

No. 13-1371

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IN THE  
**Supreme Court of the United States**

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TEXAS DEPARTMENT OF HOUSING AND  
COMMUNITY AFFAIRS, *et al.*,  
*Petitioners,*

*v.*

THE INCLUSIVE COMMUNITIES PROJECT, INC.,  
*Respondent.*

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**On Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit**

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**BRIEF OF *AMICI CURIAE* JUDICIAL  
WATCH, INC. AND ALLIED EDUCATIONAL  
FOUNDATION IN SUPPORT OF PETITIONERS**

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**INTEREST OF THE *AMICI CURIAE***<sup>1</sup>

Judicial Watch, Inc. (“Judicial Watch”) is a non-partisan educational organization that seeks to promote transparency, accountability and integrity in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as an *amicus curiae* in this Court on a number of occasions.

The Allied Educational Foundation (“AEF”) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

Judicial Watch and AEF (collectively *amici*) believe that fidelity to the rule of law as well as to the Constitution requires this Court to overrule decades of flawed lower court rulings finding that the Fair Housing Act (“FHA”) imposes liability based on “disparate impact.” *Amici* are concerned that the imposition of liability under the FHA for practices that are both facially neutral and unmotivated by

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. The parties have given blanket consent to the filing of amicus briefs, and have filed letters of consent with this Court.

discriminatory intent violates the Equal Protection Clause of the Fourteenth Amendment, and are further concerned about the corrosive effect of this violation on the nation. Among the harms caused by the Fifth Circuit's decision are the further enshrinement of the intellectually impoverished concept of race into the law, the furtherance of a culture of racial and ethnic politics in American public life, and the perpetuation of racial and ethnic resentment and intolerance in American society. For these reasons, *amici* urge the Court to overturn the Fifth Circuit's decision.

### SUMMARY OF THE ARGUMENT

The text of the FHA prohibits only disparate treatment, not disparate impact,<sup>2</sup> and the Fifth Circuit's interpretation to the contrary was wrong. Specifically, the FHA prohibits deliberately discriminatory housing practices; it does not require that all practices regarding housing have a statistically neutral or equivalent impact on any particular group of people. The text of the statute is unambiguous on this point.

Even if the Fifth Circuit's interpretation was justified by the text of the FHA, however, this interpretation would at least raise serious

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<sup>2</sup> Although some statutes prohibit both, the FHA is not one of them. For example, the Civil Rights Act "prohibits both intentional discrimination (known as disparate treatment) as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as disparate impact)." *Ricci v. DeStefano*, 557 U.S. 557, 576 (2009).

constitutional issues, and probably would be constitutionally infirm, under the Equal Protection Clause of the Fourteenth Amendment. If accepted, this interpretation would encourage both government agents and private actors to grant benefits on the basis of race, and would fail to satisfy the applicable standard of strict scrutiny review. For these reasons, the Court should refuse to incorporate a “disparate impact” requirement into the FHA.

## ARGUMENT

### **I. The Plain Language of the FHA Only Prohibits Intentional Discrimination, Not Any “Disparate Impact.”**

The Fifth Circuit’s finding that housing market actions resulting in a racial “disparate impact” violate the Fair Housing Act is inconsistent with a plain reading of the text of the FHA and should be reversed. *Dean v. U.S.*, 556 U.S. 568, 572 (2009) (“[W]e ordinarily resist reading words or elements into a statute that do not appear on its face.”). For instance, Section 804 of the FHA does nothing more than make it unlawful 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.” 42 U.S.C. § 3604(a). The phrase “because of race” conveys the fact that race must be the reason (or at least a reason) for an actor’s prohibited discriminatory conduct. *See also* 42



U.S.C. § 3605(a). Accordingly, the FHA's plain language requires *intentional* discrimination against members of a named class in order for an action to be unlawful.

The Fifth Circuit acknowledges this plain language but fails to apply it, instead relying on the regulations of the U.S. Department of Housing and Urban Development ("HUD") interpreting the FHA. *Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Aff.*, 747 F.3d 275, 276, 279 (5th Cir. 2014). However, the District Court for the District of Columbia subsequently struck down those same regulations, on the ground that the text of the FHA simply cannot be interpreted to impose disparate impact liability. That court correctly concluded:

Put simply, Congress knows full well how to provide for disparate impact liability, and has made its intent to do so known in the past by including clear effects-based language when it so chooses. The fact that this type of effects-based language appears *nowhere* in the text of the FHA is, to say the least, an insurmountable obstacle to the defendants' position regarding the plain meaning of the Fair Housing Act.

