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IN THE
Supreme Court of the United States

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, ET AL.,
Petitioners,
v.
THE INCLUSIVE COMMUNITIES PROJECT, INC.,
Respondents.

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

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS... 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 6

I. PERSISTENT HOUSING SEGREGATION CONSTRAINS INDIVIDUAL ECONOMIC POTENTIAL, DISTORTS MARKET DYNAMICS, AND JUSTIFIES ONGOING DISPARATE IMPACT ENFORCEMENT. 6

A. Issues of dignity and morality resulting from entrenched and deliberate residential segregation undergirded passage of the FHA. 6

B. Housing segregation imposes a wide array of socioeconomic harms that can only be fully eliminated through a framework that includes a disparate impact standard. 10

C. Residential segregation distorts market dynamics and degrades individual liberty and dignity. 14

II. THE DISPARATE IMPACT STANDARD IS WORKABLE, FAIR, AND EFFECTIVE AT ROOTING OUT UNJUSTIFIED BARRIERS TO HOUSING OPPORTUNITY. 17

A. The threshold showing required at the *prima facie* stage

adequately polices the boundaries of disparate impact. 18

B. After a *prima facie* case is established, liability attaches only if the defendant fails to justify its policy or if its legitimate objective can be achieved by some other less discriminatory means........................ 21

III. THE CANON OF CONSTITUTIONAL AVOIDANCE IS INAPPLICABLE TO DISPARATE IMPACT CLAIMS UNDER THE FHA. 24

A. Most FHA remedies do not trigger strict scrutiny. 24

B. Racial classifications used to remedy disparate impact discrimination will be subject to a case-specific strict scrutiny analysis......... 27

1. Demonstrating a "compelling interest" under strict scrutiny analysis..................... 27

2. Demonstrating "narrow tailoring" under strict scrutiny analysis..................... 31

CONCLUSION 32

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466 F.3d 1276 (11th Cir. 2006) 19-20

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844 F.2d 926 (2d. Cir. 1988) 17, 31

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Supp. 2d 33 (D. Mass. 2002) 22

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(2010) 2, 18, 27

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(E.D.N.C. 1989) 20

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INTEREST OF AMICUS[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is a non-profit legal organization that, for more than seven decades, has helped African Americans secure their civil and constitutional rights. Throughout its history, LDF has challenged public and private policies and practices that deny African Americans opportunities and choices in housing and isolate African-American communities. *See, e.g.*, *McGhee v. Sipes*, 334 U.S. 1 (1948) (companion case to *Shelley v. Kraemer*, 334 U.S. 1 (1948)) (racially restrictive covenants); *Cent. Ala. Fair Hous. Ctr. v. Lowder Realty Co.*, 236 F.3d 629 (11th Cir. 2000) (racial steering); *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994) (racial discrimination in public housing and assistance programs); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) (redlining); *Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (exclusionary zoning); *Thompson v. U.S. Dep't of Hous. & Urb. Dev.*, No. 95-309, 2006 WL 581260 (D. Md. Jan. 10, 2006) (federal government's obligation to further fair housing affirmatively); *Consent Decree, Byrd v. First Real Estate Corp. of Ala.*, No. 95-CV-3087 (N.D. Ala. May 14, 1998) (racial steering); *Brown v. Artery Org.*, Inc., 654 F. Supp. 1106 (D.D.C. 1987) (redevelopment plans that unfairly eliminate affordable housing); *see also* NAACP Legal Defense and Educ. Fund, Inc. et al., *The*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

Future of Fair Housing: Report on the National Commission of Fair Housing and Equal Opportunity (Dec. 2008). LDF has also long played an instrumental role in advancing the doctrine of disparate impact discrimination before this Court. *See, e.g., Lewis v. City of Chicago*, 560 U.S. 205 (2010); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For the third time in as many years, this Court faces the question of whether disparate impact claims are cognizable under the Fair Housing Act (FHA). The Court has received thorough briefing from the parties and the Solicitor General on statutory interpretation, and from a range of amici on the Congressional and historical record. In light of its long experience in the field of civil rights, LDF writes separately to highlight three unique points.

First, the framers of the Fair Housing Act were deeply conscious of the broader consequences of residential segregation and the host of interconnected harms that it imposes on society. Although the considerable progress this nation has made toward racial equality, including the passage and enforcement of the FHA, might suggest that housing segregation is a relic of the past, the unfortunate reality is that it is not. It is no coincidence that, in far too many instances, neighborhoods that were purposely zoned or subsidized for only African Americans or only whites several decades ago remain similarly racially identifiable today. The Fair Housing Act demands that we remain conscious of the long-term effects of historical patterns of housing segregation.

Long-term residential segregation has grave consequences for the lives and livelihoods of millions of African Americans. Individuals who reside in neighborhoods characterized by entrenched housing segregation face dimmer economic prospects, lower property values, truncated social and professional interactions, and inferior schools, because of the direct link between these factors and where one resides. These interrelated harms serve to demean the individuals who are forced to endure them and severely curtail the self-determination and upward mobility of both individuals and communities. Altogether, the enduring effects of *de jure* segregation continue to constrain economic liberty, distort market dynamics, and impose broad societal harms.

Second, the disparate impact framework that evolved out of the FHA has proven to be as administrable and fair as its counterparts in the contexts of Title VII of the Civil Rights Act, and the Age Discrimination Employment Act (ADEA). The framework, now codified in a final regulation by the U.S. Department of Housing and Urban Development (HUD), guards against specious claims by requiring a plaintiff to make a significant threshold showing of discriminatory effects. Moreover, liability only attaches if a defendant is unable to justify its policy or if its legitimate objective can be achieved by some other less discriminatory means. Because courts have proven to be fully adept at administering this burden-shifting framework in the housing context, it is bewildering that amici in support of Petitioners suggest that this framework wreaks havoc on business practices. Contrary to their suggestion, the sky has not fallen in the four decades during which the disparate impact framework has been employed by courts and applied to businesses. Instead, businesses have been

able to comfortably adapt to the standard and create policies and practices that comport with Congress' intent without detrimentally affecting sound business practices. The fact that some industries argue that they might benefit from deregulation is simply not a basis for changing how the FHA is interpreted.

