No. 11-1507

In The Supreme Court of the United States

TOWNSHIP OF MOUNT HOLLY, a municipal corporation of the State of New Jersey; TOWNSHIP COUNCIL OF THE TOWNSHIP OF MOUNT HOLLY, as governing body of the Township of Mount Holly; KATHLEEN HOFFMAN, as Township Manager of the Township of Mount Holly; and JULES THIESSEN, as Mayor of the Township of Mount Holly,

Petitioners,

v.

MOUNT HOLLY GARDENS CITIZENS IN ACTION, INC., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF ON THE MERITS FOR RESPONDENT TRIAD ASSOCIATES, INC., SUPPORTING PETITIONERS

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QUESTION PRESENTED

The Fair Housing Act ("FHA") makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer . . . 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). Reversing the District Court's decision, the Third Circuit found that the Respondents presented a prima facie case under the Fair Housing Act because Petitioners sought to redevelop a blighted housing development that was disproportionately occupied by low and moderate income minorities and because the redevelopment sought to replace the blighted housing with new market rate housing which was unaffordable to the current residents within the blighted area. The Third Circuit found that a prima facie case had been made despite the fact that there was no evidence of discriminatory intent and no segregative effect. The question presented is:

> Are disparate impact claims cognizable under the Fair Housing Act?

LIST OF PARTIES TO THE PROCEEDING

Pursuant to Rule 24.1(b), the following list identifies all of the parties appearing in this proceeding.

The Petitioners here and Defendants-Appellees below are Township of Mount Holly; Township Council of Township of Mount Holly; Kathleen Hoffman, as Township Manager of the Township of Mount Holly; and Jules Thiessen, as Mayor of the Township of Mount Holly.

The Respondents here and Plaintiffs-Appellants below are Mt. Holly Gardens Citizens in Action, Inc., a New Jersey non-profit corporation; Ana Arocho; Vivian Brooks; Bernice Cagle; George Chambers; Dorothy Chambers; Santos Cruz; Elide Echovirus; Norman Harris; Mattie Howell; Nancy Lopez; Dolores Nixon; Leonardo Pagan; James Potter; Henry Simmons; Joyce Starling; Robert Tiger; Tasha Tirade; Readmes Torres Burgos; Lillian Torres-Moreno; Dagmar Vicente; Albania Warthen; Sheila Warthen; Charlie Mae Wilson and Leona Wright.

The Respondents here and Defendants-Appellees below are Keating Urban Partners, L.L.C. and Triad Associates, Inc.

The United States Department of Justice, Civil Rights Division, and the United States Department of Housing and Urban Development (HUD) filed an Amicus brief in the Third Circuit.

LIST OF PARTIES TO THE PROCEEDING
– Continued

Maria Arocho, Pedro Arocho, Reynaldo Arocho, Christine Barnes, Leon Calhoun, Vincent Munoz, Angelo Nieves, Elmira Nixon, Rosemary Roberts, William Roberts, Efraim Romero, Phyllis Singleton, Flavor Tovar, and Marlene Tovar were all named as plaintiffs in the Second Amended Complaint filed in the United States District Court for the District of New Jersey, but did not participate in the appeal to the Third Circuit.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Triad Associates, Inc. states that it is a privately held corporation. None of its shares is held by a publicly traded company.

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The Third Circuit heard this matter on appeal from the U.S. District Court, District of New Jersey Opinion *Mount Holly Citizens in Action, et al. v. Tp. of Mount Holly, et al.*, reported at 2011 WL 9405. (Pet. App. 1a-29a). The Third Circuit's decision is reported at 658 F.3d 375. Petitioners' Motion for Rehearing En Banc was denied on April 13, 2012. (Pet. App. 30a-61a).

JURISDICTION

This Court has jurisdiction to review the instant matter pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 1291 and § 1331.

