

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.,

Respondent.

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

**BRIEF *AMICUS CURIAE* OF THE
PROJECT ON FAIR REPRESENTATION
IN SUPPORT OF PETITIONERS**

WILLIAM S. CONSOVOY
Counsel of Record
THOMAS R. MCCARTHY
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PLLC
3033 Wilson Boulevard, Suite 700
Arlington, VA 22209
(703) 243-9423
will@consovoymccarthy.com

Counsel for Amicus Curiae

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256679



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(800) 274-3321 • (800) 359-6859

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INTEREST OF AMICUS CURIAE¹

The Project on Fair Representation (“The Project”) is a public interest organization dedicated to the promotion of equal opportunity and racial harmony. The Project works to advance race-neutral principles in education, public contracting, public employment, and voting. Through its resident and visiting academics and fellows, The Project conducts seminars and releases publications relating to the Voting Rights Act and the Equal Protection Clause. The Project has been involved in cases in this Court involving these important issues, *see, e.g., Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013), and has submitted amicus briefs in cases before this Court as well, *see, e.g., Perry v. Perez*, 132 S. Ct. 934 (2012); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Riley v. Kennedy*, 553 U.S. 406 (2008).

The Project has a direct interest in this case. The Project opposes government-imposed racial preferences, including with regard to public housing. Such racial preferences, which would result from interpreting the Fair Housing Act to authorize disparate-impact claims, run contrary to the principles to which The Project is dedicated and to the American ideal of individual equality to which it is profoundly committed. For these reasons,

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, or its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

The Project respectfully submits this brief and urges the Court to reverse the decision below.

SUMMARY OF THE ARGUMENT

Petitioners have comprehensively explained why Section 804(a) of the Fair Housing Act does not permit disparate-impact claims. *See* Brief for Petitioners at 13-42 (“Pet. Br.”). Like analogous provisions in Title VI and Title VII of the Civil Rights Act of 1964, the Fair Housing Act protects individuals against intentional discrimination on the basis of race, ethnicity, and other prohibited bases. The statute does not impose liability for non-discriminatory practices with a disproportionate effect on racial, ethnic, or other groups. No fair reading of the text could lead to a contrary conclusion

But even if fidelity to Section 804(a)’s text were somehow insufficient to reverse the judgment below, the equal-protection concerns associated with disparate-impact liability should weigh heavily against the Fifth Circuit’s expansive interpretation. The Constitution affords each person the right to equal treatment under the law. Official action that intentionally discriminates on the basis of race violates that fundamental rule absent a compelling justification. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). And a series of federal statutes extend that ban on intentional discrimination not only to the housing sector, but also to the workplace and to recipients of federal funds, among other areas. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

Disparate-impact laws run contrary to that norm for several reasons. See *Ricci v. DeStefano*, 557 U.S. 557, 594-96 (2009) (Scalia, J., concurring). Foremost, they treat people as members of a racial group—not as individuals. Laws creating liability based on how racial groups fare under neutral practices that treat all individuals equally are constitutionally suspect. Worse still, courts have interpreted Title VII’s disparate-impact provision (on which Respondent claims Section 804(a) is modeled) either to exclude non-minorities altogether from its protection or to impose special hurdles for “favored” groups to overcome in bringing so-called “reverse discrimination” claims. Either way, such differential treatment on the basis of race must be strictly scrutinized. See *Fisher*, 133 S. Ct. at 2419-20.

Disparate-impact provisions are even more troubling in practice. They place incredible pressure on those within their regulatory ambit to resort to racial quotas, set asides, or other more subtle means of ensuring racial balance. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Indeed, there is little else that could be done to avoid protracted litigation and potentially massive liability when a non-discriminatory policy has a statistically adverse effect on a racial group. Cases such as *Ricci* and *Connecticut v. Teal*, 457 U.S. 440 (1982), illustrate the problem. The threat of disparate-impact liability creates an inevitable incentive to engage in the very racial stereotyping and group-based discrimination the Equal Protection Clause forbids. This is the definition of a statutory scheme that raises serious constitutional difficulties.

Nor can disparate-impact laws be defended as somehow enforcing the Fourteenth Amendment. The Constitution forbids intentional discrimination on the basis of race. *See Washington v. Davis*, 426 U.S. 229 (1976). Banning non-discriminatory laws because of their effect on certain racial groups deviates too far from the Fourteenth Amendment to be seen as enforcing it. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). Characterizing disparate-impact laws as merely an evidentiary tool for rooting out disparate treatment fails for similar reasons. The lenient standard for disparate impact under federal statutory law does not remotely approach the magnitude of disproportionate effect that is needed to raise an inference of intentional discrimination under the Constitution. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). Accordingly, there is no easy way to resolve this issue. “[C]onsiderations of race that would doom” a practice under “the Fourteenth Amendment . . . seem to be what save it under” federal disparate impact laws. *See Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring).

