No. 11-1507

In The
Supreme Court of the United States

TOWNSHIP OF MT. HOLLY, *et al.*,
Petitioners,

v.

MT. HOLLY GARDENS CITIZENS IN ACTION, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court Of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and the scope of the protections of the Fourteenth Amendment.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2003, Mount Holly Township ("the Township") proposed to demolish all of the homes in the Gardens, the Township's only predominantly African-American and Hispanic neighborhood, and to develop in its place a community of significantly more expensive housing units. Br. for Mt. Holly Gardens at 8-9. The majority of Gardens homeowners are long-time residents of the neighborhood, in many cases having paid off their mortgages and made plans to pass their homes on to

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, amicus states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus or its counsel made a monetary contribution to its preparation or submission.

their children. *Id.* at 8. While the Gardens' residents are almost all classified as either "very low" or "extremely low" income under federal standards, these residents have fought successfully to achieve homeownership: the Gardens had among the highest rate of minority homeownership in Burlington County. *Id*. However, if the Township proceeds with its so-called redevelopment plan, residents face losing their homeownership and will likely be relocated away from their neighborhood, unable to afford to live in the planned "Villages at Parker's Mill" development. *Id*. at 9.

Respondents Mt. Holly Gardens Citizens in Action *et al.*, challenged the redevelopment plan as a violation of Section 804(a) of the Fair Housing Act ("FHA"), 42 U.S.C. § 3604(a), because it would have an unjustified disparate impact on minorities. Petitioners and their *amici* argue that Section 804(a) does not permit disparate impact claims and that interpreting it to do so would raise serious constitutional questions under the Equal Protection Clause of the Fourteenth Amendment. *Amicus* submits this brief to demonstrate that the text and history of the Fourteenth Amendment support Congress's authority to enact laws that, like Section 804(a) of the Fair Housing Act, prohibit state action neutral in form, but discriminatory in operation, as a means of realizing the promise of equal opportunity codified in the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause provides broadly that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the law." U.S.

CONST. amend. XIV, §1. To ensure that this guarantee was a reality, Section 5 of the Fourteenth Amendment provides that Congress shall have "the power to enforce, by appropriate legislation, the provisions of" the Amendment. U.S. CONST. amend. XIV, § 5. Consistent with this core guarantee of equality for all persons regardless of race, Congress has repeatedly used its express power to enforce the Fourteenth Amendment to prevent state and local governments from enacting laws and policies that result in unjustified, racial impact on minorities, recognizing that sometimes the simple prohibition of disparate treatment is insufficient to realize the Fourteenth Amendment's goal that all persons enjoy "equal protection of the laws." This Court has recognized that such prophylactic protections of equality of opportunity are not only consistent with, but necessary to, achieving the Constitution's Equal Protection guarantee.

Petitioners' claim that the canon of constitutional avoidance precludes interpreting the FHA to protect against disparate impact cannot be squared with the text and history of the Equal Protection Clause. The Clause's Framers rejected proposals for provisions that would have prohibited any governmental consideration of race, choosing instead a broad mandate of equality. The Clause was understood not only to destroy existing caste legislation, but also to ensure equality of opportunity for African Americans and other minority groups. Consistent with that goal, the Reconstruction Congress enacted a variety of race-conscious legislation, some of which explicitly classified on the basis of race. Requiring government officials to be

aware of the possible impact of their actions on racial minorities surely fits within the sort of legislation contemplated by the Equal Protection Clause.

Thus, interpreting Section 804(a) of the Fair Housing Act to permit disparate impact claims raises no constitutional concerns under the Equal Protection Clause. To the contrary, Section 804(a) of the Fair Housing Act, like other provisions that allow liability where facially neutral practices produce an unjustified disparate impact, is a proper exercise of Congress's authority to enforce the Fourteenth Amendment's broad promise of racial equality.

ARGUMENT

I. The Fourteenth Amendment Gives Congress Authority To Enact Disparate Impact Provisions As A Means Of Effectuating The Amendment's Broad Equality Mandate.

Section 5 of the Fourteenth Amendment expressly grants Congress the "power to enforce, by appropriate legislation" the equal protection guarantee of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 5. As this Court has long recognized, under Section 5, "whatever legislation . . . tends to enforce submission to the prohibitions [of the Fourteenth Amendment], and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws . . . is brought within the domain of congressional power." *Ex parte Virginia*, 100 U.S. 339, 346 (1879). Congress has repeatedly used its enforcement power to enact laws,

like Section 804(a) of the Fair Housing Act, that prohibit policies and practices that have an unjustified disparate impact on the basis of race, and this Court has repeatedly recognized that Congress has the authority to enact such prophylactic safeguards.

