No. 13-1371

In the Supreme Court of the United States

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, ET AL., PETITIONERS

v.

THE INCLUSIVE COMMUNITIES PROJECT, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether disparate-impact claims are cognizable under the Fair Housing Act, 42 U.S.C. 3601 *et seq.*

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INTEREST OF THE UNITED STATES

This case presents the important question whether the Fair Housing Act (FHA or Act), 42 U.S.C. 3601 *et seq*., includes a disparate-impact cause of action. The Act gives the Secretary of the Department of Housing and Urban Development (HUD) "authority and responsibility for administering [the FHA]," including the authority to promulgate regulations interpreting the Act and to enforce the Act through administrative proceedings. 42 U.S.C. 3608(a), 3612, and 3614a. In exercising that authority, HUD has consistently interpreted the Act to permit disparate-impact claims. See, *e.g.*, 78 Fed. Reg. 11,460-11,482 (Feb. 15, 2013). The Department of Justice also has authority to en-

force the FHA, see 42 U.S.C. 3612(*o*) and 3614(a)-(d), and has for decades brought disparate-impact claims in its enforcement actions.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the FHA and select other statutory provisions are set forth in an appendix to this brief. App., *infra*.

STATEMENT

This case presents the question whether HUD permissibly concluded in a regulation following notice-and-comment rulemaking that the Fair Housing Act, as amended by Congress in 1988, encompasses disparate-impact claims.[1] Petitioners are a government agency and several government officials. Petitioners were found liable under the Act on a disparate-impact theory and now contend that the Act unambiguously forecloses such claims. In the decision below, the Fifth Circuit, consistent with every court of appeals to consider the issue both before and after the 1988 Amendments, rejected petitioners' contention.

A. The Legal Background

1. Enacted in 1968, the FHA aims "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. As originally enacted, Section 804(a) of the FHA made it unlawful

[1] In its regulation, HUD uses the term "discriminatory effect[s]" to describe discrimination claims that do not require proof of intent. 24 C.F.R. 100.500(a). Because the question presented refers to such claims as "disparate-impact claims," we use that phrase here without suggesting any difference in meaning from the regulatory phrase "discriminatory effect[s]."

> [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

Civil Rights Act of 1968, Pub. L. No. 90-284, § 804, 82 Stat. 83 (1968). And Section 805 made it unlawful, *inter alia*,

> to discriminate * * * in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, or national origin of such person.

Id. § 805, 82 Stat. 83.

In the two decades following the FHA's enactment, all nine courts of appeals to consider the issue concluded that the Act authorized disparate-impact claims. See, *e.g.*, *Huntington Branch, NAACP* v. *Town of Huntington*, 844 F.2d 926, 935-936 (2d Cir.), aff'd in part, 488 U.S. 15 (1988); *Resident Advisory Bd.* v. *Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978); *Smith* v. *Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Hanson* v. *Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur* v. *City of Toledo*, 782 F.2d 565, 574-575 (6th Cir. 1986); *Metropolitan Hous. Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978); *United States* v. *City of Black Jack*, 508 F.2d 1179, 1184-1185 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975); *Halet* v. *Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *United States* v. *Marengo Cnty. Comm'n*, 731

F.2d 1546, 1559 n.20 (11th Cir.), cert. denied, 469 U.S. 976 (1984).

2. In 1988, against this backdrop of unanimous judicial construction, Congress amended the Act. As relevant here, Congress amended both Sections 804 and 805, but left in place the operative language that the courts had construed to authorize disparate-impact liability. See Fair Housing Amendments Act of 1988 (1988 Amendments), Pub. L. No. 100-430, 102 Stat. 1619. With respect to Section 804(a), Congress added "familial status" to the list of prohibited characteristics, but otherwise left Section 804(a) unchanged. With respect to Section 805, the 1988 modification was more substantial. As amended, Section 805(a) makes it unlawful

> for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

42 U.S.C. 3605(a). The amended provision thus retained the core prohibition from the 1968 enactment making it unlawful to "discriminate * * * because of race."

In addition to retaining language that courts had interpreted to encompass disparate-impact claims, Congress added three exemptions from liability that presuppose the availability of such claims.

First, Section 805 itself includes a targeted exemption specifying that "[n]othing in [the Act] prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors

other than race, color, religion, national origin, sex, handicap, or familial status." 42 U.S.C. 3605(c).

Second, Congress specified that "[n]othing in [the FHA] prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance." 42 U.S.C. 3607(b)(4).

Finally, Congress specified that "[n]othing in [the FHA] limits the applicability of any reasonable * * * restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. 3607(b)(1).

3. After the 1988 Amendments, two additional courts of appeals concluded that the FHA encompasses disparate-impact claims, *Langlois* v. *Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Mountain Side Mobile Estates P'ship* v. *HUD*, 56 F.3d 1243, 1251 (10th Cir. 1995), bringing the total to eleven nationwide. No court of appeals has held otherwise.[2]

4. In 2013, following notice-and-comment rulemaking, HUD issued a regulation reaffirming that the FHA, including Sections 804(a) and 805(a), authorizes disparate-impact claims. 78 Fed. Reg. at 11,481-11,482. The regulation provides: "Liability may be established under the Fair Housing Act based on a practice's discriminatory effect * * * even if the practice was not motivated by a discriminatory in-

[2] The D.C. Circuit has yet to decide the issue. See *Greater New Orleans Fair Hous. Action Ctr.* v. *HUD*, 639 F.3d 1078, 1085 (D.C. Cir. 2011); but cf. *American Ins. Ass'n* v. *HUD*, No. 1:13-cv-00966 (D.D.C. Nov. 3, 2014) (holding HUD exceeded its authority in promulgating the disparate-impact rule), appeal pending, 12/18/14 Notice of Appeal.

tent." 78 Fed. Reg. at 11,482; 24 C.F.R. 100.500. The regulation further states:

> A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.

24 C.F.R. 100.500(a).

B. The Present Controversy

1. Respondent is a non-profit agency that seeks to promote racial and socioeconomic integration in the Dallas, Texas metropolitan area.[3] Pet. App. 147a. Respondent seeks to assist its clients, most of whom are low-income, African-American families, in finding affordable housing in Dallas's predominantly white suburbs. Respondent challenges petitioners' allocation in the Dallas area of Low Income Housing Tax Credits (LIHTCs) available pursuant to 26 U.S.C. 42. Pet. App. 146a. Respondent's clients receive rental subsidies under the Dallas Housing Authority's Housing Choice Voucher program, but may benefit from the subsidies only by finding a landlord willing to accept a voucher. *Id.* at 3a, 147a. Because federal law requires landlords who accept LIHTCs to accept Housing Choice Vouchers, petitioners' distribution of LIHTCs affects where respondent can place its clients. *Id.* 3a-4a.

