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 GOVERNMENTS OF SAN FRANCISCO, ATLANTA, FLINT, NEW HAVEN, PHILADELPHIA, TOLEDO, KING COUNTY, WASHINGTON, and CITY OF SEATTLE OFFICE FOR CIVIL RIGHTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DENNIS J. HERRERA
San Francisco City Attorney
CHRISTINE VAN AKEN
Deputy City Attorney
City Attorney's Office
City Hall Room 234
One Dr. Carlton B. Goodlett Pl.
San Francisco, CA 94102

DAVID T. GOLDBERG*
Donahue & Goldberg, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813
david@donahuegoldberg.com

**Counsel of record*

Additional Counsel Listed On Inside Cover

Additional Counsel:

CATHY HAMPTON
Atlanta City Attorney
KIMBERLY MILLER PATRICK
Deputy City Attorney
68 Mitchell St., Suite 4100
Atlanta, GA 30303

SHELLEY R. SMITH
City Solicitor
JANE LOVITCH ISTVAN
Senior Attorney, Appeals Unit
City of Philadelphia
Law Department
1515 Arch Street 17th Floor
Philadelphia, PA 19102-1595

ADAM LOUKX
Director of Law
City of Toledo Law
Department
One Government Center
Suite 2250
Toledo, OH 43604

PETER BADE
City Attorney
City of Flint
1101 S. Saginaw St.
Flint, MI 48502

DANIEL T. SATTERBERG
King County Prosecuting Attorney
PEGGY PAHL
Sr. Deputy Prosecuting Attorney
W-400 King County Courthouse
Seattle, WA 98104

VICTOR A. BOLDEN
Corporation Counsel
City of New Haven
Office of the Corporation
Counsel
165 Church Street, 4th Floor
New Haven, CT 06510

PETER S. HOLMES
Seattle City Attorney
JOHN SCHOCHET
Assistant City Attorney
PO Box 94769
600 Fourth Avenue, 4th Floor
Seattle, WA 98124-4769

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes and Laws

Federal Regulations

Other Materials

Statement of Interest*

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 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

* 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.

local governments themselves, suffer harm when discrimination go 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 – and refute – high-pitched and highly abstract assertions by petitioners and their *amici* that continued recognition of the disparate impact standard threatens local self-government or drives local authorities to "race-based" decisionmaking. 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 a 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.

Summary of Argument

In the decision below, the Third Circuit reinstated respondents' claims under Section 804(a) of the Fair Housing Act, applying the longstanding interpretation of that provision, as forbidding both intentional and disparate impact housing discrimination. As respondents and other *amici* convincingly demonstrate, the ordinary rules governing the construction of federal statutes establish the correctness of that decision.

Petitioners seek to override that result, based on a series of increasingly broad and high-pitched assertions about the consequences of allowing the disparate impact framework to continue to operate. Describing the standard as "a blunt instrument," Br. 44, the Township presents dire forecasts of what "could" or "would" (Br. 44, 45) happen were the Third Circuit's decision to be sustained, summoning images of local officials, required or "drive[n]," Br. 42, by "the specter of disparate-impact litigation" under Section 804(a), *id.* 44., "to engage in racial balancing in every redevelopment choice." *Id.* Such a regime, they assert, would trample on principles of federalism and raise sufficiently grave constitutional questions to warrant overturning an otherwise authoritative construction.

Amici respectfully disagree, and we urge that the Court uphold the settled, textually proper, and administratively codified interpretation. In view of the decades of experience nationwide under Section 804(a), there is no need for speculation about the consequences of recognizing disparate impact liability. That experience sharply contradicts petitioners' warnings. By any objective measure, the threat of Section 804(a) disparate impact liability (or

litigation) has proven exceedingly modest, and the conduct the provision "requires" and "encourages" – *consideration* of alternative and mitigating measures, in the small set of cases where severe, disproportionate impacts would result – are in fact coextensive with obligations imposed under state law and that local governments accept as participants in federal housing and development programs.

Petitioners' depiction of the rule as an exotic or significantly burdensome federal incursion also ignores basic realities about the local policymaking process it is said to "drive." Local government decisions concerning major housing and redevelopments are necessarily influenced by a vast complex of competing and conflicting fiscal, political, environmental, and housing policy considerations, including numerous federal law requirements. These types of decisions – as the prevalence of federal, state, and local impact assessment procedures attest – both allow for and benefit from careful and objective evaluation of effects and alternatives.

