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 OF *AMICI CURIAE* THE AMERICAN BANKERS ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE CONSUMER BANKERS ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE, THE HOUSING POLICY COUNCIL, AND STATE BANKING ASSOCIATIONS IN SUPPORT OF PETITIONERS

[Additional *amici* listed on inside cover]

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INTEREST OF *AMICI CURIAE* [1]

The American Bankers Association (ABA), headquartered in Washington, D.C., is the principal national trade association of the financial services industry. ABA's members, located in all fifty states, the District of Columbia, and Puerto Rico, include financial institutions of all sizes. ABA members hold a majority of the domestic assets of the banking industry in the United States. ABA frequently submits *amicus curiae* briefs in state and federal courts in matters that significantly affect its members and the business of banking.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country, including lenders and other businesses that have been sued by plaintiffs asserting disparate-impact claims under the Fair Housing Act (FHA). An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amici curiae* or their members made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

The Consumer Bankers Association (CBA) is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation on retail banking issues. CBA members include most of the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the industry's total assets.

The Financial Services Roundtable represents 100 of the largest integrated financial companies providing banking, insurance, and investment products and services to American consumers. The Roundtable's members finance the majority of single and multi-family housing in the United States.

The Housing Policy Council is made up of 32 companies that are among the nation's leaders in mortgage finance and originate an estimated 75 percent of the mortgages for American home buyers.

Also appearing as *amici* are 54 bankers associations from all 50 states and Puerto Rico. These associations represent the interests of their members (which include state and federally chartered banks, as well as savings and loan associations) at the state and local level.

Amici, on behalf of their members, have a substantial interest in the outcome of this case. *Amici*'s members are strongly committed to providing lending, financial, and other business services in a nondiscriminatory manner, and implement that commitment through compliance policies and practices. Notwithstanding their efforts, *amici*'s members have been subject to lawsuits asserting disparate-impact claims

under Section 804(a) of the FHA, 42 U.S.C. § 3604, as well as Section 805, the separate FHA provision applicable to lending, 42 U.S.C. § 3605. This Court's ruling on the types of claims permissible under the FHA will provide critical guidance to *amici*, their members, and consumers.

SUMMARY OF ARGUMENT

Respondents brought this lawsuit claiming that a small New Jersey municipality's plan to redevelop a blighted residential area violated Section 804(a) of the Fair Housing Act, 42 U.S.C. § 3604(a). Respondents allege that the redevelopment plan, though not motivated by intentional discrimination, would have a disparate impact on African-American and Hispanic households. Based on these allegations, they asserted disparate-impact claims against petitioners under the FHA, seeking injunctive relief, compensatory and punitive damages, and other remedies.

I. As petitioners demonstrate, the statutory text, context, and history of the FHA establish that Section 804(a) permits claims for only disparate treatment, not disparate impact. *E.g.*, Pet. Br. 15-36. This is clear, as petitioners show, under basic principles of statutory construction. It is additionally and even more emphatically clear under this Court's private-right-of-action jurisprudence.[2]

By contending they have a right under Section 804(a) to bring an action for "disparate impact," *e.g.*, Br. in Opp. for Mt. Holly Gardens Respondents 31-34

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[2] Although this case involves private parties bringing a damages action, the right-of-action principles apply equally to government actions asserting disparate-impact claims under the FHA. *See infra* note 3.

(filed Sept. 11, 2012) ("Br. in Opp."), respondents are asserting a new right of action that this Court has never recognized. This Court has a longstanding and well-developed framework to address whether Congress intended such actions to proceed.

Under that framework—which entails a more demanding statutory inquiry than the one respondents invoke and the court below applied—respondents must show "*affirmative evidence* of congressional intent" to permit a cause of action for disparate impact. *Alexander v. Sandoval*, 532 U.S. 275, 293 n.8 (2001) (emphasis added). And such evidence must be demonstrated "in clear and unambiguous terms" because a judicial determination that a statute authorizes a cause of action implicates the separation of powers. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002).

There is no clear, affirmative evidence that Congress intended to allow private rights of action for disparate impact under the FHA. Indeed, respondents and the United States urge the Court to *infer* congressional intent from oblique statutory language and legislative inaction. They even invoke the statute's purported *ambiguity* when asking the Court to defer to the interpretation of Section 804(a) proffered by the Department of Housing and Urban Development (HUD). Br. in Opp. 29-31; Br. for the United States as Amicus Curiae at 7-10, 14-16 (filed May 17, 2013) ("U.S. Amicus Br.").

Further, agency deference has no place in determining whether Congress intended to create a right of action: "[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by

Congress." *Sandoval*, 532 U.S. at 291. It is a "judicial task" to determine whether a right of action exists. *Id.* at 286.

