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Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410-0500

Re: Comments in Response to HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, HUD Docket No. FR-6111-P-02

To Whom It May Concern:

The National Women's Law Center (the "Center") takes this the opportunity to comment in opposition to the Department of Housing and Urban Development's (HUD) Implementation of the Fair Housing Act's Disparate Impact Standard Proposed Rule (the "Proposed Rule"). In sum, based on the reasons detailed herein, the proposed changes in the Proposed Rule would cause serious harm to low-income women and their families, their communities, and the nation.

The Center fights for gender justice – in the courts, in public policy, and in society – working across the issues that are central to the lives of women and girls. The Center uses the law in all its forms to change culture and drive solutions to the gender inequity that shapes society and to break down the barriers that harm everyone – especially those who face multiple forms of discrimination. For more than 45 years, the Center has been on the leading edge of every major legal and policy victory for women.

Because of the importance of safe and affordable housing to all facets of the lives of women, children, and families and because the existing Disparate Impact Rule is a critical tool in combatting discriminatory housing policies that appear neutral on their face but often have a devastating impact on members of a protected class, the Center strongly opposes the changes in the Proposed Rule. More specifically, the Center will stress in this comment the following:

- Access to safe and affordable housing is vital to the well-being of women and girls. Housing impacts health, education, food security, and employment. Yet the Proposed Rule would jeopardize access to fair housing opportunities.
- The FHA and disparate impact liability are valuable tools in the ongoing struggle to achieve open housing markets for all renters and homeowners, free from discrimination. HUD's existing 2013 Disparate Impact Rule already creates a

rigorous approach for evaluating housing discrimination claims and should be maintained.

- The proposed changes to the Disparate Impact Rule would create substantial and unnecessary additional hurdles for plaintiffs to prove disparate impact discrimination and would unjustly tip the scales in defendants' favor. The Proposed Rule's creation of a complicated and unbalanced framework contradicts the central purpose of the FHA and ignores decades of court precedent and agency interpretation of disparate impact under the FHA. The Proposed Rule also improperly attempts to eliminate the "perpetuation of segregation" theory of disparate impact liability and would improperly exclude suits targeting zoning decisions, which are the heartland of disparate impact liability under the FHA because, among other effects, they perpetuate segregation. Furthermore, the Proposed Rule would take away a key incentive to collect data.
- The Proposed Rule seeks to effectively eliminate core protections from policies and practices that discriminate based on sex, including policies that impact gender-based survivors, female-headed households, and LGBTQ people.
- The Proposed Rule will also impact women and girls who are also protected from discrimination based on other characteristics, including families with children, people of color, national origin, and people with disabilities.
- The Center strongly opposes the Proposed Rule and calls on HUD to withdraw it.

I. Access to safe and affordable housing is vital to the well-being of women and girls.

Access to safe and affordable housing is crucial to good health,¹ nutrition,² education,³ and stable employment.⁴ Where we live is at the very core of our daily lives. The Administration's attempt to dismantle the protections afforded by the tool of disparate impact legal theory to the goal of fair housing is unlawful and contrary to the very purpose of the law in question, the Fair Housing Act (FHA). The Proposed Rule, through the changes contained therein as detailed here, will have devastating impacts across the lives of women, children, and families.

¹ OPPORTUNITY STARTS AT HOME, HEALTH CARE ADVOCATES ARE HOUSING ADVOCATES (Dec. 2018), <https://www.opportunityhome.org/wp-content/uploads/2018/02/Health-Fact-Sheet.pdf>; CTR. FOR OUTCOMES RES. AND ED. AND ENTER. COMMUNITY PARTNERS, INC., HEALTH IN HOUSING: EXPLORING THE INTERSECTION BETWEEN HOUSING AND HEALTH CARE (Feb. 2016), <https://www.enterprisecommunity.org/download?fid=5703&nid=4247>; KATHRYN BAILEY ET AL., CHILDREN'S HEALTHWATCH, OVERCROWDING AND FREQUENT MOVES UNDERMINE CHILDREN'S HEALTH (2011), www.issuelab.org/resources/13900/13900.pdf.

² OPPORTUNITY STARTS AT HOME, ANTI-HUNGER ADVOCATES ARE HOUSING ADVOCATES (Dec. 2018), <https://www.opportunityhome.org/wp-content/uploads/2018/04/Hunger-Fact-Sheet.pdf>

³ OPPORTUNITY STARTS AT HOME, EDUCATION ADVOCATES ARE HOUSING ADVOCATES (Dec. 2018), <https://www.opportunityhome.org/wp-content/uploads/2018/02/Education-Fact-Sheet.pdf>

⁴ OPPORTUNITY STARTS AT HOME, ECONOMIC MOBILITY ADVOCATES ARE HOUSING ADVOCATES (Nov. 2018), <https://www.opportunityhome.org/wp-content/uploads/2018/02/Economic-Mobility-Fact-Sheet.pdf>

A. The Proposed Rule will negatively impact health outcomes for women and their families by limiting access to safe and affordable housing and weakening a critical tool to fighting segregation.

Safe and affordable housing is key to one's health and well-being. If finalized, the Proposed Rule will reduce the tools available to address housing discrimination. This will then decrease access to affordable housing, increase housing instability, encourage housing segregation, and threaten the health and well-being of women and girls.⁵

When women and families are forced to spend the bulk of their income on housing, they have insufficient resources for other essential needs, including food, health insurance, and health care. Having to choose between housing and your health is a devastating proposition. Those with unaffordable housing costs are more likely to skip health care treatments and not fill a prescription as a result of cost.⁶ These tradeoffs are particularly harmful for women who are already more likely to delay needed medical care⁷ and prescriptions⁸ because they can't afford it.⁹

Additionally, housing instability increases stress and related adverse health outcomes. Women with housing instability are more likely to report loss of employment and loss of employer-provided health insurance benefits and have significant disruptions to critical health services, leading to more frequent hospital visits and increased acute episodes of behavioral health conditions.¹⁰ For those who need prescription medication, lack of stable housing can also make proper storage of medications difficult or impossible.¹¹

⁵ LAUREN TAYLOR, HOUSING AND HEALTH: AN OVERVIEW OF THE LITERATURE, HEALTH AFFAIRS (June 7, 2018), <https://www.healthaffairs.org/doi/10.1377/hpb20180313.396577/full/>.

⁶ NABILAH MAQBOOL ET AL., CTR. FOR HOUSING POL'Y, THE IMPACTS OF AFFORDABLE HOUSING ON HEALTH: A RESEARCH SUMMARY (Apr. 2015), <https://www.nhc.org/wp-content/uploads/2017/03/The-Impacts-of-Affordable-Housing-on-Health-A-Research-Summary.pdf>.

⁷ See also MUNIRA Z. GUNJA ET AL., HOW THE AFFORDABLE CARE ACT HAS HELPED WOMEN GAIN INSURANCE AND IMPROVED THEIR ABILITY TO GET HEALTH CARE, COMMONWEALTH FUND (2017), <https://www.commonwealthfund.org/publications/issue-briefs/2017/aug/how-affordable-care-act-has-helped-women-gain-insurance-and> (noting that even though health insurance coverage gains through the Affordable Care Act have reduced the share of women skipping or delaying care because of costs, in 2016, 38% of women age 19 through 64 still reported not getting the health care they needed because of costs).

⁸ HEALTH POL'Y INST., PRESCRIPTION DRUGS (last visited Sept. 18, 2019, 1:45 PM), <https://hpi.georgetown.edu/rxdrugs/>.

⁹ ENTERPRISE, RENTERS REPORT HOUSING COSTS SIGNIFICANTLY IMPACT THEIR HEALTH CARE (Apr. 3, 2019), https://www.enterprisecommunity.org/news-and-events/news-releases/2019-04_renters-report-housing-costs-significantly-impact-their-health-care.

¹⁰ See WILL FISCHER, CTR. ON BUDGET & POL'Y PRIORITIES, RESEARCH SHOWS HOUSING VOUCHERS REDUCE HARDSHIP AND PROVIDE PLATFORM FOR LONG-TERM GAINS AMONG CHILDREN, (October 7, 2015), <https://www.cbpp.org/research/research-shows-housing-vouchers-reduce-hardship-and-provide-platform-for-longterm-gains>; see also LINDA GIANNARELLI ET AL., URBAN INST., REDUCING CHILD POVERTY IN THE US: COSTS AND IMPACTS OF POLICIES PROPOSED BY THE CHILDREN'S DEFENSE FUND (Jan. 2015), <https://www.urban.org/sites/default/files/publication/39141/2000086-Reducing-Child-Poverty-in-the-US.pdf>; MAQBOOL ET AL., *supra* note 6.

¹¹ GIANNARELLI ET AL., *supra* note 10.

Different forms of housing instability, including eviction, also elevate stress levels, depression, and hopelessness.¹² Poor women of color, domestic violence survivors, and women with children face a higher risk of eviction. Women evicted or threatened with eviction from their homes are more likely to experience health problems, like depression, anxiety, and high blood pressure, than people with stable housing.¹³ This exacerbates the heightened risk that women, particularly women of color, have of experiencing depression,¹⁴ anxiety,¹⁵ and high blood pressure.¹⁶

Further, unstable housing is particularly harmful to children's health. Children experiencing housing instability have higher occurrences of mental health problems, developmental delays, poor cognitive outcomes, and depression in their youth and poorer life outcomes as adults.¹⁷ The younger a child is and the longer a child experiences homelessness, the greater the cumulative toll of negative health outcomes.¹⁸ Even children born to women who experienced homelessness while pregnant are more likely to be hospitalized or suffer worse health, compared to their peers.¹⁹

When access to stable and affordable housing is limited, more women are forced to live in highly segregated and/or substandard housing. Housing segregation widens health disparities by determining access to schools, jobs, and health care.²⁰ Researchers have found that the availability of resources—such as public transportation to one's

¹² *Id.*

¹³ ALISON BOVELL & MEGAN SANDEL, CHILDREN'S HEALTH WATCH, THE HIDDEN HEALTH CRISIS OF EVICTION (Oct. 5, 2018), <http://childrenshealthwatch.org/the-hidden-health-crisis-of-eviction/>.

¹⁴ PAUL R. ALBERT, WHY IS DEPRESSION MORE PREVALENT IN WOMEN?, 40 J. PSYCHIATRY NEUROSCI. 219-221 (Jul. 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4478054/> (noting the higher prevalence of major depression in women than in men). More women seek treatment for depression than men, though white, non-Hispanic women are more likely to receive treatment for depression than Latinx and Black women. NAT'L INSTS. OF HEALTH, OFFICE OF RES. ON WOMEN'S HEALTH, WOMEN OF COLOR HEALTH DATA BOOK 147 (Oct. 2014), <https://orwh.od.nih.gov/sites/orwh/files/docs/WoC-Databook-FINAL.pdf>.

¹⁵ CARMEN P. MCLEAN ET AL., GENDER DIFFERENCES IN ANXIETY DISORDERS: PREVALENCE, COURSE OF ILLNESS, COMORBIDITY AND BURDEN OF ILLNESS, 45 J. PSYCHIATRIC RES. 1027-1035 (2011); NAT'L INST. OF MENTAL HEALTH, ANY ANXIETY DISORDER, <https://www.nimh.nih.gov/health/statistics/any-anxiety-disorder.shtml> (last updated Nov. 2017); U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE ON WOMEN'S HEALTH, ANXIETY DISORDER, <https://www.womenshealth.gov/mental-health/mental-health-conditions/anxiety-disorders> (last updated Jan. 30, 2019) (noting that more American Indian/Alaskan Native women have generalized anxiety disorder than women of other races and ethnicities).

¹⁶ NAT'L INSTS. OF HEALTH, OFFICE OF RES. ON WOMEN'S HEALTH, WOMEN OF COLOR HEALTH DATA BOOK 121 (Oct. 2014), <https://orwh.od.nih.gov/sites/orwh/files/docs/WoC-Databook-FINAL.pdf> (noting that Black women experience high blood pressure at a higher rate than Latinx or white, non-Hispanic women).

¹⁷ HEATHER SANDSTROM & SANDRA HUERTA, THE NEGATIVE EFFECTS OF INSTABILITY ON CHILD DEVELOPMENT: A RESEARCH SYNTHESIS, URBAN INST. (Sept. 2013), <https://www.urban.org/sites/default/files/publication/32706/412899-The-Negative-Effects-of-Instability-on-Child-Development-A-Research-Synthesis.PDF>; see also GIANNARELLI ET AL., *supra* note 10.

¹⁸ MEGAN SANDEL ET AL., COMPOUNDING STRESS: THE TIMING AND DURATION EFFECTS OF HOMELESSNESS ON CHILDREN'S HEALTH, NAT'L HOUSING CONFERENCE & CTR. FOR HOUSING POL'Y, (June 2015), <https://www.issuelab.org/resources/21731/21731.pdf>.

¹⁹ TAYLOR, *supra* note 5.

²⁰ CHIQUITA COLLINS & DAVID R. WILLIAMS, RACIAL RESIDENTIAL SEGREGATION: A FUNDAMENTAL CAUSE OF RACIAL DISPARITIES IN HEALTH, PUBLIC HEALTH REPORTS 116 (Sept. - Oct. 2001), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1497358/pdf/12042604.pdf>.

job,²¹ grocery stores with nutritious foods,²² and safe spaces to exercise²³—are all correlated with improved health outcomes. In contrast, living in an economically disadvantaged, racially isolated neighborhood correlates with a shorter life, higher levels of overall mortality, premature mortality, infant mortality preterm birth, and low birth weight.²⁴

Substandard housing conditions also pose a variety of health risks to women and girls. Water leaks, poor ventilation, dirty carpets, and pest infestation are associated with poor health outcomes, most notably those related to asthma.²⁵ In-home exposure to lead can irreversibly damage the brains and nervous systems of children.²⁶

Additionally, exposure to high or low temperatures can lead to adverse health events, including cardiovascular events.²⁷ Women and families with few financial resources are most likely to experience unhealthy housing and are typically least able to remedy them, contributing to disparities in health across socioeconomic groups.²⁸

Gutting protections afforded by disparate impact takes away a necessary mechanism to address racial segregation and barriers to safe and stable housing, which will exacerbate already staggering health disparities of women and harm the health of women and girls. Protecting disparate impact is critical for ensuring that everyone has a good place to live and be healthy.

²¹ SUNE DJURHUUS ET AL., THE ASSOCIATION BETWEEN ACCESS TO PUBLIC TRANSPORTATION AND SELF-REPORTED ACTIVE COMMUTING, 11 INT. J. ENVIRON. RES. PUBLIC HEALTH 12632 (Dec. 2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4276637/>.

