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 OF THE COMMITTEES ON CIVIL RIGHTS AND ADMINISTRATIVE LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

SEBASTIAN RICCARDI
CHAIR, COMMITTEE ON CIVIL RIGHTS
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
111 Livingston Street
Brooklyn, NY 11201
(718) 422-2778

PETER T. BARBUR
Counsel of Record
KATHERINE A. ROCCO
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
pbarbur@cravath.com

VICTORINE FROEHLICH, MONICA IYER, DAVID MANNION, RUNA RAJAGOPAL
On the Brief

Counsel for Amicus Curiae

October 28, 2013

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INTEREST OF *AMICUS CURIAE*

The Association of the Bar of the City of New York (the "Association") was founded in 1870 and has been dedicated ever since to maintaining the highest ethical standards of the profession, promoting reform of the law, and providing service to the profession and the public. Among its purposes are "cultivating the science of jurisprudence, promoting reforms in the law, facilitating and improving the administration of justice." Article II, Constitution of the Association. With over 24,000 members, the Association is among the nation's oldest and largest bar associations.

The Association has approximately 150 committees that focus on legal practice areas and issues. Through testimony, reports, amicus briefs, statements, and letters drafted by committee members, the Association comments on legal issues and public policy. This brief was prepared by the Committee on Administrative Law and the Committee on Civil Rights. The Committee on Administrative Law addresses administrative law issues on a local, state, and federal level. In recent years the Committee has sought to educate the profession regarding the administrative enforcement of civil rights laws. The Committee on Civil Rights has long been involved in law reform efforts to promote equality of opportunity and has been involved in the strengthening of State and local civil rights laws that protect New Yorkers from discrimination. The Association has a long-standing interest in the enforcement of anti-discrimination

laws and has submitted a number of *amicus curiae* briefs in this Court in cases addressing civil rights.[1]

SUMMARY OF ARGUMENT

Section 804(a) of the Fair Housing Act ("FHA") 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). This unqualified and expansive language focusing on "the *effects* of the action on the" protected group rather than the "motivation for the action" demonstrates that the FHA encompasses disparate impact claims. *Smith v. City of Jackson*, 544 U.S. 228, 236 (2005) (plurality opinion) (emphasis in original) (analyzing similar language in the Age Discrimination in Employment Act of 1967). Moreover, Congress preserved this language in the 1988 amendments of the FHA knowing that all nine Courts of Appeal to have addressed the issue had found that it contained a disparate impact prohibition. This history strongly supports the inference that, in the absence of express language imposing an intent requirement in the statutory prohibition, Congress did not intend to require a showing of discriminatory intent to sustain a claim.

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[1] This brief is submitted pursuant to blanket consent from all parties on file with this Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

To the extent that this question is unsettled, this Court should look and defer to the long-standing interpretation of the Department of Housing and Urban Development ("HUD") that the FHA prohibits actions which have discriminatory effects regardless of evidence of discriminatory intent. In the Fair Housing Act Amendments of 1988 (the "1988 Amendments"), Congress delegated to HUD the primary authority for administering the FHA by conducting formal adjudications of alleged violations, 42 U.S.C. § 3612, and issuing regulations interpreting the FHA, 42 U.S.C. § 3614(a). In the 25 years since, HUD has consistently taken the position in agency adjudications, court proceedings and regulations that the FHA prohibits certain actions that have a disparate impact regardless of proof of discriminatory intent. *See, e.g.*, *HUD v. Mountain Side Mobile Estates P'ship,* No. 08–92–0010–1, 1993 WL 307069 (HUD Sec'y July 19, 1993), *aff'd in relevant part*, 56 F.3d 1243 (10th Cir. 1995); *HUD v. Pfaff*, No. 10-93-0084-8, 1994 WL 592199, at *7 (HUD ALJ Oct. 27, 1994), *rev'd on other grounds*, 88 F.3d 739 (9th Cir. 1996) ("In the absence of direct evidence of discrimination, violations of the Fair Housing Act can be proven by circumstantial evidence under either a disparate treatment or adverse impact analysis, both of which have been traditionally applied to cases involving other forms of discrimination."); 24 C.F.R. §§ 81.42, 100.5(b), 100.500. This long-standing interpretation of the FHA is entitled to deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984). *See also City of Arlington, Tex. v. FCC.,* 133 S. Ct. 1863, 1868 (2013).

HUD's interpretation of the FHA to encompass disparate impact claims is both reasonable and permissible. A disparate impact standard provides a reasonable means of uncovering and remedying the effects of even well concealed discrimination. Further, HUD's disparate impact interpretation prohibits many facially neutral policies that may operate to "freeze the status quo of prior discriminatory [] practices." *See Griggs v. Duke Power Co.,* 401 U.S. 424, 430 (1971) (internal quotations omitted). For these reasons the Court of Appeals decision should be affirmed.

