No. 13-1371

In the
Supreme Court of the United States

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, et al.,
Petitioners,
v.
THE INCLUSIVE COMMUNITIES PROJECT, INC.,
Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, COMPETITIVE ENTERPRISE INSTITUTE, CATO INSTITUTE, INDIVIDUAL RIGHTS FOUNDATION, REASON FOUNDATION, PROJECT 21, AND ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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INTEREST OF AMICI CURIAE

Pacific Legal Foundation, Center for Equal Opportunity, Competitive Enterprise Institute, Cato Institute, Individual Rights Foundation, Reason Foundation, Project 21, and Atlantic Legal Foundation respectfully submit this brief amicus curiae in support of Petitioner, Texas Department of Housing and Community Affairs.[1]

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF challenges programs covering public contracting, public education, and public employment that grant special preferences to a select few on the basis of race and sex. PLF litigates to assure a color-blind society and against attempts that undermine the Constitution's Equal Protection guarantee.

Center for Equal Opportunity (CEO) is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, immigration, and assimilation. CEO supports color blind public policies and seeks to block the expansion of racial preferences and to prevent their use in, for instance, employment, education, and voting.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Competitive Enterprise Institute (CEI) is a nonprofit public interest organization dedicated to individual liberty, free enterprise, limited government, and the rule of law. To that end, CEI has participated as amicus, or counsel for amici, in cases raising federalism or civil-rights issues.

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, files amicus briefs with courts, conducts conferences, and publishes the annual *Cato Supreme Court Review*.

The Individual Rights Foundation (IRF) was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. The IRF is dedicated to supporting free speech, associational rights, and other constitutional protections. To further these goals, IRF attorneys participate in litigation and file amicus curiae briefs in cases involving fundamental constitutional issues. The IRF opposes attempts to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason

supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing Reason magazine, as well as commentary on its websites, www.reason.com and www.reason.tv, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases raising significant constitutional issues.

Project 21 is an initiative of The National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility has not traditionally been echoed by the nation's civil rights establishment. To that end, Project 21 participants write opinion editorials for newspapers; participate in public policy discussions on radio and television; participate in policy panels, by giving speeches before student, business and community groups; advise policymakers at the national, state and local levels; and file amicus briefs in cases of national importance.

Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm that provides legal counsel, without fee, to scientists, educators, and other individuals and trade associations. The Foundation's mission is to advance the rule of law in courts and before administrative agencies by advocating for limited and efficient government, free enterprise, individual liberty, school choice, and sound science. The Foundation's leadership includes distinguished legal scholars and practitioners from across the legal community. Atlantic Legal Foundation

has litigated numerous discrimination cases, both as counsel for plaintiffs and as counsel for amici curiae.

All amici have participated in the filing of numerous amicus briefs with this Court in major equal protection cases from *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), to *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality By Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014).

This case raises important issues of constitutional law, public policy, and statutory interpretation regarding whether "disparate impact" claims are cognizable under the Fair Housing Act—Title VIII of the Civil Rights Act of 1968. Amici argue that the statutory language and congressional intent of the Fair Housing Act preclude disparate impact claims, and that disparate impact doctrine is incompatible with principles of equal protection and federalism.

Amici believe that their public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court in its deliberations.

SUMMARY OF THE ARGUMENT

This case presents the question whether the Federal Fair Housing Act's ban on racial discrimination can be violated by someone who does not engage in racial discrimination. The federal court of appeals below allowed a "disparate impact" claim to proceed under the Act against the Texas Department of Housing and Community Affairs. *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, 747 F.3d 275, 276 (5th Cir.), *cert. granted in part*, 135 S. Ct. 46 (2014). For such a claim,

the plaintiffs need not allege, nor prove, that individuals were treated differently because of their race. Instead, plaintiffs need only show that a neutral practice has a disproportionate effect—that is, a disparate impact—on some racial group. *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009).

The statutory text and the legislative history of the Fair Housing Act, as expressed by its proponents in Congress, establish that the Act was intended to apply solely to disparate treatment, not to actions having a disparate impact on protected classes. The Fair Housing Act makes it unlawful "to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). By its terms, the Act prohibits disparate treatment: that is, intentional discrimination.

This Court has consistently differentiated between language imposing liability for disparate treatment and language imposing liability for disparate impact. Language in Section 703 of Title VII describes "disparate treatment," *see Ricci*, 557 U.S. at 577; as does Section 4(a) of the Age Discrimination in Employment Act (ADEA), *see Smith v. City of Jackson, Miss.*, 544 U.S. 228, 236 n.6 (2005) (plurality opinion). In both those cases, this Court held that language materially identical to the language at issue here imposes liability for disparate treatment. Very differently-worded provisions impose liability for disparate impact:

Title VII, Sec. 703(a)

No "effects" language: It shall be an unlawful. . . for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race.