Beyond that, respondents and the United States urge the Court to adopt HUD's interpretation of the FHA even though HUD's interpretative approach is at odds with decades of this Court's right-of-action decisions. HUD, which takes the position that the FHA broadly authorizes disparate-impact claims, states that its interpretation seeks to effectuate "the broad remedial goals of the Fair Housing Act." Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,466 (Feb. 15, 2013). But "generalized references to the 'remedial purposes' of [a statute] will not justify reading a provision more broadly than its language and the statutory scheme reasonably permit." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (internal quotation marks omitted).

Although this Court once considered a statute's broad remedial purposes as a guide to determining whether a private right of action existed, the Court has explicitly "abandoned" this approach. *Sandoval*, 532 U.S. at 287; *accord Touche Ross*, 442 U.S at 578 ("[W]e have adhered to a stricter standard for the implication of private causes of action."). Respondents and the United States thus urge the Court to defer to an agency's interpretation of a statute that a court could not adopt itself. In any event, petitioners are right that agency deference is beside the point because Section 804(a) is not ambiguous.

To be sure, the FHA has a provision, Section 813, granting a remedy to enforce violations of Section 804(a). But that does not answer the question whether Congress intended Section 804(a) to grant respondents

a right to sue for disparate impact. A plaintiff seeking relief under a statute must show that the statute manifests an intent to create not just a *remedy* but also an underlying substantive *right*. *See Gonzaga*, 536 U.S. at 282-85. Where, as here, a statute contains a provision providing a remedy, "the initial inquiry—determining whether a statute confers any right at all—is no different from the initial inquiry in an implied right of action case." *Id.* at 285.

Thus, no matter how the Court examines the issue, petitioners should prevail and the Court should hold that Section 804(a) does not encompass disparate-impact claims against petitioners, lenders, or any other defendant sued under Section 804(a).

II. For all the reasons Section 804(a) does not permit disparate-impact claims, Section 805 of the FHA—the provision that addresses discriminatory lending practices—also precludes such claims. Indeed, even HUD acknowledges that Section 805 does not include the "otherwise make unavailable" language respondents and the United States assert shows congressional intent for disparate-impact claims under Section 804(a). *See* 78 Fed. Reg. at 11,466; *see also* 42 U.S.C. § 3605(a).

HUD nevertheless asserts that Section 805—along with Section 804(a) and the FHA generally—allows disparate-impact claims. 78 Fed. Reg. at 11,466. Further, HUD takes the position that Section 804 applies to lenders, notwithstanding that Section 805 specifically addresses lending practices. *Id*. at 11,464 n.41. That position is untenable: "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . . Specific terms prevail over the general in the same or another statute

which otherwise might be controlling.'" *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944) (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)).

There is no basis to find that Section 804(a) authorizes disparate-impact claims. And any holding that Section 804(a) does not provide for disparate-impact claims *a fortiorari* would apply to Section 805 and other FHA provisions that do not include the "otherwise make unavailable" language relied on by respondents, the United States, and HUD. But, for the same reason, if the Court were to rule in respondents' favor and hold that Section 804 permits disparate-impact claims, the Court should state that its holding does not govern Section 805.

ARGUMENT

I. RESPONDENTS' DISPARATE-IMPACT CLAIMS ARE BARRED UNDER THIS COURT'S PRIVATE-RIGHT-OF-ACTION JURISPRUDENCE

Respondents assert that by drawing inferences from the text and history of the FHA—and by giving HUD's statutory interpretation "deference"—Section 804(a) should be construed to "encompass disparate-impact claims." Br. in Opp. 31. As petitioners demonstrate, under basic principles of statutory construction, respondents are wrong.

Respondents are also wrong—and even more starkly so—for another reason. Because they seek to assert a distinct right of action, their claims fall under the Court's private-right-of-action jurisprudence. And under that line of cases, it is additionally clear that

respondents cannot pursue their disparate-impact claims under the FHA.

A. This Case Implicates the Court's Private-Right-of-Action Decisions

1. There is no freestanding right to sue for an alleged violation of a federal statute. Congress must affirmatively create that right. *See Sandoval*, 532 U.S. at 286 ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."). Absent congressional intent to create a right as well as a remedy, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87.

This bedrock principle "reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008) (quoting *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990)). If courts were to recognize a right or a remedy that Congress did not intend to create, the judiciary would "necessarily extend[] its authority to embrace a dispute Congress has not assigned it to resolve." *Id.* at 164 (internal quotation marks omitted). This Court thus has developed a framework for determining whether Congress has created a private right of action. *See, e.g.*, *Cort v. Ash*, 422 U.S. 66 (1975).[3]

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[3] Although this case and the Court's private-right-of-action cases arise in the context of private parties seeking to assert statutory rights of action, the same principles apply equally to government claims asserting statutory rights of action, including government actions asserting violations of Section 804(a).

