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.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Are disparate-impact claims cognizable under the Fair Housing Act?

PARTIES TO THE PROCEEDING

Petitioners Texas Department of Housing and Community Affairs, Michael Gerber, Leslie Bingham-Escareno, Tomas Cardenas, C. Kent Conine, Dionicio Vidal Flores, Juan Sanchez Munoz, and Gloria L. Ray were Defendants-Appellants in the court of appeals.[†]

Respondent The Inclusive Communities Project, Inc., was a Plaintiff-Appellee in the court of appeals.

Respondent Frazier Revitalization, Inc., was an Intervenor-Appellant in the court of appeals.

[†] Pursuant to Supreme Court Rule 35, Petitioners note that Michael Gerber, Tomas Cardenas, C. Kent Conine, Dionicio Vidal Flores, and Gloria L. Ray were sued in their capacities as public officials and no longer hold office. They have been replaced by Timothy Irvine, J. Paul Oxer, Tom H. Gann, J. Mark McWatters, and Robert D. Thomas.

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BRIEF FOR THE PETITIONERS

This Court has twice granted certiorari to resolve whether the Fair Housing Act provides for disparate-impact liability, but each case was dismissed before the Court could resolve the question. *See Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 134 S. Ct. 636 (2013) (mem.); *Magner v. Gallagher*, 132 S. Ct. 1306 (2012) (mem.). This case presents an opportunity for this Court finally to resolve whether disparate-impact claims are cognizable under the Fair Housing Act.

OPINIONS BELOW

The opinion of the court of appeals is available at 747 F.3d 275. *See* J.A. 351–71. The district court's findings of

fact and conclusions of law, which found that the plaintiff had "proved its disparate impact claim" under the FHA, are reported at 860 F. Supp. 2d 312. *See* J.A. 171–217. The district court's remedial order is available at 2012 WL 3201401, J.A. 231–72, and the district court's order granting in part the petitioners' motion to amend the judgment is available at 2012 WL 5458208, J.A. 310–13.

JURISDICTION

The court of appeals entered its judgment on March 24, 2014. *See* J.A. 372–75. The petition for writ of certiorari was filed on May 13, 2014, and granted on October 2, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fair Housing Act provides, in relevant part:

> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(a).

> It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to dis-

> criminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

42 U.S.C. § 3605(a).

STATEMENT

Federal law offers tax credits to developers who build "qualified" low-income housing projects. *See* 26 U.S.C. § 42(g)(1).[1] This tax subsidy is known as the Low-Income Housing Tax Credit Program (LIHTC). The States administer this program by selecting the developers and projects that will receive these federal tax credits. *See* J.A. 354, 356–57. And federal law requires States to allocate these credits according to a "qualified allocation plan" that "sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions." 26 U.S.C. § 42(m)(1)(B).

The Texas Department of Housing and Community Affairs, its board members, and executive director (collectively, "the Department") are responsible for distrib-

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[1] A "qualified low-income housing project" is any residential rental property in which either (a) 20 percent or more of the units are both rent-restricted and occupied by individuals whose income is 50 percent or less of the area's median gross income (the "20–50 test"), or (b) 40 percent or more of the units are both rent-restricted and occupied by individuals whose income is 60 percent or less of area median gross income (the "40–60 test"). *See* 26 U.S.C. § 42(g)(1).

uting these tax credits throughout Texas. *See* Tex. Gov't Code § 2306.6701; J.A. 354. But federal and state law impose many constraints on the Department's decisionmaking. Federal law, for example, requires a State's qualified-allocation plan to give preference to projects in low-income areas. *See* 26 U.S.C. § 42(m)(1)(B)(ii)(III).[2] And state law requires the Department to "score and rank the application using a point system." Tex. Gov't Code § 2306.6710(b). This point system requires the Department to "prioritize[] in descending order" the following eleven criteria:

> (A) financial feasibility of the development … ;
>
> (B) quantifiable community participation with respect to the development … ;
>
> (C) the income levels of tenants of the development;
>
> (D) the size and quality of the units;
>
> (E) the commitment of development funding by local political subdivisions;
>
> (F) the rent levels of the units;
>
> (G) the cost of the development by square foot;

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[2] Specifically, federal law requires preferences for projects located in "qualified census tracts"—tracts for which 50 percent or more of the households have an income of less than 60 percent of the area median gross income, or that have poverty rates of at least 25 percent. *See* 26 U.S.C. § 42(d)(5)(B)(ii)(I).

> (H) the services to be provided to tenants of the development;
>
> (I) whether … the proposed development site is located in an area declared to be a disaster under Section 418.014;
>
> (J) quantifiable community participation with respect to the development, evaluated on the basis of written statements from any neighborhood organizations on record with the state or county in which the development is to be located and whose boundaries contain the proposed development site; and
>
> (K) the level of community support for the application, evaluated on the basis of a written statement from the state representative who represents the district containing the proposed development site ….

Tex. Gov't Code § 2306.6710(b)(1). The Department has also developed "below-the-line" criteria to supplement these statutorily mandated factors, but no Department-created consideration may outweigh any "above-the-line" factor listed in section 2306.6710. *See* Tex. Att'y Gen. Op. No. GA-0208 (2004).

Respondent The Inclusive Communities Project, Inc., (ICP) is a non-profit that works to place Section 8 tenants in Dallas's affluent and predominantly white suburban neighborhoods. ICP's goals are explicitly race-conscious. It describes its mission as "assist[ing] Black or African American Dallas Housing Authority Section 8 families in finding housing opportunities in the suburban

communities in the Dallas area." *See* J.A. 78; *see also* J.A. 79 ("ICP assists DHA Section 8 program families who choose to lease dwelling units in non-minority areas"). ICP helps its clients by locating apartments, subsidizing their expenses, and paying a "landlord incentive bonus," if necessary, to persuade an owner to accept a Section 8 voucher. *See* J.A. 133–34. Because federal law forbids properties receiving low-income housing tax credits to discriminate against Section 8 tenants, ICP finds it easier and less expensive to place clients in those properties. *See* 26 U.S.C. § 42(h)(6)(B)(iv); J.A. 90–91, 142–43.

ICP sued the Department in 2008, accusing it of "disproportionately allocat[ing]" tax credits to properties in minority-populated areas. *See* J.A. 81. ICP brought disparate-treatment claims under the equal-protection clause and 42 U.S.C. § 1982, and a disparate-impact claim under the FHA. *See* J.A. 171–72.[3] It demanded an injunction requiring the Department "to allocate Low Income Housing Tax Credits in the Dallas metropolitan area in a manner that creates as many Low Income Housing Tax Credit assisted units in non-minority cen-

[3] ICP established Article III standing by relying on the monetary harm caused by the Department's failure to approve more low-income housing tax credits in white-populated locations. ICP's mission is to place Section 8 tenants in predominantly white neighborhoods, and ICP must spend more resources to achieve that goal when applications for tax credits in those neighborhoods are denied. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); J.A. 142–43.

sus tracts as exist in minority census tracts."[4] J.A. 93. ICP also asked the court to "enjoin[] the defendants from … denying Low Income Housing Tax Credits to units in the Dallas metropolitan area when such denial is made by taking the race and ethnicity of the residents of the area in which the project is to be located and the race and ethnicity of the probable residents of the project into account." J.A. 93. ICP did not explain how the Department could comply with the first of these proposed injunctions without violating the second—or without violating the Fair Housing Act, which prohibits the Department from making decisions regarding the location and allotment of low-income housing "because of race." 42 U.S.C. § 3604(a).

After a four-day bench trial, the district court found that ICP had failed to prove intentional discrimination and dismissed its equal-protection and section 1982 claims. *See* J.A. 191.

