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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). Several provisions of this regulation are flatly unlawful and vastly exceed the statutory authority granted to HUD on the basis of an interpretive abuse of two plain English words. Further, HUD advances goals and aims which are not even remotely related to its statutory authority while failing to consider important costs of the rule. These glaring errors are not legal technicalities that can be removed or ignored; they represent a clear and systematic failure of the Department to abide by the standards of administrative procedure, rational decision-making, and interpretation of the law. The rulemaking is shot through with arbitrariness, caprice, and abuse of authority. For these stated reasons, the Department should not, and indeed, cannot go forward with this rule. My full comment follows. Thank you for your time and consideration.

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I. The rulemaking exceeds HUD’s statutory authority.

42 USC 3608(e)(5), upon which the Department rests its entire case for the proposed rule, states that the HUD Secretary shall:

“administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.”¹

Note that HUD is not granted some new authority by the word “affirmatively” here; the word, with the phrase “to further,” modifies the manner in which the Secretary administers the programs and activities which he or she has been authorized to administer by Congress. HUD is not directed or authorized to push “further” than these policies, nor is it mandated to create an entirely new system of rules designed to modify in any way the aims of these policies. The provision tells HUD how it shall administer programs created elsewhere in statute; it does not itself create a new program or authorize HUD to do so.

Further, HUD is not authorized to “affirmatively further fair housing,” but rather, “the policies of this subchapter.” That is, we cannot conclude that this places a substantive obligation on program participants to themselves affirmatively further “fair housing” *as a concept*. The “policies of this subchapter” are programs and policies of HUD themselves, *not* abstract goals or aims which must be “affirmatively” sought. While the subchapter in question contains a declaration of a policy of providing for fair housing as such, it does not grant HUD the opportunity to amend or go beyond the plain meaning of the statutory phrase in question.² The Department could not, in other words, pursue this wide-reaching rule (particularly its provisions concerning the equalization of community resources) by citing a statutory demand to “administer the programs and activities relating to housing and urban development affirmatively to further the policy to provide, within constitutional limitations, for fair housing throughout the United States.”³ HUD is only authorized to affirmatively further the congressionally-established policy to provide fair housing; it is not allowed to amend or “further” by way of expansion of the abstract concept of “fair housing.”

Additionally, there is no reason to claim that any of the court cases cited by the proposed rule—*NAACP Boston v. HUD* (1987), *Otero v. NYC Housing Authority* (1973), and *Shannon v. HUD* (1970)—support the interpretation of the statute by HUD given that HUD did not offer an interpretation until 1994. These cases focus on the kind of aid or programs which HUD may or may not be able to enact, and not on giving HUD new authority to impose substantive obligations on recipients, or to develop tests or programs for compliance pursuant to these statements. These cases, at best, support the interpretation that the phrase “affirmatively to further” may go beyond simply ensuring non-discrimination. In the absence of any judicial evaluation of previous administrative actions, and given the extensive nature of the framework

¹ 42 USC 3608(e)(5) (2020).

² See, e.g., 42 USC 3601.

³ The language replacing the phrase “policies of this subchapter” is taken from 42 USC 3601.

and policies HUD has created here—again, without any explicit statutory mandate besides the demand to “administer” programs “in a manner affirmatively to further” the statute’s policies—it is impossible to say that courts recognize anything like the authority to promulgate the proposed rule simply because they support a standard that exceeds the simple illegality of non-discrimination.⁴

As *NAACP Boston v. HUD* notes, the title “guarantees” protected classes “the right to live where [they] wish... and where [they] can afford.”⁵ HUD’s actions under 42 USC 3608(e)(5) must pursue this end. HUD, in the proposed rule, attempts to go far beyond this objective. The Department instead proposes to turn a misinterpretive gloss on the three-word phrase “affirmatively to further” into a blank check for new and un-legislated ideological bureaucratic machinery. HUD cannot claim such sweeping authority to change local housing dynamics on such a shaky basis. To do so violates the major questions doctrine as spelled out in *West Virginia v. EPA*: the Department claims to “discover an unheralded power representing a transformative expansion of its regulatory authority” by way of the “vague language” of a statute.⁶ This rule, in attempting to affect the very structure of communities across the country, “assert[s] highly consequential power beyond what Congress could reasonably be understood to have granted.”⁷ The Department cannot hide behind the excuse that the sweeping effects of their powers

