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Director Sandra Thompson
Federal Housing Finance Agency
Constitution Center
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Washington, D.C. 20219

Dear Director Thompson:

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") writes to provide the comments below in response to the Federal Housing Finance Agency's ("FHFA") Request for Input entitled "Tenant Protections for Enterprise-Backed Multifamily Properties" (the "RFI"). The Lawyers' Committee is a national, nonprofit civil rights legal organization that was founded in 1963 at the request of President John F. Kennedy to mobilize the nation's leading lawyers as agents for change in the Civil Rights Movement. Today, the Lawyers' Committee uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of our democracy real. Combatting the displacement of low-income communities of color with particular emphasis on Black communities and supporting the growth of a durable, well-resourced, Black-led tenant movement are two of the top priorities of the Lawyers' Committee's Fair Housing & Community Development Project.

The steps that the FHFA takes in response to the input received pursuant to the RFI could advance these priorities, contribute to material improvements in the living conditions and economic circumstances of Black renters, and reshape our housing system to better align with principles of racial equity and racial justice. This letter sets forth three of the steps that the FHFA should take, situates the imperative that the FHFA act boldly in historical context, and elucidates the legal framework within which the FFHA has the authority to act. The Lawyers' Committee appreciates the opportunity to comment and your leadership at the FHFA, as well as that of President Biden, in focusing the energies and efforts of the federal government on the advancement of tenants' rights, including through the publication of *The White House Blueprint for a Renters Bill of Rights* in January of this year.¹

I. The FHFA Should Require Landlords with Mortgages Backed by the Government-Sponsored Enterprises to Comply with Robust Tenant Protections.

¹ Domestic Policy Council & National Economic Council, *The White House Blueprint for a Renters Bill of Rights*, WHITE HOUSE (Jan. 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/01/White-House-Blueprint-for-a-Renters-Bill-of-Rights.pdf>.

Although there are many steps that the FHFA could and should take to protect tenants,² this letter focuses on just three. First, the FHFA should prohibit landlords with mortgages backed by the government-sponsored enterprises (“GSEs”) – including Fannie Mae and Freddie Mac – from imposing unreasonable rent increases of more than 3% over any 12-month period. Second, the FHFA should prohibit those landlords from evicting tenants without just cause and make clear that the expiration of a lease term does not constitute just cause. Third, the FHFA should prohibit those landlords from discriminating against tenants because of their source of income, including where that source of income is a Housing Choice Voucher (“HCV”) or other form of tenant-based rental assistance.

a. Limiting Egregious Rent Increases

Consistent with the White House’s position that rent increases should be “reasonable”³ and state laws prohibiting rent gouging,⁴ landlords that benefit from GSE financing should not be able to impose egregious rent increases on their tenants. The logic behind this fundamental point is clear: when the GSEs purchase mortgages that were made to landlords, the federal government – without which the GSEs would not exist – is conferring a benefit on the private parties involved, including both the mortgage lender and the landlord that is the borrower. When the government confers benefit on private parties, there is a presumption that, in exchange for that private benefit, the private parties should engage in activities that result in benefit to the broader public. Merely making available rental housing, on its own, is not a benefit to the public or to the people who would live in that housing if the terms on which it is offered are predatory. An adjustable-rate mortgage on which monthly payments may increase by 15% after the rate resets risks displacing homeowners through foreclosure, and, likewise, a 15% rent increase risks displacing tenants through eviction. A product is not safe and reliable if a person cannot do without it, if it can increase significantly in price in the middle of its use, and if the consumer must incur a litany of other expenses in order to stop using it.

Prohibiting rent increases of more than 3% over any 12-month period in properties with GSE-backed mortgages is the solution that provides stability for tenants and ensures that the product that landlords are being incentivized by the government to provide is a safe and reliable one. It is also a solution that avoids any downside risk of disincentivizing housing production by ensuring that landlords can still make a reasonable return on their investments. 3% is one and a half times the Federal Reserve’s long-term target for the rate of inflation⁵ and in excess of what the rate of inflation has been at most times in recent decades.⁶ Even today, with inflation still elevated in comparison to the years prior to the COVID-19 pandemic, rent increases of 3% would match the Consumer Price Index (“CPI”). Furthermore, landlords’ expenses do not

² The Homes Guarantee campaign’s comment letter includes a comprehensive set of recommendations for action by the FHFA to protect tenants.

