

October 18, 2019

**Via Regulations.Gov**

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

**Re: FR-6111-P-02, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard**

To Whom It May Concern:

Thank you for the opportunity for the undersigned individuals and organizations to submit these comments<sup>1</sup> on the Department of Housing and Urban Development's ("HUD") Disparate Impact Standard ("Proposed Rule").<sup>2</sup> Many of these individuals and groups have directly experienced the harms associated with housing and/or environmental discrimination and have faced great obstacles in securing civil rights for their families and communities. Their experiences reinforce what studies have consistently shown: where people live determines their educational, environmental, health, and employment opportunities.<sup>3</sup>

The Fair Housing Act, passed in 1968,<sup>4</sup> was designed to prohibit and eradicate housing discrimination. More than fifty years after its passage, however, many communities remain largely segregated,<sup>5</sup> and residents of color continue to experience the economic, environmental, and health harms associated with this segregation. These comments are submitted on behalf of many groups and individuals, including some in Tallassee and Uniontown, Alabama, who suffer disparate health impacts due to pests and pollution from massive landfills; residents of Flint, Michigan who have been unfairly excluded from public participation in permitting actions and whose children have elevated blood lead levels from local toxic sources; and residents of East

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<sup>1</sup> In addition to submitting these comments, we also support generally the comments of our civil rights and housing allies, including the Poverty & Race Research Action Council, the Shriver Center on Poverty Law, and the Metropolitan St. Louis Equal Housing & Opportunity Council.

<sup>2</sup> HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854 (proposed Aug. 19, 2019) (to be codified at 24 C.F.R. pt. 100).

<sup>3</sup> See Brief for The Lawyers' Committee for Civil Rights Under Law et al. as Amici Curiae Supporting Respondent ("*Inclusive Communities* Amicus Brief") at 20, n. 31, *Tex. Dep't of Hous. & Cmty. Affairs v. The Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).

<sup>4</sup> Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 ("Fair Housing Act").

<sup>5</sup> See John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census*, 3 US2010 Project (2011), <https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf>; see also Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America*, (2017); see also Rachel D. Godsil, *Environmental Justice and the Integration Deal*, 49 N.Y. L. Sch. L. Rev. 1109, 1113, n. 13 (citing Edward L. Glaeser & Jacob L. Vigdor, *Racial Segregation in the 2000 Census: Promising News*, Brookings Inst., 3 (2001); Dorceta E. Taylor, *Toxic Communities: Environmental Racism, Industrial Pollution, and Residential Mobility* (2014).

Chicago, Indiana, who have suffered an array of life-altering health effects from exposure to extremely high levels of lead and arsenic soil contamination.

When Congress passed the Fair Housing Act in 1968, it prohibited both intentional discrimination and acts with unjustified disparate impacts that created “separate and unequal conditions,”<sup>6</sup> and it required HUD “affirmatively to further” the goals of the statute.<sup>7</sup> Disparate impact claims remain necessary to address the effects of discrimination. In fact, the United States Supreme Court’s decision in *Texas Dept. of Housing and Community Development v. Inclusive Communities Project* confirmed that the Fair Housing Act includes disparate impact liability.<sup>8</sup> Yet HUD’s Proposed Rule runs counter to the *Inclusive Communities* decision by nearly eliminating the ability of victims of housing discrimination to use a disparate impact claim to prove discrimination. Accordingly, we strongly oppose the Proposed Rule and urge HUD to withdraw it.

These comments demonstrate the compelling need for the civil rights protections provided by the Fair Housing Act and explain the threat the Proposed Rule poses to those protections. The comments first explain how the nation’s history of segregation created inequities that continue today, including disproportionate environmental harmful exposures for low-income communities of color; the comments describe the stories of a handful of communities. The comments then explain that, despite the need for stronger civil rights protections, HUD’s Proposed Rule moves in the opposite direction by making it more difficult for victims of discrimination to bring a case under the disparate impact rule. A look at EPA’s implementation of similar barriers to disparate impact claims, brought by communities discussed herein, reveals the danger of HUD’s approach.

## **I. The Legacy of Segregation Includes Environmental Injustices and Poor Public Health.**

### *A. Segregation Created Inequity*

Segregation was the product of governmental policies and private practices that discriminated against people of color. For example, federal, state, and local agencies expressly discriminated against people of color by denying them loans, designating residential areas with a large percentage of people of color as less desirable for investment purposes (“redlining”),<sup>9</sup> encouraging racially restrictive covenants,<sup>10</sup> and segregating public housing by race.<sup>11</sup> The effects of those policies remain today. As Richard Rothstein describes in *Color of Law*,

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<sup>6</sup> Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81; *see also Inclusive Communities*, 135 S. Ct. at 2516 (citation omitted).

<sup>7</sup> 42 U.S.C. § 3608(e)(5).

<sup>8</sup> *See* 135 S.Ct. at 2518.

<sup>9</sup> *See* Rothstein, *supra* note 5, at 36, 76.

<sup>10</sup> Dorceta E. Taylor, *Toxic Communities: Environmental Racism, Industrial Pollution, and Residential Mobility*, 243 (2014) (noting that the Federal Housing Administration’s 1939 Underwriting Manual stated, “If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes” and the Manual encouraged “suitable restrictive covenants”).

<sup>11</sup> *See* Rothstein, *supra* note 5, at 36, 76.

Today's residential segregation in the North, South, Midwest, and West is not the unintended consequence of individual choices and of otherwise well-meaning law or regulation but of unhidden public policy that explicitly segregated every metropolitan area in the United States. The policy was so systematic and forceful that its effects endure to the present time.<sup>12</sup>

The legacy of segregation is ongoing.<sup>13</sup> Many people of color in the United States still live in communities that have high representation of people of color and relatively few white neighbors.<sup>14</sup> Further, census tracts with the highest poverty rates primarily include single minority racial or ethnic groups.<sup>15</sup> Additionally, economic mobility for people of color is impaired by ongoing disparities in investments in transportation, schools, and industrial zoning.<sup>16</sup>

The negative impacts of past and ongoing housing discrimination include the disproportionate exposure of communities of color to environmental harms, and the resultant adverse health impacts.<sup>17</sup> In 1987, the United Church of Christ's Commission for Racial Justice issued a report called *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites*. The

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<sup>12</sup>*Id.* at 8.

