedy discrimination" and to "carry out special projects, including the development of prototypes to respond to new or sophisticated forms of discrimination."[120] The proposed rule would significantly interfere with the work of FHIP grantees to enforce the Fair Housing Act.

Legal services programs frequently encounter housing discrimination cases as well. A tenant may face eviction because she was assaulted at the premises by a romantic partner. Or a rental applicant may be denied admission under a discriminatory background check policy. A family may be targeted for predatory real estate scams or subprime loans because they are immigrants and do not speak or read English as well. Low-income persons with problems such as those present at legal services programs every day—and often the best or only solution to their problem is to assert and enforce Fair Housing Act rights. The proposed rule would significantly interfere with this important legal work because U.S. Department of Justice grants are a prominent source of funding for legal services programs, as are certain U.S. Department of Housing & Urban Development grants for housing-related legal services such as the Eviction Protection Grant Program.

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[117] *See* 42 U.S.C. §§ 3604, 3605.
[118] 42 U.S.C. § 3608(d).
[119] *See* 42 U.S.C. §§ 3610, 3613 (authorizing a person aggrieved by a discriminatory practice to pursue damages, injunctive relief, and attorney fees through an administrative complaint or civil action).
[120] 42 U.S.C. § 3616a(b)(2).

Indeed, the Fair Housing Act touches so many core aspects of housing law that it's fair to say one cannot effectively or competently represent tenants, homeowners, or associations (of tenants or homeowners) without a functional understanding of the Fair Housing Act and the ability to recognize potential incidents of discrimination that arise in client experiences. At the National Housing Law Project, where we provide training and resources for thousands of legal services lawyers and other housing advocates, we teach that Fair Housing is a "cross-cutting issue" that may be present in any type of housing case—whether it's defending a signal tenant against eviction, opposing the demolition of a large subsidized housing project, countering an admission screening rule that will exclude substantial numbers of local families, or challenging the home mortgage lending practices of a major national financial institution. It is simply not practical or efficacious to attempt to segregate Fair Housing Act matters from the other aspects of housing law, whether in a legal services practice setting, a fair housing center, or elsewhere.

B. **The Fair Housing Act responded to governmentally created residential segregation.**

Personal acts of intentional discrimination against protected class members do remain quite common, and the Fair Housing Act provides powerful remedies to address cases of that kind. But sophisticated housing advocacy is not limited to addressing the egregious acts of individuals but also focuses on systemic forms of housing discrimination that spread inequality of opportunity across entire communities and reproduce disadvantage across generations. This was the original intent of the Fair Housing Act and remains central to its purpose.

Significantly, residential racial segregation has existed in the United States throughout much of the nation's modern history and remains commonplace today. "The average white person in metropolitan America[ ] lives in a neighborhood that is 75% white [while] a typical African American lives in a neighborhood that is only 35% white … and as much as 45% black."[121] Much of this segregated residential landscape derives from past discriminatory government housing policies that continue to have profound and lasting effects on American society.[122] The Fair Housing Act was in large part a direct response to these discriminatory policies and the legacy of residential segregation those policies created.

For example, one of the most important federal policies that created widespread residential segregation was "redlining," a practice multiple federal agencies used to determine which homes could qualify for residential mortgage insurance based on large part on the racial

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[121] John R. Logan et al., *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census* 2 (Mar. 24, 2011), https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf.
[122] *See* Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 Soc. F. 571, 572 (Jun. 2015) ("The black urban ghetto was created in the late nineteenth and early twentieth centuries through deliberate actions taken by white Americans to isolate African Americans spatially, and thus marginalize them socially, economically, and politically.").

and ethnic composition of the areas in which the homes were located.[123] Redlining originated in the 1930s with the federal Home Owners' Loan Corporation, which created maps that marked certain neighborhoods in red to denote their "hazardous" nature.[124] HOLC considered the socioeconomic characteristics of a neighborhood "much more important at that time in determining the value of dwelling than structural characteristics," with areas occupied by "English, Germans, Scotch, Irish, [and] Scandinavians" rated highest while communities with "Negroes" and "Mexicans" were assigned the lowest ratings.[125]

