No. 11-1507

IN THE

Supreme Court of the United States

TOWNSHIP OF MOUNT HOLLY, *et al.*,
Petitioners,
v.
MT. HOLLY GARDENS CITIZENS IN ACTION, INC., *et al.*,
Respondents.

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

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AMICI CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE* [1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned to ensure that our nation's civil rights are interpreted and enforced rationally in an impartial manner and not in accordance with politically correct attitudes and biases.

STATEMENT OF THE CASE

Mount Holly Township is a New Jersey municipality in the Philadelphia suburbs, home to approximately 10,700 residents in 2000. Joint Appendix at 103, *Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, No. 11-1159 (filed May 27, 2011) (CA3 J.A.). Median household income in Mount Holly was $43,284 in 2000, J.A. 400-01, which was close to the national average then, but significantly below average in New Jersey. In that same year, 66.2% of its citizens were white, 20.8% were African-American, and 8.8% were Hispanic, CA3 J.A. 103, which was more racially diverse than the national average.

Mount Holly Gardens is a complex of 329 low-rise, garden-apartment style homes located on 30 acres within the township. Pet. App. 5a. The homes, which range from 600 to 1300 square feet, are built attached together in blocks of eight to ten. *Citizens in Action v. Twp. Of Mt. Holly*, 2007 WL 1930457, at *1 (N.J. Super. Ct. App. Div. July 5, 2007) (per curiam). In 2000, 90% households living in Mount Holly Gardens earned less than $40,000 per year, and many earned much less, which was below the average in Mount

Holly Township, *Id.* at *2. Approximately 1,605 persons lived in the Gardens in 2000, including 28% identified as white, 44% African-American, and 22% Hispanic, which represented a higher minority participation than in the Township overall. *Id.* at *1.

The Gardens was built in the 1950s, and over the years the property has deteriorated into serious disrepair. *Id*. at 7a; Pet. App. 5a, 7a. Residents of the Gardens and of the Township as a whole have long been greatly concerned about that deterioration, and the declining safety of the surrounding neighborhood.

Moreover, by 2000 absentee landlords owned a majority of the homes in the Gardens, and too often they failed to maintain their properties adequately. CA3 J.A. 679; Pet. App. 7a; *Citizens in Action*, 2007 WL 1930457, at *2-3. With homes in the Gardens connected in blocks of 8 to 10, deterioration and decay in one home "could and sometimes did lead to the decay of the adjoining houses." Pet. App. 7a. As a result, over time numerous homes in the Gardens became vacant and "boarded up," "some yards filled with rubbish," and "parts of the area became blighted." *Id*.; *Citizens in Action*, 2007 WL 1930457, at *12-13. In addition, overcrowding in residences in the neighborhoods caused many residents to pave over their back yards to create additional parking spaces, which caused drainage problems and flooding on the grounds of neighborhood properties. *Citizens in Action*, 2007 WL 1930457, at *3.

All of these conditions "facilitated crime" in the Gardens complex, especially drug-trafficking and

robberies, particularly in the poorly-lit alleys located behind each block of homes. Pet. App. 7a; J.A. 135.

The Township began investigating possible revitalization of the Mount Holly Gardens area by 1984. J.A. 66. Citizens groups called for the condemnation and redevelopment of Gardens properties as early as 1989. CA3 J.A. 682. But the Township first attempted more targeted measures, such as new police initiatives to deter crime, CA3 J.A. 1929-33, and a citizens group, Mount Holly 2000, that attempted to rehabilitate the Gardens during the 1990s, Pet. App. 7a, 49a n.11.

But none of that seemed to work. Between 1996 and 2002, the 329 homes in the Gardens were cited for 1,117 violations of the housing code. J.A. 180-85. In 2002, 28% of all crimes in Mount Holly occurred in the Gardens, even though that neighborhood accounted for just 1.5% of the land area in the Town. J.A. 135.

The Mount Holly Township Council commissioned an investigation in 2000 to determine whether the Gardens qualified as a blighted "area in need of redevelopment" under New Jersey law, N.J. Stat. Ann. § 40A:12A-3. *Citizens in Action*, 2007 WL 1930457, at *2. *See also Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 465 (N.J. 2007) (New Jersey "Constitution restricts government redevelopment to 'blighted areas'"). An outside planning firm retained by the Township to study the area and prepare a report and recommendation recommended redevelopment under the New Jersey law. J.A. 178-79; J.A. 123; CA3 J.A. 673.

