1  IN THE SUPREME COURT OF THE UNITED STATES

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3 TEXAS DEPARTMENT OF     :

4 HOUSING AND COMMUNITY   :

5 AFFAIRS, ET AL.,     :

6   Petitioners    : No. 13-1371

7  v.         :

8 THE INCLUSIVE COMMUNITIES  :

9 PROJECT, INC.     :

10 - - - - - - - - - - - - - - - - - x

11    Washington, D.C.

12    Wednesday, January 21, 2015

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14   The above-entitled matter came on for oral

15 argument before the Supreme Court of the United States

16 at 10:21 a.m.

17 APPEARANCES:

18 SCOTT A. KELLER, ESQ., Solicitor General of Texas,

19  Austin, Tex.; on behalf of Petitioners.

20 MICHAEL M. DANIEL, ESQ., Dallas, Tex.; on behalf of

21  Respondent.

22 GEN. DONALD B. VERRILLI, JR., Solicitor General,

23  Department of Justice, Washington, D.C.; for United

24  States, as amicus curiae, on behalf of Respondent.

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1            P R O C E E D I N G S

2                    (10:21 a.m.)

3            CHIEF JUSTICE ROBERTS:        We'll hear argument

4    first this morning in Case 13-1371, the Texas Department

5    of Housing and Community Affairs v. The Inclusive

6    Communities Project.

7            Mr. Keller.

8            ORAL ARGUMENT OF SCOTT A. KELLER

9             ON BEHALF OF THE PETITIONERS

10           MR. KELLER:        Thank you, Mr. Chief Justice,

11   and may it please the Court:

12           The Fair Housing Act does not recognize

13   disparate-impact claims, first, because its plain text

14   doesn't use effects- or results-based language, and when

15   a statute prohibits actions taken because of race and it

16   lacks effects-based language, the statute is limited to

17   intentional discrimination.  And, second, the canon of

18   constitutional avoidance compels this interpretation.

19   Most importantly, the Act doesn't use the phrase

20   "adversely affect."  Smith v. City of Jackson,

21   recognized that this effects-based phrase --

22           JUSTICE SOTOMAYOR:        At the time of Smith and

23   Griggs, neither the Title VII nor the ADEA used the

24   words "disparate impact," and yet we recognize they

25   apply disparate impact.

1    MR. KELLER:        At the time, disparate -- the

2  words "disparate impact" were not used; however, the

3  words "adversely affect" were used.  And Watson

4  subsequently interpreted Griggs as finding the textual

5  hook for disparate-impact liability was based on the

6  phrase "adversely affect."

7        JUSTICE SOTOMAYOR: Well, you have a problem,

8  because it says "to refuse to sell or rent," et cetera,

9  "or otherwise make unavailable," and the agency charged

10  with interpreting that language has determined that it

11  means disparate impact.

12       MR. KELLER:        Justice Sotomayor, the -- the

13  phrase "make unavailable" is an act prohibited by the

14  Fair Housing Act.  It is an act --

15       JUSTICE SOTOMAYOR:        It's a consequence.  It

16  happens to be because that's what you do with housing,

17  but it's a consequence.

18       MR. KELLER:        The act of making unavailable a

19  dwelling to a person is the act prohibited by the Fair

20  Housing Act.  This isn't like Section 4(a)(2) of the

21  ADEA, where Smith said disparate impact lied.  This is

22  like Section 4(a)(1) of the ADEA, because of the --

23  804(a) prohibits the refusal to sell or rent, the

24  refusal to negotiate, otherwise making unavailable, or

25  denying.  All of those are active verbs, and they're all

1    acts prohibited.  The work that is being done by

2    "otherwise make unavailable" is to cover additional

3    acts, such as zoning decisions or land use restrictions

4    that are not outright refusals or outright denials.  And

5    that's why the language of the Fair Housing Act focuses

6    on actions, not on --

7         JUSTICE SCALIA:        Of course, you could say

8    the same thing about "adversely affect."  I mean, that

9    also is an active verb, right?  And it also -- you had

10   to adversely affect by discriminating.

11        JUSTICE GINSBURG:        On the basis of --

12        JUSTICE SCALIA:        So, you know, I -- the

13   points you make are -- are true enough, but they were

14   also true with -- with respect to Title VII, weren't

15   they?

16        MR. KELLER:        Justice Scalia, I don't believe

17   so.  Because Section 4(a)(2) and Section 703(a)(2) ban

18   the act of limiting, segregating, and classifying.  And

19   then they check for a certain result, something which

20   would deprive, tend to deprive, or adversely affect.

21   And it was that results- or effects-checking language

22   that gave rise to disparate-impact liability.

23        JUSTICE GINSBURG:        But after that language

24   is the phrase "on the basis of," race, sex, whatever.

25   So it's adversely affect on the basis of the -- whatever

1    the category.

2         MR. KELLER:          Well, and that was the

3    interpretation that the Smith plurality and concurrence

4    came to on Section 4(a)(2).  But in Section 4(a)(1), the

5    phrase "because of race" appears, and you have active

6    verbs there.  You have "refuse" and "otherwise

7    discriminate," and the Court was unanimous in finding

8    that Section 4(a)(1) only required intentional

9    discrimination, it did not --

10        JUSTICE GINSBURG:          Do -- do we take into

11   account at all that in both Title VII and the Fair

12   Housing Act, there was a grand goal that Congress had in

13   mind?  It meant to undo generations of rank

14   discrimination.  And what was the phrase that this Court

15   used in Trafficante to describe the Fair Housing Act?

16   That its objective was to replace ghettos by integrating

17   -- "integrated living patterns," just as Title VII was

18   meant to undo a legacy of rank employment

19   discrimination.  So doesn't that purpose give a -- a

20   clue to what Congress was after?

21        MR. KELLER:          Well, Justice Ginsburg, the

22   Court needs to focus on the plain text.  And unlike

23   Title VII, which was passed in 1964, and unlike the

24   ADEA, which was passed in 1967, both of which included

25   the phrase "adversely affect," in 1968 when Congress

1    passed the Fair Housing Act it didn't use that language.

2    Instead, it prohibited making unavailable a dwelling to

3    any person because of race.  In -- in common language if

4    you were to say, "Adam made unavailable a dwelling to

5    Bob because of race," you ask, well, why did Adam act?

6    He acted because of race, and race was a reason for the

7    action.

8         JUSTICE KAGAN:       But if I could understand

9    your point, General Keller, you agree with Justice

10   Scalia that "make unavailable," it's -- like "adversely

11   affects," they're -- they're both verbs.  "Make

12   unavailable" is just one way to adversely affect.  And

13   what you're pinning your argument on is these extra

14   added words in the Title VII statute, right?  So that

15   it's -- in the -- in the Title VII statute, it's --

16   can't even find them.  You know what I mean.

17        MR. KELLER:        I do, Justice Kagan.

18        JUSTICE KAGAN:       Okay.  So -- but I don't --

19   I don't think that that could possibly be right, because

20   then you would be saying that it would be a different

21   statute if, instead of just saying here an employer

22   can't make unavailable, but instead it said an employer

23   can't act in a way that makes unavailable.  That would

24   make it completely parallel to the Title VII and the

25   ADEA statutes.

1        And -- and those two things just can't mean

2    the same thing.  I mean, all it's doing is to take out a

3    few words, but it's saying the exact same thing, which

4    is either way, an employer can't make unavailable.

5        MR. KELLER:        Justice Kagan, I don't think

6    it's saying the same thing.  And under the reasoning of

7    Smith, it can't be saying the same thing, because

8    Section 4(a)(1), the Court unanimously recognized,

9    didn't give rise to disparate-impact liability; and it

10   didn't have the phrase that appeared in 4(a)(2) which

11   was checking to see "in any way which would deprive or

12   tend to deprive or adversely affect."  Without that

13   results-based language, you can't have disparate-impact

14   liability.  That's what Ricci said and Sandoval.