At some point, this tension will need to be resolved. But that does not mean the Court lacks the power to delay the confrontation. In contexts similar to this, the Court has required Congress to speak clearly before interpreting federal statutes to push the outer limits of legislative authority or otherwise reach into sensitive areas of national policy. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *INS v. St. Cyr*, 543 U.S. 289 (2001). A clear-statement rule is especially warranted given that in addition to creating serious equal-protections concerns, disparate impact laws (as this case shows) alter the federal-state balance by interfering with the non-

discriminatory policies of state and local governments. Congress has the constitutional authority to push the outer boundaries of its legislative power. But by forcing Congress to exercise that authority with clarity, the Court shows respect for a coordinate branch of government and ensures that difficult constitutional issues such as this one are not needlessly resolved.

Section 804(a) does not include any statement indicating that Congress sought to impose disparate-impact liability under the Fair Housing Act, let alone a clear one. The statute does not include the language that previously has led the Court to interpret other federal laws to impose disparate-impact liability. *See Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003). Statutory inferences, legislative history, and congressional purposes are insufficient. Absent unmistakable textual proof that Congress imposed disparate-impact liability, courts and agencies alike should conclude that federal anti-discrimination laws protect individuals from disparate treatment—not racial groups from disparate impact.

Finally, the fact that the U.S. Department of Housing and Urban Development (“HUD”) has issued a regulation supporting the existence of disparate-impact claims under the Fair Housing Act does not alter the outcome. This Court has long held that constitutional avoidance supersedes administrative deference. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 574-75 (1988). That rule applies with special force when equal-protection rights are at stake. *See Miller v. Johnson*, 515 U.S. 900 (1995). The judgment below should be reversed.

ARGUMENT

I. Interpreting The Fair Housing Act To Authorize Disparate-Impact Claims Would Raise Serious Equal-Protection Concerns.

The Equal Protection Clause’s “central mandate is racial neutrality in governmental decisionmaking.” *Miller*, 515 U.S. at 904; *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in the judgment). “Classifications of citizens solely on the basis of race ‘are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.’” *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)); *see also Loving v. Virginia*, 388 U.S. 1, 11 (1967). The right to equal protection of the laws, “by its terms, [is] guaranteed to the individual,” *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948), and obtains irrespective of “the race of those burdened or benefited by a particular classification,” *Croson*, 488 U.S. at 472.

In other words, “any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be.” *Adarand*, 515 U.S. at 230; *Croson*, 488 U.S. at 493 (“To whatever racial groups . . . citizens belong, their ‘personal rights’ to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.”). Regardless of whom the law claims to advantage, or the reasons why, disparate treatment “threaten[s] to stigmatize *individuals* by reason of their membership in a *racial group* and to incite racial hostility.” *Shaw*, 509 U.S. at 643 (emphasis added).

Congress has extended this ban on disparate treatment beyond the “official action” to which the Fourteenth Amendment applies. *Adarand*, 515 U.S. at 234 (citation and quotations omitted). Title VII of the Civil Rights Act of 1964 “makes it unlawful for an employer ‘to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.’” *Ricci*, 557 U.S. at 577 (quoting 42 U.S.C. § 2000e-2(a)(1)). Title VI of the Civil Rights Act extends this same ban to recipients of federal funds. *See Alexander*, 532 U.S. at 280 (citing 42 U.S.C. § 2000d). And the Fair Housing Act 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). These laws typify “the most easily understood” anti-discrimination rule: they make it illegal to treat a “particular person less favorably than others because of a protected trait.” *Ricci*, 557 U.S. at 577 (citations and quotations omitted).

Federal disparate-impact statutes are quite different. Whereas federal disparate-treatment laws require proof “that the defendant had a discriminatory intent or motive,” federal disparate-impact laws prohibit “facially neutral . . . practices that have significant adverse effects on protected groups . . . without proof that . . . those practices” were “adopted with a discriminatory intent.” *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988). Under disparate-impact statutes, “practices, procedures, or tests neutral on their face, and even neutral in terms

of intent” are unlawful because of Congress’s concern with “the consequences of [such] practices, not simply the motivation.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-32 (1971). An entity’s “good intent or absence of discriminatory intent” is irrelevant. *Id.* at 432. Indeed, absence of intentional discrimination based on a protected trait “is the very premise for disparate-impact liability in the first place, not negation of it or a defense to it.” *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 96 (2008).