*Am. Ins. Ass'n v. United States HUD*, 2014 U.S. Dist. Lexis 157904, \*31 (D.D.C. Nov. 7, 2014) (internal citations omitted).

## II. The Court Should Avoid the Constitutional Issues Associated With Reading “Disparate Impact” Liability into the FHA.

Even if it were possible to interpret the FHA to establish “disparate impact” liability, well-settled canons of statutory construction and judicial procedure counsel that this interpretation should be rejected. Foremost among these is the canon of statutory construction providing:

[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, [the Court’s] duty is to adopt the latter.

*U.S. ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); *see INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001). A related rule holds:

[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.

*Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J. concurring); *see* Antonin Scalia & Bryan A. Garner, *READING LAW*, 251 (2012) (discussing relation between doctrines).

Taken together, these principles require courts interpreting statutes to construe them in a way that avoids raising constitutional concerns. The force of these principles has been decisive even where a government agency's contrary interpretation ordinarily would have commanded great deference. For example, a duty to avoid constitutional concerns has been held to override the *Chevron* deference normally due to the statutory interpretations of the National Labor Relations Board. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988); see *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Importing a “disparate impact” standard into the FHA, even if it were somehow textually justified, would contravene these principles by raising serious constitutional issues under the Equal Protection Clause. By definition, a “disparate impact” statute is violated by a proscribed statistical disparity between racial groups, even though that disparity was not the result of deliberate conduct. When a court seeks to “remedy” a racial disparity that was not caused by intentional discrimination, it is granting the recipients of that relief a benefit on the basis of their race. Further, those who seek to avoid “disparate impact” liability can only do so by intentionally (prophylactically) discriminating in favor of a statistically underrepresented group. Accordingly, a “disparate impact” statute requires government and private actors to engage in explicit race-based decision making. These outcomes are, to

say the least, problematic under the Equal Protection Clause of the Fourteenth Amendment.

In the analogous context of “disparate impact” claims under Title VII, it has been observed that the statute “not only permits but affirmatively *requires*” race-based actions “when a disparate-impact violation *would* otherwise result.” *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring). Thus:

Title VII’s disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory.

*Id.* As explained below, *amici* respectfully submit that the inclusion of a “disparate impact” standard in the FHA would violate the Equal Protection Clause.

### **III. Reading “Disparate Impact” Liability into the FHA Would Render it Unconstitutional.**

The interpretation of the FHA adopted by the Fifth Circuit would render the statute unconstitutional. Specifically, the interpretation would fail constitutional strict scrutiny under both the “compelling interest” requirement and the “narrow tailoring” requirement.

“A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination on the basis of race.” *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). Classifications of persons according to their race “are subject to the most exacting scrutiny; to pass constitutional muster they must be justified by a compelling governmental interest and must be ‘necessary . . . to the accomplishment’ of their legitimate purposes.” *Id.*, quoting *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964); see also *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). “All racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.” *Johnson*, 543 U.S. at 505. Importantly, strict scrutiny is the appropriate standard, “even for so-called ‘benign’ racial classifications.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 741 (2007).

First, the Fifth Circuit’s interpretation of the FHA as requiring housing market participants to make race-conscious decisions fails the “compelling governmental interest” requirement of strict scrutiny review. The Fifth Circuit’s decision mandates racial discrimination without evidence of a compelling governmental interest. Its interpretation requires Texas to balance the placement of low income housing units according to the racial composition of various neighborhoods, rather than pursuing rational policy based only on relevant economic and income data. *Inclusive Cmty.*, 747 F.3d at 279-280. However, “racial group balancing”

is not a compelling state interest. In fact, this Court has found quite the opposite:

Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”

*Parents Involved*, 551 U.S. at 729 (internal citations omitted). Absent some other compelling state interest, “[r]acial balance is not to be achieved for its own sake.” *Freeman v. Pitts*, 503 U.S. 467, 494 (1992).

