No. 11-1507

IN THE

Supreme Court of the United States

TOWNSHIP OF MOUNT HOLLY, *et al.*,
Petitioners,

v.

MT. HOLLY GARDENS CITIZENS IN ACTION, INC., *et al.*,
Respondents.

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

PETITIONERS' OPENING BRIEF

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August 26, 2013

QUESTION PRESENTED

Are disparate impact claims cognizable under the Fair Housing Act?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Third Circuit:

The Petitioners here and Defendants-Appellees below are Township of Mount Holly, Township Council of Township of Mount Holly, Kathleen Hoffman, as Township Manager of the Township of Mount Holly, Jules Thiessen, as Mayor of the Township of Mount Holly.

The Respondents here and Plaintiffs-Appellants below are Mt. Holly Gardens Citizens in Action, Inc., a New Jersey non-profit corporation, Ana Arocho, Vivian Brooks, Bernice Cagle, George Chambers, Dorothy Chambers, Santos Cruz, Elida Echevaria, Norman Harris, Mattie Howell, Nancy Lopez, Dolores Nixon, Leonardo Pagan, James Potter, Henry Simons, Joyce Starling, Robert Tigar, Taisha Tirado, Radames Torres Burgos, Lillian Torres-Moreno, Dagmar Vicente, Alandia Warthen, Sheila Warthen, Charlie Mae Wilson, and Leona Wright.

The Respondents here and Defendants-Appellees below are Keating Urban Partners, L.L.C. and Triad Associates, Inc.

Maria Arocho, Pedro Arocho, Reynaldo Arocho, Christine Barnes, Leon Calhoun, Vincent Munoz, Angelo Nieves, Elmira Nixon, Rosemary Roberts, William Roberts, Efraim Romero, Phyllis Singleton, Flavio Tobar, and Marlene Tobar were all named as plaintiffs in the Second Amended Complaint filed in the United States District Court for the District of New Jersey, but did not participate in the appeal to the Third Circuit.

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The decision of the United States Court of Appeals for the Third Circuit is reported at 658 F.3d 375 and reprinted in the Appendix to the Petition for a Writ of Certiorari ("Petition") at 1a-29a. The district court's judgment is unreported but is available at 2011 WL 9405 and is reprinted in the Appendix to the Petition at 30a-61a.

JURISDICTION

The court of appeals issued its decision on September 13, 2011. Pet. App. 2a. Petitioners filed a timely petition for a writ of certiorari, which this Court granted on June 17, 2013. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 804(a) of the Fair Housing Act, 42 U.S.C. § 3604(a), and select other statutory provisions are set forth in the addendum to this brief.

STATEMENT OF THE CASE

The question presented in this case requires this Court to decide whether Section 804(a) of the Fair Housing Act ("FHA"), 42 U.S.C. § 3604(a), compels a local government to explicitly consider race when determining the best means to address a blighted area within the community. Nothing in the FHA's text, structure, or history supports such an interpretation. Section 804(a) prohibits intentional discrimination alone; it does not require local officials to use race as a criterion in determining how best to allocate limited resources in the context of redeveloping an entire section of a community. A contrary interpretation would raise serious constitutional questions under the

Equal Protection Clause and the structural guarantee of federalism, and would undermine the purposes the FHA was designed to serve.

A. Factual Background.

This case comes to the Court after more than a decade of litigation over a small New Jersey Township's decision in 2002 to redevelop a blighted residential area that all parties agree was and is in serious need of local government intervention. Courts at every level of the New Jersey court system have upheld the blight designation and the redevelopment plan as valid and appropriate. No court has found any evidence that the Township adopted the plan with a racially discriminatory motive. Respondents seek damages and to enjoin the plan on the ground that a majority of the residents of the blighted neighborhood are racial minorities.

1. Mount Holly and the Gardens Neighborhood.

Mount Holly Township is a small New Jersey municipality located in the Philadelphia suburbs. In 2000, Mount Holly was home to approximately 10,700 citizens. Joint Appendix at 103, *Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, No. 11-1159 (filed May 27, 2011) (CA3 J.A.). Most of those citizens are of modest means. Median household income in the Township in 2000 was $43,284. J.A. 400-01. Mount Holly is a more racially diverse community than the national average. In that same year, 66.2% of its citizens were white,[1] 20.8% were

[1] For the sake of simplicity, this Brief uses the term "white" to refer to individuals identified by the Census Bureau as white, but not Hispanic.

African-American, and 8.8% were Hispanic. CA3 J.A. 103.

Mount Holly Gardens is a 30-acre residential area within the Township, comprised of 329 low-rise, garden-apartment style homes. Pet. App. 5a. The homes are attached in blocks, typically of eight to ten homes, and vary in size from 600 to 1300 square feet. *Citizens in Action v. Twp. Of Mt. Holly*, 2007 WL 1930457, at *1 (N.J. Super. Ct. App. Div. July 5, 2007) (per curiam). On average, residents of the Gardens have more limited financial means than residents of the Township as a whole. In 2000, 90% of Gardens households earned less than $40,000 per year, and many earned much less. *Id.* at *2. The Gardens is also home to a higher percentage of minority citizens than the Township as a whole. Approximately 1,605 persons lived in the Gardens in 2000, 28% of those individuals identified as white, 44% as African-American, and 22% as Hispanic. *Id.* at *1.

2. Efforts to Revitalize the Gardens.

For decades, the deteriorating condition of the homes in the Gardens and the declining safety of its neighborhood have been abiding concerns for Gardens residents and the Township as a whole. Built in the 1950s, the structural design of the Gardens proved ineffective in ensuing years. All homes in the Gardens are owned in fee simple, but the Gardens lacks a homeowners' association to coordinate responsibility for maintaining common areas, such as roofs, shared walls, and alleys. *Id.*; Pet. App. 5a, 7a. As a result, these areas have fallen into serious disrepair. *Id.* at 7a.

In addition, by 2000, a majority of the homes in the Gardens were owned by absentee landlords (53%).

CA3 J.A. 679. All too frequently, these landlords were negligent in keeping up their properties. Pet. App. 7a; *Citizens in Action*, 2007 WL 1930457, at *2-3. Because homes in the Gardens are attached in blocks, "dilapidation" in one poorly-maintained home "could and sometimes did lead to the decay of the adjoining houses." Pet. App. 7a. Over time, numerous homes were vacated and "boarded up," "some yards filled with rubbish," and "parts of the area became blighted." *Id.*; *Citizens in Action*, 2007 WL 1930457, at *12-13.

At the same time, many individual residences in the neighborhood experienced overcrowding. *Citizens in Action*, 2007 WL 1930457, at *3. This prompted residents to pave over their rear yards to create additional parking space, and the excess pavement caused drainage problems. *Id.*

All of these conditions "facilitated crime" in the Gardens, most notably drug-trafficking and robberies. Pet. App. 7a. These crimes became particularly prevalent in the poorly-lit alleys that are located behind each block of homes. *Id.*; J.A. 135.

The Township began investigating ways to revitalize the area as early as 1984. J.A. 66. Although citizens groups called for the condemnation and redevelopment of Gardens properties as early as 1989, CA3 J.A. 682, the Township first attempted to rejuvenate the area through more targeted measures. For example, it implemented new police initiatives to deter crime, CA3 J.A. 1929-33, and supported a citizens group, Mount Holly 2000, that attempted to rehabilitate Gardens residences during the 1990s, Pet. App. 7a, 49a n.11.

Despite these efforts, difficulties in the Gardens proved intractable. Between 1996 and 2002, the 329

Gardens properties collectively generated 1,117 citations for violations of the housing code. J.A. 180-85. In 2002, 28% of all crimes in Mount Holly occurred in the Gardens, even though that neighborhood accounted for only 1.5% of the Township's total land area. J.A. 135.

3. The Redevelopment Study.

Facing these challenges, and aware that more limited measures had not succeeded, the Mount Holly Township Council commissioned an investigation in 2000 to determine whether the Gardens qualified as an "area in need of redevelopment"—*i.e.*, a blighted area—under New Jersey law, N.J. Stat. Ann. § 40A:12A-3. *Citizens in Action*, 2007 WL 1930457, at *2. *See also Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 465 (N.J. 2007) (holding that the New Jersey "Constitution restricts government redevelopment to 'blighted areas'").

The Township retained an outside planning firm to study the area and prepare a report and recommendation. J.A. 123; CA3 J.A. 673. That report documented the Gardens' difficulties with overcrowding, excess drainage, and rising crime. J.A. 132-37. It then analyzed each individual Gardens residence and observed "significant signs of blight including boarded up residences, exterior building code violations, and poor home and yard maintenance." J.A. 135. There were, of course, exceptions. Several units (including homes owned by some Respondents before this Court) remained in good condition. J.A. 141. But, "on average, the sense is that the area is 'run down.'" *Id.* The Report recommended redevelopment. J.A. 178-79.