Experience in fact 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, but it protects municipalities themselves and all their residents, of all backgrounds, from serious harm. While the "benefits" to local governments of the rule petitioners seek are chimerical (it is the rare disparate impact claim that cannot instead be pleaded as a "disparate treatment" violation), the latter 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.

Nor does the longstanding interpretation of Section 804(a) raise genuine constitutional concerns, let alone the "grave" ones that could authorize a court to disregard a lawful agency interpretation. The impact standard does not lead – has not led – to "racial balancing." (Indeed, it is hard to see how the relief sought in this case could be described as that). What the settled construction does encourage – advance consideration of a project's demographic effects (along with many others) and seeking to avoid actions that unnecessarily effect and reinforce discrimination, when feasible alternatives are present – are both lawful and appropriate. Indeed, the constitutionality of such decisionmaking was established with unusual clarity in the one Equal Protection decision petitioners advance as basis for "avoidance," *Parents Involved in Community Schools*, which undertook explicitly to *quell* the very "doubts" about government action that petitioners' arguments seek to provoke.

ARGUMENT

I. Petitioners Present No Valid Reason for Departing From the Settled, Textually Supported, and Administratively Codified Construction of Section 804(a)

Petitioners state no substantial ground in law or policy for rejecting the longstanding and correct interpretation of the Fair Housing Act.

For decades, Section 804(a) has been interpreted as forbidding both housing practices that purposefully

discriminate on grounds of race, religion, sex, disability, familial 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 rulemaking authority. And as respondents show, that interpretation is the best, arguably the only permissible, reading of the statutory text, which, far from forbidding the disparate impact framework, includes multiple provisions (added to the Act at a time when judicial consensus had settled) presupposing its availability.

Petitioners' invitation to invalidate the longstanding construction based largely on predicted (and, ironically, unintended) effects should be rejected. Petitioners' warnings about the dangers the disparate impact framework poses overlook important features of its design and are without support in, and strongly contradicted by, long experience with Section 804(a)'s operation. Petitioners' account likewise slights the important ways that the longstanding interpretation benefits local governments and the residents, of all backgrounds, they serve.

A. Petitioners' Account of the Disparate Impact Framework Neglects Central Aspects of Its Design and Operation

Although the disparate impact standard, as the Court has recognized, is not "the most easily understood type of discrimination," *Teamsters v.*

United States, 431 U.S. 324, 335-36, n.15 (1977), its basic contours, both under Section 804(a) and related statutes, are well settled, see 78 Fed. Reg. at 11,462, and important features of its design and operation risk being lost in petitioners' account.

On its own terms, the Section 804(a) disparate impact standard does not impose *any limit* on the substantive objectives a government or private housing provider may choose to pursue. Rather, it provides for an *inquiry* – only in those cases (not "every" one Br. 44) where challengers have made out a significant prima facie showing of discriminatory or segregative effect, see *infra* – into the availability of alternative means of pursuing the defendants' objectives that would not yield results that are the "functional[] equivalent" of purposeful discrimination. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988).

By encouraging consideration of impacts of alternative ways of proceeding – as do many other laws in the housing development and land use field, see *infra* Section I.C., the standard makes it less likely that prior acts of intentional exclusion are thoughtlessly repeated or unduly exacerbated. See *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374-75 (2001) (Kennedy, J., concurring) (recognizing that prejudice "may result … from insensitivity caused by simple want of careful, rational reflection").

Moreover, "the line between discriminatory purpose and discriminatory impact is not nearly as bright" as invective 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, *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 266 (1977).

And while there are significant differences between the "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 antidiscrimination mandate. 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?").

B. Long Experience Under Section 804(a)'s Disparate Impact Framework Contradicts Petitioners' Predictions

While petitioners' aspersions are couched in terms of what "would" or "may" happen were their interpretation of Section 804(a) to be rejected, as if the decision below and HUD regulations "established new substantive law," 78 Fed. Reg. at 11,462, see, *e.g.*, Br. 45-46, the availability of disparate impact analysis under Section 804 (a) is settled law in eleven circuits and has been, for decades.[1] Attempts to summon

[1] Indeed, as *Washington v. Davis* noted, in the time period *before* they addressed this statutory question, numerous federal courts had held that *the Constitution* imposed limits based on

objections – and even "constitutional" concerns – based on actions driven the "specter of disparate-impact litigation" founder on the fact that "[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). As this Court's recent decisions remind, 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).

