No. 11-1507

In the Supreme Court of the United States

TOWNSHIP OF MOUNT HOLLY, TOWNSHIP COUNCIL OF TOWNSHIP OF MOUNT HOLLY, KATHLEEN HOFFMAN, AS TOWNSHIP MANAGER OF TOWNSHIP OF MOUNT HOLLY, JULES THIESSEN, AS MAYOR OF TOWNSHIP OF MOUNT HOLLY,

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 *AMICUS CURIAE* OF APA WATCH IN SUPPORT OF PETITIONERS IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Are disparate impact claims cognizable under the Fair Housing Act?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae APA Watch is a nonprofit membership organization headquartered in McLean, Virginia.[1] APA Watch has participated as *amicus curiae* before this Court and the Courts of Appeals on enforcement and discrimination issues, as well as the creation of private rights of action, including in

[1] *Amicus* APA Watch files this brief with the consent of all parties; the parties have lodged blanket letters of consent with the Clerk. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

Stormans Inc. v. Seleky, No. 07-36039 (9th Cir.); *Envtl. Defense v. Duke Energy Corp.,* No. 05-848 (U.S.); *Astra USA, Inc. v. Santa Clara County, Cal.,* No. 09-1273 (U.S.); *Douglas v. Independent Living Ctr. of Southern California, Inc.,* Nos. 09-958, 09-1158, 10-283 (U.S.). In addition, construction projects involving APA Watch members are impacted by the application of disparate-impact analyses similar to the plaintiffs' theory of the case here. Accordingly, APA Watch has a direct and vital interest in the issues raised here.

STATEMENT OF THE CASE

The respondents – minority residents and former residents (collectively, "Residents") – of a poor and run-down neighborhood in the Township of Mount Holly, New Jersey, have sued that Township and various Township officers (collectively, "Mt. Holly") to enjoin redevelopment of the neighborhood and for damages under the Fair Housing Act, PUB. L. NO. 90-284, Title VIII, 82 Stat. 83 (1968) ("FHA").[2] The Residents allege that, by targeting Mt. Holly's poorest neighborhood, the redevelopment efforts violate 42 U.S.C. §3604(a) of the FHA by disparately impacting racial minorities, who make up a disproportionate share of the affected population. The District Court granted summary judgment for Mt. Holly, and the Residents appealed. The Third Circuit reversed the summary judgment, based on its

[2] Redevelopment plans can raise valid concerns for property rights under the Fifth Amendment. The sole issue before this Court, however, is whether the Residents can raise disparate-impact claims under the FHA.

finding that the Residents had made out a *prima facie* case under a disparate-impact theory.

The Residents do not allege – much less establish sufficiently to deflect a summary judgment motion – that Mt. Holly engaged in intentional, race-based discrimination. Instead, the Residents merely allege disparate impacts under a facially neutral redevelopment plan. As such, this litigation picks up where *Magner v. Gallagher,* No. 10-1032 (U.S.), left off: does the FHA allow disparate-impact claims?

STATEMENT OF FACTS

The Residents' 30-acre neighborhood in Mt. Holly was run down and overcrowded. The overcrowding led to a parking shortage, which led to paving over back yards to supplement parking. Pet. App. 6a-7a. In turn, these factors led to poor drainage and a loss of open space. *Id.* According to data from the 2000 census, the neighborhood was 19.7% non-Hispanic White, 46.1% African-American, and 28.8% Hispanic, with almost all classified as low-income and most classified as either very-low or extremely-low income. *Id.* at 6a. Many of the properties in the neighborhood fell into disrepair or even dilapidation, *id.* at 7a, and the neighborhood accounted for more than a quarter of Mt. Holly crimes in 1999, although it represented less than two percent of the Township.

In 2000, Mt. Holly found the neighborhood a prime candidate for redevelopment, based on excess land coverage, poor land use, and excess crime. *Id.* at 8a. In a series of redevelopment plans, Mt. Holly proposed new market-rate housing, with various set asides designated for senior citizens or as affordable housing. *Id.* Due to their low-income status, however,

the Residents did not believe that they could afford even these set asides. *Id.* at 9a. The District Court summarized the Residents' preferred alternative as "seeking to remain living in the … unsafe conditions until they are awarded money damages for their claims and sufficient compensation to secure housing in the local housing market." Pet. App. 50a n.12. After bringing an unripe claim in state court, the Residents brought this claim in federal court.