To protect the legislative role of Congress for separation-of-powers purposes, plaintiffs asserting a cause of action under a federal statute must set forth "affirmative evidence of congressional intent" to authorize their claim. *Sandoval*, 532 U.S. at 293 n.8 (internal quotation marks omitted). Such intent must be expressed "in clear and unambiguous terms." *Gonzaga*, 536 U.S. at 290; *see also City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 119 (2005) (applying *Gonzaga* outside Spending Clause context).

2. The FHA has a provision granting aggrieved parties a remedy for violations of substantive rights created in Section 804(a). Under FHA Section 813, "[a]n aggrieved person may commence a civil action" and seek remedies for "an alleged discriminatory housing practice," which is defined to include acts prohibited under Section 804(a). 42 U.S.C. § 3613; *id.* § 3602(f) (defining "discriminatory housing practice" to mean "an act that is unlawful under section 3604, 3605, 3606, or 3617 of this title").

The parties here agree that Section 813 provides an express remedy for plaintiffs alleging intentional disparate *treatment* claims in violation of Section 804(a). Pet. Br. 15; Br. in Opp. 33. But respondents here assert that FHA Section 804(a) creates an additional right to seek a remedy for unintentional

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"Separation-of-powers concerns apply with equal weight whether the enforcing party is a private litigant or the United States." *United States v. FMC Corp.*, 717 F.2d 775, 780 (3d Cir. 1983); *accord, e.g.*, *In re: Barnacle Marine Mgmt., Inc.*, 233 F.3d 865, 870 (5th Cir. 2000); *State of N.J., Dep't of Envtl. Prot. & Energy v. Long Island Power Auth.*, 30 F.3d 403, 423 (3d Cir. 1994) (similar for rights of action brought by states).

disparate *impacts*. Disparate-impact claims are a distinct cause of action from disparate-treatment claims. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003).

"Disparate-treatment cases . . . occur where a [defendant] has treated [a] particular person less favorably than others *because of* a protected trait." *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (emphasis added) (internal quotation marks omitted). To prove a disparate-treatment claim, "a plaintiff must establish that the defendant had a discriminatory intent or motive." *Id.* (internal quotation marks omitted). "Proof of discriminatory motive is critical." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

By contrast, a disparate-impact claim arises from "practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities." *Ricci*, 557 U.S. at 577. "Proof of discriminatory motive . . . is not required." *Teamsters*, 431 U.S. at 335 n.15. The two different claims thus have different elements, and this Court has treated them as different causes of action. *See Sandoval*, 532 U.S. at 280 (construing Section 601 of Title VI as creating a right to bring disparate-treatment claims but not creating a right to bring disparate-impact claims); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) ("We long have distinguished between 'disparate treatment' and 'disparate impact.'"). In short, they are different causes of action because disparate-impact claims would "forbid conduct that [disparate-treatment claims] permit." *Sandoval*, 532 U.S. at 285 & n.6.

3. The Court accordingly must determine whether Congress intended to create in Section 804(a) a right of action for alleged disparate impacts that can be

remedied via Section 813. Congressional intent to grant a general *remedy* in Section 813 does not answer the question whether Congress intended in Section 804(a) to grant respondents the specific *right* they seek to enforce under the statute. The question of whether Section 804(a) creates a right of action for alleged disparate impacts is answered by applying this Court's private-right-of-action jurisprudence.

Gonzaga v. Doe, 536 U.S. 273, is instructive. There, the plaintiff brought a lawsuit under 42 U.S.C. § 1983 to enforce provisions of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. *Id.* at 276. This Court held that the plaintiff did "not have the burden of showing an intent to create a private *remedy* because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes. Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." *Id.* at 284 (citation omitted). But the existence of an express *remedial* provision under section 1983 did not answer "the initial inquiry—determining whether a statute confers any right at all." *Id.* at 285. That initial inquiry, whether an enforceable right exists, "is no different from the initial inquiry in an implied right of action case." *Id*. Thus, "if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action." *Id.* at 290.

The same is true here: If Congress intended to create in Section 804(a) a right of action for disparate impact that is enforceable under the remedy provision in Section 813 (or the FHA's other remedy provisions),

"it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action." *Id.*; *see also Gomez-Perez v. Potter*, 553 U.S. 474, 483 (2008) (stating that whether a statute creates a remedy and whether a statute prohibits certain conduct are "analytically distinct" questions; "the presence or absence of another statutory provision expressly creating a private right of action [for the violation of § 1681(a)] cannot alter § 1681(a)'s scope").