15       JUSTICE KAGAN:        No, but the -- but the thing

16   that's different in this statute is the "make

17   unavailable," which focuses on an effect in the same way

18   that the "adversely affect" language does.  And it just

19   does it a little bit more economically, but the

20   effects-based nature of the provision is still the same.

21       MR. KELLER:        It doesn't focus on the

22   effects.  What Smith said was 4(a)(2) prohibited the act

23   of limiting, segregating, and classifying.  But Smith

24   said that's not simply what it was prohibiting.  It was

25   checking to see if there was also a deprivation or

1  something that tended to deprive or something that

2  adversely affected, and that was the effects-based

3  language.  It wasn't merely dropping in a phrase such as

4  "make unavailable."

5      All actions have consequences, but here

6  Congress chose active verbs.  As Meyer v.  Holley

7  recognized, the Fair Housing Act itself focuses on

8  prohibited acts.

9      JUSTICE SCALIA:      Make -- "make unavailable"

10  is not the same language as "adversely affect."

11  That's -- that's all that I'm willing to concede.

12      And I think if you thought that Smith was

13  wrong, which many people do, I suppose you could argue

14  we will not expand Smith.  And Smith hung on particular

15  words, "adversely affect."  Those words don't exist

16  here, and, therefore, since we think Smith was wrong

17  anyway, we're not going to extend it.  That's -- that's

18  a reasonable argument, but that's not the argument

19  you're making.

20      What -- what hangs me up is not so much that

21  as it is the fact that Congress seemingly acknowledged

22  the effects test in later legislation when it said that

23  certain effects will not qualify.  You know what I'm

24  referring to?

25      MR. KELLER:      Yes, Justice Scalia.

1     JUSTICE SCALIA:      Well, why doesn't that --

2  why doesn't that kill your case?  I mean, when we look

3  at a -- a provision of law, we look at the entire

4  provision of law, including later amendments.  We try to

5  make sense of the law as a whole.

6     Now, you see this statute which -- which has

7  otherwise what is -- make unavailable, and it also has,

8  however, it will not be a violation if these effects

9  are -- are -- you read those together and you say, wow,

10  this -- this law must mean mere effects qualify.

11     MR. KELLER:     Justice Scalia, the 1988

12  amendments, in enacting three exceptions from liability,

13  those provisions merely restricted liability, and the

14  Court rejected a virtually identical argument to what

15  the Respondent and the Solicitor General are making in

16  O'Gilvie v. United States.  It's a case that appears at

17  519 U.S. 79.

18     JUSTICE SCALIA:      Is this in your brief?

19     MR. KELLER:     The case was not cited in our

20  brief.

21     JUSTICE SCALIA:      Oh, I'm sorry.

22     MR. KELLER:     At Page 89 of that decision --

23     JUSTICE SCALIA:      Yeah.

24     MR. KELLER:     -- the Court noted that

25  Congress might simply have wanted to clarify the matter

1    in respect to the narrow exemption, but it wanted to

2    leave the law where it found it in respect to the

3    broader issue.

4        JUSTICE KAGAN:        But the law where it found

5    it here was very clear, because ten circuits had gone

6    the other way and had said that disparate impact was a

7    valid action under the FHA.  So leaving the law where

8    you found it, and we presume that Congress knows the

9    law, especially when the law is that clear and that

10   uniform, means, yes, there will be disparate-impact

11   actions except in these three circumstances which we're

12   going to lay out for you very clearly and very

13   precisely.

14       MR. KELLER:        Justice Kagan, in 1988 the

15   state of the law was in flux.  The Solicitor General

16   filed a brief in this Court saying that the Fair Housing

17   Act only prohibited acts of intentional discrimination.

18   And two months before the amendments, this Court decided

19   in Watson and emphasized that the phrase "adversely

20   affect" was the language that gave rise to

21   disparate-impact liability.  And if Congress would have

22   take -- if Congress was assumed to have known that this

23   Court's precedents were in place, then --

24       JUSTICE SOTOMAYOR:        How do you put

25   "adversely affect"?  Did they have to write it "or

1  otherwise adversely affect someone by making the housing

2  unavailable"?

3       MR. KELLER:       Otherwise --

4       JUSTICE SOTOMAYOR:       I mean, it's a little

5  crazy, don't you think, because otherwise adversely

6  affecting someone by making it unavailable.  I think

7  it's otherwise make unavailable --

8       MR. KELLER:       Well, otherwise it could

9  have --

10      JUSTICE SOTOMAYOR:       -- is the short form of

11  that.

12      MR. KELLER:       Or otherwise limit housing

13  opportunities in a way that would adversely affect.

14  Congress could have used the same language that appeared

15  in Title VII.

16      JUSTICE SOTOMAYOR:       But instead what it did,

17  it took a body of law, some of which had held some

18  practices as disparately -- improperly disparately

19  impacting, like drug addiction and others -- and two

20  others, and said, no, those two won't count, those three

21  won't count.  Your reading of those three exemptions is

22  they were unnecessary.

23      MR. KELLER:       Well, they were absolutely

24  doing work in 1988, and Congress could take account of

25  the fact the Court --

1          JUSTICE SOTOMAYOR:        Well, what do you make

2     with in 1988 where someone wanted to do away with

3     disparate impact and Congress didn't take up that

4     invitation?

5          MR. KELLER:        Justice Sotomayor, I believe

6     you're referring to Representative Swindall's amendment.

7     And the mere fact that Congress didn't enact a

8     provision, this Court has not looked to in reviewing a

9     statute.

10          JUSTICE SCALIA:        But what -- you're --

11     you're telling us that these amendments which said that

12     certain types of effects will not qualify, that the

13     purpose of that amendment was to prevent erroneous court

14     of appeals' decisions from affecting those particular

15     areas?

16          MR. KELLER:        Justice Scalia, that's part of

17     the work that they're doing.

18          JUSTICE SCALIA:        That's a very strange thing

19     for Congress to do, to believe that those court of

20     opinions -- court of appeals' opinions are wrong and yet

21     to -- to enact these exemptions.  So even though those

22     opinions are wrong, they will not apply to these things.

23     I -- that's very strange.

24          MR. KELLER:        Well, in 1988, when Congress

25     was legislating, it agreed on one thing, and that was in

1    these three narrow circumstances, liability would be

2    restricted under the Fair Housing Act.  It would be

3    extremely odd to read into a restriction of liability a

4    recognition of a massive expansion of Fair Housing Act

5    liability, and Congress does not hide elephants in mouse

6    holes.

7         JUSTICE SOTOMAYOR:      Exactly.  And ten

8    circuits had already said there was disparate impact.

9    If they didn't like the disparate-impact analysis, they

10   would have taken up the congressman's proposal.  But

11   they didn't.

12        MR. KELLER:      In the brief that the Solicitor

13   General filed in 1988, it made the point, which is

14   absolutely the same today, which is Congress knows how

15   to enact an effect test.

16        JUSTICE SOTOMAYOR:      It changed when -- no,

17   no, no.  When 1988 happened, the Solicitor General

18   changed its position, and it has been consistent since

19   then, that when Congress adopted the three exemptions,

20   it -- it recognized disparate impact as applying to the

21   Fair Housing Act.  That intentional brief was not in

22   1988 and not in -- it was after -- that was before 1988,

23   the 1988 amendments.

24        MR. KELLER:      It -- it was before the 1988

25   amendments, that's right.  But this Court was

1    considering the issue in Town of Huntington and after

2    the amendment.  So while Congress was passing the 1988

3    amendments, this Court has a case where the issue was

4    raised and it was actively considering it.

5        And Congress --

6        JUSTICE ALITO:        Well, General, I thought

7    your argument on the 1988 amendments was as follows:

8    Either the -- the Fair Housing Act contemplated

9    disparate-impact analysis when it was adopted in, when

10   was it, 1968 or it didn't.  And the 1988 amendments,

11   which made it clear that there could not be

12   disparate-impact analysis with respect to certain

13   matters surely didn't expand the scope of the 19 -- of

14   what was initially enacted.  So the issue is what did

15   Congress intend, what -- what is the meaning of the Act

16   as originally enacted.  I thought that was your

17   argument.