Disparate-impact statutes therefore raise serious equal protection concerns. “[I]f the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties . . . discriminate on the basis of race.” *Ricci*, 557 U.S. at 594 (Scalia, J., concurring) (citations and quotations omitted). For example, Congress could not require private employers, states and local governments, or funding recipients to segregate workplaces, low-income housing communities, or philanthropic institutions. *See Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 284 (1991). That same rule naturally must apply if Congress attempts to use its lawmaking or spending authority to mandate that third-parties violate the Constitution’s equal-protection guarantee in others ways. Yet that is precisely what federal disparate-impact laws seemingly require.

In general, federal disparate-impact statutes violate the Constitution’s requirement that the law treat each person as an individual and not simply as a member of a racial group. *See Miller*, 515 U.S. at 911 (“[T]he [g]overnment must treat citizens as individuals, not as

simply components of a racial, religious, sexual or national class.”) (citation and quotations omitted); *see also Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955). By their terms, disparate-impact laws prohibit various “practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.” *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). In other words, “[a]n individual may allege that *he* has been subjected to ‘disparate treatment’ because of his race, or that he has been the victim of a facially neutral practice having a ‘disparate impact’ on his *racial group*.” *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 582 (1978) (Marshall, J., concurring in part and dissenting in part) (emphasis added). Even at the “wholesale” level, then, federal disparate impact statutes are constitutionally troubling. *Ricci*, 557 U.S. at 595 (Scalia, J., concurring).

Such laws are problematic on their face from an equal protection perspective also because they appear to afford certain racial groups greater disparate-impact protection than “favored” groups. Even though this Court has held that at least Title VII’s protections are “not limited to discrimination against members of any particular race,” *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-79 (1976), it has never held that white or male plaintiffs can bring a disparate-impact claim. If anything, the Court has suggested they cannot. *See Teal*, 457 U.S. at 448 (“When an employer uses a non job-related barrier in order to deny a *minority or woman* applicant employment or promotion, and that barrier has a significant adverse effect on *minorities or women*, then the applicant has been deprived of an employment opportunity ‘because of . . . race, color, religion, sex, or national origin.’”) (emphasis added);

see also *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252-53 (10th Cir. 1986); Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. Rev. 1505 (2004). Under this asymmetrical approach, “a neutral employment practice that disadvantages white men yet has no business justification is permissible, while the same practice would be unlawful if it were to disadvantage women and minorities.” John J. Donahue, *Understanding the Reasons For and Impact of Legislatively Mandated Benefits for Selected Workers*, 53 Stan. L. Rev. 897, 898 (2001).

But even if disparate-impact laws protect whites and males, they do not appear to protect them *equally*. Several courts of appeals have held that such plaintiffs must meet a higher burden of proof in bringing discrimination claims against employers under Title VII. See, e.g., *Taken v. Okla. Corp. Comm’n*, 125 F.3d 1366, 1369 (10th Cir. 1997) (“Here, because plaintiffs are members of a historically favored group, they are not entitled to the *McDonnell Douglas* presumption.”); *Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993) (“Thus, in an ordinary discrimination case, in which the plaintiff is a member of a minority group, an ‘inference of discrimination’ arises when the employer simply passes over the plaintiff for a promotion to a position for which he is qualified. . . . No such inference arises when, as in this case, the plaintiff is a white man.”); *Phelan v. City of Chi.*, 347 F.3d 679, 684 (7th Cir. 2003) (explaining that “the first prong of the *McDonnell* test cannot be used” for a white plaintiff and that the plaintiff instead must “show background circumstances that demonstrate that a particular employer has reason or inclination to discriminate invidiously against whites or evidence that there is something ‘fishy’ about the facts at hand”) (citations and quotations omitted).

Thus, whether disparate-impact laws exclude whites and males from their ambit altogether or handicap them in bringing statutory discrimination claims, these statutes advantage and disadvantage individuals on the basis of their race. As a consequence, disparate-impact laws are constitutionally suspect and must pass strict scrutiny to avoid invalidation. *See Fisher*, 133 S. Ct. at 2419-20; *Adarand*, 515 U.S. at 227; *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

Beyond these concerns regarding their facial validity, disparate-impact laws “place a racial thumb on the scales” that leads to serious equal-protection concerns at the “retail” level. *Ricci*, 557 U.S. at 594 (Scalia, J., concurring). The Court has always understood “that the inevitable focus on statistics in disparate-impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures.” *Watson*, 487 U.S. at 992. Hence, while racial quotas are verboten absent specific findings of prior *de jure* discrimination, *see Croson*, 488 U.S. at 492, they are the only sure fire way for an entity to avoid disparate-impact lawsuits under federal law. *See Wards Cove*, 490 U.S. at 652 (“The only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the others portions thereof.”). “If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met.” *Watson*, 487 U.S. at 993; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 448 (1975) (Blackmun, J., concurring in the

judgment) (“I fear that a too-rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection.”); *see also Wards Cove*, 490 U.S. at 652-53.²

