NO. 11-1507

IN THE

# Supreme Court of the United States

TOWNSHIP OF MOUNT HOLLY, ET AL.,
*Petitioners*,

v.

MT. HOLLY GARDEN CITIZENS IN ACTION, INC., ET AL.,
*Respondents*.

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

## BRIEF OF CURRENT AND FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DEEPAK GUPTA
*Counsel of Record*
JONATHAN E. TAYLOR
GUPTA BECK PLLC
1625 Massachusetts Ave., NW
Suite 500
Washington, DC 20036
(202) 470-3826
*deepak@guptabeck.com*

*Counsel for Amici Curiae*

October 28, 2013

## QUESTION PRESENTED

Section 804(a) of the Fair Housing Act makes it unlawful "[t]o refuse to sell or rent . . . , 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). This Court limited the grant of certiorari to the following question:

Whether disparate-impact claims are cognizable under § 804(a) of the Fair Housing Act.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Regulations**

**Executive & Legislative Materials**

**Other Authorities**

## INTEREST OF *AMICI CURIAE*[1]

*Amici* are current and former Members of Congress, some of whom voted in favor of the Fair Housing Act, either when it was enacted in 1968 or when it was amended in 1988—including former Senator Edward W. Brooke (R-MA), co-sponsor of the original Act.[2] All agree that the law was intended to prohibit acts or practices that have an unjustified discriminatory *effect* on a person's ability to acquire housing—not just those proven to be motivated by discriminatory *intent*. And all agree that the disparate-impact standard is essential to achieving the Act's stated purpose of providing for fair housing throughout the country, subject only to constitutional limits.

*Amici* file this brief to help the Court understand the Act in its proper historical context. History demonstrates that Congress intended to prohibit *all* forms of discrimination in housing—including actions having the effect of disproportionately denying housing based on a protected characteristic—and it selected language that reflects this intent. In keeping with Congress's intent, the federal government and private parties have for decades used disparate-impact claims to challenge discriminatory housing policies. This case threatens the continued vitality of this key enforcement tool. Without disparate-impact liability, practices that have the same discriminatory consequences as intentional acts of discrimination would be shielded from the reach of the law. Congress did not intend that result.

---

[1] No counsel for a party authored this brief in whole or in part and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

[2] A complete list of *amici* appears in an appendix to this brief.

## SUMMARY OF ARGUMENT

For nearly half a century, it has been well settled that disparate-impact claims are cognizable under § 804(a) of the Fair Housing Act. That is what the Act's sponsors and Members of Congress intended when the law was enacted in 1968 and when it was amended in 1988. It is what all eleven federal circuits to consider the question have held. And it is how the Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ) have consistently enforced the law. Indeed, it is HUD's formal interpretation of the law, set forth in a regulation promulgated after notice-and-comment rulemaking and entitled to deference. For the petitioner to prevail on the question presented, *all* of these authorities would have to be wrong. And not just wrong, but unreasonable. *See Smith v. City of Jackson*, 544 U.S. 228, 243-47 (2005) (Scalia, J., concurring). As this brief will demonstrate, history shows otherwise.

Congress enacted the Fair Housing Act one week after the assassination of Dr. Martin Luther King, Jr., during the riots following his death. Even before the assassination, residential segregation and conditions in urban ghettos—brought about by widespread housing discrimination—had sparked a series of race riots from 1965 to 1967. Fair-housing legislation was necessary to combat these conditions, and Congress recognized that it would have to go further than banning intentional discrimination to be effective.

Section 804(a) makes it unlawful "[t]o refuse to sell or rent" or "otherwise make unavailable or deny" housing to someone "because of race, color, religion, sex, familial status, or national origin." This broad language—which focuses on the consequences of an action, not the mindset of the actor—carries out the Act's broad purpose: "to

provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. As the Act's sponsors put it at the time: By outlawing all the "manifold and insidious ways in which discrimination works its terrible effects," the Act aimed to "undo" the "patterns of racial segregation" in housing that had developed over time, often as a result of practices that were "facially neutral in themselves but ha[d] profound racial effects." 114 Cong. Rec. 2279, 2688, 2699 (1968).