STATUTORY PROVISIONS INVOLVED

At issue in the instant matter is the applicability and interpretation of 42 U.S.C. § 3604(a), which reads as follows:

> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful –
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person

> because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604

STATEMENT OF THE CASE

In addition to the below, Respondent Triad Associates, Inc. relies on the Statement of the Case submitted by Petitioner in Petitioners' Brief on the Merits.

A. Background

This matter involves the redevelopment of a section known as The Gardens in Mount Holly Township, New Jersey. The Gardens is a 30-acre residential area which had been known to the Township for years as an area of high crime and dilapidated residences. (Pet. App. 5a).

Pursuant to The Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1, et seq., the Township designated the Gardens as an area in need of redevelopment.

To correct the blighted conditions of the Gardens, the Township adopted a Redevelopment Plan for the Gardens in 2003. (Document #17-23, JA842-66). Following the acquisition of land adjacent to the Gardens, the Township adopted a second plan for the area, the West Rancocas Redevelopment Plan, in 2005. (Pet. App. 8a). In 2008 an Amended Redevelopment

Plan was adopted by the Township. (Pet. App. 58a). The 2008 plan called for the demolition of all current dwellings and the construction of new residential units as well as commercial space.

B. Triad's Limited Role

Indisputably, Triad played no part in the drafting and adoption of the Township's redevelopment plan in any of its incarnations; rather, it first became involved in March of 2006 when it was retained by Keating for the purposes of conducting the relocation activities necessitated by the redevelopment plan. As required by New Jersey's Relocation Assistance Law, N.J.S.A. 52:31B-1, et seq., Triad prepared the Workable Relocation Assistance Plan ("WRAP") for the Gardens project. (3d Cir. JA1035-83). The WRAP states that the goal of redevelopment "is to create an attractive, safe and cohesive residential neighborhood that provides a variety of housing options that meet the needs of the Mt. Holly community. . . . " (3d Cir. JA2444). Triad conducted a survey of the residents, assembled the WRAP, and then opened an office in the Gardens from which it assisted residents in finding new housing. (3d Cir. JA2021-22).

Triad had no input regarding the creation of any redevelopment plan, and had no role in any decision 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" any dwelling.

Triad owned no property in the community and acted only in accordance with its instructions from Keating.

C. Lower Court Proceedings and Judgments

In the New Jersey State Courts, the Plaintiffs unsuccessfully challenged the Township of Mt. Holly's (Township) determination that the Gardens was "an area in need of redevelopment."

After failing to halt redevelopment through litigation at the State level, Plaintiffs have pursued claims for violations of the Fair Housing Act against the Township, Keating Urban Partners, L.L.C. (Keating), its redeveloper, and Triad.

The District Court of New Jersey granted summary judgment in favor of Triad on January 3, 2011. The District Court held that Plaintiffs failed to articulate a prima facie case of disparate impact or intentional discrimination under the FHA. (Pet. App. 38a). The Third Circuit Court of Appeals reversed the District Court in part and affirmed in part. The Third Circuit held that all counts alleging intentional discrimination remain dismissed, but that Plaintiffs had articulated a prima facie case of disparate impact under the FHA. (Pet. App. 15a-19a, 28a). The Third Circuit then denied a rehearing en banc. (Pet. App. 63a-64a).

SUMMARY OF ARGUMENT

Respondent Triad relies on the Summary of Argument submitted in Petitioners' Brief on the Merits in addition to the arguments set forth below.

I. The decision below was made in error, because the decision is based on an interpretation of 42 U.S.C. § 3604(a) which is divorced from any plain reading of the statute. 42 U.S.C. § 3604(a) creates no cognizable claim for disparate impact under the Fair Housing Act. The pertinent provision reads as follows:

> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful –
>
> 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 statute sets a prohibition against certain actions when those actions are based on or undertaken because of the listed protected ethnic and cultural characteristics. "When the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004). The clear unambiguous language of 42 U.S.C. § 3604(a) focuses on and

outlaws types of intentional discrimination. The prohibitions are not against what impact an action has, but rather on what the decision to sell or rent can be based. Any other interpretation requires the reader to insert language that Congress did not, or contort the language into an obviously unintended meaning.