ARGUMENT

I. DISPARATE IMPACT CLAIMS ARE AVAILABLE UNDER SECTION 804(a) OF THE FHA

We agree with Respondents that § 3604(a)'s ban on "refus[ing] to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin" creates a disparate impact prohibition, because "the text focuses on the *effects* of the action on the" protected group rather than "the motivation for the action." *Smith*, 544 U.S. at 236. Further, the history and the structure of the statute imply such a disparate impact prohibition.

However, to the extent that Petitioners arguments to the contrary are persuasive, they only show that Congress left this interpretive question to the administrative agency. Because the 1988 Amendments delegated to HUD the primary authority for administering the FHA, this Court

must conduct the threshold inquiry under *Chevron* of determining whether Congress, in promulgating the FHA, has directly spoken to the precise question at issue, and, if not, inquire whether "the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843–44. If the statutory text is found to be ambiguous, this Court should defer to HUD's long-standing determination that § 3604(a) contains a disparate impact prohibition because such "[s]tatutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." *City of Arlington*, 133 S. Ct. at 1868.

A. Congress Spoke to the Issue of Disparate Impact in Promulgating the FHA

The text and history of § 3604(a) indicate that Congress intended its prohibition to encompass practices that have a disparate impact on protected classes even in the absence of discriminatory intent. Congress enacted Title VIII of the Civil Rights Act of 1968, 82 Stat. 81, as amended, 42 U.S.C. § 3601 *et seq*. "to replace the ghettos 'by truly integrated and balanced living patterns.'" *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting the FHA's drafter, Senator Walter Mondale). According to the act "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601; *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982) (recognizing Congress's "broad remedial intent"). The FHA made 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, or national origin." 42 U.S.C. § 3604(a) (1969). In the 20 years after the FHA's passage, the nine Courts of Appeal to have considered the issue unanimously held that a violation of § 3604(a) "can be established by a showing of discriminatory effect without a showing of discriminatory intent." *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); *see also Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934–35 (2d Cir. 1988), *aff'd per curiam*, 488 U.S. 15 (1988); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565, 574–75 (6th Cir. 1986); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1559 n.20 (11th Cir. 1984); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146–48 (3d Cir. 1977); *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir. 1974).

In 1988, when Congress undertook its comprehensive amendments of the FHA, it did so against the backdrop of unanimous Courts of Appeals interpretations of § 3604(a) as prohibiting facially neutral policies that had a disparate impact. *See, e.g.*, 134 Cong. Rec. 23711-12 (1988) (speech of Sen. Kennedy noting the unanimity of courts of appeals that the FHA prohibits policies with disparate impact). In the face of this unanimous judicial construction, Congress did nothing to

legislatively overrule the Courts of Appeals cases imposing disparate impact liability. Instead, the 1988 Amendments both expanded the scope of protected classes and added exemptions to the FHA that pre-supposed, or implied, the existence of disparate impact liability. In particular, the amendments added "familial status" as one of the protected characteristics under 3604(a) and prohibited housing discrimination against the disabled. 42 U.S.C. §§ 3604(a), (f). Importantly, in describing the prohibition against discrimination against the disabled, Congress used the same "otherwise make unavailable or deny[] a dwelling" language that appeared in § 3604(a), making it unlawful to "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap." 42 U.S.C. § 3604(f)(1).

Congress's decision to leave the "otherwise make unavailable or deny" language of § 3604(a) unchanged implied its acquiescence to the unanimous judicial construction of that language as imposing disparate impact liability. *C.f. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381–82 (1982) (holding that "the fact that a comprehensive reexamination and significant amendment of the [Commodities Exchange Act] left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy"); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-

enacts a statute without change[.]"). This inference is exceptionally strong here as Congress decided to use the same "otherwise make unavailable or deny" language in the new prohibition of discrimination against the disabled in § 3604(f)(1). *See Central Bank of Denver N.A. v. First Interstate Bank of Denver N.A.*, 511 U.S. 164, 185 (1994) ("When Congress reenacts statutory language that has been given a consistent judicial construction, we often adhere to that construction in interpreting the reenacted statutory language.").

The 1988 Amendments not only expanded the scope of § 3604, but substantially increased HUD's authority by including broad new enforcement powers for HUD. Previously limited to the role of a mediator in FHA disputes, the 1988 Amendments made HUD the primary enforcer of the FHA. For example, HUD gained the power to adjudicate housing discrimination complaints before Administrative Law Judges ("ALJs"), who may issue injunctions as well as order the payment of damages. 42 U.S.C. § 3612(g)(3). These orders become final and binding 30 days after being issued unless reversed by the Secretary of HUD. 42 U.S.C. § 3612(h)(1). Congress also gave HUD the authority to bring enforcement actions against violators of the FHA, 42 U.S.C. § 3610, and to "make rules . . . to carry out this subchapter." 42 U.S.C. § 3614(a). Finally, the Amendments provide that "[t]he Secretary shall give public notice and opportunity for comment with respect to all rules made under [Section 3614(a)]." *Id.*

Again, even as Congress endowed HUD with substantial, increased authority, the 1988 Amendments did not add any language to abrogate or qualify the well-established view that proof of discriminatory effect did not require a showing of discriminatory intent. This strongly demonstrates that Congress did not intend to preclude such liability or negate existing case law.

