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

REPLY BRIEF FOR THE PETITIONERS

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The Fair Housing Act unambiguously precludes disparate-impact claims. It does not include the phrase "adversely affect," which is the basis for disparate-impact liability in Title VII § 703(a)(2) and ADEA § 4(a)(2). *Smith v. City of Jackson*, 544 U.S. 228, 236 & n.6 (2005) (plurality op.). More fundamentally, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), misconstrued the original version of Title VII to encompass disparate-impact claims. *Griggs* can be retained under stare decisis, but its holding should be limited to Title VII § 703(a)(2) and statutes containing identical "adversely affect" language.

Even if the FHA's text were ambiguous—and it is not—the canon of constitutional avoidance would preclude disparate-impact claims. Interpreting the FHA to

allow such claims would force the Court to confront a serious equal-protection question: whether government can require race-based decisionmaking. *Ricci v. DeStefano*, 557 U.S. 557, 584 (2009), reserved that question, and the Court should avoid it here.

I. THE FAIR HOUSING ACT'S PLAIN TEXT UNAMBIGUOUSLY PRECLUDES DISPARATE-IMPACT CLAIMS

A. The FHA Does Not Include Effects-Based Language

The FHA's unambiguous text precludes disparate-impact claims, as it focuses on "actions with respect to the targeted individual"—not on the "*effects* of the action." *Smith*, 544 U.S. at 236 & n.6 (plurality op.).

Smith declared that ADEA § 4(a)(1) "does not encompass disparate-impact liability" because it does not include the phrase "adversely affect." *Id.* at 235–36 & n.6. *Smith* also concluded that ADEA § 4(a)(2) could be construed to establish disparate-impact liability because it included the phrase "adversely affect." *Id.* at 235. The availability of disparate-impact liability depended on this "key textual difference[]," *id.* at 236 n.6, because *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988), had interpreted "adversely affect" as the textual hook for disparate-impact claims in the identical language of Title VII § 703(a)(2).

Just like ADEA § 4(a)(1), the FHA lacks the phrase "adversely affect," or any other effects- or results-based language. *See Meyer v. Holley*, 537 U.S. 280, 285 (2003) ("The Fair Housing Act itself focuses on prohibited acts."). The FHA uses active-tense verbs requiring in-

tentional conduct: "to refuse to sell or rent," "refuse to negotiate," "make unavailable," "deny," and "discriminate." 42 U.S.C. §§ 3604(a), 3605(a); *see Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) ("words . . . are known by their companions").

The Court has already rejected disparate-impact liability in other statutes that use these words. *See, e.g.*, *Smith*, 544 U.S. at 236 n.6 ("refuse" and "discriminate" in ADEA § 4(a)(1)); *Ricci*, 557 U.S. at 577 ("refuse" and "discriminate" in Title VII § 703(a)(1)); *Alexander v. Sandoval*, 532 U.S. 275, 278, 280 (2001) ("be denied" and "subjected to discrimination" in Title VI § 601); *City of Mobile v. Bolden*, 446 U.S. 55, 60–64 (1980) (plurality op.) ("deny or abridge" in an earlier version of § 2 of the Voting Rights Act).[1] Consequently, a statute that prohibits actions taken "because of" a protected class—and that lacks effects-based language—is limited to intentional discrimination.[2]

The Solicitor General, in contrast, offers no clear theory for when a statute should, or may, be construed to establish disparate-impact liability. To compensate for the absence of "adversely affect" in the FHA, the re-

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[1] These decisions also disprove the respondent's argument that a statute can require discriminatory intent only if it specifically mentions "intent," "purpose," or "motive." Resp. Br. 48–50.

[2] *Alexander v. Choate* did not hold that Rehabilitation Act § 504 created disparate-impact liability; it "assume[d] without deciding" that it did. 469 U.S. 287, 299 (1985); *cf.* AARP Br. 5–6. And the relevant language in § 504 is identical to Title VI § 601, which permits only disparate-treatment claims. *Sandoval*, 532 U.S. at 280–81.

spondent and the Solicitor General argue that "otherwise make unavailable" and "discriminate" are sufficiently ambiguous that they could be read to encompass disparate-impact claims. Resp. Br. 46–47; U.S. Br. 18-22. Not so.

