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The Women's Legal Defense and Education Fund

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

Submitted via the Federal Rulemaking Portal: www.regulations.gov/

Legal Momentum welcomes the opportunity to comment on the Department of Housing and Urban Development's (HUD) proposed rule, which seeks to drastically curtail HUD's application of the disparate impact standard under the Fair Housing Act.

Advocating for gender equality for over 40 years, Legal Momentum remains committed to achieving economic and personal security for all women and girls by eliminating barriers to equal treatment and advancing access to equal opportunity. Based on our longstanding experience advancing the rights of the most marginalized women, we respectfully submit the comments below.

In sum, the proposed rule does not meet its stated goal of furthering the Supreme Court's 2015 ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*¹ Instead, the proposal's new burdens and defenses seek to dismantle a core standard explicitly recognized by the Supreme Court under the Fair Housing Act, undermining the law's central purpose and intent. Ultimately, this new rule will harm precisely those groups the Fair Housing Act was designed to protect: designated protected classes that historically have been denied equal access to housing opportunity due to long-term systemic discrimination.

¹ *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. ___, 135 S.Ct. 2507 (2015).

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Notably, one of the core groups to be negatively impacted by this rule will be women, particularly low-income women, women of color, women with children, and women who are survivors of gender-based violence. By severely weakening the existing disparate impact standard, the proposed rule eliminates the ability of these groups to challenge and address ongoing housing discrimination and to tackle housing and economic inequality in a meaningful way.

The Role of Sex Discrimination in Driving Housing Insecurity for Women

As a result of systemic gender discrimination, women face higher levels of economic insecurity, which in turn results in high levels of housing insecurity and homelessness.² Today, women are more educated than men but still paid less over time, pushed into lower paying occupations, expected to forgo income-earning opportunities to have children or take on unpaid care for children and family members, and financially penalized for taking on this role. The cumulative impact means that the wage gap persists throughout a woman's career, ultimately leaving women more economically insecure with less retirement income³ and leaving more women in poverty.⁴

For too many women, the lack of financial security, support, or safety net increases the probability that when one thing goes wrong, there will be a domino effect that can very quickly result in everything unraveling, with eviction being a constant risk. Unjust housing policies that disproportionately impact women and result in eviction and involuntary displacement tend to negatively impact a woman's ability to keep a job and may result in prolonged unemployment, which further impedes her ability to retain stable housing. Absent adequate protections, the cycle of housing and employment instability continues, trapping many women and children in poverty.

In the housing context, women face unique forms of both overt and underlying housing discrimination. Sex was added as a protected class under the Fair Housing Act during a time when women were often denied credit to purchase a home without the signature of a husband or father, irrespective of whether a woman was financially independent or

² U.S. Dep't of Housing and Urban Development, 2018 Annual Homeless Assessment Report to Congress 10 (2018), <https://www.wpr.org/sites/default/files/2018-ahar-part-1-compressed.pdf>; Int'l Women's Human Rights Clinic, City University of New York School of Law, *A Gendered Perspective on the Right to Housing in the United States*, 4 (2005).

³ Nat'l Women's Law Center, *The Wage Gap: The Who, How, Why, and What to Do 2* (2017), <https://nwlc.org/wp-content/uploads/2016/09/The-Wage-Gap-The-Who-How-Why-and-What-to-Do-2017.pdf>.

⁴ In the United States, women are nearly 40 percent more likely than men to live in poverty and more than twice as likely to work in low-wage occupations. Meika Berlan & Morgan Harwood, Nat'l Women's Law Ctr., *National Snapshot: Poverty Among Women and Families, 2018* (Sept. 2018), <https://nwlc-ciw49fixgw5lbab.stackpathdns.com/wp-content/uploads/2018/09/National-Snapshot.pdf>; Nat'l Women's Law Ctr., *Women in the Low-Wage Workforce by State 2* (June 2018), <https://nwlc-ciw49fixgw5lbab.stackpathdns.com/wp-content/uploads/2018/06/women-in-low-wage-workforce-by-state-2018-2.pdf> [hereinafter *Women in the Low-Wage Workforce by State*]. Note that in this analysis "low-wage jobs" refer to those with median hourly wages of \$11.50 or less per hour based on U.S. Dep't of Labor, Bureau of Labor Statistics, May 2017 National Occupational Employment and Wage Estimates.

contributing to the household.⁵ Today, we see a host of other problematic practices with banks denying mortgages to women on parental leave and landlords regularly evicting women based on their status as victims of domestic or sexual violence.