In particular, there are several striking parallels between HUD’s attempted use of 42 USC 3608(e)(5) and the EPA’s attempted use of Section 111(d) of the Clean Air Act in *West Virginia*. In particular, HUD claims that a “long-extant, but rarely used, statute designed as a gap filler”—in particular, some “oblique or elliptical language” within it, comprised of little more than a paltry handful of “modest words, vague terms, or subtle devices”—was intended by Congress to “empower an agency to make a radical or fundamental change to a statutory scheme.”⁸ Such a radical and fundamental change is clearly intended when the Department claims that HUD’s statutory obligation to administer programs “in a manner affirmatively to further” policies to “provide for fair housing” in any way grants them license to change the definition of ‘fair housing’ to ‘equal housing’ or ‘equal community assets,’ or to otherwise go further than the lawmakers who drafted the FHA themselves intended.⁹ The phrase, clearly little more than the kind of gap-filler cited in *West Virginia v. EPA*, does not authorize a sweeping rule requiring new certifications and various controversial policies as a condition of HUD funding.¹⁰

⁴ 42 USC 3608(e)(5).

⁵ *N.A.A.C.P., Boston Chapter v. Secretary of Housing & Urban Development*, 817 F.2d 149, 154-55 (1st Cir. 1987), internal quotations omitted.

⁶ *West Virginia v. Environmental Protection Agency*, No. 20-1530, 4-5 (U.S. Jun. 30, 2022).

⁷ *West Virginia v. EPA*, 26.

⁸ *Ibid.*, 5, 25 (internal quotation marks and brackets omitted).

⁹ See, e.g., Senator Mondale’s statement that “the elimination of discrimination in the sale or rental of housing” is “all [fair housing] could possibly mean,” 85 FR 47902, quoting *NAACP Boston v. HUD*.

¹⁰ 42 USC 3608(e)(5).

The statutory language does not confer the kind of power that HUD proposes to exercise. It does not explicitly or implicitly give HUD license to pursue a kind of fairness or fair housing policy radically different from “the elimination of discrimination in the sale or rental of housing” which one of the statute’s very architects claimed was “all [fair housing] could possibly mean.”¹¹ Likewise, it does not give HUD the power to claim that local realities like zoning laws or the location of public housing facilities are under its authority simply because they affect the fairness or ‘affirmatively furthered fairness’ of housing in the United States, a kind of logic which *West Virginia* clearly rebuts.¹² To claim that Congress granted it such a patently “broad and unusual authority through an implicit delegation” was held by the same case to be “not sustainable.”¹³

Ultimately, the plain meaning of the sentence is clear, as HUD wrote in the 2020 Final Rule: the statement demands that HUD and its programs should be administered in a manner that promotes fair housing “beyond passive tolerance or acceptance,” i.e., in a manner that goes beyond ensuring that recipients are not being discriminated against.¹⁴ Two words do not authorize the creation of an extensive tool that seeks to equalize “community resources,” i.e., the resources for which residents’ taxes pay and which are rightly administered by the elected representatives of the residents and not by the Secretary of Housing and Urban Development; they do not authorize the reinvention of the term “fair housing” to mean “equal housing”; and they do not authorize the inclusion of “legal zoning practices” or “nonconformity with gender stereotypes” as relevant factors to HUD funding.

II. The rule advances goals and demands actions which are not found in or supported by the statute.

A. The proposed rule would encourage goals contrary to the intent of Congress and which would expand HUD’s authority to an unprecedented degree.

The proposed rule does not merely lack statutory justification for its overall enactment; it also aims at several goals which exceed the bounds of HUD’s statutory authority. The Department specifically claims that:

“any regulation to implement the Fair Housing Act’s AFFH mandate must help program participants move away from the status quo with respect to planning approaches and facilitate the development of innovative solutions to overcome decades, if not centuries, of housing-related inequality throughout American communities.”¹⁵

¹¹ 85 FR 47902, quoting *NAACP Boston v. HUD*.

¹² See, e.g., *West Virginia v. EPA*, subsection (c), which points out that simply because a cap-and-trade system or a national generation-shifting approach would result in lower emissions does not mean that the EPA can require, by order or implicitly, the implementation of these policies by citing their power to demand a certain maximum level of emissions.

¹³ *Ibid.*, 24.

¹⁴ 85 FR 47902, quoting the *Merriam-Webster Dictionary*.

¹⁵ 88 FR 8526.

