



Secretary Shaun Donovan
451 7th Street S.W.
Washington, DC 20410

September 17, 2013

Re: Docket No. FR-5173-P-01, “Affirmatively Furthering Fair Housing”

Dear Secretary Donovan:

We write as three members of the eight-member U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole. We write to apprise you of serious concerns we have in regard to a proposed rule entitled “Affirmatively Furthering Fair Housing.”

We preface our comments by noting that the underlying flaw in this proposed rule lies in its repeated use of the term “segregation” to describe housing patterns in which members of racial or ethnic groups are concentrated in particular areas. Legal segregation has been dead for over forty years. Geographic clustering of racial and ethnic groups is not in and of itself an invidious phenomenon. Referring to contemporary housing patterns as “segregation” trivializes the horror of legal segregation that existed in the United States for over half a century. “[R]acial imbalance without intentional state action to separate the races does not amount to segregation.”¹ We suspect that the rule dubs racial imbalances in housing patterns “segregation” in order to invest a sweeping rule of dubious constitutionality with moral authority. Referring to freely-chosen housing patterns as “segregation” also gives a Manichean cast to what is in reality a complex situation.

The Fair Housing Act Does Not Authorize the Use of Disparate Impact Theory

We realize that HUD recently promulgated a rule enshrining disparate impact theory in its regulations.² Nevertheless, we must reiterate here what we have previously stated elsewhere: disparate impact claims are not cognizable under the Fair Housing Act.³

As a result of this regrettable arrogation of power, the entire proposed rule is built upon sand. Rather than focusing on incidents of disparate treatment against members of

¹ *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, at 750 (Thomas, J., concurring) (2007).

² Docket No. FR-5508-F-02, “Implementation of the Fair Housing Act’s Discriminatory Effects Standard,” (Feb. 15, 2013).

³ Brief *Amici Curiae* of Gail Heriot, Peter Kirsanow, and Todd Gaziano in Support of Petitioner at 2, *Mount Holly v. Mount Holly Gardens Citizens in Action* (No. 11-1507) (“No inference can be drawn that when Congress passed the Fair Housing Act of 1968 it was kindly disposed toward disparate impact liability.”).



protected classes, the proposed rule transforms people with middle-income levels or below into a protected class based simply on disparate impact.⁴ We certainly oppose disparate treatment in housing because of membership in a protected class. However, the proposed rule’s focus on disparate impact and the almost complete absence of a discussion of disparate treatment suggests that people are being discriminated against on the basis of their pocketbooks. Or, as we used to call it, “living within your means.” To argue that housing discrimination is pervasive because members of a protected class are less likely to be able to afford housing that is the size they want or in a more genteel area is bizarre.

The proposed rule’s focus on scrutinizing housing patterns based on race and ethnicity is concerning. The rule does not suggest that people tend to live in racial and ethnic clusters because of disparate treatment or because of an entrenched system of segregation enshrined in law. Indeed, if the latter were true forty-five years after passage of the Fair Housing Act (FHA), the FHA and HUD would have to be judged abysmal failures. Rather, the proposed rule is premised on a disparate impact theory of discrimination in housing.⁵

Additionally, as discussed below, the proposed rule engages in disparate treatment on the basis of race while attempting to combat disparate impact. This shame is not unique to HUD. Other government entities have made the same error.⁶ Nonetheless, disparate treatment on the basis of race is racial discrimination. We believe that the Supreme Court will eventually be forced to rule whether discriminatory actions taken to avoid disparate impact can be reconciled with the Fourteenth Amendment’s guarantee of equal protection.⁷ We hope this day will come sooner rather than later, but until then HUD should respect the limits of its statute and refrain from engaging in racial discrimination.

⁴ Docket No. FR-5173-P-01, “Affirmatively Furthering Fair Housing,” § 5.152.

Disproportionate housing needs exists [sic] when the percentage of extremely low-income, low-income, moderate-income, and middle-income families in a category of housing need who are members of a protected class is at least 10 percent higher than the percentage of persons in the category as a whole.

⁵ Docket No. FR-5173-P-01, “Affirmatively Furthering Fair Housing,” § 5.152.

Affirmatively furthering fair housing means taking proactive steps beyond simply combating discrimination to foster more inclusive communities and access to community assets for all persons protected by the Fair Housing Act. More specifically, it means taking steps proactively to address significant disparities in access to community assets

⁶ *Ricci v. DeStefano*, 557 U.S. 557, 563 (2009) (“We conclude that race-based action like the City’s in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.”).

⁷ *See id.* at 594 (Scalia, J., concurring (“resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection?”)).



