No. 10-1032

In the

Supreme Court of the United States

STEVE MAGNER, et al.,

Petitioners,

v.

THOMAS J. GALLAGHER, et al.,

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, COMPETITIVE ENTERPRISE INSTITUTE, AND THE CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Fair Housing Act makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer . . . 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). Respondents are owners of rental properties who argue that Petitioners violated the Fair Housing Act by "aggressively" enforcing the City of Saint Paul's housing code. According to Respondents, because a disproportionate number of renters are African-American, and Respondents rent to many African-Americans, requiring them to meet the housing code will increase their costs and decrease the number of units they make available to rent to African-American tenants. Reversing the district court's grant of summary judgment for Petitioners, the Eighth Circuit held that Respondents should be allowed to proceed to trial because they presented sufficient evidence of a "disparate impact" on African-Americans.

The following are the questions presented:

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

2. If such claims are cognizable, should they be analyzed under the burden shifting approach used by three circuits, under the balancing test used by four circuits, under a hybrid approach used by two circuits, or by some other test?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF), Center for Equal Opportunity (CEO), Competitive Enterprise Institute (CEI), and the Cato Institute respectfully submit this brief amicus curiae in support of Petitioners Steve Magner, et al.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has participated as amicus curiae in this Court in numerous cases relevant to this case. PLF has addressed unjustified applications of disparate impact theory in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) and *Alexander v. Sandoval*, 532 U.S. 275 (2001). PLF has also participated as amicus curiae in nearly every major racial discrimination case heard by this Court in the past three decades, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v.*

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

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

Jackson Bd. of Educ., 476 U.S. 267 (1986); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

CEO is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. CEO supports color blind public policies and seeks to block the expansion of racial preferences and to prevent their use in, for instance, employment, education, and voting. CEO has participated as amicus curiae in numerous cases concerning equal protection, such as *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Rice v. Cayetano*, 528 U.S. 495 (2000); *Shaw v. Reno*, 509 U.S. 630 (1993); and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

The Competitive Enterprise Institute (CEI) is a nonprofit public interest organization dedicated to individual liberty and limited government. To that end, CEI has participated as amicus, or counsel for amici, in past cases raising federalism or civil-rights issues. *See*, *e.g.*, *Florida v. United States Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (amicus brief for state legislators); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); and *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007) (representing banking experts in preemption case).

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

This case raises important issues of constitutional law, public policy, and statutory interpretation regarding whether "disparate impact" claims are cognizable under the Fair Housing Act—Title VIII of the Civil Rights Act of 1968. Amici argue that the statutory language and congressional intent of the Fair Housing Act preclude disparate impact claims. Amici believe that their public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court in its deliberations.

SUMMARY OF THE ARGUMENT

This case presents the question whether the federal Fair Housing Act's ban on racial discrimination can be violated by someone who does not engage in racial discrimination. The federal court of appeals below allowed a "disparate impact" claim to proceed under the Act against the City of St. Paul, Minnesota. For such a claim, the plaintiffs need not allege, nor prove, that individuals were treated differently because of their race. Instead, plaintiffs may merely show that a neutral practice has a disproportionate effect—that is, a disparate impact—on some racial group.

The statutory text and the legislative history of the Fair Housing Act, as expressed by its proponents in Congress, establish that the Act was intended to apply solely to disparate treatment, not to acts having a disparate impact on protected classes. The Court has never interpreted the Fair Housing Act as permitting the disparate impact doctrine. In *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005), this Court interpreted the statutory text of the Age Discrimination in Employment Act (ADEA) as permitting disparate impact claims. In doing so, however, the Court clearly identified statutory phrasing in two sections of the ADEA that both permit and prohibit claims without proving discriminatory intent. *Smith*, 544 U.S. at 236 n.6. Language that permits claims without discriminatory intent is also found in 42 U.S.C. § 2000e-2(a)(2) (Title VII), which this Court interpreted as allowing claims based on disparate impact. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). The relevant language of the Fair Housing Act is textually similar to the specific section in the ADEA that requires proof of disparate treatment, not the language in a different section of the ADEA and in Title VII that permits disparate impact claims.

Other parts of the Fair Housing Act's text make clear that no disparate impact causes of action are permitted by it. Consistent with the statutory text, the legislative history of the Fair Housing Act reveals that the intent of the Act was to prohibit the intentional refusals to sell or rent housing because of the race of the renter or buyer. 114 Cong. Rec. 4974 (Mar. 4, 1968).

