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Sasha Samberg-Champion
Deputy General Counsel for Enforcement and Fair Housing
Department of Housing and Urban Development
451 7th Street SW, Room 10110
Washington, DC 20410

Re: Comments in Response to HUD's Reinstatement of Discriminatory Effects Standard Proposed Rule, HUD Docket No. FR-6251-P-01

Dear Mr. Samberg-Champion:

The National Women's Law Center (the Center) takes this opportunity to comment in support of the Department of Housing and Urban Development's (HUD) Reinstatement of Discriminatory Effects Standard Proposed Rule, which was published in the Federal Register on June 25, 2021 (HUD Docket No. FR-6251-P-01) (Proposed Rule).

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.

Housing impacts every aspect of people's lives. Yet systemic racial and gender discrimination persist in housing.¹ Protecting fair access to housing is necessary and central to HUD's mission, yet HUD promulgated a rule in 2020 that threatens fair access to safe, affordable, and accessible housing for women, LGBTQ people, children, and families. As of the date of this Proposed Rule's publication, the 2020 Rule is subject to a preliminary injunction, and the "Implementation of the Fair Housing Act's Discriminatory Effects Standard" (2013 Rule) remains in effect. Because of the importance of fair housing to all facets of people's lives and because the 2013 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 supports recodifying the 2013 Rule through this rulemaking. More specifically, the Center will stress in this comment the following:

¹ NAT'L WOMEN'S LAW CTR. & NAT'L LOW INCOME HOUS. COAL., GENDER AND RACIAL JUSTICE IN HOUSING, (May 2021), <https://nwlc.org/resources/gender-and-racial-justice-in-housing/> [hereinafter GENDER AND RACIAL JUSTICE IN HOUSING].

- Lack of fair access to safe and affordable housing is a key gender justice issue. Housing impacts health, nutrition, education, and employment outcomes for women and LGBTQ people.
- Discrimination limits access to safe, affordable, and accessible housing for many women, LGBTQ people, and their families.
- The 2013 Rule protects women, LGBTQ people, and other protected classes from housing discrimination in the form of policies and practices that have a disparate impact (discriminatory effects) based on a protected class under the Fair Housing Act (FHA). 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 2013 Rule creates a rigorous approach for evaluating housing discrimination claims and should be maintained.
- The 2020 Rule eliminated core protections from policies and practices that have a discriminatory impact based on sex, race, and other protected classes under the FHA.
- The Proposed Rule to recodify the 2013 Rule will provide the certainty necessary to protect women, LGBTQ people, and their families from discriminatory effects and provide access to the courts when discrimination occurs.

I. Lack of access to safe and affordable housing is a key gender justice issue.

Where we live is at the very core of our daily lives. Access to safe and affordable housing is crucial to good health,² nutrition,³ education,⁴ and stable employment.⁵ Conversely, unsafe and unstable housing undermines the well-being of women, especially women of color, LGBTQ people, disabled women, and their families.

A. Lack of fair access to safe and affordable housing worsens health outcomes.

Safe, affordable, and accessible housing is key to health and well-being. When people are housing cost-burdened, they have insufficient resources for other essential needs, including food, health insurance, and health care. Those with unaffordable housing costs are more likely to skip health care treatments and not fill a prescription as a result of cost,⁶ which is particularly harmful for women and LGBTQ people, who are already

² 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. & EDUC., HEALTH IN HOUSING: EXPLORING THE INTERSECTION BETWEEN HOUSING AND HEALTH CARE (Feb. 2016), <https://www.enterprisecommunity.org/download?fid=5703&nid=4247>; CHILDREN'S HEALTHWATCH, OVERCROWDING AND FREQUENT MOVES UNDERMINE CHILDREN'S HEALTH (2011), www.issuelab.org/resources/13900/13900.pdf.

³ 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>.

⁴ OPPORTUNITY STARTS AT HOME, EDUCATION ADVOCATES ARE HOUSING ADVOCATES (Dec. 2018), <https://www.opportunityhome.org/wp-content/uploads/2018/02/Education-Fact-Sheet.pdf>.

⁵ 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>.

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

more likely to delay needed medical care and prescriptions because they can't afford it.⁷

When access to stable and affordable housing is limited, more women, LGBTQ people, and families are forced to live in highly segregated and/or substandard housing. Housing segregation widens health disparities by determining access to schools, jobs, health care, and nutritious food.⁸ By contrast, the availability of resources in more integrated neighborhoods—such as public transportation to work,⁹ grocery stores with nutritious foods,¹⁰ and safe spaces to exercise¹¹—are all correlated with improved health outcomes.

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.¹² For those who need prescription medication, lack of stable housing can also make proper storage of medications difficult or impossible.¹³

⁷ MUNIRA Z. GUNJA, SARA R. COLLINS, MICHELLE M. DOTY & SOPHIE BEUTEL, COMMONWEALTH FUND, HOW THE AFFORDABLE CARE ACT HAS HELPED WOMEN GAIN INSURANCE AND IMPROVED THEIR ABILITY TO GET HEALTH CARE (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 percent of women age 19 through 64 still reported not getting the health care they needed because of costs); GEO. U. HEALTH POL'Y INST., PRESCRIPTION DRUGS 36 (last visited Aug. 12, 2021) <https://hpi.georgetown.edu/rxdrugs/>; SPENCER WATSON, OLIVER MCNEIL & BRUCE BROISMAN, CTR. FOR LGBTQ ECON. ADVANCEMENT & RES., THE ECONOMIC WELL-BEING OF LGBT ADULTS IN THE U.S. IN 2019 (2021), <https://lgbtq-economics.org/wp-content/uploads/2021/06/The-Economic-Well-Being-of-LGBT-Adults-in-2019-Final-1.pdf>; 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.

⁸ CHIQUITA COLLINS & DAVID R. WILLIAMS, RACIAL RESIDENTIAL SEGREGATION: A FUNDAMENTAL CAUSE OF RACIAL DISPARITIES IN HEALTH, 116 PUB. HEALTH REPORTS 404 (Sept.-Oct. 2001), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1497358/pdf/12042604.pdf>.

⁹ SUNE DJURHUUS, HENNING S. HANSEN, METTE AADAHL & CHARLOTTE GLÜMER, THE ASSOCIATION BETWEEN ACCESS TO PUBLIC TRANSPORTATION AND SELF-REPORTED ACTIVE COMMUTING, 11 INT. J. ENVIRON. RES. PUB. HEALTH 12, 632 (Dec. 2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4276637/>.

¹⁰ JUDITH BELL, GABRIELLA MORA, ERIN HAGAN, VICTOR RUBIN & ALLISON KARPYN, 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.

¹¹ JUDY Y. OU, JONATHAN I. LEVY, JUNENETTE L. PETERS, ROSEANN BONGIOVANNI, JOVANNA GARCIA-SOTO, RAFAEL MEDINA & MADELEINE K. SCAMMELL, 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/>.

¹² 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/housing/research-shows-housing-vouchers-reduce-hardship-and-provide-platform-for-long-term>; see also LINDA GIANNARELLI, KYE LIPPOLD, SARAH MINTON & LAURA WHEATON, 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, VIVEIROS & AULT, *supra* note 6.

¹³ GIANNARELLI, LIPPOLD, MINTON & WHEATON, *supra* note 12.

Different forms of housing instability, including eviction, elevate stress levels, depression, and hopelessness.¹⁴ Prior to the COVID-19 pandemic, low-income Black women who rent were nine times more likely than low-income white women who rent to be evicted.¹⁵ Throughout this pandemic, Asian, Black, and Latina women have been more likely to be behind on their rent or mortgage payments,¹⁶ increasing housing instability and heightening the threat of eviction and foreclosure. 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.¹⁷ This exacerbates the heightened risk that women, particularly women of color, have of experiencing depression,¹⁸ anxiety,¹⁹ and high blood pressure.²⁰

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.²¹ The younger a child is and the longer a child experiences homelessness, the greater the cumulative toll of negative health outcomes.²² Even children born to women who experienced homelessness while pregnant are more likely to be hospitalized or suffer worse health, compared to their peers.²³

¹⁴ *Id.*

¹⁵ GENDER AND RACIAL JUSTICE IN HOUSING, *supra* note 1.

