No. 13-1371

In The
Supreme Court of the United States

TEXAS DEPARTMENT OF HOUSING
AND COMMUNITY AFFAIRS, et al.,

Petitioners,

v.

THE INCLUSIVE COMMUNITIES PROJECT, INC.,

Respondent.

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

BRIEF FOR CITIES OF SAN FRANCISCO; ATLANTA; BALTIMORE; BOSTON; BIRMINGHAM, ALABAMA; CARRBORO; CHAPEL HILL; COLUMBIA, SOUTH CAROLINA; DUBUQUE; DURHAM; FLINT; LOS ANGELES; MEMPHIS; MIAMI; MIAMI GARDENS; NEW HAVEN; NEW YORK; OAKLAND; PHILADELPHIA; SEATTLE; AND TOLEDO AND KING COUNTY, WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT THE INCLUSIVE COMMUNITIES PROJECT, INC.

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STATEMENT OF INTEREST[1]

Amici local governments have strong and direct interest in and long experience with the legal issue before this Court. We submit this brief both to highlight the significant role the Fair Housing Act's disparate impact framework plays in securing equal opportunity and to respond to arguments that considerations of "federalism" require jettisoning the longstanding interpretation of the Fair Housing Act, *i.e.*, that compliance with the disparate impact standard significantly burdens or distorts local decisionmaking relating to housing and community development.

While many municipal governments – along with States, the federal government, and private actors in the housing and lending industries – played a regrettable role in creating the discriminatory living patterns that supplied the impetus for fair housing legislation, see, *e.g.*, *Banks v. Hous. Auth. of City & Cnty. of San Francisco*, 260 P.2d 668, 678 (Cal. Ct. App. 1953), local governments later enacted the Nation's first open housing laws, see, *e.g.*, *Hunter v. Erickson*, 393 U.S. 385 (1969), and the federal FHA has, from its enactment, "recognize[d] the valuable

[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and its counsel made a monetary contribution to its preparation or submission. All parties' letters consenting to the submission of *amicus* briefs have been filed with the Clerk's Office.

role state and local agencies play" in effectuating its mandate. H.R. Rep. No. 100-711, at 35 (1988). See, *e.g.*, 42 U.S.C. §§ 3610(f)(1), 3608(e)(3). These measures reflect recognition that *all* citizens, and local governments themselves, suffer harm when discrimination goes unaddressed.

That insight was dramatically confirmed in the recent economic crisis, when predatory lending directed at minority homeowners and neighborhoods and the ensuing wave of foreclosures caused not only great individual harm but serious damage to many municipalities' fiscal and civic health. (Among the local responses were important federal Fair Housing Act suits brought by the cities of Baltimore and Memphis on their own behalf, for redress for these distinct harms. See *Mayor & City Council of Baltimore v. Wells Fargo Bank, N.A.*, 2011 WL 1557759 (D. Md.); *City of Memphis v. Wells Fargo Bank, N.A.*, 2011 WL 1706756 (W.D. Tenn.).)

Experience also makes *amici* especially well-positioned to respond to abstract and high-pitched assertions by petitioners and their *amici* that continued recognition of the longstanding disparate impact standard threatens local self-government or drives local authorities to "make race-based decisions to avoid disparate-impact liability." TDHCA Br. 44. Contrary to these claims, the disparate impact framework, by encouraging articulation of justifications and consideration of alternative, less discriminatory courses of action, has both promoted more careful, inclusive decisionmaking and provided an important

but modest check against actions that aggravate or needlessly entrench existing discriminatory patterns. Moreover, the framework spares local governments and their citizens from intrusive, divisive disputes over the motivations of government decisionmakers or project opponents.

INTRODUCTION AND SUMMARY OF ARGUMENT

For decades, Sections 804 and 805 of the Fair Housing Act have been interpreted as forbidding both housing practices that purposefully discriminate on grounds of race, religion, sex, disability, family status, and national origin and those which unjustifiably have the effect of making housing unavailable on those bases. That construction has been adopted by eleven courts of appeals; it has been the consistent understanding of the agency charged with administering and enforcing the Act, across nine presidential administrations; and it has recently been codified in carefully-reasoned notice-and-comment regulations promulgated under congressionally-conferred rule-making authority.

As we explain briefly below (and respondent and other *amici* do in greater detail), that interpretation is supported by the text of the statute, and it furthers, in distinct and necessary ways, the vitally important equal opportunity objectives the Fair Housing Act was enacted (and later amended) to

achieve. The protections the disparate impact standard affords – and the open housing goals it helps realize – benefit individuals of *all* backgrounds and the communities where they live.

I. Both logic and the long experience of *amici* and other local governments refute petitioners' and their *amici*'s arguments that upholding the long-settled understanding would be "highly disruptive" or bring important projects to a halt – or that the prospect of disparate impact liability or litigation would skew local decisionmaking. These ominous assertions about what *would* happen were the Fifth Circuit's decision to be affirmed reflect a serious misunderstanding of how the framework is meant to operate and *has* operated in the decades it has been part of the legal fabric. By any objective measure, the threat of disparate impact liability has proven exceedingly modest, and the conduct the settled interpretation of the FHA encourages – *consideration* of alternative and mitigating measures, in the small subset of cases where serious segregative effects or severe disproportionate impacts are established – is essentially co-extensive with obligations imposed under state law, ones local governments and other housing providers regularly accept as participants in federally assisted programs and that they pursue independently as a matter of sound policy.

Petitioners' and their *amici*'s depiction of the FHA disparate impact rule as an exotic, significantly burdensome, or even constitutionally doubtful federal incursion on "local policymaking" likewise ignores

basic realities of the government processes the standard is claimed to drive. This case involves the allocation of *federal* income tax credits – and *petitioners'* principal defense is that the challenged effects should be attributed to *federal* requirements. But the local government practices that have more commonly been subject to challenge under the FHA, involving restrictive zoning rules or the location of assisted housing, are necessarily influenced by a vast complex of competing and conflicting fiscal, political, environmental, legal, and policy considerations. These types of decisions – as the multitude of federal, state, and local impact assessment procedures attests – both allow for and benefit from careful and objective evaluation of effects and alternatives.