Subjecting government defendants to disparate impact claims leads them to engage in unconstitutional race-conscious decisionmaking to avoid liability for such claims. This Court's recent decision in *Ricci*, 129 S. Ct. 2658, highlights the conflict between disparate impact doctrine and the constitutional guarantees of equal protection. Even before *Ricci*, this Court noted that "[p]referential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988). Interpreting the Fair Housing Act as allowing claims without discriminatory intent, even though Congress has not clearly expressed its intention to do so, would violate the canon of constitutional avoidance. *Skilling v. United States*, 130 S. Ct. 2896, 2940 (2010) (citations omitted).

Allowing disparate impact claims to proceed under the Fair Housing Act would lead to adverse results that Congress never intended. For instance, because 42 U.S.C. § 3605 applies to financial institutions, banks and mortgage companies would be pressured to provide loans to unqualified applicants in order to avoid disparate impact liability. Similar actions played a key role in triggering the mortgage crisis of 2007-2008.

ARGUMENT

I

THE STATUTORY LANGUAGE AND CONGRESSIONAL INTENT OF THE FAIR HOUSING ACT PRECLUDE DISPARATE IMPACT CLAIMS

A. The Plain Language of the Fair Housing Act Limits Its Applicability to Disparate Treatment

The Fair Housing Act prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, because of race. The principal operative provision of the Fair Housing Act 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, or national origin.

42 U.S.C. § 3604(a).[2] Although proscribing a broad range of conduct, Congress limited Section 3604(a)'s proscription to action taken "because of" race. The words "because of" plainly connote a purposeful, causal connection between the housing-related action and the person's race or color. The proscribed action must have been caused, at least in part, by the individual's race, which strongly suggests a requirement of discriminatory motivation. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (explaining that discriminatory purpose implies a course of action taken "because of," not merely "in spite of," its adverse effects upon an identifiable group).

In *Smith*, 544 U.S. 228, the Court held that disparate impact claims were cognizable under the Age Discrimination in Employment Act of 1967 (ADEA). The Court clearly identified statutory language that would support such claims, and language that would not. The phrasing that this Court interprets as allowing disparate impact claims can be found in 29 U.S.C. § 623(a)(2) (Section 4(a)(2) of the ADEA). According to that section, it shall be unlawful for an employer

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[2] Three of the other prohibitions set forth in the Fair Housing Act also pertain to actions taken "because of" race. *See* 42 U.S.C. § 3604(b) (terms or conditions of sale or rental), 42 U.S.C. § 3604(d) (representation of unavailability of property for sale or rental), and 42 U.S.C. § 3605 (denial of financial assistance). One section, pertaining to real estate advertising, bars any indication of "preference, limitation, or discrimination based on race," (42 U.S.C. § 3604(c)), and another, relating to participation in multiple listing services, prohibits discrimination "on account of" race (42 U.S.C. § 3606). A final section makes it illegal to attempt to induce any person to sell or rent "by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race" (42 U.S.C. § 3604(e)).

> 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*.

Id. (emphasis added). This language creates "an incongruity" between an employer's actions that are focused on his employees generally, and the individual employee who is impacted "because of those actions." *Smith*, 544 U.S. at 236 n.6. Thus, even an employer who classifies his employees without age considerations may be liable under this language if such classification adversely affects the employee because of that employee's age. *Id.* This is the "very definition of disparate impact." *Id.*; *see Watson*, 487 U.S. at 991 (citation omitted) (explaining that in disparate impact cases, "the employer's practices may be said to 'adversely affect [an individual's] status as an employee'").[3] Text that focuses on the effects of the action on the employee rather than the motivation for the action of the employer encompasses disparate impact claims.

On the other end of the spectrum, 29 U.S.C. § 623(a)(1) (Section 4(a)(1) of the ADEA) provides an example of statutory text identified by this Court that does not allow disparate impact claims. *Smith*, 544 U.S. at 236 n.6. That section makes it unlawful for an employer

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[3] A separate portion of the holding in *Watson* was superseded by the 1991 amendments to the Civil Rights Act, but the holding and reasoning remain good law. *See Phillips v. Cohen*, 400 F.3d 388, 397-98 (6th Cir. 2005); 42 U.S.C. § 2000e-2(k) (2008).

> to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Id. The focus of 29 U.S.C. § 623(a)(1) is on "an employer's actions with respect to the targeted individual." *Smith*, 544 U.S. at 236 n.6. A claim brought pursuant to this section requires proof of discriminatory intent.

The Fair Housing Act's "because of" language is textually similar to the language of Section 4(a)(1) of the ADEA, which the Court had identified as prohibiting disparate impact claims. Both 42 U.S.C. § 3604(a) and the comparable language of Section 4(a)(1) prohibit a course of action taken "because of," not merely "in spite of," its adverse effects upon a identifiable group. The focus of both sections "is on the employer's actions with respect to the targeted individual." *Smith*, 544 U.S. at 236 n.6.