¹⁶ NAT'L WOMEN'S LAW CTR., NWLC ANALYSIS OF U.S. CENSUS BUREAU COVID-19 HOUSEHOLD PULSE SURVEYS, <https://nwlc.org/resources/nwlc-analysis-of-u-s-census-bureau-covid-19-household-pulse-surveys/> [hereinafter NWLC PULSE SURVEYS ANALYSIS] (last accessed August 12, 2021) (providing gender and racial analysis of behind on rent statistics across several U.S. Census Bureau Household Pulse Surveys).

¹⁷ ALISON BOVELL & MEGAN SANDEL, CHILDREN'S HEALTH WATCH, THE HIDDEN HEALTH CRISIS OF EVICTION (Oct. 5, 2018), <https://childrenshealthwatch.org/the-hidden-health-crisis-of-eviction/>.

¹⁸ 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 Latina and Black women. NAT'L INSTS. OF HEALTH, OFFICE OF RES. ON WOMEN'S HEALTH, WOMEN OF COLOR HEALTH DATA BOOK at 147 (Oct. 2014), <https://orwh.od.nih.gov/sites/orwh/files/docs/WoC-Databook-FINAL.pdf>.

¹⁹ CARMEN P. MCLEAN, ANU ASNAANI, BRETT T. LITZ & STEFAN G. HOFMANN, GENDER DIFFERENCES IN ANXIETY DISORDERS: PREVALENCE, COURSE OF ILLNESS, COMORBIDITY AND BURDEN OF ILLNESS, 45 J. PSYCHIATRIC RES. 1027-1035 (2011); <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3135672/>; 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).

²⁰ NAT'L INSTS. OF HEALTH, *supra* note 18, at 121 (noting that Black women experience high blood pressure at a higher rate than Latinx or white, non-Hispanic women).

²¹ HEATHER SANDSTROM & SANDRA HUERTA, URBAN INST., THE NEGATIVE EFFECTS OF INSTABILITY ON CHILD DEVELOPMENT: A RESEARCH SYNTHESIS, (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, LIPPOLD, MINTON & WHEATON, *supra* note 12.

²² MEGAN SANDEL, RICHARD SHEWARD & LISA STURTEVANT, NAT'L HOUS. CONF. & CTR. FOR HOUS. POL'Y, COMPOUNDING STRESS: THE TIMING AND DURATION EFFECTS OF HOMELESSNESS ON CHILDREN'S HEALTH (June 2015), <https://www.issuelab.org/resources/21731/21731.pdf>.

²³ 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/>.

Substandard housing conditions, such as lead paint, poor ventilation or heat/cooling, and pest infestation—also pose a variety of health risks.²⁴ In-home exposure to lead can irreversibly damage the brains and nervous systems of children.²⁵ Low-income women, LGBTQ people, and their families are most likely to experience unhealthy housing and are typically least able to remedy them, contributing to disparities in health across socioeconomic groups.²⁶

Thus, access to safe and affordable housing is critical to ensuring the health of women, LGBTQ people, and their families.

B. Lack of fair access to safe and affordable housing negatively impacts nutrition.

When low-income families spend high portions of their income on their rent, they struggle to pay for nutritious food and face higher food insecurity rates.²⁷ 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.²⁸ During the COVID-19 pandemic, Black and Latina women have been more likely than white, non-Hispanic men to experience food insecurity recently.²⁹ U.S. Census Bureau data also shows that LGBTQ adults are also more likely than non-LGBTQ adults to report food insecurity in recent months.³⁰

Historical residential segregation has restricted neighborhood access to healthy foods and inhibits a family's ability to engage in healthy eating behaviors.³¹ Lack of access to healthy food negatively impacts nutrition for families in neighborhoods of color and is correlated with an increased chance of obesity.³² Meanwhile, evidence suggests that an increase in access, availability, or consumption of healthy foods was associated with a significant decrease in body mass index.³³

²⁴ Nat'l Women's Law Ctr., Comment Letter on Proposed Rule on Affirmatively Furthering Fair Housing 4 (Mar. 2020), <https://nwlc.org/resources/nwlc-comments-to-the-u-s-department-of-housing-and-urban-development-on-affirmatively-furthering-fair-housing/> [hereinafter NWLC 2020 AFFH HUD Comment].

²⁵ WORLD HEALTH ORG., LEAD POISONING AND HEALTH (Aug. 23, 2018), <http://www.who.int/mediacentre/factsheets/fs379/en/>.

²⁶ PAULA BRAVEMAN, MERCEDES DEKKER, SUSAN EGERTER, TABASHIR SADEGH-NOBARI & CRAIG POLLACK, ROBERT WOOD JOHNSON FOUND., HOW DOES HOUSING AFFECT HEALTH? 3–7 (May 2011), <https://www.rwjf.org/en/library/research/2011/05/housing-and-health.html>.

²⁷ JASON M. FLETCHER, TATIANA ANDREYEVA & SUSAN H. BUSCH, ASSESSING THE EFFECT OF INCREASING HOUSING COSTS ON FOOD INSECURITY, 15 J. CHILDREN POVERTY 79 (Sept. 9, 2009), <https://www.tandfonline.com/doi/abs/10.1080/10796120903310541>.

²⁸ JOINT CTR. FOR HOUS. STUDIES OF HARVARD U., THE STATE OF THE NATION'S HOUSING 2018, at 30, 32 (2018),

http://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2018.pdf.

²⁹ NWLC PULSE SURVEYS ANALYSIS, *supra* note 16 (providing gender and racial analysis of food insecurity across several U.S. Census Bureau Household Pulse Surveys).

³⁰ THOM FILE & JOEY MARSHALL, LGBT COMMUNITY HARDER HIT BY ECONOMIC IMPACT OF RECESSION, U.S. CENSUS BUREAU (Aug. 11, 2021), <https://www.census.gov/library/stories/2021/08/lgbt-community-harder-hit-by-economic-impact-of-pandemic.html>.

³¹ NWLC 2020 AFFH HUD COMMENT, *supra* note 24, at 7.

³² NWLC 2020 AFFH HUD COMMENT, *supra* note 24, at 8.

³³ NWLC 2020 AFFH HUD COMMENT, *supra* note 24, at 8.

Access to safe and affordable housing is therefore key to ensuring good nutrition for women, LGBTQ people, and their families.

C. Lack of fair access to safe and affordable housing undermines educational outcomes.

Gender justice, access to fair housing opportunities, and educational equity are deeply intertwined.

First, housing instability has negative impacts on education. Children who experience housing instability are more likely to have behavioral problems and struggle in school.³⁴ Experiencing homelessness 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.³⁵ Homelessness is associated with an 87 percent greater likelihood of a child being pushed out of school.³⁶ In addition, housing instability directly correlates to decreases in academic achievement and retention.³⁷ Conversely, educational attainment is linked to positive health outcomes and longer lives.³⁸

Further, housing policies and practices, some of which were created or perpetuated by the government, have created segregated neighborhoods and, by extension, segregated schools. 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.³⁹ 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.

³⁴ ABIGAIL L. GAYLORD, WHITNEY J. COWELL, LORI A. HOEPNER, FREDERICA P. PERERA, VIRGINIA A. RAUH, & JULIE B. HERBSTMAN, HOUSING INSTABILITY IS LINKED TO ADVERSE CHILDHOOD BEHAVIOR, INT. PUBLIC HEALTH J. (2018), <https://howhousingmatters.org/articles/housing-instability-linked-adverse-childhood-behavior/>.

³⁵ 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 55 (Mar. 2014) (Ph.D. dissertation, Howard University), <https://www.proquest.com/openview/56127deef7305f761d645aac34b9eac/1?pq-origsite=gscholar&cbl=18750> (citations omitted).

