PACIFIC LEGAL FOUNDATION

April 27, 2023

VIA ONLINE SUBMISSION

Ms. Marcia Fudge
Secretary
United States Department of Housing and Urban Development
451 7th Street, S.W.
Washington, DC 20410

Re: Pacific Legal Foundation's objection to unconstitutional provisions of the proposed Affirmatively Furthering Fair Housing Rule.

Dear Ms. Fudge:

Pacific Legal Foundation (PLF) files this comment objecting to the unconstitutional and counterproductive provisions of the proposed Affirmatively Furthering Fair Housing (AFFH) Rule. The Department of Housing and Urban Development (HUD) will need to make significant revisions to address constitutional and policy concerns before such a rule is finalized. First, the AFFH Rule violates the constitutional separation of powers vital to a free society. It does so in three ways. First, the proposed rule exceeds the statutory authority granted by Congress, thus wresting lawmaking authority from lawmakers. Second, and relatedly, if the AFFH Rule's reading of the "affirmatively to further" language in the Fair Housing Act is correct, then the agency's interpretation would render the Fair Housing Act an unconstitutional delegation of lawmaking authority to federal agencies. Third, the AFFH Rule intrudes into traditional areas of state concern, thus undermining the balance of power between state and federal governments.

The AFFH Rule also threatens other constitutional guarantees, namely equal protection under the law and individual property rights. The AFFH Rule conflates disparate impact with disparate treatment. The courts have repeatedly warned agencies that race-based measures, such as purported attempts at defeating racial segregation that are encouraged by the AFFH Rule, must be a proportionate response to actual discrimination demonstrated by evidence, not merely an attempt to correct disparities. Finally, the means by which HUD pressures its grantees to "affirmatively further fair housing" imperil protected property rights. HUD should instead encourage grantees to adopt market-based measures that will expand housing opportunities without goading local governments into violating the rights of property owners.

STATEMENT OF INTEREST

PLF is the nation's leading public interest organization advocating in courts and with policymakers across the country to defend individual liberty and limited government. Its work centers on three pillars: the separation of powers, equality and opportunity, and property rights. PLF is dedicated to restoring and maintaining the constitutional separation of powers, which protects individual liberty by constraining the operation of government power and ensuring democratic accountability for its actions. PLF fights to ensure that individuals are treated as individuals rather than as members of a demographic group based on characteristics such as race or ethnicity. Additionally, PLF is the nation's premier defender of property rights, as property forms the essential foundation for the exercise of other liberties. In all three of these issue areas, PLF attorneys have represented clients in cases before the United States Supreme Court, produced scholarship, offered expert testimony before legislative bodies, submitted rulemaking petitions, and published policy papers.

INTRODUCTION

The AFFH Rule grants HUD significant control over the thousands of states, counties, and cities across the country that receive HUD funds. The rule requires these local governments to adopt HUD's preferred policies on a wide range of issues far afield from the housing discrimination that the Fair Housing Act addresses. These local governments must adopt policies subject to HUD's approval that will: improve racial integration, increase the stock of affordable housing, ensure minorities have access to good jobs and good schools, reduce displacement, and on and on. These sound like noble goals, but "[e]xperience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent."[1] When it comes to governance, constitutionality matters more than intent: "The point is not one of motives, but of constitutional authority, for which the best of motives is not a substitute."[2]

Moreover, local governments cannot pursue the policy goals set forth in the AFFH Rule however they see fit—HUD has final say over local governments' plans on how to approach these issues. And HUD's policy preferences have a distinctly partisan flavor. The AFFH Rule and HUD guidance, for example, unabashedly push for controversial policies like bans on income-source discrimination by landlords and affordable housing set-aside mandates for housing developers, while expressing its disapproval of nuisance and crime-free ordinances. Likewise, local governments must avoid policies and practices under the AFFH Rule that are "materially inconsistent" with the duty to affirmatively further fair housing. Hence, HUD seeks to grant itself a "roving commission to inquire into evils and upon discovery correct them."[3] None of this is authorized by the statute. And if the statute did bestow such unbounded discretion upon HUD, then the statute would be an unconstitutional delegation of legislative power.

