



Submitted online via FHFA Agency Website.

October 25, 2021

Clinton Jones
General Counsel, U.S. Federal Housing Finance Agency
400 Seventh Street SW
Washington, DC 20219

Re: Regulatory information number (RIN) 2590-AB12; 2022–2024 Enterprise Housing Goals; Proposed Rule

Dear Mr. Jones:

Democracy Forward appreciates the opportunity to provide this comment in response to the Federal Housing Finance Agency’s (“FHFA” or the “Agency”) August 25, 2021 proposed rule with request for comments on the housing goals for Fannie Mae and Freddie Mac (the “Enterprises”) for 2022 through 2024.¹

We applaud the Agency’s proposal to establish a single-family housing subgoal for Enterprise purchases of mortgages in minority census tracts. The minority census tract (“MCT”) subgoal is a necessary step toward ensuring the Enterprises fulfill their statutory duty to facilitate the financing of affordable housing for all low- and moderate-income families, including families of color.² The proposed MCT subgoal is an appropriate means of ensuring that governmental programs intended to help low- and moderate-income families purchase homes do not exclude—as they too often have in the past—families of color from their reach.³ Below, we first discuss the need for the MCT subgoal, and then present a constitutional analysis for FHFA’s consideration. We encourage the Agency to consider whether addressing the evidence it considered as showing a need for the MCT subgoal and including an analysis of the subgoal’s constitutionality in the final

¹ 2022–2024 Enterprise Housing Goals, 86 Fed. Reg. 47,398 (proposed Aug. 25, 2021) (to be codified at 12 C.F.R. pt. 1282) [hereinafter Proposed Rule].

² See Federal Housing Enterprises Financial Safety and Soundness Act of 1992, 12 U.S.C. § 4501(7); see also *id.* § 4565(b)(3)(A) (To meet the housing goals, the Enterprises must “take affirmative steps to assist primary lenders to make housing credit available in areas with concentrations of low-income and minority families.”).

³ We take no position on whether a MCT subgoal of 10% of all single-family mortgage purchases adequately provides an incentive for lenders to issue housing purchase loans to families of color and in integrated communities and communities of color. Considering, however, both that the racial homeownership gap has not improved in 50 years and that the proposed 10% MCT subgoal is only “slightly higher than the Enterprises’ recent performance, when measured as if the proposed subgoal had been in place,” we encourage FHFA to determine whether the data support a higher benchmark. See Alanna McCargo et al., *Building Black Homeownership Bridges: A Five-Point Framework for Reducing the Racial Homeownership Gap*, Urban Institute 2 (May 2019), <https://urbn.is/3CgwXis> (“Today’s 30-plus percentage-point gap between black and white homeownership rates has not decreased since the passage of the 1968 Fair Housing Act.”) [hereinafter *Building Black Homeownership Bridges*].

rule might be useful.

I. The Proposed Minority Census Tract Subgoal

Congress directed the FHFA to establish annual goals for Enterprise purchases of certain types of mortgages, including “conventional, conforming, single-family, purchase-money mortgages financing owner-occupied housing” for families that reside in low-income areas.⁴ Congress defined “low-income areas” as census tracts in which the median income does not exceed 80% of the area median income, and the term includes families with incomes no greater than 100% of the area median income who live in MCTs.⁵ A MCT is one with a minority population of at least 30% and a median family income of less than 100% of the area family median income.⁶ Congress directed FHFA to consider several factors in setting the Enterprise housing goals, including “[n]ational housing needs,” “[e]conomic, housing, and demographic conditions,” and “[s]uch other reliable mortgage data as may be available.”⁷

Under the single-family housing goals currently in effect, the low-income areas home purchase subgoal may be met by either of two types of mortgages: home purchase mortgages on single-family, owner-occupied properties with (i) borrowers (regardless of income) in census tracts with a tract median income of no greater than 80% of the area median income, *or* (ii) borrowers with incomes no greater than 100% of the area median income in MCTs.⁸ The current housing goals do not establish a subgoal for either criterion.

The proposed Enterprise housing goals for 2022–2024 “replace the low-income areas subgoal with separate area-based subgoals targeting the individual components of the low-income areas subgoal (minority census tracts and low-income census tracts).”⁹ The proposed rule establishes two discrete subgoals: one for home purchase mortgages on single-family, owner-occupied properties to borrowers with no greater than 100% of the area median income in MCTs (10% goal); and one for home purchase mortgages on single-family, owner-occupied properties to borrowers (regardless of income) in low-income census tracts that are not MCTs, or to borrowers with incomes greater than 100% of the area median income in low-income census tracts that are also MCTs (4% goal).¹⁰ The FHFA identified several purposes for the proposed subgoal, including facilitating access to affordable housing in MCTs, closing the racial homeownership gap, and

⁴ 12 U.S.C. § 4562(a)(1).

⁵ *Id.* § 4502(28). The Federal Reserve System Board of Governors’ report on Home Mortgage Disclosure Act data for 1992 found that “the rate of denial for conventional home purchase loans generally increase[d] as the proportion of minority residents in a neighborhood increase[d],” and that “[t]he residents of predominantly minority neighborhoods (defined here as census tracts in which the minority population exceeds half of the total population) typically ha[d] lower relative incomes than the residents of other neighborhoods.” Bd. of Governors of the Fed. Reserve Sys., 80 Fed. Res. Bull. 79, 86, 106–07, *Residential Lending to Low-Income and Minority Families: Evidence from the 1992 HMDA Data* (1994). The report also observed that “white applicants in all income groups had lower rates of denial than black or Hispanic applicants,” and concluded that “[t]hese disparities raise the possibility of unlawful discrimination against some minority applicants.” *Id.* at 80.

⁶ *Id.* § 4502(29). A minority means an individual included within the following specified racial and ethnic categories: American Indian or Alaskan Native, Asian, Black or African American, Hispanic or Latino, and Native Hawaiian or Other Pacific Islander. Enterprise Housing Goals and Mission, 12 C.F.R. § 1282.1(b) (2018).

⁷ 12 U.S.C. § 4562(e)(2)(B).