<sup>13</sup> While these comments are focused largely on communities highlighting impacts on African Americans and Latinx communities, other communities of color, including Native Americans and communities of Asian descent, for example, have also been disproportionately affected in various regions of the country by segregation and environmental discrimination.

<sup>14</sup> See Logan & Stults, *supra* note 5; see also Rothstein, *supra* note 5; Godsil, *supra* note 5; Florence Wagman Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 *How. L. J.* 913, n.18 (2005); John R. Logan, Lewis Mumford Ctr., *Separate and Unequal: The Neighborhood Gap for Blacks and Hispanics in Metropolitan America* (2002), <https://files.eric.ed.gov/fulltext/ED471515.pdf>; John R. Logan et al., Lewis Mumford Ctr., *Separating the Children* (2001), <http://mumford.albany.edu/census/Under18Pop/U18Preport/page1.html> (discussing segregation of Black and white children). See generally James W. Loewen, *Sundown Towns: A Hidden Dimension of American Racism* (2005) (documenting the history of intentional residential segregation in United States); Douglas Massey & Nancy Denton, *American Apartheid: Segregation and the Making of the Underclass* (1993) (discussing the concept of urban residential "hypersegregation" in the United States); Paul Mohai & Robin K. Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, 10 *Env'tl. Res. Letters*, (Nov. 2015); Luke W. Cole, "Wrong on the Facts, Wrong on the Law": *Civil Rights Advocates Excoriate EPA's Most Recent Title VI Misstep*, 29 *Env'tl. L. Rep.* 10775.

<sup>15</sup> See *Inclusive Communities* Amicus Brief, *supra* note 3, at 9 n. 12.

<sup>16</sup> Rothstein, *supra* note 5, at 201 (discussing the impact on communities of color when transportation investments favored highways over investments in subways and other urban public transportation; the highways allowed suburban white residents to travel downtown for jobs); See Robert D. Bullard, *Addressing Urban Equity in the United States*, 31 *Fordham Urban L. J.* 1183 (2004).

<sup>17</sup> The heroic work of activists like Hazel Johnson in the Chicago, Illinois public housing project Altgeld Gardens and residents of a predominantly African American community in Warren County, North Carolina caught the attention of the civil rights movement and ultimately led to the United Church of Christ's seminal report. Indeed, many veteran civil rights leaders from the 1950's and 1960's supported the Warren County protesters in their fight against a toxic waste facility in their community, and classified the protest as a new fight in the civil rights movement—the fight against "environmental racism." See U.S. Comm'n on Civil Rights, *Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898*, at 7 (2016), [https://www.usccr.gov/pubs/2016/Statutory\\_Enforcement\\_Report2016.pdf](https://www.usccr.gov/pubs/2016/Statutory_Enforcement_Report2016.pdf) ("U.S. Comm'n on Civil Rights Environmental Justice Report").

report concluded that a community's racial composition was the strongest predictor of a hazardous waste facility's location.<sup>18</sup> Subsequent researchers have clarified this causal relationship: Sources of pollution tend to come to communities of color, rather than the other way around.<sup>19</sup> The 1987 report, combined with other advocacy, led President Clinton to issue Executive Order 12,898 in 1994, which ordered each federal agency, including HUD and EPA, "[to] make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."<sup>20</sup>

Nonetheless, more than two decades later in 2016, the United States Commission on Civil Rights determined that

Both historical and current housing segregation amplifies the burden of toxic industrial waste on communities of color. Insufficient public education often leaves residents unaware of the presence of dangerous toxins that are not immediately observable, while cultural, familial, and economic ties keep residents in the community despite these hazards.<sup>21</sup>

The legacy of government-sanctioned discriminatory housing practices is devastating to generations of low-income communities of color, whose injuries include disproportionate levels of lead poisoning, asthma, diabetes, heart disease, and other environmental health impacts.<sup>22</sup>

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<sup>18</sup> See Commission for Racial Justice, United Church of Christ, *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites* xiii (1987); see also U.S. Comm'n on Civil Rights Environmental Justice Report, *supra* note 17, at 7–8 (2016).

<sup>19</sup> See Paul Mohai & Robin K. Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, 10 *Envtl. Res. Letters* 15–16 (Nov. 2015).

<sup>20</sup> Exec. Order No. 12,898, 59 *Fed. Reg.* 7629 (Feb. 11, 1994). See Paul Mohai & Robin K. Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, 10 *Envtl. Res. Letters* (Nov. 2015).

<sup>21</sup> U.S. Comm'n on Civil Rights Environmental Justice Report, *supra* note 17, at 89.

<sup>22</sup> See, e.g., Jyotsna S. Jagai et al., *The Association Between Environmental Quality and Diabetes in the U.S.*, *Journal of Diabetes Investigation* (Oct. 2019), [https://www.researchgate.net/publication/336234609\\_The\\_association\\_between\\_environmental\\_quality\\_and\\_diabetes\\_in\\_the\\_US](https://www.researchgate.net/publication/336234609_The_association_between_environmental_quality_and_diabetes_in_the_US); Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 *Am. J. of Pub. Health* 480 (Apr. 2018) (concluding that disparities in the burden from particulate matter-emitting facilities exist and are more pronounced based on race), <https://www.ncbi.nlm.nih.gov/pubmed/29470121>; Vann R. Newkirk II, *Trump's EPA Concludes Environmental Racism is Real*, *The Atlantic* (Feb. 28, 2018) (describing new report released by EPA National Center on Environmental Assessment), <https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/>; Office of Disease Prevention and Health Promotion, *Healthy People 2010: Leading Health Indicators* [https://www.healthypeople.gov/2010/Document/HTML/uih/uih\\_bw/uih\\_4.htm#environqual](https://www.healthypeople.gov/2010/Document/HTML/uih/uih_bw/uih_4.htm#environqual) (providing statistics on links between poor air quality and health outcomes).