At the same time, the Township commissioned a survey of Gardens residents. Residents told the

Township they were particularly concerned with landlord negligence, the increasing number of vacant homes in the Gardens, rodent infestations, and the Gardens being "[u]nsafe at night for children because of drugs and crime." CA3 J.A. 744. On the question of how best to rectify the situation, opinion among the residents was split. Approximately one-third (35%) wished to move out of the Gardens entirely, one-third (33%) wished to have the Gardens redeveloped and obtain a new home there, and the remaining third (37%) wished to "completely renovate their existing home." CA3 J.A. 743.

In July 2002, after studying the planner's report, the resident survey, and extensive public comment, the Township Council designated the Gardens as an "area in need of redevelopment," concluding that it met New Jersey's statutory criteria for blight. CA3 J.A. 2201-02; *see* N.J. Stat. Ann. § 40A:12A-5(a), (d), (e).

4. The Redevelopment Plan.

One year later, in September 2003, the Township Council adopted a redevelopment plan. CA3 J.A. 951. The plan was amended on two occasions—once in 2005, CA3 J.A. 954-80, and again in 2008, J.A. 193-280 (the "Redevelopment Plan"). The now-operative Redevelopment Plan calls for the Township to acquire and demolish all 329 properties in the Gardens. J.A. 210, 249. The Township has already acquired 11.4 acres of vacant land immediately adjacent to the Gardens. J.A. 202-03, 266. After acquisition of the Gardens properties, the Township will construct 520 new residences, a combination of apartments and townhomes, to be spread across the former Gardens area and the adjacent vacant lot. Pet. App. 8a; J.A. 210. In addition to the new residences, the redeveloped area will include 54,000 square feet of new

commercial space and 4.3 acres of open space. J.A. 211; J.A. 216, 232 (visual renderings).

Under the Plan, the Township will replace the eleven units in the Gardens designated as deed-restricted affordable housing under New Jersey law with eleven new units with that designation. J.A. 234; Pet. App. 8a-9a. The Township will then create 45 additional such units, making over 10% of residences in the new Gardens (56 in total) deed-restricted affordable housing. J.A. 234. The remaining new homes will be sold at market rates. *Id.*

The Plan provides substantial relocation assistance for Gardens residents who relocate after the Township acquires their home. In addition to the fair-market value of their home, effective August 1, 2006, the Plan entitles relocating homeowners to moving expenses, $15,000 in relocation benefits, and a $20,000 no-interest loan to be applied to the purchase of a new home that need not be repaid until the new home is sold. Pet. App. 10a; J.A. 274-75, 452. Relocating renters receive moving expenses and $7,500 in relocation benefits. Pet. App. 10a. These benefits far exceed what New Jersey law requires. *See* N.J. Admin. Code § 5:11-3.5(a) (requiring $4,000 in renters' relocation benefits); *id.* § 5:11-3.7(a) (requiring $15,000 in homeowners' relocation benefits).

5. Implementation of the Plan.

Although New Jersey law authorizes the Township to exercise its eminent domain authority to acquire properties in the Gardens, the Plan calls for the Township to attempt to acquire such properties from willing sellers first. J.A. 249. The Township has done so over the past decade. Although Gardens residents who oppose the Plan have challenged it in court, they have not been able enjoin the Plan. *See*

infra, at 9-13. Thus, the Township has purchased Gardens properties from willing sellers, while litigation with opponents of the Plan (none of whom has been required to sell a home) has continued.

To date, The Township has acquired 259 of the Gardens' 329 properties through such transactions. No properties have been acquired through eminent domain.[2] Only 70 remain privately owned. Pet. App. 10a-11a. Because they posed health and safety concerns, the Township has already demolished 201 of the homes it has acquired. The remaining Township-owned homes are now vacant.

As the district court found, the Township has gone to "great lengths" to assist Gardens residents in the relocation process. J.A. 472 n.7. Numerous relocated residents have experienced "'significantly improved living conditions,'" Pet. App. 55a n.16. Many residents have relocated to new housing within the Township of Mount Holly. CA3 J.A. 1160-64. There is no evidence that any Gardens resident relocating with the Township's assistance was made homeless. In addition, the Township and its agents provided relocating residents with valuable services, in addition to relocation benefits. For example, Township agents helped many Gardens homeowners resolve liens arising from non-discharged bankruptcies, foreclosures, and unpaid state and federal taxes, and helped others resolve credit issues that otherwise might have precluded them from obtaining a new mortgage or lease. J.A. 452-54, 472 n.7.

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[2] In 2010, the Township began the appraisal and negotiation process that precedes eminent domain actions, which was subsequently stayed by the Third Circuit. J.A. 36 (Mar. 16, 2011 entry).

Over 200 Gardens households have now been relocated. The process has had no appreciable impact on the racial composition of Mount Holly's population. In fact, the Township's minority population has increased during the implementation period. In 2000, before the Plan was adopted, 20.8% of the Township's population was African-American, and 8.78% was Hispanic. CA3 J.A. 103. In 2010, the African-American population grew to 23.1% and the Hispanic population grew to 12.7%. Pet. App. 78a-79a.

B. Procedural Background.

1. New Jersey State Court Proceedings.

In October 2003, a group of Gardens residents of all races who oppose the Plan, joined by other interested parties, filed suit against the Township in state court. The suit challenged the Township's designation of the Gardens as an "area in need of redevelopment," and argued that the Plan was racially discriminatory. Pet. App. 11a-12a.

The trial court upheld the Township's designation of the Gardens as an "area in need of redevelopment." *Citizens in Action*, 2007 WL 1930457. New Jersey law permits such a designation only in a narrow set of circumstances. *See*, *e.g.*, *Gallenthin Realty Dev.*, 924 A.2d at 449 (holding that it is insufficient to designate an area for redevelopment merely because its "unimproved condition render[s] it 'not fully productive'"; the area must suffer from actual blight). Here, however, the trial court concluded that the Township's evidence was "'extremely credible,'" and demonstrated that Gardens properties were, as a whole, "'substandard, dilapidated, obsolescent and in some cases unsafe and unsanitary.'" *Citizens in Action*, 2007 WL 1930457, at *9, 13.

The trial court rejected Plaintiffs' racial discrimination claims. *Id.* at *9. It found it "obvious that there ha[d] been no discrimination" in the adoption of the Plan, and dismissed the claims as unripe because "it [wa]s improper . . . to speculate" about "discrimination [that] might occur" in the Plan's future implementation. *Id.*

The Appellate Division affirmed in a reasoned opinion, finding no error in the trial court's holdings. *Id.* at *18. The New Jersey Supreme Court denied discretionary review. *Citizens in Action v. Twp. of Mt. Holly*, 937 A.2d 977 (N.J. 2007) (unpublished table decision).

2. Federal Court Proceedings.

District Court Proceedings. In 2008, after the state-court litigation had ended, many of the same plaintiffs (Respondents here) filed suit against the Township in federal district court. Respondents are a group comprised of sixteen Hispanic residents of the Gardens, fifteen African-American residents, and seven white residents. J.A. 392-96. Respondents asserted two causes of action under Section 804(a) of the FHA, 42 U.S.C. § 3604(a): a disparate-treatment claim, alleging that the Plan intentionally discriminated on the basis of race, and a disparate-impact claim, alleging that the Plan imposed disparate adverse impacts on racial minorities. J.A. 428-34. Respondents sought money damages "sufficient . . . to secure permanent replacement housing in the local housing market" and injunctive and declaratory relief to halt further implementation of the Plan. J.A. 445.

Respondents' principal objection to the Plan was that, by replacing properties in the blighted area with newer, safer, more habitable residences that command a higher market price, the Plan would reduce

the availability of housing in the Township that is affordable to "'very low income and extremely low income'" individuals. J.A. 59, 425. As Respondents explained, the Township had purchased existing Gardens properties at prices between $32,000 to $49,000, while the market values of homes in the new Gardens are expected to range from $200,000 to $275,000. Pet. App. 8a; J.A. 424. Respondents argued that the Plan was thus an intentionally discriminatory effort to remove racial minorities from the Township. J.A. 429-34. In the alternative, Respondents argued that the Plan would disproportionately and adversely affect minorities in the wider community. J.A. 428-29.

Respondents presented two statistics in support of these claims. First, Respondents noted that a greater percentage of minorities lived in the Gardens than in Mount Holly as a whole. Specifically, they pointed out that, in 2000, 22.54% of the Township's African-American population and 32.31% of its Hispanic population resided in the Gardens, while only 2.73% of its white population lived there. Pet. App. 15a-16a. Second, Respondents argued that, according to the 2000 Census, only 21% of minority households in Burlington County would be able to afford housing in the redeveloped Gardens sold at market rates, while 79% of white households in the County could afford the housing at such a price.[3] *Id.*; *id.* at 45a n.9.

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[3] Respondents' second statistic misinterprets the record. Respondents' own calculations and the relevant Census data indicate that approximately 64.5% of minority households in Burlington County (not 21%) would be able to afford housing in the redeveloped Gardens, as compared to 72.7% of white households in the County. J.A. 64; CA3 J.A. 2070, 2679-80; Br. for Appellees at 16, *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, No. 11-1159 (3d Cir. filed June 10, 2011). Applying those figures, the Plan would affect only 8.2% more minority

Respondents alleged that the Plan's racially-discriminatory effects could be eliminated only if the Township (1) abandoned the Redevelopment Plan and rehabilitated existing units instead, allowing existing residents to remain in the Gardens; (2) redeveloped the Gardens, but subsidized the new housing to keep it affordable to low-income individuals; or (3) provided additional compensation to Respondents sufficient to permanently secure housing elsewhere in the Township. J.A. 59-60.

