

United States Senate

WASHINGTON, DC 20510

September 18, 2023

The Honorable Sandra Thompson
Director
Federal Housing Finance Agency
400 7th Street, SW
Washington, D.C. 20219

RE: FHFA's Proposed Rule on Fair Lending, Fair Housing, and Equitable Housing Finance Plans [RIN: 2590-AB29]

Dear Director Thompson:

Banking Committee Republicans wrote to you last year and expressed our deep concern with the Equitable Housing Finance Plans (Plans) developed by Fannie Mae and Freddie Mac (the Enterprises) at the direction of the Federal Housing Finance Agency (FHFA).¹ Though we had asked you to refocus efforts on ensuring the safety and soundness of the Enterprises, FHFA ignored our request and instead published a proposed rule on April 26, 2023, that codifies a requirement to develop and measure implementation of the Plans.²

As we made you aware, the Plans are inherently problematic. They are manifestly unfair and encourage discrimination on the basis of race. The Plans may very well be unconstitutional and violate the Equal Protection Clause as they express a clear, discriminatory intent. Moreover, as the Court recently reaffirmed in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, race-conscious programs under the Equal Protection Clause require a review under “strict scrutiny” to determine whether a racial classification is narrowly tailored to further a compelling government interest.³ The Court determined that a compelling government interest must be “sufficiently coherent,”⁴ and reasserted that relying on an institution’s own history of past racial discrimination is insufficient to justify that institution’s consideration of race-conscious programs to remedy past societal discrimination.⁵ Merely alleging that the statutory authorities of FHFA and the Enterprises “speak to the need to advance equity”⁶ – a term that FHFA intentionally leaves undefined in the proposed rule – is not measurable nor able to be subjected to meaningful judicial review.⁷ Like the series of recent, unauthorized actions taken by

¹ Letter from Members of the S. Comm. on Banking, Hous. and Urban Affairs, to the Hon. Sandra Thompson, Dir., Fed. Hous. Fin. Agency (July 19, 2022), <https://www.tillis.senate.gov/services/files/8FB69D31-F044-4AFE-B35C-9ED23B3E7DB3>.

² Fair Lending, Fair Housing, and Equitable Housing Finance Plans, 88 Fed. Reg. 25,293 (proposed Apr. 26, 2023).

³ No. 20-1199, slip op. at 15 (U.S. June 29, 2023).

⁴ *Id.* at 23.

⁵ *Id.* at 36 n.8. See also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989) (holding that the stated interest of remedying for past discrimination is insufficient for apportioning subsidies on the basis of race).

⁶ Fair Lending, Fair Housing, and Equitable Housing Finance Plans, 88 Fed. Reg. at 25,294.

⁷ *Students for Fair Admissions, Inc.*, at 23

this administration, these plans also may violate the major questions doctrine—and therefore the constitutional separation of powers—because agencies cannot take actions with vast economic and political significance absent clear authorization from the elected members of Congress, which does not exist here.⁸

While perhaps well-intentioned, we have seen the consequences of relaxing underwriting criteria and lowering down payment requirements after years of record home price appreciation; many minority families lost significant, generational wealth when they were pushed into highly-leveraged home purchases shortly before the last housing crisis. The Plans also thrust the Enterprises back into primary market activities such as title insurance (through exploration of options to reduce costs of and consider replacements for traditional title insurance), appraisals (through promotion of alternative valuation products), and even lending itself (through subsidies for down payments and other closing costs).

Lastly, the Plans politicize the Enterprises; FHFA asserted authority applying to it and the Enterprises that “speak[s] to the need to advance equity . . . in the housing market,”⁹ but explicitly relied on its power as *conservator*—and not *regulator*—to impose the framework for the Plans.¹⁰ FHFA has weaponized the Enterprises in an effort to finance radical policies that this administration is unable to achieve legislatively.