II. Our experience establishes that the disparate impact framework *furthers* important interests of municipalities and their residents. The same reasons why the standard is necessary and effective under other civil rights statutes apply with full, if not greater, force to housing discrimination. Indeed, effective enforcement not only provides important protection to individuals, it protects municipalities themselves and their residents, of all backgrounds, from serious harm. Moreover, while the seeming "benefits" to local governments of eliminating the disparate impact framework are largely chimerical (it is the rare disparate impact claim that could not instead be pleaded as a "disparate treatment" violation), doing so would carry real costs. The disparate treatment standard, by focusing disputes on motives,

makes both decisionmaking and litigation more polarized – and more intrusive on local self-government – than does the impact framework's essentially objective inquiry.

III. Nor does the longstanding, nationally-accepted interpretation of the FHA raise genuine constitutional concerns, let alone the "grave" ones that could authorize a court to dispense with a lawful agency interpretation. The impact standard does not lead – has not led – to "racial balancing." What the settled construction does encourage – advance consideration of a project's demographic effects (along with many others) and efforts to avoid actions that needlessly effect and reinforce exclusive discrimination, when feasible equally effective alternatives are at hand – are unexceptionably lawful and entirely appropriate.

ARGUMENT

I. Long Experience Under the Fair Housing Act's Disparate Impact Framework Contradicts Petitioners' and Their *Amici*'s Predictions

Petitioners invite the Court to invalidate the longstanding construction based on its predicted effects. Petitioners' warnings about the dangers the disparate impact framework poses overlook important features of its design and are strongly contradicted by long experience with the FHA's

operation. Petitioners' account likewise slights the important ways that the longstanding interpretation benefits local governments and the residents, of all backgrounds, that they serve.

A. The Longstanding Interpretation Is Correct and Textually Supported

Petitioners claim to discern in the text of the statute an intent to foreclose disparate impact claims. But the centerpiece of that claim – the supposedly stark difference between prohibition on an employment practice that "otherwise adversely affects [a person's] status as an employee, because of such individual's race," 42 U.S.C. § 2000e-2(a)(2) (Title VII) and a practice that "otherwise make unavailable * * * to any person because of race * * *, " *id.* § 3604(a) – is unfounded. Indeed, its significant has eluded not only the courts of appeals and Members of Congress, who repeatedly introduced unsuccessful legislation seeking to extinguish disparate impact liability under the FHA, but also this Court, which in *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977), remanded a Section 804(a) challenge to a suburban zoning restriction after finding no discriminatory purpose. See *id* at 271. Indeed, the ostensibly plain textual meaning was lost on *petitioners*, who argued below that HUD's disparate impact regulation merited *Chevron* deference, *because* "Title VII and the FHA are similarly worded in their prohibition of discrimination." TDHCA C.A. Br. at 29-30.

Ordinary speakers of English would indeed understand the phrase "make unavailable" in precisely the way it has long been interpreted: Constructing an apartment building without ramps makes the units inside unavailable to wheelchair users, because of their disability (and irrespective of the builder's animus or lack thereof), see, *e.g.*, *United States v. Shanrie Co.*, 669 F. Supp. 2d 932, 937 (S.D. Ill. 2009) (applying 42 U.S.C. § 3604(f)(3)(C)); selling homes subject to a prohibition against exterior attachments would "make [them] unavailable" to observant Jews, whose religion commands mounting a mezuzah on their doorposts, cf. *Bloch v. Frischholz*, 587 F.3d 771, 777 (7th Cir. 2009); and zoning restrictions can make housing in certain areas (or entire jurisdictions) unavailable to people with disabilities who need to reside in supportive housing, see *City of Edmonds v. Oxford House, Inc.,* 514 U.S. 725 (1995).

When the original Act was introduced in 1968, its proponents emphasized that the location of federally-assisted housing could make it "*practical*[*ly*] * * * unavailable to nonwhites," even when it is "*theoretical*[*ly*] availab[le] to all citizens," Resp. Br. 61a (statement of U.S. Attorney General) (emphasis added). And as Congress understood when amending the Act in 1988, a limit on the number of inhabitants in a dwelling may make such housing unavailable to larger families (who can afford the rent), whether or not the restriction was adopted for that purpose. Indeed, the provision Congress enacted, permitting such governmental restrictions (if "reasonable," 42

U.S.C. § 3607(b)(1)), and others providing similar protection for policies excluding convicted drug offenders, *id.* § 3607(b)(4), and for appraisals that consider factors "*other than*" the categories forbidden under the Act, *id.* § 3605(c) (emphasis added), are the statutory text that speaks by far most "directly" to the question of disparate impact. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842 (1984).[2]

B. Petitioners' Aspersions Ignore How the FHA Disparate Impact Framework Actually Operates

Petitioners' and their *amici*'s arguments for jettisoning the longstanding interpretation rely heavily on assertions about the dire consequences of the Court's affirming the Fifth Circuit's decision and permitting claims to proceed (as they have for decades) based on unnecessary and unjustifiable discriminatory effects or entrenchment of residential segregation.[3]

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[2] Petitioners' principal argument why the plain textual import of these provisions may be ignored – based on what "[C]ongressional staff t[old]" law review authors about how legislation is sometimes drafted, TDHCA Br. 41 – travels a very long way from petitioners' professed commitment to the "'finely wrought' procedures for federal lawmaking established in Article I [of the Constitution]." Br. 37 (quoting *INS v. Chadha,* 462 U.S. 919, 951 (1983)).

[3] One reading the briefs of petitioners and their *amici* would have the barest inkling that HUD's regulation addresses practices

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They warn that affordable housing providers would face "staggering" liability risks, Nat'l Leased Hous. Ass'n Br. 21, and that construction and redevelopment of affordable housing projects in major cities would grind to a halt, Houston Hous. Auth. Br. 7. Such a regime would be "highly disruptive," they further insist, Washington Legal Found. Br. 29, "radically" altering "the balance of state and national authority," by "wrest[ing] control over local housing policy from the State of Texas," Project for Fair Representation (PFR) Br. 22, yielding decisions where "statistical demographic balance [would] trump all other societal interests," Frazier Revitalization, Inc. (FRI) Resp. Br. 7.