Respondents sought a preliminary injunction, which the district court denied. J.A. 462. Respondents then twice amended their complaint, and the Township moved to dismiss both. J.A. 5 (Dkt. 18), 22-23 (Dkt. 84). The district court converted the Township's second motion to a motion for summary judgment and, in 2011, entered summary judgment in the Township's favor. Pet. App. 34a-61a.

The district court found no evidence that the Township intentionally discriminated on the basis of race, and thus granted summary judgment to the Township on Respondents' disparate-treatment claim. Pet. App. 55a; *id.* at 59a-60a. The court granted summary judgment to the Township on Respondents' disparate-impact claim as well, holding that Respondents had failed to establish a prima facie case. The court concluded that neither of Respondents' statistics demonstrated that the Plan imposed disparate impacts on minorities. Respondents' first statistic merely demonstrated that Mount Holly's minority population is overrepresented in the Gardens. J.A. 466-67. The second statistic merely established a correlation between race and income in the County. *Id.*; *see supra*,

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than white households in the County under Respondents' theory. Br. for Appellees at 16.

at 11-12 n.3. The court found that the plan operated "in the exact same way" on Gardens residents of all races, and neither statistic suggested otherwise. Pet. App. 44a. In sum, the district court observed that neither the "[r]edevelopment of blighted, low-income housing" nor the "reduction of low-income housing" is "without more, a violation of the FHA." *Id.* at 44a.

Third Circuit Proceedings. The court of appeals affirmed the district court's ruling on Respondents' disparate-treatment claim, concluding that there was no evidence of intentional discrimination. Pet. App. 28a. But it reversed the district court's ruling on the disparate-impact claim. *Id.* at 15a-19a. The court of appeals concluded that both of Respondents' statistics were independently sufficient to withstand summary judgment. In its view, statistics demonstrating that a greater percentage of minorities reside in the Gardens than the Township and that minority household income in Burlington County is, on average, less than white household income in the County, established a prima facie case that the Plan "disproportionately affects or impacts one group more than another." *Id.* at 21a (emphasis omitted).

The court acknowledged the "valid and practical concern" that "finding a disparate impact here would render the Township powerless to rehabilitate its blighted neighborhoods." Pet. App. 23a. It further acknowledged that its holding would "often allow plaintiffs to make out a *prima facie* case" whenever "a segregated neighborhood is redeveloped in circumstances where there is a shortage of alternative affordable housing." *Id.* at 22a-23a. But the Court discounted these "concern[s]," reasoning that the Township would have the opportunity to rebut the prima facie case in subsequent rounds of litigation. *Id.*

The Third Circuit denied rehearing and rehearing en banc. Pet. App. 63a-64a.

C. Statutory Background.

The FHA was enacted in 1968 to "provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. Section 804(a) of the Act prohibits status-based discrimination—*i.e.*, discrimination on account of a protected trait. *Id.* § 3604(a). As enacted, the provision made 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, or national origin." *Id.* (1968). The statute was subsequently amended to add "sex" and, later, "familial status" to the list of protected traits. *Id.* (1974); *id.* (1988).

In interpreting federal statutes that prohibit status-based discrimination in employment, this Court has drawn a distinction between those that prohibit only "disparate treatment" and those that allow plaintiffs to assert claims for "disparate impact." *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003). Disparate treatment occurs when the defendant has "'treated a particular person less favorably because of' a protected trait," and has done so because of "'discriminatory intent or motive." *Ricci v. DeStefano*, 129 S. Ct. 2658, 2672 (2009) (alterations omitted). Disparate-impact claims, by contrast, hold employers liable for adopting "'practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.'" *Raytheon*, 540 U.S. at 52 (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.15 (1977)). Importantly, a disparate-impact claim may succeed

"'without evidence of the employer's subjective intent to discriminate.'" *Id.* at 52-53 (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 645–46 (1989)).

It is common ground among the parties and the courts that Section 804(a) prohibits disparate treatment. *See Meyer v. Holley*, 537 U.S. 280, 285 (2003). This Court, however, has never considered whether the FHA permits disparate-impact claims. *See Town of Huntington, N.Y.* v. *Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (per curiam) (declining to address the question); *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 199-200 (2003) (same).

SUMMARY OF ARGUMENT

1. Section 804(a) of the FHA does not permit disparate-impact claims. Its text prohibits disparate treatment alone. In making it unlawful to "refuse" to rent, sell, or negotiate for housing, "make" housing unavailable, or "deny" it, the statute proscribes actions that require a discriminatory purpose to achieve. 42 U.S.C. § 3604(a). Unlike statutory provisions that authorize disparate-impact claims against employers, Section 804(a) does not focus on "effects" or "consequences." *Smith v. City of Jackson*, 544 U.S. 228, 234-36 (2005) (plurality) (emphasis omitted) (interpreting 29 U.S.C. § 623(a)(2)); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (emphasis omitted) (interpreting 42 U.S.C. § 2000e-2(a)(2)). The fact that Section 804(a) discards the language those employment-discrimination statutes use to signal disparate-impact liability furthers the point, and the FHA's structure and history confirm that Section 804(a) is targeted at purposeful discrimination alone.

Deference to the contrary view of the Department of Housing and Urban Development ("HUD"), the

agency charged with administering the statute, is not warranted. HUD interprets Section 804(a) to permit disparate-impact claims. 78 Fed. Reg. 11,460, 11,482 (Feb. 15, 2013) (to be codified at 24 C.F.R. § 100.500). But the language of the statute is plain, and HUD's interpretation cannot be reconciled with it. Deference is therefore not appropriate. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

2. Even if Section 804(a) were ambiguous—which it is not—the statute cannot be interpreted to allow disparate-impact claims against a local government that has adopted an otherwise valid plan to redevelop a blighted area without discriminatory intent. A contrary interpretation would require local governments to account for race in every redevelopment decision, and to treat citizens in neighboring communities differently depending on the racial demographics of each. Such a result would raise serious constitutional questions under the Equal Protection Clause and the structural guarantee of federalism, and would create distorted incentives for local officials that undermine the FHA's purposes. This Court interprets statutes to avoid constitutional questions when it is "'fairly possible'" to do so. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986). Here, Section 804(a)'s text is more than "fairly" susceptible to the interpretation that it is limited to disparate-treatment claims and does not extend to prohibit efforts by a community to redevelop a blighted neighborhood based on a theory of disparate impact on race.

ARGUMENT

I. SECTION 804(a) OF THE FHA DOES NOT PERMIT DISPARATE-IMPACT CLAIMS.

A. Section 804(a)'s Text Prohibits Only Purposeful Discrimination.

The ordinary meaning of Section 804(a)'s text is sufficient to resolve this case. *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) (plurality) (statutory interpretation "begins with the statutory text" and "if the text is unambiguous," it "ends there as well") (citing *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004)). That section makes it "unlawful" to

- "*refuse* to sell or rent after the making of a bona fide offer,"
- "*refuse* to negotiate for the sale or rental," or
- "otherwise *make* unavailable or *deny*" housing

to a person on account of his or her "race" or another protected trait. 42 U.S.C. § 3604(a) (emphases added).

1. The language Congress used in Section 804(a) focuses exclusively on discriminatory "actions" and their "motivation," not the "effects" of facially-neutral policies. *City of Jackson*, 544 U.S. at 234, 236 & n.6 (plurality) (emphasis omitted). The statute thus prohibits disparate-treatment alone.

Each of Section 804(a)'s three clauses makes it unlawful to engage in a particular set of actions "because of" the "race" or other protected trait of the targeted individual. 42 U.S.C. § 3604(a). All three verbs Congress used require a discriminatory motive to accomplish the prohibited action. Because the Act "does not define" any of those verbs, "we look first to the word's ordinary meaning." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1891 (2011).

The first two clauses of Section 804(a) make it unlawful to "refuse" to sell, rent, or negotiate for housing on account of a protected trait. 42 U.S.C. § 3604(a). The ordinary meaning of "refuse" is "to show or express a positive *unwillingness* to do or comply." *Webster's Third New International Dictionary* 1910 (1971) (emphasis added); *see also The American Heritage Dictionary* 1094 (1969) (defining "refuse" as "[t]o decline to do"). Thus, a "refusal" is a willful act that requires a purpose. *See*, *e.g.*, *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 57 (2007) (noting that "willfulness" typically presumes "know[ledge]" or "'reckless disregard'").

Section 804(a)'s third clause aims at purposeful action as well. That clause makes it unlawful to "make" housing unavailable or to "deny" it on account of race. The ordinary meaning of "deny" is to "refuse to recognize or acknowledge." *Webster's Third New International Dictionary*, *supra*, at 603. *See also The American Heritage Dictionary*, *supra*, at 353 (same). Thus, a "denial"—like a "refusal"—is an action that requires a discriminatory purpose behind it.