As members of the Committee on Banking, Housing, and Urban Affairs, we reject your proposal to codify these Plans in regulation for the same reasons we rejected these plans when FHFA first required them as conservator. However, in addition to the concerns raised above and in our letter from last year, FHFA’s decision to promulgate regulations that codify such Plans creates additional legal challenges that cannot be ignored. Specific concerns are described below.

I. FHFA has limited authority to regulate the Enterprises by requiring submission of Equitable Housing Finance Plans.

In September, 2021, FHFA published a Request for Input (RFI) on requiring the Enterprises “to prepare and implement three-year Equitable Housing Finance Plans that describe each Enterprise’s planned efforts to advance equity in housing finance.”¹¹ The RFI cited several statutory authorities describing the Enterprises’ “public purposes” that permit FHFA to implement fair housing and fair lending requirements through regulation which are subsequently referenced in the proposed rule. Both the RFI and proposed rule assert that the Enterprises have

⁸ *Biden v. Nebraska*, No. 22-506, slip op. at 25 (U.S. June 30, 2023); *W. Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2609 (2022); *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022); *Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 41 S. Ct. 2485, 2489 (2021).

⁹ Fed. Hous. Fin. Agency, Enterprise Equitable Housing Finance Plans – Request for Input, 2-3 fn.5 (Sept. 2021), <https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/Equitable-Housing-Finance-Plans-RFI.pdf>.

¹⁰ *Id.* at 3 (“The Equitable Housing Finance Plan framework that FHFA has adopted as conservator is a tool for the Enterprises to undertake sustainable and meaningful actions to advance equity in the housing markets, while ensuring safety and soundness.”). *See also id.* at 7 (“FHFA, as conservator, determined that developing and adopting the plan framework . . . would allow for an efficient way to implement this framework consistent with safety and soundness, transparency, and the public interest.”).

¹¹ *Id.* at 1.

important public purposes and describe “the need to advance equity for homebuyers, homeowners, and tenants in the housing market” as a public purpose.¹² However, that authority is dubious.

II. The statutory declaration of purpose and Charter requirements do not permit rulemaking.

Specifically, the RFI and proposed rule note the congressional declarations of purpose for the Enterprises to provide ongoing assistance to the secondary market for residential mortgages, including mortgages on housing for low- and moderate-income families involving a reasonable economic return that may be less than the return earned on other activities, and to promote access to mortgage credit throughout the nation, including in central cities, rural areas, and underserved areas.¹³ FHFA arguably cites these prefatory statements to support submission of the Plans designed to subsidize people of certain protected classes against discrimination, as well as other, unprotected classes.¹⁴ Though courts may use such prefatory statements to resolve ambiguities in the statutory text or to ascertain Congress’s purpose in enacting a law, such statements describe the legislation’s general purposes and provide limited persuasive evidence of another provision’s meaning. Prefatory text generally does not have independent legal effect or “override[s] the plain meaning of specific provisions”—regardless of whether they are included in the bill itself or in the legislative record.¹⁵

Even assuming, *arguendo*, that the declarations of purpose provide the requisite authority to regulate, the relevant text references assistance for low- and moderate-income borrowers and mortgage credit for specific geographic areas. Proposed Plan requirements, however, require identification of barriers faced by “underserved communities” which are broadly defined to include individuals without regard to their calculated income or communities that may not be in central cities, rural areas, or underserved areas.¹⁶ Any Plan requirements that are not targeting low- and moderate-income families or specific geographic areas are evidently inconsistent with the supposed authorities in the declarations of purpose.

¹² See Fed. Hous. Fin. Agency, *supra* note 9; Fair Lending, Fair Housing, and Equitable Housing Finance Plans, 88 Fed. Reg. at 25,294.

¹³ *Id.* (citing 12 U.S.C. § 1716(3)–(4) (Fannie Mae charter purposes); § 1451 note (b)(3)–(4) (Freddie Mac charter purposes)).