This is not an abstract concern. In *Ricci*, after New Haven, Connecticut firefighter promotion “examination results showed that white candidates had outperformed minority candidates, the mayor and other local politicians opened a public debate that turned rancorous.” 557 U.S. at 562. New Haven eventually “threw out the examinations” on the ground that certifying the results could have led to “liability under Title VII for adopting a practice that had a disparate impact on minority firefighters.” *Id.* at 562-63. That is, New Haven threw out the test results because of its effect on a particular racial group. As the Court explained, “however well intentioned or benevolent it might have seemed . . . the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white.” *Id.* at 579-80. The question thus was “not whether the conduct was discriminatory but whether the City had a lawful justification for its race-based action.” *Id.* at 580.

2. In *Wards Cove*, this Court sensibly interpreted Title VII’s disparate impact provision to mitigate the pressure on employers to utilize racial quotas. *See* 490 U.S. at 650-661. But Congress abrogated key aspects of that ruling in the Civil Rights Act of 1991. *See Ricci*, 557 U.S. at 624 (Ginsburg, J., dissenting); *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 241 (3rd Cir. 2007). Congress’s decision to ignore this Court’s legitimate concern that there are constitutional problems with a federal law premising liability on the disparate effect of neutral practices is part of an unfortunate pattern. *See, e.g., Shelby Cnty.*, 133 S. Ct. at 2626-27.

The Court ultimately resolved that case on statutory grounds, concluding that New Haven lacked a “strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.” *Id.* at 563. Absent that rigorous standard, “an employer could discard test results (or other employment practices) with the intent of obtaining the employer’s preferred racial balance.” *Id.* at 582. And there is every indication that is precisely what New Haven was using Title VII’s disparate-impact provision to accomplish. *See id.* at 605 (Alito, J., concurring) (“[A] reasonable jury could easily find that the City’s real reason for scrapping the test results was not a concern about violating the disparate-impact provision of Title VII but a simple desire to please a politically important racial constituency.”). In light of these concerns, the Court emphasized “that meeting the strong-basis-in-evidence standard” would not necessarily “satisfy the Equal Protection Clause” and left for another day whether even “a legitimate fear of disparate impact is *ever* sufficient to justify discriminatory treatment under the Constitution.” *Id.* at 584 (emphasis added).

The Court’s decision in *Connecticut v. Teal* is even more revealing. In that case, the Connecticut Department of Income Maintenance utilized a written examination as the first step in its promotion process. 457 U.S. at 443. “The mean score on the examination was 70.4 percent. However, because the black candidates had a mean score 6.7 percentage points lower than the white candidates, the passing score was set at 65, apparently in an attempt to lessen the disparate impact of the examination.” *Id.* at 444 n.3. Despite its manipulation of the examination results to advantage African-American applicants, the Department was sued under Title VII’s disparate-impact provision for

utilizing a written promotion requirement “that excluded blacks in disproportionate numbers and that was not job related.” *Id.* at 444.

In response to the lawsuit, the Department sought to avert disparate-impact liability by making promotion decisions “from the eligibility list generated by the written examination” using “an affirmative-action program in order to ensure a significant number of minority supervisors.” *Id.* “Forty-six persons were promoted . . . , 11 of whom were black and 35 of whom were white. The overall result of the selection process was that, of the 48 identified black candidates who participated in the selection process, 22.9 percent were promoted and of the 259 identified white candidates, 13.5 percent were promoted.” *Id.* In other words, the “actual promotion rate of blacks was close to 170 percent that of the actual promotion rate of whites.” *Id.* at 444 n.6.

Remarkably, the Court not only failed to reject the Department’s naked use of racial balancing in its promotion process, but it found the racial manipulation of the process was *insufficient* to avoid liability. Ignoring the disparate treatment that white applicants had suffered, the Court held that individual African-American applicants who had failed the test had stated a claim for relief because the Department’s use of the written examination had denied them “the *opportunity* to compete equally with white workers” for promotion even though the plaintiffs’ racial group had not suffered any disparate impact. *Id.* at 441. Apparently, even “a racially balanced work force cannot immunize an employer from liability” under Title VII’s disparate-impact provision. *Id.* at 454 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978) (other citation omitted)).