²² JUDITH BELL ET AL., POLICYLINK, ACCESS TO HEALTHY FOOD AND WHY IT MATTERS: A REVIEW OF THE RESEARCH (2013), http://thefoodtrust.org/uploads/media_items/access-to-healthy-food.original.pdf.

²³ JUDY Y. OU ET AL., A WALK IN THE PARK: THE INFLUENCE OF URBAN PARKS AND COMMUNITY VIOLENCE ON PHYSICAL ACTIVITY IN CHELSEA, MA, 13 INT. J. ENVIRON. RES. PUBLIC HEALTH 97 (Jan. 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4730488/>.

²⁴ Living in an economically disadvantaged, racially isolated neighborhood is predictive of a shorter life, particularly for Black residents. Researchers have found racial isolation to be associated with host of health risks for Black residents, including higher levels of overall mortality, premature mortality, infant mortality, along with a range of other poor health outcomes such as preterm birth, and low birth weight. MARIANA C. ARCAYA & ALINA SCHNAKE-MAH, HEALTH IN THE SEGREGATED CITY, NYU FURMAN CENTER, (Oct. 2017), <https://furmancenter.org/research/iri/essay/health-in-the-segregated-city>.

²⁵ HOUSING AND HEALTH, EXPLORING THE SOCIAL DETERMINANTS OF HEALTH, 2 (May 2011), https://www.rwjf.org/content/dam/farm/reports/issue_briefs/2011/rwjf70451.

²⁶ WORLD HEALTH ORG., LEAD POISONING AND HEALTH (Aug. 23, 2018), <http://www.who.int/mediacentre/factsheets/fs379/en/>.

²⁷ K. OBAYASHI ET AL., SHORT-TERM EFFECTS OF INSTRUCTION IN HOME HEATING ON INDOOR TEMPERATURE AND BLOOD PRESSURE IN ELDERLY PEOPLE: A RANDOMIZED CONTROLLED TRIAL, J. HYPERTENS. (Nov. 2013), <https://www.ncbi.nlm.nih.gov/pubmed/26372318>; S. OETELT-PRIGIONE ET AL., GENDER IN CARDIOVASCULAR DISEASES: IMPACT ON CLINICAL MANIFESTATIONS, MANAGEMENT, AND OUTCOMES. EUR. HEART J. (Nov. 3, 2015), <https://www.acc.org/latest-in-cardiology/ten-points-to-remember/2015/11/19/23/53/gender-in-cardiovascular-diseases> (noting that although rates of hypertension are lower among young women compared to young men, rates are higher in women and the elderly).

²⁸ P. BRAVEMAN ET AL., HOW DOES HOUSING AFFECT HEALTH?, ROBERT WOOD JOHNSON FOUNDATION (May 1, 2011), <https://www.rwjf.org/en/library/research/2011/05/housing-and-health.html>.

B. The Proposed Rule will negatively impact educational opportunities for women and girls by limiting access to safe and affordable housing and weakening a critical tool to fighting segregation.

Because of the Center's focus on education for women and girls, the Center understands that access to fair housing opportunities and educational equity are deeply intertwined. The current Disparate Impact Rule strengthens our communities and nation by allowing victims of all types of systemic discrimination to seek recourse and change policies and practices that limit their housing opportunities.

First, housing instability has negative impacts on education. Children who experience housing instability are more likely to have behavioral problems and struggle in school.²⁹ Being homeless is a traumatic experience that manifests in many ways in the classroom—including ways that are coded as disruptive and can trigger a punitive response from educators. As such, housing instability contributes to high suspension rates, school turnover, truancy, and expulsions.³⁰ Homelessness is associated with an 87% greater likelihood of a child being pushed out of school.³¹ In addition, housing instability directly correlates to decreases in academic achievement and retention.³² Conversely, educational attainment is linked to positive health outcomes and longer lives.³³ Access to housing, therefore, is critical to ensuring the future success and wellbeing of all students—including young women and girls— throughout the country.

In addition, disparate impact liability provides a remedy to address the long-standing discrimination in housing policies and practices that have created segregated neighborhoods and, by extension, segregated schools. Residential segregation persists through factors including the denial of mortgage loans on fair and equal terms to applicants of color, unfair zoning restrictions, discrimination in accepting tenants, and other policies that have a disparate impact on communities of color. The neighborhoods in which children live typically determine the schools they attend, and the more racially segregated our neighborhoods, the more racially segregated our schools. Segregated neighborhoods isolate communities of color in environments that are often poorly resourced and economically disadvantaged. These disparities are mirrored in our schools, resulting in disparate educational opportunity and outcomes for students of color.

²⁹ ABIGAIL L. GAYLORD ET AL., HOUSING INSTABILITY IS LINKED TO ADVERSE CHILDHOOD BEHAVIOR, HOW HOUSING MATTERS (May 9, 2019), <https://howhousingmatters.org/articles/housing-instability-linked-adverse-childhood-behavior/>.

³⁰ See MAI ABDUL RAHMAN, THE DEMOGRAPHIC PROFILE OF BLACK HOMELESS HIGH SCHOOL STUDENTS RESIDING IN THE DISTRICT OF COLUMBIA SHELTERS AND THE FACTORS THAT INFLUENCE THEIR EDUCATION, at 55 (Mar. 2014) (Ph.D. dissertation, Howard University), *available at* <https://pqdtopen.proquest.com/doc/1620832476.html?FMT=ABS> (citations omitted).

³¹ ERIN S. INGRAM ET AL., CIVIC ENTERPRISES & HART RES. ASSOCS., HIDDEN IN PLAIN SIGHT: HOMELESS STUDENTS IN AMERICA'S PUBLIC SCHOOLS (2016), <http://www.americaspromise.org/report/hidden-plainsight>.

³² See RAHMAN, *supra* note 30.

³³ S. EGERTER ET AL., ROBERT WOOD JOHNSON FOUND., AN EXAMINATION OF THE MANY WAYS IN WHICH EDUCATION CAN INFLUENCE HEALTH, INCLUDING HOW EDUCATIONAL ATTAINMENT AFFECTS HEALTH ACROSS GENERATIONS AND THE SOCIAL AND ECONOMIC ADVANTAGES IT REPRESENTS (Apr. 1, 2011), <https://www.rwjf.org/en/library/research/2011/05/education-matters-for-health.html>.

In addition to school segregation, allowing for the continued concentration of poverty in communities limits the resources available to schools. Because of the decentralized nature of education funding, and the reliance on local property taxes, low-wealth communities are less able to provide sufficient funding for their schools, even when tax rates are high. Removing a critical tool for deconcentrating poverty would mean fewer schools have the resources they need.

Lastly, the Center is also deeply concerned about the effort to undermine disparate impact more broadly. Achieving educational equity rests upon the ability to dismantle systems that create and maintain race-based barriers to achievement and wealth. Discrimination in education is particularly nefarious and can take many forms, such as unequal enforcement of school discipline policies, as well as a dearth of qualified or experienced teachers, advanced courses, or other educational resources that prepare students for college, career, and life. Often this discrimination is advanced through facially neutral policies with disparate and unjustified effects. Without the tool of disparate impact liability, ostensibly neutral policies cannot effectively be challenged and barriers to opportunity, both in housing and education, will not only remain, but may get worse—directly contradicting the goals of our nation’s civil rights laws.

For these reasons, and more listed throughout this comment, HUD should withdraw this Proposed Rule and instead focus on robustly enforcing the FHA within housing markets using the standards established by the existing Disparate Impact Rule so everyone has a good place to live and students have equal access to quality education.

C. The Proposed Rule will negatively impact nutrition for women and girls by jeopardizing access to safe and affordable housing.

When low-income families spend high portions of their income on their rent, they struggle to pay for nutritious food. Indeed, food insecurity increases with housing costs.³⁴ One study shows that low-income households with children that pay over half of their monthly income on rent spend considerably less on other basic necessities, including about \$200 less per month on food.³⁵ In 2017, about 14% of women living alone and over 30% of families with children headed by a single woman faced food insecurity.³⁶

³⁴ JASON M. FLETCHER, TATIANA ANDREYEVA & SUSAN H. BUSCH, ASSESSING THE EFFECT OF INCREASING HOUSING COSTS ON FOOD INSECURITY (Sept. 9, 2009), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1503043.

³⁵ JOINT CTR. FOR HOUSING STUDIES OF HARVARD U., THE STATE OF THE NATION’S HOUSING 2018, at 30, 32 (2018), *available at* http://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2018.pdf.

³⁶ ALISHA COLEMAN-JENSEN ET AL., U.S. DEP’T OF AGRIC., HOUSEHOLD FOOD INSECURITY IN THE UNITED STATES IN 2017, at 13 (Sept. 2018), *available at* <https://www.ers.usda.gov/webdocs/publications/90023/err-256.pdf?v=0>. The U.S. Department of Agriculture defines food insecurity as a “lack of consistent access to enough food for an active, healthy life.” ECON. RES. SERV., U.S. DEP’T OF AGRIC., DEFINITIONS OF FOOD SECURITY (2018), *available at* <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/definitions-of-food-security.aspx>.

D. The Proposed Rule may affect employment outcomes for women by jeopardizing access to safe and affordable housing.

The Center also understands that housing instability negatively impacts employment outcomes.

As an example, eviction and involuntary displacement due to unjust housing policies often inhibit one's ability to be present during scheduled work hours and may lead to job loss and prolonged unemployment.³⁷ This is especially true for low-wage workers, who are less likely to have access to important support systems like paid leave or predictable or flexible work schedules,³⁸ and are disproportionately women.³⁹ The eviction process is usually long, unpredictable, and arduous, and can span multiple weeks with many court appearances, necessitating multiple and unpredictable absences from work. Additional barriers arise if someone is evicted. The search for a new safe and affordable home can already be a lengthy process, and tenants with an eviction record on their rental history often have a harder time finding a new landlord who will rent to them. Consequently, a tenant's housing opportunities are often limited to inconvenient or even unsafe areas, resulting in workplace tardiness or absenteeism.

Furthermore, housing instability more broadly and related economic insecurity can make it harder for individuals to obtain or maintain a job due to prior eviction records, poor credit, and inconsistent employment history. Predatory lending and other discriminatory housing policies and practices may result in tarnished credit or rental histories, which can later serve as a barrier for individuals seeking employment. Credit and background checks are increasingly common in employment, and they can effectively bar individuals from job opportunities. According to one report, 25% of unemployed respondents said that a potential employer requested a credit check on the job application.⁴⁰ Consequently, 10% of unemployed respondents were notified they would not be hired due to information in their credit report.⁴¹ Housing instability, compounded by barriers to securing stable employment, often serves to aggravate and reproduce conditions of poverty for low-income families and individuals. Thus, access to safe and stable housing is critical to advancing women's employment and economic security.

³⁷ MATTHEW DESMOND & CARL GERSHENSON, *HOUSING AND EMPLOYMENT INSECURITY AMONG THE WORKING POOR*, 2016 SOCIAL PROBLEMS ADVANCE ACCESS 0, 1-22, <https://scholar.harvard.edu/files/mdesmond/files/desmondgershenson.sp2016.pdf?m=1452638824>.

³⁸ JULIE VOGTMAN & KAREN SCHULMAN, SET UP TO FAIL: WHEN LOW-WAGE WORK JEOPARDIZES PARENTS' AND CHILDREN'S SUCCESS (2016), <https://nwlc.org/wp-content/uploads/2016/01/FINAL-Set-Up-To-Fail-When-Low-Wage-Work-Jeopardizes-Parents%E2%80%99-and-Children%E2%80%99s-Success.pdf>

³⁹ Women make up 65% of workers in the 40 lowest-paying jobs, typically paying less than \$12 per hour. NAT'L WOMEN'S LAW CTR. calculations based on U.S. CENSUS BUREAU, 2017 AMERICAN COMMUNITY SURVEY using Steven Ruggles et al., IPUMS USA: Version 9.0 [dataset] (Minneapolis, 2019), available at <https://ipums.org/>.

⁴⁰ AMY TRAUB, DISCREDITED: HOW EMPLOYMENT CREDIT CHECKS KEEP QUALIFIED WORKERS OUT OF A JOB, DEMOS (Feb. 3, 2014), <https://www.demos.org/research/discredited-how-employment-credit-checks-keep-qualified-workers-out-job#Conclusion:-Employment-credit-checks-illegitimately-obstruct-access-to-jobs>.

⁴¹ *Id.*

II. The current Disparate Impact Rule is a critical tool to address housing discrimination and helps to ensure safe and affordable housing opportunities for women and other protected classes.

For more than 40 years, disparate impact under the FHA has been used to combat housing discrimination that takes the form of policies that keep people from accessing safe and affordable housing. Every year, more than 4 million instances of discrimination impact people's ability to access affordable and accessible housing, whether it's through renting or owning a home.⁴² Discriminatory policies and practices make it harder for women in general and particularly women of color, LGBTQ women, survivors of domestic violence or sexual assault, women with disabilities, and mothers with children to obtain or maintain housing.

A. The FHA and disparate impact liability are valuable tools in the ongoing struggle to achieve open housing markets for all renters and homeowners, free from discrimination.

As the Supreme Court recognized in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, the FHA "was enacted to eradicate discriminatory practices within a sector of our Nation's economy."⁴³ Our nation has a shared interest in ensuring that housing opportunities are available to every individual, regardless of who they are.

Passed in 1968, seven days after Dr. Martin Luther King, Jr. was assassinated, the FHA prohibits discrimination in housing and housing-related services on the basis of race, color, national origin, religion, sex, familial status, and disability. The FHA makes it U.S. policy to support developing and maintaining diverse, inclusive, neighborhoods where every person has access to the community assets necessary to flourish. Fulfilling the promises of the FHA for every person in the United States is a central component of HUD's mission and national policy.

The Nixon administration first utilized disparate impact liability under the FHA to ensure equal housing opportunity. Since that time, every circuit court addressing the issue upheld this method for proving discrimination.

HUD's 2013 disparate impact rule reflected the agency's expertise and laid out a reasonable balancing test that incorporated the longstanding approach to disparate impact analysis reflected in case law. This standard balances the rights and needs of communities disproportionately affected by housing discrimination with businesses,

⁴² NAT'L FAIR HOUSING ALLIANCE, THE CASE FOR FAIR HOUSING: 2017 FAIR HOUSING TRENDS REPORT 77 (2017), available at <https://nationalfairhousing.org/wp-content/uploads/2017/04/TRENDS-REPORT-4-19-17-FINAL-2.pdf> (hereinafter "THE CASE FOR FAIR HOUSING"). For a discussion about why the number of complaints filed is drastically lower than the number of individuals who believe they experienced discrimination, see U.S. DEP'T OF HOUS. & URBAN DEV., THE STATE OF FAIR HOUSING: FY2006 ANNUAL REPORT ON FAIR HOUSING 7-8 (Mar. 29, 2007), available at https://www.hud.gov/sites/documents/DOC_14775.PDF.

