No. 10-1032

IN THE

Supreme Court of the United States

STEVE MAGNER, ET AL.,

Petitioners,

v.

THOMAS J. GALLAGHER, ET AL.,

Respondents.

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

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND OTHER NATIONAL CIVIL RIGHTS ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE FAIR HOUSING ACT IS PROPERLY INTERPRETED TO AUTHORIZE DISPARATE-IMPACT CLAIMS. 6

A. The Statutory Text 7

B. The 1968 Legislative History 11

C. Subsequent Interpretation and Legislative History............................ 17

II. DEFERENCE TO THE AGENCY THAT ADMINISTERS THE ACT REQUIRES ALLOWANCE OF DISPARATE-IMPACT CLAIMS.. 24

III. ALLOWING DISPARATE-IMPACT CLAIMS UNDER THE FAIR HOUSING ACT WOULD BE CONSISTENT WITH THE EQUAL PROTECTION GUARANTEE. 25

IV. THE DISPARATE-IMPACT STANDARD HELPS THE UNITED STATES COMPLY WITH ITS OBLIGATIONS UNDER THE CERD TREATY. 34

V. THE EIGHTH CIRCUIT APPLIED THE CORRECT DISPARATE-IMPACT TEST. 36

CONCLUSION 38

APPENDIX 1a

TABLE OF AUTHORITIES

CASES

Arthur v. City of Toledo, 782 F.2d 565 (6th Cir. 1986) 6

Betsey v. Turtle Creek Associates, 736 F.2d 983 (4th Cir. 1984) 20

Bush v. Vera, 517 U.S. 952 (1996) 32

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) 22

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 25

City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995) 6

Clinton v. City of New York, 524 U.S. 417 (1998) 23

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 7, 8

Halet v. Wend Investment Co., 672 F.2d 1305 (9th Cir. 1982) 6, 20

Hanson v. Veterans Administration, 800 F.2d 1381 (5th Cir. 1986) 6

Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988), *aff'd in part*, 488 U.S. 15 (1988) 6, 19–20, 28

Jackson v. Okaloosa County, 21 F.3d 1531 (11th Cir. 1994) 6

Langlois v. Abington Housing Authority, 207 F.3d 43 (1st Cir. 2000) 6

Lorillard v. Pons, 434 U.S. 575 (1978) 22

Meacham v. Knolls Atomic Power Laboratory, 554 U.S. 84 (2008) 11

Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977) 6, 9, 17, 20, 27, 28

Mountain Side Mobile Estates Partnership v. Secretary of HUD, 56 F.3d 1243 (10th Cir. 1995)... 6

Parents Involved in Community Schools v. Seattle School District #1, 551 U.S. 701 (2007)... 32

Resident Advisory Board v. Rizzo, 564 F.2d 126 (3d Cir. 1977) 6, 20

Ricci v. DeStefano, 129 S. Ct. 2658 (2009).. 26, 29, 31

Secretary of HUD v. Mountain Side Mobile Estates Partnership, No. 08-92-0010-1, 1993 WL 307069 (HUD July 19, 1993), *aff'd in relevant part,* 56 F.3d 1243 (10th Cir. 1995) 24

Smith v. City of Jackson, 544 U.S. 228 (2005)... 8, 9

Smith v. Town of Clarkton, 682 F.2d 1055 (4th Cir. 1982)... 6

Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15 (1988)............................. 22

United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974) 6, 17, 20

United States v. Marengo County Commission, 731 F.2d 1546 (11th Cir. 1984) 20

United States v. Mead Corp., 533 U.S. 218 (2001) 25

United States v. Mitchell, 580 F.2d 789 (5th Cir. 1978) 20

United States v. O'Brien, 391 U.S. 367 (1968) 33

United States v. Tinklenburg, 131 S. Ct. 2007 (2011) 20

Washington v. Davis, 426 U.S. 229 (1976) 14

STATUTES

29 U.S.C. § 623(a)(2) 9

29 U.S.C. § 623(f)(1) 11

42 U.S.C. § 2000e-2(a) 9

42 U.S.C. § 3601 6

42 U.S.C. § 3603(b)(1) 16

42 U.S.C. § 3604(a) 3, 7

42 U.S.C. § 3604(f)(1) 9

42 U.S.C. § 3604(f)(3) 9

42 U.S.C. § 3607(b)(1) 10

Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2(a)) 8

LEGISLATIVE MATERIALS

90 Cong. Rec. 2274 (1968) 14, 15

90 Cong. Rec. 2275 (1968) 14

90 Cong. Rec. 2281 (1968) 12

90 Cong. Rec. 2669 (1968) 16

90 Cong. Rec. 2986 (1968) 12

90 Cong. Rec. 3422 (1968) 15

90 Cong. Rec. 5214–22 (1968) 16

90 Cong. Rec. 5216 (1968) 17

90 Cong. Rec. 5220 (1968) 17

90 Cong. Rec. 5222 (1968) 17

90 Cong. Rec. 5643 (1968) 16

126 Cong. Rec. 31,164 (1980) 18

126 Cong. Rec. 31,166-67 (1980) 19

126 Cong. Rec. 31,171 (1980) 18

127 Cong. Rec. 22,156 (1981) 19

129 Cong. Rec. 808 (1983) 19

133 Cong. Rec. 7180 (1987) 19

134 Cong. Rec. 23,711 (1988) 23

Fair Housing Act of 1967: Hearing Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking and Currency, 90th Cong. (1967) 13, 14

H.R. Rep. No. 96-865 (1980) 18

H.R. Rep. No. 100-711 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173 .... 11, 20, 21

International Convention on the Elimination of all Forms of Racial Discrimination: Hearing Before the S. Comm. on Foreign Relations, 103d Cong. (1994)... 36

S. 139, 99th Cong. § 6(e) (1985) 19

OTHER AUTHORITIES

Exec. Order 11,365, 32 Fed. Reg. 11,111 (July 29, 1967) 12

Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 Harv. J. on Legis. 363 (1987) 23

Arnold R. Hirsch, *Making the Second Ghetto: Race and Housing in Chicago 1940–1960* (1998)... 27

Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921 (proposed Nov. 16, 2011)... 24, 37

International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Dec. 21, 1965, 660 U.N.T.S. 195 .... 34, 35

Christine Jolls, *Commentary Antidiscrimination and Accommodation*, 115 Harv. L. Rev. 642 (2001) 26

Kenneth L. Karst, *The Costs of a Motive-Centered Inquiry*, 15 San Diego L. Rev. 1163 (1978) 34

Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. Davis L. Rev. 755 (1999) 33

Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493 (2003) 26

Report of the National Advisory Commission on Civil Disorders (1968) 15

INTEREST OF AMICI[1]

Amici are the following national civil rights organizations:[2]

The National Lawyers' Committee for Civil Rights Under Law and eight independent affiliates

Leadership Conference for Civil and Human Rights

National Housing Law Project

LatinoJustice/PRLDEF

Asian Pacific American Legal Center

Advancement Project

American Planning Association

National Consumer Law Center

Center for Responsible Lending

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[1] Petitioners' and Respondents' written letters of consent to amicus briefs have been lodged with the Clerk. Pursuant to Rule 37.6, counsel for *amici* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity—other than *amici*, their members, and their counsel—contributed monetarily to the preparation or submission of this brief.

[2] The American Planning Association, though not itself a civil rights organization, is an independent education and research organization with membership open to all that includes in its board-approved policies an organizational goal to "identify and reform planning policies and zoning regulations at the state and local levels that are barriers to the creation of affordable housing, may exclude supportive housing, and are noncompliant with the Fair Housing Act, as amended."