SUMMARY OF ARGUMENT

Before addressing the congressional intent with respect to the FHA on intentional-discrimination versus disparate-impact standards, *amicus* APA Watch first addresses three issues relevant to determining that intent. First, the Commerce Clause – under which Congress enacted the FHA – does not provide a federal police power to regulate housing, which neither moves in interstate commerce nor substantially affects interstate commerce (Section I.A). Second, even if Congress had that power, this Court would need to overcome the presumption against preemption before inferring that the federal power's exercise here preempts Mt. Holly's historic police power over housing (Section I.B). Third, neither a prior interpretation nor a new regulation from the federal Department of Housing and Urban Development ("HUD") warrants deference on the question of whether the FHA allows disparate-impact claims (Section I.C).

The FHA's "because of race" standard prohibits disparate race-based treatment (*i.e.,* intentional discrimination), not disparate race-correlated impacts (Section II). Because the 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, the FHA simply does not prohibit disparate impacts.

ARGUMENT

I. STATUTORY CONSTRUCTION FAVORS MT. HOLLY

In this Section, prior to analyzing the FHA's legislative intent, *amicus* APA Watch evaluates three issues of statutory construction relevant to evaluating and determining that intent. *First,* Congress lacks the authority to regulate purely intrastate housing under the Commerce Clause. *Second,* even if Congress had that 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 the Residents' position is *arguable* or even better, but whether Mt. Holly's position is *untenable. Third,* and finally, this Court owes no deference to HUD interpretations and, in any event, must evaluate the FHA under traditional tools of statutory construction before considering HUD's views.

A. Congress Lacks Authority for the FHA under the Commerce Clause

When it regulates state and local government conduct – as opposed to either private conduct or both public and private conduct – Congress can rely

on the authority vested in Section 5 of the Fourteenth Amendment. U.S. CONST. amend. XIV, §5; *cf. U.S. v. Morrison,* 529 U.S. 598, 621-22 (2000) ("Fourteenth Amendment … prohibits only state action [and] erects no shield against merely private conduct, however discriminatory or wrongful") (interior citations and quotations omitted). Similarly, 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. U.S. CONST. art. I, §8, cl. 1; *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47, 58-59 (2006); *Barnes v. Gorman,* 536 U.S. 181, 186 (2002). Where, as here, it regulates under the Commerce Clause, Congress can regulate only within the limits of that clause.

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) (emphasis added). Because real estate cannot move, congressional authority for the FHA must lie in the third prong, if at all.

Several courts of appeal have held that the Commerce Clause provides authority for the 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). *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. Here, however, there is no interstate market in real estate, which sits in one state, without moving. And unlike hotels or restaurants that interstate travelers might visit on their travels, homes do not "*substantially* affect interstate commerce."

B. The Presumption against Preemption Precludes Interpreting the 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 ("we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power"), that assertion of a federal police power would be even more troubling here because of the historic *local* police power that the federal power would displace.

State and local government have a long history of regulating housing standards for the health and safety of the community. *Edgar A. Levy Leasing Co. v. Siegel,* 258 U.S. 242, 246-47 (1922); *Mansfield & Swett, Inc. v. Town of W. Orange,* 120 N.J.L. 145, 151, 198 A. 225 (N.J. 1938). As signaled by the date of the cited authorities (namely, 1922 and 1938), state and local housing regulation easily predates the FHA's enactment in 1968, PUB. L. NO. 90-284, Title VIII, 82 Stat. 83 (1968); *see generally* Eugene B. Jacobs & Jack G. Levine, *Redevelopment: Making Misused and Disused Land Available and Useable,* 8 HASTINGS L.J. 241 (1957). Thus, not that there was any doubt, Congress regulated here in a field already occupied by state and local government.