Congress's intent to address discriminatory effects is confirmed by its subsequent actions. In 1988, Congress amended the Act by expanding the scope of prohibited discrimination and adding several exemptions. At that point, Congress was aware of the overwhelming judicial consensus recognizing disparate-impact claims as cognizable under the Act. Nine circuits—every one to consider the issue—had so held. And this Court had held that Title VII of the Civil Rights Act of 1964, which bars employment discrimination, permits disparate-impact liability. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Congress did not express disagreement with this consensus or alter § 804(a)'s disparate-impact standard. Rather, it rejected a proposed intent requirement for zoning—just as it had repeatedly rejected earlier similar proposals. And the exemptions it added—allowing for housing to be denied based on drug convictions, for example—presuppose that no intent requirement exists.

Congress also significantly expanded HUD's enforcement and interpretive authority in 1988, knowing full well that HUD had already taken the position that disparate-impact claims are cognizable under the Act. HUD has since exercised its authority by issuing a formal rule to that effect. Consistent with Congress's clear intent, this Court should hold the same.

The constitutional-avoidance canon—invoked by the petitioner based on equal-protection and federalism concerns—does not dictate a different outcome. That canon gives effect to congressional intent and is applied out of respect for Congress. But, again, Congress's intent here is clear. And applying the canon in this case—where no constitutional claims have been presented, no similar claims have ever been asserted under the Act, and Congress has expressly stated that the Act's remedial scope fully extends to constitutional limits—would show *dis*respect for Congress. The upshot of doing so (no disparate-impact claims) would be the same as reaching the potential constitutional issues not presented here and resolving them against disparate-impact liability in all cases. Rather than achieve that unprecedented result, this Court should enforce the Act as Congress intended and as HUD has interpreted it, and leave any constitutional questions for another day.

## ARGUMENT

### I. Congress Intended to Authorize Disparate-Impact Claims Under the Fair Housing Act.

The Fair Housing Act aims "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. To that expansive end, § 804(a) of the Act makes it unlawful "[t]o refuse to sell or rent . . . , *or otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." *Id.* § 3604(a) (emphasis added). By focusing on the consequences of an action and not the mindset of the actor, this language permits disparate-impact claims. If an act has the effect of "mak[ing]" housing "unavailable" to an individual based on a protected characteristic, then it violates § 804(a)—regardless of whether the actor was motivated

by discrimination. That straightforward reading of the statute is what Congress intended, both when enacting the law in 1968 and amending it in 1988.

### A. Congress Intended to Authorize Disparate-Impact Claims When It Enacted the Fair Housing Act in 1968.

**1. *The need for fair-housing legislation.*** Congress enacted the Fair Housing Act in response to a national crisis: For three straight summers, from 1965 to 1967, race riots had ravaged American cities. In late July 1967—on the last day of the Detroit riots, which resulted in 43 deaths and 7,200 arrests and caused 2,700 Army troops to occupy the city—President Lyndon B. Johnson addressed the American people. *See Report of the National Advisory Commission on Civil Disorders* 100, 106-07 (N.Y. Times ed. 1968). "The only genuine, long-range solution for what has happened," he said, "lies in an attack—mounted at every level—upon the conditions that breed despair and violence." *Id.* at 539 (App. C: Excerpts from President Lyndon B. Johnson's Address to the Nation on Civil Disorders, July 27, 1967). Two days later, he established the National Advisory Commission on Civil Disorders (or Kerner Commission) to investigate the riots' origins and propose recommendations based on its findings. *See* Exec. Order No. 11,365, 32 Fed. Reg. 11,111 (July 29, 1967).

Even before the Kerner Commission's investigation, Congress identified racial segregation in housing as an underlying cause of the violence—a root problem with profound societal effects. As Senator Walter Mondale (D-MN) explained at the time, residential segregation had made it impossible "to solve the problems of de facto school segregation, slum housing, crime and violence, disease, blight, and pollution." 113 Cong. Rec. 22,841

(1967). In doing so, it had "drastically and seriously" impeded "every solution and every plan for the multiple evils in our cities and their ghettos." *Id.*

