

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

13

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: 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 needs 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: Consequence. It happens
16 to be because that's what you do with housing, but it's
17 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 of 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 horrors 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 th 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. I said why. Why? I'm not saying you
12 couldn't do it. I'm simply saying why. And I don't
13 want to repeat my question for the fourth time, and you
14 began to give an answer and the answer you began to give
15 was based on a constitutional problem that has arisen.
16 And I've taken that in and read it, and do you have
17 other answers or not? I want you fully to answer the
18 question.

19 MR. KELLER: Sure. The plain text of the
20 statute is clear. Constitutional avoidance compels that
21 interpretation, and the purposes of the Fair Housing Act
22 would be undermined by extending disparate-impact
23 liability to this degree.

24 JUSTICE SOTOMAYOR: Well, you're now talking
25 about application. And let's go back to, you made a

1 statement earlier that this is going to inhibit
2 development of blighted areas. That has to do with the
3 application in this case. If I'm right about the theory
4 of disparate impact, and I can tell you I've studied it
5 very carefully, its intent is to ensure that anyone who
6 is renting or selling property or making it unavailable
7 is doing so not on the basis of artificial, arbitrary or
8 unnecessary hurdles, policies or practices, and it's the
9 Petitioner who has to identify which they are, and to
10 explain why alternatives wouldn't work.

11 If someone's developing a blighted area or
12 an area subject to crime or something else, that's
13 something they can do and that's a criteria, a policy
14 that can't be substituted for something else. So I
15 don't know why you keep saying this is going to affect
16 private development.

17 MR. KELLER: Justice Sotomayor, in -- in
18 Ricci, the Court reserved the question whether
19 disparate-impact liability in requiring race-based
20 decision-making would violate the equal protection
21 clause, and there is a --

22 JUSTICE SOTOMAYOR: But this is not
23 race-based decision-making. Are you saying that the 10
24 percent plan in -- in colleges is race-based if it's an
25 absolutely neutral policy that happens to address a

1 need, which is to integrate schools?

2 MR. KELLER: But the --

3 JUSTICE SOTOMAYOR: So why is it wrong to
4 have a neutral policy? Because none of the policies
5 that were imposed here and in most -- in all other cases
6 are race-based. They're policies that are race neutral,
7 but happen to have a better impact in terms of
8 integration.

9 MR. KELLER: Justice Sotomayor, I would
10 disagree that it's completely race-neutral, because at
11 the outset, statistical disparities based on race,
12 racial classifications, are used and this has the
13 potential to subordinate traditional --

14 JUSTICE SOTOMAYOR: Well, that --

15 JUSTICE SCALIA: Which is not the case for
16 the 10 percent plan that Texas uses.

17 MR. KELLER: Absolutely, Justice Scalia.

18 JUSTICE SCALIA: There's no racial thing in
19 that. If you're in the top 10 percent of your high
20 school class, you go to the State university.

21 JUSTICE GINSBURG: What was the reason
22 for --

23 JUSTICE SCALIA: No race about it.

24 JUSTICE GINSBURG: What was the reason for
25 it? You can say it's a neutral, 10 percent is neutral;

1 but it's just glaring in the face that the legislature
2 that passed this was very much race-conscious. It was
3 the way that they saw of getting a minority population
4 into colleges.

5 I don't think there's really a doubt that
6 factually that's what prompted the 10 percent plan.
7 When the University of Texas was told its affirmative
8 action plan was no good, then the legislature came back
9 with the 10 percent plan.

10 MR. KELLER: But there's a difference
11 between that race-conscious decision-making and, here, a
12 situation where liability is triggered based on
13 statistical disparities.

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

15 JUSTICE SOTOMAYOR: It's not -- liability is
16 not -- well, "triggered" is a good word; but it's not
17 imposed because of that. It's imposed because the lower
18 court found, rightly or wrongly -- I don't want to get
19 into the merits of that -- that some of the criteria
20 being used was -- were unnecessary and that was -- and
21 there was no legitimate business reason for it.

22 I could, as Justice Breyer said, quarrel
23 with that conclusion; but that's in application. That's
24 not in the standard that disparate impact imposes.

25 MR. KELLER: But what objective standard is

1 there to measure whether something is a substantial
2 interest in the housing context? And that's why
3 disparate-impact liability can lead to the functional
4 equivalent of a quota system. That's what the Watson
5 plurality said, Wards Cove, and Justice Scalia's
6 concurrence in Ricci.

7 Mr. Chief Justice, if I could reserve the
8 remainder of my time for rebuttal.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Daniel.