Third, the Court can affirm the unanimous conclusion of all of the circuit courts and HUD – that disparate impact claims are cognizable under the FHA – without running afoul of constitutional concerns. In the FHA context, most remedies are race-neutral and, thus, do not trigger strict scrutiny. On the margins, any remedies that do employ race-conscious measures can be strictly scrutinized on a case-by-case basis. For example, commanding a defendant to discontinue a practice that perpetuates the effects of *de jure* segregation serves compelling governmental interests by remedying the vestiges of *de jure* discrimination. Other times, race-conscious remedies serve compelling interests by rooting out surreptitious or subtle forms of intentional discrimination. Additionally, the disparate impact framework inherently considers narrow tailoring by factoring in less discriminatory alternatives.

Under these circumstances, *stare decisis* and prudential considerations firmly counsel against the reconsideration of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and *Smith v. City of Jackson*, 544 U.S. 228 (2005), decisions by this Court which provide the foundation for jurisprudence in an array of bedrock civil rights statutes. To excise disparate impact claims from the FHA and other civil rights laws would fundamentally dismantle our nation's civil rights architecture and upend a half-century of consistent federal appellate interpretation of the FHA, Title VII,

and the ADEA. Moreover, to do so would disastrously set back the very real progress which has been made toward eradicating pernicious forms of racial segregation, and would undermine the principles upon which Congress relied in enacting the FHA.

This Court need not undertake such an aberrant and perilous course. This case can – and should – be resolved on simple and obvious grounds. The FHA, Title VII, and the ADEA – all of which were passed in quick succession between 1964 and 1968 – contain similar, effects-focused language: Title VII and the ADEA regarding practices that "otherwise adversely affect" employment status and the FHA regarding practices that "otherwise make unavailable or deny" housing. Given the animating history of these statutes, as well as the logical and common sense principle that comparable language in proximate statutes should be construed similarly, it is not surprising that each statute has been repeatedly interpreted by the courts as authorizing disparate impact claims. At worst, the FHA's language, "otherwise make unavailable or deny," is ambiguous, in which case, the consistent view of federal appellate courts over thirty years – and the recent HUD regulation interpreting that phrase – is entitled to deference.

ARGUMENT

I. PERSISTENT HOUSING SEGREGATION CONSTRAINS INDIVIDUAL ECONOMIC POTENTIAL, DISTORTS MARKET DYNAMICS, AND JUSTIFIES ONGOING DISPARATE IMPACT ENFORCEMENT.

The origins of the FHA are rooted in a system of segregated housing so severe that it left a legacy of lasting, intertwined economic and social ills based on race. Those vestiges live on today, continuing to warp free market forces, inject economic inefficiencies, and constrain earning potential in ways that ultimately impede financial liberty and degrade individual dignity. The FHA was enacted to eradicate this system and remedy the multitude of harms it causes. These objectives and implications bear upon the Court's current analysis and augur strongly in favor of maintaining the disparate impact framework. *See United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1850) (opinion of Court) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.").

A. Issues of dignity and morality resulting from entrenched and deliberate residential segregation undergirded passage of the FHA.

For decades, federal, state, and local governments proactively enforced and subsidized systemic *de jure* housing segregation. *See generally* Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (1993); Br. of Housing Scholars as Amici Curiae 8-36 (detailing government policies promoting residential

segregation). For example, the Federal Housing Administration required, actively promoted, and condoned the use of racially restrictive covenants and systematically excluded Black neighborhoods from receiving loans. Massey & Denton, *supra*, at 54-55. *See also* Richard Rothstein, *Race and public housing: Revisiting the federal role*, Poverty & Race Vol. 21, No. 6 at 1 (Dec. 17, 2012). Federal officials literally divided cities by race with "redlining" tactics that undervalued minority or mixed neighborhoods. *See* Massey & Denton, *supra*, at 51-52. These practices did not end as official policy until the mid-1960s. Elsewhere, state officials cut off Black neighborhoods by design, often using man-made divides like new highways. *See, e.g.,* Richard Rothstein, *The Making of Ferguson Public Policies at the Root of its Troubles*, Econ. Pol'y Inst. (Oct. 15, 2014).

As the civil rights movement drew attention to the devastation wrought by the myriad forms of racial segregation, a common theme emerged: that segregation inflicted a deep and lasting insult to the dignity of the humans it constrained. Dr. Martin Luther King, Jr. powerfully highlighted the feelings of humiliation and isolation that substandard segregated housing wrought upon Black communities. He described the "other America," where almost forty percent of Black families lived in often "vermin-filled, distressing housing conditions." *See* Dr. Martin Luther King, Jr., The Other America (Mar. 14, 1968). He explained that segregated housing "confined [Blacks] to a life of noiselessness and powerlessness," *see* Dr. Martin Luther King, Jr., Speech Before the Southern Christian Leadership Conference, Atlanta, Georgia (Aug. 16, 1967), and relegated them to an "island of despair," *see* Dr. Martin Luther King, Jr., A Statement by Dr. King (July 17, 1966). In his storied speech at

the March on Washington, Dr. King proclaimed that ending racial segregation necessitated sweeping change: "[w]e cannot be satisfied as long as the Negro's basic mobility is from a smaller ghetto to a larger one." *See* Dr. Martin Luther King, Jr. I Have a Dream (Aug. 28, 1963).[2] Dr. King was not alone in recognizing this link. Other faith leaders acknowledged that discrimination and "subhuman living conditions" "insult[] human dignity." United States Catholic Conference, Pastoral Constitution on the Church in the Modern World (1965).

