No. 13-1371

In the Supreme Court of the United States

TEXAS DEPARTMENT OF
HOUSING & COMMUNITY AFFAIRS, *ET AL.*,

Petitioners,

v.

THE INCLUSIVE COMMUNITIES PROJECT, INC.,

Respondent.

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

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Petitioners present the following two questions:

1. Are disparate-impact claims cognizable under the Fair Housing Act?
2. If disparate-impact claims are cognizable under the Fair Housing Act, what are the standards and burdens of proof that should apply?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For thirty years, Eagle Forum has consistently defended federalism and supported state and local autonomy from federal intrusion – particularly under the guise of the Commerce

[1] *Amicus* files this brief with consent by all parties, with 10 days' prior written notice; the parties have lodged blanket letters of consent with the Clerk. Pursuant to Rule 37.6, counsel for the *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than the *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

Clause – into areas of traditionally state and local concern. *See* Brief *Amicus Curiae* of Eagle Forum Education & Legal Defense Fund, at 4-16, *U.S. v. Morrison,* 529 U.S. 598 (2000) (Nos. 99-5, 99-29). Further, Eagle Forum opposes disparate-impact analyses because they create grievance-based spoils systems along racial, sexual, or other lines and thus not only divide the Nation but often end up hurting the groups that the law purportedly seeks to help. Because of the importance of these issues, Eagle Forum participated as *amicus curiae* in *Magner v. Gallagher,* No. 10-1032 (U.S.), and *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.,* No. 11-1507 (U.S.). For the foregoing reasons, Eagle Forum has a direct and vital interest in the issues raised here.

STATEMENT OF THE CASE

Respondent The Inclusive Communities Project ("ICP") seeks to house Texans of African ancestry in public-assisted housing in predominantly Caucasian neighborhoods of the Dallas metropolitan area. To further that mission, ICP sued petitioners Texas Department of Housing and Community Affairs and its officers (collectively, "Texas") under the Equal Protection Clause, U.S. CONST. amend. XIV, §1, cl. 4, the Fair Housing Act, 42 U.S.C. §§3601-3619 ("FHA"), and 42 U.S.C. §1982. For its part, Texas claims to have implemented federal and state laws in its Qualified Allocation Plan ("QAP") for allocating scarce development dollars, without regard to race.

The U.S. Census Bureau's American Community Survey ("ACS") breaks down 2012 income data for the Dallas/Ft. Worth/Arlington Urbanized Area by

race, and the income distributions for "Black or African American" and "White, not Hispanic or Latino" communities differ significantly for annual incomes over $50,000 and diverge at annual incomes over $150,000.

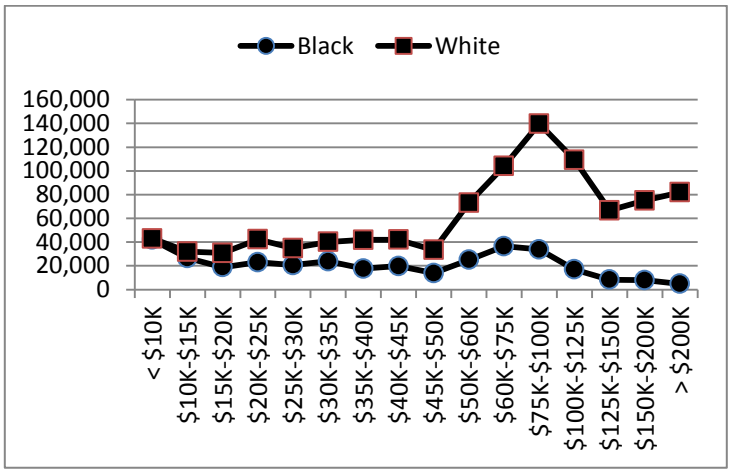

Figure 1 – 2012 Income by Race - Dallas[2]

If property values correlate with income, this income disparity, by race, likely would explain a disparity, by race, in the housing-finance outcomes that ICP challenges. Simply put, high-income areas have less need for low-income housing, but the racial makeup of those areas differs from the area's racial makeup as a whole.