¹⁴ See Fair Lending, Fair Housing, and Equitable Housing Finance Plans, 88 Fed. Reg. at 25,307 (to be codified at 12 C.F.R. § 1293.2) (defining “underserved community” as a group of people with a shared characteristic protected by fair lending or fair housing laws, or some other feature not protected in the federal antidiscrimination laws).

¹⁵ *Reeves v. Astrue*, 526 F.3d 732, 737 (11th Cir. 2008) (stating that the court “cannot use Congress’s general statements of findings and purpose to override the plain meaning of specific provisions of the Act”); see also *Astrue v. Ratliff*, 560 U.S. 586, 589–91 (2010) (resolving a circuit split involving the same statutory question at issue in *Reeves* consistently with the Eleventh Circuit’s interpretation).

¹⁶ Fair Lending, Fair Housing, and Equitable Housing Finance Plans, 88 Fed. Reg. at 25,307 (defining “underserved community” to include, for example, the dwelling age, dwelling location, neighborhood age, individuals with limited mainstream credit and banking history, counties which have historically received a lower share of the benefits of Enterprise programs and activities, individuals with income variance such as skilled tradespeople or those that receive income through commission, persons with limited English proficiency, and multigenerational households).

Additionally, FHFA cites authorities in each of the Enterprises' charters to report annually to Congress on, among other things, assessments of the Enterprises' underwriting standards and business practices that affect their purchases of mortgages for low- and moderate-income families or that may yield disparate results based on the race of the borrower, and revisions to their standards and practices that promote affordable housing or fair lending.¹⁷ While the Enterprises must report on underwriting standards and business practices that have a disparate impact on borrowers based on race, *this does not require* the Enterprises to undertake steps to reduce such disparities. Congressional reporting requirements on racial disparities cannot, on their own, be used to justify FHFA's proposed actions designed to reduce racial disparities.

III. The Housing Goals and Duty to Serve requirements do not permit rulemaking.

FHFA also relies on requirements in the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act) to establish "Housing Goals" and "Duty to Serve" requirements, ensuring that the Enterprises fulfill their mission and charters and serve low- and moderate-income families and statutorily defined underserved markets.¹⁸

Though the language in the Safety and Soundness Act establishing Housing Goals and Duty to Serve requirements do not impose obligations on the Enterprises based on borrower race, in furthering the Housing Goals and Duty to Serve requirements, the law requires the Enterprises to "take affirmative steps to assist primary lenders to make housing credit available in areas with concentrations of low- income and minority families."¹⁹ "Minority families" is ambiguous but it likely includes racial minorities. Importantly, however, the law requires affirmative steps in making credit available for *areas* with concentrations of low-income and minority families. This means assistance to lenders must target communities and not individuals. This also means the Enterprises are not authorized to target areas of only low-income *or* areas of only minority families.

The proposed rule is inconsistent with the Housing Goals and Duty to Serve requirements. It requires submission of Plans to FHFA that identify barriers faced by "underserved communities," which it defines as a group of people with a shared characteristic protected by fair lending or fair housing laws, or some other feature not protected under any the antidiscrimination laws, as well as areas subject to current or historical discrimination and areas receiving or which receive or have received fewer benefits of Enterprise programs.²⁰ However, "underserved markets" are already defined in law to include just manufactured housing, affordable housing preservation, and rural markets,²¹ so the attempt to expand the definition in

¹⁷ 12 U.S.C. § 1723a(n)(2)(G) (Fannie Mae charter), § 1456(f)(2)(G) (Freddie Mac charter).

¹⁸ *Id.* § 4561(a) (requiring FHFA to establish annual housing goals by regulation), § 4562 (establishing categories of single-family housing goals), and § 4563 (establishing multifamily affordable housing goals); § 4565 (establishing a "duty to serve" three specified underserved markets – manufactured housing, affordable housing preservation, and rural housing).

¹⁹ *Id.* § 4565(b)(3)(A).

²⁰ Fair Lending, Fair Housing, and Equitable Housing Finance Plans, 88 Fed. Reg. at 25,308 (to be codified at 12 C.F.R. § 1293.22(b)(1)).