1. The first and sufficient answer to these forecasts is that a decision by this Court *upholding* the long-governing, widely-settled interpretation of the statute could not "disrupt," let alone "radically alter," public or private decisionmaking in this area.

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that "increase[ ], reinforce[ ], or perpetuate[ ] segregated housing patterns," 24 C.F.R. § 100.500(a), as well as those which impose disproportionate burdens, and no inkling that this case arose in a jurisdiction with judicial findings of decades-long purposeful racial segregation, see *Walker v. City of Mesquite*, 169 F.3d 973, 976 (5th Cir. 1999). A state law authorizing Texas cities to enact residential segregation ordinances remained in effect until 1969, and Dallas's city ordinance "provid[ing] for the use of separate blocks for residences, places of abode . . . by members of white and colored races" was enforced into the 1940s, notwithstanding this Court's decision decades earlier in *Buchanan v. Warley,* 245 U.S. 60 (1917). See *Walker v. HUD*, 734 F. Supp. 1289, 1294 n.18 (N.D. Tex. 1989).

Indeed, what *has* happened – and has not happened – since disparate impact liability under the FHA was first recognized decades ago bears no resemblance to what petitioners and their *amici* tell the Court *would* happen.

As this Court's recent decisions affirm, when a rule "has been around in the lower courts for 40 years * * * and has not given rise to the dire consequences predicted [for it]," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012), such "parade[s] of horribles" must be evaluated in light of evidence that "none of these things has happened," *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 614 (2007).

Warnings of litigation floods and "staggering" liability notwithstanding, "[c]ourts have recognized claims of this sort for over 30 years, * * * and yet there is no indication that the system is overwhelmed by these types of suits." *Lafler v. Cooper*, 132 S. Ct. 1376, 1389-90 (2012). By one careful count, there have been just 92 appellate decisions applying the FHA disparate impact standard in the 45 years since the statute's enactment (including cases against private defendants, as well as governments), and only a small subset have been successful. See Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims under the Fair Housing Act*, 63 Am. U. L. Rev. 357, 393 (2013) (finding 18 appellate decisions favorable to plaintiffs since 1968). At the trial court level, there were 667 housing discrimination complaints *of any kind* filed in federal courts in

2013, compared, *e.g.,* to 15,266 cases alleging employment discrimination. Admin. Office of the U.S. Courts, *Judicial Business of the U.S. Courts* (2014), table C-2A at 2.

Nor does experience confirm the premise that lawsuits under the disparate impact standard are especially costly or time-consuming to defend, relative to disparate treatment suits, or are less amenable to rapid disposition. In circuits where the disparate impact framework is settled law (that is to say all but the D.C. Circuit), large numbers of such claims are dismissed prior to trial, commonly based on courts' enforcement of the rigorous requirements for a prima facie case. See, *e.g.*, *White Oak Property Devt., LLC v. Washington Township*, 606 F.3d 842, 851 (6th Cir. 2010); *Reinhart v. Lincoln County*, 482 F.3d 1225, 1226, 1230 (10th Cir. 2007); Seicshnaydre, 63 Am. L. Rev. Appendix A (collecting cases). Compare, *e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (holding summary judgment inappropriate on intentional discrimination claim, explaining that "[t]he task of assessing a jurisdiction's motivation, however, is not a simple matter; on the contrary, it is an inherently complex endeavor, one requiring the trial court to perform a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'") (quoting *Arlington Heights*, 429 U.S. at 266).

Even where a plaintiff successfully makes out a prima facie case, all that the disparate impact framework requires is *inquiry* into the defendants' justification for the challenged practice and the

availability of other means of pursuing those objectives that would not result in exclusion or perpetuate segregation. The burden on the defendant is hardly onerous, see, *e.g.*, *Green v. Sunpointe Associates, Ltd.,* C96-1542C, 1997 WL 1526484 (W.D. Wash. May 12, 1997) at *7 (holding that desire to save administrative costs by not accepting Section 8 housing vouchers "could well be * * * sufficient" under burden-shifting framework); and as the decision below held, plaintiffs may then prevail only by establishing equally effective ways of achieving the asserted interests without segregative or discriminatory effects. (Their ability to carry that burden will almost always vary inversely with how carefully the challenged decision was considered.)

2. The dire contrary predictions rest on basic misunderstandings of the design and operation of the disparate impact framework. The private defendants argue against imposing liability "based solely on the disparate impact of a practice upon different populations." FRI Resp. Br. 7. But it has *never* been the law under the FHA that "every action which produces discriminatory effects is illegal." *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); see *id.* (such a regime would be "untenable").

Rather, the framework provides for liability for practices for which no legitimate justification is advanced and those whose exclusionary effects are unjustifiable, given the presence of alternatives (identified by plaintiffs and proven by them to be feasible) that would accomplish the same objective.

Thus, it is not the case that the disparate impact framework requires lenders to "relax[ ] the[ir] borrowing standards" so as to reduce disparities genuinely grounded in individual creditworthiness. See TDHCA Br. 15. The framework only encourages exploration of practices that advance such indisputably legitimate interests in ways that do not needlessly exclude creditworthy women or minority borrowers – just as requiring employers to focus on individual applicants' physical strength, rather than rigid height or weight cut-offs, achieves their valid workforce objectives without unnecessarily screening out capable female candidates. See *Dothard v. Rawlinson*, 433 U.S. 321 (1977). The very *point* of the framework adopted by HUD and the Fifth Circuit is that "statistical demographic balance" will *never* be required to "trump * * * other societal interests," FRI Resp. Br. 7.

TDHCA, remarkably, cites this feature as a reason for *rejecting* HUD's regulation, describing the focus on the legitimate interests supporting a practice as an "atextual" "carve out," and one that makes impermissible "discrimination" "legal." TDHCA Br. 16. This is jarring, first because in the court of appeals, petitioners specifically and affirmatively endorsed the allocation of burdens in HUD's regulation – and obtained a favorable disposition on that basis. See C.A. Br. 29 ("HUD's regulations are a reasonable interpretation of the burden of proof and should be applied in this case"); cf. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (discussing judicial estoppel).

