

United States Senate

WASHINGTON, DC 20510

November 25, 2019

The Honorable Benjamin S. Carson, Sr.
Secretary
United States Department of Housing and Urban Development
451 Seventh Street S.W.
Washington, DC 20410

Dear Secretary Carson:

We are deeply troubled by the direction this Administration is heading in relation to Fair Lending and Fair Housing protections. Specifically, we are writing to urge you to reject changes proposed in the Department of Housing and Urban Development's (HUD) August 19, 2019 *Proposed Rulemaking: HUD's Implementation of the Fair Housing Act's Disparate Impact Standard* (the Proposed Rule).

Congress enacted the Fair Housing Act in the wake of the 1968 assassination of Dr. Martin Luther King, Jr. This landmark legislation struck down discriminatory practices like redlining, which had excluded racial and ethnic minority communities from access to credit, and called upon HUD and its grantees to affirmatively further fair housing. The Fair Housing Act prohibits housing discrimination in the sale, rental, or financing of housing or other housing-related activities on the basis of race, color, religion, sex, disability, familial status, or national origin.¹

While much progress has been made in the half century since Congress adopted the Fair Housing Act, the nation has more work to do to realize its promise. According to the National Fair Housing Alliance, over 4 million instances of housing discrimination occur each year,² and the nation faces tremendous racial disparities in income, wealth, and homeownership. For example, there is a 32 point gap between the homeownership rates for Black and white households, and a 26 point gap between Hispanic and white households.³ In too many instances, a person's access to opportunity and quality of life are determined by where they live in communities that still reflect the legacy of historic redlining.

HUD's existing Disparate Impact Rule codified a longstanding tool for identifying and remedying housing discrimination under the Fair Housing Act. It was built on four decades of jurisprudence and validated in the Supreme Court's 2015 decision upholding the use of disparate impact theory under the Fair Housing Act, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* ("Inclusive Communities"). The current rule relies on a balanced, three-part burden-shifting framework that follows the same formula as other anti-

¹ 78 Fed. Reg. 11460.

² "2019 Fair Housing Trends Report," National Fair Housing Alliance, November 1, 2019, available at <https://nationalfairhousing.org/wp-content/uploads/2019/10/2019-Trends-Report.pdf>.

³ QUARTERLY RESIDENTIAL VACANCIES AND HOMEOWNERSHIP, U.S. Census, July 25, 2019, available at: <https://www.census.gov/housing/hvs/files/currenthvspress.pdf>.

discrimination legal standards and has been used for decades to seek fair housing access for Black and Hispanic people, individuals with disabilities, families with children, and victims of domestic violence.

At a recent Banking Committee hearing, you claimed that HUD is simply offering this Proposed Rule in order to better reflect the Supreme Court's ruling in *Inclusive Communities*. But under HUD's proposed framework, disparate impact would exist in name only. HUD's proposal would dramatically shift the current balanced three-part test affirmed by the Supreme Court in *Inclusive Communities* to require a plaintiff to meet a five-part test to essentially prove their entire case – and disprove the defendant's case – before even bringing suit, without the benefit of discovery. Rather than reflect the *Inclusive Communities* ruling, this Proposed Rule would undo the ruling by making it nearly impossible to prove the disparate impact standard.

While raising the legal bar for victims of discrimination, the Proposed Rule provides new defenses that will allow financial institutions, insurance companies, governments, and other market participants to continue unnecessary, discriminatory practices. This includes a new safe harbor for policies or practices driven by algorithms. Society is grappling with the far-ranging effects of opaque and proprietary algorithms – often based on data harvested from our online activities – on our daily lives. Algorithms are only as good as the data they are fed and many elements that appear neutral on their face have proven to reinforce discriminatory patterns of the past. Despite these questions, the Proposed Rule offers an expansive safe harbor for business practices that rely on algorithms to make important decisions governing access to housing, such as credit scores, automated underwriting, and rental tenant-screening systems. This broad exemption will prevent people who have been excluded from housing based on flawed data from having an opportunity to seek redress.

The Proposed Rule contains other provisions that will also place a heavy thumb on the scale for market participants at the expense of people experiencing discrimination. It would permit corporations and others to defend a discriminatory practice simply because implementing a less discriminatory policy would impose some greater cost or burden on them. At the same time, the Proposed Rule fails to acknowledge the costs that discrimination imposes on individuals and society when some of its members are denied a fair chance at housing. The Proposed Rule also reduces institutions' accountability and incentives to assess the fair housing results of their policy choices by removing any expectation that they would collect data necessary to track the outcomes of their policies. Finally, the Proposed Rule removes any reference to policies or practices that perpetuate segregated housing patterns. This attempt to remove segregated housing patterns as an element of disparate impact would perpetuate discriminatory behavior and runs counter to the majority's opinion in *Inclusive Communities*, which concludes with a statement that “[the] Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society.”⁴

⁴ *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525-26 (2015).