⁴³ *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2521 (2015).

developers, and governments. Under the current standard, if an entity is using a policy or practice that has a discriminatory effect, even if they have a legitimate basis for it, and there are less harmful alternative policies or practices that achieve their legitimate nondiscriminatory interest, the entity will need to cease the discriminatory policy or practice.

Ratifying disparate impact in housing liability, Justice Anthony Kennedy wrote, “Much progress remains to be made in our Nation’s continuing struggle against racial isolation. ...The Court acknowledges the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.”⁴⁴ HUD’s current Disparate Impact Rule serves as a valuable tool for victims of housing discrimination, communities, fair housing practitioners, and the housing industry in the ongoing struggle to achieve open housing markets for all renters and owners, free from discrimination.

The current Disparate Impact Rule works to protect against discriminatory impacts on women, LGBTQ people, mothers, women of color, women with disabilities, and more. An important part of this function is to combat implicit bias. In *Inclusive Communities*, the Supreme Court acknowledged that disparate impact theory can be used to root out implicit bias:

Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.⁴⁵

As the Court recognized, not all discrimination is intentional and obvious. While discrimination resulting from implicit bias is discrimination nonetheless, it can be difficult to detect and combat without disparate impact theory. Since disparate impact is critical to combatting implicit bias, this legal tool should be protected, not weakened.

B. HUD’s existing 2013 Disparate Impact Rule already creates a rigorous approach for evaluating housing discrimination claims and should be maintained.

The current Disparate Impact Rule establishes a three-part process for courts to use when analyzing disparate impact claims under the FHA. First, plaintiffs name the policy or practice that is harmful, then defendants have an opportunity to justify these policies or practices. Then plaintiffs can provide other ways that those same interests can be met by a less discriminatory alternative. This approach follows a similar burden-shifting approach in civil rights laws in other contexts, including federal employment law. This approach allows plaintiffs to challenge practices that may appear neutral but are very harmful to particular protected classes of people. This approach also allows defendants

⁴⁴ *Id.* at 2525–26.

⁴⁵ *Id.* at 2522.

the opportunity to justify such policies or practices before courts arrive at a final determination of the claim.

In the first part of the standard under the current Disparate Impact Rule, “[t]he charging party or the plaintiff has the burden of proving that a challenged practice caused, or predictably will cause, a discriminatory effect.” Under this approach, the definition of “discriminatory effect” is appropriately case-specific. Because there are wide varieties of policies and practices challenged, the Rule and federal jurisprudence have appropriately rejected any potential single test to define “discriminatory effect” through evaluating statistical evidence in housing cases.⁴⁶ Additionally, under the current Rule, a plaintiff’s showing of outside statistical evidence of disproportionate effects alone would be insufficient to establish liability. Furthermore, this first part has been interpreted by courts to contain a “robust causality” requirement that HUD inaccurately implies in the Proposed Rule is missing. Plaintiffs already are required to make a robust showing of causality by demonstrating that the challenged policy or practice caused the harm at issue or predictably will cause harm to the protected groups.

The second part of the analysis allows defendants the opportunity to demonstrate that a valid interest is served by the challenged policy or practice. The current Rule appropriately gives defendants the burden of persuasion regarding the valid interest – consistent with burden-shifting standards followed by other civil rights laws. This requirement is reflective of a balanced approach, and a bare assertion of a valid interest would be insufficient to rebut a claim of discrimination.

Finally, even if defendants can establish that the challenged policy serves a valid interest, plaintiffs can then present alternative policies that further the same interest(s) with less discriminatory impacts. This prong advances the FHA’s goal of eliminating discrimination in housing by encouraging housing providers to adopt practices that have a less discriminatory impact on protected classes.⁴⁷ In doing so, plaintiffs must show that the challenged practices are thus “arbitrary, artificial, and unnecessary.”⁴⁸

The Supreme Court in *Inclusive Communities* ratified the current Disparate Impact Rule’s burden-shifting framework and situated it in a well-established legal framework comparable to other federal civil rights laws, including Title VII. Accordingly, HUD should maintain the current Rule and withdraw its unreasonable Proposed Rule that creates additional and unnecessary barriers to plaintiffs bringing housing disparate impact claims.

⁴⁶ See, e.g., *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, 658 F.3d 375, 382 (3d Cir. 2011); *Bonasera v. City of Norcross*, 342 F. App’x. 581, 585 (11th Cir. 2009); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 50 (1st Cir. 2000).

⁴⁷ STEPHEN M. DANE, THE POTENTIAL IMPACT OF TEXAS DEPARTMENT OF HOUSING AND OF COMMUNITY AFFAIRS V. INCLUSIVE COMMUNITIES PROJECT ON FUTURE CIVIL RIGHTS ENFORCEMENT AND COMPLIANCE, 63 THE FEDERAL LAWYER 38 (July 2016), available at <https://www.relmanlaw.com/assets/html/documents/The-Potential-Impact-of-emTexas-Department-on-Housing-and-Community-Affairs-v-Inclusive-Commun.pdf>.

⁴⁸ *Inclusive Communities*, 135 S.Ct. at 2522 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

III. The proposed changes to the Disparate Impact Rule would create substantial and unnecessary additional hurdles for plaintiffs to prove disparate impact discrimination and would unjustly tip the scales in defendants' favor.

The standards articulated in the current Rule, which the Supreme Court adopted in its decision in *Inclusive Communities*, provide an appropriate and reasonable framework for analyzing disparate impact claims. The changes proposed by HUD, however, are unnecessary and would make it easier to discriminate against protected classes.

These proposed changes are contrary to the purpose of the FHA and, in practice, would only allow intentional discrimination claims to survive. This is directly counter to *Inclusive Communities*, which held that disparate impact claims are cognizable under the FHA and recognized that “disparate-impact liability under the FHA...plays a role in uncovering discriminatory intent [by] permit[ting] plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.”⁴⁹

A. The Proposed Rule seeks to create a complicated framework that unreasonably favors defendants and imposes extreme burdens on plaintiffs.

The Proposed Rule creates additional burdens on plaintiffs bringing Disparate Impact claims by:

- Expanding the first part of the current test into five elements that plaintiffs would need to meet in order to establish a prima facie case, therefore placing more burdens on plaintiffs;
- Permitting two new categories of defenses for defendants; and
- Making it more difficult for plaintiffs to demonstrate that less discriminatory alternative practices or policies exist.

1. The Proposed Rule unjustly and unreasonably proposes additional requirements on the plaintiff in the first instance.

The Proposed Rule expands the current Rule’s first prong, under which a plaintiff establishes a prima facie case of disparate impact, into a burdensome five-element test as outlined below.

Proposed Element 1

The first element of the Proposed Rule would require the plaintiff, in addition to presenting the discriminatory policy or practice, to also show that the defendant’s practice is “arbitrary, artificial, and unnecessary to achieve a legitimate objective or valid

⁴⁹ *Id.* (emphasis added).

interest.”⁵⁰ Only if plaintiffs allege adequate facts to support this first element would the defendant then, under this Proposed Rule, “have the burden to identify a valid interest or interests that the challenged policy or practice serves, which may then be rebutted by the plaintiff.”⁵¹

HUD’s Proposed Rule would thus force people facing discriminatory impacts themselves to bear the burden of showing that an insurance company, big bank, landlord, or other business’s policy does not further *any* valid, obvious interest. And, in requiring plaintiffs to put forth rebuttals to anticipated defenses, HUD does not define “obvious legitimate objective” or “facially legitimate objective” to give plaintiffs guidance on what would be required to meet this element’s requirements. This proposed element is unreasonable for a number of reasons.

The current Disparate Impact Rule *already* allows defendants the opportunity to defend their practices or policies by proving that they have a valid business justification or serve public policy purposes. It is only sensible to ask the entity that created the policy to defend it – and to not ask the plaintiff to anticipate and defend any possible defenses to the harmful practices.

As reimagined by the Proposed Rule, the first element would turn civil rights claims on their heads. In typical civil rights discrimination cases, the burden is on the *defendant* to produce a valid justification for harmful practices. Then, in the context of disparate impact cases, the plaintiff must show that the business justification can be served by another policy or practice that has a less discriminatory effect. To place the burden of discussing potentially valid interests *first on the plaintiff* is an unreasonable interpretation of any nondiscrimination statute and is contrary to decades of caselaw and agency interpretation.

Further, this backwards approach is not supported by the Supreme Court’s decision in *Inclusive Communities*. The U.S. Supreme Court did not require plaintiffs, the ones bringing civil rights claims, to have to anticipate myriad defenses and also rebut them, in order to establish a prima facie case for FHA disparate impact claims. Rather, the Court clearly stated that “disparate-impact liability is properly limited” by giving *defendants* “leeway to state and explain the valid interest served by their policies.”⁵² Defendants already have this opportunity under the current Rule, as outlined above.

Proposed Element 2

The Proposed Rule’s second element would require “a plaintiff to allege a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class.”⁵³

⁵⁰ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42854, 42858 (proposed Aug. 19, 2019) (to be codified at 24 C.F.R. pt. 100).

⁵¹ *Id.*

⁵² *Inclusive Communities*, 135 S. Ct. at 2522 (noting that “the Title VII framework may not transfer exactly to the fair-housing context, but the comparison suffices for present purposes”).

⁵³ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. at 42858.

The current Rule already contains a sufficient and clear causation requirement as part of the first prong: the plaintiff must prove that the “challenged practice caused, or predictably will cause, a discriminatory effect.” The Supreme Court in *Inclusive Communities* construed this to mean that the plaintiff must “allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection.”⁵⁴ The Court in *Inclusive Communities* specifically characterized the causation requirement of the existing Rule as a “robust causality requirement.” The Supreme Court’s concern that courts carefully examine whether plaintiffs make out a prima facie case of disparate impact stemmed from the District Court below solely relying on statistical evidence in holding that the plaintiff had made out a prima facie case. The District Court in *Inclusive Communities* thus failed to engage in any causation analysis. The Supreme Court was not critiquing the causation requirement under the current Rule—only emphasizing the importance of courts actually applying it. Consequently, there is no need for clarification of the causation standard as set forth in the current Rule and analyzed and endorsed by the Supreme Court in *Inclusive Communities*.

In addition, the Supreme Court never used the term “robust causal link” in *Inclusive Communities*. In *Inclusive Communities*, the word “robust” modifies the word “requirement.” It emphasizes that courts must take this requirement seriously and analyze whether plaintiffs have alleged facts demonstrating a causal connection. HUD’s Proposed Rule, in contrast, seems to imply that the “causal link” is what must be “robust.” This suggests a stronger causal link than “causal connection” and therefore conflicts with the standard the Supreme Court set in *Inclusive Communities*.

Furthermore, this proposed element makes the robust causality requirement less clear because the language is ambiguous. HUD does not explicitly define the term “robust causal link.” But to the extent that HUD’s language in the Proposed Rule regarding claims that rely on statistical disparities indicates that by “robust causal link,” HUD means that plaintiffs must show that the specific housing practice at issue is the *actual cause* of the discriminatory effect, it is inconsistent with caselaw.

The Proposed Rule states that: “Claims relying on statistical disparities must articulate how the statistical analysis used supports a claim of disparate impact by providing an appropriate comparison that shows that the policy is the *actual cause* of the disparity.”⁵⁵ In proposing this standard, HUD cites to *Wards Cove*. The first reason this is problematic is because *Wards Cove* is a Title VII disparate impact case, and many courts and even the Supreme Court noted that “the Title VII framework may not transfer exactly to the fair-housing context.”⁵⁶ The bigger issue is that nowhere in *Wards Cove* or *Inclusive Communities* did the Supreme Court employ the term “actual cause.” It is therefore unreasonable for HUD to change the standard from the “causal connection” the Supreme Court required to “actual cause.”

Even if we were to compare FHA disparate impact causation to the Supreme Court’s decision in *Wards Cove*, the Court’s decision in that case does not support interpreting

⁵⁴ *Inclusive Communities*, 135 S. Ct. at 2523.

⁵⁵ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. at 42858.

⁵⁶ *Inclusive Communities*, 135 S. Ct. at 2522.

“causal connection” to mean “actual cause.” In *Wards Cove*, the Court found that plaintiffs failed to meet the causation requirement because they pointed only to the racial imbalance present in the locality, not to a barrier or practice that “deter[ed] qualified nonwhites from applying.”⁵⁷ Because the Court in *Wards Cove* did not have to reach the question of causation in its analysis, this case does not provide a basis for changing the “causal connection” standard (especially in the context of the FHA).

In addition, if HUD’s “actual cause” standard is imposed, it will be difficult – if not impossible – to challenge perpetuation of segregation. As the Court’s decision in *Inclusive Communities* made eminently clear, plaintiffs may, for example, show that a policy is causally connected to a disproportionate disadvantage for a protected class in the context of existing disparities or segregation. Under *Inclusive Communities*, a plaintiff need only show that the policy or practice used by the defendant in question *is causally connected to* segregation (by continuing it or making it worse). Thus, a plaintiff does not need to show that the challenged policy “actually caused” the segregation in the first place. HUD’s proposed language, then, would subvert the clear holding of *Inclusive Communities*.

For all these reasons, to the extent that Element 2 of the Proposed Rule requires plaintiffs to demonstrate a “robust causal link” to establish a prima facie case, and language elsewhere in the Proposed Rule suggests that HUD defines “robust causal link” to mean that the plaintiff must prove that the “policy is the *actual cause* of the disparity,” this element is both unnecessary and contrary to existing caselaw. Rather, the causation standard in the first part of the current Rule – that the plaintiff must prove that the challenged policy or practice has a causal connection to the disparity – is clear, robust, and should be maintained.

Proposed Element 3

The Proposed Rule’s “third proposed element would require a plaintiff to allege that the challenged policy or practice has an adverse effect *on members of a protected class*.”⁵⁸

Under the existing Rule, plaintiffs must already show that the challenged policy or practice harms a group of individuals in a protected class. The current Rule makes clear that plaintiffs’ claims must be regarding policies or practices that increase, reinforce, or perpetuate segregated housing patterns on the basis of “race, color, religion, sex, handicap, familial status, or national origin.” Thus, the proposed element does nothing to clarify the existing requirements in the first prong of the current Rule, but could instead create unnecessary confusion by restating the existing requirement.

