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No. 13-1371

IN THE

Supreme Court of the United States

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, ET AL.,
Petitioners,

v.

THE INCLUSIVE COMMUNITIES PROJECT, INC.,
Respondent.

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

BRIEF OF *AMICI CURIAE* THE AMERICAN BANKERS ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE CONSUMER BANKERS ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE, THE HOUSING POLICY COUNCIL, AND STATE BANKING ASSOCIATIONS IN SUPPORT OF PETITIONERS

[Additional *amici* listed on inside cover]

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	7
RESPONDENT'S DISPARATE-IMPACT CLAIMS ARE BARRED UNDER THIS COURT'S PRIVATE-RIGHT-OF-ACTION JURISPRUDENCE	7
A. This Case Implicates the Court's Private-Right-of-Action Decisions	7
B. Respondent Fails to Show Affirmative Evidence of Congressional Intent for a Private Right of Action for Disparate Impact	13
1. The Text of Sections 804(a) and 805(a) Do Not Show Congress's Intent to Authorize Disparate-Impact Claims	13
2. The FHA's Legislative History Does Not Show Congress's Intent to Authorize Disparate-Impact Claims	20
3. An Agency Cannot Conjure Up a Right of Action Where Congress Has Not Clearly Expressed an Intent for One	25
CONCLUSION	28

TABLE OF AUTHORITIES

CASES Page(s)

Adams Fruit Co. v. Barrett,
494 U.S. 638 (1990) 26

Alexander v. Sandoval,
532 U.S. 275 (2001) ....*passim*

American Ins. Ass'n v. U.S. Dep't of Hous. & Urban Dev.,
No. 13-00966 (RJL), – F. Supp. 3d –, 2014 WL 5802283 (D.D.C. Nov. 7, 2014) 16, 17, 19, 24

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) 19, 22, 23, 24

Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.,
467 U.S. 837 (1984) 13

City of Rancho Palos Verdes, Cal. v. Abrams,
544 U.S. 113 (2005) 6

Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.,
322 U.S. 102 (1944) 18

Cort v. Ash,
422 U.S. 66 (1975) 8

D. Ginsberg & Sons, Inc. v. Popkin,
285 U.S. 204 (1932) 18

Gaona v. Town & Country Credit,
324 F.3d 1050 (8th Cir. 2003) 19

TABLE OF AUTHORITIES—Continued

Page(s)

Gladstone Realtors v. Village of Bellwood,
441 U.S. 91 (1979) 21

Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.,
550 U.S. 45 (2007) 27

Gomez-Perez v. Potter,
553 U.S. 474 (2008) 11

Gonzaga Univ. v. Doe,
536 U.S. 273 (2002) ....*passim*

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 15-16

Hazen Paper Co. v. Biggins,
507 U.S. 604 (1993) 10

Helvering v. Hallock,
309 U.S. 106 (1940) 22

In re Barnacle Marine Mgmt., Inc.,
233 F.3d 865 (5th Cir. 2000) 8

Int'l Bhd. of Teamsters v. United States,
431 U.S. 324 (1977) 9

Jackson v. Birmingham Bd. of Educ.,
544 U.S. 167 (2005) 18

Laufman v. Oakley Bldg. & Loan Co.,
408 F. Supp. 489 (S.D. Ohio 1976) 19

Mackey v. Nationwide Ins. Cos.,
724 F.2d 419 (4th Cir. 1984) 19

Mass. Mut. Life Ins. v. Russell,
473 U.S. 134 (1985) 12

TABLE OF AUTHORITIES—Continued

Page(s)

Newport News Shipbuilding & Dry Dock Co. v. EEOC,
462 U.S. 669 (1983) 18

Northcross v. Bd. of Educ. of Memphis City Sch.,
412 U.S. 427 (1973) 15

Nw. Airlines, Inc. v. Transp. Workers Union of Am.,
451 U.S. 77 (1981) 20, 27

Olmsted v. L.C.,
527 U.S. 581 (1999) 18

Raytheon Co. v. Hernandez,
540 U.S. 44 (2003) 9, 16

Ricci v. DeStefano,
557 U.S. 557 (2009) 9, 15

Simms v. First Gibraltar Bank,
83 F.3d 1546 (5th Cir. 1996) 19

Smith v. City of Jackson,
544 U.S. 228 (2005) .... *passim*

State of N.J., Dep't of Envtl. Prot. & Energy v. Long Island Power Auth.,
30 F.3d 403 (3d Cir. 1994) 8

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,
552 U.S. 148 (2008) 8, 12

Tex. Indus., Inc. v. Radcliff Materials, Inc.,
451 U.S. 630 (1981) 12

TABLE OF AUTHORITIES—Continued

Page(s)

Touche Ross & Co. v. Redington,
442 U.S. 560 (1979) ... 6, 25, 27

United States v. FMC Corp.,
717 F.2d 775 (3d Cir. 1983) ... 8

United States v. Jicarilla Apache Nation,
131 S. Ct. 2313 (2011) ... 18

Va. Bankshares, Inc. v. Sandberg,
501 U.S. 1083 (1991) ... 12

Watson v. Fort Worth Bank & Trust,
487 U.S. 977 (1988) ... 14

Wilder v. Va. Hosp. Ass'n,
496 U.S. 498 (1990) ... 8

CONSTITUTION

U.S. Const art. I, § 8, cl.1 ... 8

STATUTES AND REGULATORY MATERIAL

Age Discrimination in Employment Act of 1967:

29 U.S.C. § 623(a)(1) ... 14, 15, 17

29 U.S.C. § 623(a)(2) ... 15, 16

Americans with Disabilities Act:

