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**

BRIEF *AMICUS CURIAE* OF THE PROJECT ON FAIR REPRESENTATION IN SUPPORT OF PETITIONERS

WILLIAM S. CONSOVOY
Counsel of Record
THOMAS R. MCCARTHY
BRYAN K. WEIR
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000
wconsovoy@wileyrein.com

*Attorneys for Amicus Curiae
Project on Fair Representation*

September 3, 2013

249340

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 6

I. Interpreting The Fair Housing Act To Authorize Disparate-Impact Claims Would Raise Serious Equal-Protection Concerns 6

II. The Court Should Require A Clear Congressional Statement Before Interpreting Any Federal Law To Authorize Disparate-Impact Claims 19

III. The Canon of Constitutional Avoidance Overrides Any Deference To Which HUD Might Otherwise Be Entitled 25

CONCLUSION 29

TABLE OF CITED AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Peña,
515 U.S. 200 (1995). . . . . *passim*

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975). 12, 18

Alexander v. Sandoval,
532 U.S. 275 (2001). 2, 7

Am. Bar Ass'n v. FTC,
430 F.3d 457 (D.C. Cir. 2005) 26, 27

Arizona v. Inter Tribal Council of Ariz. Inc.,
133 S. Ct. 2247 (2013). 21

Atascadero State Hosp. v. Scanlon,
473 U.S. 234 (1985). 4, 20, 23, 24

Blatchford v. Native Vill. of Noatak,
501 U.S. 775 (1991) 20

Bolling v. Sharpe,
347 U.S. 497 (1954). 27

Brown v. Bd. of Educ.,
349 U.S. 294 (1955). 9

Chevron, U.S.A., Inc. v. NRDC, Inc.,
467 U.S. 837 (1984). 26

Cited Authorities

Page

City of Boerne v. Flores,
521 U.S. 507 (1997). 4, 17

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989)0. . . . . .6, 11, 15, 27

Connecticut v. Teal,
457 U.S. 440 (1982). 3, 9, 15

Crawford v. Marion Cnty. Election Bd.,
553 U.S. 181 (2008). 16

Dellmuth v. Muth,
491 U.S. 223 (1989). 20, 21, 22, 25

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trade Council,
485 U.S. 568 (1988). 5, 26, 27

EEOC v. Arabian Am. Oil Co.,
499 U.S. 244 (1991). 20, 21

El v. Se. Pa. Transp. Auth.,
479 F.3d 232 (3rd Cir. 2007) .12

Emps. of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare,
411 U.S. 279 (1973) 22

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000). 27

Page

Fisher v. Univ. of Tex. at Austin,
133 S. Ct. 2411 (2013) 1, 3, 11

FTC v. Am. Tobacco Co.,
264 U.S. 298 (1924) 26

Furnco Constr. Corp. v. Waters,
438 U.S. 567 (1978) 9, 15

Georgia v. Ashcroft,
539 U.S. 461 (2003) 4, 19

Gomillion v. Lightfoot,
364 U.S. 339 (1960) 17

Gratz v. Bollinger,
539 U.S. 244 (2003) 11

Gregory v. Ashcroft,
501 U.S. 452 (1991) 21, 22

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

Harding v. Gray,
9 F.3d 150 (D.C. Cir. 1993) 10

Hernandez v. New York,
500 U.S. 352 (1991) 16

Page

Hilton v. S.C. Pub. Rys. Comm'n,
502 U.S. 197 (1991) 22

Hirabayashi v. United States,
320 U.S. 81 (1943) 6

INS v. St. Cyr,
543 U.S. 289 (2001) 4, 20, 21, 22, 25

Int'l Bhd. of Teamsters v. United States,
431 U.S. 324 (1977) 9

Johnson v. Robison,
415 U.S. 361 (1974) 20

Ky. Ret. Sys. v. EEOC,
554 U.S. 135 (2008) 28

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994) 22

Langlois v. Abington Hous. Auth.,
207 F.3d 43 (1st Cir. 2000) 18

Livingston v. Roadway Express, Inc.,
802 F.2d 1250 (10th Cir. 1986) 10

Loving v. Virginia,
388 U.S. 1 (1967) 6

Page

McCleskey v. Kemp,
481 U.S. 279 (1987) 18

McDonald v. Santa Fe Trail Transp. Co.,
427 U.S. 273 (1976) 9

MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.,
512 U.S. 218 (1994) 27

MD/DC/DE Broad. Ass'n v. FCC,
236 F.3d 13 (D.C. Cir. 2001) 16

Meacham v. Knolls Atomic Power Lab.,
554 U.S. 84 (2008) 8

Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.,
501 U.S. 252 (1991) 8

Miller v. Johnson,
515 U.S. 900 (1995) . . . . *passim*

Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 28

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012) 24

Negusie v. Holder,
555 U.S. 511 (2009) 27

Page

New York v. United States,
505 U.S. 144 (1992) 24

NRDC v. Reilly,
983 F.2d 259 (D.C. Cir. 1993) 26

Nw. Austin Mun. Util. Dist. No. One v. Holder,
557 U.S. 193 (2009) 1

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1,
551 U.S. 701 (2007) 1, 16