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[2] The Census Bureau website makes the ACS data available at the "American FactFinder" page (last visited June 16, 2014): http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml. Under this Court's Rule 32.3, *amicus* Eagle Forum will offer to lodge the judicially noticeable data underlying Figure 1. *U.S. v. Phillips,* 287 F.3d 1053, 1055 n.1 (11th Cir. 2002); *Fong Yue Ting v. U.S.,* 149 U.S. 698, 734 (1893) (Brewer, J., dissenting).

With respect to FHA, ICP claims that Texas committed "discriminatory housing practices" under 42 U.S.C. §3604(a) and §3605(a), which prohibit the following actions:

- "[R]efus[ing] to sell or rent after the making of a bona fide offer, or … refus[ing] to negotiate for the sale or rental of, or otherwise mak[ing] unavailable or deny[ing], a dwelling to any person because of race, color, religion, sex, familial status, or national origin," 42 U.S.C. §3604(a); and
- "[F]or any person or other entity whose business includes engaging in residential real estate-related transactions," "discriminat[ing] against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. §3605(a).[3]

Insofar as this Court has noted – without resolving – the question whether a government entity qualifies as a "person" under FHA's definition,[4] *Gladstone, Realtors v. Bellwood,* 441 U.S. 91, 109 n.21 (1979), it is perhaps significant that §3604(a) applies only to a "person" and that §3605(a) applies to "any person or

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[3] FHA defines "residential real estate-related transactions" to include "making or purchasing of loans or providing other financial assistance … for purchasing, constructing, improving, repairing, or maintaining a dwelling." 42 U.S.C. §3605(b)(1)(A).

[4] FHA defines "person" to "include[] one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, receivers, and fiduciaries." 42 U.S.C. §3602(d).

other entity whose business includes engaging in residential real estate-related transactions."

In addition to its prohibitions, FHA also includes a savings and preemption clause:

> Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.

42 U.S.C. §3615. The first sentence eschews any attempt to preempt the field of protections against housing discrimination, while the second sentence preempts any state or local law either permitting or requiring actions that FHA prohibits.

Although it alleged both disparate impacts and intentional discrimination, ICP prevailed only under its FHA disparate-impact theories. Texas prevailed on intentional discrimination under the Equal Protection Clause and §1982, but was held to have created a disparate impact actionable under FHA, notwithstanding a lack of disparate treatment.

This litigation thus picks up where *Magner v. Gallagher,* No. 10-1032 (U.S.), and *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.,* No. 11-1507 (U.S.), left off: does FHA allow

disparate-impact claims and, if so, how should courts evaluate them?

SUMMARY OF ARGUMENT

FHA's "because of race" standard prohibits disparate race-based treatment (*i.e.,* intentional discrimination), not disparate race-correlated impacts (Section I). Because FHA lacks any indicia of legislative intent to adopt a disparate-impact standard, this Court need not consider canons of statutory construction beyond the statutory text. Whatever the contours of federal power under the Constitution and countervailing state power reserved by the Tenth Amendment, FHA simply does not prohibit disparate impacts.

If it goes beyond FHA's statutory text, this Court must find that FHA does not adopt a disparate-impact standard. *First,* the Commerce Clause – under which Congress enacted FHA – does not provide a federal police power to regulate housing, which neither moves in interstate commerce nor substantially affects interstate commerce (Section II.A). *Second,* even if FHA fell within Congress's enumerated powers, Congress would lack the authority to compel racially conscious remedies – *i.e.,* actual discrimination – to displace race-correlated disparate impacts that are not actually discriminatory (Section II.B). *Third,* assuming that the Constitution gives Congress authority to enact a disparate-impact FHA, ICP would need to overcome the presumption against preemption before this Court should infer that FHA preempts Texas's historic police power over housing (Section II.C). *Fourth,* the new rules by the federal Department of

Housing and Urban Development ("HUD") warrant no deference on the question of whether FHA allows disparate-impact claims (Section II.D).

If it holds that FHA includes disparate-impact claims, this Court should rely on the presumption against preemption to adopt a narrow scope of FHA's preemption of state and local police power (Section III). Although race unfortunately correlates with wealth, that does not justify assuming that all wealth-related actions also implicate race. To the contrary, a proper disparate-impact analysis would allow defendants to rebut a disparate-impact showing by identifying other, non-protected criteria (*e.g.,* wealth, property value) that neutralize the perceived race-based disparity. In addition, because disparate-impact claims involve no finding of discrimination based on race or any other FHA-protected status, courts should use the rational-basis test to review FHA disparate-impact claims.

