No. 11-1507

In the Supreme Court of the United States

TOWNSHIP OF MOUNT HOLLY, NEW JERSEY, ET AL.,
PETITIONERS

v.

MT. HOLLY GARDENS CITIZENS IN ACTION, INC., ET AL.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether disparate-impact claims are cognizable under Section 804(a) of the Fair Housing Act, 42 U.S.C. 3604(a).

TABLE OF CONTENTS

Page

Interest of the United States 1
Statutory provisions involved 2
Statement 2
Summary of argument 6
Argument:
Disparate-impact claims are cognizable under Section 804(a) of the FHA 8
A. HUD has authoritatively interpreted Section 804(a) of the FHA to encompass disparate-impact liability 9
B. The text, structure, history, and purpose of the statute support HUD's recognition of disparate-impact claims 12
1. The text of Section 804(a) encompasses a disparate-impact cause of action 12
2. The structure of the FHA confirms that the Act prohibits actions that cause a disparate impact on a specified basis 18
3. The history of the 1988 amendments to the FHA supports the availability of disparate-impact claims 21
4. HUD's interpretation furthers the FHA's purpose 24
5. HUD's interpretation is consistent with the position of the Department of Justice 27
C. Congress did not exempt local governments from Section 804(a) 28
Conclusion 35
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Alexander v. *Choate*, 469 U.S. 287 (1985) 1
Arthur v. *City of Toledo*, 782 F.2d 565 (6th Cir. 1986) 22

Cases—Continued: Page

Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 6, 10
City of Arlington v. *FCC*, 133 S. Ct. 1863 (2013) 31
City of Edmonds v. *Oxford House, Inc.,* 514 U.S. 725 (1995) 19, 28
Forest Grove Sch. Dist. v. *T.A.*, 557 U.S. 230 (2009) 23
General Dynamics Land Sys., Inc. v. *Cline*, 540 U.S. 581 (2004) 13
Gladstone Realtors v. *Village of Bellwood*, 441 U.S. 91 (1979) 26
Greater New Orleans Fair Hous. Action Ctr. v. *HUD,* 639 F.3d 1078 (D.C. Cir. 2011) 22
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 13, 14, 24, 25, 26
Gross v. *FBL Fin. Servs., Inc.,* 557 U.S. 167 (2009) 16, 17, 25
Halet v. *Wend Inv. Co.,* 672 F.2d 1305 (9th Cir. 1982) 22
Hanson v. *Veterans Admin.,* 800 F.2d 1381 (5th Cir. 1986) 22
Havens Realty Corp. v. *Coleman,* 455 U.S. 363 (1982) 9, 26
Hazen Paper Co. v. *Biggins,* 507 U.S. 604 (1993) 16
HUD v. *Carter*, No. 03-90-0058-1, 1992 WL 406520 (HUD ALJ May 1, 1992) 11
HUD v. *Mountain Side Mobile Estates P'ship*:
No. 08-92-0010-1, 1993 WL 307069 (HUD July 19, 1993), aff'd in relevant part, 56 F.3d 1243 (10th Cir. 1995) 11
56 F.3d 1243 (10th Cir. 1995) 2, 22
HUD v. *Pfaff,* No. 10-93-0084-8, 1994 WL 592199 (HUD ALJ Oct. 27, 1994), rev'd on other grounds, 88 F.3d 739 (9th Cir. 1996) 11

Cases—Continued: Page

HUD v. *Ross,* No. 01-92-0466-8, 1994 WL 326437 (HUD ALJ July 7, 1994) 11
HUD v. *Twinbrook Vill. Apartments,* No. 02-00-0256-8, 2001 WL 16325337 (HUD ALJ Nov. 9, 2001) 11
Huntington Branch, NAACP v. *Town of Huntington:*
844 F.2d 926 (2d Cir.), aff'd, 488 U.S. 15 (1988) 21
488 U.S. 15 (1988) 27
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 12
Kelo v. *City of New London,* 545 U.S. 469(2005) 34, 35
Langlois v. *Abington Hous. Auth.,* 207 F.3d 43 (1st Cir. 2000) 22
Lindh v. *Murphy*, 521 U.S. 320 (1997) 25
Lorillard v. *Pons*, 434 U.S. 575 (1978) 23
Meacham v. *Knolls Atomic Power Lab.*, 554 U.S. 84 (2008) 12, 16, 19
Metropolitan Hous. Dev. Corp. v. *Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978) 22
Meyer v. *Holley*, 537 U.S. 280 (2003) 9
New York City Transit Auth. v. *Beazer*, 440 U.S. 568 (1979) 20
Parents Involved in Cmty. Schs. v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) 30, 31
Resident Advisory Bd. v. *Rizzo*, 564 F.2d 126 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978) 21
Ricci v. *DeStefano*, 557 U.S. 557 (2009) 30
Smiley v. *Citibank (S.D.), N.A.,* 517 U.S. 735 (1996) 18
Smith v. *City of Jackson*, 544 U.S. 228 (2005) ..... *passim*

Cases—Continued: Page

Smith v. *Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982) 22
Trafficante v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972) 26, 28
United States v. *City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975) 2, 22
United States v. *Giles*, 300 U.S. 41 (1937).....17
United States v. *Marengo Cnty. Comm'n*, 731 F.2d 1546 (11th Cir.), cert. denied, 469 U.S. 976 (1984). 22
United States v. *Mead Corp.*, 533 U.S. 218 (2001).....12
Veles v. *Lindow*, 243 F.3d 552 (9th Cir. 1999) 27
Watson v. *Fort Worth Bank & Trust*, 487 U.S. 977 (1988) 13

Constitution, statutes, and regulations:

U.S. Const.:
Amend. X.....31
Amend. XIV, § 2 (Equal Protection Clause).....8, 30
Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 14, 17
29 U.S.C. 623(a)(2) 7, 13, 14, 15, 16
29 U.S.C. 623(f)(1).....21
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 14, 17
42 U.S.C. 2000e-2(a)(2).....7, 13, 15, 16
42 U.S.C. 2000e-2(k) 14, 19
42 U.S.C. 2000e-2(k)(3).....18
Fair Housing Act, 42 U.S.C. 3601 *et seq*.....2
42 U.S.C. 3601.....9
42 U.S.C. 3604.....2
42 U.S.C. 3604(a) .....*passim*

Statutes and regulations—Continued: Page

42 U.S.C. 3604(b) 1
42 U.S.C. 3605 2
42 U.S.C. 3605(a) 1
42 U.S.C. 3605(c) 19
42 U.S.C. 3607(b)(1) 19, 20, 29
42 U.S.C. 3607(b)(4) 18
42 U.S.C. 3608(a) 2, 9
42 U.S.C. 3610 11
42 U.S.C. 3610(g)(2)(C) 29
42 U.S.C. 3612 ..... 2, 11
42 U.S.C. 3612(g) 11
42 U.S.C. 3612(h) 11
42 U.S.C. 3612(*o*) 2, 27
42 U.S.C. 3614(a)-(d) 2, 27
42 U.S.C. 3614a 2, 9
Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 21
§§ 1-15,102 Stat. 1619-1636 22
Telcommunications Act of 1996, 47 U.S.C. 332(c)(7) 32
33 U.S.C. 1342(p). 32
42 U.S.C. 2000cc 32
42 U.S.C. 3535(d) 9
24 C.F.R.:
Pt. 100 10
Section 100.500 10
Section 100.500(a) 10
Section 100.500(b) 33
Section 100.500(c) 33
Pt. 180:
Section 180.675 11

