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

BRIEF FOR MT. HOLLY GARDENS RESPONDENTS

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October 21, 2013

QUESTION PRESENTED

Section 804(a) of the Fair Housing Act ("FHA") makes it unlawful "[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). This Court limited the grant of certiorari to the following question:

Whether disparate-impact claims are cognizable under FHA § 804(a).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Mt. Holly Gardens Citizens in Action, Inc. states the following:

Mt. Holly Gardens Citizens in Action, Inc. is a private nonprofit corporation. It has no parent company, and no publicly held company has a 10% or greater ownership interest.

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INTRODUCTION

Respondents are homeowners who have lived in Mount Holly Gardens for many years. Many are older persons of color who have paid off their mortgages and wish to live out their lives in homes they have tended with their own funds. They brought this lawsuit after petitioners Township of Mount Holly *et al*. launched a campaign to oust them from their homes. Respondents invoked the Fair Housing Act ("FHA") because the effect of petitioners' action was to make housing unavailable to Gardens residents on the basis of their race.

The issue is whether actions with a disparate impact on persons within congressionally prescribed categories can give rise to claims for violating FHA § 804(a) absent intentional discrimination. Although the evidentiary framework for litigating such disparate-impact claims under the FHA is not included in the Question Presented, it nonetheless is crucial to recognize that proof of a disparate impact does not automatically result in liability. A disparate-impact standard merely permits aggrieved residents to advance claims absent evidence of discriminatory intent and requires defendants to justify actions that disproportionately affect groups Congress sought to protect.

Moreover, like most FHA claims, the claims in this case are not a zero-sum game pitting minority jobseekers against non-minorities. In the housing context, whites will not be disadvantaged if respondents can pursue claims to stay in homes they purchased. Under petitioners' theory, however, if resident homeowners lack evidence of discriminatory intent, the FHA provides no remedy against unjustified governmental housing policies that oust minori-

ties so their privately owned homes can be demolished to suit other preferred government uses – whether to create parks, erect office buildings, or sell the land.

Interpreted using the tools of textual analysis, statutory construction, and agency deference that this Court long has followed, the FHA plainly permits disparate-impact claims. Section 804(a) of the Act proscribes actions that "make unavailable or deny" housing to persons because of certain characteristics such as race. Congress's words endorse – and certainly do not foreclose – unjustified discriminatory effects as a basis on which to pursue claims under the FHA, as every court of appeals to address the question has determined. Since the 1970s, the Department of Housing and Urban Development ("HUD") consistently has construed the Act to allow such claims.

Petitioners challenge the long-accepted disparate-impact standard by contending it raises constitutional doubts, but that contention is unpersuasive. Respondents' effort to stop the Township from razing their neighborhood raises no constitutional concerns. Indeed, respondents' claims advance the constitutionally protected private-property rights of homeowners by demanding legitimate non-discriminatory reasons before the government can displace them from their homes. When properly viewed as an evidentiary standard, a disparate-impact claim also furthers the Equal Protection Clause's concern for equal treatment because it focuses attention on the justifications for actions that disproportionately affect minorities and others. In any event, courts should decide cases raising legitimate constitutional doubts on a case-by-case basis after a full evidentiary presentation, which has not yet been afforded in this case.

STATEMENT

A. Statutory and Regulatory Background

1. Congress enacted the FHA "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. As originally enacted, the Act sought to ensure equal access to housing regardless of race, color, religion, or national origin. *See* Civil Rights Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73, 81 (codified as amended at 42 U.S.C. § 3601 *et seq.*).

FHA § 804(a) currently makes it unlawful "[t]o refuse to sell or rent . . . , 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). This Court has described the Act as a "broad and inclusive" attempt to stamp out the country's legacy of racial discrimination. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972).

The FHA was the third in a series of similar remedial statutes. The first, the Civil Rights Act of 1964 ("1964 Act"), sought to combat racial discrimination in education, voting, employment, and the provision of public services. *See* Pub. L. No. 88-352, 78 Stat. 241 (codified in Title 42 of U.S. Code). Congress then used Title VII of the 1964 Act as a model for the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 ("ADEA") (codified at 29 U.S.C. § 621 *et seq.*), which forbids age-based discrimination, and the FHA. *See Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir.) (noting that 1964 Act and FHA are two prongs of "coordinated scheme of federal civil rights laws

enacted to end discrimination"), *aff'd*, 488 U.S. 15 (1988).

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court unanimously held that § 703(a)(2) of Title VII of the 1964 Act encompasses disparate-impact claims. *See id.* at 431. Congress embraced disparate-impact claims to prohibit "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, [that] operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430. This Court also has held that the ADEA recognizes disparate-impact claims. *See Smith v. City of Jackson*, 544 U.S. 228, 235-40 (2005) (plurality). And this Court repeatedly has upheld and applied the disparate-impact standard under those statutes. *See Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 95-96 (2008); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988); *Connecticut v. Teal*, 457 U.S. 440 (1982).

Between 1974 and 1988, nine federal circuits concluded that the FHA, like Title VII and the ADEA, encompasses a disparate-impact standard; two more agreed after Congress amended the FHA in 1988.[1] Prior to those Amendments, HUD likewise interpreted the Act to recognize a disparate-impact standard.[2]

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[1] *See* Br. in Opp. 27-28 (citing cases). Only the D.C. Circuit has yet to resolve this question. *See 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673, 682 (D.C. Cir. 2006).

[2] *See* Office of Policy Dev. & Research, HUD, *Recent Evidence on Discrimination in Housing* 22 (Jan. 1984) ("[w]hether discrimination is blatant, disguised, or even *unintentional*, its net effect is to limit housing alternatives available to and chosen by minorities and to limit the variety of housing environments which are available to whites as well") (emphasis added); Clarke Gable Ward, Office of Fair Housing & Equal Opportunity,

2. In 1988, Congress amended the FHA to ban discrimination based on disability or familial status. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, §§ 1-15, 102 Stat. 1619, 1619-36 ("1988 Amendments"). In enacting those amendments, Congress was aware of the federal circuits' consensus that the FHA created disparate-impact liability. *See*, *e.g.*, H.R. Rep. No. 100-711, at 21 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173. Congress left § 804(a)'s prohibitory language unchanged, explicitly rejecting amendments that would require proof of intentional discrimination.[3]

Moreover, Congress added three new provisions that create defenses to – and therefore presuppose the existence of – disparate-impact liability. *See* 42 U.S.C. §§ 3605(c), 3607(b)(1), 3607(b)(4). The exemptions carve out liability for denials of housing based on (1) a person's drug conviction; (2) reasonable

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HUD, Contract No. 1990-77, *An Analysis of Remedies Obtained Through Litigation of Fair Housing Cases: Title VIII and the Civil Rights Act of 1866* (Feb. 1978) (under FHA, "the denial of equal property rights need not be solely attributable to racial discrimination . . . discriminatory effect is enough"); National Ctr. for Housing Mgmt., Office of Policy Dev. & Research, HUD, Contract No. H-2215R, *Fair Housing and the Real Estate Industry* (Nov. 1975) (discriminatory effects, even absent discriminatory intent, can violate FHA).

[3] The House Judiciary Committee contemporaneously rejected an FHA amendment that would have provided that "a zoning decision is not a violation of the [Act] unless the decision was made with the intent to discriminate." H.R. Rep. No. 100-711, at 89-91 (dissenting views of Rep. Swindall). That rejection followed similar attempts to impose a discriminatory-intent requirement. *See*, *e.g.*, 133 Cong. Rec. 7177 (1987); 129 Cong. Rec. 808 (1983); 127 Cong. Rec. 22,155 (1981). Senator Hatch's proposal to overturn appellate decisions confirming the availability of disparate-impact claims also failed. *See* 133 Cong. Rec. 7176-77 (1987).

maximum-occupancy limits; or (3) an appraiser's consideration of factors other than protected characteristics.

3. The FHA expressly delegates to HUD authority to implement the Act through informal rulemaking and formal adjudications. *See* 42 U.S.C. §§ 3608(a), 3614a, 3535(d) (rulemaking authority); *id.* §§ 3608(a), 3610, 3612 (as amended in 1988) (adjudication authority). HUD has consistently interpreted the Act to permit disparate-impact claims, in formal adjudications,[4] policy statements,[5] guidance and interpretive documents,[6] enforcement handbooks,[7]

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[4] *See infra* pp. 41-42.

[5] *See Policy Statement on Discrimination in Lending*, 59 Fed. Reg. 18,266, 18,269 (Apr. 15, 1994) (disparate impact is among the "methods of proof of lending discrimination under" FHA); 126 Cong. Rec. 31,166-67 (1980) (HUD Secretary letter to Senate describing discriminatory-effects liability under FHA as "imperative to the success of civil rights law enforcement").

[6] *See* Memorandum from HUD Ass't Secretary for Fair Housing & Equal Opportunity, *The Applicability of Disparate Impact Analysis to Fair Housing Cases* (Dec. 17, 1993); Office of General Counsel and Office of Fair Housing & Equal Opportunity, HUD, *Occupancy Fees & Familial Status Discrimination Under the Fair Housing Act* (Mar. 29, 1994); Office of Fair Housing & Equal Opportunity, HUD, *Discretionary Preferences for Admission to Multifamily Housing Projects* (Oct. 28, 1996) ("Title VIII . . . and Title VI . . . prohibit discrimination and disparate impact in provision of housing based on certain prohibited bases."), *available at* http://www.hud.gov/offices/adm/hudclips/notices/fheo/96-4fheo.txt.

[7] *See* HUD, *No. 8024.01 – Title VIII Complaint Intake, Investigation and Conciliation Handbook* 7-12 (1995) (disparate impact is one of "the principal theories of discrimination" under FHA); HUD, *No. 8024.01 – Title VIII Complaint Intake, Investigation and Conciliation Handbook* 2-27 (1998) ("a respondent may be held liable for violating the [FHA] even if his action

and court briefs.[8] Through the tenures of nine presidents (five Republican and four Democrat), HUD never has taken the position that the Act bars only intentional discrimination. *See* Final Rule, *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11,460, 11,467 (Feb. 15, 2013) ("Final Rule").

In February 2013, HUD promulgated a final rule interpreting § 804(a) to authorize disparate-impact claims. *See id.* at 11,466, 11,482. That rule did "not establish[] new substantive law." *Id.* at 11,462. Instead, it merely codified in a formal regulation the agency's longstanding interpretation.

