Press Release

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WLF Urges HUD to Limit Disparate-Impact Liability under Fair Housing Act

(*In re FHA Disparate-Impact Liability*)

> **"The Fair Housing Act prohibits denial of housing *because of* race or other prohibited factors. The Supreme Court held that the FHA provides only limited authorization for 'disparate-impact' claims challenging facially neutral housing policies. HUD is properly revising its regulations to conform with the Court's mandate."**
> —Richard Samp, WLF Chief Counsel

WASHINGTON, DC—Washington Legal Foundation (WLF) on October 18 called on the U.S. Department of Housing and Urban Development (HUD) to impose strict limits on lawsuits seeking to impose liability under the Fair Housing Act (FHA) when no evidence exists the defendant intended to discriminate against members of a protected group. In formal comments filed at HUD's invitation, WLF applauds HUD's proposal to limit potential liability when a plaintiff alleges simply that a defendant's policy or practice has greater impact on a protected group than on the population as a whole (known as "disparate impact" liability).

The FHA proscribes "mak[ing] unavailable or deny[ing] a dwelling to any person because of race, religion, sex, familial status, or national origin." Although Congress adopted the FHA in 1968, it was not until 2015 that the Supreme Court considered whether the statute authorizes disparate-impact claims. The Court's 2015 *Inclusive Communities* decision held that disparate-impact liability is sometimes appropriate, but only under limited circumstances. The Court explained that strict limitations are required "to protect defendants against abusive" claims and to enable regulated entities "to make the practical business choices and profit-related decisions that sustain a vibrant business and dynamic free-enterprise system."

WLF's comments argue that existing HUD regulations, adopted before the 2015 decision, authorize imposition of disparate-impact liability that is far broader than the Court contemplated. WLF particularly applauds HUD's proposal to impose on the plaintiff an initial burden of demonstrating that a challenged policy or practice is "arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective."

WLF also urges HUD to modify its proposed rule governing application of the FHA to insurance companies. WLF notes that Congress has long recognized the primacy of state law over federal law in the regulation of insurance. In light of that primacy, WLF suggest that HUD specify that when state law expressly authorizes a challenged practice, the practice should not be subject to challenge under the FHA—even if the plaintiffs allege that the practice has a disparate impact on protected minority groups.

Celebrating its 42nd year, WLF is America's premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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