Amicus Eagle Forum respectfully submits that each of the foregoing reasons provides ample legal justification for this Court to grant the petition. These issues all are pervasive in federal regulations and litigation and, they seriously threaten the state-federal balance in our federalist system.

ARGUMENT

I. FHA PROHIBITS DISPARATE TREATMENT, NOT DISPARATE IMPACTS

In holding that FHA recognizes disparate-impact claims, the Fifth Circuit's decision conflicts with the decisions of this Court on the statutory language that Congress uses to prohibit disparate *impacts* versus the statutory language it uses to prohibit only

disparate *treatment* (*i.e.,* intentional discrimination). Regulating against mere disparate impacts – without any underlying intent to discriminate – tends to cause the very types of discrimination that Congress sought to stop, which makes this issue one of national importance requiring this Court's review.

As borne out by Texas' beating the constitutional claims but losing the disparate-impact FHA claims, the Constitution does not prohibit disparate impacts. *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979); *see also Shaare Tefila Congregation v. Cobb,* 481 U.S. 615, 617 (1987) (§1982). Indeed, the Constitution "neither knows nor tolerates classes among citizens." *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment) (*quoting Plessy v. Ferguson,* 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). Because it prevailed against ICP's intentional-discrimination claims, but was held to have violated FHA for disparate impacts, Texas thus squarely presents the question whether FHA prohibits disparate impacts. *Amicus* Eagle Forum respectfully submits that FHA does not.

Consistent with this Court's Rule 37.1, *amicus* Eagle Forum will not extensively brief FHA's limitation to intentional discrimination because Texas covers the topic well. Pet. at 18-21. Simply put, statutes that prohibit discrimination *because of* race or other protected status prohibit only purposeful discrimination and disparate treatment, not disparate impacts; in other words, they prohibit actions taken *because* of the protected status, not those taken merely *in spite of* that status. *Alexander v. Sandoval,* 532 U.S. 275, 282-83 & n.2 (2001);

Feeney, 442 U.S. at 279. Texas acted here on a variety of race-neutral factors that are defensible legislative choices in their own right.

In the limited instances where this Court has found Congress to have intended to prohibit disparate impacts, the statutes used more expansive, effect-based language, not the stark because-of language used in FHA. *See* 42 U.S.C. §§1973c(b), 2000e-2(a)(2); 29 U.S.C. §623(a)(2); *Griggs v. Duke Power Co.,* 401 U.S. 424, 432 (1971); *Smith v. City of Jackson, Miss.,* 544 U.S. 228, 236-40 (2005) (plurality); *Reno v. Bossier Parish Sch. Bd.,* 520 U.S. 471, 482 (1997). Similarly, in the limited instances where Congress has abrogated a holding of this Court with respect to disparate impacts, Congress has done so with pinpoint precision to allow disparate-impact claims under the affected statute, *see Reno,* 520 U.S. at 482, not under all statutes. Therefore, unless and until Congress specifies otherwise, "because" means "because."

The Fifth Circuit's reasoning conflicts with this Court's disparate-impact decisions and thus requires review here. That review need not go beyond FHA's text and certainly need not await direct challenges to HUD's new rules. Instead, the issue is fully ripe for review by the Court here.

II. FHA CANNOT BE INTERPRETED TO INCLUDE DISPARATE-IMPACT CLAIMS

In this Section, *amicus* Eagle Forum evaluates canons of statutory construction to demonstrate that, even if this Court inquired beyond the statutory text, it would reach the same conclusion: FHA cannot be interpreted to prohibit mere disparate impacts. *First,*

Congress lacks the authority to regulate purely intrastate housing under the Commerce Clause or under any other enumerated power. *Second,* even if Congress had that authority, it virtually always requires racially conscious remedies to eradicate disparate impacts, which amounts to constitutionally prohibited discrimination in order to eradicate constitutionally permissible correlations. *Third,* even if Congress had the foregoing authority, this Court nonetheless should apply the presumption against preemption in this area of traditionally local concern. Because Congress has not clearly and manifestly ordained the disparate-impact standard, the question here is not whether ICP's position is *arguable* or even better, but whether Texas's position is *untenable. Fourth,* and finally, this Court owes no deference to HUD interpretations and, in any event, must evaluate FHA under traditional tools of statutory construction before considering HUD's views.