B. Factual Background

1. Respondents are current and former residents of the Mt. Holly Gardens ("Gardens"), a neighborhood of 329 predominantly two-story rowhouses located in the Township of Mt. Holly (Township) in central New Jersey. JA398. According to the 2000 census, approximately 46% of Gardens residents were African-American and 29% were Hispanic (as compared with 21% and 9%, respectively, in the Township overall). The Gardens is the only neighborhood in the Township with a predominately minority population. CA App. 103.

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against the complainant was not even partly motivated by illegal considerations").

[8] *See*, *e.g.*, Brief for HUD Secretary as Respondent at 10, *Pfaff v. HUD*, 88 F.3d 739 (9th Cir. 1996) (No. 94-70898), 1995 WL 17017239 ("HUD need not prove discriminatory intent to establish a prima facie case of familial status discrimination. . . . [A] rule that has a disparate impact on families with children can violate the Act even if it was not adopted for intentionally discriminatory purposes.").

Respondents are overwhelmingly long-time residents of the neighborhood. "Eighty-one percent of [Gardens] homeowners had lived in their homes for at least 9 years." App. 6a. In many cases, residents have completely paid off their mortgages and undertaken substantial renovations in preparation for passing their homes to their children. *See*, *e.g.*, JA102, 106-07 (Cruz); CA App. 622 (Simons), 631-32 (Wright). Likewise, "72% of renters had lived [in their Gardens residence] for at least five years." App. 6a.

The Gardens' residents are mainly low-income families and individuals. In 2000, approximately 90% of its residents had annual incomes below $40,000, and almost all residents were classified as either "very low" income or "extremely low" income under federal standards. JA49. Financial hardship notwithstanding, the Gardens had among the highest rate of minority homeownership of any neighborhood in Burlington County. JA55-56.

Gardens residents have actively fostered a sense of community within the neighborhood and formed various non-profit groups to improve their community through measures such as neighborhood watches and clean-up programs. CA App. 632, 2135-38, 2140-41.

2. Rather than supporting the community's own initiatives, Township officials privately decided in 2000 to embark on a plan to raze the Gardens and relocate all its residents. Two years later, the Township commissioned a study to determine whether it could designate the Gardens as an area "in need of redevelopment." CA App. 808. Under New Jersey law, that designation would allow the Township to use eminent domain to redevelop the Gardens. *See*

N.J. Stat. Ann. § 20:3-5. The Township's expert made the recommendation that the area met the statutory criteria for blight primarily based on the neighborhood's layout and its exterior appearance, without entering or inspecting individual homes. *See Citizens in Action v. Township of Mt. Holly*, A-1099-05T3, 2007 WL 1930457, at *12 (N.J. Super. Ct. App. Div. July 5, 2007) (per curiam). The Township then relied on that study in formally declaring the entire neighborhood blighted. CA App. 1695-96.[9]

Subsequently, the Township developed the West Rancocas Redevelopment Project Plan ("Plan") over the strong opposition of Gardens residents. Under the Plan, the Township intends to demolish all 329 homes in the Gardens, regardless of their condition, and to replace them with "The Villages at Parker's Mill," a community of 520 townhomes and apartments. Of the 520 units, only 56 units (11%) will be designated as affordable housing, and only 11 units (2%) will be offered on a "priority" basis to existing Gardens residents who had lived in "deed restricted affordable units." *Id.* at 2590. The Plan would result in the loss of 273 units of affordable housing. JA53.

Through its corporate subcontractor, Triad Associates, petitioners devised a relocation-assistance plan for Gardens residents that had the effect of displacing Gardens residents from the neighborhood. CA

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[9] To be "blighted" under New Jersey law, an area must only be "in need of redevelopment." Local Housing and Redevelopment Law, N.J. Stat. Ann. § 40A:12A-6.b(5)(c). The Citizens of Mount Holly Gardens unsuccessfully challenged the city's blight designation, which was presumed valid and reviewed under the deferential "substantial evidence" standard. Redevelopment designations have a presumption of validity. *Citizens in Action*, 2007 WL 1930457, at *10.

App. 1035, 1037. The plan caps the amount of assistance at $84,000 per household: $32,000 to $49,000 for the homes themselves, $15,000 in relocation assistance, and a $20,000 no-interest loan for the purchase of a new home. JA59-60. That maximum amount is far lower than the estimated cost of a new home in the Villages at Parker's Mill, which is between $200,000 and $275,000. JA52.[10] According to Dr. Andrew Beveridge, the plan's maximum benefits are "woefully inadequate" to prevent the displacement of Gardens residents from their neighborhood. *Id.*

The Township's renters-relocation-assistance package also has a maximum value – $7,500 over a three-year period, or $208 per month, CA App. 73, which is far below the projected average rental prices in the Villages at Parker's Mill of at least $1,230 per month, *id.* at 2048. Given the "severe shortage of affordable housing" in Burlington County, many Gardens renters reported being unable to find affordable housing elsewhere in the Township.[11] JA61. And more than two-thirds of renters who accepted Township assistance were relocated out of the Township. CA App. 1104-08 (Resident Survey), 1697 (43 of 62).

In sum, the district court record demonstrates that, if the Township proceeds with its plan to demolish

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[10] Residents have been told that, if they accept relocation assistance to move out of the Gardens, they will not be eligible for future assistance to move back into the Gardens once the redevelopment is completed. JA106 (Cruz).

[11] Petitioners' trial expert suggested that displaced Gardens residents could move to Arborwood, a housing complex located in nearby Lindenwold. Arborwood itself has been declared blighted and Lindenwold targeted for "redevelopment." CA App. 2050.

the Gardens neighborhood, that demolition will negatively affect 32% of Hispanic households, 23% of African-American households, and less than 3% of white households in the Township. JA57.

3. "The Township and its agents have also been pressuring people to move out." JA105 (Cruz). Given the Gardens' blight designation, residents faced the choice of selling to the Township or eventually losing their home to eminent domain. Either way, residents faced the devastating loss of their home-ownership. As respondent Mrs. Wright explained, "I worry that if my home is taken by eminent domain, I will not be able to afford to purchase another home given that I am on a fixed income and am 89 years old." CA App. 633. *See also id.* at 558-59 (Arocho), 612 (Simons). Many homeowners sold out to the Township, taking what they were given. Those homes were then left vacant, which "created fire hazards, crime, squatters, graffiti, roaches and mold." JA468-69 (2/13/09 district court opinion). As petitioners acknowledge (at 4), the decay of homes like these sometimes caused damage to adjoining homes. Given the damage created by the Township, Gardens residents found it "impossible to sell a house except to the Township." JA104 (Cruz).

Despite the fact that Gardens homes were structurally sound, and although neighboring homes were still privately owned and occupied, the Township chose to destroy more than 200 of the Gardens houses it had acquired. As the Third Circuit described:

> Residents living amongst the destruction were forced to cope with noise, vibration, dust, and debris. Worse, the interconnected nature of the houses triggered a cascading array of problems. Uninsulated interior walls were exposed to the

> outside and covered with unsightly stucco or tar. But these coatings did not extend below grade, allowing moisture to seep into subterranean crawl spaces, creating an environment for mold problems. Above, the demolitions opened the roofs of adjoining homes. Those openings were patched with plywood, which was insufficient to stop water leaks. Around the neighborhood, homes bore the scars of demolition: hanging wires and telephone boxes, ragged brick corners, open masonry joints, rough surfaces, irregular plywood patches, and damaged porches, floors and railings. Destruction of the sidewalks outside demolished homes further contributed to the disarray by making it difficult to navigate through the neighborhood.

App. 11a.

As of today, less than 70 Gardens homes remain in private ownership, and the Township has constructed no new housing units.

C. Proceedings Below

Respondents brought suit in federal district court on May 27, 2008, alleging both disparate-impact and intentional discrimination in violation of the FHA, along with other statutory and constitutional claims. Respondents sought declaratory and injunctive relief preventing displacement of Gardens residents as well as damages.

On October 23, 2009, having previously dismissed several claims as moot, the court converted pending motions to dismiss respondents' federal discrimination claims into a summary judgment motion and dismissed the remaining claims. On January 3, 2011, before petitioners had filed an answer, and without any opportunity for discovery, App. 4a, the

court granted petitioners' motion for summary judgment. App. 62a; *see* Br. in Opp. 10-11.

On appeal, the Third Circuit reversed the grant of summary judgment on the disparate-impact claim and remanded the case for further discovery. It held that the district court first erred by not evaluating respondents' disparate-impact evidence in the light most favorable to them. App. 16a (finding that, under the appropriate standard, respondents' statistics "show a disparate impact"). The court of appeals then assessed the conflicting evidence concerning the existence of less discriminatory alternatives. It credited the report of respondents' planning expert that the Township's concerns about the condition of the Gardens "could be remedied in a far less heavy-handed manner" through an "alternative redevelopment plan that would rely on the targeted acquisition and rehabilitation of some of the existing Gardens homes" rather than "the wholesale destruction and rebuilding of the neighborhood." App. 25a-26a. That evidence, the court held, created genuine issues of material fact precluding summary judgment. App. 27a-28a. Accordingly, the court remanded the case for further proceedings to produce "[a] more developed factual record." App. 29a.

SUMMARY OF ARGUMENT

I.A. The FHA forbids both intentional housing discrimination and acts that cause unjustified discriminatory effects. By its plain language, § 804(a) requires no discriminatory intent, and its "otherwise make unavailable" phrase encompasses an action's effects, not just the actor's motivations. Multiple dictionary definitions of "make" confirm the meaning of causing to happen or giving rise to. That plain meaning is confirmed by this Court's usage in many

different contexts of "make" as a word that does not inherently require intent, as well as numerous statutes in which Congress included an intent-based modifier before "makes" when it wanted to specify an intent requirement. Eleven courts of appeals and HUD unanimously agree with that interpretation.

The phrase "because of race, color, religion, sex, familial status, or national origin" does not impose an intent requirement. This Court has rejected the argument that identical language in the ADEA imposed an intent requirement. As a matter of plain meaning, actions can have a disproportionate impact on individuals because of their membership in a protected class, even without discriminatory intent.

The FHA's plain meaning is confirmed by the Court's interpretations in *Griggs* and *Smith* of Title VII and the ADEA, two other anti-discrimination statutes with text that focuses on discriminatory effects. In concert with the FHA, those statutes formed a legislative trilogy, and the FHA's "otherwise make unavailable" language parallels their analogous formulation, "otherwise adversely affect," which this Court interpreted in *Griggs* and *Smith* as encompassing a disparate-impact standard. The linguistic difference between "adversely affect" and "make unavailable" does not mean that the FHA's prohibition is limited to intentional discrimination; if anything, it indicates that § 804(a)'s disparate-impact standard may prohibit a narrower range of discriminatory effects than the broader "any adverse effect" language of Title VII and the ADEA.