⁸ 2018–2020 Enterprise Housing Goals, 83 Fed. Reg. 5878, 5882 (Feb. 12, 2018) (to be codified at 12 C.F.R. pt. 1282).

⁹ Proposed Rule, *supra* n.1, at 47398.

¹⁰ *Id.* at 47,400.

refraining from causing displacement in low-income communities, including MCTs.¹¹

II. The Proposed Minority Census Tract Subgoal is a Necessary Step Toward Closing the Racial Homeownership Gap and Slowing Gentrification and Displacement

For decades, if not centuries, owning a home has been the key to achieving the American dream. Home is not only where the heart is; it is also where the wealth is. The home is the single largest asset for most Americans,¹² and for Black homeowners in particular.¹³ But home equity is not distributed evenly. In 2019, 72.1% of whites owned a home, whereas only 42% of Black Americans did.¹⁴ The homeownership rate of Asians, Hispanic people of all races, and Native Americans are also significantly lower than that of whites, at 48.1%, 60.6%, and 54.6%, respectively.¹⁵ Since 1960, white Americans' homeownership rate has increased at nearly double the rate of Black Americans'.¹⁶

People of color are not only less likely to own a home than white Americans, but also the homes they own are worth roughly half the amount. In 2019, Black Americans' median home equity was \$66,800 to white Americans' \$130,000.¹⁷ The median home equity of Hispanic Americans of all races was \$95,000, also significantly lower than that of whites.¹⁸ Secondary effects of housing wealth disparities exacerbate this inequity. With more valuable homes, and a greater likelihood of being homeowners, "white families are more often able to borrow from their home equity" to pay for their children's college or weather hard times like a worldwide pandemic.¹⁹

The gap between the homeownership rates of whites and racial and ethnic minorities is not a coincidence. There is broad scholarly consensus that the racial homeownership gap and racial segregation in housing were a direct result of "racially explicit government policies" throughout the twentieth century which, aided by private discrimination, "combined to create a nationwide system of urban ghettos, surrounded by white suburbs."²⁰ We briefly summarize the history of the

¹¹ See *id.* at 47,398–99, 47,401–02, 47,403.

¹² Aleatra P. Williams, *Lending Discrimination, the Foreclosure Crisis and the Perpetuation of Racial and Ethnic Disparities in Homeownership in the U.S.*, 6 Wm. & Mary Bus. L. Rev. 601, 621 (2015) [hereinafter *Lending Discrimination*].

¹³ "Housing equity makes up nearly 60 percent of total net worth for Black homeowners, compared with 43 percent of total net worth for white homeowners." Alanna McCargo & Jung Hyun Choi, *Closing the Gaps: Building Black Wealth through Homeownership*, Urban Institute 2 (Dec. 2020), available at <https://urban.is/3aXgYdt> [hereinafter *Closing the Gaps*]. Racial and ethnic minorities also have a significantly lower median net worth than whites. See *id.* at 3; Dedrick Asante-Muhammad & Sally Sim, *Racial Wealth Snapshot: Asian Americans and the Racial Wealth Divide*, National Community Reinvestment Coalition (May 14, 2020), <https://bit.ly/3C6auVI>; Bush Foundation, *Racial Wealth Gaps Research and Data*, <https://bit.ly/3poTLJr> (accessed Oct. 19, 2021).

¹⁴ *Closing the Gaps*, *supra* n.13, at 4.

¹⁵ *Id.*; Prosperity Now, *Data by Issue: Homeownership and Housing*, <https://scorecard.prosperitynow.org/data-by-issue#housing/outcome/homeownership-rate> (last accessed Oct. 18, 2021). Native American homeownership rate uses 2018 data.

¹⁶ See *Closing the Gaps*, *supra* n.13, at 4.

¹⁷ *Id.* at 3.

¹⁸ *Id.*

¹⁹ See Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* 185 (2017) [hereinafter *The Color of Law*].

²⁰ *Id.* at xiv, xii; see also, e.g., *Closing the Gaps*, *supra* n.13, at 4; Dedrick Asante-Muhammad et al., *60% Black Homeownership: A Radical Goal for Black Wealth Development*, National Community Reinvestment Coalition 4–6

government’s racially discriminatory housing policies and their enduring effects, including the longstanding racial homeownership gap. For a more comprehensive account, we refer you to the sources referenced in this comment, including *The Color of Law: A Forgotten History of How Our Government Segregated America*, by Richard Rothstein.

The federal government created the Home Owners’ Loan Corporation (“HOLC”) in 1933, during the height of the Great Depression. The HOLC purchased mortgages subject to foreclosure and issued new, amortized mortgages with favorable repayment schedules and low interest rates. HOLC only purchased mortgages that passed its risk assessment, which entailed color-coding maps of neighborhoods across the country by perceived risk. “A neighborhood earned a red color”—the riskiest color—“if African Americans lived in it, even if it was a solid middle-class neighborhood of single-family homes.”²¹ The presence of Hispanic Americans and other racial or ethnic minorities also contributed to a neighborhood’s perceived risk.²² Through “redlining,” the government denied countless homeowners of color the ability to refinance their mortgage and save their homes from foreclosure.

In 1934, the federal government established the Federal Housing Administration (“FHA”), which insured bank-issued mortgages for home purchases. The FHA’s underwriting manual permitted it to insure only white families’ mortgages.²³ As a result, “[b]etween 1934 and 1962, 98 percent of FHA-insured loans went to white families, providing them a critical wealth-building foundation for future generations.”²⁴ The Veterans Administration, established shortly after World War Two, insured mortgages for veterans using the FHA’s racist underwriting criteria until it expired in 1956, thereby spreading post-War opportunity almost exclusively to white families.²⁵

Racist policies and practices in housing continued through the twentieth century and into the twenty-first century. Throughout the 1990s and 2000s, mortgage brokers’ compensation systems included what were effectively kickbacks for issuing loans with ultra-high interest rates, which they targeted to Black communities in distressed neighborhoods, often through manipulation.²⁶ The government permitted this discriminatory practice—which helped precipitate the housing crisis and recession of 2008, during which the Black homeownership rate fell by over 5 percentage points²⁷—until 2010.²⁸ “Reverse redlining,” an illegal practice whereby lenders

(Mar. 2, 2021), <https://bit.ly/3vGbf59>; *Lending Discrimination*, *supra* n.12, at 607–11; Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 Wash. U. J.L. & Pol’y 53, 66 (2006).