4. At a minimum, respondents are seeking to expand a preexisting private right of action (the right to bring claims for disparate treatment) beyond its intended scope. That too independently implicates this Court's private-right-of-action jurisprudence. A right (express or implied) to bring one type of claim does not extend to provide a right to bring a different type of claim. *See Sandoval*, 532 U.S. at 280 (stating that Section 601 of Title VI authorizes disparate-treatment claims but not disparate-impact claims); *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991) (emphasizing that a preexisting right of action "should not . . . grow beyond the scope congressionally intended"); *Mass. Mut. Life Ins. v. Russell*, 473 U.S. 134, 145-47 (1985) (applying private-right-of-action analysis to determine whether ERISA provided cause of action for extra-contractual damages where statute had express right of action provision for breaches of fiduciary duty); *see also Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) (applying private-right-of-action analysis to determine whether federal antitrust laws provided defendants an implied cause of action for contribution where statutes provided plaintiffs an express right of action for conspiracy). "Concerns with judicial creation of a private

cause of action caution against its expansion. The decision to extend the cause of action is for Congress, not for us." *Stoneridge*, 552 U.S. at 165.

This principle is a "hurdle facing any litigant who urges [the Court] to enlarge the scope" of an existing right of action. *Va. Bankshares*, 501 U.S. at 1104 n.11; *see also id.* at 1102 (plaintiff's claim was not cognizable because "we can find no manifestation of intent to recognize a cause of action (or class of plaintiffs) as broad as [plaintiff's] theory of causation would entail").

Whether viewed as an effort to secure new rights under Section 804(a) or to expand the disparate-treatment right of action already recognized under the FHA, respondents' disparate-impact claims are foreclosed under the Court's private-right-of-action jurisprudence.

B. Respondents Fail to Show Affirmative Evidence of Congressional Intent for a Private Right of Action for Disparate Impact

1. The Text of Section 804(a) Does Not Show Congress's Intent to Authorize Disparate–Impact Claims

a. Respondents cannot establish the heightened showing of congressional intent required here. The starting point for determining whether a statute creates a particular right of action is the statute's text. *Sandoval*, 532 U.S. at 288. If the text does not display Congress's intent to create the right of action in question, that is the end of the inquiry. *Id.* at 288 n.7.

Respondents and *amicus* the United States do not take the position that Section 804(a) reflects clear and

unambiguous evidence of congressional intent to allow disparate-impact claims. To the contrary, they rely on a recent HUD final rule that purports to interpret Section 804(a)'s text, and they argue that the rule is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Br. in Opp. 29-31; U.S. Amicus Br. 9-10.

If, as respondents argue, Section 804(a) is sufficiently ambiguous to trigger a need for *Chevron* deference, then *a fortiorari* respondents cannot demonstrate the requisite affirmative and unambiguous evidence of congressional intent to create a right of action for disparate impact. Their call for judicial deference defeats their own position.

b. In any event, Section 804(a) is not ambiguous. Congress made clear through the statute's text that it intended Section 804(a) to allow claims for only disparate treatment, not disparate impact.

As a plurality of the Court explained in *Smith v. City of Jackson*, 544 U.S. 228 (2005), the critical textual question for determining if a statute permits parties to bring disparate-impact claims is whether the statute "focuses on the *effects* of the action on the [protected individual] rather than the motivation for the action of the [defendant]." *Id*. at 236; *see Watson v. Forth Worth Bank & Trust*, 487 U.S. 977, 991 (1988) (concluding that Title VII "may be analyzed under the disparate impact approach" because the statute prohibits employer practices that "adversely affect" an employee's status). When a statute uses language that targets the *effects* of conduct, it prohibits actions that result in disparate impacts. Conversely, when a statute proscribes only specific discriminatory acts, but does not address the effects of such acts, it prohibits disparate treatment.

Here, Section 804(a) makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a).

Section 804(a) does not include the words "affect" or "effects." In this regard, its text parallels the text of other statutory provisions that do not permit disparate-impact claims. Section 703(a)(1) of Title VII and Section 4(a)(1) of the ADEA prohibit specific discriminatory conduct, but those provisions do not focus on the "effects" of the prohibited conduct.[4] *See Ricci*, 557 U.S. at 577-78 (construing Title VII § 703(a)(1) as a disparate-treatment provision); *Smith*, 544 U.S. at 236 n.6, 249 (ADEA § 4(a)(1) does not support disparate-impact claims). "The similarity of language in [these provisions] is . . . a strong indication that [they] should be interpreted *pari passu*." *Northcross v. Bd. of Educ. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (per curiam).

In contrast, Section 804(a) is textually distinct from statutory provisions that permit claims for disparate

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[4] Section 703(a)(1) of Title VII provides that it is unlawful for an employer "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." 42 U.S.C. § 2000e-2(a)(1).