Even *assuming* the AFFH Rule is within the bounds of a constitutionally sound statute, the Rule is not sound policy. It embraces and expands upon a view of equality and racial justice focused on alleviating disparate impacts rather than disparate treatment, thus introducing extensive federal intrusion into markets and the private sphere. There are better ways to go about addressing the many issues that HUD seeks to address through the AFFH Rule.

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[1] *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).
[2] *Panama Refining Co. v. Ryan*, 293 U.S. 388, 420 (1935).
[3] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring).

I. The Proposed AFFH Rule Exceeds Statutory Authority Under the Fair Housing Act.

The Fair Housing Act prohibits discrimination against various protected classes in the housing context. This includes discrimination related to rental, sale, lending, brokerage services, and so on.[4] The HUD Secretary administers the Act.[5] Additionally, in a subchapter entitled "Administration," the Act calls upon all other "executive departments and agencies" to "administer their programs and activities relating to housing and urban development ... in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes."[6] It is from this simple directive to other agencies to help HUD in fighting discrimination that the AFFH Rule purports to draw, like an endless train of scarves from a magician's sleeve, a boundless authority to micromanage local land-use and housing policy.

a. The plain meaning and context of the Fair Housing Act does not support the AFFH Rule

The AFFH Rule purports to have unearthed a hidden treasure in this quiet, administrative mandate: the authority to force HUD grantees, which includes thousands of municipalities, to reshape their communities to satisfy a raft of policy goals far removed from preventing intentional discrimination—such as ensuring general housing affordability and improving access to services like public transit and quality schools. The statute does not bear such a reading.

HUD reads the requirement that other federal agencies administer their own housing-related programs "in a manner affirmatively to further the purposes of this subchapter" as a substantive mandate imposed on HUD to ensure that HUD and the thousands of local governments that rely on HUD funding "proactively take meaningful actions to overcome patterns of segregation, promote fair housing choice, eliminate disparities in housing-related opportunities, and foster inclusive communities that are free from discrimination."[7] There are a host of ways in which this interpretation jumps the track of the statutory text.

First, the "affirmatively to further" language only imposes a statutory duty on federal "executive departments and agencies" other than HUD itself. The layout of section 3608, entitled "Administration," confirms this. Section 3608(a) grants authority to the HUD secretary to administer the Act itself, while subsections (b) through (d) describe the roles and duties of other officers and agencies in a descending structure of authority: (b) creates the role of HUD's assistant secretary, (c) authorizes the Secretary to delegate power to subordinates, and (d) enlists the cooperation of other agencies. While subsection (d) mentions "[a]ll executive departments and agencies," this broader structure of Section 3608 makes clear that (d) is not referring to HUD itself or its grantees.

This is also underscored by the title of subsection (d): "Cooperation of Secretary and executive departments and agencies in administration of housing and urban development programs and activities to further fair housing purposes." And subsection (d) states that the "affirmatively to further" mandate

[4] *See* 42 U.S.C. §§ 3604–05.
[5] *Id.* § 3608(a).
[6] *Id.* § 3608(d).
[7] 88 Fed. Reg. 8516.

applies to agencies who shall "cooperate" with HUD in administering the Fair Housing Act.[8] HUD does not cooperate with itself.

Additionally, subsection (e) is where the statute spells out in detail the functions of the HUD Secretary, not subsection (d). Thus, the "affirmatively to further" duty applies to other federal agencies and departments other than HUD, which must simply help HUD with carrying out the Fair Housing Act's anti-discrimination mandate in their own programs.[9] The AFFH Rule's first error is to wrongly interpret the "affirmatively further" duty to apply to HUD and by extension HUD's grantees.

The second error is to read a massive helping of discretionary authority into the language, "affirmatively to further." The administrative structure laid out in Section 3608 is important in understanding the substantive scope of the "affirmatively to further" requirement. It would make little sense to grant every other agency but HUD, the primary administrator of the Act, a vast power that HUD itself does not hold. Nor would it make sense for Congress to have housed this incredible power in a mundane housekeeping section of the Act dealing with how the Act is to be administered, rather than in the Act's substantive sections. Given the location of the "affirmatively to further" language and its surrounding context, the language is simply meant to task other agencies with the duty to cooperate with the Secretary's implementation of the substantive parts of the Act as laid out in the other sections, not bestow an additional power to exercise broad discretionary control over local housing and land-use policy.