A survey of Gardens residents commissioned by the Township at the same time found that they were particularly concerned with landlord negligence, increasing numbers of vacant homes in the Gardens, rodent infestations, and the Gardens being "[u]nsafe at night for children because of drugs and crime." CA3 J.A. 744. Approximately one-third (35%) wanted to move out of the Gardens entirely, one-third (33%) wanted the Gardens to be redeveloped and to obtain a new home there, and the remaining third (37%) wanted to "completely renovate their existing home." CA3 J.A. 743.

After considering the planning firm's report, resident preferences, and public comment, the Township Council designated the Gardens as an "area in need of redevelopment," under New Jersey's statutory criteria for blight in July, 2002. CA3 J.A. 2201-02; *see* N.J. Stat. Ann. § 40A:12A-5(a), (d), (e).

The Township Council adopted a redevelopment plan over one year later in September, 2003. CA3 J.A. 951. Under the current Redevelopment Plan, since amended twice, the Township would acquire and demolish all 329 properties in the Gardens, and construct 520 new residences, a combination of apartments and townhomes, on the original property combined with a newly acquired adjacent lot of 11.4 acres. Pet. App. 8a; J.A. 210, 249. The redevelopment would also include 54,000 square feet of new commercial space and 4.3 acres of open space. J.A. 211; J.A. 216, 232.

The Redevelopment Plan provides to current homeowners in the Gardens the fair market value of

their homes, moving expenses, $15,000 in relocation benefits, and a $20,000 no-interest loan to be applied to the purchase of a new home that need not be repaid until the new home is sold. Pet. App. 10a; J.A. 274-75, 452. The Plan further provides to current Gardens renters moving expenses and $7,500 in relocation benefits. Pet. App. 10a. These benefits far exceed what New Jersey law requires. *See* N.J. Admin. Code § 5:11-3.5(a) (requiring $4,000 in renters' relocation benefits); *id.* § 5:11-3.7(a) (requiring $15,000 in homeowners' relocation benefits).

To implement the Plan, the Township has acquired 259 of the 329 homes in Mount Holly Gardens through voluntary transactions with willing sellers. The Township has acquired no properties through eminent domain. Only 70 homes in the complex remain privately owned. Pet. App. 10a-11a. The Township has now demolished 201 of the homes it has purchased, and the remainder are now vacant. During the relocation of former Mount Holly Gardens residents, the minority population of the Township has increased to 23.1% African-American and 12.7% Hispanic. Pet. App. 78a-79a.

In October, 2003, Plaintiffs, including some remaining Gardens residents, filed suit against the Township in state court, challenging the Township's designation of the Gardens as an "area in need of redevelopment," and alleging that the Redevelopment Plan was racially discriminatory. Pet. App. 11a-12a.

The trial court upheld the Township's designation of the Gardens as an "area in need of redevelopment." *Citizens in Action*, 2007 WL 1930457, concluding that

the Township's evidence was "'extremely credible,'" and demonstrated that Gardens properties were "'substandard, dilapidated, obsolescent and in some cases unsafe and unsanitary.'" *Citizens in Action*, 2007 WL 1930457, at *9, 13. The trial court also rejected Plaintiffs' racial discrimination claims, finding it "obvious that there ha[d] been no discrimination" in adoption of the Plan. *Id.* at *9. The Appellate Division affirmed, *Id*. at *18, and the New Jersey Supreme Court denied discretionary review. *Citizens in Action v. Twp. of Mt. Holly*, 937 A.2d 977 (N.J. 2007) (unpublished table decision).

After completion of the state court litigation, many of the same plaintiffs (Respondents here) filed suit against the Township in federal district court, alleging violations of Section 804(a) of the Fair Housing Act. 42 U.S.C. § 3604(a). Respondents include sixteen Hispanic residents of the Gardens, fifteen African-American residents, and seven white residents. J.A. 392-96. The complaint included a disparate-treatment claim, alleging that the Plan intentionally discriminated on the basis of race, and a disparate-impact claim, alleging that the Plan imposed disparate adverse impacts on racial minorities. J.A. 428-34.

Respondents argued that, by replacing properties in the blighted area with newer, safer, more habitable residences that command a higher market price, the Plan would reduce the availability of housing in the Township that is affordable to "'very low income and extremely low income'" individuals. J.A. 59, 425. Respondents argued that the Plan, therefore, was an

intentionally discriminatory policy to remove racial minorities from the Township. J.A. 429-34.