11 ORAL ARGUMENT OF MICHAEL M. DANIEL

12 ON BEHALF OF THE RESPONDENT

13 MR. DANIEL: Mr. Chief Justice, and may it
14 please the Court:

15 The remedy in this case is perfectly
16 consistent with the interest in revitalizing low income,
17 minority areas. The remedy in this case shows that
18 there is nothing about the Fair Housing Act --

19 JUSTICE SOTOMAYOR: We're not talking about
20 this case.

21 MR. DANIEL: No. I'm just using it as an
22 example.

23 JUSTICE SOTOMAYOR: All right. Why don't
24 you get to the legal issue, if you could.

25 MR. DANIEL: The legal issue is

1 "unavailable." Unavailable is a result-oriented
2 measure. You look to see how many units are available
3 in an area. You count them. That is the result. How
4 many units are available in another area? You count
5 them. That's a result.

6 It's clear from the Congressional Record
7 Congress was worried and concerned about making units
8 only available in low income, minority areas that it
9 called "ghettos." The remedy that it wanted --

10 JUSTICE SCALIA: It isn't the "unavailable"
11 word that's the problem. The problem is unavailable on
12 the basis of race. You can say "unavailable" a million
13 times, but the statute requires that it be made
14 unavailable for racial reasons.

15 And you're saying, no, it doesn't have to
16 be; it could be unavailable simply because you use some
17 other nonracial reason, which is stupid, right? That's,
18 that's your argument. If it produces a result that
19 is -- is not -- what, I don't know -- that the races
20 have to be in the same proportion as they are in the
21 general population. Right? I mean, that's what you're
22 arguing.

23 MR. DANIEL: The argument is that if, in
24 fact, racial discrimination is a foreseeable consequence
25 of what someone is doing --

1 JUSTICE SCALIA: No, no, no, no. Racial
2 disparity is not racial discrimination. The fact that
3 the NFL is -- is largely black players is not
4 discrimination. Discrimination requires intentionally
5 excluding people of a certain race.

6 MR. DANIEL: It certainly includes that,
7 Justice --

8 JUSTICE SCALIA: So let's not -- let's not
9 equate racial disparity with discrimination. The two
10 are quite different, and what you're arguing here is
11 that racial disparity is enough to make -- to make
12 whatever the policy adopted unlawful, right?

13 MR. DANIEL: No, Justice Scalia. That's not
14 what the argument is; and that's not what's in the
15 argument, it's not what's in the regulations.

16 The argument is, is that if I'm going to
17 make a disparate treatment case that there is
18 intentional discrimination, I'm going to start with the
19 effects, just the same place I start with a disparate
20 impact. I start with the effects: Has there been an
21 effect that is consistent with discrimination?

22 In disparate impact, I then go on to the
23 next step: Is there an interest that justifies the
24 discriminatory effect? It could be the same
25 discriminatory effect that is caused by intentional

1 discrimination.

2 JUSTICE KAGAN: Mr. Daniel, I had thought
3 that Justice Scalia's question was whether the "because
4 of" language precludes a disparate-impact theory; in
5 other words, whether the "because of" language signals
6 that it has to have a certain kind of intent which is
7 not part of a disparate treatment, a disparate-impact
8 theory.

9 And I would have thought that your main
10 argument about that is, well, actually, the Court has
11 held numerous times, in the Title VII context, in the
12 ADEA context, in the Rehabilitation Act context, in the
13 Emergency School Aid Act context, that that "because of"
14 language can be read to include disparate-impact claims,
15 and that it's at least ambiguous as to whether it should
16 be read so in this case as to this particular statute.

17 MR. DANIEL: Yes, Justice Kagan.

18 JUSTICE KAGAN: I mean, is that your
19 argument, or is your argument something else?

20 MR. DANIEL: That is the basic argument on
21 "because of," that it has been interpreted both ways;
22 and in Title VII and in Smith, it did not require proof
23 of intent. In this case --

24 CHIEF JUSTICE ROBERTS: How --

25 JUSTICE SOTOMAYOR: Could you --

1 CHIEF JUSTICE ROBERTS: I'm sorry. If you
2 want to, you can complete your answer to Justice Kagan.
3 It was not a hard question.

4 MR. DANIEL: No, Chief Justice.

5 CHIEF JUSTICE ROBERTS: How is a housing
6 authority supposed to -- if you have a claim of
7 disparate impact, how is a housing authority supposed to
8 cure the alleged problem?

9 MR. DANIEL: Assuming that you go through
10 the steps and that there is, in fact, a need to cure the
11 problem --

12 JUSTICE SOTOMAYOR: Could you --

13 CHIEF JUSTICE ROBERTS: Well, I'm sorry, I'm
14 sorry. You have made a showing of disparate impact,
15 that the impact and adverse consequences for a
16 particular race.

17 What is the housing authority supposed to do
18 at that point?

19 MR. DANIEL: At that point, the housing
20 authority is to say, this is what interest we have that
21 is served by the discriminatory practice causing the
22 racial segregation. That's what -- and they say, it --
23 whatever that interest is and they say it, that this
24 is -- this interest justifies our practice that we're
25 doing.