18       MR. KELLER:        Precisely, Justice Alito.  The

19   1968 Act --

20       JUSTICE GINSBURG:        But If we're going to be

21   realistic about this, in 1964, when the Civil Rights Act

22   passed, and in 1968, when the Fair Housing Act passed,

23   nobody knew anything about disparate impact.  That

24   didn't come up till the Griggs decision, and it was this

25   Court that gave that interpretation to Title VII in

1   light of the purpose of the statute.

2        So to try to look back and say, oh, did they

3   mean disparate impact in '64, when Griggs wasn't on the

4   books till '71, it's a little artificial, don't you

5   think?

6        MR. KELLER:      The Court has to construe the

7   plain text of the statute that Congress enacted, and the

8   text in 1964 did not use effects --

9        JUSTICE SCALIA:      It has to --

10       MR. KELLER:      Sorry.

11       JUSTICE SCALIA:      It has to construe the

12  plain text of the law, and the law consists not just of

13  what Congress did in 1968, but also what it did in '88.

14  And you look at the whole law and you say, what makes

15  sense?  And if you read those -- those two provisions

16  together, it seems to be an acknowledgment that there is

17  such a thing as disparate impact.  However, it will not

18  apply in these areas that the 1988 amendment says.  We

19  don't just look at each little piece when it was

20  serially enacted and say what did Congress think in --

21  in '68?  What did it think in '72?  We look at the law.

22  And the law includes the '68 act and the '88 amendments.

23  And I -- I find it hard to read those two together in

24  any other way than there is such a thing as disparate

25  impact.

1          MR. KELLER:          The 1988 amendments don't refer

2     to disparate impact.  This is not like the Title VII

3     1991 amendment that explicitly used the words "disparate

4     impact."

5          JUSTICE KAGAN:          Of course not, but --

6          JUSTICE SCALIA:          But they make no sense

7     unless there is such a thing as disparate impact.

8     It's -- they are prohibiting something that doesn't

9     exist, right?  I mean, you're saying that they prohibit

10    something that doesn't exist.

11         MR. KELLER:          They could do more work.  They

12    do work in disparate treatment cases.  Take the

13    occupancy exemption.  The Fair Housing Act also

14    prohibits the failure to make accommodations based on

15    disability.  The occupancy exemption is going to do work

16    in that case.  This is why -- in City of Edmonds, the

17    Court noted that these were exemptions were complete

18    exemptions from FHA scrutiny.  Congress didn't say that

19    it was limiting these to disparate impact.  It said we

20    don't want these claims to go forward.

21         JUSTICE BREYER:          So you have an argument,

22    and so does the other side have an argument.  But I

23    don't want you not to have the chance to answer what to

24    me is a pretty important question.  Say there are good

25    arguments on both sides.  The law has been against you.

1  There's been disparate impact for 40 years.  Now, let me

2  be fair.  Maybe it's only 35.  And it's universally

3  against you.  And as far as I can tell, the world hasn't

4  come to an end.

5       I mean, the form of the question I'm putting

6  is well, maybe Marbury v. Madison was wrong.  I don't

7  think it was.  But nonetheless, nonetheless, this has

8  been the law of the United States uniformly throughout

9  the United States for 35 years, it is important, and all

10  the horribles that are painted don't seem to have

11  happened or at least we have survived them.

12       So why should this Court suddenly come in

13  and reverse an important law which seems to have worked

14  out in a way that is helpful to many people, has not

15  produced disaster, on the basis of going back and making

16  a finely spun argument on the basis of a text that was

17  passed many years ago and is ambiguous at best?

18       MR. KELLER:       If you were to believe the

19  statute's ambiguous --

20       JUSTICE BREYER:       Oh, well, I don't think.

21  My goodness, if it isn't ambiguous, it would be

22  surprising because ten circuit courts of appeals have

23  all interpreted it the way opposite you and I take it

24  you don't mean it's unambiguous on their side.

25       (Laughter.)

1          MR. KELLER:          In 1988, the amendments didn't

2    touch the text of the 1968 Fair Housing Act --

3          JUSTICE BREYER:          No, no.  I don't want you

4    to -- if you'll do me the favor of answering my

5    question.

6          MR. KELLER:          Sure.

7          JUSTICE BREYER:          Which is the question that

8    it's been the law for 40 years of just a little bit

9    less, disaster has not occurred, and why when something

10   is so well established throughout the United States

11   should this Court come in and change it.

12         MR. KELLER:          There is a serious equal

13   protection question lurking here.  And as to why you

14   would change it, disparate-impact liability and where it

15   leads is being applied in a case like this in Magner v.

16   Gallagher.  Texas here was trying to give additional --

17         JUSTICE BREYER:          You don't like the way it

18   was applied, and I can understand that.  But there are

19   many remedies that you have.  One is you go to HUD and

20   you say, look at what is happening; this is happening to

21   have the opposite effect that you want.  That's one of

22   your arguments.  Well, try to convince them.

23         And if not there, you go to a court and say:

24   Court, this is a disparate-impact case, and we have a

25   justification and the justification is strong enough

1    that it survives the empirical effect, and you see if

2    you can get them to agree.  You may win; you may lose.

3        But what not to do is to overturn the whole

4    law that has been in effect, I'll repeat for the

5    nineteenth time, for 40 years with basically helpful

6    effect.  Now, that's a question.  It didn't sound like

7    one, but it was one.

8        (Laughter.)

9        JUSTICE BREYER:        So I'd like to hear what

10   you say.

11       MR. KELLER:        Sure.  The equal protection

12   concerns here are stark.  First, the government has not

13   explained if it's going to enforce the HUD regulation to

14   protect only minorities.  If it does, that's likely

15   unconstitutional under Adderand and if it doesn't,

16   that's going to interfere with Federal and State

17   programs that help lower income neighborhoods.

18       JUSTICE SCALIA:        Maybe I'm missing something

19   here.

20       JUSTICE SOTOMAYOR:        How --

21       JUSTICE SCALIA:        Didn't this Court decide

22   Marbury v. Madison?

23       MR. KELLER:        Absolutely, Justice Scalia.

24       JUSTICE BREYER:        My question was not really

25   about Marbury.

1       JUSTICE SCALIA:          I mean, isn't that a big

2  difference, I mean, between the situation here?  This

3  Court has never decided this issue.  It's just the lower

4  courts have -- have decided it in a uniform fashion.

5  Have we ever before reversed uniform holdings of -- of

6  courts of appeals, even those that have lasted 30 years?

7  The answer is yes.

8       MR. KELLER:          You have rejected the

9  overwhelming consensus of the courts of appeals.

10       JUSTICE BREYER:          That's why I asked the

11  question.

12       JUSTICE KAGAN:          We don't rarely-

13       JUSTICE BREYER:          I said why.  Why?  I'm not

14  saying you couldn't do it.  I'm simply saying why.  And I

15  don't want to repeat my question for the fourth time, and

16  you began to give an answer and the answer you began to

17  give was based on a constitutional problem that has arisen.

18  And I've taken that in and read it, and do you have

19  other answers or not?  I want you fully to answer the

20  question.

21       MR. KELLER:          Sure.  The plain text of the

22  statute is clear.  Constitutional avoidance compels that

23  interpretation, and the purposes of the Fair Housing Act

24  would be undermined by extending disparate-impact

25  liability to this degree.

1    JUSTICE SOTOMAYOR:        Well, you're now talking

2    about application.  And let's go back to, you made a

3    statement earlier that this is going to inhibit

4    development of blighted areas.  That has to do with the

5    application in this case.  If I'm right about the theory

6    of disparate impact, and I can tell you I've studied it

7    very carefully, its intent is to ensure that anyone who

8    is renting or selling property or making it unavailable

9    is doing so not on the basis of artificial, arbitrary or

10   unnecessary hurdles, policies or practices, and it's the

11   Petitioner who has to identify which they are, and to

12   explain why alternatives wouldn't work.