²¹ *Id.* § 4565(a)(1).

regulation is inappropriate. Also, person-based targeting is not contemplated by the law which permits only place-based targeting. Lastly, even if assistance were correctly targeted to places rather than people, the Enterprises must target areas of low-income *and* areas of minority families which this proposed rule fails to do as very few, if any, examples of shared characteristics of underserved communities consider income.

IV. Prudential management and operations standards do not permit rulemaking.

The proposed rule attempts to justify codification of the Plans by relying on a requirement in law that directs FHFA to establish: (1) prudential management and operations standards for its regulated entities by regulation or guideline; and (2) a corrective action framework if a regulated entity fails to meet a prudential standard.²² FHFA proposes establishing the Plans “as a prudential standard within the meaning of [the law].”²³ The proposed rule further notes that, “[t]he [Plan] framework . . . is consistent with the Enterprises’ authorizing statute obligations and FHFA’s statutory charges related to ensuring regulated entities operate consistent with the public interest and that FHFA furthers fair housing in its oversight of the regulated entities.”²⁴

Though FHFA asserts that adoption of the Plan framework as a prudential standard “is legally appropriate and would be sound policy,”²⁵ facts suggest otherwise. The law enumerates an exhaustive list of ten standards to be established by regulation or guidance, all of which very clearly describe standards for managing safety and soundness of the Regulated Entities,²⁶ but FHFA seemingly relies on the eleventh standard, authorizing FHFA to establish other appropriate management and operations standards determined to be appropriate.²⁷

Asserting that the Plan framework is appropriate without any explanation does not make it so. As FHFA’s Office of Inspector General acknowledges, FHFA’s prudential standards share a “basic statutory design” with other federal financial regulators that are responsible for ensuring the safety and soundness of their respective regulated entities, and FHFA has “underscored that its . . . authorities provide a means to set and enforce standards for risk management.”²⁸ To introduce the Plan framework as a new prudential standard simply would be inconsistent with the

²² *Id.* § 4513b.

²³ Fair Lending, Fair Housing, and Equitable Housing Finance Plans, 88 Fed. Reg. at 25,299.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Prudential Management and Operations Standards, 77 Fed. Reg. 33,950, 33,951 (June 8, 2012) (describing the ten separate areas relating to the management and operation of the regulated entities: (1) adequacy of internal controls and information systems; (2) adequacy and independence of the internal audit systems; (3) management of interest rate risk; (4) management of market risk; (5) adequacy of liquidity and reserves; (6) management of growth in assets and in the investment portfolio; (7) management of investments and acquisition of assets to ensure that they are consistent with the purposes of the Safety and Soundness Act and the regulated entities’ authorizing statutes; (8) adequacy of overall risk management processes; (9) adequacy of credit and counterparty risk management practices; and (10) maintenance of records that allow an accurate assessment of the institution’s financial condition)

²⁷ *Id.* § 4513b(a)(11).

²⁸ Fed. Hous. Fin. Agency Office of Inspector Gen., *FHFA’s Failure to Use its Prudential Management and Operations Standards as Criteria for Supervision of the Enterprises Is Inconsistent with the FHFA Director’s Statutory Duty to Ensure the Enterprises Comply with FHFA’s Guidelines*, 5 (Sept. 20, 2021), <https://www.fhfa.ig.gov/sites/default/files/OIG-2021-004.pdf>.

other operational and management standards defined in law.²⁹ Canons of statutory interpretation cannot be ignored by FHFA if it wishes to avoid legal challenges. The words “other operational and management standards” must be interpreted considering neighboring provisions in law, in this case the first ten enumerated prudential management and operations standards.