The Court has already rejected the argument that "discriminate" can encompass disparate-impact claims. Every member of the *Smith* Court recognized that ADEA § 4(a)(1), which contains the same "discriminate . . . because of" phrasing as the FHA, "does not encompass disparate-impact liability." 544 U.S. at 236 n.6 (plurality op.); *id.* at 246 (Scalia, J., concurring in part and concurring in the judgment) ("the only provision of the ADEA that could conceivably be interpreted to effect [a disparate-impact] prohibition is § 4(a)(2)"); *id.* at 249 (O'Connor, J., concurring in judgment) (deeming it "obvious" that ADEA § 4(a)(1) does not authorize disparate-impact claims). *Ricci* and *Sandoval*—a case never cited by the Solicitor General or the respondent—likewise rejected disparate-impact liability in statutes that included "discriminate" or "subjected to discrimination."[3] 557 U.S.

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[3] The Solicitor General cites four inapposite cases in arguing that that the word "discriminate" is ambiguous. U.S. Br. 21–22. *Guardians Association v. Civil Service Commission of New York City,* 463 U.S. 582 (1983), and *Regents of University of California v. Bakke,* 438 U.S. 265 (1978), concerned Title VI § 601, which was later interpreted by *Sandoval* to preclude disparate-impact claims. 532 U.S. at 280–81. The dissenting opinion in *CSX Transportation, Inc. v. Alabama Department of Revenue* interpreted a tax statute, not a statute prohibiting discrimination against protected classes. 131 S. Ct. 1101, 1115 (2011). And the now-repealed statute in *Board of Educa-*

(continued…)

at 577; 532 U.S. at 280; *see also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) ("[T]he 'normal definition of discrimination' is 'differential treatment.'" (quoting *Olmstead v. L.C.*, 527 U.S. 581, 614 (1999) (Kennedy, J., concurring in judgment))).

The phrase "otherwise make unavailable" also does not create disparate-impact liability. The phrase itself is one of the FHA's "prohibited acts," *Meyer*, 537 U.S. at 285, and encompasses housing decisions beyond refusals and denials, such as the adoption or enforcement of land-use restrictions. The FHA does not prohibit some other act that causes the effect of making unavailable a dwelling; it prohibits the act of making unavailable a dwelling. The phrase "otherwise make unavailable" therefore refers to "actions"—not the "*effects* of the action." *Smith*, 544 U.S. at 236 & n.6. ADEA § 4(a)(2), on the other hand, does not ban the act of "adversely affect[ing]" an employee's status; rather it bans a separate act ("limit, segregate, or classify") only if that act causes a certain effect ("which would deprive or tend to deprive . . . or otherwise adversely affect"). *See id.* at 235 ("Neither [Title VII] § 703(a)(2) nor the comparable language in the ADEA simply prohibits actions that 'limit, segregate, or classify' persons; rather the language prohibits such ac-

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tion v. Harris included effects-based language ("which results in the disproportionate demotion or dismissal") before the term "discriminate." 444 U.S. 130, 138 (1979). The FHA lacks effects-based language, so "*Harris* is inapposite." *Am. Ins. Ass'n v. U.S. Dep't of Hous. & Urban Dev.*, No. 1:13-cv-00966 (RJL), 2014 WL 5802283, at *8 n.19 (D.D.C. Nov. 7, 2014).

tions that 'deprive any individual of employment opportunities or *otherwise adversely affect* his status an employee, because of such individual's' race or age.").

The FHA contains none of the results- or effects-based language that this Court has previously recognized as creating disparate-impact liability. As the Solicitor General's *Town of Huntington* brief observed, "Congress has demonstrated its ability unambiguously to adopt an effects test when it wishes to do so." U.S. Amicus Br. n.18, *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (No. 87-1961), *available at* http://www.justice.gov/osg/briefs/1987/sg870004.txt. Without such results- or effects-based language, the FHA's plain text precludes disparate-impact claims under this Court's precedents.