1 At that point in time, we come back and say:
2 But there are other ways to do it that are less
3 discriminatory.

4 CHIEF JUSTICE ROBERTS: Is there --

5 MR. DANIEL: And --

6 CHIEF JUSTICE ROBERTS: Is there a way to
7 avoid a disparate-impact consequence without taking race
8 into account in carrying out the governmental activity?

9 It seems to me that if the objection is that
10 there aren't a sufficient number of minorities in a
11 particular project, you have to look at the race until
12 you get whatever you regard as the right target.

13 MR. DANIEL: You don't have to look at the
14 race at all. You look at the practice causing it; and
15 you stop the practice, like in this case or like in the
16 zoning case.

17 JUSTICE GINSBURG: Well, what was, in fact,
18 the remedy? I mean, this was a case where there was
19 litigation, you prevailed, and there was a remedy. So
20 there was disparate impact.

21 And what did the Court say had to be done to
22 cure it, to cure what it saw as the offense to the Fair
23 Housing Act?

24 MR. DANIEL: It said it had to stop the
25 discriminatory housing practice and then it had to --

1 then it ordered in place the remedy suggested by the
2 State that was, in fact, the less discriminatory
3 alternative, to a large extent, to what they had been
4 doing.

5 There's no racial goals in it, there's no
6 race conscious in it, there's no racial criteria in it.
7 It is a -- there is -- and it is the remedy that the
8 State says will work to stop the discriminatory
9 practice.

10 JUSTICE SOTOMAYOR: Could we go back?

11 MR. DANIEL: In fact --

12 JUSTICE SOTOMAYOR: Could we go back? I
13 think you've been interrupted.

14 The steps are: First you show that
15 there's -- that the numbers are off. Then the other
16 side tells you what the reason is for why the numbers
17 are off.

18 You, then, have an opportunity or an
19 obligation to come and suggest alternative methods of
20 taking care of the legitimate business need. Correct?

21 MR. DANIEL: Yes, Justice Sotomayor.

22 JUSTICE SOTOMAYOR: So you -- those are the
23 three steps?

24 MR. DANIEL: Yes.

25 JUSTICE SOTOMAYOR: If you can propose ways

1 that are race neutral, practices that` are race neutral
2 that will have -- take care of their needs, meaning the
3 other side's needs, then you get relief.

4 MR. DANIEL: And, for example, one of the
5 ways proposed was: Do not continue putting projects
6 next to landfills and hazardous industrial uses. That
7 was --

8 JUSTICE GINSBURG: Don't you have a tension
9 between two statutes here? I mean, you have the Fair
10 Housing Act; and then there is the law that sets up this
11 tax credit, right? And doesn't that law say that there
12 should be a priority for revitalizing decaying
13 communities?

14 MR. DANIEL: The law specifically says that
15 there should be a preference among all the projects that
16 are going to be awarded for applications that contribute
17 to a concerted community revitalization plan. That
18 preference is honored in the remedy and it is in the
19 remedy. If you are -- if an application is
20 concerting -- is contributing to a concerted community
21 revitalization plan just like in the IRS code, then it
22 gets the same points as a -- a project that is going to
23 be in a higher income, low poverty area with good
24 schools.

25 JUSTICE GINSBURG: Why shouldn't it get more

1 if the tax law expresses that preference for the
2 revitalization?

3 MR. DANIEL: Justice Ginsburg, it could if
4 the State set it up that way. The State just hasn't set
5 it up that way. The State could set it up so that
6 there's a pool of units that are going to be awarded
7 projects and pick out of there and give preference to
8 those concerted community revitalization plans.

9 The district court found that the State did
10 not do that. The State instead gave a two point -- one
11 or two-point selection criteria bonus for that kind of
12 project. That's -- that's -- but that's a State choice.

13 JUSTICE BREYER: Can you go back to Justice
14 Scalia's question, please? Because I took -- because I
15 just want to hear your answer to it.

16 As I understood his question, it was you
17 look at the words and the words say, "make unavailable
18 because of race." And what you're saying is those
19 words, "make unavailable because of race," can include
20 the circumstance where you make unavailable for a reason
21 that has nothing to do with race where the effect of
22 that reason is to cause a racial disparity of
23 significance and it cannot be justified as the least
24 restrictive way to bring about it. That's the point.

25 But you're saying those words are consistent

1 with the longer phrase I just said. Okay. Is there
2 case law or other, aside from this area, which builds
3 your point and says, yes, those words linguistically and
4 legally do include the disparate-impact situation, or
5 can. I take it that's his question and I was looking --

6 MR. DANIEL: This Court --

7 JUSTICE BREYER: -- for an answer somewhat
8 along --

9 MR. DANIEL: And this Court --

10 JUSTICE BREYER: -- those lines or any
11 other --

12 MR. DANIEL: This Court's two major opinions
13 on this are, of course, Griggs and Smith. The same
14 issue was wrestled with with the other courts who have
15 found the same thing in the courts of appeals, wrestling
16 with this because of, and it is -- at least admits that
17 it is a -- a -- it can -- it's a permissible reading
18 either way.