A. Congress Lacks Authority for FHA

Because the "'[federal] government is acknowledged by all to be one of enumerated powers,'" *U.S. v. Lopez,* 514 U.S. 549, 566 (1995) (*quoting McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 405 (1819)), some power granted to Congress must authorize FHA for FHA to be valid. The most obvious power is the power to regulate interstate commerce under the Commerce Clause, but real estate cannot move in interstate commerce. Nor does it appear that Congress could rely on other authority vested to it to enact FHA. As such, this Court should reject FHA as *ultra vires.*

1. The Commerce Clause Does Not Give Congress Authority to Regulate Housing

As currently interpreted, the Commerce Clause encompasses three areas that Congress may regulate: (1) "the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, and persons or things in interstate commerce," and (3) "activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005); *accord Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S.Ct. 2566, 2578 (2012) ("*NFIB*"). Only the third prong of this inquiry is even potentially relevant to real estate.

Several courts of appeal have held that the Commerce Clause provides authority for FHA. *See, e.g., Oxford House-C v. City of St. Louis,* 77 F.3d 249, 251 (8th Cir. 1996); *Morgan v. Secretary of Housing and Urban Development,* 985 F.2d 1451, 1455 (10th Cir. 1993); *Seniors Civil Liberties Ass'n, Inc. v. Kemp,* 965 F.2d 1030, 1034 (11th Cir. 1992). These decisions all rely on *Katzenbach v. McClung,* 379 U.S. 294, 301-02 (1964), which in turn relies on its companion case, *Heart of Atlanta Motel, Inc. v. U.S.,* 379 U.S. 241 (1964). These Commerce Clause authorities cannot support FHA.

McClung and *Heart of Atlanta* concern restaurants and motels, respectively, which Congress might reasonably find to qualify as intrastate activities that affect interstate commerce. Similarly, purely *intrastate* consumption of self-grown products nonetheless might affect the *interstate* market for those products. *Wickard v. Filburn,* 317 U.S. 111,

118-19 (1942); *Gonzales*, 545 U.S. at 18. By contrast, there is no interstate market in real estate, which sits in one state, without moving. Moreover, unlike hotels or restaurants that interstate travelers might visit on their travels, homes do not "*substantially* affect interstate commerce." This Court should underscore its recent holding in *NFIB,* 132 S.Ct. at 2593, that congressional power under the Commerce Clause is finite.

2. Congress's Other Enumerated Powers Do Not Authorize FHA

No other enumerated power of Congress appears to authorize FHA. If Congress lacks authority under the Commerce Clause, it appears that Congress lacks any authority for FHA whatsoever.

When it regulates only government conduct – as opposed to either private conduct or both public and private conduct – Congress can rely on the authority vested in the Fourteenth Amendment's enabling clause. U.S. CONST. amend. XIV, §5. But the "Fourteenth Amendment … prohibits only state action [and] erects no shield against merely private conduct, however discriminatory or wrongful." *U.S. v. Morrison,* 529 U.S. 598, 621-22 (2000) (interior citations and quotations omitted). Because FHA applies not only to public housing but also to private housing, the Fourtheenth Amendment cannot give Congress the authority to adopt FHA.

In *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 438-40 (1968), this Court held that the Thirteenth Amendment's enabling clause authorized Congress to regulate private and public behavior by enacting "appropriate legislation," U.S. CONST. amend. XIII,

§2, to require that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. §1982. While that potentially could authorize FHA's protections based on "race, color, ... or national origin," 42 U.S.C. §3604(a), it would not authorize protections based on "religion, sex, [or] familial status." *Id.* Thus, it appears that the Thirteenth Amendment does not provide authority for FHA.

When it regulates conduct by public and private recipients of federal funds, Congress can rely on the contract-like nature of the Spending Clause to attach reasonable conditions on the receipt of federal funds. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,* 547 U.S. 47, 58-59 (2006); *Barnes v. Gorman,* 536 U.S. 181, 186 (2002). But FHA purports to reach private and public housing, regardless of whether they reveive federal funds, so the Spending Clause cannot authorize FHA.

Finally, Congress lacks a police power to regulate housing in the same way that state and local government historically has regulated housing:[5] "we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *Morrison,* 529 U.S. at 618-19. As a creature of enumerated powers under the Constitution,

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[5] Authorities for state and local government's regulation in this field are cited in Section II.C, *infra. See* note 6 and accompanying text.

