Testimony of Peter N. Kirsanow before the House Committee on Financial Services, November 19, 2013

Mr. Chairman, thank you for inviting me to testify today. My name is Peter Kirsanow. I am a partner at the law firm of Benesch, Friedlander, Coplan & Aronoff, a former member of the National Labor Relations Board, and am presently a member of the U.S. Commission on Civil Rights. Although I have been asked to testify here because of the expertise I have gained in the area of disparate impact from my work at the Commission, I am testifying only regarding my own opinion regarding disparate impact, not on behalf of the Commission as a whole.

The Supreme Court originally approved the use of disparate impact theory in the employment context. Unfortunately, the theory has metastasized and is being used in areas of law for which it was never intended. Rather than being used as a way to prove disparate treatment in cases where there is no smoking gun, it is now being used as a way to achieve racial balancing across society. Disparate impact is a legal theory of dubious provenance and legality. Its expansion threatens to harm not only those who are members of what are considered disfavored groups, but also the purported beneficiaries.

To illustrate the metastasization of disparate impact, I would like to begin by discussing a rule HUD recently proposed, which is entitled "Affirmatively Furthering Fair Housing." The rule is based on disparate impact theory. My testimony draws upon a comment I and two of my colleagues submitted to HUD regarding this rule, in addition to an amicus brief we submitted in the Mt. Holly case.

I realize that last February HUD promulgated a rule enshrining disparate impact theory in its regulations.[1] However, that does not change the fact that disparate impact claims are not cognizable under the Fair Housing Act.[2]

Despite others' protestations, it simply is not the case that Congress intended the Fair Housing Act to include disparate impact. To elaborate upon this point, let us look at the seminal civil rights statute, the Civil Rights Act of 1964. The Civil Rights Act of 1964 did not include disparate impact. When the Fair Housing Act was passed, the Supreme Court's *Griggs* decision allowing the use of disparate impact in employment was still three years away.

If disparate impact had not been recognized even in the employment context in 1968, Congress certainly did not intend to include it in the Fair Housing Act. In fact, the legislative history surrounding the adoption of the Civil Rights Act of 1964 suggests that Congress's intent was very dissimilar to that adopted by the Court in *Griggs*.[3] The floor managers of the Senate bill stressed that employers would continue to be free to adopt "bona fide" qualification tests, even if those tests disproportionately affected members of minority groups.[4]

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[1] Docket No. FR-5508-F-02, "Implementation of the Fair Housing Act's Discriminatory Effects Standard," (Feb. 15, 2013).

[2] 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.").

[3] *See id.* at 5-11.

[4] Clark and Case Memorandum, 110 Cong. Rec. 7213.

When Congress amended the Fair Housing Act in 1988, it did not include a disparate impact requirement. To argue that Congress felt no need to include a disparate impact provision in the 1988 amendments because of the *Griggs* decision proves nothing.[5] *Griggs* dealt only with the use of disparate impact in the employment context. Even though appellate courts had recognized the use of disparate impact in the housing context, the lack of Supreme Court precedent on the point indicated to Congress that the issue was not settled, and therefore they would have included a disparate impact provision in the Fair Housing Act if such was their intent.

Furthermore, if the use of disparate impact in the fair housing context is as widely accepted as is claimed, HUD would not have felt the need to issue a rule adopting disparate impact. If there was a statutory basis in the Fair Housing Act, such a rule would have been unnecessary and superfluous. And if HUD and DOJ were confident in the statutory basis and constitutionality of the use of disparate impact in regard to housing, they would not have bent over backwards to engage in a quid pro quo to settle the *Magner v. Gallagher* case, rather than letting the Supreme Court decide the issue.[6]

As a result of HUD's regrettable arrogation of power, the "Affirmatively Furthering Fair Housing" proposed rule is built upon sand. Rather than focusing on incidents of disparate treatment against members of protected classes, the proposed rule transforms people with middle-income levels or below into a protected class based simply on disparate impact.[7] I 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. 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, 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.[8]

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[5] Brief *Amici Curiae* of Current and Former Members of Congress at 3, Mount Holly v. Mount Holly Gardens Citizens in Action (No. 11-1507).