³⁶ ERIN S. INGRAM, JOHN M. BRIDGELAND, BRUCE REED & MATTHEW ATWELL, CIVIC ENTERPRISES & HART RES. ASSOCS., HIDDEN IN PLAIN SIGHT: HOMELESS STUDENTS IN AMERICA'S PUBLIC SCHOOLS (2016), https://www.americaspromise.org/sites/default/files/d8/2016-12/HiddeninPlainSightFullReportFINAL_0.pdf.

³⁷ See RAHMAN, *supra* note 35.

³⁸ SUSAN EGERTER, PAULA BRAVEMAN, TABASHIR SADEGH-NOBARI, REBECCA GROSSMAN-KAHN & MERCEDES DEKKER, ROBERT WOOD JOHNSON FOUND., EDUCATION AND HEALTH (Apr. 2011), <https://www.rwjf.org/en/library/research/2011/05/education-matters-for-health.html>.

³⁹ See, e.g. U.S. COMM'N ON CIVIL RIGHTS, PUBLIC EDUCATION FUNDING INEQUITY IN AN ERA OF INCREASING CONCENTRATION OF POVERTY AND RESEGREGATION 85-90, 106 (2018), <https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf>.

Access to housing is thus critical to ensuring equal access to quality education and positive outcomes for women, girls, and LGBTQ people throughout the country.

D. Lack of fair access to safe and affordable housing jeopardizes employment outcomes.

In addition, 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.⁴⁰ 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,⁴¹ and are disproportionately women.⁴² 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. The housing crisis precipitated by COVID-19, including delays state and local emergency rental assistance programs face to pay back rent for evicted families, may exacerbate the challenges of finding new housing. 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 by prospective employers are increasingly common, and they can effectively bar individuals from job opportunities. According to one report, 25 percent of unemployed respondents said that a potential employer requested a credit check on the job application.⁴³ Consequently, 10 percent of unemployed respondents were notified they would not be hired due to information in their credit report.⁴⁴ Housing

⁴⁰ MATTHEW DESMOND & CARL GERSHENSON, HOUSING AND EMPLOYMENT INSECURITY AMONG THE WORKING POOR, 0 SOC. PROBLEMS 1 (2016),

<https://scholar.harvard.edu/files/mdesmond/files/desmondgershenson.sp2016.pdf?m=1452638824>.

⁴¹ 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>.

⁴² Women make up 65 percent 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), <https://ipums.org/>.

⁴³ 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>.

⁴⁴ *Id.*

instability thus compounds other barriers to securing stable employment, and often serves to aggravate and perpetuate 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.

II. Discrimination limits access to safe, affordable, and accessible housing for many women, LGBTQ people, and their families.

Every year, more than 4 million instances of discrimination impact people's ability to access affordable and accessible housing, whether through renting or owning a home.⁴⁵ Not all of this discrimination is intentional—policies and practices that have discriminatory effects make it harder for women in general and particularly women of color, survivors of domestic violence or sexual assault, LGBTQ people, women with disabilities, and mothers with children to obtain or maintain housing.

Women already face a higher risk of economic insecurity throughout their lives, which makes it difficult for them to afford safe housing. The 2021 National Housing Wage, which represents the amount that a worker should be paid to afford rent without being cost-burdened, is \$24.90 per hour for a modest two-bedroom rental home.⁴⁶ Yet, women are overrepresented in the 40 lowest paying jobs, typically paying only \$12 per hour or less.⁴⁷ Consequently, low-paid women often need rental assistance to afford a home. In fact, women head 75 percent of households served by HUD rental assistance programs.⁴⁸

In addition, women of color—especially Black and Latinx women—face greater risks of eviction,⁴⁹ homelessness,⁵⁰ and housing discrimination.⁵¹ Landlords and real estate

⁴⁵ LINDSAY AUGUSTINE, CATHY CLOUD, SHERRILL FROST-BROWN, MADELINE MCBRIDE, SAMUEL TOPE-OJO, MORGAN WILLIAMS & MAUREEN YAP, NAT'L FAIR HOUS. ALLIANCE, FAIR HOUSING TRENDS REPORT 6 (2021), https://drive.google.com/file/d/1-qkD1FQj8GjOT2UdF4buBaJ74or56_qn/view. 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), https://www.hud.gov/sites/documents/DOC_14775.pdf.

⁴⁶ ANDREW AURAND, DAN EMMANUEL, IKRA RAFI, DAN THREET & DIANE YENTEL, NAT'L LOW INCOME HOUS. COAL., OUT OF REACH: THE HIGH COST OF HOUSING 2 (2021), https://nlihc.org/sites/default/files/oor/2021/Out-of-Reach_2021.pdf.

⁴⁷ JASMINE TUCKER & JULIE VOGTMAN, NAT'L WOMEN'S LAW CTR., WHEN HARD WORK IS NOT ENOUGH: WOMEN IN LOW-PAID JOBS (Apr. 2020), <https://nwlc.org/resources/when-hard-work-is-not-enough-women-in-low-paid-jobs/>

⁴⁸ GENDER AND RACIAL JUSTICE IN HOUSING, *supra* note 1, at 4.

⁴⁹ 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, MACARTHUR FOUND.: HOW HOUSING MATTERS, POOR BLACK WOMEN ARE EVICTED AT ALARMING RATES, SETTING OFF A CHAIN OF HARDSHIP (Mar. 2014), https://www.macfound.org/media/files/HHM_-_Poor_Black_Women_Are_Evicted_at_Alarming_Rates.pdf.

⁵⁰ 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/>.

⁵¹ LAURA HARVEY, WHY EQUAL HOUSING FOR WOMEN WILL CONTINUE TO BE A 'TOUGH ROAD,' NBC NEWS: KNOW YOUR VALUE (Aug. 1, 2019), <https://www.nbcnews.com/know-your-value/feature/why-equal->

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 white individuals and families.⁵² 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.⁵³ As a result, more women of color end up experiencing homelessness in comparison to their white, non-Hispanic counterparts.⁵⁴

LGBTQ individuals also face significant challenges in accessing safe and stable housing. In 2019, LGBTQ households were more than twice as likely to receive housing assistance than non-LGBTQ households (6.0 percent compared to 2.6 percent).⁵⁵ In addition, LGBTQ individuals—including LGBTQ youth—disproportionately experience homelessness and housing insecurity, facing discrimination in both homeless shelters and rental markets.⁵⁶ Transgender and nonbinary/genderqueer individuals are particularly likely to face barriers finding another shelter if they are denied service at a homeless shelter.⁵⁷ Housing insecurity and homelessness, in turn, subject LGBTQ individuals experiencing homelessness to future violence.⁵⁸

housing-women-will-continue-be-tough-road-ncna1038266; see also AUGUSTINE, CLOUD, FROST-BROWN, McBRIDE, TOPE-OJO, WILLIAMS & YAP, *supra* note 45, at 12.

⁵² U.S. DEPT OF HOUS. & URBAN DEV., OFFICE OF POL'Y DEV. AND RES., HOUSING AND DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES (2012), https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf.

⁵³ See *id.*

⁵⁴ AGNES CONSTANTE, ADVOCATES WORRY HOUSING ISSUES MAY LEAD TO AN ASIAN-AMERICAN CENSUS UNDERCOUNT, NBC NEWS, (Aug. 12, 2018), <https://www.nbcnews.com/news/asian-america/advocates-worry-housing-issues-may-lead-asian-american-census-undercount-n900381>.

⁵⁵ CAITLIN ROONEY, CHARLIE WHITTINGTON & LAURA E. DURSO, CTR. FOR AM. PROGRESS, PROTECTING BASIC LIVING STANDARDS FOR LGBTQ PEOPLE 12 (Aug. 2018), <https://www.americanprogress.org/issues/lgbt/reports/2018/08/13/454592/protecting-basic-living-standards-lgbtq-people/>; WATSON, MCNEIL & BROISMAN, *supra* note 7.