B. *Griggs* Should Not Be Extended Beyond Title VII Or Identical Language

Griggs was not a sound textual interpretation of the original version of Title VII. Pet. Br. 29–33; *see Ricci*, 557 U.S. at 577 ("The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact."). *Griggs* recognized Title VII disparate-impact claims, even though the statutory text prohibited certain acts taken only "because of [an] individual's race." 401 U.S. at 426 n.1 (quoting 42 U.S.C. § 2000e-2(a)(2)). The phrase "because of race" requires that race be a reason for the housing action.[4] *See Gross v.*

[4] A separate FHA provision criminalizes injuring, intimidating, or interfering with a person "because of his race" and because of his housing decisions. 42 U.S.C. § 3631. Courts have interpreted this (continued…)

FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009) ("The words 'because of' mean 'by reason of: on account of.' 1 Webster's Third New International Dictionary 194 (1966)"). Title VII's plain text, as originally enacted, thus prohibited only intentional discrimination.

The Court can overrule *Griggs*, but it need not do so for the Department to prevail. The Court could adhere to *Griggs* under principles of statutory stare decisis, and the Solicitor General never denies that statutory stare decisis is a stronger doctrine of deference than *Chevron*. Pet. Br. 31–32; *cf.* U.S. Br. 31. In fact, *Smith*'s interpretation of ADEA § 4(a)(2), which is identical to Title VII § 703(a)(2) in relevant respects, depended on the stare decisis force of *Griggs*. *See Smith*, 544 U.S. at 234, 236 ("*Griggs* is therefore a precedent of compelling importance."; "*Griggs*, which interpreted the identical text at issue here, thus strongly suggests that a disparate-impact theory should be cognizable under the ADEA.").

But *Griggs* should not be extended beyond Title VII § 703(a)(2) or statutes using identical "adversely affect" language. The FHA does not use this language. Instead, it unambiguously requires intentional discrimination, and it "must be read . . . the way Congress wrote it." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517,

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statute to require racial animus. *See, e.g.*, *United States v. Piekarsky*, 687 F.3d 134, 143 (3d Cir. 2012); *United States v. Craft*, 484 F.3d 922, 926 (7th Cir. 2007). The federal hate-crimes statute also criminalizes the injuring of a person "because of . . . race," 18 U.S.C. § 249(a), and that statute requires "racial motivation," *United States v. Cannon*, 750 F.3d 492, 506 (5th Cir. 2014).

2527 (2013) (internal quotation marks and citation omitted).

C. The 1988 Amendments Do Not Recognize Disparate-Impact Claims

1. The 1988 amendments to the Fair Housing Act did not ratify the courts of appeals' decisions that erroneously recognized FHA disparate-impact claims. *Cf.* U.S. Br. 23–24.

The 1988 amendments did not change the operative language of sections 804(a) and 805(a). *Id.* at 23. Such congressional inaction "deserve[s] little weight in the interpretive process." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994), quoted in *Sandoval*, 532 U.S. at 292. Indeed, *Central Bank* refused to presume that Congress, "by silence," acquiesced in the consensus of eleven courts of appeals when it amended a statute without rejecting the judicial interpretation. 511 U.S. at 186; *see id.* at 192 (Stevens, J., dissenting). *Sandoval*, too, concluded that Congress had not acquiesced in the consensus of ten courts of appeals by passing "isolated amendments" to a statute. 532 U.S. at 292; *see id.* at 295 n.1 (Stevens, J., dissenting).

The courts of appeals' decisions also were not "unquestioned." *Jama v. ICE*, 543 U.S. 335, 349 (2005). The Solicitor General had argued to this Court that the FHA prohibits only intentional discrimination. U.S. Amicus Br., *Town of Huntington*, 488 U.S. 15 (No. 87-1961). President Reagan's signing statement observed that the FHA "speaks only to intentional discrimination." Remarks on Signing the Fair Housing Amendments Act of

1988, 24 Weekly Comp. Pres. Doc. 1140, 1141 (Sept. 13, 1988). HUD declined to take a position. 54 Fed. Reg. 3232, 3235 (Jan. 23, 1989). And this Court reserved the question. *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (per curiam); *see Sandoval*, 532 U.S. at 291–92 (rejecting acquiescence when the Court had "expressly . . . reserve[d] the question").