Public Justice

Center for Social Inclusion

Charles Hamilton Houston Institute for Race & Justice

Equal Rights Center

Impact Fund

Asian American Justice Center

Judge David L. Bazelon Center for Mental Health Law

National Urban League

Amici actively work to promote the civil rights of all Americans in a variety of ways. The specific descriptions are set forth in an appendix to this brief. Because of the work of *amici* in this field, they are acutely aware of the problem of residential segregation that persists in the United States. They are also aware of the way that application of a disparate-impact test under the Fair Housing Act has been a very important force in promoting the integration of our communities. Limiting the Act to cases in which it is possible to prove that discriminatory intent was the cause of a given exclusionary policy or practice would mean that it would lose a substantial part of its effectiveness. Regardless of whether intent can be proved in a given case, if local officials or providers of housing take actions that will have the effect of preventing equal access by all protected groups, and it can be shown that their legitimate policy goals can be served through alternative means that are less

exclusionary, the Act should continue to provide a needed remedy.

SUMMARY OF ARGUMENT

The text of the Fair Housing Act supports the conclusion, uniformly accepted in the lower courts for nearly four decades, that the Act authorizes pursuit of disparate-impact claims. Like Title VII, the Act includes language focusing on the *effects* of a particular policy or practice. *See* 42 U.S.C. § 3604(a) (it is 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") (emphasis added). That language reflects congressional intent to combat not only intentional discrimination but also actions that have unnecessary disparate effects on protected groups.

This conclusion is reinforced by the legislative history. In 1968, the sponsors of the Act made clear that their goal was the eradication of residential segregation, not merely prohibition of intentional discrimination in the sale or rental of housing. That goal can only be achieved if decision-makers are required to give up policies or practices that have avoidable disparate impacts. When the Act was amended in 1988, Congress had repeatedly refused to add language limiting it to intentional discrimination, and the amendments themselves reflect an understanding that disparate-impact claims could be brought.

Even if the Act could be viewed as ambiguous, the Court would be required to defer to the longstanding administrative interpretation adopted by the Department of Housing and Urban Development. A series of adjudicative decisions by the Secretary reflect the Department's decision to interpret the Act as authorizing disparate-impact claims and its understanding that a narrower interpretation would prevent accomplishment of Congress's goals.

Accepting that administrative determination would not conflict with the constitutional guarantee of equal protection of the laws. Imposing liability on public officials and housing providers based on the disparate impacts of their actions serves several constitutionally legitimate purposes. For one thing, the three-step disparate-impact inquiry serves to "smoke out" decisions made with covert discriminatory intent by demanding that decisions be assessed in relation to available less-discriminatory alternatives. In addition, by requiring decision-makers to avoid "thoughtless" disparate impacts, the Act simply requires them to configure their policies to promote, rather than slow, the integration of housing in this country. Race-conscious selection of policies that do not harm anyone, such as allowing low-income housing in a given municipality in order to promote greater integration, should raise no constitutional concerns. All that the Act does is require such choices when they are an available alternative.

The United States has signed and ratified the International Convention on the Elimination of All

Forms of Racial Discrimination, a 1965 treaty that defines discrimination to prohibit both racially discriminatory intent and disparate impact. Continuing the longstanding interpretation of the Act as allowing disparate-impact claims serves to facilitate our compliance with this treaty.

Finally, *amici* see no basis for second-guessing the burden-shifting approach to litigating disparate-impact claims adopted by the Eighth Circuit. That approach is consistent with the way Title VII cases are litigated, and is also reflected in HUD's proposed regulation governing this subject.

ARGUMENT

For over forty years, the Fair Housing Act has stood as a bulwark against discriminatory housing practices in the United States. Discrimination takes many forms, and in enacting the Fair Housing Act, Congress sought to attack all of them. It wanted to combat both overt prejudice and more insidious discrimination, which shows itself not in malicious words but in sophisticated or even thoughtless actions, including policies that perpetuate segregation and impose unnecessary burdens on minority groups. As Congress anticipated and the lower courts and government agencies recognize, the Act continues to play an important role in combating housing discrimination and residential segregation. The Act can do this, in part, because it contains a disparate-impact standard.

I. THE FAIR HOUSING ACT IS PROPERLY INTERPRETED TO AUTHORIZE DISPARATE-IMPACT CLAIMS.

The stated purpose of the Fair Housing Act is broad and ambitious, implying that interpretation of the Act should be bounded only by the limits set by the Constitution: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. In light of this goal, this Court has held that the text of the Act must be given a "generous construction." *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995) (*citing Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972)).

As the lower federal courts have unanimously recognized,[3] a generous construction necessarily includes allowing disparate-impact claims. The disparate-impact approach, first recognized by this

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[3] *See Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934–35 (2d Cir. 1988), *aff'd in part*, 488 U.S. 15 (1988); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146–47 (3d Cir. 1977); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565, 575 (6th Cir. 1986); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1288–89 (7th Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179, 1184–85 (8th Cir. 1974); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *Mountain Side Mobile Estates P'ship v. Sec'y of HUD*, 56 F.3d 1243, 1250–51 (10th Cir. 1995); *Jackson v. Okaloosa Cnty.*, 21 F.3d 1531, 1543 (11th Cir. 1994).

Court in the employment context under Title VII, *see Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), does not turn on proof of intent but instead turns on a showing of a policy or practice that has an avoidably disparate impact on a group protected by law from discrimination. It remains an essential and wholly justified method of establishing liability under the Fair Housing Act.

A. The Statutory Text

The text of the Act on its face strongly supports the conclusion that Congress contemplated that the Act would cover claims that a given law or policy has an avoidable disparate impact on a protected group. In Section 804(a) of the Act, Congress prohibited not just enumerated actions, but also an impermissible result. Section 804(a) states in full that it shall be 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) (emphasis added). By focusing on the end result of housing "unavailab[ility]," the provision directs attention away from the mental state of the actor and toward the consequence of the action.

In using a catch-all phrase to incorporate a disparate-impact standard into a section also concerned with disparate treatment, the Fair Housing Act follows in the footsteps of Title VII, passed just four years earlier. As this Court has held, it is appropriate to interpret two statutes in the

same manner when one mimics the language of the other and the statutes were passed in close proximity. *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion) (*citing Northcross v. Bd. of Educ. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (*per curiam*)). Title VII in its original form prohibited employment practices with an unjustifiable disparate impact, stating that "[i]t shall be an unlawful employment practice for an employer . . . . (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities *or otherwise adversely affect his status as an employee*, because of such individual's race, color, religion, sex, or national origin." Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2(a)). This Court initially found that a disparate-impact standard could be inferred from the broad, remedial purposes of the employment statute and was supported by the fact that the relevant agency had reached the same conclusion. *See Griggs*, 401 U.S. at 429–30. The Court later affirmed that this holding also represented the best reading of the text. *Smith*, 544 U.S. at 235 (*citing Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988)). In particular, the Court pointed to the Section 703(a)(2) catch-all phrase "otherwise adversely affect his status as an employee," noting that "the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer." *Smith*, 544 U.S. at 235–36.

Petitioners focus myopically on the absence of the precise term "affect" in the Act's parallel catch-all provision, but the inquiry should not turn on magic words. The question is whether the phrase focuses on effects rather than motivation. *Id.* Section 804(a) does just that by drawing attention toward the effect of "mak[ing a dwelling] unavailable" rather than the subjective intent of any individual.