[6] *The Talented Mr. Perez*, THE WALL STREET J., March 21, 2013, *available at* http://online.wsj.com/news/articles/SB10001424127887324281004578356581889324790.

[7] 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.

[8] 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 . . . .

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."[9] I 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 proposed rule contemplates that HUD will provide housing authorities with data on so-called "integration and segregation" of housing patterns and "racially and ethnically concentrated areas of poverty."[10] In order to provide this data, 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,'"[11] 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]."[12]

Not only does HUD intend to track the racial concentration of American neighborhoods, but it expects local housing authorities to engage in racial balancing. The proposed rule states that local housing plans "should be designed to reduce racial and national origin concentrations, including racially or ethnically concentrated areas of poverty, and to reduce segregation and promote integration."[13] This is disparate treatment on the basis of race, which is racial discrimination, plain and simple.

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.[14] 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 own racial or ethnic group. Surely they should have the right to choose to live where and near whom

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[9] Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, at 750 (Thomas, J., concurring) (2007).
[10] Docket No. FR-5173-P-01, "Affirmatively Furthering Fair Housing," § 5.154(c).
[11] *Id.* at 741 [citations omitted].
[12] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).
[13] Docket No. FR-5173-P-01, "Affirmatively Furthering Fair Housing," § 903.2(a)(3).
[14] 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.

they prefer. It is hardly surprising that many people 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. I 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.[15]

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?[16] For that matter, would either the predominantly Hispanic 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.

It is particularly insidious that the proposed rule 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.[17] 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?[18]

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[15]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.").

[16] 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. . . .
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> 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.

[17] I do not intend to suggest that discrimination against whites is permissible.

[18] 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 related activities' including affirmative marketing; tenant selection and assignment policies . . . should be designed to reduce racial and national origin concentrations . . . .").

It is sadly ironic that the proposed rule engages in disparate treatment on the basis of race while attempting to combat disparate impact. Many government entities make this error.[19] It is less expensive and embarrassing to quietly "get your numbers right" than to face public charges of racial discrimination. Nonetheless, disparate treatment on the basis of race is racial discrimination. I 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.[20] I 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.

One last point I would like to make is that disparate impact often winds up harming the very people intended to benefit. For example, my colleague Gail Heriot has written extensively on the problems caused by affirmative action "mismatch" in academia, which is a sort of less formal application of disparate impact theory. Less-prepared students who are admitted to selective institutions of higher learning in the interests of racial balancing often find themselves struggling to keep up with the material, which can negatively affect their future careers.[21] In the employment context, the EEOC has issued new guidance that attempts to discourage the use of criminal background checks in hiring. Why? Because African-American and Hispanic men are more likely to have criminal records than are white and Asian men, so the use of criminal background checks in hiring has a disparate impact on African-American and Hispanic men. Yet serious social science studies have shown that the use of criminal background checks in hiring actually increases the employment of African-American men overall because employers overestimate the number of African-American men with criminal records.[22] When employers can know that that a particular applicant does not have a criminal record, he can hire him without worrying about all the problems that may arise as a result of hiring an ex-criminal. I cannot predict what the consequences will be for the intended beneficiaries of disparate impact in housing, but the track record of using disparate impact as a social engineering tool suggests the consequences will not be good.

Thank you again for asking me to speak today. I look forward to your questions.

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[19] 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.").

[20] *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?").

[21] *See* Gail Heriot, *The Sad Irony of Affirmative Action*, NATIONAL AFFAIRS (Winter 2013), *available at* http://www.nationalaffairs.com/publications/detail/the-sad-irony-of-affirmative-action.

[22] *See* Harry J. Holzer *et al.*, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices* of Employers, 49 J. L. & ECON. 451 (2006).