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 *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational organization that seeks to promote transparency, accountability and integrity in government and fidelity to the rule of law. Judicial Watch regularly files *amicus* briefs as a means to advance its public interest mission and has appeared as an *amicus curiae* in this Court on a number of occasions.

Judicial Watch believes that fidelity to the rule of law as well as to the Constitution requires this Court to end decades of circuit court misinterpretation of the Fair Housing Act ("FHA") establishing liability on the basis of disparate impact. The Department of Housing and Urban Development ("HUD") has also recently adopted regulations formalizing this overreach of statutory authority, unlawfully prohibiting practices merely for having a statistically disparate impact on protected groups. Judicial Watch is concerned that the imposition of liability under the FHA for practices that are both facially neutral and unmotivated by discriminatory intent threatens the rule of law in a myriad of ways and results in violations of the Equal Protection clause of the Constitution. The Third Circuit's decision results in an unworkable standard that assumes discrimination

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[1] Pursuant to Supreme Court Rule 37.6. *amicus curiae* states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. The parties have consented to the filing of this brief. Letters reflecting this blanket consent have been filed with the Clerk.

is the cause of the natural workings of the housing market. The government should not, and constitutionally cannot, be involved in distorting the housing market on the basis of correcting racial disparities. For these reasons, Judicial Watch urges the Court to overturn the Third Circuit's decision.

SUMMARY OF THE ARGUMENT

Section 804(a) of the FHA prohibits only disparate treatment, not disparate impact as the Third Circuit has ruled. The FHA prohibits deliberately discriminatory housing practices; it does not insist that all practices regarding the sale or rental of housing impact protected and non-protected groups in a statistically neutral or equivalent manner. The text of the statute is unambiguous, and merely prohibits discriminatory treatment. An analysis of the legislative history only confirms the clear language of the text. Though HUD has adopted regulations agreeing with the Third Circuit and urges this Court to uphold the Third Circuit's opinion, its interpretation of the FHA is not entitled to deference as it reaches beyond the text of the law. Furthermore, if the FHA were to be interpreted as HUD and the Respondents advocate, it would be unconstitutional under the Fourteenth Amendment to the U.S. Constitution. The Court should decline to allow the Third Circuit, HUD, or Respondents to create an unconstitutional and unworkable disparate impact standard under the FHA.

ARGUMENT

In 1968, in an effort to promote fair housing throughout the United States, Congress passed the FHA. The FHA created a new federal private cause of action for individuals and also directed executive agencies and departments to affirmatively enforce the law. The FHA purported to increase the fairness of access to housing by outlawing discriminatory practices in regards to access to housing. The point in dispute is whether the practices that the FHA outlawed were only those constituting intentional discrimination against a member of a protected group ("disparate treatment") or all practices that do not affect each named group in a statistically neutral or equivalent manner ("disparate impact").

Congress created a relatively straightforward cause of action when it enacted the FHA. In order to win, a plaintiff must introduce evidence of discrimination on the part of the defendant. Yet several decades of court and agency misinterpretation have created a complicated scheme to determine when liability can be imposed where no discriminatory intent on the defendant's part exists.[2]

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[2] A history of the court rulings as well as agency interpretations developing this scheme was recently set out in HUD's Implementation of the Fair Housing's Discriminatory Effects Standard, Vol. 78, No. 32, Friday, February 15, 2013, pp.11461-11463. The final rule also explains that the regulation "is needed to formalize HUD's long held interpretation of the availability of 'discriminatory effects' liability under the Fair Housing Act, 42, U.S. C. 3601 *et seq.,* and to provide nationwide consistency in the application of that form of liability." *Id.* at 11460. Decades of rulings in the lower courts meant that different courts had

The Court has never ratified this scheme, and it should correct this overreach now.

I. The complicated scheme adopted by HUD and the Third Circuit to determine disparate impact liability should be rejected because the statute itself contemplates nothing other than intentional discrimination.

A) The plain language of the FHA is unambiguous.

When interpreting a statute, the first issue to consider is simply what is present in the statute's text. *See, e.g*. *Dean v. U.S.* 556 U.S. 568, 572 (2009). "We ordinarily resist reading words or elements into a statute that do not appear on its face." *Id*. Section 804(a) of the FHA does nothing more than make it unlawful to "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

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developed somewhat different standards for this kind of liability, but HUD settled on a "three part burden-shifting test for proving such liability" that imposes liability on defendants whose practices have a disparate impact on protected classes, but allow defendants to justify their practices by showing they had no less "discriminatory" alternative. While HUD congratulated itself on providing a "clear, consistent, nationwide standard" that purportedly limits litigation, this supposed clarity in no way solves the problem of the entire lack of textual authority for a burden-shifting scheme. *Id*. In addition, such a scheme, while it may be nationwide, is far from clear and consistent. Rather, it is complicated, confusing, and unworkable. The standard applied in this case by the Third Circuit is likewise confusing as well as unsupported by the statute.

dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604 (a). The words "because of" race convey that race must be the reason (or at least a reason) for the refusal. The only logical way to interpret these words is to find that there must be an intent to discriminate against a member of one of the named classes of persons in order for the refusal to be unlawful.

