No. 13-1371

IN THE
Supreme Court of the United States

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, ET AL.,

Petitioners,

v.

THE INCLUSIVE COMMUNITIES PROJECT, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether disparate-impact claims are cognizable under the Fair Housing Act.

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U.S. Department of Housing and Urban Development, "Implementation of the Fair Housing Act's Discriminatory Effects Standard," 78 Fed. Reg. 11,460 (Feb. 15, 2013) 5, 27, 31

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law firm and policy center with supporters in all 50 States.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited, accountable government, and the rule of law. To that end, WLF regularly appears before federal and state courts and administrative agencies to oppose excessive government incursions on the private sector.

In particular, WLF has appeared as *amicus curiae* in the federal courts in cases raising disparate-impact issues under federal civil rights laws. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275 (2001); *S. Camden Citizens in Action v. New Jersey Dep't of Envtl. Prot.*, 274 F.3d 771 (3d Cir. 2001). In addition, WLF routinely litigates in regulatory cases to ensure that federal agencies are not permitted to exercise powers that Congress cannot plausibly be understood to have granted them. *See, e.g., Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

WLF maintains a strong interest in ensuring that federal statutes are properly interpreted and implemented, and that courts apply *Chevron* deference in a manner that adheres to the Constitution's

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

separation of powers. Recognizing that the outcome of this case may turn on the Court's use of the *Chevron* doctrine to discern Congress's meaning in enacting the Fair Housing Act (FHA), WLF believes it is vitally important that Congress's supreme legislative and policy-making role not be usurped by an administrative agency.

Although WLF believes that laws forbidding invidious, intentional discrimination strengthen the operation of free markets, WLF seriously doubts that Congress authorized the United States Department of Housing and Urban Development (HUD) to issue regulations under the FHA to restrict otherwise lawful activities that are not motivated by an intent to discriminate. WLF believes that increasingly intrusive federal regulation targeted at activity which, while free of discriminatory intent, is nonetheless thought to have a "disparate impact," distorts rather than facilitates a vibrant free-market system.

This interference may be particularly acute in the business of property insurance, where companies must draw distinctions between classes of insureds based on the risks each presents. Drawing distinctions in the development of underwriting criteria and the writing of policies ensures that similarly situated people are treated similarly and that one class of risks does not unfairly subsidize another. If insurers are ever forced to abandon this long-standing objective of underwriting and actuarial practice in order to ensure equal treatment for the multiplicity of groups protected under the FHA regardless of risk, the market for insurance products will be distorted, and insurance consumers will suffer.

STATEMENT OF THE CASE

This case asks the Court to decide whether Title VIII of the Civil Rights Act of 1968—commonly known as the Fair Housing Act—provides for disparate-impact liability.

The FHA makes it unlawful 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). The FHA further prohibits discrimination "against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith," on account of those same protected characteristics. *Id.* § 3604(b). While the FHA clearly prohibits intentional discrimination, whether or not the statute encompasses disparate-impact liability has never been addressed by the Court.

The Low-Income Housing Tax Credit Program (LIHTC), 26 U.S.C. § 42(g)(1), offers tax credits to residential developers who build qualified low-income housing projects. Federal law requires that LIHTCs be distributed to developers through a designated state agency. Petitioners—the Texas Department of Housing and Community Affairs (TDHCA) and its Executive Director and board members—are charged with administering the federal LIHTC program in Texas. Under federal law, tax credits must be allocated 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." *Id.* § 42(m)(1)(B).

Respondent is a non-profit organization that assists low-income, predominantly African-American, Section 8 families to find affordable housing in "predominantly Caucasian, suburban neighborhoods" in the Dallas metropolitan area. Pet. App. 3a. In 2008, Respondent sued Petitioners, claiming that Petitioners disproportionately allocated tax credits in minority-concentrated neighborhoods, while disproportionately withholding tax credits from predominantly Caucasian neighborhoods. *Id.* at 7a. Alleging that Petitioners' allocation of tax credits created segregated housing patterns, Respondent brought disparate-treatment claims under the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1982, and a disparate-impact claim under the FHA. *Id.*

After a four-day bench trial, the district court found that Respondent had failed to prove intentional discrimination and dismissed Respondent's Fourteenth Amendment and § 1982 claims. Pet. App. 156a-164a. As to Respondent's claim of disparate impact under the FHA, the district court concluded that Respondent had established a "prima facie case" by showing that Petitioners approved tax credits for developments in minority neighborhoods at disproportionately higher rates than for housing in predominantly Caucasian neighborhoods. *Id.* at 165a-166a. For the district judge, the mere demonstration of this statistical imbalance—standing alone—sufficed to shift the burden of proof to Petitioners. *Id.* Because Petitioners could not prove to the district court's satisfaction that no alternative course of action was available that would result in a less discriminatory impact, the

district court entered judgment for Respondent on its disparate-impact claim and imposed an elaborate injunction against Petitioners. *Id.* at 26a-31a; 175a-186a.