Petitioners and amici also point to the phrase "because of" in Section 804(a), arguing that it is an indication that the statute is limited to banning actions taken with an intent to discriminate. But this phrase is ubiquitous in legislation banning discrimination, including the very provisions that this Court has interpreted as imposing liability based on disparate impacts. This includes Title VII, *see* 42 U.S.C. § 2000e-2(a), as well as the Age Discrimination in Employment Act, *see* 29 U.S.C. § 623(a)(2).[4] Moreover, Congress used the identical phrase "otherwise make unavailable . . . because of" when it extended the Fair Housing Act to cover the disabled, 42 U.S.C. § 3604(f)(1), while simultaneously ensuring that proof of housing discrimination in the disability context would not require a demonstration of discriminatory intent. *See id.* § 3604(f)(3) (defining discrimination to include the

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[4] *See Metro. Hous. Dev. Corp*, 558 F.2d at 1289 n.6 ("The important point to be derived from *Griggs* is that the Court did not find the 'because of race' language to be an obstacle to its ultimate holding that intent was not required under Title VII. It looked to the broad purposes underlying the Act rather than attempting to discern the meaning of this provision from its plain language.").

failure to make or permit reasonable accommodations).

Rather than suggesting intent, the function of the phrase "because of" in these disparate-impact provisions is to ensure that a court performs (and potential litigants are warned about) the crucial second and third steps of the burden-shifting test. *See infra*. To mount a successful challenge to a policy with a disparate impact on a protected group, litigants must exclude the possibility that the policy was adopted and remains justifiable on neutral grounds. Essentially, the test asks those who control access to housing to consider not just their original goals but also the effects of the means they have chosen and whether the goals could be achieved through alternate methods having a less disparate impact. Only when it is shown that these decision-makers have equally workable alternatives does the Act impose liability. In these cases, it is no stretch to infer that the otherwise unjustifiable policy and its harmful effects can be attributed to race or another protected category. It is in this sense that "unavailability" may occur "because of" race but without invidious intent.

Finally, the statutory text contains exemptions that clearly contemplate the Act's imposition of disparate-impact liability. For example, Section 807(b)(1) states that "[n]othing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1). The statistical fact

that minority households tended to have larger families had been used as a basis for successful disparate-impact claims based on race prior to the addition of Section 807(b)(1) in 1988, *see* H.R. Rep. No. 100-711, at 21 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2182, and the exemption of "reasonable" occupancy standards makes sense only if Congress expected such disparate-impact cases to be available in the future.

The use of the term "reasonable" to delimit available disparate-impact claims in the Act, meanwhile, parallels the "reasonable factors other than age" affirmative defense in the Age Discrimination in Employment Act. *See* 29 U.S.C. § 623(f)(1). As this Court has observed in that context, the inclusion of such an exemption is not a negation of disparate-impact liability; rather, it constitutes a "premise for disparate-impact liability in the first place." *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 96 (2008).

B. The 1968 Legislative History

The legislative history of the Act buttresses the conclusion that Congress authorized disparate-impact claims. Because the original Fair Housing Act was introduced as an amendment rather than a free-standing bill, the legislative history consists primarily of floor debates. This legislative history supports recognition of a disparate-impact standard along with a disparate-treatment standard.

No legislation is created in a vacuum, but the Fair Housing Act is more closely tied to the crisis that inspired it than perhaps any recent example

save the Patriot Act. Congress was spurred to action in 1968 not solely because of intentional acts of housing discrimination but also because residential segregation and conditions in inner-city ghettos had been blamed for major riots in Northern cities from Los Angeles to Chicago in the "long hot summers" from 1965 to 1967. *See, e.g.,* 90 Cong. Rec. 2281 (1968) (statement of Sen. Brooke) ("In the summer of 1966 and the summer of 1967 our Nation witnessed its greatest shame. If we are to avoid a recurrence of this unsightly, unconscionable bitterness between white and black Americans, it is [i]ncumbent upon our Government to act, and to act now."); 90 Cong. Rec. 2986 (1968) (statement of Sen. Proxmire) ("Just over the weekend, President Johnson said that he anticipated, unfortunately, that, whereas we are likely to have a hot summer, indeed, in our big cities because of racial tension, we could expect many more hot summers in the future before our problems are solved. I am sure the President shares my conviction that the violence and the tragedy that can develop in our cities will be far, far worse in the absence of fair housing legislation."). The situation seemed especially desperate in July of 1967, as major riots tore through Newark and Detroit, and President Johnson reacted by convening the National Advisory Commission on Civil Disorders (Kerner Commission). Exec. Order 11365, 32 Fed. Reg. 11,111 (July 29, 1967).

In August of 1967, witnesses at a hearing on fair housing legislation before the House Subcommittee on Housing and Urban Affairs referred frequently to the explosive conditions in the ghettos. These

witnesses made legislators aware of housing industry practices with a disparate impact, as they emphasized that residential segregation could not be explained by intentional discrimination alone:

> The ghetto pattern is not just out of one man not liking or rejecting another, the prejudice of man to man. The pattern comes from the policies of the industry reinforced by government.
>
> We can go across this country and find almost every city zoned racially. The zoning is in the minds of the banks and the lending institutions, the builders, the real estate brokers. It is written down in very few places. But it is at work in the principles of the real estate boards. It is in the patterns and practices of the industry.
>
> This is a pattern which goes beyond individual prejudices.

Fair Housing Act of 1967: Hearing before the S. Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking and Currency, 90th Cong. 174 (1967) (statement of Algernon Black of the American Civil Liberties Union). Other witnesses catalogued race-neutral policies that had the effect of enforcing segregation as effectively or more effectively than individual prejudice: "Zoning ordinances, minimum size requirements, water and sewer permits, building codes, restriction standards, and other legal and administrative devices . . . . function[ ] as a racial exclusion in our time." *Id.* at 217 (statement of Edward Rutledge of the National Committee Against

Discrimination in Housing). The executive director of the NAACP testified that such policies often cloaked intentional discrimination: "The South, while professing 'freedom of choice' where it will perpetuate segregation, is also promoting de facto segregation in many urban areas by the skillful use of urban redevelopment and other governmentally assisted programs." *Id.* at 103 (statement of Roy Wilkins). In addition, Attorney General Ramsey Clark repeatedly assured the subcommittee that Congress had the authority to address "effects" of past purposeful discrimination.[5] *Id.* at 10. When Senator Mondale introduced the bill in February, transcripts of the hearings were made available to Senators, 90 Cong. Rec. 2274 (1968), and the Senator frequently referred to the testimony in floor debate. *See, e.g., id.* at 2274–75 ("Witness after witness . . . testified that the insult of racially segregated housing patterns creates a sense of rage and frustration and a crisis which contributes enormously to the explosiveness of these communities.").

In March, just as the Senate began debate on the Dirksen substitute that would become the final Act, the Kerner Commission released its report on the

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[5] While Clark could not have anticipated that his Equal Protection Clause analysis would be foreclosed by this Court's decision in *Washington v. Davis*, 426 U.S. 229 (1976), he was right in the sense that Congress has the authority to go beyond the equal protection requirements of the Constitution to prohibit disparate impact in contexts such as employment and housing. *Id.* at 246–48.

riots. The document, which would become a best-seller, fixed blame for the riots on ghettos, "where segregation and poverty converges on the young to destroy opportunity and enforce failure." *Report of the National Advisory Commission on Civil Disorders* 5 (1968). Famously warning that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal," *id.* at 1, the *Report* urged passage of fair housing legislation. *Id.* at 263. This message was then further dramatized by the assassination of Martin Luther King in April, which triggered another round of riots in segregated urban neighborhoods, including nearby in Washington, DC.