Because the statute is unambiguous, a proper interpretation need go no further than the text. Legislative intent cannot refute unambiguous statutory language. "Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language." *Milner v. Dept of the Navy*, 131 S. Ct. 1259, 1266 (2010). Attempting to muddy clear statutory language is precisely the endeavor that proponents of the disparate impact standard have engaged in, however.

B) Using a selective reading of legislative history and context to justify expanding the FHA beyond what is supportable by the text is inappropriate.

The primary justification offered for departing from the FHA's text is that the departure is necessary to meet its broad aspirations. In this case, the Third Circuit justifies its standard by stating: "conduct that has the necessary and foreseeable consequence of perpetuating segregation … can be as deleterious as

purposefully discriminatory conduct in frustrating the national commitment to replace the ghettos by truly integrated and balanced living patterns." *Mt. Holly Gardens Citizens in Action v. Mt. Holly Gardens*, 658 F.3d 375, 381 (3d Cir. 2011), citing *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F. 2d 1283, 1289-90 (7th Cir. 1977). HUD also justifies the interpretation as done in the service of achieving "truly integrated and balanced living patterns." Federal Register, Vo. 78, No. 32 at 11461. The source of this frequently used quotation was Senator Mondale, who drafted Section 810 (a) and was a leading proponent of the FHA. *Trafficante v. Metro Life Ins. Co*, 409 U.S. 205, 211 (1972).

One reason why using the broad, aspirational goals of a single senator who promoted a statute to expand that statute's authority beyond the text is that many people with the same broad goals may differ considerably in what means they believe are necessary and appropriate to achieve them. A wish to integrate housing by one supporter of a statute, even a leading proponent, cannot be translated into statutory authority to integrate housing by any means necessary. While HUD states that "such [disparate impact] liability is 'imperative to the success of civil rights law enforcement,'" many of the law's original supporters simply had a different opinion. Federal Register at 11461. Those who favor a disparate impact standard under the FHA point to the broad goals of its supporters because a closer examination of its supporters' preferred specific means to achieve their goals does not favor the

position advocated here by HUD and the Respondents.

A closer look at legislative history shows that it also does not provide support for prohibitions based on disparate impact. The floor debate suggests that even Senator Mondale himself did *not* believe prohibiting intentional discrimination would ultimately prove inadequate to achieve integration. Some of his statements imply that prohibiting intentional discrimination *is* the way to achieve integration:

> [T]he Senate has been involved for some days in a discussion of what I regard as perhaps the most important issue to face Congress this session; namely, whether we will decide once and for all to prohibit deeply imbedded patterns of segregated living in America, *by enacting a meaningful law against widely practiced efforts to restrict housing to minorities through the discriminatory sale of rentals on housing …*

[emphasis added] 114 Cong. Rec. 2692 (Feb. 8, 1968) available at http://mondale.law.umn.edu/pdf14/v.114_pt.3_2692-2703.pdf

Proponents of the disparate impact standard seem to feel that a desire to integrate neighborhoods must translate into promotion of more than simple non-discrimination. But that is a standpoint of a modern person. Forty-five years after the FHA's

passage, discrimination in housing has become much more rare.[3] Though a HUD official today might take such results for granted, a senator in 1968 would probably see it as a great achievement and success. In 1968, those who passed the act did not know what an America that outlawed discrimination would look like. One can speculate that someone like Senator Mondale might have rather written a law that focused on effects rather than intentions if he had known what housing patterns would look like in 2013.[4] But one can also speculate that if he had written such a law instead of the one he wrote, it would not have passed in the first place; or that he would have concluded that actual integration was not important as long as no one was denied the opportunity to live anywhere on the basis of color. The uncertainty of all such speculation as to legislative intent shows why it is never appropriate to let such considerations cloud the interpretation of an unambiguously written statute. Isolating a few sentences from many days of floor debates in an attempt to create a context that will allow a massive change in meaning of the text is thus improper.

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[3] *See, e.g.* Housing Discrimination Against Racial and Ethnic Minorities, 2012, pp.8-9, available at http://www.huduser.org/portal/Publications/pdf/HUD-514_HDS2012_execsumm.pdf. This report explains that in 1977, black renters were frequently denied access to advertised units that were available to equally qualified whites. This kind of "door slamming" discrimination had declined dramatically by 1989.