⁵⁶ LINDSAY MAHOWALD, MATHEW BRADY & CAROLINE MEDINA, CTR. FOR AM. PROGRESS, DISCRIMINATION AND EXPERIENCES AMONG LGBTQ PEOPLE IN THE US: 2020 SURVEY RESULTS (Apr. 2021), <https://www.americanprogress.org/issues/lgbt-rights/news/2021/04/21/498521/discrimination-experiences-among-lgbtq-people-us-2020-survey-results/>; U.S. DEPT. OF HOUS. AND URBAN DEV., AN ESTIMATE OF HOUSING DISCRIMINATION AGAINST SAME-SEX COUPLES (2013), 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 (January 7, 2016), <https://www.americanprogress.org/issues/lgbt/reports/2016/01/07/128323/discrimination-against-transgender-women-seeking-access-to-homeless-shelters/>; SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA'AYAN ANAFI, THE NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY, <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>; JOHN ECKER, TIM AUBRY, & JOHN SYLVESTRE, A REVIEW OF THE LITERATURE ON LGBTQ ADULTS WHO EXPERIENCE HOMELESSNESS, 66 J. HOMOSEXUALITY 297 (2018), <https://doi.org/10.1080/00918369.2017.1413277>; MAYA BRENNAN, ALLY LIVINGSTON, & VERONICA GAITÁN, FIVE FACTS ABOUT HOUSING ACCESS FOR LGBT PEOPLE, HOUSING MATTERS, (June 13, 2018), <https://howhousingmatters.org/articles/five-facts-housing-access-lgbt-people/>; SOON KYU CHOI, BIANCA D.M. WILSON, JAMA SHELTON, GARY J. GATES, UCLA S.L. WILLIAMS INST., SERVING OUR YOUTH (JUNE 2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf>.

⁵⁷ MAHOWALD, BRADY, & MEDINA, *supra* note 56.

⁵⁸ LES B. WHITBECK, XIAOJIN CHEN, DAN R. HOYT, KIMBERLY A. TYLER & KURT D. JOHNSON, MENTAL DISORDER, SUBSISTENCE STRATEGIES, AND VICTIMIZATION AMONG GAY, LESBIAN, AND BISEXUAL HOMELESS AND RUNAWAY ADOLESCENTS, 41 J. SEX RES. 329 (2004) <https://www.ncbi.nlm.nih.gov/pubmed/15765273>.

In addition, many people with disabilities face obstacles to affordable, accessible housing. A staggering 55 percent of reported complaints of housing discrimination to HUD in 2020 involved discrimination on the basis of disability.⁵⁹ In addition, women were the majority of Supplemental Security Income (SSI) elderly recipients in 2019 (51 percent of non-elderly adult recipients and 65 percent of elderly recipients).⁶⁰ Unfortunately, the average monthly payment for women receiving Supplemental Security Income (SSI) is only \$549.61,⁶¹ which is insufficient to cover rent and other basic necessities in any market.⁶² Further, many people with disabilities face employment discrimination that makes disabled people more likely to work part-time and need housing assistance, such as vouchers, to afford their rent.

Further, domestic violence is a primary cause of homelessness for women and children in the United States,⁶³ and HUD has repeatedly recognized housing discrimination against domestic violence survivors as a significant fair housing issue.⁶⁴ Women account for over 80 percent of domestic violence survivors.⁶⁵ Over 90 percent of unhoused women share that they experienced domestic abuse or sexual violence in their lives, and over 50 percent say that domestic violence caused their homelessness.⁶⁶ Housing access is critical for survivors, as lack of safe and affordable housing options is regularly reported as a primary barrier to escaping abuse.⁶⁷ 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.⁶⁸

Housing discrimination against survivors also implicates other protected classes. Women of color and disabled women face both increased barriers to housing and disproportionate rates of violence.⁶⁹ Additionally, LGBTQ individuals experience high

⁵⁹ AUGUSTINE, CLOUD, FROST-BROWN, MCBRIDE, TOPE-OJO, WILLIAMS & YAP, *supra* note 45, at 3.

⁶⁰ JASMINE TUCKER, SARAH HASSMER, AMY MATSUI, MELISSA BOTEACH & CARA CLAFLIN, NAT'L WOMEN'S LAW CTR., BY THE NUMBERS: DATA ON KEY PROGRAMS FOR THE WELL-BEING OF WOMEN & THEIR FAMILIES 5 (June 2021), <https://nwlc.org/resources/by-the-numbers-data-on-key-programs-for-the-well-being-of-women-their-families/>.

⁶¹ U.S. SOC. SEC. ADMIN., FEDERALLY ADMINISTERED PAYMENTS 26, Table 5 (2019), https://www.ssa.gov/policy/docs/statcomps/ssi_asr/2019/sect02.pdf.

⁶² AURAND, EMMANUEL, RAFI, THREET & YENTEL, *supra* note 46, at 2.

⁶³ See AM. CIVIL LIBERTIES UNION WOMEN'S RIGHTS PROJECT, DOMESTIC VIOLENCE AND HOMELESSNESS (2006), <http://www.aclu.org/pdfs/dvhomelessness032106.pdf>; see also U.S. CONF. 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>.

⁶⁴ See, e.g., Memorandum from Sara K. Pratt, Deputy Assistant Secretary for Enforcement and Programs, U.S. Dep't of Hous. & Urban Dev. To FHEO Office Directors & FHEO Regional Directors (Feb. 9, 2011), <https://www.hud.gov/sites/documents/FHEODOMESTICVIOLGUIDENG.PDF> (hereinafter HUD Memo to FHEO Office & Regional Directors).

⁶⁵ U.S. DEP'T OF JUSTICE, OFF. OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS CRIME DATA BRIEF: INTIMATE PARTNER VIOLENCE, 1993-2001 (Feb. 2003), <https://bjs.ojp.gov/content/pub/pdf/ipv01.pdf>.

⁶⁶ 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.

⁶⁷ 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 (2010), https://b.3cdn.net/naeh/416990124d53c2f67d_72m6b5uib.pdf.

⁶⁸ See *id.* at 431.

⁶⁹ See McLAUGHLIN & FOX, *supra* note 66, 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

rates of domestic violence, while 71 percent of survivors reported that they were denied shelter because of barriers related to gender identity.⁷⁰

In sum, housing discrimination remains a significant barrier for many women, LGBTQ people, and their families to gain fair access to safe and affordable housing.

III. The 2013 Rule protects women, LGBTQ people, and other protected classes from housing discrimination.

Disparate impact under the FHA has been used to combat housing discrimination for over 40 years. As the Supreme Court stated in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc. (ICP)*, “Recognition of disparate-impact liability under the FHA plays an important role in uncovering discriminatory intent—it permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.”⁷¹ In this way, disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.⁷² As noted above, 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.

A. Several housing policies and practices have discriminatory effects.

Here are just some examples of discriminatory practices that disproportionately affect women and other protected classes under the FHA:

- **Voucher Discrimination:** Landlords may refuse to accept housing vouchers,⁷³ and insurance companies may deny commercial insurance coverage to landlords who rent apartments to people who use housing vouchers.⁷⁴ These and other types of voucher discrimination often have an overwhelming impact on households headed

AMERICAN WOMEN (Mar. 2013), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_SVAAWomenRevised.pdf; SHARON G. SMITH, JIERU CHEN, KATHLEEN C. BASILE, LEAH K. GILBERT, MELISSA T. MERRICK, NIMESH PATEL, MARGIE WALLING & ANURAG JAIN, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010-2012 STATE REPORT, CTRS. FOR DISEASE CONTROL & PREVENTION, NAT’L CTR. FOR INJURY PREVENTION & CONTROL (Apr. 2017), <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf>.

