

Board of Directors

Chair

Esta Gordon Epstein

CEO and National Director

Jonathan Greenblatt

Andy Adelson

Barry Curtiss-Lusher

Yasmin Green

Yadin Kaufmann

Alan Lazowski

Glen S. Lewy

Daniel Lubetzky

Nicole Mutchnik

Elizabeth A. Price, Secretary

Ben Sax, Vice Chair

Milton S. (Tony) Schneider

Larry Scott, Vice Chair

Robert Stavis

Christopher Wolf

Global Advisory Council

Barbara Adelman, Co-Chair

Michael N. Sheetz, Co-Chair

National Commission

Faith Cookler, Co-Chair

Joseph A. Goldblum, Co-Chair

Deputy National Director

Kenneth Jacobson

Senior Vice Presidents

Growth

Frederic L. Bloch

Chief of Staff

Emily Bromberg

Policy

Eileen Hershenov

Finance and Administration

Anat Kendal

International Affairs

Sharon Nazarian

Technology

Rafail Portnoy

Talent & Knowledge

Tom Ruderman

Programs

George Selim

General Counsel, Privacy &

Security

Steven C. Sheinberg

Past National Chairs

Barbara B. Balsler

Howard P. Berkowitz

Kenneth J. Bialkin

Barry Curtiss-Lusher

Burton S. Levinson

Glen S. Lewy

Marvin D. Nathan

David H. Strassler

Robert G. Sugarman

Glen A. Tobias



October 10, 2019

Office of the General Counsel, Rules Docket Clerk
Department of Housing and Urban Development
451 Seventh Street, SW, Room 10276
Washington, D.C. 20410-0001

Re: RIN: 2529-AA98

To Whom It May Concern:

On behalf of ADL (Anti-Defamation League), we are writing to offer our comments on the proposed revisions to 24 CFR Part 100, “HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard.” Disparate impact liability is a crucial vehicle for protecting victims of discrimination, but the proposed revisions to 24 CFR Part 100, particularly § 100.500 (“Proposed Rule”), would make proving a disparate impact claim dramatically more difficult for members of all protected classes. We therefore urge you to recall and modify the Proposed Rule.

Founded in 1913 in response to an escalating climate of anti-Semitism and bigotry, ADL is a leading anti-hate organization with the mission to protect the Jewish people and to secure justice and fair treatment for all. Today, we continue to fight all forms of hate with vigor and passion. A global leader in exposing extremism, delivering anti-bias education, and fighting hate online, ADL ultimately works towards a world in which no group or individual suffers from bias, discrimination, or hate.

Discrimination against individuals is a corrosive element in society that Congress, as well as the states, has sought to combat through the passage of anti-discrimination laws such as the 1968 Fair Housing Act (“FHA”). Over a half century ago, ADL mobilized support for the FHA because housing discrimination – whether intentional or not – harms people and damages the fabric of society. The FHA is essential to eliminate discrimination and promote more inclusive neighborhoods.

The government’s compelling interest in eradicating discrimination cannot be overstated. Indeed, a government’s compelling interest is one of the “highest order,” *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985), where “Congress clearly targeted the elimination of all forms of discrimination as a ‘highest priority.’” *E.E.O.C. v. Pac. Press Publ’g Ass’n*, 676 F.2d 1272, 1280 (9th Cir. 1982). See also *E.E.O.C. v. Miss. Coll.*, 626 F.2d 477, 488 (5th Cir. 1980).

The U.S. Supreme Court's 2015 decision in *Tex. Dep't of Hous. and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507 (2015), recognized a disparate impact standard of liability under the FHA and thereby "endorsed forty years of practice under the FHA, during which the impact theory of liability had been adopted by all eleven federal appellate courts to consider the matter." Robert G. Schwemm, *Fair Housing Litigation After Inclusive Communities: What's New and What's Not*, 115 Colum. L. Rev. Sidebar 106, 106 (2015). *Inclusive Communities*, however, involved a "novel theory" of liability relating to statistical disparities, prompting the majority to articulate "some 'cautionary standards' concerning the theory it endorsed." *Id.* at 111. Given this novelty, the majority distinguished the case from "the heartland of disparate-impact suits targeting artificial barriers to housing" such as "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without sufficient justification." *Inclusive Communities*, 135 S.Ct. at 2521-22 (citing *Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15, 16-18 (1988)).

The *per curiam* decision in *Huntington* did not reach the question of whether disparate impact theory was applicable to FHA claims because the parties conceded its applicability to that case. *Id.* at 18. Nonetheless, in affirming a lower court's finding of a FHA violation, the Supreme Court was "satisfied" that disparate impact was shown based on the plaintiff's demonstrating a "discriminatory impact" and the defendant's failing "to put forth 'bona fide and legitimate' reasons for their action and [] to demonstrate that no 'less discriminatory alternative can serve those ends.'" *Id.* at 17-18 (internal citations omitted).