B. Supreme Court Jurisprudence Supports a Finding that the FHA Prohibits Disparate Impact

We agree with Respondents that § 3604(a)'s ban on "refus[ing] to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin" creates a disparate impact prohibition, because "the text focuses on the *effects* of the action on the" protected group rather than "the motivation for the action." *Smith v. City of Jackson*, 544 U.S. 228, 236 (2005) (plurality opinion).

In an effort to distinguish *Smith*, Petitioners point to the textual differences between § 3604(a) and the provision of the Age Discrimination in Employment Act ("ADEA") at issue in *Smith* as evidence that Congress had decided to foreclose disparate impact liability. As set forth below, those differences between § 3604(a) and the disparate impact provisions of the ADEA and Title VII are not evidence that Congress included an intent requirement in the FHA.

In *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971), the Court confronted the issue of whether

Title VII prohibited employment policies that have a disparate impact regardless of evidence of discriminatory intent in connection with an employer requiring job candidates to take an intelligence test in the absence of a high school degree. This Court unanimously held that it did, explaining: "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." *Id.* at 432. Although the *Griggs* determination primarily relied on Congressional intent, it noted that the Equal Employment Opportunity Commission [EEOC] had issued guidelines interpreting the test requirements at issue, and "[s]ince the Act and its legislative history support the [EEOC]'s construction, this affords good reason to treat the guidelines as expressing the will of Congress." *Id.* at 434.

In *Smith*, a plurality of this Court again faced language almost identical to that confronted in *Griggs*, and reaffirmed its view that the ADEA did not require proof of intent. *Smith*, 544 U.S. at 235. The ADEA at 29 U.S.C. § 623(a)(2),[2] contains language that is almost identical to that in § 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(2),[3] which this Court had found in

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[2] 29 U.S.C. § 623(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age[.]"

[3] 42 U.S.C. § 2000e-2(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or

Griggs supported a disparate impact cause of action. In particular, the Court focused on the phrase "otherwise adversely affects," writing that this language provided a basis for disparate impact liability because "the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer." *Smith*, 544 U.S. at 236. As additional support for its reasoning, the Court noted "that both the Department of Labor, which initially drafted the legislation, and the EEOC, which is the agency charged by Congress with responsibility for implementing the statute, 29 U.S.C. § 628, have consistently interpreted the ADEA to authorize relief of a disparate-impact theory." *Smith*, 544 U.S. at 240. Although Justice Scalia did not join this section of the opinion, he concurred in the judgment, writing, "This is an absolutely classic case for deference to agency interpretation." *Id.* at 243 (Scalia, J., concurring).

When looked at in context, Congress's use of different language in § 3604(a) does not indicate that it intended to foreclose disparate impact liability. Rather, the textual differences result from the fact that these statutes apply in very different areas. The ADEA and Title VII govern employment relations and apply only in that limited context. Their prohibitions only apply to employers and only bar actions that "otherwise adversely affect[]" an employee's (or potential employee's) status. What the "effect" may be is not described, except that it is "adverse." Section 3604(a), in contrast, is not limited in its application to any particular set of actors and

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otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

instead protects "any person," which includes corporations or groups of individuals, from discriminatory practices. *See* 42 U.S.C. § 3602(d). However, unlike the ADEA or Title VII, the "adversely affects" language in § 3604(a) is not necessary because the entire phrase "otherwise make unavailable or deny a dwelling" fully describes the effect in the housing context.

Contrary to Petitioners' suggestion, Congress could not have clarified the existence of disparate impact liability in § 3604(a) by the addition of the "adversely affects" language. The language simply would not make sense in the provision: the replacement of "make unavailable or deny a dwelling" by the "adversely affects" language in § 3604(a) would broaden its prohibition and take it far outside the context of housing discrimination. Therefore, the decision of Congress to use slightly different language in the FHA does not suggest a rejection of disparate impact liability, but rather demonstrates that Congress chose clear and simple language to address its important goal of eliminating housing discrimination.