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[3] Throughout this brief, "respondent" refers to plaintiff The Inclusive Communities Project, Inc. Intervenor Frazier Revitalization, Inc. is also a respondent, participating in this Court in support of petitioners.

LIHTCs are provided to developers by the federal government and distributed through state agencies. 26 U.S.C. 42; Pet. App. 4a. Petitioners allocate two types of LIHTCs, 4% and 9% credits. *Id.* at 148a. The 9% credits are distributed annually, usually on a competitive basis. The criteria for distributing those credits are established in part by federal law, which requires a State to adopt a Qualified Allocation Plan (QAP) and dictates some of the selection criteria in the plan. *Id.* at 149a-150a; 26 U.S.C. 42(m)(1)(A)-(B). Texas has legislatively established additional selection criteria. See Tex. Gov't Code Ann. § 2306.6701 *et seq*. Under Texas's QAP, applicants that meet threshold criteria are scored and ranked by a point system that prioritizes ten state statutory criteria. Pet. App. 150a-152a; Tex. Gov't Code Ann. § 2306.6710(b)(1)(A)-(K) (West. Supp. 2014). As Texas interprets the scheme, petitioners have discretion to consider additional scoring criteria, but may not give those criteria greater weight in its scoring process than the federal and state statutory criteria. Petitioners may also take into account discretionary factors outside the scoring process. Op. Tex. Att'y Gen., No. GA-0208 (2004); Pet. App. 152a. The 4% tax credits are distributed on a rolling basis without competition. Pet. App. 152a. Applicants for the 4% credits need not be scored under the QAP. *Id.* at 153a.

2. In 2008, respondent sued petitioners, alleging, *inter alia*, that they violated Sections 804(a) and 805(a) of the FHA in their allocation of LIHTCs in the Dallas area. As relevant here, after a bench trial, the district court granted judgment to respondent, concluding that petitioners violated the FHA's prohibi-

tion on disparate-impact discrimination on the basis of race. Pet. App. 9a-11a, 158a-185a.

The district court incorporated its partial summary judgment ruling that respondent established a prima facie case of disparate-impact discrimination based primarily on statistical evidence that petitioners "disproportionately approve[] applications for non-elderly LIHTC units in minority neighborhoods, leading to a concentration of such units in these areas." *Id.* at 9a, 165a-166a. At trial, the district court assumed that petitioners' asserted interest in awarding tax credits in an objective, transparent, predictable, and race-neutral manner is a legitimate government interest. *Id.* at 168a-172a, 174a. The court allocated to petitioners the burden of establishing that no less discriminatory alternatives exist for advancing their proffered interests and concluded that petitioners failed to satisfy their burden. *Id.* at 166a-167a, 174a-185a. The court concluded that petitioners failed to show that they could not use their limited discretion to address the discriminatory impact of their selection process by, for example, altering the non-statutory criteria they used and awarding more points for projects sited in low-poverty areas. *Id.* at 175a, 178a, 180a. After soliciting the parties' views on the appropriate remedy, the court issued a remedial order requiring changes in the QAP. *Id.* at 11a.

3. The court of appeals reversed the district court's disparate-impact ruling and remanded for further consideration in light of HUD's disparate-impact regulation, which was promulgated after the district court's ruling. Pet. App. 1a-21a. The court noted that HUD's regulation allocates to the plaintiff (here, respondent) the burden of proving the existence

of less discriminatory alternatives. *Id.* at 3a, 14a-16a; 24 C.F.R. 100.500. At petitioners' urging, the court embraced the regulation's allocation of burdens and remanded the case for application of the regulation to "the complex record and fact-intensive nature of this case." Pet. App. 3a, 17a. Judge Jones filed a special concurrence. *Id.* at 18a-21a. In her view, respondent failed to isolate the policy it contends is causing the disparate impact. *Id.* at 19a-20a.

SUMMARY OF ARGUMENT

The Department of Housing and Urban Development—the agency charged with administering the Fair Housing Act—has authoritatively construed Sections 804(a) and 805(a) of the Act, as amended in 1988, to encompass disparate-impact liability. That construction is the best (and certainly a permissible) reading of the statutory text, and it comports with the uniform judicial construction of the Act over four decades. The agency's construction is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

A. The authoritative interpretation of the agency charged with administering the statute should resolve the question presented. The FHA grants HUD broad authority to administer the statute. HUD has promulgated a regulation recognizing that Sections 804(a) and 805(a) encompass disparate-impact claims. And in formal adjudications of FHA complaints, HUD has consistently recognized that disparate-impact claims are cognizable under the statute. Such authoritative agency interpretations command the full measure of *Chevron* deference.

B. HUD's construction of Sections 804(a) and 805(a) follows directly from the statute's text, structure, and history.

Section 804(a) makes it unlawful to "refuse to sell or rent" or "otherwise make unavailable or deny" housing to a person "because of" a protected characteristic, including race. 42 U.S.C. 3604(a). That language supports liability based on the disparate impacts caused by a challenged action because it focuses on the consequences of the action—the unavailability or denial of a dwelling—rather than the motivation of the actor. This Court, for the same reason, has held that Section 703(a)(2), 42 U.S.C. 2000e-2(a)(2), of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, and Section 4(a)(2), 29 U.S.C. 623(a)(2), of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, encompass disparate-impact claims.

Section 805(a)'s prohibition on discrimination on specified bases is also broad enough to encompass disparate-impact claims. This Court has repeatedly noted that the words "discriminate" and "discrimination" are ambiguous, susceptible to interpretation, and must be construed in context. The Court has also construed statutory prohibitions on discrimination to include disparate-impact discrimination. The same interpretation is appropriate here.

The 1988 Amendments confirm the reasonableness of HUD's construction. When Congress comprehensively amended the FHA, it was aware of the uniform body of court of appeals precedent supporting disparate-impact claims, but it did not amend the statute to limit such claims. To the contrary, while amending both Section 804(a) and Section 805,

Congress retained the language nine courts of appeals had construed to encompass disparate-impact claims and rejected efforts to amend the statute to require proof of discriminatory intent in a category of cases.