Even assuming the "affirmatively to further" language imposes a substantive duty on HUD itself, the language cannot bear the extraordinary strain placed upon it by HUD's ambitious interpretation. HUD claims the power to strip funding from any grantee that fails to deal with a wide array of complex social problems to HUD's satisfaction. HUD defines "affirmatively furthering fair housing" to mean:

> taking meaningful actions, *in addition to combating discrimination*, that overcome patterns of segregation, eliminate inequities in housing and related community assets, and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, reduce or end significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into well-resourced areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws and requirements. The duty to affirmatively further fair housing extends to all of a program participant's activities, services, and programs relating to housing and community development; *it extends beyond a program participant''s duty to comply with Federal civil rights laws* and requires a program participant to take actions, make investments, and

[8] 42 U.S.C. § 3608(d).

[9] This was the understanding of the Clinton Administration when the President issued the "Memorandum for the Heads of Executive Departments and Agencies" in 1994, 59 Fed. Reg. 8513, which stated that federal agencies should make sure "that our own Federal policies and programs across all of our agencies support the fair housing and equal opportunity goals to which all Americans are committed. If all of our executive agencies affirmatively further fair housing in the design of their policies and administration of their programs relating to housing and urban development, a truly nondiscriminatory housing market will be closer to achievement."

> achieve outcomes that remedy the segregation, inequities, and discrimination the Fair Housing Act was designed to redress.[10]

A deeper look into this definition demonstrates just how broad a power HUD seeks to cram into the "affirmatively to further" phrase. For instance, HUD defines racial segregation, which grantees are obligated to confront, with extraordinary breadth: "Racial segregation includes a concentration of persons of the same race regardless of whether that race is the majority or minority of the population in the geographic area of analysis."[11] One would be hard-pressed to find a neighborhood in the United States, much less a municipality or county, that is not segregated under HUD's definition. The task laid on grantees by HUD's aggressive interpretation of the "affirmatively to further" language is herculean at best, Sisyphean at worst. And, of course, HUD retains full discretion to determine whether or not the grantee has achieved this task.

HUD's interpretation extends well beyond even this expansive view of segregation. HUD expects its grantees to increase equitable access to "community assets," including:

> 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.[12]

It would undoubtably surprise the Congress of 1968 to know that the "affirmatively to further" directive would become a political Swiss army knife bestowing broad federal control over almost every urban policy issue imaginable.

Not only must grantees act to affirmatively further HUD's vision of "fair housing," but the Rule also prohibits actions that are "materially inconsistent with the duty to affirmatively further fair housing."[13] "Materially inconsistent" is undefined, but given HUD's view of what it means to affirmatively further fair housing, any number of common land-use policies could transgress this requirement, from urban growth boundaries and open space ordinances that leave land undeveloped, to zoning policies that reduce residential density.

HUD may object that the AFFH Rule only requires that local governments work out their own plans for how to resolve this smorgasbord of policy issues (which still is found nowhere in the statute). But that is not so. Indeed, local governments are called upon to create their own "equity plan" to assess the various barriers to integration, access to community resources, and so forth and then determine how best to fix them. But HUD remains the arbiter of whether these plans affirmatively further an amorphous notion of "fair housing" and whether the grantee is adequately fulfilling those plans. Unlike prior HUD rules, nothing in the proposed AFFH Rule requires that HUD defer to local authorities on these matters. Private parties, moreover, can sue if they believe their local government has not lived up to its

[10] 88 Fed. Reg. at 8557 (italics added).
[11] *Id.* at 8561.
[12] *Id.* at 8531.
[13] *Id.* at 8571.

AFFH obligations.[14]

From its humble beginnings, "affirmatively to further" has become a vehicle for the wholesale transformation of communities nationwide under HUD's preferred policy template. The Fair Housing Act cannot bear this reading. Indeed, as the Supreme Court has insisted, "The [Fair Housing Act] does not decree a particular vision of urban development."[15] Yet that is precisely what the AFFH Rule does—it decrees a particular vision of urban development: HUD's vision.