But HUD lacks any statutory directive to “overcome [...] housing-related inequality.” HUD is solely authorized to eliminate discriminatory housing practices and to ensure fair housing, not to achieve total housing equality. This is an end completely foreign to Congress’ definition of fair housing, which includes only non-discrimination, providing “decent, safe, and sanitary housing for every American,” and increasing the supply of “affordable housing.”¹⁶ It is also an end foreign to the Congressional record, especially FHA sponsor Senator Mondale’s statement that to “provide...for fair housing” means only “the elimination of discrimination in the sale or rental of housing. That is all it could possibly mean.”¹⁷ HUD’s claim that its goal is to “overcome [...] housing-related inequality” is plainly and simply a statement of an aim foreign to the statutory mandate given to HUD and evidence that the rule answers to ends not foreseen by Congress and which are antithetical to a free society, namely, the end of having every American live in housing that is exactly the same, totally free of “housing-related inequality.”

Another irrelevant aim is the equalization of “neighborhood resources,” which is once again unrelated to the congressionally-intended aim of the statute. The rule claims that *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* recognizes a statutory authority to meddle in state and local public policy related to “neighborhood resources.” But the cited portion of *Texas Housing* does not even come close to justifying such a sweeping change to the standard interpretation of the aims of the statute:

“As the United States Supreme Court noted recently, in enacting the Fair Housing Act more than fifty years ago, Congress recognized the critical role housing played and continues to play in creating and maintaining inequities based on race and color. See *Tex. Dep’t of Housing and Cmty Affairs v. Inclusive Cmty Project, Inc.*, 576 U.S. 519, 546 (2015) (“The [Fair Housing Act] must play an important part in avoiding the Kerner Commission’s grim prophecy that ‘our Nation is moving toward two societies, one [B]lack, one [W]hite—separate and unequal.’ The Court acknowledges the Fair Housing Act’s role in moving the Nation toward a more integrated society.”) (internal citations omitted).”¹⁸

The passage above does not authorize HUD to attempt to equalize neighborhood resources. The vision of “a more integrated society” is not a society where all neighborhoods are the same or where neighborhoods are deprived of their resources, by redistribution or by overuse, in order to make all neighborhoods and cities provide equal or perfectly fungible amenities.

Also among these extra-statutory aims is the aim to alleviate inequality of “community assets,” that is, the attempt to eliminate “different access” to resources like schools, police, and community centers.¹⁹ But the role played by the FHA is not as all-encompassing equalizer to eliminate all disparities of income or all differences between neighborhoods or communities. The statute’s aim is to have programs administered “in a manner affirmatively to further” the

¹⁶ 42 U.S.C. 3604.

¹⁷ 85 FR 47902, quoting *NAACP Boston v. HUD*.

¹⁸ 88 FR 8516.

¹⁹ 88 FR 8526.

policies of the FHA, including the policy to provide for fair housing within constitutional limits. It does not and cannot reasonably follow from that statutory aim that the FHA must, or even may, compensate for (or, directionally, eliminate) all non-housing-related or housing-related inequalities between communities or otherwise meddle in the level of “community assets” of a given community or political entity.

The proposed rule does not pursue fair housing alone, but a much larger equalization which exceeds its authority. The regulatory text cited clearly was not explicitly intended to confer unto HUD new aims like “overcom[ing] [...] housing-related inequality,” equalizing “community resources,” and lowering inequality of “community assets.” To claim that Congress intended for HUD to pursue such controversial aims when it wrote that the Department should “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter” runs afoul of the demand of *West Virginia v. EPA* that “the words of a statute must be read in their context and with a view to their place in the overall statutory scheme” and that even interpretations with “textual plausibility” not be used to authorize “unheralded regulatory power over a significant portion of the American economy.”^{20, 21}

Racial discrimination is illegal and should be fought by the law; this is the mandate and *raison d’etre* of the FHA and HUD more generally. Having neighborhoods of different kinds or community resources of different levels is not discriminatory, and the overall distribution of housing and community resources in the United States is emphatically *not* the purview of the Department. It is not a reasonable interpretation of “fair” to say that the FHA aims to eliminate all differences in “community assets.” The Department cannot pursue these irrelevant and unlawful aims.

B. The intended effects and policy changes of HUD’s proposal exceed the scope of the law.

Beyond the irrelevant and unlawful aims that HUD attempts to pursue in the proposed rule, the proposal also includes several provisions which are clearly outside the scope of the law. Many of the provisions in the proposed rule suggest actions that HUD claims will satisfy its standards for affirmative furtherance of fair housing. For example, HUD claims that:

“A universal basic income program is one of the more ambitious policy choices a program participant could opt to implement in its efforts to address fair housing issues. Implementation of this type of policy would require significant resources, but some jurisdictions have pursued it believing that the benefits outweigh the costs. It is an

²⁰ 42 USC 3608(e)(5).