This Court's interpretation of similar or related language in Title VII further establishes that the Fair Housing Act's "because of" phrasing precludes disparate impact claims. In *Griggs*, 401 U.S. 424, this Court construed the language in 42 U.S.C. § 2000e-2(a)(2) (Title VII), which also contains "because of" language, as prohibiting employment practices that had discriminatory effects and rejected the contention that Title VII barred only intentional discriminatory practices. *See Griggs*, 401 U.S. at 432. Although this Court's holding in *Griggs* relied primarily on the purposes of Title VII, this Court subsequently noted that its holding represented the better reading of the

statutory text as well. *Smith*, 544 U.S. at 235 (citing *Watson*, 487 U.S. at 991).

The text of Title VII examined in *Griggs* is practically identical to Section 4(a)(2) of the ADEA which allows disparate impact claims, and different than Section 4(a)(1), which does not. *Smith*, 544 U.S. at 236. In *Griggs*, this Court identified the following language from Title VII, which it interpreted as allowing disparate impact claims:

> Sec. 703. (a) It shall be an unlawful employment practice for an employer—
>
> . . . .
>
> (2) 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 race, color, religion, sex, or national origin.

Griggs, 401 U.S. at 426 n.1 (quoting 42 U.S.C. § 2000e-2). Thus both Title VII and the ADEA contain provisions which prohibit an employer's actions that "adversely affect" an individual's status because of his or her race. Section 3604(a) of the Fair Housing Act does not contain similar text.

An action taken because of some factor other than race—for example, issuing a citation for a legitimate and serious housing code violation, even if it causes an indirect discriminatory effect—does not constitute intentional discrimination as outlawed by the Fair Housing Act. The courts of appeals have not presented a plausible alternative reading of the statutory

language and, in any event, their reasoning is overruled by *Smith*'s identification of statutory language that allows, or prohibits, disparate impact claims. In *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977), for example, the court acknowledged that the "because of race" language "might seem to suggest that a plaintiff must show some measure of discriminatory intent," but rejected this logical consequence in part because such a requirement would unduly burden Fair Housing Act plaintiffs. *Id.* at 146-47. Similarly, in *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1288 (7th Cir. 1977) (*Arlington Heights II*), the court noted that "(t)he major obstacle to concluding that action taken without discriminatory intent can violate section 3604(a) [of the Fair Housing Act] is the phrase 'because of race.'" The court, however, proceeded to embrace "(t)he broad view . . . that a party commits an act 'because of race' whenever the natural and foreseeable consequence of that act is to discriminate between races, regardless of his intent." *Id.* This reasoning is directly at odds with *Feeney*, 442 U.S. 256, where this Court, in defining "discriminatory purpose," stated that the phrase

> implies more than intent as volition or intent as awareness of consequences . . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Id. at 279 (citation and footnotes omitted). The reasoning of *Arlington Heights II* is also squarely contradicted by this Court's holding in *Smith*, which

clarifies that the language of Title VII and the ADEA authorizing disparate impact claims is found in sections which prohibit actions that "deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's" race or age. *Smith*, 544 U.S. at 235. The Fair Housing Act, on the other hand, has no language prohibiting actions which "adversely affect an individual's status" because of race.

The unambiguous text of the Fair Housing Act focuses on whether people of different races are treated differently because of their race or other stated grounds. This language plainly prohibits only intentional discrimination.

There are other ways in which a disparate impact approach is inconsistent with the FHA's text. The statute's text uses not only the phrase "because of" race but also "on account of" (Section 3606) and "based on" (Section 3604(c)). It is difficult to see how all of these phrases can be read to include a disparate impact cause of action. All of them, to the contrary, are naturally read to require a showing of disparate treatment. The phrase "on account of" appears not only in Section 3606, but also in Section 3617. Plaintiffs would, presumably, insist that in the former the phrase allows disparate impact causes of action. But it is quite implausible for it to be interpreted that way in the latter section, which bans coercion and intimidation of those exercising fair-housing rights. Reading language one way in one section and another way in another section is disfavored. Likewise, the law includes Section 3631, which delineates certain fair-housing violations as crimes. It is very hard to see how any criminal provision would be interpreted to allow

prosecutions based on a disparate impact theory. Yet Section 3631 uses the same "because of" language as Section 3604. Once again, a construction of the statute that interprets a phrase one way in one section and in another way elsewhere is implausible. What's more, the disparate impact approach would render many of the provisions in the statute regarding the handicapped superfluous. For instance, the failure to make or allow "reasonable modifications" and "reasonable accommodations" as required by Section 3604(f)(3)(A) and (B), respectively, could have been attacked under a disparate impact theory without those provisions. More broadly, and particularly in the housing-standards and zoning context, an effects approach will require judges and juries to conduct a standardless "balancing" test of discriminatory effect versus myriad, hard-to-quantify interests of the city.