II. Judicial canons regarding expected meaning of statutory text conflict with HUD's aggressive interpretation.

Courts employ various interpretive defaults that presume Congress did not intend a particular reading of a statute unless Congress spoke with clear, unequivocal language. The AFFH Rule runs counter to at least four of these. Foremost among them is the constitutional avoidance canon: courts presume Congress did not intend to draft an unconstitutional statute, or one that raises serious constitutional doubts, unless there is no other plausible reading available. The other default canons that the AFFH Rule cannot overcome are the major questions doctrine, the federalism canon, and the *Pennhurst* doctrine regarding conditions on federal funding.

a. If the AFFH Rule is a correct interpretation of the Fair Housing Act, then the Act violates the non-delegation doctrine.

If the Fair Housing Act did authorize something as ambitious in scope and power as the AFFH Rule, then the Act would violate the non-delegation doctrine. Courts reviewing the statute would have to avoid such an interpretation: "The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts."[16] Here, a court of law would read the Fair Housing Act to avoid any interpretation that would support regulatory action as massive in scope as the AFFH Rule because any such reading would violate the non-delegation doctrine.

The Constitution vests "[a]ll legislative Powers" in Congress.[17] "Accompanying that assignment of power to Congress is a bar on its further delegation."[18] Congress can enlist federal agencies in implementing and enforcing law, but Congress must "suppl[y] an intelligible principle to guide the delegee's use of discretion."[19]

In *Schechter Poultry*, for instance, the Supreme Court struck down a portion of the National Industrial Recovery Act that granted the President authority to approve a code of "fair competition" for a

[14] The AFFH Rule would create a complaint process for private parties, and HUD is obligated to investigate all complaints. 88 Fed. Reg. at 8575. Private parties have also succeeded in bringing False Claims Act lawsuits against cities challenging "false" certifications with HUD that a grantee has been affirmatively furthering fair housing. *Id.* at 8530. *See, e.g.*, *United States ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cnty.*, 712 F.3d 761, 765 (2d Cir. 2013).
[15] *Texas Dep't of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 542 (2015).
[16] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).
[17] U.S. Const. Art. I, Sec. 1.
[18] *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019).
[19] *Id.*

particular trade or industry.[20] The President could approve a code upon application by a trade group or on his own initiative. He could likewise impose whatever conditions or exemptions to the code as "in his discretion deems necessary to effectuate the policy herein declared."[21] The Court reasoned that while Congress can "devolv[e] upon others the duty to carry out the declared legislative policy," it could not grant the President "an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."[22] Congress had, in short, granted the President authority to make policy, not simply enforce it.

The lack of cases striking down statutes on nondelegation grounds since *Schechter Poultry* has prompted some to wrongly state the doctrine has only had "one good year."[23] However, the non-delegation doctrine has continued to play an important role as an interpretive canon that has pushed courts toward more modest readings of statutes.[24] Moreover, courts have often used other avenues to address improper delegations of discretion, such as the void-for-vagueness doctrine.[25] Five of the current Supreme Court justices have also expressed recent interest in strengthening the doctrine.[26] Thus, the non-delegation should not be seen as a dead letter.

Like in *Schechter Poultry*, HUD's reading of the Fair Housing Act would run afoul of the non-delegation doctrine. It is worth stating in full the language that HUD believes harbors within it the power to control a broad range of urban policy matters across the nation:

> All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.[27]

HUD appears to interpret "purposes of this subchapter" as referring to the Fair Housing Act's declaration of policy, which states: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[28] Hence, HUD's title for the rule, "Affirmatively furthering fair housing."