It is similarly insignificant that Congress failed to adopt Representative Swindall's amendment, which would have precluded disparate-impact claims for zoning decisions. "[F]ailed legislative proposals are 'a particularly dangerous ground'" for statutory interpretation. *Cent. Bank*, 511 U.S. at 187 (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)). That is because "several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Benefit Guar. Corp.*, 496 U.S. at 650 (internal quotation marks and citation omitted). Congress may have rejected the amendment simply because it believed the FHA's operative language already precluded disparate-impact claims. *See United States v. Craft*, 535 U.S. 274, 287 (2002). And Representative Swindall himself did not believe his unadopted amendment ratified the courts of appeals' decisions. He stated that the amendment left the issue of disparate-impact liability to "eventual Supreme Court resolution" and "d[id] not express approval or disapproval of current court decisions." H.R. Rep. No. 100-711, at 89 (1988).

2. The three exemptions added by the 1988 amendments did not recognize disparate-impact claims. *Cf.* U.S.

Br. 24–29. These provisions *restrict* liability by clarifying that "[n]othing in [the FHA] prohibits" or "limits" the listed actions.[5] 42 U.S.C. §§ 3605(c), 3607(b)(1), 3607(b)(4). It is not plausible to read this restrictive language as an enormous, sub silentio expansion of FHA liability. Congress does not "hide elephants in mouseholes," and it did not hide disparate-impact liability in the FHA as originally enacted or in "ancillary provisions" like these three exemptions that restrict FHA liability. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).

This reading does not render these provisions surplusage. They apply to all FHA claims. *See City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 728 (1995) (construing 42 U.S.C. § 3607(b)(1) as a "complete exemption from FHA scrutiny"). They guarantee that the listed actions will be deemed "legitimate" under a *McDonnell Douglas*-type burden-shifting framework that some courts have applied to disparate-treatment claims. Pet. Br. 42. Moreover, Congress may have intended the exemptions to serve as a shield against the disparate-impact claims authorized by some courts of

[5] There is an important textual difference between these exemptions and the reasonable-factors-other-than-age provision discussed in *Smith*, which concerned actions that were "otherwise prohibited" by the ADEA. 29 U.S.C. § 623(f)(1). *Smith* interpreted this language as acknowledging some conduct would be prohibited but for the RFOA exemption. *See Smith*, 544 U.S. at 239; *id* at. 246 (Scalia, J., concurring). The three FHA exemptions, in contrast, do not implicitly recognize that the FHA otherwise prohibits actions that cause a disparate impact. *Am. Ins. Ass'n*, 2014 WL 5802283, at *10.

appeals. That does not imply that Congress also intended the exemptions to serve as a sword, affirmatively authorizing such claims.

In any event, the canon of avoiding surplusage cannot trump plain text. *See, e.g., Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004). Surplusage is pervasive in federal statutes. For example, 42 U.S.C. § 12112(b)(1) is a provision of the ADA that includes Title VII's "adversely affects" language, which *Smith* interpreted as creating disparate-impact liability. But if (b)(1) were interpreted to encompass disparate-impact liability, a separate ADA provision, § 12112(b)(6), would be rendered surplusage. Pet. Br. 40–41. Neither the Solicitor General nor the respondent addressed this example in their briefs.

D. The FHA's Text Does Not Allow HUD To Carve Out A "Legally Sufficient Justification" Defense

A *reductio ad absurdum* confirms that the FHA precludes disparate-impact liability: the statutory text does not allow HUD to create a "legally sufficient justification" defense. Pet. Br. 33–35. The FHA's absolute protections in sections 804(a) and 805(a) leave no room for HUD's split-the-difference approach. *Cf.* U.S. Br. 32–34. If practices causing a disproportionately adverse effect on a protected group are covered by sections 804(a) and 805(a), then they are prohibited *in toto* (unless an exemption applies). Title VII contains a "business necessity" defense to disparate-impact claims, 42 U.S.C. § 2000e-2(k)(1)(A)(i), and the ADEA contains a reasonable-factors-other-than-age exemption, 29 U.S.C. § 623(f)(1). But the FHA has no across-the-board exemption.