"Effects" language: (2) to limit, segregate, or classify his employees or applicants for employment . . . [or] otherwise adversely affect his status as an employee, because of such individual's race.

ADEA, Sec. 4(a)

No "effects" language: 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 . . . because of such individual's age[.]

"Effects" language:(2) to limit, segregate, or classify his employees . . . or otherwise adversely affect his status as an employee, because of such individual's age[.]

FHA 42 U.S.C. Sec. 3604(a)

It shall be unlawful—[t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race . . . .

The differences are clear: Congress imposes liability for disparate treatment by using language focusing on the defendant's motives. By contrast, Congress imposes disparate impact liability by using language that clearly focuses on the *effects* of the defendant's action. That language is conspicuously absent in the Fair Housing Act.

Consistent with the statutory text, the legislative history of the Fair Housing Act reveals that the purpose of the Act was to prohibit intentional refusals to sell or rent housing because of the race of the renter or buyer. 114 Cong. Rec. 4974 (Mar. 4, 1968). Expanding the Act to include disparate-impact liability runs afoul of previously enacted federal legislation. *See* McCarran-Ferguson Act, 59 Stat. 33 (1945) (codified at 15 U.S.C. §§ 1101, *et seq*.) (McCarran-Ferguson prohibits Congress from passing laws conflicting with state insurance laws, laws that insurers would have to violate to avoid disparate impact liability). Congress would not have drafted legislation in such a way as to contradict a previously enacted federal statute, without explicitly saying that it was doing so. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137-39 (2000) (Congress could not have intended legislative action that would run afoul of previously established congressional policy).

Subjecting government entities to disparate impact claims leads to unconstitutional race-conscious decisionmaking to avoid potential liability. This Court's decision in *Ricci*, 557 U.S. 557, highlights the conflict between the disparate impact doctrine and constitutional guarantees of equal protection. Even before *Ricci*, this Court noted that "[p]referential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988).

Interpreting the Fair Housing Act to allow claims without any showing of discriminatory intent, even though Congress was silent as to such claims, would violate the canon of constitutional avoidance. *Skilling v. United States*, 561 U.S. 358, 423 (2010) (Scalia, J., concurring) (citations omitted). When the constitutionality of a statute is challenged, if the statute is reasonably susceptible to two interpretations, the Court must adopt the construction which will save the statute from constitutional infirmity. *Id.* (citations omitted). Likewise, federal statutes cannot be construed to impinge upon important state interests without regard to the implications of our dual system of government. Before Congress may radically readjust the balance of state and national authority, it must be explicit as to its intent. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (citations omitted). No such intent can be found in either the text or legislative history of the Fair Housing Act.

For these reasons, this Court should find that disparate impact claims are not cognizable under the Fair Housing Act.

ARGUMENT

I

THE PLAIN LANGUAGE OF THE FAIR HOUSING ACT UNAMBIGUOUSLY PROHIBITS DISPARATE TREATMENT, NOT DISPARATE IMPACT

A. The Fair Housing Act Imposes Liability for Disparate Treatment by Using Language Focusing on the Defendant's Motivation

Congress imposes liability for disparate treatment by using language that focuses on "the motivation . . . of the employer." *Smith*, 544 U.S. at 236 (plurality opinion). Congress did just that in the disparate treatment provision of Title VII, enacted only four years before the Fair Housing Act, when it forbade an employer from "fail[ing] or refus[ing]" to hire on the basis of the prospective employee's race. 42 U.S.C. § 2000e-2(a)(1) (Section 703(a)(1) of Title VII); *see Ricci*, 557 U.S. at 577. Congress did so again when it enacted the ADEA, with language adopted from the Civil Rights Act, when it prohibited employers from "fail[ing] or refus[ing]" to hire a potential employee because of the employee's age. 29 U.S.C. § 623(a)(1) (Section (4)(a)(1) of ADEA); *Smith*, 544 U.S. at 236 n.6.