On the floor of Congress, Senator Mondale described the broad, remedial purpose of the Act: to replace the ghettos "by truly integrated and balanced living patterns." 90 Cong. Rec. 3422 (1968). The riots gave this goal urgency: "America's goal must be that of an integrated society, a stable society free of the conditions which spawn riots, free of the riots themselves. . . . If America is to escape apartheid we must begin now, and the best way for this Congress to start on the true road to integration is by enacting fair housing legislation." *Id.* Responding to allegations by the opposition that the measure amounted to "forced housing," Senator Mondale countered, "Forced ghetto housing, which amounts to the confinement of minority group Americans to 'ghetto jails' condemns to failure every single program designed to relieve the fantastic pressures on our cities." *Id.* at 2274. Finally, after listing ways in which federal, state, and local policies had formerly operated to require segregation, he argued

that the Act would "undo the effects of these past State and Federal unconstitutional discriminatory actions." *Id.* at 2669.

Statements that appear to narrow the scope of this broad, results-oriented legislation must be read in context. When, as Petitioners note, Senator Mondale stated that "[t]he bill permits an owner to do everything that he could do anyhow with his property—insist upon the highest price, give it to his brother or his wife, sell it to his best friend, do everything he could ever do with property, except refuse to sell it to a person solely on the basis of his color or his religion," *id.* at 5643; *see* Pet. Br. 30, he was arguing with opponents of the bill about how the duties of an individual homeowner would change under the Act. Senator Mondale's comment explains how an ordinary homeowner can avoid liability under the Act—and the Act does have provisions that exempt some individual homeowners from liability. *See* 42 U.S.C. § 3603(b)(1) (the so-called "Mrs. Murphy" exemption). But the Senator's comment in no way forecloses the possibility that other private and public parties, such as landlords and municipalities, could incur liability by adopting policies with an unjustifiable disproportionate impact.

Similarly, the rejection of the "Baker amendment," which was also concerned with the situation of an individual homeowner, nonetheless shows that Congress knew how to require intent and understood the pitfalls of intent tests. *See* 90 Cong. Rec. 5214–22 (1968). In his amendment, Senator

Baker proposed to enlarge an exemption from the Act for individuals selling property without a real estate agent by providing another safe harbor to individuals who employed a real estate agent but could not be proven to have intentionally discriminated in their use of that agent. *Id.* at 5220 (statement of Sen. Baker) ("The only thing [the amendment does] is to say the mechanical act of hiring an agent does not automatically extinguish the exemption but rather the mechanical act of hiring an agent with a discriminatory purpose destroys the exemption"). Senator Percy denounced this proposed intent requirement in clear terms: "If I understand this amendment, it would require proof that a single homeowner had specified racial preference. I maintain that proof would be impossible to produce." *Id.* at 5216. The Senate quickly rejected the amendment. *Id.* at 5222. Though this discussion was confined to individual homeowners, Senator Percy's concern with disguised intent and the evasion that intent requirements invite also reflects on the absence of an intent requirement in the language of the Act.

C. Subsequent Interpretation and Legislative History

Soon after the passage of the Act, the lower courts began to hold that the Act includes a disparate-impact standard. *See, e.g., United States v. City of Black Jack,* 508 F.2d 1179 (8th Cir. 1974); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283 (1977). Congress paid close attention to these developments, as unsuccessful attempts to

amend the Act demonstrate. A proposed 1980 amendment to the Act would have—in addition to expanding enforcement mechanisms and adding the disabled as a protected group—exempted minimum lot-size requirements from the disparate-impact test. H.R. Rep. No. 96-865, at 36 (1980). As the narrow scope of this exemption indicates, the authors of the proposed amendment were aware of the courts' recognition of the disparate-impact standard and generally decided not to disturb it. The House Judiciary Committee's report on the proposed amendment was clear on this point: The Fair Housing Act "effectively proscribed housing practices with the intent or effect of discriminating on account of race, color, national origin or religion." *Id.* at 2.

Meanwhile, opponents of the disparate-impact standard attempted in vain to overrule the judicial recognition of the disparate-impact standard by adding an intent requirement. During debate over the proposed 1980 amendment, Senator Hatch expressed "major concern" about the omission of an intent requirement in the Act, and proposed language that would have "required that the Federal Government make some showing that the practice was adopted or continued or rejected for an unlawful purpose." 126 Cong. Rec. 31,171 (1980). Sponsors of the legislation objected strenuously to Senator Hatch's proposal. Senator Bayh explained that the addition of an intent requirement "would make a radical change in the standard of proof in title VIII cases." *Id.* at 31,164. He cited approvingly recent court decisions "guided by the unbroken line of Supreme Court decisions in cases under Title VII of

the Civil Rights Act of 1964, the equal employment opportunity law. This is the functional equivalent of the fair housing law." *Id.* Senator Mathias read into the record a letter by the Secretary of Housing and Urban Development, which described the disparate-impact test in some detail. *Id.* at 31,166–67.

Neither the original amendment nor Senator Hatch's proposed additions became law in 1980, but Senator Hatch did not abandon efforts to introduce an intent requirement into the Act. In 1981, 1983, and 1985, he unsuccessfully proposed legislation, entitled the Equal Access to Housing Act, that would have amended the Fair Housing Act to state: "Nothing in this title shall prohibit any action unless such action is taken with the intent or purpose of discriminating against a person on account of race, color, religion, sex, handicap, or national origin." 127 Cong. Rec. 22,156 (1981); 129 Cong. Rec. 808 (1983); S. 139, 99th Cong. § 6(e) (1985). In 1987, he changed tactics slightly, characterizing the intent language as a "Clarifying Provision," but the thrust was the same: tenancy requirements and zoning and land-use ordinances were to be immunized from court challenge unless they were "taken for the purpose of discriminating on the account of race, color, religion, sex, handicap, or national origin." 133 Cong. Rec. 7180 (1987). Congress showed no interest in this version either. By August of 1988, when the Fair Housing Act Amendments finally passed in Congress, the lower courts that had decided the issue were unanimous in holding that the Act prohibited disparate impact. *See Huntington Branch, NAACP v. Huntington*, 844 F.2d 926, 934–37 (2d Cir. Apr. 5,

1988), *aff'd in part*, 488 U.S. 15 (Nov. 7, 1988); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 986 (4th Cir. 1984); *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1559 n.20 (11th Cir. 1984); *Halet v. Wend Inv. Co.,* 672 F.2d 1305, 1311 (9th Cir. 1982); *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978); *Metro. Hous. Dev. Corp.*, 558 F.2d at 1287–90; *Resident Advisory Bd. v. Rizzo,* 564 F.2d 126, 146 (3d Cir. 1977); *City of Black Jack*, 508 F.2d at 1184–85.[6]

Perhaps because of the broad judicial consensus, intent played a lesser role in the debates on the 1988 amendment to the Act. There was, however, an unsuccessful attempt in committee to add an intent requirement, this time in the important context of zoning. *See* H.R. Rep. No. 100-711, at 89 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 2224. In the

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[6]Thus, by 1988 (and certainly by now), the situation with regard to the FHA and disparate-impact claims paralleled that described by the Court in *United States v. Tinklenburg*, 131 S. Ct. 2007 (2011), involving the interpretation of the Speedy Trial Act:

> [W]e are impressed that during the 37 years since Congress enacted the Speedy Trial Act, every Court of Appeals has considered the question before us now, and every Court of Appeals, implicitly or explicitly, has rejected the interpretation that the Sixth Circuit adopted in this case. . . . This unanimity among the lower courts about the meaning of a statute of great practical administrative importance in the daily working lives of busy trial judges is itself entitled to strong consideration, particularly when those courts have maintained that interpretation consistently over a long a period of time.