When the Framers of the Fourteenth Amendment drafted the Amendment's broad promise of equal protection of the laws, they wanted to ensure that Congress had the power necessary to make good on that promise. *See* Cong. Globe, 42nd Cong., 2nd Sess. 525 (1872) (noting that "the remedy for the violation" of the Fourteenth Amendment "was expressly not left to the courts"); *see also* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 182 (1997) (noting that the Fourteenth Amendment's Framers feared that "the judiciary would frustrate Reconstruction by a narrow interpretation of congressional power"). To do so, the Framers chose "language [that] authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 363 (2005). Introducing the Amendment in May 1866, Senator Jacob Howard explained that Section 5 brought the power to enforce the Constitution's guarantees "within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper." Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866). "Here is a direct affirmative delegation of power to Congress to carry out all the principles of these guarantees, a power not found in the Constitution." *Id.* at 2766. The enforcement

provision, Howard said, conferred "authority to pass laws which are appropriate to the attainment of the great object of the amendment." *Id.*; *see also id.* at 1124 ("When Congress was clothed with power to enforce . . . by appropriate legislation, it meant . . . that Congress should be the judge of what is necessary for the purpose of securing to [the freemen] those rights.").

Section 5 thus "enlarge[d] . . . the power of Congress," *Ex Parte Virginia*, 100 U.S. at 345, and "authoriz[ed] [it] to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). As this Court has long recognized, Section 5 not only permits Congress to prohibit practices that courts would strike down as violations of the terms of the Fourteenth Amendment, but also to "make stronger the rights" guaranteed by the Fourteenth Amendment by "legislat[ing] prophylactically against new evils . . . . ." Stephen G. Calabresi & Nicholas P. Stabile, *On Section 5 of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1431, 1442 (2009); *see, e.g.*, *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 727 (2003) ("Congress may, in the exercise of its § 5 power, do more than simply proscribe [unconstitutional] conduct . . . . 'Congress' power "to enforce" the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'") (quoting *Bd. of*

Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356, 365 (2001)).

Using its Section 5 enforcement powers, Congress has repeatedly recognized that sometimes the simple prohibition of disparate treatment is insufficient to "uproot all vestiges of unfreedom and inequality," AMAR, *supra*, at 363. Instead, in a series of landmark civil rights statutes, Congress has concluded that a prohibition of state and local laws or practices that have an unjustified disparate impact on protected classes of individuals "tends to enforce submission" to the guarantees of the Fourteenth Amendment and "secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws." *Ex Parte Virginia*, 100 U.S. at 346. *Cf. Washington v. Davis*, 426 U.S. 229, 248 (1976) (noting that "extension of" disparate impact provisions "should await legislative prescription").

For example, in Title VII of the Civil Rights Act of 1964, Congress prohibited employment practices that disproportionately harmed people on the basis of a protected characteristic unless the practice was consistent with business necessity, and there was no alternative practice with less adverse effects. *See* Pub. L. No. 88-352, § 703, 78 Stat. 241, 255. As this Court recognized in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), "[t]he objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.* at 429-30; *see id.* at 433 (noting that "Congress directed the thrust of the Act to the

consequences of employment practices, not simply the motivation"). In other words, employers could not "provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox," *id.* at 431, but must instead ensure that practices and procedures, even ones "neutral on their face" and "neutral in terms of intent," were not maintained "if they operate[d] to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430; *see Ricci v. DeStefano*, 557 U.S. 557, 583 (2009) (recognizing that an employer may take race-conscious steps if there is a strong basis in evidence for concluding that failure to do so will create a disparate impact on the basis of race). As *Ricci* makes clear, Title VII prohibits both intentional and unintentional forms of racial discrimination in order to "rid the workplace of 'practices that are fair in form, but discriminatory in operation.'" *Id.* at 583 (quoting *Griggs*, 401 U.S. at 431).