The language of the Fair Housing Act is materially the same as the disparate treatment provisions in both Title VII and the ADEA. By making it unlawful to "refuse" to sell, rent, or negotiate with another individual, 42 U.S.C. § 3604(a), Congress used a verb centered around the defendant's motivation. In ordinary usage, the word "refuse" signals intent. *Webster's Third New International Dictionary* 1910

(1961). The dictionary defines "refuse" as "show[ing] or expressing a positive unwillingness to do or comply." *Id.* This requirement of intent is supported by examples, which also connote a purposeful act. *See id.* ("refused to answer the question."); *id.* ("refused to give his permission."). The legal definition is no different. Black's Law Dictionary defines "refuse" as "to deny, decline, or reject" and emphasizes that it involves "an act of will." *Black's Law Dictionary* 1447 (rev. 4th ed. 1968).

This Court also uses the word "refuse" to signal an intentional act. In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), the Court held that peaceful picketing at a private shopping center was protected by the First Amendment. *Id.* at 309. The Court stated that the appellant "refused to leave" after "being told that she must have a permit to distribute her literature" and "she was ordered to leave." The refusal meant that the picketer evinced a clear intent to stay on the premises. *Id.* at 317. That case was argued a month before the Fair Housing Act was enacted, and decided one month later. This commonly accepted meaning of the word "refuse" was no different when the Act was enacted.

The argument that the Fair Housing Act imposes liability only for disparate treatment is even stronger here because "refuse" is not paired with "fail," the latter word, by itself, could connote either intentional or unintentional behavior. *See Black's Law Dictionary*, *supra*, at 1447 (distinguishing "fail" and "refuse" by noting that "fail"—unlike "refuse"—does not necessarily involve willfulness but may be brought upon by necessity). It would make little sense to read "refuse" as prohibiting disparate impact when "to fail

or refuse" prohibits disparate treatment only. *See Ricci*, 557 U.S. at 577; *Smith*, 544 U.S. at 236 n.6 (plurality opinion); *id.* at 249 (O'Connor, J., concurring in the judgment). To the contrary, "when a statute uses the very same terminology as an earlier statute—especially in the very same field such as [civil-rights law]—it is reasonable to believe that the terminology bears a consistent meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012). This Court should adopt the common-sense principle that Congress, by selecting words that prohibit disparate treatment in other provisions, intended to impose liability for disparate treatment here.

B. The Fair Housing Act Does Not Impose Liability for Disparate Impact Because It Contains No Language Focusing on the Effects of the Defendant's Actions

When Congress enacted the disparate impact provision in Title VII, it did so by making it illegal for an employer to "adversely affect" an employee because of the employee's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(2) (Section 703(a)(2) of Title VII); *see* 29 U.S.C. § 623(a)(1) (Section (4)(a)(1) of the ADEA) (making it illegal for an employer to "adversely affect" the employee's status because of the employee's age). It is only logical to distinguish between statutes focused on the defendant's motivation and statutes focused on effects. Dictionaries define "effect" as a result or outcome—regardless of who caused it or why. *Webster's Third New International Dictionary*, *supra*, at 724 (defining "effect" as "something that is produced by an agent"); *see also*

Black's Law Dictionary, *supra*, at 605 (defining "effect" as "result").

As this Court has explained, the "adversely affect" language found in the disparate impact provisions of Title VII and the ADEA focus on the effects of the action on the employee rather than the motivation for the action of the employer. *Smith*, 544 U.S. at 235-36. The language of the Fair Housing Act, on the other hand, makes it unlawful to "refuse" to sell, rent, or negotiate with another individual. 42 U.S.C. § 3604(a); *see Smith*, 544 U.S. at 235 (explaining that the disparate treatment provision of Title VII prohibits actions that "limit, segregate, or classify" persons; while the disparate impact provisions of Title VII and ADEA prohibit such actions that "deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's" race or age).

The lack of requirement of intent is bolstered by examples making the object of the sentence an inanimate thing incapable of intending anything. *Webster's Third New International Dictionary*, *supra*, at 35) ("A condition affecting the heart"); *id.* ("Rainfall affecting plant growth"). These examples show that "adversely affect," unlike the word "refuse," does not require intent.

A case decided by this Court at the time when the Fair Housing Act was adopted supports the proposition that "affect" has to do with consequences and not intent. In *Perez v. United States*, 402 U.S. 146 (1971), this Court upheld a criminal statute dealing with loan sharking as a valid exercise of Congressional power under the commerce clause. As it interpreted the "affects" language in Title VII, this Court spoke of

"affect" as focusing on the effect on the subject, i.e., whether interstate commerce was affected, rather than on the intent of the defendant to affect interstate commerce. *Id.* at 156.

In sum, if Congress wanted to impose disparate impact liability through the Fair Housing Act, it could have easily done so by adding the word "effect" or "affect" to the text of the Fair Housing Act when it was enacted in 1968. It could have also added either of those words when it amended the Fair Housing Act for the first time in 1974, or the second time in 1988. Or it could have done so when it amended Title VII in 1991. Congress did not do so, because it did not intend for the Fair Housing Act to encompass disparate impact claims.