Just two days after Dr. King's tragic assassination on April 4, 1968, President Johnson extolled the "fundamental of human dignity" afforded by equal housing opportunity and exhorted the House to pass the Fair Housing Act as a tribute to Dr. King. *See* Charles M. Lamb, *Housing Segregation in Suburban America since 1960: Presidential and Judicial Politics* 42 (2005) (internal quotation marks omitted).[3] Congress enacted this landmark legislation on April 10, 1968, with full knowledge of the significant concerns about dignity expressed by Dr. King,

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[2] *See also* Dr. Martin Luther King, Jr., His Influence Speaks to World Conscience, New Delhi, India (Jan. 30, 1958) (describing non-violent resistance to racial segregation as a "struggle for freedom and human dignity"); Letter from a Birmingham Jail (Apr. 16, 1963) ("Now is the time to lift our national policy from the quicksand of racial injustice to the solid rock of human dignity.").

[3] President Johnson and Congress also recognized the role of dignity and morality in the passage of the Civil Rights Act of 1964. *See, e.g.*, President Lyndon B. Johnson, Remarks at a Reception for Members of the American Society of Newspaper Editors (Apr. 17, 1964) ("We cannot deny to a group of . . . our own American citizens[] the essential elements of human dignity."). *See generally* Bruce Ackerman, *We The People, Volume 3: The Civil Rights Revolution* (2013).

President Johnson, and others, which undergirded the need to address the harms of segregated housing. Indeed, Congress enacted the FHA in 1968 – and amended it in 1988 – after establishing a record replete with evidence of persistent segregation and racial discrimination by both public and private actors and their effect on housing opportunities.[4]

Notwithstanding the broad reach of this legislation, housing segregation persists. A recent study found that "[r]acial segregation itself is the prime predictor" of where minorities live, in spite of some progress over the last few decades. John Logan, *Separate and Unequal: The Neighborhood Gap for Blacks, Hispanics and Asians in Metropolitan America*, US2010 Project, July 2011, at 1, 3. The perseverance of segregation stems largely from the *de jure* structures and policies that laid the foundation for today's housing market. *See generally* Massey & Denton, *supra*, at 60-114.

Present-day residential segregation is more pervasive than many realize. *See, e.g.,* Haya El Nasser, *Census data show 'surprising' segregation*, USA Today, Dec. 20, 2010. While state-sanctioned segregation in housing is no longer legal per *Shelly v. Kraemer,* 334 U.S. 1 (1948), many troubling patterns still persist. In 2011, U.S. Census officials found that "[d]espite [some] declines, residential segregation was still higher for African Americans than for the other groups across all measures," and other ethnic groups and cities, in

[4] *See, e.g.,* 114 Cong. Rec. 2277 (Feb. 6, 1968) (Sen. Mondale) ("An important factor contributing to exclusion of Negroes from [suburban communities and other exclusively white areas], moreover, has been the policies and practices of agencies of government at all levels."); 134 Cong. Rec. 10454 (Aug. 1, 1988) (Sen. Kennedy) ("Housing discrimination exists in America today, and it exists in epidemic proportions.").

particular, experienced mixed results. *See* U.S. Census Bureau, Housing and Household Economic Statistics Division (Oct. 31, 2011); *see also* William Frey, *The New Metro Minority Map: Regional Shifts in Hispanics, Asians, and Blacks from Census 2010,* Brookings Institution, Aug. 2011, at 1 ("Despite recent declines, blacks remain more residentially segregated than either Hispanics or Asians."). The persistence of these troubling patterns, despite the end of state-sponsored *de jure* segregation, demonstrates the continuing need for disparate impact enforcement.

B. Housing segregation imposes a wide array of socioeconomic harms that can only be fully eliminated through a framework that includes a disparate impact standard.

Residential segregation inflicts a host of interrelated ills that adversely affect the socioeconomic condition of individuals and communities. Indeed, this Court has recognized profound "harms flowing from the realities of a racially segregated community." *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 109-111 (1979).

The economic effects of housing segregation are well established and severe. "Decades of scholarly research have documented [how] . . . the persistence of segregation sustains racial and ethnic inequality in the United States and undermines prospects for long-term prosperity." Margery Austin Turner & Lynette A. Rawlings, *Promoting Neighborhood Diversity: Benefits, Barriers, and Strategies,* The Urban Institute, Aug. 2009, at 3. *See also infra* § I.C. For example, Dallas features both startlingly high levels of segregation in public housing and also profound economic stratification. Petitioners segregated 92.29%

of low-income units into minority areas of Dallas, a result that is uncomfortably close to the 95% level of segregation in public housing that was previously achieved through *de jure* measures. Resp. Br. 1, 33. Additionally, Dallas ranks second among the nation's ten largest metropolitan areas in terms of residential segregation by income. *See* Richard Fry & Paul Taylor, *The Rise of Residential Segregation by Income*, Pew Research Center, Aug. 2012, at 3.

Equally important are the intersections between housing and educational prospects. In part, because of the prevalence of neighborhood schools in the lower grades, housing segregation remains firmly tethered to educational segregation and impairs educational opportunity. "It has been widely recognized . . . that school segregation is linked closely to housing segregation," *Gladstone*, 441 U.S. at 111 n.24, and has direct and potentially devastating consequences on the quality of education that students receive. *See also* Richard Rothstein, *Segregated Housing, Segregated Schools*, Education Week (Mar. 25, 2014); *In Pursuit of a Dream Deferred: Linking Housing and Education Policy* (john a. powell et al., eds. 2001).

Likewise, segregated neighborhoods have a significant impact on social mobility. Students are cut off, sometimes quite literally, from learning with students of different backgrounds, and adults are separated from meaningful social interactions and related professional trajectories. *See generally* Elizabeth Anderson, *The Imperative of Integration* 3 (2010) ("Segregation . . . isolates disadvantaged groups from access to public and private resources, from sources of human and cultural capital, and from the social networks that govern access to jobs, business connections, and political influence.").