Other Members of Congress agreed: *Amicus* Senator Edward W. Brooke (R-MA), who co-sponsored the original Fair Housing Act with Senator Mondale, stated that "residential segregation [had] become central to" the country's "major domestic problems," making it "the key question" of the 1960s. 114 Cong. Rec. 2688 (1968). And Senator Robert F. Kennedy (D-NY) described residential segregation's "incalculable" "insidious effect"—that it "impose[d] de facto segregation across our national life," which gave rise to the "tangible effects of crisis." *Id.* at 2085.[3]

To Congress, these effects could only be remedied by enacting comprehensive fair-housing legislation. This legislation would not be limited to eradicating only intentional discrimination. Rather, Congress aimed to eliminate discrimination in all its forms—whether intentional or not—and to reverse the segregated living patterns that had precipitated the crisis and had been exacerbated by government policies, many of which were "facially neutral in themselves but ha[d] profound racial effects." *Id.* at 2688 (Sen. Brooke).

Indeed, Congress was presented with research showing that "discrimination *per se* was only a small

---

[3] In Detroit, for example, the effects of residential segregation "were profound." Thomas J. Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit* 228 (1996). "The physical separation of blacks and whites in the city perpetuated inequality in housing and access to jobs" and "reinforced the ideology of race"—creating what residents called "invisible stone walls of prejudice" throughout the city that, "despite their invisibility," were "well known" to all. *Id.* at 228-29.

factor in the impact of federal policies and practices upon racial patterns." *Id.* "Much more important were more basic aspects of the structure and functioning of federal housing programs"—like those extending home-loan benefits to families meeting certain criteria, which "helped promote white dominance in the suburbs"; those providing "subsidized low-income public housing," which "reinforce[d]" this "effect[] upon patterns of residence"; and those promoting "urban renewal." *Id.* at 2688-89. "These regulations and directives clearly represent[ed] a large stride forward from the directly discriminatory policies pursued before 1950," but "their practical effect" was the same given "the rigid patterns of segregation that had developed over the years." *Id.* at 2690.[4]

Through fair-housing legislation, Congress sought to combat the "practical effect" of facially neutral actions—not just eliminate overt discrimination. *Id.* at 2278. The "goal," Senator Mondale stated, was to "undo the effects" of past "discriminatory actions" and become "an integrated society . . . free of the conditions which spawn riots." *Id.* at 2699; *id.* at 3422. And "the best way" to do that was to enact legislation "declaring that we have had the last of segregation in the sale and rental of living quarters in our country." *Id.* at 3422; *id.* at 2279.

2. ***The Fair Housing Act is proposed.*** In August 1967, Congress held hearings on fair-housing legislation proposed by Senator Mondale. *See* Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 Washburn L.J. 149, 149 (1969). Senator Mondale's bill—the precursor to the Fair Housing Act—

---

[4] These facially neutral policies, Senator Mondale explained, were "developed by this country in the immediate post World War II era." 114 Cong. Rec. 2278 (1968). Although many of these policies had ended by the late 1960s, their impact remained. *See id.*

included a provision making it unlawful "to refuse to sell or rent . . . , or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin." S. 1358, 90th Cong. § 4(a) (1967). This language, identical to the language ultimately included in the Act, focused on an action's discriminatory *effect*—whether it "ma[d]e" housing "unavailable" to someone because he or she is a member of a protected group. The language did not also require proof of the actor's *intent*, nor did Congress want it to.

Witnesses explained why an intent requirement would have rendered the law ineffective in combatting practices that led to segregated housing. "The ghetto pattern," explained one witness who supported the bill, "goes beyond individual prejudices." *Fair Housing Act of 1967: Hearing before the S. Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking and Currency*, 90th Cong. 174 (1967) (statement of Algernon Black). It is systemic. It "comes from the policies of the industry reinforced by government," which are rarely "written down" or made explicit. *Id.* They exist instead "in the minds of the banks and the lending institutions, the builders, [and] the real estate brokers," and are "at work in the principles of the real estate boards." *Id.* Because of these ingrained and implicit biases—pervasive yet difficult to prove—one "can go across this country and find almost every city," in practical effect, "zoned racially." *Id.*; *see also id.* at 133 (statement of Jefferson B. Fordham) (supporting bill as necessary to eliminate "obstacle of discriminatory practice"); 114 Cong. Rec. 2277 (1968) (Sen. Mondale) (recounting testimony of "several witnesses" frustrated by policies under which race was never "given as a reason" for denying housing, "but always it was absolutely obvious that no other good reason could be given").