⁶⁹ AM. CIVIL LIBERTIES UNION WOMEN’S RIGHTS PROJECT, HUM. RTS. INST. AT COLUM. L. SCH. & HUM. RTS. CLINIC AT U. OF MIAMI SCH. OF L., DOMESTIC VIOLENCE & SEXUAL ASSAULT IN THE UNITED STATES: A HUMAN RIGHTS BASED APPROACH & PRACTICE GUIDE (Aug. 2014), https://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/dv_sa_hr_guide_reduce.pdf.

⁷⁰ NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED INTIMATE PARTNER VIOLENCE IN 2015 (2016), http://avp.org/wp-content/uploads/2017/04/2015_ncavp_lgbtqipvreport.pdf.

⁷¹ *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 521 (2015).

⁷² *Id.* at 540.

⁷³ See, e.g., Complaint at 9, *Nat’l Fair Hous. Alliance v. Evolve, LLC*, No. 1:19-cv-1147 (TNM) (D.D.C. Apr. 22, 2019).

⁷⁴ See, e.g., Press Release, Nat’l Fair Hous. Alliance, *National Fair Housing Alliance Settles Disparate Impact Lawsuit with Travelers Indemnity Company* (Feb. 23, 2018), <https://nationalfairhousing.org/2018/02/23/travelers/>.

by women. In 2020, households headed by women made up 78 percent of housing choice voucher participants nationwide.⁷⁵ While these participation rates differ in different regions of the United States, households headed by women are likely to comprise the majority of housing choice voucher participants in numerous rental markets across the country. In addition, voucher discrimination may have a disparate impact on LGBTQ people in some regions of the country, as nationwide, LGBTQ people are more likely than non-LGBTQ people to receive housing assistance.⁷⁶ Given higher participation rates in the housing choice voucher program for people of color and disabled people,⁷⁷ voucher discrimination also may prevent many women of color and disabled women from accessing affordable housing.

- **Occupancy Restrictions:** Policies that impose overly restrictive occupancy requirements disproportionately harm families with children,⁷⁸ 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.⁷⁹ 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,⁸⁰ which imposes particular challenges for the one in five (20.9 percent) pregnant workers (and 30 percent of Black women and 31.3 percent of Latinas) who work in low-wage jobs and may not be able to afford to rent an apartment with an additional bedroom for their infant.⁸¹
- **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.⁸² For example, a landlord's policy against congregating in common areas may have a discriminatory impact on families with

⁷⁵ U.S. Dep't of Hous. & Urban Dev., Office of Policy Dev. & Res., *Assisted Housing: National and Local*, <https://www.huduser.gov/portal/datasets/assthsq.html> (last accessed Aug. 19, 2021) (using the "% female head" variable).

⁷⁶ WATSON, MCNEIL & BROISMAN, *supra* note 7.

⁷⁷ U.S. Dep't of Hous. & Urban Dev., Office of Policy Dev. & Research, *Assisted Housing: National and Local*, <https://www.huduser.gov/portal/datasets/assthsq.html> (last accessed Aug. 19, 2021) (using the "% minority" and "% with disability, among all persons in households" variables).

⁷⁸ See 42 U.S.C. §§ 3601-3619; see also *Hous. Opportunities Project for Excellence, Inc. v. Key Colony No. 4 Condo. Assoc.*, 510 F. Supp. 2d 1003, 1012–13 (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); *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, 16 (D. Conn. 2011).

⁷⁹ *HUD v. Mountain Side Mobile Estates P'ship*, 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).

⁸⁰ See, e.g., *Gashi*, 801 F. Supp. At 12.

⁸¹ 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).

⁸² See *Hous. Opportunities Project for Excellence, Inc.*, 510 F. Supp. at 1003; *Graul*, 120 F. Supp. 3d at 125–27; *Badgett*, 976 F.2d at 1178–79.

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

- **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 2013 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.⁸³
- **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 in their home.⁸⁴
- **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.⁸⁵ 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.⁸⁶
- **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.⁸⁷ Because of systemic issues that make people of color more likely to be economically insecure, this exclusionary zoning can also perpetuate segregated neighborhoods.

⁸³ See *Blackwell v. H.A. Hous. LP*, Civil Action No. 05-cv-01225-LTB-CBS (D. Colo. 2005). In a settlement agreement, the landlord agreed to prohibit discrimination against survivors of domestic violence and permit them to request an emergency transfer when in imminent danger. HUD Memo to FHEO Office & Regional Directors, *supra* note 64, at 8.

⁸⁴ 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”).

⁸⁵ AM. CIVIL LIBERTIES UNION & N.Y. CIVIL LIBERTIES UNION, MORE THAN A NUISANCE: THE OUTSIZED CONSEQUENCES OF NEW YORK’S NUISANCE ORDINANCES (Aug. 2018), *available at* https://www.nyclu.org/sites/default/files/field_documents/nyclu_nuisancereport_20180809.pdf.

⁸⁶ 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>.

⁸⁷ See, *e.g.*, *United States v. City of Black Jack*, 508 F. 2d 1179 (8th Cir. 1974) (finding that the ordinance “foreclose[d] 85 percent of blacks living in the metropolitan area from obtaining housing in [the city]...at a time when 40 percent of them were living in substandard or overcrowded units”).

- **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.⁸⁸
- **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.⁸⁹ 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.⁹⁰
- **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. Redevelopment plans can also displace low-income renters, who, depending on the proposed area for redevelopment, may be disproportionately women of color and women raising children on their own.⁹¹
- **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.⁹² Algorithmic models used in mortgage lending may also have disproportionate impacts on Black and Latinx people. Costlier loans make it harder for women of color to become homeowners and perpetuate racial and gender wealth gaps.
- **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. These policies preclude millions of people of color from accessing quality homeowners insurance to protect one of their most significant assets. Lawsuits challenging the disparate impact of these practices⁹³ have helped expand access to quality insurance

⁸⁸ See, e.g., *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, No. 2:06-cv-07185 (E.D. La. 2006).

⁸⁹ See, e.g., *Inclusive Cmty. Project, Inc. v. City of McKinney*, No. 4:08-CV-434, 2009 WL 2590121 (E.D. Texas. Aug. 20, 2009).

⁹⁰ See, e.g., *Keith v. Volpe*, 858 F.2d 467, 483–84 (9th Cir. 1988) (holding that the City of Hawthorne violated the FHA by refusing to construct low-income housing for Black people displaced by the construction of a Los Angeles freeway).

⁹¹ GENDER AND RACIAL JUSTICE IN HOUSING, *supra* note 1, at 2 (providing national gender and race data on income distribution nationally).

⁹² See, e.g., *United States v. Wells Fargo*, No. 1:12-cv-01150 (D.D.C. 2012); *Ramirez v. Greenpoint Mortg. Funding, Inc.*, 268 F.R.D. 627 (N.D. Cal. 2010).

⁹³ See, e.g., *Nat'l Fair Hous. Alliance, et al. v. Prudential Insurance Co.*, 208 F.Supp.2d 46, 57 (D.D.C. 2002); *Nat'l Fair Hous. Alliance, et al. v. Liberty Mutual Insurance Co.*, C.A. No. 1:98CV00928 TPJ (D.D.C.); *Nat'l Fair Hous. Alliance, et al. v. Travelers Property & Casualty Corp.*, No. 00-1506 (JR), at 1-2 (D.D.C. Jan. 9, 2001); *Toledo Fair Hous. Ctr. v. Farmers Ins. Group*, Nos. C199-1339 & C100-2981, at 13-19 (Ohio C.P. Mar. 29, 2001).

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 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.⁹⁴ 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, holding insurance companies accountable for this type of discrimination is necessary to avoid further exacerbating 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.⁹⁵ Communities with significant populations of cost-burdened households are vulnerable to the future effects of climate change.⁹⁶
- **“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.⁹⁷

B. 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. (ICP)*, the FHA “was enacted to eradicate discriminatory practices within a sector of our Nation's economy.”⁹⁸ Our nation has a shared interest in ensuring that housing opportunities are available to every individual, regardless of their identity.

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

⁹⁴ See, e.g., *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269 (W.D. Tex. 2007).