B. The FHA's structure confirms § 804(a)'s plain meaning. If the phrase "otherwise make unavailable" forbids only intentional discrimination, it is redundant with § 804(a)'s prohibition on "deny[ing]"

or "refus[ing] to sell or rent" housing because of race. The statute's plain meaning should not be set aside in favor of an interpretation that renders statutory text superfluous. Similarly, Congress's 1988 FHA amendments added three exemptions from disparate-impact claims that would be meaningless if the Act recognized no such claims. Congress added those FHA exemptions in full knowledge that HUD and the federal courts did not construe the Act to mandate an intent requirement. By rejecting proposed legislation seeking to add such a requirement, Congress actively, not passively, preserved the FHA's disparate-impact standard.

C. The FHA's history and purposes confirm that it prohibits discriminatory effects. As with Title VII and the ADEA, the FHA's prohibition against actions that cause discriminatory effects is crucial to Congress's objective of ferreting out and redressing housing discrimination.

D. Petitioners principally invoke subsidiary definitions of "make" that would render the statute nonsensical. They also misapply the canons of *noscitur a sociis* and *ejusdem generis* in an effort to set the FHA apart from Title VII and the ADEA. This Court should reject those efforts, however, as inconsistent with the FHA's text and structure.

II. HUD's longstanding and authoritative interpretation of the FHA is entitled to *Chevron* deference. The FHA confers on HUD broad interpretive authority, and, because the phrase "otherwise make unavailable" does not foreclose a disparate-impact standard, HUD's interpretation of that language warrants deference. For decades, in policy statements, adjudications, and notice-and-comment rulemaking, HUD has interpreted the FHA, like Title VII

and the ADEA, to permit disparate-impact claims. And that longstanding interpretation is reasonable. Nearly every definition of the word "make" refers to an action that triggers certain consequences, not the motivations for that action. That reasonableness is confirmed by the decades-long, unbroken consensus of every circuit to address the issue.

III. The FHA disparate-impact standard raises no serious constitutional questions. First, the constitutional-avoidance canon is applicable only where Congress has not spoken plainly. It is therefore inapplicable here because the FHA's plain language embraces a disparate-impact standard. Second, the FHA's disparate-impact standard does not offend the Equal Protection Clause. That Clause disfavors differential treatment based on racial classifications, not the mere identification of individuals by their race. A court-ordered FHA remedy need not run afoul of equal-protection principles. Here, for example, a disparate-impact standard would merely require the government to forbear from ousting respondents from their property absent a sufficient justification. Nothing in respondents' claim presents the type of zero-sum situation that may arise in the employment context, whereby giving a position to a minority applicant could deny an opportunity to a non-minority applicant. Third, petitioners' federalism argument has no merit. The FHA regulates discrimination in the interstate housing market, which is not an area of traditional state regulation. Nor do municipal governments have sovereign status or immunity from generally applicable federal law. Finally, to the extent disparate-impact liability under a different set of facts could raise constitutional questions, that possibility provides no basis to dis-

regard the FHA's plain meaning. As this Court has held, any potential constitutional concerns should be assessed in specific cases on fully developed factual records.

ARGUMENT

I. FHA § 804(a) PROHIBITS HOUSING PRACTICES WITH UNJUSTIFIED DISCRIMINATORY EFFECTS, EVEN IN THE ABSENCE OF INTENT TO DISCRIMINATE

A. Section 804(a)'s Plain Language Encompasses Effects Of Challenged Practices And Is Not Limited Solely To The Actor's Intent

The FHA's plain text supports the unanimous decisions of 11 federal circuits[12] and HUD's authoritative interpretation that the Act "prohibit[s] [housing] practices with an unjustified discriminatory effect, regardless of whether there was an intent to discriminate." 78 Fed. Reg. at 11,460. The reason is straightforward and begins "with the language of the statute," *Duncan v. Walker*, 533 U.S. 167, 172 (2001), based on the "ordinary, contemporary, common meaning" of the words used by Congress, *Perrin v. United States*, 444 U.S. 37, 42 (1979). Here, the statutory text's meaning is clear. FHA § 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) (emphasis added). The phrase "otherwise make [a dwelling] unavailable . . . because of race, color, religion, sex, familial status, or nation-

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[12] *See* Br. in Opp. 27-28 (citing cases); *supra* p. 4 & note 1.

al origin" prohibits conduct that has certain effects. No words in that phrase restrict the prohibition to actions taken with a discriminatory intent.

1. The phrase "make unavailable" plainly includes "the *consequences* of [housing] practices, not simply the motivation." *Smith*, 544 U.S. at 234 (plurality) (internal quotations omitted). The verb "make" means, as relevant here, "*to cause* to happen to or be experienced by someone." *Webster's Third New International Dictionary* 1363 (1961) ("*Webster's Third* (1961)") (definition 2b) (emphasis added);[13] *see Webster's New International Dictionary* 1485 (2d ed. 1952) ("*Webster's Second*") (defining "make" as "[t]o cause to exist, appear, or occur; . . . to give rise to"; "[t]o cause to be or become"). Thus, to "make [a dwelling] unavailable" means to cause it to become "inaccessible or unattainable."[14] Congress's language

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[13] This Court sometimes prefers a word's first dictionary definition. *See*, *e.g.*, *Muscarello v. United States*, 524 U.S. 125, 128 (1998). Nonetheless, the Court generally considers all dictionary definitions reasonably probative given the word's context. *See*, *e.g.*, *Crawford v. Metropolitan Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 281-82 (2009) (using fourth dictionary definition). The definitions of "make" provided here, although not the first definitions provided by the dictionaries, are the most sensible in § 804(a)'s context. Indeed, the first definitions in those dictionaries often refer to irrelevant uses of the word "make." *See Webster's Third* 1363 (1961) (first definition: "behave, act"); *The Random House Dictionary of the English Language* 866 (1966) ("*Random House*") (first definition: "to bring into existence by shaping or changing material"); IX *The Oxford English Dictionary* 235 (2d ed. 1989) ("*Oxford*") (first definition: "[t]o produce (a material thing) by combination of parts").

[14] The word "available" in the FHA's context means "accessible or attainable." *Webster's Second* 189 (fifth definition); I *Oxford* 812 (defining "available" as "capable of being made

makes clear that the FHA addresses any action that has the effect of making housing disproportionately unattainable. Its focus is on the causal connection between the defendant's action and the resulting unavailability of housing, not the actor's intent in bringing about the prohibited result.

The phrase "make unavailable" does not compel a requirement that the defendant have acted with discriminatory intent, because the ordinary meaning of "make" contains no intent requirement. It simply means to "cause" or to bring about. *See supra* p. 18. In both ordinary parlance and legal doctrine, a person may "cause" something to occur through neglect or disregard. *See*, *e.g.*, *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491, 497 (1934) (jury "might find that the injury was caused by accidental means").

This Court's own usage confirms that an intent requirement is not an inherent part of the word "make." In *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), for example, this Court discussed the possibility that an arbitration agreement might be invalidated because of "filing and administrative fees attached to arbitration that are so high as to *make access* to the forum impracticable." *Id.* at 2310-11 (emphasis added). The Court never suggested that anyone must have *intended* to set fees so high as to bar access to the arbitral forum. Similarly, in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), this Court explained that "*[c]ircumstances* may make obtaining a warrant impractical." *Id.* at 1555 (emphasis added). These opinions make clear

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use of, at one's disposal, within one's reach") (third definition); *Random House* 102 (defining "available" as "suitable or ready for use") (first definition).

that the word "make" focuses on effects, and not necessarily actors' intentions.

When Congress wishes to depart from the ordinary meaning of "make" and thereby impose an intent requirement, it routinely adds an intent-based modifier such as "intentionally," "willfully," or "knowingly."[15] Here, however, Congress enacted no such limitation, and this Court is not free to add an extra-textual limitation Congress did not prescribe. *See Bates v. United States*, 522 U.S. 23, 29 (1997) (Court "will ordinarily resist reading words or elements into a statute that do not appear on its face"); *United States v. Yermian*, 468 U.S. 63, 65, 75 (1984) (interpreting 18 U.S.C. § 1001 (1982) not to impose specific intent requirement for "mak[ing] any false, fictitious, or fraudulent statements or representations" where Congress had not included one). Similarly, Congress did not modify "make unavailable" with any intent-requiring language, an omission this Court should respect.

2. The phrase "because of race, color, religion, sex, familial status, or national origin" does not impose any requirement of intentional discrimina-

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[15] *See*, *e.g.*, 42 U.S.C. § 4651(8) ("*intentionally make*" necessary for owner to institute legal proceedings regarding taking of real property); 26 U.S.C. § 7206(1) ("*[w]illfully makes* and subscribes" any tax return); 29 U.S.C. § 439(c) ("*willfully makes*" false entry); 18 U.S.C. § 1001(a)(2) ("*knowingly and willfully . . . makes*" false statement to federal officer); *id.* § 922(a)(6) ("*knowingly to make* any false or fictitious" statements regarding firearms acquisition); *id.* § 1014 ("[w]hoever *knowingly makes* any false statement or report" to deceive certain federal agencies); *id.* § 1020 ("[w]hoever *knowingly makes* any false statement," related to highway construction project); *id.* § 1015(a) ("*knowingly makes*" false statement related to immigration matters) (emphasis added in all citations).

tion. This Court has recognized that § 703(a)(2) of Title VII and § 4(a)(2) of the ADEA create disparate-impact standards. *See Griggs*, 401 U.S. at 431 (Title VII); *Smith*, 544 U.S. at 235-36 (plurality) (ADEA); *see also id.* at 243 (Scalia, J., concurring in part and concurring in the judgment). Both statutes authorize disparate-impact claims even though they prohibit actions taken "because of" the person's race, color, religion, sex, national origin, or age. This Court's precedents thus establish that the "because of" phrase imposes no requirement that the defendant acted intentionally.