HOLC, an agency that helped troubled urban homeowners to refinance or buy back their homes from foreclosure, made relatively few loans.[126] But HOLC's maps and redlining system became the dominant model that both private banks and other federal agencies, especially the Federal Housing Administration (FHA) and Veterans Administration (VA), adopted for administering their own mortgage insurance programs.[127]

FHA-insured loans enabled borrowers to finance up to 80% of a home purchase over 20 years, making home ownership more attainable than earlier lending models, which often required 50% down payments and very short loan terms that necessitated serial refinancing.[128] Yet those FHA loans were generally only available in "stabl[e]" white communities, especially those insulated from what it called "'inharmonious racial groups'" by highways or other barriers.[129] The FHA deemed neighborhoods with non-white residents too risky to insure, as well as some "white neighborhoods near black ones that might possibly integrate in the future."[130] The FHA also discouraged lending in older urban neighborhoods, favoring instead new homes built in suburban communities that generally denied admission to non-whites.[131]

These discriminatory policies made federal mortgage insurance a veritable engine of residential segregation, and a prolific one: the FHA and VA mortgage insurance programs "helped nearly eleven million families to own houses and another twenty-two million families to improve their properties" by 1972, with at least 98 percent of those loans going to white borrowers.[132] While steering white families to suburbs, where they could obtain the favorable

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[123] Terry Gross, *A 'Forgotten History' of How the U.S. Government Segregated America*, NPR (May 3, 2017), https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america.
[124] Jennifer S. Light, *Nationality and Neighborhood Risk at the Origins of FHA Underwriting*, 36 J. of Urb. Hist. 634, 671 n.85 (2010).
[125] Charles L. Nier, III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. Marshall L. Rev. 617, 622 n.35 (Spring 1999).
[126] *See Id.* at 623.
[127] *See* Light, *supra* note 121 at 671 n.85
[128] *See* Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America 64 (2017).
[129] *Id*. at 65-66.
[130] *Id.* at 65.
[131] *Id.* at 65, 72-73.
[132] *See* George Lipsitz, The Possessive Investment in Whiteness: How White People Profit From Identity Politics, 107 (2006).

FHA and VA loans, redlining limited families of color to older, usually urban neighborhoods where housing was generally of lower quality and available only at higher prices and often on predatory terms.[133]

The impacts of redlining are not merely historical. Many white families that bought homes in the 1950s or 1960s because of federal mortgage insurance were able to build generational wealth that conferred advantages on their children and on grandchildren in successive decades, such as greater access to education and business opportunities.[134] Meanwhile families of color that were redlined out of home ownership were less able to accumulate wealth and their descendants competed in job markets and other economic environments at a comparative deficit.[135] Over time, the advantage that race once conferred directly through redlining now manifests in financial terms as generational wealth simply enables more whites to pay higher prices for homes than nonwhites without the same resources.[136]

Redlining was hardly the only policy behind the segregation of American cities in the 20th century. Indeed, it was not even the only *federal* policy; interstate highway construction and so-called "urban renewal" projects decimated neighborhoods of color nationwide.[137] Public housing development resulted in "segregated projects even where there was no previous pattern of segregation" as projects built in previously integrated neighborhoods were designated as "white" or "black" only.[138] The Federal Housing Administration also supported racially restrictive covenants, which usually blocked homeowners from selling to non-white buyers; the U.S. Supreme Court held state enforcement of such covenants unconstitutional in 1948.[139]

The cumulative impact of federal policies such as these, together with countless state and local policies and private acts of discrimination, was profound: by 1960 segregation levels in U.S. cities approached those of apartheid South Africa.[140] This was the context in which the Fair Housing Act was enacted. Its prohibition of racial and ethnic discrimination in housing and housing-related transactions would alone have marked a sea change in federal housing policy, as longstanding abuses like mortgage insurance redlining or whites-only suburbs became instantly unlawful. But Congress did not stop there.