Congress does not have any catch-all or general authority to regulate in the field of housing.

B. Congress Lacks Authority to Eradicate Disparate Impacts by Requiring Disparate Treatment

Whereas Section II.A, *supra,* asks whether FHA lies within the power of Congress to enact, this section asks whether a disparate-impact FHA would violate equal-protection principles and, therefore, should be rejected. When a plaintiff cannot prove that the defendants intentionally discriminated, but can show disparate impacts, there should be no liability. At best, the evidence is inconclusive that there is even a problem that requires a remedy. At worst, the remedy will require reverse discrimination to undo the disparate impacts correlating with – but are not *caused* by – a plaintiff's protected status. This Court cannot assume Congress intended that.

Significantly, the issue here is not correlation so close that the facial neutrality is merely pretextual and thus a proxy for a plaintiff's protected status: "A tax on wearing yarmulkes is a tax on Jews." *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 270 (1993); *accord Village of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 266 (1977) (collecting cases). Cases like that, however, are as "easy" as they are "rare." *Id.* Instead, the issue here is what to do when regulatory criteria correlate with a protected status, without necessarily having been caused by that status.

Mere correlation with race does not establish discrimination *based on race.* One famous statistical study showed that birthrates in seventeen countries

correlate heavily with those countries' stork populations. Robert Matthews, *Storks Deliver Babies (ρ = 0.008),* 22:2 TEACHING STATISTICS: AN INT'L JOURNAL FOR TEACHERS, at 36 (2000). The statistical inference that storks deliver babies clearly "mistakes correlation for causation." *Woodford v. Ngo,* 548 U.S. 81, 94 n.4 (2006); Matthews, *Storks Deliver Babies,* 22:2 TEACHING STATISTICS, at 36-37. The same type of mistake underlies many disparate-impact claims.

These claims often seek to compare groups that are not, in fact, comparable, such as an area's total population by race with the people who fit within specialized sub-populations. *See Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 651 (1989); *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 996 (1988) (plurality). In doing so, disparate-impact claims fail "to recognize the limited probative value of disproportionate impact" because they fail "to acknowledge the heterogeneity of the Nation's population." *Arlington Heights,* 429 U.S. at 266 n.15 (internal quotations omitted). Thus, when it treats wealthy and poor neighborhoods the same, Texas does not necessarily discriminate on the basis of race. Most likely, it discriminates (if at all) on the basis of income and wealth. Any race-related correlation would derive solely from the regrettable correlation between race and wealth, due to societal factors that Texas did not cause and perhaps also to other statistical anomalies. As such, that correlation betrays no race-based animus on Texas's part.

While ICP might wish to use FHA to eradicate disparate impacts not *caused by* race (*i.e.,* remedies that Equal Protection does not require), the remedy

typically requires race-based discrimination. When disparate *race-correlated* impacts are not, in fact, *caused by race,* virtually any disparate race-based treatment to eradicate them will *discriminate based on race,* in violation of the equal-protection principles in the Fifth and Fourteenth Amendments as well as the underlying anti-discrimination statute. *See Ricci v. DeStefano,* 557 U.S. 557, 581-82 (2009) (rejecting the "*de facto* quota system" that disparate-impact claims would create). Indeed, even under statutes like Title VII that expressly allow disparate-impact claims, it "would be contrary to Congress' clearly expressed intent" to allow "quotas and preferential treatment [to] become the only cost-effective means of avoiding expensive litigation." *Watson,* 487 U.S. at 992-93 (plurality); *Wards Cove,* 490 U.S. at 652-53. In some instances, defendants may be able to avoid disparate impacts by dropping a criterion altogether or finding different metrics for the underlying quality, but Equal Protection likely will prohibit any attempts to undo the disparate impact itself.

The foregoing discussion provides two insights into the district court's finding that Texas "approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas." Pet. App. 165a (footnote omitted). First, given the disparity by race in Dallas incomes, especially at the high end, the disparity by race in the need for low-income housing in high-income areas is neither surprising nor invidious. Second and more important here, if Texas somehow eradicated the racial disparity on housing while the underlying

income disparity remained unchanged, Texas would be sued for intentional race discrimination when it funded projects in higher-income, lower-minority areas without also funding all projects with the same or better bases in low-income, high-minority areas.