In addition to textual differences between the FHA, the ADEA and Title VII, Petitioners paradoxically point to a textual similarity between the statutes to argue that the FHA does not contain a disparate impact prohibition. Petitioners argue that since § 3604(a) only prohibits actions taken "because of" a protected trait, it is limited to intentional discrimination. Pet. Br. at 24 (citing *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) and *Univ. of Tex. Sw. Med. Cnt. v. Nassar*, 133

S. Ct. 2517 (2013). However, both the ADEA and Title VII contain this same "because of" language. Section 623(a)(2), the disparate impact provision of the ADEA, only prohibits actions which adversely affect an employee "*because of* such individual's age." 29 U.S.C. § 623(a)(2) (emphasis added); *see also Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 96 (2008) (noting that "in the typical disparate-impact case, the employer's practice is 'without respect to age' and its adverse impact (though 'because of age') is 'attributable to a nonage factor'"). And Section 2000e-2(a)(1), the disparate impact provision of Title VII, only prohibits actions that adversely affect an employee "*because of* such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added); *see also Griggs*, 401 U.S. at 434; *Smith*, 544 U.S. at 235. As a result, under this Court's jurisprudence, Congress's inclusion of the phrase "because of" cannot be interpreted to preclude disparate impact liability. The word "because" is plainly present in each statute to focus on the class or characteristic that is being protected. Accordingly, its presence in § 3604(a) cannot be a sign that—as opposed to the comparable provisions in Title VII and the ADEA which include "because of"—the FHA only prohibits disparate treatment. To apply such a rule now would overturn decades of settled jurisprudence that Congress relied on when it amended the FHA in 1988.

The conclusion that § 3604(a) imposes disparate impact liability is reinforced by the narrow exclusions to liability which were included in the 1988 amendments. "[I]f Congress intended to

prohibit all disparate-impact claims, it certainly could have done so". *Smith* 544 U.S. at 239 n.11 (noting that, in contrast to the ADEA, Congress did expressly prohibit disparate impact claims in the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1)). However, Congress did not include any language prohibiting disparate impact claims—either in 1968 when the FHA was originally passed, or in 1988 after nine Courts of Appeal held that the FHA encompassed disparate impact claims. Instead, in the 1988 Amendments, Congress chose to *narrow* the availability of disparate impact claims in three discrete areas: appraisals, occupancy by people convicted of drug crimes and maximum numerical occupancy standards. The inclusion of these targeted exemptions in the 1988 Amendments supports the inference that the FHA, generally, includes a broad disparate impact prohibition. Any other reading would render the exemptions superfluous (and would make little sense).

First, Congress chose to exempt, under § 3605(c), any "person engaged in the business of furnishing appraisals of real property" from liability when he or she "take[s] into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." 42 U.S.C. § 3605(c). The appraisal exemption implies the existence of a disparate impact prohibition because action based on a factor other than race, color, religion, national origin, sex, handicap, or familial status' is the "very premise for disparate-impact liability in the first place." *See Meacham*, 554 U.S. at 96.

Second, Congress excluded "conduct against a person because such person has been convicted . . . of the illegal manufacture or distribution of a controlled substance". 42 U.S.C. § 3607(b)(4). Because nothing in the FHA prohibits discrimination on the basis of drug convictions, this exemption must presuppose disparate impact liability. In fact, three years later, Congress inserted a nearly identical exemption from liability under the disparate impact provisions of Title VII for "a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance," 42 U.S.C. § 2000e-2(k)(3). These exemptions show that Congress knew how to preclude disparate impact liability under the FHA and that, with respect to almost all areas covered by § 3604(a), it declined to do so.

Third, the maximum occupancy exemption likewise supports the conclusion Congress intended § 3604(a) to include disparate impact liability. While amending § 3604(a) to add "familial status", Congress added an exemption to liability for "reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." § 3607(b)(1).[4] This

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[4] This exemption to liability applies to all of the FHA, not just §3604(a). *See City of Edmonds v. Oxford House, Inc.,* 514 U.S. 725 (1995) (analyzing the application of § 3607(b)(1) to a reasonable accommodation claim under § 3604(f)). However, the addition of this exemption to the FHA was driven by Congress' inclusion of discrimination on the basis of "familial status" as a basis for liability under § 3604(a). *See* H.R. Rep. No. 100-711, at 31 (1988). This interpretation of the statute is confirmed by the placement in the same subsection of an exemption specifically to liability for discrimination on the basis

exemption mirrors the exemption for liability under the ADEA for employment decisions made on the basis of "reasonable factors other than age," which this Court has recognized implies the availability of a disparate impact remedy. *Smith*, 544 U.S. at 239 ("Rather than support an argument that disparate impact is unavailable under the ADEA, the ["reasonable factors other than age"] provision actually supports the contrary conclusion."); *Meacham*, 554 U.S. at 96. Like the other exemptions, the occupancy standards exemption implies the availability of a disparate impact prohibition because only under a disparate impact theory could a defendant be liable for reliance on factors other than "familial status" in denying housing and still violate § 3604(a)'s prohibitions. However, unlike the other exemptions, the occupancy standards exemption only applies where such standards are "reasonable." This limitation of the exemption supports the inference that there is a disparate impact prohibition in § 3604(a), which remains preserved against "unreasonable" occupancy standards. *See Smith*, 544 U.S. at 239; *see also Meacham*, 554 U.S. at 96.