Miscellaneous: Page

Black's Law Dictionary (rev. 4th ed. 1968) 17
114 Cong. Rec. (1968):
p. 2277 28
p. 2699 28
134 Cong. Rec. 23,711 (1988) 22
Fair Housing Amendments Act of 1987: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. (1987) 23
54 Fed. Reg. 3235 (Jan. 23, 1989) 24
78 Fed. Reg. (Feb. 15, 2013):
pp. 11,460-11,482 2
p. 11,466 10
p. 11,467 ..... 11, 23
pp. 11,481-11,482 10
p. 11,482 ..... 10, 33
H.R. Rep. No. 711, 100th Cong., 2d Sess. (1988) 22, 23
http://www.censusscope.org/2010Census/FREY2010BLK100MetroSeg.xls. (last visited Oct. 25, 2013) 26
Allison Plyer, Elaine Ortiz, and Kathryn Pettit, *Optimizing Blight Strategies: Deploying Limited Resources in Different Neighborhood Housing Markets* (Nov. 2010) 34
Wendell E. Pritchett, "*The Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol'y Rev. 1 (2003) 35
Remarks on Signing the Fair Housing Amendments Act of 1988, 24 Weekly Comp. Pres. Doc. 1141 (Sept. 13, 1988) 23

Miscellaneous—Continued: Page

Joseph Schilling & Elizabeth Schilling, *Leveraging Code Enforcement for Neighborhood Safety: Insights for Community Developers* (June 20, 2007) 34
*Webster's New International Dictionary (*2d ed. 1934) 17
*Webster's Third New International Dictionary (*1966) 17

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INTEREST OF THE UNITED STATES

This case presents the important question whether a disparate-impact cause of action is cognizable under Section 804(a) of the Fair Housing Act (FHA or Act), 42 U.S.C. 3604(a).[1] The FHA prohibits discrimination

[1] Although the question on which this Court granted review addresses the availability of disparate-impact claims under the FHA generally, respondents' complaint alleges a disparate-impact claim under Section 804(a) only. This case therefore affords no occasion for the Court to consider the availability of disparate-impact liability under other prohibitions in the FHA. Unlike Section 804(a), certain of the FHA's other prohibitions make it unlawful "[t]o discriminate against any person" in specified, housing-related actions, *e.g.*, 42 U.S.C. 3604(b), 3605(a), and the term "discriminate" readily accommodates an interpretation encompassing disparate-impact liability. See, *e.g.*, *Alexander* v. *Choate*, 469 U.S. 287, 292

on various bases in the sale or rental of housing and in related services. See 42 U.S.C. 3604, 3605. The Act gives the Secretary of the Department of Housing and Urban Development (HUD) "authority and responsibility for administering [the FHA]," including the authority to promulgate regulations interpreting the Act and to enforce the Act through administrative proceedings. 42 U.S.C. 3608(a), 3612, 3614a. In exercising its rule-making and adjudicatory authority under the statute, HUD has consistently interpreted the Act to permit disparate-impact claims. See 78 Fed. Reg. 11,460-11,482 (Feb. 15, 2013); *Mountain Side Mobile Estates P'ship* v. *HUD*, 56 F.3d 1243, 1251 (10th Cir. 1995). The Department of Justice also has authority to enforce the FHA, see 42 U.S.C. 3612(*o*), 3614(a)-(d), and has brought disparate-impact claims in its enforcement actions. See, *e.g.*, *United States* v. *City of Black Jack*, 508 F.2d 1179, 1186 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975). At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the FHA, 42 U.S.C. 3601 *et seq.*, and select other statutory provisions are set forth in an appendix to this brief. App., *infra.*

STATEMENT

1. Mount Holly Gardens (the Gardens) is a 30-acre neighborhood of roughly 330 homes, located in the Township of Mount Holly, in Burlington County, New

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(1985). Petitioner does not argue that other FHA provisions do or do not encompass disparate-impact claims, and this Court should decline various amici's invitation to consider a question neither raised in the petition nor addressed by the parties.

Jersey. Pet. App. 5a. Nearly all Gardens residents earn less than 80% of the area's median income, and most earn much less. *Ibid.* At the time of the 2000 Census, approximately 20% of Gardens residents were white, 46% were African-American, and 29% were Hispanic. *Id.* at 6a. Overall, the Township of Mount Holly is 66% white, 23% African-American, and 13% Hispanic. *Id.* at 78a-79a.

In 2000, petitioners (the township, township council, and township officials) determined that the Gardens should be designated as an "area in need of redevelopment" under New Jersey law. Pet. App. 7a-8a. Petitioners implemented an evolving series of redevelopment plans, culminating in a plan to buy all the homes in the Gardens, demolish them, and rebuild the neighborhood. *Id.* at 8a-10a. Many Gardens residents objected to the redevelopment plan, observing that they would be unable either to afford to purchase a home in the area after redevelopment or to live elsewhere in the township. *Id.* at 9a, 11a. Although petitioners offered to pay qualified homeowners in the Gardens between $32,000 and $49,000 for their homes, plus relocation assistance of $15,000 and $20,000 of no-interest loan assistance toward the purchase of a new home, the estimated cost of a new home in the Gardens after redevelopment was between $200,000 and $275,000. *Id.* at 10a. Renters in the Gardens were also unlikely to be able to afford rents in the Gardens after redevelopment. *Ibid.* Most Gardens residents would therefore be unable to afford to live in the Gardens after redevelopment, including in the homes designated as affordable housing. *Id.* at 9a.

2. a. Respondents are Gardens residents, former residents, and a residents' association. Pet. App. 4a.

In 2008, respondents filed suit in federal court alleging, *inter alia*, violations of Section 804(a) of the FHA, including disparate-impact claims, and seeking declaratory and injunctive relief. *Id.* at 12a. During the litigation, respondents submitted the report of a statistical and demographic expert, who concluded that the displacement that would result from the redevelopment plan would adversely affect 22.54% of the township's African-American households and 32.31% of the Hispanic households, but only 2.73% of the white households. *Id.* at 15a-16a, 43a. The expert further concluded that the new homes in the redeveloped Gardens area would be affordable for 79% of Burlington County's white households, but for only 21% of African-American and Hispanic households in the county. *Id.* at 16a, 45a n.9. The expert also concluded that most displaced Gardens residents would be unable to afford to relocate elsewhere in the township. *Id.* at 18a.

b. The district court converted petitioners' motion to dismiss into a motion for summary judgment and granted it. Pet. App. 33a-61a. In relevant part, the court concluded that respondents had failed to establish a prima facie case of disparate-impact discrimination under Section 804(a) of the FHA. *Id.* at 41a-47a. Although the court acknowledged respondents' evidence that the disproportionately minority households in the Gardens before redevelopment would be unable to afford to stay in the area, it rejected respondents' statistical analysis because the analysis did not account for how many minorities might move into Mount Holly. *Id.* at 43a-46a & n.9. The court also faulted respondents for failing to demonstrate that the redevelopment plan would affect minority households in

the Gardens in a different way than it would affect white households in the Gardens. *Id.* at 45a.