²¹ *The Color of Law*, *supra* n.19, at 64.

²² See, e.g., National Archives Catalog, Federal Home Loan Bank Board, Home Owners’ Loan Corporation, *Documents Related to the Redlining Map for Miami, FL*, at 15 (1933–39), <https://catalog.archives.gov/id/85713724> (neighborhood was ranked as “blue,” which is riskier than “green,” in part because of “an infiltration of Cubans into most of the[] sections”); The Seattle Civil Rights & Labor History Project, *Segregated Seattle*, <https://depts.washington.edu/civilr/segregated.htm> (accessed Oct. 19, 2021) (aggregating data on housing discrimination against “not just African Americans but also Native Americans, Asian Americans, Pacific Islanders, people of Mexican ancestry, and also, at times, Jews”).

²³ *The Color of Law*, *supra* n.19, at 64–65.

²⁴ *Closing the Gaps*, *supra* n.13, at 4.

²⁵ *The Color of Law*, *supra* n.19, at 70.

²⁶ *Id.* at 110.

²⁷ *Closing the Gaps*, *supra* n.13, at 3. “Black homeownership declined the most following the 2008 housing market crisis and only started to recover in 2019, just before the pandemic hit.” *Id.*; see also *id.* at 4, fig. 3 (depicting homeownership rate over time by race or ethnicity).

²⁸ *The Color of Law*, *supra* n.19, at 110.

market exploitative home purchase loans to Black communities, persists to this day.²⁹

These racist federal housing policies had enduring effects. “By the time the federal government decided finally to allow African Americans into the suburbs, the window of opportunity for an integrated nation had mostly closed.”³⁰ The homes that the government helped whites to purchase have typically increased significantly in value, whereas the homes of people of color—if they were able to purchase homes—have gained much less equity over time.³¹

The racial housing gap has been the most significant driver of the racial wealth gap that has exploded over the past few decades.³² The racial wealth gap, in turn, makes it more difficult for people of color to acquire homes, particularly homes in more desirable neighborhoods. Despite the passage of legislation designed to combat separate and unequal housing over 50 years ago, “[m]any neighborhoods are as racially segregated today as they were in the middle of the 20th century.”³³ Lenders continue to deny people of color credit at disproportionate rates, further compounding the housing and wealth disparities.³⁴ The racial wealth gap also hurts the U.S. economy as a whole. The racial wealth gap’s “dampening effect on consumption and investment will cost the US economy between \$1 trillion and \$1.5 trillion between 2019 and 2028—4 to 6 percent of the projected GDP in 2028.”³⁵

New inequities resulting from this history of discrimination continue to manifest. The COVID-19 pandemic has exacerbated the racial housing gap,³⁶ rendering effective housing goals even more important. For another example, a recent study of 108 urban areas throughout the country found that formerly redlined neighborhoods in 94% of cities had hotter summer temperatures than non-redlined neighborhoods by as much as 7°C.³⁷ Because formerly redlined areas generally have fewer trees and more heat-trapping pavement, they become urban “heat islands” whose residents suffer disproportionately from heat-related illnesses and death.³⁸ Global

²⁹ *Id.* at 109.

³⁰ *Id.* at 182.

³¹ *See id.*

³² “[T]he median white family had more than ten times the wealth of the median black family in 2016.” McKinsey & Co., *The economic impact of closing the racial wealth gap* 5 (Aug. 2019), <https://mck.co/3G9au9K>.

³³ Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7487, 7487 (Jan. 26, 2021).

³⁴ See Ingrid Gould Ellen & Gerard Torrats-Espinosa, *Gentrification and Fair Housing: Does Gentrification Further Integration?*, NYU Furman Center 2, 6 (Aug. 19, 2018), <https://bit.ly/3DYJUhs> [hereinafter *Gentrification*]; *Closing the Gaps*, *supra* n.13, at 13 (A study found that “Black borrowers are charged higher rates than white borrowers among financial technology lenders after incorporating financial characteristics, suggesting that algorithmic lending does not eliminate racial disparities.”).

³⁵ McKinsey & Co., *supra* n.32, at 5–6.

³⁶ Solomon Greene & Alanna McCargo, *New Data Suggest COVID-19 is Widening Housing Disparities by Race and Income*, Urban Institute (May 29, 2020), <https://urban.is/3vAW4Kt>.

³⁷ Jeremy S. Hoffman et al., *The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas*, *Climate J.* (Jan. 13, 2020), <https://bit.ly/3Gdj0Er>.

³⁸ Anthony Nardone et al., *Redlines and Greenspace: The Relationship between Historical Redlining and 2010 Greenspace across the United States*, 129 *Env’t Health Perspectives* 1 (Jan. 27, 2021), <https://bit.ly/3C6lkcO>; see also *Temperatures in D.C.’s Heat Islands, Can Register Ten to Twenty Degrees Hotter than in Leafy Neighborhoods*, *Hola Cultura* (Aug. 19, 2021), <https://bit.ly/3vyfv6J> (an estimated 1,500 people die of heat per summer).

warming will continue to exacerbate the urban heat island effect.³⁹

In more recent years, gentrification and displacement have contributed to the housing gap between whites and people of color and between moderate- and high-income Americans and low-income Americans. As historically segregated urban locations become desirable to white and middle- and upper-class people, those neighborhoods tend to experience a brief period of integration before the rise in housing prices force low-income families of color “out of their now-upgraded neighborhoods and into newly segregated inner-ring suburbs.”⁴⁰ Rents and home values go up, making it more difficult for people with less wealth and lower incomes to live in a gentrifying neighborhood.

