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March 6, 2020

To: The Honorable Shane E. Pendergrass
Chair, Health and Government Operations Committee

From: The Office of the Attorney General

Re: House Bill 1561 – Discriminatory Housing Practices – Intent – **SUPPORT**

Consistent with the Attorney General's ongoing efforts to eliminate discrimination in all forms, including discrimination in housing, the Office of the Attorney General urges a favorable report of House Bill 1561. This legislation prohibits a person from acting in a manner, regardless of intent, that has a discriminatory effect against any person in a housing transaction because of race, color, religion, sex, disability, marital status, familial status, sexual orientation, gender, identity, or national origin.[1]

House Bill 1561 comes in response to the United States Department of Housing and Urban Development (hereinafter, HUD) proposed changes to the Fair House Act's Disparate Impact Standard, which will create a nearly insurmountable barrier to relief for a plaintiff seeking to prove that they were victims of housing discrimination. Under HUD's proposed rule change, the plaintiff alleging housing discrimination must plead and prove that the housing policy is "arbitrary, artificial, and unnecessary", has a "robust causal link" with disparate impact on a protected class, causes a "significant" adverse effect on members of a protected class, and is directly linked to the disparate impact in the plaintiff's "alleged injury."[2] House Bill 1561 attempts to codify current case law, including the Supreme Court's binding interpretation of the Fair Housing Act's language,[3] to ensure Marylanders are not subject to unfair housing practices.

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[1] House Bill 1561, Discriminatory Housing Practices – Intent, *Fiscal and Policy Note*, Department of Legislative Services, Maryland General Assembly (2020 Session), http://mgaleg.maryland.gov/2020RS/fnotes/bil_0001/hb1561.pdf.
[2] H.B. 1561, 2020 Leg., 441st Sess. (Md. 2020).
[3] *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.,* 135 S. Ct. 2507 (2015).

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The United States has an unfortunate history of engaging in discrimination related to housing. Forms of housing discrimination included "white-only" neighborhoods, red-lining practices, the refusal of governments to guarantee home loans in non-white neighborhoods, and towns that declared non-white individuals were banned from being within city limits between dusk and dawn.[4] To prevent these types of actions from occurring, Congress passed the Fair Housing Act (FHA) in 1968. Originally, the Act only protected against overtly discriminatory acts, however courts and agencies began to analyze discriminatory claims using the disparate impact theory of liability, as endorsed by the Supreme Court.[5] Under the disparate impact theory of liability for purposes of the FHA, the plaintiff is required to demonstrate that the challenged practices have a disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale.[6] The disparate impact theory of liability continues to be the way in which courts and agencies interpret discriminatory practices, with the Supreme Court recently providing a strong endorsement of disparate impact liability in the housing context in *Texas Department of Housing & Community Affairs v. Inclusive Projects, Inc.*[7]

Under current law, as issued in 2013, to prove a FHA disparate impact claim, a plaintiff has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect on a protected class.[8] The burden then shifts to the defendant who "has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests,"[9] and finally, the burden shifts back to the plaintiff who prevails if it proves the interest could be served by a less discriminatory alternative to the challenged practice.[10] This burden shifting framework has been utilized by courts and agencies for several decades, and is considered valid precedent.[11] The Proposed Rule,[12] seeks to drastically change the current rule, frequently used to combat housing discrimination, by altering the framework to:[13]

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[4] *See Shelley v. Kramer,* 334 U.S. 1 (1948); *Thompson v. U.S. HUD,* 348 F. Supp. 2d 398, 471-72 (D. Md. 2005); James W. Lowen, Sundown Towns (2005).
[5] *See Griggs v. Duke Power Co.,* 401 U.S. 424 (1971).
[6] *Reyes v. Waples Mobile Home Park Limited Partnership,* 903 F.3d 415 (4th Cir., 2018) (citing 42 U.S.C.A. § 3604(a)).
[7] 135 S. Ct. 2507 (2015).
[8] 24 C.F.R. § 100.500(c)(1).
[9] *Id.,* at § 100.500(c)(2).
[10] *Id.,* at § 100.500(c)(3).
[11] *See Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.,* 135 S. Ct. 2507 (2015); *see also interpretation of* Title 42 U.S.C. § 2000e-2(k).
[12] Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD, *HUD's Implementation of the Fair Housing Act's Disparate Impact Standard,* 84 Fed. Reg. 42854, 24 C.F.R. 100 (Aug. 19, 2019).
[13] HUD DI Proposed Rule AG Comment Letter, Re: Docket No. FR-6111-P-02, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard (Oct. 18, 2019).