13       If someone's developing a blighted area or

14   an area subject to crime or something else, that's

15   something they can do and that's a criteria, a policy

16   that can't be substituted for something else.  So I

17   don't know why you keep saying this is going to affect

18   private development.

19    MR. KELLER:        Justice Sotomayor, in -- in

20   Ricci, the Court reserved the question whether

21   disparate-impact liability in requiring race-based

22   decision-making would violate the equal protection

23   clause, and there is a --

24    JUSTICE SOTOMAYOR:        But this is not

25   race-based decision-making.  Are you saying that the 10

1    percent plan in -- in colleges is race-based if it's an

2    absolutely neutral policy that happens to address a

3    need, which is to integrate schools?

4        MR. KELLER:        But the --

5        JUSTICE SOTOMAYOR:        So why is it wrong to

6    have a neutral policy?  Because none of the policies

7    that were imposed here and in most -- in all other cases

8    are race-based.  They're policies that are race neutral,

9    but happen to have a better impact in terms of

10   integration.

11       MR. KELLER:        Justice Sotomayor, I would

12   disagree that it's completely race-neutral, because at

13   the outset, statistical disparities based on race,

14   racial classifications, are used and this has the

15   potential to subordinate traditional --

16       JUSTICE SOTOMAYOR:        Well, that --

17       JUSTICE SCALIA:        Which is not the case for

18   the 10 percent plan that Texas uses.

19       MR. KELLER:        Absolutely, Justice Scalia.

20       JUSTICE SCALIA:        There's no racial thing in

21   that.  If you're in the top 10 percent of your high

22   school class, you go to the State university.

23       JUSTICE GINSBURG:        What was the reason

24   for --

25       JUSTICE SCALIA:        No race about it.

1        JUSTICE GINSBURG:          What was the reason for

2    it?   You can say it's a neutral, 10 percent is neutral;

3    but it's just glaring in the face that the legislature

4    that passed this was very much race-conscious.   It was

5    the way that they saw of getting a minority population

6    into colleges.

7        I don't think there's really a doubt that

8    factually that's what prompted the 10 percent plan.

9    When the University of Texas was told its affirmative

10   action plan was no good, then the legislature came back

11   with the 10 percent plan.

12       MR. KELLER:          But there's a difference

13   between that race-conscious decision-making and, here, a

14   situation where liability is triggered based on

15   statistical disparities.

16       That's why the Watson plurality, Justice --

17       JUSTICE SOTOMAYOR:          It's not -- liability is

18   not triggered -- well, "triggered" is a good word; but it's

19   not imposed because of that.   It's imposed because the lower

20   court found, rightly or wrongly -- I don't want to get

21   into the merits of that -- that some of the criteria

22   being used was -- were unnecessary and that was -- and

23   there was no legitimate business reason for it.

24       I could, as Justice Breyer said, quarrel

25   with that conclusion; but that's in application.   That's

1    not in the standard that disparate impact imposes.

2         MR. KELLER:         But what objective standard is

3    there to measure whether something is a substantial

4    interest in the housing context?  And that's why

5    disparate-impact liability can lead to the functional

6    equivalent of a quota system.  That's what the Watson

7    plurality said, Wards Cove, and Justice Scalia's

8    concurrence in Ricci.

9         Mr. Chief Justice, if I could reserve the

10   remainder of my time for rebuttal.

11        CHIEF JUSTICE ROBERTS:        Thank you, counsel.

12        Mr. Daniel.

13        ORAL ARGUMENT OF MICHAEL M. DANIEL

14         ON BEHALF OF THE RESPONDENT

15        MR. DANIEL:        Mr. Chief Justice, and may it

16   please the Court:

17        The remedy in this case is perfectly

18   consistent with the interest in revitalizing low income,

19   minority areas.  The remedy in this case shows that

20   there is nothing about the Fair Housing Act --

21        JUSTICE SOTOMAYOR:        We're not talking about

22   this case.

23        MR. DANIEL:        No.  I'm just using it as an

24   example.

25        JUSTICE SOTOMAYOR:        All right.  Why don't

1    you get to the legal issue, if you could.

2         MR. DANIEL:          The legal issue is

3    "unavailable."   Unavailable is a result-oriented

4    measure.   You look to see how many units are available

5    in an area.   You count them.   That is the result.   How

6    many units are available in another area?   You count

7    them.   That's a result.

8         It's clear from the Congressional Record

9    Congress was worried and concerned about making units

10   only available in low income, minority areas that it

11   called "ghettos."   The remedy that it wanted --

12         JUSTICE SCALIA:          It isn't the "unavailable"

13   word that's the problem.   The problem is unavailable on

14   the basis of race.   You can say "unavailable" a million

15   times, but the statute requires that it be made

16   unavailable for racial reasons.

17         And you're saying, no, it doesn't have to

18   be; it could be unavailable simply because you use some

19   other nonracial reason, which is stupid, right?   That's,

20   that's your argument.   If it produces a result that

21   is -- is not -- what, I don't know -- that the races

22   have to be in the same proportion as they are in the

23   general population.   Right?   I mean, that's what you're

24   arguing.

25         MR. DANIEL:          The argument is that if, in

1    fact, racial discrimination is a foreseeable consequence

2    of what someone is doing --

3         JUSTICE SCALIA:          No, no, no, no.  Racial

4    disparity is not racial discrimination.  The fact that

5    the NFL is -- is largely black players is not

6    discrimination.  Discrimination requires intentionally

7    excluding people of a certain race.

8         MR. DANIEL:          It certainly includes that,

9    Justice --

10        JUSTICE SCALIA:          So let's not -- let's not

11   equate racial disparity with discrimination.  The two

12   are quite different, and what you're arguing here is

13   that racial disparity is enough to make -- to make

14   whatever the policy adopted unlawful, right?

15        MR. DANIEL:          No, Justice Scalia.  That's not

16   what the argument is; and that's not what's in the

17   argument, it's not what's in the regulations.

18        The argument is, is that if I'm going to

19   make a disparate treatment case that there is

20   intentional discrimination, I'm going to start with the

21   effects, just the same place I start with a disparate

22   impact.  I start with the effects:  Has there been an

23   effect that is consistent with discrimination?

24        In disparate impact, I then go on to the

25   next step:  Is there an interest that justifies the

1    discriminatory effect?   It could be the same

2    discriminatory effect that is caused by intentional

3    discrimination.

4         JUSTICE KAGAN:          Mr. Daniel, I had thought

5    that Justice Scalia's question was whether the "because

6    of" language precludes a disparate-impact theory; in

7    other words, whether the "because of" language signals

8    that it has to have a certain kind of intent which is

9    not part of a disparate treatment, a disparate-impact

10   theory.

11        And I would have thought that your main

12   argument about that is, well, actually, the Court has

13   held numerous times, in the Title VII context, in the

14   ADEA context, in the Rehabilitation Act context, in the

15   Emergency School Aid Act context, that that "because of"

16   language can be read to include disparate-impact claims,

17   and that it's at least ambiguous as to whether it should

18   be read so in this case as to this particular statute.

19        MR. DANIEL:          Yes, Justice Kagan.

20        JUSTICE KAGAN:          I mean, is that your

21   argument, or is your argument something else?

22        MR. DANIEL:          That is the basic argument on

23   "because of," that it has been interpreted both ways;

24   and in Title VII and in Smith, it did not require proof

25   of intent.   In this case --

1      CHIEF JUSTICE ROBERTS:          How --

2      JUSTICE SOTOMAYOR:          Could you --

3      CHIEF JUSTICE ROBERTS:          I'm sorry.  If you

4  want to, you can complete your answer to Justice Kagan.