The ruling not only rendered the disparate-impact theory of discrimination nonsensical, *id.* at 459 (Powell, J., dissenting) (“There can be no violation of Title VII for disparate impact in the absence of disparate impact on a *group*.”), but it showed just how thoroughly a federal policy that adjudges discrimination on the basis of effect can infect the entire decisionmaking process with racial considerations. The only way the Department could have avoided disparate-impact liability under the majority’s rationale would have been “the adoption of simple quota hiring.” *Id.* at 464 (Powell, J., dissenting). Yet “[t]his arbitrary method of employment is itself unfair to individual applicants, whether or not they are members of minority groups.” *Id.* at 464-65.

Cases like *Ricci* and *Teal* illuminate the constitutional problem with disparate-impact regimes. Laws promoting illicit racial quotas (or perhaps requiring them) to ensure statutory compliance are destructive of individual rights. “[E]ven ‘benign’ racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race.” *Croson*, 489 U.S. at 527 (Scalia, J., dissenting) (citation omitted). As Alexander Bickel explained, “a racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence.” *Id.* (quoting Bickel, *The Morality of Consent*, at 133); *see also Parents Involved*, 551 U.S. at 730-32. Disparate-impact laws thus seem to “demand the very racial stereotyping the Fourteenth Amendment forbids.” *Miller*, 515 U.S. at 928; *see, e.g., MD/DC/DE Broad. Ass’n*

v. FCC, 236 F.3d 13, 22 (D.C. Cir. 2001) (“The race of each job applicant is relevant to the prevention of discrimination only if the Commission assumes that minority groups will respond to non-discriminatory recruitment efforts in some predetermined ratio, such as in proportion to their percentage representation in the local workforce. Any such assumption stands in direct opposition to the guarantee of equal protection, however.”).

Importantly, the constitutional doubts federal disparate-impact laws raise cannot be solved by recasting them as prophylactically enforcing the Constitution’s ban on disparate treatment. Beyond the fact that they proscribe private conduct, this Court has never “embraced the proposition that a law or official act, without regard to whether it reflects a rationally discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.” *Washington*, 426 U.S. at 239; *see also Hernandez v. New York*, 500 U.S. 352, 362 (1991). “Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.” *Arlington Heights*, 429 U.S. at 265; *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 207 (2008) (Scalia, J., concurring) (“[W]ithout proof of discriminatory intent . . . a generally applicable law with a disparate impact is not unconstitutional”). As a consequence, federal disparate impact statutes deviate too far from the constitutional standard to be characterized as Fourteenth Amendment enforcement legislation. In writing disparate impact liability into the U.S. Code, “Congress’ concern was with the incidental burdens imposed, not the object or purpose of the legislation.” *Boerne*, 521 U.S. at 531. “Congress does not enforce a constitutional right by changing what the right is.” *Id.* at 519.

Nor can disparate-impact laws plausibly be defended as merely “playing some role in the evidentiary process” of rooting out disparate treatment. Such laws “sweep too broadly to be fairly characterized” as policing intentional discrimination. *Ricci*, 557 U.S. at 595 (Scalia, J., concurring). To be sure, the Court has held that “[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.” *Arlington Heights*, 429 U.S. at 266.

But federal disparate-impact statutes impose liability based on only the slightest statistical deviations. For example, the Equal Employment Opportunity Commission guideline uses a “four-fifths rule” in Title VII cases under which a “selection rate for any race, sex, or ethnic group which is less than . . . eighty percent . . . of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact[.]” 29 C.F.R. § 1607.4(D). The standard for establishing a prima facie case of discrimination under the Fair Housing Act in those courts that have wrongly permitted such claims appears to be equally liberal. *See, e.g., Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 50 (1st Cir. 2000). In short, the standard for disparate impact under the applicable federal statutes does not even come close to meeting the standard necessary for such evidence to raise an inference of intentional discrimination.

Moreover, in constitutional disparate-treatment cases the impact-based inference of discrimination can be overcome by evidence that the law or practice was in fact non-discriminatory. *See Arlington Heights*, 429 U.S. at 271 n.21. Yet such defenses are unavailable in the

statutory setting. *See Albemarle Paper Co.*, 422 U.S. at 422-23. Once there is prima facie evidence of disparate impact, the defendant can prevail only by proving that there was a legitimate justification for a practice with the prohibited effect; it cannot try to show that the inference of discrimination was mistaken in the first place. “It is one thing to free plaintiffs from proving . . . illicit intent, but quite another to preclude the [defendant] from proving that its motives were pure and its actions reasonable.” *Ricci*, 557 U.S. at 595 (Scalia, J., concurring).