B. Congress Intended the Fair Housing Act to Ban Intentional Discrimination, Not Racially Neutral Laws That Merely Have a Disproportionate Effect

The legislative history of the Fair Housing Act reveals that Congress intended the Act to apply only to purposeful discrimination. Because the Fair Housing Act was offered as a floor amendment in the Senate there are no committee reports. The legislative history thus consists of statements by individual legislators on the floor of the Senate and House that may provide evidence of congressional intent. *Brock v. Pierce County*, 476 U.S. 253, 263 (1986) (citing *Grove City Coll. v. Bell*, 465 U.S. 555, 567 (1984)). Statements in regards to the Fair Housing Act reveal that neither the supporters nor the opponents suggested the Act would

interfere with a municipality's enforcement of its housing code as racially discriminatory. This would have had the extraordinary impact of preventing municipalities from enforcing ordinances that ensure habitable living conditions, without an intent to discriminate. Instead, the legislative history shows that Congress was concerned with prohibiting intentional refusals to sell or rent housing because of the race of the renter or buyer and intended that financial ability should remain the single most important factor in such transactions.

Senator Mondale, a leading sponsor of the Fair Housing Act, stated: "The bill simply reaches the point where there is an offering to the public and the prospective seller refused to sell to someone solely on the basis of race." 114 Cong. Rec. 4974 (Mar. 4, 1968). Senator Hart agreed with this assessment: "When you go to a property that is publicly offered, let us not run the litmus test of how I spell my name, or where I went to church . . . or what color God gave me." *Id.* at 4976. Senator Mondale stressed the limits on the bill's authority:

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

Id. at 5643 (Mar. 7, 1968). Senator Mondale further proclaimed: "That is all it does. It does not confer any right. It simply removes the opportunity to insult and discriminate against a fellow American because of his color, and that is all." *Id.* Congressman Steiger

declared: "You cannot, because of one reason—race—refuse to sell or rent property. All of the legitimate criteria which a homeowner uses to judge the prospective buyer remain unimpaired."

Senator Brooke, another leading cosponsor, stated: "I believe that all we are saying in this amendment is that we are giving the opportunity for people to live where they want to live and where they can live." He described the Act's prohibition against purposeful discrimination: "A person can sell his property to anyone he chooses, as long as it is by personal choice and not because of motivations of discrimination." *Id.* at 2283 (Feb. 6, 1968). Senator Tydings also emphasized that the issue was intentional discrimination: "Just a year ago, in this Chamber . . . I made the observation that purposeful exclusion from residential neighborhoods, particularly on grounds of race, is the rule rather than the exception in many parts of our country." *Id.* at 2528 (Feb. 7, 1968). He later noted that "the deliberate exclusion from residential neighborhoods on grounds of race-and all the problems that go with it-are still with us today." *Id.* at 2530.

Congress repeatedly stressed that the bill was designed to make financial ability, rather than race, the principal qualification for purchasing or renting housing. Senator Mondale noted: "We had several witnesses before our subcommittee who were Negro, who testified that they had the financial ability to buy decent housing in all-white neighborhoods, but despite repeated good faith attempts, were unable to do so." *Id.* at 2277 (Feb. 6, 1968). Senator Hatfield emphasized:

> The point is that where discrimination exists at all, where any man in any part of this country . . . is denied the right to buy a home within a community according to his economic ability, wherever he might please, merely because his skin is of a different color, there is a denial of a right that belongs to all Americans, and therefore this should be corrected.

Id. at 3129 (Feb. 15, 1968). Senator Scott agreed: "Most persons in this country can rent or buy the dwelling of their choice if they have the money or credit to qualify. But others, even if they have unlimited funds and impeccable credit, often are denied access to decent housing simply because of the color of their skin." *Id.* at 3252 (Feb. 16, 1968). Congressman McGregor added: "How bitter it must be to find that although your bank balance is ample, your credit rating is good, your character above reproach, you may not improve your family's housing because your skin is not white." *Id.* at 9564 (Apr. 10, 1968).

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

> I emphasize that the basic purpose of this legislation is to permit people who have the ability to do so to buy any house offered to the public if they can afford to buy it. It would not overcome the economic problem of those who could not afford to purchase the house of their choice.

Id. at 3421 (Feb. 20, 1968). He emphasized: "We readily admit that fair housing by itself will not move a single Negro into the suburbs—the laws of economics

will determine that." *Id.* at 3422. This legislative history shows that Congress' purpose in adopting the Fair Housing Act was to prohibit intentional discrimination. The members' statements refute any suggestion that the Act was intended to be used by property owners to maintain their dilapidated and substandard housing.