42 U.S.C. § 12112(b) ... 15

42 U.S.C. § 12112(b)(1) ... 16

42 U.S.C. § 12112(b)(3)(A) ... 16

Civil Rights Act of 1871:

42 U.S.C. § 1983 ... 10, 11, 23

Page(s)

Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq*.:

42 U.S.C. § 2000d-1 .... 10, 11-12, 26

42 U.S.C. § 2000e-2(a)(1)....................... 14, 15, 17

42 U.S.C. § 2000e-2(a)(2)............................ 15, 16

Fair Housing Act:

42 U.S.C. § 3602(f)...................................... 9

42 U.S.C. § 3604 .... 9, 17, 18, 19

42 U.S.C. § 3604(a)....................................*passim*

42 U.S.C. § 3605 .... 9, 17, 18, 19

42 U.S.C. § 3605(a)....................................*passim*

42 U.S.C. § 3605(b)(1)(A)-(B) 18

42 U.S.C. § 3606 .... 9, 17

42 U.S.C. § 3608(a)..................................... 26

42 U.S.C. § 3613 .... 6, 9, 10, 11

42 U.S.C. § 3617 9

Family Educational Rights and Privacy Act:

20 U.S.C. § 1232g 10, 23

Voting Rights Act of 1965,
42 U.S.C. § 1973c.. 20

24 C.F.R. § 100.500... 25

Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013).......................... 3, 23

11,461... 27

Page(s)

11,462 23
11,464 18
11,465 .... 17, 23
11,466 .... *passim*
11,467 .... 22, 23, 24, 27
11,474 23
11,476 23

Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3,232, 3,235 (Jan. 23, 1989) 25

COURT FILINGS

Br. for United States as Amicus Curiae, *Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15 (1988), *available at* http://www.justice.gov/osg/briefs/1987/sg870004.txt 20

Br. for the United States as Amicus Curiae Supporting Respondents, *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507 (U.S. Oct. 28, 2013) .... *passim*

OTHER MATERIALS

Remarks on Signing the Fair Housing Amendments Act of 1988, Public Papers of President Ronald Reagan (Sept. 13, 1988) 24

INTEREST OF *AMICI CURIAE*[1]

As petitioners note (*see* Pet. Br. 14-16), this case implicates the interests not only of petitioners, but also of mortgage lenders, homeowners' insurance companies, and others who are often sued under the Fair Housing Act ("FHA") based on allegations that objective, race neutral criteria used in their industries have a "disparate impact" on particular groups. *Amici*'s members are strongly committed to providing lending, financial, and other services to consumers in a nondiscriminatory manner, and implement that commitment through compliance policies and practices. Disparate impact claims under the FHA frustrate the fulfillment of that commitment in a reliable, manageable, and predictable manner. A decision by this Court confirming that the FHA does not permit "disparate impact" claims would comport with the text and purpose of the statute, and would provide critical guidance to *Amici*, their members, and consumers.

The American Bankers Association ("ABA"), headquartered in Washington, D.C., is the principal national trade association of the financial services industry. ABA's members, located in all fifty states, the District of Columbia, and Puerto Rico, include financial institutions of all sizes. ABA members hold a majority of the domestic assets of the banking industry in the United States. ABA frequently submits *amicus curiae* briefs in state and federal

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amici curiae* or their members made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

courts in matters that significantly affect its members and the business of banking.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country, including lenders and other businesses that have been sued by plaintiffs asserting disparate-impact claims under the FHA. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Consumer Bankers Association ("CBA") is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation on retail banking issues. CBA members include most of the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the industry's total assets.

The Financial Services Roundtable represents 100 of the largest integrated financial companies providing banking, insurance, and investment products and services to American consumers. The Roundtable's members finance the majority of single and multi-family housing in the United States.

The Housing Policy Council is made up of 32 companies that are among the nation's leaders in mortgage finance and originate an estimated 75 percent of the mortgages for American home buyers.

Also appearing as *amici* are 54 bankers associations from all 50 states and Puerto Rico. These associations represent the interests of their members (which include state and federally chartered banks, as well as savings and loan associations) at the state and local level.

SUMMARY OF ARGUMENT

Respondent The Inclusive Communities Project, Inc. sued petitioners, the Texas Department of Housing and Community Affairs and certain Texas officials, alleging that the Department's provision of Low-Income Housing Tax Credits to real estate developers in Dallas "disproportionately allocated" tax credits "to developments located in minority concentrated areas," in violation of Sections 804(a) and 805(a) of the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3604(a), 3605(a). J.A. 81. After a trial, the district court found that the Department had not engaged in intentional discrimination, J.A. 191, but entered a judgment for respondent on its "disparate impact" claim under the FHA. J.A. 213, 273-77. On appeal, the Fifth Circuit panel found that it was bound by prior decisions holding that the FHA permits disparate-impact claims, J.A. 362-63, but remanded the case to the district court to apply new Housing and Urban Development ("HUD") regulations purporting to establish standards for proving disparate-impact claims under the FHA. J.A. 353; *see* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013). This Court granted review on a single question: whether

disparate-impact claims are cognizable under the FHA.

As petitioners demonstrate, the statutory text of the FHA establishes that Sections 804(a) and 805(a) do not permit claims for disparate impact. *E.g.*, Pet. Br. 13-42. This is clear, as petitioners show, under basic principles of statutory construction and this Court's decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005).