C. The Court Should Not Defer to HUD's Interpretation of the Fair Housing Act Because the Statutory Language Is Clear

This Court should not defer to HUD's interpretation of the Fair Housing Act because the statutory language is clear. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) ("deference to [an agency's] statutory interpretation is called for only when the devices of judicial construction . . . yield no clear sense of Congressional intent."); *see Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2445 (2014) (an agency has no power to "tailor" legislation to bureaucratic policy goals by rewriting unambiguous statutory terms).

HUD previously argued in *Twp. of Mount Holly, N.J. v. Mt. Holly Gardens Citizens in Action, Inc.*, 134 S. Ct. 636 (2012), that the FHA's catch-all provision,

prohibiting people from "otherwise mak[ing] unavailable or deny[ing]," means that Congress intended to impose liability for disparate impact. Brief for United States at 6-7, *Twp. of Mount Holly*, 134 S. Ct. 636 (No. 11-1507). But that cannot be the case for two reasons. First, the "or otherwise" language appears in statutes imposing liability for disparate treatment. *See* 42 U.S.C. § 2000e-2(a)(1) (Section 703(a)(1) of Title VII) (making it unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual" on the basis of race, color, religion, sex, or national origin); 29 U.S.C. § 623(a)(2) (Section 4(a)(2) of the ADEA) (making it unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual" on the basis of age). Second, a catch-all clause such as "or otherwise" must be interpreted consistently with the list of specific terms which it completes. *See*, *e.g.*, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2171 (2012). Here, the "or otherwise" provision is limited by its connection to "refuse"—a verb focused on the motivations of the defendant, and one that prohibits disparate treatment, not disparate impact. And where, as here, the "statutory language is unambiguous," the analysis should come to an end. *Sebelius v. Cloer*, 133 S. Ct. 1886, 1895 (2013) (citation omitted).

II

CONGRESS INTENDED THE FAIR HOUSING ACT TO BAN INTENTIONAL DISCRIMINATION, NOT RACIALLY NEUTRAL LAWS THAT MERELY HAVE A DISPROPORTIONATE EFFECT

Although *amici* believe a textual analysis of the Fair Housing Act compels the conclusion that the statute does not provide for a disparate impact claim, the legislative history of the statute reveals that Congress intended the Act to apply only to purposeful discrimination. Because the Fair Housing Act was offered as a floor amendment in the Senate there are no committee reports. *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 n.29 (3d Cir. 1977). The legislative history thus consists of statements by individual legislators on the floor of the Senate and House that provide evidence of congressional intent. *Brock v. Pierce Cnty.*, 476 U.S. 253, 263 (1986) (citing *Grove City Coll. v. Bell*, 465 U.S. 555, 567 (1984)) (statements by individual legislators that are consistent with statutory language and other legislative history provide evidence of Congress' intent).

The purpose of the Fair Housing Act, as explained by Senator Walter Mondale, a leading sponsor of the Act, was to enforce "the policy of the United States to prevent discrimination on account of race, color, religion, or national origin in the purchase, rental, financing, and occupancy of housing throughout the United States." 114 Cong. Rec. 2270 (Feb. 6, 1968). The following exchange on the floor of the Senate is informative:

SENATOR MONDALE: The bill simply reaches the point where there is an offering to the public and the prospective seller refused to sell to someone solely on the basis of race.

SENATOR MAGNUSON: And he [the prospective buyer] would have to prove discrimination.

SENATOR MONDALE: Yes; and the burden is on the complainant.

114 Cong. Rec. 4974 (Mar. 4, 1968). Neither Senator believed the Act would encompass a disparate impact claim.

Senator Philip Hart's statement is also consistent with a claim of intentional discrimination: "When you go to a property that is publicly offered, let us not run the litmus test of how I spell my name, or where I went to church . . . or what color God gave me." *Id.* at 4976. Senator Joseph Tydings confirmed that "what the law would do is make it possible for all citizens to buy decent houses without discrimination against them because of the color of their skin." *Id.* at 2533 (Feb. 7, 1968). Senator Mondale stressed the limits on the bill's authority:

> The bill permits an owner to do everything that he could do anyhow with his property—insist upon the highest price, give it to his brother or wife, sell it to his best friend, do everything he could ever do with property, except refuse to sell it to a person solely on the basis of his color or his religion.