Perry v. Perez,
132 S. Ct. 934 (2012) 1

Phelan v. City of Chi.,
347 F.3d 679 (7th Cir. 2003) 10

Rapanos v. United States,
547 U.S. 715 (2006) 22-23, 23

Raytheon Co. v. Hernandez,
540 U.S. 44 (2003) 5, 9

Rewis v. United States,
401 U.S. 808 (1971) 22, 23

Ricci v. DeStefano,
557 U.S. 557 (2009) . . . . *passim*

Cited Authorities

Page

Riley v. Kennedy,
553 U.S. 406 (2008) 1

Rust v. Sullivan,
500 U.S. 173 (1991) 26

Salazar v. Buono,
559 U.S. 700 (2010) 21

Seminole Tribe of Fla. v. Florida,
517 U.S. 44 (1996) 20

Shaw v. Reno,
509 U.S. 630 (1993). 6

Shelby Cnty. v. Holder,
133 S. Ct. 2612 (2013). 1, 12

Shelley v. Kraemer,
334 U.S. 1 (1948). 6

Smith v. City of Jackson,
544 U.S. 228 (2005) 24, 25

Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs,
531 U.S. 159 (2001) 20, 22

Taken v. Okla. Corp. Comm'n,
125 F.3d 1366 (10th Cir. 1997). 10

Cited Authorities

Page

U.S. ex rel. Attorney Gen. v. Del. & Hudson Co.,
213 U.S. 366 (1909) 26

United States v. Bass,
404 U.S. 336 (1971) 20, 22, 23

United States v. Heth,
3 Cranch 399 (1806) 20-21

United States v. Nixon,
418 U.S. 683 (1974) 21

Univ. of Tex. Sw. Med. Ctr. v. Nassar,
133 S. Ct. 2517 (2013) 28

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,
429 U.S. 252 (1977). 4, 16, 17, 18

Wards Cove Packing Co. v. Atonio,
490 U.S. 642 (1989). 3, 11, 12

Washington v. Davis,
426 U.S. 229 (1976). 4, 16

Watson v. Fort Worth Bank & Trust,
487 U.S. 977 (1988). 7-8, 11, 12

Will v. Mich. Dep't of Police,
491 U.S. 58 (1989) 20, 23

Page

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 17

STATUTES

42 U.S.C. § 2000d 7

42 U.S.C. § 2000e-2 7

42 U.S.C. § 3604 7

29 C.F.R. § 1607.4 18

OTHER AUTHORITIES

Alexander Bickel, *The Morality of Consent* (1975) 16

Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 Nw. U. L. Rev. 1505 (2004) 10

Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947) 23

John J. Donahue, *Understanding the Reasons For and Impact of Legislatively Mandated Benefits for Selected Workers*, 53 Stan. L. Rev. 897 (2001) 10

INTEREST OF *AMICUS CURIAE*[1]

The Project on Fair Representation ("The Project") is a public interest organization dedicated to the promotion of equal opportunity and racial harmony. The Project works to advance race-neutral principles in education, public contracting, public employment, and voting. Through its resident and visiting academics and fellows, The Project conducts seminars and releases publications relating to the Voting Rights Act and the Equal Protection Clause. The Project has been involved in cases before this Court involving these important issues. *See, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013). The Project has submitted amicus briefs in cases before this Court as well. *See, e.g.*, *Perry v. Perez*, 132 S. Ct. 934 (2012); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Riley v. Kennedy*, 553 U.S. 406 (2008).

The Project has a direct interest in this case. The Project opposes government-imposed racial preferences, including with regard to public housing. Such racial preferences, which would result from interpreting the Fair Housing Act to authorize disparate-impact claims, run contrary to the principles to which The Project is dedicated and to the American ideal of individual equality

---

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, or its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

to which The Project is profoundly committed. For these reasons, The Project respectfully submits this brief and urges the Court to reverse the decision below.

SUMMARY OF THE ARGUMENT

Petitioners have thoroughly explained why Section 804(a) of the Fair Housing Act does not permit disparate-impact claims. *See* Brief for Petitioners at 16-24 ("Pet. Br."). Like analogous provisions in Title VI and Title VII of the Civil Rights Act of 1964, the Fair Housing Act protects individuals against intentional discrimination on the basis of race, ethnicity, and other prohibited bases. The statute does not impose liability for non-discriminatory practices with a disproportionate effect. No fair reading of the text could lead to a contrary conclusion.

But even if fidelity to Section 804(a)'s text were somehow insufficient to reverse the judgment below, the equal-protection concerns associated with disparate-impact liability should weigh heavily against the Third Circuit's broad interpretation. The Constitution affords each person the right to equal treatment under the law. Official action that intentionally discriminates on the basis of race violates that fundamental rule absent a compelling justification. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). And a series of federal statutes extend that ban on intentional discrimination not only to the housing sector, but also to the workplace, to recipients of federal funds, and to other areas. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

Disparate-impact laws run contrary to that norm for several reasons. *See Ricci v. DeStefano*, 557 U.S. 557, 594-96 (2009) (Scalia, J., concurring). Foremost, they treat people as members of a racial group—not as individuals. Laws creating liability based on how racial groups fare under neutral practices that treat all individuals equally are constitutionally suspect. Worse still, some courts have interpreted Title VII's disparate-impact provision (on which Respondents claim Section 804(a) is modeled) either to exclude non-minorities from its protection altogether or to create special hurdles for "favored" groups to overcome in bringing "reverse discrimination" claims. Either way, such differential treatment on the basis of race must be strictly scrutinized. *See Fisher*, 133 S. Ct. at 2419-20.

Disparate-impact provisions are even more troubling in practice. They place incredible pressure on those within their regulatory ambit to resort to racial quotas, set asides, or other more subtle means of ensuring racial balance. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Indeed, there is little else that could be done to avoid protracted litigation and potentially massive liability when a non-discriminatory policy has a statistically adverse effect on a racial group. Cases such as *Ricci* and *Connecticut v. Teal*, 457 U.S. 440 (1982), demonstrate the problem. The threat of disparate-impact liability creates an undeniable incentive to engage in the precise racial stereotyping and group-based discrimination the Equal Protection Clause forbids. This is the very definition of a statutory scheme raising serious constitutional difficulties.