Id. at 2014.

House Report, proponents of the failed amendment discuss at length the Second Circuit's recent disparate-impact decision in *Huntington Branch, NAACP*, *id.* at 90, 1988 U.S.C.C.A.N. at 2225, demonstrating once again that Congress was following these judicial decisions closely. The majority members of the Committee were equally emphatic about the applicability of the disparate-impact test to both the original and new provisions of the Act. *See id.* at 21, 1988 U.S.C.C.A.N. at 2182 ("Because minority households tend to be larger and exclusion of children often has a racially discriminatory effect, two federal courts of appeal have held that adults-only housing may state a claim of racial discrimination under Title VIII."); *id.* at 24, 1988 U.S.C.C.A.N. at 2185 ("The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community."); *id.* at 25, 1988 U.S.C.C.A.N. at 2186 ("The Committee understands that housing discrimination against handicapped persons is not limited to blatant, intentional acts of discrimination. Acts that have the effect of causing discrimination can be just as devastating as intentional discrimination.").

Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a

statute without change. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Contrary to Petitioners' assertions, *see* Pet. Br. 32, that presumption is particularly warranted where floor debates and committee reports have repeatedly referred to this judicial interpretation over the course of years. Any controversy over the correct interpretation of the statute merely reinforces the salience of the judicial construction of the statute: If Senator Hatch could not persuade his colleagues to overturn the courts and import an intent standard into the Act, it was not for want of trying.

Petitioners' reliance on *Central Bank of Denver* to undercut the reenactment doctrine has no relevance here. *Central Bank* was concerned with a statute that had not been reenacted since 1934, *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185 (1994), whereas the statute here was supplemented in 1988 with language patterned after the original provisions. Judicial consensus in *Central Bank* had eroded after two Supreme Court opinions reserving the precise question at issue. *Id.* at 170, 186. Here, not only was judicial consensus firm, but this Court's opinion in *Huntington* did not reserve the question; rather, it assumed the existence of the disparate-impact standard because neither party disputed its applicability. *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (per curiam).

By amending the Fair Housing Act without altering the disparate-impact standard, as Senator Hatch and others had desired, Congress concurred in

the existing judicial interpretation of the Act. The Executive Branch did not participate in efforts to alter the standard, and President Reagan's signing statement simply reflects the fact that the effort in Congress had been unsuccessful in abolishing the standard through the legislative process.[7] As Senator Kennedy responded from the Senate floor, "As the principal Senate sponsor of the 1988 act, I can state unequivocally that Congress contemplated no such intent requirement. The act did not materially alter the 1968 Fair Housing Act provisions defining what is required to prove a discriminatory housing practice. All of the Federal courts of appeal that have considered the question have concluded that title VIII should be construed, at least in some instances, to prohibit acts that have discriminatory effects, and that there is no need to prove discriminatory intent." 134 Cong. Rec. 23,711 (1988).

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[7] As an executive instrument, the presidential signing statement is not particularly helpful in determining legislative intent. Moreover, reliance on the signing statement here, where the President's preferred requirement was considered and rejected by a House committee, raises constitutional questions. A signing statement can no more add provisions to a piece of legislation than a line item veto can take them away; both executive actions subvert the bicameralism and presentment requirements of the Constitution. *See Clinton v. City of New York*, 524 U.S. 417, 438 (1998) ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."); *see also* Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 Harv. J. on Legis. 363 (1987).

II. DEFERENCE TO THE AGENCY THAT ADMINISTERS THE ACT REQUIRES ALLOWANCE OF DISPARATE-IMPACT CLAIMS.

Even if the Court concludes that the text of the Act and its legislative history do not conclusively support recognition of disparate-impact claims, the Act is at a minimum ambiguous. In the wake of decades of consistent judicial interpretation supporting disparate-impact theories, it is hard to imagine how the Court could conclude that the Act is unambiguously limited to disparate-treatment claims. It follows that the Court should defer to the consistent interpretation of the Act adopted by the Department of Housing and Urban Development, which is charged with administering and enforcing the Act.

As the Brief for the United States makes clear, HUD "has long interpreted Section 804(a) to support disparate-impact liability." U.S. Br. at 20. The interpretation is reflected in a recently proposed regulation, 76 Fed. Reg. 70,921 (proposed Nov. 16, 2011), but it is also reflected in numerous decisions resulting from formal agency adjudications that eventually become final determinations of the Secretary after parties petitioned for secretarial review. *See* U.S. Br. at 20–21 & n.7. In addition, the Secretary has issued his own formal adjudication answering the question. *See Sec'y of HUD v. Mountain Side Mobile Estates P'ship*, No. 08-92-0010-1, 1993 WL 307069, at *5 (HUD July 19, 1993), *aff'd in relevant part,* 56 F.3d 1243 (10th Cir. 1995).

Such agency interpretations, just like formal agency interpretive regulations, warrant judicial deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See United States v. Mead Corp.*, 533 U.S. 218, 230 & n.12 (2001). The Court accordingly should reject Petitioners' effort to avoid deference by focusing exclusively on the pending regulation. Pet. Br. at 17. Deference is clearly warranted where, as here, an agency has definitively adopted a reasonable interpretation of a statute it administers, over a period of many years.

III. ALLOWING DISPARATE-IMPACT CLAIMS UNDER THE FAIR HOUSING ACT WOULD BE CONSISTENT WITH THE EQUAL PROTECTION GUARANTEE.

The Court should not strain to interpret the Fair Housing Act as excluding disparate-impact claims based on concerns about the constitutionality of allowing such claims. In many cases, allowing lawsuits based on disparate impacts is an essential way to combat covert intentional discrimination. Moreover, even in cases where intentional discrimination may be absent (or impossible to prove), the constitutional requirement of equal protection of the laws is fully consistent with requiring public officials and housing providers to consider alternate policies that accomplish their objectives equally well without unnecessarily promoting segregation or otherwise disparately impacting a protected group. And that is particularly true where, as in the housing field,

efforts to avoid disparate impacts seldom, if ever, cause cognizable harms to individuals or groups of individuals who fall outside the protected class.

As this Court has long recognized, allowing plaintiffs to proceed with statutory discrimination claims using the three-stage disparate-impact theory is an appropriate way of attacking the problem that intentional discrimination is much easier to carry out than it is to prove. Employers, for example, seldom admit that they have adopted a policy for the purpose excluding or penalizing employees of a given race. But that problem is often resolved by allowing affected employees to show that a policy has a disparate impact on a racial group, demand a neutral justification for that policy, and then prevail if they can show that there are equally effective alternative ways to achieve the same goal without a disparate impact. *See Ricci v. DeStefano*, 129 S Ct. 2658, 2682 (2009) (Scalia, J., concurring) ("It might be possible to defend the law by framing it as simply an evidentiary tool used to identify genuine, intentional discrimination—to 'smoke out,' as it were, disparate treatment."); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 520 (2003); Christine Jolls, *Commentary: Antidiscrimination and Accommodation*, 115 Harv. L. Rev. 642, 652 (2001) ("A leading gloss on the conception of disparate impact liability arising from [*Griggs*] is that disparate impact functions as a means of smoking out subtle or underlying forms of intentional discrimination on the basis of group membership.").

The same has been true in the housing field, where landlords and local officials often take actions that increase housing segregation or otherwise have a disparate racial impact. They, too, seldom are open about having that as their goal, but there can be no doubt that this is often the reality.[8] As the Seventh Circuit put it in 1977,

> A strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry. As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared. We cannot agree that Congress in enacting the Fair Housing Act intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly.