Housing segregation also has statistically significant effects on public health, stemming in part from decisions to site low-income housing near environmental hazards and industrial facilities. *See, e.g.,* David R. Williams & Chiquita Collins, *Racial residential segregation: a fundamental cause of racial disparities in health*, 116 Pub. Health Rep. 404 (Sept.-Oct. 2001); Jens Ludwig et al., *Neighborhoods, Obesity, and Diabetes – A Randomized Social Experiment*, 365 New Eng. J. Med. 1509, 1509 (2011). Congress understood these broader, inter-related effects of housing segregation at the time it passed the FHA.[5]

The isolated instances of individuals finding a path out of such circumstances do not lessen the daily harm imposed on the millions who do not. As this Court has recognized, "[f]rom the standpoint of the victim, it is true, an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 795 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

The repercussions of housing segregation are further heightened when the government originally caused or facilitated the harms. *Infra* n.12. Many disparate impact claims relate to *de facto* conditions that are fairly traceable to *de jure* practices that were imbedded in federal and state policies. This is directly

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[5] Segregation also harms non-minority communities and impedes economic growth in suburbs and cities writ large. *See, e.g.*, Huiping Li, et al., *Residential Segregation, Spatial Mismatch and Economic Growth across U.S. Metropolitan Areas*, 50 Urban Stud. 13, 2642-60 (Oct. 2013).

attributable to federal and state policies promoting racial segregation, and overt segregative practices by private individuals.

Disparate impact, however, can fill the void and root out the discriminatory origins undergirding current social conditions and structures. The ability to bring claims against housing practices with highly racial effects is one of the few effective means to investigate and address the legacy of *de jure* practices. For forty years, courts have utilized disparate impact analyses in FHA claims for this very reason.[6] For example, if a city council decided to intentionally segregate a town through a facially race-based zoning ordinance, that would present a straightforward case of intentional discrimination. With the passage of time, it may become more difficult to bring an intentional discrimination claim even though the neighborhood remains segregated as intended. Documents are lost, decision-makers pass on, and the causal chain becomes less immediate while the centripetal force of that pernicious zoning decision persists. In this way, disparate impact remains essential to erasing the

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[6] *See generally* Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 Am. U. L. Rev. 357, 364 (2013). It is perplexing that Petitioners and their supporting amici complain about the destructive consequences of disparate impact claims on businesses when nearly a half-century has passed since the Fair Housing Act was enacted. Whether some industries might now benefit from deregulation in the housing arena is not dispositive of how to interpret the FHA. In addition, the proposition that disparate impact claims are newly unpredictable is meritless given that four decades of practice and extensive agency guidance have fostered a stable enforcement climate. "There is no need for panic over the use of disparate impact theory in the housing" context. *Id.*

"grandfathered" effects of earlier, intentional acts of discrimination.

C. Residential segregation distorts market dynamics and degrades individual liberty and dignity.

The long shadow of *de jure* housing segregation also darkens the prospects for individual economic freedom and free markets. Homes in minority, segregated regions have less market value and are less salable. Thomas Shapiro et al., *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide* 3 (Feb. 2013). In addition, fewer Black families own homes than any other racial or ethnic group. U.S. Census Bureau News, Residential Vacancies and Homeownership in the Third Quarter 2014 at 9 (Oct. 28, 2014). Segregated Black residents build less wealth in their mortgages and encounter fewer economic opportunities. This disparity has lasting, inter-generational consequences: neighborhood conditions make it more difficult for Blacks to preserve economic advantages and wealth and transmit them to their children. *See* Patrick Sharkey, *Stuck in Place: Urban Neighborhoods and the End of Progress Toward Racial Equality* 115 (2013); *see also The Geography of Opportunity: Race and Housing Choice in Metropolitan America* 3-10 (Xavier de Souza Briggs, ed., 2005). All too often, these lasting fiscal limitations curtail the economic advancement that individuals, families, and neighborhoods can achieve.

In economic terms, this is a market distortion caused by racial bias. Mary Pattillo, *Making Fair (Public) Housing Claims in a Post-Racism Legal Context*, 18 J. Affordable Hous. & Cmty. Dev. L. 215, 217-18 (2009) ("Past racism has [] distorted the functioning of

institutions and markets – here, the housing market"). An axiom of modern economic theory is that individuals make rational, independent financial decisions that maximize their utility. *See* E. Roy Weintraub, *Neoclassical Economics*, *in* The Concise Encyclopedia of Economics (1st ed. 1993). Indeed, the principle of individual economic liberty turns on the premise that individuals are generally free to engage in such rational financial decision-making. Under ideal circumstances, free markets operate fluidly when unencumbered by distortions that impede such logical financial decisions. Arnold C. Harberger, *Microeconomics*, *in* The Concise Encyclopedia of Economics (2nd ed. 2008).

Racial bias interferes with the rational workings of a competitive market. When *de jure* segregation existed, the economic distortion of racial bias was expressly manifest in, for example, government prohibitions against property sales between certain races despite the parties' potential agreement that a given transaction and price were rational and mutually beneficial. This economic distortion deprived both the buyer and seller of economic liberty and value. Thus, Chicago-school economists, as well as civil rights groups, assert that racial bias is economically inefficient and antithetical to free markets. *See e.g.,* Milton Friedman, *Capitalism and Freedom* 108-10 (40th anniversary ed., 2002).

Today, although more subtle, race-neutral mechanisms are mainly responsible for the persistence of housing segregation, the distortive consequences are just as severe. Pattillo, *supra*, at 217-18. These distortions are further amplified because neighborhoods change slowly, and many residents cannot afford to move to other neighborhoods often,

particularly those who already struggle with other financial constraints. *See* Kyle Crowder et al., *Neighborhood Diversity, Metropolitan Constraints, and Household Migration*, Am. Soc. Rev. 77(3) 325–353 (2012). Even when residents can afford to move, neighborhood choice is often prescribed by policies that steer minorities to certain neighborhoods. *See* Sharkey*, supra*, at 53-54.