Petitioners appealed to the Fifth Circuit. While that appeal was pending, HUD issued final regulations establishing 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). According to HUD, the FHA imposes liability on 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 because of race, color, religion, sex, handicap, familial status, or national origin." 24 C.F.R. § 100.500(a).

Bound by its prior decisions in *Artisan/Am. Corp. v. City of Alvin*, 588 F.3d 291, 295 (5th Cir. 2009), and *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996), the Fifth Circuit reaffirmed its view that disparate-impact claims are cognizable under the FHA. Pet. App. 12a. In doing so, the appeals court noted that every other federal appellate court to have considered the issue has reached the same conclusion. *Id.* at 12a-13a. The court then adopted the procedures set forth in the HUD regulations for determining whether a policy that disadvantages a protected group violates the FHA. *Id.* at 16a. Because the district court's burden-shifting approach was less favorable to Petitioners, the court reversed and remanded for further consideration in light of the HUD regulations. *Id.* at 17a-18a.

SUMMARY OF ARGUMENT

The central issue in this case—whether Congress created disparate-impact liability under the FHA—can easily be resolved at *Chevron* step one. HUD's interpretation of the FHA on this question, as manifest in its final regulations establishing standards for proving disparate-impact claims under the FHA, is not entitled to deference because a fair reading of the statute leaves no doubt that Congress intended to prohibit only intentional discrimination in housing practices, not disparate impacts. Moreover, the FHA contains none of the "key" phrases this Court has recognized that Congress historically uses to signal disparate-impact liability—language that focuses on the effects of the decisionmaker's action rather than the motivation for the action. This further confirms what the FHA's text already makes clear, that the FHA targets only intentional discrimination.

Nor did Congress expand the FHA so as to encompass disparate-impact litigation when it revised the statute in 1988. Although several federal appeals courts ruled prior to 1988 that the FHA encompassed disparate-impact litigation, the 1988 amendments' failure to repudiate those rulings cannot plausibly be understood to constitute congressional acquiescence to the rulings. Nor can the 1988 addition of three statutory provisions that *limited* the scope of the FHA by exempting certain types of conduct from FHA scrutiny be interpreted as an indication that Congress simultaneously sought to *expand* the FHA by authorizing disparate-impact litigation.

The severe market disruptions that would arise

if disparate-impact analysis were routinely applied in FHA litigation provide additional grounds for interpreting the FHA as not encompassing disparate-impact litigation. The severity of those disruptions suggests that Congress would not have adopted disparate-impact liability without saying so explicitly. Indeed, Congress has been particularly careful not to interfere with actuarial standards adopted by the insurance industry: ever since adoption of the McCarran-Ferguson Act in 1945, congressional policy has stressed the primacy of state law in regulating the insurance industry. McCarran-Ferguson dictates that other federal laws (including the FHA) should not be construed so as to "impair" state law regulating the business of insurance. 15 U.S.C. § 1012(b). Because interpreting the FHA so as to encompass disparate-impact litigation would severely interfere with and impair state insurance regulation, § 1012(b) indicates that the FHA should not be interpreted in that manner.

ARGUMENT

I. HUD'S INTERPRETATION OF THE FHA AS AUTHORIZING DISPARATE-IMPACT LIABILITY IS UNWORTHY OF *CHEVRON* DEFERENCE

In the seminal case of *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), this Court cautioned that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." *Id.* at 866. The Court went on to emphasize that "[t]he responsibilities for assessing the wisdom of . . . policy

choices and resolving the struggle between competing views of the public interest are not judicial ones." *Id.* Rather, "[o]ur Constitution vests such responsibilities in the political branches." *Id.* (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)).

Mindful of the separation of powers, then, *Chevron* established a two-step framework for reviewing an agency's interpretation of a statute that it administers. As one federal appeals court has explained, *Chevron*—in devising that two-step framework—"relied on basic principles of democratic government: Policy choices are for the political branches, and Congress is the Supreme branch for making such choices." *Miss. Poultry Ass'n, Inc. v. Madigan*, 31 F.3d 293, 299 (5th Cir. 1994) (*en banc*).

Under *Chevron* step one, courts must use "traditional tools of statutory construction" to determine whether Congress's meaning is clear on the question at issue. *Chevron*, 467 U.S. at 843 & n.9. "Deference is constrained by [the] obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 411-12 (1979)(internal quotations and citations omitted). If a statute's meaning is clear, "that is the end of the matter" and both the court, as well as the agency, "must give effect to the unambiguously expressed intent of Congress." *Chevron,* 467 U.S. at 842-43. This approach reinforces Congress's unique role in making policy choices by giving primacy to those choices.