The Fair Housing Act was not intended to be used as a means to suspend the enforcement of housing codes and condemn minorities to substandard living conditions. *See*, *e.g.*, 114 Cong. Rec. 2526 (Feb. 7, 1968) (speaking of the goal of "a decent home . . . for every American family"); *id.* at 2528 ("[H]ousing of nonwhite families is consistently of poorer quality than that of white households of the same income level . . . . In 1960, [forty-four] percent of all nonwhites lived in substandard housing as compared to [thirteen] percent of white families."). During a House debate on the Fair Housing Act Representative Emanuel Celler said, "Segregated housing isolates racial minorities from the public life of the community [and] means inferior public education, recreation, health, sanitation, and transportation services and facilities, and often means denial of access to training and employment and business opportunities." To Prescribe Penalties for Certain Acts of Violence or Intimidation: Hearings Before the H. Comm. on Rules, 90th Cong. 4 (1968) (statement of Rep. Emmanuel Celler).

In enacting the Fair Housing Act, Congress intended to eliminate discrimination in housing so that minorities could escape from squalid living conditions. Senator Mondale said that fair housing legislation would have a "great practical psychological significance to the Negro who has 'tried harder' and yet remains

trapped in the ghetto for a lifetime." 114 Cong. Rec. 3421 (Feb. 20, 1968). He called the Act an important step, though "[o]utlawing discrimination in the sale or rental of housing will not free those trapped in ghetto squalor." *Id.* at 2274 (Feb. 6, 1968). Senator Brooke indicated the purpose was to ensure that minorities were not denied access to habitable living conditions, "Millions of Americans have been denied fair access to decent housing because of their race or color. If we perceive this reality, on what possible grounds can we delay the evident remedy?" *Id.* at 2279. Senator Kennedy remarked that even minorities "who can afford the housing in [the suburbs] have been excluded by the racially discriminatory practices not only of property owners themselves, but also of real estate brokers, builders, and the home finance industry." *Id.* at 2085 (Feb. 5, 1968). Senator Philip A. Hart said "[t]he best spokesman for this bill would be a Negro father who had worked hard all his life, saved diligently, had gone out and then had come back that night, and had to explain to his children why he had not been able to get the house." *Id.* at 2707 (Feb. 8, 1968). Senator Joseph Tydings confirmed that "what the law would do is make it possible for all citizens to buy decent houses without discrimination against them because of the color of their skin." *Id.* at 2533 (Feb. 7, 1968).

If it had wished to create an effects standard for the Fair Housing Act, Congress has demonstrated that it is well aware of how to do so. In Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, which predates the Fair Housing Act, Congress mandated that covered jurisdictions seek preclearance of any voting change and demonstrate that it "does not have the purpose *and will not have the effect* of denying or

abridging the right to vote on account of race or color." (emphasis added). This language shows that Congress was aware that race-neutral practices could produce racial effects and that it knew how to prohibit such practices when it intended to do so. It did not do so here.

Congress amended the Fair Housing Act in 1974 and in 1988, but none of the amendments authorize disparate impact claims. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6(b)(2), 102 Stat. 1619, 1622 (1988) (amending the Act to include "familial status" as a protected class); Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 808(b)(1), 88 Stat. 633, 729 (1974) (adding "sex" to list of protected classes). When President Reagan signed the 1988 amendments, he declared that the statute "speaks only to intentional discrimination." Remarks on Signing the Fair Housing Act Amendment Act of 1988, 24 Weekly Comp. Pres. Doc. 1140-41 (Sept. 13, 1988).

In contrast, when Congress amended Title VII in the Civil Rights Act of 1991, it affirmed the holding in *Griggs* by specifically making allowances for "disparate impact" claims in the statute. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e (2006)). As amended, the statute provides:

An unlawful employment practice based on disparate impact is established under this title only if—

> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race . . . and the respondent fails to demonstrate that the challenged practice is

> job related for the position in question and consistent with business necessity; or
>
> (ii) the complaining party . . . [identifies an adequate] alternative employment practice and the respondent refuses to adopt such an alternative employment practice.

42 U.S.C. § 2000e-2(k)(1)(A) (2006). Congress took no similar action regarding the Fair Housing Act.

II

DISPARATE IMPACT DOCTRINE DIRECTLY CONFLICTS WITH EQUAL PROTECTION

A. Disparate Impact Doctrine Encourages Racial Quotas

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

The recent decision in *Ricci*, 129 S. Ct. 2658, strongly suggests that disparate impact doctrine directly conflicts with constitutional guarantees of equal protection. Subjecting government defendants to disparate impact claims leads them to engage in

unconstitutional race-conscious decision making to avoid liability for such claims.