In the end, there is no elegant solution to this problem. The conflict between group-based disparate-impact laws and the individual right to equal protection under the Constitution will be irreconcilable when that “evil day” arrives. *Id.* at 594 (Scalia, J., concurring). As noted in a similar context, “considerations of race that would doom” a practice under “the Fourteenth Amendment . . . seem to be what save it” under disparate impact laws. *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring). Here too, there is “a fundamental flaw . . . in any scheme in which [HUD] is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive.” *Id.*

II. The Court Should Require A Clear Congressional Statement Before Interpreting Any Federal Law To Authorize Disparate-Impact Claims.

The Court can ensure that the Fair Housing Act and other federal statutes are not interpreted to needlessly create constitutional problems by requiring a clear statement from Congress that it seeks to impose disparate-impact liability. This “clear statement rule” follows from

precedent and will ensure that Congress—and not courts or federal agencies—forces a confrontation between the Equal Protection Clause and federal disparate-impact laws.

The Court has long been hesitant to interpret federal laws in a manner that presses the limits of congressional power. *See, e.g., Atascadero State Hosp.*, 473 U.S. at 242; *United States v. Bass*, 404 U.S. 336, 349 (1971). When faced with a question of statutory construction that “invokes the outer limits of Congress’ power,” *St. Cyr*, 533 U.S. at 299, or is in tension with “important values,” *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 262 (1991) (“*Aramco*”) (Marshall, J., dissenting), the Court often employs a clear-statement rule, *see, e.g., Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’gs*, 531 U.S. 159, 172 (2001) (“*SWANCC*”). Under such a rule, the Court wisely requires “unmistakable clarity” in the statute’s text before concluding that Congress intended for the law to wade into a constitutionally sensitive domain. *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989).

The Court has employed clear-statement rules in a number of settings. Congress must speak clearly when it seeks to alter the “constitutional balance between the States and the Federal Government,” *Will v. Mich. Dep’t of Police*, 491 U.S. 58, 65 (1989) (citation omitted); *see also United States v. Bass*, 404 U.S. 336, 349 (1971), abrogate Eleventh Amendment immunity, *see Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996); *Dellmuth*, 491 U.S. at 227, restrict access to judicial review or affect the scope of the federal jurisdiction, *see Johnson v. Robison*, 415 U.S. 361, 373-374 (1974) (“[C]lear and convincing’ evidence of congressional intent [is] required by this Court before

a statute will be construed to restrict access to judicial review.”), or retroactively apply new laws, *see St. Cyr*, 533 U.S. at 316 (“A statute may not be applied retroactively, however, absent a clear indication from Congress that it intended such a result.”); *United States v. Heth*, 3 Cranch 399, 408 (1806) (Johnson, J.) (“Unless, therefore, the words are too imperious to admit of a different construction, [the Court should] restric[t] the words of the law to a future operation.”).

The Court’s invocation of clear-statement rules reflects a presumption that “Congress does not exercise lightly’ the ‘extraordinary power’ to legislate” in these areas. *Arizona v. Inter Tribal Council of Ariz. Inc.*, 133 S. Ct. 2247, 2256 (2013) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). Clear-statement rules thus impose a “stringent test.” *Dellmuth*, 491 U.S. at 228; *see also St. Cyr*, 533 U.S. at 316 (“The standard for finding such unambiguous direction is a demanding one.”). They focus solely on the text of the statute at issue, *see Dellmuth*, 491 U.S. at 230 (“evidence of congressional intent must be ... textual”), “foreclos[ing] inquiry into extrinsic guides to interpretation,” *Aramco*, 499 U.S. at 263 (Marshall, J., dissenting). In short, they require “the clearest statement of congressional intent,” *St. Cyr*, 533 U.S. at 312 n.35, such that it can “be said with perfect confidence that Congress in fact intended” to wade into these areas of “special constitutional concern[.]” *Dellmuth*, 491 U.S. at 231; *see also id.* (“[I]mperfect confidence will not suffice.”).

Clear-statement rules show Congress the respect to which it is entitled. As a coordinate branch of government, Congress has “a duty to support and defend the Constitution,” *Salazar v. Buono*, 559 U.S. 700, 717

(2010). It is for Congress, then, to determine in the first instance whether it wants to test the limits of its authority. See *United States v. Nixon*, 418 U.S. 683, 703 (1974) (“In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution.”). “Requiring clear intent assures that Congress itself has affirmatively considered” the potential ramification of its legislative choice and “determined that it is an acceptable price to pay for the countervailing benefits.” *St. Cyr*, 533 U.S. at 316 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272-73 (1994)). In the sensitive areas where clear-statements rules apply, there may be particularly delicate policy factors to balance, and “[i]t is not for [the Court] to weigh the merits of these factors.” *Rewis v. United States*, 401 U.S. 808, 812 (1971); see also *Bass*, 404 U.S. at 349. At base, clear-statement rules ensure that Congress remains “the keeper” of “national policy” by making sure that Congress and not the court decide these important policy issues *Emps. of the Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*, 411 U.S. 279, 284 (1973).