The court concluded in the alternative that, even if respondents had established a prima facie disparate-impact case, petitioners met their burden of showing a legitimate interest in pursuing the redevelopment plan. Pet. App. 43a & n.6. And, the court determined, respondents had not rebutted that legitimate interest by identifying a less discriminatory alternative available to petitioners. *Id.* at 47a-51a.

c. The court of appeals reversed the district court's grant of summary judgment and remanded for further factual development on respondents' claims under Section 804(a) of the FHA. Pet. App. 1a-29a. The court concluded that the district court erred in rejecting the statistical data respondents submitted in support of their disparate-impact claim. *Id.* at 15a-18a. The court also noted that the district court had conflated the concepts of disparate impact and disparate treatment when it reasoned that each white Gardens resident was treated the same as each African-American or Hispanic Gardens resident. *Id.* at 19a. The court of appeals thus concluded that respondents had established a prima facie case of disparate-impact discrimination under the FHA. *Id.* at 23a-24a.

The court of appeals further noted that "everyone agrees that alleviating blight is a legitimate interest." Pet. App. 24a. The court found, however, a disputed issue of fact as to whether petitioners had alternative means of addressing blight that would be less discriminatory than the redevelopment plan. *Id.* at 25a-26a. The court of appeals thus remanded for further factual development to be followed by renewed motions for summary judgment. *Id.* at 28a-29a.

SUMMARY OF ARGUMENT

The United States Department of Housing and Urban Development—the agency principally charged with administering and enforcing the Fair Housing Act—has authoritatively construed Section 804(a) of the Act to encompass disparate-impact liability. That construction is the best (and certainly a permissible) reading of the statutory text, and it comports with the uniform judicial construction of the Act over four decades. The agency's construction is entitled to deference.

A. The authoritative interpretation of the agency charged with administering the statute should resolve the question presented. The FHA grants HUD broad authority to administer and enforce the statute, including by promulgating rules implementing the statute and conducting formal adjudications of FHA complaints. HUD has promulgated a rule recognizing that Section 804(a) encompasses disparate-impact claims. In exercising its authority to conduct formal adjudications, HUD has also consistently recognized that disparate-impact claims are cognizable under the statute. This Court's decisions make clear that such authoritative agency interpretations command the full measure of deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

B. HUD's construction of Section 804(a) follows directly from the statute's text, structure, and history. Section 804(a) makes it unlawful to "refuse to sell or rent" or "otherwise make unavailable or deny" housing to a person "because of" a protected characteristic, including race. 42 U.S.C. 3604(a). That language supports liability based on the disparate effects caused by a challenged action because it focuses on

the consequences of the action—the unavailability or denial of a dwelling—rather than the motivation of the actor. This Court, for the same reason, has held that Section 703(a)(2) of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e-2(a)(2), and Section 4(a)(2) of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 623(a)(2), encompass disparate-impact claims. Those provisions make it unlawful to "deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of," *inter alia*, race or age. 29 U.S.C. 623(a)(2); 42 U.S.C. 2000e-2(a)(2). Section 804(a) similarly makes it unlawful to "make unavailable or deny" housing "because of," *inter alia*, race. 42 U.S.C. 3604(a).

The FHA also contains particularized exemptions that presuppose the existence of disparate-impact liability under Section 804(a). Those exemptions insulate actions that deny housing based on: a person's conviction for certain drug offenses; a reasonable governmental rule limiting the number of occupants; or an appraiser's taking into consideration factors other than race, gender, family status, or other protected characteristics. Each of those statutory exemptions is grounded in concerns that, in the absence of the exemption, the statute would bar actions within the scope of the exemption on a disparate-impact theory. Without the exemptions, for instance, a claim could be made that a policy denying housing to persons with drug convictions has a disparate impact based on a protected characteristic.

The history of the statute lends further support to the conclusion that disparate-impact claims are cognizable under Section 804(a). When Congress in 1988

comprehensively amended the FHA, including Section 804(a), Congress was aware of the uniform body of court of appeals precedent supporting disparate-impact claims but did not amend the statute to limit such claims. To the contrary, Congress rejected efforts to amend the statute to require proof of discriminatory intent in a category of cases.

C. Petitioners err in suggesting that Section 804(a)'s disparate-impact prohibition does not apply to local governments while its disparate-treatment prohibition does. The plain text of Section 804(a) applies to any person or entity that makes housing unavailable on a specified basis. Nor do petitioners' constitutional-avoidance arguments have merit. A local government does not violate the Equal Protection Clause merely by considering whether a proposed action will have a disparate impact on the basis of race. And requiring consideration of potential disparate-impacts raises no federalism concerns. As explained in HUD's regulation, a local government (like any defendant) may proceed with an action that has a discriminatory effect if it is necessary to achieve a substantial and legitimate nondiscriminatory interest that cannot be accomplished through less discriminatory means.

ARGUMENT

DISPARATE-IMPACT CLAIMS ARE COGNIZABLE UNDER SECTION 804(a) OF THE FHA

The federal agency with authority to administer the FHA has long interpreted Section 804(a), 42 U.S.C. 3604(a), to authorize disparate-impact claims. The agency's conclusion follows from the statute's text, structure, and history. And it accords with the uniform decisions of the 11 courts of appeals to have

considered the question. See p. 22 & n.5, *infra*. Because the text of Section 804(a) is best read to include—and certainly does not foreclose—disparate-impact claims, HUD's interpretation is dispositive. See *Meyer* v. *Holley*, 537 U.S. 280, 287-288 (2003).

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

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

Congress vested HUD with broad authority to implement and construe the FHA. Exercising that authority, HUD has long interpreted Section 804(a) to support a disparate-impact theory of discrimination. HUD recently reaffirmed that interpretation after notice-and-comment rulemaking.

1. The FHA grants HUD broad authority to promulgate rules implementing and construing the statute. 42 U.S.C. 3614a ("The Secretary may make rules * * * to carry out this subchapter."); 42 U.S.C. 3608(a) (vesting "authority and responsibility for administering this Act" in the Secretary of HUD); see also 42 U.S.C. 3535(d) (general rulemaking authority).