What has happened bears no resemblance to the large-looming "specter," Br. 44, petitioners argue the Court must act to prevent. By one careful count, there have been just 92 appellate decisions addressing the FHA disparate impact liability standard in the 45 years since the statute's enactment, many involving private defendants, 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. (forthcoming Dec. 2013) (finding 18 appellate decisions favorable to plaintiffs since 1968). At the trial court level, there were 593 housing discrimination complaints *of any kind* filed in federal courts in 2006, compared, *e.g.,* to 13,042 cases alleging employment discrimination

---

discriminatory results. See 426 U.S. 229, 245 n.12 (1976). See, *e.g.*, *Kennedy Park Homes Assn. v. City of Lackawanna*, 436 F.2d 108, 114 (2d Cir. 1970) (Clark. Ret. J.).

that year. U.S. Department of Justice, Office of Justice Programs, *Civil Rights Complaints in U.S. District Courts*, 1990-2006 (2008).

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. Indeed, in practice, claims are almost invariably brought under both theories, as this one was, and rarely on the disparate impact theory alone. See, *e.g.*, *Dehoyos v. Allstate Corp.*, 345 F.3d 290, 299 n.7 (5th Cir.2003) ("We ... decline to differentiate claims of disparate impact and claims of intentional discrimination at this preliminary stage of litigation").

In circuits where the disparate impact framework is settled law, large numbers of such claims are dismissed prior to trial, commonly based on plaintiffs' failure to make the rigorous showing needed 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 *Vill. of Arlington Heights v. Metro Hous. Dev. Co.,* 429 U.S. 252, 266 (1977)).[2]

And even leaving aside the considerable overlap between the intent and impact standards, see *supra*, obligations essentially identical to the ones petitioners depict as uniquely and unduly burdensome on local decisionmaking are imposed under other federal laws and assumed voluntarily by local governments through acceptance of federal funding. Both Title VI of the 1964 Civil Rights Act and Section 504 of the Rehabilitation Act have long been implemented through federal funding conditions (including in housing and redevelopment programs) requiring local governments' compliance with disparate impact regulations. 24 C.F.R. § 8.4(b)(2) (Title VI); *id.* § 8.4(b)(4) (Rehabilitation Act). See *Shannon v. HUD*, 436 F.2d 809, 817 (3d Cir. 1970) (invoking Title VI regulations "adopting an 'effects' test rather than an 'intention' test for reviewing local actions respecting location of types of housing"). Cf. *Alexander v. Sandoval*, 532 U.S. 275 (2001) (finding no private right of action to enforce Title VI regulations).

The Religious Land Use and Institutionalized Persons Act applies by express terms to local government land use rules, see 42 U.S.C. §2000cc(a)(1), imposing strictures (without any inquiry into governmental intent) far *more* demanding than Section 804's prohibition on unjustifiable religion-based disparate impacts. See *id.* (allowing local government to enforce generally applicable land use regulations that burden religion

[2] This case provides no counterexample: the district court ruled (albeit erroneously) on summary judgment, without having permitted discovery.

only if it proves they further "compelling" purposes and are "the least restrictive means" of doing so); *Flores v. City of Boerne*, 521 U.S. 507, 535 (1997) (highlighting that statutory standard is much more stringent than a "discriminatory effects or disparate impact test"); suits under that statute, unsurprisingly, have had significant success. See Note, *Religious Land Use in the Federal Courts Under RLUIPA*, 120 Harv. L. Rev. 2178, 2199 (2007).

States and localities – including, notably, the State from which this case arises – have incorporated the disparate impact analysis into their own fair housing laws. See *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). See also *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)); 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 planners and housing 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).

Given the modesty of the "threat" of Section 804(a) disparate impact litigation and the existence of these independent, overlapping obligations, it is exceedingly *im*plausible that the "financial and political costs of litigating over … racial impacts" *under Section 804(a),* would induce a municipality to "rationally conclude" Br. 46, that a beneficial and otherwise-lawful plan should be shelved.