Congress also added three particularized exemptions that presuppose the existence of disparate-impact liability under Sections 804(a) and 805(a). Those exemptions insulate actions that deny housing based on an appraiser's taking into consideration factors other than protected characteristics; a person's conviction for certain drug offenses; or a reasonable governmental rule limiting the number of occupants. Each statutory exemption is grounded in concerns that, in the absence of the exemption, the statute would bar actions within the exemption's scope under a disparate-impact analysis. Without the exemptions, for instance, a claim could be made that a policy denying housing to persons with drug-manufacturing convictions has a disparate impact based on a protected characteristic. Petitioners' principal submission that those provisions are largely superfluous does violence to basic rules of statutory construction and certainly cannot render unreasonable HUD's effort to give effect to all the provisions Congress enacted.

C. Petitioners' remaining textual arguments are unpersuasive. First, petitioners are wrong that Congress's inclusion of the phrase "because of" forecloses disparate-impact liability. The same phrase appears in both Title VII and the ADEA, and this Court has held that each of those statutes should be read to include disparate-impact claims. Second, petitioners err in suggesting that the text requires HUD to conclude that a mere showing of a dispro-

portionate effect proves disparate-impact discrimination. This Court has repeatedly made clear that a prohibition on disparate-impact discrimination bars only *unjustified* disproportionate adverse effects—a rule that is perfectly reflected in HUD's interpretation of the FHA.

D. Finally, petitioners' constitutional-avoidance arguments lack merit. A state or local government does not violate the Equal Protection Clause merely by considering whether a proposed action will have a disparate impact on the basis of race.

ARGUMENT

DISPARATE-IMPACT CLAIMS ARE COGNIZABLE UNDER SECTIONS 804(a) AND 805(a) OF THE FHA

The federal agency with authority to administer the FHA has long interpreted Sections 804(a) and 805(a), 42 U.S.C. 3604(a) and 3605(a), to authorize disparate-impact claims and has embodied that interpretation in a regulation promulgated following notice-and-comment rulemaking. Petitioners thus must convince this Court that the FHA *unambiguously* forecloses disparate-impact claims. That they cannot do. The broad statutory language easily encompasses disparate-impact claims, as this Court's decisions make clear. The agency's construction accords with the uniform decisions of the courts of appeals, both before and after the 1988 Amendments to the Act. And HUD's interpretation is the only one that gives meaning and effect to the three statutory exemptions Congress added in 1988, which presuppose the existence of disparate-impact claims. Because HUD's interpretation of the FHA is reasonable, it is also dispositive. See *Meyer* v. *Holley*, 537 U.S. 280, 287-288 (2003).

A. HUD Has Authoritatively Interpreted Sections 804(a) And 805(a) Of The FHA To Encompass Disparate-Impact Liability

The FHA aims "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601; *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 380 (1982) (recognizing Congress's "broad remedial intent" in passing the Act). To that end, Section 804(a) of the FHA, as amended, makes it unlawful

> [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. 3604(a). Section 805(a) of the Act, as amended, makes it unlawful

> for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

42 U.S.C. 3605(a).

Congress vested HUD with broad authority to implement and construe the FHA. 42 U.S.C. 3614a ("The Secretary may make rules * * * to carry out this subchapter."); 42 U.S.C. 3608(a) (vesting "authority and responsibility for administering this Act" in the Secretary of HUD); see also 42 U.S.C. 3535(d) (general rulemaking authority); 42 U.S.C. 3612(g) and (h) (adjudicative authority). Exercising

that authority, HUD has long interpreted Sections 804(a) and 805(a) to support a disparate-impact theory of discrimination.

1. HUD recently issued a regulation reaffirming that the FHA, including Sections 804(a) and 805(a), authorizes disparate-impact claims. 78 Fed. Reg. at 11,481-11,482. The rule provides: "Liability may be established under the Fair Housing Act based on a practice's discriminatory effect * * * even if the practice was not motivated by a discriminatory intent." *Id.* at 11,482; 24 C.F.R. 100.500; see also 24 C.F.R. 100.500(a) (defining "discriminatory effect").

The rule's preamble articulates the principal bases for HUD's longstanding view that the FHA encompasses disparate-impact claims. The text of Section 804(a)—"otherwise make unavailable or deny [a dwelling]"—focuses on the *effect* of a challenged action, not the relevant actor's motivation, reflecting congressional intent that liability flow from disparate impact and not be limited to disparate treatment. 78 Fed. Reg. at 11,466; see pp. 17-21, *infra*. In addition, HUD explained, "[d]iscriminate" as used in Section 805(a) "is a term that may encompass actions that have a discriminatory effect but not a discriminatory intent." 78 Fed. Reg. at 11,466; see pp. 21-22, *infra*.

HUD further explained that the FHA's use of the phrase "because of" does not preclude disparate-impact claims because other statutes such as Title VII and the ADEA include similar language and have been construed by this Court to encompass disparate-impact claims. 78 Fed. Reg. at 11,466; see *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971); *Smith* v. *City of Jackson*, 544 U.S. 228, 240 (2005).

HUD also relied on three statutory exemptions that "presuppose that the Act encompasses an effects theory of liability" and that "would be wholly unnecessary if the Act prohibited only intentional discrimination." 78 Fed. Reg. at 11,466; see pp. 24-28, *infra*. HUD noted that uniform judicial precedent both before and after Congress amended the FHA in 1988 provides further support for its reading of the text. See 78 Fed. Reg. at 11,467. And HUD drew on its "extensive experience" with the FHA to "inform[] its conclusion" that disparate-impact liability was necessary to remain consistent with the Act's broad purpose, *id.* at 11,466, noting the sponsor's intent to address "[o]ld habits" and "frozen rules," including "the 'refusal by suburbs and other communities to accept low-income housing,'" *id.* at 11,467 (brackets in original).

HUD's regulation, promulgated after notice-and-comment rulemaking pursuant to express statutory authority, is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984).