As for the disparate-impact claim, the district court first concluded that ICP had established a "prima facie case" by showing that the Department had "disproportionately approved tax credits for non-elderly developments in minority neighborhoods and, conversely, has

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[4] The Department would be able to escape this obligation only if its "approval rates for Low Income Housing Tax Credit units in minority census tracts in the Dallas metropolitan area does not exceed the approval rate for Low Income Housing Tax Credit units in non-minority census tracts" *and* "the approved projects in the minority census tracts do not contain a higher percentage of low income residents than the percentage of low income residents in the projects approved in the non-minority census tracts." J.A. 93.

disproportionately denied tax credits for non-elderly housing in predominately Caucasian neighborhoods." J.A. 358–59; *see also* J.A. 191–92, 213. Specifically, the district court found that the Department "approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas." J.A. 192 (footnote omitted). The mere existence of this statistical disparity—without regard to whether it was affected by the strength of the applications or other race-neutral factors—was sufficient (in the district court's view) to establish a "prima facie case."

The district court next held that the Department must "prove" that its actions furthered a "legitimate" government interest *and* that "no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact." J.A. 192–94 (citations and internal quotation marks omitted).[5] The Department argued that this statistical disparity arose from federal and state laws requiring the Department to award low-income housing tax credits according to fixed criteria, some of which are correlated with race. *See* J.A. 195–99; *see also* 26 U.S.C. § 42(m)(1)(B)(ii)(III) (requir-

[5] The district court recognized that the Fifth Circuit had not yet adopted a "standard and proof regime for FHA-based disparate impact claims" and noted that the federal courts of appeals have adopted "at least three different standards and proof regimes." J.A. 192–94 (citing cases). The district court chose to follow an approach similar to the opinion in *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 939 (2d Cir. 1988).

ing a State's qualified-allocation plan to give preference to projects built in low-income areas). The district court assumed that compliance with these laws qualified as a "legitimate" interest but held that the Department failed to prove the absence of any alternative that would reduce the statistical disparity in approval rates. Specifically, the court noted that the Department had not proven that it "cannot add other below-the-line criteria" or otherwise rejigger its scoring criteria to achieve parity in its rates of approval for LIHTC applications. *See* J.A. 203. Then the district court entered judgment for ICP on its disparate-impact claim and imposed a lengthy structural injunction on the Department. J.A. 231–350.

The Department appealed to the Fifth Circuit. During that appeal, the United States Department of Housing and Urban Development (HUD) issued a regulation that purports to establish standards for proving disparate-impact claims under the FHA. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).[6] According to HUD, the Fair Housing Act should impose liability on practices with a "discriminatory effect," which includes (in HUD's view) any practice that "actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns be-

[6] HUD proposed this rule nine days after this Court granted certiorari in *Magner v. Gallagher*, 132 S. Ct. 548 (Nov. 7, 2011). *See* 76 Fed. Reg. 70,921 (Nov. 16, 2011).

cause of race, color, religion, sex, handicap, familial status, or national origin." 24 C.F.R. § 100.500(a) (2014).

HUD's regulation provides that the plaintiff should bear the burden of proving that the challenged practice has a "discriminatory effect." 24 C.F.R. § 100.500(c)(1). If the plaintiff meets this initial burden, then the defendant must prove that the challenged practice is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." *Id.* § 100.500(c)(2). If the defendant meets that burden of proof, then the plaintiff would bear the burden of proving that those substantial, legitimate, and nondiscriminatory interests "could be served by another practice that has a less discriminatory effect." *Id.* § 100.500(c)(3).

The Fifth Circuit panel was bound by prior decisions of that court holding that the FHA provides for disparate-impact liability. *See* J.A. 362–63 (citing *Artisan/Am. Corp. v. City of Alvin*, 588 F.3d 291, 295 (5th Cir. 2009); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996)). But the Fifth Circuit had never before resolved the standards for proving a disparate-impact claim. Rather than endorsing the burden-shifting approach of the district court, the Fifth Circuit "adopt[ed]" the HUD regulations as the law of the circuit and remanded for the district court to apply that standard. *See* J.A. 353.[7] Judge Jones specially concurred, questioning

[7] The Fifth Circuit did not say whether it regarded HUD's rule as the best interpretation of the Fair Housing Act, or whether it was merely deferring to HUD's rule as a reasonable interpretation of the statutory language under the framework of *Chevron, U.S.A.,* (continued…)

whether ICP had proven even a "prima facie case" of disparate-impact discrimination. *See* J.A. 368–71.

On October 2, 2014, this Court granted certiorari, limited to the question whether disparate-impact claims are cognizable under the Fair Housing Act. On November 3, 2014, after this Court had granted certiorari, the United States District Court for the District of Columbia vacated HUD's disparate-impact rule in a separate lawsuit brought under the Administrative Procedures Act. *See* Order at 1, *Am. Ins. Ass'n v. U.S. Dep't of Hous. & Urban Dev.*, No. 1:13-cv-00966 (RJL) (D.D.C., filed Nov. 3, 2014). The district court for the District of Columbia concluded that the Fair Housing Act "unambiguously prohibits *only* intentional discrimination" and that HUD "exceeded [its] authority" by issuing a rule that purports to impose disparate-impact liability. *Am. Ins. Ass'n v. U.S. Dep't of Hous. & Urban Dev.*, No. 1:13-cv-00966 (RJL), 2014 WL 5802283, at *1, *7 (D.D.C. Nov. 7, 2014).

SUMMARY OF ARGUMENT

The text of the Fair Housing Act unambiguously precludes the "disparate impact" interpretation adopted by HUD and the court of appeals. There is no language anywhere in the Fair Housing Act's anti-discrimination rules that refers to "effects" or actions that "adversely affect" others. And *Smith v. City of Jackson*, 544 U.S. 228 (2005), holds that such statutory language is essential for establishing disparate-impact liability. *See id.* at

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Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). *See* J.A. 365–68.

235–36 & n.6 (plurality); *id.* at 243 (Scalia, J., concurring in part and concurring in the judgment). That alone is sufficient to reject HUD's "disparate impact" construction of the Fair Housing Act.

In addition, the Fair Housing Act forbids only actions that discriminate "*because of* race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a) (emphasis added); *see also* 42 U.S.C. § 3605(a). This statutory language cannot support an additional prohibition on actions that discriminate because of any factor that *happens to be correlated with* race, color, religion, sex, familial status, or national origin. And even if it did, the statute's absolute prohibition on discriminatory acts leaves no room for agencies to carve out defenses for "legally sufficient justifications." It is not textually defensible for HUD to convert a statute that prohibits *all* housing decisions taken "because of race" into a statute that prohibits *some* actions taken because of any factor that happens to be correlated with race.

Even if HUD's interpretation of the Fair Housing Act were textually permissible, it should still be rejected under the canon of constitutional avoidance. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). HUD's disparate-impact rule effectively compels state and private entities to engage in race-conscious decisionmaking to avoid legal liability. *See Ricci v. DeStefano*, 557 U.S. 557, 580–84 (2009); *id.* at 594 (Scalia, J., concurring). Although *Ricci* reserved the question whether the Constitution permits governments to engage in purposeful race discrimination in response to "a legitimate fear of [a]

disparate impact [lawsuit]," *id.*, at 584, it cannot be denied that HUD's interpretation will force courts to confront and resolve that difficult constitutional question.

Finally, a ruling that defers to HUD's "disparate impact" interpretation will give agencies undue powers over the administration of anti-discrimination laws. If HUD's interpretation is sustained, then *any* statute barring discrimination "because of race" may be interpreted to establish a disparate-impact regime as strict or as lenient as an agency desires.

ARGUMENT

I. THE TEXT OF THE FAIR HOUSING ACT UNAMBIGUOUSLY PRECLUDES DISPARATE-IMPACT LIABILITY

The Fair Housing Act forbids anyone "[t]o refuse to sell or rent … , or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person *because of race* …." 42 U.S.C. § 3604(a) (emphasis added). It also forbids anyone involved in residential real-estate related transactions "to discriminate against any person … *because of race* …." 42 U.S.C. § 3605(a) (emphasis added).[8] These statutory

[8] Section 3604(a) also prohibits discrimination because of "color, religion, sex, familial status, or national origin." And section 3605(a) likewise prohibits discrimination because of those characteristics, as well as because of "handicap." For simplicity and ease of exposition, we will focus on the statutory prohibitions on discrimination "because of race." The analysis is equally applicable to the other categories of forbidden discrimination in sections 3604(a) and 3605(a).

prohibitions are absolute; they are subject to no exceptions.