5  It was not a hard question.

6      MR. DANIEL:          No, Chief Justice.

7      CHIEF JUSTICE ROBERTS:          How is a housing

8  authority supposed to -- if you have a claim of

9  disparate impact, how is a housing authority supposed to

10  cure the alleged problem?

11      MR. DANIEL:          Assuming that you go through

12  the steps and that there is, in fact, a need to cure the

13  problem --

14      JUSTICE SOTOMAYOR:          Could you --

15      CHIEF JUSTICE ROBERTS:          Well, I'm sorry, I'm

16  sorry.  You have made a showing of disparate impact,

17  that the impact and adverse consequences for a

18  particular race.

19      What is the housing authority supposed to do

20  at that point?

21      MR. DANIEL:          At that point, the housing

22  authority is to say, this is what interest we have that

23  is served by the discriminatory practice causing the

24  racial segregation.  That's what -- and they say, it --

25  whatever that interest is and they say it, that this

1    is -- this interest justifies our practice that we're

2    doing.

3         At that point in time, we come back and say:

4    But there are other ways to do it that are less

5    discriminatory.

6         CHIEF JUSTICE ROBERTS:         Is there --

7         MR. DANIEL:         And --

8         CHIEF JUSTICE ROBERTS:         Is there a way to

9    avoid a disparate-impact consequence without taking race

10   into account in carrying out the governmental activity?

11        It seems to me that if the objection is that

12   there aren't a sufficient number of minorities in a

13   particular project, you have to look at the race until

14   you get whatever you regard as the right target.

15        MR. DANIEL:         You don't have to look at the

16   race at all.  You look at the practice causing it; and

17   you stop the practice, like in this case or like in the

18   zoning case.

19        JUSTICE GINSBURG:         Well, what was, in fact,

20   the remedy?  I mean, this was a case where there was

21   litigation, you prevailed, and there was a remedy.  So

22   there was disparate impact.

23        And what did the Court say had to be done to

24   cure it, to cure what it saw as the offense to the Fair

25   Housing Act?

1          MR. DANIEL:          It said it had to stop the

2    discriminatory housing practice and then it had to --

3    then it ordered in place the remedy suggested by the

4    State that was, in fact, the less discriminatory

5    alternative, to a large extent, to what they had been

6    doing.

7          There's no racial goals in it, there's no

8    race conscious in it, there's no racial criteria in it.

9    It is a -- there is -- and it is the remedy that the

10   State says will work to stop the discriminatory

11   practice.

12         JUSTICE SOTOMAYOR:          Could we go back?

13         MR. DANIEL:          In fact --

14         JUSTICE SOTOMAYOR:          Could we go back?  I

15   think you've been interrupted.

16         The steps are:          First you show that

17   there's -- that the numbers are off.  Then the other

18   side tells you what the reason is for why the numbers

19   are.

20         You, then, have an opportunity or an

21   obligation to come and suggest alternative methods of

22   taking care of the legitimate business need.  Correct?

23         MR. DANIEL:          Yes, Justice Sotomayor.

24         JUSTICE SOTOMAYOR:          So you -- those are the

25   three steps?

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 1        MR. DANIEL:            Yes.

 2        JUSTICE SOTOMAYOR:              If you can propose ways

 3   that are race neutral, practices that are race neutral

 4   that will have -- take care of their needs, meaning the

 5   other side's needs, then you get relief.

 6        MR. DANIEL:              And, for example, one of the

 7   ways proposed was:   Do not continue putting projects

 8   next to landfills and hazardous industrial uses.   That

 9   was --

10        JUSTICE GINSBURG:             Don't you have a tension

11   between two statutes here?   I mean, you have the Fair

12   Housing Act; and then there is the law that sets up this

13   tax credit, right?   And doesn't that law say that there

14   should be a priority for revitalizing decaying

15   communities?

16        MR. DANIEL:              The law specifically says that

17   there should be a preference among all the projects that

18   are going to be awarded for applications that contribute

19   to a concerted community revitalization plan.   That

20   preference is honored in the remedy and it is in the

21   remedy.   If you are -- if an application is

22   concerting -- is contributing to a concerted community

23   revitalization plan just like in the IRS code, then it

24   gets the same points as a -- a project that is going to

25   be in a higher income, low poverty area with good
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1    schools.

2         JUSTICE GINSBURG:          Why shouldn't it get more

3    if the tax law expresses that preference for the

4    revitalization?

5         MR. DANIEL:          Justice Ginsburg, it could if

6    the State set it up that way.   The State just hasn't set

7    it up that way.   The State could set it up so that

8    there's a pool of units that are going to be awarded

9    projects and pick out of there and give preference to

10   those concerted community revitalization plans.

11        The district court found that the State did

12   not do that.   The State instead gave a two point -- one

13   or two-point selection criteria bonus for that kind of

14   project.   That's -- that's -- but that's a State choice.

15        JUSTICE BREYER:          Can you go back to Justice

16   Scalia's question, please?   Because I took -- because I

17   just want to hear your answer to it.

18        As I understood his question, it was you

19   look at the words and the words say, "make unavailable

20   because of race."   And what you're saying is those

21   words, "make unavailable because of race," can include

22   the circumstance where you make unavailable for a reason

23   that has nothing to do with race where the effect of

24   that reason is to cause a racial disparity of

25   significance and it cannot be justified as the least

 1    restrictive way to bring about it.   That's the point.

 2          But you're saying those words are consistent

 3    with the longer phrase I just said.   Okay.   Is there

 4    case law or other, aside from this area, which builds

 5    your point and says, yes, those words linguistically and

 6    legally do include the disparate-impact situation, or

 7    can.   I take it that's his question and I was looking --

 8          MR. DANIEL:          This Court --

 9          JUSTICE BREYER:          -- for an answer somewhat

10    along --

11          MR. DANIEL:          And this Court --

12          JUSTICE BREYER:          -- those lines or any

13    other --

14          MR. DANIEL:          This Court's two major opinions

15    on this are, of course, Griggs and Smith.   The same

16    issue was wrestled with with the other courts who have

17    found the same thing in the courts of appeals, wrestling

18    with this because of, and it is -- at least admits that

19    it is a -- a -- it can -- it's a permissible reading

20    either way.

21          JUSTICE ALITO:          In Smith, however, the

22    Court -- the plurality opinion cited two additional

23    things.   It didn't just say "because of" can mean

24    disparate impact.   It cited the effects language, which

25    was the subject of some questioning during General

1    Keller's argument, but it also cited the RFOA provision.

2         Now, none of -- neither of those -- I think

3    the latter is more significant and there's nothing like

4    that in Title VIII, is there?

5         MR. DANIEL:          The exemptions are -- are

6    similar in the fact that what those -- they do -- the

7    RFOA in Smith came in and basically said even if you

8    have disparate impact on these factors, if it's a

9    reasonable factor other than age, we're going to excuse

10   the disparate impact.  Okay.  Now the -- the exemptions

11   speak to the disparate impact and there's no -- nothing

12   in there that says that there's -- that you use by the

13   reason -- that you can excuse, that those don't count --

14        JUSTICE ALITO:          So is that critical to your

15   argument?  That the exemptions are critical to your

16   argument?

17        MR. DANIEL:          We -- we think the exemptions

18   are text that support the use of a disparate-impact

19   liability.  We think there's a lot of other things.  The

20   statutory construction used in the congressional record,

21   what the Congress wanted to do, 3601, which Congress

22   passed to say -- and has been used to give an expansive

23   interpretation in matters of standing and enforcement.

24   We think those -- all those tools of statutory

25   construction combine to make it at least permissible

1    and, therefore, giving due deference to the HUD

2    regulation.

3         JUSTICE ALITO:          If there was no disparate

4    impact under the Act as initially enacted, do you argue

5    that the exemptions expanded the Act so that it then, as

6    of 1988, included disparate impact?