Metro. Hous. Dev. Corp., 558 F.2d at 1290.

Since shortly after the Act was passed, fair housing and civil rights organizations have made

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[8] *See, e.g.*, Arnold R. Hirsch, *Making the Second Ghetto: Race and Housing in Chicago 1940–1960*, 240–45 (1998) (describing the selection of public housing sites in Chicago in the 1950s and early 1960s, when earlier efforts by the Chicago Housing Authority to create integrated housing across the city were abandoned in favor of a compromise that gave informal veto powers to city council aldermen and resulted in 99 percent of new public-housing units being located in all-black neighborhoods on Chicago's South Side).

consistent efforts to attack obstacles to residential desegregation by bringing cases like *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), and *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), challenging zoning decisions of municipalities that create insuperable barriers to development of affordable housing that would promote residential desegregation. Such efforts were taken to achieve one of the Act's primary goals—residential desegregation—and would have been severely deterred without the availability of disparate-impact claims. One pending case brought by one of the *amici*, *Mhany Management, Inc. v. County of Nassau and Village of Garden City*, C. A. No. 05-2301 (E.D.N.Y.), exemplifies this kind of case. There, the defendant Village voted down a zoning proposal recommended by its own consultants because of racially tinged opposition from the citizenry. This rejected proposal would have permitted construction of a 355-unit multi-family development with a mix of affordable and market rate units, but the zoning adopted in its place would make it virtually impossible to develop affordable housing.

Disparate-impact claims require lawmakers and providers of housing to explain their actions neutrally and allow the plaintiffs to show that such neutral explanations do not justify the disparate impact because the same ends could be achieved in a more equitable way. In this sense, a disparate-impact theory performs a function similar to the familiar three-step *McDonnell Douglas* approach to

proving intentional disparate treatment. Under that approach, the plaintiff first must show that she belongs to a relevant minority group, that she applied for and was qualified for a job and was not hired, and that the employer continued to look for other applicants for the job. The employer must then show that it had some reason other than the applicant's race or sex for its action. The applicant can then prevail by showing that this explanation is only a pretext. In that situation, the law infers that the employer's real reason was discriminatory.

To be sure, there are some differences between the two three-part tests. The disparate-impact test does not require the plaintiff to prove, at the third stage, that the proffered justification is pretextual—only that the defendant could accomplish the same thing in another way that would not have such a disparate impact. But that test does serve to "smoke out" disguised discriminatory intent in many cases. For example, landlords and local officials who adopt policies with a clearly disparate impact on a given racial group often know perfectly well that this impact will occur. Where they have failed to select a viable alternative that is less exclusionary or segregative, that is powerful evidence that they welcomed the discriminatory impact—even if it will never be possible to prove their state of mind definitively.

But the Act is constitutionally justified even in cases where it imposes liability on actors who lacked discriminatory intent. *See Ricci v. DeStefano*, 129 S. Ct. at 2683 (Scalia, J., concurring) (noting that

disparate-impact theory will sometimes impose liability in the absence of covert discriminatory intent). Allowing disparate-impact claims also serves additional legitimate purposes, including in cases of "unintentional discrimination." In every case, the decision-maker, to be held liable, must have bypassed some alternative policy or practice that would have had a lesser impact in terms of promoting segregation or excluding a particular protected group. The Act, by effectively requiring lawmakers and housing providers to consider such alternatives, serves the paramount congressional goal of increasing the integration of residential patterns. And it does so by not exonerating decisions with unnecessary disparate impacts, even if they reflect mere thoughtlessness about such impacts, or unconscious acceptance of the status quo, rather than conscious discriminatory animus.

Contrary to the claims of Petitioners, that reality does not render a law allowing disparate-impact claims unconstitutional. It is perfectly constitutional for Congress to say to landlords and local officials that they may not take any actions that *unnecessarily* promote segregation in housing. Just as the law may require landlords to make reasonable accommodations of the needs of persons with disabilities, it does not exceed the power of Congress to demand that landlords and officials choose a policy or practice that avoids a segregative impact instead of an equally effective policy or practice that causes such an impact. This Court's decision in *Ricci v. DeStefano* recognized that comparable employment practices would not violate the disparate-treatment

ban contained in Title VII. *See* 129 S. Ct. at 2677 ("Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race."); *id.* ("Nor do we question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made."). There is no reason to conclude that similar pro-integration measures in the housing field would raise constitutional concerns, even if motivated in part by a desire to avoid violating the Fair Housing Act.

In order to produce such salutary effects, the Act does require consideration, during the selection of particular policies and practices, of the likely effects on groups of people categorized by their race (or other protected status). But requiring race consciousness of this kind serves to avoid a discriminatory outcome without treating *individuals* differently based on their race. For example, allowing low-income housing into a given community in no way deprives anyone else of housing. The typical disparate-impact case under the Act thus bears no resemblance to the facts of *Ricci*, where the City's decision to stop relying on the results of a test had the effect of penalizing a specific group of applicants. The action the Act compels thus cannot itself be deemed discrimination triggering heightened constitutional concerns.

As Justice Kennedy put it in an analogous context involving efforts to lessen *de facto* segregation of schools, if school authorities are concerned that segregation of schools "interfere[s] with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race." *Parents Involved in Community Schools v. Seattle School Dist. #1*, 551 U.S. 701, 788-89 (2007) (Kennedy, J., concurring). Such measures, including "strategic site selection of new schools [and] drawing attendance zones with general recognition of the demographics of neighborhoods" are race conscious but they do not trigger strict constitutional scrutiny because they "do not lead to different treatment based on a classification that tells each student he or she is to be defined by race." *Id.* at 789.[9] Justice Kennedy might have added an additional constitutionally legitimate method of promoting school integration—adopting policies, consistent with the Fair Housing Act, that mitigate

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[9] Similarly, in the drawing of electoral districts, "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race, [n]or does it apply to all cases of intentional creation of majority-minority districts." *Bush v. Vera*, 517 U.S. 952, 958 (1996). The question is whether racial considerations have gone beyond being just one legitimate factor in line-drawing along with other legitimate factors, and segregating voters by race has become the *predominant* motive. *Id.*

the residential segregation that is often the underlying cause of racial imbalances in schools.

Similarly here, the Constitution is not offended by a federal law that requires local officials and providers of housing to avoid policies that (1) will predictably promote segregation or otherwise disparately impact protected groups and (2) can be replaced by other policies that reduce or eliminate the disparate impact while serving the same underlying goals. Just as these decision-makers are free to consider such outcome-related factors in crafting their policies (even if they are themselves state actors), the law should be free to require them to do so.

After all, the only alternative would be a regime that fails to address meaningfully a large percentage of the examples of intentional discrimination, just because the existence of that subjective intent cannot be proved. Intent—particularly legislative intent—is a difficult thing to prove. *See United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter."). And that is particularly true with regard to discriminatory intent, which courts are often reluctant to attribute to legislators. *See* Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. Davis L. Rev. 755, 782 (1999) ("Even if some unsophisticated citizen or commissioner blurts out an unambiguously bigoted motive, courts are often reluctant to attribute the collective decision to that motive. Trial judges are reluctant to find that local officials acted for improper motives, and often fail to

so find even in egregious cases in which appellate courts find clear error.") (footnotes omitted); Kenneth L. Karst, *The Costs of a Motive-Centered Inquiry*, 15 San Diego L. Rev. 1163, 1164–65 (1978) ("The principal concern here is . . . that a judge's reluctance to challenge the purity of other officials' motives may cause her to fail to recognize valid claims of racial discrimination even when the motives for governmental action are highly suspect.").