2. HUD's regulation reaffirmed the agency's longstanding interpretation of the FHA—an interpretation itself entitled to deference. See 42 U.S.C. 3610 and 3612. Through formal adjudications subject to review by the Secretary, see 42 U.S.C. 3612(g) and (h); 24 C.F.R. 180.675, HUD has interpreted the FHA to encompass disparate-impact claims in every adjudication to address the issue.[4] In addition, in a formal

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[4] See, *e.g.*, *HUD* v. *Twinbrook Vill. Apartments*, No. 02-00-0256-8, 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001); *HUD* v. *Pfaff*, No. 10-93-0084-8, 1994 WL 592199, at *7-9 (HUD ALJ Oct. 27, 1994), rev'd on other grounds, 88 F.3d 739 (9th Cir. 1996); *HUD*

adjudication raising the question whether the FHA supports a disparate-impact claim, the Secretary concluded that liability could be premised on a disparate-impact showing. *HUD* v. *Mountain Side Mobile Estates P'ship*, No. 08-92-0010-1, 1993 WL 307069, at *5 (July 19, 1993), aff'd in relevant part, 56 F.3d 1243 (10th Cir. 1995).[5]

When, as here, Congress expressly affords an agency authority to issue formal adjudications carrying the force of law, see 42 U.S.C. 3612, the agency's reasonable interpretation of the statute in such adjudications is entitled to the full measure of *Chevron* deference. See *United States* v. *Mead Corp.*, 533 U.S.

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v. *Carter*, No. 03-90-0058-1, 1992 WL 406520, at *5 (HUD ALJ May 1, 1992).

[5] The Department of Justice, which also enforces the FHA, has filed numerous briefs explaining that the FHA supports disparate-impact liability. See, *e.g.*, U.S. Amicus Br., *Mt. Holly Gardens Citizens in Action, Inc.* v. *Township of Mt. Holly*, 658 F.3d 375 (3d Cir. 2011) (No. 11-1159), cert. dismissed, 134 S. Ct. 636 (2013); U.S. Amicus Br., *Veles* v. *Lindow*, 243 F.3d 552 (Tbl.) (9th Cir. 2000) (No. 99-15795); U.S. Br., *United States* v. *Glisan*, Nos. 81-1746 and 81-2205, at 15-20 (10th Cir. 1981). In 1988, the government filed an amicus brief in this Court arguing that the FHA proscribes only intentional discrimination. See U.S. Amicus Br., *Town of Huntington* v. *Huntington Branch, NAACP*, 488 U.S. 15 (1988) (No. 87-1961). But that brief pre-dated the enactment of the 1988 Amendments giving HUD its full authority to administer and enforce the Act, and thus before the agency's formal adjudications and other administrative pronouncements endorsing a disparate-impact theory of discrimination. The brief also predated the enactment of the statutory exemptions that presuppose the viability of disparate-impact claims. Since those amendments, the United States has repeatedly filed briefs espousing the position reflected in HUD's regulation.

218, 230 & n.12 (2001); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999).

B. The FHA's Text, Structure, History, And Purpose Support HUD's Recognition Of Disparate-Impact Claims

Because Congress charged HUD with administering the FHA, HUD's interpretation of the statutory language controls unless it is "arbitrary or capricious in substance, or manifestly contrary to the statute." *Mead*, 533 U.S. at 227. HUD's interpretation is neither; its interpretation thus commands deference. See *Smith*, 544 U.S. at 243 (Scalia, J., concurring in part and in the judgment) (agency's exercise of rulemaking authority in ADEA presented "an absolutely classic case for deference to agency interpretation"); *Meacham* v. *Knolls Atomic Power Lab.*, 554 U.S. 84, 103-104 (2008) (Scalia, J., concurring in the judgment) (deferring to EEOC's reasonable construction of ADEA); *General Dynamics Land Sys.* v. *Cline*, 540 U.S. 581, 601-602 (2004) (Scalia, J., dissenting) (same).

1. The text of Sections 804(a) and 805(a) encompasses disparate-impact claims

Petitioners contend that the text of Sections 804(a) and 805(a) unambiguously forecloses HUD's reading of the Act. The consistency of HUD's reading with the interpretation eleven courts of appeals have given to the FHA, see pp. 3, 5, *supra*, is sufficient to refute petitioners' contention. See *Smiley* v. *Citibank*, 517 U.S. 735, 739 (1996) (finding ambiguity in part from the conflict among lower court opinions). In all events, HUD correctly concluded that the FHA's language does not unambiguously foreclose disparate-impact liability.

a. Section 804(a)

Section 804(a) makes it unlawful, *inter alia*, "[t]o refuse to sell or rent * * * or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. 3604(a). By banning actions that "make unavailable or deny" housing, Section 804(a) focuses on the result of challenged actions—the unavailability or denial of a dwelling—rather than exclusively on the actor's intent. Such a prohibition on specified outcomes that adversely affect an identifiable group is most naturally read to support a disparate-impact claim.

The plain meaning of the phrase "make unavailable" includes actions that have the result of making housing or transactions unavailable, regardless of whether the actions were intended to have that result. This Court explained long ago that "[t]he word 'make' has many meanings, among them 'To cause to exist, appear or occur.'" *United States* v. *Giles*, 300 U.S. 41, 48 (1937) (quoting *Webster's New International Dictionary* (2d ed. 1934)); see *Webster's Third New International Dictionary* 1364 (1966) ("make" "can comprise any such action" that "cause[s] something to come into being," "whether by an intelligent or blind agency"); *Black's Law Dictionary* 1107 (rev. 4th ed. 1968) ("[t]o cause to exist"). One may cause a result to "exist, appear or occur," *Giles*, 300 U.S. at 48, without specifically intending to do so. For example, a landlord may make his housing unavailable to families with children by limiting occupancy to one person per bedroom. Intent is not a prerequisite to making housing unavailable.

This Court has drawn precisely that conclusion when construing other anti-discrimination statutes that similarly place principal focus on the discriminatory consequences of the challenged actions rather than on the actor's motive. In particular, both Section 703(a)(2) of Title VII, 42 U.S.C. 2000e-2(a)(2), and Section 4(a)(2) of the ADEA, 29 U.S.C. 623(a)(2), make it unlawful for an employer "to limit, segregate, or classify his employees" "in any way" that would "deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of" a specified characteristic (race, color, religion, sex, or national origin for Title VII; age for the ADEA).