Rules promulgated pursuant to that authority are entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

HUD recently issued a regulation reaffirming that the FHA, including Section 804(a), authorizes disparate-impact claims. 78 Fed. Reg. at 11,481-11,482. The rule amends Part 100 of Title 24 of the Code of Federal Regulations to provide: "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; 24 C.F.R. 100.500. The regulation further states:

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

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

The rule's preamble articulates the principal bases for HUD's longstanding view that Section 804(a) encompasses disparate-impact claims. The statutory text—"otherwise make unavailable or deny [a dwelling]"—focuses on the *effect* of a challenged action, not the relevant actor's motivation, reflecting congressional intent that liability flow from disparate impact and not be limited to disparate treatment. 78 Fed. Reg. at 11,466; see pp. 12-18, *infra*. HUD also relied on three statutory exemptions that "presuppose that the Act encompasses an effects theory of liability" and that "would be wholly unnecessary if the Act prohibited only intentional discrimination." 78 Fed. Reg. at 11,466; see pp. 18-21, *infra*. Uniform judicial prece-

dent both before and after Congress amended the FHA in 1988 provides further support for HUD's reading of the text. And, HUD concludes, its textual interpretation is consistent with the broad purpose and legislative history of the Act, including the sponsor's recognition of the need to address "[o]ld habits" and "frozen rules," including "the refusal by suburbs and other communities to accept low-income housing." 78 Fed. Reg. at 11,467.

2. HUD's rule reaffirmed the agency's long-standing interpretation of the FHA. See 42 U.S.C. 3610 and 3612. Through formal adjudications that become final agency decisions after an opportunity for all parties to petition the Secretary for review, see 42 U.S.C. 3612(g) and (h); 24 C.F.R. 180.675, HUD has interpreted the FHA—including Section 804(a)—to encompass disparate-impact claims in every adjudication to address the issue.[2] In addition, in a formal adjudication raising the question whether a disparate-impact claim is cognizable in an action under Section 804(a), the Secretary concluded that liability could be premised on a disparate-impact showing and that disparate-impact liability had been established in the case. *HUD* v. *Mountain Side Mobile Estates P'ship*, No. 08-92-0010-1, 1993 WL 307069, at *5 (July 19, 1993), aff'd in relevant part, 56 F.3d 1243 (10th Cir. 1995).

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[2] See *e.g.*, *HUD* v. *Twinbrook Vill. Apartments*, No. 02-00-0256-8, 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001); *HUD* v. *Pfaff*, No. 10-93-0084-8, 1994 WL 592199, at *7-9 (HUD ALJ Oct. 27, 1994), rev'd on other grounds, 88 F.3d 739 (9th Cir. 1996); *HUD* v. *Ross*, No. 01-92-0466-8, 1994 WL 326437, at *5, *7 (HUD ALJ July 7, 1994); *HUD* v. *Carter*, No. 03-90-0058-1, 1992 WL 406520, at *5 (HUD ALJ May 1, 1992).

When, as here, Congress expressly affords an agency authority to issue formal adjudications carrying the force of law, see 42 U.S.C. 3612, the agency's reasonable interpretation of the statute in such adjudications is entitled to the full measure of *Chevron* deference. See *United States* v. *Mead Corp.*, 533 U.S. 218, 230 & n.12 (2001); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999).

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

Because Congress charged HUD with administering the FHA, HUD's interpretation of the statutory language controls unless it is "arbitrary or capricious in substance, or manifestly contrary to the statute." *Mead*, 533 U.S. at 227. HUD's interpretation is neither, and its interpretation thus commands deference. See *Smith* v. *City of Jackson*, 544 U.S. 228, 243 (2005) (Scalia, J., concurring in part and in the judgment) (agency's exercise of rulemaking authority in ADEA presented "an absolutely classic case for deference to agency interpretation"); *Meacham* v. *Knolls Atomic Power Lab.*, 554 U.S. 84, 103-104 (2008) (Scalia, J., concurring in the judgment) (deferring to EEOC's reasonable construction of ADEA); *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 601 (2004) (Scalia, J., dissenting) (same).

1. The text of Section 804(a) encompasses a disparate-impact cause of action

a. Section 804(a) makes it unlawful, *inter alia*, "[t]o refuse to sell or rent * * * or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national

origin." 42 U.S.C. 3604(a). That language is best read to encompass disparate-impact claims. By banning actions that "make unavailable or deny" housing on one of the specified bases, Section 804(a) focuses on the result of challenged actions—the unavailability or denial of a dwelling—rather than exclusively on the intent of the actor. Such a prohibition on specified outcomes that adversely affect an identifiable group is most naturally read to support a disparate-impact claim.

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

In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971), this Court held that Section 703(a)(2) of Title VII prohibits employers from taking actions that have the effect of discriminating on the basis of race, regardless of whether the actions are motivated by discriminatory intent. The Court explained that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432. See *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 990-991 (1988) (noting that, if

employer's practice "has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply"); see also *Smith*, 544 U.S. at 235 (plurality) (noting Court's recognition that its "holding [in *Griggs*] represented the better reading of the statutory text"). [3]

The same is true of the parallel terms in Section 4(a)(2) of the ADEA, which this Court, in *Smith*, *supra*, likewise held encompass disparate-impact claims. The Court explained that, in prohibiting actions that "deprive any individual of employment opportunities or otherwise adversely affect his [employment] status[] because of" his age, 29 U.S.C. 623(a)(2), "the text" of the statute—like Section 703(a)(2) of Title VII—"focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer." *Smith*, 544 U.S. at 235-236 (plurality); see *id.* at 243 (Scalia, J., concurring in part and in the judgment) ("agree[ing] with all of the Court's reasoning"). That focus, the Court explained, "strongly suggests that a disparate-impact theory should be cognizable." *Id.* at 236 (plurality).

The textual similarities between Section 804(a) and the disparate-impact provisions in Title VII and the ADEA fully justify HUD's conclusion that Section 804(a) authorizes disparate-impact claims. Actions that "make unavailable or deny[] a dwelling to any

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[3] In 1991, Congress amended Title VII to add a provision expressly recognizing the existence of "disparate impact cases" under the statute, 42 U.S.C. 2000e-2(k), but Title VII contained no such provision when this Court in *Griggs* construed Section 703(a)(2) to encompass disparate-impact liability.

person"—like actions that "deprive any individual of employment opportunities"—"focus[] on the *effects* of the [challenged] action * * * rather than the motivation for the action." *Smith*, 544 U.S. at 236 (plurality). This focus on effects rather than motivations is the essence of a disparate-impact prohibition.

Petitioners' efforts (Br. 19-24) to distinguish Section 804(a) are unavailing. Title VII and the ADEA both prohibit actions that "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect" his "status as an employee, because of," *inter alia*, race or age. 42 U.S.C. 2000e-2(a)(2); 29 U.S.C. 623(a)(2). The FHA analogously prohibits actions that "refuse to sell or rent" or "otherwise make unavailable or deny" housing to an individual "because of," *inter alia*, race. 42 U.S.C. 3604(a). Like Title VII and the ADEA, Section 804(a) enumerates a handful of specific prohibited actions *and* includes a nonspecific catch-all phrase that focuses on the prohibited effects of the specified actions, regardless of the motivation behind them. See *Smith*, 544 U.S. at 235 (plurality). To be sure, Title VII and the ADEA, which apply to employment-related actions generally, broadly prohibit actions that "tend to deprive any individual of employment opportunities"—while Section 804(a), which applies to a subset of housing-related transactions, more narrowly targets actions that have the effect of making housing unavailable. But the similarities in the textual structure of the prohibitions are more material than the differences in statutory scope. Given those similarities—and especially when read against the backdrop of Title VII, which was enacted before the FHA—Section 804(a) of the FHA is best read to include a

prohibition on actions having the effect of disproportionately denying housing based on a protected characteristic, without regard to the actor's motivation.

c. Petitioners' contrary parsing of the statutory text to reach an "unambiguous" result is unpersuasive.