This Court's precedents confirm that point. The Court has observed that it is "beyond dispute" that Section 601 of Title VI, 42 U.S.C. § 2000d, which makes it unlawful for any person to "be *denied*" federal financial assistance on account of race, "prohibits *only* intentional discrimination," *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (emphasis added). Likewise, Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, which (until a later amendment) made it unlawful to "'*deny* or abridge'" voting rights on account of race, was interpreted to prohibit intentional discrimination alone, *City of Mobile v. Bolden*, 446 U.S. 55, 60-64 (1980) (plurality) (emphasis added).

"Make"—the other verb in Section 804(a)'s third clause—also requires a discriminatory purpose. The ordinary meaning of "make" is "to produce as a result of action, *effort*, or behavior." *Webster's Third New International Dictionary*, *supra*, at 1363 (emphasis added); *The American Heritage Dictionary*, *supra*, at 788 ("[t]o bring about; cause"). *See also Black's Law Dictionary* 1107 (4th ed. 1951) ("do, perform, or execute"); *The American Heritage Dictionary*, *supra*, at 458 (defining "execute" to mean "carry out . . . in accordance with a *prescribed design*") (emphasis added). Thus, when Congress declared it unlawful to "make" housing unavailable on account of race, it aimed to prohibit purposeful "efforts" to deny housing.

Even if there were any doubt on that score, the "commonsense canon of *noscitur a sociis*" compels this interpretation. The word "make" must be "'given more precise content by the neighboring words with which it is associated.'" *Freeman v. Quicken Loans*, 132 S. Ct. 2034, 2042 (2012). Here, "make" is found in the same clause as "deny," a verb that unquestionably requires a discriminatory purpose. "Refuse," the only other verb in Section 804(a), requires discriminatory purpose as well. In Section 804(a), Congress created a neighborhood limited to actions taken with a racially discriminatory motive. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486-87 (2006) ("'[A] word is known by the company it keeps.'") (alteration in original).

2. This natural reading of Section 804(a) is confirmed when examined against the backdrop of two other anti-discrimination statutes Congress enacted just a few years before the FHA. Title VII of the Civil Rights Act of 1964 ("Title VII") bans discrimination in employment on account of race and other protected traits. 42 U.S.C. § 2000e-2(a). The Age Discrimina-

tion in Employment Act of 1967 ("ADEA") prohibits employment discrimination on account of "age." 29 U.S.C. § 623(a). As reflected below, the principal anti-discrimination provision in each statute is divided into two subsections with "key textual differences" between them. *City of Jackson*, 544 U.S. at 236 n.6 (plurality).

Anti-Discrimination Provisions in Title VII, ADEA, and FHA[4]

<table>
<tr><th colspan="2">Title VII
Section 703(a), 42 U.S.C. § 2000e-2(a) (1964)
Pub. L. No. 88-352, 78 Stat. 255</th></tr>
<tr><th>Disparate-Treatment</th><th>Disparate-Impact</th></tr>
<tr><td>(a) It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.</td><td>(a) It shall be an unlawful employment practice for an employer—
(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.</td></tr>
<tr><th colspan="2">ADEA
Section 4(a), 29 U.S.C. § 623(a) (1967)
Pub. L. No. 90-202, 81 Stat. 603</th></tr>
<tr><th>Disparate-Treatment</th><th>Disparate-Impact</th></tr>
<tr><td>(a) It shall be unlawful for an employer—
(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.</td><td>(a) It shall be unlawful for an employer—
(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.</td></tr>
<tr><th colspan="2">FHA
Section 804(a), 42 U.S.C. § 3604(a) (2013)</th></tr>
<tr><td colspan="2">It shall be unlawful—
(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.</td></tr>
</table>

[4] This chart reproduces the text of the principal anti-discrimination provisions in Title VII and the ADEA as they were enacted, and as they appeared when Congress adopted the FHA. Both provisions have subsequently been amended, but the operative language discussed in this brief has not changed. The current text of both statutes is reproduced in the addendum to this brief.

The first subsections in Title VII and the ADEA both make it unlawful to "fail to *refuse* to hire or to discharge any individual, or otherwise to *discriminate*" on account of a protected trait. 42 U.S.C. § 2000e-2(a)(1) (emphases added); 29 U.S.C. § 623(a)(1). "The focus of the paragraph is on the employer's actions" and "motivation." *City of Jackson*, 544 U.S. at 236 n.6 (plurality). Thus, it permits disparate-treatment claims alone. *Id.* (ADEA); *Ricci*, 129 S. Ct. at 2672 (Title VII).

The second subsection makes it unlawful to "limit, segregate, or classify . . . employees . . . in any way which would deprive or *tend to deprive* any individual of employment opportunities or otherwise *adversely affect* his status" on account of a protected trait. 42 U.S.C. § 2000e-2(a)(2) (emphases added); 29 U.S.C. § 623(a)(2). This language focuses on the "effects" of an employer's action, rather than the motivation. *City of Jackson*, 544 U.S. at 235-36 & n.6 (plurality) (emphasis omitted). This subsection does "not include an express prohibition on policies or practices that produce a disparate impact." *Ricci*, 129 S. Ct. at 2672. But the Court interpreted it to impose such a standard in *Griggs*, 401 U.S. at 432, and has since clarified that the phrases "adversely affect" and "tend to deprive" are the key terms that support that reading, *City of Jackson*, 544 U.S. at 235–36 (plurality) ("adversely affect"); *Meacham* v. *Knolls Atomic Power Lab.*, 554 U.S. 84, 96 n.13 (2008) ("tend to deprive").

In crafting Section 804(a), Congress drew heavily from the first subsection of these employment statutes, without relying on the second. Like the first subsection, Section 804(a) makes it unlawful to "refuse" to engage in conduct because of an individual's protected trait or to "otherwise" act on that account.

42 U.S.C. § 3604(a). By contrast, Section 804(a) does not use the phrases "adversely affect" or "tend to deprive" that signal disparate-impact liability. *City of Jackson*, 544 U.S. at 235-36 & n.6 (plurality).

Respondents argue otherwise. They concede that the clauses in Section 804(a) that make it unlawful to "refuse" to rent, sell, or negotiate for housing on account of race prohibit only "discriminatory treatment." Br. in Opposition for Mt. Holly Gardens Respondents at 33 (filed Sept. 11, 2012) ("BIO"). They rely solely on the phrase "otherwise make unavailable or deny" as the source of disparate-impact liability in this statute. *Id.* In their view, the word "unavailable" describes an effect, and thus suggests disparate-impact liability. *Id.*

The word "unavailable" cannot bear the weight Respondents propose to lard on it. First, it is sandwiched between two verbs—"make" and "deny." As already shown, those verbs focus on actions and their motivations, not effects. *Supra*, at 17-19. That is the hallmark of a disparate-treatment provision. *City of Jackson*, 544 U.S. at 236 n.6 (plurality); *Ricci*, 129 S. Ct. at 2672.

Moreover, Section 804(a) does not create the "incongruity" between action and injury that signals disparate-impact liability. *City of Jackson*, 544 U.S. at 236 n.6 (plurality). In both Title VII and the ADEA, the second subsection recognizes an "incongruity between the employer's actions—which are focused on his employees generally—and the individual employee who adversely suffers." *Id.* Specifically, the subsection makes it unlawful to take action affecting a group of individuals—*i.e.*, to "limit, segregate, or classify" them—*if* the action "adversely affect[s]" or "tend[s] to deprive" a particular individual

within that group of rights on account of a protected trait. 42 U.S.C. § 2000e-2(a)(2); 29 U.S.C. § 623(a)(2). By contrast, Section 804(a)'s declaration that it is unlawful to "make unavailable or deny" housing prohibits purposeful action that creates an injury when taken against a single individual alone.

Writing against the backdrop of Title VII and the ADEA, Congress knew how to impose disparate-impact liability in Section 804(a) if it had wished to do so. Congress chose not to follow the model of Title VII and the ADEA's disparate-impact provisions, and that choice confirms what the ordinary meaning of Section 804(a) already made plain: Disparate-impact claims are not cognizable.

3. Section 804(a)'s focus on purposeful discrimination is reaffirmed by its final phrase. The statute lists a series of actions that are prohibited if engaged in "because of" race or another protected trait. 42 U.S.C. § 3604(a). As this Court has explained in interpreting other anti-discrimination statutes, the principal role the words "because of" play is to require the plaintiff to show that race was the "'but-for' cause of the . . . adverse action." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2527 (2013) (holding that "'because of' means 'based on' and that '"based on" indicates a but-for causal relationship'"). In the context of Section 804(a), the words "because of" also reaffirm the provision's focus on discriminatory intent. The words "'because of' mean 'by reason of: on account of.'" *Gross*, 557 U.S. at 176 (quoting 1 *Webster's Third New International Dictionary* 194 (1966)). Thus, they suggest that an actor that engages in conduct "because of" a protected trait has made a conscious decision to discriminate on that basis. *Id.* (holding that "the ordinary meaning of the . . . re-

quirement that an employer took adverse action 'because of'" a protected trait is that the protected trait was "the '*reason*' that the employer *decided* to act" (emphasis added)); *Nassar*, 133 S. Ct. at 2528 (holding that the phrase "because of" requires "proof that the *desire* to [discriminate] was the but-for cause of the challenged employment action" (emphasis added)). *See also City of Jackson*, 544 U.S. at 249 (O'Connor, J., concurring in the judgment) (concluding that the phrase "'*because of*'" "plainly requires discriminatory intent").