In *Griggs*, 401 U.S. at 431, this Court held that Section 703(a)(2) of Title VII prohibits employers from taking unjustified actions that have the effect of discriminating on the basis of race, regardless of whether the actions are motivated by discriminatory intent. The Court explained that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432. See *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 990-991 (1988) (noting that, if employer's practice "has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply"); see also *Smith*, 544 U.S. at 235 (plurality) (noting Court's recognition that its "holding [in *Griggs*] represented the better reading of the statutory text").

The same is true of the parallel terms in Section 4(a)(2) of the ADEA, which this Court, in *Smith*, *supra*, likewise held encompass disparate-impact claims.

The Court explained that, in prohibiting actions that "deprive any individual of employment opportunities or *otherwise adversely affect* his [employment] status * * * because of" his age, 29 U.S.C. 623(a)(2), "the text" of the statute—like Section 703(a)(2) of Title VII—"focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer." *Smith*, 544 U.S. at 235-236 (plurality); see *id.* at 243 (Scalia, J., concurring in part and in the judgment) ("agree[ing] with all of the Court's reasoning"). That focus "strongly suggests that a disparate-impact theory should be cognizable." *Id.* at 236 (plurality).

The textual similarities between Section 804(a) and the disparate-impact provisions in Title VII and the ADEA fully justify HUD's interpretation that Section 804(a) authorizes disparate-impact claims. Title VII and the ADEA both prohibit actions that "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect" his "status as an employee, because of," *inter alia*, race or age. 42 U.S.C. 2000e-2(a)(2); 29 U.S.C. 623(a)(2). The FHA analogously prohibits taking actions that constitute a "refus[al] to sell or rent" or that "otherwise make unavailable or deny" housing to an individual "because of," *inter alia*, race. 42 U.S.C. 3604(a). Actions that "otherwise make unavailable or deny[] a dwelling to any person"—like actions that "deprive any individual of employment opportunities or otherwise adversely affect his status as an employee"—"focus[] on the *effects* of the [challenged] action * * * rather than the motivation for the action." *Smith*, 544 U.S. at 235-236 (plurality). This focus on effects rather than mo-

tivations is the essence of a disparate-impact prohibition.

Like Title VII and the ADEA, moreover, Section 804(a) enumerates a handful of specific prohibited actions and includes a nonspecific catch-all phrase that focuses on the prohibited effects of the specified actions, regardless of the motivation behind them. See *Smith*, 544 U.S. at 235 (plurality). Given those similarities, Section 804(a) of the FHA is best read to include a prohibition on actions having the effect of disproportionately denying housing based on a protected characteristic, without regard to the actor's motivation. At the very least, it was permissible for HUD to read Section 804(a) in that manner.

b. Section 805(a)

The same is true for Section 805(a). That provision bars acts that "discriminate" in the availability of real-estate-related transactions "because of," *inter alia*, race. 42 U.S.C. 3605(a). Although the textual construction "discriminate * * * because of" need not always encompass disparate-impact claims, it is broad enough to do so. See *CSX Transp., Inc.* v. *Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1115 (2011) (Thomas, J., dissenting) ("'Discriminate[],' standing alone, is a flexible word."); *Guardians* v. *Civil Serv. Com'n*, 463 U.S. 582, 592 (1983) (White, J., announcing judgment of the Court) (noting that the word "discrimination" is "inherently" "ambiguous"); *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 284 (1978) (opinion of Powell, J.) ("The concept of 'discrimination' * * * is susceptible of varying interpretations."). Given the broad range of meanings "discriminate" can reasonably have, the use of the phrase "discriminate * * *

because of race" does not unambiguously foreclose disparate-impact claims.

This Court has previously recognized that a statutory prohibition on "discrimination" can encompass a disparate-impact prohibition. In *Board of Education* v. *Harris*, 444 U.S. 130 (1979), this Court concluded that the term "discrimination," as used in Section 706(d)(1)(B) of the Emergency School Aid Act, Pub. L. No. 92-318, Title VII, 86 Stat. 356 (1972), was "ambiguous" as to whether it required proof of intentional discrimination. *Harris*, 444 U.S. at 140; see *id.* at 138 (statute provided that a local educational agency was ineligible for certain federal funds if it "engage[d] in discrimination * * * in the hiring, promotion, or assignment of employees"). In order to discern the meaning of the term, the Court "look[ed] closely at the structure and context of the statute and * * * review[ed] its legislative history," concluding that the prohibition on "discrimination" included a prohibition on actions that had a disparate impact. *Id.* at 140-141.

The same considerations apply here. Read in context, Section 805(a)'s prohibition on discrimination can be understood as prohibiting actions that have an unjustified disparate impact on the availability of real-estate-related transactions. The provision's text is flexible enough to encompass that interpretation and other features of the Act are nonsensical without it. See pp. 24-28, *infra*. Given the ambiguity in the term "discriminate," the text of Section 805(a) does not unambiguously foreclose HUD's construction.

2. The 1988 Amendments confirm that the Act prohibits actions that cause a disparate impact on a specified basis

a. The 1988 Amendments confirm the reasonableness of HUD's construction. Between the enactment of the FHA in 1968 and its amendment in 1988, all nine courts of appeals to consider the issue concluded that the Act authorizes disparate-impact claims. See p. 3, *supra*. Against that background, Congress substantially amended the Act in 1988, adding new provisions barring discrimination based on familial status and disability and enhancing HUD's authority to interpret and implement the Act. See 1988 Amendments §§ 1-15, 102 Stat. 1619-1636. Congress knew that the FHA had uniformly been interpreted to encompass disparate-impact claims.[6] Congress nevertheless chose when amending the Act—including amendments to Sections 804(a) and 805—to leave the operative language of each section unchanged. See *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 244 n.11 (2009) ("When Congress amended [the Act] without altering the text of [the relevant provision], it implicitly adopted [this Court's] construction" of that provi-

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[6] See, *e.g.*, H.R. Rep. No. 711, 100th Cong., 2d Sess. 21 & n.52 (1988) (citing courts of appeals decisions in discussing a policy that could have a "discriminatory effect" on minority households); 134 Cong. Rec. 23,711 (1988) (statement of Sen. Kennedy) (noting unanimity of courts of appeals as to the disparate-impact test); 134 Cong. Rec. 15,662 (1988) (statements of Reps. Gonzales, Edwards, Sensenbrenner) (noting that amendments "preserved the status quo with regard to the caselaw" interpreting Section 804(a)); *Fair Housing Amendments Act of 1987: Hearings Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 100th Cong., 1st Sess. 529-557 (1987) (testimony of Prof. Robert Schwemm) (same).

sion.); cf. *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) (noting that "every court to consider the issue" had agreed on the statute's interpretation, and explaining that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"). Moreover, Congress specifically rejected an amendment that would have overturned precedent recognizing disparate-impact challenges to zoning decisions. See H.R. Rep. No. 711, 100th Cong., 2d Sess. 89-93 (1988) (dissenting views of Rep. Swindall, et al.); 78 Fed. Reg. at 11,467 (noting five other occasions on which Congress declined to impose an intent requirement).