[4] Vastly reducing discrimination does not automatically integrate neighborhoods. Ilyce Glink. U.S. Housing Remains Deeply Segregated. *Moneywatch*, June 20, 2012

C) Potential difficulties of distinguishing between covert discrimination and non-discriminatory refusals do not justify misinterpreting the statute.

The FHA prohibits all practices motivated by discrimination against protected classes, even those that are not blatant. In some situations, a defendant can simply disguise his discrimination, adopting a seemingly neutral practice whose real purpose is to discriminate based on a forbidden category. Senator Mondale referred to such practices when he described "local ordinances with the same effect [racial discrimination], although operating more deviously in an attempt to avoid the Court's prohibition, were still being enacted." 114 Cong. Rec. 2526 (1968). Although the FHA prohibited all forms of discrimination, covert or overt, proving covert discrimination is generally much more difficult. It can be hard to prove the difference between a neutral practice adopted in good faith and covertly discriminatory practices.

But though proving a claim may not always be easy for a plaintiff, particularly if the defendant has taken pains to disguise any unlawful conduct, a court should not determine that punishing the innocent is acceptable simply because some guilty defendants are clever at hiding their unlawful conduct. Plaintiffs are not required to offer devastatingly conclusive evidence, they only need to offer evidence, and circumstantial evidence of discrimination is generally acceptable. *See, e.g. Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003), (holding that circumstantial evidence may be sufficient and even more satisfying than

direct, in discrimination cases.) Under the statute, defendants who have adopted no practice with the intent to discriminate have not violated the law.

II. The Court should also reject any construction imposing disparate impact liability because it would create constitutional infirmities for the FHA.

"[I]t is the duty of federal courts to construe a statute in order to save it from constitutional infirmities." *Morrison v. Olson*, 487 U.S. 654, 682 (1988). If Congress had imposed disparate impact liability under the FHA, it would have violated equal protection in doing so, because it would force both public agencies and private individuals to affirmatively use suspect classifications in order to avoid liability under the FHA.

"All racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny." *Johnson v. California*, 543 U.S. 449, 505 (2005). Strict scrutiny is the appropriate standard, "even for so-called benign racial classifications." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 741 (2007). Therefore, an interpretation of Section 804(a) which would cause any government agency to use or impose racial classifications would require the FHA to be subject to strict scrutiny, that is, it would need to be narrowly tailored to achieve a compelling state interest in order to be upheld. *Johnson* at 505.

Interpreting Section 804(a) to impose liability based on disparate impact rather than intentional discrimination, as Respondents urge, results in constitutionally suspect governmental classifications based on race. In this case, disparate impact liability will probably result in either a set of Plaintiffs with the ability to stop their local government from developing their property when a group of similarly situated people of a different race could not, or a local government which must use racial classifications deliberately in order to set up a redevelopment plan that will survive court challenge. The Township of Mt. Holly would not be able to ensure that any development plan it adopted did not have a disparate effect on different racial groups unless it extensively used racial classifications throughout the process.

Any such extensive use of racial classifications would not only be burdensome[5] but would be unlikely to survive strict scrutiny, as extensive use of preferences is not narrowly tailored and the Court does not view racial balancing as a compelling state interest. In fact the Court has found quite the opposite: "at the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller v. Johnson*, 515 U.S. 900, 911

[5] Officials attempting in good faith to make such classifications work would face more than one quandary: which population statistics they ought to use, how they should examine demographic breakdown, and whether to study demographics at the national, state, or county level would all be difficult questions.

(1995). The Court finds that "[t]his working backward to achieve a particular type of racial balance… is a fatal flaw under our existing precedent." *Parents Involved*, 551 at 729. "Racial balance is not to be achieved for its own sake." *Freeman v. Pitts*, 503 U.S. 467, 494 (1992).

Not only would local governments need to keep track of race when adopting redevelopment plans, such liability under Section 804 (a) provides no clear limiting principle to government action at any level that impacts access to housing. Housing codes, environmental protection regulations, or a host of other laws could all potentially be subject to disparate impact claims if they do not make use of suspect classifications. Thus it would be extremely difficult to narrowly tailor racial classifications in or to avoid disparate impact liability.

These and other potential constitutional infirmities may be avoided by construing Section 804(a) to impose liability only for intentional discrimination. Government officials would then, by the simple expediency of avoiding deliberate practices which discriminate on the basis of protected classifications, be able to avoid both liability claims under the FHA as well as equal protection claims under the Fourteenth Amendment. By so construing the FHA, the Court may save it from Constitutional infirmities. The logical choice for the Court is to overturn the Third Circuit's ruling and end this troublesome and lawless imposition of liability.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and this Court should determine that no claims based merely on disparate impact should be cognizable under the Fair Housing Act.

Respectfully submitted,

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