Nor can disparate-impact laws be defended as somehow enforcing the Fourteenth Amendment. The Constitution forbids intentional discrimination on the

basis of race. *See Washington v. Davis*, 426 U.S. 229 (1976). Banning non-discriminatory laws because of their effect on certain racial groups deviates too far from the Fourteenth Amendment to be seen as enforcing it. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). Characterizing disparate-impact laws as merely an evidentiary tool for rooting out disparate treatment fails for similar reasons. The lenient standard for disparate impact under federal law does not remotely approach the magnitude of disproportionate effect that is needed to raise an inference of intentional discrimination under the Constitution. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

Accordingly, there is no easy way to resolve this issue. "[C]onsiderations of race that would doom" a practice under "the Fourteenth Amendment . . . seem to be what save it" under federal disparate-impact laws. *See Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring). At some point, this tension will need to be resolved. But that does not mean the Court lacks the power to delay the confrontation. In contexts similar to this, the Court has required Congress to speak clearly before interpreting federal statutes to push the outer limits of legislative authority or otherwise reach into sensitive areas of national policy. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *INS v. St. Cyr*, 543 U.S. 289 (2001). And a clear-statement rule is especially warranted given the way in which disparate-impact laws not only create serious equal-protections concerns, but also alter the federal-state balance where, as here, they interfere with the non-discriminatory policies of state and local governments. Congress has the constitutional

authority to push the outer boundaries of its legislative power. But by requiring Congress to exercise it with clarity, the Court shows respect for a coordinate branch of government and ensures that difficult constitutional issues are not needlessly resolved.

Section 804(a) does not include any statement indicating that Congress sought to impose disparate-impact liability under the Fair Housing Act, let alone a clear one. The statute does not include the kind of language that led the Court to interpret other federal laws to impose disparate-impact liability. *See Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003). Statutory inferences, legislative history, and congressional purposes are insufficient. Absent unmistakable textual proof that Congress imposed disparate-impact liability, courts and agencies alike should conclude that federal anti-discrimination laws protect individuals from disparate treatment—not racial groups from disparate impact.

Finally, the fact that U.S. Department of Housing and Urban Development ("HUD") has issued a regulation supporting the existence of disparate-impact claims under the Fair Housing Act does not alter the outcome. This Court has long held that constitutional avoidance supersedes agency deference. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 574-75 (1988). That rule applies with special force when equal-protection rights are at stake. *See Miller v. Johnson*, 515 U.S. 900 (1995).

ARGUMENT

I. Interpreting The Fair Housing Act To Authorize Disparate-Impact Claims Would Raise Serious Equal-Protection Concerns.

The Equal Protection Clause's "central mandate is racial neutrality in governmental decisionmaking." *Miller*, 515 U.S. at 904; *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in the judgment). "Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)); *see also Loving v. Virginia*, 388 U.S. 1, 11 (1967). The right to equal protection of the laws, "by its terms, [is] guaranteed to the individual," *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948), and obtains irrespective of "the race of those burdened or benefited by a particular classification," *Croson*, 488 U.S. at 472. In other words, "any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be." *Adarand*, 515 U.S. at 230; *see also Croson*, 488 U.S. at 493 ("To whatever racial groups . . . citizens belong, their 'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking."). Regardless of whom the law claims to advantage, or the reasons why, disparate treatment "threaten[s] to stigmatize *individuals* by reason of their membership in a *racial group* and to incite racial hostility." *Shaw*, 509 U.S. at 643 (emphasis added).

Congress has extended this ban on disparate treatment beyond the "official action" to which the Constitution's equal-protection guarantee applies. *Adarand*, 515 U.S. at 234 (citation and quotations omitted). Title VII of the Civil Rights Act of 1964 "makes it unlawful for an employer '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.'" *Ricci*, 557 U.S. at 577 (quoting 42 U.S.C. § 2000e-2(a)(1)). Title VI of the Civil Rights Act extends this same ban to recipients of federal funds. *See Alexander*, 532 U.S. at 280 (citing 42 U.S.C. § 2000d). The Fair Housing Act likewise makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). These laws thus typify "the most easily understood" anti-discrimination rule: each makes it illegal to treat a "particular person less favorably than others because of a protected trait." *Ricci*, 557 U.S. at 577 (citations and quotations omitted).

Federal disparate-impact statutes are quite different. Whereas disparate-treatment laws require proof "that the defendant had a discriminatory intent or motive" for treating an individually unequally because of their race or other protected trait, disparate-impact laws prohibit "facially neutral … practices that have significant adverse effects on protected *groups* . . . without proof that . . . those practices" were "adopted with a discriminatory intent." *Watson v. Fort Worth Bank & Trust*, 487 U.S.

977, 986-87 (1988). Under federal disparate-impact statutes, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent" are unlawful because of Congress's concern with "the consequences of [such] practices, not simply the motivation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-32 (1971). A regulated entity's "good intent or absence of discriminatory intent" is irrelevant. *Id.* at 432. Indeed, absence of intentional discrimination based on a protected trait "is the very premise for disparate-impact liability in the first place, not negation of it or a defense to it." *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 96 (2008).

Disparate-impact statutes therefore raise serious equal protection concerns. "[I]f 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 . . . discriminate on the basis of race." *Ricci*, 557 U.S. at 594 (Scalia, J., concurring) (citations and quotations omitted). For example, Congress could not require private employers, states and local governments, or funding recipients to segregate workplaces, low-income housing communities, or philanthropic institutions. *See Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 284 (1991). That same rule naturally must apply if Congress attempts to use its lawmaking or spending authority to mandate that third-parties violate the Constitution's equal-protection guarantee in other ways. Yet that is precisely what federal disparate-impact laws seemingly require.