⁹⁵ See, e.g., *Greater New Orleans Fair Hous. Ctr. v. HUD*, No. 1:08-cv-01938 (D.D.C. 2008).

⁹⁶ ANDREANECIA M. MORRIS & LUCAS DIAZ, REIMAGINING HOUSING: AFFORDABILITY CRISIS AND ITS ROLE IN DISASTER RESILIENCE AND RECOVERY *in* LOUISIANA'S RESPONSE TO EXTREME WEATHER: A COASTAL STATE'S ADAPTATION CHALLENGES AND SUCCESSES 241–59 (Shirley Laska ed., Springer 2020) (2019).

⁹⁷ N.C. DEP'T OF HEALTH & HUMAN SERVS., N.C. HOUS. FINANCE AGENCY & S. OF GOV'T U. N.C. CHAPEL HILL, FAIR HOUSING FOR TENANTS WITH DISABILITIES: UNDERSTANDING REASONABLE ACCOMMODATIONS AND REASONABLE MODIFICATIONS 26 (2018),

https://www.nchfa.com/sites/default/files/page_attachments/RAGuide.pdf.

⁹⁸ *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 538 (2015).

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 has upheld this legal theory for proving discrimination.

HUD's 2013 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. Under the 2013 Rule's standard, a court must weigh the rights and needs of communities disproportionately affected by housing discrimination with businesses, developers, and governments. An entity must stop using a policy or practice that has a discriminatory effect when there are less harmful alternative policies or practices that achieve their legitimate nondiscriminatory interest. This is true even when an entity has a legitimate basis for the practice or policy.

Ratifying disparate impact in housing liability and the 2013 Rule, 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."⁹⁹

The 2013 Rule works to protect against discriminatory impacts on women, LGBTQ people, mothers, women of color, survivors of domestic violence and sexual assault, women with disabilities, and more. An important part of this function is to combat implicit bias. In *ICP*, 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.¹⁰⁰

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.

C. HUD's 2013 Rule already creates a rigorous approach for evaluating housing discrimination claims and should be maintained.

The 2013 Disparate Impact Rule established a three-part framework 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 burden-shifting

⁹⁹ *Id.* at 545–47.

¹⁰⁰ *Id.* at 540–41.

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

In the first part of the 2013 Rule's standard, "[t]he charging party or the plaintiff has the burden of proving that a challenged practice caused, or predictably will cause, a discriminatory effect."¹⁰¹ Under this approach, the definition of "discriminatory effect" is appropriately case-specific. Because there are wide varieties of policies and practices challenged, the 2013 Rule and federal jurisprudence have appropriately rejected any potential single test to define "discriminatory effect" through evaluating statistical evidence in housing cases.¹⁰² Additionally, under the 2013 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, including the Supreme Court in *ICP*,¹⁰³ to contain a "robust causality" requirement.

The second part of the analysis allows defendants the opportunity to demonstrate that a valid interest is served by the challenged policy or practice.¹⁰⁴ The 2013 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.¹⁰⁵ This prong advances the FHA's goal of eliminating discrimination in housing by encouraging housing providers to adopt practices that have

¹⁰¹ Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11480 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500) (hereinafter 2013 Rule).

¹⁰² See, e.g., *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. 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).

¹⁰³ In the 2020 Rule, HUD inaccurately construed the first part of the 2013 Rule's standard as inconsistent with *ICP*, when the *ICP* Court articulated a "robust causality requirement" that mirrors the 2013 Rule, and the *ICP* case itself was dismissed on remand for failure to meet the 2013 Rule's causation requirements, which the district court had not initially applied. See *Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, No. 3:08-CV-0546-D, 2015 WL 5916220, at *4 (N.D. Tex. Oct. 8, 2015) ("[G]iven the significant developments in this case on appeal, the court concludes that the interests of justice and fundamental fairness require not only that ICP's disparate impact claim be decided anew under the burden-shifting regimen adopted by HUD and the Fifth Circuit, but that the court start with whether ICP has established a prima facie case") (citing 24 C.F.R. § 100.500(c)(1)); *Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, No. 3:08-CV-0546-D, 2016 WL 4494322, at *6 (Aug. 26, 2016) ("ICP has failed to point to a specific, facially neutral policy that purportedly caused a racially disparate impact").

¹⁰⁴ 2013 Rule, at 11480.

¹⁰⁵ *Id.* at 11480.

a less discriminatory impact on protected classes.¹⁰⁶ In doing so, plaintiffs must show that the challenged practices are thus “arbitrary, artificial, and unnecessary.”¹⁰⁷

The Supreme Court in *ICP* ratified the 2013 Rule’s burden-shifting framework and situated it in a well-established legal framework comparable to other federal civil rights laws, including Title VII.¹⁰⁸

In short, the 2013 Rule serves as a valuable tool for people who experience 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.

IV. The 2020 Rule eliminated core protections from policies and practices that have a discriminatory impact based on sex, race, and other protected classes under the FHA.

While the 2013 Rule codified a fair and equitable balancing test that aligns with the purpose of the FHA¹⁰⁹ and affirmatively furthers fair housing, the 2020 Rule unreasonably tipped the scales in favor of businesses and landlords. For this reason, the Center submitted a comment in opposition to the 2019 Proposed Rule. The 2020 Rule eliminated the Perpetuation of Segregation Theory, created additional barriers to presenting a disparate impact case, and placed overwhelming burdens on plaintiffs seeking to prove discriminatory effect; ignored decades of court precedent and agency interpretation of disparate impact; and undercut challenges to zoning decisions.¹¹⁰ This increased obstacles to fair access to safe, affordable, and accessible housing based on sex (including sexual orientation, gender identity, and survivors of gender-based violence), race, disability, familial status, and other protected classes.

A. The 2020 Rule eliminated the Perpetuation of Segregation Theory.

As reflected in HUD’s 2013 Rule, and in court decisions that have considered the question,¹¹¹ discriminatory effects liability may be established where a policy

¹⁰⁶ STEPHEN M. DANE, THE POTENTIAL ‘IMPACT’ OF TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS V. INCLUSIVE COMMUNITIES PROJECT ON FUTURE CIVIL RIGHTS ENFORCEMENT AND COMPLIANCE, 63 THE FEDERAL LAWYER 38, 39–40 (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>.

¹⁰⁷ *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 540 (2015) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

¹⁰⁸ *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 539 (2015).

¹⁰⁹ 42 U.S.C. § 3601 (quoted by *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 540 (2015)).

¹¹⁰ NAT’L LOW INCOME HOUS. COAL., PRELIMINARY ANALYSIS OF HUD’S FINAL DISPARATE IMPACT RULE (Sept. 14, 2020), <https://nlihc.org/resource/preliminary-analysis-huds-final-disparate-impact-rule>.

¹¹¹ See e.g. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (“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”).

“perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.”¹¹² 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.¹¹³ The 2020 Rule removed all reference to perpetuation of segregation, effectively eliminating it from the current definition of “discriminatory effect,” *without explanation or discussion*. The 2020 Rule’s omission of perpetuation of segregation theory was a blatant attack on the ideals that the FHA was intended to further.

Furthermore, the 2020 Rule’s elimination of liability based on the perpetuation of segregation theory is arbitrary, capricious, and contrary to law. For many decades, courts have recognized that a claim based on perpetuation of segregation is a valid, independent basis for liability.¹¹⁴ However, the 2020 Rule collapsed the perpetuation of segregation liability into disparate impact liability.¹¹⁵ Coupled with the increased pleading requirements detailed below, the 2020 Rule effectively eliminated plaintiff’s ability to bring a perpetuation of segregation claim.¹¹⁶

In promulgating the 2020 Rule, HUD ignored numerous comments attesting to the importance of preserving the perpetuation of segregation theory.¹¹⁷ Many commenters were not only appalled at the weakening of the theory, but also felt that HUD misrepresented its actions, by downplaying the effect that eliminating the perpetuation of segregation theory would have.¹¹⁸ By acting contrary to law and previous policy, HUD’s elimination of the perpetuation of segregation theory was arbitrary and capricious.