Congress violates the Constitution by enacting not only "laws for the accomplishment of objects not entrusted to the government" but also those "which are prohibited by the constitution." *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 423 (1819). Put another way, "a federal statute, in addition to *being authorized* by Art. I, § 8, must also '*not [be] prohibited*' by the Constitution." *U.S. v. Comstock,* 560 U.S. 126, 135 (2010) (*quoting McCulloch,* 17 U.S. (4 Wheat.) at 421) (alterations in *Comstock,* emphasis added). The canon of constitutional avoidance interprets statutes "to *avoid* the decision of constitutional questions" by "choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Suarez Martinez,* 543 U.S. 371, 381 (2005), *Amicus* Eagle Forum respectfully submits that this Court should take Congress at its word in FHA: "It is the policy of the United States to provide, *within constitutional limitations,* for fair housing throughout the United States." 42 U.S.C. §3601 (emphasis added). Rather than interpreting FHA to create equal-protection violations through race-conscious remedies that seek to eradicate mere disparate impacts, this Court should interpret FHA not to allow disparate-impact claims in the first place.

C. The Presumption against Preemption Precludes Interpreting FHA to Preempt Local Police Power to Regulate Housing Conditions

Although the assertion of Commerce-Clause power over local housing would be troubling on federalism grounds generally, *Morrison,* 529 U.S. at 618-19, it would be even more troubling here because of the historic *local* police power that the federal power would displace. In fields traditionally occupied by state and local government, this Court applies a presumption *against* preemption under which it will not assume preemption "unless that was the *clear and manifest purpose* of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947) (emphasis added). This presumption applies "because respect for the States as independent sovereigns in our federal system leads [this Court] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth v. Levine,* 555 U.S. 555, 565 n.3 (2009) (internal quotations omitted). Thus, in addition to considering whether Congress intended to impose disparate-impact standards *at all,* this Court should also ask whether Congress has shown sufficient indicia of the intent that FHA impose disparate-impact standards *on state and local government.*

Even assuming *arguendo* that Congress intended FHA to allow disparate-impact claims, there is little indication in FHA that Congress intended to allow claims against state and local government. Given that FHA plausibly can be read to exclude state and local government, *Santa Fe Elevator* and its progeny

should lead this Court to assume that Congress did not intend to allow such claims against Texas here.

First, of course, states and localities have a long history of regulating housing under the police power for the health and safety of the community. *Edgar A. Levy Leasing Co. v. Siegel,* 258 U.S. 242, 246-47 (1922); *Lombardo v. Dallas,* 124 Tex. 1, 13, 73 S.W.2d 475, 480 (Tex. 1934) ("Apartment or Tenement Houses have always been regarded as peculiarly subject to the police power") (*citing* John Forrest Dillon, 2 COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS §698, at 1069 (5th ed. 1911)).[6] As such, this Court should interpret FHA to avoid preemption, if FHA allows that interpretation.

With FHA, there is little textual indication that Congress intended to regulate state and local governments. The relevant prohibitions apply to a "person" and "person or other entity whose business includes engaging in residential real estate-related transactions," 42 U.S.C. §§3604(a), 3605(a), but FHA does not include governments within its definition of "person." *Id.* at §3602(d). Similarly, Texas is hardly in "business" in the usual meaning of that word. At the surface, therefore, it is possible to interpret FHA as not applying to governmental functions like the Texas petitioners here. That opening alone should lead this Court to interpret FHA in Texas's favor:

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[6] As the dates of the cited authorities show, state and local housing regulations predate FHA's enactment. PUB. L. NO. 90-284, Title VIII, 82 Stat. 83 (1968). *See* Eugene B. Jacobs & Jack G. Levine, *Redevelopment: Making Misused and Disused Land Available and Useable,* 8 HASTINGS L.J. 241 (1957).

> When the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily "accept the reading that disfavors pre-emption."

Altria Group, Inc. v. Good, 555 U.S. 70, 77 (2008) (*quoting Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 449 (2005)). If it starts with the presumption that Congress would not preempt state law without showing its "clear and manifest" intent to do so, this Court cannot rule for ICP.