Amici submit that this conclusion is reinforced—and even more emphatically clear—under this Court's private-right-of-action jurisprudence. By contending it has a right under Sections 804(a) and 805(a) to bring an action for "disparate impact," *e.g.*, Cert. Br. in Opp. 13-17 (filed July 16, 2014), respondent is asserting a new right of action that this Court has never recognized. This Court has a longstanding and well-developed framework to address whether Congress intended such actions to proceed.

Under that framework—which entails a more demanding statutory inquiry than the one respondent invokes—respondent must show "*affirmative evidence* of congressional intent" to permit a cause of action for disparate impact. *Alexander v. Sandoval*, 532 U.S. 275, 293 n.8 (2001) (emphasis added). And such evidence must be demonstrated "in clear and unambiguous terms" because a judicial determination that a statute authorizes a cause of action implicates the separation of powers. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002).

There is no clear, affirmative evidence that Congress intended to allow actions for disparate impact under the FHA. Indeed, respondent and the United States urge the Court to *infer* congressional

intent from oblique statutory language and legislative inaction. They even invoke the statute's purported *ambiguity* when asking the Court to defer to the interpretation of Sections 804(a) and 805(a) proffered by HUD. Cert. Br. in Opp. 13-17; Br. for the United States as Amicus Curiae Supporting Respondents at 9-12, 31-32, *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507 (U.S. Oct. 28, 2013) ("U.S. Mount Holly Br.").[2]

Further, agency deference has no place in determining whether Congress intended to create a right of action: "[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress." *Sandoval*, 532 U.S. at 291. It is a "judicial task" to determine whether a right of action exists. *Id.* at 286.

Beyond that, respondent and the United States urge the Court to adopt HUD's interpretation of the FHA even though HUD's interpretative approach is at odds with decades of this Court's right-of-action decisions. HUD, which takes the position that the FHA broadly authorizes disparate-impact claims, states that its interpretation seeks to effectuate "the broad remedial goals of the Fair Housing Act." 78 Fed. Reg. at 11,466. But "generalized references to the 'remedial purposes' of [a statute] will not justify reading a provision more broadly than its language and the statutory scheme

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[2] This Court previously granted certiorari to address whether the FHA permits disparate-impact claims in *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013) (mem.), but the case was dismissed before the Court could resolve the question. References in this brief to the arguments of the United States refer to those set forth in the government's merits-stage *amicus* brief in *Mt. Holly*.

reasonably permit." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (internal quotation marks omitted).

Although this Court once considered a statute's broad remedial purposes as a guide to determining whether a private right of action existed, the Court has explicitly "abandoned" this approach. *Sandoval*, 532 U.S. at 287; *accord Touche Ross*, 442 U.S. at 578 ("[W]e have adhered to a stricter standard for the implication of private causes of action."). Thus, by urging deference to HUD's FHA interpretation, respondent and the United States are asking the Court to defer to a statutory interpretation that a court could not itself adopt. In any event, petitioners are right that agency deference is beside the point, because Sections 804(a) and 805(a) are not ambiguous.

To be sure, the FHA has a provision, Section 813, granting a remedy to enforce violations of Sections 804(a) and 805(a). But that does not answer the question whether Congress intended those Sections to grant respondent a right to sue for disparate impact. A plaintiff seeking relief under a statute must show that the statute manifests an intent to create not just a *remedy* but also an underlying substantive *right*. *See Gonzaga*, 536 U.S. at 282-85. Where, as here, a statute contains a provision providing a general remedy, "the initial inquiry—determining whether a statute confers any [particular] right at all—is no different from the initial inquiry in an implied right of action case." *Id.* at 285.

Thus, no matter how the Court examines the issue, petitioners should prevail and the Court should hold that Sections 804(a) and 805(a) do not encompass disparate-impact claims against petitioners, lenders, or any other defendant sued under the FHA.

ARGUMENT

RESPONDENT'S DISPARATE-IMPACT CLAIMS ARE BARRED UNDER THIS COURT'S PRIVATE-RIGHT-OF-ACTION JURISPRUDENCE

Respondent asserts that, by drawing inferences from the text and history of the FHA and by giving HUD's statutory interpretation deference, the FHA should be construed to "authoriz[e] disparate impact claims." Cert. Br. in Opp. 17. As petitioners demonstrate, under basic principles of statutory construction, respondent is wrong.

Respondent is also wrong—and even more starkly so—for an additional reason. Because respondent seeks to assert a distinct right of action, its claims fall under the Court's private-right-of-action jurisprudence. Under that jurisprudence, it is additionally and emphatically clear that respondent cannot pursue its disparate-impact claims under the FHA.

A. This Case Implicates the Court's Private-Right-of-Action Decisions

1. There is no freestanding right to sue for an alleged violation of a federal statute. Congress must affirmatively create that right. *See Sandoval*, 532 U.S. at 286 ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."). Absent congressional intent to create a right as well as a remedy, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87.

This bedrock principle "reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for

violations of statutes." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008) (quoting *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990)). If courts were to recognize a right or a remedy that Congress did not intend to create, the judiciary would "necessarily extend[] its authority to embrace a dispute Congress has not assigned it to resolve." *Id.* at 164 (internal quotation marks omitted). This Court thus has developed a framework for determining whether Congress has created a private right of action. *See, e.g.*, *Cort v. Ash*, 422 U.S. 66 (1975).[3]

To protect the legislative role of Congress for separation-of-powers purposes, the Court has held that plaintiffs asserting a cause of action under a federal statute must set forth "affirmative evidence of congressional intent" to authorize their claim. *Sandoval*, 532 U.S. at 293 n.8 (internal quotation marks omitted). Such intent must be expressed "in clear and unambiguous terms." *Gonzaga*, 536 U.S. at 290; *see also City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 119 (2005) (applying *Gonzaga* outside Spending Clause context).