Recognizing that the entrenched patterns of segregation and housing inequality could only be dismantled through broad and resolute efforts, Congress also required that all federal

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[133] See, e.g., Beryl Satter, Family Properties: Race, Real Estate, and the Exploitation of Black Urban America, Chapter 2: "The Noose Around Black Chicago," 36-40, (2010).
[134] *See* Michelle Singletary, *Redlining robs Black families of generational wealth*, Washington Post (Oct. 23, 2020).
[135] *See id.*
[136] *See id.*
[137] Alan Pyke, *Top infrastructure official explains how America used highways to destroy black neighborhoods*, ThinkProgress (Mar. 31, 2016), https://thinkprogress.org/top-infrastructure-official-explains-how-america-used-highways-to-destroy-black-neighborhoods-96c1460d1962/.
[138] Rothstein, Color of Law, *supra* note 125, at 21.
[139] *See* Shelley v. Kraemer, 334 U.S. 1 (1948).
[140] *See* Otto Kerner et al., *Report of the National Advisory Commission on Civil Disorders* (1968).

executive departments and agencies work to undo the harms that decades of segregationist housing policies had caused. This is why the meaning of the requirement that federal agencies "administer their programs and activities relating to housing and urban development...in a manner affirmatively to further the purposes of this [Act]."[141] This duty to affirmatively further fair housing obligates HUD to "do more than simply not discriminate itself ... [and] use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases."[142] The Act requires HUD to take proactive steps to overcome patterns of segregation and discrimination and promote "'truly integrated and balanced living patterns.'"[143] The duty to affirmatively further fair housing extends both to HUD's direct decision-making,[144] and to HUD's oversight of state and local governments and public housing agencies in the administration of its programs.[145]

C. Enforcement by disparate impact theory is fundamental to the Fair Housing Act's objectives.

As mentioned above, however, the Fair Housing Act does not depend for its implementation and enforcement solely on HUD and other government agencies. Rather, the Act also empowers individuals, organizations, and communities impacted by discriminatory practices to bring administrative complaints and civil actions for relief.[146] And its objectives surpass the mere deterrence and punishment of one-off discriminators to the ultimate transformation of U.S. communities from Jim Crow apartheid to a genuinely integrated, equal opportunity society.

This means fair housing advocates must concern themselves with significant policies and practices and systems that cause and reproduce incidents of structural disadvantage in minority communities, irrespective as to the personal intentions of those maintaining and administering such policies and practices and systems today. This is the function of disparate impact liability.

To take one example, many housing providers use criminal records to screen for admission. Almost all who do so believe excluding residents with criminal records promotes a safer living environment or reduces risks of lease violations and property damage. Yet it is well-documented that Black people in the U.S. are roughly five-times more likely than whites to have a criminal record of some kind, and Latinos are about 2.5 times more likely to have criminal

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[141] 42 U.S.C. § 3608(d).
[142] NAACP v. Secretary of HUD, 817 F.2d 149, 155 (1st Cir. 1987) (outlining legislative history and subsequently collecting cases).
[143] Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972).
[144] Shannon v. U.S. Dep't of Hous. & Urban Dev., 436 F.2d 809, 820-21 (3d Cir. 1970); Thompson v. U.S. Dep't of Hous. & Urban Dev., 348 F. Supp. 2d 398, 457-58, 462-64 (D. Md. 2005).
[145] City of Westchester v. U.S. Dep't of Hous. & Urban Dev., 802 F.3d 413, 434-36 (2d Cir. 2015); *NAACP*, 817 F.2d at 156-57.
[146] *See* 42 U.S.C. §§ 3610, 3613.

records.[147] This means denying housing based on criminal records will disproportionately exclude households with Black and Latino members. Even if causing this discriminatory result is not the goal of the screening, it is nevertheless a discriminatory effect that perpetuates residential segregation in frustration of the Fair Housing Act. And even if the belief that criminal records screening makes properties safer is genuinely held, we should not permit such views to frustrate the goals of federal legislation where the evidence does not support them.