Id. at 5643 (Mar. 7, 1968). Senator Mondale further explained: "That is all it does. It does not confer any right. It simply removes the opportunity to insult and

discriminate against a fellow American because of his color, and that is all." *Id.* Congressman William Steiger declared: "You cannot, because of one reason—race—refuse to sell or rent property. All of the legitimate criteria which a homeowner uses to judge the prospective buyer remain unimpaired."

Senator Tydings emphasized that the issue was intentional discrimination: "Just a year ago, in this Chamber . . . I made the observation that *purposeful exclusion* from residential neighborhoods, particularly on grounds of race, is the rule rather than the exception in many parts of our country." *Id.* at 2528 (Feb. 7, 1968) (emphasis added). He later noted that "the *deliberate* exclusion from residential neighborhoods on grounds of race—and all the problems that go with it—are still with us today." *Id.* at 2530 (emphasis added).

Members of Congress repeatedly stressed that the bill was designed to make financial ability, rather than race, the principal qualification for purchasing or renting housing. Senator Mondale noted: "We had several witnesses before our subcommittee who were Negro, who testified that they had the financial ability to buy decent housing in all-white neighborhoods, but despite repeated good faith attempts, were unable to do so." *Id.* at 2277 (Feb. 6, 1968). Senator Mark Hatfield emphasized: that discrimination exists where a person is denied the right to buy a home merely because of that person's skin color, and "therefore this should be corrected." *Id.* at 3129 (Feb. 15, 1968). Senator Hugh Scott agreed: "Most persons in this country can rent or buy the dwelling of their choice if they have the money or credit to qualify. But others, even if they have unlimited funds and impeccable credit, often are

denied access to decent housing simply because of the color of their skin." *Id.* at 3252 (Feb. 16, 1968). Representative Clark McGregor stated: "How bitter it must be to find that although your bank balance is ample, your credit rating is good, your character above reproach, you may not improve your family's housing because your skin is not white." *Id.* at 9564 (Apr. 10, 1968).

The intent of the bill was summed up by Senator Mondale:

> I emphasize that the 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.

Id. at 3421 (Feb. 20, 1968). He added: "We readily admit that fair housing by itself will not move a single Negro into the suburbs—the laws of economics will determine that." *Id.* at 3422. These legislators' comments show that Congress' purpose in adopting the Fair Housing Act plainly was to prohibit intentional discrimination, and not to remedy the effects of economic disparities.

Further, the Court should not interpret a statute to contradict a previously enacted statute. *See FDA*, 529 U.S. at 137-39 (observing that Congress could not have intended to grant the FDA authority to regulate tobacco products, where doing so would run afoul of previously established congressional policy). The expansion of the Fair Housing Act to include disparate-impact liability against insurers would run

afoul of previously enacted federal legislation. As explained, *infra*, enforcement of the Fair Housing Act, through disparate impact claims that impair state insurance laws, would cause the Act to be "reverse-preempted" by the McCarran-Ferguson Act (McCarran-Ferguson"), 59 Stat. 33 (1945) (codified at 15 U.S.C. §§ 1011, *et seq.*). McCarran-Ferguson prohibits an "Act of Congress" from being construed as invalidating, impairing, or superseding any state insurance law. 15 U.S.C. § 1012(b); *see Am. Ins. Ass'n v. United States Dep't of Hous. & Urban Dev.*, No. 13-00966, 2014 WL 5802283, at *10 (D.D.C. Nov. 7, 2014) (disparate impact claims under the Fair Housing Act would result in insurers violating state law); *Ojo v. Farmers Group, Inc.*, 600 F.3d 1205, 1209 (9th Cir. 2010) (en banc) (application of the Act may be reverse-preempted if it "invalidate[s], impair[s], or supersede[s] the provisions of the Texas Insurance Code"). It is simply illogical to assume that Congress silently intended the Fair Housing Act to encompass disparate impact claims in contradiction of previous legislation.

Statements by individual legislators, and the avoidance of conflict with a previously enacted federal statute, refute any suggestion that the Act was intended to be used as a vehicle to challenge controversial housing decisions not motivated by a discriminatory purpose.

III

DISPARATE IMPACT DOCTRINE CONFLICTS WITH EQUAL PROTECTION AND FEDERALISM

A. Disparate Impact Doctrine Encourages Racial Quotas

This Court's rulings are clear that distinctions between persons based solely upon their ancestry "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214 (1995) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). All racial classifications by government are "inherently suspect," *id.* at 223, and "presumptively invalid." *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993). Accordingly, the core purpose of the Equal Protection Clause is to eliminate governmentally sanctioned racial distinctions. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989).