In addition to Section 804(a) of the FHA, the words "because of" appear in the first subsections of Title VII and the ADEA (which prohibit only disparate treatment), and the second subsections (which prohibit disparate impact). *See supra*, at 21. But their appearance in the disparate-impact subsections does not prevent this Court from reading the words "because of" to support an interpretation of Section 804(a) that requires discriminatory intent.

This Court has held that an anti-discrimination statute such as Section 804(a) "'must be "read . . . the way Congress wrote it."'" *Nassar*, 133 S. Ct. at 2527 (omission in original) (quoting *Gross*, 557 U.S. at 179). Applying that principle, the Court has declined to extend its prior constructions of Title VII to "similar wording" in the ADEA if the plain meaning of the words support a different rule. *Id.*; *Gross*, 557 U.S. at 175 n.2. That principle should govern here. The ordinary meaning of "because of" in Section 804(a) requires proof of purposefully discriminatory action. Although that phrase appears in the disparate-impact subsections of Title VII and the ADEA, this Court has recognized that nothing in the text of those disparate-impact provisions "express[ly]" contemplates that result. *Ricci*, 129 S. Ct. at 2672. Espe-

cially in light of the different purposes Section 804(a) and those employment-discrimination statutes serve, *see infra*, at 44-48, there is no reason to extend this Court's prior constructions of Title VII and the ADEA's disparate-impact subsections to Section 804(a) without more explicit text in the statute authorizing disparate-impact claims.

B. The FHA's Statutory Context And History Confirm That Section 804(a) Does Not Permit Disparate-Impact Claims.

1. As this Court has observed, "[t]he Fair Housing Act itself focuses on prohibited acts." *Meyer*, 537 U.S. at 285. Purposeful actions, not effects, are the focus of this statutory regime. This statutory context confirms that disparate-impact claims are not cognizable under Section 804(a). *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("[W]ords of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

The operative language of Section 804(a) has not changed since the FHA was adopted in 1968. At that time, the Act contained three sections, prohibiting "Discrimination in the Sale or Rental of Housing," 42 U.S.C. § 3604 (1968), "Discrimination in the Financing of Housing," *id.* § 3605 (1968), and "Discrimination in the Provision of Brokerage Services," *id.* § 3606 (1968), respectively. Each section listed prohibited actions that require a racially discriminatory purpose. None of those provisions focused on consequences or effects. Specifically, the Act made it unlawful to engage in the following actions on account of race or another protected trait: "deny a loan," *id.* § 3605 (1968), "deny" a person access to a multiple-listing service or real estate brokers' organization, *id.* § 3606 (1968), "discriminate" in the terms or conditions of a sale or rental agreement, *id.* § 3604(b)

(1968), "indicat[e]" a racial preference in an advertisement for housing, *id.* § 3604(c) (1968), "represent . . . because of race . . . that any dwelling is not available," *id.* § 3604(d) (1968), or "induce" a person to sell or rent a dwelling by making "representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race," *id.* § 3604(e) (1968).

After it was amended in 1988, the FHA retained that focus on purposefully discriminatory actions. *See id.* § 3604(f) (making it unlawful to "discriminate" against a buyer or renter on account of a "handicap," including through a "refusal to permit" reasonable modifications to the dwelling at the buyer or renter's expense). Indeed, no section of the FHA contains the "adversely affects" or "tend to deprive" language that signal disparate-impact liability in Title VII and the ADEA.

2. It was altogether rational for Congress to decide not to extend the disparate-impact theory of liability from those employment statutes to the FHA. Racial discrimination in employment is particularly difficult to identify, because decisions regarding hiring, firing, compensation, and advancement almost invariably include a fair degree of subjectivity. Moreover, even the most subtle forms of discrimination in employment can have permanent and career-altering effects. In such an environment, facially-neutral policies, even when implemented without discriminatory intent, can "'freeze' the status quo of prior discriminatory employment practices," thereby preventing similarly situated employees from being treated equally, solely on account of their race. *Griggs*, 401 U.S. at 429-30. "[J]ob requirements" such as "general aptitude tests" or "diploma requirement[s]" that are not "demonstrably related to the jobs for which they [a]re

used" are "examples" of these facially-neutral, though discriminatory barriers. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987-88 (1988). Congress has required employers to adjust such policies when they disproportionately and unreasonably burden members of particular racial groups.

By contrast, the need for such measures in the housing market is decidedly less pronounced. The fairness of a transaction between buyer and seller or landlord and tenant can far more easily be judged by objective criteria, such as the purchase price and contractual terms. Intentional discrimination in housing is thus easier to identify and prosecute. *See*, *e.g.*, *Griggs*, 401 U.S. at 431 (noting that a purpose of the disparate-impact standard is to provide a safeguard against covert forms of intentional discrimination). Moreover, barriers erected by past discrimination do not have the same persistent legacy in housing transactions as in employment decisions. If intentional discrimination is effectively removed from the market, financial means become the principal determinant of whether a person obtains the lease or purchase he or she desires.

3. For those who consider such sources informative, the FHA's legislative history confirms that members of Congress individually viewed intentional discrimination as the barrier to equality in the housing market, and designed the Act to combat that evil alone.[5] No member of Congress suggested that the Act could be used as a tool to require homeowners,

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[5] The FHA was introduced as a floor amendment to the Civil Rights Act of 1968, *see* 114 Cong. Rec. 2270, 2270-72 (1968). Although there are no committee reports associated with the Act, it was the subject of extensive debate on the floor of the House and Senate Chambers.

landlords, or local governments to evaluate and balance the racial impacts of their otherwise neutral housing decisions.

As Senator Mondale, the FHA's principal sponsor, explained: "The bill permits an owner to 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. That is *all it does*. It does *not confer any right*." 114 Cong. Rec. 5640, 5643 (1968) (emphasis added). Other legislators echoed that refrain: "A person can sell his property to anyone he chooses, as long as it is by personal choice and not because of *motivations of discrimination*." 114 Cong. Rec. 2270, 2283 (1968) (Sen. Brooke) (emphasis added). *See also* 114 Cong. Rec. 2524, 2530 (1968) (Sen. Tydings) (stating that "the *deliberate exclusion* from residential neighborhoods on grounds of race" was the evil the Act sought to correct (emphasis added)).

Legislators' express focus on intentional discrimination in their debates over the FHA is particularly notable when contrasted with congressional discussion of Section 5 of the Voting Rights Act of 1965. 42 U.S.C. § 1973c. As originally enacted, that provision required covered jurisdictions to seek preclearance of changes to their voting laws and demonstrate that such changes "do[] not have the purpose and *will not have the effect* of denying or abridging the right to vote on account of race or color." *Id.* (1965) (emphasis added). Legislators debating the Act argued that one of its "essential justification[s]" was to "cause[] . . . change in *results*," not "only in methods." H.R. Rep. 89-439 (1965), *available at* 1965 U.S.C.C.A.N. 2437, 2441-42 (emphasis added). No such focus on results is present in the legislative history of the FHA.

At the same time that legislators emphasized the FHA's focus on intentional discrimination, they clari-

fied that it lacked a broader socioeconomic purpose of guaranteeing the availability of housing to any particular individuals or demographic groups. As Senator Mondale, declared:

> [T]he basic purpose of this legislation is to permit people who have the ability to do so to buy any house offered to the public if they can afford to buy it. *It would not overcome the economic problem of those who could not afford to purchase the house of their choice.*

114 Cong. Rec. 3421, 3421 (1968) (emphasis added). *See also* 114 Cong. Rec. 3119, 3129 (1968) (Sen. Hatfield) (recognizing that the FHA attempts to eliminate the injustice that occurs when a person "is denied the right to buy a home within a community *according to his economic ability* . . . merely because his skin is a different color" (emphasis added)); 114 Cong. Rec. 3235, 3252 (1968) (Senator Scott) (stating that the FHA would ensure that individuals "can rent or buy the dwelling of their choice *if they have the money or credit to qualify*" (emphasis added)).

Although legislators expressed hope that prohibiting intentional discrimination would encourage more "integrated and balanced living patterns" across the country, 114 Cong. Rec. at 3422 (Sen. Mondale), no legislator suggested that the Act would require homeowners, landlords, or local governments to consider race in every housing decision.

C. The FHA's 1988 Amendments Reinforce Its Focus On Purposeful Discrimination.

The 1988 amendments to the FHA, especially when read against the backdrop of Congress's adoption of other anti-discrimination statutes just a few years later, confirm that Section 804(a) prohibits intentional discrimination alone.