19 JUSTICE ALITO: In Smith, however, the
20 Court -- the plurality opinion cited two additional
21 things. It didn't just say "because of" can mean
22 disparate impact. It cited the effects language, which
23 was the subject of some questioning during General
24 Keller's argument, but it also cited the RFOA provision.

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

1 the latter is more significant and there's nothing like
2 that in Title VIII, is there?

3 MR. DANIEL: The exemptions are -- are
4 similar in the fact that what those -- they do -- the
5 RFOA in Smith came in and basically said even if you
6 have disparate impact on these factors, if it's a
7 reasonable factor other than age, we're going to excuse
8 the disparate impact. Okay. Now the -- the exemptions
9 speak to the disparate impact and there's no -- nothing
10 in there that says that there's -- that you use by the
11 reason -- that you can excuse, that those don't count --

12 JUSTICE ALITO: So is that critical to your
13 argument? That the exemptions are critical to your
14 argument?

15 MR. DANIEL: We -- we think the exemptions
16 are text to support the use of a disparate-impact
17 liability. We think there's a lot of other things. The
18 statutory construction used in the congressional record,
19 what the Congress wanted to do, 3601, which Congress
20 passed to say -- and has been used to give an expansive
21 interpretation in matters of standing and enforcement.
22 We think those -- all those tools of statutory
23 construction combine to make it at least permissible
24 and, therefore, giving due deference to the HUD
25 regulation.

1 JUSTICE ALITO: If there was no disparate
2 impact under the Act as initially enacted, do you argue
3 that the exemptions expanded the Act so that it then, as
4 of 1988, included disparate impact?

5 MR. DANIEL: Well, it -- if there was none
6 then, there -- there -- indicated the 1988 Congress
7 thought there was. We don't think you can look at what
8 Congress did in 1968 and say they did not intend to
9 cover effects. They say it time and time again.

10 JUSTICE ALITO: Well, that wasn't really my
11 question. What Congress thought the Act meant in 1988
12 wouldn't have any significance -- wouldn't have much
13 significance if they hadn't done anything, would it?

14 MR. DANIEL: No, I think they were doing it
15 in 1988, that counts for 1988. We think that it -- they
16 had done it before.

17 JUSTICE ALITO: All right. So did what
18 they -- did the things that they actually did in 1988
19 expand the coverage of the Act?

20 MR. DANIEL: No, Justice. We think that the
21 coverage was already there in the 1968 Act. When you
22 look at all the tools of statutory construction, they
23 all point in one direction, and that is, to that being
24 a -- at least a permissible, if not the best,
25 interpretation in 1968 that Congress intended to cover

1 effects of past segregation and other discrimination,
2 whether it was intentional or not. It's throughout that
3 record, it is discussing the major implement of racial
4 segregation and how it was brought about. It intended
5 to end the effects of that. It said it again and again.

6 We think the 1988, it certainly recognized
7 the disparate-impact rule, it talked about the
8 disparate-impact rule in the courts of appeals. It knew
9 it was there. It was being done in -- in the context of
10 those courts of appeals.

11 No further questions?

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 General Verrilli.

14 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

15 ON BEHALF OF UNITED STATES,

16 AS AMICUS CURIAE, SUPPORTING RESPONDENT

17 GENERAL VERRILLI: Mr. Chief Justice, and
18 may it please the Court:

19 The statutory provisions that most clearly
20 show that HUD's disparate-impact regulations are a
21 permissible interpretation of the Fair Housing Act are
22 the three exemptions. Those exemptions presuppose the
23 existence of disparate-impact liability and so serve no
24 real purpose without them -- without disparate-impact
25 liability.

1 And the provenance of those exemptions lends
2 particularly strong support for the reasonableness of
3 HUD's reading. They were added by amendment in 1988 at
4 a time when nine, I think the number is nine courts of
5 appeals, had ruled that the Fair Housing Act authorized
6 disparate impact, and they -- and they were added to
7 provide defenses to exemptions from -- they're labeled
8 as exemptions from, carve-outs from, disparate-impact
9 liability. So you've got --

10 JUSTICE SCALIA: I think your case would be
11 stronger if there had been no court of appeals that
12 had -- that had favored disparate impact. Then -- then
13 you couldn't possibly argue, well, that was put in just
14 to eliminate the erroneous judgments of these courts of
15 appeals in -- in certain areas, anyway. It would be
16 better if no court of appeals had said that --

17 GENERAL VERRILLI: Well --

18 JUSTICE SCALIA: -- and Congress had enacted
19 these --

20 GENERAL VERRILLI: No, I actually think it's
21 better the way it happened because -- for our case
22 because of the reenactment canon. You have -- Section
23 805 of this law was reenacted against the backdrop, so
24 you have the reenactment of those nine courts of
25 appeals. So you have the reenactment canon and you have

1 the canon against -- the presumption against superfluous
2 amendments both working. And remember, we're in Chevron
3 territory here. So the question is whether the
4 statutory text unambiguously forecloses HUD's
5 interpretation.