The current 24 CFR § 100.500 is modeled on this standard. It provides:

(c) *Burdens of proof in discriminatory effects cases.*

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

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

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

Misappropriating and distorting the cautionary standards of *Inclusive Communities*, the proposed revision to § 100.500 creates a much higher across-the-board burden on victims of discrimination to establish a disparate impact claim under the FHA. Specifically, the Proposed Rule sets forth a harsh, burden-shifting standard requiring a plaintiff's *prima facie* case to "state facts plausibly alleging" five elements, including "[t]hat the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of the law." If a plaintiff manages to establish a *prima facie* case, a defendant is provided with six defenses, including demonstrating the plaintiff's failure "to allege sufficient facts" indicating

that the policy or practice “is arbitrary, artificial, and unnecessary.” The Proposed Rule does not define the meaning of “a practical business, profit, [or] policy consideration.”

A plaintiff who survives the pleading stage of a claim is then required to prove by a preponderance of the evidence four of the *prima facie* case’s five elements. If a defendant “rebutts a plaintiff’s assertion that the policy or practice is arbitrary, artificial, and unnecessary [] by producing evidence showing that the challenged policy or practice advances a valid interest,” the plaintiff can prevail only by proving by a preponderance of the evidence that “a less discriminatory policy or practice exists that would serve the defendant’s identified interest in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant.” The Proposed Rule does not define the meaning of “equally effective manner,” “materially greater costs,” or “material burdens.”

This severe standard would be detrimental to victims of housing discrimination within all communities covered by the FHA, including the Jewish community. A case in point is neutral condo, co-op, or rental rules that prohibit an owner or resident from posting any object in an outer hallway – such as a mezuzah.

A mezuzah is a small, unobtrusive object, typically less than six inches long and an inch wide, which for millennia has been placed on the outer doorposts of Jewish homes in fulfillment of religious obligations. For many Jews, the mezuzah must be permanently affixed with glue, nails or screws. A mezuzah is not a decorative choice for Jews, nor a choice of any kind. Rather, an observant Jewish person cannot buy, rent, or reside in a residence where placement of a mezuzah on the outer doorpost is prohibited.

Tens of thousands of Jewish homes across America have mezuzahs. Many of these homes are in neighborhoods, developments, or buildings subject to homeowner or condominium association policies or rental rules. Some of these communities have neutral aesthetic or other restrictions that on their face prohibit the display of the mezuzah. In ADL’s day-to-day work, we regularly receive complaints about such rules being used to bar mezuzahs. Disparate impact liability is a critical tool to prevent or stop such policies from being used to discriminate against Jews, and this path for legal redress would be gravely undermined by the Proposed Rule.

We emphasize that a prohibition on mezuzah displays is just one among numerous examples of how the proposed § 100.500 would create new hurdles for individuals to prove a disparate impact housing discrimination claim. Under the current rule, a building’s neutral aesthetics or decorum policy prohibiting any outer hallway display would clearly have a disparate impact on a Jewish person seeking to fasten a mezuzah on an outer doorpost, because such a policy would serve as a determinative barrier to that person’s living in the building. Furthermore, given the small size of a typical mezuzah, it is unlikely that a defendant could demonstrate that fastening one to a doorpost would cause a substantial disruption of decorum.

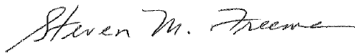
Yet under the Proposed Rule, the opposite outcome would be far more likely. Generally speaking, a housing association’s or landlord’s interest in maintaining aesthetics or decorum in communal areas is not arbitrary, artificial, or unnecessary. Thus, in the case of a mezuzah, a plaintiff would have difficulty even asserting a *prima facie* case. Should a

plaintiff survive the pleading stage, he or she ultimately would have to show that any alternative policy is both “equally effective” and not more materially costly or burdensome to the defendant. While a mezuzah is typically small, a defendant could successfully argue that exempting small religious objects from an aesthetics policy is not equally or identically effective to an across-the-board prohibition.

The Proposed Rule is thus contrary to the government’s compelling interest in eradicating discrimination. The new extensive burden placed on a plaintiff in this example could very well make a homeowner’s association more inclined to enforce such a rule as opposed to simply providing a religious accommodation. Furthermore, the proposed standard would make HUD or another fair housing agency less likely to pursue a charge of discrimination, which would result in the resident being forced to choose between moving homes or engaging in a costly and lengthy lawsuit.

We therefore urge you to recall the proposed revisions to 24 CFR Part 100 for modifications in light of these serious policy and legal arguments.

Sincerely,



Steven M. Freeman
Vice President
Civil Rights



David L. Barkey
Senior & Southeastern
Area Counsel
National Religious Freedom
Counsel

Michael Lieberman
Washington Counsel