Indeed, FHFA identified concerns about gentrification and displacement in low-income areas and MCTs in its Advance Notice of Proposed Rulemaking (“ANPR”),⁴¹ and several comments in response urged the Agency to formulate the housing goals with gentrification in mind.⁴² FHFA noted two significant points in requesting input on this topic. First, “[w]hile Enterprise mortgage acquisitions could qualify under either or both criteria [of the low-income areas subgoal], the share of the Enterprises’ mortgage acquisitions satisfying criterion (1) [mortgages originated for borrowers in low-income census tracts] has been consistently higher than the share of Enterprise mortgage acquisitions satisfying criterion (2) [mortgages originated for borrowers in MCTs] in recent years.”⁴³ Second, data show that “both low-income areas and high-minority areas have increasing shares of borrowers with incomes at or above 100 percent of AMI [area median income].”⁴⁴

The data therefore indicate that moderate- and high-income borrowers are increasingly purchasing homes in low-income areas and MCTs—a trend associated with gentrification and displacement of longtime residents. Yet the purchase of high-income buyers’ mortgages in a low-income area qualifies for the low-income areas subgoal under its current design. The combination of the current housing goals’ lack of a discrete MCT subgoal and the low-income area criterion’s lack of borrower income cap facilitates the purchase of mortgages originated for high-income borrowers in MCTs, but not necessarily the purchase of mortgages originated for low-income borrowers in MCTs. In short, the current low-income area subgoal may facilitate gentrification and displacement of low-income residents, and of low-income residents in MCTs in particular.

That outcome is problematic for several reasons. For one thing, facilitating high-income borrowers’ access to housing was not Congress’s priority in directing the FHFA to set a low-income area housing goal.⁴⁵ For another, systemic inequities in the housing market already work

³⁹ Brad Plumer & Nadja Popovich, *How Decades of Racist Housing Policy Left Neighborhoods Sweltering*, The N.Y. Times (Aug. 24, 2020), <https://nyti.ms/3nhHmnZ>.

⁴⁰ *The Color of Law*, *supra* n.19, at 211.

⁴¹ Enterprise Housing Goals, 85 Fed. Reg. 82,965 (Dec. 21, 2020).

⁴² See, e.g., Letter from Housing Policy Council to Alfred M. Pollard, General Counsel, Federal Housing Finance Agency, at 3, 4 (Feb. 25, 2021) (re: Comments/RIN 2590-AB12 Enterprise Housing Goals Advance Notice of Proposed Rulemaking); *Comment to the Federal Housing Finance Agency on Enterprise Housing Goals Advance Notice of Proposed Rulemaking*, Center for Responsible Lending 11 (Feb. 28, 2021).

⁴³ Enterprise Housing Goals, 85 Fed. Reg. at 82,967.

⁴⁴ *Id.* at 82,968.

⁴⁵ See 138 Cong. Rec. H11453-01, at H11464 (1992) (statement of Rep. Mary Rose Oakar) (“The bill would also significantly enhance these corporations’ statutory dedication to housing, particularly for those of low or moderate

against people of color or low-income borrowers. In cities across the country, people of color are routinely denied conventional mortgage loans at rates far higher than whites, even controlling for borrower income, loan amount, and neighborhood.⁴⁶ Banks also routinely deny home improvement loans to people of color in gentrifying neighborhoods, while granting loans to white newcomers.⁴⁷ These issues are not new. The Enterprises have not adequately served areas with low median incomes and high minority populations since shortly after the Safety and Soundness Act was enacted.⁴⁸

At a time where the racial homeownership gap is wider than during the Jim Crow era,⁴⁹ it is crucial that the Enterprises fulfill their obligation to not only increase access to affordable homes in low-income areas, but also to do so in a way that combats—or at the very least does not contribute to—gentrification and displacement. The proposed single-family housing goal for low-income areas course-corrects by upgrading the MCT criterion to a discrete subgoal. This modification is necessary to encourage the Enterprises to purchase mortgages originated for low- and moderate-income borrowers in MCTs, which under the current goals play second fiddle to mortgages originated for moderate- and high-income borrowers.

Although the proposed Enterprise housing goals are a crucial step toward addressing the increasing racial housing gap, they are only that: a step. The proposed goals, however, at least establish a discrete subgoal for mortgages originated for low-to-moderate income borrowers in MCTs. They also remove the current design’s incentive for the Enterprises to purchase mortgages originated for high-income buyers in low-income areas and MCTs. These modifications, in turn, will help shift incentives in the primary mortgage market.⁵⁰ By encouraging the Enterprises to purchase more mortgages originated for low- and moderate-income borrowers in MCTs, the proposed housing goals will refocus the Enterprises on their statutory duty to facilitate the financing of affordable housing for low- and moderate-income families, including families of

incomes and those who live in areas not well served by the housing finance system.”); *id.* at H11457 (statement of Rep. Henry B. Gonzalez) (“For the first time, the obligations of Fannie Mae and Freddie Mac with respect to low and moderate housing and underserved areas are defined in law. . . . The Secretary is expected to develop subgoals within the moderate and low income goals . . . to ensure that the mortgage purchases of the enterprises address the housing needs of all persons . . .”).

⁴⁶ Aaron Glantz & Emmanuel Martinez, *For people of color, banks are shutting the door to homeownership*, *Reveal News* (Feb. 15, 2018), <https://bit.ly/3maRQX7> [hereinafter *Banks are shutting the door*]; Drew DeSilver & Kristen Bialik, *Blacks and Hispanics face extra challenges in getting home loans*, *Pew Research Center* (Jan. 10, 2017), <https://pewrsr.ch/30FJqOU> (“In 2015, 27.4% of black applicants and 19.2% of Hispanic applicants were denied mortgages, compared with about 11% of white and Asian applicants . . .”).

⁴⁷ *Gentrification*, *supra* n.34, at 2, 5, 8–9.

⁴⁸ Michela Zonta, *Do the GSEs Meet the Credit Needs of Underserved Communities of Color?*, 17 *Cityscape: J. Pol’y Dev. & Rsch.* 3, 198–99 (2015) [hereinafter *Do the GSEs Meet the Credit Needs of Underserved Communities of Color?*].