Similarly, using the same language it used in Title VII, Congress provided for disparate impact claims under the Age Discrimination in Employment Act of 1967 (ADEA), which provides, in pertinent part, that it shall be unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age," 29 U.S.C. § 623(a)(2). *See Smith v. City of Jackson, Miss.*, 544 U.S. 228, 240 (2005) (holding that the ADEA authorizes recovery on a disparate impact theory of liability). *See generally* Br. for Mt. Holly Gardens at 21, 23-24.

A year after passing the Age Discrimination in Employment Act, Congress passed the Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619). The FHA made it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604. The courts of appeals to consider the issue have uniformly recognized that the Fair Housing Act, like Title VII and the ADEA, provides for disparate impact liability as a means of achieving the Act's antidiscrimination goals. Br. for Mt. Holly Gardens at 4.

In the years since the Fair Housing Act was enacted, Congress has continued to exercise its enforcement authority under Section 5 of the Fourteenth Amendment to pass laws that guard against facially neutral practices and policies that produce an unjustified disparate impact. For example, in 1982, Congress amended the Voting Rights Act of 1965 to prohibit any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," 42 U.S.C. § 1973; *see* Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (1982); *see also Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (explaining that "Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test'"). As *Gingles* explained, Congress acted to

prohibit voting discrimination—intentional or not—that results when "a certain electoral law . . . interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.* at 47.

Finally, in the Civil Rights Act of 1991, Congress re-affirmed its continuing belief that the only way to effectuate the Fourteenth Amendment's broad guarantee of equality for all persons regardless of race in the context of employment was to proscribe those practices and procedures that produced an unjustified disparate impact on the basis of race by explicitly setting out the burden a plaintiff must meet to establish disparate impact liability. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75; *see also Ricci*, 557 U.S. at 624 ("Among the 1991 alterations, Congress formally codified the disparate-impact component of Title VII.").

Thus, Congress has repeatedly exercised its Section 5 authority to enact laws that prohibit policies and practices that have an unjustified disparate impact on protected groups. Notwithstanding that long history, Petitioners now argue that interpreting Section 804(a) of the Fair Housing Act to provide for the exact same type of liability as Title VII and the ADEA would raise serious constitutional questions under the Equal Protection Clause. In addition to being difficult to reconcile with this Court's prior rulings, *see, e.g.*, Br. for Mt. Holly Gardens at 22-24, this attack is impossible to square with the text and history of the

Equal Protection Clause, as the next section demonstrates.

II. The Text And History Of The Fourteenth Amendment Affirm That Congress May Provide For Disparate Impact Liability Consistent With The Equal Protection Guarantee.

The Fourteenth Amendment provides, in pertinent part, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. As the broad language of the Amendment suggests, the Fourteenth Amendment was intended to establish a universal guarantee of equality that would apply to men and women of all races and groups. According to Petitioners, this substantive guarantee of equality prohibits any consideration of race in governmental decisionmaking, and renders constitutionally suspect federal laws that target intentional as well as unintentional forms of racial discrimination. Pet. Br. 39-40. This is plainly wrong.

First, the text and history of the Fourteenth Amendment establishes that the government may, in appropriate circumstances, take race into account to foster equality of opportunity. When the Framers of the Fourteenth Amendment drafted the Equal Protection Clause's broad guarantee of "equal protection of the laws," they recognized that, after more than a century of racial slavery, the Constitution could not be simplistically color-blind. Faced with the task of fulfilling President Abraham Lincoln's promise of a "new birth of freedom," and

integrating African Americans into the civic life of the nation, the Framers of the Fourteenth Amendment concluded that some race-conscious efforts would be appropriate to further "the legitimate interest government has in ensuring all people have equal opportunity regardless of their race." *Parents Involved In Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 787-88 (2007) (Kennedy, J., concurring).

In drafting the language of the Equal Protection Clause, the Fourteenth Amendment's Framers time and again rejected proposed constitutional language that would have precluded race-conscious measures designed to ensure equality of opportunity for African Americans. *See* Cong. Globe, 39th Cong., 1st Sess. 10 (1865) (proposing that "[a]ll national and state laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color"); JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39th Cong., 1865-1867, at 46 (Benjamin B. Kendrick ed. 1914) (proposing that "[a]ll laws, state or national, shall operate impartially and equally on all persons without regard to race or color"); *id.* at 83 (proposing that "[n]o discrimination shall be made . . . as to the civil rights of persons because of race, color, or previous condition of servitude"). As Justice Kennedy has explained, "[t]hough in some initial drafts the Fourteenth Amendment was written to prohibit discrimination against 'persons because of race, color, or previous condition of servitude,' the Amendment submitted for consideration and later ratified contained more comprehensive terms." *J.E.B. v.*

Alabama ex rel. T.B., 511 U.S. 127, 151 (1994) (Kennedy, J., concurring).