A few months after these hearings, in early 1968, Senator Mondale reintroduced his bill, now co-sponsored by Senator Brooke. *Id.* at 980-83. They called on Congress to act quickly given "the grave urgency of the urban crisis." *Id.* at 2274; *see also id.* at 2281 (Sen. Brooke) ("If we are to avoid a recurrence of this unsightly, unconscionable bitterness between white and black Americans, it is [i]ncumbent upon our Government to act, and to act now."). And President Johnson renewed his support for fair-housing legislation as well. *See* Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 192 (1993). During a short filibuster, Senator Everett Dirksen (R-IL) proposed a compromise bill—the Fair Housing Act—that weakened HUD's enforcement authority but left in place the core anti-discrimination provision.

As before, Congress intended this provision to regulate actions based on their practical effects. Senator Kennedy, for example, speaking in support of the Act, repeatedly focused on discriminatory effects and the inability of state and local laws to eradicate them: "State and local governments are frequently unwilling to alter this pattern. In one northern, liberal city, for example, a fair-housing ordinance has been in existence for 16 years. Yet most of its housing projects were more than 90 percent occupied by either white or Negro residents. Similar patterns persist across America." 114 Cong. Rec. 2085 (1968). Senator Brooke said the same: "Many States have now outlawed racial discrimination by realtors in the sale or rental of housing," but "[t]hese laws have, as yet, had no measurable effect in breaking down patterns of racial segregation." *Id.* at 2279-80. "Witness after witness" had recently "testified that the insult of racially segregated housing patterns creates a

sense of rage and frustration and a crisis which contributes enormously to the explosiveness of these communities." *Id.* at 2274-75 (Sen. Mondale). They pleaded that the "outrageous insult of segregated racial living patterns be removed from American society." *Id.*

The original sponsors of the Fair Housing Act wanted it to do just that. To Senator Mondale, the Act's purpose was to replace the segregated living patterns with "truly integrated and balanced living patterns." *Id.* at 3422. It was intended to address housing segregation brought about either by overt racial animus *or* by "frozen rules" and "[o]ld habits," like the "refusal by suburbs and other communities to accept low-income housing"—a facially neutral practice with discriminatory effects. *Id.* at 3421; *id.* at 2277. Senator Brooke shared these views. To him, the Act "recognize[d] the manifold and insidious ways in which discrimination works its terrible effects," and aimed to undo the "practical result" of discriminatory policies and break the "dreary cycle of the middle-class exodus to the suburbs and the rapid deterioration of the central city." *Id.* at 2279-80. Consistent with these goals, the Act stated that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601.

Congress's rejection of the "Baker amendment" further illustrates that Congress did not intend for the Act to require proof of discriminatory intent. *See id.* at 5214-22. This amendment would have expanded an exemption for individuals selling property without a real estate agent to also cover those who hired an agent but could not be proven to have intentionally discriminated in their use of that agent. *Id.* at 5220. Senator Charles Percy (R-IL) denounced this proposed amendment

because "it would require proof that a single homeowner had specified racial preference," which "would be impossible to produce." *Id.* at 5216. The Senate swiftly rejected the amendment. *Id.* at 5222.

3. ***The Fair Housing Act is enacted.*** On March 1, 1968—one day after Senator Dirksen proposed his compromise bill—the Kerner Commission released its report. Although President Johnson had given the Commission until July 29 to submit its recommendations, the Commission—whose members included sponsor Senator Brooke and several other supporters of the Fair Housing Act—"believe[d] that to wait until mid-summer to present [its] findings and recommendations" would "forfeit" the "opportunity" to influence the national debate. *Report of the National Advisory Commission on Civil Disorders*, at 31-32.[5]

The Commission's "basic conclusion" was blunt: "Our nation is moving toward two societies, one black, one white—separate and unequal." *Id.* at 1. This was in large part due to systemic and "[p]ervasive discrimination and segregation in . . . housing"—"[t]he corrosive and degrading effects" of which were "at the center of the problem of racial disorder." *Id.* at 8, 10, 203. "Segregation and poverty have created in the racial