HUD interprets these provisions to forbid *some* (but not all) practices that result in a "disparate impact" on any racial group—regardless of whether the practice was motivated by discriminatory intent. *See* J.A. 362; 24 C.F.R. § 100.500. A "disparate impact" arises whenever a practice fails to produce symmetrical effects across racial groups, even if the *reason* for the practice has nothing to do with race. So if a mortgage lender establishes borrowing standards based on income and net worth, and some racial groups are less likely than others to qualify for loans under those standards, this would establish a racial "disparate impact" (or "discriminatory effect") under HUD's construction of the statute. *See* J.A. 365–67; 24 C.F.R. § 100.500(a). The court of appeals, in adopting HUD's interpretation, held that the Fair Housing Act prohibits not only intentional racial discrimination, but also facially neutral practices that happen to result in a "disparate impact" on racial groups.

Yet HUD does not go so far as to claim that *every* practice with a racial disparate impact constitutes forbidden discrimination under the FHA. Even if a plaintiff were to prove that a challenged practice has a disparate impact, the defendant might escape liability by pointing to a "legally sufficient justification." 24 C.F.R. § 100.500(b); *see also* J.A. 366–67. A legally sufficient justification exists when the challenged practice:

> (i) Is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests … ; and

> (ii) Those interests could not be served by another practice that has a less discriminatory effect.

24 C.F.R. § 100.500(b)(1); J.A. 366–67. The defendant holds the burden of proving that the challenged practice is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." J.A. 366; 24 C.F.R. § 100.500(c)(2). If the defendant carries that burden, then the plaintiff must prove that those interests "could be served by another practice that has a less discriminatory effect." J.A. 366; 24 C.F.R. § 100.500(c)(3).

HUD's interpretation departs from the unambiguous text of the Fair Housing Act in two ways. First, it imposes liability even when the defendant has not acted or discriminated "because of race." If a mortgage lender establishes borrowing standards that some racial groups are less likely to meet than others, the lender has not discriminated "because of race," but because of some factor that happens to be correlated with race. This remains true even if the lender might have reduced the racial disparate impact by relaxing its borrowing standards. *See* 24 C.F.R. § 100.500(c)(3). Unless the lender would have altered his borrowing standards if the impact on the races had been different, he cannot be said to be acting "*because of* race." *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (equating "[d]iscriminatory purpose" with a decisionmaker who acts "'because of,' not merely 'in spite of,' [the] adverse effects upon an identifiable group."); *Washington v. Davis*, 426 U.S. 229, 240 (1976) ("[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a

racially discriminatory purpose"). The text of the Fair Housing Act cannot reasonably be construed to impose liability when race plays no role in the challenged decision.

Second, HUD has concocted a "legally sufficient justification" defense that has no textual basis in the statute. *See* J.A. 366–67; 24 C.F.R. § 100.500(b)(1). Even if it were possible to interpret the prohibition on discrimination "because of race" to extend to practices that disproportionately affect racial groups, it is *not* possible to carve out an atextual defense for (supposedly) discriminatory practices that advance "substantial, legitimate, [and] nondiscriminatory interests." J.A. 367; 24 C.F.R. § 100.500(b)(1). If practices that merely impose "discriminatory effects" on racial groups qualify as discrimination "because of race," then *no* justification can overcome the statute's categorical prohibition. And if these practices do not qualify as discrimination "because of race," then no justification is needed.

It is easy to understand why HUD created this atextual caveat for "legally sufficient justifications." Without it, HUD's "disparate impact" interpretation would produce the absurdity of outlawing almost every sales, leasing, or lending criterion established by landlords, homeowners, mortgage lenders, and homeowners' insurance companies. (None of these criteria will have uniform and symmetrical effects across all racial groups.) But the statutory text cannot support the idea that a discriminatory practice becomes legal if there is a good reason for engaging in that practice. The Fair Housing Act's prohibitions are absolute: discrimination "because of race" is

outlawed across the board. *See* 42 U.S.C. §§ 3604(a), 3605(a). The statute does not delegate to agencies or courts the prerogative to create exemptions for what they regard as "legally sufficient justifications."

Each of these textual objections forecloses the "disparate impact" interpretation of the Fair Housing Act that the court of appeals adopted. And each of them precludes judicial deference to HUD's disparate-impact regulation under the *Chevron* framework.[9] *See generally Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992) (*Chevron* deference is permissible only when "the agency interpretation is not in conflict with the plain language of the statute," and only when "the text is ambiguous and so open to interpretation in some respects"). Indeed, HUD has not attempted to answer these textual objections in its final rule, or in any of its briefs defending the regulation.

A. *Griggs v. Duke Power Co.* Does Not Support Disparate-Impact Liability Under The Fair Housing Act

HUD has never endeavored to explain how the text of a statute that prohibits discrimination "because of race" can prohibit discrimination "because of any factor that happens to be correlated with race." Nor has HUD

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[9] Although a federal district court has vacated HUD's disparate-impact regulation, *see supra* at 11, our discussion will assume for the sake of argument that the *Chevron* framework remains applicable.

explained how an absolute statutory prohibition on racially discriminatory practices can allow for a "legally sufficient justification" defense. When commenters raised these objections in the notice-and-comment proceedings, HUD did not present a textual argument for its "disparate impact" interpretation of the statute. Instead, HUD fell back on this Court's controversial pronouncement in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which interpreted section 703(a)(2) of Title VII to impose disparate-impact liability—subject to a court-created "business necessity" defense. *Id.* at 431. *See* 78 Fed. Reg. 11,460, 11,465–66.

HUD believes that because *Griggs* interpreted section 703(a)(2) of Title VII to impose disparate-impact liability, it is textually permissible for HUD to interpret the Fair Housing Act to impose disparate-impact liability—and to devise a "legally sufficient justification" defense that can be as broad or as narrow as the agency desires. *See id.* This argument is flawed for two reasons.

First, even if one were to assume that *Griggs* represents a textually sound construction of Title VII, the language of the Fair Housing Act contains none of the effects-based language that this Court has found essential for triggering disparate-impact liability. Second, *Griggs* was not a textually sound interpretation of Title VII, and its holding should not be extended beyond Title VII or statutes that mirror the language of Title VII.

1. *The Text Of The Fair Housing Act Does Not Contain The "Otherwise Adversely Affect" Language That Appears In Title VII And The ADEA*

Griggs does not hold that any statute barring discrimination "because of race" is susceptible to a disparate-impact construction. Indeed, this Court has interpreted numerous statutes prohibiting discrimination "because of race" or "on account of race" or "on the ground of race" to reach *only* intentional racial discrimination. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (holding that it is "beyond dispute" that section 601 of Title VI, 42 U.S.C. § 2000d, "prohibits only intentional discrimination"); *City of Mobile v. Bolden*, 446 U.S. 55, 60–64 (1980) (plurality) (holding that the pre-1982 version of section 2 of the Voting Rights Act reaches only intentional racial discrimination). And in *Smith v. City of Jackson*, 544 U.S. 228 (2005), this Court unanimously recognized that section 703(a)(1) of Title VII and section 4(a)(1) of the Age Discrimination in Employment Act (ADEA) "do[] not encompass disparate impact liability," even as the Court held that section 703(a)(2) of Title VII and section 4(a)(2) of the ADEA could be construed to allow disparate-impact claims. *See* 544 U.S. at 235–36 & n.6 (plurality); *id.* at 243 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 248–49 (O'Connor, J., concurring in the judgment).