V. The Affirmatively Furthering Fair Housing requirements do not permit rulemaking.

The RFI and proposed rule also cite Section 808(d) of the Fair Housing Act which requires all Federal agencies having regulatory or supervisory authority over financial institutions, including FHFA, to administer their programs and activities relating to housing and urban development in a manner that affirmatively furthers the purposes of the Fair Housing Act (AFFH) and to cooperate with HUD.³⁰ This is the same statutory authority relied upon by the Department of Housing and Urban Development (HUD) in its proposal to implement the obligation to affirmatively further the purposes and policies of the Fair Housing Act.³¹ However, considering the missing authority to regulate in FHFA’s organic statutes, AFFH requirements are insufficient to justify rulemaking of this kind.

A. Affirmatively Furthering Fair Housing requirements do not provide sufficient authority to regulate beyond fair housing.

Reading the Fair Housing Act reveals that the requirement to “affirmatively further its purposes” cannot justify the kind of regulation as FHFA proposes. The Fair Housing Act generally prohibits discrimination in housing on the basis of race, color, religion, sex, handicap, familial status, or national origin.³² The proposed rule, however, far exceeds the scope of fair housing and considers protections against discrimination in lending under other protected classes, and alarmingly creates new protected classes beyond the scope of any statutory authority.³³

²⁹ The principle of *noscitur a sociis*—a word is known by the company it keeps—ought to be used to “avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.” *Yates v. United States*, 574 U.S. 528, 543 (2015) (citations omitted) (holding that the words “tangible object” as the last in a list of terms that begins “any record [or] document,” is appropriately read to refer, not to any tangible object, but specifically to the subset of tangible objects used to record or preserve information); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (applying the principle of *noscitur a sociis* under which words in a statute have similar meaning to each other).

³⁰ 42 U.S.C. § 3608(d).

³¹ *Affirmatively Furthering Fair Housing*, 88 Fed. Reg. 8516, 8517 (proposed Feb. 9, 2023).

³² *Id.* § 3604–06.

³³ *See supra* note 14. “Underserved community” is defined to include groups not just with characteristics protected under the fair housing or fair lending laws, but also characteristics such as “receipt of public assistance income,” “dwelling age, dwelling location, and neighborhood age,” and “self-employed individuals, individuals with limited mainstream credit and banking history, counties which have historically received a lower share of the benefits of Enterprise programs and activities, individuals with income variance such as skilled tradespeople or those that receive income through commission, persons with limited English proficiency, and multigenerational households.” *Id.*

B. Fair Housing responsibilities are retained by HUD and were never transferred to FHFA.

Congress very clearly assigned authority and responsibility to administer the Fair Housing Act to HUD.³⁴ Moreover, administration of housing programs by other agencies in a manner that affirmatively furthers fair housing must be done in cooperation with HUD.³⁵ However, nowhere in the proposed rule is HUD consulted. Whereas FHFA coordinates with HUD on fair lending and fair housing oversight in other contexts,³⁶ the proposed rule's inclusion of the Plan framework to support compliance with the Fair Housing Act's requirement to affirmatively further its purposes notably excludes HUD.

Ignoring HUD's role in administering the Fair Housing Act is particularly troubling given that Congress considered transferring authorities to FHFA when first authorizing it through the Housing and Economic Recovery Act (HERA) of 2008 and expressly rejected transferring fair housing responsibilities of the Enterprises from HUD. As if it weren't clear, section 1122(b) of HERA updated Section 1325 of the Safety and Soundness Act to identify the "Secretary" as the "Secretary of HUD."³⁷ The law indisputably requires strong oversight of the Enterprises by the Secretary of HUD to comply with the fair housing and fair lending laws.³⁸ Despite claiming that "the actions in the proposed rule would improve FHFA's fulfillment of its statutory purposes,"³⁹ FHFA's reliance on the Fair Housing Act is beyond its statutory purposes as oversight of fair housing squarely rests with HUD.