First, petitioners argue (Br. 17, 24-26) that Section 804(a)'s requirement that the prohibited discrimination arise "because of" a protected characteristic limits the provision's reach to cases in which a defendant "has made a conscious decision to discriminate on that basis." Pet. Br. 24. Petitioners concede (Br. 25-26), however, that the disparate-impact provisions of Title VII and the ADEA also require that the prohibited discrimination arise "because of" a specified characteristic. 29 U.S.C. 623(a)(2); 42 U.S.C. 2000e-2(a)(2). See *Meacham*, 554 U.S. at 96 (explaining that, "in the typical disparate-impact case" under the ADEA, "the employer's practice is 'without respect to age' and its adverse impact (*though 'because of age'*) is 'attributable to a nonage factor'") (emphasis added; citation omitted). The phrase "because of" should not prohibit a disparate-impact cause of action under the FHA when the same phrase embraces such a cause of action in Title VII and the ADEA.

Petitioners rely (Br. 24) on this Court's decision in *Gross* v. *FBL Financial Services, Inc.*, 557 U.S. 167 (2009), which held that an ADEA plaintiff is never entitled to a mixed-motive jury instruction. *Id.* at 173-179. Relying on its earlier opinion in *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993), the Court in *Gross* explained that "the ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that

the employer decided to act." *Gross*, 557 U.S. at 176; see Pet. Br. 24. But both *Gross* and *Hazen Paper* involved exclusively disparate-treatment claims under the ADEA. See *Gross*, 557 U.S. at 170; *Hazen Paper*, 507 U.S. at 609; see also *Smith*, 544 U.S. at 237 (plurality opinion) (noting that the "opinion in *Hazen Paper* * * * did not address or comment on" the availability of a disparate-impact cause of action under the ADEA). The reasoning supporting the mixed-motive holding of *Gross* thus sheds no light on the operation of the ADEA's disparate-impact prohibition (which does not concern motive at all), let alone the prohibition in Section 804(a).

Second, petitioners argue (Br. 18-19) that Section 804(a)'s prohibition on "otherwise mak[ing] housing unavailable" encompasses only intentional discrimination. That is incorrect. The plain meaning of the phrase "make unavailable" includes actions that have the result of making housing unavailable, regardless of whether the actions were intended to have that result. This Court explained long ago that "[t]he word 'make' has many meanings, among them 'To cause to exist, appear or occur.'" *United States* v. *Giles*, 300 U.S. 41, 48 (1937) (quoting *Webster's New International Dictionary* (2d ed. 1934)); see *Webster's Third New International Dictionary* 1364 (1966) (noting that "make" "can comprise any such action" that "cause[s] something to come into being," "whether by an intelligent or blind agency"); *Black's Law Dictionary* 1107 (rev. 4th ed. 1968) ("[t]o cause to exist"). One may cause a result to "exist, appear or occur," *Giles*, 300 U.S. at 48, without specifically intending to do so. For example, a landlord may make her housing unavailable to blind individuals by refusing to permit

pets. Intent is not a prerequisite to making housing unavailable.

Third, petitioners' reading of Section 804(a) is at odds with decades of uniform precedent from the courts of appeals: all 11 circuits to have addressed the issue have concluded that the FHA encompasses disparate-impact liability. See p. 22 & n.5, *infra*. In light that that precedent, "it would be difficult indeed" to conclude that the text is, in the way petitioners suggest, "unambiguous." *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996); see *ibid.* (finding ambiguity in part from the conflict among lower court opinions).

2. The structure of the FHA confirms that the Act prohibits actions that cause a disparate impact on a specified basis

The Act's structure adds further support to HUD's interpretation of Section 804(a). The Act contains three exemptions from liability that presuppose the availability of a disparate-impact claim.

First, Congress specified that "[n]othing in [the FHA] prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance." 42 U.S.C. 3607(b)(4). Because the Act contains no direct prohibition on discriminating against individuals with drug convictions, the inclusion of that exemption makes sense only if actions denying housing to individuals with such drug convictions would otherwise be subject to challenge on the ground that they have a disparate impact based on a protected characteristic. That the exemption presupposes a disparate-impact theory of discrimination is made clear by a similar exemption in Title VII. See 42 U.S.C. 2000e-2(k)(3). Congress

enacted the Title VII exemption for drug users as part of a provision expressly addressed to "disparate impact cases," 42 U.S.C. 2000e-2(k), and the language of the exemption specifies that it applies solely to disparate-impact claims, see 42 U.S.C. 2000e-2(k)(3) (allowing employers to prohibit employment of individuals who use or possess drugs unless "such [a] rule is adopted or applied with an intent to discriminate because of race").

Second, Congress specified that "[n]othing in [the FHA] limits the applicability of any reasonable * * * restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. 3607(b)(1). Because the Act contains no direct bar against discrimination based on number of occupants, the purpose of the exemption necessarily was to preclude suits contending that otherwise reasonable occupancy limits have a disparate impact based on a protected characteristic such as familial status or race. See *City of Edmonds* v. *Oxford House, Inc.*, 514 U.S. 725, 735 n.9 (1995).

Finally, the FHA includes a targeted exemption specifying that "[n]othing in [the Act] prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." 42 U.S.C. 3605(c). There would be no reason to enact an exemption for appraisers' actions based on factors *other than* protected characteristics unless the statute would otherwise bar such actions on a disparate-impact theory. See *Meacham*, 554 U.S. at 96 ("action based on a 'factor other than age' is the very premise for disparate-impact liability"). These statutory exemptions thus

strongly support the conclusion that Section 804(a) of the Act encompasses disparate-impact claims.

Petitioners contend (Br. 31-34) that the exemptions suggest nothing about whether the FHA encompasses disparate-impact claims, contending that "all three exemptions offer valuable defenses to disparate-treatment claims." Pet. Br. 33. That is incorrect. The classic defense to a disparate-treatment claim is that the defendant undertook the challenged action for a nondiscriminatory reason. A defendant's showing that she denied housing based on (for example) a prospective buyer's drug offense would defeat disparate-treatment liability whether or not Congress had enacted Section 3607(b)(1). Congress thus had no reason to identify three particular exemptions if the FHA extends only to claims of disparate treatment. In contrast, liability for disparate impact arises precisely when a nondiscriminatory basis, such as a prior drug offense, affects a specified group disproportionately. Indeed, analogous claims had been litigated by the time Congress acted in 1988. See, *e.g.*, *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568 (1979) (asserting disparate-impact liability under Title VII based on an agency's refusal to hire methadone users). That Congress chose to identify these three exemptions from liability makes sense only if Congress had disparate-impact liability in mind.