Smith held that section 703(a)(2) of Title VII could establish disparate-impact liability only because the statute prohibits actions that "'deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's

race ...." *Id.* at 235 (plurality) (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988)); *id.* at 243 (Scalia, J., concurring in part and concurring in the judgment). Without the italicized language, no disparate-impact liability could exist and no agency rules providing for disparate-impact liability could be sustained. Not even section 703(a)(2)'s prohibitions on actions that "limit, segregate, or classify ... employees ... because of such individual's race" could suffice to establish disparate-impact liability:

> Neither § 703(a)(2) nor the comparable language in the ADEA simply prohibits actions that "limit, segregate, or classify" persons; rather the language prohibits such actions that "deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's" race or age. ... Thus the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer.

Smith, 544 U.S. at 235–36 & n.6 (plurality); *id.* at 243 (Scalia, J., concurring in part and concurring in the judgment). *Only* statutes that speak in terms of "effects" or actions that "adversely affect" others can be construed to establish disparate-impact liability.[10]

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[10] The *Smith* plurality did not explain how an employer who acts without any racial motivation can "adversely affect" his employee's status "*because of such individual's race*." 42 U.S.C. § 2000e-2(a)(2) (emphasis added). It is not correct to say that "the text focuses on the *effects* of the action on the employee rather than the motivation (continued...)

Smith went on to hold that section 4(a)(2) of the ADEA *could* be construed to establish disparate-impact liability. *See* 544 U.S. at 235–40 (plurality); *id.* at 243 (Scalia, J., concurring in part and concurring in the judgment). Section 4(a)(2) of the ADEA tracks section 703(a)(2) of the Title VII verbatim, but substitutes "age" for "race, color, religion, sex, or national origin." *Compare* 29 U.S.C. § 623(a)(2) (ADEA) *with* 42 U.S.C. § 2000e-2(a)(2) (Title VII). Crucial to the Court's decision was the fact that section 4(a)(2) was "derived *in haec verba* from Title VII," which *Griggs* had already con-

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for the action of the employer," because the text prohibits *only* those actions that "adversely affect" an employee "*because of* such individual's race." If an employer requires a college degree as a condition of employment, this will "adversely affect" *every* job applicant of *every* race who lacks a college degree. But it will not adversely affect that job applicant "because of such individual's race." It will adversely affect the job applicant because of such individual's failure to graduate from college. It is not tenable to describe *Griggs*'s interpretation of section 703(a) as "the better reading of the statutory text." *Smith*, 544 U.S. at 235 (plurality opinion).

But it may be tenable to say that the stare decisis pull of *Griggs*, when combined with the presence of "adversely affect" in the statute, is enough to allow an agency to construe section 4(a)(2) of the ADEA as establishing disparate-impact liability—especially when the text of section 4(a)(2) mirrors the language in section 703(a) of Title VII. *See Smith*, 544 U.S. 243–47 (Scalia, J., concurring in part and concurring in the judgment). One can accept the result in *Smith* even though the text of section 4(a)(2) of the ADEA would not support the "disparate impact" construction in a world without *Griggs*.

strued to establish disparate-impact liability,[11] and that it contained the "otherwise adversely affect" language that the *Smith* court deemed essential for disparate-impact liability. *See* 544 U.S. at 236 (plurality) ("*Griggs*, which interpreted the identical text at issue here, thus strongly suggests that a disparate-impact theory should be cognizable under the ADEA."); *id.* at 243 (Scalia, J., concurring in part and concurring in the judgment). Four justices thought that section 4(a)(2) of the ADEA establishes disparate-impact liability without regard to the views of the agency charged with administering the statute. *Id.* at 239–40 (plurality) (considering agency's views only after performing independent analysis). Justice Scalia's concurrence thought the text of section 4(a)(2) could support the agency's disparate-impact interpretation without deciding whether it *compelled* that construction. *Id.* at 243 (Scalia, J., concurring in part and concurring in

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[11] *See* 544 U.S. at 233–34 (plurality) ("In determining whether the ADEA authorizes disparate-impact claims, we begin with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes. *Northcross v. Board of Ed.. of Memphis City Schools*, 412 U.S. 427, 428, 93 S.Ct. 2201, 37 L.Ed. 2d 48 (1973) *(per curiam).* We have consistently applied that presumption to language in the ADEA that was 'derived *in haec verba* from Title VII.' *Lorillard v. Pons*, 434 U.S. 575, 584, 98 S.Ct. 866, 55 L.Ed. 2d 40 (1978). Our unanimous interpretation of § 703(a)(2) of Title VII in *Griggs* is therefore a precedent of compelling importance."); *id.* at 243 (Scalia, J., concurring in part and concurring in the judgment).

the judgment) ("I agree with all of the Court's reasoning, but would find it a basis, not for independent determination of the disparate-impact question, but for deferral to the reasonable views of the Equal Employment Opportunity Commission ….")

The Fair Housing Act, by contrast, contains none of the "adversely affect[s]" language that enabled this Court to defer to the EEOC's disparate-impact interpretation of the ADEA. And the Fair Housing Act was not derived *in haec verba* from section 703(a)(2) of Title VII or section 4(a)(2) of the ADEA. The following chart illustrates how the text of the Fair Housing Act compares to the disparate-treatment and disparate-impact subsections of Title VII and the ADEA:[12]

[12] The chart contains the original provisions of Title VII and the ADEA, as they appeared when Congress adopted the FHA. Both have been amended, but the operative language has not changed.

Anti-Discrimination Provisions in Title VII, ADEA, and FHA

Title VII **Section 703(a), 42 U.S.C. § 2000e-2(a) (1964)** Pub. L. No. 88-352, 78 Stat. 255	
Disparate-Treatment	**Disparate-Impact**
(a) It shall be an unlawful employment practice for an employer— (1) to fail or **refuse to hire or to discharge** any individual, or **otherwise to discriminate** against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.	(a) It shall be an unlawful employment practice for an employer— (2) to **limit, segregate, or classify** his employees in any way which would deprive or **tend to deprive** any individual of employment opportunities or otherwise **adversely affect** his status as an employee, because of such individual's race, color, religion, sex, or national origin.
ADEA **Section 4(a), 29 U.S.C. § 623(a) (1967)** Pub. L. No. 90-202, 81 Stat. 603	
Disparate-Treatment	**Disparate-Impact**
(a) It shall be unlawful for an employer— (1) to fail or **refuse to hire or to discharge** any individual **or otherwise discriminate** against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.	(a) It shall be unlawful for an employer— (2) to **limit, segregate, or classify** his employees in any way which would deprive or **tend to deprive** any individual of employment opportunities or otherwise **adversely affect** his status as an employee, because of such individual's age.
Fair Housing Act **Section 804(a) and Section 805(a), 42 U.S.C. §§ 3604(a), 3605(a) (2013)**	
[I]t shall be unlawful— (a) To **refuse to sell or rent** after the making of a bona fide offer, or to **refuse to negotiate** for the sale or rental of, or **otherwise make unavailable or deny**, a dwelling to any person because of race, color, religion, sex, familial status, or national origin. (a) … It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to **discriminate** against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.	

None of the Fair Housing Act's prohibitions bear any resemblance to the disparate-impact liability provisions of Title VII or the ADEA. The Fair Housing Act makes it unlawful to

- "refuse to sell or rent after the making of a bona fide offer,"
- "refuse to negotiate for the sale or rental," or
- "otherwise make unavailable or deny, a dwelling to any person"
- "discriminate against any person"

because of race, color, religion, sex, familial status, or national origin. 42 U.S.C. §§ 3604(a), 3605(a). No mention of "effects," and no mention of actions that "adversely affect" others.

Then there is the "because of race" language, which *Griggs* and *Smith* downplayed but which cannot be so easily pushed aside here. Deriving disparate-impact liability from statutes prohibiting actions that "adversely affect" an employee "because of such individual's race" is questionable. *See supra* at 20–21, n.10. But at least it is backed by the stare decisis force of *Griggs*, the presence of verb "affects" in the statutory text, and the strong interpretive presumption that identical language appearing in different statutes should have the same meaning. *See Smith*, 544 U.S. at 233 (plurality); *Northcross*, 412 U.S. at 428. None of that can support HUD's disparate-impact construction of the Fair Housing Act, nor can it allow HUD to ignore the fact that the statutory language prohibits *only* actions taken "*because of* race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a) (emphasis added). Neither *Griggs* nor *Smith*

offers any support to HUD's interpretation because the crucial language that triggered disparate-impact liability—the prohibition on actions that "otherwise adversely affect" an employee—does not appear in the text of the Fair Housing Act.