Likewise, step two of the *Chevron* analysis helps to preserve the separation of powers among the

legislative, executive, and judicial branches. Step two applies only where "the court determines that Congress has not directly addressed the precise question at issue," *and* that Congress has delegated authority to address the issue to the agency. *Id.* at 843. If—but only if—the agency possesses that delegated authority and the language of the statute is ambiguous on the question at issue is the reviewing court allowed to proceed to the second step of the *Chevron* inquiry, which asks "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

By conditioning step-two deference on lingering statutory ambiguity that could not be resolved at step one, "*Chevron* is not quite the 'agency deference' case that it is commonly thought to be by many of its supporters (and detractors)." *Miss. Poultry Ass'n*, 31 F.3d at 299 n.34. Rather, the *Chevron* framework recognizes that an agency's discretion to act depends entirely on a delegation of authority from Congress. Indeed, *Chevron*'s command that deference is due only when Congress has not spoken clearly is quite blunt: "The judiciary . . . *must* reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9 (emphasis added). And even in those instances where Congress expressly delegates authority to an agency, *Chevron* reminds us that such agency discretion is not without limit. Rather, at all times, a federal agency is required to act within the reasonable bounds of the relevant statute. *See id.* at 844-45.

As demonstrated below, deferring in this case to HUD's interpretation of the FHA—as embodied in its disparate-impact rule—would improperly transfer

legislative power from Congress to the Executive, thereby upending *Chevron*'s attentiveness to separation of powers.

A. Because the Statute's Meaning Is Clearly Ascertainable, Deference Is Unwarranted

An administrative agency may exercise only those powers granted by the statute reposing power in it. *See, e.g., I.N.S. v. Chadha*, 462 U.S. 919, 955 n.19 (1983) ("Congress ultimately controls administrative agencies in the legislation that creates them."). This Court has consistently refused to defer to regulatory "rights-creating language" that is contrary to the statutory text. *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2040 (2012)(refusing to defer to HUD's interpretation of a statute that "goes beyond the meaning that the statute can bear"); *Alexander v. Sandoval*, 532 U.S. 275 (2001)(holding that "language in a regulation . . . may not create a right that Congress has not").

As Petitioners persuasively demonstrate in their opening brief, application of the "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, reveals that none of the FHA's anti-discrimination provisions authorizes disparate-impact liability. In fact, to arrive at this conclusion, the Court need not look beyond the language Congress purposefully chose in defining liability. The FHA makes it unlawful 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)(emphasis added). The phrase "because of race . . ." plainly indicates that, for liability to attach, some purposeful, causal connection must exist between the housing-related action and the person's race. In other words, "race" must be the reason for the "refusal." As this Court recognized in *Pers. Adm'r of Mass. v. Feeney*, a "discriminatory purpose" requires that the decisionmaker chose a particular course of conduct at least "because of," not merely "in spite of," its adverse effects on a protected group. 442 U.S. 256, 279 (1979).

If any doubt were to remain, the FHA's statutory context eliminates it. The FHA adopts the same language and structure of Title VII and Age Discrimination in Employment Act (ADEA) provisions that prohibit only discriminatory treatment —while carefully eschewing the "key" phrases that other sections of those statutes use to signal disparate-impact liability. *See Smith v. City of Jackson*, 544 U.S. 228, 236 n.6 (2005) (plurality) (explaining that the phrase "otherwise adversely affect" focuses on the effects of the decisionmaker's action rather than the motivation for the action). Unlike Title VII and the ADEA, the FHA contains no language that refers to the "effects" of conduct or to actions that "adversely affect" others. This omission only confirms what the FHA's text already makes clear—that the FHA targets only intentional discrimination. *Cf. Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 613 (1983)(O'Connor, J., concurring)("If . . . the purpose of Title VI is to proscribe only *purposeful* discrimination in a program receiving federal financial assistance, it is difficult to fathom how the Court could uphold administrative regulations that would proscribe

conduct by the recipient having only a discriminatory *effect*.") (emphasis added).

Under *Chevron* step one, then, HUD's attempt to insert disparate-impact liability into the FHA must be rejected as *ultra vires* because the FHA plainly does not authorize such liability. "[U]nder *Chevron*, deference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004). Where the FHA is concerned, Congress has spoken with clarity and "that is the end of the matter"—both HUD and this Court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

The scope of liability under the FHA is unambiguous. Consistent with *Chevron*'s careful balancing of congressional and executive prerogatives, HUD's claimed authority to regulate disparate impacts under the FHA is contrary to Congress's clearly expressed intent and therefore must be rejected at step one. *See Am. Ins. Ass'n v. HUD*, No. 1:13-cv-966 (RJL), 2014 WL 5802283, at *7 (D.D.C. Nov. 7, 2014) (concluding that "an analysis under *Chevron* step-two is unnecessary [because] the FHA unambiguously prohibits *only* intentional discrimination")(emphasis in original).