But it is especially surprising, because what petitioners decry as an agency "improvisation[ ]," recently "created by HUD," Br. 16, is in fact a central, foundational feature of the disparate impact framework. What makes certain housing or employment practices the "functional[ ] equivalent" of purposeful discrimination, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988), is that they exclude or perpetuate segregation needlessly, for no legitimate reason at all. In such situations, it becomes difficult to maintain that action was taken "merely 'in spite of,' [the] adverse effects upon an identifiable group." TDHCA Br. 7 (quoting *Pers. Adm'r of Mass. v. Feeney,* 442 U.S. 256, 279 (1979)). See *In re Alabama Employment Discrimination Litigation*, 198 F.3d 1305, 1322 (11th Cir. 1999) (If "after a prima facie demonstration of discriminatory impact, the employer cannot demonstrate that the challenged practice is a job related business necessity, what explanation can there be for the employer's use of the discriminatory practice?").[4]

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[4] Indeed, this structure is not very different from how the disparate *treatment* framework typically works: on that mode of proof, evidence that a female employee was treated worse than a similarly qualified male co-worker establishes a prima facie case, but liability depends on inquiry into the employer's proffered reason for its decision and whether that was pretextual. See *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-04, (1973). Cf. *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 687-88 (1978) (explaining that Section 1 of Sherman Act does not prohibit "'every' contract that restrains trade").

3. Petitioners' and their *amici*'s submissions overlook a further reason why the things predicted have not occurred – and would not occur were the Court to let stand the longstanding, uniformly accepted interpretation of Sections 804 and 805. In many jurisdictions, obligations to identify potential adverse impacts on minorities, families, or people with disabilities – and to consider alternatives – are in place from sources other than the FHA. Numerous States and localities have incorporated disparate impact analysis into their own fair housing laws. See *Sisemore v. Master Fin., Inc.*, 151 Cal. App. 4th 1386, 1419 (Ct. App. 2007) (holding that state Fair Employment and Housing Act "plainly authorizes a claim for housing discrimination irrespective of intent, where the alleged act or omission has the effect of discriminating"); *Keith v. Volpe*, 858 F.2d 467, 485 (9th Cir. 1988) (same under Cal. Gov't Code § 65008(b)); *Citizens In Action v. Twp. of Mt. Holly*, 2007 WL 1930457 (N.J. Super. Ct. App. Div. July 5, 2007) (recognizing that under state law "a plaintiff may prevail on a racial discrimination housing claim on evidence of discriminatory impact alone," but holding impact claims unripe); N.Y.C. Hum. Rights Law § 8-107(17) (providing cause of action for "an unlawful discriminatory practice based upon disparate impact"); *Ohio Civil Rights Comm'n v. Wells Fargo Bank, N.A.*, 2012 WL 1288489 (N.D. Ohio Apr. 16, 2012) ("Ohio courts have established that [disparate impact] is applicable in the context of housing discrimination"); *Sunderland Family Treatment Servs. v. City of Pasco*, 26 P.3d 955, 961 (Ct. App.

2001) (holding that Washington Housing Policy Act "has no intent requirement").

And, as is explained *infra*, local officials charged with approving and siting development projects, as a matter of policy and sound practice, take into account demographic effects (and seek to avoid unjustifiable, disparate impacts). Indeed, as respondents highlight, the Texas Legislature has expressly directed petitioners to compile and report statistics concerning "the ethnic and racial composition of individuals and families applying for and receiving assistance from each housing-related program [they] operate[ ]." Tex. Gov. Code § 2306.072(c)(2)(B); see *id.* § 2306.072(c)(5), (c)(6) (similar).

Moreover, similar requirements are imposed under other provisions of federal law. Local government agencies and other recipients of federal housing and community development funds commit to "affirmatively further fair housing," see 42 U.S.C. §§ 3608(d), 5304(b)(2), which entails their identifying and addressing "impediments" to housing opportunity, including "[p]olicies, practices, or procedures that appear neutral on their face," which "have the effect of" "restrict[ing] housing choices or the availability of housing choices," based on "race, color, religion, sex, disability, familial status, or national origin." See *U.S. ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cnty.*, 668 F. Supp. 2d 548, 554, 561-62 (S.D.N.Y. 2009) (quoting HUD materials and imposing False Claims Act liability for recipient's

false certification of compliance), settlement agreement enforced, 712 F.3d 761 (2d Cir. 2013).

C. Best Practices in Housing Development Involve Consideration of a Wide Range of Alternatives, Including Unintended Exclusionary and Segregative Effects

While petitioners summon images of "racial balancing" to fend off FHA litigation, Br. 44, attorneys, planners, and housing officials in *amici* and other municipalities can attest that the risk of liability – or litigation – under Sections 804(a) and 805 for unjustifiable disparate impact ranks well down the very long list of considerations that influence housing and development decisionmaking.

1. Government decisions about siting affordable housing developments are in reality influenced by a wide array of complex, inevitably cross-cutting fiscal, political, legal, environmental, and policy considerations. State and local governments deciding whether, how, and where to provide assisted housing must determine which populations the project should serve; whether to construct a new building or rehabilitate an existing one; and whether to build at higher or lower density, for instance. Such choices invariably implicate differences as to governing philosophy, municipal priorities, and views of wise housing policy (and are influenced, as well, by the nature and availability of funding sources and the

array of political forces supportive of or opposed to a particular choice).

Such planning decisions also and necessarily take into account existing neighborhood characteristics and land uses, local and long-term economic and demographic trends, land acquisition and construction costs, site characteristics – including natural disaster risks and environmental remediation needs; traffic volume and safety; access to public transportation; the adequacy of utilities and public services; and proximity of parks, schools, and health care facilities.

These lengthy but incomplete lists highlight a further important reality: that decisionmaking relating to large-scale projects (and many smaller ones) almost always does – and as a matter of sound practice, *should* – entail rigorous evaluation of these many considerations both for the action contemplated and for available alternatives.