In any event, the no-preemption reading is the better reading. When Congress wants its public-welfare statutes to apply to government, Congress knows how to do so. *See, e.g.,* 42 U.S.C. §4902(2) (Noise Control Act); 42 U.S.C. §7602(e) (Clean Air Act). In enacting FHA, Congress worked against the backdrop of important decisions that government is not generally a "person." *See South Carolina v. Katzenbach,* 383 U.S. 301, 323-24 (1966) (Due Process Clause); *cf. Vt. Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 787 (2000) (False Claims Act); *Will v. Mich. Dep't of State Police,* 491 U.S. 58, 63-64 (1989) (§1983). If Congress intended FHA to apply to government financing of publicly assisted housing, Congress would have enacted (and still could enact) that intent into FHA.[7]

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[7] In one sense, congressional silence on this issue supports reading FHA to prohibit only intentional discrimination. The Equal-Protection Clause protects the public against government discrimination, U.S. CONST. amend. XIV, §1, cl. 4, which makes FHA coverage unnecessary if FHA prohibits only the same types of discrimination as the Equal Protection Clause.

While neither Texas nor Eagle Forum concedes that ICP's disparate-impact interpretation *is* viable, that is not the test. The burden is on ICP to demonstrate that Texas's intentional-discrimination interpretation *is not* viable.

D. HUD Lacks the Authority to Adopt – by Regulation or by Interpretation – a Disparate-Impact Standard under an Intentional-Discrimination Statute

HUD's promulgation of its new FHA rules does not change the result here.[8] To the extent that they apply, the HUD rules are not entitled to deference in a reviewing court's application of traditional tools of statutory construction. Even if valid for HUD's intra-agency purposes, the HUD rules cannot expand the scope of FHA cause of action that Congress provided.

At the outset, HUD's present-day claim that it "has long interpreted the Act to prohibit housing practices with a discriminatory effect, even where there has been no intent to discriminate," 76 Fed. Reg. 70,921, 70,921 (2011) (proposed rule); 78 Fed. Reg. 11,460, 11461, 11,465 (2013) (final rule), fails to recognize that previous Administrations took the opposite view. *See* Presidential Statement on Signing the Fair Housing Amendments Act of 1988, 24 Weekly Comp. Pres. Doc. 1141 (Sept. 13, 1988). Consistency of interpretation can increase deference,

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[8] The HUD rules define a "discriminatory effect" to include any practice that "actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin." 24 C.F.R. §100.500(a).

Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), and inconsistency can decrease or nullify it. *Id.; Morton v. Ruiz,* 415 U.S. 199, 237 (1974). On the other hand, consistency alone cannot make an arbitrary position rational: "Arbitrary agency action becomes no less so by simple dint of repetition." *Judulang v. Holder,* 132 S.Ct. 476, 488 (2011). While inconsistent HUD interpretations weaken the case for deference, the real issue is whether HUD's position is consistent *with FHA.*

As explained in Section I, *supra,* Congress enacted an intentional-discrimination statute, and HUD cannot change that by agency decree. The first step of any deference analysis is for the Court to evaluate the issue independently. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 n.9 (1984). Before considering HUD's position, this Court must employ "traditional tools of statutory construction" to determine congressional intent, with courts as "the final authority." *Id.* If that reveals an intentional-discrimination statute, that ends the matter, regardless of HUD's position:

> [D]eference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history. Here, neither the language, purpose, nor history of §504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds. Accordingly, we hold that even if [the agency] has attempted to create such an obligation itself, it lacks the authority to do so.

Southeastern Cmty. Coll. v. Davis, 442 U.S. 397, 411-12 (1979) (internal quotations and citations omitted). As explained in Section I, *supra,* FHA prohibits intentional discrimination, not disparate impacts.

But even if HUD could promulgate a regulation to establish a disparate-impact analysis for intra-agency proceedings, such as administrative hearings or enforcement, that would not establish a right of action for the public to enforce those regulations, outside of HUD. Only Congress can create rights of action:

> [I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.

Sandoval, 532 U.S. at 291. Here, Congress did not create a right of action against disparate impacts, and any HUD views to the contrary could validly apply (if at all) only within HUD.[9]

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[9] Where Congress has created a right of action to enforce regulations or where the agency regulation defines the conduct governed by a statutory cause of action, an agency regulation can play a role in the statutory cause of action. *Id.* For example, in *Wright v. City of Roanoke Development & Housing Authority,* 479 U.S. 418, 419-23 (1987), HUD's interpreting "rent" to include utilities brought utility costs into a statutory action based on rent. But unlike the determination in *Wright,* the HUD rule here violates the entire point of *Sandoval,* which is that an agency cannot define "discrimination" to include disparate impacts under intentional-discrimination statutes.