Respondents also argued that the Plan would disproportionately and adversely affect minorities because 22.54% of the Township's African-American population and 32.31% of its Hispanic population resided in the Gardens, while only 2.73% of its white population lived there. Pet. App. 15a-16a; J.A. 428-29. Respondents further alleged that, based on the 2000 Census, only 21% of minority households in surrounding Burlington County would be able to afford housing in the redeveloped Gardens sold at market rates, while 79% of white households in the County could. Pet. App. 15a-16a; *id.* at 45a n.9.

The District Court denied respondents motion for a preliminary injuction, J.A. 462, and then subsequently entered summary judgment for the Township, Pet. App. 34a-61a. The court explained that Respondents' evidence only showed that Mount Holly's minority population was overrepresented in the Gardens, J.A. 466-67, and that race and income in the County were correlated. *Id.*; *see supra* at 11-12 n.3. The District Court concluded that neither the "[r]edevelopment of blighted, low-income housing" nor the "reduction of low-income housing" is "without more, a violation of the FHA." Pet. App. at 44a.

The Third Circuit affirmed the district court's ruling on the disparate-treatment claim, concluding that there was no evidence of intentional discrimination. Pet. App. 28a. But it reversed the district court's ruling on the disparate-impact claim. *Id.* at 15a-19a. The Third Circuit concluded that

because a greater percentage of minorities reside in the Gardens than in the Township and that minority household income in Burlington County is, on average, less than white household income in the County, Respondents had established a prima facie case that the Plan "disproportionately affects or impacts one group more than another." *Id.* at 21a (emphasis omitted).

The Third Circuit conceded that "finding a disparate impact here would render the Township powerless to rehabilitate its blighted neighborhoods," Pet. App. 23a, and that its holding would "often allow plaintiffs to make out a *prima facie* case" whenever "a segregated neighborhood is redeveloped in circumstances where there is a shortage of alternative affordable housing." *Id*. at 22a-23a. But the court countered that the Township would have the opportunity to prevail on such grounds in later rebutting the prima facie case. *Id*.

SUMMARY OF ARGUMENT

The text of Section 804(a) prohibits specified intentionally discriminatory conduct. It does not prohibit discriminatory effects, consequences or impacts, as in other statutes that do authorize disparate impact claims. The decisive facts of this case are not in dispute, and demonstrate that the conduct of the Defendant Township does not come within the specified intentionally discriminatory conduct prohibited by Section 804(a).

The Redevelopment Plan will increase available dwellings in Mount Holly, and in the Mount Holly

Gardens area in particular, and increase as well the number of affordable housing units.

Furthermore, all of the 259 Mount Holly Gardens residences acquired so far under the Redevelopment Plan have been voluntarily acquired from willing sellers. So no housing has been denied or made unavailable to anyone on that account as well. Only 70 housing units remain to be acquired under the Redevelopment Plan.

Even if eminent domain were used to acquire all of those remaining 70 units, there is zero evidence in this case that the Township would be doing so "because of race, color, religion, sex, familial status, or national origin," as prohibited by the Fair Housing Act. To the contrary, all of the evidence shows that the Township would be doing so for the redevelopment and renewal of a blighted area under New Jersey law, which was found and affirmed by all the state courts in this litigation, a finding not disturbed by any of the federal courts below either.

Every court in this litigation, from the state trial court, to the state appellate court, to the New Jersey Supreme Court, to the Federal District below, to the Third Circuit Court of Appeals below, found that there was no discrimination in this case, and affirmed dismissal of the disparate treatment claim alleged by the Plaintiffs.

Of course housing in blighted areas is going to be worth less than housing after those areas are redeveloped under urban renewal. That is not any sort of evidence of any discrimination in the nation's

federal, state and local urban redevelopment and renewal programs. And of course more African Americans and other minorities reside in the blighted areas that are the focus of the nation's urban redevelopment and renewal programs. That is not any sort of evidence of any discrimination in the nation's federal, state and local urban redevelopment and renewal programs either. But that is all that the Plaintiffs' evidence shows in this case, and no more. Congress never intended that to constitute proof that the nation's urban renewal programs involve discrimination under the Fair Housing Act.

And that is why the conduct of the Township does not come under any of the language of prohibited conduct under the Fair Housing Act. And that is why the Plaintiffs' disparate impact theory of discrimination does not apply under the Fair Housing Act at all.