C. The major questions doctrine prevents FHFA from regulate as it proposes.

Though Congress may delegate authority to agencies to regulate in broad terms—and the delegation of authority to administer programs and activities relating to housing and urban development in a manner that affirmatively furthers the purposes of the Fair Housing Act is a broad delegation—the Supreme Court has indicated on numerous occasions that agency actions deciding matters of major national significance must be supported by clear, express congressional authorization. Just a few weeks ago, the Court forcefully held that "precedent—old and new—requires that Congress speak clearly before [an agency] can unilaterally alter large sections of the American economy."⁴⁰ And as the Court recently expressed in *West Virginia v. EPA*, when there are extraordinary circumstances about "the history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance' of that

³⁴ *Id.* § 3608(a).

³⁵ *Id.* § 3608(d).

³⁶ *See, e.g.*, Memorandum of Understanding by and between the U.S. Department of Housing and Urban Development and the Federal Housing Finance Agency regarding Fair Housing and Fair Lending Coordination (Aug. 12, 2021), https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/FHFA-HUD-MOU_8122021.pdf.

³⁷ Pub. L. No. 110-289, § 1122(b), 122 Stat. 2654, 2689 (2008).

³⁸ 12 U.S.C. § 4545.

³⁹ Fair Lending, Fair Housing, and Equitable Housing Finance Plans, 88 Fed. Reg. 25,293, 25,294 (proposed Apr. 26, 2023).

⁴⁰ *Biden v. Nebraska*, No. 20-506, slip op. at 25 (U.S. June 30, 2023).

assertion,” courts should “hesitate before concluding that Congress’ meant to confer such authority.”⁴¹

Though the Court has not described when an agency’s action is so significant that the major questions doctrine applies, the history of Section 808(d) of the Fair Housing Act and the economic and political significance of FHFA’s assertion that it authorizes FHFA to issue such proposed regulations could violate the doctrine.

First, there is a limited record regarding the section of the Fair Housing Act that FHFA asserts grants it regulatory authority. Section 808(d) was enacted when the Fair Housing Act was passed in 1968 and no legislative history regarding it exists in the Congressional Record. To date, other than HUD, there appear to be no agencies that have ever issued regulations under that provision. And HUD only issued regulations in 1996,⁴² decades after the Fair Housing Act’s passage. The lack of history for many years is, itself, noteworthy,⁴³ and given the breadth of the AFFH requirement, FHFA’s assertion indicates extraordinary circumstances.

Second, FHFA’s assertion that the Fair Housing Act authorizes it to promulgate regulations has political significance as every attempt to regulate under this authority has been at the direction of the President. HUD first proposed regulations in 1995 only in response to an Executive Order from President Clinton directing HUD to promulgate regulations.⁴⁴ Since then, President Obama greatly expanded the scope of the HUD AFFH rule in 2015 as an attempt to “address the racial imbalances and lack of opportunity that he says have contributed to unrest reminiscent of the turbulent 1960s . . .”⁴⁵ President Trump subsequently repealed and replaced the 2015 Obama AFFH rule, describing it as an action that “ends the Federal encroachment on local communities that threatened our nation’s suburbs” and stating that “[t]he suburb destruction will end with us.”⁴⁶ Within days of assuming office, President Biden directed HUD to review the Trump AFFH rule,⁴⁷ which HUD has withdrawn and currently replacing with another that “incorporates much of the framework of the 2015 [Obama] AFFH rule.”⁴⁸ Now, similar to HUD,

⁴¹ 142 S. Ct. 2587, 2608 (2022) (alteration in original) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)). *See also* *Util. Air Regul. Grp. v. Envtl. Prot. Agency*, 573 U.S. 302, 324 (2014); *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994); *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, 448 U.S. 607, 645–646 (1980) (plurality opinion).

⁴² *See* Office of the Assistant Secretary for Community Planning and Development; Community Development Block Grant Program; Streamlining Final Rule, 61 Fed. Reg. 11,474, 11,477 (Mar. 20, 1996) (to be codified at 24 C.F.R. § 570.601).

⁴³ *See* *Biden v. Nebraska*, at 20 (finding that no prior regulation premised on the HEROES Act to waive or modify student loan obligations “has even begun to approach the size or scope” of the Department of education’s claimed authority to release 43 million borrowers from their obligations to repay \$430 billion in student loans).