In their opinion, the majority of the Supreme Court further acknowledged that “[m]uch progress remains to be made in our Nation’s continuing struggle against racial isolation.”⁵ Housing is the foundation of opportunity for individuals, families, neighborhoods, and society. Preventing housing discrimination – including subtle, hidden discrimination – is central to the mission Congress charged HUD to carry out. We urge you to uphold this mission, reject the changes in the Proposed Rule, and preserve the existing rule.

Sincerely,



SHERROD BROWN
United States Senator



CHARLES E. SCHUMER
United States Senator



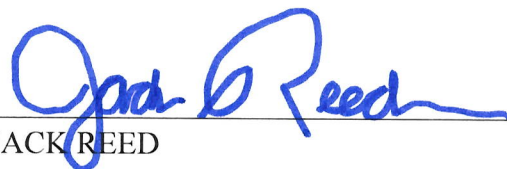
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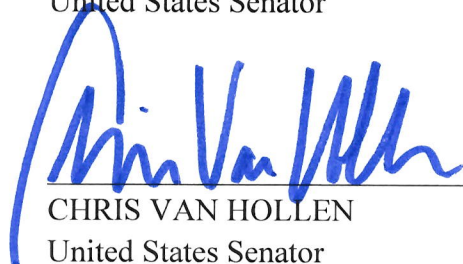
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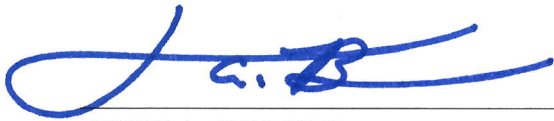


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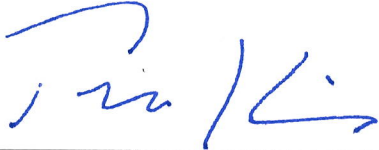
⁵ *Id.* at 2525.



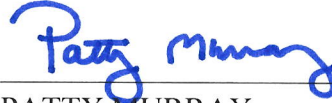
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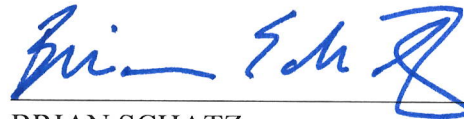
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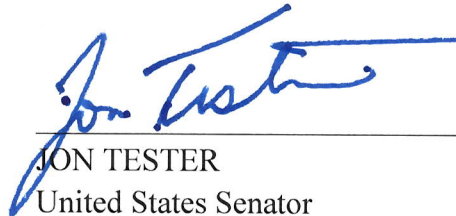
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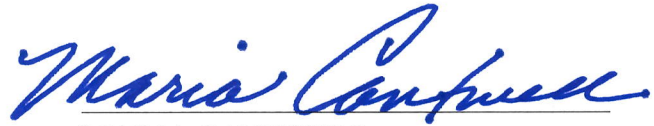
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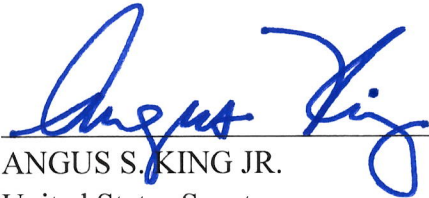
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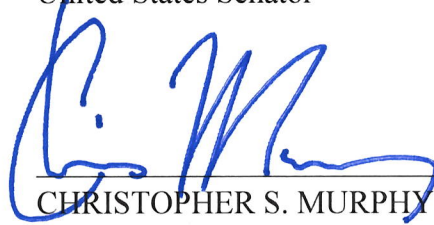
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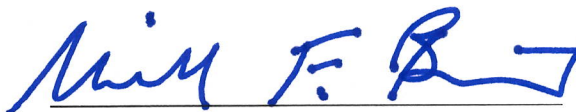
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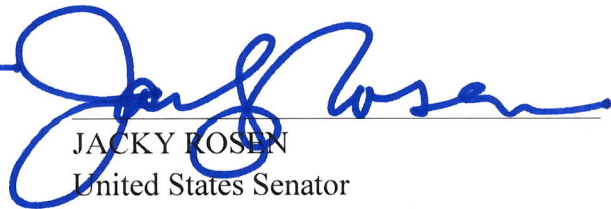
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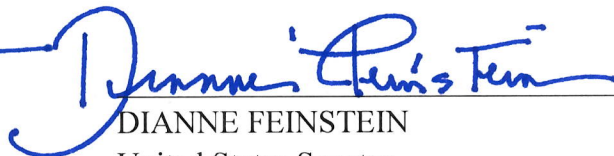
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