7         MR. DANIEL:          Well, it -- if there was none

8    then, there -- there -- indicated the 1988 Congress

9    thought there was.  We don't think you can look at what

10   Congress did in 1968 and say they did not intend to

11   cover effects.  They say it time and time again.

12        JUSTICE ALITO:          Well, that wasn't really my

13   question.  What Congress thought the Act meant in 1988

14   wouldn't have any significance -- wouldn't have much

15   significance if they hadn't done anything, would it?

16        MR. DANIEL:          No, I think they were doing it

17   in 1988, that counts for 1988.  We think that it -- they

18   had done it before.

19        JUSTICE ALITO:          All right.  So did what

20   they -- did the things that they actually did in 1988

21   expand the coverage of the Act?

22        MR. DANIEL:          No, Justice.  We think that the

23   coverage was already there in the 1968 Act.  When you

24   look at all the tools of statutory construction, they

25   all point in one direction, and that is, to that being

1    a -- at least a permissible, if not the best,

2    interpretation in 1968 that Congress intended to cover

3    effects of past segregation and other discrimination,

4    whether it was intentional or not.   It's throughout that

5    record, it is discussing the major implement of racial

6    segregation and how it was brought about.   It intended

7    to end the effects of that.   It said it again and again.

8         We think the 1988, it certainly recognized

9    the disparate-impact rule, it talked about the

10   disparate-impact rule in the courts of appeals.   It knew

11   it was there.   It was being done in -- in the context of

12   those courts of appeals.

13        No further questions?

14   CHIEF JUSTICE ROBERTS:        Thank you, counsel.

15   General Verrilli.

16   ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

17     ON BEHALF OF UNITED STATES,

18   AS AMICUS CURIAE, SUPPORTING RESPONDENT

19   GENERAL VERRILLI:        Mr. Chief Justice, and

20   may it please the Court:

21        The statutory provisions that most clearly

22   show that HUD's disparate-impact regulations are a

23   permissible interpretation of the Fair Housing Act are

24   the three exemptions.   Those exemptions presuppose the

25   existence of disparate-impact liability and so serve no

1    real purpose without them -- without disparate-impact

2    liability.

3        And the provenance of those exemptions lends

4    particularly strong support for the reasonableness of

5    HUD's reading.  They were added by amendment in 1988 at

6    a time when nine, I think the number is nine courts of

7    appeals, had ruled that the Fair Housing Act authorized

8    disparate impact, and they -- and they were added to

9    provide defenses to exemptions from -- they're labeled

10   as exemptions from, carve-outs from, disparate-impact

11   liability.  So you've got --

12        JUSTICE SCALIA:        I think your case would be

13   stronger if there had been no court of appeals that

14   had -- that had favored disparate impact.  Then -- then

15   you couldn't possibly argue, well, that was put in just

16   to eliminate the erroneous judgments of these courts of

17   appeals in -- in certain areas, anyway.  It would be

18   better if no court of appeals had said that --

19        GENERAL VERRILLI:        Well --

20        JUSTICE SCALIA:         -- and Congress had enacted

21   these --

22        GENERAL VERRILLI:        No, I actually think it's

23   better the way it happened because -- for our case

24   because of the reenactment canon.  You have -- Section

25   805 of this law was reenacted against the backdrop, so

1    you have the reenactment of those nine courts of

2    appeals.   So you have the reenactment canon and you have

3    the canon against -- the presumption against superfluous

4    amendments both working.   And remember, we're in Chevron

5    territory here.   So the question is whether the

6    statutory text unambiguously forecloses HUD's

7    interpretation.

8         JUSTICE ALITO:         Can I ask you a question --

9         CHIEF JUSTICE ROBERTS:          Well, one concern --

10   one concern about disparate impact is that it's very

11   difficult to decide what impact is -- is good and bad.

12   Take two proposals.   One is a proposal to build new

13   housing in a low income area, it would benefit

14   primary -- primarily minorities; new housing, good

15   thing.   The other proposal is to build housing in a more

16   affluent area.   It would help promote integration of

17   housing; also a good thing.

18        Which one gets credit for under -- trying to

19   decide the impact?   The one that is revitalizing a

20   low-income area or the one that is integrating a

21   high-income area?

22        GENERAL VERRILLI:         Right.   I understand

23   that, Mr. Chief Justice, and there may be difficult

24   questions.   Of course, the agency here charged by

25   Congress expressly, in the 1988 amendments, I would add,

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1    with interpreting and enforcing these provisions, has

2    concluded that they do -- that disparate impact is the

3    right policy judgment.

4         CHIEF JUSTICE ROBERTS:          No, no.  But

5    which -- which counts?  I mean, which benefits -- you're

6    trying to see if there's a disparate impact on

7    minorities.

8         GENERAL VERRILLI:          It may well be --

9         CHIEF JUSTICE ROBERTS:          If you give the

10   proposal to the low-income housing in the affluent

11   neighborhood, that certainly benefits integration.  If

12   you give the proposal to -- fund the proposal in the

13   low-income area, that certainly helps housing

14   opportunities there.

15        GENERAL VERRILLI:          So I'm going to answer

16   Your Honor's question directly.

17        CHIEF JUSTICE ROBERTS:          Good.

18        GENERAL VERRILLI:          But I think you've got to

19   do it in the context of the way in which a

20   disparate-impact case has got to be proven.  It's not

21   enough just that there's a statistical disparity.  A

22   plaintiff has got to demonstrate that a particular

23   practice or criterion being applied is being --

24        JUSTICE GINSBURG:          And what is the practice

25   here?  Because that was the question Judge Jones --
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1          GENERAL VERRILLI:          Well, you know, that's a

2     very good question.  If I may just answer Justice

3     Ginsburg, and I'll come back and finish my answer to

4     you, Mr. Chief Justice.

5          That the -- that's a very good point,

6     Justice Ginsburg.  And we are -- although we are here

7     defending HUD's interpretation, and we think the answer

8     to the question presented is yes.  That -- that's -- we

9     don't have a position on whether this is a viable

10    disparate-impact claim, and we think Judge Jones has

11    made a good point in our -- in her concurrence because

12    it's not clear to us what specific practice that the --

13    the State agency has engaged in here that would -- would

14    justify the finding of disparate-impact liability.  And

15    one thing that was suggested is maybe that could be

16    dealt with on remand from the district court.

17         And I do think that's -- and that gets to

18    what I was trying to say to you, Mr. Chief Justice,

19    which is that you've got to apply the test which is --

20    HUD has set out as a real test.

21         CHIEF JUSTICE ROBERTS:          Well, with respect,

22    I don't think that's responsive.  You say you look at

23    which provision is having the disparate impact, but I

24    still don't understand which is the disparate impact.

25         GENERAL VERRILLI:          Well --

1         CHIEF JUSTICE ROBERTS:          In other words, is

2    it the provision that causes more proposals to go to

3    low-income housing in the affluent area?  Or is it the

4    provision that causes more -- approval of more proposals

5    in the low-income area?  You've got to know what you're

6    shooting at before you can tell if you've missed.

7         GENERAL VERRILLI:          Well, the disparate --

8    right.  The disparity tied to a particular practice,

9    it's just the first step in the analysis.  The second

10   step in the analysis is justification, what's the

11   justification.

12        CHIEF JUSTICE ROBERTS:          I'm sorry, I -- and

13   I'll just ask it for the last time and then let you get

14   on.

15        GENERAL VERRILLI:          Yeah.

16        CHIEF JUSTICE ROBERTS:          You're saying you

17   need the justification, but for what?  Which is the bad

18   thing to do, not promote better housing in the

19   low-income area or not promote housing integration?

20        GENERAL VERRILLI:          You know, it may be --

21        CHIEF JUSTICE ROBERTS:          You say you look at

22   what's causing the bad effect, but what's the bad

23   effect?