Critically, Congress in 1988 also added three exemptions from liability that presuppose the availability of a disparate-impact claim.

First, Congress added in Section 805 a targeted exemption specifying that "[n]othing in [the Act] prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." 42 U.S.C. 3605(c). There would be no reason to enact an exemption for appraisers' actions based on factors *other than* protected characteristics unless the statute would otherwise bar such actions on a disparate-impact theory. See *Meacham*, 554 U.S. at 96 ("action based on a 'factor other than age' is the very premise for disparate-impact liability"). That amendment is particularly instructive, because it was part of a broader rewriting of Section 805. Before 1988, Section 805 contained no subsections and provided in relevant part: "It shall be unlawful" for a financial entity "to deny a loan or oth-

er financial assistance to a person * * * or to discriminate against him in * * * terms or conditions of such loan or other financial assistance, because of * * * race." Pub. L. No. 90-284, § 805, 82 Stat. 83. The 1988 Amendments retained the operative language—"discriminate * * * because of"—but added a definitional subsection and the appraiser exemption. Given Congress's awareness of the uniform judicial interpretation of the FHA, Congress's retention of the operative anti-discrimination language and its addition of an exemption from liability that applies only in a disparate-impact case can only be understood as a congressional endorsement of (or at least acquiescence in) that interpretation.

Second, Congress specified that "[n]othing in [the FHA] prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance." 42 U.S.C. 3607(b)(4). Because the Act contains no direct prohibition on discriminating against individuals with drug convictions, the inclusion of that exemption makes sense only if actions denying housing to individuals with such convictions would otherwise be subject to challenge on the ground that they have a disparate impact based on a protected characteristic.

Finally, Congress specified that "[n]othing in [the FHA] limits the applicability of any reasonable * * * restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. 3607(b)(1). Because the Act does not directly bar discrimination based on the number of occupants, the exemption's purpose necessarily was to preclude suits contending that otherwise reasonable occupancy

limits have a disparate impact based on a protected characteristic such as familial status or race. See *City of Edmonds* v. *Oxford House, Inc.*, 514 U.S. 725, 735 n.9 (1995). These statutory exemptions thus strongly suggest that the FHA encompasses disparate-impact claims, and they support the reasonableness of HUD's interpretation of the Act.

b. Petitioners have no satisfactory response (Br. 36-42). Petitioners suggest, for example, that the exemptions simply provide defenses to disparate-treatment claims. That is incorrect. The classic defense to a disparate-treatment claim is that the defendant undertook the challenged action for a nondiscriminatory reason. Congress had no reason to identify three particular exemptions if the FHA extends only to claims of disparate treatment.

Consider, for example, the "controlled substance" exemption Congress added in Section 3607(b)(4). A defendant's showing that she denied housing based on a prospective buyer's drug-distribution conviction would defeat disparate-treatment liability whether or not Congress had enacted the controlled substance exemption—the exemption would do no work. In contrast, liability for disparate impact may arise precisely when a nondiscriminatory basis, such as a prior drug-distribution conviction, is the basis for a decision to deny housing yet would affect a specified group disproportionately. Indeed, analogous claims had been litigated by the time Congress acted in 1988. See, *e.g.*, *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568 (1979) (asserting disparate-impact liability under Title VII based on an agency's refusal to hire methadone users). And confirming this common understanding, when Congress enacted a comparable

controlled-substance exemption in Title VII in 1991, see 42 U.S.C. 2000e-2(k)(3), it did so as part of a provision expressly addressed to "disparate impact cases," 42 U.S.C. 2000e-2(k), and specified that the exemption applies solely to disparate-impact claims, see 42 U.S.C. 2000e-2(k)(3).

Five members of this Court endorsed this very reasoning in *Smith* when considering the ADEA's "RFOA" defense, which allows an employer to escape liability if it relied on a "reasonable factor[] other than age." 544 U.S. at 238-239 (plurality); *id.* at 243 (Scalia, J., concurring in part and concurring in the judgment) (expressly agreeing with "all of the Court's reasoning); see 29 U.S.C. 623(f)(1). The RFOA defense would be "unnecessary" if the ADEA prohibited only disparate treatment because "[i]n most disparate-treatment cases, if an employer in fact acted on a factor other than age, the action would not be prohibited under [the disparate-treatment provision] in the first place." *Smith*, 544 U.S. at 238 (plurality). Because the defense "plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable,'" the availability of the defense "supports" the conclusion that the ADEA encompasses disparate-impact claims. *Id.* at 239 (plurality). The plurality explicitly rejected the dissent's efforts to characterize the ADEA's RFOA defense as merely "a 'safe harbor from liability.'" *Id.* at 238-239. Just so here.

Petitioners next contend (Br. 36) that Congress enacted the exemptions "against the backdrop of lower-court decisions" recognizing a disparate-impact cause of action in the FHA and in order to provide "safe harbors for defendants" facing disparate-impact

liability. That is exactly right, but it refutes rather than supports petitioners' argument. Congress's subsequent enactment of defenses specific to disparate-impact claims provides persuasive evidence that Congress understood the FHA to encompass disparate-impact claims in the first place. Cf. *Bilski* v. *Kappos*, 561 U.S. 593, 607 (2010) (reasoning that the existence of a statutory defense to patent infringement for certain business-method patents suggests "that there may be business method patents" in the first place); see generally *West Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 100 (1991) (noting that statutory provisions should be "construe[d] * * * to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law"); *Loving* v. *United States*, 517 U.S. 748, 770 (1996) (noting that "subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction") (brackets and citation omitted).