II. Congress' omission of any prohibition against a disparate impact in 42 U.S.C. § 3604(a) is made more compelling when compared to the language of Title VII, the Age Discrimination in Employment Act of 1967 29 U.S.C. § 621, et seq. ("ADEA"), and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq. ("ADA"). Both the ADEA and ADA include the term "affect" when describing the illegal conduct. *See* 42 U.S.C. § 2000e-2(a)(2); 42 U.S.C. § 12112(b)(1); and 29 U.S.C. § 623(a)(1) The ADEA and ADA make it clear that, when it desires, Congress has the capacity to legislate against disparate impact using the plain language of a statute. By choosing to not amend the FHA when Congress amended The Civil Rights Act of 1991, Congress expressed its intent to continue to exclude disparate impact claims under the FHA.

III. A FHA cause of action based upon disparate impact would not only fail to further the purpose of the FHA, but be a hindrance to that purpose. "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601 If any action which creates a disparate impact is unlawful, then our nation's minority neighborhoods, which in some

cases are in most need of redevelopment and assistance, will be left to languish by legislative paralysis.

IV. There is no cognizable claim under 42 U.S.C. § 3604(a) against Triad. All claims based upon intentional discrimination against Triad have been definitively dismissed. Triad's involvement in the redevelopment process did nothing to "make unavailable or deny" housing to the residents of the Gardens; in fact, Triad helped find suitable housing for all displaced Gardens residents who sought assistance, regardless of their race. The extensive factual record developed in this matter reveals that Triad played no role in the designation of the Gardens as an area in need of redevelopment, in the formulation of the redevelopment plans implemented by the Township, or in the acquisition of properties and demolition of the neighborhood.

Simply stated, there is no support for the plaintiffs' contention that a private contractor can be liable for a governmental actor's decision to act under circumstances akin to those presented here. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982)

V. The recent HUD Regulation which addresses no ambiguity in the FHA and is counter to the purpose and plain language of the statue is not dispositive on the question presented, nor is it owed any deference by the Court. The HUD rule states that, "liability may be established under the Fair Housing Act based on a practice's discriminatory effect even if the

practice was not motivated by a discriminatory intent." 78 Fed. Reg. at 11,482.

First, the timing of the regulation, during the pendency of *Magner v. Gallagher*, Docket No. 10-1032, is dubious. Decades after the FHA was passed and just as this Court was about to directly address the issue of whether a violation under the FHA could be based on a disparate impact claim, HUD found it timely to issue a rule which changes the meaning of 42 U.S.C. § 3604(a). If ambiguity did exist in § 3604(a), one would expect that HUD would not have waited so long, 45 years, to clarify the ambiguous language.

Section 3604(a) is not ambiguous and there is no gap which requires filling by HUD. HUD's recent rule does not resolve any ambiguity and is not "based on a permissible construction of the statute" *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842-843 (1984). It is therefore not due Chevron deference. Rather than a clarification, the HUD rule is more aptly described as an insertion of language that is contrary to the plain meaning of the statute.

ARGUMENT

In addition to the below, Triad relies on the Arguments advanced in Petitioner's Brief on The Merits.

I. THE DECISION BELOW IS CONTRARY TO THE PLAIN LANGUAGE OF § 3604(a)

The clear unambiguous language of 42 U.S.C. § 3604(a) creates no cognizable claim for disparate impact under the Fair Housing Act.

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

All inquiries into the interpretation of a statute by the Supreme Court begin with the language of the statute. *CSX Transportation, Inc. v. Alabama Dept. of Revenue*, 131 S. Ct. 1101, 1107 (2011). "When the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie v. U.S. Trustee,* 540 U.S. 526 (2004). The "authoritative statement is the statutory text," *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005).