[5] The Commission's other members were Otto Kerner (Governor of Illinois), John Lindsay (Mayor of New York City), Sen. Fred Harris (D-OK), Rep. William McCulloch (R-OH), Rep. James Corman (D-CA), Charles Thornton (Chairman, Litton Industries), Roy Wilkins (Executive Director, NAACP), Herbert Turner Jenkins (Chief of Police, Atlanta), Katherine Graham Peden (Commissioner of Commerce, Kentucky), and I.W. Abel (President, U.S. Steelworkers of America). *See* Exec. Order No. 11,365, 32 Fed. Reg. 11,111. At the time, the Commission's membership "was severely criticized for its moderate character." *Report of the National Advisory Commission on Civil Disorders*, at v.

ghetto a destructive environment totally unknown to most white Americans. What white Americans have never fully understood but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it." *Id.* at 2.

Immediate congressional action was necessary. "To continue present policies is to make permanent the division of our country into two societies; one, largely Negro and poor, located in the central cities; the other, predominantly white and affluent, located in the suburbs and in outlying areas." *Id.* at 22. The report urged adoption of federal "programs designed to encourage integration" and "overcom[e] the prevailing patterns of racial segregation." *Id.* at 22, 28. It recommended "[o]pening up opportunities to those who are restricted by racial segregation and discrimination, and eliminating all barriers to their choice of jobs, education and housing." *Id.* at 23. To further these goals, the report implored Congress to enact "a comprehensive and enforceable federal open housing law to cover the sale or rental of all housing." *Id.* at 28.

The Commission's report—and the "maelstrom of publicity and debate" that it generated—"greatly strengthened the growing consensus within Congress" about the need for fair-housing legislation. Massey & Denton, *American Apartheid*, at 193. "After a last-minute flurry of amendments on the extent of coverage, cloture was finally voted on March 4," and the Senate passed the Fair Housing Act. *Id.*

One month later, while the House of Representatives debated the Act, Dr. Martin Luther King Jr. was assassinated as he stood on the balcony of the Lorraine Motel in Memphis, sparking a fresh round of riots

nationwide and further heightening the sense of urgency. *Id.* at 194. Nearly two dozen representatives immediately changed positions and "urge[d] passage" of the Act. *Id.* Within one week of Dr. King's assassination, "with armed National Guardsmen still quartered in the basement of the Capitol" to protect it from surrounding violence, the House passed the Act and President Johnson signed it into law. *Id.*; *see* Civil Rights Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73.

### B. Congress Intended to Continue Authorizing Disparate-Impact Claims When It Amended the Fair Housing Act in 1988.

In keeping with the Fair Housing Act's text and purpose, federal courts of appeals soon began holding that § 804(a) prohibits actions having the effect of disproportionately denying housing based on a protected characteristic, without regard to whether intentional discrimination can be proven. *See United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1288-89 (7th Cir. 1977); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146-47 (3d Cir. 1977). And this Court held that Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241—which was enacted just before the Fair Housing Act—authorizes disparate-impact claims in the context of employment discrimination. *See Griggs*, 401 U.S. at 431 (1971); *see also Watson v. Forth Worth Bank & Trust*, 487 U.S. 977, 990-991 (1988) (if a practice "has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply").[6] Congress's actions after these decisions

[6] Section 703(a)(2) of Title VII makes it unlawful for an

make clear that it was aware of the emerging consensus on disparate-impact theory, and that it approved.

**1.** ***Congress repeatedly rejects proposed intent requirements.*** In 1980, an amendment to the Fair Housing Act was proposed that would have expanded enforcement mechanisms and added another protected group (the disabled). H.R. Rep. No. 96-865, at 36 (1980). The amendment also would have exempted minimum lot-size requirements from disparate-impact liability—a narrow exception signaling that Congress understood and intended that the Act generally includes such liability. *Id.* The House Judiciary Committee's report on the amendment provides confirmation: It says that the Act "effectively proscribed housing practices with the intent *or effect* of discriminating on account of race, color, national origin or religion." *Id.* at 2 (emphasis added).