Section 4(a)(1) of the ADEA similarly provides that it is unlawful for an employer "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." 29 U.S.C. § 623(a)(1).

impact, such as Section 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)(2); Section 4(a)(2) of the ADEA, 29 U.S.C. § 623(a)(1); and Section 102 of the ADA, 42 U.S.C. § 12112(b). Each of those provisions prohibits conduct that "adversely affects" a protected class, thereby using express language the Court has recognized as authorizing claims of disparate impact.[5] *See Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1, 429-31 (1971) (Title VII); *Smith*, 544 U.S. at 235-36 (ADEA); *Raytheon Co.*, 540 U.S. at 53 (ADA). The textual earmark of a disparate-impact claim is thus absent from Section 804(a).

c. Respondents and the United States argue that the phrase "otherwise make unavailable or deny" in Section 804(a) focuses on "effects" and thus indicates

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[5] Section 703(a)(2) of Title VII provides that it is unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment 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." 42 U.S.C. § 2000e-2(a)(2) (emphasis added).

Section 4(a)(2) of the ADEA provides that it is unlawful for 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 age." 29 U.S.C. § 623(a)(2) (emphasis added).

Section 102 of the ADA defines "discrimination" to include "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." 42 U.S.C. § 12112(b)(1) (emphasis added). *See also id.* § 12112(b)(3)(A) (discrimination includes "utilizing standards, criteria, or methods of administration . . . that ***have the effect*** of discrimination on the basis of disability" (emphasis added)).

that Congress intended to permit disparate-impact claims. Br. in Opp. 33; U.S. Amicus Br. 10-12. But the bare phrase "otherwise make unavailable or deny" does not do the work they suggest. And such language does not constitute affirmative evidence of congressional intent to permit disparate-impact claims. Similar "otherwise" language appears in both Section 4(a)(1) of the ADEA and Section 703(a)(1) of Title VII—neither of which provides for disparate-impact claims. *See supra* note 4. A majority of the Court in *Smith* agreed that Section 4(a)(1) of the ADEA, which prohibits employers from "otherwise discriminat[ing] against any individual," does not authorize disparate-impact claims. *Smith*, 544 U.S. at 236 n.6 (plurality opinion); *id*. at 249 (O'Connor, J., concurring).

If Congress wanted to speak to "effects" or "affects" in the FHA, it would have done so—plainly and not through the roundabout "otherwise make unavailable" phrase. This Court has rejected similar attempts to divine intent for a right of action from oblique language in a statute. In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), for example, the government argued that the right to bring an action under Section 10(b) of the Securities and Exchange Act encompassed the right to assert claims for aiding and abetting. *Id.* at 175. The SEC argued that "the use of the phrase 'directly or indirectly' in the text of § 10(b) covers aiding and abetting." *Id.* This Court rejected that strained attempt to discern a right of action, noting that "Congress knew how to impose aiding and abetting liability when it chose to do so" in other statutes that used plain terms long understood to cover aiding and abetting. *Id.* at 176.

The same is true here. As the United States told this Court in 1988 in an *amicus* brief arguing that Section 804(a)'s text covered only disparate-treatment, not disparate-impact claims: "Congress has demonstrated its ability unambiguously to adopt an effects test when it wishes to do so. In Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, for example, Congress required covered jurisdictions to seek preclearance of any voting change and to show that such a change 'does not have the purpose and will not have *the effect* of denying or abridging the right to vote on account of race or color.'" Br. for United States as Amicus Curiae n.18, *Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (emphasis added) ("U.S. 1988 Br."), *available at* http://www.justice.gov/osg/briefs/1987/sg870004.txt. There, unlike its position today, the government found "the statute's language and legislative history show that a violation of [Section 804(a)] requires intentional discrimination." *Id.*

Put simply, Section 804(a) lacks any textual indicia of congressional intent to authorize disparate-impact claims, much less any "affirmative evidence of congressional intent" to create a right to bring that specific cause of action. *Sandoval*, 532 U.S. at 293 n.8. Without such evidence, "the essential predicate" for bringing disparate-impact claims does not exist. *Nw. Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 94 (1981).

2. The FHA's Legislative History Does Not Show Congress's Intent to Authorize Disparate-Impact Claims

a. Because respondents and the United States cannot point to anything in the text of Section 804(a)

that affirmatively authorizes disparate-impact claims, the Court need not consider the legislative history of the FHA. *See, e.g.*, *Sandoval*, 532 U.S. at 288 n.7 ("[T]he interpretive inquiry begins with the text and structure of the statute, and ends once it has become clear that Congress did not provide a cause of action.").

In any case, the statute's legislative history likewise displays no congressional intent to create a right of action for disparate impact. The original version of the FHA was introduced as a floor amendment to the Civil Rights Act, so no committee reports discuss or analyze the legislation. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 126 (1979) (Rehnquist, J., dissenting) ("Introduced on the Senate floor and approved unchanged by the House, [the FHA]'s legislative history must be culled primarily from the Congressional Record.").