³ Domestic Policy Council & National Economic Council, *The White House Blueprint for a Renters Bill of Rights*, WHITE HOUSE (Jan. 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/01/White-House-Blueprint-for-a-Renters-Bill-of-Rights.pdf>.

⁴ See, e.g., Cal. Civ. Code § 1947.12; Or. Rev. Stat. § 90.323.

⁵ *Why Does the Federal Reserve Aim for Inflation of 2 Percent over the Longer Run?*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (last visited July 20, 2023), https://www.federalreserve.gov/faqs/economy_14400.htm.

⁶ *Consumer Price Index, 1913-*, FEDERAL RESERVE BANK OF MINNEAPOLIS (last visited July 20, 2023), <https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator/consumer-price-index-1913->.

universally rise in tandem with inflation as one of their most significant costs, mortgage payments, is fixed, and restricting rent increases to 3% over any 12-month period would not prevent landlords from setting initial rents at potentially quite high market rates. There is a growing body of evidence that increased costs do not provide the sole explanation for the rapid rent increases of the past three years.⁷ Thus, adopting this recommendation would help protect tenants in an administrable way without imposing hardship on landlords or disincentivizing housing production.

b. Requiring Just Cause for Any Eviction

The FHFA should require that any landlord with a GSE-backed mortgage only evict tenants for just cause. This is a protection that the FHFA already imposes on landlords of manufactured home communities with GSE-backed mortgages,⁸ and the lack of disruption to that market in the wake of the implementation of those requirements demonstrates that such protections are consistent with the FHFA's broader institutional goals. Just cause protections are also common in other federal housing programs like the Low-Income Housing Tax Credit program⁹ and in state law.¹⁰ Bases for eviction under just cause protections typically include serious lease violations like nonpayment of rent or serious damage to the property due to the tenant's conduct. By contrast, the mere expiration of a tenant's lease term does not constitute just cause for eviction. Although some state and local just cause protections specify that a landlord's decision to occupy the unit themselves, a decision to withdraw a unit from the rental market, or other similar circumstances constitute just cause,¹¹ those potential reasons for lease termination – unlike serious lease violations – are unlikely to arise in the context of the GSEs' multifamily portfolios. The stability that comes from knowing that one's lease will be renewed in the absence of a serious lease violation is invaluable to the ability of tenants to put down deep roots in their communities and to achieve stability in their own lives and in those of their loved ones. Prohibiting landlords from evicting tenants without identifying a serious lease violation also reduced the risk of evictions motivated by covert racial discrimination. Limits on egregious rent increases and just cause eviction protections are also complementary policies that work best in tandem with each other.

c. Banning Source of Income Discrimination

The FHFA should prohibit landlords with GSE-backed mortgages from rejecting tenants because of their source of income, and, in doing so, the FHFA should make clear that receipt of a Housing Choice Voucher (“HCV”) or other form of tenant-based rental assistance qualifies as a source of income. Source of income discrimination is a widespread problem, and there is a pressing need for federal action to address the phenomenon. Source of income discrimination

⁷ Heather Vogell, *Rent Going Up? One Company's Algorithm Could Be Why*, PROPUBLICA (Oct. 15, 2022), <https://www.propublica.org/article/yieldstar-rent-increase-realtor-rent>; Jung Hyun Choi et al., *Though Most Mom-and-Pop Landlords Plan to Raise Rent Under Market Rates, Many Tenants Will Still Struggle Financially*, URBAN WIRE (June 29, 2022), <https://www.urban.org/urban-wire/though-most-mom-and-pop-landlords-plan-raise-rent-under-market-rates-many-tenants-will> (reporting that only 43% of landlords cited increasing costs as their reason for increasing rents).

⁸ 12 C.F.R. § 1282.33(c)(4)(i).

⁹ 26 U.S.C. § 42(h)(6)(E)(ii)(I).