## *B. Environmental Injustice: The Stories of Impacted Communities*

### *East Chicago, Indiana*

The low-income community of color<sup>23</sup> living in public and private housing on the USS Lead Superfund Site in East Chicago, Indiana knows well the environmental and health harms associated with systemic racism. The concentration of African American and Latinx community members on this contaminated land is not accidental but rather the result of federal guidelines that encouraged the construction of public housing in areas with large minority populations.<sup>24</sup> Lead smelters and a lead-arsenate pesticide facility surrounded their homes and left a legacy of severely contaminated soil. Residents continued to move into this community for decades without knowing that their children were being exposed to lead and arsenic at dangerous levels. After decades of inaction at all levels of government, the Mayor of East Chicago announced that public housing residents would be relocated due to extreme contamination. The public housing residents filed a civil rights administrative complaint before HUD based on concerns about the problematic relocation efforts; the administrative complaint led to a settlement that afforded them additional time for relocation, provided rent abatement while they remained on the toxic land, and guaranteed risk assessments of new housing for families with children with elevated blood lead levels.<sup>25</sup> Residents living in private homes were not relocated and remain at the Superfund Site. They continue to fight for a stronger cleanup effort and health protections.

### *Flint, Michigan*

As the recent lead-in-water crisis has brought into stark relief, the community of Flint, Michigan has long suffered from environmental and civil rights injustices. Flint is a majority African American community with a poverty rate nearly three times the national average, ranking near last in various public health metrics compared to other areas of Michigan.<sup>26</sup> Decades of redlining, racially restrictive covenants, and harassment have led to the racially segregated Flint of today—the city has been labeled the most segregated non-Southern city in the country.<sup>27</sup>

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<sup>23</sup> The demographics for the community qualify it as an environmental justice community: 92% of the community is considered minority and 77% are deemed low-income. EPA, Region 5, USS Lead Superfund Site Action Memorandum—Fifth Amendment, Attachment 1 (Mar. 6, 2017), <https://semspub.epa.gov/work/05/933033.pdf>

<sup>24</sup> Housing Discrimination Complaint at 6 (Aug. 29, 2016) (filed on behalf of Calumet Lives Matters and individuals under Title VI, Title VIII, and Section 504 of the Rehabilitation Act of 1973), <http://povertylaw.org/files/advocacy/housing/oberry-complaint.pdf>.

<sup>25</sup> Dep't of Housing & Urban Development, Preliminary Voluntary Compliance Agreement and Title VIII Conciliation Agreement Between HUD, Calumet Lives Matter et al., and East Chicago Housing Authority at 8–12 (Nov. 3, 2016), [https://www.hud.gov/sites/documents/ECHA\\_11032016.PDF](https://www.hud.gov/sites/documents/ECHA_11032016.PDF).

<sup>26</sup> Flint Water Advisory Task Force, Final Report at 15 (Mar. 2016), [https://www.michigan.gov/documents/snyder/FWATF\\_FINAL\\_REPORT\\_21March2016\\_517805\\_7.pdf](https://www.michigan.gov/documents/snyder/FWATF_FINAL_REPORT_21March2016_517805_7.pdf) (“Flint Water Advisory Task Force Final Report”).

<sup>27</sup> Peter J. Hammer, The Flint Water Crisis: History, Housing and Spatial-Structural Racism, Testimony Before Michigan Civil Rights Commission Hearing on Flint Water Crisis (July 14, 2016), [https://www.michigan.gov/documents/mdcr/Hammer\\_PPt\\_for\\_MCRC\\_Flint\\_07-14-16\\_552224\\_7.pdf](https://www.michigan.gov/documents/mdcr/Hammer_PPt_for_MCRC_Flint_07-14-16_552224_7.pdf).

For decades, community activists have fought back against the disproportionate burdens that state permitting agencies have placed on the people of Flint.<sup>28</sup> In 1992, the St. Francis Prayer Center submitted a complaint to EPA, alleging that the Michigan Department of Environmental Quality (“MDEQ”) violated the civil rights of the people of Flint in the permitting of a wood-burning incinerator in their community.<sup>29</sup> Just four years later, when MDEQ permitted another polluting facility in Flint—the *Select Steel* steel mill—the Prayer Center submitted another civil rights complaint to EPA contesting the disproportionate burdens faced by Flint residents.<sup>30</sup> While it took EPA just a few months to issue the findings of its investigation into the Select Steel complaint, EPA did not issue findings on the 1992 complaint until 2017—a quarter-century later. In both cases, EPA discounted allegations of disparate impacts under arbitrary standards similar to those that HUD proposes to adopt here, as discussed further below.<sup>31</sup> EPA did find that MDEQ had engaged in intentional discrimination in its handling of the 1992 permit hearings. But by the time EPA made this finding in 2017, it was too little too late, and EPA had long lost the opportunity to address the policies and practices of MDEQ that would eventually help cause the disastrous Flint water crisis.<sup>32</sup>

### Tallassee, Alabama

Located just north of the civil rights landmarks of Tuskegee University, the majority African-American community members of Ashurst Bar/Smith outside of Tallassee, Alabama have lived off their land for generations, some owning property in the area since the end of the Civil War. This unbroken lineage of Black land ownership makes Ashurst Bar/Smith unusual in the State, since many Black communities could not own land in Alabama until the passage of the Civil Rights Act of 1964.<sup>33</sup> But the ever-expanding Stone’s Throw Landfill immediately next to the community continues to displace community members and threatens to turn this historical community into yet another unfortunate example of black land loss.<sup>34</sup> The Ashurst Bar/Smith Community Organization (“ABSCO”) has fought against the expansion and negative impacts from the landfill at the local, county, and federal level. They submitted a civil rights complaint

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<sup>28</sup> See Emily L. Dawson, *Lessons Learned from Flint, Michigan: Managing Multiple Source Pollution in Urban Communities*, 26 Wm. & Mary Env’tl. L. & Pol’y Rev. 367, 367 (2001).

<sup>29</sup> Letter from Father Phil Schmitter and Sister Joanne Chiaverini, St. Francis Prayer Center, to Mr. Valdas Adamkus, Regional Administrator, Region 5, U.S. EPA (Dec. 15, 1992) enclosing letters dated Dec. 15, 1992, to Mr. Herb Tate, Environmental Equity, US EPA and Mr. William Rosenberg, U.S. EPA (attached to this letter as Attachment 1).

<sup>30</sup> Letter from Father Phil Schmitter and Sister Joanne Chiaverini, St. Francis Prayer Center, to Ms. Diane E. Goode, Director, Office of Civil Rights, U.S. EPA (June 9, 1998).