⁴⁹ *Banks are shutting the door*, *supra* n.46, at 4.

⁵⁰ The Enterprises’ mortgage purchasing patterns influence the primary mortgage market, and thus ultimately, the types of home purchase loans that lenders tend to prioritize. The Enterprises’ role is to provide liquidity to primary lenders, thereby freeing up their balance sheets to make more loans. *See* 12 U.S.C. § 1716(3), (4). The more mortgages purchased from lenders in low-income areas and MCTs, the more loans primary lenders in those areas can make. In reality, most mortgages sold to the Enterprises today are “originated specifically for sale to the [Enterprises] or to be insured through the FHA [or] VA,” making the Enterprises’ mortgage purchase goals even more important. Don Layton, *America’s Housing Finance System in the Pandemic: The Causes and Policy Implications of Credit Tightening*, *Joint Ctr. for Hous. Stud. of Harvard Univ.* 6 (June 2020), <https://bit.ly/3B5o8qC> [hereinafter *America’s Housing Finance System in the Pandemic*].

color.

III. Constitutional Analysis of the Proposed Minority Census Tract Subgoal

We provide the following constitutional analysis for the FHFA's consideration. It may be helpful for the Agency to be transparent about its constitutional analysis in any final rule.

The proposed MCT subgoal is a plainly constitutional measure to encourage the Enterprises to benefit low- and moderate-income families, including families of color. Because the subgoal does not classify individuals on the basis of race or any other suspect classification, it would be constitutional so long as it has a rational basis, which it unquestionably does. But the MCT subgoal, if adopted, would survive even strict scrutiny by a court. The MCT subgoal, in conjunction with the LICT subgoal, serves a compelling governmental interest: remedying past discrimination by closing the racial homeownership gap through facilitating the financing of affordable housing for *all* low- and moderate-income families, including families of color. The MCT subgoal is also narrowly tailored to further this interest.

i. The Proposed Minority Census Tract Subgoal must have a rational basis.

Unless a federal governmental policy treats similarly situated individuals differently based on race or some other suspect classification, it comports with the equal protection guarantee of the Fifth Amendment so long as it has a rational basis.⁵¹ Those governmental programs that do treat similarly situated individuals differently based on race are strictly scrutinized.⁵² The key determinant is whether the governmental program treats *individuals* differently based on their race.⁵³

The proposed MCT subgoal does not distinguish between individuals of different races. It treats all conforming mortgages alike, regardless of whether they originated for borrowers of color. Indeed, the MCT subgoal can be met through the purchase of mortgages originated for white borrowers alone. Because the MCT subgoal denies neither lenders “the opportunity to compete for” a mortgage sale, nor borrowers “the opportunity to compete for” a mortgage in MCTs, it contains no race-based classification.⁵⁴ Nor does the subgoal's reference to MCTs render it a race-based classification. So long as the subgoal does not distinguish between individuals by race, it is not a race-based classification, even if it was “necessarily conscious of race” in design and is

⁵¹ *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 680 (2012); *see also Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 216–18 (1995) (Equal protection analysis under the Fifth Amendment is the same as under the Fourteenth Amendment).

⁵² *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (“It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”).

⁵³ *See id.*; *see also Hayden v. Cnty. of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999) (“[A] law or policy is discriminatory on its face if it expressly classifies persons on the basis of race or gender.”); *cf. Lewis v. Ascension Par. Sch. Bd.*, 806 F.3d 344, 355 (5th Cir. 2015) (“[T]he Court has repeatedly made clear that redistricting plans do not classify *individuals* and are therefore facially race neutral.”).

⁵⁴ *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (City's “minority business enterprises” policy that “denie[d] certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race” was subject to strict scrutiny).

intended to “lessen the discriminatory impact” on disadvantaged groups.⁵⁵

And the two situations in which governmental policies that do not classify individuals based on race nonetheless receive strict scrutiny—discriminatory application or animus—are not applicable.⁵⁶ There is no reason to believe the housing rules will be applied in a discriminatory fashion. And the proposed rule makes the purpose of the MCT subgoal clear; it is not racial animus.⁵⁷

ii. *The Proposed Minority Census Tract Subgoal is Constitutional, under Either Strict Scrutiny or Rational Basis Review.*

As discussed above, because the proposed MCT subgoal does not make individual distinctions based on race and is not motivated by racial animus, it comports with the Constitution’s equal protection guarantee so long as it is supported by a rational basis. The proposed subgoal is rationally related to the government’s legitimate goal of reducing the racial homeownership gap.⁵⁸

In any event, even were a court—incorrectly—to subject the proposed Enterprise housing goals to strict scrutiny, the proposed Enterprise housing goals are constitutional. Governmental policies that use racial classifications, or that are motivated by an intent to discriminate and that achieve that intent, must be “narrowly tailored” to “further compelling” governmental interests.⁵⁹ The proposed MCT subgoal furthers a compelling governmental interest—remediating past racial discrimination in housing—and is narrowly tailored to that interest.

“Remediating the effects of past or present discrimination can be a compelling governmental interest.”⁶⁰ To show a compelling interest in remediating past discrimination, the government must show the existence of discrimination in the relevant market.⁶¹ Statistics and anecdotal evidence

⁵⁵ See *Hayden*, 180 F.3d at 49–50 (police department entrance exam designed to “lessen the discriminatory impact on black applicants [was] simply not analogous to a quota system or a minority set-aside where candidates, on the basis of their race, are not treated uniformly,” did not represent an improper racial classification); see also *Parents Involved in Cmty. Schs.*, 551 U.S. at 788–89 (Kennedy, J., concurring) (School authorities “are free to devise race-conscious measures to address the problem [of unequal educational opportunity] in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.”).

⁵⁶ *Hayden*, 180 F.3d at 48.

⁵⁷ See *id.* at 51 (refusing to “equate the County’s desire to eliminate the discriminatory impact of its hiring practices on minority applicants with an intent to discriminate against Appellants”).