Not only did the Reconstruction Framers reject proposed constitutional language that would have prohibited race-conscious efforts to guarantee equality of opportunity, but, contemporaneous with the drafting and passage of the Fourteenth Amendment, they enacted a number of race-conscious laws, including the Freedman's Bureau Act and others to help ensure that the Amendment's promise of equality would be a reality for African Americans. *See* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754-84 (1985) (cataloguing race-conscious measures enacted by Framers of the Fourteenth Amendment); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 429-32 (1997) (same); Jack M. Balkin, LIVING ORIGINALISM 223, 417 n.20 (2011) (same). The Framers recognized that forward-looking, race-conscious measures would help fulfill the promise of equality contained in the Fourteenth Amendment, "break down discrimination between whites and blacks," and "ameliorate the condition of the colored people." Cong. Globe, 39th Cong., 1st Sess. 632 (1866). Rejecting charges that such legislation made African Americans not "equal before the law, but superior," *id.* at 544, the Framers understood that that efforts to ensure equality of opportunity and assist African Americans in enjoying the full measure of freedom promised by the Fourteenth Amendment were consistent with, not contrary to, the new constitutional guarantee of equality.

Second, Fourteenth Amendment history establishes what this Court's cases have long affirmed: Congress has the authority to prohibit laws and practices that result in racial discrimination in order to realize the Fourteenth Amendment's guarantee of equality.

History shows that the Framers gave Congress the authority to act under Section 5 to prevent all forms of racial discrimination faced by African Americans, including adverse treatment occasioned by facially neutral laws. Indeed, contemporaneous with the passage of the Fourteenth Amendment, the Reconstruction-era Congress enacted measures that, like today's disparate impact provisions, protected against practices—fair in form but discriminatory in result—that would have operated to deny African Americans important rights and benefits. Petitioner's argument that any consideration of race is unconstitutional, even the mere consideration by the government of the racial implications of its actions, depends on willful blindness to the basic facts of Fourteenth Amendment history.

For example, one of the most significant pieces of legislation enacted by the Reconstruction-era Congress was the Civil Rights Act of 1866, which was designed, in part, to prohibit laws that were race-neutral on their face but discriminatory in their operation. After the Thirteenth Amendment outlawed slavery, Southern legislatures enacted the Black Codes to try to minimize the force of that Amendment. *See, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 199-201 (1988). Although some of the Black Codes

were "explicitly race-based," "others, such as vagrancy and apprenticeship laws, were facially race-neutral, but had the purpose and effect of keeping the newly emancipated slaves in a system of 'virtual peonage.'" Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 271 n.109 (1997); *see also* Paul R. Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462, 474 (1980) (explaining that many aspects of the Black Codes "made no reference to race; instead, their oppressive racial impact depended on selective enforcement, customary caste relations, and private discrimination against blacks").

In response, the 39th Congress—the same Congress that framed the Fourteenth Amendment—enacted the Civil Rights Act of 1866, which provided, in part, that "all persons born in the United States and not subject to any foreign power . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." 14 Stat. 27 (1866).

Broadly declaring that African Americans were to enjoy the "same right . . . as is enjoyed by white citizens," Congress recognized it was not sufficient to simply prevent states from writing racial

classification into law. To achieve meaningful equality, the Act prohibited neutral-worded Black Code provisions that denied African Americans equal enjoyment of basic rights of free labor. As this Court has recognized in a related context, "if the 39th Congress had outlawed only those laws that discriminate on the basis of race or previous condition of servitude, African Americans in the South would likely have remained vulnerable to attack . . . ." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3043 (2010) (discussing efforts of the 39th Congress to protect African Americans from violence by state officers).