Proposed Element 4

The Proposed Rule’s fourth element “would require a plaintiff to allege that the disparity caused by the policy or practice is *significant*. Where a disparity exists but is not

⁵⁷ *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 653 (1989).

⁵⁸ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. at 42858.

material, a plaintiff will not have stated a plausible disparate impact claim.”⁵⁹ This is problematic in at least two respects.

First, it seemingly conflates two distinct concepts— “significance” and “materiality.” In disparate impact cases, significance is mostly used in relation to whether the disparity is statistically significant. This differs from materiality, which is how much the disparity matters.

Second, HUD does not provide a definition of “significant” or “material” to give plaintiffs guidance on what they must plead and prove to meet this element, which as previously stated, touches on different concepts. HUD should withdraw consideration of this new vague and unreasonable element and maintain the current Rule, which provides that “[t]he charging party or the plaintiff has the burden of proving that a challenged practice caused, or predictably will cause, a discriminatory effect.” The current Rule and federal jurisprudence have appropriately made the definition of “discriminatory effect” case-specific because of the wide varieties of policies and practices challenged, the Rule and federal jurisprudence have appropriately rejected any potential single test to define “discriminatory effect” through evaluating statistical evidence in housing cases.⁶⁰ HUD should do likewise and withdraw consideration of this new vague and unreasonable element in a plaintiff’s prima facie disparate impact FHA case.

Proposed Element 5

The fifth proposed element “would require a plaintiff to allege that the complaining party’s *alleged injury is directly caused* by the challenge[d] policy or practice.”⁶¹ The Proposed Rule states that “[t]his element seeks to codify the proximate cause requirement under the Fair Housing Act that there be ‘some direct relation between the injury asserted and the injurious conduct alleged.’”⁶²

However, rather than codify the proximate cause requirement (which was set forth by the Supreme Court in *Bank of Am. Corp. v. City of Miami*), the language in the proposed element seeks to redefine it. On its face, “directly cause” is a more demanding proximate causation standard than “[have] some direct relation between” the challenged practice and the alleged injury. Indeed, HUD’s Proposed Rule is an unreasonable interpretation of the proximate causation requirement in an FHA case and runs counter to the Supreme Court’s interpretation in *City of Miami* as well as the Eleventh Circuit’s in the same case on remand.

Courts have found that common law requires plaintiffs to establish proximate cause to recover damages for violating the FHA, analogizing a claim for damages under the FHA to a “tort action.”⁶³ In analyzing proximate cause requirements in statutory tort cases,

⁵⁹ *Id.*

⁶⁰ See, e.g., *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, 658 F.3d 375, 382 (3d Cir. 2011); *Bonasera v. City of Norcross*, 342 F. App’x. 581, 585 (11th Cir. 2009); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 50 (1st Cir. 2000).

⁶¹ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. at 42859.

⁶² *Id.* (citing *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017)).

⁶³ *Meyer v. Holley*, 537 U.S. 280, 284 (2003).

courts determine “whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits.”⁶⁴ The Supreme Court in *City of Miami* held that the proximate cause standard for awarding damages under the FHA requires “some direct relation between the injury asserted and the injurious conduct alleged.”⁶⁵

The “direct relation” standard articulated by the Supreme Court in *City of Miami* aligns with caselaw, in which courts must draw the line on proximate causation in a manner informed by the purpose of the statute.⁶⁶ Congress enacted the FHA to remedy housing segregation. In addition, as the Eleventh Circuit in *City of Miami v. Bank of America* noted on remand, the FHA has a “broad and ambitious scope” and “expansive text,” so a more flexible and expansive requirement in a pleading is more consistent with the FHA than a narrower and more stringent one.⁶⁷

The fifth element of the Proposed Rule would, in contrast, make it harder for plaintiffs to establish a prima facie case of discrimination. This is contrary to the stated purpose of the Proposed Rule, to the existing standard the Proposed Rule purports to codify, and to the broad scope and expansive language of the FHA. Accordingly, HUD should withdraw this Proposed Rule and maintain the three-part test set forth in the current Disparate Impact Rule.

2. In the second part of the disparate impact analysis, the Proposed Rule would unreasonably allow additional categories of defenses.

In its Proposed Rule, HUD unjustly and unreasonably proposes two additional defenses that would likely give housing-related providers a free pass to use policies with discriminatory impacts, rolling back decades of progress fighting discrimination and segregation.

As an initial matter, the current Rule and longstanding caselaw jurisprudence clearly recognize that creating exemptions beyond those listed in the FHA would run contrary to congressional intent.⁶⁸ Nothing in the FHA provides a statutory basis for the new defenses in the Proposed Rule. Consequently, these proposed defenses should be considered unreasonable interpretations of the FHA. Additional problems with these defenses are set forth below.

⁶⁴ *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131 (2014).

⁶⁵ *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1299 (2017).

⁶⁶ *See, e.g., Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131 (2014); *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 688, 703 (2011); *City of Miami v. Wells Fargo*, 923 F.3d 1260, 1278-79 (11th Cir. 2019).

⁶⁷ *Wells Fargo*, 923 F.3d at 1264.

⁶⁸ Implementation of the Fair Housing Act’s Discriminatory Effects Standard, Final Rule (Feb. 8, 2013) [78 Fed. Reg. 11459, 11475 (Feb. 15, 2013)], *citing* *Graoch Associates v. Louisville/Jefferson County Metro Human Relations Commission*, 508 F.3d 366, 375 (6th Cir. 2007) (“we cannot create categorical exemptions from [the Act] without a statutory basis” and “[n]othing in the text of the FHA instructs us to create practice-specific exceptions”).

Materially Limited Discretion Defense

The Proposed Rule provides that “the defendant may show its discretion is materially limited by a third party—such as through a Federal law or a State or local law—or a binding or controlling court, arbitral, regulatory, administrative order, or administrative requirement.”⁶⁹

This is an exceedingly broad exemption with no evident limitation besides the undefined term “materially.” In contrast, the current Rule appropriately uses a case-by-case approach for analyzing entities’ discretion under various laws that impact the housing and financial markets through the second part of the burden-shifting framework, analyzing the defendant’s proffered interest(s). This allows a recognition that entities may be somewhat limited in their discretion without providing a blanket defense. HUD should maintain the current Rule and withdraw this proposed defense.

Algorithm Defenses

The Proposed Rule would establish, for the first time, safe harbors for entities that can point to computer programs that allegedly led to the discrimination. In addition to the fact that the proposed defense has no basis in the text of the statute or its purpose, case law, or previous HUD regulatory materials, this defense is problematic because such programs could be based on potentially biased algorithms.

Establishment of this kind of safe harbor would incentivize a race to the bottom across industries like mortgage lending, homeowner’s insurance, and housing advertising as adherence to an “industry standard” algorithm would automatically exempt market participants from FHA liability. Defendants would also likely attempt to place blame on third parties who created such programs and/or trade associations who had recommended such programs.

In order to confront discrimination in a housing market that is constantly changing as a result of technological innovation, it is essential that civil rights advocates maintain the ability to confront new manifestations of structural inequity and discrimination even when it is effectuated through the use of computer programs. To that end, allowing blanket defenses based on algorithms is unreasonable and will not lead to the fulfillment of the purpose of the FHA. HUD should withdraw this proposed defense.

3. The framework under the Proposed Rule creates additional requirements on the plaintiff when showing that there are less discriminatory alternatives.

The Proposed Rule provides that, once defendants have demonstrated a valid interest, in order to support a disparate impact claim, plaintiffs must prove “that a less discriminatory policy or practice exists which would *serve the defendant’s identified*

⁶⁹ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. at 42859.

*interest in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant, consistent with existing disparate impact case law.*⁷⁰ However, as with other portions of the Proposed Rule, this proposal is inconsistent with existing caselaw, and the inconsistency would increase burdens on plaintiffs.

Under the well-established civil rights framework discussed above, the burden shifts back to the plaintiff after a defendant produces some valid interest for the challenged policy or practice. Under the current Rule, plaintiffs must then show a less discriminatory alternative that serves the same substantial, legitimate, non-discriminatory interest.

The Proposed Rule makes this showing much more difficult for plaintiffs. HUD cites to *Wards Cove* in proposing this element, but courts have specifically found that comparing this aspect of FHA disparate impact liability to the “business necessity” standard in employment discrimination cases is not appropriate because it does not entirely translate to the housing context.

Requiring plaintiffs to proffer only less discriminatory practices or policies that would not impose either greater costs or the wholly undefined category of “other material burdens” on defendants effectively requires plaintiffs to pre-emptively obtain information that is squarely in the purview of defendants. Moreover, the Proposed Rule offers defendants a broad and subjective way to attack less discriminatory alternatives raised by plaintiffs.

Indeed, the Proposed Rule privileges defendants – including defendants’ profits – over the goals of fair housing. Under the Proposed Rule, a less discriminatory business approach that is significantly profitable, but less so than the challenged policy, would not satisfy the standard. Valuing defendants’ profit above ending discriminatory practices violates the core purpose of the FHA.

For the reasons outlined above, HUD should withdraw the Proposed Rule and instead focus on its statutory duties to eliminate housing discrimination and affirmatively further fair housing for women and other protected classes.

B. The Proposed Rule contradicts the central purpose of the FHA.

HUD’s Proposed Rule would tip the scales in favor of businesses and landlords and harm vulnerable communities. This is the opposite of what Congress intended when it passed the FHA. The FHA was enacted with lofty goals; with its passage Congress boldly stated that “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”⁷¹ The standard outlined in this proposal would make it nearly impossible to establish disparate impact liability under the FHA. HUD’s proposal ignores, rather than “clarifies,” the Supreme Court’s guidance as reflected in *Inclusive Communities Project*.

⁷⁰ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. at 42860 (emphasis added).

⁷¹ 42 U.S.C. § 3601, quoted at *Inclusive Communities*, 135 S. Ct. at 2521.

C. The Proposed Rule ignores decades of court precedent and agency interpretation of disparate impact under the FHA.

HUD also asserts that it is “updating” the disparate impact standard, when in fact the Proposed Rule ignores decades of carefully reasoned court decisions. U.S. Courts of Appeal have broadly upheld disparate impact under the FHA and applied the three-prong burden shifting standard in some form. Because of minor variations in how HUD and courts analyzed disparate impact liability, HUD proposed a rule in 2011 that would establish a uniform standard and finalized that standard in 2013. This 2013 Disparate Impact Rule reflected the agency’s expertise and laid out a reasonable balancing test that incorporated the longstanding approach to disparate impact analysis reflected in case law.

In 2015, the Supreme Court, in effect, adopted the 2013 Disparate Impact Rule in *Inclusive Communities*, by holding that disparate impact is cognizable under the FHA and using the three-prong analysis under the current Disparate Impact Rule without questioning or challenging the framework.⁷² No holding or dicta in *Inclusive Communities* necessitates any reconsideration of the current Disparate Impact Rule. On remand, the district court noted that the Supreme Court had affirmed “the Fifth Circuit’s decision adopting the HUD regulations.”⁷³

Courts since *Inclusive Communities* have held that the Rule is consistent with the *Inclusive Communities* decision.⁷⁴ HUD itself has argued multiple times that the Rule is consistent with the *Inclusive Communities* decision.⁷⁵ For example, in March 2017, HUD argued:

[T]he Supreme Court’s holding in *Inclusive Communities* is entirely consistent with the Rule’s reaffirmation of HUD’s longstanding interpretation that the FHA authorizes disparate impact claims. 135 S. Ct. at 2516-22. And the portions of the Court’s opinion cited by [PCIA]—which discuss limitations on the application of disparate impact liability that have long been part of the standard—do not give rise to new causes of action, nor do they conflict with the Rule. See *id.* at 2522-25 (“[D]isparate-impact liability has always been properly limited in key respects . . .”). Indeed, nothing in *Inclusive Communities* casts any doubt on the validity of the

⁷² The Supreme Court also declined the opportunity to review the standard for disparate impact cases under the FHA. *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 46 (Oct. 2, 2014) (No. 13-1371) (granting certiorari on first question only).

⁷³ *Inclusive Communities Project, Inc. v. Texas Dep’t of Hous. & Cmty. Affairs*, 2015 WL 5916220, at *3 (N.D. Tex. Oct. 8, 2015).

⁷⁴ See, e.g., *MHANY Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016); *Prop. Cas. Insurers Ass’n of Am. v. Carson*, 2017 WL 2653069, at *8 (N.D. Ill. June 20, 2017); *Burbank Apartments Tenant Ass’n v. Kargman*, 474 Mass. 107, 126–27 (D. Mass. 2016).

⁷⁵ Defendants’ Memorandum in Support of Their Motion for Summary Judgment and in Opposition to Plaintiffs’ Motion for Summary Judgment, ECF No. 65, at 33, *AIA v. Dep’t of Hous. & Urb. Dev.*, No. 1:13-cv-00966-RJL (D.D.C.); Defendants’ Opposition to Plaintiff’s Motion for Leave to Amend Complaint, ECF No. 122, at 9, *PCIA v. Carson*, No. 1:13-cv-08564 (N.D. Ill.).

Rule. To the contrary, the Court cited the Rule twice in support of its analysis. See 135 S. Ct. at 2522-23.⁷⁶

This Proposed Rule is a radical departure from both court precedent and HUD's own prior interpretations of disparate impact analysis.⁷⁷ HUD is now introducing a burdensome and confusing balancing test with numerous additional requirements for plaintiffs that puts an insurmountably high burden on individuals seeking to enforce the FHA under disparate impact theory. It would set up a legal landscape in which HUD has one set of rules, courts have another standard through caselaw, and other federal regulators (like those under the Equal Credit Opportunity Act) have yet another standard.⁷⁸ This patchwork of rules would create complexity and confusion that would inevitably disadvantage those experiencing housing discrimination, and is an unreasonable interpretation of disparate impact under the FHA.

Furthermore, as described previously, the Proposed Rule is strongly biased against plaintiffs: while the plaintiff must meet a preponderance of the evidence standard to demonstrate discrimination, defendants are only required to "show" that a policy advances a legitimate interest to defend against a discrimination claim.⁷⁹ This ignores well-established precedent placing the burden of proof on the defendant to show "that the challenged practice is *necessary* to achieve one or more substantial, legitimate, nondiscriminatory interests."⁸⁰

D. The Proposed Rule also improperly attempts to eliminate the "perpetuation of segregation" theory of disparate impact liability.