2. Such assessments are performed pursuant to state and local planning and environmental review laws, which articulate objectives and priorities, see, *e.g.*, Cal. Gov. Code § 65300 (requiring city and county general plans); *id.* § 65302 (specifying mandatory subjects), and provide for, as California's Environmental Quality Act does, a comprehensive, "systematic" evaluation of a broad array of project impacts, Cal. Pub. Res. Code § 21002, often directing that public agencies reject or modify proposed projects "if there are feasible alternatives or feasible mitigation

measures available." *Id.* See also CEQA Guideline 15093 (detailing requirements for written "statement of overriding reasons").

HUD regulations likewise provide (for all but the smallest federally-supported housing and development projects) that local governments perform environmental assessments, which must, among other things, "determine existing conditions and describe the character, features and resources of the project area and its surroundings"; identify and analyze "all potential environmental impacts, whether beneficial or adverse"; and "[e]xamine and recommend feasible ways in which the project * * * could be modified [and] alternatives to the project." 24 C.F.R. § 58.40. See *id.* § 58.42 (requiring full Environmental Impact Statements for projects with potentially significant effects); cf. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 408 (1970) (interpreting statutory provision prohibiting highway construction in local public park without federal agency determination of "no feasible and prudent alternative routes or * * * design changes * * * to reduce the harm").

The character of these federal, state, and local processes reinforces that the governmental action Sections 804 and 805 encourages – careful, serious examination of effects and justifications for proposed actions, in light of the availability of feasible alternatives and mitigations – is particularly appropriate and nonintrusive. The *amici* local governments of course may disagree with HUD's (or a plaintiff's) application or interpretation of the disparate impact

standard in particular cases – sometimes in significant ways. But the *amici* do not view the existence of the disparate impact standard itself, if correctly applied, as an obstacle to effective housing and development decisionmaking.

II. There Would Be Significant Costs – Including Federalism Costs – To Jettisoning Disparate Impact as a Tool for Enforcing the FHA

A. The Disparate Impact Standard Performs a Distinct and Important Role in Combatting Discrimination, One That Benefits Municipalities and All Their Residents

Petitioners' and their *amici*'s briefs wholly ignore the principal reasons, many canvassed in opinions of this Court, why Congress, HUD, and state and local governments have adopted the disparate impact framework as part of their fair housing laws.

1. First, the standard can provide appropriate redress in cases where purposeful disparate treatment is present, but difficult to detect and prove, getting at "[d]iscrimination [that] could actually exist under the guise of compliance with [Title VIII]." See *Griggs v. Duke Power Co.*, 401 U.S. 424, 435 (1971) (citation omitted). Cf. *Alabama Employment Litig.*, 198 F.3d at 1322 ("what [other] explanation can there be . . . ?" for adhering to a practice shown to have large exclusionary effects once equally effective,

nondiscriminatory alternatives have been established).

Moreover, discriminatory effects standards push against actions that perpetuate and aggravate the present effects of earlier purposeful discrimination, reaching practices that "operate to 'freeze' the status quo of prior discriminat[ion]." *Griggs*, 401 U.S. at 430 (1971); see also *McDonnell Douglas*, 411 U.S. at 806 (1973) (impact rules ensure that earlier discrimination does not "work a cumulative and invidious burden on [minority] citizens for the remainder of their lives"). And the framework, by promoting objective analysis of alternatives, can prevent discrimination that would otherwise result from unexamined assumptions or unconscious prejudices. See *Watson,* 487 U.S. at 990-91 ("[E]ven if one assumed that [discrimination through subjective employment criteria] can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain").

2. The need for such measures continues. Rigorous studies confirm that present-day purposeful housing discrimination is remarkably pervasive, see, *e.g.*, Natl. Comm'n on Fair Housing and Equal Opportunity, *The Future of Fair Housing* 13 (2008) (finding more than four million instances of housing discrimination annually); and much of it involves practices, such as steering homebuyers to "minority" neighborhoods or failing to offer prime mortgage terms to those who qualify, that are not easy to identify and prosecute. And in certain cases, it will be practically

impossible to identify a "similarly situated," but differently treated, comparator. See *Samaad v. City of Dallas*, 940 F.2d 925, 941 (5th Cir. 1991) (dismissing Equal Protection suit for failure "to allege the existence of a similarly situated non-minority neighborhood").

Moreover, as the framers of the FHA understood, market forces cannot always be relied upon to correct intentionally discriminatory practices. See, *e.g.*, 42 U.S.C. § 3604(e) (anti-blockbusting provision, making unlawful "[f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race"); accord *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring in part). Compare American Ins. Ass'n Br. 15 (arguing that "market-driven incentive[s]" "ensure" that insurance rates are nondiscriminatory) (quotation marks omitted).

Especially important, present residential demographic patterns are, to a great degree, though by no means completely, the result of purposefully discriminatory acts, perpetrated on a vast scale by the federal government, states, localities, and private actors. See Fair Housing Act of 1967, Hearings Before Subcomm. Housing & Urban Affairs, S. Comm. on Banking and Currency, 90th Cong. (1967) at 8 (Department of Justice's acknowledgment of the "peculiarly enduring character" of "evil" done by Federal Housing Administration's discriminatory lending

rules: "Thousands of racially segregated neighborhoods were built, millions of people re-assorted on the basis of race, color, or class, the differences built in, in neighborhoods from coast to coast"). Cf. *Smith v. City of Jackson,* 544 U.S. 228, 258-59 (2005) (O'Connor, J., concurring in judgment) (objecting to decision upholding impact liability under the ADEA, noting that "no one would argue that older workers have suffered disadvantages as a result of entrenched historical patterns of discrimination").

4. Present-day actions like those which are the subject of this case will have similarly enduring effects; and, as scholars and courts have found, policies affecting where a person resides – and where housing has been made unavailable to him – have far-reaching effects on educational and employment opportunity, health and safety, and his ability to accumulate wealth. See 43 Pa. Stat. § 952 (legislative finding that discrimination in housing "result[s] in racial segregation in public schools and other community facilities"); see generally Xavier de Souza Briggs, ed., THE GEOGRAPHY OF OPPORTUNITY 7, 8 (2005); Margery Austin Turner and Lynette A. Rawlings, *Promoting Neighborhood Diversity* (Urban Inst. 2009) ("Decades of scholarly research have documented [how] * * * the persistence of segregation sustains racial and ethnic inequality in the United States and undermines prospects for long-term prosperity").