- Amend the first step, the prima facie case, from its prior simple formulation of "a challenged practice [that] caused or predictably will cause a discriminatory effect" to a five-element test with specific requirements on matters including causation and significance.[14]
- Amend the first step into both a standard that must be alleged by "stat[ing] facts plausibly alleging each of the [five] elements," and then "prove[n] by the preponderance of the evidence, through evidence that is not remote or speculative."[15]
- Add a new step, after the first step, allowing a defendant at both the pleading and proof stage to "establish that a plaintiff's allegations do not support a prima facie case" by showing either (1) "its discretion is materially limited" by federal, state, or local law or (2) one of three facts when the plaintiff's allegations involve "a model used by defendant."[16]
- Amend the Current Rule's second step (now the third step because of the addition noted above) from imposing on a defendant the "burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests" with evidence that "may not be hypothetical or speculative" to requiring only that a defendant "produc[e] evidence showing that the challenged policy or practice advance a valid interest (or interests)" with no prohibition on the use of hypothetical or speculative evidence.[17]
- Amend the Current Rule's third step (now the fourth step) to add two further requirements on a plaintiff's burden to prove a less discriminatory alternative policy or practice: the plaintiff must prove it would (1) serve the defendant's identified interest in "an equally effective manner"; and (2) "without imposing materially greater costs on, or creating other material burdens for, the defendant."[18]

These proposed changes will gut decades of protections against housing discrimination. The rule runs directly counter to four decades of federal court decisions on the issue, and directly conflicts with Congressional intent in passing the Fair Housing Act and the Agencies' longstanding guidance on standards for housing.[19] HUD's proposed rule will substantially increase the burden of proof for victims of housing discrimination, and erect unnecessary obstacles to providing disparate impact claims against discriminatory housing policies and practices.[20]

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[14] *Compare* 24 C.F.R. § 100.500(a), *with Proposed Rule* § 100.500(b)(1)-(5).10

[15] Proposed Rule § 100.500(b), (d)(1), (d)(2)(ii).11

[16] Proposed Rule § 100.500(c)(1)-(2), (d)(2)(i); see also 84 Fed. Reg. at 42,859 ("[I]n a rule 12(b)(6) motion to dismiss, the defendant can make an argument under the paragraph (c).").

[17] *Compare* 24 C.F.R. § 100.500(b)(2), (c)(2), with *Proposed Rule* § 100.500(d)(1)(ii).

[18] *Compare* 24 C.F.R. § 100.500(b)(3), with *Proposed Rule* § 100.500(d)(1)(ii), (d)(2)(iii).

[19] Morgan Williams, *HUD's Proposed Rule Is a Direct Assault on the Supreme Court's Decision in Inclusive Communities,* National Fair Housing Alliance (Oct. 10, 2019), https://nationalfairhousing.org/2019/10/10/huds-proposed-rule-is-a-direct-assault-on-the-supreme-courts-decision-in-inclusive-communities/.

[20] ACLU, *Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, HUD Docket No. FR-6111-P-02,* (Oct. 17, 2019), https://www.aclu.org/aclu-files-public-comment-opposing-huds-proposed-rule-fair-housing-acts-disparate-impact-standard.

House Bill 1561 codifies over four decades of judicial interpretation of disparate impact claims in the housing context, to ensure that Maryland residents are not subject to discriminatory practices, and if they are – are given the ability to prove their case in court. If HUD's proposed rule goes into effect without the assistance of the General Assembly, Marylanders who fall victim to these practices will face a nearly insurmountable barrier to proving their case.

The Attorney General believes that all Marylanders should have equal access to safe and decent housing, and the ability to enjoy the American dream by living in the community of their choice. House Bill 1561 ensures that all Marylanders, regardless of their race, color, religion, sex, disability, marital status, familial status, sexual orientation, gender, identity, or national origin, are able to realize this dream without the fear of discrimination. For this reason, and the reasons stated above, the Office of the Attorney General urges a favorable report of House Bill 1561.

cc: Members of the Health and Government Operations Committee