The Proposed Rule attempts to erase liability under the perpetuation of segregation theory, which encompasses the core purpose of the FHA: ending segregation. The FHA was passed to combat racial segregation in the United States, yet our communities remain segregated to this day.⁸¹ In *Inclusive Communities*, the Supreme Court acknowledged that the impacts of *de jure* housing segregation remain today. The impact of racially restrictive covenants, real-estate agents steering potential buyers to racially homogeneous areas, and intentionally discriminatory lending practices (redlining) did not end when these intentionally discriminatory practices were banned. In

⁷⁶ Defendants' Opposition to Plaintiff's Motion for Leave to Amend Complaint, ECF. No. 122, at 9, PCIA v. Carson, No. 1:13-cv-08564 (N.D. Ill.).

⁷⁷ Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2519-2520, 2523 (2015) (discussing legislative history showing that Congress ratified unanimous conclusion of nine Courts of Appeal, all of which found that the FHA is properly interpreted to include disparate impact liability, and HUD rulemaking).

⁷⁸ See, e.g., Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,474 ("Thus, under the rule's framework, in litigation involving claims brought under both the Fair Housing Act and ECOA, the parties and the court will not face the burden of applying inconsistent methods of proof to factually indistinguishable claims. Having the same allocation of burdens under the Fair Housing Act and ECOA will also provide for less confusion and more consistent decision making by the fact finder in jury trials.").

⁷⁹ HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42860.

⁸⁰ 24 C.F.R. § 100.500(c)(2) (2013).

⁸¹ STEPHEN MENENDIAN & SAMIR GAMBHIR, RACIAL SEGREGATION IN THE SAN FRANCISCO BAY AREA, PART 1, HAAS INST. (Oct. 29, 2018), available at <https://haasinstitute.berkeley.edu/racial-segregation-san-francisco-bay-area>.

2019, we still face the repercussions of these discriminatory practices and need disparate impact liability to continue to fight against the ripple effects that lead to segregated neighborhoods. Retaining meaningful tools to challenge actions that increase segregation is especially important to women, children, and families' access to health care and educational opportunities, as discussed above. Yet HUD now proposes a rule that would take away a critical tool for tackling this fundamental civil rights issue.

As reflected in HUD's 2013 Disparate Impact Rule, and in court decisions that have considered the question,⁸² discriminatory effects liability may be established where a policy "perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin."⁸³ In many areas of the United States, segregation is increasing rather than decreasing; this theory is therefore more important to realizing the FHA's goals than ever.⁸⁴

In the Proposed Rule, HUD in effect proposes to remove all reference to perpetuation of segregation from 24 C.F.R. § 100.500, effectively eliminating it from the current definition in "discriminatory effect," *without explanation or discussion*. These changes have critically important implications for our nation; research has demonstrated that "the neighborhood in which a child grows up is a significant predictor of his or her later life outcomes, even at a very local level."⁸⁵ Racial segregation impacts every aspect of a community; people of color are excluded from high quality schools, jobs, even access to fresh food or drinkable water.

HUD's omission of perpetuation of segregation theory from the Proposed Rule is a blatant attack on the ideals that the FHA was intended to further. Coupled with HUD's suspension of implementation of its Affirmatively Furthering Fair Housing regulation, HUD is retreating from its obligation as an agency to meaningfully combat segregation.

E. The Proposed Rule would undercut challenges to zoning decisions, even though these suits are the "heartland of disparate impact liability."

In *Inclusive Communities Project*, the Supreme Court recognized that "suits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification are at the heartland of disparate-

⁸² See e.g. *Metropolitan Housing Development Corp. v. Village of Arlington Heights* (7th Cir. 1977) 558 F.2d 1283, 1290 ("There are two kinds of racially discriminatory effects which a facially neutral decision about housing can produce. The first occurs when that decision has a greater adverse impact on one racial group than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act").

⁸³ 24 C.F.R. § 100.500(a) (2013).

⁸⁴ See e.g., PHILIP VERMA ET AL., U.C. BERKELEY'S URBAN DISPLACEMENT PROJECT & CAL. HOUSING PARTNERSHIP, RISING HOUSING COSTS AND RE-SEGREGATION IN THE SAN FRANCISCO BAY AREA (2019), available at https://www.urbandisplacement.org/sites/default/files/images/bay_area_re-segregation_rising_housing_costs_report_2019.pdf.

⁸⁵ RAJ CHETTY ET AL., THE OPPORTUNITY ATLAS: MAPPING THE CHILDHOOD ROOTS OF SOCIAL MOBILITY, OPPORTUNITY INSIGHTS 25 (Oct. 2018), available at https://opportunityinsights.org/wp-content/uploads/2018/10/atlas_paper.pdf.

impact liability”.⁸⁶ HUD’s proposal blatantly ignores the Supreme Court’s guidance by proposing that most zoning decisions will not be actionable under disparate impact theory. As HUD explained in the Proposed Rule:

Plaintiffs will likely not meet the standard, and HUD will not bring a disparate impact claim, alleging that a single event—such as a local government’s zoning decision or a developer’s decision to construct a new building in one location instead of another—is the cause of a disparate impact, unless the plaintiff can show that the single decision is the equivalent of a policy or practice.⁸⁷

In support of this proposition, HUD cites an unpublished district court case currently on appeal,⁸⁸ and ignores Supreme Court and circuit court decisions holding that individual zoning decisions are a proper context for bringing disparate impact liability claims.⁸⁹

As described in more detail below, land use and zoning decisions often have disparate impacts on people of color and families with children. Given that context, it goes against the FHA for HUD’s Proposed Rule to shield zoning and planning decisions from scrutiny. Consequently, HUD should withdraw the Proposed Rule and instead focus on its statutory duties to eliminate housing discrimination and affirmatively further fair housing.

F. The Proposed Rule would remove a key incentive for data collection.

HUD’s Proposed Rule contains a new provision that states, “Nothing in this part requires or encourages the collection of data with respect to race, color, religion, sex, handicap, familial stats, or national origin. The absence of any such collection efforts shall not result in any adverse inference against a party.”⁹⁰ This is problematic in a number of ways.

First, a number of existing laws and regulations require or promote the collection of data, such as the FHA, Equal Credit Opportunity Act and Regulation B, the Home Mortgage Disclosure Act and Regulation C, and other federal and state laws and regulations, and HUD does not have the authority to infringe upon these requirements.⁹¹

Second, HUD does not have authority to impose a blanket prohibition against inferences against a party. Third, this poses constitutional concerns, as “[s]tatutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments.”⁹² Fourth, this proposal is

⁸⁶ See, e.g., *Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 16–18 (1988).

⁸⁷ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. at 42858.

⁸⁸ *Barrow v. Barrow*, No. CV 16-11493-FDS, 2017 WL 2872820, at *3 (D. Mass. July 5, 2017).

⁸⁹ *Mhany Management, Inc. v. County of Nassau*, 819 F.3d 581, 619 (2d Cir. 2016).

⁹⁰ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. at 42862

⁹¹ See, e.g., 42 U.S.C. § 3608a (Fair Housing Act requirements); 15 U.S.C. § 1691c-2 (ECOA); 12 C.F.R. § 1002.13 (Regulation B, implementing ECOA); 12 C.F.R. part 1003 (Regulation C, implementing the Home Mortgage Disclosure Act).

⁹² See *Vlandis v. Kline*, 412 U.S. 441, 446 (1973).

inconsistent with Supreme Court case law about the usefulness of data that supports awareness of race, sex, or other protected characteristics. In *Inclusive Communities*, the Supreme Court acknowledged that “awareness of race” can help “local housing authorities [that] choose to foster diversity and combat racial isolation with race-neutral tools.”⁹³ In *Wards Cove*, the Supreme Court similarly approved of the use of employers’ hiring data to analyze the impact of selection procedures for a disparate impact in employment.⁹⁴

Furthermore, if the Proposed Rule is finalized, it could have a chilling effect upon entities that wish to engage in voluntary data collection. For example, businesses could be discouraged from collecting important data that helps foster awareness and can reveal discrimination. People who are experiencing discrimination will also have a more difficult time determining whether they are being discriminated against and establishing discrimination in any legal or administrative proceeding.

Because this provision in the Proposed Rule exceeds HUD’s authority, infringes upon federal and state legal requirements, is contrary to Supreme Court jurisprudence, and would take away an important tool to combat discrimination, HUD should withdraw this proposal.

IV. The Proposed Rule seeks to effectively eliminate core protections from policies and practices that discriminate based on sex.

A. The Proposed Rule will weaken protections for survivors of gender-based violence—the vast majority of whom are women.

Domestic violence is a primary cause of homelessness for women and children in the United States.⁹⁵ Over 90% of homeless women report having experienced domestic abuse or sexual violence in their lives, while over 50% of homeless women report that domestic violence was the immediate cause of their homelessness.⁹⁶ Access to housing is absolutely critical for survivors, as lack of safe and affordable housing options is regularly reported as a primary barrier to escaping abuse.⁹⁷ Homelessness can also be a precursor to additional violence, because a survivor is at the greatest risk of violence when separating from an abusive partner.⁹⁸

⁹³ *Inclusive Communities*, 135 S. Ct. at 2525.

⁹⁴ *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 657-58 (1989).

⁹⁵ See ACLU WOMEN’S RIGHTS PROJECT, DOMESTIC VIOLENCE AND HOMELESSNESS (2006), <http://www.aclu.org/pdfs/dvhomelessness032106.pdf>; see also U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA’S CITIES: A 25-CITY SURVEY (Dec. 2014), <https://www2.cortland.edu/dotAsset/655b9350-995e-4aae-acd3-298325093c34.pdf>.

⁹⁶ MONICA McLAUGHLIN & DEBBIE FOX, NAT’L NETWORK TO END DOMESTIC VIOLENCE, HOUSING NEEDS OF VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, DATING VIOLENCE, AND STALKING (2019), https://nlihc.org/sites/default/files/AG-2019/06-02_Housing-Needs-Domestic-Violence.pdf.

⁹⁷ See CHARLENE K. BAKER ET AL., DOMESTIC VIOLENCE, HOUSING INSTABILITY, AND HOMELESSNESS: A REVIEW OF HOUSING POLICIES AND PROGRAM PRACTICES FOR MEETING THE NEEDS OF SURVIVORS, 15 AGGRESSION & VIOLENT BEHAVIOR 430, 430–39 (2010), https://b.3cdn.net/naeh/416990124d53c2f67d_72m6b5uib.pdf.

⁹⁸ See *id.* at 431.

HUD has repeatedly recognized housing discrimination against domestic violence survivors as a significant fair housing issue,⁹⁹ as women account for over 80% of domestic violence survivors.¹⁰⁰ The harmful effects of housing instability are compounded for Native American women and women of color, who face both increased barriers to housing and disproportionate rates of violence.¹⁰¹ Housing discrimination against domestic violence survivors also implicates other protected classes. The rate of violence against women with disabilities, for example, is three times higher than the rate of violence against women without disabilities.¹⁰² Additionally, LGBTQ+ individuals experience high rates of domestic violence, while 71% of survivors reported that they were denied shelter because of barriers related to gender identity.¹⁰³

Advocates have relied on HUD's current Disparate Impact Rule to protect survivors against unjust policies and practices that penalize survivors due to the abuse they've experienced, including in some of the following contexts:

- **Emergency Transfers:** Domestic violence survivors sometimes face obstacles from property owners and housing providers when they request emergency transfers within housing units to escape their abusers. Advocates have relied on the current Disparate Impact Rule to challenge the failure to grant emergency transfer requests under the FHA, often resulting in the adoption of new policies that ensure that survivors who are in danger may request emergency transfers.¹⁰⁴ HUD's Proposed Rule will weaken this enforcement tool, thereby jeopardizing housing for survivors that need it the most.
- **Crime-Free Policies:** Some landlords and housing providers evict or threaten to evict domestic violence survivors based on "one-strike" or "crime-free" policies that punish survivors when they contact law enforcement about abuse they experienced

⁹⁹ See, e.g., Memorandum from U.S. Dep't of Hous. & Urban Dev. to FHEO Office Directors & FHEO Regional Directors, Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act (FHA) and the Violence Against Women Act (VAWA) (Feb. 9, 2011), available at <https://www.hud.gov/sites/documents/FHEODOMESTICVIOLGUIDENG.PDF>.

¹⁰⁰ CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS CRIME DATA BRIEF: INTIMATE PARTNER VIOLENCE, 1993-2001 (Feb. 2003), available at <https://www.bjs.gov/content/pub/pdf/ipv01.pdf>.

¹⁰¹ See MCLAUGHLIN & FOX, *supra* note 96, at 1; see also CAROLYN M. WEST & KALIMAH JOHNSON, NAT'L ONLINE RESOURCE CTR. ON VIOLENCE AGAINST WOMEN, SEXUAL VIOLENCE IN THE LIVES OF AFRICAN AMERICAN WOMEN (Mar. 2013), available at https://vawnet.org/sites/default/files/materials/files/2016-09/AR_SVAAWomenRevised.pdf; SHARON G. SMITH ET AL., DEP'T OF HEALTH & HUMAN SERVS., NAT'L CTR. FOR INJURY PREVENTION & CONTROL, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010-2012 STATE REPORT (Apr. 2017), available at <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf>.

¹⁰² AMERICAN CIVIL LIBERTIES UNION ET AL., DOMESTIC VIOLENCE & SEXUAL ASSAULT IN THE UNITED STATES: A HUMAN RIGHTS BASED APPROACH & PRACTICE GUIDE (Aug. 2014), available at https://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/dv_sa_hr_guide_reduce.pdf.

¹⁰³ NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED INTIMATE PARTNER VIOLENCE IN 2015 (2016), available at http://avp.org/wp-content/uploads/2017/04/2015_ncavp_lgbtqipvreport.pdf.

¹⁰⁴ See *Blackwell v. H.A. Hous. LP*, Civil Action No. 05-cv-01225-LTB-CBS (D. Colo. 2005) (prohibiting discrimination against survivors of domestic violence and allowing them to request an emergency transfer when in imminent danger).

in their home.¹⁰⁵ The current Disparate Impact Rule is critical for protecting survivors from further harm due to the loss of their home.¹⁰⁶

- **Nuisance Ordinances:** In many jurisdictions, nuisance ordinances coerce landlords to evict or threaten to evict households based on calls for police assistance or emergency services, disproportionately harming domestic violence victims. Research has demonstrated that nuisance and crime-free ordinances also disproportionately impact communities of color, low-income households, and people with disabilities.¹⁰⁷ In 2016, HUD issued guidance on challenging the devastating consequences of nuisance ordinances on domestic violence survivors, and other marginalized communities; using disparate impact to challenge such harmful ordinances was an important part of that guidance.¹⁰⁸

If HUD finalizes its Proposed Rule, advocates will no longer be able to rely on the Disparate Impact Rule to protect survivors and their housing. The proposed changes to the disparate impact standard would create substantial additional hurdles for survivors and make it significantly harder to challenge these unjust policies and practices. HUD's Proposed Rule, therefore, will undermine the vital role that the FHA has served in protecting fair housing for survivors of domestic violence. Consequently, the Center urges HUD to withdraw the Proposed Rule and instead focus on its statutory duties to eliminate housing discrimination and affirmatively further fair housing for women, including for survivors of gender-based violence.