Second, the Fifth Circuit’s interpretation fails strict scrutiny review because it is not “narrowly tailored.” *Adarand Constructors*, 515 U.S. at 227 (“[R]acial classifications . . . are constitutional only if they are narrowly tailored measures that further compelling government interests”). Because racial and ethnic categories are social constructs that are inherently vague, ambiguous, arbitrary, reliant on self-identification, and therefore constantly shifting, the mandated use of racial group impact tests under the FHA will never be “narrowly tailored” to advance a compelling government interest.

Not even the federal government can define what a “race” or “racial group” is with any precision. The government last tried to adopt regulations to codify human races and ethnicities in 1997, defining them vaguely as based on which continent or country a person has “origins” in.<sup>3</sup> This approach is often extremely problematic and fraught with wild imprecision, as has been thoroughly documented elsewhere. *See, e.g., United States v. Ortiz*, 897 F. Supp. 199, 203 (E.D. Pa. 1995); *McMillan v. City of New York*, 253 F.R.D. 247, 249 (E.D.N.Y. 2008); *c.f. Plessy v. Ferguson*, 163 U.S. 537, 552 (1896). Today, the government relies on “self-identification” to determine the existence of racial groups.<sup>4</sup> This has the benefit of avoiding the intrusive inquiry into blood lines of the *Plessy* era, but it results in a process that is arbitrary as well as imprecise.

The American Anthropological Association (“AAA”) has observed that our concepts of “racial” categories are generally too crude to convey accurate and useful information about individuals and

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<sup>3</sup> Office of Management and Budget, “Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity,” (Oct. 30, 1997), available at [http://www.whitehouse.gov/omb/fedreg\\_1997standards/](http://www.whitehouse.gov/omb/fedreg_1997standards/).

<sup>4</sup> U.S. Census Bureau, “What is Race,” available at <http://www.census.gov/topics/population/race/about.html> (visited Nov. 18, 2014) (“The Census Bureau collects racial data . . . based on self-identification.”).

groups.<sup>5</sup> Conversely, a reliance on racial categories can be highly effective for furthering misinformation and spreading irrational beliefs about others:

“Race” thus evolved as a worldview, a body of prejudgments that distorts our ideas about human differences and group behavior. Racial beliefs constitute myths about the diversity in the human species and about the abilities and behavior of people homogenized into “racial” categories.

*Id.* The AAA even has recommended that the government phase-out its use of racial categories in order to achieve the goal of eventually eliminating racial discrimination.<sup>6</sup>

Any governmentally mandated use of “racial classifications” – a crude, ambiguous construct

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<sup>5</sup> American Anthropological Association, “Statement on “Race,” (May 17, 1998), available at <http://www.aaanet.org/stmts/racepp.htm> (“In the United States both scholars and the general public have been conditioned to viewing human races as natural and separate divisions within the human species based on visible physical differences. With the vast expansion of scientific knowledge in this century, however, it has become clear that human populations are not unambiguous, clearly demarcated, biologically distinct groups”).

<sup>6</sup> American Anthropological Association, “Response to OMB Directive 15,” (Sept. 1997), available at <http://www.aaanet.org/gvt/ombdraft.htm> (“[T]he effective elimination of discrimination will require an end to such categorization, and a transition toward social and cultural categories that will prove more scientifically useful and personally resonant for the public than are categories of “race.””).



reliant on vague self-determinations made one at a time by hundreds of millions of Americans – is sure to fail the requirement that it be “narrowly tailored” to satisfy strict scrutiny. The only way to treat the troubled concept of “race” in the law should be to absolutely prohibit its use as a basis for making decisions affecting individuals or groups. Conveniently, such a prohibition is precisely what the Constitution already requires.

### CONCLUSION

*Amici* hold that any “disparate impact” standard read into the FHA would directly conflict with the guarantees of the Equal Protection Clause of the Fourteenth Amendment, and could not be justified as narrowly tailored to achieve a compelling government interest. In addition, any such interpretation violates the plain meaning of the FHA. At a minimum, such an interpretation of the FHA would raise serious constitutional questions which must be avoided in the first place. Accordingly, *amici* respectfully submit that this Court should refuse to graft a “disparate impact” theory of liability onto the unambiguous language of the FHA.

For all of the foregoing reasons, the judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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