C. Petitioners' Abstract Assertions Ignore the Realities of the Context in Which Section 804(a) Operates

Petitioners' dire predictions also rely on an unrealistic and wholly one-dimensional image of local government decisionmaking, where officials' actions are "driven" primarily by the "incentives," Br. 44, the Section 804(a) disparate impact liability is claimed to generate.

But as attorneys, planners, and housing officials in *amici* and other municipalities can readily attest that the risk of liability – or litigation – under Section 804(a) for unjustifiable disparate impact ranks well down the very long list of considerations that influence housing and development decisionmaking – and would so rank even if the list were confined to *legal* requirements (indeed even were it confined to *federal* legal requirements, see *infra*).

1. The type of government decisions depicted as driven by Section 804(a) compliance (or litigation avoidance) are in reality influenced by an essentially

endless array of complex, inevitably cross-cutting fiscal, political, legal, environmental, and policy considerations. Local governments deciding whether, how, and where to undertake a redevelopment project must determine which populations the project should serve; whether to construct a new building or rehabilitate an existing structure; and whether to build at high 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.

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").

Indeed, 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"; "[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 local, federal, state and local processes reinforces that the governmental action Section 804(a) in fact 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.

2. Petitioners' efforts to depict Section 804(a) as a rare or especially burdensome federal incursion into exclusively local matters, or even as raising "Tenth Amendment" concerns, likewise fail to account for the realities of municipal decisionmaking in this field.

Such assertions of course neglect that the Third Circuit's decision left the federal-local balance precisely where it was struck decades ago, see *supra*, and 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 countless federal law policies and requirements including (as noted above) civil rights environmental assessment laws, 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).[3]

[3] Indeed, while land use regulation remains a core local responsibility, see Br. 42-43, numerous other federal laws alter historic authority in ways far more direct than Section 804(a) could be claimed to. Unlike the disparate impact standard, which calls upon local officials to *justify* a small subset of actions that meet the prima facie test, in light of available, less discriminatory alternatives (or even RLUIPA), the Telecommunications Act of 1996 "impose[s] specific limitations on the traditional authority of state and local governments to

And suggestions of "Tenth Amendment" concerns, Br. 42, fail for a more basic reason: *Discrimination* in housing and in land use regulation has long, and properly, been the special concern of federal law, dating back to the Reconstruction Congress's enactment of 42 U.S.C. § 1982. See *Hurd v. Hodge*, 334 U.S. 24, 31-32 (1948); *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 generally *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976) ("[T]he Eleventh Amendment and the principle of state sovereignty which it embodies are necessarily limited by [Reconstruction Amendments].") (citation omitted); *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).[4]

---

regulate the location, construction, and modification of [cellular tower] facilities," *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005). See also, *e.g.*, *Rapanos v. United States*, 547 U.S. 715 (2006) (describing federal Clean Water Act oversight of wetlands development). See Patricia Salkin, *The Quiet Revolution and Federalism: Into The Future*, 45 J. Marshall L. Rev. 253, 255 (2012) ("The federal government, [while]… seemingly maintaining a low profile…has probably had the greatest influence on local land use control over the last forty years.").

[4] It bears emphasis that 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

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

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

Petitioners' arguments also ignore a significant demerit of the regime they invite the Court to impose in the name of "federalism": the extent to which a federal standard requiring those challenging their exclusion from housing to prove discriminatory intent can itself be "divisive," Br. 47, and carry heavy "political costs." *Id.* at 46. Cf. *City of Arlington v.*

---

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 responsible for creating "thousands of racially segregated neighborhoods [and affecting] 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)). This recognition – "[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." See 42 U.S.C. §§ 3608(d), 5304(b)(2).

FCC, 133 S. Ct. 1863, 1873 (2013) (rejecting a "faux-federalism" argument). Indeed, 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 inquiry focuses on the sincerity of policymakers' (and, in certain cases, citizen advocates') explanations of their motives for favoring their chosen course.

