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Hon. Marcia L. Fudge
Secretary
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410

Attention: Affirmatively Furthering Fair Housing NPRM (RIN 2529-AB05, Docket No. FR-6250-P-01)

Dear Secretary Fudge:

I write to comment on the NPRM “Affirmatively Furthering Fair Housing” (RIN 2529-AB05), pursuant to the notice and comment process outlined in and protected by 5 U.S.C. § 553(c).

This proposed rule, if enacted, would be an arbitrary and capricious regulatory overreach based on a fanciful interpretation four simple words: “affirmatively further fair housing.” This rule must be rejected.

The Fair Housing Act (“Act”) clearly states, “It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”¹ Lest there be any doubt about the meaning of this text, we need to look no further than what the courts have declared to be bill sponsor “Senator Mondale’s unambiguous pronouncement:”² “Without a doubt, it means to provide for what is provided in the bill. It means the elimination of discrimination in the sale or rental of housing. That is all it could possibly mean.”³ The statute rightly bans discrimination in the sale or rental of housing on the basis of a straightforward list of protected characteristics and requires you as Secretary to administer housing programs “in a manner affirmatively to further the policies” of the act.⁴ Other provisions extend to other executive departments and agencies an obligation to cooperate in the matter.⁵ Grantees are required to certify that they will “affirmatively further fair housing” (“AFFH”).⁶

This is not complicated. As your department has previously acknowledged, “The ordinary meaning of the phrase does not invite a fundamental expansion of HUD regulations to include cumbersome policy, monitoring or reporting requirements that will significantly affect the economy by impacting local zoning and development policies across the nation” and, furthermore, “Congress specifically barred HUD from using funding to force grantees to change any public policy, regulation, or law.” Your

¹ 42 U.S. Code § 3601

² NAACP v. Secretary of HUD, 817 F.2d 154 (1st Cir. 1987).

³ 114 Cong. Reg. 4975 (1968)

⁴ 42 U.S.C. 3608(e)(5)

⁵ 42 U.S.C. 3608(d)

⁶ See, for example, 42 U.S.C. 5304(b)(2), 42 U.S.C. 5306(d)(7)(B), and 42 U.S.C. 12705(b)(15).

department therefore quite reasonably concluded, consistent with the plain language of the statute, “AFFH certifications will be deemed sufficient provided grantees took affirmative steps to further fair housing policy during the relevant period,” and finalized a rule to this effect less than three years ago.⁷

Your department now proposes a new rule that requires each grantee to develop, obtain your approval of, and then implement an “equity plan” to advance “fair housing goals” which “when taken together, must be designed to overcome prioritized fair housing issues in each fair housing goal category and must be designed and reasonably expected to result in material positive change and consistent with a balanced approach.”⁸

The proposed rule exceeds your department’s statutory authority in at least four major ways:

1. The proposed rule adopts an overly broad definition of “fair housing issue.”

Specifically, the proposed rule states, “*Fair housing issue* means a condition in a program participant’s geographic area of analysis that restricts fair housing choice or access to opportunity and community assets.”⁹ However, the Act in no way supports the notion that fair housing demands equal “access to opportunity and community assets” or that a grantee should be obligated to work to equalize this access in order to fulfill its obligation to affirmatively further fair housing. As the courts have found, “if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.”¹⁰

2. The proposed rule inappropriately requires grantees to pursue low-priority goals.

Specifically, by requiring every grantee to pursue at least one goal in each fair housing category in which the grantee identifies a fair housing issue, your department under the proposed rule would divert resources from other goals that the local authorities may have identified as better uses of their limited resources. As the Supreme Court has found, “The FHA is not an instrument to force housing authorities to reorder their priorities.”¹¹ However, by requiring these authorities to allocate at least some resources toward the pursuit of low-priority goals, the proposed rule does exact that.

3. The proposed rule improperly favors a “balanced” vision of urban development.

Specifically, the proposed rule states, “A program participant that has the ability to create greater fair housing choice outside segregated, low-income areas should not rely on solely place-based strategies

⁷ “Preserving Community and Neighborhood Choice: A Rule by the Housing and Urban Development Department on 08/07/2020,” Federal Register, Vol. 85, No. 153, Pages 47,904 and 47,900.
<https://www.federalregister.gov/documents/2020/08/07/2020-16320/preserving-community-and-neighborhood-choice>.

⁸ “Affirmatively Furthering Fair Housing: A Proposed Rule by the Housing and Urban Development Department on 02/09/2023,” Federal Register, Vol. 88, No. 27, Page 8586.

<https://www.federalregister.gov/documents/2023/02/09/2023-00625/affirmatively-furthering-fair-housing>

⁹ “Affirmatively Furthering Fair Housing: A Proposed Rule by the Housing and Urban Development Department on 02/09/2023,” Federal Register, Vol. 88, No. 27, Page 8589.

<https://www.federalregister.gov/documents/2023/02/09/2023-00625/affirmatively-furthering-fair-housing>

¹⁰ ABA v. FTC, 430 F.3d 471-472 (D.C.C. 2005)

¹¹ Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 576 U.S. 519, 540 (2015)

consistent with a balanced approach.”¹² Astonishingly, the department provides no justification whatsoever for mandating that grantees pursue its preferred vision. The Supreme Court has found, “The FHA does not decree a particular vision of urban development; and it does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities.”¹³ The proposed rule would, however, improperly require all grantees who are able to do so to pursue both place-based and mobility-based strategies, regardless of local priorities or preferences (even if based on a well-reasoned analysis of which approach will more effectively further fair housing within the locality), clearly in “an attempt to second-guess which of two reasonable approaches a housing authority should follow.”¹⁴

4. The proposed rule unlawfully expands the list of protected characteristics.

Specifically, the proposed rule states, “*Protected characteristics* are race, color, religion, sex (including sexual orientation, gender identity, and nonconformance with gender stereotypes), familial status, national origin, having a disability, and having a type of disability.”¹⁵ However, the Act in no way supports the notion that sex includes any of the additional terms included in parentheses in the proposed rule. Furthermore, for discussion of the ways in which “current efforts to redefine sex to include ‘gender identity’ would dissolve sex as a stable legal category and create legal chaos,” please see the work of my colleague Dr. Jay Richards.¹⁶

For these four reasons, the proposed rule is “arbitrary and capricious” under the relevant legal standards.¹⁷ I urge you to reject the proposed rule and instead restore the “Preserving Community and Neighborhood Choice” rule enacted in 2020.

Respectfully submitted,

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¹² “Affirmatively Furthering Fair Housing: A Proposed Rule by the Housing and Urban Development Department on 02/09/2023,” Federal Register, Vol. 88, No. 27, Page 8558.

<https://www.federalregister.gov/documents/2023/02/09/2023-00625/affirmatively-furthering-fair-housing>

¹³ Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 576 U.S. 519, 542 (2015)

¹⁴ Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 576 U.S. 519, 541 (2015)

¹⁵ “Affirmatively Furthering Fair Housing: A Proposed Rule by the Housing and Urban Development Department on 02/09/2023,” Federal Register, Vol. 88, No. 27, Page 8560.

<https://www.federalregister.gov/documents/2023/02/09/2023-00625/affirmatively-furthering-fair-housing>

¹⁶ Dr. Jay Richards, “Why States Must Define Sex Precisely,” March 31, 2023.

<https://www.heritage.org/gender/commentary/why-states-must-define-sex-precisely>

¹⁷ Motor Vehicle Manufacturers Assoc. of the United States, Inc. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983).

¹⁸ Affiliation and title provided for identification purposes only. I submit this comment in my personal capacity only and not as an employee of The Heritage Foundation.