2. The FHA has a provision granting aggrieved parties a remedy for violations of substantive rights

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[3] Although this case and the Court's private-right-of-action cases arise in the context of private litigants seeking to assert statutory rights of action, the same principles apply equally to government claims asserting statutory rights of action, including government actions asserting violations of Sections 804(a) and 805(a). "Separation-of-powers concerns apply with equal weight whether the enforcing party is a private litigant or the United States." *United States v. FMC Corp.*, 717 F.2d 775, 780 (3d Cir. 1983); *accord, e.g.*, *In re Barnacle Marine Mgmt., Inc.*, 233 F.3d 865, 870 (5th Cir. 2000); *State of N.J., Dep't of Envtl. Prot. & Energy v. Long Island Power Auth.*, 30 F.3d 403, 423 (3d Cir. 1994) (similar for rights of action brought by states).

created in Sections 804(a) and 805(a). Under FHA Section 813, "[a]n aggrieved person may commence a civil action" and seek remedies for "an alleged discriminatory housing practice," which is defined to include acts prohibited under Sections 804(a) and 805(a). 42 U.S.C. § 3613; *id.* § 3602(f) (defining "discriminatory housing practice" to mean "an act that is unlawful under section 3604, 3605, 3606, or 3617 of this title").

There is no dispute that Section 813 provides an express remedy for plaintiffs alleging intentional disparate *treatment* claims in violation of Sections 804(a) and 805(a). But respondent here asserts that Sections 804(a) and 805(a) create an additional right to seek a remedy for unintentional disparate *impacts*. Disparate-impact claims are a distinct cause of action from disparate-treatment claims. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003).

"Disparate-treatment cases . . . occur where a [defendant] has treated [a] particular person less favorably than others *because of* a protected trait." *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (emphasis added) (internal quotation marks omitted). To prove a disparate-treatment claim, "a plaintiff must establish that the defendant had a discriminatory intent or motive." *Id.* (internal quotation marks omitted). "Proof of discriminatory motive is critical." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

By contrast, a disparate-impact claim arises from "practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities." *Ricci*, 557 U.S. at 577. "Proof of discriminatory motive . . . is not required." *Teamsters*, 431 U.S. at 335 n.15. The two different claims thus have

different elements, and this Court has treated them as different causes of action. *See Sandoval*, 532 U.S. at 280 (construing Section 601 of Title VI as creating a right to bring disparate-treatment claims but not creating a right to bring disparate-impact claims); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) ("We long have distinguished between 'disparate treatment' and 'disparate impact.'"). In short, they are different causes of action because disparate-impact claims would "forbid conduct that [disparate-treatment claims] permit." *Sandoval*, 532 U.S. at 285 & n.6.

3. The Court accordingly must determine whether Congress intended to create in Sections 804(a) and 805(a) rights of action for alleged disparate impacts that can be remedied via Section 813. Congressional intent to grant a general *remedy* in Section 813 does not answer the question whether Congress intended in Sections 804(a) and 805(a) to grant respondent the specific *right* it seeks to enforce under the statutes. The question of whether Sections 804(a) and 805(a) create a right of action for alleged disparate impacts is answered by applying this Court's private-right-of-action jurisprudence.

Gonzaga v. Doe, 536 U.S. 273, is instructive. There, the plaintiff brought a lawsuit under 42 U.S.C. § 1983 to enforce provisions of the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. *Id.* at 276. This Court held that the plaintiff did "not have the burden of showing an intent to create a private *remedy* because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes. Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." *Id.* at 284 (citation omitted). But the

existence of an express *remedial* provision under section 1983 did not answer "the initial inquiry—determining whether a statute confers any right at all." *Id.* at 285. That initial inquiry, whether an enforceable right exists, "is no different from the initial inquiry in an implied right of action case." *Id.* Thus, "if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action." *Id.* at 290.

The same is true here: If Congress intended to create in Sections 804(a) and 805(a) a right of action for disparate impact that is enforceable under the remedy provision in Section 813 (or the FHA's other remedy provisions), "it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action." *Id.*; *see also Gomez-Perez v. Potter*, 553 U.S. 474, 483 (2008) (stating that whether a statute creates a remedy and whether a statute prohibits certain conduct are "analytically distinct" questions; "the presence or absence of another statutory provision expressly creating a private right of action [for the violation of § 1681(a)] cannot alter § 1681(a)'s scope").

4. At a minimum, respondent is seeking to expand a preexisting private right of action (the right to bring claims for disparate treatment) beyond its intended scope. That too independently implicates this Court's private-right-of-action jurisprudence. A right (express or implied) to bring one type of claim does not extend to provide a right to bring a different type of claim. *See Sandoval*, 532 U.S. at 280 (stating that Section 601 of

Title VI authorizes disparate-treatment claims but not disparate-impact claims); *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991) (emphasizing that a preexisting right of action "should not . . . grow beyond the scope congressionally intended"); *Mass. Mut. Life Ins. v. Russell*, 473 U.S. 134, 145-47 (1985) (applying private-right-of-action analysis to determine whether ERISA provided cause of action for extra-contractual damages where statute had express right of action provision for breaches of fiduciary duty); *see also Tex. Indus., Inc. v. Radcliff Materials, Inc*., 451 U.S. 630, 639 (1981) (applying private-right-of-action analysis to determine whether federal antitrust laws provided defendants an implied cause of action for contribution where statutes provided plaintiffs an express right of action for conspiracy). "Concerns with judicial creation of a private cause of action caution against its expansion. The decision to extend the cause of action is for Congress, not for us." *Stoneridge*, 552 U.S. at 165.