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

7 CHIEF JUSTICE ROBERTS: Well, one concern --
8 one concern about disparate impact is that it's very
9 difficult to decide what impact is -- is good and bad.
10 Take two proposals. One is a proposal to build new
11 housing in a low income area, it would benefit
12 primary -- primarily minorities; new housing, good
13 thing. The other proposal is to build housing in a more
14 affluent area. It would help promote integration of
15 housing; also a good thing.

16 Which one gets credit for under -- trying to
17 decide the impact? The one that is revitalizing a
18 low-income area or the one that is integrating a
19 high-income area?

20 GENERAL VERRILLI: Right. I understand
21 that, Mr. Chief Justice, and there may be difficult
22 questions. Of course, the agency here charged by
23 Congress expressly, in the 1988 amendments, I would add,
24 with interpreting and enforcing these provisions, has
25 concluded that they do -- that disparate impact is the

1 right policy judgment.

2 CHIEF JUSTICE ROBERTS: No, no. But
3 which -- which counts? I mean, which benefits -- you're
4 trying to see if there's a disparate impact on
5 minorities.

6 GENERAL VERRILLI: It may well be --

7 CHIEF JUSTICE ROBERTS: If you give the
8 proposal to the low-income housing in the affluent
9 neighborhood, that certainly benefits integration. If
10 you give the proposal to -- fund the proposal in the
11 low-income area, that certainly helps housing
12 opportunities there.

13 GENERAL VERRILLI: So I'm going to answer
14 Your Honor's question directly.

15 CHIEF JUSTICE ROBERTS: Good.

16 GENERAL VERRILLI: But I think you've got to
17 do it in the context of the way in which a
18 disparate-impact case has got to be proven. It's not
19 enough just that there's a statistical disparity. A
20 plaintiff has got to demonstrate that a particular
21 practice or criterion being applied is being --

22 JUSTICE GINSBURG: And what is the practice
23 here? Because that was the question Judge Jones --

24 GENERAL VERRILLI: Well, you know, that's a
25 very good question. If I may just answer Justice

1 Ginsburg, and I'll come back and finish my answer to
2 you, Mr. Chief Justice.

3 That the -- that's a very good point,
4 Justice Ginsburg. And we are -- although we are here
5 defending HUD's interpretation, and we think the answer
6 to the question presented is yes. That -- that's -- we
7 don't have a position on whether this is a viable
8 disparate-impact claim, and we think Judge Jones has
9 made a good point in our -- in her concurrence because
10 it's not clear to us what specific practice that the --
11 the State agency has engaged in here that would -- would
12 justify the finding of disparate-impact liability. And
13 one thing that was suggested is maybe that could be
14 dealt with on remand from the district court.

15 And I do think that's -- and that gets to
16 what I was trying to say to you, Mr. Chief Justice,
17 which is that you've got to apply the test which is --
18 HUD has set out as a real test.

19 CHIEF JUSTICE ROBERTS: Well, with respect,
20 I don't think that's responsive. You say you look at
21 which provision is having the disparate impact, but I
22 still don't understand which is the disparate impact.

23 GENERAL VERRILLI: Well --

24 CHIEF JUSTICE ROBERTS: In other words, is
25 it the provision that causes more proposals to go to

1 low-income housing in the affluent area? Or is it the
2 provision that causes more -- approval of more proposals
3 in the low-income area? You've got to know what you're
4 shooting at before you can tell if you've missed.

5 GENERAL VERRILLI: Well, the disparate --
6 right. The disparity tied to a particular practice,
7 it's just the first step in the analysis. The second
8 step in the analysis is justification, what's the
9 justification.

10 CHIEF JUSTICE ROBERTS: I'm sorry, I -- and
11 I'll just ask it for the last time and then let you get
12 on.

13 GENERAL VERRILLI: Yeah.

14 CHIEF JUSTICE ROBERTS: You're saying you
15 need the justification, but for what? Which is the bad
16 thing to do, not promote better housing in the
17 low-income area or not promote housing integration?

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

19 CHIEF JUSTICE ROBERTS: You say you look at
20 what's causing the bad effect, but what's the bad
21 effect?

22 GENERAL VERRILLI: It may be that neither is
23 because the state may say the -- the government may say
24 in the first case, well, this is our justification, and
25 that may be a justification that holds up. The

1 government may say in the second case, well, that's our
2 justification, and that may be a justification that
3 holds up. So I just think that you've got --

4 JUSTICE SOTOMAYOR: Do you think that a
5 private developer would ever be found guilty of
6 disparate impact because he owns a piece of property in
7 an affluent neighborhood?

8 GENERAL VERRILLI: No, certainly not, of
9 course not.

10 JUSTICE SOTOMAYOR: He's permitted to
11 develop his property, right?

12 GENERAL VERRILLI: Yes, of course. And I
13 thought the question --

14 JUSTICE SOTOMAYOR: The disparate impact
15 would be if he fails to sell or make available to people
16 of all races, let's say, the units in that property,
17 correct?