The decision in *Ricci*, 557 U.S. 557, shows how subjecting government employers to disparate impact claims leads them to engage in unconstitutional race-conscious decision making in an attempt to avoid liability for such claims. In *Ricci*, white and Hispanic firefighters sued New Haven, Connecticut, following the city's refusal to certify promotion examination results because the City feared liability for the disparate racial impact on minority firefighters. The Court condemned that action, holding that the City's race-based decision making violated Title VII. *Ricci*, 557 U.S. at 563. Allowing the City to take race-based actions on a "good faith belief" that its actions are necessary to avoid disparate impact claims would

"amount to a de facto quota system, in which a 'focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures.'" *Id.* at 581-82 (quoting *Watson*, 487 U.S. at 992 (plurality opinion)).

Although the majority opinion did not resolve the tension between equal protection and disparate impact doctrine, Justice Scalia observed in his concurrence that the Court was "merely postponing the evil day" when the Court must decide "whether, or to what extent, are the disparate-impact provisions . . . consistent with the Constitution's guarantee of equal protection." *Ricci*, 557 U.S. at 594 (Scalia, J., concurring). Interpreting the Fair Housing Act to encompass disparate impact claims incontrovertibly conflicts with equal protection.

A disparate impact provision "not only permits but affirmatively requires" race-conscious decision making "when a disparate-impact violation would otherwise result." *Id.* "But if the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties—e.g., . . . whether private, State, or municipal—discriminate on the basis of race." *Id.* (citations omitted). The danger is that "disparate-impact provisions place a racial thumb on the scales, often requiring" state or municipal governments "to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes." *Id.*

Since the Court's ruling in *Ricci*, lower courts have interpreted that decision to reaffirm and emphasize the importance of the disparate-treatment provision of Title VII, rather than its disparate impact provisions.

See Kristina Campbell, *Will "Equal" Again Mean Equal?: Understanding Ricci v. Destefano*, 14 Tex. Rev. L. & Pol. 385, 405 (2010) (citing *United States v. City of New York*, 631 F. Supp. 2d 419, 429 (S.D.N.Y. 2009)). Lower courts have stressed that the purpose of Title VII is to promote hiring on the basis of job qualifications, not on the basis of a protected characteristic, further emphasizing the priority of the disparate-treatment provision over the disparate-impact provision. Campbell, *supra*, at 405 (citing *Jiminez v. Dyncorp Int'l, LLC*, 635 F. Supp. 2d 592, 601 (W.D. Tex. 2009)). Moreover, lower courts have interpreted *Ricci* to hold that evidence that an employer utilized an affirmative action plan may constitute direct evidence of unlawful discrimination, and in such a case, the relevant inquiry is whether the affirmative action plan is valid under both Title VII and the Equal Protection Clause. *Id.* (citing *Humphries v. Pulaski County Special Sch. Dist.*, 580 F.3d 688, 694 (8th Cir. 2009)).

Equal protection considerations are crucial whenever an entity attempts to avoid disparate impact liability. Had the city of New Haven in *Ricci* altered the weights assigned to the written and oral components of its examination, it could have changed the test results so that more minorities would have received higher passing scores and promotions. In doing so, New Haven would have reduced or eliminated a racial disparate impact and escaped liability for any such claims. However, in altering the results to achieve a predetermined outcome, New Haven would have engaged in race-conscious decision making, perhaps even rigging the results to achieve racial quotas. *See* Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2008-2009

Cato Sup. Ct. Rev. 53, 64 (2009) (describing the City's ability to determine the likely racial outcome of alternative testing protocols). Where the government proposes to ensure participation of some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids. *Bakke*, 438 U.S. at 307.

This Court has never upheld racial classifications that aid persons perceived as members of victimized groups at the expense of innocent individuals in the absence of judicial, legislative, or administrative findings of violations of law that the race-based aid was narrowly tailored to remedy. *Bakke*, 438 U.S. at 307 (citations omitted). Without such findings, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. *Id.* at 308-09.

Even before *Ricci*, the Court expressed concern that expansion of the disparate impact doctrine could lead to the adoption of unconstitutional racial quotas. In *Watson*, the Court noted that "preferential treatment and the use of quotas by public employers under Title VII can violate the Constitution." 487 U.S. at 993 (citation omitted) (plurality opinion). Legal rules leaving public and private employers with "little choice" but to adopt race-conscious measures stray "far from the intent of Title VII." *Id.* The Court warned that "[i]f quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted."