B. The 2020 Rule created a complicated framework that would unreasonably favor defendants and impose extreme burdens on plaintiffs.

The 2020 Rule created additional burdens on plaintiffs bringing disparate impact claims by expanding the elements that a plaintiff must meet to establish a *prima facie* case; 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 2020 Rule would unjustly and unreasonably impose additional requirements on the plaintiff to establish a *prima facie* case.

¹¹² 24 C.F.R. § 100.500(a) (2013).

¹¹³ See e.g., PHILIP VERMA ET AL., U.C. BERKELEY URBAN DISPLACEMENT PROJECT & CAL. HOUS. P’SHIP, 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.

¹¹⁴ See Compl. at 26–27, *Open Cmty. Alliance v. U.S. Dep’t of Hous. & Urban Dev.*, No. 3:20-cv-01587, ECF No. 1 (Oct. 22, 2020).

¹¹⁵ See *id.* at 27.

¹¹⁶ See *id.* at 27–28.

¹¹⁷ See *id.* at 28.

¹¹⁸ See *id.*

The 2020 Rule expanded the 2013 Rule’s first prong in ways that would make it harder for a plaintiff to establish a prima facie case of disparate impact.

a. The first element of the 2020 Rule would flip a typical defendant burden in civil rights cases to the plaintiff.

The first element of the 2020 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 interest.”¹¹⁹ Disparate-impact jurisprudence on the “arbitrary, artificial, and unnecessary” formulation has always been at the end of the three-step, burden-shifting framework—not in the initial pleading.

In addition, only after plaintiffs allege adequate facts to support this first element does the defendant “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.”¹²⁰ The 2020 Rule thus would force people facing discriminatory impacts themselves to bear the burden of alleging facts that an insurance company, big bank, landlord, or other business’s policy does not further *any* valid, obvious interest. HUD did not define “obvious legitimate objective” or “facially legitimate objective” to give plaintiffs guidance on what would be required to meet this element’s requirements—only guidance that plaintiffs must provide factual allegations to support this prong.¹²¹

The first element turns civil rights claims on their heads. In typical civil rights discrimination cases, based on the seminal case *Griggs v. Duke Power Co.*,¹²² 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*, before any discovery to develop such relevant information, 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 *ICP*. The Supreme Court did not require plaintiffs, the ones bringing civil rights claims, to have to anticipate myriad defenses and also rebut them preemptively, 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.”¹²³

¹¹⁹ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 85 Fed. Reg. 60288, 60332 (Sept. 24, 2020) (to be codified at 24 C.F.R. § 100) (hereinafter 2020 Rule).

¹²⁰ *Id.*

¹²¹ *Id.* at 60312.

¹²² See, e.g., *Griggs v. Duke Power Co.* 401 U.S. 424, 430–32 (1971).

¹²³ *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 541 (2015) (noting that “the Title VII framework may not transfer exactly to the fair-housing context, but the comparison suffices for present purposes”).

In the 2020 Rule, HUD dismissed these and other concerns commenters raised about this element, an arbitrary and capricious move given how this element represented such a radical departure from disparate impact jurisprudence.

b. The third element of the 2020 Rule would unreasonably increase the causation requirement for a plaintiff's prima facie case.

The 2020 Rule's third element would require a plaintiff to allege "a robust causal link between the challenged policy or practice and the adverse effect on members of a protected class, meaning that the specific policy or practice is the *direct cause* of the discriminatory effect."¹²⁴

The 2013 Rule already contained 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."¹²⁵ The Supreme Court in *ICP* construed this to mean that the plaintiff must "allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection."¹²⁶ The Court in *ICP* specifically characterized the causation requirement 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 *ICP* thus failed to engage in *any* causation analysis. The Supreme Court was thus not critiquing the causation requirement under the 2013 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 2013 Rule and analyzed and endorsed by the Supreme Court in *ICP*.

In addition, the Supreme Court never used the term "robust causal link" in *ICP*. In *ICP*, 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. The 2020 Rule, in contrast, seems to imply that the "causal link" is what must be "robust" and that plaintiffs must show direct causation.¹²⁷ This suggests a stronger causal link than "causal connection" and therefore conflicts with the standard the Supreme Court set forth in *ICP*.

Further, *ICP* approved of the "causal connection" requirement in the 2013 Rule. The 2020 Rule would create a much higher "direct cause" standard, an unreasonable burden for plaintiffs and one that is inconsistent with *ICP* and other disparate impact caselaw, such as *Wards Cove*.

The Supreme Court in *Wards Cove* 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[red] qualified nonwhites from applying."¹²⁸ In other words, the *Wards Cove* Court reasoned that the plaintiffs simply did not use the right

¹²⁴ 2020 Rule, at 60312 (emphasis added).

¹²⁵ 24 C.F.R. § 100.500(c)(1).

¹²⁶ *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 541 (2015).

¹²⁷ 2020 Rule, at 60312.

¹²⁸ *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 653 (1989).

comparison, which would be possible with an additional analysis of a pool of qualified candidates or prospective applicants for the positions at issue. 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).

Moreover, if the 2020 Rule’s causation standard were imposed, it would be difficult—if not impossible—to challenge perpetuation of segregation. As the Court’s decision in *ICP* 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 *ICP*, 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). This follows the causation standard in other disparate impact caselaw, such as *Griggs*, in which an employer was liable under Title VII for an employment test with a discriminatory impact on Black job applicants.¹²⁹ The employer did not cause the underlying educational discrimination, but added an unnecessary test that perpetuated discrimination in employment and was accordingly liable. The 2020 Rule, then, would subvert the clear holding of *ICP* that a plaintiff in an FHA disparate impact claim does not need to show that the challenged policy “actually” or “directly” caused the segregation in the first place.

For all these reasons, the 2020 Rule’s Element 3 unreasonably heightened the causation standard required in FHA disparate impact causes in an unnecessary way that is contrary to existing caselaw. HUD should recodify the 2013 Rule causation standards for the pleading stage to correct this gross injustice.

c. The fourth element of the 2020 Rule would unreasonably increase the disparity requirement.

The 2020 Rule’s fourth element would require a plaintiff “to allege that the disparity caused by the policy or practice is *significant*.”¹³⁰ In contrast, the 2013 Rule provides that “the plaintiff has the burden of proving that a challenged practice caused, or predictably will cause, a discriminatory effect.”¹³¹ The 2013 Rule and federal jurisprudence have appropriately made the definition of “discriminatory effect” case-specific because of the wide varieties of policies and practices challenged, and the 2013 Rule and federal jurisprudence have appropriately rejected any potential single test to define “discriminatory effect” through evaluating statistical evidence in housing cases.¹³²

2. The 2020 Rule unreasonably changed the defenses available in a way inconsistent with disparate impact caselaw.

The 2020 Rule unjustly and unreasonably privileges defendants.

¹²⁹ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

¹³⁰ 2020 Rule, at 60332.

¹³¹ 24 C.F.R. § 100.500(c)(1).

¹³² See, e.g., *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 382 (3d Cir. 2011); *Bonaser 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).

First, the 2020 Rule requires a defendant to produce evidence that its policy in question “*advances a valid interest*,”¹³³ a vast shift from the 2013 Rule’s requirement to prove that the policy is “*necessary to achieve*” that interest.¹³⁴ This lower threshold for defendants is inconsistent with the Supreme Court in *ICP* declaring that “housing authorities and private developers be allowed to maintain a policy if they can *prove it is necessary to achieve a valid interest*.”¹³⁵

Second, the 2020 Rule established a new “outcome Prediction Defense” after the pleading stage, which would have the practical effect of foreclosing many disparate impact claims based on algorithms and models. 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. Allowing blanket defenses based on algorithms is unreasonable and will not lead to the fulfillment of the purpose of the FHA. The Center agrees with HUD’s conclusion in this Proposed Rule that such a defense would be inappropriate for the insurance industry and other outcome prediction practices that may have a discriminatory effect.¹³⁶

3. The 2020 Rule created additional requirements for the plaintiff to show that there are less discriminatory alternatives.