This principle is a "hurdle facing any litigant who urges [the Court] to enlarge the scope" of an existing right of action. *Va. Bankshares*, 501 U.S. at 1104 n.11; *see also id.* at 1102 (plaintiff's claim was not cognizable because "we can find no manifestation of intent to recognize a cause of action (or class of plaintiffs) as broad as [plaintiff's] theory of causation would entail").

Whether viewed as an effort to secure new rights under Sections 804(a) and 805(a) or to expand the disparate-treatment right of action already recognized under the FHA, respondent's disparate-impact claims are foreclosed under the Court's private-right-of-action jurisprudence.

B. Respondent Fails to Show Affirmative Evidence of Congressional Intent for a Private Right of Action for Disparate Impact

1. The Text of Sections 804(a) and 805(a) Do Not Show Congress's Intent to Authorize Disparate-Impact Claims

a. Respondent cannot establish the heightened showing of congressional intent required here. The starting point for determining whether a statute creates a particular right of action is the statute's text. *Sandoval*, 532 U.S. at 288. If the text does not display Congress's intent to create the right of action in question, that is the end of the inquiry. *Id.* at 288 n.7.

Respondent and the United States do not take the position that Sections 804(a) or 805(a) reflect clear and unambiguous evidence of congressional intent to allow disparate-impact claims. To the contrary, they rely on HUD's disparate impact rule that purports to interpret the FHA's text, and argue that the rule is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Cert. Br. in Opp. 13-17; U.S. Mount Holly Br. 9-12.

If, as they argue, the FHA is sufficiently ambiguous to trigger a need for *Chevron* deference, then *a fortiorari* they cannot demonstrate the requisite affirmative and unambiguous evidence of congressional intent to create a right of action for disparate impact.

b. In any event, Sections 804(a) and 805(a) are not ambiguous. Congress made clear through the statute's text that it intended the Sections to allow

claims for only disparate treatment, not disparate impact.

As a plurality of the Court explained in *Smith v. City of Jackson*, 544 U.S. 228 (2005), the critical textual question for determining if a statute permits parties to bring disparate-impact claims is whether the statute "focuses on the *effects* of the action on the [protected individual] rather than the motivation for the action of the [defendant]." *Id*. at 236; *see Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988) (concluding that Title VII "may be analyzed under the disparate impact approach" because the statute prohibits employer practices that "adversely affect" an employee's status). When a statute uses language that targets the *effects* of conduct, it prohibits actions that result in disparate impacts. Conversely, when a statute proscribes only specific discriminatory acts, but does not address the effects of such acts, it prohibits disparate treatment.

Here, Section 804(a) makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). Section 805(a) makes it unlawful "to discriminate against any person . . . because of race." *Id.* § 3605(a).

These Sections do not include the words "affect" or "effects." In this regard, their text parallels the text of other statutory provisions that do not permit disparate-impact claims. Section 703(a)(1) of Title VII and Section 4(a)(1) of the ADEA prohibit specific discriminatory conduct, but those provisions do not

focus on the "effects" of the prohibited conduct.[4] *See Ricci*, 557 U.S. at 577-78 (construing Title VII § 703(a)(1) as a disparate-treatment provision); *Smith*, 544 U.S. at 236 n.6, 249 (ADEA § 4(a)(1) does not support disparate-impact claims). "The similarity of language in [these provisions] is . . . a strong indication that [they] should be interpreted *pari passu*." *Northcross v. Bd. of Educ. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (per curiam).

In contrast, Sections 804(a) and 805(a) are textually distinct from statutory provisions that permit claims for disparate impact, such as Section 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)(2); Section 4(a)(2) of the ADEA, 29 U.S.C. § 623(a)(1); and Section 102 of the ADA, 42 U.S.C. § 12112(b). *See* Pet. Br. 23-25. Each of those non-FHA provisions prohibits conduct that "adversely affects" a protected class, thereby using express language the Court has recognized as authorizing claims of disparate impact.[5] *See Griggs v.*

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[4] Section 703(a)(1) of Title VII provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

Section 4(a)(1) of the ADEA similarly provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1).

[5] Section 703(a)(2) of Title VII provides that it is unlawful for an employer "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

Duke Power Co., 401 U.S. 424, 426 n.1, 429-31 (1971) (Title VII); *Smith*, 544 U.S. at 235-36 (ADEA); *Raytheon Co.*, 540 U.S. at 53 (ADA). Further, those provisions refer to conduct that would "tend to deprive" an individual of equal rights, again focusing on the effects of the conduct. These textual earmarks of a right to bring disparate-impact claims are thus absent from Sections 804(a) and 805(a).

This is precisely what the United States District Court for the District of Columbia recently found in *American Insurance Association v. U.S. Department of Housing & Urban Development* ("*AIA*"), No. 13-00966 (RJL),—F. Supp. 3d—, 2014 WL 5802283 (D.D.C. Nov. 7, 2014). In addressing a facial challenge to HUD's FHA disparate impact rule, the court observed that "[w]hen Congress intends to expand liability to claims of discrimination based on disparate impact, it uses language focused on the result or effect of particular conduct, rather than the conduct itself." *Id*. at *8.

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such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2) (emphasis added).

Section 4(a)(2) of the ADEA provides that it is unlawful for an employer "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." 29 U.S.C. § 623(a)(2) (emphasis added).