B. The Mere Absence of an Express Statutory Disavowal of Disparate-Impact Liability Is Not an Ambiguity Triggering *Chevron* Step Two

In the absence of any statutory ambiguity, deferring to HUD's interpretation of the FHA would undermine the carefully calibrated framework of *Chevron* by improperly transferring legislative prerogative from Congress to the agency. While the FHA clearly prohibits intentional discrimination, the statute does not expressly disavow disparate-impact liability. But the mere absence of such a disavowal cannot serve as a basis for finding statutory ambiguity and proceeding to *Chevron* step two. To the contrary, such "statutory silence, when viewed in context, is best interpreted as *limiting* agency discretion." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) (emphasis added).

WLF does not yet have the benefit of reading the Solicitor General's brief in this case, but anticipates that the government will make arguments very similar to those advanced in its *amicus curiae* brief in *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013). In that case, the Solicitor General strongly emphasized the fact that, when Congress amended the FHA in 1988, it did not amend the statute so as to expressly disavow disparate-impact liability, even though federal courts had frequently interpreted the FHA to encompass disparate-impact claims. *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 (U.S. *Mt. Holly* Br.), at *22-23.

But *Chevron* does not permit HUD to derive the statutory authority to impose disparate-impact liability from the mere absence of an express disavowal of disparate-impact liability in the statute. *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995) ("[W]e will not presume a delegation of power based solely on the fact that there is not an express withholding of power."). And "judges cannot cause a clear text to become ambiguous by ignoring it." *Deal v. United States*, 508 U.S. 129, 136 (1993). The suggestion "that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power . . ., is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent." *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (emphasis in original).

When crafting statutes, Congress should not be required to anticipate, by way of an express disavowal or prohibition, every conceivable extra-statutory exercise of power dreamed up by an agency. *Prestol Espinal v. Atty. Gen. of the United States*, 653 F.3d 213, 220 (3d Cir. 2011)(rejecting the government's attempt to "manufacture[ ] an ambiguity from Congress' failure to specifically foreclose each exception that could possibly be conjured or imagined" and holding that such an approach "would create an 'ambiguity' in almost all statutes, necessitating deference to nearly all agency determinations"). Indeed, were "courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Ethyl Corp.*, 51 F.3d at 1060.

C. Reliance on Pre-*Smith* Case Law Is Unpersuasive

In arguing for deference in *Mount Holly*, the Solicitor General pointed repeatedly to the fact that, except for the D.C. and Federal Circuits, every other federal circuit in the country has concluded that disparate-impact liability exists under the FHA.[2] But *all* of those cases were decided *before* this Court's 2005 opinion in *Smith v. City of Jackson*, where this Court clarified that the availability of disparate-impact liability hinges on the presence, or absence, of "key" effects-based language in the statute. 544 U.S. 228, 235-36. *Smith*, which addressed liability under the ADEA, marked a true sea change in analysis for interpreting statutory provisions for disparate-impact liability, and the government's reliance on pre-*Smith* case law in urging deference is unpersuasive. None of those circuit courts recognizing claims of disparate impact under the FHA has re-examined its precedent in light of *Smith* and its holding.

Because the FHA plainly does not authorize

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[2] *See Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995); *Jackson v. Okaloosa Cnty.*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Hanson v. Veterans' Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565, 574-75 (6th Cir. 1986); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Harlet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th 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); *Metro Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1288-90 (7th Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir. 1974).

disparate-impact liability, the court's *Chevron* analysis should end there. *See Contreras-Bocanegra v. Holder*, 678 F.3d 811, 818 (10th Cir. 2012) ("*Chevron* does not require Congress to explicitly delineate everything an agency cannot do before we may conclude that Congress has directly spoken to the issue."); *Texas v. United States*, 497 F.3d 491, 502 (5th Cir. 2007) ("It stands to reason that when Congress has made an explicit delegation of authority to an agency, Congress did not intend to delegate additional authority *sub silentio*."); *Sierra Club v. EPA*, 311 F.3d 853, 861 (7th Cir. 2002) ("It is not [an agency's] prerogative to disregard statutory limitations on its discretion because it concludes that other remedies it has created out of whole cloth are better.")

A contrary view would not only permit regulatory agencies to essentially rewrite federal law, but it would invite further administrative abuses of power. Congress's ability to cabin administrative overreach by drafting legislation is one of its chief means of keeping Executive Branch power in check. Because Congress as an institution moves slowly and deliberately, Congress relies substantially on the federal courts to ensure respect for the proper boundaries of federal statutes. Otherwise, the aggrandizement of agency power will accumulate steadily, and the constitutional scheme of checks and balances could be rendered a dead letter.