<sup>31</sup> Letter from Lilian S. Dorka, Dir., External Civil Rights Compliance Office, U.S. EPA, to Heidi Grether, Dir., Michigan Department of Environmental Quality (Jan. 19, 2017), <https://www.epa.gov/sites/production/files/2017-01/documents/final-genesee-complaint-letter-to-director-grether-1-19-2017.pdf>; EPA, Office of Civil Rights, Investigative Report for Title VI Administrative Complaint File No. 5R-98-R5 (1998) (“Select Steel Investigative Report”) (attached to this letter as Attachment 2).

<sup>32</sup> See Marianne Engelman Lado, *No More Excuses: Building A New Vision of Civil Rights Enforcement in the Context of Environmental Justice*, 22 U. Pa. J.L. & Soc. Change 281, 292 (2019).

<sup>33</sup> See, e.g., Roy W. Copeland, *In the Beginning: Origins of African American Real Property Ownership in the United States*, 44 J. Black Studies, 646, 646–47 (Oct. 2013).

<sup>34</sup> See Ctr. for Social Inclusion, *Regaining Ground: Cultivating Community Assets & Preserving Black Land* at 6 (2011), <http://www.centerforsocialinclusion.org/wp-content/uploads/2014/07/Regaining-Ground-Cultivating-Community-Assets-and-Preserving-Black-Land.pdf>.

to EPA in 2003 concerning a permit modification that allowed further expansion of the landfill, but when EPA finally issued findings on its investigation in 2017, it disregarded the community's disparate impact allegations on faulty reasoning described further below.<sup>35</sup>

### Uniontown, Alabama

Uniontown, Alabama, is a city of fewer than 3,000, where 88% of its residents are African American, and residents have a median household income of \$13,800.<sup>36</sup> Once thriving with local businesses, it is now known for its environmental contamination. A cheese plant, a catfish mill, and a sewage lagoon are all located nearby, but those sites are dwarfed by Arrowhead Landfill, a municipal solid waste landfill. Arrowhead, which sits on what was once a plantation, is authorized to receive up to 15,000 tons of commercial and industrial waste per day from 33 states. After the largest coal ash spill to date occurred in majority white Roane County, Tennessee in 2008, the coal ash was dredged up and shipped more than 300 miles and dumped at the Arrowhead Landfill. As a result, today the landfill site holds 4 million tons of this coal ash, whose contents contain toxins such as mercury and arsenic that are known to cause cancer, neurological damage, and other detrimental health effects.<sup>37</sup>

In 2013, dozens of residents filed a complaint with EPA, alleging that the renewal and modification of Arrowhead's permit—increasing its size by 66 percent—adversely and disparately impacted the surrounding, primarily African American, community. The Complaint alleged various impacts, including odor, increased pollution, increased population of flies and birds, degradation of quality of life, increased noise from heavy machinery, increased emission of fugitive dust, illnesses, contaminated water, believed degradation of a community cemetery, and decline of property values. Community residents had previously filed complaints about the impacts of the landfill on their health and well-being with the state permitting agency. In 2018, on questionable reasoning described further below, EPA closed the complaint, finding that there was “insufficient” evidence the renewal and modification of Arrowhead's permit reflected any discrimination against African Americans.<sup>38</sup>

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<sup>35</sup> Letter, Tallassee Waste Disposal Center Expansion/Impact on the Ashurst Bar/Smith Community (Sept. 3, 2003) (sender and recipient redacted) (“Tallassee Complaint”) (attached to this letter as Attachment 3); Letter to Karen D. Higginbotham, Dir., U.S. EPA Office of Civil Rights (Dec. 8, 2003) (sender redacted); Letter from Lilian S. Dorka, Dir., External Civil Rights Compliance Office, U.S. EPA Office of Gen. Counsel, to Marianne Engelman Lado et al., Visiting Clinical Professor of Law, Yale Law Sch. at 2–3 (Apr. 28, 2017), [https://www.epa.gov/sites/production/files/2017-05/documents/06r-03-r4\\_closure\\_recipient\\_redacted.pdf](https://www.epa.gov/sites/production/files/2017-05/documents/06r-03-r4_closure_recipient_redacted.pdf) (“2017 Tallassee Closure Letter”).

<sup>36</sup> American Community Survey 5-year estimates from Census Reporter Profile Page for Uniontown, AL, U.S. Census Bureau (2017), <https://censusreporter.org/profiles/16000US0177904-uniontown-al/>.

<sup>37</sup> See, e.g., Environmental Integrity Project, *Coal's Poisonous Legacy: Groundwater Contaminated by Coal Ash Across the U.S.*, 9–11, (Mar. 4, 2019), <https://earthjustice.org/sites/default/files/files/National%20Coal%20Ash%20Report%203.4.19.pdf>; Kristen Lombardi, *Thirty Miles from Selma, a Different Kind of Civil Rights Struggle*, Ctr. for Public Integrity (Aug. 5, 2015), <https://publicintegrity.org/environment/thirty-miles-from-selma-a-different-kind-of-civil-rights-struggle/>.

<sup>38</sup> Title VI Civil Rights Complaint and Petition for Relief or Sanction – Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama (EPA OCR File No. 01R-12-R4), (May 30, 2013) (“Uniontown Complaint”) (attached to this letter as Attachment 4); Closure of Administrative Complaint, EPA File No. 12R-13-R4, (Mar. 1, 2018) (“Uniontown Closure Letter”); Lombardi, *supra* note 37.

## II. The Fair Housing Act Provides a Critical Mechanism for Addressing Civil Rights Violations.

Enacted in the wake of Martin Luther King’s assassination, the Fair Housing Act of 1968 aimed to end entrenched racial segregation and exclusion in housing that characterized the nation for decades. It prohibited discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin.<sup>39</sup> The statute provides that it shall be unlawful

To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable* or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.<sup>40</sup>

In its 2013 final rule (“2013 Rule”), HUD interpreted the Fair Housing Act to prohibit practices that give rise to unjustified disparate effects regardless of whether they were motivated by discriminatory intent.<sup>41</sup> The Supreme Court in *Inclusive Communities* endorsed HUD’s interpretation of the Act in the 2013 Rule, construing the phrase “otherwise make unavailable” in the statute to “refer[] to the consequences of an action rather than the actor’s intent.”<sup>42</sup> The Court based its analysis on the text of the statute, overwhelming appellate court precedent affirming that interpretation, and the 1988 statutory amendments retaining the key language.<sup>43</sup>

The 2013 Rule reflects the realities of housing discrimination in the United States: it can take myriad forms, embedded in patterns of behavior or singular events, in the hands of individual or multiple actors. For these reasons, the 2013 Rule is appropriately flexible and anticipates evaluation of the merits of a plaintiff’s claim on a case-by-case basis.