18 GENERAL VERRILLI: There's got to be a
19 specific practice.

20 JUSTICE SOTOMAYOR: Practice.

21 GENERAL VERRILLI: That's right. And that's
22 just the first state --

23 JUSTICE SOTOMAYOR: All right. The specific
24 practice --

25 GENERAL VERRILLI: And that's just the first

1 statement in the analysis --

2 JUSTICE SOTOMAYOR: -- that has a
3 business --

4 GENERAL VERRILLI: -- and it's got to be
5 unjustified.

6 JUSTICE SOTOMAYOR: Exactly.

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

8 CHIEF JUSTICE ROBERTS: I thought the
9 question was, though, I mean, the -- it's not a
10 developer, it's the Department of Housing and Community
11 Affairs, and I thought the challenge went to where they
12 were -- been -- where they were supporting
13 development --

14 GENERAL VERRILLI: Well, this --

15 CHIEF JUSTICE ROBERTS: -- not the
16 developer, but -- but --

17 GENERAL VERRILLI: This may not be a good
18 disparate-impact claim, Mr. Chief Justice. But the
19 cases that are in the Heartland are really pretty
20 straightforward.

21 JUSTICE KENNEDY: But are you saying that in
22 each case that the Chief Justice puts, there is
23 initially a disparate impact at step one, that is to
24 say, Community A wants the development to be in the
25 suburbs. And the next state, the community wants it to

1 be in the poor neighborhood. Is it your position, it
2 seems to me, and the position of the Respondents, that
3 in either case, step one has been satisfied.

4 GENERAL VERRILLI: That may be right,
5 Justice Kennedy, but I think the point --

6 JUSTICE KENNEDY: But that -- that seems
7 very odd to me.

8 GENERAL VERRILLI: But I think that even if
9 they're difficult cases under disparate impact, there
10 are cases in the Heartland that have been adjudicated
11 for 35 or 40 years, cases such as there is a zoning
12 restriction that has a disparate impact that it cannot
13 be justified on a substantial basis. There -- there is
14 an occupancy restriction for an apartment --

15 JUSTICE ALITO: Can I ask you a question --
16 I'm sorry, about Chevron. Should we be concerned here
17 about the use of Chevron to manipulate the decisions of
18 this Court? The -- the Fair Housing Act was enacted in
19 1968. For 40 years plus, there were no HUD regulations.
20 Then we granted cert in the Gallagher case, and it was
21 only after that and within, I think, days after that
22 that the HUD regulations were issued. And then the
23 Gallagher case settled, and then we issued -- then we
24 granted cert in the Mt. Holly case, and the Mt. Holly
25 case settled. So should we be troubled by this

1 chronology?

2 GENERAL VERRILLI: So the -- I understand
3 the import of your question, Your Honor. I guess I
4 would say a couple of things in response. The first is
5 that HUD, in the formal adjudications reviewed by the
6 secretary, has found disparate-impact liability
7 available under these provisions in the Fair Housing Act
8 since 1992, I believe. And those would be entitled to
9 Chevron deference, and I do think, respectfully, that
10 that's a point that we made in our brief in -- in the
11 first case, the -- the Gallagher case.

12 Second, and I don't mean to be flip about it
13 because I understand the import of Your Honor's
14 question, but I do think it overestimates the efficiency
15 of the government to think that you could get, you know,
16 a supposed rule-making on an issue like this out within
17 seven days.

18 CHIEF JUSTICE ROBERTS: It was a
19 coincidence.

20 JUSTICE SCALIA: That was very persuasive.

21 GENERAL VERRILLI: I really -- and so -- so
22 I don't -- I think, actually, this has been a position
23 of HUD for a very long time, and you would get Chevron
24 deference for the adjudications. I think that's
25 pretty -- pretty clear, wholly apart from the reg, but

1 we do have the reg now and I do think it gets Chevron
2 deference.

3 And if I could turn to the question of
4 avoidance, constitutional avoidance, that has come up.
5 I don't think this is a suitable case for constitutional
6 avoidance, and let me try to explain why. Whatever one
7 might think in the Title VII context about the
8 consequences of finding disparate-impact liability, this
9 is a very different context. In a Title VII context,
10 the issue has been raised is that the only way to avoid
11 disparate-impact liability is to engage in race-based
12 remedies, not race-based thinking about what neutral
13 criterion to adopt, but race-based remedies.

14 And here in the Heartland cases under the
15 Fair Housing Act, you aren't going to have that kind of
16 an issue. The remedy is going to be the substitution of
17 one race-neutral rule for another race-neutral rule.
18 For example, if a -- if a landlord cannot justify an
19 occupancy restriction that's particularly tight, the --
20 the remedy there is going to be either no occupancy
21 restriction or a looser occupancy restriction. And the
22 consequence in those cases -- same thing with zoning and
23 other things -- the consequence in those cases is -- is
24 that no one gets classified by race, no one gets a
25 burden imposed upon them because of race, and no one

1 gets a benefit because of race.