In general, federal disparate-impact statutes violate the Constitution's requirement that the law treat each person as an individual and not simply as a member

of a racial group. *See Miller*, 515 U.S. at 911 ("[T]he [g]overnment must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.") (citation and quotations omitted); *see also Adarand*, 515 U.S. at 227; *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955). By their terms, disparate-impact laws prohibit various "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." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *see also Raytheon Co.*, 540 U.S. at 52. In other words, "[a]n individual may allege that *he* has been subjected to 'disparate treatment' because of his race, or that he has been the victim of a facially neutral practice having a 'disparate impact' on his *racial group*." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 582 (1978) (Marshall, J., concurring in part and dissenting in part) (emphasis added). Even at the "wholesale" level, then, disparate-impact laws are constitutionally troubling. *Ricci*, 557 U.S. at 595 (Scalia, J., concurring).

Such laws are problematic on their face from an equal protection perspective also because they appear to afford certain racial groups greater disparate-impact protection than "favored" groups. Even though this Court has held that at least Title VII's protections are "not limited to discrimination against members of any particular race," *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-79 (1976), it has never held that white or male plaintiffs can bring a disparate-impact claim. If anything, the Court has suggested they cannot. *See Teal*, 457 U.S. at 448 ("When an employer uses a non job-related barrier in order to deny a minority or woman applicant employment

or promotion, and that barrier has a significant adverse effect on minorities or women, then the applicant has been deprived of an employment opportunity 'because of . . . race, color, religion, sex, or national origin.'"); *see also Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252-53 (10th Cir. 1986); Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 Nw. U. L. Rev. 1505 (2004). Under this approach, then, "a neutral employment practice that disadvantages white men yet has no business justification is permissible, while the same practice would be unlawful if it were to disadvantage women and minorities." John J. Donahue, *Understanding the Reasons For and Impact of Legislatively Mandated Benefits for Selected Workers*, 53 Stan. L. Rev. 897, 898 (2001).

But even if disparate-impact laws protect whites and males, they do not protect them *equally*. Several courts of appeals have held that such plaintiffs must meet a higher burden of proof in bringing discrimination claims against employers under Title VII. *See, e.g.*, *Taken v. Okla. Corp. Comm'n*, 125 F.3d 1366, 1369 (10th Cir. 1997) ("Here, because plaintiffs are members of a historically favored group, they are not entitled to the *McDonnell Douglas* presumption."); *Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993) ("Thus, in an ordinary discrimination case, in which the plaintiff is a member of a minority group, an 'inference of discrimination' arises when the employer simply passes over the plaintiff for a promotion to a position for which he is qualified. . . . No such inference arises when, as in this case, the plaintiff is a white man."); *Phelan v. City of Chi.*, 347 F.3d 679, 684 (7th Cir. 2003) (explaining that "the first prong of the *McDonnell* test cannot be used" for a white plaintiff and that the plaintiff

instead must "show background circumstances that demonstrate that a particular employer has reason or inclination to discriminate invidiously against whites or evidence that there is something 'fishy' about the facts at hand") (citations and quotations omitted).

Thus, whether disparate-impact laws exclude whites and males from their sphere altogether or handicap them in bringing statutory discrimination claims, these laws advantage and disadvantage individuals on the basis of their race. As a consequence, disparate-impact laws are constitutionally suspect and must pass strict scrutiny to avoid invalidation. *See Fisher*, 133 S. Ct. at 2419-20; *Adarand*, 515 U.S. at 227; *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

Beyond these concerns regarding their facial validity, disparate-impact laws "place a racial thumb on the scales" that leads to serious equal-protection concerns at the "retail" level. *Ricci*, 557 U.S. at 594 (Scalia, J., concurring). The Court has always understood "that the inevitable focus on statistics in disparate-impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures." *Watson*, 487 U.S. at 992. Thus, while racial quotas are verboten absent specific findings of prior *de jure* discrimination, *see Croson*, 488 U.S. at 492, they are the surest way for a regulated entity to avoid disparate-impact lawsuits under federal law. *See Wards Cove*, 490 U.S. at 652 ("The only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the others portions thereof."). "If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and

potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met." *Watson*, 487 U.S. at 993; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 448 (1975) (Blackmun, J., concurring in the judgment) ("I fear that a too-rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection."); *see also Wards Cove*, 490 U.S. at 652-53.[2]

This is not an abstract concern. In *Ricci*, after New Haven, Connecticut firefighter promotion "examination results showed that white candidates had outperformed minority candidates, the mayor and other local politicians opened a public debate that turned rancorous." 557 U.S. at 562. New Haven eventually "threw out the examinations" on the ground that certifying the results could have led to "liability under Title VII for adopting a practice that had a disparate impact on minority firefighters." *Id.* at 562-63. That is, New Haven threw out the test results because of its effect on a particular racial group. As the Court explained, "however well intentioned or benevolent

2. In *Wards Cove*, this Court sensibly interpreted Title VII's disparate-impact provision to mitigate the pressure on employers to utilize racial quotas. *See* 490 U.S. at 650-661. But Congress abrogated key aspects of that ruling in the Civil Rights Act of 1991. *See Ricci*, 557 U.S. at 624 (Ginsburg, J., dissenting); *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 241 (3rd Cir. 2007). Congress's decision to ignore this Court's legitimate fear that there are constitutional problems with a federal law premising liability on the disparate effect of neutral practices is part of an unfortunate pattern. *See, e.g.*, *Shelby Cnty.*, 133 S. Ct. at 2626-27.

it might have seemed . . . the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white." *Id.* at 579-80. The question thus was "not whether the conduct was discriminatory but whether the City had a lawful justification for its race-based action." *Id.* at 580.