Five members of this Court endorsed this very reasoning in *Smith* when considering the ADEA's "RFOA" defense, which allows an employer to escape liability if it relied on a "reasonable factor[] other than age." 544 U.S. at 238-239 (plurality); *id.* at 243 (Scalia, J., concurring in part and concurring in the judgment) (expressly agreeing with "all of the Court's reason-

ing); see 29 U.S.C. 623(f)(1). The RFOA defense would be "unnecessary" if the ADEA prohibited only disparate treatment because "[i]n most disparate-treatment cases, if an employer in fact acted on a factor other than age, the action would not be prohibited under [the disparate-treatment provision] in the first place." *Smith*, 544 U.S. at 238 (plurality). Because the defense "plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable,'" the availability of the defense "supports" the conclusion that the ADEA encompasses disparate-impact claims. *Id.* at 239 (plurality). Just so here.[4]

3. The history of the 1988 amendments to the FHA supports the availability of disparate-impact claims

The history of the 1988 amendments to the FHA likewise supports the existence of a disparate-impact theory of discrimination under Section 804(a). Between the enactment of the FHA in 1968 and its substantial amendment in 1988, see Fair Housing Amendments Act of 1988 (1988 Amendments), Pub. L. No. 100-430, 102 Stat. 1619, all nine courts of appeals to consider the issue concluded that the Act authorizes suits based on disparate-impact claims. See, *e.g.*, *Huntington Branch, NAACP* v. *Town of Huntington*, 844 F.2d 926, 935-936 (2d Cir.), aff'd in part, 488 U.S. 15 (1988); *Resident Advisory Bd.* v. *Rizzo*, 564 F.2d

[4] Petitioners argue that "nothing in their text" indicates that the exemptions would have "no role" in a disparate-treatment case. Br. 34. But the task of statutory construction is to harmonize the relevant statutory provisions, not marginalize them by denying them their most obvious meaning.

126, 146 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978); *Smith* v. *Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Hanson* v. *Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur* v. *City of Toledo*, 782 F.2d 565, 574-575 (6th Cir. 1986); *Metropolitan Hous. Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978); *United States* v. *City of Black Jack*, 508 F.2d 1179, 1184-1185 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975); *Halet* v. *Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *United States* v. *Marengo Cnty. Comm'n*, 731 F.2d 1546, 1559 n.20 (11th Cir.), cert. denied, 469 U.S. 976 (1984).[5]

Against that background, Congress substantially amended the Act in 1988, adding new provisions barring discrimination based on familial status and disability, establishing the statutory exemptions that presuppose the availability of disparate-impact actions (see pp. 18-21, *supra*), and enhancing HUD's authority to interpret and implement the Act. See 1988 Amendments §§ 1-15, 102 Stat. 1619-1636. Congress was aware that the FHA, including Section 804(a), had uniformly been interpreted to encompass disparate-impact claims.[6] Significantly Congress nevertheless

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[5] The First and Tenth Circuits directly confronted the question for the first time after the 1988 amendments and agreed with their sister circuits, see *Langlois* v. *Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Mountain Side Mobile Estates P'ship*, 56 F.3d at 1251, while the D.C. Circuit has yet to decide the issue, see *Greater New Orleans Fair Hous. Action Ctr.* v. *HUD*, 639 F.3d 1078, 1085 (D.C. Cir. 2011).

[6] See *e.g.*, H.R. Rep. No. 711, 100th Cong., 2d Sess. 21 (1988) (citing courts of appeals decisions in discussing a policy that could have a "discriminatory effect" on minority households); 134 Cong. Rec. 23,711 (1988) (statement of Sen. Kennedy) (noting unanimity

chose when amending the Act—including an amendment of Section 804(a) to add familial status as a protected characteristic—to leave that provision's operative language unchanged. See *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 244 n.11 (2009) ("When Congress amended [the Act] without altering the text of [the relevant provision], it implicitly adopted [this Court's] construction" of that provision.); cf. *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) (noting that "every court to consider the issue" had agreed on the statute's interpretation, and explaining that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"). Moreover, Congress specifically rejected an amendment that would have overturned precedent recognizing disparate-impact challenges to zoning decisions. See H.R. Rep. No. 711, 100th Cong., 2d Sess. 89-91 (1988) (dissenting views of Rep. Swindall); see 78 Fed. Reg. at 11,467 (noting five other occasions on which Congress declined to impose an intent requirement).

Petitioners note (Br. 35-36) that President Reagan, when signing the 1988 amendments, declared that the amendments did not "represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions," of a disparate-impact theory of discrimination under the FHA. *Remarks on Signing the Fair Housing Amendments Act of 1988*, 24 Weekly Comp. Pres. Doc. 1141 (Sept. 13,

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of courts of appeals as to the disparate-impact test); *Fair Housing Amendments Act of 1987: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 529-557 (1987) (testimony of Prof. Robert Schwemm) (same).

1988). And HUD regulations issued soon thereafter declined to "resolve the question of whether intent is or is not required to show a violation." 54 Fed. Reg. 3235 (Jan. 23, 1989). But neither of those statements casts doubt on Congress's awareness of courts' unanimous construction of the FHA as encompassing disparate-impact claims when Congress amended the FHA without changing its operative language.[7] In any event, once HUD directly confronted the question in administrative adjudications and other contexts under the authority granted to it by the 1988 amendments, HUD consistently determined that the FHA encompasses disparate-impact liability.

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

Construing Section 804(a) to encompass a disparate-impact cause of action is a reasonable implementation of the FHA's broad antidiscrimination purpose.

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[7] Nor do subsequently enacted statutes in which Congress explicitly provided for disparate-impact liability (see Pet. Br. 31) shed light on the intent of Congress in passing the FHA or its amendments. That is particularly so as to Title VII—although Congress added language in 1991 that more explicitly provided for disparate-impact claims, this Court had already held that Title VII's original language provided for such claims. *Griggs*, 401 U.S. at 431. There is no merit to petitioners' suggestion that Congress's failure to amend the FHA when it amended Title VII in 1991 "speaks volumes about" whether Congress intended Section 804(a) to encompass disparate-impact claims. Pet. Br. 31. Petitioners rely on this Court's decision in *Gross*—but *Gross* compared *contemporaneous* amendments of Title VII and the ADEA, explaining that "'negative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted.'" 557 U.S. at 175 (quoting *Lindh* v. *Murphy*, 521 U.S. 320, 330 (1997)). No such negative implication is appropriate here.

Individual motives are difficult to prove directly and Congress has frequently required proof of only discriminatory effect as a means of overcoming discriminatory practices—including in Title VII, enacted only four years before the FHA. This Court explained in *Griggs* that Congress's objective in enacting Title VII, including its disparate-impact prohibition, "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. at 429-430. "Under the Act," the Court explained, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430. The Court in *Griggs* thus had little trouble concluding that the defendant employer's education and "intelligence" requirements for certain work assignments violated Title VII even while acknowledging the employer's "lack of discriminatory intent." *Id.* at 431-433.