Section 102 of the ADA defines "discrimination" to include "limiting, segregating, or classifying a job applicant or employee in a way that *adversely affects* the opportunities or status of such applicant or employee because of the disability of such applicant or employee." 42 U.S.C. § 12112(b)(1) (emphasis added); *see also id*. § 12112(b)(3)(A) (discrimination includes "utilizing standards, criteria, or methods of administration . . . that *have the effect* of discrimination on the basis of disability" (emphasis added)).

The district court in *AIA* found no such "effects" language in the FHA, noting that "[e]ach of the FHA's operative terms' definitions describe intentional acts, which are—more often than not—motivated by specific factors." *Id*. (citing 42 U.S.C. §§ 3604-3606). And, as the court further observed, "the FHA contains no prohibitions on conduct that 'tends to' cause a particular result." *Id.*

c. Respondent, the United States, and HUD argue that the phrase "otherwise make unavailable or deny" in Section 804(a) focuses on "effects" and thus indicates that Congress intended to permit disparate-impact claims. Cert. Br. in Opp. 14-15; U.S. Mount Holly Br. 12-15; 78 Fed. Reg. at 11,465-66. But the bare phrase "otherwise make unavailable or deny" does not do the work they suggest: it does not provide affirmative evidence of congressional intent to permit disparate-impact claims. Indeed, similar "otherwise" language appears in both Section 4(a)(1) of the ADEA and Section 703(a)(1) of Title VII—neither of which provides for disparate-impact claims. *See supra* note 4. As a majority of the Court in *Smith* agreed, Section 4(a)(1) of the ADEA, which prohibits employers from "otherwise discriminat[ing] against any individual," does not authorize disparate-impact claims. *Smith*, 544 U.S. at 236 n.6 (plurality opinion); *id*. at 249 (O'Connor, J., concurring).

Further, FHA Section 805(a)—the provision of the FHA that addresses discriminatory lending practices—does not even include the "otherwise make unavailable" language to which respondent, the United States, and HUD attribute so much weight. Cert. Br. in Opp. 14-15; U.S. Mount Holly Br. 12-15; 78 Fed. Reg. at 11,465-66. HUD brushes aside the absence of this language in Section 805(a), and instead asserts

that disparate impact claims can be inferred from 805(a)'s reference to "discrimination." According to HUD, because Section 805 and other FHA provisions "make it unlawful 'to discriminate' in certain housing-related transactions," the term "discriminate" "may encompass actions that have a discriminatory effect but not a discriminatory intent." 78 Fed. Reg. at 11,466. This Court, however, has long held that "the 'normal definition of discrimination' is 'differential treatment.'" *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (quoting *Olmsted v. L.C.*, 527 U.S. 581, 614 (1999) (Kennedy, J., concurring in judgment)). "[D]iscrimination means 'less favorable' treatment." *Id.* (quoting *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 n.22 (1983)). HUD ignores this longstanding definition of discrimination.[6]

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[6] Reflecting the unduly broad interpretative lens through which HUD is currently viewing the FHA, HUD asserts that lenders, which are covered by Section 805, may also be sued under Section 804. 78 Fed. Reg. at 11,464 n.41. That is incorrect. "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'" *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944) (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)) (omission in original); *see also United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2330 (2011) (similar). Section 805 makes it unlawful for "any person or other entity whose business includes *engaging in residential real estate-related transactions* to discriminate." 42 U.S.C. § 3605(a) (emphasis added). The FHA defines a "residential real estate-related transaction" to include "[t]he making or purchasing of *loans* or providing other *financial assistance* . . . for purchasing, constructing, improving, repairing, or maintaining a dwelling[,] or secured by residential real estate." *Id.* § 3605(b)(1)(A)-(B) (emphasis added). Section

If Congress wanted to speak to "effects" or "affects" in the FHA, it would have done so—plainly and not through the roundabout "otherwise make unavailable" phrase or the general reference to "discrimination." This Court has rejected similar attempts to divine intent for a right of action from oblique language in a statute. In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), for example, the government argued that the right to bring an action under Section 10(b) of the Securities and Exchange Act encompassed the right to assert claims for aiding and abetting. *Id.* at 175. The SEC argued that "the use of the phrase 'directly or indirectly' in the text of § 10(b) covers aiding and abetting." *Id.* This Court rejected that as a strained attempt to discern a right of action, noting that "Congress knew how to impose aiding and abetting liability when it chose to do so" in other statutes that used plain terms long understood to cover aiding and abetting. *Id.* at 176.

The same is true here. *See AIA*, 2014 WL 5802283, at *10 ("Congress knows how to craft statutory language providing for disparate-impact liability when it intends to do so."). As the United States told this Court in 1988 in an *amicus* brief arguing that Section 804(a)'s text covered only disparate-treatment, not disparate-impact claims: "Congress

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805 thus expressly and specifically applies to lending. Section 804, by contrast, is silent both as to lending and as to borrowers. Thus, several courts have found that Section 804 does not apply to lenders. *See, e.g.*, *Gaona v. Town & Country Credit*, 324 F.3d 1050, 1056 n.7 (8th Cir. 2003); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1554 n.27 (5th Cir. 1996); *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 423 (4th Cir. 1984). *But cf. Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 493 (S.D. Ohio 1976).

has demonstrated its ability unambiguously to adopt an effects test when it wishes to do so. In Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, for example, Congress required covered jurisdictions to seek preclearance of any voting change and to show that such a change 'does not have the purpose and will not have *the effect* of denying or abridging the right to vote on account of race or color.'" Br. for United States as Amicus Curiae n.18, *Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (emphasis added) ("U.S. 1988 Br."), *available at* http://www.justice.gov/osg/briefs/1987/sg870004.txt. There, unlike its current position, the government found "the statute's language and legislative history show that a violation of [Section 804(a)] requires intentional discrimination." *Id.*

Put simply, Sections 804(a) and 805(a) lack any textual indicia of congressional intent to authorize disparate-impact claims, much less any "affirmative evidence of congressional intent" to create a right of action to bring such claims. *Sandoval*, 532 U.S. at 293 n.8. Without such evidence, "the essential predicate" for bringing disparate-impact claims does not exist. *Nw. Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 94 (1981).