The 2020 Rule provides that, once defendants have demonstrated a valid interest, in order to support a disparate impact claim, plaintiffs must prove the following:

...either that the interest (or interests) advanced by the defendant are not valid or that a less discriminatory policy or practice exists that would serve the defendant’s identified interest (or interests) *in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant*.¹³⁷

The 2020 Rule also states that a “valid interest” can include “a practical business, profit, policy consideration, or requirement of law,”¹³⁸ and the Rule eliminates the previous requirement that the valid interest must be substantial.

As with other portions of the 2020 Rule, this provision 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 2013 Rule, plaintiffs must then show a less discriminatory alternative that serves the same substantial, legitimate, non-discriminatory interest.

¹³³ 2020 Rule, at 60322 (emphasis added).

¹³⁴ 2013 Rule, at 11482.

¹³⁵ *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 541 (2015) (emphasis added).

¹³⁶ Reinstatement of HUD’s Discriminatory Effects Standard, 86 Fed. Reg. 33590, 33595 (Jun. 25, 2021).

¹³⁷ 2020 Rule, at 60333.

¹³⁸ *Id.* at 60332.

The 2020 Rule would make this showing much more difficult for plaintiffs. 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 2020 Rule would provide defendants a broad and subjective way to attack less discriminatory alternatives raised by plaintiffs.

Indeed, the 2020 Rule privileges defendants—including defendants’ profits—over the goals of fair housing. Under the 2020 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.

Further, the 2020 Rule did not acknowledge the large shift in the balance between plaintiffs and defendants in this third prong, nor did HUD try to justify the change to *ICP*—which does not support this change. The district court in *Massachusetts Fair Housing Center v. HUD* noted these unjustified “significant alterations” to disparate impact liability under the FHA,¹³⁹ providing part of the rationale for the preliminary injunction of the 2020 Rule.

HUD got the balance of interests between plaintiffs and defendants right in 2013, and the Center urges HUD to swiftly recodify the 2013 Rule to firmly rebalance the scales in a just manner.

C. The 2020 Rule ignores decades of court precedent and agency interpretation of disparate impact under the FHA.

In promulgating the 2020 Rule, HUD asserted that it was “updating” the disparate impact standard, when in fact the Rule ignored 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 Rule reflected HUD’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 Rule in *ICP*, by holding that disparate impact is cognizable under the FHA and using the three-prong analysis under the 2013 Rule without questioning or challenging the framework.¹⁴⁰ On remand, the district court noted that the Supreme Court had affirmed “the Fifth Circuit’s decision

¹³⁹ 496 F. Supp. 3d 600, 611 (D. Mass. 2020).

¹⁴⁰ 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.*, 573 U.S. 991 (Oct. 2, 2014) (granting certiorari on first question only).

adopting the HUD regulations.”¹⁴¹ Courts since *ICP* have held that the 2013 Rule is consistent with the *ICP* decision.¹⁴²

The 2020 Rule was a radical departure from both court precedent and HUD’s own prior interpretations of disparate impact analysis.¹⁴³ The 2020 Rule introduced a burdensome and confusing balancing test with numerous additional requirements for plaintiffs that put an insurmountably high burden on individuals seeking to enforce the FHA under disparate impact theory. It 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.¹⁴⁴ This patchwork of rules would create complexity and confusion that inevitably disadvantages those experiencing housing discrimination based on sex, race, and other protected classes, as outlined above.

Furthermore, as described previously, the 2020 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.¹⁴⁵ This bias 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.”¹⁴⁶

D. The 2020 Rule undercut challenges to zoning decisions.

In *ICP*, 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-impact liability.”¹⁴⁷ However, the 2020 Rule blatantly ignored the Court’s guidance by stating that most zoning decisions would not be actionable under disparate impact theory. Land use and zoning decisions often have disparate impacts on people of color and families with children; therefore, the 2020 Rule cut against the purpose of the FHA.

¹⁴¹ Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs, No. 3:08-CV-0546-D, 2015 WL 5916220, at *3 (N.D. Tex. Oct. 8, 2015).

¹⁴² See, e.g., *MHANY Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016); Prop. Cas. Insurers Ass’n of Am. v. Carson, No. 13-CV-8564, 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).

¹⁴³ *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 534–38, 542 (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).

¹⁴⁴ See, e.g., 2013 Rule, at 11474 (“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.”).

¹⁴⁵ 2020 Rule, at 60332-60333.

¹⁴⁶ 24 C.F.R. § 100.500(c)(2) (2013).

¹⁴⁷ See, e.g., *Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 16–18 (1988).

V. The Proposed Rule to recodify the 2013 Rule will provide the certainty necessary to protect women, LGBTQ people, and their families from discriminatory effects and provide access to the courts when discrimination occurs.

The 2020 Rule's deficiencies led to three separate lawsuits and a preliminary injunction.¹⁴⁸ President Biden was justified in ordering HUD to reexamine the 2020 Rule's effects to make sure HUD complies with the FHA.¹⁴⁹ The Center agrees with HUD's conclusion in this Proposed Rule that the 2013 Rule provides a better disparate impact standard than the 2020 Rule.¹⁵⁰

The 2013 Rule properly codified the Disparate Impact Standard that has prevailed in the courts and has been used by regulators—including but not limited to HUD—for decades.¹⁵¹ This standard is consistent with decades of case law, and it has worked.¹⁵² It has fostered more inclusive lending markets and housing markets by providing entities subject to the FHA with the incentive to search out less discriminatory alternatives to practices that have a discriminatory impact based on race or other protected classes and are not necessary to achieve any legitimate purpose. At the same time, it does not force any entity to modify practices that are necessary to accomplish legitimate purposes. This clear standard has been straightforward to apply and has struck the proper balance between competing interests.

The Proposed Rule would re-codify the 2013 Rule, which will restore the three-part burden-shifting framework upon which courts and litigants had come to rely.¹⁵³ The 2013 Rule provides greater clarity in pleading requirements,¹⁵⁴ which will help to reduce the barrier for complainants at the courthouse doors.

VI. The Center strongly urges HUD to urgently finalize this rulemaking to recodify the 2013 Rule.

HUD's Proposed Rule will reinstate the protections against housing discrimination offered by the 2013 Rule. This Proposed Rule therefore upholds HUD's mission to affirmatively further fair housing and prevent discrimination based on sex, race, disability, familial status, and other protected classes under the FHA. The Proposed Rule restores decades of fair housing case law and HUD's enforcement.

Everyone—particularly those facing additional barriers due to sex (including gender identity, sexual orientation, and survivors of gender-based violence), race, familial

¹⁴⁸ See *Mass. Fair Hous. Ctr. v. U.S. Dep't of Hous. & Urban Dev.*, 496 F. Supp. 3d 600, 611 (D. Mass. 2020) (granting preliminary injunction).

¹⁴⁹ Reinstatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. at 33594.

¹⁵⁰ *Id.* at 33594-33596.

¹⁵¹ 2013 Rule, at 11460.

¹⁵² The National Fair Housing Alliance states that it has used the disparate impact tool to assist over 750,000 individuals who were discriminated against, among other things. See Comment Letter from the Nat'l Fair Hous. Alliance on Proposed Implementation of the FHA's Disparate Impact Standard (Oct. 21, 2019), <https://www.regulations.gov/comment/HUD-2019-0067-3079>.

¹⁵³ Reinstatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. at 33591.

¹⁵⁴ *Id.* at 33594.

status, and disability—should be protected under the FHA. The FHA’s protections from discrimination are more important than ever as we seek to keep people housed and have an equitable recovery from the COVID pandemic. The Center applauds HUD’s decision to promulgate the Proposed Rule, urges swift finalization to formally reinstate the 2013 Rule into the Code of Regulations, and urges HUD to vigorously enforce the Rule to eliminate and prevent housing discrimination.

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,



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