⁵⁸ Proposed Rule, *supra* n.1, at 47,403 (FHFA proposed MCT subgoal “[i]n response to comments about the racial homeownership gap”); *id.* at 47,401 (“FHFA provided an analysis of whether the low-income areas home purchase subgoal has resulted in the displacement of residents from certain communities in the ANPR based on HMDA data. The data showed that both low-income areas and high-minority areas have increasing shares of borrowers with incomes at or above 100 percent of AMI.”); see also *Romer v. Evans*, 517 U.S. 620, 631 (1996) (governmental policy that “neither burdens a fundamental right nor targets a suspect class” will be upheld “so long as it bears a rational relation to some legitimate end”).

⁵⁹ *Adarand Constructors, Inc.*, 515 U.S. at 227.

⁶⁰ *Midwest Fence Corp. v. U.S. Dep’t of Transportation*, 840 F.3d 932, 935 (7th Cir. 2016).

⁶¹ *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1166 (10th Cir. 2000) (requiring the government to show evidence to support its assertions of “past and present discrimination” in regulated market to show compelling interest); *Mountain W. Holding Co. v. Montana*, 691 F. App’x 326, 329 (9th Cir. 2017), *as amended on denial of reh’g and reh’g en banc* (June 27, 2017) (same); *DynaLantic Corp. v. U.S. Dep’t of Def.*, 885 F. Supp. 2d 237, 250

may establish the existence of discrimination.⁶² A “strong basis in evidence” is required.⁶³

Formulations of the government’s required showing vary. The Sixth Circuit recently set forth three criteria: “First, the policy must target a specific episode of past discrimination. It cannot rest on a ‘generalized assertion that there has been past discrimination in an entire industry.’”⁶⁴ “Second, there must be evidence of *intentional* discrimination in the past.”⁶⁵ “Third, the government must have had a hand,” either actively or passively, “in the past discrimination it now seeks to remedy.”⁶⁶ These elements are not required by Supreme Court precedent, we do not agree that they are required, and other courts apply standards that require the government to show only the existence of discrimination in the sector requiring remedial action. However, the government could establish a compelling interest in remedying the effects of discrimination in the housing market even assuming this were the correct standard.

As discussed in Part II above, the racial homeownership gap is the result of numerous specific episodes of intentional discrimination against racial and ethnic minorities in which the federal government played an active, and often leading, role. “Racial segregation in housing was . . . a nation-wide project of the federal government in the twentieth century”⁶⁷ The government agrees. The U.S. Commission on Civil Rights concluded in 1973 “that the ‘housing industry, *aided and abetted by the Government*, must bear the primary responsibility for the legacy of segregated housing.”⁶⁸ During his first week in office, President Biden issued a Memorandum stating that, “[t]hroughout much of the 20th century, the Federal Government systematically supported discrimination and exclusion in housing and mortgage lending.”⁶⁹

A series of racially discriminatory federal policies over scores of years, coupled with the government’s repeated failure to prevent private discrimination, resulted in the entrenched racial housing and wealth gaps. As President Biden acknowledged in his Memorandum, “[t]he effects of these [discriminatory] policy decisions continue to be felt today, as racial inequality still permeates land-use patterns in most U.S. cities and virtually all aspects of housing markets.”⁷⁰ Part II above recounts some of the numerous consequences of the government’s racially discriminatory housing policies, and their continued effect on people of color. For example, lenders continue to deny people of color credit at disproportionate rates, resulting in part from discriminatory predatory

(D.D.C. 2012) (requiring government to show evidence of past or present discrimination to establish compelling interest).

⁶² See, e.g., *W. States Paving Co. v. Washington State Dep’t of Transp.*, 407 F.3d 983, 991 (9th Cir. 2005) (Statistical and anecdotal evidence supported Congress’s compelling interest in remediating discrimination against minorities in the transportation contracting industry); *DynaLantic Corp.*, 885 F. Supp. 2d at 251 (Statistical and anecdotal evidence supported government’s compelling interest in “breaking down barriers to minority business development created by discrimination and its lingering effects, including exclusion from contracting with the federal government.”); see also *Rothe Dev., Inc. v. U.S. Dep’t of Def.*, 836 F.3d 57, 73 (D.C. Cir. 2016) (upholding same federal program at issue in *DynaLantic Corp.* under rational basis review).

⁶³ See *Croson*, 488 U.S. at 500.

⁶⁴ *Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *The Color of Law*, *supra* n.19, at xii.

⁶⁸ *Id.* at 75 (emphasis added).

⁶⁹ Memorandum on Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7487, 7487 (Jan. 26, 2021).

⁷⁰ *Id.*

lending in the years prior to the 2008 housing crisis. A “strong basis in evidence”⁷¹ therefore supports the government’s compelling interest in remedying past discrimination by narrowing the racial homeownership gap.

The proposed MCT subgoal is narrowly tailored to attain the interest in remedying past discrimination by reducing the racial homeownership gap. In deciding whether race-conscious remedies are narrowly tailored, courts consider “the necessity for the relief and the efficacy of alternative [race-neutral] remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor [or here, housing] market; and the impact of the relief on the rights of third parties.”⁷²

First, the proposed MCT subgoal is a necessary upgrade from the current goals’ optional MCT criterion for meeting the low-income area subgoal. Since the enactment of the Safety and Soundness Act, the FHFA has continuously revisited the annual housing goals in an effort to ensure they are inclusive of people of color. The data, past and current, cast doubt on that proposition. As discussed in Part II above, there is a significant gap in the homeownership rate between whites, on the one hand, and racial and ethnic minorities, on the other. The homeownership gap has only widened in recent decades.⁷³ For nearly thirty years, “sweeping alternatives—particularly race neutral ones—have been considered and tried.”⁷⁴

Low-income census tracts would not be an effective proxy for minority census tracts. Household wealth, rather than income, is the most significant determinant of homeownership.⁷⁵ “[E]ndowment effects, particularly through intergenerational wealth transfers, can have a persistent impact on homeownership outcomes.”⁷⁶ In 2019, both the median and mean family wealth of white families was significantly higher than that of racial and ethnic minorities.⁷⁷

The proposed MCT subgoal also works in conjunction with the proposed LICT subgoal to encourage the Enterprises to purchase mortgages originated for low-income borrowers in MCTs

⁷¹ See *Croson*, 488 U.S. at 500.