As *Smith* explained, even absent intentional discrimination, actions can have a disproportionate impact on individuals because of their membership in a protected class. "[T]he very definition of disparate impact" is that "an employer who classifies his employees without respect to age may still be liable under the terms of [the ADEA] if such classification adversely affects the employee *because of* that employee's age."[16] *Smith*, 544 U.S. at 236 n.6 (plurality) (emphasis added).[17] Thus, contrary to petitioners' contention (at 24), the ordinary meaning of "because of" prohibits actions that disadvantage individuals based on their membership in a particular group,

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[16] The word "may" is crucially important here. Liability is far from automatic, and nothing in the 45-year history of FHA disparate-impact claims indicates they are easy to prove.

[17] The American Bankers Association *amicus* brief misdirects the Court by arguing that the FHA disparate-impact standard is barred by "this Court's private-right-of-action jurisprudence." Br. 7-25. Neither *amici* nor petitioners dispute that the FHA creates a private right of action. *See* 42 U.S.C. § 3613. The only question here is whether a plaintiff can invoke a disparate-impact standard in pursuing a claimed violation.

regardless of whether those actions arose out of an intentional violation.

Moreover, § 804(a) prohibits actions that cause housing to become "*unavailable*" "because of" an individual's membership in a protected class. The statute's focus is on the effects of the action on individuals within that protected class, not the actor's intent in causing the discriminatory effects, and "because of" refers only to "but for" causation. *Cf. Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63 (2007) ("In common talk, the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition."). For example, if a city enacts a putatively race-neutral zoning regulation that functionally precludes racial minorities from purchasing a home, that ordinance has "ma[d]e [housing] unavailable" to a prospective resident based on – and therefore because of – the resident's race. *See Huntington Branch, NAACP*, 844 F.2d at 936 (zoning decision that was not explicitly racially motivated could have disproportionate effect on members of protected class). Similarly, a plan to construct a highway through a residential area predominantly comprised of minority homeowners would deprive those individuals of housing because of their race. *See Keith v. Volpe*, 858 F.2d 467, 470 (9th Cir. 1988). In both cases, the phrase "because of" comfortably encompasses actions that have the effect of denying housing to individuals because of their membership in a congressionally protected class.

Petitioners' effort to stretch the phrase "because of" into an intent requirement simply cannot be reconciled with *Smith*. Justice O'Connor's separate opinion in *Smith*, which posited that the ADEA does not impose disparate-impact liability, made the same

argument that petitioners advance here – namely, the ADEA "plainly requires discriminatory intent, for to take an action against an individual '*because of* such individual's age' is to do so 'by reason of' or 'on account of' her age." 544 U.S. at 249 (O'Connor, J., concurring in the judgment); *cf.* Pet. Br. 24. But a majority of the Court disagreed, calling that textual analysis "quite wrong" and "not persuasive." 544 U.S. at 236 n.6, 237 n.7 (plurality); *see id.* at 243 (Scalia, J., concurring in part and concurring in the judgment) (agreeing with "all of the Court's reasoning, but would find it a basis" to defer to Equal Employment Opportunity Commission).

Petitioners' argument also is contrary to this Court's holding in *Meacham v. Knolls Atomic Power Laboratory*, noting again that an employer's practice may be "without respect to age" (i.e., not subjectively motivated by age discrimination) but still have an adverse impact "because of . . . age." 554 U.S. at 96 (internal quotations omitted). Thus, for more than 30 years this Court consistently has rejected petitioners' contention that "because of" requires a showing of discriminatory intent, and held that that phrase is fully consistent with disparate-impact claims.

Petitioners (at 25-26) encourage the Court to abandon the reasoning in its prior decisions in *Griggs*, *Smith*, and *Meacham*, but they offer no basis to depart from principles of *stare decisis*. Those principles "weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977); *see Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) ("[T]he burden borne by the party advocating aban-

donment of a precedent is greater where the Court is asked to overrule a point of statutory construction."). Moreover, departing from the Court's prior precedents would create an unjustified discrepancy between the FHA and the parallel provisions of Title VII and the ADEA. Petitioners cannot overcome statutory *stare decisis* and ascribe meaning to the phrase "because of" that this Court has repeatedly rejected.

3. FHA § 804(a)'s plain meaning is confirmed by Title VII and the ADEA, two other anti-discrimination statutes that likewise focus on discriminatory effects, not just discriminatory motives. Congress enacted the FHA just four years after Title VII and one year after the ADEA as part of a "coordinated scheme of federal civil rights laws enacted to end discrimination." *Huntington Branch, NAACP*, 844 F.2d at 935. Because the FHA's language mirrors the language and structure of Title VII and the ADEA, the FHA likewise prohibits actions that have discriminatory effects. *See Smith*, 544 U.S. at 233; Antonin Scalia & Bryan A. Garner, *Reading Law* 252 (2012) ("Scalia & Garner, *Reading Law*") (related statutes should "if possible be interpreted harmoniously" – *in pari materia*). In the more than 40 years since their passage, all three statutes have been interpreted consistently to support disparate-impact claims.

Such consistency follows as well from § 804(a)'s structure, which is nearly identical to the Title VII and ADEA provisions this Court has held support a disparate-impact standard. In all three statutes, Congress first prohibited specific actions and then used the word "otherwise" to introduce a separate and broader prohibition encompassing discriminatory effects. *See* 42 U.S.C. § 2000e-2(a)(2) (Title VII)

(making it unlawful "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 race, color, religion, sex, or national origin*"); 29 U.S.C. § 623(a)(2) (ADEA) (making it unlawful "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*"); 42 U.S.C. § 3604(a) (FHA) (making 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*").

In *Griggs*, this Court held that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." 401 U.S. at 431 (citing 42 U.S.C. § 2000e-2(a)(2)). "[T]he consequences of employment practices, not simply the motivation," mattered to Congress and give rise to a statutory claim. *Id.* at 432. Likewise, in *Smith*, the Court held that Congress made it unlawful to "deprive any individual of employment opportunities or otherwise adversely affect his [employment] status . . . because of such individual's race or age" by "focus[ing] on the *effects* of the action on the employee rather than the motivation for the action of the employer." 544 U.S. at 235-36 (plurality); *see id.* at 243 (Scalia, J., concurring in part and concurring in the judgment) ("agree[ing]" with plurality's analysis).

The phrase "otherwise make unavailable," like "otherwise adversely affect" and "tend[s] to deprive," "focuses on the *effects* of the action . . . rather than the motivation for the action." "Make," like "affect," focuses on the *consequences* of the challenged action and lacks any textual indicator that the prohibition is limited to intentionally discriminatory conduct.[18] Where two or more statutes have similar language and structure, they should be construed similarly. *See Smith*, 544 U.S. at 233 (plurality); *see also Northcross v. Board of Educ.*, 412 U.S. 427, 428 (1973) (per curiam) (Congress's use of similar language in two statutes is "strong indication that [they] should be interpreted pari passu"). Read against the backdrop of Title VII § 703(a)(2) and ADEA § 4(a)(2), FHA § 804(a) is best interpreted as also prohibiting conduct that produces discriminatory effects.

Petitioners' argument (at 22) that the phrases "adversely affect" and "tend to deprive" are the "key terms that support" a prohibition on discriminatory effects does not mean those are the only words Congress can use to create a disparate-impact standard. In *Smith*, this Court interpreted the ADEA's lan-

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[18] "Make" is frequently defined as "to have as a *result* or consequence." IX *Oxford* 236 (emphasis added); *see id.* at 235 (noting 31 "senses [of 'make'] in which the object of the verb is a product or *result*") (emphasis added). Moreover, "affect" is a synonym of "make." *See* I Oxford 211 (defining "affect" as "make"). Unsurprisingly, then, the words "make" and "effect" are also synonyms. *See Webster's New World Thesaurus* 234 (Charlton Laird ed., 1971) (listing "make" as synonym of "effect"); *id.* at 458 (listing "effect" as synonym of "make"); *The New Roget's Thesaurus* 132 (Norman Lewis ed., 1976) (listing "make" as synonym of "effect"); *id.* at 254 (listing "effect" as synonym of "make"); J.I. Rodale, *The Synonym Finder* 698 (Laurence Urdang & Nancy LaRoche eds., 1978) (listing "affect" as synonym of "make as if" or "as though").

guage to prohibit conduct with discriminatory effects because it used language that "focuses on the *effects* of the action . . . rather than the motivation for the action." 544 U.S. at 235-36 (plurality). This Court did not prescribe particular words that Congress must use to express its concern about effects rather than motivation. Because the phrase "make unavailable" is indistinguishable from "adversely affect" in focusing on effects rather than motives, there is no principled basis to interpret § 804(a) as prohibiting only intentionally discriminatory conduct.

To the extent there is a difference between "make unavailable" and "adversely affect," it is not that "make unavailable" requires proof of discriminatory intent. Rather, § 804(a)'s language arguably is narrower in prohibiting only effects that result in "mak[ing] [housing] *unavailable*." Some lower courts have relied on that language to hold that the FHA's focus is on accessibility, not habitability. *See*, *e.g.*, *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984) (holding § 804(a) "does not protect the intangible interests in the already-owned property raised by the plaintiffs [sic] allegations"). Although the FHA's language suggests a limitation on the types of effects that can trigger disparate-impact claims, nothing in the FHA's language supports the conclusion that it altogether foreclosed disparate-impact claims.

B. The FHA's Structure Confirms § 804(a) Is Not Limited To Intentional Deprivations Of Housing

1. Section 804's structure also supports reading the phrase "make unavailable" to prohibit actions with discriminatory effects. Statutes "should be construed so that effect is given to all its provisions,

so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). Section 804(a) prohibits conduct that "make[s] unavailable *or den[ies]*" housing to specified persons. Yet if, as petitioners assert (at 23), the phrases "make unavailable" and "deny" both require proof of discriminatory intent, such an interpretation renders "make unavailable" redundant.

2. The three exemptions from FHA liability contained in FHA § 805 and § 807 further confirm the existence of a disparate-impact standard in § 804(a). Those exemptions serve as defenses to liability predicated on an initial showing of disparate impact and would be unnecessary if § 804(a) did not encompass a disparate-impact standard.

First, Congress provided that "[n]othing in [the FHA] prohibits conduct against a person because such person has been convicted" of a drug offense. FHA § 807(b)(4), 42 U.S.C. § 3607(b)(4). Of course, nothing in the FHA directly prohibits discrimination against drug offenders, so the exemption has meaning and effect only because of the possibility that discrimination based on drug offender status could have a disparate impact on members of a protected group. If the FHA prohibited only intentional discrimination "because of race, color, religion, sex, familial status, or national origin," discrimination based on prior drug offenses could not give rise to liability, and there would be no need to create an express exemption from liability. Thus, § 807(b)(4) confirms that § 804(a) encompasses a disparate-impact standard and that the "because of" phrase does not mandate intent.