¹⁰ See, e.g., N.J. Rev. Stat. § 2A:18-61.1; Or. Rev. Stat. § 90.427.

¹¹ See Cal. Civ. Code § 1946.2.

both inflicts severe racialized harms and perpetuates residential racial segregation. It does so because, at a nationwide level, Black households are significantly more likely to receive HCV assistance than are other groups¹² and, at the level of regional housing markets, landlords in low-poverty neighborhoods, which are likely to be disproportionately white, are much more likely to turn away voucher holders than are landlords in more diverse areas.¹³ In addition to the ways in which source of income stymies fair housing, it also hinders the effectiveness of the HCV program writ large. As of 2019, in a looser rental market for low-income families than exists today, only 63% of households that are issued vouchers are able to find units to lease,¹⁴ in large part due to source of income discrimination.¹⁵ This means that federal funding that Congress has made available to address the housing crisis and to prevent homelessness is not having its intended effect. Allowing landlords with GSE-backed mortgages who are the beneficiaries of federal largesse to work at cross-purposes with another major federal housing program simply makes no sense.

In prohibiting source of income discrimination, it is critical that the FHFA take heed of the ways in which landlords have attempted to circumvent protections in states and localities that have enacted them. In particular, the FHFA should clearly state that the application of restrictive credit screening criteria and minimum income tests to voucher holders whose subsidy-administering agencies have already determined can afford the units in question constitute source of income discrimination. By doing so, the FHFA can ensure that a prohibition on source of income discrimination benefits tenants in practice, in addition to in theory.

II. The Federal Housing Finance System Is Implicated in the Racial Inequities That Tenant Protections Are Necessary to Address.

The potential of these recommendations to advance racial justice underscores that, not only does the FHFA have the authority to take these steps, it also has moral and legal obligations to take action to protect Black tenants grounded in the stark history of racially discriminatory housing policy and in the Fair Housing Act's affirmatively furthering fair housing ("AFFH") mandate. There is a direct throughline to the FHFA from the Home Owners' Loan Corporation,¹⁶ creator of the infamous redlining maps that, together with other federal government practices in

¹² *Picture of Subsidized Households*, U.S. DEP'T OF HOUS. & URBAN DEV. OFFICE OF POLICY DEV. AND RESEARCH (last visited July 20, 2023), <https://www.huduser.gov/portal/datasets/assthsg.html> (reporting that, in 2022, 48% of households with vouchers were Black and not Hispanic or Latino).

¹³ Mary Cunningham et al., *A Pilot Study of Landlord Acceptance of Housing Choice Vouchers*, U.S. Dep't of Housing & Urban Dev. 1, 32 (Sept. 2018), <https://www.huduser.gov/portal/portal/sites/default/files/pdf/Landlord-Acceptance-of-Housing-Choice-Vouchers.pdf>.

¹⁴ Ingrid Gould Ellen et al., *Using HUD Administrative Data to Estimate Success Rates and Search Durations for New Voucher Recipients*, U.S. DEP'T OF HOUS. & URBAN DEV. OFFICE OF POLICY DEV. AND RESEARCH vi (Dec. 2021), https://www.huduser.gov/portal/portal/sites/default/files/pdf/Voucher-Success_Rates.pdf.

¹⁵ Meryl Finkel & Larry Buron, *Study on Section 8 Voucher Success Rates* U.S. DEP'T OF HOUS. & URBAN DEV. 1, 3-17 (Nov. 2021), https://www.huduser.gov/portal/publications/pdf/sec8success_1.pdf.