## III. EPA’s Roundly Criticized Civil Rights Program Serves as a Warning of the Dire Consequences of Weakening the Disparate Impact Standard, as HUD Proposes.

### A. HUD’s Proposal to Weaken the Disparate Impact Standard

HUD now wishes to graft onto the broad remedial language of the Fair Housing Act an arbitrarily stringent standard to prove housing discrimination. HUD proposes to require plaintiffs to prove the following five elements to make out a prima facie case for a disparate-impact claim under Title VIII:

- 1) the challenged policy or practice is “arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective”;
- 2) there exists a “robust causal link between the challenged policy or practice and a disparate impact on members of a protected class”;

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<sup>39</sup> 42 U.S.C. § 3604.

<sup>40</sup> *Id.* § 3604(a) (emphasis added).

<sup>41</sup> 24 C.F.R. § 100.5(b) (“The illustrations of unlawful housing discrimination in this part may be established by a practice’s discriminatory effect, even if not motivated by discriminatory intent . . .”).

<sup>42</sup> 135 S. Ct. at 2518.

<sup>43</sup> *Id.*

- 3) the policy or practice identified has an “adverse effect on members of a protected class”;
- 4) the disparity caused by the policy or practice is “significant”; and,
- 5) the alleged injury is “directly caused” by the challenged policy or practice.<sup>44</sup>

HUD has solicited comment on the “likelihood of success of disparate impact claims” if this framework were to be adopted.<sup>45</sup> EPA has informally and arbitrarily applied standards in the Title VI context analogous to some of those in the Proposed Rule. The undersigned thus have insight into how unworkable and inequitable the proposed standards are, and how many legitimate disparate impact claims may not succeed under these onerous standards, if adopted.

### *B. EPA’s Abysmal Record of Civil Rights Enforcement*

As with housing discrimination, the U.S. government and experts have recognized that environmental discrimination is a significant problem in this country and has been for decades.<sup>46</sup> In recognition of that problem, EPA enacted regulations in 1973 codifying that discrimination can be proven through a disparate impact analysis. Those regulations provide that a recipient of federal funds may not directly or indirectly use criteria or methods of administering its program, or choose a site or location of a facility, that has “the effect” of excluding individuals, denying them benefits, or otherwise subjecting them to discrimination because of race, color, national origin, or sex.<sup>47</sup>

Yet, EPA has woefully failed to hold recipients of federal funds accountable for discriminatory acts and policies, which has subjected the agency to repeated criticism from multiple sources.<sup>48</sup> For example, EPA’s Office of Civil Rights, now called the External Civil Rights Compliance Office, has rejected or dismissed a majority of the hundreds of Title VI

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<sup>44</sup> Proposed Rule, *supra* note 2, at 42,858–59 (emphases omitted).

<sup>45</sup> *Id.* at 42,860.

<sup>46</sup> See generally Commission for Racial Justice, United Church of Christ, *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites* (1987); U.S. Gov’t Accounting Office, *Siting of Hazardous Waste Landfills and Their Correlation with Race and Economic Status of Surrounding Communities* (GAO/RCED-83-168), 3–4 (1983), <http://archive.gao.gov/d48t13/121648.pdf>; Mikati et al., *supra* note 22, at 480–85 (concluding that at local, state and national level, non-whites are burdened by environmental harms disproportionately to Whites). For an annotated bibliography of articles documenting environmental discrimination, see Luke W. Cole & Sheila R. Foster, *From The Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement*, 167–83 (2001).

<sup>47</sup> See 40 C.F.R. § 7.35(b), (c).

<sup>48</sup> See, e.g., Deloitte Consulting LLP, Final Report: Evaluation of the EPA Office of Civil Rights (Order # EP10H002058) 1–2 (noting EPA’s failure to “adequately adjudicate[] Title VI complaints . . . has exposed EPA’s Civil Rights programs to significant consequences which have damaged its reputation internally and externally.”); Kristen Lombardi et al., *Environmental Justice Denied: Environmental Racism Persists, and the EPA is One Reason Why*, Ctr. for Pub. Integrity, (2015) (noting EPA “the civil-rights office rarely closes investigations with formal sanctions or remedies,” so EPA’s Office of Civil Rights “appeared more ceremonial than meaningful, with communities left in the lurch.”); U.S. Comm’n on Civil Rights Environmental Justice Report, *supra* note 17, at 22, 25–33 (“The [United States Commission on Civil Rights], academics, environmental justice organizations, and news outlets have extensively criticized EPA’s management and handling of its Title VI external compliance program.”); see also Marianne Engelman Lado, *No More Excuses: Building A New Vision of Civil Rights Enforcement in the Context of Environmental Justice*, 22 U. Pa. J.L. & Soc. Change 281, 295–300.

complaints it has received.<sup>49</sup> A 2015 Center for Public Integrity investigative study showed that even where there was a reason to believe a recipient of federal funding had a discriminatory policy, the Office of Civil Rights failed to conduct an investigation.<sup>50</sup>

And most pertinent here, over time, EPA has informally applied needlessly heightened standards analogous to the ones set forth in the HUD Proposed Rule when conducting a disparate impact analysis. As a result, and as discussed further below, EPA has repeatedly concluded that no discrimination—or “insufficient evidence of discrimination”—exists under a disparate impact analysis in situations where a sensible and unencumbered application of the disparate impact standard would have led to the opposite conclusion. Indeed, in the 46 years since EPA’s Title VI anti-discrimination regulations became effective, EPA has only once concluded that a prima facie case of alleged discrimination under the disparate impact framework was established.<sup>51</sup>

### *C. EPA Case Studies Against Arbitrarily Onerous Disparate Impact Pleading Standards*

EPA’s informal application of a subjective “significant” degree of harm standard and overly stringent (and often nonsensical) causality requirements help to explain the agency’s lack of meaningful response to decades’ worth of discrimination claims.

#### *Case study against arbitrary “significance” requirements: Flint, Michigan*

One of the new elements for demonstrating disparate impact that the Proposed Rule would require is for plaintiffs to show that a policy or practice causes a *significant* disparity.<sup>52</sup> EPA has in practice repeatedly injected an undefined “significance” qualifier into its disparate impact assessments, ensuring that disparate impact discrimination complaints could not, and would not, succeed.