B. The Proposed Rule will harm female-headed households.

Nearly 3 in 10 (29%) female-headed households without children had household incomes below \$34,999 in 2018,¹⁰⁹ which is below the \$17.90 per hour (\$37,232 per year) 2018 national Housing Wage a full-time worker needs to get paid in order to afford to rent a modest, one-bedroom apartment in the United States.¹¹⁰ And more than half (56%) of female-headed households with children had household incomes below \$44,999 in 2018,¹¹¹ which is below the \$22.96 per hour (\$45,968 per year) national

¹⁰⁵ See, generally, Warren v. Ypsilanti Hous. Auth., Case No. 4:02-cv-40034 (E.D. Mich. 2003) (defendant agreed to cease evicting survivors of domestic violence under its "one-strike policy").

¹⁰⁶ See *id.*

¹⁰⁷ AMERICAN CIVIL LIBERTIES UNION & NEW YORK CIVIL LIBERTIES UNION, MORE THAN A NUISANCE: THE OUTSIZED CONSEQUENCES OF NEW YORK'S NUISANCE ORDINANCES (2018), available at https://www.nyclu.org/sites/default/files/field_documents/nyclu_nuisancereport_20180809.pdf.

¹⁰⁸ U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE ENFORCEMENT OF LOCAL NUISANCE AND CRIME-FREE HOUSING ORDINANCES AGAINST VICTIMS OF DOMESTIC VIOLENCE, OTHER CRIME VICTIMS, AND OTHERS WHO REQUIRE POLICE OR EMERGENCY SERVICES (Sept. 13, 2016), available at <https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF>.

¹⁰⁹ NWLC calculations based on U.S. Census Bureau, 2019 Current Population Survey, HINC-04, available at <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-hinc/hinc-04.2018.html>.

¹¹⁰ ANDREW AURAND ET AL., OUT OF REACH: THE HIGH COST OF HOUSING, NAT'L LOW INCOME HOUS. COAL., 1, 1 (2018), available at https://reports.nlihc.org/sites/default/files/oor/OOR_2018_0.pdf.

¹¹¹ NWLC calculations based on U.S. Census Bureau, 2019 Current Population Survey, HINC-04, available at <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-hinc/hinc-04.2018.html>.

Housing Wage needed to rent a modest, two-bedroom apartment.¹¹² This makes access to affordable housing especially crucial for women supporting families on their own.

Disparate impact theory has been used to challenge practices and policies that disproportionately impact female-headed households, such as the following:

- **Voucher discrimination:** Landlords may refuse to accept housing vouchers,¹¹³ and insurance companies may deny commercial insurance coverage to landlords who rent apartments to people who use housing vouchers.¹¹⁴ These and other types of voucher discrimination often have an overwhelming impact on female-headed households. Female-headed households make up 83% of housing choice voucher participants nationwide.¹¹⁵ While these participation rates differ in different regions of the United States, female-headed households are likely to comprise the majority of housing choice voucher participants in numerous rental markets across the country.
- **Minimum loan amounts:** Some lenders create and implement policies to not originate loans under \$100,000. This restricts homeownership access and has a disparate impact on female-headed households, who are more likely to have lower incomes because of structural discrimination and thus, lower loan amounts, as well as other individuals in other protected classes.

Because of the impacts these and other policies have on female-headed households, the Center urges HUD to withdraw the Proposed Rule and instead focus on its statutory duties to eliminate housing discrimination and affirmatively further fair housing, including for women.

C. The Proposed Rule will jeopardize access to housing and weaken anti-discrimination protections for LGBTQ+ people.

LGBTQ+ individuals face significant challenges in accessing safe and stable housing. In 2015, approximately one in four transgender people in the U.S. experienced some form of housing discrimination because of their gender identity.¹¹⁶ HUD's own research indicates that same-sex couples are treated less favorably than heterosexual couples in

¹¹² AURAND ET AL., *supra* note 110, at 1.

¹¹³ See, e.g., Complaint at 9, Nat'l Fair Housing Alliance v. Evolve, LLC, No. 1:2019cv01147 (D.D.C. Apr. 22, 2019).

¹¹⁴ See, e.g., Press Release, Nat'l Fair Housing Alliance, National Fair Housing Alliance Settles Disparate Impact Lawsuit with Travelers Indemnity Company (Feb. 23, 2018), *available at* <https://nationalfairhousing.org/2018/02/23/travelers/>.

¹¹⁵ NAT'L LOW INCOME HOUSING COAL., WHO LIVES IN FEDERALLY ASSISTED HOUSING? (Nov. 2012), *available at* <https://nlhlc.org/sites/default/files/HousingSpotlight2-2.pdf>.

¹¹⁶ SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 13 (2016), *available at* <http://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

the online rental housing market.¹¹⁷ Year after year, in study after study, findings indicate that discrimination against LGBTQ people in housing is a consistent and ubiquitous issue. Recent studies have shown:

- In states that prohibit discrimination against LGBTQ people in housing, discrimination complaints are filed by LGBTQ people at a rate similar to race discrimination complaints filed by people of color.¹¹⁸
- In a recent paired testing study conducted by the Urban Institute, gay men and transgender people experienced discrimination in the early stages of the rental process.¹¹⁹
- 48% of older LGB testers experienced adverse, differential treatment in recent matched-pair testing conducted by the Equal Rights Center.¹²⁰
- 40% of young people experiencing homelessness identify as LGBTQ.¹²¹
- LGBTQ+ respondents rely on public housing assistance about 2.5 times the rate of non-LGBTQ+ respondents.¹²² Consequently, source-of-income discrimination in the form of landlords refusing to accept housing vouchers or other forms of public housing assistance disproportionately impact LGBTQ+ people.
- Research conducted by HUD has also suggested that LGBTQ+ individuals—including LGBTQ+ youth—disproportionately experience homelessness, which can

¹¹⁷ DEP'T OF HOUS. & URBAN DEV., OFFICE OF POL'Y DEV. & RES., AN ESTIMATE OF HOUSING DISCRIMINATION AGAINST SAME-SEX COUPLES: AN EXECUTIVE SUMMARY 1 (2013), *available at* https://www.huduser.gov/portal/Publications/pdf/Hsg_Disc_against_SameSexCpls_exec_summ_v2.pdf.

¹¹⁸ CHRISTY MALLORY & BRAD SEARS, EVIDENCE OF HOUSING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY, WILLIAMS INST. (Feb. 2016), *available at* <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Housing-Discrimination-Complaints-2008-2014.pdf>.

¹¹⁹ DIANE K. LEVY ET AL., URBAN INST., A PAIRED-TESTING PILOT STUDY OF HOUSING DISCRIMINATION AGAINST SAME-SEX COUPLES AND TRANSGENDER INDIVIDUALS (June 2017), *available at* https://www.urban.org/sites/default/files/publication/91486/2017.06.27_hds_lgt_final_report_report_finalized.pdf.

¹²⁰ Types of adverse treatment included being given fewer options, being quoted higher fees or rental prices, being shown only 2-bedroom options when seeking a 1-bedroom apartment. EQUAL RIGHTS CTR., OPENING DOORS: AN INVESTIGATION OF BARRIERS TO SENIOR HOUSING FOR SAME-SEX COUPLES (2014), *available at* https://equalrightscenter.org/wp-content/uploads/senior_housing_report.pdf.

¹²¹ U.S. DEP'T OF HOUS. & URBAN DEV., LGBT HOMELESSNESS, <https://www.hudexchange.info/homelessness-assistance/resources-for-lgbt-homelessness/#resources-for-homeless-lgbt-individuals-in-crisis> (last visited Oct. 18, 2019).

¹²² CAITLIN ROONEY, CHARLIE WHITTINGTON & LAURA E. DURSO, CTR. FOR AM. PROGRESS, PROTECTING BASIC LIVING STANDARDS FOR LGBTQ PEOPLE (Aug. 13, 2018), <https://www.americanprogress.org/issues/lgbt/reports/2018/08/13/454592/protecting-basic-living-standards-lgbtq-people/>.

result from discrimination in housing.¹²³ Housing insecurity and homelessness, in turn, subject homeless LGBTQ+ individuals to future violence.¹²⁴

People living at the intersections of multiple marginalized identities, like LGBTQ people of color and LGBTQ people with disabilities, are even more likely to face discrimination in access to housing, and to have an increased need to access public housing supports:

- 49% of Black transgender and gender non-binary respondents to a recent survey experienced housing discrimination in the preceding year; 13% of Black transgender women were denied access to a homeless shelter.¹²⁵
- 17.6% of LGBTQ survey respondents with disabilities reported receipt of public housing benefits, compared to 2.5% of non-disabled, non-LGBTQ respondents.¹²⁶

It is clear that LGBTQ people face discrimination when seeking housing. The Proposed Rule will only make it harder for impacted people to bring claims alleging disparate impact, guaranteeing that LGBTQ people will continue to experience discrimination in housing. Consequently, the Center urges HUD to withdraw the Proposed Rule and instead focus on its statutory duties to eliminate housing discrimination and affirmatively further fair housing, including for LGBTQ people.

V. The Proposed Rule will also impact women and girls who are also protected from discrimination based on other characteristics.

A. The Proposed Rule will violate HUD's obligations to protect mothers with children who are seeking housing.

¹²³ U.S. DEP'T OF HOUSING & URBAN DEV., AN ESTIMATE OF HOUSING DISCRIMINATION AGAINST SAME-SEX COUPLES (2013), *available at* http://www.huduser.org/portal/publications/pdf/Hsg_Disc_against_SameSexCpls_v3.pdf; CAITLIN ROONEY, LAURA E. DURSO & SHARITA GRUBERG, CTR. FOR AM. PROGRESS, DISCRIMINATION AGAINST TRANSGENDER WOMEN SEEKING ACCESS TO HOMELESS SHELTERS (2016), *available at* <https://www.americanprogress.org/issues/lgbt/reports/2016/01/07/128323/discrimination-against-transgender-women-seeking-access-to-homeless-shelters/>; JAMES ET AL., *supra* note 116; JOHN ECKER, TIM AUBRY & JOHN SYLVESTRE, A REVIEW OF THE LITERATURE ON LGBTQ ADULTS WHO EXPERIENCE HOMELESSNESS, 66 J. HOMOSEXUALITY 297-323 (2018), *available at* <https://doi.org/10.1080/00918369.2017.1413277>; MAYA BRENNAN, ALLY LIVINGSTON & VERONICA GAITÁN, FIVE FACTS ABOUT HOUSING ACCESS FOR LGBT PEOPLE, HOW HOUSING MATTERS (2018), <https://howhousingmatters.org/articles/five-facts-housing-access-lgbt-people/>; LAURA E. DURSO & GARY J. GATES, WILLIAMS INST., TRUE COLORS FUND & THE PALETTE FUND, SERVING OUR YOUTH: FINDINGS FROM A NATIONAL SURVEY OF SERVICES PROVIDERS WORKING WITH LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH WHO ARE HOMELESS OR AT RISK OF BECOMING HOMELESS (July 2012), *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf>

¹²⁴ Les B. Whitbeck et al., U. Neb., Dep't of Sociology Mental Disorder, Subsistence Strategies, and Victimization among Gay, Lesbian, and Bisexual Homeless and Runaway Adolescents, 41 J. Sex. Res. 329-42 (2004), *available at* <https://www.ncbi.nlm.nih.gov/pubmed/15765273>.

¹²⁵ JAMES ET AL., *supra* note 116.

¹²⁶ ROONEY, WHITTINGTON & DURSO, *supra* note 122.

The effects of HUD's Proposed Rule will be particularly severe for families with children. Nearly 23 million children live in households with high housing cost burdens,¹²⁷ 17.6 million of whom live in low-income households.¹²⁸ Families with children make up about one third of all renter households in the United States.¹²⁹ Half of renter households with children are rent-burdened and a quarter are extremely rent-burdened.¹³⁰ Families with children constitute the largest share of households with what HUD calls "worst case housing needs." Nearly 3 million families with children in 2015 experienced worst case housing needs, meaning those families had income below 50% of Area Median Income and faced severe rent burdens or severely inadequate housing and did not receive housing assistance.¹³¹

Underlying this crisis for families in the United States is a nationwide scarcity of affordable housing units. In 2017, HUD wrote that worst case housing needs "result from a shortage of affordable housing."¹³² No state in the country has an adequate supply of rental housing affordable and available for extremely low-income households.¹³³ Nationwide, extremely low-income renters in the United States face a shortage of 7 million affordable and available rental homes—only 37 affordable and available homes exist for every 100 extremely low-income renter households.¹³⁴

The difficulties families face in finding affordable housing is compounded by discrimination against families with children in the rental market. Discrimination based on family status has long limited options for families with children looking for a place to live. More than a fourth of the nation's rental housing was off-limits to families with children before 1988, when Congress amended the FHA to prohibit discrimination based on family status.¹³⁵ Until that point, in addition to outright bans of families with children, landlords also often imposed onerous occupancy restrictions on families with children and charged them higher rents.¹³⁶

¹²⁷ ANNIE E. CASEY FOUND., CHILDREN LIVING HOUSEHOLDS WITH A HIGH HOUSING COST BURDEN IN THE UNITED STATES, KIDS COUNT DATA CTR. (2019), <https://datacenter.kidscount.org/data/tables/7244-children-living-in-households-with-a-high-housing-cost-burden?loc=1&loct=2#detailed/1/any/false/871,867/any/14287,14288>.

¹²⁸ ANNIE E. CASEY FOUND., CHILDREN IN LOW-INCOME HOUSEHOLDS WITH A HIGH HOUSING COST BURDEN IN THE UNITED STATES, KIDS COUNT DATA CTR. (2019), <https://datacenter.kidscount.org/data/tables/71-children-in-low-income-households-with-a-high-housing-cost-burden?loc=1&loct=2#detailed/1/any/false/871,870,573,869,36,868,867,133,38,35/any/376,377>.