⁷² *Midwest Fence Corp.*, 840 F.3d at 942 (quoting *United States v. Paradise*, 480 U.S. 149, 171 (1987)).

⁷³ See *Building Black Homeownership Bridges*, *supra* n.3.

⁷⁴ *Williams v. Babbitt*, 115 F.3d 657, 666 (9th Cir. 1997); see also *United States v. Sec’y of Hous. & Urb. Dev.*, 239 F.3d 211, 219–20 (2d Cir. 2001) (upholding court order to desegregate public housing where, “[i]n spite of fifteen years of remedial efforts encompassing four race-neutral remedial regimes . . . , Yonkers public housing remains substantially segregated even today”); *Stuart v. Roache*, 951 F.2d 446, 455 (1st Cir. 1991) (Police department’s previous, failed efforts “to produce fair testing procedures or reduce the impact of seniority on promotion” established that “racially-neutral relief alone would likely prove inadequate”).

⁷⁵ See generally Christian A.L. Hilber & Yingchun Liu, *Explaining the Black-White Homeownership Gap: The Role of Own Wealth, Parental Externalities and Locational Preferences*, Abstract, *Journal of Housing Economics*, Vol. 17 (2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1012380 (finding that differences in household income only partially explain homeownership gap, but “the black-white homeownership gap disappears if own and parental wealth,” along with location, “are accounted for”).

⁷⁶ Acolin et al., *Endowments and Minority Homeownership* 5, *Cityscape*, Forthcoming (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3269089. “Permanent income [used as a proxy for wealth] and unmeasured wealth differences and their impact on the ability to access homeownership especially through intergenerational down payment assistance, may be continuing effects of discrimination.” *Id.* at 16.

⁷⁷ Bhutta et al., *Disparities in Wealth by Race and Ethnicity on the 2019 Survey of Consumer Finances*, Bd. Of Governors of the Fed. Reserve Sys. (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm>.

in a way that does not inadvertently facilitate gentrification and displacement. FHFA observed that the current low-income area subgoal may be met through the Enterprises' purchase of mortgages originated for high-income borrowers in low-income areas, and that the Enterprises in fact purchase a disproportionate number of such mortgages. The Enterprises also purchase mortgages originated for high-income borrowers in MCTs disproportionately more than from low-income borrowers—a phenomenon that is correlated with the increased gentrification and displacement occurring over the past several years. The data strongly suggest that, without a goal that effectively creates incentives for the Enterprises to purchase mortgages originated for low- and moderate-income borrowers in MCTs, they will not do so. Maintaining the MCT subgoal as an optional criterion for meeting the low-income area subgoal is inadequate.

Second, the design of the proposed MCT subgoal as a goal, rather than a mandate, accords significant flexibility to the Enterprises.⁷⁸ If an Enterprise fails to meet a housing goal that FHFA determines is feasible, then the proposed rule gives FHFA discretion to require the Enterprise to “submit a housing plan describing the specific actions the Enterprise will take to improve its housing goals performance,”⁷⁹ any further enforcement of which is also discretionary.⁸⁰ Nothing in the proposed rule *requires* the Enterprises to meet housing goals, even where it is feasible to do so. The proposed MCT subgoal is also flexible in that it has a limited duration. FHFA revisits the housing goals every three years⁸¹ and determines the appropriate benchmark levels based on past performance.⁸²

Another flexible feature of the proposed housing goals is how they count mortgages that qualify for both the LICT subgoal and the MCT subgoal. Under the proposed rule, “a loan could not be counted under both of the new subgoals.”⁸³ A loan that qualifies for both subgoals would be counted toward the MCT subgoal.⁸⁴ As a result, the MCT subgoal might be met more quickly than the LICT subgoal, as mortgages that qualify for both are counted toward the MCT, but not the LICT, subgoal, until the MCT subgoal is met. The FHFA did not select the alternative in which a loan that qualifies for both subgoals is counted toward the LICT subgoal, which might leave the Enterprises actively pursuing mortgages that qualify for the MCT subgoal alone in order to meet the benchmark.⁸⁵

⁷⁸ See *Midwest Fence Corp.*, 840 F.3d at 954 (requirement that contractors who fail to meet disadvantaged business enterprise subcontracting goal apply for waiver did not effect a quota); *W. States Paving Co.*, 407 F.3d at 944 (“flexible system of contracting goals that contrast[ed] sharply with . . . rigid quotas” was narrowly tailored); *DynaLantic Corp.*, 885 F. Supp. 2d at 185 (narrowly-tailored program for small businesses owned by socially and economically disadvantaged individuals “provide[d] for aspirational goals and impose[d] no penalties for failing to meet them”); see also *Raso v. Lago*, 135 F.3d 11, 14, 17 (1st Cir. 1998) (differentiating between “HUD’s consent-decree goal of a tenancy reflecting the makeup of the City of Boston” and racial quota).

⁷⁹ Proposed Rule, *supra* n. 1, at 47,400. “If FHFA determines that a housing goal was not feasible for an Enterprise to achieve, then the statute and regulation provide for no further enforcement of that housing goal for that year.” *Id.*

⁸⁰ See 12 U.S.C. §§ 4566, 4581, 4585.

⁸¹ See *DynaLantic Corp.*, 885 F. Supp. 2d at 287 (program for small businesses owned by socially and economically disadvantaged individuals was of limited duration where it, *inter alia*, limited participation to a maximum nine years).

⁸² See *Midwest Fence Corp.*, 840 F.3d at 943 (“As for duration, Congress has repeatedly reauthorized the [disadvantaged business enterprise] program after taking new looks at the need for it.”).

⁸³ Proposed Rule, *supra* n.1, at 47,408.