Mere reference to a declaration of policy is not an adequate intelligible principle. In *Schechter Poultry*, the government sought to defend itself by reference to the statute's declaration of policy as a guide for the exercise of the president's discretion in formulating a code of fair competition, a far more detailed declaration of policy than the one found in the Fair Housing Act.[29] The Court held that despite the clarity

[20] 295 U.S. 495.
[21] *Id.* at 521–23.
[22] *Id.* at 537−38.
[23] *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 322 (2000).
[24] *Id.* at 315.
[25] Todd Gaziano and Ethan Blevins, *The Nondelegation Test Hiding in Plain Sight: The Void-for-Vagueness Standard Gets the Job Done*, The Administrative State Before the Supreme Court 54–64 (2022)
[26] *See Gundy*, 139 S. Ct. at 2130–31 (Alito, J., concurring; Gorsuch, J., dissenting); *Ronald Paul v. United States*, 140 S. Ct. 342 (Mem) (2019) (statement of Kavanaugh, J., respecting the denial of certiorari).
[27] 42 U.S.C. § 3608(d).
[28] *Id.* § 3601.
[29] *Schechter Poultry*, 295 U.S. at 531 n. 9.

of the statute's purpose, the Act could not simply give the president "an unfettered discretion to make whatever laws he thinks may needed or advisable" in achieving that purpose.[30]

Moreover, even if a declaration of policy could provide an intelligible principle if it were detailed enough, the Fair Housing Act's declaration of policy—to create "fair housing" in the United States—is far too vague. The statute does not define "fair housing," just as the statute in *Schechter Poultry* failed to define "fair competition."[31] Hence, if "affirmatively to further" is an independent grant of power (which it is not) rather than simply a reference to the express prohibitions written out in the statute, then that power is guided only by an undefined and subjective notion of what is "fair." As in *Schechter Poultry*, this is not an intelligible principle at all, but a "roving commission to inquire into evils and upon discovery correct them."[32]

One can test whether the AFFH Rule's vision of the statute comports with the non-delegation doctrine by asking whether other branches of government and the public generally can read it and determine whether HUD has accomplished Congress's will. To satisfy the non-delegation standard, "Congress must set forth standards sufficiently definite and precise to enable Congress, the courts, and the public to ascertain whether Congress's guidance has been followed."[33]

Could a court, reviewing the AFFH Rule, state with confidence that the Rule follows Congress's guidance when Congress wrote that federal agencies "shall administer their programs and activities relating to housing and urban development ... in a manner affirmatively to further the purposes of this subchapter?"[34] No. There simply is no standard aside from the "purposes of this subchapter," which according to HUD refers to the uncertain phrase "fair housing" in the statute's declaration of policy. Since there is no way for a court or the public to determine what "affirmatively to further" "fair housing" means, the statute as interpreted by HUD cannot satisfy the intelligible principle test.

This extraordinary grant of power by HUD unto itself is all the more alarming because the Fair Housing Act imposes the "affirmatively to further" responsibility upon "[a]ll executive departments and agencies" when they "administer their programs and activities relating to housing and urban development," including agency authority over financial institutions.[35] Hence, under HUD's reading, the Department of Agriculture enjoys this awesome power to affirmatively further fair housing in administering rural home loan programs, as does the Consumer Financial Protection Bureau in its oversight of the mortgage market, as does the Veterans Affairs Department in providing housing assistance for disabled veterans, and on and on. Surely, Congress did not intend for each of these agencies to have the grab bag of power that HUD is reading into the Fair Housing Act. If Congress did grant such roving authority to every federal agency with programs that touch in some way on housing and urban development, then the Fair Housing Act would violate the non-delegation doctrine. HUD should disavow this interpretation of the Act by disowning the AFFH Rule.

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[30] *Id.* at 537–38.
[31] *Id.* at 531.
[32] *Id.* at 551 (Cardozo, J., concurring).
[33] *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).
[34] 42 U.S.C. § 3608(d).
[35] *Id.*

b. Three other canons regarding the expected meaning of statutes counsel against the AFFH Rule.