Race-Based Classifications are Inherently Suspect

The proposed rule's provisions regarding the classification of Americans by race likely violate the constitutional guarantee of equal protection. For example, proposed Section 5.154 (c) provides in part:

(c) *Fair housing data provided by HUD.* HUD will provide program participants with nationally uniform local and regional data on patterns of integration and segregation; racially and ethnically concentrated areas of poverty; access to assets in education, employment, low-poverty, transportation, and environmental health, among others; disproportionate housing needs; data on individuals with disabilities and families and children; and data on discrimination. HUD will also provide PHA site locational data (including, to the extent available, accessible units), the distribution of housing choice vouchers, and occupancy data.

In order for HUD to provide data on “integration and segregation” and “racially and ethnically concentrated areas of poverty,” the agency will have to classify Americans on the basis of race. Such a classification is likely unconstitutional. The Supreme Court has repeatedly said that racial classifications are inherently suspect. “This Court has recently reiterated, however, that ‘all racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny,’”⁸ and “all governmental action based on race—a *group* classification long recognized as ‘in most circumstances irrelevant and therefore prohibited,’—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed [citations omitted] [citation marks omitted].”⁹

This constitutional suspicion of racial classifications also exists when the racial classification is the basis for a government-bestowed benefit or burden. The proposed rule lays the groundwork for bestowing benefits or burdens on the basis of race. Section 5.154(c) above mentions “access to assets in education, employment, low-poverty, transportation, and environmental health”. This preferred access is a benefit to those who receive it and a burden to those who do not receive preferred access because their skin is the wrong color. Proposed Section 903.2(a)(3) provides in part:

In accordance with the PHA's obligation to affirmatively further fair housing, the PHA's policies that govern its “development related activities” including affirmative marketing; tenant selection and assignment policies; applicant consultation and information; provision of additional supportive services and amenities; as well as construction, rehabilitation, modernization, demolition, disposition, designation, or physical accessibility of its housing and other facilities under its PHA Plan *should be designed to*

⁸ *Id.* at 741 [citations omitted].

⁹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).



reduce racial and national origin concentrations, including racially or ethnically concentrated areas of poverty, and to reduce segregation and promote integration, reduce disparities in access to community assets, and address disproportionate housing needs by protected class (emphasis added).

Although we realize that non-whites are members of a protected class under the Fair Housing Act, the proposed rule's assumption that it is particularly noxious if minorities live in areas of concentrated poverty displays a mindless preference for racial balancing.¹⁰ Given the demise of legal segregation, this definition ignores the possibility that at least some of these "racially or ethnically concentrated areas of poverty" exist because these members of racial and ethnic minorities prefer to live in communities predominantly peopled by fellow members of their racial or ethnic group. Surely they should have the right to choose to live where and near whom they prefer. It is hardly surprising that many people would have family and friendship networks primarily comprised of one ethnic group or another and would prefer to live near their family and friends. History suggests this is particularly likely in communities primarily comprised of recent immigrants. We suggest that individuals are the ones best suited to determine where they prefer to live, and that adults are generally capable of determining where to live without a government bureaucrat counseling them that Housing Option A is 75% black, 20% Hispanic, and 5% white, but Option B is a better choice because it is 75% white, 20% Hispanic, and 5% black.¹¹

No one wants to live in an area of concentrated poverty. But why is it inherently worse to live in a predominantly Hispanic inner-city slum than in a predominantly white poverty-stricken Appalachian county?¹² For that matter, would either the predominantly Hispanic

¹⁰ Docket No. FR-5173-P-01, "Affirmatively Furthering Fair Housing," § 5.152.

Racially or ethnically concentrated area of poverty (RCAP or ECAP) means a geographic area based on the most recent decennial Census and other data to be statistically valid, with significant concentrations of extreme poverty and minority populations.

¹¹ Docket No. FR-5173-P-01, "Affirmatively Furthering Fair Housing," § 903.2 ("(3) In accordance with the PHA's obligation to affirmatively further fair housing, . . . the PHA Plan should be designed to reduce racial and ethnic concentrations, including racially or ethnically concentrated areas of poverty, and to reduce segregation and promote integration.").

¹² Kelvin Pollard and Linda A. Jacobsen, *The Appalachian Region: A Data Overview from the 2007-2011 American Community Survey*, Appalachian Regional Commission, at 14, 41 (Feb. 2013), http://www.arc.gov/assets/research_reports/PRBDataOverviewReport2007-2011.pdf.

The Appalachian region is significantly less diverse racially and ethnically diverse than the United States as a whole, and most parts of the region have remained far below the national average in their minority populations. In two-thirds of Appalachian counties, minorities (defined as anyone who identifies with a racial or ethnic group other than "white alone, not Hispanic") made up less than 10 percent of the population during the 2007-2011 period. . . .