HUD's interpretation of the FHA to the contrary just this year is purely political with no basis in the text of Section 804(a). Deference, therefore, is not warranted under the precedents of this Court.

Disparate impact makes more sense in employment because of the desirability of rooting out job requirements such as general aptitude tests or diploma requirement[s] that are not demonstrably related to the jobs for which they [a]re used. In housing, by contrast, if intentional discrimination is eliminated, then housing decisions are determined by objective economic criteria, such as market prices and financial means, which become the principal determinant of whether a person obtains the lease or

purchase he or she desires. That market decision making reflects the bedrock economic policies of the nation, which have proven most beneficial over the long run.

The FHA's legislative history confirms that this is the choice that Congress rightly made in adopting the Fair Housing Act, prohibiting intentional discrimination as the barrier to equality in the housing market.

ARGUMENT

I. THE CHALLENGED CONDUCT OF THE TOWNSHIP IN THIS CASE DID NOT VIOLATE SECTION 804(A) OF THE FHA.

Section 804(a) of the FHA declares, "it shall be unlawful,

> -- To refuse to sell or rent after the making of a bona fide offer,
> -- or to refuse to negotiate for the sale or rental of,
> -- or otherwise make unavailable or deny,

a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a)

There is nothing ambiguous or unclear about this plain language. As this Court stated in *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004), statutory interpretation "begins with the statutory text" and "if the text is unambiguous," it "ends there as well."

ACCORD: *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004).

The decisive facts of this case are not in dispute, and demonstrate that the conduct of the Defendant Township does not come within the language of this prohibited conduct. The Township did not refuse to sell or rent, or refuse to negotiate for the sale or rental of, any dwelling, for any reason.

Moreover, the Township's Redevelopment Plan does not make unavailable or deny any dwelling either. To the contrary, the Redevelopment Plan will increase available dwellings in Mount Holly, and in the Mount Holly Gardens area in particular, by 58 percent in fact, from 329 dwellings to 520. Pet. App. 8a; J.A. 210.

In addition, the Redevelopment Plan will increase the number of deed-restricted affordable housing units from 11 to 56, an increase of 5 times, or 400 percent. J.A. 234. The total number of affordable housing units in the new, redeveloped, Mount Holly Gardens will consequently total over 10 percent of the residences in the sharply expanded Gardens complex.

Furthermore, all of the 259 Mount Holly Gardens residences acquired so far under the Redevelopment Plan have been voluntarily acquired from willing sellers. Pet. App. 10a-11a. So no housing was denied or made unavailable to anyone there as well. Only 70 housing units remain to be acquired under the Redevelopment Plan. *Id.*

Even if eminent domain were used to acquire all of those remaining 70 units, there is zero evidence in this case that the Township would be doing so "because of race, color, religion, sex, familial status, or national origin," as prohibited by the Fair Housing Act. To the contrary, all of the evidence shows that the Township would be doing so for the redevelopment and renewal of a blighted area under New Jersey law, N.J. Stat. Ann. § 40A:12A-3. *Citizens in Action*, 2007 WL 1930457, at *2. *See also Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 465 (N.J. 2007) (holding that the New Jersey "Constitution restricts government redevelopment to 'blighted areas'"). That is why the designation of Mount Holly Gardens as a blighted area under New Jersey law was upheld by the New Jersey state courts in this litigation, *Citizens in Action*, 2007 WL 1930457, and that finding has never been disturbed by the federal courts below either.

That is also why every court in this litigation, from the state trial court, to the state appellate court, to the New Jersey Supreme Court, to the Federal District below, to the Third Circuit Court of Appeals below, found that there was no discrimination in this case, and affirmed dismissal of the disparate treatment claim alleged by the Plaintiffs. The state trial court had it right from the beginning, finding that it was "obvious that there ha[d] been no discrimination" in adoption of the Mount Holly Gardens Redevelopment Plan. *Citizens in Action*, 2007 WL 1930457, at *9.

The bottom line is that Congress never considered the nation's urban renewal programs to involve discrimination per se intended to be remedied by the

Fair Housing Act. That is what Plaintiffs are effectively alleging with their disparate impact theory of discrimination in this case. Of course housing in blighted areas is going to be worth less than housing after those areas are redeveloped under urban renewal. That is not any sort of evidence of any discrimination in the nation's federal, state and local urban redevelopment and renewal programs. And of course more African Americans and other minorities reside in the blighted areas that are the focus of the nation's urban redevelopment and renewal programs. That is not any sort of evidence of any discrimination in the nation's federal, state and local urban redevelopment and renewal programs either. But that is all that the Plaintiffs' evidence shows in this case, and no more.