Petitioners then retreat (Br. 39-42) to the argument that the defenses provided by the 1988 Amendments are simply superfluous and that "surplusage and redundancies abound in federal statutes." Br. 39. But petitioners' casual discarding of the Court's usual statutory presumptions are of little help here. Although the surplusage canon may apply with reduced force in situations of "belt-and-suspenders draftsmanship" (Br. 41) or when either of two competing interpretations results in surplusage, see *Marx* v. *General Revenue Corp.*, 133 S.Ct. 1166, 1177 (2013), it would be extraordinary to ignore the canon here when the result would be to excise three carefully crafted provisions from the Code. More to the point,

when construing the Act as a whole, it is certainly reasonable for HUD to adopt a construction that gives meaning and effect to all of the provisions Congress enacted.

Finally, petitioners note (Br. 38-39) that President Reagan, when signing the 1988 Amendments, declared that the amendments did not "represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions," of a disparate-impact theory of discrimination under the FHA. *Remarks on Signing the Fair Housing Amendments Act of 1988*, 24 Weekly Comp. Pres. Doc. 1141 (Sept. 13, 1988). But this statement does not cast doubt on HUD's decision to look not to the text of the President's statement but to the text of the statute.

3. HUD's interpretation furthers the FHA's purpose

Construing Sections 804(a) and 805(a) to encompass a disparate-impact cause of action is a reasonable implementation of the FHA's broad remedial purpose. Individual motives are difficult to prove directly and Congress has frequently permitted proof of only discriminatory impact as a means of overcoming discriminatory practices—including in Title VII, enacted only four years before the FHA. This Court explained in *Griggs* that Congress's objective in enacting Title VII "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. at 429-430. "Under the Act," the Court explained, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430. In *Smith*, this Court

reaffirmed that *Griggs* relied on "the purposes of the Act, buttressed by the fact that the EEOC had endorsed the same view." 544 U.S. 235.

When enacting the FHA, Congress similarly sought to overcome entrenched barriers to equal opportunity in housing by prohibiting acts that have the effect of denying such opportunities on a specified basis. See, *e.g.*, p. 15, *supra*. Petitioners contend (Br. 45) that continuing to recognize disparate-impact claims under the FHA will inhibit state and federal efforts to assist communities petitioners suggest are "disproportionately populated by minorities." But petitioners' fear is unfounded. As reflected in HUD's regulation and this Court's disparate-impact decisions, a statute's prohibition on unjustified actions that cause a disparate impact on the basis of, *e.g.*, race does not prohibit all actions that disproportionately advantage or disadvantage a particular racial group. An action with a racial disparate impact is actionable discrimination *only* when the disparate impact cannot be justified as the least discriminatory means of achieving a legitimate, substantial, and nondiscriminatory interest. See pp. 32-34, *infra*.[7]

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[7] Intervenor-respondent Frazier Revitalization, Inc. argues (Resp. Br. 13-21) that state agencies such as petitioners have legitimate bases for allocating LIHTCs to neighborhoods that are predominantly minority. Those arguments suggest a possible defense to respondent's disparate-impact claims on the merits; they do not suggest that the FHA unambiguously forecloses all disparate-impact claims. The same is true of the arguments made by the insurance company and lending trade association amici. See Br. of Amicus Am. Ins. Ass'n et al.; Br. of Amicus Am. Fin. Servs. Ass'n et al.

C. Petitioners' Remaining Textual Arguments Are Premised On Misunderstandings About Disparate-impact Claims

Petitioners remaining arguments that the FHA forecloses disparate-impact claims are at odds with a settled body of law governing disparate-impact causes of action in other federal statutes.

1. Petitioners argue (Br. 25-33) that the FHA's requirement that the prohibited discrimination arise "because of" a protected characteristic limits the statute's reach to cases in which the protected characteristic "is a *reason* for the [challenged] action." Br. 26. That contention cannot be squared with this Court's decisions finding disparate-impact causes of action in provisions of Title VII and the ADEA that, like Sections 804(a) and 805(a) of the FHA, require that the prohibited discrimination be "because of" a specified characteristic. 29 U.S.C. 623(a)(2); 42 U.S.C. 2000e-2(a)(2). See *Meacham*, 554 U.S. at 96 (explaining that, "in the typical disparate-impact case" under the ADEA, "the employer's practice is 'without respect to age' and its adverse impact (*though 'because of age'*) is 'attributable to a nonage factor'") (emphasis added; citation omitted). Petitioners err in contending (Br. 30) that an employer who requires applicants to have a high-school diploma does not discriminate because of race even when a racial minority group will be disproportionately excluded from jobs on that basis and the employer cannot justify the requirement under the business-necessity test. The Court in *Griggs* rejected that reasoning with respect to disparate-impact claims. See 401 U.S. at 430. Although petitioners impugn the continuing vitality of *Griggs* (Br. 29-33), this Court in *Smith* both relied on *Griggs* and

employed exactly the same approach, explaining that, "[i]n disparate-impact cases" under the ADEA, the activity or criterion that allegedly adversely affects employees "because of" age "is not based on age." 544 U.S. at 239 (plurality).

Of course, not every statute that prohibits an action "because of" (or "on account of") a specified characteristic encompasses a disparate-impact cause of action. See, *e.g.*, *City of Mobile* v. *Bolden*, 446 U.S. 55, 60, 62 (1980) (cited at Br. 19). But Congress's inclusion of the phrase "because of," standing alone, cannot unambiguously prohibit a disparate-impact cause of action under the FHA when the same phrase embraces such a cause of action in Title VII and the ADEA. Petitioners' reading of the FHA is at odds with decades of uniform precedent from the courts of appeals. In light of that precedent, "it would be difficult indeed" to conclude that the text is, as petitioners suggest, "unambiguous" in foreclosing disparate-impact claims. Br. 15; *Smiley*, 517 U.S. at 739.

2. Petitioners also argue (Br. 33-35) that, even if the FHA encompasses a disparate-impact cause of action, the inclusion in HUD's regulation of a defense for actions with a "legally sufficient justification" cannot be supported by the text of the statute. Petitioners contend that, because "[t]he prohibitions in the [FHA] are absolute," a disparate-impact cause of action must prohibit all "practices that disproportionately affect racial groups." Br. 33. That argument reflects a misunderstanding of the nature of disparate-impact discrimination claims.