24        GENERAL VERRILLI:          It may be that neither is

25   because the state may say the -- the government may say

1    in the first case, well, this is our justification, and

2    that may be a justification that holds up.   The

3    government may say in the second case, well, that's our

4    justification, and that may be a justification that

5    holds up.   So I just think that you've got --

6         JUSTICE SOTOMAYOR:        Do you think that a

7    private developer would ever be found guilty of

8    disparate impact because he owns a piece of property in

9    an affluent neighborhood?

10        GENERAL VERRILLI:        No, certainly not, of

11   course not.

12        JUSTICE SOTOMAYOR:        He's permitted to

13   develop his property, right?

14        GENERAL VERRILLI:        Yes, of course.  And I

15   thought the question --

16        JUSTICE SOTOMAYOR:        The disparate impact

17   would be if he fails to sell or make available to people

18   of all races, let's say, the units in that property,

19   correct?

20        GENERAL VERRILLI:        There's got to be a

21   specific practice.

22        JUSTICE SOTOMAYOR:         Practice.

23        GENERAL VERRILLI:        That's right.  And that's

24   just the first state --

25        JUSTICE SOTOMAYOR:        All right.  The specific

1    practice --

2        GENERAL VERRILLI:        And that's just the first

3    statement in the analysis --

4        JUSTICE SOTOMAYOR:        -- that has a

5    business --

6        GENERAL VERRILLI:        -- and it's got to be

7    unjustified.

8        JUSTICE SOTOMAYOR:        Exactly.

9        GENERAL VERRILLI:        That -- and that's --

10        CHIEF JUSTICE ROBERTS:        I thought the

11    question was, though, I mean, the -- it's not a

12    developer, it's the Department of Housing and Community

13    Affairs, and I thought the challenge went to where they

14    were -- been -- where they were supporting

15    development --

16        GENERAL VERRILLI:        Well, this --

17        CHIEF JUSTICE ROBERTS:        -- not the

18    developer, but -- but --

19        GENERAL VERRILLI:        This may not be a good

20    disparate-impact claim, Mr. Chief Justice.    But the

21    cases that are in the Heartland are really pretty

22    straightforward.

23        JUSTICE KENNEDY:        But are you saying that in

24    each case that the Chief Justice puts, there is

25    initially a disparate impact at step one, that is to

1    say, Community A wants the development to be in the

2    suburbs.   And the next state, the community wants it to

3    be in the poor neighborhood.   Is it your position, it

4    seems to me, and the position of the Respondents, that

5    in either case, step one has been satisfied.

6         GENERAL VERRILLI:        That may be right,

7    Justice Kennedy, but I think the point --

8         JUSTICE KENNEDY:        But that -- that seems

9    very odd to me.

10        GENERAL VERRILLI:        But I think that even if

11   they're difficult cases under disparate impact, there

12   are cases in the Heartland that have been adjudicated

13   for 35 or 40 years, cases such as there is a zoning

14   restriction that has a disparate impact that it cannot

15   be justified on a substantial basis.   There -- there is

16   an occupancy restriction for an apartment --

17        JUSTICE ALITO:        Can I ask you a question --

18   I'm sorry, about Chevron.   Should we be concerned here

19   about the use of Chevron to manipulate the decisions of

20   this Court?   The -- the Fair Housing Act was enacted in

21   1968.   For 40 years plus, there were no HUD regulations.

22   Then we granted cert in the Gallagher case, and it was

23   only after that and within, I think, days after that

24   that the HUD regulations were issued.   And then the

25   Gallagher case settled, and then we issued -- then we

1    granted cert in the Mt. Holly case, and the Mt. Holly

2    case settled.   So should we be troubled by this

3    chronology?

4         GENERAL VERRILLI:         So the -- I understand

5    the import of your question, Your Honor.   I guess I

6    would say a couple of things in response.   The first is

7    that HUD, in the formal adjudications reviewed by the

8    secretary, has found disparate-impact liability

9    available under these provisions in the Fair Housing Act

10   since 1992, I believe.   And those would be entitled to

11   Chevron deference, and I do think, respectfully, that

12   that's a point that we made in our brief in -- in the

13   first case, the -- the Gallagher case.

14        Second, and I don't mean to be flip about it

15   because I understand the import of Your Honor's

16   question, but I do think it overestimates the efficiency

17   of the government to think that you could get, you know,

18   a supposed rule-making on an issue like this out within

19   seven days.

20        CHIEF JUSTICE ROBERTS:         It was a

21   coincidence.

22        JUSTICE SCALIA:         That was very persuasive.

23        GENERAL VERRILLI:         I really -- and so -- so

24   I don't -- I think, actually, this has been a position

25   of HUD for a very long time, and you would get Chevron

1    deference for the adjudications.  I think that's

2    pretty -- pretty clear, wholly apart from the reg, but

3    we do have the reg now and I do think it gets Chevron

4    deference.

5         And if I could turn to the question of

6    avoidance, constitutional avoidance, that has come up.

7    I don't think this is a suitable case for constitutional

8    avoidance, and let me try to explain why.  Whatever one

9    might think in the Title VII context about the

10   consequences of finding disparate-impact liability, this

11   is a very different context.  In a Title VII context,

12   the issue has been raised is that the only way to avoid

13   disparate-impact liability is to engage in race-based

14   remedies, not race-based thinking about what neutral

15   criterion to adopt, but race-based remedies.

16        And here in the Heartland cases under the

17   Fair Housing Act, you aren't going to have that kind of

18   an issue.  The remedy is going to be the substitution of

19   one race-neutral rule for another race-neutral rule.

20   For example, if a -- if a landlord cannot justify an

21   occupancy restriction that's particularly tight, the --

22   the remedy there is going to be either no occupancy

23   restriction or a looser occupancy restriction.  And the

24   consequence in those cases -- same thing with zoning and

25   other things -- the consequence in those cases is -- is

1    that no one gets classified by race, no one gets a

2    burden imposed upon them because of race, and no one

3    gets a benefit because of race.

4         JUSTICE SCALIA:          What -- what rule you

5    select depends on what affect that will have on racial

6    -- racial use of the facility.

7         GENERAL VERRILLI:          Well, I think the

8    consequence -- no I think, Justice Scalia, with all

9    due -- all --

10        JUSTICE SCALIA:          You select on the basis of

11   what affect it will have on race.

12        GENERAL VERRILLI:          Well -- well, but that

13   kind of consideration, so long as the -- the rule that

14   comes later is a race-neutral rule, seems to me is

15   exactly the kind of thing that the plurality opinion of

16   this Court in Croson said in the contracting context

17   that governments could do.  They couldn't afford a

18   preference to minority contractors, but they could do

19   such things the Court suggested as changing the bonding

20   requirements or changing other financial requirements in

21   order to make the minority contractors which tended to

22   be newer, smaller businesses more eligible.  Those --

23   those --

24        JUSTICE SOTOMAYOR:          To underscore that,

25   because I think everybody is getting confused with this,

1    disparate impact does not go to who they take unless

2    they set up a practice --

3         GENERAL VERRILLI:          That's -- that's correct.

4         JUSTICE SOTOMAYOR:          -- that has that affect.

5         GENERAL VERRILLI:          And so in the Heartland

6    cases, with respect to the Fair Housing Act, the kinds

7    of remedies that are going to be imposed are like the

8    kinds of remedies that the Court said -- or the

9    plurality, excuse me, set in Croson would find.

10        And, Justice Kennedy, they're like the kinds

11   of race-neutral considerations that Your Honor's opinion

12   in Parents involves that were refined.

13        JUSTICE BREYER:          What you're saying is

14   suppose that the plaintiffs in this case, that side,

15   wins -- to try -- they're trying to win.  The defense,

16   on the other -- it's not true that that means all

17   Section 8 housing is now going to be -- or even a large

18   amount is going to be put in rich neighborhoods.

19        First, they can defend on the ground that we

20   don't have that practice, to put it in poor

21   neighborhoods.  Second, they can say, yes, we do, but

22   don't you see that isn't going to hurt minorities

23   because it puts those minorities in housing where many

24   of them are, unfortunately, in poor neighborhoods, and

25   it doesn't have the great effect on desegregation that

1    they think.  Or third, if they lose on that, they can

2    say but anyway it's justified for a whole bunch of

3    reasons.