To the extent the legislative history implies anything relevant, it supports petitioners. As the United States told this Court in 1988, "[t]he [FHA's] legislative history reinforces the understanding that Congress intended to require a showing of intentional discrimination. Neither supporters nor opponents suggested that the legislation would ban local zoning regulations merely because they had a racial effect, without any showing that the local government intended to discriminate." U.S. 1988 Br. 16-17.

b. Given the absence of clear legislative intent to authorize disparate-impact claims under the original enactment of the FHA, respondents and the United States point to three aspects of the FHA's 1988 amendments that they assert implicitly show Congress intended Section 804(a) to authorize disparate-impact claims.

First, respondents and the United States assert that, when amending the FHA in 1988, "Congress was aware that the FHA, including Section 804(a), had uniformly been interpreted [by circuit courts] to encompass disparate-impact claims," and thus Congress must have "implicitly adopted" that construction when it did not take affirmative legislative measures to modify that interpretation. U.S. Amicus Br. 14; *accord* Br. in Opp. 27-28.

This Court rejected an identical argument in *Central Bank*. There, although the Court previously had held that Section 10(b) of the Securities Exchange Act provides a right of action for damages for certain claims, the plaintiffs sought to expand that recognized right of action to include claims for aiding and abetting. 511 U.S. at 185. The plaintiffs argued that Congress had amended the Securities Exchange Act "on various occasions" after lower courts had construed the statute as covering aiding and abetting liability and, thus, Congress had implicitly ratified those precedents by failing to overturn them. *Id.* at 186.

This Court rejected that argument, concluding that "[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the courts' statutory interpretation." *Id.* (quotation marks and citations omitted). "We walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Id.* (quoting *Helvering v. Hallock*, 309 U.S. 106, 121 (1940)); *see also Sandoval*, 532 U.S. at 291-92 (rejecting a similar argument that Congress "ratified" court decisions concerning a right of action based on disparate-impact regulations).

Notably, in *Central Bank*, as here, eleven federal courts of appeals had interpreted the statute to

provide a particular right of action, but this Court disagreed. *Cent. Bank*, 511 U.S. at 186; *id.* at 192 & n.1 (Stevens, J., dissenting).[6]

Second, the United States argues that the 1988 amendments to the FHA show that "Congress specifically rejected an amendment that would have required proof of intentional discrimination in challenges to zoning decisions." U.S. Amicus Br. 14. Thus, the government contends, Congress must have "implicitly" understood the statute to encompass disparate-impact claims, otherwise there would have been no need for a provision requiring intentional discrimination. *Id.* But again, in *Central Bank*, this Court rejected that very premise: "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including

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[6] Respondents and the United States emphasize that "11 courts of appeals . . . have held that disparate-impact claims are cognizable under the FHA." Br. in Opp. 28; *accord, e.g.*, U.S. Amicus Br. 15-16. HUD also references lower court decisions in the preamble to its new rule. *See, e.g.*, 78 Fed. Reg. at 11,460, 11,462, 11,465, 11,474, 11,476. Petitioners demonstrate that those decisions cannot bear the weight respondents, the United States, and HUD place on them. In any event, this Court repeatedly has rejected lower courts' shared views that rights of action existed. *See Cent. Bank*, 511 U.S. at 186; *see also Sandoval*, 532 U.S. at 295 & n.1 (Stevens, J., dissenting) (noting that the majority found no private right of action notwithstanding that "[j]ust about every Court of Appeals has either explicitly or implicitly held that a private right of action exists to enforce all of the regulations issued pursuant to Title VI, including the disparate-impact regulations"); *Gonzaga*, 536 U.S. at 299 (Stevens, J., dissenting) (noting that the majority found no right of action under FERPA notwithstanding that "all of the Federal Courts of Appeals expressly deciding the question have concluded that FERPA creates federal rights enforceable under § 1983").

the inference that the existing legislation already incorporated the offered change." 511 U.S. at 187.

Third, respondents and the government suggest that congressional intent to allow a disparate-impact right of action can be inferred because, in the 1988 amendments, Congress added "three FHA exceptions, each of which presupposes" the Act allows for disparate-impact claims. Br. in Opp. 33; *accord* U.S. Amicus Br. 12 ("[The FHA] contains three exemptions from liability that presuppose the availability of a disparate-impact claim."). As petitioners demonstrate, however, the three exemptions do not presuppose Section 804(a) authorizes disparate-impact claims; rather, they apply to *all* claims brought under the FHA (not just those brought under Section 804(a)) and provide a defense to *intentional* discrimination claims. *See* Pet. Br. 31-34.

In any case, respondents and the government's tea-leaf reading is hardly evidence of intent to allow a right of action for disparate impact. When President Reagan signed the 1988 amendments into law, he stated that they "do[] not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that [FHA] violations may be established by a showing of disparate impact or discriminatory effects of a practice that is taken without discriminatory intent." Remarks on Signing the Fair Housing Amendments Act of 1988, Public Papers of President Ronald Reagan (Sept. 13, 1988). Not even HUD took the exemptions as clear authorization of disparate-impact claims at the time. The agency stated that its 1989 implementing regulations "are not designed to resolve the question of whether intent is or is not required to show a violation" of Section 804(a). Implementation of the

Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3,232, 3,235 (Jan. 23, 1989).