As Congress debated this proposed amendment, Senator Orrin Hatch (R-UT) expressed "major concern" that the Act did not have an intent requirement. 126 Cong. Rec. 31,171 (1980). He proposed language that would have "required that the Federal Government make some showing that the practice was adopted or continued or rejected for an unlawful purpose." *Id.* The sponsors of the original amendment strongly disagreed that an intent requirement was appropriate. Senator Birch Bayh (D-IN) explained that this "would make a

---

employer "to limit, segregate, or classify his employees in any way" that would "deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2). Like § 804(a) of the Fair Housing Act, this section looks at outputs, not inputs: whether an action would "otherwise adversely affect" an employee "because of" a specified characteristic.

radical change in the standard of proof" for cases brought under the Act. *Id.* at 31,164. He cited judicial decisions recognizing disparate-impact claims under Title VII—a statute that he called "the functional equivalent of the fair housing law." *Id.* And Senator Charles Mathias (R-MD) read into the record a letter he had received from the HUD Secretary describing disparate-impact liability under the Act and explaining that this liability is "imperative to the success of civil rights law enforcement." *Id.* at 31,166-67. Congress rejected both Senator Hatch's proposed intent requirement and the original amendment.

Over the next decade, Senator Hatch repeatedly asked Congress to overrule the judicial recognition of disparate impact and add an intent requirement to the Act—and Congress repeatedly said no. In 1981, 1983, and 1985, he proposed an amendment that would have added: "Nothing in this title shall prohibit any action unless such action is taken with the intent or purpose of discriminating against a person on account of race, color, religion, sex, handicap, or national origin." 127 Cong. Rec. 22,156 (1981); 129 Cong. Rec. 808 (1983); S. 139, 99th Cong. § 6(e) (1985). This provision, Senator Mathias later recalled, would have marked "a radically different approach" that would have "required the courts to use an 'intent test' to determine whether fair housing violations had occurred"—"a much more difficult standard to prove" than what the Act had always required. Charles Mathias & Marion Morris, *Fair Housing Legislation: Not an Easy Road To Hoe*, Cityscape: A Journal of Policy Development and Research, HUD, Vol. 4, No. 3, at 28 (1999). As before, Congress rejected (all three times) Senator Hatch's proposed amendment. Congress did so once more in 1987, when he again tried to insert an intent requirement into the Act. *See* 133 Cong. Rec. 7180.

**2. *Congress amends the Act and confirms the consensus on disparate impact.*** In August 1988, by a vote of 94 to 3, Congress amended the Fair Housing Act to significantly expand HUD's authority, extend the scope of prohibited discrimination, and add several statutory exemptions. Pub. L. No. 100-430, 102 Stat. 1619. By that time, nine federal circuits had held that the Act prohibited disparate impact.[7] None had held to the contrary. And HUD and DOJ had also interpreted the Act to authorize disparate-impact claims.[8]

Congress was aware of this consensus. *See, e.g.*, H.R. Rep. No. 100-711, at 21 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 2182 (citing circuit decisions when discussing policy with potential "discriminatory effect");

---

[7] *See Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934-35 (2d Cir. Apr. 5, 1988), *aff'd in part*, 488 U.S. 15 (1988); *Rizzo*, 564 F.2d at 146-47 (3d Cir. 1977); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565, 575 (6th Cir. 1986); *Village of Arlington Heights*, 558 F.2d at 1288-89 (7th Cir. 1977); *City of Black Jack*, 508 F.2d at 1184-85 (8th Cir. 1974); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1559 n.20 (11th Cir. 1984). Two more circuits were first confronted with the question after the 1988 amendments. They joined the ranks of their sister circuits, bringing to eleven those that have held that disparate-impact claims are cognizable under the Act. *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, 1251 (10th Cir. 1995). The D.C. Circuit has yet to resolve the issue. *See 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673, 681 (2006).

[8] *See* 126 Cong. Rec. 31,166-67 (1980) (Sen. Mathias reading letter from HUD Secretary into record describing disparate-impact liability and explaining that it is "imperative to the success of civil rights law enforcement"); *see also* Resp. Br. 4 n.2 (HUD); *City of Black Jack*, 508 F.2d at 1186 (8th Cir. 1974) (DOJ).

134 Cong. Rec. 23,711 (1988) (Sen. Kennedy) (noting unanimity of federal circuits concerning disparate impact); *Fair Hous. Amendments Act of 1987: Hearings Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 100th Cong. 529-557 (1987) (statement of Robert Schwemm) (describing consensus judicial view that the Act prohibited disparate-impact discrimination). Against this backdrop, Congress did not express disagreement or alter the Act's disparate-impact standard. It amended § 804 of the Act to prohibit additional discriminatory practices and added familial status to the list of protected groups in § 804(a)—yet it did not amend § 804(a) to include an intent requirement.