²¹ *West Virginia v. EPA*, 22, 23-24.

example of a strategy that could potentially be linked to alleviating disparities identified in an Equity Plan.”²²

This is the ultimate case of the tail wagging the dog. HUD’s directive, as I have written, is to promote fair *housing*; while it is true that many factors can at the margins impact housing access, HUD’s mandate to further the provision of fair housing does not make it an all-purpose regulator of everything that could potentially affect housing access. There would be no limits to such a bootstrapping theory: HUD would enjoy authority to require anything at all that marginally promoted fair housing. No reasonable interpretation of the statute can allow HUD to claim that a UBI or Guaranteed Income is a *housing* benefit. To claim otherwise clearly runs counter to the holding of *West Virginia v. EPA*.

Simply asserting that these examples “are not intended to be guidance for program participants seeking to take meaningful actions to affirmatively further fair housing, but rather hypothetical actions that could be induced by this proposed rule” does not negate the fact that these policies are examples of that which does actually satisfy HUD’s orders.²³ Suggestions from agencies are not merely neutral advice; rather, they present a standard of program which certainly passes muster, a bar or aspirational program that embodies the desires of the agency. HUD is telling recipients that this is the kind of policy which it likes and thinks suits well as an example; regulated parties will surely get the message.

Other actions which HUD holds as fulfilling the AFFH obligation include changing non-discriminatory zoning laws and “modifying preferences”—a phrase whose unbelievable ambiguity alone is arbitrary and capricious on its face.²⁴ Another instance is its attempt to require “inclusionary zoning policies” of recipients.²⁵ In its discussion of “inclusionary zoning,” it should be noted that HUD clearly acknowledges the radical expansion of authority that it undertakes. The proposed rule’s RIA claims that:

“inclusionary zoning policies could result in a transfer of units and associated locational amenities that would have otherwise been for households that could afford market-rate units to families with children that otherwise would have been excluded from the area. Said another way, inclusionary zoning could have local costs but regional benefits (Cotter, 2014). Inclusionary zoning could be one way to ensure inclusive growth in areas seeing high economic investment.”²⁶

²² Regulatory Impact Analysis, FR-6250-P-01 “Affirmatively Furthering Fair Housing” (Document ID HUD-2023-0009-0014), p. 22, <https://www.regulations.gov/document/HUD-2023-0009-0014>.

²³ RIA, p. 20.

²⁴ 88 FR 8525.

²⁵ RIA, p. 21. It is notable that it is not relevant to our discussion that these may be one option among some potential set which would satisfy HUD’s AFFH requirements. The action is encouraged by the proposed rule, implicitly endorsed by HUD, and in many cases where other actions are not feasible, it would be clearly and obviously demanded. Even further, it would be taken as a “best practice” among governmental entities, contrary to the democratic process.

²⁶ *Ibid.*

Thus HUD does not propose, in line with the aforementioned conviction of Senator Mondale, that “all [fair housing] could possibly mean” is “the elimination of discrimination in the sale or rental of housing.”²⁷ Rather, it proposes to take housing from those who worked hard to afford to live in one particular area and give said housing to those who face no legal discrimination and can simply not afford said particular area, presumably continuing these transfers until full equality of “community resources”—i.e., total equality of housing and living space—is achieved.

Ultimately, the so-called AFFH statute did not authorize a regulatory scheme in which HUD can or even should attempt to effect changes in neighborhood structure against the democratically selected and perfectly legal preferences and laws of local communities. Likewise, it did not authorize HUD to make its recipients, as a condition of funding, engage in political activism or otherwise change their practices to meet a new definition of fairness far in excess of the statutory and historical standards set by Congress, carried out by HUD, and supported by the judiciary. Claiming that these are simply neutral suggestions by HUD does not make it so. HUD does not have statutory authority to meddle in local policies in this manner, and its advice carries weight that will be felt by recipients.

To say that HUD has authority to implicitly endorse and encourage a UBI, modification of preferences, changes to zoning laws, or various forms of micromanagement of recipient public housing projects is to once again run totally afoul of the holding of *West Virginia v. EPA*. HUD could not have been given “such broad and unusual authority through an implicit delegation,” and cannot claim that it has always had authority to demand as a condition of funding the location, practices, public housing policies, and non-public housing policies of recipients simply because these things affect fairness of housing.²⁸ These policy modifications exceed the intended breadth and depth of the authority granted by the statute cited. While it is perhaps true that these factors have an effect on the fairness or unfairness of housing, HUD cannot claim on the basis of two words that Congress has given it authority to change any number of factors that it can possibly connect to “fair housing.”