There is no indication in the text of § 3604(a) that actions which create a disparate impact are to be barred. The language is obviously focused on actions, not effects. The FHA is substantially different from the ADA and ADEA in that critical regard. The ADA

and ADEA, by the plain meaning of their words, are designed to make unlawful certain impacts or effects. The goal of the ADA and ADEA is in part to limit or remove discriminatory results. 42 U.S.C. § 12112(b)(1) makes it unlawful to act "in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee." 29 U.S.C. § 623(a)(2) makes it unlawful for any employer to act "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee."

The FHA has no such analogous language. The above makes it clear that Congress knows how to clearly express when a disparate impact claim shall be cognizable. The simple analysis is that if Congress wanted the same language in the FHA, Congress would have written that language into the Act. Sometimes the simple analysis is the correct analysis. Congress, by the contrasting language in the FHA, has clearly chosen to bar discriminatory motivated acts in addressing fair housing, not necessarily any particular affect.

Any attempt to contort the phrase "or otherwise make unavailable or deny," found in § 3604(a), to mean that the FHA bars disparate impacts strains credulity. Any straight forward and honest reading of the statute leads to the conclusion that the above phrase references the list of unlawful actions, and expands that list to include all similar acts taken to deny a dwelling to any person "because" of a protected

characteristic. Both the words and the structure of the statute can yield no other rational meaning.

If any doubt remained, the use of the word "because" removes any such doubt that § 3604(a) governs actions based on discriminatory intent, and not those which inadvertently result in a disparate impact. The FHA clearly makes unlawful any act to deny housing "because" of a protected characteristic. The mere happening of a housing decision or result contrary to the wishes or desires of any individual does not create a cause of action. This Court has held that the "because of" language requires a causal connection between the action taken and the protected class. *Gross v. FBL Fin. Servs., Inc.,* 557 U.S. 167, 176-177 (2009); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-240 (1989). Adherence to the law requires that discriminatory intent be an essential element of any claim under the FHA.

Prior Circuit Court decisions allowing disparate impact claims under the FHA have incorrectly ignored the plain meaning of the text, and instead created a claim for relief not grounded in statutory authority. There is not a single case in which the text of the FHA has been cited as the well spring for a disparate impact claim. Rather, perceived similarities between the FHA and Title VII resulted in some circuits simply carrying over their Title VII analysis to FHA claims.

> The Supreme Court has not decided whether the FHA allows for recovery based on a

> disparate-impact theory. *Town of Huntington v. Huntington Branch, NAACP,* 488 U.S. 15, 18, 109 S. Ct. 276, 102 L.Ed.2d 180 (1988) (per curiam). In 1974, a panel of this court, also without discussing the text of 42 U.S.C. § 3604, held that a plaintiff advancing a claim under the FHA need prove only that the conduct of a defendant had a "discriminatory effect," and thereby introduced disparate-impact analysis under the FHA. *United States v. City of Black Jack,* 508 F.2d 1179 (8th Cir.1974). The court relied on the "purpose" of the FHA and reasoned by analogy to the Supreme Court's decision in *Griggs v. Duke Power Co.,* 401 U.S. 424, 430-31, 91 S. Ct. 849, 28 L.Ed.2d 158 (1971), which applied disparate-impact analysis to a claim of employment discrimination under Title VII of the Civil Rights Act. *See Black Jack,* 508 F.2d at 1184.

Gallagher v. Magner, 636 F.3d 380 (8th Cir. 2010). The Circuit Courts, have gotten caught up in a precedent divorced from the statutory text of the FHA. *See Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Keith v. Volpe*, 858 F.2d 467, 482 (9th Cir. 1988); *Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 574 (6th Cir. 1986); *U.S. v. Mitchell*, 580 F.2d 789, 791-792 (5th Cir. 1978).