As the Seventh Circuit reasoned in its decision finding statutory liability on remand in *Arlington Heights*, the impact standard properly captures that Congress did not enact the FHA remedy as

punishment for actors with retrograde attitudes, but rather to open up housing opportunities where exclusion long prevailed. See 558 F.2d at 1292-93 ("If the effect of a zoning scheme is to perpetuate segregated housing, neither common sense nor the rationale of the Fair Housing Act dictates that the preclusion of minorities in advance should be favored over the preclusion of minorities in reaction to a plan which would create integration.").

5. Perhaps most important, the benefits secured by the Fair Housing Act generally – and the long-standing interpretation of Sections 804 and 805 – are not limited to members of groups historically subject to disadvantage and exclusion. As the framers of the Act believed, Americans of every background benefit from open housing patterns. See, *e.g.*, *Trafficante v. Met. Life Ins.*, 409 U.S. 205, 208 (1972) (upholding FHA standing based on white residents' allegations they "had lost the social benefits of living in an integrated community [and] had missed business and professional advantages").

Finally, as many state and local governments have recognized, these harms are not solely individual: "[D]iscrimination threatens not only the rights and proper privileges of [a State's] inhabitants * * * but menaces the institutions and foundation of a free democratic State." N.J. Stat. 10:5-3. In concrete terms, "[h]igh levels of segregation [have been found to] * * * constrain the vitality and economic performance of metropolitan regions," Turner and Rawlings, *supra*, at 3 (citing sources). Indeed, experience

in the recent economic crisis provided a potent, unsettling reminder of the distinct municipal injuries that unaddressed housing discrimination can wreak. The wave of foreclosures that resulted from discriminatory lending practices directed at residents of minority communities in many municipalities injured not only the homeowners targeted and their immediate neighborhoods, but entire cities, their governments, residents, and taxpayers – who incurred a wide array of fiscal, economic, and civic harms, comparable in scope to those wrought by massive natural disasters. See *Mayor & City Council of Baltimore v. Wells Fargo Bank, N.A.*, 2011 WL 1557759 (D. Md. Apr. 22, 2011) (allowing Fair Housing Act suit brought for municipal injuries to proceed).

B. The Impact Standard Avoids Intrusive Inquiries into Government Motive and Needless Polarization

"[T]he line between discriminatory purpose and discriminatory impact is not nearly as bright" as some arguments against the latter presume. *Washington v. Davis,* 426 U.S. 229, 254 (1976) (Stevens, J., concurring). Although it is a truism that "impact alone" does not establish intentional discrimination – nor disparate impact *liability*, for that matter, see *Langlois v. Abington Housing Auth.*, 207 F.3d 43, 49-50 (1st Cir. 2000) – evidence of disproportionate burden will typically "provide [the] * * * starting point" of the disparate treatment analysis, *Arlington Heights,* 429 U.S. at 266. And while there are significant

differences between "the factual issues that typically dominate in disparate impact cases," *Watson*, 487 U.S. at 987, both frameworks train on practices that offend the law's core equal opportunity mandate.

The central difference between the two modes of proof is that the impact standard directs the parties' and courts' attention toward objective aspects of a disputed action and its alternatives, while the disparate treatment analysis focuses on the sincerity of policymakers' (and, in certain cases, citizen advocates' or opponents') explanations of their motives for pursuing a chosen course. See TDHCA C.A. Br. 30 ("The burden-shifting test * * * helps the parties and the courts by providing objective factors with set burdens of proof").

Inquiries into subjective motivations and decisionmakers' sincerity raise significant conceptual and adjudicative difficulties. See *Edwards v. Aguillard*, 482 U.S. 578, 638 (1987) (Scalia, J., dissenting) (describing motive inquiry as "almost always an impossible task"). Accord *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 453 (W.D. Tex. 2001) ("It [is] * * * an exceedingly difficult and perilous enterprise to establish the intent of a lone legislator. And when the legislative body consists of numerous legislators, each with his or her own myriad and conflicting motivations, the plaintiff's burden is multiplied, if not impossible"). For example, the court in *United States v. City of Birmingham*, 538 F. Supp. 819 (E.D. Mich. 1982),

undertook to determine whether intentional discrimination had been established by proof that "[r]acial concerns were a motivating factor behind the opposition of at least two of the four members of the majority faction" that had defeated a housing development, *id.* at 829, and it ultimately imposed liability based on a finding that "[r]egardless of their personal views, all four members felt bound by the results of [a referendum and] were aware that a significant number of [referendum voters had been] * * * motivated in part by a desire to exclude black people from the City." *Id.*, *aff'd as modified*, 727 F.2d 560 (6th Cir. 1984).

As *Arlington Heights* itself recognized, "[j]udicial inquiries into legislative or executive motivation represent a substantial intrusion," 429 U.S. at 268, and the intent standard allows those alleging discrimination to seek discovery and testimony from government officials as to their purposes. *Id.* See, *e.g.*, *Scott-Harris v. City of Fall River*, 134 F.3d 427, 439 (1st Cir. 1997) (rejecting municipal liability because "the motivations of [most] council members * * * did not receive individualized scrutiny" and highlighting, as the basis for that ruling, plaintiff's failure to "depose[ ] any of the seven [council members] [ ]or call[ ] them as witnesses at trial"), *rev'd on other grounds*, 523 U.S. 44 (1998). See also *City of Cuyahoga Falls v. Buckeye Community Hope Found.*, 538 U.S. 188, 196 (2003) (affirming that "statements made by private individuals in the course of a citizen-driven petition drive [are] sometimes relevant to

equal protection analysis") (citing *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982)).