1. Congress amended the FHA in 1988, but left the operative language of Section 804(a) untouched. Pub. L. No. 100-430, § 6, 102 Stat. 1619, 1620 (1988). In subsequent years, Congress enacted two other statutes that authorize disparate-impact claims. In 1990, Congress enacted Section 102 of the Americans with Disabilities Act, which uses the phrase "adversely affects" to permit disparate-impact claims asserted by disabled persons. 42 U.S.C. § 12112(b); *see Raytheon*, 540 U.S. at 53. In 1991, Congress amended Title VII to explicitly authorize claims based on "disparate impact," codifying the holding in *Griggs* from decades earlier. 42 U.S.C. § 2000e-2(k). These subsequent enactments confirm that Congress understood how to invoke disparate-impact liability. Congress's failure to change the FHA speaks volumes about its intent to leave Section 804(a) as limited to claims for disparate treatment. "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross*, 557 U.S. at 174 (refusing to "ignore Congress' decision to amend" relevant portion of Title VII but not the ADEA). The 1988 amendments thus provide no basis to diverge from the plain meaning of the text of Section 804(a) that Congress enacted in 1968, and indeed reinforce that Congress was content with limiting that provision to intentional discrimination.

2. Respondents and the Solicitor General attempt to rebut this conclusion with two arguments. Neither is persuasive.

a. Among other things, the 1988 amendments added three new exemptions to liability. Respondents and the Solicitor General claim that these exemptions provide defenses only to disparate-impact claims, and thus demonstrate that Section 804(a) must permit disparate-impact liability.

As an initial matter, to the extent Respondents and the Solicitor General urge this Court to abandon Section 804(a)'s plain meaning because it would render these statutory exemptions superfluous, this Court has already rejected such invitations. The Court's "preference for avoiding surplusage constructions is not absolute" and does not overcome "plain meaning." *Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004). In addition, the exemptions are not reasonably susceptible to the narrow reading Respondents and the Solicitor General advance.

The first exemption provides that "[n]othing in [the FHA] prohibits conduct against a person because such person has been convicted" of a drug offense. 42 U.S.C. § 3607(b)(4). The second provides that nothing in the FHA preempts "reasonable" maximum-occupancy restrictions on residential dwellings. *Id.* § 3607(b)(1). The final exemption states that "[n]othing" in the FHA prevents a real estate appraiser from "tak[ing] into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." *Id.* § 3605(c). Respondents and the Solicitor General contend that because the FHA contains "no direct prohibition on discriminating against drug offenders," "no direct bar against discrimination based on number of occupants," and no bar on "appraisers' actions based on factors other than" race, Congress would have had "no reason" to include these exemptions except as defenses to disparate-impact claims. Br. for the United States as Amicus Curiae at 12-13 (filed May 17, 2013) ("U.S. Amicus Br.") (emphasis omitted); BIO at 33.

Yet the text of the exemptions does not support that narrow view. All three purport to eliminate liability for all claims under the FHA, not just disparate-impact claims. *See* 42 U.S.C. § 3607(b)(1) ("[*n*]*othing*"

in the FHA prohibits a denial of housing that qualifies for the exemption) (emphasis added); *id.* § 3607(b)(4) (same); *id.* § 3605(c) (same). *See also* Br. of U.S. as Amicus in Support of Neither Party at 16 n.3, *Magner v. Gallagher*, No. 10-1032 (U.S. filed Dec. 29, 2011) ("U.S. *Magner* Br.") ("[T]he exemptions by their terms apply generally to all the prohibitions in the FHA, not just Section 804(a) . . . ."). Indeed, their language provides a "complete exemption from FHA scrutiny." *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 728 (1995).

Moreover, all three exemptions offer valuable defenses to disparate-treatment claims. As this Court has explained, a disparate-treatment plaintiff must prove that the defendant's discriminatory motive was the "but-for cause" of its injury, and the defendant may "escape liability if it [can] prove that it would have taken the same . . . action in the absence of all discriminatory animus." *Nassar*, 133 S. Ct. at 2526-27; *Gross*, 557 U.S. at 174. By clarifying that a denial of housing based on a past drug offense or a maximum-occupancy requirement will not violate the Act, Congress has identified two non-discriminatory motives that provide a *per se* reasonable basis to deny housing. The same is true of the clarification that real estate appraisers may consider factors other than race in their analysis. When a disparate-treatment defendant can establish that a drug-offense, a maximum-occupancy requirement, or (in the case of an appraiser) a factor other than race, was a basis for its decision, it can prove that racial animus was not the "but-for cause" of its action and thus, avoid liability against a disparate-treatment claim.

These exemptions are particularly useful under the burden-shifting frameworks that many courts of appeals apply to disparate-treatment claims under the

FHA. *See*, *e.g.*, *Ojo v. Farmers Grp., Inc.*, 600 F.3d 1205, 1207 (9th Cir. 2010) (per curiam) (en banc); *Resident Advisory Bd. v. Rizzo,* 564 F.2d 126, 148-49 (3d Cir. 1977). Those frameworks require a disparate-treatment defendant to show a legitimate basis for its action once presented with a prima facie case of discrimination, *Ojo*, 600 F.3d at 1207; *Rizzo*, 564 F.2d at 148-49, and these exemptions can provide the defendant with a mechanism to defeat the claim at that stage of the analysis.

Even if these three exemptions would have a greater role in disparate-impact cases, *see City of Jackson*, 544 U.S. at 238-39 (plurality), nothing in their text indicates they would have no role in a disparate-treatment case. The exemptions do not alter the plain meaning of the Section 804(a).

b. Respondents and the Solicitor General next argue that, even if the 1988 amendments did not codify a disparate-impact standard, Congress implicitly adopted that standard by leaving the operative language of Section 804(a) unchanged. BIO at 28; U.S. Amicus Br. at 13-14; U.S. *Magner* Br. at 17-19. By 1988, nine courts of appeals had extended *Griggs*'s disparate-impact standard to the FHA, *see* U.S. *Magner* Br. at 17-18 (collecting decisions), although all of them had done so before this Court clarified the "key textual differences" between statutory language that permits disparate-impact claims and language that authorizes disparate-treatment claims alone,[6] *City of Jackson*, 544 U.S. at 236 n.6 (plurality). Re-

[6] After 1988, but before this Court's clarification of that distinction in *City of Jackson*, two other courts of appeals extended *Griggs* to the FHA, bringing the total to eleven. *See Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Mountain Side Mobile Estates P'ship v. HUD*, 56 F.3d 1243, 1250-51 (10th Cir. 1995).

spondents and the Solicitor General conclude that Congress, through its failure to alter the relevant text of Section 804(a), must have implicitly ratified the courts of appeals' view. U.S. Amicus Br. at 14.

There is no basis for such an interpretation of Congress's silence. For this Court to conclude that Congress implicitly ratified the prevailing view among judicial opinions, "the supposed judicial consensus [must be] so broad and unquestioned that [the Court] must presume Congress knew of and endorsed it." *Jama v. ICE*, 543 U.S. 335, 349 (2005). That standard is exceedingly difficult to meet. This Court has previously refused to presume that Congress ratified the consensus of eleven courts of appeals. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994) (declining to "infer that . . . Congress[], by silence, ha[s] acquiesced in the judicial interpretation of" a statutory provision Congress has decided not to amend).

The standard is not met here. The consensus in 1988 was by no means "unquestioned." This Court itself declined to endorse the court of appeals' disparate-impact interpretation when presented with the issue that very same year. *See Town of Huntington*, 488 U.S. at 18 (per curiam) (declining to "reach the question"). Moreover, President Reagan explicitly rejected the court of appeals' view in his statement upon signing the Amendments, declaring that "*Title 8 speaks only to intentional discrimination*." Remarks on Signing the Fair Housing Amendments Act of 1988, 24 Weekly Comp. Pres. Doc. 1140, 1141 (Sept. 13, 1988) (emphasis added). *See also id.* (stating that the amendments did "not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that [T]itle 8 viola-

tions may be established by a showing of disparate impact . . . without discriminatory intent").

Consistent with President Reagan's position, the Solicitor General urged this Court in 1988 to reject the argument that Section 804(a) permitted disparate-impact claims: "Congress intended to require a showing of intentional discrimination." Br. for United States as Amicus Curiae at 16, *Town of Huntington*, 488 U.S. 15 (U.S. filed 1988). And, just four months after the Amendments were passed, HUD, the agency charged with administering the statute, declined to take a position at all. 54 Fed. Reg. 3232, 3235 (Jan. 23, 1989) ("[T]hese regulations are not designed to resolve the question of whether intent is or is not required to show a violation . . . .").

It can hardly be said that there was a "consensus" in 1988 that Section 804(a) permitted disparate-impact claims when the President and the Solicitor General explicitly rejected that position, and both this Court and the agency charged with administering the statute declined to endorse it. If Congress wished to settle the question in the FHA amendments, it would have done so expressly, just as it had done in the ADA and the Civil Rights Act of 1991. *Supra*, at 31.

D. Section 804(a)'s Plain Meaning Precludes Deference To HUD's Regulation.

The plain meaning of Section 804(a), as confirmed by its statutory context and history, makes deference to HUD's interpretive views unwarranted. HUD—in a final rule published just this year—asserts that "[l]iability may be established under the Fair Housing Act based on a practice's discriminatory effect . . . even if the practice was not motivated by a discriminatory intent." 78 Fed. Reg. at 11,482. Respondents

and the Solicitor General argue that this Court should defer to HUD's judgment. BIO at 29-30; U.S. Amicus Br. at 7. There is no cause for deference here.