Second, Congress provided that "[n]othing in [the FHA] limits the applicability of any reasonable . . .

restrictions regarding the maximum number of occupants permitted to occupy a dwelling." FHA § 807(b)(1), 42 U.S.C. § 3607(b)(1). That provision creates an "absolute exemption" from FHA liability for "rules that cap the total number of occupants in order to prevent overcrowding of a dwelling." *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 735 (1995). Again, none of the FHA's prohibitions on intentional discrimination would impose any limitation on maximum-occupancy restrictions. If the FHA prohibited nothing more than intentional discrimination, § 807(b)(1)'s "absolute exemption" would be wholly unnecessary. The exemption makes sense only because § 804(a) could in some circumstances prohibit maximum-occupancy limits that have the effect of "mak[ing] [housing] unavailable" for members of a protected group. *See id.* at 735 n.9.

Third, Congress provided that "[n]othing in [the FHA]" prohibits those "engaged in the business of furnishing appraisals of real property [from] tak[ing] into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." FHA § 805(c), 42 U.S.C. § 3605(c). If the FHA prohibited only intentional discrimination based on "race, color, religion, sex, familial status, or national origin," it would be the case, even without the exemption, that "nothing in [the Act]" prohibits *any* person from "tak[ing] into consideration" other factors. Only a *disparate-impact* standard could create the possibility of liability for considering "factors other than race, color, religion, sex, familial status, or national origin." *See Meacham*, 554 U.S. at 96 ("action based on a 'factor other than age' is the very premise for disparate-impact liability"). The

exemption for real-estate appraisers thus confirms that the FHA authorizes disparate-impact claims.

Each of those exemptions creates a carve-out from FHA liability for conduct *other than* intentionally discriminatory treatment on the basis of race, color, religion, sex, familial status, or national origin. If the FHA did not recognize a disparate-impact standard, those exemptions would have no work to do. This Court repeatedly has declined to adopt an interpretation of a statute that renders superfluous an express exception to liability. *See*, *e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 33 (2001) (declining to adopt construction of statute "that would render [an] exception superfluous"). Similarly, this Court often has determined the scope of a statute's coverage by paying particular attention to every word and exception that Congress included in the text. *See*, *e.g.*, *Duncan*, 533 U.S. at 174 (declining to adopt construction of Antiterrorism and Effective Death Penalty Act of 1996 under which "Congress' inclusion of the word 'State' [would have] no operative effect on the scope of the provision"). Congress's enactment of these exemptions thus strongly supports the conclusion that § 804(a) extends beyond intentional discrimination and recognizes a disparate-impact standard.

On this point as well, *Smith* is dispositive. There, this Court invoked the rule against superfluities in finding disparate impact cognizable under the ADEA. *See* 544 U.S. at 239 (plurality). The ADEA included a provision stating that it shall not be unlawful for an employer "to take any action otherwise prohibited under subsection[] (a) . . . where the differentiation is based on reasonable factors other than age [discrimination]." 29 U.S.C. § 623(f)(1). That provision would have been unnecessary if the ADEA did not recognize

disparate-impact liability, because actions based on factors other than age were not expressly prohibited under subsection (a). This Court therefore found that the only purpose of § 623(f)(1) was to preclude liability arising out of a disparate-impact standard in situations where the "adverse impact was attributable to a nonage factor that was reasonable." *Smith*, 544 U.S. at 239 (plurality); *see id.* at 246 (Scalia, J., concurring in part and concurring in the judgment) ("[Because] the [reasonable factors other than age] defense is relevant *only* as a response to employer actions 'otherwise prohibited' by the ADEA[,] . . . the unavoidable meaning of the regulation at issue is that the ADEA prohibits employer actions that have an adverse impact on individuals within the protected age group.") (internal quotations omitted). Here, likewise, the FHA's exemptions confirm the existence of a disparate-impact standard because they are "relevant *only* as a response to" conduct that otherwise would give rise to liability under that standard. *Id.*

Petitioners claim (at 32-33) that the exemptions "eliminate liability for all claims under the FHA, not just disparate-impact claims." But, as explained above, the FHA's disparate-treatment provisions do not create liability in any of the situations covered by the exemptions. Absent liability that arose out of a disparate-impact standard, Congress had no need to enact any of these exemptions. Petitioners contend (at 33) that those exemptions nevertheless "offer valuable defenses to disparate-treatment claims" because they "clarif[y]" that the specified conduct – for example, denial of housing based on prior drug offenses – "will not violate the Act." But it was well-established when these exemptions were adopted

that any legitimate, non-discriminatory reason for a challenged action would defeat a disparate-treatment claim in analogous contexts. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). Petitioners offer no evidence of any confusion on this issue under the FHA. Nor do they offer any explanation for why Congress would have singled out these three reasons for explicit exemptions from among all the other legitimate non-discriminatory reasons that will defeat a disparate-treatment claim. Absent such evidence or explanation, it is implausible to believe that Congress enacted three separate exemptions merely to "clarify" that the Act does not impose liability in those circumstances. The far more reasonable conclusion is that Congress enacted these exemptions to provide a safe harbor from claims of disparate impact in these three limited circumstances. *See Smith*, 544 U.S. at 238-39 (plurality).

C. The FHA's History And Purposes Confirm That It Prohibits Unjustified Discriminatory Effects

Congress intended the FHA to combat housing discrimination, just as it intended Title VII and the ADEA to redress employment discrimination. This Court has stated repeatedly that the FHA should be interpreted in light of the FHA's "broad remedial intent." *E.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982); *see Trafficante*, 409 U.S. at 209 (mandating "generous construction" of FHA). As *Trafficante* explains, Congress intended the FHA "to replace the ghettos 'by truly integrated and balanced living patterns.'" *Id.* at 211 (quoting 114 Cong. Rec. 3422 (1968) (statement of Sen. Mondale)). This Court warned that a "wooden application" of the

FHA would undermine Congress's intent to remake entrenched and pernicious discrimination – the breadth of that intent necessitated a broad interpretation. *Havens Realty*, 455 U.S. at 380.

Between 1968 and 1988, all nine courts of appeals to address the issue had interpreted § 804(a) to prohibit discriminatory effects. *See* 78 Fed. Reg. at 11,467 & n.70; *supra* p. 4 & note 1. Moreover, HUD consistently had interpreted the FHA to create a disparate-impact standard. *See supra* notes 2, 5-8; *infra* pp. 41-42. Against that backdrop, in 1988 Congress not only enacted the three exemptions discussed above, but also expanded the FHA to prevent discrimination on the basis of familial status and created new enforcement procedures. *See* 42 U.S.C. § 3605(c). What Congress did not do, however, was amend § 804(a) or undo the unanimous interpretation of the FHA as creating disparate-impact claims.

Congress's 1988 Amendments provide strong additional evidence that the FHA prohibited discriminatory housing effects. When Congress is aware of a uniform judicial interpretation of a statutory provision and amends the Act without altering that provision, Congress is presumed to have approved that judicial interpretation. *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 the statute."); *see also Lorillard v. Pons*, 434 U.S. 575, 580 (1975) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute."). In this case, an uncommonly large body of evidence indicates that Congress was aware of the unanimous interpretation of § 804(a) when it amended the FHA in 1988. *See*,

e.g., H.R. Rep. No. 100-711, at 89-91 (citing decisions from appellate courts and discussing FHA's "effects" standard); 134 Cong. Rec. 23,711 (1988) (noting uniform interpretation of courts of appeals). Congress did not upend the FHA and eliminate all disparate-impact claims, however; it merely carved out a few areas in which it wanted to foreclose such claims.

In fact, Congress rebuffed various attempts to eliminate disparate-impact claims under the FHA, affirmatively demonstrating its intent that such claims remain cognizable. In 1988, the House Judiciary Committee rejected an amendment to the FHA providing that "a zoning decision is not a violation of the [FHA] unless the decision was made with the intent to discriminate." H.R. Rep. No. 100-711, at 89-91 (dissenting views of Rep. Swindall). Several previous attempts to impose an intent requirement similarly failed. *See supra* note 3.

Also, a bill intended to overturn the federal courts' unanimous decisions confirming the availability of disparate-impact claims failed. *See* 133 Cong. Rec. 7176-77 (1987). It is difficult to imagine a clearer sign that Congress endorsed the manner in which the FHA had been interpreted. Indeed, this case presents a particularly strong illustration of the rejected proposal rule, under which this Court will not attribute to Congress intent to do something it considered but then rejected. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000) (finding it probative that Congress has "squarely rejected proposals to give the [Food and Drug Administration] jurisdiction over tobacco"); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 183-85 (1978) (finding it probative that Congress had "rejected the Senate version of § 7 and adopted the stringent, mandatory language in H.R. 37"). Given

that "acute awareness of so important an issue, Congress' failure to act on the bills" to foreclose a disparate-impact standard "provides added support for concluding that Congress acquiesced in the [courts' interpretation]." *Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983); *accord Flood v. Kuhn*, 407 U.S. 258, 283 (1972) (finding significant that "[r]emedial legislation has been introduced repeatedly in Congress but none has ever been enacted").[19]

D. Petitioners' Interpretation Distorts The Meaning Of § 804(a)

Petitioners' argument that § 804(a) prohibits only intentional discrimination rests on two unpersuasive dictionary definitions and an unpersuasive application

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[19] Petitioners quote (at 35) this Court's language in *Jama v. ICE*, 543 U.S. 335 (2005), that "the supposed judicial consensus [must be] so broad and unquestioned that [the Court] must presume Congress knew of and endorsed it." *Id.* at 349. They claim this standard is not satisfied, as (1) this Court had not yet reached the issue; (2) the presidential signing statement that accompanied the 1988 Amendments disfavored disparate impact; and (3) the Solicitor General filed an *amicus* brief consistent with the 1988 signing statement in *Town of Huntington v. Huntington Branch, NAACP,* 488 U.S. 15 (1988) (No. 87-1961) (U.S. filed June 1988). But the signing statement and the Solicitor General's *Huntington* brief have little to do with the *judicial* consensus against which Congress legislated, and this Court's abstention from the issue merely reflects the absence of a circuit conflict to resolve.