For example, the St. Francis Prayer Center filed a civil rights complaint against the Michigan Department of Environmental Quality (“MDEQ”) concerning the *Select Steel* steel mill proposed for construction near the low-income and majority African-American city of Flint, Michigan. EPA recognized that the facility would emit pollutants such as lead and volatile organic compounds into the air, but nevertheless closed the complaint on the basis that the alleged harms were not sufficiently “adverse” because modeling showed that the airshed would remain in attainment with National Ambient Air Quality Standards.<sup>53</sup> Thus, EPA concluded, it

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<sup>49</sup> See U.S. Comm’n on Civil Rights Environmental Justice Report, *supra* note 17, at 40; see also Yue Qiu & Talia Buford, *Decades of Inaction*, Ctr. for Pub. Integrity (Aug. 3, 2015), <https://publicintegrity.org/environment/decades-of-inaction/>.

<sup>50</sup> U.S. Comm’n on Civil Rights Environmental Justice Report, *supra* note 17, at 40 (citing Kristen Lombardi et al., *Environmental Justice Denied: Environmental Racism Persists, and the EPA is One Reason Why*, Ctr for Pub. Integrity (2015), <http://www.publicintegrity.org/2015/08/03/17668/environmental-racism-persists-and-epa-one-reason-why>).

<sup>51</sup> See Marianne Engelman Lado, *supra* note 48, at 303–05; Agreement between the California Department of Pesticide and Regulation & the U.S. EPA, Aug. 24, 2011, <https://www.epa.gov/sites/production/files/2016-04/documents/title6-settlement-agreement-signed.pdf>.

<sup>52</sup> See Proposed Rule, *supra* note 2, at 42,858.

<sup>53</sup> See *Select Steel Investigative Report*, Attachment 2, at 16.

need not review whether the effect of the siting was disparate because, in EPA’s eyes, the effect was insignificant—even though there is no safe level of lead exposure, and volatile organic compounds are also harmful. In essence, EPA determined that harm from pollution that was deemed “acceptable” under environmental laws categorically could not result in a violation of civil rights law.<sup>54</sup>

In the decades after *Select Steel*, EPA has continued to apply the faulty reasoning from that decision. Indeed, EPA similarly applied this reasoning to a separate Title VI complaint filed by the St. Francis Prayer Center in 1992 concerning the granting of a permit to construct a power plant in Flint, Michigan that burns wood waste, natural gas, animal bedding, and tire-derived fuel.<sup>55</sup> The Prayer Center’s complaint included allegations that the facility would release lead, mercury, arsenic, and other pollutants and would have health and quality of life effects, which would in turn disparately affect the predominantly African-American population residing in Flint.<sup>56</sup> But in 2017, EPA closed its investigation into this complaint by once again determining there had been no discrimination because it did not find a “sufficiently adverse” impact.<sup>57</sup> And like it had done in *Select Steel*, EPA determined that the “adversity benchmarks” consisted of the level of pollution at which remedial action would have been required under environmental laws, explaining that certain levels of pollution may constitute “acceptable levels of cancer risk,” and that increases in children’s blood levels from the power plant’s activity would not be “significant.”<sup>58</sup>

EPA’s arbitrary injection of a “significance” standard into disparate impact evaluations defies reality: increased pollution and exposure to lead is harmful, regardless of whether the polluter emits lead at levels that subject it to a fine or legal action. The very notion of “acceptable” levels of pollution makes no sense for toxics such as lead for which the CDC has determined that there is no safe level<sup>59</sup>—nor does it make sense for other, threshold pollutants given that scientific advances continuously lower our understanding of what a safe level of exposure would be.<sup>60</sup> Even if society must accept *some* level of pollution, as EPA rationalizes,<sup>61</sup> civil rights law does not allow that this pollution be disproportionately borne by protected groups. And even in instances where no “acceptable” level of pollution has been set, EPA assumes that any such pollution is acceptable, rather than harmful.<sup>62</sup> EPA’s “significant harm”

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<sup>54</sup> *Id.* at 27.

<sup>55</sup> Letter from Lilian S. Dorka, Dir., External Civil Rights and Finance, U.S. EPA Office of Gen. Counsel, to Father Phil Schmitter, at 4, <https://assets.documentcloud.org/documents/4432195/FINAL-Letter-to-Genesee-Case-Complainant-Father.pdf> (“2017 Genesee Closure Letter”).

<sup>56</sup> *See supra* note 29.

<sup>57</sup> 2017 Genesee Closure Letter, *supra* note 55, at 18, 23.

<sup>58</sup> *Id.* at 20 n.126, 21.

<sup>59</sup> EPA, Integrated Science Assessment for Lead lxxxviii (2013), [http://ofmpub.epa.gov/eims/eimscomm.getfile?p\\_download\\_id=518908](http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=518908).

<sup>60</sup> Cole, *supra* note 14, at 7.

<sup>61</sup> *See Select Steel Investigative Report*, Attachment 2, at 27.

<sup>62</sup> *See, e.g.*, Preliminary Findings Letter, EPA Administrative Complaint No. 16R-17-R4 at 13 (Dec. 10, 2018), <https://www.epa.gov/sites/production/files/2018-12/documents/preliminary-findings-letter-administrative-complaint-no-16r-17-r4.pdf> (“2018 Tallassee Closure Letter”) (discounting evidence of volatile organic compound concentrations in ambient air near community because “there are no federal standards” for concentrations of these pollutants).

theory has been roundly criticized as effectively “shut[ting] the door” for complainants because a permit could not be granted at all if environmental standards could not be met.<sup>63</sup> Thus, “EPA’s [significance] hurdle is legally impossible to meet.”<sup>64</sup>

Indeed, EPA’s injection of undefined “significance” into a disparate impact assessment can lead and has led to disastrous consequences. EPA’s *Select Steel* investigation found that in Genesee County, the county where Flint is located, 8% of children already had elevated blood lead levels (above the then-CDC level of 10microg/dL) and that African-American children there were four times more likely to have very high blood lead levels (over 15 microg/dL) than white children,<sup>65</sup> making the addition of a known lead-emitting facility a source of dangerous impacts disparately suffered by the community. Yet EPA shrugged off the facility’s impact on blood lead levels as “de minimis.”<sup>66</sup> So too did EPA disregard the lead emissions from the Genesee power plant, about which the community had complained starting in 1992. Decades later, the Flint Water Advisory Task Force found that MDEQ bore “primary responsibility” for the Flint Water Crisis that began in 2014 due, in part, to its “cultural shortcomings that prevent it from adequately serving and protecting the public health of Michigan residents.”<sup>67</sup> Had EPA scrutinized—and potentially rectified—these “cultural shortcomings” of MDEQ in the 1990s, instead of letting them fester for decades, the Flint water crisis may have been abated or avoided.