Whatever their positions are today on precisely the same statute, neither the United States nor HUD can show that the FHA provides clear authorization for disparate-impact claims.

3. An Agency Cannot Conjure Up a Right of Action Where Congress Has Not Clearly Expressed an Intent for One

Respondents and the United States rely heavily on HUD's interpretation of Section 804(a), including the declaration in HUD's recent rule that "[l]iability may be established under the Fair Housing Act based on a practice's discriminatory effect . . . even if the practice was not motivated by a discriminatory intent." 24 C.F.R. 100.500.

The problem, however, is that only *Congress* can create a right of action: "[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress." *Sandoval*, 532 U.S. at 291. "[T]he language of the statute and not the rules must control." *Touche Ross*, 442 U.S. at 577 n.18 (declining to find a right of action under Section 17(a) of the Securities Exchange Act).

Allowing an agency to declare whether Congress intended to permit a right of action implicates the separation-of-powers concerns underlying this Court's right-of-action jurisprudence. *See supra* Part I.A.1. Determining whether a right of action exists is a non-delegable "judicial task." *Sandoval*, 532 U.S. at 286. "Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Id.* at 291; *see also Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990) ("[E]ven if

AWPA's language establishing a private right of action is ambiguous, we need not defer to the Secretary of Labor's view of the scope of [the statute] because Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute.").

Nor does HUD's "authority and responsibility [to] administer[]" the FHA empower the agency to create a right of action not already conferred in the statute. 42 U.S.C. § 3608(a). In *Sandoval*, a federal agency authorized "'to effectuate'" Title VI of the Civil Rights Act passed a rule prohibiting conduct that results in disparate "effect[s]." 532 U.S. at 278 (quoting 42 U.S.C. § 2000d-1). The Court rejected the agency's attempt to allow private disparate-impact claims, reasoning that the statute itself "prohibits only intentional discrimination." *Id.* at 280. "Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." *Id.* at 291.

So too here. HUD's authority to administer the FHA does not empower the agency to read into the statute a right of action for disparate impact. *See Adams Fruit*, 494 U.S. at 650 ("Congress clearly envisioned . . . a role for the Department of Labor in administering the AWPA by requiring the Secretary to promulgate *standards* implementing AWPA's provisions. This delegation, however, does not empower the Secretary to regulate the scope of the judicial power vested by the statute." (citation omitted)). This is not a case where the agency is just filling in standards for a clear statutory right of action. *See Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 54 (2007). "The authority to construe a statute is fundamentally different from the authority

to fashion a new rule or to provide a new remedy which Congress has decided not to adopt." *Nw. Airlines*, 451 U.S. at 97.

Beyond that, HUD's interpretation of Section 804(a) and the FHA as a whole is contrary to this Court's approach to analyzing whether statutes provide rights of action. At one time, this Court found that judges should consider the broad remedial purposes of a statute when interpreting whether it permitted a right of action. *See Sandoval*, 532 U.S. at 287. The Court has since "abandoned that understanding." *Id.* "[G]eneralized references to the 'remedial purposes' of [a statute] will not justify reading a provision more broadly than its language and the statutory scheme reasonably permit." *Touche Ross*, 442 U.S. at 578 (quotation marks omitted). Absent congressional intent to create a right and a remedy, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 286-87.

Yet that is the explicit framework through which HUD purports to interpret Section 804(a) specifically and the FHA generally. The preamble to HUD's rule states that HUD's interpretation is aimed at implementing the FHA's "broad remedial intent," 78 Fed. Reg. at 11,461; "the broad remedial goals of the Fair Housing Act," *id.* at 11,466; and the Act's "remedial purposes," *id.* at 11,477. "Having sworn off the habit" of that interpretive approach for the Judiciary, the Court should "not accept respondents' invitation to have one last drink" through an agency's interpretation. *Sandoval*, 532 U.S. at 287. It would be passing strange for courts to defer to a HUD interpretation allowing a private right of action where the

courts could not adopt the same interpretation themselves. For this reason, too, deferring to HUD regarding the right of action sought here would be improper.

II. CONGRESS LIKEWISE DID NOT INTEND FOR A DISPARATE-IMPACT RIGHT OF ACTION AGAINST LENDERS UNDER SECTION 805

For all the reasons Section 804(a) does not permit disparate-impact claims, Section 805 of the FHA—the provision that addresses discriminatory lending practices—also precludes such claims. Indeed, Section 805 does not include the "otherwise make unavailable" language to which respondents, the United States, and HUD attribute so much weight. Br. in Opp. 32-33; U.S. Amicus Br. 10-12; 78 Fed. Reg. at 11,466-67. Nevertheless, in its recent rule, HUD purports to interpret Section 805—and the entire FHA for that matter—as also authorizing disparate-impact claims. *See, e.g.*, 78 Fed. Reg. at 11,460, 11,466. HUD's approach to Section 805 further underscores the misguided nature of the agency's interpretation of the FHA.