HUD's interpretation has no basis in Section 804(a)'s text and thus, deference is not warranted. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) ("[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."). Section 804(a)'s language is plain—it prohibits purposeful discrimination alone, and that intent is reinforced by all relevant aids to interpretation. Under *Chevron*, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Indeed, just last Term, this Court unanimously rejected HUD's interpretation of another statute it is authorized to administer, emphasizing that deference will not be given when the agency's interpretation "'goes beyond the meaning that the statute can bear.'" *Freeman*, 132 S. Ct. at 2040. That same rule controls the outcome here.[7]

II. SECTION 804(a) DOES NOT REQUIRE LOCAL GOVERNMENTS TO ACCOUNT FOR RACE IN LAND-USE POLICY DECISIONS.

The text of Section 804(a) does not permit disparate-impact claims in any circumstances. But even if this Court finds the text ambiguous, there are special reasons why Section 804(a) should not be interpreted to permit disparate-impact claims that challenge lo-

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[7] HUD has interpreted Section 804(a) to permit disparate impact liability during several formal adjudications. *See* BIO at 29 (collecting decisions); U.S. Amicus Br. at 8 & n.1 (same). Deference to these rulings is not appropriate for the same reason.

cal governments' facially-neutral land-use policy decisions, such as the Redevelopment Plan at issue here. Interpreting the statute to require local officials to account for race as an explicit criterion in such decisions would raise serious constitutional questions under the Equal Protection Clause and the structural guarantee of federalism, and would create distorted incentives for local officials that undermine the FHA's purposes. This Court is "'obligated to construe the statute to avoid [constitutional] problems' if it is '"fairly possible"' to do so." *Boumediene v. Bush*, 553 U.S. 723, 787 (2008) (alteration in original); *Schor*, 478 U.S. at 841. Here, it is more than "fairly possible" to interpret Section 804(a) to preclude disparate-impact claims in this setting.

As a threshold matter, if this Court finds ambiguity in the text of Section 804(a), it must consider and resolve these constitutional questions HUD's contrary interpretation would raise before HUD's interpretation is accorded deference. This Court "ha[s] rejected agency interpretations to which [it] would otherwise defer when they raise serious constitutional questions." *Miller v. Johnson*, 515 U.S. 900, 923 (1995); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). That rule applies with particular force where, as here, an agency's "interpretation of the Act compels race-based [decision-making by government officials]." *Miller*, 515 U.S. at 923. "[B]y definition," such an interpretation "should not receive deference." *Id.*

A. Requiring Local Governments To Account For Race In Land-Use Policy Decisions Would Raise Serious Constitutional Questions.

1. Interpreting Section 804(a) to permit disparate-impact claims against a local government for adopting a redevelopment plan or other land-use policy without discriminatory intent would raise serious questions under the Equal Protection Clause. Under Respondents' interpretation, Section 804(a) does not merely permit local officials to perform their job with "conscious[ness]" of the racial demographics of their community. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 783, 789, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (noting that some "race conscious" actions by government officials, such as the "strategic site selection of new schools" in neighborhoods with certain racial demographics, may raise "lesser" constitutional concerns than explicitly "race-based" decisionmaking). Quite the contrary, Respondents contend that, without proof of discriminatory intent, Section 804(a) requires the Township to pay damages and provide other relief to racial-minority citizens relocating from the blighted Gardens area that non-minority citizens of equally-limited financial means relocating from an equally blighted area would have no right to claim. J.A. 59-62, 428-29, 445; *see infra*, at 44-48. This necessarily interprets Section 804(a) to require Township officials to "treat[] each [citizen] in different fashion solely on the basis of a systematic, individual typing by race." *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment).

The "central mandate" of that constitutional provision is "racial neutrality in governmental decision-

making." *Miller*, 515 U.S. at 904. But exposing the Township and other local governments to disparate-impact claims for otherwise neutral land-use decisions would affirmatively require them to "classify individuals by race and allocate benefits and burdens on that basis." *Parents Involved*, 551 U.S. at 783 (Kennedy, J., concurring in part and concurring in the judgment). Any law that requires such "'race-based'" decisionmaking is "subject[] to strict scrutiny." *Id.* (citing *Johnson v. California*, 543 U.S. 499, 505-06 (2005)).

If Section 804(a) requires local governments to explicitly account for race in determining whether and how to redevelop a blighted area, it would face serious difficulty in satisfying that standard. *See*, *e.g.*, *Johnson*, 543 U.S. at 505 (strict scrutiny permits government to make "racial classifications" only if they "'are narrowly tailored measures that further compelling government interests'").

This Court has never determined whether, or under what circumstances, a local government may consider race when deciding whether to redevelop an area, what steps to take to accomplish that task, or how much to compensate the relocated residents. Nor has the Court determined whether Congress constitutionally can require a local government to account for race in these decisions. The Equal Protection Clause may, in limited circumstances, permit racial classifications as necessary, albeit temporary, correctives to past instances of *de jure* racial discrimination. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989) (Kennedy, J., concurring in part and concurring in the judgment); *Parents Involved*, 551 U.S. at 794-95 (Kennedy, J., concurring in part and concurring in the judgment) ("reinforc[ing] the difference between the [constitutional] remedies available for redressing

de jure and *de facto* discrimination"). But the interpretation of Section 804(a) advocated by the Respondents and upheld by the court of appeals is not so limited. Rather, they suggest that Section 804(a) requires local officials to account for race when adopting redevelopment plans as a means to address racial imbalances in housing patterns and income levels across society at large. *See*, *e.g.*, J.A. 58-62, 428-29. But "'this Court has never held that societal discrimination alone is sufficient to justify a racial classification.'" *Parents Involved*, 551 U.S. at 794 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 274 (1986) (plurality)). Instead, "absent some extraordinary showing," the Equal Protection Clause prohibits government officials from "treat[ing] whole classes of persons differently" based on their "race," even if the purpose of that differential treatment is to further a valuable social goal. *Id.* at 795-96; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223-24 (1995).

That constitutional rule should apply with special force to local redevelopment decisions. Because such decisions affect the lives and livelihood of the citizens in the redevelopment zone and the wider community at large, they are among the most sensitive, politically complex decisions local officials are called upon to make. Considerations of public health, safety, and economics should drive local decisionmaking on the question. Absent proof of purposeful discrimination—and there is no such claim at issue here—requiring local officials to inject race into this equation would transform race from "an element of our diverse heritage" into "a bargaining chip in the political process," precisely the outcome the Equal Protection Clause is designed to avoid. *Parents Involved*,

551 U.S. at 797 (Kennedy, J., concurring in part and concurring in the judgment).

This Court can avoid this constitutional question if it is "'fairly possible'" to interpret Section 804(a) not to extend disparate-impact liability so far. *Schor*, 478 U.S. at 841. Here, it surely is. Section 804(a) prohibits only purposeful action. *Supra*, Part I.A. Even if the Court finds the language ambiguous, it does not expressly require racial balancing in local redevelopment policies, and thus need not be interpreted to compel such a result.

2. This interpretation of Section 804(a) is made all the more necessary because permitting federal disparate-impact challenges against a local government's facially-neutral redevelopment plan would undermine principles of federalism enshrined in the Tenth Amendment and the structure of the Constitution. "Regulation of land use," including the power to acquire and redevelop blighted properties, "is a quintessential state and local power." *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality); *Hess v. Port Auth. Trans–Hudson Corp.,* 513 U.S. 30, 44 (1994). Indeed, "[f]or more than a century," this Court has "afford[ed] legislatures broad latitude in determining what public needs justify" such policies. *Kelo v. City of New London*, 545 U.S. 469, 483 (2005); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 593 (1962); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *Fischer v. St. Louis*, 194 U.S. 361, 370 (1904).

When interpreting federal statutes, this Court presumes that "'Congress does not exercise lightly' the 'extraordinary power'" to legislate in such areas traditionally regulated by local governments. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2256 (2013) (quoting *Gregory v. Ashcroft*, 501 U.S.

452, 460 (1991)). The Court thus requires "a 'clear and manifest' statement from Congress" before it will interpret a federal statute to have such an effect. *Rapanos*, 547 U.S. at 738 (plurality) (citing *BFP v. Resolution Trust Corp.,* 511 U.S. 531, 544, (1994)). In short, Section 804(a) cannot be interpreted to empower Congress or the federal courts to "function as a *de facto* regulator" of "intrastate land—an authority that [otherwise] would befit a local zoning board"—unless the statute clearly and unambiguously requires that result. *Id.*

There is no hint whatsoever in the text of Section 804(a), let alone a "clear and manifest statement," that Congress intended for the statute to compel local governments to balance racial outcomes in their redevelopment policies or to deprive them of the deference they have enjoyed "[f]or more than a century" to formulate such policies in accordance with local needs and resources without considering race as a factor. *Kelo*, 545 U.S. at 483. If Congress had wished to do so, it would have provided a clearer statement.