A government's conscious or subconscious decision to create, reinforce, or benignly perpetuate residential segregation is pivotal to market distortions because such governmental acts often lead to long-term segregation, even if some segregated residents acquire enough financial stability to have some measure of choice in where they live. *See Parents Involved*, 551 U.S. at 798 (Kennedy, J., concurring in part and concurring in the judgment) ("Due to a variety of factors – some influenced by government, some not – neighborhoods in our communities do not reflect the diversity of our Nation as a whole."). Racialized market distortions, therefore, should come as no surprise given that *de jure* segregation was literally mapped out, promoted, and enforced by governments for much of the twentieth century.

Altogether, this tangle of interlocking ills adds up to a troubling set of constraints. It is extremely difficult for most individuals to move up or move out. This is hardly a paradigm of efficient markets and free choice. It is the consequence of distinct, long-standing and inherited segregative policies that continue to powerfully resonate in the limited economic, educational and life choices of millions of African Americans in communities all over the country.

This situation has weighty repercussions on the self-determination and dignity of the individuals who live

in segregated neighborhoods and have limited opportunities to leave. This Court has rightly recognized the inherent value of self-worth in a variety of other analogous circumstances. *See United States v. Windsor,* 133 S. Ct. 2675, 2696 (2013) (dignity of individuals and same-sex marriages); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (dignity and autonomy of "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education"); *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) (inherent dignity of those with intellectual disabilities); *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (dignity of intimate relationships); *Roper v. Simmons*, 543 U.S. 551, 578-579 (2005) (dignity of juvenile criminal defendants); *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) (dignity of prisoners). Those principles apply with equal force here. Segregated housing and lack of agency in housing decisions imposes a host of harmful conditions, connotations, and constraints that disrespect the inherent self-determination and dignity to which each individual is entitled.

II. THE DISPARATE IMPACT STANDARD IS WORKABLE, FAIR, AND EFFECTIVE AT ROOTING OUT UNJUSTIFIED BARRIERS TO HOUSING OPPORTUNITY.

The application of the disparate impact standard to fair housing claims is fully consistent with the purposes of the FHA. It does not cause the parade of horribles proposed by Petitioners and their supporting amici.[7]

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[7] Petitioners claim that upholding the disparate impact standard will lead to a vague and indeterminate enforcement

Rather, the disparate impact standard has proven to be readily administrable. In particular, the standard's burden-shifting framework[8] is a feasible approach to protect those policies and practices that are necessary to achieve legitimate, nondiscriminatory objectives, as illustrated not only by its long-standing application in fair housing cases, *see, e.g., Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 939 (2d. Cir. 1988), *aff'd*, *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (per curiam), but also in equal employment litigation, *see, e.g.*, *Lewis v. City of Chicago*, 560 U.S. 205 (2010); *Griggs*, 401 U.S. 424, and other contexts, *see, e.g.*, Civil Rights Division, U.S. Dep't of Justice, *Title VI Legal Manual* 47-53 (2001) (discrimination in programs and activities receiving federal funds).

A. The threshold showing required at the *prima facie* stage adequately polices the boundaries of disparate impact.

In the Title VII context, this Court has made clear that the first stage of the three-part burden-shifting framework, which requires a *prima facie* showing of

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regime that assigns liability whenever racial effects are not perfectly symmetrical. Pet. Br. 47-51. Their supporting amici claim that the standard would disrupt homeowners insurance and upend actuarial principles, *see* Br. for the American Insurance Association et al., as Amici Curiae 9-24, and damage mortgage lending and risk-based standards, *see* Br. for the American Financial Association et al., as Amici Curiae 22-35.

[8] Although the disparate impact burden-shifting framework is not directly at issue in this case, *see Twp. of Mount Holly v. Mount Holly Gardens Citizens in Action*, 133 S. Ct. 2824 (2013) (limiting certiorari to Question 1), *Magner v. Gallagher*, 132 S. Ct. 1306 (2013) (same), understanding how it operates in practice is helpful in countering Petitioners' claims that disparate impact enforcement is unworkable or burdensome.

disparate impact, imposes "constraints that operate to keep [disparate impact] analysis within its proper bounds." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988). The same rationale applies under the FHA.

Plaintiffs at the *prima facie* stage bear the initial burden of offering evidentiary proof that "a challenged practice caused or predictably will cause a discriminatory effect." 24 C.F.R. § 100.500c(l). This Court has eschewed a "rigid mathematical formula" for this adverse effects showing. *Watson*, 487 U.S. at 995. Instead, the Court has expressed a preference for a "case-by-case approach" to accommodate the "'infinite variety'" of statistical methods and the reality that the "'usefulness [of different methods] depends on all of the surrounding facts and circumstances.'" *Id.* at 995 n.3 (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977)). In its final regulation, HUD endorsed the same "case-by-case" approach. U.S. Dep't of Hous. & Urban Dev., *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11,460, 11,469**;** *see also id.* at 11,468 (emphasizing that "[w]hether a particular practice results in a discriminatory effect is a fact-specific inquiry"). Defendants may utilize a variety of tools to challenge the reliability of plaintiffs' statistical evidence. *See Watson*, 487 U.S. at 996 (describing different methods to refute plaintiffs' data).

Moreover, plaintiffs do not establish a *prima facie* case unless they demonstrate a causal relationship between the disputed practice and the discriminatory effect. 24 C.F.R. § 100.500(c)(l). Courts of appeals have recognized that inferences may be used to establish this causal link. *See, e.g., Hallmark Developers, Inc. v.*

Fulton Cnty., 466 F.3d 1276, 1287 (11th Cir. 2006) (collecting cases); *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 577 (2d Cir. 2003) (supporting similar causal analysis); *Keith v. Volpe,* 858 F.2d 467, 484 (9th Cir. 1988) (same); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 142 (3rd Cir. 1977) (same).