These latter inquiries raise grave 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 and 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).[5]

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*, 134 F.3d at 439 (rejecting municipal liability because "the motivations of [most] council members … did not receive individualized scrutiny," and highlighting, as 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. 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 School 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

---

[5] Compare also *Matthews v. Columbia County*, 294 F.3d 1294, 1297-98 (11th Cir. 2002) (Section 1983 municipal liability requires proof of improper motives by a *majority* of a multi-member body) with *Scott-Harris v. City of Fall River*, 134 F.3d 427, 436-40 (1st Cir. 1997) (applying a "significant bloc" test to determine intent), *rev'd on other grounds*, 523 U.S. 44 (1998), and *Scarbrough v. Bd. Of Educ.*, 470 F.3d 250, 261-63 (6th Cir. 2006) (adopting a "but for" causal analysis for such determinations).

officials, to contest the gravity of the impact or 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 its citizens the equal protection of the laws." *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). See Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking 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* "should 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 for the vastly larger number of instances that never reach a courthouse. See *e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (noting that when 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 meritorious ones. 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").

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

Unsurprisingly, petitioners' brief scarcely adverts to 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.

First, the standard can provide proper 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 VII]." *Griggs v. Duke Power Co.*, 401 U.S. 424, 435 (1971) (citation omitted). Cf. *Alabama Employment Discrimination Litigation*, 198 F. 3d at 1322 ("what [other] explanation can there be…?" for adherence to a practice shown to produce large disparities once equally effective, nondiscriminatory alternatives have been established).

Moreover, discriminatory effects standards push against actions that perpetuate and aggravate the present effects of prior 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 Corp. v. Green,* 411 U.S. 792, 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 standard, by promoting objective analysis of alternatives, can prevent discrimination that would otherwise result from unexamined assumptions or unconscious prejudices. S*ee also 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"); *Connecticut v. Teal,* 457 U.S. 440, 449 (1982) (describing disparate impact as serving a "prophylactic" role).

It is not, as petitioners suggest, "altogether rational" to authorize disparate impact liability in employment, but not housing, discrimination law, Br. 27. Each one of these rationales applies with great force in the fair housing context. Rigorous studies confirm that present-day intentional 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 minority homebuyers to "minority" neighborhoods or failing to offer prime mortgage terms to those who qualify – that are surely not "eas[y] to identify and prosecute." Br. 28. Cf. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 649 (2007) (Ginsburg, J., dissenting) ("A worker knows immediately if she is denied a promotion or transfer, if she is fired or refused e are generally public events, known to co-workers."), *superseded by statute*, Pub. L. 111-2 (2009). And in cases like this one, it can 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) ("Because the plaintiffs failed to allege the existence of a similarly situated non-minority neighborhood … their complaint does not allege an equal protection violation.").

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 Br. *Amicus Curiae* American Ins. Ass'n at 14 (arguing that "market-driven incentives" "ensure" that insurance rates are nondiscriminatory).

Equally important, present residential demographic patterns are, to a great degree, the direct result of purposefully discriminatory acts, perpetrated on a vast scale, decades ago 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"). Present-day housing and development decisions 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 the 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 disparate impact liability on remand in *Arlington Heights*, the impact standard properly captures that Congress did not enact the Section 804(a) remedy as punishment for actors with retrograde attitudes, but rather to open up housing opportunities where exclusion long prevailed. See *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1292-93 (7th Cir. 1977) ("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.").

Perhaps most important, the benefits the Fair Housing Act generally – and the longstanding interpretation of Section 804(a) – seek to secure are

not limited to members of groups that historically have been subject to disadvantage. 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").

Moreover, as many state and local governments have recognized, these harms are not solely individual: "Discrimination threatens not only the rights and privileges of [a State's] inhabitants …. but menaces the institutions and foundations 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 landing practices directed at residents of minority communities in many municipalities injured not only the homeowners targeted and their immediate neighborhoods, but entire cities, their local 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).

III. Adherence to the Authoritative, Textually Correct, and Settled Interpretation of Section 804(a) Raises No Substantial Equal Protection Concern

The Township's attempted enlistment of avoidance canons to overcome the binding and textually correct interpretation of Section 804(a) fails, because the long-accepted construction raises no "grave" or even substantially plausible Equal Protection concern.