In 23 Appalachian counties, per capita income was less than \$15,000. . . . Indeed, per capita income in the 2007-2011 period was just \$18,720 in rural Appalachian counties as a whole, and just \$18,197 in central Appalachia.



or white area be a less miserable place to live if it were more diverse? These areas are miserable because they are poor, not because most people have the same skin color. This assumption also seems patronizing to racial and ethnic minorities, as if their communities are inferior and their situations will be improved if they are living next to white neighbors.

Disparate Treatment Based on Race is Constitutionally Suspect

It also appears that the data collected as part of the rule's new initiative will be used to determine who should live where based on race and ethnicity. This is pure disparate treatment, not disparate impact. The proposed rule will monitor "local and regional data on patterns of integration, racially and ethnically concentrated areas of poverty, access to key community assets, and disproportionate housing needs based on classes protected by the Fair Housing Act."¹³ The proposed rule also states that the "PHA Plan should be designed to reduce racial and ethnic origin concentrations, including racially or ethnically concentrated areas of poverty, and to reduce segregation and promote integration,"¹⁴ and "PHA policies that govern eligibility, selection and admissions under its PHA Plan must be designed to reduce the concentration of tenants and other assisted persons by race, national origin, and disability,"¹⁵ and that PHAs should use "tenant selection and assignment policies that lead to desegregation (e.g., use of minimum/ceiling rents, narrowly tailored site-based waiting lists . . .)."¹⁶ The only way to reduce racial and ethnic concentrations is to encourage (or require) people to live in different areas based on their race. Such a use of race likely violates the Fourteenth Amendment.

These proposed rules resemble the race-based school assignment plans at issue in *Parents Involved v. Seattle*. In *Parents Involved*, school districts assigned students to schools based on race. Neither school district was operating segregated schools. Seattle had never operated racially segregated schools, and Jefferson County had been found to be unitary. Yet both school districts used race to determine which schools students would attend. Seattle required that popular high schools be "within 10 percentage points of the district's overall white/nonwhite racial balance" or the district "employs a tiebreaker that selects for assignment students whose race 'will serve to bring the school into balance.'"¹⁷ Jefferson County "require[d] all nonmagnet schools to maintain a minimum black enrollment of 15 percent, and a maximum black enrollment of 50 percent."¹⁸

¹³ Docket No. FR-5173-P-01, "Affirmatively Furthering Fair Housing," at 43712.

¹⁴ Docket No. FR-5173-P-01, "Affirmatively Furthering Fair Housing," § 903.2(a)(3).

¹⁵ Docket No. FR-5173-P-01, "Affirmatively Furthering Fair Housing," § 903.2(d)(2).

¹⁶ Docket No. FR-5173-P-01, "Affirmatively Furthering Fair Housing," § 903.2(d)(2)(ii).

¹⁷ *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, at 712 (2007) (citations omitted).

¹⁸ *Id.* at 716.



The Seattle school board argued that it had three compelling reasons for using the racial tiebreaker: educational diversity, reducing racial isolation, and ensuring equal access to popular schools despite racial clustering in housing patterns.¹⁹ The Jefferson County schools argued that ceasing to assign students based on race “would result in a substantial number of racially segregated schools” and that their race-based plan²⁰ “contains multiple strategies for achieving racially integrated schools through a system of ‘managed choice.’”²¹ Yet the Supreme Court ruled that the racially-based assignment systems violated the Constitution.²² Discriminating on the basis of race for “good” reasons is still racial discrimination, and the government may only engage in racial discrimination in exceptional situations.²³

The proposed rule’s justifications for discriminating on the basis of race are reminiscent of the school districts’ justifications: “reduc[ing] racial and ethnic origin concentrations,” “promot[ing] integration,” “reducing [the] concentration of tenants . . . by race,” and “reducing disparities in access to key community assets based on race.”²⁴ These ends are no more compelling than those offered by the school districts. Like the school districts, HUD is not attempting to desegregate housing areas that were legally segregated until very recently. HUD is not concerned about legal segregation, but about racial imbalance in residential areas. As Justice Thomas wrote, “Racial imbalance is not segregation. . . . [it] can result from any number of innocent private decisions, including voluntary housing choices.”²⁵

One particularly insidious aspect of the proposed rule is that it attempts to give a sinister sheen to voluntary housing choices. The proposed rule is intended to benefit non-whites. Yet the discriminatory provisions of the proposed rule will harm both whites and non-whites.²⁶ In fact, if the proposed rule is correct that housing prices have a disparate impact on minorities, and therefore non-whites are less likely to be able to afford housing without government assistance, the proposed rule will likely harm non-whites more than whites. The former will more often be subject to a bureaucrat’s whims regarding his housing. Why should an African-American person be less preferred under a tenant selection policy than a white person simply because a particular apartment is in a predominantly African-American area?²⁷

¹⁹ Brief for Respondent at *19, *Parents Involved*, 2006 WL 2922956 (Oct. 10, 2006)..