A. Unlike Section 804, Section 805 specifically addresses lending practices. Section 805 makes it 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." 42 U.S.C. § 3605(a).

Like Section 804, Section 805 does not contain language about the "affect" or "effects" of facially

neutral conduct. (No section of the FHA contains the "adversely affects" or "tend to deprive" language that signal disparate-impact liability in Title VII and the ADEA.)

As originally enacted in 1968, and as amended in 1988, Section 805 prohibits "discriminat[ion] . . . *because of*" an individual's protected status. *Id.* (emphasis added); *see* Pub. L. No. 90-284, § 805, 82 Stat. 81, 83 (1968) (original); Pub. L. No. 100-430, § 6(c), 102 Stat. 1619, 1622 (1988) (amended). Thus, Section 805 provides for liability only when disparate *treatment* is proven. *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009).

Remarkably, and reflecting the unduly broad interpretative lens through which HUD is currently viewing the FHA, *see supra* Part I.B.3, HUD's new rule asserts that Section 805 (and other provisions that do not include the "otherwise make unavailable" phrase) also reflect congressional intent to allow disparate-impact claims. The preamble to HUD's rule states that, because Section 805 and other provisions "make it unlawful 'to discriminate' in certain housing-related transactions," the term "discriminate" "may encompass actions that have a discriminatory effect but not a discriminatory intent." 78 Fed. Reg. at 11,466.

This Court, however, has long held that "the 'normal definition of discrimination' is 'differential treatment.'" *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (quoting *Olmsted v. L.C.*, 527 U.S. 581, 614 (1999) (Kennedy, J., concurring in judgment)). "[D]iscrimination means 'less favorable' treatment." *Id.* (quoting *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 n.22 (1983)). HUD ignores this longstanding definition of discrimination.

B. Moreover, for all its reliance on past lower court interpretations of Section 804, *see, e.g.*, 78 Fed. Reg. at 11,460, 11,462, 11,465, 11,474, 11,476, HUD's rule ignores lower court interpretations of Section 805. HUD asserts that lenders, which are covered by Section 805, may also be sued under Section 804. 78 Fed. Reg. at 11,464 n.41. That interpretation is not consistent with the weight of lower court authority. Several circuit courts have found that Section 804 does not apply to lenders. *See, e.g.*, *Gaona v. Town & Country Credit*, 324 F.3d 1050, 1056 n.7 (8th Cir. 2003); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1554 n.27 (5th Cir. 1996); *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 423 (4th Cir. 1984). *But cf. Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 493 (S.D. Ohio 1976).

The distinction between Section 804 and Section 805 is significant. Section 805 makes it unlawful for "any person or other entity whose business includes *engaging in residential real estate-related transactions* to discriminate." 42 U.S.C. § 3605(a) (emphasis added). The FHA defines a "residential real estate-related transaction" to include "[t]he making or purchasing of *loans* or providing other *financial assistance* . . . for purchasing, constructing, improving, repairing, or maintaining a dwelling[,] or secured by residential real estate." *Id.* § 3605(b)(1)(A)-(B) (emphasis added). Section 3605 thus expressly and specifically applies to lending.

Section 804, by contrast, establishes general categories of prohibited conduct, including discriminatory "sell[ing]," "rent[ing]," "negotiat[ing] for the sale or rental," and "mak[ing] unavailable or deny[ing] a dwelling." *Id.* § 3604(a). Section 804 is silent both as to lending and as to borrowers.

"However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'" *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944) (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)); *see also United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2330 (2011) (similar).

Thus, the Eighth Circuit determined that Section 804 "bars discrimination in sales and rentals, rather than loans." *Gaona*, 324 F.3d at 1056 n.7. The Fourth Circuit similarly reasoned that, "[i]f [Section] 804 was designed to reach every discriminatory act that might conceivably affect the availability of housing, [Section] 805's specific prohibition of discrimination in the provision of financing would have been superfluous." *Mackey*, 724 F.2d at 423; *see also Simms*, 83 F.3d at 1554 n.27 ("[Section] 805 is the vehicle for discrimination claims involving the financing of residential housing.").

In any event, as demonstrated above and by petitioners, there is no basis to find that Section 804 authorizes disparate-impact claims. Any holding that 804 does not provide for disparate-impact claims *a fortiorari* would apply to Section 805 and the other FHA provisions that do not include the "otherwise make unavailable" language on which respondents, the United States, and HUD rely. But if the Court were to rule in respondents' favor and hold that Section 804 permits disparate-impact claims, the Court should state that its holding does not govern Section 805.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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