HUD's attempt to derive disparate-impact liability from the Fair Housing Act extends beyond any semblance of reasonable statutory interpretation. If a landlord rents only to tenants who meet certain income levels, he is not refusing to rent "because of race"—even if some racial groups are less likely than others to have incomes at that level. The landlord is refusing to rent because of income, not "because of race" (unless, of course, the landlord's *reason* for adopting those income requirements was to exclude minority tenants). If a homeowner refuses to negotiate a sale with anyone who has not been pre-approved for a loan, he is not refusing to negotiate "because of race"—even if some racial groups are less likely to receive pre-approval because they have less income and less household wealth. When the Fair Housing Act forbids refusals to sell, rent, or negotiate "*because of race*," or actions that "make unavailable or deny" housing "*because of race*," or actions that "discriminate against any person … *because of race*," it is not forbidding discrimination on account of any factor that happens to be correlated with race. An action is not taken "because of race" unless race is a *reason* for the action. *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) ("'Because of' mean[s] 'by reason of: on account of.'") (quoting 1 *Webster's Third New International Dictionary* 194 (1966)).

HUD has never answered this most basic textual objection to its "disparate impact" interpretation. In its final rule, HUD claimed that the "'otherwise make unavailable or deny' formulation in the text of the Act focuses on the effects of a challenged action rather than the motivation of the actor." 78 Fed. Reg. at 11,466 (quoting 42 U.S.C. § 3604(a)). No, it doesn't. The Fair Housing Act provides that it is unlawful to "otherwise make unavailable or deny … a dwelling to any person *because of race, color, religion, sex, familial status, or national origin*." 42 U.S.C. § 3604(a) (emphasis added). This does not focus on the "effects" of a challenged action, but on the *reasons* for the challenged decision; that's what the phrase "because of" means. *See Gross*, 557 U.S. at 176 (quoting 1 *Oxford English Dictionary* 746 (1933), which defines "because of" to mean "By reason *of,* on account *of*" (italics in original)); *id.* (quoting *The Random House Dictionary of the English Language* 132 (1966), which defines "because" to mean "by reason; on account").

HUD also argued that the word "discriminate" is "a term that may encompass actions that have a discriminatory effect but not a discriminatory intent." 78 Fed. Reg. at 11,466. Not when the statute forbids only actions that "discriminate … *because of* race, color, religion, sex, familial status, or national origin." 42 U.S.C. §§ 3604(b) (emphasis added), 3605(a); *see also* 42 U.S.C. § 3606 (forbidding real-estate brokers "to discriminate … *on account of* race, color, religion, sex, handicap, familial status, or national origin.") (emphasis added); *Ricci*, 557 U.S. at 577 (holding that section 703(a)(1) of Title VII, which forbids an employer "to *discriminate* against any

individual … *because of* such individual's race, color religion, sex, or national origin," holds employers "liable *only* for disparate treatment.") (emphases added); *Smith*, 544 U.S. at 235–36 & n.6 (plurality) (same). The meaning of "discriminate" cannot be determined in isolation from the clause that specifically limits the scope of the statutory prohibition. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 466 (2001) ("Words that can have more than one meaning are given content, however, by their surroundings."); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.").

HUD's final rule eventually gets around to acknowledging that the statute prohibits only discrimination "because of race" and other protected characteristics. *See* 78 Fed. Reg. at 11,466. But HUD waves off this statutory language by observing that "[b]oth section 703(a)(2) of Title VII and section 4(a)(2) of the ADEA prohibit certain actions 'because of' a protected characteristic, yet neither provision requires a finding of discriminatory intent." *Id.* The problem for HUD is that *Smith* made clear that it was the "otherwise adversely affect" language in Title VII and the ADEA, combined with the stare decisis weight accorded to *Griggs*, that allowed the EEOC to interpret section 4(a)(2) as establishing disparate-impact liability. *See* 544 U.S. at 233–36 (plurality); *id.* at 243 (Scalia, J., concurring). Without this "otherwise adversely affect" language no disparate-impact liability can exist when a statute prohibits only discrimination taken "because of race." HUD appears to

believe that *Griggs* authorizes *any* agency to interpret *any* statute forbidding discrimination "because of race" as imposing disparate-impact liability. *Smith* rejects that idea and specifically holds that section 4(a)(1) of the ADEA, along with similarly worded anti-discrimination statutes, "does not encompass disparate-impact liability." 544 U.S. at 236 n.6 (plurality); *id.* at 243 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 248–49 (O'Connor, J., concurring in the judgment).

2. *Griggs Was Not A Textually Sound Construction of Title VII, And Its Holding Should Not Extend Beyond Title VII Or Statutes That Track Title VII's Language*

HUD's reliance on *Griggs* is unavailing for an additional reason: *Griggs* was not a textually sound interpretation of Title VII. To the extent that *Griggs* may be entitled to deference on account of statutory stare decisis, its holding should extend no further than section 703(a)(2) of Title VII and statutes that mirror the language of section 703(a)(2).

Griggs did not try to explain how the language of Title VII could support disparate-impact liability, or the "business necessity" defense that appeared nowhere in the text of the statute. *See* 401 U.S. at 429–32. Yet the text of section 703(a)(2) of Title VII merely forbade an employer

> to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as

> an employee, *because of such individual's race, color, religion, sex, or national origin.*

Civil Rights Act of 1964, Pub L. No. 88-352, § 703(a)(2), 78 Stat. 241, 255 (1964) (emphasis added). The text prohibited actions taken *because of* race—not because of any factor that happens to be correlated with race except in cases of business necessity. And when the *reasons* for an employment decision are entirely unrelated to race, it cannot possibly be said that this decision was made "because of … race."

This remains the case even when a statute prohibits actions that "adversely affect" an employee "because of such individual's race." If an employer requires his employees to hold high-school diplomas, this will "adversely affect" *every* job applicant of *every* race who lacks a high-school diploma. But it will not adversely affect that job applicant "because of such individual's race" (unless, of course, the employer's *reason* for adopting this requirement was to exclude certain racial groups from the workforce). It will adversely affect the job applicant "because of" such individual's failure to graduate from high school. *Griggs* did not address these incompatibilities between the statutory language and the Court's disparate-impact regime, and relied on conclusory assertions rather than statutory analysis. *See, e.g.*, 401 U.S. at 431 ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity."); *id.* at 432 ("Congress directed the thrust of the Act to the con-

sequences of employment practices, not simply the motivation.").[13]

This is not to say that the Court must overrule *Griggs* in order to reject HUD's interpretation of the Fair Housing Act. It is possible to believe that *Griggs* should be retained on account of statutory stare decisis, a doctrine of deference much stronger than *Chevron*. *See Neal v. United States*, 516 U.S. 284, 295 (1996) ("[O]ur system demands that we adhere to our prior interpretations of statutes."); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) ("[C]onsiderations of stare decisis weigh heavily in the area of statutory construction").[14] Indeed,

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[13] *Griggs* has been sharply criticized for its holding and its lack of textual analysis. *See, e.g.*, Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 192 (1992) (describing *Griggs* as "a travesty of statutory construction"); *id.* at 184–86, 195–200 (criticizing *Griggs*'s analysis of statutory text and structure); Michael E. Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 Indus. Rel. L.J. 429 (1985).