Finally, accusations of bigotry and litigation over motives are invariably divisive and polarizing. Unlike a disparate impact case, where those challenging government action can proceed, without impugning the good faith and sincerity of individual officials, to explore the gravity of the impact and the feasibility of identified alternatives, "[i]t is a most serious charge to say a State [or local government official] has engaged in a pattern or practice designed to deny * * * citizens the equal protection of the laws." *Bd. of Trustees, Univ. of Alabama v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring). See Dennis J. Hutchinson, *Unanimity and Desegregation: Decision-making in the Supreme Court*, *1948-1958*, 68 Geo. L. J. 1, 42 (1979) (quoting Chief Justice Warren's memo to the Conference that opinions in *Brown v. Board of Education* "be short, readable by the lay public, non-rhetorical, unemotional, and, above all, non-accusatory").

Indeed, this focus on objective facts relating to impacts and available alternatives promotes more constructive and substantive decisionmaking in the vastly larger number of situations that never reach a courthouse. See, *e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (noting that when an employer solicits input "during the [civil service] test-design stage * * * to ensure the test is fair, that process can provide a common ground for open discussions"). Those affected by proposed government actions can seek to work

with decisionmakers without weakening claims of invidious intent; officials have reason to consider and respond to alternative submissions on their merits, including by modifying plans based on persuasive objections. And even when plans proceed unmodified, the public and affected citizens receive some assurance that their interests and concerns received consideration. Cf. *Weinberger v. Catholic Action*, 454 U.S. 139, 143 (1981) (through NEPA's requirement of EIS publication, "the public is made aware that the agency has taken environmental considerations into account").

III. The Fifth Circuit's Decision Raises No Serious Constitutional Questions

Like the other extra-statutory grounds petitioners and their *amici* proffer for dispensing with the authoritative administrative construction, their suggestions of "constitutional" difficulties rest on assertions that are highly abstract and empirically and legally unfounded.

1. The Fifth Circuit decision did not "radically readjust[ ] the balance of state and national authority," or "wrest control over local housing policy from the State of Texas." PFR Br. 22. The decision, affirming prior precedent, left the "balance" precisely where it has been for decades, see *supra*, and did so in a case involving *federal* income tax credits and a defense predicated on compliance with *federal* law. (Indeed, the decision reversed judgment in respondents'

favor and adopted a proof regime that heightened the burden on those challenging local government action). Cf. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 (2013) (rejecting a "faux-federalism" argument).

More generally, such sweeping assertions ignore the extent and magnitude of federal law's presence and influence in this field. In reality, local governments, by dint of their participation in federal housing and community development programs that have long provided both the impetus and funding for such projects, must take account of many federal policies and requirements including (as noted above) civil rights laws, environmental assessment requirements, ones relating to historic preservation, removal of design barriers, lead paint abatement, energy efficiency, and flood control, see 24 C.F.R. §§ 58.5, 58.6, not to mention federal rules limiting their use of "cost plus" contracts, *id.* § 84.44(5)(c), requiring payment of prevailing wages, see, *e.g.*, 42 U.S.C. § 5110, and promoting the hiring of public housing tenants for construction work. 12 U.S.C. § 1701(u).

Finally, *discrimination* in housing and land use regulation has long, and properly, been the special concern of federal law, dating to the Reconstruction Congress's enactment of 42 U.S.C. § 1982. See *Hurd v. Hodge*, 334 U.S. 24, 31-32 (1948); see also *Buchanan v. Warley*, 245 U.S. 60, 79 (1917) (invalidating municipal segregation ordinance); see also *Shelley v. Kraemer*, 334 U.S. 1 (1948) (forbidding state law enforcement of racially restrictive covenants); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (holding that

San Francisco's administration of a commercial zoning ordinance violated Equal Protection). See *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 120 (5th Cir. 1973) (holding FHA to be lawful exercise of Thirteenth Amendment enforcement power).[5]

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[5] The federal government's historic role with respect to housing discrimination has hardly been consistently constructive. As scholars and courts have detailed and the government itself has acknowledged, the federal government for decades administered its housing programs in a discriminatory manner and took myriad actions that encouraged and aggravated discrimination by local actors, both public and private. See Douglas Massey & Nancy Denton, AMERICAN APARTHEID (1993); Gunnar Myrdal, AN AMERICAN DILEMMA 625 (1944) (federal housing policies had "served as devices to strengthen and widen rather than to mitigate residential segregation."). The Department of Justice's 1967 submission to Congress supporting the Fair Housing Act acknowledged the federal government's involvement in numerous "denials of equal protection," including ones that created "thousands of racially segregated neighborhoods [and affected] millions of people." Fair Housing Act of 1967, Hearings Before the Subcomm. on Housing & Urban Affairs of the S. Comm. on Banking and Currency, 90th Cong. (1967) at 8 (quoted in Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets*, 42 Wake Forest L. Rev. 333, 391 (2007)).

Belated recognition of this reality – "[that] the force which helped to spawn [segregation] must take the lead in helping to solve it," *id.* at 377-78 (quoting Sen. Robert Kennedy) – impelled Congress to enact the FHA and impose on HUD, other federal agencies, and fund recipients obligations to "affirmatively further fair housing," 42 U.S.C. §§ 3608(d), 5304(b)(2), which implement their responsibilities to remedy these actions.

2. Nor is there any merit to claims that the settled interpretation of Sections 804 and 805, by encouraging governments and other housing providers to consider the racial (and other demographic) impacts of proposed courses of action – and to avoid those which cause unjustifiable disparate impacts when alternatives are available – are equivalent to "quotas," see PFR Br. 16 or that they drive housing providers to "racial balancing." TDHCA Br. 44. It is no more plausible that housing providers and local officials would subordinate to "race" (or family status, for that matter) the vast complex of political, legal, budgetary, environmental, and policy considerations that influence decisionmaking in this field than it is that the availability of the Title VII disparate impact framework to challenge height requirements, see *Dothard v. Rawlinson*, 433 U.S. 321 (1977), ushered in a system of "gender-based" hiring decisions in corrections. See generally *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (directing courts to "exercise extraordinary caution" in adjudicating claims that race was the predominant factor, even when government actor's "awareness of" demographic impacts – and its affirmative efforts to comply with a federal civil rights statute incorporating an effects test – are undisputed).