Canons based on constitutional doubt, as the Court has long emphasized, do not apply "whenever there arises a significant constitutional question the answer to which is not obvious," *Almendarez-Torres v. United States*, 523 U.S. 224, 239 (1998), but rather only in cases where constitutional objections are "grave." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (quotation omitted). Were it otherwise, that doctrine, meant to promote judicial self-restraint, would instead supplant *Chevron* rules whenever an administrative interpretation could, through argumentative ingenuity, be said to implicate some "constitutional" interest, be it in private property ownership, free speech, federalism, or liberty – which is to say in nearly every case. See *City of Arlington*, 133 S. Ct. at 1871-73; accord *Moskal v. United States*, 498 U.S. 103, 108 (1990) (rule of lenity for criminal statutes is not triggered whenever it is "*possible* to articulate a construction more narrow than that urged by the Government").

Petitioners do not meet that standard. They insist that the settled interpretation of Section 804(a), by encouraging governments and other housing providers to consider the racial (and other) impacts of proposed courses of action – and to avoid those which

cause unjustifiable disparate impacts when alternatives are available – raises serious "constitutional questions under the Equal Protection Clause," citing both this Court's prohibition against measures that "treat[] each [citizen] in different fashion solely on the basis of a systematic, individual typing by race," Br. 39 (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 779 (2007) (Opinion of Kennedy, J.)), and the claimed danger that "incentives," Br. 38, 44, 45, presented by Section 804(a)'s disparate impact standard will "drive" local officials to "racial balancing." Br. 42, 44.

Notably, these "constitutional questions," Br. 39, were not "serious" enough for petitioners to plead as a defense to liability or even to advance as part of their interpretation *argument* prior to the grant of certiorari. Indeed, the constitutional problems they perceive are at odds with what petitioners *did* argue in their previous brief to this Court on this same statutory question. Two Terms ago, as *amicus curiae* in *Magner v. Gallagher*, the Township urged that the Court "limit[] disparate impact claims to those situations where there is evidence of segregative effect," *i.e.*, a standard by which governments (and, in the event of litigation, courts) would assess whether "a housing policy *has the effect of keeping minorities out of a predominately white neighborhood*, or … the effect of keeping minorities in a predominately minority neighborhood" – precisely the sort of consideration of comparative demographic impacts now decried as impermissibly "race-based" and constitutionally doubtful. See Br. *Amicus Curiae*, No. 10-1032 at 8 (emphasis added), cert. dismissed, 132 S. Ct. 1306 (2012).

The avoidance plea in fact rests on a misunderstanding of the disparate impact framework and a serious misreading of the precedent said to raise constitutional doubt. As just explained, the open housing aims the standard advances benefit Americans of all backgrounds. (In fact, although petitioners focus on "race," the disparate impact standard applies to all the characteristics enumerated in Section 804(a); almost every American could be subject to housing discrimination on one or more of those bases). Nor, as explained above, is the image of local decisionmaking, driven to "racial balancing," (or family-status balancing) by the need to avoid Section 804(a) *litigation*, a remotely plausible one. Municipal officials no more subordinate to "race" the vast complex of political, legal, budgetary, environmental, and policy considerations that influence decisionmaking in this field than the availability of Title VII's disparate impact standard to overturn height requirements that exclude physically able female prison guards candidates, see *Dothard v. Rawlinson*, 433 U.S. 321 (1977), ushers 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, Section 804(a)'s disparate impact analysis is meant to operate, as it 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 Section I.C, *supra.*

Remarkably, petitioners' claim of Equal Protection problems rests on a single decision of this Court, Justice Kennedy's controlling opinion in *Parents Involved*; more remarkably, that decision directly *forecloses* their constitutional arguments – and even undertakes affirmatively to quell doubts.

That opinion disavowed as "profoundly mistaken," 551 U.S. 778, an understanding of Equal Protection as treating as suspect any government action (apart from remedying a particularized constitutional violation) with a "racial" goal (such as overcoming segregated residential patterns to "bring[] together students of diverse backgrounds and races," *id.* at 789) or that pursues these though "race-conscious" means, *id.* The decision established a sharp, constitutional line between, on one hand, governmental acts 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).