The Solicitor General asserts that discriminatory effects must be "*unjustified*" to be prohibited. U.S. Br. 32. But this word, or any similar phrase, is nowhere to be found in the relevant FHA sections. HUD therefore departs from the FHA's plain text in concocting this defense. *Cf. Pfaff v. HUD*, 88 F.3d 739, 745, 747–49 (9th Cir. 1996) (rejecting deference to HUD's "[r]adically inconsistent interpretations" of sufficient legal justification under the FHA; calling HUD's conduct "reprehensible," "appalling," and "heavy-handed"; and noting that HUD's "inconsistent and misleading representations" led the public "down the garden path").

E. The FHA's Legislative History Does Not Support Disparate-Impact Liability

The FHA's "unambiguous" text precludes disparate-impact claims, so "[l]egislative history is irrelevant." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 808 n.3 (1989).

And even if the Court examines the FHA's legislative history, it will find multiple statements from the bill's sponsors indicating that the FHA is limited to intentional discrimination. The respondent ignores that the principal sponsor, Senator Mondale, said the FHA "permits an owner to do . . . everything he could ever do with property, except refuse to sell it to a person *solely on the basis of his color* or his religion. That is *all* it does." 114 Cong. Rec. 5640, 5643 (1968) (emphases added). A cosponsor, Senator Brooke, explained that "[a] person can sell his property to anyone he chooses, as long as it is by personal choice and not because of *motivations of discrimination*." 114 Cong. Rec. 2270, 2283 (1968) (empha-

sis added). And Senator Tydings said the FHA sought to fix "the *deliberate exclusion* from residential neighborhoods on grounds of race." 114 Cong. Rec. 2524, 2530 (1968) (emphasis added). Amicus briefs contain additional evidence that Members of Congress did not believe the FHA created disparate-impact liability. *See* Tex. Apartment Ass'n Br. 13–18; Pac. Legal Found. Br. 15–18.

No Member of Congress suggested that facially neutral housing policies could violate the FHA based on racial statistical disparities. The respondent presents numerous statements that the purpose of the FHA was to remedy segregated substandard housing. Resp. Br. 10a–63a. But those statements shed no light on how Congress intended to address that problem. *See Rust v. Sullivan*, 500 U.S. 173, 189 (1991) ("highly generalized" statements in legislative history that "do not directly address" the issue are not evidence of statutory meaning). In fact, disparate-impact claims can impede efforts to revitalize urban neighborhoods, contrary to the FHA's purpose. *See infra* Part IV.

II. THE CANON OF CONSTITUTIONAL AVOIDANCE PRECLUDES FHA DISPARATE-IMPACT CLAIMS

If the FHA is interpreted to encompass disparate-impact claims, the Court will be forced to confront the equal-protection question *Ricci* left unresolved: namely, when the government can require or coerce race-based decisionmaking. *See Ricci*, 557 U.S. at 584 (declining to decide "whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution"). As Justice Scalia observed, this question "is not an easy one." *Ricci*, 557 U.S. at 594 (Scalia,

J., concurring) (anticipating "the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII . . . consistent with the Constitution's guarantee of equal protection"); *see also* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 585 (2003) (noting "the affirmative tension between equal protection and disparate impact statutes"). The respondent's interpretation of the FHA would create the same constitutional quagmire.[6]

The respondent and the Solicitor General do not directly contest that the constitutional issue is a serious one. Instead, they argue the issue on the merits. The respondent, for example, cites *Ricci* for the proposition that "[t]he use of racial considerations as part of a voluntary compliance effort is not unconstitutional." Resp. Br. 63. Similarly, the Solicitor General argues that governmental actors do not violate the Equal Protection Clause by acting in race-conscious ways to avoid disparate impacts. U.S. Br. 34–35.