II. *CHEVRON* REQUIRES DEFERENCE TO HUD'S INTERPRETATION

Even if Congress did not speak clearly as to whether a disparate impact claim is available under § 3604(a), Petitioners arguments to the contrary merely indicate that the statute is ambiguous. Thus, this Court must turn to the second inquiry under

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of familial status "with respect to housing for older persons." 42 U.S.C. § 3607(b)(1).

Chevron; that is, "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *City of Arlington*, 133 S. Ct. at 1868. In that regard, § 3604(a) is phrased in "capacious" terms: "it shall be unlawful [t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin." With the enactment of § 3614(a) in 1988, Congress provided HUD with expansive rule-making authority. These provisions and those discussed above demonstrate that Congress intended to maximize the agency's power and discretion, and this Court must defer to the agency unless its interpretation is not "permissible." *City of Arlington*, 133 S.Ct. at 1868; *Chevron*, 467 U.S. at 843 n.11.

A. HUD Has Consistently Taken the Position that the FHA Prohibits Discriminatory Effects Even in the Absence of Discriminatory Intent

In the 25 years since Congress delegated to HUD the authority to interpret the FHA, HUD has consistently found that a disparate impact claim is available under the FHA. As explained below, HUD has taken this position in formal adjudications, notice and comment rulemaking, agency-initiated complaints, briefs to the courts of appeals and in its own policy statements and instructions to its staff. *See* 78 Fed. Reg. No. 32 at 11461-62. HUD's extensive public record on this issue should be given

due consideration. *C.f. Udall v. Tallman*, 380 U.S. 1, 17 (1965) (reversing Court of Appeals and affording deference to statutory interpretation of Secretary of the Interior where "[t]he Secretary's interpretation had, long prior to respondents' applications, been a matter of public record and discussion.").

In its formal adjudications, HUD has also uniformly recognized the existence of disparate impact treatment under the FHA. *See, e.g.*, *HUD v. Twinbrook Vill. Apts.*, No. 02–0256–8, 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001) ("A violation of the [Act] may be premised on a theory of disparate impact."); *HUD v. Mountain Side Mobile Estates P'ship*, No. 08-92-0010, 1993 WL 307069, at *3-7 (HUD Sec'y July 19, 1993), *aff 'd in relevant part*, 56 F.3d 1243 (10th Cir. 1995) (HUD Secretary reviewing ALJ decision and applying disparate impact analysis to complaint alleging familial status discrimination); *HUD v. Carlson*, No. 08–91–0077–1, 1995 WL 365009, at *14 (HUD ALJ June 12, 1995) ("A policy or practice that is neutral on its face may be found to be violative of the Act if the record establishes a *prima facie* case that the policy or practice has a disparate impact on members of a protected class"); *HUD v. Ross*, No. 01–92–0466–18, 1994 WL 326437, at *5 (HUD ALJ July 7, 1994) ("Absent a showing of business necessity, facially neutral policies which have a discriminatory impact on a protected class violate the Act."); *HUD v. Pfaff*, No. 10-93-0084-8, 1994 WL 592199, at *7 (HUD ALJ Oct. 27, 1994), *rev'd on other grounds*, 88 F.3d 739 (9th Cir. 1996) ("In the absence of direct evidence of discrimination, violations of the Fair Housing Act can be proven by circumstantial evidence under

either a disparate treatment or adverse impact analysis, both of which have been traditionally applied to cases involving other forms of discrimination."); *HUD v. Carter*, No. 03–90–0058–1, 1992 WL 406520, at *5 (HUD ALJ May 1, 1992) ("The application of the discriminatory effects standard in cases under the Fair Housing Act is well established."). These formal adjudications are entitled to *Chevron* deference because federal courts "[have] no business" rejecting them. *United States v. Mead*, 533 U.S. 218, 230 (2001) ("the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of . . . formal adjudication").