2. The FHA's Legislative History Does Not Show Congress's Intent to Authorize Disparate-Impact Claims

a. Because respondent and the United States cannot point to anything in the text of Sections 804(a) and 805(a) that affirmatively authorizes disparate-impact claims, the Court need not consider the legislative history of the FHA. *See, e.g.*, *Sandoval*, 532 U.S. at 288 n.7 ("[T]he interpretive inquiry begins with the text and structure of the statute, and ends once it

has become clear that Congress did not provide a cause of action.").

In any case, the statute's legislative history likewise reveals no congressional intent to create a right of action for disparate impact. The original version of the FHA was introduced as a floor amendment to the Civil Rights Act, so no committee reports discuss or analyze the legislation. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 126 (1979) (Rehnquist, J., dissenting) ("Introduced on the Senate floor and approved unchanged by the House, [the FHA]'s legislative history must be culled primarily from the Congressional Record.").

To the extent the legislative history implies anything relevant, it supports petitioners. As the United States told this Court in 1988, "[t]he [FHA's] legislative history reinforces the understanding that Congress intended to require a showing of intentional discrimination. Neither supporters nor opponents suggested that the legislation would ban local zoning regulations merely because they had a racial effect, without any showing that the local government intended to discriminate." U.S. 1988 Br. 16-17.

b. Faced with the absence of clear legislative intent to authorize disparate-impact claims under the original enactment of the FHA, respondent, the United States, and HUD point to three aspects of the FHA's 1988 amendments that they assert implicitly show Congress intended the FHA to authorize disparate-impact claims.

First, respondent, the United States, and HUD assert that, when amending the FHA in 1988, "Congress was aware that the courts of appeals had all recognized disparate impact claims under section

804(a)," and thus Congress must have "implicitly adopted" that construction when it did not take affirmative legislative measures to modify that interpretation. Cert. Br. in Opp. 16; *accord* U.S. Mount Holly Br. 22-23; 78 Fed. Reg. at 11,467.

This Court rejected an identical argument in *Central Bank*. There, although the Court previously had held that Section 10(b) of the Securities Exchange Act provides a right of action for damages for certain claims, the plaintiffs sought to expand that recognized right of action to include claims for aiding and abetting. 511 U.S. at 185. The plaintiffs argued that Congress had amended the Securities Exchange Act "on various occasions" after lower courts had construed the statute as covering aiding and abetting liability and, thus, Congress had implicitly ratified those precedents by failing to overturn them. *Id.* at 186.

This Court rejected that argument, concluding that "[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the courts' statutory interpretation." *Id.* (quotation marks and citations omitted). "We walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Id.* (quoting *Helvering v. Hallock*, 309 U.S. 106, 121 (1940)); *see also Sandoval*, 532 U.S. at 291-92 (rejecting a similar argument that Congress "ratified" court decisions concerning a right of action based on disparate-impact regulations).

Notably, in *Central Bank*, as here, eleven federal courts of appeals had interpreted the statute to provide a particular right of action, but this Court

disagreed. *Cent. Bank*, 511 U.S. at 186; *id.* at 192 & n.1 (Stevens, J., dissenting).[7]

Second, respondent, the United States, and HUD argue that the 1988 amendments to the FHA show that "Congress specifically rejected an amendment that would have required proof of intentional discrimination in challenges to zoning decisions." Cert. Br. in Opp. 16; *accord* U.S. Mount Holly Br. 23; 78 Fed. Reg. at 11,467. Thus, the government contends, Congress must have "implicitly" understood the statute to encompass disparate-impact claims, otherwise there would have been no need for a provision requiring intentional discrimination. U.S. Mount Holly Br. 23. But again, in *Central Bank*, this Court rejected that very premise: "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such

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[7] Respondent and the United States emphasize that "[e]leven circuits concluded . . . that the FHA authorizes disparate impact liability." Cert. Br. in Opp. 13; *accord* U.S. Mount Holly Br. 18. HUD also references lower court decisions in the preamble to its rule. *See, e.g.*, 78 Fed. Reg. at 11,460, 11,462, 11,465, 11,474, 11,476. Petitioners demonstrate that those decisions cannot bear the weight respondent, the United States, and HUD place on them. In any event, this Court repeatedly has rejected lower courts' shared views that rights of action existed. *See Cent. Bank*, 511 U.S. at 186; *see also Sandoval*, 532 U.S. at 295 & n.1 (Stevens, J., dissenting) (noting that the majority found no private right of action notwithstanding that "[j]ust about every Court of Appeals has either explicitly or implicitly held that a private right of action exists to enforce all of the regulations issued pursuant to Title VI, including the disparate-impact regulations"); *Gonzaga*, 536 U.S. at 299 (Stevens, J., dissenting) (noting that the majority found no right of action under FERPA notwithstanding that "all of the Federal Courts of Appeals expressly deciding the question have concluded that FERPA creates federal rights enforceable under § 1983").

inaction, including the inference that the existing legislation already incorporated the offered change." 511 U.S. at 187.