The signing statement is, at most, a variety of legislative history this Court has often disregarded. *See*, *e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 666 (2006) (Scalia, J., dissenting) ("[o]f course in its discussion of legislative history the Court wholly ignores the President's signing statement"). The signing statement is, further, legislative history only to the 1988 Amendments, not the FHA, and does not trump HUD's consistent interpretation of the FHA as including a disparate-impact standard for liability.

of interpretive canons. First, they cite a *Webster's* entry defining "make" as "'to produce as a result of action, *effort*, or behavior,'" and argue that "make" requires "*purposeful* 'efforts.'" Br. 19 (citing *Webster's Third* 1363 (1961)) (second emphasis added). But that argument distorts ordinary English usage. The definition makes clear that the focus of "make" is on the "result" – whether that result arises from "action, effort, or behavior." Although intentional conduct is included within "make," that word is not *limited* to intentional conduct. A person may take actions that *unintentionally* "make [housing] unavailable."

Petitioners also cite (at 19) a definition of "make" from a 1951 edition of *Black's Law Dictionary* as "to do, perform, or execute," and then argue based on a different dictionary that "execute" requires intent. But the definition petitioners selectively pluck from *Black's Law Dictionary* is clearly inapplicable here. The full definition reads: "to do, perform, or execute; *as to make an issue, to make oath, to make a presentment*." *Black's Law Dictionary* 1107 (4th ed. 1951). The FHA does not use "make" in that sense. Indeed, replacing "make" in § 804(a) with "do," "perform," or "execute" reduces the statute to gibberish. Petitioners also selectively omit that *Black's* also defines "make" as "[t]o cause to happen by one's neglect or omission," which fully supports a disparate-impact standard without intent. *Id.* at 1108.[20]

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[20] Petitioners' argument that "execute" requires intent also is unavailing. First, even according to the inapplicable definition they selected, "execute" is only one possible definition of "make." The other two – "do" and "perform" – do not necessarily require intent. *Webster's Second* 761 (defining "to do" as "[t]o bring about; to produce, as an effect or result; to effect; to achieve; to make; to inflict, bestow or bring . . . ; to render") (third definition), 1818 (defining "perform" as "[t]o carry out or into full

Petitioners also contend that the canon of *noscitur a sociis* "compels" the conclusion that § 804(a) requires intent. That interpretive canon, however, is appropriately invoked only to resolve ambiguities in the statute; it cannot override the plain meaning of the statutory text. *See Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923) (interpretive canons "have no place, as this court has many times held, except in the domain of ambiguity"). Because petitioners cannot point to an ordinary meaning of "make unavailable" that means *only* "intentionally make unavailable," the canon of *noscitur a sociis* is inapplicable.

Moreover, even if the statutory text contained ambiguity, *noscitur a sociis* would not support a requirement of intentional discrimination. Petitioners argue that "make" should take its meaning from the surrounding words "refuse" and "deny," which they contend requires proof of discriminatory intent. However, the words "refuse" and "deny" hardly *require* intentional discrimination. The ordinary meaning of deny is "to withhold acceptance of." *Webster's Third* 603 (1986); *see also Webster's Second* 700 (defining "deny" as "[t]o refuse to grant; to withhold; to refuse to gratify or yield to; as, to *deny* a request, an inclination"). One can certainly withhold something without intent through negligence or conscious indifference. As with the word "make," *see supra* p. 18,

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execution; esp. some action ordered or prompted by another or previously promised; to put into complete effect; to fulfill; as, to *perform* another's will or one's vow; to *perform* certain conditions") (second definition); *American Heritage Dictionary* 545 (3d ed. 1992) (defining "to do" as "[t]o bring about; effect") (definition 3a); *Webster's Third New International Dictionary* 1678 (1986) ("*Webster's Third* (1986)") (defining "perform" as "to carry out or bring about") (definition 2a).

this Court normally states expressly if it intends to indicate that a "denial" must be intentional. *E.g.*, *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980) ("[t]h[e] Amendment prohibits only *purposefully* discriminatory denial") (emphasis added). It also has used the word in a context that would render the word nonsensical if it required intent.

Even if "refuse" and "deny" are interpreted as requiring discriminatory intent, moreover, there is no basis to conclude that "make unavailable" also would require discriminatory intent. Congress used the word "otherwise" between "refuse" and "make unavailable or deny" to indicate that the prohibition against "mak[ing] unavailable or deny[ing]" housing is meant to be *broader* than the preceding prohibition against "refus[ing]" to rent or sell housing. Indeed, "otherwise" signals "different" from the language preceding it. *Webster's Third New International Dictionary* 1598 (2002). Thus, even if the preceding prohibitions require intentionality, the use of "otherwise" refutes any suggestion that "otherwise make unavailable or deny" does so as well. Moreover, as this Court has held, the *noscitur a sociis* canon should not be applied to render a term superfluous or ineffective. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 702 (1995) (explaining that *noscitur a sociis* canon "counsels that a word gathers meaning from the words around it," but does not give a word the same function as the words around it and thereby result in superfluity) (internal quotations omitted). As discussed above, interpreting "make unavailable" to require intentional discrimination renders "make unavailable" superfluous. *See supra* pp. 27-31.

Nor does the canon of *ejusdem generis* support the conclusion that "make unavailable" requires intentional discrimination. That canon applies only where there is "a general or collective term following a list of specific items to which a particular statutory command is applicable (*e.g.*, 'fishing rods, nets, hooks, bobbers, sinkers, and other equipment')." *United States v. Aguilar*, 515 U.S. 593, 614-15 (1995) (Scalia, J., concurring in part and dissenting in part). Here, however, there is no list of specific items – just three "distinct and independent prohibitions." *Id.* "The absence of a list of specific items undercuts the inference embodied in *ejusdem generis* that Congress remained focused on the common attribute when it used the catchall phrase." *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 224-25 (2008).

Petitioners unpersuasively argue that "Section 804(a) does not create the 'incongruity' between action and injury that signals disparate-impact liability." Br. 23 (quoting *Smith*, 544 U.S. at 236 n.6 (plurality)). First, the FHA's "make unavailable" provision does embody an incongruity between action and injury. A municipality's action might make housing unavailable to a large group of people, yet the effects of the action may disproportionately affect certain individuals because of their race. Here, for example, the Township's redevelopment plan, which is targeted at the neighborhood as a whole, disproportionately affects residents of color. This Court found that type of incongruity meaningful in *Smith*. In any event, the *Smith* plurality did not say that an incongruity was a necessary precondition for a disparate-impact claim in all circumstances. Petitioners therefore overstate the significance under the

FHA of the specific incongruity identified by this Court in employment cases.

Moreover, petitioners erroneously claim that this Court's observation that "'[t]he [FHA] itself focuses on prohibited acts'" means the Court has concluded that "[p]urposeful actions, not effects, are the focus of this statutory regime." Br. 26 (quoting *Meyer v. Holley*, 537 U.S. 280, 285 (2003)). The quotation from *Meyer* only says that the FHA is concerned with "acts"; petitioners can no more engraft the word "purposeful" onto this Court's opinions than it can add an intent requirement where Congress did not include one in § 804(a).

II. HUD'S AUTHORITATIVE INTERPRETATION OF FHA § 804(a) AS ENCOMPASSING A DISPARATE-IMPACT STANDARD IS ENTITLED TO DEFERENCE

To the extent this Court does not wish to adjudicate § 804(a)'s meaning as a matter of independent judicial interpretation, it should defer to HUD's construction of § 804(a), because the statutory text does not unambiguously *foreclose* disparate-impact claims. HUD has authority for administering and enforcing the FHA. It consistently has interpreted the statute to include disparate-impact claims, including in a final rule promulgated after notice and comment. Its interpretation of FHA § 804(a) warrants the full measure of deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and is eminently reasonable. As in *Smith*, "[t]his is an absolutely classic case for deference to agency interpretation." 544 U.S. at 243 (Scalia, J., concurring in part and concurring in the judgment).

A. HUD's Interpretation Of § 804(a) Warrants *Chevron* Deference

The FHA grants HUD broad authority to promulgate regulations implementing and interpreting the statute. *See* 42 U.S.C. § 3614a. Acting pursuant to that expressly delegated authority, HUD issued a final rule, after notice and comment, reaffirming its longstanding interpretation that § 804(a) prohibits not just intentional housing discrimination, but also conduct that has discriminatory effects. Specifically, that rule provides that "[l]iability may be established under the [FHA] based on a practice's discriminatory effect . . . even if the practice was not motivated by a discriminatory intent." 78 Fed. Reg. at 11,482; *see* 24 C.F.R. § 100.500 (codifying the rule).

Where Congress expressly delegates interpretive authority to an agency, and the agency interprets the statute pursuant to that authority, the agency's interpretation is entitled to *Chevron* deference. *See Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 714 (2011) (use of notice-and-comment procedures is "significant" sign that rule deserves *Chevron* deference); *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (stating *Chevron* deference applies to "the fruits of notice-and-comment rulemaking or formal adjudication").

The FHA also delegates authority to HUD to issue formal adjudications carrying the force of law. *See* 42 U.S.C. § 3612. Even prior to the Final Rule, for more than two decades, HUD had exercised this authority in interpreting § 804(a) to confirm the disparate-impact standard. *See*, *e.g.*, *HUD v. Carter*, No. 03-90-0058-1, 1992 WL 406520, at *5 (HUD ALJ May 1, 1992); *HUD v. Mountain Side Mobile Estates P'ship*, Nos. 08-92-0010-1 & 08-92-0011-1, 1993 WL 307069,

at *5 (HUD Sec'y July 19, 1993), *aff'd in part*, 56 F.3d 1243 (10th Cir. 1995); *HUD v. Ross*, No. 01-92-0466-8, 1994 WL 326437, at *5-7 (HUD ALJ July 7, 1994); *HUD v. Pfaff*, No. 10-93-0084-8, 1994 WL 592199, at *8 (HUD ALJ Oct. 27, 1994), *rev'd on other grounds*, 88 F.3d 739 (9th Cir. 1996). Those adjudications, standing alone, also qualify as authoritative agency interpretations. *See Mead*, 533 U.S. at 230 n.12 (collecting cases); *INS v Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999) (formal Board of Immigration Appeals adjudications merit *Chevron* deference). Thus, HUD's interpretation of the statute, embodied in both a rulemaking and consistent, longstanding adjudications, deserves the full measure of *Chevron* deference.