At least three other canons of construction likewise conflict with HUD's view of the statute: The major questions doctrine, the federalism canon, and a canon specific to conditions placed on federal funding.

i. The major questions doctrine

The major questions doctrine embodies the idea that courts "typically greet assertions of extravagant statutory power over the national economy with skepticism."[36] Such "[e]xtraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices."[37] As Justice Scalia once put it, Congress does not "hide elephants in mouseholes."[38]

An assertion of extravagant agency power is especially suspect when it is read into a long-extant statute that was never understood to bear such a construction before.[39] One way to appreciate this problem is to ask, if the Act always required the actions of local governments specified in the AFFH Rule (and the AFFH Rule is merely setting forth the requirements with specificity), why was it that HUD in no previous administration for over 35 years took steps to articulate and enforce that mandate? Beginning in the mid-1990s, HUD did require a certification that grantees had analyzed and taken steps to address fair housing problems within their jurisdictions, but HUD never asserted the power to oversee the grantees' fair housing plans or the discretion to demand specific policy actions to address such a broad scope of housing-related issues until the Obama Administration adopted its AFFH rule in 2016.

When an agency asserts an "extravagant statutory power," therefore, courts require "something more than a merely plausible textual basis for the agency action .... The agency instead must point to clear congressional authorization for the power it claims."[40] In other words, we must first ask if the assertion of power is an elephant, and then ask whether the statutory language forms an elephant-sized or mouse-sized hole.

The AFFH Rule is an elephant—or an out-of-water blue whale. It purports to place HUD at the helm of a wide range of urban policy issues, from access to high quality schools, to employment opportunities, to housing affordability. But the statute is only a mousehole—"modest words" and "vague terms" regarding federal agencies' duty "affirmatively to further the purposes of [the Fair Housing Act.]" Hence, the AFFH Rule exceeds statutory authority.

[36] *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (quotation marks omitted).
[37] *Id.* at 2609 (quotation marks omitted).
[38] *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (quotation marks omitted).
[39] *West Virginia*, 142 S. Ct. at 2610.
[40] *Id.* at 2609 (quotation marks omitted).

ii. The federalism canon

Courts presume, without clear language to the contrary, that Congress does not intend to encroach upon traditional state prerogatives: "Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power."[41]

Through the AFFH Rule, HUD attempts to insert its fingers into the minutiae of local concerns. This includes school boundaries,[42] public transit,[43] zoning policies,[44] emergency services,[45] and parks and recreation,[46] to name a few. Of course, HUD can only micromanage local policymakers if they accept federal funding, but many communities with federal funding built into budgets and dedicated costs cannot easily untangle themselves from federal control. And while local governments do create their own equity plan, HUD retains full authority under the AFFH Rule to reject the plan or pursue remedies if the local government is not following HUD's vision of "affirmatively furthering fair housing." As already discussed above, the "affirmatively to further" language is not so "exceedingly clear" as to permit a reading that would impose federal oversight over areas of traditional state concern.

iii. The Pennhurst *Doctrine*

Like the clear statements rules above, the courts require clear language when determining what conditions Congress placed on funding when exercising its authority under its spending power. The Supreme Court has held that that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the [funding recipients] agree to comply with federally imposed conditions."[47] Hence, "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the [funding recipients] can knowingly decide whether or not to accept funds."[48] Here, the "affirmatively to further" language of the Fair Housing Act offers no notices to grantees of what burdens they may be accepting as funding conditions.

Take, for instance, the community block grant program, which the AFFH Rule attaches conditions to. This grant program hails from an entirely separate section of the U.S. Code from the Fair Housing Act, 42 U.S.C. 5301, *et seq*. For the "affirmatively to further" language to constitute a clear statement of Congress's intent to impose a funding condition, two things would have to happen. First, Congress would have to directly incorporate the "affirmatively to further" requirement into the statutory language of the grant program or directly reference the program. Otherwise, grantees would not know that HUD will be imposing a funding condition via the "affirmatively to further" language.

Even if the "affirmatively to further" language did clearly apply to grant programs such as the community block grant program, the AFFH Rule interpretation gives grantees no notice regarding what

[41] *U.S. States Forest Service v. Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837, 1849–50 (2020).
[42] 88 Fed. Reg. at 8551.
[43] *Id.* at 8525.
[44] *Id.* at 8535.
[45] *Id.* at 8559.
[46] *Id.* at 8563.
[47] *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).
[48] *Id.* at 24.

would be expected of them. Grantees must "affirmatively further fair housing." That does not speak with the "clear voice" required for grantees to understand what responsibilities they will be shouldering if they accept funds.[49]

III. The AFFH Rule Threatens Property Rights

If HUD moves forward with the AFFH rule despite its illegal statutory foundation, HUD should amend the rule to ensure that HUD does not pressure local governments into adopting policies that violate or threaten protected property rights.