¹⁶ *FHFA Timeline*, FEDERAL HOUSING FINANCE AGENCY (last visited July 20, 2023), <https://www.fhfa.gov/AboutUs/Timeline>.

the mid-twentieth century, starved Black communities and other communities of color of mortgage credit, thereby pushing Black families into the hands of predatory contract sellers.¹⁷

Today, in part as a result of that legacy, Black families are disproportionately likely to be renters with 57.3% of Black households renting¹⁸ as opposed to just 27.5% of white households,¹⁹ and Black renters are disproportionately likely to be cost-burdened with 52.3% of Black renter households paying more than 30% of their income in rent as opposed to just 40.8% of white renter households.²⁰ All too frequently this results in the worst case outcomes of eviction²¹ and homelessness, with Black Americans more than four times as likely to experience homelessness as white Americans.²²

The rapid growth of predatory corporate landlords, along with other causes, has exacerbated the epidemic of housing insecurity in Black communities,²³ and, unfortunately, the GSEs have played a role in this by purchasing loans made to landlords notorious for poor property maintenance and egregious rent hikes.²⁴ As a federal agency that administers programs and activities relating to housing and urban development, the FHFA has a clear duty to take proactive steps to address systemic racial injustice in the rental housing market under 42 U.S.C. § 3608(d), especially since a portion of that injustice is attributable to the actions of the FHFA, its predecessor agencies, and its regulated entities. The policies proposed above are exactly what the FHFA should be doing to comply with its AFFH mandate: fostering the mobility of Black tenants to higher-opportunity neighborhoods by counteracting source of income discrimination, preventing the displacement of Black tenants from gentrifying neighborhoods through limits on rent increases and evictions, and improving the overall economic welfare of Black tenants, regardless of where they live, by limiting rent increases. Taken together, these would indeed be meaningful actions to affirmatively further fair housing and to help overcome some portion of the discriminatory legacy of the federal housing finance system.

¹⁷ Bruce Mitchell & Juan Franco, *HOLC “Redlining” Maps: The Persistent Structure of Segregation and Economic Inequality*, NCRC (Mar. 2018), https://ncrc.org/wp-content/uploads/dlm_uploads/2018/02/NCRC-Research-HOLC-10.pdf.

¹⁸ U.S. Census Bureau, *Tenure (Black or African American Alone Householder)*, AMERICAN COMMUNITIES SURVEY, [https://data.census.gov/table?q=B25003B:+TENURE+\(BLACK+OR+AFRICAN+AMERICAN+ALONE+HOUSEHOLDER\)&tid=ACSDT5Y2021.B25003B](https://data.census.gov/table?q=B25003B:+TENURE+(BLACK+OR+AFRICAN+AMERICAN+ALONE+HOUSEHOLDER)&tid=ACSDT5Y2021.B25003B) (last visited July 20, 2023).

¹⁹ U.S. Census Bureau, *Tenure (White Alone, Not Hispanic or Latino Householder)*, AMERICAN COMMUNITIES SURVEY, [https://data.census.gov/table?q=B25003H:+TENURE+\(WHITE+ALONE,+NOT+HISPANIC+OR+LATINO+HOUSEHOLDER\)&tid=ACSDT5Y2021.B25003H](https://data.census.gov/table?q=B25003H:+TENURE+(WHITE+ALONE,+NOT+HISPANIC+OR+LATINO+HOUSEHOLDER)&tid=ACSDT5Y2021.B25003H) (last visited July 19, 2023).

²⁰ U.S. DEP'T OF HOUS. & URB. DEV. OFF. OF POL'Y DEV. & RSCH, 2015-2019 CHAS DATA (2019), <https://www.huduser.gov/portal/datasets/cp/2015thru2019-040-csv.zip>.

²¹ Peter Hepburn et al., *Racial and Gender Disparities among Evicted Americans*, EVICTION LAB: EVICTION LAB UPDATES (Dec. 16, 2020), <https://evictionlab.org/demographics-of-eviction/>.

²² *State of Homelessness: 2023*, NATIONAL ALLIANCE TO END HOMELESSNESS, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness/> (last visited July 19, 2023).

²³ DESIREE FIELDS, HOMES FOR ALL CAMPAIGN OF THE RIGHT TO THE CITY ALLIANCE, THE CORPORATE LANDLORD: THE INSTITUTIONALIZATION OF THE SINGLE-FAMILY RENTAL MARKET AND POTENTIAL IMPACTS ON RENTERS 4-5, 12-13 (2014), https://www.saje.net/wp-content/uploads/2021/04/RTC.DF_report.FINALPROOF-July2_2013.pdf.