This standard by no means guarantees plaintiffs success at the *prima facie* stage. Courts can – and do – reject disparate impact claims that fail to provide sufficient evidence, through inferences or otherwise, of a causal relationship between the disputed practice and its alleged adverse effects. Indeed, "[w]hat is misleading about two recent summary judgment reversals [in *Magner* and *Mount Holly*] is that they mask" the reality that "appellate courts have overwhelmingly controlled for perverse outcomes considering the forty-year history of the FHA." *See* Seicshnaydre, *supra*, at n.6, 362, 364. Disparate impact claims are "fact-intensive," and "[p]laintiffs have received positive decisions in only 20%, or eighteen of the ninety-two FHA disparate impact claims considered on appeal," and "have been able to reverse only four summary judgments in forty years including [*Magner* and *Mount Holly*]." *Id.* at 363-64. *See also McCauley v. City of Jacksonville*, 739 F. Supp. 278, 282 (E.D.N.C. 1989) (granting summary judgment to municipality due to lack of "evidence . . . from which one could infer that a significantly higher percentage of . . . families [qualified for rent low-income units] would have been black").

B. After a *prima facie* case is established, liability attaches only if the defendant fails to justify its policy or if its legitimate objective can be achieved by some other less discriminatory means.

Importantly, disparate impact liability does not attach unless the defendant fails to show that the disputed policy "is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." 24 C.F.R. § 100.500(c)(2). If the defendant succeeds at this second stage, plaintiffs must then demonstrate that those interests "could be served by another practice that has a less discriminatory effect." *Id.* at § 100.500(c)(3).

A defendant may rebut a *prima facie* case of disparate impact by demonstrating that the challenged practice is justified by an interest that is "substantial" (i.e., "a core interest of the organization that has a direct relationship to the function of that organization"), "legitimate" (i.e., "genuine and not false"), and itself "nondiscriminatory." 78 Fed. Reg. at 11,470. Provided these criteria are satisfied, there is no dispute that legitimate government interests may include alleviating housing segregation as in the instant case; protecting local infrastructure, such as sewage systems, *see Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243, 1255-57 (10th Cir. 1995); or addressing quality of life concerns, such as density, traffic flow, and pedestrian safety, *see id.*

Therefore, the objections of Petitioners and their supporting amici – that they would be precluded from pursuing legitimate business goals, *see e.g.,* Br. for the American Insurance Association et al., as Amici Curiae 9-24, or administering public policy, Pet. Br.

47-51 – are unfounded. The FHA's prohibition against disparate impact discrimination does not condemn policies merely because they have adverse effects. Rather, it precludes only those policies that have adverse effects and are unnecessary to the achievement of the defendant's substantial, legitimate, non-discriminatory goals. 24 C.F.R. § 100.500(c)(2); *see Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro. Human Relations Comm'n*, 508 F. 3d 366, 374-75 (6th Cir. 2007) ("Of course, not every housing practice that has a disparate impact is illegal. We use the burden shifting framework described above . . . to distinguish the artificial, arbitrary, and unnecessary barriers proscribed by the FHA from valid policies and practices crafted to advance legitimate interests.").[9]

If the defendant makes this showing of a substantial, legitimate, non-discriminatory interest, the case proceeds to the third stage of the burden–shifting framework, where the plaintiff must propose an alternative, which can then be compared to the challenged practice. 24 C.F.R. § 100.500(c)(3); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 70 (D. Mass. 2002). The trier of fact must determine whether

[9] Moreover, the defendant generally has better knowledge of – and access to – information regarding its own interests and how best to serve them. *See* 78 Fed. Reg. at 11,473-74. Allocating the burden to the plaintiff at the second stage is inconsistent with the plaintiffs' burden of proof at the third stage to demonstrate that "the substantial, legitimate, non-discriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." 24 C.F.R. § 100.500(c)(3). Such a showing by the plaintiff at the third stage naturally requires some understanding of the actual grounds upon which the defendant relied when it adopted the policy or practice.

the plaintiff's proposal is workable and whether it furthers the defendant's legitimate goals while reducing the disparate effects on the protected class. *See Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 902-03 (8th Cir. 2005). The feasibility of the alternative offered by the plaintiff "must be supported by evidence, and may not be hypothetical or speculative." 24 C.F.R. § 100.500(b)(2); 78 Fed. Reg. at 11,473.

Accordingly, any allegation that the disparate impact standard requires courts to ignore, for example, a lender's interest in assessing credit risk, *see* Br. for the American Financial Services Association et al., as Amici Curiae 22-35, or an insurance company's interest in assessing risk, *see* Br. for the American Insurance Association et al., as Amici Curiae 9-24, is unfounded. "[A] less discriminatory alternative need not be adopted unless it could serve the substantial, legitimate, nondiscriminatory interest at issue." 78 Fed. Reg. at 11,473. As HUD noted in finalizing its rule, "if the lender's interest in imposing the challenged practice relates to credit risk, the alternative would also need to effectively address the lender's concerns about credit risk." *Id.* Liability results only if the fact-finder determines that a challenged practice is not "necessary" to the defendant's legitimate interests because another practice, offered by the plaintiff, can effectively serve those same interests. *Id.* at 11,475 (noting that the "burden-shifting framework" distinguishes "unnecessary barriers" from "valid policies and practices crafted to advance legitimate interests") (quoting *Graoch Assocs.*, 580 F.3d at 374-75). This means that housing subsidy plans that have both beneficial and discriminatory effects may still be

unlawful if there is another, less discriminatory means by which to accomplish the same objective.