In *Ricci*, white and Hispanic firefighters brought actions against New Haven, Connecticut, following the city's refusal to certify promotion examination results because of its disparate racial impact on minority firefighters. Nonminority firefighters achieved the top ten test scores. *Id.* at 2664. The City voided the examination results in order to avoid liability for disparate impact discrimination claims under Title VII. The firefighters who would have been promoted on the basis of the examination alleged the City discriminated against them on the basis of race by refusing to promote them. *Id.* The Second Circuit disagreed, and affirmed the district court's grant of summary judgment for the City in *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008). Reversing the court of appeal, this Court declared that the City's race-based decision making violated Title VII. *Ricci*, 129 S. Ct. at 2664. Allowing the City to take race-based actions on a "good faith belief" that its actions are necessary to avoid disparate impact claims would "amount to a de facto quota system, in which a 'focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures.'" *Id.* at 2675 (quoting *Watson*, 487 U.S. at 992 (plurality opinion)).

Although the majority opinion did not address the tension between equal protection and disparate impact doctrine, Justice Scalia observed in his concurrence that the Court was "merely postponing the evil day" when the Court must decide "whether, or to what extent, are the disparate-impact provisions . . . consistent with the Constitution's guarantee of equal protection." *Ricci*, 129 S. Ct. at 2682 (Scalia, J.,

concurring). Interpreting the Fair Housing Act to encompass disparate impact claims conflicts with equal protection.

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

> some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected . . . as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.

Bakke, 438 U.S. at 307.

For instance, had the city of New Haven in *Ricci* altered the weights assigned to the written and oral components of its examination, it could have changed the test results so that more minorities would have received higher passing scores and promotions. In doing so, New Haven would have reduced or

eliminated a racial disparate impact and escaped liability for any such claims. However, in altering the results to achieve a predetermined outcome, New Haven would have engaged in race-conscious decisionmaking, perhaps even rigging the results to achieve racial quotas. *See* Kenneth L. Marcus, *The War between Disparate Impact and Equal Protection*, 2008-2009 Cato Sup. Ct. Rev., 64 (2009) (describing the City's ability to determine the likely racial outcome of alternative testing protocols).[4] Such conduct is impermissible, because this Court has never approved a government's racial classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. *Bakke*, 438 U.S. at 307 (citations omitted). Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. *Id.* at 308-09.

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

[4] *Available at* http://www.cato.org/pubs/scr/2009/Ricci-Marcus.pdf (last visited Dec. 21, 2011).

effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted." The evolution of disparate impact analysis leading to this result would be contrary to Congress' clearly expressed intent. *Id.*

This Court's holding in *Smith*, that disparate impact claims are cognizable under the ADEA, does not raise the same constitutional concerns that a similar holding would create here. To avoid liability for disparate impact claims based upon age, government defendants must engage in age-conscious decisionmaking, which is not constitutionally suspect; rather than race-conscious decisions, which are constitutionally suspect and subject to strict scrutiny. Age-based classifications are more acceptable than race-based classifications. *Compare Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (age classifications are not subject to strict scrutiny) *with Croson*, 488 U.S. 489 (race-conscious contracting policy triggered "strict scrutiny" because it was a racial classification); *and Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998) (forcing private employer to take race-conscious actions in hiring triggered strict scrutiny and was invalid); *see also Ricci*, 129 S. Ct. at 2682 (Scalia, J. concurring) (encouraging Court to resolve "the war" between disparate impact doctrine and equal protection).

Lower courts have applied strict scrutiny to invalidate race-conscious schemes that pressured employers or contractors to use race, even when they did not require strict quotas; and simple requirements that regulated businesses use "good faith efforts" to achieve racial balance in a fashion reminiscent of disparate impact law. *See*, *e.g.*, *Walker v. City of*

Mesquite, 169 F.3d 973 (5th Cir. 1999) (race-conscious requirement that public housing units be developed in predominantly nonminority residential areas triggered strict scrutiny; remanding to lower court to determine whether requirement was constitutional); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1996) (requirement that contractor make race-conscious efforts triggered strict scrutiny and was unconstitutional).

Even if one reasonable interpretation of the Fair Housing Act is that the Act might encompass disparate impact doctrine, the clear conflict between disparate impact and the constitutional guarantee of equal protection strongly suggests that this Court reject that interpretation. The canon of constitutional avoidance states that "when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is [the Court's] plain duty to adopt that construction which will save the statute from constitutional infirmity." *Skilling*, 130 S. Ct. at 2940 (citations omitted); *see also Miller v. Johnson*, 515 U.S. 900, 923 (1995):

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

A determination that disparate impact claims are not cognizable under the Fair Housing Act, which is clearly reasonable given the plain language of the statute and its legislative history, avoids all doubt as to the Act's constitutionality.

Likewise, federal statutes impinging upon important state interests "cannot . . . be construed without regard to the implications of our dual system of government." When the Federal Government "radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit." *Bfp v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (citations omitted).