[14] Some might also believe that *Griggs* remains good law on account of the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991), which many regard as codifying the disparate-impact regime established in *Griggs*. *See, e.g.*, *Ricci*, 557 U.S. at 624 (Ginsburg, J., dissenting) ("Among the 1991 alterations, Congress formally codified the disparate-impact component of Title VII."). The text of the 1991 Civil Rights Act, however, does not codify disparate-impact liability. Rather, it *limits the permissible scope* of disparate-impact claims. *See* Civil Rights Act of 1991 § 105(a), 105 Stat. at 1074. 42 U.S.C. § 2000e-2(k)(1)(A), which codifies the disparate-impact provisions of the 1991 Civil Rights Act, provides that:

(continued…)

statutory stare decisis (unlike *Chevron*) allows this Court to defer even to atextual or unreasonable interpretations of statutes. *See Neal*, 516 U.S. at 295 (refusing to overturn prior interpretation of statute even though "there may be little in logic to defend [it]"); *see also* Adrian Vermeule, *Judging Under Uncertainty* 223–24 (2006) (defending a strong statutory stare decisis doctrine on institutional grounds). But it is a non-sequitur to contend that *Griggs*'s survival over the past 43 years can authorize agencies to follow *Griggs*'s approach when interpret-

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> An unlawful employment practice based on disparate impact is established under this subchapter *only if*—
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

42 U.S.C. § 2000e-2(k)(1)(A) (emphasis added). The words "only if" indicate that these are necessary conditions, not sufficient conditions, for disparate-impact liability, and the statutory text does not preclude this Court from overruling *Griggs* or otherwise shrinking the scope of disparate-impact liability. If the drafters of the Civil Rights Act of 1991 were hoping "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*," Civil Rights Act of 1991 § 3(2), they did not choose statutory language appropriate to accomplish that end.

ing statutes that depart from the text of section 703(a)(2) of Title VII. If *Griggs* is to be retained on account of statutory stare decisis, its holding should not extend beyond section 703(a)(2) of Title VII or statutes that track the language of section 703(a)(2).

B. The Text Of The Fair Housing Act Leaves No Room For Agencies To Create Exceptions For "Legally Sufficient Justifications"

Even if one were to *assume* that the text of the Fair Housing Act could support a prohibition on practices that disproportionately affect racial groups, there is no textual basis for the "legally sufficient justification" defense that appears in 24 C.F.R. § 100.500(b)(1). The prohibitions in the Fair Housing Act are absolute: *All* practices that "otherwise make unavailable or deny … a dwelling … because of race" are outlawed. 42 U.S.C. § 3604(a). And *all* practices that "discriminate against any person … because of race" in residential real-estate transactions are forbidden. 42 U.S.C. § 3605(a). If HUD really believes that this language "focuses on the effects of a challenged action rather than the motivation of the actor," then it must interpret the statute to prohibit all actions that produce these "discriminatory effect[s]." 78 Fed. Reg. at 11,466. There is no statutory text that can support a *partial* prohibition on actions with "discriminatory effects." And there is no text that can support a prohibition on *unjustified* actions that produce "discriminatory effects."

More importantly, the statute does not delegate to agencies the prerogative to decide what counts as a "le-

gally sufficient justification." Yet HUD believes that it holds the prerogative to decide exactly how narrow or broad this "legally sufficient justification" defense will be. HUD might have decided to impose a demanding "business necessity"–like standard, rather than requiring only a "substantial, legitimate, nondiscriminatory interest[]." *Compare Griggs*, 401 U.S. at 431, *with* 24 C.F.R. § 100.500(b)(1)(i). Or it might have chosen to impose a less-demanding standard, perhaps requiring only a "legitimate" and "nondiscriminatory" interest, rather than requiring that the interest also qualify as "substantial" (whatever that means). HUD's view of the statute changes an absolute statutory prohibition into a law that allows agencies to create dispensations for supposedly discriminatory practices.

None of this would be troubling if the text of the Fair Housing Act implicitly delegated this prerogative to the agency. If, for example, the text of the Fair Housing Act prohibited only "unjustified discriminatory practices," then the agency could more plausibly claim an implied delegation to determine: (i) whether the statute prohibits practices that disproportionately affect racial groups even when there is no racially discriminatory motive, and (ii) the meaning of the ambiguous term "unjustified." *See Chevron*, 467 U.S. at 844. But when the statute prohibits only discrimination "*because of* race, color, religion, sex, handicap, familial status, or national origin," *and* when that prohibition is phrased in absolute terms, there is no basis on which an agency can embark on the improvisation project that HUD has produced. HUD is seizing discretion that the text of the statute simply does not con-

fer. *See Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444–46 (2014); *Brown & Williamson*, 529 U.S. at 133–43.

Finally, this agency-created "disparate impact" regime cannot be defended as an evidentiary tool for weeding out intentionally discriminatory practices. *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). That is because one cannot defend against a "disparate impact" claim by showing that the conduct had no discriminatory motive—even if the absence of intentional discrimination is proven beyond a shadow of a doubt. *See Ricci*, 557 U.S. at 595 (Scalia, J., concurring); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 96 (2008) (noting that the absence of discriminatory intent "is the very premise for disparate-impact liability in the first place, not a negation of it or a defense to it."). HUD's "disparate impact" rule is nothing more than legislation by agency—converting an unambiguous statutory text that *categorically* bars discrimination "because of race" into a *partial* prohibition on practices that disproportionately affect racial groups.

C. The 1988 Amendments To The Fair Housing Act Do Not Support HUD's Disparate-Impact Interpretation

Congress amended the Fair Housing Act in 1988. *See* Pub. L. No. 100-430, § 6, 102 Stat. 1619, 1620 (1988). These amendments included three new exemptions to liability. The first provides that "[n]othing in [the Fair Housing Act] prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribu-

tion of a controlled substance." 42 U.S.C. § 3607(b)(4). The second provides: "Nothing in [the FHA] limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1). The third exemption states that "[n]othing in [the FHA] prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." 42 U.S.C. § 3605(c).

HUD argues that these exemptions "presuppose" that the Fair Housing Act prohibits disparate-impact liability. 78 Fed. Reg. at 11,466; *see also id.* ("[These] provision[s] would be wholly unnecessary if the Act prohibited only intentional discrimination."). Not at all. First, these exemptions were adopted in 1988 against the backdrop of lower-court decisions that had misconstrued the Fair Housing Act to establish disparate-impact liability. *See, e.g.*, *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1036–37 (2d Cir. 1979); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146–48 (3d Cir. 1977). Congress enacted these exemptions to provide safe harbors for defendants who were forced to litigate in courts that had adopted this misguided construction of the Fair Housing Act. The 1988 amendments "presuppose" only the *existence of court decisions* that had derived disparate-impact liability from the Fair Housing Act. They do not signify *approval* of those court decisions, and they

assuredly do not change the meaning of the unambiguous statutory text that Congress enacted in 1968.

HUD thinks it significant that Congress did not go further and reiterate what the statute already says: that the Fair Housing Act prohibits only discrimination that occurs "*because of* race, color, religion, sex, familial status, or national origin." 78 Fed. Reg. at 11,467. Indeed, the Solicitor General has gone so far as to claim that Congress implicitly *codified* a disparate-impact standard when it enacted the 1988 amendments, because it left the operative provisions unchanged in the face of nine court-of-appeals rulings that had embraced disparate-impact liability. *See* Brief for the United States as Amicus Curiae Supporting Respondents, *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507, 2013 WL 5798699, at *21–23 (U.S., filed Oct. 28, 2013). The Solicitor General's argument is untenable. The 1988 Congress neither codified nor repudiated the appellate-court rulings that had embraced disparate-impact liability. It simply carved out three exemptions from disparate-impact (and disparate-treatment) liability, while leaving in place the unambiguous statutory language that forbids discrimination *only* when it occurs "*because of* race, color, religion, sex, familial status, or national origin."