As cited in Petitioners' Reply Brief on Petition for Writ of Certiorari in this matter, the dissenting opinion in *Gallagher* highlights the key textual difference between the FHA and Title VII.

> The FHA likewise does not include text comparable to that relied on in *Smith* and appearing in § 703(a)(2) of Title VII and § 4(a)(2) of the ADEA. Rather, the text of 42 U.S.C. § 3604(a) makes it unlawful to "make unavailable or deny . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin." This language appears similar to § 4(a)(1) of the ADEA, which the Court in *Smith* said does not support a claim based on disparate impact alone.

Gallagher, 636 F.3d at 383. In *Smith v. City of Jackson*, *Miss.*, 544 U.S. 228 (2005), Justice O'Connor correctly noted that "neither petitioners nor the plurality contend that the first paragraph, § 4(a)(1), authorizes disparate impact claims, and I think it obvious that it does not." *Id*. at 249.

The pertinent portion of § 4(a)(1) of the ADEA makes it unlawful to, "fail or refuse to hire or to discharge any individual or otherwise discriminate." This language is similar to § 3604(a), and just as there is no disparate impact claim under § 4(a)(1) of the ADEA, there should be no such claim under § 3604(a) of the FHA.

II. CONGRESS INTENTIONALLY EXCLUDED DISPARATE IMPACT CLAIM FROM THE FHA BY CHOOSING NOT TO AMEND THE ACT

The omission of any analogous language in the FHA must not be read as an oversight or mistaken omission by Congress, but rather an express manifestation of Congress' intent that the FHA not include any claim for disparate impact. By not amending the FHA in conjunction with the Civil Rights Act of 1991, Congress again acted intentionally and affirmatively in choosing not to include disparate impact claims under the FHA. When one statutory provision is amended, but others are not, Congress is "presumed to have acted intentionally" when not amending the unchanged provisions. *Gross v. FBL Fin. Services, Inc.*, *supra,* 557 U.S. at 174. Congress affirmatively chose to exclude disparate impact claims when drafting the FHA, and again, declined to amend it to include such claims when drafting the Civil Rights Act of 1991.

III. A DISPARATE IMPACT CLAIM DOES NOT FURTHER THE PURPOSE OF THE FHA; INSTEAD IT WOULD BE AN IMPEDIMENT TO THE GOALS OF THE ACT

The redevelopment of communities may often affect (as a percentage of the local population) certain races, ethnicities or religious groups disproportionately. However, not all disproportionate affects are the result of a discriminatory intent or scheme. Not

"every action which produces discriminatory effects is illegal." *Metro. Housing Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977). *See also Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 192 (4th Cir. 1999) (the Fair Housing Act does not apply to every action which "might conceivably affect the availability of housing.").

If a disparate impact claim is ruled to be cognizable under the FHA, then the Court ensures what must be the unintended consequence, that any neighborhoods mostly populated with racial minorities, or citizens with other protected characteristics, could never be redeveloped or improved. If a locality has a majority of its minority population living in a blighted or unsafe area, then the judicial creation of a disparate impact claim would only frustrate the purpose of the FHA to "replace the ghettos 'by truly integrated and balanced living patterns.'" *Trafficante v. Metro Life Ins. Co.*, 409 U.S. 205, 211 (1972), declined to follow on other grounds by *Thompson v. N. Am. Stainless, L.P.*, 131 S. Ct. 863, 869 (2011).

A disparate impact cause of action under the FHA not only stifles redevelopment and community progress, but undoubtedly catches all manner of non-discriminatory redevelopment in its broad and unwieldy net. If cognizable, such a claim has the nonsensical result of barring the redevelopment and improvement of blighted areas, if those areas happen to be mostly populated by minorities.