The Court ultimately resolved that case on statutory grounds, concluding that New Haven lacked a "strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute." *Id.* at 563. Absent that rigorous standard, "an employer could discard test results (or other employment practices) with the intent of obtaining the employer's preferred racial balance." *Id.* at 582. And there is every indication that is precisely what New Haven was using Title VII's disparate-impact provision to accomplish. *See id.* at 605 (Alito, J., concurring) ("[A] reasonable jury could easily find that the City's real reason for scrapping the test results was not a concern about violating the disparate-impact provision of Title VII but a simple desire to please a politically important racial constituency."). In light of these concerns, the Court emphasized "that meeting the strong-basis-in-evidence standard" would not necessarily "satisfy the Equal Protection Clause" and left unresolved whether even "a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution." *Id.* at 584.

The Court's decision in *Connecticut v. Teal* is perhaps even more revealing. There, the Connecticut Department of Income Maintenance utilized a written examination as the first step in its promotion process. 457 U.S. at 443. "The mean score on the examination was 70.4 percent.

However, because the black candidates had a mean score 6.7 percentage points lower than the white candidates, the passing score was set at 65, apparently in an attempt to lessen the disparate impact of the examination." *Id.* at 444 n.3. Despite its manipulation of the examination results to advantage African-American applicants, the Department was sued under Title VII's disparate-impact provision for utilizing a written promotion requirement "that excluded blacks in disproportionate numbers and that was not job related." *Id.* at 444.

In response to the lawsuit, the Department sought to eliminate its potential disparate-impact liability by making promotion decisions "from the eligibility list generated by the written examination" using "an affirmative-action program in order to ensure a significant number of minority supervisors." *Id.* "Forty-six persons were promoted . . ., 11 of whom were black and 35 of whom were white. The overall result of the selection process was that, of the 48 identified black candidates who participated in the selection process, 22.9 percent were promoted and of the 259 identified white candidates, 13.5 percent were promoted." *Id.* Hence, the "actual promotion rate of blacks was close to 170 percent that of the actual promotion rate of whites." *Id*. at 444 n.6.

Remarkably, the Court failed not only to reject the Department's naked use of racial balancing in its promotion process, but it found the racial manipulation of the process was *insufficient* to avoid liability. Ignoring the disparate treatment that white applicants had suffered, the Court held that individual African-American applicants who had failed the test had stated a claim for relief because the Department's use of the written examination had denied

them "the *opportunity* to compete equally with white workers" for promotion even though the plaintiffs' racial group had not suffered any disparate impact. *Id.* at 441. Apparently, even "'a racially balanced work force cannot immunize an employer from liability'" under Title VII's disparate-impact provision. *Id.* at 454 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978) (other citation omitted)).

Not only did the Court's decision render the disparate-impact theory of discrimination nonsensical, *see id.* at 459 (Powell, J., dissenting) ("There can be no violation of Title VII for disparate impact in the absence of disparate impact on a *group*."), but it showed just how thoroughly a federal policy that adjudges discrimination on the basis of effect can infect the entire decisionmaking process with racial considerations. As Justice Powell explained, the only way the Department could have avoided disparate-impact liability under the majority's rationale would have been "the adoption of simple quota hiring." *Id.* at 464. But "[t]his arbitrary method of employment is itself unfair to individual applicants, whether or not they are members of minority groups." *Id.* at 464-65.

Cases like *Ricci* and *Teal* illuminate the constitutional problem with disparate-impact regimes. Laws promoting illicit racial quotas (or perhaps requiring them) to ensure statutory compliance are destructive of individual rights. "[E]ven 'benign' racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race." *Croson*, 488 U.S. at 527 (Scalia, J., dissenting) (citation omitted). As Alexander Bickel explained, "'a racial quota derogates the human dignity

and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence.'" *Id.* (quoting Bickel, The Morality of Consent 133 (1975)); *see also Parents Involved*, 551 U.S. at 730-32. Yet disparate-impact laws such as Title VII's seem to "demand the very racial stereotyping the Fourteenth Amendment forbids." *Miller*, 515 U.S. at 928; *see, e.g.*, *MD/DC/DE Broad. Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001) ("The race of each job applicant is relevant to the prevention of discrimination only if the Commission assumes that minority groups will respond to non-discriminatory recruitment efforts in some predetermined ratio, such as in proportion to their percentage representation in the local workforce. Any such assumption stands in direct opposition to the guarantee of equal protection, however.").

Importantly, the serious constitutional problems with federal disparate-impact laws cannot be solved by recasting them as prophylactically enforcing the Constitution's ban on disparate treatment. Beyond the fact that they proscribe private conduct, this Court has never "embraced the proposition that a law or official act, without regard to whether it reflects a rationally discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." *Washington*, 426 U.S. at 239; *see also Hernandez v. New York*, 500 U.S. 352, 362 (1991). "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Arlington Heights*, 429 U.S. at 265; *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 207 (2008) (Scalia, J., concurring) ("[W]ithout proof of discriminatory intent . . . a generally applicable law

with a disparate impact is not unconstitutional."). As a consequence, federal disparate-impact statutes deviate too far from the constitutional standard to be seen as legislation enforcing the Fourteenth Amendment. In writing disparate impact into Title VII and elsewhere, "Congress' concern was with the incidental burdens imposed, not the object or purpose of the legislation." *Boerne*, 521 U.S. at 531. "Congress does not enforce a constitutional right by changing what the right is." *Id.* at 519.