When enacting the FHA, Congress similarly sought to overcome entrenched barriers to equal opportunity in housing by prohibiting acts that have the effect of denying such opportunities on a specified basis. Petitioners err in arguing (Br. 27-28) that there is less need for a disparate-impact cause of action in the housing context than there is in the employment context because (they assert) it is easier to establish the motivation of individual decisionmakers in the housing context. Housing-related decisions (like employment-related decisions) frequently involve a significant degree of subjectivity. A would-be renter who is denied a lease when others receive one will often

have just as much difficulty discerning the basis for that treatment as she would if she were informed that a potential employer had filled available job openings with more qualified applicants. The difficulties in proof are only exacerbated when the defendant in a housing action is a local government body, whose discriminatory motives can be particularly hard to discern.

Petitioners further err in asserting that "barriers erected by past discrimination do not have the same persistent legacy in housing transactions as in employment decisions." Br. 28. Housing discrimination can entail the "loss of social, professional, and economic benefits," *Havens Realty Corp.*, 455 U.S. at 376-377; see *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 208 (1972), by, *e.g.*, depressing prices, reducing the number of buyers in a particular market, diminishing the tax base, and making affordable housing unavailable, *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 110-111 & n.24 (1979). In many areas of the country, substantial residential segregation persists as a result of past discrimination. Indeed, according to 2010 Census data, the Philadelphia-Camden area, which includes Mount Holly, is among the ten most segregated large metropolitan areas for African-American residents. http://www.censusscope.org/2010Census/FREY2010BLK100MetroSeg.xls (last visited Oct. 25, 2013). Section 804(a)'s prohibition on actions that have a disparate impact on a specified basis is an important tool in ameliorating such conditions.

5. HUD's interpretation is consistent with the position of the Department of Justice

HUD and the Department of Justice are in accord with respect to disparate-impact liability under the FHA. The FHA grants the Department of Justice authority to enforce the statute by filing actions in federal court. See 42 U.S.C. 3612(*o*), 3614(a)-(d). The Department has filed numerous briefs (including in the court of appeals in this case) explaining that the FHA supports disparate-impact liability. See, *e.g.*, Br. for the United States as Amicus Curiae in *Mt. Holly Gardens Citizens in Action, Inc.* v. *Township of Mt. Holly*, 658 F.3d 375 (3d Cir. 2011) (No. 11-1159); Br. for the United States as Amicus Curiae in *Veles* v. *Lindow*, 243 F.3d 552 (9th Cir. 1999) (No. 99-15795); Br. for the United States in *United States* v. *Glisan*, Nos. 81-1746 and 81-2205, at 15-20 (10th Cir. 1981).

Petitioners observe (Br. 36) that, in 1988, the government filed an amicus brief in this Court arguing that the FHA proscribes only intentional discrimination. See Br. for the United States as Amicus Curiae at 13-18, *Town of Huntington* v. *Huntington Branch, NAACP*, 488 U.S. 15 (1988) (No. 87-1961). But that brief was filed before the enactment of the 1988 statutory amendments giving HUD its full authority to administer and enforce the Act, and thus before the agency's formal adjudications and other administrative pronouncements endorsing the existence of a disparate-impact theory of discrimination under the statute. The brief also predated the enactment of the statutory exemptions that presuppose the viability of disparate-impact claims (see pp. 18-21, *supra*). As explained, moreover, the United States has repeatedly filed briefs since the 1988 amendments espousing the

position that the amended Act encompasses disparate-impact claims. That is the precise interpretation HUD has adopted here, and it is that agency interpretation that commands deference.

C. Congress Did Not Exempt Local Governments From Section 804(a)

Petitioners argue (Br. 37-48) that this Court should construe Section 804(a) not to impose disparate-impact liability on local governments. There is no basis in the statute's text for such an argument; nor is such a counter-textual construction compelled by constitutional concerns.

1. In drafting Section 804(a), Congress broadly declared it unlawful to refuse to sell or rent a dwelling "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). Nothing in the text of the provision indicates that some categories of defendants are entirely immune from claims of disparate impact, even though they are otherwise fully covered by the statute. This Court has long recognized "the FHA's 'broad and inclusive' compass," and "accord[ed] a 'generous construction'" to achieve the statute's purpose of providing for fair housing. *City of Edmonds*, 514 U.S. at 731 (quoting *Trafficante*, 409 U.S. at 209). The FHA's sponsors indicated an intent to cover local governments, explaining that the law was intended to stop municipalities whose segregation rules were struck down by courts from enacting "[l]ocal ordinances with the same effect, although operating more deviously in an attempt to avoid the Court's prohibition." 114 Cong. Rec. 2699 (1968); see also *id.* at 2277 (noting segrega-

tion was exacerbated by local governments' refusal to allow low-income housing).

Other provisions confirm Section 804(a)'s applicability to local governments. The FHA's exemption from liability for "any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling," 42 U.S.C. 3607(b)(1), would have been largely unnecessary if local governments were not potentially liable under the statute for other types of local housing regulations with a discriminatory effect. In addition, Section 810 of the FHA, which governs the Secretary's administrative enforcement, specifies that the Secretary must refer any complaint filed under the FHA to the Department of Justice "[i]f the Secretary determines that the matter involves the legality of any State or local zoning or other land use law or ordinance." 42 U.S.C. 3610(g)(2)(C). That provision, too, presupposes application of the FHA's substantive prohibitions to local governments. Especially in light of those clear statutory statements, the Court should decline petitioners' late-breaking invitation (Br. 37-38) to invent a statutory limit that appears nowhere in the text and is at odds with congressional intent.

2. Petitioners are also incorrect (Br. 39-42) that Congress's inclusion of disparate-impact liability in Section 804(a) raises constitutional concerns when applied to local governments. A local government does not violate the Equal Protection Clause merely by considering the racial effects of a proposed action and possibly altering its course if such action will impose disparate burdens on one racial group. On the contrary, consideration of a course of action's actual consequences may *assist* a municipality in acting in a

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

Cases such as *Parents Involved in Community Schools* v. *Seattle School District Number 1*, 551 U.S. 701, 711-712, 718-719 (2007) (Pet. Br. 41), do not support petitioners here. Those cases involve the intentional distribution of a limited set of benefits that, if allocated on a preferential basis to members of one race, could not then be allocated to members of another race. There is no analogue here—petitioners would not, for example, be forced to redevelop (or be foreclosed from redeveloping) a white neighborhood by the outcome of the redevelopment decision here. The merits question in this case is simply whether petitioners may proceed with a project if it will have a discriminatory effect on African-American and Hispanic residents. Petitioners point to nothing in the record suggesting that adopting a different redevelopment plan (or no redevelopment plan at all) would have any effect at all on citizens of other races. As Justice Kennedy explained in his concurring opinion in *Parents Involved in Community Schools*, when a government "considers the impact a given approach might have on [citizens] of different races," it does not

run afoul of the Constitution—instead, it acts in service of its duty "to preserve and expand the promise of liberty and equality on which [the Nation] was founded." 551 U.S. at 787, 789.