Ricci and *Watson* concerned employment practices under Title VII. This case demonstrates that the conflict between disparate impact and equal protection also arises in cases brought pursuant to Title VIII. Here, the issue is whether a state is liable for disparate impact for disproportionately approving tax credits for housing developments in minority neighborhoods, even though it used lawful race-neutral criteria. *Inclusive Communities Project*, 747 F.3d at 279. The district court held the state housing department liable, because the department could add other criteria to reduce racially disproportionate impacts. *Id.* at 280. The court's solution required the state to use race to evaluate the racial outcomes of its tax-credit distribution plan, and apply additional factors to preclude disparate impacts. This is exactly the unconstitutional scenario that Justice Scalia forecast in *Ricci*. *Ricci*, 557 U.S. at 594 (Scalia, J., concurring) (disparate impact doctrine requires states to "place a racial thumb on the scales, . . . evaluate the racial outcomes of [their] policies, and . . . make decisions based on (because of) those racial outcomes").

Magner presented equal protection concerns over the enforcement of city housing codes. There, the City of Saint Paul noted that if a city is subject to disparate-impact claims for enforcing its housing code, it will be required to consider race in its enforcement decisions. *Gallagher v. Magner*, 636 F.3d 380 (8th Cir. 2010), *cert. granted sub nom.*, 132 S. Ct. 548 (Nov. 7, 2011), No. 10-1032, 2011 WL 6813543, at *54 (U.S. Dec. 22, 2011) (Brief for the Petitioners). For example, if the city discovered that a multi-family building has serious structural problems and should be condemned, the city would need to consider the race of the occupants to determine if minorities would be

displaced in a larger proportion than non-minorities. *Id.* If it condemned the building, the city could be sued under the Fair Housing Act on a disparate-impact theory. *See Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 385 (3d Cir. 2011) (court held Township could be liable for disparate impact despite the district court's concern that liability would render the Township powerless to rehabilitate its blighted neighborhoods). If the city decided not to enforce the housing code and that decision was made based on the race of the occupants of the building, the decision may violate the Equal Protection Clause. *Magner*, 2011 WL 6813543, at *54 (Brief for the Petitioners).

The Court's holding in *Smith*, that disparate impact claims are cognizable under the ADEA, does not raise the same constitutional concerns that a similar holding would create here. To avoid liability for disparate impact claims based upon age, government defendants must engage in age-conscious decision making, which is not constitutionally suspect. Race-conscious decisions, on the other hand, are constitutionally suspect because racial equality is explicitly protected by the Constitution, and thereby subject to strict scrutiny. *Compare Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (age classifications required only rational basis review, because police officers over 50 were not a suspect class for purposes of equal protection analysis), *with Adarand*, 515 U.S. at 227 (all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.)

To avoid the clear conflict between disparate impact and the constitutional guarantee of equal

protection, this Court should reject an interpretation of the Fair Housing Act that would permit disparate impact claims. According to the canon of constitutional avoidance, where the construction of a statute would raise serious constitutional problems, it is the Court's duty to adopt a construction which will save the statute from "constitutional infirmity." *Skilling*, 561 U.S. at 423 (Scalia, J., concurring) (citations omitted).

B. HUD's Interpretation Undermines Federalism

The principle of deference is trumped in this case by the "constitutional-doubt canon," which applies doubly here, since the interpretation of the Fair Housing Act in HUD's regulations raises both equal protection and federalism concerns. The Constitution creates a Federal Government of enumerated powers. *See* U.S. Const. art. I, § 8. This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (internal quotation marks omitted). A healthy balance of power between the States and the Federal government reduces "the risk of tyranny and abuse from either front." *Id.* "[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Shelby Cnty, Ala. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (citations omitted). Accordingly, federal statutes impinging upon important state interests "cannot . . . be construed without regard to the implications of our dual system of government." When the Federal government "radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit." *BFP*, 511 U.S. at 544 (citations omitted); *see*

United States v. Bass, 404 U.S. 336, 349-50 (1971) (unless Congress conveys its purpose clearly, it will not be deemed to have altered "sensitive federal-state relationships"); *see also Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (Congress may abrogate state authority only by making its intention unmistakably clear in the language of a statute.)