2 JUSTICE SCALIA: What -- what rule you
3 select depends on what affect that will have on racial
4 -- racial use of the facility.

5 GENERAL VERRILLI: Well, I think the
6 consequence -- no I think, Justice Scalia, with all
7 due -- all --

8 JUSTICE SCALIA: You select on the basis of
9 what affect it will have on race.

10 GENERAL VERRILLI: Well -- well, but that
11 kind of consideration, so long as the -- the rule that
12 comes later is a race-neutral rule, seems to me is
13 exactly the kind of thing that the plurality opinion of
14 this Court in Croson said in the contracting context
15 that governments could do. They couldn't afford a
16 preference to minority contractors, but they could do
17 such things the Court suggested as changing the bonding
18 requirements or changing other financial requirements in
19 order to make the minority contractors which tended to
20 be newer, smaller businesses more eligible. Those --
21 those --

22 JUSTICE SOTOMAYOR: To underscore that,
23 because I think everybody is getting confused with this,
24 disparate impact does not go to who they take unless
25 they set up a practice --

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

2 JUSTICE SOTOMAYOR: -- that has that affect.

3 GENERAL VERRILLI: And so in the Heartland
4 cases, with respect to the Fair Housing Act, the kinds
5 of remedies that are going to be imposed are like the
6 kinds of remedies that the Court said -- or the
7 plurality, excuse me, set in Croson would find.

8 And, Justice Kennedy, they're like the kinds
9 of race-neutral considerations that Your Honor's opinion
10 in Parents involves that were refined.

11 JUSTICE BREYER: What you're saying is
12 suppose that the plaintiffs in this case, that side,
13 wins -- to try -- they're trying to win. The defense,
14 on the other -- it's not true that that means all
15 Section 8 housing is now going to be -- or even a large
16 amount is going to be put in rich neighborhoods.

17 First, they can defend on the ground that we
18 don't have that practice, to put it in poor
19 neighborhoods. Second, they can say, yes, we do, but
20 don't you see that isn't going to hurt minorities
21 because it puts those minorities in housing where many
22 of them are, unfortunately, in poor neighborhoods, and
23 it doesn't have the great effect on desegregation that
24 they think. Or third, if they lose on that, they can
25 say but anyway it's justified for a whole bunch of

1 reasons.

2 GENERAL VERRILLI: Yes, but so --

3 JUSTICE BREYER: So the answer is case by
4 case, they have a specific set of forms that give
5 answers --

6 GENERAL VERRILLI: That's --

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

8 GENERAL VERRILLI: Absolutely.

9 JUSTICE BREYER: -- and HUD can come in and
10 decide, and there is no need to throw the whole baby
11 out -- or I don't know whether it's the baby or the bath
12 water, whatever you're throwing out. But you don't have
13 to throw out the whole big thing in order to prevent --

14 CHIEF JUSTICE ROBERTS: So just -- I'm
15 sorry. So Just so I can understand, because, again, I
16 don't know what you're shooting for. Two different
17 communities, okay? They have these tax credits,
18 whatever to give out. One place, they give it to the
19 housing in the affluent neighborhood; the other, they
20 give it to the house in the low-income neighborhood.
21 They're both sued for disparate impact. In the one,
22 they say, oh, no, no, this is good because we're
23 promoting integration so the impact on minorities is not
24 a problem. And the other says, no, this is good because
25 we're revitalizing low-income neighborhoods and that

1 helps the minorities. They both win?

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

3 And if I could, I just want to finish up on the
4 constitutional avoidance point, if I could connecting
5 something Justice Breyer said.

6 If there are particular instances in which
7 there is a concern that the recognition of disparate
8 impact liability could result in not just race-based
9 thinking about neutral means but race-based remedies, it
10 seems to me the answer there is the answer that the
11 Court usually gives, which is think about them on an
12 as-applied basis. But that isn't a justification for
13 denying HUD the authority that we submit that HUD has
14 under -- under the regulations -- under the statute as
15 amended in 1988 when Congress specifically gave HUD the
16 authority to interpret these provisions and did so
17 against the backdrop of imposing the exemptions which
18 presupposed disparate impact liability and reenacting
19 the statute in which, after nine courts of appeals had
20 found that it did impose disparate impact liability.
21 The question here is whether under Chevron the statutory
22 text read fairly in 1988, taking all provisions of the
23 statute together, unambiguously forecloses HUD from
24 finding disparate impact liability here. And we assume
25 and we a -- we submit that the answer to that question

1 must be no, it does not unambiguously for -- forbid HUD
2 from reaching the conclusion that it reached and,
3 therefore, the answer to the question presented in this
4 case which is whether the Fair Housing Act recognizes
5 disparate impact liability is yes.

