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Submitted Electronically

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Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, SW
Room 10276
Washington, DC 20410-0500

Subj: Affirmatively Furthering Fair Housing, RIN 2529-AB05
Docket No. FR-6250-P-01

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops (USCCB), we respectfully submit the following comments on the proposed rule, published by the Department of Housing and Urban Development (HUD) at 88 Fed. Reg. 8516 (Feb. 9, 2023), on affirmatively furthering fair housing.

Three years ago, we filed comments on HUD's then-proposed rule on affirmatively furthering fair housing.[1] We supported, and continue to support, HUD's overarching goal of ensuring fair housing. Everyone, without exception, should have access to housing opportunities. In our 2020 comments, we raised a number of issues. Among other things, we underscored the importance of addressing racial and economic segregation in housing, and we emphasized that the elimination of such disparities must remain a high priority with HUD. These and other concerns voiced in our 2020 comments remain equally valid today.

At the same time, with regard to the present round of proposed regulations, we believe that the inclusion of sexual orientation, gender identity, and nonconformance with gender stereotypes as distinct protected classes is problematic for several reasons.

First, incorporation of these categories into the regulations has no support in an Act of Congress. Unlike discrimination based on age, disability, or other classifications recognized in federal law, Congress has never acted to prohibit discrimination generally, or housing discrimination in particular, on the basis of sexual orientation, gender identity, or gender stereotypes. The treatment of these categories as protected classes therefore lacks a statutory foundation.

[1] Our 2020 comments are available here.

Second, the existing prohibition on sex discrimination in the Fair Housing Act (FHA or Act) cannot fairly be read to include these additional categories. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), does not mandate or counsel a different result. The Court's opinion in that case "proceed[s] on the assumption that 'sex' … refer[s] only to the biological distinctions between male and female." *Id*. at 1739. Based on its reading of the text of Title VII, the Court concluded, but only in the context of Title VII, that the term "sex" prohibits, in the Court's words, "fir[ing] an individual merely for being gay or transgender." *Id*. at 1754. The Court underscored the importance of relying on statutory text, *id*. at 1737 ("[o]nly the written word is the law"), and disclaimed any intention that its holding with respect to Title VII apply outside of Title VII. *Id*. at 1753 (noting that "other laws" were not before the Court, that "we have not had the benefit of adversarial testing about the meaning of their terms," and that "we do not prejudge any such question today"). It cannot be argued by analogy that *Bostock* applies to the FHA given the significant textual differences between that Act and Title VII. *See* Executive Order 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021) (declaring that various prohibitions on sex discrimination, including the Fair Housing Act, prohibit discrimination on the basis of sexual orientation and gender identity "so long as the laws do not contain sufficient indications to the contrary"); *Neese v. Becerra*, No. 2:21-CV-163-Z, 2022 WL 16902425 (N.D. Tex. Nov. 11, 2022) (holding that *Bostock* does not require Title IX to be interpreted to prohibit sexual orientation or gender identity discrimination).

Third, the inclusion of sexual orientation, gender identity, and gender stereotypes in HUD regulations may unintentionally cause a type of discrimination not contemplated in the proposed rule, namely, discrimination against stakeholders with religious objections to facilitating shared housing arrangements between unmarried persons of the opposite biological sex or between persons who are not joined in the legal union of one man and one woman.

To reiterate, we are not suggesting that any person should be denied access to housing or to housing opportunities. But, with respect to *shared* housing, no stakeholder should be required, over its religious objection, to facilitate cohabitation between unmarried persons, be it an unmarried heterosexual couple or a homosexual couple, or to facilitate shared housing between persons of the opposite sex, especially when such a requirement is divorced from any command of Congress and stands to violate the stakeholder's religious beliefs. Faith-based organizations in particular should retain the freedom they have historically enjoyed to make housing placements in a manner consistent with their religious beliefs. Indeed, given the large role that such organizations play in HUD programs, a nondiscrimination provision of this sort may have the ultimate effect of driving away organizations with a successful track record in meeting housing needs, leaving beneficiaries without the housing that they sought or that the government intended them to receive. The Religious Freedom Restoration Act protects the rights of stakeholders who would be substantially burdened by such a provision in the absence of a compelling interest and narrow tailoring, a standard that we believe the government in this instance cannot meet.

Fourth and relatedly, challenges to HUD's position on this issue, e.g., *School of the Ozarks v. Biden*, 41 F.4th 992 (8th Cir. 2022) (dismissed because it was thought to be premature), are more likely to be renewed once these challenged categories are imbedded in regulation. The

Department can avoid being drawn into unnecessary litigation if it refrains from creating protected categories having no basis in the statute.

Fifth, assuming for argument's sake that "sex" as used in the FHA includes gender identity and gender stereotypes, an assumption that we believe is unfounded, then the Act does not require the admission of the opposite biological sex in any circumstance where it does not bar single-sex housing (e.g., women's dormitories or shelters). If sex discrimination does not apply to such facilities, then *a fortiori* neither does discrimination on the basis of gender identity/gender stereotypes, because the latter, under HUD's theory, is simply a species of the former. Indeed, taking HUD's interpretation of sex discrimination to its logical extreme, a requirement that biological men who identify as women (but only such men) be admitted to women's housing, where single-sex housing is permissible, would discriminate against biological men who identify as men and therefore amount to its own form of gender identity discrimination, which is an absurd result.

Conclusion

We urge HUD not to include sexual orientation, gender identity, or nonconformance with gender stereotypes as protected classes in the regulations. There is no statutory basis for including these classifications in HUD nondiscrimination rules, and their inclusion may create conflicts with the exercise of religious beliefs, including those of faith-based organizations, and result in burdens on religious exercise that likely violate RFRA.

Sincerely,

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