The opinion then explained specifically that the Equal Protection Clause poses no barrier to mechanisms such as "strategic site selection of new schools; drawing attendance zones with general

recognition of the demographics of neighborhoods … and tracking enrollments, performance, and other statistics by race." *Id.* at 789. Those measures are essentially indistinguishable from what the Fair Housing Act's disparate impact standard encourages – and petitioners posit are objectionable.

Indeed, as if anticipating the assertions of "constitutional doubt" the Court's holding might mistakenly be claimed to support, Justice Kennedy's opinion undertook expressly 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.

Id. at 789.

Miller v. Johnson, the only other Equal Protection decision petitioners' avoidance argument even discusses, offers no substantive support. Although the *Miller* decision referenced constitutional doubts as a ground for rejecting an administrative construction, *id.* at 923, the agency whose interpretation was before the Court, the Department of Justice, held unusual power to disapprove state districting legislation, and the "interpretation" at issue, which conditioned federal approval on States' maximizing the number of districts in which African-American voters would be an effective majority,

required exactly the subordination of non-racial districting factors that the Court had held the Constitution prohibits. See 515 U.S. at 916.[6]

Indeed, petitioners' 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, in language resonant here: (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

---

[6] Unlike some a*mici*, petitioners do not claim that Justice Scalia's short concurring opinion in *Ricci v. DeStefano*, hypothesizing an eventual "war" between Equal Protection and disparate impact, see 557 U.S. at 594, would be a proper basis for departing from an authoritative agency interpretation. No other Justice joined that opinion, and if such expressions in separate opinions sufficed to trigger "constitutional avoidance" canons, many more statutes would require narrow construction, see, *e.g.*, *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring in judgment) (concluding that death penalty is "cruel and unusual punishment," in violation of the Eighth Amendment). In fact, no previous opinion of the Court, including landmark ones announcing and applying the disparate impact standard, adverted to any such constitutional doubt. And the opinion for the Court in *Ricci*, echoing the controlling opinion in *Parents Involved*, drew a distinction (under Title VII) between race-based invalidation of individual employees' civil service test results and "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.

Petitioners' relative reticence can be read as implicit acknowledgement that accepting the proposition that disparate impact rules – by encouraging public and private parties to consider the racial or gender effects of policy alternatives – are (or even might be) a facial violation of Equal Protection would entail a startling repudiation of decades of settled law.

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 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 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).

Finally, the "constitutional" understanding petitioners casually advance (for the limited purpose of escaping a correct and otherwise controlling agency interpretation) is, in fact, seriously at odds with the appeals to federalism that populate their brief. In addition to its other far-reaching implications, the rule they invite the Court to issue (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.

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 dramatic 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 antidiscrimination measures that "give[] greater protection" 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,

DENNIS J. HERRERA
San Francisco City Attorney
CHRISTINE VAN AKEN
Deputy City Attorney
City Attorney's Office
City Hall Room 234
One Dr. Carlton B. Goodlett Pl.
San Francisco, CA 94102

CATHY HAMPTON
Atlanta City Attorney
KIMBERLY MILLER PATRICK
Deputy City Attorney
68 Mitchell St., Suite 4100
Atlanta, GA 30303

SHELLEY R. SMITH
City Solicitor
JANE LOVITCH ISTVAN
Senior Attorney, Appeals Unit
City of Philadelphia
Law Department
1515 Arch Street 17th Floor
Philadelphia, PA 19102-1595

ADAM LOUKX
Director of Law
City of Toledo Law Department
One Government Center
Suite 2250
Toledo, OH 43604

DAVID T. GOLDBERG*
Donahue & Goldberg, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813
david@donahuegoldber.com

PETER BADE
City Attorney
City of Flint
1101 S. Saginaw St.
Flint, MI 48502

DANIEL T. SATTERBERG
King County Prosecuting Attorney
PEGGY PAHL
Sr. Deputy Prosecuting Attorney
W-400 King County Courthouse
Seattle, WA 98104

VICTOR A. BOLDEN
Corporation Counsel
City of New Haven
Office of the Corporation Counsel
165 Church Street, 4th Floor
New Haven, CT 06510

PETER S. HOLMES
Seattle City Attorney
JOHN SCHOCHET
Assistant City Attorney
PO Box 94769
600 Fourth Avenue, 4th Floor
Seattle, WA 98124-4769

**Counsel of Record*