Instead, Congress once again rejected an attempt to add an intent requirement—this time in the context of zoning. *See* H.R. Rep. No. 100-711, at 89 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 2224; *see also id.* at 25, *reprinted in* 1988 U.S.C.C.A.N. at 2186 ("The Committee understands that housing discrimination . . . is not limited to blatant, intentional acts of discrimination. Acts that have the effect of causing discrimination can be just as devastating as intentional discrimination.").[9] Senator Edward Kennedy (D-MA), "the principal Senate sponsor of the 1988 act," "state[d] unequivocally that Congress contemplated no such intent

[9] During debate on this amendment, Members discussed circuit decisions holding that the Fair Housing Act includes a disparate-impact standard—once again showing that Congress understood that courts had interpreted the Act to allow disparate-impact claims. *See id.* at 90, *reprinted in* 1988 U.S.C.C.A.N. at 2225; *id.* at 21, *reprinted in* 1988 U.S.C.C.A.N. at 2182 ("Because minority households tend to be larger and exclusion of children often has a racially discriminatory effect, two federal courts of appeal have held that adults-only housing may state a claim of racial discrimination under Title VIII.").

requirement." 134 Cong. Rec. 23,711 (1988). He explained that "[a]ll of the Federal courts of appeal that have considered the question have concluded that title VIII should be construed, at least in some instances, to prohibit acts that have discriminatory effects, and that there is no need to prove discriminatory intent." *Id.*

Congress also added § 804(f)(1) of the Act, which uses the same language—"to otherwise make unavailable or deny"—that courts had unanimously held encompasses disparate-impact claims.[10] Moreover, Congress created three exemptions premised on the availability of these claims: One states that "[n]othing in this title 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." 42 U.S.C. § 3607(b)(4). Another states that "[n]othing in this title limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." *Id.* § 3607(b)(1). And one allows for "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." *Id.* § 3605(c).

These exemptions would be superfluous if intentional discrimination were required: The first two concern facially neutral criteria—drug convictions and maximum-occupancy restrictions—that would likely have a disproportionate effect based on covered characteristics (including race, national origin, disability, and familial status). And the third would be unnecessary if intent were required because an appraiser would

[10] This section expands the list of protected traits by prohibiting discrimination based on "handicap." 42 U.S.C. § 3604(f)(1).

*always* be able "to take into consideration factors" other than the protected characteristics themselves.

**3.** ***1988 amendments expand HUD's authority.*** The 1988 amendments also significantly enhanced HUD's authority to enforce and implement the Act, giving the agency powers that went beyond even those provided in the original 1968 Act sponsored by Senators Mondale and Brooke. These powers had been greatly weakened by the compromise legislation, and this subsequently came to be viewed as a "serious weakness" of the Act, as "extensively documented in Congressional hearings conducted in 1971 and 1972 and by exhaustive studies prepared by the U.S. Commission on Civil Rights in 1974 and 1979." Massey & Denton, *American Apartheid*, at 209-10. Congress fixed this problem by giving the agency the power to conduct formal adjudications of complaints and to issue regulations interpreting the Act. *See Id.* § 3608(a). And it did so fully aware that HUD had interpreted the Act to permit disparate-impact liability, which HUD had told Congress was "imperative" to the Act's successful enforcement. 126 Cong. Rec. 31,166-67 (1980); *see also* Resp. Br. 4 n.2.[11]

Indeed, HUD has *never* (either before 1988 or after) taken the position that the Fair Housing Act prohibits only overt discrimination. *See Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11,460, 11,467 (Feb. 15, 2013). It has consistently exercised its statutory authority by interpreting the Act to authorize disparate-impact claims. *Id.* at 11,1461-62. And in February 2013, HUD

[11] The Act also "expanded the role of the Department of Justice in fair housing enforcement." Massey & Denton, *American Apartheid*, at 211. Like HUD, DOJ had enforced the Act to include a disparate-impact standard. *See City of Black Jack*, 508 F.2d at 1186.

formalized its longstanding interpretation by promulgating a final rule adopting that interpretation. At no point during this time has Congress withdrawn or curtailed HUD's authority, amended the Act, or otherwise signaled disagreement with HUD's interpretation of it. *Id.* at 11,466 & 11,482. This Court should defer to that interpretation. *See City of Jackson*, 544 U.S. at 243-47 (Scalia, J., concurring).