Congress thus had every reason to dispense with this requirement and impose liability in cases where it can be shown that public officials or housing providers have adopted policies or practices that are unnecessarily discriminatory in their impact, regardless of their motivation for doing so.

IV. THE DISPARATE-IMPACT STANDARD HELPS THE UNITED STATES COMPLY WITH ITS OBLIGATIONS UNDER THE CERD TREATY.

The United States is a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination, a 1965 treaty that defines discrimination to prohibit both racially discriminatory intent and disparate impact. *See* International Convention on the Elimination of All Forms of Racial Discrimination (CERD), art. 1, Dec. 21, 1965, 660 U.N.T.S. 195 ("In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on

an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.") (emphasis added). By ratifying the treaty in 1994, the United States assumed the obligation to "take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists," CERD, art. 2(1)(c), as well as to "condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction," CERD, art. 3. Although the treaty is not self-executing and cannot be directly enforced by the federal courts, it nonetheless imposes an affirmative duty on the political branches to implement the treaty's requirement that States "nullify" or "eradicate" policies with a disparate impact. This Court should not interfere with the efforts of Congress, in enacting the Fair Housing Act and its amendments, and the executive branch, in issuing its proposed rule, to comply with the United States' obligations under the treaty.

Notably, during the CERD ratification process, representatives of the executive branch stressed the importance of disparate-impact legislation such as the Fair Housing Act in permitting the United States to comply with the treaty. Acting Secretary of State Strobe Talbott argued in a memorandum submitted to the Senate Committee on Foreign Relations that the United States

> satisfies the policy review obligation of Article 2(1)(c) through this nation's legislative and administrative process, as well as through court challenges brought by governmental and private litigants. With respect to the second obligation of Article 2(1)(c), practices that have a discriminatory effect are prohibited by certain federal civil rights statutes, even in the absence of any discriminatory intent underlying those practices.

International Convention on the Elimination of All Forms of Racial Discrimination: Hearing before the S. Comm. on Foreign Relations, 103d Cong. 33 (1994). Secretary Talbott pointed to the Fair Housing Act as one of the statutes that allow the United States to fulfill its obligations under CERD, expressly noting that lower courts had uniformly held that the Fair Housing Act includes a disparate-impact standard. *Id.* Even the Act's three-step, burden-shifting standard helped to illustrate that the CERD Committee's focus on "unjustifiable disparate impact" was in conformity with United States law. *Id.*

V. THE EIGHTH CIRCUIT APPLIED THE CORRECT DISPARATE-IMPACT TEST.

In the view of amici, the Eighth Circuit's version of the disparate-impact test, mimicking as it does the approach currently in force under Title VII and the approach proposed by HUD in the pending regulation, is fully appropriate. Under that test, the plaintiff must first prove the existence of a policy or practice causing a disparate impact. The burden

then shifts to the defendant to show that the policy or practice has a "manifest relationship" to the achievement of some legitimate and non-discriminatory policy objective and is necessary to the attainment of that objective. If the defendant carries that burden, the plaintiff must then show that there is a viable alternative means available to achieve the policy objective without discriminatory effects. *See* Pet. App. 16a-17a.

As HUD explains in the pending Notice of Proposed Rulemaking, this approach makes sense for a variety of reasons. It parallels the approach used under both Title VII and the Equal Credit Opportunities Act. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921, 70,924 (proposed Nov. 16, 2011). It has been adopted by a large number of federal courts. *Id.* at 70,923 & n.23 (citing cases). And it has the virtue of not requiring either party to prove a negative—as would occur if the plaintiff (at stage 2) had to prove the absence of a legitimate objective served by the challenged policy or the defendant (at stage 3) had to prove the absence of a less discriminatory but equally effective alternative policy. *Id.* at 70,924. We think the Court of Appeals correctly remanded the case for trial under this standard.

CONCLUSION

The decision of the Eighth Circuit should be affirmed.

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APPENDIX

APPENDIX

The **Lawyers' Committee for Civil Rights Under Law** ("Lawyers' Committee") is a nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. Part of the mission of the Lawyers' Committee is to work with communities across the nation to combat and seek to remediate discriminatory housing practices. The Lawyers' Committee has eight independently governed local affiliates who join this brief: (i) the Washington Lawyers' Committee for Civil Rights and Urban Affairs; (ii) the Chicago Lawyers' Committee for Civil Rights Under Law, Inc.; (iii) the Lawyers' Committee for Civil Rights and Economic Justice, Boston, MA; (iv) the Public Interest Law Center of Philadelphia; (v) Public Counsel Law Center, Los Angeles, CA; (vi) the Lawyers' Committee for Civil Rights of the San Francisco Bay Area; (vii) the Mississippi Center for Justice in Jackson, Mississippi; and (viii) the Colorado Lawyers' Committee. The Lawyers' Committee and its affiliates have litigated numerous fair housing claims under the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, many of which have raised disparate impact claims.

The **Leadership Conference on Civil and Human Rights** is a diverse coalition of more than 200 national organizations charged with promoting and protecting the rights of all persons in the United States. The Leadership Conference was founded in

1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council. The Leadership Conference works to build an America that's as good as its ideals and toward this end, supports the continued use of the disparate impact standard to the Fair Housing Act of 1968. Beginning with the Fair Housing Act and continuing through the 1988 Amendments to the Act, The Leadership Conference has been instrumental in ensuring the passage of fair housing protections. Its sister organization, The Leadership Conference Education Fund, was a founding member of the National Commission on Fair Housing and Equal Opportunity, a bipartisan commission created in 2008 to examine the nature and extent of illegal housing discrimination, its origins, its connection with government policy and practice, and its effect on communities across the nation. Access to equal housing opportunity is a civil and human right, but past and ongoing discriminatory practices in the nation's housing markets continue to produce levels of residential segregation that result in significant disparities between minority and non-minority households, in access to good jobs, quality education, homeownership attainment and asset accumulation. The disparate-impact standard remains a critical way to address the continuing problem of housing discrimination in the United States.

National Housing Law Project is a charitable nonprofit corporation established in 1968 whose mission is to use the law to advance housing

justice for the poor by increasing and preserving the supply of decent, affordable housing; by improving existing housing conditions, including physical conditions and management practices; by expanding and enforcing tenants' and homeowners' rights; and by increasing housing opportunities for people protected by fair housing laws.

LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund) was founded in New York City in 1972. Our continuing mission is to protect the civil rights of all Latinos and to promote justice for the pan-Latino community especially across the Eastern United States. During its 40-year history, LatinoJustice has advocated for and defended the constitutional rights and the equal protection of all Latinos under the law and has litigated numerous cases challenging multiple forms of discrimination including fair housing, employment, education, language rights, redistricting and voting rights.

The **Asian Pacific American Legal Center** ("APALC"), a member of Asian American Center for Advancing Justice, is the nation's largest public interest law firm devoted to the Asian American, Pacific Islander, and Native Hawaiian communities. As part of its mission to advance civil rights, APALC is committed to enforcing the fair housing rights of its clients and employing the disparate impact standard under the Fair Housing Act in order to prove discrimination, which often is covert or the

result of implicit bias, because it produces the same invidious results as overt discrimination.

Advancement Project is a national multi-racial civil rights organization founded in 1999 by veteran civil rights lawyers. Its principal objective is to pursue policy changes that remove structural barriers in order to achieve an inclusive and just democracy. Advancement Project has represented communities of color in voting rights and housing litigation. In *Anderson, et al. v. Donovan, No.* 06-3298, U.S. D.C., Eastern District of Louisiana, Advancement Project represented public housing residents who were removed from their homes in the wake of Hurricane Katrina, alleging violations of the Fair Housing Act under the disparate-impact theory. Advancement Project continues to represent plaintiffs, individual and organizational, in civil rights litigation and therefore, has an interest in the outcome of this matter.