²⁴ Georgia Kromrei, *Congressional Report Finds Invitation Homes Downplayed Evictions to Fannie Mae*, HOUSINGWIRE (July 29, 2022 1:45 PM), <https://www.housingwire.com/articles/congressional-report-finds-invitation-homes-downplayed-evictions-to-fannie-mae/>.

III. The FHFA Has the Power to Act.

The GSEs have long dictated the contents of the contractual commitments that landlords make to their mortgage lenders in exchange for financing through a variety of standard forms. The FHFA, in turn, as both the regulator of the GSEs²⁵ and as conservator of Fannie Mae and Freddie Mac,²⁶ has the authority to require the GSEs to include terms consistent with the recommendations above in those forms. That authority is at its apogee when the FHFA is exercising regulatory power with respect to the markets regarding which Congress has charged the GSEs with a statutory duty to serve,²⁷ but the FHFA's robust powers are not limited to those markets. Indeed, Congress invested the Director of the FHFA with the duty to ensure that "the activities of each regulated entity and the manner in which such regulated entity is operated are consistent with the public interest."²⁸ The FHFA's authorizing statute further requires the Director to "issue any regulations, guidelines, or orders necessary to carry out the duties of the Director under this chapter or the authorizing statutes, and to ensure that the purposes of this chapter and the authorizing statutes are accomplished."²⁹ These duties and powers must be seen through the prism of the FHFA's additional role of setting goals for the purchase of mortgages for affordable, multifamily developments.³⁰ In other words, in establishing the FHFA, Congress was not value-neutral in describing what kind of housing the Agency should be supporting: the need to support housing that provides the public benefit of affordability is paramount.

It is important to note that there is no inconsistency or tension between this view of the FHFA's powers and a parallel emphasis on the Agency's role in ensuring that the GSEs operate in a "safe and sound manner" as required by 12 U.S.C. § 4513(a)(1)(B)(i). As discussed above, the rent increases that landlords would be allowed to impose pursuant to these recommendations are consistent with a reasonable rate of return on their investment and therefore with a high likelihood of loan repayment. Likewise, participation in the HCV program is not a financial hardship for landlords. Indeed, in economic downturns, landlords that rent to voucher holders may do better than those who do not due to the ability of voucher holders who have lost income to go through an interim recertification that increases the portion of their rent paid by the public housing authority.³¹ Lastly, there is no evidence that just cause eviction protections would put loan repayment at risk. Therefore, the FHFA not only has the power to act to protect tenants, that power is not in tension with the FHFA's other duties.

²⁵ 12 U.S.C. § 4513(a).

²⁶ *Conservatorship*, FEDERAL HOUSING FINANCE AGENCY, <https://www.fhfa.gov/Conservatorship> (last visited July 20, 2023).

²⁷ 12 U.S.C. § 4565(a). If the FHFA concludes that it does not have the authority to impose the requirements urged in this letter across the GSEs' portfolios, it should, at a minimum, impose these requirements in the markets that it has a duty to serve. For manufactured housing, that would mean adding limits on rent increases and a prohibition on source of income discrimination to the existing just cause eviction requirement. For the affordable housing preservation and rural housing markets, that would mean imposing all three requirements for the first time.

²⁸ 12 U.S.C. § 4513(a)(1)(B)(v).

²⁹ 12 U.S.C. § 4526(a).

³⁰ 12 U.S.C. § 4563(a).

³¹ 24 C.F.R. § 982.516(c) (2022).

The Lawyers' Committee appreciates the FHFA's solicitation of comment on how it can better protect the tenants of landlords with GSE-backed mortgages. This RFI is an important first step in a process that has the potential to significantly advance racial justice, which is a strong moral and policy imperative in light of the history of the FHFA's predecessor agencies. Limiting rent increases, requiring just cause for eviction, and prohibiting source of income discrimination are three important steps, alongside others, that the FHFA should take as it moves forward to next steps. If you or your staff are interested in discussing these steps that the FHFA can take to protect tenants and advance racial justice, please feel free to contact me at tsilverstein@lawyerscommittee.org or (202) 662-8600.

Sincerely,

Thomas Silverstein
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