It is beyond question that an essential state interest is at issue here. This Court has given traditional deference to exercises of a locality's police power. This presumption of validity stems from a recognition that federal courts should be wary to tread on the spheres of authority that were never given up by state and local governments. Health and safety concerns are at the very heart of local police powers, and this Court has traditionally given deference to ordinances controlling uses of land for these reasons. *See Fischer v. City of St. Louis*, 194 U.S. 361, 370 (1904)):

> The power of the legislature to authorize its municipalities to regulate and suppress all such places . . . as, in its judgment, are likely to be injurious to the health of its inhabitants, or to disturb people living in the immediate neighborhood . . ., is so clearly within the police power as to be no longer open to question.

Such enactments have long been accorded a presumption of validity. *See*, *e.g.*, *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (requiring zoning laws to be upheld as valid exercises of police power unless "clearly arbitrary or unreasonable, having no substantial relation to the public health, safety, morals or general welfare"); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 593 (1962) (states have power of prohibiting use of property that is "prejudicial to the health, the morals, or the safety of the public").

Extending disparate impact doctrine to the Fair Housing Act would deeply intrude on the authority of state and local governments, and render much of their housing policies illegal. Doing so would inappropriately alter the federal-state balance in far-reaching ways, because the Fair Housing Act, unlike Title VII, is silent about disparate impact claims. *See United States v. Bass*, 404 U.S. 336, 349-50 (1971) (unless Congress conveys its purpose clearly, it will not be deemed to have altered "sensitive federal-state relationships"); *see also Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (Congress may abrogate state authority only by making its intention unmistakably clear in the language of a statute.) Congress has not unequivocally provided for disparate impact claims in the language of the Fair Housing Act.

It would be astonishing to interpret a national civil-rights statute in a way that makes identical conduct in one city illegal while allowing exactly the same conduct in another city, just because of the different racial makeup of the two cities. And it would be offensive to interpret the same statute to mean that whether a city can enforce an ordinance in a particular way hinges on an individual victim's skin color and the

skin color of his neighbors. The application of disparate impact theory in this case means that a city might be able to enforce its ordinance but only so long as it did so with an eye on the racial and ethnic neighborhoods that were being affected. The city would be unable to enforce its ordinance in a particular neighborhood because it was mostly of a particular race, and it had already enforced the ordinance in "too many" neighborhoods with the same racial composition.

B. Constitutional Violations Require Discriminatory Intent

Although this Court has recognized the concept of disparate impact, it has been uneasy with its application and has often sought to limit it. In *Washington v. Davis*, 426 U.S. 229 (1976), black applicants for a police training program sued alleging that the failure rate of blacks was four times that of whites. As evidence of discriminatory intent in the admissions process, the petitioners offered the disparate effect of the test on blacks as compared to whites. *Id.* at 233. The Court held that the petitioners failed to prove a violation of the Equal Protection Clause, because discriminatory intent is the critical element in an equal protection claim and, while disparate impact is not irrelevant to such claim, it is not sufficient as proof of intent. *Id.* at 242.

In *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), nonprofit housing developers planned to develop a tract of land into a racially diverse neighborhood for residents with low to moderate incomes. When the village refused to rezone the land for multifamily housing, the developers sued under the Equal Protection Clause, alleging that the

refusal was racially motivated. *Id.* at 258-59. This Court found that the plaintiffs had failed to prove the key element of discriminatory intent. *Id.* at 270. "[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.'" *Id.* at 253 (quoting *Davis*, 426 U.S. at 242).

The applicability of disparate impact in cases of alleged sex discrimination was addressed in *Feeney*, 442 U.S. 256. *Feeney* involved an equal protection claim that the award of veterans preference in employment had a disparate impact on women, because proportionately fewer women were veterans. The Court noted that *Davis* and *Arlington Heights* recognized that when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may be at work. But the Court found that those cases signaled no departure from the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results. *Feeney* held that this principle applies with equal force to a case involving alleged sex discrimination. *Id.* at 273-74.

In *Lewis v. Casey*, 518 U.S. 343 (1996) (involving prisoners' right of access to the courts), the Court reemphasized the holding of *Davis*. "[A]bsent proof of discriminatory purpose, a law or official act does not violate the Constitution, solely because it has a . . . disproportionate impact." *Id.* at 375 (internal citations and quotation marks omitted). As the Court summarized: "At bottom, *Davis* was a recognition of the settled rule that the Fourteenth Amendment

guarantees equal laws, not equal results." *Id.* (internal citations, quotation marks, and parentheses omitted).

Lewis recognized that the *Davis* court was motivated in no small part by the potentially radical implications of the disparate impact rationale. This Court keenly observed that "[e]very financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than the indigent." *Id.* at 376. In response to disparate impact claims, "regulatory measures always considered to be constitutionally valid, such as sales taxes, state university tuition, and criminal penalties, would have to be struck down." *Id.* The disparate impact approach was rejected in *Davis*,

> because of the recognition that [a] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id. at 376-77 (internal citations and quotation marks omitted).