But the constitutional avoidance canon does not require a constitutional violation; it requires only constitutional doubt. *See Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) (noting that "one of the canon's chief justifications is that it allows courts to *avoid* the decision of constitu-

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[6] Separate constitutional questions would arise if HUD were to enforce disparate-impact regulations to benefit only minorities. Pet. Br. 45–46. But uniform enforcement of those regulations could seriously inhibit programs that disproportionately aid minority communities.

tional questions"). *Ricci* expressly reserved the difficult equal-protection question implicated by disparate-impact liability. The Court should similarly avoid this question here. *See id.* at 381 (noting that the canon applies "whether or not those constitutional problems pertain to the particular litigant before the Court").[7]

In all events, there is a serious argument that FHA disparate-impact liability would violate the Equal Protection Clause. The Clause's "central mandate" is "racial neutrality in governmental decision-making." *Miller v. Johnson*, 515 U.S. 900, 904 (1995). Race-based decisionmaking is subject to strict scrutiny. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). Yet FHA disparate-impact claims can force each regulated entity to evaluate the racial outcomes of its housing decisions and make race-based decisions to avoid liability. This is far more than merely nudging regulated entities to use "'race-conscious'" mechanisms. U.S. Br. 35, 36 (quoting *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment)); *cf.* Massachusetts Br. 36–37 n.52; Dunne Br. 13–20.

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[7] That *Ricci* expressly reserved the question renders irrelevant the Solicitor General's observation that the Court has previously recognized disparate-impact liability under other statutes. *Cf.* U.S. Br. 35. Similarly, the question is in no way resolved by the Court's decisions about the scope of Congress's power under § 5 of the Fourteenth Amendment, as the Equal Protection Clause is an independent constitutional bar. *Cf.* U.S. Br. 35 (citing *Tennessee v. Lane*, 541 U.S. 509, 520 (2004)).

Analogously, the policy invalidated in *Parents Involved* was based on racial statistical disparities. Seattle specified that if a disparity of more than 10% existed between the racial makeup of a school and its district, admissions decisions had to be made to reduce the racial disparity. 551 U.S. at 712. Like the policy in *Parents Involved*, disparate-impact claims create "sweeping race-based classifications," which require officials to "classify individuals by race and allocate benefits and burdens on that basis." *Id.* at 783, 790 (Kennedy, J., concurring in part and concurring in the judgment).

At a minimum, *Parents Involved* demonstrates that governmental consideration of race is an unsettled area of the law rife with difficult constitutional questions.[8] *Compare id.* at 709–25, 733–35 (majority op.), *with id.* at 725–33, 735–48 (plurality op.); *id.* at 748–82 (Thomas, J., concurring); *id.* at 782–98 (Kennedy, J., concurring); *id.* at 798–803 (Stevens, J., dissenting); and *id.* at 803–68 (Breyer, J., dissenting). *See, e.g.*, Dunne Br. 15–20; NAACP LDEF Br. 24–26.

The Court need not resolve these questions now. It can simply acknowledge that the respondent's interpre-

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[8] The amici States argue that the issue is unlikely to arise in the future because it has not arisen to date. Massachusetts Br. 36. Of course, that can be said of any issue that has yet to be resolved. In any event, the likelihood of the issue arising in the future would certainly increase if this Court recognizes FHA disparate-impact claims. *See Ricci*, 557 U.S. at 595–96 (Scalia, J., concurring) (observing, in the Title VII context, that "the war between disparate impact and equal protection will be waged sooner or later").

tation of the FHA creates a difficult constitutional issue and interpret the FHA accordingly.

III. *CHEVRON* DEFERENCE CANNOT SAVE THE HUD REGULATION

A. The respondent and the Solicitor General rely heavily on *Chevron* in their effort to defend the HUD regulation. Resp. Br. 66–69; U.S. Br. 13–17. *Chevron* deference does not apply here for several reasons.