¹²⁹ CHILDREN'S DEF. FUND calculation based on U.S. Census Bureau, American Housing Survey Table Creator (2017), https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html?s_areas=00000&s_year=2017&s_tablename=TABLE8A&s_bygroup1=20&s_bygroup2=1&s_filtergroup1=3&s_filtergroup2=1.

¹³⁰ *Id.*

¹³¹ U.S. DEP'T OF HOUS. & URBAN DEV., WORST CASE HOUSING NEEDS: 2017 REPORT TO CONGRESS (2017), available at <https://www.huduser.gov/portal/sites/default/files/pdf/Worst-Case-Housing-Needs.pdf>.

¹³² *Id.*

¹³³ ANDREW AURAND, ET AL., NAT'L LOW INCOME HOUS. COAL. THE GAP: A SHORTAGE OF AFFORDABLE HOMES 1, 1 (Mar. 2019), available at https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2019.pdf.

¹³⁴ *Id.*

¹³⁵ LAUDAN ARON, U.S. DEP'T OF HOUS. & URBAN DEV., DISCRIMINATION AGAINST FAMILIES WITH CHILDREN IN RENTAL HOUSING MARKETS: FINDINGS OF THE PILOT STUDY iii, 4 (2016), available at <https://www.huduser.gov/portal/sites/default/files/pdf/HDSFamiliesFinalReport.pdf>.

¹³⁶ *Id.*

Since the 1988 amendment to the FHA, this type of overt discrimination has been curbed, but some landlords have resorted to facially-neutral policies to turn away families with children. A 2016 study from HUD found no signs of overt discrimination against families with children in the rental market, but did find evidence that landlords were taking more subtle steps to discourage renters with children, including steering families with children toward larger, more expensive units and, on average, showing families with children fewer units.¹³⁷ Those factors, the study noted, “may constrain the choices for some families seeking rental housing.”¹³⁸

The existing Disparate Impact Rule affords vital housing protections for women with children and allows advocates to challenge unjust policies that harm families. In particular, advocates have challenged policies such as the following:

- **Occupancy Restrictions:** Policies that impose overly restrictive occupancy requirements disproportionately harm families with children,¹³⁹ significantly limit access to affordable housing for these families, and often have the harshest consequences for low-income women of color. In a case involving an occupancy restriction in a mobile home community, the HUD Secretary even noted that the policy would exclude families with minor children at more than four times the rate of households without minor children.¹⁴⁰ Landlords with these policies have also issued vacate notices to pregnant women expecting a new baby or new parents who do not have a separate bedroom for their infant,¹⁴¹ which imposes particular challenges for the one in five (20.9%) pregnant workers (and 30% of Black women and 31.3% of Latinx women) who work in low-wage jobs and may not be able to afford to rent an apartment with an additional bedroom for their infant.¹⁴²
- **Amenity Restrictions:** Policies that overly restrict the use of facilities that are overwhelmingly enjoyed by children, such as pools or courtyards, can be considered discriminatory under the FHA.¹⁴³ For example, a landlord’s policy against congregating in common areas may have a discriminatory impact on families with

¹³⁷ *Id.*

¹³⁸ *Id.* at vii.

¹³⁹ See 42 U.S.C. §§ 3601-19; see also *Hous. Opps. Project for Excellence, Inc. v. Key Colony No. 4 Condo. Assoc.*, 510 F. Supp. 2d 1003 (S.D. Fla. 2007) (holding that residents had successfully stated a disparate impact claim because the restrictive occupancy rules had discouraging effects on families with more than two children). See also *Rhode Island Comm’n for Human Rights v. Graul*, 120 F. Supp. 3d 110, 125–27 (D.R.I. 2015); *United States v. Badgett*, 976 F.2d 1176, 1178–79 (8th Cir. 1992); *Gashi v. Grubb & Ellis*, 801 F. Supp. 2d 12 (D. Conn. 2011).

¹⁴⁰ *HUD v. Mountain Side Mobile Estates Partnership*, No. 08-92-0010, 1993 WL 307069, at *3-7 (HUD Sec’y July 19, 1993), *aff’d in relevant part*, 56 F.3d 1243 (10th Cir. 1995).

¹⁴¹ See, e.g., *Gashi v. Grubb & Ellis*, 801 F. Supp. 2d 12 (D. Conn. 2011).

¹⁴² MORGAN HARWOOD & SARAH DAVID HEYDEMANN, NAT’L WOMEN’S LAW CTR., *BY THE NUMBERS: WHERE DO PREGNANT WOMEN WORK?* 1, 4-5 (Aug. 2019), <https://nwlc.org/wp-content/uploads/2019/08/Pregnant-Workers-by-the-Numbers-v3-1.pdf> (this resource uses a \$11.50 per hour definition for low-wage worker, but this is a very similar group of workers as the lowest-paying 40 job definition used elsewhere in this comment).

¹⁴³ See *Hous. Opps. Project for Excellence, Inc. v. Key Colony No. 4 Condo. Assoc.*, 510 F. Supp. 2d 1003 (S.D. Fla. 2007); *Rhode Island Comm’n for Human Rights v. Graul*, 120 F. Supp. 3d 110, 125–27 (D.R.I. 2015); *United States v. Badgett*, 976 F.2d 1176, 1178–79 (8th Cir. 1992).

children when evidence shows that children are more likely than adults to play, or congregate, in such places.¹⁴⁴

- **Voucher Discrimination:** Landlords refusing to accept housing vouchers may also have a disproportionate impact on female-headed households with children. For example, in the District of Columbia, female-headed households with children are 13.5% of all renters but 37% of all Section 8 voucher holders.¹⁴⁵ This voucher discrimination blocks mothers' access to fair housing opportunities.

Despite these victories, the fight against housing discrimination against families with children is far from finished. In 2017, familial status was the third most common type of discrimination cited in fair housing complaints after disability status and race.¹⁴⁶ In total, there were 2,675 familial status discrimination complaints filed that year, the vast majority of which pertained to rental market discrimination.¹⁴⁷

If HUD finalizes its Proposed Rule, advocates will no longer be able to rely on disparate impact to protect families with children and their housing. The proposed revised standard would create substantial additional hurdles for these families and make it significantly harder to challenge these unjust policies and practices. HUD's Proposed Rule, therefore, will undermine the vital role that the FHA has served in protecting fair housing for historically marginalized communities—and particularly for families with children.

Additionally, the Proposed Rule will have a greater impact on families of color because women are more likely to represent heads of households and/or breadwinners. “[B]lack and Latina mothers are more likely to be breadwinners than white mothers. Furthermore, a substantial 84.4 percent of black mothers were primary, sole, or co-breadwinners in 2017, compared with 60.3 percent of Latina mothers and 62.4 percent of white mothers.”¹⁴⁸ Because mothers of color and their children face intersecting forms of discrimination based on race, gender, and familial status, the existing rule provides important protections and should not be changed. The Proposed Rule removes these protections and makes it easier to mask discriminatory policies that have a cumulative negative effect of families of color.

¹⁴⁴ See, e.g., *Khalil v. Farash Corp.*, 260 F. Supp. 2d 582, 589 (W.D.N.Y. 2003); *Yazdian v. Las Virgenes Village Community Association*, No. cv-11-07611 (C.D. Cal. 2012); *United States v. Dominic Properties, LLC* (D. Minn.), <https://www.justice.gov/crt/case-document/settlement-agreement-united-states-v-dominic-properties-d-minn>.

¹⁴⁵ See, e.g., Complaint at 10, *Nat'l Fair Housing Alliance v. Evolve, LLC*, No. 1:2019cv01147 (D.D.C. Apr. 22, 2019).

¹⁴⁶ NAT'L FAIR HOUS. ALLIANCE, MAKING EVERY NEIGHBORHOOD A PLACE OF OPPORTUNITY: 2018 FAIR HOUSING TRENDS REPORT (2018), available at https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report_4-30-18.pdf.

¹⁴⁷ *Id.*

¹⁴⁸ COLIN SEEBERGER, CTR. FOR AM. PROGRESS, NEARLY TWO-THIRDS OF MOTHERS CONTINUE TO BE FAMILY BREADWINNERS, BLACK MOTHERS ARE FAR MORE LIKELY TO BE BREADWINNERS (May 10, 2019), <https://www.americanprogress.org/press/release/2019/05/10/469660/release-nearly-two-thirds-mothers-continue-family-breadwinners-black-mothers-far-likely-breadwinners/>.

Because of the importance of housing for families with children, the Center urges HUD to withdraw this Proposed Rule and instead focus on its statutory duties to eliminate housing discrimination and affirmatively further fair housing, including for families with children.

B. The Proposed Rule will jeopardize housing access for women and girls of color and undermine HUD's mission to affirmatively further fair housing.

Weakening protections against discrimination in housing will disproportionately harm women of color. Women of color—especially Black and Latinx women—face greater risks of eviction,¹⁴⁹ homelessness,¹⁵⁰ and housing discrimination.¹⁵¹ Landlords and real estate agents recommend and show fewer available apartments and homes to Black, Latinx, and Asian American and Pacific Islander (AAPI) individuals and families, compared to equally qualified whites.¹⁵²

Moreover, Black and Latinx residents are less likely to live in safe and adequate housing than white, non-Hispanic people, and are four times more likely to live in high-poverty areas than white public housing residents.¹⁵³ As a result, more women of color end up homeless in comparison to their white, non-Hispanic counterparts.¹⁵⁴

Housing disparities for women of color also have the potential to exacerbate the significant racial and gender wealth gaps that women of color face,¹⁵⁵ both because home equity represents a greater share of wealth for households of color than for white

¹⁴⁹ CATHERINE LIZETTE GONZALEZ, STUDY: WOMEN OF COLOR LIVING IN POVERTY FACE HIGHEST RISK OF EVICTION, COLORLINES (Apr. 9, 2018), <https://www.colorlines.com/articles/study-women-color-living-poverty-face-highest-risk-eviction>; see also MATTHEW DESMOND, POOR BLACK WOMEN ARE EVICTED AT ALARMING RATES, POOR BLACK WOMEN ARE EVICTED AT ALARMING RATES, SETTING OFF A CHAIN OF HARDSHIP, MACARTHUR FOUND. (Mar. 2014), https://www.macfound.org/media/files/HHM_-_Poor_Black_Women_Are_Evicted_at_Alarming_Rates.pdf.

¹⁵⁰ NAT'L ALLIANCE TO END HOMELESSNESS, RACIAL DISPARITIES IN HOMELESSNESS IN THE UNITED STATES (June 6, 2018), <https://endhomelessness.org/resource/racial-disparities-homelessness-united-states/>.

¹⁵¹ LAURA HARVEY, WHY EQUAL HOUSING FOR WOMEN WILL CONTINUE BE A 'TOUGH ROAD,' NBC NEWS (Aug. 1, 2019), <https://www.nbcnews.com/know-your-value/feature/why-equal-housing-women-will-continue-be-tough-road-ncna1038266>; see also THE CASE FOR FAIR HOUSING, *supra* note 42.

¹⁵² U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF POL'Y DEV. & RES., HOUSING AND DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES (2012), available at https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf.

¹⁵³ See *id.*

¹⁵⁴ AGNES CONSTANTE, ADVOCATES WORRY HOUSING ISSUES MAY LEAD TO AN ASIAN AMERICAN CENSUS UNDERCOUNT, NBC NEWS (2018), <https://www.nbcnews.com/news/asian-america/advocates-worry-housing-issues-may-lead-asian-american-census-undercount-n900381>.

¹⁵⁵ See, e.g., MARIKO CHANG, ASSET FUNDERS NETWORK, WOMEN AND WEALTH: INSIGHTS FOR GRANTMAKERS 6 (2015), available at https://assetfunders.org/wp-content/uploads/Women_Wealth_-_Insights_Grantmakers_brief_15.pdf (showing that the median net wealth of single, working-age, white, non-Hispanic men was \$28,900 in 2013, compared to \$100 for single, working-age Latinx women and \$200 for single, working-age Black women).

households¹⁵⁶ and because housing insecurity and eviction can strip wealth. Median wealth for single men age 18-64 (“working-age”) was \$10,150 in 2013—more than three times the median wealth of \$3,210 for single working-age women.¹⁵⁷ The gaps are even greater for women of color.

- In 2016, the median wealth of white households was almost 10 times greater than that of Black households (\$171,000 vs \$17,600) and over eight times greater than that of Latinx households (\$171,000 vs \$20,700).¹⁵⁸
- White households living near the poverty line typically have about \$18,000 in wealth, while Black households in similar economic conditions typically have a median wealth close to zero.¹⁵⁹
- Single women of color face a staggering gap in wealth because of the compounded effects of race and gender: The median net wealth of single, working-age, white, non-Hispanic men was \$28,900 in 2013, compared to \$100 for single, working-age Latinx women and \$200 for single, working-age Black women.¹⁶⁰

This is why disparate impact is so important to protect against rental policies that have a disproportionate impact on people of color, such as the following:

- **Voucher discrimination:** Landlords discriminating against Section 8 voucher holders often has an overwhelming impact on people of color. According to Washington D.C.’s Equal Rights Center, 36 cases of housing discrimination that were reported were source of income cases.¹⁶¹ When landlords do not accept housing vouchers, it often can foster and perpetuate residential segregation by erecting artificial barriers between neighborhoods with high opportunities and those with low opportunities.¹⁶²
- **Exclusionary zoning:** Cities passing zoning laws limiting the construction of affordable housing, such as multi-family dwellings, often has a disparate impact on people of color.¹⁶³ Because of systemic issues that make people of

¹⁵⁶ WILLIAM R. EMMONS, HOMEOWNERSHIP AND THE RACIAL WEALTH DIVIDE, FED. RESERVE OF ST. LOUIS 1, 1 (2017), <https://www.stlouisfed.org/publications/housing-market-perspectives/2017/homeownership-racial-wealth-divide>.

¹⁵⁷ CHANG, *supra* note 155, at 5.

¹⁵⁸ JESSE BRICKER ET AL., FED. RESERVE, CHANGES IN U.S. FINANCES FROM 2013 TO 2016: EVIDENCE FROM THE SURVEY OF CONSUMER FINANCES, (2017), *available at* <https://www.federalreserve.gov/publications/files/scf17.pdf>.

¹⁵⁹ WILLIAM DARITY, JR. ET AL., SAMUEL DUBOIS COOK CENTER ON SOCIAL EQUITY, WHAT WE GET WRONG ABOUT CLOSING THE RACIAL WEALTH GAP (Apr. 2018), *available at* https://socialequity.duke.edu/sites/socialequity.duke.edu/files/site-images/FINAL%20COMPLETE%20REPORT_.pdf.