Viewed in this light, clear-statement rules are not so much a limitation on congressional authority but a tool “of assistance to the Congress and the courts in drafting and interpreting legislation.” *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 206 (1991). They improve judicial decisionmaking by ensuring “that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” *Bass*, 404 U.S. at 349; *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). And they prevent courts from “needlessly reach[ing] constitutional issues.” *SWANCC*, 531 U.S. at 172; *Gregory*, 501 U.S. at 464 (“Application of the plain statement rule thus may

avoid a potential constitutional problem.”). By requiring evidence of congressional intent “both unequivocal and textual,” *Dellmuth*, 491 U.S. at 230, before presuming that Congress has “presse[d] the envelope of constitutional validity,” *Rapanos v. United States*, 547 U.S. 715–738 (2006) (plurality), the Court enhances legislative and judicial decisionmaking.

This is the paradigmatic circumstance in which a clear-statement rule is needed. Respondent’s construction of Section 804(a), as applied to this case, raises difficult constitutional questions concerning the federal-state balance as it would wrest control over local housing policy from the State of Texas. The Court must apply a clear-statement rule for this reason alone. *See Will*, 491 U.S. at 65; *Atascadero State Hosp.*, 473 U.S. at 242; *Bass*, 404 U.S. at 349; *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539–540 (1947) (“[W]hen the Federal Government . . . radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit.”).

But the additional layer of concern triggered by the equal-protection problems associated with disparate-impact liability makes a clear-statement rule particularly appropriate. Disparate-impact liability is undoubtedly an area of important constitutional values given the threat it poses to individual liberty. *See supra* at 6–7. Any interpretation of federal anti-discrimination legislation that advances a theory of disparate-impact liability thus “presses the envelope of constitutional validity,” thereby warranting imposition of a clear-statement rule. *Rapanos*, 547 U.S. at 738. Indeed, the Court should be

at least as wary of interpreting federal laws to authorize disparate-impact claims as it is of interpreting them to “alter sensitive federal-state relationships.” *Bass*, 404 U.S. at 349 (quoting *Rewis*, 401 U.S. at 812). Federalism is designed not as an end in and of itself but as a means of “secur[ing] to citizens the liberties that derive from the diffusion of sovereign power.” *New York v. United States*, 505 U.S. 144, 181 (1992) (citation omitted); *see also Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012).

In other words, “[t]he constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties.” *Atascadero State Hosp.*, 473 U.S. at 242 (citation and quotations omitted). The right to equal protection of the laws is certainly one of those liberties. It is Congress, therefore, that must decide if its desire for disparate-impact liability is so strong that it is willing to have the inevitable constitutional tension between the Constitution and such laws resolved once and for all. That is the legislature’s prerogative. But that difficult and important issue should not be foisted on this Court because the Fifth Circuit and HUD have chosen to read Section 804(a) expansively. If that confrontation is to come, it should be because Congress clearly sought it.

Section 804(a) does not even come close to meeting this standard. HUD has concluded that the phrase “otherwise make available or deny” authorizes disparate impact liability. *See Implementation of the Fair Housing Act’s Discriminatory Effects Standard*, 78 Fed. Reg. 11,460, 11,466 (Feb. 15, 2013). However, the hallmark of disparate-impact legislation is express language focusing on conduct that “adversely affects” particular groups. Pet. Br. 23-25.

Section 804(a) nowhere uses the language “adversely affect” or “tend to deprive,” which are the usual phrasings employed by Congress in anti-discrimination statutes that authorize disparate-impact claims. *See Smith v. City of Jackson*, 544 U.S. 228, 235-36 & n.6 (2005) (plurality opinion). Section 804(a) targets discriminatory “actions” and their “motivation,” as opposed to the “effects” of neutral policies. *Id.* at 236 & n.6. The Fair Housing Act does not include any statement—clear or otherwise—indicating that the statute authorizes disparate impact claims.

But even if the phrase “otherwise make available or deny” could support an inference that Congress sought to authorize disparate-impact claims, it is not a clear statement. “[S]uch a permissible inference, whatever its logical force, would remain just that: a permissible inference.” *Dellmuth*, 491 U.S. at 232. Statutory ambiguity is not enough in this setting. Only “the clearest statement of congressional intent” will do. *St. Cyr*, 533 U.S. at 312 n.35. As “it cannot be said with perfect confidence” that Congress intended to authorize disparate-impact liability in Section 804(a), the Court should reject the Fifth Circuit’s sweeping interpretation of the Fair Housing Act. *Dellmuth*, 491 U.S. at 231.