And that is why the conduct of the Township does not come under any of the language of prohibited conduct under the Fair Housing Act. And that is why the Plaintiffs' disparate impact theory of discrimination does not apply under the Fair Housing Act at all. And that is why Plaintiff's case must now be dismissed. The Township and other defendants are entitled to rely on the actual language of the Fair Housing Act.

What Plaintiffs are effectively asking of this Court in this case is to rule that all of the nation's urban redevelopment and renewal programs involve discrimination in violation of the Fair Housing Act. Because in every case it will always be true that housing in currently blighted areas is going to be worth less than housing after those areas are redeveloped under urban renewal. And in every case

it will always be true that more African Americans and other minorities reside in the blighted areas that are the focus of the nation's urban redevelopment and renewal programs, and so will be disparately impacted by those programs. This is why this Court should rule in this case that the disparate impact theory of discrimination does not apply under the Fair Housing Act.

This logical result is in accord with this Court's precedents. *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001)(Section 601 of Title VI, 42 U.S.C. § 2000d, declaring it unlawful for any person to "be *denied*" federal financial assistance on account of race, "prohibits *only* intentional discrimination."); *City of Mobile v. Bolden*, 446 U.S. 55, 60-64 (1980) (plurality) (Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, declaring it unlawful to "'deny or abridge'" voting rights due to race, was interpreted to prohibit intentional discrimination alone, until a later amendment.); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)(the phrases "adversely affect" and "tend to deprive" are the key terms that support a statutory reading providing for disparate impact); *Smith v. City of Jackson*, 544 U.S. 228, 235-236 & n.6 (2005)("adversely affect"); *Meacham* v. *Knolls Atomic Power Lab.*, 554 U.S. 84, 96 n.13 (2008) ("tend to deprive"); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009)(the words "because of" require the plaintiff to show that race was the "'but-for' cause of the . . . adverse action," reaffirming the provision's focus on discriminatory in-tent); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2527, 2528 (2013)("because of" requires "proof that the desire to [discriminate] was the but-for cause of the challenged employment

action"). *See also City of Jackson*, 544 U.S. at 249 (O'Connor, J., concurring in the judgment) ("'*because of*'" "plainly requires discriminatory intent").

This Court recognized in *Meyer v. Holley*, 537 U.S. 280, 285 (2003), "The Fair Housing Act itself focuses on prohibited acts." As a result, purposeful actions, not effects, are the focus of the statutory framework enacted by the Fair Housing Act. This statutory context only further confirms that disparate-impact claims are not cognizable under Section 804(a). *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("[W]ords of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

HUD's interpretation of the FHA to the contrary just this year, 78 Fed. Reg. at 11,482, is purely political with no basis in Section 804(a)'s text. Deference, therefore, is not warranted, As this Court said in *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004), "[U]nder *Chevron*, deference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." As discussed above, standard judicial construction of the plain text of Section 804(a) demonstrates congressional intent with no doubt. Under *Chevron*, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Freeman v. Quicken Loans*, 132 S. Ct. 2034, 2040 (2012); *BedRoc Ltd.,* 541 U.S. at 183; *Lamie,* 540 U.S. at 534.

II. THE HISTORY OF THE FHA CONFIRMS THAT SECTION 804(a) DOES NOT PERMIT DISPARATE-IMPACT CLAIMS.

When the FHA was adopted in 1968, it contained three sections, prohibiting "Discrimination in the Sale or Rental of Housing," 42 U.S.C. § 3604 (1968), "Discrimination in the Financing of Housing," *id.* § 3605 (1968), and "Discrimination in the Provision of Brokerage Services," *id.* § 3606 (1968). Each section prohibited specific actions that require a racially discriminatory purpose, but none of these sections mentioned any prohibited consequences or effects. The operative language of Section 804(a) has not changed since the adoption of the FHA in 1968. It remains focused on prohibiting actions with a discriminatory purpose.