In its rule-making, HUD has consistently required the application of a disparate impact analysis. HUD issued comprehensive regulations in 1996 based, in part, on its authority under the FHA covering two government sponsored enterprises ("GSEs"), the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). 24 C.F.R. 81.1 *et seq*. Within that framework, HUD expressly recognized the applicability of an effects test:

> Neither GSE shall discriminate in any manner in making any mortgage purchases because of race, color, religion, sex, handicap, familial status, age, or national origin, including any consideration of the age or location of the dwelling or the age of the neighborhood or census tract where the

> dwelling is located *in a manner that has a discriminatory effect.*[5]

In pronouncements leading to the issuance of 24 C.F.R. 81.42, HUD stressed the importance of the disparate impact theory. For instance, HUD cited to the joint statement it issued with nine other federal agencies that recognized disparate impact as one of the methods of proving unfair lending. *See* Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266 (Apr. 15, 1994) ("the Policy Statement"). Similarly, in issuing the GSE regulation, HUD explained that "[a]ll the Federal financial regulatory and enforcement agencies recognize the role that disparate impact analysis plays in scrutiny of mortgage lending" and have "jointly recognized the disparate impact standard as a means of proving lending discrimination under the Fair Housing Act." *See* HUD's Regulation of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) 60 Fed. Reg. at 61846, 61867 (Dec. 1, 1995). HUD's issuance of a regulation under the FHA that addresses the effects of discrimination in lending is entitled to *Chevron* deference. *See, e.g.*, *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Of course, the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation.").

Most recently, in February of 2013, HUD amended 24 CFR part 100 to clarify that, consistent

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[5] Prohibitions Against Discrimination, 24 C.F.R. § 81.42 (emphasis added); *see also* 24 C.F.R. § 81.41.

longstanding policy, the FHA did bar, and has always barred, disparate impact discrimination ("the 2013 Regulation"). The 2013 Regulation clearly stated that "this rule is not establishing new substantive law. Rather, this final rule embodies law that has been in place since the Act was passed and that has consistently been applied, with minor variations, by HUD, the Justice Department and nine other federal agencies, and federal courts." 78 Fed. Reg. No. 32, at p. 11462. The 2013 Regulation is entitled to "respectful consideration" because it embodies long-standing agency interpretation. *Cf. Dada v. Mukasey*, 554 U.S. 1, 20 (2008) ("the DOJ's proposed interpretation of the statutory and regulatory scheme . . . 'warrants respectful consideration'") (citations omitted); *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 496–97 (2002) ("a recently proposed rule" issued by the Secretary of Health and Human Services "warrants respectful consideration" where the Secretary "possess[ed] the authority to prescribe standards relevant to the issue[]").

B. HUD'S Interpretation Is a Reasonable Interpretation

HUD's long-standing position that § 3604(a) may be violated by actions which have a disparate impact on protected classes without a showing of discriminatory intent is a reasonable method of implementing the FHA's "broad remedial intent." *Havens Realty Corp*, 455 U.S. at 380. Because "clever men may easily conceal their motivations," imposing a strict intent requirement would leave § 3604(a)'s prohibitions under-enforced. *United States*

v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974). Further, a discriminatory impact standard is necessary to challenge the many facially neutral practices that perpetuate residential segregation and operate to "freeze the status quo of prior discriminatory [housing] practices." *Griggs*, 401 U.S. at 430 (internal quotations omitted). "Only by eliminating practices with an unnecessary disparate impact or that unnecessarily create, perpetuate, increase or reinforce segregated housing patterns, can the [FHA's] intended goal to advance equal housing opportunity and achieve integration be realized." 78 Fed. Reg. No. 32 at 11466 (2013 Regulation, Preamble).

Affirming HUD's broad enforcement authority is particularly important in cities like New York, which suffer a litany of social ills as a result of concentrated poverty and long-standing discrimination in the housing market. *See generally* Michael H. Shill, *Local Enforcement of Laws Prohibiting Discrimination in Housing: The New York City Human Rights Commission*, 23 FORDHAM URB. L.J. 991, 1004 (1996) (describing effects of residential segregation in 20th century New York). "[S]tudies suggest that housing segregation and discrimination are important issues not only because of housing denied, but because they contribute to other problems - especially segregated schools, limited job opportunities, and exposure to high crime in minority neighborhoods." Charles M. Lamb & Eric M. Wilk, *Presidents, Bureaucracy, and Housing Discrimination Policy: The Fair Housing Acts of 1968 and 1988,* 37 POL. & POL'Y 127, 128 (2009). Today, the New York-metropolitan area remains the third

most segregated in the country among the 50 largest urban areas. John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census* at 6 (2011), *available at* http://www.s4.brown.edu/us2010/Data/Report/report 2.pdf (accessed Oct. 18, 2013).