Nor can disparate-impact laws plausibly be defended as merely "playing some role in the evidentiary process" of rooting out disparate treatment. Such laws "sweep too broadly to be fairly characterized" as policing intentional discrimination. *Ricci*, 557 U.S. at 595 (Scalia, J., concurring). To be sure, the Court has held that "[s]ometimes a clear pattern, *unexplainable on grounds other than race*, emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Arlington Heights*, 429 U.S. at 266 (emphasis added). Yet the Court has been equally clear that "such cases are rare" and that "[a]bsent a pattern as stark" as those in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), "impact alone is not determinative, and the Court must look to other evidence." *Id.* In *Gomillion*, Tuskegee, Alabama district boundary "alterations excluded 395 of 400 black voters without excluding a single white voter," and in *Yick Wo* a San Francisco "ordinance prohibited operation of 310 laundries that were housed in wooden buildings, but allowed such laundries to resume operations if the operator secured a permit from the government. When laundry operators applied for permits to resume operation,

all but one of the white applicants received permits, but none of the over 200 Chinese applicants were successful." *McCleskey v. Kemp*, 481 U.S. 279, 294 n.12 (1987).

Federal disparate-impact statutes, by contrast, impose liability based on only the slightest statistical deviations. For example, the Equal Employment Opportunity Commission guideline uses a "four-fifths rule" in Title VII cases under which a "selection rate for any race, sex, or ethnic group which is less than . . . eighty percent . . . of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact[.]" 29 C.F.R. § 1607.4(D). The standard for establishing a prima facie case of discrimination under the Fair Housing Act in those courts that have wrongly permitted such claims appears equally liberal. *See, e.g.*, *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 50 (1st Cir. 2000). In short, the standard for disparate impact under the applicable federal statutes does not even come close to meeting the standard necessary for such evidence to raise an inference of intentional discrimination within the meaning of the Constitution.

Moreover, in constitutional disparate-treatment cases, the impact-based inference of discrimination can be overcome by evidence that the law or practice was in fact non-discriminatory. *See Arlington Heights*, 429 U.S. at 271 n.21. Yet such defenses are unavailable in the statutory setting. *See Albemarle Paper Co.*, 422 U.S. at 422-23. Once there is prima facie evidence of disparate impact, the defendant can prevail only by proving that there was a legitimate justification for a practice with the prohibited effect; it cannot try to show that the inference of discrimination was mistaken in the first place. "It is one thing to free plaintiffs from proving . . . illicit intent, but

quite another to preclude the [defendant] from proving that its motives were pure and its actions reasonable." *Ricci*, 557 U.S. at 595 (Scalia, J., concurring).

In the end, there is no elegant solution to this problem. The conflict between group-based disparate-impact laws and the individual right to equal protection under the Constitution will be impossible to reconcile whenever that "evil day" arrives. *Id.* at 594 (Scalia, J., concurring). As Justice Kennedy noted in a strikingly similar context, "considerations of race that would doom" a practice under "the Fourteenth Amendment . . . seem to be what save it" under federal disparate-impact laws. *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring). Here too, then, there is "a fundamental flaw . . . in any scheme in which [HUD] is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive." *Id.*

II. The Court Should Require A Clear Congressional Statement Before Interpreting Any Federal Law To Authorize Disparate-Impact Claims.

The Court can ensure that the Fair Housing Act and other federal statutes are not interpreted to needlessly create constitutional problems by requiring a clear statement from Congress that it seeks to authorize disparate-impact claims. This "clear statement rule" follows directly from precedent and will ensure that it is Congress—and not the courts or federal agencies—that forces a confrontation between the Equal Protection Clause and federal disparate-impact laws.

The Court has long been wary of interpreting federal laws to reach the limits of congressional power or otherwise

into areas of sensitive concern. *See, e.g.*, *Atascadero State Hosp.*, 473 U.S. at 242; *United States v. Bass*, 404 U.S. 336, 349 (1971). When faced with a question of statutory construction that "invokes the outer limits of Congress' power," *St. Cyr*, 533 U.S. at 299, or is in tension with "important values," *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 262 (1991) ("*Aramco*") (Marshall, J., dissenting), the Court often employs a clear-statement rule, *see, e.g.*, *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) ("*SWANCC*"). Under such a rule, the Court wisely requires "unmistakable clarity" in the statutory text before concluding that Congress intended for the legislation to wade into these sensitive areas. *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989).

The Court has employed clear-statement rules in a variety of settings. For example, Congress must speak clearly when it seeks to alter the "'constitutional balance between the States and the Federal Government,'" *Will v. Mich. Dep't of Police*, 491 U.S. 58, 65 (1989) (citation omitted); *see also United States v. Bass*, 404 U.S. 336, 349 (1971), abrogate Eleventh Amendment immunity, *see Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996) (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 786 (1991)); *Dellmuth*, 491 U.S. at 227, restrict access to judicial review or affect the scope of the federal jurisdiction, *see Johnson v. Robison*, 415 U.S. 361, 373-374 (1974) ("'[C]lear and convincing' evidence of congressional intent [is] required by this Court before a statute will be construed to restrict access to judicial review."), or raise issues of retroactive application, *see St. Cyr*, 533 U.S. at 316 ("A statute may not be applied retroactively, however, absent a clear indication from Congress that it intended such a result."); *United States v. Heth*, 3 Cranch 399, 408

(1806) (Johnson, J.) ("Unless, therefore, the words are too imperious to admit of a different construction, [the Court should] restric[t] the words of the law to a future operation.").