6 JUSTICE KAGAN: And General, could I just
7 ask -- I don't know a lot about this area and I take it
8 that one of the things that you are warning us against
9 is seeing the entire area through the prism of this one
10 quite unusual case. And you've referred a few times to
11 sort of the Heartland cases without really getting out
12 what the Heartland cases are. So, for me, what are
13 they?

14 MR. VERRILLI: Sure they're the kind -- may
15 I answer, Mr. Chief Justice?

16 CHIEF JUSTICE ROBERTS: Sure.

17 MR. VERRILLI: Thank you. They're the kinds
18 of cases that have been litigated and you'll see in the
19 courts of opinions, court of appeals' opinions for 35
20 years restrictions -- say a town adopts a restriction
21 saying you can't convert housing from ownership to
22 rental unless you're renting to a blood relative has the
23 effect of excluding minorities. Town adopts an
24 occupancy restriction for apartment buildings that's so
25 tight that you're not going to be able to -- families

1 with kids aren't going to be able to live there. That
2 disproportionately effects minorities groups with kids.
3 Those kind of things, zoning restrictions, housing
4 program restrictions, those kinds of rules are the
5 Heartland cases. Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, General.
7 General Keller, you have four minutes remaining.

8 ORAL ARGUMENT OF MR. SCOTT A. KELLER
9 ON BEHALF OF THE PETITIONER

10 MR. KELLER: Mr. Chief Justice, to answer
11 your question, both would open up liability for
12 disparate impact. Here the Department could have faced
13 disparate impact liability if it was going to take tax
14 credits and send them to lower-income neighborhoods or
15 more affluent neighborhoods. And even --

16 JUSTICE SOTOMAYOR: Well, you keep saying
17 that, but that's not what happened here. The remedy was
18 not to tell you to move your development from one area
19 to another. The remedy here is -- it did preclude
20 development next to landfills, but it also included
21 other -- other tinkering with the qualifications. But
22 you're going to still need people who want to do --

23 MR. KELLER: But in the remedy in this case
24 the district court --

25 JUSTICE SOTOMAYOR: -- what they want to do.

1 MR. KELLER: -- kept it and retained
2 jurisdiction for five years so even if the disparity's
3 not closed --

4 JUSTICE SOTOMAYOR: That has to go with your
5 attacks on the remedy. That has -- doesn't have
6 anything to do with what disparate impact as an approach
7 set out by HUD -- direct should be done.

8 MR. KELLER: And each regulated entity is
9 going to have to examine the racial outcomes of their
10 policies in every zoning decision made --

11 JUSTICE SOTOMAYOR: No.

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

13 JUSTICE SOTOMAYOR: What they do is what
14 everyone should do. Is before they set up any policies,
15 think about what is the most race-neutral policy.
16 That's a very different thing. That, I think, everyone
17 is obligated to do.

18 MR. KELLER: And that's precisely what the
19 Department --

20 JUSTICE SOTOMAYOR: It's only if the other
21 side proves that a qualification has an -- a race effect
22 that's not necessary, can they win.

23 MR. KELLER: And here the Department engaged
24 in race-neutral policies.

25 Justice Alito, to your point about Smith and

1 the ADA's reasonable factors other than age exemptions,
2 there are three things that distinguish that from this
3 case. First, there's an important textural difference.
4 The ADA's reasonable factor other than age provision
5 referred to actions otherwise prohibited. And the Court
6 in Smith interpreted that as recognizing the disparate
7 impact liability could lie under the ADA. In the Fair
8 Housing Act, we don't have that language. The
9 exemptions say nothing in the FHA prohibits or limits.
10 So this is truly a safe harbor.

11 Second, Smith already noted that the ADA
12 used adversely effect. And third, Smith didn't involve
13 race and so no constitutional avoidance can and would
14 have applied there.

15 And on constitutional avoidance, the reason
16 we're here today is because the Texas department did not
17 use race-based decision-making. Take a hypothetical
18 from Gruder. If the University of Michigan had said,
19 the incoming class must have 30 percent of its incoming
20 class of a certain race and we prefer that
21 race-conscious or race-neutral means were used to do
22 that, but if those aren't available, race-based means
23 must be used, that would be suspect. At the very least
24 all we need to show is a constitutional doubt for the
25 constitutional avoidance canon to apply here and the

1 remedy said that there was one.

2 JUSTICE SOTOMAYOR: What in the remedy
3 ordered here was race-based? What remedy said you have
4 to take in 10, 20, 15 percent?

5 MR. KELLER: The particular remedy here
6 wasn't race-based, but the liability to begin with and
7 whether the disparity is going to close and whether the
8 Department is going to remain not in compliance with the
9 Fair Housing Act, is still race-based.

10 Thank you, Mr. Chief Justice.

11 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
12 The case is submitted.

13 (Whereupon, at 11:21 a.m., the case in the
14 above-entitled matter was submitted.)

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