⁴⁴ Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 20, 1994).

⁴⁵ Julie Hirschfeld Davis & Binyamin Appelbaum, *Obama Unveils Stricter Rules Against Segregation in Housing*, N.Y. TIMES, July 8, 2015, <https://www.nytimes.com/2015/07/09/us/hud-issuing-new-rules-to-fight-segregation.html>.

⁴⁶ White House Fact Sheet, *President Donald J. Trump Is Protecting Our Suburbs and Preserving the American Dream for All Americans* (July 23, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-protecting-suburbs-preserving-american-dream-americans/>.

⁴⁷ Memorandum from Joe Biden, President, on Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies 86 Fed. Reg. 7487 (Jan. 29, 2021).

⁴⁸ Press Release, Dep’t of Hous. and Urban Dev., HUD Announces New Proposed “Affirmatively Furthering Fair Housing” Rule, Taking A Major Step Towards Rooting Out Longstanding Inequities In Housing And Fostering

FHFA's proposed rule seeks to "codify in regulation much of FHFA's existing practices and programs," including the Plans,⁴⁹ which were created partly in response to an Executive Order from President Biden issued on his first day in office establishing a policy of his administration to "pursue a comprehensive approach to advancing equity for all."⁵⁰ It is undoubtedly politically significant when the President directed action each time regulatory authority under AFFH was asserted.

Third, the assertion that the Fair Housing Act authorizes FHFA to regulate is of economic significance. FHFA regulates and serves as conservator of the Enterprises which at the end of last year collectively owned or guaranteed nearly \$7 trillion of outstanding single-family mortgage debt. The Enterprises have been in conservatorship over 14 years following their collapse, yet they remain dominant participants in the housing finance system despite being severely undercapitalized. Actions taken, which, as indicated in statute, may result in an economic return that may be less than the return earned on other activities,⁵¹ will only prolong the conservatorships. Revenue that the Enterprises earn on their portfolios is deliberately retained as capital to protect taxpayers during a downturn, but as contemplated under the Plan framework, some of that revenue instead would be used for subsidizing mortgages for select borrowers. Using authority under the Fair Housing Act to impose the Plan framework increases the risk of losses to taxpayers and subjects the Enterprises to longer and more permanent conservatorship. FHFA, is, ultimately, a safety and soundness regulator. To read Section 808(d) of the Fair Housing Act as providing FHFA authority to regulate as asserted ignores FHFA's responsibilities as a prudential regulator and embraces a more permanent conservatorship regime which allows the government to politically allocate credit.

Congress did not mean to confer authority under the Fair Housing Act to regulate as FHFA proposes. FHFA simply ignores the history and breadth of the asserted authority as well as the economic and political significance of the assertion.

VI. Conclusion

As members of the Committee on Banking, Housing, and Urban Affairs, we object to your proposal and submit these formal comments for your consideration. We again call for you to abandon these Plans that risk setting up new generations of borrowers for failure and needlessly politicize the Enterprises in an effort to secure political victories that are legislatively infeasible and legally impermissible. However, given that FHFA may be exceeding its statutory authority to in promulgating such regulations, we again ask each GSE to retain all

Inclusive Communities (Jan. 19, 2023),

https://www.hud.gov/press/press_releases_media_advisories/hud_no_23_013.

⁴⁹ Fair Lending, Fair Housing, and Equitable Housing Finance Plans, 88 Fed. Reg. 25,293, 25,294 (proposed Apr. 26, 2023).

⁵⁰ Fed. Hous. Fin. Agency, Enterprise Equitable Housing Finance Plans – Request for Input, 1 (Sept. 2021), <https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/Equitable-Housing-Finance-Plans-RFI.pdf> (citing Exec. Order No. 13,985, 86 Fed. Reg. 7009, 7009 (Jan. 25, 2021)).