IV. NO FHA VIOLATION CAN BE ASSERTED AGAINST TRIAD BASED ON DISPARATE IMPACT

Triad was retained by Keating in March of 2006 to provide relocation case management services for Gardens residents. (JA2438). As required by New Jersey's Relocation Assistance Law, N.J.S.A. 52:31B-1, et seq., Triad prepared the Workable Relocation Assistance Plan (WRAP) for the Gardens project. (JA1035-83). Triad's specific tasks performed in connection with the redevelopment of the Gardens did not involve the forcible displacement of any residents. Since being retained, Triad has established a relocation file for each homeowner and tenant, conducted meetings with homeowners and tenants to obtain financial information and determine eligibility for relocation, worked to locate suitable relocation sites and then facilitated all aspects of the residents' relocation, including arranging for logistical and financial support. (JA2442-43). Triad's communications with the residents included the aforementioned in-person surveys, as well as mailing flyers to residents that explain their rights under state law and set forth in detail the relocation assistance that would be provided. (JA1070-83).

The record is devoid of any evidence that indicates that Triad provided its services in a discriminatory fashion, or that it played a role in the actual physical destruction of the Gardens. Rather, the acquisition, maintenance of and eventual demolition of the neighborhood's townhomes was performed by the

Township and Keating. (JA1394, 1409). In *Rendell-Baker v. Kohn,* 457 U.S. 830 (1982), the Supreme Court explained that the acts of private contractors do not become the acts of government by reason of their significant or even total engagement in performing public contracts. *Id*. at 831. Therefore, "guilt by association" is insufficient to give rise to liability under the FHA.

V. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT'S REGULATORY INTERPRETATION OF THE FHA IS NOT DISPOSITIVE AND NOT OWED DEFERENCE BY THIS COURT

Codified at 24 C.F.R. § 100.500, HUD has now issued a final rule that attempts to rewrite the FHA to include a disparate impact claim. The rule states, without reference to any specific statutory authority that it has been HUD's "longstanding interpretation of the Act . . . that liability under the Fair Housing Act may arise from a facially neutral practice that has a discriminatory effect." 78 Fed. Reg. at 11,460. Subpart G of the Rule states that "liability may be established under the Fair Housing Act based on a practice's discriminatory effect." 24 C.F.R. § 100.500, 78 Fed. Reg. at 11,482.

An analysis of whether or not 24 C.F.R. § 100.500 is owed deference by this Court consistent with *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) need not be conducted as

the HUD Rule "goes beyond the meaning that the statute can bear." *Freeman v. Quicken Loans, Inc.,* 132 S. Ct. 2034, 2040 (2012). As discussed in Section III above, the interpretation espoused by HUD is neither supported by the plain language nor the purpose of the FHA.

"Deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004). As detailed above, there is no ambiguity for HUD to resolve, and this Court need not defer to HUD's reimagining of the FHA.

HUD is not filling a gap left by any ambiguity in the FHA, rather it is improperly rewriting a statute that was "affirmatively and specifically enacted." *U.S. v. Locke*, 471 U.S. 84, 95 (1985). Like the Circuit Courts, HUD is ignoring the language of the statute, and is perpetuating the conflation in application of Title VII and the FHA. In support of this improper mingling of the two Acts, HUD, cites to *Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971). *Griggs* held that § 703(a)(2) of Title VII permitted claims for disparate impact. However, HUD ignores the clear and meaningful differences between the language of 42 U.S.C. § 3604(a) and § 703(a)(2) of Title VII. Any straightforward reading of § 3604(a) makes clear that the phrase "otherwise make available or deny" is meant to include other actions which deny housing

based on improper characteristics, not the "effects" of any such actions.

It is respectfully requested that this Court do what neither HUD nor the Circuit Courts have done, and that is, based on the language of § 3604(a), determine whether the FHA includes a cognizable claim under a disparate impact theory of liability. A plain reading of the unambiguous language contained in the Act makes clear that Congress has spoken affirmatively on this issue, and chose not to establish disparate impact claims under the FHA.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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