The Respondents' use of disparate impact doctrine in an attempt to suspend or limit the citation of housing code violations exemplifies the Court's concern in *Davis*.

C. Extending Disparate Impact Doctrine to the Fair Housing Act Would Lead to Substantially Adverse Results

Not only do the statute's language and legislative history show that a violation of the Fair Housing Act requires intentional discrimination, substantial practical problems result if this requirement is discarded.[5] For instance, if a landlord refuses to rent to people who are unemployed, and it turns out that this excludes a higher percentage of whites than renters of other races, then a white would-be renter could sue. It would not matter that the reason for the landlord's policy was race-neutral and had nothing to do with hostility toward white renters. The landlord would be liable, unless he could show some "necessity" for the policy. This, in turn, would depend on whether the landlord could convince a judge or jury that the economic reasons for preferring to rent to the gainfully employed were not only nondiscriminatory but essential. Roger Clegg, *Home Improvement: The Court Should Kill an Unfair Housing Strategy With No Basis in Law*, Legal Times, Vol. 25, Issue 39 (Oct. 7, 2002).[6] Similar results could occur if a landlord required renters to have good credit.

Section 3605 of the Fair Housing Act prohibits discrimination in the granting of home loans.

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[5] For a discussion of adverse and unintended consequences of disparate impact doctrine in general, *see* Roger Clegg, *Disparate Impact in the Private Sector: A Theory Going Haywire*, Briefly, Perspectives on Legislation, Regulation, and Litigation, Vol. 5, No. 12 (Dec. 2001), *available at* http://www.aei.org/files/2001/12/01/Briefly-Disparate-Impact.pdf (last visited Dec. 21, 2011).

[6] *Available at* http://judiciary.house.gov/hearings/pdf/Clegg100429.pdf (Appendix) (last visited on Dec. 21, 2011).

42 U.S.C. § 3605. Recognition of a disparate impact cause of action under the Act would require imprudent mortgage eligibility determinations to avoid racial disproportionalities. The pressure on banks and mortgage companies to grant loans to applicants with poor credit may have played a key role in triggering the mortgage crisis of 2007-2008. Hans Bader, *Justice Department's Witch Hunt Against Banks Will Harm Economy*, Competitive Enterprise Institute (July 11, 2011);[7] Patric H. Hendershott & Kevin Villani, *The Subprime Lending Debacle: Competitive Private Markets Are the Solution, Not the Problem*, Policy Analysis no. 679, Cato Institute (June 20, 2011).[8] Requiring banks and mortgage companies to grant loans to unqualified applicants in order to avoid disparate impact liability under the Fair Housing Act would be financially unwise, and is not an expressed intent of Congress. *See* Testimony of Roger Clegg Before the House Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties (Apr. 29, 2010) (explaining how the use of disparate impact civil rights enforcement to pressure lenders is unwise).[9]

The U.S. Department of Justice (DOJ) has previously taken the position that disparate impact claims are not cognizable under the Act. The DOJ

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[7] *Available at* http://www.openmarket.org/2011/07/11/justice-departments-witchhunt-against-banks-will-harm-economy/ (last visited on Dec. 21, 2011).

[8] *Available at* http://www.cato.org/pub_display.php?pub_id=13205 (last visited on Dec. 21, 2011).

[9] *Available at* http://judiciary.house.gov/hearings/pdf/Clegg100429.pdf (last visited on Dec. 21, 2011).

shares enforcement responsibility of the Fair Housing Act, with the U.S. Department of Housing and Urban Development (HUD). *See* 42 U.S.C. § 3613 (DOJ), 42 U.S.C. § 3610 (HUD). In *Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (per curiam), DOJ filed a brief arguing that the statutory text and congressional intent of the Fair Housing Act requires proof of intentional discrimination. Brf. for United States, as Amicus Curiae (June 1988).[10] The brief filed by DOJ in *Huntington* also noted the substantial practical problems related to local zoning decisions that would result if the requirement for intentional discrimination were discarded in Fair Housing Act claims. *Id.* These concerns remain valid today.

[10] *Available at* http://www.justice.gov/osg/briefs/1987/sg870004.txt (last visited on Dec. 21, 2011).

CONCLUSION

For the foregoing reasons, Amici Curiae Pacific Legal Foundation, Center for Equal Opportunity, Competitive Enterprise Institute, and the Cato Institute respectfully request that this Court find disparate impact claims are not cognizable under the Fair Housing Act, and reverse the decision of the courts below.

DATED: December, 2011.

Respectfully submitted,

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