Disparate impact theory is how policies of this kind may be further scrutinized. Disparate impact theory holds that if a facially nondiscriminatory practice—such as criminal history screening—causes a discriminatory outcome, then the person or entity engaging in that practice must justify it.[148] A practice is justified by proving, with evidence, that it serves a business necessity which cannot be fulfilled through any equally effective, less-discriminatory means.[149] A practice that is justified by evidence does not violate the Fair Housing Act, no matter how discriminatory its outcomes. It is only those policies which are not justified, which pose "artificial, arbitrary, and unnecessary barriers," that ultimately violate the Act.[150]

Under these principles, courts have invalidated excessive criminal records screening policies because of their racially discriminatory effects for going on fifty years.[151] HUD itself issued guidance in 2016 suggesting that housing providers who engage in criminal records screening likely could not justify denying housing based on non-conviction records, under "blanket bans" that did not distinguish between crimes relevant to housing and recent enough to bear on the applicant's likely behavior and those unrelated to housing or too remote in time, or without an opportunity for individualized assessment of the applicant's record and evidence of changed circumstances or mitigating information.[152] HUD has since withdrawn this guidance for unexplained reasons, but courts continue to evaluate Fair Housing Act challenges to criminal history policies under substantially similar criteria.[153] The Fair Housing Act does not prohibit criminal records screening altogether—but it does prohibit housing providers from carrying out excessive criminal records screening that poses artificial, arbitrary, and unnecessary barriers to housing access.[154]

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[147] *See* Prison Policy Initiative Fact Sheet, https://www.prisonpolicy.org/racialjustice.html
[148] *See* Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc., 576 U.S. 519, 527-28 (2015).
[149] *Id*.
[150] *Id*. at 540, quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
[151] *See, e.g.*, Green v. Missouri Pacific Railroad, 549 F.2d 1158 (8th Cir. 1977).
[152] Helen R. Kanovsky, General Counsel, *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (Apr. 4, 2016), https://www.novoco.com/documents97930/hud_ogc_guide_fha_040416.pdf.
[153] E. Scott Turner, HUD Secretary, *SOHUD Letter to PHAs and Owners re. Public Safety* (Nov. 25, 2025), https://content.govdelivery.com/attachments/USHUDFHA/2025/11/26/file_attachments/3474936/SOHUD%20Letter%20on%20Criminal%20Screening%20Responsibilities%20of%20PHAs%20and%20Owners_final.pdf.
[154] *Inclusive Communities Project*, 576 U.S. at 540.

Criminal records screening is just one sole example of a practice that can frustrate the goals of the Fair Housing Act despite the absence of discriminatory animus. There are many others, ranging from per-person admission screening fees that impose higher costs on families with children (even if the children are too young to have credit reports or background checks and are not expected to contribute to the rent) to advertising algorithms that only show available housing near a person's current residence (thus reinforcing existing patterns of segregated living) to facially-neutral land use policies that prevent the construction of new housing (the occupants of which may have a different demographic profile than the existing population of the community).

In summary, there is no practical way to dismantle residential segregation or promote open and integrated housing without considering protected characteristics such as race and national origin, or incentivizing integration. Yet OMB's proposed rule calls for the elimination of any such activity—at least insofar as federal funds are involved. Indeed, the proposed rule would even disallow the use of federal funds to conduct statistical or demographic analysis that a grantee might use to avoid causing discriminatory effects on groups protected by the Fair Housing Act. This is just one reason the proposed rule is irreconcilable with the Fair Housing Act and should be rejected as contrary to law.