III. The Canon Of Constitutional Avoidance Overrides Any Deference To Which HUD Might Otherwise Be Entitled.

The absence of any textual indication from Congress that the Fair Housing Act imposes disparate-impact liability should end the matter. That HUD has issued a regulation endorsing Respondent’s construction makes no

difference. Not only is HUD's interpretation foreclosed by the text and unreasonable in any event, *see* Pet. Br. 17, but constitutional avoidance takes precedence over any deference to which the federal agency might otherwise entitled.

Time and again, this Court has squarely “rejected agency interpretations to which [it] would otherwise defer where they raise serious constitutional questions.” *Miller*, 515 U.S. at 923 (citation omitted). As the Court has explained, “[t]his canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations.” *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (citing *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 305-07 (1924)); *U.S. ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909) (“[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter”). Indeed, the rule “has for so long been applied by this Court that it is beyond debate.” *Edward J. DeBartolo Corp.*, 485 U.S. at 574-75.

Not only does this rule of constitutional avoidance have precedential force, it fits comfortably with the paradigm of agency deference. In the main, the Court will “not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984). But before deferring under *Chevron*, the Court must always assure itself that “Congress either explicitly or implicitly delegated authority to cure that ambiguity.” *Am. Bar Ass’n v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005). After all, “it is only legislative intent to delegate

such authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of *Chevron*.” *NRDC v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993) (citation omitted).

Agency deference therefore is not implicated “any time a statute does not expressly negate the existence of a claimed administrative power.” *Am. Bar. Ass’n*, 430 F.3d at 468; *Negusie v. Holder*, 555 U.S. 511, 550 (2009) (Thomas, J., dissenting). Indeed, on questions of sufficient importance the Court presumes that Congress would have clearly delegated the power in question had it wanted the agency to wield it. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160-61 (2000); *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994). Statutory interpretation questions fraught with constitutional implications fit the bill. *See Edward J. DeBartalo Corp.*, 485 U.S. at 575.

Whether the Fair Housing Act authorizes disparate-impact claims is just such a question. An agency interpretation triggering equal-protection concerns, as HUD’s clearly does, “by definition raises a serious constitutional question.” *Miller*, 515 U.S. at 923. Racial classifications “are contrary to our traditions and hence constitutionally suspect.” *Fisher*, 133 S. Ct. at 2418 (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)). As a result, such laws demand “detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed” as race is “a group classification long recognized as irrelevant and therefore prohibited.” *Adarand*, 515 U.S. at 227 (citation and quotations omitted); *see also Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) (“[A]ny racial

preference must face the most rigorous scrutiny by the courts.”). The Court can avoid confronting these serious issues by interpreting the Fair Housing Act as Congress wrote it, *viz.*, to protect individuals against disparate treatment, not groups against disparate impact. In contrast, interpreting the statute to allow disparate-impact claims will force the Court—whether in this case or in the near future—to determine whether this theory of discrimination is compatible with the Constitution’s guarantee of equal treatment.

Finally, judicial deference to HUD’s regulation would be especially inappropriate given the agency’s failure to grapple with these important issues. Nowhere in its final rule does HUD even consider whether its interpretation of the statute raises serious constitutional questions or how those concerns might be mitigated through regulatory implementation. Instead, HUD “automatically” reaches a “conclusion” that the Fair Housing Act protects against disparate impact without making any “effort to justify” that determination in light of the serious equal-protection problems its construction of the statute raises. *Ky. Ret. Sys. v. EEOC*, 554 U.S. 135, 150 (2008); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013). An agency, like HUD, unwilling to acknowledge the constitutional difficulties posed by its construction has not engaged in reasoned decisionmaking. *See Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that the agency’s decision must be “based on a consideration of the relevant factors”). Whether the Fair Housing Act authorizes disparate-impact claims is without doubt a relevant factor that HUD should have considered. By failing to do so, the agency forfeited any claim of deference to which it might otherwise have been entitled.

CONCLUSION

For the reasons set forth herein, the judgment of the court of appeals should be reversed.

Respectfully submitted,

WILLIAM S. CONSOVOY

Counsel of Record

THOMAS R. MCCARTHY

J. MICHAEL CONNOLLY

CONSOVOY MCCARTHY PLLC

3033 Wilson Boulevard, Suite 700

Arlington, VA 22209

(703) 243-9423

will@consovoymccarthy.com

Counsel for Amicus Curiae

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