3. Petitioners are also incorrect (Br. 42-44) that Congress's decision to prohibit disparate-impact discrimination undermines principles of federalism. At no previous point in this litigation have petitioners challenged the constitutionality of Section 804(a) or suggested that it violates the Tenth Amendment. As this case comes to the Court, it is a given that Section 804(a) is a constitutional exercise of Congress's enumerated powers and that it therefore does not violate the Tenth Amendment. And, as discussed at pp. 13-18, *supra*, the plain and expansive text of Section 804(a) provides a sufficiently "clear and manifest statement," Pet. Br. 43, that Congress intended its prohibitions to apply to local governments.

To the extent petitioners suggest that this Court should not defer to HUD's regulatory interpretation of Section 804(a) because of federalism concerns about supplanting local land-use decisions, this Court recently rejected a similar argument. In *City of Arlington* v. *FCC*, 133 S. Ct. 1863 (2013), the Court considered whether a federal court or a federal agency should resolve ambiguous language in a federal statute that supplanted some local land-use discretion. That choice, the Court explained, "has nothing to do with federalism." *Id.* at 1873. Here, local governments are plainly subject to Section 804(a)'s requirements. In the words of this Court, petitioners raise a "faux-federalism argument" in insisting that this Court's independent construction of any ambiguous

language should trump HUD's considered judgment, based on its expertise and rulemaking authority. *Ibid.*

Local governments are subject to myriad federal rules and regulations, including with respect to their land-use decisions. The Telecommunications Act of 1996, for example, leaves intact local governments' authority to direct the placement of telecommunications towers *except* insofar as such decisions would discriminate among providers or have the effect of prohibiting the provision of personal wireless service. 47 U.S.C. 332(c)(7). Local governments similarly must ensure that their land-use decisions do not discriminate on the basis of religion. 42 U.S.C. 2000cc. And local governments must comply with federal environmental protections by, *e.g.*, conforming stormwater discharges to limits in permits issued pursuant to federal law. 33 U.S.C. 1342(p). Such regulations, if authorized pursuant to an enumerated power, do not violate federalism principles. Neither does Section 804(a).

4. Finally, petitioners err in arguing (Br. 44-48) that requiring local governments to comply with Section 804(a)'s prohibition on taking actions that have the effect of making housing unavailable on a specified basis "undermine[s] the FHA's core objectives." Pet. Br. 44. In particular, petitioners contend (Br. 44-45) that local governments will be loath to undertake any project to improve a blighted area that is predominantly minority. Not so. Disparate-impact liability under the FHA has been the law of the land for more than three decades, and petitioners offer no evidence that the FHA has prevented local officials from addressing blighted neighborhoods in that time.

For good reason. Section 804(a) does not prevent local officials from addressing urban blight, either in this case or elsewhere. As reflected in HUD's recent regulation, a defendant may move forward with a proposed action that has an otherwise-prohibited disparate impact when the defendant establishes that the proposed action is necessary to achieve a substantial, legitimate nondiscriminatory interest and the plaintiff does not establish that the defendant's interest could be served by another practice with a less discriminatory effect. 78 Fed. Reg. at 11,482; 24 C.F.R. 100.500(b) and (c). In this case, the court of appeals found that petitioners had satisfied their burden of establishing a legitimate interest. Pet. App. 24a ("[E]veryone agrees that alleviating blight is a legitimate interest."). Finding a disputed issue of fact about whether petitioners may use alternative means of addressing blight that would be less discriminatory than the redevelopment plan, the court remanded for further proceedings. *Id.* at 25a-29a. Thus, petitioners may yet be permitted to proceed with their redevelopment plan. Or they may discover an alternative, less discriminatory plan that would achieve their goals, while providing more affordable housing. Either way, Section 804(a)'s disparate-impact cause of action does not prevent municipalities from alleviating blight.

Experience confirms that Section 804(a)'s disparate-impact prohibition does not prevent cities from implementing appropriate revitalization projects. In the decades since courts have recognized the existence of disparate-impact liability under the FHA, cities have taken steps to address blight by, *e.g.*, enforcing building code requirements, securing vacant

homes, and maintaining surrounding public and abandoned space. See, *e.g.*, Allison Plyler, Elaine Ortiz, and Kathryn L.S. Pettit, *Optimizing Blight Strategies: Deploying Limited Resources in Different Neighborhood Housing Markets* 9, 16 (Nov. 2010) (*Optimizing Blight Strategies*); Joseph Schilling & Elizabeth Schilling, *Leveraging Code Enforcement for Neighborhood Safety: Insights for Community Developers* 2-3 (June 20, 2007). And, as discussed, where such alternate means cannot achieve the substantial, legitimate nondiscriminatory goals of a municipality, Section 804(a)'s disparate-impact prohibition will not stand in its way.

Finally, petitioners' concern that disparate-impact liability "undermine[s] the FHA's core objectives" (Br. 44) rings hollow. At the outset, it is the Secretary of HUD, not petitioners, that Congress charged with determining how best to advance the core objectives of the Act. In any event, the availability of disparate-impact liability here serves the core purposes of the Act without unduly burdening petitioners. Before undertaking their redevelopment project, petitioners have already conducted studies, inspected properties, considered alternatives, amended their plans several times, and followed state procedures to designate the Gardens as blighted. See Pet. App. 7a-11a. It is reasonable for Congress to require petitioners—before displacing long-time residents and seizing homes through eminent domain—to also consider whether their plan will have a discriminatory effect and, if so, whether a less discriminatory alternative would serve petitioners' legitimate interests. As Justice Thomas explained in his dissent in *Kelo* v. *City of New London*, 545 U.S. 469 (2005), urban development plans in

this country have historically had the effect of disproportionately displacing racial minorities. *Id.* at 522; see *ibid.* ("Urban renewal projects have long been associated with the displacement of blacks; '[i]n cities across the country, urban renewal came to be known as 'Negro removal.'") (brackets in original) (quoting Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol'y Rev. 1, 47 (2003)); see Institute for Justice Amicus Br. 9-34. Congress and the Secretary made a reasonable policy choice in requiring municipalities to avoid such harmful and disparate effects when those effects are unnecessary to achieving the municipalities' legitimate goals. Disparate-impact liability thus advances, rather than undermines, the core objectives of the FHA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Relevant Fair Housing Act Provisions

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

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

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

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

* * * * *

2. 42 U.S.C. 3605 provides in pertinent part:

Discrimination in residential real estate-related transactions

* * * * *

(c) Appraisal exemption

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

3. 42 U.S.C. 3607 provides in pertinent part:

Religious organization or private club exemption

* * * * *

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

* * * * *

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

* * * * *

4. 42 U.S.C. 3608 provides in pertinent part:

Administration

(a) Authority and responsibility

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

* * * * *

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

5. 42 U.S.C. 2000e-2 provides in pertinent part:

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

* * * * *

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

* * * * *

(k) Burden of proof in disparate impact cases

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

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and

the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

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

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

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

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

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

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

* * * * *

Relevant Provision of the Age Discrimination in Employment Act

6. 29 U.S.C. 623 provides in pertinent part:

Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

* * * * *

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

* * * * *