#### Case study against onerous “causality” requirements: Tallassee and Uniontown, Alabama

The Proposed Rule also seeks to inject two causality requirements into the prima facie case for a disparate impact Title VIII claim. One would require plaintiffs to show a “robust causal link between the challenged policy or practice and a disparate impact on members of a protected class.”<sup>68</sup> HUD cites as justification for this element the Supreme Court’s desire to “protect[] defendants from being held liable for racial disparities they did not create.”<sup>69</sup> The other “proximate cause” element would require plaintiffs to prove that “the complaining party’s alleged injury is directly caused by the challenged policy or practice.”<sup>70</sup>

HUD’s proposed heightened causality requirements, which focus on connections between an individual policy or practice and a discrete injury, are problematic. First, they are undefined and as such, could be used arbitrarily to shut the door on disparate impact claims. Second, they are antithetical to the broad remedial purposes of civil rights anti-discrimination laws such as the

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<sup>63</sup> See Cole, *supra* note 14, at 10 (arguing that since “[i]t is legally impossible under the [Clean Air Act] for an agency to grant a permit in an attainment area that would result in the violation of the NAAQS [(National Ambient Air Quality Standards)] . . . EPA’s hurdle—that a permit must cause a violation of NAAQS to have an impact—means that, legally, there can never be a successful Title VI claim filed in an [NAAQS] attainment area. EPA has effectively read Title VI out of the equation entirely.”).

<sup>64</sup> *Id.*

<sup>65</sup> Select Steel Investigative Report, Attachment 2, at 32.

<sup>66</sup> *Id.* at 31.

<sup>67</sup> Flint Water Advisory Task Force Final Report, *supra* note 26, at 28.

<sup>68</sup> Proposed Rule, *supra* note 2, at 42,858 (emphasis omitted).

<sup>69</sup> *Id.* at 42,855–56 (citing *Inclusive Communities*, 135 S. Ct. at 2523).

<sup>70</sup> *Id.* at 42,859 (emphasis omitted).

Fair Housing Act.<sup>71</sup> Cumulative risk assessments are integral to a “more sophisticated” understanding of effects, and cumulative impacts result from “individually minor but collectively significant actions taking place over a period of time.”<sup>72</sup> An artificially narrow “proximate cause” requirement does not logically flow from the Supreme Court’s warning that parties should not be liable for disparities they did not create, and could leave civil rights plaintiffs without redress—tragically and ironically—for injuries caused by a host of collectively disastrous harms that tend to work in combination.

Indeed, EPA has arbitrarily imposed an onerous and ill-defined “causality” requirement to disparate impact claims that has led the agency to disregard legitimate allegations of disparate harm. Two locations in Alabama that were the subject of civil rights complaints illustrate this practice.

In 2013, dozens of residents of Uniontown, Alabama filed a complaint with EPA, alleging that the renewal of the permit for the Arrowhead Landfill and the permit modification, allowing an increase of its size by two-thirds, adversely and disparately impacted the surrounding, primarily African American, community. Even before the expansion, the permit authorized 15,000 tons of waste per day, twice the amount permitted at the next largest landfill in Alabama at the time.<sup>73</sup> And the landfill had already received and held 4 million tons of coal ash. The Complaint alleged impacts related to odors, increased population of flies and birds, increased noise from heavy machinery, increased emission of fugitive dust, illnesses, contaminated water, believed degradation of a community cemetery, and decline of property values, about which many community members had previously complained.<sup>74</sup>

Residents had submitted a study showing health impacts, and the record contained evidence that there had been an increase in flies and birds. Even without such evidence, straightforward logic compels a conclusion that renewing (the equivalent of granting) a permit for an enormous landfill, containing toxic coal ash and other industrial waste, causes adverse harms to the surrounding community. And once a finding of disproportionate adverse impact is made, the question shifts to the justification for the action and whether there is a less discriminatory alternative for achieving the objective.

Yet EPA used the cloak of “causality” in 2018 to find no prima facie case of discrimination. EPA ignored record evidence by residents that there had been an increase in pests and a decrease in quality of life—which should have been sufficient evidence of adverse

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<sup>71</sup> See *supra* notes 39–40 and accompanying text; see also 42 U.S.C. § 3601 (“It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”).

<sup>72</sup> U.S. EPA, Cumulative Risk Assessment Guidance-Phase I Planning and Scoping at 4 (July 3, 1997) (available from the ELR Document Service, ELR Order No. AD-3708), [https://www.epa.gov/sites/production/files/2014-11/documents/frmwrk\\_cum\\_risk\\_assmnt.pdf](https://www.epa.gov/sites/production/files/2014-11/documents/frmwrk_cum_risk_assmnt.pdf)); see also U.S. EPA, Memorandum, Cumulative Risk Assessment Guidance-Phase I Planning and Scoping at 1 (July 3, 1997), <https://www.epa.gov/sites/production/files/2015-01/documents/cumulrisk.pdf> (“[T]oday, better methods and data often allow us to describe and quantify the risks that Americans face from many sources of pollution, rather than by one pollutant at a time.”); Gina M. Solomon et al., *Cumulative Environmental Impacts: Science and Policy to Protect Communities*, 37 *Ann. Rev. Pub. Health* 83, 84–85 (2016).

<sup>73</sup> Uniontown Complaint, Attachment 4, at 7–8.