III. The rule fails to justify several costly provisions

Another glaringly arbitrary part of the proposal is its evaluation of cost: the Department does not take into account the costs of the regulation on local entities in any serious way. In the NPRM, the Department promotes targeting those communities with high levels of community assets for fair housing projects.²⁹ Relevant to the overall cost of this action is the fact that “community assets” are defined by the proposed rule as “the types of assets that are often not equitably distributed and available within communities”; especially as this definition includes

²⁷ 85 FR 47902, quoting *NAACP Boston v. HUD*.

²⁸ *Ibid.*, 24, 31-33. The holding explicitly denies that the EPA could regulate the kinds of energy sources used, either explicitly or implicitly, simply because the mix of energy sources is always affected by EPA emissions rules.

²⁹ See, e.g., 88 FR 8532.

both “community” and “assets” in the definition text, this is a basically vacuous definition that is in and of itself arbitrary and capricious on that account alone.³⁰ The agency defines “community assets” so vaguely that it essentially can include anything and everything about a community that is different from another one. This alone makes it nearly impossible to accurately estimate the cost of such proposals.

The Department does provide some examples of things which may fall under the wide umbrella of “community assets.” This list includes:

“high quality schools, equitable employment opportunities, reliable transportation services, parks and recreation facilities, community centers, community-based supportive services, law enforcement and emergency services, healthcare services, grocery stores, retail establishments, infrastructure and municipal services, libraries, and banking and financial institutions.”³¹

By definition, the vast majority of these “community assets” will be more strained when more and more people are expending or taking a share of them. The more students who attend a high-quality school, for example, the higher the student-to-faculty ratio, and thus, by definition, the less time each instructor has to devote to the particular needs of each student. The more workers in a given area’s labor market, the more that “equitable employment opportunities” will be strained by increased demand, driving down the wages offered by the market. This analysis applies to transportation services, parks and recreation facilities, community centers, “supportive services,” libraries, and even things like infrastructure and law enforcement: increased use of rival goods degrades the overall level of those goods.

The Department’s focus on targeting FHA projects for the equality of “community assets” amounts, then, to a choice to saddle these communities’ common resources, like schools and police forces, with more population than they are otherwise prepared to operate over. This will only serve to make those community resources worse, greatly exceeding the statutory aims of the FHA.

Even worse, HUD does not even try to account for the overall cost of this radical program of redistribution of community resources in its RIA. The costs of redistribution do not fall simply on the residents who lose out by the transfer of their resources to others; the entire community as a whole, and its common government, is subject to costs from the redistribution proposed. The consideration of increased use of common resources and non-public goods is a foundational component of even the most basic economic analysis of a regulation. The lack of even a word about this cost, let alone a satisfactory economic analysis, shows that there was a total failure to treat cost “as a centrally relevant factor when deciding whether to regulate” that “reflects the understanding that reasonable regulation ordinarily requires paying attention to the

³⁰ 88 FR 8531.

³¹ Ibid.

advantages *and* the disadvantages of agency decisions.”³² In other words, the agency cannot be said to have seriously considered cost; the public has compelling evidence that the agency decided upon its favored course of action without considering cost when its course-of-action was chosen. The failure to consider such an important cost renders the rule arbitrary and capricious.

Had the Department considered the overall cost to communities, it might have changed course. For example, rather than focus on moving public housing to pursue high levels of community assets and thereby degrading the quality of said assets, they could have focused on encouraging the building-up of community assets by and for underserved communities themselves. Programs that would encourage and aid public housing residents and HUD recipients to engage in their communities—for example, by encouraging them to partake in publicly-funded programs and activities, frequent their local public library, or attend meetings of local government and non-government organizations (school boards, community associations, charitable organizations, etc.)—could easily lead to higher levels of community assets in areas where public housing already exists and in areas to which public housing residents already feel attachment and affection.³³ Of course, it is worth noting that this alternative is simply an option that the Department could have considered had it actually attempted to seriously consider the cost of its actions under its proposed reinterpretation of 42 USC 3608(e)(5). It is provided only to demonstrate the necessity of considering this cost, which the Department totally ignored. With the Department having ignored cost, the rule is again, in this way, revealed to be arbitrary and capricious to its core.

For all of the reasons detailed above, I urge the Department of Housing and Urban Development not to go forward with the proposed rule.

Respectfully submitted,

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³² *Michigan v. Environmental Protection Agency*, 576 U.S. 743, 752-53 (2015)

³³ This could be of great benefit considering the fact that low-income Americans do not engage in community resources as much as high-income Americans, as documented by a recent [Pew Research Center](#) study.

³⁴ 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.