II. CONGRESS DID NOT EXPAND THE FHA TO COVER DISPARATE IMPACT WHEN IT AMENDED THE STATUTE IN 1988

Petitioners have cogently explained why the FHA as initially enacted cannot reasonably be interpreted to encompass disparate-impact litigation. The United States argues in response that, regardless of the FHA's meaning in 1968, the 1988 amendments to the statute demonstrate that the law encompasses such litigation. U.S. *Mt. Holly* Br. 18-24. It argues that because in 1988 "Congress was aware that the FHA, including Section 804(a), had uniformly been interpreted [by federal appeals courts] to encompass disparate-impact claims" yet nonetheless chose to leave § 804(a)'s operative language unchanged while revising other FHA provisions, Congress implicitly adopted the appeals courts' interpretation of the FHA. *Id.* at 21-22. It also argues that three "exemptions from liability" added to the FHA in 1988 demonstrate that Congress intended that conduct not falling within one of the three exemptions would be subject to disparate-impact scrutiny. *Id.* at 18-21. Neither argument is well taken.

A. Congressional Inaction Is Not a Basis for Inferring Acquiescence

This Court has routinely rejected claims that the meaning of a statute can be inferred from congressional inaction in the face of judicial interpretations of the statute. *See, e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) ("As a general matter, . . . we have held that these arguments deserve little weight in the interpretive process.").

Indeed, the Court has explicitly rejected a congressional-inaction-equals-assent argument in the context of efforts to apply disparate-impact analysis to civil rights litigation. In *Alexander v. Sandoval*, the Court held that there is no private right of action to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*[3] *Alexander*, 532 U.S. at 293. In so doing, the Court explicitly rejected an argument that Congress had "ratified" court decisions finding an implied right of action when it amended Title VI without disavowing those decisions. *Id.* at 291-92. While conceding that it had inferred congressional acquiescence to federal court rulings in a 1982 decision, the Court explained that inferred ratification was not a generally accepted canon of statutory interpretation:

> But we recently criticized [the 1982 decision's] reliance on congressional inaction, saying that "[a]s a general matter . . . [the] argumen[t] deserve[s] little weight in the interpretive process." [*Central Bank of Denver*,] 511 U.S., at 187. And when, as here, Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, we have spoken more bluntly: "It is impossible to assert with any degree of assurance that congressional

[3] Title VI prohibits discrimination on the basis of race, color, or national origin under any program or activity receiving federal financial assistance. The Court has repeatedly stated that Title VI itself extends no farther than the Equal Protection Clause and thus that Title VI does not encompass disparate-impact litigation. *See, e.g., United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992).

> failure to act represents congressional approval of the Court's statutory interpretation."

Id. at 292 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989)).[4]

Congress did not comprehensively revise the FHA in 1988.[5] The United States concedes that the "operative language" of § 804(a)—the principal FHA provision at issue in this case—was "unchanged" by the 1988 amendments. U.S. *Mt. Holly* Br. at 23. Accordingly, there is no basis for inferring "ratification" of appeals court decisions such that the FHA was transformed from a statute whose language was most naturally read as applying only to disparate-treatment claims into a statute that also encompassed disparate-impact claims.

Indeed, an equally strong argument could be made that the 1988 amendments acquiesced to the views of the U.S. Department of Justice, whose official position in 1988 (and throughout the Reagan Administration) was that the FHA did not encompass disparate-impact litigation. *See, e.g.,* Brief for the

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[4] There is even less reason to infer congressional ratification when, as here, the court decisions at issue emanate not from this Court but from lower federal courts.

[5] The Fair Housing Amendments Act of 1988, 102 Stat. 1619, revised the FHA by: (1) adding provisions that barred discrimination because of familial status or disability; (2) added to HUD's enforcement powers; and (3) established several safe-harbor defenses for those accused of violating the FHA. The Amendments made no changes in provisions specifying the standards for determining whether challenged conduct violated the FHA.

United States as Amicus Curiae, *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (No. 87-1961). During the Carter Administration, the Justice Department filed several FHA enforcement actions that sought to impose liability under a disparate-impact theory. After concluding in 1981 that the FHA did not encompass liability under that theory, the Justice Department amended its filings in pending enforcement actions to withdraw previously-asserted disparate- impact claims. *See, e.g., United States v. City of Birmingham*, 538 F. Supp. 819, 827 n.9 (E.D. Mich. 1982). The Justice Department thereafter refrained from making such claims in any of the FHA enforcement actions it filed in the period preceding adoption of the 1988 amendments. Accordingly, if one accepts the premise that congressional silence can be understood to constitute acquiescence to statutory interpretations adopted by other branches of government, a plausible case can be made that Congress—in adopting the 1988 amendments—was acquiescing to the views of the Justice Department, not those of the lower federal courts.[6]

[6] The Solicitor General on a number of very recent occasions has made such congressional-acquiescence-to-the-views-of-a-federal-agency arguments in briefs filed with the Court. *See, e.g.,* Brief for the Federal Trade Commission, *Ross v. FTC*, No. 13-1426 (July 2014) (citing *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979)).