In order to prove a claim of disparate-impact discrimination, a plaintiff must establish that a challenged action has an *unjustified* discriminatory effect

on a particular group. Contrary to petitioners' assertion (Br. 8), merely establishing a disproportionate effect is not sufficient *under any statute* to establish disparate-impact discrimination. In holding that Title VII encompasses disparate-impact claims, the Court in *Griggs* explained that the statute "required * * * the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 401 U.S. at 431. The Court's focus on "artificial, arbitrary, and unnecessary barriers" was critical. As the Court explained, "Congress did not intend by Title VII * * * to guarantee a job to every person regardless of qualifications" and did "not command that any person be hired simply because * * * he is a member of a minority group." *Id.* at 430-431. Title VII's prohibition on actions with a discriminatory effect, the Court held, prohibits only practices that disproportionately affect a particular racial group and cannot be justified by business necessity. *Id.* at 431.

Petitioners' assertions that a plaintiff can succeed on a disparate-impact claim merely by identifying a disparate effect is incorrect for two reasons. First, as Judge Jones explained in her concurring opinion, Pet. App. 18a, a plaintiff cannot establish a prima facie case of disparate-impact discrimination without identifying the specific or aggregate practice that causes a disproportionately adverse effect on a particular group. See 24 C.F.R. 100.500(c)(1). To do that, a plaintiff must do more than simply identify a statistical disparity—the plaintiff must link that disparity to a defendant's policy, practice, or action. *Smith*, 544 U.S. at 241 ("[I]t is not enough to simply allege that

there is a disparate impact on workers, or point to a generalized policy that leads to such an impact."). Second, even when a plaintiff succeeds in establishing that a practice has a disproportionately adverse effect on a particular group, the adverse effect constitutes disparate-impact discrimination *only* if the practice cannot be justified as necessary to achieve a legitimate and substantial nondiscriminatory interest. See 24 C.F.R. 100.500(b)(1). As HUD explains in its regulation, a practice with a disparate effect "may still be lawful if supported by a legally sufficient justification." 24 C.F.R. 100.500. When a defendant can establish such a justification (and the plaintiff cannot rebut it), the disparate effect does not qualify as discrimination on the basis of, *e.g.*, race. That result follows from the essential nature of disparate-impact discrimination, as interpreted by this Court, not from a discretionary agency interpretation of the FHA's disparate-impact causes of action.[8]

D. This Court Should Not Invalidate HUD's Authoritative Interpretation Of The FHA Based On Petitioners' Constitutional Concerns

Petitioners are also incorrect (Br. 42-45) that Congress's inclusion of disparate-impact liability in the FHA raises constitutional concerns when applied to government actors. A state or local government does not violate the Equal Protection Clause merely by considering the racial effects of a proposed action and possibly altering its course if such action will

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[8] To the extent petitioners seek to challenge the specifics of the burden-shifting framework in the HUD regulation, they stray beyond the question on which this Court granted review. Compare Pet. i and 135 S. Ct. 46 (2014).

impose disparate burdens on one racial group. On the contrary, consideration of the actual consequences of government action may *assist* a government entity in acting in a racially neutral manner and providing equality of opportunity to its citizens. In an analogous context, this Court explained that Title VII's disparate-treatment prohibition "does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race." *Ricci* v. *DeStefano*, 557 U.S. 557, 585 (2009). Neither does the Equal Protection Clause prohibit a state or local government from considering the effects of a proposed action in order to ensure that it does not unnecessarily burden one racial group.

This Court has long recognized disparate-impact liability under other statutes similar to the FHA. See, *e.g.*, *Lewis* v. *City of Chicago*, 560 U.S. 205, 211-213 (2010); *Watson*, 487 U.S. at 986-987; *Griggs*, 401 U.S. at 431. And the Court has recognized that the Constitution authorizes "prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause." *Tennessee* v. *Lane*, 541 U.S. 509, 520 (2004). As Justice Kennedy explained in his concurring opinion in *Parents Involved in Community Schools* v. *Seattle School District Number 1*, 551 U.S. 701 (2007), when a government "considers the impact a given approach might have on [citizens] of different races," it does not run afoul of the Constitution—instead, it acts in service of its duty "to preserve and expand the promise of liberty and equality on which [the Nation] was founded." *Id.* at 787, 789.

Petitioners do not contend, let alone demonstrate, that the type of remedy respondent seeks here would constitute disparate treatment prohibited by the FHA or any other statute or constitutional provision. As Justice Kennedy has suggested, when government officials use "mechanisms [that] are race conscious but do not lead to different treatment based on a classification," it is unlikely those mechanisms "would demand strict scrutiny to be found permissible." *Parents Involved in Cmty. Schs.*, 551 U.S. at 789 (concurring in part and concurring in the judgment). The FHA's disparate-impact prohibition fits comfortably within the history of statutory prohibitions on disparate-impact discrimination long recognized by this Court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 2014

APPENDIX

Relevant Fair Housing Act Provisions

1. 42 U.S.C. 3604 provides in pertinent part:

Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

* * * * *

2. 42 U.S.C. 3605 provides:

Discrimination in residential real estate-related transactions

(a) In general

It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) "Residential real estate-related transaction" defined

As used in this section, the term "residential real estate-related transaction" means any of the following:

(1) The making or purchasing of loans or providing other financial assistance—

(A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or

(B) secured by residential real estate.

(2) The selling, brokering, or appraising of residential real property.

(c) Appraisal exemption

Nothing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.

3. From 1968 to 1988, 42 U.S.C. 3605 provided:

Discrimination in financing of housing

After December 31, 1968, it shall be unlawful for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of

such loan or other financial assistance, because of the race, color, religion, sex, or national origin of such person or of any person associated with him in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given: *Provided*, That nothing contained in this section shall impair the scope or effectiveness of the exception contained in section 3603(b) of this title.

4. 42 U.S.C. 3607 provides in pertinent part:

Religious organization or private club exemption

* * * * *

(b)(1) Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons.

* * * * *

(b)(4) Nothing in this subchapter prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in section 802 of title 21.

* * * * *

5. 42 U.S.C. 3608(a) provides:

Administration

(a) Authority and responsibility

The authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development.

Relevant Provisions of Title VII of the Civil Rights Act of 1964

6. 42 U.S.C. 2000e-2 provides in pertinent part:

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

* * * * *

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

* * * * *

Relevant Provision of the Age Discrimination in Employment Act

7. 29 U.S.C. 623 provides in pertinent part:

Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

* * * * *

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

* * * * *