III. THE CANON OF CONSTITUTIONAL AVOIDANCE IS INAPPLICABLE TO DISPARATE IMPACT CLAIMS UNDER THE FHA.

As Respondents and the Solicitor General explain, the FHA's text, structure, and legislative history authorize disparate impact claims. Should the Court find the statute ambiguous, however, the canon of constitutional avoidance is inapplicable, notwithstanding the contrary arguments of Petitioners and their supporting amici.

Under this canon, the Court strives "to construe the statute to avoid [constitutional] problems if it is fairly possible to do so." *Boumediene v. Bush*, 553 U.S. 723, 787 (2008) (internal citations and quotation marks omitted). But this canon is applicable only where there are "grave" constitutional concerns. *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (citation omitted). There are no such grave constitutional concerns here that trump deference to the consistent and long-standing determination of the courts of appeal and HUD, as confirmed in its recently promulgated rule, that the disparate impact framework advances the FHA's core purposes.

A. Most FHA remedies do not trigger strict scrutiny.

Petitioners' invocation of the canon of constitutional avoidance is premised on the deeply flawed notion that application of disparate impact to the allocation of tax credits would require race-conscious decision-making in order to avoid legal liability. Pet. Br. 43. Nothing could be further from the truth.

First, Petitioners' concerns about "racial balancing," Pet. Br. 44, are overwrought. State governments are unquestionably cognizant of this Court's holdings that "outright racial balancing," for its own sake, is "patently unconstitutional." *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). Indeed, most remedies in the FHA context are straightforward as well as race-neutral.

Second, there are many options for government officials to avoid or redress disparate impact liability that do not trigger strict scrutiny. For instance, when government officials utilize "mechanisms [that] are race conscious but do not lead to different treatment based on a classification that tells each [individual] he or she is to be defined by race, . . . it is unlikely any of [these mechanisms] would demand strict scrutiny to be found permissible." *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment). In the school context, these mechanisms might include "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." *Id. Cf. Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (declining to "question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made"). These measures may still lend themselves to judicial review, but need not implicate strict scrutiny.

Similarly, when allocating low-income housing tax credits, local governments should be able to consider the demographics of targeted neighborhoods without

triggering strict scrutiny. As in the context of school attendance zones, the result would be a policy that benefits the neighborhood as whole, rather than only residents of a particular race. *Cf. United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1184, 1236 (2d Cir. 1987) (upholding order to build 200 public housing units in areas that were predominantly non-minority to further racial integration); *Rizzo*, 564 F.2d at 153 (affirming order requiring construction of a low-income housing project in a predominantly white neighborhood to redress disparate impact and intentional violations).

Third, even in the context of court-approved settlements and court-ordered remedies for FHA disparate impact claims, most relief is facially race neutral insofar as it benefits all individuals, and not just the disparately impacted racial minorities who were subjected to the challenged policy. This is particularly true in the context of decreasing housing segregation.

Moreover, as Respondents point out, Resp. Br. 20, and notwithstanding Petitioners' contention to the contrary, Pet. Br. 43-44, a remedy in this case would not require the allocation of benefits or burdens based on individual racial classifications. For instance, the remedial plan ordered here simply required Texas to consider neutral factors, such as the allocation of tax credits for sites near hazardous or nuisance conditions like industrial facilities, landfills, or high-crime areas. Resp. Br. 28.

B. Racial classifications used to remedy disparate impact discrimination will be subject to a case-specific strict scrutiny analysis.

Even if some remedies for disparate impact discrimination may allocate benefits or burdens based on an individual's race, that mere possibility should not automatically trigger any "grave" constitutional concerns with the overall statutory disparate impact framework. *Rust*, 500 U.S. at 191. There is a well-established strict scrutiny standard for evaluating the constitutionality of racial classifications on a case-by-case, context-specific basis. While such rigorous constitutional review would apply to a racial classification that is part of a remedy for a government actor's disparate impact discrimination under the FHA (or any other federal civil rights statute that permits such claims), a defendant would not face difficulty in satisfying the compelling interest or narrow tailoring prong of strict scrutiny.

1. Demonstrating a "compelling interest" under strict scrutiny analysis.

This Court can straightforwardly affirm that disparate impact remedies, to the extent they are race-conscious in the FHA context, serve a compelling government interest. The Court has invariably presumed that compliance with presumptively valid federal antidiscrimination law is a compelling interest. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 977 (1996); *Shaw v. Hunt*, 517 U.S. 899, 915 (1996); *Shaw v. Reno*, 509 U.S. 630, 656 (1993). That presumption is equally applicable here. This Court has also repeatedly endorsed disparate impact analysis, without ever questioning its constitutionality. *See, e.g.*, *Lewis*, 130

S. Ct. at 2197-98: *Watson*, 487 U.S. at 986-87; *Griggs*, 401 U.S. at 431.

Even if the Court feels the need to delve further, disparate impact claims under the FHA fulfill two complementary goals that serve compelling interests while steering clear of other constitutional concerns.

First, the FHA's disparate impact framework serves a compelling interest by rooting out subtle or surreptitious intentional discrimination. As this Court has recognized in other contexts, severe disparate impact can provide probative evidence of discriminatory intent. *See, e.g.*, *Teamsters*, 431 U.S. at 339-40 & n.20 (1977); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). The three-part, burden-shifting framework under the disparate impact standard provides a powerful, evidentiary tool for sussing out, in an orderly and sensible fashion, policies or practices that are surreptitiously discriminatory. *See e.g., In re Emp't Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1321 (11th Cir. 1999) ("[A] genuine finding of disparate impact can be highly probative of the [defendant]'s motive since a racial 'imbalance is often a telltale sign of purposeful discrimination.'") (quoting *Teamsters*, 431 U.S. at 339-40 n.20). Under the third step of the framework, "the Supreme Court has been even more unambiguous in characterizing an employer's refusal to adopt the alternative practice as 'evidence that the employer was using its tests merely as a 'pretext' for discrimination." *Id. at* 1322 (quoting *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975)).[10]