First, deference is permissible only when "the agency interpretation is not in conflict with the plain language of the statute." *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992). Here, the FHA's plain text precludes disparate-impact liability.[9]

Second, even if the text were not plain, constitutional avoidance would trump deference. *Miller*, 515 U.S. at 923; *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

Third, HUD's reading of the statute cannot be reconciled with this Court's precedents. HUD's position is that any statutory prohibition against "discrimination" because of one's membership in a protected class can be

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[9] The statute should not be treated as ambiguous just because some lower courts have read it differently. *Cf.* U.S. Br. 17. This Court has repeatedly held statutes to be unambiguous despite a circuit split. *See, e.g.*, *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1706, 1709 (2012); *CSX Transp., Inc. v. Ga. State Bd. of Equalization*, 552 U.S. 9, 15–16, 20 (2007); *Miller v. French*, 530 U.S. 327, 335–36, 341 (2000). Judicial disagreement over a statute's meaning cannot by itself make the statute ambiguous. *Reno v. Koray*, 515 U.S. 50, 64–65 (1995).

interpreted to establish disparate-impact liability. U.S. Br. 14. This Court already rejected that reading in *Smith*, 544 U.S. at 236 n.6; *Ricci*, 557 U.S. at 577; and *Sandoval*, 532 U.S. at 280.

Finally, HUD's position requires this Court to locate an enormous delegation in statutory language that is poorly suited to the task. Congress does not delegate "decision[s] of . . . economic and political significance" in "cryptic . . . fashion," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); in "vague terms," *Whitman*, 531 U.S. at 468; or through "subtle device[s]," *MCI Telecomc'ns Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994).

B. The respondent incorrectly suggests that, because the Department argued that the Court of Appeals should defer to the burden-of-proof standard in HUD's regulation, the Department must now accept the regulation in its entirety. Resp. Br. 67–68.

The Department's brief below preserved the argument that FHA disparate-impact claims are not cognizable. The brief acknowledged that this Court, "[i]n the pending *Mount Holly* petition," was "considering the predicate question of whether the FHA permits a cause of action for disparate-impact discrimination in the first place." Appellants' Br. 29 n.10, *The Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, No. 12-11211 (5th Cir. Apr. 22, 2013) (citing *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507). And the Department then asked the Court of Appeals "to reverse and render judgment in [its] favor" if "the Supreme Court grants certiorari and rules that

such a cause of action is not available." *Id.* The brief went on to explain that the Department would "focus [its] briefing on the legal standard for judging such claims," as the Court of Appeals "has already concluded that a disparate-impact claim may be brought under the FHA." *Id.*

The Department never suggested *Chevron* deference should apply to HUD's determination that FHA disparate-impact claims are cognizable. Consistent with the Department's argument that the FHA does not recognize disparate-impact claims, the brief noted that "Congress has not spoken clearly on the burden-of-proof issue in disparate-impact claims under the FHA." *Id.* at 29. The Department then argued only that "HUD's regulations are a reasonable interpretation of *the burden of proof*." *Id.* (emphasis added).

IV. DISPARATE-IMPACT LIABILITY IS INCONSISTENT WITH THE FHA'S PURPOSE

The respondent and its amici devote many pages to the proposition that the FHA's purpose was to eliminate substandard segregated housing. *See, e.g.*, Resp. Br. 1–12. Although segregation undoubtedly loomed large in the minds of many, Congress identified the primary purpose of the FHA as "provid[ing], within constitutional limits, for fair housing throughout the United States." 42 U.S.C. § 3601. And this Court confirmed that the FHA was intended to ensure fair housing for all Americans, not only those groups that had been directly harmed by prior housing discrimination. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972). Disparate-impact liability is inconsistent with the FHA's purpose in at least

two significant ways: it undermines efforts to help poorer communities, and it is unnecessary to achieve the FHA's purpose of providing fair housing.

A. Disparate-impact liability interferes with programs intended to help lower-income communities, where minorities are often overrepresented. It can divert resources from poorer neighborhoods, reduce the stock of decent affordable housing in those neighborhoods, and prevent municipal housing authorities from mitigating urban blight.

In Houston, like many cities, lower-income areas tend to have a higher concentration of minority residents. The Houston Housing Authority wants to revitalize certain low-income neighborhoods, Houston Housing Auth. Br. 4, 11, in accordance with the congressional objective of subsidizing housing in lower-income areas, 26 U.S.C. § 42(m)(1)(B)(ii)(III). Redirecting development investment away from lower-income areas would harm the residents of those neighborhoods. Houston Housing Auth. Br. 7. The Authority has a 43,000-family waiting list, but it cannot meet that demand if courts decide that tax credits must be allocated to housing in more affluent neighborhoods. *Id.* at 8–10; *see id.* at 11 (Wilmington House project sits vacant due to fear of disparate-impact litigation). In the Authority's words, disparate-impact liability "essentially prevents construction and redevelopment of public housing projects in the major cities." *Id.* at 7.