Congress's failure to enact language explicitly repudiating disparate-impact liability does not signal congressional approval of disparate-impact liability. The Congress that enacted the 1988 amendments did not weigh in, one way or the other, on whether disparate-impact liability claims are cognizable under the Fair

Housing Act. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533 (1983). More importantly, no statutory language approving disparate-impact liability would have made it past the President's desk. When President Reagan signed the 1988 Fair Housing Act amendments, he issued a statement declaring that "Title 8 speaks only to intentional discrimination." Remarks on Signing the Fair Housing Amendments Act of 1988, 24 Weekly Comp. Pres. Doc. 1140, 1141 (Sept. 13, 1988). Remarkably, the Solicitor General wants this Court to act as though the 1988 Congress had enacted a statute that explicitly enshrined disparate-impact liability into law, even though the President was on record opposing the idea and surely would have vetoed such legislation if Congress had presented it to him. *See* Brief for the United States as Amicus Curiae Supporting Respondents, *Twp. of Mount Holly*, 2013 WL 5798699, at *23–24 (U.S., filed Oct. 28, 2013). The Solicitor General appears to believe that members of Congress can achieve through silence what they would have been unable to achieve through explicit statutory language.

Whatever inferences the Solicitor General may try to draw about the mindset of legislators that enacted the 1988 amendments, it remains the case that unenacted congressional thoughts or aspirations do not have the status of law. And they cannot be given the status of law without circumventing the "finely wrought" procedures for federal lawmaking established in Article I, section 7. *See INS v. Chadha*, 462 U.S. 919, 951 (1983); *Clinton v. City of New York*, 524 U.S. 417, 439–40 (1998); *see also* John F. Manning, *Textualism as a Nondelegation Doc-*

trine, 97 Colum. L. Rev. 673, 707–09 (1997); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994) (refusing to "infer that … Congress[], by silence, ha[s] acquiesced in the judicial interpretation of" a statute that Congress has declined to amend). Lawmaking requires approval from the House, the Senate, *and* the President (unless a law is passed over the President's veto), and only the language agreed to by those three entities can have the force of law.

Second, there is nothing wrong with surplusage when the relevant texts are unambiguous. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004) (noting that the "preference for avoiding surplusage constructions is not absolute" and that courts "should prefer the plain meaning" over a non-surplusage construction); *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (rejecting surplusage argument in part because "a court should always turn first to one, cardinal canon before all others … courts must presume that a legislature says in a statute what it means and means in a statute what it says there"). Indeed, surplusage and redundancies abound in federal statutes—including anti-discrimination laws. *See, e.g.*, *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177–78 (2013) ("[R]edundancy is hardly unusual in statutes") (internal quotation marks omitted)); *Conn. Nat. Bank*, 503 U.S. at 253 ("Redundancies across statutes are not unusual events in drafting").[15] Consider the Americans

[15] Surplusage also appears throughout the Constitution. *See The Federalist No. 33* (Alexander Hamilton) (stating that the Necessary and Proper Clause and the Supremacy Clause "are only declaratory (continued…)

With Disabilities Act. It defines prohibited discrimination to include:

> (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee; …
>
> (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity ….

42 U.S.C. § 12112(b). Subsection (1) resembles the language of section 703(a)(2) of Title VII, which *Griggs* interpreted as establishing disparate-impact liability. But if subsection (1) is given a *Griggs*-like "disparate impact" construction, then subsection (6) becomes superfluous. We doubt that the respondent or the Solicitor General will contend that 42 U.S.C. § 12112(b)(1) must be limited

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of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers"). In many cases this Court has not hesitated to interpret even ambiguous constitutional texts in a manner that creates surplusage. *See, e.g.*, *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

to disparate treatment in an effort to avoid statutory surplusage. Surplusage is often the inevitable result of legislative logrolling or belt-and-suspenders draftsmanship. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 934–35 (2013) ("Common sense tells us that, despite the popularity of [the canon against surplusage] with judges, there is likely to be redundancy, especially in exceedingly long statutes. … [E]ven in short statutes—indeed, even within single sections of statutes— … terms are often purposefully redundant to satisfy audiences other than courts."); William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 Colum. L. Rev. 531, 573 (2013) ("[C]ongressional staff tell us that they will purposely use redundant terms to make sure that all bases are covered and to satisfy interest groups and executive officials who are worried that their interests are not being adequately protected."). It is not a reason to disregard the normal meaning of statutory language.

If the text of the Fair Housing Act were *ambiguous* as to whether it imposes disparate-impact liability, then the preference for avoiding surplusage *might* come into play and support HUD's interpretation if a contrary reading would leave the 1988 exemptions with no role to play. But the statute is unambiguous: it prohibits only discrimination "*because of* race, color, religion, sex, familial status, or national origin," and it contains none of the effects-based language that allowed the EEOC to derive disparate-impact liability from section 4(a)(2) of

the ADEA. Neither a court nor an agency can invoke its desire to avoid surplusage as an excuse for disregarding unambiguous statutory language.

Finally, HUD is wrong to assert that a textual reading of the Fair Housing Act would leave the 1988 exemptions with *no* work to do. Even in disparate-treatment cases, many courts apply a *McDonnell Douglas*–type burden-shifting framework, in which a disparate-treatment defendant must show a "legitimate basis" for its action once the plaintiff establishes his "prima facie case" of discrimination. *See, e.g.*, *Ojo v. Farmers Grp., Inc.*, 600 F.3d 1205, 1207 (9th Cir. 2010) (per curiam) (en banc); *Rizzo*, 564 F.2d at 148–49. The 1988 exemptions ensure that compliance with maximum-occupancy laws and exclusions of convicted drug offenders will be deemed *per se* "legitimate" under the burden-shifting framework, and preclude any quibbling over whether these policies can satisfy the disparate-treatment defendant's burden of production. True, it is likely that most courts would have found these policies "legitimate" even in the absence of the statutory exemptions, but at least the 1988 amendments remove any doubt on that score. That's enough to show that the exemptions will have at least *something* to do in a world without disparate-impact liability.

II. HUD'S DISPARATE-IMPACT INTERPRETATION RAISES SERIOUS CONSTITUTIONAL QUESTIONS

Even if HUD's "disparate impact" interpretation of the Fair Housing Act were textually permissible (and it isn't), it should nevertheless be rejected under the canon

of constitutional avoidance. *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Courts must construe federal statutes to avoid not only actual constitutional violations, but also serious constitutional questions. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001); *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991); *NLRB v. Catholic Bishop*, 440 U.S. 490, 500 (1979). And they should do so even when an agency has adopted a contrary interpretation of the statute. *See Edward J. DeBartolo Corp.*, 485 U.S. at 575–78; *Miller v. Johnson*, 515 U.S. 900, 923 (1995) ("We have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions.").

HUD's disparate-impact rule presents the same constitutional problem as the now-extinct "nonretrogression doctrine." Both of them effectively compel entities to engage in race-conscious decisionmaking in order to avoid legal liability. *See Ricci*, 557 U.S. at 580–84; *id.* at 594 (Scalia, J. concurring) ("Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes"); *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring) ("[C]onsiderations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5."); *Miller v. Johnson*, 515 U.S. 900, 927–28 (1995). This is not acceptable under modern equal-protection doctrine, which requires color-blind government and abhors government decisionmak-

ing based on race. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730–31 (2007); *Johnson v. California*, 543 U.S. 499, 505–06 (2005); *see also Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.").

Ricci reserved the question whether the Constitution permits governments to engage in purposeful racial discrimination when motivated by "a legitimate fear of [a] disparate impact [lawsuit]." 557 U.S. at 584. But it cannot be denied that HUD's interpretation of the Fair Housing Act will force courts to confront the serious and difficult constitutional questions that *Ricci* left unresolved. HUD's "disparate impact" regime will compel *every* regulated entity to evaluate the racial outcomes of its policies and make race-based decisions to avoid disparate-impact liability. *See Watson*, 487 U.S. at 992–93 (noting that "the inevitable focus on statistics in disparate-impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures"). Indeed, HUD's regulation specifically requires policies that will minimize racial disparities. *See* 24 C.F.R. § 100.500(b)(1)(ii) (imposing liability whenever an interest could be "served by another practice that has a less discriminatory effect"). The Constitution does not permit state actors to engage in racial balancing of this sort. *See Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). And it does not permit governments to enact laws that compel or induce private parties to do so. *See Ricci*, 557 U.S. at

594 (Scalia, J., concurring) ("[I]f the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties … discriminate on the basis of race.") (citation omitted).