Third, respondent, the United States, and HUD suggest that congressional intent to allow a disparate-impact right of action can be inferred because, in the 1988 amendments, Congress added three FHA exemptions, each of which "presuppose[s] disparate impact liability." Cert. Br. in Opp. 15; *accord* U.S. Mount Holly Br. 18 ("[The FHA] contains three exemptions from liability that presuppose the availability of a disparate-impact claim."); 78 Fed. Reg. at 11,466-67. The three exemptions, however, do not presuppose that Sections 804(a) and 805(a) authorize disparate-impact claims; rather, they apply to *all* claims brought under the FHA (not just those brought under Sections 804(a) and 805(a)) and provide a defense to *intentional* discrimination claims. *See AIA*, 2014 WL 5802283, at *10 (observing that these "three provisions . . . in the FHA *merely* provide safe-harbors, clarifying that *nothing* in the FHA prohibits the specific conduct discussed."); Pet. Br. 35-42.

In any case, the government's tea-leaf reading is hardly evidence of intent to allow a right of action for disparate impact. When President Reagan signed the 1988 amendments into law, he stated that they "do[] not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that [FHA] violations may be established by a showing of disparate impact or discriminatory effects of a practice that is taken without discriminatory intent." Remarks on Signing the Fair Housing Amendments Act of 1988, Public Papers of President Ronald Reagan (Sept. 13, 1988). Not even HUD took the exemptions as clear authorization of disparate-

impact claims at the time. The agency stated that its 1989 implementing regulations "are not designed to resolve the question of whether intent is or is not required to show a violation" of the FHA. Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3,232, 3,235 (Jan. 23, 1989).

Whatever their positions are today on precisely the same statute, neither the United States nor HUD can show that the FHA provides clear authorization for disparate-impact claims.

3. An Agency Cannot Conjure Up a Right of Action Where Congress Has Not Clearly Expressed an Intent for One

Respondent and the United States rely heavily on HUD's interpretation of Sections 804(a) and 805(a), including the declaration in HUD's recent rule that "[l]iability 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." 24 C.F.R. § 100.500.

However, "it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress." *Sandoval*, 532 U.S. at 291. "[T]he language of the statute and not the rules must control." *Touche Ross*, 442 U.S. at 577 n.18 (declining to find a right of action under Section 17(a) of the Securities Exchange Act).

Allowing an agency to declare whether Congress intended to permit a right of action implicates the separation-of-powers concerns underlying this Court's right-of-action jurisprudence. *See supra* Part A.1. Determining whether a right of action exists is a non-

delegable "judicial task." *Sandoval*, 532 U.S. at 286. "Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Id.* at 291; *see also Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990) ("[E]ven if AWPA's language establishing a private right of action is ambiguous, we need not defer to the Secretary of Labor's view of the scope of [the statute] because Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute.").

Nor does HUD's "authority and responsibility [to] administer[]" the FHA empower the agency to create a right of action not already conferred in the statute. 42 U.S.C. § 3608(a). In *Sandoval*, a federal agency authorized "'to effectuate'" Title VI of the Civil Rights Act passed a rule prohibiting conduct that results in disparate "effect[s]." 532 U.S. at 278 (quoting 42 U.S.C. § 2000d-1). The Court rejected the agency's attempt to allow private disparate-impact claims, reasoning that the statute itself "prohibits only intentional discrimination." *Id.* at 280. "Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." *Id.* at 291.

So too here. HUD's authority to administer the FHA does not empower the agency to read into the statute a right of action for disparate impact. *See Adams Fruit*, 494 U.S. at 650 ("Congress clearly envisioned . . . a role for the Department of Labor in administering the AWPA by requiring the Secretary to promulgate *standards* implementing AWPA's provisions. This delegation, however, does not empower the Secretary to regulate the scope of the judicial power vested by the statute." (citation omitted)). This is not a case where the agency is just filling in standards for a clear

statutory right of action. *See Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 54 (2007). "The authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt." *Nw. Airlines*, 451 U.S. at 97.

Beyond that, HUD's interpretation of Sections 804(a) and 805(a), and the FHA as a whole, is contrary to this Court's approach to analyzing whether statutes provide rights of action. At one time, this Court found that judges should consider the broad "remedial purposes" of a statute when interpreting whether it permitted a private right of action. *See Sandoval*, 532 U.S. at 287. The Court has since "abandoned that understanding." *Id.* "[G]eneralized references to the 'remedial purposes' of [a statute] will not justify reading a provision more broadly than its language and the statutory scheme reasonably permit." *Touche Ross*, 442 U.S. at 578 (quotation marks omitted). Absent congressional intent to create a right and a remedy, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 286-87.

Yet that is the explicit framework through which HUD purports to interpret Sections 804(a) and 805(a) specifically and the FHA generally. The preamble to HUD's rule states that HUD's interpretation is aimed at implementing the FHA's "broad remedial intent," 78 Fed. Reg. at 11,461; "the broad remedial goals of the Fair Housing Act," *id.* at 11,466; and the Act's "remedial purposes," *id.* at 11,477. "Having sworn off the habit" of that interpretive approach for the Judiciary, the Court should "not accept respondents'

invitation to have one last drink" through an agency's interpretation. *Sandoval*, 532 U.S. at 287. It would be passing strange for courts to defer to a HUD interpretation allowing a private right of action where the courts could not adopt that same interpretation themselves. For this reason, too, deferring to HUD regarding the right of action sought here would be improper.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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