D. Housing lawyers, including those funded by federal grants, are ethically bound to evaluate and potentially advance disparate impact claims they encounter during their advocacy.

Among the most well-known and fundamental obligations a lawyer owes to a client is the duty of zealous representation. As stated by the American Bar Association:

> "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[155]

The proposed OMB restriction on disparate impact advocacy would drastically interfere with the practice of housing law in a legal services setting, where zealous advocacy is not possible without disparate impact claims.

Indeed, regardless of the specific discriminatory practice at issue, federal courts have consistently recognized disparate impact as a theory of enforcing the Fair Housing Act throughout the entire history of the statute, including the U.S. Supreme Court which famously reaffirmed its applicability in 2015's *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc*. Accordingly, disparate impact is a viable legal theory under the Fair

[155] ABA Model Rule of Professional Conduct 1.3[1].

Housing Act and when a housing advocate encounters a discriminatory housing practice that harms a client, responsible advocacy requires evaluating, advising, and potentially mounting a disparate impact challenge.

It would scarcely be practical for housing advocates to carve out disparate impact from other practice areas in the housing space. This is especially true given that fair housing claims of all kinds—including but not limited to disparate impact—are commonly embedded in cases that present as other types of housing problems.

For example, a significant percentage of Housing Justice Network members represent tenants in eviction cases. Clients seek legal assistance because they have received notice to vacate their rental dwellings or have been served with formal eviction lawsuits. The clients' objectives are often simply to retain their housing, or even just to mitigate the impacts of the eviction case on their ability to find some other place to live. It is usually only analysis and investigation of such cases that reveals discriminatory practices may be at work:

- **Survivors of Domestic Violence.** The advocate may discover that the tenant is a survivor of domestic violence or other forms of gender-based violence and the lease is being terminated because the tenant called the police to the residence or the landlord learned of the abuse in some other way. While eviction for being the victim of such conduct is prohibited by the Violence Against Women Act in federally assisted properties and by state laws in some jurisdictions, VAWA does not apply to most private-market rental housing and the majority of states and cities are without their own local protections. This leaves disparate impact theory under the Fair Housing Act as the tenant's most likely defense.[156] An advocate arbitrarily barred from asserting disparate impact claims would thus not be able to effectively assist the tenant in defending against the eviction—meaning in all likelihood the tenant would go without representation.

- **Background checks.** Tenants who reside in multifamily apartment buildings are often subjected to new background checks when they renew their leases or if the ownership or management company changes. This can result in tenants facing eviction from homes where they have demonstrated the ability to live successfully based on changes in their credit score or new policies around acceptable rental history or criminal records, for eample. Tenants often seek legal assistance with such evictions because they perceive them as illogical and unfair, but very few U.S. jurisdictions require landlords to have good cause for declining to renew an expiring residential lease. This often means the only defense even potentially available in such cases are fair housing disparate impact theories, which may be available when the policies giving rise to the evictions disproportionately impact protected classes. Barring participation in disparate impact litigation would thus effectively preclude an advocate from providing competent representation in this kind of case too.

[156] *See, e.g.*, Bouley v. Young-Sabourin, 394 F. Supp. 2d 675, 678 (D. Vt. 2005).

- **Families with Children.** Families with children commonly face eviction for alleged violations of lease provisions that limit the use of common areas in multifamily properties—such as restrictions on outdoor play, adult supervision requirements, and so on. Some policies of this nature may be appropriate and necessary for safety purposes, to protect their physical grounds and facilities, and so on. But other such policies may be arbitrary and onerous. Once again, fair housing disparate impact theories may provide the best, or only, avenue to defend against such evictions—so an advocate unable to prepare and present disparate impact claims would be unable to render effective assistance.