In such fields traditionally occupied by state and local government, courts apply a presumption *against* preemption under which they 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); *Wyeth v. Levine,* 555 U.S. 555, 565 (2009); *cf. U.S. v. Bass*, 404 U.S. 336, 349 (1971) ("[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *accord Gonzales v. Oregon*, 546 U.S. 243, 275 (2006). Under the circumstances, the presumption against preemption applies here.

Even assuming *arguendo* that one could interpret the FHA to allow disparate-impact claims, *but see* Section II, *infra,* the presumption against preemption would reject interpreting the FHA to

preempt Mt. Holly's police power if the intentional-discrimination interpretation was also viable:

> 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)). Thus, while neither Mt. Holly nor APA Watch concedes that the Residents' disparate-impact interpretation *is* viable, that is not the test. The burden is on the Residents to demonstrate that Mt. Holly's intentional-discrimination interpretation *is not* viable.

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

In its recent rulemaking, HUD promulgated disparate-impact standards under the FHA. 76 Fed. Reg. 70,921 (2011) (proposed rule); 78 Fed. Reg. 11,460 (2013) (final rule). Of course, the rule itself cannot apply retroactively to pre-rule conduct challenged in this lawsuit. *Georgetown University Hospital v. Bowen,* 488 U.S. 204, 208 (1988). Nonetheless, under some of this Court's holdings on deference to agencies' non-rule *interpretations,* the Residents might claim deference *now,* based on either the new rule or the implicit interpretation that underlies the rule.

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. at 70,921, does not 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, *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. *Judulang v. Holder,* 132 S.Ct. 476, 488 (2011) ("[a]rbitrary agency action becomes no less so by simple dint of repetition"). Thus, under whatever form of deference the Residents would claim for HUD's present position, the primary issue is whether HUD's position is *consistent with the FHA.*

As explained in Section II, *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. Thus, before considering HUD's position, this Court must employ "traditional tools of statutory construction" to determine congressional intent, on which courts are "the final authority." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 n.9 (1984). If that analysis reveals an intentional-discrimination statute, that is the end of 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 II, *infra,* the FHA prohibits intentional discrimination, not disparate impacts.

But even if HUD lawfully 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.

Alexander v. Sandoval, 532 U.S. 275, 291 (2001). Here, Congress did not create a right of action against disparate impacts, and any HUD views to the contrary could apply only within HUD.

Of course, 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 will

play a role in the statutory cause of action. *Id.; Wright v. City of Roanoke Development & Housing Authority,* 479 U.S. 418, 419-23 (1987). But unlike the determination in *Wright* that HUD's interpreting "rent" to include utilities could bring utility costs into a statutory action based on rent, the entire point of *Sandoval* is that an agency cannot define "discrimination" to include disparate impacts under intentional-discrimination statutes.

The presumption against preemption (Section I.B, *supra*) provides another reason to reject any deference to HUD. At *Chevron* "step one," courts employ "traditional tools of statutory construction" to determine congressional intent, on which courts are "the final authority." *Chevron* 467 U.S. at 843 n.9. Only if the attempt to interpret the statute is inconclusive does a federal court go to "*Chevron* step two," where a court would defer to a plausible agency interpretation of an ambiguous statute. *Id.* at 844. Even if the Court remained open to *Chevron* deference generally, that deference would be inappropriate where (as here) the presumption against preemption applies.

In a dissent joined by the Chief Justice and Justice Scalia, and not disputed by the majority, Justice Stevens called into question the entire enterprise of administrative preemption vis-à-vis the presumption against preemption:

> Even if the OCC did intend its regulation to pre-empt the state laws at issue here, it would still not merit *Chevron* deference. No case from this Court has ever applied such a deferential standard to an agency decision

> that could so easily disrupt the federal-state balance.