III. IF FHA ALLOWS DISPARATE-IMPACT CLAIMS, THE PRESUMPTION AGAINST PREEMPTION SHOULD LIMIT THE SCOPE OF THOSE CLAIMS

In its second Question Presented, Texas asks this Court to resolve a deep circuit split on the type of analysis that courts should use to evaluate disparate-impact claims, assuming *arguendo* that FHA allows such claims. The uncertainty from this circuit split provides ample reason for this Court to grant the writ of *certiorari,* regardless of how the Court resolves the first Question Presented.

In the event that the Court finds FHA to allow disparate-impact claims – and thereby to preempt Texas's historic police power over housing – *amicus* Eagle Forum respectfully submits that the presumption against preemption nonetheless should limit FHA's disparate-impact regime. Specifically, under *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), the presumption against preemption applies to determining the *scope* of preemption, even after a court finds a statute to preempt *some* state action. *Id.* As applied here to state and local government, therefore, this Court should adopt the least restrictive interpretation of FHA on state and local police power. *See* Section II.C, *supra.*

Although *amicus* Eagle Forum does not support *any* disparate-impact analysis here, the analysis most deferential to state and local police power would evaluate claims based *inter alia* on relevant populations. *Wards Cove,* 490 U.S. at 651; *Watson,* 487 U.S. at 996, with the opportunity to rebut the plaintiffs' statistical showing as flawed. In addition,

given the absence of any intentional discrimination whatsoever – much less discrimination that would trigger elevated scrutiny – this Court should adopt the rational-basis test as the standard for defendants to rebut showings under a disparate-impact theory.

Comparing high-minority poor areas with low-minority wealthy areas is a "nonsensical" way to try to demonstrate race-based animus, *Wards Cove,* 490 U.S. at 651 (comparing participation in specialized pursuits with general population is "nonsensical"), with "little probative value" even under a disparate-impact regime like Title VII. *Watson,* 487 U.S. at 996 ("statistics based on an applicant pool containing individuals lacking minimal qualifications … [has] little probative value"). Accordingly, defendants should have the opportunity to rebut disparate-impact claims by showing that some basis other than a FHA-protected status explains the disparity: "statistics are not irrefutable," so "like any other kind of evidence, they may be rebutted." *Int'l Bhd. of Teamsters v. U.S.,* 431 U.S. 324, 340 (1977). "If the [defendant] discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own." *Dothard v. Rawlinson,* 433 U.S. 321, 331 (1977). Any other regime would "mistake[] correlation for causation." *Woodford,* 548 U.S. at 94 n.4. Thus, for example, Texas must have the opportunity to show that whatever correlation exists between race and Texas's QAP has nothing to do with race-based animus or discrimination. Indeed, the correlation most likely derives from race-neutral criteria such as wealth, income, or property values. As explained in Section

II.B, *supra,* trying to eradicate that disparate impact would not solve any actual discrimination and likely would *cause* racial discrimination.

FHA protects various statuses – *e.g.,* race, sex, and handicap, 42 U.S.C. §3604(a) – that would trigger different levels of scrutiny for intentional-discrimination claims under the Equal Protection Clause. *Miller v. Johnson,* 515 U.S. 900, 904 (1995) (strict scrutiny for race-based discrimination); *U.S. v. Virginia,* 518 U.S. 515, 531 (1996) (intermediate scrutiny for sex-based discrimination); *Bd. of Trs. of the Univ. of Ala. v. Garrett,* 531 U.S. 356, 366-68 (2001) (rational-basis test for handicap-based discrimination). Here, for disparate-impact claims that do not trigger elevated scrutiny under the Equal Protection Clause, the Court should adopt the rational-basis test to review claims against government policies. Any higher scrutiny would preempt more government policies than Congress "clearly and manifestly" intended in this field of traditional state and local concern, thus implicating the *Medtronic* presumption against the scope of FHA preemption.

CONCLUSION

The Court should grant the petition for a writ of *certiorari.*

Dated: June 16, 2014 Respectfully submitted,

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