⁵¹ 12 U.S.C. § 1716(3)–(4) (Fannie Mae charter purposes); § 1451 note (b)(3)–(4) (Freddie Mac charter purposes)

correspondence with FHFA and other records relating to these Plans and rulemaking in anticipation of congressional oversight and litigation challenging the legality of these plans.

We also request your immediate attention and prompt response to the following questions and requests for records no later than October 6, 2023:

1. Though FHFA repeats its assertion throughout the RFI and proposed rule that the Enterprises have important “public purposes” and describe “the need to advance equity for homebuyers, homeowners, and tenants in the housing market” as a public purpose,⁵² equity is undefined, which FHFA expressly admits in its rulemaking.⁵³
 - a. Though FHFA asks commenters for an appropriate definition of equity, how would FHFA propose defining the term?
 - b. Why would FHFA propose a rule that allegedly advances equity without proposing a definition for the term?
2. On another proposed rule published days later, clarifying that FHFA may establish prudential management and operations standards as regulations as well as guidelines, the Office of General Counsel (OGC) is listed as the contact.⁵⁴ However, FHFA’s Office of Fair Lending Oversight is listed as the contact for information relating to this proposed rule. Why is OGC not listed as a contact for this related proposed rule?
3. Does OGC generally review whether FHFA has statutory authority to regulate before promulgating a regulation?
4. With respect to this proposed rule, when, if ever, did OGC review whether FHFA has statutory authority to regulate?
5. What review, if any, did the Office of General Counsel undertake?
6. Is the Director presented with and does she generally review recommendations from OGC advising her on rulemaking actions?
7. With respect to this proposed rule, when, if ever, did the Director review OGC’s recommendations?
8. Please share all records recommending action relating to the proposed rule that the Director reviewed from OGC.

Thank you for your attention to this important matter.

⁵² See *supra* note 12.

⁵³ Fair Lending, Fair Housing, and Equitable Housing Finance Plans, 88 Fed. Reg. at 25,306 (“The rule currently does not define equity. FHFA seeks comments on whether the rule should define equity.”).

⁵⁴ Prudential Management and Operations Standards, 88 Fed. Reg. 28,433, 28,433 (proposed May 4, 2023).

The Hon. Sandra Thompson
September 18, 2023

Sincerely,



Bill Hagerty

United States Senator



Tim Scott

Ranking Member



Katie Boyd Britt

United States Senator



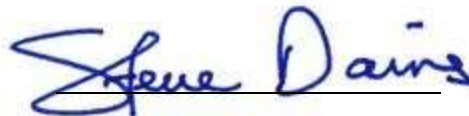
Kevin Cramer

United States Senator



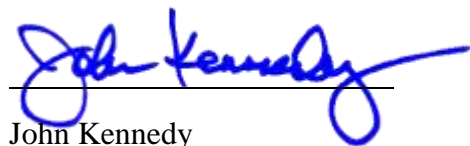
Mike Crapo

United States Senator



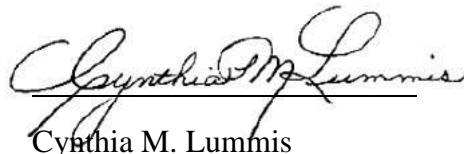
Steve Daines

United States Senator



John Kennedy

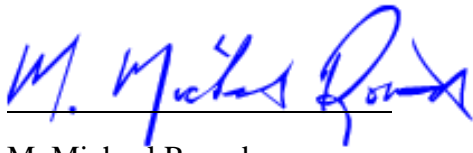
United States Senator



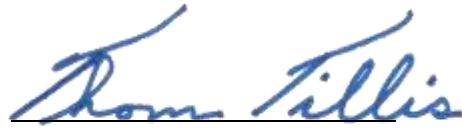
Cynthia M. Lummis

United States Senator

The Hon. Sandra Thompson
September 18, 2023



M. Michael Rounds
United States Senator



Thom Tillis
United States Senator



JD Vance
United States Senator