4         GENERAL VERRILLI:         Yes, but so --

5         JUSTICE BREYER:           So the answer is case by

6    case, they have a specific set of forms that give

7    answers --

8         GENERAL VERRILLI:       That's --

9         JUSTICE BREYER:          -- and judges judge it --

10        GENERAL VERRILLI:         Absolutely.

11        JUSTICE BREYER:           -- and HUD can come in and

12   decide, and there is no need to throw the whole baby

13   out -- or I don't know whether it's the baby or the bath

14   water, whatever you're throwing out.  But you don't have

15   to throw out the whole big thing in order to prevent --

16        CHIEF JUSTICE ROBERTS:        So just -- I'm

17   sorry.  So just so I can understand, because, again, I

18   don't know what you're shooting for.  Two different

19   communities, okay?  They have these tax credits,

20   whatever to give out.  One place, they give it to the

21   housing in the affluent neighborhood; the other, they

22   give it to the housing in the low-income neighborhood.

23   They're both sued for disparate impact.  In the one,

24   they say, oh, no, no, this is good because we're

25   promoting integration so the impact on minorities is not

1    a problem.   And the other says, no, this is good because

2    we're revitalizing low-income neighborhoods and that

3    helps the minorities.   They both win?

4        MR. VERRILLI:         They might both win, yes.

5    And if I could, I just want to finish up on the

6    constitutional avoidance point, if I could connecting

7    something Justice Breyer said.

8        If there are particular instances in which

9    there is a concern that the recognition of disparate

10   impact liability could result in not just race-based

11   thinking about neutral means but race-based remedies, it

12   seems to me the answer there is the answer that the

13   Court usually gives, which is think about them on an

14   as-applied basis.   But that isn't a justification for

15   denying HUD the authority that we submit that HUD has

16   under -- under the regulations -- under the statute as

17   amended in 1988 when Congress specifically gave HUD the

18   authority to interpret these provisions and did so

19   against the backdrop of imposing the exemptions which

20   presupposed disparate impact liability and reenacting

21   the statute in which, after nine courts of appeals had

22   found that it did impose disparate impact liability.

23   The question here is whether under Chevron the statutory

24   text read fairly in 1988, taking all provisions of the

25   statute together, unambiguously forecloses HUD from

 1    finding disparate impact liability here.  And we assume

 2    and we a -- we submit that the answer to that question

 3    must be no, it does not unambiguously for -- forbid HUD

 4    from reaching the conclusion that it reached and,

 5    therefore, the answer to the question presented in this

 6    case, which is whether the Fair Housing Act recognizes

 7    disparate impact liability, is yes.

 8         JUSTICE KAGAN:        And General, could I just

 9    ask -- I don't know a lot about this area and I take it

10    that one of the things that you are warning us against

11    is seeing the entire area through the prism of this one

12    quite unusual case.  And you've referred a few times to

13    sort of the Heartland cases without really getting out

14    what the Heartland cases are.  So, for me, what are

15    they?

16         MR. VERRILLI:        Sure they're the kind -- may

17    I answer, Mr. Chief Justice?

18         CHIEF JUSTICE ROBERTS:        Sure.

19         MR. VERRILLI:        Thank you.  They're the kinds

20    of cases that have been litigated and you'll see in the

21    courts of opinions, court of appeals' opinions for 35

22    years restrictions -- say a town adopts a restriction

23    saying you can't convert housing from ownership to

24    rental unless you're renting to a blood relative has the

25    effect of excluding minorities.  Town adopts an

1    occupancy restriction for apartment buildings that's so

2    tight that you're not going to be able to -- families

3    with kids aren't going to be able to live there.   That

4    disproportionately effects minorities groups with kids.

5    Those kind of things, zoning restrictions, housing

6    program restrictions, those kinds of rules are the

7    Heartland cases.   Thank you.

8         CHIEF JUSTICE ROBERTS:       Thank you, General.

9    General Keller, you have four minutes remaining.

10         ORAL ARGUMENT OF MR. SCOTT A. KELLER

11          ON BEHALF OF THE PETITIONER

12         MR. KELLER:        Mr. Chief Justice, to answer

13    your question, both would open up liability for

14    disparate impact.   Here the Department could have faced

15    disparate impact liability if it was going to take tax

16    credits and send them to lower-income neighborhoods or

17    more affluent neighborhoods.   And even --

18         JUSTICE SOTOMAYOR:        Well, you keep saying

19    that, but that's not what happened here.   The remedy was

20    not to tell you to move your development from one area

21    to another.   The remedy here was -- it did preclude

22    development next to landfills, but it also included

23    other -- other tinkering with the qualifications.   But

24    you're going to still need people who want to do --

25         MR. KELLER:        But in the remedy in this case

1    the district court --

2         JUSTICE SOTOMAYOR:        -- the development they

3    want to do.

4         MR. KELLER:        -- kept it and retained

5    jurisdiction for five years so even if the disparity's

6    not closed --

7         JUSTICE SOTOMAYOR:        That has to go with your

8    attacks on the remedy.  That has -- doesn't have

9    anything to do with what disparate impact as an approach

10   set out by HUD -- direct should be done.

11        MR. KELLER:        And each regulated entity is

12   going to have to examine the racial outcomes of their

13   policies in every zoning decision made --

14        JUSTICE SOTOMAYOR:        No.

15        MR. KELLER:        -- in every raise in rent --

16        JUSTICE SOTOMAYOR:        What they do is what

17   everyone should do.  Is before they set up any policies,

18   think about what is the most race-neutral policy.

19   That's a very different thing.  That, I think, everyone

20   is obligated to do.

21        MR. KELLER:        And that's precisely what the

22   Department --

23        JUSTICE SOTOMAYOR:        It's only if the other

24   side proves that a qualification has an -- a race effect

25   that's not necessary, can they win.

1        MR. KELLER:            And here the Department engaged

2    in race-neutral policies.

3        Justice Alito, to your point about Smith and

4    the ADA's reasonable factors other than age exemptions,

5    there are three things that distinguish that from this

6    case.   First, there's an important textual difference.

7    The ADA's reasonable factor other than age provision

8    referred to actions otherwise prohibited.   And the Court

9    in Smith interpreted that as recognizing the disparate

10   impact liability could lie under the ADA.   In the Fair

11   Housing Act, we don't have that language.   The

12   exemptions say nothing in the FHA prohibits or limits.

13   So this is truly a safe harbor.

14        Second, Smith already noted that the ADA

15   used adversely effect.   And third, Smith didn't involve

16   race and so no constitutional avoidance can and would

17   have applied there.

18        And on constitutional avoidance, the reason

19   we're here today is because the Texas department did not

20   use race-based decision-making.   Take a hypothetical

21   from Gruder.   If the University of Michigan had said,

22   the incoming class must have 30 percent of its incoming

23   class of a certain race and we prefer that

24   race-conscious or race-neutral means were used to do

25   that, but if those aren't available, race-based means

1    must be used, that would be suspect.  At the very least

2    all we need to show is a constitutional doubt for the

3    constitutional avoidance canon to apply here and the

4    remedy said that there was one.

5        JUSTICE SOTOMAYOR:        What in the remedy

6    ordered here was race-based?  What remedy said you have

7    to take in 10, 20, 15 percent?

8        MR. KELLER:            The particular remedy here

9    wasn't race-based, but the liability to begin with and

10   whether the disparity is going to close and whether the

11   Department is going to remain not in compliance with the

12   Fair Housing Act, is still race-based.

13       Thank you, Mr. Chief Justice.

14       CHIEF JUSTICE ROBERTS:        Thank you, Counsel.

15   The case is submitted.

16       (Whereupon, at 11:21 a.m., the case in the

17   above-entitled matter was submitted.)

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## A

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