Indeed, decades after the passage of the FHA and despite being the first city in the nation to outlaw discrimination in the private housing market, New York City has witnessed little change in residential segregation in the past 30 years, showing a clear and continuing need for enforcement of anti-discrimination laws. *Id.* The ability to bring disparate impact claims is arguably even more important in today's market because, as HUD described in a recent report,

> Although the most blatant forms of housing discrimination (refusing to meet with a minority homeseeker or provide information about any available units) have declined since the first national paired-testing study in 1977, the forms of discrimination that persist (providing information about fewer units) raise the costs of housing search for minorities and restrict their housing options. Looking forward, national fair housing policies must continue to adapt to address the patterns of

> discrimination and disparity that persist today.[6]

a. HUD's Interpretation Is a Reasonable Evidentiary Tool for Proving Discrimination

"A strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry." *Vill. of Arlington Heights*, 558 F.2d at 1290. The disparate impact standard, recognized by even the earliest appellate decisions, provides a reasonable method of remedying the most insidious type discrimination, which is intentional yet concealed. *See Ricci v. DeStefano,* 557 U.S. 557, 595 (2009) (Scalia, J., concurring) ("It might be possible to defend [disparate impact liability] by framing it as simply an evidentiary tool used to identify genuine, intentional discrimination—to 'smoke out,' as it were, disparate treatment").

Much FHA enforcement has been driven by the use of "testers" and the disparate impact standard provides a remedy for intentional discrimination that would be unenforced through this traditional method of proof. Testers "are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful" housing practices. *Havens*, 455

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[6] U.S. Department of Housing and Urban Development, *Housing Discrimination Against Racial and Ethnic Minorities* xi (2013), *available at* http://www.huduser.org/portal/Publications/pdf/HUD-514_HDS2012.pdf (accessed Oct. 17, 2013).

U.S. at 373. HUD has conducted four large nation-wide audits of housing discrimination based on paired testers since the passage of the FHA. HUD, *Housing Discrimination Against Racial and Ethnic Minorities* at 1–2 (2013) (audits conducted in 1977, 1989, 2000 and 2012). The results of these studies have shown that residential discrimination is a stubborn and persistent dilemma. *Id.* at xi. Twenty years after the passage of the FHA, the 1989 audit "provide[d] little evidence that that discrimination against blacks ha[d] declined since the first nationwide assessment in 1977." Nancy Denton & Douglas Massey, *American Apartheid: Segregation and the Making of the Underclass* 102 (1993). The 2000 audit showed some improvements in treatment over the 1989 findings, but found that "discrimination still persists in both rental and sales markets of large metropolitan areas nationwide." HUD, *Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000* at iii (2002), *available at* http://www.huduser.org/portal/Publications/pdf/Phase1_Report.pdf (accessed Oct. 15, 2013). HUD's most recent study found yet additional improvement, but still found that "the forms of discrimination that persist (providing information about fewer units)" still "raise the costs of housing search for minorities and restrict their housing options." *Housing Discrimination Against Racial and Ethnic Minorities* at xi.

However, testing cannot uncover all discrimination. Both common sense and research shows that certain types of discrimination are "difficult to observe with audits." John Yinger, *Sustaining the Fair Housing Act*, 4 Cityscape: A

Journal Of Pol'y & Research 94, 97 (1999); *Housing Discrimination Against Racial Minorities* at 3. Audits that are based on the use of testers cannot adequately capture discrimination in lending or the artificial supply restrictions of available housing. *See* Vincent J. Roscigno, Diana L. Karafin, & Griff Tester, *The Complexities and Processes of Racial Housing Discrimination*, 56 Soc. Problems, 49 (2009). The Mount Holly redevelopment scheme at issue in this case also does not lend itself to proof by a comparison of the treatment of minority and white testers.

Disparate impact cures the deficiencies and limitations of the "intent" regime. *See City of Black Jack*, 508 F.2d at 1185; *Vill. of Arlington Heights*, 558 F.2d at 1290; *see also* George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 Va. L. Rev. 1297, 1309–10 (1987). Through its burden-shifting framework, this standard ensures optimal enforcement of the FHA and, by focusing on the effects of practices, captures even the most clever forms of discrimination. *See Graoch Associates # 33, L.P. v. Louisville/Jefferson County Metro Human Relations Com'n*, 508 F.3d 366, 374-75 (6th Cir. 2007) (noting that the burden shifting framework "distinguish[es] the artificial, arbitrary, and unnecessary barriers proscribed by the FHA from valid policies and practices crafted to advance legitimate interests."). This approach does not invite frivolous or unfettered litigation, because a finding of discriminatory impact under the FHA is not the final step in establishing liability. Rather, consistent with every circuit court, HUD has adopted a burden-shifting framework,

which sifts through the evidence and allows defendants to avoid liability by offering a legitimate, substantial interest served by the challenged practice. *See* 24 C.F.R. § 100.500(b)(1); *see also HUD v. Carter*, 1992 WL 406520, at *6 (HUD ALJ May 1, 1992); *Rizzo* at 564 F.2d at 149. Upon such a showing, plaintiffs can establish liability only if they can show the existence of alternative means that would have a less discriminatory effect and that would achieve the same legitimate objectives. *See* 24 C.F.R. § 100.500(b)(2); *see also Darst-Webbe Tenant Ass'n Bd. v. St. Louis Housing Authority*, 417 F.3d 898, 902–03 (8th Cir. 2005) (finding that Plaintiffs had not provided evidence of a less discriminatory option than Housing Authority's post-demolition development plan). This framework creates a reasonable and sensible allocation of burdens of proof. Given the ease with which discriminatory intent can be concealed (and clear motives for doing so), it was reasonable for HUD to interpret the FHA to include a disparate impact provision "smoke out" disparate treatment. *Ricci,* 557 U.S. at 595 (Scalia, J. concurring).