HUD's disparate-impact interpretation presents yet another potential equal-protection problem. Many federal and state housing programs disproportionately *aid* racial minorities or communities disproportionately populated by minorities. *See, e.g.*, Tex. Gov't Code §§ 2306.581 to .591 (establishing program to help colonias, which are low-income communities near the Mexican border); 2306.801 to .805 (funding rehabilitation of certain at-risk multifamily housing developments); 2306.921 to .933 (governing migrant labor housing facilities). Indeed, the federal statute governing the Low-Income Housing Tax Credit Program *requires* a State's qualified-allocation plan to give preference to projects in low-income areas—and those areas will be disproportionately populated by racial minorities. *See* 26 U.S.C. § 42(m)(1)(B)(ii)(III). Does *that* constitute a forbidden "discriminatory effect," which must be justified by a "substantial, legitimate, or nondiscriminatory interest[]" and replaced by any practice that would have a "less discriminatory effect"?

The answer would appear to be "yes" based on the text of HUD's regulation, which purports to confer equal protections on members of all races. *See* 24 C.F.R. § 100.500(a). But it is absurd to suggest that programs of this sort must take every step possible to ensure racially

symmetrical effects,[16] and HUD has not said whether it will enforce its disparate-impact regulation in that manner. *Cf.* U.S. Comm'n on Civil Rights, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination* 21 n.20 (1981) ("Founded as it is on the historical and current process of discrimination against minorities and women, the *Griggs* principle cannot sensibly be applied to white males."); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 528 (2003) ("What authority there is supports the view that employment practices with disparately adverse impacts on historically dominant classes are, as a matter of law, not actionable under Title VII."). But if HUD interprets its disparate-impact regulation to protect only minorities and not whites, or if it declines to enforce its disparate-impact regulation against practices that disproportionately help minorities, then it would violate the Equal Protection Clause by conferring asymmetric protections on members of different races. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 230 (1995).

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[16] *See Washington v. Davis*, 426 U.S. 229, 248 (1976) ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.").

III. A DECISION THAT DEFERS TO HUD'S DISPARATE-IMPACT RULE WILL GIVE AGENCIES ATEXTUAL AND FAR-REACHING POWERS IN ENFORCING ANTI-DISCRIMINATION LAWS

A ruling that approves HUD's disparate-impact rule will have far-reaching implications for the power of administrative agencies. HUD asserts that *any* statutory prohibition on acts that "discriminate … because of race" may be construed to establish disparate-impact liability—subject to whatever agency-created exceptions that the agency decides to create. *See* 78 Fed. Reg. at 11,466 ("[M]any of the Fair Housing Act's provisions make it unlawful 'to discriminate' in certain housing-related transactions based on a protected characteristic. 'Discriminate' is a term that may encompass actions that have a discriminatory effect but not a discriminatory intent."). If the Court approves or defers to this argument, it will empower any agency that enforces any anti-discrimination law to make up its own "disparate impact" regime and extend disparate-impact liability as far as the agency desires.

The behavior of administrative agencies in enforcing "disparate impact" regimes shows that agencies should not be trusted to wield these discretionary powers—especially when the "legally sufficient justification" defense is couched in vague and agency-empowering language (such as whether a policy furthers a "substantial" interest). The Equal Employment Opportunity Commission, for example, has recently issued "enforcement guidance" that purports to limit the prerogative of employers to exclude convicted felons from employment.

See EEOC, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, No. 915.002 (Apr. 25, 2012), available at http://1.usa.gov/1cgbyTD (last visited on November 16, 2014). EEOC claims that categorical exclusions of felons create an unlawful "disparate impact" under Title VII, and that employers must conduct "individualized assessments" of felons' job applications. *Id.* at 9, 18–20. If an employer refuses to hire a convicted felon, it is the employer's burden to prove that the felony disqualification is "job related for the position in question and consistent with business necessity." *Id.* at 8; *see also id.* at 13–14 (urging employers not to "ask about convictions on job applications"). EEOC has also instructed employers to ignore state and local laws that disqualify convicted felons from holding certain jobs, to the extent those state and local laws conflict with EEOC's interpretation of Title VII. *See id.* at 24. And EEOC has used this "enforcement guidance" to sue employers who have declined to hire convicted felons. *See* Compl., *EEOC v. Dolgencorp LLC d/b/a Dollar General*, Case No. 1:13-cv-4307 (N.D. Ill., filed June 11, 2013) (claiming that Dollar General failed to prove business necessity for refusing to hire a twice-convicted drug user as a "Stocker/Cashier"). This is the *reductio ad absurdum* of agency-enforced "disparate impact" regimes: Any policy that disproportionately affects racial groups can become an enforcement target for agencies that disapprove the practice.

Agencies have also tried to impose disparate-impact regimes based on statutes that have been held by this

Court to extend only to intentional discrimination. Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, *on the ground of race, color, or national origin*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (emphasis added). This statute contains none of the effects-based language that appears in Title VII or the ADEA, and this Court has specifically held that "Title VI itself directly reach[es] only instances of intentional discrimination." *Alexander*, 532 U.S. at 281 (citation and internal quotation marks omitted).

But on October 1, 2014, the Department of Education's Office of Civil Rights sent a 37-page "Dear Colleague" letter to every State, school district, and school purporting to define their "legal obligations under Title VI." *See* Letter from Catherine E. Lhamon, Asst. Sec. for Civil Rights, U.S. Dep't of Educ., to Colleagues at 1 (Oct. 1, 2014), available at http://1.usa.gov/1rCujKI (last visited on November 16, 2014). The letter declares that "[s]chool districts … violate Title VI if they adopt facially neutral policies that are not intended to discriminate based on race, color, or national origin, but do have an *unjustified, adverse disparate impact* on students based on race, color, or national origin." *Id.* at 8 (emphasis added). Of course, it is hard to image any educational policy or practice that produces perfectly symmetrical outcomes across all racial groups. School disciplinary policies, requirements for graduation, standards for admission into gifted-and-talented programs, and reliance on

property taxes to fund public education will all result in racial "disparate impact." The "Dear Colleague" letter effectively empowers the Department of Education to declare any school decision or policy that it deems "unjustified" as evidence of illegal race discrimination, and threaten to cut off federal funds unless the school complies.

Equally troubling is the all-too-common agency practice of defining disparate-impact liability in terms that are vague and indeterminate. Consider the now-defunct DOJ regulations that explained how the Attorney General would go about deciding whether a proposed voting change violates the "effects" prong of section 5 of the Voting Rights Act. *See* 28 C.F.R. §§ 51.57–51.61. These regulations did nothing but list "factors" that the Attorney General would "consider" in making preclearance determinations. The weight to be accorded to each of these "factors" rested entirely in the discretion of the decisionmaker, and the regulations did not even purport to represent an exclusive list of the "factors" that would be considered. *See id.* § 51.57 ("*Among the factors* the Attorney General will consider …") (emphasis added). One who read these regulations could only guess at whether a law that disproportionately affects racial groups would have been deemed to violate the "effects" prong of section 5.

Although HUD's disparate-impact rule is not as open-ended as DOJ's section 5 regulations, it nevertheless gives agency administrators *carte blanche* to decide whether an asserted interest is "substantial" enough to justify a racially disproportionate impact. *See* 24 C.F.R.

§ 100.500(b)(1)(i) (disparate impact is justified if the challenged practice "[i]s necessary to achieve one or more substantial, legitimate, nondiscriminatory interests"). Does a landlord's unwillingness to rent to convicted felons qualify as a "substantial" interest? That will depend entirely on the whim of the agency, and its decision will be entitled to the ultra-strong deference that this Court accords to agency interpretations of their own regulations. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14 (1945); *but see* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) (criticizing the practice of *Seminole Rock* deference). HUD's rule (and similar rules that other agencies may adopt) will effectively empower agencies to decide on a case-by-case basis whether a practice that disproportionately affects racial groups will be allowed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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