Interpreting the Fair Housing Act as encompassing disparate impact claims raises federalism concerns, as illustrated by *Magner*. There, disparate impact claims against the City of Saint Paul allowed the federal government to interfere with the city's ability to enforce its own housing code. *See Gallagher v. Magner*, 619 F.3d 823, 830 (8th Cir. 2010) (rental property owners sued city for issuing enforcement orders for inhabitable living conditions including rodent infestation, inadequate sanitation facilities, and inadequate heat). Generally, when the exercise of the state's police power does not infringe upon rights protected by the Federal Constitution through the Fourteenth Amendment, this Court has given traditional deference to exercises of a locality's police power. This presumption of validity stems from a recognition that federal courts should be wary about treading on the spheres of authority that were retained by state and local governments upon admission to the Union. *See Gregory*, 501 U.S. at 457 (describing in detail our nation's system of dual sovereignty). Health and safety concerns are at the very heart of local police powers, and this Court has traditionally given deference to ordinances controlling uses of property to address those specific concerns. *See Fischer v. City of St. Louis*, 194 U.S. 361, 370 (1904) (the authority of municipalities to regulate a place "likely to be injurious

to the health of its inhabitants . . . is so clearly within the police power as to be no longer open to question.").

Additionally, permitting disparate impact liability under the Fair Housing Act raises serious concerns regarding widespread federal encroachment upon state insurance regulation. *See Saunders v. Farmers Ins. Exch.*, 537 F.3d 961, 967 (8th Cir. 2008) (noting that suits "challenging the racially disparate impact of industry-wide rate classifications may usurp core rate-making functions of the State's administrative regime."). The expansion of the Act to include disparate impact liability would disrupt the pricing and provision of homeowner's insurance within each state, and would also require insurers to collect and analyze certain types of race-based data on their clients and prospective clients. *Am. Ins. Ass'n*, 2014 WL 5802283, at *11. State insurance regulations ordinarily prohibit insurers from considering race in the evaluation and pooling of risk, and some states even prohibit insurers from collecting such data. *See*, *e.g.*, Md. Code Ann. § 27-501(c)(1) (prohibiting an insurer from making an inquiry about race, creed, color, or national origin in any manner that relates to an application for insurance).[2] Making insurers liable under a theory of disparate impact discrimination would require those same insurers to collect and evaluate race-based data, thereby engaging in conduct expressly proscribed by state law. *Am. Ins. Ass'n*, 2014 WL 5802283, at *11.

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[2] *See also*, *e.g.*, 215 Ill. Comp. Stat. 5/424(3); Alaska Stat. § 21.36.090; Ky. Rev. Stat. Ann. § 304.12-085; Mass Gen. Laws Ann. ch. 175 § 4C; Me. Rev. Stat. tit. 24-A, § 2303(1)(G); Okla. Stat. Ann. tit. 36, § 985; S.C. Code Ann. § 38-75-1210(B)(1); Tenn. Code Ann. § 56-5-303(a)(2)(d); Tex. Ins. Code Ann. art. 544.002.

An agency's interpretation of a statute is not entitled to deference if such interpretation would raise constitutional questions. *See Miller v. Johnson*, 515 U.S. 900, 923 (1995):

> Although we have deferred to the [Justice] Department's interpretation in certain statutory cases . . . we have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions . . . . When the Justice Department's interpretation of the Act compels race-based districting, it by definition raises a serious constitutional question . . . and should not receive deference.

HUD's interpretations and disparate impact regulations therefore are not entitled to deference. As already discussed, the meaning of the statute is clear: only actual discrimination—"disparate treatment"—is proscribed. This Court defers to an administrative interpretation of a statute only "if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable." *Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491, 508 (1992) (The principle of agency deference "has its limits. Deference does not mean acquiescence."); *see also Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2040 (2012) (overturning HUD's interpretation of the Real Estate Settlement Procedures Act, and criticizing HUD for espousing a position that "goes beyond the meaning that the statute can bear.").

A determination that disparate impact claims are not cognizable under the Fair Housing Act, which is the only reasonable interpretation given the plain

language of the statute and its legislative history, protects the powers of the state and federal governments.[3]

CONCLUSION

For the foregoing reasons, Amici Curiae Pacific Legal Foundation, Center for Equal Opportunity, Competitive Enterprise Institute, Cato Institute, Individual Rights Foundation, Reason Foundation, Project 21, and Atlantic Legal Foundation respectfully urge this Court to hold that disparate impact claims

[3] There are other ways in which a disparate impact approach is inconsistent with the statute's text. *See* Roger Clegg, *Home Improvement: The Court Should Kill an Unfair Housing Strategy With No Basis in Law*, LEGAL TIMES, Vol. 25, Issue 39 (Oct. 7, 2002), *available at* http://www.nationallawjournal.com/id=900005532645/Home-Improvement (last visited Nov. 20, 2014); *see also* Testimony of Roger Clegg Before the House Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties (Apr. 29, 2010), *available at* http://judiciary.house.gov/_files/hearings/pdf/Clegg100429.pdf (last visited on Nov. 20, 2014)

are not cognizable under the Fair Housing Act, and reverse the decision of the court below.

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