b. HUD's Interpretation Is a Reasonable Means of Eliminating Barriers to Integration

HUD's interpretation of § 3604(a) to prohibit facially neutral policies that perpetuate the legacies of past residential segregation is reasonable because those policies stand as obstacles to the accomplishment of the purposes of the FHA. According to HUD, § 3604(a) "proscribes not only

overt discrimination but also practices that are fair in form, but discriminatory in operation." Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70923 (Nov. 16, 2011) (to be codified at 24 C.F.R. pt. 100) (citing *Griggs*, 424 U.S. at 431). This disparate impact interpretation is based on the idea that "some [] practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 987 (1988); *see also City of Black Jack*, 508 F.2d at 1185. Today, many facially neutral policies have the same effect as intentional discrimination in standing as barriers to "truly integrated and balanced living patterns." *Huntington Branch*, 844 F.2d at 937.

Until the passage of the FHA in 1968, federal, state, and local housing policy all contributed to increased residential segregation. *See* Nancy Denton & Douglas Massey, *American Apartheid: Segregation and the Making of the Underclass* 51–57 (1992). Federally insured mortgages exacerbated white flight from cities and were only available to purchase or refinance housing in all-white neighborhoods. Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 212–17 (1985). Cities located public housing projects in minority neighborhoods, thus concentrating poverty and exacerbating pre-existing racial isolation. Cities like Mount Holly engaged in urban renewal programs which devastated minority neighborhoods. *See Kelo v. City of New London, Conn.*, 545 U.S. 469, 522 (2005) (Thomas, J., dissenting) (citing B. Frieden &

L. Sagalyn, *Downtown, Inc. How America Rebuilds Cities* 17 (1989)).

The FHA marked a turning point in federal policy. For the first time, the federal government promoted housing integration instead of housing segregation. Changing the spatial distribution of housing patterns to create truly integrated housing has proven more difficult in practice than the optimistic predictions of the FHA's sponsors. Despite declines from its peak when the FHA was passed in 1968, "[b]lack-white segregation remains very high." John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census*, at 4.

This Court reasonably recognized in *Griggs* that many facially neutral policies may operate to "'freeze' the status quo of prior discriminatory [] practices." *Griggs*, 401 U.S. at 430. In the housing context, many facially neutral policies may work to perpetuate the legacy of prior discrimination. For example, local zoning ordinances frequently operate to prevent the development of affordable housing that would bring racial minorities into largely white areas. *See, e.g.*, *City of Black Jack*, 508 F.2d at 1188 (holding that a zoning ordinance that would prohibit new multifamily construction in a suburb of St. Louis that was 99% white violated the FHA); *Vill. of Arlington Heights*, 558 F.2d at 1285 (holding that village had statutory obligation under the Fair Housing Act to refrain from zoning policies that effectively foreclosed construction of any low-cost housing within its corporate boundaries); *Huntington Branch*, 844 F.2d at 938 (finding that a town's

refusal to amend its restrictive zoning ordinance to permit privately-built multifamily housing significantly perpetuated segregation). Localities prohibit the development of affordable housing that would ultimately be occupied by racial minorities. *See, e.g.*, *Rizzo*, 564 F.2d at 149–50 (finding that Housing Authority's termination of public housing project in predominantly white neighborhood violated the FHA); *Keith v. Volpe*, 858 F.2d 467, 484 (9th Cir. 1988) (finding that town's refusal to permit construction of subsidized housing for families displaced by freeway violated the FHA). Over the past twenty five years, HUD has sought to foster residential integration and prohibit housing segregation against classes protected by the FHA with its own application of the disparate impact standard in its rule-making, adjudication, policy statements and enforcement matters. For these reasons, HUD's longstanding interpretation is not only permissible, it is entitled to deference. *See Chevron,* 533 U.S. at 256–57.

CONCLUSION

Congress made clear that § 3604(a) prohibited actions that had a disparate impact on protected classes even in the absence of discriminatory intent. Should this Court find that Congress did not speak to this issue, HUD's long standing interpretation is entitled to deference under *Chevron*. The Association respectfully requests that this Court affirm the decision of the Court of Appeals.

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Respectfully Submitted

PETER T. BARBUR
Counsel of Record
KATHERINE A. ROCCO
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

SEBASTIAN RICCARDI
CHAIR, COMMITTEE ON CIVIL RIGHTS
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Counsel for Amicus Curiae