B. Adding Three *Exemptions* from Liability Is Not Grounds to Infer *Expansion* of Liability

The United States's other argument—that three exemptions from liability added to the FHA in 1988 demonstrate that Congress intended that conduct not falling within one of the three exemptions would be subject to disparate-impact scrutiny—fares no better. The three exemptions were designed to *contract* the potential scope of liability under the FHA and thus cannot reasonably be understood as an effort by Congress to create new liability under disparate-impact theory by implicitly ratifying federal court decisions.

1. The Three Exemptions Contain No Language Indicating Endorsement of Disparate-Impact Liability

The provisions added in 1988 created safe harbors from liability for conduct fitting within three specified fact patterns: (1) taking adverse action against a person convicted of drug offenses;[7] (2) imposing restrictions on the maximum number of occupants in a dwelling;[8] and (3) in the course of appraising real property, taking into account factors other than race, color, religion, national origin, sex,

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[7] 42 U.S.C. § 3607(b)(4) ("Nothing in [the FHA] prohibits conduct against a person because such person has been convicted . . . of the illegal manufacture or distribution of a controlled substance.").

[8] 42 U.S.C. § 3607(b)(1).

handicap, or familial status.[9] The United States contends that these exemptions demonstrate that Congress understood that the FHA encompassed disparate-impact litigation. It reasons that there would have been no need to adopt these exemptions unless the fact patterns would otherwise have been subject to challenge under a disparate-impact theory, because each of the fact patterns presupposes that the actor's motivation did not include an intent to discriminate on the basis of one of the FHA's protected factors. U.S. *Mt. Holly* Br. at 18-19.

Nothing in the language of the three new provisions supports the United States's interpretation. If the provisions were intended to convey that individuals could be subject to suit under a disparate-impact theory unless they fit within the confines of one of the exemptions, one would expect the provisions to include words to that effect. No such words appear in the provisions; they merely specify circumstances under which individuals may *not* be held accountable under the FHA, without specifying alternate circumstances under which those same individuals might be held accountable. Indeed, given (as Petitioners have demonstrated) that the 1968 version of the FHA cannot reasonably be understood to have encompassed disparate-impact liability, it is highly unlikely that Congress in 1988 would have chosen those new provisions—provisions that on their face create safe-harbor exemptions from liability—to undertake *sub silentio* a massive expansion of the FHA.

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[9] 42 U.S.C. § 3605(c).

2. The *Smith* Court's Analysis of the ADEA's Statutory Defense Provision Is Irrelevant to the FHA

To support its understanding of the three exemptions, the United States cites the Court's 2005 decision in *Smith*, which concluded that § 4(a)(2) of the ADEA encompassed disparate-impact claims. The decision was based in part on the Court's interpretation of the ADEA's "RFOA defense."[10] The plurality opinion concluded that the RFOA language provided some support for its disparate-impact interpretation of § 4(a)(2). *Smith*, 544 U.S. at 238-39 (plurality). It reasoned that the RFOA defense could have no possible applications if the ADEA prohibited only disparate treatment. The Court had previously determined that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age" and thus, it concluded, the scenario envisioned by the RFOA provision (that the employer has acted based on a reasonable factor other than age yet the employer's action is nonetheless "otherwise prohibited" under the ADEA) could never arise in a disparate-treatment case. *Id.* at 238.

The United States argues that *Smith*'s discussion of the RFOA defense to an ADEA action

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[10] RFOA is an acronym for "reasonable factor other than age." The RFOA provision states that it is not unlawful for an employer "to take any *action otherwise prohibited* under [the ADEA] . . . where the differentiation [between young and old employees] is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1) (emphasis added).

supports its view of the three FHA exemptions. Not so. The *Smith* plurality's analysis of the RFOA defense turned on specific statutory language ("action otherwise prohibited") that indicated, in the plurality's view, congressional endorsement of disparate-impact litigation under the ADEA. It construed the "action otherwise prohibited" language as an explicit congressional recognition that there is at least some conduct that would be prohibited by the ADEA, but for the RFOA defense, even in circumstances in which the employer's actions were not motivated by the plaintiff's age. *Ibid.* Imposing liability on the basis of such conduct is properly understood as disparate-impact liability, the plurality reasoned. *Ibid.*

The FHA contains no language remotely akin to the ADEA's "action otherwise prohibited" language. Accordingly, *Smith*'s analysis of the ADEA's RFOA provision is inapplicable here.

3. Petitioners' Interpretation of the Three Exemptions Is the Most Plausible, Regardless of Whether That Interpretation Renders Them Redundant

The United States argues alternatively that Congress would have had no reason to enact the three exemptions if, as Petitioners contend, the FHA already excluded disparate-impact claims. Accordingly, it argues, Petitioners' interpretation should be rejected because it would reduce the three exemptions to mere surplusage. U.S. *Mt. Holly* Br. at 20. But even if the

United States's surplusage argument were correct,[11] that would not provide a sound basis for rejecting Petitioners' interpretation. It is far from unusual or illogical for a legislature to say the same thing twice. Indeed, taking a belt-and-suspenders approach is practically a cliché. By doing so, legislatures convey the message, "We really, really meant what we said the first time."