## II. The Canon of Constitutional Avoidance Should Play No Role In This Case.

Against the weight of all this history, the petitioner argues that the Fair Housing Act should no longer be read to authorize disparate-impact claims because doing so "would raise serious questions" under the Equal Protection Clause and the Tenth Amendment. Pet'r Br. 39. But the constitutional-avoidance canon does not compel a reading of the statute that "is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). As discussed above, Congress repeatedly made clear that it did *not* intend to limit the Act to intentional discrimination. Constitutional avoidance is "a means of giving effect to congressional intent, not of subverting it." *Clark v. Martinez*, 543 U.S. 371, 382 (2005). And the subversion of congressional intent would be especially acute here because Congress stated its intent to extend the Fair Housing Act's remedial scope to the full extent of "constitutional limitations." 42 U.S.C. § 3601. Thus, while the avoidance "canon is followed out of respect for Congress," *Rust v. Sullivan*, 500 U.S. 173, 191 (1991), its application here would show *dis*respect for Congress.

Nor does constitutional avoidance justify casting aside bedrock principles of agency deference in this case,

particularly given Congress's decision in 1988 to delegate authority to HUD against the backdrop of a strong consensus (both in the agency and the courts) that the Act authorizes disparate-impact claims. Because HUD's regulations "do not raise the sort of grave and doubtful constitutional questions that would lead [this Court] to assume Congress did not intend to authorize their issuance," the Court "need not invalidate the regulations in order to save the statute from unconstitutionality." *Id.*

Indeed, the constitutional concerns here are purely hypothetical. Not only has no constitutional challenge been properly presented in this case, but similar concerns have not been raised in other disparate-impact cases under the Act since its enactment in 1968. To the extent that these concerns are nevertheless legitimate, they may be raised as a defense to liability on the facts of a particular case, *see Ricci v. DeStefano*, 557 U.S. 557, 593 (2009), or incorporated into whatever statutory framework the Court ultimately adopts for disparate-impact claims—a question not before the Court today. But they should not be addressed in a vacuum. *See Yazoo & M.V.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219 (1912) ("[T]his court must deal with the case in hand and not with imaginary ones"). To address speculative and hypothetical constitutional questions in the name of constitutional-avoidance principles would turn those principles on their head. Such an approach would run headlong into "the fundamental principle of judicial restraint" that courts should not "'anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

On the question presented here—whether disparate-impact claims are cognizable under § 804(a) of the Fair Housing Act—this Court should enforce the statute as Congress intended and as the agency charged with its enforcement has interpreted it, and save any constitutional questions for a case in which they are actually presented.

## CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

DEEPAK GUPTA
*Counsel of Record*
JONATHAN E. TAYLOR
GUPTA BECK PLLC
1625 Massachusetts Ave., NW
Washington, DC 20036
(202) 470-3826
*deepak@guptabeck.com*

*Counsel for Amici Curiae*

October 28, 2013

## APPENDIX: LIST OF *AMICI CURIAE*

*Amici curiae* include the following current and former Members of Congress:

- Senator **Edward W. Brooke**, co-sponsor of the Fair Housing Act of 1968 (in office 1967-1979)

- Representative **John Conyers, Jr.**, Ranking Member, House Committee on the Judiciary (in office since 1965)

- Representative **George Miller**, Ranking Member, House Committee on Education and the Workforce (in office since 1975)

- Representative **Jerrold Nadler**, Ranking Member, Subcommittee on the Constitution and Civil Justice, House Committee on the Judiciary (in office since 1992)

- Representative **Maxine Waters**, Ranking Member, House Committee on Financial Services (in office since 1991)

- Representative **Michael E. Capuano**, Ranking Member, Subcommittee on Housing and Insurance, House Committee on Financial Services (in office since 1999)

- Representative **Charles B. Rangel** (in office since 1971)

- Representative **Jim Cooper** (in office 1983-1995, and since 2003)