The Court's imposition of clear-statement rules reflects a presumption that "'Congress does not exercise lightly' the 'extraordinary power' to legislate" in these areas. *Arizona v. Inter Tribal Council of Ariz. Inc.*, 133 S. Ct. 2247, 2256 (2013) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). Clear-statement rules thus impose a "stringent test." *Dellmuth*, 491 U.S. at 228; *see also St. Cyr*, 533 U.S. at 316 ("The standard for finding such unambiguous direction is a demanding one."). They focus solely on the text of the statute at issue, *see Dellmuth*, 491 U.S. at 230 ("evidence of congressional intent must be . . . textual"), "foreclos[ing] inquiry into extrinsic guides to interpretation," *Aramco*, 499 U.S. at 263 (Marshall, J., dissenting). In short, they require "the clearest statement of congressional intent," *St. Cyr*, 533 U.S. at 312 n.35, such that it can "be said with perfect confidence that Congress in fact intended" to wade into these areas of "special constitutional concern[]," *Dellmuth*, 491 U.S. at 231; *see also id.* ("[I]mperfect confidence will not suffice.").

Clear-statement rules show Congress the respect to which it is entitled. As a coordinate branch of government, Congress has "a duty to support and defend the Constitution." *Salazar v. Buono*, 559 U.S. 700, 717 (2010). It is for Congress, then, to determine in the first instance whether it wants to test the limits of its authority. *See United States v. Nixon*, 418 U.S. 683, 703 (1974) ("In the performance of assigned constitutional duties each branch of the Government must initially interpret the

Constitution."). "Requiring clear intent assures that Congress itself has affirmatively considered" the potential ramifications of its legislative choice and "determined that it is an acceptable price to pay for the countervailing benefits." *St. Cyr*, 533 U.S. at 316 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272-73 (1994)). In the sensitive areas where clear-statement rules apply, there may be particularly delicate policy factors to balance, and "[i]t is not for [the Court] to weigh the merits of these factors." *Rewis v. United States*, 401 U.S. 808, 812 (1971); *see also Bass*, 404 U.S. at 349. By making sure that the legislature and not the court decide the most important policy issues, clear-statement rules thus ensure that Congress remains "the keeper" of "national policy." *Emps. of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 284 (1973).

In this way, clear-statement rules are not so much as a limitation on congressional authority but a tool "of assistance to the Congress and the courts in drafting and interpreting legislation." *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 206 (1991). They improve judicial decisionmaking by ensuring "that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bass*, 404 U.S. at 349; *see also Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). And they prevent courts from "needlessly reach[ing] constitutional issues." *SWANCC*, 531 U.S. at 172; *Gregory*, 501 U.S. at 464 ("Application of the plain statement rule thus may avoid a potential constitutional problem."). By requiring evidence of congressional intent "both unequivocal and textual," *Dellmuth*, 491 U.S. at 230, before presuming that Congress "presses the envelope of constitutional validity," *Rapanos v. United States*, 547

U.S. 715, 738 (2006) (plurality), the Court thus enhances both legislative and judicial decisionmaking.

This is the paradigmatic circumstance in which a clear-statement rule is needed. As an initial matter, Respondents' construction of Section 804(a) as applied to this case raises difficult constitutional questions concerning the federal-state balance. Pet. Br. at 42. The Court must apply a clear-statement rule for this reason alone. *See Will*, 491 U.S. at 65; *Atascadero State Hosp.*, 473 U.S. at 242; *Bass*, 404 U.S. at 349; *see also* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539–540 (1947) ("[W]hen the Federal Government . . . radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit.").

But the additional layer of concern triggered by the equal-protection problems associated with disparate-impact liability makes a clear-statement rule particularly appropriate. As discussed above, disparate-impact liability is, without question, an area of important constitutional values given the threat it poses to individual liberty. Any interpretation of federal anti-discrimination legislation that advances a theory of disparate-impact liability thus "presses the envelope of constitutional validity," thereby warranting imposition of a clear-statement rule. *Rapanos*, 547 U.S. at 738. Indeed, the Court should be at least as wary of interpreting federal laws to authorize disparate-impact claims as it is of interpreting them to "'alter sensitive federal-state relationships.'" *Bass*, 404 U.S. at 349 (quoting *Rewis*, 401 U.S. at 812). Federalism is designed not as an end in and of itself but a means of "'secur[ing] to citizens the liberties that derive from the

diffusion of sovereign power.'" *New York v. United States*, 505 U.S. 144, 181 (1992) (citation omitted); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012).

In other words, "[t]he constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties." *Atascadero State Hosp.*, 473 U.S. at 242 (citation and quotations omitted). The right to equal protection of the laws is certainly one of those liberties. It is Congress, therefore, that must decide if its desire for disparate-impact liability is so strong that it is willing to have the inevitable constitutional tension between the Constitution and disparate impact decided once and for all. That is the legislative prerogative. But that difficult and important issue should not be foisted on this Court because the lower courts and HUD have decided to read Section 804(a) expansively. If that confrontation is to come, it should be because Congress clearly sought it.