Academic studies have concluded that legislators frequently include redundant provisions in legislation, for a variety of reasons. Two leading commentators have observed:

> [Congressional] respondents also pointed out that the political interests of the audience often demand redundancy. They told us, for example, that "sometimes politically for compromise they must include certain words in the statute—that senator, that constituent, that lobbyist wants to see the word"; similarly, they said that "sometimes the lists are in there to satisfy groups, certain phrases are needed to satisfy political interests and they might overlap" or that "sometimes you have it in there because someone had to see their phrase in the bill to get it passed." . . . We are not surprised to see pragmatic considerations trumping application of the rule against superfluities. Common sense tells us that, despite the popularity of this rule

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[11] As Petitioners have noted, there is a strong basis for concluding that the three exemptions are not redundant, because they can assist parties in defending against disparate-treatment claims as well. *See* Pet. Br. at 42.

> with judges, there is likely to be redundancy.

Abbe R. Gluck & Lisa Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 934 (2013).

Moreover, the situation facing Members of Congress in 1988 provided them with good reason to adopt the three exemptions despite understanding that the FHA did not encompass disparate-impact litigation.

As the United States notes, some Members of Congress were aware in 1988 that several federal appeals courts had interpreted the FHA as encompassing disparate-impact litigation. Congress may well have adopted the three exemptions to ensure that those appeals courts would thereafter apply their disparate-impact theory in a more limited fashion. No rule of statutory construction suggests that Congress, by adopting legislation that cuts back on judicial interpretations of a statute as applied to certain types of conduct, is thereby endorsing broader judicial interpretation of the statute as applied to other types of conduct. Applying such a rule of construction to the actions of the House, the Senate, and the President (who signed the 1988 amendments into law) would be particularly inappropriate in this case, given President Reagan's statement, issued at the time of signing, that Title VIII "speaks only to intentional discrimination." Remarks on Signing the Fair Housing Amendment Act of 1988, 24 Weekly Comp. Pres. Doc. 1140, 1141 (Sept. 13, 1988).

III. THE SEVERE MARKET DISRUPTIONS THAT AUTHORIZING DISPARATE-IMPACT LIABILITY IN THE FHA WOULD CAUSE SUGGEST THAT CONGRESS WOULD NOT HAVE AUTHORIZED SUCH LIABILITY WITHOUT SAYING SO EXPLICITLY

The FHA broadly prohibits a wide range of activities that limit the availability of housing "because of" race, color, religion, sex, handicap, familial status, or national origin. 42 U.S.C. § 3604. HUD has interpreted the FHA's prohibitions as applying to numerous industries only indirectly involved in the sale or rental of dwelling units, such as the insurance and residential mortgage-lending industries. *See, e.g.,* 78 Fed. Reg. 11460, 11475 (Feb. 15, 2013) ("HUD has long interpreted the Fair Housing Act to prohibit discriminatory practices in connection with homeowner's insurance"); *id.* at 11476 (FHA applies to non-depository lenders, banks, thrifts, and credit unions).

Prudent practices in both the insurance and lending industries require careful risk management, which in turn requires industry officials to carefully screen their potential customers to ensure that products offered to them are tailored to the risks of loss posed by those customers. When evaluating risk, the insurance and home mortgage-lending industries do not take into account any of the characteristics protected under the FHA; indeed, intentional discrimination on the basis of race and sex is universally prohibited by a wide range of state and federal laws. However, the tools that have long been employed to evaluate risk necessarily will result in

determinations that some customers pose a higher risk of loss and thus that they should be charged more than others for the very same product. As the Seventh Circuit has observed:

> [T]erm life insurance costs substantially more per dollar of death benefit for someone 65 years old than for one 25 years old, although the expected return per dollar of premium is the same to both groups because the older person, who pays more, also has a higher probability of dying during the term. Auto insurance is more expensive in a city than in the countryside, because congestion in cities means more collisions. Putting young and old, or city and country into the same pool would lead to adverse selection; people knowing that the risks they face are less than the average of the pool would drop out. A single price for term life insurance would dissuade younger persons from insuring, because the price would be too steep for the coverage offered; the remaining older persons would pay a price appropriate to their age, but younger persons would lose the benefits of insurance altogether. To curtail adverse selection, insurers seek to differentiate risk classes with many variables.

NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 290 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993).

Risk classes that accurately predict risk inevitably will have a greater impact on some of the groups protected by the FHA than on the general

public. For example, if members of a particular racial group are more likely to live in large cities than the public at large, they will be disadvantaged by insurance practices that charge higher premiums for city dwellers. Such risk assessment practices are unassailable under the FHA so long as the statute is understood to prohibit disparate treatment only; *i.e.*, so long as its prohibitions are focused on actions taken "because of" a potential customer's race, color, religion, sex, familial status, or national origin.