Notice-and-comment rules generally may not apply retroactively. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *see also* 5 U.S.C. § 551(4) (defining "rule" as "an agency statement of general or particular applicability and future effect"). But that principle is only triggered when some "*new* provision attaches *new* legal consequences to events completed before its enactment." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 (1994) (emphases added). In this case, retroactivity is not implicated because HUD's rule did not change the law; it formalized an agency interpretation that had existed for more than 40 years. *See* 78 Fed. Reg. at 11,462 ("[T]his rule is not establishing new substantive law."). Petitioners do not argue otherwise.

This Court has recognized that principle. In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), the Court noted that retroactivity analysis for new rules is implicated only when "the regulation replaced a prior agency interpretation" and is

not appropriate when "no clear agency guidance" existed before the new rule was promulgated. *Id.* at 744 n.3. Given that holding, it follows *a fortiori* that a rulemaking that reaffirms an agency's preexisting interpretation in formal adjudications does not implicate the retroactivity principle. For that reason, this Court repeatedly has granted *Chevron* deference to rules that were promulgated *after* the relevant litigation began. *See*, *e.g.*, *Barnhart v. Walton*, 535 U.S. 212, 221 (2002) (*Chevron* deference afforded to 2001 regulation despite lawsuit having been filed in 1996); *Smiley*, 517 U.S. at 741 ("Nor does it matter that the regulation was prompted by litigation, including this very suit."). Accordingly, HUD's Final Rule interpretation applies fully to this case and requires affirmance of the judgment below.

B. HUD's Interpretation Of § 804(a) Is Reasonable

Under *Chevron*, HUD's interpretation should be given "controlling weight" if the statute "does not unambiguously require a different interpretation" and the regulation is a "reasonable interpretation of the text." *Barnhart v. Thomas*, 540 U.S. 20, 29-30 (2003); *see Chevron*, 467 U.S. at 842-44 (stating that deference is due where Congress has not "directly spoken to the precise question at issue" and agency's rule adopts "permissible" or "reasonable" construction of statute); *Mead*, 533 U.S. at 257 (Scalia, J., dissenting) ("*Chevron* sets forth an across-the-board presumption, which operates as a background rule of law against which Congress legislates: Ambiguity means Congress intended agency discretion. Any resolution of the ambiguity by the administering agency that is authoritative – that represents the

official position of the agency – must be accepted by the courts if it is reasonable.").

Here, the FHA does not "unambiguously require a different interpretation" than the one rendered by HUD. *Barnhart*, 540 U.S. at 29-30. The phrase "make unavailable" does not, by its terms, require discriminatory intent. *See supra* pp. 18-20. Even if this Court finds that the word "make" might, by some definitions, connote intentional conduct, other definitions – indeed, virtually all definitions – construe "make" simply to refer to an action that triggers the consequences of the conduct. *See supra* p. 18. Where, as here, a word or phrase admits of more than one meaning, this Court consistently has recognized the language as ambiguous. *See*, *e.g.*, *Mayo*, 131 S. Ct. at 711 (explaining that "student" could have multiple meanings under Social Security Act); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218-19 (2009) (noting that either of two definitions of word "best" might be reasonable in context of statute, because either could be used in "common parlance"); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (finding term "employees" ambiguous because capable of multiple meanings); *see also* Scalia & Garner, *Reading Law* 425 (explaining ambiguity as "[a]n uncertainty of meaning based not on the scope of a word or phrase but on a semantic dichotomy that gives rise to any of two or more quite different but almost equally plausible interpretations").

Indeed, this Court has recognized that the word "make" is not "entirely free from ambiguity." *Tyler v. Cain*, 533 U.S. 656, 662 (2001) (noting that word "'made' has several alternative meanings, none of which is entirely free from ambiguity"); *see United States v. Giles*, 300 U.S. 41, 48 (1937) (observing that

word "make" is broad and has numerous definitions). Even petitioners appear to admit as much. *See* Br. 19 (acknowledging possibility of "doubt on that score"). Petitioners thus simply cannot bear their burden to demonstrate that "make [housing] unavailable" unambiguously requires intentional conduct. Likewise, this Court has construed the phrase "because of" as consistent with disparate-impact liability, demonstrating that that phrase – even if ambiguous – is reasonably susceptible of that meaning. Because the FHA is, at best, ambiguous, HUD's reasonable interpretation is due deference. *See Chevron*, 467 U.S. at 865; *see also Mead*, 533 U.S. at 257 (Scalia, J., dissenting) (agency interpretation of ambiguous statute "must be accepted by the courts if it is reasonable"); *Barnhart*, 540 U.S. at 29-30.

HUD's interpretation is reasonable. In addition to the textual arguments in Part I, the reasonableness of HUD's interpretation is confirmed by the fact that 11 courts of appeals have, for more than two decades, interpreted § 804(a) to support such claims. *See Brendlin v. California*, 551 U.S. 249, 258 (2007) (supporting Court's interpretation of Fourth Amendment by noting "[o]ur conclusion comports with the views of all nine Federal Courts of Appeals"); *Stutson v. United States*, 516 U.S. 193, 195-96 (1996) (per curiam) (citing unanimous opinion of six courts of appeals as persuasive part of "combination of circumstances" counseling in favor of particular course of action); *City of Canton v. Harris*, 489 U.S. 378, 387 & n.6 (1989) (citing unanimous opinion of "all the Courts of Appeals that have addressed this issue"). Given the consistent and uniform decisions of every federal court of appeals to consider the issue, HUD's interpretation is reasonable.

HUD's statutory interpretation also is reasonable in light of the FHA's overarching purpose to provide "for fair housing throughout the United States." 42 U.S.C. § 3601. Whether § 804(a) encompasses a disparate-impact standard is a "quintessential example[] of [a] term[] that the expert agency should be allowed to interpret in the light of the policies animating the statute." *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 728 (2001); *see id.* at 726 (finding "good reason to resolve the ambiguities [in the Act] consistently with the [National Labor Relation] Board's interpretation"). Here, HUD has reasonably decided that "the Act's intended goal to advance equal housing opportunity and achieve integration" can only be realized "by eliminating practices with an unnecessary disparate impact or that unnecessarily create, perpetuate, increase, or reinforce segregated housing patterns." 78 Fed. Reg. at 11,466. Like employment discrimination, modern-day housing discrimination often is particularly difficult to identify and rectify, and a disparate-impact standard provides an evidentiary mechanism to test the reasons given for the policies that produce the disparate impact. *See* Christine Jolls, *Antidiscrimination and Accommodation*, 115 Harv. L. Rev. 642, 652 (2001) ("leading gloss" on *Griggs* is that "disparate impact functions as a means of smoking out subtle or underlying forms of intentional discrimination on the basis of group membership").[21] HUD's

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[21] The unique circumstances presented by eminent-domain powers heighten the necessity of protection against actions with a disparate racial impact. "Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only

decision to interpret § 804(a) as encompassing a disparate-impact standard is reasonable and fully consistent with this Court's admonition that an overly "wooden" reading of the statute would "undermine[] the broad remedial intent of Congress embodied in the Act." *Havens Realty*, 455 U.S. at 380; *see Trafficante*, 409 U.S. at 212 (mandating "generous construction" of FHA).

Finally, the long duration of HUD's interpretation further attests to its reasonableness. *See Barnhart*, 535 U.S. at 220 ("[T]his Court will normally accord particular deference to an agency interpretation of 'longstanding' duration.") (citation omitted); *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 487 (2004) (same); *Entergy*, 556 U.S. at 224 ("While not conclusive, it surely tends to show that the [agency's] current practice is . . . reasonable . . . that the agency has been proceeding in essentially this fashion for over 30 years."). "[A]gency interpretations that are of long standing come before [this Court] with a certain credential of reasonableness, since it is rare that error would long persist." *Smiley*, 517 U.S. at 740 (Scalia, J.).

HUD's interpretation that § 804(a) encompasses a disparate-impact standard has been maintained across the tenures of presidents of both parties since its enactment more than 40 years ago. *See supra* notes 2, 5-7 (listing HUD documents from Republican and Democratic presidential administrations indicating that disparate-impact claims are cognizable under

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systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful." *Kelo v. City of New London*, 545 U.S. 469, 521-22 (2005) (Thomas, J., dissenting) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

the FHA). In addition to numerous formal adjudications, *see supra* pp. 41-42, HUD also consistently has interpreted the FHA to embrace a disparate-impact standard in various guidance and interpretive documents, *see supra* notes 2, 5-7; *see also Smith*, 544 U.S. at 244-45 (Scalia, J., concurring in part and concurring in the judgment) (finding that agency's view was "deserving of deference" in part because agency had "appeared in numerous cases in the lower courts, both as a party and as *amicus curiae*, to defend the position" it later formalized in a rule). Its rule also has been embraced by "the Justice Department and nine other federal agencies." 78 Fed. Reg. at 11,462.

As in *Smith*, HUD's consistent and longstanding interpretation reflects a reasonable answer, based on the agency's expertise, to a policy question delegated by Congress to the agency. *See Sullivan v. Everhart*, 494 U.S. 83, 93 (1990) (deferring to agency's interpretation because, although the Court did not say the agency's interpretation was "an inevitable interpretation of the statute[,] . . . it is assuredly a permissible one"); *Smith*, 544 U.S. at 244-45 (Scalia, J., concurring in part and concurring in the judgment) (agency's view was "deserving of deference" in part because it affirmed "the longstanding position of the Department of Labor, the agency that previously administered the ADEA"); *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 601 (2004) (Scalia, J., dissenting) (disagreeing with majority's conclusion that agency interpretation was "clearly wrong" and instead deferring to that interpretation because it was "neither foreclosed by the statute nor unreasonable").

III. THE CANON OF CONSTITUTIONAL AVOIDANCE DOES NOT WARRANT IMPOSING AN INTENT REQUIREMENT

A. The Canon Of Constitutional Avoidance Cannot Overcome The Plain Meaning Of The Statutory Text Or HUD's Authoritative Interpretation

Petitioners contend that the FHA's plain language and HUD's authoritative interpretation should be disregarded because recognizing a disparate-impact standard under the FHA would create "serious constitutional problems" under the Equal Protection Clause and the Tenth Amendment. The canon of constitutional avoidance is inapplicable here because § 804(a) "is unambiguous on the point" in question. *Salinas v. United States*, 522 U.S. 52, 60 (1997). As this Court has emphasized, the canon of constitutional avoidance is "a means of giving effect to congressional intent, not of subverting it." *Clark v. Martinez*, 543 U.S. 371, 382 (2005). Because Congress has expressly legislated to the limits of its constitutional authority, *see supra* p. 3, the canon of constitutional avoidance cannot properly be invoked to override Congress's intent.