Unsurprisingly, certain groups of women are particularly vulnerable. Women of color, especially Black and Latinx women, face greater risks of eviction,⁶ homelessness,⁷ and housing discrimination.⁸ Women with children also face a higher risk of eviction.⁹ Women account for over 80 percent of domestic violence survivors. HUD has therefore recognized housing discrimination against domestic violence survivors as an important fair housing issue.¹⁰

The lack of safe and affordable housing options serves as a primary barrier for victims of domestic or sexual violence to escape abuse.¹¹ Those who do escape often face severe housing consequences, thus domestic violence is a primary cause of homelessness for women and children in the United States.¹² Securing safe and sustainable housing is absolutely critical towards helping victims escape abuse and maintain their safety.

The Existing Disparate Impact Standard is a Critical Tool to Meaningfully Address Systemic Sex Discrimination

⁵ Kristin Messerli, *The Evolution of the Fair Housing Act and Women's Progress in Housing*, MORTGAGE WOMEN MAGAZINE (May 10, 2018), <https://www.mortgagewomenmagazine.com/industry/the-evolution-of-the-fair-housing-act-and-womens-progress-in-housing/>.

⁶ 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, Setting Off a Chain of Hardship*, MacArthur Foundation: How Housing Matters (Mar. 2014), https://www.macfound.org/media/files/HHM_-_Poor_Black_Women_Are_Evicted_at_Alarming_Rates.pdf.

⁷ National Alliance to End Homelessness, *Racial Disparities in Homelessness in the United States* (June 6, 2018), <https://endhomelessness.org/resource/racial-disparities-homelessness-united-states/>.

⁸ Laura Harvey, *Why equal housing for women will continue be a 'tough road,'* NBC News: Know Your Value (Aug. 1, 2019), <https://www.nbcnews.com/know-your-value/feature/why-equal-housing-women-will-continue-be-tough-road-ncna1038266>; see also National Fair Housing Alliance, *The Case For Fair Housing: 2017 Fair Housing Trends Report*, <https://nationalfairhousing.org/wp-content/uploads/2017/07/TRENDS-REPORT-2017-FINAL.pdf>.

⁹ See Chris Saviati, Apartment List, *Rental Insecurity: The Threat of Evictions to America's Renters* (Oct. 2017), <https://www.apartmentlist.com/rentonomics/rental-insecurity-the-threat-of-evictions-to-americas-renters/>; Mathew Desmon, Weihua An, Richelle Winkler, Thomas Ferriss, *Evicting Children*, SOCIAL FORCES 92(1) (Sept. 2013), https://scholar.harvard.edu/files/mdesmond/files/social_forces-2013-desmond-303-27.pdf.

¹⁰ U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics Crime Data Brief: *Intimate Partner Violence, 1993-2001* (Feb. 2003).

¹¹ 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://b3cdn.net/naeh/416990124d53c2f67d_72m6b5uib.pdf.

¹² 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>.

Robust legal protections, like those contemplated under the Fair Housing Act, are critical to ensuring that women have the appropriate and necessary tools to challenge persistent discrimination and secure equal access to decent, safe, and sanitary housing. The disparate impact standard under the Fair housing Act has specifically served as an invaluable protection for achieving the full purpose of the Fair Housing Act. This is specifically because the rule provides a meaningful avenue for protected classes to challenge policies that appear gender neutral on their face but have a demonstrably adverse discriminatory impact. Women regularly come across such policies and the impact can be devastating.

For survivors of domestic and sexual violence, the current rule provides a means to challenge unjust policies and laws that further penalize survivors for the abuse they have suffered. Examples include one-strike or zero-tolerance policies, which subject victims to eviction based on any crime on the property, property damage, or noisy or offensive behavior on the property;¹³ and local nuisance laws, which provide grounds for eviction or penalty in certain jurisdictions if tenants call the police or emergency services seeking emergency assistance on repeated occasions.¹⁴ Screening policies have also been used by landlords to exclude or avoid renting to women who are trying to move out of domestic violence shelters.