As written, HUD openly encourages local governments to adopt policies that will violate the property rights of landlords and housing developers. For instance, the rule cites the "lack of laws banning source of income discrimination" as a barrier to fair housing,[50] thus implying that HUD expects its grantees to adopt such laws to fulfill the AFFH Rule.[51] Such laws illegally impair a landlord's right to exclude, which the Supreme Court has recently and repeatedly affirmed.[52]

Another example is inclusionary zoning. The rule states that it will follow the 2015 AFFH Rule Guidebook until it provides further guidance.[53] The guidebook encourages local governments to adopt inclusionary zoning policies, which typically require housing developers, as a condition of permit approval, to devote a certain percentage of units to affordable housing or pay an in-lieu fee.[54] Such policies violate the Fifth Amendment by exacting a property interest as a condition of permit approval even though such development does not contribute to the underlying problem of affordable housing.[55]

These two examples are not exhaustive. HUD has broad discretion to pressure local governments into adopting any other policies that HUD deems beneficial to achieving "fair housing." Any number of policies HUD may realistically support could pose a threat to property rights, such as bans on criminal background checks, just-cause eviction ordinances, tenant-relocation assistance, and so on.

Even less aggressive iterations of the AFFH Rule have pushed municipalities into adopting laws that impinge on property rights. For instance, in 2006, a non-profit organization sued Westchester County under the False Claims Act for allegedly making the false claim that the county had satisfied its AFFH obligation, which at that time required the County to certify that it was affirmatively furthering fair

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[49] *Id.* at 17.
[50] As one example, the City of Seattle bars landlords from rejecting a rental applicant because their income comes from sources other than wages from a job, such as social security, disability assistance, or housing vouchers. Seattle Municipal Code § 14.08.040.
[51] 88 Fed. Reg. at 8565.
[52] *See Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (stating that landlords have the right to exclude individuals without a valid lease agreement as "one of the most fundamental elements of property ownership"); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2078 (2021) (the right to exclude "is a fundamental element of the property right that cannot be balanced away") (cleaned up).
[53] 88 Fed. Reg. at 8530.
[54] *See* U.S. Dep't of Housing and Urban Development, Affirmatively Furthering Fair Housing Rule Guidebook (2015) at 124.
[55] *See Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 606 (2013) ("[A] government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.").

housing.[56] The United States intervened and presented the court with a consent decree requiring the County to, among other things, promote a ban on source-of-income discrimination in housing.[57] The County relented and agreed under threat of as much as $156 million in False Claims Act liability.[58] A newly elected County Executive later vetoed the promised source-of-income discrimination bill, and HUD terminated the County's federal funding, an outcome later upheld by the Second Circuit.[59] The pre-2016 rule—significantly less demanding than the proposed rule—gave HUD and a private non-profit leverage to pressure the County into violating fundamental property rights. The new, more demanding rule, which openly states that a lack of such laws impedes fair housing, will only exacerbate this problem.

One way to address this issue is to return to the prior "analysis of impediments" rule, simply requiring certification that grantees are affirmatively furthering fair housing and deferring to local governments regarding how to do so. If HUD moves forward with the proposed rule, however, it should amend it in at least two ways to address these concerns. First, the rule should refrain from openly encouraging policy solutions that could pose a threat to property rights. Second, HUD should add a deference component to the rule, requiring HUD officers to defer to local governments' equity plans for addressing fair housing concerns so long as they are reasonably related to preventing discrimination in the housing context.

If HUD insists on serving as a federal overseer of local housing policy via the AFFH Rule, it should at least encourage policies that promote housing solutions that do not imperil property rights. HUD could, for instance, encourage local governments to ease regulations on accessory dwelling units and build-to-rent properties, upzone single-family housing, and remove permitting burdens that slow housing development.