¹⁶⁰ CHANG, *supra* note 155, at 6.

¹⁶¹ ALLY SCHWEITZER, HOUSING DISCRIMINATION RIFE IN D.C. REGION 50 YEARS AFTER FAIR HOUSING BECAME LAW, WAMU 88.5, AM. U. RADIO (2018), <https://wamu.org/story/18/04/11/housing-discrimination-rife-d-c-region-50-years-fair-housing-became-law/>.

¹⁶² *See, e.g.*, Complaint at 19, Nat’l Fair Housing Alliance v. Evolve, LLC, No. 1:2019cv01147 (D.D.C. Apr. 22, 2019).

¹⁶³ *See, e.g.*, United States v. City of Black Jack, 508 F. 2d 1179 (8th Cir. 1974) (finding that the ordinance “foreclose[d] 85% of African Americans living in the metropolitan area from obtaining housing in the city, and...at a time when 40 percent of them were living in substandard or overcrowded units”).

color more likely to be economically insecure, this exclusionary zoning can also perpetuate segregated neighborhoods.

- **Residency Preferences:** Some cities enact ordinances that restrict renting to “blood relatives” of the property owners. Depending on the demographics of the city, this can disproportionately exclude people of color from renting in that housing market.¹⁶⁴
- **Segregation of Publicly-Supported Housing:** Some cities refuse to construct affordable housing units in predominantly white areas, which has a disproportionate impact on people of color who need access to affordable housing close to quality jobs and/or good schools and also perpetuates racial segregation in the city.¹⁶⁵ This may happen in the context of the need to add affordable housing supply to an area, but it can also arise when there is a need to provide replacement housing after construction dislocates communities of color.¹⁶⁶
- **Displacement:** Some landlords engage in practices such as dramatically raising rents, creating new rental criteria, and discontinuing participation in the Section 8 program that, unless prevented through the use of disparate impact, would disproportionately displace renters of color.¹⁶⁷ Redevelopment plans can also displace low-income renters, who, depending on the proposed area for redevelopment, may be disproportionately people of color.¹⁶⁸
- **Discrimination in Insuring Apartments with Voucher Participants:** Just as landlords refusing to accept Section 8 voucher holders can have a disparate impact on people of color, insurance companies denying insurance coverage to landlords who rent apartments to Section 8 voucher holders can also have a disparate impact on people of color.¹⁶⁹

In addition, weakening protections against disparate impact in policies impacting homeowners and people seeking to become homeowners may exacerbate the racial wealth gap. These are some examples of such policies:

- **Reverse redlining:** Some mortgage lenders and brokers engage in lending policies that use a mixture of objective and subjective factors that lead to disproportionately negative impacts on people of color, such as raising interest rates and brokering fees on people of color who pose the same credit risk as white, non-Hispanic borrowers.¹⁷⁰ Algorithmic models used in mortgage lending may also have

¹⁶⁴ See, e.g., *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish*, No. 2:06-cv-07185 (E.D. La. 2006).

¹⁶⁵ See, e.g., *Inclusive Comm. Project, Inc. v. City of McKinney*, 2009 WL 2590121 (E.D. Texas. Aug. 20, 2009).

¹⁶⁶ See, e.g., *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988) (holding that the City of Hawthorne violated the Fair Housing Act by refusing to construct low-income housing for African Americans displaced by the construction of a Los Angeles freeway).

¹⁶⁷ See, e.g., *Crossroads Residents Organized for Stable & Secure Residencies v. MSP Crossroads Apartments*, 2016 U.S. Dist. LEXIS 86965 (D. Minn. 2016).

¹⁶⁸ See, e.g., *Rivera v. Incorporated Village of Farmingdale*, 571 F.Supp.2d 359 (E.D.N.Y. 2008).

¹⁶⁹ See, e.g., *National Fair Housing Alliance v. Travelers Indemnity Corporation*, No. 1:16-cv-00928 (D.D.C 2016)).

¹⁷⁰ See, e.g., *United States v. Wells Fargo*, No. 1:12-cv-01150 (D.D.C. 2012); *Ramirez v. Greenpoint Mortgage Funding*, 268 F.R.D. 627 (N.D. Cal. 2010).

disproportionate impacts on Black and Latinx people.¹⁷¹ Costlier loans make it harder to become a homeowner and perpetuate the racial wealth gap.¹⁷²

- **Insurance redlining:** Insurance companies using policies such as “minimum house value,” “market value-to-replacement cost,” and “minimum age of house” policies have created a new system of redlining neighborhoods of color. Rather than outright denying loans for homes in neighborhoods of color, these policies preclude millions of Black people from accessing quality homeowners insurance to protect one of their most significant assets. Lawsuits challenging the disparate impact of these practices¹⁷³ have helped expand access to quality insurance coverage for many people of color, so that they can protect one of the biggest sources of wealth for people of color.
- **Higher Insurance Premiums:** Instead of actually denying homeowner insurance coverage to households of color, some insurance companies use credit scoring algorithms that result in higher insurance premiums for homeowners of color compared to similarly situated white, non-Hispanic customers.¹⁷⁴ Paying higher insurance premiums eats up more of families’ budgets, meaning they have less money to pay their mortgages, save, or pay down other debt. Consequently, making it harder to hold insurance companies accountable for this type of discrimination can exacerbate the racial wealth gap.
- **Disaster Relief:** Some disaster relief programs that provide storm victims with funding to rebuild their homes base their compensation rates on the pre-storm value of the home or the cost to rebuild. Because homes in neighborhoods of color typically have lower values than homes in white neighborhoods, these policies have a disparate impact on neighborhoods of color.¹⁷⁵

Because of the importance of combatting discrimination against people of color and policies and practices that perpetuate segregation, the Center urges HUD to withdraw this Proposed Rule and instead focus on its statutory duties to eliminate housing discrimination and affirmatively further fair housing, including for people of color.

C. The Proposed Rule will harm immigrants based on their national origin.

The FHA prohibits discrimination on the basis of national origin, and the current Disparate Impact Rule helps challenge policies with a disparate impact on

¹⁷¹ FIGHT FOR HOUSING JUSTICE, WHAT YOU NEED TO KNOW ABOUT HUD’S PROPOSED DISPARATE IMPACT RULE & ALGORITHMIC MODELS (2019), *available at* https://docs.wixstatic.com/ugd/e9d741_0ebf823b5c13492da600cbe2a94fabaa.pdf.

¹⁷² KIMBERLY AMADEO, HOME EQUITY AND THE RACIAL WEALTH GAP, THE BALANCE (2019), <https://www.thebalance.com/how-home-equity-drives-the-racial-wealth-gap-4178236>; GILLIAN B. WHITE, WHY BLACKS AND HISPANICS HAVE SUCH EXPENSIVE MORTGAGES, THE ATLANTIC (2016), <https://www.theatlantic.com/business/archive/2016/02/blacks-hispanics-mortgages/471024/>.

¹⁷³ See, e.g., National Fair Housing Alliance, et al. v. Prudential Insurance Co., 208 F.Supp.2d 46, 57 (D.D.C. 2002); National Fair Housing Alliance, et al. v. Liberty Mutual Insurance Co., C.A. No. 1:98CV00928 TPJ (D.D.C.); National Fair Housing Alliance, et al. v. Travelers Property & Casualty Corp., No. 00-1506 (JR), at 1-2 (D.D.C. Jan. 9, 2001); and Toledo Fair Hous. Ctr. v. Farmers Ins. Group, Nos. C199-1339 & C100-2981, at 13-19 (Ohio C.P. Mar. 29, 2001).

¹⁷⁴ See, e.g., DeHoyos v. Allstate Corp., 240 F.R.D. 269 (W.D. Tex. 2007).

¹⁷⁵ See, e.g., Greater New Orleans Fair Housing Center v. HUD, No. 1:08-cv-01938 (D.D.C. 2008).

immigrants based on their national origin. For example, localities or landlords requiring renters to provide documentation of U.S. citizenship or immigration status may have a disparate impact on immigrants.¹⁷⁶ In localities with high immigrant populations, cities trying to enact land use and zoning policies seeking to ban mobile homes may have a disparate impact on immigrants who are seeking affordable housing in the locality.

Because of the importance of fair housing opportunities for immigrants, who are facing myriad threats to their well-being from the Trump administration, the Center urges HUD to withdraw this Proposed Rule and instead focus on its statutory duties to eliminate housing discrimination and affirmatively further fair housing.

D. The Proposed Rule will harm women and girls with disabilities and their families.

People with disabilities face particular barriers in securing housing. First, people with disabilities are twice as likely to live in poverty than people without disabilities, making affordable housing an acute problem.¹⁷⁷ This heightened risk of poverty is partly due to employment discrimination—for many years, people with disabilities have been employed at less than half the rates of people without disabilities. In 2017, the National Council on Disability reported that only 32% of working-age people with disabilities are employed compared with 73% of those without disabilities.¹⁷⁸ Some people with disabilities are paid a subminimum wage. Other people with disabilities are unable to work because of the unavailability of jobs in their area that can accommodate a severe disability. People with disabilities who are unable to work may participate in the Supplemental Security Income (SSI) program.¹⁷⁹ The majority (52%) of non-elderly adults receiving SSI were women.¹⁸⁰

Neither the low-wage work paid to many people with disabilities nor the \$6,122.16 average monthly payment for women receiving Federal SSI benefits,¹⁸¹ provides enough income by itself to cover rent and other basic necessities. This makes housing assistance programs, particularly important for people with disabilities. Publicly subsidized rental units are also more likely to be accessible.¹⁸²

¹⁷⁶ FIGHT FOR HOUSING JUSTICE, HOW YOU CAN STOP HUD FROM HARMING IMMIGRANTS' FAIR HOUSING RIGHTS, (2019), https://docs.wixstatic.com/ugd/e9d741_4dc0637ac9ab4f8399e288367c68a4a6.pdf.

¹⁷⁷ NAT'L COUNCIL ON DISABILITY, A PROGRESS REPORT 21 (Oct. 26, 2017), https://ncd.gov/sites/default/files/NCD_A%20Progress%20Report_508.pdf.

¹⁷⁸ *Id.* at 32.

¹⁷⁹ U.S. SOC. SEC. ADMIN., SSI ANNUAL STATISTICAL REPORT, 2017: FEDERALLY ADMINISTERED PAYMENTS, at 25 (Table 4), (Sep. 2018), *available at* https://www.ssa.gov/policy/docs/statcomps/ssi_asr/2017/sect02.pdf.

¹⁸⁰ NAT'L WOMEN'S LAW CTR. calculations based on *Id.* at 26 (Table 5). Among non-elderly adult beneficiaries, 51.6% were women; among adults 65 and older, 66.1% were women.

¹⁸¹ U.S. SOC. SEC. ADMIN., *supra* note 179, at Table 5.

¹⁸² SEWIN CHAN & INGRID GOULD ELLEN, HOUSING FOR AN AGING POPULATION, 27 HOUSING POL'Y DEBATE 167-192 (2017), *available at* <https://www.tandfonline.com/doi/abs/10.1080/10511482.2016.1184696>.

This is why it critical to ensure that protections against disability-based housing discrimination are not weakened. As it is, complaints of disability discrimination have comprised the largest percentage of housing discrimination complaints received by both public and private fair housing enforcement organizations since the early 2000s.¹⁸³ The inability to preserve housing will not only put people with disabilities at risk of homelessness and institutionalization, but will likely increase costs to state and local governments, as institutionalization, shelter placements, and emergency department visits increase in proportion to the decreased access to housing.

The Proposed Rule would weaken the disparate impact rule, which has provided protection for people with disabilities who have been disproportionately impacted by policies such as the following:

- **“Independent living” requirement:** Some landlords and public housing authorities require applicants to “live independently,” which excludes people with disabilities who use supportive services and want to live in integrated communities.
- **Source-of-income discrimination:** Policies that deny housing to applicants who receive disability benefits, housing assistance, or other public benefits that would permit them to meet the income requirement also disproportionately impact people with disabilities.
- **Zoning ordinances:** Some zoning ordinances deny people with disabilities permission to live in their own homes, purchased or leased by a service provider.
- **Minimum income requirements:** When landlords impose minimum income requirements, people with disabilities who could pay the required rent but do not have sufficient income to meet the requirements are disproportionately impacted because they are likely to have lower incomes.

The Proposed Rule will undermine protections against disparate impact housing discrimination for women and girls with disabilities, exacerbating the broader discrimination and housing needs that already exist. Consequently, the Center urges HUD to withdraw its Proposed Rule and shift its focus to its statutory duties to eliminate housing discrimination and affirmatively further fair housing, including for women and girls with disabilities.

VI. The Center strongly opposes the Proposed Rule and calls on HUD to withdraw it.

The FHA was enacted to promote integration and fight discrimination in housing. HUD’s Proposed Rule, in contrast, ensures continued segregation and intentionally harms protected classes. Businesses, governments, landlords, and other entities will be emboldened to act in unprincipled ways, regardless of the impact of their actions, knowing that challenging discrimination will be more difficult than in the past.

Weakening the current Disparate Impact Rule will cause harm to millions of people who already struggle to find housing. As the Administration is turning its attention to the

¹⁸³ THE CASE FOR FAIR HOUSING, *supra* note 42, at 27.

increasing number of people experiencing homelessness in the U.S., the Center strongly urges HUD not to exacerbate housing instability by making the Disparate Impact rule less effective. This proposal is completely antithetical to HUD's mission to affirmatively further fair housing, threatens our nation's core values, upends decades of fair housing case law and HUD enforcement, and serves the interests of certain industry groups like mortgage lenders and homeowner's insurance providers, while restricting the rights of women, children, and their families who experience housing discrimination every day.

Women of all backgrounds—particularly those facing additional barriers due to race, disability, gender identity, sexual orientation, and immigration status—should have robust protections under the Fair Housing Act. Property owners, housing providers, and local governments are endlessly creative in crafting and adopting discriminatory policies that make it harder for women to access safe and affordable housing. The Center urges HUD to immediately withdraw the Proposed Rule and instead advance housing policies that strengthen – not undermine – the disparate impact theory that allows for stable, safe, and affordable housing for all.

Thank you for the opportunity to submit comments on the Proposed Rule. Please do not hesitate to contact Sarah Hassmer at shassmer@nwlc.org to provide further information.

Sincerely,



Melissa Boteach
Vice President for Income Security and Child Care/ Early Learning
National Women's Law Center



Amy K. Matsui
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