Section 804(a) does not even come close to meeting this standard. Respondents argue that the phrase "otherwise make available or deny" authorizes disparate-impact liability. Br. in Opp'n for Mt. Holly Gardens Respondents at 33 (filed Sept. 11, 2012). As Petitioners have explained, however, the hallmark of disparate impact is express language that focuses on "effects" or "consequences." Pet. Br. 15, 17-23. Section 804(a) nowhere uses the language "adversely affect" or "tend to deprive," which are the usual phrasings employed by Congress in anti-discrimination statutes that authorize disparate-impact claims. *See Smith v. City of Jackson*, 544 U.S. 228, 235-36 & n.6 (2005) (plurality opinion). Section 804(a) "focuses exclusively on

discriminatory 'actions' and their 'motivation,' not the 'effects' of facially-neutral policies." Pet. at 17 (quoting *Smith*, 544 U.S. at 236 & n.6 (plurality opinion)). The Fair Housing Act does not include any statement—clear or otherwise—indicating that the statute authorizes disparate-impact claims.

But even if the phrase "otherwise make available or deny" could support an inference that Congress sought to authorize disparate-impact claims, it is not a clear statement. "[S]uch a permissible inference, whatever its logical force, would remain just that: a permissible inference." *Dellmuth*, 491 U.S. at 232. Statutory ambiguity is not enough in this circumstance. Only "the clearest statement of congressional intent" will do. *St. Cyr*, 533 U.S. at 312 n.35. Because "it cannot be said with perfect confidence" that Congress in fact intended to authorize disparate-impact liability in Section 804(a), Respondents' expansive interpretation of the Fair Housing Act must be rejected. *Dellmuth*, 491 U.S. at 231.

III. The Canon of Constitutional Avoidance Overrides Any Deference To Which HUD Might Otherwise Be Entitled.

The absence of any textual indication from Congress that the Fair Housing Act imposes disparate-impact liability should be decisive. That HUD has issued a regulation endorsing Respondents' construction makes no difference. Not only is HUD's interpretation foreclosed by the text and unreasonable in any event, *see* Pet. Br. 17-37, but constitutional avoidance takes precedence over any deference to which the federal agency might otherwise entitled. *See id*. 37-42.

Time and again, this Court has squarely "rejected agency interpretations to which [it] would otherwise defer where they raise serious constitutional questions." *Miller*, 515 U.S. at 923 (citation omitted). As the Court has explained, "[t]his canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (citing *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 305-07 (1924)); *U.S. ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter"). Indeed, the rule "has for so long been applied by this Court that it is beyond debate." *Edward J. DeBartolo Corp.*, 485 U.S. at 574-75.

Not only does this rule of constitutional avoidance have precedential force, it fits comfortably with the paradigm of agency deference. In the main, the Court will "not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984). But before deferring under *Chevron*, the Court must always assure itself that "Congress either explicitly or implicitly delegated authority to cure that ambiguity." *Am. Bar Ass'n v. FTC,* 430 F.3d 457, 469 (D.C. Cir. 2005). After all, "it is only legislative intent to delegate such authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of *Chevron*." *NRDC v. Reilly,* 983 F.2d 259, 266 (D.C. Cir. 1993) (citation omitted). Agency deference thus is not implicated "any time a statute does not expressly negate the existence of a claimed administrative power."

Am. Bar. Ass'n, 430 F.3d at 468; *Negusie v. Holder*, 555 U.S. 511, 550 (2009) (Thomas, J., dissenting). Indeed, on questions of sufficient importance the Court presumes that Congress would have clearly delegated the power in question had it wanted the agency to wield it. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160-61 (2000); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994). Statutory interpretation questions fraught with constitutional implications fit the bill. *See Edward J. DeBartalo Corp.*, 485 U.S. at 575.

Whether the Fair Housing Act authorizes disparate-impact claims is just such a question. *See* Pet. Br 39-41. An agency interpretation triggering equal-protection concerns, as HUD's clearly does here, "by definition raises a serious constitutional question." *Miller*, 515 U.S. at 923. Racial classifications "'are contrary to our traditions and hence constitutionally suspect.'" *Fisher*, 133 S. Ct. at 2418 (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)). As a result, such laws demand "detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed" as race is "a group classification long recognized as irrelevant and therefore prohibited." *Adarand*, 515 U.S. at 227 (citation and quotations omitted); *see also Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) ("[A]ny racial preference must face the most rigorous scrutiny by the courts."). The Court can avoid confronting these serious issues by interpreting the Fair Housing Act as Congress wrote it, *viz.*, to protect individuals against disparate treatment, not groups against disparate impact. In contrast, interpreting the statute to allow disparate-impact claims will force the Court—whether in this case or in the near future—to

determine whether this theory of discrimination is compatible with the Constitution's guarantee of equal treatment.

Finally, judicial deference to HUD's regulation would be especially inappropriate given the agency's failure to grapple with these important issues. Nowhere in its final rule does HUD even consider whether its interpretation of the statute raises serious constitutional questions or how those concerns might be mitigated through regulatory implementation. Instead, HUD "automatically" reaches a "conclusion" that the Fair Housing Act protects against disparate impact without making any "effort to justify" that determination in light of the serious equal-protection problems its construction of the statute raises. *Ky. Ret. Sys. v. EEOC*, 554 U.S. 135, 150 (2008); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013). An agency, like HUD, unwilling to even acknowledge the constitutional difficulties posed by its construction has not engaged in reasoned decisionmaking. *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (explaining that the agency's decision must be "based on a consideration of the relevant factors"). Whether the Fair Housing Act authorizes disparate-impact claims is without doubt a relevant factor that HUD should have considered. By failing to do so, the agency forfeited any claim of deference.

CONCLUSION

For the reasons set forth herein, the judgment of the court of appeals should be reversed.

Respectfully submitted,

WILLIAM S. CONSOVOY
Counsel of Record
THOMAS R. MCCARTHY
BRYAN K. WEIR
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000
wconsovoy@wileyrein.com

Attorneys for Amicus Curiae Project on Fair Representation

September 3, 2013