²⁰ Brief for Respondent at *3, *Meredith v. Jefferson County Board of Education*, 2006 WL 2944684 (Oct. 10, 2006).

²¹ *Id.* at *4.

²² *Parents Involved* at 709.

²³ *Id.* at 741-743.

²⁴ Docket No. FR-5173-P-01, “Affirmatively Furthering Fair Housing,” at 43711.

²⁵ *Parents Involved* at 750.

²⁶ We do not intend to suggest that discrimination against whites is permissible.

²⁷ Docket No. FR-5173-P-01, “Affirmatively Furthering Fair Housing,” § 903.2(a)(3) (“In accordance with the PHA’s obligation to affirmatively further fair housing, the PHA’s policies that govern its ‘development



The race-based housing assignment system envisioned by the proposed rule is particularly troubling when considering America’s changing demographics. As the summary of the proposed rule notes, “Within little more than a generation, America is poised to become a nation where traditional minorities are in the majority.”²⁸ The binary black/white conception of American demographics is no longer accurate. The demise of America’s binary racial makeup renders the racial balancing envisioned by the proposed rule even sillier and more unworkable. Who decides what balance of what races and ethnicities should be represented in each area? Is it more important to nudge African-Americans into largely white neighborhoods, or to funnel Asian-Americans into largely Hispanic neighborhoods? What if Cambodian immigrants and Vietnamese immigrants are the primary residents of one neighborhood? Is the neighborhood diverse because they come from different countries, or is it not diverse because they are both included in the catch-all “Asian”? And what happens when the day comes that “whites” are no longer a majority? Will they then be entitled to special solicitude from HUD? After all, “whites” might still be the largest ethnic group, but the discrete ethnic groups that make up the “white” group would be small, and Norwegians and Italians are as ethnically distinct from each other as are Cambodians and Vietnamese. It is far better to end the racial bean-counting and let people live where they wish and where they can afford to live.

Access to Schools

One of the stated goals of the proposed rule is to improve educational outcomes for disadvantaged children. However, even the Wodtke study the proposed rule relies upon admits that family structure—to be frank, illegitimacy—is the most important factor in children’s educational attainment. The Wodtke study is only able to claim that its findings pertain to the importance of neighborhoods as opposed to single motherhood by stating that “Because family characteristics are in part the result of past neighborhood conditions, it is misleading to contrast the neighborhood and family as independent, competing determinants of children’s outcomes.”²⁹ In other words, the primary problem is that this child was born to a single mother, but she is more likely to be a single mother because she lives in a poor neighborhood. Regardless of why the woman became a single mother, the main problem for the child is that he was born to an unwed mother. Moving single-parent families into more affluent neighborhoods won’t magically transform them into two-parent families where the parents were married to each other before any of the children were born. Perhaps instead of worrying about whether people live in racially

related activities’ including affirmative marketing; tenant selection and assignment policies . . . should be designed to reduce racial and national origin concentrations . . .”).

²⁸ Docket No. FR-5173-P-01, “Affirmatively Furthering Fair Housing,” at 43713.

²⁹ Geoffrey T. Wodtke *et al.*, *Neighborhood Effects in Temporal Perspective: The Impact of Long-Term Exposure to Concentrated Disadvantage on High School Graduation*, *AMERICAN SOCIOLOGICAL REVIEW* Vol. 76, No. 5, 713, at 732 (2001).



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concentrated neighborhoods, HUD should be more concerned about the number of children who are born to unwed mothers.

Additionally, if the Administration is truly concerned about improving poor children's access to better schools, there is an easier way of doing it. Perhaps instead of trying to get the "right" racial mix in affluent neighborhoods, HUD's sister agency the Department of Justice could end its suit against Louisiana's voucher program.³⁰

Sincerely,

A handwritten signature in black ink, appearing to read 'Abigail Thernstrom'.

Abigail Thernstrom
Vice Chair

A handwritten signature in black ink, appearing to read 'Peter Kirsanow'.

Peter Kirsanow
Commissioner

A handwritten signature in black ink, appearing to read 'Todd Gaziano'.

Todd Gaziano
Commissioner

³⁰ Editorial Board, "Justice Department bids to trap poor, black children in ineffective schools," WASH. POST, Sept. 1, 2013, http://www.washingtonpost.com/opinions/the-justice-department-bids-to-trap-poor-black-children-in-ineffective-schools/2013/09/01/2173e5a6-0f77-11e3-85b6-d27422650fd5_story.html.