Likewise, the canon of constitutional avoidance should not be permitted to override this Court's settled principles of agency deference. The canon of constitutional avoidance is a "tool [for a court] to choose between competing plausible interpretations of a statutory text." *Id.* Under *Chevron*, however, "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). Applying the canon of constitutional

avoidance to trump *Chevron* deference would create a significant and unwarranted loophole in this Court's administrative-law jurisprudence. Thus, even if § 804(a) is deemed ambiguous, the canon of constitutional avoidance does not apply absent the type of "grave and doubtful constitutional questions [about the agency's regulations] that would lead [this Court] to assume Congress did not intend to authorize their issuance." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (internal quotations and citation omitted). Rather, under *Chevron*, this Court should defer to the agency's reasonable interpretation of § 804(a). *See* Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 Geo. L.J. 833, 914-15 (2001).

B. Disparate-Impact Liability Under The FHA Does Not Offend The Equal Protection Clause

Disparate-impact liability in the housing context does not run afoul of the Equal Protection Clause. To the extent any "difficulty" has been identified in reconciling a disparate-impact standard with equal-protection principles, that difficulty exists only insofar as disparate-impact prohibitions "affirmatively *require*[]" government actors to discriminate against other individuals on the basis of race. *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring). The issue arose on "the facts" of *Ricci* because imposing disparate-impact liability on the City of New Haven might have required it intentionally to pursue "racial quotas" to avoid racially disproportionate results. *See id.* The tension between disparate-impact liability and the Equal Protection Clause arose to the extent avoiding disparate-impact liability required intentionally race-based treatment.

There is no such tension in this case. To avoid disparate-impact liability here, petitioners need not disfavor any individual on the basis of their race (or any other protected characteristic). The Township could refrain from engaging in the proposed redevelopment project. It also could revise the redevelopment plan to provide existing residents of the Gardens with access to affordable alternative housing. Protecting members of disadvantaged groups from the discriminatory effects of governmental action furthers equal protection rather than offends it, where the remedy does not require the government to treat the members of any other group unfavorably because of their race.

Petitioners' argument that disparate-impact claims would "affirmatively require [local governments] to 'classify individuals by race and allocate benefits and burdens on that basis'" simply is not accurate. Br. 40 (quoting *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789-90 (2007) (Kennedy, J., concurring in part and concurring in the judgment). Nothing in respondents' claims creates the same kind of zero-sum game that might exist in the employment context where selection of a minority candidate might mean that a white person loses a job opportunity or is otherwise injured. Indeed, no one would have standing to pursue an equal-protection claim challenging the Township's decision *not* to raze respondents' homes.

Nor is it true in the housing context more generally that avoiding disparate-impact liability would require intentional racial quotas. Indeed, courts have recognized that there are myriad race-neutral ways to avoid unjustifiably depriving individuals of housing because of their membership in a congressionally

protected class. *See*, *e.g.*, *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064-65 (4th Cir. 1982) (suggesting that municipality might have avoided disparate impact simply by remaining in a multimunicipality housing authority). Similarly, this Court held in *Ricci* that employers are not prohibited 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." 557 U.S. at 585. Likewise, there is no constitutional concern with similar remedies that are sensitive to, and seek to avoid, unjustified discriminatory effects in the availability of housing.

To the extent petitioners contend that merely classifying people based on their membership in a protected group to *assess* whether conduct has a disparate impact is subject to heightened scrutiny under equal-protection principles, they mischaracterize this Court's precedents. The Equal Protection Clause subjects to strict scrutiny the imposition of differential "burden[s] or benefit[s]" on the basis of racial classifications, not the mere identification of individuals based on their race. *Shaw v. Reno*, 509 U.S. 630, 651 (1993); *see City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality). In the context of public schools, for example, local governments "are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race." *Parents Involved*, 551 U.S. at 787-89 (Kennedy, J., concurring in part and concurring in the judgment); *see id.* ("race-conscious measures that do not rely on differential treatment based on individual classifications" raise "lesser" problems). Because mere "race-

conscious[ness]" does not implicate equal-protection concerns, the fact that a disparate-impact standard involves assessing the effects of the challenged practice on members of particular groups raises no inherent constitutional doubts. *See also Miller v. Johnson*, 515 U.S. 900, 916 (1995) ("Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process.").

There also is no constitutional doubt about the existence of a disparate-impact standard for evidentiary purposes as such. As Justice Scalia has stated, although it is "possible to defend [a disparate-impact standard] by framing it as simply an evidentiary tool used to identify genuine, intentional discrimination," disparate-impact provisions may "sweep too broadly to be fairly characterized in such a fashion." *Ricci*, 557 U.S. at 595 (Scalia, J., concurring). Even if that concern were accepted, it would not form a basis to add an extra-textual intent requirement to § 804(a), because disparate-impact liability can be made consistent with equal protection by adjusting the applicable evidentiary standard, for example, by requiring "an affirmative defense for good-faith (*i.e.*, nonracially motivated) conduct." *Id.*

A burden-shifting or balancing test that occurs after initial proof of disparate impact is analogous to the analysis performed by courts in the context of government takings. "A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose." *Kelo*, 545 U.S. at 491 (Kennedy, J.,

concurring). Just as proof of "impermissible favoritism to private parties" is the beginning and not the end of the takings analysis, so too is proof of a disparate impact.

This Court specifically declined to review the appropriate standard for liability under § 804(a), however. *See* 133 S. Ct. 2824 (2013) (limiting grant of certiorari to Question 1). Moreover, none of the courts below addressed whether the burden-shifting framework imposed is too "demanding" for petitioners in light of constitutional concerns. *Ricci*, 557 U.S. at 595 (Scalia, J., concurring). Because merely interpreting § 804(a) to encompass a disparate-impact standard does not raise constitutional concerns, it is unnecessary to resolve those questions at this time.

C. FHA Disparate-Impact Claims Do Not Raise Tenth Amendment Concerns

Petitioners' argument (at 42) that FHA disparate-impact liability raises federalism concerns because it touches on "areas traditionally regulated by local governments" is unpersuasive. First, § 804(a) is not exclusively, or even primarily, a statute that regulates local land-use decisions. Rather, the FHA prohibits discrimination in the interstate housing market. That is not an area of traditional *state* regulation, but rather an area of longstanding *federal* regulation. *See*, *e.g.*, *Groome Res., Ltd. v. Parish of Jefferson*, 234 F.3d 192, 215 (5th Cir. 2000) ("it does not serve the balance of federalism to allow local communities to discriminate"); *Morgan v. Secretary of HUD*, 985 F.2d 1451, 1455 (10th Cir. 1993) ("Housing discrimination based on familial status surely interferes with the efficient allocation of housing resources and could hinder interstate relocation."); *cf. Gonzales v. Oregon*, 546 U.S. 243, 292 (2006) (Scalia,

J., dissenting) ("[N]o clear statement is required on the ground that the Directive intrudes upon an area traditionally reserved exclusively to the States because the Federal Government has pervasively regulated the dispensation of drugs for over 100 years.") (citation omitted).

Contrary to petitioners' claim (at 42), this case is nothing like *Rapanos v. United States*, 547 U.S. 715 (2006). In *Rapanos*, the Army Corps of Engineers' interpretation of the Clean Water Act of 1977 was so broad as to "authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land," "with the scope of discretion that would befit a local zoning board." *Id.* at 738 (plurality). In contrast, prohibiting discriminatory effects in the interstate housing market only incidentally affects the ability of local governments to make local land-use decisions. It certainly does not give HUD plenary control over those decisions.

Second, this Court has made clear that local governments possess no sovereign immunity against federal laws. Rather, Congress "may subject a municipality to suit in state court if that is done pursuant to a valid exercise of its enumerated powers." *Jinks v. Richland Cnty.*, 538 U.S. 456, 465-66 (2003) (emphasis omitted). This is true even for legislation that covers "areas traditionally regulated by local governments," Pet. Br. 42, as this Court has long abandoned that standard as a limitation on congressional authority. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Moreover, federal limitations on local governments' ability to seize individuals' homes furthers the Constitution's interest in "safeguard[ing] against excessive, unpredictable, or unfair use of the government's eminent

domain power – particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will." *Kelo*, 545 U.S. at 496 (O'Connor, J., dissenting).[22]

The FHA thus raises no federalism-based constitutional concerns. It "does not push the outer limits of Congress's commerce power." *Gonzales*, 546 U.S. at 291 (Scalia, J., dissenting). It also is appropriate legislation to enforce the Thirteenth Amendment. *See*, *e.g.*, *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1100 (2d Cir. 1988). Accordingly, "[i]t would be a novel and massive expansion of the clear-statement rule" to apply it in this case. *Gonzales*, 546 U.S. at 292 (Scalia, J., dissenting).

D. The Canon Of Constitutional Avoidance Should Not Apply To Speculative And Hypothetical Constitutional Concerns

As explained above, there is "no serious doubt about the constitutionality of [§ 804(a)] as applied to the facts of this case." *Salinas*, 522 U.S. at 60. Petitioners' constitutional-avoidance argument thus relies on speculative constitutional concerns in *other* cases. As this Court has ruled, however, petitioners' "need to rely on *hypotheticals*" demonstrates that adhering to the language of the statute and the agency's authoritative interpretation "will not 'raise a multitude of constitutional problems.'" *Rita v. United States*, 551 U.S. 338, 353 (2007). Just as laws

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[22] Beyond that, "[s]o-called 'urban renewal' programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes." *Kelo*, 545 U.S. at 521 (2005) (Thomas, J., dissenting).

should not be invalidated by "'reference to hypothetical cases,'" their plain meaning also should not be disregarded based on constitutional concerns that may (or may not) arise in future cases. *United States v. Booker*, 543 U.S. 220, 280 (2005) (Stevens, J., dissenting in part) (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)).

To the extent any constitutional concerns do arise, they can and should be adjudicated on a case-by-case basis. Each FHA case will raise different facts, and courts should be allowed to decide any cases raising legitimate constitutional doubts on the basis of a full record. *Cf. Sabri v. United States*, 541 U.S. 600, 609-10 (2004) (noting that facial challenges are "discouraged" because they "invite judgments on fact-poor records"). Because this case raises no such concerns, the Court should adhere to its longstanding standards of statutory interpretation and agency deference to conclude that disparate-impact claims are cognizable under the FHA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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October 21, 2013