Again, these comments can show only a small handful of the myriad situations from which disparate impact claims may arise in the course of eviction defense advocacy—to say nothing of housing advocacy around housing admissions, mortgage servicing, real estate fraud, emergency homeless services, public and subsidized housing, heirs' property, affordable housing preservation, and the many, many other aspects of housing law in which legal services lawyers regularly engage.

Those lawyers can provide zealous advocacy, or they can attempt to practice housing law without analyzing, advising upon, and advancing disparate impact claims even where appropriate; it is not possible to do both.

E. The proposed rule misunderstands and mischaracterizes disparate impact theory.

The proposed rule would obstruct and interfere with the delivery of legal services to clients in housing cases even if it reflected a proper understanding of how disparate impact theory works. However, the proposed rule defines disparate impact as "a theory under which a facially neutral policy or practice … gives rise to an automatic or near-insurmountable presumption of the existence of unlawful discrimination on the basis of federally protected characteristics (such as race or sex) where there are *any* differences or disparities in outcomes[.]"[157]

It is settled law that a racial imbalance alone "does not, without more, establish a prima facie case of disparate impact."[158] Rather, disparate impact discrimination claims require the claimant to first demonstrate both a *significant* disproportionate, adverse effect on members of the protected class and identify the specific policy or policies that caused it.[159] In practice, this

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[157] 91 Fed. Reg. at 32,252 (emphasis added).
[158] *Inclusive Communities Project*, 576 U.S. at 542, quoting Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653 (1989).
[159] See, e.g., Southwest Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist., 17 F.4th 950, 962 (9th Cir. 2021) (prima facie case of disparate impact requires "(1) the existence of a policy, not a one-time decision, that is outwardly neutral; (2) a significant, adverse, and disproportionate effect on a

typically means showing outcomes under the challenged policy are less favorable by at least two standard deviations than they would be in the absence of the policy.

Hence it is simply not true that a presumption of unlawful discrimination arises any time there are differences in outcomes between different protected groups—let alone a "near-insurmountable" one. The disparity must be statistically significant, and attributable to a specific policy or set of policies. Even then, policies which are shown to cause a discriminatory impact may yet be justified, as discussed above.

The proposed rule also states, incorrectly, that "[d]isparate impact liability … incentivizes racial balancing, contrary to principles of equal treatment and merit-based opportunity."[160] Yet as discussed above, disparate impact theory in the housing space is concerned with removing "artificial, arbitrary, and unnecessary barriers" that impede access and enjoyment by protected class members—this is fully consistent with merit-based opportunity, much more so than turning a blind eye to arbitrary policies that treat all persons "equally" yet consistently disadvantage members of a protected class for reasons entirely unrelated to their qualifications for the housing. Such is the very point of disparate impact liability—and though the authors of the proposed rule may disagree, they have lost this argument in Congress and in the courts.[161] OMB political appointees may not lawfully substitute their own policy preferences for the manifest will of Congress.

Thank you for your time. For questions, please contact Deborah Thrope, Chief Program Officer, National Housing Law Project, dthrope@nhlp.org.

Sincerely,

Chief Program Officer
National Housing Law Project

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protected class; and (3) robust causality that shows, beyond mere evidence of a statistical disparity, that the challenged policy, and not some other factor or policy, caused the disproportionate effect."); Reyes v. Waples Mobile Home Park Ltd. P'ship, 903 F.3d 415, 425 (4th Cir. 2018) (causation in a disparate-impact claim requires showing that a specifically identified practice "has a significantly disparate impact on the protected class," that is, "statistical disparities must be sufficiently substantial that they raise such an inference of causation.").

[160] 91 Fed. Reg. at 32,252.

[161] *See Inclusive Communities Project*, 576 U.S. at 535-36 ("all nine Courts of Appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims" at the time Congress passed the Fair Housing Amendments Act in 1988, and that "[w]hen it amended the FHA, Congress was aware of this unanimous precedent. And with that understanding, it made a considered judgment to retain the relevant statutory text.").