Even this small measure of legal protection was deemed a form of racial discrimination by opponents of Reconstruction. President Johnson vetoed the bill, arguing that it "in effect proposes a discrimination against large numbers of intelligent, worthy and patriotic foreigners, and in favor of the negro." *See* 6 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 406 (James D. Richardson ed., 1900); *see id.* at 406-07 ("it is now proposed by a single legislative enactment to confer the rights of citizens upon all persons of African descent, born within the extended limits of the United States, while persons of foreign birth . . . must undergo a probation of five years"). Congress successfully overrode President Johnson's veto, Cong. Globe, 39th Cong., 1st Sess. 1809, 1861 (1866), thus affirming that the government may take action to redress the discriminatory consequences that are sometimes produced by even facially neutral laws. *Cf. Ricci*, 557 U.S. at 595 (Scalia, J., concurring) (noting

that one purpose of disparate impact provisions is to "'smoke out' . . . disparate treatment'").

The Reconstruction-era Congress did the same thing when it enacted legislation, in 1866 and 1867, to ensure that African Americans who had enlisted in the Union Army were not cheated out of their bounties by the fraudulent acts of claims agents. This legislation recognized that applying the same anti-fraud policies to both African-American and white soldiers would produce an unjustified disparate impact on the basis of race because the former slaves, by virtue of their lack of education, would be particularly susceptible to fraud. To address the disparate impact that a facially neutral law would produce, Congress enacted race-conscious measures to ensure that both African-American and white soldiers would enjoy bounties due for service in the Union Army. S*ee* Joint Resolution of July 26, 1866, No. 86, 14 Stat. 367, 368 (fixing the maximum fees chargeable by an agent to collect a bounty on behalf of "colored soldiers"); Resolution of Mar. 29, 1867, No. 25, 15 Stat. 26, 26-27 (providing for payment to agents of "colored soldiers, sailors, or marines" by the Freedmen's Bureau); *see also* Act of Mar. 3, 1869, ch. 122, 15 Stat. 301, 302 (appropriating money for "collection and payment of bounty, prize-money and other legitimate claims of colored soldiers and sailors"); Act of Mar. 3, 1873, ch. 227, 17 Stat. 510, 528 (same); Stephen A. Siegel, *The Federal Government's Power To Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 561 (1998) (observing that these measures resulted in "the creation of special protections for black, but not white, soldiers").

Opponents of Reconstruction in Congress denounced these additional measures to protect the rights of African-American soldiers as "class legislation" and argued that "there is no reason . . . why we should pass such a law such as this applicable to colored people and not apply it to white people." Cong. Globe, 40th Cong., 1st Sess. 79 (1867). The Framers of the Fourteenth Amendment firmly rejected the argument that Congress could not adopt race-conscious measures to protect African-American soldiers from fraud and ensure that "the balance of this little bounty shall get into the hand of the soldier himself." *Id.* at 444. Emphasizing that "[w]e have passed laws that made it a crime for them to be taught," the Reconstruction Framers concluded that it was permissible to enact race-conscious measures "to protect colored soldiers against the fraudulent devices by which their small bounties are taken away from them." *Id.* Congress did not have to ignore the reality that African-American soldiers, denied a proper education, might be more susceptible to fraud—but instead could take race into account to ensure that African-American soldiers, like their white counterparts, would enjoy the bounties for military service to which they were legally entitled.

Thus, in drafting the broad language of the Fourteenth Amendment and in adopting race-conscious measures to fulfill the promise of that Amendment, the Reconstruction-era Framers rejected "an all-too-unyielding insistence that race cannot be a factor," *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring), concluding instead that government may properly take race into account to

"ensur[e] all people have equal opportunity regardless of their race." *Id.* at 788 (Kennedy, J., concurring); *see id.* at 787 (noting Reconstruction-era efforts of the Framers to "expand the promise of liberty and equality" and to "confront the flaws and injustices that remain"). Since the Reconstruction-era Framers recognized that legislation that explicitly classifies on the basis of race could be consistent with the equal protection guarantee, it necessarily follows that legislation that requires the government to consider the racial effects of its actions poses no problem under the Equal Protection Clause. Indeed, the Reconstruction-era Framers recognized that such legislation would sometimes be necessary and adopted Section 5 to ensure that Congress had the authority to enact it. The Amendment authorizes Congress to enact laws, like Section 804(a) of the Fair Housing Act, that permit the consideration of race as a means of realizing the promise of equal opportunity codified in the Equal Protection Clause.

CONCLUSION

Amicus respectfully submits that the language of the FHA and the Department of Housing and Urban Development's interpretation of the statute to protect against unjustified disparate impact do not raise constitutional problems under the Fourteenth Amendment. There are no constitutional concerns under the Equal Protection Clause to justify application of the canon of constitutional avoidance in this case.

Respectfully submitted,

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