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[10] In addition, "even if one assumed that [intentional] discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and

Petitioners fail to acknowledge these authorities and instead obliquely lament that it can be difficult to disprove discriminatory intent. Pet. Br. 35. But the reasonable operation of the burden-shifting framework renders "an affirmative defense for good-faith" unnecessary to assuage any equal protection concerns raised by disparate impact enforcement. *Cf. Ricci*, 557 U.S. at 595 (Scalia, J., concurring). Likewise, in rebuffing a constitutional challenge to Title VII's disparate impact framework for the workplace, the Eleventh Circuit reasoned:

> If, after a *prima facie* demonstration of discriminatory impact, the employer cannot demonstrate that the challenged practice is a job related business necessity, what explanation can there be for the employer's continued use of the discriminatory practice other than that some invidious practice is probably at work?

In re Emp't Discrimination Litig. Against Ala., 198 F.3d at 1321-22.[11]

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prejudices would remain." *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 990 (1998).

[11] Of course, not every practice with an unlawful disparate impact is actually motivated by intentional discrimination. Instead, the Court has recognized that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997). Using that rationale, this Court has endorsed "prophylactic legislation" prohibiting disparate impact discrimination in order to enforce the Fourteenth Amendment's equal protection guarantee. *Tennessee v. Lane*, 541 U.S. 509, 520 (2004); *see also Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 737-38 (2003). Notably, this Court's cases recognizing Congressional intent to prohibit disparate impact discrimination under Title VII do not justify disparate impact

Second, the FHA's disparate impact framework serves another compelling interest by remedying the vestiges of *de jure* segregation and identifying practices that would freeze that harmful legacy in place. Disparate impact enforcement reflects a concern that the disadvantages faced by "minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973) (citing *Griggs*, 401 U.S. at 430). To a substantial and unfortunate degree, such disadvantages are the result of prior unconstitutional, state action, and the case law is abundantly clear that government officials have both the constitutional authority and the responsibility to assure that the legacy and vestiges of those discriminatory practices are not given any more effect than legitimately necessary. *See, e.g.*, *City of Richmond v. J.A. Croson*, 488 U.S. 469, 532-33 (1989). Moreover, the removal of such barriers instills greater community confidence in the fairness of public housing policies and, as a consequence, the legitimacy of the government itself. *Cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 290 (1986) (O'Connor, J., concurring).[12]

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merely as an evidentiary dragnet; instead, the Court has recognized that disparate impact enforcement also operates as a broader "prophylactic" measure to further Congress's goal "of achieving equality of employment 'opportunities' and removing 'barriers' to such equality.'" *Connecticut v. Teal*, 457 U.S. 440, 449 (1982) (quoting *Griggs*, 401 U.S. at 429-30). *See also Albemarle Paper*, 422 U.S. at 417 (same).

[12] This second rationale for disparate impact enforcement as providing a means to redress facially neutral practices that "freeze" in place a discriminatory "status quo," *Griggs*, 401 U.S. at 430, is consistent with, although ultimately broader than, the "segregation" prong of HUD's disparate impact rule. *See* 24 C.F.R. § 100.500(a) ("A practice has a discriminatory effect where it

2. Demonstrating "narrow tailoring" under strict scrutiny analysis.

Disparate impact analysis is a presumptively valid tool to effectuate the FHA's goals and, thus, satisfies the "compelling interest" prong of strict scrutiny. Accordingly, any lingering concerns about the constitutionality of a specific race-conscious remedy or voluntary compliance effort implemented by a government actor should be addressed as a matter of reviewing the narrow tailoring in the particular circumstances at issue. Petitioners, *see* Pet. Br. 43-44, and some of their supporting amici, *see, e.g.*, Br. of Amicus Curiae The Project on Fair Representation 18, focus on Justice Scalia's concurrence in *Ricci,* where he speculated about potential tension between disparate impact and disparate treatment. *Ricci*, 557 U.S. at 594 (Scalia, J., concurring). Yet the narrow-tailoring prong of strict scrutiny already builds in a framework that fully and adequately addresses any possible tension based on the facts of a specific case. *See Croson*, 488 U.S. at 500; *United States v. Paradise*, 480 U.S. 149, 171 (1987); *Wygant*, 476 U.S. at 277 (plurality opinion).

Courts have adeptly applied narrow-tailoring in those instances where racial classifications in the housing context have been challenged. *Compare United States v. Starrett City Assocs.*, 840 F.2d 1096, 1103 (2d Cir. 1988) (striking down tenant selection procedure that utilized "rigid racial quotas of indefinite duration to maintain a fixed level of

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actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns." (emphasis added)); *see* 78 Fed. Red. at 11,463; *Graoch Assocs.,* 508 F.3d at 378; *Huntington Branch*, 844 F.2d at 937.

integration”), *with Jaimes v. Lucas Metro. Hous. Author.*, 833 F.2d 1203, 1206-07 (6th Cir. 1987) (upholding a tenant selection plan for a municipal housing complex, which classified applicants based on their race).

Thus, as a general matter, FHA disparate impact enforcement and the remedies it requires do not raise constitutional concerns. Any specific remedies that involve racial classifications in the allocation of case-specific relief by government actors – unlike the less discriminatory alternatives proposed in this case – can be addressed through well-established mechanisms of heightened judicial review.

CONCLUSION

This case can be resolved on straightforward grounds of statutory interpretation and/or *Chevron* deference. There is no legal basis for the Court to dismantle foundational doctrine within our nation’s civil rights architecture. Rather, in light of the significant equities concerning economic opportunity and human dignity that are implicated by entrenched housing segregation, the Court must preserve disparate impact claims under the Fair Housing Act. For the foregoing reasons, this Court should affirm the judgment of the Fifth Circuit.

Respectfully submitted,

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