The **American Planning Association** (APA) is a nonprofit public-interest and research organization founded in 1978 to advance the art and science of land-use, economic, and social planning at the local, regional, state, and national levels. APA, and its professional institute, the American Institute of Certified Planners, represent approximately 40,000 professional planners, planning commissioners, and citizens involved with urban and rural planning issues. The APA regularly files amicus briefs in cases of importance to the planning profession and the public interest in the federal and state appellate courts.

The **National Consumer Law Center** (NCLC) is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a nonprofit corporation in 1969 at Boston College School of Law, NCLC has been a resource center addressing numerous consumer finance issues affecting equal access to fair credit in the marketplace. NCLC publishes an 18-volume Consumer Credit and Sales Legal Practice Series, including *Credit Discrimination*, Fifth Ed., and 2011 Supplement, and has served on the Federal Reserve System Consumer-Industry Advisory Committee and committees of the National Conference of Commissioners on Uniform State Laws, and acted as the Federal Trade Commission's designated consumer representative in promulgating important consumer-protection regulations.

The **Center for Responsible Lending** is a non-profit policy, advocacy, and research organization dedicated to exposing and eliminating abusive and discriminatory practices in the market for consumer financial services. CRL is an affiliate of Self-Help, a non-profit that has provided more than $6 billion in financing to help over 50,000 low-wealth borrowers buy homes, build businesses, and strengthen community resources. CRL's extensive research exploring the causes and impact of the ongoing subprime mortgage and foreclosure crises has shaped the debate, most recently with its report, Bocian, Li, Reid, *Lost Ground 2011: Disparities in Mortgage Lending and Foreclosures* (Nov. 2011), *available at*

http://www.responsiblelending.org/mortgage-lending/research-analysis/lost-ground-2011.html,

Public Justice, P.C., is a national public interest law firm dedicated to pursuing justice for the victims of corporate and government abuses. It specializes in precedent-setting and socially significant litigation designed to advance civil rights and civil liberties, consumer and victims' rights, workers' rights, the preservation of the civil justice system, and the protection of the poor and powerless. Throughout its history, Public Justice has participated in cases to highlight the importance of the role that disparate impact claims play in ensuring the effectiveness of our nation's federal civil rights statutes. For example, Public Justice joined in an *amici* brief in *Smith v. City of Jackson*, urging this Court to hold, as it ultimately did, 544 U.S. 228 (2005), that the Age Discrimination in Employment Act prohibits not only intentional age discrimination, but also disparate impact discrimination. Public Justice is gravely concerned that the arguments advanced by Petitioners in this case, if adopted, would eviscerate the effectiveness of the Fair Housing Act by requiring victims of housing discrimination to prove discriminatory intent.

The **Center for Social Inclusion** ("CSI") is a national strategy center founded in 2002 that works to unite public policy research and grassroots advocacy to transform structural inequity and exclusion into structural fairness and inclusion. CSI works with community groups and national organizations to generate policy ideas, foster

effective leadership and develop communications tools for an opportunity-rich world in which we all thrive. CSI recognizes that, increasingly, structural inequity results from policies and practices that unduly burden communities of color, even where such burdens are not intended. Reforming housing policies and practices that perpetuate exclusion is particularly important in the area of housing, since where one lives typically determines the structures of opportunity to which one has access.

The **Charles Hamilton Houston Institute for Race and Justice** at Harvard Law School (CHHIRJ) continues the unfinished work of Charles Hamilton Houston, one of the Twentieth Century's most talented legal scholars and litigators. The CHHIRJ marshals resources to advance Houston's dreams for a more equitable and just society. It brings together students, faculty, practitioners, civil rights and business leaders, community advocates, litigators, and policymakers to focus on, among other things, reforming criminal justice policies. Advancement Project is a national multi-racial civil rights organization founded in 1999 by veteran civil rights lawyers. Its principal objective is to pursue policy changes that remove structural barriers in order to achieve an inclusive and just democracy. Advancement Project has represented communities of color in voting rights and housing litigation. In *Anderson, et al. v. Donovan, No.* 06-3298, U.S. D.C., Eastern District of Louisiana, Advancement Project represented public housing residents who were removed from their homes in the wake of Hurricane

Katrina, alleging violations of the Fair Housing Act under the disparate impact theory.

The **Equal Rights Center** is a national non-profit civil rights organization dedicated to promoting equal opportunity in housing, employment, public accommodations, and government services. With members located in all fifty states, the District of Columbia, and Puerto Rico, the ERC is one of the largest fair housing organizations in the country, and works to ensure full compliance with the Fair Housing Act through education, research, testing, counseling, advocacy, collaboration, and enforcement. With its unique expertise in identifying discrimination, and its commitment to redressing all forms of housing discrimination, the ERC views addressing the disparate impact of facially neutral policies as a critical component of its work.

The **Impact Fund** is a non-profit foundation that provides funding, training, and co-counsel to public interest litigators across the country. It is a California State Bar Legal Services Trust Fund Support Center, providing services to legal services projects across California. The Impact Fund is counsel in a number of major civil rights class actions, including cases challenging employment discrimination, lack of access for those with disabilities and violations of fair housing laws.

The **Asian American Justice Center (AAJC)**, member of the Asian American Center for Advancing Justice, is a national nonprofit, nonpartisan organization whose mission is to advance the civil and human rights of Asian Americans and to

promote a fair and equitable society for all. Founded in 1991, AAJC engages in litigation, public policy, advocacy, and community education and outreach on a range of issues, including economic justice. Unequal access to quality, affordable housing is a key barrier to long-term economic stability and self-sufficiency for a disproportionately high percentage of Asian Americans and Pacific Islanders. AAJC has a long history of engagement in disparate impact litigation and is committed to ensuring that civil rights laws, like the Fair Housing Act, are fully implemented and vigorously enforced.

The **Judge David L. Bazelon Center for Mental Health Law** is a national non-profit advocacy organization that provides legal assistance to individuals with mental disabilities. The Center was founded in 1972 as the Mental Health Law Project. Through litigation, policy advocacy, training and education, the Center promotes the rights of individuals with mental disabilities to participate equally in all aspects of society, including community living, housing, health care, employment, education, and other areas. The Center has devoted much of its resources to enforcement of the Americans with Disabilities Act, the Fair Housing Act, and other laws in order to ensure that individuals with disabilities have opportunities to live in their own homes with supports.

The **National Urban League** is a historic civil rights organization dedicated to economic empowerment in order to elevate the standard of living in historically underserved urban

communities. Founded in 1910 and headquartered in New York City, the National Urban League spearheads the efforts of its local affiliates through the development of programs, public policy research and advocacy. Today, there are nearly 100 local affiliates in 36 states and the District of Columbia, providing direct services that impact and improve the lives of more than 2 million people nationwide. With its Housing and Community Development division, the National Urban League preserves individual and community assets through partnering with the U.S. Department of Housing and Urban Development (HUD), NeighborWorks America and a diverse network of institutions to provide consumers with financial management, home ownership and retention strategies. Specifically, Comprehensive Housing Counseling programming offered by the National Urban League supports the delivery of a wide spectrum of housing counseling services to homebuyers, homeowners, low- to moderate-income renters and the homeless. The National Urban League seeks to ensure that its constituencies are neither discouraged nor precluded from finding decent and affordable housing on fair terms in communities of their choice.