Importantly, by holding that Section 804(a) does not permit disparate-impact claims against facially-neutral local redevelopment policies, this Court need not cast doubt on Congress's authority to prohibit local governments from engaging in intentional discrimination of any kind. Congress has a constitutional responsibility to exercise that authority under Section 5 of the Fourteenth Amendment, and a decades-long history of doing so.[8] *See*, *e.g.*, *City of*

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[8] By contrast, disparate-impact requirements are statutory alone. Absent discriminatory intent, facially-neutral policies that affect a greater proportion of one race than of another do not violate the Equal Protection Clause. *See*, *e.g.*, *Washington v. Davis*, 426 U.S. 229, 242 (1976).

Boerne v. Flores, 521 U.S. 507, 517-29 (1997) (discussing this history). Nor would such a holding necessarily call into question the constitutionality of federal statutes permitting disparate-impact claims against local governments in their capacities as employers. *See*, *e.g.*, *Waters v. Churchill*, 511 U.S. 661, 671-72 (1994) (plurality) (observing that different constitutional requirements apply to "government as employer" than "government as sovereign"). It suffices to say that Section 804(a) should not be interpreted to require local governments to inject race into a policymaking arena Congress has never endeavored to regulate absent an express requirement in Section 804(a)'s text.

B. Requiring Local Governments To Account For Race In Land-Use Policy Decisions Would Conflict With The FHA's Purposes.

If Section 804(a) is interpreted to permit disparate-impact claims against local redevelopment decisions despite these constitutional problems, it would create a set of distorted incentives for local policymakers that would undermine the FHA's core objectives. Under Respondents' view, Section 804(a) is not just the weapon against intentional discrimination that members of Congress described, *supra*, at 28-30, but rather a blunt instrument that requires local policymakers to engage in racial balancing in every redevelopment choice. In that scenario, *any* policy aimed at redeveloping, rehabilitating, or otherwise restoring a deteriorating neighborhood with racial demographics that do not match the wider geographic area would raise the specter of disparate-impact litigation. Local policymakers would then face a choice: implement the policy and invite a costly and time-consuming battle in the courts, or stand by and con-

tinue to allow the neighborhood to decline, thereby perpetuating the segregated "ghettos" the FHA was designed to disintegrate, 114 Cong. Rec. at 3421 (Sen. Mondale), and failing to correct the "substandard" housing conditions the FHA sought to reduce, 114 Cong. Rec. at 2528 (Sen. Tydings).

Subjecting local governments to disparate-impact liability for their redevelopment choices *without* discriminatory intent would undermine the FHA's purposes in at least three ways. First, the mere cost and delay associated with a disparate-impact suit, even if ultimately unmeritorious, could severely reduce the effectiveness of the redevelopment plan. Litigation over this Plan alone has spanned more than ten years without a final resolution of Respondents' disparate-impact claims. The needs of a blighted area, and the availability of local resources to address them, can change significantly in far less time. As this Court has recognized, federal rules that "requir[e] postponement . . . of every condemnation until" federal litigation has run its course "unquestionably impose a significant impediment to the successful consummation of many such plans." *Kelo*, 545 U.S. at 488.

Second, local governments seeking to avoid disparate-impact litigation would face strong political and economic incentives to build inefficiencies into a redevelopment plan solely to prevent a disparate-impact claim. For example, a local government that decides redevelopment of a minority-predominated neighborhood is necessary may seek to avoid disparate-impact liability by expanding the redevelopment zone to include adjoining streets or buildings with different racial demographics to bring the racial composition of the total redevelopment zone into line with the broader community average. *See*, *e.g.*, N.J. Stat. Ann. § 40A:12A-3 (authorizing redevelopment areas

to include properties that are not themselves blighted if "necessary . . . for the effective redevelopment of the area of which they are a part"). Such a waste of local resources serves no citizen's interests, but may be deemed necessary to ensure that the cost and delay of disparate-impact litigation can be avoided.

Finally, the prospect of disparate-impact suits may simply deter local officials from taking action in minority-predominated blighted areas at all. Local governments could rationally conclude that the financial and political costs of litigating over the racial impacts of an attempt to restore a blighted neighborhood are too substantial, and opt to acquiesce to the continuing deterioration of that community instead.[9] Ironically, as the district court noted, *any* policy—even a policy

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[9] These distorted incentives are illustrated in stark relief in *Gallagher v. Magner*, 619 F.3d 823, 837 (8th Cir. 2010), *petition dismissed*, 80 U.S.L.W. 3465 (U.S. Feb. 14, 2012) (No. 10-1032). There, apartment owners who "rented primarily" to low-income African-Americans filed suit to enjoin the City of St. Paul's policy of maximizing enforcement of its housing code against rental properties in the City. *Id.* at 830. Under the policy, the apartment owners received numerous citations for "rodent infestation, missing dead-bolt locks, inadequate sanitation facilities, inadequate heat," among other failures to provide basic standards of habitability. *Id.* Apartment owners were forced to incur costs to remedy these deficiencies, and some of their properties were condemned. *Id.* The apartment owners argued, and the court of appeals agreed, that the City's policy violated Section 804(a) because it "increased costs" for the apartment owners, thereby reduced "affordable housing," and thus injured "[r]acial minorities," because they "made up a disproportionate percentage of lower-income households in the city." *Id.* at 834-35 (emphasis omitted). When it enacted the FHA in 1968, it is virtually impossible that Congress would have expected its prohibition on intentional discrimination would allow landlords in segregated "urban ghettos" to assert the rights of their minority tenants as reason for failing to provide those tenants with basic standards of habitability. 114 Cong. Rec. at 3421 (Sen. Mondale).

of inaction—towards a blighted neighborhood could potentially trigger a disparate-impact claim under Respondents' view. Pet. App. 58a n.18. But, on the whole, permitting disparate-impact liability here will likely deter, rather than encourage, local governments from developing creative solutions to restore neighborhoods in need of intervention.

Under Respondents' theory, the question whether a local government is free to bring the full force of its resources and ingenuity to redevelop a blighted neighborhood depends on the racial demographics of that neighborhood. If one neighborhood's demographics mirror those in the wider community, the local government may impose the benefits and burdens of a redevelopment on the neighborhood's citizens without restraint under the FHA. If another neighborhood's racial demographics are different, citizens of the minority race in that neighborhood may enjoin the Plan and obtain additional compensation for relocation, invoking rights citizens in the first neighborhood cannot claim, even though they are similarly situated in all respects but race.

It is exceedingly unlikely that Congress intended the FHA to require local governments to subject citizens in minority-predominated neighborhoods to different rules than citizens in neighborhoods with more balanced racial demographics. "The allocation of governmental burdens and benefits, contentious under any circumstances, is even more divisive when allocations are made on the basis of individual racial classifications." *Parents Involved*, 551 U.S. at 795 (Kennedy, J., concurring in part and concurring in the judgment) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), *Adarand*, 515 U.S. 200). Forcing local governments to explicitly consider race in redevelopment policies would surely have such a divisive

effect—discouraging, rather than enhancing, the racial integration of communities the FHA sought to promote.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the judgment of the court of appeals be reversed.

Respectfully submitted,

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STATUTORY ADDENDUM

29 U.S.C. § 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

* * * *

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * *

42 U.S.C. § 3604. Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate 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, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of—

(A) that buyer or renter,[1]

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

(2) To discriminate 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 with such dwelling, because of a handicap of—

(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

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[1] So in original. The comma probably should be a semicolon.

(3) For purposes of this subsection, discrimination includes—

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.[2]

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or

(C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that—

(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings con-

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[2] So in original. The period probably should be a semicolon.

tain the following features of adaptive design:

(I) an accessible route into and through the dwelling;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1") suffices to satisfy the requirements of paragraph (3)(C)(iii).

(5)(A) If a State or unit of general local government has incorporated into its laws the requirements set forth in paragraph (3)(C), compliance with such laws shall be deemed to satisfy the requirements of that paragraph.

(B) A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.

(C) The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the re-

view and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraph (3)(C), and shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).

(D) Nothing in this subchapter shall be construed to require the Secretary to review or approve the plans, designs or construction of all covered multifamily dwellings, to determine whether the design and construction of such dwellings are consistent with the requirements of paragraph 3(C).

(6)(A) Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to section 3610(f)(3) of this title to receive and process complaints or otherwise engage in enforcement activities under this subchapter.

(B) Determinations by a State or a unit of general local government under paragraphs (5)(A) and (B) shall not be conclusive in enforce-ment proceedings under this subchapter.

(7) As used in this subsection, the term "covered multifamily dwellings" means—

(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and

(B) ground floor units in other buildings consisting of 4 or more units.

(8) Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this

subchapter shall be effective, that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this subchapter.

(9) Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

* * * *

42 U.S.C. § 3605. Discrimination in residential real estate-related transactions

(a) In general

It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

* * * *

(c) Appraisal exemption

Nothing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.

* * * *

42 U.S.C. § 3607. Religious organization or private club exemption.

* * * *

(b)(1) Nothing 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. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons.

* * * *

(4) Nothing in this subchapter prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in section 802 of Title 21.

* * * *