This case demonstrates that a supposed "adverse impact" on housing is often in the eye of the beholder. The respondent believes the best way to help lower-income

minorities is to encourage the development of affordable housing in higher-income areas with smaller minority populations. But the allocation of redevelopment dollars is zero-sum. The Houston Housing Authority and Frazier Revitalization prefer tax credits aimed at creating affordable housing options in lower-income neighborhoods, where minorities tend to be overrepresented. Houston Housing Auth. Br. 1; Resp. Frazier Revitalization Inc. Br. 1–2.

Regardless of how the Department allocated the tax credits, somebody would be aggrieved. Accordingly, any deviation from a perfect racial balance threatens potential disparate-impact litigation and liability. *See* Tex. Apartment Ass'n Br. 22–27 (examples of weak disparate-impact claims that imposed significant costs). But only by making race a primary consideration could the Department even hope to approximate such perfect balance. That would violate not only Texas law, which requires the Department to score projects primarily using a specific set of non-racial factors, Pet. Br. 4–5, but likely the Constitution as well, *see supra* Part II.

B. Disparate-impact liability is also unnecessary to achieve the FHA's purpose. Direct evidence of discriminatory intent is not needed to prevail on a disparate-treatment claim. *Cf.* Resp. Br. 57; U.S. Br. 29. Disparate-treatment liability can be based on the totality of the circumstances—including evidence of disparate impact. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 242 (1976) (noting that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts"). The amici States tacitly acknowledge that disparate-

impact liability is unnecessary by arguing that it is functionally equivalent to the *McDonnell Douglas* burden-shifting analysis, which is used to smoke out intentional discrimination. Massachusetts Br. 8–9.

Griggs is a useful example, as the facts there strongly suggested intentional discrimination beneath facially neutral policies. *See, e.g.*, George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 Va. L. Rev. 1297, 1331 (1987) ("In hindsight, *Griggs* appears to be a case of obvious pretextual discrimination, which could equally well have been the subject of a claim of disparate treatment."). The defendant, Duke Power, had engaged in open discrimination for years by restricting minority employees to low-paying jobs in its labor department. 401 U.S. at 427. On "the date on which Title VII became effective," Duke ended that policy but began requiring completion of high school and passage of two aptitude tests to transfer out of the labor department. *Id.* at 427–28. Those requirements, which were not shown to bear a demonstrable relationship to successful performance, had the effect of limiting minority employees' access to better-paying jobs. *Id.* at 430 & n.6. The court of appeals had found no violation of Title VII on the ground that the plaintiffs failed to show a discriminatory purpose. *Id.* at 429. This Court accepted that finding, *id.* at 432, but reversed the judgment of dismissal based on its conclusion that Title VII authorizes disparate-impact liability, *id.* at 432–36. The Court's inclination to find the employer liable on these facts is understandable. But adopting disparate-impact liability to accomplish that goal was a mistake. As the Court clar-

ified five years later, plaintiffs in cases like *Griggs* can use disparate-impact evidence to prove disparate treatment. *See Davis*, 426 U.S. at 242.

By contrast, disparate-impact liability sweeps in defendants who are entirely blameless—for example, the Department. There is no evidence that the Department has undertaken facially race-neutral actions that are "functionally equivalent to intentional discrimination." *Watson*, 487 U.S. at 987. To the contrary, the District Court found that the Department had not engaged in any intentional discrimination, JA 187–91, and had "attempted to use its limited discretion to deconcentrate LIHTC developments in high-minority areas and encourage development in 'high opportunity areas,'" JA 186–87.

In short, the courts of appeals have relied on *Griggs* to expand FHA liability far beyond the statute's purpose of providing fair housing by prohibiting intentional discrimination. *See* Am. Fin. Servs. Ass'n Br. 6–16. *Griggs* should not be extended to the FHA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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