But a ruling by this Court that the FHA encompasses disparate-impact litigation would be highly disruptive for industries such as insurance and home mortgage-lending that are dependent on risk management. They would be faced with a no-win situation: continue with current risk-management practices and face significant litigation costs, or else alter well-accepted risk evaluation methods in order to minimize disparate impact on groups protected by the FHA and thereby experience adverse selection and the other sorts of loss described by the Seventh Circuit. In light of the disruption that would result from widespread application of FHA disparate-impact analysis to the insurance and mortgage-lending industries, it is inconceivable that Congress would have adopted disparate-impact analysis without saying so explicitly. As the Seventh Circuit explained, in rejecting a claim that the Americans with Disabilities Act required health insurers to eliminate coverage caps for treatment of diseases that qualified as disabilities, "Had Congress purposed to impose so enormous a burden on the retail sector of the economy and so vast a supervisory responsibility on the federal courts, we think it would have made its intention

clearer and would at least have imposed some standards."). *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 560 (7th Cir. 1999) (Posner, J.).

It is particularly unlikely that Congress would have done so with respect to a statute that (according to HUD) is fully applicable to the insurance industry. Congress has long been solicitous of the insurance industry's need to "discriminate" against potential customers who present a higher risk of loss, and it has adopted legislation designed to impose strict limitations on the authority of the federal government to regulate the industry. In particular, the McCarran-Ferguson Act provides that "no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

The insurance industry has cogently explained why enforcement of the FHA against it under a disparate- impact theory will "impair" numerous state laws designed to "regulate the business of insurance." *See, e.g., Property Cas. Insurers Assoc. of Am. v. Donovan*, ___ F. Supp. 2d ___, 2014 WL 4377570 (N.D. Ill. Sept. 3, 2014). Section 1012(b) thus points decisively away from interpreting the FHA as encompassing disparate-impact litigation. The District of Columbia federal district court decision striking down the HUD FHA disparate-impact regulations cited conflict with the McCarran-Ferguson Act as one of the bases for its conclusion that the FHA does not encompass disparate-impact liability. *Am. Ins. Assoc.*, 2014 WL 5802283 at *10-11.

In the preamble to its FHA disparate-impact regulations, HUD dismissed such concerns. It concluded that McCarran-Ferguson has no role to play in its decision regarding whether the FHA should be construed so as to encompass disparate-impact litigation. 78 Fed. Reg. at 11475. Rather, it concluded, it would construe the FHA in light of the facts of each case: "How the Act should be construed in light of McCarran-Ferguson depends on the relevant State law 'relating to the business of insurance.'" *Ibid.* (quoting 15 U.S.C. § 1012(b)).

HUD's proposed case-by-case construction of the FHA is simply not plausible. It cannot possibly be the case that Congress meant the FHA's meaning to be infinitely malleable, first encompassing disparate-impact litigation when its application does not impair state insurance regulation, then not encompassing disparate-impact litigation in the next case when conditions change.

Indeed, by merely insisting on a federal forum for purposes of determining on a case-by-case basis whether disparate-impact litigation impairs state insurance regulation, HUD is trenching to a significant degree on traditional state regulation of the insurance industry. For example, FHA disparate-impact litigation can be expected to explore such issues as whether a defendant's limitations on insurance coverage are actuarially sound. As an Illinois district judge recently observed, in a case challenging HUD's FHA disparate-impact regulations as applied to the insurance industry, such exploration impairs/interferes with state regulation, regardless whether the federal judge claims to be applying state insurance law:

> Even if the formal criteria are the same under federal and state law, displacing their administration into federal court—requiring a *federal* court to decide whether an insurance policy is consistent with *state* law—obviously would interfere with the administration of state law. The states are not indifferent to who enforces their laws.

Property Cas. Insurers, 2014 WL 4377570, at *5 (quoting *Doe v. Mutual of Omaha*, 179 F.3d at 564) (emphasis in original).[12]

In sum, interpreting the FHA as encompassing disparate-impact litigation would cause significant disruption in the insurance and residential mortgage-lending industries and would bring the statute into significant conflict with the McCarran-Ferguson Act. Those considerations weigh strongly against the United States's interpretation of the FHA and in favor of a conclusion that disparate-impact claims are not cognizable under the FHA.

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[12] The Illinois district court ultimately determined that the insurance industry's overarching McCarran-Ferguson Act claim—that HUD's FHA disparate-impact regulations violate McCarran-Ferguson—was not sufficiently ripe to permit a facial challenge to the regulations on that ground at this time. *Id.* at *16. The court nonetheless held that HUD acted arbitrarily and capriciously in deciding, with no more than a cursory explanation, that a case-by-case approach was the most appropriate means of determining whether disparate-impact claims against insurers were precluded by McCarran-Ferguson. *Id.* at *21.

CONCLUSION

Amicus curiae WLF respectfully requests that the Court reverse the decision of the Fifth Circuit.

Respectfully submitted,

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