Watters v. Wachovia Bank, N.A., 550 U.S. 1, 41 (2007) (Stevens, J., dissenting). Significantly, *Watters* arose under banking law that is more preemptive than federal law generally. *Id.* at 12 (majority). The lower federal courts have adopted a similar rationale to disfavor agency interpretations that are at odds with the presumption against preemption.[3] *Amicus* APA Watch respectfully submits that the respect owed by both federal courts and the Congress to state and local government in our federal system trumps the separation-of-powers respect for Congress that underlies courts' deferring to federal agencies under *Chevron.* Clearly federal agencies – which draw their delegated power from Congress – cannot have a freer hand in this arena than Congress itself.

II. THE FHA PROHIBITS DISPARATE TREATMENT, NOT DISPARATE IMPACTS

The Third Circuit ended its decision with a rhetorical flourish that evokes balance, reason, and the Constitution:

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[3] *See, e.g., Nat'l Ass'n of State Utility Consumer Advocates v. F.C.C.,* 457 F.3d 1238, 1252-53 (11th Cir. 2006) ("[a]lthough the presumption against preemption cannot trump our review … under *Chevron,* this presumption guides our understanding of the statutory language that preserves the power of the States to regulate"); *Fellner v. Tri-Union Seafoods, L.L.C.,* 539 F.3d 237, 247-51 (3d Cir. 2008); *Massachusetts Ass'n of Health Maintenance Organizations v. Ruthardt,* 194 F.3d 176, 182-83 (1st Cir. 1999); *Albany Engineering Corp. v. F.E.R.C.,* 548 F.3d 1071, 1074-75 (D.C. Cir. 2008); *Massachusetts v. U.S. Dept. of Transp.,* 93 F.3d 890, 895 (D.C. Cir. 1996).

> The Township has broad discretion to implement the policies it believes will improve its residents' quality of life. But that discretion is bounded by laws like the FHA and by the Constitution, which prevent policies that discriminate on the basis of race.

Pet. App. 29a. Of course, the Constitution does not prohibit disparate impacts. *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979). Indeed, notwithstanding that lofty close, the body of the appellate decision falls flat and Orwellian, rejecting "specious concepts of equality." Pet. App. at 19a. Equality under the law, however, is the cornerstone of a Constitution that "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)). Leaving the Constitution momentarily aside, Mt. Holly's petition squarely presents the question whether the FHA *statutorily* prohibits disparate impacts. *Amicus* APA Watch respectfully submits that the FHA does not.

Consistent with this Court's rules, *amicus* APA Watch will not extensively brief the FHA's limitation to intentional discrimination because Mt. Holly covers the topic well. *See* Mt. Holly Br. at 17-37; S. Ct. Rule 37.1 (*amicus* briefs should focus on matters not already addressed by the parties). 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. *Sandoval,* 532 U.S. at 282-83 & n.2; *cf. Feeney,* 442 U.S. at 279 (Fourteenth Amendment prohibits only intentional discrimination). Whatever correlation exists between race and Mt. Holly's redevelopment plan has nothing to do with race-based animus or intentional discrimination and everything to do with the fact that poverty correlates with race in Mt. Holly.[4]

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)

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[4] Comparing the high-minority poor part of town with the low-minority wealthy parts of town is "nonsensical" to the end of trying to demonstrate a race-based animus, *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 651 (1989) (comparing participation in specialized pursuits with general population is "nonsensical"), with "little probative value" even under a disparate-impact regime like Title VII. *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 996 (1988) (plurality) ("statistics based on an applicant pool containing individuals lacking minimal qualifications … [has] little probative value"). Indeed, basic statistics warns against "confusing correlation with causation." Robert Matthews, *Storks Deliver Babies ($\rho = 0.008$),* 22:2 TEACHING STATISTICS at 36 (2000); *Woodford v. Ngo,* 548 U.S. 81, 95 n.4 (2006) (cautioning against "mistak[ing] correlation for causation"). The Matthews article gets its title from the strong correlation between stork populations and births in 17 European countries. Matthews, *Storks Deliver Babies,* at 36-37.

(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."

Accordingly, without the need for any legislative or administrative gloss, this Court should answer the Question Presented in the negative.

CONCLUSION

For the foregoing reasons and those argued by Mt. Holly, this Court should reverse the Third Circuit's holding that the FHA allows disparate-impact claims.

September 3, 2013

Respectfully submitted,

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