⁸⁴ See *id.*

⁸⁵ See *Midwest Fence Corp.*, 840 F.3d at 942 (Federal disadvantaged business enterprise program was narrowly tailored where it, *inter alia*, “require[d] states to meet as much as possible of their overall DBE participation goals

Third, the proposed MCT benchmark of 10% of single-family mortgage purchases is modest and justified by the need for affordable housing in those census tracts. As discussed in Part II above, research shows that Black Americans face continued discrimination in the housing market. They are denied conventional mortgages at disproportionate rates, are targets of predatory loan peddlers, and are more likely to be given mortgages with higher interest rates than white households with a similar financial background.⁸⁶

Even though over one-third of the single-family mortgages acquired by the Enterprises in 2019 were located in MCTs,⁸⁷ fewer than 10% of those mortgages originated for borrowers with incomes at or below 100% of the area median income in recent years.⁸⁸ In 2019, only 4.8% of Fannie Mae’s single-family mortgage purchases, and 3.6% of Freddie Mac’s purchases, originated for Black borrowers,⁸⁹ despite the fact that Black Americans comprised 13.4% of the population.⁹⁰ The percentage of the Enterprises’ single-family mortgage purchases originated for people who are Hispanic, Native American, and Native Hawaiian or other Pacific Islander are also lower than those groups’ representation in the general population.⁹¹ Additionally, 20% of Black millennials,⁹² including over 1.7 million people living in the 31 largest metropolitan areas, are “mortgage-ready.”⁹³ 28% of Hispanic millennials are mortgage-ready.⁹⁴ The data suggest a strong need to encourage the Enterprises to purchase mortgages originated for low- and moderate-income borrowers in MCTs. The 10% MCT benchmark is a modest and incremental, but necessary, step toward attaining the subgoal’s purposes.⁹⁵

Fourth, the proposed MCT subgoal will likely have a negligible impact, if at all, on non-minority borrowers. As discussed in Part I above, mortgages that qualify for the subgoal need not be for borrowers of color; any home-purchase mortgage in a MCT originated for a borrower with an income at or below 100% of the area median income counts toward the subgoal, regardless of the race or ethnicity of the borrower.⁹⁶ Nor is there any requirement that the borrower’s home purchase not displace a pre-existing member of the community.

To the extent the MCT subgoal reduces the incentive for lenders to issue mortgages to white borrowers, it will be due to those borrowers’ high incomes, and not their race. Even if the MCT subgoal were to burden lenders or non-minority borrowers to some degree—which it almost

through race- and gender-neutral means.”); *W. States Paving Co.*, 407 F.3d at 993 (Federal disadvantaged business enterprise program “place[d] a preference on the use of race-neutral means . . . to achieve” goal).

⁸⁶ *Building Black Homeownership Bridges*, *supra* n.3, at 7.

⁸⁷ FHFA, *Annual Housing Report: January 1, 2019–December 31, 2019*, at 13, Table 8 (Oct. 30, 2020), <https://bit.ly/3B0uOGO> [hereinafter *FHFA Annual Housing Report*].

⁸⁸ See Proposed Rule, *supra* n.1, at 47,409.

⁸⁹ *Annual Housing Report supra* n.87, at 11.

⁹⁰ *Population estimates, July 1, 2019*, U.S. Census Bureau, <https://bit.ly/3vBJ6vU> (accessed Oct. 22, 2021).

⁹¹ See *id.*; *Annual Housing Report, supra* n.87, at 11.

⁹² Laurie Goodman & Sarah Stochak, *More than 19 million millennials in 31 US cities are ready to become homeowners*, Urban Institute (Sept. 26, 2018), <https://urban.is/3b2fBu4> [hereinafter *More than 19 million millennials*].

⁹³ *Building Black Homeownership Bridges, supra* n.3, at 8.

⁹⁴ *More than 19 million millennials, supra* n.92.

⁹⁵ See *Stuart*, 951 F.2d at 454 (promotional goals which were “linked to the size of the relevant qualified labor pool,” and in fact “[e]ll short of the projected number of black officers eligible for promotion,” were narrowly tailored).

⁹⁶ See *Midwest Fence Corp.*, 840 F.3d at 942 (disadvantaged business enterprise program was narrowly tailored in part because it “require[d] states to meet as much as possible of their overall DBE participation goals through race- and gender-neutral means”).

certainly would not—any such burden would be minimal and would not render the subgoal unconstitutional.⁹⁷ Nor is the proposed MCT subgoal “underinclusive” or “overinclusive” in reach.⁹⁸ There is a gap in homeownership rate between whites and Black Americans, Hispanic Americans, and Asian Americans, and it is a gap that evidence shows is attributable in significant measure to discrimination. Those communities face gentrification and displacement as well.⁹⁹

Accordingly, we encourage FHFA to adopt the proposed MCT subgoal; consider whether the data support a MCT benchmark of higher than 10%; and consider whether to address the evidence FHFA considered as showing a need for the MCT subgoal and to include an analysis of the proposed Enterprise housing goals’ constitutionality in the final rule. If you have any questions or would like to discuss the information in this comment, please contact Rachel L. Fried, at (202) 448-9090 Ext. 1011, or rfried@democracyforward.org.

Respectfully submitted,

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⁹⁷ See *W. States Paving Co.*, 407 F.3d at 995 (Disadvantaged business enterprise program was narrowly tailored despite “very real burden on non-DBE firms”).

⁹⁸ See *Croson*, 488 U.S. at 506 (including governmental policy’s level of inclusiveness in narrow tailoring analysis); see also *Adarand Constructors, Inc.*, 228 F.3d at 1176 n.18 (rejecting “contention that Congress must make specific findings regarding discrimination against every single sub-category of individuals within the broad racial and ethnic categories designated by statute and addressed by the relevant legislative findings”).

⁹⁹ See, e.g., *Closing the Gaps*, *supra* n.13, at 4; Laura Romero, *Gentrification, rising rent prices push Latinos out of neighborhoods*, Latino Reporter (Sept. 6, 2019), <https://bit.ly/2ZfFvbs>; Alana Semuels, *The End of the American Chinatown*, The Atlantic (Feb. 4, 2019), <https://bit.ly/3nkwy9>.