On the contrary, the FHA's disparate impact analysis operates, as Title VII's did in *Dothard*, to leave government actors free to pursue their chosen, legitimate policy ends, while encouraging more careful attention to unnecessary, exclusionary effects.

See 433 U.S. at 332 (emphasizing that Alabama's "purpose could be achieved by adopting * * * a test for applicants that measures strength directly"). Indeed, in cases like this, the standard operates in a setting where analysis of impacts and competing alternatives *is already the norm*, providing a modest check on heedless or habit-driven, but very consequential, government actions. See pp. 17-18, *supra.*

To be sure, *Washington v. Davis*, 426 U.S. 229, 242 (1976), held that "disproportionate impact * * * is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution," see TDHCA Br. 46. But the Court's opinion, which went on to decide the merits of plaintiffs' Title VII disparate impact claim, did not give the slightest hint that the statute raised any constitutional difficulty. See 426 U.S. at 249-50. And the decision in *Arlington Heights*, the first to apply *Washington*'s rule, first reversed a ruling of liability under the Equal Protection Clause for failure to prove discriminatory purpose, but then *remanded* the case for determination whether the zoning decision violated the FHA's statutory prohibition against discrimination, 429 U.S. at 566-67. See 558 F.2d. at 1290-93 (finding liability under Section 804(a) on remand).[6]

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[6] Hardly a brief against the disparate impact framework, *Washington* observed that adverse impact "[s]tanding alone * * * does not trigger [strict Equal Protection scrutiny],"426 U.S. at 242; recognized substantial arguments that purpose should not be required even for *constitutional* liability*, id.* at 244; and noted

(Continued on following page)

Indeed, the understanding of Equal Protection animating these arguments – as treating as suspect *any* government action with a "racial" goal (such as overcoming segregated residential patterns to "bring[ ] together students of diverse backgrounds and races,") or that pursues these through "race-conscious" means – is one in the controlling opinion in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, disavowed as "profoundly mistaken." See 551 U.S. 701, 778-79 (2007) (Opinion of Kennedy, J.).

That decision drew a sharp, constitutional line between, on one hand, governmental actions that "assign[ ] * * * a personal designation according to a crude system of *individual* racial classifications," and, on the other, "race-conscious measures [that] address * * * [racial isolation] in a *general* way," affirming that the Constitution leaves local authorities "free to" pursue the latter type. *Id.* at 788-89 (emphasis supplied). Notwithstanding casual invocations of the harms of "quotas," PFR Br. 16, there is no individual here who could plausibly claim, as did the plaintiffs in *Parents Involved* and *Ricci*, to have been personally "classified" or disadvantaged.

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that special constitutional rules govern when intentional segregation and its present-day vestiges are established. *Id.* at 243. Cf. *United States v. Fordice*, 505 U.S. 717, 731-32, (1992) (in such cases, policies that "have segregative effects[; that] are without sound * * * justification; and [that] can be practicably eliminated," may "run afoul of the Equal Protection Clause," even though they are "not animated by a discriminatory purpose").

Indeed, as if anticipating the assertions of "constitutional doubt" advanced here, Justice Kennedy's opinion in *Parents Involved* undertook to assure government officials of the lawfulness of taking into account the demographic consequences of competing, alternative courses of action:

> Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races.

551 U.S. at 789.

In fact, petitioners' and *amici*'s Equal Protection logic would condemn as impermissibly "race-based" Justice Thomas's dissenting opinion in *Kelo v. City of New London*, 545 U.S. 469 (2005), which: (1) took note of the extreme demographic impacts of redevelopment projects, see *id*. at 522 (Thomas, J., dissenting) (noting that "[o]ver 97 percent of the individuals forcibly removed from their homes by the 'slum-clearance project upheld by this Court in [*Parker v.*] *Berman* were black"); (2) saw these effects on "predominantly minority communities" as itself warrant for inquiry into the justification for the action, see *id.* (suggesting heightened scrutiny, in light of the "powerless groups" burdened and the benefits to "citizens with disproportionate influence and power in the political process, including large corporations and

development firms"); and (3) viewed present actions that have the "predictable consequence of exacerbat[ing] these effects," as "regrettabl[e]," *id*. – to be avoided, presumably, to the extent viable alternatives are available. See *Keith v. Volpe*, 858 F.2d at 483 (applying § 804(a)'s disparate impact test to invalidate city's refusal to permit development that would provide housing to residents displaced by highway project).

3. Finally, the "constitutional" understanding petitioners and their *amici* casually advance (for the limited purpose of escaping a textually proper and otherwise controlling agency interpretation) is at odds with the appeals to federalism that populate their briefs. In addition to its other far-reaching implications, the "constitutional" rule they invite the Court to embrace (or at least pronounce "serious") would cast unwarranted doubt on the vast number of local and state antidiscrimination laws that incorporate the disparate impact analysis. (Indeed, it would impugn petitioners' own decision in this case to voluntarily expand statewide the remedy the district court adopted for plaintiffs' Dallas-area claims.)

That inhibition on state and local governments' power to make decisions about the laws and standards necessary to protect their citizens and themselves from the harms of discrimination *would* represent a "radical" and unwarranted shift in the longstanding federal-state balance. As the Court has recognized, the first state and local antidiscrimination laws pre-dated the federal statute invalidated in

The Civil Rights Cases, 109 U.S. 3 (1883), and in the decades from that decision "until the Federal Government reentered the field in 1957," those laws provided the primary protection against many types of discrimination. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). See also 109 U.S. at 19 (referencing State authority).

Since then, state and local governments, which are closer to the problem and bear the harms of discrimination more directly, have led the way in identifying harmful practices and devising more effective remedies, often enacting measures that "give[ ] greater protection" against discrimination than do federal laws. 15 U.S.C. § 1691d (exempting such laws from preemption by federal lending discrimination statute). See *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 287-88 (1987); *Garrett*, 531 U.S. at 368 n.5 (noting "by the time that Congress enacted the ADA in 1990, every State in the Union had enacted * * * measures" prohibiting disability discrimination); *id.* at 374-75 (Kennedy, J., concurring) (crediting such statutes for providing "an incentive * * * to develop a better understanding, a more decent perspective").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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