The FHA was amended in 1988 to prohibit discrimination against a buyer or a renter based on "handicap." 42 U.S.C. § 3604(f)(1988). But the FHA still retained its focus on purposefully discriminatory actions. In particular, the operative language of Section 804(a) has not changed since the adoption of the FHA in 1968. It remains focused on prohibiting actions with a discriminatory purpose. No section of the FHA has ever contained the "adversely affects" or "tend to deprive" language that authorizes disparate-impact liability in Title VII and the ADEA.

In sharp contrast, when the Congress wanted to prohibit disparate effects, it knew how to do so. Just two years after the 1988 amendments to the FHA, Congress enacted Section 102 of the Americans with

Disabilities Act in 1990, which uses the phrase "adversely affects" to permit disparate-impact claims. 42 U.S.C. § 12112(b); *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003). In 1991, Congress amended Title VII to explicitly authorize claims based on "disparate impact," codifying the holding in *Griggs* from 20 years earlier. 42 U.S.C. § 2000e-2(k). Congress's failure to change the FHA similarly to authorize disparate impact claims further confirms its intent to leave Section 804(a) limited to claims for disparate treatment and purposeful discrimination. "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross*, 557 U.S. at 174.

Disparate impact makes more sense in employment because of the desirability of rooting out "job requirements" such as "general aptitude tests" or "diploma requirement[s]" that are not "demonstrably related to the jobs for which they [a]re used." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987-88 (1988). These are facially neutral barriers with important and troubling discriminatory effects.

In housing, by contrast, if intentional discrimination is eliminated, then housing decisions are determined by objective economic criteria, such as market prices and financial means, which become the principal determinant of whether a person obtains the lease or purchase he or she desires. That market decision making reflects the bedrock economic policies of the nation, which have proven most beneficial over the long run.

The FHA's legislative history confirms that this is the choice that Congress rightly made in adopting the Fair Housing Act, prohibiting intentional discrimination as the barrier to equality in the housing market. Senator Mondale, the FHA's principal sponsor, argued, "The bill permits an owner to do . . . everything he could ever do with property, except refuse to sell it to a person solely on the basis of his color or his religion. That is *all it does*. It does *not confer any right*." 114 Cong. Rec. 5640, 5643 (1968) (emphasis added). Other legislators echoed that principle, "A person can sell his property to anyone he chooses, as long as it is by personal choice and not because of motivations of discrimination." 114 Cong. Rec. 2270, 2283 (1968) (Sen. Brooke). Senator Tydings added, "the deliberate exclusion from residential neighborhoods on grounds of race" was the evil the Act sought to correct. 114 Cong. Rec. 2524, 2530 (1968).

Advocates of the Fair Housing Act emphasized that it did not have any broader socioeconomic purpose of guaranteeing the availability of housing to any particular individuals or demographic groups. Senator Mondale, declared:

> "[T]he basic purpose of this legislation is to permit people who have the ability to do so to buy any house offered to the public if they can afford to buy it. *It would not overcome the economic problem of those who could not afford to purchase the house of their choice*.

114 Cong. Rec. 3421, 3421 (1968) (emphasis added). Senator Hatfield emphasized that the FHA attempts

to eliminate the injustice that occurs when a person "is denied the right to buy a home within a community *according to his economic ability* . . . merely because his skin is a different color." 114 Cong. Rec. 3119, 3129 (1968)(emphasis added). Senator Scott added that the FHA would ensure that individuals "can rent or buy the dwelling of their choice *if they have the money or credit to qualify*." 114 Cong. Rec. 3235, 3252 (1968)(emphasis added).

Legislators expressed hope that prohibiting intentional discrimination would encourage more "integrated and balanced living patterns" across the country, 114 Cong. Rec. 3422 (Sen. Mondale). But no member of Congress suggested that the Act would require homeowners, landlords, or local governments to consider the racial impacts and effects of every housing decision.

This is all in sharp contrast with the legislative history of Section 5 of the Voting Rights Act of 1965. 42 U.S.C. § 1973c. That provision required covered jurisdictions to demonstrate that changes to their voting laws "do[] not have the purpose and *will not have the effect* of denying or abridging the right to vote on account of race or color." *Id.* (1965) (emphasis added). Legislators debating the Act argued that one of its "essential justification[s]" was to "cause[] . . . change in *results*," not "only in methods." H.R. Rep. 89-439 (1965), *available at* 1965 U.S.C.C.A.N. 2437, 2441-42 (emphasis added). No such focus on results or effects is present in the legislative history of the FHA.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully submits that this Court should reverse the judgment of the Court of Appeals below.

Respectfully submitted,

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