IV. The AFFH Rule Threatens Equality and Opportunity

The AFFH Rule threatens equality and opportunity by requiring every covered government entity and public housing agency to submit and implement equity plans. Equity plans must answer a host of questions about race. HUD directs local governments to provide information on changes in racial demographics in their jurisdiction over time, the current demographics of residents of different categories of publicly supported housing, and identify areas that have significant concentrations of particular protected class groups. Local governments must further identify homeownership rates by protected class and pinpoint protected class groups that experience significant disparities in access to homeownership opportunities. A local government's duty to identify racial disparities go beyond housing; it must also identify disparities in education, employment, transportation, and so on. Local governments must specify how they intend to address such disparities, for instance, by partnering with other departments and agencies within the jurisdiction. These requirements reflect HUD's belief that "the Fair Housing Act's broad remedial purposes cannot be accomplished simply by banning intentional discrimination today."[60] Yet by going beyond intentional discrimination and reaching into disparate impact, the Rule compounds the concerns of racial balancing that the Supreme Court recently cautioned against.

[56] *Westchester County*, 712 F.3d at 765.
[57] *Id.* at 766.
[58] *Id.* at 765.
[59] *Id.* at 766.
[60] 88 Fed. Reg. 8524.

In *Inclusive Communities Project*, the Supreme Court held that the Fair Housing Act encompasses disparate impact liability.[61] Nonetheless, the Court cautioned that "[w]ithout adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and 'would almost inexorably lead' governmental or private entities to use 'numerical quotas,' and serious constitutional questions then could arise."[62]

It's not difficult to see why. As Justice Scalia put it in *Ricci v. DeStefano*, disparate impact provisions "place a racial thumb on the scales, often requiring [decision-makers] to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes."[63] In other words, government entities straining to avoid disparate impact liability might well be coerced into treating individuals differently on the basis of race. *Ricci* is one example of that phenomenon. There, the New Haven Fire Department administered an exam to 118 candidates for promotion to the ranks of lieutenant or captain.[64] Yet because the majority of applicants who scored well enough to earn a promotion happened to be white, New Haven threw out the results.[65] White and Hispanic firefighters who likely would have been promoted based on their test scores brought suit. The Supreme Court ruled in their favor, concluding that "the City was not entitled to disregard the tests based solely on the racial disparity in the results."[66]

Yet similar problems persist in Fair Housing Act cases. One famous case involved the City of St. Paul's crackdown on landlords who ignored rat problems, bad sanitation, and poor heating.[67] Instead of improving conditions, the landlords brought a lawsuit against the City—unapologetically arguing that the City's insistence on decent housing conditions disproportionately impacted minority inhabitants by "forcing" the landlords to raise rent. As Justice Alito noted: "Something has gone badly awry when a city can't even make slumlords kill rats without fear of a lawsuit."[68]

The AFFH Rule thus undermines both equality and opportunity. It undermines the promise of equality by moving America further away from the Constitution's promise of "eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race."[69] And it undermines opportunity by imposing still more red tape to housing and the ability of individuals to earn a living.[70]

CONCLUSION

HUD is operating outside the scope of its statutory authority. And if the statute does in fact offer HUD this extraordinary mantle of discretionary power, then the statute is unconstitutional. If HUD opts to

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[61] 579 U.S. at 545–46. Pacific Legal Foundation believes now, as it did then, that the Court's decision in *Inclusive Communities Project* was wrong. See Amicus Brief of Pacific Legal Foundation, *Inclusive Communities Project*.
[62] *Id.* at 542.
[63] *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring).
[64] *Id.* at 562.
[65] *Id.*
[66] *Id.* at 593.
[67] *See Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010).
[68] *Inclusive Communities*, 135 S. Ct. at 2532 (Alito, J., dissenting).
[69] *Parents Involved in Cmty. Schs. v. Seattle Public Sch. Dist. No. 1,* 551 U.S. 701, 730 (plurality opinion) (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion)).
[70] *See* Kelli Pierce, *Zoning Laws Make Child Care Unaffordable in Utah*, Reason (Sept. 29, 2022), https://reason.com/2022/09/29/zoning-laws-make-child-care-unaffordable-in-utah/.

adopt a rule outside its authority, it should at least amend the rule to better respect property rights and equality under the law.

Sincerely,

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