<sup>74</sup> Uniontown Complaint, Attachment 4; Uniontown Closure Letter, *supra* note 38.

harm on its own. And even though ADEM allowed Arrowhead to use “alternates“ for daily cover of the landfill, such as coal ash, in violation of state law requiring soil cover, EPA concluded it was “unable to identify any functions” related to that decision that could result in the alleged increased populations of flies and birds.<sup>75</sup>

At bottom, EPA indicated that the absence of “scientific proof of a direct link” compelled it to conclude that there was no evidence that the Alabama Department of Environmental Management’s (“ADEM”) permitting decisions caused any impact to the community. But the action of ADEM—approving the renewal and modification of the permit—clearly caused the adverse impacts; absent the permit, the facility would not be operating, or absent the permit terms ADEM had set, the facility would be operating with different conditions and requirements.

EPA’s determinations that causation could not be established with respect to other parts of the Uniontown complaint were similarly far-fetched. The complainants alleged that they believed the permits interfered with the ability of community members to visit the cemetery because of loud nearby equipment and an acrid odor.<sup>76</sup> EPA nonsensically determined that causation could not be established because the cemetery was not within the operational boundaries of the landfill. But sound and odor do not stop at operational boundaries. EPA further stated that it decided that “it would not investigate substantively the alleged harm of diminution of property values” and, as a result, concluded that there “is insufficient evidence in the record to suggest that ADEM’s permitting actions themselves resulted in a sufficiently significant harm with regard to property values.”<sup>77</sup> Of course, if an agency not only fails to recognize that the decision to permit the facility directly causes adverse impacts, but also refuses to investigate or consider evidence of an obvious harm, it can and will find no causation.

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In 2017, EPA similarly closed a 2003 civil rights complaint of the Ashurst Bar/Smith Community Organization (“ABSCO”) that alleged that ADEM caused disparate adverse impacts when it approved a permit modification to expand a landfill adjacent to a low-income African-American community. In its closure letter, as it did with Uniontown, EPA systematically discounted the various harms alleged in the complaint under the assertion that there was “insufficient evidence in the record to show a causal link” between the permit modification and the alleged harm.<sup>78</sup>

For example, the 2003 ABSCO complaint raised the “alternate” daily cover issue also raised in the Uniontown complaint: ABSCO alleged that ADEM’s grant of a waiver from the statutory requirement to use daily soil cover caused harm to the community by increasing exposure to rodents, wild dogs, and other pests, and the record contained evidence that

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<sup>75</sup> Letter from Lilian S. Dorka, Dir., U.S. EPA, External Civil Rights Compliance Office, Office of Gen. Counsel, to Marianne Engelman Lado, Yale Law Sch., *Envtl. Justice Clinic* 15 (Mar. 1, 2018).

<sup>76</sup> *Id.* at 16.

<sup>77</sup> *Id.* at 18.

<sup>78</sup> Letter from Lilian S. Dorka, Dir. External Civil Rights Compliance Office, Office of Gen. Counsel, U.S. EPA, to Marianne Engelman Lado et al., *Visiting Clinical Professor of Law, Yale Law Sch.* (Apr. 28, 2017).

community members had observed increases in these pests since the 2003 modification.<sup>79</sup> EPA acknowledged that it was “possible” that the permit modification increased these pests, but, despite the record evidence and without further investigation, inexplicably concluded that it “could not establish a causal link between the 2003 permit modification and any changes in animal population numbers.”<sup>80</sup> Yet after ABSCO filed a new Title VI complaint regarding ADEM’s renewal of the landfill’s permit in 2017, EPA did a more searching review and found that the evidence *did* “establish a causal connection” between the alleged harms stemming from the landfill’s failure to use proper daily soil cover, but EPA steadfastly refused to make a finding of disparate impact.<sup>81</sup>

Then in 2019, in a distinct court proceeding, a unanimous opinion of the Alabama Court of Civil Appeals found that ADEM’s policy of waiving the daily soil cover requirement violated Alabama statute, and ruled in favor of community members that challenged that practice.<sup>82</sup> Had EPA properly investigated the allegation about daily cover first raised in 2003—instead of dismissing it under an onerous “causality” requirement or faulty disparate impact logic—then perhaps the people of Tallassee and Uniontown would not have had to wait 16 years for some of their harms to be redressed.

\* \* \*

As detailed above, by injecting arbitrary, undefined, and unattainable standards into its disparate impact assessments, EPA has dismissed or rejected almost all of the Title VI complaints it has received.<sup>83</sup> HUD’s proposal to formally inject analogous heightened, conjured up qualifiers into a functioning disparate impact approach could similarly very well bring enforcement of housing discrimination to a standstill.

#### IV. Conclusion

As the stories of the undersigned individuals and groups demonstrate, the impacts of segregation persist today in the form of housing, environmental, and health injustices. HUD’s Proposed Rule would impose needlessly onerous requirements at the *prima facie* stage and would prevent fair housing plaintiffs from obtaining any kind of factual investigation or fair hearing of the alleged violations of their civil rights.

Portions of HUD’s Proposed Rule parallel EPA’s additional requirements related to an element achieving “significance” and causation.<sup>84</sup> EPA’s abysmal record of evaluating discrimination claims underscore that the additional requirements HUD proposed to enshrine in

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<sup>79</sup> 2017 Tallassee Closure Letter, *supra* note 35, at 11.

<sup>80</sup> *Id.* at 11–12.

<sup>81</sup> Letter from Lilian S. Dorca, Dir., External Civil Rights Compliance Office, U.S. EPA Office of Gen. Counsel, to Marianne Engelman Lado et al., (Dec. 10, 2018) at 20. In its second analysis, EPA found that ADEM’s failure to adequately enforce daily cover requirements of the permit did cause harm, but nevertheless failed to find disproportionality based on a faulty analysis of only 3 of the state’s 32 municipal solid waste landfills. *Id.*

<sup>82</sup> *Smith v. LaFleur*, No. 2180375, 2019 WL 5091863 (Ala. Civ. App. Oct. 11, 2019).

<sup>83</sup> See *supra* note 49 and accompanying text.

<sup>84</sup> See *supra* Section III.

Title VIII regulations are problematic for the furtherance of civil rights and eradication of discrimination.

We urge HUD to affirm its responsibility to further the goals of the Fair Housing Act, by addressing ongoing discrimination, rather than neglecting one of its core purposes.<sup>85</sup> For these reasons, we request that HUD withdraw its Proposed Rule.

Sincerely,

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<sup>85</sup> HUD's core mission includes "build[ing] inclusive and sustainable communities free from discrimination." *Mission*, HUD, <https://www.hud.gov/about/mission> (last visited Oct. 17, 2019).

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