The existing rule also provides a means to challenge other practices that have disproportionately harmed families with children, pregnant women, women of color, and women seeking to overcome gender-based barriers to homeownership. Policies that impose overly restrictive occupancy requirements have been challenged under the existing disparate impact standard, allowing advocates to tackle the negative impact on families with children and pregnant women (with the harshest consequences for low-income women of color)¹⁵ who face limited housing opportunities. The disparate impact standard has also been used to challenge policies that discourage rentals to low-income households, recognizing once again the severe negative impact on women-headed households and women of color.¹⁶ The current standard has also played a role in addressing and increasing

¹³ See *Bouley v. Young-Sabourin*, 394 F. Supp.2d 675 (D. Vt. 2005) (landlord's policy of prohibiting "noisy, boisterous or any other many offensive" activities was a pretext for discriminating against victims of domestic violence.).

¹⁴ See *Briggs v. Borough of Norristown, et al.*, No. 2:13-cv-02191-ER *ED Pa. filed Apr. 29, 2013 (Settlement reached in fair housing complaint where African American single mother suffered repeated acts of domestic violence was discouraged from calling 911 under threat that police would enforce nuisance ordinance.); U.S. Dep't of Housing and Urban Development, *Office of General Counsel Guidance on Application of Fair Housing Act Standard 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. 2016); <https://www.hud.gov/sites/documents/FINALNUISANCEORDGNCE.PDF>.

¹⁵ 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) (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).

¹⁶ See *National Fair Housing Alliance v. Travelers Indemnity*, 261 F. Supp. 3d 20, 34 (D.D.C. 2017) (complainant stated a prima facie disparate impact case, meeting the "robust causality requirement" in showing that insurance company's policy of denying insurance to landlords whose tenants receive Housing Choice voucher assistance discourages landlords from renting to voucher

women's access to buying power and home ownership, providing a vehicle to address discriminatory mortgage lending practices which exclude women and families.

HUD's Proposed Rule Would Eliminate a Core Housing Protection, Harming Women, Children, and Families

HUD's proposed rule, which would impose a drastically higher burden of proof by applying a new five-step process to establish a prima facie disparate impact case, sets forth overly burdensome and debilitating obstacles for complainants, effectively eliminating the disparate impact standard as envisioned under the Fair Housing Act. Contrary to its stated goal, the extreme nature of the proposed scheme undermines the Supreme Court's 2015 ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* and would disable the Fair Housing Act's disparate impact standard by establishing such an excessively burdensome standard alongside overly liberal and problematic affirmative defenses.

For example, the new requirement that the policy or practice be shown to be "arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective *such as a practical business, profit, policy consideration, or requirement of law*"¹⁷ is at odds with the underlying purpose of disparate impact analysis and would ultimately prevent complainants from establishing disparate impact in cases where profits justified discriminatory outcomes, as they have in the past. Allowing profits to justify conduct that could have a significant discriminatory impact thwarts the purpose of the Fair Housing Act and its goal of addressing systemic housing discrimination. The defenses raise similar problems. Allowing a landlord or housing provider to justify a discriminatory outcome based on use of an algorithm that does not use inputs that are proxies for protected classes should be irrelevant to whether a particular policy or practice has a discriminatory impact on a protected class since discriminatory "intent" is not meant to be part of the calculation. Allowing reliance on these types of algorithm-based exceptions creates approved methods for engaging in discriminatory conduct.

Further, the proposed rule would severely undermine the ability of women to challenge very real and ongoing forms of housing discrimination, from facially neutral policies known to penalize survivors of domestic and sexual violence to mortgage lending practices and occupancy requirements that uniquely harm women of all identities.

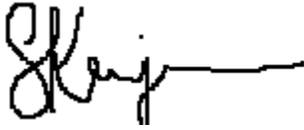
In conclusion, Legal Momentum thanks HUD for this opportunity to express its views on the proposed regulation. As noted above, Legal Momentum strongly opposes the proposed rule. Instead of advancing longstanding jurisprudence recently affirmed by the Supreme Court, the proposed rule would (1) weaken the current disparate impact standard in a way that is

recipients and that such practices have a disproportionate impact on tenants who are African-American or in women-headed households.).

¹⁷ 84 Fed. Reg. 42862.

contrary to the purpose and intent of the Fair Housing Act, (2) undermine the ability of women and other protected classes to effectively challenge discriminatory practices, and (3) be harmful to the wellbeing of women, particularly women of color, women with children, low-income women, and survivors of domestic and sexual violence. We therefore urge you to promptly withdraw the proposed rule in its entirety.

Sincerely,

A handwritten signature in black ink, appearing to read 'Seher Khawaja', with a long horizontal flourish extending to the right.

Seher Khawaja
Senior Attorney, Economic Empowerment
Legal Momentum